File

MEMORANDUM

TO: Phil & John

FROM: David

RE: Final Order in Osheroff

DATE: February 26, 1983

Attached is a draft of a decree to be entered in the Osheroff v. Greenspan matter. I thought a few explanatory notes concerning my thinking in drafting the decree might be helpful.

First, with regard to interest. You will note that I have included provisions for pre-judgment interest and judgment interest. The Va. Code, §8.01-382 provides that the verdict of the jury or judgment or decree of the court may provide for interest on any sum awarded and fix the period for which the interest may commence. If the verdict or judgment does not set the interest, then the judgment shall bear interest at the judgment rate of interest (see 6.1-330.10) which is not 10%. In short, the jury or the court can award pre-judgment interest but if the jury or the court does not do so, then the judgment automatically bears the 10% judgment interest from the date of the entry of the judgment.

The statute above, however, does not address the percentage rate at which pre-judgment interest may be

awarded. A Fourth Circuit case, Marsteller Corp. v. Ranger Construction Co., 530 F.2d 608 (4th Cir. 1976), however, limits pre-judgment interest to the maximum rate of interest allowable on contracts under Virginia Usury laws. (See Va. Code §6.1-330.11). In Virginia, that interst rate is 8%. (Note that at the time of the decision of Marsteller, the usury interest rate of 8% and the judgment interest rate of 8% were the same). Under Marsteller, then, it seems that pre-judgment interest is limited to 8%, but judgment interest may be 10%. This seems anomalous to me, and I suspect that when the judgment interest statute was amended, the usury statute should have been amended at the same time but was not. In any event, this lengthy explanation explains why I left the percentage rate blank on the pre-judgment interest, as I don't want to invite error and give them something to appeal. In short, to be safe we should ask for 8%, but logically we could ask for 10%. Take your pick and I'll abide by it.

With regard to the dates that I have selected for the running of the interest, I of course picked the dates which are most beneficial to Osheroff. With regard to pre-judgment interest, I used the date January 1, 1980 on the theory that Ray was deprived of money during all of 1980, 1981 and 1982, the years for which the judge has awarded him compensatory

damages. Thus we are claiming that Ray lost the use of that income and should be compensated in some way by pre-judgment interest. (Note that when the interest arises from an express or implied contract to pay interest, that the market rate of interest may be awarded. I don't think we have those facts here, so I think we are limited to the statutory interest). Of course, if the judge is inclined to award pre-judgment interest at all, he may choose to select a date in June 1980, which marks the opening of the Prince William Dialysis Facility. Of course, this is when the patients began to transfer away from Osheroff and he actually began to lose the income that we are claiming. In any event, I have selected the most advantageous date for Ray, and let's hope the judge agrees with it.

With regard to all the post-judgment interest, I have selected the date of February 8, 1983, which was the date of the Memorandum of Opinion of the judge filed with the court. Of course, judgment interest generally starts to run from the date of the entry of the judgment, which technically will not be until we get a final order entered in this case. That may be some time, however, given the status of the attorney's fees and costs issue, so I think we should try to get the judge to set the actual date of his decision as the date of the interest to start

running, so there is some incentive for the defendants to cooperate with us and to conclude this thing expeditiously.

You will note also that I have computed, or at least included in the order, that the pre-judgment interest run up until the date of judgment, then the post-judgment interest is computed on the total amount due plus the interest which has accrued to that day. I think this is a fair way of handling it, if the judge does award pre-judgment interest. After all, the only reason for awarding judgment interest is to compensate the complainant for the loss and the delay of getting his money which is due and owing to him at that time, at the date of judgment.

Next, with regard to the constructive trust count, as you can see from the Order, I have constructed a system by which Ray is entitled to an immediate accounting and payment of profits with interest and a yearly accounting for every year thereafter, with interest penalties if the profits are not paid in a timely manner. You know as well as I that, if this trust is to be handled, that there are going to be many times we'll have to go back to the court for relief. Accordingly, I have included in the decree the continuing right of the complainant to reinstate the cause on motion if any rulings of the court are needed after the final order is entered. This is

required, as after 21 days from the date of the order, the court ordinarily loses all power over the cause, and can only grant further relief upon the filing of another separate lawsuit. My research in Phelps Va. Rules of Equity Practice and Procedure and in Lyles Equity Pleading & Practice, however, indicates that in instances such as this, when we know we'll have to go back before the court, that "it is common practice, where the circumstances warrant the precaution, to reserve, on the face of the final decree, the right to reinstate the cause, on motion, for the purpose of securing complete benefit of the decree." See Lyles Equity Pleading & Practice, §272. I think this will give us the ongoing protection that we need.

Further, I have defined profit to be the gross revenue for the Prince William Dialysis Facility, and I have included the unit professional fees of $260 a month. As you know, this is not income to the corporation, but rather is taken into the income of the Nephrology Associates Inc. I have included a language which allows deductions only for costs and expenses demonstrated by defendants to be reasonable and necessary and directly related to the business of the corporation. I borrowed this language from Patent Infringement Law, where constructive trusts are regularly

applied, and by federal statute, the plaintiff demonstrates the gross profits, and then the defendant must come forward and demonstrate that the deductions are based on reasonable and necessary expenses. Further, I tried to allow for scamming by Greenspan and Tolkan by disallowing compensation for benefits to them or to the officers and directors of the corporation. Of course, you have more experience in the corporate structure and actual business, so if you don't think the language is inclusive enough, please let me know.

With regard to including the unit professional fees in our definition of profits, I have one major concern. Of course, in a broad sense, these fees are generated by the facility and are profits to which we may feel Osheroff is entitled. He of course lost a whole market area in the Prince William County area, and thus may well be entitled to a portion of those unit professional fees. This was the theory of damages we put forth at trial, and this was the theory of damages which Dr. Schramm based his figures on. Judge Wright, in assessing the money damages, took into account Schramm's testimony and awarded $184,00 plus dollars to compensate Osheroff for the loss of patients and for the lost of unit professional fees. I am thus concerned about including this same amount in the constructive trust theory, as I am afraid that Pledger will be able to make a convincing argument

that the constructive trust and the money damages are overlapping and that Osheroff should not be entitled to both. Of course, we could take the position that the money damages were to compensate Osheroff for his out-of-pocket losses, and that the constructive trust on all these profits is to prevent Greenspan and Tolkan from profiting from their wrongdoing, and thus Osheroff is entitled to both. I don't think, however, that this is what Judge Wright had in mind and I don't think he'll buy it.

If we view this constructive trust as only on the Prince William Dialysis Facility, and thus only on the facility fees, I think we can avoid more clearly this notion of "overlapping damages." Osheroff was compensated in money damages for his actual losses (and I think from Judge Wright's language, he's included prospective losses in this figure) which is basically loss of the $260 a month professional fees and other medical fees generated by the patients. This figure does not take into account, however, and neither did Dr. Schramm take into account, any profits which would be generated by the facility itself, i.e. the facility fees of $135 per dialysis treatment. Ray, of course, participates in the Northern Virginia Dialysis Center facility fees and gets 40% of the profits after taxes. If we consider Greenspan's having to open the facility for Osheroff in Prince William, or that, had Greenspan not done

what he did, Osheroff could have opened a facility in Prince William, then he would be entitled to the profits from the facility itself. (Of course, under his contract with National Medical Care, he may have been limited to 40%, but that could have been negotiated.) Further, these profits are the direct result of Greenspan's and Tolkan's deceptiveness in setting up a competing facility, and these profits represent the direct fruits of their wrongdoing. Thus, I think it is very easy to distinguish between the money damages awarded to Ray and the constructive trust profits awarded, and make a clear showing of absolutely no overlapping whatsoever.

Of course, we may want to go all the way and let the judge cut us back, but I think we should give it some thought before actually filing the order with the court.

What I propose to do is get this typed up once you and John have reviewed it, send it to Pledger and set it down for the next available motions day for entry. I am having the research done on the loadstar for attorney's fees, and will have it available to file at the same time that we file this, although I think we should set down the attorney's fee matter for a later hearing, so we can have time to bargain with Pledger. As always, I welcome your input.

I forgot one thing. In equity, the court can enter interlocutory orders, so it is possible for the judge to order all the things that we've asked for except for the attorney's fees. I have included language in the order to indicate that the order is final in all respects except with regard to the attorney's fee matter, and this may or may not start the appeal time running. Frankly, I think the decree is not final and the appeal time does not start running until an order is entered which takes care of all the matters in the lawsuit. In any event, we will get our interest with dates set and interest running, and Pledger can figure out for himself whether he is under a deadline to appeal or not.