

1 STATE OF MICHIGAN  
2 IN THE COURT OF CLAIMS  
3

4 PETER J. HAMMER,  
5 Plaintiff,

6 v

File No. 04-241-MK

HON. JAMES R. GIDDINGS

7 THE BOARD OF REGENTS OF THE  
8 UNIVERSITY OF MICHIGAN, a  
9 body politic,  
10 Defendant.  
11 \_\_\_\_\_/

12 DEPOSITION OF RICHARD D. FRIEDMAN

13 Taken by the Plaintiff on the 26th day of January, 2006, at  
14 Green, Green & Adams, P.C., 900 Victors Way, Suite 240, Ann  
15 Arbor, Michigan, at 10:00 a.m.  
16

17 APPEARANCES:

18 For the Plaintiff: MR. PHILIP GREEN (P14316)  
19 Green, Green & Adams, P.C.  
20 900 Victors Way, Suite 240  
Ann Arbor, Michigan 48108  
(734) 665-4036

21 For the Defendant: MR. RICHARD J. SERYAK (P26152)  
22 Miller, Canfield, Paddock and Stone, P.L.C.  
23 150 West Jefferson Avenue, Suite 2500  
Detroit, Michigan 48226  
(313) 963-6420

24 Also Present: Peter J. Hammer  
25 Steven Croley

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DEPOSITION OF:  
Richard D.  
Friedman



1 Q Okay. Did you ask him why he was coming to you for a  
2 comment?  
3 A No. I -- no.  
4 Q Okay. Fine. And do you remember what article this was?  
5 A Well, I remember the long one that eventually was published  
6 in Michigan, and I can't remember what else.  
7 Q Do you remember the title of the article or any part of it?  
8 A Well, it became something like "Antitrust Beyond  
9 Competition," I think was the final published form.  
10 Q And do you remember approximately when that was? And let  
11 me try and make it a little more broad so it will be easier  
12 to place.  
13 A Yeah.  
14 Q Was it before the 2000 tenure deferral or after that, but  
15 before the 2002 tenure vote?  
16 A I'm pretty sure he gave me a copy before the 2000 deferral  
17 and we also talked about some of his work and possibly that  
18 draft between the two.  
19 Q Okay. Let's talk for a moment about the 2000 tenure  
20 consideration for Peter Hammer. You were not on the  
21 committee, I take it, the Tenure Committee?  
22 A I wasn't.  
23 Q Do you remember who chaired that committee? Did Rick  
24 Lempert?  
25 A That rings a vague bell, so --

1 Q Okay. Did you participate in any way in the 2000 tenure  
2 consideration?  
3 A Yes.  
4 Q And by that I mean -- okay. And in what ways did you  
5 participate in the 2000 tenure issue?  
6 A As I recall, the committee asked me for a memo evaluating  
7 Peter's work and I wrote one. And then there was  
8 discussion at the faculty meetings, and I participated in  
9 the discussion.  
10 Q And how many faculty meetings were there concerning the  
11 tenure issue for Peter Hammer in the year 2000?  
12 A I believe there were two. We have a two-meeting rule, and  
13 I don't recall there being more than two. I mean, there's  
14 got to be two, and I don't remember that there were more  
15 than two.  
16 Q All right. Was there a vote by the tenured faculty to  
17 either grant or deny Peter Hammer tenure in 2000?  
18 A I don't believe so.  
19 Q Was there a vote to defer consideration for a period of two  
20 years?  
21 A There was.  
22 Q All right.  
23 (Deposition Exhibit I marked)  
24 Q Professor Friedman, you now have in front of you what's  
25 marked Deposition Exhibit Number 1. Can you identify that

1 document for us?  
2 (Witness reviews exhibit)  
3 A Yeah. That looks like the memo that I have written in  
4 connection with the first consideration.  
5 Q Did you have occasion to write a memo as well in the year  
6 2002 on the issue of Peter Hammer's tenure?  
7 A I don't remember. I don't remember writing a memo.  
8 Q In your memo of January 10, 2000, you conclude the first  
9 paragraph by observing that -- well, you -- "Also, though  
10 my antitrust teaching and practice have occasionally  
11 touched on health care, I have essentially no special  
12 expertise in the area, which is Peter's primary focus." Do  
13 you see that?  
14 A Uh-huh (affirmative).  
15 Q Between 2000 and 2002, had you done any study, reading, or  
16 other work that gave you a degree of expertise in the  
17 health care area?  
18 A I would say that I did not have substantially further  
19 expertise in health care in 2002 than I did in 2000.  
20 Q In the second paragraph, you indicate -- looking at the  
21 second sentence referring to Peter's writing, "This body of  
22 work shows Peter to be an intelligent and perceptive  
23 analyst." Do you see that?  
24 A Uh-huh (affirmative).  
25 Q Was it your opinion in 2000 that the writing that Peter

1 Hammer had done thus far showed him to be intelligent and a  
2 perceptive analyst?  
3 A I assume that if I wrote that that that is what I believed.  
4 Q Okay. Now, between 2000 and 2002, is it your opinion that  
5 Peter's work got better, worse, or stayed the same?  
6 A I'm not sure I can answer that question.  
7 Q That's all right. Okay. Well, let me put it to you a  
8 little differently then. Was there anything that occurred  
9 between the deferral vote on Peter Hammer's tenure and the  
10 denial of Peter Hammer's tenure two years later that led  
11 you to believe that Peter's work -- body of work showed that  
12 he was not intelligent or not a perceptive analyst?  
13 A Well, there's no doubt that Peter is very intelligent. I  
14 don't think there's any doubt that he's perceptive. The  
15 analytical quality of the writing, I think, is not what I  
16 would have hoped.  
17 Q Okay. Your next sentence starts, "I think he has good  
18 judgment on substantive matters." I take it you believed  
19 that in 2000 or you wouldn't have put that in here?  
20 A That's right.  
21 Q Okay. Was there anything that occurred between February of  
22 2000 -- I'm sorry, January of 2000 and February of 2002  
23 that indicated to you that he did not have good judgment on  
24 substantive matters?  
25 A Possibly. I think the -- I think the overall judgment in

1 the long article about general approach to antitrust and  
 2 how it should be implemented didn't strike me as sound, and  
 3 that seemed perhaps to move in the wrong direction.  
 4 Q Now, you did indicate in the latter part of that sentence  
 5 that "there are no major bloopers in the articles, and for  
 6 that matter few significant errors altogether." Did his  
 7 articles get worse between 2000 and 2002 in that regard?  
 8 A I don't believe so.  
 9 Q Okay. The next sentence is, "The importance of the issues  
 10 he addresses is very great." You still believe that?  
 11 A Yes.  
 12 Q So if we can stop for a minute, in 2000, what you were  
 13 saying about Peter personally, at least, is that he was an  
 14 intelligent and perceptive analyst who had good judgment on  
 15 substantive matters, wrote articles on important issues,  
 16 the importance of which were very great, and the articles  
 17 had few significant errors and no major bloopers; fair?  
 18 A No, not fair.  
 19 Q Why?  
 20 A Because you said what are we saying about Peter, and, of  
 21 course, you've only taken a small part out of context.  
 22 Q Well, taking your introduction is what I'm taking. We'll  
 23 get into the substance of this afterwards. You made  
 24 general observations about him and those were your words,  
 25 weren't they?

1 A The --  
 2 MR. SERYAK: Excuse me. You asked a general  
 3 question and I think he was responsive to that.  
 4 MR. GREEN: Yeah. And I'm asking him a different  
 5 question now.  
 6 Q Those were your words, weren't they?  
 7 A The words you have chosen were among the words that I used.  
 8 Q Right.  
 9 A Those were among the observations that I made.  
 10 Q And then you had some criticisms of the articles as well?  
 11 A I did.  
 12 Q One of the criticisms was that the articles were very  
 13 repetitive?  
 14 A That's correct.  
 15 Q And then you went on to analyze the different articles and  
 16 your problems that you had with them; correct?  
 17 A Correct.  
 18 Q And you concluded this entire analysis by saying, "I am  
 19 certain" --  
 20 "I certainly am prepared to be persuaded by those more  
 21 active in antitrust than I or more knowledgeable about  
 22 the health care industry and its literature, that  
 23 there is more in this body of work than has met the  
 24 eye";  
 25 right?

1 A Uh-huh (affirmative).  
 2 Q So, essentially, if I can paraphrase that, you were  
 3 deferring to people who have more expertise on the  
 4 significance of the articles that Peter had written;  
 5 correct?  
 6 A No, not correct. I don't think I was deferring. I said I  
 7 was prepared to be persuaded.  
 8 Q Okay. Would you say that it would be fair to read that  
 9 comment that you were prepared to be persuaded with your  
 10 first observation that this was not necessarily your area  
 11 of expertise although you were knowledgeable in the area?  
 12 A Could you repeat that question?  
 13 Q Sure.  
 14 A It got a little convalescent.  
 15 Q Would it be fair taking out the -- all of the specifics of  
 16 the comments that you made to take your first observation  
 17 that although you've taught antitrust and occasionally have  
 18 touched upon health care that you have essentially no  
 19 special expertise in the area, and read that together with,  
 20 "I am certainly" --  
 21 (Mr. Croley)  
 22 MR. GREEN: Ah, you made it through.  
 23 Q -- "I am certainly prepared to be persuaded by those more  
 24 active in antitrust." Be fair to take those two comments  
 25 together?

1 A Yeah. I think it's fair to take the two comments together.  
 2 Q Now, is Tom Kauper someone that you believe has more  
 3 expertise in antitrust than you?  
 4 A He does.  
 5 Q And did you have occasion to read his analysis of Peter  
 6 Hammer's writings?  
 7 A I did.  
 8 Q And do you know how many times he --  
 9 MR. SERYAK: Can we just get the time frame?  
 10 MR. GREEN: We will.  
 11 MR. SERYAK: All right.  
 12 Q Do you know of how many times Professor Kauper has  
 13 performed an analysis of Peter Hammer's writing?  
 14 A I don't.  
 15 Q You know that he did in 1998 -- don't you? -- prior to the  
 16 2000 tenure?  
 17 A That's my recollection.  
 18 Q And that he wrote another evaluation for the 2000 tenure  
 19 review?  
 20 A Oh, you're saying two before the initial consideration. I  
 21 wouldn't have remembered that.  
 22 Q Okay. And he wrote another one as a part of the committee  
 23 member on the committee for the 2002 tenure vote?  
 24 A I didn't even remember that he was a member of the  
 25 committee.

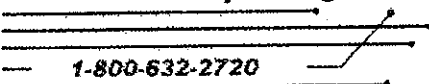
1 individuals were identified to Peter Hammer to assist him  
 2 and review his writings?  
 3 **A Yes.**  
 4 **Q** Were you one of those individuals?  
 5 **A I was.**  
 6 **Q** Okay. And from your earlier testimony I gather that Peter  
 7 did submit his writings to you for assistance?  
 8 **A That's right.**  
 9 **Q** All right. Now, let's come back up to 2002. Prior to the  
 10 first meeting -- the meeting at which no vote was taken,  
 11 which I think was February 11th of 2002 -- had you yet made  
 12 up your mind on how you intended to vote on the issue of  
 13 tenure?  
 14 **A I think by that point I was inclined against. I don't know**  
 15 **that made up my mind. I can't tell, but I was inclined**  
 16 **against.**  
 17 **Q** All right. And as you sit here today, is it possible for  
 18 you to identify what factors influenced you to be inclined  
 19 against tenure prior to the first tenure meeting in 2002?  
 20 **A Yes.**  
 21 **Q** Could you tell me what those are?  
 22 **A Predominantly, it was my own assessment of the writing.**  
 23 **Q** Did you read the external reviews?  
 24 **A Yes.**  
 25 **Q** Did they influence you in either way?

1 that Peter Hammer failed on both accounts?  
 2 **A I don't know that I didn't break it down that way. I mean,**  
 3 **ultimately it's a final judgment on tenure, and I don't**  
 4 **think I -- I don't recall, you know, putting it in separate**  
 5 **boxes.**  
 6 **Q** Okay. But as you sit here today, thinking back on it --  
 7 let's take them one at a time. You've already indicated  
 8 that you thought his writing was flawed, so I think we  
 9 can --  
 10 **A Yeah.**  
 11 **Q** -- at least for our purposes agree that one of the reasons  
 12 you decided to vote against tenure for Peter Hammer is  
 13 because you thought his writing itself was flawed?  
 14 **A Uh-huh (affirmative).**  
 15 **Q** Correct?  
 16 **A That's correct.**  
 17 **Q** All right. Now, with regard to the other part of the  
 18 equation that you've identified, what did you think of him  
 19 personally in terms of his potential to do significant work  
 20 in the field?  
 21 **MR. SERYAK:** I'm going to object to the form of  
 22 the question.  
 23 **Q** You can answer.  
 24 **MR. SERYAK:** I mean, that does mischaracterize  
 25 his testimony.

1 **A I think they left me believing that this was a question on**  
 2 **which reasonable minds could differ. And I think they gave**  
 3 **me some support in feeling that mine was a reasonable view.**  
 4 **Q** And which reviews, in particular, made you believe your  
 5 opinion was reasonable?  
 6 **A As best I recall, Elhaug and Blumstein. There may have**  
 7 **been others.**  
 8 **Q** Let me ask you: When you're analyzing the writings of a  
 9 fellow faculty person for the purpose of voting on tenure,  
 10 are you looking at the writings to determine whether those  
 11 writings in and of themselves are significant, well-  
 12 written, contributive of the law in some important fashion,  
 13 or are you looking at the writings to analyze whether or  
 14 not the person behind them has the capacity to turn out  
 15 truly remarkable work?  
 16 **MR. SERYAK:** I'll just object to the form.  
 17 **Q** You can answer. Or some other purpose?  
 18 **A I'm looking at the writings in order to form my best**  
 19 **judgment as to whether the candidate has satisfied our**  
 20 **tenure standards, and my understanding is that we're meant**  
 21 **to assess both the writing that's in the file and the**  
 22 **potential for being a leading scholar in the field. It's**  
 23 **suppose to be somebody on the way to becoming a leading**  
 24 **scholar in the field.**  
 25 **Q** Okay. And was it your opinion before the 2002 tenure votes

1 **Q** You can answer the question.  
 2 **A I thought it was not sufficiently likely that he would be a**  
 3 **sufficiently good scholar to justify an award of tenure.**  
 4 **Q** Okay.  
 5 (Deposition Exhibit 3 marked)  
 6 I show you what's marked Deposition Exhibit Number 3 and  
 7 ask you if you can identify that?  
 8 (Witness reviews exhibit)  
 9 **A I don't remember it all. I mean, I see --**  
 10 **MR. SERYAK:** Well, just take your time and look  
 11 at it.  
 12 **A I see on the face of it it's a message from our Public**  
 13 **Relations person asking me to help out with a media**  
 14 **request.**  
 15 **Q** Okay. And your reply to that Public Relations person;  
 16 correct?  
 17 **A Was suggesting three people who -- three colleagues who**  
 18 **might know something about it.**  
 19 **Q** Okay. Now, the date of this particular e-mail, at least  
 20 from the printed copy, would be February 18, 2002?  
 21 **A Uh-huh (affirmative).**  
 22 **Q** And according to my recollection, that would be close to  
 23 the second meeting on tenure and after the first meeting on  
 24 tenure for Peter Hammer; correct?  
 25 **A If you tell me that's according to your recollection, I'll**

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1 You have in front of you Deposition Exhibit Number 6. Do  
2 you recognize this?  
3 (Witness reviews exhibit)  
4 **A I do, yeah.**  
5 **Q** Now, this is an e-mail from Peter Hammer asking for your  
6 assistance, your advice, or any help you might be able to  
7 give --  
8 **A Right.**  
9 **Q** -- In his seeking employment elsewhere?  
10 **A Right; right.**  
11 **Q** And it's dated April 25th of 2002; correct? The actual --  
12 **A My response is dated April 25th.**  
13 **Q** I'm sorry, yeah. Peter's e-mail to you --  
14 **A Peter's is April 23rd.**  
15 **Q** -- is the 23rd. And your response to his request was --  
16 and I'm quoting -- "I've written Spindelman, Gallanis,  
17 Dressler, and Colker. Let me know if there's anything else  
18 I can do. Good luck."  
19 **A Uh-huh (affirmative).**  
20 **Q** Right?  
21 **A Uh-huh (affirmative).**  
22 **Q** Now, at the tenure meeting you had wished him good luck and  
23 then spoke out against his tenure; correct?  
24 **A Uh-huh (affirmative).**  
25 **Q** And I guess my question is, you say you've written these

1 individuals and again said "good luck" to Peter. Did you  
2 write nice things about him or critical things about him to  
3 these individuals?  
4 **A I would not have written to them unless I felt what I could**  
5 **write would be generally supportive, and that those would**  
6 **improve Peter's chance of getting a job at Ohio State. I**  
7 **would have had no reason to write on my own initiative**  
8 **otherwise. I don't remember the -- so I can be confident**  
9 **that what I wrote I was hopeful would improve his chances.**  
10 **I don't remember at this moment the substance and if there**  
11 **was -- if there was anything negative, I would have said --**  
12 **I would have tried to be honest with them, but as I said,**  
13 **it presented reasons why they should consider hiring Peter.**  
14 **Q** Are these all individuals who were affiliated at Ohio  
15 State?  
16 **A That's right.**  
17 **Q** And these are all individuals you know?  
18 **A I knew Spindelman, Gallanis, Dressler, and I guess I'd had**  
19 **some contact with Colker.**  
20 **Q** All right. Did you maintain copies of what you wrote them?  
21 **A I don't remember. Until you showed me this, I had**  
22 **forgotten about this. I would guess I sent them an e-mail**  
23 **and it would be in my out box.**  
24 **Q** And it would have been about this time?  
25 **A It would have been between the 23rd and the 25th, yeah.**

1 **Q** And it would have had Peter Hammer's name on it, I take it?  
2 **A I suppose, yeah.**  
3 **Q** All right.  
4 **MR. GREEN:** And I would indicate on the record  
5 that those documents were not provided to us as part of our  
6 e-mail request.  
7 **Q** I would request that you check your --  
8 **A I'll go back and see.**  
9 **Q** -- archives and see. That was certainly broad enough to be  
10 caught by the request as redefined by counsel.  
11 **A Yeah. I don't remember -- I remember this exchange. I**  
12 **don't remember beyond, but I'll check.**  
13 **Q** To facilitate it, let me give you -- so that you have a  
14 copy of this -- an extra copy of the e-mail in question so  
15 that we can retain the marked copy.  
16 **A Right; sure.**  
17 **Q** That may help you with regard to the references. So as you  
18 sit here today, it's your belief that you were writing in  
19 support of Peter Hammer's candidacy at the Ohio State Law  
20 School?  
21 **A That's right.**  
22 **Q** All right. And you indicate that you would be honest about  
23 any criticisms that you had of Peter's work in those  
24 letters; correct?  
25 **A I wouldn't be dishonest. I would not feel the need to go**

1 **into depth about all my views. If I felt that he was not a**  
2 **plausible candidate for that school, I wouldn't have**  
3 **written to them, so --**  
4 **Q** You know, I take it back. I apologize. I do have --  
5 **A Oh, you do?**  
6 **Q** -- an e-mail that you've addressed to them.  
7 **A Oh, good.**  
8 **Q** It was undated. That's why I didn't know that --  
9 **A All right.**  
10 **MR. SERYAK:** So you have that?  
11 **Q** Well, I have an e-mail, but it's an undated e-mail.  
12 **A Well, that's what it would have been.**  
13 **Q** Is it? All right. I apologize.  
14 **A When I said I've written, I'm sure I would have --**  
15 **Q** I apologize. I do have it.  
16 **A Yeah. No, no problem.**  
17 **MR. GREEN:** Now let me have this marked. It's  
18 probably why I had it in here, to try and tag a date for  
19 it.  
20 **THE WITNESS:** Yeah.  
21 (Deposition Exhibit 7 marked)  
22 **MR. GREEN:** All right. There we go. I'll get  
23 you a copy.  
24 **Q** All right. You have in front of you now Deposition Exhibit  
25 7. Would this document, which is undated other than a time

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- 1 that anything having to do with the conclusion of  
2 competence by the faculty was not grievable?
- 3 **A I was not the proponent. I think that was a widely shared**  
4 **view.**
- 5 **Q Within the Law School?**
- 6 **A Within the Law School.**
- 7 **Q Well, it was proposed by the committee in the first**  
8 **instance, wasn't it?**
- 9 **A My best recollection is that before it was referred to the**  
10 **committee, faculty discussion included that point.**
- 11 **Q Oh, okay.**
- 12 **MR. GREEN:** Let me take two minutes and you can  
13 take two minutes. I may be done with my questions. I want  
14 to talk with Peter and you can -- we'll leave the room.  
15 You can stay.
- 16 **(Off the record)**
- 17 **MR. GREEN:** I have no further questions.
- 18 **EXAMINATION**
- 19 **BY MR. SERYAK:**
- 20 **Q Professor, I believe you indicated in response to one of**  
21 **counsel's questions that you had had lunch with Peter**  
22 **Hammer after the 2002 tenure vote?**
- 23 **A That's correct.**
- 24 **Q And was there any general discussion in that lunch about**  
25 **the outcome of the vote?**

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- 1 **A Yes.**
- 2 **Q And what that outcome was?**
- 3 **A Yes.**
- 4 **Q And what did you tell Peter Hammer as to why he didn't get**  
5 **tenure?**
- 6 **A We talked about the scholarship. The focus was on the**  
7 **scholarship.**
- 8 **Q And from your attendance at the meetings or any**  
9 **conversation you had with any faculty regarding Peter**  
10 **Hammer's tenure application, was anything said or did you**  
11 **observe anything to indicate that his -- that his sexual**  
12 **orientation had anything to do with the vote, with why**  
13 **people voted the way they did?**
- 14 **A No.**
- 15 **MR. SERYAK:** That's all I have.
- 16 **MR. GREEN:** Nothing further.
- 17 **(Deposition concluded at 11:56 a.m.)**
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16 (Pages 58 to 59)