

1 the arguments that you heard this morning.

2 Again, Your Honor, note that in this count Doctor
3 Kaswan, individually, is the Plaintiff. It is not KFL
4 who is the Plaintiff on the breach of fiduciary duty, and
5 she is complaining about a 2003 transaction, the Allergan
6 buy down. But in 1999 as we showed before, Doctor Kaswan
7 assigned her interest to KFL. KFL has not asserted a
8 claim. It probably recognizes that it would be frivolous
9 because there's no duty owed to KFL, no fiduciary duty
10 under any theory. After the assignment, UGARF had no
11 legal relationship with Doctor Kaswan at all.

12 Assuming that Kaswan, individually, has a legal
13 interest, UGARF is not a fiduciary. Our own interest
14 predominated. The sort of the hallmark of a fiduciary
15 relationship is that you subordinate your interest to
16 those of your principal. Here, our own interest
17 predominated to the tune of 65 percent in this particular
18 case and 75 percent in the vet end of it. We are
19 required to perform our charitable corporate
20 person -- purpose, not Kaswan personal's interest. We've
21 already talked about that. UGARF is an affiliated quasi
22 public corporation, as it were. It is there to assist
23 the purpose of the Board of Regents and the University of
24 Georgia. We're not there having fiduciary duties to
25 individual inventors. Our sole legal relationship with

James J. Meyer
Official Court Reporter
Western Judicial Circuit
Athens, Georgia
(706) 613-3172

1 her was to pay her net income, if any. Purely a
2 contractual duty, not a fiduciary duty.

3 Also, our ownership of patents and discretion to
4 administer patents negates a fiduciary duty. You simply
5 cannot read these agreements without saying first of all
6 that UGARF is the owner of the patent. UGARF has the
7 right to commercialize the patents. Our only duty is to
8 pay her a share, or KFL a share of the net income, if
9 any, that we went through our efforts of
10 commercialization. It's not -- it's a purely contractual
11 duty. It's not a fiduciary duty. There's nothing I
12 think -- I think Mr. Devine conceded this. There's
13 nothing in the agreement that says our right to
14 commercialize is limited by a duty to the inventor. She
15 doesn't get a chance to veto. She doesn't get to do
16 anything. The University of West Virginia Board of
17 Trustees v. Van Voorhies. The same contractual frame
18 work as we see in this case is involved obviously in the
19 University of West Virginia. It's a federal circuit
20 case. The court there said we agree with WVU that the
21 relationship between WVU and Van Voorhies as set forth in
22 the assignment and patent police does not establish any
23 fiduciary duty on WVU's part.

24 The implied joint venture, we argued that earlier
25 this morning. I'm not going to go over that again. Even

1 if there was a duty, it wasn't breached. It appears that
2 the allegations now boil down to a complaint that the
3 UGARF board undersold future royalties. That's what this
4 case seems to be about. The complaint trying to second
5 guess the board, the same way, you undersold future
6 royalties. The Kucharczyk v. The University of
7 California case has been mentioned before, instructive on
8 this point. There, the professor has alleged the
9 university entered into a grossly one sided agreement.
10 The court said the agreement grants discretion to the
11 university in conducting negotiations. The Court said no
12 evidence of bad faith or reason why the university would
13 have intentionally helped the licensee and harmed itself.
14 And then the court said the plaintiff's claim is akin to
15 strict liability for an error in judgement.

16 I know you've had this quotation cited to you before
17 I'm going to cite it again. In the case the Court said
18 if the Court were to accept Plaintiff's argument it would
19 be tantamount to imposing strict liability upon the
20 university for the actions of the patent office. If this
21 were the true meaning of the patent policy, an inventor
22 could sue the university anytime he felt the university
23 errantly underestimated its bargaining power vis-a-vis a
24 commercial entity who wished purchase a license to the
25 invention. More generally every time the university made

1 an error while exercising its duties as set forth in the
2 patent policy the person would have -- who would have
3 received more money but for that error would be allowed
4 to sue for breach of contract. Logic as well as the
5 plain meaning of the patent policy belies such an
6 interpretation.

7 THE COURT: Well, when would someone who had
8 assigned their patent have the right to bring a claim?

9 MR. LARKINS: You're talking about under the UGARF
10 policy?

11 THE COURT: Under these -- Yes.

12 MR. LARKINS: First of all, I would say that the
13 clear right to bring a claim would be if you were not
14 paid what you should have been paid. In other words if
15 the university collected a \$1,000 and you weren't paid
16 your 25 percent or 35 percent, you have a right to sue.

17 Now, if your question is when can they challenge the
18 licensing decisions of the board, I would say number one,
19 they can't do that because the sole discretion as to
20 decisions of that nature are vested in the UGARF, in
21 UGARF itself. UGARF itself has the exclusive right to do
22 that, and that's been bargained away. But even if there
23 were, and let's assume that's wrong. Let's assume that
24 there is a duty of good faith in the licensing process,
25 let's assume that a duty of good faith is inherent in

1 that, then what you would do, the inquiry would be did
2 the board act in a reasonable exercise of its discretion.
3 You cannot come in as they have attempted to do and say
4 you're expert said it was fair and reasonable to sell it
5 for 23 million plus milestones, et cetera. Our expert
6 disagrees. You can't do that because the issue is not
7 whether experts would agree or disagree. The issue is
8 when they made that decision did they exercise that
9 decision in good faith.

10 And the evidence here is what? Approached by
11 Allergan, long bargaining process, terms being enhanced,
12 expert IPAC retained. Expert and they want to say well,
13 this doesn't amount to much. This is one of IPAC's
14 analyses. Intricate analysis. Fair and reasonable
15 opinion. Come to a board meeting made of members of the
16 community who have no animus against Doctor Kaswan, whose
17 only interest is to serve the University of Georgia and
18 the corporate purposes that they have in their agreement.
19 IPAC comes in and presents their opinions, says
20 let's -- we're here to answer questions. We're making
21 presentations. And they make a decision. They make a
22 decision balancing the risks, balancing all their duties
23 and that's good faith. And the issue, if we're going to
24 be in this case trying to determine what is right and
25 what is wrong as far as a number that this should have

1 been sold at, that's not the right inquiry. The inquiry
2 is did they exercise their discretion in good faith.

3 THE COURT: But you said there was no obligation to
4 do that anyway.

5 MR. LARKINS: That's right. I think they could
6 have -- I think the contract gives them the right to do
7 whatever they wanted to, but even if this court were to
8 disagree with that, or you say I don't even need to get
9 that far, even assuming that it had -- we exercised our
10 discretion in good faith.

11 Again, it's getting back to the common sense example
12 I did about my telling somebody to sell a car. Again,
13 it's not the question of whether he got the right number
14 or didn't get the right number. He comes in and says,
15 look, I went and conferred with a person I thought knew
16 what the right answer was and he gave me this advice and
17 I followed this advice. That's all this required. I
18 think that is really the crucial analysis on all of these
19 points here.

20 So in summary, Your Honor, I would respectfully
21 submit that the Research Foundation is entitled to
22 summary judgment on these remaining counts. There is no
23 genuine issue of material fact, and we are entitled to
24 judgment in our favor.

25 THE COURT: Thank you, Mr. Larkins. Mr. Devine.