

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

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| RAPHAEL J. OSHEROFF, M.D., |) | |
| et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | IN CHANCERY NO. 11345 |
| |) | |
| ROBERT GREENSPAN, M.D., |) | |
| et al., |) | |
| |) | |
| Defendants. |) | |

PLAINTIFFS' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

I. Findings

1. Dr. Raphael Osheroff, a board certified nephrologist, opened a nephrology practice in Northern Virginia in March of 1972, consisting of an office practice and a dialysis center in Alexandria which Dr. Osheroff had originally begun by supplying in-hospital dialysis to patients in the Northern Virginia area. The process of dialysis is necessary to sustain the lives of persons with end stage renal disease, and is an integral part of a nephrology practice. The process involves the filtering of the blood through an artificial kidney to remove toxins from the blood and to remove excess fluids from the blood and from body tissues. (Maitland test., tr. pp. 802-803). In 1977, Dr. Osheroff's dialysis center had approximately 85 patients and was very successful. (Osheroff test., tr. pp. 215-16, 217-25).

2. By 1977 Doctor Osheroff was operating the Northern Virginia Dialysis Center in Alexandria and a second dialysis

facility in Fredericksburg, Virginia. He also owned at that time, a license or Certificate of Need to open a third facility in Warrenton, Virginia. (Osheroff test., tr. pp. 227-231; Pl. Ex. 1).

3. On October 1, 1977, Raphael J. Osheroff, M.D. entered into a Consulting and Profit-Sharing Agreement with National Medical Care, Inc. (Pl. Ex. 1, p. 793). The terms of this agreement were effective until September 30, 1987, and subject to renewal at that time (Pl. Ex. 1, p. 795). National Medical Care is a private corporation and the largest provider of out-of-hospital dialysis services in the country (Hampers depo., p. 7).

4. Pursuant to this agreement, National Medical Care purchased Dr. Osheroff's dialysis center in Alexandria, Virginia, his center in Fredericksburg, Virginia and his Certificate of Need for a facility in Warrenton, Virginia. National Medical Care retained Dr. Osheroff as Medical Director of these facilities. (Pl. Ex. 1, p. 795).

5. As compensation for the medical directorship, Dr. Osheroff received 40% of the net income after taxes of the income generated by these centers. (Pl. Ex. 1, p. 796).

6. Further, pursuant to the Consulting and Profit Sharing Agreement, Dr. Osheroff retained the exclusive right to payment of physicians' services rendered to patients in the dialysis center and the exclusive right to choose the physicians who practiced in the centers. (Pl. Ex. 1, p. 795)

7. After the sale of the dialysis centers to National Medical Care, Inc., Dr. Osheroff incorporated his practice as

Raphael J. Osheroff, M.D., Inc. He continued his office nephrology practice, ran the Northern Virginia Dialysis Center, and did renal consults in Northern Virginia hospitals. (Smith test., tr. pp. 866-67).

Greenspan and Tolkan

8. In June of 1978, Dr. Osheroff hired Dr. Robert Greenspan as an employee of Osheroff, Inc. to assist Dr. Osheroff in his medical practice. Dr. Greenspan was hired at a salary of \$50,000 with an understanding that he would become a partner in two years. (Osheroff test., tr. pp. 232-235; Westerman test., tr. p. 654).

9. At the time Dr. Greenspan joined the practice in 1978, he had had no prior experience in the private practice of nephrology and had just finished his residency (Tolkan test., tr. p. 1905).

10. Shortly after Dr. Greenspan was hired, Dr. Steven Tolkan, a board-certified nephrologist, joined the practice in mid-1978 with the understanding that he would be a salaried employee of Osheroff, Inc. with no promise of a partnership. His salary was \$45,000. (Tolkan test., tr. pp. 1748-1749, 1823). Dr. Tolkan, at that time, had also just finished his residency. (Tolkan test., tr. p. 1905).

11. Prior to accepting employment with Dr. Osheroff, Dr. Tolkan spoke with Dr. Greenspan who told Tolkan that Osheroff had a good reputation. (Tolkan test., tr. p. 1833). At the time Greenspan and Tolkan joined the practice in mid-1978, Dr.

Osheroff was getting most of the nephrology referrals in the Alexandria area. (Greenspan test., tr. p. 2479).

12. At the time Dr. Greenspan was hired, his wife, Bonnie Greenspan, R.N., was employed by Osheroff, Inc. as the in-hospital coordinator for dialysis services. (B. Greenspan test., tr. p. 2253).

13. Dr. Chanthawanich and Dr. Goldberger were also nephrologists working for the practice in 1978, doing rounds in the dialysis center on a limited basis. (Osheroff test., tr. pp. 240-251; Greenspan test., tr. pp. 2456-57). At that time, there were more than enough doctors to handle the practice. (Greenspan test., tr. pp. 2456-57).

14. From mid-1978 through December 1978, the practice was divided among Drs. Tolkan, Greenspan and Osheroff as follows: Dr. Tolkan covered the outlying hospitals such as Prince William and Potomac, and Dr. Osheroff and Dr. Greenspan covered Alexandria Hospital and the office patients. (Smith test., tr. p.4; Osheroff test., tr. pp. 469-70).

15. At the time Dr. Greenspan joined the practice, he was offered a written contract of employment which contained, among other provisions, a covenant not to compete and a covenant not to use confidential information, such as patient lists, for his own benefit. (Pl. Ex. 3, pp. 244, 246). Although Dr. Greenspan never signed this contract, it was clear to Dr. Greenspan that Osheroff and his attorney, Arnold Westerman, were interested in a non-competitive arrangement with Dr. Greenspan. (Greenspan test., tr. p. 2461; Westerman test., tr. pp. 654-55).

16. During employment negotiations, Arnold Westerman, Osheroff's attorney, provided information to Dr. Greenspan and his attorney, Larry Rubin, concerning Dr. Osheroff's contractual arrangement with NMC. Mr. Westerman sent to Mr. Rubin the confidential contract between Osheroff and NMC, the Consulting and Profit-Sharing Agreement, as well as a financial statement prepared by Frank Notaris for Osheroff's professional corporation. (Westerman test., tr. pp. 656-57; Pl. Ex. 4; Greenspan test., tr. p. 2345).

Osheroff's Depression

17. During the summer and fall of 1978, Dr. Osheroff became severely depressed. The depression was precipitated by the departure to Europe of his two young children from a former marriage and the sale of his dialysis centers to NMC. (Dot Smith test., tr. p. 865; Osheroff test., tr. pp. 246-48).

18. As his depression deepened, Dr. Osheroff gradually withdrew from the practice of medicine. During the fall of 1978 he did continue to see patients in the hospitals, in the dialysis center, and in his office, but he increasingly did less and less work in the practice. (Osheroff test., tr. pp. 246-49; Dot Smith test., tr. p. 867).

19. During the fall of 1978, Dr. Osheroff saw several psychiatrists in an effort to end his depression. He consulted with Dr. Wellhouse, a psychiatrist, Dr. Nathan Kline, Dr. Ralph Moore, and Dr. Frank Board. (Osheroff test., tr. pp. 588-92). Dr. Greenspan knew that Dr. Osheroff was seeking this treatment, and in fact, accompanied Dr. Osheroff on several occasions in his

sessions with Dr. Wellhouse. (Osheroff test., tr. pp. 254-255). Both Dr. Greenspan and Dr. Tolkan knew at that time that Dr. Osheroff was suffering from a serious depression. (Greenspan test., tr. p. 2465; Tolkan test., tr. pp. 1762, 1835-37)

20. During the fall of 1978 Dr. Greenspan encouraged Dr. Osheroff on numerous occasions to hospitalize himself. (Osheroff test., tr. p. 258). Even after Dr. Osheroff had consulted with Dr. Moore and informed Dr. Greenspan of Dr. Moore's proposed out-patient treatment with anti-depressant medication, Dr. Greenspan still insisted that Osheroff enter a hospital. Greenspan stated that he would take care of the practice in Osheroff's absence and that if Osheroff did not go to the hospital he would leave. (Osheroff test., tr. pp. 260-62; Westerman test., tr. p. 658; Greenspan test., tr. pp. 2474-75).

21. Dr. Greenspan was Dr. Osheroff's major confidant during the fall and early winter of 1978. (Greenspan test., tr. pp. 2467-68). Dr. Osheroff was a constant visitor in the Greenspan home during that period of time, and he discussed with Dr. Greenspan and his wife Bonnie Greenspan the intimate details of his personal problems and his depression. Dr. Osheroff trusted and relied on Dr. Greenspan's support at that time. (B. Greenspan test., tr. p. 2254; Osheroff test., tr. pp. 261-62).

22. During this period Dr. Greenspan continually assured Dr. Osheroff and his representatives that he could maintain medical practice until Dr. Osheroff recovered from his depression. Dr. Greenspan made this representation to Dr. Osheroff, attorneys Arnold Westerman and Martin Gannon, to his account-

ant Frank Notaris and to Dr. Tolkan. (Greenspan test., tr. pp. 2599, 2476-77, 2460; Answer to Complaint).

23. Dr. Greenspan discussed this commitment with Dr. Tolkan, who also agreed to maintain the practice until Osheroff's return from hospitalization. (Greenspan test., tr. pp. 2606-07; Answer to Bill of Complaint).

24. At the time Dr. Greenspan made this commitment to maintain Dr. Osheroff's practice, he sought the advice of his attorney, Lawrence Rubin, regarding the duties and obligations demanded by this commitment. (Greenspan test., tr. pp. 2607-08).

Chestnut Lodge

25. On January 2, 1979, Dr. Osheroff voluntarily committed himself to Chestnut Lodge, a private psychiatric facility in Rockville, Maryland, for treatment of his depression. Dr. Greenspan, along with Dr. Osheroff's step father, Louis Bader, drove Dr. Osheroff to the hospital, and during the drive, Dr. Greenspan assured Dr. Osheroff several times that he would take care of the medical practice while Osheroff was away. (Bader test., tr. pp. 168-69).

26. Chestnut Lodge is a private psychiatric facility specializing in the use of psychoanalysis for the long-term treatment of schizophrenia and other psychotic conditions. Chestnut Lodge does not treat depression with medication. (Osheroff test., tr. pp. 311-13).

27. Dr. Osheroff was admitted to Chestnut Lodge with a diagnosis of a severe depression of nonpsychotic proportions. (Dingman depo., p. 25).

28. On the day of Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan discussed with the hospital personnel the course and proposed length of treatment for Dr. Osheroff, which he initially understood to be approximately six to twelve months. Later, Dr. Greenspan concluded that the treatment would be more than a year. (Greenspan test., tr. pp. 2599-2600).

29. An informal understanding was reached between Dr. Greenspan and the Chestnut Lodge personnel that Dr. Greenspan would be kept informed of Dr. Osheroff's progress as if Dr. Greenspan were a member of Dr. Osheroff's family. (Dingman depo. pp.14-15).

30. Within a day or two of Dr. Osheroff's entrance into Chestnut Lodge, Mr. Westerman arranged a meeting with Dr. Greenspan, Frank Notaris, and Dr. Joy Osheroff to discuss the operation of Dr. Osheroff's business in his absence. At that meeting, Drs. Greenspan and Joy Osheroff informed Westerman that they had made a study of the hospitals and found Chestnut Lodge to be a good facility for Dr. Osheroff because it would enable him to maintain contact with his business and friends in the Washington area. (Westerman test., tr. p. 660).

31. Following the meeting among Mr. Westerman, Mr. Notaris, Joy Osheroff, and Dr. Greenspan, it was agreed that all medical decisions would be handled by Dr. Greenspan. Dr. Greenspan agreed to assume the medical aspects of the business and told Mr. Westerman that he intended to act as a trustee and fiduciary for Dr. Osheroff in Osheroff's absence. (Westerman test., tr. pp. 661-62; Greenspan test., tr. pp. 2371-72, 2376).

It was also agreed at this meeting that Dr. Osheroff's financial affairs would be handled by Frank Notaris and several trusted employees of Dr. Osheroff's, including Dottie Smith and Kay Mills. (Westerman test., tr. p. 664).

32. While at Chestnut Lodge, Dr. Osheroff's phone calls were unlimited for a period of six weeks. Following that period, he was only allowed one call a week from Dr. Greenspan and one call from his parents. Greenspan's calls were for the purpose of informing Dr. Osheroff on the status of the practice. (Osheroff test., tr. pp. 276-78).

33. At some point during the first half of 1979, Dr. Greenspan was responsible for the curtailment of Dr. Osheroff's phone privileges at Chestnut Lodge. Mr. Westerman had difficulty communicating with Dr. Osheroff because his phone privileges had been removed. (Westerman test., tr. pp. 666-667).

34. On two occasions, Dottie Smith attempted to visit Dr. Osheroff at Chestnut Lodge to bring him clothes and visit him on his birthday, but she was not permitted to see him. (Dot Smith test., tr. p. 9).

35. In the ten month period that Osheroff was hospitalized, the only person in the dialysis unit and medical practice who knew anything about Osheroff's mental condition was Dr. Greenspan. (Greenspan test., tr. p. 2544; Smith test. tr. p. 11).

36. During Dr. Osheroff's stay at Chestnut Lodge, Dottie Smith tried to call him several times but was not permitted to speak to him. Dottie Smith did speak to Dr. Osheroff

on those occasions when Dr. Osheroff called the office, but she was never able to place a call to Dr. Osheroff at Chestnut Lodge during his confinement in that institution. (Smith test., tr. pp. 8-9).

37. Dr. Greenspan contacted Dr. Osheroff once a week on Sunday. Sometimes Dr. Greenspan would discuss with Dottie Smith the conversations he had with Dr. Osheroff, at which time Dr. Greenspan told her that Dr. Osheroff was progressing well. (Smith test., tr. pp. 10-11).

38. During the meeting among Westerman, Notaris, Greenspan and Joy Osheroff held shortly after Dr. Osheroff entered Chestnut Lodge, it was indicated to Dr. Greenspan that if any sale of the practice were to take place, Greenspan would receive first opportunity to buy it; however both Westerman and Notaris felt at that time that the proper thing to do would be to wait and see whether Osheroff would improve. (Notaris test., tr. p. 11). During Dr. Osheroff's absence, Frank Notaris made constant and frequent visits to Dr. Osheroff's office in order to ascertain how the practice was doing. During these visits, Notaris spoke frequently with Dr. Greenspan. (Notaris test., tr. pp. 8-10).

39. During the first two to three months of 1979, Dr. Greenspan was pressing Notaris for numbers concerning the sale of the practice. The impression that Notaris got from Greenspan at that time was that Greenspan had concluded that Dr. Osheroff was not going to get well. Greenspan led Notaris to believe that Osheroff was not going to be able to return to the Center a well

man and therefore a sale should be discussed and that they should start talking about numbers in terms of an agreement. (Notaris test., tr. pp. 1282-83).

40. During Dr. Osheroff's confinement at Chestnut Lodge, he received no medication for his depression and his physical and mental state deteriorated. (Osheroff test., tr. pp. 278-96).

41. During Dr. Osheroff's confinement at Chestnut Lodge, he spoke to Dr. Greenspan on the phone and asked him to help him get out. (Osheroff test., tr. p. 294). Greenspan was Osheroff's only link to the outside world during Osheroff's confinement at Chestnut Lodge, especially after his phone calls were limited. (Osheroff test., tr. p. 296).

42. Although Osheroff told Greenspan about the conditions at Chestnut Lodge, Greenspan told Dr. Osheroff that Chestnut Lodge would make him happy, promised to continue to take care of Osheroff's interests and to keep him abreast of the practice through the Sunday evening phone calls. (Osheroff test., tr. pp. 297-99).

43. After Dr. Osheroff left the practice for Chestnut Lodge, Dr. Greenspan instructed Dottie Smith to designate for his care all the referrals and all the new patients in the Alexandria area. (Dot Smith test., tr. pp. 1000, 11-12).

44. After Dr. Osheroff entered Chestnut Lodge, Dr. Greenspan told Dottie Smith that he would see all new patients and renal consults that came into the office, and that Dr. Tolkan would continue to see all the new patients in the outbound hospitals. (Dot Smith test., tr. pp. 1004-06).

45. Following Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan authorized a raise of \$20,000 for Dr. Tolkan. (Tolkan test., tr. p. 1823).

46. Shortly after Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan's salary was raised from \$50,000 to \$100,000. Greenspan never discussed this raise with Dr. Osheroff. (Osheroff test., tr. pp. 273-74, 300; Greenspan test., tr. p. 2608).

47. After Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan arranged a \$4,000 raise for Mabel Lowrey, a secretary in Dr. Osheroff's office. (Dot Smith test., tr. p. 14).

48. After Dr. Osheroff's admission to Chestnut Lodge, Dr. Greenspan hired Peggy Hess as head nurse of NVDC. Ms. Hess was a friend of Bonnie Greenspan's and in February of 1979, Dr. Greenspan called Ms. Hess to invite her to interview for the position of head nurse. Ms. Hess accepted the position in March, 1979 and began work at NVDC on April 10, 1979. (Hess test., tr. pp. 1651-1655).

Greenspan - Acting Medical Director

49. In March of 1979, Dr. Greenspan contacted Dr. Osheroff's attorney, Mr. Westerman, seeking to have himself officially associated in the practice of medicine with Dr. Osheroff. (Westerman test., tr. pp. 650-51).

50. As a result of his conversation with Mr. Westerman, Dr. Greenspan dictated a letter indicating that he was formally "associated" in the practice of medicine with Dr. Osheroff. (Pl. Ex. 8). Greenspan personally carried the letter to Dr. Osheroff

in Chestnut Lodge on March 23, 1979, and obtained Dr. Osheroff's signature. (Greenspan test., tr. pp. 2609-10).

51. Pursuant to the March 23, 1979 letter to Dr. Hampers (Pl. Ex. 8), Dr. Greenspan was given the rights provided in Section 14 of Dr. Osheroff's contract with NMC, (Pl. Ex. 1); i.e.; that in the event of Dr. Osheroff's disability, Dr. Greenspan would have the right to obtain the practice and renegotiate with NMC to provide exclusive medical services at the dialysis unit. (Westerman test., tr. p. 652; Greenspan test., tr. pp. 2613-14).

52. "Disability" under Dr. Osheroff's contract with NMC was defined as the continuing inability for a period of twelve months of Dr. Osheroff to perform his duties under the contract by reason of physical or mental impairment. (Pl. Ex. 1, p. 796).

53. On or about March 9, 1979, Dr. Robert Greenspan was formally appointed Acting Medical Director of the Northern Virginia Dialysis Center and the Fredericksburg Dialysis Center. This appointment was formally acknowledged by Constantine L. Hampers, M.D., Chairman of the Board of NMC on March 29, 1979. (Pl. Ex. 5).

54. During Osheroff's hospitalization at Chestnut Lodge, Dr. Greenspan visited three times, the last time to enable Osheroff to sign Pl. Ex. 8, associating Greenspan with the practice. (Osheroff test., tr. pp. 262-63).

55. After Greenspan met with Osheroff at Chestnut Lodge to obtain Dr. Osheroff's signature on Pl. Ex. 8, and after he had received a \$50,000 raise, Greenspan's visits to Chestnut Lodge stopped. (Osheroff test., tr. p. 299-300).

NVDC Bylaws

56. On March 19, 1979, Dr. Robert Greenspan promulgated bylaws for the medical staff of the NVDC. (Pl. Ex. 6). These bylaws specifically provided that "membership in the medical staff shall usually be granted to a physician who offers evidence that he or she is a member of the staff of the George Washington University Medical Center." (Pl. Ex. 6, p. 1602). This provision was directly contrary to Dr. Osheroff's contract with NMC, as, under that contract, Dr. Osheroff retained the exclusive right to admit physicians of his choice. (Westerman test., tr. pp. 669-70).

57. On or about March 22, 1979, Robert E. Greenspan, M.D., as Chairman of the governing body, promulgated bylaws for the Governing Body of the NVDC, Inc. (Pl. Ex. 7). These bylaws provided for various due process procedures including an opportunity for a hearing before the Executive Committee of the medical staff to any physician whose privileges were suspended or terminated. (pp. 1599-1600).

58. Dr. Greenspan never discussed the medical staff bylaws of the NVDC with Mr. Westerman. (Westerman test., tr. p. 668).

59. Greenspan never discussed the bylaws with Tolkan. (Tolkan test., tr. p 1916).

60. It was Dr. Greenspan's choice to retain in the bylaws the section that closed the staff to everyone but George Washington University associates. (Greenspan test., tr. pp. 2558-59).

61. At the time that Greenspan drafted the bylaws, he included Peggy Hess as head nurse in the Governing Body. Greenspan did not give Hess a copy of the bylaws nor did he give Tolkan or Goldberger a copy of the bylaws. (Greenspan test., tr. pp. 2560-61; Hess test., tr. pp. 1723-25).

62. Greenspan made no effort to have the bylaws known to anybody other than Pat Shine. (Greenspan test., tr. p. 2561).

Prince William Dialysis Facility

63. Within two months of Dr. Osheroff's admission to Chestnut Lodge, Greenspan began efforts to open a competing dialysis facility in Woodbridge, Virginia. (Greenspan test., tr. p. 2391).

64. The need for a dialysis unit in Woodbridge became clear to Greenspan in February of 1979 during a blizzard when a number of NVDC patients missed treatment. (Greenspan test., tr. p. 2391).

65. In March or April of 1979, Greenspan first began to look seriously into obtaining a certificate of need for Woodbridge facility. At that time, Greenspan had become aware of interest in a unit by the Bethesda (or "Georgetown") group who had been looking in the Manassas area, as well as Dr. Kim who was interested in setting up a dialysis facility in Woodbridge. (Greenspan test., tr. p. 2392).

66. Greenspan felt that he needed to act to set up a unit in the Woodbridge area for two reasons, one being that he had a relationship with the patients and feared that if another unit would be set up, it would be a closed unit and he would lose

contact with the patients. Greenspan also felt that he was protecting Dr. Osheroff's practice. (Greenspan test., tr. pp. 2393-94).

67. Dr. Greenspan told Dr. Tolkan in February or March of 1979 that he had been approached by the Georgetown group with an offer to join their practice and that if he did not join them, the Georgetown group would set up a competing practice in Alexandria. (Tolkan test., tr. p. 1909).

68. In early 1979, Dr. Tolkan was approached by the Georgetown group who tried to get him to join them and Dr. Tolkan informed them he thought he would soon have a written contract with Dr. Osheroff. (Tolkan test., tr. p. 1908).

69. At the same time, Dr. Tolkan learned that Dr. Kim was considering opening a unit in Prince William County, which posed a threat of competition. (Tolkan test., tr. p. 1910).

70. During Greenspan's visits to Osheroff in Chestnut Lodge during the first 3 months of 1979, he did not tell Dr. Osheroff about the proposed competing dialysis facility. (Osheroff test., tr. p. 302).

71. In July of 1979, Dr. Greenspan contacted Dr. Hampers, Chairman of the Board of NMC, to inquire about NMC's posture in establishing a facility in Woodbridge. Hampers initially told Greenspan that he was helpless to do anything about it, but on reflection, decided that Greenspan should be bound by the non-compete clause in Dr. Osheroff's contract with NMC. (Hampers depo. pp. 25-26).

72. Greenspan discussed with Tolkan, his meeting with Hampers. (Tolkan test., tr. p. 1931).

73. At the time of the meeting with Hampers, Greenspan and Tolkan assumed that Osheroff could not go to Prince William County because of contractual restrictions. (Pl. Ex. 1, pp. 797-98). Greenspan was concerned that another unit would be set up in that area and patients would be lost to that practice. (Greenspan test., tr. p. 2393; Tolkan test., tr. pp. 1929-30).

74. Tolkan also recognized that a competing unit in Prince William would do great harm to Dr. Osheroff's practice, and he intended to be involved in the Prince William unit, either as part of Dr. Osheroff's practice, or as a competitor. (Tolkan test., tr. pp. 1932-34).

75. Tolkan expected from the beginning that he might have a financial interest in the Prince William Facility. (Tolkan test., tr. p. 1935).

76. Tolkan knew in February and March 1979, that Greenspan intended to file an application for a competing dialysis facility. (Tolkan test., tr. pp. 1931-1935).

77. In July of 1979, Dr. Greenspan called Mr. Westerman and discussed the application for the Prince William facility. At that time, Mr. Westerman asked Dr. Greenspan why the application was to be filed in Greenspan's name rather than Dr. Osheroff's, and Greenspan explained that it was because Osheroff was not around to take care of the details and he felt it best to have it put in his name for that reason. However, Dr. Greenspan assured Mr. Westerman that it was Dr. Osheroff's application, that he was his employee and it was held for Dr. Osheroff. (Westerman test., tr. p. 676).

78. During the discussion between Mr. Westerman and Dr. Greenspan concerning Greenspan's application for the Prince William facility, Dr. Greenspan told Mr. Westerman that he had asked for a NMC agreement to join in the unit and that NMC had waived and agreed that he could go ahead and open it. (Westerman test., tr. p. 677).

79. On July 26, 1979, the date of the phone conversation between Westerman and Dr. Greenspan concerning the Prince William application, Mr. Westerman made a contemporaneous memo of the conversation. (Westerman test., tr. pp. 677-78; Pl. Ex. 13).

80. During a telephone conversation with Dr. Greenspan in early summer of 1979, Frank Notaris first heard that Dr. Greenspan intended to file an application for a dialysis facility in Woodbridge. When Notaris inquired of Greenspan whether he was going to file it under the name of the corporation, Greenspan replied that he could not do that but was going to file it under his own name because he was prevented from doing so by Dr. Osheroff's contract with NMC. Dr. Greenspan indicated to Notaris that the reason he was filing the application for the Woodbridge facility was because the Bethesda group had filed an application for Manassas and he felt that a Woodbridge facility would protect the Alexandria unit from losing patients that were presently coming from the Woodbridge area and might transfer to the Manassas facility proposed by the Bethesda group. (Notaris test., tr. pp. 16-17).

81. During his telephone conversation with Dr. Greenspan, Frank Notaris gained the clear impression that, although Greenspan was filing the Woodbridge application under his own

name, the facility was an operation to be managed by both Osheroff and Greenspan. (Notaris test., tr. p. 17).

82. Dottie Smith first heard about the proposed Prince William facility when Dr. Greenspan requested that she compile some data for him including the names, addresses, titles and phone numbers of civic leaders in the Prince William County area. Dr. Greenspan told her he was preparing an application for a Prince William Dialysis facility and also asked her to gather names and locations of patients who lived in that area. Dr. Greenspan told Dottie Smith that the proposed Prince William Center would be open for his and Dr. Osheroff's partnership. (Smith test., tr. p. 15; Smith test., tr. p. 1014).

83. In the summer of 1979, Kay Mills first became aware that Dr. Greenspan was filing an application for a dialysis facility in Prince William. (Mills test., tr. p. 917). She, too, was led to believe by Dr. Greenspan that the facility would belong to Osheroff. (Mills test., tr. p. 920).

Joseph Long and Peggy Hess

84. Joseph C. Long, Jr. is the Regional Administrator for Medical Administrative Services in Silver Hill, Maryland (Long depo., p. 4). Prior to that time, he was administrator for the Mid Atlantic Nephrology Center in Camp Springs, Maryland for four years. (Long depo., pp. 4-5). During that time, he worked with Peggy Hess at the Mid Atlantic Center. (Long depo., p. 6).

85. Joseph Long's company provided consulting services for the Prince William Dialysis facility with regard to the state of Virginia Certificate of Need application. Mr. Long first became involved with that application sometime in June or July of 1979. (Long depo., pp. 10-12).

86. Dr. Greenspan was referred to Joseph Long by Peggy Hess. Hess had previously been involved in a suit between Long and Dr. Solano when Long tried to set up a competing dialysis facility in Laurel Springs, Maryland. (Hess test., tr. pp. 1637-39; Long depo, pp. 46-47).

87. When Hess referred Greenspan to Long, she knew Greenspan was seeking help in setting up another dialysis facility. (Hess test., tr. pp. 1684-86).

88. Long told Greenspan that he should keep the Prince William Dialysis facility separate in funds and employees used. Long told Greenspan that he could not use the facilities of the Northern Virginia Dialysis Center to promote the application. (Long depo., p. 4).

89. Long advised Greenspan, because of Long's experience with regard to the lawsuit with Solano, that he would have a problem in the nature of a "corporate opportunity" if he did not keep the facilities separate. Long discussed with Greenspan that while he was working for Osheroff he should not provide for himself at the same time. (Long depo., p. 42; Greenspan test., tr. pp. 2527-28).

90. At the time Greenspan talked with Jay Long before the Prince William application was filed, Long warned Greenspan that there would be problems with patients choosing doctors. Greenspan knew that Long had been involved in a lawsuit over the same problem. (Greenspan test., tr. p. 2641).

91. Despite Long's warnings about corporate opportunity problems, Greenspan never chose to put in writing to Dr. Osheroff

or his representatives any information concerning the establishment of the Prince William facility. (Greenspan test., p. 2642).

United Health Care

92. During 1979, there were two other inquiries regarding potential filing of application for a dialysis facility in the Prince William County area. One was from a physician practicing in eastern Prince William County [Dr. Kim] and the other from a California corporation, United Health Care. (Montgomery test., tr. p. 1402).

93. Prior to Osheroff's return from his hospitalization, Greenspan had negotiated with United Health Care. (Greenspan test., tr. pp. 2601-02).

94. Greenspan had never informed Notaris or Westerman of his negotiations with United Health Care Association, nor did Greenspan inform Dr. Hampers of his discussions with United Health Care during his July meeting in Boston. (Greenspan test., tr. p. 2637).

Prince William Dialysis Facility

95. On July 17, 1979, Greenspan received the application for a Certificate of Need for a dialysis facility in Woodbridge, Virginia. (Pl. Ex. 12). This letter was addressed to Greenspan at the Northern Virginia Dialysis Center and set forth the time schedule for state review: application completed September 10, HSA review completed November 9, State Health Coordinating Committee review November 29, Commissioner's decision December 9.

96. The Health Systems Agency (HSA) is a regional planning agency that functions under federal and Virginia law to plan for the development including facilities such as hospitals, nursing homes, and renal dialysis facilities. In order to open a renal dialysis facility in Virginia, one of the procedures an applicant must follow is the certificate of need review which is overseen by the HSA. Under Virginia law, a proposed dialysis facility must be certified by the state and approved by the state health commissioner. In order to obtain that certification, an application must be filed in a form prescribed by the state health commissioner which provides all information requested. A public hearing is scheduled within the time constraints prescribed by the law and that public hearing is conducted by the local HSA. After the public hearing, the board of directors of the HSA makes a formal recommendation based on the results of the public hearing and its analysis of the application. That recommendation is transmitted to the state health commissioner. At the state level, there is another review body which makes a recommendation on the application as well. These two recommendations go to the state health commissioner who within a prescribed period of time must make a decision on the application either approving it or disapproving it. In addition to state requirements, the federal government must certify such a facility. (Montgomery test., tr. pp. 1358-60).

"Sale" of Practice

97. In late spring, early summer of 1979, Notaris and Westerman met with Dr. Osheroff to discuss whether Osheroff would

approve or indeed 'wanted them to seriously consider the idea of a sale of his practice. (Notaris test., tr. p. 13).

98. In the summer of 1979, when Frank Notaris observed Dr. Osheroff in Chestnut Lodge, Osheroff appeared to be in a worse state than when he first entered and he did not seem to be interested at all in the discussion regarding potential sale of his practice. Instead, his interest was on his family. (Notaris test., tr. p. 14).

99. In June of 1979, Mr. Westerman became concerned with the prospect of negotiating a sale or partnership agreement in Dr. Osheroff's absence and instituted a proceeding for the appointment of Mr. Evans and Mr. Bader as guardians for Dr. Osheroff. Mr. Westerman never thought that Dr. Osheroff was incompetent in any mental capacity. (Westerman test., tr. pp. 672-73).

100. In July of 1979, Frank Notaris was instructed to put together figures with regard to the value of Dr. Osheroff's practice for potential sale to Dr. Greenspan. Those figures were prepared and in late September 1979, the financial statement for the previous two years and 11 months were sent to Mr. Westerman and Mr. Evans. (Notaris test., tr. p. 15).

Transfer From Chestnut Lodge

101. By the summer of 1979, Dr. Osheroff's condition had deteriorated drastically. (Osheroff test., tr. pp. 310-17; Bader test., tr. pp. 169-71). Upon the recommendation of Dr. Sigmund Lebensohn, Dr. Osheroff was transferred on July 31, 1979 from

Chestnut Lodge to the Silver Hill facility in New Canaan, Connecticut where his depression was treated with medication.

(Bader test., tr. pp. 172-74).

102. Dr. Greenspan knew that while he was at Chestnut Lodge Osheroff had not been getting better, and that Osheroff was not getting medication at that facility. (Greenspan test., tr. pp. 2509-10).

103. When Dr. Osheroff transferred from Chestnut Lodge on August 1, 1979, Dr. Greenspan called Dr. Dingman and expressed his concern over whether Dr. Osheroff's transfer was proper. (Dingman depo. p. 17; Greenspan test., tr. pp. 2518-19).

104. Greenspan and Tolkan both objected to Dr. Osheroff's transfer from Chestnut Lodge. (Greenspan test., tr. p. 2510; Tolkan test., tr. pp. 1968-70).

105. Greenspan told Dottie Smith that he objected to Osheroff's transfer because Osheroff had been doing "so well" at Chestnut Lodge. (Smith test., tr. p. 21).

106. Pat Shine, Administrator of NVDC, discussed with Dr. Greenspan his visits to Dr. Osheroff at Chestnut Lodge during the spring and early summer of 1979. Greenspan expressed the concern that Dr. Osheroff stay in therapy at Chestnut Lodge. He also discussed with Pat Shine whether or not Osheroff would be able to come back at the end of the year. Greenspan indicated to Pat Shine that Osheroff's condition was probably more serious than was initially known and that Osheroff probably would not be able to come back within a year. (Shine depo. pp. 38-40).

107. During Osheroff's hospitalization at Chestnut Lodge, Greenspan visited him only three times. During the last two or three months that Osheroff was in Chestnut Lodge, when he

was applying for the Woodbridge facility, Greenspan did not visit Dr. Osheroff at all. Further, during this same period, he had absolutely no phone contact with Dr. Osheroff. (Greenspan test., tr. pp. 2470, 2493).

108. Dr. Tolkan never visited, called or wrote Dr. Osheroff while he was at Chestnut Lodge or Silver Hill. (Osheroff test., tr. p. 469; Tolkan test., tr. pp. 1773-74).

109. Mr. Westerman's twice-weekly telephone conversations with Dr. Greenspan decreased beginning in late May or early June of 1979 to less than once or twice a month. (Westerman test., tr. pp. 665-666).

110. During the period when Greenspan was applying for the Woodbridge facility, Dr. Greenspan's contact with Mr. Notaris also decreased significantly. (Notaris test., tr. pp. 20-21).

111. During the six month period of 1979 following Greenspan's last visit to Osheroff at Chestnut Lodge in April, Greenspan made no effort to keep Osheroff apprised of his activities with regard to the Prince William facility. Nor did Greenspan keep Osheroff apprised of what was happening to his medical practice during his absence. (Greenspan test., tr., p. 2517).

112. During the summer of 1979 Greenspan told Dr. Haut, Chief of Medicine at Alexandria Hospital, that Dr. Osheroff was in a psychiatric facility. (Greenspan test., tr. pp. 2422-23). Tolkan also discussed Dr. Osheroff's hospitalization with Dr. Haut during this same period of time. (Tolkan depo., pp. 111, 115).

113. During the summer of 1979, while Dr. Osheroff was still in Chestnut Lodge, Dr. Greenspan directed Dot Smith not to

renew Dr. Osheroff's license to practice medicine. Dr. Greenspan said that he could see no reason for the renewal since it was more than likely that Dr. Osheroff would not be coming back any time soon. Dottie Smith renewed the license anyway because she did not want to let the license lapse in light of the possibility that Dr. Osheroff might return. (Smith test., tr. pp. 38-39).

Solicitation Re: PWDF

114. Beginning in August, 1979, immediately after Dr. Osheroff's transfer to Silver Hill and continuing into September and October, 1979, Dr. Robert Greenspan wrote numerous letters to public officials and other groups in Prince William County soliciting their support for a dialysis facility in Prince William County. These letters all indicated that the new facility would be part of NVDC. These letters were all written on NVDC stationery and signed by Robert E. Greenspan as Acting Medical Director. In these letters, Dr. Greenspan referred to "we" having provided acute dialysis in Prince William County for the "last several years." Greenspan also made constant reference to "our chronic dialysis program in Alexandria." (Pl. Exs. 14, 15, 16, 17, 20, 21, 25, 35, 36, 42). In these letters, Greenspan intended "we" to mean Osheroff's practice. (Greenspan test., tr. p. 2635-2636).

115. Also, beginning in August 1979, Dr. Greenspan received letters in return to his letters of solicitation for support directed to him at the NVDC and indicating that he was "planning an additional unit in the Woodbridge-Manassas area of Northern Virginia." (Pl. Ex. 8).

116. During August of 1979, Dr. Greenspan met with various public bodies to solicit support for the Prince William

Dialysis facility. (Pl. Exs. 22-29; Greenspan test., tr. pp. 2502-03).

117. Dr. Tolkan was aware of all these activities by Greenspan. (Tolkan test., tr. pp. 1918-19).

118. On August 13, 1979, the council for the City of Manassas issued a resolution indicating that "whereas NVDC, Inc. proposes to establish a dialysis center in Prince William County on Davis Ford Road near Hoadley." (Pl. Ex. 24). Dr. Greenspan thus led the council for the City of Manassas to believe that the NVDC was establishing the dialysis center in Woodbridge, Virginia.

119. Greenspan wrote NVDC patients on August 7, 1979 as the Acting Medical Director telling them that in order to have the Prince William facility approved, they needed community support. (Greenspan test., tr. pp. 2697-98; Pl. Ex. 100).

120. At the same time Greenspan told the patients in the memo that "this unit will be staffed by some of the same nurses and technicians now at NVDC as well as by the same physicians." (Greenspan test., tr. p. 2698; Pl. Ex. 100).

121. Dr. Greenspan never showed Dr. Osheroff any of the letters he wrote to these patients and various public bodies. Also, Dr. Osheroff never authorized Greenspan to make application for any other dialysis facility in the name of the NVDC. (Osheroff test., tr. p. 302).

122. On August 8, 1979, Brad Evans and Louis Bader were appointed as Dr. Osheroff's guardians. (Pl. Ex. 83).

August Meeting Re: Sale Or Partnership

123. On August 21, 1979, a meeting was held among Mr. Westerman, Dr. Greenspan and his lawyer, Larry Rubin, Mr. Evans and Mr. Lou Bader to discuss the possibility of a partnership or sale of Dr. Osheroff's practice. The guardians did not wish to see the practice sold but wanted a partnership which would enable Dr. Osheroff to return to practice, as he had been progressing well at Silver Hill. Dr. Greenspan rejected any partnership or probationary period which would enable Dr. Osheroff to return to the practice. At that time, Dr. Greenspan stated that it had been his efforts and his activities that held the practice together and increased the number of patients and that he thought those considerations should be recognized when arriving at a price. (Westerman test., tr. pp. 671-74; Bader test., tr. pp. 178-83; Greenspan test., tr. pp. 2524-25).

124. At the August 21 meeting, there was never a firm proposal for a sale communicated to Dr. Greenspan or his attorney. (Westerman test., tr. p. 675). Greenspan did, however, offer a million dollars for the practice at that meeting. (Greenspan test., tr. p. 2616).

125. The result of the August meeting was that Greenspan and his attorney were to receive more financial information concerning Dr. Osheroff's practice. (Greenspan test., tr. pp. 2390-91).

126. Following the August 21 meeting, on August 23, 1979, Brad Evans forwarded to Larry Rubin, Greenspan's attorney, a copy of the Consulting and Profit Sharing Agreement (Pl. Ex. 1) and other confidential information concerning Dr. Osheroff's business. (Pl. Ex. 79).

PWDF Application

127. On September 7, 1979, Greenspan filed the application for a Certificate of Need for the Prince William Dialysis Facility. (Montgomery test., tr. p. 1373; Pl. Ex. 34).

128. In the application, Greenspan and Tolkan were listed as co-medical directors. (Pl. Ex. 34; Tolkan test., tr. p. 1855).

129. Both Greenspan and Tolkan signed letters of intent to be physicians in the new facility and included these letters with their resumes in the application. (Pl. Ex. 34, pp. 1834-1837).

130. The application for the Prince William facility specifically referred to the 17 Medicare patients currently "travelling from this area to the NVDC," Greenspan knew how many patients were travelling to NVDC because he was there and he was the attending physician for those patients. (Greenspan test., tr. pp. 2629-30; Pl. Ex. 34, p. 1845).

131. The curricula vitae of those people who worked for NVDC and for Dr. Osheroff were not public records and were used in the dialysis applications Greenspan filed. (Greenspan test., tr. pp. 2695-96).

132. Greenspan used NVDC stationery to send out most of the letters regarding the Prince William Dialysis facility. (Greenspan test., tr. p. 2628).

133. Greenspan read and approved the language in the Prince William application, which states "the NVDC has reached a capacity of 2.5 shifts per day, and an additional facility in

Prince William County would allow for them to take new patients without going to a sixth shift." (Greenspan test., tr. pp. 2632-33; Pl. Ex. 34, p. 1849).

134. The knowledge of whether the NVDC expand or not expand with the number of patients was not public record. (Greenspan test., tr. p. 2696).

135. When Greenspan put in the application in September 1979, Dr. Hampers called Greenspan to tell him that he was going to be in violation of his non-compete clause and that Hampers would not continue Greenspan as Acting Medical Director of the NVDC as long as he had a competitive unit. (Hampers depo., p. 26).

136. The majority of the staff listed by Greenspan in the application for the Prince William facility were under the employ of NMC. The social worker who was listed in the application was someone who had worked for Ray for years and whom Greenspan had not met until he came to work in Osheroff's practice. The dietician and the nurses who were listed in the application also had worked for Osheroff and had not previously known Greenspan until he came to work in Osheroff's practice. (Greenspan test., tr. pp. 2531-32).

137. Pl. Ex. 24 was secured as part of Greenspan's preparation to open the Prince William facility. The fifth paragraph of Pl. Ex. 24 which reads "now, therefore, be it resolved by the council of the city of Manassas meeting in regular session the 13th day of August, 1979, that the efforts of the NVDC, Inc. to establish a dialysis center in Prince William County be endorsed." That document, containing that paragraph,

was part of the application prepared by Dr. Greenspan for the Prince William facility. (Greenspan test., tr. p. 2496).

138. Greenspan never sent Osheroff a copy of any of the letters soliciting support for the proposed Prince William facility nor did he send Osheroff a copy of the application for certificate of need. (Greenspan test., t. pp. 2493-94).

139. The application contains a financial statement prepared by Frank Notaris at the request of Dr. Greenspan in August of 1979. The financial statement was prepared on or about August 24, 1979, sometime after Notaris' conversation with Greenspan concerning the facility. Dr. Greenspan did not hire Notaris apart from his duties as an accountant for Osheroff's corporation, rather Notaris felt at the time he was performing a service basically for Osheroff, Inc. inasmuch as the provider number Greenspan sought was to be filed and eventually used by Osheroff, Inc. Mr. Notaris' fees were paid by the corporation. (Notaris test., tr. pp. 19-20; Pl. Ex. 34, pp. 1870-71).

140. In September of 1979, Kay Mills inquired of Dr. Greenspan if he wanted anything done about provider numbers from the insurance company for billing purposes for the Prince William facility. Greenspan told her he wanted her to file with the insurance companies for provider numbers. (Mills test., tr. p. 918).

141. Kay Mills sent out a form letter to all insurance companies for coverage for the Prince William facility. That letter was written on stationery bearing the address of Dr. Osheroff, (see Pl. Ex. 75) in which she requested a provider

number for Dr. Osheroff and also requested applications for the proposed Prince William facility. (Mills test., tr. p. 920).

142. At the time Kay Mills sent the letter, Pl. Ex. 75, requesting provider numbers for insurance coverage for the Prince William Dialysis facility, she thought it was going to be operated by Drs. Osheroff, Greenspan and Tolkan. That letter was sent out by Mills when she was working for Dr. Osheroff. Mills would not have sent the letter had she known the facility was going to be Dr. Greenspan's and not Dr. Osheroff's. (Mills test., tr. pp. 919-20).

143. When Dr. Tolkan signed a letter in support of the application for the Prince William facility on August 30, 1979, he did not make any effort to inform Dr. Osheroff, Mr. Westerman or Mr. Notaris of his support of an application for another facility. (Tolkan test., tr. pp. 1919-21).

144. Dr. Tolkan spoke with Dean Montgomery of the HSA about the application's approval, and he wrote letters to the HSA in favor of the application. (Montgomery test., tr. p. 1423).

145. Dr. Tolkan felt that it was essential to Osheroff's practice and the NVDC that they have a unit in Prince William County, as otherwise, a competing unit would take the patients. (Tolkan test., tr. p. 1934).

146. Dr. Osheroff did not authorize or have any indication that other employees would be leaving his employment to work for the Prince William facility as indicated by the inclusion of their curricula vitae in the Prince William application. (Osheroff test., tr. p. 636; Pl. Ex. 34, pp. 1826, 1828).

147. Dr. Osheroff did not authorize either Dr. Greenspan or Dr. Tolkan to use the NVDC stationery bearing Dr. Osheroff's name on the letterhead as part of the application for the Prince William facility. (Osheroff test., tr. p. 637).

148. On the evening that Federal Express was supposed to come to the office and pick up the application for certificate of need for the Prince William facility to take it to Richmond, Dr. Greenspan was in his office with the application in his hand and commented on how well it had been written, stating that BMA would not be able to do an application in two weeks which would block his application for the Prince William Dialysis Center. At that time, Dr. Greenspan stated that it would be a facility that he and Dr. Osheroff would share. Greenspan also noted that Ray would be pleased with the application. (Smith test., tr. pp. 18-19).

149. On page 1849 of Pl. Ex. 34, the application for certificate of need for the Prince William Dialysis facility, Dr. Greenspan stated that he would be providing better access to patients already under his care. Those patients under Dr. Greenspan's care were those at the NVDC. (Osheroff test., tr. p. 631).

150. It was common knowledge in the dialysis facility in the fall of 1979 that Dr. Greenspan was setting up a facility in Woodbridge. The NVDC staff assumed that the Prince William facility would be part of the NVDC. (Collins test., tr. pp. 2040, 2043; see Smith test., tr. p. 2187).

151. The opening of the Prince William Dialysis facility was discussed at a staff meeting, the minutes of which are con-

tained in Pl. Ex. 94. The opening of the new facility was discussed in relation to staffing problems at the NVDC and one consideration was that an additional evening shift at NVDC would be avoided since some patients would be leaving to go to the Woodbridge unit. (Collings test., tr. p. 2041).

152. Peggy Hess was present at that meeting. (Collings test., tr. p. 2042).

153. Mr. McFeeley contacted Arnold Westerman in the fall of 1979 to inform him that he felt Dr. Greenspan was, by setting up a competing dialysis facility, violating the consulting agreement between NMC and Dr. Osheroff. (McFeeley depo., p. 22).

United Health Care

154. While discussions about buying the practice from Dr. Osheroff were ongoing in August, Greenspan had been negotiating with United Health Care and Dr. Kim about setting up a facility in Prince William County. (Greenspan test., tr. pp. 2525-26).

155. Greenspan had been negotiating with Mr. May of United Health Care since March or April of 1979. (Greenspan test., tr. p. 2526).

156. Greenspan was trying to stall United Health Care from setting up a dialysis unit in Prince William County. (Greenspan test., tr. p. 2527).

157. Greenspan did not give United Health Care formal rejection until he had his application for the Prince William facility all prepared and ready to file. (Greenspan test., tr. p. 2541; Pl. Exs. 76, 77, 78).

Silver Hill

158. During Dr. Osheroff's hospitalization at Silver Hill, his psychological and physical condition improved radically. (Bader test., tr. pp. 177-78).

159. At the time of his discharge from Chestnut Lodge, Dr. Osheroff's mental and physical condition had seriously deteriorated from the time he had entered the hospital. Dot Smith visited him at Silver Hill during the first two weeks of August, and observed that his appearance had drastically changed since the day he had left from Chestnut Lodge in January 1979. Dr. Osheroff had lost 55 pounds, his hair was long, and he had no motor ability in his hands, which was obvious from his inability to use a knife and fork at dinner. (Smith test., tr. p. 22). She did notice, however, that his depression had lifted somewhat, and he was willing to talk about normal, everyday things. (Smith test., tr. p. 23).

160. At Silver Hill, Dr. Osheroff was treated for his depression with medication, and after three weeks he began to respond to this treatment and his depression stopped. (Osheroff test., tr. pp. 314-15).

161. On the first occasion that Dot Smith visited Dr. Osheroff in Silver Hill, she told him that Dr. Greenspan had applied for the Prince William facility and that the facility would be part of Dr. Osheroff's practice. (Smith test., tr. p. 20)

162. Two weeks after Dottie Smith first visited Dr. Osheroff at Silver Hill, she made a second visit during which

time she observed that Dr. Osheroff's appearance had improved and his motor ability in his hands had also improved. She learned that he received therapy and was on medication for his depression. Dr. Osheroff told her he was anxious to come back to the center to practice and become a doctor again. (Smith test., tr. pp. 23-24).

163. Approximately 4 weeks prior to Dr. Osheroff's discharge from Silver Hill, Dottie Smith met him for an outing in New York City. Dottie Smith noticed an overall improvement in his condition. (Smith test., tr. p. 25).

164. After her visits to Dr. Osheroff at Silver Hill, Dot Smith told Greenspan about her visits and that Osheroff was improved and ready to come back to practice medicine. (Smith test., tr. p. 1025).

165. After seven weeks at Silver Hill, Dr. Osheroff made a weekend visit to Washington during which he consulted with a psychoanalyst, Dr. Frank Board, who would see Dr. Osheroff upon his release. He also met with his attorney Mr. Westerman to discuss lifting the guardianship. (Osheroff test., tr. p. 322). The guardianship was lifted on November 1, 1979. (Pl. Ex. 85).

166. During a furlough from Silver Hill, Dr. Osheroff had lunch with Dr. Greenspan at Clyde's Restaurant, where they discussed Dr. Osheroff's hospitalization and his desire to return to practice. At the same time, Dr. Osheroff sensed a growing negativism from Dr. Greenspan regarding Dr. Osheroff's return to the practice and Dr. Greenspan told Osheroff that Dr. Hampers did not want Dr. Osheroff to return to the practice. (Osheroff test., tr. p. 324).

167. During Dr. Osheroff's stay at Silver Hill, Dr. Greenspan did not visit or call him. (Osheroff test., tr. p. 318).

168. When Dr. Osheroff was discharged from Silver Hill on November 1, 1979, Dr. Greenspan called Dr. Dingman at Chestnut Lodge and Dr. Dingman had had no correspondence or contact with Dr. Osheroff at all while he was at Silver Hill. (Dingman depo., p. 19).

169. Greenspan expressed to Dr. Dingman his concern over whether Osheroff's discharge was premature or advisable and he asked Dingman's opinion whether Osheroff should be discharged at that time. Dingman informed Greenspan that he was not Osheroff's doctor any longer and was not there to evaluate his clinical state so he could express no opinion concerning the advisability of his discharge. (Dingman depo., p. 19).

170. Greenspan further asked Dr. Dingman whether there was any input that he, Dr. Dingman, could have into what was going on with Dr. Osheroff's discharge, and Dingman told him there was nothing he could do about it. (Dingman depo., p. 20).

171. The statement made by Greenspan on page 309 of his January 8 deposition that he did not call Dr. Dingman when Dr. Osheroff was discharged from Silver Hill was an untrue answer. (Greenspan test., tr. p. 2655).

Staff Meetings

172. In the latter part of August, 1979, amid rumors in the unit that Dr. Osheroff was possibly coming back, there was a staff meeting at which Dr. Osheroff's return was discussed. At

that staff meeting, Peggy Hess, the head nurse, commented that they didn't feel Dr. Osheroff was coming back and that Dr. Greenspan was going to continue to provide continuity of care. She stated that if Osheroff did come back, she would understand if anyone had qualms about working for him, and that she didn't want him to come back. (Young test., tr pp. 776-77).

173. As of August 1979, Peggy Hess had never seen Dr. Osheroff, had never talked to him, or practiced medicine with him. (Hess test., tr. p. 1660).

174. At the August staff meeting where Dr. Osheroff's return was discussed, most of the people who made comments expressing concern about Osheroff's return had not worked for Dr. Osheroff prior to his absence. (Young test., tr. p. 778).

175. On or about October 17, 1979, when Dr. Osheroff was preparing to return to the Washington area, both Greenspan and Tolkan refused to sign assignment of Medicare benefits forms which would assign their fees to the corporation, from which their salaries would be paid. This was a routine procedure which had been done regularly during their employment with Dr. Osheroff. Tolkan initially signed the form, but apparently after consulting with Greenspan, scratched his signature from the form. (Miller test., tr. pp. 922-24; Pl. Exs. 101, 102, 103).

176. Around this same period of time Dr. Greenspan stated to Dr. Ocuin, an area nephrologist that "by the time Dr. Osheroff got out of the hospital, there wouldn't be much of a practice left for him to sell." (Greenspan test., tr. pp. 2605-06).

November 1 - December 12
"Osheroff's Return"

177. Dr. Osheroff was discharged from Silver Hill on November 1, 1979, and he returned to the Washington area at that time. (Osheroff test., tr. p. 447).

178. Following his return to the practice on November 1, 1979 and up until November 20, Dr. Osheroff prepared himself to re-enter the practice by reviewing patient charts and by referring to new drug lists and medical tests to update his medical knowledge. Prior to December 12, 1979, Dr. Osheroff made no rounds or gave any orders for medication. (Osheroff test., tr. pp. 326-28; Tolkan test., tr. p. 1939).

179. During this period of time, neither Greenspan, Tolkan nor Hess made any effort to discuss patient care with Osheroff, nor did they discuss with him at all his return to the practice. None of these individuals made rounds or even offered to make rounds with Dr. Osheroff. (Osheroff test., tr. pp. 459, 469; Tolkan test., tr. p. 1774; Hess test., tr. pp. 1596, 1658; Greenspan test., tr. pp. 2556-57, 2403-04).

180. Peggy Hess, on numerous occasions, including informal meetings of the NVDC staff, called Dr. Osheroff "a lunatic," "incompetent," and instructed the staff not to take orders from him. (Rowe test., tr. pp. 46-49).

181. In November 1979, Dr. Osheroff met Greenspan for lunch at the Lobster Shed in Alexandria to discuss Osheroff's return to the practice. When Osheroff made it clear that he did not wish to sell his practice, but wanted to practice medicine,

Greenspan told Osheroff that Dr. Hampers wanted Osheroff to sell. Greenspan terminated the meeting. (Osheroff test., tr. p. 325; Greenspan test., tr. p. 2545).

182. Following Dr. Osheroff's return to the area, Greenspan called Kay Mills into his office and asked her whether Osheroff intended to return to practice. He stated to her that he was concerned about Osheroff's ability to practice, although he had had no opportunity to observe Osheroff practice medicine since his discharge from Silver Hill. (Mills test., tr. pp. 914-15).

183. Prior to Dr. Osheroff's release from Silver Hill, Greenspan had already made up his mind that he would not continue to work with Osheroff. (Greenspan test., tr. p. 2601).

184. The day after Mills' discussion with Greenspan, Bonnie Greenspan asked her the same question. Bonnie Greenspan was Osheroff's employee at that time, in charge of the acute dialysis technicians. (Mills test., tr. p. 916).

Staff Meetings

185. Following a visit to the center by Dr. Osheroff in November, 1979, a meeting of the NVDC staff was held at which Dr. Osheroff's return was discussed. Peggy Hess stated at that meeting that she would not work for Osheroff and if he did come back, she would stay long enough to see that all the nurses were transferred out, and then she would leave. Hess also indicated that she did not want Osheroff to return and would do what she could to prevent it. (Young test., tr. pp. 793, 779).

186. Dr. Greenspan, Eileen Collins, Diane Synan, and Sue Smith were all present at this meeting. (Young test., tr. pp. 779-80).

187. At this November meeting, Sue Smith asked if the staff could do anything to prevent Osheroff's return. Hess stated that they could write a petition refusing to work for Osheroff, but that she could not initiate it because she was head nurse. This resulted in the petition alleging Osheroff's incompetence (Pl. Ex. 96) being circulated among the staff on December 12, 1979. (Young test., tr. pp. 780-81).

PWDF - HSA Meeting

188. On November 12, 1979, the full board of the HSA approved the Prince William Dialysis Facility application. Dr. Greenspan, Dr. Tolkan, Bonnie Greenspan, and Mr. Rubin all attended this meeting. (Pl. Ex. 58, B. Greenspan test., tr. pp. 2296-97; Tolkan test., tr. pp. 1854-55).

189. Dr. Osheroff asked Greenspan if he could go to this November 12 meeting, and Greenspan told Osheroff it would not be a good idea for him to go. Osheroff, nor any of his representatives attended this meeting. (Greenspan test., tr. pp. 2630-31).

190. At the November 12, 1979 meeting, the question of the ownership of the Prince William Facility was raised by one of the board members, who questioned whether the new facility would be part of NVDC. (Pl. Ex. 58, p. 3016).

191. The day after this meeting, on November 13, 1979, Greenspan's attorney, Larry Rubin, wrote Westerman concerning

Osheroff's intention to sell the practice. (Pl. Ex. 80). This letter was the first mention of sale since August, 1979. Greenspan and Rubin clearly were concerned about the PWDF ownership question which had been raised just the night before.

Meeting With Dr. Hampers

192. On November 15, 1979, Greenspan met with Dr. Hampers at National Airport. Hampers discussed his concerns that Greenspan was filing another application for a facility in Northeast Washington, and he told Greenspan that he wanted him to turn the Prince William application over to NMC. (Hampers depo., p. 27). Greenspan told Hampers that he would consider turning both the Prince William and Woodbridge applications over to NMC if he were made permanent Medical Director of NMC. (Hampers depo., pp. 28-29).

193. Greenspan then asked Hampers to use what influence he could to convince Osheroff to sell the practice to Greenspan. Greenspan stated that Hamper's decision not to re-appoint Osheroff as Medical Director would weigh heavily on Osheroff's decision to sell. (Hampers depo. pp. 26-28).

194. Hampers responded that he would not enter into collusion to force Osheroff to sell. Greenspan then told Hampers that if Osheroff didn't sell, he would take the patients from Osheroff anyway. (Hampers depo., pp. 28-29).

Patient List

195. On or about November 19, 1979 Greenspan instructed Martha Hall to make a list of patient names, addresses, and phone

numbers of all patients who had come to the practice since the beginning of his employment in June, 1978. (Pl. Exs. 104, 105; Mills test., tr. pp. 925-926; Hall test., tr. pp. 896-99).

Mid-Montgomery Application

196. On November 19, 1979 Greenspan filed the application for the Mid-Montgomery dialysis facility. (Pl. Ex. 191). Greenspan did not tell Osheroff about this application, nor did he or Tolkan tell Osheroff that Tolkan was listed as part of the medical staff in the application. (Greenspan test., tr. p. 2624).

Osheroff Barred From Unit

197. On or about November 20, 1979, Dr. Osheroff offered to make rounds at NVDC as Greenspan was due to be out of town, and Tolkan was occupied at the hospital. Osheroff called Tolkan at the hospital to tell him he would make the rounds. Tolkan did not offer to do the rounds with Osheroff, but rather told Osheroff that he could not make rounds, then immediately called Greenspan. Greenspan then appeared at the Center and told Osheroff he could not see patients or give orders, and that the nurses would not take his orders. Osheroff then left the Center without making rounds. (Tolkan test., tr. pp. 1945-46; Osheroff test., tr. pp. 327-29, 462-63).

198. Hess also ordered staff not to take orders from Osheroff. (Hess test., tr. p. 1595).

199. After Drs. Greenspan and Tolkan told Osheroff on November 20 that he could not see patients, Osheroff called Dr.

Hampers in Boston. On November 30, Dr. Osheroff met with Dr. Hampers in Boston to discuss his reinstatement as Medical Director. (Osheroff test., tr. pp. 332-34; Pl. Ex. 9).

200. Dr. Hampers met with Dr. Osheroff on November 30, 1979 and requested letters from two psychiatrists, Dr. Board and Dr. Frank, concerning Osheroff's competence to return as Medical Director. (Hampers depo. pp. 13-14). Hampers also solicited the opinion of the NVDC staff, including that of Dr. Greenspan. Greenspan told Hampers that Osheroff was not competent, but could give Hampers no sound basis for his opinion. (Hampers depo., pp. 15-16, 19). By letter of December 6, 1979, Hampers formally reinstated Osheroff as Medical Director of NVDC. (Pl. Ex. 10).

201. At the November 30 meeting with Dr. Hampers, Osheroff learned about Greenspan's activities in setting up competing dialysis facilities and of Greenspan's request that Osheroff not be re-appointed as Medical Director. (Osheroff test., tr. pp. 335-37).

202. Following the November 20 conversation between Tolkan and Osheroff regarding Osheroff's making rounds, Osheroff and Tolkan had a conversation initiated by Osheroff to discuss Osheroff's return to practice. At this meeting Osheroff expressed concern that Tolkan had been doing insurance physicals on the side, and he offered Tolkan a \$10,000 raise. Tolkan did not discuss with Osheroff whether or not he would continue to practice with Osheroff, or whether Osheroff could return. Also, he did not express any doubts about Osheroff's ability to practice. (Tolkan test., tr. pp. 1776, 1944).

Osheroff's Privileges

203. At the end of November, 1979, both Tolkan and Greenspan knew that Dr. Osheroff's privileges would be suspended at Alexandria Hospital should he seek to admit patients there, based on their previous discussions with Dr. Haut, Chief of Medicine. Neither of these doctors discussed this fact with Dr. Osheroff. (Greenspan test., tr. pp. 2551-52; Pl. Ex. 115, Alexandria Hospital Transcript [Tolkan test.] pp. 73-74).

Northeast Application

204. On December 3, 1979, Greenspan filed the application for the Northeast Washington dialysis facility (Pl. Ex. 192), listing himself and Tolkan as the doctors for that facility. Greenspan and Tolkan did not inform Osheroff of the application. (Greenspan test., tr. p. 2624).

205. The Northeast (Pl. Ex. 192) and Mid-Montgomery (Pl. Ex. 191) applications were markedly different from the Prince William application (Pl. Ex. 34) in that Greenspan did not list himself as Acting Medical Director of NVDC, and they did not contain the numerous support letters on NVDC stationery. This was done on Rubin's advice to make it clear that the two new applications were not affiliated with Dr. Osheroff. (Greenspan test., tr. pp. 2625-26; Rubin test., tr. pp. 2743-45).

206. At the time the Northeast application was filed on December 3, 1979, there were seven or eight NVDC patients on dialysis who would be likely to go to a new facility in Northeast D.C. (Greenspan test. tr. p. 2677).

207. After Osheroff was told on November 20, 1979 that he could not make rounds in the Center, Greenspan did not see him in the center again until December 12, 1979.

December 12, 1979

208. On the morning of December 12, 1979, Arnold Westerman and Dr. Osheroff met with Greenspan to discuss the terms of his continued tenure with the practice. Greenspan refused to enter into a partnership agreement with Osheroff, and he was then terminated. (Westerman test., tr. p. 681).

209. Following his termination Greenspan vehemently stated to Westerman and Osheroff numerous times: "This is my unit, I built it up. You are not going to have a thing, Ray. I am going to take it all from you. I have already made a call to make sure you are not going to be able to practice medicine in this area again. You are going to lose everything you have unless you sell to me." (Westerman test, tr. p. 682; Osheroff test., tr. pp. 338-40).

Dr. Haut

210. The phone call referred to by Greenspan was a call he had made that same day to Dr. Haut, Chief of Medicine at Alexandria Hospital, concerning Osheroff's privileges. In response to Dr. Greenspan's call on December 12, 1979, Dr. Haut called Dr. Osheroff and summarily suspended his privileges. (Greenspan test., tr. p. 2578; Haut test., tr. pp. 365-66). The only knowledge Haut had about Dr. Osheroff was from Greenspan and Tolkan. (Haut test., tr. p. 379; Tolkan test., tr. p. 1869;

Tolkan depo., pp. 111, 115). Dr. Haut confirmed this suspension by letter of December 13, 1974. (Pl. Ex. 113).

211. Haut called Osheroff on the afternoon of December 12 and informed him he was suspending his privileges because Greenspan and Tolkan felt he was not ready to come back to practice. (Osheroff test., tr. p. 343; Westerman test., tr. pp. 684-85).

212. Prior to December 12, 1979, Dr. Osheroff had had no contact with Dr. Haut, but he had made an appointment with David Peters, Administrator of Professional Affairs to discuss his resumption of medical practice. (Osheroff test., tr. pp. 339-40).

213. According to Dr. Sanford Warshauer, President of the Alexandria Hospital Medical Staff in December 1979, such a summary suspension was extraordinary. Ordinarily, a physician would simply present his credentials to the hospital, as Osheroff had arranged to do, then resume his practice. (Warshauer depo. pp. 3-5, 12).

214. On the morning of December 12, 1979 Greenspan called Tolkan at the hospital and told him he had been fired. Tolkan immediately met with Greenspan in the office Greenspan had already rented on the first floor of the NVDC building. Even though Osheroff asked Tolkan to stay on and offered him a raise, Tolkan chose to resign and go with Greenspan. (Tolkan test., tr. pp. 1936-37, 1949-50, 1784; Westerman test., tr. p. 683; Greenspan test., tr. p. 2578).

215. Westerman informed both Greenspan and Tolkan that they were not to use Osheroff's facilities, nor were they to enter the dialysis unit. (Westerman test., tr. p. 686).

216. Despite Mr. Westerman's directive, Greenspan and Tolkan continued to make rounds in the unit for approximately two weeks after December 12, 1979. (Osheroff test., tr. pp. 344-45).

217. On the same day they left Osheroff, Greenspan and Tolkan set up a practice on the first floor of the same building that NVDC was located in. (Osheroff test., tr. pp. 440-41).

218. Throughout the day and into the night on December 12, 1979, Osheroff, Westerman, Rubin, Tolkan, and Greenspan conducted extensive negotiations on how to resolve the situation. At various points, Greenspan and Tolkan offered one million dollars for the practice, and Osheroff demanded three million dollars. (Osheroff test., tr. p. 342; Greenspan test., tr. p. 2617; Rubin test., tr p. 2727).

219. Osheroff offered to allow Greenspan and Tolkan to remain in the practice for a "cooling off period," during which all three doctors would see the patients. Greenspan and Tolkan rejected this compromise. (Greenspan test., tr. pp. 2579-80, 2583).

Patient Solicitation

220. On December 12, 1979, Martha Hall, a long-time employee of Dr. Osheroff's, went to work for Greenspan and Tolkan. She immediately began to call all the patients who had been part of Osheroff's practice and solicited them to see Greenspan and Tolkan. Both Greenspan and Tolkan knew she was calling these patients, but did nothing to stop her. (Hall test., tr. pp. 890-91; Greenspan test., tr. pp. 2668-69, 2695; Tolkan test., tr. p. 1799).

221. For a period of a few days immediately after December 12, 1979, Greenspan and Tolkan continued to use Dr. Osheroff's acute dialysis machines without his permission. (Tolkan test., tr. p. 1962).

Staff "Petition"

222. On the evening of December 12, 1979, a petition was circulated among the NVDC staff, stating that Osheroff was "professionally incompetent." (Pl. Ex. 96). Peggy Hess urged the staff to sign the petition in the "best interest" of the unit because Dr. Osheroff had made errors in taking care of patients. (Froelich test., tr. pp. 436-37). Osheroff, by that time had not rendered medical care to patients since before his hospitalization in January 1979.

223. Sue Smith wrote the petition, directed to Dr. Hampers (Pl. Ex. 96) on December 12, 1979 (Smith test., tr. pp. 2083-84). This was the petition which Hess had suggested in the November meeting concerning Osheroff's return to practice. (Young test., tr. pp. 780-81).

224. Drs. Tolkan and Greenspan decided to file suit against Dr. Osheroff the day after they left his employment. (Tolkan test., tr., p. 1871).

Staff Resigns

225. Within a day or two of December 12, 1979, all of Dr. Osheroff's acute technicians, Jean Rowell, Claudia Brown,

and John Doyle, went to work for Greenspan and Tolkan. At the time they were all under the supervision of Bonnie Greenspan, who discussed their leaving Osheroff with them. (Rowell test., tr. pp. 845-846; B. Greenspan test., tr. p. 2298).

226. Jean Rowell, one of the acute technicians, was called into Greenspan's and Tolkan's office to sign a pre-typed letter of resignation, identical to resignation letters signed by Brown and Doyle, stating that she was resigning "in the best interests of the patients" (Pl. Exs. 98, 99). Dr. Greenspan, Bonnie Greenspan, and Tolkan were present in the office at the time. (Rowell test., tr. pp. 841-45).

227. Rowell refused to sign the letter because she objected to its language. (Pl. Ex. 97; Rowell test., tr. pp. 842-45). Rowell resigned because she had heard that Osheroff had no hospital privileges and thus no acute practice, and because she had heard Osheroff was released from Silver Hill against medical advice. (Rowell test., tr. pp. 846-47).

228. Mabel Lowrey, who had worked for Dr. Osheroff, went to work for Greenspan and Tolkan. Lowrey typed Jean Rowell's letter of resignation. (Rowell test., tr. p. 842).

229. Rowell, Doyle, and Brown continued to see the same patients they had seen when they had worked for Osheroff. (Rowell test., tr. pp. 848-49).

230. A number of Dr. Osheroff's and NVDC employees went to work for Greenspan and Tolkan (see Pl. Ex. 110): Martha Hall, Mabel Lowrey, Diane Synan, John Doyle, Jean Rowell, Claudia

Brown, Peggy Hess, Eileen Collins, Amy Chapman, Jesse Foster, and Anne Pierce. (Smith test., tr. pp. 27-31).

December 12th
Patient Solicitation

231. On December 12, 1979, and for one or two days thereafter, Greenspan and Tolkan circulated the following form, on NVDC stationery, among all the NVDC patients while they were hooked up to dialysis machines:

To Whom It May Concern:

I (patient name), currently a patient undergoing chronic hemodialysis at the Northern Virginia Dialysis Center, do hereby declare that I will not accept any medical services from Raphael J. Osheroff, M.D. and am under the care of Robert E. Greenspan, M.D. for any and all medical services associated with my therapy at the Northern Virginia Dialysis Center in Alexandria, Virginia, (Pl. Ex. 107, 108; Greenspan test., tr. pp. 2414-15).

232. Although Tolkan's name was not on the form, he helped draft it and discussed the form with numerous patients. (Tolkan test., tr. pp. 1791-92, 1959, 1951).

233. Tolkan and Greenspan did not have authority from anyone to use NVDC stationery for the solicitation form. (Tolkan test., tr. p. 1951).

234. The form was given to many patients who had been in Dr. Osheroff's practice from 5 to 10 years. (Tolkan test., tr. p. 1872).

235. Tolkan told many patients on or about December 12, 1979, that he and Greenspan were going to sue Osheroff to get

privileges in the center. (Tolkan test., tr. p. 1960).

236. The form was given to patients to sign who were under Dr. Kim's and Dr. Goldberger's care. (Greenspan test., tr. p. 2539).

237. Greenspan told patients that Osheroff's privileges had been suspended at Alexandria hospital and that Osheroff was incompetent. (Greenspan test., tr. pp. 2664, 2422, 2660).

238. The patients were very upset when this form was passed out to them. (Greenspan test., tr. p. 2662; Froelich test., tr. pp. 438-39).

240. Many of the patients were fragile, had poor eyesight, and couldn't read. (Sue Smith test., tr. p. 2090; Quesada depo.; Tolkan test., tr. p. 1953).

241. Peggy Hess acted as a witness on several of the patient solicitation forms while the patients were undergoing dialysis. (Hess test., tr. pp. 1665-67, 1673-74). (Hess even provided the form to one patient who didn't have one, and witnessed that patient's signature. Hess test., tr. pp. 1674-78). Hess never discussed the patient forms with Dr. Osheroff, even though he was the Medical Director. (Hess test., tr. p. 1680).

242. A list of patients was made up from these solicitation forms to determine which patients were "Greenspan's and Tolkan's. (Hess test., tr. p. 1671). Hess never discussed the list with Dr. Osheroff (Hess test., tr. p. 1697).

Breach Of Medical Ethics

243. Section 5 of the Code of Ethics of the American

Medical Association and the corresponding section of the Principles of Medical Ethics prohibit the solicitation of patients by physicians, solicitation being defined as the use of "undue influence or pressure to obtain patients." (Fletcher test., tr. pp. 384-86; Pl. Ex. 134).

244. Submission to a patient of a form such as Pl. Ex. 108 violates the central canon of medical ethics in protecting a patient's freedom of choice in the selection of his or her physician inasmuch as it exerts undue pressure and influence on that choice by a physician. (Fletcher test., tr. pp. 403-4).

245. The language in Pl. Ex. 108 which states that "I declare that I will not accept any medical treatment from Dr. Osheroff and am under the care of Dr. Robert E. Greenspan" is improper because it requests the patient to change physicians and is an example of one physician soliciting a change of a physician/patient relationship from another physician. (Fletcher test., tr. pp. 404-5).

250. A form such as Pl. Ex. 108 which is printed on the letterhead of the employer physician offends ethical principles because it might mislead a patient into believing that the employer physician approved of the form and because it violates the specific ethical principle that a physician should be honest to the patient in all things. (Fletcher test., tr. pp. 405-6).

251. It is unethical to ask a patient to sign a form when they are undergoing treatment since they are most likely to be vulnerable at that time. (Fletcher test., tr. pp. 406-7).

252. Even if a dialysis patient had been referred directly to Dr. Greenspan, if Dr. Greenspan had taken the form in Pl. Ex. 108 printed on Dr. Osheroff's stationery and presented it to that patient when he was hooked up on a dialysis machine, that conduct would be unethical. (Fletcher test., tr. p. 434).

253. Susan Young recalls a specific incident where the solicitation form (Pl. Ex. 108) was attached to the patient's chart and she gave it to the patient who said he needed to think about it before he signed it and was going to take it home. (Young test., tr. pp. 782-83).

254. The next time the patient came in for dialysis, Dr. Greenspan asked the patient if he had signed the form and the patient responded that no, he did not sign the form because he had had a nervous breakdown himself and he could not sign the paper in good faith. Dr. Greenspan responded that that was fine, that he didn't need his signature anyway. (Young test., tr. pp. 783-84).

Thomas Maitland

255. Thomas Maitland was a dialysis patient under the care of Dr. Osheroff since September of 1974 and received his dialysis treatments at the NVDC during that time. (Maitland test., tr. p. 801).

256. Thomas Maitland first saw the form, Pl. Ex. 108, when it was given to him by a nurse or technician while he was on the dialysis machine in the center. The form was also given to

other patients at the same time. (Maitland test., tr. p. 806).

257. After reading the form that Dr. Greenspan had sent around, Thomas Maitland became angry as did some of the other patients and wrote a letter, (Pl. Ex. 112) which was signed by other patients including Patricia Wool who had been a patient of Dr. Osheroff and asked to sign it. Matiland hung a copy of the letter in the waiting room for everyone to read. (Maitland test., tr. pp. 809-11).

258. Maitland did not feel that he was being given a straight story of what was occurring with regard to Dr. Osheroff but felt that he was being dragged into something that he didn't know anything about and about which he could not make an intelligent decision. Maitland also felt that it was unprofessional and cruel of Greenspan to drag patients into the dispute. (Maitland test., tr. p. 810).

Nestor Dialozo

259. Nestor Dialozo is a forty-three year old resident of Alexandria, Virginia, who became a patient at the Northern Virginia Dialysis Center as a dialysis patient in August of 1977. (Dialozo depo., p. 5). During the time that Dr. Osheroff was hospitalized, Mr. Dialozo was under the medical care of Drs. Greenspan and Tolkan. (Dialozo depo., p. 6). On December 12, 1979, while Mr. Dialozo was undergoing dialysis on the dialysis machine, Dr. Greenspan approached him with the form letter (Pl. Ex. 107). Dr. Greenspan told Dr. Dialozo at this time that he,

Dr. Tolkan and Dr. Osheroff were splitting and that Mr. Dialozo would have to choose the doctor that he wanted so that if he was hospitalized he would know who would be handling him in the hospital. Greenspan said also "that they were splitting because Dr. Osheroff is not competent enough or not yet fit to practice his profession." (Dialozo depo., p. 10).

260. At the time Dr. Greenspan handed out this form, Mr. Dialozo did not know that Dr. Osheroff had returned to his medical practice and had been reinstated as Medical Director of the Center. (Dialozo depo., p. 10).

261. Mr. Dialozo asked Peggy Hess why Dr. Osheroff was not fit to practice his profession if he had been hospitalized and had then been discharged from the hospital. Ms. Hess responded to Mr. Dialozo that Osheroff was not fit to practice his profession. (Dialozo depo., pp. 11-12).

262. Greenspan also told Mr. Dialozo that Osheroff had lost his privileges at Alexandria Hospital. (Dialozo depo., pp. 12-13).

Charles Sparrow

263. Charles R. Sparrow, a thirty-eight year old resident of the District of Columbia, was a chronic dialysis patient at the Northern Virginia Dialysis Center on December 12, 1979.

264. Prior to being asked to sign the form, (Pl. Ex. 108), Dr. Greenspan discussed with Mr. Sparrow Dr. Osheroff's incompetence to practice medicine. Dr. Greenspan stated that he

and Tolkan thought Dr. Osheroff was incompetent and that they wanted to get him out of the unit. (Sparrow depo., pp. 16-17, 36).

265. Mr. Sparrow was originally referred to Dr. Osheroff by Dr. Abramson, an Alexandria physician. Dr. Osheroff first diagnosed Mr. Sparrow's kidney problem and put him on chronic hemodialysis. (Sparrow depo., p. 39).

Albert Lazzaro

266. Albert Lazzaro was a 75 year old resident of Alexandria, Virginia who had been a chronic dialysis patient at the NVDC approximately 2½ years in December 1979. (Lazzaro depo., pp. 4-5)

267. Mr. Lazzaro was shown the form which was passed around to all the patients in the dialysis center. (Lazzaro depo. pp. 12-13).

268. Mr. Lazzaro refused to sign this form, because he felt it was an outrage and that it implied that Dr. Osheroff was not capable of treating patients. He also felt that for Dr. Greenspan to ask him to sign a paper which would give him total access to his medical treatment was unfair. (Lazzaro depo. p. 22).

269. Mr. Lazzaro was told on December 12, 1979 that Dr. Osheroff had been restored as medical director and that Dr. Tolkan and Dr. Greenspan had resigned because Dr. Osheroff had been restored to the directorship of the clinic. He was told this by Carol Mirc. Carol Mirc also told him that Dr. Osheroff

was not authorized or acceptable in the hospital to treat patients. She passed this information all around the clinic, and Mr. Lazzaro heard it from several sources in the clinic. (Lazzaro depo. p. 26-27).

Donald Quesada

270. Donald Quesada, at the time of his deposition in November 1980, was a 51 year old chronic hemodialysis patient at the NVDC. Mr. Quesada was blind and had been blind for several years prior to December 1979. (Quesada depo., pp. 4-6).

271. Mr. Quesada was an office patient of Dr. Osheroff's prior to Dr. Osheroff's leaving for the hospital, and Greenspan took over his medical care in 1979. (Quesada depo., pp. 11-12).

272. In December, 1979, Mr. Quesada was approached by Greenspan while he was on the dialysis machine and was given the form, Pl. Ex. 108, to sign. Mr Quesada asked Dr. Greenspan what the piece of paper was, as he could not read it, and Greenspan said it was permission slip for Greenspan to give him treatment. Greenspan did not read the form to the patient. (Quesada depo., pp. 13-14).

273. Mr. Quesada asked Greenspan twice what the form was about and Greenspan gave him no response other than it was just a form for treatment. (Quesada depo., p. 15).

274. At the time Dr. Greenspan asked Mr. Quesada to sign this form, Mr, Quesada did not know that Dr. Osheroff had returned to the area and to his medical practice. Further, Dr. Greenspan did not tell Mr. Quesada that Dr. Osheroff had been reappointed to the Medical Directorship of the center. (Quesada

depo., p. 18).

275. Judge Lewis, in Greenspan v. NMC, considered Greenspan's passing the form (Pl. Ex. 108) around to the patients to be highly unethical solicitation of patients. (Pl. Ex. 168, p. 267).

276. Judge Lewis considered Greenspan's passing the form around to patients while they were on the dialysis machines to be highly unethical. (Pl. Ex. 168, pp. 303-05).

277. Shortly after Dr. Greenspan and Dr. Tolkan opened their practice on the first floor of the NVDC building, they placed a sign (Pl. Ex. 109) on the door of their office stating that there would be no charge and no appointment necessary." Patients were to contact Martha (Hall) or the nurses if they needed hospitalization.

278. After Greenspan and Tolkan set up their office, Peggy Hess sent patients to Dr. Greenspan and Tolkan and engaged in a constant telephone communication with these doctors concerning the patients. (Osheroff test., tr. pp. 460-61). Greenspan and Tolkan would call the nurses in the unit and ask them to send patients up to their office. The nurses included Peggy Hess, Diane Synan, Eileen Collins, and Sue Smith. (Tolkan test., tr. pp. 1892-93).

279. Hess, Synan, and Collins communicated on a daily basis with Greenspan and Tolkan concerning the NVDC patients. This continued until all three nurses left at the same time on March 5, 1980 and went to work for Greenspan and Tolkan. (Collins test., tr. pp. 2013-2015, 2009-10; Synan test., tr. pp. 1563-64).

280. A list was posted in the dialysis unit of those patients who had signed the patient solitication form (Pl. Exs. 107, 108). This list was used to determine which patients were "Greenspan's and Tolkan's." (Collins test., tr. p. 2015; B. Greenspan test., tr. pp. 2299-2301).

281. At least thirty of these chronic hemodialysis patients transferred to the Prince William Dialysis Facility when it opened in June, 1980. (Dot Smith test., tr. p. 1076).

Executive Committee
Alexandria Hospital

282. During Dr. Osheroff's hearing to reinstate his privileges before the Executive Committee of the Alexandria Hospital, on December 27, 1979 (Pl. Ex. 115) Dr. Stephen Tolkan and Dr. Greenspan testified against him. (Osheroff test., tr. p. 443).

283. At the Alexandria Hospital Executive Committee meeting, Dr. Greenspan brought up a biopsy incident concerning Dr. Osheroff which he had never mentioned to Osheroff previously. (Osheroff test., tr. pp. 255-56).

284. When Greenspan and Tolkan testified at the hearing, their lawsuit against Osheroff was still pending. (Pl. Exs. 127, 168, 170).

285. Prior to the hearing at Alexandria Hospital, Dr. Osheroff had been given no statement of charges of mental incompetence nor did he have any knowledge that any witnesses intended to testify against him at that hearing. (Osheroff test., tr. pp.

443-4).

286. Dr. Osheroff had no intention of resuming his practice until December 14 when he intended to present his credentials to the Administrator of Professional Affairs at Alexandria Hospital. (Osheroff test., tr. p. 444).

287. Prior to Dr. Osheroff's entrance into Chestnut Lodge, neither Dr. Greenspan nor Dr. Tolkan complained to him of medical incompetence. (Osheroff test., tr. p. 444).

288. At the hearing of the Executive Committee of Alexandria Hospital, Dr. Greenspan submitted three letters from the dialysis center's shift supervisors and the administrator. One of these letters stated that the staff felt that its professional integrity would be damaged if it followed Dr. Osheroff's orders as they felt he was professionally incompetent (Pl. Ex. 96). At that time, Dr. Osheroff had not seen any of those letters nor had he given any of the people signing them orders prior to the time they were written. (Osheroff test., tr. pp. 449-50).

289. Dr. Greenspan brought to the attention of the Alexandria Executive Committee a matter concerning a typographical error in a pill prescription where the word microgram was confused for miligram and Dr. Greenspan interpreted that error as indicative of Dr. Osheroff's lack of knowledge on the newest drugs available and the appropriate dosages, implying the error was responsible for a lethal dosage. (Osheroff test., tr., pp. 451-52).

290. Dr. Greenspan also brought to the attention of the

Executive Committee of Alexandria Hospital an incident in which Dr. Osheroff had prescribed 250 milligrams of aminophylline for a patient who had previously received and responded to that dosage of medication. At the time Dr. Osheroff prescribed that medication, Peggy Hess, the head nurse for NMC, had refused to administer the drug despite the fact that the patient had previously received the same dosage, and that Dr. Greenspan had previously ordered the same medication on a PRN basis which gave the nurses authority to give that medication when needed without specific order from a physician. That same incident was the subject of a newspaper article. (Pl. Ex. 120; Osheroff test., tr. pp. 452-55).

291. At the Alexandria Medical Committee hearing, Dr. Greenspan also brought to the attention of the committee an incident which had occurred in late fall of 1978 where he alleged that Dr. Osheroff took 45 minutes and placed 25 needle holes in a child's back during a biopsy. During that incident in which Dr. Osheroff took two passes at the child's kidney, and the requested Dr. Greenspan to take a third pass, Dr. Greenspan never mentioned that he had done anything improper. (Osheroff test., tr. pp. 456-458).

292. Prior to his testimony at the Executive Committee of the Alexandria Hospital, Dr. Greenspan had never mentioned to Dr. Osheroff that he felt Dr. Osheroff was not fit to practice medicine. Further, Dr. Greenspan did not talk to Dr. Board or request information from Dr. Naarad of Silver Hill or any psychiatrist on Dr. Osheroff's case concerning Dr. Osheroff's mental medical competence. (Osheroff test., tr. pp. 466-67).

293. At the time Dr. Tolkan questioned Dr. Osheroff's medical competence at the Alexandria Committee hearing, he had two years of residency and two years of nephrology including a year and a half of private practice. Dr. Tolkan misinterpreted Dr. Osheroff's practice of looking drug doses up in a book as incompetent. (Osheroff test., tr. pp. 470-71).

294. Prior to his testimony before the Executive Committee of the Alexandria Hospital, Dr. Tolkan had never suggested to Dr. Osheroff that he thought he was incompetent in any way nor had Dr. Tolkan had much contact with Dr. Osheroff. (Osheroff test., tr. pp. 472-73; Tolkan test., tr. p. 1838).

295. Dr. Tolkan formed the impression that Dr. Osheroff was incompetent from information he obtained from Bob Greenspan while he was working in the hospital. (Osheroff test., tr. p. 474).

296. Dr. Tolkan testified before the Executive Committee of the Alexandria Hospital that his only link to Dr. Osheroff was through Dr. Greenspan and that he had no additional reason to question Dr. Osheroff's ability to make rounds. (Osheroff test., tr. p. 478).

297. Although Dr. Tolkan testified before the Executive Committee of the Alexandria Hospital that he was disturbed by Dr. Osheroff's psychiatric condition, Dr. Tolkan never made any effort to contact Dr. Osheroff, his doctors, his lawyer, his accountant or his family to determine his psychiatric status. (Osheroff test., tr. p. 480).

298. Dr. Osheroff came to the hearing of the Alexandria Hospital Executive Committee prepared to establish his ability to come back to the practice of medicine and towards that end, he carried two letters from physicians and had made arrangements with the director of the Silver Hill Foundation to speak to anyone over the telephone concerning his mental health and recovery from depression. (Osheroff test., tr. pp. 605-06).

299. Dr. Greenspan testified before the Alexandria Hospital Medical Committee hearing that when Dr. Osheroff returned from Silver Hill, he was not depressed. (Osheroff test., tr. p. 627).

300. In response to a question by Dr. Pepper at the Alexandria Hospital Committee hearing, Dr. Greenspan stated that he could not evaluate the elevation of Dr. Osheroff's mood upon his return from Silver Hill because he had not spent enough time with him as he did in the period previous to Osheroff's entry into Chestnut Lodge. (Osheroff test., tr. pp. 627-28).

301. During his testimony before the Alexandria Committee hearing, Dr. Greenspan stated that he thought Dr. Osheroff had gotten better, "there is no question about that, I think he got better because of the medication." (Osheroff test., tr. p. 629).

302. Dr. Tolkan testified before the Executive Committee of the Alexandria Hospital medical staff that he felt that Dr. Osheroff was incompetent. (Tolkan test., tr. p. 1796).

303. Tolkan told the Executive Committee of the Alexan-

dria Hospital that he had been fired by Dr. Osheroff on the 12th of December, when he in fact had resigned. (Tolkan test., tr., p. 1964).

304. Dr. Tolkan testified before the Executive Committee of the Alexandria Hospital that he had been disturbed when he heard that Dr. Osheroff left (Chestnut Lodge) in dispute with the staff. Dr. Tolkan heard about the "dispute" with the staff from Dr. Greenspan. (Tolkan test., tr. pp. 1968-69).

305. Dr. Tolkan had no knowledge of whether Chestnut Lodge provided medication treatment to its patients. (Tolkan test., tr. pp. 1969-70).

306. In 1979, Dr. Tolkan had no idea what type of psychiatric treatment Dr. Osheroff had received. (Tolkan test., tr. p. 1974).

307. Eileen Collins had no idea how the letter she wrote to Dr. Hampers became an exhibit in Greenspan v. NMC or the petition she signed (Pl. Ex. 96) came to the attention of the Alexandria Hospital Executive Committee. Collins did not give the petition to Dr. Greenspan. (Collins test., tr. pp. 2033-34).

308. Collins never authorized the letter she wrote to Hampers or the petition she signed, (Pl. Ex. 96) to be given to Greenspan as exhibits. (Collins test., tr. p. 2035).

309. Diane Synan never gave Dr. Greenspan a copy of the letter she had written to Dr. Hampers which was subsequently presented by Dr. Greenspan to the Alexandria Executive Committee when they reviewed Dr. Osheroff's privileges. (Synan test., tr. p. 1561).

310. Greenspan took the documents with him to the Executive Committee meeting because he felt he needed evidence to support what he might have said. (Greenspan test., t.r pp. 2421-21A).

311. At the time Greenspan testified before the Executive Committee of Alexandria Hospital, he told the Committee that Osheroff was better symptomatically. Greenspan also told them that Osheroff's mood was elevated and he was no longer depressed. (Greenspan test., tr. p. 2644).

312. Dispite Tolkan's and Greenspan's efforts to have Osheroff's privileges removed after an evaluation by Dr. William Z. Potter of NIH was submitted to the Committee (Pl. Ex. 91), Osheroff's privileges were restored on January 16, 1980. (Pl. Ex. 116).

Greenspan v. NMC

313. On or about December 17, 1979 Greenspan and Tolkan, filed suit against Dr. Osheroff, his corporation, and National Medical Care for antitrust violations and to gain privileges in the center. (Pl. Ex. 127). Greenspan and Tolkan alleged that the patients had chosen them for their doctor, based on the patient solicitation form, and also that their due process rights under Greenspan's bylaws (Pl. Exs. 6, 7) had been violated.

314. Judge Lewis ruled against the two doctors, finding that they had improperly solicited Dr. Osheroff's patients, and that the bylaws they were suing under were fraudulently promulgated. (Pl. Ex. 168, pp. 267, 276-76, 303-05, 371-72, 368-69;

Pl. Ex. 170).

315. The antitrust claim was voluntarily dismissed by the plaintiffs. (Pl. Ex. 169).

Publicity And Complaints

316. After December 12, 1979, the situation at NVDC received a great deal of adverse publicity. Dr. Osheroff became aware of newspaper articles (Pl. Exs. 118, 119, 120A-O) which were published around the time of the lawsuit initiated by Greenspan in late December 1979. Those articles seriously disturbed Dr. Osheroff because of the professional and social ramifications and because of allegations about his professional competence and mental health. Dr. Osheroff was also concerned with the effect of this publicity on his three sons. (Osheroff test., tr. pp. 347-350).

317. The newspaper articles were derogatory in nature about the medical care at NVDC and upset and increased the anxiety levels of the patients. (Shine depo., p. 65).

318. Dr. Greenspan was interviewed on television on a number of occasions concerning his firing from NVDC, and on one occasion, the television crews came to the unit. This publicity greatly upset the dialysis patients. (Shine depo., p. 64).

319. On December 19, 1979, Greenspan and Tolkan's lawyers sent a copy of the complaint in their suit against Osheroff to the Health Care Financing Administrator. (Pl. Ex. 127). This complaint resulted in a surprise inspection of NVDC by HCFA on the second day of the Greenspan v. NMC hearing on January 10, 1980. (Pl. Ex. 121). Greenspan's and Tolkan's allegations

resulted in inspections by the Renal Network and the Virginia Board of Health as well. (Pl. Exs. 122-126).

320. Peggy Hess' contacts with Nancy Sharpe resulted in yet another inspection of NVDC. (Sharpe test., tr. pp. 1501-06; Pl. Exs. 124, 125).

321. On March 12, 1980, the Alexandria Journal published an article entitled "Half of Dialysis Center Nurses Quit." In that article, a nurse was quoted as stating that a patient "might well have died" had the nurse administered medication Dr. Osheroff had ordered. Peggy Hess was the nurse who made this false statement. (Pl. Ex. 120(j); Hess test., tr., p. 1627).

322. Hess knew that all she could accomplish by making such a statement to the press would be to injure the reputation of Dr. Osheroff and NVDC. (Hess test., tr. p. 1722).

Damages

323. The income accruing to Dr. Osheroff in his dialysis practice and his medical practice accrued from two different sources. A unit professional fee is derived from patients who are receiving chronic dialysis treatment within the center for which the corporation receives a fee every time a patient is dialyzed within the facility. The second source of income is derived from the medical practice for the treatment of patients in the office and in the hospital and some dialysis service that is provided on the hospital grounds. The unit professional fee is \$260 a month per patient. In addition, Dr. Osheroff receives a participation fee as a result of his contract with National

Medical Care, that fee is equal of 40% of the new profits before taxes earned by the NVDC and is paid in July of the following year. (Notaris test., tr. pp. 22-23).

324. The Prince William Dialysis Facility opened in June, 1980. (Smith test., tr. pp. 41-43).

325. Since Dr. Greenspan opened his dialysis center in Prince William County, Dr. Osheroff has had no patients from the Manassas-Prince William area, although he used to average 16 to 20 chronic patients from that county. (Osheroff test., tr. p. 532).

326. During the period of time before Dr. Greenspan started working for Dr. Osheroff in May of 1978, there were approximately 79 chronic patients in the dialysis center. At the time Dr. Osheroff entered Chesnut Lodge in January of 1979, there were 86 chronic patients in the dialysis facility. In the fall of 1979, November 30, 1979, when Dr. Osheroff returned to his practice, there were 101 chronic patients in the dialysis facility. At the end of May 31, 1980, immediately prior to the opening of the Prince William facility by Dr. Greenspan, there were 82 chronic patients in the facility. In July 1980, one month after Dr. Greenspan opened the Prince William facility, there were 77 chronic patients in the NVDC. By December 31, 1980, there were 58 chronic patients in the NVDC facility. On September 30, 1981, the NVDC had 59 chronic patients. As of the present time, January 29, 1982, Dr. Osheroff has 60 patients in the dialysis facility. There are 12 patients that are seen by Dr.

Goldberger and 3 CAPD patients at present in the chronic dialysis facility at NVDC. (Smith test., tr. pp. 41-43).

327. Prior to Dr. Greenspan's joining Dr. Osheroff on May 31, 1978, there were 274 office patients in Dr. Osheroff's private practice. In January 1979 at the time Dr. Osheroff left for Chestnut Lodge, there were 157 office patients in his private practice. In November 1979 upon Dr. Osheroff's return to the practice, there were 195 office patients in his practice. As of May 1980, immediately prior to the opening of the Prince William facility, there were 47 office patients in Dr. Osheroff's private practice. On September 30, 1981, there were 91 office patients in Dr. Osheroff's private practice and on January 29, 1982, there are presently 115 patients in Dr. Osheroff's practice. (Smith test., tr., pp. 43-44).

328. Page 3000 of Pl. Ex. 147 contains the billing and unit professional fees of Osheroff, Inc. from October 1979 to September of 1980 as prepared by Frank Notaris. That statement covered a period time when Dr. Osheroff was in Silver Hill, recently out of Silver Hill, until Dr. Greenspan was fired. That document reflects the change in income in the practice, there was a dramatic change in June and July of 1980 and July to August 1980 when the Woodbridge unit opened up. During that period, the number of chronic patients in the unit dropped correspondingly. Prior to that time, the number of patients ranged from 74 to 101 and during the last two months of the year, the average was 57-58 patients a month. There was a dramatic drop in business in

August, 1979. (Notaris test., tr. pp. 35-36).

329. During the following 12 month period from October 1, 1980 to September 30, 1981, the number of the patient census decreased, the average number of patients per month in the unit was 51.2. (Notaris test., tr. p. 36).

330. A loss in the unit professional fee of \$1 results in a \$1 loss in actual net income. This is so because the overhead for dialysis is paid basically by NVDC and there is no additional overhead whether you have 80 patients or 45 patients. Most of the overhead is incurred by the doctors, basically for malpractice insurance which is required for both services, and will not increase with the number of patients. The heaviest overhead is accrued in the dialysis of acute patients outside the center. To the extent that a chronic patient leaves the unit, the business loses everything that patient contributed to whatever the professional income of the corporation is. (Notaris test., tr. p. 37).

331. Approximately 30 chronic patients actually left Dr. Osheroff's practice and went to Greenspan and Tolkan when the Prince William Dialysis Facility opened in June or July of 1980. (Smith test., tr. p. 1076; Montgomery test., tr. p. 1411; Greenspan test., tr. p. 2643).

332. Other patients left the medical practice and went to Dr. Greenspan and Dr. Tolkan at that time. (Smith test., tr. p. 1076). At least 77 former patients from Osheroff's practice have gone to Greenspan and Tolkan. (Pl. Ex. 176). Other

patients, chronic and office, have been lost because of lost referrals and loss of the Prince William referral area.

333. In 1977, Dr. Osheroff's medical practice generated gross fees of over one million dollars. (Notaris test., tr. pp. 1240, 1252-53; Pl. Ex. 147).

334. In 1978, the net income of Dr. Osheroff's practice was \$301,755. (Notaris test. tr. pp. 26-28, 32-33, 1267-68, 1325).

335. In 1979, the net income of Dr. Osheroff's practice was \$291,452. (Notaris test., tr. p. 1270).

336. In 1980, there was a net corporate loss for Osheroff, Inc., with no contribution made to the employee retirement plan. (Notaris test., tr. p. 1273). The net income of Dr. Osheroff's practice in 1980 was \$150,000. (Notaris test., tr. pp. 1342, 1344, 1345).

337. In 1981, the net income for Dr. Osheroff's practice was approximately \$50,000 to \$60,000. (Notaris test., tr. pp. 32-33, 1329-31).

338. NVDC and Osheroff, Inc. operated at a significant profit in 1978 and 1979, but ran into a loss beginning in mid-1980.

339. Osheroff's medical practice has suffered significant losses, both during the years prior to trial and future lost profits. (Schramm test., tr. pp. 1122-1123; Pl. Ex. 175).

340. Using Dr. Schramm's assumption 1, the loss to Osheroff's practice would be \$824,762 for the years 1980 through

1985. Using a 9% discount rate, the present value of this figure is \$535,270 (Schramm test., tr. pp. 1122-23; see Pl. Ex. 177 as aid).

341. Using assumption 2, the loss to Osheroff's practice from 1980 through 1985 is \$1,237,211 discounted to present value, the figure is \$802,949. (Schramm test., tr. p. 1123).

342. Dr. Schramm's calculations were based only on the most conservative calculations. He used only the income stream that was projected forward as an aggregation of the medical practice fees and unit fees for chronic patients only. (Schramm test., tr. p. 1125).

343. Under Dr. Schramm's first assumption, he assumes that, absent the harm done by Greenspan and Tolkan, the NVDC would continue to have its historic share of the total Network 23 market of chronic patients, i.e. 10.53%. Using this growth factor, the NVDC should have had 96 patients in 1980 and approximately 129 patients by the year 1985. (Schramm test., tr. p. 1128).

344. Assumption 2 is based on the NVDC's historic growth rate which is greater than the surrounding dialysis facilities in the metropolitan area. Using this higher growth rate, the patient stream at the NVDC should grow to 105 patients in 1980 and should grow to 172 patients by the year 1985.

345. Assuming that the actual income for 1981 was not the projected \$161,940 but somewhere closer to \$65,000, (See Notaris test., tr. pp. 1329-31), the total loss to Osheroff and Osheroff, Inc. for the years 1980 and 1981, using these calculations, would be \$334,733. (Schramm test., tr. pp. 1175-76).

II. Proposed Conclusions of Law

A. Counts I and II

1. Counts I and II allege that defendants Greenspan, Tolkan and Hess concerted together for the purpose of wilfully and maliciously injuring the reputation, trade, business, and profession of Raphael J. Osheroff, M.D. and Raphael J. Osheroff, M.D., Inc., in violation of Va. Code §§18.2-499 and 18.2-500.

These statutes, in pertinent part, provide:

§18.2-499 - (a) Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever ... shall be jointly and severally guilty of a Class 3 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under §18.2-500.

(b) Any person who attempts to procure the participation, cooperation, agreement or other assistance of any one or more persons to enter into any combination, association, agreement, mutual understanding or concert prohibited in subsection (a) of this section shall be guilty of a violation of this section and subject to the same penalties set out in subsection (a) hereof.

§18.2-500 - (a) Any person who shall be injured in his reputation, trade, business or profession by any reason of a violation of §18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel, and without limiting the generality of the term "damages" shall include loss of profits.

2. Subsection (a) of 18.2-499, together with 18.2-500(a) requires a finding that (1) the defendants acted

in concert (2) for the purpose of wilfully injuring plaintiffs and (3) that the reputation, trade, business and profession of plaintiffs were indeed injured. The conspiracy or agreement need not be shown expressly, however; indeed, the gist of a civil conspiracy is not the agreement itself, but the harm done. Gallop v. Sharpe, 179 Va. 335 (1942). The conspiracy may be shown by indirect or circumstantial evidence. Floyd v. Commonwealth, 219 Va. 575, 580 (1978). See Pl. Tr. Memo., at pp. 9-10.

Further, plaintiffs need not show that defendants acted with "actual malice," but rather that defendants "intentionally interfered with a right without lawful justification." 16 Am. Jur. 2d, Conspiracy, §50, p. 268. See Pl. Tr. Memo., at pp. 3, 11.

3. Defendants Greenspan, Tolkan and Hess clearly acted together with the common purpose in mind of preventing Dr. Osheroff from returning to his practice of medicine and to obtain that medical practice for themselves.

a. Within a few months of Dr. Osheroff's hospitalization, Greenspan and Tolkan began the process of setting up a competing dialysis facility, which, after it opened, took numerous patients from the NVDC and removed a large traditional patient referral area from Dr. Osheroff's practice. Both Greenspan and Tolkan testified that they knew that a competing facility in Prince William would gravely injure Dr. Osheroff's practice, yet they proceeded to set up the facility without even honestly revealing to Osheroff or his representatives

what they intended to do. That facility now provides a generous source of income for both Greenspan and Tolkan.

Greenspan was the author of the Prince William Dialysis Facility, and it was he who used Osheroff's staff, his accountant, the NVDC staff, his reputation and medical practice to set up a competing facility. Greenspan misrepresented his intentions to Westerman, Notaris, Osheroff's staff, the NVDC staff, the patients, and the public bodies whose support he solicited, by directly telling these people that his efforts were on behalf of Osheroff, and by the numerous letters he wrote indicating that the center would be part of NVDC. Indeed, both Eileen Collins and Sue Smith testified that it was common knowledge among the staff that the Prince William Dialysis Facility would be part of the NVDC. It was clearly Greenspan's intention to mislead and deceive everyone in order to obtain that part of the practice for himself.

Tolkan also directly participated in the setting up of the Prince William Dialysis Facility and now derives substantial income from that facility. Tolkan testified that he intended to be part of a facility in Prince William, and that he knew about Greenspan's plan in early 1979 to set up the Prince William Dialysis Facility. Tolkan was listed as co-medical director of the facility, he submitted a copy of his resumes with the application, he submitted a letter of intent to provide services at the competing facility, he wrote letters in support of the facility and spoke to Dean Montgomery of the

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HSA in favor of the application, and he attended at least one HSA meeting with Greenspan where the application for the facility was considered. Tolkan, like Greenspan, never revealed these activities to his employer, Dr. Osheroff, or to any of his representatives.

Greenspan and Tolkan also attempted to set up two other dialysis facilities while employed with Osheroff, the Mid-Montgomery and Northeast D.C. facilities. Neither of these doctors told Osheroff about these centers.

Hess, who was hired by Greenspan in Osheroff's absence, was also directly involved in the setting up of the Prince William Dialysis Facility. Hess was well aware of the legal implications of setting up a competing facility, based on offer to make rounds, Osheroff was barred from the unit, and the staff was instructed not to take orders from him.

In October 1979 both Greenspan and Tolkan refused to sign assignment of Medicare benefits forms which would entitle Osheroff, Inc. to payment for their physicians' services.

Both Greenspan and Tolkan had told Dr. Haut, Chief of Medicine, about Osheroff's hospitalization, and both knew that Osheroff's status at Alexandria Hospital would be questioned when he returned. Neither doctor told Osheroff about this. Greenspan called Dr. Haut on the day he was fired to have Osheroff's privileges suspended, and Tolkan spoke to Haut about Osheroff's privileges around that same time. The suspension was based solely on information Haut obtained from Greenspan

and Tolkan.

Greenspan and Tolkan both defamed Osheroff before the Alexandria Hospital Executive Committee, by testifying that Osheroff was incompetent. Neither doctor had had an opportunity to practice medicine with Osheroff since his hospitalization. Both doctors knew that they had a lawsuit pending against Osheroff and that the loss of privileges at Alexandria Hospital would destroy Osheroff's practice.

Greenspan raised an incident before the Executive Committee concerning the administration of the drug aminophylline to a patient. He had learned about this incident from Hess, who later reported the incident to the press which resulted in an article alleging that Osheroff was endangering the lives of the patients at the Center.

On December 12, 1979, Greenspan was fired and Tolkan resigned and joined him in practice. On that same day, Hess circulated the petition alleging Osheroff's "professional incompetence."

Both Greenspan and Tolkan openly and actively solicited Osheroff's patients by circulating forms among the dialysis patients and by having Martha Hall call all of the office patients at home. Hess witnessed some of the forms and helped circulate the forms among the patients. In circulating these forms, Greenspan told patients that Osheroff had no hospital privileges and was incompetent. Tolkan told patients that he and Greenspan were going to sue Osheroff to gain

access to the Center. This solicitation was a breach of medical ethics and thus, in and of itself, constitutes "wrongful interference" with Osheroff's practice. See Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175, 1184 (Pa. 1978); see also Pl. Tr. Memo., at pp. 3-5.

Greenspan and Tolkan joined in suing Dr. Osheroff, alleging that the patients in the Center were their patients, and claiming center privileges and due process rights under the NVDC bylaws fraudulently promulgated by Greenspan. Even after losing the suit and being admonished for their unethical conduct, they continued in their efforts to establish a competing facility.

Hess assisted Greenspan and Tolkan after they left Osheroff's practice by providing them with information on the patients at the center while she continued as head nurse until March 5, 1979. Greenspan and Tolkan were thus able to maintain contact with the patients until they were ready to open the competing facility.

4. There is no evidence that defendants acted with any "legal justification," (see Pl. Tr. Memo., at pp. 3, 11), but rather the evidence shows that the conduct was intentionally calculated to prevent Osheroff from practicing medicine and to obtain his practice. Indeed, many of the activities, including the setting up of the Prince William Dialysis Facility and Hess' meetings with the staff, occurred before Osheroff ever returned to the Washington area. Further, there is no evidence

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that any of the defendants ever attempted to use legitimate channels to prevent Osheroff from practicing, if they had a valid concern about his competence. Accordingly, defendants can make no claim that their conduct was justified in the "interest of the patients."

5. Under §§18.2-499(b) and 18.2-500(a), Dr. Greenspan is liable to Osheroff for treble damages, costs, and attorneys fees for his conduct, as these sections proscribe the conduct of any person who attempts to procure the assistance of others to participate in a violation of 18.2-499(a). Greenspan clearly involved Tolkan and Hess in his activities, and, even if Hess and Tolkan were "innocent" in their participation, Greenspan violated this subsection by procuring their assistance.

Further, on November 15, 1979, Greenspan asked Dr. Constantine Hampers not to reappoint Osheroff as Medical Director of NVDC, as this would force Osheroff to sell his practice to Greenspan. Hampers refused to participate in this scheme. Given the power and influence of Dr. Hampers' position, his decision not to re-appoint Osheroff would have virtually ended Osheroff's medical career. Greenspan's solicitation of Dr. Hampers, by itself, constitutes a violation of §18.2-499(b), entitling plaintiffs to relief.

6. The evidence shows overwhelmingly that the conduct of defendants has severely injured the reputation, trade, and profession of plaintiffs. The drastic drop in numbers of chronic patients, office patients, referrals, and net income can be traced directly to the conduct of defendants during 1979 and the opening of the Prince William Dialysis Facility in 1980.

Prior to that time, Osheroff had a thriving, highly profitable practice of nephrology. In cases such as this, involving lost profits, damages need not be shown with exact certainty.

See Worrie v. Boze, 198 Va. 553 (1956); see also Pl. Tr. Memo., at pp. 7-8.

B. Count III

1. Count III alleges that Greenspan, Tolkan and Hess defamed Osheroff and injured his reputation.

2. Greenspan defamed Osheroff by telling patients, including Mr. Sparrow and Mr. Dialazo, that Osheroff was incompetent. Further, he introduced no evidence of the truth of these statements.

3. Greenspan and Tolkan defamed Osheroff before the Executive Committee of Alexandria Hospital by testifying that Osheroff was incompetent. Neither doctor had a sufficient basis to assess Osheroff's competence, and they had no basis on which to claim that Osheroff had not been cured of his depression. Greenspan raised incidents which had been conveyed to him by Peggy Hess, and he introduced NVDC staff letters to Hampers which were privileged communications between NVDC staff and Dr. Hampers. Both doctors were involved in litigation with Osheroff over the right to see patients in the unit, and both doctors knew that if Osheroff's privileges were not restored, Osheroff would not be able to practice medicine. The evidence shows that Greenspan and Tolkan both had an ulterior purpose

for testifying adversely against Osheroff and both testified before the Committee in bad faith. These doctors cannot claim any qualified privilege for their statements before the Committee under these circumstances. See Pl. Tr. Memo., at pp. 13-16.

4. Hess defamed Osheroff to the NVDC staff by calling him a "lunatic" and "incompetent." Further, she reported incidents to the press which resulted in a newspaper article (Pl. Ex. 120(j)), indicating that Osheroff was endangering the lives of patients. Ms. Hess admitted that, with regard to one incident, she told the newspaper reporter that the patient "might well have died." No competent evidence was introduced to prove the truth of that statement, or the truth of any of Ms. Hess' defamatory statements.

5. Ms. Hess can make no claim of common law qualified immunity for her statements, as no evidence was introduced to show either that she made these statements out of a duty to patients or that she pursued legitimate channels to protect patients from an "incompetent" doctor. Ms. Hess herself testified that she had no purpose in mind when she spoke to the press about Osheroff and that she knew her statements would injure his reputation. See Pl. Tr. Memo., at pp. 13-16.

6. The statements made by these defendants concerning Osheroff's competence are defamation per se. Rosenberg v. Mason, 157 Va. 215, 234 (1931); see Pl. Tr. Memo., at p. 14.

C. Count IV

1. Count IV alleges that Greenspan and Tolkan breached their fiduciary obligation to Osheroff and Osheroff, Inc. by setting up a competing facility, and thus holds the Prince William Dialysis Facility as constructive trustees for plaintiffs.

2. Greenspan and Tolkan, as plaintiffs' employees, and, by virtue of their agreement to maintain Dr. Osheroff's practice, stood in a fiduciary relationship with plaintiffs and were bound to exercise utmost faith and loyalty to their employer. Horne v. Holley, 167 Va. 234, 241 (1958); H-B Partnerships v. Wimmer, 220 Va. 176, 197 (1979); see also Pl. Tr. Memo., at pp. 17-20.

3. In setting up the Prince William Dialysis Facility, Greenspan and Tolkan acquired an interest adverse to that of their principal and severely injured Dr. Osheroff's practice. In addition, these doctors took advantage of confidential information which came to them by virtue of their position:

- a) the nature and terms of Dr. Osheroff's contract with NMC,
- b) confidential financial information, c) patient names and lists, and d) inside information about NVDC's ability to expand.

More importantly, these doctors took advantage of the physician-patient relationship which they had developed only because they were Osheroff's employees and used these relationships in setting up a competing facility. This conduct was in breach

of their fiduciary obligations to their employer. See Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175, 1184 (Pa. 1978); see also Pl. Tr. Memo., at pp. 3-5; Community Counselling Service v. Reilly, 317 F.2d 239, 244 (4th Cir. 1963); Pl. Tr. Memo., at pp. 18-20.

4. The fiduciary duty owed by these two doctors is underscored by the fact that their employer was incapacitated during most of the time relevant to this case, and he entrusted his medical practice to his two employees. Greenspan and Tolkan were privy to medical information concerning Dr. Osheroff's progress, and they used that information to their advantage.

5. Under these circumstances, with such a wilfull breach of fiduciary trust, the appropriate remedy in equity is to impose a trust on behalf of plaintiffs on the profits of the Prince William Dialysis Facility. Pl. Tr. Memo., at pp. 17-22.

D. Count VI

1. Count VI alleges that defendant Greenspan, individually, deliberately interfered with the business reputation and profession of plaintiffs. This count is based on the common law tort of interference with business relationships, (see Picture Lake Campgrounds v. Holiday Inns, Inc., 497 F.Supp. 858, 863 (E.D. Va. 1980); also Pl. Tr. Memo., at pp. 5-7,) and differs from a claim under Va. Code §18.2-499(a) and §18.2-500 in that a conspiracy need not be proven.

2. As set forth in Counts I, II, III, and IV, Greenspan took many actions in concert with other defendants to prevent Osheroff from practicing medicine, but his conduct warrants a further finding that he personally undertook to interfere with Dr. Osheroff's practice.

3. Greenspan was appointed Acting Medical Director and "associated" with Osheroff in the practice of medicine, which gave him the right of first refusal to the NVDC Medical Directorship if Osheroff did not return within twelve months. Greenspan was kept abreast of Osheroff's progress at Chestnut Lodge, and he knew that Osheroff was not progressing well. He used this knowledge to his advantage in negotiating for sale of the practice, as he led Osheroff's representatives to believe that Osheroff would lose the directorship by virtue of the disability clause. When Osheroff transferred to Silver Hill and later, when he was discharged from Silver Hill, Greenspan called Dr. Dingman to discuss Osheroff's progress and to see if Dingman could do anything about Osheroff's discharge. Greenspan's intent is transparent: he wanted to keep Osheroff in Chestnut Lodge as long as possible to lower his purchase price or to gain the Medical Directorship by default.

4. Greenspan personally misrepresented to Westerman and Notaris that he was developing a dialysis facility in Prince William. Osheroff's representatives, trusting Dr. Greenspan in his position as employee and professional, were

thus misled and delayed taking steps to protect Osheroff's interests.

5. Greenspan personally undertook to have Dr. Osheroff's privileges removed at Alexandria Hospital. He threatened Osheroff on the day he was fired and called Dr. Haut the same day to carry out his threat. Further, his testimony before the Alexandria Hospital Executive Committee was an obvious malicious attempt to insure that Osheroff had no privileges at Alexandria Hospital, which would have given him a tremendous advantage in his then pending lawsuit against Osheroff.

6. Greenspan personally requested Dr. Hampers not to reinstate Osheroff as Medical Director so that Osheroff would be forced to sell his practice. When Hampers refused to assist Greenspan, Greenspan threatened to take the patients anyway. On December 12, 1979 he threatened again to steal Osheroff's practice.

7. Greenspan personally solicited each and every dialysis patient at NVDC, telling some of them that Osheroff was incompetent.

8. While he was Osheroff's employee, Greenspan filed applications for three dialysis facilities. He told Osheroff about none of them.

9. Greenspan's conduct was not inadvertent, but intentional and deliberate, calculated to prevent Dr. Osheroff from practicing medicine and to obtain the medical practice for himself.

10. As a result of Greenspan's conduct, plaintiffs have suffered severe financial losses, as reflected in the markedly decreased number of chronic and office patients in plaintiffs' practice and in the significant decreases in net income to the practice. Additionally, Dr. Osheroff has suffered grave personal humiliation and embarrassment and irreparable damage to his professional reputation.


Collateral Estoppel

1. Defendants are collaterally estopped from asserting that the patients they solicited from Dr. Osheroff's practice were "their" patients or that their conduct in soliciting patients was not a breach of medical ethics. These issues were raised and litigated between the same parties in Greenspan v. NMC, et al., (Pl. Ex. 168) and were findings necessary to the decision in that action. The record in that case, and, indeed, the record in this case, fully support these findings. The doctrine of collateral estoppel thus precludes this court from making a contrary finding. Bates v. Devers, 214 Va. 667 (1974); see Pl. Tr. Memo., at pp. 22-26.

Respectfully submitted,

RAPHAEL J. OSHEROFF, M.D., et al.,
By Counsel

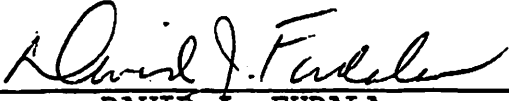
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiffs' Proposed Findings of Fact and Conclusions of Law was hand delivered to R. Harrison Pledger, Jr., Esquire, 1489 Chain Bridge Road, Suite 204, McLean, Virginia, 22101, this 8th day of June, 1982.



DAVID J. FUDALA