

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

Gabriel De Alba  
on Wednesday, May 11, 2016

neelsons

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Toronto, Ontario  
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1 Court File No. CV-14-507120

2 ONTARIO

3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

5  
6 THE CATALYST CAPITAL GROUP INC.

7 Plaintiff

8 - and -

9 BRANDON MOYSE and WEST FACE CAPITAL INC.

10 Defendants

11  
12 -----

13  
14 --- This is the Examination for Discovery of  
15 GABRIEL DE ALBA, taken at the offices of Lax  
16 O'Sullivan Lisus Gottlieb LLP, 27th Floor, 145 King  
17 Street West, Toronto, Ontario, on the 11th day of  
18 May, 2016.

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20 -----  
21  
22  
23  
24  
25

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

Andrew Winton, Esq., for the Plaintiff

Brad Vermeersch, Esq.,

& Rocco DiPucchio, Esq.

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

Kris Borg-Olivier, Esq. Brandon Moyse

& Denise Cooney, Esq.

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

& Andrew Carlson, Esq. West Face Capital Inc.

ALSO PRESENT: (Via Live Streaming) Philip Panet,

In-House Counsel, West Face Capital

Greg Boland, West Face Capital

REPORTED BY: Kimberley Neeson

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

## 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.

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

A. Yes, I have.

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

A. I will do, thank you.

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

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

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

A. Yes, I do.

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

A. Can you please show it to me?

17 Q. Okay. It's WFC75126. And feel  
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. Moyse 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. Moyse 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.

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

A. Do you mind opening the  
presentation?

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

THE DEPONENT: Yes.

BY MR. MILNE-SMITH:

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

A. May I read it --

125 Q. Sure. Paragraph 36.

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

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

A. Yes.

127 Q. And I understand there was  
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. Moyse 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

document).

BY MR. MILNE-SMITH:

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

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

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

MR. DIPUCCHIO: Yes.

BY MR. MILNE-SMITH:

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

A. I do.

324 Q. And --

A. I believe so.

325 Q. Right, that's your understanding.

A. He might be doing other things,  
right?

326 Q. I take it that you have no  
evidence as to whether he actually read this or  
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. Moyse?

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. Moyse?

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

whether Catalyst was able to fund the transaction?

I'm just wondering whether we're going down a rabbit hole here.

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

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

BY MR. MILNE-SMITH:

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

MR. VERMEERSCH: We have it.

BY MR. MILNE-SMITH:

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

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

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

A. He was asked where he was going.

359 Q. Yes. And he told you?

A. And for the first time he said he 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. Moyse 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. Moyse 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           Moyse -- so we're sitting here two years later,  
6           you're telling me that Brandon Moyse 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 Moyse 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. Moyse 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.

652 Q. Okay. And finally the fourth  
bullet point, just look at the last sentence:

"Nicholson reports that  
Minister Moore and PM Harper are  
entrenched and there will be no  
flip-flop."

So again, that's something that  
Mr. Drysdale was told and that you were therefore  
advised?

A. Correct.

653 Q. So Mr. Glassman's response starts  
on page 1 and it carries over to page 2, and his  
view is that "It's all positioning."

Do I take it then Catalyst's view is  
that notwithstanding the clearly-expressed position  
of the government, you didn't necessarily believe  
the government would actually carry through if put  
to the test?

A. Put to the test, what do you mean  
put to the test?

654 Q. Meaning your plan was to sign the  
SPA and even though the government said they  
wouldn't give you concessions, you were going to  
try and get concessions before the deal closed?

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. Moyse 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. Moyse  
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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## REPORTER'S CERTIFICATE

I, KIMBERLEY A. NEESON, RPR, CRR,  
CSR, CCP, CBC, Certified Shorthand Reporter,  
Realtime Systems Administrator, certify;

That the foregoing proceedings were  
taken before me at the time and place therein set  
forth, at which time the witness was put under oath  
by me;

That the testimony of the witness  
and all objections made at the time of the  
examination were recorded stenographically by me  
and were thereafter transcribed;

That the foregoing is a true and  
correct transcript of my shorthand notes so taken.

Dated this 11th day of May, 2016.



NEESON COURT REPORTING INC.

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**WORD INDEX**

&lt; \$ &gt;

**\$10,000** 217:12**\$150** 58:3**\$5,000** 217:12

&lt; 0 &gt;

**0026616** 161:24

&lt; 1 &gt;

**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	330 89:16	366 98:17	400 108:6
47:17 48:3, 4 93:4, 9	331 89:23	367 98:25	401 108:11
120:14 146:18 147:2	332 90:8	368 99:5	402 108:15
163:15, 25 164:8, 12	333 90:12	369 99:11	403 108:20
165:11 170:18, 19	334 90:19	37 12:17 89:24	404 108:23
175:24 182:5 196:8	335 90:22	370 99:16	405 109:15
212:8	336 91:3	371 99:19	406 110:2
3, 121:14	337 91:10	372 99:22	407 110:5
3:10 248:5	338 91:21	373 99:24	408 110:15
3:48 185:17	339 92:3	374 100:4	409 110:20
30 10:21 22:18	34 11:23	375 100:11	41 13:21 165:22
226:7	34.17 230:20 231:4	376 100:24	170:23
300 82:20 95:23	34.20 230:3 231:4	377 101:8	410 111:2
301 82:25	34.22 231:6, 9 237:23	378 101:15	411 111:10
302 83:5	34.23 230:3	379 101:18	412 111:24
303 83:7	34.33 230:20	38 13:4	413 112:5
304 83:10	34:1 3:17	38:13 3:18	414 112:25
305 83:14	34:16 3:18	380 102:2	415 113:9
306 83:22	34:7 4:5	381 102:6	416 113:17
307 84:7	340 92:11	382 102:21	417 113:20
308 84:12	341 93:1	383 102:24	418 113:23
309 84:17	342 93:4	384 103:4	419 114:4
30-day 58:12	343 93:9	385 103:14	42 14:3
30th 32:1 33:13	344 93:16	386 104:3	42:9 4:6
110:16 163:1	345 93:19	387 104:9	420 114:11
31 10:24 90:3	346 93:24	388 104:16	421 114:16
310 84:20	347 94:2	389 104:23	422 114:20
311 84:24	348 94:15	39 13:11 114:17	423 115:2
312 85:3	349 94:18	390 105:4	424 115:6
313 85:5	35 12:7	391 105:13	425 115:15
314 85:11	350 94:22	392 106:6	426 115:19
315 85:17	351 95:2	393 106:16	427 115:25
316 85:23	352 95:9	394 106:24	428 116:6
317 86:6	353 95:16	395 107:7	429 116:13
318 86:11	354 95:20	396 107:11	43 14:13
319 86:20	355 95:22	397 107:20	43:5 3:18
31st 246:23	356 96:10	398 107:24	430 117:6
32 11:11 70:8, 20	357 96:15	399 108:2	431 117:15
320 87:3	358 96:19	3rd 174:20 176:20	432 117:20
321 87:11	359 96:23		433 118:4
322 88:3	36 12:13 35:12, 16	< 4 >	434 118:9
323 88:15	90:3, 7	4 5:16 26:14 108:20	435 118:13
324 88:18	36:17 4:5	147:2 163:15, 25	436 118:18
325 87:24 88:20	360 97:1	164:8, 12 165:11	437 118:23
326 88:23	361 97:5	194:9 196:8 212:4, 7	438 119:2
327 89:2	362 97:12	4:14 212:10	439 119:5
328 89:7	363 97:24	4:48 205:14	44 14:16
329 89:11	364 98:8	40 13:18 114:23	440 119:8
33 11:21	365 98:13	40:22 3:18	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

## &lt; 8 &gt;

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

## &lt; 9 &gt;

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

## &lt; A &gt;

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 <b>accessed</b> 223:15 <b>accessing</b> 245:16 <b>account</b> 225:10 234:4, 9 245:6, 18, 25 246:1, 12, 13, 20 247:1, 14 <b>accounts</b> 233:8 234:10 246:7 247:10 <b>accurate</b> 78:7 80:8 168:20 198:23 205:6 226:14 <b>accurately</b> 198:2, 10, 15 <b>achieved</b> 141:22 200:2 206:18 <b>acknowledged</b> 123:14 <b>acknowledging</b> 187:10 <b>acquire</b> 138:12 140:9 145:8 148:12 152:10 164:4 212:24 213:3 <b>acquiring</b> 27:1 140:20 <b>acquisition</b> 18:12 25:10 26:5, 10 27:16 56:10 60:23 76:9 94:25 95:9 150:9 <b>acquisitions</b> 142:15 148:8 <b>Act</b> 16:24 70:23 71:2, 7 110:22 111:4 115:12 <b>acted</b> 230:23 <b>acting</b> 179:22 191:9 211:15 <b>action</b> 69:18 70:3 166:13, 21 238:1, 2, 8 <b>active</b> 18:7 121:21 137:2, 6 163:21 172:19 <b>actively</b> 174:9 <b>actual</b> 106:3 <b>adamant</b> 175:6 <b>add</b> 184:25 <b>added</b> 90:9, 15, 24 91:13 184:22 <b>addition</b> 23:1 32:22 91:11 184:17 236:12	<b>additional</b> 43:7 184:15 <b>address</b> 247:1 <b>addressed</b> 74:3 <b>addressees</b> 30:21 <b>addresses</b> 246:18 247:5, 6 <b>adjust</b> 61:25 <b>adjusted</b> 17:15 <b>Administrator</b> 249:5 <b>admitted</b> 236:11, 14 <b>advance</b> 32:17 143:8, 20 153:2 174:4 <b>advanced</b> 33:1 40:9 44:16 117:23 <b>advantage</b> 59:15 153:14 <b>advise</b> 23:7 30:18 38:21 40:20 66:18 72:1 191:3, 5 200:7 202:16 <b>advised</b> 38:21, 24 96:20, 21 177:9 <b>advisement</b> 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 <b>advisements</b> 3:10 4:1 55:5, 17 215:6 <b>advisor</b> 179:21, 22 <b>advisors</b> 23:12 <b>advisory</b> 164:25 196:15, 16, 24, 25 197:2, 4, 9, 16 <b>advocacy</b> 62:9 <b>advocating</b> 60:14 <b>affidavit</b> 35:11, 22 76:17 97:25 235:9 236:9 <b>affiliate</b> 130:21 <b>affiliate,</b> 131:11 <b>affiliates</b> 131:3 135:3 <b>affiliation</b> 182:21 <b>after</b> 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 <b>agenda</b> 130:8 <b>agent</b> 180:4, 5, 6 <b>aggregation</b> 148:2 <b>ago</b> 157:1 219:4 <b>agree</b> 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 <b>agreed</b> 46:6 63:9 157:14 161:14 163:5 230:22, 25 232:5 <b>agreeing</b> 178:21 <b>agreement</b> 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 <b>agreements</b> 42:13, 16 45:23 81:11 132:6 133:16 167:22 171:14 <b>agrees</b> 244:23 <b>Ah</b> 53:2 162:21 195:14 <b>ahead</b> 47:2 77:16 181:16 <b>ALBA</b> 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 <b>Alba's</b> 173:13 198:22 236:1 <b>alignment</b> 19:5 20:23 215:22 216:23 217:1 <b>allegation</b> 106:6, 17 <b>allegations</b> 119:17 238:7 <b>allege</b> 11:2, 13 <b>allegedly</b> 122:23 <b>alleging</b> 106:2 <b>allocation</b> 77:13 <b>allow</b> 9:2 23:10 155:10 167:15 175:22 195:21 211:6, 19 <b>allowance</b> 63:15 <b>allowed</b> 169:16 170:3, 12 183:20 <b>allows</b> 156:17 <b>alter</b> 86:18 223:4 <b>alternative</b> 48:23 119:20 191:1, 25 <b>alternatives</b> 51:14 <b>amended</b> 16:23, 24 229:21, 21, 21 <b>amendments</b> 114:23 <b>America</b> 6:3, 9 <b>amount</b> 85:1 216:15 <b>amounts</b> 216:23 <b>Amsterdam</b> 121:4 <b>analysis</b> 16:16 25:23 41:11 43:14 57:22 86:19 142:21 179:23 <b>analyst</b> 19:5 243:9
---	---	---	---

<b>analysts</b> 18:21, 25 20:21 125:6 243:23 244:11	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	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	<b>attempt</b> 220:22 222:1 223:2
<b>analytics</b> 20:25 23:3	<b>approvals</b> 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	<b>asking</b> 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	<b>attempts</b> 221:19, 22
<b>analyze</b> 9:16 13:16 41:24	<b>approve</b> 193:13	<b>asks</b> 161:2	<b>attend</b> 36:5
<b>analyzing</b> 51:24 220:1, 5	<b>approved</b> 47:6, 11, 14 112:23 211:6	<b>aspect</b> 102:8 235:24	<b>attended</b> 36:3, 7 39:7
<b>Andrew</b> 2:3, 12 20:12, 13 28:23, 25 29:3 30:16 244:4	<b>approves</b> 156:18	<b>aspects</b> 143:4	<b>attending</b> 121:7
<b>announced</b> 137:15 139:19 140:5, 6 141:5 194:22	<b>April</b> 58:9 236:16	<b>assertion</b> 232:22	<b>attention</b> 35:20 239:4
<b>announcement</b> 141:18 144:16	<b>Arcan</b> 8:4 9:11, 15	<b>asset</b> 69:2, 4 155:12 156:17	<b>auction</b> 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
<b>answered</b> 14:8 219:5	<b>archived</b> 15:16	<b>assets</b> 68:4, 5 92:20, 21 115:10, 21 169:17 170:4	<b>August</b> 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
<b>answering</b> 151:13 203:2 217:21	<b>areas</b> 45:22	<b>assist</b> 24:9 38:25 39:1 185:10	<b>authored</b> 19:20
<b>answers</b> 5:13 21:10 55:6 202:8, 15 215:5 221:19 248:1	<b>argument</b> 59:19 60:9, 15 61:3, 3 62:8, 8 63:1	<b>assistance</b> 3:12	<b>authority</b> 68:12 115:11 167:23 169:19 170:6
<b>Anthony</b> 74:3 78:11 131:2	<b>arguments</b> 214:25	<b>assistant</b> 30:10, 11	<b>Auto</b> 247:5
<b>anybody</b> 83:23 234:8 241:3, 9, 15, 17	<b>arises</b> 248:1	<b>associates</b> 18:21	<b>automatic</b> 110:21 111:2 211:19
<b>Anyway</b> 136:23 230:17 240:18	<b>arising</b> 215:6, 7 242:14	<b>assume</b> 30:14 40:23 53:15 97:7 121:4, 8, 14 157:20 161:8 168:14 175:1 210:1 244:20	<b>automatically</b> 211:17
<b>AOL</b> 245:6 246:1, 3, 19	<b>arose</b> 108:23	<b>assumes</b> 105:21	<b>available</b> 98:7 165:13 225:6
<b>AP</b> 196:1, 13	<b>arrangements</b> 68:3, 7 92:20	<b>assumption</b> 129:9 166:8	<b>aware</b> 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
<b>apologies</b> 65:24	<b>article</b> 145:14, 16, 20, 22 146:4, 8 147:4	<b>attached</b> 25:10 32:25 130:6 162:11, 15	
<b>apologize</b> 174:13	<b>articles</b> 30:14 146:3 147:20	<b>attaches</b> 35:1 66:1 87:12	
<b>apparently</b> 121:8	<b>articulated</b> 199:23 200:6	<b>attaching</b> 25:1 31:17 66:6 105:5	
<b>appear</b> 3:17 4:4, 12	<b>Asia</b> 88:16 113:12, 14 116:8 117:8	<b>attachment</b> 8:16 25:17	
<b>appears</b> 120:16 137:8 184:10 203:21 205:15	<b>aside</b> 10:13, 15, 24, 25 14:7 20:8 138:6 141:21 143:19 148:12 163:10 183:15	<b>attachments</b> 8:15 9:12	
<b>approach</b> 33:5 38:4 86:16 140:23 144:19 191:22	<b>asked</b> 24:1, 17, 23 30:14 42:23, 25 55:2 73:17 82:17 96:22 115:25 141:25 156:3		
<b>approached</b> 17:5 18:4, 6			
<b>appropriate</b> 14:1 235:2 245:17			
<b>approval</b> 26:24 27:2 57:13, 24 68:17, 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 <b>AWS3</b> 137:12, 14, 22 138:10 147:15 149:1	159:2 238:9 <b>bases</b> 233:4 <b>basic</b> 16:6 <b>basically</b> 5:20 6:1 17:17 18:18 237:19 <b>basis</b> 77:20 108:14, 15 114:1 146:15 157:5 205:20 214:3 <b>bathroom</b> 128:2 <b>be'</b> 146:16 <b>becoming</b> 215:19 <b>beginning</b> 62:6 160:18 <b>behalf</b> 5:11, 14 33:12 34:12 161:10 186:10 206:12 214:8 <b>behaviour</b> 12:20 86:18 193:10 234:25 236:11 <b>belief</b> 191:17 <b>believe</b> 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 <b>believed</b> 62:22 63:3 155:7 <b>Bell</b> 7:15 <b>belonged</b> 12:6 <b>Ben</b> 56:1 66:5 120:16, 25, 25 161:12 181:9 199:24 200:4, 4, 7 212:9, 11 246:24 <b>benefit</b> 149:3 <b>Bennett</b> 129:24, 24 130:3 161:10 <b>Ben's</b> 200:4 <b>best</b> 106:21 123:18 173:8 198:11 205:20 <b>better</b> 242:24	<b>bid</b> 74:20 113:1 138:7 <b>bidder</b> 118:16, 24 <b>bidders</b> 117:25 118:20 134:17 <b>big</b> 129:8 135:6 230:11 <b>bigger</b> 212:14 <b>biggest</b> 243:6 <b>bind</b> 134:16 169:2 <b>binder</b> 170:18 <b>binding</b> 5:14 194:23 <b>bit</b> 7:19 47:3 89:16 124:4 166:18 179:12 215:18 236:21 246:16 <b>black</b> 87:19, 21 89:23 109:22, 24 110:10 <b>blacked</b> 111:16 <b>Blackstone</b> 122:5 <b>Blackstone,</b> 121:13 <b>blank</b> 185:7 <b>blindingly</b> 212:11 <b>block</b> 139:20 <b>blue</b> 57:1 <b>board</b> 182:9, 20 183:14 185:24 186:9, 20 187:1, 18 189:17 191:9, 13 193:4, 5, 18, 23 <b>Boland</b> 2:18 8:11 <b>bonds</b> 23:13, 15 <b>bones</b> 222:20 230:12 <b>Borg-Olivier</b> 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 <b>Borg-Olivier's</b> 215:4	242:14 <b>bother</b> 204:11 <b>bottom</b> 57:7 90:2 118:13 129:23 146:9 184:9 185:16 194:10 197:23 <b>bound</b> 131:12 132:3, 6, 11 133:18 190:21 <b>box</b> 234:3, 9, 10 <b>Brad</b> 2:4 224:15 <b>branded</b> 136:24 <b>BRANDON</b> 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 <b>Brandon's</b> 123:23 127:6 <b>breach</b> 11:8 82:13 128:22 129:7 133:13 135:20 191:10 209:3, 6, 8, 9, 14 211:12 230:24 <b>breached</b> 135:4 136:8 191:13 <b>break</b> 128:3, 9 138:18 160:8 200:16, 24 201:1, 8, 17 202:17, 21 203:8, 12 211:5 <b>breakdown</b> 204:15, 19 <b>briefly</b> 5:21 <b>bring</b> 192:16, 19 <b>broad</b> 240:10 <b>broaden</b> 241:15 <b>broader</b> 60:18 79:20 241:22 <b>brought</b> 61:4 62:19, 21 152:12 239:4 <b>Bruce</b> 63:19, 20, 20 64:1 154:15 156:14 178:25 180:4 <b>Bryce</b> 75:4, 5 80:10 <b>build</b> 65:1 146:22 156:21 176:16 <b>building</b> 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

**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

< 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

**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

**capitals** 81:15

**captured** 173:5

**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

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  
**Catalyst's** 18:13  
20:10 38:2 39:21  
73:3, 10 74:20 80:9

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



**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

**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

**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

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

<b>competitor</b> 13:20 23:17 97:10 235:4 <b>competitors</b> 13:17 <b>compiled</b> 85:12 <b>complete</b> 53:17 54:3 77:11 150:20 151:12 206:19 247:5 <b>completed</b> 44:17 45:5 162:13 <b>completely</b> 135:7 <b>completing</b> 5:25 <b>completion</b> 168:24 <b>complicate</b> 111:22 195:25 <b>complying</b> 86:22 <b>component</b> 27:3 41:15 57:23 60:21 <b>comprised</b> 197:9 <b>computer</b> 6:17, 23 231:20 233:12 235:10 <b>concede</b> 81:5 <b>conceding</b> 81:15 <b>concern</b> 9:10 11:5, 11 27:6 82:6 107:15 109:9 183:4, 16 184:10 193:4, 5 245:3 <b>concerned</b> 8:1 26:10 189:14, 15, 19 193:9 205:3 <b>concerning</b> 19:13 21:14 33:24 65:13 115:20 137:5 209:14 230:10 232:21 <b>concerns</b> 221:4 <b>concession</b> 116:15, 21 156:21 168:22 201:18 <b>concessions</b> 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	170:13, 25 171:8 175:18 176:17 177:23, 24 178:2, 8, 9, 17 179:17 183:9, 20 <b>concise</b> 230:10 <b>conclude</b> 7:9 43:25 151:15 <b>concluded</b> 248:5 <b>concluding</b> 159:15 <b>conclusion</b> 31:13 150:15 <b>conclusions</b> 228:2 <b>concrete</b> 116:18, 19 <b>condition</b> 46:6 57:13, 14 68:10 69:2 71:13, 22 184:11 <b>conditions</b> 70:9, 10, 22, 25 152:8, 8 184:16 <b>conduct</b> 41:21 68:8 189:16, 20 238:9, 10 <b>conducted</b> 6:20 25:23 41:11 151:9 <b>confess</b> 127:4 226:2 <b>confessing</b> 228:11 <b>confident</b> 124:18, 21 126:3, 5 200:17 <b>confidential</b> 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 <b>confidentiality</b> 80:24 81:10 82:13 133:15, 20 <b>confined</b> 57:10 <b>confirm</b> 33:10 78:5 79:6 80:5 82:4 86:10 88:6, 8 89:17 120:18 <b>confirmation</b> 57:21 <b>confirmed</b> 82:1 86:4 <b>conflict</b> 12:22 <b>confused</b> 179:12	<b>confusing</b> 142:9 <b>connect</b> 41:17, 17 <b>connected</b> 15:22 221:1 <b>connection</b> 115:11 182:21 217:24 218:7 <b>conscious</b> 237:17 <b>consent</b> 65:14, 15 69:22 70:1 81:3 166:15, 24 167:10, 14, 20 169:6 <b>consents</b> 164:20 165:19 184:11, 15, 17, 20, 21, 25 <b>consequences</b> 193:6 <b>consider</b> 136:13, 16 141:23 142:17 149:13 235:2 <b>consideration</b> 104:19 148:6 <b>considered</b> 32:19 41:13 97:9 142:19 244:16 245:1 <b>considering</b> 13:9 184:16 <b>considers</b> 162:12 <b>consist</b> 239:18 <b>consistent</b> 76:17 110:18 166:3 171:8 183:16 211:1 <b>consistently</b> 183:24 <b>consolidate</b> 142:15 144:20 145:5 147:14 <b>consortium</b> 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 <b>constrained</b> 139:11 <b>constraining</b> 139:8 <b>constraints</b> 139:22 <b>consult</b> 165:2, 5 <b>consultant</b> 63:24 157:6 <b>consultation</b> 137:13 <b>consulted</b> 203:1, 4, 24 <b>consumers</b> 149:2	<b>consummate</b> 238:4 <b>consummation</b> 167:24 <b>contact</b> 213:17, 22, 25 214:10 <b>contacted</b> 15:10 <b>contemplate</b> 68:13 77:17 <b>contemplated</b> 68:14 167:25 168:12 <b>content</b> 43:18 67:23 144:1 238:14 <b>contents</b> 8:22 105:5 <b>context</b> 14:25 15:9 17:5 18:5 44:6 47:22 61:25 62:2 96:7 107:13 178:4, 9 <b>continue</b> 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 <b>continued</b> 13:1 51:17 148:2 208:7 221:9 246:12 <b>continues</b> 178:23 <b>continuity</b> 144:20 <b>contracts</b> 161:5, 17 <b>contrary</b> 88:12 173:6 176:23 <b>contribute</b> 79:19 <b>control</b> 14:21 33:5 40:11 94:14 211:17 225:12 <b>controlled</b> 15:3 131:1 132:10 <b>conversation</b> 107:25 108:17 109:3 155:6 <b>conversations</b> 34:5 97:17 175:2 <b>convert</b> 139:1, 12, 24 140:3 <b>converting</b> 27:20 <b>Cooney</b> 2:9 <b>cooperate</b> 85:25 86:7 <b>coordination</b> 133:13 <b>copied</b> 19:15 34:23 80:1 88:5 97:7 116:11 188:5 246:1,
--	---	---	---

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	<b>create</b> 41:14 42:1 43:22 46:13	187:1 202:1, 3 204:16 205:4 206:22, 24 229:16 247:15, 17
<b>copies</b> 39:5, 12, 22	<b>creation</b> 219:10, 18	<b>creation</b> 219:10, 18	<b>dated</b> 8:8 24:24 32:1 78:11 88:4 249:17
<b>copy</b> 105:22 229:21	<b>creditors</b> 48:25	<b>Creighton</b> 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	<b>dates</b> 33:25
<b>core</b> 20:15 22:21, 23 23:5 30:20 36:24 37:3, 11 42:1	<b>correction</b> 227:15	<b>Creighton's</b> 98:18 225:9 228:20	<b>day</b> 1:17 11:2 114:7 130:8 161:24 194:5 249:17
<b>Correct</b> 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	<b>cost</b> 9:21 145:7	<b>crossed</b> 92:23	<b>DE</b> 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
<b>costs</b> 94:24	<b>costs</b> 94:24	<b>cross-examination</b> 201:24 203:3	<b>Dea</b> 8:10
<b>Council</b> 175:1	<b>Counsel</b> 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	<b>cross-examined</b> 9:1 219:3	<b>dead</b> 155:16, 24
<b>count</b> 55:2	<b>count</b> 55:2	<b>CRR</b> 2:22 249:3, 22	<b>deadline</b> 211:5, 21
<b>couple</b> 67:4 129:22 146:2 193:21	<b>course</b> 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	<b>CRTC</b> 14:19 15:9 172:22	<b>deal</b> 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
<b>course</b> 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	<b>Court</b> 1:1, 3 49:14 238:8, 24, 25 239:2 249:21	<b>CV-14-507120</b> 1:1	
<b>courts</b> 49:12, 13	<b>coverage</b> 140:2, 12	<b>&lt; D &gt;</b>	
<b>covered</b> 82:18 128:18 172:1, 24 173:10 174:1, 9 223:11	<b>covering</b> 27:15 34:21 161:24	<b>data</b> 41:2, 3, 20, 22 53:18 178:13	
		<b>date</b> 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

**discussing** 33:17  
65:13 74:21, 23  
141:24 242:17  
**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  
**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  
**dispute** 108:23 185:1  
**distinct** 83:25  
**distinction** 106:11  
244:9  
**distinguish** 22:21  
**distribution** 223:8  
**divest** 69:1, 3  
**divested** 108:8  
**divestitures** 68:2  
92:19  
**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,

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  
**documentary** 20:2  
238:6  
**documentation** 29:14,  
19 237:1, 5  
**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  
**doing** 8:25 13:14  
88:21 95:20 204:9  
218:2 236:18 237:24  
238:23  
**domain** 54:10, 13, 15  
85:2 143:22, 23, 25  
197:15  
**doubt** 175:12  
**download** 233:11  
234:12  
**downloading** 233:12  
**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  
**drafted** 111:13  
**drafting** 102:12  
**drafts** 31:22 71:19,  
25 111:15

**draw** 12:18 165:14,  
16, 16 238:8, 24  
**drawing** 208:10  
244:9  
**drawn** 165:11, 12  
238:11  
**Drew** 129:23 130:6  
**driver** 145:7  
**drivers** 29:9, 11 42:3  
43:15  
**driving** 112:13  
**DropBox** 233:10  
236:13, 14  
**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  
**Drysdale's** 155:23  
**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  
**duplicative** 224:18  
225:13, 16  
**duration** 169:14  
**duty** 136:9  
**dynamic** 32:15 69:9  
**dynamics** 134:13  
178:6, 13

## &lt; E &gt;

**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  
**early** 38:15 65:18  
**easier** 242:6  
**easy** 14:1  
**economic** 42:14, 19  
44:18, 22 45:7, 10  
48:22 150:13 151:10  
**economics** 134:9  
**edited** 19:20  
**effect** 117:1 144:10  
237:14  
**effectively** 15:4  
**efforts** 212:23 213:3  
221:16  
**ego** 223:5  
**elaborate** 74:14  
**electronic** 90:1, 4  
**elephant's** 146:20  
**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  
**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  <b>embodies</b> 217:1  <b>employed</b> 31:7 127:7  215:17 218:5  <b>employee</b> 22:10  127:12 216:16 226:7  <b>employees</b> 127:17  215:19 217:23, 25  <b>employment</b> 5:22  218:10 226:11, 20  229:3 232:15 233:15  <b>encouraging</b> 44:7  <b>encroaches</b> 27:19  <b>end</b>, 161:14  <b>ended</b> 6:25 211:14  <b>Endowment</b> 196:6  <b>engage</b> 56:9  <b>engaged</b> 56:22, 23  207:8 221:2  <b>engagement</b> 56:19  <b>engrace</b> 232:9  <b>enhancement</b> 12:5  <b>ensure</b> 247:9  <b>enter</b> 26:15 181:23  <b>entered</b> 27:10 128:13  130:16 213:8  <b>entering</b> 167:21  <b>enterprise</b> 33:4  <b>entirety</b> 90:14, 23  <b>entities</b> 15:2 68:5, 9  92:21  <b>entitled</b> 216:8, 12  218:16  <b>entrants</b> 137:22  138:6  <b>entrenched</b> 177:5  <b>environment</b> 101:24  103:11  <b>equal</b> 140:12, 13  <b>equity</b> 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  <b>erased</b> 11:7  <b>especially</b> 142:23  <b>Esq</b> 2:3, 4, 5, 7, 8, 9,</p>	<p>11, 12  <b>essence</b> 60:21  <b>essentially</b> 68:16  115:7 161:20 204:15  237:15  <b>establish</b> 95:11  <b>established</b> 54:23  133:23 134:1 150:12  <b>establishing</b> 44:17  45:6  <b>Europe</b> 6:1  <b>event</b> 94:4 137:25  142:8 160:23  <b>events</b> 192:12  <b>eventual</b> 179:6  <b>eventually</b> 132:14, 22  204:14  <b>everybody</b> 19:8 22:2,  3 170:18 216:21  217:6  <b>everyone's</b> 188:12  <b>evidence</b> 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  <b>evidencing</b> 220:4  <b>evolution</b> 33:7  102:10 156:7 183:7  <b>evolve</b> 144:16 206:24  <b>evolved</b> 15:24 52:1  183:12 206:19  <b>evolving</b> 142:18  <b>exactly</b> 142:7 173:22  <b>Examination</b> 1:14  3:5, 6, 7 5:3 7:12</p>	<p>215:5, 8, 14 242:12,  15 248:5 249:12  <b>examined</b> 5:11 7:2  <b>example</b> 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  <b>exchange</b> 18:11  <b>exchanged</b> 12:16  25:22, 24 32:7 42:12,  14 207:2  <b>exchanges</b> 42:19  <b>exchanging</b> 26:5  127:16  <b>exclusive</b> 130:17  <b>exclusivity</b> 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  <b>executed</b> 40:17 130:7  <b>executives</b> 76:10, 11,  11  <b>exist</b> 11:5  <b>existed</b> 90:23  <b>existence</b> 117:10  234:9  <b>existing</b> 95:6 196:22  <b>exit</b> 46:4, 18 182:25  183:2  <b>expect</b> 217:22  <b>expectation</b> 128:12, 15  <b>expectations</b> 196:21  <b>expected</b> 77:25 93:13,  21 166:14, 22 188:11,  18 218:18  <b>experience</b> 193:8  205:24  <b>expired</b> 47:5 192:6  213:3 214:15  <b>explain</b> 210:7 222:5  236:25  <b>explains</b> 78:19</p>	<p><b>explanation</b> 246:18  <b>explicitly</b> 154:1  <b>explode</b> 211:22  <b>explore</b> 18:1 32:8  119:20  <b>exploring</b> 27:25  <b>express</b> 51:19 69:21,  25  <b>expressed</b> 51:22  159:25 204:25 245:3  <b>expressing</b> 157:18  195:5  <b>extend</b> 188:13  <b>extended</b> 163:4  211:17  <b>extending</b> 161:7  <b>extension</b> 161:3  211:19  <b>extensions</b> 110:21  111:3  <b>extensive</b> 15:15, 18  16:9  <b>extensively</b> 9:2 14:9  <b>extent</b> 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  <b>extraordinary</b> 233:18  <b>extrapolate</b> 158:17</p> <p>&lt; F &gt;  <b>FACE</b> 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</p>
--	---	--	--

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

## &lt; G &gt;

**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

## &lt; H &gt;

**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



<b>holdings</b> 107:23 108:7 130:25 136:4 <b>hole</b> 96:3 <b>Homberg</b> 8:2, 16 9:11 10:2, 5 <b>home</b> 235:10 <b>honest</b> 109:8 <b>honoured</b> 133:20 <b>hoovered</b> 237:16 <b>hope</b> 110:8 134:14 157:24 190:25 <b>hour</b> 156:14 195:18 <b>huge</b> 42:7 <b>hundreds</b> 235:9 <b>hurt</b> 81:23 <b>hypothetical</b> 152:2, 2, 7, 8 <b>hypothetically</b> 116:17 217:9 <b>hypotheticals</b> 150:5  < I > <b>ID</b> 112:2 <b>idea</b> 113:1 141:17 144:25 152:21, 23 230:21 238:19 243:20 <b>ideas</b> 200:1 <b>identify</b> 43:2 105:13 106:4 136:6 <b>if</b> , 81:14 <b>ignored</b> 86:13 <b>ii</b> 130:23, 24 <b>imagine</b> 80:19 112:17 <b>immediate</b> 237:13, 14 <b>immediately</b> 194:22 210:13 <b>imminently</b> 237:17 <b>impaired</b> 61:6 <b>imparted</b> 240:8 <b>impasse</b> 121:18, 25 123:7 <b>implementation</b> 45:18 <b>implied</b> 100:1 155:14 <b>imply</b> 148:1, 8 <b>implying</b> 54:4 <b>importance</b> 178:7 <b>important</b> 221:2 244:13	<b>imposed</b> 91:4, 15 <b>impossible</b> 179:4 <b>impression</b> 168:17 <b>improper</b> 118:23 119:19 233:16 245:1 <b>inability</b> 238:3 <b>inaccurate</b> 99:4 <b>inadvertently</b> 82:12 <b>inappropriate</b> 188:24 233:21 <b>incident</b> 7:22 17:2 <b>include</b> 18:20 60:25 63:12 78:16 92:18 102:13 <b>included</b> 12:10 30:23 31:12 55:16, 20 97:5 99:12 102:11 111:17 123:19 186:11 232:7 <b>includes</b> 46:18 163:11 166:12 <b>including</b> 12:23, 24 18:9, 11 27:19 82:15 167:7 <b>inclusion</b> 184:15 <b>inconsistencies</b> 189:12 <b>Incorporated</b> 131:1 136:4 <b>incorrect</b> 39:4 40:23 <b>increased</b> 149:3 <b>incumbent</b> 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 <b>incumbents</b> 46:8 47:6 138:6 149:9 171:6, 11, 12 172:1, 12 173:4 <b>incumbent's</b> 45:21 <b>independently</b> 122:11 <b>INDEX</b> 3:14 4:1, 9 <b>indicate</b> 51:5, 10 <b>indicated</b> 155:9 <b>indication</b> 23:16 143:15 <b>indicative</b> 208:24 <b>individual</b> 12:1, 2 104:20	<b>individuals</b> 25:20 52:10 75:18 232:10 234:12 <b>inducing</b> 135:7, 19 136:1 190:24 <b>industry</b> 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 <b>infer</b> 239:2 <b>inference</b> 123:3 208:11 <b>inferences</b> 12:18 238:9, 11, 24 <b>information</b> 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 <b>informed</b> 22:4 37:17 38:15 122:6 214:18 <b>In-House</b> 2:16 162:4, 7 <b>in-person</b> 34:11 <b>input</b> 244:2, 8, 12, 13 <b>inquiries</b> 98:13 185:10 223:1, 22 <b>inquiry</b> 31:5	<b>insight</b> 116:20 <b>insinuations</b> 119:17 <b>instance</b> 239:15 <b>instructing</b> 213:4 <b>instructions</b> 199:22 222:8, 21, 24 228:21 <b>integration</b> 141:20 <b>intelligence</b> 104:17 118:20 128:9 <b>intelligent</b> 145:3 147:12, 25 148:10 <b>intend</b> 178:16 238:25 <b>intending</b> 94:18 <b>intends</b> 208:13 <b>Intent</b> 25:1, 11 27:15 31:25 32:3, 11, 12 42:17, 22, 24 <b>intention</b> 10:20 78:16 <b>intentionally</b> 231:13 <b>interest</b> 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 <b>interested</b> 44:2 66:14 67:14 95:7 108:21 110:5 118:3, 5, 24 120:3 122:7 146:14 200:5 <b>interesting</b> 11:24 <b>interests</b> 23:24 24:13 <b>interim</b> 169:14 170:7, 9 178:18 <b>intermediary</b> 179:22 <b>internal</b> 83:23 95:22 102:25 103:4 188:10, 17 <b>internally</b> 53:7 95:20 151:2 212:15 <b>international</b> 6:2, 4 <b>interpret</b> 148:15 170:1 208:17, 18 <b>interrupt</b> 225:1 236:20 <b>interview</b> 11:25 12:4 <b>interviewing</b> 236:17 <b>interviews</b> 11:21 12:12 13:3
--	---	--	--

<b>invest</b> 9:23 10:20 15:17 19:2 22:7, 8 74:19 215:25 216:21 217:17, 19 242:21 <b>invested</b> 23:1 24:5 37:25 216:23 <b>investigations</b> 20:3 <b>Investing</b> 8:17 17:6, 21 74:10 216:1 <b>investment</b> 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 <b>investments</b> 20:10 21:14 23:23 164:5, 6 165:13, 17 196:22 218:17 <b>investor</b> 196:7 <b>investors</b> 19:9 164:21 165:3 196:5, 6 197:10 <b>invite</b> 33:3 <b>invited</b> 116:12 191:25 <b>involve</b> 238:2 <b>involved</b> 13:2, 5 76:2 81:20 103:12 119:3 121:21, 22 125:6 128:25 129:14 219:7 235:24 <b>involvement</b> 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 <b>involves</b> 83:20 <b>involving</b> 128:10 225:19	<b>issue</b> 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 <b>issued</b> 14:19 <b>issues</b> 7:19 75:20 119:24 142:25 160:22 161:4 195:22 <b>items</b> 78:1 171:9 196:20  < J > <b>Jacquart</b> 30:10 31:6 <b>James</b> 154:23, 25 174:25 <b>January</b> 24:24 <b>Jim</b> 30:14 36:4 72:23 <b>Job</b> 11:21, 25 12:11 <b>John</b> 120:16, 21 160:19 161:3 181:9 188:4 194:13 200:3 205:15 <b>join</b> 234:19 <b>joined</b> 6:10 <b>joint</b> 27:22 217:18 242:20 <b>Jonathan</b> 52:10 <b>Jones</b> 129:24, 24 130:3 161:10 <b>July</b> 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 <b>jump</b> 47:2 77:16 <b>June</b> 16:23 107:11, 11, 16 108:20 110:17 114:11 117:16, 17 123:12 146:8 226:12, 13 234:23 <b>jurisdiction</b> 49:10 <b>JUSTICE</b> 1:3  < K > <b>kept</b> 92:25	<b>key</b> 16:18 27:3, 6 57:23 61:12 101:13 238:7 <b>kicks</b> 114:6 <b>Kimberley</b> 2:21 249:3, 22 <b>kind</b> 57:14 62:12 105:21 129:6 136:9 164:25 <b>King</b> 1:16 <b>knew</b> 13:12 54:4 112:14, 15 120:10 132:9 153:6, 17 <b>knowing</b> 12:2, 21 37:8 38:3 101:19 144:15 206:17 <b>knowingly</b> 69:18 70:2 166:20 <b>knowledge</b> 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 <b>known</b> 16:17 23:2, 11 44:10 141:6 142:7 143:21 144:18 <b>knows</b> 207:15 <b>Kris</b> 2:8  < L > <b>Lacavera</b> 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 <b>Lacavera's</b> 15:5 77:23 82:15, 20 131:21 <b>lack</b> 81:22 238:6 <b>language</b> 92:15 111:18 167:19 <b>large</b> 85:1 <b>largest</b> 22:14 27:20 <b>Lastly</b> 155:14 <b>late</b> 174:24	<b>latest</b> 52:13 <b>Latin</b> 6:8 <b>lawyer</b> 120:22 184:8 <b>lawyers</b> 161:9 <b>Lax</b> 1:15 <b>lead</b> 52:10 161:9 209:13 <b>leak</b> 129:16 <b>leaked</b> 129:6 <b>learned</b> 190:15 191:21 <b>leases</b> 161:5, 18 <b>leasing</b> 65:1 <b>leave</b> 173:9 227:24 237:17 <b>leaving</b> 13:24 221:5 226:8, 9, 10 <b>led</b> 25:15 <b>left</b> 100:12, 20 101:10 111:13 125:5 127:17 141:7 163:8 232:23 237:20 240:23 <b>legal</b> 134:1 136:9 <b>lend</b> 179:8 <b>lender</b> 59:25 60:10, 15 61:13, 24 62:3, 22 63:3 <b>lenders</b> 95:6 179:8 <b>Letter</b> 25:1, 11 26:13 27:15 31:25 32:3, 11, 12 42:17, 22, 24 56:20 96:16 109:6 <b>letters</b> 95:17 <b>level</b> 16:15 19:6 20:19, 20 53:1 189:17 <b>levels</b> 182:10 <b>Levin</b> 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 <b>library</b> 15:16 <b>license</b> 156:19 <b>licensed</b> 45:21 <b>licenses</b> 68:2 92:19 <b>licensing</b> 155:11 <b>light</b> 126:25
---	--	--	---

<b>Lightner</b> 186:10 210:10, 16, 17, 25 <b>likes</b> 195:13 <b>limit</b> 132:6 156:22 186:25 231:3 <b>limitation</b> 90:15, 24 92:6 166:12 <b>limitations</b> 134:5 <b>limited</b> 9:2 19:6 92:3, 13 139:8 164:21, 24 215:23 217:2 236:20 <b>limiting</b> 167:7 <b>limits</b> 91:4, 15 169:7 <b>lines</b> 109:24 210:15 <b>linked</b> 79:20 <b>listed</b> 45:13 46:17 84:23 85:1 <b>listened</b> 29:9 <b>lists</b> 70:22 137:2 172:19 <b>Lisus</b> 1:16 <b>literally</b> 179:4 <b>litigation</b> 38:16 204:24 210:1 <b>Live</b> 2:15 101:24 102:19 <b>LLP</b> 1:16 <b>loading</b> 160:14 162:20 <b>loads</b> 97:21, 22 231:17, 18, 24, 24 232:13, 13, 15, 15 233:2, 2 234:15, 15 235:19, 19 <b>lobbyist</b> 157:6 <b>locate</b> 43:6 <b>Lockie</b> 75:9 76:16 136:7 214:9 <b>log</b> 224:2 <b>logged</b> 223:19 <b>LOI</b> 25:10 <b>long</b> 5:16 69:14 92:25 93:4 112:22 113:7 133:20, 22 158:24 169:24 199:3 218:19 <b>longer</b> 49:16 95:7 97:7 138:11 188:11,	18 204:22 230:24 <b>long-standing</b> 134:5 <b>looked</b> 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 <b>looking</b> 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 <b>looks</b> 74:3 110:11 <b>Lorne</b> 125:8 <b>lost</b> 191:19 <b>lot</b> 24:13 54:5 <b>lots</b> 15:1 <b>love</b> 103:17 <b>low</b> 200:14 <b>loyalty</b> 180:12, 14 <b>LPs</b> 20:21 <b>LTE</b> 139:3, 12, 14, 24 140:3 142:23 <b>lunch</b> 160:8 174:13, 15 <b>LUNCHEON</b> 160:9 <b>lying</b> 212:19  < M > <b>made</b> 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 <b>magnitude</b> 65:13 <b>main</b> 29:9 54:22 145:7 162:8	<b>maintain</b> 83:7, 22, 23 215:1 <b>major</b> 137:25 <b>making</b> 60:14 86:21 179:2 211:14 <b>manage</b> 199:25 <b>management</b> 52:14 53:16, 20 76:13 77:14 243:7 <b>managing</b> 5:8 65:11, 20, 24 228:19 <b>mandate</b> 56:21 236:15 <b>March</b> 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 <b>mark</b> 122:17, 20 129:4 <b>marked</b> 7:21 <b>market</b> 17:1 24:3, 5 46:14, 23 145:4 147:13 148:6, 7, 10 220:1, 2, 5 <b>markets</b> 6:6 59:25 <b>Martineau</b> 120:22 124:25 <b>material</b> 161:19 230:10 <b>materiality</b> 161:5, 17 184:2 <b>materially</b> 73:5, 11, 19 <b>materials</b> 11:9 12:9 137:11 201:22 232:2 233:11, 12 <b>mathematics</b> 6:16, 23 <b>matter</b> 91:21 127:4 174:8 200:14 216:3, 22 217:13 230:25 <b>matters</b> 41:24 111:22 137:7 <b>Matthew</b> 2:11 <b>MBA</b> 6:15, 19	<b>meaning</b> 30:13 41:5 71:5 167:1 177:21 182:24 214:9 <b>meaningful</b> 32:18 <b>means</b> 48:9 49:2 53:6 68:25 138:5 167:12, 13 175:9 208:8 216:8 <b>meant</b> 3:11 32:16 33:6 53:4 138:10 139:19 158:6 211:20 214:17 <b>measures</b> 98:11 <b>meat</b> 222:20 230:7, 12 <b>meet</b> 74:13 <b>meeting</b> 13:8 35:25 51:4, 9, 13 121:23 130:8 175:4 185:21 186:2 196:1, 13 197:16 <b>meetings</b> 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 <b>Melissa</b> 30:9 <b>member</b> 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 <b>members</b> 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 <b>memos</b> 10:25 14:6 <b>mentioned</b> 18:18 22:13, 20 30:1 62:1 63:10 98:10 107:21 129:2 192:3 220:25 <b>mentioning</b> 156:1 <b>mentorship</b> 20:24 21:5 217:4 <b>merchant</b> 6:4
--	--	---	---

<b>merge</b> 138:11, 20, 24 139:22 145:10, 18 147:6 <b>merger</b> 26:17, 23 <b>merging</b> 140:7 143:3 147:10 <b>met</b> 121:3 174:25 227:24 <b>methods</b> 11:10 <b>metrics</b> 86:4 <b>Michael</b> 186:10 210:10 <b>Michaud</b> 20:12 28:3, 7 30:16, 19 34:23 125:2 140:18 <b>M-I-C-H-A-U-D</b> 28:4 <b>middle</b> 52:4 205:13 <b>mid-May</b> 220:18 <b>million</b> 58:4 79:19 95:23 140:21, 25 141:1 142:1, 2 <b>Milne-Smith</b> 2:11 3:5, 7 5:3 8:20 9:5, 8 14:10, 12 19:18, 25 20:7 21:12, 19 23:18 24:9, 11, 17, 18, 22 25:5 26:8 29:21 30:8 31:9 33:15, 21 34:3, 10, 19 35:9 36:19, 21 38:14 39:2, 8, 14, 18 40:6, 25 41:7 42:11, 23 43:4, 8, 16 51:1, 3 55:7, 12, 15, 22 62:15 64:15 66:24 67:2, 8, 11 68:22 69:5, 10, 12 70:7, 15, 19 72:3, 4, 11, 14 73:22 74:1 75:22 78:22, 25 79:3, 8, 12, 17 82:19 83:21 84:3, 6 85:16 87:2, 8, 10, 21, 24 88:2, 10, 14 89:22 93:3, 8 95:15 96:4, 9, 14 97:18, 23 98:16, 24 100:10, 23 101:7 103:23 104:2 105:3, 12, 25 106:5, 12, 15, 23 107:6, 10 108:5 109:4, 13, 14, 19, 23 110:1, 4	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 <b>mind</b> 8:5, 24 35:4 148:15 <b>minimize</b> 183:25 <b>minimizing</b> 183:17 <b>minimum</b> 179:11, 15 205:22 216:13 <b>Minister</b> 177:4 <b>Minister's</b> 175:9 <b>minor</b> 161:16 <b>minute</b> 215:10 <b>minutes</b> 83:22, 23	84:2, 4 157:1 242:10 <b>misled</b> 180:21, 23 <b>misread</b> 71:21 <b>missed</b> 71:24 <b>missing</b> 183:22 <b>mistakenly</b> 82:12 <b>misuse</b> 237:14 <b>MMFG</b> 28:17 <b>Mobile</b> 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 <b>Mobilicity</b> 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 <b>Mobilicity's</b> 48:25 <b>model</b> 28:24 29:4, 6, 12 <b>Monday</b> 29:11 52:17 53:3 96:20 182:14 186:3 198:3 <b>monetize</b> 59:17 <b>money</b> 9:21 19:8 22:5 164:4 165:17 216:15 217:23 218:6, 18 <b>month</b> 94:5 163:4 205:23 224:3 <b>months</b> 141:13 142:8 152:21 153:2 205:21 206:13, 14, 17, 17 211:23, 25 <b>Moore</b> 177:4	<b>Morgan</b> 56:2, 4, 9, 21 66:6 121:1 124:24 245:25 <b>morning</b> 5:4, 7 30:2 194:5, 6 198:1 <b>motion</b> 230:13 <b>motivated</b> 210:25 <b>move</b> 94:2 96:6 206:9, 18 <b>moved</b> 6:3, 5 <b>moving</b> 56:13 236:13 <b>MOYSE</b> 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 <b>Moyse's</b> 20:2 29:14 38:11 96:11 97:2 104:5 123:16 220:4, 12 225:22 229:3, 12, 14
--	---	---	--

<p><b>multiple</b> 11:17 13:3 18:9 75:1 76:23 77:5 233:8 <b> mumbling</b> 166:18 <b>Musters</b> 232:19</p> <p>&lt; N &gt;</p> <p><b>nail</b> 239:12 <b>names</b> 122:5 <b>national</b> 43:22 44:8 46:13 <b>natural</b> 13:19 32:15 92:5 141:22 144:18 <b>nature</b> 91:8 119:21 146:11 228:16 240:3 242:3 <b>NDA</b> 31:22 32:14, 16, 20 33:18, 24 40:19 128:13, 18, 22 129:7 <b>necessarily</b> 62:10, 16 177:16 <b>necessary</b> 27:11 68:13, 16 205:23 <b>necessities</b> 142:21 <b>needed</b> 45:24 138:11, 24 144:22 182:9 <b>needing</b> 17:18 181:23 <b>needs</b> 93:13, 21 133:13 161:7 <b>Neeson</b> 2:21 249:3, 21, 22 <b>negative</b> 155:6 <b>negotiate</b> 158:2 <b>negotiated</b> 132:15, 22 142:19 202:20 203:12 204:22 <b>negotiating</b> 61:11, 12, 17, 21 101:17 180:19 189:23 190:9 193:18 195:3, 4 <b>negotiation</b> 62:13 92:6 100:2 153:8 211:8, 9 <b>negotiations</b> 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 <b>negotiator</b> 162:8 179:22 <b>neither</b> 65:15 82:1 241:7 <b>networks</b> 45:21 <b>New</b> 6:14 93:12, 20 137:22 138:6 142:11 247:1 <b>news</b> 170:18 <b>newspaper</b> 146:3 147:4 <b>Newton</b> 30:13 36:4 72:23 <b>nice</b> 197:3 <b>Nicholson</b> 154:23, 25 155:14 157:15 174:25 176:13 177:3 <b>nodding</b> 58:16 <b>non-Canadian</b> 14:21 <b>non-disclosure</b> 31:17 40:17 <b>non-incumbent</b> 16:25 <b>non-public</b> 23:23, 24 <b>non-starter</b> 184:17 <b>note</b> 43:13 88:3 158:8 <b>notebook</b> 83:15 <b>notebooks</b> 83:7, 11, 15 <b>noted</b> 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 <b>notes</b> 65:17 83:9, 18 84:1 104:6, 19 215:4 224:24 249:15 <b>notice</b> 58:11, 13, 18 96:11 97:8 163:11 <b>notification</b> 11:8 192:1 <b>notifications</b> 90:10 <b>notion</b> 114:5</p>	<p><b>notwithstanding</b> 111:8 131:16 177:15 <b>November</b> 110:15 163:1 <b>NSI</b> 10:2, 6 <b>NSINV</b> 8:3 9:11 <b>number</b> 24:25 26:14 85:8 89:25 90:4 137:20 143:4 202:8, 9, 9 <b>numeral</b> 115:6, 7 130:24</p> <p>&lt; O &gt;</p> <p><b>Oak</b> 121:13 <b>Oakhill</b> 121:14 122:5 128:10 <b>objections</b> 249:11 <b>obligation</b> 68:15 136:9 <b>obligations</b> 70:10 84:16 92:16, 17 133:21 180:13 191:10, 14 <b>obliged</b> 218:6 <b>observer</b> 145:4 147:13, 25 148:10, 14 <b>obsession</b> 168:15 <b>obtain</b> 27:11 62:1 68:16, 24 69:7 164:20 <b>obtained</b> 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 <b>obtaining</b> 68:10 69:19 70:4 99:2 150:18 151:4 152:10 166:14, 23 <b>obvious</b> 134:15 240:17 <b>occasion</b> 23:22 85:24 <b>occasionally</b> 233:25 <b>occasions</b> 155:20 227:24 <b>occur</b> 242:25 <b>occurred</b> 119:23</p>	<p>150:6 <b>occurring</b> 243:21 <b>October</b> 14:18 <b>offer</b> 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 <b>offered</b> 188:12 <b>offers</b> 186:9 <b>office</b> 114:7 175:1, 10 176:25 223:20 <b>officers</b> 11:18 83:3 85:20, 23 <b>offices</b> 1:15 126:10 <b>official</b> 155:2 175:2 <b>offside</b> 14:21 <b>old</b> 98:5 <b>one-month</b> 110:21 111:3 <b>ones</b> 94:10 131:14 153:24 154:1 163:24 225:11 <b>one-third</b> 16:3 23:13 <b>ongoing</b> 47:12 80:14 137:5 172:20, 21 176:25 208:14 <b>ONTARIO</b> 1:2, 17 <b>onward</b> 97:12 <b>open</b> 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 <b>opening</b> 35:4 158:7 <b>openly</b> 29:24 38:3 217:6 <b>operate</b> 46:23 166:7 <b>operation</b> 156:20 <b>opinion</b> 61:16 <b>opinions</b> 57:11 244:17 <b>opportunities</b> 13:9 <b>opportunity</b> 19:1 <b>opposed</b> 32:14 105:23 175:17 <b>option</b> 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

&lt; P &gt;

**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 <b>Plaintiff</b> 1:7 2:3 <b>plan</b> 33:1, 2 52:14 138:1, 19, 21 148:5 174:2 177:21 182:13 186:1 242:17 <b>planning</b> 95:2 <b>plans</b> 115:9, 20 138:22, 23 144:16 169:16, 18 170:4, 5 <b>play</b> 101:19 152:22 <b>played</b> 85:19 <b>player</b> 16:19 59:23 <b>playing</b> 58:19 <b>pleaded</b> 230:15 <b>pleadings</b> 136:1 <b>ploy</b> 193:18 <b>plus</b> 212:16 <b>PM</b> 177:4 <b>PMO</b> 175:6, 8 <b>poaching</b> 238:19 <b>point</b> 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 <b>pointed</b> 142:22	<b>pointing</b> 173:25 238:23 <b>points</b> 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 <b>policy</b> 44:7, 10 137:12 175:7 <b>poorly</b> 150:23 <b>portfolio</b> 28:19 76:13 <b>portion</b> 230:16 <b>position</b> 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 <b>positioned</b> 59:14 <b>positioning</b> 177:13 179:20 <b>positions</b> 12:23 76:5 183:24 184:1 204:25 <b>possession</b> 126:22 225:10, 12 227:11 <b>possibility</b> 174:1 <b>possible</b> 74:13 223:14 237:21 <b>Post</b> 146:4, 9, 13 <b>postponed</b> 186:5 <b>post-secondary</b> 5:22 <b>potential</b> 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 <b>potentially</b> 17:6 44:2 83:3 120:2 123:19	134:3 221:1 243:11 <b>power</b> 69:7 <b>PowerPoint</b> 36:1 39:6 104:7 218:24 219:10, 18 <b>powers</b> 49:14 <b>practical</b> 216:3 217:13 <b>practice</b> 39:21, 25 245:14 247:18 <b>precedent</b> 70:10 <b>preceding</b> 234:22 <b>precise</b> 32:23 <b>precisely</b> 92:22 191:19 192:7, 10 <b>preconditions</b> 184:22 185:1 <b>predetermined</b> 60:22 <b>predominant</b> 183:3 <b>pre-established</b> 86:5 <b>preparation</b> 234:18 <b>prepare</b> 36:10 <b>prepared</b> 26:15 35:12 37:23 42:4 77:19 79:6 92:24 101:16 102:1 179:18 <b>PRESENT</b> 2:15 208:14 <b>presentation</b> 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 <b>presentations</b> 38:22 39:22 101:22 102:3, 6, 7, 9 151:6 154:2 156:5 178:8 <b>presented</b> 36:1 38:18 59:19 140:7, 14 176:2 <b>presenting</b> 189:12 <b>presently</b> 171:1 <b>preserve</b> 230:22 <b>preserved</b> 91:9	<b>press</b> 119:1 129:3 137:11 <b>presumably</b> 112:16 245:7 <b>presume</b> 25:12 <b>pretty</b> 16:6 66:19 129:8 194:12 223:6 230:11 <b>prevent</b> 69:19 70:3 80:25 81:11 166:14, 22 <b>previous</b> 7:2 25:7 26:1 49:9 53:25 55:10 60:23 106:9 111:15 133:10 155:20 178:8 <b>previously</b> 32:6 <b>price</b> 57:9, 19 141:22 142:11 143:9, 19 <b>pricing</b> 57:22 <b>primarily</b> 57:10 60:6 <b>Prime</b> 175:9 <b>principal</b> 65:6, 21 154:19 <b>principally</b> 125:6 <b>principals</b> 65:9 75:13 76:2, 4 85:19 86:22 136:6 <b>prior</b> 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 <b>prioritize</b> 13:10 <b>private</b> 6:5 245:2 <b>privilege</b> 109:12 228:21 <b>privy</b> 102:25 175:1 <b>problem</b> 48:19 86:11 195:20 200:12 245:16 247:8, 19, 21 <b>problems</b> 195:23 <b>procedural</b> 99:21 <b>procedures</b> 49:7 222:14 <b>proceed</b> 99:1 149:24 150:2, 8, 17 151:18 152:16 157:5 244:6 <b>proceeded</b> 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><b>rely</b> 199:4 208:23 214:23 232:20, 21, 21 <b>relying</b> 199:1 240:1 <b>remain</b> 76:8 95:7 <b>remained</b> 133:1 <b>remember</b> 181:22 191:18 192:7, 10, 14 199:8 <b>reminder</b> 154:18 <b>remotely</b> 223:15, 19 224:2 <b>remove</b> 223:7 <b>reopen</b> 211:7, 9 <b>repeat</b> 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 <b>replied</b> 161:4 <b>replies</b> 53:10, 13 156:14 200:4 <b>reply</b> 63:17 200:4 <b>REPORTED</b> 2:21 <b>Reporter</b> 249:4, 24 <b>REPORTER'S</b> 249:1 <b>reporting</b> 147:4 249:21 <b>reports</b> 177:3 <b>represent</b> 42:2 <b>representatives</b> 91:25 119:9 121:4 <b>request</b> 33:2 54:3 55:2 61:12 74:7, 15 85:25, 25 86:21 167:13 171:9 201:3 211:4 <b>requested</b> 39:6 81:9 156:2 157:20, 24 160:2 183:10, 21 231:18 <b>requesting</b> 178:10 <b>requests</b> 3:16 4:3, 11 28:17 86:8, 13, 14 87:4 167:16 <b>require</b> 26:23 27:2 153:13 165:18 <b>required</b> 59:16 68:24 115:10 166:15, 24</p>	<p>168:23 204:16, 22 206:2 216:15, 21 <b>requirements</b> 46:17 59:9 <b>Requires</b> 45:14 65:20 <b>Resbech</b> 31:16 <b>research</b> 16:10 <b>reseller</b> 156:20 175:23 <b>reserve</b> 143:9 <b>resignation</b> 96:11, 15 221:17 224:3 226:19 229:13, 14, 17 <b>resigns</b> 13:23 <b>resources</b> 9:18 <b>respect</b> 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 <b>respected</b> 133:22 190:17, 19 <b>respecting</b> 133:25 190:14 <b>respond</b> 198:13 <b>response</b> 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 <b>responses</b> 54:20 <b>responsibility</b> 19:1 162:5 <b>responsible</b> 25:20 125:16 <b>responsive</b> 203:16 <b>rest</b> 11:1 44:20 45:8 <b>restriction</b> 115:15, 19 133:8 <b>restrictions</b> 46:5, 19 100:13, 21 101:11 134:1 149:9 207:14 <b>result</b> 11:9 15:18 76:25 77:6 138:3 153:1 224:13 243:10 244:17 <b>resulted</b> 11:7 100:1 244:5</p>	<p><b>RESUMING</b> 70:18 128:6 160:10 215:13 <b>retail</b> 161:5, 17 <b>return</b> 179:11, 15, 19, 24 180:25 <b>reveal</b> 228:21 <b>revealed</b> 236:9 <b>review</b> 34:17 48:2 71:18 73:7 75:25 76:18 142:18 166:2 210:17 225:6 237:19 <b>review,</b> 54:3 <b>reviewed</b> 29:8 54:6 183:19 225:9 <b>reviewing</b> 215:3 236:13, 14 <b>revised</b> 87:13 89:13 130:7 <b>revisions</b> 87:14 89:14, 19 <b>Riley</b> 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 <b>risk</b> 183:17, 25 200:1, 15 211:2 <b>road</b> 155:17, 21 <b>roaming</b> 171:14 172:22 <b>Robert</b> 2:7 <b>Rocco</b> 2:5 <b>Rogers</b> 7:15 <b>role</b> 78:1 83:2 221:12 <b>roles</b> 85:18 <b>Roman</b> 115:6, 7 130:24 <b>Rona</b> 8:2 9:10 10:1, 5 <b>room</b> 41:2, 3, 20, 22 53:18 102:19 <b>Roughly</b> 22:18 <b>round</b> 223:5 <b>RPR</b> 2:22 249:3, 22 <b>RSA</b> 2:22 249:23 <b>running</b> 6:9</p>	<p><b>Russell</b> 129:23  &lt; S &gt; <b>safe</b> 43:25 <b>safely</b> 7:9 <b>sake</b> 122:15 <b>sale</b> 27:10 46:8 47:6 48:16 49:2, 5 115:9, 21 176:14 <b>samples</b> 7:21 8:1 9:10 105:6 <b>Saratovsky</b> 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 <b>Saratovsky's</b> 189:16, 20 <b>sat</b> 196:25 <b>satisfied</b> 46:7 91:8 150:13 152:9 <b>satisfy</b> 87:15 <b>schedules</b> 162:14 185:6 <b>Scheschuk</b> 75:4, 5 136:6 214:9 <b>school</b> 6:13, 14, 16 <b>science</b> 6:17, 23 <b>scope</b> 9:3 102:19 173:22 <b>scroll</b> 7:25 8:13 246:5 <b>scrubber</b> 238:23 <b>searches</b> 98:1 <b>seconds</b> 73:7 <b>secret</b> 145:10, 12 <b>section</b> 70:9 90:5 131:14 137:18 <b>secured</b> 22:15 <b>securities</b> 9:22 10:18 <b>security</b> 240:2 <b>seek</b> 168:18 169:8 170:13 178:17 179:17 193:11 <b>seeking</b> 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  
**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  
**Spectrums** 140:12  
**speculating** 122:21 153:22, 25  
**speculation** 119:2, 4, 6 120:5, 12 122:9 129:3, 19, 20  
**spend** 9:18, 20 10:14, 19 140:25  
**spending** 141:1 142:1, 2  
**spent** 126:8  
**spoke** 124:25 182:18 204:3  
**spoken** 241:20  
**spoliation** 230:7, 11, 17 231:3 236:22 237:4 239:9, 9, 12, 13, 14, 16, 18 240:4  
**stake** 50:7  
**stakeholders** 81:24  
**stand** 102:1, 4  
**stand-alone** 50:1, 15, 18, 20 59:23 77:20 108:14 140:22 142:19, 20, 20 144:22 146:15  
**Standing** 25:11  
**Stanley** 56:2, 5, 9, 21 66:6 121:1 124:25 246:1  
**start** 19:12 52:16 53:3 56:14, 17 67:9 189:9 214:19  
**started** 5:24, 25 17:23 18:1 41:24, 25 52:19, 25 123:12  
**starting** 8:15 33:8 170:2 172:21 184:9  
**starts** 52:3 57:5, 5 74:2 90:5 117:17 177:11 185:15 199:13 230:21  
**state** 5:5  
**stated** 80:13  
**statement** 76:22 93:22 229:22 230:16  
**statements** 80:9

137:12 230:10  
**states** 26:14  
**status** 81:2 196:17, 21, 22 220:23  
**stay** 218:18  
**stayed** 218:19  
**stenographically** 249:12  
**step** 63:13 107:1 209:23  
**steps** 32:25 68:16, 23 98:8 168:23 223:7 231:1  
**Stern** 6:14  
**stick** 55:5  
**stop** 50:15  
**stops** 97:5  
**straight-up** 155:8  
**stranded** 156:17  
**strategic** 27:19  
**strategies** 21:1 37:17 38:1 124:1  
**strategy** 23:17 41:12, 15 47:11 50:15 73:4, 10, 18 76:1 141:20 142:14, 17  
**Streaming** 2:15  
**Street** 1:17  
**strict** 148:25 149:13  
**strike** 240:16  
**strong** 152:23  
**structure** 15:20 16:11, 18 17:15 33:6 45:25 60:25 213:19  
**structured** 59:9 63:11  
**structuring** 213:20  
**studied** 14:16  
**studies** 6:16, 20  
**style** 195:13  
**subheading** 71:3  
**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  
**sub-paragraph** 170:21  
**subscriber** 146:24  
**subscribers** 85:8

**Subsequent** 42:21 43:1 198:12  
**subsequently** 225:11  
**subsidiaries** 131:3, 24 132:2, 10, 25 133:19 136:5  
**substantial** 94:24  
**substantially** 162:13  
**substantive** 31:24 32:2 43:2  
**substituted** 246:19  
**successive** 110:21 111:3  
**sufficient** 95:11  
**suggest** 158:24 159:12, 19 225:20 226:17  
**suggesting** 10:4 187:7, 8 199:6 230:15  
**suggestion** 9:25 159:19, 21 216:9 237:4  
**suggests** 201:15 220:11  
**suitable** 32:19  
**sum** 208:22  
**summarize** 197:25 198:10  
**summarized** 198:2, 16  
**summarizing** 175:4  
**summation** 51:1  
**SUPERIOR** 1:3  
**support** 50:7 117:10 132:15, 24 181:18, 23 182:3  
**supposed** 160:24  
**surprise** 235:2  
**surrounding** 194:12  
**suspect** 58:18 112:19 208:22  
**suspicious** 118:6  
**swearing** 113:10  
**swore** 35:11  
**SWORN** 5:2 37:7, 9, 12 102:24  
**system** 233:11 245:17  
**Systems** 249:5

**table** 48:8, 14 64:17, 24 77:16 122:1, 2  
**table, 49:24**  
**tailored** 16:18  
**tainted** 193:19  
**takes** 64:17, 24  
**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  
**talked** 12:25 22:20 57:2 69:15 84:7, 8 85:17 145:15 181:18, 20, 22  
**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  
**talks** 43:21 50:6 172:22 184:14  
**target** 185:25  
**tautology** 197:3  
**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  
**teams** 13:1 76:13  
**team's** 9:20 104:11  
**technology** 139:2  
**telecom** 29:15 107:15 108:25 130:25 131:23 132:1, 9, 16,

&lt; T &gt;

25 133:18 136:4  
146:21  
**Telecommunications**  
16:24  
**tells** 200:15  
**Telus** 7:16 48:16  
49:1, 2, 3, 20  
**Tennenbaum** 120:2  
121:13 122:5 128:10  
186:16, 18 187:2  
**tense** 134:11  
**tenure** 123:17  
**term** 138:5 201:9, 10  
**terminated** 226:12, 20  
232:14  
**termination** 229:2  
**terminology** 7:13  
15:1 164:10 226:9  
**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  
**territories** 140:2, 12  
**test** 177:18, 19, 20  
**testify** 113:24  
**testimony** 37:7, 10, 13  
249:10  
**text** 110:13  
**theoretically** 80:21  
82:11  
**theory** 81:22 239:20  
**thereabouts** 14:19  
**therefrom** 215:7  
**thereon** 57:11  
**thing** 117:6 158:24  
206:21 239:11  
**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  
**thinking** 21:1 38:3  
104:13 243:6  
**third** 28:14 40:7  
45:20 58:6 61:1, 5

67:13 90:9 148:23  
176:12  
**thought** 30:15  
174:14 190:11  
**three-and-a-half-week**  
123:17  
**thresholds** 161:17  
**throwing** 62:12  
**tied** 12:25 156:13  
**ties** 58:23  
**tight** 40:12 86:15  
**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  
**timeframe** 86:15  
119:11 192:9  
**timeline** 54:3 181:10  
**times** 55:3 188:21  
**timing** 167:21 183:7  
195:23 197:14 210:7  
211:18  
**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  
**told** 63:18 64:1  
96:23 123:25 140:18

143:7 146:13 177:8  
180:24 188:17 233:1  
240:19 241:16  
244:19  
**Tom** 8:10  
**tomorrow** 196:1  
**Tony** 8:11 23:25  
80:19  
**top** 43:21 48:20  
66:4 158:20 195:19  
212:7  
**topic** 166:1  
**Toronto** 1:17  
**total** 16:3  
**totality** 208:22  
**touch** 38:6 124:7  
**touched** 39:11 103:12  
**tough** 158:17  
**tower** 171:14 172:23  
**track** 109:10  
**tracked** 111:15  
**traction** 121:12  
123:1, 4, 20, 22  
**traffic** 223:7  
**training** 20:17 21:5  
**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  
**transaction,** 48:24  
**transactions** 15:24  
52:1 68:14 167:24  
222:12 234:8  
**transcribed** 249:13  
**transcript** 202:4, 10  
249:15  
**transfer** 49:5 59:6  
64:10 94:13 149:1, 8,  
17 155:10 156:18

172:25 178:3, 17  
179:17  
**transferability** 179:6  
**transferrable** 179:2,  
14  
**transferred** 49:14  
**translate** 149:11  
**translates** 148:7  
**transmitted** 106:18,  
19, 20  
**transparency** 217:3  
**transparent** 20:25  
**transpired** 232:19  
**treading** 109:11  
**trial** 106:1 135:24  
174:3 209:5, 9, 14, 16,  
17 214:23 230:25  
232:21  
**trouble** 128:23  
**troubling** 189:11  
**true** 93:22 180:17  
193:18 195:7, 10  
249:14  
**Trust** 6:1 189:22, 24,  
25 212:12, 14, 16  
**trusting** 200:13  
**truth** 61:15, 21 62:10,  
11  
**truthful** 61:15  
**trying** 60:24 78:20  
105:23 106:10  
119:20 135:12  
151:10 171:21  
184:22, 25 188:22  
239:12  
**Turgeon** 31:16 52:5,  
9 53:10, 13  
**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  
**turnaround** 6:9  
**turned** 158:12  
**turns** 185:20  
**two-month** 206:8, 22  
210:22 211:13, 16  
**two-thirds** 16:2 55:25  
**type** 59:11, 18 62:7,

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