

1990 WL 223192

Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Barbara O'Hara BIRSTER

v.

O'HARA SANITATION COMPANY, INC., Betty
O'Hara as Executrix for the Estate of William
O'Hara, Sr. Betty O'Hara, Individually, William
J. O'Hara, Michael O'Hara Thomas O'Hara,
Browning–Ferris Industries, Inc., Nicholas J.
Caramenico and Steven E. Speece, Esquire.

Civ. A. No. 90–2786.

|
Dec. 21, 1990.

Attorneys and Law Firms

Paul R. Rosen, Richard E. Miller, Philadelphia, Pa., for
plaintiff.

Eric J. Lobenfeld, Robin D. Adelstein, Lawrence V.
Brocchini, pro hac vice for defendants.

Thomas B. Rutter, Philadelphia, Pa., for defendants.

Eric J. Lobenfeld, Robin D. Adelstein, Lawrence V.
Brocchini, New York City, Arthur H. Kahn, Dale P.
Schomer, Philadelphia, Pa., for defendants.

MEMORANDUM OF DECISION

McGLYNN, District Judge.

*1 Before the Court is a motion to enforce a settlement. Specifically, Defendants O'Hara Sanitation Company, Inc., the Estate of William J. O'Hara, Sr., Betty O'Hara, William J. O'Hara, Jr., Patrick O'Hara, Michael O'Hara, Thomas O'Hara, Nicholas J. Caramenico and Steven E. Speece (hereinafter, collectively, the "Defendants") ask the Court to enforce the settlement by compelling Plaintiff Barbara O'Hara Birster and Counterclaim Defendant Thomas Birster, to do all acts necessary to consummate the settlement and cause this matter to be dismissed with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure. The Birsters concede that there was a settlement but contend that the defendants breached the

agreement by failing to timely perform and, therefore, they were entitled to rescind.

Plaintiff commenced this action seeking to void a transaction that had occurred in June 1988 in which she transferred her shares of stock in O'Hara Sanitation Company, Inc. ("O'Hara, Inc.") to O'Hara, Inc. Plaintiff sought to share in the several hundred thousand shares of stock which Browning–Ferris Industries, Inc. ("BFI") paid for the sale to BFI of the assets of O'Hara, Inc. and other companies in November 1989. Plaintiff alleged diversion of funds and corporate opportunities; excessive compensation; failure to declare dividends; breach of fiduciary duty; concealment of intention to sell; intentional infliction of emotional distress; and other related claims. It was contended that the Defendants had, *inter alia*, diverted funds from O'Hara, Inc. to purchase interests in other companies for the benefit of some or all of the defendants, as opposed to the best interests of O'Hara, Inc. and its shareholders, including Mr. Birster.

Defendants counterclaimed against Mrs. Birster and added Mr. Birster as a Counterclaim Defendant. After several days of intense negotiations between counsel for Mr. and Mrs. Birster and counsel for the Defendants, the parties arrived at a settlement on August 3, 1990. It was agreed that the parties would appear before the Court, and, in the presence of Mr. and Mrs. Birster, make an oral presentation regarding the settlement.

A description of the settlement, in writing, was drafted by counsel for the parties (the "Prepared Settlement").

On the afternoon of August 3, 1990, Mrs. and Mr. Birster and their counsel, Paul Rosen and Richard Miller, and counsel for the Defendants appeared before the Court and advised the Court that the parties had reached agreement on a settlement. The Court suggested that Mr. Rosen and Mr. Miller read and explain the Prepared Statement to Mrs. and Mr. Birster; that Mrs. Birster and Mr. Birster then initial each page of the prepared Statement; and that the Prepared Statement then be read into the record in their presence. Thereafter, for approximately twenty-five minutes Messrs. Rosen and Miller consulted in private with Mrs. and Mr. Birster. Defendants' counsel then re-entered the room and Mr. Rosen read the Prepared Statement into the Court record, which Statement was supplemented by explanations to the Birsters by Mr. Rosen, along with comments by defense counsel.

*2 Mrs. and Mr. Birster initialed each and every page of this Prepared Statement and copies of the initialed Statement were disseminated to all counsel. (Appendix A attached hereto). Throughout the reading of the Prepared Statement, Mrs. and Mr. Birster were present, heard the entire discussion, and stated that they understood and assented to the settlement agreement and Prepared Statement as placed on the record (Appendix B attached hereto) and as initialed by them.

The consideration which was agreed to be paid to Mrs. Birster, as part of the settlement, permitted her to keep \$225,000.00 in cash which she had already received from certain trusts which had been created in 1988 in connection with the transfer by her of her O'Hara, Inc. stock, plus the transfer to her by certain defendants of 56,210 shares of BFI stock. The parties also agreed that:

(a) Mrs. Birster and her issue would relinquish all right, title and interest in the O'Hara Sr. and Birster trusts. These relinquishments were required to be approved by the Orphans Court of Montgomery County, with minors and unborn issue being represented by a Guardian *ad litem*.

(b) BFI was required to agree that the manner in which this settlement was "structured and phased" would not cause O'Hara, Inc. to be subject to a claim for indemnification by BFI by virtue of its having adversely affected the "pooling of interest principles adopted by BFI."

(c) Mutual General Releases, which conformed to the terms agreed upon in the settlement, would be exchanged.

By letter dated Friday, August 24, 1990, counsel for Mrs. and Mr. Birster notified defendants that the settlement was terminated because, as stated by counsel:

While procedures have moved before Judge Stefan on the approvals of the Orphans's Court, we have not received approval from BFI on the pooling, and we never even received a written release agreement from your client (which was to be sent to us by August 10, 1990.) It has been three weeks with no resolution. Accordingly, we can no longer agree to the settlement. The stock of BFI has dropped from 41 to 34¾. My. clients are no longer receiving the benefits of this settlement, which was contemplated on the date we went before the Court. The

conditions to be fulfilled by BFI have not been met and approved. The time in which to complete the settlement has expired, while the stock of BFI continues to go down. We, therefore, have no alternative but to terminate the settlement. (Appendix C)

In a reply dated August 28, 1990 Moving Defendants rejected the position asserted in the August 24, 1990 letter and stated their intention to continue to move forward as promptly as possible to conclude the settlement. (Appendix D)

As of August 27, 1990, the Guardian *ad litem*, who had been appointed on August 13, 1990, had submitted his report to the Orphans Court of Montgomery County. The Presiding Judge has not proceeded to an adjudication because of the lack of cooperation on the part of Mrs. Birster. Indeed, Mrs. Birster has since filed a petition challenging the Guardian's recommendation.

*3 As of September 17, 1990, the assent of BFI with respect to the pooling of interest aspect had been received. And thus, on that date, all conditions had been satisfied, except the approval by the Orphans Court and the formal exchange of the documents.

Concedely, the Birsters hoped for a "wrap"¹ within two weeks of August 3 but, significantly, they agreed not to put a specific time limitation on the defendants' performance. The Birsters recognized that there were two conditions not within the control of the settling parties; i.e., Orphans Court approval and BFI's approval.²

In the absence of a specified time within which performance is to occur, the law implies a requirement to perform within a reasonable time under the circumstances, *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, cert. denied, 414 U.S. 1158 (1973), and neither party is free to repudiate the agreement during the period of time required to accomplish the conditions needed to be fulfilled. *Main Line Theaters, Inc. v. Paramount Film Distrib. Corp.*, 298 F.2d 801 (3d 1962).

Getting this settlement in a posture for approval by the Orphans Court by August 27, 1990 and obtaining that court's willingness to schedule a prompt hearing is reasonable under the circumstances presented here. Similarly, obtaining BFI's approval which, in turn, was conditioned on a certificate by its independent auditor was

accomplished within a reasonable period of time. Further, I am satisfied that, given the circumstances of this case, the preparation and submission of global type releases within 24 days is not unreasonable.

The Birsters argue that because the consideration involved the transfer of publicly traded stock in a volatile market, such circumstances dictate a shorter performance period which the defendants violated. Given the nature of the conditions here, particularly the fact that fulfillment of the conditions depended on action by entities not subject to the control of the parties to the agreement, the Birster's attempt to limit the defendants' tender of performance to twenty-one days is unreasonable.

If the Birsters wanted to protect themselves from a drop in the market price, they could have done so by insisting on appropriate language in the settlement agreement.

In *Green v. Lewis*, 436 F.2d 389 (3d Cir.1971) a securities account manipulation case, plaintiff repudiated a settlement because the defendants did not act "expeditiously" when they made a tender 39 days after the settlement had been entered into. The court, in affirming the enforcement of the settlement, stated at page 390:

[2] Although the term "expeditiously" admits of no precise definition, we are satisfied that the conduct of defendants, under the circumstances, met the requirements of the settlement agreement. We reject the argument that the permissible time period should be governed by the custom of the securities exchange trade. We are here concerned with a contractual settlement of a legal dispute, not with the transfer of shares of stock. Moreover, if plaintiff desired such a limited period in which he would accept tender, there was ample opportunity for him to so specify.

*4 Finally, the Birsters argue that, at the very least, the defendants could have submitted the releases and transferred the stock within two weeks without waiting for the other conditions to be fulfilled. This is an unrealistic view of the settlement process. The then unfulfilled conditions were designed to protect the parties from collateral claims that could arise as a result of the settlement. The defendants bargained for this protection and were not obligated to make a tender until it was assured.

The settlement will be enforced in accordance with its terms.

APPENDIX A

1. We are here to describe settlement of the action brought by Barbara O'Hara Birster against O'Hara Sanitation Company, Inc. ("O'Hara Sanitation"), the Estate of William J. O'Hara, Sr., Betty E. O'Hara, William J. O'Hara, Jr., individually and to the extent necessary to comply with this in his capacity as Liquidating Trustee for the O'Hara Sanitation Company, Inc. Liquidating Trust, Patrick O'Hara, Thomas O'Hara, Nicholas J. Caramenico, and Steven E. Speece ("Settling Defendants"). The settlement does not include Browning-Ferris Industries ("BFI").

2. The settlement contains an agreement that it will be kept confidential, subject to certain specified exceptions. Therefore, while the parties deem it desirable to make a general statement of the settlement arrangement on the record at this time, they request that this statement, when transcribed, be placed under seal.

3. In her Complaint, Mrs. Birster contended that transfer of her O'Hara Sanitation stock to O'Hara Sanitation in June of 1988 pursuant to a Redemption Agreement was invalid and sought rescission of that transfer and the restoration of her shares in that company so that she could share in the sale of assets of O'Hara Sanitation and the sale of assets or stock of other companies to BFI in November 1989. Mrs. Birster also raised issues regarding the operation of O'Hara Sanitation, alleged diversion of funds and corporate opportunities to others, excessive compensation, failure to declare dividends, breach of fiduciary duty, alleged concealment of intention to sell, intentional infliction of emotional distress, and payments to her as compared to payments and fringe benefits to other stockholders of O'Hara Sanitation who were employees of O'Hara Sanitation.

4. Mrs. Birster's claims included Securities Act and common law fraud claims.

5. The sale to BFI pursuant to agreements dated Nov. 17, 1989, were essentially for BFI stock which are subject to certain reductions or return of stock to pay for fulfillment of environmental and other obligations. The O'Hara

shareholders received 861,542 shares of BFI stock, as is set forth in a letter to Judge Louis D. Stefan from James R. Beam, Esquire dated June 15, 1990. The sale of O'Hara Sanitation assets, while subject to reductions as stated, was also subject to increases. For example, BFI has made certain substantial claims against the BFI purchase price approximating \$2,500,000, which O'Hara Sanitation intends to contest. Plaintiff acknowledges that claim.

*5 6. The Settling Defendants answered, denying Mrs. Birster's claims and pleaded Counterclaims against Mrs. and Mr. Birster alleging civil conspiracy, abuse of process, defamation and interference with present and prospective contractual relations. Nothing in this settlement can or should be construed as an admission of any parties' claims.

7. After June of 1988, the late William J. O'Hara, Sr. and Mrs. Betty E. O'Hara, Mrs. Birster's mother, transferred certain real estate into a trust created by Mr. O'Hara of which Mrs. Betty E. O'Hara was trustee (the "O'Hara Senior Trust"). Mrs. Birster and her issue were the named beneficiaries of one-half of that trust's assets. This trust will be affected by the settlement.

8. Since June of 1988, approximately \$225,000 was paid to Mrs. Birster with funds from O'Hara Sanitation through a trust for herself and her issue (the "Barbara Birster Trust").

9. (a) The settlement involves the payment to Mrs. Birster of \$2,375,000, which includes the following:

(1) \$225,000 already received by Mrs. Birster since June of 1988;

(2) an additional payment of \$2,150,000 payable in 56,210 shares of BFI stock valued at \$38.25 per share (which all of the parties hereto agree is the approximate average price of the shares received at closing of the BFI sale). The number of shares of BFI stock has been calculated by plaintiff's attorney for purposes of this settlement and approximates the gross number of shares of BFI stock which Mrs. Birster might have received as if a shareholder of O'Hara Sanitation on November 30, 1989.

(b) The BFI stock paid to Mrs. Birster is to be registered stock which is freely transferrable. One-half of the shares of, if sold, their proceeds, remaining with Mrs. Birster, after she has paid her counsel's fees and costs, will be

retained by Mrs. Birster to do with as she pleases. Mrs. Birster has explained to me that she intends to share these shares and the proceeds from the shares with her husband Tom Birster, in any way that they want regardless of whether or not they even go to a racetrack as I explained it to them and gamble it away if that's what they feel like doing, the both of them.

(c) With respect to the other one-half of the shares, Mrs. Birster will create a new trust of which she will be the settlor and income beneficiary, with power to invade and consume principal for her or her children's health, maintenance, support, or benefit. Mrs. Birster's issue will be the only other beneficiaries of this trust, and they will be income and then remainder beneficiaries. A reputable corporate trustee shall be selected by Barbara Birster to be named as trustee.

(d) The interests of Mrs. Birster and her issue in one-half of the assets of the O'Hara Senior Trust will be relinquished. Mrs. Birster's sister, Elizabeth, and her issue are the beneficiaries of the other half interest in the O'Hara Senior Trust, and it has not been decided at this time whether that trust will be terminated.

*6 (e) O'Hara Sanitation Company, Inc. and the Liquidating Trust of O'Hara Sanitation Company, Inc. the distributees of the assets of the Liquidating Trust of the extent of any such distribution of BFI share or their equivalent of O'Hara Sanitation and to the extent of any BFI shares or their equivalent received by any entity of individual except Speece and Caramenico from the BFI transaction will indemnify, hold harmless and defend Mrs. Birster and her issue against any environmental or other liability which can be imposed on her by virtue of her having been a shareholder of O'Hara Sanitation or a beneficiary of the O'Hara Senior Trust. O'Hara Sanitation shall have the right to designate legal counsel to defend Mrs. Birster in any action brought against her or her issue.

10. The November 17, 1989 agreement between O'Hara Sanitation and BFI provides for an appraisal by arbitrators of a claim of O'Hara Sanitation against the City of Harrisburg arising out of a disposal agreement effective as of February 1, 1985, as amended. This claim was assigned to BFI as one of the assets purchased in November of 1989. However, the value of that claim, if any, is to be determined by arbitrators pursuant to paragraph 16.1 of the November 17, 1989 agreement.

If the arbitrators place an affirmative value on that claim, then BFI is to pay additional shares of BFI stock pursuant to a formula set forth in the November 17, 1989 agreement.

11. As part of this settlement, Mrs. Birster will receive 9.7% of any BFI stock received with respect to the first \$6,000,000 worth of value ascribed to the Harrisburg cause of action, and 4.85% of any BFI stock received with respect to value ascribed to the Harrisburg cause of action in excess of \$6,000,000. In determining the amount to be received by Mrs. Birster, O'Hara Sanitation shall first deduct from the value of the shares received from BFI, all expenses incurred (and approved to be paid) by it since November 30, 1989, in either preserving the Harrisburg cause of action or in preparing and placing before the arbitrators O'Hara Sanitation's position regarding valuation of the Harrisburg cause of action and obtaining and enforcing a final award. These expenses will include the reasonable fees and expenses of attorneys, accountants and consultants. O'Hara Sanitation's liquidating trustee has advised Mrs. Birster's counsel, that Steven E. Speece, has been the attorney chiefly in charge of preparing for the arbitration and it is anticipated that he will continue to do so. Nicholas J. Caramenico, a Settling Defendant, has been a consultant who has worked with Mr. Speece in preparing for the arbitration, and he will continue to do so. Further, it is contemplated that William J. O'Hara, Jr., another Settling Defendant, will be utilized as a witness and/or consultant in connection with the arbitration. Mrs. Birster's counsel has been so advised and has no objection to the continuation of these three persons in the contemplated O'Hara Sanitation/BFI arbitration, or their receipt of reasonable fees and expenses.

*7 Mrs. Birster's share of any BFI stock received from the arbitration shall be paid to her promptly upon receipt. However, if BFI withholds delivery of the shares pursuant to the arbitration award because of a claim independent of the Harrisburg arbitration, or any acts of Mrs. Birster (e.g. breach of Warranty Claim) the O'Hara Sanitation or the Liquidating Trust will deliver other BFI shares to Mrs. Birster equal to her proportion of the shares to be delivered under the arbitration award, without deducting any expensed relating to the unrelated offsets.

12. Although this Court will be requested to retain jurisdiction over this matter to enforce the settlement undertakings, the Complaint and the Counterclaims are

to be dismissed with prejudice. This means that not only will all of the claims which the parties to this settlement made be foreclosed, but all claims which the parties to this settlement could have made against one another will also be foreclosed.

13. This is significant because Mrs. Birster's claims, while based on her connection with O'Hara Sanitation, reached for numerous other companies and transactions. Subpoenas were served on a number of banks relating to the named defendants and also to sixteen other companies. Even though no documents were received, deposition notices required deponents to bring documents relating to nineteen companies. Even though no Accountant was appointed, plaintiff's motion to permit her accountant to review O'Hara Sanitation's books and records attached an exhibit listing eighteen companies. It described five corporations or partnerships as "related entities" and said that there were at least sixteen other companies sold to BFI which could be relevant to Mrs. Birster's claims. It raised questions as to loans to the Settling Defendants and whether the purchase of the related entities were separate from O'Hara Sanitation.

14. All of these claims which were or could have been made in the Complaint or the Counterclaim are included in this Settlement and are being dismissed with prejudice. Furthermore, all of these claims or possible claims are to be included in and released by mutual releases between parties. In addition, the Birsters will execute a release document regarding the aforesaid claims and releasing related parties including Touche Deloitte and Maille Falconiero. In addition, the Birsters agree to execute a Griffith type release for other third-party claims not listed in this release. In short, with respect to any claims by Mrs. and Mr. Birster against any O'Hara companies or any companies in which the defendants have or had an interest or as to investments by the Settling Defendants or their salaries or activities, this settlement covers them all.

15. In addition, the Settling Defendants will dismiss their Counterclaims against Mrs. and Mrs. Birster with prejudice.

16. This settlement is also subject to the fulfillment of several conditions which are these:

First—Mrs. Birster and her issue will relinquish all right, title and interest which they now or hereafter may have

in the income, including accrued income, and principal of the O'Hara Senior Trust and Barbara Birster Trust. These relinquishments must be approved by the Orphans' Court of Montgomery County, with minors represented by a *guardian ad litem*. Disposition of the relinquished interests in both trusts shall be determined by Settling Defendants' counsel, subject to approval by the Orphans' Court of Montgomery County.

***8** *Third*—The final characterization of this settlement must be structured and phrased in such a way that BFI agrees that it will not cause O'Hara Sanitation to be subject to a claim for indemnification or damages as described in the BFI–O'Hara Sanitation agreement for adversely affecting the pooling of interest principles adopted by BFI.

Although the foregoing conditions must be fulfilled before the settlement can be consummated, nevertheless plaintiff's counsel has requested that we move to consummate this settlement quickly and Settling Defendants have agreed to do that. For example, we have contacted Judge Stefan of the Montgomery County Orphans' Court and he has agreed to treat any petition or other proceeding with respect to the O'Hara Senior and/or Barbara Birster Trusts with dispatch.

17. Plaintiff's counsel has not only received various documents from opposing counsel in this action, but has also subpoenaed and reviewed certain records and work papers of Deloitte–Touche regarding O'Hara Sanitation and related entities.

18. With this background except for the facts set forth in paragraph 5 above, the Settling Defendants are making no representations or warranties with respect to the underlying facts in this matter, or with respect to the financial or tax implications of these transactions. In addition to her counsel, Mrs. Birster also has other advisers and is relying upon their advice in appraising the economic and tax consequences of the settlement which has been reached, and its ultimate effect and results for Mrs. Birster.

19. No portion of the settlement will be paid by Mrs. Betty E. O'Hara, the Estate of William J. O'Hara, Sr., or Nicholas J. Caramenico.

20. It is dependant Steven E. Speece position that he denies any liability to plaintiff. He claims he is making no payments hereunder and is not to be deemed a "Settling Defendant" hereunder for any purpose other than paragraph 21. He has no ther obligation under this agreement. He agrees to execute a Release to Mrs. and Mr. Birster of his Counterclaim and dismiss the Counterclaim with prejudice. Mrs. and Mr. Birster will execute a Release of all claims against Mr. Speece and, as to him, dismiss the Complaint with prejudice.

21. This settlement agreement and its implementation are to be kept strictly confidential and are not to be disclosed to anyone not a party to this agreement or not counsel for such a party, except for disclosure to Mrs. Birster's trustees, lenders or proposed advisors to BFI, to the Settling Defendants, to Mrs. Birster's sister, or except with respect to tax, financial or administrative purposes, or with the approval of the other parties to the settlement. The parties will request that the Court maintain the transcript of these statements and of the Stipulations to be filed with the Court under seal.

22. The Court will be requested to dismiss Mrs. Birster's Complaint and the Settling Defendants' Counterclaims with prejudice and to embody the settlement arrangements, when reduced to formal documents, in an order which will have the effect of a mandatory Order. The Court will be requested to retain jurisdiction over the transaction to enforce the settlement arrangements.

***9** 23. Counsel for the parties shall cooperate with one another in supplying tax information, however, the foregoing shall not be deemed to imply that any party shall be required to warrant or adopt a tax position taken by any other party.

The Settling Defendants appreciate the assistance of this Court and of Judge Stefan in working out the settlement arrangements discribed above.

APPENDIX B

BARBARA O'HARA BIRSTER, Plaintiff,

vs.

O'HARA SANITATION
COMPANY, INC., et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

of settlement hearing held in the above-entitled action on Friday, August 3, 1990 before the Honorable Charles R. Weiner, Senior District Judge.

APPEARANCES:
For the Plaintiff:

Spector, Cohen, Gadon & Rosen

1700 Market Street

Philadelphia, Pa. 19103

By: Paul R. Rosen, Esq.

For the Defendants except B.F.I.:

Stradley, Ronon, Stevens & Young

2600 One Commerce Square

Philadelphia, Pa. 19103-7098

By: S. Gordon Elkins, Esq.

William S. Sasso, Esq.

James A. Young, Esq.

Florence Jones

Official Reporter

(The following proceedings were held commencing at 3:35 p.m.)

THE COURT: Come on up, please. Good afternoon.

MR. ROSEN: Your Honor, this is Barbara Birster and Tom Birster, her husband.

THE COURT: Right. Come on up.

MR. ROSEN: Come on up?

THE COURT: Is that a problem for you?

THE PLAINTIFF MRS. BIRSTER: No.

THE COURT: Come on up all of you. You can stand next to each other even if it's painful.

MR. SASSO: Oh, no, not for me.

MR. ROSEN: Not any more.

(All parties approached the bench.)

THE COURT: I'll hear anybody who wants to be heard.

MR. ROSEN: Your Honor, my name is Paul Rosen. I represent the plaintiff, Barbara O'Hara Birster, and the counterclaim defendant her husband, Thomas Birster. We're here today to describe a settlement of the action brought by Barbara O'Hara Birster against O'Hara Sanitation, Inc. in this description who will be referred to as O'Hara Sanitation, the estate of William J. O'Hara, Sr., Betty O'Hara, William J. O'Hara, Jr., individually and to the extent necessary to comply with this settlement in his capacity as liquidating trustee for the O'Hara Sanitation Company, Inc. liquidated trust, Patrick O'Hara, Thomas O'Hara, Nicholas J. Caramenico and Steven E. Speece, S-p-e-e-c-e, all of which parties I just mentioned are referred to in the description of this settlement as the settling defendants. This settlement does not include Browning-Ferris Industries who will be referred to hereinafter as BFI.

THE COURT: Have they read this?

MR. ROSEN: My clients have been explained in detail the contents of this.

THE COURT: Have you read the document?

MR. ROSEN: They have not read this sheet of paper, Your Honor. I've explained it to them and now I'm going to read it in front of them but they—

THE COURT: How many pages is that?

MR. ROSEN: 12, Your Honor.

THE COURT: You don't have to do all that. Why don't we take a minute and why don't they read it.

*10 MR. ROSEN: There's a lot of handwritten notes.

THE COURT: Read it to them. I want them to sign it and I want them to come up here and understand that this is their day in court; that once they sign it, they can't come back again unless it's fraud, accident or mistake.

Do you understand that?

THE PLAINTIFF MRS. BIRSTER: Yes.

THE COURT: Have you gone over it with this lawyer?

THE PLAINTIFF MRS. BIRSTER: Yes.

THE COURT: You realize this is your day in court and once you sign this agreement after you have—you go over it with him including the handwritten notes and the rest of it, we'll make it a part of the record and attach it to it and it will be witnessed by everybody here and that will be the end of it? Do you understand that?

THE PLAINTIFF MRS. BIRSTER: Yes.

THE COUNTERCLAIM DEFENDANT MR. BIRSTER: Yes.

THE COURT: Are you satisfied to do that?

THE COUNTERCLAIM DEFENDANT MR. BIRSTER: The only thing I'm not sure about is the liabilities you explained to us about our children.

MR. ROSEN: There are a couple points in here that will require you to retain jurisdiction to enforce the terms of the settlement.

THE COURT: We'll do that.

MR. ROSEN: There are a number of areas because of the lateness of the day in which we wrote the matters. What I prefer to do after the clients have read it and even before

they read it is to read it into the record and leave my copy with the Court and all the counsel in this room including my clients to assent to the terms of the settlement.

THE COURT: I want everybody to sign it or initial it and make it part of the record unless there's some reason for it not to be on the record.

MR. SASSO: Our clients aren't here, Your Honor.

THE COURT: You're here on their behalf.

MR. ELKINS: Yes.

THE COURT: Are you not authorized to sign for them or speak for them?

MR. SASSO: We're authorized.

THE COURT: You can certainly do that. All right? Okay. You don't need me here to do that. I'll agree that you can read and the people next to you can understand and you can understand.

MR. ROSEN: I understand, Your Honor.

THE COURT: The only question he has as to his children I think if you sat with him that—

MR. ROSEN: There are issues with respect to environmental exposures which are indemnified and held harmless to the Birsters and will be provided—The indemnity will be provided to the defendant as provided in here.

THE COURT: Take a minute and sit down here and go over it with them and I want them to initial each page, have the lawyers initial it and make it part of the record.

MR. ROSEN: Then can I read it into the record that it's clear what I have initialed?

THE COURT: Yes. I want you to sit down with them and initial each page as they go through it.

MR. ELKINS: May we go off the record?

THE COURT: Yes.

(There was an off the record discussion after which a recess was taken at 3:40 p.m. The following proceedings were held commencing at 4:05 p.m. without the Court.)

***11 MR. ROSEN:** This will come after the defendants have indicated to the Judge that they have their clients' consent to enter into the settlement as we've set it on the record.

Paragraph 2 of the understanding is that the settlement agreement contains an agreement that it will be kept confidential subject to certain specified exceptions. Therefore, while the parties deem it desirable to make a general statement of the settlement arrangement on the record at this time, they request that this statement, when transcribed, be placed under seal.

Paragraph 3. In her Complaint, Mrs. Birster contended that transfer of her O'Hara Sanitation stock to O'Hara Sanitation in June of 1988 pursuant to a Redemption Agreement was invalid and sought rescission of that transfer and the restoration of her shares in that company so that she could share in the sale of assets of O'Hara Sanitation and the sale of assets or stock of other companies to BFI in November 1989. Mrs. Birster also raised issues regarding the operation of O'Hara Sanitation alleged diversion of funds and corporate opportunities to other excessive compensation, failure to declare dividends, breach of fiduciary duty, alleged concealment of intention to sell, intentional infliction of emotional distress, and payments to her as compared to payments and fringe benefits to other stockholders of O'Hara Sanitation who were employees of O'Hara Sanitation.

Paragraph 4. Mrs. Birster's claims included Securities Act and common law claims.

Paragraph 5. The sales to BFI pursuant to agreement dated November 17th, 1989 were essentially for BFI stock which are subject to certain reductions or return of stock to pay for fulfillment of environmental and other obligations. The O'Hara shareholders received 861,542 shares of BFI stock, as it is set forth in the letter to Judge Louis D. Stefan from James R. Beam, Esquire dated June 15th, 1990.

I will give to the court reporter a copy of that letter that I showed my clients as part of this. I'm handing it to the

court reporter now this letter of June 15th, 1990 as part of this transcript.

The sale of O'Hara Sanitation assets, while subject to reductions as stated, was also subject to increases. For example, BFI has made certain substantial claims against the BFI purchase price approximating \$2,500,000, which O'Hara Sanitation intends to contest. Plaintiff acknowledges that claim.

Paragraph 6. The Settling Defendants answered, denying Mrs. Birster's claims and pleaded Counterclaims against Mrs. and Mr. Birster alleging civil conspiracy, abuse of process, defamation and interference with present and prospective contractual relations. Nothing in this settlement can or should be construed as an admission of any parties' claims.

Paragraph 7. After June of 1988, the late William J. O'Hara, Sr. and Mrs. Betty E. O'Hara, Mrs. Birster's mother, transferred certain real estate into a trust created by Mr. O'Hara of which Mrs. Betty E. O'Hara was trustee, referred herein as the O'Hara Senior Trust. Mrs. Birster and her issue were the named beneficiaries of one-half of that trust's assets. This trust will be affected by the settlement.

***12** Paragraph 8. Since June of 1988, approximately \$225,000 was paid to Mrs. Birster with funds from O'Hara Sanitation through a trust for herself and her issue, referred to herein as the Barbara Birster Trust.

Paragraph 9, Subparagraph (a). This settlement involves the payment to Mrs. Birster of \$2,357,000, which includes the following:

Subparagraph (1) \$225,000 already received by Mrs. Birster since June of 1988; and

Subparagraph (2) an additional payment of \$2,150,000 payable in 56,210 shares of BFI stock valued at \$38.25 per share (which all of the parties hereto agree is the approximate average price of the shares received at the closing of the BFI sale). The number of shares of BFI stock has been calculated by plaintiff's attorney for purposes of this settlement and approximates the gross number of shares of BFI stock which Mrs. Birster might have received as if a shareholder of O'Hara Sanitation on November 30, 1989.

Subparagraph (b). The BFI stock paid to Mrs. Birster is to be registered stock which is freely transferrable. One-half of the shares or, if sold, their proceeds, remaining with Mrs. Birster, after she has paid her counsel's fees and costs, will be retained by Mrs. Birster to do with as she pleases. Mrs. Birster has explained to me that she intends to share these shares and the proceeds from the shares with her husband Tom Birster, in any way that they want regardless of whether or not they even go to a racetrack as I explained it to them and gamble it away if that's what they feel like doing, the both of them.

Subparagraph (c). With respect to the other one-half of the shares, Mrs. Birster will create a new trust of which she will be the settlor and income beneficiary, with power to invade and consume principal for her or her children's health, maintenance, support, or benefit. Mrs. Birster's issue will be the only other beneficiaries of this trust and they will be income and then remainder beneficiaries. A reputable corporate trustee shall be selected by Barbara Birster to be named as trustee.

Subparagraph (d). The interests of Mrs. Birster and her issue in one-half of the assets of the O'Hara Senior Trust will be relinquished. Mrs. Birster's sister, Elizabeth, and her issue are the beneficiaries of the other half interest in the O'Hara Senior Trust, and it has not been decided at this time whether that trust will be terminated.

Subparagraph (e). O'Hara Sanitation Company, Inc.—

MR. SASSO: Let me just interrupt and go off the record a minute.

(There was an off the record discussion.)

MR. ROSEN: Subparagraph (e). O'Hara Sanitation Company, Inc. and the Liquidating Trust of O'Hara Sanitation Company, Inc., the distributees of the assets of the Liquidating Trust, to the extent of any such distribution of O'Hara Sanitation and to the extent of any BFI shares—

I have to read that over again.

Subparagraph (e). O'Hara Sanitation Company, Inc. and the Liquidating Trust of O'Hara Sanitation Company, Inc., the distributees of the assets of the Liquidating

Trust to the extent of any such distribution of BFI shares or their equivalent of O'Hara Sanitation and to the extent of any BFI shares or their equivalent received by any entity or individual except Messrs. Speece and Caramenico from the BFI transaction will indemnify, hold harmless and defend Mrs. Birster and her issue against any environmental or other liability which can be imposed on her by virtue of her having been a shareholder of O'Hara Sanitation or a beneficiary of the O'Hara Senior Trust. O'Hara Sanitation shall have the right to designate legal counsel to defend Mrs. Birster in any action brought against her or her issue.

*13 Paragraph 10. The November 17th, 1989 agreement between O'Hara Sanitation and BFI provides for an appraisal by arbitrators of a claim of O'Hara Sanitation against the City of Harrisburg arising out of a disposal agreement effective as of February 1st, 1985, as amended. This claim was assigned to BFI as one of the assets purchased in November of 1989. However, the value of that claim, if any, is to be determined by arbiters pursuant to paragraph 16.1 of the November 17th, 1989 agreement. If the arbiters place an affirmative value on that claim, then BFI is to pay additional shares of BFI stock pursuant to a formula set forth in the November 17th, 1989 agreement.

Paragraph 11. As part of this settlement, Mrs. Birster will receive 9.7% of any BFI stock received with respect to the first \$6,000,000 worth of value ascribed to the Harrisburg cause of action, and 4.85% of any BFI stock received with respect to value ascribed to the Harrisburg cause of action in excess of \$6,000,000. In determining the amount to be received by Mrs. Birster, O'Hara Sanitation shall first deduct from the values received from BFI all expenses incurred and approved to be paid by it since November 30th, 1989, in either preserving the Harrisburg cause of action or in preparing and placing before the arbitrators O'Hara Sanitation's position regarding valuation of the Harrisburg cause of action and obtaining and enforcing a final award. These expenses will include the reasonable fees and expenses of attorneys, accountants and consultants. O'Hara Sanitation's liquidating trustee has advised Mrs. Birster's counsel, through—has advised Mrs. Birster's counsel that Steven E. Speece, has been the attorney chiefly in charge of preparing for the arbitration and it is anticipated that he will continue to do so. Nicholas J. Caramenico, a Settling Defendant, has been a consultant who has worked with Mr. Speece in preparing

for the arbitration, and he will continue to do so. Further, it is contemplated that William J. O'Hara, Jr., another Settling Defendant, will be utilized as a witness and/or consultant in connection with the arbitration.

I've been so advised and I have no objection to the continuation of these persons in the contemplated O'Hara Sanitation/BFI arbitration, or their receipt of reasonable fees and expenses.

MR. YOUNG: And your clients have no objection, fair

MR. ROSEN: My clients have explained to me that the approve the terms of Paragraph 11 as I have just read it.

Mrs. Birster's share of any BFI stock received from the arbitration shall be paid to her promptly upon receipt. However, if BFI withholds delivery of the shares pursuant to the arbitration award because of a claim independent of the Harrisburg arbitration or any acts of Mrs. Birster (e.g. breach of warranty claim)—

After "breach of warranty claim", an independent claim is also described as the claim that is found in Paragraph 5, the \$2,500,000 which is referred to in Paragraph 5. That is considered an independent claim which would not prevent the delivery of the shares to Mrs. Birster even if they were withheld by BFI.

***14** It is understood that O'Hara Sanitation or the liquidating trust will deliver other BFI shares to Mrs. Birster equal to her proportion of the shares to be delivered under the arbitration award, without deducting any expenses relating to the unrelated offsets.

For the purposes of clarity, the unrelated offsets I just mentioned is \$2,500,000 in Paragraph 5 and/or the breach of a warranty claim as described above.

Paragraph 12. Although this Court will be requested to retain jurisdiction over this matter to enforce the settlement undertakings, the Complaint and the Counterclaims are to be dismissed with prejudice. This means that not only will all of the claims which the parties to this settlement made be foreclosed, but all claims which the parties to this settlement could have made against one another will also be foreclosed.

Paragraph 13. This is significant because Mrs. Birster's claims, while based on her connection with O'Hara Sanitation, reached for numerous other companies and transactions. Subpoenas were served on a number of banks relating to the named defendants and also to sixteen other companies. Even though no documents were received, the deposition notices required deponents to bring documents relating to nineteen companies and even though no accountant was appointed, plaintiff's motion to permit Mrs. Birster's accountant to review O'Hara Sanitation's books and records attached an exhibit listing eighteen companies. This exhibit described five corporations or partnerships as related entities and said there were at least sixteen other companies sold to BFI which could be relevant to Mrs. Birster's claims.

It is important to note that we settled this case before the appointment of the accountant or the review of those documents.

In addition, Mrs. Birster raised questions through her attorney as to loans to the Settling Defendants and whether the purchase of the related entities were separate from O'Hara Sanitation.

Paragraph 14.—

MR. ELKINS: Mr. Rosen, you said the exhibit described listed and you said there would be sixteen other companies. I believe that was the petition itself.

MR. ROSEN: The petition itself.

MR. ELKINS: And the petition also referred to documents which you received.

MR. ROSEN: That is correct. We have received documents from Deloitte-Touche with respect to O'Hara and certain of its related companies but the appointment described in their petition did not take place.

MR. ELKINS: That is correct.

MR. ROSEN: Paragraph 14. All of the claims which were or could have been made in the Complaint or the Counterclaim are included in this settlement and are being dismissed with prejudice. Furthermore, all of these claims or possible claims are to be included in and released by mutual releases between the parties. In

addition, the Birsters will execute a release document regarding the claims I just described and releasing related parties including Touche Deloitte and Maille Falconiero. In addition, the Birsters agree to execute a Griffith type release for other third-party claims not listed in this release. In short, with respect to any claims by Mr. and Mrs. Birster against any O'Hara companies or companies in which the defendants have or had an interest or as to investments by the Settling Defendants or their salaries or activities this settlement covers them all.

***15** Let me just explain. The Birsters—that this is their day in court with respect to anything they could have found out about O'Hara, its related companies, its affiliates and that their release means when they settle this case, they are releasing those persons that contracted with O'Hara and are involved in the BFI transactions or anything raised in our complaint that we referred to in the Complaint whether or not we named them as a defendant. If the defendants worked with them in connection with the matter in our Complaint and helped them complete the transactions referred to in our Complaint, they are entitled to be released and that you are going to give me a list of names which in addition to Maille Falconiero and Touche Deloitte were covered in our subpoenas and in other matters referred to and that they are considered released within the confines of this and the payments they're getting are for those in fact parties of the transactions—in the transaction as related to the Complaint.

I've explained that to them and they understand that.

MR. SASSO: No, it's not just limited to parties referred to in the Complaint.

MR. ROSEN: Arising out of the transactions referred to in the Complaint.

MR. SASSO: It also relates to any investments made by the parties, anything that they've been—

MR. ELKINS: The things you described for the investments: the loans, the excessive compensation, all of those things and that's one of the things I wanted to say, Mr. Rosen. It isn't clear to me from what you just said that the release in addition to being a general release will specifically describe the fact that the Birsters are releasing all of the various claims that I was just referring to which are referred to in the Complaint and related entities which

you referred to in the various motions and requests. I thought that was clear.

MR. ROSEN: I thought that's what I said.

MR. SASSO: You kept referring to the Complaint. For example, Uncle Bill's may not be referred to in the Complaint directly or indirectly but that's one of the entities that we include in this widespread release.

MR. ROSEN: Let me explain so it's clear. We have made it clear that they siphoned monies out of corporate entities and funneled it into Uncle Bill's whether by improper benefits. Salaries, excessive compensation was given to O'Hara's diversion of corporate opportunity. We have made those allegations and said they used that money to buy Uncle Bill's, to buy Constitution Bank stock, to buy matters like that and that we raised it in the Complaint saying that we're entitled to get that back. We understand that we are releasing that claim and the right to get that back or the entity that got it.

MR. SASSO: Amen.

MR. ELKINS: Exactly.

MR. ROSEN: Is that how I explained it to you?

THE PLAINTIFF MRS. BIRSTER: Yes.

MR. YOUNG: Just to make it clear, there's going to be a release document which describes all this in writing to be signed which will be very specific.

***16** MR. ROSEN: It cannot go any further than what I just said the release document—

MR. ELKINS: I think it goes that far.

MR. ROSEN: Paragraph 15. In addition, the settling defendants will dismiss their Counterclaims against Mr. and Mrs. Birster with prejudice.

Paragraph 16. The settlement is also subject to the fulfillment of several conditions which are these:

First, Mrs. Birster and her issue will relinquish all of their right, title and interest which they now or hereafter may have in the income, including accrued income, and

principal of the O'Hara Senior Trust and Barbara Birster Trust. These relinquishments must be approved by the Orphans' Court of Montgomery County, with minors represented by a guardian ad litem. Disposition of the relinquished interests in both trusts will be determined by Settling Defendants' counsel, subject to approval by the Orphans' Court of Montgomery County.

MR. ELKINS: You have this agreement—

(There was an off the record discussion.)

MR. ROSEN: I have explained to my clients that the concept of this transaction is to move quickly; that the price of stock is set at 38.25 a share and they are very nervous that you're going to delay this and their settlement is going to be in jeopardy. I told them I have your assurance to move quickly.

MR. SASSO: Absolutely.

MR. ROSEN: I have asked you for two weeks. While you won't commit to two weeks, you told me you'll move as quickly as possible but we are shooting for a wrap within a two-week period of time. There is a commitment to move as quickly as possible to resolve all the outstanding issues and get the shares to these people.

MR. ELKINS: We will do that but I also want your clients to understand that we've talked to Judge Stefan and that's not within our control. When we talked to BFI, we may very well, for example, as you talked about it do have to do things such as talk to the Judge about it. It's not within our control.

MR. ROSEN: With respect to getting the transaction approved for the pooling effort, that is in BFI and the accountant's control, I have brought this to the attention of the Court that BFI is not a party to this but they're in control of resolving a certain issue and he's indicated in no uncertain terms this to me that he will stay on top of it to see that this issue is resolved.

MR. SASSO: Okay.

Second. The final characterization of this agreement must be structured—

Second. The final characterization of this settlement must be structured and phrased in such a way that BFI agrees that it will not cause O'Hara Sanitation to be subject to a claim for indemnification or damages as described in the BFI–O'Hara Sanitation agreement for adversely affecting the pooling of interest principles adopted by BFI.

So it's clear on the record, as I explained to my clients, this is a tax ramification issue in which—an accounting ramification issue in which if the—when BFI acquired the assets of O'Hara is placed in jeopardy, there's a warranty in the agreement that would come into play which could be severe damages to O'Hara and, therefore, affect them as their interest in O'Hara and they understand that the accountants have to pass on the adequacy of that tax issue in order for that ramification not to happen.

*17 Do you understand this now, Mr. and Mrs. Birster?

THE COUNTERCLAIM DEFENDANT MR. BIRSTER: I understand it as best I can.

MR. ROSEN: Those are the two conditions. Now although the foregoing conditions must be fulfilled before the settlement can be consummated, nevertheless, plaintiff's counsel has requested that we move to consummate this settlement quickly and the Settling Defendants have agreed to do that. For example, the Settling Defendants have contacted Judge Stefan of the Montgomery County Orphan's Court and he has agreed to treat any petition or other proceeding with respect to the O'Hara Senior and/or Barbara Birster Trusts with dispatch.

Paragraph 7. Plaintiff's counsel has not only received various documents from opposing counsel in this action, but has also subpoenaed and reviewed certain records and work papers of Deloitte–Touche regarding O'Hara Sanitation and related entities.

Paragraph 18. With this background, except for the facts set forth in Paragraph 5 above, the Settling Defendants are making no representations or warranties with respect to the underlying facts in this matter, or with respect to the financial or tax implications of these transactions. It is our understanding that in addition to her counsel, Mrs. Birster has also—

Let me start that over.

In addition, Mrs. Birster also has other advisers and is relying upon their advice in appraising the economic and tax consequences of the settlement which has been reached, and its ultimate effect and results for Mrs. Birster.

Paragraph 19. No portion of the settlement will be paid by Mrs. Betty E. O'Hara, the Estate of William J. O'Hara, Sr., or Nicholas J. Caramenico.

I have explained to the Birsters that's what you have told me but I have not seen any documentation but I accept your representation.

Paragraph 20.

(There was an off the record discussion.)

MR. SASSO: Steven E. Speece denies any liability to plaintiff. He is making no payments hereunder and is not to be deemed a Settling Defendant hereunder for any purpose other than Paragraph 21. He has no other obligation under this agreement. He agrees to execute a release to Mrs. and Mr. Birster of his counterclaim and dismiss the counterclaim with prejudice. Mrs. and Mr. Birster will execute a release of all claims against Mr. Speece and as to him dismiss the Complaint with prejudice.

MR. YOUNG: On the record for Paragraph 21.

MR. ROSEN: All right. This settlement agreement and its implementation are to be kept strictly confidential and are not to be disclosed to anyone not a party to this agreement or not counsel for such a party, except for disclosure to Mrs. Birster's trustees, lenders or proposed advisers, to BFI, to the Settling Defendants, to Mrs. Birster's sister, or except with respect to tax, financial or administrative purposes, or with the approval of the other parties to the settlement. The parties will request that the Court maintain the transcript of these statements and of the Stipulations to be filed with the Court under seal.

***18** Paragraph 22. The Court will be requested to dismiss Mrs. Birster's Complaint and the Settling Defendants' Counterclaims with prejudice and to embody the settlement arrangements when reduced to formal documents, in an Order which will have the effect of a mandatory Order. The Court will be requested to

retain jurisdiction over the transaction and to enforce the settlement agreements.

So that Mr. and Mrs. Birster knows, the Judge when he was in here before indicated his willingness and consent to retain jurisdiction and to see to it that you got the shares you've been promised and the considerations you've been promised, also to see to it that you executed the releases you promised and the dismissals you promised.

Next paragraph, Paragraph 23. Counsel for the parties shall cooperate with one another in supplying tax information, however, the foregoing shall not be deemed to imply that any party shall be required to warrant or adopt a tax position take by any other party.

(There was an off the record discussion.)

The Settling Defendants appreciate the assistance of this Court and of Judge Stefan in working out the settlement arrangements described above and the plaintiff also appreciates the assistance of Judge Weiner and Judge Stefan in aiding the working out of this settlement. My clients have read the entire settlement agreement that I just read into the record and have initialed each page pursuant to the Court's request and I ask that they assent on the record right now their agreement with respect to the paragraphs that embody obligations affecting them.

Barbara?

THE PLAINTIFF MRS. BIRSTER: Yes.

MR. ROSEN: Thomas?

THE COUNTERCLAIM DEFENDANT MR. BIRSTER: Yes.

MR. ROSEN: With respect to the parts involving my clients, I stand on the settlement agreement as an agreement of our understanding.

Counsel for the defendants I understand will now set forth that they have a consent of their clients and—

MR. SASSO: William R. Sasso does hereby verify that we have the consent of our clients to enter into this settlement.

MR. ROSEN: And that their clients are the parties named as the Settling Defendants, is that correct?

29TH FLOOR

MR. SASSO: That is correct.

1700 MARKET STREET

MR. YOUNG: During the last few remarks by Mr. Sasso, he or one of us may have said that Mr. Speece is a Settling Defendant. The agreement has provisions in it which specifically says he shall not be deemed a Settling Defendant for some purposes. We stand on the agreement. Just so there's no confusion. The agreement I think is clear by that. We intend to abide by the agreement.

PHILADELPHIA, PENNSYLVANIA 19103

August 24, 1990

MR. ROSEN: The consent I want on the record is does your firm represent Steven Speece, yes or no?

William R. Sasso, Esquire

Stradley, Ronon, Stevens & Young

2600 One Commerce Square

MR. YOUNG: Yes.

Philadelphia, PA 19103-7098

MR. ROSEN: And you have his consent to approve the settlement as I've described and you read it?

Re: *Birster v. O'Hara & BFI*

MR. SASSO: As described and read.

Dear Bill:

MR. YOUNG: Done.

When we entered the settlement on the record on August 3, 1990, I advised you that my clients could only accept the settlement if it could be implemented within two weeks, perhaps a bit longer. (Enclosed is a copy of the portion of the transcript reflecting this issue). I requested that the Settlement Agreement be implemented expeditiously, that approvals be obtained and the pooling of interest issue be resolved quickly. I explained to you that I did not believe I could hold to the settlement if the stock price of BFI dropped below 38¾ in the event the settlement was not implemented and closed in a two week period of time.

MR. ROSEN: That's what I was trying to accomplish.

(The proceedings were thereupon concluded at 5 p.m.)

*19 To the best of my ability, I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter

/s/ Florence Jones

8/7/90

Court Reporter/Transcriber

Date

While procedures have moved before Judge Stefan on the approvals of the Orphan's Court, we have not received approval from BFI on the pooling, and we never even received a written release agreement from your client (which was to be sent to us by August 10, 1990.) It has been three weeks with no resolution. Accordingly, we can no longer agree to the settlement. The stock of BFI has dropped from 41 to 34¾. My clients are no longer receiving the benefits of this settlement, which was contemplated on the date we went before the Court. The conditions to be fulfilled by BFI have not been met and approved. The time in which to complete the settlement has expired, while the stock of BFI continues to go down. We, therefore, have no alternative but to terminate the settlement.

APPENDIX C

SPECTOR COHEN GADON & ROSEN

ATTORNEYS AT LAW—A
PROFESSIONAL CORPORATION

I am going on vacation tomorrow. Upon my return from vacation, I will request the Court to reinstate this case on the trial list and commence opening discovery.

Very truly yours,

/s/ PAUL R. ROSEN

PRR/iaw

Enc.

CC/Honorable Charles R. Weiner

Eric J. Lobenfeld, Esquire

APPENDIX D

Law Offices

Stradley, Ronon, Stevens & Young

2600 One Commerce Square

Philadelphia, Pennsylvania 19103-7098

August 28, 1990

Paul R. Rosen, Esquire

Spector Cohen Gadon & Rosen, P.C.

1700 Market Street

29th Floor

Philadelphia, PA 19103

Re: *Barbara O'Hara Birster v. O'Hara
Sanitation Company, Inc., et al.*

Dear Paul:

I do not agree with either the premises or conclusions stated in your letter of August 24, 1990. So the facts are straight, I remind you of the following:

1. The settlement contemplates the relinquishment by Barbara, her children, and other unborn issue of rights

in both the O'Hara trust and her own irrevocable trust. Accordingly, both sides agreed that a guardian and trustee ad litem was necessary to represent the interests of Barbara's children and any unborn issue. Immediately following the proceeding before Judge Weiner earlier this month, we contacted Judge Stefan, who appointed Robert L. Adshead, Esquire, in an expeditious fashion, to act as guardian and trustee ad litem.

*20 Promptly thereafter, Ken Levin of your office and Jim Beam met with Mr. Adshead in order to provide him with information concerning the case so that he might more readily review the entire transaction and write his report to the court. As you may or may not know, there was one provision in the new trust, which your firm drafted, which delayed Mr. Adshead's final conclusion. That provision dealt with a power of appointment and its effect on the gifts over to Mrs. Birster's children.

Mr. Adshead has completed his report and filed it with Judge Stefan, agreeing, on behalf of Barbara's children and unborn issue, to release and renounce their rights in the subject trusts, in light of the terms of the settlement contained in the transcript of proceedings before Judge Weiner. You should know that the guardian, with our urging, acted as quickly as anyone could expect in agreeing to meet with us, analyzing all of the factual ramifications of this matter, resolving the above problem created by the new trust, and preparing his report to the court in Montgomery County. We should all be grateful for the efforts of Mr. Adshead, since we had absolutely no control over his actions.

2. Immediately following the settlement, our office contacted counsel for Browning Ferris Industries (BFI) regarding the pooling of interest issue which, as you know, must be resolved. On a frequent basis, communications have continued in order to resolve that issue. You are aware, both from the discussions we had prior to the settlement proceedings before Judge Weiner, as well as the actual transcript of the proceedings, that this issue with BFI is another issue over which we have no control. We are, however, continuing to make every effort to resolve favorably this issue at the earliest opportunity.

It is our understanding that BFI internally has no problem with our transaction, but must obtain agreement from its accountants. As I advised you today, we are having a conference call with BFI tomorrow to press for

accountant approval as quickly as possible. I will call you immediately thereafter to advise you of where this stands. Also, I understand that counsel for BFI has been in touch with Rick Miller regarding drafting and execution of mutual releases, and I trust that Rick will follow up on this matter as quickly as possible.

3. If you read again page 19 of the transcript, which you forwarded with your letter, and also read pages 20 and 21 of the transcript which are enclosed herewith, you will see that while there was a commitment on the part of everyone to act promptly to consummate the settlement, it was made quite clear that those aspects of the settlement relating to Montgomery County and BFI were not and are not within our control, contrary to the thrust of your letter.

4. As of this writing, you have received from us a mutual release of claims, which needs only the signature of the clients. You have the report of the guardian and trustee ad litem, which recommends to Judge Stefan that the settlement be approved by the court in Montgomery County. On the other hand, we do not have from you a release and disclaimer of Mrs. Birster, relinquishing her rights to the Barbara Birster and William J. O'Hara trusts, which release and disclaimer must be signed before the settlement can be completed. Hopefully, Rick Miller can follow up on this while Ken Levin is on vacation.

*21 Paul, while we are all concerned with the price of BFI stock in the marketplace, it does not change the fact that we have a binding settlement agreement between our clients which we will move to enforce, if necessary. My review of the stock price indicates that it has rebounded nicely from the low point of last week. However, whether it goes up or down is of no relevance to the deal that we made. On our part, we are continuing to press forward as expeditiously as we can with BFI in order to resolve the pooling of interest issue. Judge Stefan, upon receipt of a disclaimer and release from

Mrs. Birster, and proper release language, is ready to prepare his adjudication and approve the settlement in Montgomery County. Therefore, as indicated above, I trust that you will work with us to complete the few remaining open items so that this matter can be completely closed as quickly as possible.

Very truly yours,

/s/ William R. Sasso

WRS: amg

Enclosure

cc: Honorable Charles R. Weiner

Honorable Louis D. Stefan

Eric J. Lobenfeld, Esquire

Richard E. Miller, Esquire

ORDER

AND NOW, this 21st day of DECEMBER, 1990, upon consideration of the motion to enforce a settlement filed on behalf of the defendants, O'Hara Sanitation Company, Inc., The Estate of William J. O'Hara, Sr., Betty O'Hara, William J. O'Hara, Jr., Patrick O'Hara, Nicholas J. Caramenico and Stephen Speece, it is

ORDERED

that the motion is **GRANTED** and the Settlement of August 3, 1990 shall be enforced according to its terms. Counsel shall submit an appropriate order.

All Citations

Not Reported in F.Supp., 1990 WL 223192

Footnotes

1 Appendix B p. 19.

2 "MR. ROSEN: Those are the two conditions. Now although the foregoing conditions must be fulfilled before the settlement can be consummated, nevertheless, plaintiff's counsel has requested that we move to consummate this settlement quickly and the settling defendants have agreed to do that." Appendix B p. 20-21.