

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

JAMES RILEY
May 13, 2015

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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 JAMES RILEY, on
his affidavit, taken at the offices of Davies Ward
Phillips & Vineberg LLP, 40th Floor, 155 Wellington
Street West, Toronto, Ontario, on the 13th day of May,
2015.

I N D E X

WITNESS: JAMES RILEY

	Page
Cross-examination by Mr. Borg-Olivier	6
Cross-Examination by Mr. Milne-Smith	46
Re-Examination by Mr. Winton	276

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: 173/19, 176/18, 176/25, 177/7, 177/12, 178/1, 179/2, 179/15, 210/22, 211/6, 245/25, 248/20,

INDEX OF UNDERTAKINGS

The questions/requests undertaken are noted by U/T and appear on the following pages/lines: 42/23, 44/9, 46/14, 108/19, 126/9, 127/22, 128/3, 131/13.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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23
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25

INDEX OF UNDER ADVISEMENTS

The questions/requests taken under advisement are noted by U/A and appear on the following pages/lines: 42/23, 64/5, 65/1, 65/11, 72/8, 77/21, 101/6, 123/11, 124/15, 125/4, 164/8, 214/10, 255/16, 264/24.

LIST OF EXHIBITS		
EXHIBIT NO./DESCRIPTION		Page
1	Letter from Mr. Milne-Smith to	95
	Mr. DiPucchio dated March 13, 2015	
2	Request for production of documentation	96
	relating to letter from Mr. Mitchell to	
	Mr. DiPucchio dated February 20, 2015	
3	Letter dated February 26 to Mr. Mitchell	97
4	Document entitled "Accounting Alerts!	161
	Callidus Capital Corporation" dated	
	April 16, 2015	
5	Wall Street Journal article dated May 12,	165
	2015	
6	Monitor's report dated March 17, 2015	207
7	Morning note from M Partners dated April 2,	270
	2015	

1 --- Upon commencing at 10:05 a.m.

2 CROSS-EXAMINATION BY MR. BORG-OLIVIER:

3 1 Q. Good morning, Mr. Riley.

4 A. Good morning.

5 2 Q. You're here today, Mr. Riley, in
6 connection with the action Catalyst versus Brandon
7 Moyses and West Face Capital. Do you understand that?

8 A. Yes.

9 3 Q. And you have sworn, if I have
10 counted correctly -- sworn or affirmed -- five
11 affidavits in this proceeding? I can walk you through
12 the dates, if you would like.

13 A. Could you -- if you could, could
14 just show me the first page?

15 4 Q. Absolutely.

16 A. Please.

17 5 Q. And maybe for the record, I will
18 point out that, in the motion record dated February 18,
19 2015, there's an affidavit of yours sworn February 18,
20 2015, which is at tab 3. And your counsel will take
21 you to the first page.

22 A. Thank you.

23 Yes.

24 6 Q. Then attached to that affidavit is
25 exhibits you have at tab A, an affidavit that you swore

1 in this proceeding dated June 26, 2014, and if I have
2 it correct, that was the first affidavit that you
3 swore?

4 A. Yes. I don't know if it's the
5 first, but I do recognize the affidavit.

6 7 Q. Behind tab B, there's what's called
7 a reply affidavit of yours sworn July 14, 2014?

8 A. Yes.

9 8 Q. This one was -- if you look at
10 paragraph 2 there, this one was sworn primarily in
11 response to affidavits that were put in by our client
12 Mr. Moyle and by West Face?

13 A. Yes.

14 9 Q. And behind tab C, there's a further
15 reply affidavit sworn July 28, 2014.

16 A. Yes.

17 10 Q. And, finally, if you pull up the
18 supplementary motion record dated May 1st, 2015,
19 there's an affidavit of yours, supplementary affidavit,
20 sworn May 1st, 2015?

21 A. Yes.

22 11 Q. Okay. And have you had a chance
23 before appearing here today to review the affidavits
24 that you swore in this proceeding?

25 A. I have reviewed them.

1 12 Q. And is there anything in those
2 affidavits that you would like to take the opportunity
3 to correct?

4 A. Not at this time, no.

5 13 Q. Okay. For your purposes and your
6 counsel's purposes, I will let you know that my
7 examination will be quite brief, and then I will be
8 turning it over to Mr. Milne-Smith, and I expect most
9 of my questions will pertain to the affidavit of
10 February 18, 2015.

11 A. May I do one thing before we start?

12 MR. BORG-OLIVIER: Yes.

13 -- OFF THE RECORD --

14 BY MR. BORG-OLIVIER:

15 14 Q. So if I could have you turn,
16 please, Mr. Riley, to the affidavit of February 18,
17 2015, which is at tab 3 of the motion record. And I
18 would ask you to pull up paragraph 31, please.

19 A. Can I read it for one moment?

20 15 Q. Please do.

21 A. Yes, I have read it.

22 16 Q. And in this paragraph, you are
23 describing the parties' appearance before Justice Himel
24 on June 30th to schedule Catalyst's motion for urgent
25 interim relief. Do you see that?

1 A. Yes, I do.

2 17 Q. And Catalyst, I believe, was
3 represented by Mr. Winton on that appearance; is that
4 right?

5 A. I don't know. I don't remember
6 whether it was Mr. DiPucchio or Mr. Winton, but if you
7 tell me it's Mr. Winton, I will take that as given.

8 18 Q. Were you in court that day?

9 A. No.

10 19 Q. And what your counsel, whether it
11 be Mr. Winton or Mr. DiPucchio, was seeking that day,
12 as you know, was an urgent motion for an interim
13 injunction, correct?

14 A. Correct.

15 20 Q. And if you turn up Exhibit F to
16 this affidavit. We'll all struggle with this a little
17 bit.

18 A. Is there a typed version of this
19 endorsement?

20 21 Q. There isn't, but I don't think
21 there is going to be anything controversial about it.

22 So what this is, I will tell you,
23 Mr. Riley, is Justice Himel's endorsement, and one
24 thing that you can see there, at the top, is that the
25 approved date for the hearing of the motion was

1 July 16, 2014. Do you see that?

2 A. Yes, I see that.

3 22 Q. Okay. And the endorsement reads --
4 about three lines down, you will see it says:

5 "Counsel seeks urgent motion interim
6 injunction."

7 Do you see that?

8 A. Yes.

9 Q. "Moving party to serve and file
10 materials by July 2, 2014, and
11 responding party by July 7, 2014."

12 Do you see that?

13 A. Yes, I see it.

14 23 Q. And, finally, it says:

15 "On consent, counsel agree to preserve
16 status quo re documents."

17 Et cetera. Do you see all that?

18 A. Yes, I do.

19 24 Q. Okay. And if you turn two pages
20 beyond that to page --

21 A. Sorry, there is a -- there's a --
22 there's a little bit of writing to the right.

23 25 Q. There is. Yes. I think that's
24 Justice Himel's description of the type of case it is,
25 so it says "Employment departure employee case

1 non-compete clause".

2 A. Okay. Thank you.

3 26 Q. I think it's typical in those cases
4 so that the next judge would understand basically what
5 kind of case they are dealing with.

6 A. Okay.

7 27 Q. So if you turn two pages beyond
8 that to 129 in the motion record, what you see there is
9 the consent that was entered into between the parties.
10 Do you see that?

11 A. Yes.

12 28 Q. And it's signed by Mr. Pushalik for
13 the defendants and by Mr. Winton for the plaintiffs.
14 Do you see that?

15 A. Yes.

16 29 Q. And that reads:

17 "Defendants' counsel agree to preserve
18 the status quo with respect to relevant
19 documents in the defendants' power,
20 possession, or control."

21 Do you see that?

22 A. Yes, I see that.

23 30 Q. And I take it that that was the
24 only undertaking that the -- that Catalyst obtained at
25 the time?

1 A. As far as I know, yes, as far as I
2 know.

3 31 Q. And Catalyst accepted and
4 understood that those terms would stay in place from
5 that date, June 30th, until the July 16th hearing?

6 A. And I'm not quibbling in any way.
7 Just having reread the endorsement and looking at the
8 undertaking, it's a little broader than the judge's
9 order. I'm just -- just looking at the language.

10 32 Q. Yes. So we are focussing right now
11 on the undertaking that was provided by -- on consent.

12 A. Yes.

13 33 Q. So Catalyst understood and accepted
14 that those terms would stay in place from June 30th to
15 July 16th, to the date of the hearing?

16 A. Yes.

17 34 Q. And, of course, it was open to
18 Catalyst, as it was to any of the other parties, to
19 seek that different terms be included in that
20 undertaking?

21 A. Yes.

22 35 Q. And the undertaking didn't say, for
23 example, that counsel would agree to preserve the
24 status quo with respect to irrelevant documents?

25 A. No.

1 36 Q. That wasn't a concern for Catalyst?
2 The focus was on relevant documents?

3 A. Yes.

4 37 Q. Yes. And nor did it require, for
5 example, that Mr. Moyses hand over his computer
6 immediately on that date?

7 A. I don't recall why there was a
8 hiatus between the date of the order and the date of
9 the turnover.

10 38 Q. Okay. But that wasn't something
11 that Catalyst sought or obtained on that date?

12 A. No. Never turned our minds to it,
13 as far as I recall.

14 39 Q. Okay. Then if we can go to
15 paragraph 32 of your affidavit, please.

16 A. Sorry. I will leave him to find
17 it, because otherwise I will --

18 MR. BORG-OLIVIER: It's page 65 of the
19 record, if that helps.

20 -- OFF THE RECORD --

21 BY MR. BORG-OLIVIER:

22 40 Q. So, Mr. Riley, in paragraph 32, you
23 describe the motion for interim relief which took place
24 on July 16, 2014?

25 A. Yes.

1 41 Q. Were you in court that day?

2 A. As far as I recall, no.

3 42 Q. You understand, I take it, that the
4 parties appeared before Justice Firestone?

5 A. Yes.

6 43 Q. And you understand, in fact, you
7 have stated here, that the parties consented to interim
8 terms which were incorporated into an order of Justice
9 Firestone?

10 A. Yes.

11 44 Q. All the parties consented to the
12 interim terms that day, I understand?

13 A. Yes.

14 45 Q. And those terms were acceptable to
15 Catalyst?

16 A. They were, although, to my best
17 recollection, they were read to me over the telephone.
18 I was not given a hard copy.

19 46 Q. Understood. Was it you who was
20 providing instruction to counsel that day?

21 A. I was, and as I recall, we were
22 under a lot of time pressure.

23 47 Q. No doubt. And you were providing
24 instructions on behalf of Catalyst?

25 A. I was.

1 48 Q. And, ultimately, the instructions
2 that you provided were that the terms of what became
3 the order of Justice Firestone were acceptable to you
4 and to Catalyst?

5 A. That is correct.

6 49 Q. And if we go to Exhibit G, this,
7 Mr. Riley, is the interim relief order signed that day
8 by Justice Firestone?

9 MR. WINTON: I don't want to interfere
10 unduly, Counsel, but it wasn't signed that day by
11 Justice Firestone.

12 MR. BORG-OLIVIER: Okay.

13 MR. WINTON: But it is the interim
14 order.

15 MR. BORG-OLIVIER: Okay. Fair enough.

16 BY MR. BORG-OLIVIER:

17 50 Q. And I take it, Mr. Riley, that this
18 order appropriately captured what you understood to be
19 the terms that Catalyst had consented to at that time?

20 A. May I just read it?

21 51 Q. Please do.

22 A. I think that's correct, but I just
23 want to read it. May I take a moment?

24 I've read it.

25 52 Q. Okay. And I will repeat my

1 question. I take it that this order appropriately
2 captured the relief that Catalyst sought and obtained
3 on that date?

4 A. Yes.

5 53 Q. Okay.

6 A. Yes, it does.

7 54 Q. And Catalyst did not seek or obtain
8 any broader relief than that captured within this
9 order, I take it?

10 MR. WINTON: Can you just clarify when
11 you say -- what do you mean by "sought" or "seek"?

12 BY MR. BORG-OLIVIER:

13 55 Q. Well, fair point. Maybe the point
14 that should be made in the question is, ultimately,
15 Catalyst didn't obtain any further relief beyond this?
16 Beyond what was in this order at that time?

17 A. To the best of my knowledge, no.

18 56 Q. Okay. Nor did it seek to by
19 bringing a motion for further relief at that time?

20 A. No.

21 57 Q. Okay. If we can go to
22 paragraph 36, please, of your affidavit, and this is at
23 page 68 of the record.

24 So, Mr. Riley, subsequent to the interim
25 relief order being signed on July 16 or soon

1 thereafter, I take it counsel were in regular
2 communication regarding the process that would lead to
3 the creation of the images of Mr. Moyses's computer
4 devices? Do you recall that?

5 A. I don't recall. That would have
6 been communication between counsel, which I would only
7 be on the periphery of.

8 58 Q. Okay. But I take it you were
9 generally kept informed of the fact that the parties
10 were working together in furtherance of the order?

11 A. I have no recollection either way.
12 I mean, I assume -- when I say -- "assume" is always a
13 bad word. I would take it that they were working
14 towards fulfilling the order of Justice Firestone.

15 59 Q. Okay. So in these paragraphs where
16 you are describing the process by which the image was
17 ultimately created on July 21, 2014, I take it this is
18 information that you received from counsel or
19 otherwise?

20 So if I start you at paragraph 33, for
21 example. And maybe it makes sense, Mr. Riley, that you
22 take a moment to read through these paragraphs, but
23 what you are describing here is the process leading up
24 to Mr. Moyses turning over his computer and the image
25 being created. So why don't you have a look at that.

1 A. Do I need to look at the exhibits?

2 60 Q. If you'd like. I'm going to take
3 you to Exhibit K, but you are welcome to look at any
4 exhibits you need.

5 A. Okay. I think.

6 61 Q. So you've told us in paragraph 1 of
7 the affidavit -- and I acknowledge this is standard
8 language in these affidavits -- that you have knowledge
9 of the matters set out in the affidavit and that, where
10 it's based on information and belief, you identify the
11 source of the information and belief to be true?

12 A. Yes.

13 62 Q. So I don't see any language
14 suggesting that this is on information and belief, so
15 is it a fair conclusion to draw that this is
16 information that you are now aware of or were aware of
17 at the time?

18 A. Yes.

19 63 Q. Okay. So I'll ask again. This is
20 a description, then, of the process by which
21 Mr. Moyse's computer came to be turned over for
22 forensic imaging on July 21st?

23 A. Yes.

24 64 Q. And as described in those
25 paragraphs, counsel were in regular communication

1 regarding that process?

2 A. Yes.

3 65 Q. Okay. And as you note in
4 paragraph 33, it was agreed that -- Harold
5 Burt-Gerrans?

6 A. I don't know how to pronounce that.

7 MR. WINTON: We have been using the hard
8 G internally, but I don't think --

9 BY MR. BORG-OLIVIER:

10 66 Q. Harold Burt-Gerrans of --

11 A. Why don't you call him "H&A"?

12 67 Q. Yes. H&A eDiscovery was retained
13 to create the images. Do you see that?

14 A. Yes.

15 68 Q. Okay. And in paragraph 36, you
16 refer to an e-mail which is reproduced in full at
17 tab K.

18 A. Yes.

19 69 Q. From Mr. Hopkins, who is then
20 Mr. Moyse's counsel to Mr. Burt-Gerrans?

21 A. Yes, I see it.

22 70 Q. Okay. And that e-mail was copied
23 to your counsel, Mr. Winton and Mr. DiPucchio, and to
24 West Face's counsel, Mr. Pushalik. Do you see that?

25 A. I do.

1 71 Q. Okay. And this e-mail is dated
2 July 18 at 8:54. Do you see that?

3 A. Yes.

4 72 Q. Okay. And it sets out some
5 proposed changes to the engagement letter. Do you see
6 that?

7 A. Yes.

8 73 Q. And it requests consultation with
9 Mr. Musters regarding how to image Mr. Moyse's iPad, in
10 the paragraph beneath the numbered paragraphs?

11 A. I see that.

12 74 Q. Okay. And, finally, it advises in
13 the last standalone paragraph that Mr. Moyse has
14 confirmed he will be at the Grossman offices by 10 a.m.
15 on Monday with his three computer devices. Do you see
16 that?

17 A. Yes.

18 75 Q. And I can tell you, Mr. Riley --
19 you won't necessarily know this by looking at it --
20 that the Monday he's referring to, the following
21 Monday, is July 21, 2014.

22 A. I will take that as given.

23 76 Q. Yes. So there was, you'll agree
24 with me, no attempt on behalf of Mr. Moyse's counsel to
25 hide the fact that he would only be producing the

1 computer for forensic imaging some days later?

2 A. No.

3 77 Q. And I haven't seen any evidence
4 that your counsel or anybody else objected in any way
5 to that plan?

6 A. Not to my knowledge.

7 BY MR. BORG-OLIVIER:

8 78 Q. Okay. And I can ask this to you or
9 to Mr. Winton, but if there are any communications from
10 you, Mr. Winton, or Mr. DiPucchio, or anyone else to
11 Mr. Moyle's former counsel objecting to the plan or
12 suggesting that the computer, in fact, had to be turned
13 over immediately, I take it you will provide them to
14 me? We haven't seen anything like that?

15 MR. WINTON: In response to this e-mail,
16 no.

17 MR. BORG-OLIVIER: Okay. And you can
18 certainly do it by way of undertaking, if that's
19 easier.

20 MR. WINTON: What I am just reviewing
21 right now is the correspondence, because there was one
22 fact I wanted to check, but -- in response to that
23 question.

24 MR. BORG-OLIVIER: Should we go off for
25 a second?

1 MR. WINTON: If we can. That would be
2 great. Thanks.

3 MR. BORG-OLIVIER: Sure.

4 -- OFF THE RECORD --

5 MR. WINTON: That's fine.

6 BY MR. BORG-OLIVIER:

7 79 Q. Okay. Can we go, Mr. Riley, to
8 paragraph 61, please, of your affidavit, which is at
9 page 74 of the record.

10 Just so I'm clear on the record,
11 Mr. Winton, when you said "That's fine", that means you
12 gave the undertaking asked before we went off the
13 record?

14 MR. WINTON: No, it means there is no
15 such correspondence. There's nothing to undertake to
16 produce.

17 MR. BORG-OLIVIER: Okay. So you have
18 provided the answer?

19 MR. WINTON: Correct.

20 MR. BORG-OLIVIER: Okay.

21 THE WITNESS: I'm on paragraph 61.

22 BY MR. BORG-OLIVIER:

23 80 Q. Sorry, actually, go to
24 paragraph 60, if you wouldn't mind, and I would ask if
25 you would just read from paragraph 60 to paragraph 63.

1 A. Just to 63?

2 81 Q. Yes. Please. So you are
3 describing here, Mr. Riley, your reaction or views to
4 the draft report from the ISS that was circulated?

5 A. Yes.

6 82 Q. And one of the concerns that you
7 have that you express in paragraph 63 is that you or
8 Catalyst were concerned that Catalyst's confidential
9 information was potentially mistakenly omitted from the
10 draft report?

11 A. Yes.

12 83 Q. And at paragraph 62, you suggest
13 that the ISS might have misunderstood the relationship
14 between Catalyst and Callidus and that may have been a
15 reason why certain confidential information was
16 mistakenly omitted from the draft report?

17 A. Yes.

18 84 Q. And you'll recall that there was a
19 series of what you describe as additional search terms
20 that had been provided to the ISS that you make
21 reference to at paragraph 62?

22 A. Yes, I recall that.

23 85 Q. Yes. And you take the position at
24 the end of paragraph 62 that any document in
25 Mr. Moyses's possession or potentially any document in

1 Moyle's possession that was responsive to the
2 additional search terms, by its nature, very likely
3 contained Catalyst's confidential information?

4 A. Yes. That was my belief at the
5 time.

6 86 Q. Okay. And I take it that you had
7 reviewed the additional search terms before swearing
8 this affidavit?

9 A. Yes. Is it attached here? I can't
10 remember. Did we redact this?

11 87 Q. They are not.

12 A. Sorry. I apologize. I think we
13 redacted them.

14 88 Q. Yes.

15 A. Yes. Okay. And I do recall the
16 search -- I don't recall each one of them, but I do
17 recall the additional search terms.

18 89 Q. Okay. And I take it that you at
19 least turned your mind to what those search terms were
20 when providing the evidence that --

21 A. Yes.

22 90 Q. -- any document containing those
23 search terms, by their nature, very likely contained
24 Catalyst's confidential information?

25 A. Yes.

1 91 Q. Okay. And in making that
2 statement, did you consider whether it might be
3 possible that some of the terms would show up on
4 Mr. Moyle's computer for benign reasons, that is, in
5 contexts unrelated to Catalyst's confidential
6 information?

7 A. I did not, but I'm not a
8 computer -- a computer -- I'm relying on others for
9 that expertise.

10 92 Q. Okay. You understood this much,
11 surely, that, to the extent a document on Mr. Moyle's
12 computer contained one of those search terms, it would
13 register as a hit?

14 A. Yes, I do understand that.

15 93 Q. Okay. And you expressed the view
16 that, when there would be such a hit, it very likely
17 was a document containing Catalyst's confidential
18 information? That's what you have said here, isn't it?

19 A. Yes.

20 94 Q. Okay. And the conclusion that you
21 reached, I take it, is that it was very unlikely that
22 there would be documents on there that would register
23 hits but not contain Catalyst's confidential
24 information?

25 A. I'm not sure -- could you repeat

1 the question.

2 95 Q. Sure. I'm just really stating the
3 converse of what you have stated here. I think you are
4 saying that if a document contains one of those search
5 terms, by its nature, that very likely contained
6 Catalyst's confidential information?

7 A. Yes.

8 96 Q. You have said that?

9 A. Yes.

10 97 Q. So I'm suggesting that the
11 necessary converse of that is that it's very unlikely
12 that documents containing those search terms would be
13 benign: Not containing Catalyst's confidential
14 information?

15 A. I think that's correct. I have
16 trouble with --

17 98 Q. I think I'm stating that fairly.

18 A. And I'm not quibbling. I'm just
19 saying I think that is correct, but I'm not sure I --
20 I'm not sure I understand the construct.

21 99 Q. Fair enough. I will move forward
22 on that basis.

23 A. Okay.

24 100 Q. As you mentioned, the search terms
25 have been redacted on the record and, in fact, we

1 included the supplementary ISS report in Mr. Moyses's
2 motion record, but we redacted those terms, and I have
3 a copy of the unredacted one for these purposes. I
4 don't propose to enter it as an exhibit, nor do I
5 propose to share it with West Face's counsel, but I do
6 want to have a list of the search terms available to
7 us, and I won't read any of them into the record, but
8 the purpose of the questions, I need to have reference
9 to those search terms. So they start at paragraph 3.

10 MR. WINTON: Can we go off the record?

11 -- OFF THE RECORD --

12 THE WITNESS: May I look at this for a
13 moment?

14 BY MR. BORG-OLIVIER:

15 101 Q. For sure, absolutely.

16 A. Yes.

17 102 Q. So am I right, Mr. Riley, that the
18 additional search terms to which you make reference at
19 paragraph 62 of your affidavit are those listed here at
20 paragraph 8 of the unredacted supplementary ISS report?

21 A. I'm sorry, I don't see the
22 reference to it in here. What paragraph, 62?

23 103 Q. Paragraph 62.

24 A. Yes.

25 104 Q. In the last line.

1 A. Oh, I apologize. I see it now.

2 105 Q. That's okay. So there's a
3 reference at paragraph 62 to additional search terms?

4 A. Yes.

5 106 Q. And I'm just seeking your
6 confirmation that the terms listed here at paragraph 8
7 of the supplementary ISS report are those additional
8 search terms to which you've referred.

9 A. What date is this document?

10 107 Q. This document is dated --

11 A. March, okay.

12 108 Q. -- March 30, 2015.

13 A. Yes, these are -- to the best of my
14 recollection, these are the additional search terms.

15 109 Q. Okay. And if you turn to page 4
16 and look at the third term down on that list, it's one
17 that registered 541 hits. Do you see that?

18 A. Yes, I see it.

19 110 Q. Okay. You'll agree with me, I take
20 it, that that's a common man's name?

21 A. I would actually disagree with
22 that.

23 111 Q. Okay.

24 A. I don't know any [redacted]. I'm
25 not an expert on names.

1 MR. WINTON: Let's go off the record for
2 a second.

3 -- OFF THE RECORD --

4 BY MR. BORG-OLIVIER:

5 112 Q. So we are back on. So without
6 saying the name in question, and perhaps without
7 getting into too much of an argument about how common
8 that name is, would you at least go this far with me,
9 Mr. Riley: That's a recognized man's name?

10 A. Yes.

11 113 Q. In other words, you look at that
12 and you would acknowledge that certainly it's a word
13 and a name that might appear in contexts other than in
14 respect of Catalyst confidential information?

15 A. Yes.

16 114 Q. And did you consider at the time
17 you swore the affidavit that that term might show up on
18 Mr. Moyses's computer because he might have had
19 reference to or discussions with a person with that
20 name in an unrelated context to Catalyst?

21 A. We did, but we looked at the
22 totality of all of the hits and found it -- in context,
23 that it seemed unusual to us.

24 115 Q. What do you mean by that?

25 A. That it was not something I would

1 have expected to come up as frequently as that, and
2 when I tied it in with the other -- the other hits, it
3 seemed unusual to me.

4 116 Q. Okay. And the second term that I
5 want to take you to, which I think we have agreement
6 from you and your counsel that we can read into the
7 record, notwithstanding that it was previously
8 redacted, is the term "leader". Do you see that?

9 A. Yes.

10 117 Q. L-E-A-D-E-R.

11 A. I do.

12 118 Q. Okay. Can you agree with me that
13 that is a common word?

14 A. Yes.

15 119 Q. Used in normal conversation outside
16 of Catalyst context?

17 A. Yes.

18 120 Q. And, in fact, in numerous contexts
19 that would have nothing to do with finance?

20 A. Yes.

21 121 Q. Sports, politics, others?

22 A. Yes.

23 122 Q. Okay. And you didn't disclose to
24 the Court, I take it, that this was a common term that
25 was among the redacted search terms?

1 A. Not to my knowledge, but I wasn't
2 present in any of those hearings, I don't think.

3 123 Q. Okay. In your affidavit?

4 A. Yeah. Not in my affidavit, no.

5 124 Q. Okay. And I take it, again, did
6 you give any consideration to the fact that that term
7 could show up in benign contexts on Mr. Moyses's
8 computer?

9 A. I'm prepared to answer that
10 question, but I think when I looked at these search
11 terms, I looked at them in the context of the
12 likelihood of the number of times that all of them
13 would show up. In other words, I -- from my view, I
14 didn't isolate one term and say, wow, that showed up a
15 lot; I looked at it in the context of why would these
16 names have shown up and what was the likelihood of all
17 of them showing up in any significant way.

18 125 Q. Okay. I see. As I look at the hit
19 counts, it looks to me like there's a pretty broad
20 range, from zero all the way up to 15,000, on the
21 different hits, right?

22 A. Yes.

23 126 Q. Okay.

24 A. What I'm saying and what I'm trying
25 to say is I don't think you can isolate just one set of

1 hit counts and dismiss them because of the likelihood
2 that they could be a common term. I'm expressing this
3 in my own way. You have to look at all of the ones
4 that show up. What is the likelihood with those search
5 terms of all of them showing up in any significant way?
6 Sorry, a number of them showing up in any significant
7 way? So without going through the names again --

8 127 Q. Right.

9 A. -- I was surprised to see these
10 names showing up in any way. I would have expected
11 zeros or low numbers.

12 128 Q. Okay. I think I understand the
13 point. But I take it, Mr. Riley, you are not
14 quarreling with the idea that the word "leader", for
15 example, could quite easily show up in contexts
16 unrelated to Catalyst?

17 A. I'm not quarreling with that. I
18 didn't think I was quarreling with anything you were
19 saying.

20 129 Q. No, no. I think it was going
21 swimmingly.

22 In paragraph 65, if I can take you
23 there.

24 A. May I look at 64?

25 130 Q. Of course.

1 A. Okay.

2 131 Q. So at paragraph 64 of your
3 affidavit, Mr. Riley, you set out there four questions
4 that your counsel, Mr. Winton, on behalf of Catalyst,
5 asked the ISS arising out of their draft report. Do
6 you see that?

7 A. Yes.

8 132 Q. And those were questions intended
9 to address the concerns that you have set out in the
10 preceding paragraphs about potentially the ISS
11 misinterpreting the relationship between Catalyst and
12 Callidus, among other issues?

13 A. Yes.

14 133 Q. And at paragraph 65, you note that
15 Mr. Moyses's counsel objected to letting the ISS answer
16 the questions?

17 A. Yes.

18 134 Q. You are aware, I take it,
19 Mr. Riley, that Mr. Moyses's new counsel subsequently
20 agreed to have the ISS answer those questions?

21 A. Can I just -- I never know the rule
22 on this. Can I confirm? I do not recall -- I do
23 believe that that is correct, but I can't recall
24 precisely when I saw it or when I was informed of it.

25 135 Q. That's perfectly fair. You

1 understand, I take it, that the ISS subsequently
2 delivered a supplementary report?

3 A. Yes.

4 136 Q. Which is the document that I have
5 handed to you --

6 A. Yes.

7 137 Q. -- that maybe you can have
8 reference to if your counsel has it handy.

9 A. Yes.

10 138 Q. And you understood then or, at a
11 minimum, I take it you understand now that the purpose
12 of that ISS supplementary report was, in fact, to
13 specifically answer the four questions that you have
14 set out there at paragraph 64?

15 MR. WINTON: Just -- I note that I think
16 paragraph 3 of the supplementary report, which is not
17 redacted from the record, may help address this
18 question.

19 MR. BORG-OLIVIER: Perfect.

20 MR. WINTON: And maybe if I pull out a
21 copy of the appendix C, which might be in -- is the
22 appendix to that report in the record somewhere,
23 because that might also help.

24 MR. BORG-OLIVIER: It is. Do you have
25 our responding motion record?

1 MR. WINTON: I will.

2 MR. BORG-OLIVIER: Let's go off for a
3 second.

4 -- OFF THE RECORD --

5 BY MR. BORG-OLIVIER:

6 139 Q. So, Mr. Riley, your counsel is
7 showing you the complete supplementary ISS report,
8 including its appendices, which is at tab K of
9 Mr. Moyse's affidavit in our responding motion record.
10 And if you go to tab C of the complete supplementary
11 ISS report at page 129 of the responding motion record
12 of Moyse, you will see there an e-mail from Mr. Winton
13 to the ISS, and others. Can you have a look at that
14 e-mail.

15 A. Yes, I've looked at it.

16 140 Q. And you see there confirmation
17 that, in fact, Mr. Moyse's new counsel agreed that the
18 issues of concern that had been raised previously
19 could, in fact, be responded to and addressed by the
20 ISS?

21 A. Yes.

22 141 Q. And that subsequently led to the
23 creation of the supplementary report that we have been
24 looking at?

25 A. Yes. Thank you.

1 142 Q. So I take it that the concerns,
2 then, that you had raised in those preceding paragraphs
3 have now been addressed by virtue of the ISS preparing
4 its supplementary report?

5 A. I still have some residual concern.

6 143 Q. Okay. But I take it the concern
7 that the issues had not been addressed by the ISS
8 certainly have been dealt with?

9 A. I'm not trying to be argumentative.
10 I still have residual concerns.

11 144 Q. I understand that. You may
12 disagree with the conclusions of the ISS, but -- let me
13 ask the question -- but you no longer have the concern
14 that you have expressed in here that Catalyst had
15 raised certain concerns which the ISS was precluded
16 from dealing with?

17 A. Again, I'm not trying to be
18 argumentative. I think this was part of the response,
19 but I do believe I've still got residual concerns, so I
20 want that expressed that way.

21 145 Q. Okay. And neither you nor your
22 counsel, I take it, asked any further questions of the
23 ISS coming out of this supplementary report?

24 A. We did resolve that we would have
25 to probe deeper into the ISS and we might need a

1 broader process.

2 146 Q. I take it neither you nor your
3 counsel asked any further questions of the ISS in the
4 aftermath of this report?

5 A. I only asked questions of my
6 counsel. Whether they pursued them at that time, I
7 don't know or I don't recall.

8 147 Q. Okay. Maybe we can get that answer
9 from your counsel or by way of undertaking, but I
10 certainly haven't seen any further issues or questions
11 raised with the ISS in the aftermath of the
12 supplementary report, and I'd appreciate getting that
13 confirmation.

14 MR. WINTON: That's correct, we did not
15 pursue this further with the ISS in relation to
16 Mr. Moyses's -- the images in Mr. Moyses's devices.

17 BY MR. BORG-OLIVIER:

18 148 Q. Thank you. And, finally, I'm going
19 to ask you to turn up your July 14th affidavit, which
20 is at tab B of your motion record at page 109.

21 MR. WINTON: Tab 3B.

22 MR. BORG-OLIVIER: Sorry, tab 3B. There
23 are several B's.

24 THE WITNESS: May I look at this for a
25 moment just to put it in context?

1 BY MR. BORG-OLIVIER:

2 149 Q. Yes. You can look at it to place
3 yourself at the right moment in time, and I will let
4 you know that the only questions I'm going to be asking
5 pertain to paragraph 14.

6 A. Yes.

7 150 Q. Okay. So at this paragraph 14,
8 Mr. Riley, you're discussing the fact that Mr. Moyse
9 wiped his company-issued BlackBerry before returning it
10 to Catalyst?

11 A. Yes.

12 151 Q. And in the last line of that
13 paragraph, you raise concern that, by doing so,
14 Mr. Moyse may have destroyed evidence of, among other
15 things, Moyse's communications with West Face?

16 A. Yes.

17 152 Q. And I take it, Mr. Riley, that it's
18 speculation on your part that Mr. Moyse had any
19 communications with West Face from his work-issued
20 BlackBerry?

21 A. I can't tell one way or the other,
22 because it's wiped.

23 153 Q. Therefore, it's speculation,
24 correct? You don't know that Mr. Moyse had any
25 communications with West Face -- let me ask the

1 question.

2 A. I don't know that, because his
3 BlackBerry was wiped.

4 154 Q. Yes.

5 A. If I was able to look at his
6 BlackBerry, unwiped or unaltered, I would be able to
7 answer that question.

8 155 Q. Well, you are still able to answer
9 that question. The question is it's speculation on
10 your part that Mr. Moyses had any communications with
11 West Face from his work-issued BlackBerry?

12 A. Yes, that is correct.

13 156 Q. Okay. And I take it that e-mails
14 sent to or from a Catalyst work e-mail address are
15 maintained on a server at Catalyst; is that correct?

16 A. Yes.

17 157 Q. And my understanding -- and you can
18 correct me if I'm wrong -- would be that wiping a
19 BlackBerry would not remove e-mails on that BlackBerry
20 from the Catalyst server; is that correct?

21 A. That is correct.

22 158 Q. Okay. So e-mails that Mr. Moyses
23 may have sent or received on that BlackBerry wouldn't
24 have been destroyed by virtue of the wiping of the
25 BlackBerry?

1 A. I'm not -- again, I'm not a
2 technical expert, but I think what I'm about to say is
3 correct. If you deleted the e-mail on our -- in our
4 system, double delete, it's most likely it would have
5 been taken out of -- our server would be removed, but
6 it would still be retained on his BlackBerry.

7 159 Q. Okay.

8 A. If I delete -- let me say it
9 simply. If I delete an e-mail from my -- if I double
10 delete an e-mail --

11 160 Q. What do you mean by "double
12 delete"?

13 A. You delete it once and then you go
14 and you delete it --

15 161 Q. You empty the deleted folder.

16 A. -- you empty the deleted bucket, it
17 will still be on my BlackBerry, because I don't sync
18 the two from the deletion point of view. Similarly, if
19 I delete a message on my BlackBerry, it is not deleted
20 from my computer.

21 162 Q. Okay. Does --

22 A. The other thing I will say is that
23 I believe in the BlackBerry system that if you use
24 BlackBerry Messenger or text messages, those are not --
25 those are not touched.

1 163 Q. Understood. I imagine Catalyst has
2 some sort of e-mail backing-up system?

3 A. I would have to -- I would have to
4 confirm that with our tech people, how it's backed up.
5 Again, there is a backup system.

6 164 Q. Yes.

7 A. But I believe that when you delete
8 it, it's deleted from the system.

9 165 Q. Okay. You have access to your IT
10 people, right?

11 A. Yes.

12 166 Q. I mean, you have made reference in
13 one of your affidavits to the fact that you spoke to
14 one of your internal IT people?

15 A. Yes.

16 167 Q. But I take it you didn't raise this
17 issue with them before swearing the affidavit?

18 A. I do not recall.

19 168 Q. Okay. So when you provided this
20 evidence that, by virtue of the BlackBerry being wiped
21 Mr. Moyses's communications would be destroyed, I take
22 it you didn't confirm that fact with anybody in the IT
23 department as to whether, in fact, e-mails might be
24 preserved?

25 A. We discussed at the time how we

1 could access different messages; in particular, what
2 was on his BlackBerry, and it was confirmed to me we
3 could not trace what was on his BlackBerry through any
4 system we had.

5 169 Q. By whom?

6 A. What date was that? It was -- I
7 can't remember the name of the -- I can undertake to
8 give you the name.

9 MR. WINTON: I will do undertakings.

10 THE WITNESS: Yes. I just can't recall
11 the name, because we have switched providers.

12 BY MR. BORG-OLIVIER:

13 170 Q. Okay. Well, what I would like to
14 know is what Catalyst's backup data retention policies
15 are, and if the evidence is that e-mails wiped from a
16 BlackBerry would not be maintained, I'd like to
17 understand why that is with respect to its data
18 retention policies.

19 MR. WINTON: First of all, I'm going to
20 restrict any response to whatever policies may have
21 existed in July, 2000 -- or June-July, 2014.

22 MR. BORG-OLIVIER: Yes.

23 U/A, U/T MR. WINTON: I'm going to take it under
24 advisement in any event as far as production of a data
25 retention policy.

1 As for the second, I will confirm
2 whether or not on a factual basis it's Catalyst's
3 position that e-mails wiped from a BlackBerry would not
4 otherwise be maintained on Catalyst's servers, but I
5 just want to make it clear we are referring to e-mails
6 sent or received from a Catalyst e-mail address --

7 MR. BORG-OLIVIER: Absolutely.

8 MR. WINTON: -- and account, not
9 referring to Mr. Moyses's personal e-mails.

10 MR. BORG-OLIVIER: No, my only interest,
11 in fact, is on the work-issued BlackBerry account.

12 THE WITNESS: The other thing, I don't
13 know how he set up his BlackBerry, but you can set it
14 up as a feature that if you delete it on your
15 BlackBerry, it's deleted on the system. That's a
16 feature that BlackBerry has. I don't do it that way
17 for a particular reason, which is I like to -- I like
18 to keep the two systems somewhat separate.

19 BY MR. BORG-OLIVIER:

20 171 Q. Okay. And do you have any
21 information as to how Mr. Moyses would have set up his
22 BlackBerry at the time?

23 A. No. As I said, I don't know.

24 BY MR. BORG-OLIVIER:

25 172 Q. And perhaps that's something that

1 could be determined by your IT folks, in which case I'd
2 ask that we get that information by way of undertaking.

3 MR. WINTON: I don't agree with the
4 suggestion that that can be determined, so we will make
5 inquiries as to whether it can be determined, and if it
6 can be determined, we will make inquiries as to
7 whether -- to what evidence they have on that point.

8 MR. BORG-OLIVIER: Yes. That's fair.

9 U/T MR. WINTON: Okay. And just to be
10 clear, the determination is whether it is possible now
11 to determine whether Mr. Moyses's BlackBerry was
12 synchronized with his -- the Catalyst server such that
13 e-mails that were deleted from one would be deleted
14 from the other.

15 MR. BORG-OLIVIER: I think that's what I
16 understand Mr. Riley's evidence to suggest, so that's
17 the information --

18 MR. WINTON: That may be a setting
19 that's turned on or off, and we will see if we can
20 determine what the setting was on Mr. Moyses's
21 BlackBerry and, if we can make that determination, we
22 will share that information with you.

23 BY MR. BORG-OLIVIER:

24 173 Q. Thank you. And I take it the
25 BlackBerry that would have been work-issued would have

1 included a phone component?

2 A. Yes.

3 174 Q. It would have been usable as a
4 phone?

5 A. Yes.

6 175 Q. When you refer to Mr. Moyle's
7 hypothetical communications with West Face in this
8 paragraph 14, I take it you are not suggesting that
9 records of any phone calls Mr. Moyle might have made to
10 or from West Face would also be destroyed by virtue of
11 the BlackBerry being wiped?

12 A. I don't know the answer to that
13 question.

14 176 Q. I take it that Catalyst receives --

15 A. Actually, I apologize -- I
16 apologize. It would wipe it from his phone, because
17 there is a phone record, but as to -- as to -- I have
18 not examined our phone records.

19 177 Q. Okay. Do you see the bills that
20 Catalyst receives in respect to, for example, your
21 BlackBerry?

22 A. I don't, personally. They go
23 directly -- no, they go directly to our accounting
24 group.

25

1 BY MR. BORG-OLIVIER:

2 178 Q. Okay. Then I would ask for an
3 undertaking seeking confirmation that, in fact,
4 Catalyst would receive bills in respect of work-issued
5 BlackBerrys that would, around this time, have included
6 records of phone calls made and received from that
7 work-issued BlackBerry.

8 MR. WINTON: Well, I think I just want
9 to get clarification, Counsel, as to what you mean by
10 "records of phone calls". What data points you say
11 would be recorded in the invoices.

12 MR. BORG-OLIVIER: The numbers of the
13 calls of the sender or recipient of the phone calls.

14 U/T MR. WINTON: Okay. Yes, we will give
15 you that undertaking.

16 MR. BORG-OLIVIER: Okay. And subject to
17 the answers to the undertakings that come back, those
18 are the questions that I have for you, Mr. Riley.
19 Thank you for your time.

20 THE WITNESS: Thank you.

21 MR. BORG-OLIVIER: I'll turn you over to
22 Mr. Milne-Smith.

23 -- RECESS AT 10:58 --

24 CROSS-EXAMINATION BY MR. MILNE-SMITH:

25 179 Q. Good morning, Mr. Riley. I'm going

1 to skip over the preliminaries that Mr. Borg-Olivier
2 covered.

3 I take it you assume or that you will
4 understand that you are still under oath and the same
5 ground rules that Mr. Borg-Olivier set up this morning
6 still apply.

7 A. Good morning, and I do.

8 180 Q. Okay. Good. Now, Catalyst alleges
9 in this motion and in this action that Mr. Moyses has
10 misappropriated and given to West Face confidential
11 information belonging to Catalyst; is that right?

12 A. Yes.

13 181 Q. And you have put in your
14 affidavits -- and Mr. Borg-Olivier went through the
15 five of them -- all relevant information of which you
16 are aware in support of that allegation, correct?

17 A. Yes.

18 182 Q. And Catalyst has also filed two
19 affidavits of Mark Musters; is that right?

20 MR. WINTON: Martin Musters.

21 BY MR. MILNE-SMITH:

22 183 Q. Sorry, Martin Musters.

23 A. Yes. Is it two?

24 MR. WINTON: It's two, yes.

25 THE WITNESS: Yes.

1 BY MR. MILNE-SMITH:

2 184 Q. Okay. And, Mr. Riley, you are the
3 Chief Operating Officer of Catalyst?

4 A. I am.

5 185 Q. And that makes you one of the most
6 senior executives at the firm?

7 A. Yes.

8 186 Q. One of three, correct?

9 A. One of three. I think that's a
10 better way to express it.

11 187 Q. Okay. I take it there's no formal
12 general counsel role at Catalyst?

13 A. No.

14 188 Q. But you are the closest thing to an
15 in-house counsel?

16 A. I am.

17 189 Q. You were a banking lawyer for
18 several decades before joining Catalyst?

19 A. I also did insolvency work, but I
20 was a banking and insolvency lawyer for --

21 190 Q. Okay. So you certainly --

22 A. For some years.

23 191 Q. Okay. So you certainly have an
24 extensive legal background?

25 A. I do.

1 192 Q. And do I also understand it -- or,
2 sorry, just to finish off that point. Is it fair to
3 say you are the closest thing to an in-house counsel
4 that Catalyst would have?

5 A. Yes. I'm the only lawyer.

6 193 Q. Okay. And you've taken an active
7 role in managing this litigation?

8 A. Yes, I have.

9 194 Q. You're the company's principal,
10 indeed, only affiant from the company itself?

11 A. Yes.

12 195 Q. And without disclosing the content
13 of any communications, is it fair to say that you are
14 the principal person at Catalyst involved in
15 instructing counsel?

16 A. Yes. I should step back from that.
17 I think instruction was also provided by Newton
18 Glassman from time to time. Newton Glassman,
19 G-L-A-S-S-M-A-N.

20 196 Q. And I take it you would be aware of
21 any material instructions that Mr. Glassman gave, you
22 would become aware of any --

23 A. Yes, I would be aware of any.

24 197 Q. Okay. That Mr. Glassman gave to
25 your counsel?

1 A. Yes.

2 198 Q. Okay. And to the best of your
3 knowledge, Catalyst's various affidavits have put
4 before the Court all evidence of which it is aware
5 supporting the allegation that Mr. Moyse disclosed
6 confidential Catalyst information to West Face?

7 A. Sorry, ask the question again,
8 please.

9 199 Q. Sure. To the best of your
10 knowledge, Catalyst's various affidavits have put
11 before the Court all evidence of which Catalyst is
12 aware that support the allegation that Mr. Moyse
13 disclosed confidential Catalyst information to West
14 Face?

15 A. Yes.

16 200 Q. Okay. So we briefly touched on --
17 I just want to make sure the Court has a little bit of
18 information on your background and qualifications. So
19 your background is as a banking and insolvency lawyer?

20 A. Yes.

21 201 Q. You practiced at Stikemans, Ogilvy
22 Renault, and Goodmans?

23 A. Yes.

24 202 Q. You left the private practice of
25 law in 2011 to join Catalyst; is that correct?

1 A. Yes.

2 203 Q. You obviously have a law degree.
3 Do you have any other degrees or professional
4 qualifications beyond undergraduate?

5 A. I have a Masters of Law from
6 Harvard.

7 204 Q. Could you briefly describe for me
8 your responsibilities as COO of Catalyst.

9 A. They are fairly broad. I do the
10 day-to-day operations, including management of the
11 office. I interface with the finance group. When
12 we're fundraising, I handle the mechanics of
13 fundraising as well as participate in those fundraising
14 meetings. I do the -- our financial banking
15 arrangements. I interface with, in particular -- some
16 of the portfolio companies and, in particular, Callidus
17 on a daily basis. And anything that falls between the
18 cracks usually falls into my remit.

19 205 Q. Okay.

20 A. Including paying attention to
21 things like Nortel. That's why I was asking the
22 questions.

23 206 Q. Okay. I take it, as COO, you do
24 not make any final investment decisions at Catalyst?

25 A. No. Let me qualify that.

1 Investment decisions are made by all three partners,
2 but ultimately, the final say would be Newton
3 Glassman's as the chief investment officer.

4 207 Q. That's correct. So I think you
5 have anticipated where I --

6 A. Sure, and I wasn't trying to
7 anticipate. I was just -- you asked me the question
8 and I wanted to be able to say.

9 208 Q. No, that's fine. So you referred
10 to Mr. Glassman as the chief investment officer,
11 correct?

12 A. Yes. I'm not sure he has that
13 official title, but that's certainly functionally.

14 209 Q. Okay. That's fine. And you would
15 be aware that Mr. Glassman is the only person at
16 Catalyst registered with the Canadian Securities
17 Administrators as a dealing representative?

18 A. That is correct.

19 210 Q. Under national instrument 31-103?

20 A. I'm not sure what the instrument
21 number is, but I will take it. If that's the right
22 instrument, I will accept that.

23 211 Q. Okay. And just for the sake of the
24 record, you are aware that the Canadian Securities
25 Administrators have a national instrument that deals

1 with the qualifications for people entitled to make
2 various levels of investment decisions?

3 A. Yes.

4 212 Q. And Mr. Glassman is the only person
5 at Catalyst with such a designation?

6 A. That is correct.

7 213 Q. Okay. Because your background is
8 in law, not in investment, correct?

9 A. That is correct.

10 214 Q. Okay. And I take it you would
11 agree with me that analyzing investments is an inexact
12 science if it's a science at all?

13 A. I'm not -- I am not sure I can
14 agree with that. I think there are nuances.

15 215 Q. Okay. So let's put it another way.
16 You would agree with me that two
17 analysts could look at the same facts and draw
18 different conclusions about a company's prospects?

19 A. Yes.

20 216 Q. And sometimes analysts agree and
21 sometimes they do not?

22 A. Again, I mean, I understand where
23 you -- I understand what you are asking for in the
24 question. The only things in the back of my mind is
25 that, to the extent that they're applying the same

1 principles to the same set of facts --

2 217 Q. Yes.

3 A. -- I would expect them to come
4 close to the same answer.

5 218 Q. Okay.

6 A. I think it's -- that's why --
7 again, I'm not trying to be argumentative. I think
8 it's a nuanced question, and I do think that a certain
9 set of facts run through the same model or the same
10 analysis -- I don't mean model in the technical
11 sense -- should result, more or less, in the same
12 answer.

13 219 Q. But the fact of the matter is that
14 people do, in fact, reach different conclusions on the
15 prospects of a company or an investment all the time?

16 A. Yes.

17 220 Q. Okay. And when they do not agree
18 like that, it's not necessarily a matter of bad faith;
19 it could just be a matter of a difference of opinion or
20 a difference of approach?

21 A. Maybe. I don't --

22 221 Q. It depends on the facts?

23 A. You're asking a question that has a
24 lot of nuances. That's what I'm -- that's why I'm
25 hesitating.

1 222 Q. That's fine. Mr. Moyle gave notice
2 of his intention to resign from Catalyst on May 24,
3 2014, correct?

4 A. Is that a Sunday?

5 223 Q. I can check for you.

6 A. Could you check for me? I think if
7 the 24th is a Sunday, I believe he gave it on Sunday.
8 Around that date.

9 224 Q. I will confirm for you.

10 A. Do we have that e-mail?

11 225 Q. May 24 was a Saturday.

12 A. Saturday. Then it was on that
13 weekend.

14 226 Q. Okay. That, obviously, was almost
15 a year ago?

16 A. Yes.

17 227 Q. And you would agree with me that
18 after six months Mr. Moyle's knowledge of Catalyst's
19 plans would be stale and of little use to West Face?

20 A. Depends on what the facts were. I
21 think some things might be stale, not all things.

22 228 Q. Okay. Well, let me take you to --

23 A. In other words, what I'm saying is
24 I think it's still subject to the confidentiality wrap
25 that's in his employment agreement.

1 229 Q. Let me take you -- well, the
2 confidentiality wrap was a six-month ...

3 A. No, I think confidential is
4 forever.

5 230 Q. Okay.

6 A. That's why I say there are two
7 provisions in the employment agreement, and maybe we
8 should go to that. One is the non-compete and the
9 other is confidentiality.

10 231 Q. Let me take you to paragraph 33 of
11 your June 26, 2014, affidavit.

12 A. Yes. Is that a clean copy?

13 MR. WINTON: Yes. Paragraph 33?

14 BY MR. MILNE-SMITH:

15 232 Q. Paragraph 33, correct.

16 A. What page was that?

17 233 Q. That's on page 19 of the record,
18 page -- I'm going to flip you over to the
19 subparagraphs (a), (b), and (c), but feel free to read
20 the entire paragraph.

21 MR. WINTON: We are actually at page 94
22 of our most recent motion record, which attached the
23 affidavit.

24 MR. MILNE-SMITH: Oh, that's fine.

25 MR. WINTON: It's the same text.

1 THE WITNESS: Here?

2 MR. WINTON: Yes.

3 THE WITNESS: May I look at his
4 employment agreement first for a moment before I answer
5 this question?

6 BY MR. MILNE-SMITH:

7 234 Q. By all means.

8 A. Okay.

9 235 Q. That was at tab A, tab 2A, of your
10 original motion record from last summer.

11 MR. WINTON: At hand, I have tab 1E of
12 Mr. Moyse's responding record.

13 MR. MILNE-SMITH: If it's there too,
14 that's fine.

15 MR. WINTON: It's at page 92 of
16 Mr. Moyse's responding record.

17 MR. MILNE-SMITH: Okay.

18 THE WITNESS: I still agree with
19 generally what I said there. I think the nuance that
20 is missing in there is that I don't read the
21 confidentiality agreement as being limited as to time.
22 I.e., if the information is confidential or if there is
23 a limitation of one year for any opportunities
24 belonging to the fund.

25

1 BY MR. MILNE-SMITH:

2 236 Q. I don't want to debate nor I think
3 is the role for either of us to debate the meaning and
4 impact of the confidentiality provision in the
5 employment agreement.

6 A. Okay.

7 237 Q. The only thing I want to confirm is
8 a factual point, which is, at paragraph 33 of your
9 June 26, 2014, affidavit, you are discussing the
10 non-compete clause, correct?

11 A. Correct.

12 238 Q. And in that context, you say, at
13 paragraph 33(b):

14 "After six months, the analyst's
15 knowledge of Catalyst's plans would be
16 'stale' and of little use to a
17 competitor."

18 You stand by those words?

19 A. I do, but if I were rewriting this,
20 given the question you are asking, I would say "should
21 be stale".

22 239 Q. Okay. But you said "would be
23 stale"?

24 A. I did.

25 240 Q. Okay. And the analyst here would

1 be Mr. Moyses?

2 A. Yes.

3 241 Q. And the reference to a competitor,
4 that's what you are alleging in this case that West
5 Face is?

6 A. Yes.

7 242 Q. So we established earlier that
8 May 24 was when Mr. Moyses gave notice that he was
9 leaving. I take it you would also agree with me that
10 two days later, on May 26, was when he told Catalyst
11 that he was going to West Face?

12 A. Yes.

13 243 Q. Okay. So it's safe to say that,
14 from that day forward, you knew he was planning to work
15 for someone that Catalyst, at least, considered to be a
16 competitor?

17 A. Yes.

18 244 Q. And he was on vacation at the time?

19 A. No, the 26th ...

20 245 Q. Sorry, the 26th was when he
21 returned?

22 A. He returned to the office, yes.

23 246 Q. Right. And he was sent home at
24 that time?

25 A. I asked him to go home, yes.

1 247 Q. Okay. And he stayed home for the
2 reminder of his notice period?

3 A. Yes.

4 248 Q. And he wasn't given any additional
5 assignments?

6 A. I don't know that for sure, but I
7 think we were reluctant to engage him in anything that
8 was active.

9 249 Q. You certainly don't recall --

10 A. No, no.

11 250 Q. Let me just make sure it's clear
12 for the record. You didn't recall giving him or anyone
13 else at Catalyst giving him any additional assignments?

14 A. That is correct.

15 251 Q. And you kept him away from any
16 further discussions regarding investment opportunities
17 at Catalyst?

18 A. Yes.

19 252 Q. So six months from late May would
20 have been late November, 2014, correct?

21 A. It depends -- his notice period was
22 30 days, so I think he would count the non-compete
23 six-month period starting after 30 days.

24 253 Q. So either late November or late
25 December?

1 A. Yes.

2 254 Q. In your February 18, 2015,
3 affidavit, paragraph 8, you refer to the danger of a
4 competitor scooping an opportunity that Catalyst was
5 considering?

6 A. Yes.

7 255 Q. I take it you'd agree with me,
8 because I think you gave this evidence in your last
9 cross-examination, that, in the last six months of
10 Mr. Moyses's employment, his work was focussed almost
11 entirely on performing operating reviews of
12 Catalyst-owned companies?

13 A. He was also involved in the -- in
14 the telecom files.

15 256 Q. I understand that, but his work was
16 focussed -- outside of the telecom opportunity, his
17 work was focussed almost entirely on performing
18 operating reviews of Catalyst-owned companies?

19 A. Yes, yes.

20 257 Q. And so if they were Catalyst-owned
21 companies, they were no longer an opportunity someone
22 else could scoop; that was something that Catalyst
23 already owned?

24 A. But there might be bolt-on
25 acquisitions that would be new opportunities.

1 258 Q. Okay. The only opportunity that,
2 in your affidavits, you say West Face has scooped
3 relates to Wind Mobile, correct?

4 A. That is correct. Excuse me. That
5 is what I said in my affidavits at the time. I think
6 there's some issue around Arcan, which was part of the
7 information that was conveyed by Moyses to West Face.

8 259 Q. Okay. Catalyst alleges that
9 Mr. Moyses disclosed confidential information to West
10 Face in the March 27, 2014, e-mail which attached the
11 writing samples?

12 A. Yes.

13 260 Q. And Catalyst has, in fact,
14 consented to unsealing the court record that contained
15 those documents, correct?

16 A. Yes.

17 261 Q. So it no longer treats that
18 information as confidential?

19 A. Yes.

20 262 Q. Meaning I was correct? I'm correct
21 that Catalyst no longer treats them as confidential?

22 A. That is correct.

23 263 Q. Okay. Good. Sometimes a "yes" can
24 mean --

25 A. No, no, sorry, I wasn't trying

1 to -- I was trying to agree with you.

2 264 Q. I understand.

3 A. Ask simpler questions.

4 265 Q. Yes. Did anyone at Catalyst advise
5 any members of the media that the court file was
6 unsealed and they could find materials there?

7 A. Not to my knowledge.

8 266 Q. Did anyone at Catalyst speak to
9 Theresa Tedesco of the National Post?

10 A. We would have spoken to Theresa
11 from time to time.

12 267 Q. Do you know if anyone spoke to
13 Ms. Tedesco about these proceedings?

14 A. I don't know if it's possible that
15 Newton would have spoken to her or one of our -- I
16 think -- I can't remember when -- when we hired --
17 we've hired a new communications officer, Shawn Lepin.

18 BY MR. MILNE-SMITH:

19 268 Q. I would like to know if your
20 communication officer or Mr. Glassman spoke to
21 Ms. Tedesco at any time after the unsealing of the
22 court record about this case.

23 MR. WINTON: Perhaps you can explain how
24 it's relevant before we respond to that.

25 MR. MILNE-SMITH: Catalyst has made

1 allegations about West Face making -- entering evidence
2 about Callidus in an effort to publicize its position,
3 effectively. So I would like to test whether Catalyst
4 has, in fact, been doing exactly the same thing.

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

7 MR. MILNE-SMITH: I would ask the same
8 questions for Tim Kiladze at the Globe and Mail.

9 MR. WINTON: Kiladze.

10 MR. MILNE-SMITH: And just for your
11 reference, those are the authors of two articles about
12 the case that we have included at Volume 2, tab 50 of
13 the responding motion record.

14 THE WITNESS: Sorry, tab 2?

15 BY MR. MILNE-SMITH:

16 269 Q. Sorry, Volume 2, tab 50.

17 A. Do I have that? May I see that for
18 a minute?

19 MR. WINTON: I'm just getting down the
20 question that was asked so I make sure I have it. I
21 just want to make sure I have this right. You want to
22 know if Mr. Lepin or Mr. Glassman spoke at any time
23 after the unsealing of the court order with Ms. Tedesco
24 or Mr. Kiladze about this case?

25 MR. MILNE-SMITH: Yes.

1 U/A MR. WINTON: And I will take that under
2 advisement.

3 MR. MILNE-SMITH: Okay. And just to be
4 clear, I would like to know if anyone at Catalyst spoke
5 to anyone at the Globe and Mail or National Post, but I
6 have named those four individuals as the most likely
7 participants in such communication.

8 MR. WINTON: So the question is actually
9 broader than the names you gave?

10 MR. MILNE-SMITH: Yes.

11 U/A MR. WINTON: Still under advisement.

12 THE WITNESS: Was this an online piece
13 or was it also in FP?

14 BY MR. MILNE-SMITH:

15 270 Q. I don't know.

16 A. Okay.

17 MR. WINTON: So that's the -- Mr. Riley
18 is looking at the --

19 THE WITNESS: That's Tedesco.

20 MR. WINTON: -- Financial Post article,
21 and slip-sheeted behind that is a Globe and Mail
22 article.

23 MR. MILNE-SMITH: That's correct.

24 BY MR. MILNE-SMITH:

25 271 Q. I'm ready to move on from that

1 whenever you are, Mr. Riley.

2 A. Okay.

3 272 Q. So going back to the four writing
4 samples, I take it there's no dispute here that West
5 Face has not made an investment into Homburg?

6 A. Not to my knowledge.

7 273 Q. Homburg was one of the four writing
8 samples?

9 A. Yes.

10 274 Q. And another one of the writing
11 samples was a company called NSINV?

12 A. Yes.

13 275 Q. And West Face hasn't made any
14 investment in that company?

15 A. I don't know if West Face has made
16 an investment or not.

17 276 Q. Not to your knowledge?

18 A. You have asked me that question. I
19 don't know.

20 277 Q. You have no information that West
21 Face has made an investment in that company?

22 A. No, no.

23 278 Q. And another one of the companies --
24 another one of the companies addressed by a writing
25 sample was Rona?

1 A. Yes.

2 279 Q. And you are not aware of West Face
3 making any investment in that company?

4 A. No.

5 280 Q. Okay. And the fourth one, the last
6 one, is Arcan Resources, correct?

7 A. Yes.

8 281 Q. And that's the one that you
9 mentioned earlier?

10 A. Yes.

11 282 Q. So you are aware, of course -- I
12 take it that you have reviewed Mr. Griffin's affidavit?

13 A. I have.

14 283 Q. So you are aware that Mr. Griffin
15 addressed that investment in his affidavit?

16 A. Yes.

17 284 Q. And his evidence was that the
18 investment arose out of a plan of arrangement with a
19 company called Aspen Leaf. Do you recall that?

20 A. I'd have to go back to his
21 testimony, but I believe that's correct.

22 285 Q. Okay.

23 A. I will take it -- if you say it's
24 correct, I will take it as -- I will concur.

25 286 Q. Thank you.

1 MR. WINTON: Don't get into that habit.

2 THE WITNESS: Sorry, no, no. You know
3 what I mean. Without having to go back to the
4 document.

5 BY MR. MILNE-SMITH:

6 287 Q. So Mr. Griffin explained in his
7 affidavit that he concluded that debentures were being
8 treated unfairly by the Aspen Leaf plan of arrangement
9 compared to the shareholders. Do you recall that?

10 A. Yes.

11 288 Q. And you'd agree with me, of course,
12 that the Aspen Leaf transaction hadn't even happened
13 when Mr. Moyses wrote his memo for Catalyst, correct?

14 A. I would have to go back and -- I
15 would have to go back and look at the time sequence.

16 289 Q. Okay. Do you have any familiarity
17 with the Aspen Leaf plan of arrangement yourself?

18 A. I do not.

19 290 Q. And I take it, then, you are not
20 aware of Catalyst taking any position with respect to
21 that transaction?

22 A. It's the best of my recollection we
23 did not.

24 291 Q. Okay. You weren't aware of
25 Catalyst considering any investment?

1 A. We were considering it.

2 292 Q. Okay. In the Aspen Leaf
3 transaction?

4 A. I would have to go back and, again,
5 double-check, but I believe we were looking at -- we
6 continued to monitor Arcan.

7 293 Q. Okay. But decided not to pursue
8 it?

9 A. Yes.

10 294 Q. Okay. And I take it you can't
11 point to anything in Mr. Moyse's memo for Catalyst
12 about Arcan that would have been relevant to
13 Mr. Griffin's investment hypothesis as explained in his
14 affidavit?

15 A. I would have to review. I would
16 have to review both the analysis he did for West
17 Face --

18 295 Q. Right.

19 A. -- and the analysis he did -- and
20 the information he had from -- from Catalyst. I have
21 not done that review.

22 296 Q. Okay. And you are not aware of
23 anyone else telling you there was anything relevant
24 between the two?

25 A. I -- no.

1 297 Q. You are not aware of any overlap
2 from any source between the two?

3 A. No, but, again, I have not done the
4 review to compare what he did and what we did.

5 MR. MILNE-SMITH: I understand. Why
6 don't we -- I'm moving on to a new subject, so why
7 don't we take the morning break now.

8 -- RECESS AT 11:30 --

9 -- RESUMING AT 11:41 --

10 BY MR. MILNE-SMITH:

11 298 Q. So, Mr. Riley, just a few follow-up
12 points or clarification points from this morning before
13 I move on to our next subject.

14 In respect of the examination conducted
15 by Mr. Borg-Olivier, I take it that Catalyst, as a
16 factual matter, has not conducted or instructed to be
17 conducted any search of Mr. Moyses's text message or
18 e-mail or phone history in respect of his company
19 BlackBerry, correct?

20 A. That is correct as to phone, but we
21 would not be able to trace BlackBerry text.

22 299 Q. Okay. Well, I think there may be a
23 technical dispute about that down the road, but I just
24 want to make sure, as a factual matter, whether it's
25 because they couldn't or, for whatever reason, they did

1 not instruct such a search be taken.

2 A. At the time, I believe I talked to
3 Jonathan -- and I can't remember Jonathan's last
4 name -- as to whether we would be able to retrieve text
5 or BBM messages.

6 300 Q. Okay. Again, I'm not looking for
7 the why at this point. I think that has to be left to
8 the technical experts. I just want to figure out the
9 what. So, as a matter of fact, no search has been
10 directed or conducted of SMS, meaning text messages?

11 A. Yes.

12 301 Q. Or e-mail or phone records,
13 correct?

14 A. There's been no search of phone
15 records, and I don't believe -- sorry, and I'm not
16 trying to quibble or quarrel, but I don't believe --
17 based on my understanding is, we would not be able to
18 trace BBM or SMS messages.

19 302 Q. And so you didn't try to?

20 A. No, didn't try to do the
21 impossible.

22 BY MR. MILNE-SMITH:

23 303 Q. Okay. I'm going to have to
24 apologize to Mr. Winton here, because I have already
25 expanded the scope of his advisement once. I'm going

1 to ask to do it once more.

2 When I was asking this morning about
3 communications with the Globe and Mail or National
4 Post, I would also like that to encompass any indirect
5 communications. So if Catalyst advised an external
6 press agent or anyone else on its behalf to communicate
7 with the press, I would also like to know about that.

8 U/A MR. WINTON: Okay. Well, still, I'll
9 take it under advisement.

10 MR. MILNE-SMITH: Of course.

11 MR. WINTON: I understand.

12 BY MR. MILNE-SMITH:

13 304 Q. Okay. But it's unclear on the
14 record here whether I got my answer about e-mail
15 records. You said there was no search of phone
16 records, and you weren't trying to quibble or quarrel.
17 Based on your understanding, you would not be able to
18 trace BBM.

19 A. Or text, SMS.

20 305 Q. But how about e-mail? Was a search
21 done of Brandon's e-mails?

22 A. Not from his BlackBerry device.

23 306 Q. From his Catalyst -- from
24 Catalyst's records, did you search?

25 A. Yeah, we did -- we did do some

1 searches.

2 307 Q. Okay. And I assume anything
3 relevant would have been produced?

4 A. Yes.

5 308 Q. I take it you'd agree with me that,
6 to the best of your knowledge, the position that West
7 Face took in Arcan was a passive one?

8 A. I don't know.

9 309 Q. You are not aware of West Face
10 taking any control position in Arcan?

11 A. No, I am not.

12 310 Q. Mr. Griffin's evidence was that
13 they bought some debentures, correct?

14 A. Yes. I mean, I would have to go
15 back and look, but I believe that is correct.

16 311 Q. And you are not aware of anything
17 further?

18 A. No.

19 312 Q. So I take it you would agree with
20 me that West Face buying some debentures would not
21 interfere with Catalyst's ability to make a similar or
22 an opposing investment in Arcan?

23 A. It could.

24 313 Q. Are you saying that West Face's
25 purchase of debentures interfered with the market price

1 of those debentures?

2 A. No. It could, in certain
3 circumstances, represent a blocking position, i.e., it
4 might be a critical piece of the control piece.

5 314 Q. But you are not aware of West Face
6 acquiring a position large enough to constitute a
7 blocking position?

8 A. I don't know. I don't know what
9 they acquired.

10 315 Q. Okay. And if Catalyst had wanted
11 to make an investment in Arcan, presumably, you would
12 have done the deal just to find out whether or not West
13 Face had a blocking position?

14 A. We would continue diligence before
15 investing.

16 316 Q. Okay. But you haven't --

17 A. But we would not know -- the fact
18 you just presented to me, we would not necessarily
19 know.

20 317 Q. Okay. You haven't made that
21 effort?

22 A. No.

23 318 Q. In other words, to find out that
24 West Face had a blocking position, you would have to
25 try to invest?

1 A. Correct.

2 319 Q. And because West -- because you
3 don't know or are aware of West Face having a blocking
4 position, you haven't made the effort to invest?

5 A. I think that is correct, but I
6 would have to go -- I would have to go back and
7 double-check some of these things.

8 320 Q. Well, if you have any information
9 to the contrary, you will let me know?

10 A. Yes.

11 321 Q. Okay.

12 MR. WINTON: And just to be clear, let's
13 not treat that as an undertaking. If there is a need
14 to correct --

15 MR. MILNE-SMITH: Absolutely.

16 MR. WINTON: -- what was said, it will
17 be corrected, but, otherwise, if you don't hear from
18 us, it's going to just stand as is.

19 MR. MILNE-SMITH: I agree.

20 MR. WINTON: Thanks.

21 BY MR. MILNE-SMITH:

22 322 Q. Mr. Moyses was only assigned to work
23 on Wind roughly two weeks before he submitted his
24 resignation; is that correct?

25 A. I believe he may have been working

1 on it earlier than that.

2 323 Q. Mr. Riley, you were cross-examined
3 on your first three affidavits on July 29, 2014?

4 A. Yes.

5 324 Q. Do you recall that?

6 A. I do.

7 325 Q. Okay. And you were asked the
8 question -- now, Brandon's evidence at paragraph 11 of
9 his affidavit is that he was only assigned to work on
10 Wind Mobile two weeks before he left on vacation.

11 A. Yes.

12 326 Q. That's at paragraph 11, halfway
13 down the paragraph, and now, in quotes, from
14 Mr. Moyses's affidavit:

15 "I was only assigned to work on Wind
16 Mobile the week before I left on
17 vacation two weeks before my resignation
18 and, as such, did not have extensive
19 knowledge of the transaction."

20 "Would you agree with that statement?"

21 "Answer: I would have to double-check
22 the timing, but I'm willing to accept it
23 for now."

24 And then you move on to a different
25 point.

1 I take it you stand by that evidence?

2 A. I would like to go back and, again,
3 double-check, because I don't -- my recollection is
4 that there may be some documents from earlier time --
5 like, a March date where his name appeared. So I
6 would -- I would, once again, like to go back and
7 affirm my recollection.

8 327 Q. Okay. So is that --

9 A. That is --

10 328 Q. -- an undertaking to advise of any
11 documents showing Brandon on -- involved in Wind before
12 April -- before May of 2014?

13 MR. WINTON: Here's what I will suggest.
14 We will undertake to inform you whether the evidence
15 given at Mr. Riley's July 29th cross-examination is
16 correct.

17 MR. MILNE-SMITH: Yes.

18 MR. WINTON: Because he referred to a
19 need to double-check.

20 MR. MILNE-SMITH: Yes.

21 U/A MR. WINTON: And if there is any
22 document that supports his suggestion that his
23 involvement predates the two-week period referred to in
24 the question, we'll -- I'll take under advisement
25 whether we will produce it, but we will definitely

1 discuss it with you and come up with a solution with
2 regards to that document.

3 MR. MILNE-SMITH: Okay. And I take it
4 before this matter was argued to Mr. Justice Lederer
5 last year, no update to that evidence was given?

6 MR. WINTON: That's correct.

7 BY MR. MILNE-SMITH:

8 329 Q. Okay. And we're going to come this
9 later, but I think it might be relevant now. I
10 understand there has been some reference to a
11 PowerPoint presentation to Industry Canada on which
12 Mr. Moyse worked?

13 A. Yes.

14 330 Q. Might that have been what you were
15 thinking of, of something that took place earlier in
16 the year on which Mr. Moyse worked?

17 A. I would have to check my dates. If
18 you are asking me the question right now, I do not
19 recall the actual date when that was presented.

20 331 Q. Okay.

21 A. Or prepared -- excuse me.

22 332 Q. I will just wait to see the answers
23 that come on the previous question, then.

24 Am I correct in understanding that this
25 PowerPoint presentation was not specifically in respect

1 of Wind but was with respect to the telecom industry
2 more broadly?

3 A. At that -- at this time or at that
4 time? You cannot talk about the telecom industry
5 without talking about at least Mobilicity and Wind.

6 333 Q. Okay. But, again, so the
7 presentation would have applied to Wind but wasn't
8 solely in respect of Wind?

9 A. That is correct.

10 334 Q. Okay. And I understand from e-mail
11 received from your counsel last night that the
12 PowerPoint presentation in question has been -- was
13 destroyed shortly after it was given?

14 A. Yes.

15 335 Q. And no records of it have been
16 maintained?

17 A. That is correct.

18 336 Q. Mr. Riley, I take it you would
19 agree with me that the fact that VimpelCom was
20 considering selling its investment in Wind in early
21 2014 was not a piece of information that was
22 confidential to Catalyst?

23 A. That is correct.

24 337 Q. There's no dispute that the price
25 demanded by VimpelCom was well known to all potential

1 bidders?

2 A. I don't know that.

3 338 Q. If you want to look at
4 Mr. Griffin's affidavit, Exhibit 5. So that's in
5 Volume 1, tab 5.

6 MR. WINTON: It's clean.

7 BY MR. MILNE-SMITH:

8 339 Q. So this is an article in the Globe
9 and Mail --

10 A. Sorry.

11 340 Q. This is an article in the Globe and
12 Mail dated July 31, 2014?

13 A. Yes.

14 341 Q. And you will see the first line of
15 the article states "Wind Mobile's foreign owner ..."

16 Let me just pause there. I take it we
17 agree that's reference to VimpelCom?

18 A. Yes.

19 Q. "... has put a \$300 million price
20 tag on the start-up wireless
21 carrier."

22 Do you see that?

23 A. Yes, I see that, yeah.

24 342 Q. So based on that, you would agree
25 with me, then, that the \$300 million price tag set by

1 VimpelCom was known to the market at least as of July,
2 2014?

3 A. Again, I'm not quibbling, but
4 certainly Christine Dobby believed it. I don't know
5 whether -- I don't know what her source was for that.

6 343 Q. Okay.

7 A. And I don't -- she is -- I have
8 only met her once.

9 344 Q. And I take it there's no dispute
10 also that by May, 2014, VimpelCom had expressed any
11 interest in bidders that it was interested in a
12 complete sale of its interest? In other words, it
13 wasn't trying to refinance, it was trying to get out?

14 A. Yes, I believe that is correct.

15 345 Q. Okay. And, finally, it was also
16 well known to all interested parties that regulatory
17 risk was a significant issue from the perspective of
18 VimpelCom, correct?

19 A. I'm not sure I can -- I'm not sure
20 I can say that -- what you are asking me, I'm not sure
21 I can affirm yes or no.

22 346 Q. Okay. So let's talk a little bit
23 more about what regulatory risk means and maybe we can
24 come back to that.

25 Is it fair to say that Wind Mobile was

1 considered a strategic asset by Industry Canada?

2 A. Yes.

3 347 Q. And a company called AAL controlled
4 by Anthony Lacavera and others held two-thirds of the
5 voting shares in Wind Mobile?

6 A. That sounds correct.

7 348 Q. And VimpelCom held debt non-voting
8 equity and some of the remaining voting shares,
9 correct?

10 A. Yes.

11 349 Q. Industry Canada, by virtue of Wind
12 Mobile being a strategic asset, held the right to
13 approve any transfer of voting shares?

14 A. Yes.

15 350 Q. And this was well known to anybody
16 in the marketplace?

17 A. Yes.

18 351 Q. So if VimpelCom wanted to get paid
19 for its share --

20 A. Can I go back for a second?

21 352 Q. Please.

22 A. What I would understand from the
23 questions you are asking is if you wanted to have a
24 controlling interest, a share ownership controlling
25 interest, and you were -- you would need Industry

1 Canada approval. That's what I would understand from
2 that question. If you want control of VimpelCom, you
3 needed IC approval.

4 353 Q. And control --

5 A. Or, sorry, excuse me, of Wind.

6 354 Q. Right. And "control" means voting
7 shares?

8 A. Yes.

9 355 Q. So if you wanted to get the voting
10 shares, you had to get Industry Canada approval?

11 A. Yes.

12 356 Q. And so if a party wanted to acquire
13 all of the equity in Wind -- meaning both the voting
14 shares held by AAL and the other shares held by
15 VimpelCom -- in one transaction, Industry Canada had
16 the right to approve that or not?

17 A. That is correct.

18 357 Q. So there was a risk to VimpelCom or
19 any potential purchaser that industry Canada could deny
20 such approval?

21 A. Say that -- sorry, ask -- sorry,
22 I'm not -- again, I'm not trying to quibble. I just
23 want to make sure I understand the question.

24 358 Q. There was a risk to VimpelCom that
25 Industry Canada could deny approval of a transaction

1 that included a transfer of the voting shares?

2 A. I'm going to say maybe, because I
3 think you can pre-socialize with Industry Canada where
4 they are going to come out on that decision, because I
5 think that Industry Canada -- this is -- I don't want
6 to over-answer, but I think you have to put it in the
7 context of what is it that the Government of Canada
8 wanted to see, which is the development of a fourth
9 carrier and, to a certain extent, the reduction of
10 foreign ownership in the space at that time.

11 359 Q. And the socialization of Industry
12 Canada, until you had done that, you wouldn't know what
13 their reaction was going to be?

14 A. Yes.

15 360 Q. And that was a risk that any
16 potential bidder faced until they had undergone that
17 socialization?

18 A. We had spent a fair amount of time
19 in discussions with Industry Canada and with other
20 members -- other aspects of the government, so we had a
21 sense of what they would be willing to agree to in
22 terms of approvals.

23 361 Q. Is it your position that Catalyst
24 had Industry Canada's pre-approval for the acquisition
25 of the voting shares in Wind?

1 A. You never have pre-approval from
2 the government, in my experience.

3 362 Q. So there was a risk there?

4 A. Yes.

5 363 Q. And that risk was equally borne by
6 VimpelCom in that it could see a transaction into which
7 it wanted to participate be blocked?

8 A. Yes.

9 364 Q. So that's the regulatory risk I was
10 talking about for VimpelCom.

11 A. Yes.

12 365 Q. So you would agree that it was well
13 known that regulatory risk was an issue for VimpelCom?

14 A. Yes.

15 366 Q. Okay. So let's see if we can agree
16 on one more thing. If VimpelCom wanted to get out, to
17 sell its entire interest in Wind as part of a
18 transaction in which the acquiring party or parties
19 would also be acquiring the voting shares, all right?
20 So are we clear on the hypothetical? It's a
21 transaction where VimpelCom is selling everything and
22 the purchaser is acquiring the voting shares. Right?

23 A. And everything else.

24 367 Q. Yes.

25 A. Okay. Yes.

1 368 Q. So if VimpelCom wanted to do that
2 without getting Industry Canada approval, one way they
3 could do that is if the owner of the voting shares was
4 one of the purchasers, because then there would be no
5 transfer of the voting shares, right?

6 A. I'm sorry, I just -- again, could
7 you please repeat the question.

8 369 Q. Yes. So VimpelCom wants to get
9 paid for transfer of their interest, correct?

10 A. Yes, yes.

11 370 Q. And they want to do it without
12 incurring the risk of Industry Canada saying no?

13 A. Yes.

14 371 Q. One way they could do that is if no
15 transfer of the voting shares was required, correct?

16 A. Yes.

17 372 Q. And they could do that, for
18 example, if the purchaser already holds the voting
19 shares, because then there is no transfer of voting
20 shares.

21 A. Keep going, because I'm not sure --
22 I can't -- are you saying if Mr. X owns two-thirds --

23 373 Q. Mr. Lacavera.

24 A. -- and Mr. Lacavera acquires the
25 third, would that require approval? I don't know the

1 answer to that question. I think the answer is
2 probably not, but I don't know the answer. I'm not --
3 I am not a regulatory -- I am not a regulatory guru in
4 that space.

5 374 Q. Fair enough. Another way you could
6 do it without Industry Canada approval is if the voting
7 shares are being transferred, if they just stayed --

8 A. Yes.

9 375 Q. Okay. And that was never something
10 that Catalyst was considering, correct?

11 A. To the best of my knowledge, no.
12 Although we may have considered many hypotheticals at
13 that time.

14 376 Q. Okay. But never something that was
15 seriously pursued?

16 A. To the best of my knowledge, no.

17 377 Q. Okay. If I have read your
18 affidavit correctly, your position is that the
19 information that Mr. Moyses disclosed to West Face
20 thereby blocking Catalyst's efforts to acquire Wind
21 related to Catalyst's confidential regulatory concerns;
22 is that right?

23 A. Yes.

24 378 Q. So how Catalyst planned to deal
25 with the regulatory risk was the confidential

1 information?

2 A. Yes. Attitude. I will call it
3 attitude towards the government and risk.

4 379 Q. What was Catalyst's attitude
5 towards the government?

6 A. We believed that you needed --
7 you -- it would be a smarter approach to get approval
8 from the government for any transaction you did. A
9 broader concern -- broader expression than you have.
10 You wanted the government to be on side.

11 380 Q. So your position is that it's --
12 the confidential information is that it would be better
13 to have the government on side?

14 A. Yes.

15 381 Q. Okay. And I take it you are not
16 aware of any efforts by West Face to get the government
17 on side in advance?

18 A. Don't know.

19 382 Q. I want to come back to that
20 PowerPoint presentation we have spoken about earlier.
21 What was in the presentation?

22 A. It was -- can we go off the record
23 for a moment?

24 MR. MILNE-SMITH: Yes.

25 -- OFF THE RECORD --

1 THE WITNESS: Yes. I have read
2 paragraph 36.

3 BY MR. MILNE-SMITH:

4 383 Q. Okay. Before we get to that, I
5 just want to go back and make sure I have covered off
6 one point completely.

7 You told me earlier that the
8 confidential information you are concerned Mr. Moyses
9 conveyed to West Face related to the need or the desire
10 to have government on side before entering into a
11 transaction, correct?

12 A. Correct.

13 384 Q. Was there anything else? Is there
14 anything else? Any other confidential information that
15 you say Mr. Moyses passed to West Face? Relating to
16 Wind?

17 A. There would also be in that context
18 the ability to transfer Spectrum. Which is an ongoing
19 issue in the telecom space.

20 385 Q. So Industry Canada's approval for
21 whether or not you can transfer Spectrum?

22 A. It would be their consideration of
23 future transfers of Spectrum.

24 386 Q. Industry Canada's consideration?

25 A. Yes, and the government indirectly.

1 387 Q. And, again, are you aware of any
2 efforts by West Face to determine the government's
3 willingness to transfer Spectrum in the future?

4 A. I do not know that.

5 388 Q. Have we, then, now completely
6 covered the landscape of what confidential information
7 you are concerned about passing from Mr. Moyses to West
8 Face? Relating to Wind?

9 A. Yes.

10 389 Q. Okay. So back to paragraph 36 of
11 your reply affidavit.

12 A. This one?

13 MR. WINTON: Yes.

14 THE WITNESS: Yes.

15 BY MR. MILNE-SMITH:

16 390 Q. And that's May 1, 2015. You state
17 that:

18 "The PowerPoint presentation primarily
19 concerned Catalyst's plans for Wind and
20 outlined regulatory concessions Catalyst
21 needed in order to carry out a Wind
22 transaction."

23 A. Correct.

24 391 Q. So the regulatory concessions that
25 you are talking about there, are we talking about, for

1 example, wholesale roaming rates?

2 A. Yes. Oh, no, excuse me. No, that
3 was not -- to the best of my recollection, that was not
4 a consideration.

5 392 Q. Okay. Tower sharing or tower
6 leases?

7 A. It may have been in there, because
8 that was an ongoing issue at the time.

9 393 Q. Okay. Spectrum transfer?

10 A. Spectrum transfer, for sure, and
11 use of Spectrum, alternative uses of Spectrum.
12 Wholesale versus retail.

13 394 Q. Any other regulatory concessions
14 that you can recall being a part of that presentation?

15 A. Considerations of consolidation in
16 the industry.

17 395 Q. Okay. And you are not aware of
18 West Face raising any of those concerns with Industry
19 Canada?

20 A. You are asking me -- you are asking
21 me questions that I have no basis to answer one way or
22 the other.

23 396 Q. Okay. So you have -- you have no
24 basis to conclude that West Face implemented any of
25 Catalyst's strategy with respect to these regulatory

1 issues?

2 A. I have a concern that West Face
3 took a position, knowing what our regulatory attitude
4 was, that was more aggressive than they might otherwise
5 have taken.

6 397 Q. Okay. So the concern is not that
7 West Face copied Catalyst; it's that West Face took a
8 different approach?

9 A. That knowing our strategy, they
10 were willing to be more aggressive, but they only were
11 willing to be more aggressive if they knew what our
12 strategy was.

13 398 Q. Okay. Mr. Griffin has sworn in his
14 affidavit that West Face first explored investment in
15 Wind in 2009. Do you recall that?

16 A. If you -- if you can tell me that
17 that's what it says, I will agree with you --

18 399 Q. Okay. You have no reason --

19 A. -- without having to go back to
20 that.

21 400 Q. You have no reason to dispute that?

22 A. I have no reason to dispute that.
23 Sorry, what was the date, in 2009?

24 401 Q. I don't recall precisely when
25 in 2009.

1 A. It doesn't matter the month. Just
2 the year was 2009?

3 402 Q. The year was 2009.

4 A. Thank you.

5 403 Q. So I take it there is no issue here
6 that West Face was aware of and, indeed, was pursuing
7 in late 2013 and early 2014 the Wind opportunity before
8 Moyle ever appeared on the landscape of West Face?

9 A. Is that what -- is that what
10 Mr. Griffin's affidavit --

11 404 Q. Yes.

12 A. I have no reason to disagree with
13 that.

14 405 Q. Okay. So Mr. Griffin, in his
15 affidavit, states that West Face entered into a
16 confidentiality agreement on December 7, 2013, with
17 VimpelCom. I take it you have no reason to dispute
18 that?

19 A. No reason to dispute that.

20 406 Q. Okay. And are you aware that West
21 Face told your counsel at the time they delivered
22 Mr. Griffin's affidavit that West Face could not
23 produce the confidentiality agreement and other
24 negotiating documents with VimpelCom because of the
25 obligations in the CA but invited Catalyst to seek an

1 exception and said that West Face wouldn't oppose it?
2 Were you aware of that?

3 A. I'm not recalling that.

4 407 Q. Okay.

5 A. Is there something you can point me
6 to?

7 408 Q. Sure. So I'm handing you a copy of
8 a March 13, 2015, letter from me to Mr. DiPucchio.

9 And you'll see in the first paragraph
10 this refers to serving the responding motion record of
11 West Face?

12 A. I do.

13 409 Q. And you will see in the second
14 paragraph it refers to the nondisclosure agreement with
15 VimpelCom?

16 A. I do.

17 410 Q. And you'll see the last sentence,
18 it says:

19 "West Face undertakes not to oppose a
20 motion to relieve it of its
21 nondisclosure obligations to VimpelCom
22 under the 2013 NDA."

23 A. I'm sorry, where is that, please?

24 411 Q. The last sentence of paragraph 2 of
25 the letter.

1 A. Got it.

2 412 Q. Reads:

3 "West Face undertakes not to oppose a
4 motion to relieve it of its
5 nondisclosure obligations to VimpelCom
6 under the 2013 NDA."

7 A. I do see that.

8 413 Q. And I take it we are agreed that
9 Catalyst took no steps in that regard?

10 A. Do you have any response from Rocco
11 on this one?

12 414 Q. No. But you are not aware of
13 anything?

14 A. No, but I would want to confer -- I
15 would want to confer with Rocco.

16 MR. MILNE-SMITH: Okay. I would like to
17 mark that as the first exhibit on this examination.

18 MR. WINTON: Okay.

19 EXHIBIT NO. 1: Letter from
20 Mr. Milne-Smith to Mr. DiPucchio dated
21 March 13, 2015

22 BY MR. MILNE-SMITH:

23 415 Q. Now, Mr. Riley, as the instructing
24 principal at Catalyst, I take it you are also aware or
25 you'd also agree that, after delivery of your affidavit

1 on this motion on February 18, 2015, West Face's
2 counsel asked Catalyst to produce copies of any
3 documentation relating to your allegation that Catalyst
4 and VimpelCom had negotiated everything but a term
5 relating to regulatory approval? Do you recall that?

6 A. Yes.

7 416 Q. So I'm handing you a copy of a
8 letter dated February 20, 2015. This one was from Jeff
9 Mitchell at Denton's sent, again, to Mr. DiPucchio?

10 A. Uhm-hmm.

11 417 Q. And you'll see the third paragraph.

12 A. Yes.

13 418 Q. Makes the request for production of
14 documentation relating to that assertion in your
15 affidavit?

16 A. Yes.

17 MR. MILNE-SMITH: So let's mark that as
18 Exhibit 2.

19 EXHIBIT NO. 2: Request for production
20 of documentation relating to letter from
21 Mr. Mitchell to Mr. DiPucchio dated
22 February 20, 2015

23 THE WITNESS: Yes.

24 BY MR. MILNE-SMITH:

25 419 Q. And then the response comes from

1 Mr. Winton on February 26 to Mr. Mitchell. I'm handing
2 you a copy of that.

3 A. Thank you.

4 420 Q. You are aware of that
5 communication?

6 A. Yes.

7 MR. MILNE-SMITH: So we will mark that
8 as Exhibit 3.

9 EXHIBIT NO. 3: Letter dated February 26
10 to Mr. Mitchell

11 BY MR. MILNE-SMITH:

12 421 Q. I take it you'd agree with me --
13 feel free to review the letter, but I take it you would
14 agree with me that Mr. Winton, on behalf of Catalyst,
15 refused to produce the requested communications?

16 A. Yes.

17 422 Q. And counsel advised last night that
18 this refusal was based on an agreement from last July
19 between counsel to Mr. Moyle and counsel to Catalyst
20 that Catalyst didn't have to produce e-mails on which
21 Mr. Moyle was copied concerning negotiations with
22 VimpelCom; is that correct?

23 A. Sorry, where is that referenced in
24 the letter?

25 423 Q. No, I'm moving on to a

1 communication I had last night. Perhaps you should let
2 Mr. Winton answer this.

3 Counsel, you'd agree with me, of course,
4 that last night you advised that the refusal to produce
5 the communications with VimpelCom -- and that refusal
6 is set out in Exhibit 3 -- was based on an agreement
7 from last July between counsel to Mr. Moyle and counsel
8 to Catalyst that you didn't have to produce e-mails
9 Mr. Moyle was copied on?

10 MR. WINTON: Well, the e-mail
11 correspondence last night was not in reference to
12 communications with VimpelCom; it was, as I understood
13 it, a request for copies of the e-mails referenced in
14 affidavits that said Mr. Moyle had been copied on
15 e-mails at Catalyst relating to Wind.

16 MR. MILNE-SMITH: Okay.

17 MR. WINTON: There's an allegation or
18 it's -- in Mr. Riley's affidavit, there's a statement
19 that Mr. Moyle was copied on numerous e-mails, dozens
20 of e-mails. You may not use the term "dozens", but
21 several e-mails, let's say, relating to Wind. Those
22 e-mails were present at Mr. Moyle's cross-examination
23 on July 31st, 2014, and at the time, rather than
24 introduce them into the record under some form of seal
25 or confidentiality undertaking between the parties, it

1 was agreed that Mr. Moyses would admit to having
2 received the e-mails and, on that basis, there was no
3 need to introduce them into the record.

4 BY MR. MILNE-SMITH:

5 424 Q. And at the time of that agreement,
6 Wind was still in play, correct? So this is in July of
7 2014, Mr. Riley, Wind was still in play?

8 A. I believe that that's correct. I
9 can't remember what the date of the West Face
10 transaction was.

11 425 Q. That was in September 16, I
12 believe.

13 A. Thank you.

14 426 Q. And, in fact, Catalyst had
15 exclusivity from I believe July 23rd until August 18?
16 Does that sound correct?

17 A. That sounds correct.

18 427 Q. Okay. So at the time of this
19 agreement, the negotiations between Catalyst and
20 VimpelCom were very much confidential?

21 A. Yes.

22 428 Q. Those negotiations are no longer
23 confidential, would you agree?

24 A. There may still be some vestige of
25 confidentiality vis-a-vis us and VimpelCom. I would

1 have to look at that arrangement.

2 429 Q. Certainly concerns about
3 confidentiality are greatly attenuated? Greatly
4 reduced?

5 A. I think that's correct, although
6 there may be still some sensitive information in there.

7 430 Q. Okay. But you haven't checked to
8 see if there is anything still, have you?

9 A. I have not, I have not.

10 431 Q. So the reason, then, that documents
11 relating to Catalyst's negotiation with VimpelCom have
12 not been produced is because of what is set out in
13 paragraph 3 of Exhibit 3, which is that they simply
14 aren't relevant? On the first page, paragraph 3.

15 MR. WINTON: Well, to be fair, I think
16 the letter says "are relevant and/or should be
17 produced". So I think there's suggestion there that
18 it's not just about concerns about relevancy or about
19 whether it's proper to produce them to West Face in the
20 context of what is complained of.

21 MR. MILNE-SMITH: So is it relevance and
22 confidentiality?

23 MR. WINTON: Correct.

24 BY MR. MILNE-SMITH:

25 432 Q. Okay. I will repeat for the record

1 my request that Catalyst produce any evidence
2 concerning its negotiations with VimpelCom that support
3 Mr. Riley's assertion in his February 18 affidavit that
4 Catalyst and VimpelCom had negotiated everything except
5 for a term relating to regulatory approval.

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

8 BY MR. MILNE-SMITH:

9 433 Q. And, Mr. Riley, you are aware, I
10 take it, that West Face has produced to your counsel
11 all e-mails it was able to retrieve from the West Face
12 computer servers either from, to, or about Mr. Moyse?

13 A. To the best of my knowledge, yes.

14 434 Q. Okay. And you are also aware that
15 West Face made an offer to let the independent
16 supervising solicitor review any documents that were
17 able to be retrieved from the West Face computer system
18 that were created, edited, or accessed by Mr. Moyse?
19 Were you aware of that?

20 A. I -- I think your question is more
21 precise than I can answer. I think it's more -- I turn
22 to Andrew and ask him to answer that.

23 435 Q. That's fine.

24 MR. WINTON: I believe it's in Exhibit 1
25 the offer is made.

1 Counsel, I think we need to distinguish
2 between what West Face -- or what you and West Face say
3 has been done versus whether or not it has actually
4 been done. And so in saying you provided a USB drive
5 that contains all the e-mails relating -- to/from
6 relating to Mr. Moyle versus whether in fact that's the
7 case, that's, of course, a matter that is at issue in
8 this motion.

9 MR. MILNE-SMITH: I understand.

10 MR. WINTON: Okay.

11 MR. MILNE-SMITH: The fact I'm trying to
12 establish is if the offer has been made. I'm asking
13 specifically about the ISS proposal now.

14 MR. WINTON: Right. But I'm going back
15 to two questions ago where you asked Mr. Riley that ...

16 MR. MILNE-SMITH: All e-mails were
17 produced.

18 MR. WINTON: All e-mails were produced,
19 and that's the position you are taking.

20 MR. MILNE-SMITH: Right.

21 MR. WINTON: But whether or not that is,
22 in fact, the case is what is really at the heart of
23 this motion.

24 MR. MILNE-SMITH: I understand.

25 MR. WINTON: Okay.

1 MR. MILNE-SMITH: At least one of the
2 issues that your client has raised.

3 BY MR. MILNE-SMITH:

4 436 Q. But going back to my -- my question
5 now is just a predicate to what is going to be the real
6 question.

7 So the predicate is an offer was made to
8 let the ISS review and then produce to Catalyst, under
9 appropriate confidentiality terms, any document
10 created, edited, or accessed by Mr. Moyse. That offer
11 was made, correct?

12 A. In this letter? Is that in this
13 letter?

14 437 Q. In this letter and, in fact, also
15 in Mr. Griffin's affidavit.

16 A. Yes.

17 438 Q. And there was no response to that
18 offer, correct? That's the real question.

19 A. To the best of my knowledge, no.

20 439 Q. Mr. Riley, were you aware that
21 VimpelCom, during the course of its negotiations with
22 Catalyst, sent a draft share purchase agreement to
23 Catalyst?

24 A. Yes.

25 440 Q. And we're going to have to do a

1 little bit of compare and contrast here, so bear with
2 me. I'd like you to have your reply affidavit,
3 specifically Exhibit E, and Mr. Griffin's supplementary
4 motion record.

5 A. Okay.

6 441 Q. Tab 1A.

7 A. So what is this? What is this one?

8 MR. WINTON: This one is Mr. Griffin's.

9 BY MR. MILNE-SMITH:

10 442 Q. Right. So just to give you the
11 context, sir, and be fair to you. Tab 1A of
12 Mr. Griffin's affidavit.

13 A. This one? This one?

14 443 Q. Yes, correct. Is what he describes
15 as a May 9, 2014, draft share purchase agreement sent
16 by VimpelCom to West Face.

17 A. Okay.

18 444 Q. Okay. Now, the proposition I'm
19 going to put to you, sir, is that -- sorry, let me get
20 the other side of the equation clear on the record as
21 well.

22 So Exhibit E to your reply affidavit is
23 a clean and a blackline copy of a share purchase
24 agreement sent by Catalyst to VimpelCom, correct?

25 A. Yes, it is. That's this one,

1 right? This one?

2 445 Q. Correct. You are at page -- Bates
3 stamp page 51.

4 A. 51, yes. Yes.

5 446 Q. So the simple proposition I want to
6 put to you is that -- sorry, if you want to go to
7 page 165 of the record. So what you are looking at now
8 is the clean copy; page 165 is the blackline.

9 A. Okay.

10 447 Q. So the simple proposition I would
11 put to you, sir, is that the blackline here that we are
12 looking at on page 165 is a blackline against the very
13 same VimpelCom draft that's at tab 1A of Mr. Griffin's
14 supplementary affidavit.

15 A. I can't answer that. I mean,
16 that's -- I can't -- the reason I can't answer that
17 question is that when you have documents that are
18 some -- have, whatever, ten -- ten articles.

19 448 Q. Okay.

20 A. In other words --

21 449 Q. I understand.

22 A. -- you would have to do a fairly
23 thorough cross-reference between the documents.

24 450 Q. I understand. So we have done
25 that.

1 A. Okay. Can I rely on your
2 diligence?

3 451 Q. Well, Mr. Griffin says, at
4 paragraph 4 of his supplementary affidavit, that:

5 "Exhibit E includes clean and
6 blackline copies of what appear to be a
7 Catalyst markup of a draft share
8 purchase agreement provided by
9 VimpelCom."

10 A. So can I -- sorry.

11 452 Q. So what I would ask is for --

12 A. Hang on. Sorry, now I'm confused,
13 and you have got to help me.

14 453 Q. Yes.

15 A. This is a draft of May 9th.

16 454 Q. Yes.

17 A. The blackline, which is Faskens'
18 comments, is marked May 23rd.

19 455 Q. Correct.

20 A. Okay. So, I'm sorry, can you ask
21 the question again, because I may be misunderstanding
22 your question.

23 456 Q. Okay. So let me restate it so it's
24 hopefully clear on the record.

25 I'm going to put a proposition to you.

1 What I'm going to ask for at the end is if you have any
2 information or evidence to the contrary.

3 So the proposition is this. What's at
4 tab 1A of Mr. Griffin's supplementary affidavit is a
5 draft share purchase agreement sent by VimpelCom to
6 West Face. My first proposition to you is that that
7 very same draft was sent by VimpelCom to Catalyst.

8 A. I don't know. I can't -- I mean, I
9 can't answer that question, because you are asking --
10 you are asking me to confirm things that I may not be
11 able to prove.

12 457 Q. I understand.

13 A. Or establish, say.

14 458 Q. The basis on which I assert that is
15 that Exhibit E to your reply affidavit --

16 A. Yes.

17 459 Q. -- is a blackline against the very
18 same document that is at tab 1A of Mr. Griffin's
19 affidavit. In other words, if you take out all the
20 changes shown in the blackline, what you're left with
21 is Exhibit 1A of Mr. Griffin's affidavit.

22 A. And, again, I'm not trying to
23 argue. You would have do a line-by-line comparison.

24 MR. MILNE-SMITH: So if you are going to
25 take a contrary position at the return of the motion, I

1 would like to know on what basis.

2 MR. WINTON: Well, without getting into
3 the nuts and bolts, I just notice right away that on
4 page 165 of the Catalyst supplementary record.

5 MR. MILNE-SMITH: Yes.

6 MR. WINTON: The red struck-out text
7 suggests this was a draft dated May 16th.

8 MR. MILNE-SMITH: As opposed to May 9.

9 MR. WINTON: As opposed to May 9.

10 MR. MILNE-SMITH: So there's one
11 difference. If you have any others, please let me
12 know.

13 THE WITNESS: The others -- that was
14 provided during the confidentiality period, the
15 exclusive negotiation period, I believe.

16 BY MR. MILNE-SMITH:

17 460 Q. No. That came later.

18 A. No. Oh, sorry, later. Okay.

19 U/T MR. WINTON: I just was bringing that to
20 the attention. We do not -- if we intend to take that
21 position, we will let you know.

22 THE WITNESS: And I'm not trying to be
23 difficult, I'm just saying you are asking a person
24 who -- this is what I do for a living.

25

1 BY MR. MILNE-SMITH:

2 461 Q. Yes.

3 A. Or used to do for a living for many
4 decades, so I have learned my lesson.

5 462 Q. Mr. Riley, I'm not faulting you for
6 not being able to answer this question on the spot, and
7 I didn't mean to imply that you should. All I want to
8 know is whether a contrary position to the proposition
9 I have stated is going to be taken at the return of the
10 motion, and, if so, on what basis.

11 A. May I ask a question?

12 463 Q. Yes.

13 A. Just for my own edification. The
14 only thing that I'm confused by -- it's a different
15 issue than Andrew raised. In what I appended, a party
16 to the agreement is VimpelCom.

17 464 Q. Yes.

18 A. In this draft of May 9th, which
19 precedes this draft, I think, if I'm correct.

20 465 Q. Yes.

21 A. In other words, I'm looking at the
22 ribbon at the top of the Faskens document.

23 466 Q. Yes.

24 A. VimpelCom is not a party to this
25 agreement.

1 467 Q. Yes. That's one of the changes
2 that you made. If you go to the blackline at page 165,
3 you will see --

4 A. Okay. So that was an add by us.

5 468 Q. Right. You'll see that "and
6 VimpelCom" has been added by Catalyst.

7 A. Okay. Sorry, and that's why I say
8 I don't want to -- I don't want to -- without --
9 without going through them and also asking some
10 questions, I can't answer your question.

11 469 Q. Okay.

12 A. In the way you want it answered.

13 470 Q. That's fine. I think I've got the
14 commitment clear on the record that if you are going to
15 take a contrary position to the proposition I've put,
16 you're going to let me know ahead of time and on what
17 basis, correct?

18 MR. WINTON: Yes. Just to be clear, the
19 proposition that is at tab 1A of Mr. Griffin's
20 affidavit is the same draft that was marked up in the
21 blackline attached to tab 1E of Mr. Riley's
22 supplementary affidavit.

23 MR. MILNE-SMITH: Right. With the only
24 apparent difference being the date.

25 MR. WINTON: Right.

1 BY MR. MILNE-SMITH:

2 471 Q. Right. So let's look at the
3 VimpelCom form at tab 1A of Mr. Riley's -- of
4 Mr. Griffin's supplementary affidavit, and I want to
5 take you to section 7.3B, as in Bravo.

6 Let's go off the record.

7 -- OFF THE RECORD --

8 BY MR. MILNE-SMITH:

9 472 Q. Just one thing I wanted to make
10 clear, and I don't think I did before. We were looking
11 at Exhibit E to your affidavit, and that includes a
12 covering e-mail dated May 24, which is copied to a
13 number of people including Mr. Moyses?

14 MR. WINTON: Yes.

15 BY MR. MILNE-SMITH:

16 473 Q. So I take it we are in agreement
17 that --

18 MR. WINTON: Tab E is May 23.

19 MR. MILNE-SMITH: No, no. Sorry,
20 Mr. Riley's reply affidavit, not Mr. Griffin.

21 MR. WINTON: Yes. Let's go to it.

22 MR. MILNE-SMITH: Okay.

23 MR. WINTON: Are you referring to an
24 e-mail from Mr. Batista?

25 MR. MILNE-SMITH: I am referring to --

1 oh, yes, May 23, not 24. I apologize.

2 MR. WINTON: Right.

3 MR. MILNE-SMITH: Yes.

4 BY MR. MILNE-SMITH:

5 474 Q. So I take it that was the latest
6 draft that Mr. Moyse would have seen? That's why you
7 included it, right?

8 A. I think that's correct.

9 475 Q. The day before he gave notice?

10 A. Yes. That's a -- I want to keep, I
11 just want to remember, that would be a Friday, correct?

12 476 Q. Correct.

13 A. Okay. Thank you.

14 477 Q. That's correct. So if we go to tab
15 1A of Mr. Griffin's supplementary affidavit, page 36 of
16 the record.

17 A. So let me just understand. This
18 is -- you're asking me to look at an agreement dated
19 May 9th that was presented to West Face or it was a
20 document that we were not in the circle on?

21 478 Q. Correct.

22 A. Okay.

23 479 Q. All we are doing is looking,
24 compare and contrast here to make sure I'm not missing
25 anything.

1 A. I'm more worried about me missing
2 something.

3 480 Q. So you will see section 7.3 (b)
4 there is a clause referring to Industry Canada
5 approval?

6 A. Yes.

7 481 Q. So without limiting the purchaser's
8 obligations herein, including in section 6.5 -- sorry,
9 I'm going to read the preamble so it makes sense. It
10 says:

11 "The obligation of the parties to
12 complete the transaction is subject to
13 the following conditions which are the
14 benefit of all of the parties."

15 And then A deals with Competition Act
16 approval and B deals with Industry Canada approval.

17 A. Yes.

18 482 Q. So what this is saying is that the
19 transaction doesn't go ahead unless Industry Canada
20 approves?

21 A. Yes. Do you mind if I look at the
22 definition?

23 483 Q. Sure. You are looking at the
24 definition of Industry Canada approval?

25 A. Yes, because it was a defined term.

1 484 Q. For the record that's on page 12.

2 A. Okay. Thank you.

3 485 Q. Maybe you can leave that in front
4 of you. And then if you want to pull up Exhibit E to
5 your affidavit, it's at page 209 of the Bates stamp.

6 A. So this is -- this -- can I refer
7 to this as the West Face document?

8 486 Q. Sure. So the West Face document
9 means tab 1A of Mr. Griffin's supplementary affidavit.

10 A. Thank you.

11 487 Q. So you will see Catalyst has made a
12 few changes to the preamble of clause 7.3 substituting
13 purchaser and the seller for parties?

14 A. Can I just, again, can I look at
15 this?

16 488 Q. Sure.

17 A. So the only parties to this
18 agreement -- just -- were the purchasers, so whoever
19 the purchasers, and Globalive.

20 489 Q. Yes.

21 A. So here who was defined as the
22 seller? We're presumably the purchaser.

23 490 Q. The seller is Globalive. VimpelCom
24 is a separate defined term.

25 A. Okay. So this was --

1 MR. WINTON: Page 177 of the Catalyst
2 supplementary record, the defined term "seller" is the
3 meaning specified in the recitals to this agreement,
4 and if we -- recitals are where? Are on page --

5 THE WITNESS: Sorry.

6 MR. WINTON: -- 169 --

7 MR. MILNE-SMITH: Correct.

8 MR. WINTON: -- of the agreement. And
9 the seller is defined as Globalive Investment Holdings
10 Corp.

11 BY MR. MILNE-SMITH:

12 491 Q. Correct. Sir, my simple question
13 is the Industry Canada approval clause doesn't change,
14 correct?

15 A. I'd have to go back and understand
16 why VimpelCom was not involved in that ability to waive
17 the condition. I just -- just don't know.

18 492 Q. VimpelCom is not included, not
19 included on either -- in either of the drafts. Because
20 it's not a party to the West Face document and it's not
21 a purchaser or seller in the Catalyst draft.

22 A. I agree with -- I just can't --
23 mine is an intellectual point, not anything more than I
24 can't understand why VimpelCom wouldn't have been in
25 that circle. That's -- it's a question.

1 493 Q. My simple point is that there's no
2 change made to the Industry Canada approval clause?

3 A. Correct.

4 Although you are asking -- and I only
5 say this, you are asking me a question about a document
6 that if I ever read it, I haven't looked at it in a
7 long time.

8 494 Q. Okay. That's fine.

9 A. So there may be a nuance in there.

10 495 Q. Here's my simple point, and I'm
11 happy to take this by way of undertaking. On my review
12 of Exhibit E, I don't see Catalyst adding anything
13 novel about Industry Canada approval or regulatory risk
14 to the draft agreement that it sends back to VimpelCom.
15 And if I'm wrong, I would like you to tell me where it
16 is.

17 A. No. On the wording of this
18 agreement I don't see that.

19 496 Q. Okay. So just to take stock then,
20 as of May 24 when Mr. Moyse announces his departure,
21 VimpelCom had proposed a regulatory approval condition?

22 A. Hmm-hmm.

23 497 Q. You have to say yes. Okay?

24 A. Sorry, yes.

25 498 Q. And Catalyst have not demanded any

1 additional regulatory conditions in its black line it
2 sent back on May 23?

3 A. Not in the blackline draft.

4 499 Q. And you are not aware of it sending
5 such a condition anywhere else?

6 A. There were conversations at the
7 time which I was not a party to, but I know it was a
8 subject of discussion internally as to whether we had
9 to expand what -- what the aspects of that consent,
10 that consent should be.

11 500 Q. Okay.

12 A. Which would not be unusual, when
13 you are at that early stage, to see where you end up in
14 the negotiations.

15 501 Q. But certainly nothing had been
16 communicated to VimpelCom?

17 A. Not to my knowledge.

18 502 Q. And you're not aware of Mr. Moyses
19 being involved in high-level discussions like that?

20 A. Oh, that -- he would be involved
21 in -- he would be aware of our concern about, as I say,
22 going back to the presentation that he was a party to.

23 503 Q. Right.

24 A. That would be part of that whole
25 text.

1 504 Q. Okay. But nothing communicated to
2 VimpelCom on that front?

3 A. To my knowledge, no.

4 505 Q. Okay. Mr. Moyses stopped working at
5 West Face on July 16, 2014, as part of a consent order.
6 You saw that in the discussions with Mr. Borg-Olivier
7 this morning?

8 A. Yes.

9 506 Q. And as of that date, I take it you
10 have and Catalyst has no evidence that West Face was
11 willing to drop a condition of regulatory approval?

12 A. Not to my knowledge.

13 507 Q. Okay. And on July 23rd catalyst
14 earned the exclusive right to negotiate with VimpelCom
15 for the sale of its interest in Wind; is that right?

16 A. I --

17 508 Q. You will take my word for it?

18 A. I will take your word for it.

19 509 Q. Okay.

20 A. Because otherwise I have to go back
21 and double-check the date.

22 510 Q. That's fine. I take it I'm right
23 that Catalyst has not commenced proceedings against
24 VimpelCom for breach of that exclusivity obligation?

25 A. No, we have not.

1 511 Q. There is no suggestion here that
2 VimpelCom breached exclusivity?

3 A. I wouldn't say that.

4 512 Q. You haven't sent a demand letter to
5 VimpelCom?

6 A. We have not at this time.

7 513 Q. You haven't made any allegation to
8 VimpelCom in that regard?

9 A. Not to my knowledge.

10 However, when a contract is breached, as
11 I recall, there's two -- you can -- under the theory of
12 Lumly and Guy, and I'm not trying to play lawyer, you
13 can go after one of two parties, the party breaching or
14 the party inducing a breach.

15 514 Q. There's been no pleading of
16 inducing breach of contract?

17 A. There's been no pleading.

18 515 Q. If we go back to your original -- I
19 shouldn't say original, because that's 2014. We go to
20 your February 8, 2015, affidavit.

21 A. Sorry, 2015? You said 2008 and I
22 was nervous.

23 516 Q. Sorry, 2015. I apologize.

24 A. That's okay.

25 517 Q. February 8, 2015.

1 MR. WINTON: Can I put the others away?

2 MR. MILNE-SMITH: For now, yes.

3 THE WITNESS: There are a lot of dates
4 that float around.

5 BY MR. MILNE-SMITH:

6 518 Q. Yes, it's good to be clear.

7 So if you go to your affidavit at tab 3,
8 paragraph 45, and we've touched on this before but I
9 want to make sure I have covered it off.

10 A. Sorry, this is my affidavit,
11 correct?

12 519 Q. Your affidavit, correct,
13 February 18, 2015.

14 A. Yes.

15 520 Q. You say:

16 "During the exclusivity period,
17 Catalyst and VimpelCom were able to
18 negotiate almost all of the terms of the
19 potential sale of Wind Mobile to
20 Catalyst. The only point over which the
21 parties could not agree was regulatory
22 approval risk. Catalyst wanted to
23 ensure that its purchase was conditional
24 on receiving certain regulatory
25 concessions from Industry Canada, but

1 VimpelCom would not agree to the
2 conditions Catalyst sought."

3 So I take it we are talking here about
4 regulatory concessions that were not in the draft on
5 which Mr. Moyle was copied on May 23rd appearing at
6 Exhibit E to your reply affidavit?

7 A. It's not in that agreement, no. We
8 have touched on that before.

9 521 Q. Okay. What were the conditions
10 that Catalyst demanded?

11 A. We have touched on them before and
12 I don't want to be and I'm not trying to be a
13 hundred percent these are the only ones, but it had to
14 do with transferability of Spectrum --

15 522 Q. Okay.

16 A. -- in certain events. It also had
17 to do with the ability to create a wholesale as opposed
18 to a retail --

19 523 Q. Okay.

20 A. -- network.

21 524 Q. So I take it between May 23rd,
22 2014, and call it August 18 when exclusivity ended in
23 2014, nobody at Catalyst communicated with Mr. Moyle
24 and told him that Catalyst was demanding those
25 conditions?

1 A. That is correct.

2 525 Q. In your reply affidavit at
3 paragraph 41.

4 A. Is that the same affidavit I'm
5 looking at here?

6 526 Q. No. That's the May 1 affidavit.
7 They have the same subject covered in two affidavits so
8 we have to flip back and forth.

9 A. Okay. That's fine.

10 MR. WINTON: Which paragraph?

11 BY MR. MILNE-SMITH:

12 527 Q. Paragraph 41.

13 A. This is the reply affidavit to
14 Moyse? Or what is the affidavit I'm applying to?

15 528 Q. You are replying to Moyse and
16 Griffin.

17 A. Okay. Thank you.

18 MR. WINTON: I just want to show you
19 those pages.

20 MR. MILNE-SMITH: That's fine.

21 529 Q. So you see paragraph 41 you are
22 referring to information and belief --

23 A. Yes.

24 530 Q. -- you obtained from Mr. DeAlba?

25 A. Yes.

1 531 Q. I take it this is something you
2 were not aware of at the time you swore your
3 February 18 affidavit? It's not referred to.

4 A. No. I mean, I can't recall why it
5 would have been omitted from there. I ...

6 532 Q. Okay. So this refers to final but
7 unsigned paper work for a transaction to acquire Wind.

8 A. Yes.

9 533 Q. I'd like production of that final
10 but unsigned paper work?

11 U/A MR. WINTON: Take that under advisement.

12 BY MR. MILNE-SMITH:

13 534 Q. And would that final but unsigned
14 paper work have included the regulatory conditions that
15 we've been referring to?

16 A. I would have to say, subject to
17 seeing it, yes.

18 535 Q. Okay. And paragraph 41 also refers
19 to a conference calls with representatives of Industry
20 Canada?

21 A. We is this now?

22 536 Q. Paragraph 41.

23 A. Paragraph 41, yes.

24 537 Q. So this is in August of 2014, a
25 conference call with representatives of Industry

1 Canada?

2 A. Yes.

3 538 Q. And obviously Mr. Moyle would have
4 no way of knowing the contents of that conversation?

5 A. He would not.

6 Unless he bugged --sorry, strike that.

7 I don't want to --

8 539 Q. That's fine. I understand what was
9 said in jest and you are not making an allegation.

10 A. Exactly.

11 540 Q. I would like any -- in addition to
12 the final but unsigned paper work referred to, I'd like
13 any documentary evidence demonstrating that VimpelCom
14 was prepared to accept those terms.

15 U/A MR. WINTON: Take that under advisement.

16 BY MR. MILNE-SMITH:

17 541 Q. Okay. When did this call with --
18 are there any records that reflect when exactly the
19 call with Industry Canada took place?

20 A. Not, not -- I would have to -- I
21 would have to confirm with Mr. DeAlba to figure out the
22 date.

23 542 Q. If you could consult either diaries
24 or maybe long-distance phone records --

25 A. Yes.

1 543 Q. -- of Catalyst and advise when that
2 call took place?

3 A. Yes.

4 U/A MR. WINTON: we will take that under
5 advisement.

6 MR. MILNE-SMITH: Okay.

7 THE WITNESS: I apologize. I have my
8 counsel.

9 BY MR. MILNE-SMITH:

10 544 Q. Now, I take it you would accept
11 that at this stage in the transaction you are
12 identifying when you are having a call with Industry
13 Canada and there was final but unsigned paper work, but
14 the matter was still subject of VimpelCom board
15 approval, correct?

16 A. I don't know.

17 545 Q. If you could advise -- make an
18 inquiry of the appropriate people and advise?

19 MR. WINTON: Whether -- I'm sure I'm
20 understanding.

21 BY MR. MILNE-SMITH:

22 546 Q. At the point in the transaction --

23 A. Was it conditional upon board
24 approval?

25 547 Q. Right, VimpelCom's board still had

1 not given approval?

2 MR. WINTON: You are asking for
3 Catalyst's understanding?

4 BY MR. MILNE-SMITH:

5 548 Q. Correct. And if any VimpelCom
6 approval had been communicated, I'd like to see
7 evidence of it.

8 So take that under advisement?

9 U/T MR. WINTON: No. I will give you that
10 undertaking.

11 BY MR. MILNE-SMITH:

12 549 Q. Wonderful. Paragraph 42 you go on
13 to say that the anticipated deal with VimpelCom was
14 conditional on Industry Canada approval and the
15 granting of certain regulatory concessions to a
16 Catalyst-owned Wind, and in Catalyst's mind would make
17 it easier for a fourth national carrier to succeed. I
18 take it those are the same regulatory concessions we've
19 been discussing?

20 A. Yes.

21 550 Q. And those weren't in the May 23
22 draft that Mr. Moyses saw?

23 A. No, but, again, it would have
24 been -- I think it was in the context of the PowerPoint
25 that I have raised it.

1 551 Q. I understand. And to your
2 knowledge, West Face has never asked -- never asked for
3 any such concessions?

4 A. I don't know what concessions they
5 asked for.

6 552 Q. You're not aware of them ever
7 asking for those kinds of concession?

8 A. No. But just to be clear, I have
9 no way of knowing that. Industry Canada would never
10 share that under kind of information. Counsel would
11 never share that kind of information and West Face
12 would not share that information to my knowledge.

13 553 Q. I understand.

14 A. So there is no source for that.

15 554 Q. Did VimpelCom ever ask for a break
16 fee?

17 A. I don't know.

18 555 Q. Could you --

19 A. Is it in the draft?

20 556 Q. Could you please make inquiries and
21 advise?

22 U/T MR. WINTON: Yes.

23 BY MR. MILNE-SMITH:

24 557 Q. I would also like to know that if
25 VimpelCom did ask for a break fee, I'd like to know

1 obviously its precise terms and whether Catalyst agreed
2 to it?

3 U/T MR. WINTON: That I will take under
4 advisements.

5 BY MR. MILNE-SMITH:

6 558 Q. Mr. Riley, do you know if Catalyst
7 ever had committed financing for its proposed
8 transaction to acquire VimpelCom's interest in Wind?

9 A. Can I defer for a minute just to
10 explain the fund structure? We would call for capital.

11 559 Q. Yes.

12 A. And we do have a line of credit
13 that we could use in the interim. So our access,
14 our -- our ability to access funds is under our limited
15 partnership agreements.

16 560 Q. Did your line of credit -- was the
17 available balance --

18 A. I don't know.

19 561 Q. You don't know whether it would
20 have covered --

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

22 562 Q. Okay. So it would have then been
23 subject to a capital call that would have to be
24 approved by the various investors in Catalyst?

25 A. No, there's no approval rights. If

1 we call Capital, they are required under the LPA to
2 provide that capital.

3 563 Q. The limited partners?

4 A. Correct.

5 564 Q. You'd never made that call though,
6 call for capital?

7 A. To my knowledge, no. I mean, I
8 would have to look back at the calls at that period.

9 565 Q. Right.

10 A. In other words, I don't know
11 because we call capital on a fairly frequent basis.

12 566 Q. Okay.

13 A. And what we were calling capital
14 for at that time, we may or may not have made any
15 capital calls at that time. I just -- I can't answer
16 that question.

17 567 Q. And you hadn't gotten far enough
18 along in that transaction to actually make that capital
19 call with respect to Wind?

20 A. No. We would make that capital
21 call when we were ready to close. And I suspect, given
22 the availability -- if we had our capital call
23 facility, which is a line of credit, available we would
24 use that first, just to manage cash flows.

25 568 Q. Okay. West Face ultimately made an

1 offer to close without any condition related to
2 transfer of ownership of voting shares held by AAL.

3 Are you aware of that?

4 A. Yes.

5 569 Q. And that offer went in on
6 August 7th, 2014, according to Mr. Griffin?

7 A. Yes. Well, I'm going based on what
8 he said in his affidavit.

9 570 Q. Correct. And you're not aware of
10 any evidence to the contrary?

11 A. No.

12 571 Q. And I take it we are agreed that
13 Mr. Moyse obviously had been gone from West Face for
14 three weeks by then?

15 A. He left on July 16th.

16 572 Q. Yes.

17 A. And it sounds like three weeks to
18 me.

19 573 Q. July 16 to August 7 is roughly
20 three weeks, right?

21 A. Yes. I had to do the math.

22 574 Q. And Catalyst never agreed to drop
23 all regulatory conditions, correct?

24 A. Not that I can recall.

25 575 Q. And it was never part of Catalyst's

1 strategy to engage in a two-part structure to the
2 transaction whereby VimpelCom only transferred
3 nonvoting shares at the first stage of the transaction?
4 That was never contemplated by --

5 A. I was not -- that's a very
6 technical point in a deal, so I can't answer that
7 question.

8 576 Q. Okay. If you can advise by way of
9 undertaking whether Catalyst ever engaged or considered
10 that structure and, if so, produce evidence of having
11 done so?

12 A. Yes.

13 U/T MR. WINTON: Yes.

14 BY MR. MILNE-SMITH:

15 577 Q. I also take it it was never part of
16 Catalyst's strategy to waive any and all conditions for
17 regulatory approval or regulatory concessions?

18 A. Not to my knowledge.

19 578 Q. Okay. And it was also never part
20 of Catalyst's strategy to give VimpelCom a
21 representation backed by an indemnity that no
22 regulatory approval was required for the transfer of
23 its shares?

24 A. Sorry, I would -- not to my
25 knowledge.

1 579 Q. Why don't we take a break for lunch
2 there.

3 -- LUNCHEON RECESS AT 12:54 --

4 -- RESUMING AT 2:03 --

5 BY MR. MILNE-SMITH:

6 580 Q. Mr. Riley, just a few points to
7 close off from this morning. We talked about your role
8 at Catalyst. I just want to understand the scope of
9 Catalyst.

10 I believe in a previous
11 cross-examination -- sorry, take a step back. So we
12 know there are three partners?

13 A. Correct.

14 581 Q. We have heard of that already. I
15 believe in a previous cross-examination, you refer to
16 there being one or two vice-presidents?

17 A. There are currently three
18 vice-presidents.

19 582 Q. Three vice-presidents. And how
20 many analysts or associates?

21 A. There are two right now, and I
22 can't remember whether they're associates. There are
23 at least one analyst, one associate. I think one is an
24 associate, one is an analyst.

25 583 Q. Okay. And I read an article that

1 appeared shortly after you started Catalyst in 2011,
2 and it said that, at the time, there were over 25
3 professionals. What do you recall as being the -- sort
4 of the comparable head count at the time in 2011?

5 A. Three.

6 584 Q. Okay.

7 A. I don't know where that number -- I
8 would have to see the article. I don't know where that
9 number came from.

10 585 Q. That's fine.

11 A. That might include -- I'd have to
12 go back.

13 586 Q. That might include support staff?

14 A. Yeah.

15 587 Q. Right. What are the current assets
16 under management for Catalyst?

17 A. It would be in the order of
18 4 billion, 4.5.

19 588 Q. And how is that comprised? I know
20 there are sort of the five funds and they're in various
21 stages. How is that number calculated?

22 A. By assets under administration.
23 I'm sorry, I don't know what -- what are trying to get
24 to, maybe?

25 589 Q. So which of the five funds would be

1 comprised in that?

2 A. In that number?

3 590 Q. Yes.

4 A. Fund 2, fund 3, fund 4 -- oh, I'm
5 sorry, there's a parallel fund to fund 2, and then
6 fund 3, and then fund 4, and fund 4 parallel.

7 591 Q. Okay. But not fund 5?

8 A. No. Fund 5 is in just the course
9 of raising funds.

10 592 Q. Okay. Thank you.

11 You talked this morning about a capital
12 call. What is the notice period for a capital call?

13 A. Ten days.

14 593 Q. Ten days. And you never sought
15 outside financing?

16 A. Separate, no.

17 594 Q. Okay. Just the line of credit
18 availability that you referred to, which was never
19 drawn on?

20 A. Correct.

21 595 Q. Now, at the time that negotiations
22 broke down or at least that exclusivity expired with
23 VimpelCom.

24 A. Yes.

25 596 Q. I take it that you didn't

1 disclose -- Catalyst didn't disclose to anybody outside
2 Catalyst why those negotiations had broken down?

3 A. Not to my knowledge.

4 597 Q. And you are not aware of VimpelCom
5 disclosing or anybody on behalf of VimpelCom
6 disclosing?

7 A. No, not to my knowledge.

8 598 Q. Okay. And so at that time --

9 A. Sorry, and, again, when you say
10 "outside", do you mean outside of professionals that
11 might have been involved in the matter?

12 599 Q. That's what I meant, yes, and thank
13 you for clarifying. So obviously, for example,
14 VimpelCom had UBS working for them?

15 A. Correct.

16 600 Q. And they had lawyers working for
17 them?

18 A. Yes.

19 601 Q. So outside of VimpelCom, nobody at
20 VimpelCom or their professional advisors, to your
21 knowledge, disclosed to any third party?

22 A. To my knowledge.

23 602 Q. Okay. And so when exclusivity
24 expired, all of a sudden, anybody could bid for Wind,
25 correct?

1 A. Yes.

2 603 Q. And I think we discussed this
3 before. It had been known throughout 2014 that getting
4 to the finish line, as it were, was an important thing
5 for VimpelCom?

6 A. Yes.

7 604 Q. And so it would have been a
8 sensible thing for any interested bidder to drop as
9 many conditions as possible to get to that finish line,
10 correct?

11 A. I disagree with that. I think you
12 have to always look at what conditions make sense in
13 the context of what you are prepared to do.

14 605 Q. That's a fair point. So you don't
15 want to drop so many conditions that it's no longer a
16 good deal for you?

17 A. Correct.

18 606 Q. Because Catalyst determined that
19 dropping conditions wasn't a good deal?

20 A. I think it was our conditions were
21 important to us. Whether we would have dropped them in
22 certain circumstances, I can't -- it's a hypothetical.

23 607 Q. Okay. But you certainly weren't
24 willing to drop them at the time?

25 A. Yes.

1 608 Q. And presumably, if presented with
2 the same choice today, you wouldn't drop them again?

3 A. Don't know that.

4 609 Q. All other things being equal, you
5 are not aware of anything that would have changed?

6 A. Well, actually, there's a lot of
7 things have changed in telecom, so I can't answer.

8 610 Q. In telecom. I see.

9 A. I'm not trying to be argumentative
10 as much as I'm saying your question asks too much.

11 611 Q. The landscape just changed?

12 A. The landscape has changed
13 dramatically.

14 612 Q. Did you know back in August, on
15 August 18, when exclusivity expired, did you know that
16 West Face was interested in Wind?

17 A. I don't know the answer to that.

18 613 Q. Okay. Let's talk about Callidus.
19 You note in your reply affidavit -- so this is the
20 May 1, 2015, affidavit. At paragraph 7.

21 MR. WINTON: Counsel, that's fine.

22 MR. MILNE-SMITH: That's fine.

23 THE WITNESS: Sorry, where am I, please?

24 BY MR. MILNE-SMITH:

25 614 Q. Paragraph 7.

1 A. Okay.

2 615 Q. So just take a look at that
3 paragraph.

4 A. May I just read it?

5 616 Q. Absolutely.

6 A. Yes.

7 617 Q. So you note that the short position
8 against Catalyst started to be reduced --

9 A. Against Callidus.

10 618 Q. Against Callidus. I'm sorry.

11 A. By the way, at this point, I would
12 rather prefer "Callidus" and "the funds", because
13 otherwise, by the time we are through, it will be
14 interspersed, trust me.

15 619 Q. Okay. I will try to remember that.
16 It's a good way to keep it straight.

17 So the short position against Callidus
18 started to be reduced on March 30th?

19 A. Yes. Based on the reports that we
20 can get.

21 620 Q. Okay. And you note that that took
22 place after a BNN article, Business News Network
23 article, was published on March 30, 2015?

24 A. Correct.

25 621 Q. Now, it's also true, you'd agree,

1 that Callidus released its 2014 year-end financials on
2 March 31st, correct?

3 A. Correct.

4 622 Q. So reducing the short position also
5 occurred after Callidus' -- release of Callidus'
6 financials?

7 A. Correct.

8 623 Q. And I think it's fair to say that
9 Callidus did not meet analysts' predicted earnings?

10 A. I can't remember. I just -- I
11 don't recall.

12 624 Q. You'd agree that --

13 A. I just -- I can't recall whether we
14 had met their expectations or not.

15 625 Q. Okay. You'd agree that the
16 coverage of Callidus that is referred to in paragraph 7
17 only came after West Face filed materials at court
18 relating to Callidus, correct?

19 A. What was the date of that? Was it
20 March 15th? The date of the affidavit?

21 626 Q. Mr. Griffin's affidavit was sworn
22 March 7, 2015?

23 A. Okay.

24 MR. WINTON: But I seem to recall,
25 counsel, there was a bit of a brief lull before --

1 between the time he was sworn and a copy of the
2 affidavit sent to us and the date that you actually
3 filed it. If you recall, there was some e-mails that
4 may even be in the record or we discussed some e-mails
5 relate -- there was some e-mail traffic between us
6 about the filing of the record.

7 MR. MILNE-SMITH: Yes, but the BNN
8 article comes out on March 30th.

9 MR. WINTON: Correct. And I believe
10 that the date is March 13th, roughly, is when the
11 record was filed, just to make sure we are accurate in
12 the record.

13 BY MR. MILNE-SMITH:

14 627 Q. So either way, the coverage only
15 comes out after the West Face materials are filed with
16 the court?

17 A. Yes, yup, yes.

18 628 Q. And it's true, isn't it, that the
19 first time the word "Callidus" appeared in this
20 litigation was when the funds filed their amended
21 notice of motion on February 6th, 2015, correct?

22 A. Hmm, I have no --

23 MR. WINTON: Why don't I show the
24 amended notice of motion to --

25 THE WITNESS: Okay.

1 MR. MILNE-SMITH: Okay.

2 THE WITNESS: This is February?

3 BY MR. MILNE-SMITH:

4 629 Q. This is February?

5 MR. WINTON: I mean, if we're going to
6 be -- I don't want the witness to be put to a memory
7 test if I can --

8 MR. MILNE-SMITH: No, I'm happy for you
9 to answer.

10 MR. WINTON: Fine. Then the issue -- or
11 at least the mention of Callidus did come up in the
12 record with respect to -- during the cross-examination
13 of Mr. Dea and Mr. Moyses back in July in -- based on
14 the March 27th e-mail or March 26-27th e-mail
15 exchange between Mr. Dea and Mr. Moyses. There was a
16 question from Mr. Dea about Callidus that was the
17 subject of some discussion.

18 BY MR. MILNE-SMITH:

19 630 Q. Right. There was a -- there was a
20 question -- I think Mr. Dea asked Mr. Moyses what was
21 the name of that entity that had been modelled after a
22 Cerberus entity or something like that, right?

23 A. I think it would be Callidus
24 modelled after -- sorry, what would be the Cerberus
25 entity that Catalyst was modelled after.

1 631 Q. Okay.

2 A. I suspect is the question.

3 MR. WINTON: Right. And just because
4 your question asked the first time the word "Callidus"
5 appeared in this litigation, ellipses.

6 I'm trying to make sure -- just to
7 respond accurately that, if he agrees with that, that's
8 not technically what --

9 MR. MILNE-SMITH: Okay. No, that's very
10 fair. So to the best of both of our recollections as
11 of right now, the only time "Callidus" appeared was in
12 the context of that e-mail where they were asking about
13 the Cerberus connection?

14 MR. WINTON: And questions in the
15 transcripts relating to that e-mail.

16 MR. MILNE-SMITH: Right. That's
17 correct.

18 MR. WINTON: Okay.

19 BY MR. MILNE-SMITH:

20 632 Q. So I take it it's fair to say that
21 there was no allegation made by West Face in respect of
22 Callidus before February 6th? It's not something that
23 West Face was raising?

24 A. Callidus?

25 633 Q. Yes.

1 A. Not to my knowledge.

2 634 Q. Okay. Now, your affidavit dated
3 February 18 elaborated on the Callidus accusation made
4 in the notice of motion dated February 6th, correct?

5 MR. WINTON: Can you take him to where
6 in the affidavit you are referring to.

7 BY MR. MILNE-SMITH:

8 635 Q. Sure. So that's in tab 3 of the
9 motion record.

10 MR. WINTON: Yes.

11 BY MR. MILNE-SMITH:

12 636 Q. And starting at paragraph 70. So
13 feel free to review it, but you can review it with this
14 context. My question is that the basic accusation here
15 is that Mr. Moyses took confidential information about
16 Callidus and gave it to West Face, correct?

17 A. Yes.

18 637 Q. And West Face hadn't made any
19 effort to introduce evidence in this proceeding about
20 Callidus, its strengths or weaknesses, until after you
21 had filed your affidavit on February 18, 2015, correct?

22 A. I'm not sure I'm following you,
23 Counsel. I just -- if you could walk me through it a
24 little bit.

25 638 Q. Sure. So the February 18 affidavit

1 that you filed said that Callidus confidential
2 information was given by Mr. Moyses to West Face,
3 correct?

4 A. Yes.

5 639 Q. And West Face, in its responding
6 materials, included evidence about what information it
7 had about Callidus and where it came from, correct?

8 A. That is correct.

9 640 Q. And West Face had never tried to
10 lead evidence like that before your February 18
11 affidavit, correct?

12 A. No, but we had -- I think it was --
13 we had requested of West Face several times to provide
14 the information we refer to as the November, 2014,
15 whisper campaign.

16 641 Q. But that was entirely outside the
17 context of the litigation, correct?

18 A. Of this litigation?

19 642 Q. Yes.

20 A. Yes, because at that time, we
21 hadn't seen anything that would suggest where you could
22 imply the source of that information was.

23 643 Q. Right. So we now know that
24 starting in -- we know this based on Mr. Griffin's
25 testimony, that starting in mid-October, West Face

1 was -- started to accumulate a short position on
2 Callidus, correct?

3 A. Yes, without having undertaken
4 research at that time.

5 644 Q. Well, we have a disagreement about
6 that, but it will be for a judge to interpret
7 Mr. Griffin's evidence.

8 A. Yes.

9 645 Q. The original injunction motion, I
10 believe, the -- not the interim but the interlocutory,
11 was argued on October 27, 2014, before Justice Lederer?

12 A. Yes, that's -- yes.

13 646 Q. And there was no effort made at
14 that time by West Face to introduce any information
15 about Callidus or the strengths of Callidus' financial
16 condition?

17 A. In that motion?

18 647 Q. Correct.

19 A. No.

20 648 Q. And there was no effort thereafter
21 to introduce information about Callidus until after you
22 swore your February 18 affidavit, correct?

23 MR. WINTON: I think he already answered
24 that.

25 THE WITNESS: I think I have answered

1 that, haven't I?

2 BY MR. MILNE-SMITH:

3 649 Q. And the answer is "yes", correct?

4 A. Yes.

5 650 Q. Okay. And I take it Callidus
6 wasn't raising money in the public markets at any time
7 since October, 2014, was it?

8 A. No.

9 651 Q. I believe we are agreed, but let me
10 be sure. Mr. Moyse never worked for Callidus?

11 A. No, but at the time he was -- at
12 the time he was with Catalyst, Callidus and the funds
13 occupied the same space, and there was no partition.

14 652 Q. I understand. They had different
15 computer systems?

16 A. Yes, they had different computer
17 systems.

18 653 Q. And you conducted your -- people on
19 behalf of Catalyst, the funds, conducted forensic
20 reviews of his computer both at Catalyst and his home
21 computer?

22 A. We didn't conduct a forensic on his
23 home computer. That was through the ISS.

24 654 Q. Through the ISS.

25 A. We did review his computer, and

1 that's when we started our action.

2 655 Q. Okay. And in your reply affidavit,
3 that's the May 1 affidavit, you point to various pieces
4 of information that you say West Face got wrong about
5 Callidus.

6 A. Yes.

7 656 Q. You say it's inaccurate?

8 A. Yes. Could I look at the -- sorry,
9 can you flip to the page, just if we could, please.

10 657 Q. Sure. I'm not talking about
11 anything in particular right now --

12 A. Okay.

13 658 Q. -- but I'm just summarizing
14 generally.

15 A. I think I set out three possible
16 examples.

17 659 Q. Correct. But the allegation you
18 made is one of inaccuracy, correct?

19 A. Yes. Can I just see what I --

20 660 Q. Sure.

21 A. May I just take a moment to read
22 these paragraphs?

23 661 Q. By all means.

24 A. Thank you.

25 Yes.

1 662 Q. So in your reply affidavit, you
2 don't point to anything about Callidus that you say was
3 based on confidential information, correct?

4 A. My concern is that, in order to
5 conduct the type of research that West Face purported
6 to undertake, he would be guided by confidential
7 information. That's my -- that's my allegation, I
8 guess.

9 663 Q. Okay. But you haven't, in your
10 affidavit, pointed to one fact that West Face has put
11 forward that you say was based on confidential
12 information?

13 A. Well, I do, because I say that the
14 names of the companies involved would be I think based
15 on confidential information.

16 664 Q. Well, West Face has put in an
17 affidavit of Mr. Griffin that specifies for every
18 single borrower, it has identified from Callidus the
19 source of that information. You are aware of that from
20 Mr. Griffin's affidavit?

21 A. Yes.

22 665 Q. And I take it you are not able to
23 point to one fact in Mr. Griffin's affidavit with
24 respect to Callidus that came from a nonpublic source?

25 A. I would have to look back through

1 his affidavit. I have not looked at the report on that
2 basis.

3 666 Q. Okay. Well, you understood that
4 the issue in this proceeding --

5 A. Yes, correct.

6 667 Q. -- was whether or not West Face had
7 confidential information about Callidus?

8 A. Yes, and I'm starting with the
9 names.

10 668 Q. Okay. And you read Mr. Griffin's
11 affidavit with that purpose in mind?

12 A. Yes.

13 669 Q. And in reading that affidavit, you
14 don't recall coming across a single piece of
15 information that could be traced to a nonpublic source?

16 A. I would have to go back and look at
17 his whole affidavit again, because there were extensive
18 materials.

19 670 Q. But in reading it for that purpose
20 and in that context, you don't recall coming across
21 anything?

22 A. I tried to replicate his searches,
23 and I wasn't able to replicate them to the degree of
24 specificity that he was able to do so.

25 671 Q. But you saw that he produced

1 exhibits documenting every single fact, correct?

2 A. After the fact.

3 672 Q. Okay. And all of the exhibits that
4 are in Mr. Griffin's affidavit are from public sources,
5 correct? We are agreed on that much?

6 A. I think that's probably correct.

7 673 Q. Okay. And if someone were to have
8 confidential information from Catalyst, then --

9 A. From Catalyst or Callidus? Sorry,
10 that's why I just --

11 674 Q. Sorry, no, you are right.

12 A. Sorry, I want to -- I will keep
13 doing that, because you are better off using "the
14 funds" or "Callidus".

15 675 Q. Let's say Callidus.

16 A. Yes.

17 676 Q. So if someone had confidential
18 information from Callidus --

19 A. Or about Callidus.

20 677 Q. -- or about Callidus, then it would
21 be correct, right? You don't maintain inaccurate
22 information about Callidus?

23 A. No. No, we do not.

24 678 Q. Right. Okay. So to the extent,
25 then, that you are pointing to inaccuracies in

1 Mr. Griffin's information, that can't have come from a
2 confidential source?

3 A. I think that's correct.

4 679 Q. Okay. I'd like to look at
5 Exhibit A to your May 1 reply affidavit.

6 MR. WINTON: It's the short chart?

7 MR. MILNE-SMITH: Yes.

8 BY MR. MILNE-SMITH:

9 680 Q. So this shows that in October and
10 November of 2014 the share price was above \$20?

11 A. Yes. Let me just check the bar
12 graph. Yes, yeah, okay, thank you, yup.

13 681 Q. And I think it's fair to say that
14 the vast majority of the short interest came during
15 this period when the share price was above \$20?

16 A. Yes.

17 682 Q. And once the share price came down
18 in the \$16 range in early December, the short interest,
19 it's fair to say, petered out? At least the short
20 interest you were able to track?

21 A. This is taken off a Bloomberg
22 screen. This is not -- it's nothing --

23 683 Q. I understand.

24 A. No rocket science involved.

25 MR. WINTON: What do you mean by

1 "petered out"?

2 BY MR. MILNE-SMITH:

3 684 Q. It means it --

4 A. And nobody increased their short
5 position.

6 685 Q. Correct.

7 A. There's little blips in March.

8 686 Q. Right. But between early December
9 and March, the short interest stays not completely but
10 relatively flat?

11 MR. WINTON: I'm just pointing out the
12 dots on the chart to assist Mr. Riley.

13 BY MR. MILNE-SMITH:

14 687 Q. Correct.

15 A. Sorry, and I'm just trying to pick
16 the dates off the bottom. There's too much information
17 on this chart.

18 Yes, I agree with that statement.

19 688 Q. Okay. And then in -- I think you
20 said in April, between March 30 and April 14, you see
21 some reducing of the short position?

22 A. Yes.

23 689 Q. Some reduction in the short
24 position?

25 A. Yes. No, you can see -- you can

1 see it over on the right-hand side of that chart.

2 690 Q. Right. And this stock price chart
3 starts in October, because that's when the short
4 interest began?

5 A. Correct.

6 691 Q. So if you go, then, to Exhibit B.

7 A. Okay.

8 692 Q. This includes a very small stock
9 chart, but is it fair to say this would appear to be
10 from the IPO up through the date of the article, which
11 is March 30?

12 A. I apologize, I can't see -- there
13 are dates at the bottom that I can't make out.

14 693 Q. Yes. The first line is --

15 A. Yes, this would run through July
16 to -- I actually can't read the dates.

17 694 Q. Right. The point is it starts
18 below -- it starts before July, 2014?

19 A. Yes.

20 695 Q. So that would be going back to the
21 April, 2014, IPO?

22 A. Yes.

23 696 Q. Okay.

24 A. Sorry, what date did you say?

25 April, 2014.

1 697 Q. April, 2014, yes. I'm sorry if I
2 misspoke.

3 A. Yes, yes. That's okay.

4 698 Q. The IPO price was \$14, correct?

5 A. Yes.

6 699 Q. And the shorting occurred, we can
7 see, when the Callidus stock was at its peak, around
8 October of 2014?

9 A. No, the peak I think was in August.
10 I think.

11 700 Q. Okay. I don't want to quibble
12 about the exact --

13 A. Yeah. I think it was in August.
14 The peak was in August.

15 701 Q. But you'd agree that in October the
16 price was still -- sorry, no, that can't be right. If
17 you look in August on this share price chart, it's
18 barely above 20, and then as you get into
19 September/October, it's well above 23.

20 A. Sorry, which chart are you looking
21 at?

22 702 Q. I'm on Exhibit B still.

23 MR. WINTON: Page 16. Right?

24 MR. MILNE-SMITH: Yes.

25 THE WITNESS: Sorry, can we look back at

1 this?

2 MR. WINTON: This only starts October 1.

3 THE WITNESS: Oh, okay. Got you.

4 BY MR. MILNE-SMITH:

5 703 Q. Right. So I'm going before
6 Exhibit A.

7 MR. WINTON: This is the October line.

8 THE WITNESS: Yes. So October would
9 appear to be somewhere between 20 and 25.

10 BY MR. MILNE-SMITH:

11 704 Q. Right.

12 A. Is that what you said -- the point
13 you are trying to make? Assuming this is correct. I
14 mean, it's a --

15 705 Q. Assuming this is correct, then
16 October 14 -- October, 2014, the stock price is at or
17 near its peak?

18 A. Yes.

19 706 Q. Okay.

20 MR. WINTON: I think what Mr. Riley is
21 referring to is, just prior to October, there seems to
22 be a slightly higher peak.

23 THE WITNESS: And that's why I think
24 that occurred in August. It's hard to extrapolate what
25 the dates are from this chart.

1 MR. WINTON: Late August or early
2 September.

3 BY MR. MILNE-SMITH:

4 707 Q. It's at or near the peak?

5 A. Yes. Somewhere between July and
6 October, it was near the peak.

7 708 Q. Right. So the short interest only
8 began when the price was roughly 50 percent higher than
9 the IPO price?

10 A. Yes. No -- yes. Sorry.

11 709 Q. Yes. 14 up above 20?

12 A. I had to do the math.

13 710 Q. So you say that West Face's short
14 selling was based on nonpublic confidential information
15 about Callidus disclosed to it by Moyses?

16 A. Well, no, I think -- I think that's
17 not what I'm saying, precisely. I think what I'm
18 saying is they discovered names, purported to do
19 research on those names, and yet didn't -- weren't as
20 fulsome in their research as they could have been. So
21 I think there's two aspects to it: How did they find
22 out the names, because we are very careful about that,
23 and what did they say about those names. There's two
24 issues in there.

25

1 BY MR. MILNE-SMITH:

2 711 Q. Okay. Given what you have said
3 about the names, our position is that every single one
4 of the names that West Face was able to identify has
5 been traced to a public source which is attached to an
6 exhibit to Mr. Griffin's affidavit. If you have any
7 evidence to the contrary, if you have any evidence that
8 one of the documents that attached is nonpublic or you
9 can show me an identified borrower that cannot be
10 traced to a public document, I would like to know about
11 it before the motion.

12 MR. WINTON: I think the issue here,
13 Counsel, is there is a difference between identifying a
14 document that is, at least in theory, public and how
15 that document was found or how one knew to look for
16 that document. And so it's not evidence you'll be
17 hearing, but I will just be fair and to make sure there
18 is no surprise. Given the question you've asked, there
19 will be argument as to whether or not it's reasonable
20 to suggest that the evidence in Mr. Griffin's affidavit
21 is, in fact, the basis upon which West Face discovered
22 of the names was Callidus borrowers.

23 BY MR. MILNE-SMITH:

24 712 Q. Okay. I appreciate you clarifying
25 what you will be relying on at the motion.

1 -- RECESS AT 2:29 --

2 -- RESUMING AT 2:32 --

3 BY MR. MILNE-SMITH:

4 713 Q. So the only nonpublic -- the only
5 confidential information you say was taken by Moyses and
6 given to West Face relates to the identity of
7 borrowers?

8 A. Yes.

9 714 Q. Relating to Callidus?

10 A. At least that's from what I can
11 tell. There may be others -- there may -- there may be
12 other information, but that's ...

13 715 Q. Would it have been the practice of
14 Callidus to carry out intellectual property
15 registration at the time that its loans were initiated?

16 A. Depends on what the collateral was.

17 716 Q. To the extent the collateral
18 included IP?

19 A. Uhm-hmm.

20 717 Q. You have to say "yes".

21 A. Yes. Sorry.

22 718 Q. So to the extent that an IP
23 registration was done at all, it would have been done
24 at the initiation of a loan?

25 A. Yes.

1 719 Q. And that --

2 A. Or contemporaneous with the loan.

3 720 Q. Contemporaneous. And that would be
4 in the public domain?

5 A. Yes.

6 721 Q. Okay.

7 A. However -- may I go -- when I tried
8 to do those searches, I couldn't find it using the
9 lender's name; I could only find it using the
10 borrower's name.

11 722 Q. But you understand that the
12 intellectual property registrations are public
13 information?

14 A. Absolutely.

15 723 Q. And some people may be better at
16 searching than you?

17 A. That could be.

18 724 Q. Okay. Are you familiar with a
19 company called Veritas?

20 A. Yes, I am.

21 725 Q. You are aware that they are an
22 independent market research company?

23 A. They purport to be an independent
24 research company.

25 726 Q. They aren't taking the position --

1 they aren't making investments on stocks?

2 A. I don't know. I don't know how
3 they make -- I don't know how their model works,
4 whether they are paid to produce their research and how
5 they are paid for producing their research.

6 727 Q. Okay. The position they have
7 taken, publicly, at least, is that they do not make
8 investments; they conduct research, correct?

9 A. Okay.

10 728 Q. You agree with that?

11 A. I will take -- if that's what you
12 are saying that's publicly said.

13 729 Q. Well, I'd also like to know what --
14 your knowledge of them about how they have been
15 marketed to the public. Do you have any awareness?

16 A. No.

17 730 Q. Okay. I take it they would have no
18 access to Callidus confidential information?

19 A. They shouldn't.

20 731 Q. Okay. And you are aware, of
21 course, that they published a report on Callidus dated
22 April 16, 2015?

23 A. If you could show me the report
24 again, but I think I am aware of the report.

25 732 Q. Sure. So let's mark this as the

1 next -- well, sorry, let me ask you. Have you seen
2 this report before?

3 A. Yes, I have.

4 733 Q. So this is --

5 MR. WINTON: This one is highlighted.
6 Do you want to hand that back.

7 BY MR. MILNE-SMITH:

8 734 Q. Can I trade?

9 A. Can I look at this?

10 735 Q. Well, we're going to be going to
11 the passages.

12 A. This is the exhibit.

13 736 Q. We are going to go to the same
14 passages, so this will help me get there quicker.

15 A. Okay.

16 MR. MILNE-SMITH: So this is a document
17 entitled "Accounting Alerts! Callidus Capital
18 Corporation" dated April 16, 2015.

19 THE WITNESS: Yes.

20 EXHIBIT NO. 4: Document entitled
21 "Accounting Alerts! Callidus Capital
22 Corporation" dated April 16, 2015

23 THE WITNESS: Can you tell me what date
24 April 16 was?

25

1 BY MR. MILNE-SMITH:

2 737 Q. What day of the week?

3 A. What day of the week. Was it a
4 Thursday?

5 738 Q. Just a second. April 16, 2015, was
6 a Thursday, yes.

7 A. Thank you.

8 MR. WINTON: This is Exhibit 4, I
9 believe?

10 MR. MILNE-SMITH: I think that's right.

11 BY MR. MILNE-SMITH:

12 739 Q. Flip over to the second page of the
13 exhibit but it's marked page 1 at the top.

14 A. Okay. Sorry. Yes. I'm there.

15 740 Q. So you'll see, at the bottom
16 paragraph, it states that:

17 "The analysis and estimates included
18 herein are based on our interpretation
19 of publicly available information and
20 applicable accounting standards."

21 A. Uhm-hmm, yes.

22 741 Q. And you have no evidence on which
23 to dispute that statement?

24 A. Not currently.

25 742 Q. And it says:

1 "Management has yet to provide
2 responses to our questions."

3 Were you aware that Veritas had made
4 inquiries of Callidus?

5 A. The only inquiry that I was aware
6 of was on March 31, when we were releasing our annual
7 statements, that they had launched a call in to our
8 communications officer.

9 743 Q. And no response was provided?

10 A. No. To my knowledge, no.

11 744 Q. And if you go up to the third
12 paragraph on page 1.

13 A. Sorry, can I -- it's not -- can we
14 go off the record for a second?

15 MR. MILNE-SMITH: Sure.

16 -- OFF THE RECORD --

17 BY MR. MILNE-SMITH:

18 745 Q. So the date of this report is
19 obviously April 16 and, therefore, when Veritas said
20 that there had not been a response to their questions,
21 that was as of April 16, 2015, correct?

22 A. That is correct.

23 746 Q. Okay. And has there subsequently
24 been any communications with Veritas?

25 A. There have been communications to

1 say that there are a number of misstatements in their
2 report and that they should be aware that we consider
3 that to be defamatory.

4 BY MR. MILNE-SMITH:

5 747 Q. Okay. And will you produce any
6 correspondence between Veritas and Catalyst or anybody
7 on behalf of Catalyst?

8 U/A MR. WINTON: I will take that under
9 advisement.

10 BY MR. MILNE-SMITH:

11 748 Q. Okay. If you go up to the third
12 paragraph on this same page 1.

13 A. Sorry.

14 749 Q. You see it says:

15 "Our analysis indicates that investor
16 concerns are well-founded."

17 A. I'm sorry, where is that?

18 750 Q. Third paragraph.

19 A. Oh, got it.

20 Yes.

21 751 Q. And you'd agree that, as of the
22 date of this report, April 16, 2015, West Face was the
23 only other investor on the public record as having a
24 concern about Callidus at the time?

25 A. Were they on the public record at

1 that time? Had that material been filed?

2 752 Q. It had been filed in the court.

3 A. Yes, then I'm aware of that.

4 753 Q. Okay. You are also aware, I take
5 it, of an article published in the Wall Street Journal
6 yesterday about Callidus?

7 A. Yes.

8 754 Q. So this is a May 12, 2015, article
9 in the Wall Street with the heading "Manager Feels Heat
10 on IPO". You are familiar with this article?

11 A. Yes, I am.

12 755 Q. I'd like to mark that --

13 A. Sorry, is this the one from the
14 Journal itself or is this the one online?

15 756 Q. This is the one online.

16 A. There was also one -- I have not
17 tried to compare the two, but there's one in the
18 Journal yesterday.

19 757 Q. Right.

20 A. Which I have not read.

21 MR. MILNE-SMITH: So I would like to
22 mark this as Exhibit 5.

23 EXHIBIT NO. 5: Wall Street Journal
24 article dated May 12, 2015

25

1 BY MR. MILNE-SMITH:

2 758 Q. So if you look at the fourth
3 paragraph of this article.

4 A. Starting "Some Callidus"?

5 759 Q. Yes. It says:

6 "Some Callidus investors say they are
7 worried about potential conflicts
8 created by the company's shared
9 management team."

10 A. Yes.

11 760 Q. And down at the bottom of the page,
12 it quotes someone by the name Salman Malik, portfolio
13 manager at Toronto-based Barometer Capital Management,
14 expressing concerns about potential conflicts of
15 interest.

16 A. Yes, I see -- I read -- I see the
17 paragraph.

18 761 Q. Yes. And I take it Mr. Malik, to
19 your knowledge, has no access to Callidus confidential
20 information?

21 A. To my knowledge, no.

22 762 Q. Okay. And over on the second page,
23 in the second-last paragraph, it quotes an Andrew Pink,
24 a fund manager at LDIC Inc.?

25 A. Sorry, where is that paragraph?

1 763 Q. Second-to-last paragraph.

2 A. Yes.

3 764 Q. And Mr. Pink expresses -- he says:

4 "It would be worthwhile if the company

5 was a lot more explicit about the

6 business, the loan guarantees, and the

7 business in general, because they have

8 to answer to public shareholders, but

9 management is still pretty

10 tight-lipped."

11 Do you see that?

12 A. Yes, I do.

13 765 Q. And I take it Mr. Pink has no

14 access to Callidus --

15 A. To my knowledge, no.

16 766 Q. -- confidential information?

17 A. No.

18 767 Q. Your affidavit states that

19 Mr. Griffin's affidavit was "replete" with

20 misrepresentations or inaccuracies about Callidus?

21 A. Yes.

22 768 Q. And you say that you have singled

23 out three categories of what you've called the most

24 egregious misrepresentations?

25 A. Yes.

1 769 Q. And that concerns an excerpt from a
2 Callidus conference call, the Arthon Resources --

3 A. Yes.

4 770 Q. -- A-R-T-H-O-N -- the Arthon
5 Resources Company and comparisons to BDCs?

6 A. Correct.

7 771 Q. So let's start with the Callidus
8 conference call.

9 A. Okay. What -- can we -- there it
10 is. Okay.

11 MR. WINTON: I brought the witness to
12 page 4 of his supplementary affidavit, paragraphs 14
13 and 15.

14 BY MR. MILNE-SMITH:

15 772 Q. And you should also have, in
16 fairness to you, I think, Mr. Griffin's affidavit, his
17 March 7 affidavit, which the relevant passage is at
18 paragraph 110 on page 43 of the record.

19 MR. WINTON: You may want to give me
20 your copy, please. I'll share with the witness. Thank
21 you.

22 MR. CARLSON: Do you want to just flip
23 the page and see if there is anything on the next page.

24 MR. MILNE-SMITH: It's fine.

25 THE WITNESS: Where am I looking now?

1 BY MR. MILNE-SMITH:

2 773 Q. Paragraph 110 quotes from a
3 conference call with investors held by Callidus on
4 November 7, 2014, correct?

5 A. That is correct, yes.

6 774 Q. And that paragraph says -- it's
7 quoting Mr. Glassman saying that:

8 "Callidus does not have a single loan
9 that is nonperforming."

10 Correct?

11 A. That is correct.

12 775 Q. And you'll see that there's a
13 footnote at the end of that excerpt, footnote 47?

14 A. Yes.

15 776 Q. And that attaches a copy of the
16 entire transcript as Exhibit 42 to the affidavit,
17 correct?

18 A. Yes.

19 777 Q. So anybody who wanted to see the
20 context for that statement could look it up at
21 Exhibit 42, correct?

22 A. That is correct, but I feel it's
23 buried in the affidavit.

24 778 Q. Okay. But the fact remains it was
25 available for anyone who wanted to look at it?

1 A. Yes, although with a little bit of
2 obfuscation in the way it was displayed.

3 779 Q. The paragraph that Mr. Griffin
4 quotes in his affidavit gives an extremely positive
5 portrayal of Callidus, correct?

6 A. No, but it goes on -- I think it --
7 you have to look at that in the context. So I'm not
8 sure it's glowing. We have to look at what we were --
9 what Mr. Glassman, in a Q&A period after the
10 announcement of our earnings, was trying to convey in
11 terms of --

12 780 Q. Okay. We'll get to that. I just
13 want to understand, this paragraph alone, I mean, I
14 struggle to see anything negative about Callidus in
15 this paragraph.

16 A. That's not what I'm saying. I
17 think you have to look at the whole thing to portray --
18 what I think the context is trying to portray is that
19 there was something misleading about this statement.
20 That's what I think this is -- that Mr. Griffin was
21 trying to say.

22 781 Q. Okay. So you are saying that this
23 paragraph was -- looked at alone, was -- painted an
24 excessively optimistic view of Callidus?

25 A. I think it wasn't -- I think it

1 wasn't balanced in terms of what -- what -- and let me
2 go on to say that we have not experienced any -- what's
3 the phrase he used? No, it's not -- it's -- we have
4 not had any actual loan loss in the portfolio, the
5 current Callidus portfolio.

6 782 Q. Okay.

7 A. Recognized loss, if you know what I
8 mean. That's apart from reserves.

9 783 Q. Okay. We'll get to that.

10 A. Okay.

11 784 Q. If a company cannot pay principal
12 and cannot meet interest payments, is that considered
13 to be a performing loan?

14 A. It's not the way IFRS works,
15 unfortunately. Do we want to refer to it as "IFRS"?

16 785 Q. That's fine. Okay.

17 A. IFRS, if you have a contractually
18 committed cash flow, you keep bringing in income, and
19 then you now analyze whether it is actually going to be
20 realized or not. I.e., for example, if you think
21 through a realization process, you will be able to
22 recognize that amount; you don't have to back it out of
23 IFRS. It's different than the old way non-performing
24 loans worked.

25 786 Q. Or, for example, you say that you

1 are going to get paid through a guarantee?

2 A. No, the way we set it up on our
3 books is that we recognize a loan loss provision and we
4 look at what the guarantee covers. So if you've got
5 \$10 of loan losses, then you have \$10 -- you may
6 have \$10 of claim over against the funds.

7 787 Q. But I want to understand what you
8 say is a performing loan. To be a performing loan,
9 does the borrower have to be able to pay interest and
10 principal as they come due?

11 A. They don't have to be paying it
12 currently, as I'm talking -- we are talking about an
13 accounting concept.

14 788 Q. I understand.

15 A. That I think as long as you are
16 satisfied that you will be able -- that there are
17 amounts available to pay those claims, you can still
18 recognize them.

19 789 Q. Amounts available at some point in
20 the future?

21 A. Yes.

22 790 Q. Okay. So even if they can't --

23 A. But determined at the time you are
24 making the calculation. I believe that is the correct
25 analysis.

1 791 Q. So if you can't pay it now, but you
2 are confident based on the facts as they exist now that
3 they will be able to pay it in the future, then it's
4 performing?

5 A. I believe that still counts as
6 performing, but in the loans that he was referring to,
7 we were still receiving interest payments as they fell
8 due.

9 792 Q. So the remaining three paragraphs,
10 which you've quoted at paragraph 14 of your affidavit,
11 provide further support for the statement in the first
12 paragraph, correct?

13 A. Yes. We didn't see -- we didn't
14 see value at risk other than in two loans.

15 793 Q. So it refers to a watch list?

16 A. Yes.

17 794 Q. Which loans are currently on the
18 watch list?

19 R/F MR. WINTON: Not going to -- we're not
20 answering that.

21 THE WITNESS: That's MNPI. Material
22 nonpublic information.

23 BY MR. MILNE-SMITH:

24 795 Q. Okay. Just so it's clear on the
25 record, the reason why I'm asking this is because I've

1 been told by the witness that these three paragraphs
2 are necessary to provide the proper context and
3 understand why the first paragraph isn't a fair
4 presentation by Mr. Griffin, and what these paragraphs
5 talk about is watch lists and value at risk and
6 guarantees.

7 A. Yes.

8 Q. And so that's what I want to
9 understand.

10 MR. WINTON: Well, I think, first off, I
11 don't think that's quite an accurate summary of the
12 witness's evidence, because I think what the witness is
13 saying, both in his affidavit and today, is that
14 Mr. Griffin's selective quotation from the transcript
15 and then suggesting that that is somehow an inaccurate
16 statement about the state of affairs of Callidus, which
17 is what happens in -- what we say happens in his
18 affidavit, was misleading because he ignored the
19 context provided by the remaining paragraphs.

20 MR. MILNE-SMITH: I want to understand
21 the remaining paragraphs.

22 MR. WINTON: Right. You don't need to
23 know which loans are on the watch list to understand
24 the remaining paragraphs, and that is material
25 nonpublic information. It won't be disclosed in the

1 course of this litigation.

2 THE WITNESS: What may help you is the
3 watch list consists of loans where we have a heightened
4 concern and whether we should be taking further action,
5 not necessarily in an insolvency or realization sense
6 but in an increased vigilance over that particular
7 borrowing relationship.

8 BY MR. MILNE-SMITH:

9 797 Q. And how do you determine -- what
10 threshold do you use for putting something on the watch
11 list?

12 A. It's not a dollar amount. It's
13 just in conversations between the Credit Committee and
14 our underwriters whether there should be enhanced
15 supervision or whether a loan should come off. It's a
16 two-way conversation.

17 798 Q. And who are your underwriters?

18 A. Craig Boyer, Jim Hall, and Kurt --
19 Bert Crossin.

20 799 Q. Can you say --

21 MR. WINTON: These are employees of
22 Callidus.

23 THE WITNESS: Yes.

24 BY MR. MILNE-SMITH:

25 800 Q. Okay. And can you say which two

1 loans have negative value at risk?

2 A. I can't remember from that time.

3 This is March 31? I can't remember which two those --

4 MR. WINTON: And I'm not even sure, even
5 if he could remember, we would answer that question.

6 THE WITNESS: I wouldn't be able to give
7 you the names.

8 BY MR. MILNE-SMITH:

9 801 Q. It would be November, 2014. That's
10 when the conference call took place.

11 A. Okay. I -- I cannot recall.

12 802 Q. Okay. I will ask for --

13 A. And if I recalled, I wouldn't be
14 able to give them to you. I'll adopt my counsel's
15 answer.

16 MR. MILNE-SMITH: I will take that as
17 refusal, then?

18 R/F MR. WINTON: Yes.

19 BY MR. MILNE-SMITH:

20 803 Q. Putting aside the identities, how
21 much money was owed by borrowers on the watch list?

22 MR. WINTON: I'm just going to ask. Is
23 that public information?

24 THE WITNESS: No.

25 R/F MR. WINTON: You can't answer that.

1 BY MR. MILNE-SMITH:

2 804 Q. Okay. What is the amount of
3 negative VAR?

4 MR. WINTON: I'm going to assume we
5 can't answer that?

6 THE WITNESS: No.

7 R/F MR. WINTON: We can't answer that.

8 BY MR. MILNE-SMITH:

9 805 Q. Have there been any additional
10 loans placed on the watch list since this conference
11 call?

12 R/F MR. WINTON: We are not going to answer
13 that as well.

14 BY MR. MILNE-SMITH:

15 806 Q. Do you have third-party valuations
16 for loans that are on the watch list?

17 A. We have third-party valuations for
18 all of the equipment-type collateral or land collateral
19 that forms part of our collateral package. We rely on
20 management information systems subject to our --
21 subject to field examiners for counts, and inventory,
22 we have may have third-party valuations.

23 BY MR. MILNE-SMITH:

24 807 Q. Okay. Can you produce any
25 valuations for loans that West Face has identified?

1 R/F MR. WINTON: No.

2 BY MR. MILNE-SMITH:

3 808 Q. Okay. So I take it that you would
4 have -- the valuations would -- that you have described
5 would apply to anything that is put up as collateral?

6 A. Yes.

7 809 Q. You are not interested in
8 valuations of assets that you don't have security over?

9 A. Well, no. In asset-based lending,
10 you have assets on which you are lending money and then
11 you take what is known as boot collateral. Boot
12 collateral is something you are not lending on but you
13 take as something to boot with the original collateral.

14 810 Q. So that's additional collateral?

15 A. Correct. Whatever word you want to
16 use.

17 811 Q. Okay. So you would have valuations
18 for -- would you have valuations for both classes of
19 collateral?

20 A. Sometimes, we would, sometimes, we
21 would not. Sometimes, we would take it just because it
22 was there to take.

23 MR. MILNE-SMITH: Okay. So I would ask
24 that my previous request for an undertaking, which you
25 have refused, I would include both aspects of that

1 collateral to the extent valuations exist.

2 R/F MR. WINTON: Doesn't change our answer.

3 BY MR. MILNE-SMITH:

4 812 Q. Okay. And do you conduct any
5 internal valuations for assets held by borrowers?

6 A. No. Although we -- the field
7 examiners may do some assessments relating to value as
8 to whether they are overvalued. We have our own
9 internal field examiners, but the answer is, no, we
10 don't -- we don't -- we -- any valuations we rely upon
11 like that, we have third-party confirmations.

12 BY MR. MILNE-SMITH:

13 813 Q. Okay. And I'd like financial
14 statements for any borrowers on the watch list.

15 R/F MR. WINTON: No.

16 BY MR. MILNE-SMITH:

17 814 Q. Okay. The last paragraph refers to
18 a guarantee. I'd like to understand the nature of this
19 guarantee.

20 A. I'm sorry, where are we now?

21 MR. WINTON: You're referring to the
22 last paragraph in the full quotation in Mr. Riley's
23 affidavit.

24 BY MR. MILNE-SMITH:

25 815 Q. The last paragraph of

1 Mr. Glassman's quotation on page 5.

2 A. Page 5 of mine. Thank you.

3 816 Q. Of your reply affidavit.

4 So I understand that public --
5 Catalyst -- the funds -- have publicly disclosed a
6 debenture repayment agreement?

7 A. Yes.

8 817 Q. And a participation agreement?

9 A. Yes.

10 818 Q. Are there any other contracts that
11 relate to or underlie the guarantee?

12 A. No.

13 819 Q. I understand Mr. Glassman has made
14 public statements that newly originated loans after the
15 IPO in April, 2014, that subsequently go on the watch
16 list are thereafter guaranteed by the funds?

17 A. Sorry, let me -- could you read
18 that more slowly, because there are two different types
19 of guarantees, so I want to make sure I'm answering the
20 right question.

21 820 Q. Well, why don't you describe to me
22 the two guarantees.

23 A. Well, let me describe how the
24 original guarantee works.

25 821 Q. Yes.

1 A. To the extent that they were loans
2 on the watch list at the time of the IPO, we agreed
3 they would be covered in perpetuity by the guarantee.
4 So let's assume that there was a loan on the watch
5 list, it was in insolvency proceedings or it was of
6 concern -- of heightened concern, as I said before;
7 then we agreed that would be covered by 100 percent
8 guarantee in perpetuity until the loan was repaid or
9 realized upon.

10 822 Q. Okay.

11 A. So just to stick with that simple
12 example for a moment. Let's assume it was a \$10
13 loan -- and I will give you rationale for it. I would
14 like to also give the rationale, because it makes more
15 sense, I think. To me, it makes more sense. It may
16 not to you.

17 You have a \$10 loan. It's on the watch
18 list at the time. We agreed 100 percent coverage of
19 the principal amount in perpetuity until it was
20 realized. If it was realized and got \$11, then there
21 was no impairment of the loan and we didn't have to pay
22 under the guarantee. If there was \$9 realized, then we
23 had to pay \$1.

24 823 Q. Right.

25 A. The rationale for that was we

1 wanted to sell the whole -- the whole of the loan
2 portfolio, because keeping loans back would have meant
3 we had to manage them; it would be difficult to manage.
4 The underwriter is quite right. He said we don't want
5 to be stuck in a situation where we are accused of
6 taking a bad loan, and we said we won't do that; we
7 will guarantee it.

8 That guarantee -- so let's assume it's
9 not on the watch list and it goes -- it goes to, in
10 effect, its new credit renewal period, so we're
11 essentially one year down the road and the credit is
12 renewed. On the same underwriting principles that we
13 would on any new loan, then the guarantee ceases to
14 apply. So the third case is if a loan is in between,
15 so it's not on the watch list at IPO time, it never
16 gets to a renewal on the credit cycle, and some credit
17 event occurs, then that is covered by the guarantee of
18 100 percent in perpetuity.

19 824 Q. So if anything ever goes on the
20 watch list, it becomes guaranteed in perpetuity?

21 A. On the original portfolio.

22 825 Q. From the original portfolio.

23 A. Yes.

24 826 Q. Whether it was --

25 MR. WINTON: Let me just stop you --

1 BY MR. MILNE-SMITH:

2 827 Q. -- on the watch list at the time of
3 the IPO or not?

4 A. Correct.

5 MR. WINTON: Just to clarify, though,
6 only if it goes on the watch list before the first
7 renewal.

8 THE WITNESS: Yes, before credit
9 renewal.

10 BY MR. MILNE-SMITH:

11 828 Q. Before credit renewal.

12 A. So let's step back for a second.
13 The same \$10 loan. Not on the watch list at the time
14 of the IPO. So let's say it was -- originally, it was
15 part of the IPO loan pool. You get six months out, and
16 it goes into insolvency. We push it into insolvency or
17 they take themselves into bankruptcy, whatever -- that
18 will then have the benefit of the same guarantee as if
19 it was on the watch list at IPO.

20 829 Q. Okay. So anything originated after
21 the IPO is not going to be covered by the guarantee?

22 A. No. There's -- there's an
23 exception -- sorry, there is another guarantee, a
24 second guarantee.

25 830 Q. Okay. What is the second

1 guarantee?

2 A. That was all the first guarantee.

3 831 Q. Okay.

4 A. That's the first. So that's why --
5 okay. So that's -- that's the -- think of --

6 832 Q. Sorry, before we move on to the
7 second guarantee, I take it the guarantee you've just
8 been describing only covers principal, not interest?

9 A. That's correct.

10 833 Q. Okay. Sorry I interrupted you.

11 A. That's okay. But the interest is,
12 in effect, a first claim on the cash flow.

13 834 Q. I understand. You were then going
14 to talk about the second guarantee.

15 A. Second guarantee, the funds have
16 participation rights in -- had in the existing loan
17 portfolio, so there's a little bit of overlap here that
18 just -- let's assume away for the sake of the
19 discussion the overlap, because, for the most part,
20 that first guarantee is going to cover the loan pool.

21 If there is a participation by a loan --
22 by a Catalyst fund in a pool of loans going forward --
23 and that will happen in two occasions. It happened in
24 the initial IPO because there was participation given
25 to one of the funds as consideration for, in effect,

1 repayment of the amounts that was it was owing.

2 835 Q. Right.

3 A. Then a subsequent fund well also
4 have similar rights. So fund 5, for example, will have
5 a right to participate in new loans originated while
6 fund 5 is in existence.

7 836 Q. Yes.

8 A. Until that loan participation is
9 cancelled. If it has, let's say, a 50 -- let's assume
10 there is \$100 of loan and Callidus puts up \$50 -- bear
11 with me; you know what I mean by that -- and the funds
12 put up \$50, when that loan is -- when the participation
13 is cancelled, i.e., gets back whatever amount it put in
14 for its participation, then it will -- it will agree on
15 the same basis as the original guarantee -- the same
16 principles of the original guarantee -- to cover its
17 interest in the loan.

18 837 Q. So that guarantee, then, is
19 contingent on the funds selling back their
20 participation to Callidus?

21 A. Correct.

22 838 Q. And has that actually happened?

23 A. Fund 4's participation has been
24 purchased back. Fund 5 hasn't started. It's just
25 starting its participation interest, so it has not been

1 paid back.

2 839 Q. Why would fund 4 sell back its
3 participation?

4 A. Because at some point the return on
5 the participation, the -- whatever the -- it's
6 essentially the same as the ROE because it's like an
7 equity piece. When its return on that piece is less
8 than it can get investing in other assets.
9 Essentially, that's when the determination would be
10 made.

11 840 Q. And all of this that you have
12 described is set out in the debenture repayment
13 agreement and the participation agreement?

14 A. Correct. Plus there have been --
15 there's an ongoing -- in effect, Callidus and Catalyst
16 will periodically make sure that we are agreeing on how
17 it applies to particular loans, so that's an ongoing
18 discussion from time to time.

19 841 Q. Sorry, are you saying that there's
20 something that wouldn't be in the participation
21 agreement?

22 A. No. You will actually see that
23 there is a provision in there for arbitration, but
24 rather than going to arbitration, there is a discussion
25 between the independent directors and Callidus --

1 Catalyst funds. Just to make sure we're -- make sure
2 we're agreeing on how the participation -- how the
3 guarantee works.

4 842 Q. Okay. Is there any outside
5 advisory board that reviews transactions between
6 Catalyst funds and Callidus?

7 A. Yes, the independent directors.

8 843 Q. Of Callidus?

9 A. Yes. Those are related part --
10 those would be related-party transactions.

11 844 Q. And do principals of Catalyst funds
12 like yourself, Mr. Dialba, and Mr. Glassman have
13 economic incentives in the Callidus share price?

14 A. We -- we have -- our interests are
15 the same as they would be for the fund itself. We have
16 a portion of our -- let me step back. And you tell me
17 if I'm telling you too much.

18 We have what's called a European
19 carrier.

20 MR. WINTON: I doubt he will do that.

21 THE WITNESS: We have what is called a
22 European carrier.

23 BY MR. MILNE-SMITH:

24 845 Q. Yes, I read about that in the
25 affidavit.

1 A. Okay, okay. So the European
2 carrier says at the end of -- once the -- once the LP's
3 have gotten back their principal plus an 8 percent
4 preferred return, we then -- there's a trueing up
5 provision, but then we share 80/20 in any amounts that
6 are realized subsequent to that -- that date of
7 8 percent return.

8 846 Q. Right.

9 A. So we will have an entitlement to
10 have some of the shares or an economic amount equal to
11 the shares in each of the funds to the extent that
12 there is -- we earn our carry.

13 847 Q. I guess what --

14 A. That's why I'm not sure what your
15 question is, but that's --

16 848 Q. Okay. Just to simplify, do the
17 funds hold any -- the funds continue to hold shares of
18 Catalyst -- of Callidus, correct?

19 A. Yes, fund 3 and fund 4.

20 849 Q. Right. Okay. So let's talk --

21 A. And, sorry, fund 2 also has some.

22 850 Q. Okay. So let's talk, then, about
23 Arthon.

24 A. Yes.

25 851 Q. That's the second misrepresentation

1 you've alleged?

2 A. Yes.

3 852 Q. So at paragraph 17 in your
4 affidavit, in your personal affidavit.

5 A. Yes. Sorry, for my benefit, could
6 I also have Mr. Griffin's affidavit?

7 853 Q. I was going to ask you to do that,
8 yes. So what you are going to want to be looking at --

9 A. Could you turn to -- there's an
10 appendix, I believe, that contains the Arthon
11 information.

12 854 Q. Yes. It's appendix C, which starts
13 at -- the Arthon information starts at page 80 of the
14 record.

15 A. May I turn to appendix B? Sorry,
16 where is appendix B?

17 855 Q. You're in it.

18 MR. WINTON: This is it.

19 THE WITNESS: This is appendix B? Okay.
20 Thank you.

21 MR. WINTON: This is the beginning of C.
22 Appendix C.

23 BY MR. MILNE-SMITH:

24 856 Q. This is the one that contains
25 detailed information about certain loans that West Face

1 found to be of concern?

2 A. Excuse me, can I go to the report
3 that -- the ...

4 MR. WINTON: Monitor's reports?

5 THE WITNESS: No, no.

6 BY MR. MILNE-SMITH:

7 857 Q. Oh, you mean this report? Tab 46
8 of Mr. Griffin?

9 A. Tab 46, as it's known on the
10 street. Can I look at that for a second, please?

11 858 Q. Yes. I think the analysis of
12 Arthon is near the back of it.

13 -- OFF THE RECORD --

14 MR. WINTON: It's page 769 of the
15 record, I believe.

16 BY MR. MILNE-SMITH:

17 859 Q. Okay.

18 A. And this I think was purporting to
19 be done on the basis of publicly available information?

20 860 Q. That's correct.

21 A. Okay.

22 861 Q. Do you see any nonpublic
23 information in that report?

24 A. Well, no. What I do see -- may I?

25 862 Q. Yes.

1 A. Do you want to ask your questions
2 or do you want me to put something on the record now?

3 863 Q. No, I want to ask you a question.
4 You have looked at that -- what page is
5 that, Counsel?

6 MR. WINTON: 769.

7 BY MR. MILNE-SMITH:

8 864 Q. 769. Do you see any nonpublic
9 information on that page?

10 A. No, but I see a failure to have a
11 complete disclosure of what was on the public record at
12 the time.

13 865 Q. Okay. Well, that's a separate
14 question. We're going to go through that now.

15 A. Okay.

16 866 Q. Can I have that back?

17 A. Yes. I don't know what I'm looking
18 at.

19 867 Q. There are two things you should
20 have in front of you.

21 A. Okay.

22 868 Q. Two things you should have in front
23 of you are your reply affidavit.

24 A. Yes.

25 869 Q. Dated May 1, 2015, at page 6,

1 starting paragraph 16.

2 A. Okay.

3 870 Q. And Mr. Griffin's exhibit
4 appendix C to his March 7 affidavit, which the
5 information on Arthon starts at page 80 of the record.

6 A. I'm in the right spot? Thank you.

7 871 Q. All right. So let's start with
8 paragraph 17 of your reply affidavit.

9 A. What page is it?

10 872 Q. Paragraph 17.

11 A. Thank you.

12 873 Q. So in that paragraph, is that fair
13 to say you state that Arthon is a construction holding
14 company that owned mining equipment, a coal mine, an
15 aggregate deposit through four subsidiaries?

16 A. That is correct.

17 874 Q. Okay. If you then look at
18 paragraph 10 of appendix C to Mr. Griffin's affidavit,
19 on page 81, you will see that paragraph contains those
20 same facts, correct?

21 A. Yes, correct.

22 875 Q. Okay. So so far, so good. No
23 inaccuracy so far with Mr. Griffin, correct?

24 A. Yes. And I believe this was taken
25 from the same source.

1 876 Q. Yes. So paragraph 18 of your reply
2 affidavit, then, says that Arthon equipment and
3 Coalmont filed for CCAA protection in order to
4 restructure the HSBC debt.

5 A. Yes.

6 877 Q. And it states that Sandhill, the
7 related company, was liable for the debts to HSBC,
8 correct?

9 A. Yes.

10 878 Q. If you then go to Mr. Griffin's
11 paragraph 12, you'll see that the same information is
12 there with the exception of the fact that Sandhill did
13 not file for CCAA?

14 A. Yes.

15 879 Q. And, in fact, if you look then at
16 Exhibit 138, which is what is cited to in that
17 paragraph. So Exhibit 138 is in Volume 4. It's the
18 second report of the monitor.

19 A. I'm sorry, where is 138?

20 MR. WINTON: There's a reference.

21 BY MR. MILNE-SMITH:

22 880 Q. It's Exhibit 138 is what is cited
23 at --

24 A. Oh, sorry, got it, got it. Okay.
25 It's a footnote.

1 881 Q. It's footnote 170.

2 MR. WINTON: Yes. Second report of the
3 monitor dated -- it doesn't actually say Exhibit 138,
4 but we agree that that's -- okay -- the information.

5 BY MR. MILNE-SMITH:

6 882 Q. Correct. Exhibit 138 is referred
7 to back on an earlier page.

8 A. Okay. Got it.

9 883 Q. And you will see, of course, that
10 on this Exhibit 138, it refers to a
11 plaintiff-compromising arrangement of Arthon
12 Industries, Arthon Contractors, Arthon Equipment,
13 Coalmont, and two other companies, so Sandhill is not
14 an applicant, correct?

15 A. That is correct.

16 884 Q. That means Sandhill did not file
17 for CCAA?

18 A. And Sandhill was the aggregates.
19 It was aggregates.

20 885 Q. Correct. And so that was apparent
21 from the information relied upon by Mr. Griffin?

22 A. Uhm-hmm.

23 886 Q. Right. So Mr. Griffin was not
24 purporting to say that Sandhill filed? He never said
25 Sandhill filed for CCAA?

1 A. Let me just -- can I look back at,
2 again, the 46 report?

3 887 Q. Yes.

4 A. I just want to make sure this is
5 consistent.

6 Yes. Here, it's -- if you go down to
7 the April, 2014.

8 888 Q. Yes?

9 A. It says "The restructuring
10 focus" -- sorry, it's page 783.

11 889 Q. 793.

12 A. Sorry, 793.

13 There's nothing in here that
14 separates -- that same distinction that Sandhill was
15 not part of the CCAA, which part of that would be that
16 it was not insolvent.

17 890 Q. Okay.

18 A. Okay?

19 891 Q. So it doesn't --

20 A. It become important later when we
21 get into --

22 892 Q. It doesn't explicitly say in the
23 report that Sandhill was not insolvent?

24 A. Well, it also doesn't say in that
25 report -- and this is important, and I'm not trying to

1 jump ahead -- that there was a successful restructuring
2 of the CCAA in I believe late December or early
3 January.

4 893 Q. We're going to come to that.

5 A. Okay. Good.

6 894 Q. Paragraph 19 of your reply
7 affidavit says that Callidus assumed the position of
8 HSBC ultimately at a substantial discount to the book
9 value of the secured debt.

10 A. Yes, yes.

11 895 Q. Mr. Griffin's paragraph 13 in
12 appendix C at page 82 refers to an assignment to the
13 HSBC loan?

14 A. Yes.

15 896 Q. Now, Mr. Griffin does not refer to
16 that assignment taking place at a discount. Did the
17 discount occur at assignment?

18 A. I think ultimately there was a
19 discount. It wasn't at the initial assignment date.
20 It was -- it was through the whole process -- the whole
21 agreement with HSBC.

22 897 Q. Right. So if you look at the
23 second report of the monitor at tab 138, which is what
24 Mr. Griffin was relying on, if you go to paragraph 7.4
25 at page 1131.

1 A. Uhm-hmm.

2 898 Q. It says:

3 "Callidus will take an assignment of
4 HSBC security for the total amount
5 outstanding."

6 Which is approximately 47 million. So
7 no reference to a discount there?

8 A. Yes. Except there's the 10 million
9 that's provided in the next period.

10 899 Q. Yes. So:

11 "HSBC has to provide a \$10 million
12 line of credit in favour of Callidus
13 which will be drawn upon if the Coalmont
14 Mine and related assets owned by
15 Coalmont are sold for anything less than
16 net less proceeds of 10 million."

17 Is that the discount you are referring
18 to?

19 A. Yes, yeah. So, in effect, it was a
20 sure \$10 million.

21 900 Q. Well, HSBC is providing a line of
22 credit, not a gift, correct?

23 A. Well, it's a letter of credit in
24 our favour.

25 901 Q. Right. But you have to pay it back

1 if you draw on it?

2 A. No. It's a -- we are the
3 beneficiary of the letter of credit.

4 902 Q. Okay. So that's what you interpret
5 this as?

6 A. Yes. Sorry, I'm not -- letters of
7 credit are funny.

8 903 Q. So that's what you interpret as the
9 discount?

10 A. Yes, yeah. We are beneficiary of
11 the letter of credit.

12 904 Q. Okay. And this information was
13 available in the exhibit to Mr. Griffin's report if
14 anybody wanted to look at it?

15 A. Well, I think he tries to paint it
16 in a different way than what I just said. In other
17 words, you'd have to go in and look at that
18 information, because he didn't synthesize it.

19 905 Q. He just says in paragraph 13 that
20 the loan was assigned to Callidus?

21 A. Yes. And he also doesn't --
22 there's also -- and it's a nuance, but this is a dip
23 financing, which is generally considered to be one of
24 the safer ways to provide -- to provide loans.

25 906 Q. Well, now that I know that you say

1 the discount is the 10 million, you will look four
2 lines down, it says:

3 "HSBC agreed" --

4 A. Sorry, four lines down in what,
5 please?

6 907 Q. In paragraph 13 of appendix C.

7 A. Yup.

8 908 Q. Mr. Griffin says:

9 "HSBC agreed to provide a \$10 million
10 line of credit in favour of Callidus" --

11 A. Yes.

12 Q. -- "to be drawn upon."

13 A. Yes.

14 909 Q. So he did synthesize that
15 information?

16 A. Okay. I apologize, then.

17 910 Q. So, again, so far, everything we
18 have seen in your paragraphs 17, 18, and 19 has all
19 been faithfully reproduced in one manner or another in
20 Mr. Griffin's affidavit?

21 MR. WINTON: Save for the exclusion of
22 Sandhill. That was not faithfully represented in
23 Mr. Griffin's affidavit.

24 MR. MILNE-SMITH: Okay. We have gone
25 over that, so no need to go over it again.

1 MR. WINTON: Right. I just want to make
2 sure that your summary isn't taken to include that.

3 BY MR. MILNE-SMITH:

4 911 Q. So then in paragraph 20, you say --
5 you describe restructuring activities, and you say that
6 Arthon Equipment sold assets to Arthon Industries.

7 A. Yes.

8 912 Q. Arthon Industries and Sandhill
9 assumed joint responsibility for the debt?

10 A. Uhm-hmm.

11 913 Q. That's correct?

12 A. Yes.

13 914 Q. And Mr. Griffin, at paragraph 12 of
14 appendix C, says that various HSBC facilities were
15 secured and cross-collateralized within the Arthon
16 Group?

17 A. Uhm-hmm.

18 915 Q. Yes?

19 A. Yes, I see it.

20 916 Q. And "secured and
21 cross-collateralized" means multiple entities had joint
22 responsibility for the debt?

23 A. Yes, I would -- I would say that,
24 yes.

25 917 Q. And then if one wanted to find out

1 the detail behind that, you see there is a footnote 169
2 that refers to the affidavit of Keri Ming Leong?

3 A. Yes. That was the original
4 affidavit sworn in connection with the CCAA.

5 918 Q. Right. And that, I can tell you,
6 is at footnote -- at tab 137 in Volume 4. So you
7 recognize that affidavit --

8 A. Yes.

9 919 Q. -- as the original application in
10 the CCAA process?

11 A. Yes. And what paragraph do you
12 want me to look at?

13 920 Q. Paragraph 25. So you will see, at
14 paragraph 25, Mr. Leong says that:

15 "The various HSBC facilities were
16 secured and, in many respects,
17 cross-collateralized within the Arthon
18 Group, Sandhill, and other entities."

19 A. Yeah. I don't know why he said
20 "many respects". So it's less -- it's not equivocal.
21 Or not unequivocal.

22 921 Q. Okay. But you can't blame
23 Mr. Griffin for not picking that up?

24 A. Okay. Well, I could, but let's
25 keep going. You cannot tell me I cannot blame someone.

1 I think I'm still free to blame people.

2 922 Q. Okay. Well, let's put it another
3 way. To the extent that Mr. Griffin is relying on the
4 Leong affidavit, he can't be expected to know that
5 Mr. Leong was not entirely correct in that?

6 A. In other words, he didn't
7 independently verify anything. He relied on the
8 reports.

9 923 Q. He relied on the public reports,
10 correct.

11 A. Okay, yup.

12 924 Q. So we were talking about
13 paragraph 20 of your affidavit, which talks about an
14 asset sale of equipment to Arthon?

15 A. Yes.

16 925 Q. So then if you go to paragraph 19
17 of Mr. Griffin's affidavit. You'll see there he refers
18 to the --

19 A. Sorry, what is -- is this --

20 926 Q. This is appendix C --

21 A. This is an appendix to an
22 affidavit, right?

23 927 Q. Appendix C to Mr. Griffin's
24 affidavit.

25 A. So -- but I'm just trying to --

1 okay.

2 928 Q. This is on paragraph 19 of page 85.

3 A. Yup, yup.

4 929 Q. So you will see there Mr. Griffin
5 refers to the sale of equipment. That's what you were
6 referring to in your paragraph 20, correct?

7 A. Yes.

8 930 Q. Okay.

9 A. No, this is separate. This is a
10 sale outside. Those weren't -- I don't think those
11 were the ones that were ultimately transferred to
12 Sandhill. These were third-party sales. If you see,
13 there was a realization of \$6 million of total net
14 proceeds on a sale of 28 pieces of equipment. The
15 company advised it would no longer focus on the
16 equipment sales.

17 MR. WINTON: I think it's a reference to
18 a different --

19 THE WITNESS: These sound to me like
20 third-party equipment sales that he's referring to.
21 The ones that are referred to in here were ultimately
22 Coalmont properties, Coalmont equipment, that was sold
23 to whatever the name of the entity is -- Equipment. I
24 think -- and I'm going by memory, but I think there was
25 a coal wash facility that was transferred up to --

1 what's the name of the subsidiary, Equipment? I think
2 Equipment.

3 BY MR. MILNE-SMITH:

4 931 Q. And that's what we -- that's what
5 you talked before about the ultimate outcome of the
6 restructuring, correct?

7 A. Yes.

8 932 Q. So this is what's being described
9 here as the net result of the CCAA process?

10 A. Yes. Which I describe, I think, in
11 paragraphs 21, 22, 23, and 24.

12 933 Q. Yes, you describe it in 20 and then
13 you characterize it in the remaining paragraphs.

14 A. Okay. Yeah.

15 934 Q. So Mr. Griffin's affidavit was
16 sworn on March 7th, 2015, correct?

17 A. Sorry. Again.

18 935 Q. Mr. Griffin's affidavit was sworn
19 on March 7, 2015?

20 A. Yes.

21 936 Q. Okay. The last monitor's report
22 for Arthon before March 7, 2015, was January 27, 2015,
23 which is tab 146, correct?

24 A. Yes.

25 937 Q. And as of that date, the CCAA

1 process had not yet wrapped up, right?

2 A. I think it did. I think it was
3 wrapped up at that point.

4 938 Q. Okay. Well, if you want to look at
5 page 1290 of the record, you'll see that it seeks an
6 extension of the stay period, which was set to expire
7 on January 30th.

8 A. Yeah. That's to Equipment and
9 Coalmont.

10 939 Q. Right. So to seek an extension of
11 the stay period to the earlier of February 18, 2015, or
12 the date on which the respective --

13 A. It's been assigned into bankruptcy.

14 940 Q. Right. So that hadn't yet
15 occurred?

16 A. I don't have that information, but
17 what that represents is the end of the stay period,
18 okay? It relates only to Equipment and Coalmont.

19 MR. WINTON: But also --

20 THE WITNESS: So this is the -- so the
21 other parts of the restructuring have been completed at
22 that time.

23 MR. WINTON: And just to be clear,
24 Counsel, February -- the earlier of February 18th or
25 the assignment of bankruptcy had occurred by the time

1 Mr. Griffin swore his affidavit, right?

2 THE WITNESS: And you'll see --

3 BY MR. MILNE-SMITH:

4 941 Q. Well, the question is whether it
5 was in the public record or not.

6 A. I think it would have been filed at
7 that time.

8 BY MR. MILNE-SMITH:

9 942 Q. Okay. Can you produce it?

10 THE WITNESS: This document?

11 MR. WINTON: It's not --

12 THE WITNESS: This is dated
13 January 27th, 2015.

14 BY MR. MILNE-SMITH:

15 943 Q. Right.

16 A. So it's got to be in the public
17 record, because it was before the Supreme Court.

18 944 Q. Look, this -- I mean, Mr. Griffin
19 referred to it, so obviously he had it.

20 A. Exactly, but, you see:

21 "Based on the foregoing, the monitor
22 respectfully recommends that this
23 Honourable Court grant the petitioner's
24 request for the following orders: An
25 order approving the sale of the Coalmont

1 assets to Sandhill; investing the
2 Coalmont assets in Sandhill and 102; an
3 order approving the sale of the
4 Equipment assets to Industries and
5 vesting the Equipment assets in
6 Industries; the bankruptcy orders; and
7 the extension order."

8 So then let me just -- to me, having
9 done insolvency work, the only reason you kept the stay
10 in place was to give you time to file the bankruptcy
11 orders and have them become effective. And that's why
12 the first part of 8.1 has two dates.

13 945 Q. So I'm giving you the twelfth
14 report of the monitor. We were just looking at the
15 eleventh. This is the twelfth report of the monitor
16 dated March 17, 2015.

17 A. Sorry, what's the date, March 17?
18 MR. MILNE-SMITH: Yes. Mark that as
19 Exhibit 6.

20 EXHIBIT NO. 6: Monitor's report dated
21 March 17, 2015

22 BY MR. MILNE-SMITH:

23 946 Q. So that obviously is after
24 Mr. Griffin's affidavit?

25 A. Yes.

1 947 Q. And I hope this is -- can be taken
2 for granted, but let me make sure. We were looking at
3 the eleventh from January 27th. This is the twelfth.
4 There would have been nothing in between, correct? You
5 can't have a monitor's report between the eleventh and
6 the twelfth?

7 A. Sorry, what's the --

8 MR. WINTON: As far as monitor's reports
9 go, yes, we will agree to that.

10 MR. MILNE-SMITH: Yes.

11 THE WITNESS: Sorry, what's the date?

12 MR. WINTON: This is March 17.

13 THE WITNESS: And this is the eleventh
14 and the twelfth -- or the twelfth and thirteenth.

15 MR. WINTON: No.

16 THE WITNESS: Sorry, eleventh and
17 twelfth.

18 MR. WINTON: Yes.

19 THE WITNESS: Okay. Got it.

20 MR. WINTON: The eleventh is in January,
21 the twelfth is in March.

22 MR. MILNE-SMITH: Exhibit 6 is the
23 twelfth.

24 MR. WINTON: Correct.

25

1 BY MR. MILNE-SMITH:

2 948 Q. There's no report 11.5?

3 A. Not to my knowledge, no. Smarty
4 pants.

5 949 Q. So if we look at, for example, on
6 paragraph 4.3 on page 5 --

7 A. Yes.

8 950 Q. -- it says that:

9 "Sandhill entered into an asset
10 purchase agreement with Coalmont which
11 was approved by this Honourable Court on
12 January 29, 2015."

13 So that approval happened after the
14 eleventh report?

15 A. Yes.

16 951 Q. And the transaction was closed on
17 February 12th, also after the eleventh report.

18 A. Okay.

19 952 Q. So if one were just looking at the
20 reports of the monitor, there would be nothing in
21 between the eleventh report and the twelfth report?

22 A. Uhm-hmm.

23 953 Q. Yes?

24 A. But they're -- hold on.

25 954 Q. If you are looking just at the

1 monitor's reports.

2 A. Okay.

3 955 Q. There's nothing between January 27
4 and March 17, correct?

5 A. Uhm-hmm.

6 956 Q. You have to say "yes".

7 A. Yes. I'm sorry.

8 957 Q. Okay. And in terms of the ultimate
9 outcome of this investment --

10 A. Yes.

11 958 Q. -- what's the interest rate that
12 Callidus is enjoying on the loan?

13 A. I don't know that. I would have to
14 go back and look. I can't remember what rate it's at
15 right now.

16 BY MR. MILNE-SMITH:

17 959 Q. Okay. Could you make an
18 undertaking to advise, please.

19 MR. WINTON: Stop.

20 THE WITNESS: This is -- again, it's not
21 public information. So -- as far as I know.

22 R/F MR. WINTON: We are not going to answer
23 that.

24 THE WITNESS: Okay.

25

1 BY MR. MILNE-SMITH:

2 960 Q. How much principal or interest has
3 been repaid to Callidus out of cash generated by
4 Arthon, in other words, not funded by further advances
5 by Callidus?

6 R/F MR. WINTON: We're not answering that.

7 BY MR. MILNE-SMITH:

8 961 Q. Okay. So Mr. Riley has taken the
9 position that this was a "very successful workout" in
10 paragraph 22.

11 A. Yes.

12 962 Q. But you are not willing to tell me
13 how much principal or interest has actually been paid?

14 A. I can say that there have been
15 paydowns on the loan subsequent to the insolvency
16 proceedings.

17 963 Q. You but you can't tell me how much?

18 A. Significant.

19 MR. MILNE-SMITH: I'd like to know how
20 much principal or interest has been repaid by Arthon
21 out of funds that were not funded by Callidus.

22 MR. WINTON: I understand the question.
23 It's refused.

24 BY MR. MILNE-SMITH:

25 964 Q. Okay. And what are the assets

1 securing the loan at present?

2 A. It is the aggregate.

3 965 Q. Okay.

4 A. And others. Equipment and some
5 other assets.

6 966 Q. Okay. Well, all equipment was put
7 up for sale, and what could be sold was sold, correct,
8 at the time?

9 A. Well, there is equipment that's
10 needed to -- there's equipment, as I recall, came from
11 Coalmont.

12 967 Q. Yes.

13 A. Excess -- it was just equipment
14 that came from Coalmont, given that they were going to
15 put it into bankruptcy, and then there was equipment
16 used for -- in the operation of the aggregate mine.

17 968 Q. Okay. So you kept the
18 information -- you kept the equipment necessary for the
19 aggregate mine?

20 A. Yeah, exactly.

21 969 Q. But the aggregate mine is not an
22 operating facility, correct?

23 A. I believe it is, currently, right
24 now. It is either -- it is -- there are contracts
25 relating to that operation. Whether they are actually

1 conveying the aggregate at this time. But there are
2 contracts in place.

3 970 Q. If you look at tab 145.

4 A. Yup.

5 971 Q. This is a document from June, 2012.
6 You'll see, at the top, it says "Brief on Projects
7 Proposed for Kitimat, June, 2012"?

8 A. Yes.

9 972 Q. And number 5 is Sandhill materials?

10 A. Yes.

11 973 Q. And it says -- this is the Sandhill
12 project that Callidus has loaned to, correct?

13 A. Yes, uhm-hmm.

14 974 Q. It says:

15 "Marine terminal and aggregate expert
16 operation construction start date is
17 contingent on finalizing
18 pre-construction and sales agreements."

19 A. Yes.

20 975 Q. And it says 25 to \$30 million of
21 investment is required?

22 A. Yes.

23 976 Q. So you are telling me that that 25
24 to \$30 million investment was made and then, in fact,
25 the construction was not just started but was

1 completed?

2 A. I actually don't know. I mean, I
3 don't know. I think the main use of the aggregate will
4 be for -- in connection with LNG facilities that are
5 being built.

6 BY MR. MILNE-SMITH:

7 977 Q. Okay. Well, if there's any
8 documentary evidence that the Sandhill facility is up,
9 running, and generating income, I'd like to see it.

10 U/A MR. WINTON: I will take that under
11 advisement.

12 BY MR. MILNE-SMITH:

13 978 Q. Okay. And let's just make sure
14 we've got a few other things here on the record, and
15 I'm happy to take you to the monitor's reports if you
16 want to, if you are not familiar with it personally.

17 You're aware that the monitor ran a
18 sales process for Coalmont?

19 A. Yes.

20 979 Q. And no one submitted an offer?

21 A. Yes, I'm aware of that.

22 980 Q. And the assets were transferred to
23 Sandhill, a related company?

24 A. I -- well, I think they were put
25 into a company -- sorry, when you say -- sorry, which

1 assets? The mine itself --

2 981 Q. The assets. Coal.

3 A. -- the mine or the assets?

4 982 Q. Yes.

5 A. Sorry, the mine itself? The coal
6 property?

7 983 Q. Correct.

8 A. The coal property, I think it was
9 taken through bankruptcy. It was put into bankruptcy.

10 984 Q. Right. And any remaining assets
11 were transferred to Sandhill?

12 A. I think that is correct. I think
13 that's what the monitor's reports says, and I don't
14 think -- I don't know anything inconsistent with that.

15 985 Q. And there was also a sales process
16 with respect to the company known as Arthon Equipment?

17 A. Can you lead it to me in the
18 monitor --

19 986 Q. Okay. So let's --

20 A. I'm not -- I get very confused when
21 there are multiple subsidiaries with similar names.

22 987 Q. I know. It is confusing. So let's
23 go to tab 146, the eleventh report, at paragraph 4.14.

24 A. Yes.

25 988 Q. So it says:

1 "On April 15, 2014, this Honourable
2 Court granted an order authorizing the
3 company to undertake a process to market
4 and sell its machinery and equipment."

5 And it says, in the next paragraph:

6 "The proceeds realized from the
7 equipment sales process total
8 approximately \$769,000."

9 A. Yes.

10 Q. "The majority of the machinery
11 and equipment assets remain unsold."

12 A. Yes.

13 989 Q. And those assets were transferred
14 to Arthon Industries?

15 A. Yes. Hmm, can I just -- can we
16 read the rest of that sentence? Could you read the
17 rest of the sentence for me.

18 990 Q. Sure.

19 "In October, 2014, the company
20 determined that it may require the
21 machinery and equipment owned by
22 Equipment for use by Sandhill to fulfill
23 large extraction agreements that it was
24 planning to enter into and, accordingly,
25 it re-focussed its efforts on other

1 restructuring matters."

2 A. And I would -- I would -- I'm not
3 going to submit, but I would say that's consistent with
4 how the restructure evolved: That that equipment was
5 transferred and that the aggregate -- the aggregate --
6 the aggregate mine is now in or will begin operation.

7 991 Q. So the assets --

8 A. I.e., the aggregate is valuable.

9 992 Q. So to sum up, the assets of both
10 Coalmont and Equipment were put up for sale and
11 garnered net cash proceeds of 769,000?

12 A. Yeah. I'd have -- that's what it
13 says in the monitor's report.

14 993 Q. Okay.

15 A. So that was the equipment that was
16 sold.

17 994 Q. Okay.

18 A. I thought there were some other
19 numbers in there.

20 MR. WINTON: And, Counsel, I just want
21 to make sure it's clear. The reference to the
22 capital C "Company" in paragraph 4.1.4 and elsewhere in
23 this monitor's report, that's a defined term that
24 refers collectively to all of the CCAA entities, as I
25 understand from the preamble of the report.

1 MR. MILNE-SMITH: That's correct.

2 MR. WINTON: And so the sale of
3 machinery and equipment, that's not limited to the
4 capital E Equipment as in the subsidiary known as "the
5 Equipment company"; it's referring to all the machinery
6 and equipment collectively owned -- as I read it,
7 collectively owned by all of the applicant companies.

8 MR. MILNE-SMITH: Well, I don't think we
9 need to debate it on the record.

10 MR. WINTON: Okay.

11 MR. MILNE-SMITH: But, I mean, it says
12 the capital C "Company" determined it may require
13 machinery and small E "equipment" owed by big E
14 "Equipment".

15 MR. WINTON: Yes, correct.

16 MR. MILNE-SMITH: Okay. So it says what
17 it says.

18 MR. WINTON: It does. Because of the
19 defined term, I want to make sure there is no confusion
20 as to what we are talking about. Any more than
21 already.

22 THE WITNESS: You guys think that
23 commercial lawyers are way smarter than they are.

24 MR. WINTON: No, we don't.

25

1 BY MR. MILNE-SMITH:

2 995 Q. And paragraph 4.11, at the top of
3 that page.

4 A. Yes.

5 996 Q. Summarizes that there -- as of the
6 date of this report on January 27, 2015, there was
7 \$53.8 million owing by Arthon to Callidus?

8 A. So this is January, 2015, and it's
9 the eleventh report?

10 997 Q. Correct.

11 A. Thank you.

12 998 Q. So that was, to the best of your
13 knowledge, accurate, the 53.8 million?

14 A. I'm sorry, you are -- 53.8 --

15 999 Q. You will see in 4.11C.

16 A. Yes, got it, got it.

17 1000 Q. And so that 53.8 million, that's,
18 in fact, more than the 47 million plus 5 million dip
19 loan. So the balance has gone up from 47 million
20 assigned from HSBC plus the five million dip loan,
21 correct?

22 A. I can't do my math quickly enough.
23 I just --

24 1001 Q. Sorry. 47 plus 5 is 52.

25 A. Can I have a pen just for a second?

1 1002 Q. Sure.

2 A. Because I want to make sure we're
3 taking the same note. And you deducted the 10 out of
4 there? The 10 from the letter of credit?

5 1003 Q. No. I'm just going directly on
6 what the monitor said.

7 A. Okay. So you are adding the -- the
8 18.9, the 34.9. Is that what you are adding?

9 1004 Q. That's what the monitor appears to
10 have added, yes.

11 A. Sorry, I want to make sure that I
12 am working this. Okay. So that comes to 53.8.

13 1005 Q. Yes.

14 A. Okay. Thank you.

15 1006 Q. And so that is more than the
16 47 million plus 5 million that was --

17 A. Yes.

18 1007 Q. -- initially loaned?

19 A. Yes.

20 1008 Q. Okay.

21 A. Although pretty close.

22 1009 Q. And so there was no further public
23 information about the amounts of the debt owing by
24 Arthon to Callidus?

25 A. The other thing, he doesn't break

1 it -- I assume this is -- I assume he is talking about
2 principal. He doesn't make it clear.

3 1010 Q. I'm not asking about principal or
4 interest. I'm just saying that, at the time that
5 Mr. Griffin swore his affidavit on March 7th, the most
6 recent public information about the amount of the debt
7 owing was 53.8 million.

8 A. I think that's fair.

9 1011 Q. Okay. And that brings us to the
10 BDC comparison. Now, you'd agree with me that
11 Mr. Griffin did not purport to say that Callidus was
12 the same as a BDC, correct?

13 A. Can you -- well, are we looking at
14 his affidavit or are we looking at the -- the tab 46
15 report?

16 1012 Q. No, we are looking at his
17 affidavit. So if you want to look at --

18 A. I think we need perhaps to look at
19 both.

20 1013 Q. Sure.

21 MR. WINTON: And I believe this is in
22 the body of the affidavit, not in one of the
23 appendices.

24 BY MR. MILNE-SMITH:

25 1014 Q. That's correct. If you look at

1 paragraph 113. That's on page 44 of the record. And
2 specifically, it's footnote 50. He says:

3 "In West Face's view, the most closely
4 comparable companies to Callidus are US
5 business development companies."

6 Which we referred to as BDCs?

7 A. Yes.

8 1015 Q. So he doesn't say they are the
9 same; he says they are the closest comparable, right?

10 A. I think that's a nuance.

11 1016 Q. And he also acknowledges in that
12 same footnote that Callidus may also be compared to
13 specialty finance companies?

14 A. Accord and Chesswood? Yes.

15 1017 Q. And in paragraph 116, he says, in
16 the middle of the paragraph:

17 "To put Callidus' lack of disclosure
18 in perspective, U.S. business
19 development companies, BDCs (arguably
20 Callidus' closest comparables)."

21 A. Yes.

22 1018 Q. So he is calling them, again, not
23 the same thing but arguably the closest comparables,
24 fair?

25 A. Those are his words.

1 1019 Q. Okay. So are you aware that the
2 Veritas report we looked at, which I believe was
3 Exhibit 4 --

4 A. Yes.

5 1020 Q. -- had also indicated that BDCs
6 might be a good comparable to Callidus?

7 A. I think that, to a certain extent,
8 I find that the Veritas report bears a startling
9 resemblance to what West Face had produced.

10 1021 Q. In other words, they agreed with
11 West Face?

12 A. No, I think they were informed by
13 West Face. I don't know whether they agreed.

14 1022 Q. Okay. Well, they published it,
15 right?

16 A. Yes, but they don't reference it.

17 1023 Q. Are you saying they published
18 something that they didn't believe?

19 A. I think there is that possibility.
20 Possibility.

21 1024 Q. Veritas' business depends on their
22 reputation for producing accurate research, correct?

23 A. It would be a factor.

24 1025 Q. Okay. So it would certainly be
25 against their interest to publish information they

1 believed to be incorrect?

2 A. Say that again. Sorry.

3 1026 Q. It would be against their interest
4 to publish something that they didn't believe to be
5 correct?

6 A. Had they done enough verification
7 to determine whether it was correct.

8 1027 Q. That's not my question. The
9 question isn't whether or not they are right, the
10 question is whether or not they believed in it. You
11 have no reason to believe that they didn't believe in
12 what they published?

13 A. Correct.

14 1028 Q. Okay. So let's then turn to the
15 differences that you point out in your reply affidavit
16 of paragraph 26.

17 A. Okay. So can I put this to one
18 side now --

19 1029 Q. Yes.

20 A. -- or are you going back to it?

21 1030 Q. You can. Thank you.

22 A. Okay. Paragraph ...

23 1031 Q. Paragraph 26, and, actually, the
24 four enumerated points you make are on page 8.

25 A. Can I just read it again?

1 1032 Q. Yes.

2 A. This is underlined, by the way.

3 1033 Q. That's fine. The whole thing is
4 underlined. No point of emphasis.

5 A. Yes.

6 1034 Q. So point number 1 is that BDCs tend
7 to have external management whereas Callidus is managed
8 internally?

9 A. Correct.

10 1035 Q. And, in your view, management
11 provided by executives of Catalyst funds through a
12 management services agreement constitutes internal
13 management for Callidus?

14 A. Let me step back for a second.
15 You're misconstruing what Callidus -- how Callidus is
16 managed. It has its own president and chief operating
17 officer.

18 1036 Q. Yes.

19 A. It also has, I think, 28 or 29
20 other people who fulfill various functions. Chief
21 financial officer, it has its own underwriters, it has
22 its own originators, it has its own collateral
23 management people, and it has field examiners.

24 The roles that I play and Newton play
25 are -- are an adjunct to that. We're on portfolio --

1 not me, but others are on portfolio companies. So the
2 reason we have a management services agreement was
3 because that's what the underwriters wanted, to make
4 sure that we were available to Callidus.

5 1037 Q. Right.

6 A. If we did not have that management
7 services agreement, this would be the same issue.
8 Newton is active as CEO, he's active as a chair of the
9 investment committee, he is on the board. What we
10 don't get is any compensation for it, whereas BDCs are
11 externally managed for a fee. They have no -- they
12 have no actual management people at all, no employees.

13 1038 Q. And the value of management depends
14 on how good they are?

15 A. I agree.

16 1039 Q. And so the reason why Mr. Glassman
17 provides value is because you say he is good at what he
18 does?

19 A. Yes.

20 1040 Q. And so that's really the most
21 important thing in terms of management is whether it is
22 good or bad?

23 A. Yes.

24 1041 Q. Okay. The second point is you say
25 Callidus does not pay dividends, it reinvests its

1 income for future growth?

2 A. Correct. It's a growth company.

3 1042 Q. Right. And you would agree that
4 Mr. Griffin recognized that distinction in his
5 affidavit at paragraph 113?

6 A. Sorry, I don't have any -- sorry, I
7 have no idea which affidavit I'm looking at anymore.

8 1043 Q. We are looking at Mr. Griffin's
9 affidavit.

10 A. I've got it.

11 1044 Q. At paragraph 113, the last sentence
12 says that:

13 "These comparable businesses" --

14 A. Uhm-hmm.

15 1045 Q. Referring to BDCs:

16 -- "generally provide investors with
17 attractive dividend yields, whereas
18 Callidus had publicly disclosed its
19 intention to not declare or pay
20 dividends in the foreseeable future."

21 A. What he doesn't go on to say is
22 that we are considered by the market to be a growth
23 story. I.e., you are investing in us for future
24 growth. Whereas BDCs are, in effect, more like a bond.
25 You are getting back your principal/interest over time.

1 There's no new assets acquired.

2 1046 Q. Okay. Different investors will be
3 attracted to different kinds of companies?

4 A. Fair.

5 1047 Q. Right?

6 A. But someone who is attracted to a
7 BDC will not be attracted to a Callidus.

8 1048 Q. Right. Someone who's attracted to
9 a BDC may not be attracted to Callidus and vice versa?

10 A. So to compare the two and say they
11 are comparable is very difficult.

12 1049 Q. Okay. But, again, Mr. Griffin
13 explicitly states that distinction?

14 A. No, he doesn't.

15 1050 Q. Between paying dividends or not?

16 A. No, but he doesn't make the
17 distinction I just made. He's saying they're
18 comparable.

19 1051 Q. That's not what I am asking,
20 though.

21 A. No, but I am saying.

22 1052 Q. Yes.

23 A. I'm saying he has said they're
24 comparable, and you have emphasized that several times.
25 I'm saying they're not comparable because of one is a

1 growth story and one is more like a bond. A BDC is
2 like a bond.

3 1053 Q. But I'm saying the difference that
4 you point out, Mr. Griffin has acknowledged?

5 MR. WINTON: No.

6 BY MR. MILNE-SMITH:

7 1054 Q. Not the way you put it, but he's
8 acknowledged the different --

9 A. No, no, I don't think he's
10 acknowledged it in a way that is accurate, that's what
11 I'm saying.

12 1055 Q. Okay. So he has acknowledged that
13 they -- that Callidus does not pay dividends --

14 A. Yes.

15 1056 Q. -- he just hasn't characterized it
16 the way you would like him to?

17 A. I don't think I would -- I don't
18 agree with what you've just said.

19 1057 Q. Okay. Mr. Griffin has acknowledged
20 that Callidus doesn't pay dividends?

21 A. That is correct.

22 1058 Q. And that's what you say in your
23 paragraph 26B, that Callidus does not pay dividends?

24 A. No, but I also say the closed-end
25 funds are required to return cash to investors, so they

1 are like a bond. There's a payout ratio of 90 percent,
2 so over time, you're going to get back your cash or
3 whatever -- subject to whatever losses there are.

4 1059 Q. Okay. And if you're not
5 distributing your dividends, the only other alternative
6 is you're reinvesting it for future growth?

7 A. Yes.

8 1060 Q. Okay. So that's implicit in what
9 Mr. Griffin says? If you are not paying dividends, you
10 are re-investing for future growth?

11 A. Okay.

12 1061 Q. Fair?

13 A. Yes.

14 1062 Q. Okay. Third point, you say that:
15 "BDCs tend to finance subordinate debt
16 in unsecured positions, including
17 equity, whereas Callidus focusses almost
18 exclusively on senior secured debt."

19 A. Correct.

20 1063 Q. Now, you'd agree with me that, in
21 some cases, Callidus has taken equity?

22 A. Only as a result of lending. In
23 other words, we might end up taking equity in a
24 realization situation.

25 1064 Q. Right. But not --

1 A. We don't invest in it, we receive
2 it as a result, whereas BDCs do invest in that.

3 1065 Q. So Callidus winds up holding equity
4 in some circumstances?

5 A. Purely limited, but, yes.

6 1066 Q. Okay. And your statement that
7 Callidus focusses almost exclusivity on senior secured
8 debt, the only way to verify that would be to see the
9 loan book?

10 A. No. I think we've made public
11 statements in our -- in our IPO and in subsequent
12 documents that that -- we focus on senior secured debt,
13 top of the balance sheet.

14 1067 Q. You have made the statement and
15 you've also made the statement here, but that's not my
16 question. My question is the only way to verify the
17 accuracy of that statement would be to see your loan
18 book?

19 A. And I think that's what
20 underwriters do as part of the underwriting process.

21 1068 Q. Okay. But the public can't do
22 that?

23 A. No.

24 1069 Q. And the fourth point is you
25 mentioned that BDCs are not taxable --

1 A. Although that's not true. They can
2 do the search that was done by West Face and find that.

3 1070 Q. That's certainly what we say
4 happened.

5 The fourth point is you say BDCs are not
6 taxable at the corporate level --

7 A. Yes.

8 1071 Q. -- they are taxed at the personal
9 level. Being taxed at the personal level means you're
10 avoiding double taxation, correct?

11 A. No. What I mean by that is if you
12 look at the return in Callidus.

13 1072 Q. Yes.

14 A. And let's say it's 20 percent, for
15 argument's sake, that's post-tax. The BDC references
16 that I think Mr. Griffin is referring to are before
17 personal tax so that you have to take out some taxation
18 to -- say I get 7 percent net of tax, and in Callidus,
19 I'm getting a 20 percent return net of tax, because we
20 pay no dividends, as he has pointed out. So I'm just
21 trying to get to a comparable return.

22 1073 Q. Okay. You'd agree that --

23 A. Both net of tax. That's what I'm
24 trying to say.

25 1074 Q. You'd agree that both the BDCs and

1 Callidus provide customized financing solutions to
2 corporations?

3 A. I have not seen that for a -- have
4 you got an example of a BDC saying that?

5 1075 Q. I'm just wondering if you are aware
6 of that from your experience in the market.

7 A. For us, we would say we do
8 bespoke-type financing. I don't know about BDCs.

9 1076 Q. Okay. You can't say if they do
10 that or not?

11 A. Don't know.

12 1077 Q. Would you agree that both BDCs and
13 Callidus lend to a variety of industries?

14 A. Yes.

15 1078 Q. You are not industry-specific?

16 A. We can be agnostic. We do not
17 lend to E&P -- resource -- resource development or
18 exploration other than to the extent you want to say
19 that an aggregate pit is a mine, which I don't think it
20 is. It's gravel.

21 1079 Q. Okay. And both BDCs and Callidus
22 rely on income generated from a loan portfolio?

23 A. Yes.

24 1080 Q. And both have portfolio monitoring
25 policies and procedures in place?

1 A. We certainly do. I can't vouch for
2 BDCs.

3 1081 Q. Okay. You just don't know one way
4 or another for BDCs?

5 A. Yes. But I don't think -- is that
6 in an affidavit somewhere?

7 1082 Q. No, these are propositions I'm
8 putting to you.

9 A. Okay. Thank you.

10 1083 Q. You say that in your reply
11 affidavit you addressed some of the more "egregious"
12 errors about Callidus. Let's look at a couple of
13 other -- you know what, before we do that, let's take a
14 break now.

15 -- RECESS AT 3:46 --

16 --- RESUMING AT 4:00 ---

17 BY MR. MILNE-SMITH:

18 1084 Q. So Mr. Riley, we have been talking
19 about some of the alleged errors you've pointed out in
20 your reply affidavit. I want to look at few other
21 examples of the research that is in Mr. Griffin's
22 affidavit. Let's start with Exchange Technology Group.
23 Are you familiar with that company?

24 A. Yes.

25 1085 Q. So Callidus has made a loan to this

1 company?

2 A. Yes.

3 1086 Q. So if you go to volume 4, tab
4 132 -- so tab 132, and if you go in to page 1064 of the
5 record, do you see Callidus is the applicant?

6 A. Yes.

7 1087 Q. And this is a report of Duff &
8 Phelps Canada --

9 A. Yes.

10 1088 Q. -- as proposed receiver?

11 A. Yes.

12 1089 Q. So Duff & Phelps are the party that
13 Callidus put up to be the receiver, correct?

14 A. Yes.

15 1090 Q. So I can take it what's in here
16 would be accurate from Callidus' perspective?

17 A. Yes. Although they are a
18 court-appointed receiver, so there is some degree of
19 independence. We might put them up, but they are still
20 a court officer.

21 1091 Q. Right, but that's not going to
22 detract from the accuracy of it?

23 A. Shouldn't.

24 1092 Q. And this is dated October 25, 2013,
25 just so you have that.

1 A. Yes.

2 1093 Q. So if you go to page 1073.

3 A. Just before we get there, can I
4 just look at something for a second?

5 1094 Q. Sure. --

6 A. Okay.

7 1095 Q. So if you go to page 1073, at the
8 very top of that page there's a numbered point 2 which
9 says that:

10 "As at October 24, 2013, the XTG Group
11 was indebted to Callidus in the amount
12 of 36.97 million including an over
13 advance for approximately 4.5 million on
14 the revolving line of credit facility."

15 A. Yes.

16 1096 Q. An over advance, can you explain
17 what that means?

18 A. An over advance is where you are
19 lending against -- the easiest way to think of it,
20 let's assume you have an asset on which you are
21 prepared to make an original loan of 50 cents on the
22 dollar, so it's a one dollar asset and you'll advance a
23 loan of 50.

24 1097 Q. Yes.

25 A. An over advance is where you are

1 prepared to advance on the value in excess of the 50
2 cents.

3 1098 Q. Right.

4 A. So you may still have collateral
5 value, but you're over advanced over what you are
6 anticipating.

7 1099 Q. And if you go to page 1072, just
8 back one page, you'll see the numbered paragraph 3
9 says --

10 MR. WINTON: Sorry?

11 THE WITNESS: Got it.

12 BY MR. MILNE-SMITH:

13 1100 Q. It says:

14 "XTG Group is presently not generating
15 sufficient cash flow to service its
16 obligations to Callidus --"

17 A. Yes.

18 Q. "-- nor does it have sufficient
19 funding to continue to operate in the
20 normal course."

21 A. Yes.

22 1101 Q. So that was correct at that time?

23 A. It would, I can't -- I can't
24 disagree with it, because it's a statement that is
25 there. I don't have any information in my mind that's

1 contrary to that.

2 1102 Q. Okay. That's all I can ask for.

3 A. Yes.

4 1103 Q. Then if you flip forward to page
5 1078.

6 A. 1078, thank you.

7 1104 Q. Yes, you will there's a heading "CG
8 Processing Results."

9 A. Yes.

10 1105 Q. I will let you know that earlier in
11 the report CG is defined as Canaccord Genuity.

12 A. Genuity, yes.

13 1106 Q. So it says the 23 parties executed
14 the CA confidentiality agreement?

15 A. Uhm-hmm, yes.

16 1107 Q. And it says in the next paragraph
17 that Canaccord Genuity received five verbal expressions
18 of interest, three terms sheets, only one of these
19 threats parties performed due diligence, and that party
20 passed on the opportunity shortly after it commenced
21 due diligence. So the upshot of that is no one was
22 willing to make an offer, correct?

23 A. Yes.

24 1108 Q. And down at paragraph 5 it's
25 explaining the only sort of fruit that emerged from the

1 CG process was a private equity firm that made an offer
2 to purchase the Callidus debt for 17 million?

3 A. Correct.

4 1109 Q. But that was -- less than half of
5 the value that's been described earlier?

6 A. Yes.

7 1110 Q. That refers to a KPMG process, and
8 over next page, KPMG process results. Do you see that?

9 A. Yes, but I'm trying to remember
10 what KPMG was doing.

11 Sorry, it was part of XTG's attempts,
12 right?

13 1111 Q. That's correct.

14 A. Both 4.1 and 4.2 were -- the events
15 described there were attempts by exchange.

16 1112 Q. Yes.

17 A. Okay. I just want to make sure
18 we --

19 1113 Q. They are trying to find an external
20 party to pay something.

21 A. Yes, exactly, but it's under their
22 watch.

23 1114 Q. Right.

24 A. Yup.

25 1115 Q. And KPMG turned up only one term

1 sheet which passed on the opportunity after performing
2 diligence?

3 A. Yes.

4 1116 Q. Then if you go to the next tab,
5 that's tab 133, we have excerpts from an affidavit of
6 Craig Boyer?

7 A. I'm sorry, where are we? Thank
8 you, yes.

9 1117 Q. I think you referred to Mr. Boyer
10 before. He is a Callidus employee?

11 A. Yes, he is.

12 1118 Q. Vice-president of Callidus?

13 A. Yes, he is, and he is one of our
14 underwriters, one of the peoples experienced in
15 insolvency matters.

16 1119 Q. Right. So if you just flip over
17 the slip sheet to paragraph 56, it says that Duff &
18 Phelps has prepared a liquidation analysis, the
19 liquidation analysis illustrates that Callidus will
20 incur a substantial shortfall on its advances to the
21 XTG debtors should the XTG debtors business and assets
22 be liquidated?

23 A. Uhm-hmm.

24 1120 Q. And then over the next page to
25 paragraph 58.

1 A. Yes.

2 1121 Q. And paragraph 58, it's fair to say,
3 says that XTG is currently lending -- sorry, Callidus
4 is lending to XTG in excess of the limits under the
5 loan agreement?

6 A. Yes.

7 1122 Q. And am I correct that Callidus
8 ultimately made a stocking horse credit bid for the
9 assets of XTG Group?

10 A. Correct. If I could just draw your
11 attention, just as part of my premise in thinking what
12 you asking me is paragraph 60.

13 1123 Q. Yes.

14 A. "-- where Callidus is prepared to
15 continue its support of the XTG
16 debtors for a limited period in order
17 to fund the implementation of a
18 restructuring to be carried out
19 through receivership and stocking
20 horse sales process --
21 --- Reporter clarification.

22 1124 Q. Let's just make sure that what I
23 think is clear to all of us in the room is also clear
24 to whoever is reading this transcript.

25 A credit bid means that you exchange

1 your debt for equity in the company?

2 A. Well, it -- what you do is you say
3 I -- I will bid my paper, let's say it's \$20.

4 1125 Q. Right.

5 A. For all of the assets of the
6 company.

7 1126 Q. Right.

8 A. Every aspect of the company.

9 1127 Q. Right.

10 A. You can think of -- it also
11 actually I think in this case probably consider also
12 the stocking horse bid. If someone wants to come along
13 and bid \$21, we are gone.

14 1128 Q. Right. So Callidus said we will
15 give up our -- the indebtedness that the company owes
16 us, and we get everything in the company?

17 A. Correct.

18 1129 Q. And if anybody wants to pay more,
19 be our guest?

20 A. Yes.

21 1130 Q. And --

22 A. But in the context of believing
23 that a restructuring would increase value returns to
24 us.

25 1131 Q. Well, at this point you didn't

1 really have any alternative, correct?

2 A. No. We could have, we could have
3 let it go into bankruptcy.

4 1132 Q. Right. And then you would have
5 lost a lot of money?

6 A. Probably.

7 1133 Q. Okay. So then if you go to the
8 next tab, paragraph 134, this is the first report of
9 Duff & Phelps on November 19, 2013, after they have
10 been appointed as receiver.

11 A. Yes.

12 1134 Q. Can you flip to page 1096 of the
13 record.

14 A. Yes.

15 1135 Q. Sorry, just to be fair in 1095,
16 just to situate you, this is describing the sale
17 process.

18 A. Uhm-hmm.

19 1136 Q. So this is the sale. We talked
20 earlier about the sale process run by XTG. This is now
21 the sale process being run by Duff and Phelps.

22 A. Yup.

23 1137 Q. So at the top of the page 1096?

24 A. Sorry, I meant yes.

25 1138 Q. Top of 1096 they refer to 88

1 perspective purchasers?

2 A. This was the teaser, right?

3 1139 Q. Yes.

4 A. Yes, yes.

5 1140 Q. And then when you go down to look
6 at the results, it says that three parties executed a
7 confidentiality agreement?

8 A. Uhm-hmm.

9 1141 Q. And no offers were submitted?

10 A. Uhm-hmm.

11 1142 Q. Yes?

12 A. Yes.

13 1143 Q. And so the stocking horse bid was
14 final, that went through?

15 A. Yes, but can I -- can I spend a
16 moment on this?

17 1144 Q. Sure.

18 A. Typically when you go into a
19 court-appointed receiver, you have to demonstrate to
20 the Court that you have tried to market the company.

21 1145 Q. Yes.

22 A. When I say company, it can be
23 shares or assets, market the company to the universe of
24 people.

25 1146 Q. Right.

1 A. And you have -- that takes an
2 extended period of time, and there has to be a
3 confidential information memorandum and all of those
4 things that go towards a sale process that would
5 normally be required by the court. In certain
6 circumstances where there has been efforts by the
7 debtor company to market itself, they will allow for a
8 truncated sale process. In this case Mr. Justice
9 Morawetz was satisfied that there had been enough
10 efforts that we would not be able to get more than our
11 credit, more than we were owed on our credit. So
12 that's -- you have to keep it in the context of, we
13 were trying to get an expedited court-appointed
14 receiver.

15 1147 Q. Right. And how much money did
16 Callidus ultimately advance to XTG?

17 A. I --

18 MR. WINTON: If it's not already in the
19 public record, we are not saying it here.

20 BY MR. MILNE-SMITH:

21 1148 Q. All I know is 36.97 million which
22 is --

23 A. That was in these materials?

24 1149 Q. Yes.

25 R/F MR. WINTON: Then we can't answer that

1 question, other than to say if it's in the public
2 materials, it is in the public materials and we can't
3 say anything else.

4 BY MR. MILNE-SMITH:

5 1150 Q. Okay. And we then go to tab 136.

6 A. Uhm-hmm.

7 1151 Q. This is a receiver's certificate.

8 A. Yes.

9 1152 Q. And this is essentially approving
10 the transaction that was described in the previous
11 receiver's report we just looked at, correct?

12 A. Correct, yes.

13 1153 Q. So this is over a year later?

14 A. Yeah. It would be -- I can't
15 remember when the order was made, but this is
16 January 2nd, 2015.

17 1154 Q. Right. So it says that the -- if
18 you look at paragraph B of the certificate on page 1104
19 of the record, it says there was an order of the court
20 dated November 22nd --

21 A. Yes.

22 1155 Q. -- 2013?

23 A. Uhm-hmm.

24 1156 Q. Approving the asset purchase
25 agreement?

1 A. Uhm-hmm.

2 1157 Q. And so the closing -- the receiver
3 doesn't certify the closing of the transaction until
4 January 2, 2015?

5 A. Yes.

6 1158 Q. Does Callidus continue to hold the
7 equity of XTG Group?

8 A. Today?

9 1159 Q. Yes.

10 A. Yes, we do.

11 1160 Q. So you haven't realized anything on
12 that investment to date?

13 A. No, we have not. And I think it
14 will be -- it's classified as an asset held for sale on
15 our books.

16 1161 Q. Can you produce financial
17 statements or anything else that might indicate that
18 the asset will return anything of value?

19 A. Not publicly available.

20 MR. WINTON: I think there are already
21 published financial statements that refer to subsequent
22 events, because this is a subsequent event --

23 THE WITNESS: Those are our financial
24 statements.

25 MR. WINTON: Right. You're asking for

1 financial statements of?

2 BY MR. MILNE-SMITH:

3 1162 Q. XTG.

4 MR. WINTON: No.

5 THE WITNESS: No.

6 BY MR. MILNE-SMITH:

7 1163 Q. Okay. If you go back to tab 132,
8 this was the original report of the proposed receiver
9 on October 25th, 2013. If you go to page 1080, at the
10 bottom, at the very bottom of page 1080 it says that
11 Callidus would provide "new or amended credit
12 facilities to the purchaser to facilitate its
13 restructuring and future growth." Do you see that?

14 A. Yes, I do see that.

15 1164 Q. So has Callidus, in fact, advanced
16 additional funds to XTG to facilitate its restructuring
17 and future growth?

18 MR. WINTON: Is that public information?

19 THE WITNESS: No.

20 R/F MR. WINTON: We can't answer that.

21 BY MR. MILNE-SMITH:

22 1165 Q. Okay.

23 A. What I can say is that we have
24 restructured exchange, as is evidenced by the
25 receiver's certificate.

1 1166 Q. Okay. And how did Callidus value
2 XTG's loan in its financial statements at the time of
3 the IPO?

4 A. I don't -- I don't know how it was
5 valued.

6 1167 Q. Do you know how it's currently
7 valued?

8 A. Well, an asset held for sale is
9 based on enterprise value.

10 1168 Q. And how do you determine the
11 enterprise value?

12 A. Enterprise value is a function of
13 the EBITDA of the enterprise and the appropriate
14 multiplier.

15 1169 Q. What multiplier do you apply?

16 A. I think that's not in the public
17 domain, but the valuation is reviewed, in our case, by
18 PWC and KPMG. When we have -- in Catalyst, I suppose
19 we've now taking the practice to Callidus. When we
20 value assets for our purposes for public reporting or
21 even reporting to LPs, we have two people evaluate it:
22 PWC who is external and provides third-party
23 verification and then it's reviewed as KPMG as part of
24 their audit process.

25 1170 Q. Do you know if XTG, the XTG asset

1 is held at a premium to its book value?

2 MR. WINTON: I don't think we can answer
3 that specifically, but I think -- I don't think that's
4 possible, is it?

5 THE WITNESS: Sure. You can -- in fact,
6 it's common. Most companies, the value of the company
7 is in excess of the book value of its assets. Can I
8 ask you why you are asking that question? I'm not
9 sure -- I don't want to say something that's wrong
10 because I don't understand your question.

11 BY MR. MILNE-SMITH:

12 1171 Q. I'm just interested in testing the
13 assertion that Mr. Griffin's research with respect to
14 XTG was inaccurate.

15 A. He had no basis to establish a
16 value one way or another for XTG.

17 1172 Q. Okay.

18 A. And didn't provide any that I
19 recall in his report. Indeed if you're asking that
20 question, if I can make the observation that the
21 attempt to value was not based -- or the attempt -- the
22 observation on the loan is not based on any valuations
23 that I can see. So, in other words, there were
24 observations about credits without any -- without
25 appointing any values. Just an observation.

1 1173 Q. Because Mr. Griffin didn't have
2 access to the nonpublic information he needed to do
3 that.

4 A. Yup, so I guess you would say --
5 you would agree with me that he didn't have a basis for
6 established values. He could ask questions, but not
7 establish values.

8 1174 Q. I don't know where Mr. Griffin
9 purported to do that.

10 A. Okay.

11 1175 Q. But we can each interpret it our
12 way own way.

13 A. Okay.

14 1176 Q. Another loan that West Face
15 identified was Sherwood Hockey. Is that a loan by
16 Callidus?

17 A. Sherwood was an asset acquired as
18 part of an original purchase of distressed assets from
19 one of the Canadian charter banks. They had financed a
20 particular entity that was, in turn, lending to
21 companies one of which was Sherwood Hockey.

22 1177 Q. Right. If we look at the Callidus
23 IPO -- sorry, the Callidus prospectus, this is tab 33
24 in Volume 2 of Mr. Griffin's materials.

25 A. Yes.

1 MR. WINTON: There's some flagging and
2 highlighting, but no comments.

3 MR. MILNE-SMITH: That's fine.

4 MR. WINTON: Okay. Which page?

5 BY MR. MILNE-SMITH:

6 1178 Q. Page 623.

7 A. And where are we?

8 1179 Q. Page 623 under, "Assets held for
9 sale."

10 A. Yes.

11 1180 Q. So this says during 2011 the
12 company received 100 percent of the common shares of a
13 borrower in exchange for a loan valued at 12.6 million.
14 "The asset held for sale is a corporation which
15 distributes athletic equipment." That's Sherwood?

16 A. Yes.

17 1181 Q. Okay. So this is another case
18 where you held equity?

19 A. Yes, but -- but be careful though.
20 We didn't pay anything for that equity. When we
21 acquired the assets from the Canadian chartered bank,
22 we were handed, in effect, a loan plus the shares of
23 that company.

24 1182 Q. Right.

25 A. That's -- so we didn't -- we

1 didn't -- we were -- it was part of our overall
2 acquisition of a portfolio in various states.

3 1183 Q. Okay. You paid money to acquire
4 that portfolio?

5 A. We -- we --

6 1184 Q. Paid valuable assets?

7 A. Yeah, we paid value to the bank in
8 question.

9 1185 Q. Right.

10 A. At -- I think we acquired
11 everything at a discount, an overall discount.

12 1186 Q. I think you said earlier that XTG
13 was held on the books as assets for sale?

14 A. Asset held for sale.

15 1187 Q. Asset held for sale. Why wouldn't
16 it show up in this note on page 623?

17 A. What date was that?

18 1188 Q. December 31, 2013.

19 A. Because it's -- these, this is year
20 ended 2013?

21 1189 Q. Yes.

22 A. So the date on which the
23 receivership was completed was, I believe, 2015.

24 1190 Q. Okay. So it's not as of the date
25 of the approval. It has to be when it closes.

1 A. Well, yes. Well, XTG at that time
2 was a functioning loan, right. In 2013? End of --
3 during this period for the period 21 -- 2012, 2013.

4 1191 Q. So you will recall, though, when we
5 look at XTG at the end of 2013, the sale processes
6 had -- run by the company had failed --

7 A. Yes.

8 1192 Q. -- with respect to CG and KPMG?

9 A. Yes.

10 1193 Q. And no buyer had been produced by
11 stocking horse bid process run by Duff and Phelps,
12 correct?

13 A. Uhm-hmm.

14 1194 Q. And the only person willing to pay
15 anything was paying 17 million, which was less than
16 half the value of the loan?

17 A. Yes.

18 1195 Q. But on your books that was still a
19 performing loan?

20 A. I -- there might be loan lost
21 provisions in here, but I can't -- I don't recall
22 whether there were any attributions of loan lost
23 provisions against that particular loan at that time.

24 1196 Q. Okay.

25 A. The other is that these statements

1 are -- these in the context of restating the
2 financials. In, during the period -- until the IPO --

3 1197 Q. Yes.

4 A. -- exchange was a loan held
5 directly -- in effect, directly by the funds.

6 1198 Q. Okay.

7 A. So these were restatements of the
8 financial statements which KPMG was satisfied as to how
9 we characterized the assets.

10 1199 Q. And Sherwood Hockey was ultimately
11 sold to a company called Gracious Living?

12 A. Yes.

13 1200 Q. For how much?

14 A. I don't recall.

15 1201 Q. Would you undertake to advise?

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

18 BY MR. MILNE-SMITH:

19 1202 Q. The principals of that company were
20 Enzo Macri and Vito Galloro?

21 A. Yes.

22 1203 Q. Did you have any prior relationship
23 with those individuals?

24 A. I did. I had acted as their
25 counsel. They were part of Royal Group Technologies

1 and I had acted for Royal Group Technologies and
2 subsequent to its evolution into Georgia Pacific. I
3 did some work for Gracious Living, but not much.

4 1204 Q. Okay. At Exhibit D to your reply
5 affidavit -- that's the May 1 affidavit -- you have
6 included correspondence between -- I believe it's
7 between myself and Mr. Winton actually.

8 MR. WINTON: This is the May affidavit?

9 MR. MILNE-SMITH: No. This is the
10 May 1, the reply.

11 MR. WINTON: The reply affidavit.

12 MR. MILNE-SMITH: D as in Donald.

13 MR. WINTON: D. Okay.

14 THE WITNESS: Can I look at this?

15 BY MR. MILNE-SMITH:

16 1205 Q. Yes. And it's between myself and
17 Mr. Winton or Mr. DiPucchio.

18 A. Okay.

19 1206 Q. Just to situate you, there's an
20 e-mail chain here.

21 This is correspondence surrounding the
22 filing of Mr. Griffin's affidavit, and it was sent
23 electronically to your counsel before it was filed.

24 A. Okay.

25 1207 Q. And your counsel took objection to

1 the contents. And you'll see --

2 A. Yes. This is over tab 46?

3 1208 Q. Page 46.

4 A. Okay.

5 1209 Q. Sorry -- well, it's not just about
6 tab 46. It's about the entire record.

7 A. Okay.

8 1210 Q. So we're at page 45 of your record.

9 A. Yes.

10 1211 Q. I guess you can go over to 44 and
11 see the date. It's a March 9 e-mail from me. You will
12 see the last paragraph of --

13 A. Sorry, I'm having trouble getting
14 this in focus. So this is March 9? You to --

15 1212 Q. Yes.

16 A. Okay.

17 MR. WINTON: Over here, it's the chain
18 so it's reading backwards.

19 BY MR. MILNE-SMITH:

20 1213 Q. Right. So it's March 9 from me to
21 Rocco, and then you have to go back to page 45 to see
22 the content. And the last paragraph says:

23 "While we see no merit to your
24 client's attempt to control the court
25 record, we will defer filing West Face's

1 responding motion record until Wednesday
2 at 10 a.m. so that you may obtain
3 instructions in respect of the
4 foregoing."

5 A. Sorry, so I'm having -- what date
6 would Wednesday be?

7 1214 Q. I will tell you.

8 A. Sorry, I just ...

9 1215 Q. I will tell you. It was March 9th,
10 that was the Monday. So offering to defer for two
11 days. I'm just giving you all the context here before
12 I asked the ultimate question, okay.

13 A. Is it okay to look through all the
14 e-mails?

15 1216 Q. Sure. I'm going to walk you
16 through it.

17 A. Why don't you do that. I won't
18 take the time.

19 1217 Q. So then Mr. Winton's reply comes on
20 March the 12th, so that's on page 44 now.

21 A. That's -- how many days later?

22 1218 Q. Three days later.

23 A. Oh, there -- sorry, okay. Yes.

24 1219 Q. So you'll see Mr. Winton does not
25 accept the -- Catalyst does not accept the offer that I

1 had set out. It says that:

2 "Catalyst's position is that the
3 Griffin affidavit contains material
4 misstatements of fact about Callidus.
5 If West Face proceeds to file the
6 Griffin affidavit in the public record,
7 Catalyst will be sending a copy of the
8 affidavit to the OSC to deal with that
9 matter."

10 A. Hmm.

11 1220 Q. Did Catalyst, in fact, do that?

12 A. We had discussions with the OSC,
13 but the ultimate result, as you know, in enforcement
14 they don't tell you what's happening.

15 1221 Q. Okay. So you are not aware of them
16 doing anything in response?

17 A. No.

18 1222 Q. And the next paragraph:

19 "Catalyst was not willing to advise
20 West Face of what the alleged
21 misstatements were."

22 A. Yes.

23 1223 Q. And then the last paragraph says
24 that if West Face agreed to keep the Griffin affidavit
25 out of the public record by agreeing to a sealing

1 order, Catalyst will agree to seal its reply to that
2 affidavit.

3 A. Correct.

4 1224 Q. And then if you go to the next
5 e-mail in the chain on paragraph 43 --

6 A. Okay.

7 1225 Q. -- Mr. Winton -- on page 43, sorry,
8 Mr. Winton clarifies:

9 "The suggestion that West Face can
10 file the Griffin affidavit under seal
11 and Catalyst will file its reply under
12 seal is a suggestion, not a firm offer.
13 To the extent the e-mail below suggests
14 otherwise, I misstated Catalyst's
15 position."

16 A. Okay.

17 1226 Q. So is it fair to say that
18 Catalyst's position was that West Face should file
19 under seal but Catalyst would not undertake to do the
20 same?

21 A. I think -- well, you tell me. I
22 don't remember the context of this.

23 MR. WINTON: That's not what is being
24 suggested here. It's being suggesting if the parties
25 can agree the parties can agree, but Catalyst wasn't

1 willing to bind itself yet until it understood what
2 West Face, if West Face was interested in that
3 suggestion. At that point we would seek instructions.

4 BY MR. MILNE-SMITH:

5 1227 Q. Right. Is it fair to say Catalyst
6 took no steps so seal the record?

7 MR. WINTON: Yes.

8 BY MR. MILNE-SMITH:

9 1228 Q. If we go to paragraph 12 of the
10 reply affidavit.

11 A. I think it's fair to say from my
12 point of view the cat was out of the bag.

13 MR. WINTON: Paragraph 12?

14 MR. MILNE-SMITH: Paragraph 12.

15 MR. WINTON: Of the affidavit?

16 MR. MILNE-SMITH: Of the affidavit.

17 That's on page 4.

18 MR. WINTON: Yes.

19 BY MR. MILNE-SMITH:

20 1229 Q. The last sentence there says:

21 "Griffin also implicitly admits
22 without giving details that West Face
23 circulated to third parties its research
24 with respect to Catalyst."

25 Where do you say Mr. Griffin made that

1 admission?

2 A. May I go back? Can I also see
3 his -- his testimony? If you can give me his
4 testimony.

5 1230 Q. Just to clear, Mr. Riley, you said
6 this before you had his testimony, so you couldn't --

7 A. I agree with that.

8 1231 Q. Okay. So you are not referring to
9 anything in his testimony when you swore your reply
10 affidavit?

11 A. I agree with that.

12 MR. WINTON: If I may?

13 MR. MILNE-SMITH: Yes.

14 MR. WINTON: I think it's implicit in
15 paragraph 120 that the preparation of the PowerPoint
16 document which is the Callidus' analysis --

17 MR. MILNE-SMITH: Yes.

18 MR. WINTON: -- is the report that has
19 the appearance and trappings of being presented for
20 public consumption and not for internal use.

21 THE WITNESS: That was, I think, my --
22 one doesn't prepare a deck of that number of pages for
23 an internal review and also, in effect, making a case
24 for the public as opposed to case for internal position
25 given that they had already put on their short -- I

1 don't know -- I don't know when they started -- I don't
2 know they completed their research, but they certainly
3 said they put their short on before they did the
4 research.

5 BY MR. MILNE-SMITH:

6 1232 Q. They don't say that, sir, but we
7 will leave that for the judge to determine.

8 A. Okay.

9 1233 Q. I take it, sir, you'd agree with me
10 that once you have opened a short position you need to
11 continue tracking the stock so you can decide when to
12 consolidate it?

13 A. I agree.

14 1234 Q. So it would certainly make sense
15 for West Face, after it had opened its short position,
16 to continue following and updating its research on
17 Callidus?

18 A. I agree with that.

19 1235 Q. You never worked at West Face
20 obviously?

21 A. No.

22 1236 Q. You have no idea how they present
23 things externally?

24 A. Sorry, sorry. No, I have not.

25 It's only -- sorry, it's only I understand why you are

1 asking the question.

2 1237 Q. So you have no idea how they might
3 present things internally?

4 A. No, I do not.

5 1238 Q. And you aren't able to point to
6 anyone they disclose some version of that report to
7 outside of West Face?

8 A. I would like confirmation that they
9 did not share it, share the substance and issues of it
10 with Veritas.

11 1239 Q. That's been the subject of
12 examination of Mr. Griffin. But I'm asking about what
13 you are aware. So you are not aware of them giving it
14 to anybody?

15 A. No. Well I am aware of several
16 people who were -- referenced that they were, that
17 there was discussions with West Face as to certain
18 aspects of the report. Whether the report was finished
19 or not, I don't know.

20 1240 Q. Who was that?

21 A. Certain of our investors.

22 1241 Q. Who?

23 A. Do I have to --

24 U/A MR. WINTON: We can -- we will take it
25 under advisement. Probably refuse it, but ...

1 BY MR. MILNE-SMITH:

2 1242 Q. Okay. Just to be clear, the
3 paragraph that you say is where he implicitly admits to
4 circulating it to third parties is paragraph 120?

5 A. I believe that is correct. Can I
6 go back and refresh?

7 1243 Q. Yes.

8 Mr. Riley, Catalyst has taken the
9 position in this litigation that West Face --

10 A. Sorry, can I go back to it again
11 for a second?

12 1244 Q. Sure.

13 A. Okay. Thank you.

14 1245 Q. So Catalyst has taken the position
15 in this litigation that West Face is a competitor of
16 Catalyst, right?

17 A. Yes.

18 1246 Q. So they -- one of the things they
19 compete for is investments?

20 A. Yes.

21 1247 Q. And is it also fair to say that
22 your position is they compete for investors, people who
23 are willing to give you money?

24 A. I don't know who their investors
25 are. I know who our investors are, but I can't -- I

1 can't say. Because we have a certain type of
2 investors; they may have different type.

3 1248 Q. Okay. You can't say one way or
4 another?

5 A. No.

6 1249 Q. To the extent that West Face's
7 investment in Wind were to be impeded or harmed, that
8 would lower West Face's value and perception in the
9 market, fair to say?

10 A. I'm sorry. What do you mean by
11 impeded or harmed?

12 1250 Q. The value of it were diminished.

13 A. In what way?

14 1251 Q. Well, for example, by --

15 A. Of Wind?

16 1252 Q. For example, by the relief sought
17 in this motion being granted?

18 A. It depends whether or not the
19 relief is -- if the relief is granted --

20 1253 Q. Yes?

21 A. -- then it's not their value.

22 Right? In other words, if we are successful in getting
23 result in trust, it's not diminished. It's not their
24 investment.

25 1254 Q. Let's distinguish between the

1 motion and the action. So in the action you are
2 seeking constructive trust.

3 A. Got you.

4 1255 Q. In the motion you are seeking
5 injunctive relief to prevent them from exercising any
6 control over the asset?

7 A. Yes.

8 1256 Q. Or any influence over the asset?

9 A. Yes.

10 1257 Q. So that would --

11 A. Yes.

12 1258 Q. -- harm West Face if that were to
13 happen?

14 A. I don't know if that's true.

15 1259 Q. Okay. Fair to say that if an order
16 was made enjoining West Face from playing any role in
17 Wind, that would have a negative impact on West Face's
18 standing in the market?

19 A. It may. I don't know how I can
20 assess that because it depends ultimately on the
21 outcome of the action.

22 1260 Q. And to the extent that West Face,
23 an alleged competitive of Catalyst, were to be harmed,
24 that would also help Catalyst, correct?

25 A. Again, I can't say.

1 1261 Q. As an investment manager, Catalyst
2 has an incentive to maximize returns on investments in
3 its funds, obviously?

4 A. Yes, that's fair enough.

5 1262 Q. And you have no reason to dispute
6 that West Face would have the same incentives?

7 A. Yes.

8 1263 Q. So West Face would obviously have
9 an incentive to maximize the value of its investment in
10 Wind?

11 A. Yes.

12 1264 Q. Let's take a break there. I want
13 to check a couple of things and then we will close up.

14 -- RECESS AT 4:35 --

15 -- RESUME AT 4:39 --

16 BY MR. MILNE-SMITH:

17 1265 Q. Mr. Riley, I thank you for your
18 patience. Just one last point. Earlier in your
19 cross-examination I referred to earnings not meeting
20 expectations from the May 31st?

21 A. Yes.

22 1266 Q. And I just wanted to give you an
23 example of that.

24 A. March 31, sorry.

25 1267 Q. March 31, yes, I'm sorry.

1 A. That's okay.

2 1268 Q. That is an analyst report from M.
3 Partners. You recognize them as one of the companies
4 that -- one of the analysts that follows Callidus?

5 A. Uhm-hmm.

6 1269 Q. So this is dated April 2, 2015. Do
7 you follow analyst reports for Callidus?

8 A. I look at them. I don't follow
9 them religiously. I kind of look at them from time to
10 time.

11 1270 Q. Okay, but you presumably --

12 A. We do. Catalyst, or Callidus and
13 Catalyst are well aware of the analyst reports.

14 1271 Q. So you can recognize this as one of
15 the reports following the release of the Q4?

16 A. Yes, I'm trying to remember. M
17 Partners chose to follow us. I don't think we had
18 any -- they were not part of the original underwriting
19 group.

20 1272 Q. Right. So you will see that it
21 says, just at the very top of the text, it says:

22 "As a result of reduced gross yield
23 expectations higher provisions to
24 reflect risk in the book and a lower
25 target multiple, our target price moves

1 to \$24 from \$34."

2 A. Yes.

3 1273 Q. So what that means to a layperson
4 is that their projection for the future share price of
5 Callidus dropped from 34 to 22?

6 A. On their methodology, and I'm not
7 here to debate. Every -- I think the other analysts
8 are looking -- I think the consensus is 25. Did you
9 look at that? Are you looking at just -- this is an
10 isolated report.

11 1274 Q. There are many different numbers
12 and I think that goes to the point we discussed earlier
13 about how analysts can look at the same facts and come
14 to different projection.

15 A. Although again, I don't recall. I
16 know -- I don't recall the details of this report. Can
17 I look at it for a second to try to help you with the
18 question you are asking me?

19 1275 Q. Sure. In the interim I will mark
20 this as Exhibit 7, the morning note from M Partners
21 dated April 2, 2015.

22 EXHIBIT NO. 7: Morning note from M
23 Partners dated April 2, 2015

24 THE WITNESS: Yes, without going through
25 this in detail right now, if you go through it --

1 there's some, if you look at the estimates that they
2 had for net income and our actual --

3 BY MR. MILNE-SMITH:

4 1276 Q. Where are you looking?

5 A. Just looking in the table, the Q4,
6 14 results.

7 1277 Q. Yes.

8 A. Trying to remember whether they
9 were looking at Q14 [sic] or full year.

10 1278 Q. Looks like Q4.

11 A. It's Q4? I'm not sure. Oh, there
12 we are. Review, okay. This is Q4. If you look at
13 their estimate for total revenue and actual --

14 1279 Q. Yes.

15 A. -- net income, ours was actually
16 higher, earnings per share was higher, gross loans
17 receivable was -- give a push, right. Average
18 outstandings we were higher than they were.

19 1280 Q. Sorry, total revenue was lower.
20 Actual is 33.5, consensus was 34.39.

21 A. Yes, and you'll see that -- sorry,
22 you're quite right. You will see there's a slight
23 compression of gross yield as they go on to talk about.

24 1281 Q. Yes.

25 A. What people are starting to talk

1 about is we have a mixture of Callidus light and
2 Callidus. We have two types, two general products.
3 And in that particular quarter there was more Callidus
4 light. And as we pointed out to the market, that
5 number will go up and down, the gross yield, because it
6 depends on what -- how much of the light product
7 compared to the regular product.

8 So that's what I think, that's what --
9 they are saying that will perpetuate forever. We don't
10 believe in that. They are saying until we see -- I
11 think what they are saying is until we see proof over
12 time, they are just saying what's your return, not any
13 other issue than that. So I can't remember why we
14 started this analysis.

15 1282 Q. And to be fair, the gross yield
16 compression is something that Mr. Griffin had -- or
17 that West Face had predicted in the, what you call the
18 exhibit 46 report.

19 A. But that wasn't -- he did no
20 analysis as to how much was Callidus light and how much
21 regular Callidus.

22 1283 Q. Yes, but just to get the basic
23 facts on the record, West Face had predicted that
24 Callidus light loans would take up, in the future, a
25 bigger proportion and that Callidus loans would take up

1 a smaller portion resulting in overall reduction of
2 gross yields?

3 A. He had no basis to make that
4 conclusion. That just happens to be in this quarter we
5 did more Callidus light.

6 1284 Q. Again, that's not my question.
7 It's not whether he had a basis to say it. It's that
8 that's what he predicted.

9 A. Can you show me his prediction?
10 That doesn't necessarily reduce our
11 returns, because with Callidus light you can use more
12 leverage in the book.

13 1285 Q. Again, not my question.

14 A. I'm just -- you started down this
15 line of questioning, so I just want to make sure we
16 have facts on the record.

17 1286 Q. Look at page 784 of the record. So
18 it says:

19 "Analysts currently expect Callidus
20 will have a gross yield of approximately
21 19.4 percent in 2016."

22 It says:

23 "Analysts underestimate the diluted
24 impact that competition in Callidus
25 light will have on gross yields."

1 So whether, whether you think he was
2 justified in doing so or not, he was predicting that
3 gross yields would come down?

4 A. Could you please read the next
5 point?

6 Q. "For reasons already elucidated,
7 the traditional Callidus loan book is
8 very difficult to monitor and scale.
9 Therefore, Callidus light will likely
10 outpace growth in the traditional
11 Callidus loan book and become a
12 larger portion of the loan book."

13 A. And could you tell me how he gets
14 to those elucidations?

15 1287 Q. That's not the purpose of this
16 cross-examination, sir. I'm just trying to make a
17 simple factual point. Let's just be clear on this.
18 The Court isn't being asked to determine whether West
19 Face was correct or not in its analysis of Callidus.
20 All the Court is being -- all we're looking at here is
21 a simple question of whether or not the gross yield
22 compression referred to in Exhibit 7 is the same
23 phenomenon that's being referred to in page 784,
24 regardless of whether you think it's hogwash or not.

25 A. I don't think it is. I think that

1 he is saying that over time it will be for sure that it
2 is going to compress. This is taking a one quarter
3 compression and implying that, he has implied that that
4 kind of compression will last forever. This is just
5 one notation of a compression.

6 1288 Q. Well, the M Partner says "gross
7 yield as a result of Callidus light will -- well in
8 excess of expectations and we expect it to continue."

9 A. To be compressed?

10 1289 Q. Yes. That's what it says.

11 A. Okay. But this is the only report
12 you are going to put in?

13 1290 Q. Yes.

14 A. Okay.

15 1291 Q. And this report agrees with the
16 predictions made by West Face on gross yield
17 compressions.

18 A. Dated April 2.

19 1292 Q. Yes. At least one analyst agreed,
20 right?

21 A. Subsequent to, not before.

22 1293 Q. After seeing the results.

23 A. In that one quarter.

24 1294 Q. Yes.

25 A. Okay.

1 1295 Q. Subject to the undertakings and
2 questions taken under advisement, those are my
3 questions. Thank you.

4 MR. WINTON: I do have a brief re-exam.

5 RE-EXAMINATION BY MR. WINTON:

6 1296 Q. Mr. Riley, you recall that earlier
7 today Mr. Milne-Smith asked you some questions
8 regarding Catalyst's communication with Industry
9 Canada?

10 A. Yes.

11 1297 Q. And one of those questions
12 concerned the discussions regarding concessions that
13 Catalyst would be seeking from Industry Canada?

14 A. Yes.

15 1298 Q. You recall that in particular he
16 posited to you that any discussions with Industry
17 Canada that took place on May 24th or thereafter would
18 not be within the knowledge of Mr. Moyses.

19 A. That's correct.

20 1299 Q. You agreed with that?

21 A. I did.

22 1300 Q. My question for you is, when did
23 the discussions with Industry Canada regarding
24 concessions Catalyst may be seeking first take place?

25 A. Prior to that date. On several

1 occasions prior to that date.

2 1301 Q. You recall that this afternoon
3 Mr. Milne-Smith asked you questions regarding Arthon?

4 A. Yes.

5 1302 Q. In particular he brought you to at
6 least one, I think two, maybe three of the monitor's
7 report that were filed in that proceeding?

8 A. Yes, he did.

9 1303 Q. And you recall that he brought you
10 to the monitor's report that was filed in late January
11 of 2015?

12 A. Sorry what was the date again?

13 1304 Q. Late January 2015.

14 A. Yes, I recall that one.

15 1305 Q. The 11 --

16 MR. MILNE-SMITH: The 11th report.

17 BY MR. WINTON:

18 1306 Q. And the 12th report which is an
19 exhibit to this examination --

20 A. Yes, yes.

21 1307 Q. -- which is Exhibit 6 is dated
22 March 17th, 2015?

23 A. Correct.

24 1308 Q. This is just to situate where we
25 are going here. To your knowledge what other documents

1 are publicly posted on a monitor's website in relation
2 to a CCAA proceeding?

3 A. I believe the bankruptcy filings
4 would have been posted as part of the court record. In
5 fact, and I can't speak for Alvarez' filing, but you
6 have all of the pleadings made, you have the reports,
7 and you have any of the orders made that relate to it,
8 so one of those would be the bankruptcy order for
9 Coalmont.

10 1309 Q. Now you recall in relation to the
11 discussions concerning BDCs, Mr. Milne-Smith asked you
12 certain questions about Catalyst's loan behaviour and
13 I'm going to review them in summary for you. One, he
14 made mention of the fact that Catalyst loans to a
15 variety of industries, and you agreed with that
16 statement?

17 A. Yes.

18 1310 Q. Two, he suggested that Callidus
19 relies on the income from its loan portfolio?

20 A. Yes.

21 1311 Q. Third was that Callidus has
22 portfolio monitoring policies and procedures in place?

23 A. Yes.

24 1312 Q. Aside from BDCs, are you aware of
25 any other lending institutions that would share those

1 characteristics?

2 A. Banks.

3 MR. WINTON: No further questions.

4 MR. MILNE-SMITH: Okay.

5 -- Whereupon the cross-examination concluded at

6 4:52 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 19th day of May, 2015.

Terry Wood

NEESONS

PER: TERRY WOOD, RPR, CSR

CERTIFIED COURT REPORTER

<hr/> \$ <hr/>	100 26:24 181:7,18 182:18 252:12	1032 225:1	1065 231:3
\$1 181:23	1000 219:17	1033 225:3	1066 231:6
\$10 172:5,6 181:12,17 183:13 197:11,20 199:9	1001 219:24	1034 225:6	1067 231:14
\$100 185:10	1002 220:1	1035 225:10	1068 231:21
\$11 181:20	1003 220:5	1036 225:18	1069 231:24
\$14 154:4	1004 220:9	1037 226:5	107 28:10
\$16 151:18	1005 220:13	1038 226:13	1070 232:3
\$20 151:10,15 242:3	1006 220:15	1039 226:16	1071 232:8
\$21 242:13	1007 220:18	104 27:25	1072 232:13 237:7
\$24 270:1	1008 220:20	1040 226:20	1073 232:22 236:2,7
\$30 213:20,24	1009 220:22	1041 226:24	1074 232:25
\$300 80:19,25	101 27:15	1042 227:3	1075 233:5
\$34 270:1	1010 221:3	1043 227:8	1076 233:9
\$50 185:10,12	1011 221:9	1044 227:11	1077 233:12
\$53.8 219:7	1012 221:16	1045 227:15	1078 233:15 238:5,6
\$6 203:13	1013 221:20	1046 228:2	1079 233:21
\$769,000 216:8	1014 221:25	1047 228:5	108 28:12
\$9 181:22	1015 222:8	1048 228:8	1080 233:24 248:9,10
<hr/> (<hr/>	1016 222:11	1049 228:12	1081 234:3
(a) 56:19	1017 222:15	105 28:2	1082 234:7
(b) 56:19 113:3	1018 222:22	1050 228:15	1083 234:10
(c) 56:19	1019 223:1	1051 228:19	1084 234:18
<hr/> - <hr/>	102 27:17 207:2	1052 228:22	1085 234:25
--sorry 124:6	1020 223:5	1053 229:3	1086 235:3
<hr/> 1 <hr/>	1021 223:10	1054 229:7	1087 235:7
1 6:3 18:6 80:5 90:16 95:19 101:24 122:6 137:20 147:3 151:5 155:2 162:13 163:12 164:12 191:25 225:6 256:5,10	1022 223:14	1055 229:12	1088 235:10
10 7:17 20:14 192:18 197:8,16 199:1 220:3,4 258:2	1023 223:17	1056 229:15	1089 235:12
	1024 223:21	1057 229:19	109 28:15 37:20
	1025 223:24	1058 229:22	1090 235:15
	1026 224:3	1059 230:4	1091 235:21
	1027 224:8	106 28:5	1092 235:24
	1028 224:14	1060 230:8	1093 236:2
	1029 224:19	1061 230:12	1094 236:5
	103 27:23	1062 230:14	1095 236:7 243:15
	1030 224:21	1063 230:20	1096 236:16 243:12,23, 25
	1031 224:23	1064 230:25 235:4	1097 236:24

1098 237:3	1127 242:9	116 30:4 222:15	1192 254:8
1099 237:7	1128 242:14	1160 247:11	1193 254:10
10:05 6:1	1129 242:18	1161 247:16	1194 254:14
10:58 46:23	113 29:11 222:1 227:5, 11	1162 248:3	1195 254:18
11 7:22 76:8,12 277:15	1130 242:21	1163 248:7	1196 254:24
11.5 209:2	1131 196:25 242:25	1164 248:15	1197 255:3
110 28:19 168:18 169:2	1132 243:4	1165 248:22	1198 255:6
1100 237:13	1133 243:7	1166 249:1	1199 255:10
1101 237:22	1134 243:12	1167 249:6	11:30 70:8
1102 238:2	1135 243:15	1168 249:10	11:41 70:9
1103 238:4	1136 243:19	1169 249:15	11th 277:16
1104 238:7 246:18	1137 243:23	117 30:10	12 8:1 114:1 165:8,24 193:11 200:13 261:9, 13,14
1105 238:10	1138 243:25	1170 249:25	12.6 252:13
1106 238:13	1139 244:3	1171 250:12	120 30:18 262:15 265:4
1107 238:16	114 29:16	1172 250:17	1200 255:13
1108 238:24	1140 244:5	1173 251:1	1201 255:15
1109 239:4	1141 244:9	1174 251:8	1202 255:19
111 28:23	1142 244:11	1175 251:11	1203 255:22
1110 239:7	1143 244:13	1176 251:14	1204 256:4
1111 239:13	1144 244:17	1177 251:22	1205 256:16
1112 239:16	1145 244:21	1178 252:6	1206 256:19
1113 239:19	1146 244:25	1179 252:8	1207 256:25
1114 239:23	1147 245:15	118 30:12	1208 257:3
1115 239:25	1148 245:21	1180 252:11	1209 257:5
1116 240:4	1149 245:24	1181 252:17	121 30:21
1117 240:9	115 29:24	1182 252:24	1210 257:8
1118 240:12	1150 246:5	1183 253:3	1211 257:10
1119 240:16	1151 246:7	1184 253:6	1212 257:15
112 29:5	1152 246:9	1185 253:9	1213 257:20
1120 240:24	1153 246:13	1186 253:12	1214 258:7
1121 241:2	1154 246:17	1187 253:15	1215 258:9
1122 241:7	1155 246:22	1188 253:18	1216 258:15
1123 241:13	1156 246:24	1189 253:21	1217 258:19
1124 241:22	1157 247:2	119 30:15	1218 258:22
1125 242:4	1158 247:6	1190 253:24	1219 258:24
1126 242:7	1159 247:9	1191 254:4	

122 30:23	1252 266:16	1285 273:13	133 33:14 240:5
1220 259:11	1253 266:20	1286 273:17	134 33:18 243:8
1221 259:15	1254 266:25	1287 274:15	135 33:25
1222 259:18	1255 267:4	1288 275:6	136 34:4 246:5
1223 259:23	1256 267:8	1289 275:10	137 34:7 201:6
1224 260:4	1257 267:10	129 11:8 32:20 35:11	138 34:10 193:16,17, 19,22 194:3,6,10 196:23
1225 260:7	1258 267:12	1290 205:5 275:13	139 35:6
1226 260:17	1259 267:15	1291 275:15	13th 140:10
1227 261:5	126 31:23	1292 275:19	14 7:7 8:15 38:5,7 45:8 152:20 155:16 156:11 168:12 173:10 271:6
1228 261:9	1260 267:22	1293 275:22	140 35:16
1229 261:20	1261 268:1	1294 275:24	141 35:22
123 31:3	1262 268:5	1295 276:1	142 36:1
1230 262:5	1263 268:8	1296 276:6	143 36:6
1231 262:8	1264 268:12	1297 276:11	144 36:11
1232 263:6	1265 268:17	1298 276:15	145 36:21 213:3
1233 263:9	1266 268:22	1299 276:20	146 37:2 204:23 215:23
1234 263:14	1267 268:25	12:54 132:3	147 37:8
1235 263:19	1268 269:2	12th 209:17 258:20 277:18	148 37:18
1236 263:22	1269 269:6	13 8:5 94:8 95:21 196:11 198:19 199:6	149 38:2
1237 264:2	127 32:8	130 32:25	14th 37:19
1238 264:5	1270 269:11	1300 276:22	15 8:20 168:13 216:1
1239 264:11	1271 269:14	1301 277:2	15,000 31:20
124 31:5	1272 269:20	1302 277:5	150 38:7
1240 264:20	1273 270:3	1303 277:9	151 38:12
1241 264:22	1274 270:11	1304 277:13	152 38:17
1242 265:2	1275 270:19	1305 277:15	153 38:23
1243 265:7	1276 271:4	1306 277:18	154 39:4
1244 265:12	1277 271:7	1307 277:21	155 39:8
1245 265:14	1278 271:10	1308 277:24	156 39:13
1246 265:18	1279 271:14	1309 278:10	157 39:17
1247 265:21	128 32:12	131 33:2	158 39:22
1248 266:3	1280 271:19	1310 278:18	159 40:7
1249 266:6	1281 271:24	1311 278:21	15th 139:20
125 31:18	1282 272:15	1312 278:24	16 8:22 10:1 13:24 16:25 99:11 118:5
1250 266:12	1283 272:22	132 33:8 235:4 248:7	
1251 266:14	1284 273:6		

130:19 154:23 160:22 161:18,22,24 162:5 163:19,21 164:22 192:1	183 47:22	2008 119:21	21 9:20 17:17 20:21 204:11 254:3
160 40:11	184 48:2	2009 92:15,23,25 93:2, 3	210 52:19
161 40:15	185 48:5	201 50:21	211 52:23
162 40:21	186 48:8	2011 50:25 133:1,4 252:11	212 53:4
163 41:1	187 48:11	2012 213:5,7 254:3	213 53:7
164 41:6	188 48:14	2013 93:7,16 94:22 95:6 235:24 236:10 243:9 246:22 248:9 253:18,20 254:2,3,5	214 53:10
165 41:9 105:7,8,12 108:4 110:2	189 48:17	2014 7:1,7,15 10:1,10, 11 13:24 17:17 20:21 42:21 55:3 56:11 58:9 60:20 62:10 76:3 77:12 79:21 80:12 81:2,10 93:7 98:23 99:7 104:15 118:5 119:19 121:22,23 123:24 130:6 136:3 139:1 144:14 145:11 146:7 151:10 153:18, 21,25 154:1,8 155:16 169:4 176:9 180:15 195:7 216:1,19	215 53:15
166 41:12	18th 205:24	2015 6:19,20 7:18,20 8:10,17 28:12 61:2 90:16 94:8 95:21 96:1, 8,22 119:20,21,23,25 120:13 137:20 138:23 139:22 140:21 143:21 160:22 161:18,22 162:5 163:21 164:22 165:8,24 191:25 204:16,19,22 205:11 206:13 207:16, 21 209:12 219:6,8 246:16 247:4 253:23 269:6 270:21,23 277:11,13,22	216 53:20
167 41:16	19 9:10 56:17 196:6 199:18 202:16 203:2 243:9	2016 273:21	217 54:2
168 41:19	19.4 273:21	202 50:24	218 54:5
169 42:5 115:6 201:1	190 48:21	203 51:2	219 54:13
16th 12:5,15 108:7 130:15	191 48:23	204 51:7	21st 18:22
17 9:2 189:3 192:8,10 199:18 207:16,17,21 208:12 210:4 239:2 254:15	192 49:1	205 51:19	22 10:3 204:11 211:10 270:5
170 42:13 194:1	193 49:6	206 51:23	220 54:17
171 43:20	194 49:9	207 52:4	221 54:22
172 43:25	195 49:12	208 52:9	222 55:1
173 44:24	196 49:20	209 52:14 114:5	223 55:5
174 45:3	197 49:24		224 55:9
175 45:6	198 50:2		225 55:11
176 45:14	199 50:9		226 55:14
177 45:19 115:1	1A 104:6,11 105:13 107:4,18,21 110:19 111:3 112:15 114:9		227 55:17
178 46:2	1E 57:11 110:21		228 55:22
179 46:25	1st 7:18,20		229 56:1
17th 277:22	2		22nd 246:20
18 6:18,19 8:10,16 9:8 20:2 61:2 96:1 99:15 101:3 120:13 121:22 123:3 137:15 143:3,21, 25 144:10 145:22 193:1 199:18 205:11	2 6:5 7:10 10:10 64:12, 14,16 94:24 96:18,19 134:4,5 188:21 236:8 247:4 251:24 269:6 270:21,23 275:18		23 10:14 111:18 112:1 117:2 126:21 154:19 204:11 238:13
18.9 220:8	20 9:15 96:8,22 154:18 155:9 156:11 200:4 202:13 203:6 204:12 232:14,19		230 56:5
180 47:8	200 50:16		231 56:10
181 47:13	2000 42:21		232 56:15
182 47:18			233 56:17
			234 57:7
			235 57:9
			236 58:2
			237 58:7
			238 58:12

239 58:22	265 63:4	293 69:7	311 73:16
23rd 99:15 106:18 118:13 121:5,21	266 63:8	294 69:10	312 73:19
24 10:19 55:2,11 59:8 111:12 112:1 116:20 204:11 236:10	267 63:12	295 69:18	313 73:24
240 58:25	268 63:19	296 69:22	314 74:5
241 59:3	269 64:16	297 70:1	315 74:10
242 59:7	26B 229:23	298 70:11	316 74:16
243 59:13	26th 59:19,20	299 70:22	317 74:20
244 59:18	27 11:7 62:10 145:11 204:22 210:3 219:6	29th 77:15	318 74:23
245 59:20	270 65:15	2:03 132:4	319 75:2
246 59:23	271 65:25	2:29 158:1	31st 98:23 139:2 268:20
247 60:1	272 66:3	2:32 158:2	32 12:10 13:15,22
248 60:4	273 66:7	2A 57:9	320 75:8
249 60:9	274 66:10	2nd 246:16	321 75:11
24th 55:7 276:17	275 66:13	<hr/> 3 <hr/>	322 75:22
25 10:23 133:2 155:9 201:13,14 213:20,23 235:24 270:8	276 66:17	3 6:9,20 8:17 27:9 34:16 97:8,9 98:6 100:13,14 120:7 134:4,6 143:8 188:19 237:8	323 76:2
250 60:11	277 66:20	30 11:23 28:12 60:22, 23 138:23 152:20 153:11	324 76:5
251 60:15	278 66:23	300 71:6	325 76:7
252 60:19	279 67:2	301 71:12	326 76:12
253 60:24	27th 141:14 206:13 208:3	302 71:19	327 77:8
254 61:2	28 7:15 11:12 203:14 225:19	303 71:23	328 77:10
255 61:7	280 67:5	304 72:13	329 78:8
256 61:15	281 67:8	305 72:20	33 12:13 17:20 19:4 56:10,13,15 58:8 251:23
257 61:20	282 67:11	306 72:23	33(b) 58:13
258 62:1	283 67:14	307 73:2	33.5 271:20
259 62:8	284 67:17	308 73:5	330 78:14
25th 248:9	285 67:22	309 73:9	331 78:20
26 7:1 11:3 56:11 58:9 59:10 97:1,9 224:16,23	286 67:25	30th 8:24 12:5,14 138:18 140:8 205:7	332 78:22
26-27th 141:14	287 68:6	31 8:18 12:3 80:12 163:6 176:3 253:18 268:24,25	333 79:6
260 62:13	288 68:11	31-103 52:19	334 79:10
261 62:17	289 68:16	310 73:12	335 79:15
262 62:20	29 11:16 76:3 209:12 225:19		336 79:18
263 62:23	290 68:19		337 79:24
264 63:2	291 68:24		338 80:3
	292 69:2		339 80:8
			34 12:17 270:5

34.39 271:20	370 86:11	133:18 134:4,6 161:20	420 97:4
34.9 220:8	371 86:14	162:8 168:12 186:2	421 97:12
340 80:11	372 86:17	188:19 193:17 201:6	422 97:17
341 80:14	373 86:23	223:3 235:3 261:17	423 97:25
342 80:24	374 87:5	4's 185:23	424 99:5
343 81:6	375 87:9	4.1 239:14	425 99:11
344 81:9	376 87:14	4.1.4 217:22	426 99:14
345 81:15	377 87:17	4.11 219:2	427 99:18
346 81:22	378 87:24	4.11C 219:15	428 99:22
347 82:3	379 88:4	4.14 215:23	429 100:2
348 82:7	38 13:10	4.2 239:14	43 14:6 168:18 260:5,7
349 82:11	380 88:11	4.3 209:6	430 100:7
35 12:22	381 88:15	4.5 133:18 236:13	431 100:10
350 82:15	382 88:19	40 13:22	432 100:25
351 82:18	383 89:4	400 92:21	433 101:9
352 82:21	384 89:13	401 92:24	434 101:14
353 83:4	385 89:20	402 93:3	435 101:23
354 83:6	386 89:24	403 93:5	436 103:4
355 83:9	387 90:1	404 93:11	437 103:14
356 83:12	388 90:5	405 93:14	438 103:17
357 83:18	389 90:10	406 93:20	439 103:20
358 83:24	39 13:14	407 94:4	44 14:11 222:1 257:10
359 84:11	390 90:16	408 94:7	258:20
36 13:1 16:22 19:15	391 90:24	409 94:13	440 103:25
89:2 90:10 112:15	392 91:5	41 14:1 122:3,12,21	441 104:6
36.97 236:12 245:21	393 91:9	123:18,22,23	442 104:10
360 84:15	394 91:13	410 94:17	443 104:14
361 84:23	395 91:17	411 94:24	444 104:18
362 85:3	396 91:23	412 95:2	445 105:2
363 85:5	397 92:6	413 95:8	446 105:5
364 85:9	398 92:13	414 95:12	447 105:10
365 85:12	399 92:18	415 95:23	448 105:19
366 85:15	3:46 234:15	416 96:7	449 105:21
367 85:24	3B 37:21,22	417 96:11	45 14:14 120:8 257:8,
368 86:1		418 96:13	21
369 86:8		419 96:25	450 105:24
37 13:4		42 14:3 126:12 169:16,	451 106:3
	4	21	
	4 6:15 28:15 106:4		

452 106:11	484 114:1	507 118:13	539 124:8
453 106:14	485 114:3	508 118:17	54 16:7
454 106:16	486 114:8	509 118:19	540 124:11
455 106:19	487 114:11	51 15:21 105:3,4	541 28:17 124:17
456 106:23	488 114:16	510 118:22	542 124:23
457 107:12	489 114:20	511 119:1	543 125:1
458 107:14	49 15:6	512 119:4	544 125:10
459 107:17	490 114:23	513 119:7	545 125:17
46 14:19 190:7,9 195:2 221:14 257:2,3,6 272:18	491 115:12	514 119:15	546 125:22
460 108:17	492 115:18	515 119:18	547 125:25
461 109:2	493 116:1	516 119:23	548 126:5
462 109:5	494 116:8	517 119:25	549 126:12
463 109:12	495 116:10	518 120:6	55 16:13
464 109:17	496 116:19	519 120:12	550 126:21
465 109:20	497 116:23	52 15:25 219:24	551 127:1
466 109:23	498 116:25	520 120:15	552 127:6
467 110:1	499 117:4	521 121:9	553 127:13
468 110:5	4:00 234:16	522 121:15	554 127:15
469 110:11	4:35 268:14	523 121:19	555 127:18
47 14:23 169:13 197:6 219:18,19,24 220:16	4:39 268:15	524 121:21	556 127:20
470 110:13	4:52 279:6	525 122:2	557 127:24
471 111:2	5	526 122:6	558 128:6
472 111:9	5 6:17 80:4,5 134:7,8 165:22,23 180:1,2 185:4,6,24 209:6 213:9 219:18,24 220:16 238:24	527 122:12	559 128:11
473 111:16	50 15:17 64:12,16 156:8 185:9 222:2 236:21,23 237:1	528 122:15	56 16:18 240:17
474 112:5	500 117:11	529 122:21	560 128:16
475 112:9	501 117:15	53 16:5	561 128:19
476 112:12	502 117:18	53.8 219:13,14,17 220:12 221:7	562 128:22
477 112:14	503 117:23	530 122:24	563 129:3
478 112:21	504 118:1	531 123:1	564 129:5
479 112:23	505 118:4	532 123:6	565 129:9
48 15:1	506 118:9	533 123:9	566 129:12
480 113:3		534 123:13	567 129:17
481 113:7		535 123:18	568 129:25
482 113:18		536 123:22	569 130:5
483 113:23		537 123:24	57 16:21
		538 124:3	570 130:9

571 130:12	241:12	631 142:1	663 148:9
572 130:16	600 135:16	632 142:20	664 148:16
573 130:19	601 135:19	633 142:25	665 148:22
574 130:22	602 135:23	634 143:2	666 149:3
575 130:25	603 136:2	635 143:8	667 149:6
576 131:8	604 136:7	636 143:12	668 149:10
577 131:15	605 136:14	637 143:18	669 149:13
578 131:19	606 136:18	638 143:25	67 19:12
579 132:1	607 136:23	639 144:5	670 149:19
58 17:8 240:25 241:2	608 137:1	64 18:24 32:24 33:2 34:14	671 149:25
580 132:6	609 137:4	640 144:9	672 150:3
581 132:14	61 18:6 22:8,21	641 144:16	673 150:7
582 132:19	610 137:8	642 144:19	674 150:11
583 132:25	611 137:11	643 144:23	675 150:15
584 133:6	612 137:14	644 145:5	676 150:17
585 133:10	613 137:18	645 145:9	677 150:20
586 133:13	614 137:25	646 145:13	678 150:24
587 133:15	615 138:2	647 145:18	679 151:4
588 133:19	616 138:5	648 145:20	68 16:23 19:15
589 133:25	617 138:7	649 146:3	680 151:9
59 17:15	618 138:10	65 13:18 19:3 32:22 33:14	681 151:13
590 134:3	619 138:15	650 146:5	682 151:17
591 134:7	62 18:13 23:12,21,24 27:19,22,23 28:3	651 146:9	683 151:23
592 134:10	620 138:21	652 146:14	684 152:3
593 134:14	621 138:25	653 146:18	685 152:6
594 134:17	622 139:4	654 146:24	686 152:8
595 134:21	623 139:8 252:6,8 253:16	655 147:2	687 152:14
596 134:25	624 139:12	656 147:7	688 152:19
597 135:4	625 139:15	657 147:10	689 152:23
598 135:8	626 139:21	658 147:13	69 19:19
599 135:12	627 140:14	659 147:17	690 153:2
6	628 140:18	66 19:10	691 153:6
6 6:24 191:25 207:19,20 208:22 277:21	629 141:4	660 147:20	692 153:8
6.5 113:8	63 18:19 22:25 23:1,7	661 147:23	693 153:14
60 18:2 22:24,25	630 141:19	662 148:1	694 153:17
			695 153:20

696 153:23	72 20:4	752 165:2	784 171:11 273:17 274:23
697 154:1	720 159:3	753 165:4	785 171:16
698 154:4	721 159:6	754 165:8	786 171:25
699 154:6	722 159:11	755 165:12	787 172:7
6th 140:21 142:22 143:4	723 159:15	756 165:15	788 172:14
<hr/> 7 <hr/>	724 159:18	757 165:19	789 172:19
7 7:6 10:11 93:16 130:19 137:20,25 139:16,22 168:17 169:4 192:4 204:19,22 232:18 270:20,22 274:22	725 159:21	758 166:2	79 22:7
7.3 113:3 114:12	726 159:25	759 166:5	790 172:22
7.3B 111:5	727 160:6	76 20:23	791 173:1
7.4 196:24	728 160:10	760 166:11	792 173:9
70 19:22 143:12	729 160:13	761 166:18	793 173:15 195:11,12
700 154:11	73 20:8	762 166:22	794 173:17
701 154:15	730 160:17	763 167:1	795 173:24
702 154:22	731 160:20	764 167:3	796 174:8
703 155:5	732 160:25	765 167:13	797 175:9
704 155:11	733 161:4	766 167:16	798 175:17
705 155:15	734 161:8	767 167:18	799 175:20
706 155:19	735 161:10	768 167:22	7th 130:6 204:16 221:5
707 156:4	736 161:13	769 168:1 190:14 191:6,8	<hr/> 8 <hr/>
708 156:7	737 162:2	769,000 217:11	8 7:9 27:20 28:6 61:3 119:20,25 188:3,7 224:24
709 156:11	738 162:5	77 21:3	8.1 207:12
71 20:1	739 162:12	770 168:4	80 22:23 189:13 192:5
710 156:13	74 20:12 22:9	771 168:7	80/20 188:5
711 157:2	740 162:15	772 168:15	800 175:25
712 157:24	741 162:22	773 169:2	801 176:9
713 158:4	742 162:25	774 169:6	802 176:12
714 158:9	743 163:9	775 169:12	803 176:20
715 158:13	744 163:11	776 169:15	804 177:2
716 158:17	745 163:18	777 169:19	805 177:9
717 158:20	746 163:23	778 169:24	806 177:15
718 158:22	747 164:5	779 170:3	807 177:24
719 159:1	748 164:11	78 21:8	808 178:3
	749 164:14	780 170:12	809 178:7
	75 20:18	781 170:22	
	750 164:18	782 171:6	
	751 164:21	783 171:9 195:10	

81 23:2 192:19	842 187:4	875 192:22	904 198:12
810 178:14	843 187:8	876 193:1	905 198:19
811 178:17	844 187:11	877 193:6	906 198:25
812 179:4	845 187:24	878 193:10	907 199:6
813 179:13	846 188:8	879 193:15	908 199:8
814 179:17	847 188:13	88 24:14 243:25	909 199:14
815 179:25	848 188:16	880 193:22	91 25:1
816 180:3	849 188:20	881 194:1	910 199:17
817 180:8	85 23:23 203:2	882 194:6	911 200:4
818 180:10	850 188:22	883 194:9	912 200:8
819 180:13	851 188:25	884 194:16	913 200:11
82 23:6 196:12	852 189:3	885 194:20	914 200:13
820 180:21	853 189:7	886 194:23	915 200:18
821 180:25	854 189:12	887 195:3	916 200:20
822 181:10	855 189:17	888 195:8	917 200:25
823 181:24	856 189:24	889 195:11	918 201:5
824 182:19	857 190:7	89 24:18	919 201:9
825 182:22	858 190:11	890 195:17	92 25:10 57:15
826 182:24	859 190:17	891 195:19	920 201:13
827 183:2	86 24:6	892 195:22	921 201:22
828 183:11	860 190:20	893 196:4	922 202:2
829 183:20	861 190:22	894 196:6	923 202:9
83 23:12	862 190:25	895 196:11	924 202:12
830 183:25	863 191:3	896 196:15	925 202:16
831 184:3	864 191:8	897 196:22	926 202:20
832 184:6	865 191:13	898 197:2	927 202:23
833 184:10	866 191:16	899 197:10	928 203:2
834 184:13	867 191:19	8:54 20:2	929 203:4
835 185:2	868 191:22		93 25:15
836 185:7	869 191:25	9	930 203:8
837 185:18	87 24:11	9 7:14 104:15 108:8,9 257:11,14,20	931 204:4
838 185:22	870 192:3	90 24:22 230:1	932 204:8
839 186:2	871 192:7	900 197:21	933 204:12
84 23:18	872 192:10	901 197:25	934 204:15
840 186:11	873 192:12	902 198:4	935 204:18
841 186:19	874 192:17	903 198:8	936 204:21

937 204:25	97 26:10		acquired 74:9 228:1 251:17 252:21 253:10
938 205:4	970 213:3	A	acquires 86:24
939 205:10	971 213:5	A-r-t-h-o-n 168:4	acquiring 74:6 85:18, 19,22
94 25:20 56:21	972 213:9	a.m. 6:1 20:14 258:2	acquisition 84:24 253:2
940 205:14	973 213:11	AAL 82:3 83:14 130:2	acquisitions 61:25
941 206:4	974 213:14	ability 73:21 89:18 115:16 121:17 128:14	Act 113:15
942 206:9	975 213:20	absolutely 6:15 27:15 43:7 75:15 138:5 159:14	acted 255:24 256:1
943 206:15	976 213:23	accept 52:22 76:22 124:14 125:10 258:25	action 6:6 47:9 147:1 175:4 267:1,21
944 206:18	977 214:7	acceptable 14:14 15:3	active 49:6 60:8 226:8
945 207:13	978 214:13	accepted 12:3,13	activities 200:5
946 207:23	979 214:20	access 41:9 42:1 128:13,14 160:18 166:19 167:14 251:2	actual 78:19 171:4 226:12 271:2,13,20
947 208:1	98 26:17	accessed 101:18 103:10	add 110:4
948 209:2	980 214:22	Accord 222:14	added 110:6 220:10
949 209:5	981 215:2	account 43:8,11	adding 116:12 220:7,8
95 26:2	982 215:4	accounting 45:23 161:17,21 162:20 172:13	addition 124:11
950 209:8	983 215:7	accumulate 145:1	additional 23:19 24:2, 7,17 27:18 28:3,7,14 60:4,13 117:1 177:9 178:14 248:16
951 209:16	984 215:10	accuracy 231:17 235:22	address 33:9 34:17 39:14 43:6
952 209:19	985 215:15	accurate 140:11 174:11 219:13 223:22 229:10 235:16	addressed 35:19 36:3,7 66:24 67:15 234:11
953 209:23	986 215:19	accurately 142:7	adjunct 225:25
954 209:25	987 215:22	accusation 143:3,14	administration 133:22
955 210:3	988 215:25	accused 182:5	Administrators 52:17,25
956 210:6	989 216:13	acknowledge 18:7 29:12	admission 262:1
957 210:8	99 26:21	acknowledged 229:4,8,10,12,19	admit 99:1
958 210:11	990 216:18	acknowledges 222:11	admits 261:21 265:3
959 210:17	991 217:7	acquire 83:12 87:20 123:7 128:8 253:3	adopt 176:14
96 26:8	992 217:9		advance 88:17 236:13,16,18,22,25 237:1 245:16
960 211:2	993 217:14		advanced 237:5
961 211:8	994 217:17		
962 211:12	995 219:2		
963 211:17	996 219:5		
964 211:25	997 219:10		
965 212:3	998 219:12		
966 212:6	999 219:15		
967 212:12	9th 106:15 109:18 112:19 258:9		
968 212:17			
969 212:21			

248:15	202:4,13,17,22,24	agreeing 186:16 187:2 259:25	analyst's 58:14
advances 211:4 240:20	204:15,18 206:1 207:24 221:5,14,17,22 224:15 227:5,7,9 234:6,11,20, 22 240:5 256:5,8,11,22 259:3,6,8,24 260:2,10 261:10,15,16 262:10	agreement 30:5 55:25 56:7 57:4,21 58:5 93:16,23 94:14 97:18 98:6 99:5,19 103:22 104:15,24 106:8 107:5 109:16,25 111:16 112:18 114:18 115:3,8 116:14,18 121:7 180:6, 8 186:13,21 196:21 209:10 225:12 226:2,7 238:14 241:5 244:7 246:25	analysts 53:17,20 132:20 269:4 270:7,13 273:19,23
advise 63:4 77:10 125:1,17,18 127:21 131:8 210:18 255:15 259:19	affidavits 6:11 7:11, 23 8:2 18:8 41:13 47:14,19 50:3,10 62:2,5 76:3 98:14 122:7	agrees 142:7 275:15	analysts' 139:9
advised 72:5 97:17 98:4 203:15	affirm 77:7 81:21	agreements 128:15 213:18 216:23	analyze 171:19
advisement 42:24 64:6 65:2,11 71:25 72:9 77:24 101:7 123:11 124:15 125:5 126:8 164:9 214:11 255:17 264:25 276:2	affirmed 6:10	Alerts 161:17,21	analyzing 53:11
advisements 128:4	aftermath 37:4,11	allegation 47:16 50:5, 12 96:3 98:17 119:7 124:9 142:21 147:17 148:7	and/or 100:16
advises 20:12	afternoon 277:2	allegations 64:1	Andrew 101:22 109:15 166:23
advisors 135:20	agent 72:6	alleged 189:1 234:19 259:20 267:23	announcement 170:10
advisory 187:5	aggregate 192:15 212:2,16,19,21 213:1, 15 214:3 217:5,6,8 233:19	alleges 47:8 62:8	announces 116:20
affairs 174:16	aggregates 194:18, 19	alleging 59:4	annual 163:6
affiant 49:10	aggressive 92:4,10, 11	alternative 91:11 230:5 243:1	answering 173:20 180:19 211:6
affidavit 6:19,24,25 7:2,5,7,15,19 8:9,16 9:16 13:15 16:22 18:7,9 22:8 24:8 27:19 29:17 31:3,4 33:3 35:9 37:19 41:17 56:11,23 58:9 61:3 67:12,15 68:7 69:14 76:9,14 80:4 87:18 90:11 92:14 93:10,15,22 95:25 96:15 98:18 101:3 103:15 104:2,12,22 105:14 106:4 107:4,15, 19,21 110:20,22 111:4, 11,20 112:15 114:5,9 119:20 120:7,10,12 121:6 122:2,4,6,13,14 123:3 130:8 137:19,20 139:20,21 140:2 143:2, 6,21,25 144:11 145:22 147:2,3 148:1,10,17,20, 23 149:1,11,13,17 150:4 151:5 157:6,20 167:18,19 168:12,16,17 169:16,23 170:4 173:10 174:13,18 179:23 180:3 187:25 189:4,6 191:23 192:4,8,18 193:2 196:7 199:20,23 201:2,4,7	agnostic 233:16	Alvarez' 278:5	answers 46:17 78:22
	agree 10:15 11:17 12:23 20:23 28:19 30:12 44:3 53:11,14,16, 20 54:17 55:17 57:18 59:9 61:7 63:1 68:11 73:5,19 75:19 76:20 79:19 80:17,24 84:21 85:12,15 92:17 95:25 97:12,14 98:3 99:23 115:22 120:21 121:1 138:25 139:12,15 152:18 154:15 160:10 164:21 185:14 194:4 208:9 221:10 226:15 227:3 229:18 230:20 232:22,25 233:12 251:5 260:1,25 262:7,11 263:9,13,18	amended 140:20,24 248:11	Anthony 82:4
	agreed 19:4 33:20 35:17 95:8 99:1 128:1 130:12,22 146:9 150:5 181:2,7,18 199:3,9 223:10,13 259:24 275:19 276:20 278:15	amount 84:18 171:22 175:12 177:2 181:19 185:13 188:10 197:4 221:6 236:11	anticipate 52:7
		amounts 172:17,19 185:1 188:5 220:23	anticipated 52:5 126:13
		analysis 54:10 69:16, 19 162:17 164:15 172:25 190:11 240:18, 19 262:16 272:14,20 274:19	anticipating 237:6
		analyst 58:25 132:23, 24 269:2,7,13 275:19	anymore 227:7
			apologize 24:12 28:1 45:15,16 71:24 112:1 119:23 125:7 153:12 199:16
			apparent 110:24 194:20
			appearance 8:23 9:3 262:19
			appeared 14:4 77:5 93:8 133:1 140:19 142:5,11
			appearing 7:23 121:5
			appears 220:9
			appended 109:15
			appendices 35:8 221:23
			appendix 34:21,22 189:10,12,15,16,19,22 192:4,18 196:12 199:6 200:14 202:20,21,23

applicable 162:20	argue 107:23	5 211:25 212:5 214:22 215:1,2,3,10 216:11,13 217:7,9 228:1 240:21 241:9 242:5 244:23 249:20 250:7 251:18 252:8,21 253:6,13 255:9	authorizing 216:2
applicant 194:14 218:7 235:5	argued 78:4 145:11		authors 64:11
application 201:9	argument 29:7 157:19		availability 129:22 134:18
applied 79:7	argument's 232:15		Average 271:17
applies 186:17	argumentative 36:9, 18 54:7 137:9	assigned 75:22 76:9, 15 198:20 205:13 219:20	avoiding 232:10
apply 47:6 178:5 182:14 249:15	arising 33:5	assignment 196:12, 16,17,19 197:3 205:25	aware 18:16 33:18 47:16 49:20,22,23 50:4, 12 52:15,24 67:2,11,14 68:20,24 69:22 70:1 73:9,16 74:5 75:3 88:16 90:1 91:17 93:6,20 94:2 95:12,24 97:4 101:9,14, 19 103:20 117:4,18,21 123:2 127:6 130:3,9 135:4 137:5 148:19 159:21 160:20,24 163:3,5 164:2 165:3,4 214:17,21 223:1 233:5 259:15 264:13,15 269:13 278:24
applying 53:25 122:14	arose 67:18	assignments 60:5, 13	awareness 160:15
appointed 243:10	arrangement 67:18 68:8,17 100:1 194:11	assist 152:12	
appointing 250:25	arrangements 51:15	associate 132:23,24	<hr/> B <hr/>
approach 54:20 88:7 92:8	Arthon 168:2,4 188:23 189:10,13 190:12 192:5,13 193:2 194:11, 12 200:6,8,15 201:17 202:14 204:22 211:4,20 215:16 216:14 219:7 220:24 277:3	associates 132:20,22	
appropriately 15:18 16:1	article 65:20,22 80:8, 11,15 132:25 133:8 138:22,23 140:8 153:10 165:5,8,10,24 166:3	assume 17:12 47:3 73:2 177:4 181:4,12 182:8 184:18 185:9 221:1 236:20	
approval 83:1,3,10, 20,25 86:2,25 87:6 88:7 89:20 96:5 101:5 113:5, 16,24 115:13 116:2,13, 21 118:11 120:22 125:15,24 126:1,6,14 128:25 131:17,22 209:13 253:25	articles 64:11 105:18	assumed 196:7 200:9	
approvals 84:22	asks 137:10	Assuming 155:13,15	
approve 82:13 83:16	aspect 242:8	athletic 252:15	B's 37:23
approved 9:25 128:24 209:11	aspects 84:20 117:9 156:21 178:25 264:18	attached 6:24 24:9 56:22 62:10 110:21 157:5,8	back 29:5 46:17 49:16 53:24 66:3 67:20 68:3, 14,15 69:4 73:15 75:6 77:2,6 81:24 82:20 88:19 89:5 90:10 92:19 102:14 103:4 115:15 116:14 117:2,22 118:20 119:18 122:8 129:8 132:11 133:12 137:14 141:13 148:25 149:16 153:20 154:25 161:6 171:22 182:2 183:12 185:13,19,24 186:1,2 187:16 188:3 190:12 191:16 194:7 195:1 197:25 210:14 224:20 225:14 227:25 230:2 237:8 248:7 257:21 262:2 265:6,10
approves 113:20	Aspen 67:19 68:8,12, 17 69:2	attaches 169:15	
approving 206:25 207:3 246:9,24	assert 107:14	attempt 20:24 250:21 257:24	
approximately 197:6 216:8 236:13 273:20	assertion 96:14 101:3 250:13	attempts 239:11,15	
April 77:12 152:20 153:21,25 154:1 160:22 161:18,22,24 162:5 163:19,21 164:22 180:15 195:7 216:1 269:6 270:21,23 275:18	assess 267:20	attention 51:20 108:20 241:11	
arbitration 186:23,24	assessments 179:7	attenuated 100:3	
Arcan 62:6 67:6 69:6, 12 73:7,10,22 74:11	asset 82:1,12 202:14 209:9 236:20,22 246:24 247:14,18 249:8,25 251:17 252:14 253:14, 15 267:6,8	attitude 88:2,3,4 92:3	
arguably 222:19,23	asset-based 178:9	attracted 228:3,6,7,8, 9	
	assets 133:15,22 178:8,10 179:5 186:8 197:14 200:6 207:1,2,4,	attractive 227:17	
		attributions 254:22	
		audit 249:24	
		August 99:15 121:22 123:24 130:6,19 137:14,15 154:9,13,14, 17 155:24 156:1	

backup 41:5 42:14	bear 104:1 185:10	15,16,22 44:11,21,25 45:11,21 46:7 70:19,21 72:22	borrowing 175:7
backwards 257:18	bears 223:8		bottom 152:16 153:13 162:15 166:11 248:10
bad 17:13 54:18 182:6 226:22	began 153:4 156:8	Blackberrys 46:5	bought 73:13
bag 261:12	begin 217:6	blackline 104:23 105:8,11,12 106:6,17 107:17,20 110:2,21 117:3	Boyer 175:18 240:6,9
balance 128:17 219:19 231:13	beginning 189:21	blame 201:22,25 202:1	Brandon 6:6 77:11
balanced 171:1	behalf 14:24 20:24 33:4 72:6 97:14 135:5 146:19 164:7	blips 152:7	Brandon's 72:21 76:8
bank 252:21 253:7	behaviour 278:12	blocked 85:7	Bravo 111:5
banking 48:17,20 50:19 51:14	belief 18:10,11,14 24:4 122:22	blocking 74:3,7,13,24 75:3 87:20	breach 118:24 119:14, 16
bankruptcy 183:17 205:13,25 207:6,10 212:15 215:9 243:3 278:3,8	believed 81:4 88:6 224:1,10	Bloomberg 151:21	breached 119:2,10
banks 251:19 279:2	believing 242:22	BNN 138:22 140:7	breaching 119:13
bar 151:11	belonging 47:11 57:24	board 125:14,23,25 187:5 226:9	break 70:7 127:15,25 132:1 220:25 234:14 268:12
barely 154:18	beneath 20:10	body 221:22	briefly 50:16 51:7
Barometer 166:13	beneficiary 198:3,10	bolt-on 61:24	bringing 16:19 108:19 171:18
based 18:10 71:17 72:17 80:24 97:18 98:6 130:7 138:19 141:13 144:24 148:3,11,14 156:14 162:18 173:2 206:21 249:9 250:21,22	benefit 113:14 183:18 189:5	bolts 108:3	brings 221:9
basic 143:14 272:22	benign 25:4 26:13 31:7	bond 227:24 229:1,2 230:1	broad 31:19 51:9
basically 11:4	Bert 175:19	book 196:8 231:9,18 250:1,7 269:24 273:12 274:7,11,12	broader 12:8 16:8 37:1 65:9 88:9
basis 26:22 43:2 51:17 91:21,24 99:2 107:14 108:1 109:10 110:17 129:11 149:2 157:21 185:15 190:19 250:15 251:5 273:3,7	bespoke-type 233:8	books 172:3 247:15 253:13 254:18	broadly 79:2
Bates 105:2 114:5	bid 135:24 241:8,25 242:3,12,13 244:13 254:11	boot 178:11,13	broke 134:22
Batista 111:24	bidder 84:16 136:8	Borg-olivier 6:2 8:12, 14 13:18,21 15:12,15, 16 16:12 19:9 21:7,17, 24 22:3,6,17,20,22 27:14 29:4 34:19,24 35:2,5 37:17,22 38:1 42:12,22 43:7,10,19,24 44:8,15,23 46:1,12,16, 21 47:1,5,14 70:15 118:6	broken 135:2
BBM 71:5,18 72:18	bidders 80:1 81:11	borne 85:5	brought 168:11 277:5, 9
BDC 221:10,12 228:7,9 229:1 232:15 233:4	big 218:13	borrower 148:18 157:9 172:9 252:13	bucket 40:16
BDCS 168:5 222:6,19 223:5 225:6 226:10 227:15,24 230:15 231:2,25 232:5,25 233:8,12,21 234:2,4 278:11,24	bigger 272:25	borrower's 159:10	bugged 124:6
	billion 133:18	borrowers 157:22 158:7 176:21 179:5,14	built 214:5
	bills 45:19 46:4		buried 169:23
	bind 261:1		Burt-gerrans 19:5, 10,20
	bit 9:17 10:22 50:17 81:22 104:1 139:25 143:24 170:1 184:17		business 138:22 167:6,7 222:5,18 223:21 240:21
	black 117:1		businesses 227:13
	Blackberry 38:9,20 39:3,6,11,19,23,25 40:6,17,19,23,24 41:20 42:2,3,16 43:3,11,13,		buyer 254:10
			buying 73:20

C					
CA 93:25 238:14	278:18,21	catalyst 6:6 9:2 11:24 12:3,13,18 13:1,11 14:15,24 15:4,19 16:2, 7,15 23:8,14 29:14,20 30:16 32:16 33:4,11 36:14 38:10 39:14,15, 20 41:1 43:6 44:12 45:14,20 46:4 47:8,11, 18 48:3,12,18 49:4,14 50:6,11,13,25 51:8,24 52:16 53:5 55:2 59:10, 15 60:13,17 61:4,22 62:8,13,21 63:4,8,25 64:3 65:4 68:13,20,25 69:11,20 70:15 72:5,23 74:10 79:22 84:23 87:10,24 90:20 92:7 93:25 95:9,24 96:2,3 97:14,19,20 98:8,15 99:14,19 101:1,4 103:8, 22,23 104:24 106:7 107:7 108:4 110:6 114:11 115:1,21 116:12,25 118:10,13,23 120:17,20,22 121:2,10, 23,24 125:1 128:1,6,24 130:22 131:9 132:8,9 133:1,16 135:1,2 136:18 138:8 141:25 146:12,19,20 150:8,9 164:6,7 180:5 184:22 186:15 187:1,6,11 188:18 225:11 249:18 258:25 259:7,11,19 260:1,11,19,25 261:5, 24 265:8,14,16 267:23, 24 268:1 269:12,13 276:13,24 278:14	Callidus' 139:5 145:15 222:17,20 235:16 262:16	calling 129:13 222:22	ceases 182:13
calculated 133:21	calls 45:9 46:6,10,13 123:19 129:8,15	campaign 144:15	cents 236:21 237:2		
calculation 172:24	Canaccord 238:11,17	Canada 78:11 82:1,11 83:1,10,15,19,25 84:3, 5,7,12,19 86:2,12 87:6 91:19 113:4,16,19,24 115:13 116:2,13 120:25 123:20 124:1,19 125:13 126:14 127:9 235:8 276:9,13,17,23	CEO 226:8		
call 19:11 88:2 121:22 123:25 124:17,19 125:2,12 128:10,23 129:1,5,6,11,19,21,22 134:12 163:7 168:2,8 169:3 176:10 177:11 272:17	Canada's 84:24 89:20,24	Canadian 52:16,24 251:19 252:21	Cerberus 141:22,24 142:13		
called 7:6 66:11 67:19 82:3 159:19 167:23 187:18,21 255:11	cancelled 185:9,13	capital 6:7 128:10,23 129:1,2,6,11,13,15,18, 20,22 134:11,12 161:17,21 166:13 217:22 218:4,12	certificate 246:7,18 248:25		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7	captured 15:18 16:2,8	Catalyst's 8:24 23:8 24:3,24 25:5,17,23 26:6,13 42:14 43:2,4 50:3,10 55:18 58:15 72:24 73:21 87:20,21 88:4 90:19 91:25 100:11 126:3,16 130:25 131:16,20 259:2 260:14,18 276:8 278:12	certify 247:3		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7	careful 156:22 252:19	CARLSON 168:22	certificated 246:7,18 248:25		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7	carried 241:18	carrier 80:21 84:9 126:17 187:19,22 188:2	chain 256:20 257:17 260:5		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7	case 10:24,25 11:5 44:1 59:4 63:22 64:12, 24 102:7,22 182:14 242:11 245:8 249:17 252:17 262:23,24	Catalyst-owned 61:12,18,20 126:16	chair 226:8		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7	cases 11:3 230:21	categories 167:23	chance 7:22		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7	cash 129:24 171:18 184:12 211:3 217:11 229:25 230:2 237:15	CCAA 193:3,13 194:17,25 195:15 196:2 201:4,10 204:9,25 217:24 278:2	change 115:13 116:2 179:2		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7	cat 261:12		changed 137:5,7,11, 12		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7			characteristics 279:1		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7			characterize 204:13		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7			characterized 229:15 255:9		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:12 219:7 220:24 221:11 222:4,12 223:6 225:7, 13,15 226:4,25 227:18 228:7,9 229:13,20,23 230:17,21 231:3,7 232:12,18 233:1,13,21 234:12,25 235:5,13 236:11 237:16 239:2 240:10,12,19 241:3,7, 14 242:14 245:16 247:6 248:11,15 249:1,19 251:16,22,23 259:4 263:17 269:4,7,12 270:5 272:1,2,3,20,21, 24,25 273:5,11,19,24 274:7,9,11,19 275:7			chart 151:6 152:12,17 153:1,2,9 154:17,20 155:25		
Callidus 23:14 33:12 51:16 64:2 137:18 138:9,10,12,17 139:1,9, 16,18 140:19 141:11, 16,23 142:4,11,22,24 143:3,16,20 144:1,7 145:2,15,21 146:5,10, 12 147:5 148:2,18,24 149:7 150:9,14,15,18, 19,20,22 154:7 156:15 157:22 158:9,14 160:18,21 161:17,21 163:4 164:24 165:6 166:4,6,19 167:14,20 168:2,7 169:3,8 170:5, 14,24 171:5 174:16 175:22 185:10,20 186:15,25 187:6,8,13 188:18 196:7 197:3,12 198:20 199:10 210:12 211:3,5,21 213:1					

The Catalyst Capital Group Inc. v. Brandon Moyses et al
RILEY, JAMES on May 13, 2015

Index: circulating..confer

circulating 265:4	207:2 209:10 212:11,14 214:18 217:10 278:9	242:1,6,8,15,16 244:20, 22,23 245:7 250:6 252:12,23 254:6 255:11,19	comprised 133:19 134:1
circumstances 74:3 136:22 231:4 245:6	collateral 158:16,17 177:18,19 178:5,11,12, 13,14,19 179:1 225:22 237:4	company's 49:9 53:18 166:8	computer 13:5 17:3, 24 18:21 20:15 21:1,12 25:4,8,12 29:18 31:8 40:20 101:12,17 146:15,16,20,21,23,25
cited 193:16,22	collectively 217:24 218:6,7	company-issued 38:9	concept 172:13
claim 172:6 184:12	commenced 118:23 238:20	comparable 133:4 222:4,9 223:6 227:13 228:11,18,24,25 232:21	concern 13:1 35:18 36:5,6,13 38:13 88:9 92:2,6 117:21 148:4 164:24 175:4 181:6 190:1
claims 172:17	commencing 6:1	comparables 222:20,23	concerned 23:8 89:8 90:7,19 276:12
clarification 46:9 70:12 241:21	comments 106:18 252:2	compare 70:4 104:1 112:24 165:17 228:10	concerns 23:6 33:9 36:1,10,15,19 87:21 91:18 100:2,18 164:16 166:14 168:1
clarifies 260:8	commercial 218:23	comparison 107:23 221:10	concession 127:7
clarify 16:10 183:5	commitment 110:14	comparisons 168:5	concessions 90:20, 24 91:13 120:25 121:4 126:15,18 127:3,4 131:17 276:12,24
clarifying 135:13 157:24	committed 128:7 171:18	compensation 226:10	conclude 91:24
classes 178:18	committee 175:13 226:9	compete 265:19,22	concluded 68:7 279:5
classified 247:14	common 28:20 29:7 30:13,24 32:2 250:6 252:12	competition 113:15 273:24	conclusion 18:15 25:20 273:4
clause 11:1 58:10 113:4 114:12 115:13 116:2	communicate 72:6	competitive 267:23	conclusions 36:12 53:18 54:14
clean 56:12 80:6 104:23 105:8 106:5	communicated 117:16 118:1 121:23 126:6	competitor 58:17 59:3,16 61:4 265:15	concur 67:24
clear 22:10 43:5 44:10 60:11 65:4 75:12 85:20 104:20 106:24 110:14, 18 111:10 120:6 127:8 173:24 205:23 217:21 221:2 241:23 262:5 265:2 274:17	communication 17:2,6 18:25 63:20 65:7 97:5 98:1 276:8	complained 100:20	condition 115:17 116:21 117:5 118:11 130:1 145:16
client 7:11 103:2	communications 21:9 38:15,19,25 39:10 41:21 45:7 49:13 63:17 72:3,5 97:15 98:5,12 163:8,24,25	complete 35:7,10 81:12 113:12 191:11	conditional 120:23 125:23 126:14
client's 257:24	companies 51:16 61:12,18,21 66:23,24 148:14 194:13 218:7 222:4,5,13,19 226:1 228:3 250:6 251:21 269:3	completed 205:21 214:1 253:23 263:2	conditions 113:13 117:1 121:2,9,25 123:14 130:23 131:16 136:9,12,15,19,20
close 54:4 129:21 130:1 132:7 220:21 268:13	company 49:10 54:15 66:11,14,21 67:3,19 70:18 82:3 159:19,22, 24 167:4 168:5 171:11 192:14 193:7 203:15 214:23,25 215:16 216:3,19 217:22 218:5, 12 227:2 234:23 235:1	completely 89:6 90:5 152:9	conduct 146:22 148:5 160:8 179:4
closed 209:16		component 45:1	conducted 70:14,16, 17 71:10 146:18,19
closed-end 229:24		compress 275:2	confer 95:14,15
closely 222:3		compressed 275:9	
closes 253:25		compression 271:23 272:16 274:22 275:3,4, 5	
closest 48:14 49:3 222:9,20,23		compressions 275:17	
closing 247:2,3			
coal 192:14 203:25 215:2,5,8			
Coalmont 193:3 194:13 197:13,15 203:22 205:9,18 206:25			

conference 123:19, 25 168:2,8 169:3 176:10 177:10	171:12 198:23 227:22	contractually 171:17	78:6,24 79:9,17,23 81:14,18 82:6,9 83:17 86:9,15 87:10 89:11,12 90:23 97:22 99:6,8,16, 17 100:5,23 103:11,18 104:14,24 105:2 106:19 109:19 110:17 112:8, 11,12,14,21 115:7,12, 14 116:3 120:11,12 122:1 125:15 126:5 129:4 130:9,23 132:13 134:20 135:15,25 136:10,17 138:24 139:2,3,7,18 140:9,21 142:17 143:4,16,21 144:3,7,8,11,17 145:2, 18,22 146:3 147:17,18 148:3 149:5 150:1,5,6, 21 151:3 152:6,14 153:5 154:4 155:13,15 160:8 163:21,22 168:6 169:4,5,10,11,17,21,22 170:5 172:24 173:12 178:15 183:4 184:9 185:21 186:14 188:18 190:20 192:16,20,21,23 193:8 194:6,14,15,20 197:22 200:11 202:5,10 203:6 204:6,16,23 208:4,24 210:4 212:7, 22 213:12 215:7,12 218:1,15 219:10,21 221:12,25 223:22 224:5,7,13 225:9 227:2 229:21 230:19 232:10 235:13 237:22 238:22 239:3,13 241:7,10 242:17 243:1 246:11,12 254:12 260:3 265:5 267:24 274:19 276:19 277:23
confident 173:2	consistent 195:5 217:3	contrary 75:9 107:2, 25 109:8 110:15 130:10 157:7 238:1	corrected 75:17
confidential 23:8,15 24:3,24 25:5,17,23 26:6,13 29:14 47:10 50:6,13 56:3 57:22 62:9,18,21 79:22 87:21, 25 88:12 89:8,14 90:6 99:20,23 143:15 144:1 148:3,6,11,15 149:7 150:8,17 151:2 156:14 158:5 160:18 166:19 167:16 245:3	consists 175:3	contrast 104:1 112:24	correctly 6:10 87:18
confidentiality 55:24 56:2,9 57:21 58:4 93:16,23 98:25 99:25 100:3,22 103:9 108:14 238:14 244:7	consolidate 263:12	control 11:20 73:10 74:4 83:2,4,6 257:24 267:6	correspondence 21:21 22:15 98:11 164:6 256:6,21
confirm 33:22 41:4,22 43:1 55:9 58:7 107:10 124:21	consolidation 91:15	controlled 82:3	counsel 6:20 9:10 10:5,15 11:17 12:23 14:20 15:10 17:1,6,18 18:25 19:20,23,24 20:24 21:4,11 27:5 30:6 33:4,15,19 34:8 35:6,17 36:22 37:3,6,9 46:9 48:12,15 49:3,15,25
confirmation 28:6 35:16 37:13 46:3 264:8	constitute 74:6	controlling 82:24	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
confirmations 179:11	constitutes 225:12	controversial 9:21	copyies 96:2 98:13 106:6
confirmed 20:14 42:2	construct 26:20	conversation 30:15 124:4 175:16	copies 96:2 98:13 106:6
conflicts 166:7,14	construction 192:13 213:16,25	conversations 117:6 175:13	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
confused 106:12 109:14 215:20	constructive 267:2	converse 26:3,11	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
confusing 215:22	consult 124:23	convey 170:10	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
confusion 218:19	consultation 20:8	conveyed 62:7 89:9	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
connection 6:6 142:13 201:4 214:4	consumption 262:20	conveying 213:1	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
consensus 270:8 271:20	contained 24:3,23 25:12 26:5 62:14	COO 51:8,23	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
consent 10:15 11:9 12:11 117:9,10 118:5	contemplated 131:4	copied 19:22 92:7 97:21 98:9,14,19 111:12 121:5	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
consented 14:7,11 15:19 62:14	contemporaneous 159:2,3	copied 19:22 92:7 97:21 98:9,14,19 111:12 121:5	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
consideration 31:6 89:22,24 91:4 184:25	content 49:12 257:22	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
Considerations 91:15	contents 124:4 257:1	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
considered 59:15 82:1 87:12 131:9	context 29:20,22 30:16 31:11,15 37:25 58:12 84:7 89:17 100:20 104:11 126:24 136:13 142:12 143:14 144:17 149:20 169:20 170:7,18 174:2,19 242:22 245:12 255:1 258:11 260:22	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
	contexts 25:5 29:13 30:18 31:7 32:15	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
	contingent 185:19 213:17	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
	continue 74:14 188:17 237:19 241:15 247:6 263:11,16 275:8	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
	continued 69:6	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
	contract 119:10,16	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
	Contractors 194:12	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7
	contracts 180:10 212:24 213:2	copies 96:2 98:13 106:6	copy 14:18 27:3 34:21 56:12 94:7 96:7 97:2 104:23 105:8 140:1 168:20 169:15 259:7

79:11 93:21 96:2 97:17, 19 98:3,7 101:10 102:1 125:8 127:10 137:21 139:25 143:23 157:13 191:5 205:24 217:20 255:25 256:23,25	cross- collateralized 200:15,21 201:17	day-to-day 51:10	defendants' 11:17,19
counsel's 8:6 176:14	cross-examination 6:2 46:24 61:9 77:15 98:22 132:11,15 141:12 268:19 274:16 279:5	days 21:1 59:10 60:22, 23 134:13,14 258:11, 21,22	defer 128:9 257:25 258:10
count 60:22 133:4	cross-examined 76:2	Dea 141:13,15,16,20	defined 113:25 114:21,24 115:2,9 217:23 218:19 238:11
counted 6:10	cross-reference 105:23	deal 74:12 87:24 126:13 131:6 136:16,19 259:8	definition 113:22,24
counts 31:19 32:1 173:5 177:21	Crossin 175:19	Dealba 122:24 124:21	degree 51:2 149:23 235:18
couple 234:12 268:13	current 133:15 171:5	dealing 11:5 36:16 52:17	degrees 51:3
court 9:8 14:1 30:24 50:4,11,17 62:14 63:5, 22 64:23 139:17 140:16 165:2 206:17,23 209:11 216:2 235:20 244:20 245:5 246:19 257:24 274:18,20 278:4	customized 233:1	deals 52:25 113:15,16	delete 40:4,8,9,10,12, 13,14,19 41:7 43:14
court-appointed 235:18 244:19 245:13	cycle 182:16	dealt 36:8	deleted 40:3,15,16,19 41:8 43:15 44:13
cover 184:20 185:16	D	debate 58:2,3 218:9 270:7	deletion 40:18
coverage 139:16 140:14 181:18	daily 51:17	debenture 180:6 186:12	delivered 34:2 93:21
covered 47:2 89:5 90:6 120:9 122:7 128:20 181:3,7 182:17 183:21	danger 61:3	debentures 68:7 73:13,20,25 74:1	delivery 95:25
covering 111:12	data 42:14,17,24 46:10	debt 82:7 193:4 196:9 200:9,22 220:23 221:6 230:15,18 231:8,12 239:2 242:1	demand 119:4
covers 172:4 184:8	date 9:25 12:5,15 13:6, 8,11 16:3 28:9 42:6 55:8 77:5 78:19 92:23 99:9 110:24 118:9,21 124:22 139:19,20 140:2,10 153:10,24 161:23 163:18 164:22 188:6 196:19 204:25 205:12 207:17 208:11 213:16 219:6 247:12 253:17,22,24 257:11 258:5 276:25 277:1,12	debtor 245:7	demanding 121:24
cracks 51:18	dated 6:18 7:1,18 20:1 28:10 80:12 95:20 96:8, 21 97:9 108:7 111:12 112:18 143:2,4 160:21 161:18,22 165:24 191:25 194:3 206:12 207:16,20 235:24 246:20 269:6 270:21,23 275:18 277:21	debtors 240:21 241:16	demonstrate 244:19
Craig 175:18 240:6	dates 6:12 78:17 120:3 152:16 153:13,16 155:25 207:12	debts 193:7	demonstrating 124:13
create 19:13 121:17	day 9:8,11 14:1,12,20 15:7,10 59:14 112:9 162:2,3	decades 48:18 109:4	Denton's 96:9
created 17:17,25 101:18 103:10 166:8		December 60:25 93:16 151:18 152:8 196:2 253:18	deny 83:19,25
creation 17:3 35:23		decide 263:11	department 41:23
credit 128:12,16 129:23 134:17 175:13 182:10,11,16 183:8,11 197:12,22,23 198:3,7, 11 199:10 220:4 236:14 241:8,25 245:11 248:11		decided 69:7	departure 10:25 116:20
credits 250:24		decision 84:4	depends 54:22 55:20 60:21 158:16 223:21 226:13 266:18 267:20 272:6
critical 74:4		decisions 51:24 52:1 53:2	deposit 192:15
		deck 262:22	describe 13:23 23:19 51:7 180:21,23 200:5 204:10,12
		declare 227:19	describes 104:14
		deducted 220:3	describing 8:23 17:16,23 23:3 184:8 243:16
		deeper 36:25	description 10:24 18:20
		defamatory 164:3	
		defendants 11:13	

designation 53:5	directors 186:25 187:7	dividend 227:17	drawn 134:19 197:13 199:12
desire 89:9	disagree 28:21 36:12 93:12 136:11 237:24	dividends 226:25 227:20 228:15 229:13, 20,23 230:5,9 232:20	drive 102:4
destroyed 38:14 39:24 41:21 45:10 79:13	disagreement 145:5	Dobby 81:4	drop 118:11 130:22 136:8,15,24 137:2
detail 201:1 270:25	disclose 30:23 135:1 264:6	document 23:24,25 24:22 25:11,17 26:4 28:9,10 34:4 68:4 77:22 78:2 103:9 107:18 109:22 112:20 114:7,8 115:20 116:5 157:10, 14,15,16 161:16,20 206:10 213:5 262:16	dropped 136:21 270:5
detailed 189:25	disclosed 50:5,13 62:9 87:19 135:21 156:15 174:25 180:5 227:18	documentary 124:13 214:8	dropping 136:19
details 261:22 270:16	disclosing 49:12 135:5,6	documentation 96:3,14,20	due 172:10 173:8 238:19,21
determination 44:10,21 186:9	disclosure 191:11 222:17	documenting 150:1	Duff 235:7,12 240:17 243:9,21 254:11
determine 44:11,20 90:2 175:9 224:7 249:10 263:7 274:18	discount 196:8,16,17, 19 197:7,17 198:9 199:1 253:11	documents 10:16 11:19 12:24 13:2 25:22 26:12 62:15 77:4,11 93:24 100:10 101:16 105:17,23 157:8 231:12 277:25	<hr/> E <hr/>
determined 44:1,4,5, 6 136:18 172:23 216:20 218:12	discovered 156:18 157:21	dollar 175:12 236:22	E&p 233:17
detract 235:22	discuss 78:1	domain 159:4 249:17	e-mail 19:16,22 20:1 21:15 35:12,14 39:14 40:3,9,10 41:2 43:6 55:10 62:10 70:18 71:12 72:14,20 79:10 98:10 111:12,24 140:5 141:14 142:12,15 256:20 257:11 260:5,13
development 84:8 222:5,19 233:17	discussed 41:25 136:2 140:4 270:12	Donald 256:12	e-mails 39:13,19,22 41:23 42:15 43:3,5,9 44:13 72:21 97:20 98:8, 13,15,19,20,21,22 99:2 101:11 102:5,16,18 140:3,4 258:14
device 72:22	discussing 38:8 58:9 126:19	dots 152:12	earlier 59:7 67:9 76:1 77:4 78:15 88:20 89:7 194:7 205:11,24 238:10 239:5 243:20 253:12 268:18 270:12 276:6
devices 17:4 20:15 37:16	discussion 117:8 141:17 184:19 186:18, 24	double 40:4,9,11 232:10	early 79:20 93:7 117:13 151:18 152:8 156:1 196:2
Dialba 187:12	discussions 29:19 60:16 84:19 117:19 118:6 259:12 264:17 276:12,16,23 278:11	double-check 69:5 75:7 76:21 77:3,19 118:21	earn 188:12
diaries 124:23	dismiss 32:1	doubt 14:23 187:20	earned 118:14
difference 54:19,20 108:11 110:24 157:13 229:3	displayed 170:2	dozens 98:19,20	earnings 139:9 170:10 268:19 271:16
differences 224:15	dispute 66:4 70:23 79:24 81:9 92:21,22 93:17,19 162:23 268:5	draft 23:4,10,16 33:5 103:22 104:15 105:13 106:7,15 107:5,7 108:7 109:18,19 110:20 112:6 115:21 116:14 117:3 121:4 126:22 127:19	easier 21:19 126:17
difficult 108:23 182:3 228:11 274:8	distinction 195:14 227:4 228:13,17	drafts 115:19	easiest 236:19
diligence 74:14 106:2 238:19,21 240:2	distinguish 102:1 266:25	dramatically 137:13	easily 32:15
diluted 273:23	distressed 251:18	draw 18:15 53:17 198:1 241:10	EBITDA 249:13
diminished 266:12, 23	distributes 252:15		
dip 198:22 219:18,20	distributing 230:5		
Dipucchio 9:6,11 19:23 21:10 94:8 95:20 96:9,21 256:17			
directed 71:10			
directly 45:23 220:5 255:5			

economic 187:13 188:10	ended 121:22 253:20	equity 82:8 83:13 186:7 230:17,21,23 231:3 239:1 242:1 247:7 252:18,20	exception 94:1 183:23 193:12
edification 109:13	endorsement 9:19, 23 10:3 12:7	equivocal 201:20	excerpt 168:1 169:13
ediscovers 19:12	enforcement 259:13	errors 234:12,19	excerpts 240:5
edited 101:18 103:10	engage 60:7 131:1	essentially 182:11 186:6,9 246:9	excess 212:13 237:1 241:4 250:7 275:8
effect 182:10 184:12, 25 186:15 197:19 227:24 252:22 255:5 262:23	engaged 131:9	establish 102:12 107:13 250:15 251:7	excessively 170:24
effective 207:11	engagement 20:5	established 59:7 251:6	exchange 141:15 234:22 239:15 241:25 248:24 252:13 255:4
effectively 64:3	enhanced 175:14	estimate 271:13	exclusion 199:21
effort 64:2 74:21 75:4 143:19 145:13,20	enjoining 267:16	estimates 162:17 271:1	exclusive 108:15 118:14
efforts 87:20 88:16 90:2 216:25 245:6,10	enjoying 210:12	European 187:18,22 188:1	exclusively 230:18
egregious 167:24 234:11	ensure 120:23	evaluate 249:21	exclusivity 99:15 118:24 119:2 120:16 121:22 134:22 135:23 137:15 231:7
elaborated 143:3	enter 27:4 216:24	event 42:24 182:17 247:22	excuse 62:4 78:21 83:5 91:2 190:2
electronically 256:23	entered 11:9 93:15 209:9	events 121:16 239:14 247:22	executed 238:13 244:6
eleventh 207:15 208:3,5,13,16,20 209:14,17,21 215:23 219:9	entering 64:1 89:10	evidence 21:3 24:20 38:14 41:20 42:15 44:7, 16 50:4,11 61:8 64:1 67:17 73:12 76:8 77:1, 14 78:5 101:1 107:2 118:10 124:13 126:7 130:10 131:10 143:19 144:6,10 145:7 157:7, 16,20 162:22 174:12 214:8	executives 48:6 225:11
elucidated 143:3	enterprise 249:9,11, 12,13	evidenced 248:24	exercising 267:5
electronically 256:23	entire 56:20 85:17 169:16 257:6	evolution 256:2	exhibit 9:15 15:6 18:3 27:4 80:4 95:17,19 96:18,19 97:8,9 98:6 100:13 101:24 104:3,22 106:5 107:15,21 111:11 114:4 116:12 121:6 151:5 153:6 154:22 155:6 157:6 161:12,20 162:8,13 165:22,23 169:16,21 192:3 193:16,17,22 194:3,6, 10 198:13 207:19,20 208:22 223:3 256:4 270:20,22 272:18 274:22 277:19,21
elucidations 274:14	entities 200:21 201:18 217:24	evolved 217:4	exhibits 6:25 18:1,4 150:1,3
emerged 238:25	entitled 53:1 161:17, 20	exact 154:12	exist 173:2 179:1
emphasis 225:4	entitlement 188:9	examination 8:7 70:14 95:17 264:12 277:19	existed 42:21
emphasized 228:24	entity 141:21,22,25 203:23 251:20	examined 45:18	existence 185:6
employee 10:25 240:10	enumerated 224:24	examiners 177:21 179:7,9 225:23	
employees 175:21 226:12	Enzo 255:20	examples 147:16 234:21	
employment 10:25 55:25 56:7 57:4 58:5 61:10	equal 137:4 188:10		
empty 40:15,16	equally 85:5		
encompass 72:4	equation 104:20		
end 23:24 107:1 117:13 169:13 188:2 205:17 230:23 254:2,5	equipment 192:14 193:2 194:12 200:6 202:14 203:5,14,16,20, 22,23 204:1,2 205:8,18 207:4,5 212:4,6,9,10, 13,15,18 215:16 216:4, 7,11,21,22 217:4,10,15 218:3,4,5,6,13,14 252:15		
	equipment-type 177:18		

existing 184:16	extensive 48:24 76:18 149:17	facilitate 248:12,16	Faskens' 106:17
expand 117:9	extent 25:11 53:25 84:9 150:24 158:17,22 179:1 181:1 188:11 202:3 223:7 233:18 260:13 266:6 267:22	facilities 200:14 201:15 214:4 248:12	faulting 109:5
expanded 71:25	external 72:5 225:7 239:19 249:22	facility 129:23 203:25 212:22 214:8 236:14	favour 197:12,24 199:10
expect 8:8 54:3 273:19 275:8	externally 226:11 263:23	fact 14:6 17:9 20:25 21:12,22 26:25 30:18 31:6 34:12 35:17,19 38:8 41:13,22,23 43:11 46:3 54:13,14 62:13 64:4 71:9 74:17 79:19 99:14 102:6,11,22 103:14 148:10,23 150:1,2 157:21 169:24 193:12,15 213:24 219:18 248:15 250:5 259:4,11 278:5,14	feature 43:14,16
expectations 139:14 268:20 269:23 275:8	extraction 216:23	factor 223:23	February 6:18,19 8:10,16 61:2 96:1,8,22 97:1,9 101:3 119:20,25 120:13 123:3 140:21 141:2,4 142:22 143:3,4, 21,25 144:10 145:22 205:11,24 209:17
expected 30:1 32:10 202:4	extrapolate 155:24	facts 53:17 54:1,9,22 55:20 173:2 192:20 270:13 272:23 273:16	fee 127:16,25 226:11
expedited 245:13	extremely 170:4	factual 43:2 58:8 70:16,24 274:17	feel 56:19 97:13 143:13 169:22
experience 85:2 233:6		failed 254:6	Feels 165:9
experienced 171:2 240:14	F	failure 191:10	fell 173:7
expert 28:25 40:2 213:15	Face 6:7 7:12 38:15, 19,25 39:11 45:7,10 47:10 50:6,14 55:19 59:5,11 62:2,7,10 64:1 66:5,13,15,21 67:2 69:17 73:7,9,20 74:5, 13,24 75:3 87:19 88:16 89:9,15 90:2,8 91:18,24 92:2,7,14 93:6,8,15,21, 22 94:1,11,19 95:3 99:9 100:19 101:10,11,15,17 102:2 104:16 107:6 112:19 114:7,8 115:20 118:5,10 127:2,11 129:25 130:13 137:16 139:17 140:15 142:21, 23 143:16,18 144:2,5,9, 13,25 145:14 147:4 148:5,10,16 149:6 157:4,21 158:6 164:22 177:25 189:25 223:9, 11,13 232:2 251:14 259:5,20,24 260:9,18 261:2,22 263:15,19 264:7,17 265:9,15 267:12,16,22 268:6,8 272:17,23 274:19 275:16	fair 15:15 16:13 18:15 26:21 33:25 44:8 49:2, 13 81:25 84:18 87:5 100:15 104:11 136:14 139:8 142:10,20 151:13,19 153:9 157:17 174:3 192:12 221:8 222:24 228:4 230:12 241:2 243:15 260:17 261:5,11 265:21 266:9 267:15 268:4 272:15	field 177:21 179:6,9 225:23
expertise 25:9	Face's 19:24 27:5 73:24 96:1 156:13 222:3 257:25 266:6,8 267:17	fairly 26:17 51:9 105:22 129:11	figure 71:8 124:21
experts 71:8		fairness 168:16	file 10:9 63:5 193:13 194:16 207:10 259:5 260:10,11,18
expire 205:6		faith 54:18	filed 47:18 139:17 140:3,11,15,20 143:21 144:1 165:1,2 193:3 194:24,25 206:6 256:23 277:7,10
expired 134:22 135:24 137:15		faithfully 199:19,22	files 61:14
explain 63:23 128:10 236:16		falls 51:17,18	filing 140:6 256:22 257:25 278:5
explained 68:6 69:13		familiar 159:18 165:10 214:16 234:23	filings 278:3
explaining 238:25		familiarity 68:16	final 51:24 52:2 123:6, 9,13 124:12 125:13 244:14
explicit 167:5		Faskens 109:22	finalizing 213:17
explicitly 195:22 228:13			finally 7:17 10:14 20:12 37:18 81:15
exploration 233:18			finance 30:19 51:11 222:13 230:15
explored 92:14			financed 251:19
express 23:7 48:10			financial 51:14 65:20 145:15 179:13 225:21 247:16,21,23 248:1 249:2 255:8
expressed 25:15 36:14,20 81:10			
expresses 167:3			
expressing 32:2 166:14			
expression 88:9			
expressions 238:17			
extended 245:2			
extension 205:6,10 207:7			
	faced 84:16		

financials 139:1,6 255:2	foreign 80:15 84:10	funds 128:14 133:20, 25 134:9 138:12 140:20 146:12,19 150:14 172:6 180:5,16 184:15,25 185:11,19 187:1,6,11 188:11,17 211:21 225:11 229:25 248:16 255:5 268:3	180:13 187:12 226:16
financing 128:7 134:15 198:23 233:1,8	forensic 18:22 21:1 146:19,22	funny 198:7	Glassman's 52:3 180:1
find 13:16 63:6 74:12, 23 156:21 159:8,9 200:25 223:8 232:2 239:19	foreseeable 227:20	furtherance 17:10	Globalive 114:19,23 115:9
fine 22:5,11 52:9,14 55:1 56:24 57:14 101:23 110:13 116:8 118:22 122:9,20 124:8 133:10 137:21,22 141:10 168:24 171:16 225:3 252:3	forever 56:4 272:9 275:4	future 89:23 90:3 172:20 173:3 227:1,20, 23 230:6,10 248:13,17 270:4 272:24	Globe 64:8 65:5,21 72:3 80:8,11
finish 49:2 136:4,9	form 98:24 111:3	G	glowing 170:8
finished 264:18	formal 48:11	G-l-a-s-s-m-a-n 49:19	good 6:3,4 46:25 47:7, 8 62:23 120:6 136:16, 19 138:16 192:22 196:5 223:6 226:14,17,22
Firestone 14:4,9 15:3,8,11 17:14	forms 177:19	Galloro 255:20	Goodmans 50:22
firm 48:6 239:1 260:12	forward 26:21 59:14 148:11 184:22 238:4	garnered 217:11	government 84:7,20 85:2 88:3,5,8,10,13,16 89:10,25
flagging 252:1	found 29:22 157:15 190:1	gave 22:12 49:21,24 55:1,7 59:8 61:8 65:9 112:9 143:16	government's 90:2
flat 152:10	fourth 67:5 84:8 126:17 166:2 231:24 232:5	general 48:12 167:7 272:2	Gracious 255:11 256:3
flip 56:18 122:8 147:9 162:12 168:22 238:4 240:16 243:12	FP 65:13	generally 17:9 57:19 147:14 198:23 227:16	grant 206:23
float 120:4	free 56:19 97:13 143:13 202:1	generated 211:3 233:22	granted 208:2 216:2 266:17,19
flow 171:18 184:12 237:15	frequent 129:11	generating 214:9 237:14	granting 126:15
flows 129:24	frequently 30:1	Genuity 238:11,12,17	graph 151:12
focus 13:2 195:10 203:15 231:12 257:14	Friday 112:11	Georgia 256:2	gravel 233:20
focussed 61:10,16,17	front 114:3 118:2 191:20,22	gift 197:22	great 22:2
focusses 230:17 231:7	fruit 238:25	give 31:6 42:8 46:14 104:10 126:9 131:20 168:19 176:6,14 181:13,14 207:10 242:15 262:3 265:23 268:22 271:17	greatly 100:3
focussing 12:10	fulfill 216:22 225:20	Giving 60:12,13 207:13 258:11 261:22 264:13	Griffin 67:14 68:6 92:13 93:14 106:3 111:20 122:16 130:6 148:17 170:3,20 174:4 190:8 192:23 194:21,23 196:15,24 199:8 200:13 201:23 202:3 203:4 206:1,18 221:5,11 227:4 228:12 229:4,19 230:9 232:16 251:1,8 259:3,6,24 260:10 261:21,25 264:12 272:16
folder 40:15	fulfilling 17:14	Glassman 49:18,21, 24 52:10,15 53:4 63:20 64:22 169:7 170:9	Griffin's 67:12 69:13 73:12 80:4 93:10,22 103:15 104:3,8,12 105:13 107:4,18,21 110:19 111:4 112:15 114:9 139:21 144:24 145:7 148:20,23 149:10
folks 44:1	full 19:16 179:22 271:9		
follow 269:7,8,17	fulsome 156:20		
follow-up 70:11	function 249:12		
footnote 169:13 193:25 194:1 201:1,6 222:2,12	functionally 52:13		
foregoing 206:21 258:4	functioning 254:2		
	functions 225:20		
	fund 57:24 128:10 134:4,5,6,7,8 166:24 184:22 185:3,4,6,23,24 186:2 187:15 188:19,21 241:17		
	funded 211:4,21		
	funding 237:19		
	fundraising 51:12,13		

150:4 151:1 157:6,20 167:19 168:16 174:14 189:6 192:3,18 193:10 196:11 198:13 199:20, 23 202:17,23 204:15,18 207:24 227:8 234:21 250:13 251:24 256:22	hand 13:5 57:11 161:6	high-level 117:19	
gross 269:22 271:16, 23 272:5,15 273:2,20, 25 274:3,21 275:6,16	handed 34:5 252:22	higher 155:22 156:8 269:23 271:16,18	I
Grossman 20:14	handing 94:7 96:7 97:1	highlighted 161:5	i.e. 57:22 74:3 171:20 185:13 217:8 227:23
ground 47:5	handle 51:12	highlighting 252:2	IC 83:3
group 45:24 51:11 200:16 201:18 234:22 236:10 237:14 241:9 247:7 255:25 256:1 269:19	handy 34:8	Himel 8:23	idea 32:14 227:7 263:22 264:2
growth 227:1,2,22,24 229:1 230:6,10 248:13, 17 274:10	Hang 106:12	Himel's 9:23 10:24	identified 148:18 157:9 177:25 251:15
guarantee 172:1,4 179:18,19 180:11,24 181:3,8,22 182:7,8,13, 17 183:18,21,23,24 184:1,2,7,14,15,20 185:15,16,18 187:3	happen 184:23 267:13	hired 63:16,17	identify 18:10 157:4
guaranteed 180:16 182:20	happened 68:12 184:23 185:22 209:13 232:4	history 70:18	identifying 125:12 157:13
guarantees 167:6 174:6 180:19,22	happening 259:14	hit 25:13,16 31:18 32:1	identities 176:20
guess 148:8 188:13 251:4 257:10	happy 116:11 141:8 214:15	hits 25:23 28:17 29:22 30:2 31:21	identity 158:6
guest 242:19	hard 14:18 19:7 155:24	Hmm 140:22 216:15 259:10	IFRS 171:14,15,17,23
guided 148:6	harm 267:12	Hmm-hmm 116:22	illustrates 240:19
guru 87:3	harmed 266:7,11 267:23	Hockey 251:15,21 255:10	image 17:16,24 20:9
Guy 119:12	Harold 19:4,10	hogwash 274:24	images 17:3 19:13 37:16
guys 218:22	Harvard 51:6	hold 188:17 209:24 247:6	imagine 41:1
H	head 133:4	holding 192:13 231:3	imaging 18:22 21:1
H&a 19:11,12	heading 165:9 238:7	Holdings 115:9	immediately 13:6 21:13
habit 68:1	hear 75:17	holds 86:18	impact 58:4 267:17 273:24
half 239:4 254:16	heard 132:14	Homburg 66:5,7	impairment 181:21
halfway 76:12	hearing 9:25 12:5,15 157:17	home 59:23,25 60:1 146:20,23	impeded 266:7,11
Hall 175:18	hearings 31:2	Honourable 206:23 209:11 216:1	implementation 241:17
	heart 102:22	hope 208:1	implemented 91:24
	Heat 165:9	Hopkins 19:19	implicit 230:8 262:14
	heightened 175:3 181:6	horse 241:8,20 242:12 244:13 254:11	implicitly 261:21 265:3
	held 82:4,7,12 83:14 130:2 169:3 179:5 247:14 249:8 250:1 252:8,14,18 253:13,14, 15 255:4	HSBC 193:4,7 196:8, 13,21 197:4,11,21 199:3,9 200:14 201:15 219:20	implied 275:3
	helps 13:19	hundred 121:13	imply 109:7 144:22
	hesitating 54:25	hypothesis 69:13	implying 275:3
	hiatus 13:8	hypothetical 45:7 85:20 136:22	important 136:4,21 195:20,25 226:21
	hide 20:25	hypotheticals 87:12	impossible 71:21
			in-house 48:15 49:3

inaccuracies 150:25 167:20	indirectly 89:25	initially 220:18	interface 51:11,15
inaccuracy 147:18 192:23	individuals 65:6 255:23	initiated 158:15	interfere 15:9 73:21
inaccurate 147:7 150:21 174:15 250:14	inducing 119:14,16	initiation 158:24	interfered 73:25
incentive 268:2,9	industries 194:12 200:6,8 207:4,6 216:14 233:13 278:15	injunction 9:13 10:6 145:9	interim 8:25 9:12 10:5 13:23 14:7,12 15:7,13 16:24 128:13 145:10 270:19
incentives 187:13 268:6	industry 78:11 79:1,4 82:1,11,25 83:10,15,19, 25 84:3,5,11,19,24 86:2,12 87:6 89:20,24 91:16,18 113:4,16,19, 24 115:13 116:2,13 120:25 123:19,25 124:19 125:12 126:14 127:9 276:8,13,16,23	injunctive 267:5	interlocutory 145:10
include 133:11,13 178:25 200:2	industry-specific 233:15	inquiries 44:5,6 127:20 163:4	internal 41:14 179:5,9 225:12 262:20,23,24
included 12:19 27:1 45:1 46:5 64:12 84:1 112:7 115:18,19 123:14 144:6 158:18 162:17 256:6	inexact 53:11	inquiry 125:18 163:5	internally 19:8 117:8 225:8 264:3
includes 106:5 111:11 153:8	influence 267:8	insolvency 48:19,20 50:19 175:5 181:5 183:16 207:9 211:15 240:15	interpret 145:6 198:4, 8 251:11
including 35:8 51:10, 20 111:13 113:8 230:16 236:12	inform 77:14	insolvent 195:16,23	interpretation 162:18
income 171:18 214:9 227:1 233:22 271:2,15 278:19	information 17:18 18:10,11,14,16 23:9,15 24:3,24 25:6,18,24 26:6,14 29:14 43:21 44:2,17,22 47:11,15 50:6,13,18 57:22 62:7, 9,18 66:20 69:20 75:8 79:21 87:19 88:1,12 89:8,14 90:6 100:6 107:2 122:22 127:10, 11,12 143:15 144:2,6, 14,22 145:14,21 147:4 148:3,7,12,15,19 149:7, 15 150:8,18,22 151:1 152:16 156:14 158:5,12 159:13 160:18 162:19 166:20 167:16 173:22 174:25 176:23 177:20 189:11,13,25 190:19,23 191:9 192:5 193:11 194:4,21 198:12,18 199:15 205:16 210:21 212:18 220:23 221:6 223:25 237:25 245:3 248:18 251:2	institutions 278:25	interrupted 184:10
inconsistent 215:14	informed 17:9 33:24 223:12	instruct 71:1	interspersed 138:14
incorporated 14:8	initial 184:24 196:19	instructed 70:16	introduce 98:24 99:3 143:19 145:14,21
incorrect 224:1		instructing 49:15 95:23	inventory 177:21
increase 242:23		instruction 14:20 49:17	invest 74:25 75:4 231:1,2
increased 152:4 175:6		instructions 14:24 15:1 49:21 258:3 261:3	investing 74:15 186:8 207:1 227:23
incur 240:20		instrument 52:19,20, 22,25	investment 51:24 52:1,3,10 53:2,8 54:15 60:16 66:5,14,16,21 67:3,15,18 68:25 69:13 73:22 74:11 79:20 92:14 115:9 210:9 213:21,24 226:9 247:12 266:7,24 268:1,9
incurring 86:12		intellectual 115:23 158:14 159:12	investments 53:11 160:1,8 265:19 268:2
indebted 236:11		intend 108:20	investor 164:15,23
indebtedness 242:15		intended 33:8	investors 128:24 166:6 169:3 227:16 228:2 229:25 264:21 265:22,24,25 266:2
indemnity 131:21		intention 55:2 227:19	invited 93:25
independence 235:19		interest 43:10 81:11, 12 82:24,25 85:17 86:9 118:15 128:8 151:14, 18,20 152:9 153:4 156:7 166:15 171:12 172:9 173:7 184:8,11 185:17,25 210:11 211:2,13,20 221:4 223:25 224:3 238:18	invoices 46:11
independent 101:15 159:22,23 186:25 187:7		interested 81:11,16 136:8 137:16 178:7 250:12 261:2	involved 49:14 61:13 77:11 115:16 117:19,20 135:11 148:14 151:24
independently 202:7		interests 187:14	
indirect 72:4			

involvement 77:23	July 7:7,15 10:1,10,11 12:5,15 13:24 16:25 17:17 18:22 20:2,21 37:19 42:21 76:3 77:15 80:12 81:1 97:18 98:7, 23 99:6,15 118:5,13 130:15,19 141:13 153:15,18 156:5	<hr/> L <hr/>	lend 233:13,17
IP 158:18,22	jump 196:1	L-e-a-d-e-r 30:10	lender's 159:9
ipad 20:9	June 7:1 8:24 12:5,14 56:11 58:9 213:5,7	Lacavera 82:4 86:23, 24	lending 178:9,10,12 230:22 236:19 241:3,4 251:20 278:25
IPO 153:10,21 154:4 156:9 165:10 180:15 181:2 182:15 183:3,14, 15,19,21 184:24 231:11 249:3 251:23 255:2	June-july 42:21	lack 222:17	Leong 201:2,14 202:4, 5
irrelevant 12:24	Justice 8:23 9:23 10:24 14:4,8 15:3,8,11 17:14 78:4 145:11 245:8	land 177:18	Lepin 63:17 64:22
isolate 31:14,25	justified 274:2	landscape 90:6 93:8 137:11,12	lesson 109:4
isolated 270:10	<hr/> K <hr/>	language 12:9 18:8, 13	letter 20:5 94:8,25 95:19 96:8,20 97:9,13, 24 100:16 103:12,13,14 119:4 197:23 198:3,11 220:4
ISS 23:4,13,20 27:1,20 28:7 33:5,10,15,20 34:1,12 35:7,11,13,20 36:3,7,12,15,23,25 37:3,11,15 102:13 103:8 146:23,24	keeping 182:2	large 74:6 216:23	letters 198:6
issue 41:17 62:6 81:17 85:13 89:19 91:8 93:5 102:7 109:15 141:10 149:4 157:12 226:7 272:13	Keri 201:2	larger 274:12	letting 33:15
issues 33:12 35:18 36:7 37:10 92:1 103:2 156:24 264:9	Kiladze 64:8,9,24	late 60:19,20,24 93:7 156:1 196:2 277:10,13	level 232:6,9
<hr/> J <hr/>	kind 11:5 127:10,11 269:9 275:4	latest 112:5	levels 53:2
January 196:3 204:22 205:7 206:13 208:3,20 209:12 210:3 219:6,8 246:16 247:4 277:10,13	kinds 127:7 228:3	launched 163:7	leverage 273:12
Jeff 96:8	Kitimat 213:7	law 50:25 51:2,5 53:8	liable 193:7
jest 124:9	knew 59:14 92:11 157:15	lawyer 48:17,20 49:5 50:19 119:12	light 272:1,4,6,20,24 273:5,11,25 274:9 275:7
Jim 175:18	knowing 92:3,9 124:4 127:9	lawyers 135:16 218:23	likelihood 31:12,16 32:1,4
join 50:25	knowledge 16:17 18:8 21:6 31:1 50:3,10 55:18 58:15 63:7 66:6, 17 73:6 76:19 87:11,16 101:13 103:19 117:17 118:3,12 119:9 127:2, 12 129:7 131:18,25 135:3,7,21,22 143:1 160:14 163:10 166:19, 21 167:15 209:3 219:13 276:18 277:25	layperson 270:3	limitation 57:23
joining 48:18	KPMG 239:7,8,10,25 249:18,23 254:8 255:8	LDIC 166:24	limited 57:21 128:14 129:3 218:3 231:5 241:16
joint 200:9,21	Kurt 175:18	lead 17:2 144:10 215:17	limiting 113:7
Jonathan 71:3		leader 30:8 32:14	limits 241:4
Jonathan's 71:3		leading 17:23	line-by-line 107:23
Journal 165:5,14,18, 23		Leaf 67:19 68:8,12,17 69:2	lines 10:4 199:2,4
judge 11:4 145:6 263:7		learned 109:4	liquidated 240:22
judge's 12:8		leases 91:6	liquidation 240:18,19
		leave 13:16 114:3 263:7	list 27:6 28:16 173:15, 18 174:23 175:3,11 176:21 177:10,16 179:14 180:16 181:2,5, 18 182:9,15,20 183:2,6, 13,19
		leaving 59:9	listed 27:19 28:6
		led 35:22	
		Lederer 78:4 145:11	
		left 50:24 71:7 76:10,16 107:20 130:15	
		legal 48:24	

lists 174:5	LP'S 188:2	228:16 236:21 238:22 239:17 241:22 250:20 263:14 273:3,15 274:16	markup 106:7
litigation 49:7 140:20 142:5 144:17,18 175:1 265:9,15	LPA 129:1	makes 17:21 48:5 96:13 113:9 181:14,15	Martin 47:20,22
living 108:24 109:3 255:11 256:3	LPS 249:21	making 25:1 64:1 67:3 124:9 160:1 172:24 262:23	Masters 51:5
LNG 214:4	lull 139:25	Malik 166:12,18	material 49:21 165:1 173:21 174:24 259:3
loan 158:24 159:2 167:6 169:8 171:4,13 172:3,5,8 175:15 181:4, 8,13,17,21 182:1,6,13, 14 183:13,15 184:16, 20,21 185:8,10,12,17 196:13 198:20 210:12 211:15 212:1 219:19,20 231:9,17 233:22 234:25 236:21,23 241:5 249:2 250:22 251:14,15 252:13,22 254:2,16,19, 20,22,23 255:4 274:7, 11,12 278:12,19	Lumly 119:12	man's 28:20 29:9	materials 10:10 63:6 139:17 140:15 144:6 149:18 213:9 245:23 246:2 251:24
loaned 213:12 220:18	lunch 132:1	manage 129:24 182:3	math 130:21 156:12 219:22
loans 158:15 171:24 173:6,14,17 174:23 175:3 176:1 177:10,16, 25 180:14 181:1 182:2 184:22 185:5 186:17 189:25 198:24 271:16 272:24,25 278:14	LUNCHEON 132:3	managed 225:7,16 226:11	matter 54:13,18,19 70:16,24 71:9 78:4 93:1 102:7 125:14 135:11 259:9
long 116:7 172:15	<hr/> M <hr/>	management 51:10 133:16 163:1 166:9,13 167:9 177:20 225:7,10, 12,13,23 226:2,6,12,13, 21	matters 18:9 217:1 240:15
long-distance 124:24	machinery 216:4,10, 21 218:3,5,13	manager 165:9 166:13,24 268:1	maximize 268:2,9
longer 36:13 61:21 62:17,21 99:22 136:15 203:15	Macri 255:20	managing 49:7	meaning 58:3 62:20 71:10 83:13 115:3
looked 29:21 31:10, 11,15 35:15 116:6 149:1 170:23 191:4 223:2 246:11	made 16:14 41:12 45:9 46:6 52:1 63:25 66:5, 13,15,21 74:20 75:4 101:15,25 102:12 103:7,11 110:2 114:11 116:2 119:7 129:5,14, 25 142:21 143:3,18 145:13 147:18 163:3 180:13 186:10 213:24 228:17 231:10,14,15 234:25 239:1 241:8 246:15 261:25 267:16 275:16 278:6,7,14	manner 199:19	means 22:11,14 57:7 81:23 83:6 114:9 147:23 152:3 194:16 200:21 232:9 236:17 241:25 270:3
loss 171:4,7 172:3	Mail 64:8 65:5,21 72:3 80:9,12	March 28:11,12 62:10 77:5 94:8 95:21 138:18, 23 139:2,20,22 140:8, 10 141:14 152:7,9,20 153:11 163:6 168:17 176:3 192:4 204:16,19, 22 207:16,17,21 208:12,21 210:4 221:5 257:11,14,20 258:9,20 268:24,25 277:22	meant 135:12 182:2 243:24
losses 172:5 230:3	main 214:3	Marine 213:15	mechanics 51:12
lost 243:5 254:20,22	maintain 150:21	mark 47:19 95:17 96:17 97:7 160:25 165:12,22 207:18 270:19	media 63:5
lot 14:22 31:15 54:24 120:3 137:6 167:5 243:5	maintained 39:15 42:16 43:4 79:16	marked 106:18 110:20 162:13	meet 139:9 171:12
low 32:11	majority 151:14 216:10	market 73:25 81:1 159:22 216:3 227:22 233:6 244:20,23 245:7 266:9 267:18 272:4	meeting 268:19
lower 266:8 269:24 271:19	make 23:20 27:18 43:5 44:4,6,21 50:17 51:24 53:1 60:11 64:20,21 70:24 73:21 74:11 83:23 89:5 111:9 112:24 120:9 125:17 126:16 127:20 129:18, 20 136:12 140:11 142:6 153:13 155:13 157:17 160:3,7 180:19 186:16 187:1 195:4 200:1 208:2 210:17 214:13 217:21 218:19 220:2,11 221:2 224:24 226:3	marketed 160:15	meetings 51:14
		marketplace 82:16	members 63:5 84:20
		markets 146:6	memo 68:13 69:11
			memorandum 245:3
			memory 141:6 203:24
			mention 141:11 278:14
			mentioned 26:24 67:9 231:25
			merit 257:23
			message 40:19 70:17

messages 40:24 42:1 71:5,10,18	209:1 210:16 211:1,7, 19,24 214:6,12 218:1,8, 11,16 219:1 221:24 229:6 234:17 237:12 245:20 246:4 248:2,6, 21 250:11 252:3,5 255:18 256:9,12,15 257:19 261:4,8,14,16, 19 262:13,17 263:5 265:1 268:16 271:3 276:7 277:3,16 278:11 279:4	misunderstood 23:13	56:22 57:10 64:13 94:10,20 95:4 96:1 102:8,23 104:4 107:25 109:10 140:21,24 143:4,9 145:9,17 157:11,25 258:1 266:17 267:1,4
Messenger 40:24	mind 22:24 24:19 53:24 113:21 126:16 149:11 237:25	Mitchell 96:9,21 97:1, 10	move 26:21 65:25 70:13 76:24 184:6
met 81:8 139:14 180:23	minds 13:12	mixture 272:1	moves 269:25
methodology 270:6	mine 115:23 180:2 192:14 197:14 212:16, 19,21 215:1,3,5 217:6 233:19	MNPI 173:21	moving 10:9 70:6 97:25
mid-october 144:25	Ming 201:2	Mobile 62:3 76:10,16 81:25 82:5,12 120:19	Moyse 6:7 7:12 13:5 17:24 20:13 35:12 38:8, 14,18,24 39:10,22 43:21 45:9 47:9 50:5,12 55:1 59:1,8 62:7,9 68:13 75:22 78:12,16 87:19 89:8,15 90:7 93:8 97:19,21 98:7,9,14,19 99:1 101:12,18 102:6 103:10 111:13 112:6 116:20 117:18 118:4 121:5,23 122:14,15 124:3 126:22 130:13 141:13,15,20 143:15 144:2 146:10 156:15 158:5 276:18
middle 222:16	minimum 34:11	Mobile's 80:15	Moyse's 17:3 18:21 19:20 20:9,24 21:11 23:25 24:1 25:4,11 27:1 29:18 31:7 33:15,19 35:9,17 37:16 38:15 41:21 43:9 44:11,20 45:6 55:18 57:12,16 61:10 69:11 70:17 76:14 98:22
million 80:19,25 197:6,8,11,16,20 199:1, 9 203:13 213:20,24 219:7,13,17,18,19,20 220:16 221:7 236:12,13 239:2 245:21 252:13 254:15	mining 192:14	Mobilicity 79:5	multiple 200:21 215:21 269:25
Milne-smith 8:8 46:22,24 47:21 48:1 56:14,24 57:6,13,17 58:1 63:18,25 64:7,10, 15,25 65:3,10,14,23,24 68:5 70:5,10 71:22 72:10,12 75:15,19,21 77:17,20 78:3,7 80:7 88:24 89:3 90:15 95:16, 20,22 96:17,24 97:7,11 98:16 99:4 100:21,24 101:8 102:9,11,16,20, 24 103:1,3 104:9 107:24 108:5,8,10,16 109:1 110:23 111:1,8, 15,19,22,25 112:3,4 115:7,11 120:2,5 122:11,20 123:12 124:16 125:6,9,21 126:4,11 127:23 128:5 131:14 132:5 137:22,24 140:7,13 141:1,3,8,18 142:9,16,19 143:7,11 146:2 151:7,8 152:2,13 154:24 155:4,10 156:3 157:1,23 158:3 161:7, 16 162:1,10,11 163:15, 17 164:4,10 165:21 166:1 168:14,24 169:1 173:23 174:20 175:8,24 176:8,16,19 177:1,8,14, 23 178:2,23 179:3,12, 16,24 183:1,10 187:23 189:23 190:6,16 191:7 193:21 194:5 199:24 200:3 204:3 206:3,8,14 207:18,22 208:10,22	minute 64:18 128:9	model 54:9,10 160:3	multiplier 249:14,15
	misappropriated 47:10	modelled 141:21,24, 25	Musters 20:9 47:19, 20,22
	misconstruing 225:15	modelled 141:21,24, 25	
	misinterpreting 33:11	moment 8:19 15:23 17:22 27:13 37:25 38:3 57:4 88:23 147:21 181:12 244:16	
	misleading 170:19 174:18	Monday 20:15,20,21 258:10	
	misrepresentation 188:25	money 146:6 176:21 178:10 243:5 245:15 253:3 265:23	
	misrepresentations 167:20,24	monitor 69:6 193:18 194:3 196:23 206:21 207:14,15 209:20 214:17 215:18 220:6,9 274:8	
	missing 57:20 112:24 113:1	monitor's 190:4 204:21 207:20 208:5,8 210:1 214:15 215:13 217:13,23 277:6,10 278:1	
	misspoke 154:2	monitoring 233:24 278:22	
	misstated 260:14	month 93:1	
	misstatements 164:1 259:4,21	months 55:18 58:14 60:19 61:9 183:15	
	mistakenly 23:9,16	Morawetz 245:9	
	misunderstanding 106:21	morning 6:3,4 46:25 47:5,7 70:7,12 72:2 118:7 132:7 134:11 270:20,22	
		motion 6:18 7:18 8:17, 24 9:12,25 10:5 11:8 13:23 16:19 27:2 34:25 35:9,11 37:20 47:9	
			named 65:6
			names 28:25 31:16 32:7,10 65:9 148:14 149:9 156:18,19,22,23 157:3,4,22 176:7

215:21	nonpublic 148:24 149:15 156:14 157:8 158:4 173:22 174:25 190:22 191:8 251:2	obligation 113:11 118:24	operate 237:19
national 52:19,25 63:9 65:5 72:3 126:17	nonvoting 131:3	obligations 93:25 94:21 95:5 113:8 237:16	operating 48:3 61:11, 18 212:22 225:16
nature 24:2,23 26:5 179:18	normal 30:15 237:20	observation 250:20, 22,25	operation 212:16,25 213:16 217:6
NDA 94:22 95:6	Nortel 51:21	observations 250:24	operations 51:10
necessarily 20:19 54:18 74:18 175:5 273:10	notation 275:5	obtain 16:7,15 258:2	opinion 54:19
needed 83:3 88:6 90:21 212:10 251:2	note 19:3 33:14 34:15 137:19 138:7,21 220:3 253:16 270:20,22	obtained 11:24 13:11 16:2 122:24	opportunities 57:23 60:16 61:25
negative 170:14 176:1 177:3 267:17	notice 55:1 59:8 60:2, 21 108:3 112:9 134:12 140:21,24 143:4	occasions 184:23 277:1	opportunity 8:2 61:4, 16,21 62:1 93:7 238:20 240:1
negotiate 118:14 120:18	notwithstanding 30:7	occupied 146:13	oppose 94:1,19 95:3
negotiated 96:4 101:4	November 60:20,24 144:14 151:10 169:4 176:9 243:9 246:20	occur 196:17	opposed 108:8,9 121:17 262:24
negotiating 93:24	NSINV 66:11	occurred 139:5 154:6 155:24 205:15,25	opposing 73:22
negotiation 100:11 108:15	nuance 57:19 116:9 198:22 222:10	occurs 182:17	optimistic 170:24
negotiations 97:21 99:19,22 101:2 103:21 117:14 134:21 135:2	nuanced 54:8	October 145:11 146:7 151:9 153:3 154:8,15 155:2,7,8,16,21 156:6 216:19 235:24 236:10 248:9	order 12:9 13:8 14:8 15:3,7,14,18 16:1,9,16, 25 17:10,14 64:23 90:21 118:5 133:17 148:4 193:3 206:25 207:3,7 216:2 241:16 246:15,19 260:1 267:15 278:8
nervous 119:22	nuances 53:14 54:24	offer 101:15,25 102:12 103:7,10,18 130:1,5 214:20 238:22 239:1 258:25 260:12	orders 206:24 207:6, 11 278:7
net 197:16 203:13 204:9 217:11 232:18, 19,23 271:2,15	number 31:12 32:6 52:21 111:13 133:7,9, 21 134:2 164:1 213:9 225:6 262:22 272:5	offering 258:10	original 57:10 119:18, 19 145:9 178:13 180:24 182:21,22 185:15,16 201:3,9 236:21 248:8 251:18 269:18
network 121:20 138:22	numbered 20:10 236:8 237:8	offers 244:9	originally 183:14
newly 180:14	numbers 32:11 46:12 217:19 270:11	office 51:11 59:22	originated 180:14 183:20 185:5
News 138:22	numerous 30:18 98:19	officer 48:3 52:3,10 63:17,20 163:8 225:17, 21 235:20	originators 225:22
Newton 49:17,18 52:2 63:15,225:24 226:8	nuts 108:3	offices 20:14	OSC 259:8,12
night 79:11 97:17 98:1, 4,11		official 52:13	ot 268:9
non-compete 11:1 56:8 58:10 60:22	<hr/> O <hr/>	Ogilvy 50:21	outcome 204:5 210:9 267:21
non-performing 171:23	oath 47:4	omitted 23:9,16 123:5	outlined 90:20
non-voting 82:7	obfuscation 170:2	ongoing 89:18 91:8 186:15,17	outpace 274:10
nondisclosure 94:14,21 95:5	objected 21:4 33:15	online 65:12 165:14, 15	outstanding 197:5
nonperforming 169:9	objecting 21:11	open 12:17	
	objection 256:25	opened 263:10,15	

<p>outstandings 271:18</p> <p>over-answer 84:6</p> <p>overlap 70:1 184:17, 19</p> <p>overvalued 179:8</p> <p>owed 176:21 218:13 245:11</p> <p>owes 242:15</p> <p>owing 185:1 219:7 220:23 221:7</p> <p>owned 61:23 192:14 197:14 216:21 218:6,7</p> <p>owner 80:15 86:3</p> <p>ownership 82:24 84:10 130:2</p> <p>owns 86:22</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m. 279:6</p> <p>Pacific 256:2</p> <p>package 177:19</p> <p>pages 10:19 11:7 122:19 262:22</p> <p>paid 82:18 86:9 160:4, 5 172:1 186:1 211:13 253:3,6,7</p> <p>paint 198:15</p> <p>painted 170:23</p> <p>pants 209:4</p> <p>paper 123:7,10,14 124:12 125:13 242:3</p> <p>paragraph 7:10 8:18, 22 13:15,22 16:22 17:20 18:6 19:4,15 20:10,13 22:8,21,24,25 23:7,12,21,24 27:9,19, 20,22,23 28:3,6 32:22 33:2,14 34:14,16 38:5, 7,13 45:8 56:10,13,15, 20 58:8,13 61:3 76:8, 12,13 89:2 90:10 94:9, 14,24 96:11 100:13,14 106:4 120:8 122:3,10, 12,21 123:18,22,23</p>	<p>126:12 137:20,25 138:3 139:16 143:12 162:16 163:12 164:12,18 166:3,17,23,25 167:1 168:18 169:2,6 170:3, 13,15,23 173:10,12 174:3 179:17,22,25 189:3 192:1,8,10,12,18, 19 193:1,11,17 196:6, 11,24 198:19 199:6 200:4,13 201:11,13,14 202:13,16 203:2,6 209:6 211:10 215:23 216:5 217:22 219:2 222:1,15,16 224:16,22, 23 227:5,11 229:23 237:8 238:16,24 240:17,25 241:2,12 243:8 246:18 257:12,22 259:18,23 260:5 261:9, 13,14 262:15 265:3,4</p> <p>paragraphs 17:15,22 18:25 20:10 33:10 36:2 147:22 168:12 173:9 174:1,4,19,21,24 199:18 204:11,13</p> <p>parallel 134:5,6</p> <p>part 36:18 38:18 39:10 62:6 85:17 91:14 117:24 118:5 130:25 131:15,19 177:19 183:15 184:19 187:9 195:15 207:12 231:20 239:11 241:11 249:23 251:18 253:1 255:25 269:18 278:4</p> <p>participants 65:7</p> <p>participate 51:13 85:7 185:5</p> <p>participation 180:8 184:16,21,24 185:8,12, 14,20,23,25 186:3,5,13, 20 187:2</p> <p>parties 11:9 12:18 14:4,7,11 17:9 81:16 85:18 98:25 113:11,14 114:13,17 119:13 120:21 238:13,19 244:6 260:24,25 261:23 265:4</p> <p>parties' 8:23</p> <p>partition 146:13</p>	<p>Partner 275:6</p> <p>partners 52:1 129:3 132:12 269:3,17 270:20,23</p> <p>partnership 128:15</p> <p>parts 205:21</p> <p>party 10:9,11 83:12 85:18 109:15,24 115:20 117:7,22 119:13,14 135:21 235:12 238:19 239:20</p> <p>passage 168:17</p> <p>passages 161:11,14</p> <p>passed 89:15 238:20 240:1</p> <p>passing 90:7</p> <p>passive 73:7</p> <p>patience 268:18</p> <p>pause 80:16</p> <p>pay 171:11 172:9,17 173:1,3 181:21,23 197:25 226:25 227:19 229:13,20,23 232:20 239:20 242:18 252:20 254:14</p> <p>paydowns 211:15</p> <p>paying 51:20 172:11 228:15 230:9 254:15</p> <p>payments 171:12 173:7</p> <p>payout 230:1</p> <p>peak 154:7,9,14 155:17,22 156:4,6</p> <p>pen 219:25</p> <p>people 41:4,10,14 53:1 54:14 111:13 125:18 146:18 159:15 202:1 225:20,23 226:12 244:24 249:21 264:16 265:22 271:25</p> <p>peoples 240:14</p> <p>percent 121:13 156:8 181:7,18 182:18 188:3, 7 230:1 232:14,18,19 252:12 273:21</p>	<p>perception 266:8</p> <p>Perfect 34:19</p> <p>perfectly 33:25</p> <p>performed 238:19</p> <p>performing 61:11,17 171:13 172:8 173:4,6 240:1 254:19</p> <p>period 60:2,21,23 77:23 108:14,15 120:16 129:8 134:12 151:15 170:9 182:10 197:9 205:6,11,17 241:16 245:2 254:3 255:2</p> <p>periodically 186:16</p> <p>periphery 17:7</p> <p>perpetuate 272:9</p> <p>perpetuity 181:3,8,19 182:18,20</p> <p>person 29:19 49:14 52:15 53:4 108:23 254:14</p> <p>personal 43:9 189:4 232:8,9,17</p> <p>personally 45:22 214:16</p> <p>perspective 81:17 222:18 235:16 244:1</p> <p>pertain 8:9 38:5</p> <p>petered 151:19 152:1</p> <p>petitioner's 206:23</p> <p>Phelps 235:8,12 240:18 243:9,21 254:11</p> <p>phenomenon 274:23</p> <p>phone 45:1,4,9,16,17, 18 46:6,10,13 70:18,20 71:12,14 72:15 124:24</p> <p>phrase 171:3</p> <p>pick 152:15</p> <p>picking 201:23</p> <p>piece 65:12 74:4 79:21 149:14 186:7</p> <p>pieces 147:3 203:14</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Pink 166:23 167:3,13	politics 30:21	pre-construction 213:18	preserved 41:24
pit 233:19	pool 183:15 184:20,22	pre-socialize 84:3	president 225:16
place 12:4,14 13:23 38:2 78:15 124:19 125:2 138:22 176:10 196:16 207:10 213:2 233:25 276:17,24 278:22	portfolio 51:16 166:12 171:4,5 182:2, 21,22 184:17 225:25 226:1 233:22,24 253:2, 4 278:19,22	preamble 113:9 114:12 217:25	press 72:6,7
plaintiff- compromising 194:11	portion 187:16 273:1 274:12	precedes 109:19	pressure 14:22
plaintiffs 11:13	portray 170:17,18	preceding 33:10 36:2	pretty 31:19 167:9 220:21
plan 21:5,11 67:18 68:8,17	portrayal 170:5	precise 101:21 128:1	prevent 267:5
planned 87:24	posited 276:16	precisely 33:24 92:24 156:17	previous 78:23 132:10,15 178:24 246:10
planning 59:14 216:24	position 23:23 43:3 64:2 68:20 73:6,10 74:3,6,7,13,24 75:4 84:23 87:18 88:11 92:3 102:19 107:25 108:21 109:8 110:15 138:7,17 139:4 145:1 152:5,21, 24 157:3 159:25 160:6 196:7 211:9 259:2 260:15,18 262:24 263:10,15 265:9,14,22	precluded 36:15	previously 30:7 35:18
plans 55:19 58:15 90:19	positions 230:16	predates 77:23	price 73:25 79:24 80:19,25 151:10,15,17 153:2 154:4,16,17 155:16 156:8,9 187:13 269:25 270:4
play 99:6,7 119:12 225:24	positive 170:4	predicate 103:5,7	primarily 7:10 90:18
playing 267:16	possession 11:20 23:25 24:1	predicted 139:9 272:17,23 273:8	principal 49:9,14 95:24 171:11 172:10 181:19 184:8 188:3 211:2,13,20 221:2,3
pleading 119:15,17	possibility 223:19,20	predicting 274:2	principal/interest 227:25
pleadings 278:6	Post 63:9 65:5,20 72:4	prediction 273:9	principals 187:11 255:19
point 6:18 16:13 32:13 40:18 44:7 49:2 58:8 69:11 71:7 76:25 89:6 94:5 115:23 116:1,10 120:20 125:22 131:6 136:14 138:11 147:3 148:2,23 153:17 155:12 172:19 186:4 205:3 224:15 225:4,6 226:24 229:4 230:14 231:24 232:5 236:8 242:25 261:3,12 264:5 268:18 270:12 274:5,17	post-tax 232:15	predictions 275:16	principles 54:1 182:12 185:16
pointed 148:10 232:20 234:19 272:4	posted 278:1,4	prefer 138:12	prior 155:21 255:22 276:25 277:1
pointing 150:25 152:11	potential 79:25 83:19 84:16 120:19 166:7,14	preferred 188:4	private 50:24 239:1
points 46:10 70:12 132:6 224:24	potentially 23:9,25 33:10	preliminaries 47:1	probe 36:25
policies 42:14,18,20 233:25 278:22	power 11:19	premise 241:11	procedures 233:25 278:22
policy 42:25	Powerpoint 78:11,25 79:12 88:20 90:18 126:24 262:15	premium 250:1	proceeding 6:11 7:1, 24 143:19 149:4 277:7 278:2
	practice 50:24 158:13 249:19	preparation 262:15	proceedings 63:13 118:23 181:5 211:16
	practiced 50:21	prepare 262:22	proceeds 197:16 203:14 216:6 217:11 259:5
	pre-approval 84:24 85:1	prepared 31:9 78:21 124:14 136:13 236:21 237:1 240:18 241:14	process 17:2,16,23 18:20 19:1 37:1 171:21 196:20 201:10 204:9

quotes 76:13 166:12, 23 169:2 170:4	ready 65:25 129:21	RECESS 46:23 70:8 132:3 158:1 234:15 268:14	reduce 273:10
quoting 169:7	real 103:5,18	recipient 46:13	reduced 100:4 138:8, 18 269:22
R	realization 171:21 175:5 203:13 230:24	recitals 115:3,4	reducing 139:4 152:21
R/f 173:19 176:18,25 177:7,12 178:1 179:2, 15 210:22 211:6 245:25 248:20	realized 171:20 181:9, 20,22 188:6 216:6 247:11	recognize 7:5 171:22 172:3,18 201:7 269:3, 14	reduction 84:9 152:23 273:1
raise 38:13 41:16	reason 23:15 43:17 70:25 92:18,21,22 93:12,17,19 100:10 105:16 173:25 207:9 224:11 226:2,16 268:5	recognized 29:9 171:7 227:4	refer 19:16 45:6 61:3 114:6 132:15 144:14 171:15 196:15 243:25 247:21
raised 35:18 36:2,15 37:11 103:2 109:15 126:25	reasonable 157:19	recollection 14:17 17:11 28:14 68:22 77:3, 7 91:3	reference 23:21 27:8, 18,22 28:3 29:19 34:8 41:12 59:3 64:11 78:10 80:17 98:11 193:20 197:7 203:17 217:21 223:16
raising 91:18 134:9 142:23 146:6	reasons 25:4 274:6	recollections 142:10	referenced 97:23 98:13 264:16
ran 214:17	recall 13:7,13 14:2,21 17:4,5 23:18,22 24:15, 16,17 33:22,23 37:7 41:18 42:10 60:9,12 67:19 68:9 76:5 78:19 91:14 92:15,24 96:5 119:11 123:4 130:24 133:3 139:11,13,24 140:3 149:14,20 176:11 212:10 250:19 254:4,21 255:14 270:15,16 276:6,15 277:2,9,14 278:10	recommends 206:22	references 232:15
range 31:20 151:18	recalled 176:13	record 6:17,18 7:18 8:13,17 11:8 13:19,20 16:23 22:4,9,10,13 26:25 27:2,7,10,11 29:1,3 30:7 34:17,22,25 35:4,9,11 37:20 45:17 52:24 56:17,22 57:10, 12,16 60:12 62:14 63:22 64:13 72:14 88:22,25 94:10 98:24 99:3 100:25 104:4,20 105:7 106:24 108:4 110:14 111:6,7 112:16 114:1 115:2 140:4,6,11, 12 141:12 143:9 163:14,16 164:23,25 168:18 173:25 189:14 190:13,15 191:2,11 192:5 205:5 206:5,17 214:14 218:9 222:1 235:5 243:13 245:19 246:19 257:6,8,25 258:1 259:6,25 261:6 272:23 273:16,17 278:4	referred 28:8 52:9 77:18,23 123:3 124:12 134:18 139:16 194:6 203:21 206:19 222:6 240:9 268:19 274:22,23
rate 210:11,14	recalling 94:3	recorded 46:11	referring 20:20 43:5,9 111:23,25 113:4 122:22 123:15 143:6 155:21 173:6 179:21 197:17 203:6,20 218:5 227:15 232:16 262:8
rates 91:1	receivable 271:17	records 45:9,18 46:6, 10 71:12,15 72:15,16, 24 79:15 124:18,24	refers 94:10,14 123:6, 18 173:15 179:17 194:10 196:12 201:2 202:17 203:5 217:24 239:7
ratio 230:1	receive 46:4 231:1	red 108:6	refinance 81:13
rational 181:13,14, 25	received 17:18 39:23 43:6 46:6 79:11 99:2 238:17 252:12	redact 24:10	reflect 124:18 269:24
re-exam 276:4	receiver 235:10,13,18 243:10 244:19 245:14 247:2 248:8	redacted 24:13 26:25 27:2 28:24 30:8,25 34:17	refresh 265:6
RE-EXAMINATION 276:5	receiver's 246:7,11 248:25	regard 95:9 119:8	refusal 97:18 98:4,5 176:17
re-focussed 216:25	receivership 241:19 253:23	register 25:13,22	
re-investing 230:10	receives 45:14,20		
reach 54:14	receiving 120:24 173:7		
reached 25:21	recent 56:22 221:6		
reaction 23:3 84:13			
read 8:19,21 14:17 15:20,23,24 17:22 22:25 27:7 30:6 56:19 57:20 87:17 89:1 113:9 116:6 132:25 138:4 147:21 149:10 153:16 165:20 166:16 180:17 187:24 216:16 218:6 224:25 274:4			
reading 149:13,19 241:24 257:18			
reads 10:3 11:16 95:2			

registered 28:17 52:16	19 267:5	262:9	required 86:15 129:1 131:22 213:21 229:25 245:5
registration 158:15, 23	relies 278:19	replying 122:15	reread 12:7
registrations 159:12	relieve 94:20 95:4	report 23:4,10,16 27:1, 20 28:7 33:5 34:2,12, 16,22 35:7,11,23 36:4, 23 37:4,12 149:1 160:21,23,24 161:2 163:18 164:2,22 190:2, 7,23 193:18 194:2 195:2,23,25 196:23 198:13 204:21 207:14, 15,20 208:5 209:2,14, 17,21 215:23 217:13, 23,25 219:6,9 221:15 223:2,8 235:7 238:11 243:8 246:11 248:8 250:19 262:18 264:6,18 269:2 270:10,16 272:18 275:11,15 277:7,10,16, 18	research 145:4 148:5 156:19,20 159:22,24 160:4,5,8 223:22 234:21 250:13 261:23 263:2,4,16
regular 17:1 18:25 272:7,21	religiously 269:9	Reporter 241:21	resemblance 223:9
regulatory 81:16,23 85:9,13 87:3,21,25 90:20,24 91:13,25 92:3 96:5 101:5 116:13,21 117:1 118:11 120:21,24 121:4 123:14 126:15,18 130:23 131:17,22	reluctant 60:7	reporting 249:20,21	reserves 171:8
reinvesting 230:6	rely 106:1 177:19 179:10 233:22	reports 138:19 190:4 202:8,9 208:8 209:20 210:1 214:15 215:13 269:7,13,15 278:6	residual 36:5,10,19
reinvests 226:25	relying 25:8 157:25 196:24 202:3	represent 74:3	resign 55:2
relate 140:5 180:11 278:7	remain 216:11	representation 131:21	resignation 75:24 76:17
related 87:21 89:9 130:1 187:9 193:7 197:14 214:23	remaining 82:8 173:9 174:19,21,24 204:13 215:10	representative 52:17	resolve 36:24
related-party 187:10	remains 169:24	representatives 123:19,25	resource 233:17 168:2,5
relates 62:3 158:6 205:18	remember 9:5 24:10 42:7 63:16 71:3 99:9 112:11 132:22 138:15 139:10 176:2,3,5 210:14 239:9 246:15 260:22 269:16 271:8 272:13	represented 9:3 199:22	Respect 11:18 12:24 29:14 42:17 45:20 46:4 68:20 70:14,18 78:25 79:1,8 91:25 129:19 141:12 142:21 148:24 215:16 250:13 254:8 258:3 261:24
relating 89:15 90:8 96:3,5,14,20 98:15,21 100:11 101:5 102:5,6 139:18 142:15 158:9 179:7 212:25	reminder 60:2	reproduced 19:16 199:19	respectfully 206:22
relation 37:15 278:1, 10	remit 51:18	reputation 223:22	respective 205:12
relationship 23:13 33:11 175:7 255:22	remove 39:19	represents 205:17	respects 201:16,20
release 139:5 269:15	removed 40:5	request 96:13,19 98:13 101:1 178:24 206:24	respond 63:24 142:7
released 139:1	Renault 50:22	requested 97:15 144:13	responded 35:19
releasing 163:6	renewal 182:10,16 183:7,9,11	requests 20:8	responding 10:11 34:25 35:9,11 57:12,16 64:13 94:10 144:5 258:1
relevance 100:21	renewed 182:12	require 13:4 86:25 216:20 218:12	response 7:11 21:15, 22 36:18 42:20 95:10 96:25 103:17 163:9,20 259:16
relevancy 100:18	repaid 181:8 211:3,20		responses 163:2
relevant 11:18 13:2 47:15 63:24 69:12,23 73:3 78:9 100:14,16 168:17	repayment 180:6 185:1 186:12		responsibilities 51:8
relied 194:21 202:7,9	repeat 15:25 25:25 86:7 100:25		responsibility 200:9, 22
relief 8:25 13:23 15:7 16:2,8,15,19,25 266:16,	replete 167:19		
	replicate 149:22,23		
	reply 7:7,15 90:11 104:2,22 107:15 111:20 121:6 122:2,13 137:19 147:2 148:1 151:5 180:3 191:23 192:8 193:1 196:6 224:15 234:10,20 256:4,10,11 258:19 260:1,11 261:10		

responsive 24:1	reviewing 21:20	rules 47:5	seal 98:24 260:1,10,12, 19 261:6
rest 216:16,17	reviews 61:11,18, 146:20 187:5	run 54:9 153:15 243:20,21 254:6,11	sealing 259:25
restate 106:23	revolving 236:14	running 214:9	search 23:19 24:2,7, 16,17,19,23 25:12 26:4, 12,24 27:6,9,18 28:3,8, 14 30:25 31:10 32:4 70:17 71:1,9,14 72:15, 20,24 232:2
restatements 255:7	rewriting 58:19	S	searches 73:1 149:22 159:8
restating 255:1	ribbon 109:22	safe 59:13	searching 159:16
restrict 42:20	right-hand 153:1	safer 198:24	second-last 166:23
restructure 193:4 217:4	rights 128:25 184:16 185:4	sake 52:23 184:18 232:15	Second-to-last 167:1
restructured 248:24	Riley 6:3,5 8:16 9:23 13:22 15:7,17 16:24 17:21 20:18 22:7 23:3 27:17 29:9 32:13 33:3, 19 35:6 38:8,17 46:18, 25 48:2 65:17 66:1 70:11 76:2 79:18 95:23 99:7 101:9 102:15 103:20 109:5 128:6 132:6 152:12 155:20 211:8 234:18 262:5 265:8 268:17 276:6	sale 81:12 118:15 120:19 202:14 203:5, 10,14 206:25 207:3 212:7 217:10 218:2 243:16,19,20,21 245:4, 8 247:14 249:8 252:9, 14 253:13,14,15 254:5	section 111:5 113:3,8
restructuring 195:9 196:1 200:5 204:6 205:21 217:1 241:18 242:23 248:13,16	Riley's 44:16 77:15 98:18 101:3 110:21 111:3,20 179:22	sales 203:12,16,20 213:18 214:18 215:15 216:7 241:20	secured 196:9 200:15,20 201:16 230:18 231:7,12
result 54:11 204:9 230:22 231:2 259:13 266:23 269:22 275:7	risk 81:17,23 83:18,24 84:15 85:3,5,9,13 86:12 87:25 88:3 116:13 120:22 173:14 174:5 176:1 269:24	Salman 166:12	securing 212:1
resulting 273:1	road 70:23 182:11	sample 66:25	Securities 52:16,24
results 238:8 239:8 244:6 271:6 275:22	roaming 91:1	samples 62:11 66:4,8, 11	security 178:8 197:4
RESUME 268:15	Rocco 95:10,15 257:21	Sandhill 193:6,12 194:13,16,18,24,25 195:14,23 199:22 200:8 201:18 203:12 207:1,2 209:9 213:9,11 214:8, 23 215:11 216:22	seek 12:19 16:7,11,18 93:25 205:10 261:3
RESUMING 70:9 132:4 158:2 234:16	rocket 151:24	satisfied 172:16 245:9 255:8	seeking 9:11 28:5 46:3 267:2,4 276:13,24
retail 91:12 121:18	ROE 186:6	Saturday 55:11,12	seeks 10:5 205:5
retained 19:12 40:6	role 48:12 49:7 58:3 132:7 267:16	Save 199:21	selective 174:14
retention 42:14,18,25	roles 225:24	scale 274:8	sell 85:17 182:1 186:2 216:4
retrieve 71:4 101:11	Rona 66:25	schedule 8:24	seller 114:13,22,23 115:2,9,21
retrieved 101:17	room 241:23	science 53:12 151:24	selling 79:20 85:21 156:14 185:19
return 107:25 109:9 186:4,7 188:4,7 229:25 232:12,19,21 247:18 272:12	roughly 75:23 130:19 140:10 156:8	scoop 61:22	sender 46:13
returned 59:21,22	Royal 255:25 256:1	scooped 62:2	sending 117:4 259:7
returning 38:9	rule 33:21	scooping 61:4	sends 116:14
returns 242:23 268:2 273:11		scope 71:25 132:8	senior 48:6 230:18 231:7,12
revenue 271:13,19		screen 151:22	sense 17:21 54:11 84:21 113:9 136:12 175:5 181:15 263:14
review 7:23 69:15,16, 21 70:4 97:13 101:16 103:8 116:11 143:13 146:25 262:23 271:12 278:13			sensitive 100:6
reviewed 7:25 24:7 67:12 249:17,23			

sentence 94:17,24 216:16,17 227:11 261:20	Shawn 63:17	sir 104:11,19 105:11 115:12 263:6,9 274:16	speak 63:8 278:5
separate 43:18 114:24 134:16 191:13 203:9	sheet 231:13 240:1,17	situate 243:16 256:19 277:24	specialty 222:13
separates 195:14	sheets 238:18	situation 182:5 230:24	specifically 34:13 78:25 102:13 104:3 222:2 250:3
September 99:11 156:2	Sherwood 251:15,17, 21 252:15 255:10	six-month 56:2 60:23	specificity 149:24
September/october 154:19	short 138:7,17 139:4 145:1 151:6,14,18,19 152:4,9,21,23 153:3 156:7,13 262:25 263:3, 10,15	skip 47:1	specifies 148:17
sequence 68:15	shortfall 240:20	slight 271:22	Spectrum 89:18,21, 23 90:3 91:9,10,11 121:14
series 23:19	shorting 154:6	slightly 155:22	speculation 38:18,23 39:9
serve 10:9	shortly 79:13 133:1 238:20	slip 240:17	spend 244:15
server 39:15,20 40:5 44:12	show 6:14 25:3 29:17 31:7,13 32:4,15 122:18 140:23 157:9 160:23 253:16 273:9	slip-sheeted 65:21	spent 84:18
servers 43:4 101:12	showed 31:14	slowly 180:18	spoke 41:13 63:12,20 64:22 65:4
service 237:15	showing 31:17 32:5, 6,10 35:7 77:11	small 153:8 218:13	spoken 63:10,15 88:20
services 225:12 226:2,7	shown 31:16 107:20	smaller 273:1	Sports 30:21
servicing 94:10	shows 151:9	smarter 88:7 218:23	spot 109:6 192:6
set 18:9 31:25 33:3,9 34:14 43:13,21 47:5 54:1,9 80:25 98:6 100:12 147:15 172:2 186:12 205:6 259:1	sic 271:9	Smarty 209:3	staff 133:13
sets 20:4	side 88:10,13,17 89:10 104:20 153:1 224:18	SMS 71:10,18 72:19	stage 117:13 125:11 131:3
setting 44:18,20	signed 11:12 15:7,10 16:25	socialization 84:11, 17	stages 133:21
share 27:5 44:22 82:19,24 103:22 104:15,23 106:7 107:5 127:10,11,12 151:10, 15,17 154:17 168:20 187:13 188:5 264:9 270:4 271:16 278:25	significant 31:17 32:5,6 81:17 211:18	solely 79:8	stale 55:19,21 58:16, 21,23
shared 166:8	similar 73:21 185:4 215:21	solicitor 101:16	stamp 105:3 114:5
shareholders 68:9 167:8	Simply 40:18	solution 78:1	stand 58:18 75:18 77:1
shares 82:5,8,13 83:7, 10,14 84:1,25 85:19,22 86:3,5,15,19,20 87:7 130:2 131:3,23 188:10, 11,17 244:23 252:12,22	simple 105:5,10 115:12 116:1,10 181:11 274:17,21	solutions 233:1	standalone 20:13
sharing 91:5	simpler 63:3	sort 41:2 133:3,20 238:25	standard 18:7
	simplify 188:16	sought 13:11 16:2,11 121:2 134:14 266:16	standards 162:20
	simply 40:9 100:13	sound 99:16 203:19	standing 267:18
	single 148:18 149:14 150:1 157:3 169:8	sounds 82:6 99:17 130:17	start 8:11 17:20 27:9 168:7 192:7 213:16 234:22
	singled 167:22	source 18:11 70:2 81:5 127:14 144:22 148:19,24 149:15 151:2 157:5 192:25	start-up 80:20
		sources 150:4	started 133:1 138:8,18 145:1 147:1 185:24 213:25 263:1 272:14 273:14
		space 84:10 87:4 89:19 146:13	starting 60:23 143:12 144:24,25 149:8 166:4

185:25 192:1 271:25	street 165:5,9,23 190:10	suggested 260:24 278:18	swore 6:25 7:3,24 29:17 123:2 145:22 206:1 221:5 262:9
startling 223:8	strengths 143:20 145:15	suggesting 18:14 21:12 26:10 45:8 174:15 260:24	sworn 6:9,10,19 7:7, 10,15,20 92:13 139:21 140:1 201:4 204:16,18
starts 153:3,17,18 155:2 189:12,13 192:5	strike 124:6	suggestion 44:4 77:22 100:17 119:1 260:9,12 261:3	sync 40:17
state 90:16 174:16 192:13	struck-out 108:6	suggests 108:7 260:13	synchronized 44:12
stated 14:7 26:3 109:9	structure 128:10 131:1,10	sum 217:9	synthesize 198:18 199:14
statement 25:2 76:20 98:18 152:18 162:23 169:20 170:19 173:11 174:16 231:6,14,15,17 237:24 278:16	struggle 9:16 170:14	Summarizes 219:5	system 40:4,23 41:2, 5,8 42:4 43:15 101:17
statements 163:7 179:14 180:14 231:11 247:17,21,24 248:1 249:2 254:25 255:8	stuck 182:5	summarizing 147:13	systems 43:18 146:15,17 177:20
states 80:15 93:15 162:16 167:18 193:6 228:13 253:2	subject 46:16 55:24 70:6,13 113:12 117:8 122:7 123:16 125:14 128:23 141:17 177:20, 21 230:3 264:11 276:1	summary 174:11 200:2 278:13	T
stating 26:2,17	submit 217:3	summer 57:10	tab 6:20,25 7:6,14 8:17 19:17 35:8,10 37:20,21, 22 57:9,11 64:12,14,16 80:5 104:6,11 105:13 107:4,18 110:19,21 111:3,18 112:14 114:9 120:7 143:8 190:7,9 196:23 201:6 204:23 213:3 215:23 221:14 235:3,4 240:4,5 243:8 246:5 248:7 251:23 257:2,6
status 10:16 11:18 12:24	submitted 75:23 214:20 244:9	Sunday 55:4,7	table 271:5
stay 12:4,14 205:6,11, 17 207:9	subordinate 230:15	supervising 101:16	tag 80:20,25
stayed 60:1 87:7	subparagraphs 56:19	supervision 175:15	takes 245:1
stays 152:9	subsequent 16:24 185:3 188:6 211:15 231:11 247:21,22 256:2 275:21	supplementary 7:18,19 27:1,20 28:7 34:2,12,16 35:7,10,23 36:4,23 37:12 104:3 105:14 106:4 107:4 108:4 110:22 111:4 112:15 114:9 115:2 168:12	taking 68:20 73:10 102:19 159:25 175:4 182:6 196:16 220:3 230:23 249:19 275:2
step 49:16 132:11 183:12 187:16 225:14	subsequently 33:19 34:1 35:22 163:23 180:15	support 47:16 50:12 101:2 133:13 173:11 241:15	talk 79:4 81:22 137:18 174:5 184:14 188:20,22 271:23,25
steps 95:9 261:6	subsidiaries 192:15 215:21	supporting 50:5	talked 71:2 132:7 134:11 204:5 243:19
stick 181:11	subsidiary 204:1 218:4	supports 77:22	talking 79:5 85:10 90:25 121:3 147:10 172:12 202:12 218:20 221:1 234:18
Stikemans 50:21	substance 264:9	suppose 249:18	talks 202:13
stock 116:19 153:2,8 154:7 155:16 263:11	substantial 196:8 240:20	Supreme 206:17	target 269:25
stocking 241:8,19 242:12 244:13 254:11	substituting 114:12	surely 25:11	
stocks 160:1	succeed 126:17	surprise 157:18	
stop 182:25 210:19	successful 196:1 211:9 266:22	surprised 32:9	
stopped 118:4	sudden 135:24	surrounding 256:21	
story 227:23 229:1	sufficient 237:15,18	suspect 129:21 142:2	
straight 138:16	suggest 23:12 44:16 77:13 144:21 157:20	swearing 24:7 41:17	
strategic 82:1,12		swimmingly 32:21	
strategy 91:25 92:9, 12 131:1,16,20		switched 42:11	

tax 232:17,18,19,23	theory 119:11 157:14	times 31:12 144:13 228:24	86:5,9,15,19 89:18,21 90:3 91:9,10 130:2 131:22
taxable 231:25 232:6	Theresa 63:9,10	timing 76:22	transferability 121:14
taxation 232:10,17	thing 8:11 9:24 40:22 43:12 48:14 49:3 58:7 64:4 85:16 109:14 111:9 136:4,8 170:17 220:25 222:23 225:3 226:21	title 52:13	transferred 87:7 131:2 203:11,25 214:22 215:11 216:13 217:5
taxed 232:8,9	things 38:15 51:21 53:24 55:21 75:7 107:10 137:4,7 191:19, 22 214:14 245:4 263:23 264:3 265:18 268:13	to/from 102:5	transfers 89:23
team 166:9	thinking 78:15 241:11	today 6:5 7:23 137:2 174:13 247:8 276:7	trappings 262:19
teaser 244:2	third-party 177:15, 17,22 179:11 203:12,20 249:22	told 18:6 59:10 89:7 93:21 121:24 174:1	treat 75:13
tech 41:4	thirteenth 208:14	top 9:24 109:22 162:13 213:6 219:2 231:13 236:8 243:23,25 269:21	treated 68:8
technical 40:2 54:10 70:23 71:8 131:6	thought 217:18	Toronto-based 166:13	treats 62:17,21
technically 142:8	threats 238:19	total 197:4 203:13 216:7 271:13,19	trouble 26:16 257:13
Technologies 255:25 256:1	threshold 175:10	totality 29:22	true 18:11 138:25 140:18 232:1 267:14
Technology 234:22	Thursday 162:4,6	touched 40:25 50:16 120:8 121:8,11	trueing 188:4
Tedesco 63:9,13,21 64:23 65:19	tim 64:8	tower 91:5	truncated 245:8
telecom 61:14,16 79:1,4 89:19 137:7,8	time 8:4 11:25 14:22 15:19 16:16,19 18:17 24:5 29:16 37:6 38:3 41:25 43:22 46:5,19 49:18 54:15 57:21 59:18,24 62:5 63:11,21 64:22 68:15 71:2 77:4 79:3,4 84:10,18 87:13 91:8 93:21 98:23 99:5, 18 110:16 116:7 117:7 119:6 123:2 129:14,15 133:2,4 134:21 135:8 136:24 138:13 140:1,19 142:4,11 144:20 145:4, 14 146:6,11,12 158:15 164:24 165:1 172:23 176:2 181:2,18 182:15 183:2,13 186:18 191:12 205:22,25 206:7 207:10 212:8 213:1 221:4 227:25 230:2 237:22 245:2 249:2 254:1,23 258:18 269:9,10 272:12 275:1	trace 42:3 70:21 71:18 72:18	trust 138:14 266:23 267:2
telephone 14:17	tight-lipped 167:10	traced 149:15 157:5, 10	turn 8:15 9:15 10:19 11:7 28:15 37:19 46:21 101:21 189:9,15 224:14 251:20
telling 69:23 187:17 213:23	Tim 64:8	track 151:20	turned 13:12 18:21 21:12 24:19 44:19 239:25
ten 105:18 134:13,14	time 8:4 11:25 14:22 15:19 16:16,19 18:17 24:5 29:16 37:6 38:3 41:25 43:22 46:5,19 49:18 54:15 57:21 59:18,24 62:5 63:11,21 64:22 68:15 71:2 77:4 79:3,4 84:10,18 87:13 91:8 93:21 98:23 99:5, 18 110:16 116:7 117:7 119:6 123:2 129:14,15 133:2,4 134:21 135:8 136:24 138:13 140:1,19 142:4,11 144:20 145:4, 14 146:6,11,12 158:15 164:24 165:1 172:23 176:2 181:2,18 182:15 183:2,13 186:18 191:12 205:22,25 206:7 207:10 212:8 213:1 221:4 227:25 230:2 237:22 245:2 249:2 254:1,23 258:18 269:9,10 272:12 275:1	tracking 263:11	turning 8:8 17:24
tend 225:6 230:15	Tim 64:8	trade 161:8	turnover 13:9
term 28:16 29:17 30:4, 8,24 31:6,14 32:2 96:4 98:20 101:5 113:25 114:24 115:2 217:23 218:19 239:25	time 8:4 11:25 14:22 15:19 16:16,19 18:17 24:5 29:16 37:6 38:3 41:25 43:22 46:5,19 49:18 54:15 57:21 59:18,24 62:5 63:11,21 64:22 68:15 71:2 77:4 79:3,4 84:10,18 87:13 91:8 93:21 98:23 99:5, 18 110:16 116:7 117:7 119:6 123:2 129:14,15 133:2,4 134:21 135:8 136:24 138:13 140:1,19 142:4,11 144:20 145:4, 14 146:6,11,12 158:15 164:24 165:1 172:23 176:2 181:2,18 182:15 183:2,13 186:18 191:12 205:22,25 206:7 207:10 212:8 213:1 221:4 227:25 230:2 237:22 245:2 249:2 254:1,23 258:18 269:9,10 272:12 275:1	traditional 274:7,10	twelfth 207:13,15 208:3,6,14,17,21,23 209:21
terminal 213:15	time 8:4 11:25 14:22 15:19 16:16,19 18:17 24:5 29:16 37:6 38:3 41:25 43:22 46:5,19 49:18 54:15 57:21 59:18,24 62:5 63:11,21 64:22 68:15 71:2 77:4 79:3,4 84:10,18 87:13 91:8 93:21 98:23 99:5, 18 110:16 116:7 117:7 119:6 123:2 129:14,15 133:2,4 134:21 135:8 136:24 138:13 140:1,19 142:4,11 144:20 145:4, 14 146:6,11,12 158:15 164:24 165:1 172:23 176:2 181:2,18 182:15 183:2,13 186:18 191:12 205:22,25 206:7 207:10 212:8 213:1 221:4 227:25 230:2 237:22 245:2 249:2 254:1,23 258:18 269:9,10 272:12 275:1	traffic 140:5	two-part 131:1
terms 12:4,14,19 14:8, 12,14 15:2,19 23:19 24:2,7,17,19,23 25:3,12 26:5,12,24 27:2,6,9,18 28:3,6,8,14 30:25 31:11 32:5 84:22 103:9 120:18 124:14 128:1 170:11 171:1 210:8 226:21 238:18	time 8:4 11:25 14:22 15:19 16:16,19 18:17 24:5 29:16 37:6 38:3 41:25 43:22 46:5,19 49:18 54:15 57:21 59:18,24 62:5 63:11,21 64:22 68:15 71:2 77:4 79:3,4 84:10,18 87:13 91:8 93:21 98:23 99:5, 18 110:16 116:7 117:7 119:6 123:2 129:14,15 133:2,4 134:21 135:8 136:24 138:13 140:1,19 142:4,11 144:20 145:4, 14 146:6,11,12 158:15 164:24 165:1 172:23 176:2 181:2,18 182:15 183:2,13 186:18 191:12 205:22,25 206:7 207:10 212:8 213:1 221:4 227:25 230:2 237:22 245:2 249:2 254:1,23 258:18 269:9,10 272:12 275:1	transaction 68:12,21 69:3 83:15,25 85:6,18, 21 88:8 89:11 90:22 99:10 113:12,19 123:7 125:11,22 128:8 129:18 131:2,3 209:16 246:10 247:3	two-thirds 82:4 86:22
test 64:3 141:7	testimony 67:21 144:25 262:3,4,6,9	transaction.' 76:19	two-way 175:16
testing 250:12	text 40:24 56:25 70:17, 21 71:4,10 72:19 108:6 117:25 269:21	transactions 187:5, 10	two-week 77:23
		transcript 169:16 174:14 241:24	type 10:24 148:5 266:1,2
		transcripts 142:15	typed 9:18
		transfer 82:13 84:1	types 180:18 272:2
			typical 11:3
			Typically 244:18

U	211:22 217:25 250:10 263:25	117:12	vice-presidents 132:16,18,19
U.S. 222:18	understanding 39:17 71:17 72:17 78:24 125:20 126:3	unwiped 39:6	view 25:15 31:13 40:18 170:24 222:3 225:10 261:12
U/a 42:23 64:5 65:1,11 72:8 77:21 101:6 123:11 124:15 125:4 164:8 214:10 255:16 264:24	understood 12:4,13 14:19 15:18 25:10 34:10 41:1 98:12 149:3 261:1	update 78:5	views 23:3
U/t 42:23 44:9 46:14 108:19 126:9 127:22 128:3 131:13	undertake 22:15 42:7 77:14 148:6 216:3 255:15 260:19	updating 263:16	vigilance 175:6
UBS 135:14	undertaken 145:3	upshot 238:21	Vimpelcom 79:19,25 80:17 81:1,10,18 82:7, 18 83:2,15,18,24 85:6, 10,13,16,21 86:1,8 93:17,24 94:15,21 95:5 96:4 97:22 98:5,12 99:20,25 100:11 101:2, 4 103:21 104:16,24 105:13 106:9 107:5,7 109:16,24 110:6 111:3 114:23 115:16,18,24 116:14,21 117:16 118:2,14,24 119:2,5,8 120:17 121:1 124:13 125:14 126:5,13 127:15,25 131:2,20 134:23 135:4,5,14,19, 20 136:5
uhm-hmm 96:10 158:19 162:21 194:22 197:1 200:10,17 209:22 210:5 213:13 227:14 238:15 240:23 243:18 244:8,10 246:6,23 247:1 254:13 269:5	undertakes 94:19 95:3	urgent 8:24 9:12 10:5	V
ultimate 204:5 210:8 258:12 259:13	undertaking 11:24 12:8,11,20,22 21:18 22:12 37:9 44:2 46:3,15 75:13 77:10 98:25 116:11 126:10 131:9 178:24 210:18	usable 45:3	vacation 59:18 76:10, 17
ultimately 15:1 16:14 17:17 52:2 129:25 196:8,18 203:11,21 241:8 245:16 255:10 267:20	undertakings 42:9 46:17 276:1	USB 102:4	valuable 217:8 253:6
unaltered 39:6	undertaker 182:4		valuation 249:17
unclear 72:13	underwriters 175:14, 17 225:21 226:3 231:20 240:14		valuations 177:15,17, 22,25 178:4,8,17,18 179:1,5,10 250:22
underestimate 273:23	underwriting 182:12 231:20 269:18		valued 249:5,7 252:13
undergone 84:16	unduly 15:10		values 250:25 251:6,7
undergraduate 51:4	unequivocal 201:21	VAR 177:3	variety 233:13 278:15
underlie 180:11	unfairly 68:8		vast 151:14
underlined 225:2,4	universe 244:23		verbal 238:17
understand 6:7 11:4 14:3,6,12 25:14 26:20 32:12 34:1,11 36:11 42:17 44:16 47:4 49:1 53:22,23 61:15 63:2 70:5 72:11 78:10 79:10 82:22 83:1,23 102:9,24 105:21,24 107:12 112:17 115:15,24 124:8 127:1,13 132:8 146:14 151:23 159:11 170:13 172:7,14 174:3,9,20,23 179:18 180:4,13 184:13	unredacted 27:3,20		verification 224:6 249:23
	unrelated 25:5 29:20 32:16		verify 202:7 231:8,16
	unsealed 63:6		Veritas 159:19 163:3, 19,24 164:6 223:2,8 264:10
	unsealing 62:14 63:21 64:23		Veritas' 223:21
	unsecured 230:16		versa 228:9
	unsigned 123:7,10,13 124:12 125:13		version 9:18 264:6
	unsold 216:11		versus 6:6 91:12 102:3,6
	unusual 29:23 30:3		vestige 99:24
			vesting 207:5
			vice 228:9
			Vice-president 240:12
			W
			wait 78:22
			waive 115:16 131:16
			walk 6:11 143:23 258:15
			Wall 165:5,9,23

wanted 21:22 52:8 74:10 82:18,23 83:9,12 84:8 85:7,16 86:1 88:10 111:9 120:22 169:19,25 182:1 198:14 200:25 226:3 268:22	22 268:6,8 272:17,23 274:18 275:16	205:19,23 206:11 208:8,12,15,18,20,24 210:19,22 211:6,22 214:10 217:20 218:2, 10,15,18,24 221:21 229:5 237:10 245:18,25 247:20,25 248:4,18,20 250:2 252:1,4 255:16 256:7,8,11,13,17 257:17 258:24 260:7,8, 23 261:7,13,15,18 262:12,14,18 264:24 276:4,5 277:17 279:3	works 160:3 171:14 180:24 187:3
wash 203:25	whisper 144:15	Winton's 258:19	worried 113:1 166:7
watch 173:15,18 174:5,23 175:3,10 176:21 177:10,16 179:14 180:15 181:2,4, 17 182:9,15,20 183:2,6, 13,19 239:22	wholesale 91:1,12 121:17	wipe 45:16	worthwhile 167:4
ways 198:24	willingness 90:3	wiped 38:9,22 39:3 41:20 42:15 43:3 45:11	wow 31:14
weaknesses 143:20	Wind 62:3 75:23 76:10, 15 77:11 79:1,5,7,8,20 80:15 81:25 82:5,11 83:5,13 84:25 85:17 87:20 89:16 90:8,19,21 92:15 93:7 98:15,21 99:6,7 118:15 120:19 123:7 126:16 128:8 129:19 135:24 137:16 266:7,15 267:17 268:10	wiping 39:18,24	wrap 55:24 56:2
website 278:1	winds 231:3	wireless 80:20	wrapped 205:1,3
Wednesday 258:1,6	Winton 9:3,6,7,11 11:13 15:9,13 16:10 19:7,23 21:9,10,15,20 22:1,5,11,14,19 27:10 29:1 33:4 34:15,20 35:1,12 37:14,21 42:9, 19,23 43:8 44:3,9,18 46:8,14 47:20,24 56:13, 21,25 57:2,11,15 63:23 64:5,9,19 65:1,8,11,17, 20 68:1 71:24 72:8,11 75:12,16,20 77:13,18, 21 78:6 80:6 90:13 95:18 97:1,14 98:2,10, 17 100:15,23 101:6,24 102:10,14,18,21,25 104:8 108:2,6,9,19 110:18,25 111:14,18, 21,23 112:2 115:1,6,8 120:1 122:10,18 123:11 124:15 125:4,19 126:2, 9 127:22 128:3 131:13 137:21 139:24 140:9,23 141:5,10 142:3,14,18 143:5,10 145:23 151:6, 25 152:11 154:23 155:2,7,20 156:1 157:12 161:5 162:8 164:8 168:11,19 173:19 174:10,22 175:21 176:4,18,22,25 177:4,7, 12 178:1 179:2,15,21 182:25 183:5 187:20 189:18,21 190:4,14 191:6 193:20 194:2 199:21 200:1 203:17	Wonderful 126:12	writing 10:22 62:11 66:3,7,10,24
week 76:16 162:2,3		wondering 233:5	wrong 39:18 116:15 147:4 250:9
weekend 55:13		word 17:13 29:12 30:13 32:14 118:17,18 140:19 142:4 178:15	wrote 68:13
weeks 75:23 76:10,17 130:14,17,20		wording 116:17	<hr/> X <hr/>
well-founded 164:16		words 29:11 31:13 55:23 58:18 74:23 81:12 105:20 107:19 109:21 129:10 198:17 202:6 211:4 222:25 223:10 230:23 250:23 266:22	XTG 236:10 237:14 240:21 241:3,4,9,15 243:20 245:16 247:7 248:3,16 249:25 250:14,16 253:12 254:1,5
West 6:7 7:12 19:24 27:5 38:15,19,25 39:11 45:7,10 47:10 50:6,13 55:19 59:4,11 62:2,7,9 64:1 66:4,13,15,20 67:2 69:16 73:6,9,20,24 74:5,12,24 75:2,3 87:19 88:16 89:9,15 90:2,7 91:18,24 92:2,7,14 93:6,8,15,20,22 94:1, 11,19 95:3 96:1 99:9 100:19 101:10,11,15,17 102:2 104:16 107:6 112:19 114:7,8 115:20 118:5,10 127:2,11 129:25 130:13 137:16 139:17 140:15 142:21, 23 143:16,18 144:2,5,9, 13,25 145:14 147:4 148:5,10,16 149:6 156:13 157:4,21 158:6 164:22 177:25 189:25 222:3 223:9,11,13 232:2 251:14 257:25 259:5,20,24 260:9,18 261:2,22 263:15,19 264:7,17 265:9,15 266:6,8 267:12,16,17,		work 39:14 48:19 59:14 61:10,15,17 75:22 76:9,15 123:7,10, 14 124:12 125:13 207:9 256:3	XTG'S 239:11 249:2
		work-issued 38:19 39:11 43:11 44:25 46:4, 7	<hr/> Y <hr/>
		worked 78:12,16 146:10 171:24 263:19	year 55:15 57:23 78:5, 16 93:2,3 182:11 246:13 253:19 271:9
		working 17:10,13 75:25 118:4 135:14,16 220:12	year-end 139:1
		workout 211:9	years 48:22
			yesterday 165:6,18
			yield 269:22 271:23 272:5,15 273:20 274:21 275:7,16
			yields 227:17 273:2,25 274:3
			yup 140:17 151:12 199:7 202:11 203:3 213:4 239:24 243:22 251:4
			<hr/> Z <hr/>
			zeros 32:11

**List of Undertakings, Adviseements, and Refusals
Given at the Cross-Examination of JAMES RILEY, held May 13, 2015**

Examination by Mr. Borg-Olivier

No.	P.	Q.	Category	Question	Answer
1.	41-43	168-170	Undertaking	To advise whether or not it is Catalyst's position that emails wiped from a Blackberry would not otherwise be maintained on Catalyst's servers.	Emails sent through a Catalyst account would be maintained on Catalyst's servers or servers to which Catalyst has access, even if a Blackberry is wiped. But emails sent through a non-Catalyst account via a Blackberry would not be maintained on a Catalyst server.
2.	41-43	168-170	Adviseement	To advise what Catalyst's backup data retention policies are and, if the evidence is that emails wiped from a Blackberry would not be maintained, to advise why that is with respect to its data retention policies.	Refused – in light of the answer to #1, this information is irrelevant.
3.	43-44	171-172	Undertaking	To make inquiries of IT and advise whether it is possible to determine now whether Mr. Moyses's Blackberry was synchronized with the Catalyst server such that emails deleted from one would be deleted from the other.	Catalyst's standard practice is to synchronize Blackberry devices, but there is no way to determine whether Mr. Moyses's Blackberry was synchronized.
4.	46	178	Undertaking	To provide confirmation that during the relevant timeframe, Catalyst would receive bills in respect of a work-issued blackberry that would include records of phone calls made and received [the number of calls of the sender or recipient of the phone calls].	Catalyst received invoices that showed the telephone number of an incoming caller or to which an outgoing call was made. However, the invoices do not contain the name of the caller/recipient, which is recorded on a Blackberry and which was wiped when Mr. Moyses wiped his company-issued Blackberry prior to returning it to Catalyst.

Examination by Mr. Milne-Smith

No.	P.	Q.	Category	Question	Answer
5.	63-65	268-269	Advisement	To advise whether at any time after the unsealing of the court record, Jean Lepine, Mr. Glassman or any other individual at Catalyst spoke about this case with anyone at the Globe and Mail or National Post, specifically with either Ms. Tedesco or Mr. Kladze.	Refused.
6.	71-72	303	Advisement	Further to ADV 5, to advise whether at any time after the unsealing of the court record, Jean Lepine, Mr. Glassman or any other individual at Catalyst had any indirect communications about this case with any external press agent.	Refused.
7.	76-77	326-328	Undertaking	To advise whether the evidence given at Mr. Riley's July 29 th , 2014 cross-examination is correct, that Mr. Moyse was only assigned to work on Wind Mobile the week before he left on vacation two weeks before he resigned.	As stated in Mr. Riley's April 30, 2015 affidavit, Mr. Moyse worked on a PowerPoint presentation in March 2014 that related to Wind Mobile, approximately two months before his resignation.
8.	77-78	328	Advisement	Further to UT 7, to provide any documents that support Mr. Riley's suggestion that Mr. Moyse was involved with Wind Mobile before the two-week period in question.	As previously explained, all copies of the PowerPoint prepared in March 2014 were destroyed.

No.	P.	Q.	Category	Question	Answer
9.	100-101	432	Advisement	To provide any evidence concerning Catalyst's negotiations with VimpelCom that support Mr. Riley's assertion in his February 18, 2015 affidavit that Catalyst and VimpelCom had negotiated everything except for a term relating to regulatory approval.	Attached at Tab 9-A is the Share Purchase Agreement negotiated by the parties as of August 8, 2014, together with related email messages. Attached at Tab 9-B is an email chain dated August 8-10, 2014, with an attached press release drafted by VimpelCom. These documents demonstrate that the parties were on the verge of completing a deal for Catalyst to purchase Wind Mobile as of August 8, 2014.
10.	106-108; 110	456-460; 470	Undertaking	If the Catalyst Group intends to take a position to the contrary than what is at Tab 1A of Mr. Griffin's supplementary affidavit is the same draft that was marked up in the blackline attached to Tab 1E of Mr. Riley's supplementary affidavit, with the only apparent difference being the date, to advise.	Catalyst does not take this position.
11.	123	532-533	Advisement	To produce the final but unsigned paper work for the transaction to acquire Wind, as referenced at paragraph 41 of Mr. Riley's May 1 st , 2015 affidavit.	Attached at Tab 9-A.
12.	124	540	Advisement	Further to ADV 11, to provide any documentary evidence demonstrating that VimpelCom was prepared to accept the terms.	Attached at Tab 9-B.
13.	124-125	541-543	Advisement	To make inquiries of Mr. De Alba, review diaries or long-distance phone records to try to determine when exactly the call with Industry Canada took place.	The call with Industry Canada took place on August 11, 2014.

No.	P.	Q.	Category	Question	Answer
14.	125-126	544-548	Undertaking	Further to ADV 12 and 13, to make inquiries and provide Catalyst's understanding whether the transaction was conditional upon VimpeCom board approval. If any VimpeCom approval had been communicated, to provide evidence of it.	The transaction was conditional upon VimpeCom board approval. Board approval was not formally communicated to Catalyst, but was assumed given that VimpeCom had drafted and circulated to Catalyst the press release attached at Tab 9-B.
15.	127	554-556	Undertaking	To advise whether VimpeCom ever asked for a break fee.	The parties never negotiated a break fee.
16.	127-128	557	Advisement	Further to UT 15, if VimpeCom did ask for a break fee, to provide its precise terms and whether Catalyst agreed to it.	N/A
17.	130-131	574-576	Undertaking	To advise whether Catalyst ever considered a strategy to engage in a two-part structure to the transaction whereby VimpeCom only transferred nonvoting shares at the first stage of the transaction. If so, to provide evidence of ever having done so.	A two-part structure to the transaction was considered but not pursued.
18.	163-164	745-747	Advisement	To provide any correspondence between Veritas and Catalyst, or anybody on behalf of Catalyst, listing the number of misstatements in the report entitled "Accounting Alerts! Callidus Capital Corporation" dated April 16, 2015.	Attached at Tab 18 is a letter to Veritas from Catalyst's outside counsel dated April 24, 2015.
19.	173	794	Refusal	To advise which loans are currently on the watch list.	Refusal maintained. This is material, non-public information.
20.	175-176	800-803	Refusal	To advise which two loans have negative value at risk and how much money was owed by borrowers on the watch list.	Refusal maintained. This is material, non-public information.

No.	P.	Q.	Category	Question	Answer
21.	177	804	Refusal	To provide the amount of negative VAR.	Refusal maintained. This is material, non-public information.
22.	177	805	Refusal	To advise whether there have been any additional loans placed on the watch list since the conference call in November, 2014.	Refusal maintained. This is material, non-public information.
23.	177-179	807; 811	Refusal	To provide any valuations for loans that West Face has identified, including both aspects of that collateral, to the extent valuations exist.	Refusal maintained. This is material, non-public information.
24.	179	813	Refusal	To provide financial statements for any borrowers on the watch list.	Refusal maintained. This is material, non-public information.
25.	210	958-959	Refusal	To advise what interest rate Callidus enjoys on the loan.	Refusal maintained. This is material, non-public information.
26.	211	960; 963	Refusal	To advise how much principal or interest has been repaid to Callidus out of cash generated by Arthon, not funded by further advances by Callidus.	Refusal maintained. This is material, non-public information.
27.	213-214	971-977	Advisement	If there is any documentary evidence that the Sandhill facility is up, running, and generating income, to provide.	Attached at Tab 27.
28.	243-246	1136-1149	Refusal	To advise how much money Callidus ultimately advanced to XTG.	Refusal maintained. This is material, non-public information.
29.	247-248	1161-1162	Refusal	To provide financial statements of XTG.	Refusal maintained. This is material, non-public information.
30.	248	1163-1164	Refusal	To advise whether Callidus has, in fact, advanced additional funds to XTG to facilitate its restructuring and future growth.	Refusal maintained. This is material, non-public information.

No.	P.	Q.	Category	Question	Answer
31.	255	1199-1201	Advisement	To advise how much Sherwood Hockey was sold for to Gracious Living.	Refusal maintained. This is material, non-public information.
32.	264	1238-1241	Advisement	To provide the names of the investors Mr. Riley had discussions with that had become aware of certain aspects of the report.	Refused.