

1 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
2 LOUISVILLE DIVISION

3
VENTAS, INC.,) Case No. 3:07CV-238-H
4)
Plaintiff,)
5)
VS.)
6)
HCP, INC.,)
7) September 3, 2009
Defendant.) Louisville, Kentucky
8

9 *****

10 VOLUME 12A
TRANSCRIPT OF JURY TRIAL
11 BEFORE HONORABLE JOHN G. HEYBURN II
UNITED STATES DISTRICT JUDGE

12 *****

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1 PROCEEDINGS

2 THE COURT: All right. We'll have the
3 instructions in just a minute. They're not -- the only
4 changes from what you have other than, you know, some
5 editing changes are some tweaking of the but to
6 explanation language, not the -- not the actual -- trying
7 to be a little bit more consistent in, you know, improper
8 interference is really the same thing as defined as
9 significantly wrongful conduct. We're just trying to be
10 more consistent throughout so the jury's not confused.
11 And then a little change under, it's on page 3. The
12 explanation of element number three, you'll see it starts
13 at the top of 3 and goes on to page 4. It's not a
14 substantive change, but it is a slight change emphasis, I
15 guess.

16 All right. So you've had -- I mean, I've
17 heard all of the arguments. This is not going to change
18 unless someone sees -- and, again, all of the objections
19 are preserved. Any objections to the extent you've
20 offered instructions contrary to this are preserved as
21 objections and, of course, obviously, objections can be
22 made if these instructions are wrong as a matter of law
23 in some way. But unless someone sees anything that's in
24 error that's been created since the last time you looked
25 at these or it's something that's very confusing perhaps

1 to the jury, that's what we'll go with. Thanks for all
2 your help.

3 MR. BRADFORD: Thank you, Your Honor.

4 MR. HANSEN: Thank you, Your Honor.

5 THE COURT: Some of those of us who deal with
6 Kentucky law -- those of you who don't deal with Kentucky
7 law might be surprised there's a dearth of opinions on
8 some of these which seem to be commonly occurring areas,
9 but those of us who deal with it all the time, deal with
10 it all the time. So, let's see, we've got about an
11 hour-and-a-half.

12 MR. BRADFORD: Might be a little bit less,
13 Your Honor.

14 THE COURT: All right. Fine. Fifteen-minute
15 rebuttal. You got, you know, hour-and-a-half if you want
16 it, and, I guess, what we'll do is take, again, a brief
17 break after your opening and then we'll finish up on with
18 your close and the rebuttal and then probably these
19 instructions won't take too long, so I'll go ahead and
20 read those. The jury will go back and then we will deal
21 with any exhibit problems before all that stuff goes
22 back. All right. Okay.

23 (Jury enters the courtroom.)

24 THE COURT: Good morning. All right. We have
25 now finished all of the testimony and evidence in the

1 case, and it's time to hear the closing arguments. And,
2 of course, the lawyers will argue. First, the Plaintiff
3 and then the Defendant. Probably for not more than an
4 hour-and-a-half each and then after those two, the
5 Plaintiff will have not more than 15 minutes as a
6 rebuttal argument and they'll make arguments to you about
7 what the evidence -- what they think the evidence means
8 in the case.

9 I've already decided on the instructions that
10 I'm going to give you as a matter of law. The lawyers
11 already have those instructions, so they may refer to
12 them during the course of the arguments. They may not.
13 But in any event, after they finish the arguments, I'll
14 read you the instructions. You won't have to memorize
15 them because I'm going to give you an actual copy that
16 you'll be able to look at. And then it will be your time
17 to deliberate the case.

18 I think it's been a very well-trying case on
19 both sides. You may have thought there were a lot of
20 difficulties, but in a case of this complexity, I think
21 it's gone very, very well. So now I would like you to
22 give your very closest attention to Mr. Bradford on
23 behalf of Ventas.

24 MR. BRADFORD: Thank you, Your Honor. Thank
25 you, ladies and gentlemen of the jury. First of all,

1 thank you very much for giving up, I know, what's been
2 the last three weeks of your life. I got called for jury
3 duty earlier this year, and I know it put your life on
4 hold, and I appreciate how you've sat here every day and
5 paid close attention to this case. And I know I say that
6 for both of the parties and everybody in this courtroom,
7 so thank you very much.

8 When I stood before you at opening statement I
9 said that the evidence would show to you that my client,
10 Ventas, had a reasonable expectation of an agreement at
11 \$15 a share to buy Sunrise REIT, and I think the evidence
12 has proved to you that they had that expectation. That
13 everybody was enthusiastic about a transaction that had a
14 record premium for a company that, even after they
15 announced the \$15, nobody ever paid that \$15 for the
16 stock. And every witness, I believe, testified that had
17 it not been for HCP's conduct, that agreement would have
18 been approved, Ventas would have acquired this company
19 for \$15, and we would not be here today.

20 I also said to you that we would prove that
21 HCP interfered with that expectation through
22 significantly wrongful conduct. And I believe that the
23 evidence that we've presented shows that HCP did
24 precisely that. Whatever the reasons for acting, what
25 they did was significantly wrongful. They acted through

1 wrongful means. It doesn't matter what their purpose
2 was, what their goal was, whether it was to buy the
3 assets, or whether it was to create a jump all and come
4 back and get them later. The question is how did they go
5 about doing what they did?

6 And what they did was to act through
7 significantly wrongful means. They acted with deceit.
8 They acted with fraudulent misrepresentations, and they
9 got the public markets involved. And that's where
10 particularly what they did was significantly wrongful.

11 This wasn't just lying to somebody in a
12 private negotiation. What they did is they went out and
13 used the public markets. Used investors and REITs, which
14 we know are investors who buy REITs because they deliver
15 steady income, high dividends. These are generally
16 retirement funds, people's pension funds. You know, you
17 hear it's Morgan Stanley or you hear it's ING, but it's
18 not their money. They're custodians. They're trustees.
19 They're fiduciaries for people's who retirement funds and
20 pension funds who are the real economic buyers of this
21 stock.

22 And what they did to suit their own business
23 purpose is to deliver a very clear message through that
24 press release and through their conduct. And we'll talk
25 about the press release in detail. But when you read it

1 as a whole, and you'll have a chance to do that, there
2 was one overriding message that came through from that
3 press release; and that is, we're ready to put \$18 in
4 your pocket here and now as good as Ventas's money in a
5 signed unconditional agreement. What screamed off the
6 page was \$18 money on the table, good now.

7 Not we've got -- or we can't sign this yet,
8 we've got to get a deal done with another major business
9 partner, and not, by the way, we're legally prohibited
10 from doing this. You heard that the Canadian courts have
11 already found that by even going public with a bid in
12 these circumstances, they breached the confidentiality
13 agreement by making a bid and that the REIT could not
14 accept this bid.

15 So what could they possibly accomplish by a
16 bid that could not be accepted? What could they
17 accomplish by going to the media and saying, we're ready
18 to put \$18 in everybody's pocket? And the answer is made
19 plain by what happened the next day. In 24 hours, 30
20 million shares of stock were bought and sold. And
21 Sunrise REIT's world was turned upside down.

22 Never before had anybody paid \$15. Now, it
23 closes above \$18 that day. There's a brand new
24 shareholder base, to use Mr. Flaherty's own testimony.
25 And that was obviously designed to disrupt and interfere

1 with the Ventas agreement. And, again, I say to you for
2 whatever purpose what they did was significantly wrongful
3 because they committed fraud on the public markets and
4 then in order to prevent the REIT from shutting them down
5 that night, they lied to the REIT about what it was they
6 were delivering. They lied to the REIT about saying,
7 we've signed the purchase agreement, and they were not up
8 front with the REIT. And this is deceit.

9 When you call somebody up on the phone and
10 say, I'm going to make your Valentine's Day and you don't
11 mention that this is a conditional SSL proposal when all
12 along you've been told that that kind of proposal is a
13 non-starter. They knew if they said up front it was an
14 SSL out proposal, it would never be accepted.

15 Now, before I go through the evidence, I want
16 to talk to you about a few of the witnesses that you've
17 heard in this case. You know, you've heard from Ventas,
18 you've heard from HCP. But I think this case is fairly
19 unusual because we have the benefit of several witnesses
20 who had no financial interest in the outcome of this
21 case. People, who I think, were individuals of
22 extraordinary integrity, who it was a pleasure to meet, a
23 privilege to meet, and people -- and I refer here
24 specifically to Mr. Warren -- of extraordinary business
25 experience and acumen.

1 And all of us sit here in a courtroom two
2 years after trying to reconstruct for ourselves what
3 really happened back in 2007. Well, Mr. Warren, among
4 others, lived through it. And what he said what that in
5 his 30 years of business experience, he never experienced
6 anything like this. It was an experience that stayed
7 with him and an experience that he felt compelled to come
8 before you. No reason he had to appear, but it was such
9 an extraordinary experience in his life that stayed with
10 him that he came to you and told you in his own words
11 what happened here.

12 And he was at the center of this storm. He
13 was a person who could see both sides. The conduct of
14 each of the parties. No reason to favor one party or
15 another. Trying to get the best for his own
16 shareholders. And he came before you and said in 30
17 years of a great variety of business experience,
18 including buying and selling many companies, he never saw
19 a company go out in the public arena in this kind of way
20 and take a private confidential process to the media and
21 public, and then did so in a misleading way.

22 The other witness who I thought was very
23 important was Mr. Phillips. Again, an independent
24 financial advisor. No interest in the outcome of this
25 case. No reason to come before you and make up any kinds

1 of stories or shade the evidence in any way. And what
2 did Mr. Phillips testify to? That HCP did not play by
3 the rules. That he found that night, and he put it in
4 his own words that night. This isn't him coming into the
5 Court afterward and saying, I thought the press release
6 was misleading. He wrote that night, and you'll see the
7 e-mails.

8 This press release is misleading. It's not
9 factually correct. It says it's identical to the Ventas
10 deal and the Ventas deal is an unconditional deal. He
11 said that Mr. Flaherty lied to him about the signature.
12 And we'll talk about that, because there's no way to
13 reconcile the two accounts of what occurred that night.
14 And one person came into this court and told you the
15 truth about what happened. And one person came into this
16 court and told you an account of that night that was not
17 correct. And, in fact, the lies continued throughout
18 this process to this very day.

19 If we could see what Mr. Feeney said. This is
20 another guy, doesn't even work for any of these companies
21 anymore. He's got no axe to grind, no reason to come in
22 here and tell you anything but the truth. And what he
23 told you, you'll recall, this referred to the period of
24 time when he was trying to get a deal done with SSL. He
25 said he's never seen anything like this in all his years

1 of business having a term sheet thrown at him at the
2 eleventh hour that was completely different than what
3 they were negotiating. Three independent, separate
4 witnesses who have testified that the conduct they
5 observed here was extraordinary and unique in each of
6 their business careers.

7 Now what was the significantly wrongful
8 conduct? First, as well see, HCP violated virtually
9 every rule of the game. They breached contract
10 obligation and promise after contract obligation and
11 promise. They issued a press release that they knew they
12 had to know was prohibited. They were signed to an 18
13 month confidentiality agreement, and Mr. Phillips
14 specifically asked him, please, don't issue the press
15 release. But they went right through that barricade.

16 And then -- and this is what was critical to
17 them because the only way to stop the Ventas agreement
18 from going forward was three days before the record date,
19 you got to get that stock price up well-above \$15 or
20 people are going to vote for \$15. And the way that that
21 was done before anybody was ready to sign an agreement,
22 before anybody was ready to put a real \$18 on the table
23 if they ever were ready to pay \$18 for these assets, they
24 went out and told the public, we got the identical deal
25 with Ventas, greater certainty of closing than Ventas,

1 this is a superior proposal to Ventas.

2 They knew, they signed a contract that
3 prohibited them from doing what they did. They knew it
4 couldn't be accepted. So the tortious interference case
5 really breaks down to several separate issues. The first
6 issue is simply what were Ventas's expectations? You'll
7 be asked to decide did Ventas have a reasonable
8 expectation? Was it going to get this \$15 deal approved
9 but for HCP's significantly wrongful conduct?

10 And second, what was the significantly
11 wrongful conduct? Is what HCP did here significantly
12 wrongful? And third, I want to talk about HCP's excuses
13 for what they did and why those excuses don't cut it and
14 why HCP should own up to and take responsibility for the
15 consequences of their own actions and their own
16 decisions.

17 So, first, if I might talk about the
18 expectations. Ventas had a signed written purchase
19 agreement with Sunrise REIT for \$15 a share and it earned
20 it fair and square by winning an auction process that
21 you've heard the Canadian courts reviewed and found to be
22 a fair auction process. I believe His Honor will
23 instruct you that the Canadian courts found this was a
24 fair auction, Ventas won it fair and square, it had a
25 signed written purchase agreement. It also worked hard

1 to get an agreement with SSL, the property manager who
2 takes care the residence. And Ventas went out of its way
3 to make that arrangement, that relationship, that deal
4 work. It made concessions that HCP never was willing to
5 make to get the deal with SSL that was important to help
6 make this transaction work.

7 So it had two signed agreements, an
8 expectation that the shareholders would approve, and in
9 fact, if we can look at the next slide, you heard the
10 reaction of Sunrise REIT. Remember, this was a \$10 to
11 \$11 stock. They were thrilled with this type of
12 record-breaking premium. The highest premium ever for a
13 Canadian Real Estate Investment Trust of this kind. They
14 said it was remarkable. Everybody predicted that the
15 shareholders would view it enthusiastically.

16 And, in fact, every shareholder was going to
17 profit from this transaction. And, again, significantly
18 even after Ventas told the market it would pay \$15,
19 nobody -- not Morgan Stanley, not ING, not anybody went
20 out and started paying \$15 for the stock. If they all
21 thought it was worth more, you'd think somebody would
22 have paid more than \$15 for it.

23 There is an adage that things are worth what
24 people will pay for them. At this point nobody would pay
25 \$15. That was the most anybody ever offered to pay. A

1 record premium. Every shareholder profited. You heard
2 that every analyst, the people who follow the industry in
3 the companies, predicted approval.

4 Their target price for this company was \$10 to
5 \$11 and significantly you did not see a single document
6 from HCP in the course of this case where anybody within
7 HCP expressed the opinion before February the 14th, hey,
8 maybe this will get voted down. There was no e-mail
9 where somebody saying hey maybe there's a possibility
10 this will get voted down.

11 There wasn't a single HCP witness who took the
12 witness stand and could say under oath we expected it
13 would get voted down. Obviously, if they expected it
14 would get voted down, they could sit on the sidelines and
15 let that happen. So there was no evidence, not a shred
16 of evidence.

17 And even yesterday you heard Professor Fischel
18 acknowledge that had it not been for HCP's conduct
19 starting on February 14, the market expected, everybody
20 expected this deal would be approved. So clearly, we had
21 a reasonable expectation of approval.

22 And that changed on February 14th, and it
23 changed because of a press release that was highly
24 misleading. It was deceitful. It contained fraudulent
25 misrepresentations. And it's significantly wrongful not

1 only because it's deceptive, but because it went out and
2 used the public market, other people's money, to try to
3 achieve their own business purposes and cause people to
4 pay \$18 knowing that, in fact, there wasn't going to be
5 \$18 put in anybody's pocket.

6 HCP never put that money on the table. They
7 were never legally able to pay that. The Canadian court
8 held that they could not make that bid. The Canadian
9 court held that Sunrise REIT could not accept that bid.
10 They're talking about money that can't be paid, and
11 apart from the fact that they're prohibited, they don't
12 have the SSL deal.

13 You heard consistently there's going to be no
14 deal. It's a non-starter without an SSL agreement. So
15 they go out to the public markets and what everybody
16 reads is \$18. And then when you start to read the press
17 release, the press release says, this transaction, other
18 than its price, is identical to the transaction entered
19 into by Ventas.

20 Well, we all know what the word identical
21 means. It doesn't even say it's similar to. Identical
22 means identical. That's a factual statement. And it's a
23 factual statement that was no doubt wrong and false,
24 because this transaction was not identical to the Ventas
25 transaction in the most significant ways.

1 Ventas had a signed agreement. Ventas had no
2 SSL out. Ventas had won its agreement through an auction
3 process fair and square. HCP was prohibited at this
4 point from making an agreement. It puts forward an
5 agreement that's not even signed and it has the fatal SSL
6 out in it. And similarly, as to the agreements with SSL,
7 Ventas has a signed agreement. It's given up the
8 development rights. It's given up the accounting periods
9 in order to make that happen.

10 And where is HCP? They're not even talking to
11 SSL at this juncture. They want to keep these
12 development rights. They don't have even a business
13 understanding on key terms they weren't willing to give
14 up, and yet they go out to the market and say, our
15 agreement is identical to Ventas, so take ours because
16 it's \$18 rather than \$15. But the problem is it's a sham
17 because they're not ready to put the \$18 on the table.

18 And that right there you can stop and decide
19 the case based on that statement to the public markets.
20 The fact that they told the public markets that this was
21 an identical offer when it was factually false and they
22 knew it was factually false. This is not an innocent
23 mistake. Mr. Flaherty acknowledged that he knew that the
24 agreement with Ventas did not have a condition in it. He
25 knew his did.

1 And so to go to the market and say, these two
2 agreements are identical, is a knowing, false
3 representation to the public markets. That is
4 significantly wrongful conduct. Whatever his agenda,
5 whatever his motives, you can't go about doing it through
6 a misleading press release with factually false
7 statements upon which people rely in spending their money
8 and buying stock that they're only going to lose money on
9 because nobody's going to deliver \$18.

10 Another factually false statement in this
11 press release: The press release and the letters say,
12 our proposal clearly meets the standards for a superior
13 proposal as set forth in the Ventas agreement. Well, you
14 heard Mr. Flaherty's testimony. He knew that as long as
15 there was a condition, an SSL out, it could not be a
16 superior proposal. So this is not a statement that says,
17 we expect some time in the future we'll be able to meet
18 the standards for a superior proposal. He's telling the
19 market on February 14th, we meet the standard of superior
20 proposal. There's nothing that stands in the way of
21 Sunrise REIT right here and now declaring this a superior
22 proposal and putting \$18 in your pocket.

23 And, in fact, that was simply false. It was
24 not a superior proposal, Sunrise REIT probably determined
25 it was not a superior proposal, and everybody knew it

1 couldn't be a superior proposal because it had an SSL
2 out. And Sunrise REIT was clear on January 14th, at all
3 times don't come to us with an agreement if it has an SSL
4 out. And, of course, why is that? Because if you've got
5 an SSL out, you can just walk away from your agreement if
6 you decide you're not going to get a deal done with some
7 other party. It's totally within the control of the
8 person making the offer, whether they do or don't work
9 out this other deal.

10 So you are taking an agreement that the other
11 side has a right to just walk out on any time they say,
12 hey, we just couldn't work it out with SSL, sorry.
13 Sorry. We really meant to pay \$18, but we're not legally
14 obligated because the condition never came to pass. And
15 then they don't put that condition anywhere up front or
16 in behind or in any kind of clear terms in the contract.
17 They lead everybody to believe there's no condition by
18 calling it identical to an unconditional offer and saying
19 it's a superior proposal, which can only be
20 unconditional.

21 To compound it, they say, this proposed
22 acquisition has a greater certainty. Not likelihood.
23 They're not using qualified terms here. Absolutist
24 terms. Greater certainty. Identical. There's no
25 certainty to this. Don't go tell the market you're

1 certain something is going to happen when you're legally
2 prohibited from doing it and it can't happen when you are
3 having an SSL out that you know is going to prevent this
4 from ever being consummated.

5 So when people read this press release, okay,
6 this is more certain this is going to happen quicker than
7 the Ventas \$15, it's safe to go out and pay \$18 for this
8 stock because HCP is ready and willing and legally able
9 to put that \$18 in my pocket, and nothing could have been
10 farther from the truth. This is deceit, it is fraudulent
11 misrepresentation, and it is significantly wrongful
12 conduct.

13 And finally, they tell the market, we are
14 confident that we can enter into arrangements with
15 Sunrise Senior Living. Well, you know that they had no
16 conversations with Sunrise Senior Living. The last time
17 they talked to Sunrise Senior Living before February
18 14th, was January 14th when they wrongfully accused SSL
19 and tried to blame them for sending them a curve ball.
20 And then they went dark, as they put it, for 30 days and
21 wouldn't talk to SSL about the Sunrise REIT deal.

22 And then that afternoon, they call Mr. Newell
23 as he's convalescing and Mr. Clausen on the train. And
24 you heard Mr. Newell's testimony. We didn't discuss a
25 management agreement. We had to substantive discussions.

1 I said to him I'd honor my CNL agreement. I told him I'd
2 stay neutral, I'd stay out of it, but there were no
3 promises made, no deals made on that telephone call. And
4 Mr. Newell was very clear about that in his testimony.

5 So they had no reason to say, we're confident
6 we can get a deal done with SSL, when nothing had changed
7 from January when they couldn't get a deal done with SSL
8 and when they hadn't changed their negotiating position
9 and when there were serious legal questions about could
10 they even talk to SSL because, as you will see, the
11 confidentiality agreement that HCP signed prohibited them
12 from talking to SSL. So this we are not confident or
13 we're confident, is just another misrepresentation to the
14 market to make it appear that they're ready to get a deal
15 done.

16 And you heard Mr. Flaherty admit, while he
17 tells the market we're confident we can get a deal, he
18 wasn't confident enough to just go in with an
19 unconditional deal, as Mr. Phillips had earlier suggest
20 and say, I'll take my chances and get my SSL deal done
21 later. He was not confident enough. His board wasn't
22 confident. And you heard from his board member about
23 that.

24 And then we hear this idea, and you'll
25 evaluate this for yourself. That by saying he's

1 confident he can get a deal with SSL, that everybody is
2 supposed to know that that means that this agreement is
3 no good; that it's -- unless he gets that deal. That
4 it's somehow conditioned on getting that deal. And you
5 heard Mr. Hartman on the subject, as somebody who's
6 practiced a long time, seen these kind of bid letters and
7 so forth. Does this suggest to you a condition? No.
8 Why not? Because when you want to say something is
9 conditional, you say it's conditional. That's the word
10 we all use. We know what the word conditional means. We
11 know what the word subject to means.

12 If somebody says, I'm going to buy your house,
13 but it's conditioned on my selling my house first, we
14 know that we don't have a deal unless they go and sell
15 their house first. But if they say to you, I'm going to
16 buy your house. I'm committed to do that. And by the
17 way, I'm confident I can sell my house, I don't think you
18 walk away from that conversation knowing that if they
19 can't sell their house, you no longer have a deal.
20 Telling somebody you are confident you can do something,
21 doesn't mean you can walk away from your bargain. You
22 have to say it's conditioned on my doing this, on my
23 giving this deal done. And no where did they use the
24 language that all of us know.

25 I mean, this is just common sense. And this

1 press release wasn't just intended for the people on Wall
2 Street. It went out to all the investors, to all the
3 public. So read this as you would read any press release
4 in your daily life, and see if you take away from this
5 that there was any disclosure that HCP was legally
6 prohibited from doing what it was doing; that HCP did
7 not -- was not able to come forward with an unconditional
8 deal; that this could not be a superior proposal. You'll
9 decide for yourself. Was this press release misleading?
10 Was it deceitful? And I think the answer is abundantly
11 clear.

12 Now, Ventas had certain deal protections that
13 it negotiated for by winning the auction. One of those
14 was Sunrise REIT was to use its best efforts to obtain
15 shareholder approval. Another was that Sunrise REIT
16 would not solicit or encourage any competing bids. And
17 another was Sunrise REIT was going to enforce the
18 confidentiality agreements of the other bidders in the
19 auction.

20 You'll see HCP's confidentiality agreement.
21 Appreciate this is something they negotiated. They have
22 many advisers, sophisticated lawyers. These were terms
23 they promised that they could live up to. They had an
24 opportunity to negotiate, but once they signed it like
25 any agreement, all of us are bound by our agreements.

1 There's no reason HCP should not be bound by its
2 agreements.

3 And first of all, we've heard about the
4 standstill provision. I'm showing you a provision that's
5 different than the standstill provision. I'll show you
6 the standstill in a minute. But on top of the standstill
7 provision, belt and suspenders, and yet a different place
8 in the contract there was a further provision that made
9 it abundantly clear for 18 months there could be no
10 disclosure to anybody about any discussions regarding
11 this transaction about any facts with respect to this
12 transaction.

13 And here's where it goes on to say they could
14 not approach or contact or discuss with Sunrise, that's
15 SSL in this context, any of these terms. And so there's
16 a clear prohibition against going public. There's no
17 mistake about this. It's right there, black and white,
18 and it was violated. Absolutely violated by this press
19 release.

20 And His Honor will tell you that the fact that
21 they violated their contract in and of itself doesn't
22 make their conduct tortious or independently
23 significantly wrongful, but that it is a fact that you
24 may consider in deciding whether what they did was
25 significantly wrongful. And this wasn't a single

1 technical violation of a contract. It was a basic
2 flaunting of every promise or contractual obligation that
3 they ever made as a condition of getting into this
4 auction.

5 Let's look at the standstill provision,
6 itself. This was yet a separate part of their
7 confidentiality agreement, and you'll see this in your
8 deliberations. Again, 18 months. We heard the
9 suggestion, oh, the confidential phase was over. These
10 were 18-month agreements and they specifically provided,
11 among other things, and this is what HCP agreed to as the
12 rules of the game, as the contract obligations they made
13 that they would not make any proposals after the auction
14 to acquire Sunrise REIT. They needed permission to make
15 a proposal and they had none.

16 And significantly this is something we didn't
17 talk about much during the trial, but you heard some
18 evidence on it. They promised that once there was an
19 election or a vote, I should say, on a deal, whoever won
20 the auction, that the other participants weren't going to
21 try to influence the shareholders on how they were going
22 to vote on that deal. They promised not to seek to
23 influence any person with respect to the voting on the
24 securities of Sunrise REIT. And they violated that
25 promise when they met directly, when he had drinks with

1 Teddy Bigman. You heard the gentleman from Mr. Smith
2 from ING telling me how great his bid. That he was going
3 to be there. That he had this particular cap rate on the
4 deal. Pure violations of their promise. Promise after
5 promise violated.

6 They promised to return and destroy the
7 confidential information, because the auction is over.
8 They're not supposed to use that material. That's
9 because what's supposed to happen now is the winning bid
10 is supposed to be put out in a fair vote with the
11 recommendation of management and the losing bidders don't
12 get to go out and be spoilers and try to talk the
13 shareholders into voting against it. They had their
14 chance in the auction to put the best money on the table.

15 So now, you give back your information and you
16 let the vote go on. If it's voted down by the
17 shareholders then, yes, it is a jump ball. That's how
18 the process works. But you don't get to go interfere
19 with that vote and you don't get to go make public
20 announcements in the middle of the vote, let alone three
21 days before the record date. This was purposeful
22 interference with Ventas's business expectations. And
23 this, too, was violated in terms of continuing to retain
24 and use this confidential information. So virtually,
25 every promise they made was a breach of contract, and

1 each of them was significant in the outcome as to what
2 happened here.

3 If we could look at the next slide. There
4 was, as you heard in the contract and some discussion of
5 this, relates to the press release. There was such a
6 thing as a superior proposal. That there was a fair way
7 to still beat the Ventas agreement at this point. And
8 that is, if somebody came forward with what was a
9 superior proposal, then it could be accepted by Sunrise
10 REIT. And if it was accepted, Ventas would have a right
11 to match. And if Ventas decided not to match that higher
12 proposal, Ventas was entitled to \$40 million. That's
13 called a break-up fee.

14 So Ventas at this point its worse case should
15 have been that if somebody came along and made a better
16 deal, it was entitled for all its expense and investment
17 and expectation here, its worse case is it should have
18 been paid \$40 million. Instead, its damage is much more
19 significant than that because of what HCP did, because
20 HCP didn't come in with a superior proposal. They just
21 blew up the Ventas agreement and then, of course, tried
22 to avoid the responsibility for this \$40 million break
23 fee but just having the agreement voted down here.

24 Now, if we could go back to that slide for one
25 more second, I want to talk about what was a superior

1 proposal because it was everything that the HCP press
2 release was not. A superior proposal had to be signed.
3 You saw that Sunrise REIT said, among other things, we're
4 not going to consider this until it's signed. And you
5 heard the testimony that finally on the 18th, the
6 following week, they signed an agreement, but now in
7 order to sign it, they had to put the condition expressly
8 in the agreement.

9 So when you read the agreement that got
10 submitted on February 18th, you'll see that it expresses
11 a condition the way we would all expect to see a
12 condition expressed. It says, this transaction will not
13 close until the following conditions are met. That's
14 what they refer to it as. Not until the following things
15 we're confident will happen. It's until this condition
16 is met. And one condition was they get a deal that they
17 like with SSL.

18 So now it's got to be signed, it's got to be
19 bona fide, it's got to be unconditional. That was made
20 clear by TD Securities, by the REIT from day one. You
21 had to have an unconditional proposal. And as the
22 Canadian courts found, it could not be in breach of a
23 confidentiality agreement. A proposal that breaches a
24 confidentiality agreement cannot be a superior proposal.
25 And somebody who comes forward having breached their

1 confidentiality agreement cannot and has not made a
2 superior proposal.

3 And it's got to be capable of closing without
4 undue delay, which clearly this wasn't because they still
5 had to go out and have a whole negotiation with SSL, who
6 they hadn't bothered to talk to up until this point. So
7 this is the expectations under the contract. Now, you
8 heard Mr. Warren talk about how did the parties conduct
9 themselves. And, again, I think Mr. Warren came into
10 this court and testified as a person of great business
11 acumen, experience. A guy with pretty good judgment
12 about the way that people behaved.

13 And, again, no predisposition in this case.
14 He was not playing favorites. But he said, and I think
15 the evidence bears it out, Ventas at all times was very
16 business like. They kept their word. They followed the
17 rules. They put their money on the table. They actually
18 wrote out a check. They actually signed a contract.
19 They actually sat down across the table from the people
20 who managed the properties at SSL and worked out terms
21 that would work for the managers so it would work for the
22 residence. They did this the right way to the front
23 door, the way that any of us would act if we wanted to
24 get a deal done.

25 I mean, how do you get a deal done? You sit

1 down with people and you talk with them privately and you
2 work out your differences, and then you walk out of the
3 room hand in hand. And that's what Ventas did at every
4 stage of this process. And how did HCP behave? Well,
5 Mr. Warren told you. They were here one day. They
6 weren't here another day. They were at this price this
7 day. They never once, and this is so significant, they
8 never once made a signed unconditional proposal to buy
9 Sunrise REIT at any price. Whether it's a dime or
10 whether it's \$18, they never once signed an agreement
11 without an out in it that would let them walk away.

12 There's one party in this courtroom that has
13 made a signed legally permitted, unconditional agreement
14 to buy Sunrise REIT and there's one party who has never
15 done that, and a party who's also never offered SSL that
16 they would do the same deal with them that Ventas did in
17 order to get this done. So that was Mr. Warren's
18 testimony.

19 Now, I want to go back and just talk about
20 what happened here chronologically. You heard on January
21 13th, this is the day before the final bids are due.
22 Mr. Flaherty and his management team make a decision to
23 tell the board the next day, let's not show up at the
24 final deadline. Let's not make a bid for Sunrise REIT.
25 And, again, I don't know everything that's in

1 Mr. Flaherty's head. I can read the evidence and I can
2 infer from it, as you can.

3 But we know a couple of things. We know as he
4 acknowledged that week he learned for the first time that
5 the Slough property was going to be sold. His own
6 calendar notes said now he was highly confident that it
7 would sell, and we knew that was an important deal
8 because they had been working on it for years and we know
9 it was important enough that on February 21, they
10 authorized a \$3 billion bid to buy Slough, and they did
11 get Slough done.

12 And interestingly, how did they make that deal
13 happen? They didn't go out to the media to try and buy
14 Slough. They sat down across the table from Slough and
15 they negotiated confidentially, just like they did with
16 CNL. And when he wanted to buy that company, they got it
17 done.

18 Now, we heard that HCP is great at closing
19 deals, and that's the way they do it when they want to
20 close a deal is they sit down and negotiate with people.
21 They don't go the media on the party you're trying to get
22 a deal done says to you, don't go to the media, please,
23 talk to us. Let's see if we can work it out tonight.

24 So they're interested in Slough, and that's
25 going to be \$3 billion, and they decide to pass on

1 Sunrise REIT. That's Mr. Flaherty's own words. We're
2 going to pass. Not we got jammed or SSL mistreated us.
3 But they need to tell a reason. They need a pretext for
4 why they're not bidding, and so what do they say? Well,
5 first of all, we see they got a changing agenda. If we
6 can look at the next slide here.

7 You see that you recall he testified, and
8 these are his handwritten notes from the board meeting on
9 January 14th in the afternoon with his board of
10 directors. He said, we're going to change the
11 priorities. That was a pretty unusual thing to do in a
12 board meeting. And even though this was supposed to be a
13 blind auction where you're not supposed to know what the
14 other bidder's bid is, hey, let's find out what the
15 Ventas deal is. Let's find out what price this is going
16 to happen.

17 And now we need to raise some money. And you
18 saw the e-mails that he immediately went to the public
19 markets on January 16th and 17th. That's what he was
20 bragging to Mr. MacLatchy about how much money he raised
21 a couple days later. So he needed money to pay down CNL
22 to start to finance these acquisitions. He wasn't ready
23 to pull the trigger on January 14th, particularly now
24 with Slough on the table.

25 And so you see his sequence. The next thing

1 is Mount Street, and you'll recall that Mount Street,
2 that's the code name for that deal. So that's his next
3 priority is get the money. Mount Street. And then even
4 on January 14th, he says to his board of directors, maybe
5 we'll make a topping bid for Sunrise REIT. So this is
6 discuss with board of directors on the afternoon of the
7 14th. But, of course, when they go and tell Sunrise REIT
8 why they're not bidding, they don't tell them it's
9 because we're interested in another transaction or we may
10 come back at a later date with a topping bid, they say,
11 it's all SSL's fault.

12 And this is part of the business strategy of
13 they wanted to put pressure on SSL. You remember the
14 testimony that when they bought the CNL deal, SSL was
15 managing those properties. They wanted to reduce the
16 profits that the property manager was making. They
17 wanted to squeeze another \$200 million was their number
18 out of that number out of those management contracts.
19 They wanted the manager to be spending less money on the
20 properties, on the residents, and put more money in their
21 pocket. Fine. That's how business is done.

22 But what they're trying to do is get Sunrise
23 REIT mad at SSL. Hey, you guys, SSL, screwed up the fact
24 that HCP didn't bid. They're blaming you. What are you
25 doing wrong? Why don't you negotiate better with them?

1 So that's part of what might be accomplished here by
2 blaming SSL. And was it SSL's fault? I think the
3 evidence is entirely clear on this.

4 You heard Mr. Feeney, again, a guy who's got
5 no axe to grind. And here's what he said, you heard his
6 testimony. He said -- can we play that for a second?

7 (Video played.)

8 "New business terms in the negotiation would
9 have been ongoing for months and, you know, offered this
10 document essentially the day before it was supposed to be
11 signed with a straight face is that he was a party acting
12 in faith. And obviously, that wasn't the case."

13 MR. BRADFORD: So they blew up those
14 negotiations so they could blame SSL sending a term sheet
15 that was completely different than what they had been
16 talking about. And, of course, Sunrise REIT wanted to
17 see them work something out with SSL. Gave them every
18 opportunity.

19 Now, they made the decision the day before.
20 At no point did Mr. Flaherty just pick up phone and call
21 Mr. Newell and say, could we work out an agreement here
22 so we could bid for Sunrise REIT? If he wants to get a
23 deal done, he knows how to get a deal done and you begin
24 by picking up the phone and talking to the other guy to
25 try to do it. But he made a choice not at that have an

1 SSL deal and not to make a bid. That was their choice.
2 It was their decision. It was their right to make that
3 decision. But once the auction is over and Ventas has
4 been declared a winner, they've got to respect the
5 outcome of that process and the consequences of their own
6 choices and actions.

7 You heard Mr. Phillips say, we asked him if he
8 wanted more time. He didn't want more time. He didn't
9 want to get this solved. Do you want to make a lower bid
10 and get your SSL deal done later? No, not interested in
11 bidding. We're moving on to another transaction.

12 What was really happening? That day they were
13 already planning on let's see Ventas's cards before we
14 play ours. Let's forget about the fact that this auction
15 was designed fair and square so both people put their
16 money on the table at the same time. Let's forget about
17 that. Let's see the other person's hand.

18 And first, let's tell the REIT -- and
19 Mr. Flaherty actually told his own board of directors,
20 SSL was the one that threw us a curve ball. SSL linked
21 these negotiations. You'll see that there was one deal
22 on CNL and Sunrise REIT properties proposed all along by
23 HCP. This linking was going on the whole time. It was
24 HCP that blew up the negotiations, as Mr. Feeney said.

25 And I thought it was very interesting that

1 Mr. Feeney's counterpart, Mr. Maulbetsch, never came in
2 this court and testified. There was no reputation of
3 Mr. Feeney's testimony about what happened in the course
4 of those negotiations.

5 So now we blamed SSL for this. If we could
6 see the next slide, please. You see that a strategic
7 decision is made that afternoon. Before they know what
8 the Ventas numbers are, they've decided they're going to
9 look at Ventas's cards and make a topping bid. And the
10 show-me-what-you-got-yoa-mama e-mail is sent a 5:30
11 Pacific time. You know, you heard the suggestion made
12 the only reason they were making a topping bid because
13 they knew the \$15 number and they thought they could beat
14 it. But, in fact, the decision was made at a board
15 meeting at 3 o'clock that afternoon. The decision to
16 say, show-me-what-you-got-yoa-mama was well before there
17 was any understanding or announcement of what the terms
18 of the Ventas deal was.

19 And then you see Mr. Flaherty saying, this is
20 perfect for us. He wasn't upset that he couldn't get a
21 deal done for SSL. He had a business plan he thought was
22 perfect. Reload his balance sheets, go out and raise
23 money, go out after Mount Street and Slough, and then if
24 he can knock the ball that Ventas won fair and square out
25 of its hands. And the problem with that strategy is the

1 only way we could knock the ball out of Ventas's hands
2 and take away what it rightfully earned by participating
3 straight up by the rules in that auction, was to breach
4 every promise he made. To pump up a stock price. To lie
5 to the market. And it's the means by which he tried to
6 accomplish these goals that was wrongful, significantly
7 wrongful.

8 It's not what he was trying to accomplish
9 that's wrong, it's how he did it. It's that he -- and
10 the only way he could do it was to break every promise he
11 made, to deceive the market into creating a stock price
12 that he knew would kill the deal, and to drag the public
13 into it to put the pressure on to coerce the parties to
14 try to abandon the Ventas agreement.

15 This started on January 14th, and then they
16 acknowledged they went into a secrecy mode. They didn't
17 want anybody to know what they were working on. If they
18 thought what they were doing was legitimate, why the
19 secrecy? Why do they have to be so secretive about what
20 they're doing? No communications with the REIT. No
21 communications with SSL. This is going to be a surprise.

22 And as you saw, they continue to use the
23 confidential information, even though they've represented
24 and certified that it was all returned or destroyed. But
25 they're continuing to use it secretly up to February 11.

1 And then on February 14th, we see at even at this point
2 they had multiple choices to go and acquire Sunrise REIT.

3 They had choices, if that's what they really
4 wanted to do in mid-February for to how to get this done.
5 First of all, if they really wanted to get it done, they
6 could have won the auction. You heard them say they got
7 more money, they got more financial resources than
8 Ventas. If this was their top priority, they could have
9 made it happen in the auction. This was a fair and
10 square auction to determine the winner.

11 If they really wanted to get it done on
12 February 14th, they could have at least sat down
13 privately with the REIT and tried to negotiate. They
14 were invited to do that. They were invited, don't put
15 out a press release and come talk to us. Let's see if we
16 can make this a superior proposal. But it was more
17 important to them to get out to the public markets before
18 they could get shut rather than it was to get a deal
19 right then and there.

20 It's no the behavior of somebody trying to get
21 a deal done. It's the behavior of somebody who wants to
22 make sure that the Ventas deal is voted down now and that
23 we have a new shareholder base who will do that. And
24 that's why he went to the public before he even
25 negotiated. If he wanted to get the deal done, there

1 were many legitimate ways to do it. And one of them was
2 sit down with SSL and take care of the reason you said
3 you couldn't bid.

4 Sit down with them. They negotiated for CNL
5 on February 1st. Why didn't they talk to Sunrise REIT
6 right then? If he wanted to get this deal done, he is a
7 very capable businessman, very easy. SSL was very
8 willing to negotiate. They wanted to get these things
9 resolved. You heard Mr. Newell's testimony at all times
10 he was willing to deal with HCP. Why didn't HCP deal
11 with them and just get this deal done?

12 And finally, if they believed for a minute
13 that the Ventas agreement was a low ball, as they like to
14 use that term, and it was going to get voted down, then
15 sit on the sidelines and let it get voted down and then
16 come back because you got a new ball game.

17 But what they did is they took a path that if
18 you're goal was to really get an agreement with Sunrise
19 REIT, is not the path that any smart business person
20 would take. They went down a path where they knew signed
21 contracts was necessary, and they send in a contract
22 that's not signed and then they lied about it, and I'll
23 talk about that.

24 They knew they were prohibited from making a
25 public bid; that that would put them in breach of

1 contract. And if you breach your confidentiality
2 agreement, your agreement, your proposal, can't be
3 accepted. It can't be superior. Why go down a path of
4 making a public bid when you know it's prohibited to do
5 that? And making a post-auction bid without getting any
6 prior written permission from the REIT without seeking a
7 waiver of whatever obligations you have in your contract?
8 You know that's a non-starter. You know it can't legally
9 be accepted unless you get a waiver of some other
10 determination, and they just go right down that path and
11 they go forward putting out a proposal without an SSL,
12 with an SSL out in the back of their pocket. Of course,
13 not telling anybody.

14 They never put in the contract. When you read
15 that contract that night, you'll see no condition in
16 there for SSL. How is anybody supposed to know that
17 there was a condition for SSL? It's why they wouldn't
18 sign the contract, because they knew the contract didn't
19 have the condition. You know, the easiest way to make
20 people aware that something is conditional, is put it in
21 the contract, itself. But they wouldn't do that because
22 they wanted people to see an unconditional contract and
23 then to put out a press release and not even say, this is
24 conditioned on our first getting a deal with SSL. That's
25 significantly wrongful conduct. It's basic deceit. It's

1 basic fraudulent misrepresentation and it ultimately
2 resulted in a manipulation of the financial markets,.

3 And, again, why did they do this? I can't
4 give you all the reasons. But we know, among other
5 things, that they did not want to see Ventas acquire
6 Sunrise REIT. At some point maybe HCP wanted to come
7 back and bite at whatever price, but the immediate goal
8 here was to stop Ventas from catching us.

9 These were Mr. Flaherty's words the day before
10 he made the press release. And he was concerned -- you
11 saw the graphs -- that if Ventas acquired these
12 properties, they would catch up. They would be almost an
13 equal competitor to HCP. They could get into the S&P
14 500. They could be a competitor for these joint
15 ventures. And he also knew that if they lost this deal,
16 after it was publically announced, after the reputation
17 was hitched to it, after their investors believed that
18 this was really going to be a step up into the big
19 leagues for Ventas, if they now publically lost this
20 deal, in his own words, they're hosed. That's what he
21 was focused on. If they lost this deal, they're hosed.

22 And so what did he do to make sure they didn't
23 get the deal to interfere with -- improperly interfere
24 with this deal? He engaged in more significantly
25 wrongful conduct. He pumped up the stock price making

1 sure it was high enough, making sure there was no chance
2 this deal could ever be approved. In his own words he
3 put in a new shareholder base. In order to make sure he
4 could get this done before anybody blew the whistle and
5 put out a release that made it clear what he was up to,
6 he duped Sunrise REIT. He confused Sunrise REIT by
7 saying, this is a superior proposal. I'm going to get
8 you everything you need to make it a superior proposal.
9 You all are going to be happy because I really got \$18
10 and I'm prepared to give it to you.

11 And so, let's see how he accomplished that.
12 First, he calls Mr. Phillips up. And you heard
13 Mr. Phillips' account of this conversation. Mr. Flaherty
14 said, I'm going to make your Valentine's Day and this is
15 exactly the same as the Ventas agreement. He did not say
16 right up front, by the way, I can't give you the money
17 until I get a deal done with SSL.

18 You heard Mr. Phillips' account of that
19 conversation. You heard him say, please don't press
20 release it. And Mr. Flaherty acknowledged that he was
21 asked not to press release it, but he went ahead and did
22 it anyway. And you also heard Mr. Pickette's account of
23 that conversation and both Mr. Pickette and Mr. Phillips
24 testified there was no discussion of an out for SSL in
25 this call. If there was, this thing would have been shut

1 down.

2 Mr. Flaherty came into this court and said,

3 oh, I told him in the afternoon it was conditional.

4 Nobody knew that's why they were calling later at night

5 to find out is it conditional or isn't it conditional.

6 If you're not being deceitful, why don't you just say up

7 front, why don't you put it in your contract, this is

8 conditioned on my getting a deal with SSL?

9 And we see what happens further that night.

10 And this is everybody's Valentine's day. Nobody is

11 expecting this. People are going home from work. And

12 now they're going to deal with everything that happens.

13 And so if we can look at the next slide, please.

14 Mr. Warren, himself, reacted by saying he was

15 flabbergasted. This was the first time this his business

16 experience in which you have a press release about an

17 offer in a confidential process.

18 This was something that each of the people

19 living through it knew was not right and not designed to

20 bring about a deal. But it was designed to bring about a

21 transformation of the shareholder base. 30 million

22 shares traded that 24 hours. 10 million more the next

23 day. 60 percent of the shares traded. This was in the

24 history of Sunrise REIT, far and away the hugest day they

25 ever had, and the stock actually closes over \$18 that

1 day. And what does that tell you? It tells you the
2 people reading the press release, the people getting the
3 news even by the end of the day think that this has got
4 to be worth \$18. Why else would you be paying \$18 unless
5 you think HCP is money good, able now. Not that they're
6 legally prohibited from what they're doing what they're
7 doing. Not that they still need to get an SSL deal done.

8 And, of course, this has its intended affect.
9 It kills the Ventas deal. This wave of buying and
10 selling ensures that there's no way that Ventas agreement
11 can succeed, and that's the immediate goal is interfere
12 with the Ventas agreement and use the public's money.
13 Manipulate the markets and pump up the stock and get it
14 done that way.

15 And I tell you of everything that I've seen in
16 this case, I think that's the most significantly wrongful
17 thing they did. Now people get in a room and they lie in
18 negotiations and they use coercion in negotiation, but I
19 think when you go out and you start involving the public
20 and other people's money and get them to put their money
21 into something knowing that you can't really put the
22 money in their pocket that you're telling them that you
23 can, I think that's significantly wrongful. I think
24 we've had enough of that in this country, and I think
25 that this is case where this jury should send a loud and

1 clear message that this needs to stop. This is as
2 significantly wrongful as it gets. Don't go out and use
3 the public to accomplish whatever your business purposes
4 in a deceitful way that pumps up the stock to a price you
5 know you can't pay there and now.

6 And so HCP uses -- they acknowledge, well, why
7 did you go public? Well we wanted to put pressure on
8 everybody. They wanted to coerce the parties into
9 reaching terms and making decisions they otherwise would
10 not make. They want these arbitrageurs and others
11 calling the REIT saying, break your contract with Ventas.
12 To make sure SSL does a deal that's better than Ventas.
13 Whatever is necessary. They're trying to coerce the
14 parties by using the eye of people who have now paid \$18
15 for the stock to create pressure to change the contracts
16 that they've otherwise committed to.

17 And Sunrise REIT, to its credit, went to court
18 and said, can we change -- can we do this? Would it
19 violate the contract for us to do this? And the answer
20 was clear. The Court was clear. You made a contract.
21 You have a deal with Ventas. HCP had a confidentiality
22 agreement that they've just breached. You can't take an
23 offer from a party that's in breach of their agreement
24 that had no right to make you this bid, this public bid
25 in the first place. And so this was a scheme that was

1 doomed to fail at a business level. There's no chance
2 this was going to result in a deal, but it had every
3 chance, expectation, and affect of killing the Ventas
4 deal.

5 Now, they want to say, oh, this wasn't a very
6 misleading press release. Well, I thought it was very
7 interesting that even the most sophisticated guys on Wall
8 Street, the guys who know how to read the fine print.
9 You heard Mr. Bigman's testimony. He said when he read
10 it, he thought it was a good, clean offer. Not an offer
11 subject to anything.

12 And you heard Mr. Smith of ING when he read
13 this, he did not have an understanding that this was
14 conditional on an agreement with SSL. You know, if these
15 guys on Wall Street couldn't figure it out, how does
16 anybody on Main Street, anybody, any one of us who pick
17 up a newspaper and read about some kind of proposal, how
18 are we supposed to know that there's an SSL out here?
19 How are we supposed to know that if these guys can't even
20 figure it out?

21 And, again, this is what the people said in
22 real time. You know, you're going do have experts come
23 in the courtroom and tell you this happened and that
24 happened or you should read it this way or read it that
25 way. Look at how the people who lived through this saw

1 it. How it appeared through their own eyes and their own
2 words written while the events themselves were happening.
3 That's always the best evidence.

4 And what we see here is Mr. Warren smelled it
5 from the start. That HCP may be up total bait and
6 switch, just like last time. And Mr. Phillips by 11:15
7 that night put it in his own words. That HCP's press
8 release is misleading because they say their proposal is
9 identical to the Ventas proposal.

10 So he knew better than anybody this was
11 misleading and he said it. Mr. Turner, who was one of
12 the trustees. He said the press release is misleading.
13 These are sophisticated, smart investment bankers and
14 trustees who saw it then and there. This was misleading.

15 And we saw that HCP never corrected that press
16 release. They never put out a correcting press release
17 to say this is legally prohibited, this has an SSL out,
18 this is unsigned. Each of these things was fatal to
19 their deal. Each prevented it from being a superior
20 proposal, but they told the public this meets the
21 standards for superior proposal, and they never corrected
22 that. They said greater certainty of closing. They
23 never corrected that. They said identical to Ventas.
24 They never corrected that. This, again, is deceit, it is
25 fraudulent misrepresentations, it is significantly

1 wrongful conduct.

2 Now, I want to talk about what happened that
3 night with the signature. And I think some of this will
4 be helpful for you to see in chronological order. In
5 4:40 that afternoon, HCP sends an e-mail that attaches
6 two documents. On behalf of Mr. Flaherty please find the
7 attached documents. And there were two documents that
8 came by e-mail. And they didn't come by fax or any other
9 way, they came by e-mail.

10 And when you printed the documents that were
11 attached to the e-mail you had a signed cover letter.
12 That was already signed. And then behind the cover
13 letter was the second document, and that was the purchase
14 agreement and the purchase agreement was unsigned. So if
15 there's any question about getting a signature that night
16 by 4:40 in the afternoon, they had a signature on the
17 cover letter. What they didn't have, and this is
18 sometimes referred to as the offer letter, but there's
19 only one letter and there's one agreement and the letter
20 is signed and the agreement is unsigned.

21 And so what does Sunrise need? It needs a
22 signature on the agreement, because it's not going to
23 consider anything until it's signed. Mr. Warren was
24 asked, what does it the matter whether you got a
25 signature. Well, I think we all know if you don't sign

1 something, it's not binding, it doesn't mean anything.

2 The signature was critically important to Sunrise before

3 it could decide whether to consider this.

4 And we then see Mr. Warren by 7:36 that night,

5 he's concerned about the fact that they haven't signed

6 the purchase agreement. This is not something that got

7 raised afterward in litigation. This was in real time

8 what was important to them. He told all the other

9 trustees, they haven't signed and I'm not going to bring

10 something to you unless it's formal, and by that he said

11 he meant signed in all respects.

12 They had a committee meeting to discuss all

13 this at 9 o'clock, and at 9:25, Mr. Phillips has been

14 charged by the special committee to call Mr. Flaherty and

15 find out what's going on with this agreement and to ask

16 him about the signature on the agreement. And at 9:28,

17 he can't reach Mr. Flaherty at the office and he sends

18 him his cell phone so that whenever Mr. Flaherty calls

19 him, he can do it at his cell phone. And Mr. Flaherty,

20 obviously understanding something is up, three minutes

21 later says, you've been sent a signed executed original

22 offer letter.

23 Well, this is covering your tracks. I mean,

24 this is a real CA kind of thing because, of course, they

25 got a letter signed, but what, obviously, the REIT wants

1 is a signature on the purchase agreement. And
2 Mr. Flaherty wants to say, oh, this happened as a result
3 of the phone call to Mr. Phillips. This is how we
4 concluded the call. But look at the timeline, folks, and
5 you'll see the e-mails because the timeline doesn't lie.

6 This is an e-mail that Mr. Flaherty sends at
7 9:38 after he sent this e-mail about the letter and he
8 says he's on with Mr. Phillips right now after this
9 e-mail about a letter is sent. And Mr. Phillips comes
10 away saying that he was told executed agreements were
11 sent. That's what he was asking about. He would not be
12 asking about a signed letter. He had a signed letter and
13 he asked for the signed agreements and he was promised
14 signed agreements.

15 Mr. Phillips is a pretty accomplished
16 investment banker. He knows that you need the agreements
17 signed, not another signing of a letter that's already
18 signed. So you decide who to believe about what was said
19 that night and what was promised and why did everybody at
20 Sunrise REIT spend the next day getting tracking numbers
21 and sending messengers to open Fed Ex boxes. It wasn't
22 to get another copy of a letter that was already signed.
23 It was to get the all important signatures on the
24 agreement.

25 And you heard Mr. Flaherty's explanation of

1 this. And now he came into court and he says, there's
2 only one reason why the agreement wasn't signed. We were
3 making a conditional offer. He now says, I knew I
4 couldn't sign the agreement. But when I asked him at his
5 deposition where he was also sworn under oath, well, do
6 you know any reason why you didn't sign the agreement?
7 He said, no. I don't know why I wouldn't have signed it.
8 And now he comes into court and says, oh, yeah, there was
9 a reason I wouldn't sign it. Why didn't he know that
10 reason at his deposition? This is a pretty critical
11 issue. He couldn't explain it. Now they've come up with
12 an explanation.

13 And similarly, when I asked him at his
14 deposition, do you think that maybe you made a conscious
15 choice not to sign the agreement because you didn't have
16 an agreement with SSL? That's, you know, what we
17 expected. He says, I don't recall. I have no
18 recollection of these events. That was his sworn
19 testimony. No recollection? And now he's telling you
20 accounts of these conversations and that he hung up the
21 phone and went to Mr. Henning's office and asked
22 Mr. Henning and made a conscious choice not to sign the
23 agreement. But when he was first asked under oath, I
24 have no recollection of these events. I don't recall.

25 And Mr. Warren indicated the significance of

1 this signature, because he testified that they were ready
2 to put out a press release to the market to tell the
3 market that this was an unsigned agreement. It could not
4 be consummated because it hadn't been signed. That's the
5 press release that was going to go out, and then they
6 changed the press release so they didn't tell the public
7 that this was unsigned because they had been promised a
8 signature on the agreement, and the public never learned
9 that it was unsigned.

10 You heard that the public never saw what the
11 agreement said. That wasn't part of the press release.
12 And so what could Sunrise REIT do? They were told a
13 couple of conflicting things. They're told in a
14 late-night conversation, well, I meant this to be
15 conditional, but they also see they've got a purchase
16 agreement with no conditions in it. And Mr. Flaherty
17 says, I signed it and Edex it to you. So maybe they're
18 getting a signed unconditional agreement, but they're not
19 going to believe anything until they see it in writing
20 and signed and they shouldn't.

21 And look at what they tell the market. HCP
22 wants to tell you that this put the world on notice that
23 this was a conditional deal. It's not at all what
24 Sunrise REIT said in its press release. It said it could
25 not decide if this was a superior proposal until such

1 time as it receives a confirmation, and by that they
2 meant the signature, from HCP that their proposal is not
3 conditional on reaching an agreement. Well, when you say
4 you want confirmation of something, you confirm a
5 reservation in a restaurant. You think you have it, but
6 you need to confirm it.

7 So they think they've got a proposal that's
8 not conditional that's going to be signed and they're not
9 going to stake their reputation on being right or wrong
10 on what Mr. Flaherty tells them in a late night
11 conversation. It's HCP's press release. It's not
12 Sunrise REIT's job to put out a press release correcting
13 somebody else's press release. And if they got it wrong,
14 be sued for defamation or somehow maligning somebody
15 else's proposal in a \$2 billion transaction. If there
16 was something wrong with this, it was HCP's
17 responsibility to go out and issue a correcting press
18 release. But they want to say now, oh, it's Sunrise
19 REIT's fault. You all should have corrected this.

20 Why didn't they say anything beyond this?
21 Mr. Warren explained it. He was told the purchase
22 agreement, which they were told was going to be signed,
23 had no condition in it and that would have been an
24 unconditional offer. You see the next day there's a
25 conversation here where Mr. Warren says, we have been

1 told that Jay is now faxing his signature. And what are
2 they talking about? This is sent after the Fed Ex boxes
3 arrived.

4 So now they've got a signed letter sent by
5 fax, they've got an original letter sent in the Fed Ex
6 boxes, but they still have no signature on the agreement.
7 And you heard Mr. Phillips testify that he called
8 Mr. Flaherty and said, would you fax us the signature on
9 the agreement. He clearly wasn't asking him to fax him
10 again the signature on the letter. And I don't think
11 anybody was hallucinating when they wrote in real time
12 back then no signatures that referred to the packages
13 that had just been opened and the fact that the
14 agreements weren't signed, but Jay says he's sending his
15 signature by fax now.

16 Why was that statement written on February
17 14th, if the statement the promise wasn't made, that the
18 signature on the agreement was being faxed? There's your
19 concrete documented evidence of what was actually said
20 this those telephone conversations. So, Mr. Warren, I
21 think, was very straight about it when he testified. He
22 looked Mr. Flaherty in the eye from the witness stand and
23 said, I believe he lied to us. And Mr. Flaherty did lie
24 to them that day.

25 He lied to them so that they would not go out

1 and tell the markets this is not a real offer, folks,
2 don't put your money out on the table. And he lied to
3 them long enough that 30 million shares traded by the
4 time they figured out this was not a signed deal. He
5 lied to them by not putting up front that this was an
6 unconditional non-starter type of deal. And we've seen
7 what happened here.

8 The campaign continued after that. We saw
9 these additional conditional proposals suggesting they
10 were on the eve of getting something done with SSL when
11 they weren't talking to SSL. They kept the stock price
12 up by announcing in court that they were going to keep
13 their offer open. And you saw that they were lobbying
14 improperly influencing while they were subject to a
15 confidentiality agreement that says you can't influence
16 the votes of any of the shareholders.

17 You saw Mr. Flaherty and you saw his
18 discomfort when he was asked about it. He had drinks
19 with Teddy Bigman and he acknowledged that he talked to
20 Mr. Bigman that day, that afternoon, about the virtues of
21 his deal, about his bid. He asked, did I go too far in
22 my comments? And you heard Mr. Smith's testimony that
23 Mr. Flaherty came to him and said, I got a great law
24 case. I'm going to win my case. I'm very serious about
25 getting these assets. He's trying to convince him that

1 he's really there at \$18. He's trying to influence the
2 vote, don't vote for Ventas, I'm really going to be there
3 for you at \$18. And, again, is a clear breach of his
4 confidentiality agreement. It is, again, significantly
5 wrongful conduct. It's not how the rules were supposed
6 to be abided by.

7 And we have an admission here that HCP engaged
8 in conversations with the shareholders of Sunrise REIT
9 after February 14th that could have been understood to
10 provide reasons to vote against the Ventas deal. They're
11 lobbying against the Ventas deal to make sure it gets
12 shut down. Now, the other piece of conduct that is
13 revealing here is that we see on February 14th, we have
14 this press release. February 18th, the next letter to
15 Sunrise REIT. February 20th, the next letter to Sunrise
16 REIT.

17 It's interesting that after February 21st,
18 when they authorize the \$3.1 billion bid for Slough, we
19 don't see any further proposals to Sunrise REIT. Now
20 they've committed their \$3 billion to the Slough deal and
21 they've accomplished what they need to because they know
22 the Ventas deal would get voted down and that property
23 may be available somewhere down the road because the
24 Ventas deal is going to be destroyed. And do they want
25 those assets? Sure they want those assets. I believe

1 they wanted at some point acquire Sunrise REIT, but they
2 weren't able to do it here and now. What they needed to
3 do was destroy the Ventas deal.

4 And, again, maybe there's nothing wrong with
5 destroying your competitor's deal, if you do it properly.
6 But what is wrong is when you do it through wrongful
7 means. The end doesn't justify the use of wrongful
8 means. And when you do it through lying and you do it
9 through manipulating the market and fraud on the market,
10 that is very simply significantly wrongful means. It is
11 tortiously interfering with somebody's business deal by
12 using wrongful means. And that's the essence of the
13 issue you're asked to decide.

14 And I submit to you that telling the market
15 that you were prepared to pay \$18 on February 14th, was a
16 sham and a fraud on the market because they were legally
17 prohibited from doing it, because they didn't have the
18 SSL deal. They never submitted a signed unconditional
19 bona fide offer at \$18 at any time. So how can you go to
20 the media and the public markets and say, \$18 good, when
21 you're not prepared to sign and make a written bona fide
22 unconditional offer to actually pay that money? No
23 chance of being accepted.

24 A Canadian court found, and His Honor will
25 instruct you on this, that confidentiality agreement was

1 in effect. HCP's proposal was contractually barred and
2 Sunrise REIT could not consider it. No chance of it
3 resulting in \$18 in the shareholders pockets. Every
4 chance of destroying the Ventas deal. Again,
5 significantly wrongful conduct and fraud.

6 If we could look at the next slide. We saw,
7 again, the real-time testimony or document of Ms. Cafaro.
8 She knew at the time that she was communicating with
9 Mr. Warren that she believed this was illusory. He's
10 positioning to knock out they're deal and then come back
11 at what she calls a retrade, a lower price.

12 So once the Ventas deal gets voted down, will
13 HCP come back? Sure they will. But if Ventas is gone,
14 you heard there's only two competitors to the deal. Is
15 HCP still going to be willing pay \$18 for a stock that
16 might go down to \$10? Now he can buy it for whatever
17 \$13, \$14, \$15, \$16. He might have authority to pay \$18,
18 but why did would he pay it once he knocked them out of
19 the picture. So what he's doing is knocking them out and
20 preparing to come back and try to cut the best deal that
21 he can.

22 And Mr. Warren also saw it for what it was at
23 the time. That at the conclusion of dealing with HCP, he
24 understood they weren't reliable. That they weren't
25 real. And I think one of the most significant pieces of

1 evidence as well in this case, is a business decision
2 that Mr. Warren made in April. Because people's conduct,
3 I think, speak much louder than their words.

4 Mr. Warren, who was at the center of the storm
5 who can size up everybody's intentions and purposes and
6 sincerity, had two choices that day. The Ventas deal was
7 dead. It was two days away from the final vote and it
8 was going down. So Mr. Warren, acting for the benefit of
9 his unit holders, had a choice. He could just let the
10 Ventas deal get voted down and two days later he could
11 start negotiating with HCP.

12 And if he believed for a minute that HCP was
13 there and it had \$18 to pay his shareholders, why
14 wouldn't he do that? That would be his obligation to get
15 the best price for his unit holders. Why didn't he wait
16 two more days and negotiate with HCP? And he told you
17 the reason, because he didn't believe that the \$18 would
18 be there. He didn't believe that once the Ventas deal
19 was voted down and there was no real competition from
20 Ventas, that this \$18 would be there. Mr. Flaherty had
21 already walked away.

22 That \$18 was never there to put in anybody's
23 pocket. And the fact that Mr. Warren thought it was the
24 wiser course to take a real 16.50 rather than depend on
25 this representation of 18, tells you he put his money in

1 and his decisions where his belief was, that 18 wasn't
2 real.

3 You saw the reaction of Mr. Flaherty the day
4 he drove up the stock price on 30 million shares.
5 \$18.19. If you're really trying to buy something, why
6 would you be happy that its price is going up? That
7 shareholders are now paying more than \$18. And the day
8 before, this is part of his script for his conversation
9 with Mr. Clausen and Newell, he said, he knew what was
10 going to happen. Two stocks are going to go up and two
11 stocks was going to go down. One was going to be Ventas.
12 He knew Ventas would be injured by this by the prospect
13 of losing the deal. And he knew his own stock would go
14 down.

15 Why would his own stock go down? Because he
16 knew his shareholders would look at this and say, why are
17 you paying \$18 for these assets? We're unhappy about
18 this decision. This is going to be unprofitable or HCP.
19 It wasn't a business decision that was going to make
20 sense to his shareholders, but it accomplished the
21 purpose he needed of driving up the SSL stock and driving
22 up the Sunrise REIT stock so those shareholders would put
23 pressure on the company to do a higher-priced deal with
24 HCP, to coerce HCP's or to coerce Sunrise REIT to do so.

25 And why \$18? You know, you heard some

1 explanations. You'll judge it for yourself. But I
2 suggest it doesn't make common sense. There was every
3 opportunity if they really wanted to get a deal done here
4 to go privately to Sunrise REIT and say, I'll pay you
5 \$16. I'll pay you 16.50. And if Ventas came back and
6 matched, HCP could take it higher. They could take up by
7 whatever increment they want. Another 50 cents, another
8 25 cents until they could outspend Ventas.

9 But why throw \$3? And, you know, we talk
10 about \$3, but this is hundreds of millions of dollars of
11 your shareholders' money. Are you just going to give
12 that away when you can negotiate a lower price for the
13 same properties? Is that really the way that anybody
14 conducts their business? You've got a bid at \$15. And
15 significantly at this point nobody had ever even paid the
16 \$15. Morgan Stanley, ING, they're not coming in the
17 market and paying \$15. When Mr. Flaherty comes out and
18 says I'll pay \$18, nice round number, for the assets.
19 It's not a real number. It's a number designed to make
20 sure that the Ventas deal was voted down and then the
21 real negotiations would begin.

22 And, again, maybe in private that's fine to
23 throw out a number that you're not going to come back
24 with. But don't go out the public markets and tell them
25 that you're prepare to pay them the \$18 and have them buy

1 stock in reliance of it, and that's what happened. His
2 goal was clear in his own writing. You got a brand new
3 shareholder base, and they were going to vote down the
4 Ventas deal.

5 He said it in his own words. And he said it
6 -- this is Mr. Phillips. He says, strategically that's
7 why HCP press released the proposal, so the arbs would
8 pile in prior to the record date. This is -- why did he
9 do it three days before the record date? To change the
10 shareholder vote and get buyers at \$18.

11 And you saw that if they really wanted to get
12 a deal done, why didn't they offer the same deal to SSL
13 that Ventas did? On February 20th, they had a copy of
14 the Ventas SSL agreement. If they wanted to clear up
15 this condition, it would have been very simple to sign
16 their name to that and send it over to SSL and say, here,
17 here is the Ventas deal. Let's sign it and now we've got
18 an agreement.

19 But, no, they cross out the key provision here
20 about the development properties being given up by
21 Ventas, and they say, we want those. And you heard some
22 testimony, I believe it was from Morgan Stanley, these
23 development properties were highly valuable. They had
24 blown up the negotiations before. I heard the price tag
25 of \$2.44 a share with Morgan Stanley talking about the

1 value of development properties. That was their

2 assessment of the value.

3 So what HCP is saying, sure, we can get a

4 \$2.44 better deal with SSL. We might pay you \$18, but

5 we're not prepared to do that because SSL won't do that

6 deal with us. It's not a real offer. And, again, they

7 changed the financial reporting and they know that's a

8 deal breaker for SSL.

9 You heard what happened to Ventas. It had a

10 very difficult choice to make. Its deal was gone. Its

11 \$15, which it had every right to was gone. And so what

12 are they going to do? They could walk away and they

13 would be damaged goods. Their reputation, their ability

14 to be seen as a genuine competitor to HCP by anybody

15 who's going to sell their company would have been

16 injured. You heard Mr. Riney testify to the same thing.

17 They had to salvage their transaction.

18 And so they paid the extra \$1.50 more than

19 they were ever contractually obligated to pay to mitigate

20 their damages to salvage their deal, and they come to

21 this courtroom to try to be made whole for what was

22 properly there's in the first place. They ask for

23 nothing more than that, just to be put in the position

24 they would have been in if their contract had been

25 honored, as it should have been.

1 And I'll talk just for a moment here about
2 HCP's excuses. HCP has offered a series of excuses for
3 its conduct. Never has it stood up and been accountable
4 for its own actions. We heard early on it was SSL's
5 fault they we couldn't get a deal done. They threw us a
6 curve ball. Well, obviously, this curve ball was the
7 unprecedented deal term that Mr. Feeney said it was
8 unlike anything he had seen in his business career.

9 Another excuse that we've heard from HCP for
10 this conduct is MacLatchy made me do it. And this one is
11 particularly bogus. HCP has acknowledged, first of all,
12 Mr. Flaherty testified we were not solicited to make this
13 offer. They made this decision on their own. They
14 represented to the Canadian courts that anything Sunrise
15 REIT did had absolutely nothing to do with HCP's
16 decisions. And here again, the timeline is very
17 important. Because to the extent that they want to get
18 up here and argue that they only made a topping bid
19 because of these e-mails with Mr. MacLatchy, that
20 decision to make a topping bid was discussed at the board
21 meeting the afternoon of January 14th.

22 The show-me-what-you-got-yoa-mama e-mail,
23 which they acknowledge referred to a topping bid
24 strategy, was at 8:30 Eastern time. That's 5:30 Pacific.
25 The afternoon of January 14th. The let's go to work was

1 the next morning, January 15th day, which was a national
2 holiday. The first time that you get Mr. Flaherty
3 getting into these kinds of substantive discussions with
4 Mr. MacLatchy is two days later when it gets started by
5 Mr. Flaherty. It's not Mr. MacLatchy who starts up, it's
6 Mr. Flaherty starts e-mailing Mr. MacLatchy and saying,
7 look how much money I raised.

8 And sure, Mr. MacLatchy responds. And
9 Mr. MacLatchy -- you heard Mr. Flaherty acknowledge from
10 the witness stand, they had no verbal conversations
11 during this time. So whatever so-called encouragement
12 occurred, was what Mr. Flaherty chose to read into these
13 e-mails. And you're going to hear, I'm sure, about
14 Mr. MacLatchy's deposition testimony. Mr. MacLatchy was
15 asked, what were you thinking when you were sending these
16 e-mails? And Mr. MacLatchy was honest and he said, I was
17 hoping he'd come back and bid and bid high. That's what
18 he was thinking.

19 But he didn't write HCP, please come back.
20 This is an invitation. This is a solicitation. I'm
21 encouraging you to make a bid. He was candid about what
22 he hoped would happen, but he never said those words to
23 Mr. Flaherty. And I think that's sometimes gets confused
24 here when you hear this bid and bid high. That was in
25 response to a question, what were you thinking in your

1 own mind, not what did you say to the man. And you heard
2 Mr. Flaherty acknowledge there were no conversations
3 during this period.

4 So you read those e-mails and you ask yourself
5 did anybody make a \$2 billion business decision because
6 of some e-mail banter that week? And the one on January
7 23, Mr. MacLatchy says he expects the Ventas deal to
8 close. So that's the MacLatchy made me do it excuse.

9 Then there's Ventas blacked us. We would have
10 got a deal with SSL, but Ventas, point a finger at them,
11 they got in the way. Well, what did Ventas do? It tried
12 to protect its deal. You saw under the confidentiality
13 agreement there was a written prohibition against HCP
14 talking to SSL. And Ventas did try to salvage its deal
15 and protect itself, as anybody would. They didn't do
16 anything inappropriate. They didn't interfere by any
17 kind of wrongful conduct. They asserted the protections
18 they were due under a contract.

19 And HCP wants to say, well, it's Ventas's
20 fault. But HCP, you recall, was sending out agreements
21 that she said SSL could just sign. Did they ever once
22 take the agreement that Ventas had, make no changes in
23 it, sign their name to it, and send it to SSL and say,
24 sign here. They didn't have to talk in order to do that.
25 You'll see in the February 20th letter, they say we don't

1 have to talk, we can just send an agreement and they can
2 countersign it. So if SSL -- if HCP really wanted to get
3 a deal, a good way to start is just send them the Ventas
4 agreement with their name in it and sign it. They never
5 did that. So don't blame Ventas that you don't make a
6 proposal that's as good as the Ventas proposal to get
7 this done.

8 And you heard Ms. Cafaro testify, and there's
9 her e-mail on this subject, that when she learned on
10 February 23 that she was being used as the excuse by HCP
11 for why they weren't getting their SSL deal done, she got
12 out of the way. She wrote to Mr. Newell and said, I'm
13 going to drop this point on this language preventing you
14 talking to HCP. So this is an excuse for why they didn't
15 get a deal done. It doesn't explain what they did here
16 or excuse their wrongful conduct.

17 And we heard more generally that after
18 February 14th, Sunrise REIT encouraged us. Well, Sunrise
19 REIT was consistent from day one about one thing. They
20 would not consider an offer superior if it was
21 conditional. That never changed. There was enormous
22 pressure brought to bear, I would say, coercive pressure
23 brought to bear on Sunrise REIT by these buyers at \$18.
24 Abandon your contract with Ventas. Don't honor your
25 obligations. Get people to show up at court and put that

1 pressure on them. But Sunrise REIT, to its credit, and I
2 think you'll get an instruction from this on the Judge,
3 they never breached their contract. They held to the
4 firm position that a superior proposal requires an
5 unconditional proposal.

6 So whatever so-called encouragement they gave,
7 they held to the requirements of the contract and said,
8 we're not going to consider this until you bring us an
9 unconditional proposal that you can't back away from.
10 And HCP never ever gave them an unconditional signed bona
11 fide legally permitted proposal.

12 Next excuse. Well, you guys can't prove that
13 the unit holders would have approved 15. I think the
14 evidence was very clear on this point. Again, a record
15 premium. No one ever paid \$15 for this stock. Every
16 shareholder would have profited. Every analyst predicted
17 approval. Target price had been \$10, \$11. Most of the
18 shareholders were Canadians where these properties were
19 undervalued.

20 And if we could get look at the next slide.
21 You heard the two shareholders that HCP wants to say
22 would have voted against this transaction. And you heard
23 their testimony was Mr. Smith said, my honest answer is
24 I'm not sure. You recall that before he heard about the
25 \$18, he called this a home run. It was called a home run

1 in his communications. They were thrilled with the 60
2 percent profit.

3 You know, of course once somebody waves \$18 in
4 front of you, you're not going to see things the same if
5 you would you never heard \$18. But everybody, when they
6 were asked the question -- and Mr. Bigman said too, I
7 can't say for sure how I would have voted. These guys
8 are fiduciaries. It's not just their money. They've got
9 other people. Again, the retirement funds, the pension
10 plan money is there. They got to do the right thing.

11 So think about it. You got stock at \$10 or
12 \$11 if the best deal on the table ever is \$15 and
13 nobody's ever paid \$15 for this stock, are you going to
14 turn around to your shareholders and said, I voted that
15 down. I didn't get you the profit you would have made on
16 that transaction? I don't think so. And Professor
17 Fischel even yesterday said everybody expected this
18 agreement was going to be approved until HCP acted on
19 February 14th.

20 And why if HCP believed it wasn't going to be
21 approved, did they act? In fact, you did not see a shred
22 of evidence from HCP's own documents from HCP's own files
23 to suggest that they believed it would be voted down.
24 Yet, another excuse from HCP.

25 And another one we heard was, well, we used

1 lawyers and we use bankers. You heard Mr. Shean get on
2 the stand, you heard Mr. Pickette get on the stand and
3 say, I was associated with this transaction. Well, look,
4 folks, at the end of the day it's HCP's press release.
5 It's HCP's decision. Stop blaming other people for your
6 own actions and take responsibility and accountability
7 for the decisions and choices and actions you make. If
8 it was a defense to significantly wrongful conduct that
9 you employed lawyers and bankers, there would not be a
10 corporation in this country that would ever be
11 accountable for anything.

12 Of course they use lawyers and bankers, but
13 the lawyers and bankers don't know everything that
14 Mr. Flaherty knows, what he's up to. They're told to do
15 this or to do that, and they do it professionally. But
16 you can't blame them or you can't say what you did is
17 perfectly permissible because these firms or these
18 individuals were acting as part of your team. That
19 doesn't absolve you from responsibility of your own
20 decisions and your own conduct, and it's time people took
21 responsibility for their own decisions and their own
22 conduct and stop shifting it on other people.

23 And this one I love. It's, well, all we were
24 doing was offering more money. We were just trying to be
25 good to the shareholders of Sunrise REIT. And there's

1 one problem with this excuse, which is that they weren't
2 offering more money because they were legally prohibited
3 and the Canadian court found they couldn't even pay this
4 money, they couldn't go forward with this, and they never
5 submitted a superior proposal. And they, you know, they
6 knew they had all these advisors pouring over this stuff.
7 They knew with an SSL out with these legal issues, they
8 could not deliver this money. And HCP's bid, again, was
9 based on this whole assumption of getting development
10 rights. It was not necessarily more money. It was going
11 to be renegotiated once they negotiated on the
12 development rights.

13 Final excuse, and this is just kind of the
14 overriding theme or excuse in this case. And that is to
15 tell you this is just business. This is just the way
16 that business is done in this country. This is just
17 competition. And I think one of the wonderful things
18 about being able to come into this courtroom is to have
19 all of you make that decision. It's really one of the
20 great things about this country and about having a jury
21 system is that all of us at some point in our lives get
22 to make a decision that affects the way that other people
23 are going to behave and conduct themselves in the future,
24 and you can make a difference in making that decision.

25 And you can answer for yourself the question.

1 Is it just business to lie to people? Is it just
2 business to cheat and break every single rule? Is it
3 just business to go to the media and tell them that
4 you've got \$18 million good on the table, identical deal
5 greater certainty of closing when you know that's not the
6 case? Breaching your contract. Manipulating the market.
7 I suggest to you that that's not just business.

8 And we're going to ask you at the conclusion
9 of this case to enter a verdict that will be understood
10 that will send a message that says this is not business
11 as we accept it. This is significantly wrongful conduct.
12 It involved deceit. It involved fraudulent
13 misrepresentations, and it involved coercion. And that
14 is not acceptable or just business.

15 Now finally, if we could see the next slide.
16 I want to mention Ventas's damages. The damages that
17 Ventas is seeking is \$101,672,807. That represents the
18 difference between what Ventas would have paid had its
19 contract been honored and what it had to pay because of
20 HCP's significantly wrongful conduct. And, again, I say
21 to you Ventas does not come into this court seeking a
22 penny more than what it would have received had its
23 contract been honored.

24 Now, I want to talk to you just briefly about
25 the verdict form and the questions you're going to be

1 asked to answer in this case. There are several issues
2 that you're going to have to decide under the jury
3 instructions. One will be did we have a reasonable
4 expectation of getting our deal done. I've talked about
5 that.

6 Was HCP's wrongful conduct a substantial
7 factor in disrupting that expectation? Clearly it was.
8 The deal would have closed without it. And you'll be
9 asked whether this was, in fact, significantly wrongful
10 conduct such as fraud, a fraudulent misrepresentation,
11 deceit, coercion. And clearly it was.

12 And you'll also be asked a question about the
13 role of Sunrise REIT in all of this and I want to talk
14 about that for a minute, too. The first question you'll
15 be asked is did we meet our burden of proof on HCP's
16 tortious interference. I hope that you check the box yes
17 and say that we did.

18 And then you'll be asked was there fault by
19 Sunrise REIT. And there will be a question for you to
20 answer there and instructions on that. And I hope that
21 you will find that Sunrise REIT was not to blame. That
22 whatever they did was a result of the position they were
23 put in by HCP, and that HCP is the party here who caused
24 everything to happen and turn the world upside down, and
25 that the fault rests with HCP. There's no fault that

1 rests with Sunrise REIT.

2 And if you answer that question, no, you don't
3 have to fill these out. I filled them out just to show
4 that they could be filled out. If you answer the
5 question, yes, then you'll be asked, well, what
6 percentage of the fault was HCP's and what percentage was
7 Sunrise REIT. And to make it clear, if, for example, you
8 were to find just to make the math easy, \$100 million of
9 damage for Ventas and you were to find HCP 90 percent
10 responsible and Sunrise REIT 10 percent, then Ventas
11 would only get 90 percent of this number.

12 But it doesn't mean that you should write in
13 90 percent down here. You should decide what is Ventas's
14 damage, and then if there's any percentage allocation the
15 Judge will do the math on that. So the Judge will take
16 the damage number and multiply it by the percentage by
17 which HCP has its share of fault. So I don't -- if there
18 is a reduction, and I hope there shouldn't be. I really
19 hope this is 100 percent and you say, no. But we want to
20 make sure that there's not a double multiplying.

21 So in other words, if you take this number
22 down by 10 percent and you put 10 percent fault here,
23 then your number is going to get reduced by another 10
24 percent. So this is the question simply of what was
25 Ventas's damage. And I think that number is clear. The

1 damage was the difference in the purchase price. Our
2 damage is \$101,672,807, and I hope you say Sunrise REIT
3 had no fault.

4 If you find fault, I would hope it would be a
5 very small percent or 1 percent, but it should be a 0
6 percent. But in all event our damages are our damages
7 and the math from here to here will be for the Judge to
8 do. I hope that that's clear and I'm sure His Honor will
9 make that clear, as well.

10 So I want to thank you again for your
11 patience. I know you've -- we've seen throughout the
12 trial paid very careful attention to this case. I
13 apologize to you for the times we had to go up to the
14 bench for the times that got wasted. I know that this
15 took days out of your lives, but we generally do
16 genuinely appreciate it, regardless of your verdict.
17 You've really, again, put your lives on hold to be here
18 to make these decisions and we appreciate that. I will
19 have a short opportunity to talk to you again after
20 Mr. Hansen has spoken to you and, again, thank you for
21 everything.

22 THE COURT: Thank you very much. All right.
23 Ladies and gentlemen, we're going to take a brief break.
24 Sort of let everybody had a break, if you could just let
25 me know. I would anticipate it being, you know, ten to

1 fifteen minutes max, and then we'll come back and hear
2 the remainder of the arguments. Okay? And I would say
3 don't start talking with each other about the case, yet.
4 You haven't heard all the arguments, so I think it's
5 better to wait, and you haven't heard my instructions, so
6 it's better to wait until you heard all the arguments,
7 heard the instructions, and then you have plenty of time,
8 thanks.

9 (Jury leaves the courtroom.)

10 THE COURT: Take ten or fifteen minutes.

11 (A brief recess was then taken.)

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C E R T I F I C A T E

I, CAROLA G. STRIJEK, RPR, THE UNDERSIGNED, AND
NOTARY PUBLIC-COURT REPORTER, DO HEREBY CERTIFY THAT AT
THE TIME AND PLACE STATED HEREIN, I RECORDED THE
FOREGOING PROCEEDINGS BY STENOGRAPHY MEANS AND THEREAFTER
TRANSCRIBED WITH COMPUTER-AIDED TRANSCRIPTION, AND THAT
THE FOREGOING TRANSCRIPT OF PROCEEDINGS IS A COMPLETE AND
ACCURATE REPORT OF MY SAID STENOGRAPHED NOTES.
MY COMMISSION EXPIRES: SEPTEMBER 26, 2012.

S: / _____
CAROLA G. STRIJEK DATE

1 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
2 LOUISVILLE DIVISION

3
4 VENTAS, INC.,) Case No. 3:07CV-238-H
)
5 Plaintiff,)
)
6 VS.)
)
7 HCP, INC.,)
) September 3, 2009
8 Defendant.) Louisville, Kentucky

9 *****

10 VOLUME 12B
11 TRANSCRIPT OF JURY TRIAL
BEFORE HONORABLE JOHN G. HEYBURN II
12 UNITED STATES DISTRICT JUDGE

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1 for you to pay, again, close attention to Mr. Bradford, who
2 will have 15 minutes for his rebuttal.

3 I'll let you know at two minutes.

4 MR. BRADFORD: Thank you, Your Honor. I appreciate
5 that.

6 Thank you again, ladies and gentlemen. I know it's been
7 a long morning for you. I appreciate your patience.

8 When Mr. Phillips talked to Mr. Flaherty on February
9 14th, the question he asked was, "Why isn't the agreement
10 signed?" Now they want to tell you that that question was
11 answered by Mr. Flaherty saying the documents had been signed
12 and Fed Ex'd to you. The next day they are looking for the
13 signature on the agreement. There was no dispute about what
14 signatures were asked for that night. They had a signed
15 letter. He specifically asked him, "Where is the signed
16 agreement?" Mr. Flaherty said, "The signed documents will be
17 there tomorrow." He was obviously concealing the fact that he
18 was not prepared to sign the agreement.

19 If you have any doubt about that, there is the telephone
20 call the next day about faxing the signature on the
21 agreements. Why would he lie about that if there was not
22 deceit and fraud going down? And why would somebody go out to
23 the public markets -- this is not how they did the Slough
24 deal. This is not how they did the CNL deal. This is not how
25 you do any deal. Why would you issue a press release before

1 you are ready to write out a check?

2 We hear that proposals are sent, these January 8th
3 proposals, these are nonbinding proposals. They say private
4 and confidential on the top of them. Nobody goes to the media
5 with them to try to negotiate. Ask yourselves, use your good
6 judgment, your common sense, what would be the purpose of
7 going to the media when you know you've got a confidentiality
8 agreement that explicitly prohibits you from doing so? There
9 was one purpose to go to the media. It's obvious to everybody
10 in this case. They wanted the stock price to be at \$18 the
11 next day.

12 Why would you not advertise if you have got problems in
13 your deal? I don't have the necessary agreement with SSL yet.
14 I don't have board authorization to sign this agreement. Why
15 not even put the condition in the agreement? It's because you
16 want the market to think that this is money good in your
17 pocket right now, that it's safe to start buying this stock
18 because we are superior to the Ventas agreement. That's what
19 it said. We are identical to the Ventas agreement. It was
20 not anywhere near identical or superior.

21 Yes, during the course of the day and the evening, the
22 truth worked its way out. That night Sunrise REIT effectively
23 busted Mr. Flaherty. Mr. Warren had his antenna up, and he
24 said, "I think it's bait and switch." They had to confront
25 him. He didn't come forward and volunteer what was going on

1 here. Then he lied about the signature to make the REIT feel,
2 "You are going to get a signed agreement here, and we will
3 take care of this condition very quickly, and don't worry
4 about it and don't go issuing any kind of press release that
5 shuts us down in the morning. We are going to work with you.
6 We will make this happen. We are going to get \$18 to your
7 shareholders." And that's what happens.

8 You see -- we are told there's no evidence or witnesses
9 coming in here who were testifying it was misleading.

10 Mr. Phillips testified directly it was misleading. He wrote
11 it that night. Mr. Turner of the trustees wrote that night in
12 their own words, "This is a misleading press release."

13 Mr. Bigman, Mr. Smith, the Wall Street guys, even they said
14 that this was a misleading press release. There is no doubt
15 about it.

16 So sure, they got caught at a point, and the fact that it
17 was conditional came out. But at that point 30 million shares
18 had traded. The world had changed.

19 Now put yourself in the shoes of the folks at Sunrise
20 REIT, who are now being accused of doing something wrong in
21 this courtroom. I believe His Honor will instruct you that
22 Sunrise REIT did not breach their contract. Sunrise REIT was
23 put in an impossible situation. They knew the agreement that
24 they were contractually bound to support was dead in the
25 water. It had been blown up, and there was no more chance of

1 approval. They have got shareholders and people phoning them
2 and saying, "You got to get us this \$18." And they know they
3 can't get the \$18. They know they have agreed that they can't
4 accept or even consider this kind of bid. HCP new full well
5 they couldn't do that.

6 He comes in here and tells you something about a
7 ground-breaking decision. When he asked Ms. Cafaro, "Why did
8 you write that this was a ground-breaking decision," she told
9 you the answer to that, and that's because the Canadian court
10 wrote that their arguments were so creative and strained.
11 Nobody dared to make an argument like that to a court before
12 that we can just defy our contracts. There's nothing
13 ground-breaking or unprecedented about the basic rule that you
14 live by your contracts and you honor your contracts.

15 I believe Mr. Hansen told you that the contracts have
16 nothing to do with this case. I believe the instructions will
17 tell you, yes, a breach of contract alone is not enough to
18 prove a case, but it is something you can take into
19 consideration in determining whether this was or was not
20 significantly wrongful. It does matter. It matters whether
21 people live by their word and whether they honor their
22 agreement, and every agreement that HCP made they breached.
23 They promised not to go public. That was clear, unambiguous.
24 They promised not to influence the shareholders. They did
25 that. They promised to return the confidential information.

1 They didn't do that. They lied about whether they had done
2 it. They knew they could not make a bid without prior written
3 permission from Sunrise REIT, and they went ahead and they did
4 it anyway. So you heard direct evidence of deception.

5 You heard this argument that there were no complaints
6 about what they did. There were complaints. People were in
7 the Canadian courts inside of a week raising the legality of
8 what HCP did. Of course, there were complaints. This went to
9 court inside of a week. The courts made the decisions. What
10 it found was that HCP's bid was not something that Sunrise
11 REIT could even consider because they had made a public bid
12 that was in violation of their confidentiality agreement.
13 They came before that court with unclean hands, and they come
14 before this court with unclean hands, and reprehensible
15 conduct is their legacy in this case.

16 To start pointing fingers at Sunrise REIT and everybody
17 else in the world, you know what, folks? Take accountability
18 for your own conduct. Take responsibility for your own
19 decisions and actions. It's great to say it's everybody
20 else's fault. It's like a kid saying, "I only hit that guy
21 because my friend told me to do it." You got to be
22 responsible for what you do in this life, and they are the
23 ones that put out the press release. They are the ones that
24 should be accountable.

25 We also heard, "Mr. MacLatchy made me do it."

1 Mr. MacLatchy never said, "Go put out a press release."
2 Mr. MacLatchy may have said in his own little e-mails, "I
3 would be delighted if you came back and tried to make the
4 superior proposal." That's not what they did. They put out a
5 press release and they made a proposal that had the out in it
6 that everybody knew was unacceptable. Mr. MacLatchy never
7 said, "Come back with an inferior proposal, a proposal with
8 an out." Mr. MacLatchy never said, "Go public with this." So
9 to blame Mr. MacLatchy for this is nothing short of
10 outrageous.

11 The December 29th bid letter. Now they want to say, "We
12 did what we did because of some bid letter back on December
13 29th." You'll see that bid letter. The bid letter didn't
14 say, "Put out a press release." The bid letter said, "It's a
15 private and confidential process here." The bid letter said,
16 "Send your communications to TD Securities."

17 On February 14th, they write a letter directly to Michael
18 Warren, and they publish it to the world. That's not what the
19 bid letter told them to do. The bid letter related to an
20 auction process that had concluded. Let's blame the REIT
21 because they wrote that bid letter.

22 They want to say, "Well, Ventas in its January 8th
23 proposal used the phrase 'we are confident.'" You bet they
24 used it because it was a nonbinding proposal. Ms. Cafaro
25 testified they were not making the SSL deal a condition of

1 their proposal. They hoped to get a deal done. But they were
2 not saying, "Yes or no, we are only going to do this deal if
3 we get something done with SSL." They said, "This is not
4 binding. We are not prepared to tell you that we can sign the
5 agreement."

6 The difference is on February 14th, HCP said they were
7 making a superior proposal. They told the market that this
8 was an offer, an identical agreement to what was an
9 unconditional signed agreement. It was far from identical.
10 That was a false fabrication by HCP.

11 Ventas signed that agreement the night of January 14th.
12 Nobody went home till there was a signed agreement. So don't
13 tell me what Ventas did in sitting down and negotiating and
14 signing an agreement and being ready to write out a check is
15 the same thing as going to the public markets in a press
16 release and telling the world that you have got an identical
17 offer that's not identical, a superior proposal that you know
18 can't be a superior proposal, that you know your contract
19 prohibits you from even offering. And again why? That's the
20 question? Why do you go to the media if you really want to
21 get a deal done here and now?

22 I don't dispute they want to buy these assets. There's
23 going to come a point in time when they were going to
24 negotiate. They are great negotiators. Yes, they were
25 setting up a negotiation for a later date. But in order to

1 get to that negotiation, they had to blow up the Ventas deal.
2 Otherwise the shareholders approve it, and they are not going
3 to get these assets.

4 That's a situation they put themselves in by decision
5 they made on January 14th. But they don't want to take
6 responsibility for that decision either. They want to blame
7 SSL for it.

8 So now they have got to blow up this deal. There is no
9 legitimate way to do it. There were legitimate ways to try to
10 buy the REIT. They could have sat down and tried to
11 negotiate. They could have offered to pay or negotiate with
12 Ventas, which is entitled to a \$40 million breakup fee. They
13 could try to sit down and negotiate with SSL.

14 Going to the media is not a way that anybody in this
15 country tries to get a deal done with another party. That is
16 not what they were trying to accomplish. The effect of their
17 behavior -- they are very smart people. They didn't make
18 mistakes. They knew exactly what they were doing.

19 What was the consequence of their behavior? Stock price
20 goes to \$18, Ventas deal is dead, and there is no contract
21 between HCP and Sunrise REIT. So give them credit for
22 accomplishing what they set out to do because their behavior
23 was certainly determined and likely to result in that outcome.
24 If the outcome they really wanted was to get a deal right then
25 and there for \$18, what would they have done? The same thing

1 they did on Slough and every other deal, sit down and talk to
2 SSL, sit down and talk to Sunrise REIT, and work out a deal
3 and then go hand-in-hand to the public markets, not in
4 hand-in-hand to court to defend a breach of your contract and
5 to try to find a way to excuse your behavior when there is no
6 excuse.

7 Now they want to say, "Oh, we didn't know for sure that
8 an unconditional offer would be not superior." You heard
9 Mr. Flaherty acknowledge, I think I put it up earlier today,
10 that he knew that this could not be considered a superior
11 proposal unless or until it was unconditional. So however
12 certain he thought he was or wasn't about getting an SSL deal,
13 and, frankly, SSL would have negotiated, it was -- HCP, who
14 never sat down and tried to negotiate with them either before
15 February 14th, during the call on February 14th or any time
16 until they could blame Ventas for not being able to do it,
17 none of them ever tried to get that negotiation done.

18 If you want to come forward and tell the market that you
19 have got a real good deal, then go to your SSL deal first.
20 Don't go issue a press release and say, "I'll work it out with
21 these guys later," and let everybody believe that they are
22 going to have \$18 on the table. Why did the stock go to \$18?
23 Only because people thought it was money good, no catches.

24 Sure, the stock went down. You saw the graph. If we
25 could put the stock chart up for a minute. You'll see when

1 the news comes out, the stock does start to come down. HCP is
2 putting out press releases saying that, "Oh, we are very close
3 to doing a deal here. We are very close to just two minor
4 terms" when, in fact, they are deal killers. Actually the
5 Canadian courts ruled, as you'll hear, you've now got 30, 40
6 million shares bought at 18. You heard it doesn't go down
7 overnight. People have now paid \$18. Not everybody is going
8 to take their losses and sell their stock.

9 But the stock price does go down because people know that
10 this is not a legitimate offer.

11 THE COURT: About a minute.

12 MR. BRADFORD: Okay. I want to just mention quickly
13 on the shareholders, Mr. Bigman, Mr. ING, on which they
14 relied, they were lobbied, they were improperly influenced
15 here. You heard ING say, "We need -- potentially Mr. Flaherty
16 is just playing us to make Ventas pay more." They have never
17 to this day made a bona fide offer for Sunrise REIT. Never to
18 this day.

19 Finally, I would just say to you on the significantly
20 wrongful conduct issue -- and this is I think, again, the
21 wonderful thing that you all get to decide, what is
22 competition, what is acceptable. There's got to be rules.
23 People have to follow the rules. It is not competition when
24 you have a set of rules and you don't play by those rules and
25 you break every one. It's not competition or business as

1 usual in this country when you put out a press release that
2 you know is misleading and false. It is not competition to
3 lie to somebody about signing an agreement.
4 I hope that whatever you do in that jury room, you make a
5 decision that sends a message from here in Louisville,
6 Kentucky, that is going to get heard in Long Beach,
7 California, and is going to get heard on Wall Street, and
8 please tell them that is not business as usual or business as
9 it should be. I thank you very much.