

**APPENDIX A**

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 16-1669

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UNITED STATES OF AMERICA EX REL.  
ROBERT P. BAUCHWITZ, M.D., PH.D.,  
Appellant

v.

WILLIAM K. HOLLOMAN, PH.D; CORNELL  
UNIVERSITY MEDICAL COLLEGE; ERIC B.  
KMIEC, PH.D; THOMAS JEFFERSON UNIVERSITY

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(E.D. Pa. No. 2-04-cv-02892)

District Judge: Honorable Timothy J. Savage

Submitted Under Third Circuit LAR 34.1(a)  
October 25, 2016

BEFORE: VANASKIE, KRAUSE, and NYGAARD,  
*Circuit Judges*

(Filed: November 29, 2016)

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OPINION\*

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NYGAARD, *Circuit Judge*.

In June of 2004, Appellant, Robert P. Bauchwitz, filed a *qui tam* action against William K. Holloman, Cornell University Medical College, Eric B. Kmiec, and Thomas Jefferson University. This appeal purportedly springs from a show cause hearing that took place on October 17, 2005 and concerned Appellant's counsel's request to withdraw representation. Although this hearing was entered on the docket, no transcript was ever produced nor does it appear from the docket that one was ever contemporaneously requested. In December of 2009, the District Court granted summary judgment to Thomas Jefferson University and Dr. Kmiec, but denied the same to Cornell University Medical College and Dr. Holloman. *See United States ex rel. Bauchwitz v. Holloman et al.*, 671 F.Supp.2d 674 (E.D. Pa. 2009). In April of 2010, the District Court dismissed the remaining case with prejudice by stipulated order. No appeal was taken from that dismissal.

Appellant alleges that he sought to obtain a transcript of the show cause hearing through contact with the District Court Clerk's Office. The Clerk's Office informed Appellant in September of 2012 of an equipment malfunction and that there were no court

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

reporters notes available from the hearing. Appellant then filed a motion requesting access to the court reporter's original stenographic record and/or untranscribed recordings of the October 17, 2005 hearing. The District Court held a hearing on that request which was denied a few months later. Appellant has appealed the denial of that motion.<sup>1</sup>

On appeal, Appellant contends that he has a First Amendment right of access to a transcript of the hearing and, if the Court cannot provide that, this right of access extends to any "storage media" on which the hearing record may be stored. Appellant's Br. at 7. Accordingly, Appellant argues that he should be permitted to have a forensic expert investigate any such media that is in the Clerk's office possession in order to attempt to extract the lost data and recreate the hearing transcript. In denying relief, the District Court noted that "there is no storage medium that can be used to create a transcript of the hearing," and it could not provide Appellant something that does not exist. Specifically, the District Court determined that the notes and hearing testimony were never transcribed. The scant record on appeal likewise provides us no basis to grant relief. Eleven years has passed since the hearing date; six years have passed since the case was dismissed with prejudice; the court reporter has long

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<sup>1</sup> Shortly after the Notice of Appeal was filed, Thomas Jefferson University, Cornell College of Medicine, Eric Kmiec and William Holomon informed us that they would not be participating in this appeal and indicated their belief that Appellant's arguments were an exercise in futility.

since retired; and the stenographic equipment no longer functions. Thus, the District Court's determination that the information Appellant seeks does not exist is credible.

And even if Appellant's First Amendment right of access to judicial documents extended to the storage media he seeks, he has no right of access to storage equipment that is not within the court's files. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994) (observing that "even where there is no dispute that documents were at one time judicial records, once such documents are no longer part of the court file they lose their status as judicial records"). Therefore, the District Court did not err by denying the Appellant's request for access to a non-existent stenographic record, and we will affirm.

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA EX REL.  
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District Judge: Honorable Timothy J. Savage

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October 25, 2016

BEFORE: VANASKIE, KRAUSE, and NYGAARD,  
Circuit Judges

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JUDGMENT

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This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on October 25, 2016.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the orders of the said District Court entered on February 25, 2016 and February 26, 2016, be and the same are hereby AFFIRMED.

Costs are taxed against the Appellant.

All of the above is in accordance with the Opinion of this Court.

ATTEST:

s/ Marcia M. Waldron  
Clerk

Dated: November 29, 2016

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**APPENDIX B**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT**  
**OF PENNSYLVANIA**

<b>UNITED STATES OF</b>	<b>:</b>	<b>CIVIL ACTION</b>
<b>AMERICA, <i>ex rel.</i> ROBERT</b>	<b>:</b>	<b>NO. 04-2892</b>
<b>BAUCHWITZ, M.D., Ph.D.</b>	<b>:</b>	
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	
<b>WILLIAM K. HOLLOMAN,</b>	<b>:</b>	
<b>Ph.D., <i>et al.</i></b>	<b>:</b>	

**ORDER**

(Filed Feb. 24, 2016)

**AND NOW**, this 24th day of February, 2016, upon consideration of the Motion for Access to Court Reporter's Original Stenographic Hearing Records (Document No. 137) and after a hearing, it is **ORDERED** that the motion is **DENIED**.<sup>1</sup>

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<sup>1</sup> The plaintiff moves for production of the court reporter's records of a hearing held on October 17, 2015, The hearing was to show cause why the plaintiffs former attorney should not be permitted to withdraw his appearance.

It is not necessary to address Dr. Bauchwitz's entitlement to a transcript of the proceedings. Assuming that he is, we still must deny his motion because what he seeks does not exist.

The notes were never transcribed. The court reporter's equipment malfunctioned so that a working copy of a disc was not created. Additionally, the long-retired court reporter does not have his notes or a file. Nor can the Clerk locate any notes of the hearing. In short, there is no storage medium that can be used to

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/s/ Timothy J. Savage  
TIMOTHY J. SAVAGE, J.

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create a transcript of the hearing. Therefore, it is not possible to provide Dr. Bauchwitz what he seeks.

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**APPENDIX C**  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT**  
**OF PENNSYLVANIA**

<b>UNITED STATES OF</b>	<b>:</b>	<b>CIVIL ACTION</b>
<b>AMERICA, <i>ex rel.</i> ROBERT</b>	<b>:</b>	<b>NO. 04-2892</b>
<b>BAUCHWITZ, M.D., Ph.D.</b>	<b>:</b>	
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	
<b>WILLIAM K. HOLLOMAN,</b>	<b>:</b>	
<b>Ph.D., <i>et al.</i></b>	<b>:</b>	

**AMENDED ORDER**

(Filed Feb. 25, 2016)

**AND NOW**, this 25th day of February, 2016, upon consideration of the Motion for Access to Court Reporter's Original Stenographic Hearing Records (Document No. 137) and after a hearing, it is **ORDERED** that the motion is **DENIED**.<sup>1</sup>

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<sup>1</sup> The plaintiff moves for production of the court reporter's records of a hearing held on October 17, 2005. The hearing was to show cause why the plaintiff's former attorney should not be permitted to withdraw his appearance.

It is not necessary to address Dr. Bauchwitz's entitlement to a transcript of the proceedings. Assuming that he is, we still must deny his motion because what he seeks does not exist.

The notes were never transcribed. The court reporter's equipment malfunctioned so that a working copy of a disc was not created. Additionally, the long-retired court reporter does not have his notes or a file. Nor can the Clerk locate any notes of the hearing. In short, there is no storage medium that can be used to

/s/ Timothy Savage  
TIMOTHY J. SAVAGE, J.

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create a transcript of the hearing. Therefore, it is not possible to provide Dr. Bauchwitz what he seeks.

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**APPENDIX D**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 16-1669

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UNITED STATES OF AMERICA EX REL.  
ROBERT P. BAUCHWITZ, M.D., PH.D.,  
Appellant

v.

WILLIAM K. HOLLOMAN, PH.D; CORNELL  
UNIVERSITY MEDICAL COLLEGE; ERIC B.  
KMIEC, PH.D; THOMAS JEFFERSON UNIVERSITY

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(ED. Pa. No. 2-04-cv-02892)

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SUR PETITION FOR REHEARING

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(Filed Dec. 28, 2016)

Present: SMITH, *Chief Judge*, AMBRO, FISHER,  
CHAGARES, JORDAN, HARDIMAN, GREENAWAY,  
JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO,  
and NYGAARD,\* *Circuit Judges*

The petition for rehearing filed by appellant in the  
above-entitled case having been submitted to the

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\* Pursuant to Third Circuit I.O.P. 9.5.3, Judge Richard L.  
Nygaard's vote is limited to panel rehearing.

judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Richard L. Nygaard

Circuit Judge

Dated: December 28, 2016

CJG/cc: David L. Finger, Esq.

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**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT  
OF PENNSYLVANIA

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UNITED STATES OF	)	
AMERICA ex rel. ROBERT	)	
BAUCHWITZ M.D., Ph.D.,	)	
	)	
Plaintiff,	)	
	)	CA. No.
v.	)	04-2892 (TJS)
	)	
WILLIAM K. HOLLOMAN,	)	
PhD., et al.,	)	
	)	
Defendants.	)	Electronically Filed

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**MOTION FOR ACCESS TO COURT  
REPORTER’S ORIGINAL STENOGRAPHIC  
HEARING RECORDS**

(Filed Oct. 16, 2015)

1. In actions brought under the False Claims Act, as with any other types of actions, there is a strong presumption in favor of public access to judicial records and proceedings. *U.S. ex rel. Grover v. Related Companies, L.P.*, 4 F.Supp.2d 21, 25 (D.D.C. 2013).

2. “Cases brought under the False Claims Act [also] receive special consideration by the courts because they ‘inherently implicate the public interest’ *United States ex rel. Durham v. Prospect Waterproofing, Inc.*, 818 F.Supp.2d 64, 67 (D.D.C.2011) (quoting

*United States ex rel. Littlewood v. King Pharmaceuticals, Inc.*, 806 F.Supp.2d 833, 840 (D.Md.2011)) (quoted in *U.S. ex rel. Grover*, 21 F.Supp.2d at 25). In FCA cases, taxpayers are, in effect, “real parties in interest” because they have a strong interest in fraud perpetrated against the United States that results in monetary loss to the Government. *U.S. ex rel. Grover*, 21 F.Supp.2d at 25-26 (quoting *United States ex rel Schweizer v. OCE*, N.V., 577 F.Supp.2d 169, 172 (D.D.C.2008)).

3. The right of public access also attaches to transcripts of judicial proceedings. *Publicker*, 733 F.2d at 1070-71; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F.Supp. 866, 897 (ED. Pa. 1981). Where a transcript is not available or unreliable, and there is an underlying recordation of the data, then that recordation is a judicial record subject to the right of access. *Smith v. U.S. District Court Officers*, 203 F.3d 440, 441-42 (7th Cir. 2000).

4. Movant had repeatedly requested transcripts from the Clerk’s office for the hearing held on October 17, 2005. He has been told that there is no stenographic transcript due to technical error in a letter dated September 20, 2012 from Joan Carr, Supervisor of Court Reporters for the Eastern District of Pennsylvania:

In response to your recent inquiry regarding the availability of the transcript of a hearing held before the Honorable Timothy J. Savage in the above-captioned matter on October 17, 2005, I was advised by the court reporter assigned to transcribe the hearing [Philip C.

Feldman] that the equipment he had used to burn a CD of the hearing apparently malfunctioned and that he does not have a working copy of the disk on which the hearing is recorded. The court reporter's files in storage in the Clerk's Office do not contain his notes of this particular proceeding, and the court reporter – who is now retired – cannot otherwise explain the absence of transcription notes of the hearing.

(Ex. A hereto).

5. Movant has not been afforded access to the underlying recording. He has not been afforded the opportunity to have a forensic examiner review the storage medium and determine whether a transcript can be recreated.

6. 28 U.S.C. § 753(b) states, in its plain language that “[t]he original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.”

7. Section 753(b) also states that “The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.”

8. It is responsibility of court to be certain that provisions of this section are strictly observed, with or

without request. *Edwards v. U.S.*, 374 F.2d 24, 26 n.1 (10th Cir. 1966).

9. As there currently is no transcript (much less a “reliable” one), movant should be allowed access to the electronic storage medium, damaged or otherwise, so that a forensic expert may attempt to restore it sufficiently to satisfy the public’s right of access. In addition, movant requests access to any stenographic paper output, or other document or file, including backup and audio files, relevant to this request.

Respectfully Submitted,

/s/ David L. Finger

David L. Finger, Esquire

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Robert Bauchwitz

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/s/ Ronald T. Tomasko  
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Fax: (717) 533-2795  
rtt@jfdc.com

Date: October 16, 2015      Local Counsel for the Plaintiff,  
Robert Bauchwitz

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[Certificate Of Service Omitted]

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**EXHIBIT A**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA  
U.S. COURTHOUSE  
INDEPENDENCE MALL WEST  
601 MARKET STREET  
PHILADELPHIA, PA 19106-1797**

**MICHAEL E. KUNZ  
CLERK OF COURT**

**CLERK'S OFFICE  
ROOM 2609  
DIRECT TELEPHONE  
(267)299-7184**

September 20, 2012

Robert Bauchwitz, M.D., Ph.D.  
324 Candlewyck Lane  
Hershey, PA 17033

RE: *Bauchwitz v. Hollomen*, C.A. #04-2892

Dear Dr. Bauchwitz:

In response to your recent inquiry regarding the availability of the transcript of a hearing held before the Honorable Timothy J. Savage in the above captioned matter on October 17, 2005, I was advised by the court reporter assigned to transcribe the hearing that the equipment he had used to burn a CD of the hearing apparently malfunctioned and that he does not have a working copy of the disk on which the hearing is recorded. The court reporters files in storage in the Clerk's Office do not contain his notes of this particular proceeding, and the court reporter – who is now retired – cannot otherwise explain the absence of transcription notes of the hearing.

Accordingly, should you wish to proceed In this matter, I refer you to the procedure set forth in Rule 10(c) of the Federal Rules of Appellate Procedure, which states in relevant part as follows:

**(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript is Unavailable.** *If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the*

*district court for settlement and approval. As settled and approved, the statement must be included by the district clerk-in the record on appeal.*

Thank you for your time and attention, and please feel free to contact me should you have any additional questions.

Very truly yours,

/s/ Joan Carr

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JOAN CARR,

Supervisor of Court Reporters

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