

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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FAIRFAX COUNTY WATER AUTHORITY,)
Plaintiff,) Civil Action No.

v.) 2008-16114

CITY OF FALLS CHURCH,)
Defendant and Third-Party)

Plaintiff,) Thursday,

v.) August 13, 2009

FAIRFAX COUNTY AND THE BOARD OF)

SUPERVISORS OF FAIRFAX COUNTY, VA.,) 10:00 a.m.

Third-Party Defendants.)

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Motions Hearing before the Honorable R. Terrence Ney, held at the Fairfax Circuit Court, 4110 Chain Bridge Road, Courtroom 5-E, Fairfax, Virginia 22030, the proceedings being recorded stenographically by Jonathan Wonnell, a Notary Public of the Commonwealth of Virginia (Reg. #7142970), and transcribed under his direction.

2	<p>1 APPEARANCES OF COUNSEL</p> <p>2 On behalf of the Fairfax County Water Authority:</p> <p>3 STUART A. RAPHAEL, ESQ.</p> <p>4 PATRICIA M. MOODY, ESQ.</p> <p>5 Hunton & Williams LLP</p> <p>6 1751 Pinnacle Drive, Suite 1700</p> <p>7 McLean, Virginia 22102</p> <p>8 (703) 714-7400</p> <p>9 sraphael@hunton.com</p> <p>10 pmoody@hunton.com</p> <p>11</p> <p>12 On behalf of Fairfax County and the Board of</p> <p>13 Supervisors of Fairfax County, Virginia:</p> <p>14 ELLEN F. M. POSNER, ESQ.</p> <p>15 CYNTHIA TIANI, ESQ.</p> <p>16 Office of the County Attorney</p> <p>17 Fairfax County, Virginia</p> <p>18 12000 Government Center Parkway, Suite 549</p> <p>19 Fairfax, Virginia 22035-0064</p> <p>20 (703) 324-2421</p> <p>21</p> <p>22</p>	4
3	<p>1 APPEARANCES (Cont'd)</p> <p>2 On behalf of the City of Falls Church:</p> <p>3 ALEXANDER Y. THOMAS, ESQ.</p> <p>4 RICHARD D. HOLZHEIMER, JR., ESQ.</p> <p>5 Reed Smith LLP</p> <p>6 3110 Fairview Park Drive, Suite 1400</p> <p>7 Falls Church, Virginia 22042</p> <p>8 (703) 641-4200</p> <p>9 athomas@reedsmith.com</p> <p>10 rholzheimer@reedsmith.com</p> <p>11 -- and --</p> <p>12 JOHN E. FOSTER, ESQ.</p> <p>13 City Attorney</p> <p>14 City of Falls Church</p> <p>15 300 Park Avenue, Suite 302E</p> <p>16 Falls Church, Virginia 22046</p> <p>17 (703) 248-5001</p> <p>18 attorney@fallschurchva.gov</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	5
	<p>1 EXHIBIT INDEX</p> <p>2 NUMBER DESCRIPTION PAGE</p> <p>3 No. 1 Outline of Claims 36</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	
	<p>1 PROCEEDINGS</p> <p>2 (10:11 a.m.)</p> <p>3 THE COURT: Let's see. Fairfax County</p> <p>4 Water Authority against the City of Falls Church and</p> <p>5 County of Fairfax.</p> <p>6 MS. POSNER: Yes, Your Honor.</p> <p>7 THE COURT: All right. And who's here on</p> <p>8 behalf of the County?</p> <p>9 MR. RAPHAEL: Good morning, Your Honor,</p> <p>10 Stewart Raphael for the plaintiff, Fairfax County</p> <p>11 Water Authority.</p> <p>12 MS. POSNER: Ellen Posner on behalf of both</p> <p>13 of the county third party defendants.</p> <p>14 THE COURT: All right. And your name, sir?</p> <p>15 MR. THOMAS: Sandy Thomas representing the</p> <p>16 City of Falls Church.</p> <p>17 THE COURT: All right. And Mr. Foster?</p> <p>18 MR. FOSTER: Good morning, Your Honor.</p> <p>19 City attorney for Falls Church.</p> <p>20 THE COURT: Right. Okay. Preliminarily, I</p> <p>21 have a question and it's a serious question. Why is</p> <p>22 this matter on? This is not evidentiary. We don't</p>	

6	<p>1 hear non-evidentiary motions during our week. This is 2 where we take evidence and hear from witnesses. And I 3 don't understand how this could have happened. 4 I've spoken to Judge White who is the 5 calendar control judge and he said it was represented 6 to him that I had approved this and I said I would 7 certainly remember that. And then he managed to find 8 the blue sheet which he brought to my attention 9 yesterday. And it states "RTN" -- that's me -- 10 "assigned case as okayed." Now, why did he have that 11 information? 12 MR. THOMAS: I do not know the answer to 13 that, Your Honor, chiefly because I was not at 14 calendar control when the case was set. 15 THE COURT: Mr. Foster, were you there? 16 MR. FOSTER: I was not, Your Honor. 17 THE COURT: Mr. Raphael? 18 MR. RAPHAEL: Your Honor, I was in France 19 when this motion was filed. Ms. Moody was there. I 20 don't think we ever represented that we intended to 21 offer any evidence on this. 22 THE COURT: Well, who actually attended</p>	8	<p>1 I believe we were at calendar control at 2 the end of July and he wanted it set for the 4th or 3 5th or 3rd or whatever of August. Mr. Raphael had 4 some conflicts with that, as did the County. And 5 Judge White set it finally after much consternation on 6 August 13th. 7 I don't believe anyone represented -- I 8 don't remember Mr. -- certainly I did not represent 9 and Ms. Moody did not represent that you had okayed 10 it. We had told Judge White that you had been 11 assigned to the case and that demurrers were set for 12 August 14th. 13 THE COURT: Right. 14 MS. TIANI: It was not our motion. We 15 were there to just set a date but we obviously needed 16 to have a date that we were all available. 17 THE COURT: What about from the City? Does 18 anybody wish to be heard on this? 19 MR. THOMAS: Your Honor, Sandy Thomas from 20 the City. As I indicated I was not in attendance at 21 that calendar control appearance and so I can't say 22 what Mr. Gary, my associate, said or did not say. But</p>
7	<p>1 calendar control? 2 MS. MOODY: I did, Your Honor. Patty Moody 3 for Fairfax Water Authority. 4 THE COURT: I'm sorry. What was your name 5 again? 6 MS. MOODY: Patricia Moody, Your Honor. 7 THE COURT: All right. Can you shed any 8 light on this, Ms. Moody? 9 MS. TIANI: And Your Honor, my name is 10 Cindy Tianti with the County Attorney's Office. I was 11 also at calendar control along with Brent Gary from 12 Reed Thomas who is not here today. 13 THE COURT: Can you all shed any light on 14 this? 15 MS. TIANI: Your Honor, when Ms. Moody and 16 I -- Falls Church City was quite emphatic about the 17 urgency of having this matter stayed. Ms. Moody and I 18 were representing that we already had demurrers set 19 for August 14th and that either we could have it heard 20 that day or really any Friday. But it was my 21 understanding and Mr. Gary argued strenuously to have 22 it set even earlier than it was.</p>	9	<p>1 I think Ms. Tianti just said that she did not recall 2 Mr. Gary representing that Your Honor had said it was 3 okay to set it on the 13th. I never had the 4 understanding that you had okayed it to be on the 5 13th. 6 THE COURT: No, I did not. And I'm 7 obviously going to discuss this further with Judge 8 White. Not bad vibes or anything like that. But we 9 just don't hear non-evidentiary matters except on 10 Fridays because the evidentiary matters -- I mean, you 11 all know this better than I do. This docket is just 12 out of control. We just have too much to do. And 13 that's why I wanted to know that. Okay. Well, thank 14 you. 15 Now, with regard to -- I received two 16 letters, one from Mr. Thomas and one from Mr. Raphael 17 with regard to motions. I guess Mr. Thomas' was 18 first. The Fairfax Water's motion to bifurcate the 19 trial on liability and damages set for August 21st. 20 And that overlaps with your motion with regard to the 21 fact that Fairfax Water's damages are speculative. 22 Mr. Raphael responded to that yesterday</p>

10	<p>1 stating that it's an overlapping motion and could be</p> <p>2 heard at the same time. If it is I'll do it. But if</p> <p>3 it's not, so there's no misunderstanding, we're only</p> <p>4 going to hear one two week motion unless I'm asked and</p> <p>5 I okay it. I hope I'm not unreasonable as a matter of</p> <p>6 course. But I would like to at least be asked. Okay?</p> <p>7 So is that the case? Can those two motions</p> <p>8 be heard?</p> <p>9 MR. THOMAS: We don't think that they can</p> <p>10 be heard, Your Honor. And that was part one of our</p> <p>11 objection to the rapid filing from the Fairfax Water</p> <p>12 Authority last week, which is that we don't believe</p> <p>13 they are cross motions at all. Our motion to dismiss</p> <p>14 the damages claims is free-standing on its own. We're</p> <p>15 not in a situation where we have a motion to compel</p> <p>16 which is a motion for a protective order or that sort</p> <p>17 of cross motion.</p> <p>18 So no, we don't think that --</p> <p>19 THE COURT: He's not saying it's a cross</p> <p>20 motion. He's simply just saying if you bifurcate the</p> <p>21 damages we don't get to it. Is that correct?</p> <p>22 MR. RAPHAEL: That's exactly right. It's</p>	12	<p>1 THE COURT: Well, but it doesn't deny your</p> <p>2 motion; it simply defers it. I mean, is this a bench</p> <p>3 or a jury trial?</p> <p>4 MR. HOLZHEIMER: It is a jury trial, Your</p> <p>5 Honor.</p> <p>6 THE COURT: It's a jury trial? Then that</p> <p>7 bifurcation would seem to make the most sense, to have</p> <p>8 the jury listen to damages which are sought and argued</p> <p>9 against -- unless your motion were granted, of</p> <p>10 course -- when we haven't figured out the questions of</p> <p>11 liability.</p> <p>12 MR. HOLZHEIMER: And that may be the</p> <p>13 Court's only decision. But procedurally our motion to</p> <p>14 strike them is on pure substantive issues of law and</p> <p>15 in fact. His motion to bifurcate is clearly</p> <p>16 procedural.</p> <p>17 THE COURT: Absolutely. But see, if I</p> <p>18 grant the procedural motion I don't have to get into</p> <p>19 substantive issues.</p> <p>20 MR. HOLZHEIMER: Which is fine, but --</p> <p>21 THE COURT: I mean, we just defer them is</p> <p>22 what I'm saying. But I know what I'm going to do.</p>
11	<p>1 the exact same argument on both motions.</p> <p>2 THE COURT: Right. Yes, sir?</p> <p>3 MR. HOLZHEIMER: Your Honor, I've looked at</p> <p>4 his motion and I was preparing to respond to it. So I</p> <p>5 might be in a better position than Mr. Thomas to --</p> <p>6 THE COURT: Yes, sir.</p> <p>7 MR. HOLZHEIMER: Sorry, Your Honor. The</p> <p>8 motion to strike the damages -- and my name, Your</p> <p>9 Honor, is Rick Holzheimer on behalf of the City.</p> <p>10 THE COURT: Yes, sir.</p> <p>11 MR. HOLZHEIMER: It deals with the</p> <p>12 speculative nature of the damage. We don't believe</p> <p>13 that they have any claim for damages based on some</p> <p>14 recent developments. Mr. Raphael's motion to</p> <p>15 bifurcate, his entire argument is, Your Honor, well,</p> <p>16 it saves the Court time if we don't have to get to</p> <p>17 damages we can bifurcate the issue of liability and if</p> <p>18 the Court finds liability then we have damages.</p> <p>19 That's a completely kind of procedural argument, Your</p> <p>20 Honor. He really doesn't get into any substantive as</p> <p>21 to our hearing that the damages are completely</p> <p>22 speculative based on some recent facts.</p>	13	<p>1 But I think it's close enough I'm going to let those</p> <p>2 two be heard. Okay?</p> <p>3 MR. THOMAS: Judge, part two to our</p> <p>4 objection in my letter to Your Honor related to the</p> <p>5 other two big motions which were noticed --</p> <p>6 THE COURT: Right. I've already announced</p> <p>7 my ruling on that. They have to be requested or</p> <p>8 else -- I mean, they're not going to be set</p> <p>9 automatically motions in limine.</p> <p>10 MR. RAPHAEL: Your Honor, if I may just</p> <p>11 comment briefly?</p> <p>12 THE COURT: Before I want to ask you a</p> <p>13 question. What does the Fairfax Circuit Court</p> <p>14 Practice Manual say at E-10, Mr. Raphael?</p> <p>15 MR. RAPHAEL: That's the provision for</p> <p>16 overlapping motions. That's what we cited.</p> <p>17 THE COURT: Does it say they can be filed</p> <p>18 without Court permission?</p> <p>19 MR. RAPHAEL: Yes. I believe, it does.</p> <p>20 THE COURT: Oh, really? Okay. I just had</p> <p>21 a question mark.</p> <p>22 MR. RAPHAEL: And Your Honor, with respect</p>

14	<p>1 to the other motions, the scheduling order required</p> <p>2 that we file motions in limine to be heard before</p> <p>3 trial so we're trying to get them at a time when it</p> <p>4 would technically be on a docket that you could hear.</p> <p>5 When we filed the praecipe we said subject to getting</p> <p>6 the Clerk of the Court's permission.</p> <p>7 THE COURT: No. I understood that.</p> <p>8 MR. RAPHAEL: One of the things that we'd</p> <p>9 like to do after the stay motion is determined is talk</p> <p>10 about scheduling what's left and where we're going to</p> <p>11 find a home --</p> <p>12 THE COURT: No. I understand that as well.</p> <p>13 I just didn't want there to be any question at least</p> <p>14 at this point the motions are not on the docket until</p> <p>15 we figure out what is going to be done.</p> <p>16 MR. RAPHAEL: I understand.</p> <p>17 THE COURT: Okay. All right. The motion</p> <p>18 to stay.</p> <p>19 MR. THOMAS: Thank you, Judge. Again,</p> <p>20 Sandy Thomas representing the City of Falls Church.</p> <p>21 We are here on our motion to stay, Your Honor, and</p> <p>22 that motion should be granted for a number of reasons,</p>	16	<p>1 Mr. Thomas?</p> <p>2 MR. THOMAS: I don't think so. And the</p> <p>3 reason I don't think so is because the relief we</p> <p>4 requested before the special court is relief that</p> <p>5 we're entitled to request under 2143 of 15.2.</p> <p>6 THE COURT: But what about Fairfax Water?</p> <p>7 The relief which they have requested is not before the</p> <p>8 special court.</p> <p>9 MR. THOMAS: No, it is not. But it strikes</p> <p>10 me, Your Honor, that that is an issue for the special</p> <p>11 court to take up as to whether they will hear the</p> <p>12 relief that the Fairfax Water Authority has asked for</p> <p>13 in this case.</p> <p>14 THE COURT: But we know that this Court can</p> <p>15 hear it. We're ready to go and there's no question</p> <p>16 this claim has been filed, demurrers have been</p> <p>17 sustained, discovery has been ongoing, there have been</p> <p>18 a number of substantive motions and some procedural,</p> <p>19 one procedural motion now coming up. I just -- you</p> <p>20 know, I'm brand-new to this case, so please forgive me</p> <p>21 for knowing so little about it. But didn't you all</p> <p>22 file a counterclaim in this case?</p>
15	<p>1 the first of which is that there is total overlap,</p> <p>2 Your Honor, between the issues presented in this case</p> <p>3 and the issues before the special court impaneled by</p> <p>4 the Chief Justice of the Supreme Court.</p> <p>5 THE COURT: Well, if there's complete</p> <p>6 overlap than why not just try this case? It's ready</p> <p>7 to go. It's teed up for the 14th. That's even before</p> <p>8 of you have a pretrial hearing in the three judge</p> <p>9 case.</p> <p>10 MR. THOMAS: For the second reason, Your</p> <p>11 Honor, which is we have a serious risk of inconsistent</p> <p>12 rulings as between what's been asked in this case and</p> <p>13 what the special court has now been impaneled to hear</p> <p>14 by the Chief Justice of the Supreme Court.</p> <p>15 THE COURT: Don't you think that the</p> <p>16 special court will have the benefit of once it's heard</p> <p>17 in this case and it will be urged upon them by one</p> <p>18 side or the other that this issue has been decided and</p> <p>19 it's either res judicata or claim preclusion?</p> <p>20 MR. THOMAS: I don't think so.</p> <p>21 THE COURT: Collateral estoppel? There we</p> <p>22 are. Okay. Don't you think somebody would do that,</p>	17	<p>1 MR. THOMAS: We have. We filed a</p> <p>2 counterclaim in the third-party claim.</p> <p>3 THE COURT: So you have had the opportunity</p> <p>4 to express everything in this case that would be of</p> <p>5 concern to the City.</p> <p>6 MR. THOMAS: Well, I think that is also</p> <p>7 true, and we had the right to do that in the form of a</p> <p>8 counterclaim in the third-party claim.</p> <p>9 THE COURT: Which you did.</p> <p>10 MR. THOMAS: Which we did. My only quarrel</p> <p>11 with the Court is that we also have a right under 15.2</p> <p>12 2143 to petition the chief justice to form a special</p> <p>13 court.</p> <p>14 THE COURT: Will you get two trials or do</p> <p>15 you make an election?</p> <p>16 MR. THOMAS: Well, we would certainly be in</p> <p>17 a place to make an election, I believe.</p> <p>18 THE COURT: Well, why didn't you make an</p> <p>19 election when you filed your counterclaim? Why didn't</p> <p>20 you file your motion for your petition and a plea and</p> <p>21 bar, a motion to stay at that time saying that we're</p> <p>22 electing to go under the statutory scheme provided by</p>

18	<p>1 the Commonwealth of Virginia, as opposed to filing a</p> <p>2 counterclaim and a third-party motion for judgment,</p> <p>3 bringing in the County and the Board of Supervisors,</p> <p>4 and then engaging in discovery and all these other</p> <p>5 matters?</p> <p>6 MR. THOMAS: Because we have a right under</p> <p>7 each avenue, Your Honor. We have a right to proceed</p> <p>8 as a counter claimant and a third-party claimant in</p> <p>9 this action and then we had a right under 15.2 2143 to</p> <p>10 seek the remedy and to seek the relief from the</p> <p>11 special court.</p> <p>12 THE COURT: But you've conceded you need to</p> <p>13 make an election. Why wasn't your counterclaim and</p> <p>14 third-party claim that election?</p> <p>15 MR. THOMAS: I don't think it was. We</p> <p>16 simultaneously filed before the Chief Justice of the</p> <p>17 Supreme Court asking for the formation of the special</p> <p>18 court.</p> <p>19 THE COURT: That was filed simultaneously</p> <p>20 with your counterclaim?</p> <p>21 MR. THOMAS: Yes. It was filed at the same</p> <p>22 time in May of this year. And moreover, Judge, as I</p>	20	<p>1 initial question, Mr. Thomas. If it's either/or,</p> <p>2 namely you make an election, which is it going to be?</p> <p>3 We now have two pending actions both of which contain</p> <p>4 affirmative claims by the City.</p> <p>5 MR. THOMAS: That's correct. And under</p> <p>6 2135 the reason why that action should take primacy</p> <p>7 over this action is that it allows a locality under</p> <p>8 the circumstances we are in to seek the impanelment of</p> <p>9 the court and have the special court appointed from</p> <p>10 Circuit Court judges remote from the jurisdiction</p> <p>11 where the localities are. And for that reason -- that</p> <p>12 is why we asked for the impanelment of the special</p> <p>13 court. The chief justice of the supreme court went</p> <p>14 about impaneling the court. It is now pending in the</p> <p>15 Circuit Court of Hampton. The same parties here</p> <p>16 before Your Honor are going to be before that special</p> <p>17 court.</p> <p>18 THE COURT: But you've also said that</p> <p>19 Fairfax Water will have to ask that panel for the</p> <p>20 right to assert the claims which it is permitted by</p> <p>21 right to assert in this court.</p> <p>22 MR. THOMAS: That's correct.</p>
19	<p>1 mentioned, we have a right under 15.2 2143 to seek the</p> <p>2 impanelment of the special court by the chief justice</p> <p>3 and there's a particular reason for that under the</p> <p>4 code. And the reason is because 2143 takes the Court</p> <p>5 back to 2135 of 15.2. That code section provides for</p> <p>6 the special court and it provides for it for a very</p> <p>7 particular reason under circumstances where you have a</p> <p>8 dispute between localities -- and in this case</p> <p>9 involving the Water Authority -- about the provision</p> <p>10 of water service by one locality -- in this case Falls</p> <p>11 Church -- in another locality.</p> <p>12 THE COURT: Then why didn't you simply</p> <p>13 demur on that ground and say that this is exactly the</p> <p>14 nature of a dispute even admitting that everything the</p> <p>15 plaintiff says is true that needs to be heard pursuant</p> <p>16 to the statutory scheme by a three judge panel? Why</p> <p>17 didn't you do that?</p> <p>18 MR. THOMAS: Well, as I said, Judge, we</p> <p>19 simultaneously sought the impanelment of the special</p> <p>20 court along with our answer and counterclaim and</p> <p>21 third-party claim.</p> <p>22 THE COURT: But that gets back to my</p>	21	<p>1 THE COURT: Which might be denied. They</p> <p>2 may say, you know, the statutory scheme is set out for</p> <p>3 precisely the reasons you've described to me and we're</p> <p>4 going to stick to that, we've got enough to do.</p> <p>5 MR. THOMAS: Well, they may.</p> <p>6 THE COURT: So what happens to poor Fairfax</p> <p>7 Water?</p> <p>8 MR. THOMAS: This case would be stayed</p> <p>9 based on our motion. And in the event the special</p> <p>10 court decides that they can move to lift the stay in</p> <p>11 this case.</p> <p>12 THE COURT: And then Mr. Raphael is not --</p> <p>13 you know, the way we read the special court's</p> <p>14 decision, this is a res judicata or collateral</p> <p>15 estoppel and they've decided that already.</p> <p>16 MR. THOMAS: Well, it may be. And all the</p> <p>17 more reason to stay the case, Your Honor. It may be</p> <p>18 that -- the special court's decision on whatever</p> <p>19 portion of our petition that the special court decides</p> <p>20 to hear, it may be that the special court's decision</p> <p>21 on the petition has some bearing on Fairfax Water's</p> <p>22 ability to seek its recovery, but that's worth knowing</p>

22	<p>1 before we have a trial on Fairfax Water's alleged 2 damages claims.</p> <p>3 THE COURT: When you all appeared before 4 Judge Alden weren't some representations made that 5 filing the counterclaim or seeking the special court 6 would not cause a delay in this case that you were, I 7 think it was, in Mr. Foster's words, ready to go?</p> <p>8 MR. THOMAS: Here's what Mr. Foster had to 9 say when asked specifically about that by Judge Alden. 10 Judge Alden said "Well, what happens if the Supreme 11 Court grants your petition and convenes a special 12 court? What does that do to this litigation?" And 13 Mr. Foster said, "Your Honor, the short answer is I 14 don't know. And that is something that we will have 15 to confront if and when they do that. I'm reluctant 16 to speculate at this point about what they are going 17 to do."</p> <p>18 So no, Your Honor, we did not represent 19 that in the event the special court -- we didn't know 20 whether the special court was going to be impaneled at 21 all, much less when. And so we did not represent to 22 Judge Alden that we would --</p>	24	<p>1 is we'll have to see what happens when that happens, 2 because we -- in the spring of the year we didn't know 3 whether the Supreme Court, the chief justice, would 4 impanel this special court or not.</p> <p>5 THE COURT: Right.</p> <p>6 MR. THOMAS: Now, if I could, Your Honor, a 7 couple of points about the petition that is now 8 pending before the special court. And as I mentioned, 9 these same parties, Judge, will be before that special 10 court in October on October 2nd.</p> <p>11 THE COURT: But not these same issues.</p> <p>12 MR. THOMAS: Oh, absolutely these same 13 issues. And the reason I say that, Judge, is 14 because --</p> <p>15 THE COURT: Fairfax Water, you've already 16 conceded Mr. Thomas is going to have to persuade the 17 special panel to hear its claims for damages and 18 unconstitutionality and tortious interference and et 19 cetera.</p> <p>20 MR. THOMAS: Correct. And our request to 21 the special court in the petition that is now pending 22 before the special court asks that that special court</p>
23	<p>1 THE COURT: Well, what about Judge Alden's 2 question: "In your estimation, can this case if your 3 motion today is granted proceed to trail on the 4 scheduled trial date of September 14th?"</p> <p>5 "Mr. Foster: I think it can"?</p> <p>6 MR. THOMAS: Well, we've been proceeding on 7 a discovery pace that is consistent with the Court's 8 scheduling order. So I think Mr. Foster's answer to 9 that question is perfectly consistent with the fact 10 that we've been conducting discovery in this case.</p> <p>11 THE COURT: Don't misunderstanding me. I'm 12 not suggesting that Mr. Foster was not being 13 completely candid with the Court. This is litigation. 14 Fairfax employed some strategies and so forth and so 15 on. Mr. Foster has an excellent reputation with this 16 Court. But notwithstanding, I'm sure he believed 17 whether he responded to Judge Alden that, well, we 18 never know what's going to happen but at this point we 19 expect to proceed on the 13th of September.</p> <p>20 MR. THOMAS: If I could, though, Judge when 21 asked directly by Judge Alden, well, what happens if 22 the special court is impaneled Mr. Foster's response</p>	25	<p>1 rule that the City of Falls Church has engaged in no 2 unlawful conduct as alleged by Fairfax Water in this 3 case. Now, whether that means that Fairfax Water will 4 prevail on having the special court hear those issues, 5 I don't know.</p> <p>6 THE COURT: Are you prepared to ask the 7 special court to hear all matters that are contained 8 in this case?</p> <p>9 MR. THOMAS: Yes.</p> <p>10 THE COURT: I mean, everything, including 11 their allegations?</p> <p>12 MR. THOMAS: Yes.</p> <p>13 THE COURT: But you haven't done so as yet?</p> <p>14 MR. THOMAS: No, we have not. And we have 15 as I mentioned a hearing before the special court in 16 October. We tried to have that happen now in the 17 month of August and for reasons having to do with 18 scheduling over here to my right we could not 19 accomplish that. So we are trying to move this thing 20 along as quickly as we can.</p> <p>21 And the petition that is now pending -- we 22 have a live petition before the three judge panel</p>

26	<p>1 sitting in Hampton. That petition is so interrelated</p> <p>2 to the claims in this case that I think a stay in this</p> <p>3 case, first of all, will not cause any prejudice to</p> <p>4 Fairfax Water as it is a stay and it is the case that</p> <p>5 they may come back and ask that it be lifted. But</p> <p>6 those issues, what we have asked the special court to</p> <p>7 consider -- and the special court has to decide</p> <p>8 whether they'll hear these things or not -- are so</p> <p>9 interrelated to these issues in this case. And the</p> <p>10 reason for that is because that's exactly what we have</p> <p>11 asked the special court to do in the petition.</p> <p>12 THE COURT: Why not hear them in this case?</p> <p>13 You've moved to -- they're part of the issues.</p> <p>14 They're similar to the issues. They may not contain</p> <p>15 all of Fairfax Water's issues, but you would have no</p> <p>16 objection to those being included in the matters to be</p> <p>17 decided by the special court, which they would have to</p> <p>18 accede to, they would have to agree to. So all of</p> <p>19 that is the same. All the more reason to go ahead and</p> <p>20 hear it now.</p> <p>21 MR. THOMAS: Respectfully, I don't agree.</p> <p>22 And here's why. Under Section 2143 having had the</p>	28	<p>1 court lacking jurisdiction to do certain things. And</p> <p>2 what the Supreme Court said is we're denying your</p> <p>3 petition and we're denying it without prejudice to you</p> <p>4 raising it before the special court.</p> <p>5 In other words, we're going to impanel this</p> <p>6 special court --</p> <p>7 THE COURT: And let them take care of it.</p> <p>8 MR. THOMAS: -- and let them take care of</p> <p>9 it. So with all respect, Your Honor, I think that the</p> <p>10 place that we are, is that under the code -- and I</p> <p>11 think some close attention to the code is worthwhile</p> <p>12 here. Under the code the special court is charged.</p> <p>13 These are shalls, not may's under the code. The</p> <p>14 special court is charged with responsibility for</p> <p>15 considering the petition, entering an order to carry</p> <p>16 out the conduct of the case. And if these parties</p> <p>17 want to come to the special court and say you should</p> <p>18 hear this much of this petition or nothing, then</p> <p>19 that's what they can do. And the Supreme Court has</p> <p>20 given them the avenue to do that.</p> <p>21 We of course will say to the special court</p> <p>22 you should hear this much of the case. I don't know</p>
27	<p>1 special court impaneled by the chief justice under</p> <p>2 that section it directs the Court right back to 2135,</p> <p>3 which says that those issues are to be heard by a</p> <p>4 three judge panel designated by the chief justice.</p> <p>5 THE COURT: Maybe your motion to stay is</p> <p>6 directed to the wrong court then.</p> <p>7 MR. THOMAS: Well, I don't think that it</p> <p>8 is.</p> <p>9 THE COURT: Couldn't the Supreme Court say</p> <p>10 that having appointed a special court pursuant to the</p> <p>11 statute all matters are stayed?</p> <p>12 MR. THOMAS: I'm sorry?</p> <p>13 THE COURT: Count the Supreme Court have</p> <p>14 said when it issued this order forming the three judge</p> <p>15 court that having done so all other matters are</p> <p>16 stayed?</p> <p>17 MR. THOMAS: No. It could have, but what</p> <p>18 it said otherwise was in response to the arguments</p> <p>19 made by Fairfax Water and the County in their effort</p> <p>20 to have the petition dismissed -- all right? They</p> <p>21 filed a joint motion to have the petition dismissed.</p> <p>22 They raised many of these same arguments about special</p>	29	<p>1 what the special court will hear. It is between this</p> <p>2 much and this much. But I do believe that if this</p> <p>3 Court is to proceed with a trial on these very issues,</p> <p>4 which overlap so totally with the petition before the</p> <p>5 special court, it will in effect be making the</p> <p>6 decision for the special court what the special court</p> <p>7 is to hear and what it is not to hear. That strikes</p> <p>8 me as decisions that the special court should make in</p> <p>9 carrying out its statutory exercise.</p> <p>10 I'd like to point the Court to those parts</p> <p>11 of the code that are obligatory on the part of the</p> <p>12 special court, which as I said, is live. It's</p> <p>13 pending. We know the three judges who are on it and</p> <p>14 we know it's sitting in the Supreme Court of Hampton</p> <p>15 and we'll all be before it in two months' time. I</p> <p>16 have a copy of the sections of the code. If the Court</p> <p>17 would like I can pass them up.</p> <p>18 THE COURT: Yes, sir. Thank you. Yes,</p> <p>19 sir.</p> <p>20 MR. THOMAS: First, of course, Judge, is</p> <p>21 2135, which as I mentioned is that part of the code</p> <p>22 that the enabling statute, if you will, under 2143</p>

30	<p>1 refers one to once the special court has been formed, 2 as it has. And that says of course that the Court 3 shall be composed of three judges of the Circuit 4 Courts remote from the jurisdictions of the parties 5 involved. 6 THE COURT: Right. 7 MR. THOMAS: Again, I don't want to beat 8 this horse to death. But that strikes me as an 9 important point. We have a right to a special court 10 under this Section 2135 to hear disputes of just this 11 nature and that right is to be heard before a three 12 judge panel of judges remote from the jurisdictions 13 where the localities are involved. In other words, 14 remote from Fairfax and remote Arlington. 15 THE COURT: You're not suggesting that any 16 judges on this Court could not hear this case, are 17 you? 18 MR. THOMAS: I'm not. I'm simply saying 19 that under the code that strikes me as important. 20 That's a value that the legislature built into the 21 code. 22 THE COURT: And that's certainly</p>	32	<p>1 Court carries on with its case, I think that that 2 interferes with what the special court is charged with 3 doing under the code, which is making an order for the 4 conduct of the case. The issues about whether Fairfax 5 Water can be heard on the issues that it has brought 6 affirmatively here they should be brought to the 7 special court. And in carrying out this 8 responsibility under 2136 it can make that decision. 9 It can make that decision. 10 2137, Judge, itself provides a couple of 11 important things for what the special court must do in 12 2137(b). Well, first of all, in (a), "The special 13 court shall hear the case upon the evidence introduced 14 as evidence is introduced in civil cases." And then 15 under (b) "It shall determine the necessity for and 16 the expediency of the proposed action and the best 17 interests of the parties." 18 I think if it is to do that, if it is to 19 carry out that statutory responsibility, then it 20 should do that while this case is on hold and 21 determine what it's going to hear, how it's going to 22 hear it, determine what the best interests of the</p>
31	<p>1 understandable. But it would be of a special value 2 probably in more rural jurisdictions where you have 3 one judge as opposed to fifteen hearing such matters. 4 And you probably have much smaller municipal 5 corporations handling these matters. But perhaps not. 6 So what's the next section? 7 MR. THOMAS: Yeah. The next section of 8 course is 2136. And there, Your Honor, the first part 9 of the code section of course says "The Court in 10 making its decision shall balance the equities of the 11 case and enter an order setting forth what it deems 12 fair and reasonable terms and conditions." That's 13 what the special court is charged with the 14 responsibility for doing. 15 And at the bottom of 2136 the special court 16 is charged with -- "It shall make an appropriate order 17 which will control the subsequent conduct of the 18 case." That I suspect is what we're going to start 19 doing if -- and likely before -- that is what we're 20 going to start doing on October 2nd. 21 THE COURT: Right. 22 MR. THOMAS: And again, to the extent this</p>	33	<p>1 parties are with the City having availed itself of 2 this right to the special court. 3 THE COURT: Right. If you look at point 4 (c) then, "If a majority of the special court is of 5 the opinion that the proposed action is not necessary 6 or expedient, the petition shall be dismissed." Why 7 is it not possible that the three judge special court 8 will look at 15.2 2137 part C and say this matter was 9 resolved by the Circuit Court of Fairfax County and 10 there's nothing left for us to do? Is that not 11 possible? 12 MR. THOMAS: I suppose that it's possible, 13 but it strikes me as unlikely and not the right way to 14 go because of the relief that we have asked for in the 15 petition itself. In other words, if we had asked in 16 the petition for something short of a declaration that 17 we have done nothing unlawful, as alleged in this 18 case, a declaration short of an order that we had a 19 right to provide service to the Halstead property, 20 which is at the heart of allegations in this case, if 21 we had asked for something short of a declaration that 22 the conduct of the Water Authority and the County and</p>

34	<p>1 the Board in trying to -- withholding approval from</p> <p>2 the City to operate its water system in those parts of</p> <p>3 the County where it's operated for decades, if we had</p> <p>4 asked for something short of that then 2137(c) might</p> <p>5 make -- Your Honor's approach to 2137(c) might make</p> <p>6 sense.</p> <p>7 But what we have asked is for something far</p> <p>8 broader than that of the special court. It's alive in</p> <p>9 a petition now before the special court. And my chief</p> <p>10 point to Your Honor is that what the special court</p> <p>11 should be able to do under 2137 is look at the</p> <p>12 totality of the petition that's before it and make a</p> <p>13 judgment based on the petition that the chief justice</p> <p>14 has lodged before it as opposed to some subset of it.</p> <p>15 THE COURT: And the totality of your</p> <p>16 petition is that you haven't done anything illegal?</p> <p>17 MR. THOMAS: As alleged in this action. As</p> <p>18 alleged in this action. And that the conduct on the</p> <p>19 part of the Water Authority, the County and the Board</p> <p>20 is unlawful pursuant to Section 15.2 2143 in that they</p> <p>21 have withheld their consent for one locality, the City</p> <p>22 of Falls Church, to operate its water system in</p>	36	<p>1 THE COURT: Sure. Yes, sir.</p> <p>2 MR. THOMAS: Does the Court have a copy of</p> <p>3 the petition to the Court?</p> <p>4 THE COURT: I have not. All I have are</p> <p>5 your briefs in this matter. This motion to stay and</p> <p>6 the response, and now I have these statutory</p> <p>7 provisions which you've handed up. I have nothing</p> <p>8 else.</p> <p>9 MR. THOMAS: The petition that the City</p> <p>10 filed is attached as Exhibit 1 to our motion. And if</p> <p>11 the Court has that then great. And if it doesn't I</p> <p>12 have copies.</p> <p>13 THE COURT: I have the City of Falls</p> <p>14 Church's motion to stay. I have nothing attached to</p> <p>15 it.</p> <p>16 MR. THOMAS: Okay. Well then if the Court</p> <p>17 won't object to additional paper I'll hand up a copy</p> <p>18 of our petition.</p> <p>19 THE COURT: Thank you. You don't expect me</p> <p>20 to read all this now?</p> <p>21 MR. THOMAS: I don't. My point about</p> <p>22 Section 2138, Judge, is that, as I mentioned, Fairfax</p>
35	<p>1 another locality. And that's the totality of the</p> <p>2 relief that we have asked from the special court.</p> <p>3 And again, my point to Your Honor is that's</p> <p>4 what the special court should be able to decide, what</p> <p>5 it's going to hear among that universe of relief that</p> <p>6 we have requested.</p> <p>7 THE COURT: Mm-hmm.</p> <p>8 MR. THOMAS: And Judge, if I could,</p> <p>9 flipping over to 15.2 2138, I think this is a</p> <p>10 particularly important provision. 2138 provides that</p> <p>11 "Any person affected by the proceedings may appear and</p> <p>12 shall be made a party defendant in the case." A party</p> <p>13 defendant in the case. That's what Fairfax Water has</p> <p>14 done. That's what they have done.</p> <p>15 Fairfax Water when they filed their joint</p> <p>16 motion to dismiss our petition with the Supreme Court,</p> <p>17 they declared themselves an indispensable party to</p> <p>18 those proceedings. I have a copy which I'd like to</p> <p>19 hand up to the Court of the joint motion to dismiss,</p> <p>20 the petition, that the Water Authority, the County and</p> <p>21 the Board filed and attached to it is our response.</p> <p>22 Can I hand that up to the Court?</p>	37	<p>1 Water Authority has already availed itself of its</p> <p>2 rights under Section 2138 which is to say its right to</p> <p>3 appear and be made a party defendant in this action.</p> <p>4 And the way they did that, Your Honor, in their motion</p> <p>5 to dismiss was they said about our petition to the</p> <p>6 Supreme Court -- and I'm reading from page 14 of their</p> <p>7 motion to dismiss filed with the Supreme Court.</p> <p>8 They said "Fairfax Water is obviously an</p> <p>9 indispensable party to this proceeding. The City</p> <p>10 seeks to nullify Fairfax Water's pending complaint in</p> <p>11 the Circuit Court through a declaration that the City</p> <p>12 has done nothing wrong." Fairfax Water then requested</p> <p>13 leave to intervene and said in any event we can</p> <p>14 intervene. We can make ourselves a party to these</p> <p>15 proceedings before the Supreme Court and then by</p> <p>16 extension before the special court under Section 2138.</p> <p>17 And so, Judge, what they've now said in</p> <p>18 their papers -- in response to the motion to stay,</p> <p>19 what they've now said is those issues before the</p> <p>20 Supreme Court are so remote from the issues here</p> <p>21 before the Court in Fairfax that there should be no</p> <p>22 reason to stay the case. That is totally the opposite</p>

38	<p>1 of what they said to the Supreme Court.</p> <p>2 THE COURT: But aren't they saying to the</p> <p>3 Supreme Court dismiss this case -- not this case, this</p> <p>4 petition. This is a motion to dismiss, but if you</p> <p>5 don't dismiss, be sure and let us come along. That's</p> <p>6 what they're saying. I mean, I haven't even read it,</p> <p>7 but I'm certain that's what -- am I not correct in</p> <p>8 that, Mr. Raphael?</p> <p>9 MR. RAPHAEL: That's correct, Your Honor.</p> <p>10 MR. THOMAS: I think that is correct. And</p> <p>11 I think that makes my point, which is the Supreme</p> <p>12 Court denied the motion to dismiss and denied it</p> <p>13 without prejudice to them to raise those issues before</p> <p>14 the special court. Many of the same arguments that</p> <p>15 they made in the motion to dismiss are the same</p> <p>16 arguments that they're making here in opposition to</p> <p>17 the motion to stay.</p> <p>18 For example, they say in their opposition</p> <p>19 to the motion to stay, well, the special court can't</p> <p>20 really hear these issues under the Virginia Antitrust</p> <p>21 Act. Well, that's something for the special court to</p> <p>22 decide whether it can hear issues under the Virginia</p>	40	<p>1 But that's where I'm hung up, sir.</p> <p>2 MR. THOMAS: Okay. Well, I do think the</p> <p>3 Court understands my argument.</p> <p>4 THE COURT: Oh, I do understand it. And I</p> <p>5 read the papers obviously before I came here this</p> <p>6 morning. I understand your all's position. But I'm</p> <p>7 just not persuaded that it makes sense to stop this</p> <p>8 litigation. In fact I feel -- I believe, rather --</p> <p>9 that this case can be resolved by this trial and then</p> <p>10 everybody will be -- all these issues will be</p> <p>11 resolved.</p> <p>12 MR. THOMAS: Well, if I could, a couple of</p> <p>13 points.</p> <p>14 THE COURT: Yes, sir.</p> <p>15 MR. THOMAS: First of all --</p> <p>16 THE COURT: You have to understand the</p> <p>17 easiest thing for me to do would be to grant your</p> <p>18 motion.</p> <p>19 MR. THOMAS: I do. I do understand.</p> <p>20 THE COURT: We have backed up huge</p> <p>21 trials -- that is, I -- in September and October. But</p> <p>22 unfortunately that's not a basis for a decision.</p>
39	<p>1 Antitrust --</p> <p>2 THE COURT: I have to tell you, Mr. Thomas,</p> <p>3 respectfully, I'm willing to assume that the issues</p> <p>4 are identical in both cases for the purpose of the</p> <p>5 decision in this case. I just don't know why this</p> <p>6 case should be stayed. Since they're identical why</p> <p>7 not go ahead and try it? I mean, there is an option</p> <p>8 of having the special court, but it's not the only way</p> <p>9 this matter can be resolved. It can be resolved here.</p> <p>10 The parties are at issue. Everyone knows</p> <p>11 what this dispute is about. It's not all that</p> <p>12 complicated, really. And I just don't understand why</p> <p>13 we would stay this matter. I mean, I understand your</p> <p>14 arguments and I respect them very much. But I just</p> <p>15 don't know understand why we would stay this matter.</p> <p>16 I mean, there is a possibility of conflicting</p> <p>17 decisions if the special court chooses to forge ahead</p> <p>18 given the results of what happens up here. And it may</p> <p>19 wish to.</p> <p>20 But I just suspect the judges -- they're</p> <p>21 pretty busy. I don't know who's on the panel</p> <p>22 actually. But they may have some other things to do.</p>	41	<p>1 MR. THOMAS: Right. I understand. A</p> <p>2 couple of points, if I could.</p> <p>3 THE COURT: Yes, sir.</p> <p>4 MR. THOMAS: At least part of what is</p> <p>5 before the special court in the petition is not right</p> <p>6 for disposition in this case. And those involve the</p> <p>7 demurrers by the Fairfax Water Authority, the County</p> <p>8 and the Board to our third party complaint and our</p> <p>9 counterclaim. All right? So I think that puts us in</p> <p>10 a little bit of an untenable position, which is to say</p> <p>11 in the event the Court resolves those adverse to us</p> <p>12 then I think that has the effect of depriving the City</p> <p>13 of its rights to proceed before -- certainly on those</p> <p>14 parts of the case -- of its right to proceed before</p> <p>15 the special court on those issues.</p> <p>16 THE COURT: But shouldn't we cross that</p> <p>17 bridge when we get to it?</p> <p>18 MR. THOMAS: Well, that bridge is tomorrow.</p> <p>19 THE COURT: Well, I know. I know that.</p> <p>20 And so if tomorrow the demurrers are sustained, or</p> <p>21 rather overruled, no problem. If they're sustained --</p> <p>22 well, I don't know. But it seems to me we can't make</p>

42	<p>1 a decision on what might happen until what that what 2 might decision has first been made.</p> <p>3 MR. THOMAS: Okay. My last point to the 4 Court is on the issue of prejudice because I think to 5 the extent prejudice to Fairfax Water or to the County 6 and the Board has an impact on the course of decision 7 on the motion, I think I can convince the Court that 8 there is no prejudice to Fairfax Water, the Board or 9 the County if this case is stayed pending the special 10 court going about doing what the chief justice has 11 asked it to do, which is to consider the petition.</p> <p>12 Really the only prejudice that Fairfax 13 Water has raised is that they will not somehow be 14 entitled to an injunction or injunctive relief to 15 deprive the City of its property rights and its 16 easements on this Halstead property. And for reasons 17 that have a lot to do with what we have set out in our 18 motion to dismiss the damages claims, that really is a 19 very speculative prejudicial harm, if you will, to 20 Fairfax Water Authority.</p> <p>21 The damages claims, if they have any 22 damages claims -- and I don't think that they do -- it</p>	44	<p>1 Court has set out what the right test is for 2 determining whether to grant a stay. And I don't know 3 if you want me to go through all that.</p> <p>4 THE COURT: It's really unnecessary. And 5 Mr. Thomas said that they'd be willing to let you have 6 all of your claims be heard by the special court. 7 They really want the special court to hear these 8 disputes instead of it being heard in this Court. And 9 you've heard the questions that I put to Mr. Thomas. 10 But let me put this one to you. Is this a matter that 11 should with heard by a jury?</p> <p>12 MR. RAPHAEL: I think that there are mixed 13 issues. The count 5 issue, for example, if we only 14 want to trial on the count 5 issue concerning 15 constitutional claim -- constitutional water rights 16 diversion, I think that would be a bench trial. With 17 regard to the injunctive relief, that is clearly a 18 judge issue. With regard to the damages for the 19 antitrust claim, that is a jury issue. And of course 20 the special court is not entitled --</p> <p>21 THE COURT: That issue would be decided by 22 a judge as well.</p>
43	<p>1 strikes me that the damages claims when and if they 2 ever become ripe -- and they're not -- but when and if 3 they ever become ripe it strikes me that they can 4 proceed to seek those. A different issue. But they 5 can proceed to seek those.</p> <p>6 So what they've zeroed in on is this lack 7 of entitlement or this lack of ability to secure 8 injunctive relief to make us give up our easement 9 rights and our property rights, the City's property 10 rights. I think the chances of that are truly remote. 11 And so I guess what I'm saying is that my hope is that 12 prejudice such as it is to Fairfax Water of granting 13 the motion to stay would not be a reason --</p> <p>14 THE COURT: All right. I'll ask Mr. 15 Raphael about that point. Thank you very much, Mr. 16 Thomas. I appreciate that.</p> <p>17 MR. THOMAS: Thank you.</p> <p>18 THE COURT: Yes, sir.</p> <p>19 MR. RAPHAEL: Good morning, Your Honor. If 20 I could hand up some papers that I'd like to refer to.</p> <p>21 THE COURT: Yes, sir.</p> <p>22 MR. RAPHAEL: Your Honor, there is -- the</p>	45	<p>1 MR. RAPHAEL: It could be, if the parties 2 waived the jury. The chart I handed up sets out what 3 our claims are, what their claims are. And what I 4 want to demonstrate is that whether they win or lose 5 in the special court, we're still going to have to 6 come back and try this case all over again.</p> <p>7 THE COURT: Even if you request of the 8 special court that they hear your claims, all of the 9 claims?</p> <p>10 MR. RAPHAEL: Your Honor, the special court 11 does not have jurisdiction under the Virginia 12 Antitrust Act to hear an antitrust claim. The 13 jurisdiction under the Antitrust Act is in Section 14 59.1-9.8 and it says the circuit courts have 15 jurisdiction over Virginia antitrust claims. So first 16 of all, we haven't filed a claim in the special court. 17 I don't think they have jurisdiction under their own 18 enabling legislation that Mr. Thomas handed up.</p> <p>19 THE COURT: What you're saying is that 20 despite Mr. Thomas' generous offer the Court would not 21 be able to accept it with the three judges?</p> <p>22 MR. RAPHAEL: I don't think they have</p>

46	<p>1 jurisdiction. It's a special court. It's not a 2 general jurisdictional court like this one is. 3 Moreover, they don't have power to grant me the 4 injunctive relief I need or damages. And as the Court 5 said in the Settlement versus Certified case, the lack 6 of injunctive relief in the other forum is reason 7 enough by itself to deny a motion to stay. 8 Your Honor, what I wanted to demonstrate 9 with the chart is in counts 1 and 2 of our 10 monopolization claim what we're saying is the City is 11 doing three things that we need them to stop doing. 12 Number one, they have been telling people that the 13 City still has an exclusive service area for water 14 service in Fairfax County which is discouraging 15 developers from wanting to switch. The second page of 16 the handout is a map. And I don't know if Your Honor 17 has had a chance to look at the complaint. But this 18 map shows what the current service area is. The dark 19 green is the City of Falls Church and the City serves 20 the area outside in the eastern part of Fairfax County 21 that is shown in light green. 22 They filed suit in 2007 seeking a federal</p>	48	<p>1 reflect the existing City water lines. The water has 2 been shut off. The developer has his approval to 3 build this thing, but the City has blocked it. 4 They've blocked it by saying that they're not going to 5 give permission for these green lines to be relocated 6 and you have to that to build it. 7 THE COURT: I'm familiar with the merits. 8 MR. RAPHAEL: Okay. And so because they've 9 blocked the developer the developer has had to file 10 with Fairfax County a request to be let out of his 11 previous offer to connect to Fairfax Water. The 12 developer testified that the City has been holding him 13 hostage, it was blackmailed. And that proffer 14 condition amendment is going Fairfax County Board of 15 Supervisors in December. So the prejudice that we 16 said to us would happen is that if you stay this case 17 and we can't get that injunction, Fairfax County might 18 well feel compelled to let the developer out of the 19 proffer because it's blocking the project. 20 So the City has caused that problem and now 21 they're trying to benefit from it. And the state will 22 really hurt us because -- if we win the injunction in</p>
47	<p>1 court order to block any competition. They said 2 federal law preempts competition. They lost that 3 case, both in the trial court -- Judge Hilton threw it 4 out -- and in the Fourth Circuit affirmed in 2008. 5 And what our complaint is about, Your Honor, is that 6 after losing that case they've continued to monopolize 7 by, number one, telling people they still have an 8 exclusive service area; number two -- and this came 9 out in the City's deposition. They've told three or 10 four, maybe five developers that if they considered 11 switching to Fairfax water they would be caught up in 12 litigation. They're deterring developers who would 13 otherwise be interested in switching -- 14 THE COURT: And the special court could not 15 hear those? 16 MR. RAPHAEL: No. It's an antitrust claim. 17 They have no jurisdiction over that. 18 The third claim relates to this Halstead 19 project. And the third page I handed up, this 20 schematic, it kind of looks like an electrical 21 drawing. But this is the Halstead property. Four 22 buildings will be built on it. The green lines</p>	49	<p>1 September it's over and the developer can build the 2 project. He already chose to connect to Fairfax 3 Water. 4 THE COURT: I'm sorry, Mr. Raphael. You 5 lost me. What is the injunction about in December? 6 MR. RAPHAEL: The injunction is the relief 7 we're asking for in September at trial. 8 THE COURT: In September? 9 MR. RAPHAEL: In September. We're asking 10 the court to enjoin the City from using its control 11 over existing easements to prevent developers from 12 switching. That's an antitrust claim. 13 THE COURT: The developer here wants to 14 switch to Fairfax Water? 15 MR. RAPHAEL: Yes. And the City has 16 blocked it by saying we won't let you move your 17 easements unless you connect only to the City's water 18 system. That's what the case is about. And we want 19 to enjoin that practice. If we win that, the proffer 20 condition amendment that the City has forced the 21 developer to get -- 22 THE COURT: That's where my confusion was.</p>

50	<p>1 That's in December, right?</p> <p>2 MR. RAPHAEL: The County Board is hearing</p> <p>3 the developer's request in December to be let out of</p> <p>4 the proffer because Falls Church is blocking them.</p> <p>5 And we attached the letter the developer submitted to</p> <p>6 the County saying we're having to do this because the</p> <p>7 City won't give permission to relocate the lines. So</p> <p>8 the prejudice to us is we will lose -- we run a huge</p> <p>9 risk of losing that project forever, and the City is</p> <p>10 arguing your damages are speculative. So we need the</p> <p>11 injunction --</p> <p>12 THE COURT: You don't want to lose it</p> <p>13 because you want to sell them the water.</p> <p>14 MR. RAPHAEL: That's exactly right.</p> <p>15 THE COURT: And what the developer is</p> <p>16 saying is faced with this situation, let me out of my</p> <p>17 agreement to take the water from Fairfax Water, I'll</p> <p>18 go ahead and I'll cave -- I'm saying that --</p> <p>19 MR. RAPHAEL: That's exactly right.</p> <p>20 THE COURT: No. I've got it. okay. I've</p> <p>21 got it.</p> <p>22 MR. RAPHAEL: The City has now said, oh, if</p>	52	<p>1 in their countersuit. They acknowledged that.</p> <p>2 THE COURT: Mm-hmm.</p> <p>3 MR. RAPHAEL: Okay? Now, looking at their</p> <p>4 complaint, their third party complaint and</p> <p>5 counterclaim, it doesn't raise the question of whether</p> <p>6 they're falsely telling people they have an exclusive</p> <p>7 service area. That's why I have number 1 not raised.</p> <p>8 It doesn't raise the issue of whether they're</p> <p>9 threatening developers with litigation if they want to</p> <p>10 switch to Fairfax Water. And then most recently in</p> <p>11 the City's brief and opposition to the County's</p> <p>12 demurrer at page 5 -- that was filed July 4th 2009 --</p> <p>13 the City admits that it's not challenging the Halstead</p> <p>14 proffer in this case.</p> <p>15 So this case has nothing to do then from</p> <p>16 the City's perspective of what their arguments are</p> <p>17 about whether it's proper or not proper for Fairfax</p> <p>18 County to have accepted that proffer. As I've said,</p> <p>19 the City doesn't address the tax count of our case in</p> <p>20 their countersuit. And then in the middle column at</p> <p>21 the bottom, Your Honor, I have -- those are the four</p> <p>22 counts of the City's countersuit.</p>
51	<p>1 Fairfax County lets the developer out then we'll let</p> <p>2 the developer choose. So they're still using it as a</p> <p>3 weapon to force --</p> <p>4 THE COURT: I understand.</p> <p>5 MR. RAPHAEL: Okay. Well, getting back</p> <p>6 then to my chart, counts 1 and 2 are the</p> <p>7 monopolization claims. Count 4 is the tortious</p> <p>8 interference claim. And count 5 is the claim about</p> <p>9 the City's water rights being an unconstitutional tax.</p> <p>10 And I don't think the City has ever disputed that that</p> <p>11 has nothing to do with the special court proceeding.</p> <p>12 They said in front of Judge Alden that they</p> <p>13 acknowledged that the tax claim is entirely separate.</p> <p>14 THE COURT: I'm sorry. They said what?</p> <p>15 MR. RAPHAEL: They acknowledged before</p> <p>16 Judge Alden -- when they were trying to get permission</p> <p>17 to bring a leave counterclaim, they acknowledged that</p> <p>18 count 5 of our claim, our claim that the City's water</p> <p>19 rates are unconstitutional --</p> <p>20 THE COURT: Right. I understand that.</p> <p>21 MR. RAPHAEL: They acknowledged that that</p> <p>22 was separate from anything that they're arguing about</p>	53	<p>1 Count 1 says that in the future it would be</p> <p>2 unlawful for the board of supervisors to accept</p> <p>3 proffers because it would be an unreasonable</p> <p>4 condition. Count 2 says future proffers to the Board</p> <p>5 of Supervisors would violate the Dillon rule. Count 3</p> <p>6 says future proffers would be an illegal special law</p> <p>7 in violation of the constitution and count 4 says that</p> <p>8 future water proffers would violate 15.2-2143. That's</p> <p>9 the only count at a overlaps. The 2143 is an argument</p> <p>10 for the special court.</p> <p>11 So the City has not raised counts 1, 2 or 3</p> <p>12 in their special court proceeding. And as I indicated</p> <p>13 earlier the special court of course does not have</p> <p>14 power to grant us damages or injunctive relief. Even</p> <p>15 if we asked them to do it I don't think they could do</p> <p>16 it and we haven't asked yet and we don't plan to.</p> <p>17 Now, let's go through the two possible</p> <p>18 scenarios. Suppose that you stayed this case and the</p> <p>19 City were to win in front of the special court. We</p> <p>20 still have to come back here to try a whole bunch of</p> <p>21 issues. So there's no judicial economy at all. We</p> <p>22 still have to come back and try the antitrust question</p>

54	<p>1 of whether the City should be enjoined from falsely 2 telling people it had an exclusive service area after 3 the Federal Court threw out that claim a year ago. 4 We'd still have to come back and try the question of 5 whether they should be enjoined from threatening 6 developers with litigation if they would want to 7 switch to Fairfax Water. And we'd still have to come 8 back and try the question of whether the City should 9 not be allowed to use its control over easements to 10 prevent a developer from switching because they've got 11 a monopoly and they have got the developer by the you 12 know what.</p> <p>13 So there's no efficiency savings at all. 14 We still have to come back and try this case. 15 Moreover, counts 1, 2 and 3 of their countersuit here 16 are not raised in the special court proceeding. So 17 when they say it's all the same issues, it's not. 18 There's minor, minor overlap.</p> <p>19 Now, with regard to all of the factors of 20 the test for whether a stay should be granted I think 21 they weigh strongly in our favor against a stay. 22 We've just covered the identity of the claims issue.</p>	56	<p>1 And let me finish on the issue of 2 prejudice. I've already talked about the prejudice to 3 us if the stay is granted. We may well lose the 4 Halstead connections forever. That is real prejudice 5 to us. Let's talk about prejudice to the City. How 6 would they be prejudiced by a stay? Answer, they 7 cannot claim prejudice because they told Judge Alden 8 when they got permission to file this late permissive 9 counterclaim that it would not stay the trial. And 10 mr. Thomas only read a portion of the transcript. 11 Your Honor had the other portion where Mr. --</p> <p>12 THE COURT: Right. Mr. Thomas did not say 13 that they would be prejudiced. He was talking about 14 inconsistent verdicts right under the law. He didn't 15 say exclusive jurisdiction. But this is exactly the 16 kind of matter for which these statutes were crafted, 17 et cetera. He simply in addressing prejudice said 18 that Fairfax Water and the Board and the County would 19 not be prejudiced.</p> <p>20 MR. RAPHAEL: Well, for the reasons I 21 described above -- I'm not speaking about Fairfax 22 County. Fairfax Water.</p>
55	<p>1 And as I've shown the claims are very different. The 2 only claim that overlaps is the one in count 4 of the 3 countersuit based on 15.2-2143 and Your Honor is 4 exactly right when you were asking about election.</p> <p>5 We cited the Jennings versus Reality 6 Development Corporation case in our papers which 7 stands for the proposition that where a party files 8 parallel actions in different courts he has to elect 9 which one he's going to pursue when asked to. And so 10 if the City wants to pursue its claims before the 11 special court it can do that and it should nonsuit 12 count 4 of the case here and then it can pursue that.</p> <p>13 The other factor, time of filing. Your 14 Honor, we filed this case in December of 2008. The 15 City has tried to postpone the trial to 2010. Judge 16 Thatcher said, no, it's going to be tried within a 17 year of trial. We've been working our tails off to 18 get it ready. We've spent over a million dollars to 19 get this case ready for trial and I believe the City 20 has probably spent over a million dollars as well. It 21 would not promote judicial efficiency to stay for 22 reasons I mentioned above.</p>	57	<p>1 THE COURT: No. I understand that.</p> <p>2 MR. RAPHAEL: And the City of Falls Church 3 would not be because, A, they said they're ready to go 4 to trial on the counterclaim and they asked to bring 5 it here. So they've put themselves in the position of 6 asking the courts by filing the late countersuit. So 7 they wouldn't be prejudiced. And if they really don't 8 want this Court to decide that issue they can and they 9 should frankly elect where they're going to pursue 10 count 4. And that's why we said in their papers they 11 should be made to elect are they going to pursue count 12 4 in the countersuit here or in the special court.</p> <p>13 So in all four factors of the test they 14 clearly weigh against a stay. The strongest factors I 15 think are prejudice to us and the fact that the claims 16 are not overlapping. We cannot get injunctive relief 17 before the special court.</p> <p>18 THE COURT: All right. Thank you very 19 much.</p> <p>20 MR. RAPHAEL: Thank you. Do you wish to be 21 heard from?</p> <p>22 MS. POSNER: Just briefly, Your Honor.</p>

58	<p>1 Again, Ellen Posner for the Board and the County. And</p> <p>2 I'm not going to rehash everything Mr. Raphael so ably</p> <p>3 stated and certainly the County supports that. I</p> <p>4 would say, Your Honor, just harkening back to the fact</p> <p>5 that this pleading which was denominated as a single</p> <p>6 pleading, a third-party claim and counterclaim, the</p> <p>7 County did object to being brought in very vehemently</p> <p>8 and continues to object.</p> <p>9 It has waited patiently to have the</p> <p>10 demurrers and pleas and bar heard and they are set for</p> <p>11 tomorrow. They're fully briefed. And when we talk</p> <p>12 about the procedural posture of the two cases</p> <p>13 vis-a-vis prejudice, Mr. Thomas is omitting the fact</p> <p>14 that I think the County has a right to have those</p> <p>15 demurrers and pleas and bar heard as opposed to the</p> <p>16 other case which is in its -- to say the least, its</p> <p>17 infancy -- I mean, it is a neophyte.</p> <p>18 And I agree with Your Honor's statement.</p> <p>19 Your Honor, if there is some type of concurrent</p> <p>20 jurisdiction Your Honor is perfectly capable. And if</p> <p>21 the ruling -- in fact if they do overlap, the ruling</p> <p>22 is the demurrers are sustained and the plea and bars</p>	60	<p>1 with the powers of the Court.</p> <p>2 That strikes me as a direct authorization</p> <p>3 under the code for the special court to provide</p> <p>4 equitable relief, and certainly injunctive relief</p> <p>5 would be among those.</p> <p>6 THE COURT: Well, it might fall under</p> <p>7 subsection 4 as well. "Take other actions as may" --</p> <p>8 MR. THOMAS: Of course. Yes. "Take other</p> <p>9 actions as may aid in the disposition of the case."</p> <p>10 With respect to the point that the special</p> <p>11 court does not have jurisdiction to hear the antitrust</p> <p>12 cases inasmuch as the code provides that a</p> <p>13 jurisdiction for antitrust cases is in the circuit</p> <p>14 courts, I would only say, again, Judge, that the</p> <p>15 special court can make that decision and I think the</p> <p>16 special court is the right one to make that decision.</p> <p>17 The special court by degree of the chief justice is</p> <p>18 sitting in the Circuit Court of Hampton. That's where</p> <p>19 the filings that we're making are being handled. The</p> <p>20 County and the Board have already filed a demurrer and</p> <p>21 plea and bar to the petition in that Circuit Court.</p> <p>22 And so I think, again, that's a question that the</p>
59	<p>1 are sustained, yes, the County and the Board would in</p> <p>2 fact advise the three judge panel that at the October</p> <p>3 2nd -- and all that is is a pretrial conference, Your</p> <p>4 Honor.</p> <p>5 So beyond that the County doesn't have</p> <p>6 anything else to say. And we hope that Your Honor</p> <p>7 would go ahead and allow us to argue the pleas and</p> <p>8 bars and the demurrers which have been specially set</p> <p>9 for almost two and a half months. Thank you.</p> <p>10 THE COURT: Thank you, Ms. Posner. Mr.</p> <p>11 Thomas, you have the last word on this matter.</p> <p>12 MR. THOMAS: Thank you.</p> <p>13 THE COURT: Yes, sir.</p> <p>14 MR. THOMAS: Just a couple of points,</p> <p>15 Judge. Mr. Raphael insists that the special court</p> <p>16 cannot grant it injunctive relief and I think that's</p> <p>17 inconsistent with the Virginia code. And I would</p> <p>18 direct the Court to 15.2-2136, which provides right</p> <p>19 there in the first paragraph "The Court in making its</p> <p>20 decision shall balance the equities in the case,</p> <p>21 entering an order setting forth what it deems fair and</p> <p>22 reasonable terms and conditions," and then goes on</p>	61	<p>1 Circuit Court can answer.</p> <p>2 Judge, on the question about the injunction</p> <p>3 relevant to the Halstead property -- and again, I</p> <p>4 think what you've heard is that when you strip away</p> <p>5 the idea that the special court can't grant injunctive</p> <p>6 relief -- wrong -- I think what you're really hearing</p> <p>7 from Fairfax Water is that it just really wants to get</p> <p>8 an injunction to force the City to relinquish its</p> <p>9 property rights and its easements that the City has in</p> <p>10 lots of different places throughout Fairfax County.</p> <p>11 This proffer condition amendment that the</p> <p>12 developer has filed, one thing that the Fairfax County</p> <p>13 Water Authority has omitted here in its argument to</p> <p>14 the Court is that the City has said to the developer</p> <p>15 so long as you have your proffer condition amendment</p> <p>16 on file and if it's granted, no matter who you decide</p> <p>17 to choose we're going to agree to move our lines.</p> <p>18 We're going to agree to move our lines.</p> <p>19 That brings us all the way back, Judge, to</p> <p>20 the grinning of this dispute and the reasons for the</p> <p>21 special court as the appropriate court to hear it,</p> <p>22 which is to say what we really have here is a dispute</p>

62	<p>1 between jurisdictions involving one jurisdiction 2 withholding its consent for another jurisdiction to 3 operate or expand its water system in that 4 jurisdiction.</p> <p>5 That's exactly what we have here. That's 6 what's contemplated by 2143 of the code, which allows 7 us to ask for a special court to hear these issues, 8 balance the equities, determine what's in the best 9 interests of the parties -- and that's from the code 10 itself -- and enter an order granting or denying the 11 petition as the special court deems fit.</p> <p>12 What the City has under the code is a right 13 to have that whole dispute -- which is what this whole 14 dispute is -- determined by a special court from 15 judges remote from the jurisdiction sitting without a 16 jury. That's what the code allows us to have. And so 17 we think the case ought to be stayed until such time 18 as a special court can do the work that the chief 19 justice has asked it to do.</p> <p>20 Thank you very much, Your Honor.</p> <p>21 THE COURT: All right. Thank you very 22 much, Mr. Thomas.</p>	64	<p>1 all matters were there it just seems to the Court that 2 there's no reason to stay. The parties have been 3 involved in this case. The issues are no surprise. 4 And the case is or soon will be ready to go once some 5 procedural matters are addressed or as substantive. 6 And for all of these reasons the motion of the City of 7 Falls Church to stay this action is denied. The 8 exception of the City to the Court's ruling is noted.</p> <p>9 Did you bring an order, Mr. Raphael?</p> <p>10 MR. RAPHAEL: Yes, Your Honor. We did. If 11 we could spend a little bit of time talking about 12 scheduling issues I would be most grateful.</p> <p>13 THE COURT: Could we take five minutes 14 before doing that?</p> <p>15 MR. RAPHAEL: Yes, Your Honor.</p> <p>16 THE COURT: Okay. The Court will be in 17 recess for five minutes and will return.</p> <p>18 (Recess.)</p> <p>19 THE COURT: My law clerk is making copies. 20 You didn't want certified copies, did you?</p> <p>21 MR. RAPHAEL: No, Your Honor.</p> <p>22 THE COURT: All right. She'll be back from</p>
63	<p>1 Not surprisingly this matter has been well 2 briefed and well argued. All of the claims, all of 3 the disputes between the various parties are not 4 presently and it appears from the Virginia code cannot 5 be before the three judge panel. Perhaps the 6 injunctive relief might fall within some of the 7 broader language, the injunctive relief sought of the 8 enabling legislation for the three judge special 9 court. But it strikes the Court as a stretch that the 10 Virginia Antitrust Act, which specifically places 11 jurisdiction of those matters in the circuit courts, 12 would be something that would be considered by the 13 three judge panel. If it were it would have been set 14 out in the enabling legislation. It is not.</p> <p>15 Conversely, all of the claims are here, all 16 asserted by Fairfax Water. And wisely, no surprise, 17 the City has elected through its counterclaim to 18 proceed to this Court if necessary by asserting its 19 claims in this jurisdiction. So simply put, all 20 matters are before this Court. All matters are not 21 and cannot be before the three judge panel.</p> <p>22 Moreover, even if all matters were here and</p>	65	<p>1 a minute. All right. How can I help you next?</p> <p>2 MR. RAPHAEL: Thank you, Your Honor. If I 3 may approach, I'd like to hand up a list of the 4 pending motions. I'll leave a copy for your clerk.</p> <p>5 THE COURT: All right. Thank you.</p> <p>6 MR. RAPHAEL: There are 13 motions that are 7 pending. Some of them already have hearing dates. 8 The ones that are already set -- items 1 and 2 are set 9 for hearing tomorrow. So those are fine.</p> <p>10 THE COURT: Okay.</p> <p>11 MR. RAPHAEL: Item 8 and 9 -- those are the 12 ones we talked about this morning -- those are set for 13 hearing on the 21st. The rest of these need a home. 14 And I was going to suggest two possibilities to Your 15 Honor.</p> <p>16 THE COURT: Let me just digest that.</p> <p>17 MR. RAPHAEL: Sure.</p> <p>18 THE COURT: 1 and 2 are for tomorrow?</p> <p>19 MR. RAPHAEL: Yes, Your Honor.</p> <p>20 THE COURT: Okay.</p> <p>21 MR. RAPHAEL: And then 8 and 9 have been 22 set for the 21st.</p>

66	<p>1 THE COURT: Okay.</p> <p>2 MR. RAPHAEL: A couple of them are --</p> <p>3 they're in question as to whether they have been set.</p> <p>4 Item 4 is our motion to compel the City to turn over a</p> <p>5 memo for which we say they waived privilege. We were</p> <p>6 told by your law clerk that that was going to be heard</p> <p>7 on the 14th also because it was set originally two</p> <p>8 weeks ago.</p> <p>9 THE COURT: Right.</p> <p>10 MR. RAPHAEL: But apparently the docket may</p> <p>11 not be showing it for that date.</p> <p>12 THE COURT: Let's ask when she gets back.</p> <p>13 But I think that one we ended up continuing because it</p> <p>14 hadn't been briefed; is that correct?</p> <p>15 MR. RAPHAEL: No. It had been briefed.</p> <p>16 The date -- and you ended up not being able to hear</p> <p>17 several motions on the day on which it had been set.</p> <p>18 THE COURT: What was the one we continued</p> <p>19 to --</p> <p>20 MR. THOMAS: Judge, I think I can help on</p> <p>21 that.</p> <p>22 THE COURT: Yes, sir. You were here on</p>	68	<p>1 would certainly want to be able to take that</p> <p>2 deposition testimony outside of the discovery period</p> <p>3 and that discovery period closes on the 14th.</p> <p>4 THE COURT: Right.</p> <p>5 MR. RAPHAEL: So 7 it sounds like the other</p> <p>6 parties agree that that can be heard on the 21st.</p> <p>7 THE COURT: Yes, sir.</p> <p>8 MR. RAPHAEL: So that one is good. And</p> <p>9 then going back to item 5, our motion to compel the</p> <p>10 production of the -- I'm sorry. I misspoke. It was</p> <p>11 item 4 that I was talking about, the motion to compel</p> <p>12 production of the City internal memo. Our</p> <p>13 understanding was that that was going to be heard</p> <p>14 tomorrow as well.</p> <p>15 THE COURT: Is that set for tomorrow?</p> <p>16 THE CLERK: Yes.</p> <p>17 THE COURT: Oh, it is. Okay.</p> <p>18 MR. RAPHAEL: So that one is taken care of.</p> <p>19 So then I believe the rest of these need a home. And</p> <p>20 I had a modest proposal as to how we could get these</p> <p>21 done.</p> <p>22 THE COURT: And what is the proposal?</p>
67	<p>1 that?</p> <p>2 MR. THOMAS: I was. That was the County's</p> <p>3 motion to quash which was noticed as a one week motion</p> <p>4 and Your Honor said, well, that really ought to be a</p> <p>5 two week motion.</p> <p>6 THE COURT: Right.</p> <p>7 MR. THOMAS: And I think what the Court did</p> <p>8 is it set it for a date that it --</p> <p>9 THE COURT: When I had criminal motions.</p> <p>10 MR. THOMAS: Correct.</p> <p>11 THE COURT: So is it on for tomorrow?</p> <p>12 MR. THOMAS: No, it's not. I believe it is</p> <p>13 on the for the 21st.</p> <p>14 THE COURT: Oh, I see it.</p> <p>15 MR. RAPHAEL: Number 7. Right.</p> <p>16 THE COURT: And that's agreeable with you?</p> <p>17 MS. POSNER: Yes, Your Honor. It's</p> <p>18 agreeable.</p> <p>19 MR. THOMAS: If I could, Judge, it's</p> <p>20 agreeable insofar as what we are simply trying to do</p> <p>21 is get deposition testimony from the County and the</p> <p>22 Board and if the Court denies the motion to quash we</p>	69	<p>1 MR. RAPHAEL: I understand that Your Honor</p> <p>2 is going on vacation.</p> <p>3 THE COURT: I'm afraid so.</p> <p>4 MR. RAPHAEL: Yes. Having just come back</p> <p>5 from one I know how horrible it is to come back. So I</p> <p>6 had two suggestions. One is if we could find a time</p> <p>7 like this one where you had two hours, two and a half</p> <p>8 hours to address these, that would be one way to do</p> <p>9 it. Another way to do it would be for Your Honor to</p> <p>10 say that these various discovery motions or motions in</p> <p>11 limine could be heard by another judge. And we would</p> <p>12 have no objection to that.</p> <p>13 But they do need a home. The motions in</p> <p>14 limine, they're not hugely long, but they are longer</p> <p>15 than five minutes and that's why we did file them in</p> <p>16 time to be heard before trial.</p> <p>17 THE COURT: Someone this morning said to me</p> <p>18 that many, many judges have heard pieces of this case.</p> <p>19 MR. RAPHAEL: That's true.</p> <p>20 THE COURT: Do you have any objection to</p> <p>21 having another judge hear the motions to compel, sir?</p> <p>22 MR. THOMAS: Yeah. If I could, Judge, yes</p>

70	<p>1 is the short answer.</p> <p>2 THE COURT: In a word?</p> <p>3 MR. THOMAS: Yeah. And the reason for</p> <p>4 that, Your Honor, is we've heard a couple of I think</p> <p>5 representations from Fairfax Water here that -- for</p> <p>6 example, count 5 which is the unconstitutionality of</p> <p>7 the City's rates and charges claim should be heard by</p> <p>8 the Court and not by a jury.</p> <p>9 These motions in limine I expect. I know</p> <p>10 that some of the ones that the plaintiff has filed are</p> <p>11 pretty substantive. I know that the one that we had</p> <p>12 filed but was not noticed, which is the last one on</p> <p>13 the list that Your Honor has is pretty substantive.</p> <p>14 Those that we expect to file will be substantive. And</p> <p>15 I just think it's preferable that the Court that's</p> <p>16 going to hear the case hear the motions.</p> <p>17 THE COURT: Well, actually, I agree with</p> <p>18 you with regard to motions in limine. But an</p> <p>19 alternative is to simply hear those in the morning of</p> <p>20 trial before we seat the jury. And if we're not going</p> <p>21 to have a jury then the motions in limine can be</p> <p>22 subsumed in the trial itself because the trial judge</p>	72	<p>1 differently. What about all other motions?</p> <p>2 MR. RAPHAEL: Well, if we could start at</p> <p>3 the top, we filed a plea and bar some time ago. We</p> <p>4 filed a brief on that some time ago. The City has not</p> <p>5 filed its response. If the demurrers are sustained</p> <p>6 tomorrow to the City's countersuit, the plea and bar</p> <p>7 would be moved and you wouldn't need to get to it.</p> <p>8 THE COURT: All right. So we don't need to</p> <p>9 worry about that at this minute. And what about the</p> <p>10 motion -- Ms. Posner, did you wish to saying</p> <p>11 something?</p> <p>12 MS. POSNER: In accord with Mr. Raphael,</p> <p>13 again, just to make sure that the pleas and bar, which</p> <p>14 are obviously substantive motions, both from the</p> <p>15 County and Fairfax Water's standpoint, don't kind of</p> <p>16 fall through the cracks.</p> <p>17 THE COURT: Okay. Thank you.</p> <p>18 MR. RAPHAEL: In terms of the importance of</p> <p>19 getting things done sooner than later, item 5 is our</p> <p>20 motion to compel the City to turn over e-mails from</p> <p>21 its 2008 backup tapes that it has. The City has</p> <p>22 declined to do that or refused to do that. If the</p>
71	<p>1 will hear the objections when that point of the</p> <p>2 evidence is gotten to, unless there's some reason they</p> <p>3 need to be knocked out immediately.</p> <p>4 MR. THOMAS: Well, I think the only reason</p> <p>5 that they ought to be knocked out before the morning</p> <p>6 of the trial is because I do think that they are</p> <p>7 pretty substantive motions, meaning I don't think</p> <p>8 we're talking about this person should not be</p> <p>9 permitted to say this or this particular document</p> <p>10 should not be permitted into evidence. I think that</p> <p>11 they are material and substantive.</p> <p>12 THE COURT: Right. I'm not quarreling with</p> <p>13 that. I was just thinking of a time to do them. And</p> <p>14 if worst comes to worst, motions of limine can be</p> <p>15 heard the morning of the trial, if worst comes to</p> <p>16 worst.</p> <p>17 MR. THOMAS: They can.</p> <p>18 THE COURT: What about the motion to</p> <p>19 compel?</p> <p>20 MR. THOMAS: Mr. Raphael has got this</p> <p>21 helpful list. I'm going to grab it so I can look at.</p> <p>22 THE COURT: Okay. Let's put it</p>	73	<p>1 Court is going to order them to do that they need time</p> <p>2 to do it and get it to us. So that would be one that</p> <p>3 we would think would need to be done earlier than</p> <p>4 others.</p> <p>5 THE COURT: You could not have another</p> <p>6 judge hear that tomorrow?</p> <p>7 MR. RAPHAEL: Absolutely we could.</p> <p>8 THE COURT: Mr. Thomas, what about that?</p> <p>9 MR. THOMAS: Can I ask Mr. Foster and Mr.</p> <p>10 Holzheimer one other question?</p> <p>11 THE COURT: Yes, sir.</p> <p>12 MR. RAPHAEL: I think the City has refused</p> <p>13 to file responses to motions briefed a while ago if</p> <p>14 they don't have a hearing date. So that was not</p> <p>15 briefed yet by the City. We filed our brief on the</p> <p>16 31st.</p> <p>17 MR. THOMAS: I guess, Judge, I would frame</p> <p>18 that a little bit differently, if I may.</p> <p>19 THE COURT: Yes, sir.</p> <p>20 MR. THOMAS: And that is I believe that</p> <p>21 this is one of the motions that we spoke to the</p> <p>22 Court's clerk about that was filed by Fairfax Water</p>

74	<p>1 without regard to the rule about more than one two 2 week motion and at the time we understood that that 3 would be off for tomorrow. 4 THE COURT: Oh, I see. So that's why you 5 didn't brief it? 6 MR. THOMAS: And for that reason we didn't 7 brief it. And it is homeless now. And when it finds 8 a home then we would like to respond to it 9 substantively with a brief. 10 THE COURT: Well, what about taking numbers 11 4, 5 and 6? 12 MR. RAPHAEL: 4 is on for tomorrow, Your 13 Honor. 14 THE COURT: Excuse me. 5 and 6. And just 15 get someone else to hear those two tomorrow? 16 MR. THOMAS: Well, again, Judge, we have 17 not responded. 18 THE COURT: Oh, I'm sorry. But you've 19 responded to 4 but not to 5. Then what about on the 20 21st? 21 MR. RAPHAEL: I think that would be fine. 22 THE COURT: Is that okay, Mr. Thomas?</p>	76	<p>1 by another judge of this Court. And you might want to 2 try to get Judge Thatcher or Judge Alden, simply 3 because they know the case. 4 MR. RAPHAEL: Or Judge Klein also has heard 5 this. 6 MR. THOMAS: He's heard it. Yeah. 7 THE COURT: Judge Klein as well. I didn't 8 realize that. And then on the 21st we'll hear 7, 8 9 and 9. And the motions in limine we're just going to 10 have to think about a little bit because -- I'm just 11 going to take a look at my calendar. We're just 12 running out of time is the problem. 13 MR. RAPHAEL: If it were possible for Your 14 Honor to find two to two and a half hours sometime we 15 could knock a bunch of them out if that would work. 16 THE COURT: Well, that's the problem. I do 17 that almost every day because there are a lot of other 18 cases. 19 MR. RAPHAEL: Sure. 20 THE COURT: And so let's just see what we 21 can do about those. It would just be the three 22 motions in limine, correct?</p>
75	<p>1 MR. THOMAS: I think that's fine. Would 2 Your Honor be hearing that on the 21st? 3 THE COURT: No. Because I've got 7, 8 and 4 9 on the 21st. I wouldn't mind it. Unfortunately we 5 have got 25 other cases tomorrow. 6 MR. THOMAS: On the 21st? 7 THE COURT: That's the problem. So get 5 8 and 6 to be heard by some other judge on the 21st. 9 MR. RAPHAEL: And Your Honor, in light of 10 the ruling that the case is going forward, the City 11 ought to file the outstanding briefs in response to 12 these motions so we can get them teed up. 13 THE COURT: Well, Mr. Thomas will do that. 14 He knows that. He didn't do it because the motion -- 15 as I understand it, because the motion had not 16 actually been placed on the docket because we didn't 17 have court approval. 18 MR. RAPHAEL: That's correct. 19 MR. THOMAS: Right. 20 THE COURT: Okay. So then to recap, 21 tomorrow we hear 1, 2, 4. 3 is being held in abeyance 22 at this time but not forgotten. 5 and 6 will be heard</p>	77	<p>1 MR. THOMAS: Well, number 13, Your Honor, 2 which is our motion to strike one of Fairfax Water's 3 experts or -- 4 THE COURT: Okay. Excuse me. I'm sorry. 5 Thank you. 10, 11, 12 and 13, well, we'll see if we 6 can find some time for those. 7 MR. THOMAS: Your Honor, just so we're 8 clear, I do expect to file a number other motions in 9 limine, which, if it's okay with the Court, would then 10 just get added on to this list of -- 11 THE COURT: Well, I don't know. It depends 12 how many there are. You may file them and they may be 13 added to the list, but there's no guarantee what's 14 going to happen. We're just going to do the best we 15 can. All we can do is the best if we can and if 16 things just completely fall through then we'll hear 17 the motions in limine prior to the trial beginning. 18 MR. THOMAS: That's fair. I understand 19 that. And all I want to make sure is that -- 20 THE COURT: That I know that there may be 21 some more motions. 22 MR. THOMAS: Right. And that there is</p>

78	<p>1 equal uncertainty as to when those motions will be</p> <p>2 heard as compared to 10 through 13.</p> <p>3 THE COURT: Yes, sir. The sooner you get</p> <p>4 them filed the better.</p> <p>5 MR. THOMAS: Understood.</p> <p>6 THE COURT: Then we'll know the universe</p> <p>7 all that we have to worry about.</p> <p>8 MR. THOMAS: Understood.</p> <p>9 MR. RAPHAEL: Your Honor, since we don't</p> <p>10 have a specific date yet, can we get a date set for</p> <p>11 when the City will reply to the motions that we have</p> <p>12 filed already?</p> <p>13 THE COURT: What's your pleasure, Mr.</p> <p>14 Thomas?</p> <p>15 MR. THOMAS: If we could, Your Honor, let's</p> <p>16 take those in turn. And I believe that the first one</p> <p>17 would be number 5, which the Court has set for the</p> <p>18 21st. Can I suggest Tuesday?</p> <p>19 MR. RAPHAEL: Doesn't the -- if this is</p> <p>20 going to be heard by a different judge, do they need</p> <p>21 it on the preceding Friday?</p> <p>22 THE COURT: Which is tomorrow, correct?</p>	80	<p>1 it on Tuesday.</p> <p>2 THE CLERK: That's true.</p> <p>3 THE COURT: Okay.</p> <p>4 MR. RAPHAEL: If that works we have no</p> <p>5 objection to that.</p> <p>6 THE COURT: All right. Tuesday it is.</p> <p>7 Okay. What else? Yes, sir.</p> <p>8 MR. THOMAS: If I could, a couple of points</p> <p>9 about the conduct of the trial. I think what I</p> <p>10 understood from Fairfax Water today is that they have</p> <p>11 the view that count 5 should not be tried by the jury.</p> <p>12 It should be tried through a bench trial. And they</p> <p>13 believe the same is true for the injunction issues.</p> <p>14 And I think it's worth raising at least at</p> <p>15 this point how the Court would like to proceed with</p> <p>16 trial in light of those representations today, and</p> <p>17 would offer as one suggestion that count 5 of the</p> <p>18 case, inasmuch as it is very distinct from the other</p> <p>19 three counts that are alleged before it, that it be</p> <p>20 severed from the case and tried before the Court.</p> <p>21 THE COURT: Count 5 is the unconstitutional</p> <p>22 tax?</p>
79	<p>1 MR. RAPHAEL: That is tomorrow.</p> <p>2 MR. THOMAS: That is tomorrow.</p> <p>3 THE COURT: Can you do that?</p> <p>4 MR. THOMAS: I suspect I can. I'd rather</p> <p>5 not.</p> <p>6 THE COURT: Well, if it were me I wouldn't</p> <p>7 mind. But I think you'd better -- it's only two of</p> <p>8 them you have to respond to. Is that -- or one?</p> <p>9 MR. THOMAS: Well, I think what Mr. Raphael</p> <p>10 is talking about is number 5 and number 6. And</p> <p>11 then --</p> <p>12 THE COURT: Right. 5 and 6. You've got</p> <p>13 lots of help over there. Okay? So if you could by</p> <p>14 tomorrow and then they'll go to somebody.</p> <p>15 MR. HOLZHEIMER: Your Honor, on that, since</p> <p>16 I'll probably be the one who will be working most of</p> <p>17 them, procedurally, Your Honor, I'd like to find out</p> <p>18 what law clerk is going to get it. The law clerks</p> <p>19 normally don't pull the dockets until Tuesday. And we</p> <p>20 can have it copy hand delivered to that law clerk. So</p> <p>21 that there would be no difference whether we filed it</p> <p>22 on Friday or Tuesday because the law clerk would date</p>	81	<p>1 MR. THOMAS: Correct.</p> <p>2 MR. RAPHAEL: Yes, it is. If I could just</p> <p>3 clarify, there is some evidence that will come in on</p> <p>4 count 5 that is relevant to the antitrust issues. The</p> <p>5 idea behind count 5 is the City because it has a</p> <p>6 monopoly is charging high rates and taking chunks of</p> <p>7 that money and putting it in its general funds. So</p> <p>8 there is overlapping evidence.</p> <p>9 And what I would propose -- and you're</p> <p>10 going to hear this on the bifurcation motion. But</p> <p>11 what we propose is we try the case to the jury, we ask</p> <p>12 the jury to come back on a verdict of liability, yes</p> <p>13 or no, on the antitrust counts. We could have a</p> <p>14 question for the jury do you find that the City is</p> <p>15 transferring monies from the water fund, yes or no.</p> <p>16 Whether there's an injunctive relief I</p> <p>17 think is for the Court to decide. But I think the</p> <p>18 jury should hear the evidence that overlaps between</p> <p>19 the unconstitutional tax claim and the antitrust</p> <p>20 claim. To put it in a short mantra, monopoly rents</p> <p>21 are the equivalent of the monies that they are</p> <p>22 improperly transferring to the general fund. So I</p>

82	<p>1 think there is some fair overlap on that.</p> <p>2 THE COURT: Yes, sir.</p> <p>3 MR. THOMAS: If I could -- and it may be a</p> <p>4 preview of what the Court will hear on the 21st.</p> <p>5 THE COURT: Excuse me. I've got it take</p> <p>6 this call. I'm just going to step here. I'll be</p> <p>7 right back.</p> <p>8 (Recess.)</p> <p>9 THE COURT: I apologize. I had to take</p> <p>10 that call. Yes, sir.</p> <p>11 MR. THOMAS: If I could, Judge, I was</p> <p>12 raising the issue of severing count 5.</p> <p>13 THE COURT: Right.</p> <p>14 MR. THOMAS: And I think I need to differ</p> <p>15 with Mr. Raphael on the relatedness between count 5</p> <p>16 and all the other claims.</p> <p>17 THE COURT: I just don't think I can decide</p> <p>18 that right now. I mean, I just have to think about it</p> <p>19 a little bit. I really want you all to think -- I'll</p> <p>20 just make an absolute drop-dead decision as to whether</p> <p>21 or not you want a jury to hear this case. And you</p> <p>22 don't have to answer me right this minute.</p>	84	<p>1 MR. THOMAS: Okay. And then the burden</p> <p>2 will then be on us to make a motion if we think that's</p> <p>3 appropriate.</p> <p>4 THE COURT: And we'll figure out a way to</p> <p>5 resolve it. If I'm going to try the case, we'll take</p> <p>6 care of that. It won't be a problem.</p> <p>7 My law clerk made a very good suggestion</p> <p>8 with regard to items 5 and 6. Go ahead and brief them</p> <p>9 just the way we've talked, everything the same, and</p> <p>10 they will be set for the 21st. But if we can swap --</p> <p>11 and we'll try to swap out some two weeks motions, keep</p> <p>12 those, and then I'll hear all five of those. That</p> <p>13 would be more efficient, et cetera, et cetera, et</p> <p>14 cetera.</p> <p>15 But I don't know that we can. And I have</p> <p>16 to go to somebody to find out. But that's what I'm</p> <p>17 going to try to do.</p> <p>18 MR. RAPHAEL: That's fine. I had two minor</p> <p>19 housekeeping -- I'm sorry, Mr. Thomas. If you're</p> <p>20 finished --</p> <p>21 MR. THOMAS: Thank you.</p> <p>22 One other response date, Your Honor, for</p>
83	<p>1 MR. THOMAS: Oh, I can answer you right</p> <p>2 this minute.</p> <p>3 THE COURT: Oh, you want one?</p> <p>4 MR. THOMAS: No, I do not.</p> <p>5 THE COURT: Okay. Then Mr. Raphael -- and</p> <p>6 you don't have to answer me. This is not a proffer.</p> <p>7 There's no pressure whatsoever. But if you decide not</p> <p>8 to go with a jury that will take care of this</p> <p>9 question. If you still want to go with a jury then</p> <p>10 we'll have to think about it. But why don't we just</p> <p>11 decide that we'll make a final decision on that next</p> <p>12 week? How does that sound? You've already made your</p> <p>13 decision, but it just seems to me with the nature of</p> <p>14 the case, you might want to have it, but you're</p> <p>15 entitled to have it by a jury.</p> <p>16 MR. RAPHAEL: Thank you, Your Honor.</p> <p>17 THE COURT: Okay?</p> <p>18 MR. THOMAS: And that's fine. My only</p> <p>19 question would be how should that come to a decision</p> <p>20 next week? Would you like to hear from the parties?</p> <p>21 THE COURT: He'll call us up or write a</p> <p>22 letter.</p>	85	<p>1 the motion to bifurcate, which is number 9 on this</p> <p>2 list, that is a motion that we had taken a position it</p> <p>3 was not an overlapping or a cross motion. And I</p> <p>4 understand the Court disagrees with that. We need to</p> <p>5 file a response. We'd like to file it under the same</p> <p>6 regime that Mr. Holzheimer just --</p> <p>7 THE COURT: That's fine. Yes, sir.</p> <p>8 MR. RAPHAEL: Just so it's clear, that will</p> <p>9 be next Tuesday?</p> <p>10 THE COURT: Tuesday. And just plan on</p> <p>11 filing everything with Ms. McCliggott. We're just</p> <p>12 going to assume that we can trade something else out.</p> <p>13 And if we're not able to do so then she will get it to</p> <p>14 a judge, whoever is going to hear it. Okay?</p> <p>15 MR. RAPHAEL: One administrative detail.</p> <p>16 If it's acceptable, Your Honor, I'd like to make the</p> <p>17 papers I handed up to the Court an exhibit to the</p> <p>18 transcript.</p> <p>19 THE COURT: Your chart? You'd like to have</p> <p>20 it attached to the transcript?</p> <p>21 MR. RAPHAEL: Yes, Your Honor.</p> <p>22 THE COURT: Well, that's perfectly fine.</p>

1 MR. RAPHAEL: Thank you. I'd like to
2 include the four things I handed up to you, just make
3 that an attachment to the transcript.

4 THE COURT: That's perfectly fine.

5 MR. RAPHAEL: Okay.

6 THE COURT: Anything else?

7 MR. RAPHAEL: No, Your Honor. Thank you
8 very much for your time.

9 THE COURT: Okay. You're very much
10 welcome. And we'll get to these motions in limine.
11 Just let me think about it. Okay?

12 MR. THOMAS: Thank you, Your Honor.

13 MR. RAPHAEL: Thank you.

14 THE COURT: Thank you all. The Court
15 stands adjourned.

16 (Whereupon, at 11:57 p.m. the motions
17 hearing was adjourned.)

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