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STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

PETER J. HAMMER,  
Plaintiff,

Case No.: 04-241 MK

THE BOARD OF REGENTS OF THE  
UNIVERSITY OF MICHIGAN,  
a body politic,  
Defendant.

\_\_\_\_\_ /

The Deposition of PROFESSOR ROBERT HOWSE, taken pursuant to Notice in the above-captioned cause at 900 Victors Way, in the City of Ann Arbor, Michigan, on Thursday, June 16, 2005, commencing at or about 10:06 a.m., before Jacqueline D. Afifi, CSR-4182, a Notary Public, in and for the County of Washtenaw, acting in Washtenaw.

APPEARANCES: PHILIP GREEN (P14316)  
Green, Green & Adams, P.C.  
900 Victors Way  
Suite 240  
Ann Arbor, MI 48108  
(734) 665-4036

Appearing on behalf of Plaintiff.

RICHARD J. SERYAK (P26152)  
Miller, Canfield, Paddock & Stone  
150 W. Jefferson Avenue  
Suite 2500  
Detroit, MI 48226  
(313) 963-6420

Appearing on behalf of Defendant.

Page 2

1	<b>I N D E X</b>	
2	<b>WITNESS:</b>	<b>PAGE</b>
3	<b>PROFESSOR ROBERT HOWSE</b>	
4		
5	EXAMINATION by Mr. Green . . .	3
	EXAMINATION by Mr. Seryak . . .	25
6	RE-EXAMINATION by Mr. Green . .	26
	RE-EXAMINATION by Mr. Seryak . .	27
7	RE-EXAMINATION by Mr. Green . .	28
8	<b>EXHIBITS</b>	
9	None marked.	
10		
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Page 4

1 Q Okay. Have you ever seen either the Renotice of  
 2 Corporate Deposition or the original Notice of Corporate  
 3 Records Deposition in this action?  
 4 A I do not believe so.  
 5 Q Okay. All right. Well, actually, why don't you keep  
 6 that for a moment.  
 7 A Okay.  
 8 Q Looking at the topics on page 2 of the Renotice, do you  
 9 see the first topic designated there?  
 10 A Yes.  
 11 Q Has anybody requested that you gather information to  
 12 respond to the subject matter of that particular  
 13 request?  
 14 A Not that I can recall.  
 15 Q Okay. Do you of your own knowledge know the identity of  
 16 all persons who provided information to the tenured  
 17 faculty and used by the tenured faculty in determining  
 18 whether to vote favorably or not on the plaintiff's  
 19 application for tenure in 2002?  
 20 A I do personally know who provided information to the  
 21 tenure committee since I served -- as the Chair of the  
 22 committee and also the identity of those people who  
 23 would have provided information -- distributed  
 24 information to the faculty as a whole that might have  
 25 come later or -- well, I think my recollection is that

Page 3

1 Ann Arbor, Michigan  
 2 Thursday, June 16, 2005  
 3 At about 10:06 a.m.  
 4 \* \* \*  
 5 PROFESSOR ROBERT HOWSE,  
 6 a Witness herein, was first duly sworn by the  
 7 Notary Public to tell the truth, the whole truth,  
 8 and nothing but the truth, testified as follows:  
 9 EXAMINATION  
 10 BY MR. GREEN:  
 11 Q Would you state your name and business address for the  
 12 record, please?  
 13 A My name is Robert Howse, and my business address is the  
 14 University of Michigan Law School.  
 15 Q Okay. Is it Professor Howse or?  
 16 A Professor.  
 17 Q Professor, you understand that you've been nominated to  
 18 represent the corporate entity known as the Board of  
 19 Regents of the University of Michigan in this action for  
 20 this deposition?  
 21 A Yes.  
 22 Q Okay. And in that capacity were you asked to obtain  
 23 certain information to respond to the topics in the  
 24 Notice of Deposition provided?  
 25 A I'm not sure that I understand your question.

Page 5

1 it was all in the -- the dossier that -- that we  
 2 distributed to the faculty.  
 3 Q When you say the dossier, you're talking about --  
 4 A The committee --  
 5 MR. SERYAK: Let him --  
 6 THE WITNESS: -- had put it together.  
 7 MR. SERYAK: Excuse me. Let him finish his  
 8 question.  
 9 BY MR. GREEN:  
 10 Q Okay. You're talking about a package of information  
 11 that is compiled by the tenure committee which includes  
 12 the application, the internal and external references,  
 13 your report and any publications that Professor Hammer  
 14 had?  
 15 A Yes.  
 16 Q Did it include any documents beyond those?  
 17 A Yes.  
 18 Q What documents beyond those did it include?  
 19 A My recollection is that it also includes or would  
 20 normally include a summary of -- of teaching  
 21 evaluations.  
 22 Q Okay. You participated in the actual discussions  
 23 preceding the vote for or against tenure being awarded  
 24 to Mr. -- or to Professor Hammer?  
 25 A Do you mean the discussions of the full tenured faculty?

Page 6

- 1 Q Yes.
- 2 A Yes.
- 3 Q And in --
- 4 MR. SERYAK: Counsel, could we just get -- if
- 5 we could just clarify what year you're talking about.
- 6 MR. GREEN: 2002.
- 7 MR. SERYAK: All right.
- 8 BY MR. GREEN:
- 9 Q This will all be about 2002 unless I otherwise indicate.
- 10 A Yep.
- 11 Q In your experience as a tenured faculty member at the
- 12 law school, from time to time do individuals who are
- 13 tenured faculty members obtain information from outside
- 14 sources that they share in these discussions, these
- 15 private discussions, if you will, with the other faculty
- 16 members?
- 17 A Do you mean the information that is not part of the
- 18 record that's distributed?
- 19 Q Yes.
- 20 A I can't recall a situation of that nature out of -- at a
- 21 tenure meeting.
- 22 Q And you don't recall that happening with Professor
- 23 Hammer's application in 2002?
- 24 A Any -- any, you know, outside information that was not
- 25 in material formally distributed to the faculty, no, I

Page 7

- 1 really can't.
- 2 Q Okay. So that the response to number 1 would basically
- 3 be the materials that were provided by the tenure
- 4 committee to the tenure faculty?
- 5 A Yes.
- 6 Q Okay. And I think you've already answered number 2,
- 7 that information was provided through your committee?
- 8 A That's correct. And mostly it was by reproduction of
- 9 the actual letters or reviews. In one case there was a
- 10 report of a telephone conversation.
- 11 Q And would you describe that for me? Who was the
- 12 telephone conversation between, if you recall?
- 13 MR. SERYAK: That -- I think the hesitation
- 14 is whether this would involve disclosing an external
- 15 reviewer. And can you answer the question without -- if
- 16 it's an external reviewer?
- 17 THE WITNESS: It is.
- 18 MR. GREEN: We're really going to fight that
- 19 one out, huh?
- 20 MR. SERYAK: Uh-huh.
- 21 MR. GREEN: Then we have got the whole summer
- 22 to do it.
- 23 MR. SERYAK: I'm sorry?
- 24 MR. GREEN: We have the whole summer to do
- 25 it.

Page 8

- 1 THE WITNESS: It was an external expert who
- 2 was consulted by the committee.
- 3 BY MR. GREEN:
- 4 Q Was it an external expert who -- whose evaluation was
- 5 ultimately provided to the tenured faculty as a part of
- 6 the vote?
- 7 A Through a summary of the telephone conversation that was
- 8 contained in part of these written materials that were
- 9 distributed to the faculty.
- 10 MR. GREEN: Okay. Was that included in the
- 11 materials you provided to me? Because I know there
- 12 was -- I think the external reviews were there, but with
- 13 the identifiers redacted from them.
- 14 MR. SERYAK: I will check that.
- 15 MR. GREEN: I just want to make sure that it
- 16 wasn't limited to just the written reviews as opposed to
- 17 this telephone conference.
- 18 BY MR. GREEN:
- 19 Q Who was the telephone conference with on this end?
- 20 A Myself.
- 21 Q Okay. And did you record the telephone conversation?
- 22 A What do you mean by record?
- 23 Q Did you record it by electronic means of any form?
- 24 A The actual conversation, no.
- 25 Q Okay. So you took careful notes?

Page 9

- 1 A Yes.
- 2 Q And did you transcribe your notes to be a part of the
- 3 dossier that was sent to the tenured faculty?
- 4 A Yes. Well, it was simply put into the description that
- 5 was sent to the tenured faculty.
- 6 Q How was this outside reviewer selected, if you recall?
- 7 A The -- by discussion within the committee.
- 8 Q Was the recommendation of this outside reviewer
- 9 favorable or unfavorable with regard to Dr. Hammer's
- 10 application?
- 11 A Favorable.
- 12 Q Okay.
- 13 MR. SERYAK: Counsel, can I just, just for
- 14 clarity, if I'm checking something here, was this -- my
- 15 understanding is this -- this was incorporated into a
- 16 report that went to the faculty?
- 17 THE WITNESS: That's correct.
- 18 MR. SERYAK: So it's not a separate document?
- 19 THE WITNESS: No.
- 20 BY MR. GREEN:
- 21 Q Oh, I thought that -- didn't you indicate that you had
- 22 summarized --
- 23 A Yes. But it's in the dossier.
- 24 Q Okay.
- 25 A Yeah. With all of the other reviews and -- and relevant

Page 10

1 material.

2 **Q Okay. Is it unusual for you to obtain information by**

3 **telephone as opposed to having a written review by the**

4 **external reviewer?**

5 A I don't know. I don't have enough experience. This was

6 my first time on the tenure committee.

7 **Q Okay. And I take it this is your first time being a**

8 **corporate rep in a corporate deposition?**

9 A Yes. Yes.

10 **Q Lucky you. What was the reason why this was done by**

11 **telephone as opposed to obtaining a written review from**

12 **this individual, if you know?**

13 MR. SERYAK: I just want to place an

14 objection. I'm not trying to lead here. It assumes

15 that there was no written review.

16 MR. GREEN: Well, that's true. Let me

17 rephrase. Good point.

18 BY MR. GREEN:

19 **Q Was there also a written review by this individual?**

20 A No.

21 **Q Okay. Now, going back to the other question, why -- how**

22 **was it that this -- this was done by phone as opposed to**

23 **obtaining a written review from this individual?**

24 A My --

25 MR. SERYAK: I'm -- same objection.

Page 11

1 MR. GREEN: What's the objection? He's

2 already said there was no written review.

3 MR. SERYAK: Oh, did you say no? The answer

4 was no to that?

5 MR. GREEN: Yeah. Yeah.

6 MR. SERYAK: Oh, I'm sorry.

7 MR. GREEN: Yeah. I backed up and asked him.

8 MR. SERYAK: Oh, I'm sorry. I withdraw that.

9 THE WITNESS: My recollection was that views

10 that we had already received concerning one particular

11 aspect of the candidate's scholarship showed

12 disagreement between certain experts, and we thought

13 that this particular individual might be able to help us

14 in our job of coming to terms with some of the

15 conflicting views given who they were.

16 BY MR. GREEN:

17 **Q Okay. So this was someone that was selected by the**

18 **committee?**

19 A Yes. And to answer your question more directly, it was

20 at a late stage after other material had come in and we

21 understood that the individual was not in a position

22 within the required time frame to write something.

23 That's my recollection.

24 **Q I understand. Okay. Okay. Topic number 3 is the**

25 **identity of all tenured faculty who did not vote**

Page 12

1 basically on plaintiff's application for tenure. And

2 that would fall into my mind in two categories, those

3 who voted against or those who either didn't participate

4 or abstained. Do you have information to respond to

5 that particular topic?

6 A No.

7 MR. GREEN: Mr. Seryak?

8 MR. SERYAK: We did produce, with the earlier

9 records that were date stamped, we did produce a set of

10 notes.

11 MR. GREEN: I saw that. I wasn't sure

12 whether or not the notes were complete in terms of who

13 voted and which way and which vote. I was hoping that I

14 could have actually a live witness speak for the

15 University as opposed to some notes by somebody unknown.

16 MR. SERYAK: Well, you can ask. I mean,

17 based -- you can ask this witness what his recollection

18 is.

19 MR. GREEN: Okay.

20 MR. SERYAK: And you can refer to those

21 notes. Although I'll represent to you he was not the

22 note taker.

23 MR. GREEN: Okay. Do we know who the note

24 taker was?

25 MR. SERYAK: (Indicating).

Page 13

1 MR. GREEN: Can we tell that at least?

2 MR. SERYAK: Yes. Will you -- I don't know

3 if you want to ask -- I thought maybe you were going to

4 ask some of these.

5 MR. GREEN: I don't care. I would accept

6 your --

7 THE WITNESS: The note taker was the dean's

8 secretary, and it was Rozona Kelemen.

9 MR. GREEN: Okay.

10 MR. SERYAK: I'm sorry, I didn't -- I didn't

11 hear the last response.

12 MR. GREEN: The note taker was the dean's

13 secretary.

14 MR. SERYAK: Okay.

15 MR. GREEN: Her name.

16 BY MR. GREEN:

17 **Q In par -- you participated in the discussions and**

18 **ultimately the vote, did you not?**

19 A That is correct.

20 **Q And from the perception you had did you observe**

21 **individuals who tended to be outspoken against the grant**

22 **of tenure, certain individuals who were perhaps at the**

23 **forefront of -- of that side of the discussion?**

24 A The -- the case generated a great deal of discussion

25 both overall views for and against, but much of the

Page 14

1 discussion really was about people's views of individual  
 2 pieces of scholarship or -- and that -- that was a lot  
 3 of the -- the focus. So it's -- it's sort of hard to  
 4 disentangle, you know, things that people might have  
 5 said that were very strong views about individual  
 6 writings from, you know, you know, their general overall  
 7 judgments.

8 **Q Yeah. As I read the notes, to the extent I could read**  
 9 **them, much better handwriting than mine, there seemed to**  
 10 **be three different groups of people, one group that**  
 11 **tended to be very outspoken against Dr. Hammer's ability**  
 12 **to write; one group that seemed to be critical of**  
 13 **certain aspects, but you couldn't tell from their**  
 14 **discussion whether they were for or against his tenure,**  
 15 **and one group that was very favorable to his writing.**  
 16 **Was your perception along those lines from your vantage**  
 17 **point?**

18 **A** I think maybe it would be even more nuanced than that in  
 19 the sense that, as I say, there were people who -- there  
 20 were certainly people who had very strong positive  
 21 reactions perhaps to one piece, had serious criticisms  
 22 of one or two other pieces. So it was a very  
 23 comprehensive and nuanced discussion, and I just don't  
 24 think it could be characterized by putting individuals  
 25 in one of those three, those three camps.

Page 15

1 **Q Okay. How about in terms of demeanor, was there any**  
 2 **animated discussion, if we can use that term, by people**  
 3 **who were opposed or seemed to be opposed to his tenure?**

4 **A** There was animated discussion all around. It was a case  
 5 where, you know, there are different people had very  
 6 different views. And in an institution that's very  
 7 collegial like ours where really these decisions are  
 8 made by a body like that, where there are different  
 9 views strongly held, there is a tendency for the  
 10 discussion to be animated.

11 **Q With respect to those individuals who were animated and**  
 12 **opposed the award of tenure, do any of those individuals**  
 13 **stand out in your mind?**

14 **A** Stand out by what criterion?

15 **Q Good question. Should know better to ask a law**  
 16 **professor questions.**

17 **All right. Let's do it a different way. Did**  
 18 **you observe the discussion to the extent it involved**  
 19 **J.J. White?**

20 **A** Yes.

21 **Q Did he appear to you to be strongly opposed to the award**  
 22 **of tenure to Professor Hammer?**

23 **A** Yes.

24 **Q Was he animated in his description of the reasons why he**  
 25 **thought Professor Hammer should not be awarded tenure?**

Page 16

1 **A** Not -- not in my recollection. He had submitted a --  
 2 a -- he was on the tenure committee and he submitted a  
 3 dissenting report. And my own recollection was that  
 4 I -- first of all, I -- to be, you know -- to search my  
 5 memory, I'm not sure if he was at both the meetings, but  
 6 my recollection was that he didn't expand greatly on or  
 7 go much beyond the things that he said in the -- in the  
 8 written dissenting report, and so what he said didn't  
 9 really stick out perhaps just because it seemed to  
 10 really conform to all the points that he made in that  
 11 document.

12 **Q I see. So he was one of the -- were there four members**  
 13 **of the tenure committee?**

14 **A** Five.

15 **Q Five. And you were one of the four who voted or**  
 16 **recommended in favor of tenure?**

17 **A** That's correct.

18 **Q And Professor White recommended against tenure?**

19 **A** That's correct.

20 **Q And I take it as a member of that committee you had a**  
 21 **series of discussions with the other members to**  
 22 **ascertain why they were either for or opposed to the**  
 23 **award of tenure?**

24 **A** That is correct.

25 **Q And what is your best recollection in those discussions**

Page 17

1 **of Professor White's reasons for being opposed to the**  
 2 **award of tenure to Mr. -- or Professor Hammer?**

3 **A** Well, I think actually that my recollections are really  
 4 don't diverge from the, you know, the report that --  
 5 that he produced. And, so, I mean, if you would like me  
 6 to summarize some of the points made in that report, I  
 7 would be happy to do it. But there was really nothing  
 8 that he -- he said in the committee that really did  
 9 not -- he didn't write up in his -- in his report.  
 10 Well, I mean, he said things, but -- but I mean, I guess  
 11 what I'm saying is that I'm not sure that I could  
 12 illuminate his views on the -- against the case for  
 13 tenure beyond what he says in the written report.

14 **Q Was there any discussion within the committee concerning**  
 15 **the points that Professor White made in his report about**  
 16 **other committee members' views of whether or not those**  
 17 **points were accurate?**

18 **A** Yes.

19 **Q So there -- there was challenge, I take it, among the**  
 20 **committee members to Professor White's views?**

21 **A** Vigorous.

22 **Q Okay. And was Professor White at all open minded in the**  
 23 **discussion with the other members of the committee about**  
 24 **the issues that were raised by other committee member?**

25 **A** Well, as the chair of the committee my approach to the

Page 18

1 whole exercise was to seek consensus. I mean, not to,  
2 you know, try and push people, but -- but, you know, to  
3 see whether there was common ground to write a single  
4 report with a single recommendation. And so if you're  
5 going to try and do that, you're going to have to have  
6 discussions to -- to see whether you can reconcile views  
7 and perspectives that are different.

8 **Q Right.**

9 A And, you know, Professor White participated in those  
10 discussions in a respectful and -- and collegial way.  
11 And ultimately, though, you know, I and others who  
12 looked at the file differently were not able to persuade  
13 him to -- to participate in our majority recommendation.

14 **Q If you could boil down his opposition to one or two  
15 sentences, what would you say or describe struck you as  
16 the main point in his opposition, viewing not just the  
17 report but your discussions with him and the committee?**

18 MR. SERYAK: You're asking for this -- for  
19 the deponent's opinion?

20 MR. GREEN: Yeah. His view.

21 MR. SERYAK: Right.

22 BY MR. GREEN:

23 **Q Yeah.**

24 A I -- well, I could -- I really have little to say on  
25 his -- I think that he was blunt in the sense that he

Page 20

1 members to Professor White as counterpoints to his  
2 criticisms?

3 A I would say so, yes.

4 **Q Okay. So there's nothing outside of those reports that  
5 occurred within the discussion that to your mind is of  
6 any significance in the decision making process?**

7 A No, not that I can recall. I think it all really got,  
8 you know, written up in those -- in those, you know,  
9 reports. I mean, there was discussion that, you know,  
10 and -- used more in formal, you know, language and so  
11 on. But the substantive points ended up getting  
12 recorded in the -- in the reports even though, you know,  
13 in somewhat more formal and nuanced language.

14 **Q Right. During the course of the committee meetings, was  
15 there ever any discussion whatsoever of Professor  
16 Hammer's sexual preference?**

17 A It was not mentioned.

18 **Q How about during the faculty meetings at which his  
19 tenure application was considered in 2002?**

20 A To my recollection it never came up.

21 **Q All right. Outside of those meetings have you ever  
22 heard it discussed by Professor White?**

23 A No.

24 **Q Have you ever heard it discussed by any other professors  
25 tenured faculty?**

Page 19

1 wrote up, you know, a set of points in his, you know,  
2 dissent that --

3 **Q Right.**

4 A -- that actually stated exactly that and which was  
5 responsive in some sense to those who found strengths in  
6 the file. And he served again by saying there are  
7 strengths in this file and -- and weaknesses, I'm less  
8 impressed by the strengths and more by the weaknesses  
9 than the other members of the committee. And he went  
10 through, as I recall, a discussion of some of the  
11 letters that came in and why he felt he wanted -- he  
12 wanted to rely more on say some of them rather than  
13 others or some were more credible or some were more  
14 probative of the issue of whether the scholarship met  
15 our tenure standard. But all this is I think quite  
16 succinctly outlined in his -- if his dissenting view.  
17 And I don't recall that there was anything that, you  
18 know, he sort of said or responded to us orally that he  
19 didn't ultimately write up in that view.

20 **Q Okay. And would it be fair to say that from your  
21 recollection of the discussions that you had with  
22 Professor White in these committee settings that the  
23 majority report and recommendation that was ultimately  
24 submitted to the faculty contained the various points  
25 that you tried to make along with your other committee**

Page 21

1 A Yes.

2 **Q Can you tell me who?**

3 A No. Well, I -- I -- I don't have a distinct rec --  
4 recollection, but, you know, somebody, you know, must  
5 have, you know, mentioned it to me at some point when I  
6 joined the faculty or pointed it out and -- and maybe in  
7 a discussion of, you know, what his family situation was  
8 or something.

9 **Q Okay.**

10 A As a fact.

11 **Q Right. No, I understand.**

12 A But that was so long ago, I mean, six years ago; but  
13 it's not -- it's not something that was a sort of in my  
14 experience ever, you know, a common matter of  
15 conversation.

16 **Q No, I understand. And it wasn't the type of thing where  
17 as soon as he left the faculty lounge everybody started  
18 buzzing about it?**

19 A No.

20 **Q Okay. But it was something you were made aware of when  
21 you came on the faculty?**

22 A By someone, yes.

23 **Q In a friendly manner, not in an offhand manner?**

24 A Yes. It was a friend of his.

25 **Q Okay. All right. Okay.**

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

PETER J. HAMMER,

Plaintiff,

v  
MK

File No. 04-241-

HON. JAMES R.

GIDDINGS  
THE BOARD OF REGENTS OF THE  
UNIVERSITY OF MICHIGAN, a  
body politic,

Defendant.

DEPOSITION OF ROBERT L. HOWSE

Taken by the Plaintiff on the 1st day of February, 2006, at  
Green, Green & Adams, P.C., 900 Victors Way, Suite 240, Ann  
Arbor, Michigan, at 11:00 a.m.

APPEARANCES:

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

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

Also Present: Steven Croley

**NetworkReporting**

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1 REPORTED BY: Sandra K. Harrison, CER 3193  
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1 Ann Arbor, Michigan  
 2 Wednesday, February 1, 2006 - 11:02 a.m.  
 3 REPORTER: Please raise your right hand. Do you  
 4 swear or affirm to tell the truth, the whole truth, and  
 5 nothing but the truth, so help you God?  
 6 MR. HOWSE: I do.  
 7 ROBERT L. HOWSE  
 8 having been called by the Plaintiff and sworn:  
 9 EXAMINATION

10 BY MR. GREEN:  
 11 Q Professor Howse, your deposition -- actually, the corporate  
 12 deposition of the University was taken before and you were  
 13 nominated as the witness to appear on their behalf. You're  
 14 now appearing on your own behalf as a deponent. Do you  
 15 understand the difference?  
 16 A Yes, I think I understand the difference.  
 17 Q Okay. I won't go through the background questions that we  
 18 did the last time. We'll just skip right to the heart of  
 19 the matter. You were the chair of the committee for Peter  
 20 Hammer's tenure issue in the year 2002, were you not?  
 21 A That's correct.  
 22 Q You were not on the committee in the year 2000; correct?  
 23 A I was not.  
 24 Q Okay. Do you recall considering the issue of tenure for  
 25 Peter Hammer in the year 2000?

TABLE OF CONTENTS  
PAGE

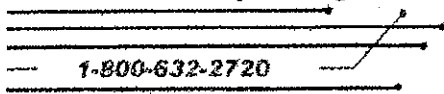
2 Examination by Mr. Green ..... 4  
 3 Examination by Mr. Szyrak ..... 50  
 4 Examination by Mr. Green ..... 51

EXHIBIT INDEX  
PAGE

5  
 6  
 7  
 8 Deposition Exhibit 1 marked ..... 10  
 9 (e-mail exchange; UM 2988)  
 10 Deposition Exhibit 2 marked ..... 12  
 11 (e-mail exchange; UM 4848-4849)  
 12 Deposition Exhibit 3 marked ..... 23  
 13 (e-mail from Howse to Hammer, 2/21/02; UM 4170)  
 14 Deposition Exhibit 4 marked ..... 26  
 15 (e-mail exchange; UM 4125-4127)  
 16 Deposition Exhibit 5 marked ..... 30  
 17 (e-mail exchange; UM 4328-4331)  
 18 Deposition Exhibit 6 marked ..... 35  
 19 (e-mail exchange; UM 3567-3568)  
 20 Deposition Exhibit 7 marked ..... 41  
 21 (e-mail exchange; UM 3931-3932)  
 22 Deposition Exhibit 8 marked ..... 38  
 23 (memo to Tenured Faculty from Howse with  
 24 attachment; UM 0694-0701)  
 25 Deposition Exhibit 9 marked ..... 42  
 (e-mail from Malamud to Howse, 1/23/02; UM 3930)  
 Deposition Exhibit 10 marked ..... 47  
 (e-mail exchange; UM 3920-3923)  
 Deposition Exhibit 11 marked ..... 50  
 (e-mail exchange between Howse and Hammer)  
 Deposition Exhibit 12 marked ..... 50  
 (e-mail to Howse from Hammer, 10/19/01 with  
 attachment)  
 Deposition Exhibit 13 marked ..... 50  
 (e-mail exchange between Howse and Hammer)

1 A I do.  
 2 Q And was there one or two meetings in 2000 for the purpose  
 3 of the tenured faculty to consider that issue?  
 4 A Well, I can't remember distinctly whether there were two.  
 5 It's our normal practice, and I do remember the meeting at  
 6 which a vote was taken, and normally that would be a second  
 7 meeting.  
 8 Q Okay. And the vote that was taken, do you remember the  
 9 proposition for which the vote was taken?  
 10 A Well, as I recall, there were a number of possible  
 11 propositions that were put to the faculty in this  
 12 particular case. And the vote I remember was on, you know,  
 13 the proposition to give Professor Hammer as it were another  
 14 hearing in a couple of years.  
 15 Q Okay. Do you recall whether or not there was ever a vote  
 16 on the proposition of whether to grant or deny tenure in  
 17 the year 2000?  
 18 A I don't recall whether that actually went to a vote or  
 19 whether there was a straw vote. I was quite new to the  
 20 faculty at the time, actually. I think it was probably the  
 21 first tenure meeting I attended.  
 22 Q All right. What are your areas of expertise?  
 23 A Now, I mostly write on international trade, investment, and  
 24 financial law; and I also do some research and writing in  
 25 legal and political philosophy. When I was at the

Network Reporting



1-800-632-2720

Page 6

1 University of Toronto, I also worked on administrative law,  
 2 constitutional law, and regulatory theory.  
 3 Q When were you at the University of Toronto?  
 4 A Between 1990 and 1998.  
 5 Q Coming forward to the year 2001, were you asked to chair  
 6 the committee for the tenure consideration of Peter Hammer  
 7 that was to take place in early 2002?  
 8 A I was asked to chair the tenure committee for that year  
 9 which would have considered his case as well as some third  
 10 year reviews.  
 11 Q I see. Third year reviews are typically referred to as mid  
 12 term reviews?  
 13 A Yes, they might well be. Yeah.  
 14 Q So Peter Hammer's tenure report then was the only report  
 15 generated by your committee with respect to whether or not  
 16 to recommend or deny tenure?  
 17 A Yes; that's my recollection.  
 18 Q All right. And the other members of your committee were J.  
 19 J. White, Deborah Malamud, Mathias Reimann, and who was the  
 20 last?  
 21 A Tom Green.  
 22 Q Tom Green, I'm sorry. And as I recall, you and Professor  
 23 Green and Professor Reimann all voted in favor of tenure  
 24 and concurred in a majority report?  
 25 A That is correct.

Page 7

1 Q And you wrote the majority report?  
 2 A With their assistance. It was a joint work product.  
 3 Q Right. And Deborah Malamud wrote a concurring report, but  
 4 separate?  
 5 A That's correct.  
 6 Q And as I recall in reviewing e-mails, you made various  
 7 suggestions to her and, in fact, had some discussion over  
 8 her criticisms prior to the time that report was submitted  
 9 to the tenured faculty?  
 10 A That's correct.  
 11 Q Similarly, J. J. White wrote a dissenting report. Did you  
 12 have input in the same nature that you had with Deborah  
 13 Malamud with Professor White?  
 14 A Well, after -- by the time -- I made some suggestions when  
 15 the report was drafted to Professor White for revisions as  
 16 I recall, but by that time I had come to understand his  
 17 position on the case I thought quite clearly. In the case  
 18 of Professor Malamud, frankly, I had some time -- some  
 19 difficulty understanding her view that she was coming to  
 20 the same result through an alternative form of reasoning.  
 21 And it was out of that concern that I, you know, pressed  
 22 her on a number of occasions as to the particular way in  
 23 which she was explaining her view of the case.  
 24 Q And if we can refocus again on Professor White for a  
 25 moment. Did you discuss with him the report that he

Page 8

1 ultimately submitted to the committee for distribution to  
 2 the tenured faculty?  
 3 A After he had drafted it?  
 4 Q Yes.  
 5 A I believe I had some e-mail correspondence with him or --  
 6 and perhaps also a discussion after the first -- after he  
 7 sent me the first version of the report. But I did not  
 8 engage in a very extensive discussion with him.  
 9 Q So it was not the type of input that you had with Professor  
 10 Malamud?  
 11 A That's correct. In many respects, Professor White's report  
 12 reflected views that he had essentially firmed up during  
 13 our committee deliberation, and it was, in fact, quite a  
 14 clear record of, you know, the concerns and arguments that  
 15 he had raised during the committee discussions. So I  
 16 wasn't, shall I say, surprised by it and I thought that he  
 17 had communicated his view of the case quite lucidly,  
 18 generally speaking, in the report. So I only had minor  
 19 suggestions to him.  
 20 Q Did you ever refer to his position on tenure or his  
 21 commitment to his position on tenure as reflecting his  
 22 intransigence on the issue?  
 23 A No. I think that would have been not a good way to conduct  
 24 a committee. In other words, at the outset of our  
 25 deliberations, definitely I think my goal was to try and

Page 9

1 come to a consensus and to not impose on anyone a view that  
 2 they couldn't honestly in good conscience hold, but try and  
 3 talk through the issues and differences on how we read the  
 4 record, and ultimately to try and get a consensus. And as  
 5 the committee chair, you know, obviously I would probably  
 6 try and get a consensus towards my own just overall view of  
 7 the case while respectfully taking into account, you know,  
 8 other points of view.  
 9 Q Right.  
 10 A So, you know, we had discussions and those, you know, who  
 11 were more favorable in the way that they read the record  
 12 definitely engaged with Professor White through the  
 13 process, and at some point it was clear that he was  
 14 definitely going to take a dissenting view and that he  
 15 would be writing a report along those lines. So if the  
 16 word "intransigence" was ever used, I think it would have  
 17 been used entirely without a pejorative context. In other  
 18 words, that we had moved to a point where it was clear  
 19 enough what views were held on the committee that we could  
 20 start drafting the various reports.  
 21 Q I understand. Fair enough. In your discussions with  
 22 Professor White concerning his position on Peter Hammer's  
 23 tenure, did you discuss the role, if any, that the internal  
 24 review written by Omri Ben-Shahar played in his arriving at  
 25 his conclusion?

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1-800-632-2720

THE WITNESS: Yeah; yeah.

Q And after all of the reviews were collected by the committee, I take it the committee itself -- the members of the committee itself read all of the articles available to them?

A Yes, the committee did.

THE WITNESS: If I could just -- can I go back to the previous answer for a second?

MR. SERYAK: If you feel you need to, I think you answered it.

Q If there's something that needs to be explained, sure.

A Only that I would say that there might be some pieces in a file that would be in different areas of the law, and therefore you might have a reviewer who would review only a piece in their area. So I -- and that might come legitimately out of the committee. So I didn't wish to be suggesting that -- that it would never be the proper strategy to ask a reviewer to review only a particular piece or pieces.

Q Understand. And, again, the committee itself reviewed all of the literature available from Peter Hammer?

A All the literature that was submitted within the time frames for the tenure process.

Q Okay. And there was some issue, was there not, at least between committee members whether the committee was to do a

A No. Apart from, you know, the committee being guided by the faculty's guidelines on tenure, no.

Q What was your understanding of the weight to be accorded each component?

A Well, the -- I think the answer with respect to service is fairly obvious.

MR. SERYAK: Just tell him your understanding of the way -- try to answer the question.

MR. GREEN: He is.

Q Go ahead.

A My understanding is that tenure depends upon meeting a certain standard both with respect to teaching and service.

Q Right. Let's go back to the question. I guess --

A In other words, it's not a trade-off.

Q So you have to meet a standard with respect to each of the three elements considered for tenure; correct?

A Yes.

Q All right. Fair enough. And each standard is independent of how one views any other standard?

MR. SERYAK: Object to the form of the question.

Q You can answer it. You can answer it.

THE WITNESS: Should I answer it or --

Q Of course, yeah.

MR. SERYAK: If you understand -- well, if you understand it. I object to the vagueness and the form of

de novo review of all of the writings of Peter Hammer that was available for the process as opposed to simply going back to the year 2000 and reviewing 2000 forward?

MR. SERYAK: Object for lack of foundation. Answer it if you can.

Q You can answer it.

A I -- it was a question of -- that I, you know, had for the dean initially and, you know, how are we going to do this? And I think everyone, in my recollection, agreed that the proper approach was to start with a new file and review everything de novo.

Q All right.

A With the exception of the teaching and service. So with respect to the teaching and service, there -- well, there -- you know, there was some reliance, at least in the case of the teaching, I believe, on what had happened before, and Peter Hammer himself accepted that; in other words, that we -- you know, that there was not a problem in not starting from scratch there. But on the scholarship that we would start again reading the file as a whole with new reviewers.

Q Okay. And was there any discussion between yourself and the dean or yourself and Evan Caminker respecting how much weight was to be accorded each of the three components on the tenure issue?

the question. If you understand that question -- I just -- go ahead. I'm not sure what you're answering.

A Yeah. I also would find it difficult to answer without more precision as to what you're suggesting.

Q I'm not suggesting anything. I was asking you a question --

A Or asking.

Q -- but why don't you explain then where your difficulty is with the question and I'll try and explain it?

A Well, let's go back to my previous answer, which was that my understanding of the tenure standard is that a candidate must meet a certain standard both with respect to teaching and scholarship and service.

Q Right.

A And then I wasn't sure -- I thought that was a clear answer.

Q That was a clear answer. And my question to you that followed was: In considering each of those elements, is it appropriate to view another element to see whether it was well beyond the standard in deciding on any given standard? In other words, can you look at service to see whether it was well beyond the minimum required for tenure in determining whether or not the amount by which the service standard was exceeded may influence a vote with respect to, for example, the teaching standard and whether that was

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1-800-632-2720

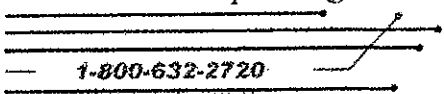
1 met?  
 2 A That is not how I as a member of the faculty would proceed  
 3 in understanding a tenure case.  
 4 Q Okay. Your reading of the standards for the granting or  
 5 denying of tenure don't permit that, do they?  
 6 MR. SERYAK: Asked and answered. Go ahead.  
 7 Q You can answer it.  
 8 A I believe I've answered the question.  
 9 Q I want you to answer it now.  
 10 MR. SERYAK: Answer it again.  
 11 Q Because I don't agree with counsel's objection, so I want  
 12 you to answer it.  
 13 A My belief is that if a candidate has not met the standard  
 14 for either teaching or scholarship, that it would not be  
 15 possible under our guidelines to grant them tenure.  
 16 Q And then getting back to my original question is that  
 17 because each element must be satisfied independent of the  
 18 other?  
 19 A Yes.  
 20 Q Thank you.  
 21 A And that's the way we -- if you look at the way the  
 22 committee makes its report, we look at each independently.  
 23 Q Okay. And with respect to each element of the tenure  
 24 consideration that you went through for Peter Hammer, I  
 25 take it that you believe Peter Hammer passed the mark, so

1 submitted the committee report to Peter Hammer for his  
 2 comment, or am I misunderstanding that?  
 3 A I don't think that's what we do, no.  
 4 Q Is it the reviews that are submitted to him for his  
 5 comment?  
 6 A They're -- a redacted, you know, version of the reviews is  
 7 submitted. By redacted, what that means is that the ideas  
 8 of the candidate should be able to, you know, comment on  
 9 any adverse or negative remarks in the reviews. So those  
 10 are redacted a provided to the candidate, the external  
 11 reviews.  
 12 Q The negative remarks?  
 13 A Yes.  
 14 Q So none of the positive statements are provided to the  
 15 candidate prior to their being submitted to the tenured  
 16 faculty?  
 17 A No.  
 18 Q And the committee decides what is a negative remark and  
 19 what is not a negative remark?  
 20 A Yes.  
 21 Q All right. Is there a document that exists that contains  
 22 the redacted remarks that were submitted to Peter Hammer  
 23 for his comments?  
 24 A It should exist.  
 25 Q Should it have been a part of the tenure file?

1 to speak, without any qualifications with respect to  
 2 teaching, service, and writing?  
 3 A That is correct.  
 4 Q Okay.  
 5 (Deposition Exhibit 3 marked)  
 6 You now have Exhibit 3 in front of you which appears to be  
 7 an e-mail that was sent by you to Peter Hammer the day  
 8 following the tenure vote. Do you recognize this?  
 9 A Yes, I do.  
 10 Q Is there anything in this that was sent purely to assuage  
 11 Peter Hammer's feelings irrespective of whether it was  
 12 true?  
 13 A No.  
 14 Q All right. So everything in this is true?  
 15 A Yes.  
 16 Q And you actually felt this way?  
 17 A Yes, very much so.  
 18 Q And you feel this way today?  
 19 A Let me read it once more.  
 20 MR. SERYAK: Take your time.  
 21 Q Go ahead.  
 22 (Witness reviews exhibit)  
 23 A Yes.  
 24 Q Okay. Now prior to the tenure committee meetings in the  
 25 year 2002, as I understand the procedure, you first

1 A No, I don't believe so.  
 2 Q Who was responsible for determining which of the remarks to  
 3 redact -- or, I'm sorry, which of the remarks to submit to  
 4 Peter Hammer for his comment?  
 5 A It was myself in consultation with members of the  
 6 committee.  
 7 Q And when that was submitted, was it submitted by e-mail or  
 8 hard copy?  
 9 A Knowing how I operate, probably it was by e-mail.  
 10 Q All right. Would you have copied anyone other than Peter  
 11 Hammer knowing how you normally conduct yourself?  
 12 A It's possible I would have copied the dean, but no one  
 13 else -- or the dean's secretary just because maybe Julie  
 14 would have been the person who would have been the conduit  
 15 to Peter Hammer, but I can't think of anyone other than  
 16 Jeff Lehman or Julie Rooney that I would have copied it to.  
 17 Q Okay. And at some point you received a response from Peter  
 18 Hammer?  
 19 A Correct.  
 20 Q And you had some concerns about the tone of the response;  
 21 correct?  
 22 A Yes.  
 23 Q And you gave Peter Hammer your good counsel and advice on  
 24 your impressions of the response?  
 25 A That's correct.

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1-800-632-2720

7 (Pages 22 to 25)

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1 the tone of it, or -- I mean, what are you --  
 2 Q The tone of it?  
 3 A Yes.  
 4 Q The type of interplay back and forth --  
 5 A Yes.  
 6 Q -- over the substance of Peter Hammer's tenure file?  
 7 A Yeah. That would have been characteristic. Yeah. The  
 8 substantive tone and so on, yeah.  
 9 Q This is not unusual in terms of the communications --  
 10 A No; no.  
 11 Q -- you had with Deborah Malamud on that topic?  
 12 A No; that's correct.  
 13 Q And would you say that your communication with her was  
 14 fairly open?  
 15 A Yes. I would say my communication with all the members of  
 16 the committee was of an open and direct nature.  
 17 (Deposition Exhibit 9 marked)  
 18 Q And I'll show you Exhibit Number 9, which appears to be an  
 19 e-mail dated January 23rd from Deborah Malamud to you  
 20 regarding some quick comments.  
 21 A Right.  
 22 Q Take a moment to look at that.  
 23 (Witness reviews exhibit)  
 24 A Okay. I've read it, again. Yes.  
 25 Q Now, if you look at the third paragraph, she seems to raise

1 some question about whether or not in the report we -- "we"  
 2 meaning the committee -- should disclose what was said to  
 3 each of the reviewers?  
 4 A Right.  
 5 Q And she had some concerns about whether or not the tenured  
 6 faculty might misunderstand what the reviewers actually  
 7 had; correct?  
 8 A Right.  
 9 Q And I take it that in your discourse with Deborah Malamud  
 10 not only were you having input into her thought processes  
 11 as reflected in her concurring report, but she was still  
 12 having input into the majority of the report as well?  
 13 A Well, it was my hope until, you know, it -- until she  
 14 stated absolutely categorically that she could not sign on  
 15 to the majority of the report, that through this dialogue  
 16 eventually we would be able to produce a single report, and  
 17 that we would have addressed enough of each other's  
 18 concerns that we would have been able to produce one report  
 19 in favor of the recommendation for tenure and then there  
 20 just would have been Professor White's dissenting report.  
 21 So it was with a view to the continuing effort to possibly  
 22 get some kind of single positive report from four members  
 23 of the committee that these exchanges were taking place.  
 24 Also, I felt that even if she did write her own report, it  
 25 was only reasonable that she should have an opportunity to

1 raise issues about the majority of the report, and I was  
 2 happy to be responsive. But I was -- but, you know, at the  
 3 same time I think I really hoped that maybe we would be  
 4 able to avoid the outcome of having her write a separate  
 5 concurring report if we went back and forth enough on some  
 6 of these issues.  
 7 Q Okay. Looking at the final three paragraphs of this  
 8 particular e-mail -- actually, the last one and the third  
 9 from the last one -- not the one that begins "my current  
 10 sense" --  
 11 A So the beginning, "Finally"?  
 12 Q "Finally," yeah.  
 13 A Yeah.  
 14 Q "Finally" -- skipping the next one, and then going to  
 15 "Also." Take a look at those.  
 16 A Yes.  
 17 Q First with respect to the paragraph beginning "Finally," do  
 18 you believe -- I'm sorry, do you agree with her analysis as  
 19 she has it there in terms of what is required by the  
 20 standards for tenure?  
 21 MR. SERYAK: I'm going to object to the form  
 22 of the question; lack of foundation.  
 23 Q You can answer it. You can answer it.  
 24 A Can you point me more precisely to the proposition you're  
 25 asking me whether I agree with or not?

1 Q All of the propositions contained in that paragraph?  
 2 A Well, the first two propositions really simply recite  
 3 language in the tenure guidelines. So, yes, I -- the -- we  
 4 have to look at whether there's a significant contribution  
 5 to scholarship and whether the work demonstrates the high  
 6 intelligence, care, and perception required. And then she  
 7 says,  
 8 "I think most of my concerns with the work go to the  
 9 question of care, and I have to decide whether the  
 10 kind of shortfalls of care I see in his work preclude  
 11 tenure even if those in the community who need to use  
 12 the work find it makes a contribution either despite  
 13 or, in some cases, without recognizing the flaws of  
 14 the work."  
 15 Q Okay. Now, with regard to that, if the perception is that  
 16 there is perhaps not as much care demonstrated as one might  
 17 want on a tenure committee, for example, if the work was  
 18 nonetheless found to contribute -- make a significant  
 19 contribution to scholarship and demonstrates high  
 20 intelligence and perception, does the standard permit you  
 21 to pass the tenure candidate on that basis?  
 22 A No. My reading is that there has to be a significant  
 23 contribution, and that the candidate has to demonstrate  
 24 high intelligence, care, and perception.  
 25 Q And I take it that your opinion was that in this instance

Page 50

Page 52

1 MR. SERYAK: If I could have just a couple of  
2 minutes?  
3 MR. GREEN: Sure.  
4 (Off the record)  
5 (Evan Caminker present)  
6 (Deposition Exhibits 11 through 13 marked)  
7 MR. SERYAK: On the record.  
8 EXAMINATION  
9 BY MR. SERYAK:  
10 Q Professor Howse, could you take a look at what's marked as  
11 Exhibits 11, 12, 13?  
12 A Certainly.  
13 (Witness reviews exhibits)  
14 Q And without at this point getting into the substance of the  
15 contents, just what form of communications are these?  
16 A This is e-mail correspondence between myself and Peter  
17 Hammer.  
18 Q And as part of your role as chair of the Evaluation  
19 Committee, did you invite Peter Hammer to provide you with  
20 the names of reviewers or the identities of individuals  
21 whom he did not want to participate in his tenure review?  
22 A That is correct. And that is contained in the e-mail at  
23 the bottom of page 1 of Exhibit 11, dated 10/18/01.  
24 Q And did Peter Hammer respond to your invitation?  
25 A Yes, he did.

1 MR. SERYAK: I'm going to object to the form and  
2 lack of foundation.  
3 Q You can answer.  
4 A No, I never saw that list.  
5 Q Had you been aware that he objected to Elhauge being a  
6 reviewer in 2000, would you have selected him in 2002?  
7 A I might still have selected him given that his statement  
8 was unequivocal, to my eyes, in the e-mail in Exhibit 13  
9 that there was, quote, unquote, no particular individual  
10 that he felt we should not ask.  
11 MR. GREEN: Nothing further.  
12 MR. SERYAK: Thank you.  
13 (Deposition concluded at 12:40 p.m.)  
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Page 51

1 Q And what exhibit did he respond?  
2 A His response is Exhibit 12.  
3 Q And did you rely on his response and the committee's work  
4 with respect to soliciting external reviewers?  
5 A Yes. We selected a significant number of reviewers that we  
6 approached from his list.  
7 Q And did he identify by name any individuals who he did not  
8 want the committee to contact?  
9 A No. In Exhibit 13, he writes an e-mail to me, dated the  
10 20th of October, 2001, "There are no particular individuals  
11 that I would list as persons not to seek outside review  
12 letters from." And then he goes on to say that he has  
13 concerns about types of reviewers.  
14 Q Meaning the area that they specialize in?  
15 A The kind of school of thought or methodology that  
16 characterizes their work.  
17 Q Thank you.  
18 MR. SERYAK: That's all I have.  
19 EXAMINATION  
20 BY MR. GREEN:  
21 Q Who suggested Einer Elhauge as a reviewer?  
22 A I did.  
23 Q Were you aware that Einer Elhauge had been struck from the  
24 list in 2000 that had been provided to Peter Hammer?  
25 A No.

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1-800-632-2720

14 (Pages 50 to 52)

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