
**In The
United States Court of Appeals
for the Seventh Circuit**

Nos. 98-1807, 98-2311 & 98-3145 (Consolidated)

DOROTHY GAUTREAUX, et al.

Plaintiffs-Appellees,

v.

**CHICAGO HOUSING AUTHORITY, a
corporation, and JOSEPH SHULDINER,
Executive Director, in his official capacity,**

Defendants-Appellants.

Appeal from the United
States District Court for the
Northern District of Illinois
Eastern Division

No. 66 C 1459

**Honorable
Marvin E. Aspen
Judge Presiding**

**BRIEF OF THE RECEIVER,
APPELLEE IN CONNECTION WITH THE ISSUES
PRESENTED BY APPEAL NUMBER 98-3145**

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CERTIFICATE OF INTEREST

Appellate Court No: 98-3145

Short Caption: Gautreaux v. CHA

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

- (1) The full name of every party or amicus the attorney represents in the case:

Daniel E. Levin and The Habitat Co., Inc.

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- (2) If such party or amicus is a corporation:

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- i) Its parent corporation, if any; and

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- ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:

N/A

- (3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

Miller Shakman Hamilton Kurtzon & Schlifke

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in from of the table of contents of the party's main brief.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(D)(2)

The undersigned, one of the attorneys for Receiver, hereby certifies pursuant to Circuit Rule 32(d)(3) that the following Brief of Receiver, Appellee in No. 98-3145 complies with the type volume limitation of Circuit Rule 32(d)(2). The word processing program (Word Perfect 8) indicates that the Brief contains 12,873 words.

A handwritten signature in cursive script, appearing to read "Edward W. Johnson", is written over a horizontal line.

One of the Attorneys for Receiver

JURISDICTIONAL STATEMENT

The Statement of Jurisdiction contained in the Brief of Defendants-Appellants Chicago Housing Authority and Joseph Shuldiner In Connection With The Issues Presented By Appeal Number 98-3145 (“CHA Cabrini Br.”) at 1 is complete and correct.^{1/}

STATEMENT OF ISSUES ON APPEAL

For purposes of this Brief, the Receiver assumes that the District Court’s February 23 Order (ruling that CHA’s non-elderly housing development activities under the HOPE VI program are subject to the 1969 Injunction Order) was correct. The issue in this appeal is:

Did Chief Judge Aspen act within his discretion (i) by ruling that CHA violated his 1987 Receivership Order – which vested in the Receiver “all powers of CHA” regarding the development of new non-elderly public housing, including the power of “negotiating and executing any contracts or other documents necessary or appropriate to implement the scattered site program” – by excluding the Receiver from the negotiation of a consent decree that included the development of new non-elderly public housing at Cabrini-Green, and (ii) by enjoining CHA to comply with the 1987 Order?

STATEMENT OF THE CASE

The 1969 Injunction Order provided a framework for the CHA to remedy the District Court’s finding of intentional segregation in the location of CHA public housing. After two decades of CHA

^{1/} We will use the same citation abbreviations herein as in the Receiver’s prior brief. See Rec.Br. 1 n.2. The abbreviation “SSA.” refers to CHA’s supplemental appendix filed in connection with its third appeal.

noncompliance, the 1987 Receivership Order gave the Receiver “all powers of CHA” for the development of “scattered-site housing,” which the Order defined as certain existing development programs and “all CHA non-elderly public housing development programs which may in the future be authorized by HUD during the pendency of Civil Action No. 66 C 1459.” [SSA.23.] The Receivership Order expressly listed “negotiating and executing any contracts or other documents necessary or appropriate to implement the scattered site program” as the Receiver’s responsibility. [SSA.24.] In addition, it stated that “CHA . . . shall provide full cooperation and assistance to, and shall not interfere with, the Receiver in the performance of the Receiver’s responsibilities hereunder.” [SSA.27.]

The CHA has never sought to dissolve or modify either the 1969 Injunction Order or the 1987 Receivership Order. [RA.34.] With respect to the former, CHA counsel told Chief Judge Aspen in February 1998 that the CHA does not want to vacate the Injunction and that “[t]he Gautreaux remedy should stay in place.” [2/10/98 Tr. at 36, AA. (Plaintiffs’ Appendix) 66.]

Events leading to the District Court’s Orders of February 23 and May 19-21, 1998 are described in the Statements of the Case in the Receiver’s Brief filed on July 29 in Nos. 98-1807 & 98-2311 (“Rec.Br.”) at 4-10 and in Plaintiffs’ Brief filed on July 29 in those appeals (“Plf.Br.”) at 5-6. Those Orders confirmed that new non-elderly housing development under the HOPE VI program was subject to the 1969 Injunction Order and the 1987 Receivership Order. This Brief will focus on events leading to entry of the August 12 Order concerning Cabrini-Green. (Unless specified otherwise, all dates are 1998.)

On July 29, a *Chicago Tribune* article disclosed that the CHA had agreed with the Cabrini-Green Local Advisory Council (“Cabrini LAC”) and the City of Chicago (“City”) to enter into a consent decree to settle a lawsuit pending before Judge Coar. Cabrini-Green LAC v. CHA, No. 96 C 6949 (N.D. Ill.). According to the *Tribune*, the proposed settlement contemplated, *inter alia*, the performance of housing development activities that had been transferred from the CHA to the Receiver as part of the 1987 Receivership Order. Moreover, the agreement contemplated the building of new, non-elderly housing primarily in a predominantly African-American “Limited Area” – which, absent a waiver, would violate the 1969 Injunction. [SSA.15-17.]

On July 30, the Receiver filed an Emergency Motion. It contended that CHA was not permitted to negotiate regarding development of new non-elderly public housing at Cabrini under the Receivership Order. In addition, it contended that portions of the reported agreement *might* violate the Injunction Order.

Chief Judge Aspen enjoined CHA from presenting the decree to Judge Coar pending briefing and decision of the Emergency Motion. [SSA.127.] The matter was briefed and the Motion was granted in the August 12 Order. [AP.5-6.]

CHA filed a timely appeal of the August 12 Order on August 24, and on September 3 this Court consolidated this appeal with the CHA’s previous appeals of the February 23 and May 19 Orders, Nos. 98-1807 and 98-2311.

The Receiver expressed no view below, and expresses none in this Brief, on the merits of the proposed consent decree. The Receiver had not seen the proposed decree when the Emergency Motion was filed, and an intelligent evaluation of a proposal as complex as the redevelopment of

Cabrini Green into a mixed-income community required additional information and time. In the weeks following the August 12 Order the Receiver requested and has received voluminous documents from CHA, the City and the Cabrini LAC regarding the Cabrini lawsuit and the proposed decree, which the Receiver is evaluating so as to make substantive comments and suggestions.

STATEMENT OF FACTS

The facts relevant to entry of the February 23 and May 19 Orders are also relevant to entry of the August 12 Order, since they concern the background of the HOPE VI program and the District Court's previous attempts to enforce compliance with its remedial orders. Those facts are set forth in greater detail at Rec.Br. 10-22 and Plf.Br. 7-23, to which the Court is respectfully referred.

A. The Pertinent Terms of the Receivership Order.

The CHA's eighteen-year failure to implement the remedy ordered as a result of its intentional discrimination in the location of public housing, and Judge Aspen's resulting 1987 appointment of the Receiver, are described at Plf.Br. 8-10. The Receivership Order defined the "scattered site program" as certain then-pending programs and "all CHA non-elderly public housing development programs which may in the future be authorized by HUD during the pendency of Civil Action No. 66 C 1459" (emphasis added). [SSA.23.] The Receiver was granted "all powers of CHA respecting the scattered site program necessary and incident to the development and administration of such program" (emphasis added), which expressly included:

Making all determinations governing the scattered site program in compliance with prior and future orders of this Court, including without limitation . . . site selection and acquisition (including policies respecting the location of sites and buildings to be acquired) . . . and . . . [c]arrying out the determinations so made, including without

limitation (i) negotiating and executing any contracts or other documents necessary or appropriate to implement the scattered site program.

[SSA.24 ¶2 (emphasis added).] Section 7 of the Order requires CHA to “provide full cooperation and assistance to” the Receiver, orders it not to “interfere with the Receiver in the performance of the Receiver’s responsibilities hereunder,” and directs it to provide the Receiver “full access” to information and documents relating to the scattered site program. [SSA.27 ¶7.]

B. Efforts to Obtain Cooperation After
The District Court Entered Its February 23, 1998 Order.

Chief Judge Aspen’s February 23 Order held that the Judgment Order in this case “governs the CHA’s use of HOPE VI funds” and that “any construction of public housing in Cook County must conform to the judgment order’s locational requirements.” [RA.24.] The events after Chief Judge Aspen entered his February 23 Order are spelled out in detail at Rec.Br.17-22 and Plf.Br.21-23. They include the March 10 meeting in which CHA’s Executive Director, Joseph Shuldiner, made the statements described in the Receiver’s March 13 report to Chief Judge Aspen,^{2/} in which Mr. Shuldiner expressed his disagreement with the February 23 Order, his opposition to the Receivership and his disagreement “with the requirements of various Court Orders mandating housing to be located so as to further desegregation goals.” [SSA.35.] He also stated that the “CHA intended to proceed with its own programs for development of new housing without the Receiver, and invited [the Receiver] to ‘try to stop him.’ He made it clear that no cooperation would be forthcoming.” [Id.] With respect to Cabrini, the Receiver reported to Chief Judge Aspen:

^{2/} The report has been verified by two affidavits and has never been contested. [RA.305-06 & 452 (Vol.II).] See Rec.Br.17-18.

Near the end of the meeting, Mr. Shuldiner told me that he had offered to residents at Cabrini-Green a development partnership interest. He will build replacement housing with them, and without the Receiver. He made it clear that he is going to continue to make plans with the residents at Cabrini-Green, and that we could only "try to stop him." [SSA.39.]

On March 18, 1998, in response to the problems described in the Receiver's March 13 report, the plaintiffs filed their Motion for Further Relief, which is described at Rec.Br.6-7, 18, 21 n.13 and Plf.Br.21-22. That Motion sought much of the relief later sought by the Receiver in its July 30 Emergency Motion.

On March 31, while the plaintiffs' Motion for Further Relief was pending, HUD announced the availability of up to \$35 million in HOPE VI funds, and set an application deadline of June 29. This led to the Receiver's requests that CHA cooperate in the preparation of a funding application, the CHA's failure even to respond to the Receiver's request, and the Receiver's May 18 Emergency Motion seeking cooperation in the preparation of the HOPE VI application. See Rec.Br.7-8, 19. Chief Judge Aspen's ruling of May 19 ordered the CHA to cooperate with the Receiver in the preparation of the application. [SSA.65-66.] In addition, his oral remarks of May 19 and his three Orders of May 19, 21 and 22 confirmed that all of CHA's non-elderly housing development activities under HOPE VI were subject to both the Injunction Order and the Receivership Order. Rec.Br.8-10, 19-21 and RA.27-34. On May 29, this Court denied CHA's motions to stay the February 23 and May 19 Orders, leaving those orders intact as the law of the case pending appeal.

Because he had ruled that CHA's housing development activities under HOPE VI were subject to the Receivership, and presumably expecting CHA to comply with that ruling, Chief Judge

Aspen denied plaintiffs' Motion for Further Relief as "moot," [RA.31-32], thereby giving CHA further opportunity to demonstrate its willingness to comply with the Court's prior rulings.

C. Background Concerning CHA's Actions at Cabrini-Green.

1. Originally the CHA recognized the Receiver's role in the Cabrini redevelopment, then it excluded the Receiver.

The background concerning the Receiver's prior involvement with Cabrini-Green redevelopment activities is set forth in Rec.Br.14 and in the Affidavits cited there. In brief, in 1993 the CHA unilaterally applied to HUD for HOPE VI funds for the Cabrini redevelopment. After the Receiver learned of the application and objected, the CHA agreed that the Receiver would function as "development manager" for the construction of replacement units. [RA.321.(Vol.II) ¶¶18-19.] This agreement was confirmed by letter of November 14, 1995 from the CHA's board chairman, [RA.159. (Vol.I).], but CHA subsequently declined to execute a written agreement.

The Receiver functioned as development manager for Cabrini for over a year, until the CHA told the Receiver (in September 1996) to stop work, and the CHA thereafter began performing development tasks that are the Receiver's responsibility under the Receivership Order. [RA.84-87, 89-90 (Vol.I) ¶¶28-39, 44-46.] The dispute concerning the Receiver's role was brought to the District Court in 1997, which reaffirmed the Receiver's authority over non-elderly housing development through its rulings of February 23 and May 19-22. See Rec.Br. 16-21 and Plf.Br. 19-23.

2. CHA broke a promise to provide the Receiver with information regarding "agreements made and proposed" with tenants concerning HOPE VI projects.

After the Court entered its May 19 Order (directing CHA to cooperate with the Receiver in preparing a new HOPE VI application for CHA's ABLA development), the Receiver, CHA and the City entered into discussions to prepare the application by June 29, 1998.^{3/} In those discussions, the CHA referred to agreements it claimed to have made with tenants that limited the options available for development planning at the ABLA development. [SSA.74.] On June 12, 1998 one of the Receiver's attorneys wrote one of the CHA's attorneys seeking information, and focused on the CHA's negotiation of separate development arrangements with tenants. The June 12 letter stated:

The CHA has repeatedly stated that it has entered into agreements with ABLA tenants, and that those agreements limit the redevelopment planning potential. ... [W]e have not yet seen any executed agreements. The Receiver is sensitive to the importance of communication with tenants as part of the planning process. But we have not been afforded the opportunity to participate. Instead, we have been presented with an agreement we have not seen as a *fait accompli*.

While the agreement with ABLA tenants apparently predates the 5/19 Order, when the CHA follows the practice of negotiating agreements with tenants (to which the Receiver is not a party), that limit development options that may later be available, the CHA impermissibly occupies a portion of the Receiver's responsibility. We trust this won't happen again in the future.

In keeping with the above, with respect to ABLA and elsewhere, the Receiver requests that (1) the CHA provide it with information about all agreements it has made with tenants concerning rehabilitation or redevelopment, anywhere in the City, and (2) the CHA not enter into any such agreements hereafter without the participation and written concurrence of the Receiver. [Emphasis added]

[SSA.74.]

^{3/} The CHA cooperated with the Receiver in the preparation of the June 29 HOPE VI application (though the Receiver believes the cooperation fell short in some respects). The application was successful. HUD has announced that a grant of \$35 million, the maximum amount awardable, will be made. See Flynn McRoberts, *ABLA Homes Rehab Gets \$35 Million*, CHI. TRIB., Aug. 20, 1998 at 3N.

By letter of June 16, 1998, counsel for CHA responded. CHA expressly stated its intention to continue violating the negotiation provision, but promised to provide certain information:

The CHA does not intend to provide the receiver with “information about all agreements it has made with tenants concerning rehabilitation or redevelopment, anywhere in the City,” nor does the CHA intend to refrain from entering into any such agreements “hereafter without the participation and written concurrence of the Receiver.” . . . The CHA will provide information to the receiver regarding agreements made and proposed with regard to HOPE VI projects and any other projects that involve the construction of new housing.” [Emphasis added.]

[SSA.81.]

Despite CHA’s promise to “provide information to the receiver regarding agreements made and proposed with regard to HOPE VI projects and any other projects that involve the construction of new housing,” CHA did not provide such information with respect to the Cabrini agreement. In fact, CHA failed to disclose that (i) negotiations with tenants concerning replacement housing for Cabrini had been occurring for several months, (ii) a tentative agreement had been reached on May 1, 1998, and (iii) further negotiations were ongoing to reduce that agreement to writing. [SSA.168-70.] Indeed, thirteen drafts of the agreement were exchanged between May 5 and July 16. [SSA.170 ¶22.]

The Receiver did not learn of these matters until it read about the proposed consent decree in the July 29 *Chicago Tribune* and CHA revealed the chronology in its response to the Receiver’s

Emergency Motion. [SSA.242, 168-70.]^{4/} In its response to the Receiver's Emergency Motion, CHA admitted that it "did not fulfill its commitment to provide information to the Receiver about the consent decree negotiations." [SSA.139 n.4.]

3. The Cabrini-Green LAC Lawsuit.

In 1996, the Cabrini-Green Local Advisory Council, a tenant's organization, sued CHA to enjoin an alleged CHA/Chicago joint plan for the redevelopment at Cabrini-Green under the HOPE VI program. This lawsuit essentially brought development activities at Cabrini-Green to a stop. The Receiver was not joined.

On January 22, 1997, Judge Coar denied defendants' motion to dismiss, Cabrini-Green LAC v. CHA, No. 96 C 6949, 1997 U.S. Dist. LEXIS 625 (N.D. Ill. Jan. 22, 1997). CHA Cabrini Br. Exh.B.1. His opinion describes various claims raised in the suit. The Cabrini plaintiffs did not seek mandatory relief in the form of a plan for the redevelopment of Cabrini. Rather, the gravamen of the complaint was to enjoin demolition, enjoin implementation of the CHA/Chicago joint plan and compel consultation with tenants respecting any future redevelopment. See SSA.280-82.

In its motion to dismiss that suit, CHA argued that the Cabrini-Green LAC case was an impermissible collateral attack on the prohibition in Gautreaux's of building housing in racially segregated communities without court approval. [SSA.93, 1997 U.S. Dist. LEXIS 625 at *44-*45; SSA.103-05.] Judge Coar rejected CHA's argument because the requested relief *might* not be within

^{4/} The Receiver was aware of the Cabrini lawsuit, but not of the details or substance of the settlement negotiations or that those negotiations contemplated a redevelopment of Cabrini. See SSA.193-201.

the scope of Gautreaux. In addition, Judge Coar expressly noted that the agreement the Cabrini-Green LAC was seeking to enforce was subject to Gautreaux, and that any relief ordered by the Court would take Gautreaux into account. [SSA.93, 1997 U.S. Dist. LEXIS 625 at *44-45.]

4. The Cabrini-Green settlement.

The proposed Cabrini decree contains, among others, the following provisions:

- CHA agreed to build 895 apartments for people who qualify for public housing. Of those units, 700 would have rents set at 30 percent of a family's income; 195 units would be for families with incomes 40 percent of median income or below. [SSA.247.]
- The decree concentrates at least 472 of the public housing units on CHA property within the development area, raising concerns about the density of the housing and the viability of obtaining a racial and income mix. [SSA.250.]
- Cabrini's tenant council would be a partner for the development of all units on the site of demolished buildings, with a 51 percent interest in the ownership of the general partnership. [SSA.249.]
- The tenant council would receive a portion of developers' fees and profits – provided it uses such fees and profits for not-for-profit purposes – and a role in the selection of property managers and construction contractors. [Id..]
- CHA has promised \$59 million over the next few years, apparently including the \$40 million in HOPE VI housing development money that has previously been authorized by HUD. [SSA.247.]
- The agreement purports to replace the Receiver with a separate company as “development manager.” [SSA.250.]

Because these terms (i) raise questions as to whether the proposed decree would advance the desegregation objectives of the 1969 Injunction and therefore justify a waiver of the locational requirements of the Injunction, and (ii) impinge upon the Receiver's negotiation and development authority as defined in the Receivership Order, and as clarified by the District Court's Orders of February 23 and May 19, 21 and 22, the Receiver brought the Emergency Motion.

D. The Receiver's Emergency Motion and the District Court's August 12 Order.

After reading the July 29 *Tribune* article, the Receiver requested a copy of the proposed consent decree from CHA, which refused to provide it without preconditions. [SSA.108.] In order to avoid having the Receiver's motion heard on an expedited basis, the Receiver asked CHA to delay presenting the decree to Judge Coar until the motion was briefed and decided. CHA refused. [SSA.2, 111.] The Receiver's Motion was, therefore, presented to Chief Judge Aspen as an emergency on July 30. [SSA.109-126 (transcript of hearing).]

1. The July 30 hearing.

At the July 30 hearing, the Receiver's counsel summarized the Motion, adding:

I am sensitive to the fact that I am here as the lawyer for your receiver. And if you wish the receiver to be bypassed in this [Cabrini settlement] process, that's your call. And we would not argue with that call. [SSA.119.]

Chief Judge Aspen expressed concerns about whether CHA had been complying with the Court's prior orders. These concerns were similar to those he expressed on May 19. See Rec.Br.19 and RA.41-42. On July 30, he stated [SSA.122, 124 (emphasis added)]:

You know, I am distressed that issues like this keep arising. It seems to me that it's not a matter of form over substance. There is an important principle

involved and that principle is that if the receiver has been appointed, the receiver has been given authority, that authority has been clarified, if the CHA has an order, a recent order, clarifying that authority, that order is still the law of the case. And the CHA, particularly as a governmental body, really should feel obligated to follow the law as it exists. And there is some question as to whether it has.

* * * * *

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Chief Judge Aspen enjoined CHA from presenting the proposed decree to Judge Coar pending briefing and ruling upon the Receiver's Motion. [SSA.127.] He also granted the Cabrini LAC and the City (non-parties to this case, but parties in the Cabrini lawsuit) leave to file briefs. [SSA.123.]

2. The parties' positions on the Emergency Motion.

The Receiver's Emergency Motion and the parties' briefs and supporting exhibits are reproduced in CHA's Supplemental Appendix. The Gautreaux plaintiffs supported the Motion. [SSA.287-96.] One of their reasons for doing so was articulated at the July 30 hearing: the Receivership Order required the Receiver to be included at the negotiating table as a participant during the negotiations. If limited to commenting after a deal had been reached, the Receiver (and the Gautreaux plaintiffs) would be consigned to role of "naysayer" and of upsetting the "apple cart." [SSA.117-18.] Chief Judge Aspen agreed with this point on July 30:

But I think Mr. Polikoff fairly states the posture of this case, both in terms of fairness in dealing with everyone and also with the unwanted political social implications of a violation of this decree; that is, when there is a done deal and somebody who is supposed to participate in that deal is not involved in the deal, but later comes in and attempts to undo the deal, that puts all the parties in a very different posture than the posture that they are intended to be as to their [roles] as defined by the decree and the orders under the decree. So it's not simply form over substance. [SSA.122-23.]

CHA raised numerous objections to the Receiver's Emergency Motion [SSA.129-55]. CHA's two lead arguments below – that the Receiver's objections were untimely and CHA was following the “precedent” established in 1995 concerning the entry of a consent decree for redevelopment of the Henry Horner Homes, [SSA.133-35] – have been abandoned in this appeal.^{5/}

The City did not object to the Receiver's Emergency Motion. [SSA.315-16.] Its “Statement of Position” stated that the proposed Cabrini-Green redevelopment “necessarily implicates the Gautreaux judgment order;” that “any effective settlement would require review and approval of its terms (a) by the Corporation Counsel, (b) by the Receiver, and (c) by the Court;” and that “[a]fter reviewing the Receiver's Emergency Motion . . . the City believes that further Orders of Court are required.” [SSA.316.] Thus, the City's position was that:

the proper course of action is to review the terms of the proposed settlement agreement in the Cabrini Green LAC litigation with the Receiver and this Court and that any agreement reached with the participation of the Receiver be reviewed and approved by the Corporation Counsel and the Court. [Id.]

The Cabrini LAC's Memorandum said that the LAC wished “to execute the proposed Consent Decree, and begin the long awaited, and often delayed, revitalization of their community.” [SSA.325.] However, the Cabrini LAC acknowledged that it “was always aware that any agreement would be subject to the requirements of the Gautreaux Order,” and that it never intended to “circumvent or bypass the Receiver, or the requirements set forth in the Gautreaux Order.”

^{5/} Presumably, CHA concluded those arguments were untenable. The Receiver showed below that it gave timely notice to CHA and the Cabrini LAC that the Receiver had responsibility for development. Since CHA has not raised the “timeliness” and “Horner” arguments in its initial appellate brief, those issues are waived, see, e.g., Kauthar SDN BHD v. Sternberg, 149 F.3d 659 (7th Cir. 1998), and therefore will not be addressed herein. The Receiver's and Plaintiffs' detailed replies to CHA's arguments in the District Court are found at SSA.193-202, 287-91.

[SSA.329.] The Cabrini LAC said it was scheduling meetings to discuss the proposed agreement with the Gautreaux plaintiffs and the Receiver. [Id.]

Thus, only CHA objected to the Receiver's participation in the negotiations related to Cabrini redevelopment.

3. The August 12 Order.

The August 12 Order granted the Receiver's Emergency Motion. [AP.6.] Chief Judge Aspen found only one of CHA's objections "meaningful": CHA's argument that it had intended to seek a waiver of the 1969 Injunction. He rejected it, holding:

The problem is that *no waiver has been sought*. Without a waiver the CHA lacks the authority to unilaterally negotiate *any* contract or agreement respecting the construction of housing, for the receivership order provides that the scattered site program includes *all* non-elderly housing.

[Id., Court's emphasis.] The District Court also ruled:

The CHA is hereby enjoined from developing or negotiating or otherwise pursuing any agreement with any person or entity regarding the development of dwelling units (a term defined in the original injunction in this case) without the full participation of the Receiver unless, of course, it has already secured a waiver for the contemplated development. By full participation we mean that the Receiver must have timely and unfettered access to "all information, records, documents, [and] files" relating to the contemplated development and that the Receiver must be given advance notice of all meetings (whether conducted in person or by any other means of communication) related to such development and allowed to attend and give his input. The Receiver, of course, possesses *all* of the CHA's development authority, so the CHA may not come to any agreement regarding development without his written consent.

As for the CHA's agreement with the Cabrini-Green representatives, the parties must now return to the drawing board and renegotiate their agreement with the full participation of the Receiver since the CHA has not yet secured a waiver of the injunction. If the CHA chooses instead to seek a waiver, it should know that we will consult the Receiver on the merits of the proposed waiver (and we will require the CHA to provide "all information, records, documents [and] files" concerning the

Cabrini-Green development and proposed waiver to the Receiver so that he may offer us intelligent and informed comments on the proposed waiver). So, the more prudent, effective, and efficient course will be to negotiate with the Receiver prior to seeking our involvement. [Id.]

STANDARD OF REVIEW

The August 12 Order should be reviewed under the abuse-of-discretion standard. This is so for several reasons:

- (1) A District Court has broad discretion concerning the supervision of an equity receivership, see Rec.Br.27-28;
- (2) Chief Judge Aspen was interpreting the Receivership Order he entered and has monitored since 1987, see id. at 28;
- (3) Chief Judge Aspen was seeking to enforce compliance with the prior desegregation remedies in the case, which were based upon judicial findings of de jure segregation, see id. at 28-31; and
- (4) A District Court's entry of an injunction is reviewable for abuse of discretion, see, e.g., In Re VMS Securities Litigation, 103 F.3d 1317, 1323 (7th Cir. 1996).^{6/}

^{6/} CHA's statement of the Standard of Review, CHA Cabrini Br. 8, is only partly correct. CHA correctly concedes the application of the abuse of discretion standard, but incorrectly limits that standard to the "decision to impose a receivership over a defendant's assets." CHA Cabrini Br. 8. The August 12 Order did not "impose" a receivership. It ruled that CHA's negotiating activities concerning Cabrini violated the provision of the Receivership Order of 1987 entrusting negotiations to the Receiver. The 1987 Order has not been challenged, and CHA has not sought to vacate or modify it. Second, CHA's observation that "questions of law are reviewed de novo," id., is correct but irrelevant, since the August 12 Order and CHA's appeal raise no abstract questions of law. They concern interpretation of the 1987 Receivership Order and the 1998 HOPE VI Orders (which, though ultimately a legal question, is reviewed deferentially, as noted above). They also involve whether CHA's actions with respect to Cabrini were faithful to those Orders, and whether the District Court properly exercised its discretion in enforcing compliance with those Orders.

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2. The parties' positions on the Emergency Motion.

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SUMMARY OF ARGUMENT

The principal purpose and effect of the August 12 Order was to restore the rule of law by requiring CHA to comply with the Court's prior orders. CHA's negotiation of the Cabrini consent decree violated the Receivership Order and conflicted with the District Court's February and May rulings. Though it may have disliked those rulings, CHA had no choice but to obey until they were vacated or modified. See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., 445 U.S. 375, 386 (1980). Chief Judge Aspen did not abuse his discretion in entering the August Order, and it was clearly correct under any standard of review.

Like the May 19 Order, the August 12 Order is a straightforward application of the plain and unambiguous terms of the 1987 Receivership Order to negotiations for the development of new, non-elderly HOPE VI housing at Cabrini. [SSA.24, 27.] Chief Judge Aspen correctly held that absent a waiver, the Receivership Order deprives CHA of the "authority to unilaterally negotiate *any* contract or agreement" respecting the development of such housing. [AP.6 (Court's italics).] Accordingly, he correctly enforced the Receivership Order by enjoining CHA to cease unilateral development activities or negotiations, provide full discovery of such activities to the Receiver, and renegotiate the proposed consent decree with the full participation of the Receiver. [Id.]

Most of CHA's arguments are red herrings. The August 12 Order gave the Receiver no new authority or power it did not already have. It did not change the already-existing obligations of the parties. It was not based on either the "duty to cooperate" in Section 7 of the Receivership Order or on the general "duty to desegregate" in Article VIII of the Injunction. Rather, it was based on Sections 1 and 2 of the Receivership Order, which transferred all new non-elderly public housing

development authority, including the power to negotiate agreements concerning development, to the Receiver. The August 12 Order correctly holds that this power necessarily includes the power to participate in the Cabrini negotiations to the extent those negotiations concern such development.

Like the May 19 Order, the August 12 Order was a restrained judicial response to an agency that has shown a pattern of ignoring Court orders. While the plain language of the Receivership Order is controlling and dispositive of this appeal, the Receiver's affidavits that were before Chief Judge Aspen when he entered the May 19 Order and August 12 Orders (reproduced in Volumes I-II of the Receiver's Appendix) set forth an uncontradicted history of CHA hostility and intent to disregard District Court orders. Those affidavits detail an unfortunate course of conduct under which CHA began acting as if the 1987 Receivership Order did not exist and ultimately dared the Receiver to "try to stop" it from taking action in violation of that Order and the 1969 Injunction. The August 12 Order was a proper and restrained exercise of Chief Judge Aspen's broad discretion to enforce compliance with his remedial orders.

ARGUMENT

I.

THE AUGUST 12 ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S BROAD DISCRETION.

A. The District Court Correctly Interpreted Its Unambiguous Receivership Order.

Chief Judge Aspen correctly read the 1987 Receivership Order to apply to CHA's negotiation of housing development provisions of the proposed Cabrini consent decree. No other reading is plausible. CHA suggests none.

That Order defines the “scattered site program” to include “all CHA non-elderly public housing development programs which may in the future be authorized by HUD during the pendency” of the action. [SSA.23.] HOPE VI is such a program, as confirmed by the (unstayed) February 23 Order. The Receiver’s powers respecting such housing development are quoted above at 4-5, and include (a) “site selection and acquisition (including policies respecting the location of sites and buildings to be acquired)” and (b) “negotiating and executing any contracts or other documents necessary or appropriate to implement the scattered site program.” [SSA.24.] These terms plainly and unequivocally apply to any effort by CHA to negotiate development agreements with tenants, including those at Cabrini-Green. Chief Judge Aspen’s holding to that effect was correct, and cannot be deemed an abuse of his discretion.

B. CHA Violated The Receivership Order.

By negotiating the terms of the proposed consent decree without Receiver participation, CHA usurped powers that had been withdrawn from it and transferred to the Receiver by the 1987 Receivership Order. It is undisputed that the proposed decree contains extensive terms concerning new housing development. It designates how many public housing units will be built and where they will be sited. These and other terms unquestionably impinge upon the Receiver’s power to determine “site selection” and to “negotiat[e] and execut[e] any contracts.” The proposed decree itself is irrebuttable evidence of CHA’s violation.

Doubt, if any, about whether the negotiation of development terms in the proposed decree was subject to the Receivership was quelled by the District Court’s Orders of February 23 and May 19-22. The Cabrini redevelopment is a HOPE VI project, and the February 23 Order confirmed that

new HOPE VI non-elderly housing development activities are subject to the Injunction. That ruling, combined with the language of the Receivership Order, confirmed (if confirmation was needed) that all CHA new non-elderly HOPE VI housing development activities, including those at Cabrini, were subject to the Receivership. The District Court's May 19 holding that such activities fit "entirely within the Receiver's jurisdiction" confirmed matters beyond all doubt. When CHA continued to negotiate the Cabrini deal without Court permission and without involving the Receiver after May 19, it did so in contravention of the District Court's prior orders.

Moreover, as CHA candidly admitted, see SSA.139 n.4, it broke its June 16 promise to the Receiver to "provide information to the receiver regarding agreements made and proposed with respect to HOPE VI projects and any other projects that involve the construction of new housing." [SSA.81.] That promise, of course, was required by Section 7 of the 1987 Receivership Order.

C. The August 12 Order Was A Correct and Restrained Response to CHA's Recalcitrance.

1. The August 12 Order vindicated the rule of law.

The August 12 Order restores the rule of law, which was correctly one of Chief Judge Aspen's objectives:

There is an important principle involved . . . [I]f the CHA has an order, a recent order, clarifying that authority, that order is still the law of the case. And the CHA, particularly as a governmental body, really should feel obligated to follow the law as it exists.

July 30 Tr. 14, SSA.122. The August 12 Order, AP.6, made the same point: "compliance with our orders is not optional and we will take every necessary step to ensure the compliance of all parties."

More was at stake here than a correct interpretation of the Receivership Order. The relief entered by the District Court vindicated the public's interest in compliance with court orders:

Courts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender. [Federal] courts, equally with those of the state, are possessed of ample power to protect the administration of justice from being thus hampered or interfered with.

Waffenschmidt v. MacKay, 763 F.2d 711, 716 (5th Cir. 1985) (internal quotation omitted).

The 1987 Receivership Order and the District Court's orders of February 23 and May 19-22 were the law of the case. CHA was free to seek a stay of the recent orders, as it did. But because the District Court and this Court denied the stay, CHA had no choice but to obey. See GTE Sylvania, 445 U.S. at 386 ("persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order"). See also Celotex Corp. v. Edwards, 514 U.S. 300, 306 (1995); Retired Chicago Police Ass'n. v. City of Chicago, 76 F.3d 856, 870 (7th Cir. 1996); Alexander v. Chicago Park District, 927 F.2d 1014, 1025 (7th Cir. 1991). Chief Judge Aspen acted well within his discretion in seeking to enforce compliance with his prior orders, and CHA has failed to show that he abused his discretion.

2. The District Court acted with restraint.

Chief Judge Aspen showed patience with CHA, giving it several opportunities to comply with his orders. His February 23 Order was purely declaratory. His response to the plaintiffs' March 18 Motion for Further Relief was restrained. Plaintiffs presented the Receiver's report of Mr. Shuldiner's March 10 declaration of open hostility to the Court's desegregation orders and extensive

and uncontradicted affidavits evidencing CHA's repeated violations of the Injunction Order and the Receivership Order. See Rec.Br.6-7, 17-18. Yet Judge Aspen limited his response to an oral admonition on May 19. [SSA.19.] He held that HOPE VI was subject to the Receivership and ordered CHA to "cooperate" with the Receiver in preparing the June 29 HOPE VI application. [SSA.66.] After ruling that the Receivership Order extended to HOPE VI, he declined to reach the other issues raised by plaintiffs, denying their motion as "moot" on May 21. [RA.31-32.]

It was only after learning from the July 30 Emergency Motion that CHA had negotiated the Cabrini agreement without the Receiver, and had done so in violation of an express promise to notify the Receiver of any such negotiations or proposed agreements, that Chief Judge Aspen ordered further relief. But the Order he entered is limited to CHA's violation. His August 12 Order does no more than confirm that the negotiation provision of the Receivership Order means what it says and seeks to compel CHA compliance with that Order. CHA's argument that the August 12 Order "expanded the duties of the receiver," CHA Cabrini Br. 6, is wrong.

3. The order to renegotiate was correct, fair and properly restored the *status quo*.

The order to renegotiate was based on well-established contract law. The Receivership Order removed from CHA the power to negotiate unilaterally concerning new, non-elderly public housing development. The other parties to the proposed decree were, as a matter of law, charged with knowledge that a contract with a government agency that is entered into without authority is void. See, e.g., Lindahl v. City of Des Plaines, 210 Ill. App. 3d 281, 568 N.E.2d 1306 (1st Dist. 1991); Bank of Pawnee v. Joslin, 166 Ill. App. 3d 927, 521 N.E.2d 1177 (4th Dist. 1988). See also Perkins v. Chicago Heights, 47 F.3d 212, 214 (7th Cir. 1995) (vacating consent decree with government

“[b]ecause the parties to the consent decree lacked the authority to assent to it”); Dunn v. Carey, 808 F.2d 555, 559-60 (7th Cir. 1986) (validity of decree “depends on the parties’ authority to give assent”).^{7/}

Chief Judge Aspen’s renegotiation order also was fair, for the reasons he expressed on July 30. See above at 13. It would have been unfair to permit CHA to present the proposed decree to Judge Coar as a *fait accompli*, relegating the Receiver and the Gautreaux plaintiffs to the role of objecting to provisions, however improper, that the tenants had erroneously been led to believe would be acceptable. The District Court’s order to “renegotiate” properly and fairly restores the parties to the *status quo ante*, the position the parties would have been in had CHA complied with the Receivership Order from the outset.

II.

CHA’S ARGUMENTS ARE INCORRECT.

CHA takes a scattershot approach to the August 12 Order, raising ten “issues” for appeal. CHA Cabrini Br. 6-7. Its arguments are based upon mischaracterizations of the Order and erroneous premises of fact and law.

^{7/} Indeed, the parties had actual knowledge of the Receiver’s role. When Valerie Jarrett of the Receiver’s staff was deposed in November 1997, she was questioned about the Receiver’s role at Cabrini and testified that (a) “Judge Aspen has appointed Habitat and Daniel Levin as the receiver for the nonelderly public housing developed by public housing that is developed in the city,” [SSA.200] and (b) that “CHA doesn’t get to select the development manager” because “Judge Aspen appointed . . . the receiver.” [*Id.*] These statements put all parties to that case on actual notice of the Receiver’s responsibility for new, non-elderly CHA housing development.

A. CHA Mischaracterizes the August 12 Order and the Receiver's Position.

CHA incorrectly writes that the District Court “held that the CHA has no power or authority to negotiate or execute an agreement . . . that would resolve the Cabrini litigation . . .” CHA Cabrini Br. 1. It also incorrectly claims that the Receiver seeks “exclusive authority to negotiate and execute” the proposed decree. Id. at 10. That was neither the District Court’s ruling nor the Receiver’s position.

The Cabrini lawsuit involved several matters outside the scope of the Receivership, and CHA was free to settle those matters without involving the Receiver. It had every right to defend the action vigorously and to negotiate terms of a settlement respecting such matters. In addition, the Cabrini LAC Complaint itself did not seek mandatory relief concerning new housing development. Judge Coar could not properly have ordered new housing development, and it was certainly a possibility that CHA could have settled the lawsuit without implicating the Receiver’s authority.^{8/}

Like any litigant, CHA’s right to negotiate was limited to those terms about which it had the authority to negotiate. It could not promise to exercise a power transferred to the Receiver by the Receivership Order. Once the talks turned to matters within the scope of the Receivership – i.e., the development of new, non-elderly housing – CHA lacked unilateral authority to negotiate or make

^{8/} For example, the Cabrini LAC lawsuit could have been settled with agreements concerning (i) which buildings to demolish, (ii) procedures for future consultations with tenants and (iii) relocation benefits and services for tenants – all issues raised by the Cabrini LAC’s complaint.

promises on such matters. See cases cited above at 22-23. Absent advance permission from the District Court to the contrary, it was obligated to include the Receiver in such discussions.^{9/}

CHA mistakenly argues that the fact that the litigation and negotiations included matters outside the scope of the Receiver's jurisdiction (such as tenant selection and demolition) meant "the CHA had full power and authority to settle the litigation" as a whole; otherwise, "CHA's exposure under the LAC's claims would be controlled by the receiver." CHA Cabrini Br. 10. This argument cannot be squared with the language of the Receivership Order, and CHA makes no attempt to do so. Nor does it cite any law suggesting that the power to negotiate development terms, which had been transferred to the Receiver, somehow reverts to CHA when those terms are being discussed together with terms that are not part of the Receiver's duties.^{10/}

^{9/} CHA also misstates the law when it states that "[e]verything has to be negotiated with the City of Chicago and the Local Advisory Councils." CHA Cabrini Br. 25-26. This repeats CHA's mistaken assertion that HOPE VI requires tenant consent. As discussed elsewhere, see Plf.Br. 39-40, HOPE VI requires tenant consultation, not consent, and CHA cites no law to the contrary. Neither does it cite law supporting the Cabrini plaintiffs' alleged "right to remain in their neighborhood." CHA Cabrini Br. 9. Judge Coar found no such right under HOPE VI, CHA Cabrini Br. Exh.B.12. In any event, the scope of the Cabrini tenants' rights is irrelevant to CHA's duties to obey the Receivership Order and its lack of authority to negotiate new housing development matters unilaterally. (It should be noted that, notwithstanding the lack of a tenant veto or a tenant entitlement to remain in the neighborhood, the Receiver is sensitive to tenant desires to remain and will attempt to maximize tenant choice to the extent practicable).

^{10/} CHA's fears that its "exposure" would be "controlled by the Receiver" are speculative rhetoric. If the fears were genuine, CHA should have sought clarification or modification from the Court, not take matters into its own hands, negotiate unilaterally, and violate the Receivership Order for months. Further, CHA was not "exposed" to the Cabrini tenants with respect to matters within the Receiver's jurisdiction. While Judge Coar arguably had the power to enjoin demolition of certain buildings or to compel CHA to consult with tenants, he had no power to order CHA to reach any specific agreement with tenants or implement any specific redevelopment plan at Cabrini.

Finally, contrary to CHA's claim at 9, the tenants' claims in the Cabrini lawsuit to remain in the Cabrini neighborhood, even if they had merit, do not necessarily conflict with the
(continued...)

B. The District Court Correctly Rejected CHA's "Waiver" Argument.

CHA, like any litigant subject to an injunction, has every right to apply to the Court to vacate or modify the Injunction. (CHA, with agreement of the plaintiffs and Receiver, did so several times in obtaining "revitalizing" orders. See Plf.Br.12-14.) But the litigant must have good reasons for doing so, and modification of the injunctive order must be sought in advance. See cases above at 21. CHA had no right to violate the Receivership Order for months and then seek a waiver after-the-fact.

But that is exactly what it did. Once the Cabrini negotiations turned to new non-elderly housing development, a subject delegated to the Receiver under Section 2 of the Receivership Order (as opposed to demolition, tenant consultation, social programs or other matters), CHA was obligated (i) to inform the other parties that it had no legal authority to negotiate those issues without the participation of the Receiver, and (ii) either to bring the Receiver to the table or seek an immediate modification of the Receivership Order. CHA cites no law that authorized it to violate the Receivership Order for months because it intended to ask for the Court's blessing afterward.

CHA claims that it was entitled to formulate a plan to build "no units" in the General Area, "and to seek a waiver of the locational requirements of the Injunction."^{11/} CHA Cabrini Br. at 11.

^{10/}(...continued)

desegregation objectives of Gautreaux. As was the case in the Henry Horner settlement, replacement housing can be built in the Cabrini area in a manner to promote a mixed-income development and racial desegregation. Of course, a revitalization order would be needed, as has been obtained in several prior circumstances.

^{11/} Actually, contrary to CHA's assertion, the proposed decree does provide for certain units to be built in the General Area, see SSA.269 (designation of Old Town Square).

But this argument improperly ignores the existence of the Receivership Order. There is nothing wrong with formulating a plan to deviate from the locational requirements of the Injunction and then trying to persuade the Court to authorize the deviation (which is what the parties jointly did in obtaining prior revitalizing orders). But a waiver of the locational requirements of the Injunction is not a waiver of the Receivership Order. That Order vested all of CHA's non-elderly development authority, including the authority to develop new non-elderly housing in revitalizing areas, in the Receiver. The Receivership Order draws no distinctions between locations and is not yoked to the one-for-one provisions of the Injunction.^{12/}

CHA's argument that a modification of the locational requirements of the Injunction equals a waiver of the Receivership Order is also belied by recent history. In the past when a modification of the Injunction was obtained under the "revitalizing" concept, the Receiver continued to discharge its duties under the Receivership Order, with full knowledge of CHA and approval of Chief Judge Aspen. See Plf.Br. 12-14 for a discussion of the Horner and North Kenwood-Oakwood orders.^{13/} In short, it is incorrect both as a matter of history and under the terms of the Receivership Orders,

^{12/} CHA argues from the false premises that the Receiver is authorized to build only in the General Area and that the Receiver would be loath to seek a waiver of the locational requirements of the Injunction. Cabrini Br. 13. But nothing in the Receivership Order limits the Receiver's development duties to any particular location. Over the past several years the Receiver has overseen the development of housing in both the General and Limited Areas. And it has participated in development where waivers of the locational requirements of the Injunction were obtained because the areas were designated as "revitalizing," such as the Henry Horner and North Kenwood-Oakland redevelopment work. More background concerning the revitalizing concept and these projects is set forth in Plf.Br. 12-14.

^{13/} CHA settled the Henry Horner litigation by bringing the Receiver into the process months before the proposed consent decree was finalized and presented to the Court for approval. While even then the plaintiffs and the Receiver objected that they were brought into the process too late, they were involved in the settlement process far sooner than they were at Cabrini. See SSA.196-98, 293-96.

that “if a waiver of the Injunction is granted, then the Receiver has no responsibilities.” CHA Cabrini Br. 11.^{14/}

C. The District Court’s Orders Were Clear, and Informed CHA of its Obligations.

Much of CHA’s Brief is devoted to arguing how the Court’s prior orders are allegedly ambiguous and required further clarification. As CHA portrays it, the Court has planted a thicket of ambiguity, and the three Orders of May 19, 21 and 22, only worsened the ambiguity. CHA identifies the following alleged problems: (i) the February Order and the May 19-22 Orders are unclear, CHA Cabrini Br. 14-15, 18-19; (ii) the Receiver’s authority concerning HOPE VI is unclear and the Receivership Order conflicts with HOPE VI, CHA Cabrini Br. 15-17; (iii) responsibility for a HOPE VI project “cannot be shared,” CHA Cabrini Br. 19-20; and (iv) the duty of cooperation is unclear and unenforceable, CHA Cabrini Br. 24-26. Each of these contentions is advanced to complicate a simple matter.

At the outset, the Court should reject CHA’s assumption that the District Court’s orders are ambiguous because the parties have disagreed over them. “What the injunction actually says – not

^{14/} Contrary to CHA’s Cabrini Br. 11, the District Court did not “agree[.]” with CHA’s position in its August 12 Order. CHA refers to the following sentence: “The CHA’s only meaningful objection to this request is that it has intended all along to seek a waiver of the primary injunction in this case, which, if we consented, would mean that the Receiver would have no role in development at Cabrini-Green.” [AP.6.] This sentence is a restatement of CHA’s position, not an endorsement of its theory collapsing the Injunction and the Receivership Order. The District Court made that clear two sentences later by referring to the Receivership Order. And the District Court was aware that the Receiver continued to perform its duties when prior revitalizing waivers had been obtained.

what the parties think it ought to have said – controls subsequent proceedings in contempt.” Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1432 (7th Cir. 1985).^{15/}

Further, the Court should not reach CHA’s “ambiguity” and vagueness allegations because they should have been presented to the District Court before CHA acted unilaterally and negotiated the Cabrini deal. Even if the orders were as plagued with ambiguity as CHA suggests, it was not free to adopt its own interpretation and proceed. It knew that the Receivership Order contained language vesting negotiation authority in the Receiver; that Chief Judge Aspen found HOPE VI subject to the Injunction; that he ruled that CHA’s HOPE VI non-elderly housing development activities “fit entirely within the Receiver’s jurisdiction,” [RA.28.]; and that the Receiver had been asserting that CHA had no authority to negotiate unilaterally with tenants concerning such activities. If CHA was in a genuine state of confusion,^{16/} it was required to seek guidance from the District Court, not continue on with the Cabrini negotiations as if the Orders had never been entered. It is most unfair to blame the District Court for not ruling on the motion (to modify the Receivership) that CHA has studiously avoided filing.

^{15/} Cf. Emergency Medical Care, Inc. v. Marion Memorial Hosp., 94 F.3d 1059, 1061 (7th Cir. 1996) (“the fact that the parties disagree over the precise meaning of a contractual provision does not render the contract ambiguous”).

^{16/} An alternative explanation for CHA’s conduct is that Mr. Shuldiner was acting as he had threatened to do in the March 10 meeting – he made a deal with tenants in an attempt to contract away the Receiver’s development authority, and to obtain through extra-judicial maneuvers what he could not obtain from the District Court. But Mr. Shuldiner’s actual motivation is irrelevant – CHA’s conduct violated the Receivership Order.

1. The 1998 Orders are clear.

The February and May Orders could not have more clearly put CHA on notice that the Injunction governs HOPE VI; and that housing development activities under HOPE VI are subject to the Receivership. CHA has chosen to profess confusion instead of obeying.

CHA's principal source of alleged confusion is based on the locational requirements of the injunction, which it construes as a straightjacket that brings this case into conflict with the HOPE VI statute. CHA Cabrini Br. 14-15. But this is just a rehash of CHA's challenge to the February 23 Order, which is addressed in Plf.Br. 35-42. There is no conflict between HOPE VI and the Injunction, and, in any event, CHA again ignores the now-long history of revitalizing orders, under which CHA, the Receiver, and the plaintiffs have developed new housing – including HOPE VI housing with HUD's consent – without any of the confusion that now purportedly burdens CHA. And its purported confusion about prior orders provides no reason to disturb the August 12 Order, about which CHA professes no confusion and which should have clarified matters for CHA. CHA was not punished for its alleged confusion and lack of compliance. It was merely compelled to obey on a going-forward basis, and enjoined from further violations. See United States v. Mansion House Center, 594 F.2d 653, 655-56 (8th Cir. 1979).^{17/}

^{17/} In that case the district court entered an injunction against a party in receivership which had violated a provision barring "interference" with the court's receiver. The party claimed the non-interference provision was "vague." In affirming, the Court of Appeals held that however the non-interference provision "may be interpreted, the injunction now being appealed is sufficiently clear to alert the Group to its duty." Mansion House, 594 F.2d at 656. The same can be said of the August 12 Order.

2. The Receivership Order is clear and does not conflict with HOPE VI.

The clarity of the Receivership Order is discussed above at 18-20. In no way does the Receivership conflict with HOPE VI, as CHA suggests. This matter is discussed further at Rec.Br. 36-37, 42-45. As shown there, CHA itself has submitted, and HUD has approved, HOPE VI applications with the Receiver discharging its duties, most recently in the 1998 application recently approved by HUD. Both the breadth of the language in the Receivership Order and the Receiver's past participation in HOPE VI activities (with CHA and HUD consent) rebut CHA's incorrect contention (CHA Cabrini Br. 15-17) that the Receiver's duties were limited to simpler programs in existence when the Receivership was imposed.

CHA also argues that because it has designated another development manager in the proposed decree, "CHA is not the developer of the project that will design, provide specifications for and construct new public housing built with HOPE VI funds," and that since "CHA is not the developer, the receiver cannot be the developer." CHA Cabrini Br. 17. But the Receivership Order transferred CHA's development authority for new non-elderly housing to the Receiver. CHA cannot rewrite that Order by purporting to delegate the developer duties to a third party. It lacks the power to make the delegation. Further, the Court's appointment of the Receiver does not "directly conflict with federal law." Id. CHA's citation to a HUD regulation requiring a bidding process for the selection of a developer refers to the selection of the specific party who will design and construct the housing. The Receiver typically has not performed this construction function. Rather, it oversees the process by which such parties are selected and it monitors the ensuing work. That is the role it

has performed at Horner and that is the role CHA and the Receiver agreed it will perform in the ABLA/Horner HOPE VI process. [RA.516-27 (Vol.II).]^{18/}

3. CHA knows how to “share.”

CHA complains that the “sharing of responsibility” between it and the Receiver on a HOPE VI project will inevitably breed so much ambiguity and tension that it “cannot” be done. CHA Cabrini Br. 19. But sharing is not as hard as CHA suggests; CHA has done it on prior projects, including: the successful 1996 HOPE VI application for Horner, see Rec.Br.14, 43-45; the construction of replacement housing at Horner, id. 13 n.8; and the successful 1998 HOPE VI application at ABLA.^{19/}

Successful “sharing” hinges on the parties’ good faith. HOPE VI involves matters both within the Receiver’s jurisdiction (housing development, site selection, etc.) and within CHA’s jurisdiction (social programs, etc.). Thus, HOPE VI activities within each party’s jurisdiction sometimes need coordination (although, since in dollar terms the housing portion of HOPE VI dwarfs the

^{18/} In a further attempt to create unnecessary confusion, CHA also misreads the “relocation” provision of the Receivership Order. CHA Cabrini Br. 17, referring to Section 2(a)(iii) of the Receivership Order giving the Receiver power concerning “relocation of occupants, when necessary.” [SSA.24.] CHA argues that this language would allow the Receiver to relocate public housing residents displaced by demolition, a “massive task” for which the Receiver is allegedly unqualified. But the Receiver has not asserted such a power and the District Court has not construed the Receivership Order in the way CHA fears. The “relocation” provision of the Receivership Order empowers the Receiver to relocate occupants of new properties it acquires pursuant to the Receivership. If a new, occupied property is acquired, the existing tenants must be relocated. The Receiver does not read this provision to cover the relocation of public housing tenants from one CHA building to another, or to other housing on an interim basis.

^{19/} CHA’s prediction to this Court that the 1998 application was doomed to fail if it was prepared in cooperation with the Receiver, see CHA’s Mem. in support of Stay Motion of May 19 at 4-5, proved incorrect.

other provisions, CHA exaggerates the extent of potential friction). There is no inherent reason that separate responsibilities cannot be meshed, as they have before. If legitimate disagreements arise in a specific factual context, the matter can be presented to the District Court for guidance.

4. The duty to cooperate is enforceable, but irrelevant.

(a) The August 12 Order was not based on the duty to cooperate.

CHA's arguments concerning the allegedly vague and unenforceable "duty to cooperate" are red herrings that the Court need not reach, since the duty was neither the focus of the Receiver's Emergency Motion nor a basis for the August 12 Order. The cooperation duty is set forth in Section 7 of the Receivership Order. [SSA.27.] But Chief Judge Aspen entered the August 12 Order because CHA had engaged in unilateral negotiations concerning housing development matters at Cabrini in violation of Sections 1 and 2 of the Receivership Order, which unambiguously transferred such authority to the Receiver. CHA does not and cannot advance vagueness arguments with respect to those terms.

(b) The duty to cooperate is enforceable, and was violated.

Of course, the violation of Sections 1 and 2 of the Receivership Order simultaneously violated the duty to cooperate in Section 7. While the Receiver believes it is unnecessary for the Court to reach CHA's arguments concerning cooperation, CHA's arguments are in any event wrong.

CHA argues that injunctions must be clear. CHA Cabrini Br. 26. But the duty of cooperation set forth in the Receivership Order, though broad, is neither unclear nor unenforceable, and breadth does not excuse CHA's violations of that duty. As the District Court observed on May 19, CHA had

previously had no problem understanding or complying with the duty to cooperate. [RA.41-42.] Further, the Receivership Order says more than “cooperate.” Paragraph 7 provides for “full cooperation and assistance,” it prohibits interference with the Receiver, and it mandates “providing full access to all information, records, documents, files relating to the scattered site program.” [SSA.27.]

(i) CHA violated the duty to cooperate.

Under any view of paragraph 7, the following actions by CHA violated its duty to cooperate: (i) failing to include the Receiver in the Cabrini negotiations; (ii) breaching the promise in CHA counsel’s June 16 letter to “provide information to the receiver regarding agreements made and proposed with regard to HOPE VI projects and any other projects that involve the construction of new housing,” [SSA.81]; (iii) refusing to provide the Receiver with information about agreements with tenants elsewhere regarding rehabilitation or redevelopment, id.; (iv) refusing to produce to the Receiver the CHA’s prior HOPE VI applications until being compelled to do so by the District Court on May 20, 1998, see Rec.Br.21 & RA.30; (v) refusing to provide the Receiver a copy of the proposed Decree without preconditions, see above at 12; and (vi) making the statements and threats on March 10, 1998 that are set forth in Mr. Levin’s March 13, 1998 letter to the District Court.^{20/}

^{20/} We have set forth only these matters as they relate to Cabrini. Other violations have occurred with respect to other developments, as set forth in the Affidavits previously submitted by the Receiver.

(ii) The duty to cooperate is enforced by the courts.

Broad language imposing a duty to cooperate with a receiver is commonplace in orders appointing the receiver. See orders in Receiver's Supplemental Appendix, attached hereto: FTC v. Think Achvt. Corp., No. 2:98-CV-12-JM, 1998 U.S. Dist. LEXIS 3894 (N.D. Ind. Feb. 10, 1998) (order appointing receiver requires defendant to "assist" and not to "interfere" with receiver); FTC v. Independence Med., Inc., No. 2:95-1581-18, 1996 U.S. Dist. LEXIS 13217 (D.S.C. Aug. 26, 1996) (same); SEC v. Vision Comm'ns, Inc., No. 94-0615, 1994 U.S. Dist. LEXIS 8661 (D.D.C. May 11, 1994) (duty to "cooperate with and assist the Receiver"); SEC v. Bloom, No. 88 Civ. 0201, 1988 U.S. Dist. LEXIS 2487 (S.D.N.Y. Jan. 12, 1988) (defendants "shall cooperate in all respects with the efforts of the receiver and of the Commission").^{21/} It would be surprising if an order appointing a receiver did not contain such a provision.^{22/}

There is good reason for the duty to cooperate to be painted in general terms. Requiring more specificity would create loopholes and invite evasion. As this Court has observed:

[Rule 65(d)] does not require the impossible. There is a limit to what words can convey. The more specific the order, the more opportunities for evasion ("loopholes").

* * * * *

Rule 65(d) does not require a torrent of words when more words would not produce more enlightenment about what is forbidden. When the difficulty stems from the inability of words to describe the variousness of experience, the court may prefer brief imprecise standards to prolix imprecise standards. The right to seek

^{21/} Interference with a receiver is punishable through contempt. See, e.g., United States v. Maragas, 390 F.2d 88 (6th Cir. 1968). Neither the Receiver nor plaintiffs have brought a contempt proceeding. The goal has always been compliance.

^{22/} Similarly, the duty to cooperate is so ubiquitous in the law that it is implied in every contract as part of the duty of good faith. See Weiberg v. Resthaven, No. 89-1509-C, 1991 U.S. Dist. LEXIS 12387 (D. Kan. Aug. 28, 1991)(further detail in defining duty to cooperate is impractical, since parties cannot address in contract each instance that may later require cooperation).

clarification or modification of the injunction provides assurance, if any be sought, that proposed conduct is not proscribed. Euroquilt did not seek modification or clarification from the district court; it did not ask for assurances that the third or fourth logos are permitted, even though Scandia's objection to the second logo put Euroquilt on notice that Scandia would almost certainly object to the third. Euroquilt has only itself to blame for its current predicament.

Scandia Down, 772 F.2d at 1431-32 (emphasis added). See also Williams v. City of Dothan, 818 F.2d 755, 761 (11th Cir. 1987). These words aptly describe the current situation.^{23/}

Fourth, the allegation that the parties have “vast differences” in their “perceptions of what the duty of cooperation requires of the CHA,” CHA Cabrini Br. 25, hardly erases the duty to cooperate. A disagreement over the meaning of a term does not render the term either ambiguous or unenforceable. See above at 28-29. If there is a disagreement that cannot be resolved, the proper course is to seek guidance from the District Court, not continue to negotiate a deal with tenants in the face of objections to doing so and in breach of a promise to disclose such deals.

That point also answers CHA's hyperbole that “[i]t is not possible” to isolate any element of a HOPE VI plan, and give authority over one element (such as development) to the Receiver and others (such as tenant selection) to CHA. CHA Cabrini Br. 25-26. Why not? This is merely a rehash of CHA's flawed “sharing” argument. If, in the course of actual negotiations a conflict arose that threatened to cause real harm to the interests of CHA and tenants, modification or clarification

^{23/} CHA mistakenly cites Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 276 (7th Cir. 1992). There the Court did not hold that “the duty of cooperation is not enforceable through the Court's power of contempt.” CHA Cabrini Br. 26. It merely discussed the fact that an injunction that requires monitoring can pose difficulties for the Court. The other case cited in CHA Cabrini Br. at 26, Clark v. Coye, 60 F.3d 600, 604 (9th Cir. 1995), did not involve a duty to cooperate, nor did it address whether specific language in an injunction was too vague to be enforceable.

could be sought from the Court. But to speculate over such a conflict is not a reason to embark unilaterally on a violation of the Receivership Order.

D. CHA's Duty to Desegregate Is Enforceable, But Irrelevant.

CHA argues (CHA Cabrini Br. 20-24) that the Receiver has no duty or power to exercise discretion to desegregate public housing, and the duty to desegregate is "not judicially enforceable." These points are addressed in greater detail in Plaintiffs' Brief, to which the Court is respectfully referred. The two principal reasons CHA is incorrect are:

- (i) The August 12 Order is grounded in the explicit terms of Sections 1 and 2 of the Receivership Order, not Article VIII of the Injunction, which sets forth the general duty to desegregate.^{24/} Thus, the Court need not address this contention.
- (ii) CHA's unsupported arguments conflict with decades of desegregation jurisprudence dating back to Brown v. Board of Education, 349 U.S. 294 (1955), which imposes just such a sweeping duty as a matter of law on a party, like CHA, that has engaged in de jure segregation.^{25/} It is not enough for CHA to comply with HOPE VI and the Fair Housing Act, as it contends. CHA Cabrini Br. 22. CHA has the additional duty to dismantle its segregated housing because it was found to have engaged in *de jure* segregation in violation of the

^{24/} Article VIII provides in relevant part: "CHA shall affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures." [RA.4.]

^{25/} United States v. Fordice, 505 U.S. 717, 727 (1992), quoted in Parents for Quality Education v. Indiana, 977 F.2d 1207, 1210 (7th Cir. 1992) (State must eliminate "all vestiges of state imposed segregation" and remains in violation of Fourteenth Amendment until it has done so). See also Keyes v. Sch. Dist. No. 1, Denver, Colo., 895 F.2d 659, 664-65 (10th Cir. 1990).

Constitution. See n.25 above. It may be sufficient for the housing authority of City X simply to comply with HOPE VI and the Fair Housing Act, but CHA has an affirmative duty to remedy its constitutional violations and comply with an Injunction it has never challenged.^{26/}

In addition, CHA's attack on Article VIII of the Injunction ignores Article X of the Injunction and the role of the Court in enforcing the duty to desegregate. This case, like any desegregation case, evolves over time as conditions change and new programs are developed. The locational restrictions of the Injunction are not a straightjacket. Article VIII, with Article X,^{27/} recognizes the Court's flexibility to deal with changing circumstances.^{28/}

Finally, CHA incorrectly criticizes the Receiver for asserting that its duties include giving weight to and implementing the Court's desegregation remedies. CHA Cabrini Br. 20-22. But that was the reason for the Receivership. The Receiver was appointed in 1987 because CHA had failed for eighteen years to do exactly that. It was given all of the power of CHA to develop new, non-

^{26/} The real issue may be that the duty to desegregate conflicts with Mr. Shuldiner's views expressed in his statements on March 10. See above at 5-6.

^{27/} Article X provides that the Court retains jurisdiction to enter

orders modifying or supplementing the terms of this order upon the presentation of relevant information with respect to proposed developments designed by CHA alone or in combination with other private or public agencies to achieve results consistent with this order, material changes in conditions existing at the time of this order or any other matter. [RA.4.]

^{28/} Thus, where alternatives to the one-for-one provisions have been found, such as when the parties have jointly sought and secured revitalizing orders, Article X has been employed and the parties satisfied Judge Aspen that the proposed construction in Limited Areas promised to revitalize the community in question and lead to a desegregated community in the future.

elderly housing. Just as CHA had some discretion in fulfilling its duty to desegregate under the Judgment Order, so too the Receiver is not an automaton – it inherited CHA’s discretion when it was appointed, a discretion that is subject to and reviewable by the District Court. This is confirmed by paragraph 2 of the Order, which provides that “all powers of CHA” includes “Making all determinations governing the scattered site program in compliance with prior and future orders of this Court,” including “site selection and acquisition (including policies respecting the location of sites and buildings to be acquired).” [SSA.24 (emphasis added).] To the extent that a matter is within the purview of the Receivership Order, the Receiver has been assigned and must fulfill the Article VIII duties that CHA had previously failed for eighteen years to fulfill. See Dixon v. Barry, 967 F. Supp. 535, 550 (D.D.C. 1997) (receiver granted discretionary functions of public officials).

E. CHA Had No Right to an Evidentiary Hearing.

CHA complains that its “demand for an evidentiary hearing was not granted,” CHA Cabrini Br. 4, but it had no right to an evidentiary hearing and there was no reason for the Court to conduct one. No material facts were in dispute. And CHA’s brief does not suggest any that were.

The Receiver’s Motion raised three issues: (1) What are the requirements of the Court’s prior orders; (2) Did CHA violate those Orders by negotiating the terms in the proposed Cabrini consent decree concerning new, non-elderly housing development or by engaging in other housing development activities; (3) If so, what is to be done to correct the violation and prevent similar violations in the future? No evidentiary hearing was required to resolve these questions.

No evidence was required to interpret the District Court’s prior orders because they are clear and because Chief Judge Aspen required no extrinsic evidence to know what he meant in entering

the orders. Cf. Harris v. Rivera Cruz, 20 F.3d 507, 511 (1st Cir. 1994) (“[a] judgment unambiguous on its face is construed as a writing without resort to extrinsic evidence”).

Likewise, no evidentiary hearing was required as to CHA’s violations of the Court’s orders. While CHA disputes the meaning of those orders and whether it knowingly violated those orders, there was no material dispute as to what CHA did. Its intent is immaterial to the Emergency Motion granted on August 12. Whether it violated the Court’s orders innocently, negligently, recklessly or intentionally, it violated the Orders. CHA’s actions are set forth in the various affidavits cited in the Receiver’s Motion and have never been contradicted by CHA. The most important fact is CHA’s admitted negotiation of and agreement to terms in the proposed Cabrini decree concerning new housing development. Either that violates the Receivership Order and other orders or it does not. No evidentiary hearing was required to make that determination.^{29/}

Finally, no hearing was required for the Court to decide what relief is appropriate to enforce the Receivership Order, and CHA identifies no disputed factual questions on this issue either.

This was not a contempt proceeding, civil or criminal. The Receiver only sought relief that would allow it to do its job under the Receivership Order and that will prevent further violations.

^{29/} CHA cites disagreements between it and the Receiver over whether CHA provided sufficient cooperation to the Receiver in connection with the June 1998 HOPE VI application regarding ABLA, and whether the Receiver properly commented to HUD upon a landmark issue. CHA Cabrini Br. 21, 25. But these alleged disputes were not material to deciding the Receiver’s motion, which was based simply upon the negotiation and execution of the Cabrini agreement. Further, CHA mischaracterizes the letter to HUD, SSA.162. The Receiver was “writing to respond” to HUD’s request for comments from the Receiver. Id. (emphasis added). The thrust of the letter is to comment upon CHA’s failure to recognize the Receiver’s proper role and to ensure that the Receiver is consulted where appropriate in the future. Contrary to CHA Cabrini Br. 21, the letter to HUD does not go beyond the duties for which the Receiver was appointed.

But even in the context of contempt proceedings there is no right to an evidentiary hearing when there is no dispute of material fact. See D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 459 (7th Cir.

1993) (internal citation omitted):

[b]ecause the contempt proceeding is concerned solely with whether or not the respondent's conduct violates a prior court order, the parties cannot reasonably expect to litigate to the same extent that they might in a new and independent civil action. . . .

The district court therefore acted reasonably in cutting to the chase. "Once it becomes clear that additional proceedings are pointless, the court should bring the case to a close.

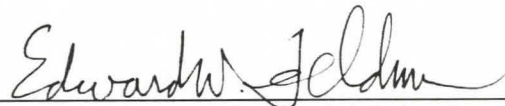
See also Rolex Watch U.S.A., Inc. v. Crowley, 74 F.3d 716, 721 (6th Cir. 1996) ("undenied accusations and uncontroverted affidavits generally may support a contempt adjudication").

CONCLUSION

For the foregoing reasons, the August 12 Order should be affirmed.

Respectfully submitted;

Date: September 29, 1998



One of the Counsel for Daniel E. Levin and
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to the Court's Order of August 14, 1987

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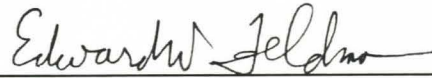
CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on September 29, 1998 he served two copies of the ***Brief of the Receiver, Appellee in Connection With the Issues Presented by Appeal Number 98-3145*** on the parties listed below by causing two true and correct copies to be delivered to them via messenger delivery at their respective addresses as indicated below:

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1996 U.S. Dist. LEXIS 13217 printed in FULL format.

FEDERAL TRADE COMMISSION, Plaintiff, v. INDEPENDENCE MEDICAL, INC., a South Carolina corporation; INDEPENDENT MEDICAL OF AMERICA, INC., a Florida corporation; JERRY RODNEY ROGERS, individually, and as an officer of said corporations; JEFFREY S. MARMER, individually, and as an officer of said corporations; ABILITY MEDICAL, INC., an Ohio corporation; AMERICAN MEDICAL INDEPENDENCE, also known as A.M.I., an unincorporated business entity; VIOLET CASSIE ROGERS, individually, and as an officer and/or agent of Ability Medical and A.M.I.; and JERRY WILBURN ROGERS, individually, and as an officer and/or agent of Ability Medical and A.M.I., Defendants.

Civil No. 2:95-1581-18

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON
DIVISION

1996 U.S. Dist. LEXIS 13217

August 26, 1996, Decided

CORE TERMS: receivership, consumer, receiver, durable, bond, medical equipment, rental, monetary, submit, business entity, wheelchair, engaging, concert, entity, bed, modification, waive, independent contractor, telemarketing, disbursement, adjustable, subsidiaries, interview, enforcing, affiliates, preliminary injunction, duly authorized, written notice, legal counsel, satisfaction

COUNSEL: [*1] For INDEPENDENCE MEDICAL INC, receiver: Robert Patrick Flynn, Robertson & Seekings, Charleston, SC.

For INDEPENDENT MEDICAL OF AMERICA INC, receiver: Robert Patrick Flynn, (See above).

For FEDERAL TRADE COMMISSION, plaintiff: Joseph P. Griffith, Jr., Assistant United States Attorney, U. S. Attorney's Office, Charleston, SC. Stephen Calkins, General Counsel, Federal Trade Commission, Washington, DC. David R Spiegel, Federal Trade Commission, Washington, DC. Jeffrey S Galvin, Federal Trade Commission, Washington, DC.

For INDEPENDENCE MEDICAL INC, a South Carolina corporation, defendant: Daniel F Blanchard, III, Rosen, Rosen & Hagood, Charleston, SC. Susan Corner Rosen, Rosen, Rosen & Hagood, Charleston, SC.

For JERRY RODNEY ROGERS, individually and as an officer of said corporations, defendant: Daniel F Blanchard, III, (See above). Susan Corner Rosen, (See above).

For SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION, claimant: Harold

Williams Funderburk, Jr., S.C. Employment Security Commission, Columbia, SC.

INDEPENDENT MEDICAL OF AMERICA INC, claimant, [PRO SE], Internal Revenue Service, Mary M. Green, Columbia, SC.

JUDGES: DAVID C. NORTON, UNITED STATES DISTRICT [*2] JUDGE

OPINIONBY: DAVID C. NORTON

OPINION: STIPULATED FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("Commission"), has filed a First Amended Complaint for a permanent injunction and other equitable relief, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), against Independence Medical, Inc. ("Independence Medical"), Independent Medical of America, Inc. ("I.M.A."), Jerry Rodney Rogers ("Rodney Rogers"), Jeffrey S. Marmer, Ability Medical, Inc., American Medical Independence ("A.M.I."), Violet Cassie Rogers ("Cassie Rogers"), and Jerry Wilburn Rogers ("Jerry Rogers").

FINDINGS

By the stipulation of the parties, the Court makes the following findings:

A. The Commission alleges that defendants have violated § 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), by committing unfair or deceptive acts and practices in connection with the sale of durable medical equipment to consumers and the submission of claims for durable medical equipment to health insurers.

B. Defendants deny the Commission's allegations of violations of § 5(a) of the FTC Act [*3] and consent to entry of this Order in the interest of settling this litigation, without admission of liability. The Court makes no findings of liability for violations of the FTC Act. This settlement is in compromise of disputed claims and nothing contained in this Order, nor the fact that defendants have agreed hereto, shall be considered an admission of any wrongdoing, liability, or violation of any law by defendants.

C. The Court entered a temporary restraining order in this matter on May 22, 1995, and entered a stipulated preliminary injunction on June 1, 1995.

D. This action and the relief ordered herein are in addition to, and not in lieu of, other remedies as may be provided by law to any party or parties other than the Commission, including both civil and criminal remedies.

E. The individual defendants agree that this Order shall be construed as solely remedial in nature, and shall not be construed as the payment of a fine, penalty, punitive assessment, or forfeiture.

F. The undersigned parties agree that this stipulation shall be submitted to the Court once fully executed, and shall be binding upon approval by this Court.

G. Each of the defendants waives all rights to [*4] seek judicial review of, or otherwise challenge or contest the validity of, this Order, except as provided in Section X of the Order. This provision shall not be construed to prevent any party from seeking judicial interpretation or enforcement of this Order.

H. Where required by this Order, written notice to the Commission shall be effected by serving papers (by personal delivery or certified mail) on the Federal Trade Commission, Associate Director for Service Industry Practices, 6th Street and Pennsylvania Avenue, N.W., Room 200, Washington, D.C. 20580.

I. Where required by this Order, written notice to a defendant shall be either (1) by personal delivery, or

(2) by certified mail to defendant's last known address, return receipt requested, with delivery restricted to the defendant.

DEFINITIONS

For purposes of this Order:

A. "durable medical equipment" shall mean non-consumable products designed for the treatment of illness or injury and/or the convenience of consumers, including without limitation: motorized wheelchairs, manual wheelchairs, scooters (sometimes known as carts and power operated vehicles), adjustable hospital beds, adjustable leisure beds (sometimes known [*5] as electric adjustable beds), lift chairs, and accessories associated with these items; and

B. "telemarketing" shall mean contact with consumers by a seller or solicitor by means of a telephone in order to solicit the purchase of a good, service or charitable donation, except that "telemarketing" shall not include activities that involve substantial face-to-face contact between the seller or solicitor and all or virtually all of the consumers who are being solicited.

I. PROHIBITED BUSINESS ACTIVITIES

IT IS THEREFORE STIPULATED AND ORDERED that, in connection with the provision, sale, offer for sale, or rental of any medical equipment or service, or any product or service described as usable for medical purposes, defendants, their officers, agents, employees, attorneys, and all other persons or entities in active concert or participation with them who receive actual notice of this order, are permanently enjoined and restrained from falsely representing to consumers, physicians, insurance companies and any other person or business entity, directly or by implication:

A. The make, model, type, serial number, or other features of the product or service that defendants [*6] are providing, selling or offering to sell to consumers;

B. That a scooter is another type of durable medical equipment, such as a motorized wheelchair, power wheelchair, or any type of wheelchair;

C. That an adjustable leisure bed is another type of durable medical equipment, such as a hospital or rehabilitation bed;

D. The numerical code assigned by the Health Care Financing Administration to any product that defendants are providing, selling or offering to sell to consumers;

E. That a certain dollar amount has been charged or will be charged to consumers for a product, when said amount has not been and will not be charged to con-

sumers, because applicable insurance copayments and deductibles have been or will be waived;

F. That a consumer has ordered a product or service, when in fact the consumer has not;

G. That a consumer has authorized contact with the consumer's physician for the purpose of seeking a certificate of medical necessity, when in fact the consumer has not;

H. That a consumer has authorized contact with the consumer's health insurance carrier (including the submission of a claim for benefits), when in fact the consumer has not;

I. That a consumer's signature [*7] is on file, when in fact the signature is not;

J. That, by stating a "date of service" on an insurance claim form or otherwise, products or services actually have been delivered to consumers, when in fact they have not; and/or

K. Any other material fact regarding the products or services that defendants are providing, leasing, selling or offering to sell to consumers.

The prohibitions contained in this section are permanent and shall be in addition to any restrictions and prohibitions contained in other sections of this Order. The prohibitions apply to oral and written representations and omissions, including statements made on insurance claim forms, certificates of medical necessity and product invoices. The prohibitions are not an admission by defendants that the proscribed conduct is unlawful.

II. MARKETING BAN AS TO DEFENDANT RODNEY ROGERS

A. For a period of ten (10) years from the date of entry of this order, defendant Rodney Rogers is prohibited from engaging, whether directly or indirectly, in concert with others, or through any business entity, and whether acting as an owner, employee, employer, independent contractor or otherwise, in the provision, marketing, [*8] sale or rental of any medical product or service, or of any product or service described as usable for medical purposes.

B. For a period of five (5) years from the date of entry of this order, defendant Rodney Rogers is prohibited from engaging, whether directly or indirectly, in concert with others, or through any business entity, and whether acting as an owner, employee, employer, independent contractor or otherwise, in the telemarketing of any product or service; provided, however, that for purposes of this section only, "telemarketing" shall

not include the solicitation of business entities such as corporations, partnerships or proprietorships.

III. BOND REQUIREMENT AS TO DEFENDANTS JEFFREY S. MARMER, CASSIE ROGERS AND JERRY ROGERS

A. For a period of seven (7) years from the date of entry of this order, defendant Marmer is restrained and enjoined from engaging, whether directly, in concert with others, or through any business entity, in the provision, sale or rental of any durable medical equipment unless he first obtains a performance bond in the principal sum of ONE HUNDRED THOUSAND DOLLARS (\$ 100,000.00).

B. For a period of five (5) years from the date of entry [*9] of this order, defendants Cassie Rogers and Jerry Rogers are restrained and enjoined from engaging, whether directly, in concert with others, or through any business entity, in the provision, sale or rental of any durable medical equipment unless they first obtain a performance bond in the principal sum of FIFTY THOUSAND DOLLARS (\$ 50,000.00).

C. The terms and conditions of this bond requirement shall be as follows:

1. The bond is conditioned upon compliance by each such defendant with Section 5(a) of the FTC Act, 15 U.S.C. § 45, and with the provisions of this Order;

2. The bond shall remain in full force and effect as long as the defendant continues to engage in the provision, sale or rental of any durable medical equipment, and for at least three (3) years thereafter;

3. The bond shall be an insurance agreement providing surety for financial loss that is issued by a surety company (1) admitted to do business in each state in which the defendant obtaining the bond does business and (2) that holds a Federal Certificate of Authority As Acceptable Surety On Federal Bond and Reinsuring;

4. The bond shall be in favor of the Federal Trade Commission for the benefit of any party injured [*10] as a result of any deceptive misrepresentation or violation of this Order;

5. Any defendant engaging in activity requiring the obtaining of a bond shall provide written notice and proof of such bond to the Federal Trade Commission at least ten (10) days before the commencement of the activity for which the bond is required; and

6. Each bond required by this Order shall be in addition to, and not in lieu of, any bond required by federal, state, or local law, or the order of another court.

American Medical Independence by Cassie Rogers, its
Managing Agent

David R. Spiegel, Esq.
Joseph P. Griffith, Jr., Esq.
Jeffrey S. Galvin, Esq.
Attorneys for the Federal Trade Commission

APPROVED AS TO FORM:

R. [*22] Patrick Flynn, Esq.
Receiver for Independent Medical of America, Inc., and
Independent Medical, Inc.

SO ORDERED, this 26 day of August, 1996.

DAVID C. NORTON

UNITED STATES DISTRICT JUDGE

APPENDIX A: TERMS OF RECEIVERSHIP

I. POWERS OF RECEIVER

The receiver is empowered to:

A. take immediate control of the premises of the receivership defendants, wherever situated, and to take possession of all records, documents, property and other assets of the receivership defendants;

B. hold and manage all such assets in order to reduce the risk of loss, damage or injury;

C. hire agents to serve the receiver and the receivership defendants, and to terminate any such agents;

D. make such payments and disbursements as may be necessary and advisable for the preservation of the properties of the receivership defendants;

E. receive and collect sums of money due or owing the receivership defendants;

F. institute, prosecute and defend, compromise, adjust, or become party to such judicial proceedings as may in the receiver's opinion be proper for the preservation of the assets of the receivership defendants;

G. obtain, by presentation of this Order, information [*23] within the custody or control of any person or entity sufficient to identify accounts, properties, assets or employees of the receivership defendants;

H. utilize the services of any local, state, or federal law enforcement agency as permitted by law; and

I. wind up and terminate the business activities of the receivership defendants, to liquidate all receivership assets, and to file articles of dissolution for the receivership

defendants; and

J. file a petition for relief under the U.S. Bankruptcy Code, with prior permission of the Court.

II. DELIVERY OF RECEIVERSHIP PROPERTY

The defendants, and any other person or entity served with a copy of this Order, shall deliver to the receiver upon request:

A. possession and custody of all funds, assets, records, documents and other property, wherever situated, of the receivership defendants;

B. possession and custody of all funds and other assets belonging to members of the public now held by or on behalf of the receivership defendants;

C. all keys and combinations to locks required to open or gain access to any of the property or effects; and

D. any and all passwords or codes required to access any electronic files on any [*24] media.

III. COOPERATION WITH THE RECEIVER

The defendants and any other person or entity with notice of this Order shall not interfere in any way with the functions of the receiver and shall assist the receiver in accomplishing the purposes of the receivership including the gathering and preserving of documents and assets. The defendants, acting personally or through others, shall not excuse debts to the receivership defendants, take, use or divert the receivership defendants' assets, or otherwise impair or dispose of the assets of the receivership defendants.

IV. STAY OF ACTIONS

During the pendency of the receivership ordered herein, except for actions by law enforcement agencies and actions necessary to toll any applicable statutes of limitations, the defendants and all other entities or persons seeking to establish or enforce any claim, right or interest against or on behalf of the receivership defendants, or its subsidiaries or affiliates are stayed from:

A. commencing, prosecuting, continuing or enforcing any suit or proceeding against the receivership defendants, or its subsidiaries or affiliates;

B. commencing, prosecuting, continuing or enforcing any [*25] suit or proceeding in the name of the receivership defendants or its subsidiaries or affiliates;

C. accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession or retaining possession

of, property of the receivership defendants, or its subsidiaries or affiliates, or any property claimed by any of them, or attempting to foreclose, forfeit, alter, or terminate any of their interests in any property, whether or not such acts are part of a judicial proceeding; and

D. using self-help or executing or issuing, or causing the execution or issuance, of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any property, wheresoever located, owned or in the possession of the receivership defendants or the receiver ap-

pointed pursuant to this Order.

V. COMPENSATION

The receiver and his agents shall be compensated for reasonable and necessary fees and expenses from (a) the assets of the receivership estate, or (b) if said assets are insufficient, from any trust funds that may be in the [*26] possession of the receivership estate, upon application to the Court. This application shall be served upon counsel for the parties, who may file oppositions thereto within fifteen (15) days of the date said application is served upon them.

1998 U.S. Dist. LEXIS 3894 printed in FULL format.

FEDERAL TRADE COMMISSION, Plaintiff, v. THINK ACHIEVEMENT CORPORATION, et al.,
Defendants.

CIVIL NO. 2:98-CV-12-JM

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA,
HAMMOND DIVISION

1998 U.S. Dist. LEXIS 3894

February 10, 1998, Decided

CORE TERMS: receivership, enjoined, receiver, entity, consumers, preliminary injunction, temporary restraining order, subsidiaries, affiliates, enforcing, permanent, advertisements, financial institution, preliminarily, disbursement, restrained, indirectly, wherever, delivery, titled, adjust, short period of time, collectively, affiliated, endorsed, falsely, refunds, scores, safe deposit box, safe deposit

COUNSEL: [*1] For FEDERAL TRADE COMMISSION, plaintiff: Debra A Valentine, Unknown.

For FEDERAL TRADE COMMISSION, plaintiff: Jeffrey S Galvin, Gregory A Ashe, Federal Trade Commission, Washington, DC.

For THINK ACHIEVEMENT CORPORATION, NATIONAL ANSWERING SERVICE, INC., NEW AGE ADVERTISING CORP., H.D. DAVIDSON ADVERTISING CORP., WILLIAM H TANKERSLEY, defendants: Gregory J Sarkisian, Sarkisian and Flemming, Portage, IN.

For PATRICIA A HARRIS, HARRY D BRANKLE, SENA RAGER, TILLWANNER JACKSON aka Tee, FERRON F HARRIS, JILL ROBINSON aka Jill Carpenter, INFORMATION DELIVERY SYSTEMS INC., DAVID L BARNACK, dba Information Delivery Systems, Inc., defendants: Kevin W Marshall, Kevin C Smith, Ruman Clements Tobin and Holub, Hammond, IN.

For STEVEN F STUCKER, defendant: Steven A Wilson, Carson City, NV.

J BRIAN HITTINGER, receiver, Pro se, Merrillville, IN.

For STEVEN F STUCKER, cross-claimant: Steven A Wilson, Carson City, NV.

For PATRICIA A HARRIS, cross-defendant: Kevin W

Marshall, Kevin C Smith, Ruman Clements Tobin and Holub, Hammond, IN.

For WILLIAM H TANKERSLEY, cross-defendant: Gregory J Sarkisian, Sarkisian and Flemming, Portage, IN.

JUDGES: JAMES T. MOODY, UNITED STATES DISTRICT JUDGE.

OPINIONBY: JAMES T. MOODY

OPINION: [PROPOSED] PRELIMINARY INJUNCTION AS TO DEFENDANTS THINK ACHIEVEMENT CORP., NATIONAL ANSWERING SERVICE, INC., NEW AGE ADVERTISING CORP., H.D. DAVIDSON ADVERTISING CORP., PATRICIA HARRIS, HARRY BRANKLE, SENA RAGER, TILLWANNER JACKSON, FERRON HARRIS, AND JILL ROBINSON

On January 15, 1998, plaintiff Federal Trade Commission ("Commission") filed a complaint for injunction and other equitable relief, including restitution and disgorgement, pursuant to Sections 5(a) and 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and 53(b). The Commission simultaneously moved for a temporary restraining order with an asset freeze, the appointment of a receiver, and other preliminary relief. On January 15, 1998, the Court granted the Commission's motion and ordered defendants Think Achievement Corporation, National Answering Service, Inc., New Age Advertising Corp., H.D. Davidson Advertising Corp., Patricia Harris, Harry Brankle, Sena

Rager, Tillwanner Jackson, Ferron Harris, Jill Robinson (collectively, the "Enjoined Defendants"), and Steven Stucker to show cause why a preliminary injunction should [*2] not be entered against them. On February 1, 1998, the Court entered a stipulated preliminary injunction as to defendant Steven Stucker.

On February 4, 1998, the Commission filed a motion for leave to amend its complaint to add as additional defendants The Answering Service, Inc., The Rosewood Group, Career Advancement Corp., Information Delivery Systems, Inc., William Tankersley, and David Barnack ("Additional Defendants"). Simultaneously with its motion to amend, the Commission filed a motion for temporary restraining order against the Additional Defendants.

All Enjoined Defendants have been served with the summons, complaint, temporary restraining order, and related papers. No Enjoined Defendant has filed any papers in opposition to the entry of a preliminary injunction.

The Court has considered the Commission's motion, and the brief and exhibits filed in support thereof, and makes the following findings pursuant to Fed.R.Civ.P. 65(b).

1. The Court has jurisdiction over the subject matter of this case and there is good cause to believe it will have jurisdiction over all parties hereto.

2. The Enjoined Defendants place advertisements in various newspapers [*3] that announce that jobs are available with the United States Postal Service (the "Postal Service"). When consumers call in response to these advertisements, the Enjoined Defendants and their telemarketers solicit consumers to purchase a package of "registration" materials for approximately \$ 47.

3. The Commission has shown a likelihood of proving that the Enjoined Defendants falsely represent that:

(a) their employment program is affiliated with or endorsed by the Postal Service;

(b) permanent positions with the Postal Service are available in the geographic areas where they place their advertisements, and that the Postal Service is offering examinations for those positions;

(c) consumers who purchase and review their materials are likely to receive scores of 95 or higher on the Postal Service entrance examination;

(d) consumers who purchase and review their materials are likely to receive permanent positions with the Postal Service within a short period of time; and

(e) they pay full refunds to all consumers who request them.

4. There is good cause to believe the Commission will ultimately succeed in establishing that the Enjoined Defendants have [*4] engaged in, and are likely to engage in, deceptive acts and practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

5. The potential injury to the Commission and to the public it represents outweighs any hardship to the Enjoined Defendants from the entry of this Order, and the entry of this Order is in the public interest.

6. The Court finds that a receiver for the corporate defendants is necessary to preserve their assets and documents. Since there appears to be no legal and profitable manner to continue the business, the Court finds that the receivership estate should be liquidated as soon as possible.

7. As an agency of the United States, the Commission need not post a security for the issuance of a preliminary injunction. Fed.R.Civ.P. 65(c).

8. This order is binding upon the Enjoined Defendants, and their officers, agents, servants, employees, attorneys, and upon those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise. Fed.R.Civ.P. 65 (d).

I. PROHIBITED BUSINESS ACTIVITIES

IT IS THEREFORE ORDERED that the Enjoined Defendants are hereby preliminarily [*5] restrained and enjoined, from falsely representing, expressly or by implication:

A. that any employment program is affiliated with or endorsed by the Postal Service;

B. that permanent positions with the Postal Service are available in particular geographic areas, and that the Postal Service is offering examinations for such positions;

C. that consumers who purchase and review printed materials are likely to receive high scores on Postal Service exams;

D. that consumers who purchase and review printed materials are likely to receive permanent positions with the Postal Service within a short period of time;

E. that full refunds are paid to all consumers who request them; and

F. any other material fact regarding any employment program, or employment with Postal Service.

II. DOCUMENT PRESERVATION

IT IS FURTHER ORDERED that the Enjoined Defendants, and any other person or entity served with a copy of this Order, are hereby preliminarily restrained and enjoined from:

A. destroying, concealing, altering, transferring or otherwise disposing of any documents or records, stored on any medium, that relate in any way to the business practices [*6] or business or personal finances of any defendant or any entity directly or indirectly under any defendant's control; and

B. failing to keep books, records, and accounts which, in reasonable detail, accurately reflect the incomes, disbursements, transactions and use of monies by any defendant or other entity directly or indirectly under any defendant's control.

III. ASSET FREEZE

IT IS FURTHER ORDERED that the Enjoined Defendants are hereby preliminarily restrained and enjoined from:

A. selling, transferring, encumbering, loaning, concealing, dissipating, converting, withdrawing, or making any other disposition of any funds, credit instruments, real or personal property, or other assets or any interest therein, whenever acquired and wherever located, including any assets outside the territorial United States, which are: (1) owned, possessed or controlled by any Enjoined Defendant; (2) held for the benefit of any Enjoined Defendant; or (3) owned, possessed or controlled by any person or entity directly or indirectly under any Enjoined Defendant's control; and

B. opening or causing to be opened any safe deposit boxes titled in the name of an Enjoined Defendant, [*7] or subject to access by an Enjoined Defendant.

Provided, however, that the Enjoined Defendants may file a motion with Court for the release of funds for rea-

sonable and necessary expenses. No such funds shall be spent without prior approval from the Court.

Provided, further, that the Enjoined Defendants may retain and spend income from employment performed after January 16, 1998.

IV. RETENTION OF ASSETS AND DOCUMENTS BY THIRD PARTIES

IT IS FURTHER ORDERED that any bank or financial institution, brokerage house, escrow agent, money market or mutual fund, commodity trading company, title company, common carrier, storage company, trustee, mail receiving agent, or any person or other entity served with a copy of this Order by any means (including, but not limited to, facsimile transmission, overnight delivery or hand delivery) shall, until further order by this Court:

A. hold and retain within such entity's or person's control, and prohibit the withdrawal, assignment, transfer, encumbrance, disbursement, sale, or other disposal of any assets or documents held by such entity or person on behalf of, for the benefit of, or subject to access or use by any Enjoined [*8] Defendant;

B. deny access to any safe deposit boxes held by such entity or person on behalf of, for the benefit of, or subject to access or use by any Enjoined Defendant; and

C. provide to the Commission, within four business days after service of this order, a statement setting forth:

1. an identification of each account or asset titled in the name, individually or jointly, or held on behalf of, or for the benefit of, any Enjoined Defendant;

2. the balance of each such account, or a description of the nature and value of such asset;

3. an identification of any safe deposit box that is either titled in the name of, individually or jointly, or is otherwise subject to access or control by, any Enjoined Defendant; and

4. if an account, safe deposit box, or other asset has been closed or removed, the date closed or removed and the balance on said date.

Provided, that a financial institution does not have to provide the information required in this Subparagraph if (1) the financial institution has complied with the similar provision set forth in the Temporary Restraining Order

entered by the Court on January 15, 1998, and extended by the Court on [*9] January 23, 1998; and (2) the information provided has not changed.

The accounts subject to this section include existing assets and assets deposited after the effective date of this Order. All correspondence to the Commission shall be addressed to:

Jeffrey S. Galvin, Esq.
Federal Trade Commission
6th St. and Penn. Ave., NW, Room 200
Washington, DC 20580
tel. (202) 326-3505; fax (202) 326-3392

V. CONTINUATION OF RECEIVERSHIP

IT IS FURTHER ORDERED that J. Brian Hittinger shall continue to serve as receiver for defendants National Answering Service, Inc., Think Achievement Corporation, New Age Advertising Corp., and H.D. Davidson Advertising Corp. (collectively, the "Receivership Defendants"). The receiver shall wind up the business affairs of the Receivership Defendants and liquidate all assets. The receiver may take any necessary measures to preserve the assets of the receivership estate, including the sale of property and the termination of contracts, including leases of business premises. On or before March 10, 1998, and at 60 day intervals thereafter, the receiver shall file a periodic report as provided by Local Rule 66.1(c). The receiver shall have [*10] the powers and rights set forth in Appendix A to this Order.

IT IS SO ORDERED, this day of February, 1998.

JAMES T. MOODY
UNITED STATES DISTRICT JUDGE

APPENDIX A: TERMS OF RECEIVERSHIP

I. POWERS OF RECEIVER

The receiver is empowered to:

A. take possession of all records, documents, property and other assets of the Receivership Defendants, wherever situated;

B. hold and manage all such assets in order to reduce the risk of loss, damage or injury;

C. continue the business of the Receivership Defendants in such manner and for such duration as the receiver may in good faith deem to be appropriate, if at all;

D. hire agents to serve the receiver and Receivership Defendants, and to terminate such agents;

E. make such payments and disbursements as may be necessary for the preservation of the estate;

F. receive and collect sums of money due or owing the Receivership Defendants;

G. obtain, by presentation of this Order, information within the custody or control of any person or entity sufficient to identify accounts, properties, assets or employees of the Receivership Defendants;

H. utilize the services of any local, state, or [*11] federal law enforcement agency as permitted by law;

I. remove the individual defendants, and any other shareholder, director, officer or other person from the control, or the employment, of the Receivership Defendants;

J. attend any deposition noticed by any party to this action and ask questions of any witness pertinent to the receivership estate; and

K. institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in state or federal court as may in the receiver's opinion be necessary or proper for the collection, marshaling, protection, maintenance, and preservation of the assets of the Receivership Defendants, and the recovery of assets conveyed by the Receivership Defendants, or the carrying out of the terms of this Order, and likewise to defend, compromise or adjust or otherwise dispose of any or all actions or proceedings instituted against the receiver or against the Receivership Defendants, and also to appear in and conduct the defense of any suit or to adjust or compromise any actions or proceedings now pending in any court by or against the Receivership Defendants where such prosecution, defense or other disposition [*12] of such actions or proceedings will in the judgment of the receiver be advisable or proper for the protection of the properties of the Receivership Defendants.

II. DELIVERY OF RECEIVERSHIP PROPERTY

The Enjoined Defendants, and any other person or entity served with a copy of this Order, shall deliver to the receiver upon request:

A. possession and custody of all funds, assets, records, documents and other property, wherever situated, of the Receivership Defendants; and

B. all keys, combinations and passwords required to open or gain access to any of the receivership property.

III. COOPERATION WITH THE RECEIVER

The Enjoined Defendants and any other person or entity with notice of this Order shall not interfere in any way with the functions of the receiver and shall assist the receiver in accomplishing the purposes of the receivership including the gathering and preserving of documents and assets. The Enjoined Defendants, acting personally or through others, shall not excuse debts to the receivership defendants, take, use or divert the Receivership Defendants' assets, or otherwise impair or dispose of the assets of the Receivership Defendants.

IV. [*13] STAY OF ACTIONS

During the pendency of the receivership ordered herein, except for actions by law enforcement agencies and actions necessary to toll any applicable statutes of limitations, the Enjoined Defendants and all other entities or persons seeking to establish or enforce any claim, right or interest against or on behalf of the Receivership Defendants, or its subsidiaries or affiliates are stayed from:

A. commencing, prosecuting, continuing or enforcing any suit or proceeding against the Receivership Defendants, or its subsidiaries or affiliates;

B. commencing, prosecuting, continuing or enforcing any suit or proceeding in the name of the Receivership Defendants or its subsidiaries or affiliates;

C. accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession or retaining possession of, property of the Receivership Defendants, or its subsidiaries or affiliates, or any property claimed by any of them, or attempting to foreclose, forfeit, alter, or terminate any of their interests in any property, whether or not such acts are part of a judicial proceeding; and

D. using self-help [*14] or executing or issuing, or causing the execution or issuance, of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any property, wheresoever located, owned or in the possession of the Receivership Defendants or the receiver appointed pursuant to this Order.

V. COMPENSATION

Pursuant to Northern District of Indiana Local Rule 66.1, the receiver and his agents may be compensated for reasonable and necessary fees and expenses from the assets of the receivership estate, upon application to the Court and after notice to plaintiff and defendants.

1988 U.S. Dist. LEXIS 2487 printed in FULL format.

Securities and Exchange Commission, Plaintiff, v. David Peter Bloom and Greater Sutton Investors Group, Inc., a/k/a Sutton Investors Group and Sutton Investment Group, Defendants

No. 88 Civ. 0201 (MBM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1988 U.S. Dist. LEXIS 2487; Fed. Sec. L. Rep. (CCH) P93,577

January 11, 1988, Decided; January 12, 1988, Filed

CORE TERMS: receiver, custody, receivership, servants, concert, disposition, undertakings, personal service, transferred, indirectly, accounting, enjoined, attorneys-in-fact, restrained, investment adviser, instrumentality, permanently, engaging, interstate commerce, deposit, mails, course of business, receiver appointed, income received, interfere, successor, advisory, recommendation, thereunder, accuracy

OPINIONBY: [*1]

MUKASEY

OPINION: FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF AS TO DAVID PETER BLOOM AND GREATER SUTTON INVESTORS GROUP, INC.

MICHAEL B. MUKASEY UNITED STATES DISTRICT JUDGE

Plaintiff SECURITIES AND EXCHANGE COMMISSION ("COMMISSION"), having filed a Complaint For Permanent Injunction and Other Equitable Relief ("Complaint"), and Defendants DAVID PETER BLOOM ("BLOOM") and GREATER SUTTON INVESTORS GROUP, INC., a/k/a SUTTON INVESTORS GROUP and SUTTON INVESTMENT GROUP ("SUTTON"), in their attached Consent and Undertakings, incorporated herein, having entered a general appearance, having admitted the jurisdiction of this Court over them and over the subject matter of this action, having waived the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, and, without admitting or denying the allegations of the Complaint, having consented, without trial, argument or adjudication of any issue of fact or law, to the entry of this Final Judgment of Permanent Injunction and Other Equitable Relief as to David Peter Bloom and Greater Sutton Investors Group, Inc. ("Final Judgment") enjoining them from engaging in transactions, acts, [*2] practices and courses of business which constitute violations of Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5] and Sections 203(a), 204, 206

of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-3, 80b-4 and 80b-6] and Rules 203-1, 204-2(a) and (b), 204-3(a) and (b), and 206(4)-2(a) and (b) thereunder [17 C.F.R. §§ 275.203-1, 275.204-2, 275.204-3 and 275.206(4)-2(a) and (b)], and it further appearing that this Court has jurisdiction of the parties and the subject matter hereof, and the Court being fully advised in the premises:

I.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants BLOOM and SUTTON, their officers, agents, servants, employees, attorneys-in-fact and all persons in active concert and participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them be, and they hereby are, permanently restrained and enjoined from, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails,

- (1) employing any device, scheme or artifice to defraud,
- (2) making any untrue statement [*3] of a material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
- (3) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

II.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants BLOOM and SUTTON, their officers, agents, servants, employees, attorneys-in-fact and all persons in active concert and participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them be, and they hereby are, permanently restrained and enjoined from, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails,

(a) employing any device, scheme or artifice to defraud any client or prospective client;

(b) engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon any client or prospective client; or,

(c) engaging in any act, practice or course of business which is fraudulent, deceptive, or manipulative; [*4] including, but not limited to: taking custody or possession of any funds or securities in which any client has any beneficial interest, and taking any action, directly or indirectly, singly or in concert, with respect to such funds or securities without:

(1) having segregated such securities, marked to identify the particular client who has the beneficial interest therein;

(2) (A) having deposited such funds in one or more bank accounts which contain only clients' funds; (B) having maintained such account or accounts in the name of the investment adviser as agent or trustee for such clients; and (C) having maintained a separate record for each account, showing the name and address of the bank where such account is maintained, the dates and amounts of deposits in and withdrawals from such account, and the exact amount of each client's beneficial interest in such account;

(3) immediately after accepting custody or possession of such funds or securities from any client, notifying such client in writing of the place and manner in which such funds and securities will be maintained, and thereafter, if and when there is any change in the place or manner in which such funds or securities [*5] are being maintained, giving each such client written notice thereof;

(4) sending to each client, not less frequently than once every three months, an itemized statement showing the funds and securities in the custody or possession of the investment adviser at the end of such period, and all debits, credits and transactions in such client's account

during such period; and

(5) having an independent public accountant verify by actual examination, at least once during each calendar year, all such funds and securities.

III.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants BLOOM and SUTTON, their officers, agents, servants, employees, attorneys-in-fact and all persons in active concert and participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them be, and they hereby are, permanently restrained and enjoined from, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, directly or indirectly, engaging, for compensation, in the business of advising fifteen or more other persons, who are not all residents of the state within which the principal office and place of [*6] business of the investment adviser is maintained, as to the value of securities, or as to the advisability of investing in, purchasing, or selling securities, without being registered with the Commission as an investment adviser.

IV.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants BLOOM and SUTTON, their officers, agents, servants, employees, attorneys-in-fact and all persons in active concert and participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them be, and they hereby are, permanently restrained and enjoined from, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, in connection with a business as an investment adviser, failing to make and keep for periods prescribed by the Commission books and records relating to their investment advisory business, required by the Commission to be kept, in true, accurate and current form.

V.

IT IS ORDERED, ADJUDGED AND DECREED that Defendants BLOOM and SUTTON shall transfer to the receiver appointed in Paragraph VII herein all assets (including all assets acquired by BLOOM or SUTTON, in whole or in part, directly [*7] or indirectly, with funds obtained from investment advisory clients) in their possession, custody, or control as of the date of this Final Judgment according to the procedures set forth below:

A. Those assets shown on Schedule A to this Final Judgment (which is the same Schedule incorporated in

the Consent and Undertakings of Bloom), shall be transferred to the receiver forthwith.

B. Promptly upon receipt of the accountings of BLOOM'S and SUTTON'S assets required by Paragraph XIV of this Final Judgment, the receiver shall establish a schedule for the transfer of all or a portion of those assets, excluding such personal items as the receiver determines appropriate. After a hearing by the Court, and Court approval of the schedule, BLOOM and SUTTON shall transfer additional assets in accord with such schedule.

C. Defendants BLOOM and SUTTON shall transfer to the receiver such additional assets of BLOOM or SUTTON as BLOOM, SUTTON, the receiver or others shall discover to have been in their possession, custody or control as of the date of this Final Judgment.

VI.

IT IS ORDERED, ADJUDGED AND DECREED that all officers, agents, servants, employees, and attorneys-in-fact of BLOOM and [*8] SUTTON, and all persons in active concert and participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, shall transfer to the receiver all assets or other property of defendant BLOOM or defendant SUTTON, or in which defendant BLOOM or defendant SUTTON has a legal or beneficial interest of any kind as of the date of this Final Judgment.

VII.

IT IS ORDERED that Irving Picard, Esq. is hereby appointed receiver and conservator for the assets and estate of Defendants BLOOM and SUTTON. The receiver shall:

(1) immediately take into his custody, control and possession all assets described in Paragraph V herein, including assets held in any name defendant BLOOM or defendant SUTTON has used or is using as a business name or as an alias;

(2) conserve all assets in a manner which the receiver finds in his sole discretion to be the most advantageous to the estate, and to invest and reinvest such resulting funds as authorized herein ("Permissible Investments"). Permissible Investments shall include, at the election of the receiver, only (i) bonds, notes, treasury bills and other securities constituting direct obligations of, [*9] or fully guaranteed by, the United States of America, or any agency or instrumentality thereof; provided that such direct obligations or guarantees, as the case may

be, are entitled to the full faith and credit of the United States of America and (ii) money market funds or certificates of deposit of any bank organized under the laws of the United States of America, or any state thereof, having a combined capital and surplus of not less than \$ 500,000,000, whose deposits are insured by the Federal Deposit Insurance Corporation;

(3) hold such assets pending such final determination of their disposition as may be further ordered by this Court;

(4) investigate and inquire into the location and disposition of, and account for, all assets acquired, and all income received, by defendants BLOOM and SUTTON, from January 1, 1983, until such time as there is a final disposition of all assets transferred to the receivership; and determine the accuracy of the accounting of assets by the Defendants ordered in Paragraph XIV, herein;

(5) institute and defend such causes of action as the receiver deems appropriate and in the interest of protecting, conserving, and recovering assets of the receivership [*10] estate; and

(6) investigate the nature and amount of any and all claims against defendants BLOOM and SUTTON arising out of their investment advisory activities since January 1, 1983.

VIII.

IT IS ORDERED that within 60 days of the date of this Final Judgment, the receiver shall file with the Court and serve upon the parties an initial report with respect to his activities as receiver. Within 120 days from the date of this Final Judgment, or such later date as the Court, upon the request of the receiver, may permit, the receiver shall file with the Court and serve upon counsel for the parties a report describing:

(1) his activities as receiver;

(2) the assets under his control;

(3) the claims and potential claims against those assets;

(4) his findings, if any, concerning the accuracy of the defendants' accounting submitted pursuant to their Consents and Undertakings and Paragraph XIV of this Final Judgment; and

(5) his recommendations for considering and resolving claims of investors and others and the appropriate disposition of receivership assets. In making his recommendation, the receiver shall give appropriate consideration

to the decision in *SEC v. American Board [*11] of Trade, Inc.*, 830 F.2d 431 (2d Cir. 1987).

At such time as the Court shall determine after the service of the receiver's final report, the Court shall convene a hearing upon the report and determine the appropriate disposition of the assets held by the receiver.

IX.

IT IS FURTHER ORDERED that for the purpose of implementing and effectuating this Final Judgment, the receiver shall have the following rights, duties and responsibilities:

(1) He shall be entitled to be reimbursed for all reasonable costs, fees and other expenses (including but not limited to, fees of attorneys, appraisers, accountants and other experts) as are incurred by him in the performance of his duties and shall be further entitled to be compensated for his services from the funds in his custody as provided herein; provided, however, that all such payments to him as fees or other expenses shall first be approved by the Court;

(2) The receiver shall be entitled to rely on all outstanding rules of law and orders and shall not be liable to any person for his own good faith compliance with any order, rule, law, judgment or decree, nor shall he be liable in any event for his compliance with the orders of this [*12] Court. The receiver shall in no event be liable to the Defendants for his good faith compliance with his duties and responsibilities under this Final Judgment, nor may he be held liable to any person for any action taken or omitted by him except upon a finding by this Court that the receiver has acted or failed to act as a result of misfeasance, bad faith, gross negligence or in reckless disregard of his duties;

(3) The receiver may at any time be removed by the Court and replaced with a successor. In the event the receiver decides to resign, he shall first give written notice to the parties and the Court of his intention, and his resignation shall not become effective until the Court has appointed a successor. The receiver shall follow such instructions as his successor or the Court gives him in turning over custody and control of the property collected pursuant to this Final Judgment; and

(4) The receiver's fees and expenses shall be paid from the funds and assets collected pursuant to this Final Judgment. Payment shall first be made from the interest accumulated thereon.

X.

IT IS ORDERED that, for the purposes of implementing and effectuating this Final Judgment, and upon a [*13] finding that a stay of proceedings against the receiver and the estate during the pendency of the receivership is necessary to effectuate this Final Judgment, all creditors, claimants and other persons, and others acting on behalf of such creditor, claimant or other person, including sheriffs, marshals, other officers, agents, deputies, servants, employees and attorneys, be, and the same hereby are, enjoined from:

(1) commencing, prosecuting, continuing or enforcing any suit or proceeding against the receiver or the receivership estate, except that (i) such actions may be filed to toll any statute of limitations; and (ii) this stay shall not apply to any suit or proceeding in any bankruptcy court having jurisdiction thereof.

(2) using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any property owned by or in the possession of or to be transferred to the receivership estate or the receiver, wheresoever situated;

(3) attempting to modify, cancel, terminate, call, extinguish, [*14] revoke, or accelerate the due date of any lease, loan, mortgage, indebtedness, security agreement or other agreement regarding property to be turned over to the receiver or in the possession of the receiver; and

(4) doing any act or thing whatsoever to interfere with the taking control, possession, or management by the receiver appointed herein of the property and assets owned, controlled or in the possession of the defendants, or in any way to interfere with or harass said receiver, or to interfere in any manner with the exclusive jurisdiction of this Court over the receivership estate without the prior permission of this Court.

XI.

IT IS ORDERED that Defendants BLOOM and SUTTON shall cooperate in all respects with the efforts of the receiver and of the Commission pursuant to this Final Judgment, shall give the receiver and the Commission all reasonable assistance, including powers of attorney and assignments, and subject to any applicable privilege BLOOM or SUTTON may assert, such testimony and documents as the receiver requires in order to carry out his duties detailed above, or as the Commission requires in connection with any continuing investigation of the matters alleged [*15] in the Complaint.

XII.

IT IS ORDERED, ADJUDGED AND DECREED, that pending further order of this Court, Defendants BLOOM and SUTTON, their officers, agents, servants, employees, attorneys-in-fact and all persons in active concert and participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them be, and they hereby are, restrained and enjoined from destroying, mutilating, concealing, altering or disposing of any items concerning the business activities of defendants BLOOM and SUTTON, or concerning their income or assets since January 1, 1983. Such items include, but are not limited to, any books, records, contracts, receipts, agreements and other documents which relate to or pertain to or contain evidence of the Defendants' accounting described in the Consent and Undertakings of defendant BLOOM and the Consent and Undertakings of defendant SUTTON.

XIII.

IT IS ORDERED, ADJUDGED AND DECREED, that BLOOM and SUTTON, their officers, agents, servants, employees, attorneys-in-fact, and those in active concert or participation with them who receive actual notice of the Final Judgment by personal service or otherwise, and each of them [*16] be, and they hereby are permanently restrained and enjoined from:

(1) withdrawing funds or securities from any account in which a client of BLOOM or SUTTON has an interest, regardless of the right, if any, of defendant(s) to make withdrawals pursuant to an existing agreement;

(2) directing that funds or securities held in any account in which a client of BLOOM or SUTTON has an interest be transferred to any other person or entity other than a receiver appointed by this Court;

(3) causing the disposition of any asset with a value of over \$ 100 within the possession, custody, or control of BLOOM or SUTTON as of the date of this Final Judgment, other than such assets determined by the receiver, after approval by the Court, to be personal items pursuant to Paragraph V herein.

XIV.

IT IS ORDERED, ADJUDGED AND DECREED, that on or before 12:00 noon, January 25, 1988, or such later date as the receiver shall determine, Defendants

BLOOM and SUTTON shall serve upon the receiver, and upon the plaintiff, at its Washington, D.C., office, 450 Fifth Street, N.W., Washington, D.C. 20549, an accounting of all income received and of all assets with a cost of more than \$ 100 acquired by defendants [*17] BLOOM and SUTTON, from January 1, 1983, to the date of this Final Judgment. To the extent records are unavailable to Defendants BLOOM and SUTTON, they shall use their best efforts to provide the information, including the location of records unavailable to them, necessary for the accounting. After January 25, 1988, and continuing until such time as there is a final disposition of all assets transferred to the receivership, Defendants BLOOM and SUTTON shall promptly amend their accounting to report any additional material information concerning the acquisition of such assets or income by BLOOM and SUTTON. Until such time as there is a final disposition of all assets transferred to the receiver, BLOOM and SUTTON shall report, at such intervals as the receiver shall determine, as to the extent of any income received and of any assets with a cost of more than \$ 100 acquired by defendants BLOOM and SUTTON, from the date of this Final Judgment.

XV.

IT IS ORDERED, ADJUDGED AND DECREED, that the annexed consent and undertakings of defendant BLOOM and defendant SUTTON be and the same hereby are, incorporated herein with the same force as if fully set forth herein, and that defendants BLOOM [*18] and SUTTON shall comply with their undertakings.

XVI.

IT IS ORDERED, ADJUDGED AND DECREED, that this Court shall retain jurisdiction of this action for all purposes, including the implementation and enforcement of this Final Judgment.

* * *

There being no reason for delay, the Clerk of the Court is hereby directed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to enter this Final Judgment forthwith.

SCHEDULE A

ASSETS TO BE TRANSFERRED TO RECEIVER

(based solely on information supplied to plaintiff by defendants)

A. Cash

Bank	Account No.	Balance as of 12/31/87
1. Chemical Bank	115-012-818	\$ 499,471.19 n1

n1 Includes January 1988 deposit of \$ 60,000.

2.	Chemical Bank 115-012-273	\$ 1,302.86
3.	Chemical Bank 115-013-210	\$ 25,027.09
4.	Chemical Bank 115-229-272	\$ 9,677.68
5.	Citibank 379-46-027	\$ (392.81)
6.	Citibank 379-46-019	\$ 7,334.18
7.	Citibank 379-19-205	\$ 235.33
8.	Citibank 377-37-049	\$ 69,892.74 n2

[*19]

9. Citibank 377-57-787 \$ 104,385.98 n2

n2 Pledged as security.

n2 Pledged as security.

10. Citibank	377-36-935	\$ 15,901.30
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B. Works of Art

Description	Cost n3
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n3 Exclusive of sales tax.

1. MILTON AVERY, Sun Bather and Sea Watcher	\$ 48,000
2. EDWARD HOPPER, Trees, East Gloucester	\$ 75,000
Description	Cost
3. FREDERICK C. FRIESEKE, Bowl of Flowers	\$ 12,000
4. LAWTON PARKER, Woman in Boat	\$ 250,000

5. THEODORE ROBINSON, A Sweet Girl Graduate	\$ 150,000
6. RICHARD EMIL MILLER, Sewing by Lamplight	\$ 250,000
7. THOMAS HART BENTON, July Hay (verso: Studies of Clouds)	\$ 65,000
8. WILLARD L. METCALF, Le Ruisseau	\$ 35,000
9. CHILDE HASSAM, Pont Neuf	\$ 125,000
10. SANFORD ROBINSON GIFFORD, Constantinople	\$ 50,000
11. WILLIAM TROST RICHARDS, An Apple	Gift
12. LASZLO MOHOLY-NAGY, Truncated Pyramids	\$ 22,000
13. HARRIET W. FRISHMUTH, The Star	\$ 14,000
14. HARRIET W. FRISHMUTH, Crest of the Waves	\$ 22,000
15. WILL HICOCK LOW, Souvenir of Nantucket	\$ 130,000
16. JOHN SLOAN, Road Barnyard	\$ 55,000
17. GEORGE DE FOREST BRUSH, In the Garden	\$ 85,000
18. EVERETT SHINN, Young Woman and Her Maid	\$ 55,000
19. SEVERIN ROESEN, Vase of Flowers in Footed Glass Bowl with Bird's Nest	\$ 175,000
20. MARY CASSATT, Bacchante (Roman Girl Smiling)	\$ 150,000
21. PAUL LACROIX, Study of Cherries	\$ 10,000
22. OTIS KAYE, The Key to Success	\$ 20,000
23. IRVING RAMSEY WILES, Purple Clematis	\$ 40,000
24. JOHN WHITE ALEXANDER, Alethea	\$ 660,000

25. SIR JAMES JEBUSA SHANNON, Portrait of a Gentleman at a Hunt Dinner	\$ 125,000
26. JOHN SINGER SARGENT, Portrait of Eugene Juillerat	\$ 150,000
27. FRANK WESTON BENSON, Firelight	\$ 350,000
28. THOMAS WILMER DEWING, Lady in White	\$ 750,000
29. WILLEM DE KOONING, Woman	\$ 184,800
30. ROBERT FREDERICK BLUM, Repose	\$ 75,000
31. WALT KUHN, Green Plums	\$ 35,000
32. GEORGE LUKS, Park Scene	\$ 125,000
33. BESSIE POTTER VONNOH, Mother and Child	\$ 20,000
34. RALSTON CRAWFORD Wing Fabrication #2	\$ 75,000
35. YASUO KUNIYOSHI, Broken Objects	\$ 90,000
36. CORNELIUS DEBEET, Still Life Painting	\$ 30,000
37. MILTON AVERY, Gaspe	\$ 125,000
38. EMIL CARLSEN, Red Roses	\$ 70,000
	\$ 4,702,800.00
C. Condominium Apt. (#3) at 52 East 72nd Street	\$ 830,000 (540,000) mortgage
	\$ 290,000
D. House and lot (Bloom property) on Cross Highway, East Hampton, N. Y. (unfurnished)	\$ 1,900,000
E. 1987 Mercedes-Benz 560 SEL	\$ 60,000
F. 1988 Aston Martin Valente Convertible	\$ 139,000
G. Furnishings in NYC apt.	not yet available
H. Jewelry	

1. Pearl necklace	\$ 30,000
2. Single strand diamond and platinum necklace, approximately 52 carats	\$ 195,000
	\$ 2,614,000
TOTAL OF ALL REPORTED ASSETS	\$ 8,049,635.54

[*20]

1994 U.S. Dist. LEXIS 8661 printed in FULL format.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. VISION COMMUNICATIONS, INC.,
WILLIAM L. CLEMENS, JR., MICHAEL IMBESI, WILKES-BARRE-SCRANTON, L.C., Defendants.

CIV. NO. 94-0615(CRR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1994 U.S. Dist. LEXIS 8661

May 10, 1994, Decided

May 11, 1994, Filed

CORE TERMS: indirectly, servants, mails, interstate commerce, custody, registration statement, enjoined, transportation, permanently, restrained, interfere, concert, carrying, setting forth, accounting, registered, hereunder, authorize, signatory, cooperate, engaging, assist, prospectus, medium, material fact necessary, financial institutions, artifice to defraud, course of business, untrue statement, material fact

JUDGES: [*1] Richey

OPINIONBY: CHARLES R. RICHEY

OPINION: FINAL JUDGMENT OF PERMANENT
INJUNCTION AND OTHER EQUITABLE RELIEF

Plaintiff Securities and Exchange Commission, having filed a Complaint in the above-captioned action, and defendants Vision Communications, Inc. ("VCI"), William L. Clemens, Jr. ("Clemens"), Michael Imbesi ("Imbesi"), and Wilkes-Barre-Scranton, L.C. ("WBS"), having entered a general appearance, having waived the entry of findings of fact and conclusions of law under Federal Rule of Civil Procedure 52, and without admitting or denying any of the allegations of the Complaint, except as to jurisdiction, which is admitted, and having consented to entry of this Final Judgment of Permanent Injunction and Other Equitable Relief ("Final Judgment"), it appearing that this Court has jurisdiction over defendants and the subject matter hereof:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that VCI, Clemens, Imbesi and WBS, their agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be and hereby are permanently restrained and enjoined from, in the absence of an applicable exemption, directly or indirectly:

a) unless a registration statement is in [*2] effect as to a security, i) making use of any means or instruments of

transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise or ii) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or delivery or

b) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal or stop order or (prior to the effective date of the registration statement) any public proceeding under Section 8 of the Securities Act [15 U.S.C. § 77h].

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that VCI, Clemens, Imbesi, and WBS, their agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be and hereby are permanently restrained and [*3] enjoined from, in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly,

a) employing any device, scheme or artifice to defraud, or

b) obtaining money or property by means of any untrue statement of a material fact or omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

c) engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that VCI, Clemens, Imbesi, and WBS, their agents, servants, employees, and attorneys, all persons in active concert or participation with them, be and hereby are permanently restrained and enjoined from, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, [*4]

a) employing any device, scheme, or artifice to defraud,

b) making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

c) engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that VCI, Clemens, and Imbesi, their agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be and hereby are permanently restrained and enjoined from, directly or indirectly, engaging in the business of a broker or a dealer by making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of any security (in the absence of an applicable exemption), without being registered with the Commission as a broker or dealer.

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Clemens and Imbesi shall provide a sworn accounting setting forth the identity and value of all of their assets, as [*5] well as a sworn statement setting forth the amount of monies they received from WBS

and identifying individual expenditures of such monies that exceed \$ 2,500 per expenditure, within fourteen (14) days of the entry of this FINAL JUDGMENT. If the Commission subsequently discovers the existence of assets of Clemens and/or Imbesi that should have been, but were not disclosed to the Commission prior to entry of this FINAL JUDGMENT and/or in the accounting, or that disclosed assets prior to entry of this FINAL JUDGMENT or in the accounting were materially undervalued, to the extent not disclosed or materially undervalued these assets will be forfeited and disgorged for distribution by the Receiver appointed under paragraph VII of this Final Judgment.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that VCI, Clemens and Imbesi shall subordinate their interest in WBS to that of the investors in WBS, and shall receive no distribution from the assets marshalled by the Receiver as forth in paragraph VII of this FINAL JUDGMENT, until the investors have received distributions amounting to 100% of the value of their capital, at which time VCI, Clemens and Imbesi shall receive distributions amounting [*6] to 100% of the value of their capital investment. Any remaining distributions shall be made based on each person's respective interest in WBS.

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Fred Fielding, Esquire of the law firm of Wiley, Rein and Fielding, be appointed Receiver of VCI and WBS for the purpose of marshalling their assets for distribution in accordance with this FINAL JUDGMENT. The Receiver shall take control of VCI's and WBS's operations, funds, assets and property wherever situated, with the powers set forth herein, including powers over all funds, assets, premises (whether owned, leased, occupied, or otherwise controlled), choses in action, books, records, and other property belonging to or in the possession of or control of VCI or WBS, and the Receiver is hereby authorized, empowered, and directed:

a. to have exclusive control of, and to be added as the sole authorized signatory for, all accounts of VCI and WBS at any bank, brokerage firm or financial institution that has possession, custody or control of any assets or funds of any of said entities, wherever situated;

b. to take such action as is necessary and appropriate to preserve and take control [*7] of, and to prevent the dissipation or concealment of any assets of VCI or WBS;

c. to make or authorize such payments and disbursements from the funds and assets taken into control, or thereafter received by him, and to incur, or authorize the incurrence of, such expenses and make, or authorize the making of, such agreements as may be reasonable, necessary and advisable in discharging his duties as Receiver;

d. to engage and employ persons in his discretion to assist him in carrying out his duties and responsibilities hereunder; and

e. to marshal the assets of VCI and WBS at the maximum value attainable, through liquidation or otherwise, and distribute them in accordance with a Plan of Distribution to be submitted by the Commission and approved by the Court, which Plan shall be consistent with this FINAL JUDGMENT.

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, in connection with the appointment of the Receiver provided for in paragraph VII above:

a. Defendants and their officers, agents, servants, employees, attorneys-in-fact, shareholders and other persons who are in custody, possession, or control of any assets, books, records, or other property of VCI or WBS [*8] shall forthwith give access to and control of such property to the Receiver, and shall forthwith grant to the Receiver authorization to be a signatory as to all accounts at banks, brokerage firms or financial institutions that have possession, custody or control of any assets or funds in the name of or for the benefit of VCI or WBS.

b. All banks, brokerage firms, financial institutions, and other business entities that have possession, custody or control of any assets, funds or accounts in the name or for the benefit of VCI or WBS shall cooperate expeditiously in the granting of control and authorization as a necessary signatory as to said assets and accounts to the Receiver.

c. Defendants and their respective officers, agents, servants, employees and attorneys-in-fact shall cooperate with and assist the Receiver, and shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the Receiver in the conduct of his duties or to interfere in any manner, directly or indirectly, with the custody, possession, management, or control by the Receiver of the funds, assets, premises, and chooses in action described above.

d. No creditor of or claimant against [*9] VCI, WBS,

Clemens or Imbesi, or any person acting on behalf of such creditor or claimant, shall take any action to interfere with the taking control, possession or management of the assets transferred to the Receiver under this FINAL JUDGMENT, nor interfere in any way with the exclusive jurisdiction of this Court over the receivership estate.

e. All costs, fees and expenses of the Receiver incurred in connection with the performance of his duties described herein shall be paid from the assets of VCI and WBS, including the costs and expenses of those persons who may be engaged or employed by the Receiver to assist him in carrying out his duties and obligations hereunder. All applications for costs, fees and expenses for services rendered in connection with the Receiver shall be made by application to the Court, with service on the Commission and defendants (through their counsel), setting forth in reasonable detail the nature of the services.

f. No bond shall be required in connection with the appointment of the Receiver. Except for an act of gross negligence, the Receiver shall not be liable for, and shall be indemnified from the receivership estate against, any loss or damage [*10] incurred by defendants or their officers, agents or employees, or any other person, by reason of any act performed or omitted to be performed by the Receiver in connection with the discharge of his duties and responsibilities hereunder.

IX.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, within five (5) business days of entry of this FINAL JUDGMENT, Clemens and Imbesi shall return to VCI, respectively, the sums of \$ 225,000 and \$ 325,000, payable by certified check to the Receiver. Copies of such checks shall be simultaneously served on Judith R. Starr, Assistant Chief Litigation Counsel, Securities and Exchange Commission, Stop 4-2, 450 5th Street, N.W., Washington, D.C. 20549.

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendants Clemens and Imbesi agree to cooperate with the Commission in its investigations, whether current or future, and upon reasonable notice to do the following: a) appear and be interviewed by the staff of the COMMISSION at such times and places as the COMMISSION reasonably requests, any reasonable travel expenses to be paid by the COMMISSION in accordance with COMMISSION policy; b) produce any and all documents in their possession or custody [*11] or subject to their control that the COMMISSION requests;

c) provide, upon request by the COMMISSION, affidavits, declarations, and/or other written statements; d) appear and testify at such hearings, depositions, and/or trials as the COMMISSION requests; e) give full, accurate, and truthful information at such interviews, hearings, depositions, and/or trials, with the knowledge and understanding that the failure to give full, accurate, and truthful information shall be a violation of this FINAL JUDGMENT.

XI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the annexed CONSENT be incorporated herein with the same force and effect as if fully set forth

herein.

XII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction over this action for the purpose of implementing and enforcing the terms and conditions of this FINAL JUDGMENT and for all other purposes.

Charles R. Richey

United States District Judge

DATED: May 10, 1994

1991 U.S. Dist. LEXIS 12387 printed in FULL format.

NICK WIEBERG, d/b/a FAMILY MEMORIAL PLANNING INC., and FAMILY MEMORIAL PLANNING INC., Plaintiffs v. RESTHAVEN GARDENS OF MEMORY, INC., and HARRY D. "HAP" BLEDSOE, Defendants

No. 89-1509-C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

1991 U.S. Dist. LEXIS 12387

August 28, 1991, Decided

August 28, 1991, Filed

CORE TERMS: implied covenant, promissory estoppel, cemetery, pre-need, good faith, quota, lot, fair dealing, duty of good faith, binding contract, breached, stock, head of household, sales contract, funeral, promisee, negotiations, caskets, crypt, buyer, sell, promisor, establishments, calculating, marketing, estoppel, quarter, dollars, hit, enforceable contract

COUNSEL: [*1]

Randall K. Rathbun, Depew, Gillen & Rathbun, Wichita, Kansas, for Plaintiff.

Stephen P. Weir, Carpenter, Weir & Myers, Topeka, Kansas, for Defendants.

JUDGES: Sam A. Crow, United States District Judge.

OPINIONBY: CROW

OPINION: MEMORANDUM AND ORDER

This case involves actions for breach of a business contract and fraud. Plaintiff, Family Memorial Planning, Inc. ("FMPI"), alleges the defendants breached the sales contract damaging FMPI in unpaid commissions and lost profits. Plaintiff, Nick Wieberg ("Wieberg"), alleges defendant, Harry D. "Hap" Bledsoe ("Bledsoe"), orally agreed to sell his stock in Resthaven Gardens of Memory, Inc. ("Resthaven") and is liable for not fulfilling his promise under the theories of promissory estoppel and fraudulent misrepresentation. These claims were tried to the court on April 30, May 1 and 2, of 1991. The parties thereafter submitted their proposed findings of fact and conclusions of law. The court then heard the parties' closing arguments on June 5, 1991. The court enters the following as its findings of fact and conclusions of law in this case.

Findings of Fact

1. Plaintiff Wieberg is presently the sole stockholder

of FMPI and has been FMPI's president from its inception. [*2] The business of FMPI is the pre-need sale and marketing of services and goods supplied by funeral establishments.

2. Defendant Resthaven is a funeral establishment and cemetery. Defendant Bledsoe is the sole stockholder in Resthaven.

3. While in college, plaintiff Wieberg had his first experience with pre-need funeral sales as a part-time salesman. After leaving college, Wieberg was employed by D. W. Newcomers which owns and operates a number of funeral homes in the Kansas City area. His first job was to set up a sales office in the Johnson County area. Less than a year later, Wieberg was promoted to senior coordinator of sales having the responsibility to oversee the efforts of the 52-person Kansas City sales force. On behalf of Newcomers, Wieberg also negotiated sales agreements with other funeral establishments and prepared budgets for those new sales offices.

4. In March of 1986, Wieberg left Newcomers and started his own sales corporation, FMPI, modelling it after the Newcomers sales division. FMPI initially contracted with a number of smaller cemeteries and later entered into an agreement with Memorial Park Cemetery, the largest cemetery in Kansas City.

5. Defendant Bledsoe [*3] started in the cemetery business in 1950 as a sales counselor in Dallas, Texas. After eight years of sales, Bledsoe formed Resthaven in west Wichita. A funeral home was added to Resthaven's

cemetery in 1970. Resthaven does approximately 500 internments annually.

6. In late 1985 or early 1986, Bledsoe decided to sell Resthaven. Bledsoe approached two possible buyers with an offer to sell Resthaven. Negotiations with the second buyer, D.W. Newcomer, were extensive, but the deal was not consummated. The proposed agreement with Newcomers consisted of nineteen pages and recited a purchase price of nearly five million dollars.

7. After the Newcomers negotiations failed, Wieberg and Bledsoe met in October of 1986. They orally agreed that FMPI would be the sales agent for Resthaven. There were also some discussions over Wieberg eventually purchasing Bledsoe's stock in Resthaven. After their first meeting, Wieberg sent Bledsoe a copy of FMPI's standard sales agency contract. Bledsoe said his attorney must review the contract before he would sign it. They agreed that sales would commence the first of November even if the written contract was not executed. Negotiations on the sale of Resthaven [*4] continued.

8. FMPI's sales force at Resthaven was eight persons, including Wieberg. FMPI focused its immediate efforts on the sale of caskets, because Bledsoe wanted to sale as many caskets as possible before the law changing the trusting requirements on caskets took effect in July of 1987. Pre-need sales generated by FMPI during this period far exceeded earlier sales at Resthaven.

9. In January of 1987, Bledsoe and Wieberg again sat down and went over the terms of a proposed written sales contract. A number of changes were made and Bledsoe volunteered to have the contract with changes typed for their signature. After more inquiries by Wieberg, Bledsoe produced the written sales contract in March of 1987 and it was executed by the parties. The term of the contract was one year with renewals for two additional years if the annual sales quota for the first year was met by FMPI. The contract also included quarterly sales quotas, which for the third year was \$ 250,000.

10. FMPI generally solicited sales by telephone using discounts or incentives to entice people into scheduling an appointment for a personal meeting with one of its sales persons. Incentives are critical to the success [*5] of pre-need sales. One example of a sales incentive used by FMPI in 1987 and 1988 was the head of household program. The potential buyer was given a certificate for a free lot at Resthaven in exchange for agreeing to a sales meeting and for paying a single \$ 50 fee to the perpetual care fund. With this marketing tool, a salesperson had the opportunity to sell the buyer the additional pre-need merchandise beyond the initial free lot. FMPI used the head of household program successfully in many of its

agency contracts, including Resthaven.

11. In the summer of 1987, Wieberg and Bledsoe further discussed the arrangements for a written stock purchase agreement. In the fall of 1987, Wieberg moved his family to Wichita. This move was a discussed condition to Bledsoe's sale of Resthaven.

12. Bledsoe said he never offered to sell Resthaven to Wieberg. Wieberg recalls such an offer and its terms were a selling price of 3.7 million dollars with one million dollars down and the remainder financed by Bledsoe. Wieberg said a condition imposed by Bledsoe was that sales would have to generate enough receivables, that if discounted, would cover at least 60% of the note held by Bledsoe.

13. Bledsoe [*6] and Wieberg never reduced to writing any understanding or arrangement for the sale of Resthaven. Wieberg believed that both parties contemplated the completion of certain paperwork before the purchase of Resthaven could ever be accomplished. Specifically, Wieberg testified that he was under no obligation to buy Resthaven until the agreement was put in writing. In addition, Wieberg never determined if the receivables had reached the required level.

14. The sales agency contract provides in pertinent part: "The parties of this Contract intend to fully cooperate in marketing of cemetery property, lawn crypts, mausoleum crypts and niches, bronze memorials, caskets and vaults on a 'preneed' basis for Cemetery."

15. In the late summer of 1988, a cemetery owner in Texas visited Resthaven and described to Wieberg and Bledsoe the large pre-need sales and profits being made in Texas. After that conversation, Bledsoe told Wieberg that he was paying FMPI "way too much."

16. In December of 1988, Jon Baird, the general manager of Resthaven, told Wieberg that he had a message from Bledsoe, who was in Palm Springs at the time. The message was: "we're going to have to eliminate the head of household [*7] program and the living offer" and "I want to see you hit your quota now."

17. In the early fall of 1988, Wieberg approached Charlie Lawter, an accountant and comptroller with Resthaven, about developing a list of those families with lots in Resthaven. The list would specify also if the lot owners owed any outstanding sums and whether they had purchased all pertinent pre-need merchandise. Wieberg wanted to use this list for sales during the coming holiday season which was generally a slow period for sales. Lawter ran this sample list. Although FMPI already had general access to Resthaven's lot owner card files, Bledsoe instructed Lawter not to turn over this final com-

puter list to Wieberg. At trial, Bledsoe explained that he never would produce a list of owners and disclose it to anyone for reasons of confidentiality, possible competition, and the potential for its use to sell insurance. Since FMPI could have generated the same list through its general access to lot files and used it in the same manners feared by Bledsoe, the court does not give much credence to Bledsoe's explanation for denying FMPI a computer-generated list of lot owners.

18. Bledsoe testified that he eliminated [*8] the head of household program and other free space incentives because he was losing money on them. Bledsoe pointed to no sales reports or records which supported his explanation. These incentives have been used successfully by Wieberg at other funeral establishments. The sales records of Resthaven indicate these incentives were used with the same general success there.

19. While Resthaven allowed the \$ 500 lawn crypt discount to remain, Wieberg cogently explained how this was not an effective sales tool because most people did not know what a crypt was.

20. Bledsoe testified that he had not been unhappy with FMPI's performance but believed it could have been better. He also said FMPI's departure disappointed him and place a financial burden on Resthaven to carry on its own sales. This testimony is belied by Bledsoe's notes to Wieberg at the time.

21. In October of 1988, Bledsoe wrote a note to Wieberg stating in part: "This is an absolutely pitiful, sick week of work production. . . . Nick I cannot let the P & L of this corp. depend on such a slip shod hit or miss operation and I refuse to do so--"

22. A month later, Bledsoe wrote to Wieberg:

In our meeting a few months ago, [*9] with Jon and I, you agreed to increase your organization to 15 to 20 people and put your monthly volume in the \$ 200,000 per month range. Yet your report shows only 9 sales people and a pitiful 13 presentations.

At this rate you will not make your contractual quarterly quota of new business during the last quarter of this year.

If your intentions are to give up the agreement at the end of the quarter, I would appreciate knowing so that I can make the necessary plans for your replacement.

Wieberg responded to this note with a letter dated December 12, 1988, explaining the reasons for low production levels and expressing his frustration with Bledsoe's lack of cooperation with new proposals and elimination of other sales incentives.

23. Leads on prospective customers and sales declined as a result of Bledsoe's decision to eliminate the head of household program and other sales incentives.

23. On February 25, 1989, Jon Baird met with Wieberg and two sales managers of FMPI to discuss the matter of Tom Bledsoe. Baird related that Bledsoe wanted his son, Tom, to be trained and treated as one of FMPI's sales persons, but FMPI would not receive any commission for Tom's pre-need sales. In [*10] notes written shortly after this meeting, Baird recounted that he told Wieberg that in his opinion the issue with Tom was Bledsoe's first step toward removing FMPI from family services and that in his opinion Bledsoe was tying FMPI's hands in an effort to get them to leave. As also found in the notes, after Wieberg told Baird that he would be quoted against his wishes, Baird told Wieberg that his recommendation to Bledsoe would be "to get you guys out of here just as quickly as is legally possible."

25. On April 10, 1989, Bledsoe wrote Wieberg: "it appears that your organization has not met its quota for the period. Please verify these numbers as soon as possible, so that I can make further determinations."

26. Counsel for FMPI notified Bledsoe by letter dated April 19, 1989, that FMPI was canceling the sales agency contract pursuant to Section VII. B. of that contract. The letter explained that the cancellation was involuntary as Resthaven had deliberately breached the contract and prevented FMPI from fulfilling its obligations under the contract.

27. As a result of the actions of Resthaven and Bledsoe, FMPI was not allowed to complete the term of the sales agency contract.

28. In [*11] a joint stipulation, the following appears:

1. The parties admit to the authenticity of the executed sales agency agreement.

2. Plaintiff corporation is making a claim for the recovery of lost profits associated with the breach of the sales agency agreement for May through December of 1989 in the amount of \$ 113,063.44.

3. Plaintiff corporation calculates the \$ 113,063.44 figure by adding the total sales for 1986 through March 1989 multiplied by a "profit" of 7% and divided by the 29 months that the parties operated under the contract. This figure totals \$ 14,132.93 which the corporation maintains is the average monthly profit earned during the period in which the parties operated under the contract. This \$ 14,132.93 figure is then multiplied by 8 months which is the amount of lost profit claimed by the

plaintiff corporation.

4. This 7% figure represents plaintiff corporation's gross profit after expenses but before taxes.

5. The 7% figure does not include Wieberg's salary payments or withdrawals from the corporation.

29. Wieberg testified that the 7% figure was an average profit on FMPI's contracts. He also said that the Resthaven contract was not making as much profit [*12] as many of FMPI's other contracts. Nonetheless, Wieberg believed the 7% figure was reasonable had Resthaven cooperated with FMPI. Wieberg believed the actual profit levels of FMPI were close to 7%.

30. Wieberg testified to another method of calculating lost profits for 1989. He assumed for purposes of these calculations that he lost three quarters of business rather than eight months reflected in its stipulation above. He established net revenues for 1988 by deducting commissions from gross sales for a total of \$ 167,282. Wieberg testified it was a general corporate rule and goal to maintain expenses at a level to yield a net profit equalling 7% of gross sales. Consequently, he found this 7% figure, \$ 112,065 and reduced it to reflect the nine-month total of \$ 84,049 for lost profits. Using this method, plaintiff's expenses were \$ 41,413 or \$ 125,462 (\$ 167,282 x .75) minus \$ 84,049. If the court were to use the eight-month period instead, plaintiff's lost profits would be \$ 74,709 and expenses would be \$ 35,697 or \$ 110,406 (\$ 167,282 x .66) minus \$ 74,709.

31. In FMPI's proposed findings and its closing argument, yet another method for calculating lost profits is offered. Plaintiff [*13] lists what it believes are the applicable and deductible expenses for 1988 totalling \$ 66,314.53. Deducting this total from \$ 167,282 and adjusting it for a nine-month period, FMPI's claimed lost profits are \$ 75,725. If the court were to adjust, instead, for the eight-month period found in the stipulations, FMPI's lost profits would be \$ 67,305.

32. Certain overhead or indirect expenses like Wieberg's salary and bonus were not directly affected by opening the Wichita sales office. There were no expenses directly attributable to vehicles or equipment located in Wichita.

33. FMPI has listed a number of contracts with the amount of sales for which it alleges the commissions are unpaid in the amount of \$ 5,565.78. Defendant lists the same contracts and others in calculating that plaintiff was overpaid commissions in the amount of \$ 5,125.98. Both lists purport to be accurate summaries or histories of the commissions paid to FMPI. Without know-

ing what records were reviewed, the process by which Wieberg prepared the summary and the facts showing FMPI deserved those commissions, the court is unable to find that Resthaven presently owes any commissions to FMPI.

CONCLUSIONS OF LAW

1. This [*14] court has jurisdiction of the action and over the parties. Venue is proper.

2. To the extent that any of these legal conclusions are more appropriately findings of fact or entail such findings, they should be viewed as findings and incorporated by this reference in the court's findings.

3. On defendants' motion for summary judgment, this court held that promissory estoppel is an exception to the statute of frauds at K.S.A. 84-8-319 governing the sale of securities. The court denied defendants' motion as Wieberg had brought a promissory estoppel claim concerning the sale of Resthaven stock.

4. In *Decatur Cooperative Association v. Urban*, 219 Kan. 171, 179, 547 P.2d 323 (1976), the doctrine of promissory estoppel is set forth:

Before the doctrine of promissory estoppel can be invoked in a case involving the statute of frauds the promisee must first show by competent evidence that a valid and otherwise enforceable contract was entered into by the parties. (Citation omitted). The conduct of the promisor must be something more than a mere refusal to perform the oral contract, since any party to an oral contract unenforceable under the statute of frauds has [*15] that right, and the exercise of the right of non-performance is no more a fraud than a breach of any other contract. (Citation omitted). And the promisee must show the facts of the case and the conduct of the promisor justifying application of the doctrine. We further outlined the elements of promissory estoppel in *Marker v. Preferred Fire Ins. Co.*, 211 Kan. 427, 506 P.2d 1163 (1973)) in this fashion:

"In order for the doctrine of promissory estoppel to be invoked the evidence must show that the promise was made under circumstances where the promisor intended and reasonably expected that the promise would be relied upon by the promisee and further that the promisee acted reasonably in relying upon the promise. Furthermore promissory estoppel should be applied only if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice." (Syl. para. 4.)

The vital principle [of estoppel rendering the statute of frauds inoperative] is that he who by his language or conduct leads another to do, upon the faith of an oral

agreement, what he would not otherwise have done, and changes his position to his prejudice, [*16] will not be allowed to subject such person to loss or injury, or to avail himself of that change to the prejudice of such other party.

219 Kan. at 179. The critical element here is the existence of a binding contract.

5. Plaintiff Wieberg has failed to carry his burden of proving a valid and otherwise enforceable contract. For there to be a binding contract, the parties must have a meeting of the minds on the essential terms. *Phillips & Easton Supply Co., Inc., v. Eleanor International, Inc.*, 212 Kan. 730, 734, 512 P.2d 379 (1973). "Generally, an agreement to make a contract in the future is not binding unless the terms and conditions are agreed upon and nothing is left to future negotiations." *Weil & Associates v. Urban Renewal Agency*, 206 Kan. 405, Syl. para. 5, 479 P.2d 875 (1971). The intent of the parties to be bound absent a written executed contract is a question of fact. *Short v. Sunflower Plastic Pipe, Inc.*, 210 Kan. 68, 75, 500 P.2d 39 (1972). In *Weil & Associates*, the Kansas Supreme Court affirmed the finding of no contract:

Undoubtedly execution [*17] of a binding contract was expected, but the intention of the parties seems clear: They negotiated with the definite understanding the terms of any contract were not fully agreed upon; a written formal agreement was contemplated and no valid, enforceable contract was to exist until the execution of such an instrument. The intention of the parties is controlling. In such case, where a written agreement was never executed, a binding contract never came into existence, and we so hold, as did the trial court.

206 Kan. at 416 (citation omitted). Plaintiff Wieberg testified himself that he was not bound to purchase the stock of Resthaven until the parties agreed on the terms of a written contract. For this reason alone, the court concludes that a binding contract for the sale of Resthaven stock never existed between Wieberg and Bledsoe. Plaintiff's claim for promissory estoppel fails, and his claim for fraud falls along with it. See *Mildfelt v. Lair*, 221 Kan. 557, 561 P.2d 805 (1977).

6. Kansas law follows the modern trend of applying the duty of good faith and fair dealing to every contract. *Bonanza Inc. v. McLean*, 242 Kan. 209, 222, 747 P.2d 792 (1987); [*18] see *EDO Corp. v. Beech Aircraft Corp.*, F.2d 1447, 1453 n. 6 (10th Cir. 1990). This court recently discussed the implied covenant in the context of franchise agreements:

The implied covenant of good faith and fair deal-

ing particularly comes into play in those circumstances where the parties to the contract realize detailed provisions on performance would be ineffectual, frustrating, or impractical. The parties are then forced to confer control of a contract term, or discretionary authority, upon one another, leaving each to depend on the good faith of the other. See, e.g., *Boone v. Kerr-McGee Oil Industries*, 217 F.2d 63, 65 (10th Cir. 1954). By employing this doctrine, a court forces the

parties to perform consistent with their intentions and expectations which are embodied, expressly and impliedly, in the terms of their agreement. For example, the duty of good faith could be breached by one party exercising its discretion for purposes not reasonably contemplated or assumed as a risk by the other party. See *Best v. U.S. Nat. Bank of Oregon*, 303 Or. [557] at 563, 739 P.2d 554 [(1987)]; *Boone*, 217 F.2d at 65; [*19] see generally *Burton, Breach of Contract and the Common Law Duty to perform in Good Faith*, 94 Harv. L. Rev. 369, 383-387 (1980).

The implied covenant is derivative in nature, that is, it does not create or supply new contract terms but grows out of existing ones. See *Metromedia Broadcasting v. MGM/UA Entertainment*, 611 F. Supp. 415, 421 (D. Cal. 1985); *Gordon v. Matthew Bender & Co., Inc.*, 562 F. Supp. 1286, 1289 (N.D. Ill. 1983); *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 482 (Tex. Ct. App. 1989). "Essential terms of a contract on which the minds of the parties have not met cannot be supplied by the implication of good faith and fair dealing." *Bonanza, Inc.*, 242 Kan. at 222 (quoting 17 Am. Jur. 2d, Contracts § 256, pp. 653-54 (1964)); see *Metromedia Broadcasting*, 611 F. Supp. at 421 (The implied covenant does not supply new or different rights and obligations to those expressly agreed to by the parties); *Gordon*, 562 F. Supp. at 1289-90 (An obligation cannot be implied if it would be inconsistent with other express terms of the [*20] contract). The duty of good faith assumes the existence of a contractual right; it does not create one. *Noller v. General Motors Corp.*, 13 Kan. App. 2d [13] at 35 [(1988)] (J. Davis, concurring and dissenting). Because the goal of this implied duty is to effectuate the parties' express promises, breach of this duty is actionable when it relates "to some aspect of performance under the terms of the contract." *Adolph Coors Co.*, 780 S.W.2d at 482. A breach occurs when a party's actions are commercially unreasonable. *Larese v. Creamland Dairies, Inc.*, 767 F.2d 716, 717-18 (10th Cir. 1985); *Burgess Const. Co. v. M. Morrin & Son Co., Inc.*, 526 F.2d 108, 115 (10th Cir. 1975); see *Restatement (Second) of Contracts* § 205 comment d (1979) ("abuse of a power to specify terms").

Pizza Management, Inc., v. Pizza Hut, Inc., 737 F. Supp. 1154, 1178-79 (D. Kan. 1990). The implied covenant is likewise breached when a party's actions are not taken in good faith. *Edo Corp.*, 911 F.2d at 1453 n.6. The duty of good faith and fair dealing is assessable from both an objective standard [*21] of commercial unreasonableness and a subjective standpoint of honesty in fact.

7. The duty to cooperate clause in the parties' sales agency contract presents a fitting example of a contract term in which further detail is impractical and the expectation interests therein can be protected only by imposing and enforcing an implied duty of good faith and fair dealing. The parties could hardly address in their contract every instance requiring cooperation and what each would be expected to do in each circumstance. Realistically, the parties expressed their general desire to cooperate realizing the mutual success of the sales contract depended on it.

8. Resthaven breached the implied covenant when it eliminated most of the sales incentives in late 1988 and early 1989, denied FMPI access to a computer-generated lot owners' list, and insisted that FMPI essentially hire and train Bledsoe's son without receiving any percentage of the commissions earned by him. The evidence surrounding each of Resthaven's actions strongly shows the lack of any business reasons grounded in good faith. Besides the revealing statements from Resthaven's principals regarding "tying FMPI's hands" and "I want to see [*22] you hit your quota now," the timing of Resthaven's actions and the untenable business explanations offered for them convince this court that Resthaven took these actions simply to end the sales contract by taking measures which would frustrate FMPI and hopefully prevent FMPI from making its sales quotas.

9. As a result of Resthaven's breach of the implied covenant of good faith and fair dealing, FMPI lost profits for the remaining months of the sales contract. The court will hold FMPI to its stipulation at trial that its claim for lost profits is for the eight months of May through December of 1989.

10. Loss of future profits are recoverable in a breach of contract action if proved with reasonable, not absolute, certainty and they were within the parties' contemplation. *Butler v. Westgate State Bank*, 226 Kan. 581, 582, 602 P.2d 1276 (1979). Evidence of lost profits is weighed in each case "individually and pragmatically," and the court should require "the best proof available" under the circumstances. *Id.* at 581, Syl para. 2.

11. Plaintiff FMPI has a number of sales contracts and does business in other states. FMPI has a [*23] number

of indirect overhead expenses that are fixed whether or not the Resthaven contract existed. While these expenses may be paid from the proceeds of the business, they do not bear such a direct relationship to the Resthaven contract that this court believes it appropriate to deduct an allocable share of those fixed expenses as costs. *Buono Sales, Inc. v. Chrysler Motors Corporation*, 449 F.2d 715, 720 (3rd Cir. 1971). Such a rule is in keeping with the general notion that only those expenses saved as a result of the breach must be deducted from the expected gross profits. See Restatement (Second) of Contracts § 347(c) (1979).

12. FMPI's financial earnings for 1988 are a good indicator for its lost profits in 1989. FMPI's financial records for 1988 include a number of fixed costs that are not allocable to the Resthaven operation because they are not directly attributable to performance under that contract and would have been incurred even if the contract had not existed. On the other hand, those variable overhead costs attributable to the Resthaven contract should be deducted in calculating the net profit. The testimony by Wieberg on this matter was confusing [*24] at times and difficult to follow. Reading the financial records for 1988 in the light of Wieberg's testimony about FMPI's 7% average profits and the slightly lower profit percentage for Resthaven, this court believes a fair and reasonable profit level for FMPI on its Resthaven contract is 5%. Using this figure, plaintiff is entitled to lost profits in the amount of \$ 53,311 ($\$ 1,600,925$ [gross sales] $\times .05 = \$ 80,046$ which is then reduced to reflect the eight month total). n1

n1 The court also calculated lost profits using plaintiff's third method making additional deductions based on reasonable portions of the variable overhead expenses presumably linked to the Resthaven contract. This method yielded lost profits in the same general area as the 5% figure. Because the evidence to support allocating these additional expenses is incomplete, the court believes it appropriate to rely on the 5% calculation.

13. FMPI did not carry its burden of proving that Resthaven owes \$ 5,560 in at-need commissions.

IT IS THEREFORE ORDERED [*25] that the clerk shall enter judgment in accordance with the following:

(A) Plaintiff Nick Wieberg d/b/a Family Memorial Planning, Inc. shall not recover on its claims of promissory estoppel and fraud against Harry D. "Hap" Bledsoe;

(B) Plaintiff Family Memorial Planning, Inc. shall not recover on its claim for breach of the sales agreement

concerning at-need sales commissions against Resthaven Gardens of Memory, Inc.; and

(C) Plaintiff Family Memorial Planning, Inc. shall recover \$ 53,311 on its claim for breach of the implied

covenant of good faith and fair dealing against defendant Resthaven Gardens of Memory, Inc.

Dated this 28th day of August, 1991, at Wichita, Kansas.