

ONTARIO
SUPERIOR COURT OF JUSTICE

RD/lms

B E T W E E N:

NELSON BARBADOS GROUP LTD.

Plaintiff

- and -

RICHARD IVAN COX, GERARD COX, ALAN COX, PHILIP VERNON NICHOLLS, ERIC ASHBY BENTHAM DEANE, OWEN BASIL KEITH DEANE, MARJORIE ILMA KNOX, DAVID SIMMONS, ELNETH KENTISH, GLYNE BANNISTER, GLYNE B. BANNISTER, PHILIP GREAVES, a.k.a. PHILIP GREAVES, GITTENS CLYDE TURNEY, R.G. MANDEVILLE & CO., COTTLE, CATFORD & CO., KEBLE WORRELL LTD., ERIC IAIN STEWART DEANE, ESTATE OF COLIN DEANE, LEE DEANE, ERRIE DEANE, KEITH DEANE, MALCOLM DEANE, LIONEL NURSE, LEONARD NURSE, EDWARD BAYLEY, FRANCIS DEHER, DAVID SHOREY, OWEN SEYMOUR ARTHUR, MARK CUMMINS, GRAHAM BROWN, BRIAN EDWARD TURNER, G.S. BROWN ASSOCIATES LIMITED, GOLF BARBADOS INC., KINGSLAND ESTATES LIMITED, CLASSIC INVESTMENTS LIMITED, THORNBROOK INTERNATIONAL CONSULTANTS INC., THORNBROOK INTERNATIONAL INC., S.B.G. DEVELOPMENT CORPORATION, THE BARBADOS AGRICULTURAL CREDIT TRUST, PHOENIX ARTISTS MANAGEMENT LIMITED, DAVID C. SHOREY AND COMPANY, C. SHOREY AND COMPANY LTD., FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LTD., PRICE WATERHOUSE COOPERS (BARBADOS), ATTORNEY GENERAL OF BARBADOS, the COUNTRY OF BARBADOS and JOHN DOES 1-25, PHILIP GREAVES, ESTATE OF VIVIAN GORDON LEE DEANE, DAVID THOMPSON, EDMUND BAYLEY, PETER SIMMONS, G.S. BROWN & ASSOCIATES LTD., GBI GOLF (BARBADOS) INC., OWEN GORDON FINLAY DEANE, CLASSIC INVESTMENTS LIMITED and LIFE OF BARBADOS LIMITED c.o.b. as LIFE OF BARBADOS HOLDINGS, LIFE OF BARBADOS LIMITED, DAVID CARMICHAEL SHOREY, PRICEWATERHOUSECOOPERS EAST CARIBBEAN FIRM, VECO CORPORATION, COMMONWEALTH CONSTRUCTION CANADA LTD. and COMMONWEALTH CONSTRUCTION, INC.

Defendants

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This is the Cross-Examination of JESSICA A. DUNCAN, on her affidavit sworn the 22nd day of April, 2010, taken at the offices of VICTORY VERBATIM REPORTING SERVICES, Suite 900, Ernst & Young Tower, 222 Bay Street, Toronto, Ontario, on the 26th day of April, 2010.

- - - - -

APPEARANCES:

GERALD L.R. RANKING	}	-- for the Defendant,
EMMELINE MORSE	}	PricewaterhouseCoopers East Caribbean Firm
IAN S. EPSTEIN		-- for the Witness
LORNE S. SILVER		-- for the Defendants, Richard Ivan Cox, Gerard Cox, Alan Cox, Gittens Clyde Turney, R.G. Mandeville & Co., Keble Worrell Ltd., Lionel Nurse, The Right Honourable Owen Seymour Arthur M.P., Mark Cummins, Kingsland Estates Limited, Classic Investments Limited, The Barbados Agricultural Credit Trust (more properly, Barbados Agricultural Credit Trust Limited), the Attorney General of Barbados, the Country of Barbados, The Honourable Elneth Kentish, Malcolm Deane, Eric Ashby Bentham Deane, Errie Deane, Owen Basil Keith Deane, Keith Deane, Leonard Nurse, Estate of Vivian Gordon Lee Deane, David Thompson, Owen Gordon Finlay Deane, Life of Barbados Holdings and Life of Barbados Limited

DAVID I. BRISTOW, Q.C.

-- for the Defendants,
Philip Vernon Nicholls, and
Cottle, Catford & Co.

MAANIT T. ZEMEL

-- for the Defendants,
Eric Iain Stewart Deane, and
Estate of Colin Deane

SARAH CLARKE

-- for the Defendant,
First Caribbean
International Bank

JEFFREY W. KRAMER

-- for K. William McKenzie

ALSO PRESENT:

K. William McKenzie
Leah Anderson Vojdani

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1 JESSICA A. DUNCAN, sworn

2 CROSS-EXAMINATION BY MR. RANKING:

3 1. Q. You are Ms. Jessica Duncan?

4 A. Yes.

5 2. Q. And I understand that you have been
6 sworn to tell the truth?

7 A. I have.

8 3. Q. And you are here to be
9 cross-examined on an affidavit that you swore on the
10 22nd of April, 2010?

11 A. Yes.

12 4. Q. Before swearing this affidavit, did
13 you speak to Mr. McKenzie about it?

14 A. No.

15 5. MR. RANKING: What I would like to do
16 is, for the purposes of the
17 cross-examination, if we can mark the
18 two-volume affidavit of Ms. Duncan as
19 Exhibit number 1.

20 MR. EPSTEIN: That is fine.

21 6. MR. RANKING: Thank you.

22

23 --- EXHIBIT NO. 1 : Affidavit of Documents of

24 Ms. Duncan, two volumes

25

1 BY MR. RANKING:

2 7. Q. Now, I understand, Ms. Duncan, that
3 you are a partner at the law firm of Crawford McLean
4 Anderson & Duncan LLP?

5 A. Yes.

6 8. Q. And I take it that that is the
7 successor law firm to Crawford McKenzie McLean
8 Anderson & Duncan LLP?

9 A. Yes.

10 9. Q. And I take it you are also a partner
11 at the predecessor firm of Crawford McKenzie?

12 A. Yes.

13 10. Q. So, for the purposes of my
14 questions, when I am referring to the successor firm
15 of Crawford McLean, I will refer to it as Crawford
16 McLean, and for the predecessor firm, I will simply
17 say Crawford McKenzie.

18 A. Thank you.

19 11. Q. All right. And aside from those two
20 firms, did you ever practice law with Mr. McKenzie
21 in another law firm?

22 A. No.

23 12. Q. And I take it that you had no other
24 business relationship with Mr. McKenzie?

25 A. No...sorry, I am just thinking back.

1 When you say "any other law firms", do you mean the
2 same law firm with different names over the years?

3 13. Q. Yes.

4 A. Okay. In that case, I was wrong.
5 The law firm has gone through a number of name
6 changes.

7 14. Q. All right. Why don't we do it this
8 way to make it easier for you? When did you
9 graduate from law school?

10 A. 1995...I'm sorry, 1993.

11 15. Q. And after your graduation, where did
12 you article?

13 A. Russell Christie.

14 16. Q. Okay. And following your articles
15 at Russell Christie, what law firm did you join?

16 A. I practised at Russell Christie
17 until the year 2000.

18 17. Q. And in 2000, what firm did you join?

19 A. Crawford McKenzie McLean & Wilford.

20 18. Q. All right. Were you called in 1995?

21 A. Yes.

22 19. Q. So, just summarizing, you practised
23 for five years at another firm, and then you joined
24 Mr. McKenzie's firm in 2000?

25 A. Yes.

1 20. Q. And then you remained with that firm
2 as the name may have changed or gone through various
3 iterations through until today's date?

4 A. That is correct.

5 21. Q. Thank you. Now, at what time did
6 you become a partner in the Crawford McKenzie or
7 Crawford McLean firm?

8 A. January of 2002.

9 22. Q. And did you sign a partnership
10 agreement then?

11 A. Yes.

12 23. Q. And can you tell me who the partners
13 were in January of 2002?

14 A. I am pausing because Mr. Crawford, I
15 think, was still a partner then, as opposed to a
16 retired senior counsel...or, no, he may have been
17 retired by then. Partners I can be certain of:
18 Bill McKenzie, William G. McLean or Bill McLean,
19 Karen Wilford, Tim Anderson, and myself.

20 24. Q. All right. I don't need to go
21 through all the iterations of the partners from 2002
22 to 2007, but can you tell me who the partners were
23 as of February 2007 and through until today's date?

24 A. February of 2007, it was Bill
25 McKenzie, Bill McLean, Tim Anderson, and myself.

1 25. Q. And they remained partners through
2 until December 31, 2009?

3 A. Yes.

4 26. Q. And it was at that point, having now
5 read Mr. McKenzie's affidavit, that he withdrew from
6 the partnership?

7 A. Officially, yes.

8 27. Q. All right. I am going to come back
9 to that because there are a few questions on his
10 affidavit. But as of December 31, Mr. McKenzie
11 withdrew, and I take it then that the current
12 partners of Crawford McLean are now yourself, Bill
13 Anderson, and Bill McLean?

14 A. Bill McLean and Tim Anderson.

15 28. Q. Sorry. Thank you. Those are the
16 three partners?

17 A. Yes.

18 29. MR. RANKING: Okay. Thank you. Just
19 off the record.

21 --- DISCUSSION OFF THE RECORD

23 BY MR. RANKING:

24 30. Q. If I could ask you to just turn
25 up...do you have Mr. McKenzie's affidavit?

1 MR. EPSTEIN: Which affidavit are
2 you...the one that he recently swore?

3 31. MR. RANKING: This is the affidavit that
4 was sworn on April 23rd.

5 MR. EPSTEIN: Yes.

6

7 BY MR. RANKING:

8 32. Q. I just want to make sure that you
9 and he agree on some of the points in his affidavit.
10 Do you have that before you, Ms. Duncan?

11 A. Well, I am going to look at my
12 counsel's copy because I just have an unsworn
13 e-mailed copy.

14 33. Q. I am just going to ask you to look
15 at the first few paragraphs. Paragraph 4, the
16 statement is made that:

17 "...Mr. McKenzie advised his partners on
18 February 26th, 2007 that he would be
19 winding down his practice and withdrawing
20 from the firm completely in 2009..."

21 Is that accurate?

22 A. That is not my recollection.

23 34. Q. All right. Can you tell me your
24 recollection?

25 A. My recollection is that that was his

1 birthday in 2007. He made some comment that he did
2 not wish to remain a partner over the age of 70. He
3 wished to retire at age 65. He did indicate that on
4 his 60th birthday, which would have been in February
5 of 2009, that he intended to start winding down his
6 practice.

7 35. Q. And when did he make this statement,
8 in February of '07?

9 A. There were various times he made
10 that statement, and the statement changed over time.
11 But it did...the first time that I can recall
12 hearing it was around his birthday in 2007.

13 36. Q. And did he, in fact, provide any
14 written letter or memorandum to the firm as of
15 February 26th, 2007?

16 A. No, he did not.

17 37. Q. So, as far as you are concerned, you
18 don't agree with paragraph 4 of Mr. McKenzie's
19 affidavit?

20 A. Well, I can say it is not my
21 recollection, but I can't speak to Mr. McKenzie's
22 recollection.

23 38. Q. All right. And you indicated that
24 you have an unsworn e-mailed copy...

25 A. Yes.

1 39. Q. ...of the affidavit? And how did
2 that come into your possession? What version of the
3 affidavit is that that you were looking at?

4 A. I am pretty sure it's the sworn...it
5 is the one that was sworn. I was under the
6 impression it was served unsworn for time reasons.

7 40. Q. I see. So that was provided to you
8 by your counsel?

9 A. Yes.

10 41. Q. All right. Thank you. Now, just
11 asking you to go back to Mr. McKenzie's affidavit.
12 Paragraph 3 indicates that:

13 "...[He] withdrew from the firm and had no
14 relationship with it since December 31,
15 2009..."

16 If I can take each of those statements separately,
17 do you agree with Mr. McKenzie that he withdrew from
18 the firm as of December 31, 2009?

19 A. Yes.

20 42. Q. And has he had no relationship with
21 the firm since that date?

22 A. No, he has not.

23 43. Q. So you agree with that?

24 A. Yes.

25 44. Q. All right. And if I could also ask

1 you to turn to paragraph 5. Mr. McKenzie states in
2 the second sentence that:

3 "...[He] sold his half interest in the
4 building in July of 2008..."

5 But he goes on to say:

6 "...I ceased to be a partner in the firm at
7 the beginning of 2009..."

8 Now, I am having difficulty reconciling the third
9 paragraph where he indicates that he withdrew from
10 the firm as of December 31, 2009, and yet, in
11 paragraph 5, he states that he ceased to be a
12 partner at the beginning of 2009. Can you assist
13 me, as a partner of the firm, and reconcile those
14 two paragraphs?

15 A. My remaining partners and I have had
16 difficulty with those paragraphs as well. There was
17 definitely a dispute in August of 2008, at which
18 point Mr. McKenzie had been managing partner up to
19 that point. He continued as managing partner until
20 mid to late September of 2008, at which point there
21 was a very serious breakdown of the partnership
22 relationship.

23 He then began dictating terms on which he
24 would be continuing to deal with the firm. There
25 was never any agreement signed. However, in October

1 2008, Mr. McKenzie began simply contributing a
2 preset amount of funds to the firm, and he otherwise
3 carried on, essentially, an independent practice.

4 45. Q. All right. If I could just go back
5 for a moment. I take it that you said that there
6 was a major dispute in August of 2008, but then
7 erupted in September of 2008?

8 A. There had been difficulties over the
9 summer of 2008. In August of 2008, I believe there
10 was an e-mail in which Mr. McKenzie purported to
11 withdraw, but he continued to act as managing
12 partner after the date of that e-mail.

13 46. Q. And what was it that prompted Mr.
14 McKenzie, to your knowledge, to send that e-mail and
15 to withdraw from the partnership in 2008?

16 A. He didn't feel the other three
17 partners were bringing in enough money.

18 47. Q. And when you said that matters came
19 to a head in September of 2008, what were you
20 referring to?

21 A. Although he had indicated that he
22 wanted to turn over management to the other
23 partners, we discovered that he had been, in fact,
24 continuing to operate all the accounts and carry on
25 transactions as if he were managing. And there was

1 a lot of disagreement around those issues.

2 48. Q. And did any of the issues that gave
3 rise to the concerns expressed by you and the other
4 partners, excluding Mr. McKenzie, have anything to
5 do with the matters in issue in this action, or the
6 subject matter in this action?

7 A. No.

8 49. Q. So, to use the vernacular, this was
9 a typical good law firm partnership dispute over
10 profits, allocation and the amount of work that
11 people were doing to bring in money and allocate it?

12 A. Yes.

13 50. Q. Okay. And as of September of '08,
14 it comes to a head, and you said that Mr. McKenzie
15 then began contributing preset amounts of money to
16 the firm as of October '08. How was this dispute
17 resolved?

18 A. I would have difficulty answering
19 that question. I believe the dispute is still
20 ongoing.

21 51. Q. And you have indicated that you and
22 your partners have difficulty with the paragraphs
23 that I took you to, namely reconciling paragraphs 3
24 and 5 of the McKenzie affidavit. According to you
25 and your partners, when do you say that Mr. McKenzie

1 withdrew from the Crawford McKenzie partnership?

2 A. He made the statement a number of
3 times. But, at the same time that he would make a
4 statement that he was no longer a partner, we would
5 get an e-mail another time indicating that he was
6 still a partner. It just depended on what the
7 subject was at the time. So, it wasn't until he
8 delivered a formal...he delivered a formal written
9 withdrawal from the partnership in October of 2009,
10 and that was to be effective by the end of the year.

11 52. Q. And was that document that was sent
12 to the partners in October '09 accepted by the
13 partners?

14 A. Yes.

15 53. Q. Will you produce a copy of that
16 document?

17 MR. EPSTEIN: I will take that under
18 advisement.

U/A

19 54. MR. RANKING: Thank you.

21 BY MR. RANKING:

22 55. Q. So I take it that one of the matters
23 with which you and your partners take issue is the
24 statement by Mr. McKenzie in paragraph 5 of his
25 affidavit that he ceased to be a partner at the

1 beginning of 2009?

2 A. Well, legally, as far as outside...
3 any outside people were involved, he did not.
4 Internally, he certainly was not acting as a partner
5 except when he was upset about something.

6 56. Q. Have you ever come to a settlement
7 agreement with Mr. McKenzie? When I say "you", I
8 mean you and your partners.

9 A. No.

10 57. Q. And have you ever distributed assets
11 to him with respect to the dissolution of the
12 partnership as it existed up to and including
13 December 2009?

14 A. That may be an issue that is under
15 dispute. I can't say one way or the other.

16 58. Q. And when you indicated that he began
17 contributing a preset amount in October of 2008, was
18 that different from the practice that had been
19 followed by Mr. McKenzie and the other partners up
20 to October 2008?

21 A. Yes.

22 59. Q. And can you tell me what the
23 practice was prior to October 2008, and how it
24 changed?

25 A. Prior to October of 2008, we

1 operated as a partnership. Everybody pooled their
2 billings. We paid our overhead, we paid our
3 expenses, and the profits were then shared on a
4 proportional basis.

5 60. Q. And prior to October of 2008, what
6 was Mr. McKenzie's share of the partnership? In
7 other words, I think some of us at the table refer
8 to it as points in our firms, but...

9 A. We are too small for that, sorry.

10 61. Q. Sometimes the people at larger firms
11 are quite jealous of that. But leaving that aside,
12 how do you characterize Mr. McKenzie's interest in
13 the firm relative to those of the other partners?

14 A. Prior to August of 2008?

15 62. Q. Yes.

16 63. MR. SILVER: August or October?

17 THE DEPONENT: Well, August of 2008 was
18 when the dispute started. Mr. McKenzie,
19 his nickname was the 500-pound gorilla
20 because he could sit wherever he wanted to
21 sit. He made probably three times the
22 billings of the rest of us put together,
23 twice or three times the billings of the
24 rest of us put together.

1 BY MR. RANKING:

2 64. Q. And taking it back to an equally
3 objective standard, but not knowing what the
4 billings of the firm were, what was his...when you
5 come to the percentage of profit that he would
6 withdraw from the firm on an annual basis, what was
7 his division of profit?

8 A. There was a formula. I believe it
9 was up to 500,000 was 40 percent, up to between
10 500,000 and 600,000 was 50 percent, and over 600,000
11 was supposed to be 60 percent.

12 65. Q. And I take it that the dispute
13 erupted as of August of '08? There was then some
14 area over the period of August, September, October
15 where matters were in flux, presumably?

16 A. Yes.

17 66. Q. And in October of 2008, at that
18 point in time, Mr. McKenzie then began contributing
19 a specific amount?

20 A. Yes.

21 67. Q. And how was the amount calculated
22 that he would contribute to the firm?

23 A. There was some discussion about the
24 amount for the last three months of 2009.

25 68. Q. 2008?

1 A. Sorry, 2008. But for 2009, Mr.
2 McKenzie told us what he was going to pay each
3 month.

4 69. Q. And that is with respect, I take it,
5 to the payment of expenses for the overhead of the
6 firm?

7 A. Yes.

8 70. Q. And he then selected that amount and
9 dictated to the firm what that would be, I take it?

10 A. Yes.

11 71. Q. And with respect to the other side
12 of the equation, the amount that he was taking out,
13 did that change, if at all, after the dispute in
14 August of '08, leading up to October of '08?

15 A. I really don't know. It is one of
16 the problems. Mr. McKenzie set up his own general
17 account. He and his assistant were handling all of
18 his billings.

19 72. Q. I see. And when you say he set up a
20 general account, was that in the name of the firm,
21 or his own name?

22 A. That was in his own name.

23 73. Q. So was he actually directing clients
24 of the firm to pay him directly?

25 A. That is beyond my knowledge. That

1 wasn't what the agreement was, but we have no way of
2 knowing.

3 74. Q. Did the firm continue to allocate
4 and pay Mr. McKenzie a draw after October of '08?

5 A. No...well...I am sorry, in...as of
6 October of '08 to December of '08, I think he was
7 still taking his share out. But as of 2009, no.

8 75. Q. And he was taking any money out of
9 the firm as of January 1, 2009?

10 A. As I said, we still...we have a lot
11 of issues with the accounting, that he was taking...
12 anything that he took was money that he billed. I
13 am not...

14 76. Q. So do I then understand, again by
15 way of a high-level summary, that the dispute
16 erupted in August of '08? With respect to his
17 contribution, he was handling the billing for his
18 own files; he continued to withdraw, to the best of
19 your knowledge...and it may not be perfect,
20 recognizing that you don't have details of what his
21 accounting was...he continued to withdraw funds over
22 the period from August of '08 through the end of
23 '08, and he then predetermined what he would
24 contribute towards the firm's overhead; is that
25 fair?

1 A. Yes.

2 77. Q. And I take it that one of the
3 matters which is in dispute is a claim by you and
4 your partners for an accounting from Mr. McKenzie as
5 to the amounts that were billed, whether or not
6 those amounts were appropriately billed, and whether
7 or not he, in fact, was applying the rigors of the
8 partnership agreement that existed, certainly up to
9 his withdrawal from the partnership; is that fair?

10 A. Yes.

11 78. Q. And as I take it, I think it is fair
12 to say that matters have not yet been resolved
13 between you and your partners and Mr. McKenzie?

14 MR. EPSTEIN: She indicated that.

15

16 BY MR. RANKING:

17 79. Q. And with respect to the dispute and
18 the concerns that you and your partners have, have
19 you written...when I say "you", again I am talking
20 collectively, for you and your partners...have you
21 written to Mr. McKenzie or expressed the concerns,
22 to demand an accounting...are there letters to
23 confirm the concerns that you were expressing?

24 A. There were various letters, memos
25 and e-mails back and forth.

1 talking about exact amounts that he paid or
2 didn't pay, I am not sure that that is
3 relevant. /R

4

5 BY MR. RANKING:

6 82. Q. We are getting into the accounts
7 very soon, but with respect to the amounts that were
8 billed for the various files to which you make
9 reference in paragraph 3 of your affidavit, all the
10 funds were received by the firm; is that correct?

11 A. I believe so, yes.

12 83. Q. And were the funds that were
13 received with respect to the subject matter, what I
14 have called the subject matter of the Nelson
15 Barbados litigation, were they distributed to Mr.
16 McKenzie in accordance with the partnership
17 agreement?

18 A. Insofar as possible.

19 84. Q. What do you mean by that?

20 A. Well, one of the issues was
21 overhead. Mr. McKenzie felt that he should have
22 received the full percentage as set out in the
23 partnership agreement. Overhead was not permitting
24 that, and that was a source of disagreement.

25 85. Q. And do I take your answer to mean

1 that Mr. McKenzie thought that no overhead should be
2 deducted from the billings that were coming in from
3 Mr. Allard or Peterco?

4 A. I don't think that was his position.

5 86. Q. I may well have misunderstood your
6 answer, Ms. Duncan.

7 A. I think his position was that the
8 other lawyers should have been contributing more to
9 overhead so that he could take his full percentage
10 out.

11 87. Q. I see. Again, I would like to come
12 back to this, but one of the issues that we are
13 concerned to understand is, with respect to the
14 billings from the Crawford McKenzie firm relative to
15 the subject matter of the Nelson Barbados file, we
16 understand that it was billed by the firm, correct?

17 A. Yes.

18 88. Q. It was collected by the firm?

19 A. Yes.

20 89. Q. And it then became an issue between
21 Mr. McKenzie and the firm as to how those
22 collections were distributed; is that fair?

23 A. The issue was the amount of funds
24 available to pay overhead. So it wasn't tied to one
25 file. That is why I am having difficulty answering

1 your question.

2 90. Q. All right. At the end of the day,
3 Mr. McKenzie thought he should be getting paid more
4 because he though the other partners were
5 undercontributing to overhead?

6 A. Yes.

7 91. Q. Okay. But certainly, we are in
8 agreement that, throughout the entire proceeding,
9 for any of the various files that formed the subject
10 matter of Nelson Barbados, they were billed by the
11 firm, and the firm collected those funds, correct?

12 A. Yes.

13 92. Q. All right. Thank you. Now, I just
14 want to put a couple of documents to you so that I
15 understand, because the actual documents on the
16 public record may be something different. I am
17 going to pass across to you a business names report,
18 and this business names report is from the Ministry
19 of Government Services.

20 And you will see it is a business name for
21 Crawford McKenzie McLean Anderson & Duncan, and it
22 indicates that the activity being carried out is a
23 law practice. The registration date on the left
24 hand side of the page, Ms. Duncan, is April 25,
25 2007, and it shows an expiry date of April 24, 2012.

1 And it certainly...

2 MR. EPSTEIN: Why don't you give us a
3 moment to review this, please?

4 93. MR. RANKING: What I propose to do, Mr.
5 Epstein, is I've got three documents. I am
6 going to put them all across so you can see
7 them, and I am happy to take answers to
8 this by way of undertaking.

9 MR. EPSTEIN: Okay.

10 94. MR. RANKING: This isn't a skill-testing
11 question. I am just trying to understand.

12 MR. EPSTEIN: Okay.

13 95. MR. RANKING: So I am going to hand them
14 across and then I will...perhaps I can do
15 this. I am going to mark the business
16 names report for Crawford McKenzie McLean
17 Anderson & Duncan that expires on April 24,
18 2012 as Exhibit number 2.

19
20 --- EXHIBIT NO. 2 : Business Names Report for Crawford
21 McKenzie McLean Anderson & Duncan,
22 expiry date April 24, 2012

23
24 96. MR. RANKING: And I am now passing
25 across to you a second report, again from

1 the Ministry of Government Services...the
2 first is for the same law firm, Crawford
3 McKenzie McLean Anderson & Duncan, and it
4 shows an expiry date of February 20th,
5 2010. If we could mark that as
6 Exhibit number 3.

7
8 --- EXHIBIT NO. 3 : Business Names Report for Crawford
9 McKenzie McLean Anderson & Duncan,
10 expiry date February 20, 2010

11
12 BY MR. RANKING:

13 97. Q. And if you don't know the answer,
14 that is obviously understandable, but can you
15 explain to me how it is that there is still an
16 active registration with respect to the Crawford
17 McKenzie firm?

18 A. No.

19 98. Q. All right. Could I ask you to do
20 this, could you speak to your partners and let us
21 know? It may be just an oversight that this wasn't
22 deleted. I don't know.

23 MR. EPSTEIN: Okay. Sorry, I just want
24 to be clear on the undertaking. You want
25 to ask the partners why...

1 99. MR. RANKING: Why there is still an
2 active...I had understood from both Mr.
3 McKenzie's affidavit and Ms. Duncan's
4 affidavit that the Crawford McKenzie is no
5 longer an active firm. The business names
6 report, which we have marked as Exhibit 2
7 seems to suggest otherwise. I would like
8 to understand whether or not there is any
9 firm actually acting under that name, and
10 if not, if it was just an oversight. And
11 again...

12 THE DEPONENT: You want to know if there
13 is any firm acting...

14 100. MR. RANKING: Acting under the name of
15 Crawford McKenzie.

16 MR. EPSTEIN: He wants to know if there
17 is any firm acting under the name of
18 Crawford McKenzie, or if this is just an
19 oversight, that there hasn't been an
20 updated filing, correct?

21 101. MR. RANKING: Yes. Thank you.

22 MR. EPSTEIN: Yes, we will give you that
23 undertaking.

U/T

24 102. MR. RANKING: And the third document
25 that I will pass across is another business

1 names report. This is under the name
2 Crawford McLean Anderson & Duncan, which
3 indicates that the registration date was
4 January 18th, 2010. We will mark that as
5 Exhibit 4.

6
7 --- EXHIBIT NO. 4 : Business Names Report for Crawford
8 McLean Anderson & Duncan,
9 registration date January 18, 2010

10

11 BY MR. RANKING:

12 103. Q. I take it that this document was
13 filed on behalf of your current partnership, Ms.
14 Duncan?

15 A. I believe so.

16 104. Q. And, although the dates do not
17 coincide identically, it certainly would seem to
18 reflect Mr. McKenzie's withdrawal from the firm as
19 of December of 2009, and this firm continuing as a
20 successor firm; is that correct?

21 A. Yes.

22 105. Q. And was there any change in terms of
23 the address of practice? I take it they are
24 continuing to carry on practice from 40 Coldwater
25 Street?

1 A. Yes.

2 106. Q. And as I understand your earlier
3 evidence, the issue with respect to taking accounts
4 with Mr. McKenzie remains outstanding?

5 A. Yes.

6 107. Q. And that is with respect to both
7 assets of the firm, and what are called hard assets
8 and soft assets, being work in process, and return
9 of capital, and things of that nature?

10 A. I think it is more a question of
11 whether or not the terms of the partnership
12 agreement have been met.

13 108. Q. Thank you. Now, if I could ask you
14 to go back to paragraph 2 of your affidavit. You
15 indicate in paragraph 2 that you make the affidavit
16 for the purposes of correcting inaccuracies that
17 were brought to your attention and to your partner's
18 attention. Do you see that?

19 A. Yes.

20 109. Q. And can you tell me, who was it that
21 brought the inaccuracies to your attention?

22 A. When I attended at the hearing on
23 February 23rd, 2010 and I listened to your
24 submissions, Mr. Ranking, I became aware that things
25 did not appear, or certainly did not seem to be in

1 accordance with my understanding.

2 110. Q. So that is something that you heard
3 yourself, Ms. Duncan?

4 A. Yes.

5 111. Q. All right. And what is it that you
6 heard that did not accord with your recollection?
7 Are all the issues that you heard that gave you
8 concern, and what you have referred to as
9 inaccurate, set forth in your affidavit?

10 A. I would have to consult my notes. I
11 think the majority of them are, but I...I think I
12 had provided a list to my counsel. My counsel
13 combined them to make the affidavit as efficient as
14 possible.

15 112. Q. All right. And when you say to your
16 counsel, is that to Mr. Dewart, subsequent to Mr.
17 Epstein?

18 A. Yes.

19 113. Q. I was just interested in the
20 language that you used in paragraph 2. I had
21 understood from...I don't know if it was from Mr.
22 Epstein or from Mr. Dewart, that you had attended in
23 court and heard things that gave you concern. What
24 I found interesting to note...and again, it may be
25 the person that drafted this affidavit did not

1 reflect precisely your intention, for which I am not
2 critical, but paragraph 2 does say that inaccuracies
3 were brought to your attention and to the attention
4 of your partners.

5 Do I now understand, from your evidence,
6 that these inaccuracies were inaccuracies that you,
7 yourself, detected, rather than having Mr. Dewart or
8 someone else bring them to your attention?

9 A. That is correct, although I then
10 went and spoke to my partners and brought it to
11 their attention, so I think maybe the two things got
12 conflated.

13 114. Q. All right. And with whom did you
14 speak when you speak of bringing it to the attention
15 of your partners?

16 A. Bill McLean and Tim Anderson.

17 115. Q. And what did you tell them?

18 A. The day after the hearing, I sat
19 down with them at the coffee break, so approximately
20 10:30 in the morning, and just laid out to them
21 essentially the issues that you see here. It was a
22 slightly different format obviously because it was
23 just based on what I had heard at court the day
24 before and what I subsequently heard from Mr. Dewart
25 after I raised these issues with him after court.

1 And things developed from there.

2 116. Q. All right. And what was the
3 response of your partners? Did they share your view
4 that these were matters that had to be dealt with by
5 way of filing an affidavit and bringing the
6 inaccuracies to the attention of the court?

7 A. We believed that the inaccuracies
8 had to be corrected. We wished to give Mr. McKenzie
9 the opportunity to do that. We asked him to correct
10 the inaccuracies. He told us that we were mistaken.
11 We then sought our own independent counsel for
12 advice as to how we should proceed in these
13 circumstances.

14 117. Q. I was actually going to delve into
15 that because I was interested to know if you had
16 actually spoken with Mr. McKenzie to ask him to
17 correct the inaccuracies. Who actually spoke with
18 him?

19 A. I believe that Mr. Dewart actually
20 spoke to him.

21 118. Q. Do you know when?

22 A. It would have been between February
23 24th and 27th.

24 119. Q. Do you know what he said?

25 MR. EPSTEIN: I think we are getting

1 into an area of solicitor/client privilege
2 here. Mr. Dewart was Mr. McKenzie's
3 counsel at the time, and I think those
4 discussions are subject to solicitor/client
5 privilege. /R

6 120. MR. RANKING: I am going to reserve my
7 position with respect to whether this is
8 privileged or not.

9
10 BY MR. RANKING:

11 121. Q. But for my purposes, I understand
12 that Mr. Dewart asked Mr. McKenzie to correct the
13 inaccuracies and he refused; is that fair?

14 A. I don't know the substance of their
15 conversation. I know that Mr. Dewart then told us
16 he had to get off the record for conflict. That is
17 the extent of my knowledge.

18 122. Q. And did you or your partners speak
19 with Mr. McKenzie?

20 A. We did not speak with him.

21 123. Q. Did you write him a letter with
22 respect to correcting the inaccuracies?

23 A. There were e-mail communications.

24 124. MR. RANKING: All right. Will those be
25 produced, Mr. Epstein?

1 MR. EPSTEIN: I am sorry, I am just
2 trying to get my notes down from the
3 previous question. What was the last...

4 125. MR. RANKING: I understand you are
5 taking notes. I understand from Ms.
6 Duncan's evidence that there were no oral
7 communications between either Ms. Duncan or
8 her partners and Mr. McKenzie requesting
9 that he correct the inaccuracies, or what
10 Ms. Duncan very fairly characterized as his
11 inaccuracies, but that there were e-mails.
12 And I am asking for the e-mails that passed
13 between Ms. Duncan or her partners to Mr.
14 McKenzie, and Mr. McKenzie's responses to
15 be produced, please.

16 MR. EPSTEIN: Do you have those
17 available?

18 THE DEPONENT: I am not sure what I have
19 and what I don't.

20 MR. EPSTEIN: Yes. We will look and we
21 will produce those to you if we have got
22 them.

U/T

23 126. MR. RANKING: Thank you.

24

25 BY MR. RANKING:

1 Dewart?

2 MR. EPSTEIN: No.

3 THE DEPONENT: No. We sought advice
4 from LawPro. We also sought independent
5 counsel because LawPro's coverage was
6 limited.

7

8 BY MR. RANKING:

9 133. Q. Thank you. Now, if I go back to our
10 Notice of Motion, I served...and I had an extra
11 copy. This is the Notice of Motion which I have
12 given to everybody. I am handing across to you, and
13 I have provided copies to your counsel, the Further
14 Further Amended Notice of Motion, returnable June
15 7th, 8th, 9th, et cetera, for the cost hearing.

16 This motion has gone through a number of
17 iterations, Ms. Duncan, since it was served in July.
18 What I can tell you is those portions of the Notice
19 of Motion that are not underlined existed in the
20 original motion. I take it that we can agree that
21 my process server served Mr. McKenzie and all the
22 partners at Crawford McKenzie with the motion record
23 in July of 2009?

24 A. Copies were left, yes.

25 134. Q. All right. So that, as of July

1 2009, both you and your partners knew that,
2 certainly, PricewaterhouseCoopers, in its own right
3 and on behalf of various defendants, were seeking
4 costs on a full indemnity scale against, among
5 others, Mr. McKenzie and your firm; is that fair?

6 A. Yes.

7 135. Q. Okay. And after you were served
8 with the Notice of Motion, what steps did you or
9 your partners take to investigate the conduct of Mr.
10 McKenzie?

11 A. What do you mean by that?

12 136. Q. Well, if I look at the Notice of
13 Motion, and I would like this to be marked as an
14 exhibit, which I will do momentarily, but I set
15 forth various orders that we seek, and I set out in
16 some detail under paragraph 2 at page 5 the grounds
17 for the motion. And some of those grounds, I
18 respectfully suggest, reflect conduct unbecoming a
19 solicitor. And my question is, did you or your
20 partners take any steps to investigate Mr.
21 McKenzie's activities as we have set forth and as we
22 allege took place in the Notice of Motion?

23 A. At the time, we spoke with Mr.
24 McKenzie and he assured us that the allegations were
25 untrue.

1 137. Q. And who spoke to Mr. McKenzie?

2 A. I believe that all three of us spoke
3 to him at various times. I certainly...there was a
4 meeting on September 3rd, 2009, at which this was
5 discussed in more detail, that Mr. McKenzie assured
6 us that the allegations were untrue, and we believed
7 him.

8 138. Q. All right. Did you take notes of
9 that meeting?

10 A. Not that I recall.

11 139. Q. Did any of your partners, to the
12 best of your knowledge?

13 A. I would have no way of knowing that.

14 140. Q. Will you make inquiries of your
15 partners and let me know if they made notes of that
16 meeting, and if they did, produce those notes?

17 MR. EPSTEIN: Yes.

U/T

18

19 BY MR. RANKING:

20 141. Q. And when you had the meeting, did
21 you have the Notice of Motion before you, and did
22 you review each paragraph with Mr. McKenzie?

23 A. No.

24 142. Q. But I take it that you talked
25 generally about the Notice of Motion that sought

1 costs against the firm and against Mr. McKenzie,
2 personally, with Mr. McKenzie?

3 A. Yes.

4 143. Q. And, as I understand your evidence,
5 he gave you assurance not to worry, everything was
6 in hand?

7 A. Yes.

8 144. Q. And you indicated you had maybe more
9 than the one meeting on September 3rd, 2009. Did
10 you, in fact, have more than one meeting with him?

11 A. Well, I would have...I am sure there
12 was more than one conversation. But this is a very
13 small firm and people would walk into another
14 person's office and have a conversation. I can't...
15 those are not scheduled and those certainly...you
16 know, there are no notes from those sorts of
17 conversations.

18 145. Q. And what was the nature of those
19 conversations?

20 A. Well, just at various times just
21 checking up on how things were going with Mr.
22 Dewart, or...

23 146. Q. All right. Was anybody assigned to
24 actually look at the files?

25 A. No.

1 147. Q. And were any interviews conducted of
2 the staff that worked on the file?

3 A. No.

4 148. Q. Were any interviews conducted of the
5 associates that worked on the file?

6 A. No.

7 149. Q. And did you or your partners seek
8 outside legal advice on behalf of the firm after
9 having received this Notice of Motion in July of
10 2009?

11 A. Are you referring to other than from
12 Mr. Dewart?

13 150. Q. Yes.

14 A. No.

15 151. Q. And is it fair to say that, until
16 February 23rd, when you were attending in court,
17 that that was the first time where you heard
18 firsthand matters that gave you real concern with
19 respect to how Mr. McKenzie had conducted this file?

20 A. Yes.

21 152. Q. Thank you. And between July of 2009
22 and February of 2010, was anyone within the firm
23 prescribed to oversee the conduct of the action?

24 A. Not really, no. I was responsible
25 for reporting to the partners when we heard from Mr.

1 Dewart or Mr. McKenzie, just because that
2 information tended to come to me. But the Notice of
3 Motion did not seem to really...other than naming
4 the firm, the Notice of Motion didn't seem to speak
5 to anything that the firm had done. It all seemed
6 to speak to Mr. McKenzie and his clients. Mr.
7 Dewart advised us that he had matters in hand. Mr.
8 McKenzie advised us he had matters in hand. So we
9 stayed out of it.

10 153. Q. Is it fair to say, therefore,
11 summarizing your evidence, that you were really
12 leaving matters in the hands of Mr. Dewart, and to
13 the extent that he reported, you would provide that
14 information to your partners; but, other than that,
15 you were not proactively managing the file?

16 A. No, we weren't...neither I nor my
17 partners were reviewing documents or taking any
18 active hand in this. We were staying away from it.

19 154. Q. Right. Now, we know that Mr. Dewart
20 was acting for both Mr. McKenzie and your firm. I
21 have seen Mr. McKenzie's affidavit at paragraph 8,
22 where he makes the comment that he understood that
23 you were dealing with Mr. Dewart with respect to the
24 firm's interests. Do you see that?

25 A. Yes.

1 155. Q. Is that accurate?

2 A. Yes, I believe I was the contact
3 person for Mr. Dewart, if that's what that means, at
4 the firm.

5 156. Q. So, insofar as the firm was
6 concerned, you were the contact. And I take it that
7 Mr. Dewart didn't deal with either of your other two
8 partners?

9 A. No.

10 157. Q. I am correct?

11 A. Yes.

12 158. Q. All right. And did Mr. Dewart
13 actually report to you, or was he reporting to Mr.
14 McKenzie who, in turn, would give you information?

15 A. He would copy us with reports.

16 159. Q. And with respect to the factual
17 investigation as to what occurred and what didn't
18 occur, I take it that was solely within the hands of
19 Mr. McKenzie?

20 A. Yes. Mr. McKenzie spent a great
21 deal of time at Mr. Dewart's office preparing the
22 affidavit.

23 160. Q. And he did not come to you and ask
24 for the assistance of the firm in terms of the
25 background, or getting files, or anything of that

1 nature?

2 A. He did not come to me. He may have
3 asked Sunny Ware or Stacey Ball to provide him with
4 documents, or provide him with information. That
5 would have been standard.

6 161. Q. But with respect to the firm's
7 interest, the firm did not actively involve itself
8 in the preparation of the affidavit; is that fair?

9 A. That is correct.

10 162. Q. And with respect to providing
11 instructions to Mr. Dewart, I take it those
12 instructions came from Mr. McKenzie?

13 A. Well, I think the instructions came
14 from LawPro, to be specific?

15 MR. EPSTEIN: Well...

16 MR. BRISTOW: No. She just said that...

17 MR. EPSTEIN: Just hold on.

18 163. MR. RANKING: It's okay.

19 MR. BRISTOW: And we are already on
20 notice that we are going after LawPro, all
21 right?

22 164. MR. RANKING: David, you will have your
23 chance.

24 MR. EPSTEIN: Sorry, I...

25 MR. BRISTOW: Look, don't tell her to

1 disregard what she just said, sir.

2 MR. EPSTEIN: I didn't say anything
3 about disregarding, Mr. Bristow. Would you
4 mind reading back the record before I...I
5 was going to say something and I couldn't.
6 Mr. Bristow interrupted me, didn't give me
7 a chance to...

8 165. MR. RANKING: I think I can do it.

9 MR. EPSTEIN: Okay.

10 166. MR. RANKING: I think my question, Mr.
11 Epstein, was whether anybody at the firm
12 was providing instructions to Mr. Dewart.
13 That was the thrust of my question.

14 MR. EPSTEIN: Right. And to the extent
15 you are asking about...your question, I
16 take it, related to the investigation that
17 was being done with regard to the
18 allegations that were raised in the Notice
19 of Motion?

20 167. MR. RANKING: Yes.

21 MR. EPSTEIN: Right. So, the question
22 is with regard to the investigation that
23 was done, those were instructions...were
24 any instructions coming from the firm, or
25 were they all coming from McKenzie?

1 THE DEPONENT: No. Those instructions
2 were coming from Mr. McKenzie. I was
3 specifically advised by Mr. Dewart at one
4 point that the firm was background in this
5 motion, and we should not interfere.
6

7 BY MR. RANKING:

8 168. Q. So the firm really took a hands-off
9 approach. It did not conduct an investigation of
10 Mr. McKenzie. While it was copied on letters that
11 came from Mr. Dewart, any work to respond to these
12 allegations was dealt with by Mr. McKenzie without
13 the active involvement of you or your partners, and
14 any instructions that were provided to Mr. Dewart
15 really came from Mr. McKenzie; is that fair?

16 A. For the most part, yes.

17 169. Q. And when you say "for the most
18 part", is there any particular instance that stands
19 out where the firm became actively involved in
20 managing this...

21 A. Well, not actively involved in
22 managing it. We just raised on several occasions
23 our concerns over whether there was a separate
24 interest for the firm in this matter, and we were
25 told no. In the way that the motion was framed, no,

1 there wasn't.

2 170. Q. There was nothing that prevented you
3 or your partners from being more actively involved?

4 A. Not really, no.

5 171. Q. You could have appointed a partner
6 to investigate Mr. McKenzie's activities?

7 A. That sounds awfully formal for a
8 firm like ours.

9 172. Q. It may be more formal than you are
10 accustomed to, but there was nothing that prevented
11 you from doing it?

12 A. Except that that is nothing
13 something that really would have occurred to us.

14 173. Q. But whether it would have occurred
15 to you or not, had you thought of it, you certainly
16 could have carried out an investigation of Mr.
17 McKenzie's handling of the file; isn't that fair?

18 A. Yes.

19 174. Q. Now, Mr. Dewart was retained in or
20 about August of '09 to represent Mr. McKenzie and
21 your firm. Can you tell me, as of the date of Mr.
22 Dewart's retainer, what steps, if any, did he take
23 to come to you or your partners to investigate the
24 conduct of Mr. McKenzie?

25 MR. EPSTEIN: You are asking what steps

1 Mr. Dewart took on behalf of his clients to
2 pursue his mandate?

3 175. MR. RANKING: Yes.

4 MR. EPSTEIN: Okay. I am going to...I
5 think that is privileged, what...

6 176. MR. RANKING: I am not asking for any of
7 the communications that may have passed. I
8 am asking very simply of your partner to
9 let me know what steps Mr. Dewart took to
10 investigate the conduct of Mr. McKenzie.

11 MR. EPSTEIN: So you are not asking for
12 any content of any exchange of information;
13 you are just asking in a general way what
14 he took...

15 177. MR. RANKING: That is correct.

16 MR. EPSTEIN: Okay. Go ahead and answer
17 that.

18 THE DEPONENT: Can I get clarification
19 on...

20

21 BY MR. RANKING:

22 178. Q. Sure. Would you like me to make my
23 question more specific?

24 A. Yes, please.

25 179. Q. All right. Did Mr. McKenzie

1 interview you or any of your partners?

2 A. Mr. McKenzie?

3 180. Q. Excuse me, I apologize. I seem to
4 have...I keep looking at Mr. McKenzie at the end of
5 the room, so...did Mr. Dewart take steps to
6 interview you or any of your partners concerning Mr.
7 McKenzie's conduct?

8 A. No.

9 181. Q. Did Mr. Dewart take any steps to
10 interview any associates?

11 A. No.

12 182. Q. Did Mr. Dewart take any steps to
13 interview any students or staff?

14 A. No.

15 183. Q. To your knowledge, did Mr. Dewart
16 take any steps to verify what Mr. McKenzie told him?

17 MR. EPSTEIN: Just answer to your
18 knowledge. I mean, she obviously doesn't
19 know what steps Mr. Dewart took to satisfy
20 himself.

21 184. MR. RANKING: I am very specific in my
22 questions.

23 MR. EPSTEIN: That is fine.

24 THE DEPONENT: I have no knowledge.

25

1 BY MR. RANKING:

2 185. Q. I take from that answer that you are
3 not aware of Mr. Dewart taking any steps to verify
4 what Mr. McKenzie told him?

5 A. I have no knowledge if he did or he
6 did not.

7 186. Q. All right. Will you undertake to
8 make inquiries of your partners to determine if they
9 know or have any knowledge, information or belief of
10 any steps taken by Mr. Dewart to verify what Mr.
11 McKenzie was telling him?

12 MR. EPSTEIN: Yes, we will ask that. U/T

13 187. MR. RANKING: Thank you.

14

15 BY MR. RANKING:

16 188. Q. And did Mr. Dewart ever come to
17 Orillia?

18 A. Sorry, let me just have a moment to
19 finish writing this down.

20 189. Q. Sorry. Are you ready?

21 A. Yes, thank you.

22 190. Q. I am sorry, I may have lost my own
23 train of thought.

24 MR. EPSTEIN: You asked us to give you
25 an undertaking to ask the partners if they

1 knew of steps that Dewart had taken to
2 verify the information of McKenzie, and we
3 agreed to give you that undertaking.

4 191. MR. SILVER: And if so, what steps.

5 MR. EPSTEIN: Right.

6

7 BY MR. RANKING:

8 192. Q. And I think I asked the question,
9 but I am just going to ask it again. If I have
10 asked it, I apologize. Did Mr. Dewart ever come to
11 the Crawford McKenzie firm to review any of the
12 files?

13 A. No. Mr. McKenzie brought the
14 material to Mr. Dewart.

15 193. Q. And do you know what files he took
16 to Mr. Dewart's office?

17 A. No.

18 194. Q. Was Mr. McKenzie the individual
19 solely responsible for selecting what files he took
20 to Mr. Dewart's office?

21 A. I don't know.

22 195. Q. And do you know what steps, if any,
23 Mr. Dewart took to determine if Nelson Barbados was
24 a legitimate operating company?

25 A. I have no knowledge.

1 196. Q. And do you know if Mr. Dewart took
2 any steps to speak with Donald Best?

3 A. I have no knowledge.

4 197. Q. And do you know if Mr. Dewart took
5 any steps to try to locate Mr. Best?

6 A. I have no knowledge.

7 198. Q. Do you know if Mr. Dewart took any
8 steps to speak with any third parties to determine
9 whether what he was being told by Mr. McKenzie was,
10 in fact, truthful?

11 A. I have no knowledge until my
12 discussion with Mr. Dewart on February 23rd and
13 24th.

14 199. MR. RANKING: And we will come to that
15 momentarily. With respect to that last
16 series of questions, Mr. Epstein, will you
17 make inquiries of the partners to determine
18 if they have any knowledge?

19 MR. EPSTEIN: Yes.

U/T

20 200. MR. RANKING: Thank you.

21

22 BY MR. RANKING:

23 201. Q. And when you say you have no
24 knowledge, I take from that that you have no
25 information, nor do you have a belief? Or, do you

1 have information or a belief?

2 A. I have no knowledge. I...Mr. Dewart
3 was carrying out the file, and I don't know the
4 particulars.

5 202. Q. Right. Is it fair to say, to
6 summarize what I am understanding from your answer
7 is that, to the best of your knowledge, information
8 and belief, Mr. Dewart was reporting to and taking
9 instructions and relying upon Mr. McKenzie for the
10 factual investigation in order to prepare his
11 affidavit to respond to the Notice of Motion that
12 was served in July of 2009?

13 A. I am sorry, could you repeat the
14 question?

15 203. Q. Yes.

16 A. There are a lot of parts there.

17 204. Q. To the best of your knowledge,
18 information and belief, I take it that Mr. Dewart
19 was relying entirely upon Mr. McKenzie, and not
20 conducting any independent investigation?

21 A. When we are referring to the
22 preparation of materials from October of 2009?

23 MR. EPSTEIN: I believe your question
24 before made reference again to the
25 investigation that was done with regard to

1 the preparation of the affidavit. If my
2 understanding is correct, the question is
3 that, is it your understanding that Mr.
4 Dewart relied upon information from Mr.
5 McKenzie in preparing that affidavit?

6 THE DEPONENT: I believe so. I don't
7 know what Mr. Dewart did or did not do. I
8 know that...

9 MR. EPSTEIN: Just as to your
10 information.

11 THE DEPONENT: To my information...

12 MR. EPSTEIN: Your best information and
13 belief.

14 THE DEPONENT: To my information, all of
15 his information came from Mr. McKenzie.

16

17 BY MR. RANKING:

18 205. Q. Okay. Thank you. And, again, to
19 your knowledge, information or belief, did Mr.
20 Dewart take any steps to review the accounting
21 information from the Crawford McKenzie firm?

22 A. At what point in time?

23 MR. EPSTEIN: I take it we are all
24 talking about pre-February 2010?

25 206. MR. RANKING: That is right.

1 THE DEPONENT: So before the
2 examinations?

3

4 BY MR. RANKING:

5 207. Q. That is right.

6 A. I don't know.

7 208. Q. Clearly, he had to make some inquiry
8 after the examinations because I asked that
9 undertakings be given, which they were.

10 A. Yes.

11 209. Q. And, at that point in time, I
12 understand that certain investigation was made by
13 Mr. Dewart, or inquiries may have been made by him.
14 But prior to February 2010, I take it that you are
15 not aware of Mr. Dewart taking steps to review any
16 of the ledgers or accounting information of the
17 Crawford McKenzie firm?

18 A. I have no knowledge of that.

19 210. MR. RANKING: Likewise, Mr. Epstein,
20 will you ask the partners?

21 MR. EPSTEIN: Yes.

U/T

22 211. MR. RANKING: Thank you.

23

24 BY MR. RANKING:

25 212. Q. And did Mr. Dewart ever ask who paid

1 the accounts of Nelson Barbados, to your knowledge?

2 A. Ever?

3 213. Q. Yes, again, you are correct to
4 correct me. As of February...up to February 2010.

5 A. Not that I know.

6 214. Q. And prior to February of 2010, did
7 Mr. Dewart ever learn that the accounts for Nelson
8 Barbados had actually been paid by Peter Allard or a
9 related company?

10 MR. EPSTEIN: She can't answer as to
11 what Mr. Dewart learned.

/R

12

13 BY MR. RANKING:

14 215. Q. Did you or your partners ever inform
15 Mr. Dewart who was paying the accounts at Nelson
16 Barbados?

17 A. When you say "ever", you mean ever?

18 MR. EPSTEIN: Well, again, prior to
19 February...

20

21 BY MR. RANKING:

22 216. Q. Of 2010.

23 A. We had no conversation with him
24 about that topic prior to that date.

25 217. Q. All right. And prior to matters

1 arising in court on February 23rd, to your
2 knowledge, did Mr. Dewart identify that there were
3 three other files that had been opened by Mr.
4 McKenzie relating to the subject matter of the
5 Nelson Barbados litigation?

6 A. I have no knowledge.

7 218. MR. RANKING: Can you inquire of them
8 and determine if they have any knowledge?

9 MR. EPSTEIN: I just want to clarify. I
10 didn't get the first part of the question.
11 You want us to ask them...

12 219. MR. RANKING: Whether or not the other
13 two partners are aware of Mr. Dewart making
14 inquiries of the firm, or determining that
15 there were three other files opened by Mr.
16 McKenzie in relation to Nelson Barbados.

17 MR. KRAMER: Well, there is a dispute in
18 the evidence as to whether those other
19 files relate to Nelson Barbados. Perhaps
20 you will want to qualify the undertaking.
21 We know the three files we are talking
22 about.

23 220. MR. RANKING: Right. I am talking about
24 the three files in paragraph 3 of Ms.
25 Duncan's affidavit.

1 MR. EPSTEIN: Right. U/T

2

3 BY MR. RANKING:

4 221. Q. And I take it, to the extent that
5 you were qualifying your answers perviously, Ms.
6 Duncan, they were qualified because, as of or
7 beginning on the 23rd of February, matters changed
8 dramatically when you heard my submissions in
9 argument before Justice Shaughnessy; is that fair?

10 A. Yes.

11 222. Q. And it was at that point in time, I
12 take it, without getting into the details of your
13 communications, of course, that you had privileged
14 discussions with Mr. Dewart that prompted him to
15 make further inquiries, and which ultimately
16 resulted in him withdrawing as both counsel for Mr.
17 McKenzie and the firm?

18 A. Yes.

19 223. Q. All right. And again, without
20 getting into details of the discussions, I take it
21 that it was as a consequence of the further
22 investigation conducted by Mr. Dewart, some of those
23 matters being set forth in your affidavit upon which
24 I am cross-examining you, that Mr. Dewart felt
25 compelled to withdraw; is that fair?

1 MR. EPSTEIN: Well, you would have to
2 ask Mr. Dewart that as to what compelled
3 him to withdraw.
4

5 BY MR. RANKING:

6 224. Q. Not entirely, because certainly Ms.
7 Duncan...let's do it this way. I take it that Mr.
8 Dewart...one of the factors that led to Mr. Dewart
9 withdrawing...and I am not asking you about the
10 communications, but I take it that by reason of the
11 communications that you had with him, he expressed
12 concern to you, without identifying the nature of
13 the communication, and it was the information that
14 is now being set forth in your affidavit sworn April
15 22nd that was a factor in having him withdraw as
16 counsel to your firm?

17 THE DEPONENT: Yes.

18 225. MR. RANKING: Let's take a short break.
19

20 --- A BRIEF RECESS
21

22 JESSICA A. DUNCAN, resumed

23 CONTINUED CROSS-EXAMINATION BY MR. RANKING :

24 226. MR. RANKING: Before our break, I had
25 been examining Ms. Duncan in part on the

1 Notice of Motion that was served upon her
2 and her partners in July 2009. I would
3 like to mark that Notice of Motion as the
4 next exhibit, with the qualification that
5 it has been further amended since that
6 time. That will be Exhibit 5.

7 MR. EPSTEIN: Sorry, it has been further
8 amended since?

9 227. MR. RANKING: Since July 2009.

10 MR. EPSTEIN: Right. I thought that the
11 one that you gave us is the latest version
12 of the Notice of Motion?

13 228. MR. RANKING: That is correct.

14 THE DEPONENT: The Further Further
15 Amended.

16 MR. EPSTEIN: So this is the latest
17 version of the Notice of Motion?

18 229. MR. RANKING: Yes.

19 230. MR. SILVER: So the further amendments
20 of July '09 are reflected in the document?

21 MR. EPSTEIN: Right. That is Exhibit 5?

22 231. MR. RANKING: Thank you.

23

24 --- EXHIBIT NO. 5 : Further Further Amended Notice of
25 Motion served on Crawford McLean

Anderson & Duncan in July 2009

BY MR. RANKING:

232. Q. Now, if I could ask you to look to paragraph 3 of your affidavit, Ms. Duncan. You have made reference there to the four files that relate to the subject matter of the litigation, and you also make reference at paragraph 11 to Mr. McKenzie's habit of opening a series of file numbers relating to large files due to data partition issues. Can you just explain to me what data partition issues refers to?

A. Unfortunately, no, I can't. That was just what I was told.

233. Q. Can you make inquiries and advise?

MR. EPSTEIN: Well, why don't you give this...some information as to what she was told, which, if she can give you that information, I am very happy for her to do that.

THE DEPONENT: Yes.

MR. EPSTEIN: So, why don't you tell me what you told me.

THE DEPONENT: This was not in relation to these files. This was back when I

1 started working with Mr. McKenzie. The
2 file number changed on a file we were
3 working on. I was just told to docket to
4 the new file number, and I was advised by
5 his assistant that, because of the manner
6 in which PCLaw was set up, you could only
7 put a certain amount of data under a
8 particular file number before the memory in
9 that partition would be full, and that was
10 why you had to put a new file number in
11 when the data got to be a certain size.

12 I never spoke about it again. I
13 never questioned it again. It is just
14 that, since that time, since I started at
15 the firm, on any large file of Mr.
16 McKenzie's, file numbers have changed from
17 time to time, just the file number you
18 docket, nothing...I mean, the files
19 themselves remained physically the same.

20

21 BY MR. RANKING:

22 234. Q. And in those cases, is the file name
23 the same?

24 A. Yes.

25 235. Q. So that, if it were merely a data

1 partition issue, one would expect there to be
2 another electronic file opened with the same file
3 name and the same file number, correct?

4 A. The same file name and a different
5 file number.

6 236. Q. Right. The same file name and a
7 different file number, fair enough?

8 A. Yes.

9 237. Q. But in this case, we have different
10 file names, correct?

11 A. Well, you have two different...there
12 were definitely two different matters involved. We
13 put it in groups. The Nelson Barbados and the
14 Allard file were separately maintained.

15 238. Q. Right. And you don't know whether
16 that was because of data partition issues or other
17 issues, correct?

18 A. I have no knowledge of that.

19 239. Q. Okay. And with respect to each of
20 these files referred to in paragraph 3, and I am
21 most interested in BMC 543, and the other active
22 file, 568, did they have separate correspondence
23 brads, separate document brads?

24 A. Yes, I believe they did. They had
25 separate boxes for correspondence.

1 240. Q. And when you began, because I know
2 we will get to it, I think probably after the lunch
3 break, when you began working on the file, were you
4 told by Mr. McKenzie the file to which you should
5 docket your time?

6 A. Yes.

7 241. Q. And I take it that applied equally
8 to the other timekeepers, that Mr. McKenzie would
9 instruct them on how to docket their time?

10 A. Mr. McKenzie or his assistant, yes.

11 242. Q. All right. Now, when did you first
12 learn that there were multiple files opened with
13 respect to the subject matter of the underlined
14 litigation?

15 A. With respect to Nelson Barbados?

16 243. Q. Yes.

17 A. With respect to the Nelson Barbados
18 file, I was aware that originally when I was
19 involved in security issues, I was docketing to 568.
20 Then in 2009, when I was working on the allegations
21 of defamation by Miller Thomson, the file number
22 changed in that period that I was docketing to 568,
23 and then I was told to docket to 586.

24 244. Q. And who told you?

25 A. Sunny Ware.

1 245. Q. And did she explain why you should
2 docket to one file or the other?

3 A. Well, between those two files, no,
4 because that was...as I said, this was something
5 that would happen on a...you know, it was a regular
6 practice with Mr. McKenzie's files, so it was
7 just...we just changed the file number. That was
8 not of particular note. It was just...that is what
9 we were told.

10 246. Q. And was it generally known within
11 your law firm that Mr. McKenzie would open multiple
12 files with respect to a complex matter?

13 A. Yes...I mean, I want to be very
14 careful. When you say "multiple files"...what I
15 mean is there would be a file number and then we
16 would be told to docket to a new file number. It
17 would be the same file name each time. It would
18 just be a new file number.

19 247. Q. Right. And presumably, if I look at
20 the monikers for the various files, I take it that
21 is Bill McKenzie, "BMC"?

22 A. That is Bill McKenzie, C. It runs
23 initials "A", "B", "C", "D", each within...you have
24 1,000 files in "A"...1 to 999 in "A", 1 to 999 in
25 "B", 1 to 999 in "C".

1 248. Q. And so if I am just looking for Mr.
2 McKenzie's files, I would just look for "BM"?

3 A. Yes. "BM", "A", "B", "C", "D".

4 249. Q. So I take it it would be a
5 relatively easy task if I wanted to determine how
6 many files Mr. McKenzie had opened with respect to
7 this one, this particular matter using that word to
8 include both Mr. Allard and Nelson Barbados? It
9 wouldn't be difficult to make that determination?
10 You had to do it presumably?

11 A. I search...I just searched client
12 names.

13 250. Q. And how long did it take you to
14 determine that there were multiple files open with
15 respect to the subject matter of this litigation?

16 A. Well, it didn't take me long for
17 Nelson Barbados Group because I knew that. That was
18 something I had personally known. For the Allard
19 matter, it didn't take long either because I just
20 had to search for the files opened under that name.

21 251. Q. Were you searching under the file
22 name or under the lawyer name?

23 A. Under the client name.

24 252. Q. And I take it you knew that Mr.
25 Allard was paying the account, so you would search

1 under "Peter Allard"?

2 A. At the time...by the time that I was
3 searching this, yes.

4 253. Q. All right. Now, at paragraph 6,
5 there is reference to matter number 543, and you
6 quoted from various docket entries. Do you see
7 that?

8 A. Yes.

9 254. Q. And I know that we wrote to you or
10 your counsel to ask who the various lawyers were
11 identified by number, and I am just going to follow
12 up because we have prepared a list of lawyers who
13 docketed time to those files. And if I could ask
14 you, and you don't need to do it now, but if I could
15 ask you by way of undertaking to confirm either the
16 accuracy of this summary, or if you take issue with
17 it, if you could let us know, and if you could also
18 please identify the lawyers for whom we don't have
19 names?

20 And I can tell you that what we have done
21 is taken the information that you have previously
22 supplied to us for lawyer 4 being Bill McKenzie, or
23 lawyer 12 being Sunny Ware, and identify, where we
24 have been able to, the lawyer that did the work or
25 the assistant that did the work.

1 A. I would have to give you best
2 efforts on that.

3 255. Q. That is fine.

4 A. We attempted to retrieve some kind
5 of archive or something from our PCLaw database to
6 give us this information. However, we have changed
7 our contract, so we have lost the old list. So all
8 I can do is use my best efforts to look through and
9 try to figure it out.

10 MR. EPSTEIN: So, as I understand it,
11 Mr. Ranking, for example, when we have got
12 number 28, you want to know who the
13 timekeeper is of 28?

14 256. MR. RANKING: Correct.

15 MR. EPSTEIN: Okay. So we will make our
16 best efforts to find that out. U/T

17 257. MR. RANKING: And I think the second
18 part of the undertaking, and I am happy to
19 take it as a negative undertaking, if you
20 take issue...we have identified under each
21 of the files who actually did the work. I
22 believe we have been accurate, but if you
23 take issue with it, if you could let us
24 know?

25 MR. EPSTEIN: Yes. U/T

1 A. That is correct.

2 260. Q. And, as you say, those are the
3 actual docket entries that would have been entered
4 in by the individual timekeeper?

5 A. Yes.

6 261. Q. Okay. And do you recall from your
7 review of Mr. McKenzie's transcript that I had asked
8 whether or not Crawford McKenzie retained dockets?

9 A. I am sorry?

10 262. Q. Do you recall my asking Mr. McKenzie
11 whether or not Crawford McKenzie retained dockets?

12 A. Yes.

13 263. Q. And do you recall, unless I am
14 mistaken, that his answer was that they did not?

15 A. I believe it was something to that
16 effect, yes.

17 264. Q. And I take it that you would agree
18 with me that the client ledgers that you have
19 produced are the dockets that were maintained by the
20 timekeepers for the various files set forth in
21 Exhibits A and B?

22 A. Those are the dockets that were
23 entered. Mr. McKenzie would keep his own record of
24 his time and send that to his assistant to enter
25 into PCLaw on his behalf. I mean, I just want to

1 say, technically, if he did not retain those files,
2 he would not have retained his personal docket.

3 265. Q. Right. And because Mr. McKenzie, I
4 take it from your evidence, would keep dockets in a
5 manual way?

6 A. He had his own timekeeping method.
7 I believe he just kept a running list either beside
8 him, or on his computer, or something.

9 266. Q. Right. And I appreciate the
10 clarification, but so that I understand, how is that
11 different from other timekeepers that were entering
12 docket entries in PCLaw?

13 A. Everybody has their own approach.
14 Some people do it directly, some people make a list
15 and give it to an assistant to enter. But,
16 generally, if it is a student or an associate, they
17 would generally be entering their own dockets, and
18 an assistant would be entering their own dockets.

19 267. Q. I don't know if this assists, but if
20 I could ask you to turn to your Exhibit F. Is that
21 an example of a handwritten docket that has
22 subsequently...

23 A. Yes. That is how Ms. Ware would
24 maintain her time for each day, which she would fill
25 the sheet out and then subsequently enter it into

1 PCLaw.

2 268. Q. Right. And is it your understanding
3 that that is how Mr. McKenzie maintained his docket
4 as well?

5 A. I don't know exactly what Mr.
6 McKenzie did or didn't do.

7 269. Q. But while you may not know Mr.
8 McKenzie's practice, certainly, from your evidence
9 and the productions that you have made, Crawford
10 McKenzie was able to retrieve and produce the docket
11 entries for the various files that are attached as
12 exhibits to your affidavit?

13 A. The ones that were entered into
14 PCLaw, yes.

15 270. Q. And how difficult a task was it for
16 you to retrieve and print out those dockets?

17 A. Well, it took most of the day. I
18 mean, the bookkeeper just trying to find the
19 archived files, and make sure that we could pull
20 them up, and then printing off 300 pages of
21 material. And then searching through for the files,
22 handwritten dockets of Ms. Ware and various other
23 group of...

24 271. Q. And is there any reason, to your
25 knowledge, that Mr. McKenzie could not have

1 just...I was preparing for trials at the time, and I
2 had been told Mr. McKenzie was looking after it, and
3 I trusted him.

4 276. Q. And when you were given the
5 opportunity, was that by Mr. McKenzie or Mr. Dewart?

6 A. Mr. Dewart forwarded a copy to our
7 office.

8 277. Q. And, to your knowledge, did either
9 of your partners review the affidavit before it was
10 sworn?

11 A. No.

12 278. Q. And after the affidavit was sworn
13 and served upon the responding parties, when did you
14 first review the affidavit?

15 A. On February 23rd, when I returned
16 home from court.

17 279. Q. And between the date it was sworn at
18 the beginning of October and February 23rd, to your
19 knowledge, did either of your partners review the
20 affidavit?

21 A. No. They asked me for a copy after
22 I advised them of my concerns.

23 280. Q. And when did you first review the
24 transcript of the cross-examination of Mr. McKenzie
25 that was taken on the 3rd and 8th of February, 2010?

1 A. February 23rd to 24th.

2 281. Q. Thank you. Now, there was certain
3 cross-examination that day, or those days, which was
4 rather illuminating with respect to the work that
5 Mr. McKenzie was doing in Barbados during the latter
6 part of 2005 and throughout 2006 relative to the
7 evidence which he set forth in his affidavit where
8 he said he had only really started working on the
9 action shortly before February 2007. You are aware
10 of that discrepancy?

11 A. That is what led me to, in part,
12 make the affidavit I did.

13 282. Q. Right. Now, while I understand that
14 you didn't first review the transcript of that
15 cross-examination until on or about the 23rd of
16 February, was the gist of that evidence relayed to
17 you by Mr. Dewart?

18 A. No.

19 283. Q. All right. In paragraph 12 of your
20 affidavit, you indicate that you searched the firm
21 records extensively, dealing with the incorporation
22 of Nelson Barbados. Do you see that?

23 A. Yes.

24 284. Q. I take it that all of the searches
25 that are referred to in paragraphs 12 and 13

1 occurred after the 23rd of February?

2 A. Yes. In fact, in this case, it
3 occurred several weeks after.

4 285. Q. And I take it that also relates to
5 the investigation to which you refer in paragraph
6 13?

7 A. Yes.

8 286. Q. And I take it all the documents that
9 you reviewed either in paragraphs 12 or 13 were
10 available and in the possession of Crawford
11 McKenzie?

12 A. I am just going to take a moment to
13 review the paragraphs. Well, the firm records, yes.
14 And when I say "the firm records", I am referring to
15 our records of closed files, our records of open
16 files.

17 287. Q. Okay. In paragraphs 14 and 15, we
18 deal with the work that was performed by Mr.
19 McKenzie's wife, Lisa Carolyn James?

20 A. Yes.

21 288. Q. I take it that she was Mr.
22 McKenzie's wife in 2005?

23 A. Yes.

24 289. Q. And remains so today?

25 A. As far as I know.

1 290. Q. And is Ms. James still providing
2 services to Crawford McLean?

3 A. No.

4 291. Q. And you deal at the end of paragraph
5 15 with the invoices that she was submitting. Do
6 you have a file with respect to the invoices that
7 were being submitted by Ms. James?

8 A. There may be. Our files are
9 maintained in the basement of a 108-year-old
10 building. I believe we still have the accounting
11 records for 2005 somewhere in the basement.

12 292. Q. Do you know the name of her firm?
13 This isn't a skill-testing question.

14 A. I think it's just her name.

15 293. Q. All right. And I take it that you
16 weren't able to locate any invoices for the
17 incorporation of Nelson Barbados that were submitted
18 by Ms. James?

19 A. No.

20 294. Q. In paragraph 16, you go on to deal
21 with certain docket entries which you say you
22 believe relate to the incorporation of Nelson
23 Barbados. I am interested to take your attention to
24 subparagraph (a) where you replicate there, there
25 was:

1 "...Call from PA, review documents from JK
2 and JG and security documents..."

3 Do you know what documents Mr. McKenzie reviewed
4 when the docket says "review documents"?

5 A. No.

6 295. Q. I take it there is a correspondence
7 file for file 543 to which you could make reference?

8 A. I believe there is a box or possibly
9 two boxes of correspondence.

10 296. Q. Right. But to be fair to you, if I
11 were to ask you to go back to October 24, 2005...
12 well, first of all, do you have any knowledge,
13 information or belief as to the documents that Mr.
14 McKenzie would have been reviewing in October of
15 2005?

16 A. No.

17 297. Q. And I am also particularly
18 interested to know what the security documents are
19 to which that docket references. Do you have any
20 knowledge, information or belief as to the security
21 documents?

22 A. No.

23 298. Q. You are aware that there is a
24 reference in the Statement of Claim to certain
25 security documents, or security that was held by

1 Nelson Barbados over certain shares in Kingsland
2 Estates?

3 A. Yes.

4 299. Q. I take it you appreciate why this
5 particular docket entry is one of particular
6 interest to me?

7 A. Yes.

8 300. Q. And I take it that, whatever the
9 security documents may or may not have been, that
10 there is reference to them prior to the
11 incorporation of Nelson Barbados, as evident from
12 the docket entry itself?

13 A. Well, I don't know. I don't know
14 what security documents this docket entry refers to.
15 I don't.

16 301. Q. Perhaps we could just leave it at
17 this. Could I ask you, through your counsel, of
18 course, to review the client ledger 543 documents or
19 correspondence file to determine to the best of your
20 ability the documents that were supplied to Mr.
21 McKenzie by Jane Goddard and John Knox, and the
22 security documents to which this docket is
23 referring?

24 MR. EPSTEIN: We will make our best
25 efforts. Ms. Duncan indicates that it may

1 not be information that is easily
2 retrievable, but we will try.

U/T

3 302. MR. RANKING: Thank you.

4

5 BY MR. RANKING:

6 303. Q. In paragraph 18, you deal with the
7 actual incorporation and who may have pushed the
8 button to incorporate, and I know that you...I take
9 it you have seen Mr. McKenzie's affidavit sworn
10 April 23rd?

11 MR. EPSTEIN: Yes.

12 THE DEPONENT: Yes.

13

14 BY MR. RANKING:

15 304. Q. He takes issue with you on this, and
16 I am going to give you an opportunity before I have
17 finished to comment on Mr. McKenzie's affidavit at
18 the end of the day, but I take it that,
19 notwithstanding what you have seen from Mr.
20 McKenzie, that nothing in paragraph 18 has changed
21 insofar as you are concerned?

22 A. No.

23 305. Q. And when you go on to say that you
24 have been unable to locate anyone in the office to
25 whom Mr. McKenzie may have directed the

1 inquiry...and, again, for the purposes of my
2 submissions to Justice Shaughnessy, did you make an
3 extensive inquiry?

4 A. I asked my partners. I asked Ms.
5 Ball and our bookkeeper. I also inquired with Sunny
6 Ware, who is now retired, as to whether she had any
7 knowledge.

8 306. Q. And all of those individuals were
9 unable to provide information as to the matters in
10 issue?

11 A. That is correct.

12 307. Q. And when you say your bookkeeper,
13 who is that?

14 A. Presently, her name is Julie James
15 (sic).

16 308. Q. Was there anyone else to whom you
17 could have directed your inquiries that you may have
18 overlooked?

19 A. Well, there may have been other...
20 sorry, I am just trying to take my mind back to
21 2005. Not that I can think of.

22 309. Q. Okay. Thank you.

23 A. I am sorry, it's Julie Jones.

24 310. Q. Julie Jones?

25 A. Lisa James, Julie Jones.

1 311. Q. Paragraphs 19 and 20, I am going to
2 come back to. Paragraph 21 deals with the e-mail
3 issue in KWM External. Is Ms. Ware still...do you
4 know her current whereabouts? I understand from
5 your last answer that she is now retired?

6 A. Yes, and I do know her current
7 whereabouts.

8 312. Q. And where is Stacey Ball currently?
9 Is she still employed by Crawford McLean?

10 A. Yes.

11 313. Q. Paragraph 22, we deal with the
12 Heaslet affidavit, and then you go through some of
13 those e-mails at Exhibit H. I take it that you only
14 first learned of these e-mails at some point after
15 February 23rd?

16 A. No. I was working on the security
17 issues, so I saw some of them, at least. I can't
18 recall what I saw in August and September of 2007,
19 but I would have seen some of them.

20 314. Q. And do you know the extent or nature
21 of Mr. McKenzie's involvement with respect to the
22 taping of these calls by Mr. Heaslet?

23 A. I think it is accurately reflected
24 in the e-mails. Mr. Heaslet contacted us to advise
25 that he felt there had been a threat personally

1 against Mr. McKenzie. He advised that he felt it
2 would be wise to tape that conversation because of
3 other knowledge that we had that there was an actual
4 danger. He had reason to believe that threats had
5 been made and been carried out in the past.

6 315. Q. And when you say it was Mr.
7 Heaslet's suggestion to tape the calls, I have
8 looked at the e-mails, and I may have overlooked it,
9 but can you identify in the e-mails where Mr.
10 Heaslet makes that recommendation?

11 A. Well, I don't think it is in here
12 that he makes a recommendation. I think it is just
13 his statement that he messed up on the recording
14 when he talks about getting another call. So I am
15 not aware of anything but Mr. Heaslet acting on his
16 own in that regard. That is certainly the
17 information that I was given at the time.

18 316. Q. And who gave you that information?

19 A. Mr. McKenzie.

20 317. Q. Right. And you wouldn't know one
21 way or another whether Mr. McKenzie had had a prior
22 call with Mr. Heaslet?

23 A. No.

24 318. Q. And if I could ask you to look to
25 the third-last page in the book, I draw your

1 attention to an e-mail from Bill McKenzie dated
2 Sunday, August 12th at 7:47 a.m. Do you see that?

3 A. Yes.

4 319. Q. And I take it you know, from having
5 worked on the security issues, that the two calls
6 were taped on August 10th and August 13th?

7 A. Yes, I believe so.

8 320. Q. And I take it what you have produced
9 here is a string of e-mails starting with Mr.
10 Heaslet to Mr. McKenzie on August 11th at 8:55 p.m.?
11 Reading from the bottom of the page up.

12 A. Yes.

13 321. Q. And he is saying, Mr. Heaslet to Mr.
14 McKenzie:

15 "...I will be talking with Peter Simmons on
16 Monday, August 13th to discuss his
17 impending disassociation with FOGH..."

18 Do you see that?

19 A. Yes.

20 322. Q. And what do you understand FOGH to
21 mean?

22 A. I don't know.

23 323. MR. SILVER: Friends of Graeme Hall.

24 324. MR. RANKING: Thank you.

25

1 BY MR. RANKING:

2 325. Q. And it goes on:

3 "...Also because of my relationship, I feel
4 I need to mention the reaction I received
5 from you and Peter Allard when I delivered
6 his message warning that your personal
7 safety in Barbados could be compromised..."

8 Do you see that?

9 A. Yes.

10 326. Q. And then am I reading the e-mail
11 correctly that the response from Mr. McKenzie is
12 then set forth immediately above at 7:47 a.m., where
13 Mr. McKenzie is then responding to Mr. Heaslet
14 saying:

15 "...Shouldn't this be taped?..."

16 A. Yes. I was mistaken obviously.

17 327. Q. All right. So I take it that, as an
18 exhibit to your affidavit, your understanding of
19 this is that Mr. Heaslet wrote to Mr. McKenzie on
20 August 11, 2007, talking about Mr. McKenzie's
21 personal safety and perhaps that of others being
22 compromised, and Mr. McKenzie's response is to ask
23 the rhetorical question as to whether the
24 conversation should be taped; is that fair?

25 A. That is what I am seeing in these

1 e-mails, yes.

2 328. Q. Thank you. And I take it you have
3 no knowledge, information or belief to contradict
4 the evidence you have just given?

5 A. No.

6 329. Q. And also, if I could take you back
7 to the first e-mail at Exhibit H, and I know you
8 were involved in the security issues, and you have
9 indicated that you may first have seen these when
10 you were working on the file in August of 2007. I
11 am interested that the first e-mail is an e-mail
12 from Mr. Heaslet, and you then have to flip through
13 the first e-mail, and there is a second one. But we
14 ultimately, and there may be a third, come to an
15 e-mail from Peterco Holdings dated August 13th, 2007
16 at 5:43 p.m. Do you see that?

17 A. Yes.

18 330. Q. And do you know who Barbara Dortch
19 is?

20 A. My understanding is that she was one
21 of Peter Allard's assistants.

22 331. Q. And is it your understanding, based
23 on that personal involvement with the file, that in
24 2007, together with your review leading up to the
25 preparation of your affidavit, that it was Ms.

1 Dortch, as Mr. Allard's assistant, who actually
2 transcribed the taperecordings of these
3 conversations?

4 A. That is what was suggested in the
5 e-mails, yes.

6 332. Q. All right. Thank you. Mr. Silver
7 notes that it is a revised transcription. We will
8 worry about the revisions. But, in any event, your
9 best understanding, based on your review of the
10 documents, is that it was Mr. Allard's assistant who
11 transcribed the taperecordings?

12 A. The best that I can say with all
13 accuracy is that it was Mr. Allard's assistant who
14 e-mailed them to us.

15 333. Q. Thank you. If I could ask you to
16 turn back to your affidavit. In paragraph 23, you
17 talk about the accounts and the removal of the trust
18 statements.

19 A. Yes.

20 334. Q. And I take it that that was advice
21 that was provided by Ms. Ball?

22 A. Yes.

23 335. Q. Did you have any discussion with her
24 as to whether the actual descriptions in the
25 accounts were changed in any way?

1 A. My discussion with her was that I
2 asked her to look at the evidence in the transcript.
3 I asked her about the trust statements, and this is
4 the information she gave me about the trust
5 statements. As far as I know, she copied the
6 accounts as we had them, with the exception of the
7 trust statements.

8 336. Q. Would you be good enough just to
9 make an inquiry of her to confirm that your
10 information is correct?

11 MR. EPSTEIN: Yes.

U/T

12 337. MR. RANKING: Thank you.

13

14 BY MR. RANKING:

15 338. Q. And I take it, when the firm
16 customarily sends out accounts, trust statements are
17 customarily appended to those accounts?

18 A. Yes.

19 339. Q. And when you, as a partner of the
20 Crawford McKenzie firm, refer to an account, do you
21 and your partners consider the trust statements to
22 be a document that is incorporated and constitutes
23 part of an account?

24 A. I do. I don't know about my
25 partners.

1 340. MR. RANKING: Would you make inquiries
2 and let us know, Mr. Epstein?

3 MR. EPSTEIN: So you want us to ask the
4 partners if they consider the trust
5 statements to be part of the account?

6 341. MR. RANKING: Yes, please.

7 MR. EPSTEIN: Yes. U/T

8 342. MR. RANKING: Thank you.

9

10 BY MR. RANKING:

11 343. Q. Now, in paragraph 24, you go on to
12 deal with the issue of whether accounts were left at
13 reception, and the payments being made by Mr.
14 Allard. In paragraph 26, you go on to say that:
15 "...[You] have been unable to locate any
16 documents suggesting that accounts were
17 ever directed to Nelson et al., or that
18 they were left in the drawers at reception
19 to be retrieved..."

20 Do you see that?

21 A. Yes.

22 344. Q. Did you also make inquiries of
23 others within the firm before making that statement?

24 A. I asked Stacey Ball to review the
25 correspondence, such as we had it, to see if she

1 could locate any cover letters directed to Nelson
2 Barbados. I reviewed the accounting records we had
3 to see if I could locate anything of that nature.
4 We could not locate anything like that. We have not
5 spoken with Stacey...with Sunny Ware. That is why I
6 said I have not been able to locate any document
7 because I have not...that was the extent of my
8 inquiry.

9 345. Q. And to the best of your knowledge,
10 information and belief, who was responsible for, in
11 fact, sending accounts to Mr. Allard?

12 A. Ms. Ware.

13 346. Q. Ms. Ware. Would you undertake to
14 make inquiries of her to determine if she is aware
15 of any accounts ever having been left at reception
16 for collection?

17 MR. EPSTEIN: This is specifically
18 accounts for Peter Allard?

19 347. MR. RANKING: No. These are the
20 accounts that were marked as Exhibit 10 on
21 the cross-examination of Mr. McKenzie on
22 February 3rd and 8th. Mr. McKenzie gave
23 evidence that the accounts were left at
24 reception to be picked up by Mr. Donald
25 Best. And I understand from paragraph 24

1 of Ms. Duncan's affidavit that she is
2 taking issue with that evidence.

3 MR. EPSTEIN: Right. So you are
4 specifically asking about the accounts that
5 are referenced in Exhibit 10?

6 348. MR. RANKING: Yes.

7 MR. EPSTEIN: You want us to ask Ms.
8 Ware if she is aware of the accounts having
9 been left at the reception?

10 349. MR. RANKING: Yes.

11 MR. EPSTEIN: Yes. U/T

12 350. MR. RANKING: And if she was aware of
13 any accounts having been left at reception,
14 then we would like to know the particulars.

15 MR. EPSTEIN: Sorry, "any accounts", I
16 just want to know..."any accounts" is very
17 broad.

18 351. MR. RANKING: Any accounts within
19 Exhibit 10. I am only talking about
20 accounts that were the subject matter of
21 Mr. McKenzie's cross-examination.

22 MR. EPSTEIN: Thank you. That is fine. U/T

23 THE DEPONENT: Now, I just want to
24 clarify, though, the import of my evidence.
25 I can't say that accounts weren't left.

1 All I can say is I found evidence that
2 accounts were forwarded to Mr. Allard. I
3 found cover letters, et cetera. I have
4 found no evidence that accounts were left
5 in the form of cover letters or directions
6 or e-mails that would suggest that they
7 were left at reception. It doesn't mean
8 they weren't.

9

10 BY MR. RANKING:

11 352. Q. I understand, and I think you were
12 very clear in that, and that is why I have asked for
13 the undertaking. But I did appreciate that
14 evidence. I guess you will also recall the evidence
15 that was given by Mr. McKenzie that there was
16 a...however inelegantly as I might put this...I had
17 understood it to be an accordion folder with
18 alphabet 'A' through to 'Z' for materials to be
19 picked up at reception. Are you aware, did that
20 exist?

21 A. It was not an accordion folder.
22 It's a big, old, metal file cabinet with drawers
23 with letters of the alphabet on them. And if you
24 want a client to pick...if a client is coming to
25 pick something up, you place the item in the drawer

1 with the right letter on it, so that the
2 receptionist knows where to look.

3 353. Q. And what is the practice customarily
4 carried out by your partners to notify a client that
5 documents are available to be picked up?

6 A. Generally, we would call or e-mail
7 them or...yes, generally, it is a telephone call or
8 an e-mail.

9 354. Q. And is there a document that the
10 client signs to acknowledge having picked up the
11 envelope or whatever the package is?

12 A. I think it depends on the
13 circumstances. Certainly in my practice, if they
14 are coming to pick up a cheque, we have them sign an
15 acknowledgment.

16 355. Q. All right. And in your experience,
17 having regard to the evidence that you have given
18 which supplements paragraph 24, is it out of the
19 ordinary for you not to have been able to locate a
20 document to evidence that materials were picked up,
21 according to the evidence given by Mr. McKenzie?

22 A. For the most part...I can't speak to
23 Mr. McKenzie's practice. I can tell you, for the
24 most part in my practice and in my partner, Tim
25 Anderson's practice, we do a cover letter, and at

1 the top of the address block, there is the notation,
2 "Picked up by client".

3 356. Q. Thank you. If I could ask you to
4 turn to Exhibit J. This is the e-mail from Sunny
5 Ware to which you make reference in paragraph 24 of
6 your affidavit. I know that inquiries are being
7 made of TD Bank with respect to the wire transfers
8 for the TD Canada Trust account in Canada.

9 My request...and we can talk about this off
10 the record...but certainly with respect to the
11 inquiries that are being made of TD Bank for both
12 the Canadian account and the U.S. account, I would
13 ask that you make the inquiry for production of the
14 wire transfer documents evidencing payments by Mr.
15 Allard or his company to the U.S. account.

16 And I think what I would like to do, so as
17 not to make it unduly expensive or problematic, is I
18 am going to ask for an undertaking that all accounts
19 be produced with respect to any payments made by
20 Allard or...

21 MR. EPSTEIN: All accounts be produced?

22 357. MR. RANKING: All wire transfer
23 documents evidencing payment of accounts.

24 THE DEPONENT: Can I speak to my lawyer
25 for a moment?

1 previously referred to the wire transfers
2 from Mr. Allard or his company in the
3 Canadian TD Bank trust account.

4 MR. EPSTEIN: Right.

5 360. MR. RANKING: I have not previously seen
6 the document that is now being attached as
7 Exhibit J to Ms. Duncan's affidavit. I am
8 now expanding that undertaking to request
9 that any wire transfer documents that were
10 made to pay accounts relating to the
11 subject matter of the litigation that is
12 referred to in Ms. Duncan's affidavit, any
13 wire transfer documents from Mr. Allard or
14 his company to the U.S. account of the TD
15 Bank also be produced. I am seeking that
16 undertaking.

17 But before I compel you to answer
18 the undertaking which I am seeking, I am
19 suggesting that if you give me two or three
20 examples, that might suffice so as to
21 obviate the necessity of having to pull all
22 the documents. And Ms. Duncan does want to
23 talk to you, so...

24 MR. EPSTEIN: Yes.

25 361. MR. RANKING: And I am happy that you

1 speak with her before you answer my
2 undertaking, if that is of any assistant.

3 362. MR. SILVER: Well, I want to make sure I
4 understand, too, what...

5 MR. EPSTEIN: Perhaps we can have a
6 discussion over the lunch break about...we
7 are willing to assist you with this, but
8 there are concerns about the scope of the
9 undertaking and what may be involved, so...

10 363. MR. RANKING: I don't want to be
11 unreasonable. I think I am entitled to it,
12 but I want to be fair to you, and I am
13 happy to discuss it over the lunch hour.

14 MR. EPSTEIN: All right.

15 364. MR. SILVER: Sorry to interrupt, but why
16 don't we have a discussion off the record
17 now, nail this down now, and maybe it will
18 be the lunch break? Because I am
19 interested in this, and I don't want
20 to...maybe the best way to do it is with an
21 off-the-record discussion and then come
22 back on the record and confirm exactly what
23 the undertaking is.

24 365. MR. RANKING: Can we do this: Although
25 I very rarely disagree with Mr. Silver,

1 given the number of counsel that want to
2 ask questions, I think it is better done
3 over the lunch hour so that we can at least
4 get another ten minutes of examination
5 done?

6 MR. EPSTEIN: That is fine.

7 366. MR. RANKING: Thank you.

8

9 BY MR. RANKING:

10 367. Q. Okay. If I could ask you to just
11 deal with the trust ledgers, and they have been
12 produced at Exhibits A and B of your affidavit.
13 Before I get to those trust ledgers, I have certain
14 questions. First of all, Mr. Donald Best, do you
15 know him?

16 A. Yes.

17 368. Q. And how long have you known him?

18 A. Since the year 2000.

19 369. Q. And in what capacity do you know
20 him?

21 A. He was acting as an investigator on
22 the telecommunications files I worked on.

23 370. Q. And these are what have otherwise
24 been called the satellite cases?

25 A. Yes.

1 371. Q. All right. And how many files did
2 you work on with Mr. Best?

3 A. He was involved in a great deal of
4 them. I worked closely with Mr. Best on about three
5 of them.

6 372. Q. And how many cases...of these
7 satellite cases did Mr. McKenzie have in which he
8 was using Mr. Best?

9 A. That would be quite a few. Any case
10 that involved investigation, he would have Mr. Best
11 on.

12 373. Q. I take it that Mr. Best...and
13 certainly based on your knowledge of Mr. Best and
14 Mr. McKenzie, they had a close association?

15 A. Yes.

16 374. Q. And I take it the association was,
17 in fact, greater than that set forth in the
18 affidavit of my student, Mr. Kwidzinski?

19 A. Well, could you specify what the...

20 375. Q. Yes. Let me tell you, it is
21 interesting what happens when things get filed on
22 Internet blogs, but I had thought there had been
23 some association between Mr. Best and Mr. McKenzie
24 of some eight or nine cases. I am told that,
25 indeed, Mr. Best and Mr. McKenzie have worked on at

1 least twenty cases together.

2 A. I wouldn't be surprised.

3 376. Q. All right. So that doesn't come as
4 a surprise to you?

5 A. No.

6 377. Q. And how would you, Ms. Duncan,
7 characterize Mr. McKenzie's relationship with Mr.
8 Best?

9 A. They were very close. They
10 understood each other very well in terms of how to
11 work together on a case. Mr. Best understood how
12 Mr. McKenzie wanted the cases done. Mr. McKenzie
13 trusted Mr. Best to carry out his role, whatever it
14 was, in a very competent way.

15 378. Q. And to your knowledge, did Mr.
16 McKenzie ever use any other private investigator for
17 his satellite cases?

18 A. At times, I believe that, for
19 example, on some of the pay-per-view files where we
20 were going after people for illegally showing boxing
21 matches or wrestling matches without paying for them
22 for money, that other investigators would be hired,
23 because you would be talking about ten or twenty or
24 thirty bars across the country.

25 379. Q. I see. So it was a matter of

1 geography that Mr. Best couldn't handle those
2 matters, so that Mr. McKenzie would hire someone
3 else?

4 A. Or it may simply be the fact that
5 that wasn't really an involved...an involved case to
6 carry out. Mr. Best had a very extensive set of
7 skills that were best used on the more sophisticated
8 cases.

9 380. Q. Would it be fair to say that Mr.
10 Best was Mr. McKenzie's primary private
11 investigator?

12 A. For certain matters, yes.

13 381. Q. Some have referred to Mr. Best as
14 Mr. McKenzie's go-to guy. Would that be a fair...

15 A. Yes.

16 382. Q. Thank you. Is it also true that Mr.
17 McKenzie acted for Mr. Best?

18 A. I don't know that he...we haven't
19 been able to locate any files. We have located some
20 correspondence that would indicate Mr. McKenzie
21 assisted Mr. Best with an MTO investigation. As
22 I...I, at one time, prepared a marriage contract for
23 Mr. Best.

24 383. Q. Does the name Dean Love mean
25 anything to you?

1 A. Yes.

2 384. Q. Will you agree or disagree that, in
3 fact, Mr. McKenzie may well have represented Mr.
4 Best in a Manitoba action?

5 A. I have no knowledge of that. I am
6 aware that Mr. Love named a lot of people in various
7 lawsuits, including Mr. McKenzie. I know who
8 represented our firm, and that is the extent of my
9 knowledge of the Manitoba actions.

10 385. Q. Okay. Do you know the current
11 whereabouts of Mr. Best?

12 A. No, I don't.

13 386. Q. Do you have any contact details,
14 other than the details that are set forth at the
15 bottom of the page on NIS, that we will get to this
16 afternoon?

17 A. No.

18 387. Q. All right.

19 A. And I mean, other than the ones set
20 out in Mr. Kwidzinski's affidavit.

21 388. Q. Right. Now, you also worked
22 directly with Mr. McKenzie on those cases, correct?

23 A. Yes.

24 389. Q. And I take it, when you were working
25 on the satellite cases, you were working closely

1 with him?

2 A. With?

3 390. Q. Mr. McKenzie?

4 A. Yes.

5 391. Q. And by reason of your association on
6 a professional basis and your opportunity to work
7 with him on a day-to-day basis, I take it you
8 understood how he would manage a file and document a
9 file?

10 A. Yes.

11 392. Q. And I take it that you were familiar
12 with the way he practised in terms of documenting
13 matters?

14 A. Yes.

15 393. Q. And when I cross-examined Mr.
16 McKenzie, he certainly led me to believe that he was
17 not an assiduous notetaker. Did you read that
18 portion of the transcript?

19 A. Yes.

20 394. Q. And, in particular, I asked him
21 whether or not he had taken notes of his meetings
22 with Mr. Best. Do you recall that?

23 A. Yes.

24 395. Q. I also asked whether he had taken
25 notes of his meetings with Mr. Knox. Do you recall

1 that?

2 A. Yes.

3 396. Q. And before I ask you questions with
4 respect to whether or not notes might exist
5 concerning meetings or discussions with either of
6 those individuals, given your observations, would
7 you agree that Mr. McKenzie is a meticulous
8 notetaker?

9 A. Mr. McKenzie is meticulous in his
10 docketing. As far as notes may be concerned, he
11 takes notes when there is a hearing proceeding, but
12 he generally would rely on someone else to take
13 notes on meetings, or he would place his notes in an
14 e-mail, I think.

15 397. Q. And you are aware that he said that
16 there were no notes of his meetings with Mr. Best
17 and Mr. Knox?

18 A. Yes.

19 398. Q. And you are aware, as well, he
20 answered an undertaking to say there were no notes
21 in the files?

22 A. That is correct.

23 399. Q. Now, I know...and I am not asking
24 you to do this...I know you have reviewed the files
25 extensively for the purposes of preparing your

1 affidavit?

2 A. Not necessarily extensively. We are
3 talking about, I believe, twelve or so boxes of
4 material.

5 400. Q. Based on that review and
6 appreciating the qualification that you have given
7 me, were you able to identify any notes taken by Mr.
8 McKenzie with respect to meetings with Mr. Knox or
9 Mr. Best?

10 A. No, as I said, other than the
11 e-mails or dockets that we have produced.

12 401. Q. And did he have e-mails to Mr. Best?

13 A. We did not locate any.

14 402. Q. All right. Now, Mr. Peter Allard,
15 are you familiar with him?

16 A. Not personally, no.

17 403. Q. You never met him?

18 A. Never.

19 404. Q. And do you know his current
20 whereabouts?

21 A. I know nothing, other than contact
22 information we have in the files.

23 405. Q. Will you provide that to me by way
24 of undertaking, if you don't have it now?

25 MR. EPSTEIN: Yes.

U/T

1 406. MR. RANKING: Thank you.

2

3 BY MR. RANKING:

4 407. Q. And do you know how long Mr.
5 McKenzie has known Mr. Allard?

6 A. No. I know he is better acquainted
7 with Mr. Allard's brother.

8 408. Q. And who is that?

9 A. Charles or Chuck Allard.

10 409. Q. Is that because of the Allard
11 family's interest in telecommunications?

12 A. That is correct. I believe they may
13 have known each other before that, but I don't have
14 those details.

15 410. Q. All right. And I take it, and we
16 will get to this in more detail this afternoon, but
17 by way of overview, that Mr. Peter Allard, either
18 directly or indirectly, was responsible for paying
19 all of the accounts that are referenced in your
20 affidavit?

21 A. That is what our firm's accounting
22 records suggest.

23 411. Q. And do you know if there was a
24 written agreement between Mr. Allard and Crawford
25 McKenzie with respect to the subject matter of the

1 various files that are referenced in your affidavit?

2 A. I have not been able to locate them.

3 412. Q. And does that apply equally with
4 respect to his responsibility for paying the
5 accounts?

6 A. In terms of whether I could find a
7 written agreement?

8 413. Q. Yes.

9 A. That is right. I did not find any
10 written agreements in what remains in our office.

11 414. Q. And when I refer to Mr. Allard's
12 company, I am referring to Peterco Holdings. Is
13 that your understanding, that that company is
14 closely held by Mr. Allard?

15 A. Yes.

16 415. Q. And are you aware of any other
17 closely held companies of Peter Allard, other than
18 Peterco Holdings?

19 A. I am not aware of the details. I
20 believe he has a number of other corporations.

21 416. Q. And certainly, Peterco Holdings was
22 also responsible for paying, and in fact did pay,
23 some of the accounts at Crawford McKenzie, correct?

24 A. That is the source of my knowledge,
25 is the fact that accounts were paid.

1 417. Q. And your knowledge, that is gleaned
2 from the wire transfer documents?

3 A. That is right.

4 418. Q. And from the entries on your
5 ledgers, correct?

6 A. Yes.

7 419. Q. Which we will review this afternoon.
8 To your knowledge, did Mr. Best pay any accounts of
9 Nelson Barbados?

10 A. The only reference I found was on
11 the very first trust statement, I think. I think
12 there was one trust statement referring to some
13 400-or-some dollars received from...shown as
14 received from Nelson Barbados.

15 420. Q. Why don't we do this: I will ask
16 you if you could perhaps get me that reference over
17 the lunch hour?

18 MR. EPSTEIN: Okay.

19

20 BY MR. RANKING:

21 421. Q. But aside from some payment of \$400,
22 was there any other evidence that Mr. Best paid any
23 of the accounts of Nelson Barbados?

24 A. Not that I found.

25 422. Q. And did you find, in the course of

1 preparing your affidavit and reviewing the files,
2 any evidence that any members of the Knox family
3 paid the accounts of Crawford McKenzie?

4 A. No.

5 423. Q. And so that there is no
6 misunderstanding for the record, when I use the
7 phrase "Knox family", I am including in that moniker
8 John Knox, Marjorie Knox, Jane Goddard and Cathleen
9 Davis.

10 A. As far as I could see in our trust
11 records, the funds came from either Mr. Allard,
12 Peterco Holdings, or they are shown as coming from
13 Nelson Barbados.

14 424. Q. Right. And what we will do this
15 afternoon...in fact, we can do it right now. When
16 it is shown as coming from Nelson Barbados, I think
17 you also produced evidence that, in fact, when
18 Nelson Barbados paid accounts, the actual source of
19 the funds which permitted Nelson Barbados to make
20 the payments was, in fact, Allard or Peterco
21 Holdings, correct?

22 A. I don't know. I would have to rely
23 on the banking documents for that.

24 425. Q. All right. Well, let me just turn
25 up Exhibit L to your affidavit. Exhibit L is

1 referenced in paragraph 27 of your affidavit at page
2 9, and it's at that paragraph where you say:

3 "...McKenzie's evidence, page 999, question
4 1155, is that he was advised by Best that
5 Nelson was paying him. However, in
6 examination of the available accounting
7 files for 543 reveals a series of e-mail
8 exchanges between Allard, Denis Flynn,
9 another of Allard's assistants, KWM
10 External, and Sunny Ware, discussing funds
11 advanced by Allard to pay the Nelson
12 accounts..."

13 A. Yes.

14 426. Q. And you attach this group of e-mails
15 as an exhibit, correct?

16 A. Yes.

17 427. Q. All right. And if you read this,
18 you will see that the first e-mail is an e-mail from
19 Mr. McKenzie, as I now understand KWM External to
20 be, to Denis Flynn and Sunny Ware. Firstly, who is
21 Denis Flynn?

22 A. I believe that is another of Mr.
23 Allard's assistants.

24 428. Q. Right. I am sorry, I just read
25 that. I apologize. And it says there, after

1 dealing with cash that is going to go to Jane

2 Goddard:

3 "...NB is paying for the work.

4 Accordingly, when doing the accounting

5 including the 1,000, it comes out of NB's

6 account, as eventually it may be a taxable

7 disbursement that has to be treated

8 accordingly..."

9 And we were talking about advances that are being

10 made, as I understand it, from Peter Allard to

11 Nelson Barbados, and there are certain tax reasons,

12 as I understand these e-mails, for the funds to be

13 paid by Nelson Barbados. Is that your

14 understanding?

15 A. No. I believe that referred to Mr.

16 McKenzie anticipating being successful in the

17 proceeding, and having an account receiving costs.

18 429. Q. I think that was one aspect of it,

19 but I think there may also have been an issue with

20 respect to taxable disbursements, but...

21 A. Not in this e-mail. There are other

22 discussions...

23 430. Q. I agree.

24 A. There are other discussions with

25 respect to taxation issues. But in this e-mail, he

1 is referring to his anticipation of receiving costs
2 on a successful conclusion.

3 431. Q. I agree with that. If you turn to
4 the next e-mail, Ms. Duncan, you will see there is a
5 further e-mail from Mr. McKenzie to Peter Allard,
6 copied to Mr. Flynn, and the subject is "Monies
7 advanced by PA to Nelson Barbados"?

8 A. Yes.

9 432. Q. And as I read this e-mail, what was
10 happening was Mr. Allard was, in fact, providing
11 funds to permit Nelson Barbados to pay the accounts
12 at Crawford McKenzie?

13 A. That would be what that e-mail
14 suggests, yes.

15 433. Q. And I take it...and I can take you
16 to the next e-mail of June 11th, in the fourth full
17 paragraph:

18 "...Re NB..."

19 And I take it this is an e-mail from Mr. McKenzie
20 where it says:

21 "...Re NB: I expect the best idea is for
22 NB to set up a dedicated account to pay its
23 legal bills and any cost orders. You [and
24 this is being addressed to Peterco
25 Holdings] can provide any money that you

1 loan to it by wiring it into the account.
2 It will pay its own bills out of that
3 account..."

4 Again, that e-mail is consistent with the previous
5 answer you gave with respect to Mr. Allard or
6 Peterco Holdings funding Nelson Barbados to permit
7 Nelson Barbados to pay your firm accounts?

8 A. Yes.

9 434. Q. There is a series of other e-mails
10 that I was going to take you through. Having regard
11 to the time, I am going to say, is there anything
12 else in these e-mails relative to the line of
13 questions that I am asking you that you want to
14 bring to my attention?

15 MR. EPSTEIN: That is a broad question.

16 THE DEPONENT: I would have to look at
17 that over lunch, I think.

18 435. MR. RANKING: It is not an appropriate
19 question at all, but I am just trying to
20 move it along.

21 MR. EPSTEIN: I know. It is a broad
22 question. I mean, if you want to ask her a
23 specific question...

24 436. MR. RANKING: That is fine.

25 MR. EPSTEIN: ...but it is very

1 difficult...

2

3 BY MR. RANKING:

4 437. Q. Well, let's finish off with this
5 question. Based on my review of these e-mails that
6 you have attached as Exhibit L to your affidavit and
7 the earlier evidence that you have given, although
8 this afternoon we are going to see payments being
9 made by Nelson Barbados to the Crawford McKenzie
10 firm, I take it that we can agree that, while the
11 immediate or the direct payment came from a Nelson
12 Barbados account to Crawford McKenzie, that the
13 source of the funds, in fact, emanated either from
14 Peter Allard or one of his companies; is that fair?

15 A. I would have to look at the banking
16 records to know.

17 438. Q. But today...and the reason that you
18 attached these e-mails to your affidavit and made
19 the statements you did in paragraph 27 was in
20 support of that proposition; isn't that fair?

21 A. I believe that our records show that
22 Mr. Allard was the source of funds. I can't say the
23 mechanism by which the funds were delivered. I
24 don't know that.

25 439. Q. Fair enough. And apropos your

1 earlier comment that, other than \$400 of it being
2 paid by Mr. Best, you are not aware of anyone else
3 paying your firm's accounts, other than Mr. Allard
4 or Peterco Holdings; isn't that fair?

5 A. I believe that is correct. As I
6 said, some of it is shown as coming from Nelson
7 Barbados. Again...

8 440. MR. SILVER: Shown where, in the trust
9 ledger?

10 THE DEPONENT: On the trust ledger, it
11 says, "Received from Nelson Barbados", but
12 I would have to look at the banking
13 documents to know exactly the mechanism.

14 441. MR. RANKING: I am happy to break there.

15

16 --- A LUNCHEON RECESS

17

18 JESSICA A. DUNCAN, resumed

19 CONTINUED CROSS-EXAMINATION BY MR. RANKING

20 442. MR. RANKING: After we broke for lunch,
21 counsel had an opportunity to discuss the
22 undertakings with respect to the production
23 of further wire transfer documents from the
24 Toronto-Dominion Bank, and I think Mr.
25 Silver has an accurate note of the

1 conclusion of those discussions. So if I
2 can turn it over to Mr. Silver.

3 443. MR. SILVER: Thank you. I think it is
4 pretty simple. I just want Mr. Epstein's
5 confirmation that we have got these
6 undertakings right, and they are a
7 combination of the undertakings given on
8 February 3rd and 8th, and then the one that
9 Mr. Ranking asked of Ms. Duncan this
10 morning.

11 And I think that what we have agreed
12 to off the record is that previously, there
13 was an undertaking given to get the TD Bank
14 wire transfer documents and/or particulars
15 for every wire transfer into a Canadian
16 dollar account. That was the undertaking
17 previously given. And then I just want to
18 add for clarity that we are looking for
19 wire transfer particulars for every wire
20 transfer into a Canadian dollar account in
21 any of files 543, 587, 568 and 586, which,
22 of course, we only found out about the
23 other file numbers after we cross-examined
24 Mr. McKenzie.

25 MR. EPSTEIN: Yes. Those are the

1 numbers...these are...

2 444. MR. SILVER: Those are the numbers in
3 paragraph 3.

4 MR. EPSTEIN: In paragraph 3?

5 445. MR. SILVER: Yes. So do we have that
6 undertaking? And, Mr. Epstein, I am not
7 avoiding the discussion we had, which was
8 your position is, "We will get a quote and
9 tell you how much it is, and if you guys
10 agree to pay for it, we will go ahead with
11 it."

12 MR. EPSTEIN: Yes.

13 446. MR. SILVER: And our position is, we
14 will cross that bridge when we know what
15 the quote is.

16 MR. EPSTEIN: Fair enough.

17 447. MR. SILVER: Not accepting that it is
18 our obligation, or not yet, but we will get
19 there. But the undertaking is right?

20 MR. EPSTEIN: Yes.

U/T

21 448. MR. SILVER: And then secondly, and this
22 is the additional part that Mr. Ranking got
23 and I am confirming, is that we are
24 asking...you have undertaken to provide the
25 same TD Bank wire transfer particulars for

1 wire transfers into a U.S. dollar account
2 for the same files, with the caveat that a
3 sampling of three or four of those wire
4 transfers might be sufficient.

5 And so, Mr. Ranking asked that we be
6 provided with three or four from the U.S.
7 dollar account, and we reserve the right to
8 seek more. Now, it may be with the TD Bank
9 that that doesn't make it any easier. I
10 don't know. We will have to cross that
11 bridge, but that was the undertaking given,
12 or that was the request made this morning.
13 I just want to confirm that that is the
14 undertaking being given.

15 MR. EPSTEIN: Yes. That is fine,
16 subject to the same qualification we gave
17 before. It is subject to the issue of
18 payment of costs, and you have outlined
19 your position and we have outlined ours.

20 I am just wondering, Mr. Ranking,
21 with regard to the former undertaking, and
22 we have undertaken...the request that we
23 made of the bank was for all of the wire
24 transfer records. I am wondering if, in
25 the same way that you are...with regard to

1 the U.S. dollar bank accounts, you are
2 content to initially look at a sampling of
3 three or four wire transfers.

4 Would you be content...and this just
5 may...I am also very mindful of the timing
6 issues that we have in this lawsuit. Would
7 you be content for initially to be provided
8 with a sampling of three or four wire
9 transfers to the Canadian accounts without
10 waiving your right to get full production
11 in due course?

12 449. MR. SILVER: I am not. I know you asked
13 Mr. Ranking. I am not, and I will tell you
14 why. There are a lot of these trust
15 entries that say "Received from Nelson
16 Barbados", and we all suspect that even
17 though it says "Received from Nelson
18 Barbados", it came from Peter Allard, and I
19 want to nail that down.

20 There are also wire transfers that
21 came in to pay amounts other than to the
22 law firm, and there are some in particular
23 that I am interested in. And so the
24 sampling would be pretty large if we limit
25 it to a sampling, as opposed to getting it

1 all.

2 MR. EPSTEIN: That is fine.

3 450. MR. RANKING: And just a follow-up, when
4 this line of questioning began, I had put
5 to Ms. Duncan Exhibit J to her affidavit,
6 and always rushing in where angels fear to
7 tread, I just want to make sure there is
8 only one Canadian account and one U.S.
9 account, whether those are the accounts
10 that we were referring to in Exhibit J.

11 But, presumably, the whole issue
12 here is we need an undertaking to deal with
13 the wire transfer payments that were made
14 by Mr. Allard or his company to pay these
15 accounts. And I am assuming that these are
16 the only two accounts, the one Canadian
17 account and the one U.S. account maintained
18 by Crawford McKenzie, but if there are
19 others, I take it that it would extend to
20 that as well?

21 THE DEPONENT: Yes. To my knowledge, we
22 only had the two trust accounts, but I...

23 451. MR. RANKING: If that is different, you
24 will let us know?

25 452. MR. SILVER: See, and the other thing

1 that may be...I am sorry that I am
2 participating so much now, but it always
3 occurred to me that the only reason we went
4 to the TD Bank records was because of a
5 concern as to whether or not the firm had
6 records proving where the wire transfers
7 were coming, because your firm and my firm,
8 Ian, I suspect, we wouldn't have to go to
9 the bank to give particulars of where wire
10 transfers came into our accounts.

11 And it seems to me, again, without
12 detracting from the undertakings given, but
13 does the firm have records that confirm
14 where the wire transfers came from?
15 Because if that were the case, then we
16 might not need to go to the TD Bank.

17 453. MR. RANKING: I concur with that.

18 THE DEPONENT: That is something we can
19 try to check. And I am not trying to be
20 difficult, but we have been through two
21 bookkeepers since the bookkeeper that was
22 working at the time in question. So we can
23 certainly examine the accounting records in
24 our possession and determine if we have
25 that in our possession. And would that be

1 an alternative to the bank...

2 454. MR. SILVER: Well, if we...

3 THE DEPONENT: ...if we locate...

4 455. MR. SILVER: ...get conclusive evidence
5 that this wire transfer that was made on
6 this day came from Peter Allard, or
7 Peterco, or whoever it came from, and it is
8 evidence that is reliable, then you don't
9 need to go to the bank to get confirmation
10 of otherwise reliable evidence.

11 MR. EPSTEIN: I understand what...you
12 are looking for evidence of the source of
13 the wire transfers. That's the bottom
14 line. That's what you are looking for. We
15 will undertake to examine our records to
16 see if we can obtain that information
17 directly through the firm.

18 If it's available through the firm,
19 I think it will make it a lot easier, and
20 we will provide that information to you.
21 If it's not, then we will carry on with the
22 other undertakings as discussed.

U/T

23 456. MR. SILVER: I just don't remember what
24 the specific answer to the undertaking that
25 we got before the motion was in respect of

1 the firm records in respect of wire
2 transfers. I think the answer was it is
3 not available, and that came from McKenzie
4 and...so you might want to check that and
5 let us know.

6 MR. EPSTEIN: We will look into that,
7 and, as I say, if there is an easier way to
8 provide you with that information/
9 documentation, we will do so.

10 457. MR. SILVER: Well, thank you, and thanks
11 for allowing me to speak to it.

12 MR. RANKING: No problem.

13

14 BY MR. RANKING:

15 458. Q. If I could ask Ms. Duncan to turn up
16 Exhibit A of her affidavit, which is a copy of the
17 client ledger for file number 543. You might want
18 to actually give that to your client. I am now
19 referring to page 1. This is a document, for the
20 purposes of the record, that is Exhibit A. It is
21 titled "Crawford McLean Anderson & Duncan LLP Client
22 Ledger, All Dates". But I take it the information
23 that is set forth in this, in fact, relates to the
24 predecessor firm, correct?

25 A. Well, depending on the date, yes.

1 Anything from prior to January 1st, 2010...yes.

2 459. Q. Okay. And if I look at the actual
3 document, so that I understand it, on the left-hand
4 side, is that the name of the file, "Peter Allard,
5 Knox and Kingsland Estates action", or is Peter
6 Allard the client?

7 A. Peter Allard is the client. "Knox
8 and Kingsland Estates action" is the name of the
9 file.

10 460. Q. All right. And then we see BMC 543
11 is the actual file number?

12 A. Yes. That "A*" before that, it
13 means archived because it is a closed-out file.

14 461. Q. It means archived?

15 A. Yes.

16 462. Q. Okay. And what is the relevance of
17 930 immediately above the moniker for the file?

18 A. 8930 is the client number.

19 463. Q. 8930. Okay. On my copy, I don't
20 have an "8". So there should be an "8" in front of
21 it?

22 A. Yes. I do have a complete original
23 copy.

24 MR. EPSTEIN: If you want to take a look
25 at the...

1 A. I believe that is cheque number or
2 receipt number.

3 469. Q. Okay. And then under the next
4 heading where it says "General Receipts or
5 Disbursements", I take it that will reflect the...

6 A. Cash flow.

7 470. Q. ...cash flow? And then the third
8 column is for fees?

9 A. Yes.

10 471. Q. And that reflects the actual
11 docketed time, taking the number of hours times the
12 hourly rate?

13 A. Yes.

14 472. Q. And what is the next column where it
15 says "BLD Invoice Number"?

16 A. Billed. So when a docket entry is
17 billed, it gets an entry number assigned to it on
18 the bill, but...I believe that is the number of the
19 bill on which the docket entry appears, sorry.

20 473. Q. That would be the invoice number on
21 the account?

22 A. Yes.

23 474. Q. All right. So that if we just take,
24 by way of example, the first eleven entries with
25 31975, those would have been billed under one

1 invoice?

2 A. I believe so. As I have said, I am
3 not an accountant by any means. I believe that is
4 what that represents.

5 475. Q. All right. And then if I go back to
6 the top of the page and come down to the next line
7 under "Peter Allard", you have indicated that the
8 asterisk means it was archived. And I take it that
9 is "A*" for archived?

10 A. Yes.

11 476. Q. And then the archived date, is that
12 the 8th of April, or the...I guess it must be the
13 8th of April?

14 A. No...yes, that is the 8th...that is
15 the date that it was retrieved.

16 477. Q. That is the date it was retrieved.

17 A. That's the date that that was
18 printed off.

19 478. Q. Okay. And then "Closed Number",
20 what does that refer to?

21 A. That is the closed file number.

22 479. Q. All right. So that when you are
23 actually retrieving it from storage, that is the
24 number that you would use, as opposed to the BMC 543
25 number?

1 A. Unfortunately, it is not that
2 simple. That is the closed number in PCLaw's
3 database.

4 480. Q. I see. All right.

5 A. We have a completely different
6 system for closing out files, physical files.

7 481. Q. But that number really has no
8 relevance for our purposes?

9 A. No, because the physical file was
10 never closed.

11 482. Q. Right. Okay. Then let me take you
12 to...what I am going to do is I want to go through a
13 number of entries, and I take it, from your review
14 of whether it is...and this is a general question...
15 that you are comfortable that the docket entries on
16 this are accurate to the extent that you have any
17 personal knowledge of the entries?

18 A. Certainly to my knowledge, the
19 timekeepers at our firm are accurate in what they
20 enter, yes.

21 483. Q. All right. Now, the first thing I
22 wanted to do is...I think we have identified two
23 other files that may relate to the subject matter of
24 Nelson Barbados, and I would like to take you to
25 those to see whether or not our review is accurate.

1 If I could ask you to turn to page 34 of Exhibit A,
2 the second-last entry on the page dated August 2,
3 2006. Do you see that?

4 A. Yes, I do.

5 484. Q. And it says:

6 "...Transfer BMC 543 to BMC 553..."

7 Do you see that?

8 A. Yes, I do.

9 485. Q. All right. Now, if I go back to
10 your paragraph 3, there is no reference to a BMC
11 553.

12 A. That is correct.

13 486. Q. Okay. But I take from the docket
14 entry:

15 "...Transfer to political matters..."

16 that this is also a file for which the firm was
17 acting for Mr. Peter Allard?

18 A. Yes.

19 487. Q. All right. And can you tell me what
20 the firm was doing for Mr. Allard with respect to
21 political matters?

22 MR. EPSTEIN: You know what, I...can we
23 go off the record one second?

24

25 --- DISCUSSION OFF THE RECORD

1 MR. EPSTEIN: Just so we are clear on
2 the record, and I think the court order
3 speaks to this, any matters that Mr. Allard
4 was involved with relating to this, the
5 Nelson Barbados dispute, if you could call
6 it that, I think there is protection under
7 a court order for Ms. Duncan to answer
8 those questions. But questions relating to
9 other files are ones that we are not in a
10 position to waive privilege on. If Mr.
11 Allard chooses to do that, he can, but...

12

13 BY MR. RANKING:

14 488. Q. Okay. Do I understand this to be a
15 matter that relates to Mr. Allard?

16 A. I believe so.

17 489. Q. All right. And were the political
18 matters dealing with political matters in Barbados
19 or elsewhere?

20 MR. EPSTEIN: You know what, I don't
21 think that she can answer questions...

22 490. MR. RANKING: All right.

23 MR. EPSTEIN: Anything further than what
24 is already contained in these records, I
25 think it could be a waiver of his

1 privilege.

2 491. MR. RANKING: Thank you.

3 492. MR. SILVER: Can we go off for a second?

4

5 --- DISCUSSION OFF THE RECORD

6

7 493. MR. RANKING: So I understand, Mr.
8 Epstein, your position is you won't permit
9 any questions with respect to the Peter
10 Allard file entitled "Political Matters",
11 bearing file number 553. I acknowledge
12 your position.

13 MR. EPSTEIN: Correct. /R

14 494. MR. RANKING: And again, I think you are
15 going to take the same position with
16 respect to the second entry at the bottom
17 of the page, dated October 2, 2006. There
18 seems to be a second matter called "The
19 Sanctuary Matter", bearing file number BMC
20 552. Do you see that, Ms. Duncan?

21 MR. EPSTEIN: Yes.

22 THE DEPONENT: Yes, I do.

23

24 BY MR. RANKING:

25 495. Q. And is that, similarly, another file

1 where your predecessor firm was acting for Mr.
2 Allard?

3 A. Yes.

4 496. MR. RANKING: And I take it, Mr.
5 Epstein, that, as with the other file, you
6 will not permit your client to answer any
7 questions with respect to that file?

8 MR. EPSTEIN: Correct. /R

9 497. MR. SILVER: Sorry, off the record.

10

11 --- DISCUSSION OFF THE RECORD

12

13 BY MR. RANKING:

14 498. Q. And if we go back again to the entry
15 on August 2, 2006, there is a third file, Longview.
16 I take it that is also a file relating to Mr. Peter
17 Allard where Mr. Allard was your client?

18 A. Yes.

19 499. MR. RANKING: And, similarly, I take it,
20 Mr. Epstein, that you will not permit any
21 questions with respect to that matter?

22 MR. EPSTEIN: Correct. /R

23 500. MR. RANKING: All right. Thank you.
24 And I am going to ask you to produce those
25 files, Mr. Epstein, but you would refuse to

1 produce that, correct?

2 MR. EPSTEIN: Yes. /R

3

4 BY MR. RANKING:

5 501. Q. All right. And I am now going to
6 ask you to turn to December 8th, which is at...

7 A. Of what year?

8 502. Q. Of '05.

9 MR. EPSTEIN: Which is page what, did
10 you say?

11 503. MR. RANKING: Page 9.

12

13 BY MR. RANKING:

14 504. Q. And before I ask you any questions
15 on the entry at December 8th, I am going to ask you
16 to turn as well to paragraph 20 of your affidavit.
17 In paragraph 20 of your affidavit, you speak of the
18 accounting records for BMC 543, which are the
19 accounting records we are going to, correct, Ms.
20 Duncan?

21 A. That is correct.

22 505. Q. And what you say at paragraph 20 is
23 that there are numerous invoices from NIS Inc., a
24 company which appears to be owned by Best, and I
25 take it those were invoices that were paid by the

1 Crawford McKenzie firm, correct?

2 A. They were paid by the firm and
3 reimbursed by the client, yes.

4 506. Q. Right. And if I take you now to the
5 entry at NIS, by way of background, you will see
6 beside December 8th that there was a payment to NIS
7 Inc. for research and investigation in the amount of
8 1,426.80, right?

9 A. Yes.

10 507. Q. And there were then taxes on the
11 disbursements of some 99.87, correct?

12 A. Yes.

13 508. Q. All right. And as you just
14 indicated, I take it that the firm paid that amount
15 and was then reimbursed by Mr. Allard when the
16 accounts were paid by him on behalf of Nelson
17 Barbados?

18 A. Yes. I think that is what that
19 series of entries on December 8th shows. I think
20 that...if you look at 490743 further down the page,
21 that shows that funds were transferred to pay an
22 invoice.

23 509. Q. Right.

24 510. MR. SILVER: Where is that?

25

1 BY MR. RANKING:

2 511. Q. Because the way this works is you
3 will take the disbursements in the column under
4 "General", and at December 8th, if you take it
5 across, you will see disbursements of 40,254.75, and
6 if you then...

7 A. I believe that is the receipt. I
8 think the disbursements are listed above.

9 512. MR. RANKING: I believe...let's just go
10 off the record.

11

12 --- DISCUSSION OFF THE RECORD

13

14 BY MR. RANKING:

15 513. Q. So then I think that we are in
16 agreement that the firm paid the NIS account
17 1,426.80 plus tax of 99.87. It was added to an
18 omnibus account, which aggregated 40,254.75, and
19 that account was ultimately rendered by Crawford
20 McKenzie and paid in full by way of a transfer of
21 funds?

22 A. That is correct.

23 514. Q. Okay. And if I could ask you then
24 to go down to December 12th, we see another entry
25 beside the entry number 491062...

1 A. Yes.

2 515. Q. ...where again:

3 "...Paid to NIS re special research and
4 investigation, Barbados..."

5 A. Correct.

6 516. Q. In the amount of \$5,000. And then a
7 further entry immediately thereunder:

8 "...Paid to NIS re special blog
9 research..."

10 in the amount of \$2,500?

11 A. Yes.

12 517. Q. And then tax on that of \$525?

13 A. Yes.

14 518. Q. And those disbursements, I

15 understand, would have been included, or more
16 particularly, were included in an account that was
17 rendered in the amount of \$55,702.89?

18 A. That appears to be the case, yes.

19 519. Q. Okay. Now, I am going to take you
20 to some of those accounts just to confirm that my
21 understanding is correct. But can I just pause just
22 to deal with NIS Inc.? Firstly, you indicate in
23 your affidavit at paragraph 20 that you think that
24 the company was owned by Best. We have done a
25 corporate search, and I am going to pass it across

1 to you. You have a copy of it? Yes, this is a
2 Ministry of Government Services corporation profile
3 report for Ontario corporation number 2049968, which
4 reflects a company for which Donald Best is the
5 administrator, and the address of the office is at
6 3044 Bloor Street West.

7 MR. EPSTEIN: Right. We have that.

8 THE DEPONENT: Is this an exhibit?

9
10 BY MR. RANKING:

11 520. Q. We have not yet marked it because I
12 was going to first take you to Exhibit G of your
13 affidavit, and take your attention to the invoices
14 that you were referencing there. And the first
15 invoice is dated October 24, 2005, and you will see
16 that the address for NIS Inc. on the footer is the
17 same as that in the corporation profile report. Do
18 you see that?

19 A. Yes, I do.

20 521. Q. And I take it that, for the purposes
21 of your cross-examination, we can agree that this is
22 the corporation profile report for the corporation
23 that was providing services to Crawford McKenzie?

24 A. I would agree that that appears to
25 be the case, yes.

1 522. MR. RANKING: Thank you. If we can mark
2 that as the next exhibit. The corporation
3 profile report for NIS Inc. will be
4 Exhibit number 7.

5
6 --- EXHIBIT NO. 7 : Corporation profile report for
7 NIS Inc.

8
9 BY MR. RANKING:

10 523. Q. Okay. Now, while we are here, can I
11 just ask you...I have taken you to a couple of
12 docket entries, and there seem to be many, and just
13 to assuage any concerns you have got, I am going to
14 take you to a few sample entries and...

15 A. Are we back to Exhibit A?

16 524. Q. We are back to Exhibit A, but don't
17 close Exhibit G. Was there a separate retainer
18 between Crawford McKenzie and NIS Inc. for the work
19 it was conducting? I mean, we see there are
20 invoices virtually on a monthly basis rendered by
21 NIS Inc. to Crawford McKenzie. Was there a letter
22 of engagement or a retainer letter or a letter of
23 instruction whereby Crawford McKenzie said to the
24 principal of NIS, Donald Best, "This is the work we
25 want you to do"?

1 A. I am not aware of anything in the
2 file. I have not examined the file for that type of
3 material.

4 525. Q. Would you do so, so we have some
5 indication of what the work was that NIS was doing?

6 MR. EPSTEIN: We will look to see if
7 there is a retainer agreement between
8 Crawford and NIS.

U/T

9 526. MR. RANKING: Thank you.

10 THE DEPONENT: In the file that we have.

11 MR. EPSTEIN: Yes.

12

13 BY MR. RANKING:

14 527. Q. And do we know the nature of the
15 work? I mean, other than the...and I can read the
16 description as well as you can, Ms. Duncan. But I
17 guess what I would like...and there...

18 A. I am shaking my head no.

19 528. Q. Right. I am sure you don't want to
20 know, but what I am interested in finding out, and I
21 will put this on the record...and there are going to
22 be a few other very interesting entries that Ms.
23 Duncan has taken us to. I would be interested to
24 know if there is a retainer, or agreement, or a
25 letter of instruction. You have kindly undertaken

1 to do that.

2 I would also like to know if there is a
3 correspondence file which would have correspondence
4 and e-mails and other communications, and an
5 understanding...

6 MR. EPSTEIN: So, specifically, you are
7 asking for a correspondence file with...

8 529. MR. RANKING: Between NIS Inc. and
9 Crawford McKenzie.

10 MR. EPSTEIN: Can you answer that
11 question?

12 THE DEPONENT: We did look for some
13 communication. We did not find any. In
14 the course of my inquiries in that
15 direction, Ms. Ball advised me that, for
16 some period of time, Mr. Best was
17 communicating with the firm using a code
18 name. We have not done a thorough
19 investigation as to whether we can find the
20 code name anywhere in the files because
21 this was something that Ms. Ball kind of
22 remembered as I was forcing her to go
23 through boxes and boxes of dusty material.

24 So, in order to be completely
25 accurate in any undertaking, I would have

1 to ask Ms. Ball to look for both
2 communications involving NIS and
3 communications involving Nathan.

4

5 BY MR. RANKING:

6 530. Q. Was Nathan the code name?

7 A. That is what I have been advised by
8 Ms. Ball.

9 531. Q. All right. I am going to come back
10 to that. Was "Nathan" Mr. Best?

11 A. That is what I was told, yes.

12 532. Q. All right. Thank you. So, with
13 that very helpful clarification, Ms. Duncan, could I
14 then ask for you to determine if there is any
15 correspondence or e-mails from Nathan to the firm,
16 and if so, to produce those communications? That is
17 number 1.

18 MR. EPSTEIN: Yes.

U/T

19

20 BY MR. RANKING:

21 533. Q. And secondly, and in addition, if
22 there is information or documents or reports which
23 reflect the results of the work that Mr. Best was
24 doing on behalf of NIS that the firm was paying, if
25 we could get production of the results of his work?

1 that.

2

3 BY MR. RANKING:

4 536. Q. Yes?

5 A. I mean, I have very limited
6 knowledge, but I am aware that Mr. Best was doing
7 something. I mean, that is...and I just say that
8 because when he did show up for a security-related
9 meeting, he and Mr. McKenzie were conferring about
10 other work he was doing. So, while I can't answer
11 your question as phrased, I can advise that I am
12 aware that Mr. Best was performing some services. I
13 don't know the details.

14 537. Q. All right. Well, that is very
15 helpful. And if you obtain any evidence one way or
16 the other as to the services he was performing or
17 not performing, if you would let us know?

18 MR. EPSTEIN: Yes. U/T

19 538. MR. RANKING: Thank you.

20 539. MR. SILVER: Sorry, but...because I
21 don't want to come back to it. So you
22 don't have any knowledge that Best was paid
23 to be a director of Nelson Barbados?

24 THE DEPONENT: No. There is nothing in
25 the files that has that indication.

1 540. MR. SILVER: So you don't have any
2 knowledge and you don't have any
3 information or belief either?

4 THE DEPONENT: No.

5 541. MR. SILVER: Thank you.

6

7 BY MR. RANKING:

8 542. Q. So, if I go back then, and I just
9 wanted you to keep up Exhibit G, the first invoice
10 that we have identified, and this is the same
11 invoice that I was actually examining on at the
12 entry of December 8th?

13 A. Yes.

14 543. Q. And I am going to try to take you
15 through the process so that everything works. We
16 see an invoice dated October 24th, 2005 at Exhibit G
17 in the amount of 1,426.80, and there is then GST
18 added to that in the amount of 99.87, for a total of
19 1,526.67, correct?

20 A. Yes.

21 544. Q. If you go back to page 9 of
22 Exhibit A, you will see those same two entries?

23 A. Maybe flipping back and forth, I
24 might refer to my copy?

25 545. Q. That is fine.

1 A. On page 9?

2 546. Q. Yes.

3 A. Yes.

4 547. Q. And then the total amount of

5 1,526.67, if I go back to Exhibit G, was then

6 processed by Crawford McKenzie and paid by Crawford

7 McKenzie on its general account, correct?

8 A. Yes.

9 548. Q. And a cheque was mailed on December

10 9th, 2005, which is consistent with the entries on

11 page 8 having been processed on December 8th?

12 A. I don't know if it was mailed. I
13 can tell you that there is a handwritten notation on
14 the invoice with Sunny Ware's initial on it that
15 indicates that.

16 549. Q. Okay. Thank you.

17 550. MR. SILVER: And then can I just...

18 sorry, Gerry, but I just want to get this
19 confirmation and I don't want to come back,
20 but it says:

21 "...Transfer funds to pay invoice..."

22 This is under December 8th. It says:

23 "...Transfer funds to pay invoice number
24 31975..."

25 which is the \$40,000 account?

1 THE DEPONENT: Yes.

2 551. MR. SILVER: And then if you go to tab
3 K, we actually now have that account. It's
4 the first one, just to close the loop on
5 this.

6 552. MR. RANKING: I will be doing that one
7 next.

8 553. MR. SILVER: All right.

9 THE DEPONENT: Yes.

10 554. MR. SILVER: And then if you go to page
11 6 of that account, you actually see the
12 40,254 amount, right? And then in the last
13 of the disbursements, the paid agency
14 account to NIS for 1,426 is there?

15 THE DEPONENT: Yes.

16 555. MR. SILVER: So it really closes the
17 loop. It is paid by the firm, and then
18 billed and repaid by the client as payment
19 of this invoice number 31975?

20 THE DEPONENT: Yes. I think that every
21 firm in the province would do the same.

22 556. MR. RANKING: And what account was that?

23 557. MR. SILVER: That is the first one in
24 'K'.
25

1 BY MR. RANKING:

2 558. Q. Right. And similarly, just
3 following up on Mr. Silver, if you take the entries
4 that are made on the 12th of December, the total
5 amount of that account was 55,702.89? That is the
6 account dated December 6th, 2005?

7 A. Yes.

8 559. Q. And like Mr. Silver, if you go to
9 page 8 of that account...

10 560. MR. SILVER: Of which account?

11 561. MR. RANKING: The December 6th, 2005
12 account.

13 562. MR. SILVER: Right.

14 THE DEPONENT: That would be account...
15 invoice number 32102.

16

17 BY MR. RANKING:

18 563. Q. Right. If you go to page 8 of that
19 account, you can see there are two entries to pay
20 NIS: The first for \$2,500, and the second for
21 \$5,000?

22 A. Yes.

23 564. Q. And then the total amount of
24 \$55,702.89 having been paid, correct? Well, that is
25 the invoice.

1 A. It has now.

2 565. Q. That is the bill.

3 A. The invoice indicates that, at the
4 time, both invoices were outstanding. If you look
5 at page 9, it says "Balance Due Now".

6 566. Q. Right, was 95,957.64?

7 A. Which is not surprising, since they
8 were billed within days of each other.

9 567. Q. Right. And if you turn to the next
10 account, the account of January 20th, 2006, you can
11 see that there is a receipt, at least for the
12 December 6 account, in the amount of 55,702.89.

13 A. Yes.

14 568. MR. RANKING: And I think that that was
15 the example I was going to take you to, and
16 I think Mr. Silver has helpfully taken you
17 to another. Just because we are there, Mr.
18 Silver, do you have any other questions
19 based on...

20 569. MR. SILVER: Well, the last question
21 that connects it all is, by going through
22 this exercise, can you confirm for us that
23 Peter Allard paid for the NIS invoices?

24 THE DEPONENT: According to our
25 accounting records, yes.

1 570. MR. SILVER: And you have got no
2 information, knowledge or belief that your
3 accounting records are not accurate in that
4 regard?

5 THE DEPONENT: No, I do not. I believe
6 our accounting records are accurate.

7 571. MR. SILVER: Thank you.

8

9 BY MR. RANKING:

10 572. Q. Okay. Now, the other point that I
11 was interested to confirm with you, again on the
12 accounting records, is there are various transfers
13 between the accounts, and I am just going to take
14 you to one. Again, by way of example, if I can take
15 you to page 65.

16 MR. EPSTEIN: This is of exhibit...

17 573. MR. RANKING: Exhibit A, and I am going
18 to ask you to look at the entry on the 30th
19 of April.

20 574. MR. SILVER: What page, Gerry?

21 575. MR. RANKING: Page 65.

22 576. MR. SILVER: 65 or 55?

23 577. MR. RANKING: 65, as in the retirement
24 age.

25 THE DEPONENT: There are a number of

1 entries on that date. Could you tell me
2 which entry number?

3 578. MR. RANKING: Yes. It is 545725.

4 THE DEPONENT: Yes.

5 MR. EPSTEIN: What date is this?

6 579. MR. RANKING: April 30.

7 MR. EPSTEIN: Right.

8

9 BY MR. RANKING:

10 580. Q. So there was a transfer:

11 "...BMC 568 to BMC 543. Transfer U.S.
12 funds deposited to BMC 568 in error..."

13 Do you see that?

14 A. Yes.

15 581. Q. And this is only one of a number of
16 transfers, and I use this simply as an example. But
17 I take it that we are in agreement that these
18 transfers or these sorts of transfers as between the
19 various Peter Allard files occurred as a matter of
20 custom if the firm had inadvertently applied a
21 payment to a wrong account?

22 A. I believe so. I don't have
23 independent knowledge of that. That is my
24 understanding based on the e-mails, for example.
25 That is all I know.

1 582. Q. All right. And the client wouldn't
2 have any objection to that because the client was
3 ultimately funding the various files, and one would
4 want to make sure that they were allocated
5 appropriately within the files of Crawford McKenzie,
6 correct?

7 A. I believe so.

8 583. Q. Okay. Thank you. Now, if I could
9 ask you to go back to your affidavit...just before I
10 leave NIS Inc., and looking at the invoice that you
11 had before you...this is the invoice of October 24,
12 and other invoices...did you ever attend the office
13 of NIS Inc. at Suite 116, 3044 Bloor Street West?

14 A. No.

15 584. Q. And do you know if Mr. Best had any
16 other associates, employees or agents acting on his
17 behalf?

18 A. During the satellite files, Mr. Best
19 would occasionally have his son assist him. His son
20 is very skilled with video equipment.

21 585. Q. And what is his name?

22 A. I believe it is David.

23 586. Q. And other than David, would there be
24 anybody else assisting Mr. Best?

25 A. Not that I know of.

1 587. Q. So I am now going to ask you to turn
2 to page 25. This is all Exhibit A.

3 A. All right.

4 588. Q. And if I could take you back, if I
5 might, before I start asking questions, back to your
6 affidavit to lay the proper foundation. At
7 paragraph 19, you make reference to Mr. Best's wife,
8 Wanphen Panna. Do you see that?

9 A. Yes, I do.

10 589. Q. And you indicate in paragraph 19
11 that there were certain disbursements that were made
12 to that individual, correct?

13 A. That is correct.

14 590. Q. Right. And what I am going to ask
15 you to now do, with that by way of background, is to
16 take you to what I believe is one such disbursement
17 on page 25, May 17, 2006. It is about a third of
18 the way up from the bottom of the page, the first of
19 the May 17 entries.

20 A. Yes.

21 591. Q. And it states:

22 "...Wire transfer to Wanphen Panna, B-A..."

23 A. Bangkok.

24 592. Q. "...Bangkok..."

25 Thank you.

1 "...Paid agency accounts by wire transfer
2 to Thailand. Billing on invoice 32593 in
3 the amount of \$9,750..."

4 I take it that is one such payment that you were
5 referring to when you were drafting paragraph 20?

6 A. Yes.

7 593. Q. All right. Now, is...

8 MR. EPSTEIN: You are referring to
9 paragraph 19?

10 594. MR. RANKING: I am sorry, paragraph 19.
11 Thank you.

12 THE DEPONENT: Thank you.

13

14 BY MR. RANKING:

15 595. Q. Ms. Panna, is she of Thai
16 nationality?

17 A. Yes.

18 596. Q. And have you met her?

19 A. Yes.

20 597. Q. And do you know where she lives now?

21 A. I don't.

22 598. Q. Do you know anybody that does?

23 A. Mr. McKenzie and his assistant, Ms.
24 Ware, both spent vacation time in Thailand staying
25 with Mr. Best and his wife at her family home there.

1 599. Q. Do you know the name of the city?

2 A. No, I don't.

3 600. Q. And how long ago did they vacation
4 in Thailand?

5 A. That I know of, 2008. If I recall
6 correctly, in December of 2009, Mr. McKenzie still
7 had some pictures and a painting that he got on that
8 trip displayed in his study in his home.

9 601. Q. And do you know if Mr. McKenzie has
10 contact details for Mr. Best in Thailand?

11 A. At this point, I don't know. I have
12 heard too many stories.

13 602. Q. Are you aware of any other
14 properties or areas anywhere where either Mr. Best
15 or his wife may be resident, other than in Thailand?

16 A. No. In fact, the only addresses I
17 had for Mr. Best were the ones that turned out to be
18 post office boxes.

19 603. Q. And those are the post office boxes
20 that we have talked about in the affidavits that
21 have been exchanged?

22 A. That is correct.

23 604. Q. All right. Now, if I just take you
24 back there to the entry on May 17th, it indicates
25 that it is in payment...this is the bank wire of

1 \$9,750...in payment of billing on invoice 32593. Do
2 you see that?

3 A. Yes, I do.

4 605. Q. And have you been able to locate
5 that invoice?

6 A. If it's not produced, we do not have
7 it.

8 606. MR. SILVER: Which one?

9 THE DEPONENT: We produced all of the
10 invoices. We had a box from this file
11 titled "Accounting". It only went to a
12 particular date, but...I mean, I can ask
13 Stacey to check again, but what she did was
14 take that box and take all the invoices
15 out. Since it contains a lot of paper, it
16 is possible she missed it, and I will ask
17 her to check again.

18 607. MR. SILVER: Well, for 32593?

19 608. MR. RANKING: 32593.

20

21 BY MR. RANKING:

22 609. Q. I take that to be an invoice that
23 was rendered by Wanphen Panna?

24 610. MR. SILVER: No.

25 THE DEPONENT: Actually, no, that is our

1 firm account.

2

3 BY MR. RANKING:

4 611. Q. I see. So the disbursement of the
5 9,750 would have been included in that invoice?

6 A. Yes.

7 612. Q. Do you know, did Wanphen Panna issue
8 an invoice or an account for the services she
9 provided in the amount of \$9,750?

10 A. There are a number of invoices from
11 her in the file. I am not sure about that one
12 specifically.

13 613. Q. All right. Can I ask you to produce
14 her invoices?

15 MR. EPSTEIN: Yes.

U/T

16

17 BY MR. RANKING:

18 614. Q. Okay. And again, much as I asked
19 with respect to NIS Inc., was there a retainer
20 agreement or a letter of instruction or a letter of
21 engagement of any sort between Crawford McKenzie and
22 Wanphen Panna?

23 A. Not that we located in the file.

24 615. Q. And likewise, did the firm maintain
25 a file for the services that she was providing?

1 A. No. We located her invoices in the
2 accounting box. That is the only record we found.

3 616. Q. Were you able to locate any
4 correspondence file or any file that would contain
5 communications with Ms. Panna?

6 A. No, we did not locate any
7 correspondence file. We found one entry in Ms.
8 Ware's contacts file for a Hushmail account.

9 617. Q. What is a Hushmail account?

10 A. It's an Internet e-mail service.

11 618. Q. Will you produce that?

12 619. MR. SILVER: I thought you did.

13 THE DEPONENT: We may have already.

14 620. MR. SILVER: Well, just give me a
15 second. I thought I saw that last night in
16 between Vancouver goals. Do you want to
17 give me a second? I think there was a
18 Hushmail...

19 THE DEPONENT: I believe that was Bill
20 McKenzie's...

21 621. MR. RANKING: Off the record.

22

23 --- DISCUSSION OFF THE RECORD

24

25 BY MR. RANKING:

1 622. Q. While we were off the record, we
2 have located under Exhibit G, I think the Hushmail
3 e-mail to which Ms. Duncan was referring. If I
4 could just ask your counsel to put that before you.
5 Is that the same e-mail, Ms. Duncan?

6 A. Well, those two addresses are for
7 Sunny Ware and Bill McKenzie. They are also
8 addresses for Don Best and his wife.

9 623. Q. All right. And which is the address
10 for Don Best?

11 A. genxdad@hushmail.

12 624. Q. And is that the e-mail from...

13 A. I don't think it is on here...

14 625. MR. SILVER: Yes, it is.

15 626. MR. RANKING: Both of them?

16 THE DEPONENT: There it is. It is at
17 the top. That's who printed out this
18 e-mail.

19 627. MR. SILVER: This is printed off of
20 Donald Best's computer.

21 THE DEPONENT: Yes.

22 628. MR. SILVER: Do you see that, Gerry?

23 629. MR. RANKING: Yes.

24

25 BY MR. RANKING:

1 630. Q. And how did this copy come into the
2 possession of Crawford McKenzie?

3 A. It was sent as an attachment with
4 the account, from the looks of it.

5 631. Q. I see. All right. And the e-mail,
6 genxdad@hushmail.com, I take it is both the e-mail
7 for Wanphen Panna and Donald Best?

8 A. No, that is Donald Best.

9 632. Q. And which is the e-mail for Wanphen
10 Panna?

11 A. Hers does not appear on this e-mail.

12 633. Q. I see. But she has a different
13 Hushmail account?

14 A. I believe that is what we found in
15 Sunny Ware's contacts, yes.

16 634. Q. And you will undertake to...

17 A. I have given an undertaking.

18 635. Q. ...produce that?

19 A. Yes.

20 636. Q. And can you assist us...

21 MR. EPSTEIN: So, just so we are clear,
22 we are going to give you the address of
23 Panna's Hushmail account?

24 637. MR. RANKING: Yes.

25 THE DEPONENT: Well, I'll tell you what,

1 we will just give you whatever e-mail
2 address appears in Sunny Ware's contacts,
3 in case my memory is failing me this late
4 in the day.

5 638. MR. RANKING: Thank you.

6 MR. EPSTEIN: So, produce the e-mail
7 address in Ware's contacts re Panna.

U/T

8 639. MR. RANKING: Right.

9 THE DEPONENT: Yes.

10

11 BY MR. RANKING:

12 640. Q. I was going to ask you, what is a
13 Hushmail account?

14 A. As far as I know, as I was advised,
15 Hushmail is a web service that provides e-mail that
16 is designed to be secure, and designed to be...not
17 leave a lot of traces. It's designed to be covert.
18 It's very much security oriented.

19 641. Q. Thank you. Does Bill McKenzie have
20 a Hushmail account?

21 A. That is Mr. McKenzie's Hushmail
22 account at the top of the e-mail...

23 642. Q. I see, lawyerbil@hushmail.com?

24 A. That is correct, lawyerbil, with one
25 "l" at the end of "bil", one "l" at the beginning of

1 "lawyer".

2 643. Q. This file never ceases to amaze.
3 Now, if I take you back to the wire transfer to
4 Wanphen Panna...

5 A. On page 25?

6 644. Q. ...on page 25, we have not asked for
7 production thus far of the evidence of the wire
8 transfer documents in payment of the accounts
9 rendered by Wanphen Panna. Will you undertake to
10 produce the wire transfer documents so that we can
11 determine the account to which these funds were
12 wired, where it is located, and other obvious
13 relevant details concerning the work performed by
14 Ms. Panna?

15 MR. EPSTEIN: You want the wire transfer
16 documents evidencing payments from Panna?

17 645. MR. SILVER: No...

18 646. MR. RANKING: Payments from the firm to
19 Panna.

20 647. MR. SILVER: And sorry to interrupt, but
21 not just this one, any and all payments.

22 648. MR. RANKING: It was broad.

23 MR. EPSTEIN: Again, I assume if there
24 are any costs involved in this, you will
25 pay the costs?

1 649. MR. SILVER: Well, why don't we reserve
2 our rights in that regard until we know
3 what it is going to cost. And again, Ian,
4 there might be firm documents that provide
5 us with the same information, which saves
6 the cost.

7

8 BY MR. RANKING:

9 650. Q. Just because we are dealing with
10 the...I don't believe, although nothing surprises
11 me, that the NIS accounts were paid by wire
12 transfer. I think they were paid by cheque.

13 A. According to the notations on the
14 accounts, that appears to be the case.

15 651. Q. Right. The problem is Ms. Ware only
16 initialled the one, so I don't know how the others
17 were paid, and I haven't gone back to double-check.
18 But if they were paid by wire transfer, could we ask
19 for an undertaking? And we will go back, likewise,
20 Ms. Duncan, to review the file. I am not asking for
21 things that...I just want to be cautious not to put
22 any more undue burdens, but clearly NIS is a...if
23 the accounts were ultimately paid other than at 3044
24 Bloor Street West, we would like to know where they
25 were paid, for obvious reasons.

1 MR. EPSTEIN: So you want us to find the
2 NIS payments that were made by the firm?

3 652. MR. RANKING: Yes, and if made by
4 wire...

5 MR. EPSTEIN: The wire transfers?

6 653. MR. RANKING: If made by wire transfer,
7 production of the wire transfer documents.
8 I am happy that you take it under
9 advisement right now because it may be an
10 academic undertaking.

11 MR. EPSTEIN: Yes. I will take it under
12 advisement. Also, I don't know the scope
13 of what would be involved in this.

14 654. MR. RANKING: That is fine. Just before
15 I...off the record.

16

17 --- DISCUSSION OFF THE RECORD

18

19 655. MR. RANKING: While we were off the
20 record, we discussed the issue with respect
21 to any wire transfer particulars by which
22 the Crawford McKenzie firm may have paid
23 Mr. Best and/or NIS Inc. with respect to
24 the NIS Inc. invoices. We would still like
25 an undertaking to produce those wire

1 transfers if, in fact, there were wire
2 transfers.

3 But, in addition, Mr. Epstein, in an
4 effort to try to facilitate matters for us,
5 has also volunteered to produce whatever
6 correspondence may exist to Mr. Best, and
7 we would also like to take Mr. Epstein up
8 on that offer. And to the extent that Ms.
9 Duncan or Ms. Ball can locate any
10 correspondence, if we could have those
11 letters produced as well?

12 MR. EPSTEIN: We will undertake to have
13 a look for those letters. If we are able
14 to find them, we will produce them to you. U/T

15 656. MR. RANKING: Okay.

16 MR. EPSTEIN: With regard to your
17 previous request regarding the wire
18 transfers, we will take that under
19 advisement. U/A

20 657. MR. RANKING: Thank you. Mr. Silver
21 reminds me that I didn't ask for letters
22 with respect to Wanphen Panna. If I could
23 ask that the undertaking be extended
24 accordingly?

25 MR. EPSTEIN: Yes. U/T

1 658. MR. RANKING: Thank you.

2

3 BY MR. RANKING:

4 659. Q. What I didn't ask was that...I think
5 that I had asked with respect to Wanphen Panna about
6 any correspondence or e-mails, and I think that we
7 dealt with that. But, in addition, is there a file
8 that deals with any of the results of her work, her
9 work product, or reports, or anything of that
10 nature?

11 A. Not that we could locate.

12 660. Q. All right. Now, I think that deals
13 with the entry that I was just taking you to. If I
14 could also ask you to move from page 25 to a second
15 entry. This is at page 28.

16 MR. EPSTEIN: This is Exhibit A?

17 661. MR. RANKING: Yes.

18

19 BY MR. RANKING:

20 662. Q. And the second entry appears to be
21 on the 2nd of June, it indicates:

22 "...RET - Pay account of Wanphen Panna in
23 the amount of \$3,150..."

24 A. Yes.

25 663. Q. Now, first of all, what does "RET"

1 mean?

2 A. I am sorry, where does the "RET"
3 appear?

4 MR. BRISTOW: You said 2nd June. I
5 think it is 1st June.

6

7 BY MR. RANKING:

8 664. Q. Just before the actual description:
9 "...Pay account of Wanphen Panna..."

10 A. I think...

11 665. Q. And I think Mr. Bristow has
12 corrected me. I am looking at June 1.

13 A. 519039?

14 MR. EPSTEIN: Right.

15 THE DEPONENT: Okay. I believe that is
16 a correcting entry. If I look at the
17 previous page...because it...like, the same
18 thing appears again June 2nd.

19

20 BY MR. RANKING:

21 666. Q. I was going to drop down there after
22 taking you to that one, because you are right, it
23 does appear again. On June 2nd beside the entry
24 509090, there is the entry:

25 "...Wanphen Panna, Thailand, money wired to

1 cover Internet research account..."

2 A. I do not know what the significance
3 of that is. I would have to ask the accountant.

4 667. Q. Do I understand this entry to be
5 that, on the 1st of June, the firm received \$3,150,
6 and on the 2nd of June, those monies were then wired
7 as a disbursement to pay that account?

8 A. That could be. I don't know.

9 668. Q. There is an asterisk beside the
10 words "research account". Do you know what the
11 significance of the asterisk is?

12 A. No. It may have just been a typo.
13 It may not be. I don't know.

14 669. Q. I don't think it is, and the
15 asterisk is quite interesting where it is actually
16 placed on some of the entries that we are going to
17 go to. Who, within your firm, would have knowledge
18 of how an asterisk might come to be placed beside a
19 particular docket description or disbursement
20 description?

21 A. Well, these docket entries appear to
22 have been made by either the bookkeeper or Sunny
23 Ware.

24 670. Q. Would you make inquiries of Sunny
25 Ware to see if she knows?

1 MR. EPSTEIN: To see if she knows what
2 the asterisk meant?

3 671. MR. RANKING: Yes, what it signifies.

4 MR. EPSTEIN: Okay. U/T

5

6 BY MR. RANKING:

7 672. Q. If you go back to the entry at page
8 25, just in the interest of full disclosure, you
9 will see that, just as with the entry on the 2nd of
10 June, so too the entry on the 17th of May has an
11 asterisk as well.

12 A. Well, there is also an asterisk
13 beside:

14 "...Paying airfare for Bill McKenzie from
15 Toronto to Barbados..."

16 on the 17th of May as well, so...

17 673. Q. You are absolutely right. All
18 right. And then with respect to the June 2nd
19 payment, I take it that that will be covered again
20 with your earlier undertaking concerning the
21 documentation for the wire transfer?

22 A. Yes, I believe it would be.

23 674. Q. Thank you. Now, we have prepared an
24 exhibit, a copy of which I am handing across to you,
25 which are payments made to Wanphen Panna for the

1 file number 543. You don't need to review it now.
2 I believe it to be accurate. But if I could ask you
3 to advise in due course if you agree with the
4 accuracy of this exhibit, and that, in fact, over
5 the currency of file BMC 543, Ms. Wanphen Panna was
6 paid \$175,768?

7 A. That is very...to the best of my
8 recollection, that is very close to the figure that
9 I came up with when I tried to do the same thing.

10 675. MR. RANKING: Okay. Thank you. If we
11 could mark this summary titled "Payments
12 Made to Wanphen Panna, File Number BMC
13 543", as the next exhibit. That would be
14 Exhibit number 8.

15
16 --- EXHIBIT NO. 8 : Summary titled "Payments Made to
17 Wanphen Panna, File Number BMC 543"

18
19 BY MR. RANKING:

20 676. Q. Now, while I appreciate that you
21 don't have, or you haven't been able to locate a
22 file, do you have any knowledge, information or
23 belief as to the work that Ms. Panna was doing with
24 respect to Internet research?

25 A. I have no information. All I can

1 tell you is the invoices in our file simply say
2 "Internet research". There is no detail whatsoever.

3 677. Q. And would you undertake to make
4 inquiries of Stacey Ball to determine if she might
5 assist?

6 A. Ms. Ball had no knowledge. Ms. Ware
7 handled that exclusively, and Ms. Ball never knew
8 anything about it.

9 678. Q. And did you make the inquiry of Ms.
10 Ware as to what she thought was going on with
11 respect to this Internet research?

12 A. No, I have not.

13 679. Q. Would you make the inquiry? What I
14 would like to know is the...

15 A. I am looking to my counsel on that
16 one.

17 MR. EPSTEIN: Yes.

18 THE DEPONENT: Yes.

19

20 BY MR. RANKING:

21 680. Q. To the extent that she can assist, I
22 would like to know what her information is with
23 respect to the nature of the work that Ms. Panna was
24 doing, where she was performing the work, to whom
25 she was reporting, and what information she was

1 providing.

2 MR. EPSTEIN: I am trying to write that
3 down. You were saying it way too quickly.
4 You wanted us to find out the information
5 on the work that Panna did?

6 681. MR. RANKING: Yes.

7 MR. EPSTEIN: What was the next thing?

8 682. MR. RANKING: Where she did the work.

9 MR. EPSTEIN: Yes. U/T

10 683. MR. RANKING: To whom she was reporting,
11 and the substance of the reports that she
12 was providing.

13 MR. EPSTEIN: Yes. I think Ms. Duncan
14 indicated that, to the best of their
15 knowledge, there were no reports. U/T

16 684. MR. RANKING: Right. Or certainly none
17 that found their way into the files of
18 Crawford McKenzie.

19 MR. EPSTEIN: That is right.

20 685. MR. RANKING: But there may well have
21 been reports.

22 MR. EPSTEIN: There may well have been
23 reports, but she doesn't have any reports.

24

25 BY MR. RANKING:

1 686. Q. And I would also be interested if
2 you could make inquiries of Ms. Ware to determine
3 her knowledge, information or belief as to the
4 extent to which Mr. McKenzie was involved in the
5 Keltruth blog, and having either Mr. Best as a
6 representative of NIS, or Ms. Panna reviewing the
7 Keltruth blog, or posting material to the Keltruth
8 blog.

9 A. Could you repeat that last bit,
10 please?

11 687. Q. The extent to which Mr. McKenzie was
12 involved, either directly or indirectly, in posting
13 information to the Keltruth blog. And I would also
14 be interested to know whether that extended to
15 Barbados Underground, or, in fact, to any other
16 blog, details of which we don't know.

17 A. Can I speak to my counsel for a
18 moment?

19 688. Q. Yes.

20 MR. EPSTEIN: There is some additional
21 information that Ms. Duncan will assist you
22 with regarding blogs.

23 689. MR. RANKING: Thank you.

24 THE DEPONENT: Just in reference to that
25 undertaking, I was...in going through the

1 files, we found information suggesting that
2 they were investigating who was posting.
3 They had somebody monitoring who was
4 posting to these blogs, and trying to trace
5 ISPs, trying to trace identities of who was
6 posting to the blogs, and from where.

7

8 BY MR. RANKING:

9 690. Q. And were you able to determine if
10 they came to any conclusion as to who was posting to
11 those blogs?

12 A. Well, actually I think some of it
13 was produced. I think that some of that information
14 was actually produced in the record that has been
15 filed in this proceeding.

16 691. Q. I think it may have been a letter
17 from Mr. McKenzie to Mr. Roman suggesting that Mr.
18 Roman was posting on the blogs, but I could perhaps
19 be wrong. Or somebody from the Miller Thomson firm,
20 I certainly saw that.

21 A. Yes. I think that was a suggestion
22 made, but I believe there was actually an expert
23 report that was produced. That is...

24 692. MS. ZEMEL: Could I just pick up on
25 this? Are you referring now to the expert

1 report that your firm filed with respect to
2 the Justice Brown action? Because there
3 was something filed, but if that is the
4 only thing you are referring to...

5 THE DEPONENT: There was a record filed
6 that I think contained information about
7 tracing where things were posted.

8 693. MS. ZEMEL: Okay. But besides that, is
9 there anything else?

10 THE DEPONENT: That, I don't know.

11 694. MR. RANKING: And I appreciate...because
12 I haven't been following the blogs, but do
13 I have the undertaking, Mr. Epstein? Your
14 counsel sought your ear to which I didn't
15 object. But I had asked for an
16 undertaking. I am not sure that I got it.

17 MR. EPSTEIN: The undertaking to make an
18 inquiry of Ms. Ware about...

19 695. MR. RANKING: Yes.

20 MR. EPSTEIN: Yes, we will make that
21 inquiry.

U/T

22 696. MR. RANKING: Thank you.

23 697. MS. ZEMEL: I am sorry, I just want to
24 add to that. I know Mr. Ranking referred
25 to the various blogs, and he mentioned

1 Barbados Underground. Could you also make
2 that for Barbados Free Press as well?

3 698. MR. RANKING: Yes.

4

5 BY MR. RANKING:

6 699. Q. Just while we are here, one of the
7 questions I asked of Mr. McKenzie, for which I
8 received an answer that I was somewhat surprised to
9 receive, was that he indicated that his cell phone
10 provider did not provide details of telephone
11 numbers. Do you recall that answer?

12 A. Yes.

13 700. Q. Did you have the same degree of
14 suspicion when you saw the answer that I did?

15 A. Well, his answer was substantively
16 accurate in that it did not show incoming calls. It
17 did show outgoing calls.

18 701. Q. Did Mr. McKenzie seek reimbursement
19 from the firm with respect to his cell phone?

20 A. Until August of 2008, yes.

21 702. Q. And would you produce to us for the
22 period starting with the entries to account 543 from
23 September of 2005 through to August of 2008, with
24 copies of Mr. McKenzie's cell phone bills?

25 MR. EPSTEIN: Do you have them?

1 THE DEPONENT: We have them, but I have
2 a concern, and that concern is that he was
3 dealing with more than one file, and there
4 may be privileged material in those phone
5 records that does not relate to this file
6 in any way, shape or form. Unfortunately,
7 the only way I can find that out is to
8 inquire of Mr. McKenzie, and that is not a
9 big conduit of information for me at the
10 moment.

11 703. MR. RANKING: Well, perhaps we could do
12 this: I am going to make the request; if
13 you could take it under advisement, we may
14 be able to fashion a way in which...through
15 the good graces of Mr. Kramer and his
16 office, we may be able to...

17 MR. EPSTEIN: I think that would be a
18 better way to do it. Why don't you ask Mr.
19 McKenzie if he will provide that
20 information to you. And then if you have
21 difficulty in that regard, then we will
22 consider our position.

23 THE DEPONENT: I can advise, we do have
24 the records from September or October of
25 2005, up to September of 2008.

1 704. MR. RANKING: So I think the way in
2 which I would like the undertaking to be
3 fashioned...and you are, of course, free to
4 take it under advisement. But I would
5 like, recognizing what I consider to be the
6 legitimate concerns expressed by Ms. Duncan
7 with respect to not only privileged, but
8 possible other privacy issues concerning
9 calls by Mr. McKenzie, I think the
10 undertaking that I would seek is that
11 Crawford McKenzie produce to Mr. Kramer, or
12 whatever successor counsel Mr. McKenzie may
13 retain, the...

14 MR. EPSTEIN: No, no, he is in here
15 until the end.

16 705. MR. RANKING: ...the phone records of
17 Mr. McKenzie for his cell phone for the
18 period from September 2005 through to
19 August of 2008. And I will then ask Mr.
20 McKenzie through his counsel to review and
21 to produce copies of the cell phone records
22 relating to any individuals having anything
23 to do with this particular case.

24 MR. EPSTEIN: All right. Yes. So we
25 will give you that undertaking to provide

1 those records to Mr. Kramer, and then you
2 can follow up with Mr. Kramer and Mr.
3 McKenzie whatever questions you have
4 regarding those records.

U/T

5 706. MR. RANKING: Thank you.

6

7 BY MR. RANKING:

8 707. Q. And with respect to Wanphen Panna, I
9 take it that the same applies as applied...and I ask
10 if these accounts were addressed to Crawford
11 McKenzie, and that they were processed by Crawford
12 McKenzie, and paid by the firm, and the
13 disbursements were then added to accounts that were
14 rendered to Nelson Barbados, or Mr. Allard, and then
15 paid by Mr. Allard?

16 A. I believe so.

17 708. Q. Thank you. All right. If I could
18 ask you to turn to page 32, the entry on 14 July,
19 2006 at 514307 to Wanphen Panna. And again, this is
20 a payment for consulting services in the amount of
21 \$26,478.64. Do you have any knowledge, information
22 or belief as to why Ms. Panna was rendering an
23 account for such an amount in mid-July 2006?

24 A. No. No, I don't.

25 709. Q. All right. And I take it your

1 partners would have no such information?

2 A. No.

3 710. Q. Okay. And again, I am not sure that
4 anything turns on this, but you will see that that
5 entry also has an asterisk.

6 A. Yes.

7 711. Q. And if we go up to the account
8 rendered by Jenny McKenzie that I am going to take
9 you to next, that similarly has an asterisk?

10 A. Yes.

11 712. Q. Again, nothing turns on it, but I
12 just share with you...well, I find it to be somewhat
13 surprising, I have no idea why Mr. McKenzie's
14 airfare has an asterisk, but anyway. I am taking
15 you now to 14 July with "Jenny McKenzie". I take it
16 that Jenny McKenzie is one of Mr. McKenzie's
17 daughters?

18 A. That is correct.

19 713. Q. And how many children does Mr.
20 McKenzie have?

21 A. In total, he has four.

22 714. Q. Okay. And I know of Krista.

23 A. Yes.

24 715. Q. I take it Krista is no longer
25 working at your firm?

1 A. No.

2 716. Q. And who were the other two? I am
3 sure I will find them somewhere in the dockets.

4 A. Actually, no, you won't. Jenny and
5 Krista are both adults. They are from his first
6 marriage. Sarah and Lindsay are minors of his
7 second marriage to Ms. James.

8 717. Q. Okay. And is Jenny the younger of
9 the two?

10 A. I believe she is.

11 718. Q. So we see at tab 8, page 32 that
12 Jenny McKenzie was being paid for services that seem
13 to have been provided through JEM Consulting Agency.
14 Firstly, do you know of JEM Consulting Agency, and
15 what that particular, it would seem, sole
16 proprietorship does?

17 A. No.

18 719. Q. All right. And do you have any
19 knowledge, information or belief as to why it is
20 that Mr. McKenzie was paying his daughter in the
21 middle of 2006 some \$2,500?

22 A. No.

23 720. Q. Not meaning to tread on sensitive
24 ground, but would this type of entry be one of the
25 areas of concern that you and your partners had with

1 Mr. McKenzie?

2 A. Potentially, yes.

3 721. Q. Okay. And I take it that you are
4 not aware of any particular service that Jenny
5 McKenzie was providing to the file for which this
6 docket entry was made in July of 2006?

7 A. I have to say that that is not
8 what...there were various times Mr. McKenzie
9 referred to Jenny doing some kind of assessment for
10 another matter unrelated to Kingsland Estates for
11 Mr. Allard. And I am cautious in how I answer that
12 because there may be solicitor/client privilege
13 issues.

14 722. Q. Okay. Well, I don't want you to
15 trench on that. Having seen JEM Consulting, it
16 won't come as any surprise that we did a sole
17 proprietor search, and this may mean nothing to you,
18 but I note that Joan Elaine Miller is shown as the
19 sole proprietor of this entity or sole
20 proprietorship. Do you know of a Joan Elaine
21 Miller?

22 A. No.

23 723. Q. Are you familiar with 30 Harrison
24 Garden Boulevard? Is that an address that you knew
25 of?

1 A. No.

2 724. Q. And do you know the mailing or
3 residential address of Jennifer McKenzie?

4 A. I do not.

5 725. MR. RANKING: I am not going to mark
6 this as an exhibit, Mr. Epstein, although
7 you are free to keep it if you want.

8 MR. EPSTEIN: Why don't we just mark it
9 as 'A' for identification, just so that we
10 know what has been referred to?

11 726. MR. RANKING: I can mark it as an
12 exhibit if you want. I just didn't
13 think...

14 MR. EPSTEIN: Well, not as an exhibit,
15 but just to...

16 727. MR. RANKING: That is fine. We will
17 mark it as Exhibit A. It is a sole
18 proprietorship search in respect of JEM
19 Consulting, with a registration...the
20 registration date actually was only May
21 14th, 2008. I hadn't noticed that until
22 now. So, likely, wholly irrelevant.

23

24 --- EXHIBIT A : Sole proprietorship search in respect of
25 JEM Consulting Agency, registration date

1 May 14, 2008 (for identification)

2

3 BY MR. RANKING:

4 728. Q. As before, are you aware, through
5 your review of the files, of any file that Crawford
6 McKenzie had with respect to the work that was being
7 performed by Jennifer McKenzie?

8 A. That may be. There may be a file,
9 but again, I am hesitant to give any more detail
10 than that for solicitor/client privilege reasons.

11 729. Q. And I am certainly content that the
12 matter be taken under advisement. But if you can
13 review it for the purposes of privilege and redact
14 it as appropriate, I am only interested in any of
15 the work that Ms. McKenzie did relative to Nelson
16 Barbados.

17 MR. EPSTEIN: What we will do is we will
18 consider whether...if she did any work on
19 this file, I will advise you. U/T

20 730. MR. RANKING: Yes.

21 MR. EPSTEIN: But anything else, we
22 won't. /R

23 731. MR. RANKING: That is fine. And if she
24 did do work on this file, if you could
25 produce the nature of her work product so

1 that we can see what it is she did?

2 MR. EPSTEIN: If we have it, yes. U/T

3 732. MR. RANKING: Thank you.

4 THE DEPONENT: If we have it, yes.

5

6 BY MR. RANKING:

7 733. Q. And I take it that, with respect to
8 her invoices, as with the others, that the invoices
9 were rendered by Ms. McKenzie to the firm, they were
10 reviewed and processed and paid by the firm, and
11 then reimbursement was sought from Mr. Allard or
12 Peterco?

13 A. That is what is shown in this ledger
14 entry, yes.

15 734. MR. RANKING: Okay. Let's go off.

16

17 --- A BRIEF RECESS

18

19 JESSICA A. DUNCAN, resumed

20 CONTINUED CROSS-EXAMINATION BY MR. RANKING :

21 735. Q. If I could now ask you to turn to
22 page...just before I do, there is an entry for:

23 "...And payments made to Paul
24 DeVilliers..."

25 A. Yes.

1 736. Q. Who is Mr. DeVilliers?

2 A. He is the former member of
3 parliament in our riding. He was retained as a
4 consultant.

5 737. Q. Okay. And what was the nature of
6 the consulting? And if you want to take the
7 protection of the Canada Evidence Act , I kind of
8 understand.

9 A. I don't know.

10 738. Q. Good answer.

11 A. No, I really don't know.

12 739. Q. If I could ask you to turn to page
13 53, and at the bottom of the page...this is at
14 Exhibit A, entry 28, 2007. It's the second-last
15 entry on the page and it indicates:

16 "...Peter Allard, U.S. funds, retainer for
17 Miami lawyers, Broad & Cassel trust
18 account..."

19 Going over to page 54:

20 "...Retainer by wire transfer, Wanphen
21 Panna..."

22 A. Well, I think Wanphen Panna is a
23 separate entry.

24 740. Q. I agree. Now, let's just deal with
25 the entry at the bottom of page 53. We have seen

1 reference to the Broad & Cassel firm, and I don't
2 know if you are familiar with them, but they were
3 the firm that wrote to me by letter dated February
4 18, 2010. And they were the firm that, as of
5 February 2010, were acting in connection with the
6 Marjorie Ilma Knox revocable trust. This is a
7 letter that was written to me by Michael Dribin, and
8 it attached various other documents including the
9 revocable trust for which Cathleen Davis is the
10 trustee.

11 A. Yes. I recognize this letter from
12 the court date.

13 741. MR. RANKING: If we could mark my letter
14 of February 18th as the next exhibit. That
15 will be Exhibit number 9. That is a letter
16 dated February 18th, 2010, from Michael A.
17 Dribin to myself, Mr. Ranking, with various
18 attachments relating to the revocable Ilma
19 Knox trust. That will be Exhibit number 9.

20
21 --- EXHIBIT NO. 9 : Letter from Michael A. Dribin to
22 Gerald Ranking, dated February 18,
23 2010, with attachments relating to
24 the revocable Ilma Knox trust
25

1 BY MR. RANKING:

2 742. Q. So with that by way of background,
3 do I understand and is it your understanding that
4 Peter Allard actually put Crawford McKenzie in funds
5 to retain the Broad & Cassel firm on or about
6 February 28, 2007?

7 A. I don't know if these two are
8 connected. I mean, I don't know what the connection
9 might be between their representation of the Knox
10 family and anything they might have done for Mr.
11 Allard.

12 743. Q. All right. That is fair enough.
13 And I think what Mr. Dribin may have been doing when
14 he was writing to me this past February may well
15 have been different to what he was doing in February
16 of 2007. But certainly, I take it we can agree it
17 is the same firm?

18 A. I believe it's the same firm, but
19 I...there is not enough on this ledger entry for me
20 to identify and address or anything else...I can't
21 say anything more than what is in the ledger.

22 744. Q. All right. I will take you to
23 another entry where Mr. Dribin is actually referred
24 to. But what I would like to understand is, as I
25 read this entry, there was a wire transfer of

1 \$15,000 on February 28th, 2007, less a \$10 wire
2 transfer fee...excuse me, \$12,490, less a \$10 wire
3 transfer fee that was given to the Crawford McKenzie
4 firm for your firm to retain Broad & Cassel.

5 A. That is what that ledger seems to
6 say, yes.

7 745. Q. All right.

8 746. MR. SILVER: Sorry, \$12,500 less a \$10
9 wire transfer fee.

10 747. MR. RANKING: That is correct. And the
11 entry of \$12,490.

12 748. MR. SILVER: Right.

13

14 BY MR. RANKING:

15 749. Q. And do I also understand that your
16 firm, in fact, retained the Broad & Cassel firm?

17 A. We paid a retainer to them. I don't
18 know who the official client was.

19 750. Q. And when you say that, you mean
20 whether it was Mr. Allard, or one of his companies,
21 or Nelson Barbados Group?

22 A. Or anybody else. I have no
23 knowledge.

24 751. Q. All right. But certainly, what we
25 can agree upon today is that the funds were provided

1 by Mr. Allard to your firm, and your firm, in turn,
2 sent them to Broad & Cassel for the initial
3 retainer?

4 A. That is correct.

5 752. Q. Okay. Thank you. Do you know what
6 the purpose of the retainer was in February of 2007?

7 A. No.

8 753. Q. And would Mr. McKenzie be the only
9 individual who could assist in that regard?

10 A. Mr. McKenzie probably is the one
11 with the most direct knowledge. His assistant, Ms.
12 Ware, probably has some knowledge. She may not have
13 independent knowledge. I have not examined the file
14 to see if we have anything in the file.

15 754. Q. All right. If I could ask you to
16 turn back...this may assist your recollection, and I
17 don't pretend to have a photographic memory of all
18 the entries, but on page 49 at January 31, 2007,
19 about a third of the way up beside the entry 537772,
20 there is a five-and-a-half-hour meeting between Mr.
21 McKenzie, who I understand to be lawyer for, and the
22 entry indicates:

23 "...Meet and brief with Mike Dribin, and
24 later with Jane and Cathy. Call with Peter
25 Allard, recap and research..."

1 A. Yes, I see that entry.

2 755. Q. And I take it from that...and if you
3 have a different understanding, you can let me
4 know...that that was a meeting to interview Mr.
5 Dribin with subsequent discussions with Jane Goddard
6 and Cathleen Davis on a call with Peter Allard to
7 determine whether or not they would, in fact, retain
8 the Broad & Cassel firm. And it seems that...

9 A. I can't go that far. I am sorry,
10 but this entry just talks about "meeting with Mike
11 Dribin, and later with". That is all I can...that
12 is my only source of knowledge. I have no
13 independent knowledge of what might be connected
14 there.

15 756. Q. Right. But I guess my simple point
16 is, and I am just a lawyer, but it would seem to me
17 that this is the meeting that ultimately resulted in
18 the retainer, upon which I was examining you, as of
19 February 28th, 2007.

20 MR. EPSTEIN: I think she has indicated
21 she doesn't have any information as to what
22 this meeting related to.

23
24 BY MR. RANKING:

25 757. Q. Okay. And are there any files at

1 your firm that deal with a retainer of Broad &
2 Cassel?

3 A. I don't know.

4 758. MR. RANKING: Because I would be
5 interested to know if there was, in fact, a
6 specific retainer between either your firm
7 on behalf of Mr. Allard, or either Mr.
8 Allard or one of his companies, and the
9 Broad & Cassel firm. And if there was, and
10 especially given regard to the fact that
11 this retainer relates specifically to
12 matters docketed to files that are the
13 subject matter of this action, I would like
14 the retainer to be produced. Will you
15 produce that, Mr. Epstein?

16 MR. EPSTEIN: We will look into whether
17 such a retainer exists. And if it does
18 exist and if it relates to the matters
19 relating to this file, we will produce it. U/T

20 759. MR. RANKING: Thank you. And likewise,
21 if there is a correspondence...

22 THE DEPONENT: So is that under
23 advisement?

24 760. MR. SILVER: No.

25 THE DEPONENT: Are you taking it under

1 concerning the shareholder dispute
2 involving Kingsland Estates.

3 So, to the extent that Broad &
4 Cassel has been consulted by Mr. McKenzie
5 in furtherance of whatever it was he was
6 doing, taking instructions from Mr. Allard
7 to commence lawsuits either in Ontario, or
8 to commence lawsuits in Florida or
9 elsewhere, all of that underlying factual
10 matrix is very relevant to the position
11 that we are putting forward, and for which
12 we are seeking costs against Mr. McKenzie
13 and his firm, regrettably, and also against
14 Peter Allard and the Knoxs.

15 MR. EPSTEIN: Mr. Ranking, I wasn't
16 attempting to be cute with my answer. I
17 stand by the same qualification. We have
18 not seen that. We have not seen what the
19 nature of the retainer is, and we will
20 firstly want to look at exactly what the
21 retainer was, what it related to. But we
22 will produce it...we are not, you know,
23 trying to create a fine definition as I
24 think had existed in the past as to what
25 the underlying matters were in this

1 lawsuit.

2 But if it relates to something that
3 is unrelated in our view to this lawsuit,
4 then it is obviously not producible. But
5 because of the fact that the witness just
6 doesn't know, she has no information as to
7 what this relates to, obviously we can't
8 give a blanket undertaking to produce it
9 until we have reviewed it and determined
10 that it is relevant.

11 762. MR. RANKING: And I know Mr. Silver has
12 a number of questions, but before I invite
13 him to make his comment, if I could just
14 finish my line of inquiry. I would also
15 like you to undertake to produce
16 correspondence and e-mails from the Broad &
17 Cassel firm to Mr. McKenzie and/or to Mr.
18 Allard involving the subject matter of the
19 retainer if it relates to any of the issues
20 that have been canvassed in Ms. Duncan's
21 affidavit.

22 And I would also be interested to
23 secure the results of their work and copies
24 of their invoices which relate to the work
25 that emanated from either this retainer or

1 a subsequent retainer by the Crawford
2 McKenzie firm for or on behalf of Peter
3 Allard, or any of his companies if the
4 retainer relates to the subject matter of
5 the litigation as I have defined it. If I
6 can just get the answer to the undertaking?

7 MR. EPSTEIN: With the same
8 qualification I gave before, if it relates
9 to this matter, then, yes, we will
10 undertake to provide that.

U/T

11 763. MR. SILVER: Can we just clarify that?
12 When you say "relates to this matter", that
13 includes relates to the docket entries that
14 we are looking at?

15 MR. EPSTEIN: Yes. To the extent...when
16 we have already identified that, and this
17 is why I want to be a little cautious. We
18 have already identified there were some
19 docket entries in here that related to
20 matters that Mr. Allard was involved with
21 that had nothing to do with this lawsuit.
22 That is why I don't want to say, "Well,
23 it's necessarily going to relate to
24 everything in the dockets." But, you know,
25 for example...

1 764. MR. SILVER: Let me make it easier for
2 you, Ian.

3 MR. EPSTEIN: ...the four files we have
4 identified...

5 765. MR. SILVER: Let me make it easier for
6 you because this is an area that I was
7 going to question on, and if we could do it
8 now. In Exhibit 9, one of the attachments
9 to Exhibit 9 is the irrevocable trust that
10 was created or is dated March 5th, 2007.
11 So what it appears is that, on January,
12 McKenzie goes down, meets with Dribin, and
13 it says he flies to Miami on January 30th.

14 He meets with Dribin, as Mr. Ranking
15 has pointed out, on January 31st, and then
16 three pages later, in the end of February,
17 he is provided with funds for a retainer of
18 that law firm for \$12,500. And on March
19 5th, out comes a revocable trust. And so,
20 it would appear that Allard, through
21 McKenzie, paid the legal fees to Broad &
22 Cassel to create this revocable trust dated
23 March 5th, 2007 on behalf of Marjorie.

24 Now, whether you have the opinion
25 that that is related to this or not, it is

1 our view that it is. It is in the docket
2 entries. And to the extent that you can
3 produce documentation that relates to all
4 of that, I want to make sure that that is
5 within your definition of what you agree to
6 produce.

7 MR. EPSTEIN: I am going to give the
8 same answer I gave before. I hear what you
9 are saying. But, you know, I want to see
10 exactly what the nature of the retainer
11 was, and we will provide you with a
12 response accordingly.

13 766. MR. RANKING: But, in any event, I think
14 Mr. Silver has fairly identified the issues
15 from our perspective, and clearly, if it
16 relates to the...and I will tell you that
17 Justice Shaughnessy was very interested in
18 our submissions with respect to the Ilma
19 Knox irrevocable trust and what it did or
20 didn't do to a particular security
21 agreement that was included in the
22 Statement of Claim.

23 So we say it is pretty relevant. If
24 you take a different view, that is fine.
25 But if you are inclined to take a different

1 view, we should take you out for lunch and
2 we might be able to explain our position in
3 a more fulsome manner.

4 MR. EPSTEIN: You also have the benefit
5 of background information and a series
6 of...

7 767. MR. RANKING: I know, but...

8 768. MR. SILVER: There is no doubt about...

9 MR. EPSTEIN: ...you know, we have not
10 necessarily been privy to all of it. And
11 so that is why, before I give you an
12 undertaking, I want to make sure that we
13 are performing within the four corners of
14 what we are required to produce.

15

16 BY MR. RANKING:

17 769. Q. And just to follow up on my friend's
18 line of inquiry, I will take you to page 62, where
19 there is a further retainer of \$10,000, a bank wire
20 transfer. This is about the middle of the page, Ms.
21 Duncan.

22 MR. EPSTEIN: I am sorry, this is April
23 18?

24 770. MR. RANKING: 544437.

25 THE DEPONENT: Yes.

1 BY MR. RANKING:

2 771. Q. You will see there is a further U.S.
3 funds retainer by wire transfer. And on the same
4 day, you will see that there is then a payment that
5 was made through the...and when I say this, Ms.
6 Duncan, if you disagree with me, please let me know.
7 But I say there was a payment made under entry
8 544519 to the Broad & Cassel Iota Trust, Mike
9 Dribin, in the amount of \$2,904.70.

10 A. Yes. There are those payments on
11 those dates, yes.

12 772. Q. And you will see that that was paid
13 by bank wire charge re Broad & Cassel, Iota payment.
14 Do you see that?

15 A. Yes.

16 773. Q. Thank you.

17 774. MR. SILVER: And then it paid an
18 account.

19 THE DEPONENT: And there is another
20 asterisk on that one.

21 775. MR. RANKING: There is.

22 776. MR. SILVER: Thank you. But just while
23 we are on it, it paid an account. And so
24 Gerry has asked for copies of the accounts.

25 777. MR. RANKING: Yes. I think that was the

1 subject of an earlier question.

2 778. MR. SILVER: It was. You have got that
3 undertaking subject to the reservation that
4 Ian satisfy himself that it relates to this
5 subject matter.

6 779. MR. RANKING: Right.

7

8 BY MR. RANKING:

9 780. Q. Now, I am looking here and I am
10 changing courses for a moment. If I go down, and
11 just by way of example, Ms. Duncan, there are
12 numerous entries that refer to Nathan. But lawyer
13 number 4 at April 18, 2007, there is a big entry.
14 Then at 544687, lawyer 4, which is Mr. McKenzie:

15 "...E-mail and case law from Kelly. Call
16 with Nathan, blogging..."

17 Do you see that?

18 A. Yes, I do.

19 781. MR. SILVER: I don't. What date?

20 782. MR. RANKING: April 18. It's the last
21 April 18th entry.

22 MR. EPSTEIN: I see it.

23 783. MR. SILVER: Yes.

24

25 BY MR. RANKING:

1 784. Q. Now, is it your evidence that you
2 think that "Nathan" refers to Donald Best?

3 A. That is what I was advised by Stacey
4 Ball.

5 785. Q. And does he use that name when he is
6 performing private investigative services for Mr.
7 McKenzie?

8 A. That was the name attached to this
9 file. There were...in our satellite files, for
10 example, we were dealing with people who had the
11 capability of hacking our system, hacking our
12 various communication modes. So it was customary on
13 those files to deal in aliases and nicknames to
14 avoid the particular target of an investigation
15 discovering what we were up to. So there are a
16 number of names that Mr. Best may have used as his
17 code name over the course of his association with
18 Mr. McKenzie. This is the name attached to this
19 file.

20 786. Q. I thank you for that. But can I
21 just take you...because this is the reason I am
22 asking. If I can ask you to turn the page and go to
23 page 62. I am sorry, I was going to take you to the
24 reference "Douglas Best".

25 787. MR. SILVER: That is page 62 or...

1 788. MR. RANKING: Page 63. There was an
2 entry on 19 April, 2007. Right here,
3 lawyer 12. And I apologize because I
4 thought it was Donald Best, but it says
5 Douglas Best.

6 MR. EPSTEIN: Right. I see that.

7

8 BY MR. RANKING:

9 789. Q. So, as I understand your evidence
10 then, this is Douglas Best, and a couple of entries
11 here...and I apologize, I thought it was Donald
12 Best, but...so do I understand what you are saying,
13 is that Donald Best never would have used his name
14 in this file? It would have been Nathan, to the
15 best of what you have been told by Ms. Ball?

16 A. Well, for the period of time that he
17 was acting under cover, if I can put it that way.
18 When he was acting in an investigative capacity...

19 790. Q. That is my point.

20 A. ...he would have been referred to as
21 Nathan.

22 791. Q. So that, to the extent that we see
23 Mr. Best rendering accounts as an investigator for
24 NIS Inc., then, according to what Ms. Ball has told
25 you, he would have been known by his code name,

1 Nathan?

2 A. I believe that is what she told me,
3 yes.

4 792. Q. But to the extent that Mr. Best was
5 providing instructions as a principal of Nelson
6 Barbados, I take it he would have been known as
7 Donald Best?

8 A. I don't know.

9 793. Q. All right. Will you make inquiries
10 of Ms. Ball and see if she has any knowledge,
11 information or belief?

12 MR. EPSTEIN: We will ask her.

13 794. MR. RANKING: Because...

14 MR. EPSTEIN: I just want to get the
15 undertaking. So, just so that I have got
16 the undertaking clear, what you have asked
17 us to do is to ask Ms. Ball that, to the
18 extent that Best was providing instructions
19 on behalf of Nelson Barbados, that he used
20 the name Donald Best, not Nathan, correct?

U/T

21

22 BY MR. RANKING:

23 795. Q. You had indicated before that you
24 thought that Mr. Best said it was David Best.
25 Having now seen the entries "Douglas Best", is it

1 possible that his son's name is Douglas Best?

2 A. No, that might be his brother. I
3 would have to ask Stacey Ball or Sunny Ware.

4 796. Q. Would you? And my colleague, Ms.
5 Morse, tells me there is also an entry for a Winston
6 Best.

7 A. Again, I would have to ask the staff
8 members who were dealing with the file.

9 797. Q. We think that his father was Nelson
10 Best.

11 A. Actually, I believe that was his
12 parrot.

13 798. Q. His parrot?

14 799. MR. SILVER: I thought you said parent.
15 It was his parrot?

16 THE DEPONENT: I think so.

17 800. MR. RANKING: I want you to know,
18 whoever gets the book rights for this could
19 really have fun.

20

21 BY MR. RANKING:

22 801. Q. I am also told that there is a
23 Rosalyn Best.

24 A. That's his sister.

25 802. Q. Is she also known as Rosalee?

1 A. I don't know.

2 803. Q. These are just various entries that
3 we found. All right.

4 MR. EPSTEIN: So you want us to ask Ms.
5 Ball if Douglas Best is his brother?

6 804. MR. RANKING: Well, the reason this is
7 relevant, aside from the prurient interest
8 that I said we have in the Best family, is
9 that it does demonstrate the interstices of
10 Mr. Best and the Crawford McKenzie firm
11 insofar as Donald Best is concerned. It
12 would certainly seem that there is more
13 than one association with Donald Best and
14 his alias, Nathan, but it may well extend
15 to other members of his family. So I am
16 interested to know because these names come
17 up in the documents.

18 MR. EPSTEIN: All right. So we will
19 make that inquiry, if Douglas Best is his
20 brother.

U/T

21 805. MR. RANKING: And if you do it for all
22 three names, please, for Douglas, for
23 Winston, and Rosalyn.

24 MR. EPSTEIN: Well, Rosalyn, she has
25 already given her evidence, that that is

1 the sister.

2 806. MR. RANKING: Yes. Thank you.

3 MR. EPSTEIN: So, Winston...who do you
4 think Winston is? Do you know?

5 THE DEPONENT: No idea.

6 MR. EPSTEIN: Okay. We will ask. U/T

7

8 BY MR. RANKING:

9 807. Q. If I could ask you to turn to page
10 113.

11 A. 113?

12 808. Q. Yes, please. Before I go there, I
13 forgot to ask one other question with respect to
14 Wanphen Panna. It talked about an Internet account.
15 "An account" can have two meanings. An account can
16 either be a paper invoice that is rendered to
17 Crawford McKenzie, or an Internet account can
18 actually be an account, an electronic website that
19 you can access over the Internet.

20 Do you have any knowledge, information or
21 belief as to when Wanphen Panna was conducting her
22 work, when she was referring to "account", was she
23 referring to an Internet account? Do you know?

24 A. I don't know.

25 809. Q. Would you make inquiries of Ms. Ball

1 and Ms. Ware to determine whether they might know?
2 And if it is only one of the two, we will know.
3 That is fine.

4 A. Ms. Ware was the assistant who
5 handled all the accounting, whereas Ms. Ball had no
6 connection with that.

7 810. Q. Perhaps Ms. Ware then. And I can
8 tell you that that...I examined you on the entry
9 that I am referring to. If you want me to take you
10 back to that, I will do that after.

11 MR. EPSTEIN: So you want us to ask
12 Ware...

13 811. MR. RANKING: Whether the docket entry
14 was referring to...

15 MR. EPSTEIN: Just identify the
16 document, please, just so that I know for
17 the record, please.

U/T

18 812. MR. RANKING: The entry I was referring
19 to is at page 28, the 2nd of June, 2006.

20 It indicates:

21 "...Money wired to cover Internet research
22 account..."

23

24 BY MR. RANKING:

25 813. Q. And what is not clear from that

1 docket is whether that is to pay an account that was
2 rendered by Wanphen Panna, or whether that was paid
3 to maintain an electronic account for which she was
4 doing research. I just don't know.

5 A. As I said, I don't know. All I have
6 is a series of accounts in the file. I don't know
7 if that is what it refers to.

8 814. Q. All right. And I know you have
9 undertaken to do that, so that is great. Thank you.
10 I had asked you to go to page 113. And you will see
11 at the entry, I think it is January 15th. Beside
12 entry number 611452, it appears that Peterco, which
13 I take to be Peterco Holdings, had provided the firm
14 with a \$5,000 U.S. retainer for Miami counsel in
15 connection with a Florida action. Do you see that?

16 MR. EPSTEIN: Yes.

17

18 BY MR. RANKING:

19 815. Q. That again seems to be a Broad &
20 Cassel firm. And do I understand from these entries
21 that in January of '09, Crawford McKenzie was
22 continuing to receive funds, and to retain the Broad
23 & Cassel firm on behalf of Mr. Allard and his
24 company, Peterco?

25 A. I don't know.

1 816. Q. Would you agree with my summary or
2 understanding of what I take from the document...
3 would that be the same as yours?

4 MR. EPSTEIN: I mean, it refers to Miami
5 counsel, in fairness. I mean, your
6 assumption sounds reasonable, but it makes
7 reference to Miami counsel.

8 817. MR. RANKING: Well, because what you see
9 is this, you see a \$5,000 retainer less a
10 \$10 wire transfer fee. You then see a
11 \$45,000 retainer plus a \$10 transfer fee,
12 and then you see \$50,000 being sent to
13 Broad & Cassel.

14 MR. EPSTEIN: I agree. I am not
15 disagreeing with you. That seems like a
16 reasonable assumption to make, but...

17 818. MR. RANKING: Well, perhaps we can do it
18 this way. If you have any evidence to the
19 contrary, then let me know.

20 MR. EPSTEIN: Okay.

U/T

21
22 BY MR. RANKING:

23 819. Q. And do we know who was providing
24 instructions to the Broad & Cassel firm with respect
25 to either the retainer, to which we have already

1 made reference, in January and February of '07, or
2 the retainer in January of '09?

3 A. I don't know.

4 820. Q. Will you make inquiries of Ms. Ware
5 to determine if she has any knowledge, information
6 or belief?

7 MR. EPSTEIN: Yes.

U/T

8 821. MR. RANKING: Thank you.

9

10 BY MR. RANKING:

11 822. Q. At the break, I gave your counsel a
12 copy of a summary entitled "Funds Deposited into
13 Trust Accounts for Files BMC 543, 568 and 586". And
14 we corrected a typo on page 5, which referred to
15 BMC 568, and the last of those files has now been
16 corrected to 586. And what this summary provides is
17 it is a summary of the client ledgers that you
18 provided and had the receipts of funds.

19 And we went through those ledgers, Ms.
20 Duncan, and summarized on this summary the various
21 amounts received by the Crawford McKenzie firm in
22 respect of those three files, BMC 543, 568 and 586.
23 Could I ask you to let me know, does this summary
24 fairly represent your understanding of the amounts
25 received as extracted from the client ledgers?

1 A. I would have to take a close look at
2 it.

3 823. Q. All right. Would you do that?

4 MR. EPSTEIN: Yes. U/T

5 THE DEPONENT: Yes.

6

7 BY MR. RANKING:

8 824. Q. And if I can take you to the last
9 page, the summary from all three files as reflected
10 on the client ledgers is 3,451,840.34. That is the
11 amount that we say flows into the trust account.

12 MR. EPSTEIN: On all three files?

13 825. MR. RANKING: On all three files. And
14 we have given you a breakdown on the fees
15 billed on each file. And then we have set
16 forth beneath that the information that
17 came from your client ledgers, which is
18 indented, the fees billed on each file.
19 And there would appear to be a discrepancy
20 between the two numbers of almost \$1
21 million.

22 And based on the information that we
23 have got, we can't determine the
24 discrepancy. So if you could assist by
25 speaking with your accounting people, that

1 would be of assistance.

2 MR. EPSTEIN: It does appear that there
3 were some internal transfers, although,
4 admittedly, those internal transfers don't
5 explain the entire discrepancy. It would
6 probably account for \$100,000.

7 826. MR. RANKING: And you are absolutely
8 correct. Our summary does not back out the
9 transfers. And so, to that extent, we
10 acknowledge that this is inaccurate because
11 all we have done is taken it off the
12 "Receipts" column. So if you have got
13 money transferred, then there is an element
14 of double counting, and I think we have
15 explained that to you off the record. So
16 we have to take that into account.

17 But given that acknowledged error,
18 we still can't come to a landing. So, why
19 don't we mark this as the next exhibit? It
20 will be Exhibit number 10.

21
22 --- EXHIBIT NO. 10 : Summary entitled "Funds Deposited
23 into Trust Accounts for Files BMC
24 543, 568 and 586"

25

1 BY MR. RANKING:

2 827. Q. And what I would like to know, Ms.
3 Duncan, by way of summary is, you have been a
4 partner of the McKenzie firm since 2000,
5 thereabouts?

6 A. 2002.

7 828. Q. 2002. I take it that you would
8 agree that a file of this magnitude is not
9 characteristic of the billings to clients of the
10 Crawford McKenzie firm, in your experience?

11 A. It is not characteristic of
12 anybody's files, other than Mr. McKenzie's.

13 829. Q. All right. And I take it, for you
14 and Mr. McKenzie, this could be a large file?

15 A. Actually, this is smaller than his
16 telecommunications files.

17 830. MR. SILVER: But we only got to the
18 jurisdiction motion.

19
20 BY MR. RANKING:

21 831. Q. Relative to the files of the firm,
22 this is a significant file?

23 A. If you are comparing Mr. McKenzie to
24 all the other lawyers, yes. If you are comparing
25 Mr. McKenzie to himself, no.

1 832. Q. And when you say, "when you compare
2 this to Mr. McKenzie, it is not exceptional", what
3 would be the extent of Mr. McKenzie's billings on an
4 annual basis?

5 MR. EPSTEIN: Don't answer that
6 question.

/R

7 833. MR. RANKING: Well, the reason it's
8 relevant...well, I don't need to tell you
9 why it is relevant. What I am going to ask
10 you for is...are you going to produce the
11 financial statements of the Crawford
12 McKenzie firm for the years 2005 to 2009?
13 Because what I say is relevant...and Mr.
14 McKenzie has made clear that he doesn't
15 have an interest in this lawsuit, but he
16 clearly has a very significant interest in
17 the billings that were generated from it.

18 And we are interested to know, both
19 from Mr. McKenzie's perspective, and to the
20 extent that the firm profited through these
21 bills, the extent to which this was a
22 significant file for the Crawford McKenzie
23 firm.

24 MR. EPSTEIN: Well, I don't think she is
25 disputing the fact that this was a

1 significant file for the Crawford McKenzie
2 firm. Your earlier question was, was this
3 an extraordinary large file for Mr.
4 McKenzie? And I think she indicated that
5 it wasn't an extraordinarily large file for
6 Mr. McKenzie. He had others that were
7 bigger. I don't think there is any dispute
8 that this was a significant file for the
9 firm. If that is what you are looking at,
10 I don't...

11 THE DEPONENT: If you are trying to...

12 MR. EPSTEIN: ...think we have any
13 difficulty acknowledging that.

14 THE DEPONENT: No. And if you are
15 trying to get at the question of whether
16 this was a significant file for these
17 particular years...

18 834. MR. RANKING: Because that is where I am
19 going.

20 THE DEPONENT: Okay. The answer is yes.
21 Mr. McKenzie's telecommunications practice
22 had slowed down considerably. This was his
23 main...these two files were his main source
24 of revenue for those years.

25 835. MR. RANKING: Thank you.

1 836. MR. SILVER: Well, they were the firm's
2 main source of revenue for the two years.

3 THE DEONENT: Revenue, yes.
4

5 BY MR. RANKING:

6 837. Q. And perhaps we can get over the
7 issue of producing the financial statements. When
8 you talk about the main source of revenue on a
9 percentage basis, how significant were they? When I
10 say "were they", I am talking about the four files
11 that have been identified as the Nelson Barbados,
12 Peter Allard files.

13 MR. EPSTEIN: What are you asking? Are
14 you asking what percentage of the billings
15 these files represented?

16 838. MR. RANKING: Correct.

17 MR. EPSTEIN: I am going to take the
18 question under advisement.

19 839. MR. SILVER: Sorry, Gerry, because I was
20 going to cover this, too. So, what I think
21 I would like is broken down by year, and
22 because '05 was a short year, I think it
23 would be sufficient for us if we knew what
24 percentage of the billings to these files
25 was to gross billings of the firm for each

1 of 2006, 2007, and 2008. And then 2009, it
2 changed because he started paying some
3 towards expenses.

4 So let's limit it to '06, '07 and
5 '08, the percentage of gross billings on
6 this file to the gross billings of the
7 firm.

8 MR. EPSTEIN: I understand what the
9 question is. Can you just explain to me
10 again the relevance of this, of this
11 particular matter? What is the relevance
12 of this?

13 840. MR. SILVER: Well, I mean, at least one
14 relevance is the significance of the file
15 to the firm in respect of our claim against
16 the firm.

17 MR. EPSTEIN: Fine. I think she has
18 already given you evidence that this was a
19 significant file for the firm.

20 841. MR. SILVER: Well, was it 50 percent?

21 THE DEPONENT: Well, I think, as I...I
22 testified earlier that Mr. McKenzie's
23 billings for himself were more than...at
24 least double the other partners combined.

25 842. MR. SILVER: So, without getting into

1 anymore detail, can we say that it was at
2 least 50 percent of the firm's billings for
3 2006, 2007 and 2008?

4 THE DEPONENT: Yes.

5 843. MR. SILVER: I think that is good
6 enough.

7 844. MR. RANKING: I think that is good
8 enough.

9 MR. EPSTEIN: I think that is the
10 information you...

11 845. MR. RANKING: That is fine. That is the
12 information we are looking for.

13 846. MR. SILVER: So it was at least 50
14 percent of firm's billings for each of
15 those years.

16

17 BY MR. RANKING:

18 847. Q. Based on your review of the
19 materials and your work on the file, did you
20 understand the individual to whom Mr. McKenzie was
21 reporting with respect to these files?

22 A. It was really difficult to say.
23 Certainly he mentioned Mr. Allard a number of times.
24 That was more...that came into it more after these
25 disputes arose.

1 848. Q. Which disputes are you referring to?

2 A. The partnership disputes arose. So
3 it was only, I think, in the year 2009 that we
4 really began to hear about Mr. Allard, that he was
5 unhappy with accounts, or something of that nature.
6 So it was only in 2009 we really began to hear
7 anything significant about Mr. Allard.

8 849. Q. But I take it the reason for that
9 was, until 2009, Mr. Allard was generally satisfied
10 with the work that was being done?

11 A. As I said, I really don't have any
12 direct knowledge of Mr. Allard's level of
13 satisfaction. I only have Mr. McKenzie giving
14 statements to us about cash flow issues. So I don't
15 know the truth or the untruth of those statements.

16 850. Q. But I think it is fair to say that
17 Mr. McKenzie began reporting to you when things were
18 not going as well with Mr. Allard as they had once
19 gone; is that fair?

20 A. No, I can't tie it to anything
21 involving Mr. Allard because it only ties in with
22 the disputes that were going on between the
23 partners.

24 851. Q. Right. But the communications that
25 you received from Mr. McKenzie relative to Mr.

1 Allard in 2009 were expressing concern with respect
2 to fees?

3 A. Yes, at times that we were asking
4 Mr. McKenzie for money. I don't want to give...I
5 want to put those in context because I think that is
6 very relevant. And the other information we had
7 about Mr. Allard related to other issues that Mr.
8 McKenzie was dealing with.

9 852. Q. But I take it you understood the
10 client to be Mr. Allard?

11 A. I knew he was involved.

12 853. Q. And I take it that, to the extent
13 that he was involved, you understood that he was the
14 individual that was providing Mr. McKenzie with
15 instructions?

16 A. In relation to this matter, that
17 wasn't something that was clear. We heard more
18 about other issues he was dealing with.

19 854. Q. And was it not clear simply because
20 you didn't inquire?

21 A. Partly, yes.

22 855. Q. And I take it you weren't aware of
23 Mr. Best providing instructions?

24 A. Not really, until...again, as I
25 said, when I was asked to deal with security issues,

1 Mr. Best came to some meetings, and, at that point,
2 he was introduced as the client. And that was when
3 I became aware that Mr. Best was supposedly the
4 directing mind of the plaintiff in this action.

5 856. Q. And aside from his involvement of
6 the security issues, were you ever aware of his
7 involvement otherwise?

8 A. I was aware...he would come to the
9 firm...he would come to the office occasionally, but
10 I only became aware of it after the security issues
11 arose. So it was only when I became aware that it
12 was in relation to this file.

13 857. Q. What was he doing when he came to
14 the firm?

15 A. That, I don't know. He and Mr.
16 McKenzie and Ms. Ware were closeted in their end of
17 the office, and I don't know what they were doing.

18 858. Q. And to the best of your knowledge,
19 was that dealing with security issues?

20 A. In 2007 and early 2008, yes. That
21 is the extent of my knowledge.

22 859. Q. I am going to leave your work on the
23 file and the various insurance issues to others,
24 just because I said I would afford you the
25 opportunity, and because I like to be true to my

1 word. We have had delivered an affidavit from Mr.
2 McKenzie, and I do want to give you the opportunity
3 to reflect on that. I do have a number of exhibits
4 to mark. But just before I do that, to reflect on
5 the affidavit and to let me know if you have any
6 particular comments with respect to the affidavit
7 that you would like to put on the record.

8 MR. EPSTEIN: That is a big question,
9 and it is a fair question. What I would
10 like to do is have her...because obviously
11 it is a lengthy affidavit. I would like
12 the witness to reflect on that and come
13 back at the next examination.

14 860. MR. RANKING: That is entirely fair. I
15 have no problem with that at all. Let me
16 just look at my list of exhibits, which I
17 undoubtedly jettisoned.

18
19 BY MR. RANKING:

20 861. Q. I do have one other document for
21 sure I would like to tender...I've got two,
22 actually. One document is the land parcel register
23 for 40 Coldwater Street. I hand that across to you.
24 Mr. McKenzie indicates that he sold his partnership
25 interest to you in July of 2008. And if I can take

1 you to the last two entries, you will see that there
2 was a transfer of his interest to you and to Tim
3 Anderson on July 21, 2008?

4 A. Yes.

5 862. Q. And as I understand that, he sold
6 his interest to you for \$246,733?

7 A. That is what is shown on the
8 document.

9 863. Q. I see.

10 A. I...documents were placed in front
11 of me on that date, and I was told to sign them,
12 and...

13 864. Q. Did you pay him \$246,733?

14 A. No.

15 865. Q. And did you take back a mortgage, or
16 did you take out a mortgage for \$180,000?

17 A. We did sign a mortgage, yes.

18 866. Q. Did you see any funds?

19 A. No, no, that mortgage went to
20 Mr...that was in favour of Mr. McKenzie to fund the
21 transfer. He had been...he is owed payments under
22 that, and as far as I know, they were...those
23 payments started the next month.

24 867. Q. And did he receive the difference in
25 cash or in some other form of assets between the 180

1 and the 246?

2 A. That, I don't know. Mr. McLean
3 handled all the real estate details for that.

4 868. Q. All right. Will you make inquiries
5 of Mr. McLean and advise?

6 MR. EPSTEIN: I will take that under
7 advisement.

U/A

8 869. MR. RANKING: Okay. If we can mark the
9 parcel register as the next exhibit. That
10 will be Exhibit number 11.

11
12 --- EXHIBIT NO. 11 : Land parcel register for 40
13 Coldwater Street

14
15 870. MR. RANKING: And one thing which I had
16 intended to mark, which I have not yet
17 marked, was the copy of the initial letter
18 from Mr. Dewart, answering undertakings.
19 If we could mark that as the Exhibit number
20 12. I will provide an additional copy to
21 you, not that you need it. I know that
22 you've already got it.

23 That is a letter dated February
24 19th, with various attachments being
25 answers to undertakings on the

1 cross-examination of Mr. McKenzie held
2 February 3rd and February 8th. That will
3 be Exhibit number 12.
4

5 --- EXHIBIT NO. 12 : Letter from Mr. Dewart to
6 Mr. Ranking, dated February 19,
7 2010, with various attachments
8

9 871. MR. RANKING: And the chart that was
10 prepared with your assistance by Mr.
11 Epstein's firm, which I will call the
12 revised undertakings chart, will be marked
13 as Exhibit number 13. And that can easily
14 be differentiated because it has a middle
15 column, "Answers Given in February 2010",
16 and the right-hand column provides
17 "Clarification/Additional Information".
18 And I take it that is the updated
19 undertakings that you were good enough to
20 provide, Ms. Duncan?

21 THE DEPONENT: Yes.

22 872. MR. RANKING: Thank you.
23

24 --- EXHIBIT NO. 13 : Revised undertakings chart from
25 Mr. Dewart to Mr. Ranking, dated

February 19, 2010

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873. MR. SILVER: Can I just ask a question?
In respect of Exhibit 12, Ms. Duncan, did you review the answers to undertakings that Mr. Dewart had sent over under cover of his letter dated February 19th?

THE DEPONENT: Not until February 23rd, 24th.

874. MR. SILVER: So you didn't review it before it was sent to us?

THE DEPONENT: No.

875. MR. RANKING: I know that my colleagues have other questions, but I've dragged the puck long enough, so...

876. MR. SILVER: Well, if I could...I think we should have a discussion off the record. But before we do, I think that Mr. Ranking's examination really isn't finished, in that there are some loose ends that, for example, you are going to reflect on Mr. McKenzie's April 23rd affidavit, and come back and tell us.

So I think that we should discuss off the record when the reattendance is

1 going to take place. And then, at that
2 time, Mr. Ranking will complete his
3 examination, if nothing more but to follow
4 up on these loose ends. Then I am going to
5 go, and David Bristow will go after me, and
6 finally, Maanit Zemel will follow up. And
7 I think we will need about a day for that,
8 like, four hours. I mean, my two hours may
9 now be cut back because Gerry has covered
10 some of the ground.

11 So, why don't we go off the record
12 and decide on a day when we can come back,
13 and then we will just adjourn to that day?

14 MR. EPSTEIN: Fine.

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REPORTER'S NOTE:

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I hereby certify the foregoing to be a true and accurate the above noted proceedings held before me on the 26th DAY OF APRIL, 2010 and taken to the best of my skill, ability and understanding.

Reporter

}
} Certified Correct:
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}
}
}
}
} Robert Dudley
} Certified Verbatim

