

In the Matter Of:
The Catalyst Capital Group Inc. v.
Brandon Moyse et al

MARTIN MUSTERS
May 19, 2015

neelsons

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Court File No. CV-14-507120

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendant

--- This is the Cross-Examination of MARTIN MUSTERS, on
his affidavits sworn February 15, April 30, and May 13,
2015, taken at the offices of Davies Ward Phillips &
Vineberg LLP, 40th Floor, 155 Wellington Street West,
Toronto, Ontario, on the 19th day of May, 2015.

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

2

3 Andrew Winton, Esq. for the Plaintiff.

4

5 Kristian Borg-Olivier, Esq. for the Defendant
6 Brandon Moyse

7

8 Matthew Milne-Smith, Esq. for the Defendant
9 & Andrew Carlson, Esq. West Face Capital
10 Inc.

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12 REPORTED BY: Terry Wood, RPR, CSR

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I N D E X

WITNESS:

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MARTIN MUSTERS

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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 REFUSALS

The questions/requests refused are noted by R/F and appear on the following pages/lines: 46/11, 56/14.

INDEX OF UNDERTAKINGS

The questions/requests undertaken are noted by U/T and appear on the following pages/lines: None.

INDEX OF UNDER ADVISEMENTS

The questions/requests taken under advisement are noted by U/A and appear on the following pages/lines: 45/5.

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INDEX OF EXHIBITS

NUMBER/DESCRIPTION

PAGE NO.

None .

1 --- Upon commencing at 2:05 p.m.

2

3 MARTIN MUSTERS, SWORN;

4 CROSS-EXAMINATION BY MR. BORG-OLIVIER:

5 1 Q. Good afternoon, Mr. Musters.

6 A. Hi.

7 2 Q. You have sworn four affidavits in
8 this proceeding, I believe. And I can just walk you
9 through them just to make sure that we have them all.

10 A. Sure.

11 3 Q. There was one dated June 26, 2014,
12 which is attached as Exhibit A to your February 15,
13 2015, affidavit in your -- in Catalyst's motion record.

14 A. Yes.

15 4 Q. Then the second one is that
16 February 15, 2015, affidavit?

17 A. Uhm-hmm.

18 5 Q. And, subsequently, you put in an
19 April 30, 2015, affidavit?

20 A. Yes.

21 6 Q. And, most recently, just last week,
22 there was a short affidavit dated May 13th, 2015?

23 A. Yes.

24 7 Q. You understand, I take it,
25 Mr. Musters, that the purpose of these affidavits is

1 that they be used in a pending court proceeding?

2 A. Correct.

3 8 Q. That they will be reviewed by a
4 judge perhaps along with the transcript of your
5 cross-examinations?

6 A. I understand.

7 9 Q. And you understand, I take it,
8 that, among other things, on its most recent motion,
9 Catalyst is seeking a contempt order against Mr. Moyse?

10 A. I wasn't aware, but ...

11 10 Q. Okay. So I take it you are not
12 aware, then, that among the relief that Catalyst is
13 seeking is an order that Mr. Moyse be sent to jail?
14 That's not something you are aware of?

15 A. I was not aware of that.

16 11 Q. Okay. On the February 15, 2015,
17 affidavit, at tab F -- and I don't think it's necessary
18 that you turn this up unless you or your counsel would
19 like to -- you signed an acknowledgment of expert's
20 duty form. You're familiar with that form?

21 A. For sure.

22 12 Q. And I imagine you have signed it in
23 a number of different proceedings?

24 A. Correct.

25 13 Q. Even though this acknowledgment

1 form was not attached to all four of your affidavits, I
2 take it that this acknowledgment governs all your
3 affidavits and this cross-examination?

4 A. Absolutely.

5 14 Q. I don't propose to go to your CV
6 and talk about your experience, but I noted in your
7 cross-examination transcript from last summer your
8 evidence that you had been involved throughout your
9 career in something like 1200 or 1300 of these sorts of
10 forensic cases. Is that about right?

11 A. We -- as a company, we do 3 to 400
12 cases a year, so, yes.

13 15 Q. And that number probably has gone
14 up since last summer?

15 A. Yes.

16 16 Q. And what you said at the time, and
17 I take it it remains true, is that probably half of
18 those cases would generally fall into this type of
19 litigation, namely, civil litigation involving some
20 sort of forensic analysis of computers?

21 A. Hmm, just to clarify, probably a
22 little more slanted towards criminal investigations as
23 opposed to civil litigation, but both, I mean, equally
24 involving investigation, if I could use that word.

25 17 Q. Sure. In the acknowledgment of

1 expert's duty, you sign and you acknowledge that it's
2 your duty to provide opinion evidence that's fair,
3 objective, and nonpartisan, and I take it you
4 understand what those terms mean?

5 A. I understand what those terms mean.

6 18 Q. And you agree that means making an
7 effort to see both sides of the situation that you are
8 analyzing?

9 A. Absolutely.

10 19 Q. And when the facts point in a
11 particular direction, to state that the facts are in
12 that direction even though they may be contrary to, in
13 this case, the position of Catalyst?

14 A. I'm -- I just -- sorry, I missed
15 the last part of your question, but if the -- if my
16 answer is I acknowledge that I'm fair and impartial
17 regardless of where the facts -- sorry, regardless of
18 whose side I'm working on -- I do work for the Crown, I
19 do work for defence counsel -- I understand very
20 clearly the need to be -- to give fact-based evidence
21 and to help the Court understand what I would consider
22 sometimes difficult concepts from a Court's
23 perspective. I mean no disrespect to the Court by
24 saying that.

25 20 Q. I think the lawyers would have

1 equivalent difficulty, I'd have to say. But I think
2 the point here is just that, when the facts point in a
3 direction different from the position of the party that
4 retained you, it's not your duty to hide those facts or
5 run from those facts; you acknowledge them and they
6 form a part of your opinion?

7 A. Absolutely.

8 21 Q. A couple of additional propositions
9 that I will put to you which don't arise out of the
10 acknowledgment of expert's duty but may be
11 noncontroversial. I take it you'd agreed with me,
12 Mr. Musters, that it is important when preparing an
13 affidavit to be clear and precise in the language of
14 your affidavits?

15 A. I agree with that.

16 22 Q. And, in part, that's because the
17 Court will review these affidavits and will need to
18 understand what it is that you are saying?

19 A. Clearly.

20 23 Q. And the Court may rely on your
21 affidavit evidence to reach a finding, including, in
22 this case, for example, to send somebody to jail?

23 A. I've certainly been involved in
24 many situations where -- on the criminal side, you
25 could imagine --

1 24 Q. Exactly.

2 A. -- that's exactly the case.

3 25 Q. And it's important as well in
4 arriving at your conclusions or your findings to be
5 careful and thorough?

6 A. Absolutely.

7 26 Q. And not to reach conclusions rashly
8 or without due care?

9 A. I agree.

10 27 Q. And, finally, this is language that
11 I found in a brochure online advertising a talk that
12 you were giving, and it said that you strive to let the
13 evidence tell the story, and I take it that continues
14 to be something that governs your approach to these
15 kinds of cases?

16 A. Absolutely.

17 28 Q. Can we turn up, please, the
18 February 15, 2015, affidavit, which is at page 23 of
19 the Catalyst motion record. That's tab 2.

20 A. Yes.

21 29 Q. So you had previously, as you note
22 in paragraph 4, been retained by Lax O'Sullivan in
23 connection with this matter?

24 A. Yes.

25 30 Q. And, initially, as you note in

1 paragraph 4, among the tasks that you were asked to
2 conduct was a forensic analysis of the desktop computer
3 that had been used by Mr. Moyse?

4 A. Yes.

5 31 Q. And in or around this time of
6 mid-February, 2015, or I presume in the weeks leading
7 up to it, you were contacted again by Lax to conduct
8 different and further analysis and perhaps prepare
9 another affidavit?

10 A. Hmm ...

11 32 Q. And I should be clear. I'm not
12 getting into any technical question of when you were
13 retained or anything like that. The point is just
14 that, as the matter developed, you were asked to review
15 some further information and provide further opinion
16 evidence?

17 A. I'm -- forgive me, I'm just trying
18 to go through the steps. Clearly, I was retained by
19 Lax; yes, I imaged a computer that belonged to Brandon
20 Moyse when -- not trying to be evasive at all. I just
21 don't recall the specific --

22 33 Q. Okay.

23 A. Andrew and I have had communication
24 with respect to things, so I can't give you a date off
25 the top of my head.

1 34 Q. That's fine. Maybe I can place it
2 in time this way. You will recall that, prior to you
3 swearing this affidavit, you were provided a copy of a
4 draft ISS report?

5 A. Let me just think. Yes, yes. Yes,
6 yes. Yes, yes, yeah.

7 35 Q. Let me put it this way. Why don't
8 we go to paragraph 9 of your affidavit so there is no
9 mystery in all this, because it's not meant to be
10 difficult.

11 A. Yes, yes.

12 36 Q. So at paragraph 9, you note that:
13 "This affidavit concerns information
14 set out in paragraphs 44 to 48 the draft
15 ISS report."

16 Do you see that?

17 A. Yes.

18 37 Q. Okay. So in leading up to your
19 swearing of this affidavit, at paragraph 5, you note
20 that you reviewed the order of Justice Firestone and
21 the order Justice Lederer. Do you see that?

22 A. Yes.

23 38 Q. And you recall doing that?

24 A. Yes.

25 39 Q. Paragraph 6, you make mention of

1 the document review protocol, the DRP.

2 A. Yes.

3 40 Q. That's something that you reviewed
4 as well?

5 A. Yes.

6 41 Q. And, finally, at paragraph 7, you
7 note the draft ISS report dated February 1, 2015. And
8 you recall reviewing that?

9 A. Yes. And, just for the record,
10 forgive me. I didn't realize we were looking at
11 February 15th affidavit as opposed to the one in June.

12 42 Q. Understood.

13 A. So, yes.

14 43 Q. Okay. So was there anything else
15 besides the documents that you have set out here that
16 you reviewed in preparation of this affidavit?

17 A. Not that I can recall at this time.

18 44 Q. And I take it you were taking
19 instructions in regards to this affidavit from
20 Mr. Winton or one of his colleagues?

21 A. Well, I remember the ISS was
22 Mr. Neijenhuis -- Brendon. Let's call him "Brendon".

23 45 Q. Well, "Brendon" might not be the
24 best one since we've got Brandon Moyse, so why don't we
25 just call it the ISS.

1 A. The ISS, yes. So I recall a few
2 conversations with the ISS as well.

3 46 Q. Okay. But in terms of where your
4 instructions were coming from, I take it those
5 continued to come from Lax O'Sullivan? In other words,
6 it wasn't the ISS who contacted you and said,
7 Mr. Musters, we need you to prepare another affidavit?

8 A. No.

9 47 Q. That was Lax?

10 A. That was Lax.

11 48 Q. Okay. And I'd like you to tell me,
12 if you would, what your instructions were. What were
13 you asked to do in this portion of your retainer?

14 A. Okay. Let me reflect on that for a
15 minute.

16 49 Q. Please do.

17 A. Sorry, I'm just trying to be
18 thoughtful in the response.

19 50 Q. No rush at all.

20 A. I'm going by recollection, so my
21 recollection was that the draft ISS report included a
22 mention by -- is it DEA?

23 MR. WINTON: DEI.

24 THE WITNESS: DEI. So we will call them
25 DEI?

1 BY MR. BORG-OLIVIER:

2 51 Q. Yes.

3 A. Included a mention of a program
4 called Secure Delete, and if I recall, my instructions
5 were what information can I give with respect to this
6 program; and can I tell how the program works; and if
7 anyone deleted documents using that program or how the
8 program works or how it relates to the deletion of
9 documents.

10 52 Q. Okay. At paragraph 11 of your
11 affidavit, you talk about downloading the Advanced
12 System Optimizer 3 software and installing it on your
13 personal computer. I will refer to that as the ASO
14 software, okay?

15 A. Sure.

16 53 Q. I take it this is the first time
17 that you had occasion to use the ASO software?

18 A. That is correct.

19 54 Q. So at paragraph 12 and at
20 paragraph 13 -- and you are obviously welcome to read
21 those paragraphs -- when you make reference to your own
22 experience using the software and using the Secure
23 Delete feature, you are talking specifically about the
24 investigations you did in connection with this retainer
25 and not any sort of experience that you had coming into

1 the retainer?

2 A. Your statement is correct with
3 respect to the ASO program.

4 55 Q. Yes. I understand you are
5 obviously bringing to bear your various forensic skills
6 and experience, and I'm not suggesting that wasn't the
7 case.

8 A. Right.

9 56 Q. And you mentioned what your
10 instructions were and, I take it, from looking at
11 paragraphs 12 and 13, that one aspect of your inquiry
12 was looking into the fact that there was a Secure
13 Delete folder found on Mr. Moyse's computer?

14 A. That was mentioned in the ISS
15 report/D ...

16 57 Q. DEI?

17 A. -- DEI.

18 58 Q. Right.

19 A. DEI had mentioned that, which the
20 ISS had mentioned in his report.

21 59 Q. Right. And among the things that
22 you were seeking to determine and that you report on
23 here at paragraphs 12 and 13 is the issue of how the
24 Secure Delete folder can end up on a user's computer,
25 correct?

1 A. Not only how but when and under
2 what circumstances.

3 60 Q. Right. I think the when was
4 covered in the ISS report, correct? It noted the time?

5 A. It did note a date and time, yes.

6 61 Q. Correct. So what you were
7 particularly tasked with, looking at these paragraphs,
8 is how? How and under what circumstances does a Secure
9 Delete folder end up on someone's computer?

10 A. I want to broaden that just
11 slightly in terms of -- you are correct, but I want to
12 broaden that slightly to not disclude -- that's a poor
13 choice of words. To not --

14 62 Q. Exclude?

15 A. -- exclude -- thank you. To not
16 exclude the when, because there has been an issue with
17 respect to last access dates and times, and so the
18 question in my mind as an investigator would be does
19 that date get updated, how does that date get updated,
20 and does the creation modified and last access dates
21 represent or tell us anything or not -- again, this is
22 an investigation in terms of how this program works --
23 with respect to at what points do these dates get
24 updated, created, and so on.

25 63 Q. Okay. I appreciate all that, but

1 now read paragraphs 12 and 13, if you would.

2 A. Yes.

3 64 Q. And, again, my question for you is
4 one of the critical things that you were investigating
5 and reporting on here was how/under what circumstances
6 does a Secure Delete folder end up on a user's
7 computer?

8 A. Correct.

9 65 Q. That was one of the focuses of your
10 inquiry?

11 A. That was one of the focuses, yes.

12 66 Q. Okay. And in paragraphs 12 and 13,
13 you were reporting on your findings in that regard?

14 A. Correct.

15 67 Q. And the reason this was important
16 is because the ISS had identified that Secure Delete on
17 Mr. Moyse's computer and everybody was wondering what
18 implications could be drawn from that fact?

19 A. I can't speak to everyone, but,
20 yes, I wanted to understand what implications could be
21 drawn from that fact, yes.

22 68 Q. Okay. And in paragraph 12, you
23 refer to your own experience, but you would agree with
24 me that you don't set out here in a step-by-step basis
25 what it was that you did to draw the conclusions that

1 you report on in these paragraphs, correct?

2 A. I didn't set out in a step-by-step
3 basis in this affidavit, no.

4 69 Q. Okay. But the conclusion that you
5 reach at the end of paragraph 12 is that a Secure
6 Delete folder is only created -- and I will quote this:

7 "Only created when a user runs the
8 Secure Delete feature to delete a file
9 or folder from his computer."

10 That was the conclusion that you
11 reached, correct?

12 A. Can you just show me that in
13 which -- where you are reading.

14 70 Q. Sure. I'm reading from the last
15 sentence in paragraph 12.

16 A. Yes.

17 71 Q. And at paragraph 13, you say, based
18 on your experience using the software:

19 "There is no other explanation as to
20 why a Secure Delete folder would be
21 created on Moyse's personal computer on
22 that date."

23 Other than, as you say at the first part
24 of the paragraph, that someone using that computer
25 deleted one or more files or folders beginning at

1 8:09 p.m. That was the conclusion that you drew?

2 A. That is correct.

3 72 Q. And the conclusion at paragraph 13,
4 I take it, with respect to Mr. Moyse's actions follows
5 naturally from the conclusion at paragraph 12? In
6 other words, if a Secure Delete folder only appears
7 when a user uses the program to delete a file or
8 folder, then the presence of such a folder on
9 Mr. Moyse's computer can only mean that he used the
10 software to delete files or folders. Is that a fair
11 reading?

12 A. Can you -- forgive me, can you
13 repeat it.

14 73 Q. Sure.

15 A. Because there's one little piece in
16 there that I didn't know if I wanted to comment on.

17 74 Q. So at paragraph 12 --

18 A. Yeah.

19 75 Q. -- we have got a conclusion that
20 the folder is only created when Secure Delete is used
21 to delete files and folders?

22 A. Correct.

23 76 Q. Paragraph 13, we've got a
24 conclusion that someone using Mr. Moyse's computer
25 deleted files and folders?

1 A. Correct.

2 77 Q. And I'm saying that the conclusion
3 at paragraph 13 flows naturally from the conclusion at
4 paragraph 12?

5 A. Correct.

6 78 Q. Okay. And my question for you,
7 Mr. Musters, is do you stand by, sitting here today,
8 the conclusion in the last line of paragraph 12,
9 namely, that a Secure Delete folder is only created
10 when a user runs the Secure Delete feature to delete a
11 file or folder from his computer?

12 A. The answer is no.

13 79 Q. Okay.

14 A. With clarification.

15 80 Q. Okay. Let's start with the "no".

16 A. Okay.

17 81 Q. Tell me how you would like to
18 correct your evidence in this regard.

19 A. The Secure Delete folder is created
20 when the program is launched. More specifically, the
21 Secure Delete -- the ASO -- sorry. Can I start over
22 again?

23 82 Q. Yes.

24 A. Secure Delete is a subprogram
25 within ASO, and when the Secure Delete program is

1 launched, the Secure Delete program -- sorry -- the
2 Secure Delete folder is created. Should the user
3 choose at that moment to not run, as in not run files
4 or folders or not run anything else, the folder --
5 Secure Delete folder will still exist.

6 83 Q. Okay.

7 A. So the correction that I would like
8 to make for the record is that launching the -- that
9 the existence of the Secure Delete folder means that
10 the program was -- the Secure Delete program was
11 launched, but it doesn't yet speak to whether or not
12 files or folders were deleted.

13 84 Q. Okay. And can I ask you,
14 Mr. Musters, how you came to this realization that your
15 initial conclusion was incorrect?

16 A. I read Mr. Lo's affidavit, and I --
17 forgive me, the date, but his --

18 85 Q. Yes. It's April 2nd, 2015, I
19 believe.

20 MR. WINTON: Let me show it to you and
21 see if that's the one.

22 BY MR. BORG-OLIVIER:

23 86 Q. Yes.

24 A. Do you mind if I take a quick look?

25 87 Q. Please do.

1 A. Yes. So I did some more
2 investigation, or, to answer your question
3 specifically, after reviewing the affidavit of Mr. Lo,
4 which is dated April 2nd.

5 88 Q. Okay. And I take it, upon reading
6 Mr. Lo's affidavit, you didn't simply accept his
7 evidence as gospel; you actually went and tried to
8 replicate the analysis that he had done?

9 A. Well, correct, and I agree with you
10 that the way that items 12 and 13 read in my affidavit
11 sworn February 15th draws a conclusion that isn't
12 exactly correct. I made an assumption which I didn't
13 document here, which, basically, the assumption was if
14 you go to run a program, you are going to use it. So,
15 therein, I didn't -- I drew that inference in my mind
16 and, hence, that's why you see number 12 and 13 the way
17 they are written, but Mr. Lo -- how do I put it? --
18 brought some clarity to that, if that makes sense to
19 you.

20 89 Q. Okay. And on April 30th, you swore
21 a supplementary affidavit in response to Mr. Lo's
22 affidavit of April 2nd.

23 A. Correct.

24 90 Q. Do you recall that?

25 A. I do. I'd like to see the content,

1 but, yes, I do recall.

2 91 Q. Sure.

3 A. Yes.

4 92 Q. And as I read your April 30th
5 affidavit, nowhere in there do you advise the Court
6 that your conclusion in paragraph 12 was incorrect or
7 had been revisited in light of Mr. Lo's affidavit of
8 April 2nd. Am I reading that correctly or am I
9 missing something?

10 A. I would like to state that, based
11 on my experience, that it was not my intention to
12 mislead the Court. Based on my experience, someone
13 running the Secure Delete program would run it for a
14 purpose, and, hence, my conclusion -- my conclusion
15 stands.

16 You are asking if I -- if I should have
17 clarified that. Technically, yes, but at the same
18 time, it didn't change my opinion of the facts. I'll
19 agree with you that 12 and 13 wasn't worded as well as
20 I should have.

21 93 Q. Well, it's -- let's be fair. It's
22 not about whether they are worded as well as it should
23 have. That statement at paragraph 12, you have
24 conceded to me, I think, today, is incorrect. In other
25 words, that folder is not only created when a user runs

1 the feature to delete a file or folder? That was
2 incorrect?

3 A. As stated, that is incorrect.

4 94 Q. Okay. And you understood that the
5 Court would be referring to your affidavit and Mr. Lo's
6 affidavit and all the other evidence in the case to
7 determine, among other things, whether Mr. Moyse had
8 acted in ways that constituted contempt of the
9 Firestone order. You understood that, right?

10 A. Clearly.

11 95 Q. And, again, I think you have told
12 me that you don't understand the consequences or the
13 relief being sought, but the Court was relying on that,
14 among other things, to determine whether Mr. Moyse
15 should be jailed for his contempt. That was the
16 conclusion that was going to be drawn on the basis of
17 these affidavits, potentially?

18 MR. WINTON: I don't think that's a fair
19 question given the questions previously asked and the
20 answers previously given about the consequences.

21 BY MR. BORG-OLIVIER:

22 96 Q. Okay. You understood that the
23 issue of the creation of the Secure Delete folder and
24 the consequences to be drawn from that would be a
25 critical part of the Court's analysis in deciding the

1 contempt motion against Mr. Moyse, did you not?

2 A. Clearly, but if you are asking me
3 is it my professional opinion that Mr. Moyse deleted
4 something --

5 97 Q. That's not -- if that was my
6 question, I would ask you that question.

7 A. Okay.

8 98 Q. My question is you understood, did
9 you not, that the question of how the Secure Delete
10 folder was created and what implications could be drawn
11 from that was going to be a critical part of the
12 Court's analysis in determining whether Mr. Moyse had
13 engaged in contempt?

14 A. Clearly, yes, to your answer, but
15 the conclusion in -- the conclusion that we have drawn
16 is not incorrect.

17 99 Q. Well --

18 A. In my opinion.

19 100 Q. Okay. So sitting here today, if I
20 put the following proposition to you, would you agree
21 with me or disagree with me? You should, in responding
22 to Mr. Lo's affidavit, have noted for the Court that
23 the conclusion you had drawn with respect to the
24 creation of the Secure Delete folder was wrong.

25 A. I'm just going to read my

1 affidavit, my supplementary affidavit --

2 101 Q. Please.

3 A. -- to see if I --

4 102 Q. Sure.

5 A. Would you allow me the --

6 103 Q. I absolutely would.

7 A. Okay.

8 I'm going to say that -- well, if you
9 re-ask the question. Forgive me. I have just read
10 some material, and I would like to --

11 104 Q. Sure. I'll be rephrasing my
12 question, I guess.

13 A. Okay.

14 105 Q. But the question that I'm asking is
15 was it not incumbent on you as an objective, fair, and
16 impartial expert to advise the Court -- after reading
17 Mr. Lo's affidavit and realizing that he was correct,
18 to advise the Court that your conclusion with respect
19 to the creation of the Secure Delete feature in
20 paragraph 12 of your affidavit was incorrect?

21 A. My responding affidavit sworn
22 April 30th dealt with the issue of whether or not
23 Secure Delete was used to delete files, folders, or
24 other data from the hard drive, so I'm going to answer
25 and say I believe that my responding affidavit did

1 indeed clarify what you are seeking me to clarify.

2 106 Q. Point to that paragraph or sentence
3 in which you made that clarification.

4 A. When we talk about paragraph 6, 7,
5 8, 9, 10, 11, 12, and so on, they are all talking about
6 how the Secure Delete program works, and if I recall --
7 one second. I'm looking for a specific line. Hold on.

8 I thought in my February -- sorry, my
9 April 30th affidavit that I had made a reference to
10 when the Secure Delete folder was created. It's either
11 not here or I can't put my finger on it at this moment.

12 107 Q. Okay. I can tell you I haven't
13 found it either.

14 A. Okay.

15 108 Q. If you or your counsel find it
16 after the fact, perhaps you can point it out to me.

17 A. I will -- believe me, I thought I
18 had put a reference in here to say this is when this
19 folder was created.

20 109 Q. Okay. Let's go back to your
21 February 15 affidavit, if you don't mind.

22 A. Okay.

23 110 Q. So read paragraph 16 to yourself,
24 if you would.

25 A. Yes.

1 111 Q. Okay. And in paragraph 16,
2 you've -- and I'm not going to call it a -- maybe it's
3 unfair to call it a conclusion, but you provide the
4 opinion that, in a case like this, it's your experience
5 that deletion of data in such circumstances is done to
6 hide evidence that a person took confidential
7 information from a former employer and communicated it
8 to their new employer, right? That's the -- what would
9 you like to call that, your opinion or your conclusion?

10 A. Let's call it an opinion.

11 112 Q. Okay. And the basis of that
12 opinion, if I read the beginning of paragraph 16, is
13 the fact that you had encountered evidence that:

14 "Someone used a Secure Delete tool to
15 delete data."

16 Correct?

17 A. It is my -- yes, correct.

18 113 Q. And the evidence that you say you
19 had that someone used a Secure Delete tool to delete
20 data is the evidence at paragraphs 12 and 13 that the
21 creation of a Secure Delete folder can only be evidence
22 of deletion of data, correct?

23 A. If you're in -- okay. Sorry, I was
24 going to say something, but I'm correcting myself.

25 It is my belief, my opinion, based on

1 what I see, that the Secure Delete program was not only
2 launched but run, and that's the distinguish -- that's
3 the -- that's the distinguishing part that we're making
4 here.

5 So in number 13, I say -- I agree with
6 you -- I have already stated on the record I agree with
7 you -- that simply launching the program creates a
8 Secure Delete folder, but what I'm really saying is
9 that it is my belief, based on what I know, based on
10 what I have seen, and based on what I have read, that
11 the Secure Delete program was indeed run.

12 114 Q. Okay.

13 A. So based on that, I draw that
14 conclusion in number 16.

15 115 Q. Okay. And at paragraph 16, you
16 refer to evidence that someone used a Secure Delete
17 tool to delete that. I'm reading that correctly, am I
18 not?

19 A. Correct. And if you're --

20 116 Q. Sorry. Let me ask the question.

21 A. Sure.

22 117 Q. Here, you are not talking about
23 your feelings or your intuition; you're referring to
24 evidence?

25 A. Uhm-hmm.

1 118 Q. And to the extent that you had
2 evidence, you would have set it out in this report?
3 Correct?

4 A. I'm sorry, if I had evidence, I
5 would have set it out --

6 119 Q. Any evidence that you say you are
7 relying on --

8 A. Yes.

9 120 Q. -- that someone used a Secure
10 Delete tool to delete data --

11 A. Yes.

12 121 Q. -- I take it is set out in this
13 report?

14 A. Yes.

15 122 Q. Okay. And, in particular, at
16 paragraphs 12 and 13, because that's where we are
17 talking about the use of the Secure Delete program,
18 correct?

19 A. Yes. Now, for the record, I do not
20 have nor have I had access to the image. I'm just
21 saying, for the record. So you are asking me to form
22 my opinion based on what I know.

23 123 Q. Right. But stick with me here.
24 Any evidence that you had --

25 A. Yes.

1 124 Q. -- that you were relying on to draw
2 the conclusion or the opinion that you have at
3 paragraph 16 is set out in this report?

4 A. Yes.

5 125 Q. Okay. And at paragraph 13, which
6 is where you conclude that somebody used Mr. Moyse's
7 computer to delete files, you say:

8 "Based on my experience using the
9 software, there is no other explanation
10 as to why a Secure Delete folder would
11 be created on Moyse's personal computer
12 on that date."

13 So that is the evidence that you are
14 relying on to conclude that the Secure Delete folder --
15 that the Secure Delete program was used to delete files
16 and folders, isn't it? If there was any other
17 evidence, you would tell us what it was?

18 A. Correct, and let me just clarify.
19 So the evidence I have before me is that the -- I know
20 how the program works, because I analyzed the program,
21 and I know that it was launched, and, yes, I drew the
22 conclusion from that and stand by the conclusion from
23 that, that it was run to delete files and folders. I
24 stand by that.

25 I don't have the image, so you are

1 asking me my opinion based on what I know. My
2 experience tells me that we don't buy a program, launch
3 a program, and then choose not to use the program
4 because we are bored. So my experience draws me to
5 number 16 based on the evidence I have before me.

6 126 Q. Okay. So let me be clear, then.
7 So your evidence -- and we'll put this before the
8 Court -- your evidence is that, in your experience,
9 when people buy products that have a suite of different
10 software programs, it simply does not happen that one
11 might click on the component programs to see what they
12 are without then running them. Is that your evidence?

13 A. My evidence is that the Secure
14 Delete program within the ASO suite is not easy to
15 find. It's not on the first page. You have to go
16 through a few series of options to get there. And one,
17 in my opinion, would intend to launch the program for a
18 purpose. That would be my evidence.

19 127 Q. Okay.

20 A. I don't initiate the program Word
21 if I don't intend to type a document.

22 128 Q. Okay. And if somebody opens -- or
23 purchases Microsoft Office for the first time, it's
24 beyond the bounds of possibility that somebody might,
25 for example, click on Excel to see what an Excel

1 spreadsheet looks like and then not use it? That
2 doesn't happen?

3 A. I'm not suggesting that that
4 doesn't happen.

5 129 Q. Okay. Let me suggest to you -- and
6 you can agree or disagree -- other facts that might be
7 relevant to the question of whether Mr. Moyse was
8 attempting to hide evidence, okay?

9 A. Uhm-hmm.

10 130 Q. The fact that the ASO software
11 remained on Mr. Moyse's computer when he turned it over
12 for forensic inspection, I would suggest that that
13 could lead one to infer that he was not attempting to
14 hide or cover his tracks. Do you agree or disagree?

15 A. I'm not sure that I can agree or
16 disagree with that statement.

17 131 Q. Okay. Well, now, to be clear,
18 because you've referred to your experience and -- as
19 you are very well entitled to do. That's I think part
20 of your role in all this. I'm just -- I'm asking you
21 to give me your view on it.

22 In your view, it's neither -- it's not
23 relevant one way or the other that Mr. Moyse took no
24 steps to delete the software from his computer prior to
25 handing it over?

1 A. I'm saying that that question in
2 isolation doesn't answer the broader question: Why did
3 he buy the software; why did he buy the reg cleaning
4 program, that registry cleaner program, separate from
5 the ASO program; why did he launch it; what was in his
6 intention when he launched it? I mean, clearly,
7 Mr. Moyse is the one that should really speak to those
8 issues, but from my investigative perspective, it seems
9 highly unusual that one would purchase, install, and
10 run a Secure Delete program, if I understand the facts
11 correctly, just prior to turning it over to an ISS.

12 132 Q. Okay. That's fine. That's all
13 evidence that's in your affidavit.

14 A. I understand that.

15 133 Q. Okay. That's not what I'm asking
16 you now.

17 A. Okay. Sorry.

18 134 Q. What I'm asking you is take your
19 experience --

20 A. Yes.

21 135 Q. -- and your investigative
22 analytical ability --

23 A. Sure.

24 136 Q. -- and consider the fact that you
25 concluded or given the opinion that Mr. Moyse was

1 trying to hide evidence and cover his tracks.

2 A. Sure.

3 137 Q. Is that a fair thing? Okay.

4 A. Yes.

5 138 Q. And I'm saying the fact that he
6 made apparently no effort to remove the software from
7 his computer, the ASO/Secure Delete software from his
8 computer, prior to handing it over, do you view that as
9 a relevant fact as to --

10 A. It's a fact to be considered, sure.

11 139 Q. Okay. And which way would it cut?

12 A. Well, we can explore many options.

13 Am I allowed to explore many options with you?

14 MR. WINTON: Well, I don't think that's
15 helpful.

16 MR. BORG-OLIVIER: I can ask as
17 open-ended a question as -- what's wrong with that?

18 MR. WINTON: No, you can't. I think
19 your question was which way would it cut.

20 MR. BORG-OLIVIER: Yes.

21 MR. WINTON: And if he is going to
22 speculate -- are you inviting him to speculate as to
23 which way it cuts or are you asking him his opinion as
24 to which way --

25 MR. BORG-OLIVIER: I'm inviting him to

1 speculate as to which way it cuts. I'm not sure I draw
2 a distinction between speculation and his opinion. My
3 point is much of the opinion evidence that he is giving
4 seems to be based on bringing his experience to bear to
5 facts like this, and I'm providing other facts from the
6 record that haven't made their way into his affidavit
7 and asking for his view on whether they affect his
8 analysis or not, and, if not, why not.

9 MR. WINTON: Okay. Well, that's the
10 question, then, that he should answer.

11 BY MR. BORG-OLIVIER:

12 140 Q. Okay.

13 A. Sorry, you've both been talking
14 so -- if you could ask the question --

15 141 Q. Sure.

16 A. -- I would be --

17 142 Q. So the fact that the ASO software
18 was apparently not deleted from Mr. Moyse's computer
19 prior to him turning it over for forensic analysis,
20 does that bear on your analysis of whether Mr. Moyse
21 was likely seeking to hide evidence or cover his
22 tracks?

23 A. It bears on my opinion. There are
24 a number of factors to consider. Again, I haven't seen
25 the image, but according to the ISS report, there was

1 an e-mail indicating the purchase of the software.

2 143 Q. We will get to that one.

3 A. Okay. So ...

4 144 Q. Let me --

5 A. Sorry.

6 145 Q. Why don't I just phrase it this
7 way. Isn't it fair to say that somebody who is trying
8 to cover his tracks would, at a minimum, in a situation
9 like this, have sought to delete the software from his
10 computer? Isn't that a fair statement?

11 A. In light of some other facts, I'm
12 not sure that that's a fair statement, although I am
13 not arguing with you that he would have been better off
14 to delete it. I agree with that statement.

15 146 Q. What other facts are you referring
16 to when you say "in light of some other facts"?

17 A. Well, when I read Mr. Lo's
18 affidavit describing the registry keys inside the
19 registry, I can tell you that those registry keys are
20 only created on the initiation of the program, same as
21 a Secure Delete folder gets created on the initiation
22 of the program.

23 In a theoretical sense -- and I'm being
24 theoretical -- had someone launched the program like I
25 did in my affidavit, I would then see that I ran the

1 program and I would then see that I deleted, in my
2 affidavit, four files and -- on this date and so
3 many -- so many bytes of data were deleted.

4 If I -- again, hypothetically, because I
5 don't know the exact facts of what happened on that
6 evening. If I were to see that, I would go, oh, darn,
7 I need to make that go away, and I do know that there
8 is an article on the Internet that shows you how to
9 make that go away. So did or did not Mr. Moyse go to
10 the Internet and search that article so that he could
11 then, as I described in my affidavit, make those
12 registry keys go away? We can speculate about that or
13 not. I'm just saying Mr. Moyse may or may not have
14 felt comfortable that he had done all he needed to do
15 to make the history go away, on the assumption that he
16 ran it.

17 So there's a number of different factors
18 to consider, not only the e-mail that was in his inbox,
19 not only the fact that he purchased and installed the
20 software, not only that he ran the software, that he
21 may or may not have used it to delete files and
22 folders, and that he may or may not have then tried to
23 make that history log go away. So you can ask me my
24 opinion in terms of what I believe, but at the end of
25 the day, we're not going to know.

1 147 Q. Let's talk about the e-mail.

2 A. Okay.

3 148 Q. So the ISS reports on e-mails, I
4 think it was. I think it was two e-mails confirming
5 the purchase of the software that we can --

6 A. One for ASO and one for a registry
7 cleaner.

8 149 Q. Correct. And is it not fair to
9 conclude, Mr. Musters, that somebody looking to cover
10 his tracks and hide evidence would, at a minimum, have
11 deleted those e-mails out of his inbox? Would you not
12 expect that?

13 A. I would like to say that in every
14 investigation -- and I'm drawing upon my experience
15 more so from a criminal perspective; I do a lot of
16 criminal work, both for the Crown and the defence -- is
17 that somewhere, somehow, someone makes a mistake. So
18 that is ultimately how -- if we were all perfect, we
19 would all commit the perfect crime, and we wouldn't be
20 caught.

21 Now, again, I'm being theoretical, but
22 I'm just saying whether Mr. Moyse -- should he have
23 deleted his e-mail if he was trying to cover his
24 tracks? Yes. Was he thinking that way? I have no
25 idea.

1 150 Q. Okay. But so I hear you conceding
2 the point I think that somebody looking to cover his
3 tracks would not have wanted, for example, to have
4 those two e-mails remain in his inbox?

5 A. Or should have.

6 151 Q. Right.

7 A. Sure.

8 152 Q. And would not have wanted the
9 software to remain in his computer?

10 A. Again, we are being speculative,
11 but assuming that he had intentions to delete things,
12 he -- I'm going by recollection -- he said -- Mr. Moyse
13 said in one of his affidavits that he wanted to delete
14 his Internet history, which he felt wasn't relevant,
15 because there may be some things that he thought were
16 not relevant -- these are his words and I'm
17 paraphrasing.

18 153 Q. Yes, I understand.

19 A. That he wanted to make go away. So
20 again, we're speculating in terms of what his
21 intentions were. He said he wanted to clean his web
22 history. I addressed that in one of my affidavits as
23 well, and we can talk about that.

24 So should he have? If he is trying to
25 hide things, sure, absolutely, I can see that.

1 MR. BORG-OLIVIER: Okay.

2 -- RECESS AT 2:52 --

3 -- RESUMING AT 3:00 --

4 BY MR. BORG-OLIVIER:

5 154 Q. Mr. Musters, I'm going to ask you
6 to turn up tab 2 of Catalyst's supplementary motion
7 record dated May 1, 2015, and that tab is your
8 supplementary affidavit sworn April 30, 2015.

9 A. Yup.

10 155 Q. At paragraph 2 of this affidavit,
11 you note that you reviewed the affidavits of Mr. Moyse
12 and Mr. Lo?

13 A. Yes.

14 156 Q. And you note that this affidavit is
15 sworn in reply to those affidavits?

16 A. Yes.

17 157 Q. Were you given any particular
18 instructions in preparation of this affidavit or was it
19 simply a matter of give us your reply evidence in
20 regards to the affidavits of Lo and Moyse?

21 A. If you give me a moment.

22 I was asked if I had any comments more
23 specifically with respect to Mr. Lo's affidavit.

24 158 Q. Yes.

25 A. And if I had any explanation as to

1 how a file may have been deleted yet not show as being
2 deleted. So, in order words, to address the issue of
3 the -- in Mr. Lo's words, the logs in the registry.

4 159 Q. And the conclusion that you draw or
5 the opinion that you provide is I think headlined on
6 page 2 of your affidavit, which is that the Secure
7 Delete history is stored in the registry and can be
8 deleted?

9 A. It can be deleted, yes.

10 160 Q. Okay. And --

11 A. I was going to use the words can be
12 manipulated to show that nothing had been run, but,
13 sure.

14 161 Q. Fair enough. But the conclusion,
15 anyway, is that you say the fact of there being no log
16 showing wiping activity is not dispositive because
17 Secure Delete can be reset?

18 A. Yes. That's a good word. Thank
19 you.

20 162 Q. It's your word from paragraph 8.
21 Can I take you to paragraph 8.

22 A. Yes.

23 163 Q. So, there, you refer to a simple
24 Internet search on how to delete the remnant files of
25 ASO from a computer's registry. Is this a search that

1 you did?

2 A. Yes.

3 164 Q. Okay. Can you tell me what search
4 terms you used?

5 A. I don't recall specifically at this
6 moment. I can guess, but that's not a definitive
7 answer.

8 165 Q. Don't guess. And you haven't
9 provided here the website address, either, of the
10 publicly available information that you referred to. I
11 take it when you refer to publicly available
12 information, you are suggesting that your simple
13 Internet search turned up a website?

14 A. It did.

15 166 Q. Okay. And you haven't provided us
16 with a copy of what the information says?

17 A. Okay.

18 167 Q. Correct?

19 A. I do recall -- I do recall
20 recording that.

21 168 Q. Can I ask why you didn't include
22 that with your affidavit?

23 A. Oversight on my part.

24 BY MR. BORG-OLIVIER:

25 169 Q. Can I get an undertaking, Counsel,

1 to get the search terms that were used or search term
2 that was used as well as the results of that search and
3 a copy of the publicly available information referred
4 to by Mr. Musters at paragraph 8?

5 U/A MR. WINTON: I will take that under
6 advisement.

7 BY MR. BORG-OLIVIER:

8 170 Q. And I take it, Mr. Musters, that
9 the publicly available information that you are
10 referring to provided advice on removal of the entire
11 program of ASO and not simply of the remnant files?

12 A. That's not correct. It provided
13 step-by-step instructions on how to -- we'll use the
14 word "reset"; it's a good word -- to reset the Secure
15 Delete logs.

16 171 Q. Okay. And if someone wanted to
17 completely cover their tracks and remove any evidence
18 of having attempted to delete anything, you'd agree
19 with me that the prudent thing to do would be to remove
20 not just evidence of wiping but evidence of the program
21 ever having been on the computer?

22 A. I'm not sure I agree with that, and
23 I would like to explain my reason, if I may.

24 172 Q. Sure.

25 A. On the assumption that someone ran

1 Secure Delete, and on the assumption that someone then
2 looked at the log and it showed that certain things had
3 been deleted, again, I can't speak to the mind of
4 Mr. Moyse, but I would think it might be good enough to
5 show the system summary -- and I'm looking at the
6 system summary on page 3 -- to show no wiping has been
7 performed and then go I'm good.

8 173 Q. The ISS obviously thought the
9 presence of the Secure Delete folder was a relevant and
10 important fact?

11 R/F MR. WINTON: He's not going to give
12 evidence about what the ISS thought.

13 BY MR. BORG-OLIVIER:

14 174 Q. Okay. The ISS included in its
15 report the fact that the Secure Delete folder was found
16 on Mr. Moyse's computer?

17 A. That's correct.

18 175 Q. And Catalyst brought a motion for
19 contempt based on the presence of the Secure Delete
20 folder?

21 A. I -- you're -- I don't know.

22 176 Q. Okay. But your evidence is that
23 somebody trying to cover their tracks would not
24 necessarily look to delete the entire software program;
25 they would simply try to reset the registry? That's

1 your view on this?

2 A. Well, if I saw this summary -- and
3 I know that the reporter here can't see that, but
4 there's a picture towards the bottom or as part of --

5 MR. WINTON: It's on page 289 of our --

6 THE WITNESS: Page 289.

7 MR. WINTON: -- responding record.

8 THE WITNESS: And if I saw last wiped,
9 items wiped, space recovered, items wiped, nothing
10 done, I may feel confidence that I have dodged the
11 bullet on the assumption that I had previously wiped
12 something, so I may not take additional steps to do
13 anything.

14 BY MR. BORG-OLIVIER:

15 177 Q. Okay. But I'm not asking you now
16 for a conclusion that supports Catalyst's position; I'm
17 asking for your view, objectively --

18 A. Yes.

19 178 Q. -- on somebody looking to cover
20 their tracks. Is it your informed opinion that
21 somebody would more likely seek to remove evidence of
22 the wiping versus removing any evidence of the software
23 having been there?

24 A. That's a difficult question to
25 answer at a technical level, and I'd like to explain

1 why.

2 Uninstalling a program doesn't always
3 remove all of the registry entries, and it doesn't
4 always remove things that are forensically recoverable,
5 i.e., deleting a program or file still keeps the master
6 file table entry and it shows it as a deleted entry.
7 So showing the program installed and not being run may
8 be better than trying to uninstall it and hiding it
9 forensically. So I'm just saying both of them have
10 merit; I'm not saying one has more merit than the
11 other. That's what I'm trying to say.

12 MR. BORG-OLIVIER: Mr. Winton, I would
13 ask, if at all possible, that we get your position on
14 the questions that you have taken under advisement, and
15 if you agree to answer them, that we get the
16 information in time to allow further cross-examination
17 before the 22nd, which is the last day on which
18 examinations will take place, because I expect -- I
19 think this is important information.

20 I think that the reference to the search
21 and publicly available information, without including
22 that in the affidavit -- I hear Mr. Musters that was an
23 oversight -- I think that's information on which I'm
24 more than entitled to question, and if you will be
25 undertaking to provide that to us, then I would like it

1 in a timely fashion so that we can schedule a follow-up
2 cross-examination on those points, because I -- I think
3 there are questions that I would want to ask based on
4 that.

5 MR. WINTON: I hear you. I am not
6 disagreeing with you.

7 BY MR. BORG-OLIVIER:

8 179 Q. Okay. Can we go to paragraph 20,
9 please.

10 A. Uhm-hmm.

11 180 Q. And at paragraph 20, here, you
12 reach a conclusion or you say:

13 "The most likely conclusion to draw
14 from Mr. Moyse's conduct of June and
15 July, 2014, is that he did, in fact, use
16 Secure Delete to permanently delete
17 files from his computer."

18 Correct? That was the conclusion you
19 reached?

20 A. That's my conclusion.

21 181 Q. And that conclusion is based on
22 four separate facts that you have set out in the
23 following subparagraphs?

24 A. Correct.

25 182 Q. Can I take you to (b) first.

1 A. Uhm-hmm.

2 183 Q. So, here, you refer to Moyse's
3 admitted conduct of investigating how to clean his
4 registry, and you say:

5 "That displays a level of IT
6 sophistication that exceeds that of the
7 ordinary user."

8 And can I ask you to expand on that and
9 explain to me what it is you say about his conduct that
10 displays a level of IT sophistication exceeding that of
11 the ordinary user, because that is not clear to me as I
12 read that.

13 A. Okay. My first response to that
14 would be if I were to ask a hundred people to define in
15 computer terms what a registry is, I'm not sure that
16 many people would be able to answer that question. So
17 the fact that he is looking at registry cleaners, has
18 purchased a registry cleaner, shows that he understands
19 something about registries and what is contained in
20 them and what he doesn't want, theoretically, someone
21 to see.

22 184 Q. Okay. Anything else?

23 A. I'm not saying that -- I'm saying
24 that the average user doesn't know what's in the
25 registry and what the registry is and what it contains.

1 185 Q. Okay. Can we turn up Mr. Moyse's
2 affidavit, which is at tab 1 of the responding motion
3 record of Moyse dated April 6.

4 A. Sure.

5 186 Q. And can you point me to where you
6 say Mr. Moyse is engaging in this admitted conduct that
7 you refer to here. And I think it's around
8 paragraph 42, if I'm reading the correct part of it,
9 but I want to make sure that -- I want to be fair to
10 you and give you the opportunity to point me to what it
11 is you are relying on for this particular statement.

12 A. In paragraph 41, just prior, he
13 talks about deleting his browsing history from his
14 computer; he talks about searching the Internet for the
15 recently deleted material, which is in 42, which you
16 know; he -- in paragraph 59, he talks about wiping his
17 BlackBerry.

18 I'm going by recollection, and I stand
19 to be corrected if I'm wrong, and please do so, but my
20 recollection is that in his -- in Mr. Moyse's first
21 affidavit, he said he didn't take anything, and then
22 later there was disclosure that there was a number of
23 files that were indeed on his computer.

24 187 Q. Okay. Let me stop you there for a
25 second.

1 A. Yes.

2 188 Q. Because I think we are going a bit
3 far afield. What we are talking about here is what you
4 have referred to in your affidavit as his admitted
5 conduct of investigating how to clean his registry.
6 That was the reference there. There's nothing about
7 wiping a BlackBerry, there's nothing about files
8 remaining on his computer. And to be fair to you,
9 paragraph 43 refers to him purchasing registry-cleaning
10 products, so I don't want you to miss that paragraph.

11 A. So, I mean, it was more of a
12 generic statement that I made, but, yes, 43
13 specifically talks about the ASO software.

14 189 Q. Okay. So let's now break down
15 paragraph 42. Let's start there.

16 A. Okay.

17 190 Q. So you'll agree with me that
18 Mr. Moyse's evidence is that, as you have pointed out,
19 he was doing Internet searches on how to ensure a
20 complete deletion of his Internet browsing history?

21 A. Correct.

22 191 Q. And he notes that many websites
23 said that cleaning the registry following the deletion
24 of the Internet history would accomplish this, correct?

25 A. He notes that, yes.

1 192 Q. He notes that. He notes that the
2 websites -- he is reporting on what the websites say?

3 A. Correct.

4 193 Q. Okay. So there's no --

5 MR. WINTON: I just want to make it
6 clear. Mr. Musters' agreeing with what the affidavit
7 says does not necessarily mean Mr. Musters is affirming
8 Mr. Moyse's evidence.

9 MR. BORG-OLIVIER: Completely. I
10 understand that.

11 MR. WINTON: Good.

12 THE WITNESS: Okay.

13 BY MR. BORG-OLIVIER:

14 194 Q. There's no suggestion here, I put
15 it to you, Mr. Musters, that Mr. Moyse even knew what a
16 registry was before doing these Internet searches,
17 correct? There is no suggestion of that in his
18 affidavit?

19 A. I'm on the fence on that one,
20 because how did he know to look for the registry, but,
21 on the other hand, if he is searching the registry,
22 sure.

23 195 Q. There's nothing here that says he
24 was searching a registry, it says he was searching for
25 how to delete his Internet history, right?

1 A. One second. I then did some
2 further -- I'm reading paragraph 43:

3 "I then did some further online
4 research for registry cleaning
5 products."

6 So he would -- Mr. Moyse would infer,
7 based on his affidavit, that he is getting up to speed
8 on what a registry is through these searches, based
9 on --

10 196 Q. That's how I read it as well.

11 A. Sure.

12 197 Q. And the conclusion that he drew or
13 the steps that he took with respect to deleting his
14 Internet browsing history through cleaning the
15 registry, you have said in your affidavit of
16 April 30th, at paragraph 4, that it makes no sense,
17 because a computer's registry does not store
18 information concerning a user's web browsing history,
19 right?

20 A. That is correct.

21 198 Q. That's your evidence?

22 A. Yes.

23 199 Q. So quite contrary to the position
24 that Mr. Moyse was more sophisticated than the average
25 user, in fact, it seems that he is utterly

1 unsophisticated, is he not, in terms of doing some
2 basic Internet research; gleaning information that
3 turns out to be completely incorrect? Isn't that the
4 mark of someone unsophisticated?

5 A. I would certainly say that it -- I
6 know he's a smart guy based on his -- based on his
7 education and where he went to school and so on and so
8 forth, so I think we can all agree -- I have never met
9 Mr. Moyse, just for the record. So I think we can
10 agree he's a smart guy and he's doing some research to
11 try and figure things out in his mind. So we can
12 certainly agree on that. Did he get the registry wrong
13 or did he believe information incorrectly on the
14 Internet? Sure. Not everything on the Internet is
15 correct.

16 200 Q. Right.

17 A. But I believe he shows a level of
18 sophistication on one hand, and on the other hand, I'll
19 also agree with you that he shows a level of lack of
20 knowledge in certain areas as well.

21 201 Q. Okay. But you didn't make mention
22 of that in your affidavit?

23 A. That is correct.

24 202 Q. Okay. And going back to what the
25 sophistication is, when I asked you what you meant by

1 that, you suggested that if you ask a hundred people to
2 define what the registry is, most couldn't answer. Do
3 you see any evidence in here that suggests that, before
4 doing that Internet research, Mr. Moyse knew what the
5 registry was?

6 MR. WINTON: I'm just ...

7 MR. BORG-OLIVIER: Counsel, he is
8 drawing a conclusion --

9 MR. WINTON: No, I think you have asked
10 that question, just in a different way, so I feel it's
11 the same question being asked twice. That's why I'm
12 hesitating to let the witness answer.

13 MR. BORG-OLIVIER: Is that a refusal?

14 R/F MR. WINTON: Yes.

15 BY MR. BORG-OLIVIER:

16 203 Q. It is. Okay.

17 Let's go to paragraph C, which is
18 another of the facts that you say leads you to the
19 conclusion --

20 A. Sorry.

21 MR. WINTON: I'm just pointing him in
22 the right spot.

23 BY MR. BORG-OLIVIER:

24 204 Q. Yes. So paragraph (c) is another
25 of the facts, as you describe them, that leads you to

1 the conclusion with respect to Mr. Moyse's conduct.

2 A. Yes.

3 205 Q. Do you see that?

4 A. Yes, I do.

5 206 Q. Okay. And this is with respect to
6 Mr. Moyse wiping his BlackBerry smart phone?

7 A. Uhm-hmm.

8 207 Q. And you say that he thereby
9 permanently destroyed evidence of his phone and data
10 usage. Do you see that?

11 A. Yes.

12 208 Q. And I take it phone and data usage
13 does not include e-mail, correct?

14 A. By wiping his BlackBerry, his --
15 let me -- okay, let me -- no, not incorrect, not
16 correct. Let me explain.

17 Had he had his work e-mail synced to his
18 BlackBerry, simply wiping his BlackBerry would not
19 affect any data as it related to the Cat Capital --

20 209 Q. Catalyst.

21 A. Sorry, Cat Catalyst (sic) e-mail.

22 210 Q. Right.

23 A. Had he had a personal e-mail
24 account on there, he would have no data from his
25 personal e-mail; it would have been wiped off. Any SMS

1 message, call histories. There's other applications
2 more prevalent on an iPhone than on a BlackBerry, but
3 there's various chat programs available.

4 211 Q. Okay.

5 A. And so on.

6 212 Q. Again, we're going a bit far
7 afield.

8 A. Sorry.

9 213 Q. I'm simply trying to be clear that
10 what I asked you was that the e-mail is not -- and,
11 again, I'm not trying to be tricky. At page 71 of your
12 earlier transcript from last year, you were asked about
13 Mr. Moyse's e-mail, and I think, quite fairly, you
14 acknowledged that Catalyst would likely still have
15 access to Brandon's work e-mails. And the point I was
16 trying to make is this appears to carefully exclude
17 e-mail from what you say was permanently destroyed, and
18 I want to make sure I'm reading that correctly.

19 Your counsel may have a point to make
20 here.

21 MR. WINTON: No, that's fine. I just
22 wasn't sure where you were going with that.

23 MR. BORG-OLIVIER: I'm trying to be very
24 fair in noting that e-mails -- there doesn't seem to be
25 an allegation here that the wiping of the BlackBerry

1 destroyed evidence of e-mail usage, because I thought
2 that point was covered last year.

3 MR. WINTON: That's right.

4 MR. BORG-OLIVIER: But if I'm
5 misreading -- I don't know exactly what the term "data"
6 means.

7 MR. WINTON: Okay. And I think he has
8 answered that question now, has he not? He
9 acknowledged the same thing about the e-mails.

10 MR. BORG-OLIVIER: Okay.

11 MR. WINTON: And then he explained what
12 "data" could refer to, but it was a host of things, and
13 then you cut him off by saying we are going far afield.

14 MR. BORG-OLIVIER: Because my question
15 was about e-mail.

16 MR. WINTON: Okay. But now you are
17 saying you want to know what "data" means.

18 MR. BORG-OLIVIER: I wanted to know if
19 "data" means e-mail.

20 MR. WINTON: Okay. Why don't we ask
21 that.

22 BY MR. BORG-OLIVIER:

23 214 Q. Okay. "Data", I take it, does not
24 mean e-mail usage? That's a different category of
25 things?

1 A. I'm just going to -- in terms of --
2 data is e-mail, but if I understand your question
3 correctly to be is wiping the BlackBerry going to
4 prevent -- I'm going to use "Cat" so I don't get it
5 wrong -- prevent Cat from accessing any e-mail, the
6 answer is no.

7 215 Q. Okay.

8 A. If that's the question.

9 216 Q. That's not precisely my question.
10 You have made allegations here about facts that you say
11 support the conclusion that you have reached.

12 A. Yes.

13 217 Q. I'm entitled to test you on those
14 facts.

15 A. Sure, sure.

16 218 Q. And I just want to make sure that
17 I'm understanding clearly what it is that you have said
18 here.

19 A. There are other --

20 219 Q. That's the reason I'm asking this
21 question.

22 A. There are other points of data --
23 let's call them SMS messages, BBM messages, other chat
24 programs that may or may not have been installed on the
25 BlackBerry -- there are other pieces of information on

1 the BlackBerry besides e-mail that I would refer to as
2 data that were erased as a result of wiping the
3 BlackBerry.

4 220 Q. I understand all that.

5 A. Okay.

6 221 Q. Thank you. With respect to the
7 phone usage, who was the phone provider on that
8 BlackBerry?

9 A. I don't know. I don't know who
10 the -- I don't recall.

11 MR. WINTON: Go off the record for one
12 second.

13 MR. BORG-OLIVIER: Sure.

14 -- OFF THE RECORD --

15 BY MR. BORG-OLIVIER:

16 222 Q. So, Mr. Musters, your counsel was
17 kind enough to show me some information from the report
18 that you had prepared for Mr. Riley that seems to
19 indicate that the BlackBerry was on the Rogers network,
20 and I take it you have no reason to dispute that if you
21 don't specifically remember it?

22 A. I have no reason to dispute it. I
23 don't specifically recall that at this moment.

24 223 Q. Okay. Do you know whether Catalyst
25 paid the bills in connection with that BlackBerry?

1 A. I do not know.

2 224 Q. Okay.

3 A. I can only assume yes, but I do not
4 know.

5 225 Q. Okay. Do you know whether Catalyst
6 received copies of the bills?

7 A. I do not know.

8 226 Q. Do you know whether the bills that
9 were prepared monthly included records of phone calls
10 made and received?

11 A. And, again, I don't know.

12 227 Q. Did you make any inquiries with
13 Catalyst or otherwise about those questions?

14 A. No.

15 228 Q. Okay. Your conclusion here, as I
16 read it, is quite unequivocal, right? You note that
17 Mr. Moyse, by wiping the BlackBerry, permanently
18 destroyed evidence of his phone usage?

19 A. Evidence of his phone and data
20 usage, yes.

21 229 Q. Okay. I take it to the extent that
22 the monthly bills included those sorts of records, in
23 fact, that evidence wouldn't be destroyed?

24 A. The monthly bills -- I'm sure that
25 you can get a record from Rogers with respect to the

1 fact that I called you or you called me, that there was
2 a call. I'm sure you can get that information, yes.

3 230 Q. Okay. And when you say in
4 subparagraph (c) "evidence of his phone usage", I take
5 it what you are referring to is, for example, whom he
6 called?

7 A. Well, the Rogers bills would have
8 phone numbers.

9 231 Q. Right.

10 A. Those phone numbers may not be
11 readily translatable to a person, in other words,
12 905-123-4567, Cat may not know who that is, they may be
13 able to do a reverse phone look-up, they may or may not
14 know who that is registered to, and so on.

15 232 Q. Okay. It may be evidence, you are
16 referring to, of who called Mr. Moyse?

17 A. It may be.

18 233 Q. Evidence of the duration of calls?

19 A. Correct.

20 234 Q. Anything else that I'm missing in
21 terms of what you refer to as evidence of his phone
22 usage?

23 A. Well, when I referred to phone
24 usage, I was also referring to SMS and BBMs and --

25 235 Q. Okay. Well, that's data usage.

1 You said phone and data usage. I'm focussing on the
2 phone.

3 A. Well, okay. Phone usage. If
4 you're referring -- I mean, we can define the term any
5 way you like. If you are referring to phone usage as
6 simply calls in and out.

7 236 Q. It's your terminology. I'm trying
8 to understand, you're referring -- you've said here --

9 A. Well --

10 237 Q. Let me put the question to you.

11 A. Okay.

12 238 Q. You have said here that, by wiping
13 the BlackBerry smart phone, Mr. Moyse had thereby
14 permanently destroyed evidence of his phone usage, and
15 I'm trying to explore what you mean by "evidence of his
16 phone usage", and I've suggested to you that might mean
17 whom he called, who called him, and duration of calls,
18 and I'm asking if there is anything else that would
19 fall under that category of evidence of phone usage.

20 A. All right. May I be permitted to
21 answer the question what did you mean, Marty, by phone
22 and data usage?

23 239 Q. I'm not interested in data usage at
24 the moment, I'm interested in phone usage. That's the
25 question I'm asking about.

1 A. Yes, I understand, and, believe me,
2 I'm simply trying to -- I'm not being argumentative in
3 any way, shape, or form; I'm simply trying to
4 understand.

5 I used the term "phone and data" in one
6 piece. I didn't separate it out in my mind when I
7 wrote those three words. And the reason that I don't
8 is because you can take -- what's a good one?

9 There are chat programs on an iPhone,
10 predominantly, that either go through Wi-Fi or they go
11 through cellular data. So when I say "phone and data",
12 I'm referring to the collective use of the phone. I,
13 in my mind, when I wrote those words, did not break it
14 out in terms of phone is calls and data is SMS. So if
15 you are asking what I meant, I meant the collective use
16 of the phone.

17 240 Q. Okay. We have talked about this.
18 You understand that the Court will be looking at this
19 and will rely on what's in your affidavit?

20 A. Absolutely.

21 241 Q. Okay. And you understand -- and
22 the reason I'm asking these questions is because
23 somebody might look at that and think that "phone
24 usage" refers to usage of the telephone. You
25 understand that?

1 A. I -- I do now. I --

2 242 Q. Okay. So let's clear this up.

3 A. Sure.

4 243 Q. When you say that by wiping the
5 smart phone Mr. Moyse permanently destroyed evidence of
6 his phone and data usage, I take it, then, if I'm
7 hearing you correctly, that you are not suggesting that
8 evidence of Mr. Moyse's use of the telephone has been
9 permanently destroyed. Because those records likely
10 exist through, for example, the monthly bills.

11 A. Correct, yes. I fully acknowledge
12 that those records exist through the monthly bill.

13 What I was saying was that there is data -- as a
14 forensic investigator, there is a ton of data on the
15 phone, the collective smart phone, which are now like
16 computers, that can be valuable to any investigation.

17 244 Q. Last week, as you probably know,
18 Kevin Lo was cross-examined.

19 A. I'm aware.

20 245 Q. Okay. And Mr. Lo raised something
21 for the first time on re-examination, which I assured
22 your counsel I would give you the opportunity to
23 respond to.

24 A. Okay.

25 246 Q. Because it was not something that

1 had shown up. Because of the pace at which the
2 duelling affidavits came in on the eve of Mr. Lo's
3 cross-examination, I think that's the way things ended
4 up shaking out.

5 The evidence as, I understood it -- and
6 if I'm not capturing this correctly, I will ask
7 Mr. Winton to jump in or Mr. Milne-Smith. I understood
8 Mr. Lo to say the following, and I apologize if it
9 sounds like I'm testifying on the record. I'm just
10 trying to capture what it was that he said.

11 As you know, there was this question
12 raised on his affidavit and yours about the use of the
13 registry editor?

14 A. Uhm-hmm.

15 247 Q. You know that. And Mr. Lo, upon
16 seeing your reply affidavit, conceded that he had been
17 incorrect about the last time accessed information in
18 the sense that the fact that the computer reflected
19 that registry editor had been last accessed in 2009 did
20 not necessarily mean that, in fact, it had been last
21 accessed in 2009. Do you recall that issue?

22 A. Yes.

23 248 Q. Okay. And I understand from
24 Mr. Lo's evidence that, after reviewing your reply
25 affidavit, he then looked into something called the

1 link files. Is that a term you are familiar with?

2 A. I'm familiar with the term "link
3 files".

4 249 Q. And what Mr. Lo stated was that
5 he -- in reviewing the link files on Mr. Moyse's
6 computer, he saw evidence of use of programs dating
7 back to 2012 but no evidence of registry editor having
8 been run at any time.

9 A. Okay.

10 250 Q. And I'm opening the floor to you to
11 respond or react, if you would like to, to that
12 evidence from Mr. Lo.

13 A. Yes, I would like to.

14 I can emphatically state that running
15 reg edit, running the reg edit program, creates -- on a
16 Windows 7 computer -- which is what we are talking
17 about -- leaves no evidence that it was run. And what
18 I mean by that -- or let me -- sorry, not what I mean
19 by that, but let me clarify. I submitted an affidavit
20 on -- April the 30th?

21 251 Q. Yes.

22 A. Yes. And during the course of that
23 affidavit on April the 30th, I ran the registry edit
24 program on April 29th, as you will see. And I took a
25 forensic image of my forensics computer and found no

1 evidence that regedit.exe had been initiated or run
2 even though I had made changes to the registry itself.
3 So the registry edit program changes files, but we are
4 talking about the program itself. So the last accessed
5 date on regedit.exe was still its original date. There
6 were no link files for reg edit, so there was no
7 visible evidence that reg edit was run, even though I
8 can assure everyone here that I ran it on the 29th, as
9 evidenced by my affidavit.

10 252 Q. Okay. And can I ask --

11 A. So --

12 253 Q. Sorry. Go ahead.

13 A. So for Mr. Lo to say I saw no
14 evidence that it was run, although correct, is
15 meaningless, because there would be no evidence that it
16 was run, had it been run.

17 254 Q. And did you actually go and search
18 the link files on your computer?

19 A. Yes.

20 255 Q. Okay. And when did you do that?

21 A. I did that after I saw Mr. Lo's
22 affidavit with respect to that. So I had taken a
23 forensic image on April the 30th of my forensics
24 computer.

25 256 Q. Can you tell me precisely when it

1 was that you searched for the link files on your
2 computer?

3 A. Can you tell me the date of
4 Mr. Lo's affidavit? When -- the date that he was
5 cross-examined?

6 MR. WINTON: That's what I think. I was
7 just going to say I think he means cross-examination,
8 not affidavit.

9 THE WITNESS: The cross -- sorry, sorry.
10 The date he was cross-examined on this.

11 MR. BORG-OLIVIER: Mr. Lo was
12 cross-examined --

13 MR. WINTON: Thursday.

14 MR. BORG-OLIVIER: Last Thursday, the
15 14th.

16 MR. WINTON: 14th.

17 THE WITNESS: It would have been the
18 evening of the 14th.

19 MR. WINTON: Counsel, just to make sure
20 there is no misunderstanding, as I understand what
21 Mr. Musters was saying, the search on the link files
22 was run on an image of his computer that was made on
23 the 30th, which will record the April 29th activity.

24 MR. BORG-OLIVIER: I understand.

25 MR. WINTON: If there was anything to

1 record.

2 MR. BORG-OLIVIER: Yes.

3 MR. WINTON: Okay.

4 MR. BORG-OLIVIER: Can we go off. I may
5 just have one or two more questions, but I'm just about
6 done. I just want to speak to Mr. Milne-Smith for a
7 second.

8 -- RECESS AT 3:38 --

9 -- RESUMING AT 3:42 --

10 MR. BORG-OLIVIER: So subject to
11 whatever answers come back on what I think was only one
12 under advisement.

13 MR. WINTON: Technically two. You asked
14 for the search terms and then you asked for the
15 results.

16 MR. BORG-OLIVIER: Correct. Those are
17 my questions. Thank you, Mr. Musters.

18 CROSS-EXAMINATION BY MR. MILNE-SMITH:

19 257 Q. Mr. Musters, I just have questions
20 in two areas.

21 With respect to cloud storage services,
22 you are familiar with what I am speaking about there?

23 A. Yes, I am.

24 258 Q. So these are programs like Dropbox
25 or box.com?

1 A. Yes.

2 259 Q. Okay. So I take it we would be in
3 agreement that one reason why a person might use a
4 service of that nature is to sync or transfer documents
5 between a home and an office computer?

6 A. That's one usage, certainly.

7 260 Q. And another possible usage is for
8 more than one person to share access to a document?

9 A. Correct.

10 261 Q. And you have no way of knowing why
11 Mr. Moyse was using Dropbox at Catalyst?

12 You seem to be --

13 A. I'm -- I'm always trying to be
14 reflective of the answer so that I can give you the
15 best thoughtful response.

16 I am not -- I'm just going to repeat
17 your question to make sure I still have it accurately
18 in my head. Your question was did I know for what
19 purpose Mr. Moyse was using Dropbox? Is that -- or
20 please clarify if I didn't get it right.

21 262 Q. Essentially, yes. Maybe I can help
22 you if I can put it another way. Would you agree with
23 me it's entirely possible that Mr. Moyse was using
24 Dropbox to, for example, share information with
25 individuals at a Catalyst portfolio company?

1 A. It's possible, yes.

2 263 Q. Mr. Musters, in your June 24, 2014,
3 affidavit, you described a pattern of access to certain
4 files that you consider to be consistent with copying
5 data to cloud services?

6 A. Correct.

7 264 Q. And you drew that conclusion, as I
8 understood it, based on, at least in part, on metadata
9 time stamps for access?

10 A. Correct.

11 265 Q. And you'll recall that you admitted
12 in cross-examination that you didn't, in fact, know
13 whether that metadata time stamp was generated by the
14 opening or the closing of the file?

15 A. Yes.

16 266 Q. Okay. And so if the metadata time
17 stamp was based on opening a file, it tells you nothing
18 about how long the file was open, correct?

19 A. That's a correct statement, but to
20 clarify, my recollection is that there were numerous
21 documents -- see, I'm referring to the link files, and
22 there was a pattern of access -- I'm gathering the
23 metadata from the link files, so the usage is
24 consistent with the metadata on the -- on the link
25 files that I'm looking at is consistent with a copy

1 function or something like that, if I recall.

2 267 Q. Why don't we look at -- I think
3 this is Exhibit F to your affidavit.

4 MR. WINTON: I will have to pull that
5 out of the archives.

6 MR. BORG-OLIVIER: This is from the
7 original motion record.

8 MR. WINTON: Yes.

9 -- OFF THE RECORD --

10 BY MR. MILNE-SMITH:

11 268 Q. So just for the record, I
12 apologize, I believe I mistakenly referred to June 24.
13 It's June 26, 2014, affidavit, tab F.

14 A. Okay.

15 269 Q. So, Mr. Musters, I've actually done
16 my homework, and we'll see if you agree with me. My
17 understanding -- tell me if you disagree or if you just
18 have no knowledge -- is that these metadata time stamps
19 are created in a Windows 7 environment by the accessing
20 of a file and would not reflect when the file was
21 closed. Do you agree?

22 A. You're making the assumption that
23 the file was open, so I'm disagreeing with your first
24 premise.

25 270 Q. Wouldn't agree that, if a file was

1 opened, it would not show in the metadata when it was
2 closed?

3 A. In that very narrow view, yes, but
4 we need to talk about Windows 7 and last access dates
5 in a slightly different way. We have seen or previous
6 evidence has shown us that if you launch the reg edit
7 program, and clearly that program was opened and
8 closed, it didn't update the last access date in time.

9 So this last -- so the last visited date
10 and time is coming from a link file that is associated
11 with these records. So having said -- so because the
12 link file is created, it creates a record in the master
13 file table, and it creates a creation date, last access
14 date, last modified date of that link file, so these
15 files were last visited or accessed, may have been
16 opened, may not have been opened, may have been copied,
17 may not have been copied, but when I see three files
18 with the exact same 83909 -- I'm looking at the first
19 three entries -- that, to me, doesn't say I opened it
20 and I closed it all within the same millisecond,
21 83909 -- all within the same second, I'm sorry -- that
22 tells me that some other function was performed on
23 that -- on those three files, a copy, as an example.

24 271 Q. Or an opening?

25 A. I can't -- I -- no. Not an

1 opening. As in you can't open three files and close
2 three files in the same second.

3 272 Q. But, Mr. Musters, this is the point
4 we just established. It doesn't -- it wouldn't say
5 anything about closing it, would it? So I don't know
6 why you are talking about opening and closing, because
7 the closing wouldn't show up. Correct?

8 A. The closing wouldn't show up, I
9 agree with you, but I'm also not agreeing with the
10 first premise: That the file was opened.

11 273 Q. Let's put this a different way.
12 These records are equally consistent with copying the
13 files or just opening them. In other words, you can't
14 tell which it is just from these files.

15 A. If I go to -- it says record
16 number 285, on the left. It's, I don't know, eight
17 down or something. I haven't counted.

18 274 Q. Yes.

19 A. And I look at 84343, and I look at
20 the next entry, 84343, and I count one, two, three,
21 four, five, six.

22 275 Q. Yes.

23 A. My experience tells me that someone
24 didn't open six files at the same time and leave them
25 open and close them at some time in the future. That,

1 to me, screams I copied them.

2 276 Q. You are not aware that someone
3 could highlight six files at the same time and open
4 them all at once?

5 A. That is more likely to happen on a
6 MacIntosh computer.

7 277 Q. Okay. But it's possible on a
8 Windows computer? You just said it's more likely on a
9 Windows, so by implication, you are saying it's
10 possible on a Windows computer.

11 MR. WINTON: Just to get it straight, he
12 said it's more --

13 MR. MILNE-SMITH: More likely.

14 MR. WINTON: On a Mac.

15 MR. MILNE-SMITH: Yes.

16 MR. WINTON: Mac. You said Windows.

17 BY MR. MILNE-SMITH:

18 278 Q. So that means it's possible on a
19 Windows.

20 A. I'm -- I'm actually trying to think
21 of how I would do it in a Windows operating system.

22 All right. Let me correct the record.
23 I'm not aware of how to open six Word documents in a
24 Windows operating system at the same time.

25 279 Q. Okay. Mr. Musters, you'd agree

1 with me that, in your previous cross-examination, you
2 relied on the fact that it was improbable for someone
3 to open and close -- make a decision and close it
4 within seconds?

5 A. I agree with that statement.

6 280 Q. Okay. But you'd agree with me now
7 that you were mistaken when you relied on any evidence
8 of closing a file within seconds, because you simply
9 don't have any evidence of that, correct?

10 A. Your entire --

11 MR. WINTON: I just don't think it's
12 fair to call him mistaken. We don't know the question
13 that was asked of him.

14 MR. MILNE-SMITH: Okay. Let's read it.
15 Could you go to -- do you have your copy of the
16 transcript?

17 MR. WINTON: I don't think we do.

18 MR. MILNE-SMITH: Okay. I'm just going
19 to read it into the record, then.

20 So I'm at page 52, question 161. I'm
21 afraid it's going to go on for a while, because we've
22 got some back-and-forth between counsel, but I don't
23 see any other way to do this.

24 MR. BORG-OLIVIER: If it helps to
25 follow. What's the last page from which you're going

1 to be reading?

2 MR. MILNE-SMITH: Question 161, I'm
3 going to start, and it's going to go through to
4 question 162. So it's page 52 to 54.

5 MR. WINTON: Mr. Borg-Olivier has been
6 so kind as to share his copy with us. Perhaps he can
7 read it and then you can ask your question without
8 having to read it all into the record.

9 BY MR. MILNE-SMITH:

10 281 Q. All right. So please read
11 questions 161 through 162.

12 A. Okay.

13 282 Q. So, Mr. Musters, you'd agree with
14 me that --

15 MR. WINTON: Sorry.

16 MR. MILNE-SMITH: Sorry. Mr. Winton?

17 MR. WINTON: Yes. This is also in
18 reference to some evidence that was given in
19 Mr. Moyse's affidavit, as I recall. I'm just -- before
20 he answers any questions, I want to review Mr. Moyse's
21 affidavit and see if I am going to insist that that be
22 put to the witness at the same time.

23 MR. MILNE-SMITH: Go ahead.

24 MR. WINTON: Yes. This copy is marked
25 up. I don't want to show it to the witness. I

1 understand it is sensitive.

2 But Mr. Moyse's affidavit sworn
3 July 7th, 2014, at paragraph 55, I think provides the
4 context of what Mr. Musters is being asked to respond
5 to at his cross-examination. I think it's only fair to
6 put that paragraph to him as well. I'm happy for you
7 to look at it if you agree or disagree before it is
8 shown to him, but I just want to put in the record I
9 think there was a certain situation that was being put
10 to him that might explain it, and I don't think you
11 have captured it exactly as it was put to him there or
12 that doesn't have the right context without having
13 reference to Mr. Moyse's affidavit.

14 MR. MILNE-SMITH: Okay. Well, I have
15 gone through the transcript. I don't see any reference
16 to this passage in the lead-up to these answers, but
17 I'm happy to read this into the record.

18 Paragraph 55 of Mr. Moyse's affidavit
19 dated July 7, 2014, reads as follows. And he is
20 speaking specifically in reference to the so-called
21 telecom files, so this isn't with respect to all four
22 categories of documents; this is with respect
23 specifically to the telecom files.

24 MR. WINTON: Which are the files that
25 are attached at tab F of Mr. Musters' affidavit.

1 MR. MILNE-SMITH: Right.

2 MR. WINTON: Which is why it refers only
3 to that section.

4 BY MR. MILNE-SMITH:

5 283 Q. It says:

6 "I admit that I accessed the files in
7 question. Contrary to Mr. Riley's bald
8 assertion that I did so for a nefarious
9 purpose, I accessed the files as part of
10 my duties at Catalyst. In fact, I was
11 specifically assigned to work on Wind
12 Mobile by Mr. Dialba. I accessed the
13 files in question because I was working
14 on a chart to include in an investment
15 memo. As there are hundreds of files
16 related to Wind Mobile in Catalyst's
17 system, I had to open a number of files
18 and quickly scan them to determine if
19 they contained the information I was
20 looking for. I did not have to read the
21 entirety of all the documents I
22 accessed. While I accessed the files
23 between 8:39 p.m. and 9:03 p.m., e-mail
24 records show that I was still at work.
25 Attached to Exhibit J is an e-mail

1 exchange between myself and my
2 girlfriend dated May 13, 2014, in which
3 I tell her that I will not be home until
4 10:15. I was also working amongst other
5 employees and not trying to
6 surreptitiously read or transfer files.
7 One of those employees still in the
8 office was Lorne Creighton (who was also
9 working on Wind Mobile). I did not
10 transfer any of the files to my Box,
11 Dropbox, or any other personal account,
12 nor have I provided any of the
13 information to West Face."

14 So having done that, my question to you,
15 sir, going back to questions 161 and 162 of your
16 August 1, 2014, transcript, which you have had an
17 opportunity to review, isn't it true that, in your
18 response to question 161, you've relied specifically on
19 the improbability of opening, looking at, making some
20 sort of decision, and closing a file, and opening the
21 next one within a matter of five seconds? You
22 specifically refer to that, correct?

23 A. You are talking about 161 and 162?

24 284 Q. 161. Look at the bottom of page 53
25 and the top of page 54.

1 A. So I'm reading from this transcript
2 out of 161:

3 "So if you asked me logically for
4 something that's five minutes apart, I
5 totally agree with you. If you ask me
6 for something that is six seconds apart,
7 five seconds apart, I disagree with you.
8 So I can't see how someone -- I'm
9 looking at -- for the very first
10 entry -- someone can open up an Excel
11 spreadsheet, open it, look at it, make
12 some sort of decision, close it, and
13 have the next one open in five seconds
14 later."

15 So I stand by that statement.

16 285 Q. But isn't it true, sir, that you
17 have no way of knowing when they closed it?

18 A. I'm making that assumption based on
19 when they opened the next one. In other words, can you
20 review three documents in a second?

21 286 Q. So you are saying just because they
22 open another file means they must have closed the
23 previous one?

24 A. I'm not saying that. I'm saying
25 that this -- what I see is consistent with someone

1 copying a file or set of files in groups. That's what
2 I see.

3 287 Q. But, sir, you have no basis to
4 conclude that they closed the file, right? You have no
5 evidence?

6 A. I'm also not suggesting they have
7 opened the file -- I'm not saying that they did or they
8 didn't open the file. It looks consistent with
9 copying, not opening.

10 288 Q. It's just as consistent with
11 opening or copying?

12 A. I disagree.

13 289 Q. Okay. Would you agree with me that
14 your testimony depended on or assumed that, if
15 Mr. Moyse had opened the file, he also had to close it,
16 based on the evidence you had?

17 A. If he opened it, I'm -- I fully
18 agree that he would have closed it, yes.

19 290 Q. No, but within the five-second
20 window you referred to. You thought the evidence
21 supported that?

22 A. If I recall, I was asked a
23 hypothetical question.

24 291 Q. Yes.

25 A. I don't believe he opened any of

1 these files. If you are asking me to look at this
2 piece of paper and make a determination, my experience
3 tells me this is a pattern consistent with copying, not
4 opening. Now, is it possible he opened the file? Yes.
5 Is it logical or makes sense? No.

6 292 Q. And, sir, when you go to
7 paragraph -- to question 162, you didn't understand at
8 the time that you gave that answer when Microsoft
9 updates the access time?

10 A. This -- so specifically, we're
11 talking -- correct, to your question. At the time,
12 yes.

13 293 Q. Okay. But you'd agree with me now
14 that it only updates it when the file is opened or
15 copied, not when it's closed?

16 A. We have to be -- we have to be very
17 careful when we talk Windows 7, when we talk about
18 updating the last access time, because Windows, by
19 simply opening -- taking a theoretical example, we open
20 a Word document, we close a Word document, and we make
21 no changes, the last access time is not going to get
22 updated. Okay? If we open a picture, view a picture,
23 and close the picture, the last access time is not
24 going to get updated on a Windows 7 operating system.

25 So the reason that the last access time

1 gets updated is if the master file table entry gets
2 updated for some other reason.

3 For example, if I open a document, I
4 make a change to that document, and I close that
5 document, Windows 7 will update the last modified date
6 and time. Since it's updating the master file table
7 entry anyway, it will also update the last access time.

8 My point is this: If it's only going to
9 update the last access time, it doesn't, by default, in
10 a Windows 7 operating system.

11 So here, we are talking about link
12 files. These are the link files that reference these
13 documents, and the link file was created as a result of
14 accessing these documents -- and "access" is an
15 interesting word -- and because there was an entry
16 created in the master file table, it created all of the
17 information as it related to that link file. And,
18 hence, that's why we get the last access date.

19 I will go back to my -- so I agree with
20 you that, if a document is opened and a link file is
21 created, then the last access date would get updated on
22 the link file, not the document.

23 294 Q. Right. And that's what we're
24 talking about here, the link files?

25 A. And that's what we are talking

1 about, the link files.

2 295 Q. So when you open a file, the link
3 file's last access date would reflect that moment that
4 you opened it?

5 A. If we are talking about a link
6 file.

7 296 Q. Yes. Which is what is in
8 Exhibit F, correct?

9 A. Which is what is in Exhibit F.

10 297 Q. Okay.

11 A. However, this -- what I'm looking
12 at at Exhibit F is consistent with the copying of
13 documents, not the opening of documents. Is it
14 theoretically possible he opened these documents? Yes,
15 but highly unlikely. That's my evidence.

16 298 Q. If Mr. Moyse had gone through and
17 opened these call them 25 documents at the times
18 indicated and then done nothing else other than close
19 them, you would have this exact same record?

20 A. I'm running through a scenario in
21 my head, so give me one second to just ... I'm not
22 sure that's true.

23 299 Q. Mr. Musters, you understand you are
24 here to give objective evidence to help the Court?

25 A. Yes, absolutely, absolutely.

1 300 Q. I'm going to give you one more try
2 here, because we've already got Mr. Burt-Gerrans'
3 evidence on this, and the Court will have to decide
4 between your respective evidence.

5 I don't know exactly how many files
6 there are. Let's say there are 25 files here in
7 Exhibit F.

8 A. Sure.

9 301 Q. If Mr. Moyse had done nothing more
10 than open these 25 files on the time and date stamps
11 indicated and then subsequently closed them, you would
12 have the exact same record here as what appears?

13 A. If you are asking me for a
14 theoretical answer, the answer is yes; however, that is
15 a highly unlikely situation based on what I'm looking
16 at.

17 302 Q. Okay. And that's based on your
18 assessment of the motivations and profiling of people
19 who engage in corporate malfeasance?

20 A. It's simply based on what I'm
21 looking at in terms of the times, which are, in some
22 cases, three documents, same second; five documents,
23 same second; eight documents, same second. That's what
24 I'm basing it on.

25 MR. MILNE-SMITH: Okay. Thank you.

1 Those are my questions.

2 MR. WINTON: I just have one brief
3 question in re-exam.

4 RE-EXAMINATION BY MR. WINTON:

5 303 Q. Mr. Musters, you recall that
6 Mr. Borg-Olivier gave you an opportunity to provide
7 your evidence regarding Mr. Lo's suggestion that the
8 absence of link files was somehow relevant to whether
9 or not Mr. Moyse had run the reg edit application?

10 A. I recall that, yes.

11 304 Q. In your experience as a forensic
12 examiner, investigator, how widely known is it
13 regarding the fact, as you put it, that using reg edit
14 would not create link files?

15 A. Link files -- there's link files
16 and shortcuts, and oftentimes, terminology, we cross
17 the two, but I can define a link file as a file which
18 is a link to another document, and there are rules
19 around when link files get created: Predominantly when
20 we're bridging -- bridging is the wrong word -- when we
21 are transferring data from one type of file type to
22 another. A simple example is burning files to a CD or
23 a USB drive. We're going to create link files as a
24 result of that activity. Running a program does not
25 create a link file.

1 Now, I wasn't here when Mr. Lo gave his
2 testimony. If he meant creating a shortcut in the
3 list, the Windows 7 list, commonly referred to as the
4 most recently used activity list, that would,
5 terminology, be a shortcut: Potentially a link file
6 created to show that it had been run. Mr. Lo should
7 have known that running the reg edit program does not
8 create a link or a shortcut or any reference to the
9 most recently used list on a Windows 7 operating
10 system.

11 How common is that? I would assume that
12 any forensic investigator would know that.

13 MR. WINTON: I have no further
14 questions.

15 --- Whereupon the cross-examination concluded at
16 4:12 p.m.

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REPORTER'S CERTIFICATE

I, TERRY WOOD, RPR, CSR, Certified
Shorthand Reporter, 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 25th day of May, 2015.

Terry Wood

NEESONS

PER: TERRY WOOD, RPR, CSR

CERTIFIED COURT REPORTER

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