

Catalyst Capital Group
Inc. v. Brandon Moyse and
West Face Capital Inc.

Gabriel De Alba
on Wednesday, May 11, 2016

neelsons

141 Adelaide Street West, Floor 11
Toronto, Ontario
M5H 3L5

1.888.525.6666 | 416.413.7755

Court File No. CV-14-507120

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

--- This is the Examination for Discovery of
GABRIEL DE ALBA, taken at the offices of Lax
O'Sullivan Lisus Gottlieb LLP, 27th Floor, 145 King
Street West, Toronto, Ontario, on the 11th day of
May, 2016.

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1 A P P E A R A N C E S :

2
3 Andrew Winton, Esq., for the Plaintiff

4 Brad Vermeersch, Esq.,

5 & Rocco DiPucchio, Esq.

6
7 Robert A. Centa, Esq., for the Defendant,

8 Kris Borg-Olivier, Esq. Brandon Moyse

9 & Denise Cooney, Esq.

10
11 Matthew Milne-Smith, Esq., for the Defendant,

12 & Andrew Carlson, Esq. West Face Capital Inc.

13
14
15 ALSO PRESENT: (Via Live Streaming) Philip Panet,

16 In-House Counsel, West Face Capital

17
18 Greg Boland, West Face Capital19
20
21 REPORTED BY: Kimberley Neeson

22 RPR, CRR, CSR, CCP, CBC (RSA)

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I N D E X

WITNESS: GABRIEL DE ALBA

	PAGE
Examination by Mr. Milne-Smith.....	5
Examination by Mr. Borg-Olivier.....	215
Further Examination by Mr. Milne-Smith...	242

The following list of undertakings, advisements and refusals is meant as a guide only for the assistance of counsel and no other purpose

INDEX OF UNDERTAKINGS

The questions/requests undertaken are noted by U/T and appear on the following pages: 24:8, 34:1, 34:16, 38:13, 40:22, 43:5, 72:2, 86:25, 87:9, 88:8, 89:21, 98:15, 98:22, 105:9, 106:2, 106:21, 107:5, 107:9, 108:3, 109:7, 114:2, 114:9, 116:23, 117:12, 124:10, 126:24, 136:13, 144:9, 156:11, 160:4, 176:10, 185:9, 210:20, 218:11, 220:16, 222:15, 223:1, 223:21, 224:4, 227:1, 228:8, 229:8, 229:19, 241:12.

INDEX OF ADVISEMENTS

The questions/requests taken under advisement are noted by U/A and appear on the following pages:
19:16, 19:23, 20:5, 21:9, 26:6, 29:17, 34:7, 36:17,
42:9, 55:1, 83:19, 85:14, 186:22, 187:15, 193:25,
204:7, 209:18, 218:20.

INDEX OF REFUSALS

The questions/requests refused are noted by R/F and appear on the following pages: 96:7, 119:21,
196:10, 197:6, 197:11, 197:17, 213:4, 213:15,
214:1, 214:11.

1 -- Upon commencing at 8:05 a.m.

2 GABRIEL DE ALBA: SWORN.

3 EXAMINATION BY MR. MILNE-SMITH:

4 1 Q. Good morning, Mr. de Alba. Could
5 you please state for me your current position at
6 Catalyst?

7 A. Yes, good morning. I am a
8 managing director and partner of the Catalyst
9 Capital Group Inc.

10 2 Q. And you understand that you are
11 being examined on behalf of Catalyst?

12 A. Yes, I do.

13 3 Q. So the answers you give are
14 binding on behalf of Catalyst?

15 A. Yes.

16 4 Q. How long have you been at
17 Catalyst?

18 A. Since 2002.

19 5 Q. And is that when it was founded?

20 A. Yeah, basically around that time.

21 6 Q. And could you just briefly
22 describe for me your post-secondary employment
23 before Catalyst?

24 A. I started my -- well, after
25 completing university, I started at a bank in

1 Europe called Banker's Trust, basically working on
2 their international investment banking group.
3 After that I moved to Bank of America, working in
4 their international merchant banking group. I also
5 moved to -- as I was working on the private equity
6 side, I also worked on the capital markets side.

7 Q. Um-hmm.

8 A. After that I worked at AT&T Latin
9 America running the financial turnaround of that
10 company, and after that I joined Catalyst.

11 Q. When did you graduate university?

12 A. 1995.

13 Q. Where did you go to school?

14 A. New York University, Stern School
15 of Business. I also have an MBA from Columbia
16 Business School and graduate studies in mathematics
17 and computer science from Harvard.

18 Q. When were those obtained?

19 A. The MBA was obtained in 1997, the
20 program, and the studies in Harvard were conducted
21 around 2000 but I did not get a degree.

22 Q. And those were, you said,
23 mathematics and computer science?

24 A. Correct. I was working at the
25 time so I ended up not finishing.

1 12 Q. Right, understand. Have you been
2 examined for discovery before in previous cases?

3 A. Yes, I have.

4 13 Q. So you're familiar with the
5 process? Okay. If you don't understand a
6 question, please ask me to clarify it.

7 A. I will do, thank you.

8 14 Q. And if you don't ask me to
9 clarify, then I can safely conclude that you
10 understood the question; fair enough?

11 A. Okay, that's fair, thank you.

12 15 Q. In this examination, just to make
13 sure we're on common ground with some terminology,
14 if I refer to an incumbent wireless company, I'll
15 take you to understand I refer to Rogers, Bell or
16 Telus?

17 A. Yes, I do.

18 16 Q. Before we get to Wind, let's just
19 talk a little bit about other potential issues. We
20 know that Mr. Moyse sent a March 27, 2014 email
21 with four writing samples marked confidential. Are
22 you familiar with that email and that incident?

23 A. Can you please show it to me?

24 17 Q. Okay. It's WFC75126. And feel
25 free to scroll through, but I will tell you that

1 the four writing samples concerned four companies;
2 one was Rona, one was Homberg, one was a company
3 called NSINV, and the fourth was a company called
4 Arcan.

5 A. Do you mind going up? I see an
6 email --

7 18 Q. Yes.

8 A. -- dated March 27.

9 19 Q. Yes.

10 A. Which has -- from Tom Dea to
11 Mr. Greg Boland, Peter Fraser, Tony Griffin and
12 Yu-jia Zhu.

13 20 Q. Yes. And if you scroll through
14 the pages of that, you will see that there are
15 attachments. So starting on the seventh page of
16 the document, there is an attachment for Homberg
17 Investing?

18 MR. WINTON: Mr. de Alba is right now
19 just reading the email itself.

20 BY MR. MILNE-SMITH:

21 21 Q. I'm actually not asking you any
22 questions about the contents of the email.

23 A. I'm just getting familiar with the
24 email, if you don't mind.

25 MR. WINTON: Just while he's doing

1 that, Mr. Riley was cross-examined on this document
2 extensively, so we're only going to allow limited
3 scope for questioning in this discovery on this
4 document.

5 MR. MILNE-SMITH: I'm just updating.

6 THE DEPONENT: (Witness reads
7 document). Can you please repeat the question?

8 BY MR. MILNE-SMITH:

9 22 Q. Are you aware that the four
10 writing samples concern four companies, Rona,
11 Homberg, NSINV and Arcan?

12 A. Those are the attachments, yes, to
13 the email that was circulated.

14 23 Q. Yes. And am I correct that
15 Catalyst never pursued an investment in Arcan?

16 A. We never -- well, we analyze it.

17 24 Q. Yes.

18 A. We spend resources on it.

19 25 Q. Yes.

20 A. We spend team's time on it, which
21 cost us money, and then we did not make an
22 investment in terms of the securities but we did
23 invest time on it.

24 26 Q. I understand. And am I correct
25 also that there is no suggestion by Catalyst that

1 West Face ever made or pursued investment in Rona,
2 Homberg or NSI?

3 A. Could you repeat the question?

4 27 Q. You're not suggesting that West
5 Face tried to pursue an investment in Rona, Homberg
6 or NSI, are you?

7 A. I do not know what they pursued.

8 28 Q. Okay. That's fine if you don't
9 know. The point is, you have no evidence that West
10 Face pursued such an investment?

11 A. No, I don't have the evidence. I
12 personally don't.

13 29 Q. Putting aside Wind, which we're
14 going to spend most of today on, what confidential
15 information -- and putting aside this March 27
16 email --

17 A. Can I just -- I don't know if they
18 pursued again an investment of the securities. I
19 wonder if they spend time also looking at those
20 situations with the intention to invest.

21 30 Q. Okay, you wonder but you have no
22 evidence that they did?

23 A. Yeah, I don't have the evidence.

24 31 Q. Putting aside those four
25 companies, those four memos, and putting aside

1 Wind, which we're going to discuss for the rest of
2 the day, does Catalyst allege any other
3 confidential information was passed by Mr. Moyse to
4 West Face?

5 A. The concern exist because the
6 information was received by West Face and not
7 deleted or erased or even resulted in a
8 notification to Catalyst about what is a breach of
9 the disclosure of materials that result from our
10 work product and our methods.

11 32 Q. I understand your concern but I'm
12 asking a slightly different question. Do you
13 actually allege or do you have any evidence of any
14 other confidential information being passed by
15 Mr. Moyse to West Face?

16 A. We understand that there were
17 multiple meetings that took place between Mr. Moyse
18 and senior officers of West Face in which there
19 were discussions about the work product and about
20 the qualifications that Mr. Moyse has.

21 33 Q. Job interviews?

22 A. There were meetings.

23 34 Q. Yes.

24 A. What is interesting is that in a
25 job interview you should look for the skills of the

1 individual and in this case they were looking at
2 the work product of the individual, knowing that
3 the work product was confidential. I would not
4 qualify that as an interview. I will qualify that
5 as an enhancement towards passing information that,
6 again, belonged to Catalyst.

7 35 Q. Mr. de Alba, what evidence do you
8 have about what took place in those meetings?

9 A. I understand that the materials
10 that were included in this email were used as part
11 of the discussion in what is so-called job
12 interviews.

13 36 Q. How do you understand that, based
14 on what?

15 A. Based on the other emails that you
16 will see exchanged amongst members of West Face.

17 37 Q. So all you have are the emails and
18 whatever inferences you might draw from them?

19 A. There was -- there was also the
20 behaviour of Mr. Moyse which, throughout this
21 process, he did not, knowing that there was clear
22 conflict between West Face and Catalyst as to
23 potential competitive positions, including one
24 directly in Mobilicity and including one that was
25 tied up to Mobilicity which talked to the four

1 carrier, he still continued to be part of the teams
2 that were involved in those deals while having
3 these multiple interviews.

4 38 Q. How did Mr. Moyse know that West
5 Face was involved in a competitive situation when
6 he was at Catalyst?

7 A. Because at Catalyst we have a
8 weekly meeting; on those weekly meetings we discuss
9 the opportunities that we are considering and we
10 prioritize them.

11 39 Q. I'm asking a different question.
12 I'm not asking how he knew about what Catalyst was
13 pursuing. How did Mr. Moyse, when he was at
14 Catalyst, know what West Face was doing? Did you
15 know that at Catalyst?

16 A. In those discussions we analyze
17 who could be the competitors on a certain deal.

18 40 Q. Okay.

19 A. And it's natural that in Canadian
20 situations, West Face is a common competitor.

21 41 Q. Okay.

22 A. So much that when Mr. Moyse
23 resigns, he never discloses or he first does not
24 disclose to us that he is leaving for West Face.
25 So he himself recognized that that was not

1 something that is appropriate or easy as he tried
2 to hide it from us.

3 42 Q. So let's go back to my original
4 question. What evidence do you have of any
5 confidential information that Mr. Moyse passed to
6 West Face other than the four memos and putting
7 aside Wind?

8 MR. WINTON: He just answered that
9 question extensively.

10 MR. MILNE-SMITH: Okay, if that's all
11 there is.

12 BY MR. MILNE-SMITH:

13 43 Q. I take it, Mr. de Alba, you're
14 familiar with Wind's regulatory history?

15 A. Yes.

16 44 Q. You've studied the company?

17 A. Yes.

18 45 Q. So you're aware that in October
19 2009 or thereabouts the CRTC issued a decision that
20 Orascom's debt and equity position in Wind put it
21 offside the non-Canadian control prohibition. Are
22 you familiar with that?

23 A. Yes.

24 46 Q. And am I correct that in that
25 context, Globalive -- let me pause here and talk

1 about terminology. There are lots of Globalive
2 entities. When I say Globalive in this discovery I
3 am referring to the companies controlled by
4 Mr. Lacavera, so not GWMC which is effectively Wind
5 Mobile, so when I am talking about Mr. Lacavera's
6 companies we are on common ground there?

7 A. Okay.

8 47 Q. Okay. So am I correct that in
9 that context of the CRTC decision in 2009 Globalive
10 contacted Catalyst about being a potential source
11 of Canadian capital for Wind?

12 A. Yes, that's correct.

13 48 Q. Okay. And you chose not to pursue
14 that investment with Globalive at that time?

15 A. We did extensive work, that work
16 was archived into our files and library, and at
17 that point in time we did not invest, indeed.

18 49 Q. As a result of that extensive work
19 obviously you would have been familiar with Wind's
20 capital structure and Globalive's place in it?

21 A. At the time, however the capital
22 raise, if I recall, was connected to a debt
23 financing, which is different to the ultimate
24 transactions that evolved in 2014.

25 50 Q. Oh, I understand. I just want to

1 make sure that you understood that for example
2 Globalive held two-thirds of the voting shares but
3 only one-third of the total equity?

4 A. Yeah, yeah, I think at the time
5 that was understood.

6 51 Q. It's a pretty basic fact. You
7 understood that?

8 A. Yeah.

9 52 Q. You said you did extensive
10 research on the company so you understood its
11 capital structure?

12 A. Yes. I mean, again you are
13 looking for debt financing --

14 53 Q. I understand.

15 A. -- which is a different level of
16 analysis versus looking at an equity investment,
17 but I think it was known that indeed it was a
18 structure that was tailored to deal with a key
19 player, which was -- or which were the Canadian
20 regulators.

21 54 Q. Okay. And then just going on
22 through the history of Wind Mobile, in or about
23 June 2012 the government amended -- the federal
24 government amended the Telecommunications Act to
25 permit foreign ownership of non-incumbent wireless

1 companies under 10 percent market share. Do you
2 recall that incident?

3 A. Correct.

4 55 Q. And am I correct that in that
5 context Globalive again approached Catalyst about
6 potentially investing? Is that right?

7 A. Probably, yeah. I believe
8 discussions happened at the time.

9 56 Q. Right. Okay. And ultimately, as
10 I understand it, Globalive and VimpelCom also had
11 discussions and decided that VimpelCom would try to
12 buy Globalive. Were you aware of those
13 discussions?

14 A. I was aware that ultimately they
15 adjusted again the capital structure --

16 57 Q. Yes.

17 A. -- to continue basically without
18 at that point in time needing capital from
19 Catalyst.

20 58 Q. Did you have any discussions with
21 VimpelCom at that time about investing?

22 A. I don't think in 2012. I think
23 the discussions with VimpelCom started in 2013.

24 59 Q. Okay, that was my next question.
25 So in 2013, as I understand it, is when VimpelCom

1 first started to explore selling its interest in
2 Wind Mobile; is that right?

3 A. That's correct.

4 60 Q. And they approached you in that
5 context?

6 A. That's correct. We approached
7 them too, it was an active pursue from our side.

8 61 Q. Right.

9 A. Including multiple emails and
10 communications and meetings that took place and
11 including, I believe, exchange of proposals towards
12 an acquisition.

13 62 Q. And who was on Catalyst's deal
14 team for that set of negotiations?

15 A. Well, at Catalyst we have a flat
16 team.

17 63 Q. Yes.

18 A. So basically, as I mentioned
19 before, all of the deals are discussed amongst the
20 full team members. The team members include
21 analysts, associates, VPs and partners. We are a
22 small team, and as a team we look at all of the
23 deals together and discuss them together at least
24 once a week.

25 This is because even the analysts have

1 the opportunity but also the responsibility to
2 utilize their own capital to invest on the deals in
3 what is called co-invest.

4 That is -- that is done so that there
5 is an alignment between the analyst at the youngest
6 level and our limited partners, therefore the deals
7 are discussed fully across the investment team as
8 everybody will have to put its own money on the
9 line on par with the investors.

10 64 Q. Mr. de Alba, could you please
11 produce for me all documents from 2013, all
12 communications -- let's start with emails, all
13 emails concerning the 2013 negotiations between
14 VimpelCom and Catalyst on which Mr. Moyses was
15 copied?

16 U/A MR. WINTON: We'll take that under
17 advisement.

18 BY MR. MILNE-SMITH:

19 65 Q. Can you produce all documents
20 created, authored, edited by Mr. Moyses regarding
21 these 2013 negotiations between VimpelCom and
22 Catalyst?

23 U/A MR. WINTON: We'll take that under
24 advisement.

25 BY MR. MILNE-SMITH:

1 66 Q. Can you produce any other
2 documentary evidence that demonstrates Mr. Moyse's
3 involvement in these negotiations, investigations,
4 discussions?

5 U/A MR. WINTON: We'll take that under
6 advisement.

7 BY MR. MILNE-SMITH:

8 67 Q. Now, putting aside the issue that
9 you have meetings where you discuss all of
10 Catalyst's investments, am I correct that the deal
11 team for Catalyst and Wind Mobile and VimpelCom was
12 yourself, Mr. Glassman, Zach Michaud and Andrew,
13 originally Andrew Yeh, Y-E-H, as of, say, December
14 2013?

15 A. That was the core deal team.
16 However, as we are a small firm and we are
17 committed to training and we are a flat
18 organization, the details related to the deals are
19 shared from the partner level to the youngest
20 level. It is done, as I noted, because ultimately
21 even the analysts will be co-investing with the LPs
22 on each deal and we want to show them that
23 alignment.

24 Also, in terms of mentorship, we are
25 very transparent about not only the analytics, but

1 also the thinking process and the strategies
2 related to the deals.

3 68 Q. Okay. Well, I'd like to see
4 production of all documents that demonstrate the
5 involvement, the mentorship, the training that you
6 just described --

7 A. Absolutely.

8 69 Q. -- for Mr. Moyse?

9 U/A MR. WINTON: I'll be the one who
10 answers those questions and, as I said, we'll take
11 that under advisement.

12 BY MR. MILNE-SMITH:

13 70 Q. Did Mr. Moyse choose to co-invest
14 in any investments concerning -- I guess there
15 never was an investment so there never would have
16 been any co-investment by Mr. Moyse because
17 ultimately an investment was never made, right?

18 MR. WINTON: Are you referring to Wind?

19 BY MR. MILNE-SMITH:

20 71 Q. Yes, referring to Wind.

21 A. It's not a choice.

22 72 Q. Oh, you're talking about the
23 carried interest through the funds?

24 A. No, I'm talking about
25 co-investing.

1 73 Q. Yes.

2 A. It is not a choice. Everybody
3 co-invests in all deals, therefore everybody is
4 informed about where they are putting their own
5 money.

6 74 Q. Okay.

7 A. For example, Mr. Moyse did invest
8 in Mobilicity and did invest in every other single
9 investment that Catalyst was pursuing.

10 75 Q. Simply by being an employee?

11 A. Simply by being a member of the
12 investment team.

13 76 Q. Right. You mentioned Mobilicity.
14 In 2013 I understand that Catalyst was the largest
15 holder of senior secured debt in Mobilicity; is
16 that right?

17 A. That's correct.

18 77 Q. Roughly 30 percent?

19 A. Correct.

20 78 Q. You mentioned -- we've talked
21 about the core deal team to distinguish it from
22 your overall investment team with respect to Wind.
23 Did you have a core deal team for Mobilicity as of
24 the end of 2013, say?

25 A. All of the investment members who

1 had invested in Mobilicity. In addition, it was
2 known across the firm what was -- what were the
3 analytics related to Mobilicity.

4 79 Q. That's not my question. My
5 question is, who was on the core deal team?

6 A. I'll need to check.

7 80 Q. If you could advise me?

8 U/T MR. WINTON: Yes, we'll let you know.

9 THE DEPONENT: But I want to just
10 clarify something, if you allow me. It was also
11 known across Catalyst, and even discussed with
12 advisors, investment banks, that while Catalyst had
13 close to one-third of the Mobilicity bonds, it was
14 our understanding that West Face also had a
15 position on the bonds. Therefore, that was another
16 indication that in our pursuit of the four carrier
17 strategy, West Face was a competitor.

18 BY MR. MILNE-SMITH:

19 81 Q. Was that public knowledge, West
20 Face's involvement?

21 A. It was knowledge at Catalyst.

22 82 Q. Okay. So you would on occasion
23 have information about the non-public investments
24 or non-public interests that West Face had?

25 A. No, I called Tony Griffin and

1 asked him to discuss that situation and I
2 understood from him that indeed they were looking
3 at the wireless market.

4 83 Q. That they were looking at the
5 wireless market or that they were invested in
6 Mobilicity?

7 A. Both.

8 MR. WINTON: Just to clarify, this
9 might assist, at this time, Mr. Milne-Smith, as you
10 know, Mobilicity was in CCAA.

11 MR. MILNE-SMITH: Yes.

12 MR. WINTON: So the very public
13 proceeding, I think a lot of the parties' interests
14 in the Mobilicity debt was in fact, if not
15 widespread public knowledge, common knowledge
16 within the industry.

17 MR. MILNE-SMITH: That's why I asked.

18 BY MR. MILNE-SMITH:

19 84 Q. Could you please turn up CCG25177.
20 Off the record for a second.

21 -- OFF THE RECORD DISCUSSION --

22 BY MR. MILNE-SMITH:

23 85 Q. So I've asked you to call up
24 document CCG0025176 which is an email dated January
25 2nd, 2014 from you, Mr. de Alba, to a number of

1 people at VimpelCom attaching a Letter of Intent.

2 Do you see that?

3 MR. WINTON: Mr. de Alba now has the
4 email in front of him.

5 BY MR. MILNE-SMITH:

6 86 Q. Okay. So it reads:

7 "As per previous communications
8 and in order to get some direction
9 to our dialogue, please find
10 attached a full acquisition LOI."
11 Standing for Letter of Intent, I
12 presume?

13 A. That is correct.

14 87 Q. Can you just describe for me the
15 communications that had led up to this?

16 A. Can you please open the
17 attachment?

18 88 Q. Sure. That's 25177.

19 A. So before this, there had been
20 discussions with VimpelCom individuals responsible
21 for the Wind Canada investment. Before this, terms
22 had been exchanged and certainly discussions and
23 analysis at Catalyst would have been conducted.

24 89 Q. You said terms had been exchanged
25 between the parties; is that right?

1 A. I believe previous to this there
2 had been emails which also highlighted terms
3 related to a potential transaction.

4 90 Q. Counsel, could I see any emails
5 exchanging terms for a proposed acquisition?

6 U/A MR. WINTON: We'll take that under
7 advisement.

8 BY MR. MILNE-SMITH:

9 91 Q. And had these terms that were
10 under discussion concerned the acquisition of all
11 of the equity of Wind Mobile?

12 A. I believe so.

13 92 Q. If you go to page 2 of the letter,
14 you'll see point number 4 states that:

15 "Catalyst is prepared to enter
16 into discussions regarding a
17 potential merger between Mobilicity
18 and Wind."

19 Had that been part of your prior
20 discussions?

21 A. I believe so.

22 93 Q. And you understood of course that
23 any merger of Mobilicity and Wind would require
24 government approval?

25 A. Certainly.

1 94 Q. And in fact, just acquiring Wind
2 by itself would require government approval?

3 A. Certainly. Key component.

4 95 Q. Right. And I take it, given the
5 history of Wind that we've discussed, you were
6 aware that regulatory approvals were a key concern
7 for VimpelCom?

8 A. For -- correct.

9 96 Q. They were -- they wanted to be
10 sure that any deal they entered into for the sale
11 of Wind would obtain the necessary regulatory
12 approvals, right?

13 A. Correct.

14 97 Q. Okay. If we just go back to the
15 covering email, so the Letter of Intent is for a
16 full acquisition, but you also go on to say in the
17 second sentence that:

18 "Catalyst is open to discuss
19 other strategic encroaches including
20 converting the largest position on
21 Mobilicity debt into equity or debt
22 into a joint partnership within
23 VimpelCom."

24 So that's another option you were open
25 to exploring?

1 A. Correct.

2 98 Q. Could you turn up CCG0010331.

3 10331. So this is an email from Zach Michaud,

4 M-I-C-H-A-U-D, Zach with an H, to you, Mr. de Alba.

5 Do you see that?

6 A. Yes, I do.

7 99 Q. Mr. Michaud, as I understand it,

8 was a vice-president at Catalyst; is that correct?

9 A. That's correct.

10 100 Q. So would he have been the most

11 senior member of the investment team below

12 yourself, Mr. Riley and Mr. Glassman?

13 A. Correct.

14 101 Q. So you'll see in the third

15 paragraph he says:

16 "Brandon and I are working on

17 the cash flow requests from MMFG."

18 Am I correct that that's another

19 Catalyst portfolio company that has nothing to do

20 with the wireless industry?

21 A. You are correct.

22 102 Q. And then he says:

23 "Andrew and I are refining the

24 Wind Mobilicity combination model."

25 So that's Andrew, do I pronounce it

1 Yeh, Y-E-H?

2 A. Correct.

3 103 Q. So Andrew Yeh and Zach are
4 refining the Wind Mobilicity combination model. So
5 do I take it from that that Mr. Moyse was not
6 working on the Wind Mobilicity combination model?

7 A. No. He might have done other
8 work, he might have reviewed with his colleague.
9 He will have listened to the main drivers that I
10 would have noted to the whole team, at least on the
11 Monday meetings, about what were the value drivers
12 of the business and the model.

13 104 Q. Can you please produce for me all
14 documentation demonstrating Mr. Moyse's involvement
15 in what I'll call the telecom file prior to March
16 26, 2014?

17 U/A MR. WINTON: Well, I'll take that under
18 advisement. I'm not sure. We may have to discuss
19 what you mean by all documentation, but we'll take
20 that under advisement.

21 BY MR. MILNE-SMITH:

22 105 Q. Okay.

23 A. It might be helpful again for you
24 to know that the files are discussed openly amongst
25 all team members on the weekly meetings.

1 106 Q. I understand. You mentioned that
2 this morning. That's helpful, thank you.

3 A. And Mr. Moyse at that point in
4 time who had been an investment on Mobilicity.

5 107 Q. Could you turn up CCG0010364. Do
6 you have that?

7 MR. WINTON: It's now open.

8 BY MR. MILNE-SMITH:

9 108 Q. So this is an email from a Melissa
10 Jacquart. Is she Mr. Glassman's assistant?

11 A. No, she was assistant to Zach.

12 109 Q. Oh, to Zach. Okay. So this is
13 just -- she says that Newton, meaning Mr. Glassman,
14 I assume, asked Jim to grab these Wind articles,
15 thought I'd pass them along to you as well. And
16 it's sent to Mr. Michaud and Andrew Yeh.

17 So perhaps I'd ask by way of
18 undertaking to advise if the reason it was sent to
19 Mr. Michaud and Mr. Yeh is because they were part
20 of the core deal team for Wind, that's why those
21 addressees were chosen?

22 A. I will tell you you're wrong
23 because I'm not included on those -- on that email
24 either, and that does not mean I was not a member
25 of the team.

1 110 Q. Okay. If you can just tell me why
2 those, then, why those two people were selected?

3 A. We don't know but it's clear that
4 they are members of the team.

5 111 Q. Can you make an inquiry to find
6 out? Is Ms. Jacquart still there?

7 MR. WINTON: Is she still employed?

8 THE DEPONENT: No.

9 BY MR. MILNE-SMITH:

10 112 Q. Okay.

11 A. But it's clear I was a member of
12 the team and it's clear I was not included, so your
13 conclusion is wrong.

14 113 Q. Could you turn up CCG0023893.
15 This is a document, an email from you to
16 Mr. Resbech at VimpelCom and Mr. Turgeon at UBS
17 attaching comments on a non-disclosure agreement.
18 Do you see that?

19 A. Yes, I do.

20 114 Q. Now, in the documents that have
21 been produced by Catalyst in this case, I've seen a
22 few different drafts of an NDA in the period of
23 February and March of 2014, but I haven't seen any
24 evidence of substantive negotiations beyond the
25 Letter of Intent sent -- that we looked at earlier

1 that was sent, dated, I think, December 30th.

2 Were there any substantive negotiations
3 between the Letter of Intent that we looked at
4 earlier and, just to pick a point in time, this
5 document on March 22nd?

6 A. There were, as noted previously,
7 terms exchanged under which Catalyst was proposing
8 to VimpelCom to explore a transaction.

9 115 Q. We looked at those. I'm asking a
10 different question. I'm asking about after that
11 Letter of Intent that we looked at, from that
12 Letter of Intent up until this date of March 22nd
13 had there been any further negotiations about the
14 deal as opposed to just the terms of an NDA?

15 A. The natural dynamic of a deal to
16 get to signing an NDA meant that there would have
17 been discussions amongst the parties to advance the
18 transaction. So I will say yes, meaningful enough
19 that VimpelCom considered Catalyst a suitable party
20 to sign an NDA and get into more detail into
21 discussions of a deal.

22 In addition to that, as you know it
23 from the email, there are already very precise
24 points noted by me, such as, for example, please
25 find attached next steps are to receive business

1 plan. So the deal has advanced so far in which now
2 I can make a specific request, business plan.

3 I also invite VimpelCom to be as
4 specific about enterprise value, their equity and
5 control approach, as we will be devising a capital
6 structure. This meant that there has been an
7 evolution of the dialogue so that the details of
8 the deal are starting to get cemented.

9 116 Q. Mr. de Alba, first of all, can I
10 confirm that you've already produced all
11 communications between Catalyst and VimpelCom or
12 anyone on their behalf in this period from December
13 30th through March 22nd?

14 MR. WINTON: Yes.

15 BY MR. MILNE-SMITH:

16 117 Q. Okay. And am I correct that there
17 are no emails discussing any terms other than an
18 NDA?

19 MR. WINTON: I'm not sure we're going
20 to agree with that.

21 BY MR. MILNE-SMITH:

22 118 Q. Okay. If there are any documents
23 demonstrating negotiations or discussions other
24 than concerning the terms of an NDA between those
25 two dates, please point them to me?

1 U/T MR. WINTON: We'll do that by way of
2 undertaking.

3 BY MR. MILNE-SMITH:

4 119 Q. Can you please produce for me any
5 records of phone conversations that you had with
6 VimpelCom during that time period?

7 U/A MR. WINTON: We'll take that under
8 advisement. We have to see what we can do about
9 that.

10 BY MR. MILNE-SMITH:

11 120 Q. And did you have any in-person
12 meetings with VimpelCom or anyone on their behalf?

13 A. I would need to check the
14 calendar.

15 121 Q. If you could let me know?

16 U/T MR. WINTON: Mr. de Alba will undertake
17 to review his calendar and see if we can answer
18 that question.

19 BY MR. MILNE-SMITH:

20 122 Q. Okay. Would you turn up
21 CCG0011564. So this is an email, a covering email
22 from Mr. Moyse to Mr. Glassman, yourself, Mr. Riley
23 as well and then copied to Mr. Michaud. Do you see
24 that?

25 A. (Witness reads document). Yes.

1 123 Q. And this attaches a presentation
2 which I understand was made to Industry Canada; is
3 that right?

4 A. Do you mind opening the
5 presentation?

6 MR. CARLSON: That's 11565. He has it
7 open.

8 THE DEPONENT: Yes.

9 BY MR. MILNE-SMITH:

10 124 Q. Now, earlier in this proceeding
11 Mr. Riley swore an affidavit on May 1, 2015. At
12 paragraph 36 he refers to a presentation prepared
13 by Mr. Moyse. Is this the same presentation
14 Mr. Riley is referring to there?

15 A. May I read it --

16 125 Q. Sure. Paragraph 36.

17 A. (Witness reads document). Yes, I
18 have read.

19 126 Q. My question is, the presentation I
20 have just directed your attention to, CCG0011565,
21 is that the same presentation that Mr. Riley was
22 referring to in his affidavit?

23 A. Yes.

24 127 Q. And I understand there was
25 actually a meeting in Ottawa with Industry Canada

1 at which this PowerPoint was presented?

2 A. Correct.

3 128 Q. Who attended for Catalyst?

4 A. Newton Glassman and Jim Riley.

5 129 Q. You didn't attend?

6 A. No, I did not.

7 130 Q. Do you know who attended for the
8 government?

9 A. I do not.

10 131 Q. Why did Mr. Moyses prepare this
11 presentation? Why was he chosen to do it?

12 A. Because he was a critical member
13 of the team.

14 132 Q. And you will produce for me all
15 other documents demonstrating his involvement with
16 the team prior to this date?

17 U/A MR. WINTON: We already took that under
18 advisement, didn't we?

19 MR. MILNE-SMITH: I'll take it that you
20 have.

21 BY MR. MILNE-SMITH:

22 133 Q. When you say a critical member of
23 the team, do you mean the Catalyst investment team
24 or the core deal team for the wireless industry?

25 A. Can you repeat the question?

1 134 Q. You say he was a critical member
2 of the team. Are you talking about the Catalyst
3 investment team in general or specifically the core
4 deal team that was working on Wind and Mobilicity?

5 A. Both.

6 135 Q. Mr. de Alba, you're under oath
7 here. It's your sworn testimony that Brandon
8 Moyse, knowing that you're going to have to produce
9 all documents demonstrating this, it's your sworn
10 testimony that Brandon Moyse was a critical member
11 of the core deal team working on Wind and
12 Mobilicity prior to March 27th? That's your sworn
13 testimony?

14 A. Yes.

15 136 Q. Okay.

16 A. So to the point that he is
17 informed about the critical strategies that
18 Catalyst is going to be pursuing with the
19 government. This is highly confidential
20 information.

21 137 Q. I understand. And what
22 involvement did he have before -- before he
23 prepared this presentation?

24 A. As noted, he had participated and
25 invested in Mobilicity, he had participated in

1 discussions with the partners of all the strategies
2 related to Catalyst's involvement in Wind and
3 Mobilicity, openly knowing the thinking of myself
4 and Mr. Glassman about the approach, and so far
5 that, you know, his involvement is so critical that
6 he is the last person to touch the presentation
7 before it is shown to the government.

8 138 Q. And can you also produce for me
9 all -- because I haven't seen any, can you produce
10 for me all documents between March 27th and May 6th
11 demonstrating Mr. Moyse's involvement in the Wind
12 or Mobilicity files?

13 U/T MR. WINTON: Yes.

14 BY MR. MILNE-SMITH:

15 139 Q. We were informed early in the
16 course of this litigation by your counsel that this
17 presentation we're looking at, CCG11565, was
18 destroyed after it was presented. Are you aware of
19 that?

20 A. As the information was critical,
21 we advise -- or it was advised that the
22 presentations were destroyed so that the
23 information would not be floating around.

24 140 Q. It was advised by who?

25 MR. WINTON: I think I can assist. Let

1 me try to assist.

2 MR. MILNE-SMITH: Okay.

3 MR. WINTON: My understanding, and
4 Mr. de Alba can correct me if this is incorrect, is
5 that after the -- at the presentation the copies of
6 this PowerPoint were requested back from the
7 government members who attended.

8 MR. MILNE-SMITH: Yes.

9 MR. WINTON: And taken back by Catalyst
10 and destroyed and a direction went out to all
11 members of the deal team who had touched this
12 presentation to destroy all copies from their
13 records as well.

14 BY MR. MILNE-SMITH:

15 141 Q. And who made that order?

16 MR. WINTON: I understand it was either
17 Mr. Riley or Mr. Glassman or Mr. de Alba.

18 BY MR. MILNE-SMITH:

19 142 Q. Do you recall?

20 A. I don't recall.

21 143 Q. Is it Catalyst's general practice
22 to destroy copies of presentations made to
23 government?

24 A. It is. It is also industry
25 practice to keep information that is critical

1 confidential.

2 144 Q. So let's look at the presentation
3 itself. If you go to page 2, under the heading
4 "Overview."

5 MR. WINTON: Yes, we're there.

6 BY MR. MILNE-SMITH:

7 145 Q. You will see about a third of the
8 way down the page, it says:

9 "Catalyst is in advanced
10 discussion with VimpelCom to gain
11 control of Wind Canada but the
12 process is tight on time."

13 Do you see that?

14 A. Yes, I do.

15 146 Q. Now, am I correct that as of the
16 date of this presentation, March 27th, you had not
17 yet executed a signed non-disclosure agreement?

18 A. I need to check the date of the
19 NDA.

20 147 Q. You can advise me by way of
21 undertaking; is that fine, counsel?

22 U/T MR. WINTON: Yes, we'll let you know if
23 that's incorrect. You can assume that's correct
24 unless we tell you otherwise.

25 BY MR. MILNE-SMITH:

1 148 Q. Am I also correct that you did not
2 yet have access to the data room? You didn't get
3 into the data room until May, correct?

4 A. Not at that point in time.

5 149 Q. Meaning I'm correct?

6 MR. WINTON: You're correct.

7 BY MR. MILNE-SMITH:

8 150 Q. So obviously you hadn't commenced
9 due diligence?

10 A. That's wrong. Due diligence was
11 commenced with the analysis that was conducted on
12 Mobilicity because the strategy, as noted in the
13 prior emails, and as even considered by the
14 government, was to create a fourth carrier, so a
15 critical component of our strategy was to
16 understand Mobilicity and then how Wind would
17 connect or could connect with Mobilicity.

18 151 Q. So you had done due diligence on
19 Mobilicity but not on Wind, obviously, because you
20 didn't even have access to a data room?

21 A. You can conduct due diligence
22 without access to a data room. There was public
23 information related to spectrum that -- and other
24 matters, that our team had started to analyze. And
25 as noted, discussions had already started with

1 VimpelCom to create a framework for the core
2 negotiations which would represent that we had
3 already an understanding of drivers that we were
4 prepared to discuss with VimpelCom.

5 152 Q. Please produce all evidence of
6 your due diligence on Wind, not Mobilicity, I'm not
7 -- because I know that's a huge other file, on Wind
8 prior to March 27th?

9 U/A MR. WINTON: I'm going to take that
10 under advisement.

11 BY MR. MILNE-SMITH:

12 153 Q. You obviously hadn't exchanged
13 draft share purchase agreements?

14 A. We had exchanged economic terms
15 and proposals. I don't think yet share purchase
16 agreements.

17 154 Q. Other than the Letter of Intent
18 which we've already seen, I'd like to see those
19 exchanges of economic terms and proposals regarding
20 Wind?

21 MR. WINTON: Subsequent to the delivery
22 of the Letter of Intent?

23 MR. MILNE-SMITH: I've already asked
24 prior to the Letter of Intent, so yes.

25 MR. WINTON: I think you've also asked

1 subsequent to, so we gave you an undertaking to
2 identify documents that refer to substantive
3 discussions.

4 MR. MILNE-SMITH: Yes.

5 U/T MR. WINTON: And I guess to the extent
6 that if they aren't produced but we can locate
7 additional documents, we will produce them.

8 BY MR. MILNE-SMITH:

9 155 Q. If you go to page 7 of this
10 presentation.

11 MR. WINTON: Just before you get there,
12 Mr. de Alba, it's at page 3.

13 THE DEPONENT: I will just note that
14 the presentation itself provides analysis related
15 to the industry and certain drivers.

16 BY MR. MILNE-SMITH:

17 156 Q. Yes. I'm certainly aware of the
18 content of the document.

19 A. So certainly work had been done.

20 157 Q. So on page 7 you'll see right at
21 the top it talks about option 1, which is combining
22 Wind and Mobilicity to create a fourth national
23 carrier. So you see the next two pages talk about
24 option 2 and option 3.

25 Is it safe for me to conclude that

1 these are the options as Catalyst sees them, what
2 Catalyst would be potentially interested in
3 pursuing?

4 A. These are the options to have a
5 discussion framework with the government.

6 158 Q. Right. And this is in the context
7 of the government's policy of encouraging a fourth
8 national carrier, correct?

9 A. Correct.

10 159 Q. And that policy was well known and
11 widely publicized?

12 A. Yes.

13 160 Q. So you say in the first bullet
14 point there, or the presentation says:

15 "Negotiations with VimpelCom
16 are well advanced but no deal can be
17 completed without establishing a
18 viable regulatory and economic
19 framework."

20 And then the rest of this page, as I
21 understand it, goes on to say what Catalyst
22 perceives to be a viable regulatory and economic
23 framework; is that fair?

24 A. Let me read it.

25 161 Q. Sure.

1 A. (Witness reads document). I have
2 read it. Can you please repeat the question?

3 162 Q. Sure. So the first bullet says
4 that:

5 "...no deal can be completed
6 without establishing a viable
7 regulatory and economic framework."

8 Am I correct that the rest of the page
9 is setting out what Catalyst perceives to be a
10 viable regulatory and economic framework?

11 A. Correct.

12 163 Q. Okay. And am I also correct that
13 all the points listed there under the heading of
14 "Requires" are not in place as of March 27th? In
15 other words, these are changes that need to be
16 made?

17 A. Some of them might have partial
18 implementation.

19 164 Q. Such as?

20 A. Using the third bullet that says
21 "using incumbent's networks outside licensed
22 areas." There might be some of them which already
23 there have been agreements.

24 165 Q. Okay. So more work was needed but
25 there was some helpful regulatory structure on that

1 point?

2 A. I believe so.

3 166 Q. Okay. And looking specifically at
4 the last one, "Ability to exit the investment with
5 no restrictions in five years," I take it we're
6 agreed that at that point in time that condition
7 was not satisfied because the government wouldn't
8 permit sale of spectrum to incumbents?

9 A. Correct.

10 167 Q. If you go to the next page, page 8
11 of 11565, this sets out what Catalyst perceives as
12 option 2, which is combining Wind and Mobilicity to
13 create a fourth national carrier focused on the
14 wholesale market; is that right?

15 A. Correct.

16 168 Q. And when you look at the
17 requirements listed further down the page, that
18 also includes the ability to exit the investment
19 with no restrictions in five years, the same as we
20 saw for option 1?

21 A. Correct.

22 169 Q. And am I also right that the
23 ability to operate on the wholesale market is not
24 something that was permitted by the government at
25 that time?

1 A. Correct.

2 170 Q. And just to jump ahead in time a
3 little bit, am I also correct that by, just pick a
4 point in time, August 18, 2014, when your
5 exclusivity with VimpelCom expired, the government
6 had not approved unrestricted sale to incumbents;
7 is that right? There had been no regulatory change
8 on that front?

9 A. Correct.

10 171 Q. And the government also had not
11 approved a wholesale strategy?

12 A. There were ongoing discussions on
13 both points.

14 172 Q. Yes, but they hadn't approved it?

15 A. Right.

16 173 Q. And then if you go to the next
17 page, option 3, am I correct, and take a look at
18 the document obviously, but am I correct in reading
19 this as being the "or else"? In other words, what
20 will happen if the government doesn't give the
21 concessions outlined in options 1 or 2?

22 A. No, that's not the context, right?
23 This goes to the point that these options were
24 there to frame a dialogue.

25 174 Q. Yes.

1 A. And as part of that dialogue there
2 was a review of the various options but you cannot
3 qualify 3 as an "or else." It's like saying that 2
4 will be an "or else" of 1 and 3.

5 175 Q. If you look at the second last
6 bullet point, it says:

7 "VimpelCom deal will be off the
8 table."

9 Now, I take it that means that Catalyst
10 would not pursue a VimpelCom deal; is that right?

11 A. Let me read.

12 176 Q. Sure.

13 A. No, it will not mean that the deal
14 will be off the table. It will mean that the
15 ability to combine Mobilicity and Wind will be
16 difficult as people could pursue the sale to Telus.

17 177 Q. I'm not sure I understood that so
18 I'm going to try to clarify it and I think part of
19 the problem is I didn't ask the question properly.

20 Let's look at the top here. You say:

21 "Without a viable regulatory
22 and economic framework provided by
23 the government for an alternative
24 transaction," you say option 1 or
25 option 2, "Mobilicity's creditors

1 will push for a Telus transaction."

2 A Telus transaction means the sale of
3 Mobilicity or at least its spectrum to Telus,
4 correct?

5 A. Sale or a transfer.

6 178 Q. Right.

7 A. Via bankruptcy procedures.

8 179 Q. Right.

9 A. In which there is previous
10 jurisdiction history in the US.

11 180 Q. I understand.

12 A. In which via courts, via
13 bankruptcy courts, the spectrum might be
14 transferred using bankruptcy court powers.

15 181 Q. So if that were to happen, then
16 obviously you could no longer combine Wind and
17 Mobilicity or make it more challenging for you to
18 combine Wind and Mobilicity?

19 A. Correct.

20 182 Q. If Telus has got the spectrum,
21 then you can't get it for Wind, right?

22 A. Correct.

23 183 Q. So when you read further down and
24 it says "VimpelCom deal will be off the table,"
25 you're telling me I should not read that to mean

1 Catalyst would not pursue a deal for a stand-alone
2 Wind deal with VimpelCom?

3 A. This bullet, as it says at the
4 end --

5 184 Q. Yes.

6 A. -- it talks about Catalyst having
7 to support the Mobilicity stake.

8 185 Q. Yes.

9 A. So the focus here is on
10 Mobilicity.

11 186 Q. When you say the VimpelCom deal,
12 that's about Wind?

13 A. It's -- yeah, it's about the
14 combination of Wind with Mobilicity. It does not
15 stop us from pursuing a Wind stand-alone strategy.

16 187 Q. Okay. So you weren't telling the
17 government here that you had no interest in a Wind
18 stand-alone?

19 A. We did have an interest in a Wind
20 stand-alone.

21 MR. WINTON: I may -- this may help,
22 this may not, I'm going to try, but I think the
23 reference to VimpelCom deal in that bullet is a
24 reference to option 1, the combination of VimpelCom
25 and Mobilicity that you referred to,

1 Mr. Milne-Smith, in your earlier summation of what
2 was going on.

3 BY MR. MILNE-SMITH:

4 188 Q. Am I correct that at this meeting
5 the government did not indicate a willingness to
6 grant any of the concessions Catalyst was seeking?

7 A. Can you repeat the question,
8 please?

9 189 Q. At this meeting on March 27th the
10 government did not indicate a willingness to grant
11 any of the concessions Catalyst was seeking; am I
12 right?

13 A. No. This was a meeting to discuss
14 various alternatives.

15 190 Q. Yes.

16 A. And to continue a dialogue with
17 the government as we continued also our path with
18 Mobilicity and with Wind.

19 191 Q. Did the government express any
20 willingness to grant any of the concessions
21 Catalyst was seeking?

22 A. They expressed an interest to
23 continue with the dialogue and that certainly they
24 were analyzing the situation and that they were
25 open to discuss specific proposals noted to them as

1 the transactions evolved.

2 192 Q. Okay. Let's go to CCG0028351.

3 This is an email that starts with -- about the
4 middle of the page you will see there is an email
5 from Francois Turgeon at UBS. I understand UBS
6 were the bankers for VimpelCom on this deal; is
7 that correct?

8 A. That's right.

9 193 Q. Francois Turgeon and I think
10 Jonathan Herbst were the two lead individuals at
11 UBS?

12 A. Correct.

13 194 Q. So he sends you the latest
14 management presentation and business plan from Wind
15 Canada, and then you thank him for it and you say:

16 "Due diligence can start on
17 Friday or Monday."

18 I take it from this, your words there,
19 that due diligence had not started until that
20 point?

21 A. That's wrong.

22 195 Q. Okay. So what you said to him was
23 wrong?

24 A. No. What you're saying is wrong.
25 Due diligence had started at Catalyst much earlier.

1 The level of -- the due diligence with the company.

2 196 Q. Ah, okay. So due diligence with
3 the company can start on Friday or Monday is what
4 you meant?

5 A. Correct.

6 197 Q. So due diligence to you means
7 something you can do purely internally and based on
8 public information?

9 A. Yeah, absolutely.

10 198 Q. Mr. Turgeon then replies --

11 A. You have to do it. I mean, you
12 always have to do it.

13 199 Q. Mr. Turgeon replies:

14 "In terms of due diligence I
15 assume that you would like a
16 management presentation and then
17 would complete your due diligence
18 via access to data room."

19 So I take it that there had not been a
20 management presentation as of this date, May 6th?

21 A. May I read the email?

22 200 Q. Sure.

23 A. (Witness reads document). May I
24 also clarify that the email of May 6th, in
25 recognition of all the previous work that Catalyst

1 has done, and I'm going to quote from the banker at
2 UBS, he says "can you also provide due diligence
3 request and timeline to complete your review,"
4 implying that they knew that we had already done a
5 lot of work on the company before.

6 201 Q. But obviously you hadn't reviewed
7 anything provided by the company because you hadn't
8 been given any access to the company's information?

9 A. We will have received information
10 from the company that will be in the public domain.

11 202 Q. Okay. So that was not received
12 from the company, that was about the company that
13 you obtained in the public domain?

14 A. Or from the company that would be
15 in the public domain. The company had regulatory
16 filings.

17 203 Q. Right. But nothing was provided
18 directly to you by the company, until this time?

19 A. Yes, they provide a framework for
20 a discussion and they provide responses to our
21 various proposals. Therefore during this period of
22 time, the main deal parameters have been
23 established.

24 204 Q. And can you produce all evidence
25 of that because I haven't --

1 U/A MR. WINTON: I think this is the same
2 request you've asked for now, by my count, three
3 times. I'll take it under advisement because I
4 think we've made various undertakings and/or given
5 under advisements and we're just going to stick to
6 the same answers.

7 MR. MILNE-SMITH: Okay. Well, we're up
8 to May 6th now, so just make sure it goes up to
9 that date.

10 MR. WINTON: I think your previous
11 questions were up to May 6th.

12 MR. MILNE-SMITH: Okay.

13 MR. WINTON: Now we're clear that's
14 what you mean.

15 BY MR. MILNE-SMITH:

16 205 Q. And is it also included in the
17 advisements you have given to produce any evidence
18 of Catalyst pursuing a Wind deal between the March
19 22 document we looked at and May 6? Can I take it
20 that's also included?

21 MR. WINTON: Yes.

22 BY MR. MILNE-SMITH:

23 206 Q. Can you please turn to CCG28356.
24 This is also on May 6th, and you'll see about
25 two-thirds of the way down the page there is an

1 email from you to Ben Babcock. I understand he was
2 at Morgan Stanley; is that right?

3 A. Yes.

4 207 Q. And he was the head of the Morgan
5 Stanley team that worked on the Wind deal for
6 Catalyst?

7 A. Correct.

8 208 Q. Okay. So your email says you
9 would like to engage MS, being Morgan Stanley, on
10 the acquisition of Wind Canada.

11 "As you might be aware and as
12 per our discussions, process is
13 moving fast and due diligence can
14 start this week."

15 So I should read that to mean that due
16 diligence of information provided by the company
17 can start this week?

18 A. Correct.

19 209 Q. So you ask him for an engagement
20 letter and propose the team that will work on the
21 mandate. So I take it Morgan Stanley had not been
22 engaged prior to this date of May 6th?

23 A. Formally engaged, no. There might
24 have been discussions.

25 210 Q. Right. I'm sure you didn't just

1 send them this email out of the blue; you had
2 talked to them about the deal?

3 A. Yes.

4 211 Q. Okay. CCG0009482. So this is an
5 email chain that starts with -- it starts on the
6 second page on May 6th and carries over onto the
7 first page. You'll see at the bottom of the first
8 page on May 6th Mr. Glassman writes, first of all
9 about the price, and then his second point is that
10 "due diligence can be confined primarily to
11 spectrum ownership and opinions thereon since we
12 are buying way below spectrum value." Then he says
13 "need a condition of governmental approval."

14 What kind of condition was he referring
15 to there? What did you understand him to mean?

16 A. The first part of the email that
17 you are quoting goes back to how on the value side
18 we had determined that the spectrum itself could be
19 purchased at a price way below spectrum value.

20 212 Q. Yes.

21 A. This is further confirmation that
22 we had cemented our analysis on pricing. However,
23 a key component of the deal was government
24 approval.

25 213 Q. And just to look at your response,

1 you first -- in your response you talk about the
2 vendor financing. So I take it, just to make sure
3 we're on common ground, there was about \$150
4 million of vendor debt at Wind; you're aware of
5 that?

6 A. There was third party vendor debt
7 that was in default.

8 214 Q. Right. Or it was in default as of
9 the end of April, I think?

10 A. It says -- I think here it says
11 default notice period.

12 215 Q. Right. So May was the 30-day
13 default notice period, correct?

14 A. Yes.

15 216 Q. Sorry, you just have to say yes
16 for the record rather than nodding your head,
17 that's why I'm waiting. So you refer to the
18 default notice period and you say that you suspect
19 one of the reasons why the vendors are playing hard
20 ball is "because without clarity on to who, how and
21 when the spectrum can be sold, their collateral
22 package is very weak."

23 So am I correct this ties back into the
24 March 27th presentation we looked at where you
25 wanted regulatory concessions or clarifications

1 about the ability to sell spectrum to an incumbent?

2 A. This actually goes towards the
3 vendor's willingness to continue to provide vendor
4 financing to Wind.

5 217 Q. Right. And they wanted the same
6 sort of clarity you did on the ability to transfer
7 spectrum, right?

8 A. That could have been one of the
9 requirements. However, it could be structured in
10 other ways in which Catalyst, for example, could
11 provide some type of warranty to the financiers.

12 218 Q. So you go on in the second
13 paragraph to say:

14 "This can be positioned to our
15 advantage with the government to get
16 the required clarity on the ability
17 to sell spectrum and/or monetize the
18 investment. The following type of
19 argument can be presented to the
20 government.

21 'We are the Canadian solution.
22 We will focus on building the
23 stand-alone fourth player, but even
24 from a debt financing/capital
25 markets perspective, no lender will

1 provide funding unless there is
2 clarity on how the collateral and
3 ultimately the business can be sold
4 and when.'"

5 The collateral you are referring to
6 there is primarily the spectrum, correct?

7 A. Correct.

8 219 Q. So you were saying that the
9 presentation, the argument that should be made to
10 the government is that no lender will provide
11 funding unless you had the ability to sell the
12 spectrum to an incumbent?

13 A. Can you repeat the question?

14 220 Q. You were advocating, making an
15 argument to the government that no lender will
16 provide funding unless a purchaser of Wind had the
17 ability to sell the spectrum to an incumbent?

18 A. I think the answer is broader than
19 that. It says how the collateral and ultimately
20 the business can be sold and when. It goes to the
21 essence that the government is a critical component
22 of the deal as we have already predetermined an
23 acquisition value from the previous email. We are
24 now trying to wrap up how to set up the capital
25 structure which would include the ability to get

1 third party financing.

2 221 Q. Yes.

3 A. And the argument, it's an argument
4 to be brought to the government is if there is no
5 clarity, the ability to get third party financing
6 will be greatly impaired.

7 222 Q. And the clarity you were looking
8 for was the ability to sell to an incumbent after
9 five years, as you had pitched to the government
10 back in March?

11 A. That would be the negotiating
12 point. That would be the key negotiating request.

13 223 Q. And when you said no lender will
14 provide funding without that clarity, you were
15 saying the truth there, that was your truthful
16 opinion?

17 A. That was a negotiating
18 presentation.

19 224 Q. Are you saying -- that's not quite
20 an answer to my question. You were saying the
21 truth, regardless of whether it was a negotiating
22 position or not? You weren't going to say
23 something false to the government, right?

24 A. No lender would provide funding in
25 that context. However, you can always adjust, as

1 mentioned to you, to obtain the funding.

2 225 Q. It doesn't say in that context.

3 It says no lender will provide funding unless there
4 is clarity on the ability to sell spectrum to an
5 incumbent.

6 A. If you read the beginning of the
7 sentence it says "The following type." Type of
8 argument, it's a type of argument.

9 226 Q. So it was advocacy, it wasn't
10 necessarily the truth, is what you're saying?

11 MR. WINTON: I think the word "truth"
12 is kind of throwing Mr. de Alba off here. It is a
13 negotiation. It is a position to take to the
14 government.

15 BY MR. MILNE-SMITH:

16 227 Q. But not necessarily what you
17 believe? Is that what you're saying?

18 A. I do believe the point should be
19 brought up.

20 228 Q. My question is not whether you
21 think the point should be brought up. My question
22 is whether you believed that no lender will provide
23 funding unless there is clarity on the ability to
24 sell spectrum or the business?

25 A. I did believe that that type of

1 argument should be raised with the government.

2 229 Q. That's not my question. My
3 question is whether you believed that no lender
4 will provide funding unless there is clarity on the
5 ability to sell spectrum or the business.

6 A. No. It says clarity on the
7 collateral.

8 230 Q. Which is spectrum, which we
9 already agreed?

10 A. Yeah, but I also mentioned to you
11 that the collateral could be structured in
12 different ways. For example to include a Catalyst
13 warranty in which we will -- we could step up if
14 there was a shortcoming from the collateral
15 allowance that the government would provide.

16 231 Q. If you look at Mr. Glassman's
17 reply to you, he says:

18 "The government has told us
19 today via Bruce D."

20 Just pause there. Bruce D is Bruce
21 Drysdale?

22 A. That's correct.

23 232 Q. And he was sort of your government
24 consultant?

25 A. Correct.

1 233 Q. So Bruce D has told you that the
2 government will not give us in writing the right to
3 sell spectrum in five years; is that correct?

4 A. That's what it says. That's what
5 the email says.

6 234 Q. But are you aware that that is in
7 fact what happened?

8 A. What -- what in fact happened?

9 235 Q. That the government said no to the
10 right to transfer to an incumbent after five years?

11 A. No.

12 MR. WINTON: He says they will not --

13 THE DEPONENT: They will not give it in
14 writing.

15 BY MR. MILNE-SMITH:

16 236 Q. Okay. Well, Mr. Glassman says
17 that that takes option 1 off the table. So
18 Mr. Glassman's position, as I understand it then,
19 is that absent government permission in writing to
20 sell the spectrum in five years, Catalyst was not
21 willing to pursue option 1 from the March 27
22 presentation; is that right?

23 A. He says his response is that such
24 takes option 1 off the table.

25 237 Q. Yes. And would only be willing to

1 build a wholesale leasing business, which was
2 option 2, correct?

3 A. That's the position he is writing
4 in the email.

5 238 Q. Okay. And I take it Mr. Glassman
6 is the principal of Catalyst, correct? He's the
7 most senior person?

8 A. Yes, all of the investment
9 professionals are principals.

10 239 Q. Yes.

11 A. He is the managing partner.

12 240 Q. Right. And an investment of this
13 magnitude that we are discussing concerning Wind
14 would not be made without Mr. Glassman's consent?

15 A. Correct, neither my consent.

16 241 Q. Okay.

17 A. And what the email also notes is
18 that we are going to Ottawa early next week, which
19 again centres this to being a critical point for
20 Catalyst that indeed requires the managing
21 principal to go and continue those negotiations.

22 242 Q. Yes, I understand. Could you
23 now --

24 A. Managing partner, my apologies.

25 243 Q. That's fine. Could you now turn

1 please to CCG9525. So this attaches at 9527 a
2 draft share purchase agreement.

3 A. Can you please go back? Sorry.

4 244 Q. So the email at the top of the
5 chain is Ben Babcock to various people at Catalyst
6 and Morgan Stanley attaching the form of share
7 purchase agreement?

8 A. Correct.

9 245 Q. And then if you flip over to the
10 share purchase agreement at 9527 --

11 A. Yes.

12 246 Q. -- my understanding is that this
13 is sort of the draft form of agreement that
14 VimpelCom has provided to interested purchasers.
15 This is their first draft; is that right?

16 A. I do not know if it is the first
17 draft but is a draft.

18 247 Q. If you could advise me,
19 Mr. Winton, if I have that wrong? I'm pretty sure
20 we're on common ground here.

21 MR. WINTON: I think maybe what we can
22 agree is that it's the first draft sent by
23 VimpelCom to Catalyst.

24 MR. MILNE-SMITH: Yes.

25 MR. WINTON: If that's what you mean by

1 first draft, then I think we can agree to that.

2 BY MR. MILNE-SMITH:

3 248 Q. I'd just like to take you to a
4 couple of provisions. The first is at page 27.

5 MR. VERMEERSCH: Sorry, counsel, hold
6 on.

7 MR. WINTON: Page 27?

8 MR. MILNE-SMITH: Yes. In fairness,
9 maybe we should start at page 26.

10 MR. VERMEERSCH: 6.3?

11 BY MR. MILNE-SMITH:

12 249 Q. 6.3, yes. You'll see 6.3 is
13 regulatory and third party approvals, and then if
14 you flip over to the next page, I'm interested in
15 paragraph (d), as in delta. Do you see that
16 clause, Mr. de Alba?

17 A. Yes.

18 250 Q. If I were to refer to this as a
19 "hell or high water" clause, is that a phrase
20 you're familiar with in your business dealings?

21 A. I do not know what you mean.

22 251 Q. Okay. Let's talk about the
23 content of it. If you read this provision, first
24 of all it says that:

25 "The purchaser is committing to

1 any and all undertakings,
2 divestitures, licenses or hold
3 separate and similar arrangements
4 with respect to its assets or the
5 assets of the Globalive entities,
6 and committing to any undertakings
7 or other arrangements relating to
8 conduct of its business or the
9 business of the Globalive entities
10 as a condition to obtaining any and
11 all approvals or clearances from any
12 governmental authority or person
13 necessary to contemplate the
14 transactions contemplated hereby."

15 So it's an obligation on the purchaser
16 essentially to take all necessary steps to obtain
17 governmental approval, correct?

18 A. I'm reading it.

19 252 Q. Yes.

20 A. (Witness reads document).

21 MR. WINTON: I don't think that's quite
22 right, the way you put it, Mr. Milne-Smith. I
23 think it's a commitment to undertake the steps
24 required to obtain government approval, but I think
25 what that means is that if the government says

1 we'll give you approval but you need to divest
2 yourself of a certain asset as a condition of that
3 approval, then it's a commitment to divest that
4 asset.

5 MR. MILNE-SMITH: Yes.

6 MR. WINTON: It's not a do whatever is
7 within your power to actually obtain government
8 approval. Do you see the difference in that
9 dynamic?

10 MR. MILNE-SMITH: I'm fine with that.

11 MR. WINTON: Okay.

12 BY MR. MILNE-SMITH:

13 253 Q. And then the second part -- so
14 there's two sentences in this very long provision,
15 or three sentences I guess. We've talked about the
16 first sentence. The second sentence, as I
17 understand it, prohibits the purchaser from
18 knowingly taking or causing to be taken any action
19 that might prevent or delay obtaining government
20 approval. Is that a fair reading?

21 A. Without the express written
22 consent of the seller.

23 254 Q. Correct.

24 A. Can you repeat the question?

25 255 Q. So without the express written

1 consent of the seller, the second sentence
2 prohibits the purchaser from knowingly taking or
3 causing to be taken any action that might prevent
4 or delay obtaining government approval?

5 MR. WINTON: That's what it says.

6 THE DEPONENT: Correct.

7 BY MR. MILNE-SMITH:

8 256 Q. And then if you go to page 32,
9 section 7.3 sets out general conditions which are
10 conditions precedent to the parties' obligations
11 under the agreement?

12 MR. VERMEERSCH: Just hold on, counsel.

13 MR. WINTON: Could we just go off the
14 record for one second?

15 MR. MILNE-SMITH: Yes.

16 -- OFF THE RECORD DISCUSSION --

17 -- RECESS AT 9:38 --

18 -- UPON RESUMING AT 9:54 --

19 BY MR. MILNE-SMITH:

20 257 Q. So we are at page 32 of
21 CCG0009527, which is page 28 of the SPA, and under
22 the heading of 7.3, general conditions, it lists
23 Competition Act approval and Industry Canada
24 approval. Do you see that?

25 A. 7.3, general conditions?

1 258 Q. Yes.

2 A. And then A, Competition Act
3 approval is the subheading, and B, Industry Canada
4 approval.

5 259 Q. Right. Meaning obviously you
6 can't close the transaction unless you get
7 Competition Act approval and Industry Canada
8 approval, correct?

9 A. Let me just read it.

10 260 Q. Yes.

11 A. (Witness reads document).
12 Correct.

13 261 Q. But there was no condition that
14 the deal couldn't close unless Catalyst obtained
15 any regulatory concessions, correct?

16 A. Not on this draft.

17 262 Q. And, in fact, not on any draft?

18 A. I would have to review all the
19 drafts.

20 263 Q. I have, and I didn't see, unless I
21 misread it, I didn't see anything that looked like
22 a condition that the deal couldn't close unless
23 Catalyst obtained certain regulatory concessions
24 from the government. If I've missed that and you
25 can point that to me somewhere in one of the drafts

1 of the SPA, please advise me by way of undertaking?

2 U/T MR. DIPUCCHIO: We'll do that.

3 MR. MILNE-SMITH: Thank you.

4 BY MR. MILNE-SMITH:

5 264 Q. If you could go to CCG9517. This
6 is another version of a presentation that I
7 understand you made to the government on May the
8 12th. Do you recall that presentation?

9 MR. DIPUCCHIO: Give us one second, the
10 document is coming up.

11 MR. MILNE-SMITH: I'm sorry.

12 MR. DIPUCCHIO: All right, we have it
13 now.

14 BY MR. MILNE-SMITH:

15 265 Q. Just to situate you, Mr. de Alba,
16 do you recall a presentation that Catalyst made to
17 Industry Canada on or about May 12th of 2014?

18 A. Yes.

19 266 Q. You do?

20 A. Yes.

21 267 Q. And who was at that presentation
22 for Catalyst?

23 A. Newton Glassman and Jim Riley.

24 268 Q. You didn't go to that one either?

25 A. No.

1 269 Q. And I've looked through this
2 presentation, and feel free to flip through it
3 yourself, but it's fair to say that Catalyst's
4 strategy or position before the government hadn't
5 materially changed from March 27th to May 12th?

6 A. Can you repeat the question and
7 then give me two seconds to review the
8 presentation?

9 270 Q. Sure. Is it fair to say that
10 Catalyst's strategy or position before the
11 government hadn't materially changed from March
12 27th to May 12th?

13 A. Just give me one second.

14 271 Q. Sure.

15 A. (Witness reads document). Can you
16 please repeat the question again?

17 MR. DIPUCCHIO: He's asked whether the
18 Catalyst strategy or position before the government
19 had or hadn't materially changed from March 27th to
20 May 12th?

21 THE DEPONENT: No, it hadn't.

22 BY MR. MILNE-SMITH:

23 272 Q. Okay, good. Could you go to
24 CCG0028389. Got it? Okay.

25 MR. DIPUCCHIO: It's coming up. Okay.

1 BY MR. MILNE-SMITH:

2 273 Q. So this starts with an email from
3 Anthony Lacavera to, it looks like it's addressed
4 to yourself and Mr. Glassman; is that right?

5 A. Yes.

6 274 Q. And he says they're working on the
7 diligence request, following up, and then he says:

8 "I'm following up with you on
9 my email from last week regarding my
10 interest in investing and
11 participating in the go-forward of
12 Wind Mobile and wanted to find a
13 time to meet this week if possible."

14 Then he goes on to elaborate on that
15 request.

16 And based on your response, which you
17 are of course free to read, am I correct in
18 understanding that Catalyst really didn't have any
19 interest in having Mr. Lacavera invest and
20 participate in Catalyst's bid?

21 A. We were discussing it. I would
22 not say that we did not have any interest. We were
23 discussing it.

24 275 Q. Did you pursue it with
25 Mr. Lacavera?

1 A. We pursued multiple discussions.

2 276 Q. Okay. Have you produced all
3 communications between yourself and either
4 Mr. Lacavera, Mr. Bryce -- sorry, Mr. Scheschuk --
5 Bryce Scheschuk, do you know him?

6 A. The former CFO?

7 277 Q. Yes.

8 A. Yes.

9 278 Q. And you know Simon Lockie?

10 A. The former regulatory head?

11 279 Q. Correct.

12 A. Yes.

13 280 Q. Those are the three principals of
14 Globalive, right?

15 A. I believe so.

16 281 Q. Okay. I take it, counsel, that
17 all communications between any one of those three
18 individuals and Catalyst have been produced?

19 MR. VERMEERSCH: To the extent that
20 they were relevant to the issues in the claim, I
21 believe that that's the case.

22 BY MR. MILNE-SMITH:

23 282 Q. So, Mr. de Alba, you're speaking
24 generally about discussions, but my understanding
25 based on the review of the documents is there

1 really was no pursuit by Catalyst of a strategy
2 that involved Globalive or its principals; am I
3 right?

4 A. There were also principals of Wind
5 with many of them having positions at Wind.

6 283 Q. Of course.

7 A. Many of them -- part of the
8 discussion was related to their interest to remain
9 at Wind following a Catalyst acquisition?

10 284 Q. As executives?

11 A. As executives, and as executives
12 it's also common that there would be an equity
13 upside for members of management teams of portfolio
14 companies.

15 285 Q. My understanding, Mr. de Alba, and
16 Mr. Lockie has already given this evidence by
17 affidavit and it's certainly consistent with my
18 review of the record, but I want to have your
19 evidence on this, my understanding is that Catalyst
20 had no interest in co-investing with Globalive as
21 it pursued Wind. Do you disagree with that
22 statement?

23 A. There were multiple discussions
24 directly with Mr. Lacavera.

25 286 Q. But what was the result of those

1 discussions? My understanding is --

2 A. Could you refer -- your first
3 question is different than your second question.
4 Can you please ask them both?

5 287 Q. You said that there were multiple
6 discussions. Am I correct that the result of any
7 such discussions was that Catalyst had no interest
8 in pursuing investment with Mr. Lacavera or
9 Globalive?

10 A. Well, we ultimately were not able
11 to complete the transaction. That did not mean
12 that we will have not pursued either a co-invest
13 and again an allocation of equity to members of the
14 management team.

15 288 Q. Okay. The deal that was on the
16 table in August, just to jump ahead in time here,
17 did not contemplate any investment for Globalive or
18 Mr. Lacavera?

19 A. Catalyst was prepared to do it on
20 a stand-alone basis.

21 289 Q. Right.

22 A. But that did not mean that we
23 would foreclose Mr. Lacavera's potential
24 participation, and certainly Simon, as head of
25 regulatory, it was expected for him to have a

1 future role at the company as regulatory items were
2 critical to the deal and were critical for the
3 business going forward.

4 290 Q. Mr. de Alba, am I correct that in
5 July 2014 Mr. Glassman wouldn't even confirm to
6 Mr. Lacavera whether Catalyst was pursuing Wind?

7 A. That does not seem accurate to me,
8 right?

9 291 Q. Can you turn up, please, CCG25806.
10 Do you have that? So if you go to the second page,
11 there is an email from Anthony Lacavera dated July
12 21 written to you and Mr. de Alba -- sorry, to you
13 and Mr. Glassman, and it says:

14 "I understand from VimpelCom

15 that we are close to a deal. Let me
16 know if your intention is to include
17 my own or my equity group or not."

18 And he has a parenthetical where he
19 explains his equity group.

20 MR. DIPUCCHIO: Sorry, we're trying to
21 find where you are.

22 MR. MILNE-SMITH: Do you have the email
23 I'm referring to?

24 MR. DIPUCCHIO: Give me the date again.

25 MR. MILNE-SMITH: July 21 at 11:07 p.m.

1 MR. DIPUCCHIO: Just a second. We're
2 looking at the wrong email.

3 MR. MILNE-SMITH: CCG25806.

4 MR. DIPUCCHIO: Sorry, your question,
5 as I understood it, was that Mr. Glassman wasn't
6 even prepared to confirm that Catalyst was pursuing
7 Wind?

8 MR. MILNE-SMITH: I'm going to get
9 there.

10 MR. DIPUCCHIO: Okay. So your question
11 in relation to this email is what?

12 BY MR. MILNE-SMITH:

13 292 Q. So, first of all, you see this
14 email, "I understand from VimpelCom that we are
15 close to a deal"?

16 MR. DIPUCCHIO: Right.

17 BY MR. MILNE-SMITH:

18 293 Q. Okay. And Mr. Lacavera says he
19 would like to contribute 15 million himself, "not
20 in any way linked to my broader group's potential
21 participation." So you received that email, Mr.
22 de Alba, correct?

23 A. Yes, correct.

24 294 Q. Then if you go to the first page
25 of that document, it's the response from

1 Mr. Glassman on which you were copied; do you see
2 that?

3 A. I see the email.

4 295 Q. And you see that Mr. Glassman
5 wouldn't even confirm or deny whether Catalyst was
6 pursuing Wind?

7 A. It is not -- what you're saying is
8 not accurate. Mr. Glassman had made public
9 statements before about Catalyst's interest in
10 Wind. Mr. Lacavera, Bryce and Simon were part of
11 the due diligence process, the company's due
12 diligence process, they were part of the
13 negotiations and they were, as it is clearly stated
14 here, aware that there were negotiations ongoing
15 around that time, there were also meetings that
16 took place with Mr. Lacavera.

17 296 Q. Mr. Glassman -- I'm going to read
18 this to you:

19 "Hey Tony, as you can imagine,
20 your email below puts us in a
21 theoretically difficult position.
22 If we were in direct discussion with
23 VimpelCom, we would most likely be
24 subject to a confidentiality
25 agreement that would prevent us from

1 disclosing such and for sure the
2 status of such without their
3 consent."

4 Let's just pause there. Mr. Glassman
5 won't even concede that Catalyst is in direct
6 discussions with VimpelCom, wouldn't you agree?

7 A. He is saying that the framing of
8 the email from Mr. Lacavera could be -- and the
9 requested response could put Catalyst in a bad
10 position if Catalyst is subject to confidentiality
11 agreements that prevent us from having that
12 dialogue.

13 297 Q. That's not my question. My
14 question is Mr. Glassman, by using the word "if,"
15 all capitals, Mr. Glassman is not even conceding
16 that Catalyst is in direct discussions with
17 VimpelCom; wouldn't you agree?

18 A. No.

19 298 Q. Okay. Next sentence:

20 "If we are not involved with
21 VimpelCom in such disclosing, said
22 lack of involvement could in theory
23 hurt our position with other
24 stakeholders in Mobilicity.

25 Therefore whether such is factually

1 correct can neither be confirmed nor
2 denied."

3 Do you accept that Mr. Glassman will
4 not even confirm or deny whether it is in --
5 whether Catalyst is in discussions with VimpelCom?

6 A. As he is -- his concern is about
7 the phrasing of the question from Mr. Lacavera.
8 Mr. Lacavera is asking a direct question about
9 Catalyst's position towards the deal, and
10 Mr. Glassman is saying your email below puts us in
11 a theoretically difficult position. Mr. Glassman
12 does not want to mistakenly and inadvertently
13 breach a confidentiality agreement.

14 299 Q. I take it that Catalyst did not
15 pursue including Mr. Lacavera's equity group in its
16 potential investment with VimpelCom and Wind?

17 MR. DIPUCCHIO: Haven't you asked that
18 already? We've covered that.

19 BY MR. MILNE-SMITH:

20 300 Q. In response to Mr. Lacavera's
21 email of July 21, which we just looked at, at any
22 time between July 21 and August 18th did Catalyst
23 pursue the offer made by Mr. Lacavera?

24 A. We discussed it.

25 301 Q. When? When did you discuss it?

1 A. During various meetings about not
2 -- their potential or their role going forward as
3 officers of Wind Canada and then potentially on the
4 co-invest.

5 302 Q. When were those meetings?

6 A. We need to check the calendar.

7 303 Q. Did you maintain notebooks
8 relating to the Wind investment?

9 A. I take notes.

10 304 Q. Okay. Did any other members of
11 the Catalyst team keep notebooks relating to the
12 Wind investment?

13 A. I do not know.

14 305 Q. I'd like to have produced your
15 notebook and the notebooks of every other member of
16 the Catalyst investment team, because you said
17 everyone was part of the team on Wind, I'd like to
18 have produced all of their notes relating to Wind?

19 U/A MR. DIPUCCHIO: We'll take that under
20 advisement. I have to see what that involves.

21 BY MR. MILNE-SMITH:

22 306 Q. Did you maintain minutes of your
23 internal meetings? Did anybody maintain minutes of
24 those meetings?

25 MR. DIPUCCHIO: You mean as distinct

1 from notes that may have been taken by people?

2 Formal minutes you're talking about?

3 MR. MILNE-SMITH: Correct.

4 MR. DIPUCCHIO: Formal minutes.

5 THE DEPONENT: No.

6 BY MR. MILNE-SMITH:

7 307 Q. Obviously we talked earlier about
8 your due diligence process and you talked about
9 being able to do due diligence on Wind's public
10 disclosure. Do you recall that discussion?

11 A. Yes.

12 308 Q. Do you agree with me of course
13 Wind is not a public company and it wasn't at the
14 time?

15 A. Wind had public disclosure
16 obligations to the Canadian regulators.

17 309 Q. Right, with respect to sort of
18 spectrum disclosure and so forth?

19 A. And regulatory.

20 310 Q. But you appreciate and you'd agree
21 with me that Wind did not make typical public
22 company disclosure?

23 A. Public listed?

24 311 Q. Yes.

25 A. The company was not publicly

1 listed, however there was a large amount of
2 information that was filed in the public domain.

3 312 Q. About their spectrum and so forth?

4 A. Right.

5 313 Q. But you didn't have any of their
6 financial information?

7 A. Yes, we did. There was
8 information related to their number of subscribers
9 and other information relevant to their
10 performance.

11 314 Q. Would you please produce for me
12 the public information that Catalyst had compiled
13 as of May 6th, 2014?

14 U/A MR. DIPUCCHIO: Let me think about
15 that. We'll take that under advisement.

16 BY MR. MILNE-SMITH:

17 315 Q. Okay. We've talked about the
18 different roles that Mr. Lacavera and his team
19 played, they were both principals of Globalive,
20 they were also officers of Wind. Do you recall
21 that?

22 A. Correct.

23 316 Q. In their capacity as officers of
24 Wind was there ever an occasion where they did not
25 cooperate in a due diligence request or request for

1 information made by Catalyst?

2 A. I think that they -- from the
3 financial perspective, the due diligence process
4 confirmed the transaction metrics that Catalyst had
5 pre-established before the due diligence.

6 317 Q. I am actually asking a much
7 simpler question. Did they always cooperate with
8 your requests? Did they give you what you were
9 asking for?

10 A. Enough to confirm our prior work.

11 318 Q. You never had a problem with them
12 where they just wouldn't get back to you and they
13 ignored your requests?

14 A. Usually requests are not filled
15 out fully and the timeframe was tight. However,
16 the financial approach to the deal from the
17 Catalyst side was based on the value of the
18 spectrum. Their behaviour did not alter that
19 analysis.

20 319 Q. If you can show me any evidence of
21 you making a request of any of those three
22 principals of Globalive and them not complying with
23 it, can you please point me to it in the record?

24 Because I haven't seen it.

25 U/T MR. DIPUCCHIO: If it's in writing, we

1 will do that.

2 BY MR. MILNE-SMITH:

3 320 Q. And if you can provide any details
4 about any oral requests that were made and not
5 fulfilled, I would like to know about that?

6 MR. DIPUCCHIO: As part of the due
7 diligence process?

8 MR. MILNE-SMITH: Yes.

9 U/T MR. DIPUCCHIO: We'll do that.

10 BY MR. MILNE-SMITH:

11 321 Q. Let's go to CCG11323. So this is
12 an email chain, the last email of which attaches a
13 revised draft of the share purchase agreement
14 reflecting the Catalyst side revisions. So just
15 feel free to satisfy yourself to that extent and
16 then I'd like to take a look at the draft, which is
17 11325.

18 A. (Witness reads document).

19 MR. VERMEERSCH: The draft or the black
20 line?

21 MR. MILNE-SMITH: The black line,
22 sorry.

23 MR. VERMEERSCH: Understood.

24 MR. MILNE-SMITH: 325.

25 THE DEPONENT: (Witness reads

1 document).

2 BY MR. MILNE-SMITH:

3 322 Q. I should note, this email, while
4 we're on the email, the email is dated May 23rd at
5 2 a.m. and Mr. Moyse is copied on it. I'd just
6 like to confirm this is the last draft of the SPA
7 that Mr. Moyse saw?

8 U/T MR. DIPUCCHIO: Why don't we confirm
9 that to you and give you an undertaking.

10 MR. MILNE-SMITH: That's my
11 understanding and you'll tell me if it's to the
12 contrary?

13 MR. DIPUCCHIO: Yes.

14 BY MR. MILNE-SMITH:

15 323 Q. And you'll recall that Mr. Moyse
16 was on vacation in Asia at this time?

17 A. I do.

18 324 Q. And --

19 A. I believe so.

20 325 Q. Right, that's your understanding.

21 A. He might be doing other things,
22 right?

23 326 Q. I take it that you have no
24 evidence as to whether he actually read this or
25 not?

1 A. No, I don't recall.

2 327 Q. He'd already received an offer
3 from West Face by this time; you understand that
4 now?

5 A. I don't think I was aware at the
6 time.

7 328 Q. Not at the time but I'm saying now
8 you know that he had already received an offer from
9 West Face by this time?

10 A. Yes.

11 329 Q. And I take it there's no evidence
12 or you have no information that anyone at Catalyst
13 discussed this revised draft or any of these
14 revisions with Mr. Moyses?

15 A. I don't recall.

16 330 Q. Okay. I'd like to go a little bit
17 further. I would like to confirm that there is no
18 evidence coming from Catalyst that anyone at
19 Catalyst discussed any of the revisions set forth
20 in this draft with Mr. Moyses?

21 U/T MR. DIPUCCHIO: We'll let you know.

22 BY MR. MILNE-SMITH:

23 331 Q. Okay. So if you go to the black
24 line at page 37. And just for clarity on the
25 record, whenever I refer to a page number, I'm

1 referring to the electronic document, so you can
2 see at the bottom of this document in the original
3 date it's page 31 that I'm referring to, page 36
4 which is the electronic document number and which
5 is where section 6.3 starts.

6 So do you have that, Mr. de Alba?

7 A. We are on page 36?

8 332 Q. Yes, just showing you again this
9 is 6.3, regulatory and third party, they have added
10 notifications and approvals?

11 A. Yes.

12 333 Q. And if you then go over to the
13 next page where paragraph (d) is, you'll see that
14 (d) has been deleted in its entirety and what's
15 been added in instead is a limitation on
16 VimpelCom's ability to receive Catalyst's
17 confidential information; is that right?

18 A. Will you let me read it, please?

19 334 Q. Of course.

20 A. (Witness reads document). I have
21 read it. Can you please repeat the question?

22 335 Q. You will agree with me paragraph
23 (d) as it had existed was deleted in its entirety
24 and what's been added in instead is a limitation on
25 VimpelCom's ability to receive Catalyst's

1 confidential information?

2 A. Correct.

3 336 Q. And the reason that you deleted
4 paragraph (d) is because it imposed limits on
5 Catalyst's ability to pursue government
6 concessions, regulatory change?

7 A. It also says unless the purchaser
8 is satisfied that the confidential nature of such
9 information can be preserved.

10 337 Q. Sorry, I'm not talking about the
11 addition, I'm talking about the deletion, I should
12 have been more clear. The reason that you deleted
13 paragraph (d), I'm not asking about what you added
14 in, the reason you deleted paragraph (d) is because
15 it imposed limits on Catalyst's ability to pursue
16 regulatory concessions?

17 A. It could have been that. It could
18 have been that we were looking for clarity about
19 what were the undertakings that Catalyst was going
20 to have to take.

21 338 Q. The fact of the matter is you
22 wanted the ability to pursue regulatory
23 concessions, right? You had done it, what's the
24 date of this, this is the 23rd, less than two weeks
25 earlier, representatives of Catalyst had been in

1 Ottawa pursuing regulatory concessions, right?

2 A. Correct.

3 339 Q. And you didn't want to be limited
4 in your ability to do so?

5 A. Well, there could be a natural
6 limitation which is part of the negotiation with
7 VimpelCom, so this was a response to VimpelCom on
8 what was at that point in time the regulatory --
9 you know, being the regulatory framework, the final
10 pending point on the deal.

11 340 Q. And you wanted to be able to
12 pursue the right -- you wanted to be able to pursue
13 regulatory concessions and paragraph (d) limited
14 your ability to do so, so you deleted it, correct?

15 A. The language deleted, as noted,
16 goes to the obligations that Catalyst was -- as it
17 says, the obligations of the purchaser shall
18 include committing to any and all undertakings,
19 divestitures, licenses or hold separate and similar
20 arrangements with respect to its assets or the
21 assets of the Globalive entities.

22 I don't recall why counsel precisely
23 crossed that paragraph, but what we are saying is
24 that we are prepared to provide the information as
25 long as the information can be kept confidential.

1 341 Q. Go to CCG0011342.

2 MR. VERMEERSCH: We have it.

3 BY MR. MILNE-SMITH:

4 342 Q. Go to page 3. This is a long
5 email chain over a period of many days.

6 MR. VERMEERSCH: Which email in
7 particular, counsel?

8 BY MR. MILNE-SMITH:

9 343 Q. The one I am looking at on page 3
10 is from you, Mr. de Alba, on May the 23rd at 9:10
11 a.m. and you're saying that you found out in due
12 diligence that the new spectrum and capex related
13 needs are much greater than expected. Do you see
14 that?

15 A. Let me read the email.

16 344 Q. Yes.

17 A. (Witness reads document). I have
18 read it.

19 345 Q. So you're saying you found out in
20 due diligence that new spectrum and capex related
21 needs were much greater than expected. That's a
22 true statement of what happened?

23 A. Yeah, that's...

24 346 Q. Okay. And then --

25 A. Can you repeat the question,

1 please?

2 347 Q. Okay. No, I'm just going to move
3 on.

4 "In any event, the deal is not
5 closing at the end of the month. We
6 cannot fund the transaction without
7 the right government approvals which
8 will take time."

9 So the right government approvals there
10 are the ones that you sought on March 27th and on
11 May 12th, correct?

12 A. They could also be government
13 approvals related just to the pure transfer of the
14 spectrum and change of control.

15 348 Q. Okay. You can be referring to
16 both there?

17 A. Yeah.

18 349 Q. How was Catalyst intending to fund
19 this transaction?

20 A. We were able to fund it with our
21 own capital.

22 350 Q. And my understanding, based on
23 this email, is that there were going to be
24 substantial spectrum and capex related costs
25 following the acquisition?

1 A. Correct.

2 351 Q. And how were you planning to fund
3 that?

4 A. We would be looking towards vendor
5 financiers and, as noted here, we were also looking
6 for the existing lenders to see if they were
7 interested to remain in place for a longer period
8 of time.

9 352 Q. And related to the acquisition
10 itself, is there any document or evidence that can
11 establish that Catalyst had sufficient cash on hand
12 to fund the transaction?

13 A. Just --

14 MR. DIPUCCHIO: What do you mean?

15 BY MR. MILNE-SMITH:

16 353 Q. I don't know what it would be. I
17 mean, you weren't getting equity commitment letters
18 from outside sources, correct?

19 A. Correct.

20 354 Q. You were doing it all internally?

21 A. Correct.

22 355 Q. Is there some internal document
23 that will show that there was 300 million on hand?

24 MR. DIPUCCHIO: I don't know what that
25 would be. Is there some realistic question about

1 whether Catalyst was able to fund the transaction?
2 I'm just wondering whether we're going down a
3 rabbit hole here.

4 MR. MILNE-SMITH: If you want to take
5 the question under advisement or refuse it, I'm
6 happy to move on.

7 R/F MR. DIPUCCHIO: I think in this context
8 I'm just going to refuse it, counsel.

9 BY MR. MILNE-SMITH:

10 356 Q. Okay. On May the 24th you
11 received notice of Mr. Moyses's resignation. You
12 can look at CCG18691.

13 MR. VERMEERSCH: We have it.

14 BY MR. MILNE-SMITH:

15 357 Q. So you received that resignation
16 letter from Mr. Moyses on May 24th?

17 A. Yes. It's an email May 24th at
18 12:02 a.m.

19 358 Q. Yes. And on May 26th, which was
20 the Monday, he advised you that he was going to
21 West Face, correct, in person he advised you?

22 A. He was asked where he was going.

23 359 Q. Yes. And he told you?

24 A. And for the first time he said he
25 was going to West Face.

1 360 Q. Okay. And at what point did you
2 cut off Mr. Moyse's access to any further Catalyst
3 information? Was it on May 26th?

4 A. I'm not aware of what was cut off.

5 361 Q. Well, he stops to be included on
6 emails to the deal team, for example, we see him no
7 longer being copied on any emails. Can I assume
8 that you did that promptly after receiving notice
9 he was going to someone you considered to be a
10 competitor on May 26th?

11 A. Yes.

12 362 Q. So from May 26th onward, Mr. Moyse
13 would not have had access to any further Catalyst
14 confidential information?

15 MR. DIPUCCHIO: Well, that -- there may
16 be a question on that, counsel, just because of
17 certain conversations he had with --

18 MR. MILNE-SMITH: Mr. Creighton?

19 MR. DIPUCCHIO: Yes.

20 THE DEPONENT: And what also happened,
21 it seems that Mr. Moyse took with him loads and
22 loads of information.

23 BY MR. MILNE-SMITH:

24 363 Q. No, I understand, we've got his
25 Affidavit of Documents and we know what's been

1 found in the various forensic searches. My point
2 is all of that would have been from May 26th or
3 earlier?

4 A. I do not know if he had still
5 access to his old emails. I do not know if he
6 still had access to our servers where the
7 information was still available.

8 364 Q. Did you not take steps to cut off
9 his access to your servers as of May 26th?

10 A. As I mentioned, I did not do that
11 personally. I don't know what measures other
12 members of the team might have taken.

13 365 Q. Could you make inquiries and let
14 me know?

15 U/T MR. DIPUCCHIO: Yes.

16 BY MR. MILNE-SMITH:

17 366 Q. I would like to know what, whether
18 through Mr. Creighton's emails or otherwise, or any
19 other communications, I would like to know what
20 evidence you have of confidential Catalyst
21 information passing to Mr. Moyses after May 26th?

22 U/T MR. DIPUCCHIO: Okay, we'll let you
23 know that.

24 BY MR. MILNE-SMITH:

25 367 Q. As of May 26th am I correct that

1 Catalyst's position was that it would not proceed
2 with the transaction without obtaining certain
3 regulatory concessions from government?

4 A. That's inaccurate.

5 368 Q. Do you recall the email we just
6 looked at where you said you cannot fund the
7 transaction without the right government approvals?
8 Do you recall that?

9 A. Approvals is different than
10 concessions.

11 369 Q. Well, the answer you gave me is
12 that it included the concessions that were sought
13 in the March 27th presentation. You just gave me
14 that answer.

15 A. In a combination.

16 370 Q. Right.

17 A. That doesn't mean that one will
18 overcome the other one.

19 371 Q. One what will overcome another
20 what?

21 A. There were procedural approvals.

22 372 Q. Yes?

23 A. And there are concessions.

24 373 Q. Yes?

25 A. Ultimately the right combination

1 will have resulted in a deal. But that implied
2 that there was going to be a negotiation with the
3 government.

4 374 Q. In the May 23rd draft that we just
5 looked at, Catalyst cut out paragraph (d) which
6 would have prohibited you from pursuing
7 concessions, right?

8 MR. DIPUCCHIO: I think we've been over
9 this, counsel.

10 BY MR. MILNE-SMITH:

11 375 Q. So as of the date that Brandon
12 left, Catalyst's position on the SPA was that it
13 did not accept any restrictions on its right to
14 pursue government concessions? That's why you took
15 out paragraph 6.3(d), right?

16 MR. DIPUCCHIO: You keep saying that's
17 why you took out paragraph 6.3. I think we've been
18 over that. I'm happy to have him answer the first
19 part of your question, which was that so as of the
20 date Brandon left Catalyst's position on the SPA
21 was that it did not accept any restrictions on its
22 right to pursue government concessions.

23 BY MR. MILNE-SMITH:

24 376 Q. Okay. And of course Brandon --

25 MR. DIPUCCHIO: I'm not saying that's

1 right. I'm saying I'm happy to have him answer
2 that part. I just don't want to go back over why
3 you say they took out paragraph 6.3 because I think
4 the answer to that was he said that he wasn't
5 aware, there may have been other reasons why
6 paragraph 6.3 was taken out.

7 BY MR. MILNE-SMITH:

8 377 Q. So the question your counsel is
9 willing to have you answer is that as of the date
10 Brandon left, Catalyst's position on the SPA is
11 that it did not accept any restrictions on its
12 right to pursue government concessions, correct?

13 A. That was a key deal point at that
14 point in time.

15 378 Q. Right.

16 A. And we were prepared to continue
17 negotiating that point throughout.

18 379 Q. And Brandon would have no way of
19 knowing how those negotiations would play out?

20 A. He did. He was aware about -- by
21 having, you know, put together the two
22 presentations for the government and hearing from
23 the partners about our willingness or willingness
24 to live with that regulatory environment, he would
25 have a good sense of when and if we will have

1 prepared to stand firm on that point, or waive it.

2 380 Q. And the sense that you would get
3 from those presentations is that Catalyst was going
4 to stand firm on those, correct?

5 A. No. That's --

6 381 Q. The presentations --

7 A. That's the presentations but
8 that's only one aspect. You don't talk to your
9 team through your presentations to the government.
10 You talk to your team through the evolution of the
11 deal. That's why he has been included on the
12 drafting and all of the communications which
13 include back and forth on the points with the
14 government.

15 So the communications show that indeed,
16 if that point had been that absolute, we would have
17 probably walked away from the deal sooner. But in
18 this case there were negotiations, there was always
19 room and scope to be willing to live with that
20 point.

21 382 Q. So Mr. --

22 A. Or with certain framework from the
23 government.

24 383 Q. Mr. de Alba, your sworn evidence
25 is that Mr. Moyse was privy to internal Catalyst

1 discussions about its willingness to walk from any
2 government concessions?

3 A. Yes.

4 384 Q. Okay. And are there any internal
5 Catalyst documents that reflect that?

6 A. There will have been calls with
7 counsel, there will have been calls and meetings
8 with counsel and the investment bankers, and there
9 would have been the discussions amongst the team
10 about how to work within that regulatory
11 environment of which he was the last person that
12 touched the first presentation and was involved in
13 the second presentation.

14 385 Q. But it never would have shown up
15 in a document because I haven't seen any evidence
16 of this in a document. If you can point me to it,
17 I would love to see it.

18 MR. DIPUCCHIO: Well, we can probably
19 have a discussion about characterizations of the
20 documents that have been produced, but your point
21 being has everything been produced relevant to that
22 question?

23 MR. MILNE-SMITH: Yes.

24 MR. DIPUCCHIO: I think the answer to
25 that is yes. If there is anything else we come

1 across, we'll obviously give it to you.

2 BY MR. MILNE-SMITH:

3 386 Q. In terms of the March 27th
4 presentation, my understanding is the extent of
5 Mr. Moyse's involvement is he received handwritten
6 notes from you which he then just typed up into
7 PowerPoint form; is that right?

8 A. I don't recall.

9 387 Q. Okay.

10 A. His involvement, as well as other
11 members of the team's involvement, his involvement
12 of investment professionals, in this case with
13 degrees, I am thinking of a graduate degree from
14 the University of Pennsylvania which is one of the
15 highest financial universities there is in the US.

16 388 Q. This isn't my question about his
17 qualifications or his intelligence.

18 A. It is about your framing that he
19 just typed notes without taking into consideration
20 you have a highly qualified individual in the
21 centre of the deal, in the centre of the
22 discussions.

23 389 Q. Okay. And you have produced all
24 the documents that prove that he was in the centre
25 of the discussion, right?

1 MR. DIPUCCHIO: Everything we have,
2 yes.

3 BY MR. MILNE-SMITH:

4 390 Q. Okay. Mr. de Alba, other than the
5 contents of the March 27 email attaching four
6 writing samples, what evidence do you have of
7 Mr. Moyse passing confidential information to West
8 Face?

9 U/T MR. DIPUCCHIO: Well, rather than ask
10 him, why don't we take that under advisement.
11 We'll undertake to answer that for you.

12 BY MR. MILNE-SMITH:

13 391 Q. So to the extent you can identify
14 any such confidential information that you say has
15 been passed from Mr. Moyse to West Face, I'd like
16 to know where I can find that information in the
17 documents of Catalyst, where I can find it in the
18 documents of Mr. Moyse, or where I can find it in
19 the documents of West Face.

20 MR. DIPUCCHIO: Well, okay. But that
21 question assumes that there's some kind of hard
22 copy of information that's been passed along as
23 opposed to discussions or -- I'm just trying to get
24 a sense of what you're asking us to do.

25 MR. MILNE-SMITH: I would like to know

1 what the case at trial is going to be.

2 U/T MR. DIPUCCHIO: If we are alleging that
3 there are actual documents that have been passed
4 along, we'll identify those for you.

5 BY MR. MILNE-SMITH:

6 392 Q. If there is an allegation that
7 Mr. Moyse passed on information orally, I'd like to
8 know what it is?

9 MR. DIPUCCHIO: That was your previous
10 question. That's why I was trying to get a
11 distinction.

12 MR. MILNE-SMITH: I want to know in any
13 form.

14 MR. DIPUCCHIO: I hear you.

15 BY MR. MILNE-SMITH:

16 393 Q. Okay. And to the extent there is
17 an allegation of confidential information being
18 transmitted in any way whatsoever, I would like to
19 know when and how it was transmitted and to whom at
20 West Face it was transmitted?

21 U/T MR. DIPUCCHIO: We'll give you the best
22 information that we have.

23 BY MR. MILNE-SMITH:

24 394 Q. I would like to know how receipt
25 of that confidential information -- sorry, let me

1 take a step back.

2 I would like to know what evidence is
3 going to be relied on that that information was
4 used by West Face?

5 U/T MR. DIPUCCHIO: Okay.

6 BY MR. MILNE-SMITH:

7 395 Q. And how that use caused harm to
8 Catalyst?

9 U/T MR. DIPUCCHIO: Okay.

10 BY MR. MILNE-SMITH:

11 396 Q. Prior to June 4th, June 4th, 2014,
12 and the reason I select that date, just to give you
13 the context, is that's the date that I believe
14 Mr. DiPucchio reached out to West Face and said
15 there was a concern about a, quote, telecom file in
16 respect of Mr. Moyse, so prior to June 4th did
17 anyone at Catalyst have a discussion with anyone at
18 West Face about either company's interest in Wind?

19 A. Yes.

20 397 Q. And what was that discussion?

21 A. As mentioned earlier, we had a
22 discussion with Mr. Griffin in relationship to
23 their holdings on Mobilicity.

24 398 Q. Yes. And when was this
25 conversation?

1 A. I need to check the calendar.

2 399 Q. You can let me know?

3 U/T MR. VERMEERSCH: We have undertaken to
4 do that, counsel.

5 BY MR. MILNE-SMITH:

6 400 Q. Because my understanding is that
7 West Face had no holdings in Mobilicity as of 2014,
8 it had divested its holding in 2013. Are you aware
9 of that?

10 A. No. I am not aware now.

11 401 Q. So that's Mobilicity. But had
12 there been any discussion between Catalyst and West
13 Face about an interest in Wind?

14 A. Wind on a stand-alone basis?

15 402 Q. On any basis.

16 A. Well, Wind has, as part again -- I
17 don't recall. I believe the conversation with Mr.
18 Griffin was focused on Mobilicity but at Catalyst
19 we were looking at Mobilicity and Wind together.

20 403 Q. As of June 4 were you aware that
21 West Face was interested in Wind?

22 A. I don't recall.

23 404 Q. When the dispute arose over
24 Mr. Moyse, why did Catalyst make a specific warning
25 about a potential telecom file? Was that a

1 reference to Wind or to Mobilicity or to both?

2 MR. DIPUCCHIO: You're talking about my
3 conversation?

4 MR. MILNE-SMITH: I don't want to get
5 into solicitor/client communications but you
6 obviously sent that letter for a reason.

7 U/T MR. DIPUCCHIO: I did. I'd have to go
8 back and check, counsel, to be honest, about
9 whether the concern at that time was Mobilicity
10 more so than Wind. If I can track that down
11 somehow without treading on solicitor/client
12 privilege, we'll get you the answer to that.

13 MR. MILNE-SMITH: Okay, thank you.

14 BY MR. MILNE-SMITH:

15 405 Q. I want to go to another draft of
16 the SPA. This is CCG0012066.

17 MR. VERMEERSCH: Counsel, what's the
18 parent?

19 MR. MILNE-SMITH: I don't know. I
20 don't have it.

21 MR. VERMEERSCH: Hold on. Right. And
22 this is the black line again?

23 MR. MILNE-SMITH: Yes. I'm only
24 looking at black lines.

25 MR. VERMEERSCH: He has it.

1 BY MR. MILNE-SMITH:

2 406 Q. If you go to page 12.

3 MR. VERMEERSCH: We're there.

4 BY MR. MILNE-SMITH:

5 407 Q. So the clause I'm interested in is
6 the outside date clause which is one that wasn't in
7 the May 23rd draft that we looked at earlier. I
8 hope you'll take my word on that without having to
9 turn it up and show the absence of it.

10 So reading the black line here, it
11 looks like VimpelCom had proposed an outside date
12 of 18 weeks following signing. Do you see that
13 from the deleted text?

14 A. Yes, I see.

15 408 Q. And you're proposing November
16 30th, which as of the date of this draft, which is
17 June 14th, that's more like 24 weeks; is that
18 consistent with your recollection?

19 A. Yes.

20 409 Q. And your draft also provided for
21 automatic extensions of successive one-month
22 periods until such time as Competition Act approval
23 or Industry Canada approval are obtained? Do you
24 see that?

25 A. (Witness reads document). Can you

1 repeat the question, please?

2 410 Q. Your draft provided for automatic
3 extensions of successive one-month periods until
4 such time as Competition Act approval or Industry
5 Canada approval are obtained?

6 A. Not correct, because if you read
7 further, you will see provided further that
8 notwithstanding the foregoing, the outside date
9 shall be no later than.

10 411 Q. To be filled in. With that
11 proviso, that's fine. Obviously this outside date
12 clause, Brandon was unaware of it because it hadn't
13 been drafted at the time he left?

14 MR. DIPUCCHIO: Is that -- we haven't
15 tracked the previous drafts but obviously something
16 has been blacked out there, too, right? So there
17 must have been another draft that included some
18 language that was then --

19 MR. MILNE-SMITH: Let's just go back to
20 it.

21 MR. DIPUCCHIO: Again, I don't want to
22 complicate matters.

23 BY MR. MILNE-SMITH:

24 412 Q. No, that's fine. It's CCG0011325.

25 Go to page --

1 MR. VERMEERSCH: Hold on, counsel. You
2 need to give me the parent ID.

3 MR. MILNE-SMITH: 11323.

4 BY MR. MILNE-SMITH:

5 413 Q. And if you go to page 13 you will
6 see that no one had even proposed what the outside
7 date would be, it was just a bullet point?

8 MR. DIPUCCHIO: Okay, but there was a
9 provision in there for an outside date.

10 MR. MILNE-SMITH: Yeah, it's just no
11 one had filled in --

12 MR. DIPUCCHIO: Yes, that's sort of
13 what I was driving at. So I was just clarifying
14 your question about what Moyse knew or didn't know.
15 He knew there was going to be a provision in there
16 about an outside date, presumably.

17 MR. MILNE-SMITH: It is hard to imagine
18 a transaction without an outside date.

19 THE DEPONENT: And I suspect that there
20 would be, as you saw from the following draft,
21 there probably were discussions with counsel about
22 how long it will take to get the transaction
23 approved.

24 BY MR. MILNE-SMITH:

25 414 Q. Right. My simple point is

1 Mr. Moyse had no idea what the bid/ask on the
2 outside date would be because nobody had even
3 proposed one as of the last version he saw?

4 A. He could have been in a Catalyst
5 call with our counsel in which that point would
6 have been discussed and directions given to
7 counsel, for example, check how long will it take
8 for approval to take place in Ottawa.

9 415 Q. Could have been, but you can't sit
10 here today swearing he was part of such a
11 discussion?

12 Let me help you. Mr. Moyse was in Asia
13 from May 16 until May 25. Do you recall that? He
14 was on a 10-day vacation in Asia?

15 A. Yeah, I understand he was on
16 vacation.

17 416 Q. Yes. And he didn't participate in
18 any calls during that vacation?

19 A. I don't recall. He might have.

20 417 Q. You're not aware of him
21 participating in any calls?

22 A. I would need to check the records.

23 418 Q. Okay. If someone is going to
24 produce or someone is going to testify that he
25 participated in any of those calls, I would like to

1 know on what basis?

2 U/T MR. DIPUCCHIO: Fair enough.

3 BY MR. MILNE-SMITH:

4 419 Q. And if you have any evidence that
5 this notion of the outside date was discussed
6 between May 6th when the deal kicks off and May
7 15th which is his last day in the office, you'll
8 give me the evidence?

9 U/T MR. DIPUCCHIO: Yes.

10 BY MR. MILNE-SMITH:

11 420 Q. So going back to that June 14th
12 version of the share purchase agreement, 12066, I
13 think 12064 was the parent --

14 MR. VERMEERSCH: We have it.

15 BY MR. MILNE-SMITH:

16 421 Q. Let's now go to paragraph 6.3(d)
17 which is on page 39.

18 MR. VERMEERSCH: We have it.

19 BY MR. MILNE-SMITH:

20 422 Q. And you'll see that instead of
21 deleting the 6.3(d), this draft delivered by
22 Catalyst or its counsel now simply makes some
23 amendments to it, which you'll see on page 40. Do
24 you see that?

25 A. I'm reading it. (Witness reads

1 document).

2 423 Q. You'll tell me when you've read
3 it?

4 A. I'm still reading it. (Witness
5 reads document). Yes, I read it.

6 424 Q. You see in small Roman numeral
7 (i), Roman numeral 1, it says, it essentially
8 prohibits the purchaser, being Catalyst, from
9 developing any plans relating to the sale of the
10 business or of its assets that are required to be
11 disclosed to a governmental authority in connection
12 with Industry Canada or Competition Act approval.
13 Do you see that?

14 A. Yes.

15 425 Q. So this is a restriction on
16 Catalyst that it had not accepted in the last draft
17 seen by Mr. Moyse, correct?

18 A. Could you repeat it? These are?

19 426 Q. This is a restriction on Catalyst
20 concerning the ability to develop plans relating to
21 the sale of the business or its assets that
22 Catalyst had not accepted in the last draft seen by
23 Mr. Moyse, correct?

24 A. Correct.

25 427 Q. And again, the same as we asked

1 these questions with respect to the outside date,
2 Mr. Moyse wouldn't have participated in any
3 discussions from May 16 to his departure on May
4 26th relating to this question?

5 A. That I cannot tell.

6 428 Q. You'll tell me if you have any
7 evidence of him participating in phone calls from
8 Asia on this point?

9 A. Mr. Moyse had full access to the
10 files, Mr. Moyse had full access to the emails in
11 which he was certainly copied to, Mr. Moyse will
12 have been invited to the calls.

13 429 Q. I haven't seen any emails in which
14 this issue, that Catalyst was willing to make this
15 concession, in which it was raised during the
16 period Mr. Moyse was at Catalyst. You're talking
17 hypothetically he would have had access to, but I'm
18 looking for concrete information, you understand,
19 concrete information that he would have had some
20 insight into Catalyst's willingness to make this
21 concession. Can you produce any such evidence for
22 me?

23 U/T MR. DIPUCCHIO: If you're telling me
24 there is nothing in writing, then there is nothing
25 in writing. Whether he was on a call or something

1 to that effect, counsel, we'll let you know, as I
2 said, that he participated in, to the extent we
3 can, whether he participated in any calls during
4 that period of time.

5 BY MR. MILNE-SMITH:

6 430 Q. And the same thing, to the extent
7 there is some evidence of any calls before his
8 departure for Asia between March 6th -- May 6th and
9 May 15th, I would like to know any evidence to
10 support the existence of such a call in which
11 Mr. Moyses participated?

12 U/T MR. DIPUCCHIO: We'll see what we can
13 dig up.

14 BY MR. MILNE-SMITH:

15 431 Q. Okay. Could you go to CCG0025737.
16 You will see this email chain is on June 15, at
17 least it starts on June 15 with an email from you
18 to Mr. Glassman at 8:29 p.m. on page 2?

19 A. Yes, I see the email.

20 432 Q. It says you had a call with
21 VimpelCom and then you say:

22 "I continue to believe we are
23 the most advanced."

24 So you were aware that there were other
25 bidders?

1 A. Yeah, I believe -- I believe so,
2 and I believe VimpelCom will have hinted that there
3 will be other interested parties, right?

4 433 Q. Did you know who the other
5 interested parties were, or did you have
6 suspicions?

7 A. I would need to check. I don't
8 recall.

9 434 Q. If you go over to page 1 of this,
10 if you go to page 1 you'll see Mr. Glassman writes
11 to you at 8:42 p.m.?

12 A. Um-hmm.

13 435 Q. And at the bottom of his email
14 there, he refers to Quebecor? Is that because
15 Catalyst understood them to be another potential
16 bidder?

17 A. Correct.

18 436 Q. It's not unusual in auction
19 situations like this for one potential party to
20 have intelligence on who other potential bidders
21 might be, correct?

22 A. Yeah.

23 437 Q. There's nothing improper about you
24 having found out Quebecor was an interested bidder,
25 right?

1 A. Probably you read it in the press.

2 438 Q. Right. There's public speculation
3 about who is involved in these things?

4 A. Speculation.

5 439 Q. I mean, there has been public
6 speculation about Catalyst's involvement, correct?

7 A. I believe so, yeah.

8 440 Q. Did Catalyst have any discussions
9 with representatives of Quebecor?

10 A. I believe so.

11 441 Q. In what timeframe?

12 A. I need to check the calendar.

13 442 Q. If you could let me know?

14 MR. DIPUCCHIO: Is it relevant to
15 something, counsel?

16 MR. MILNE-SMITH: There have been, I
17 don't know about allegations, but insinuations made
18 that West Face's knowledge of Catalyst's potential
19 involvement was somehow improper or untoward. I'm
20 just trying to explore the alternative.

21 R/F MR. DIPUCCHIO: Okay, but the nature of
22 the discussions or when discussions would have
23 occurred with Quebecor, I think that's not relevant
24 to the issues we are facing here.

25 BY MR. MILNE-SMITH:

1 443 Q. Were you also aware that
2 Tennenbaum Capital Partners were a potentially
3 interested party?

4 A. I think at that point in time
5 there was speculation.

6 444 Q. Yes. Because they held some of
7 the vendor debt, right?

8 A. I believe they held some of the
9 vendor's debt.

10 445 Q. And you knew they might also be
11 potential in taking over the equity, correct?

12 A. Speculation, but, you know...

13 446 Q. Could you go to CCG0024192. This
14 is -- if you go to page 3 of this email chain,
15 you'll see on July 8th you wrote an email which
16 appears to be to John Levin and Ben Babcock. Do
17 you see that?

18 A. Would you please confirm the time?

19 447 Q. 5:39 p.m. Do you see that email?

20 A. Yeah.

21 448 Q. So just to be clear, John Levin
22 was the senior lawyer at Fasken Martineau working
23 on the deal for Catalyst?

24 A. Correct.

25 449 Q. And Ben is obviously Ben Babcock

1 at Morgan Stanley?

2 A. Correct.

3 450 Q. You say FYI met with them today in
4 Amsterdam. I assume the "them" is representatives
5 of VimpelCom?

6 A. That's correct.

7 451 Q. Where you were attending meetings
8 apparently about something else, I assume not
9 related to this case because it's redacted?

10 A. Correct.

11 452 Q. "They want us back as they are
12 getting no traction with the
13 Tennenbaum/Blackstone," it says "Oak
14 3," I assume that is Oakhill and
15 then "West Face consortium."
16 When you say "they want us back," where
17 had you gone?

18 A. There must have been an impasse in
19 the negotiations.

20 453 Q. Okay. So as of July 8th you
21 weren't involved in active negotiations?

22 A. Well, I was involved so far that I
23 was meeting with them, right?

24 454 Q. Right. But there had been an
25 impasse and they were asking for you to come back

1 to the table, is all I'm saying, so you must have
2 been away from the table for some period?

3 A. Yeah.

4 455 Q. Okay. And there is a whole list
5 of names there, Tennenbaum, Blackstone, Oakhill,
6 West Face. VimpelCom informed you those were some
7 of the other interested parties?

8 A. I do not know if that was from the
9 speculation.

10 456 Q. So you're not -- that might have
11 been something that you were aware of independently
12 of VimpelCom?

13 A. Well --

14 MR. VERMEERSCH: Counsel, I just point
15 out for the sake of the record you're quoting West
16 Face and on the document it does say West Face
17 question mark.

18 BY MR. MILNE-SMITH:

19 457 Q. Yes.

20 A. So there is a question mark.

21 458 Q. So you were speculating?

22 A. Yeah. Then I continue to say
23 "allegedly."

24 459 Q. And so the information you had
25 from VimpelCom -- now, when it says they are

1 getting no traction with those various parties, was
2 that information you got from VimpelCom or was that
3 your own inference that they were getting no
4 traction with other potential buyers?

5 A. Well, my understanding would have
6 been if there is a re-acceleration of the process,
7 it must have been that there was an impasse with
8 the other side.

9 460 Q. Okay. And of course Mr. Moyse had
10 been at -- you understand that Mr. Moyse had been
11 at West Face for over two weeks now, correct? You
12 know he started there on the 23rd of June?

13 MR. DIPUCCHIO: Yeah, I think that's
14 been acknowledged.

15 BY MR. MILNE-SMITH:

16 461 Q. So two weeks into Mr. Moyse's
17 three-and-a-half-week tenure at West Face, your
18 best understanding is that a consortium that
19 potentially included West Face was getting no
20 traction?

21 A. Or at least to get, you know, no
22 traction, they need to get us back, yeah.

23 462 Q. And obviously since Brandon's
24 departure, no one to your knowledge, no one at
25 Catalyst told him anything about the deal or

1 Catalyst strategies or the course of Catalyst
2 negotiations?

3 MR. DIPUCCHIO: That I think we'll have
4 to qualify a little bit with the discussions that
5 were happening between Moyse and Creighton.

6 MR. MILNE-SMITH: My understanding is
7 those discussions don't touch on Wind at all,
8 certainly not in this time period, but if you want
9 to --

10 U/T MR. DIPUCCHIO: We'll get you
11 information on that, counsel. I just don't want to
12 foreclose.

13 BY MR. MILNE-SMITH:

14 463 Q. Sitting here today, Mr. de Alba,
15 obviously you weren't aware of any such
16 communication with Mr. Moyse?

17 A. Correct.

18 464 Q. And you're confident obviously you
19 didn't talk to Mr. Moyse?

20 A. No.

21 465 Q. You're confident Mr. Glassman
22 didn't talk to Mr. Moyse?

23 A. I don't think so.

24 466 Q. To your knowledge no one at Morgan
25 Stanley or Fasken Martineau spoke to Mr. Moyse?

1 A. I am not aware.

2 467 Q. To your knowledge Zach Michaud did
3 not speak to Mr. Moyse?

4 A. I do not know.

5 468 Q. Once Mr. Moyse left, who were the
6 analysts most principally involved in the
7 transaction from Catalyst?

8 A. I think it was Lorne Creighton.

9 469 Q. Yes. Anyone else?

10 A. I don't recall.

11 470 Q. And I understand that you've now
12 obtained from Mr. Creighton all of his
13 communications with Mr. Moyse during the relevant
14 time period?

15 MR. DIPUCCHIO: I'll let Mr. Vermeersch
16 answer that because he's been responsible for it.

17 MR. VERMEERSCH: We've obtained all of
18 the emails that we -- yes, all the email
19 communication between the two and disclosed,
20 subject to what Brandon disclosed, everything that
21 is relevant.

22 MR. MILNE-SMITH: And all SMS
23 communications?

24 MR. VERMEERSCH: We have not obtained
25 SMS communications from Mr. Creighton. Those are

1 produced by --

2 MR. MILNE-SMITH: Oh, okay. So you're
3 confident you have SMS communications between the
4 two?

5 MR. VERMEERSCH: We're confident that
6 we have seen them as produced by Mr. Moyse.

7 BY MR. MILNE-SMITH:

8 471 Q. Okay. I understand that you spent
9 some time with Mr. Creighton, that he came to the
10 offices and was questioned about any relevant
11 information he might have about this case?

12 MR. VERMEERSCH: That's correct.

13 BY MR. MILNE-SMITH:

14 472 Q. And did Mr. Creighton disclose any
15 oral communications to Mr. Moyse of confidential
16 Catalyst information about Wind?

17 MR. DIPUCCHIO: Do we have that right
18 now?

19 MR. VERMEERSCH: We don't have that
20 right now.

21 MR. DIPUCCHIO: So we're going to, to
22 the extent it comes into our possession, we're
23 going to give it to you.

24 U/T In other words, if we have further
25 discussions with him and that comes to light we're

1 going to pass that along to you, obviously.

2 BY MR. MILNE-SMITH:

3 473 Q. But to date, when questioned about
4 the matter, he didn't -- he didn't confess to any
5 disclosure of confidential information to Brandon?

6 MR. VERMEERSCH: Outside of Brandon's
7 -- outside of the time Brandon was employed by
8 Catalyst?

9 MR. MILNE-SMITH: Of course.

10 MR. VERMEERSCH: Not to my recollection
11 sitting here, outside of the end of the time period
12 at which Brandon was an employee of Catalyst.

13 MR. MILNE-SMITH: Of course.

14 MR. VERMEERSCH: Right.

15 MR. MILNE-SMITH: Of course they are
16 exchanging confidential information while they are
17 both employees. My point is after Brandon left
18 Catalyst, we've got the emails now, we've got the
19 SMS. The only other form of communication could be
20 meetings or phone calls.

21 MR. VERMEERSCH: Right.

22 BY MR. MILNE-SMITH:

23 474 Q. And Mr. Creighton hasn't disclosed
24 any oral communications at which he disclosed
25 Catalyst confidential information relating to Wind?

1 MR. VERMEERSCH: That's correct.

2 THE DEPONENT: Could we take a bathroom
3 break?

4 MR. MILNE-SMITH: Sure. Take five.

5 -- RECESS AT 11:10 --

6 -- UPON RESUMING AT 11:20 --

7 BY MR. MILNE-SMITH:

8 475 Q. So, Mr. de Alba, we were talking
9 before the break about the intelligence you had on
10 a consortium involving Tennenbaum, Oakhill, West
11 Face, and so forth. I take it your understanding,
12 your expectation would be that those parties would
13 have entered into an NDA the same way that Catalyst
14 had, correct? That would have been your ordinary
15 expectation?

16 A. Correct.

17 476 Q. And that the fact of their
18 involvement would have been covered by that NDA?

19 A. From that point on, yeah.

20 477 Q. Right. So the fact that you were
21 receiving this information, whatever the source
22 might have been, in breach of an NDA didn't give
23 you any trouble in the circumstances?

24 A. What information?

25 478 Q. That they were involved in

1 negotiations?

2 A. As I mentioned, that was from
3 speculation related to the press and, as you know,
4 there is a question mark about the consortium.

5 479 Q. Right. And somebody must have
6 leaked somehow, so there must have been some kind
7 of breach of the NDA, correct?

8 MR. DIPUCCHIO: That's a pretty big
9 assumption, isn't it, counsel?

10 MR. MILNE-SMITH: Okay.

11 MR. DIPUCCHIO: I mean, how do we know?

12 BY MR. MILNE-SMITH:

13 480 Q. So the same way, if West Face
14 finds out that Catalyst was involved, there is
15 really no way to find out, there is really no way
16 to know who the leak was? It could have been
17 someone at Catalyst, it could have been someone at
18 VimpelCom, we have no way to know?

19 A. It could be speculation.

20 481 Q. It could be speculation, right.
21 Okay. The next document is CCG24308. That's the
22 parent. So this is an email, a couple of emails on
23 July 23rd and you'll see at the bottom Russell Drew
24 of Bennett Jones. Pausing there, Bennett Jones
25 were counsel to VimpelCom, correct?

1 MR. DIPUCCHIO: Do you know?

2 BY MR. MILNE-SMITH:

3 482 Q. Do you recall that Bennett Jones
4 were counsel to VimpelCom?

5 A. Yes, correct.

6 483 Q. So Mr. Drew says he has attached
7 the executed exclusivity agreement and revised
8 agenda for a meeting the next day, and then the
9 exclusivity agreement I have at 24320. Do you see
10 that?

11 MR. DIPUCCHIO: Yes.

12 BY MR. MILNE-SMITH:

13 484 Q. So you're free to flip to the last
14 page if you want, but you can see that this is
15 signed by VimpelCom and Catalyst. So I take it
16 that as of the 23rd of July, Catalyst had entered
17 into exclusive negotiations with VimpelCom?

18 A. Yes.

19 485 Q. And there is a definition on page
20 1 of the agreement, the first definition is of the
21 word "affiliate"?

22 A. Yes.

23 486 Q. And if you look down to (ii),
24 Roman numeral (ii), it says that:

25 "AAL Telecom Holdings

1 Incorporated, a company controlled
2 by Anthony Lacavera, and its
3 subsidiaries are not affiliates of
4 VimpelCom."

5 Do you see that?

6 A. I'm reading it. (Witness reads
7 document).

8 487 Q. Feel free to refamiliarize
9 yourself with the agreement, but it's my
10 understanding, based on this definition of
11 "affiliate," that the Lacavera companies are not
12 bound by this exclusivity agreement; is that
13 correct?

14 A. The ones noted on section 2.

15 488 Q. So, in other words,
16 notwithstanding this exclusivity agreement,
17 Mr. Lacavera and his companies were free to pursue
18 whatever other deal they wanted to?

19 MR. DIPUCCHIO: Well, I don't know
20 about Mr. Lacavera. Let's be clear.

21 MR. MILNE-SMITH: Mr. Lacavera's
22 companies.

23 MR. DIPUCCHIO: AAL Telecom and its
24 subsidiaries, right.

25 BY MR. MILNE-SMITH:

1 489 Q. Right. So AAL Telecom and its
2 subsidiaries were free to pursue whatever deal they
3 wanted to. They were not bound by this agreement,
4 right?

5 A. We did not know that they were
6 bound by other agreements that would limit their
7 ability to pursue the deal, but according to this
8 agreement, they are not part of the exclusivity.

9 490 Q. You knew that AAL Telecom and its
10 subsidiaries were not controlled by this -- not
11 bound by this exclusivity agreement, correct?

12 A. Correct.

13 491 Q. I'm not sure if you understood it
14 as of this date, but you eventually became aware
15 that a support agreement was negotiated between AAL
16 Telecom and VimpelCom?

17 A. Correct.

18 492 Q. And that was finalized on August
19 7th?

20 A. I don't recall but...

21 493 Q. Sounds about right? You know that
22 it was eventually negotiated and signed?

23 A. Yeah.

24 494 Q. And until that support agreement
25 was signed, AAL Telecom and its subsidiaries

1 remained free to pursue whatever transaction they
2 wanted?

3 MR. DIPUCCHIO: Well, I guess how would
4 he know that, right? I mean, that would be as
5 between VimpelCom and --

6 BY MR. MILNE-SMITH:

7 495 Q. Put it this way; you weren't aware
8 of any restriction on their ability to pursue
9 whatever deal they wanted?

10 A. If you read some of the previous
11 emails, it is also clearly noted to Lacavera that
12 as he has a relationship with VimpelCom, there
13 needs to be coordination so there is not a breach.

14 496 Q. Of what?

15 A. Of our confidentiality agreement
16 or other agreements.

17 497 Q. My point is that to your knowledge
18 there was no agreement that bound AAL Telecom and
19 its subsidiaries from pursuing whatever deal it
20 wanted so long as it honoured any confidentiality
21 obligations?

22 A. So long it was also respected
23 within the process that VimpelCom established.

24 498 Q. Well, this is what I want to
25 understand. You talk about respecting the process

1 VimpelCom established. What legal restrictions
2 were there on AAL's ability to pursue its own deal?

3 A. Well, they had to also potentially
4 respect confidential information. I do not know
5 their own limitations. They had a long-standing
6 partner, right?

7 499 Q. But that's all you're aware of?

8 A. And there were also negotiations
9 about the economics and the payout of Mr. Lacavera
10 and I know that those negotiations in the past had
11 been tense and there had been friction amongst the
12 parties. So it is difficult for me to guess what
13 were the dynamics of that relationship.

14 500 Q. And obviously - well, I hope this
15 is obvious - you'd agree with me that the
16 exclusivity agreement doesn't bind any other
17 potential bidders for Wind?

18 MR. DIPUCCHIO: Well, they're not
19 parties to it, obviously.

20 BY MR. MILNE-SMITH:

21 501 Q. Right. And, Mr. de Alba, has
22 Catalyst ever made an offer, an unsolicited offer
23 to a company while it was in exclusivity?

24 A. In -- in this case --

25 502 Q. Not in this case. Ever.

1 A. I don't recall.

2 503 Q. Do you have any evidence that
3 VimpelCom or any of its affiliates as defined in
4 the agreement breached the exclusivity agreement?

5 MR. DIPUCCHIO: Well, okay, help me out
6 with this. You guys made a big deal about an
7 inducing claim being completely separate from what
8 we're dealing with here, so why is that relevant?

9 MR. MILNE-SMITH: If you're not
10 pursuing it --

11 MR. DIPUCCHIO: Well, I'm not saying
12 I'm not pursuing it. I'm just trying to figure out
13 why it's relevant to this proceeding.

14 MR. MILNE-SMITH: Because I'm still not
15 clear if you're pursuing it in this proceeding.

16 MR. DIPUCCHIO: But that's a different
17 question. You can write to me on that.

18 BY MR. MILNE-SMITH:

19 504 Q. Are you pursuing an inducing
20 breach claim in this proceeding?

21 MR. DIPUCCHIO: I don't think we have
22 to answer that today, counsel. In this proceeding?

23 MR. MILNE-SMITH: In this proceeding,
24 the one that's going to trial.

25 MR. DIPUCCHIO: No, obviously the

1 pleadings aren't for inducing.

2 BY MR. MILNE-SMITH:

3 505 Q. Are you pursuing a claim in this
4 proceeding that AAL Telecom Holdings Incorporated,
5 any of its subsidiaries or any of its three
6 principals that I will identify - Mr. Scheschuk,
7 Mr. Lacavera or Mr. Lockie - are you pursuing a
8 claim that any of those parties have breached any
9 kind of legal duty or obligation to Catalyst in
10 respect of their discussions with West Face?

11 MR. DIPUCCHIO: As part of this claim?

12 MR. MILNE-SMITH: Yes.

13 U/T MR. DIPUCCHIO: Let me consider that
14 question and I'll get back to you on that, okay? I
15 think the answer to that is no, obviously, but let
16 me just consider that, okay?

17 BY MR. MILNE-SMITH:

18 506 Q. Let's go to CCG0012078.

19 MR. VERMEERSCH: Is there a parent to
20 that document?

21 MR. MILNE-SMITH: 12076 is the parent.

22 BY MR. MILNE-SMITH:

23 507 Q. Anyway, 12078 is a Wind Mobile
24 branded document?

25 MR. VERMEERSCH: We have it.

1 BY MR. MILNE-SMITH:

2 508 Q. Which lists Industry Canada active
3 files. So do I understand correctly that this is a
4 document produced by Wind and given to Catalyst as
5 part of the negotiations concerning its ongoing or
6 active discussions with Industry Canada about
7 regulatory matters?

8 A. Yeah, that's what it appears to
9 be.

10 509 Q. Okay. And you see it refers right
11 on the first paragraph to press materials and
12 public statements on July 7 about an AWS3 policy
13 consultation document? I take it we're on common
14 ground that the AWS3 being referenced there is a
15 wireless spectrum auction that had been announced
16 for 2015?

17 A. Could you point me again to the
18 section you are referring to?

19 510 Q. First paragraph. And then you'll
20 see there's a number of bullet points there setting
21 out that there's going to be a set-aside spectrum
22 for new entrants of AWS3 wireless spectrum?

23 A. Correct.

24 511 Q. And you recall this happening,
25 obviously, it was a major event in terms of Wind

1 and its business plan, correct?

2 A. Correct.

3 512 Q. So as a result of there being a
4 set-aside auction -- sorry, I should define that
5 term. So set-aside auction means spectrum which is
6 set aside for new entrants on which incumbents
7 cannot bid, right?

8 A. Correct.

9 513 Q. The fact of there being a
10 set-aside auction for AWS3 spectrum meant that you
11 no longer needed to merge Wind with Mobilicity in
12 order to acquire enough spectrum to make Wind
13 viable, correct?

14 A. Who are you referring to as "you"?

15 514 Q. A purchaser of Wind.

16 A. Could you repeat the question,
17 please?

18 515 Q. Let's break it down into smaller
19 pieces for you. The plan that Catalyst had been
20 pursuing is that you wanted to merge Wind and
21 Mobilicity; that was the original plan, right?

22 A. That was one of the plans.

23 516 Q. One of the plans, right. And one
24 of the reasons why you needed to merge Wind and
25 Mobilicity is because Wind didn't have enough

1 wireless spectrum on its own to convert to fourth
2 generation wireless technology, which is commonly
3 referred to as LTE, correct?

4 A. That was one of the reasons but
5 there were other reasons why a combination would
6 make sense.

7 517 Q. I appreciate that. But one of the
8 constraining factors for Wind was its limited
9 spectrum ownership, correct?

10 A. Correct.

11 518 Q. And that constrained its ability
12 to convert to LTE?

13 A. Correct.

14 519 Q. And if you don't have LTE, it
15 would be hard to compete with wireless companies
16 that did?

17 A. Correct.

18 520 Q. So when the wireless set-aside
19 auction was announced, that meant -- sorry, let me
20 take one more building block.

21 A way to get around those spectrum
22 constraints would be to merge Wind and Mobilicity
23 so you could put their spectrum together and
24 together you would have enough to convert to LTE,
25 right?

1 A. You do have enough to have more
2 coverage and in some territories you would be able
3 to convert to LTE.

4 521 Q. Right, okay. So when the spectrum
5 auction was announced, the set-aside spectrum
6 auction was announced, another option that
7 presented, instead of merging with Mobilicity or
8 buying Mobilicity out of the CCAA process or buying
9 the spectrum, you could simply acquire this
10 spectrum through the set-aside auction, right?

11 A. It is not apples to apples, right?
12 Spectrums are not equal. The coverage territories
13 are not equal.

14 522 Q. But it presented another option?

15 A. Correct.

16 523 Q. And in fact, as I recall, we can
17 turn it up if we have to, but my recollection is
18 that you told Zach Michaud that your base case for
19 Wind should change from buying Mobilicity or its
20 spectrum to simply acquiring spectrum in the
21 set-aside auction for 62.5 million?

22 A. It could change on a stand-alone
23 approach.

24 524 Q. Right. Your base case went from
25 having to spend 200 million on spectrum for

1 Mobilicity spending 62.5 million from the set-aside
2 auction?

3 A. Could be.

4 525 Q. Okay. And obviously the fact that
5 this set-aside spectrum auction would be announced
6 in July couldn't have been known to Mr. Moyse when
7 he left Catalyst in May?

8 A. I don't recall the communications
9 that the government had provided so far to that
10 point.

11 526 Q. You're not aware of any evidence
12 that Mr. Moyse would have been able to see two
13 months into the future and know what the government
14 would do with respect to a set-aside auction?

15 A. No.

16 527 Q. And obviously Mr. Moyse would have
17 no idea how Catalyst would react to that
18 announcement?

19 A. No, he would have. As you pursue
20 an integration strategy for the fourth carrier, and
21 there is spectrum being set aside that can be
22 achieved at a cheap price, it's just natural that
23 you will consider that's one of the options that we
24 were discussing.

25 528 Q. Well, Mr. de Alba, I asked you if

1 your base case went from spending 200 million on
2 Mobilicity to spending 62.5 million on the
3 set-aside auction and your answer is "Could be."

4 But you're telling me that Brandon
5 Moyses -- so we're sitting here two years later,
6 you're telling me that Brandon Moyses in May would
7 have known exactly what Catalyst's response would
8 be to an event happening two months in the future?

9 A. Your question has -- is confusing
10 because nobody could have had certainty at what
11 price the new auction will take place.

12 529 Q. Of course.

13 A. But what Moyses will have realized,
14 and it has been a common strategy, is that we
15 consolidate companies around their acquisitions.
16 So in this case, as noted, the fourth carrier
17 strategy consider Mobilicity and Wind. We also
18 read review as Mobilicity was evolving, we also
19 considered and negotiated the stand-alone Wind, and
20 with a stand-alone Wind you had stand-alone
21 necessities that on the analysis of Wind will have
22 shown the shortcomings that you pointed out,
23 especially on LTE.

24 530 Q. Mr. de Alba, you've said that
25 spectrum was only one of the issues facing Wind,

1 correct?

2 A. Correct.

3 531 Q. And that merging with Mobilicity
4 had a number of different aspects to it other than
5 spectrum?

6 A. Correct.

7 532 Q. You've also told me that nobody
8 could know in advance what the set-aside auction
9 reserve price would be?

10 A. If it had not been published,
11 yeah.

12 533 Q. In fact, you couldn't even know if
13 there would be a set-aside spectrum auction?

14 A. I believe there would have been
15 indication from the government that there would be
16 more spectrum coming.

17 534 Q. But you didn't know what the terms
18 would be, when it would be, how much would be set
19 aside, what the price would be, you didn't know any
20 of those details in advance?

21 A. We could have known what was in
22 the public domain. I don't recall at this time
23 what was in the public domain.

24 535 Q. If you want to produce to me any
25 evidence in the public domain as to what the

1 content of the set-aside spectrum auction would be
2 as of May 26th, 2014, I'd like to see it. I don't
3 think there's anything.

4 MR. DIPUCCHIO: I don't know how we're
5 going to do that counsel, frankly.

6 MR. MILNE-SMITH: I don't think there
7 is anything, but if there is anything that Mr. de
8 Alba is referring to, I'd like to see it.

9 U/T MR. DIPUCCHIO: If we can find anything
10 to that effect in our files, yeah, of course we'll
11 produce it.

12 BY MR. MILNE-SMITH:

13 536 Q. So my very simple question for you
14 then, Mr. de Alba, is Mr. Moyses had no way of
15 knowing what Catalyst's reaction and how Catalyst's
16 plans would evolve in response to this announcement
17 of the set-aside auction?

18 A. He would have known that a natural
19 approach from Catalyst would be to continue to
20 consolidate spectrum as that would be a continuity,
21 as noted before, of the discussion between Wind and
22 Mobilicity, and then a stand-alone Wind that needed
23 to overcome certain spectrum shortcomings.

24 537 Q. So he could understand that
25 general idea but he couldn't know any of the

1 details?

2 A. Yes.

3 538 Q. I mean, any -- any intelligent
4 observer of the market would know that you'd want
5 to continue to consolidate spectrum, right?

6 A. Yes, and as noted before, for
7 Catalyst the main value driver was the cost at
8 which we could acquire the Wind spectrum.

9 539 Q. Right. And Catalyst had made no
10 secret of its desire to merge Wind and Mobilicity,
11 correct?

12 A. What do you mean, made no secret?

13 540 Q. You had disclosed it publicly?

14 A. I think there was an article that
15 talked about it but I don't recall.

16 541 Q. You recall an article in which
17 Mr. Glassman was quoted as saying that Catalyst
18 wanted to merge Mobilicity and Wind, correct?

19 MR. VERMEERSCH: I don't believe that
20 that's the quote from Mr. Glassman in that article.

21 MR. DIPUCCHIO: Do you have the
22 article?

23 MR. MILNE-SMITH: There's a few of
24 them. Okay. WFC78062.

25 MR. DIPUCCHIO: 7062?

1 BY MR. MILNE-SMITH:

2 542 Q. 78062. These are a couple of
3 newspaper articles. If you go to the second page,
4 it's a Financial Post article.

5 MR. DIPUCCHIO: They are just coming
6 up, counsel. Okay, second page.

7 BY MR. MILNE-SMITH:

8 543 Q. It's a June 27, 2013 article from
9 the Financial Post. The bottom paragraph says:

10 "Mr. Glassman would not comment
11 on the nature of his firm's
12 involvement with Verizon or Wind,
13 however he told the Financial Post,
14 'Catalyst is not interested in
15 Mobilicity on a stand-alone basis.
16 Never were, never will be'."

17 And then it goes on, he is quoted
18 further on page 3 saying:

19 "Mobilicity on its own is a
20 flea on an elephant's butt of
21 wireless telecom in Canada. The
22 only way to build a fourth wireless
23 provider in Canada is through Wind
24 because of its subscriber base and
25 spectrum."

1 Then if you go to the first page,
2 paragraph 1, 2, 3, 4, 5 -- paragraph 6. Now, this
3 isn't quoting Mr. Glassman, I'll be clear about
4 that, but this is a newspaper article reporting
5 that Catalyst Capital Group Inc. wants Mobilicity
6 to merge with Wind Mobile.

7 So based on those various provisions,
8 would you agree with me that it was -- there was
9 widespread public discussion of Catalyst's interest
10 in merging Mobilicity and Wind?

11 A. Correct.

12 544 Q. Okay. And so any intelligent
13 observer of the market would know that you'd want
14 to continue to consolidate spectrum with respect to
15 the AWS3 set-aside auction?

16 A. Correct.

17 545 Q. Sorry, we've just got to go back
18 to that document.

19 A. Can I just answer something? I
20 don't think that -- I think what these articles
21 point out is the combination of Wind and
22 Mobilicity.

23 546 Q. Yes.

24 A. I'm not sure that what you're
25 qualifying as any intelligent observer would then

1 further understand that that would imply the
2 continued aggregation of spectrum. What I can tell
3 you is that members of the Catalyst team will
4 understand that, as that would have been part of
5 the business plan Catalyst would develop in the
6 consideration of the market. I'm not sure if that
7 translates into the market understanding that it
8 would also imply further acquisitions of spectrum.

9 547 Q. So you don't think, your position
10 is that an intelligent observer of the market
11 wouldn't understand that a set-aside auction gave
12 Catalyst another option to acquire spectrum aside
13 from Mobilicity? That's your position?

14 A. Well, in a specialized observer
15 mind, but I cannot interpret what other people
16 would understand from that.

17 548 Q. Go back to 12078. Tell me when
18 you've got it.

19 MR. VERMEERSCH: We have it.

20 BY MR. MILNE-SMITH:

21 549 Q. You'll see that -- we were looking
22 at the first page and there's four bullet points
23 under the first paragraph. The third bullet point
24 says:

25 "There would be strict

1 provisions on the transfer of AWS3
2 spectrum so that Canadian consumers
3 benefit from increased competition
4 of wireless services."

5 Do you see that?

6 A. Yes.

7 550 Q. So this gave no comfort to
8 Catalyst's desire to be able to transfer spectrum
9 without restrictions to incumbents after five
10 years?

11 A. I'm not sure you can translate
12 that because how do you define what the government
13 will consider strict provisions?

14 551 Q. Am I correct that at no point
15 before August 18 did Catalyst receive any comfort
16 from the government that it would permit you to
17 transfer spectrum unrestricted after five years?

18 A. Up to -- throughout our
19 discussions related to Wind, there was always an
20 open dialogue with the government related to their
21 approval, understanding that that was indeed the
22 final pending point on the negotiations.

23 But it does not mean that Catalyst will
24 not have been willing to still proceed with the
25 transaction.

1 552 Q. Okay. So Catalyst was willing to
2 proceed with the transaction without any regulatory
3 concessions?

4 A. We could have.

5 553 Q. I'm not asking hypotheticals.
6 This is real-life situations that occurred in
7 August of 2014. I want to know if your position is
8 that Catalyst was willing to proceed with the
9 acquisition of Wind Mobile without any government
10 concessions?

11 A. We were in -- that was a critical
12 point that we had established from the get-go. We
13 had satisfied the economic variables and that was
14 the final point. We were not able to get to a
15 conclusion or to be able to finalize that decision.

16 554 Q. So Catalyst never made a decision
17 on whether or not you would proceed with the
18 transaction without obtaining regulatory
19 concessions?

20 A. We were not able to complete it as
21 another proposal came.

22 555 Q. No, sorry, I'm asking my question
23 poorly, obviously. My question isn't whether or
24 not you obtained concessions or whether or not you
25 were able to pursue them. My question is as of

1 your exclusivity period up to August 18th, had
2 Catalyst made its own decision internally on
3 whether you would be willing to pursue and close a
4 transaction without first obtaining the sorts of
5 regulatory concessions outlined in your
6 presentations to the government of March 27 and May
7 12?

8 A. Those concessions were critical
9 and we conducted the negotiations all the way,
10 trying to get from the government an economic
11 framework that would make sense. However, we were
12 not able to complete the transaction.

13 556 Q. Again, you're not answering my
14 question, Mr. de Alba. My question isn't whether
15 you were able to conclude a transaction. My
16 question is whether you were able to make a
17 decision on the point about whether or not you
18 would proceed if the concessions were not obtained?

19 A. We did -- we did not get the final
20 word from the government as to their position on
21 those concessions.

22 557 Q. Let me try this a different way
23 because it must be my fault because I'm still not
24 getting an answer to my question.

25 If the government had refused to grant

1 you the regulatory concessions, so this is part one
2 of a hypothetical; part two of the hypothetical is
3 you were able to reach an SPA on terms acceptable
4 to you in terms of the negotiations with VimpelCom,
5 and we've got a final draft so we know how close
6 that was.

7 So those are my two hypothetical
8 conditions. If those two hypothetical conditions
9 were satisfied, would you have closed a deal to
10 acquire Wind without obtaining any government
11 concessions?

12 A. It would have been brought to a
13 discussion amongst the team members.

14 558 Q. Yes?

15 A. And I would have recommended that
16 we proceed with the transaction.

17 559 Q. But it would have had to be a
18 discussion?

19 A. Correct.

20 560 Q. And of course, Brandon Moyse, four
21 months earlier, couldn't have had any idea how that
22 discussion would play out?

23 A. He did have an idea how strong the
24 points were for us.

25 561 Q. Mr. de Alba, you can't tell me

1 today what the result would have been; how could
2 Mr. de Alba four months in advance have done so?

3 MR. DIPUCCHIO: Moyse.

4 BY MR. MILNE-SMITH:

5 562 Q. Moyse, I'm sorry.

6 A. He knew that we were going to push
7 those points all the way to the end of the
8 negotiation.

9 563 Q. Yes, but he didn't know what would
10 have happened had you not obtained those
11 concessions?

12 A. But he did know that if somebody
13 did not require those concessions, they would be in
14 a competitive advantage to us.

15 564 Q. He didn't know what would have
16 happened had you not obtained those concessions?

17 A. He knew that we were going to push
18 for those concessions.

19 565 Q. He didn't know what would have
20 happened had you not obtained them? You didn't
21 know. You don't know sitting here today?

22 A. You're speculating about what
23 concessions we could have obtained.

24 566 Q. The ones set out in the March 27
25 and May 12 -- I'm not speculating. I said

1 explicitly it's the ones in the March 27 and May 12
2 presentations.

3 A. If we had not obtained any of
4 those concessions? Any?

5 567 Q. Correct.

6 A. We would not have proceeded.

7 568 Q. You would not have proceeded?

8 A. We have not obtained any of those
9 concessions?

10 569 Q. Right.

11 A. No.

12 570 Q. Let's go to the next document,
13 CCG0025815. So this is an email chain. The first
14 email in the chain is on the second page and it is
15 from Bruce Drysdale to you and Mr. Riley. Do you
16 see that at 2:17 p.m. on July 25th?

17 A. Yes, I do.

18 571 Q. Okay. So just a reminder,
19 Mr. Drysdale is your principal point of
20 communications with the government, correct?

21 A. Correct.

22 572 Q. He says:

23 "James Nicholson reached out to
24 me today."

25 Who is James Nicholson?

1 A. I believe he was a government
2 official.

3 573 Q. At Industry Canada, correct?

4 A. Hmmm.

5 574 Q. So Mr. Drysdale said they had a
6 good conversation, he's not as negative on the
7 proposed transaction as Mr. Drysdale believed he
8 would be, don't have an issue with a straight-up
9 purchase of Wind by Catalyst, and indicated
10 Industry Canada would allow the transfer of
11 spectrum, that they would have views on licensing
12 of the asset going forward.

13 In the second paragraph he says:

14 "Lastly, Nicholson implied that
15 Catalyst seeking any concessions was
16 a dead end as we have gone down that
17 road twice before with them and they
18 are unlikely to be flexible."

19 So I take it from this communication
20 that on the two previous occasions you went down
21 that road on March 27th and May 12th, you received
22 no assurances of any concessions being granted and
23 Mr. Drysdale's understanding as of July 25th is
24 that it was a dead end?

25 A. I do not know if what he is

1 mentioning here as any concessions were the same
2 concessions requested on the original presentation.

3 575 Q. Well, had you asked for any
4 different concessions other than the two set out in
5 the presentations we've looked at?

6 A. I'll have to look at the
7 evolution.

8 576 Q. I am not aware of any but if you
9 can point me to some other concessions that were
10 being sought, please let me know?

11 U/T MR. DIPUCCHIO: All right.

12 BY MR. MILNE-SMITH:

13 577 Q. So you just say you're tied up and
14 Bruce replies again to you an hour and a half later
15 and says:

16 "I worry we end up with a
17 stranded asset where Ottawa allows
18 us to buy Wind and approves transfer
19 of spectrum but won't license
20 operation to be a reseller or won't
21 give us concession to build it out.
22 Then they limit who we can sell it
23 to."

24 A. Um-hmm.

25 578 Q. I take it that's why, as you just

1 said to me five minutes ago, that's why you
2 wouldn't buy it if you didn't get any of the
3 concessions you were seeking? Mr. Drysdale has
4 described the reasons why you wouldn't want to
5 proceed on such basis?

6 A. He is a lobbyist or a consultant,
7 so --

8 579 Q. Right.

9 A. -- he's giving feedback. His
10 feedback is from the government side. If you read
11 my response is instead of worry, we need your help
12 to turn it around.

13 580 Q. Right.

14 A. And he says agreed, that's why I
15 have been chipping away today with Nicholson.

16 581 Q. Right. But, Mr. de Alba, I

17 haven't seen anywhere in the record of this case
18 any record of the Government of Canada expressing
19 any willingness to make the regulatory concessions
20 being requested. So I assume obviously that all
21 relevant productions have been made, so my question
22 is do you have any evidence of any willingness on
23 the part of the government to make the concessions
24 being requested other than just a hope that you
25 keep chipping away at them?

1 A. Well, there is a dialogue, right?
2 If you negotiate, you have a dialogue.

3 582 Q. Right, and in that dialogue did
4 they ever say anything other than no?

5 A. Well, to the point that there was
6 still discussions and chipping away meant that
7 there was still an opening, right? So is my
8 response where I note, instead of being worried,
9 and I quote:

10 "We need your help to turn it
11 around."

12 583 Q. Right. But he hadn't turned it
13 around by this point certainly, July 25th?

14 A. Correct.

15 584 Q. And he didn't turn it around
16 before August 18th?

17 A. It's tough to extrapolate between
18 this and August 15.

19 585 Q. Well, why don't you look at the
20 email at the top of this chain.

21 MR. DIPUCCHIO: It's July 25th.

22 BY MR. MILNE-SMITH:

23 586 Q. July 25th. Feel free to read the
24 whole thing, it's not that long, but you suggest at
25 the end that we do not talk to government until we

1 have an SPA signed.

2 So my understanding, based on that, is
3 that you didn't have any further discussion with
4 government until an SPA was signed, which in fact
5 never happened?

6 A. Let me read the email for a
7 second.

8 587 Q. Of course.

9 A. (Witness reads document). Can you
10 please ask your question again?

11 588 Q. In the second to last sentence of
12 your email at 7:36 p.m. on July 25th, you suggest
13 that Catalyst not talk to government until you had
14 an SPA signed.

15 So am I correct in concluding that
16 there were no further discussions -- there were no
17 further discussions with government on this issue?

18 A. What I say is different. What I
19 say is a suggestion. I suggest we do not talk to
20 the government until we have the SPA signed.

21 589 Q. And was that suggestion accepted?

22 A. I don't recall.

23 590 Q. If you are aware of any further
24 discussions with government between July 25th and
25 August 18th in which the government expressed a

1 willingness to make any of the regulatory
2 concessions requested on March 27 or May 12, I'd
3 like to know.

4 U/T MR. DIPUCCHIO: We'll let you know if
5 there were any discussions at all with the
6 government.

7 MR. MILNE-SMITH: Why don't we take the
8 lunch break there. 12:45?

9 -- LUNCHEON RECESS AT 12:02 --

10 -- UPON RESUMING AT 1:02 --

11 BY MR. MILNE-SMITH:

12 591 Q. The next document I'd like to look
13 at is CCG0024418. Do you have that email?

14 MR. WINTON: It's loading. Yes, it's
15 up.

16 BY MR. MILNE-SMITH:

17 592 Q. If you go to the second page, you
18 can see the beginning of the chain, it's an email
19 from John Levin to you and Mr. Babcock on August
20 the 1st at 11:20 p.m.?

21 A. Yes.

22 593 Q. There are some time zone issues
23 but, in any event, the first email says:

24 "Felix is supposed to be
25 calling Gabriel now to say that they

1 believe everything is settled."

2 Then Mr. Babcock asks if they agree to
3 the exclusivity extension, and then you see John
4 Levin replied to that one proposing some issues
5 around materiality for contracts and retail leases,
6 and he says that Chris says he sees no issue
7 extending exclusivity but needs to talk to Felix.
8 I assume we can agree that Chris there is Chris
9 Gauthier who was one of the lead lawyers from
10 Bennett Jones on behalf of VimpelCom?

11 A. Correct.

12 594 Q. And on the first page Ben Babcock
13 says "Defer to Gabriel but we are done or it will
14 never end," and you say "Agreed."

15 Can you take it that as of August 1st,
16 Catalyst, subject to some minor provisions like
17 materiality, thresholds for contracts and retail
18 leases as set out in this, Catalyst viewed the deal
19 as being -- all the material deal points in the SPA
20 as being essentially decided?

21 A. With VimpelCom, yes.

22 595 Q. With VimpelCom, yes. Then if we
23 want to look at a draft of what the SPA looked like
24 on that day, you can go to 0026616, is the covering
25 email.

1 MR. VERMEERSCH: We have it.

2 BY MR. MILNE-SMITH:

3 596 Q. So there is an email from
4 Mr. Saratovsky who was, I think, the in-house
5 counsel at VimpelCom with responsibility for this
6 deal; is that right?

7 A. He was in-house counsel and also
8 the main negotiator.

9 597 Q. Right.

10 A. On the other side.

11 598 Q. So he says that the attached draft
12 of the share purchase agreement VimpelCom considers
13 substantially completed subject only to settling
14 some of the details in the schedules. And then the
15 draft is attached at 26625.

16 A. Okay.

17 599 Q. So if we then go to some of the
18 provisions we have looked at before, on page 12 is
19 the definition of outside date?

20 MR. WINTON: It's just still loading.

21 MR. MILNE-SMITH: Ah.

22 MR. WINTON: Okay, page 12?

23 MR. MILNE-SMITH: Yes.

24 MR. WINTON: Okay.

25 BY MR. MILNE-SMITH:

1 600 Q. So outside date is November 30th
2 but if we haven't got Competition or Industry
3 Canada approval, through no fault of the parties,
4 extended for one month; that's the definition
5 that's agreed upon?

6 A. Correct.

7 601 Q. And obviously that hadn't been
8 decided by the time Brandon left on May 26th?

9 A. Decided, no. Discussed, maybe.

10 602 Q. Okay. Just an aside, you'll
11 notice the definition of "parties" includes a
12 reference to CF3 and CF4?

13 A. Correct.

14 603 Q. Can I take it those are references
15 to Catalyst fund 3 and Catalyst fund 4? We can
16 look up the definition, if you want.

17 A. Correct.

18 604 Q. Catalyst, as I understand today,
19 has five funds?

20 A. Correct.

21 605 Q. They're not all active but has had
22 five funds?

23 A. Correct.

24 606 Q. The ones that were going to be the
25 purchasers in this transaction were funds 3 and 4?

1 A. Correct.

2 607 Q. As I understand the way these
3 funds work is you have a period in which you raise
4 money and then a period in which you acquire
5 investments and then a period in which you harvest
6 the investments?

7 A. Correct.

8 608 Q. So would fund 3 and fund 4 both
9 have been within -- what do you call those three
10 phases, just for terminology?

11 A. The investment period.

12 609 Q. Okay. So both fund 3 and fund 4
13 were in the investment period as of August 2014?

14 A. Correct.

15 610 Q. When did their investment periods
16 close?

17 A. I need to check but it was after
18 that date.

19 611 Q. Okay. So you didn't need -- did
20 you need to obtain any consents or waivers from any
21 of your investors or limited partners in order to
22 make this investment?

23 A. I don't think so.

24 612 Q. Did you have a limited partner
25 advisory committee of any kind?

1 A. No, we don't.

2 613 Q. So you didn't have to consult any
3 of your investors about this deal?

4 A. No, we don't. Not for the
5 approval, right? We do not need to consult with
6 them for approval.

7 614 Q. Right. You can do the deal
8 without talking to them?

9 A. Correct.

10 615 Q. Were there any undrawn commitments
11 for fund 3 or fund 4 or was it all fully drawn?

12 A. They were drawn in order to have
13 capital available to make investments.

14 616 Q. But you had the right to draw on
15 them?

16 A. To draw, to draw so we could have
17 money to make investments, correct.

18 617 Q. But you didn't require any
19 consents from them, it was purely in your
20 discretion?

21 A. Correct.

22 618 Q. The next provision is on page 41,
23 so here we see the version of 6.3(d) and, as I
24 understand it, this was the final draft of 6.3(d)
25 and there were no further negotiations around this

1 topic from August 1st forward. That's my
2 understanding on a review of the documents. Is
3 that consistent with your understanding or your
4 recollection?

5 A. Again, I do not recall.

6 MR. WINTON: If we have a different
7 position, we'll let you know, but we can operate
8 today on the assumption you are correct.

9 MR. MILNE-SMITH: Good.

10 MR. WINTON: Okay.

11 BY MR. MILNE-SMITH:

12 619 Q. So this includes a limitation on
13 Catalyst's right to take any action that could be
14 expected to prevent or delay the obtaining of any
15 consent or approval required under the agreement,
16 correct?

17 A. Sorry, could you repeat it? You
18 are mumbling a little bit.

19 620 Q. This provision says that:

20 "Catalyst shall not knowingly
21 take or cause to be taken any action
22 which would be expected to prevent
23 or delay the obtaining of any
24 consent or approval required
25 hereunder."

1 Meaning under the agreement, correct?

2 A. Let me read it, please.

3 621 Q. Yes.

4 A. (Witness reads document). It has
5 follow-up provisos, A and B.

6 622 Q. Yes. Well, those aren't provisos,
7 those are including. So it's not limiting it, it's
8 just providing some specificity?

9 A. But it also says without the
10 written consent of the seller, not to be
11 unreasonably withheld, right?

12 623 Q. Yes. It means you are --

13 A. So it means that you could request
14 the consent from the seller and the seller cannot
15 unreasonably withhold it and that could allow to
16 make requests or have a dialogue with the
17 government.

18 624 Q. Well, no. Because let's look
19 carefully at the language there. It says:

20 "Without written consent of the
21 seller entering into any timing or
22 other agreements with any
23 governmental authority for the
24 consummation of the transactions
25 contemplated hereby."

1 So it's for this transaction?

2 MR. WINTON: I think Mr. de Alba at
3 first was looking at A.

4 MR. MILNE-SMITH: Yes.

5 MR. WINTON: Not to be unreasonably
6 withheld, he was referring to A.

7 MR. MILNE-SMITH: Oh, seeking an
8 approval.

9 MR. WINTON: For another transaction.

10 BY MR. MILNE-SMITH:

11 625 Q. For a transaction other than the
12 transaction contemplated. Okay, I was looking at
13 B, you were looking at A.

14 I assume VimpelCom had never, given
15 their obsession with government approvals and the
16 way they'd been burned in the past, VimpelCom had
17 never given you any impression that they would
18 permit you to seek an approval for another
19 transaction?

20 A. That's not accurate. We even had
21 communications with the government about the
22 concession that we were pursuing as well as, you
23 know, the follow-up steps that might be required
24 for completion.

25 626 Q. Of course you had. That's for

1 approval of this transaction. In fact, this clause
2 of course doesn't bind you until you sign it, so
3 there's no question you were having discussions
4 with the government; we've looked at them.

5 The point is that once you signed this,
6 without the consent of VimpelCom not to be
7 unreasonably withheld, it limits your ability to
8 seek the approval of any other transaction?

9 A. Not to be unreasonably withheld.

10 627 Q. And then if you go down and look
11 at the next sentence where it says "For greater
12 certainty," it says:

13 "For greater certainty for the
14 duration of the interim period..."

15 Which is the period between signing and
16 closing, you're not even allowed to make any plans
17 to sell the business or its assets to an incumbent
18 or to discuss any such plans with any governmental
19 authority. Do you see that?

20 A. Would you let me read it for one
21 second?

22 628 Q. Of course.

23 A. (Witness reads document). Sorry,
24 it was a long sentence or paragraph. Can you
25 please repeat the question?

1 629 Q. So as I interpret that sentence
2 starting "For greater certainty," Catalyst, once it
3 signs the agreement, would not even be allowed to
4 make any plans to sell the business or its assets
5 to an incumbent or to discuss any such plans with a
6 governmental authority?

7 MR. WINTON: During the interim period.

8 BY MR. MILNE-SMITH:

9 630 Q. During the interim period, right?

10 A. Correct.

11 631 Q. Okay. So had you signed this
12 agreement, you would not have been allowed to go
13 and seek concessions from the government until
14 after closing about the ability to sell spectrum to
15 an incumbent?

16 A. Correct.

17 632 Q. So if we go to - I've got to get
18 my next binder - good news for everybody, Volume 3
19 of 3.

20 MR. WINTON: Wait, I want to direct you
21 to sub-paragraph (e).

22 BY MR. MILNE-SMITH:

23 633 Q. Yes. 6.3(e) is on page 41 and it
24 says that the purchaser can pursue -- continue to
25 pursue regulatory concessions that GWMC, which is

1 Wind Mobile, is presently seeking, right?

2 MR. WINTON: Right.

3 BY MR. MILNE-SMITH:

4 634 Q. And Wind Mobile at that time was
5 not seeking the ability to sell its spectrum to
6 incumbents?

7 A. They were seeking other
8 concessions and I believe they were also consistent
9 with some of the items Catalyst would request.

10 635 Q. Yes, but they were not seeking the
11 right to sell spectrum to incumbents?

12 A. Not to incumbents.

13 636 Q. They were seeking things like
14 tower sharing, roaming agreements, those sorts of
15 things?

16 A. Yes.

17 637 Q. They weren't seeking the right to
18 sell the spectrum to an incumbent?

19 A. Correct.

20 638 Q. Obviously they're seeking to sell
21 the spectrum to other people because they're trying
22 to sell it to you?

23 A. They might have pursued another
24 incumbent, I don't know.

25 639 Q. But the right to sell spectrum to

1 incumbents wasn't covered by 6.3(e)?

2 A. Right.

3 640 Q. Next document --

4 MR. WINTON: I think, just to qualify
5 that, it could have been if that --

6 MR. MILNE-SMITH: Well, hang on,
7 counsel.

8 MR. WINTON: No, wait. The point is
9 you are asking him to agree to something he may or
10 may not know, all right? Where is it where you say
11 there is the document that shows that Globalive,
12 GWMC, wasn't seeking to sell to incumbents?

13 THE DEPONENT: I believe they tried at
14 one point as well.

15 MR. WINTON: So if you have that, fine,
16 if it's there, it's fine.

17 BY MR. MILNE-SMITH:

18 641 Q. CCG12078. This is Wind Mobile
19 Industry Canada active files and it lists
20 everything they have ongoing with Industry Canada,
21 and then starting at page 5 everything ongoing with
22 the CRTC. And it talks about roaming rates and
23 tower sharing and a variety of other things, the
24 spectrum option we already covered. There is no
25 reference in here to seeking the right to transfer

1 spectrum to an incumbent.

2 I put it to you that there is nowhere
3 in any document in this case that Wind Mobile was
4 pursuing the right to sell spectrum to incumbents
5 such that it would be captured by 6.3(e), and if
6 you have evidence to the contrary, I'd like to see
7 it. Fair enough?

8 MR. WINTON: I think the best we can
9 leave it at is if they were seeking it, then it
10 would be covered by that, but I'll take your point,
11 we don't have a document that shows they were.

12 MR. MILNE-SMITH: Or any evidence. In
13 fact, we have Mr. de Alba's evidence that he did
14 not believe they were. He is not aware of it.

15 THE DEPONENT: No, what I said was --

16 MR. MILNE-SMITH: Well, the record says
17 what it says.

18 MR. WINTON: The record says what it
19 says. I think the point is I don't think Mr. de
20 Alba is the witness, I think it's either someone
21 from Wind or someone from the government who would
22 know exactly what's the full scope and I don't
23 think we should take it from any one particular
24 document that that's all of it.

25 I'm just pointing out there is an open

1 possibility that it's covered by --

2 MR. MILNE-SMITH: If you plan to call
3 such evidence at trial, I would like to know about
4 it in advance.

5 BY MR. MILNE-SMITH:

6 642 Q. And you didn't have an
7 understanding at that time on August 1st that that
8 was an open file, that was an open matter that Wind
9 was actively pursuing such that it would be covered
10 by 6.3(e)?

11 A. Correct.

12 643 Q. So 25843. First of all, I'd like
13 to apologize, just before lunch I had forgotten
14 about this document because I thought that the one
15 we looked at before lunch was the last
16 communication with government, but I think this one
17 is it now.

18 So if you go to page 2 of the document
19 you'll see an email from Mr. Drysdale again on
20 August the 3rd?

21 A. From what time?

22 644 Q. 9:15 a.m.

23 A. Yes.

24 645 Q. So he says he was in Ottawa late
25 last week, met with James Nicholson, had coffee

1 with the senior PCO, Privy Council Office, I assume
2 we agree, official, had conversations with both.

3 Looking at his bullet points
4 summarizing the meeting, he says:

5 "Both Industry Canada and
6 PCO/PMO are adamant that the current
7 federal policy will not change."

8 I take it we can agree that PCO/PMO
9 means this went right up to the Prime Minister's
10 Office?

11 A. According to Mr. Drysdale.

12 646 Q. And you have no reason to doubt
13 Mr. Drysdale?

14 A. No.

15 647 Q. The next bullet point says that:

16 "The government would not be
17 opposed to Catalyst buying Wind, but
18 Ottawa would not provide concessions
19 Catalyst outlined in its May
20 presentation for building out a
21 fourth carrier nor would Ottawa
22 allow Catalyst or anyone else to
23 become a reseller."

24 Again, as of August 3 that was
25 Catalyst's understanding of the government

1 position?

2 A. As presented by Mr. Drysdale.

3 648 Q. Right. And that position didn't
4 change as of August 18th?

5 A. I would need to check to see if
6 there were any other communications with government
7 during that period of time.

8 649 Q. Okay. You can let me know by way
9 of undertaking. Is that okay, counsel?

10 U/T MR. WINTON: Yes.

11 BY MR. MILNE-SMITH:

12 650 Q. The third bullet point says that
13 if -- Mr. Drysdale recounts Mr. Nicholson saying
14 that if Catalyst were to sign a sale/purchase
15 agreement with Wind, it should do so with a clear
16 understanding it would have to build out a fourth
17 carrier without concessions and without ability to
18 sell to an incumbent after five years.

19 So again, that was the understanding of
20 Catalyst from August 3rd through August 18th?

21 A. As per Mr. Drysdale.

22 651 Q. Yes. And you have nothing to the
23 contrary?

24 A. I need to check to see if there
25 was other dialogue ongoing with the office.

1 652 Q. Okay. And finally the fourth
2 bullet point, just look at the last sentence:

3 "Nicholson reports that
4 Minister Moore and PM Harper are
5 entrenched and there will be no
6 flip-flop."

7 So again, that's something that
8 Mr. Drysdale was told and that you were therefore
9 advised?

10 A. Correct.

11 653 Q. So Mr. Glassman's response starts
12 on page 1 and it carries over to page 2, and his
13 view is that "It's all positioning."

14 Do I take it then Catalyst's view is
15 that notwithstanding the clearly-expressed position
16 of the government, you didn't necessarily believe
17 the government would actually carry through if put
18 to the test?

19 A. Put to the test, what do you mean
20 put to the test?

21 654 Q. Meaning your plan was to sign the
22 SPA and even though the government said they
23 wouldn't give you concessions, you were going to
24 try and get concessions before the deal closed?

25 A. We were going to try.

1 655 Q. Right. And you were going to try
2 to get concessions on things like ability to
3 transfer spectrum to an incumbent?

4 A. No, only within the context of
5 whatever we had discussed in parallel with
6 VimpelCom, right? You need to look at the dynamics
7 of the deal on how the importance of the
8 concessions from the previous presentations in the
9 context of the concessions that Wind itself was
10 requesting.

11 656 Q. Right.

12 A. And then put that together with
13 the dynamics of the data between us and the
14 government.

15 657 Q. So your view is that -- sorry,
16 your evidence is that Catalyst did not intend to
17 seek any concessions about transfer of spectrum in
18 the interim period between signing an SPA and
19 closing?

20 A. That's what we saw before, that's
21 what we were agreeing with VimpelCom.

22 658 Q. Okay. So if you go then over to
23 page 2, this continues Mr. Glassman's email and he
24 says:

25 "Bruce,

1 Do they understand that without
2 making the spectrum transferrable at
3 sometime in the future, they have
4 literally made it impossible for
5 anyone to get financing/debt since
6 without eventual transferability,
7 there is no collateral value against
8 which lenders will lend and
9 therefore a fourth carrier cannot
10 and will not make anyone reasonable
11 minimum rate of return."

12 So I'm a little bit confused here,
13 Mr. de Alba. Mr. Glassman is saying unless the
14 spectrum is transferrable you can't get financing
15 and you can't make a minimum rate of return. But
16 you're also saying that Catalyst wasn't going to
17 seek any concessions on spectrum transfer. So was
18 Catalyst prepared to go into a transaction without
19 any ability to make a reasonable rate of return?

20 A. The positioning that Mr. Glassman
21 is taking with the government advisor, in which the
22 advisor is acting as an intermediary negotiator,
23 right, is not the same as our analysis on the
24 ultimate rate of return that the Catalyst team had
25 developed.

1 659 Q. Hang on, let me make sure we
2 understand here.

3 A. Sure.

4 660 Q. Bruce Drysdale is your agent?

5 A. Government agent.

6 661 Q. Agent for government relations?

7 A. Correct.

8 662 Q. He works for you?

9 A. Um-hmm.

10 663 Q. He doesn't work for government?

11 A. Correct.

12 664 Q. So he owes no loyalty or
13 obligations to the government, he only owes his
14 loyalty to you?

15 A. Correct.

16 665 Q. But you're saying that
17 Mr. Glassman wasn't telling him Catalyst's true
18 position, he was just telling Mr. Drysdale
19 Catalyst's negotiating position with government?

20 A. Absolutely.

21 666 Q. So Mr. Glassman misled
22 Mr. Drysdale about what the ultimate position was?

23 A. No. What do you mean misled?

24 667 Q. Well, he told him something about
25 the ability to make a rate of return and the

1 ability to get financing debt that you just said
2 wasn't actually Catalyst's final position?

3 A. Correct.

4 668 Q. If you could go to 26064, do you
5 have that?

6 MR. VERMEERSCH: Correct.

7 BY MR. MILNE-SMITH:

8 669 Q. So this is an email on August 4th
9 from Ben Babcock to you and John Levin and he's
10 talking about, as I understand it, the timeline for
11 approval of VimpelCom. Do you recall that?

12 A. Let me read it for a second.

13 670 Q. Yes.

14 A. (Witness reads document).

15 671 Q. Have you read this email?

16 A. Almost. Okay, go ahead.

17 672 Q. The first two points are about the
18 AAL support agreement which we've talked about
19 before, correct?

20 A. Can you clarify when we talked
21 about that before?

22 673 Q. Do you remember we talked about
23 AAL needing to enter into a support agreement with
24 VimpelCom? Are you familiar with that?

25 A. I think that was the case.

1 674 Q. Right. All I'm saying is the
2 first two points are just relating to the AAL
3 support agreement.

4 A. Okay.

5 675 Q. Right? So then point 3 says that
6 they need VIP, that's VimpelCom?

7 A. Correct.

8 676 Q. They need VimpelCom finance
9 committee and GTH board approval, so they needed
10 approval at two different levels; you were aware of
11 that?

12 A. Yes, as per the email.

13 677 Q. And their plan was to do it for
14 the next Monday which would have been August the
15 11th. You were also aware of that?

16 A. As per this email.

17 678 Q. Okay. And Mr. Babcock says he
18 spoke to Gusev. Who was Gusev?

19 A. I would need to check but I
20 believe he was a VimpelCom board member or he had
21 some affiliation in connection towards approval of
22 the deal.

23 679 Q. It says:

24 "He," meaning Gusev, "is
25 singularly focused on clean exit and

1 nothing else."

2 So the reference to clean exit, that is
3 something that in fact had been a predominant
4 concern of VimpelCom throughout its negotiations,
5 correct?

6 A. Not throughout. There was an
7 evolution, right, on the timing?

8 680 Q. Yes.

9 A. And the concessions that could be
10 requested?

11 681 Q. Right.

12 A. And that evolved into the SPA, and
13 then here you are hearing the position of one -- I
14 believe one of the decision-makers of the board.

15 682 Q. But putting aside the specifics,
16 isn't it fair to say that a consistent concern
17 about VimpelCom was minimizing regulatory risk?

18 A. That point went back and forth,
19 right? As you saw from the documents we reviewed,
20 the SPA allowed for certain concessions to be
21 requested as well.

22 683 Q. Again, you're missing my point.
23 I'm not asking about specific provisions, I'm
24 saying VimpelCom consistently pushed for positions
25 that would minimize risk to a regulatory approval?

1 A. I'm saying those positions vague
2 -- or varied in materiality throughout the
3 negotiations.

4 684 Q. With you pushing for greater
5 freedom and VimpelCom pushing for less?

6 A. Correct.

7 685 Q. If you go to CCG24550, and I'm
8 looking at an email from a lawyer at Faskens to you
9 and Mr. Levin on August 8th starting at the bottom
10 of page 1, and it appears to concern certain
11 consents that were a condition to closing.

12 Feel free to read it but I'm just going
13 to let you know what my question is. You'll see in
14 the second paragraph it talks about Catalyst
15 pushing for inclusion of additional consents as
16 conditions to closing, and seller considering the
17 addition of other consents as a non-starter.

18 Now, I've looked at the draft SPAs
19 around this time and I don't see any reference to
20 what these other consents were, but I'd like to
21 know what the consents were that Catalyst was
22 trying to have added as preconditions to the deal.

23 A. So there were two questions?

24 686 Q. I'd like to know what are the
25 consents that Catalyst was trying to add as

1 preconditions to the deal that were in dispute in
2 this email?

3 A. I don't recall.

4 687 Q. Okay. Counsel, you can try to
5 find out from Faskens perhaps? Because I don't
6 see -- like, the draft schedules in the SPA are all
7 blank so I don't know what they're referring to
8 here.

9 U/T MR. WINTON: Why don't we -- we'll see
10 if they can assist. We'll make inquiries.

11 BY MR. MILNE-SMITH:

12 688 Q. Okay. If we go to CCG0024559.

13 MR. VERMEERSCH: We have it.

14 BY MR. MILNE-SMITH:

15 689 Q. So this email chain starts with an
16 email from you, Mr. de Alba, at the bottom of page
17 1 on August the 8th at 3:48 p.m. sending it to
18 various members of your team. And on page 2 you
19 say that you heard from Felix:

20 "It turns out they did not have
21 the finance committee meeting today
22 and that they are not going to be
23 able to sign the SPA without full
24 VimpelCom board approval. He is
25 saying target date is now next

1 Friday as they plan to do the
2 finance committee meeting on
3 Monday."

4 So closing is being, or potential
5 signing of the deal is being postponed by a week,
6 by this email?

7 A. Correct.

8 690 Q. And do you have any evidence that
9 the VimpelCom board was even aware of the offers
10 sent in by Michael Lightner (ph) on behalf of the
11 consortium that included West Face on August the
12 7th?

13 MR. WINTON: How is that relevant?

14 MR. MILNE-SMITH: You're saying -- the
15 whole point of this case is you say that VimpelCom
16 changed its position because of the Tennenbaum
17 offer. I'd like to know if there's any evidence
18 that they were even aware of the Tennenbaum offer.

19 MR. WINTON: You're talking about the
20 board?

21 MR. MILNE-SMITH: Yes.

22 U/A MR. WINTON: I'll take that under
23 advisement.

24 MR. MILNE-SMITH: Just to be clear, I
25 don't want to limit that advisement to as of this

1 date. I would like to know if the VimpelCom board
2 or finance committee became aware of the Tennenbaum
3 offer at any time up until August the 18th, I'd
4 like to know what evidence you have of that.

5 MR. WINTON: So I just want to make
6 sure, since we're -- you're asking this question
7 and suggesting this is a relevant fact, you're not
8 suggesting there's -- or West Face doesn't have any
9 evidence of that that it has produced, because if
10 you are asking this question and acknowledging it
11 as a relevant issue and you are saying you produced
12 all the documents that you have regarding
13 VimpelCom's knowledge of that offer?

14 MR. MILNE-SMITH: Yes.

15 U/A MR. WINTON: Okay. I've got it under
16 advisement.

17 MR. MILNE-SMITH: It was obviously
18 sent, that's why I said the board, right? It was
19 sent to Felix --

20 MR. WINTON: It was sent around --
21 could we go off the record for one second?

22 MR. MILNE-SMITH: Sure.

23 -- OFF THE RECORD DISCUSSION --

24 BY MR. MILNE-SMITH:

25 Q. CCG24575.

691

1 MR. VERMEERSCH: We have it.

2 BY MR. MILNE-SMITH:

3 692 Q. So there is an email from
4 Mr. Gauthier to John Levin on August the 8th and he
5 said -- and I appreciate you weren't copied on this
6 email though it's then forwarded to you later, but
7 it says:

8 "As you may be aware, Felix
9 called Gabriel to let him know that
10 regrettably internal approvals are
11 taking longer than expected to
12 everyone's frustration and offered
13 to extend exclusivity."

14 Did you have that call with
15 Mr. Saratovsky?

16 A. I believe so.

17 693 Q. And he told you that internal
18 approvals were taking longer than expected?

19 A. I believe so.

20 694 Q. And your understanding is that
21 Mr. Saratovsky was at all times working in good
22 faith trying to get a deal done up to the 18th?

23 MR. WINTON: You're asking him his --
24 no, that's an inappropriate question.

25 BY MR. MILNE-SMITH:

1 695 Q. I'm asking if you ever had any
2 reason to think that Mr. Saratovsky was not working
3 in good faith to try to get a deal done with
4 Catalyst?

5 MR. WINTON: Whether he had or whether
6 he now has? Because those are two very different
7 questions.

8 BY MR. MILNE-SMITH:

9 696 Q. Let's start with whether had at
10 the time?

11 A. It was indeed troubling that there
12 were inconsistencies on what he was presenting as
13 what was going to happen and ultimately how things
14 happening, so I was concerned.

15 697 Q. My point is, were you concerned
16 about Mr. Saratovsky's personal conduct or about
17 what was happening at the board level?

18 A. About him.

19 698 Q. Okay. You were concerned about
20 Mr. Saratovsky's conduct?

21 A. Yes.

22 699 Q. Did you trust him?

23 A. I was negotiating but I did not
24 trust.

25 700 Q. Did not trust him?

1 A. Correct.

2 701 Q. Did you believe he was being
3 untruthful to you?

4 A. Yes.

5 702 Q. What did you think he was being
6 untruthful about?

7 A. He was looking at other options.

8 703 Q. Okay. So do you think he was
9 actually negotiating with other options or just
10 looking at them?

11 A. I thought there was an
12 exclusivity --

13 704 Q. Yes.

14 A. -- and that he was respecting it,
15 which I learned that was not the case.

16 705 Q. Okay. So you don't think
17 Mr. Saratovsky respected exclusivity?

18 A. I think exclusivity was not
19 respected by Mr. Saratovsky and by West Face and by
20 the consortium.

21 706 Q. Well, West Face wasn't bound by
22 exclusivity, they weren't a party to it, right?

23 A. Well, they were sending proposals,
24 inducing a party to walk away from a well-advanced
25 agreement, giving them hope that there was another

1 alternative than just closing with Catalyst.

2 707 Q. And we've got an undertaking for
3 you to advise whether Catalyst has ever made an
4 offer to a party that was a party to an exclusivity
5 agreement. Do you recall you're going to advise me
6 about that?

7 A. Yes.

8 708 Q. So you also believe that
9 Mr. Saratovsky and the VimpelCom board were acting
10 in breach of their exclusivity obligations?

11 A. Can you repeat the question?

12 709 Q. You believe that Mr. Saratovsky
13 and the VimpelCom board breached their exclusivity
14 obligations to Catalyst?

15 A. I do believe that.

16 710 Q. Okay. When did you form that
17 belief?

18 A. After, I need to remember
19 precisely, but after we lost the exclusivity --

20 711 Q. Yes.

21 A. -- I learned from Mr. Gauthier
22 that the approach that had been pursued by the West
23 Face consortium and by VimpelCom was to continue to
24 receive proposals in order to have a potential
25 alternative. And he invited and noted that the

1 exclusivity did not have a notification clause if
2 other proposals would have been received, and he
3 further, you know, mentioned that that's, you know,
4 something that had been happening.

5 712 Q. And this you found out back in
6 August 2014 after your exclusivity expired?

7 A. I don't remember precisely when.

8 713 Q. But in that August/September
9 timeframe?

10 A. I don't remember precisely when.

11 714 Q. It wasn't, like, this year, it was
12 back at the time the events in question were
13 happening?

14 A. Yeah, but I don't remember if --
15 yes.

16 715 Q. Okay. Did we already bring up
17 24606?

18 MR. VERMEERSCH: I don't believe so.

19 MR. MILNE-SMITH: So please bring up
20 24606.

21 MR. VERMEERSCH: We have it.

22 BY MR. MILNE-SMITH:

23 716 Q. If you go to page 2.

24 MR. VERMEERSCH: Which email?

25 BY MR. MILNE-SMITH:

1 717 Q. It's on page 2, it's Felix's email
2 to you, Mr. de Alba, on August 11th at 7:38 a.m.
3 So Mr. Saratovsky raises two points that have been
4 of concern to the VimpelCom board or he says were
5 of concern to the VimpelCom board.

6 One is about the consequences of not
7 getting government approval, and he says:

8 "After our experience with the
9 government, they are concerned about
10 the government's behaviour and
11 therefore want us to seek protection
12 in case the government does not
13 approve."

14 What sort of protection were they
15 seeking?

16 A. I do not know. I do not even know
17 what Mr. Saratovsky was commenting here was a
18 negotiating ploy or a true position from the board,
19 and this is also tainted by the framework that, as
20 you noted, there was a proposal sent from West Face
21 a couple of days prior, on August the 7th.

22 718 Q. And you're going to let me know if
23 you have any evidence that the board ever saw that,
24 right?

25 U/A MR. WINTON: I think we actually took

1 that under advisement.

2 MR. MILNE-SMITH: Fair enough.

3 BY MR. MILNE-SMITH:

4 719 Q. So then if we go to an email that
5 same day at 24640, this is later that morning.
6 Actually, it's around the same time that morning.

7 MR. VERMEERSCH: We have it.

8 BY MR. MILNE-SMITH:

9 720 Q. Go to page 4 of that email chain.
10 You'll see right at the bottom there is an email
11 from Mr. Glassman and it's unclear who it's to but
12 from the surrounding emails I think it seems pretty
13 clear he's writing to John Levin and to you. Do
14 you see that?

15 MR. VERMEERSCH: This is at 8:12 p.m.?

16 MR. MILNE-SMITH: Yes.

17 MR. VERMEERSCH: Yes, we have it.

18 THE DEPONENT: Yes.

19 BY MR. MILNE-SMITH:

20 721 Q. Mr. Glassman says:
21 "I am done with this situation.
22 Either it's announced immediately
23 and it's fully binding subject to
24 regulatory approval (has always been
25 the deal) or Catalyst is out right

1 now."

2 Was that Mr. Glassman's position or was
3 that a negotiating position?

4 A. Negotiating position.

5 722 Q. So even though he was expressing
6 it just to you and Mr. Levin, this wasn't in fact
7 his true position, it was just his position for
8 negotiations?

9 A. Correct.

10 723 Q. Why would he not tell you his true
11 position?

12 A. Because he -- as part of his
13 style, he likes to push.

14 724 Q. Ah, okay. So he's pushing you?

15 A. Correct.

16 725 Q. Okay. And then if you go to page
17 1, so this email chain has been going back and
18 forth for an hour or two now and he says at the
19 very top email in the chain, he says:

20 "It's their problem to solve.

21 I will not allow us to own their

22 process issues. I have my own

23 problems related to this timing, not

24 the least of which is a call with

25 Harvard today and, to complicate it,

1 AP meeting tomorrow."

2 What was the call with Harvard?

3 A. I don't recall but I can tell you
4 it had nothing to do with approvals of the deal.

5 726 Q. Was Harvard one of your investors
6 or potential investors, the Harvard Endowment?

7 A. It is an investor.

8 727 Q. In funds 3 and 4?

9 A. I would need to check but --

10 R/F MR. WINTON: We're not going to do
11 that.

12 BY MR. MILNE-SMITH:

13 728 Q. Okay. And what is an AP meeting?
14 What's that referring to?

15 A. Advisory panel.

16 729 Q. And what's the advisory panel?

17 A. It's a panel in which the status
18 of the fund is discussed.

19 730 Q. Yes.

20 A. You discuss items like capital
21 call, expectations for future capital calls, status
22 of existing investments, you discuss the status of
23 potential deals and then you set out the protocol
24 for discussion for future advisory panel meetings.

25 731 Q. And who sat on that advisory

1 panel?

2 A. A group of advisory panel members.

3 732 Q. That's a nice tautology,

4 Mr. de Alba. Who were the members of the advisory
5 panel?

6 R/F MR. WINTON: We're not going to answer
7 that.

8 BY MR. MILNE-SMITH:

9 733 Q. Was the advisory panel comprised
10 of Catalyst investors?

11 R/F MR. WINTON: We're not going to answer
12 that.

13 BY MR. MILNE-SMITH:

14 734 Q. What did the timing of this deal
15 and getting it into the public domain have to do
16 with the advisory panel meeting?

17 R/F MR. WINTON: We're not going to answer
18 that either.

19 BY MR. MILNE-SMITH:

20 735 Q. CCG24656.

21 MR. VERMEERSCH: We have it.

22 BY MR. MILNE-SMITH:

23 736 Q. I want to look at the bottom of
24 the page. It's an email from Mr. Saratovsky in
25 which he purports to summarize a call he had with

1 you that morning. If you can just read that and
2 tell me if he's accurately summarized the call?

3 A. This is an email from Monday,
4 August 11 at 11:15?

5 737 Q. Correct.

6 A. Let me read it, please.

7 738 Q. Yes.

8 A. (Witness reads document). I have
9 read the email.

10 739 Q. And does it accurately summarize
11 the phone call, to the best of your recollection?

12 A. There is a subsequent email above,
13 right, in which I respond.

14 740 Q. Yes. That's not my question. My
15 question is whether Mr. Saratovsky has accurately
16 summarized --

17 A. I don't recall.

18 741 Q. You have no further recollection
19 beyond what's in this email?

20 A. No, but there is an email right
21 next to it which can help.

22 MR. WINTON: I think what Mr. de Alba's
23 answer is is that it's accurate subject to the
24 qualifications in his own email.

25 MR. MILNE-SMITH: Okay, that's fair.

1 MR. WINTON: So he's relying on the
2 written record.

3 MR. MILNE-SMITH: Fair enough. As long
4 as we can rely on the written record in respect to
5 that email.

6 MR. WINTON: We're not suggesting that
7 there's anything other than here that he can
8 remember. Yes.

9 BY MR. MILNE-SMITH:

10 742 Q. Next one is CCG24774.

11 MR. VERMEERSCH: We have it.

12 BY MR. MILNE-SMITH:

13 743 Q. The email chain starts on page 2.

14 MR. VERMEERSCH: Yes.

15 BY MR. MILNE-SMITH:

16 744 Q. And Mr. Saratovsky on August 15th
17 at 8:20 a.m. sends an email?

18 A. What time again, please?

19 745 Q. 8:20.

20 A. 8:20, okay.

21 746 Q. He says:

22 "My instructions are that the
23 position the chairman articulated to
24 Ben has not changed. We need to
25 have a way to manage the regulatory

1 risk and are open to other ideas on
2 how this may be achieved."

3 And then John Levin forwards that email
4 to you and Ben and Ben replies. It's Ben's reply
5 that I'm interested in. Sorry, before we do that,
6 do you know what the chairman had articulated to
7 Ben? Did Mr. Babcock advise you of what had been
8 said?

9 A. I don't recall.

10 747 Q. Okay. So Mr. Babcock's email
11 says:

12 "The problem is the chairman is
13 solving for not trusting the
14 government no matter how low anyone
15 tells him the risk is, and he wants
16 to either be paid a break fee if we
17 are so confident we will get it, or
18 have the ability to keep his options
19 open while our deal is pursued with
20 the government."

21 Do you see that?

22 A. Yes.

23 748 Q. And so I take it from this that
24 VimpelCom had asked you for a break fee?

25 A. I take from this two things. The

1 comment of the break fee.

2 749 Q. Yes.

3 A. And a request to keep options
4 open, which smells to me, or sounds to me like the
5 ability to pursue another transaction.

6 750 Q. Okay. My simple question is,
7 you'd agree with me that Catalyst -- sorry, that
8 VimpelCom asked Catalyst to agree to a break fee as
9 a term of the SPA?

10 A. As a term of the SPA?

11 MR. WINTON: Well, the email from
12 Mr. Babcock says "or."

13 THE DEPONENT: Right.

14 MR. MILNE-SMITH: Yes.

15 MR. WINTON: So it suggests that --

16 BY MR. MILNE-SMITH:

17 751 Q. A break fee is one of the things
18 that VimpelCom asked you for as a concession on
19 this issue?

20 A. Correct.

21 752 Q. Okay. So if we go back, I don't
22 know if you have any of the earlier materials in
23 this case, Mr. Winton, but if you'll recall during
24 the cross-examination of Mr. Riley, I put a
25 question to him?

1 MR. WINTON: Which date?

2 MR. MILNE-SMITH: The one that I did.

3 MR. WINTON: That can only be one date.

4 I have the transcript here.

5 MR. MILNE-SMITH: May 13.

6 MR. WINTON: Yes.

7 MR. MILNE-SMITH: I'm actually looking
8 at the answers to undertaking number 15, so I'll
9 give you the page number and the question number.
10 So it's page 127 of the transcript.

11 MR. WINTON: Yes.

12 MR. MILNE-SMITH: Questions 554 to 556.

13 MR. WINTON: Yes.

14 MR. MILNE-SMITH: And the question was,
15 it's been recorded in your answers to undertaking
16 as being: To advise whether VimpelCom ever asked
17 for a break fee.

18 MR. WINTON: Yes.

19 MR. MILNE-SMITH: And the answer that
20 we got back was: "The parties never negotiated a
21 break fee."

22 BY MR. MILNE-SMITH:

23 753 Q. Were you aware of that, Mr. de

24 Alba?

25 A. Aware of what, sorry?

1 754 Q. Were you consulted in providing
2 this -- answering this undertaking that was given
3 on the cross-examination of Mr. Riley? Were you
4 consulted?

5 A. No.

6 755 Q. So I take it that the answer to
7 the question whether VimpelCom ever asked for a
8 break fee was in fact yes, Mr. Winton?

9 MR. WINTON: Yes.

10 BY MR. MILNE-SMITH:

11 756 Q. Okay. So when the answer that was
12 given to us is the parties never negotiated a break
13 fee, you chose not to answer the question that was
14 asked and instead to answer a different question?

15 MR. WINTON: I'll take issue with the
16 word "chose," but the answer is responsive to a
17 different question, yes.

18 BY MR. MILNE-SMITH:

19 757 Q. So the answer to my question was
20 yes?

21 MR. WINTON: That's what it appears
22 like from this record, yes.

23 BY MR. MILNE-SMITH:

24 758 Q. Who was consulted in providing
25 this answer to undertaking? Mr. de Alba said he

1 wasn't.

2 MR. WINTON: I'll have to let you know
3 because I spoke with and worked with Mr. Riley, and
4 I will --

5 MR. MILNE-SMITH: So if you could ask
6 Mr. Riley --

7 U/A MR. WINTON: I will -- I think I'm
8 going to take that under advisement. I'm not going
9 to do that -- I'm not going to commit to doing
10 that. I'm going to take it under advisement
11 whether we are going to bother with that.

12 BY MR. MILNE-SMITH:

13 759 Q. Now, Mr. de Alba, am I correct in
14 understanding that what eventually caused the
15 breakdown in negotiations was the time, essentially
16 the outside date, the time that would be required
17 for regulatory approvals?

18 A. That's not correct. What caused
19 the breakdown of the negotiations is that VimpelCom
20 developed another proposal with West Face and the
21 consortium in which the regulatory points that we
22 had negotiated were no longer required.

23 760 Q. Let me ask you -- I understand
24 that's your position in this litigation. In terms
25 of positions that were expressed to you, what

1 VimpelCom was asking for from you, the only gap
2 between what you were willing to offer and what
3 VimpelCom was asking for concerned the outside
4 date?

5 MR. WINTON: I don't think that's
6 accurate.

7 BY MR. MILNE-SMITH:

8 761 Q. Okay. CCG24784.

9 MR. VERMEERSCH: We have it.

10 MR. MILNE-SMITH: Page 2.

11 MR. VERMEERSCH: Um-hmm.

12 BY MR. MILNE-SMITH:

13 762 Q. If you look in the middle of the
14 page, August 15th at 4:48 p.m., there is an email
15 from John Levin. It appears to be going back and
16 forth, Mr. Levin and Mr. Saratovsky, though
17 ultimately it all gets forwarded to you so you
18 would have seen this before. Mr. Levin writes:

19 "My regulatory people tell me
20 that on an absolute best case basis
21 three months would be the bare
22 minimum and more than likely another
23 month or two would be necessary
24 given their experience with the
25 regulators."

1 You understand that what he was talking
2 about here was the time required for regulatory
3 approval?

4 A. Correct.

5 763 Q. And Mr. Saratovsky goes back and
6 says:

7 "What if we sign the SPA with a
8 two-month outside and if the
9 government does not move quickly
10 then we can both decide if we want
11 to give the government more time?"

12 So, in other words, Mr. Levin on behalf
13 of Catalyst is proposing three months, maybe four,
14 and Mr. Saratovsky is proposing two months,
15 correct?

16 A. Mr. Saratovsky is proposing two
17 months knowing that the two months are not going to
18 be achieved and having then the optionality to move
19 away and complete the transaction as evolved and as
20 shown interest by the West Face consortium.

21 764 Q. Right. My point is the only thing
22 he was asking you for was a two-month outside date?

23 A. He was asking for an unrealistic
24 outside date in order to continue to evolve its
25 negotiations with the West Face consortium with

1 whom there had been some type of dialogue and
2 proposals exchanged before.

3 MR. WINTON: I --

4 MR. MILNE-SMITH: Hang on. He's given
5 the answer.

6 BY MR. MILNE-SMITH:

7 765 Q. You have no evidence that during
8 the exclusivity period VimpelCom engaged in any
9 negotiations with West Face and its consortium
10 other than simply receiving an unsolicited offer?

11 MR. WINTON: I'm not comfortable with
12 the way that question has been phrased, given the
13 productions that have been made by West Face and
14 given the restrictions on Mr. de Alba on what he
15 personally has seen and knows.

16 BY MR. MILNE-SMITH:

17 766 Q. Are you aware of any
18 communications --

19 MR. WINTON: You're asking if he is
20 aware?

21 MR. MILNE-SMITH: Yes, I'll ask him and
22 then I'll ask you.

23 BY MR. MILNE-SMITH:

24 767 Q. Are you aware of any
25 communications by VimpelCom to West Face or any

1 member of its consortium during the exclusivity
2 period?

3 A. I am not aware that indeed
4 proposals were sent by West Face.

5 768 Q. That's not my question. My
6 question is by VimpelCom to West Face.

7 A. The fact that West Face continued
8 to send proposals means to me that there has been a
9 dialogue.

10 769 Q. But you're just drawing an
11 inference there; you have no direct knowledge?

12 A. Correct.

13 770 Q. Mr. Winton, if Catalyst intends to
14 present any evidence of ongoing communications by
15 VimpelCom to any member of the West Face
16 consortium, I'd like to know what that is. Because
17 that's not how we interpret any of the documents,
18 but if you interpret them differently, I'd like to
19 know what that is?

20 MR. WINTON: I think the documents
21 recently produced to us by West Face, which we
22 suspect are not the sum totality of those, but we
23 rely on you to produce what you're going to
24 produce, is already indicative of the fact that
25 there were communications back and forth.

1 BY MR. MILNE-SMITH:

2 771 Q. I want to know which
3 communications you say were in breach of the
4 exclusivity agreement. I want to know what your
5 case is going to be at trial as to which documents
6 were in breach --

7 MR. WINTON: This case isn't about
8 breach of the exclusivity agreement. So our case
9 at trial isn't going to be about a breach of the
10 exclusivity agreement. There is no claim in
11 relation to that.

12 BY MR. MILNE-SMITH:

13 772 Q. If you are going to lead evidence
14 at trial concerning a breach of exclusivity, I'd
15 like to know what it is. If you're not raising it
16 at this trial, that's fine. I just want to know
17 what it is if it's going to be raised at trial.

18 U/A MR. WINTON: I'm going to take that
19 under advisement because I think we have a
20 different view as to what this case is about.

21 BY MR. MILNE-SMITH:

22 773 Q. VimpelCom never came to you and
23 asked you -- sorry, let me take a step back.

24 I take it you're aware now of what the
25 West Face consortium offer looked like because it's

1 been produced in this litigation. I assume you've
2 looked at it?

3 A. Yes.

4 774 Q. VimpelCom never came back to you
5 and asked you to sign anything that looked like
6 that?

7 A. Can you explain the timing of your
8 question?

9 775 Q. At any time between August the 7th
10 when the Michael Lightner offer went in, and
11 September 16 when the deal closed, or at least when
12 it was signed and closing happened almost
13 immediately, so between August 7th and September
14 16th, VimpelCom never asked Catalyst to sign or
15 never proposed to Catalyst a deal along the lines
16 of the Lightner offer?

17 A. I will need to review the Lightner
18 offer.

19 776 Q. Could you do that and let me know?

20 U/T MR. WINTON: Yes.

21 BY MR. MILNE-SMITH:

22 777 Q. Other than the two-month closing
23 which you say was unrealistic, what changes, what
24 demands do you say were made by VimpelCom that were
25 motivated by the Lightner offer?

1 A. The -- that was consistent with
2 two things; the passing on the regulatory risk to
3 Catalyst and their interest to pursue another
4 option. And that's why in that email they request
5 a break fee or again a deadline that is too short
6 that would allow them before the deal gets approved
7 by the government to go back and reopen the
8 negotiation.

9 778 Q. Reopen the negotiation with who?

10 A. With other parties.

11 779 Q. Well, that would have been a
12 breach of exclusivity, correct?

13 A. No, because the two-month period
14 would have ended. You are making a great point.
15 Our position was if the parties are acting in good
16 faith, that two-month period should be
17 automatically extended because we do not control
18 the timing of the government approval. And the
19 refusal to allow for an automatic extension even
20 with the parties working in good faith meant that
21 they themselves wanted to have this deadline in a
22 way that will explode and will free them up.

23 780 Q. After the two months?

24 A. Yeah.

25 781 Q. Okay. After the two months, okay.

1 No, I understand that.

2 A. We didn't know they were having
3 dialogue during that period, right?

4 782 Q. CCG24800. If you go to page 4.

5 MR. VERMEERSCH: We have it.

6 BY MR. MILNE-SMITH:

7 783 Q. So at the top of page 4, and, I
8 mean, you can look over at page 3 just to see, but
9 it's an email from Mr. Saratovsky to Ben Babcock on
10 August 15 at 4:14 p.m., and Mr. Saratovsky says:

11 "Ben, I'm blindingly aware of
12 the trust issue. The chairman
13 undercut his deal team so I have a
14 bigger trust issue to deal with
15 internally. I'm asking you as
16 someone I trust whether two plus one
17 is worth a shot."

18 When he says he undercut his deal team,
19 do you believe Mr. Saratovsky was lying when he
20 said that?

21 A. Yes.

22 784 Q. You have produced no documents
23 after August 18th relating to any efforts to
24 acquire Wind. I believe we can agree on that?

25 MR. WINTON: I believe that's right.

1 BY MR. MILNE-SMITH:

2 785 Q. Did Catalyst undertake no further
3 efforts after exclusivity expired to acquire Wind?

4 R/F MR. WINTON: We're instructing Mr. de
5 Alba not to answer that.

6 BY MR. MILNE-SMITH:

7 786 Q. Were you aware that ultimately the
8 West Face consortium entered into exclusivity with
9 VimpelCom before an agreement was signed? Were you
10 aware of that?

11 A. No.

12 787 Q. Did you have any communications
13 with VimpelCom between August 25th and September
14 16th?

15 R/F MR. WINTON: That's refused.

16 BY MR. MILNE-SMITH:

17 788 Q. Did VimpelCom contact Globalive
18 after August 18th about using the Globalive capital
19 structure in the same way that the West Face
20 consortium did in structuring its offer?

21 MR. WINTON: How -- did VimpelCom
22 contact Globalive?

23 BY MR. MILNE-SMITH:

24 789 Q. Sorry, Catalyst. Did Catalyst
25 contact Globalive?

1 R/F MR. WINTON: That's refused.

2 BY MR. MILNE-SMITH:

3 790 Q. And what's the basis for your
4 refusal?

5 MR. WINTON: None of those questions
6 are relevant.

7 BY MR. MILNE-SMITH:

8 791 Q. Did AAL or anyone on their behalf,
9 meaning Lacavera, Scheschuk or Lockie, did any of
10 them contact you about Wind after August 18th?

11 R/F MR. WINTON: We're going to refuse all
12 questions regarding what happened with Catalyst
13 after August 18th.

14 MR. MILNE-SMITH: Just so we're clear,
15 the fact that exclusivity expired on the 18th does
16 not mean that Catalyst had no further chance; it
17 just meant that they were into open competition. I
18 am informed by Mr. Carlson that exclusivity didn't
19 start until August 27th, so our position is that it
20 was fully open to Catalyst to pursue a deal with
21 VimpelCom between the 18th and the 27th, and to the
22 extent they chose not to do so, that's something we
23 can rely on at trial.

24 So you have given your refusals. I
25 want you to know the arguments you're going to face

1 in that regard if you maintain those refusals.

2 MR. WINTON: That's fine.

3 MR. MILNE-SMITH: Subject to reviewing
4 my notes, which I'll do during Mr. Borg-Olivier's
5 examination, and subject to the answers to
6 undertakings, advisements, documents arising
7 therefrom and any questions arising out of them,
8 that wraps up my examination, thank you.

9 MR. BORG-OLIVIER: Can we go off for a
10 minute?

11 MR. WINTON: Sure.

12 -- RECESS AT 2:17 --

13 -- UPON RESUMING AT 2:26 --

14 EXAMINATION BY MR. BORG-OLIVIER:

15 792 Q. Mr. de Alba, you described
16 Mr. Moyse and I think everyone else who would be
17 employed at Catalyst as a co-investor on deals.
18 Can you provide a bit of background of what the
19 details are around employees of Catalyst becoming
20 co-investors?

21 A. In order to have a culture of
22 alignment between the investment professionals and
23 our limited partners, every single investment
24 professional at Catalyst has to participate and
25 invest on the deals on which the funds are also

1 investing.

2 793 Q. And how does that work as a
3 practical matter?

4 A. It works --

5 MR. WINTON: How is that relevant?

6 MR. BORG-OLIVIER: Well, he's described
7 him as a co-investor on the deals and I think we're
8 entitled to understand what that means. The
9 suggestion I think was that his understanding of
10 the deals and his involvement in the deals was
11 greater by virtue of the fact that he was a
12 co-investor on the deal, and I think we're entitled
13 to know at a minimum whether this is, for example,
14 a deal-by-deal investment or whether it's simply a
15 particular amount of money that's required to be
16 put into the fund generally by the employee.

17 MR. WINTON: Then why don't you ask
18 that question.

19 BY MR. BORG-OLIVIER:

20 794 Q. That's the question I've asked.

21 A. Everybody is required to invest in
22 all deals. Again, that's a matter of culture and
23 alignment. The amounts invested are proportionate
24 to the ownership that each investment professional
25 has in the firm, and that is part again of the

1 culture which embodies two things: An alignment
2 between investment professionals and the limited
3 partners, and a culture of transparency and
4 mentorship between the senior partners and the
5 other members of the team as all deals are
6 discussed openly up to the point that everybody has
7 skin in the game.

8 795 Q. Okay, let me put it this way. If
9 in May 2014, hypothetically, Catalyst had purchased
10 an interest in Wind, would you have gone to
11 Mr. Moyse, Mr. Creighton and said we need you to
12 put up \$5,000, \$10,000 at this time? Is that the
13 way it would work as a practical matter?

14 A. It is not a need. It is an
15 understanding amongst the professionals. So it is
16 not a need for capital, it is an understanding
17 amongst the professionals that every time we invest
18 it's because the team has made a joint and unified
19 decision to invest and therefore we all need to
20 have skin in the game.

21 796 Q. I don't think you're answering my
22 question. Would Catalyst go and expect each of the
23 employees to actually put up some money in
24 connection with each deal that Catalyst does?

25 A. Not employees, but investment

1 professionals who are again familiar with the deals
2 that we're doing.

3 797 Q. So if the deal for Wind had
4 closed, for example, while Mr. Moyse was still
5 employed there as an investment professional, he
6 would have been obliged to put up some money in
7 connection with that transaction?

8 A. Correct.

9 798 Q. And would that be pursuant to an
10 employment agreement or anything else in writing?

11 U/T MR. WINTON: I don't know if Mr. de
12 Alba is the right person to ask that question. Why
13 don't we undertake to answer that for you.

14 BY MR. BORG-OLIVIER:

15 799 Q. Okay. And when would -- and would
16 the investment professionals be entitled to
17 withdraw their investments at any particular time
18 or would it be expected that the money would stay
19 in so long as Catalyst's investment stayed in?

20 U/A MR. WINTON: We're going to take that
21 one under advisement.

22 BY MR. BORG-OLIVIER:

23 800 Q. You described Mr. Moyse at the
24 time of the March PowerPoint presentation as a
25 critical member of the team. Did I have that

1 right?

2 A. Correct.

3 801 Q. When we cross-examined Mr. Riley
4 some time ago, one of the things we asked him, and
5 one of the things that he answered by way of
6 undertaking, was whether he had any evidence of
7 Mr. Moyse being involved with the Wind transaction
8 prior to May 6th. Okay? And the answer that he
9 gave us on the undertaking was simply that he
10 participated in the creation of the PowerPoint.

11 Do you disagree with Mr. Riley, from
12 your perspective did Mr. Moyse do more than that in
13 the period prior to May 6th?

14 A. Yes.

15 802 Q. You do, okay. Tell me what else
16 you say specifically Mr. Moyse did with respect to
17 the Wind transaction before May 6th other than
18 participating in the creation of the PowerPoint?

19 A. He did participate on the weekly
20 meetings in which the decision and details of the
21 deals are discussed; he did participate on the
22 discussion process on the four carrier.

23 803 Q. I'm sorry, on the what?

24 A. The four carrier which was the
25 combination of Mobilicity and Wind, and he did

1 participate on analyzing the market, the wireless
2 market.

3 804 Q. And can I ask that we see
4 production of any documents evidencing Mr. Moyse's
5 participation in analyzing the wireless market?

6 MR. WINTON: I was going to say I think
7 we have already produced those. What we have on
8 that is already in the record.

9 BY MR. BORG-OLIVIER:

10 805 Q. Well, I haven't seen anything like
11 that. I haven't seen anything that suggests
12 Mr. Moyse's involvement prior to May 6th. So if
13 there's anything in writing that you can point to,
14 I would appreciate getting that by way of
15 undertaking?

16 U/T MR. WINTON: Sure, we'll give you that.

17 BY MR. BORG-OLIVIER:

18 806 Q. In mid-May I take it Mr. Moyse
19 went on vacation and you were aware of that?

20 A. Yeah, I was aware he went on
21 vacation.

22 807 Q. Did you make any attempt to have
23 him cancel the vacation given the status of the
24 deal with Wind heating up at that time?

25 A. I recall he mentioned that a

1 vacation was connected with him potentially getting
2 engaged, so I believe it was an important time for
3 him.

4 808 Q. Did you have concerns about him
5 leaving the team shorthanded given that you have
6 described him as a critical member of the team at
7 the time?

8 A. It is a flat team and there is, as
9 noted, continued discussions amongst all members,
10 so there is familiarity with what is happening in
11 each of the deals by, again, the small team.

12 809 Q. So in his absence his role could
13 be filled by somebody else at Catalyst?

14 A. Correct.

15 810 Q. Mr. Milne-Smith asked you about
16 efforts that were made after Mr. Moyse handed in
17 his resignation to cut off his access to the server
18 and I believe an undertaking was provided that you
19 would give answers as to whether any such attempts
20 were made.

21 I want to ask you beyond that if any
22 further attempts were made within Catalyst in the
23 workplace to make sure that information with
24 respect to Wind didn't get to Mr. Moyse.

25 I'll give you an example. Was any

1 attempt made to put up a wall walling off Mr. Moyse
2 from the people who were working most closely on
3 the Wind deal?

4 MR. WINTON: I think you need to
5 explain what you mean by putting up a wall.

6 MR. BORG-OLIVIER: Sure, fair enough.

7 BY MR. BORG-OLIVIER:

8 811 Q. Were instructions given to the
9 people who were working closely on the Catalyst
10 deal and to Mr. Moyse that they shouldn't be
11 speaking to one another as to the specifics of the
12 transactions as it developed?

13 A. I don't recall all of the
14 procedures that were taken.

15 U/T MR. WINTON: We'll undertake to answer
16 that.

17 BY MR. BORG-OLIVIER:

18 812 Q. To be clear, what I'd like is,
19 I've described it as putting up a wall, but I think
20 to put some meat on the bones, I think what we're
21 looking for is whether any instructions were given
22 to others at Catalyst not to speak to Mr. Moyse
23 about the Wind transaction, and whether any
24 instructions were given to Mr. Moyse not to speak
25 to people about the transaction.

1 U/T MR. WINTON: So we'll make inquiries
2 and attempt to answer that question for you.

3 MR. BORG-OLIVIER: Thank you.

4 MR. WINTON: Because it was my alter
5 ego who was here during that round of questioning.
6 I can point out I think it's pretty clear from
7 email traffic that steps were taken to remove
8 Mr. Moyses from the email distribution list for
9 Wind.

10 MR. BORG-OLIVIER: Yes, that was
11 covered.

12 MR. WINTON: Thank you.

13 BY MR. BORG-OLIVIER:

14 813 Q. And is it possible to determine
15 whether somebody accessed the server remotely? Is
16 that something that can be done, the Catalyst
17 server? In other words, can you go back and look
18 at your records and determine whether Mr. Moyses
19 logged into the server remotely while not in the
20 office?

21 U/T MR. WINTON: I'll have to make
22 inquiries and try and answer that for you.

23 BY MR. BORG-OLIVIER:

24 814 Q. And the follow-up question to that
25 obviously is if the answer is yes, then we'd like

1 to know if there's any evidence that Mr. Moyse did
2 in fact log in remotely either while on vacation or
3 in the month following his resignation.

4 U/T MR. WINTON: Well, if we can, we will
5 answer that question.

6 MR. BORG-OLIVIER: Thank you.

7 BY MR. BORG-OLIVIER:

8 815 Q. Mr. Milne-Smith asked you and your
9 counsel about discussions that took place with
10 Mr. Creighton recently in the last week or two. Do
11 you recall those questions?

12 A. I do.

13 816 Q. And as a result of which I think
14 three emails were produced. If I understood
15 Mr. Vermeersch's answer correctly -- Brad, maybe
16 I'll put this to you directly, beyond the three
17 emails produced, I take it Mr. Creighton provided
18 others, but to the extent they were duplicative of
19 documents that have been produced by Mr. Moyse, you
20 didn't produce them back to us; is that right?

21 MR. VERMEERSCH: That is correct.

22 BY MR. BORG-OLIVIER:

23 817 Q. One of you, and I can't tell from
24 my notes whether it was you, Mr. de Alba, or --

25 MR. WINTON: Sorry, I just want to

1 interrupt for one second. I just want to make sure
2 to clarify whether it was that Mr. Creighton
3 produced them to us or whether he showed them to
4 us, because there is some issue as to what we
5 actually have from him versus what he made
6 available to us to review.

7 MR. VERMEERSCH: Right. And the
8 clarification I can offer is I have -- I have
9 reviewed emails that are in Mr. Creighton's
10 possession through his personal email account, the
11 ones that were subsequently produced by Mr. Moyse.
12 We have not obtained in our possession or control
13 the documents that are duplicative of those that
14 were produced by Mr. Moyse otherwise. The three
15 that are produced are where they were not
16 duplicative and otherwise relevant to the case.

17 BY MR. BORG-OLIVIER:

18 818 Q. I take it you haven't received or
19 otherwise seen any emails involving Mr. Creighton
20 and Mr. Moyse which suggest a passing of
21 information regarding Wind; is that fair?
22 Following Mr. Moyse's departure from Catalyst?

23 MR. VERMEERSCH: And those outside of
24 what has been produced already.

25 BY MR. BORG-OLIVIER:

1 819 Q. And one of you said that
2 Mr. Creighton didn't confess to any disclosure of
3 confidential information to Brandon following his
4 departure from Catalyst.

5 MR. VERMEERSCH: Just as a
6 clarification, counsel, I think we said after he
7 ceased being an employee of Catalyst after the 30
8 days, so not after leaving, but after -- it's a
9 terminology issue. Leaving in terms of physically
10 leaving but after being --

11 MR. WINTON: His employment with
12 Catalyst terminated June 20th. So if you're
13 talking about after June 20th, then yes, I think
14 that's accurate.

15 BY MR. BORG-OLIVIER:

16 820 Q. Have you seen any documents that
17 suggest Mr. Creighton passing to Mr. Moyse
18 information pertaining to Wind in the period after
19 he handed in his resignation but before his
20 employment terminated?

21 MR. WINTON: I don't think we have any
22 documents.

23 BY MR. BORG-OLIVIER:

24 821 Q. Do you have any information about
25 that?

1 U/T MR. WINTON: I believe we have some
2 information but we have to clarify what that is
3 from Mr. Creighton in order to give you a clear
4 answer, so if you want that, we'll give that to you
5 by way of undertaking.

6 BY MR. BORG-OLIVIER:

7 822 Q. So I'd like to know what
8 information you have now, okay, by way of
9 undertaking before you have further discussions
10 with Mr. Creighton. In other words, what the
11 information is that you have in your possession now
12 from Mr. Creighton pertaining to any discussions he
13 had with Mr. Moyse about Wind information.

14 MR. WINTON: Right. Our understanding,
15 so this is -- and it's subject to correction
16 because it's not something that we have from
17 directly asking Mr. Creighton questions about this
18 so it's just from an understanding of when talking
19 about the documents and what was passing back and
20 forth and that's why I'm saying it's subject to
21 clarification from Mr. Creighton when we
22 specifically ask him about it, but our
23 understanding is there were discussions when they
24 met on social occasions during that garden leave
25 period, there were discussions regarding what

1 Mr. Creighton was working on from which Mr. Moyse
2 could glean or make conclusions about the work
3 being taken -- the work being undertaken on the
4 Wind transaction by Mr. Creighton.

5 BY MR. BORG-OLIVIER:

6 823 Q. Okay. So you'll provide us
7 further clarity on that point?

8 U/T MR. WINTON: We will.

9 BY MR. BORG-OLIVIER:

10 824 Q. And I take it beyond Mr. Creighton
11 not confessing to any disclosure of confidential
12 information, was he asked specifically whether he
13 disclosed any confidential information to
14 Mr. Moyse?

15 MR. WINTON: I'm not sure we have asked
16 him that. We were -- given the nature of the
17 documents that Mr. Moyse recently produced, it's a
18 very delicate situation, so we have been -- we have
19 been managing that in a way that's protective of
20 Mr. Creighton's own circumstances, and I don't want
21 to reveal any privilege as to what our instructions
22 are, but we haven't asked him that question.

23 BY MR. BORG-OLIVIER:

24 825 Q. Okay. By way of undertaking I
25 would like to know the following: Whether

1 Mr. Creighton says he had any discussions about
2 Wind with Mr. Moyse following the termination of
3 Mr. Moyse's employment and, if so, to give us the
4 details of those discussions?

5 MR. WINTON: Other than what's
6 disclosed in the documents?

7 MR. BORG-OLIVIER: Yes.

8 U/T MR. WINTON: Okay.

9 BY MR. BORG-OLIVIER:

10 826 Q. And whether Mr. Creighton ever
11 passed any confidential information pertaining to
12 Wind to Mr. Moyse following either Mr. Moyse's
13 resignation or Mr. -- well, just following
14 Mr. Moyse's resignation and, if so, the details
15 pertaining to that?

16 MR. WINTON: What date do you mean by
17 following his resignation?

18 MR. BORG-OLIVIER: May 24th.

19 U/T MR. WINTON: Okay. Yes.

20 MR. BORG-OLIVIER: Mr. Winton, do you
21 have a copy of your amended amended amended
22 Statement of Claim?

23 MR. WINTON: We do.

24 MR. BORG-OLIVIER: Would you pull it
25 up, please.

1 BY MR. BORG-OLIVIER:

2 827 Q. I'd ask you to turn up pages 19
3 and 20, so that's paragraphs 34.20 to 34.23.

4 MR. WINTON: Yes.

5 BY MR. BORG-OLIVIER:

6 828 Q. Am I reading this correctly to see
7 those paragraphs as the meat of the spoliation
8 claim against Mr. Moyse?

9 MR. WINTON: They are the -- it's the
10 concise statements of material facts concerning the
11 spoliation claim. I think we have a pretty big
12 record that puts more meat on these bones from the
13 motion last year.

14 MR. BORG-OLIVIER: Fair enough. I
15 wasn't suggesting you should have pleaded all the
16 evidence, but that's the portion of the Statement
17 of Claim, anyway, which grounds the spoliation
18 claim?

19 MR. WINTON: Well, I think it's
20 everything from 34.17 through to 34.33, because I
21 think it starts with the idea that there was an
22 order in which Mr. Moyse agreed to preserve
23 evidence, and while I get whether or not he acted
24 in breach of that order is no longer going to be a
25 matter for trial, the fact that he had agreed and

1 that steps were taken as part of that pursuant to
2 that order I think is still relevant to the claim
3 of spoliation. So I don't want to limit it to
4 34.20, I think it goes back to 34.17.

5 BY MR. BORG-OLIVIER:

6 829 Q. That's fine. Let's look at 34.22,
7 please, and, Mr. de Alba, if you could read that
8 paragraph, please.

9 A. 34.22?

10 830 Q. Yes, please.

11 A. (Witness reads document). Yes, I
12 read it.

13 831 Q. It says Moyse intentionally
14 destroyed evidence relevant to the wrongdoing of
15 himself and West Face. What evidence do you say he
16 destroyed?

17 A. I am aware that he took loads and
18 loads of information and that when requested to
19 provide details of it, as well as access to his
20 personal computer devices, there was a delay and
21 then some devices came out, what I understand were
22 wiped out clean using a sophisticated software.

23 832 Q. You say that you are aware he took
24 loads and loads of information. What information
25 are you talking about and how are you aware of

1 that?

2 A. So I am aware of the materials
3 that he forwarded to the West Face team.

4 833 Q. Okay, but that has nothing to do
5 with Wind. We are agreed on that, right?

6 A. The email that was -- that
7 included certain files from Catalyst, those files
8 were not related to Wind but they were indeed used
9 by Mr. Moyse as a way to engrace himself with West
10 Face individuals.

11 834 Q. Sure. Let's focus, though, on
12 what we're talking about here. So you say I am
13 aware that he took loads and loads of information.
14 I take it you mean when he terminated his
15 employment with Catalyst he took loads and loads of
16 information with him. Am I fairly understanding
17 you?

18 MR. WINTON: I think we already have
19 the evidence from Mr. Musters as to what transpired
20 as far as the -- and the evidence we rely upon and
21 will rely upon at trial concerning what we rely on
22 for the assertion that Mr. Moyse took confidential
23 information before he left.

24 BY MR. BORG-OLIVIER:

25 835 Q. But I want an understanding from

1 Mr. de Alba of what he's telling me. He told me
2 he's aware that Mr. Moyse took loads and loads of
3 information with him and I want to know what
4 information he's referring to and what he bases
5 that on.

6 A. So my understanding is that he
7 forward to his personal emails, and I think he
8 might have used multiple personal email accounts,
9 information from Catalyst servers related to our
10 deals. We also believe that he used a DropBox type
11 of system to download materials as well as again
12 downloading materials to his personal computer
13 devices which were later wiped out.

14 836 Q. Is it your evidence that Mr. Moyse
15 in the course of his employment forwarding
16 documents to himself via email was improper? Is
17 that your evidence?

18 A. It is only in extraordinary
19 circumstances where an email should go outside of
20 the Catalyst servers. So I think that's
21 inappropriate.

22 837 Q. And is it your evidence that you
23 and the other partners at Catalyst were unaware
24 while Mr. Moyse was working there that he would
25 occasionally forward documents to himself by his

1 email?

2 A. I was unaware.

3 838 Q. You are aware that there was a box
4 account created to which people uploaded documents
5 at Catalyst?

6 A. Who do you refer to as people,
7 sorry?

8 839 Q. Anybody working on transactions.
9 Were you aware of the existence of the box account?

10 A. In certain deals box accounts
11 might be used but they should not be used by
12 individuals to download information related to the
13 deals. I am not aware of it.

14 840 Q. So when you talk about Mr. Moyse
15 taking loads and loads of information, you're
16 talking about emails that he would have sent to
17 himself in the course of participation on deals?

18 A. In the course of his preparation
19 to join West Face.

20 841 Q. So you're not talking about the
21 emails that he would have sent to himself in the
22 year or two preceding, you're talking about from,
23 let's say, May and June of 2014?

24 A. I'm not aware of the personal
25 behaviour and his use of that information. What

1 I'm now aware is that, and again it was a shocking
2 surprise, that Mr. Moyse would consider appropriate
3 to disclose work product from Catalyst to our
4 closest competitor.

5 842 Q. That's not what we're talking
6 about. And I take it, Mr. de Alba, you and
7 Catalyst became aware of Mr. Moyse forwarding these
8 emails to himself in part because he produced an
9 Affidavit of Documents featuring hundreds of
10 Catalyst documents on his home computer; is that
11 right?

12 MR. WINTON: I don't think that's a
13 fair question.

14 MR. BORG-OLIVIER: Why?

15 MR. WINTON: Because that's not what
16 the record shows.

17 MR. BORG-OLIVIER: Then he can correct
18 me. He said he became aware that Mr. Moyse had
19 loads and loads of information. So tell me how he
20 became aware.

21 MR. WINTON: I'll let him answer the
22 question you're asking about how he became aware,
23 but, as you are aware, it's more than just Mr. de
24 Alba who has been involved in that aspect of this
25 case for almost two years now, and so to the extent

1 you're asking Mr. de Alba's personal knowledge,
2 that's fine.

3 MR. BORG-OLIVIER: It's the party's
4 knowledge. I'm happy to have you answer the
5 question.

6 MR. WINTON: Well, it was discovered
7 before Mr. Moyse disclosed the fact that he used
8 personal emails, that he had used personal emails
9 and I believe that was revealed in an affidavit
10 from Mr. Riley in July of 2014 before Mr. Moyse
11 admitted to that behaviour.

12 We also know that in addition to either
13 reviewing files through DropBox or moving files to
14 and from DropBox, Mr. Moyse admitted to reviewing
15 files that had nothing to do with any mandate he
16 was working on in the April 2014 time period,
17 around the same time he was interviewing, and he
18 said he was doing so out of curiosity.

19 MR. BORG-OLIVIER: I don't mean to
20 interrupt you but because we're time limited, I
21 want to focus this a bit. I want the particulars
22 of the spoliation claim. So anything pertaining to
23 things that had nothing to do with Wind I don't
24 think are relevant to the claim. If you tell me
25 that they are, you can explain to me how they are,

1 but I am focusing on documentation with respect to
2 the Wind transaction.

3 Is it a fair reading of your claim that
4 any suggestion of spoliation pertains to
5 documentation relating to the Wind transaction?

6 MR. WINTON: I think it goes beyond
7 that, but if that's what you want to ask about,
8 we're happy to give you that.

9 MR. BORG-OLIVIER: I want to understand
10 the particulars of your claim. If it goes beyond
11 Wind, then tell me and tell me how.

12 MR. WINTON: Mr. Moyse, beyond just
13 Wind, which was the immediate transaction which had
14 the immediate effect of what we say was the misuse
15 of confidential information, Mr. Moyse essentially
16 hoovered up information from Catalyst once he had
17 made a conscious decision to leave imminently,
18 whether to West Face or elsewhere, and so having
19 basically tried to absorb, take, review as much
20 confidential information before he left as
21 possible, that is the evidence of his wrongdoing.

22 BY MR. BORG-OLIVIER:

23 843 Q. Okay. In 34.22, when you say he
24 destroyed evidence with the knowledge that doing so
25 would harm Catalyst's ability to prove its claims

1 in this action, should I be reading "prove its
2 claims in this action" to involve something more
3 than the Wind transaction and its inability to
4 consummate the Wind transaction?

5 MR. WINTON: No, but I think that to
6 the extent that there is a lack of documentary
7 evidence for some of the key allegations in this
8 action, and we're asking the court to draw
9 inferences based on conduct, he has also destroyed
10 evidence of that conduct upon which those
11 inferences can be drawn.

12 BY MR. BORG-OLIVIER:

13 844 Q. I guess this is for Mr. de Alba,
14 but again, Mr. Winton, I'm content with having you
15 answer this.

16 Can you point me to documents that
17 Mr. Moyse had access to prior to his departure from
18 Catalyst which you say would have been useful to
19 West Face in poaching the idea of the transaction
20 from Catalyst? Are there specific documents that
21 he had access to that you say...

22 Look, here's the point. If all that
23 you're doing is pointing to the scrubber situation
24 and asking that the court draw inferences, that's
25 fine, but if you intend to take the court to

1 particular documents that you say Mr. Moyse had
2 access to that you want the court to infer he
3 passed along and then destroyed, then I would like
4 those documents brought to our attention.

5 MR. WINTON: That he actually passed
6 along documents versus passing along information in
7 the documents?

8 MR. BORG-OLIVIER: Yes. Because the
9 spoliation claim, spoliation has to pertain to the
10 destruction of documents, right? If there is an
11 oral passage of information, that's one thing, but
12 that's not spoliation. I'm trying to nail down the
13 spoliation claim.

14 MR. WINTON: But it would be spoliation
15 if he -- for instance, we think that the
16 destruction of his web history was spoliation. We
17 think that the destruction of any emails would
18 consist of spoliation.

19 MR. BORG-OLIVIER: And is that because
20 the theory is that he passed along the information
21 to West Face via email?

22 MR. WINTON: Yes.

23 BY MR. BORG-OLIVIER:

24 845 Q. Okay. I take it you have no
25 particular documents that you can point to one way

1 or the other and you'll be relying on the fact that
2 you say he ran the security program; is that fair?

3 MR. WINTON: Right, that's the nature
4 of a spoliation claim, he's destroyed the evidence.

5 BY MR. BORG-OLIVIER:

6 846 Q. I take it there are no emails that
7 you can point to that show confidential information
8 being imparted to West Face?

9 MR. WINTON: Other than the -- I mean,
10 that's a very broad -- are you talking --

11 MR. BORG-OLIVIER: With respect to
12 Wind.

13 MR. WINTON: With respect to Wind,
14 that's right.

15 BY MR. BORG-OLIVIER:

16 847 Q. And, Mr. de Alba, this will strike
17 you as obvious but I'm going to ask you the
18 question anyway. I take it Mr. Moyse has never
19 told you or anyone else at Catalyst that he gave
20 confidential Catalyst information about Wind to
21 West Face, correct?

22 A. I have not seen Mr. Moyse since he
23 left.

24 848 Q. And you are not aware of him
25 telling anyone else at Catalyst that he had passed

1 along confidential Wind information to West Face?

2 A. I have not asked.

3 849 Q. Has anybody at West Face -- so did
4 you mean you have not asked Mr. Moyse or you
5 haven't asked any of your colleagues or you haven't
6 asked Mr. Moyse?

7 A. Neither.

8 850 Q. So can we get an undertaking,
9 please, to ask others at Catalyst if anybody has
10 any information from Mr. Moyse that he passed along
11 confidential information about Wind to West Face?

12 U/T MR. WINTON: Yes.

13 MR. BORG-OLIVIER: Thank you.

14 BY MR. BORG-OLIVIER:

15 851 Q. And to broaden that, has anybody
16 from West Face ever told you, Mr. de Alba, or
17 anybody else at Catalyst that Mr. Moyse gave
18 confidential information pertaining to Wind to West
19 Face?

20 A. I have not spoken with them about
21 this.

22 852 Q. So can we get the same broader
23 undertaking with respect to information passed
24 along --

25 MR. WINTON: I think for that one it's

1 fair to say the answer is no, and we'll correct the
2 record if we feel the need to, but we're not going
3 to give an undertaking given the nature of the
4 question.

5 MR. BORG-OLIVIER: That's fine.

6 MR. WINTON: It would be a much easier
7 case if we had it.

8 MR. BORG-OLIVIER: Yes, I know. You
9 probably would have disclosed it by now. Can we go
10 off for two minutes?

11 -- OFF THE RECORD DISCUSSION --

12 FURTHER EXAMINATION BY MR. MILNE-SMITH:

13 853 Q. So, Mr. de Alba, I just have two
14 points arising out of Mr. Borg-Olivier's
15 examination. The first is on the issue of
16 co-investment. Do you recall when you were
17 discussing the co-investment plan at Catalyst?

18 A. Correct.

19 854 Q. So you referred in the course of
20 your answer on that subject to a "joint and unified
21 decision to invest." Do you recall giving that
22 evidence?

23 A. Correct.

24 855 Q. I'd just like to understand better
25 how investment approvals occur at Catalyst. Is

1 there a vote?

2 A. There is an open discussion.

3 856 Q. Yes.

4 A. Amongst all investment
5 professionals. Certainly the partners have the
6 biggest weight but we still disclose our thinking
7 to other members of the management team, and there
8 have been some deals in which you might have an
9 analyst saying I don't see it that way and that
10 could result in the investment partners
11 reconsidering the situation and potentially not
12 proceeding with the investment.

13 857 Q. Did the partners -- the partners
14 you referred to would be you, Mr. Glassman and
15 Mr. Riley, correct?

16 A. Correct.

17 858 Q. I take it that an investment was
18 never -- an investment that you three wanted to
19 pursue was never passed on because Mr. Moyse said I
20 think it's a bad idea? You can't give me an
21 example of that occurring?

22 A. Not from Mr. Moyse but from other
23 analysts.

24 859 Q. How about Mr. Creighton?

25 A. Not from Mr. Creighton.

1 860 Q. And so obviously they could offer
2 input but they clearly couldn't veto a deal?

3 A. As noted, there was a deal in
4 which Mr. Andrew Yeh had some further questions and
5 that resulted in the partners reconsidering and
6 then we did not proceed.

7 861 Q. But you understand the difference
8 between input and a veto? You understand that
9 distinction I am drawing?

10 A. Correct.

11 862 Q. Yes. So the investment analysts
12 had input, they didn't have a veto?

13 A. Have important input.

14 863 Q. But they didn't have a veto?

15 A. Not formally but their comments
16 will be highly considered to the point it could
17 result in the partners changing their opinions.

18 864 Q. The partners of course would have
19 a veto? You already told me Mr. Glassman had a
20 veto. I assume that you and Mr. Riley would also
21 have a veto?

22 A. What we look for is deals in which
23 the full firm agrees.

24 865 Q. Right. You also, the second
25 point, you gave some evidence about what you

1 considered to be improper about Mr. Moyse
2 forwarding work emails to his private email. You
3 expressed concern about that?

4 A. Correct.

5 866 Q. You'd agree with me of course that
6 you forwarded various emails to your AOL account
7 about Wind and presumably other Catalyst files?

8 A. What I noted was that only under
9 unique circumstances that could happen and that is
10 circumstances where for example the company server
11 might be down.

12 867 Q. Right.

13 A. But not -- not as a common
14 practice.

15 868 Q. So where the Catalyst server was
16 down or where there was a problem with accessing
17 the system, it might be appropriate for a Catalyst
18 professional to use their personal email account?

19 A. Yeah. Could be.

20 869 Q. So just to give an example, on --
21 if you look at CCG27196.

22 MR. VERMEERSCH: We have it.

23 BY MR. MILNE-SMITH:

24 870 Q. So this is an email that you sent
25 from your Catalyst account to Mr. Babcock at Morgan

1 Stanley copied to yourself at your AOL account. So
2 the Catalyst server was up and you copied yourself
3 at AOL?

4 A. I would need to - give me one
5 second - can I scroll down and see the email.

6 MR. WINTON: The original email is
7 actually sent from Mr. Babcock to both accounts.

8 BY MR. MILNE-SMITH:

9 871 Q. Yes.

10 A. What happened in this case is that
11 my personal email uploaded into Mr. Babcock's
12 account and he just continued sending it without
13 realizing that it was going to my personal account.

14 872 Q. Well, I do know what you're
15 talking about, I have seen reference to that, but
16 the reason I think this is a little bit different
17 is because he doesn't -- he sends it to both of
18 your addresses, so that explanation would make
19 sense if the AOL was substituted for the Catalyst
20 Capital account, but this one sends it to both.

21 A. On the email that I'm seeing I
22 don't see them both, sorry.

23 873 Q. If you look at July 31st at 11:52
24 a.m., Ben Babcock sends to de Alba comma Gabriel,
25 which I take it to be your Catalyst Capital

1 account, semi-colon new address gdealba@aol.com.

2 Do you see that?

3 A. Yes, I see it.

4 874 Q. So he sent it to both of those
5 addresses. Auto complete can't fill in two
6 different addresses.

7 A. No, but as there has been a
8 problem with me getting emails, I believe he sent
9 it to both to ensure receipt of the email by both
10 accounts.

11 875 Q. Of course. My only point is that
12 in circumstances where there is uncertainty about
13 the servers, it's perfectly reasonable for you to
14 use your personal account in order to make sure you
15 keep up to date with things?

16 A. Not to make sure that you keep up
17 to date with things; it is under unique
18 circumstances, it's not a practice.

19 876 Q. Where there is a problem with the
20 server?

21 A. If there had been a problem with
22 the server, yes.

23 MR. MILNE-SMITH: Those are my
24 follow-up questions, thank you.

25 MR. BORG-OLIVIER: So subject to

1 anything that arises out of the answers to
2 undertakings and refusals, I don't have any more
3 questions.

4 MR. WINTON: Thank you.

5 -- Whereupon the examination concluded at 3:10 p.m.
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1 REPORTER'S CERTIFICATE

2
3 I, KIMBERLEY A. NEESON, RPR, CRR,
4 CSR, CCP, CBC, Certified Shorthand Reporter,
5 Realtime Systems Administrator, certify;

6 That the foregoing proceedings were
7 taken before me at the time and place therein set
8 forth, at which time the witness was put under oath
9 by me;

10 That the testimony of the witness
11 and all objections made at the time of the
12 examination were recorded stenographically by me
13 and were thereafter transcribed;

14 That the foregoing is a true and
15 correct transcript of my shorthand notes so taken.

16
17 Dated this 11th day of May, 2016.

18
19 

20
21 _____
22 NEESON COURT REPORTING INC.

23 PER: KIMBERLEY NEESON, RPR, CRR, CSR,
24 CCP, CBC, RSA

25 CERTIFIED REAL-TIME REPORTER

WORD INDEX

< \$ >

\$10,000 217:12**\$150** 58:3**\$5,000** 217:12

< 0 >

0026616 161:24

< 1 >

1 5:4 35:11 43:21

46:20 47:21 48:4, 24

50:24 64:17, 21, 24

115:7 118:9, 10

130:20 147:2 177:12

184:10 185:17

195:17

1:02 160:10**10** 6:18 17:1**100** 28:10**101** 28:14**102** 28:22**103** 29:3**10331** 28:3**104** 29:13**105** 29:22**105:9** 3:19**106** 30:1**106:2** 3:19**106:21** 3:19**107** 30:5**107:5** 3:19**107:9** 3:20**108** 30:9**108:3** 3:20**109** 30:12**109:7** 3:20**10-day** 113:14**11** 6:22 198:4**11:07** 78:25**11:10** 128:5**11:15** 198:4**11:20** 128:6 160:20**11:52** 246:23**110** 31:1**111** 31:5**112** 31:10**113** 31:14**11323** 112:3**11325** 87:17**114** 31:20**114:2** 3:20**114:9** 3:20**115** 32:9**11565** 35:6 46:11**116** 33:9**116:23** 3:20**117** 33:16**117:12** 3:20**118** 33:22**119** 34:4**119:21** 4:12**11th** 1:17 182:15

193:2 249:17

12 7:1 110:2 151:7

153:25 154:1 160:2

162:18, 22

12:02 96:18 160:9**12:45** 160:8**120** 34:11**12064** 114:13**12066** 114:12**12076** 136:21**12078** 136:23 148:17**121** 34:15**122** 34:20**123** 35:1**124** 35:10**124:10** 3:21**125** 35:16**126** 35:19**126:24** 3:21**127** 35:24 202:10**128** 36:3**129** 36:5**12th** 72:8, 17 73:5,

12, 20 94:11 155:21

13 7:4 112:5 202:5**130** 36:7**131** 36:10**132** 36:14**133** 36:22**134** 37:1**135** 37:6**136** 37:15**136:13** 3:21**137** 37:21**138** 38:8**139** 38:15**14** 7:8**140** 38:24**141** 39:15**142** 39:19**143** 39:21**144** 40:2**144:9** 3:21**145** 1:16 40:7**146** 40:15**147** 40:20**148** 41:1**149** 41:5**14th** 110:17 114:11**15** 7:12 79:19

117:16, 17 158:18

202:8 212:10

150 41:8**151** 41:18**152** 42:5**153** 42:12**154** 42:17**155** 43:9**156** 43:17**156:11** 3:21**157** 43:20**158** 44:6**159** 44:10**15th** 114:7 117:9

199:16 205:14

16 7:18 113:13

116:3 210:11

160 44:13**160:4** 3:21**161** 44:25**162** 45:3**163** 45:12**164** 45:19**165** 45:24**166** 46:3**167** 46:10**168** 46:16**169** 46:22**16th** 210:14 213:14**17** 7:24**170** 47:2**171** 47:10**172** 47:14**173** 47:16**174** 47:25**175** 48:5**176** 48:12**176:10** 3:22**177** 48:17**178** 49:6**179** 49:8**18** 8:7 47:4 110:12

149:15

180 49:11**181** 49:15**182** 49:20**183** 49:23**184** 50:5**185** 50:8**185:9** 3:22**186** 50:11**186:22** 4:6**187** 50:16**187:15** 4:6**188** 51:4**189** 51:9**18th** 82:22 151:1

158:16 159:25 176:4,

20 187:3 188:22

212:23 213:18

214:10, 13, 15, 21

19 8:9 230:2**19:16** 4:5**19:23** 4:5**190** 51:15**191** 51:19**192** 52:2**193** 52:9**193:25** 4:6**194** 52:13**195** 52:22**196** 53:2**196:10** 4:13**197** 53:6**197:11** 4:13**197:17** 4:13**197:6** 4:13**198** 53:10**199** 53:13**1995** 6:12**1997** 6:19**1st** 160:20 161:15

166:1 174:7	210:20 3:22	123:12 129:23	26th 96:19 97:3, 10,
< 2 >	211 57:4	130:16	12 98:2, 9, 21, 25
2 5:10 26:13 40:3	212 57:20	24 9:17 110:17	116:4 144:2 163:8
43:24 46:12 47:21	213 57:25	24:8 3:17	27 7:20 8:8 10:4, 15
48:3, 25 65:2 88:5	213:15 4:13	240 65:12	64:21 67:4, 7 105:5
117:18 131:14 147:2	213:4 4:13	241 65:16	146:8 151:6 153:24
174:18 177:12	214 58:8	241:12 3:24	154:1 160:2
178:23 185:18	214:1 4:14	242 3:7 65:22	270 73:9
192:23 193:1 199:13	214:11 4:14	243 65:25	271 73:14
205:10	215 3:6 58:12	24320 130:9	272 73:23
2:17 154:16 215:12	216 58:15	244 66:4	273 74:2
2:26 215:13	217 59:5	245 66:9	274 74:6
20 8:13 230:3	218 59:12	246 66:12	275 74:24
20:5 4:5	218:11 3:22	24606 192:17, 20	276 75:2
200 53:22 140:25	218:20 4:7	24640 194:5	277 75:7
142:1	219 60:8	247 66:18	278 75:9
2000 6:21	22 9:9 55:19	248 67:3	279 75:11
2002 5:18	220 60:14	249 67:12	27th 1:16 37:12
2009 14:19 15:9	220:16 3:22	24th 96:10, 16, 17	38:10 40:16 42:8
201 54:6	221 61:2	229:18	45:14 51:9 58:24
2012 16:23 17:22	222 61:7	25 9:19 113:13	73:5, 12, 19 94:10
2013 17:23, 25 19:11,	222:15 3:22	250 67:18	99:13 104:3 155:21
13, 21 20:14 22:14,	223 61:13	251 67:22	214:19, 21
24 108:8 146:8	223:1 3:23	25177 25:18	28 10:8 70:21
2014 7:20 15:24	223:21 3:23	252 68:19	280 75:13
24:25 29:16 31:23	224 61:19	253 69:13	281 75:16
47:4 72:17 78:5	224:4 3:23	254 69:23	282 75:23
85:13 107:11 108:7	225 62:2	255 69:25	283 76:6
144:2 150:7 164:13	226 62:9	256 70:8	284 76:10
192:6 217:9 234:23	227 62:16	257 70:20	285 76:15
236:10, 16	227:1 3:23	258 71:1	286 76:25
2015 35:11 137:16	228 62:20	25843 174:12	287 77:5
2016 1:18 249:17	228:8 3:23	259 71:5	288 77:15
202 54:11	229 63:2	25th 154:16 155:23	289 77:21
203 54:17	229:19 3:23	158:13, 21, 23 159:12,	29 10:13
204 54:24	229:8 3:23	24 213:13	29:17 4:5
204:7 4:7	22nd 32:5, 12 33:13	26 9:24 29:16 67:9	290 78:4
205 55:16	23 9:14	26:6 4:5	291 78:9
206 55:23	230 63:8	260 71:10	292 79:13
207 56:4	231 63:16	26064 181:4	293 79:18
208 56:8	232 63:23	261 71:13	294 79:24
209 56:19	233 64:1	262 71:17	295 80:4
209:18 4:7	234 64:6	263 71:20	296 80:17
20th 226:12, 13	235 64:9	264 72:5	297 81:13
21 8:21 78:12, 25	236 64:16	265 72:15	298 81:19
82:21, 22	237 64:25	266 72:19	299 82:14
21:9 4:5	238 65:5	26625 162:15	2nd 24:25
210 56:25	239 65:10	267 72:21	< 3 >
	23rd 88:4 91:24	268 72:24	
	93:10 100:4 110:7	269 73:1	

3 5:13 43:12, 24 47:17 48:3, 4 93:4, 9 120:14 146:18 147:2 163:15, 25 164:8, 12 165:11 170:18, 19 175:24 182:5 196:8 212:8	330 89:16	366 98:17	400 108:6
3, 121:14	331 89:23	367 98:25	401 108:11
3:10 248:5	332 90:8	368 99:5	402 108:15
3:48 185:17	333 90:12	369 99:11	403 108:20
30 10:21 22:18 226:7	334 90:19	37 12:17 89:24	404 108:23
300 82:20 95:23	335 90:22	370 99:16	405 109:15
301 82:25	336 91:3	371 99:19	406 110:2
302 83:5	337 91:10	372 99:22	407 110:5
303 83:7	338 91:21	373 99:24	408 110:15
304 83:10	339 92:3	374 100:4	409 110:20
305 83:14	34 11:23	375 100:11	41 13:21 165:22 170:23
306 83:22	34.17 230:20 231:4	376 100:24	410 111:2
307 84:7	34.20 230:3 231:4	377 101:8	411 111:10
308 84:12	34.22 231:6, 9 237:23	378 101:15	412 111:24
309 84:17	34.23 230:3	379 101:18	413 112:5
30-day 58:12	34.33 230:20	38 13:4	414 112:25
30th 32:1 33:13 110:16 163:1	34:1 3:17	38:13 3:18	415 113:9
31 10:24 90:3	34:16 3:18	380 102:2	416 113:17
310 84:20	34:7 4:5	381 102:6	417 113:20
311 84:24	340 92:11	382 102:21	418 113:23
312 85:3	341 93:1	383 102:24	419 114:4
313 85:5	342 93:4	384 103:4	42 14:3
314 85:11	343 93:9	385 103:14	42:9 4:6
315 85:17	344 93:16	386 104:3	420 114:11
316 85:23	345 93:19	387 104:9	421 114:16
317 86:6	346 93:24	388 104:16	422 114:20
318 86:11	347 94:2	389 104:23	423 115:2
319 86:20	348 94:15	39 13:11 114:17	424 115:6
31st 246:23	349 94:18	390 105:4	425 115:15
32 11:11 70:8, 20	35 12:7	391 105:13	426 115:19
320 87:3	350 94:22	392 106:6	427 115:25
321 87:11	351 95:2	393 106:16	428 116:6
322 88:3	352 95:9	394 106:24	429 116:13
323 88:15	353 95:16	395 107:7	43 14:13
324 88:18	354 95:20	396 107:11	43:5 3:18
325 87:24 88:20	355 95:22	397 107:20	430 117:6
326 88:23	356 96:10	398 107:24	431 117:15
327 89:2	357 96:15	399 108:2	432 117:20
328 89:7	358 96:19	3rd 174:20 176:20	433 118:4
329 89:11	359 96:23	< 4 >	434 118:9
33 11:21	36 12:13 35:12, 16 90:3, 7	4 5:16 26:14 108:20 147:2 163:15, 25 164:8, 12 165:11 194:9 196:8 212:4, 7	435 118:13
	36:17 4:5	4:14 212:10	436 118:18
	360 97:1	4:48 205:14	437 118:23
	361 97:5	40 13:18 114:23	438 119:2
	362 97:12	40:22 3:18	439 119:5
	363 97:24		44 14:16
	364 98:8		440 119:8
	365 98:13		441 119:11

442	119:13	487	131:8	525	141:4	569	154:10
443	120:1	488	131:15	526	141:11	57	17:16
444	120:6	489	132:1	527	141:16	570	154:12
445	120:10	49	15:18	528	141:25	571	154:18
446	120:13	490	132:9	529	142:12	572	154:22
447	120:19	491	132:13	53	16:14	573	155:3
448	120:21	492	132:18	530	142:24	574	155:5
449	120:25	493	132:21	531	143:3	575	156:3
45	14:18	494	132:24	532	143:7	576	156:8
450	121:3	495	133:7	533	143:12	577	156:13
451	121:7	496	133:14	534	143:17	578	156:25
452	121:11	497	133:17	535	143:24	579	157:8
453	121:20	498	133:24	536	144:13	58	17:20
454	121:24	499	134:7	537	144:24	580	157:13
455	122:4	4th	107:11, 11, 16	538	145:3	581	157:16
456	122:10		181:8	539	145:9	582	158:3
457	122:19			54	16:21	583	158:12
458	122:21	< 5 >		540	145:13	584	158:15
459	122:24	5	3:5 5:19 147:2	541	145:16	585	158:19
46	14:24		172:21	542	146:2	586	158:23
460	123:9	5:39	120:19	543	146:8	587	159:8
461	123:16	50	15:25	544	147:12	588	159:11
462	123:23	500	134:14	545	147:17	589	159:21
463	124:14	501	134:21	546	147:23	59	17:24
464	124:18	502	134:25	547	148:9	590	159:23
465	124:21	503	135:2	548	148:17	591	160:12
466	124:24	504	135:19	549	148:21	592	160:17
467	125:2	505	136:3	55	17:4	593	160:22
468	125:5	506	136:18	55:1	4:6	594	161:12
469	125:9	507	136:23	550	149:7	595	161:22
47	15:8	508	137:2	551	149:14	596	162:3
470	125:11	509	137:10	552	150:1	597	162:9
471	126:8	51	16:6	553	150:5	598	162:11
472	126:14	510	137:19	554	150:16 202:12	599	162:17
473	127:3	511	137:24	555	150:22		
474	127:23	512	138:3	556	151:13 202:12	< 6 >	
475	128:8	513	138:9	557	151:22	6	5:21 55:19 147:2
476	128:17	514	138:15	558	152:14	6.3	67:10, 12, 12 90:5,
477	128:20	515	138:18	559	152:17	9	100:15, 17 101:3, 6
478	128:25	516	138:23	56	17:9		114:16, 21 165:23, 24
479	129:5	517	139:7	560	152:20		170:23 172:1 173:5
48	15:13	518	139:11	561	152:25		174:10
480	129:13	519	139:14	562	153:5	60	18:4
481	129:20	52	16:9	563	153:9	600	163:1
482	130:3	520	139:18	564	153:15	601	163:7
483	130:6	521	140:4	565	153:19	602	163:10
484	130:13	522	140:14	566	153:24	603	163:14
485	130:19	523	140:16	567	154:5	604	163:18
486	130:23	524	140:24	568	154:7	605	163:21

606	163:24	649	176:8	693	188:17	725	195:16
607	164:2	65	19:19	694	188:20	726	196:5
608	164:8	650	176:12	695	189:1	727	196:8
609	164:12	651	176:22	696	189:9	728	196:13
61	18:8	652	177:1	697	189:15	729	196:16
610	164:15	653	177:11	698	189:19	73	22:1
611	164:19	654	177:21	699	189:22	730	196:19
612	164:24	655	178:1	6th	38:10 53:20, 24	731	196:25
613	165:2	656	178:11		55:8, 11, 24 56:22	732	197:3
614	165:7	657	178:15		57:6, 8 85:13 114:6	733	197:9
615	165:10	658	178:22		117:8, 8 219:8, 13, 17	734	197:14
616	165:14	659	180:1		220:12	735	197:20
617	165:18	66	20:1			736	197:23
618	165:22	660	180:4	< 7 >		737	198:5
619	166:12	661	180:6	7	6:7 43:9, 20	738	198:7
62	18:13	662	180:8		137:12	739	198:10
62.5	140:21 141:1	663	180:10	7.3	70:9, 22, 25	74	22:6
	142:2	664	180:12	7:36	159:12	740	198:14
620	166:19	665	180:16	7:38	193:2	741	198:18
621	167:3	666	180:21	70	21:13	742	199:10
622	167:6	667	180:24	700	189:25	743	199:13
623	167:12	668	181:4	701	190:2	744	199:16
624	167:18	669	181:8	702	190:5	745	199:19
625	168:11	67	20:8	703	190:8	746	199:21
626	168:25	670	181:13	704	190:13	747	200:10
627	169:10	671	181:15	705	190:16	748	200:23
628	169:22	672	181:17	706	190:21	749	201:2
629	170:1	673	181:22	7062	145:25	75	22:10
63	18:17	674	182:1	707	191:2	750	201:6
630	170:9	675	182:5	708	191:8	751	201:17
631	170:11	676	182:8	709	191:12	752	201:21
632	170:17	677	182:13	71	21:20	753	202:23
633	170:23	678	182:17	710	191:16	754	203:1
634	171:4	679	182:23	711	191:20	755	203:6
635	171:10	68	21:3	712	192:5	756	203:11
636	171:13	680	183:8	713	192:8	757	203:19
637	171:17	681	183:11	714	192:11	758	203:24
638	171:20	682	183:15	715	192:16	759	204:13
639	171:25	683	183:22	716	192:23	76	22:13
64	19:10	684	184:4	717	193:1	760	204:23
640	172:3	685	184:7	718	193:22	761	205:8
641	172:18	686	184:24	719	194:4	762	205:13
642	174:6	687	185:4	72	21:22	763	206:5
643	174:12	688	185:12	72:2	3:18	764	206:21
644	174:22	689	185:15	720	194:9	765	207:7
645	174:24	69	21:8	721	194:20	766	207:17
646	175:12	690	186:8	722	195:5	767	207:24
647	175:15	691	187:25	723	195:10	768	208:5
648	176:3	692	188:3	724	195:14	769	208:10

77 22:18
 770 208:13
 771 209:2
 772 209:13
 773 209:22
 774 210:4
 775 210:9
 776 210:19
 777 210:22
 778 211:9
 779 211:11
 78 22:20
 780 211:23
 78062 146:2
 781 211:25
 782 212:4
 783 212:7
 784 212:22
 785 213:2
 786 213:7
 787 213:12
 788 213:17
 789 213:24
 79 23:4
 790 214:3
 791 214:8
 792 215:15
 793 216:2
 794 216:20
 795 217:8
 796 217:21
 797 218:3
 798 218:9
 799 218:15
 7th 132:19 186:12
 193:21 210:9, 13

< 8 >

8 6:11 46:10
 8:05 5:1
 8:12 194:15
 8:20 199:17, 19, 20
 8:29 117:18
 8:42 118:11
 80 23:7
 800 218:23
 801 219:3
 802 219:15
 803 219:23

804 220:3
 805 220:10
 806 220:18
 807 220:22
 808 221:4
 809 221:12
 81 23:19
 810 221:15
 811 222:8
 812 222:18
 813 223:14
 814 223:24
 815 224:8
 816 224:13
 817 224:23
 818 225:18
 819 226:1
 82 23:22
 820 226:16
 821 226:24
 822 227:7
 823 228:6
 824 228:10
 825 228:24
 826 229:10
 827 230:2
 828 230:6
 829 231:6
 83 24:4
 83:19 4:6
 830 231:10
 831 231:13
 832 231:23
 833 232:4
 834 232:11
 835 232:25
 836 233:14
 837 233:22
 838 234:3
 839 234:8
 84 24:19
 840 234:14
 841 234:20
 842 235:5
 843 237:23
 844 238:13
 845 239:24
 846 240:6
 847 240:16

848 240:24
 849 241:3
 85 24:23
 85:14 4:6
 850 241:8
 851 241:15
 852 241:22
 853 242:13
 854 242:19
 855 242:24
 856 243:3
 857 243:13
 858 243:17
 859 243:24
 86 25:6
 86:25 3:18
 860 244:1
 861 244:7
 862 244:11
 863 244:14
 864 244:18
 865 244:24
 866 245:5
 867 245:12
 868 245:15
 869 245:20
 87 25:14
 87:9 3:18
 870 245:24
 871 246:9
 872 246:14
 873 246:23
 874 247:4
 875 247:11
 876 247:19
 88 25:18
 88:8 3:18
 89 25:24
 89:21 3:19
 8th 120:15 121:20
 184:9 185:17 188:4

< 9 >

9 6:13
 9:10 93:10
 9:15 174:22
 9:38 70:17
 9:54 70:18
 90 26:4

91 26:9
 92 26:13
 93 26:22
 94 27:1
 95 27:4
 9527 66:1, 10
 96 27:9
 96:7 4:12
 97 27:14
 98 28:2
 98:15 3:19
 98:22 3:19
 99 28:7

< A >

a.m 5:1 88:5 93:11
 96:18 174:22 193:2
 199:17 246:24
 AAL 130:25 131:23
 132:1, 9, 15, 25
 133:18 136:4 181:18,
 23 182:2 214:8
 AAL's 134:2
 Ability 46:4, 18, 23
 48:15 59:1, 6, 16
 60:11, 17, 25 61:5, 8
 62:4, 23 63:5 90:16,
 25 91:5, 15, 22 92:4,
 14 115:20 132:7
 133:8 134:2 139:11
 169:7 170:14 171:5
 176:17 178:2 179:19
 180:25 181:1 200:18
 201:5 237:25
 absence 110:9 221:12
 absent 64:19
 absolute 102:16
 205:20
 Absolutely 21:7 53:9
 180:20
 absorb 237:19
 accept 82:3 100:13,
 21 101:11
 acceptable 152:3
 accepted 115:16, 22
 159:21
 access 41:2, 20, 22
 53:18 54:8 97:2, 13
 98:5, 6, 9 116:9, 10,

17 221:17 231:19 238:17, 21 239:2 accessed 223:15 accessing 245:16 account 225:10 234:4, 9 245:6, 18, 25 246:1, 12, 13, 20 247:1, 14 accounts 233:8 234:10 246:7 247:10 accurate 78:7 80:8 168:20 198:23 205:6 226:14 accurately 198:2, 10, 15 achieved 141:22 200:2 206:18 acknowledged 123:14 acknowledging 187:10 acquire 138:12 140:9 145:8 148:12 152:10 164:4 212:24 213:3 acquiring 27:1 140:20 acquisition 18:12 25:10 26:5, 10 27:16 56:10 60:23 76:9 94:25 95:9 150:9 acquisitions 142:15 148:8 Act 16:24 70:23 71:2, 7 110:22 111:4 115:12 acted 230:23 acting 179:22 191:9 211:15 action 69:18 70:3 166:13, 21 238:1, 2, 8 active 18:7 121:21 137:2, 6 163:21 172:19 actively 174:9 actual 106:3 adamant 175:6 add 184:25 added 90:9, 15, 24 91:13 184:22 addition 23:1 32:22 91:11 184:17 236:12	additional 43:7 184:15 address 247:1 addressed 74:3 addressees 30:21 addresses 246:18 247:5, 6 adjust 61:25 adjusted 17:15 Administrator 249:5 admitted 236:11, 14 advance 32:17 143:8, 20 153:2 174:4 advanced 33:1 40:9 44:16 117:23 advantage 59:15 153:14 advise 23:7 30:18 38:21 40:20 66:18 72:1 191:3, 5 200:7 202:16 advised 38:21, 24 96:20, 21 177:9 advisement 4:3 19:17, 24 20:6 21:11 26:7 29:18, 20 34:8 36:18 42:10 55:3 83:20 85:15 96:5 105:10 186:23, 25 187:16 194:1 204:8, 10 209:19 218:21 advisements 3:10 4:1 55:5, 17 215:6 advisor 179:21, 22 advisors 23:12 advisory 164:25 196:15, 16, 24, 25 197:2, 4, 9, 16 advocacy 62:9 advocating 60:14 affidavit 35:11, 22 76:17 97:25 235:9 236:9 affiliate 130:21 affiliate, 131:11 affiliates 131:3 135:3 affiliation 182:21 after 5:24 6:3, 8, 10 32:10 38:18 39:5 61:8 64:10 97:8	98:21 127:17 149:9, 17 164:17 170:14 176:18 191:18, 19 192:6 193:8 211:23, 25 212:23 213:3, 18 214:10, 13 221:16 226:6, 7, 8, 8, 10, 13, 18 agenda 130:8 agent 180:4, 5, 6 aggregation 148:2 ago 157:1 219:4 agree 33:20 66:22 67:1 81:6, 17 84:12, 20 90:22 134:15 147:8 161:2, 8 172:9 175:2, 8 201:7, 8 212:24 245:5 agreed 46:6 63:9 157:14 161:14 163:5 230:22, 25 232:5 agreeing 178:21 agreement 31:17 40:17 66:2, 7, 10, 13 70:11 80:25 82:13 87:13 114:12 130:7, 9, 20 131:9, 12, 16 132:3, 8, 11, 15, 24 133:15, 18 134:16 135:4, 4 162:12 166:15 167:1 170:3, 12 176:15 181:18, 23 182:3 190:25 191:5 209:4, 8, 10 213:9 218:10 agreements 42:13, 16 45:23 81:11 132:6 133:16 167:22 171:14 agrees 244:23 Ah 53:2 162:21 195:14 ahead 47:2 77:16 181:16 ALBA 1:15 3:3 5:2, 4 8:18 12:7 14:13 19:10 24:25 25:3 28:4 33:9 34:16 37:6 39:4, 17 43:12 62:12 67:16 72:15 75:23 76:15 78:4, 12	79:22 90:6 93:10 102:24 105:4 124:14 128:8 134:21 141:25 142:24 144:8, 14 151:14 152:25 153:2 157:16 168:2 173:20 179:13 185:16 193:2 197:4 202:24 203:25 204:13 207:14 213:5 215:15 218:12 224:24 231:7 233:1 235:6, 24 238:13 240:16 241:16 242:13 246:24 Alba's 173:13 198:22 236:1 alignment 19:5 20:23 215:22 216:23 217:1 allegation 106:6, 17 allegations 119:17 238:7 allege 11:2, 13 allegedly 122:23 alleging 106:2 allocation 77:13 allow 9:2 23:10 155:10 167:15 175:22 195:21 211:6, 19 allowance 63:15 allowed 169:16 170:3, 12 183:20 allows 156:17 alter 86:18 223:4 alternative 48:23 119:20 191:1, 25 alternatives 51:14 amended 16:23, 24 229:21, 21, 21 amendments 114:23 America 6:3, 9 amount 85:1 216:15 amounts 216:23 Amsterdam 121:4 analysis 16:16 25:23 41:11 43:14 57:22 86:19 142:21 179:23 analyst 19:5 243:9
---	---	---	---

analysts 18:21, 25
 20:21 125:6 243:23
 244:11
analytics 20:25 23:3
analyze 9:16 13:16
 41:24
analyzing 51:24
 220:1, 5
Andrew 2:3, 12
 20:12, 13 28:23, 25
 29:3 30:16 244:4
announced 137:15
 139:19 140:5, 6
 141:5 194:22
announcement 141:18
 144:16
answered 14:8 219:5
answering 151:13
 203:2 217:21
answers 5:13 21:10
 55:6 202:8, 15 215:5
 221:19 248:1
Anthony 74:3 78:11
 131:2
anybody 83:23 234:8
 241:3, 9, 15, 17
Anyway 136:23
 230:17 240:18
AOL 245:6 246:1, 3,
 19
AP 196:1, 13
apologies 65:24
apologize 174:13
apparently 121:8
appear 3:17 4:4, 12
appears 120:16
 137:8 184:10 203:21
 205:15
apples 140:11, 11
appreciate 84:20
 139:7 188:5 220:14
approach 33:5 38:4
 86:16 140:23 144:19
 191:22
approached 17:5
 18:4, 6
appropriate 14:1
 235:2 245:17
approval 26:24 27:2
 57:13, 24 68:17, 24
 69:1, 3, 8, 20 70:4, 23,
 24 71:3, 4, 7, 8
 110:22, 23 111:4, 5
 113:8 115:12 149:21
 163:3 165:5, 6
 166:15, 24 168:8, 18
 169:1, 8 181:11
 182:9, 10, 21 183:25
 185:24 193:7 194:24
 206:3 211:18
approvals 27:6, 12
 67:13 68:11 90:10
 94:7, 9, 13 99:7, 9, 21
 168:15 188:10, 18
 196:4 204:17 242:25
approve 193:13
approved 47:6, 11, 14
 112:23 211:6
approves 156:18
April 58:9 236:16
Arcan 8:4 9:11, 15
archived 15:16
areas 45:22
argument 59:19 60:9,
 15 61:3, 3 62:8, 8
 63:1
arguments 214:25
arises 248:1
arising 215:6, 7
 242:14
arose 108:23
arrangements 68:3, 7
 92:20
article 145:14, 16, 20,
 22 146:4, 8 147:4
articles 30:14 146:3
 147:20
articulated 199:23
 200:6
Asia 88:16 113:12,
 14 116:8 117:8
aside 10:13, 15, 24, 25
 14:7 20:8 138:6
 141:21 143:19
 148:12 163:10
 183:15
asked 24:1, 17, 23
 30:14 42:23, 25 55:2
 73:17 82:17 96:22
 115:25 141:25 156:3
 200:24 201:8, 18
 202:16 203:7, 14
 209:23 210:5, 14
 216:20 219:4 221:15
 224:8 228:12, 15, 22
 241:2, 4, 5, 6
asking 8:21 11:12
 13:11, 12 32:9, 10
 82:8 86:6, 9 91:13
 105:24 121:25 150:5,
 22 172:9 183:23
 187:6, 10 188:23
 189:1 205:1, 3
 206:22, 23 207:19
 212:15 227:17
 235:22 236:1 238:8,
 24
asks 161:2
aspect 102:8 235:24
aspects 143:4
assertion 232:22
asset 69:2, 4 155:12
 156:17
assets 68:4, 5 92:20,
 21 115:10, 21 169:17
 170:4
assist 24:9 38:25
 39:1 185:10
assistance 3:12
assistant 30:10, 11
associates 18:21
assume 30:14 40:23
 53:15 97:7 121:4, 8,
 14 157:20 161:8
 168:14 175:1 210:1
 244:20
assumes 105:21
assumption 129:9
 166:8
assurances 155:22
attached 25:10 32:25
 130:6 162:11, 15
attaches 35:1 66:1
 87:12
attaching 25:1 31:17
 66:6 105:5
attachment 8:16
 25:17
attachments 8:15
 9:12
attempt 220:22
 222:1 223:2
attempts 221:19, 22
attend 36:5
attended 36:3, 7 39:7
attending 121:7
attention 35:20 239:4
auction 118:18
 137:15 138:4, 5, 10
 139:19 140:5, 6, 10,
 21 141:2, 5, 14 142:3,
 11 143:8, 13 144:1,
 17 147:15 148:11
August 47:4 77:16
 82:22 132:18 149:15
 150:7 151:1 158:16,
 18 159:25 160:19
 161:15 164:13 166:1
 174:7, 20 175:24
 176:4, 20, 20 181:8
 182:14 184:9 185:17
 186:11 187:3 188:4
 192:6, 8 193:2, 21
 198:4 199:16 205:14
 210:9, 13 212:10, 23
 213:13, 18 214:10, 13,
 19
authored 19:20
authority 68:12
 115:11 167:23
 169:19 170:6
Auto 247:5
automatic 110:21
 111:2 211:19
automatically 211:17
available 98:7
 165:13 225:6
aware 9:9 14:18
 17:12, 14 27:6 38:18
 43:17 56:11 58:4
 64:6 80:14 89:5
 97:4 101:5, 20 108:8,
 10, 20 113:20 117:24
 120:1 122:11 124:15
 125:1 132:14 133:7
 134:7 141:11 156:8
 159:23 173:14
 182:10, 15 186:9, 18
 187:2 188:8 202:23,
 25 207:17, 20, 24

208:3 209:24 212:11 213:7, 10 220:19, 20 231:17, 23, 25 232:2, 13 233:2 234:3, 9, 13, 24 235:1, 7, 18, 20, 22, 23 240:24 AWS3 137:12, 14, 22 138:10 147:15 149:1	159:2 238:9 bases 233:4 basic 16:6 basically 5:20 6:1 17:17 18:18 237:19 basis 77:20 108:14, 15 114:1 146:15 157:5 205:20 214:3 bathroom 128:2 be' 146:16 becoming 215:19 beginning 62:6 160:18 behalf 5:11, 14 33:12 34:12 161:10 186:10 206:12 214:8 behaviour 12:20 86:18 193:10 234:25 236:11 belief 191:17 believe 17:7 18:11 26:1, 12, 21 46:2 62:17, 18, 25 75:15, 21 88:19 107:13 108:17 117:22 118:1, 1, 2 119:7, 10 120:8 143:14 145:19 155:1 161:1 171:8 172:13 173:14 177:16 182:20 183:14 188:16, 19 190:2 191:8, 12, 15 192:18 212:19, 24, 25 221:2, 18 227:1 233:10 236:9 247:8 believed 62:22 63:3 155:7 Bell 7:15 belonged 12:6 Ben 56:1 66:5 120:16, 25, 25 161:12 181:9 199:24 200:4, 4, 7 212:9, 11 246:24 benefit 149:3 Bennett 129:24, 24 130:3 161:10 Ben's 200:4 best 106:21 123:18 173:8 198:11 205:20 better 242:24	bid 74:20 113:1 138:7 bidder 118:16, 24 bidders 117:25 118:20 134:17 big 129:8 135:6 230:11 bigger 212:14 biggest 243:6 bind 134:16 169:2 binder 170:18 binding 5:14 194:23 bit 7:19 47:3 89:16 124:4 166:18 179:12 215:18 236:21 246:16 black 87:19, 21 89:23 109:22, 24 110:10 blacked 111:16 Blackstone 122:5 Blackstone, 121:13 blank 185:7 blindingly 212:11 block 139:20 blue 57:1 board 182:9, 20 183:14 185:24 186:9, 20 187:1, 18 189:17 191:9, 13 193:4, 5, 18, 23 Boland 2:18 8:11 bonds 23:13, 15 bones 222:20 230:12 Borg-Olivier 2:8 3:6 215:9, 14 216:6, 19 218:14, 22 220:9, 17 222:6, 7, 17 223:3, 10, 13, 23 224:6, 7, 22 225:17, 25 226:15, 23 227:6 228:5, 9, 23 229:7, 9, 18, 20, 24 230:1, 5, 14 231:5 232:24 235:14, 17 236:3, 19 237:9, 22 238:12 239:8, 19, 23 240:5, 11, 15 241:13, 14 242:5, 8 247:25 Borg-Olivier's 215:4	242:14 bother 204:11 bottom 57:7 90:2 118:13 129:23 146:9 184:9 185:16 194:10 197:23 bound 131:12 132:3, 6, 11 133:18 190:21 box 234:3, 9, 10 Brad 2:4 224:15 branded 136:24 BRANDON 1:9 2:8 28:16 37:7, 10 100:11, 20, 24 101:10, 18 111:12 125:20 127:5, 7, 12, 17 142:4, 6 152:20 163:8 226:3 Brandon's 123:23 127:6 breach 11:8 82:13 128:22 129:7 133:13 135:20 191:10 209:3, 6, 8, 9, 14 211:12 230:24 breached 135:4 136:8 191:13 break 128:3, 9 138:18 160:8 200:16, 24 201:1, 8, 17 202:17, 21 203:8, 12 211:5 breakdown 204:15, 19 briefly 5:21 bring 192:16, 19 broad 240:10 broaden 241:15 broader 60:18 79:20 241:22 brought 61:4 62:19, 21 152:12 239:4 Bruce 63:19, 20, 20 64:1 154:15 156:14 178:25 180:4 Bryce 75:4, 5 80:10 build 65:1 146:22 156:21 176:16 building 59:22 139:20 175:20
---	--	---	--

bullet 44:13 45:3, 20 48:6 50:3, 23 112:7 137:20 148:22, 23 175:3, 15 176:12 177:2	CAPITAL 1:6, 9 2:12, 16, 18 5:9 6:6 15:11, 20, 21 16:11 17:15, 18 19:2 33:5 59:24 60:24 94:21 120:2 147:5 165:13 196:20, 21 213:18 217:16 246:20, 25	71:14, 23 72:16, 22 73:18 74:18 75:18 76:1, 9, 19 77:7, 19 78:6 79:6 80:5 81:5, 9, 10, 16 82:5, 14, 22 83:11, 16 85:12 86:1, 4, 17 87:14 89:12, 18, 19 91:19, 25 92:16 94:18 95:11 96:1 97:2, 13 98:20 100:5 102:3, 25 103:5 105:17 107:8, 17 108:12, 18, 24 113:4 114:22 115:8, 16, 19, 22 116:14, 16 118:15 119:8 120:23 123:25 124:1, 1 125:7 126:16 127:8, 12, 18, 25 128:13 129:14, 17 130:15, 16 134:22 136:9 137:4 138:19 141:7, 17 144:19 145:7, 9, 17 146:14 147:5 148:3, 5, 12 149:15, 23 150:1, 8, 16 151:2 155:9, 15 159:13 161:16, 18 163:15, 15, 18 166:20 170:2 171:9 175:17, 19, 22 176:14, 20 178:16 179:16, 18, 24 184:14, 21, 25 189:4 191:1, 3, 14 194:25 197:10 201:7, 8 206:13 208:13 210:14, 15 211:3 213:2, 24, 24 214:12, 16, 20 215:17, 19, 24 217:9, 22, 24 221:13, 22 222:9, 22 223:16 225:22 226:4, 7, 12 232:7, 15 233:9, 20, 23 234:5 235:3, 7, 10 237:16 238:18, 20 240:19, 20, 25 241:9, 17 242:17, 25 245:7, 15, 17, 25 246:2, 19, 25	82:9 90:16, 25 91:5, 15 99:1 100:12, 20 101:10 116:20 119:6, 18 142:7 144:15, 15 147:9 149:8 166:13 175:25 177:14 180:17, 19 181:2 218:19 237:25 caused 107:7 204:14, 18 CBC 2:22 249:4, 23 CCAA 24:10 140:8 CCG0009482 57:4 CCG0009527 70:21 CCG0010331 28:2 CCG0010364 30:5 CCG0011325 111:24 CCG0011342 93:1 CCG0011564 34:21 CCG0011565 35:20 CCG0012066 109:16 CCG0012078 136:18 CCG0023893 31:14 CCG0024192 120:13 CCG0024418 160:13 CCG0024559 185:12 CCG0025176 24:24 CCG0025737 117:15 CCG0025815 154:13 CCG0028351 52:2 CCG0028389 73:24 CCG11323 87:11 CCG11565 38:17 CCG12078 172:18 CCG18691 96:12 CCG24308 129:21 CCG24550 184:7 CCG24575 187:25 CCG24656 197:20 CCG24774 199:10 CCG24784 205:8 CCG24800 212:4 CCG25177 24:19 CCG25806 78:9 79:3 CCG27196 245:21 CCG28356 55:23 CCG9517 72:5 CCG9525 66:1 CCP 2:22 249:4, 23
burned 168:16 Business 6:15, 16 29:12 32:25 33:2 52:14 60:3, 20 62:24 63:5 65:1 67:20 68:8, 9 78:3 115:10, 21 138:1 148:5 169:17 170:4 butt 146:20 buy 17:12 156:18 157:2 buyers 123:4 buying 57:12 140:8, 8, 19 175:17	carefully 167:19 Carlson 2:12 35:6 214:18 carried 21:23 carrier 13:1 23:16 41:14 43:23 44:8 46:13 141:20 142:16 175:21 176:17 179:9 219:22, 24 carries 57:6 177:12 carry 177:17 case 12:1 31:21 75:21 102:18 104:12 106:1 121:9 126:11 134:24, 25 140:18, 24 142:1, 16 157:17 173:3 181:25 186:15 190:15 193:12 201:23 205:20 209:5, 7, 8, 20 225:16 235:25 242:7 246:10 cases 7:2 cash 28:17 95:11 CATALYST 1:6 5:6, 8, 11, 14, 17, 23 6:10 9:15, 25 11:2, 8 12:6, 22 13:6, 7, 12, 14, 15 15:10 17:5, 19 18:15 19:14, 22 20:11 22:9, 14 23:11, 12, 21 25:23 26:15 27:18 28:8, 19 31:21 32:7, 19 33:11 36:3, 23 37:2, 18 39:9 40:9 44:1, 2, 21 45:9 46:11 48:9 50:1, 6 51:6, 11, 21 52:25 53:25 55:18 56:6 59:10 63:12 64:20 65:6, 20 66:5, 23	Catalyst's 18:13 20:10 38:2 39:21 73:3, 10 74:20 80:9	
< C > calendar 34:14, 17 83:6 108:1 119:12 call 24:23 29:15 113:5 116:25 117:10, 20 164:9 174:2 188:14 195:24 196:2, 21 197:25 198:2, 11 called 6:1 8:3, 3 19:3 23:25 188:9 calling 160:25 calls 103:6, 7 113:18, 21, 25 116:7, 12 117:3, 7 127:20 196:21 Canada 25:21 35:2, 25 40:11 52:15 56:10 70:23 71:3, 7 72:17 83:3 110:23 111:5 115:12 137:2, 6 146:21, 23 155:3, 10 157:18 163:3 172:19, 20 175:5 Canadian 13:19 15:11 16:19 59:21 84:16 149:2 cancel 220:23 capacity 85:23 capex 93:12, 20 94:24			

<p>ceased 226:7 cemented 33:8 57:22 Centa 2:7 centre 104:21, 21, 24 centres 65:19 certain 13:17 43:15 69:2 71:23 97:17 99:2 102:22 144:23 183:20 184:10 232:7 234:10 certainly 25:22 26:25 27:3 43:17, 19 51:23 76:17 77:24 116:11 124:8 158:13 243:5 certainty 142:10 169:13 certainty, 169:12 170:2 CERTIFICATE 249:1 Certified 249:4, 24 certify 249:5 CF3 163:12 CF4 163:12 CFO 75:6 chain 57:5 66:5 87:12 93:5 117:16 120:14 154:13, 14 158:20 160:18 185:15 194:9 195:17, 19 199:13 chairman 199:23 200:6, 12 212:12 challenging 49:17 chance 214:16 change 47:7 91:6 94:14 140:19, 22 175:7 176:4 changed 73:5, 11, 19 186:16 199:24 changes 45:15 210:23 changing 244:17 characterizations 103:19 cheap 141:22 check 23:6 34:13 40:18 83:6 108:1 109:8 113:7, 22 118:7 119:12 164:17 176:5, 24 182:19 196:9</p>	<p>chipping 157:15, 25 158:6 choice 21:21 22:2 choose 21:13 chose 15:13 203:13 214:22 chose, 203:16 chosen 30:21 36:11 Chris 161:6, 8, 8 circulated 9:13 circumstances 128:23 228:20 233:19 245:9, 10 247:12, 18 claim 75:20 135:7, 20 136:3, 8, 11 209:10 229:22 230:8, 11, 17, 18 231:2 236:22, 24 237:3, 10 239:9, 13 240:4 claims 237:25 238:2 clarification 225:8 226:6 227:21 clarifications 58:25 clarify 7:6, 9 23:10 24:8 48:18 53:24 181:20 225:2 227:2 clarifying 112:13 clarity 58:20 59:6, 16 60:2 61:5, 7, 14 62:4, 23 63:4, 6 89:24 91:18 228:7 clause 67:16, 19 110:5, 6 111:12 169:1 192:1 clean 182:25 183:2 231:22 clear 12:21 31:3, 11, 12 55:13 91:12 120:21 131:20 135:15 147:3 176:15 186:24 194:13 214:14 222:18 223:6 227:3 clearances 68:11 clearly 80:13 133:11 244:2 clearly-expressed 177:15 client 109:5, 11</p>	<p>close 23:13 71:6, 14, 22 78:15 79:15 151:3 152:5 164:16 closed 152:9 177:24 210:11 218:4 closely 222:2, 9 closest 235:4 closing 94:5 169:16 170:14 178:19 184:11, 16 186:4 191:1 210:12, 22 coffee 174:25 co-invest 19:3 21:13 77:12 83:4 co-investing 20:21 21:25 76:20 co-investment 21:16 242:16, 17 co-investor 215:17 216:7, 12 co-investors 215:20 co-invests 22:3 collateral 58:21 60:2, 5, 19 63:7, 11, 14 179:7 colleague 29:8 colleagues 241:5 Columbia 6:15 combination 28:24 29:4, 6 50:14, 24 99:15, 25 139:5 147:21 219:25 combine 48:15 49:16, 18 combining 43:21 46:12 come 103:25 121:25 comes 126:22, 25 comfort 149:7, 15 comfortable 207:11 coming 72:10 73:25 89:18 143:16 146:5 comma 246:24 commenced 41:8, 11 commencing 5:1 comment 146:10 201:1 commenting 193:17 comments 31:17</p>	<p>244:15 commit 204:9 commitment 68:23 69:3 95:17 commitments 165:10 committed 20:17 committee 164:25 182:9 185:21 186:2 187:2 committing 67:25 68:6 92:18 common 7:13 13:20 15:6 24:15 58:3 66:20 76:12 137:13 142:14 245:13 commonly 139:2 communication 124:16 125:19 127:19 155:19 174:16 communications 18:10 19:12 25:7, 15 33:11 75:3, 17 98:19 102:12, 15 109:5 125:13, 23, 25 126:3, 15 127:24 141:8 154:20 168:21 176:6 207:18, 25 208:14, 25 209:3 213:12 companies 8:1 9:10 10:25 15:3, 6 17:1 76:14 131:11, 17, 22 139:15 142:15 company 6:10 7:14 8:2 3 14:16 16:10 28:19 53:1, 3 54:5, 7, 10, 12, 12, 14, 15, 18 56:16 78:1 84:13, 22, 25 131:1 134:23 245:10 company's 54:8 80:11 107:18 compete 139:15 Competition 70:23 71:2, 7 110:22 111:4 115:12 149:3 163:2 214:17 competitive 12:23 13:5 153:14</p>
--	---	---	---

<p>competitor 13:20 23:17 97:10 235:4</p> <p>competitors 13:17</p> <p>compiled 85:12</p> <p>complete 53:17 54:3 77:11 150:20 151:12 206:19 247:5</p> <p>completed 44:17 45:5 162:13</p> <p>completely 135:7</p> <p>completing 5:25</p> <p>completion 168:24</p> <p>complicate 111:22 195:25</p> <p>complying 86:22</p> <p>component 27:3 41:15 57:23 60:21</p> <p>comprised 197:9</p> <p>computer 6:17, 23 231:20 233:12 235:10</p> <p>concede 81:5</p> <p>conceding 81:15</p> <p>concern 9:10 11:5, 11 27:6 82:6 107:15 109:9 183:4, 16 184:10 193:4, 5 245:3</p> <p>concerned 8:1 26:10 189:14, 15, 19 193:9 205:3</p> <p>concerning 19:13 21:14 33:24 65:13 115:20 137:5 209:14 230:10 232:21</p> <p>concerns 221:4</p> <p>concession 116:15, 21 156:21 168:22 201:18</p> <p>concessions 47:21 51:6, 11, 20 58:25 71:15, 23 91:6, 16, 23 92:1, 13 99:3, 10, 12, 23 100:7, 14, 22 101:12 103:2 150:3, 10, 19, 24 151:5, 8, 18, 21 152:1, 11 153:11, 13, 16, 18, 23 154:4, 9 155:15, 22 156:1, 2, 4, 9 157:3, 19, 23 160:2</p>	<p>170:13, 25 171:8 175:18 176:17 177:23, 24 178:2, 8, 9, 17 179:17 183:9, 20</p> <p>concise 230:10</p> <p>conclude 7:9 43:25 151:15</p> <p>concluded 248:5</p> <p>concluding 159:15</p> <p>conclusion 31:13 150:15</p> <p>conclusions 228:2</p> <p>concrete 116:18, 19</p> <p>condition 46:6 57:13, 14 68:10 69:2 71:13, 22 184:11</p> <p>conditions 70:9, 10, 22, 25 152:8, 8 184:16</p> <p>conduct 41:21 68:8 189:16, 20 238:9, 10</p> <p>conducted 6:20 25:23 41:11 151:9</p> <p>confess 127:4 226:2</p> <p>confessing 228:11</p> <p>confident 124:18, 21 126:3, 5 200:17</p> <p>confidential 7:21 10:14 11:3, 14 12:3 14:5 37:19 40:1 90:17 91:1, 8 92:25 97:14 98:20 105:7, 14 106:17, 25 126:15 127:5, 16, 25 134:4 226:3 228:11, 13 229:11 232:22 237:15, 20 240:7, 20 241:1, 11, 18</p> <p>confidentiality 80:24 81:10 82:13 133:15, 20</p> <p>confined 57:10</p> <p>confirm 33:10 78:5 79:6 80:5 82:4 86:10 88:6, 8 89:17 120:18</p> <p>confirmation 57:21</p> <p>confirmed 82:1 86:4</p> <p>conflict 12:22</p> <p>confused 179:12</p>	<p>confusing 142:9</p> <p>connect 41:17, 17</p> <p>connected 15:22 221:1</p> <p>connection 115:11 182:21 217:24 218:7</p> <p>conscious 237:17</p> <p>consent 65:14, 15 69:22 70:1 81:3 166:15, 24 167:10, 14, 20 169:6</p> <p>consents 164:20 165:19 184:11, 15, 17, 20, 21, 25</p> <p>consequences 193:6</p> <p>consider 136:13, 16 141:23 142:17 149:13 235:2</p> <p>consideration 104:19 148:6</p> <p>considered 32:19 41:13 97:9 142:19 244:16 245:1</p> <p>considering 13:9 184:16</p> <p>considers 162:12</p> <p>consist 239:18</p> <p>consistent 76:17 110:18 166:3 171:8 183:16 211:1</p> <p>consistently 183:24</p> <p>consolidate 142:15 144:20 145:5 147:14</p> <p>consortium 121:15 123:18 128:10 129:4 186:11 190:20 191:23 204:21 206:20, 25 207:9 208:1, 16 209:25 213:8, 20</p> <p>constrained 139:11</p> <p>constraining 139:8</p> <p>constraints 139:22</p> <p>consult 165:2, 5</p> <p>consultant 63:24 157:6</p> <p>consultation 137:13</p> <p>consulted 203:1, 4, 24</p> <p>consumers 149:2</p>	<p>consummate 238:4</p> <p>consummation 167:24</p> <p>contact 213:17, 22, 25 214:10</p> <p>contacted 15:10</p> <p>contemplate 68:13 77:17</p> <p>contemplated 68:14 167:25 168:12</p> <p>content 43:18 67:23 144:1 238:14</p> <p>contents 8:22 105:5</p> <p>context 14:25 15:9 17:5 18:5 44:6 47:22 61:25 62:2 96:7 107:13 178:4, 9</p> <p>continue 17:17 51:16, 23 59:3 65:21 101:16 117:22 122:22 144:19 145:5 147:14 170:24 191:23 206:24</p> <p>continued 13:1 51:17 148:2 208:7 221:9 246:12</p> <p>continues 178:23</p> <p>continuity 144:20</p> <p>contracts 161:5, 17</p> <p>contrary 88:12 173:6 176:23</p> <p>contribute 79:19</p> <p>control 14:21 33:5 40:11 94:14 211:17 225:12</p> <p>controlled 15:3 131:1 132:10</p> <p>conversation 107:25 108:17 109:3 155:6</p> <p>conversations 34:5 97:17 175:2</p> <p>convert 139:1, 12, 24 140:3</p> <p>converting 27:20</p> <p>Cooney 2:9</p> <p>cooperate 85:25 86:7</p> <p>coordination 133:13</p> <p>copied 19:15 34:23 80:1 88:5 97:7 116:11 188:5 246:1,</p>
--	--	---	---

2	198:5 201:20 204:13, 18 206:4, 15 208:12 211:12 218:8 219:2 221:14 224:21 235:17 240:21 242:1, 18, 23 243:15, 16 244:10 245:4 249:15	create 41:14 42:1 43:22 46:13 created 19:20 234:4 creation 219:10, 18 creditors 48:25 Creighton 97:18 124:5 125:8, 12, 25 126:9, 14 127:23 217:11 224:10, 17 225:2, 19 226:2, 17 227:3, 10, 12, 17, 21 228:1, 4, 10 229:1, 10 243:24, 25 Creighton's 98:18 225:9 228:20 critical 36:12, 22 37:1, 10, 17 38:5, 20 39:25 41:15 60:21 65:19 78:2, 2 150:11 151:8 218:25 221:6 crossed 92:23 cross-examination 201:24 203:3 cross-examined 9:1 219:3 CRR 2:22 249:3, 22 CRTC 14:19 15:9 172:22 CSR 2:22 249:4, 22 culture 215:21 216:22 217:1, 3 curiosity 236:18 current 5:5 175:6 cut 97:2, 4 98:8 100:5 221:17 CV-14-507120 1:1	187:1 202:1, 3 204:16 205:4 206:22, 24 229:16 247:15, 17 dated 8:8 24:24 32:1 78:11 88:4 249:17 dates 33:25 day 1:17 11:2 114:7 130:8 161:24 194:5 249:17 days 93:5 193:21 226:8 DE 1:15 3:3 5:2, 4 8:18 12:7 14:13 19:10 24:25 25:3 28:4 33:9 34:16 37:6 39:4, 17 43:12 62:12 67:16 72:15 75:23 76:15 78:4, 12 79:22 90:6 93:10 102:24 105:4 124:14 128:8 134:21 141:25 142:24 144:7, 14 151:14 152:25 153:2 157:16 168:2 173:13, 19 179:13 185:16 193:2 197:4 198:22 202:23 203:25 204:13 207:14 213:4 215:15 218:11 224:24 231:7 233:1 235:6, 23 236:1 238:13 240:16 241:16 242:13 246:24 Dea 8:10 dead 155:16, 24 deadline 211:5, 21 deal 13:17 16:18 18:13 20:10, 15, 22 22:21, 23 23:5 27:10 30:20 32:14, 15, 21 33:1, 8 36:24 37:4, 11 39:11 44:16 45:5 48:7, 10, 13 49:24 50:1, 2, 11, 23 52:6 54:22 55:18 56:5 57:2, 23 60:22 71:14, 22 77:15 78:2, 15 79:15 82:9 86:16
copies 39:5, 12, 22 copy 105:22 229:21 core 20:15 22:21, 23 23:5 30:20 36:24 37:3, 11 42:1 Correct 6:24 9:14, 24 14:24 15:8, 12 17:3, 4 18:3, 6 20:10 22:17, 19 25:13 27:8, 13 28:1, 8, 9, 13, 18, 21 29:2 33:16 36:2 39:4 40:15, 23 41:1, 3, 5, 6 44:8, 9 45:8, 11, 12 46:9, 15, 21 47:1, 3, 9, 17, 18 49:4, 19, 22 51:4 52:7, 12 53:5 56:7, 18 58:13, 23 60:6, 7 63:22, 25 64:3 65:2, 6, 15 66:8 68:17 69:23 70:6 71:8, 12, 15 74:17 75:11 77:6 78:4 79:22, 23 82:1 84:3 85:22 91:2 92:2, 14 94:11 95:1, 18, 19, 21 96:21 98:25 101:12 102:4 111:6 115:17, 23, 24 118:17, 21 119:6 120:11, 24 121:2, 6, 10 123:11 124:17 126:12 128:1, 14, 16 129:7, 25 130:5 131:13 132:11, 12, 17 137:23 138:1, 2, 8, 13 139:3, 9, 10, 13, 17 140:15 143:1, 2, 6 145:11, 18 147:11, 16 149:14 152:19 154:5, 20, 21 155:3 158:14 159:15 161:11 163:6, 13, 17, 20, 23 164:1, 7, 14 165:9, 17, 21 166:8, 16 167:1 170:10, 16 171:19 174:11 177:10 180:7, 11, 15 181:3, 6, 19 182:7 183:5 184:6 186:7 190:1 195:9, 15	cost 9:21 145:7 costs 94:24 Council 175:1 Counsel 2:16 3:12 26:4 38:16 40:21 67:5 70:12 75:16 92:22 93:7 96:8 97:16 100:9 101:8 103:7, 8 108:4 109:8, 17 112:1, 21 113:5, 7 114:22 117:1 119:15 122:14 124:11 129:9, 25 130:4 135:22 144:5 146:6 162:5, 7 172:7 176:9 185:4 224:9 226:6 count 55:2 couple 67:4 129:22 146:2 193:21 course 26:22 38:16 74:17 76:6 84:12 90:19 100:24 123:9 124:1 127:9, 13, 15 142:12 144:10 152:20 159:8 168:25 169:2, 22 233:15 234:17, 18 242:19 244:18 245:5 247:11 Court 1:1, 3 49:14 238:8, 24, 25 239:2 249:21 courts 49:12, 13 coverage 140:2, 12 covered 82:18 128:18 172:1, 24 173:10 174:1, 9 223:11 covering 27:15 34:21 161:24		
	create 41:14 42:1 43:22 46:13 created 19:20 234:4 creation 219:10, 18 creditors 48:25 Creighton 97:18 124:5 125:8, 12, 25 126:9, 14 127:23 217:11 224:10, 17 225:2, 19 226:2, 17 227:3, 10, 12, 17, 21 228:1, 4, 10 229:1, 10 243:24, 25 Creighton's 98:18 225:9 228:20 critical 36:12, 22 37:1, 10, 17 38:5, 20 39:25 41:15 60:21 65:19 78:2, 2 150:11 151:8 218:25 221:6 crossed 92:23 cross-examination 201:24 203:3 cross-examined 9:1 219:3 CRR 2:22 249:3, 22 CRTC 14:19 15:9 172:22 CSR 2:22 249:4, 22 culture 215:21 216:22 217:1, 3 curiosity 236:18 current 5:5 175:6 cut 97:2, 4 98:8 100:5 221:17 CV-14-507120 1:1	< D > data 41:2, 3, 20, 22 53:18 178:13 date 32:12 36:16 40:16, 18 53:20 55:9 56:22 78:24 90:3 91:24 100:11, 20 101:9 107:12, 13 110:6, 11, 16 111:8, 11 112:7, 9, 16, 18 113:2 114:5 116:1 127:3 132:14 162:19 163:1 164:18 185:25	

92:10 94:4 97:6 100:1 101:13 102:11, 17 104:21 114:6 120:23 123:25 131:18 132:2, 7 133:9, 19 134:2 135:6 152:9 161:18, 19 162:6 165:3, 7 177:24 178:7 182:22 184:22 185:1 186:5 188:22 189:3 194:25 196:4 197:14 200:19 210:11, 15 211:6 212:13, 14, 18 214:20 216:12 217:24 218:3 220:24 222:3, 10 244:2, 3 deal-by-deal 216:14 dealing 135:8 dealings 67:20 deals 13:2 18:19, 23 19:2, 6 20:18 21:2 22:3 196:23 215:17, 25 216:7, 10, 10, 22 217:5 218:1 219:21 221:11 233:10 234:10, 13, 17 243:8 244:22 debt 14:20 15:22 16:13 22:15 24:14 27:21, 21 58:4, 6 59:24 120:7, 9 179:5 181:1 December 20:13 32:1 33:12 decide 206:10 decided 17:11 161:20 163:8, 9 decision 14:19 15:9 150:15, 16 151:2, 17 217:19 219:20 237:17 242:21 decision-makers 183:14 default 58:7, 8, 11, 13, 18 Defendant 2:7, 11 Defendants 1:10 Defer 161:13	define 138:4 149:12 defined 135:3 definition 130:19, 20 131:10 162:19 163:4, 11, 16 degree 6:21 104:13 degrees 104:13 delay 69:19 70:4 166:14, 23 231:20 deleted 11:7 90:14, 23 91:3, 12, 14 92:14, 15 110:13 deleting 114:21 deletion 91:11 delicate 228:18 delivered 114:21 delivery 42:21 delta 67:15 demands 210:24 demonstrate 21:4 demonstrates 20:2 demonstrating 29:14 33:23 36:15 37:9 38:11 denied 82:2 Denise 2:9 deny 80:5 82:4 departure 116:3 117:8 123:24 225:22 226:4 238:17 DEPONENT 9:6 23:9 31:8 35:8 43:13 64:13 70:6 73:21 84:5 87:25 97:20 112:19 128:2 172:13 173:15 194:18 201:13 describe 5:22 25:14 described 21:6 157:4 215:15 216:6 218:23 221:6 222:19 desire 145:10 149:8 destroy 39:12, 22 destroyed 38:18, 22 39:10 231:14, 16 237:24 238:9 239:3 240:4 destruction 239:10, 16, 17 detail 32:20	details 20:18 33:7 87:3 143:20 145:1 162:14 215:19 219:20 229:4, 14 231:19 determine 223:14, 18 determined 57:18 develop 115:20 148:5 developed 179:25 204:20 222:12 developing 115:9 devices 231:20, 21 233:13 devising 33:5 dialogue 25:9 33:7 47:24 48:1 51:16, 23 81:12 149:20 158:1, 2, 3 167:16 176:25 207:1 208:9 212:3 difference 69:8 244:7 different 11:12 13:11 15:23 16:15 31:22 32:10 63:12 77:3 85:18 99:9 135:16 143:4 151:22 156:4 159:18 166:6 182:10 189:6 203:14, 17 209:20 246:16 247:6 differently 208:18 difficult 48:16 80:21 82:11 134:12 dig 117:13 diligence 41:9, 10, 18, 21 42:6 52:16, 19, 25 53:1, 2, 6, 14, 17 54:2 56:13, 16 57:10 74:7 80:11, 12 84:8, 9 85:25 86:3, 5 87:7 93:12, 20 DiPucchio 2:5 72:2, 9, 12 73:17, 25 78:20, 24 79:1, 4, 10, 16 82:17 83:19, 25 84:4 85:14 86:25 87:6, 9 88:8, 13 89:21 95:14, 24 96:7 97:15, 19 98:15, 22 100:8, 16, 25 103:18, 24 105:1, 9, 20 106:2, 9, 14, 21 107:5, 9, 14 109:2, 7	111:14, 21 112:8, 12 114:2, 9 116:23 117:12 119:14, 21 123:13 124:3, 10 125:15 126:17, 21 129:8, 11 130:1, 11 131:19, 23 133:3 134:18 135:5, 11, 16, 21, 25 136:11, 13 144:4, 9 145:21, 25 146:5 153:3 156:11 158:21 160:4 direct 80:22 81:5, 16 82:8 170:20 208:11 directed 35:20 direction 25:8 39:10 directions 113:6 directly 12:24 54:18 76:24 224:16 227:17 director 5:8 disagree 76:21 219:11 disclose 13:24 126:14 235:3 243:6 disclosed 115:11 125:19, 20 127:23, 24 145:13 228:13 229:6 236:7 242:9 discloses 13:23 disclosing 81:1, 21 disclosure 11:9 84:10, 15, 18, 22 127:5 226:2 228:11 discovered 236:6 Discovery 1:14 7:2 9:3 15:2 discretion 165:20 discuss 11:1 13:8 18:23 20:9 24:1 27:18 29:18 42:4 51:13, 25 82:25 169:18 170:5 196:20, 22 discussed 18:19 19:7 23:11 27:5 29:24 82:24 89:13, 19 113:6 114:5 163:9 178:5 196:18 217:6 219:21
--	---	---	---

<p>discussing 33:17 65:13 74:21, 23 141:24 242:17</p> <p>discussion 12:11 24:21 26:10 40:10 44:5 54:20 70:16 76:8 80:22 84:10 103:19 104:25 107:17, 20, 22 108:12 113:11 144:21 147:9 152:13, 18, 22 159:3 187:23 196:24 219:22 242:11 243:2</p> <p>discussions 11:19 13:16 17:8, 11, 13, 20, 23 20:4 25:20, 22 26:16, 20 32:17, 21 33:23 38:1 41:25 43:3 47:12 56:12, 24 75:1, 24 76:23 77:1, 6, 7 81:6, 16 82:5 103:1, 9 104:22 105:23 112:21 116:3 119:8, 22, 22 124:4, 7 126:25 136:10 137:6 149:19 158:6 159:16, 17, 24 160:5 169:3 221:9 224:9 227:9, 12, 23, 25 229:1, 4</p> <p>dispute 108:23 185:1</p> <p>distinct 83:25</p> <p>distinction 106:11 244:9</p> <p>distinguish 22:21</p> <p>distribution 223:8</p> <p>divest 69:1, 3</p> <p>divested 108:8</p> <p>divestitures 68:2 92:19</p> <p>document 8:16 9:1, 4, 7 24:24 31:15 32:5 34:25 35:17 43:18 45:1 47:18 53:23 55:19 68:20 71:11 72:10 73:15 79:25 87:18 88:1 90:1, 2, 4, 20 93:17 95:10, 22 103:15, 16 110:25 115:1, 5 122:16 129:21 131:7 136:20,</p>	<p>24 137:4, 13 147:18 154:12 159:9 160:12 167:4 169:23 172:3, 11 173:3, 11, 24 174:14, 18 181:14 198:8 231:11</p> <p>documentary 20:2 238:6</p> <p>documentation 29:14, 19 237:1, 5</p> <p>documents 19:11, 19 21:4 31:20 33:22 36:15 37:9 38:10 43:2, 7 75:25 97:25 103:5, 20 104:24 105:17, 18, 19 106:3 166:2 183:19 187:12 208:17, 20 209:5 212:22 215:6 220:4 224:19 225:13 226:16, 22 227:19 228:17 229:6 233:16, 25 234:4 235:9, 10 238:16, 20 239:1, 4, 6, 7, 10, 25</p> <p>doing 8:25 13:14 88:21 95:20 204:9 218:2 236:18 237:24 238:23</p> <p>domain 54:10, 13, 15 85:2 143:22, 23, 25 197:15</p> <p>doubt 175:12</p> <p>download 233:11 234:12</p> <p>downloading 233:12</p> <p>draft 42:13 66:2, 13, 15, 17, 17, 22 67:1 71:16, 17 87:13, 16, 19 88:6 89:13, 20 100:4 109:15 110:7, 16, 20 111:2, 17 112:20 114:21 115:16, 22 152:5 161:23 162:11, 15 165:24 184:18 185:6</p> <p>drafted 111:13</p> <p>drafting 102:12</p> <p>drafts 31:22 71:19, 25 111:15</p>	<p>draw 12:18 165:14, 16, 16 238:8, 24</p> <p>drawing 208:10 244:9</p> <p>drawn 165:11, 12 238:11</p> <p>Drew 129:23 130:6</p> <p>driver 145:7</p> <p>drivers 29:9, 11 42:3 43:15</p> <p>driving 112:13</p> <p>DropBox 233:10 236:13, 14</p> <p>Drysdale 63:21 154:15, 19 155:5, 7 157:3 174:19 175:11, 13 176:2, 13, 21 177:8 180:4, 18, 22</p> <p>Drysdale's 155:23</p> <p>due 41:9, 10, 18, 21 42:6 52:16, 19, 25 53:1, 2, 6, 14, 17 54:2 56:13, 15 57:10 80:11, 11 84:8, 9 85:25 86:3, 5 87:6 93:11, 20</p> <p>duplicative 224:18 225:13, 16</p> <p>duration 169:14</p> <p>duty 136:9</p> <p>dynamic 32:15 69:9</p> <p>dynamics 134:13 178:6, 13</p> <p>< E ></p> <p>earlier 31:25 32:4 35:10 51:1 52:25 84:7 91:25 98:3 107:21 110:7 152:21 201:22</p> <p>early 38:15 65:18</p> <p>easier 242:6</p> <p>easy 14:1</p> <p>economic 42:14, 19 44:18, 22 45:7, 10 48:22 150:13 151:10</p> <p>economics 134:9</p> <p>edited 19:20</p> <p>effect 117:1 144:10</p>	<p>237:14</p> <p>effectively 15:4</p> <p>efforts 212:23 213:3 221:16</p> <p>ego 223:5</p> <p>elaborate 74:14</p> <p>electronic 90:1, 4</p> <p>elephant's 146:20</p> <p>email 7:20, 22 8:6, 19, 22, 24 9:13 10:16 12:10 24:24 25:4 27:15 28:3 30:9, 23 31:15 32:23 34:21, 21 52:3, 4 53:21, 24 56:1, 8 57:1, 5, 16 60:23 64:5 65:4, 17 66:4 74:2, 9 78:11, 22 79:2, 11, 14, 21 80:3, 20 81:8 82:10, 21 87:12, 12 88:3, 4, 4 93:5, 6, 15 94:23 96:17 99:5 105:5 117:16, 17, 19 118:13 120:14, 15, 19 125:18 129:22 154:13, 14 158:20 159:6, 12 160:13, 18, 23 161:25 162:3 174:19 178:23 181:8, 15 182:12, 16 184:8 185:2, 15, 16 186:6 188:3, 6 192:24 193:1 194:4, 9, 10 195:17, 19 197:24 198:3, 9, 12, 19, 20, 24 199:5, 13, 17 200:3, 10 201:11 205:14 211:4 212:9 223:7, 8 225:10 232:6 233:8, 16, 19 234:1 239:21 245:2, 18, 24 246:5, 6, 11, 21 247:9</p> <p>emails 12:15, 17 18:9 19:12, 13 26:2, 4 33:17 41:13 97:6, 7 98:5, 18 116:10, 13 125:18 127:18 129:22 133:11 194:12 224:14, 17 225:9, 19 233:7</p>
---	---	--	--

234:16, 21 235:8 236:8, 8 239:17 240:6 245:2, 6 247:8 embodies 217:1 employed 31:7 127:7 215:17 218:5 employee 22:10 127:12 216:16 226:7 employees 127:17 215:19 217:23, 25 employment 5:22 218:10 226:11, 20 229:3 232:15 233:15 encouraging 44:7 encroaches 27:19 end , 161:14 ended 6:25 211:14 Endowment 196:6 engage 56:9 engaged 56:22, 23 207:8 221:2 engagement 56:19 engrace 232:9 enhancement 12:5 ensure 247:9 enter 26:15 181:23 entered 27:10 128:13 130:16 213:8 entering 167:21 enterprise 33:4 entirety 90:14, 23 entities 15:2 68:5, 9 92:21 entitled 216:8, 12 218:16 entrants 137:22 138:6 entrenched 177:5 environment 101:24 103:11 equal 140:12, 13 equity 6:5 14:20 16:3, 16 26:11 27:21 33:4 76:12 77:13 78:17, 19 82:15 95:17 120:11 erased 11:7 especially 142:23 Esq 2:3, 4, 5, 7, 8, 9,	11, 12 essence 60:21 essentially 68:16 115:7 161:20 204:15 237:15 establish 95:11 established 54:23 133:23 134:1 150:12 establishing 44:17 45:6 Europe 6:1 event 94:4 137:25 142:8 160:23 events 192:12 eventual 179:6 eventually 132:14, 22 204:14 everybody 19:8 22:2, 3 170:18 216:21 217:6 everyone's 188:12 evidence 10:9, 11, 22, 23 11:13 12:7 14:4 20:2 31:24 42:5 54:24 55:17 76:16, 19 86:20 88:24 89:11, 18 95:10 98:20 102:24 103:15 105:6 107:2 114:4, 8 116:7, 21 117:7, 9 135:2 141:11 143:25 157:22 173:6, 12, 13 174:3 178:16 186:8, 17 187:4, 9 193:23 207:7 208:14 209:13 219:6 224:1 230:16, 23 231:14, 15 232:19, 20 233:14, 17, 22 237:21, 24 238:7, 10 240:4 242:22 244:25 evidencing 220:4 evolution 33:7 102:10 156:7 183:7 evolve 144:16 206:24 evolved 15:24 52:1 183:12 206:19 evolving 142:18 exactly 142:7 173:22 Examination 1:14 3:5, 6, 7 5:3 7:12	215:5, 8, 14 242:12, 15 248:5 249:12 examined 5:11 7:2 example 16:1 22:7 32:24 59:10 63:12 97:6 113:7 216:13 218:4 221:25 243:21 245:10, 20 exchange 18:11 exchanged 12:16 25:22, 24 32:7 42:12, 14 207:2 exchanges 42:19 exchanging 26:5 127:16 exclusive 130:17 exclusivity 47:5 130:7, 9 131:12, 16 132:8, 11 134:16, 23 135:4 151:1 161:3, 7 188:13 190:12, 17, 18, 22 191:4, 10, 13, 19 192:1, 6 207:8 208:1 209:4, 8, 10, 14 211:12 213:3, 8 214:15, 18 executed 40:17 130:7 executives 76:10, 11, 11 exist 11:5 existed 90:23 existence 117:10 234:9 existing 95:6 196:22 exit 46:4, 18 182:25 183:2 expect 217:22 expectation 128:12, 15 expectations 196:21 expected 77:25 93:13, 21 166:14, 22 188:11, 18 218:18 experience 193:8 205:24 expired 47:5 192:6 213:3 214:15 explain 210:7 222:5 236:25 explains 78:19	explanation 246:18 explicitly 154:1 explode 211:22 explore 18:1 32:8 119:20 exploring 27:25 express 51:19 69:21, 25 expressed 51:22 159:25 204:25 245:3 expressing 157:18 195:5 extend 188:13 extended 163:4 211:17 extending 161:7 extension 161:3 211:19 extensions 110:21 111:3 extensive 15:15, 18 16:9 extensively 9:2 14:9 extent 43:5 75:19 87:15 104:4 105:13 106:16 117:2, 6 126:22 214:22 224:18 235:25 238:6 extraordinary 233:18 extrapolate 158:17 < F > FACE 1:9 2:12, 16, 18 10:1, 5, 10 11:4, 6, 15, 18 12:16, 22 13:5, 14, 20, 24 14:6 23:14, 17, 24 89:3, 9 96:21, 25 105:8, 15, 19 106:20 107:4, 14, 18 108:7, 13, 21 121:15 122:6, 16, 16 123:11, 17, 19 128:11 129:13 136:10 186:11 187:8 190:19, 21 191:23 193:20 204:20 206:20, 25 207:9, 13, 25 208:4, 6, 7, 15, 21 209:25 213:8, 19 214:25 231:15 232:3, 10 234:19 237:18
--	--	---	---

238:19 239:21 240:8, 21 241:1, 3, 11, 16, 19 Face's 23:20 119:18 facing 119:24 142:25 fact 16:6 24:14 27:1 64:7, 8 71:17 91:21 128:17, 20 138:9 140:16 141:4 143:12 159:4 169:1 173:13 183:3 187:7 195:6 203:8 208:7, 24 214:15 216:11 224:2 230:25 236:7 240:1 factors 139:8 facts 230:10 factually 81:25 fair 7:10, 11 44:23 69:20 73:3, 9 114:2 173:7 183:16 194:2 198:25 199:3 222:6 225:21 230:14 235:13 237:3 240:2 242:1 fairly 232:16 fairness 67:8 faith 188:22 189:3 211:16, 20 false 61:23 familiar 7:4, 22 8:23 14:14, 22 15:19 67:20 181:24 218:1 familiarity 221:10 Fasken 120:22 124:25 Faskens 184:8 185:5 fast 56:13 fault 151:23 163:3 featuring 235:9 February 31:23 federal 16:23 175:7 fee 200:16, 24 201:1, 8, 17 202:17, 21 203:8, 13 211:5 feedback 157:9, 10 feel 7:24 73:2 87:15 131:8 158:23 184:12 242:2 Felix 160:24 161:7 185:19 187:19 188:8	Felix's 193:1 figure 135:12 File 1:1 29:15 42:7 107:15 108:25 174:8 filed 85:2 files 15:16 29:24 38:12 116:10 137:3 144:10 172:19 232:7, 7 236:13, 13, 15 245:7 filings 54:16 fill 247:5 filled 86:14 111:10 112:11 221:13 final 92:9 149:22 150:14 151:19 152:5 165:24 181:2 finalize 150:15 finalized 132:18 finally 177:1 finance 182:8 185:21 186:2 187:2 financial 6:9 85:6 86:3, 16 104:15 146:4, 9, 13 financiers 59:11 95:5 financing 15:23 16:13 58:2 59:4, 24 61:1, 5 179:5, 14 181:1 find 25:9 31:5 32:25 74:12 78:21 105:16, 17, 18 129:15 144:9 185:5 finds 129:14 fine 10:8 40:21 65:25 69:10 111:11, 24 172:15, 16 209:16 215:2 231:6 236:2 238:25 242:5 finishing 6:25 firm 20:16 23:2 102:1, 4 216:25 244:23 firm's 146:11 flat 18:15 20:17 221:8 flea 146:20 flexible 155:18 flip 66:9 67:14 73:2	130:13 flip-flop 177:6 floating 38:23 Floor 1:16 flow 28:17 focus 50:9 59:22 232:11 236:21 focused 46:13 108:18 182:25 focusing 237:1 following 3:10, 17 4:4, 12 59:18 62:7 74:7, 8 76:9 94:25 110:12 112:20 224:3 225:22 226:3 228:25 229:2, 12, 13, 17 follow-up 167:5 168:23 223:24 247:24 foreclose 77:23 124:12 foregoing 111:8 249:6, 14 foreign 16:25 forensic 98:1 forgotten 174:13 form 66:6, 13 104:7 106:13 127:19 191:16 Formal 84:2, 4 Formally 56:23 244:15 former 75:6, 10 forth 84:18 85:3 89:19 102:13 128:11 183:18 195:18 205:16 208:25 227:20 249:8 forward 78:3 83:2 155:12 166:1 233:7, 25 forwarded 188:6 205:17 232:3 245:6 forwarding 233:15 235:7 245:2 forwards 200:3 found 93:11, 19 98:1 118:24 192:5 founded 5:19	fourth 8:3 41:14 43:22 44:7 46:13 59:23 139:1 141:20 142:16 146:22 175:21 176:16 177:1 179:9 frame 47:24 framework 42:1 44:5, 19, 23 45:7, 10 48:22 54:19 92:9 102:22 151:11 193:19 framing 81:7 104:18 Francois 52:5, 9 frankly 144:5 Fraser 8:11 free 7:25 73:2 74:17 87:15 130:13 131:8, 17 132:2 133:1 158:23 184:12 211:22 freedom 184:5 friction 134:11 Friday 52:17 53:3 186:1 front 25:4 47:8 frustration 188:12 fulfilled 87:5 full 18:20 25:10 27:16 116:9, 10 173:22 185:23 244:23 fully 19:7 86:15 165:11 194:23 214:20 fund 94:6, 18, 20 95:2, 12 96:1 99:6 163:15, 15 164:8, 8, 12, 12 165:11, 11 196:18 216:16 funding 60:1, 11, 16 61:14, 24 62:1, 3, 23 63:4 funds 21:23 163:19, 22, 25 164:3 196:8 215:25 future 78:1 141:13 142:8 179:3 196:21, 24 FYI 121:3
---	---	--	--

< G >

GABRIEL 1:15 3:3
5:2 160:25 161:13
188:9 246:24
gain 40:10
game 217:7, 20
gap 205:1
garden 227:24
Gauthier 161:9
188:4 191:21
gdealba@aol.com
247:1
general 37:3 39:21
70:9, 22, 25 144:25
generally 75:24
216:16
generation 139:2
get-go 150:12
give 5:13 47:20 64:2,
13 69:1 72:9 73:7,
13 78:24 86:8 88:9
104:1 106:21 107:12
112:2 114:8 126:23
128:22 156:21
177:23 202:9 206:11
220:16 221:19, 25
227:3, 4 229:3 237:8
242:3 243:20 245:20
246:4
given 27:4 54:8
55:4, 17 76:16 113:6
137:4 168:14, 17
203:2, 12 205:24
207:4, 12, 14 214:24
220:23 221:5 222:8,
21, 24 228:16 242:3
giving 157:9 190:25
242:21
Glassman 20:12
28:12 30:13 34:22
36:4 38:4 39:17
57:8 64:16 65:5
72:23 74:4 78:5, 13
79:5 80:1, 4, 8, 17
81:4, 14, 15 82:3, 10,
11 117:18 118:10
124:21 145:17, 20
146:10 147:3 179:13,

20 180:17, 21 194:11,
20 243:14 244:19
Glassman's 30:10
63:16 64:18 65:14
177:11 178:23 195:2
glean 228:2
Globalive 14:25 15:1,
2, 9, 14 16:2 17:5, 10,
12 68:5, 9 75:14
76:2, 20 77:9, 17
85:19 86:22 92:21
172:11 213:17, 18, 22,
25
Globalive's 15:20
go-forward 74:11
Good 5:4, 7 73:23
101:25 155:6 166:9
170:18 188:21 189:3
211:15, 20
Gottlieb 1:16
government 16:23, 24
26:24 27:2 36:8
37:19 38:7 39:7, 23
41:14 44:5 46:7, 24
47:5, 10, 20 48:23
50:17 51:5, 10, 17, 19
57:23 59:15, 20
60:10, 15, 21 61:4, 9,
23 62:14 63:1, 15, 18,
23 64:2, 9, 19 68:24,
25 69:7, 19 70:4
71:24 72:7 73:4, 11,
18 91:5 94:7, 9, 12
99:3, 7 100:3, 14, 22
101:12, 22 102:9, 14,
23 103:2 141:9, 13
143:15 149:12, 16, 20
150:9 151:6, 10, 20,
25 152:10 154:20
155:1 157:10, 18, 23
158:25 159:4, 13, 17,
20, 24, 25 160:6
167:17 168:15, 21
169:4 170:13 173:21
174:16 175:16, 25
176:6 177:16, 17, 22
178:14 179:21 180:5,
6, 10, 13, 19 193:7, 9,
12 200:14, 20 206:9,
11 211:7, 18

governmental 57:13
68:12, 17 115:11
167:23 169:18 170:6
government's 44:7
193:10
grab 30:14
graduate 6:11, 16
104:13
grant 51:6, 10, 20
151:25
granted 155:22
great 211:14
greater 93:13, 21
169:11, 13 170:2
184:4 216:11
greatly 61:6
Greg 2:18 8:11
Griffin 8:11 23:25
107:22 108:18
ground 7:13 15:6
58:3 66:20 137:14
grounds 230:17
GROUP 1:6 5:9 6:2,
4 78:17, 19 82:15
147:5 197:2
group's 79:20
GTH 182:9
guess 21:14 43:5
69:15 133:3 134:12
238:13
guide 3:11
Gusev 182:18, 18, 24
guys 135:6
GWMC 15:4 170:25
172:12

< H >

half 156:14
hand 95:11, 23
handed 221:16
226:19
handwritten 104:5
hang 172:6 180:1
207:4
happen 47:20 49:15
189:13 245:9
happened 17:8 64:7,
8 93:22 97:20
153:10, 16, 20 159:5

210:12 214:12
246:10
happening 124:5
137:24 142:8 189:14,
17 192:4, 13 221:10
happy 96:6 100:18
101:1 236:4 237:8
hard 58:19 105:21
112:17 139:15
harm 107:7 237:25
Harper 177:4
Harvard 6:17, 20
195:25 196:2, 5, 6
harvest 164:5
He, 182:24
head 56:4 58:16
75:10 77:24
heading 40:3 45:13
70:22
hear 106:14
heard 185:19
hearing 101:22
183:13
heating 220:24
He'd 89:2
held 16:2 120:6, 8
hell 67:19
help 50:21 113:12
135:5 157:11 158:10
198:21
helpful 29:23 30:2
45:25
Herbst 52:10
hereunder 166:25
Hey 80:19
hide 14:2
high 67:19
highest 104:15
highlighted 26:2
highly 37:19 104:20
244:16
hinted 118:2
history 14:14 16:22
27:5 49:10 239:16
Hmmm 155:4
hold 67:5 68:2
70:12 92:19 109:21
112:1
holder 22:15
holding 108:8

holdings 107:23
108:7 130:25 136:4
hole 96:3
Homberg 8:2, 16
9:11 10:2, 5
home 235:10
honest 109:8
honoured 133:20
hoovered 237:16
hope 110:8 134:14
157:24 190:25
hour 156:14 195:18
huge 42:7
hundreds 235:9
hurt 81:23
hypothetical 152:2, 2,
7, 8
hypothetically 116:17
217:9
hypotheticals 150:5

< I >
ID 112:2
idea 113:1 141:17
144:25 152:21, 23
230:21 238:19
243:20
ideas 200:1
identify 43:2 105:13
106:4 136:6
if, 81:14
ignored 86:13
ii 130:23, 24
imagine 80:19 112:17
immediate 237:13, 14
immediately 194:22
210:13
imminently 237:17
impaired 61:6
imparted 240:8
impasse 121:18, 25
123:7
implementation 45:18
implied 100:1 155:14
imply 148:1, 8
implying 54:4
importance 178:7
important 221:2
244:13

imposed 91:4, 15
impossible 179:4
impression 168:17
improper 118:23
119:19 233:16 245:1
inability 238:3
inaccurate 99:4
inadvertently 82:12
inappropriate 188:24
233:21
incident 7:22 17:2
include 18:20 60:25
63:12 78:16 92:18
102:13
included 12:10 30:23
31:12 55:16, 20 97:5
99:12 102:11 111:17
123:19 186:11 232:7
includes 46:18
163:11 166:12
including 12:23, 24
18:9, 11 27:19 82:15
167:7
inclusion 184:15
inconsistencies 189:12
Incorporated 131:1
136:4
incorrect 39:4 40:23
increased 149:3
incumbent 7:14 59:1
60:12, 17 61:8 62:5
64:10 169:17 170:5,
15 171:18, 24 173:1
176:18 178:3
incumbents 46:8
47:6 138:6 149:9
171:6, 11, 12 172:1,
12 173:4
incumbent's 45:21
independently 122:11
INDEX 3:14 4:1, 9
indicate 51:5, 10
indicated 155:9
indication 23:16
143:15
indicative 208:24
individual 12:1, 2
104:20

individuals 25:20
52:10 75:18 232:10
234:12
inducing 135:7, 19
136:1 190:24
industry 24:16 28:20
35:2, 25 36:24 39:24
43:15 70:23 71:3, 7
72:17 110:23 111:4
115:12 137:2, 6
155:3, 10 163:2
172:19, 20 175:5
infer 239:2
inference 123:3
208:11
inferences 12:18
238:9, 11, 24
information 10:15
11:3, 6, 14 12:5 14:5
23:23 37:20 38:20,
23 39:25 41:23 53:8
54:8, 9 56:16 85:2, 6,
8, 9, 12 86:1 89:12
90:17 91:1, 9 92:24,
25 97:3, 14, 22 98:7,
21 105:7, 14, 16, 22
106:7, 17, 22, 25
107:3 116:18, 19
122:24 123:2 124:11
126:11, 16 127:5, 16,
25 128:21, 24 134:4
221:23 225:21 226:3,
18, 24 227:2, 8, 11, 13
228:12, 13 229:11
231:18, 24, 24 232:13,
16, 23 233:3, 4, 9
234:12, 15, 25 235:19
237:15, 16, 20 239:6,
11, 20 240:7, 20
241:1, 10, 11, 18, 23
informed 22:4 37:17
38:15 122:6 214:18
In-House 2:16 162:4,
7
in-person 34:11
input 244:2, 8, 12, 13
inquiries 98:13
185:10 223:1, 22
inquiry 31:5

insight 116:20
insinuations 119:17
instance 239:15
instructing 213:4
instructions 199:22
222:8, 21, 24 228:21
integration 141:20
intelligence 104:17
118:20 128:9
intelligent 145:3
147:12, 25 148:10
intend 178:16 238:25
intending 94:18
intends 208:13
Intent 25:1, 11 27:15
31:25 32:3, 11, 12
42:17, 22, 24
intention 10:20 78:16
intentionally 231:13
interest 18:1 21:23
50:17, 19 51:22
74:10, 19, 22 76:8, 20
77:7 80:9 107:18
108:13 147:9 206:20
211:3 217:10
interested 44:2 66:14
67:14 95:7 108:21
110:5 118:3, 5, 24
120:3 122:7 146:14
200:5
interesting 11:24
interests 23:24 24:13
interim 169:14 170:7,
9 178:18
intermediary 179:22
internal 83:23 95:22
102:25 103:4 188:10,
17
internally 53:7 95:20
151:2 212:15
international 6:2, 4
interpret 148:15
170:1 208:17, 18
interrupt 225:1
236:20
interview 11:25 12:4
interviewing 236:17
interviews 11:21
12:12 13:3

<p>invest 9:23 10:20 15:17 19:2 22:7, 8 74:19 215:25 216:21 217:17, 19 242:21</p> <p>invested 23:1 24:5 37:25 216:23</p> <p>investigations 20:3</p> <p>Investing 8:17 17:6, 21 74:10 216:1</p> <p>investment 6:2 9:15, 22 10:1, 5, 10, 18 15:14 16:16 19:7 21:15, 17 22:9, 12, 22, 25 23:12 25:21 28:11 30:4 36:23 37:3 46:4, 18 59:18 65:8, 12 77:8, 17 82:16 83:8, 12, 16 103:8 104:12 164:11, 13, 15, 22 215:22, 23 216:14, 24 217:2, 25 218:5, 16, 19 242:25 243:4, 10, 12, 17, 18 244:11</p> <p>investments 20:10 21:14 23:23 164:5, 6 165:13, 17 196:22 218:17</p> <p>investor 196:7</p> <p>investors 19:9 164:21 165:3 196:5, 6 197:10</p> <p>invite 33:3</p> <p>invited 116:12 191:25</p> <p>involve 238:2</p> <p>involved 13:2, 5 76:2 81:20 103:12 119:3 121:21, 22 125:6 128:25 129:14 219:7 235:24</p> <p>involvement 20:3 21:5 23:20 29:14 36:15 37:22 38:2, 5, 11 81:22 104:5, 10, 11, 11 119:6, 19 128:18 146:12 216:10 220:12</p> <p>involves 83:20</p> <p>involving 128:10 225:19</p>	<p>issue 20:8 116:14 155:8 159:17 161:6 187:11 201:19 203:15 212:12, 14 225:4 226:9 242:15</p> <p>issued 14:19</p> <p>issues 7:19 75:20 119:24 142:25 160:22 161:4 195:22</p> <p>items 78:1 171:9 196:20</p> <p>< J ></p> <p>Jacquart 30:10 31:6</p> <p>James 154:23, 25 174:25</p> <p>January 24:24</p> <p>Jim 30:14 36:4 72:23</p> <p>Job 11:21, 25 12:11</p> <p>John 120:16, 21 160:19 161:3 181:9 188:4 194:13 200:3 205:15</p> <p>join 234:19</p> <p>joined 6:10</p> <p>joint 27:22 217:18 242:20</p> <p>Jonathan 52:10</p> <p>Jones 129:24, 24 130:3 161:10</p> <p>July 78:5, 11, 25 82:21, 22 120:15 121:20 129:23 130:16 137:12 141:6 154:16 155:23 158:13, 21, 23 159:12, 24 236:10 246:23</p> <p>jump 47:2 77:16</p> <p>June 16:23 107:11, 11, 16 108:20 110:17 114:11 117:16, 17 123:12 146:8 226:12, 13 234:23</p> <p>jurisdiction 49:10</p> <p>JUSTICE 1:3</p> <p>< K ></p> <p>kept 92:25</p>	<p>key 16:18 27:3, 6 57:23 61:12 101:13 238:7</p> <p>kicks 114:6</p> <p>Kimberley 2:21 249:3, 22</p> <p>kind 57:14 62:12 105:21 129:6 136:9 164:25</p> <p>King 1:16</p> <p>knew 13:12 54:4 112:14, 15 120:10 132:9 153:6, 17</p> <p>knowing 12:2, 21 37:8 38:3 101:19 144:15 206:17</p> <p>knowingly 69:18 70:2 166:20</p> <p>knowledge 23:19, 21 24:15, 15 119:18 123:24 124:24 125:2 133:17 187:13 208:11 236:1, 4 237:24</p> <p>known 16:17 23:2, 11 44:10 141:6 142:7 143:21 144:18</p> <p>knows 207:15</p> <p>Kris 2:8</p> <p>< L ></p> <p>Lacavera 15:4 74:3, 19, 25 75:4 76:24 77:8, 18 78:6, 11 79:18 80:10, 16 81:8 82:7, 8, 23 85:18 131:2, 11, 17, 20 133:11 134:9 136:7 214:9</p> <p>Lacavera's 15:5 77:23 82:15, 20 131:21</p> <p>lack 81:22 238:6</p> <p>language 92:15 111:18 167:19</p> <p>large 85:1</p> <p>largest 22:14 27:20</p> <p>Lastly 155:14</p> <p>late 174:24</p>	<p>latest 52:13</p> <p>Latin 6:8</p> <p>lawyer 120:22 184:8</p> <p>lawyers 161:9</p> <p>Lax 1:15</p> <p>lead 52:10 161:9 209:13</p> <p>leak 129:16</p> <p>leaked 129:6</p> <p>learned 190:15 191:21</p> <p>leases 161:5, 18</p> <p>leasing 65:1</p> <p>leave 173:9 227:24 237:17</p> <p>leaving 13:24 221:5 226:8, 9, 10</p> <p>led 25:15</p> <p>left 100:12, 20 101:10 111:13 125:5 127:17 141:7 163:8 232:23 237:20 240:23</p> <p>legal 134:1 136:9</p> <p>lend 179:8</p> <p>lender 59:25 60:10, 15 61:13, 24 62:3, 22 63:3</p> <p>lenders 95:6 179:8</p> <p>Letter 25:1, 11 26:13 27:15 31:25 32:3, 11, 12 42:17, 22, 24 56:20 96:16 109:6</p> <p>letters 95:17</p> <p>level 16:15 19:6 20:19, 20 53:1 189:17</p> <p>levels 182:10</p> <p>Levin 120:16, 21 160:19 161:4 181:9 184:9 188:4 194:13 195:6 200:3 205:15, 16, 18 206:12</p> <p>library 15:16</p> <p>license 156:19</p> <p>licensed 45:21</p> <p>licenses 68:2 92:19</p> <p>licensing 155:11</p> <p>light 126:25</p>
---	---	--	---

Lightner 186:10 210:10, 16, 17, 25 likes 195:13 limit 132:6 156:22 186:25 231:3 limitation 90:15, 24 92:6 166:12 limitations 134:5 limited 9:2 19:6 92:3, 13 139:8 164:21, 24 215:23 217:2 236:20 limiting 167:7 limits 91:4, 15 169:7 lines 109:24 210:15 linked 79:20 listed 45:13 46:17 84:23 85:1 listened 29:9 lists 70:22 137:2 172:19 Lisus 1:16 literally 179:4 litigation 38:16 204:24 210:1 Live 2:15 101:24 102:19 LLP 1:16 loading 160:14 162:20 loads 97:21, 22 231:17, 18, 24, 24 232:13, 13, 15, 15 233:2, 2 234:15, 15 235:19, 19 lobbyist 157:6 locate 43:6 Lockie 75:9 76:16 136:7 214:9 log 224:2 logged 223:19 LOI 25:10 long 5:16 69:14 92:25 93:4 112:22 113:7 133:20, 22 158:24 169:24 199:3 218:19 longer 49:16 95:7 97:7 138:11 188:11,	18 204:22 230:24 long-standing 134:5 looked 31:25 32:3, 9, 11 55:19 58:24 71:21 73:1 82:21 99:6 100:5 110:7 156:5 161:23 162:18 169:4 174:15 184:18 209:25 210:2, 5 looking 10:19 12:1 16:13, 16 24:2, 4 38:17 46:3 61:7 79:2 91:18 93:9 95:4, 5 108:19 109:24 116:18 148:21 168:3, 12, 13 175:3 184:8 190:7, 10 202:7 222:21 looks 74:3 110:11 Lorne 125:8 lost 191:19 lot 24:13 54:5 lots 15:1 love 103:17 low 200:14 loyalty 180:12, 14 LPs 20:21 LTE 139:3, 12, 14, 24 140:3 142:23 lunch 160:8 174:13, 15 LUNCHEON 160:9 lying 212:19 < M > made 10:1 21:17 35:2 39:15, 22 45:16 55:4 60:9 65:14 72:7, 16 80:8 82:23 86:1 87:4 119:17 134:22 135:6 145:9, 12 150:16 151:2 157:21 179:4 191:3 207:13 210:24 217:18 221:16, 20, 22 222:1 225:5 237:17 249:11 magnitude 65:13 main 29:9 54:22 145:7 162:8	maintain 83:7, 22, 23 215:1 major 137:25 making 60:14 86:21 179:2 211:14 manage 199:25 management 52:14 53:16, 20 76:13 77:14 243:7 managing 5:8 65:11, 20, 24 228:19 mandate 56:21 236:15 March 7:20 8:8 10:15 29:15 31:23 32:5, 12 33:13 37:12 38:10 40:16 42:8 45:14 51:9 55:18 58:24 61:10 64:21 73:5, 11, 19 94:10 99:13 104:3 105:5 117:8 151:6 153:24 154:1 155:21 160:2 218:24 mark 122:17, 20 129:4 marked 7:21 market 17:1 24:3, 5 46:14, 23 145:4 147:13 148:6, 7, 10 220:1, 2, 5 markets 6:6 59:25 Martineau 120:22 124:25 material 161:19 230:10 materiality 161:5, 17 184:2 materially 73:5, 11, 19 materials 11:9 12:9 137:11 201:22 232:2 233:11, 12 mathematics 6:16, 23 matter 91:21 127:4 174:8 200:14 216:3, 22 217:13 230:25 matters 41:24 111:22 137:7 Matthew 2:11 MBA 6:15, 19	meaning 30:13 41:5 71:5 167:1 177:21 182:24 214:9 meaningful 32:18 means 48:9 49:2 53:6 68:25 138:5 167:12, 13 175:9 208:8 216:8 meant 3:11 32:16 33:6 53:4 138:10 139:19 158:6 211:20 214:17 measures 98:11 meat 222:20 230:7, 12 meet 74:13 meeting 13:8 35:25 51:4, 9, 13 121:23 130:8 175:4 185:21 186:2 196:1, 13 197:16 meetings 11:17, 22 12:8 13:8 18:10 20:9 29:11, 25 34:12 80:15 83:1, 5, 23, 24 103:7 121:7 127:20 196:24 219:20 Melissa 30:9 member 22:11 28:11 30:24 31:11 36:12, 22 37:1, 10 83:15 182:20 208:1, 15 218:25 221:6 members 12:16 18:20, 20 22:25 29:25 31:4 39:7, 11 76:13 77:13 83:10 98:12 104:11 148:3 152:13 185:18 197:2, 4 217:5 221:9 243:7 memos 10:25 14:6 mentioned 18:18 22:13, 20 30:1 62:1 63:10 98:10 107:21 129:2 192:3 220:25 mentioning 156:1 mentorship 20:24 21:5 217:4 merchant 6:4
--	--	---	---

merge 138:11, 20, 24 139:22 145:10, 18 147:6	111:19, 23 112:3, 4, 10, 17, 24 114:3, 10, 15, 19 117:5, 14 119:16, 25 122:18 123:15 124:6, 13 125:22 126:2, 7, 13 127:2, 9, 13, 15, 22 128:4, 7 129:10, 12 130:2, 12 131:21, 25 133:6 134:20 135:9, 14, 18, 23 136:2, 12, 17, 21, 22 137:1 144:6, 12 145:23 146:1, 7 148:20 153:4 156:12 158:22 160:7, 11, 16 162:2, 21, 23, 25 166:9, 11 168:4, 7, 10 170:8, 22 171:3 172:6, 17 173:12, 16 174:2, 5 176:11 181:7 185:11, 14 186:14, 21, 24 187:14, 17, 22, 24 188:2, 25 189:8 192:19, 22, 25 194:2, 3, 8, 16, 19 196:12 197:8, 13, 19, 22 198:25 199:3, 9, 12, 15 201:14, 16 202:2, 5, 7, 12, 14, 19, 22 203:10, 18, 23 204:5, 12 205:7, 10, 12 207:4, 6, 16, 21, 23 209:1, 12, 21 210:21 212:6 213:1, 6, 16, 23 214:2, 7, 14 215:3 221:15 224:8 242:12 245:23 246:8 247:23	84:2, 4 157:1 242:10 misled 180:21, 23 misread 71:21 missed 71:24 missing 183:22 mistakenly 82:12 misuse 237:14 MMFG 28:17 Mobile 15:5 16:22 18:2 20:11 26:11 74:12 136:23 147:6 150:9 171:1, 4 172:18 173:3 Mobilicity 12:24, 25 22:8, 13, 15, 23 23:1, 3, 13 24:6, 10, 14 26:17, 23 27:21 28:24 29:4, 6 30:4 37:4, 12, 25 38:3, 12 41:12, 16, 17, 19 42:6 43:22 46:12 48:15 49:3, 17, 18 50:7, 10, 14, 25 51:18 81:24 107:23 108:7, 11, 18, 19 109:1, 9 138:11, 21, 25 139:22 140:7, 8, 19 141:1 142:2, 17, 18 143:3 144:22 145:10, 18 146:15, 19 147:5, 10, 22 148:13 219:25 Mobilicity's 48:25 model 28:24 29:4, 6, 12 Monday 29:11 52:17 53:3 96:20 182:14 186:3 198:3 monetize 59:17 money 9:21 19:8 22:5 164:4 165:17 216:15 217:23 218:6, 18 month 94:5 163:4 205:23 224:3 months 141:13 142:8 152:21 153:2 205:21 206:13, 14, 17, 17 211:23, 25 Moore 177:4	Morgan 56:2, 4, 9, 21 66:6 121:1 124:24 245:25 morning 5:4, 7 30:2 194:5, 6 198:1 motion 230:13 motivated 210:25 move 94:2 96:6 206:9, 18 moved 6:3, 5 moving 56:13 236:13 MOYSE 1:9 2:8 7:20 11:3, 15, 17, 20 12:20 13:4, 13, 22 14:5 19:14, 20 21:8, 13, 16 22:7 29:5 30:3 34:22 35:13 36:10 37:8, 10 88:5, 7, 15 89:14, 20 96:16 97:12, 21 98:21 102:25 105:7, 15, 18 106:7 107:16 108:24 112:14 113:1, 12 115:17, 23 116:2, 9, 10, 11, 16 117:11 123:9, 10 124:5, 16, 19, 22, 25 125:3, 5, 13 126:6, 15 141:6, 12, 16 142:5, 6, 13 144:14 152:20 153:3, 5 215:16 217:11 218:4, 23 219:7, 12, 16 220:18 221:16, 24 222:1, 10, 22, 24 223:8, 18 224:1, 19 225:11, 14, 20 226:17 227:13 228:1, 14, 17 229:2, 12 230:8, 22 231:13 232:9, 22 233:2, 14, 24 234:14 235:2, 7, 18 236:7, 10, 14 237:12, 15 238:17 239:1 240:18, 22 241:4, 6, 10, 17 243:19, 22 245:1 Moyse's 20:2 29:14 38:11 96:11 97:2 104:5 123:16 220:4, 12 225:22 229:3, 12, 14
---	--	---	--

<p>multiple 11:17 13:3 18:9 75:1 76:23 77:5 233:8</p> <p>mumbling 166:18</p> <p>Musters 232:19</p> <p>< N ></p> <p>nail 239:12</p> <p>names 122:5</p> <p>national 43:22 44:8 46:13</p> <p>natural 13:19 32:15 92:5 141:22 144:18</p> <p>nature 91:8 119:21 146:11 228:16 240:3 242:3</p> <p>NDA 31:22 32:14, 16, 20 33:18, 24 40:19 128:13, 18, 22 129:7</p> <p>necessarily 62:10, 16 177:16</p> <p>necessary 27:11 68:13, 16 205:23</p> <p>necessities 142:21</p> <p>needed 45:24 138:11, 24 144:22 182:9</p> <p>needing 17:18 181:23</p> <p>needs 93:13, 21 133:13 161:7</p> <p>Neeson 2:21 249:3, 21, 22</p> <p>negative 155:6</p> <p>negotiate 158:2</p> <p>negotiated 132:15, 22 142:19 202:20 203:12 204:22</p> <p>negotiating 61:11, 12, 17, 21 101:17 180:19 189:23 190:9 193:18 195:3, 4</p> <p>negotiation 62:13 92:6 100:2 153:8 211:8, 9</p> <p>negotiations 18:14 19:13, 21 20:3 31:24 32:2, 13 33:23 42:2 44:15 65:21 80:13, 14 101:19 102:18 121:19, 21 124:2 129:1 130:17 134:8,</p>	<p>10 137:5 149:22 151:9 152:4 165:25 183:4 184:3 195:8 204:15, 19 206:25 207:9</p> <p>negotiator 162:8 179:22</p> <p>neither 65:15 82:1 241:7</p> <p>networks 45:21</p> <p>New 6:14 93:12, 20 137:22 138:6 142:11 247:1</p> <p>news 170:18</p> <p>newspaper 146:3 147:4</p> <p>Newton 30:13 36:4 72:23</p> <p>nice 197:3</p> <p>Nicholson 154:23, 25 155:14 157:15 174:25 176:13 177:3</p> <p>nodding 58:16</p> <p>non-Canadian 14:21</p> <p>non-disclosure 31:17 40:17</p> <p>non-incumbent 16:25</p> <p>non-public 23:23, 24</p> <p>non-starter 184:17</p> <p>note 43:13 88:3 158:8</p> <p>notebook 83:15</p> <p>notebooks 83:7, 11, 15</p> <p>noted 3:16 4:4, 11 20:20 29:10 32:6, 24 37:24 41:12, 25 51:25 92:15 95:5 131:14 133:11 142:16 144:21 145:6 191:25 193:20 221:9 244:3 245:8</p> <p>notes 65:17 83:9, 18 84:1 104:6, 19 215:4 224:24 249:15</p> <p>notice 58:11, 13, 18 96:11 97:8 163:11</p> <p>notification 11:8 192:1</p> <p>notifications 90:10</p> <p>notion 114:5</p>	<p>notwithstanding 111:8 131:16 177:15</p> <p>November 110:15 163:1</p> <p>NSI 10:2, 6</p> <p>NSINV 8:3 9:11</p> <p>number 24:25 26:14 85:8 89:25 90:4 137:20 143:4 202:8, 9, 9</p> <p>numeral 115:6, 7 130:24</p> <p>< O ></p> <p>Oak 121:13</p> <p>Oakhill 121:14 122:5 128:10</p> <p>objections 249:11</p> <p>obligation 68:15 136:9</p> <p>obligations 70:10 84:16 92:16, 17 133:21 180:13 191:10, 14</p> <p>obliged 218:6</p> <p>observer 145:4 147:13, 25 148:10, 14</p> <p>obsession 168:15</p> <p>obtain 27:11 62:1 68:16, 24 69:7 164:20</p> <p>obtained 6:18, 19 54:13 71:14, 23 110:23 111:5 125:12, 17, 24 150:24 151:18 153:10, 16, 20, 23 154:3, 8 225:12</p> <p>obtaining 68:10 69:19 70:4 99:2 150:18 151:4 152:10 166:14, 23</p> <p>obvious 134:15 240:17</p> <p>occasion 23:22 85:24</p> <p>occasionally 233:25</p> <p>occasions 155:20 227:24</p> <p>occur 242:25</p> <p>occurred 119:23</p>	<p>150:6</p> <p>occurring 243:21</p> <p>October 14:18</p> <p>offer 82:23 89:2, 8 134:22, 22 186:17, 18 187:3, 13 191:4 205:2 207:10 209:25 210:10, 16, 18, 25 213:20 225:8 244:1</p> <p>offered 188:12</p> <p>offers 186:9</p> <p>office 114:7 175:1, 10 176:25 223:20</p> <p>officers 11:18 83:3 85:20, 23</p> <p>offices 1:15 126:10</p> <p>official 155:2 175:2</p> <p>offside 14:21</p> <p>old 98:5</p> <p>one-month 110:21 111:3</p> <p>ones 94:10 131:14 153:24 154:1 163:24 225:11</p> <p>one-third 16:3 23:13</p> <p>ongoing 47:12 80:14 137:5 172:20, 21 176:25 208:14</p> <p>ONTARIO 1:2, 17</p> <p>onward 97:12</p> <p>open 25:16 27:18, 24 30:7 35:7 51:25 149:20 173:25 174:8, 8 200:1, 19 201:4 214:17, 20 243:2</p> <p>opening 35:4 158:7</p> <p>openly 29:24 38:3 217:6</p> <p>operate 46:23 166:7</p> <p>operation 156:20</p> <p>opinion 61:16</p> <p>opinions 57:11 244:17</p> <p>opportunities 13:9</p> <p>opportunity 19:1</p> <p>opposed 32:14 105:23 175:17</p> <p>option 27:24 43:21, 24, 24 46:12, 20 47:17 48:24, 25</p>
--	---	--	---

50:24 64:17, 21, 24 65:2 140:6, 14 148:12 172:24 211:4 optionality 206:18 options 44:1, 4 47:21, 23 48:2 141:23 190:7, 9 200:18 201:3 oral 87:4 126:15 127:24 239:11 orally 106:7 Orascom's 14:20 order 25:8 39:15 138:12 164:21 165:12 191:24 206:24 215:21 227:3 230:22, 24 231:2 247:14 ordinary 128:14 organization 20:18 original 14:3 90:2 138:21 156:2 246:6 originally 20:13 O'Sullivan 1:16 Ottawa 35:25 65:18 92:1 113:8 156:17 174:24 175:18, 21 outlined 47:21 151:5 175:19 outside 45:21 95:18 110:6, 11 111:8, 11 112:6, 9, 16, 18 113:2 114:5 116:1 127:6, 7, 11 162:19 163:1 204:16 205:3 206:8, 22, 24 225:23 233:19 overall 22:22 overcome 99:18, 19 144:23 Overview 40:4 owes 180:12, 13 ownership 16:25 57:11 139:9 216:24 < P > p.m 78:25 117:18 120:19 154:16 159:12 185:17 205:14 212:10 248:5	p.m. 118:11 160:20 194:15 package 58:22 pages 3:17 4:4, 12 8:14 43:23 230:2 paid 200:16 panel 196:15, 16, 17, 24 197:1, 2, 5, 9, 16 Panet 2:15 par 19:9 paragraph 28:15 35:12, 16 59:13 67:15 90:13, 22 91:4, 13, 14 92:13, 23 100:5, 15, 17 101:3, 6 114:16 137:11, 19 146:9 147:2, 2 148:23 155:13 169:24 184:14 231:8 paragraphs 230:3, 7 parallel 178:5 parameters 54:22 parent 109:18 112:2 114:13 129:22 136:19, 21 parenthetical 78:18 part 12:10 13:1 26:19 30:19 48:1, 18 57:16 69:13 76:7 80:10, 12 83:17 87:6 92:6 100:19 101:2 108:16 113:10 132:8 136:11 137:5 148:4 152:1, 2 157:23 195:12 216:25 231:1 235:8 partial 45:17 participate 74:20 113:17 215:24 219:19, 21 220:1 participated 37:24, 25 113:25 116:2 117:2, 3, 11 219:10 participating 74:11 113:21 116:7 219:18 participation 77:24 79:21 220:5 234:17 particular 93:7 173:23 216:15 218:17 239:1, 25	particulars 236:21 237:10 parties 24:13 25:25 32:17 70:10 118:3, 5 122:7 123:1 128:12 134:12, 19 136:8 163:3, 11 202:20 203:12 211:10, 15, 20 partner 5:8 20:19 65:11, 24 134:6 164:24 partners 18:21 19:6 38:1 101:23 120:2 164:21 215:23 217:3, 4 233:23 243:5, 10, 13, 13 244:5, 17, 18 partnership 27:22 party 32:19 58:6 61:1, 5 67:13 90:9 118:19 120:3 190:22, 24 191:4, 4 party's 236:3 pass 30:15 127:1 passage 239:11 passed 11:3, 14 14:5 105:15, 22 106:3, 7 229:11 239:3, 5, 20 240:25 241:10, 23 243:19 passing 12:5 98:21 105:7 211:2 225:20 226:17 227:19 239:6 path 51:17 pause 14:25 63:20 81:4 Pausing 129:24 payout 134:9 PCO 175:1, 6, 8 pending 92:10 149:22 Pennsylvania 104:14 people 25:1 31:2 48:16 66:5 84:1 148:15 171:21 205:19 222:2, 9, 25 234:4, 6 perceives 44:22 45:9 46:11 percent 17:1 22:18 perfectly 247:13 performance 85:10	period 31:22 33:12 34:6 54:21 58:11, 13, 18 93:5 95:7 116:16 117:4 122:2 124:8 125:14 127:11 151:1 164:3, 4, 5, 11, 13 169:14, 15 170:7, 9 176:7 178:18 207:8 208:2 211:13, 16 212:3 219:13 226:18 227:25 236:16 periods 110:22 111:3 164:15 permission 64:19 permit 16:25 46:8 149:16 168:18 permitted 46:24 person 38:6 65:7 68:12 96:21 103:11 218:12 personal 189:16 225:10 231:20 233:7, 8, 12 234:24 236:1, 8, 8 245:18 246:11, 13 247:14 personally 10:12 98:11 207:15 perspective 59:25 86:3 219:12 pertain 239:9 pertaining 226:18 227:12 229:11, 15 236:22 241:18 pertains 237:4 Peter 8:11 ph 186:10 phases 164:10 Philip 2:15 phone 34:5 116:7 127:20 198:11 phrase 67:19 phrased 207:12 phrasing 82:7 physically 226:9 pick 32:4 47:3 pieces 138:19 pitched 61:9 place 11:17 12:8 15:20 18:10 45:14
--	---	---	---

80:16 95:7 113:8 142:11 224:9 249:7 Plaintiff 1:7 2:3 plan 33:1, 2 52:14 138:1, 19, 21 148:5 174:2 177:21 182:13 186:1 242:17 planning 95:2 plans 115:9, 20 138:22, 23 144:16 169:16, 18 170:4, 5 play 101:19 152:22 played 85:19 player 16:19 59:23 playing 58:19 pleaded 230:15 pleadings 136:1 ploy 193:18 plus 212:16 PM 177:4 PMO 175:6, 8 poaching 238:19 point 10:9 15:17 17:18 26:14 30:3 32:4 33:25 37:16 41:4 44:14 46:1, 6 47:4, 23 48:6 52:20 57:9 61:12 62:18, 21 65:19 71:25 86:23 92:8, 10 97:1 98:1 101:13, 14, 17 102:1, 16, 20 103:16, 20 112:7, 25 113:5 116:8 120:4 122:14 127:17 128:19 133:17 137:17 141:10 147:21 148:23 149:14, 22 150:12, 14 151:17 154:19 156:9 158:5, 13 169:5 172:8, 14 173:10, 19 175:15 176:12 177:2 182:5 183:18, 22 186:15 189:15 206:21 211:14 217:6 220:13 223:6 228:7 238:16, 22 239:25 240:7 244:16, 25 247:11 pointed 142:22	pointing 173:25 238:23 points 32:24 45:13 47:13 102:13 137:20 148:22 152:24 153:7 161:19 175:3 181:17 182:2 193:3 204:21 242:14 policy 44:7, 10 137:12 175:7 poorly 150:23 portfolio 28:19 76:13 portion 230:16 position 5:5 14:20 23:15 27:20 61:22 62:13 64:18 65:3 73:4, 10, 18 80:21 81:10, 23 82:9, 11 99:1 100:12, 20 101:10 148:9, 13 150:7 151:20 166:7 176:1, 3 177:15 180:18, 19, 22 181:2 183:13 186:16 193:18 195:2, 3, 4, 7, 7, 11 199:23 204:24 211:15 214:19 positioned 59:14 positioning 177:13 179:20 positions 12:23 76:5 183:24 184:1 204:25 possession 126:22 225:10, 12 227:11 possibility 174:1 possible 74:13 223:14 237:21 Post 146:4, 9, 13 postponed 186:5 post-secondary 5:22 potential 7:19 12:23 15:10 26:3, 17 77:23 79:20 82:16 83:2 108:25 118:15, 19, 20 119:18 120:11 123:4 134:17 186:4 191:24 196:6, 23 potentially 17:6 44:2 83:3 120:2 123:19	134:3 221:1 243:11 power 69:7 PowerPoint 36:1 39:6 104:7 218:24 219:10, 18 powers 49:14 practical 216:3 217:13 practice 39:21, 25 245:14 247:18 precedent 70:10 preceding 234:22 precise 32:23 precisely 92:22 191:19 192:7, 10 preconditions 184:22 185:1 predetermined 60:22 predominant 183:3 pre-established 86:5 preparation 234:18 prepare 36:10 prepared 26:15 35:12 37:23 42:4 77:19 79:6 92:24 101:16 102:1 179:18 PRESENT 2:15 208:14 presentation 35:1, 5, 12, 13, 19, 21 36:11 37:23 38:6, 17 39:5, 12 40:2, 16 43:10, 14 44:14 52:14 53:16, 20 58:24 60:9 61:18 64:22 72:6, 8, 16, 21 73:2, 8 99:13 103:12, 13 104:4 156:2 175:20 218:24 presentations 38:22 39:22 101:22 102:3, 6, 7, 9 151:6 154:2 156:5 178:8 presented 36:1 38:18 59:19 140:7, 14 176:2 presenting 189:12 presently 171:1 preserve 230:22 preserved 91:9	press 119:1 129:3 137:11 presumably 112:16 245:7 presume 25:12 pretty 16:6 66:19 129:8 194:12 223:6 230:11 prevent 69:19 70:3 80:25 81:11 166:14, 22 previous 7:2 25:7 26:1 49:9 53:25 55:10 60:23 106:9 111:15 133:10 155:20 178:8 previously 32:6 price 57:9, 19 141:22 142:11 143:9, 19 pricing 57:22 primarily 57:10 60:6 Prime 175:9 principal 65:6, 21 154:19 principally 125:6 principals 65:9 75:13 76:2, 4 85:19 86:22 136:6 prior 26:19 29:15 36:16 37:12 41:13 42:8, 24 56:22 86:10 107:11, 16 193:21 219:8, 13 220:12 238:17 prioritize 13:10 private 6:5 245:2 privilege 109:12 228:21 privy 102:25 175:1 problem 48:19 86:11 195:20 200:12 245:16 247:8, 19, 21 problems 195:23 procedural 99:21 procedures 49:7 222:14 proceed 99:1 149:24 150:2, 8, 17 151:18 152:16 157:5 244:6 proceeded 154:6, 7
---	---	---	---

proceeding 24:13
35:10 135:13, 15, 20,
22, 23 136:4 243:12
proceedings 249:6
process 7:5 12:21
21:1 40:12 56:12
80:11, 12 84:8 86:3
87:7 123:6 133:23,
25 140:8 195:22
219:22
produce 19:11, 19
20:1 29:13 34:4
36:14 37:8 38:8, 9
42:5 43:7 54:24
55:17 85:11 113:24
116:21 143:24
144:11 208:23, 24
224:20
produced 31:21
33:10 43:6 75:2, 18
83:14, 18 103:20, 21
104:23 126:1, 6
137:4 187:9, 11
208:21 210:1 212:22
220:7 224:14, 17, 19
225:3, 11, 14, 15, 24
228:17 235:8
product 11:10, 19
12:2, 3 235:3
production 21:4
220:4
productions 157:21
207:13
professional 215:24
216:24 218:5 245:18
professionals 65:9
104:12 215:22 217:2,
15, 17 218:1, 16 243:5
program 6:20 240:2
prohibited 100:6
prohibition 14:21
prohibits 69:17 70:2
115:8
promptly 97:8
pronounce 28:25
properly 48:19
proportionate 216:23
proposal 150:21
193:20 204:20

proposals 18:11
42:15, 19 51:25
54:21 190:23 191:24
192:2 207:2 208:4, 8
propose 56:20
proposed 26:5
110:11 112:6 113:3
155:7 210:15
proposing 32:7
110:15 161:4 206:13,
14, 16
protection 193:11, 14
protective 228:19
protocol 196:23
prove 104:24 237:25
238:1
provide 54:2, 19, 20
59:3, 11 60:1, 10, 16
61:14, 24 62:3, 22
63:4, 15 87:3 92:24
175:18 215:18 228:6
231:19
provided 48:22 54:7,
17 56:16 66:14
110:20 111:2, 7
141:9 221:18 224:17
provider 146:23
provides 43:14
providing 167:8
203:1, 24
provision 67:23
69:14 112:9, 15
165:22 166:19
provisions 67:4
147:7 149:1, 13
161:16 162:18
183:23
proviso 111:11
provisos 167:5, 6
public 23:19 24:12,
15 41:22 53:8 54:10,
13, 15 80:8 84:9, 13,
15, 21, 23 85:2, 12
119:2, 5 137:12
143:22, 23, 25 147:9
197:15
publicized 44:11
publicly 84:25 145:13
published 143:10
pull 229:24

purchase 42:13, 15
66:2, 7, 10 87:13
114:12 155:9 162:12
176:14
purchased 57:19
217:9
purchaser 60:16
67:25 68:15 69:17
70:2 91:7 92:17
115:8 138:15 170:24
purchasers 66:14
163:25
pure 94:13
purely 53:7 165:19
purports 197:25
purpose 3:12
pursuant 218:9 231:1
pursue 10:5 15:13
18:7 48:10, 16 50:1
64:21 74:24 82:15,
23 91:5, 15, 22 92:12,
12 100:14, 22 101:12
131:17 132:2, 7
133:1, 8 134:2
141:19 150:25 151:3
170:24, 25 201:5
211:3 214:20 243:19
pursued 9:15 10:1, 7,
10, 18 75:1 76:21
77:12 171:23 191:22
200:19
pursuing 13:13 22:9
37:18 44:3 50:15
55:18 77:8 78:6
79:6 80:6 92:1
100:6 133:19 135:10,
12, 15, 19 136:3, 7
138:20 168:22 173:4
174:9
pursuit 23:16 76:1
push 49:1 153:6, 17
195:13
pushed 183:24
pushing 184:4, 5, 15
195:14
put 14:20 19:8
68:22 81:9 101:21
133:7 139:23 173:2
177:17, 19, 20 178:12
201:24 216:16 217:8,

12, 23 218:6 222:1,
20 224:16 249:8
puts 80:20 82:10
230:12
Putting 10:13, 15, 24,
25 14:6 20:8 22:4
183:15 222:5, 19
< Q >
qualifications 11:20
104:17 198:24
qualified 104:20
qualify 12:4, 4 48:3
124:4 172:4
qualifying 147:25
Quebecor 118:14, 24
119:9, 23
question 7:6, 10 9:7
10:3 11:12 13:11
14:4, 9 17:24 23:4, 5
32:10 34:18 35:19
36:25 45:2 48:19
51:7 60:13 61:20
62:20, 21 63:2, 3
69:24 73:6, 16 77:3,
3 79:4, 10 81:13, 14
82:7, 8 86:7 90:21
93:25 95:25 96:5
97:16 100:19 101:8
103:22 104:16
105:21 106:10 111:1
112:14 116:4 122:17,
20 129:4 135:17
136:14 138:16 142:9
144:13 150:22, 23, 25
151:14, 14, 16, 24
157:21 159:10 169:3,
25 184:13 187:6, 10
188:24 191:11
192:12 198:14, 15
201:6, 25 202:9, 14
203:7, 13, 14, 17, 19
207:12 208:5, 6
210:8 216:18, 20
217:22 218:12 223:2,
24 224:5 228:22
235:13, 22 236:5
240:18 242:4
questioned 126:10

127:3
questioning 9:3 223:5
questions 3:16 4:3,
 11 8:22 21:10 55:11
 116:1 184:23 189:7
 202:12 214:5, 12
 215:7 224:11 227:17
 244:4 247:24 248:3
quickly 206:9
quite 61:19 68:21
quote 54:1 107:15
 145:20 158:9
quoted 145:17 146:17
quoting 57:17
 122:15 147:3

< R >

rabbit 96:3
raise 15:22 164:3
raised 63:1 116:15
 209:17
raises 193:3
raising 209:15
ran 240:2
rate 179:11, 15, 19, 24
 180:25
rates 172:22
re-acceleration 123:6
reach 152:3
reached 107:14
 154:23
react 141:17
reaction 144:15
read 35:15, 18 44:24
 45:2 48:11 49:23, 25
 53:21 56:15 62:6
 67:23 71:9 74:17
 80:17 88:24 90:18,
 21 93:15, 18 111:6
 115:2, 5 119:1
 133:10 142:18
 157:10 158:23 159:6
 167:2 169:20 181:12,
 15 184:12 198:1, 6, 9
 231:7, 12
reading 8:19 47:18
 68:18 69:20 110:10
 114:25 115:4 131:6
 230:6 237:3 238:1

reads 9:6 25:6
 34:25 35:17 45:1
 53:23 68:20 71:11
 73:15 87:18, 25
 90:20 93:17 110:25
 114:25 115:5 131:6
 159:9 167:4 169:23
 181:14 198:8 231:11
realistic 95:25
realized 142:13
realizing 246:13
real-life 150:6
really 74:18 76:1
 129:15, 15
Realtime 249:5
REAL-TIME 249:24
reason 30:18 91:3,
 12, 14 107:12 109:6
 175:12 189:2 246:16
reasonable 179:10, 19
 247:13
reasons 58:19 101:5
 138:24 139:4, 5
 157:4
recall 15:22 17:2
 39:19, 20 72:8, 16
 84:10 85:20 88:15
 89:1, 15 92:22 99:5,
 8 104:8 108:17, 22
 113:13, 19 118:8
 125:10 130:3 132:20
 135:1 137:24 140:16
 141:8 143:22 145:15,
 16 159:22 166:5
 181:11 185:3 191:5
 196:3 198:17 200:9
 201:23 220:25
 222:13 224:11
 242:16, 21
receipt 106:24 247:9
receive 32:25 90:16,
 25 149:15 191:24
received 11:6 54:9,
 11 79:21 89:2, 8
 96:11, 15 104:5
 155:21 192:2 225:18
receiving 97:8
 128:21 207:10
RECESS 70:17

128:5 160:9 215:12
recognition 53:25
recognized 13:25
recollection 110:18
 127:10 140:17 166:4
 198:11, 18
recommended 152:15
reconsidering 243:11
 244:5
record 24:20, 21
 58:16 70:14, 16
 76:18 86:23 89:25
 122:15 157:17, 18
 173:16, 18 187:21, 23
 199:2, 4 203:22
 220:8 230:12 235:16
 242:2, 11
recorded 202:15
 249:12
records 34:5 39:13
 113:22 223:18
recounts 176:13
redacted 121:9
refamiliarize 131:8
refer 7:14, 15 43:2
 58:17 67:18 77:2
 89:25 234:6
reference 50:23, 24
 109:1 163:12 172:25
 183:2 184:19 246:15
referenced 137:14
references 163:14
referred 50:25 139:3
 242:19 243:14
referring 15:3 21:18,
 20 35:14, 22 57:14
 60:5 78:23 90:1, 3
 94:15 137:18 138:14
 144:8 168:6 185:7
 196:14 233:4
refers 35:12 118:14
 137:10
refining 28:23 29:4
reflect 103:5
reflecting 87:14
refusal 211:19 214:4
refusals 3:11 4:9
 214:24 215:1 248:2
refuse 96:5, 8 214:11

refused 4:11 151:25
 213:15 214:1
regard 215:1
regarding 19:20
 26:16 42:19 74:9
 187:12 214:12
 225:21 227:25
regardless 61:21
regrettably 188:10
regulators 16:20
 84:16 205:25
regulatory 14:14
 27:6, 11 44:18, 22
 45:7, 10, 25 47:7
 48:21 54:15 58:25
 67:13 71:15, 23
 75:10 77:25 78:1
 84:19 90:9 91:6, 16,
 22 92:1, 8, 9, 13 99:3
 101:24 103:10 137:7
 150:2, 18 151:5
 152:1 157:19 160:1
 170:25 183:17, 25
 194:24 199:25
 204:17, 21 205:19
 206:2 211:2
related 20:18 21:2
 23:3 26:3 38:2
 41:23 43:14 76:8
 85:8 93:12, 20 94:13,
 24 95:9 121:9 129:3
 149:19, 20 195:23
 232:8 233:9 234:12
relating 68:7 83:8,
 11, 18 115:9, 20
 116:4 127:25 182:2
 212:23 237:5
relation 79:11 209:11
relations 180:6
relationship 107:22
 133:12 134:13
relevant 75:20 85:9
 103:21 119:14, 23
 125:13, 21 126:10
 135:8, 13 157:21
 186:13 187:7, 11
 214:6 216:5 225:16
 231:2, 14 236:24
relied 107:3

<p>rely 199:4 208:23 214:23 232:20, 21, 21 relying 199:1 240:1 remain 76:8 95:7 remained 133:1 remember 181:22 191:18 192:7, 10, 14 199:8 reminder 154:18 remotely 223:15, 19 224:2 remove 223:7 reopen 211:7, 9 repeat 9:7 10:3 36:25 45:2 51:7 60:13 69:24 73:6, 16 90:21 93:25 111:1 115:18 138:16 166:17 169:25 191:11 replied 161:4 replies 53:10, 13 156:14 200:4 reply 63:17 200:4 REPORTED 2:21 Reporter 249:4, 24 REPORTER'S 249:1 reporting 147:4 249:21 reports 177:3 represent 42:2 representatives 91:25 119:9 121:4 request 33:2 54:3 55:2 61:12 74:7, 15 85:25, 25 86:21 167:13 171:9 201:3 211:4 requested 39:6 81:9 156:2 157:20, 24 160:2 183:10, 21 231:18 requesting 178:10 requests 3:16 4:3, 11 28:17 86:8, 13, 14 87:4 167:16 require 26:23 27:2 153:13 165:18 required 59:16 68:24 115:10 166:15, 24</p>	<p>168:23 204:16, 22 206:2 216:15, 21 requirements 46:17 59:9 Requires 45:14 65:20 Resbech 31:16 research 16:10 reseller 156:20 175:23 reserve 143:9 resignation 96:11, 15 221:17 224:3 226:19 229:13, 14, 17 resigns 13:23 resources 9:18 respect 22:22 68:4 84:17 92:20 107:16 116:1 134:4 136:10 141:14 147:14 199:4 219:16 221:24 237:1 240:11, 13 241:23 respected 133:22 190:17, 19 respecting 133:25 190:14 respond 198:13 response 57:25 58:1 64:23 74:16 79:25 81:9 82:20 92:7 142:7 144:16 157:11 158:8 177:11 responses 54:20 responsibility 19:1 162:5 responsible 25:20 125:16 responsive 203:16 rest 11:1 44:20 45:8 restriction 115:15, 19 133:8 restrictions 46:5, 19 100:13, 21 101:11 134:1 149:9 207:14 result 11:9 15:18 76:25 77:6 138:3 153:1 224:13 243:10 244:17 resulted 11:7 100:1 244:5</p>	<p>RESUMING 70:18 128:6 160:10 215:13 retail 161:5, 17 return 179:11, 15, 19, 24 180:25 reveal 228:21 revealed 236:9 review 34:17 48:2 71:18 73:7 75:25 76:18 142:18 166:2 210:17 225:6 237:19 review, 54:3 reviewed 29:8 54:6 183:19 225:9 reviewing 215:3 236:13, 14 revised 87:13 89:13 130:7 revisions 87:14 89:14, 19 Riley 9:1 28:12 34:22 35:11, 14, 21 36:4 39:17 72:23 154:15 201:24 203:3 204:3, 6 219:3, 11 236:10 243:15 244:20 risk 183:17, 25 200:1, 15 211:2 road 155:17, 21 roaming 171:14 172:22 Robert 2:7 Rocco 2:5 Rogers 7:15 role 78:1 83:2 221:12 roles 85:18 Roman 115:6, 7 130:24 Rona 8:2 9:10 10:1, 5 room 41:2, 3, 20, 22 53:18 102:19 Roughly 22:18 round 223:5 RPR 2:22 249:3, 22 RSA 2:22 249:23 running 6:9</p>	<p>Russell 129:23 < S > safe 43:25 safely 7:9 sake 122:15 sale 27:10 46:8 47:6 48:16 49:2, 5 115:9, 21 176:14 samples 7:21 8:1 9:10 105:6 Saratovsky 162:4 188:15, 21 189:2 190:17, 19 191:9, 12 193:3, 17 197:24 198:15 199:16 205:16 206:5, 14, 16 212:9, 10, 19 Saratovsky's 189:16, 20 sat 196:25 satisfied 46:7 91:8 150:13 152:9 satisfy 87:15 schedules 162:14 185:6 Scheschuk 75:4, 5 136:6 214:9 school 6:13, 14, 16 science 6:17, 23 scope 9:3 102:19 173:22 scroll 7:25 8:13 246:5 scrubber 238:23 searches 98:1 seconds 73:7 secret 145:10, 12 section 70:9 90:5 131:14 137:18 secured 22:15 securities 9:22 10:18 security 240:2 seek 168:18 169:8 170:13 178:17 179:17 193:11 seeking 51:6, 11, 21 155:15 157:3 168:7 171:1, 5, 7, 10, 13, 17,</p>
--	---	---	--

20 172:12, 25 173:9 193:15 select 107:12 selected 31:2 sell 59:1, 17 60:11, 17 61:8 62:4, 24 63:5 64:3, 20 156:22 169:17 170:4, 14 171:5, 11, 18, 20, 22, 25 172:12 173:4 176:18 seller 69:22 70:1 167:10, 14, 14, 21 184:16 selling 18:1 semi-colon 247:1 send 57:1 208:8 sending 185:17 190:23 246:12 sends 52:13 199:17 246:17, 20, 24 senior 11:18 22:15 28:11 65:7 120:22 175:1 217:4 sense 101:25 102:2 105:24 139:6 151:11 246:19 sentence 27:17 62:7 69:16, 16 70:1 81:19 159:11 169:11, 24 170:1 177:2 sentences 69:14, 15 separate 68:3 92:19 135:7 September 192:8 210:11, 13 213:13 server 221:17 223:15, 17, 19 245:10, 15 246:2 247:20, 22 servers 98:6, 9 233:9, 20 247:13 services 149:4 set 18:14 60:24 89:19 138:6 141:21 143:18 153:24 156:4 161:18 196:23 249:7 set-aside 137:21 138:4, 5, 10 139:18 140:5, 10, 21 141:1, 5, 14 142:3 143:8, 13	144:1, 17 147:15 148:11 sets 46:11 70:9 setting 45:9 137:20 settled 161:1 settling 162:13 seventh 8:15 share 17:1 42:13, 15 66:2, 6, 10 87:13 114:12 162:12 shared 20:19 shares 16:2 sharing 171:14 172:23 shocking 235:1 short 211:5 shortcoming 63:14 shortcomings 142:22 144:23 Shorthand 249:4, 15 shorthanded 221:5 shot 212:17 show 7:23 20:22 86:20 95:23 102:15 110:9 240:7 showed 225:3 showing 90:8 shown 38:7 103:14 142:22 206:20 shows 172:11 173:11 235:16 side 6:6, 6 18:7 57:17 86:17 87:14 123:8 157:10 162:10 sign 32:20 169:2 176:14 177:21 185:23 206:7 210:5, 14 signed 40:17 130:15 132:22, 25 159:1, 4, 14, 20 169:5 170:11 210:12 213:9 signing 32:16 110:12 169:15 178:18 186:5 signs 170:3 similar 68:3 92:19 Simon 75:9 77:24 80:10 simple 112:25	144:13 201:6 simpler 86:7 Simply 22:10, 11 114:22 140:9, 20 207:10 216:14 219:9 single 22:8 215:23 singularly 182:25 sit 113:9 Sitting 124:14 127:11 142:5 153:21 situate 72:15 situation 13:5 24:1 51:24 194:21 228:18 238:23 243:11 situations 10:20 13:20 118:19 150:6 skills 11:25 skin 217:7, 20 slightly 11:12 small 18:22 20:16 115:6 221:11 smaller 138:18 smells 201:4 SMS 125:22, 25 126:3 127:19 so-called 12:11 social 227:24 software 231:22 sold 58:21 60:3, 20 solicitor 109:5, 11 solution 59:21 solve 195:20 solving 200:13 somebody 129:5 153:12 221:13 223:15 sooner 102:17 sophisticated 231:22 Sorry 58:15 66:3 67:5 72:11 75:4 78:12, 20 79:4 87:22 91:10 106:25 138:4 139:19 147:17 150:22 153:5 166:17 169:23 178:15 200:5 201:7 202:25 209:23 213:24 219:23 224:25 234:7 246:22	sort 59:6 63:23 66:13 84:17 112:12 193:14 sorts 151:4 171:14 sought 94:10 99:12 156:10 Sounds 132:21 201:4 source 15:10 128:21 sources 95:18 SPA 70:21 72:1 88:6 100:12, 20 101:10 109:16 152:3 159:1, 4, 14, 20 161:19, 23 177:22 178:18 183:12, 20 185:6, 23 201:9, 10 206:7 SPAs 184:18 speak 125:3 222:22, 24 speaking 75:23 222:11 specialized 148:14 specific 33:2, 4 51:25 108:24 183:23 238:20 specifically 37:3 46:3 219:16 227:22 228:12 specificity 167:8 specifics 183:15 222:11 spectrum 41:23 46:8 49:3, 13, 20 57:11, 12, 18, 19 58:21 59:1, 7, 17 60:6, 12, 17 62:4, 24 63:5, 8 64:3, 20 84:18 85:3 86:18 93:12, 20 94:14, 24 137:15, 21, 22 138:5, 10, 12 139:1, 9, 21, 23 140:4, 5, 9, 10, 20, 20, 25 141:5, 21 142:25 143:5, 13, 16 144:1, 20, 23 145:5, 8 146:25 147:14 148:2, 8, 12 149:2, 8, 17 155:11 156:19 170:14 171:5, 11, 18, 21, 25 172:24 173:1,
--	---	---	---

4 178:3, 17 179:2, 14, 17	137:12 230:10	Subsequent 42:21 43:1 198:12	table 48:8, 14 64:17, 24 77:16 122:1, 2
Spectrums 140:12	states 26:14	subsequently 225:11	table, 49:24
speculating 122:21 153:22, 25	status 81:2 196:17, 21, 22 220:23	subsidiaries 131:3, 24 132:2, 10, 25 133:19 136:5	tailored 16:18
speculation 119:2, 4, 6 120:5, 12 122:9 129:3, 19, 20	stay 218:18	substantial 94:24	tainted 193:19
spend 9:18, 20 10:14, 19 140:25	stayed 218:19	substantially 162:13	takes 64:17, 24
spending 141:1 142:1, 2	stenographically 249:12	substantive 31:24 32:2 43:2	talk 7:19 14:25 43:23 58:1 67:22 102:8, 10 124:19, 22 133:25 158:25 159:13, 19 161:7 234:14
spent 126:8	step 63:13 107:1 209:23	substituted 246:19	talked 12:25 22:20 57:2 69:15 84:7, 8 85:17 145:15 181:18, 20, 22
spoke 124:25 182:18 204:3	steps 32:25 68:16, 23 98:8 168:23 223:7 231:1	successive 110:21 111:3	talking 15:5 21:22, 24 37:2 84:2 91:10, 11 109:2 116:16 128:8 165:8 181:10 186:19 206:1 226:13 227:18 231:25 232:12 234:16, 20, 22 235:5 240:10 246:15
spoken 241:20	Stern 6:14	sufficient 95:11	talks 43:21 50:6 172:22 184:14
spoliation 230:7, 11, 17 231:3 236:22 237:4 239:9, 9, 12, 13, 14, 16, 18 240:4	stick 55:5	suggest 158:24 159:12, 19 225:20 226:17	target 185:25
stake 50:7	stop 50:15	suggesting 10:4 187:7, 8 199:6 230:15	tautology 197:3
stakeholders 81:24	stops 97:5	suggestion 9:25 159:19, 21 216:9 237:4	team 18:14, 16, 20, 20, 22, 22 19:7 20:11, 15 22:12, 21, 22, 23 23:5 28:11 29:10, 25 30:20, 25 31:4, 12 36:13, 16, 23, 23, 24 37:2, 3, 4, 11 39:11 41:24 56:5, 20 77:14 83:11, 16, 17 85:18 97:6 98:12 102:9, 10 103:9 148:3 152:13 179:24 185:18 212:13, 18 217:5, 18 218:25 221:5, 6, 8, 11 232:3 243:7
stand 102:1, 4	straight-up 155:8	suggests 201:15 220:11	teams 13:1 76:13
stand-alone 50:1, 15, 18, 20 59:23 77:20 108:14 140:22 142:19, 20, 20 144:22 146:15	stranded 156:17	suitable 32:19	team's 9:20 104:11
Standing 25:11	strategic 27:19	sum 208:22	technology 139:2
Stanley 56:2, 5, 9, 21 66:6 121:1 124:25 246:1	strategies 21:1 37:17 38:1 124:1	summarize 197:25 198:10	telecom 29:15 107:15 108:25 130:25 131:23 132:1, 9, 16,
start 19:12 52:16 53:3 56:14, 17 67:9 189:9 214:19	strategy 23:17 41:12, 15 47:11 50:15 73:4, 10, 18 76:1 141:20 142:14, 17	summarized 198:2, 16	
started 5:24, 25 17:23 18:1 41:24, 25 52:19, 25 123:12	Streaming 2:15	summarizing 175:4	
starting 8:15 33:8 170:2 172:21 184:9	Street 1:17	summation 51:1	
starts 52:3 57:5, 5 74:2 90:5 117:17 177:11 185:15 199:13 230:21	strict 148:25 149:13	SUPERIOR 1:3	
state 5:5	strike 240:16	support 50:7 117:10 132:15, 24 181:18, 23 182:3	
stated 80:13	strong 152:23	supposed 160:24	
statement 76:22 93:22 229:22 230:16	structure 15:20 16:11, 18 17:15 33:6 45:25 60:25 213:19	surprise 235:2	
statements 80:9	structured 59:9 63:11	surrounding 194:12	
	structuring 213:20	suspect 58:18 112:19 208:22	
	studied 14:16	suspicious 118:6	
	studies 6:16, 20	swearing 113:10	
	style 195:13	swore 35:11	
	subheading 71:3	SWORN 5:2 37:7, 9, 12 102:24	
	subject 80:24 81:10 125:20 161:16 162:13 194:23 198:23 215:3, 5 227:15, 20 242:20 247:25	system 233:11 245:17	
	sub-paragraph 170:21	Systems 249:5	
	subscriber 146:24		
	subscribers 85:8		
		< T >	

25 133:18 136:4 146:21	67:13 90:9 148:23 176:12	143:7 146:13 177:8 180:24 188:17 233:1 240:19 241:16 244:19	172:25 178:3, 17 179:17
Telecommunications 16:24	thought 30:15 174:14 190:11	Tom 8:10	transferability 179:6
tells 200:15	three-and-a-half-week 123:17	tomorrow 196:1	transferrable 179:2, 14
Telus 7:16 48:16 49:1, 2, 3, 20	thresholds 161:17	Tony 8:11 23:25 80:19	transferred 49:14
Tennenbaum 120:2 121:13 122:5 128:10 186:16, 18 187:2	throwing 62:12	top 43:21 48:20 66:4 158:20 195:19 212:7	translate 149:11
tense 134:11	tied 12:25 156:13	topic 166:1	translates 148:7
tenure 123:17	ties 58:23	Toronto 1:17	transmitted 106:18, 19, 20
term 138:5 201:9, 10	tight 40:12 86:15	total 16:3	transparency 217:3
terminated 226:12, 20 232:14	time 5:20 6:25 9:20, 23 10:19 15:14, 17, 21 16:4 17:8, 18, 21 24:9 30:4 32:4 34:6 40:12 41:4 46:6, 25 47:2, 4 54:18, 22 74:13 77:16 80:15 82:22 84:14 88:16 89:3, 6, 7, 9 92:8 94:8 95:8 96:24 101:14 109:9 110:22 111:4, 13 117:4 120:4, 18 124:8 125:14 126:9 127:7, 11 143:22 160:22 163:8 171:4 174:7, 21 176:7 184:19 187:3 189:10 192:12 194:6 199:18 204:15, 16 206:2, 11 210:9 217:12, 17 218:17, 24 219:4 220:24 221:2, 7 236:16, 17, 20 249:7, 8, 11	totality 208:22	transparent 20:25
termination 229:2	timeframe 86:15 119:11 192:9	touched 39:11 103:12	transpired 232:19
terminology 7:13 15:1 164:10 226:9	timeline 54:3 181:10	tough 158:17	treading 109:11
terms 9:22 20:24 25:21, 24 26:2, 5, 9 32:7, 14 33:17, 24 42:14, 19 53:14 104:3 137:25 143:17 152:3, 4 204:24 226:9	times 55:3 188:21	tower 171:14 172:23	trial 106:1 135:24 174:3 209:5, 9, 14, 16, 17 214:23 230:25 232:21
territories 140:2, 12	timing 167:21 183:7 195:23 197:14 210:7 211:18	track 109:10	trouble 128:23
test 177:18, 19, 20	today 10:14 63:19 113:10 121:3 124:14 135:22 153:1, 21 154:24 157:15 163:18 166:8 185:21 195:25	tracked 111:15	troubling 189:11
testify 113:24	told 63:18 64:1 96:23 123:25 140:18	traction 121:12 123:1, 4, 20, 22	true 93:22 180:17 193:18 195:7, 10 249:14
testimony 37:7, 10, 13 249:10		traffic 223:7	trust 6:1 189:22, 24, 25 212:12, 14, 16
text 110:13		training 20:17 21:5	trusting 200:13
theoretically 80:21 82:11		transaction 26:3 32:8, 18 49:1, 2 71:6 77:11 86:4 94:6, 19 95:12 96:1 99:2, 7 112:18, 22 125:7 133:1 149:25 150:2, 18 151:4, 12, 15 152:16 155:7 163:25 168:1, 9, 11, 12, 19 169:1, 8 179:18 201:5 206:19 218:7 219:7, 17 222:23, 25 228:4 237:2, 5, 13 238:3, 4, 19	truth 61:15, 21 62:10, 11
theory 81:22 239:20		transaction, 48:24	truthful 61:15
thereabouts 14:19		transactions 15:24 52:1 68:14 167:24 222:12 234:8	trying 60:24 78:20 105:23 106:10 119:20 135:12 151:10 171:21 184:22, 25 188:22 239:12
therefrom 215:7		transcribed 249:13	Turgeon 31:16 52:5, 9 53:10, 13
thereon 57:11		transcript 202:4, 10 249:15	turn 24:19 28:2 30:5 31:14 34:20 55:23 65:25 78:9 110:9 140:17 157:12 158:10, 15 230:2
thing 117:6 158:24 206:21 239:11		transfer 49:5 59:6 64:10 94:13 149:1, 8, 17 155:10 156:18	turnaround 6:9
things 88:21 119:3 171:13, 15 172:23 178:2 189:13 200:25 201:17 211:2 217:1 219:4, 5 236:23 247:15, 17			turned 158:12
thinking 21:1 38:3 104:13 243:6			turns 185:20
third 28:14 40:7 45:20 58:6 61:1, 5			two-month 206:8, 22 210:22 211:13, 16

7, 8, 25 207:1 233:10
typed 104:6, 19
typical 84:21

< U >

UBS 31:16 52:5, 5,
 11 54:2

ultimate 15:23
 179:24 180:22

ultimately 17:9, 14
 20:20 21:17 60:3, 19
 77:10 99:25 189:13
 205:17 213:7

Um-hmm 6:7 118:12
 156:24 180:9 205:11

unaware 111:12
 233:23 234:2

uncertainty 247:12

unclear 194:11

undercut 212:13, 18

understand 5:10 7:1,
 5, 15 9:24 11:11, 16
 12:9, 13 15:25 16:14
 17:10, 25 22:14 28:7
 30:1 35:2, 24 37:21
 39:16 41:16 44:21
 49:11 52:5 56:1
 57:15 64:18 65:22
 69:17 72:7 78:14
 79:14 89:3 97:24

113:15 116:18
 123:10 125:11 126:8
 133:25 137:3 144:24
 148:1, 4, 11, 16
 163:18 164:2 165:24
 179:1 180:2 181:10
 204:23 206:1 212:1
 216:8 231:21 237:9
 242:24 244:7, 8

understanding 23:14
 39:3 42:3 66:12
 74:18 75:24 76:15,
 19 77:1 88:11, 20
 94:22 104:4 108:6
 123:5, 18 124:6
 128:11 131:10 148:7
 149:21 155:23 159:2
 166:2, 3 174:7
 175:25 176:16, 19
 188:20 204:14 216:9

217:15, 16 227:14, 18,
 23 232:16, 25 233:6
understood 7:10
 16:1, 5, 7, 10 24:2
 26:22 48:17 79:5
 87:23 118:15 132:13
 224:14

undertake 34:16
 68:23 105:11 213:2
 218:13 222:15

undertaken 3:16
 108:3 228:3

undertaking 30:18
 34:2 40:21 43:1
 72:1 88:9 176:9

191:2 202:8, 15
 203:2, 25 219:6, 9
 220:15 221:18 227:5,
 9 228:24 241:8, 23
 242:3

undertakings 3:10, 14
 55:4 68:1, 6 91:19
 92:18 215:6 248:2

undrawn 165:10

unified 217:18 242:20

unique 245:9 247:17

universities 104:15

university 5:25 6:11,
 14 104:14

unrealistic 206:23
 210:23

unreasonably 167:11,
 15 168:5 169:7, 9

unrestricted 47:6
 149:17

unsolicited 134:22
 207:10

untoward 119:19

untruthful 190:3, 6

unusual 118:18

updating 9:5

uploaded 234:4
 246:11

upside 76:13

useful 238:18

utilize 19:2

< V >

vacation 88:16
 113:14, 16, 18 220:19,
 21, 23 221:1 224:2

vague 184:1

value 29:11 33:4
 57:12, 17, 19 60:23
 86:17 145:7 179:7

variables 150:13

varied 184:2

variety 172:23

various 48:2 51:14
 54:21 55:4 66:5

83:1 98:1 123:1
 147:7 185:18 245:6

vendor 58:2, 4, 6

59:3 95:4 120:7

vendors 58:19

vendor's 59:3 120:9

Verizon 146:12

Vermeersch 2:4 67:5,
 10 70:12 75:19

87:19, 23 93:2, 6
 96:13 108:3 109:17,

21, 25 110:3 112:1
 114:14, 18 122:14

125:15, 17, 24 126:5,
 12, 19 127:6, 10, 14,

21 128:1 136:19, 25
 145:19 148:19 162:1

181:6 185:13 188:1
 192:18, 21, 24 194:7,

15, 17 197:21 199:11,
 14 205:9, 11 212:5

224:21 225:7, 23
 226:5 245:22

Vermeersch's 224:15

version 72:6 113:3

114:12 165:23

versus 16:16 225:5
 239:6

veto 244:2, 8, 12, 14,
 19, 20, 21

viable 44:18, 22 45:6,
 10 48:21 138:13

vice-president 28:8

view 177:13, 14

178:15 209:20

viewed 161:18

views 155:11

VimpelCom 17:10, 11,
 21, 23, 25 19:14, 21
 20:11 25:1, 20 27:7,
 23 31:16 32:8, 19

33:3, 11 34:6, 12
 40:10 42:1, 4 44:15

47:5 48:7, 10 49:24
 50:2, 11, 23, 24 52:6

66:14, 23 78:14

79:14 80:23 81:6, 17,
 21 82:5, 16 92:7, 7

110:11 117:21 118:2
 121:5 122:6, 12, 25

123:2 129:18, 25
 130:4, 15, 17 131:4

132:16 133:5, 12, 23
 134:1 135:3 152:4

161:10, 21, 22 162:5,
 12 168:14, 16 169:6

178:6, 21 181:11, 24
 182:6, 8, 20 183:4, 17,

24 184:5 185:24

186:9, 15 187:1

191:9, 13, 23 193:4, 5
 200:24 201:8, 18

202:16 203:7 204:19
 205:1, 3 207:8, 25

208:6, 15 209:22

210:4, 14, 24 213:9,
 13, 17, 21 214:21

VimpelCom's 90:16,
 25 187:13

VIP 182:6

virtue 216:11

Volume 170:18

vote 243:1

voting 16:2

VPs 18:21

< W >

Wait 170:20 172:8

waiting 58:17

waive 102:1

waivers 164:20

walk 103:1 190:24

walked 102:17

wall 222:1, 5, 19

walling 222:1

wanted 27:9 58:25

59:5 74:12 91:22

92:11, 12 131:18 132:3 133:2, 9, 20 138:20 145:18 211:21 243:18 wants 147:5 200:15 warning 108:24 warranty 59:11 63:13 water 67:19 ways 59:10 63:12 weak 58:22 web 239:16 week 18:24 56:14, 17 65:18 74:9, 13 174:25 186:5 224:10 weekly 13:8, 8 29:25 219:19 weeks 91:24 110:12, 17 123:11, 16 weight 243:6 well-advanced 190:24 WEST 1:9, 17 2:12, 16, 18 10:1, 4, 9 11:4, 6, 15, 18 12:16, 22 13:4, 14, 20, 24 14:6 23:14, 17, 19, 24 89:3, 9 96:21, 25 105:7, 15, 19 106:20 107:4, 14, 18 108:7, 12, 21 119:18 121:15 122:6, 15, 16 123:11, 17, 19 128:10 129:13 136:10 186:11 187:8 190:19, 21 191:22 193:20 204:20 206:20, 25 207:9, 13, 25 208:4, 6, 7, 15, 21 209:25 213:8, 19 231:15 232:3, 9 234:19 237:18 238:19 239:21 240:8, 21 241:1, 3, 11, 16, 18 WFC75126 7:24 WFC78062 145:24 whatsoever 106:18 when.' 60:4 wholesale 46:14, 23 47:11 65:1 widely 44:11 widespread 24:15 147:9	willing 64:21, 25 101:9 102:19 116:14 149:24 150:1, 8 151:3 205:2 willingness 51:5, 10, 20 59:3 101:23, 23 103:1 116:20 157:19, 22 160:1 Wind 7:18 10:13 11:1 14:7, 20 15:4, 11 16:22 18:2 20:11 21:18, 20 22:22 25:21 26:11, 18, 23 27:1, 5, 11 28:24 29:4, 6 30:14, 20 37:4, 11 38:2, 11 40:11 41:16, 19 42:6, 7, 20 43:22 46:12 48:15 49:16, 18, 21 50:2, 12, 14, 15, 17, 19 51:18 52:14 55:18 56:5, 10 58:4 59:4 60:16 65:13 74:12 76:4, 5, 9, 21 78:6 79:7 80:6, 10 82:16 83:3, 8, 12, 17, 18 84:13, 15, 21 85:20, 24 107:18 108:13, 14, 16, 19, 21 109:1, 10 124:7 126:16 127:25 134:17 136:23 137:4, 25 138:11, 12, 15, 20, 24, 25 139:8, 22 140:19 142:17, 19, 20, 21, 25 144:21, 22 145:8, 10, 18 146:12, 23 147:6, 10, 21 149:19 150:9 152:10 155:9 156:18 171:1, 4 172:18 173:3, 21 174:8 175:17 176:15 178:9 212:24 213:3 214:10 217:10 218:3 219:7, 17, 25 220:24 221:24 222:3, 23 223:9 225:21 226:18 227:13 228:4 229:2, 12 232:5, 8 236:23 237:2, 5, 11, 13 238:3,	4 240:12, 13, 20 241:1, 11, 18 245:7 Wind's 14:14 15:19 84:9 Winton 2:3 8:18, 25 14:8 19:16, 23 20:5 21:9, 18 23:8 24:8, 12 25:3 26:6 29:17 30:7 31:7 33:14, 19 34:1, 7, 16 36:17 38:13, 25 39:3, 9, 16 40:5, 22 41:6 42:9, 21, 25 43:5, 11 50:21 55:1, 10, 13, 21 62:11 64:12 66:19, 21, 25 67:7 68:21 69:6, 11 70:5, 13 160:14 162:20, 22, 24 166:6, 10 168:2, 5, 9 170:7, 20 171:2 172:4, 8, 15 173:8, 18 176:10 185:9 186:13, 19, 22 187:5, 15, 20 188:23 189:5 193:25 196:10 197:6, 11, 17 198:22 199:1, 6 201:11, 15, 23 202:1, 3, 6, 11, 13, 18 203:8, 9, 15, 21 204:2, 7 205:5 207:3, 11, 19 208:13, 20 209:7, 18 210:20 212:25 213:4, 15, 21 214:1, 5, 11 215:2, 11 216:5, 17 218:11, 20 220:6, 16 222:4, 15 223:1, 4, 12, 21 224:4, 25 226:11, 21 227:1, 14 228:8, 15 229:5, 8, 16, 19, 20, 23 230:4, 9, 19 232:18 235:12, 15, 21 236:6 237:6, 12 238:5, 14 239:5, 14, 22 240:3, 9, 13 241:12, 25 242:6 246:6 248:4 wiped 231:22 233:13 wireless 7:14 16:25 24:3, 5 28:20 36:24 137:15, 22 139:1, 2,	15, 18 146:21, 22 149:4 220:1, 5 withdraw 218:17 withheld 167:11 168:6 169:7, 9 withhold 167:15 WITNESS 3:3 9:6 34:25 35:17 45:1 53:23 68:20 71:11 73:15 87:18, 25 90:20 93:17 110:25 114:25 115:4 131:6 159:9 167:4 169:23 173:20 181:14 198:8 231:11 249:8, 10 wonder 10:19, 21 wondering 96:2 won't 81:5 156:19, 20 word 62:11 81:14 110:8 130:21 151:20 203:16 words 45:15 47:19 52:18 126:24 131:15 206:12 223:17 227:10 work 11:10, 19 12:2, 3 15:15, 15, 18 29:8 43:19 45:24 53:25 54:5 56:20 86:10 103:10 164:3 180:10 216:2 217:13 228:2, 3 235:3 245:2 worked 6:6, 8 56:5 204:3 working 6:1, 3, 5, 24 28:16 29:6 37:4, 11 74:6 120:22 188:21 189:2 211:20 222:2, 9 228:1 233:24 234:8 236:16 workplace 221:23 works 180:8 216:4 worried 158:8 worry 156:16 157:11 worth 212:17 wrap 60:24 wraps 215:8 write 135:17 writes 57:8 118:10 205:18
---	---	--	--

writing 7:21 8:1
 9:10 64:2, 14, 19
 65:3 86:25 105:6
 116:24, 25 194:13
 218:10 220:13
written 69:21, 25
 78:12 167:10, 20
 199:2, 4
wrong 30:22 31:13
 41:10 52:21, 23, 24
 66:19 79:2
wrongdoing 231:14
 237:21
wrote 120:15

< Y >

Yeah 5:20 10:23
 16:4, 4, 8 17:7 50:13
 53:9 63:10 93:23
 94:17 112:10 113:15
 118:1, 22 119:7
 120:20 122:3, 22
 123:13, 22 128:19
 132:23 137:8 143:11
 144:10 192:14
 211:24 220:20
 245:19
year 192:11 230:13
 234:22
years 46:19 61:9
 64:3, 10, 20 142:5
 149:10, 17 176:18
 235:25
years, 46:5
Yeh 20:13 29:1, 3
 30:16, 19 244:4
Y-E-H 20:13 29:1
York 6:14
youngest 19:5 20:19
Yu-jia 8:12

< Z >

Zach 20:12 28:3, 4
 29:3 30:11, 12 125:2
 140:18
Zhu 8:12
zone 160:22