

ONTARIO  
SUPERIOR COURT OF JUSTICE

HD/dl

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 GRAVES, 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

- - - - -

This is the Continued Cross-Examination of JESSICA ANN DUNCAN, on her affidavit sworn on 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 30th day of April, 2010.

- - - - -

APPEARANCES:

K. WILLIAM MCKENZIE	-- for the Plaintiff
GERALD L.R. RANKING EMMELINE MORSE	-- for the Defendant, PricewaterhouseCoopers East Caribbean Firm
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

A P P E A R A N C E S (CONT'D) :

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

IAN S. EPSTEIN

-- for Jessica Ann Duncan

LEAH ANDERSON VOJDANI

-- for K. William McKenzie

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1 JESSICA ANN DUNCAN, resumed

2 CONTINUED CROSS-EXAMINATION BY MR. RANKING :

3 877. Q. Ms. Duncan, this is a continuation  
4 of your cross-examination on your affidavit sworn  
5 April 22nd, 2010?

6 A. Yes.

7 878. Q. And I know that you are aware that  
8 you continue to be under oath?

9 A. I am.

10 879. Q. Just as a housekeeping matter, Mr.  
11 Silver has prepared a list of the undertakings from  
12 his notes from your first day of cross-examination.  
13 I will provide another copy, but what I would like  
14 to do is mark that as an exhibit to assist, so that  
15 we can start working on the undertakings given the  
16 time frame that we have and the impending June 7th  
17 date. So, I can pass the copy across...

18 MR. SILVER: I have extra copies.

19 MR. EPSTEIN: Obviously we just received  
20 this right now, so I haven't reviewed it.  
21 I'm reluctant to make an exhibit, because  
22 we haven't reviewed it and I don't know...

23 880. MR. RANKING: I'm happy to have it  
24 marked just for identification.

25 MR. EPSTEIN: Just for identification

1 purposes. I have no reason to believe it's  
2 not on any list, but I just want to  
3 obviously review it, before we begin.

4 MR. SILVER: If I could just speak to it  
5 for a second, I can't guarantee it's  
6 accurate, but I took notes through the  
7 course of Ms. Duncan's cross-examination on  
8 Monday, and marked, as I'm showing  
9 you...so, I just dictated from my notes.  
10 So, I think I got them. I was paying  
11 attention to that when I wrote the notes.  
12 But it should be checked against the  
13 transcript to be safe when the transcript  
14 comes out. But I thought it would give  
15 everybody, you guys especially, a head  
16 start on the information that was  
17 undertaken to be provided. And then the  
18 under advisements and refusals are in  
19 there, all in the order in which they came  
20 up in cross-examination. So, it's just  
21 something to help.

22 MR. EPSTEIN: Thank you. No, it is  
23 helpful, and as I said, I'm content to mark  
24 this as a document for identification  
25 purposes.

1       881.               MR. RANKING:        So, we'll mark for  
2                               identification under Exhibit B the  
3                               undertakings, under advisements and  
4                               refusals given at the cross-examination of  
5                               Jessica Duncan, held on April 26, 2010.  
6

7       ---   EXHIBIT B:            The undertakings, under advisements  
8                               and refusals given at the  
9                               cross-examination of Jessica Ann  
10                              Duncan, held on April 26, 2010  
11

12       BY MR. RANKING:

13       882.               Q.        Ms. Duncan, when I last was  
14                              examining you, we had gone through in some detail  
15                              the wire transfers from Peter Allard and Peterco to  
16                              pay the accounts of Crawford, McKenzie. Are you  
17                              aware of Mr. Allard, aside from funding the  
18                              litigation, having any interest in the action  
19                              commenced by Nelson Barbados against Richard Cox  
20                              that was stayed by Justice Shaughnessy?

21                            A.        If I could have a minute to speak  
22                              with my counsel.

23       883.               Q.        Right.

24                            A.        Yes.

25       884.               Q.        What interest do you say that he

1 has?

2 A. In attempting to get a start on the  
3 undertakings and reviewing the file contents, a  
4 staff member came across what appeared to be trust  
5 agreements between Peter Allard and Donald Best in  
6 trust for a company to be incorporated. As well as  
7 a promissory note with various dates between 2005  
8 and 2007. I have not had an opportunity to examine  
9 those documents in any detail and I have turned them  
10 over to my counsel.

11 885. Q. Do you know the dates of these  
12 agreements? First of all, was there more than one  
13 agreement?

14 A. Yes.

15 886. Q. And do you know how many agreements  
16 there were?

17 A. It's difficult to say because I  
18 think there may have been duplicates that were  
19 obtained in the course of getting signatures, so I  
20 can't really say.

21 887. Q. First of all, let's go back to the  
22 beginning. Where were these agreements found, in  
23 what file?

24 A. They were found within the BMC 543  
25 file.



1           888.           Q.       And who found them?

2                           A.       Stacey Ball.

3           889.           Q.       And I take it that she found them,  
4           in light of your earlier answer, at some point after  
5           your cross-examination on Monday, April 26th?

6                           A.       Yes, when we were attempting  
7           to...one of the undertakings given was to try and  
8           identify documents described in a particular docket  
9           entry. And she was trying to search for documents  
10          around that time. And that led her to discover this  
11          set of documents.

12          890.           Q.       And when she was searching for the  
13          documents, was she in a document file or a  
14          correspondence file?

15                          A.       Actually, I believe she was looking  
16          at documents that have been scanned to pdf or  
17          something like that.

18          891.           Q.       And were they scanned from a  
19          correspondence or a documents file, do you know?

20                          A.       I believe they were scanned from an  
21          email and attachments.

22          892.           Q.       Will you undertake to make inquiries  
23          of Ms. Ball to determine where these documents were  
24          located and the original file from which the  
25          documents were scanned?



1           there was a group of documents saved  
2           electronically on the server,  
3           correspondence, et cetera. At one point,  
4           the contents of that portion of our server  
5           were removed. Not just that file...at one  
6           point, partners became aware that Mr.  
7           McKenzie's entire server contents were no  
8           longer on our server. The documents that  
9           we have were retrieved when we discovered  
10          that from our backup tape. So, Ms. Ball  
11          had been examining what we had retrieved  
12          under that file name.

13

14 BY MR. RANKING:

15 896.           Q.       All right. If I could go back and  
16           ask a series of questions relating to those answers.  
17           And I do want to come back and ask some further  
18           questions with respect to your earlier answers.

19                   MR. SILVER:       Can we just go off the  
20                   record for one second?

21 897.           MR. RANKING:       Yes.

22

23 --- DISCUSSION OFF THE RECORD

24

25 BY MR. RANKING:

1           898.           Q.       I think that as a consequence of our  
2                           discussion off the record, we've clarified somewhat  
3                           the undertaking, and I think Ms. Duncan has it  
4                           accurately transcribed.  If I could just ask her to  
5                           repeat it, because I didn't make a note of our  
6                           discussion.  And then I will continue with my  
7                           questions.

8                           A.       As I understand the undertaking, I  
9                           am to inquire of Stacey Ball under what subfile she  
10                          located the documents, and to the best of her  
11                          ability, what date those documents were scanned in.

12           899.           Q.       And if you could also ask her the  
13                           original source of the documents.  Did they come  
14                           from one of Mr. McKenzie's files?

15                          A.       As I said, I will ask her that.  The  
16                          appearance is that they were attachments to an  
17                          email.

18           900.           Q.       And just with respect to the email,  
19                           can you tell me the details of that email, who was  
20                           it from?

21                          A.       I believe it was from Ms. Sunny  
22                          Ware.

23           901.           Q.       Who was it to?

24                          A.       Mr. McKenzie.

25           902.           Q.       And what was the date of the email?

1 A. I can't recall the exact date.

2 MR. EPSTEIN: Do you want to go off the  
3 record for a minute?

4 903. MR. RANKING: Yes.

5

6 --- DISCUSSION OFF THE RECORD

7

8 904. MR. RANKING: Ms. Duncan, through her  
9 counsel, informs us that she has in fact  
10 brought the email and the various documents  
11 upon which I was cross-examining. We've  
12 agreed that it only makes sense to afford  
13 her an opportunity to secure the documents,  
14 review them with Mr. Epstein. We're  
15 therefore going to adjourn shortly to  
16 provide her that opportunity and we will  
17 resume in ten minutes.

18

19 --- A BRIEF RECESS

20

21 JESSICA ANN DUNCAN, resumed

22 CONTINUED CROSS-EXAMINATION BY MR. RANKING :

23 905. MR. RANKING: While we were off the  
24 record, Mr. Epstein conferred with Ms.  
25 Duncan and in fact has been able to locate

1 a number of documents. The documents, I am  
2 told, do not unequivocally indicate on the  
3 face of the documents that they relate to  
4 this action. And although they came from  
5 file BMC 543, out of an abundance of  
6 caution, the procedure which we have agreed  
7 to follow is this. I will ask Mr. Epstein  
8 to identify the documents and we will then  
9 mark them for identification purposes. Mr.  
10 Epstein following the cross-examination  
11 over the lunch hour will speak with Mr.  
12 Kramer who acts for Mr. McKenzie to  
13 determine if he can confirm that the  
14 documents in fact relate to this matter.  
15 And if we have to argue the matter before  
16 Justice Shaughnessy, then the documents  
17 that are marked for identification can be  
18 produced by Mr. Epstein. I wanted to be  
19 clear that neither Mr. Silver or myself or  
20 any other counsel on this side of the table  
21 are asking for production of the documents,  
22 rather they will be marked for  
23 identification and they will remain in the  
24 exclusive possession of Mr. Epstein,  
25 pending the resolution of the matter. Does

1                   that fairly summarize?

2                   MR. EPSTEIN:        Yes.

3           906.       MR. RANKING:        All right.  So, I'm happy  
4                   to do it either way.  I could either ask  
5                   the questions, Mr. Epstein, or I'm happy to  
6                   have you...

7                   MR. EPSTEIN:        No, I think it might be  
8                   easiest...why don't I just identify the  
9                   documents as best I can.  So, there's a  
10                  series of documents.  The first one is an  
11                  email from Sunny Ware to KWM External,  
12                  dated June 13, 2007.

13

14       ---   EXHIBIT C1:           Email from Sunny Ware to KWM  
15                                    External, dated June 13, 2007

16

17                  MR. SILVER:        I would propose that you  
18                  mark it as C1 and then the next one is C2  
19                  and C3.

20                  MR. EPSTEIN:        Fine.  I'm fine with that.

21       907.       MR. RANKING:        That document is marked as  
22                  C1 for identification?

23                  MR. EPSTEIN:        Yes.  The next document,  
24                  and they're in no particular order, is an  
25                  agreement between Peter Allard and Donald

1 Best in Trust for a company to be  
2 incorporated. And this is dated January 1  
3 of 2007. And I'll mark this as Exhibit C2  
4 for identification.

5  
6 --- EXHIBIT C2: Agreement between Peter Allard and  
7 Donald Best in Trust for a company  
8 to be incorporated, dated January 1,  
9 2007

10  
11 MR. SILVER: Is it executed?  
12 MR. EPSTEIN: It's partially executed.  
13 908. MR. RANKING: By whom, if you could tell  
14 us?

15 MR. EPSTEIN: I would just prefer to  
16 identify the document at the moment.

17 909. MR. RANKING: All right. That's C2?  
18 MR. EPSTEIN: C2. The next document is  
19 an agreement between Allard and Donald Best  
20 in Trust for a company to be incorporated.  
21 And this one is dated August 1, 2005,  
22 partially executed. I'll mark this as  
23 Exhibit C3 for identification.

24 MR. SILVER: And Exhibit C2 is clearly  
25 dated January 1, 2007?



1 MR. EPSTEIN: Yes.

2  
3 --- EXHIBIT C3: Agreement between Peter Allard and  
4 Donald Best in Trust for a company  
5 to be incorporated, dated August 1,  
6 2005, partially executed

7  
8 MR. EPSTEIN: The next document, and  
9 although it's almost identical to the  
10 previous one, because there's a slight  
11 change, a slight difference, I'm going to  
12 include this document as well, because this  
13 one is executed by both parties, but it's  
14 an agreement between Allard and Donald Best  
15 in Trust for a company to be incorporated.  
16 It's dated August 1, 2005, and it's  
17 executed by both parties. And this will be  
18 Exhibit C4.

19  
20 --- EXHIBIT C4: Agreement between Peter Allard and  
21 Donald Best in Trust for a company  
22 to be incorporated, dated August 1,  
23 2005, executed by both parties

24  
25 MR. SILVER: So, is it otherwise

1 identical to C3, other than it's executed?

2 MR. EPSTEIN: It's not identical. It  
3 looks very similar, but the font is  
4 different, and on the...it's slightly  
5 different. Very similar.

6 MR. SILVER: Okay.

7 MR. EPSTEIN: And then the next document  
8 is a promissory note dated November 15,  
9 2005 and it's C5.

10

11 --- EXHIBIT C5: Signed promissory note dated  
12 November 15, 2005, executed on  
13 behalf of Nelson Barbados Group  
14 Ltd., signed

15

16 910. MR. RANKING: Sorry, who is it between?

17 MR. EPSTEIN: It's executed on behalf of  
18 Nelson Barbados Group Ltd.

19 911. MR. RANKING: In favour of?

20 MR. EPSTEIN: In favour of Allard.

21 MR. SILVER: Nelson Barbados Group  
22 Limited, the plaintiff?

23 912. MR. RANKING: Is there an amount?

24 MR. EPSTEIN: There is, but the  
25 promissory note will speak for itself.

1           913.           MR. RANKING:       And is that signed?  
2                           MR. EPSTEIN:        Yes, it is.  
3                           MR. SILVER:         Sorry, is it Limited or  
4                           Ltd.?  
5                           MR. EPSTEIN:        Ltd.  
6                           MR. SILVER:         Thank you. So, it's the  
7                           plaintiff?  
8           914.           MR. RANKING:        Yes.  
9                           MR. SILVER:         And it's signed and  
10                          executed. So, that was C5?  
11                          MR. EPSTEIN:        Yes. And there's another  
12                          promissory note which is dated June 12 of  
13                          '07 made in the United States of America  
14                          between Nelson Barbados Group Ltd. in  
15                          favour of Peter Allard.  
16  
17           ---   EXHIBIT C6:        Promissory note between Nelson  
18   Barbados Group Ltd. in favour of  
19   Peter Allard, dated June 12, 2007  
20  
21           915.           MR. RANKING:        And is that executed?  
22                           MR. EPSTEIN:        No.  
23           916.           MR. RANKING:        Anything further, Mr.  
24                           Epstein?  
25                           MR. EPSTEIN:        No.

1 BY MR. RANKING:

2 917. Q. When we began this line of inquiry,  
3 Ms. Duncan, you had indicated that Ms. Ball came  
4 into possession of these documents. I'm going to  
5 come back to that momentarily, but just before we  
6 leave the exhibits, which your counsel has marked  
7 for identification, could you ask Ms. Ball who  
8 generated the documents that have been marked as C1  
9 through C6?

10 MR. EPSTEIN: Sorry?

11 918. MR. RANKING: Who generated the  
12 documents? In other words, did they come  
13 from Mr. McKenzie's machine, did they come  
14 from Ms. Ball's machine. Can we determine?

15 MR. EPSTEIN: What I'm going to do with  
16 regard to...you're fine to ask the  
17 questions. All the questions relating to  
18 these documents I'm going to take under  
19 advisement. Obviously, it will depend on  
20 our first inquiry and if our first inquiry  
21 that these documents are related to this  
22 action, then these under advisements will  
23 obviously be answered.

24 919. MR. RANKING: The thrust of my questions  
25 is I would be interested to know if they

1                   were generated by the McKenzie, Crawford  
2                   firm or if they were provided to the firm  
3                   by Mr. Allard. Ms. Duncan is appearing  
4                   quizzical and I'll try to assist. It comes  
5                   back to who was orchestrating the entire  
6                   matter, and one of those indicia is who in  
7                   fact is drafting the documents and putting  
8                   the pieces in place in furtherance of a  
9                   scheme which we certainly believe to have  
10                  been the case. That's the thrust of the  
11                  question.

12                 THE DEPONENT:        I understand the thrust  
13                 of your question. I'm looking quizzical  
14                 because I'm very unsure as to what we can  
15                 determine based on what we have in our  
16                 possession.

17                 MR. EPSTEIN:        Okay. So, the question  
18                 was, and what we've agreed to take under  
19                 advisement is to ask her, if she knows. I  
20                 mean, she may not know, but we'll make the  
21                 inquiry.

U/A

22                 920.                 MR. RANKING:        All right, thank you.

23  
24                 BY MR. RANKING:

25                 921.                 Q.        Mr. Silver has brought to my

1 attention the docket entry in Exhibit K to Ms.  
2 Duncan's affidavit under the account dated June 22,  
3 2007 on the third page, being a docket entry dated  
4 June 8th, 2007.

5 A. I'm sorry, could you give that page  
6 again.

7 922. Q. It's an account under Exhibit K.

8 MR. EPSTEIN: Correct, we've got that.

9 923. MR. RANKING: In Ms. Duncan's affidavit.

10 MR. EPSTEIN: Right.

11 924. MR. RANKING: If you go maybe half or  
12 maybe two thirds of the way through,  
13 there's an account dated June 22nd, 2007.

14 THE DEPONENT: Yes.

15

16 BY MR. RANKING:

17 925. Q. And on the third page, there is an  
18 entry at the top of the page dated June 8, 2007.

19 A. I see it.

20 926. Q. Which indicates,  
21 "...Review financial arrangements documents  
22 re MK, blogging call with PA, SM and  
23 Nathan..."

24 I take it that we can agree that MK is Marjorie  
25 Knox?

1 A. I have no knowledge, I'm sorry.

2 927. Q. We do know that PA is Peter Allard?

3 A. I would assume that, but I don't  
4 know.

5 928. Q. Do we know who SM is?

6 A. I don't.

7 929. Q. Other than an individual by the name  
8 of Sean Moore, do you know who is identified in the  
9 dockets? Are you aware of anybody else with those  
10 initials?

11 A. No, I have no knowledge.

12 930. Q. And I take it from your evidence on  
13 Monday that Nathan would be Donald Best?

14 A. That's what I'm advised, yes.

15 931. Q. I wanted to bring that to your  
16 attention so that you can consider it in the context  
17 of my earlier question with respect to who may have  
18 authored or created the documents that have been  
19 marked for identification.

20 MR. SILVER: And whether they should be  
21 produced.

22 THE DEPONENT: Well, I just point out  
23 that the end of that entry says "and  
24 download documents", which suggests that  
25 they were coming from an outside source.

1 BY MR. RANKING:

2 932. Q. Although I also draw your attention  
3 to the fact that it refers to "Blogging". So, your  
4 point is a fair one, Ms. Duncan. I just think we  
5 don't know one way or another.

6 A. Exactly.

7 MR. SILVER: And also I think you need  
8 to point out that as I now understand your  
9 firm's account, that would be a Sunny Ware  
10 activity, downloading documents in  
11 the...McKenzie's documentary would end with  
12 the word "Nathan".

13 THE DEPONENT: Yes. McKenzie's entry  
14 ends with the word "Nathan". The following  
15 statement which starts "Review of emails  
16 from JK" is something of Sunny Ware doing.

17

18 BY MR. RANKING:

19 933. Q. Before we went off the record for  
20 your counsel to identify the documents or review the  
21 documents which have now been identified and marked  
22 for identification, you were indicating that a  
23 portion of the server had been removed. Before I  
24 ask questions on that, could you tell me, these are  
25 just general questions, when you talk about "removed



1 from your system", what is the system in 2005 that  
2 Crawford, McKenzie was using to capture electronic  
3 data?

4 A. I think the word "system" might be a  
5 little fancy for what we have. We have a server and  
6 a number of work stations that connect to the  
7 server.

8 934. Q. And what type of server is it?

9 A. In 2005? I wouldn't be able to tell  
10 you. I believe we were running some form of a  
11 Windows network software.

12 935. Q. Can you tell me what type of  
13 documents were captured on the server?

14 A. Well, work product. So, that would  
15 be correspondence, emails, memos in general. I  
16 can't speak specifically to any particular file, but  
17 I'm saying in general. Whatever electronic  
18 documents would be generated in the course of doing  
19 your work on file, and that could include if you  
20 received documents from a client or a third party  
21 and scanned them in for the purpose of emailing them  
22 or storing them, that would be included.

23 936. Q. And was there a backup for that  
24 system?

25 A. We have a tape backup that one of

1 the partners puts in each night. We have I think a  
2 series of seven tapes.

3 937. Q. I take it that all the backup tapes  
4 for 2005, 2006, 2007 continue to exist?

5 A. No. When I say we have seven backup  
6 tapes, we have seven backup tapes that are put in  
7 sequentially. So, we save over the backup tapes  
8 each week. We have a Monday tape, a Tuesday tape, a  
9 Wednesday tape.

10 938. Q. So, what backup tapes would you have  
11 or do you have for documents such as those that have  
12 been marked for identification in 2005? What exists  
13 currently with respect to documents that were  
14 generated in 2005?

15 A. Currently, it was whatever was on  
16 the server...whatever remained on our backup tape at  
17 the time that we discovered that there was nothing  
18 in Mr. McKenzie's folder on the server. So, we had  
19 our computer...we have a company that does our  
20 technical work and they extracted what they could  
21 off the backup tapes that we had.

22 939. Q. Just before I get to that, you've  
23 indicated that certain documents were removed.  
24 Aside from this instance, have partners at your firm  
25 ever removed documents from the server, to your

1 knowledge?

2 A. Well, during the time that I've been  
3 at the firm, one partner left the firm to start a  
4 practice in another province, and all of the  
5 documents she had...there was no change. Her folder  
6 on the server remained the same when she left. She  
7 didn't change anything to my knowledge.

8 940. Q. Was it deleted?

9 A. No.

10 941. Q. My question is, to your knowledge,  
11 have any partners ever removed documents from the  
12 server?

13 A. Well, I don't know about ever.  
14 Things may be deleted from time to time, but in  
15 terms of an entire file? When a file is closed,  
16 sometimes the practise is to create a DVD or a CD  
17 backup and remove it from the server for space  
18 reasons. But in terms of wholesale, not to my  
19 knowledge.

20 942. Q. And I take it that in this case Mr.  
21 McKenzie removed the file, in your term, wholesale?

22 A. Well, each lawyer has a folder on  
23 the server where they store all of their work  
24 product and we discovered at some point that Mr.  
25 McKenzie's sector was completely empty. So, that

1 was all the files he had ever worked on that were  
2 stored there.

3 943. Q. And to your knowledge, has that ever  
4 occurred with other partners?

5 A. Not to my knowledge. As I said,  
6 there's only one partner, another partner, that left  
7 during the time that I was there.

8 944. Q. And it didn't occur in that  
9 instance?

10 A. No.

11 945. Q. And I take it you've never seen fit  
12 to remove your work product from the server?

13 A. No, I use it for precedent material.

14 946. Q. And I take it that similarly applies  
15 to Mr. Anderson and Mr. McLean?

16 A. That's correct.

17 947. Q. Now, did Mr. McKenzie ever speak to  
18 you or any of your partners with respect to the  
19 removal of his electronic data from the server?

20 A. I had a conversation with him after  
21 the discovery. He advised me that he had a copy of  
22 everything and if I had a specific file that I  
23 wanted, he would provide a record of that file. He  
24 would provide it in CD with the material on it.

25 948. Q. And when did you have that

1 discussion with Mr. McKenzie?

2 A. I couldn't tell you the date. It  
3 was during the week that we found the folder empty.

4 949. Q. And when was that?

5 A. I believe it was sometime in  
6 November.

7 950. Q. Of 2009?

8 A. Of 2009. And in fact he did replace  
9 the contents of the Nelson Barbados file on the  
10 server at my request.

11 951. Q. And when he replaced the Nelson  
12 Barbados file, did that include the documents that  
13 have now been marked by your counsel for  
14 identification today?

15 A. No, these came out of a different  
16 file. This was BMC 543, which was Allard Re: Knox  
17 and Kingsland Estates. The Nelson Barbados file was  
18 BMC 568 or BMC 586.

19 952. Q. I take it first of all that Mr.  
20 McKenzie did not speak to you before removing his  
21 files from the server, is that correct?

22 A. No, he did not.

23 953. Q. So, I am correct?

24 A. Yes.

25 954. Q. To your knowledge, I take it he did

1 not speak with either Mr. McLean or Mr. Watson  
2 before removing the files from the server?

3 A. Mr. Watson?

4 955. Q. Excuse me, Mr. Anderson.

5 A. No, he did not.

6 956. Q. And how did it come to pass that you  
7 or your partners found out that Mr. McKenzie had  
8 emptied his files from the server?

9 A. I was looking for a particular  
10 letter on another file that I had worked with Mr.  
11 McKenzie on unrelated to these matters. And when I  
12 tried to open the folder, I discovered that it was  
13 empty.

14 957. Q. And I take it that it was at that  
15 point in time that you went and spoke to Mr.  
16 McKenzie?

17 A. Well, first there was a partners  
18 meeting between Mr. McLean, Mr. Anderson and I. I  
19 spoke to Mr. McKenzie after that partners meeting.  
20 I'm not sure if it was the same day or the day  
21 after.

22 958. Q. This would have been in November  
23 2009?

24 A. I believe so.

25 959. Q. And was it of concern to you that

1 the documents had been removed from the server?

2 A. Yes, that's why we had a partners  
3 meeting about it.

4 960. Q. So, I take it from your answer, it  
5 was equally of concern to Mr. Anderson and to Mr.  
6 McLean?

7 A. That is correct.

8 961. Q. What was the essence of your  
9 partners meeting in terms of resolving the issue of  
10 Mr. McKenzie removing the files?

11 A. Well, we made the decision to have  
12 our computer expert pull what he could off the  
13 backup tapes. And I agreed that I would speak to  
14 Mr. McKenzie about it.

15 962. Q. And dealing with each of those in  
16 terms...I take it that your computer expert was able  
17 to recover whatever he or she could recover?

18 A. I believe so, yes. He provided us  
19 with a DVD, yes.

20 963. Q. And I take it that that has been  
21 retained by you and the Crawford, McLean firm?

22 A. That is correct.

23 964. Q. And were the documents that have now  
24 been produced for identification located in that  
25 DVD?

1 A. Yes.

2 965. Q. Now, you said you also spoke to Mr.  
3 McKenzie. Can you tell me about the nature of the  
4 discussion that you had with him?

5 A. It was very brief. He was...I'm not  
6 sure, he had other things to do. He was in the  
7 office. I think I spoke with him in a hallway. And  
8 as I said, I expressed my concern over the removal  
9 of the files. Mr. McKenzie said that he would  
10 replace what we requested him to replace on a  
11 piecemeal basis. He did not want to simply put  
12 everything back.

13 966. Q. Did you have a discussion about him  
14 putting everything back, did you request that that  
15 occur?

16 A. I suggested that that might be the  
17 appropriate thing to do.

18 967. Q. And what did he say to you?

19 A. As I said, I can't really recall the  
20 particulars of the conversation. I just remember  
21 coming away from the conversation with the  
22 understanding that he was willing to replace those  
23 files that we specifically requested. And at that  
24 point I had specifically requested that the Nelson  
25 Barbados be placed back because I was aware of this



1 cost proceeding.

2 968. Q. When you spoke to Mr. McKenzie in  
3 November of 2009, were you aware that the Nelson  
4 Barbados file comprised more than simply files 568  
5 and 586?

6 A. I don't know if I would agree with  
7 that way of putting it. If what you're asking me is  
8 if I was aware there was certainly items related to  
9 that litigation in other files, no, I wasn't.

10 969. Q. So, is it fair for me to take from  
11 your answer that when you asked Mr. McKenzie in  
12 November of 2009 to return the electronic files  
13 relating to the Nelson Barbados group, that you  
14 thought that he had returned all such files, when he  
15 agreed to return files BMC 568 and 586?

16 A. That was my understanding, yes.

17 970. Q. And I take it that Mr. McKenzie at  
18 no time disclosed to you in his discussions in  
19 November of 2009 that in fact there was a file BMC  
20 543?

21 A. Well, it wasn't specifically  
22 discussed, no.

23 971. Q. But you would agree with me that  
24 given the number of dockets that Mr. McKenzie has to  
25 that file that relate to the subject matter of this

1 case, you have no reason to doubt that he would have  
2 been aware of that file?

3 A. I can't testify to what Mr.  
4 McKenzie's knowledge was.

5 972. Q. That's fair. Have you, at any time,  
6 since discovering the existence...well, first of  
7 all, when did you discover the existence of file BMC  
8 543?

9 A. Well, it's a very large file. So,  
10 there were lots of boxes around. In terms of  
11 discovering it, there was a relationship as  
12 significant as the one we've discovered, it came  
13 about in the period following February 23rd, through  
14 the month of March, when I started to investigate  
15 the answers to undertakings, the cross-examination  
16 transcripts more thoroughly. And I started to look  
17 for certain pieces of information that were not  
18 available in the Nelson Barbados file, which came as  
19 a surprise to me. It was my understanding that the  
20 Nelson Barbados file went back to incorporation. I  
21 had expected to find a corporate file open for  
22 Nelson Barbados. So, it was in the course of my  
23 trying to trace that back that I realized that the  
24 material such as it was seemed to be located in that  
25 file.

1           973.           Q.       Let me just put that in a different  
2                               way.  After February 23rd when you heard my  
3                               submissions in court that had concerns with respect  
4                               to inaccuracies of Mr. McKenzie's evidence, you went  
5                               back to your firm.  You wanted to find the files  
6                               going to the incorporation of Nelson Barbados, which  
7                               was November of 2005, correct?

8                               A.       That's a very condensed version,  
9                               yes.

10           974.           Q.       And you determined, as a consequence  
11                              of that review when you couldn't find information  
12                              going back to that date in BMC 586 and 568 that  
13                              there may have been another file which prompted you  
14                              to make inquiries and you then determined the  
15                              existence of file BMC 543, is that fair?

16                              A.       Yes.

17           975.           Q.       And after having found the existence  
18                              of BMC 543, have you requested that Mr. McKenzie  
19                              return his version of that electronic file?

20                              A.       No.

21           976.           Q.       To your knowledge, have any of your  
22                              partners asked Mr. McKenzie to return that file?

23                              A.       No.  Once there was...I would  
24                              characterize it as a further breakdown in the  
25                              relationship between Mr. McKenzie and the partners

1 after February 23rd that led to our having separate  
2 counsel.

3 977. Q. All right.

4 A. We have not had much direct  
5 communication since I believe about March 3rd about  
6 any of these issues.

7 978. Q. Fair enough. Now, you've indicated  
8 that you've retained a company to come in and assist  
9 you with respect to retrieving information from the  
10 backup tapes.

11 A. Yes.

12 979. Q. What's the name of that company?

13 A. Computer Muskoka.

14 980. Q. And who was the individual who came  
15 to assist you?

16 A. Tim Veitch.

17 981. Q. Was Mr. Veitch able to determine if  
18 he had been able to retrieve the entire BMC 543  
19 file?

20 A. We have never asked him that. We  
21 simply asked him to retrieve the data that he could  
22 from the backup tapes. We call the server the "G"  
23 drive. We asked him to retrieve whatever he could  
24 from Bill McKenzie's G drive folder as it existed on  
25 the backup tapes. That's the extent of what we

1           asked him to do.

2           982.           MR. RANKING:        Would you make inquiries,  
3                           Mr. Epstein, of Mr. Veitch to determine if  
4                           as a computer consultant he can advise  
5                           whether or not he was able to retrieve all  
6                           of Mr. McKenzie's electronic files. But in  
7                           particular, whether he was able to retrieve  
8                           all of the electronic files relating to the  
9                           subject matter of this action, in  
10                          particular being BMC 543.

11           MR. EPSTEIN:        Would he have known about  
12                          individual files? As I understand...

13           983.           MR. RANKING:        Perhaps we can do it this  
14                          way. I have a lot of questions, so if you  
15                          want to take it under advisement, I'm happy  
16                          that you do that, but I would rather limit  
17                          the...

18           MR. EPSTEIN:        It's not a question of  
19                          taking it under advisement, I'm  
20                          just...you're asking whether he would have  
21                          known that the file relating to 543 was  
22                          transferred and my understanding from Ms.  
23                          Duncan's evidence is that there was a  
24                          general inquiry to transfer the folder of  
25                          Mr. McKenzie's that was missing back into

1           their server. And I want to clarify with  
2           the witness whether there was any direction  
3           given with regard to any files.

4           THE DEPONENT:       No.

5           984.           MR. RANKING:       My question was more  
6           specific. I don't profess to be a computer  
7           individual, but I think that when, and I  
8           could be wrong on this, Mr. Epstein, but  
9           the nature of my inquiry is, when computer  
10          people who know how to read code go into a  
11          computer, they may be able to determine the  
12          size of a particular file as it once  
13          existed and how much they've been able to  
14          recover, I don't know. The purport of my  
15          question is to make the inquiry. If he  
16          doesn't know or can't identify how much was  
17          recovered, then we will know that. But I  
18          would like to know because obviously I'm in  
19          concern that we have access to the entire  
20          file, and if we don't, I'm going to be  
21          taking some further steps to see if we can  
22          get it. But that's what I'm interested to  
23          know. And it may be, in fairness to Mr.  
24          Veitch and Computer Muskoka, that he can't  
25          determine. I just don't know whether from

1 reviewing the backup tape you can determine  
2 whether they have recovered some or all of  
3 the material that was initially in the  
4 memory.

5 THE DEPONENT: I think the bigger  
6 problem here is we didn't ask him to even  
7 look at that at the time. And the backup  
8 tape has now been in use. So, he can't go  
9 back to the data he was looking at because  
10 it's been used repeatedly.

11

12 BY MR. RANKING:

13 985. Q. Did Mr. Veitch provide a report or  
14 any letter setting forth what his findings were?

15 A. No, and we did not ask him to do  
16 that. He just provided us with the DVD with what he  
17 had recovered.

18 986. Q. Have you provided or can you  
19 identify, is there a table of contents for the DVD  
20 that indicates what it is that you've been able to  
21 recover?

22 A. Well, I imagine in the sense that  
23 when you burn a DVD a table of contents is built in,  
24 but it's just accessed, I believe, through Windows  
25 Explorer.

1           987.           Q.       Will you provide the defence counsel  
2           a copy of the DVD for file BMC 543?

3                   MR. EPSTEIN:       The witness has indicated  
4                   to me that that DVD contains many other  
5                   matters, Nelson Barbados file being just  
6                   one of them.

7           988.           MR. RANKING:       I'm not interested in any  
8                   of Mr. McKenzie's other files. But I am  
9                   interested to have produced whatever it is  
10                  that relates, and I've only asked for the  
11                  DVD relating to BMC 543.

12                  MR. EPSTEIN:       We'll take that under  
13                  advisement. I understand what it is you're  
14                  looking for. My concern is there's a vast  
15                  number of documents relating to other  
16                  files. But I understand what it is you're  
17                  looking for. But we'll certainly retrieve  
18                  the DVD and we'll determine for you what  
19                  portions of that relate to this particular  
20                  matter.

U/A

21           989.           MR. RANKING:       Thank you.

22                  MR. SILVER:       Sorry, that would be 543 or  
23                  568/586? I just thought Jerry's questions  
24                  were limited to 543 in first instance, and  
25                  then I think you gave a broader undertaking



1 or under advisement. And I would like to  
2 see whatever is available on electronic  
3 files in respect of clearly 543, but also  
4 568 and 586, which are the other two.

5 990. MR. RANKING: Mr. Silver raises a valid  
6 point, and that is, to the extent that the  
7 DVD contains any electronic files relating  
8 to the subject matter of this action,  
9 whether in BMC 543, its successor file,  
10 587, or the other two related files, 568  
11 and 586, if we could extend the undertaking  
12 in our request for production of that  
13 electronic information.

14 MR. EPSTEIN: Okay, we'll take it under  
15 advisement. I just want to see what's  
16 there.

U/A

17 THE DEPONENT: I would just advise that  
18 for these files there would only be one  
19 folder for the file on the server. As the  
20 file number changed, the folder would  
21 remain the same. There weren't new folders  
22 for the file numbers, if that makes sense.

23

24 BY MR. RANKING:

25 991. Q. Can I pause, because I hear what

1           you're telling me, but I understood your evidence on  
2           Monday to be slightly different because I thought  
3           that in fact you need to have separate file folders  
4           for the data separation issues.

5                     A.       That's PCLaw. That's the docketing  
6                     system. That's not our data system.

7           992.           Q.       I stand corrected. So, to the  
8                     extent that I now understand, when we're dealing  
9                     with your server, am I to understand that all of the  
10                    electronic data would be on one file folder, whether  
11                    it relates to BMC 543 or something else?

12                    A.       There is a file folder called Bill  
13                    McKenzie.

14           993.           Q.       I see, okay.

15                    A.       Within Bill McKenzie's folder he  
16                    would have subfolders for each file. And within  
17                    each file there would be subfolders for things like  
18                    correspondence, court documents, or whatever else.

19           994.           Q.       And your point is there is only one  
20                    subfolder for Nelson Barbados. But I guess that's  
21                    the question. Is there one subfolder for Nelson  
22                    Barbados or would there be a separate subfolder for  
23                    Peter Allard?

24                    A.       There's a folder for Nelson  
25                    Barbados. There's a separate folder for this BMC

1           543 file, those are two separate matters in the  
2           system.

3           995.           MR. RANKING:        So, our request then would  
4                           be for production of those two subfolders.

5           MR. SILVER:        At least...and anywhere  
6                           else...

7           MS. ZEMEL:        Can I interrupt for a  
8                           minute, I mean...

9           MR. EPSTEIN:       Subfolders...

10          996.           MR. RANKING:        If you want to go off, we  
11                           can go off. I have to deal with this.

12          MR. EPSTEIN:        You want the subfolders  
13                           for 543, is that what you asked for?

14          997.           MR. RANKING:        I want the subfolders  
15                           certainly for all of the files that are  
16                           referenced in paragraph 3 of Ms. Duncan's  
17                           affidavit, which include 543, 587, 568, and  
18                           586.

19          MR. EPSTEIN:        Four of them?

20          998.           MR. RANKING:        Yes.

21          MR. EPSTEIN:        Okay.

U/A

22  
23          BY MR. RANKING:

24          999.           Q.        So, were you the partner that  
25                           discovered that Mr. McKenzie had taken all of his

1 files off the system?

2 A. Yes. As I said, I was looking for a  
3 letter on an unrelated matter and discovered that  
4 there was nothing there in his folder.

5 1000. MR. RANKING: And I understand why you  
6 have not asked Mr. McKenzie to return the  
7 balance of the electronic files, but I want  
8 the record to show that Mr. McKenzie is in  
9 the examining room and I am making a formal  
10 request of Mr. McKenzie to please produce  
11 to his counsel, Mr. Kramer, all electronic  
12 files in any way relating to his  
13 association and involvement with Mr.  
14 Allard, with any of the Knoxes, with Mr.  
15 Best, with Nelson Barbados Group, and more  
16 generally, with respect to any of the  
17 matters or work he performed touching upon  
18 or relating to Kingsland Estates, starting  
19 from the commencement of his involvement  
20 through until today's date. Do I have that  
21 undertaking, Mr. McKenzie.

22 MS. VOJDANI: I think I'll take that  
23 under advisement. I'll speak with Mr.  
24 Kramer.

U/A

25 1001. MR. RANKING: And irrespective of

1           whether or not that will become an  
2           undertaking, I want it clear on the record  
3           that we expect Mr. McKenzie to assiduously  
4           retain and not to alter in any way the  
5           electronic data and I will also be seeking  
6           information, we'll deal with this on Mr.  
7           McKenzie's cross-examination, but I don't  
8           want there to be any issue with respect to  
9           the documents being preserved from an after  
10          today's date, but I will be seeking  
11          information with respect to where the  
12          documents are stored, how they are stored,  
13          how they can be accessed, et cetera, just  
14          so that you are aware. Thank you. We can  
15          go off the record.

16  
17       ---     DISCUSSION OFF THE RECORD

18  
19           MR. EPSTEIN:       Off the record we've  
20           agreed to take that under advisement, but  
21           we've also agreed as part of that under  
22           advisement request to include documents  
23           relating to blogs that are relevant to the  
24           subject matter of this litigation,  
25           including the Keltruth matter, the Barbados

1 Free Press matter, and the Barbados  
2 Underground matter.

3 THE DEPONENT: The blogs.

4 MR. EPSTEIN: The blogs, yes.

5 1002. MR. RANKING: Thank you, Mr. Epstein.

6

7 BY MR. RANKING:

8 1003. Q. You've indicated that Mr. McKenzie  
9 provided you with a DVD to return the electronic  
10 files relating to Nelson Barbados, is that correct?

11 A. No, it was placed back on the  
12 server, except in my folder.

13 1004. Q. And how did it come to be placed  
14 back, how did Mr. McKenzie actually place the  
15 electronic data back on your server?

16 A. I believe his assistant, Sunny Ware,  
17 had some record, a DVD or something, that she placed  
18 it from. I don't know the details.

19 1005. Q. Do you know if Ms. Ware had that in  
20 her possession at all times or was that something  
21 that Mr. McKenzie gave to her after your request of  
22 Mr. McKenzie?

23 A. I would have no knowledge.

24 1006. Q. I'm interested to know what  
25 information Mr. McKenzie restored in the system as a

1 consequence of your request and how that information  
2 was actually given back to the firm, if that is the  
3 case.

4 A. Well, I believe the previous under  
5 advisement covers that, because you've asked for the  
6 subfolder relating to Nelson Barbados. That's what  
7 was placed back, as far I know, the Nelson Barbados  
8 subfolder was.

9 1007. Q. Is there any way of comparing what  
10 Mr. McKenzie gave back and was ultimately uploaded  
11 back in the system against what was in the system at  
12 first instance? Let me just cut to the chase. We  
13 are relying, I take it, entirely upon what Mr.  
14 McKenzie gave you as an accurate reflection of what  
15 now constitutes the Nelson Barbados file, is that  
16 not fair?

17 A. That's what I'm relying on. That's  
18 all I have to rely on.

19 1008. Q. And based on your review, have you  
20 reached a view one way or another as to whether  
21 that's complete?

22 A. I can't tell.

23 1009. Q. The exhibits that have been marked  
24 for identification, they came from the backup tape  
25 under file 543, correct?

1                   A.       The data retrieved from the backup  
2                   tape, yes.

3       1010.           Q.       And have you been able to compare  
4                   what was on the backup tape for file 568 or 586 to  
5                   what Mr. McKenzie gave you and was ultimately  
6                   restored to the system?

7                   A.       We have not done that, no.

8       1011.           Q.       Can you make inquiries of Ms. Ware  
9                   to determine how she came into possession of the  
10                  electronic data for files 568 and 586 in order to  
11                  upload that data back onto the system?

12                  MR. EPSTEIN:       That was 543 and 586?

13                  THE DEPONENT:       No, just 586 and 568.

14                  MR. EPSTEIN:       I just want to make sure I  
15                  understand it. The undertaking is to ask  
16                  how she came into the possession of the  
17                  data regarding 568 and 586 to upload that  
18                  data back into the system?

19       1012.           MR. RANKING:       Yes. And just to put that  
20                  into perspective, I understand from Ms.  
21                  Duncan's evidence that there is a  
22                  discussion she had following the partners  
23                  meeting in November 2009 for Mr. McKenzie,  
24                  where the partners, not to put too fine a  
25                  point on it, said "We want the electronic



1 data back that were removed with respect to  
2 Nelson Barbados". And Mr. McKenzie, I take  
3 in, in response to that request provided  
4 Ms. Ware with electronic information that  
5 was subsequently uploaded onto your firm's  
6 server.

7 THE DEPONENT: I don't know. Maybe Ms.  
8 Ware was the one who was responsible for  
9 creating the data that she had, I don't  
10 know.

11 1013. MR. RANKING: So, I would be interested  
12 to know from Ms. Ware if she was the  
13 individual responsible for the data removal  
14 and/or retrieval, what discussions she had  
15 with Mr. McKenzie, if any...

16 MR. EPSTEIN: Hold on. You're going way  
17 too quickly. Can you start at the  
18 beginning?

19 1014. MR. RANKING: Let me give you the big  
20 picture, Mr. Epstein. I think we all need  
21 to know how is it that Mr. McKenzie removed  
22 information from the system. That's number  
23 one. And did Ms. Ware assist him. That  
24 will then lead to a whole series of  
25 questions if Ms. Ware was involved, because

1 I would like to know from Ms. Ware what she  
2 says happened. But after the material was  
3 removed, we then had the discussion that  
4 Ms. Duncan has given evidence about and it  
5 was restored. I would like to know from  
6 Ms. Ware generally the procedure that was  
7 followed in order to restore the electronic  
8 data to the system.

9 MR. EPSTEIN: Okay. Does that replace  
10 the previous undertaking, because that's a  
11 more broader question.

12 1015. MR. RANKING: I think it is.

13 MR. EPSTEIN: Your previous question  
14 related to two specific files. I think  
15 you're asking a more broader question here.  
16 So, we'll leave the previous undertaking,  
17 and now we'll ask the broader question of  
18 Ms. Ware, ask her to provide information  
19 about the procedure, if any, that she was  
20 involved in to restore data into the  
21 electronic system. U/T

22 1016. MR. RANKING: And if she helped with the  
23 removal.

24 MR. EPSTEIN: And you want us to ask if  
25 she assisted in the removal of the files.

1                   Okay, we'll ask her that.                   U/T

2       1017.           MR. RANKING:       And if others were  
3                   involved, we don't know if she could make  
4                   inquiries of those others.

5                   MR. EPSTEIN:       Well, I'll ask her if  
6                   she's aware of others being involved.                   U/T

7

8       BY MR. RANKING:

9       1018.           Q.       I take it that the documents that  
10                   have been marked for identification as Exhibit C  
11                   were not found in the files that were restored to  
12                   the computer on the server?

13                   A.       Well, they wouldn't have been  
14                   because they're in a different folder.

15       1019.           Q.       So, not to make too fine a point of  
16                   it, the documents that have been marked for  
17                   identification as Exhibit C were not returned and  
18                   produced by Mr. McKenzie to the Crawford, McKenzie  
19                   firm, is that correct?

20                   A.       Sorry, I'm a little behind you.

21       1020.           Q.       Mr. McKenzie, in response to your  
22                   request, I understand gave electronic information  
23                   back to the firm that permitted you to upload files  
24                   568 and 586.

25                   A.       Mr. McKenzie caused that data to be

1 replaced on the server.

2 1021. Q. Right.

3 A. He did not give us the data to  
4 upload. It was replaced on the server.

5 1022. Q. And hence my last question, and  
6 we'll find out how Mr. McKenzie caused that data to  
7 be replaced, but the follow-up question to that was  
8 that he did not cause any of the data to be replaced  
9 that related to BMC 543?

10 A. No, that wasn't the agreement.

11 1023. Q. And he did not disclose to you the  
12 existence of file BMC 543, correct?

13 A. Well, I'm a little...again, I'm  
14 somewhat confused by that question, because the  
15 existence of the file was never hidden. It was on  
16 our PC log list of files and there were boxes in the  
17 office labelled that way. But if you're asking if  
18 he specifically, at some point, when I asked for the  
19 return of Nelson Barbados, did he specifically  
20 advise me about BMC 543, the answer is no.

21 1024. Q. Right, and in fact, you only  
22 discovered the existence of BMC 543 through your  
23 diligence in going back to try to find the  
24 electronic file which dated from the incorporation  
25 of Nelson Barbados in November 2005?

1                   A.       Well, I only discovered the  
2                   connection between the two at that point. The  
3                   existence of the file I don't think was ever a  
4                   secret. It was the content that was unknown to me  
5                   because it was not my file.

6       1025.           Q.       Right, but not to put too fine a  
7                   point on it, when Mr. McKenzie agreed to return BMC  
8                   568 and 586, you reasonably thought that that would  
9                   be the entire electronic file from at least November  
10                  2005 through to the present?

11                  A.       Well, reasonably or unreasonably,  
12                  that's what I thought, yes.

13       1026.           Q.       And I take it that after Mr.  
14                   McKenzie removed the files electronically, he has  
15                   not to this day ever returned the electronic file  
16                   relating to BMC 543?

17                  A.       Not to me.

18       1027.           Q.       Are you aware that he's returned it  
19                   to anyone?

20                  A.       That I do not know. I have not made  
21                   inquiries.

22       1028.           Q.       And to whom would you make  
23                   inquiries?

24                  A.       When Mr. McKenzie and Ms. Ware left  
25                   at the end of 2009, they gave a large volume of

1 material to Stacey Ball, and to be fair, I have not  
2 inquired as to whether any of that material consists  
3 of any backups or any other record. I would have to  
4 ask her.

5 1029. Q. Would you make inquiries of Ms.  
6 Ball?

7 A. Yes.

8 MR. EPSTEIN: So, I just want to get the  
9 undertaking clear. You want us to ask  
10 Stacey Ball if the documents that she was  
11 given by McKenzie and Ware when they left  
12 firm at the end of 2009 included file 543?

13 1030. MR. RANKING: Yes.

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

15

16 BY MR. RANKING:

17 1031. Q. Are these hardcopy documents that  
18 Mr. McKenzie returned?

19 A. Well, in the process of Ms. Ware  
20 retiring and Mr. McKenzie leaving the firm, Ms. Ball  
21 had to take over certain things for Ms. Ware. She's  
22 managing her tickler system, for example. So, she's  
23 received a lot of things from Ms. Ware and I have  
24 not inquired as to the full extent of that. And  
25 it's entirely possible that there's a DVD in there

1           that may be the contents of Mr. McKenzie's G drive  
2           folder. I don't know. I don't want to make any  
3           definitive answers when I don't know.

4           1032.           Q.       So, you'll make inquiries and  
5           advise?

6                        A.       Yes.

7                        MR. EPSTEIN:       Yes.

U/T

8

9           BY MR. RANKING:

10          1033.           Q.       When speaking of the removal of the  
11           electronic data, we haven't spoken of the actual  
12           hardcopy file. If I can turn to that. What became  
13           of the hardcopy files for Nelson Barbados when Mr.  
14           McKenzie left the firm?

15                        A.       We have a number of boxes. We  
16           certainly have a full set of pleadings. We  
17           certainly seem to have most, if not all, of the  
18           correspondence. However, at least a box of  
19           accounting material left the firm at some point and  
20           it appears to be in Mr. McKenzie's possession. I  
21           don't know if there's anything else that left the  
22           firm. I have no way of knowing that. Ms. Ball was  
23           responsible for maintaining a correspondence file  
24           and pleadings and she confirms that those remain in  
25           the form that she had maintained.

1 MR. EPSTEIN: And we are aware that Mr.  
2 McKenzie did take a number of documents  
3 with him, and perhaps it's something you  
4 want to explore with him when you examine  
5 him on Monday. But we don't know, and  
6 we've actually made inquiries ourselves of  
7 Mr. McKenzie's counsel as to exactly what  
8 was removed because we don't know for sure  
9 what was removed and we've asked him to  
10 advise us of that.

11 1034. MR. RANKING: And have you received a  
12 response from Mr. Kramer?

13 MR. EPSTEIN: Not yet. But I suggest  
14 you follow up with Mr. Kramer on Monday.

15

16 BY MR. RANKING:

17 1035. Q. And how is it that you learned that  
18 Mr. McKenzie had taken at least a box of accounting  
19 materials?

20 A. During the course of my inquiries  
21 through the month of March when I was speaking with  
22 Ms. Ball about the answers to undertakings, and  
23 specifically about the accounts, she told me that  
24 she had had to go to Mr. McKenzie's home and he had  
25 pulled out a box or some boxes that had accounting



1 material in them when she was trying to collate the  
2 brief of accounts that was provided.

3 1036. Q. So, your information came from Ms.  
4 Ball?

5 A. Yes.

6 1037. Q. And I take it that when you're  
7 talking about the accounts that were provided, those  
8 were the accounts that were marked as Exhibit 10?

9 A. I believe so, yes.

10 1038. Q. Let me just ask you generally as a  
11 partner of the Crawford, McKenzie, now the Crawford,  
12 McLean firm, do you consider accounts to be the  
13 property of the firm?

14 A. Yes.

15 1039. Q. And did Mr. McKenzie at any time ask  
16 you for permission to remove the accounts?

17 A. No, he didn't.

18 1040. Q. And to your knowledge, did Mr.  
19 McKenzie ever ask either of your partners, Mr.  
20 Anderson or Mr. McLean?

21 A. No, he didn't.

22 1041. Q. And when you found out that Mr.  
23 McKenzie had in fact removed a box of accounting  
24 material, what was your reaction?

25 A. I was upset.

1 1042. Q. Why were you upset?

2 A. I did not feel it was appropriate  
3 for Mr. McKenzie to be removing file material  
4 without either advising us and without providing a  
5 written direction from the client to allow him to do  
6 that.

7 1043. Q. Have you or your partners asked Mr.  
8 McKenzie to return that material?

9 A. That was, I believe, part of the  
10 request through our counsel.

11 1044. MR. RANKING: Thank you. This may be  
12 covered by the earlier undertaking, Mr.  
13 Epstein, but what was the timeframe between  
14 the date that you had your discussion with  
15 Mr. McKenzie in November of 2009, asking  
16 him to return the electronic file and the  
17 actual time when he returned it?

18 THE DEPONENT: I believe it was the same  
19 day.  
20

21 BY MR. RANKING:

22 1045. Q. And finally, with respect to the  
23 fact that you discovered in November of 2009 the  
24 removal of the file by Mr. McKenzie, was this a fact  
25 that you disclosed to your counsel, Mr. Dewart?

1                   MR. EPSTEIN:        Don't answer that  
2                   question.

/R

3

4           BY MR. RANKING:

5           1046.           Q.        I had afforded you the opportunity  
6                   when I last examined you to review Mr. McKenzie's  
7                   affidavit and to provide your comments, if any, on  
8                   that affidavit, and I want to be true to my word to  
9                   allow you to respond to that question, if you're so  
10                  inclined.

11                  A.        I have no comment.

12           1047.           Q.        I do have one or two questions,  
13                   perhaps not surprisingly. In paragraph 6, Mr.  
14                   McKenzie makes the statement that you were involved  
15                   in the Nelson Barbados file with regard to work  
16                   relating to the security issues in 2008. I take it  
17                   you would agree with me that that was 2007?

18                  A.        Yes. I believe that my involvement  
19                   actually ended by December 2007, January 2008.

20           1048.           Q.        Right. At paragraph 9, Mr. McKenzie  
21                   speaks to the removal of the Crawford, McKenzie firm  
22                   as solicitors of record for the plaintiff. He  
23                   states that he signed the affidavit and that you  
24                   took care of the motion. Do you know what  
25                   communication, if any, Mr. McKenzie had with either

1 Mr. Best or Mr. Allard with respect to that motion  
2 and the removal of your firm as counsel of record?

3 A. No, I don't.

4 1049. Q. In paragraph 10, Mr. McKenzie makes  
5 the comment that you had a parallel relationship  
6 with Mr. Dewart. Do you accept that statement?

7 MR. EPSTEIN: Perhaps I can assist in  
8 answering that question. Mr. Dewart was  
9 representing both Mr. McKenzie and the law  
10 firm. That was his mandate to represent  
11 both until such time as he withdrew as  
12 counsel and when it was evident that there  
13 were issues as between Mr. McKenzie and the  
14 law firm, a separate counsel were  
15 appointed.

16 1050. MR. RANKING: That's not what I was  
17 asking. What I find interesting is how Mr.  
18 McKenzie characterizes the relationship.

19  
20 BY MR. RANKING:

21 1051. Q. I mean, I'm not sure that I would  
22 say that it's accurate to say that you had a  
23 parallel relationship with Mr. Dewart, because I  
24 understood that the individual primarily responsible  
25 for giving Mr. Dewart instructions was Mr. McKenzie,

1           wasn't that the case?

2                   A.       I believe that certainly was the  
3           case in the fall of 2009.

4    1052.           Q.       And I take it when you say the fall  
5           of 2009, isn't it fair that throughout the time  
6           where we had put your firm on notice and Mr. Dewart  
7           had been retained, that the individual from whom he  
8           took primary direction and instruction was Mr.  
9           McKenzie?

10                   A.       Yes.

11   1053.           Q.       Right. And he also goes on to say  
12           that he dealt with Mr. Dewart and yourself remotely.  
13           One might infer from that that there was actually a  
14           communication taking place between yourself and Mr.  
15           McKenzie. Did that in fact occur?

16                   A.       There were times we had discussions.  
17           But for the most part, my partners and I relied on  
18           Mr. McKenzie to provide instructions to Mr. Dewart  
19           and to provide information to Mr. Dewart. I think  
20           that's the fairest way of putting it.

21   1054.           Q.       And when you say you had discussions  
22           with Mr. McKenzie, over the period from July of 2009  
23           through until February 23rd, can you approximate how  
24           many discussions you had with Mr. McKenzie  
25           concerning the matters that are at issue?

1                   A.       There were several early on. For  
2                   example, at the telephone conference in August of  
3                   2009 when Mr. Dewart had just been appointed, Mr.  
4                   McKenzie and I had extensive discussions when he  
5                   instructed me very particularly on what to say or  
6                   not say at that conference. He reported, as I  
7                   earlier testified, he made a report to my partners  
8                   and I at a meeting on September 3rd. There were  
9                   discussions in the week following September 3rd when  
10                  the motion to be removed from record was being  
11                  prepared and signed. On the date that Mr. McKenzie  
12                  signed the affidavit, he was in the office. He  
13                  reviewed...he had a draft. I'm not sure who  
14                  prepared the draft. He and I had a discussion about  
15                  the draft.

16       1055.           Q.       Sorry, the draft what?

17                  A.       The motion to be removed from the  
18                  record. Changes were made. He signed the documents  
19                  and wanted that motion to be completed as quickly as  
20                  possible. I had been booked to be out of the office  
21                  from the 9th to the 17th. So, we were having  
22                  discussions about how we would get this done,  
23                  because I was unavailable. There were various other  
24                  brief discussions at times that he was in the  
25                  office. And then, of course, there were the emails

1 in late February.

2 1056. Q. Is it fair to say that aside from  
3 the extensive discussions you had in August and the  
4 discussions you had in the fall of 2009 concerning  
5 the removal of your firm as counsel for Nelson  
6 Barbados that the more appropriate characterization  
7 is that Mr. McKenzie was not in constant contact  
8 with your office?

9 A. That would be correct.

10 1057. Q. And he was content, I take it, to  
11 instruct Mr. Dewart and to handle the matter as he  
12 saw fit, isn't that also fair?

13 A. That was our understanding, yes.

14 1058. Q. And you relied upon him in that  
15 regard?

16 A. Yes.

17 1059. Q. With respect to the discussions that  
18 you had with respect to the preparation of his  
19 affidavit to remove your firm as counsel of record,  
20 were you aware that...first of all, who prepared  
21 that affidavit?

22 A. As I said, I'm not sure who prepared  
23 it. I was given a draft at some point before the  
24 date that Mr. McKenzie signed it. On the date he  
25 signed it, he was present in the office. I had a

1 discussion with him in Ms. Ware's office. He was  
2 sitting in the chair in Ms. Ware's office. He  
3 directed the changes he wanted made. We had a  
4 discussion about timing and how to get Nelson  
5 Barbados served, because at that point he told us he  
6 didn't know where Don Best was. And we went on from  
7 there based on his instructions.

8 1060. Q. Did you discuss with him the fact  
9 that the order called for service upon Nelson  
10 Barbados Group to a post office box in Kingston?

11 A. Well, he provided that address to me  
12 as the address for service. And we didn't really  
13 have any further discussion about it.

14 1061. Q. That was an address that was  
15 provided to you by Mr. McKenzie?

16 A. Mr. McKenzie or Ms. Ware had that  
17 address. I'm not sure where they had it from.

18 1062. Q. How did your firm serve Mr. Best  
19 with that motion of record to remove your firm as  
20 solicitors of record?

21 A. That's outside my knowledge.

22 1063. Q. Would Ms. Ball be the individual who  
23 would know that?

24 A. It was either Ms. Ball or Ms. Ware  
25 that was involved in that.



1 1064. Q. Would you make inquiries and advise?

2 MR. EPSTEIN: Yes, we'll ask Ms. Ball if  
3 she knows.

4 1065. MR. RANKING: And I would also be  
5 interested to see the affidavit of service  
6 to see the address that was actually used  
7 for the service upon Mr. Best.

8 MR. EPSTEIN: We'll ask Ball if she  
9 knows...

10 1066. MR. RANKING: And Ms. Ware.

11 MR. EPSTEIN: ...and Ware if they know  
12 where Best was served.

13 MR. SILVER: As to how he was served.

14 THE DEPONENT: Best or Nelson Barbados,  
15 I believe we served the corporation.

16 1067. MR. RANKING: Well, it's a fair point,  
17 Ms. Duncan, but given the fact that Nelson  
18 Barbados only has one director, it may be  
19 somewhat academic. The concern is this...

20 MR. EPSTEIN: Before we get into another  
21 discussion, I want to get the undertakings  
22 down. So, we're going to ask Ball and Ware  
23 if they know where...

24 1068. MR. RANKING: How.

25 MR. EPSTEIN: ...or how...

1 1069. MR. RANKING: How the Crawford, McKenzie  
2 firm served Nelson Barbados and/or Mr. Best  
3 with their motion to remove their firm as  
4 counsel of record. I would also like the  
5 production of the affidavit of service.

6 MR. EPSTEIN: We'll give you that  
7 undertaking.

U/T

8

9 BY MR. RANKING:

10 1070. Q. And please, by asking this question,  
11 I'm in no means intending to be critical of anybody,  
12 Ms. Duncan, but was there discussion with Mr.  
13 McKenzie as to the judge to whom the motion should  
14 be returnable?

15 A. No, not at all.

16 1071. Q. And you appreciate that Justice  
17 Shaughnessy was the judge appointed to deal with all  
18 interlocutory motions in this case?

19 A. I really didn't have any  
20 particular...that wasn't something that was  
21 necessarily with in my direct knowledge. I was  
22 aware that he was certainly seized of the  
23 jurisdiction matter and it certainly wasn't  
24 something that came up in the discussions that day  
25 to my recollection.

1       1072.           Q.       In paragraph 11 Mr. McKenzie goes on  
2                   to say that he assumed that you had received and  
3                   reviewed the affidavit. Do you have any knowledge,  
4                   information or belief as to how Mr. McKenzie might  
5                   have come to that assumption?

6                   A.       Yes. Mr. Dewart regularly, or his  
7                   assistant regularly sent emails to our office with  
8                   documents attached. Those were generally copied to  
9                   myself and Stacey Ball. And there was an email with  
10                  Mr. McKenzie's affidavit attached sent to our firm.

11       1073.           Q.       Was that asking for your comment?

12                  A.       I don't recall. To be honest, it  
13                  wasn't something that I reviewed. I did receive it  
14                  though, and Mr. McKenzie was working with Mr. Dewart  
15                  at his office when that affidavit was drafted, so he  
16                  may have been present when that email was sent.

17       1074.           Q.       But you weren't asked to comment on  
18                  the affidavit?

19                  A.       I would have to review the email to  
20                  see if that was in the body of the email.

21       1075.           Q.       But isn't it fair that even if you  
22                  had been asked for the purposes of a...having that  
23                  assumption to my question, would you have had in  
24                  August of 2009 knowledge to be able to comment  
25                  advisably to the matters that Mr. McKenzie was

1 speaking to?

2 A. It was October of 2009.

3 1076. Q. I apologize. I stand corrected.

4 A. There were certainly, when I  
5 reviewed that affidavit, there were issues that  
6 jumped out at me as seeming to be inaccurate and  
7 that's in the affidavit.

8 MR. EPSTEIN: And subsequently, you  
9 reviewed the affidavit subsequent to...

10 THE DEPONENT: On February 23rd, I  
11 reviewed...on February 23rd and 24th I  
12 don't think I slept much. I reviewed the  
13 affidavit and skimmed through the  
14 transcripts.

15

16 BY MR. RANKING:

17 1077. Q. And I take it that there were  
18 certain matters that when you reviewed the affidavit  
19 following the hearing on February 23rd that jumped  
20 off the page which you say, had you reviewed it when  
21 it was supplied in draft form, you would have  
22 recognized there were errors.

23 A. It's laid out in my affidavit, I  
24 believe.

25 1078. Q. And which of those issues, because

1           in fairness to you, I said some issues may have  
2           jumped off the page that were known to you in  
3           October, but other issues may have required you to  
4           review the files or other documents. Which matters  
5           would have jumped off the page had you reviewed the  
6           affidavit in October of 2009?

7                   A.       I believe the thing that really  
8           struck me was the statements implying that Mr.  
9           McKenzie was not well acquainted with Mr. Best.

10                   MR. SILVER:       Mr. McKenzie was what?

11                   THE DEPONENT:       The statements that  
12           suggested that Mr. McKenzie was not well  
13           acquainted with Mr. Best, and suggesting  
14           that he hadn't had contact with him  
15           between, I think, 2005 and 2007.

16

17           BY MR. RANKING:

18           1079.           Q.       Those were the things that jumped  
19           off the page for you?

20                   A.       I believe so, yes.

21           1080.           Q.       I have been very permissive in  
22           permitting you to speak with your counsel and to  
23           look at your computer throughout the conduct of this  
24           cross-examination. I know that Mr. Epstein is aware  
25           of the law that I'm entitled to see whatever it is

1           you're looking at. I'm not going to ask to see it,  
2           but can you tell me what you are looking at and then  
3           I'll decide whether or not I want to ask...

4                     A.       At this point it's a blank screen.  
5           I was looking for Mr. McKenzie's affidavit, frankly.

6   1081.           Q.       Okay, that's fair.

7                     A.       And Mr. Epstein suggested to me that  
8           I should just try to remember what my impressions  
9           were and not look at the affidavit again.

10   1082.          Q.       That's fair, but if anything further  
11           comes to your attention, you'll let me know?

12                    MR. EPSTEIN:       Yes.

13

14   BY MR. RANKING:

15   1083.          Q.       Paragraph 11, Mr. McKenzie doesn't  
16           say who has given him the advice, this is the last  
17           sentence, but he says,

18                    "...I am now advised that Ms. Duncan denies  
19           receiving or reviewing my affidavit before  
20           it was filed..."

21           I understand from your evidence that you received,  
22           but you didn't review it?

23                    A.       That's correct.

24   1084.          Q.       Paragraph 14, Mr. McKenzie speaks of  
25           a list of corrections he had begun to prepare. Did

1           he ever speak to you or your partners with respect  
2           to corrections in this transcript?

3                   A.       No, he did not.

4       1085.           MR. RANKING:       I could ask many more  
5                   questions, but I'm not going to. I thank  
6                   you for your time, and subject to the  
7                   undertakings and matters taken under  
8                   advisement, I'll turn it over to Mr.  
9                   Silver. Thank you.

10

11       ---    A LUNCHEON RECESS

12

13       JESSICA ANN DUNCAN, resumed

14       CROSS-EXAMINATION BY MR. SILVER:

15       1086.           Q.       Ms. Duncan, you know that I'm Lorne  
16                   Silver, counsel for Richard Ivan Cox, the first  
17                   named defendants, and many other defendants?

18                   A.       Yes.

19       1087.           Q.       When did you first become aware of  
20                   the file in the office?

21                   A.       Mr. McKenzie made a number of  
22                   informal comments at various partners meetings, just  
23                   that he thought he had a very large claim that he  
24                   would be bringing in Ontario, that it was very  
25                   complex. So, I guess that would be when we became

1           aware of the file and I think the comments that I  
2           can recall go back as far as 2005.

3       1088.           Q.       So, the claim was issued in February  
4           of 2007, but it was being talked about in the firm  
5           amongst the partners. At least Mr. McKenzie was  
6           indicating that he likely had a big action in  
7           Ontario to bring in as early as 2005, right?

8                    A.       I'm thinking it was late 2005, early  
9           2006.

10      1089.           Q.       When did you, and when I say "you",  
11           I'm really asking you questions of Crawford, McLean,  
12           Anderson, the other partners. You were the only  
13           four partners involved in late 2005 and 2006, right?

14                   A.       Mr. Crawford, I believe, had left  
15           the firm as a partner earlier than that.

16      1090.           Q.       So, it was you, McLean, Anderson and  
17           McKenzie?

18                   A.       Correct.

19      1091.           Q.       Through the material time, which I'm  
20           defining to be late '05 to date.

21                   A.       Yes.

22      1092.           Q.       Subject to the tail end. I have a  
23           few questions about the end period when Mr. McKenzie  
24           is no longer a partner. So, the questions that I'm  
25           directing of you is really of you, Jessica Duncan,



1 and also on behalf of McLean and Anderson. I want  
2 to understand the knowledge that the three of you  
3 had.

4 A. Right.

5 1093. Q. So, if yours is different than you  
6 think from McLean and Anderson, you should let me  
7 know that if you can.

8 A. I will try.

9 1094. Q. So, in late '05 you, McLean and  
10 Anderson knew that McKenzie was working on a file  
11 that might result in a big claim being launched in  
12 Ontario?

13 A. Yes.

14 1095. Q. And is it fair to say that you knew  
15 more than that, that it involved interests in  
16 Barbados and related to Kingsland Estates Limited?

17 A. The name "Kingsland Estates" did not  
18 mean anything to any of us. We knew Barbados was  
19 involved because Mr. McKenzie was spending a great  
20 deal of time there and at times we had to arrange  
21 for him to call in to partners' meeting from there  
22 or make other arrangements because he was not  
23 available.

24 1096. Q. Right, because the ledgers and the  
25 dockets which I'll come to in more detail, show that

1 he's back and forth, especially through '06.

2 A. Yes.

3 1097. Q. And you would know that as one of  
4 his partners, and so would McLean and Anderson?

5 A. Yes. Our knowledge was vague, but  
6 we knew that there was something going on involving  
7 Barbados and that he felt he had a large claim  
8 arising out of something that he was doing.

9 1098. Q. Did you know at that time in '06  
10 that Peter Allard was his client?

11 A. He may have mentioned the name. I  
12 don't have any specific recollection. But it's  
13 certainly possible that he mentioned the name in the  
14 context of staying with him or travelling with him.

15 1099. Q. Would you agree with me that whether  
16 you actually met Peter Allard or he told you his  
17 name, your firm was issuing accounts to Peter  
18 Allard? He was the client that the accounts at  
19 Exhibit K of your affidavit are all addressed.

20 A. Yes, that's correct.

21 1100. Q. And these accounts are a firm  
22 record?

23 A. Yes.

24 1101. Q. And you could have gone and looked  
25 at any one of the accounts that Mr. McKenzie

1 rendered on behalf of the firm just as he could have  
2 tracked down and looked at any accounts that you  
3 rendered?

4 A. I don't know if it would have been  
5 that easy.

6 1102. Q. Was there anything in place that  
7 suggested that you don't have access to his  
8 accounts?

9 A. Mr. McKenzie's assistant, Ms. Ware,  
10 was handling all of the accounting on these files.  
11 I believe most of these accounts did go through our  
12 accounting department in the normal course. But as  
13 time passed there was less and less of that  
14 information flowing through our accounting  
15 department. It was definitely handled differently  
16 from other people's accounts in the firm.

17 1103. Q. I don't understand it. And I think  
18 I have to go over a little bit of what Mr. Ranking  
19 asked you. But I really need to understand how the  
20 accounting worked in your office. I think you said  
21 to Mr. Ranking that it all starts with the  
22 handwritten docket. At least the system that was in  
23 place at the material time started with handwritten  
24 dockets?

25 A. No, in some cases. Everybody had

1 their own method of getting their time recorded in  
2 PCLaw. Some people just keep it open on their  
3 desktop and docket as they go.

4 1104. Q. Electronically?

5 A. Yes. Some people keep a separate  
6 list, either handwritten, like on a docket sheet,  
7 such as the one produced for Ms. Ware, or  
8 handwritten notes on a separate piece of paper, or  
9 typed notes on their computer. Everybody has their  
10 own system. So, I can't say...

11 1105. Q. But ultimately, whatever system any  
12 timekeeper used, one way or another, it would get  
13 inputted into PCLaw.

14 A. Eventually, yes.

15 1106. Q. So, the ledgers that you've produced  
16 in Exhibit A and B are the result of, amongst other  
17 things, it includes the result of inputting of  
18 dockets into the system, however somebody might do  
19 that.

20 A. Yes.

21 1107. Q. Now, do you know how Mr. McKenzie  
22 did his dockets?

23 A. I don't have direct knowledge. My  
24 understanding is that he kept a separate list. He  
25 would then email or give his list to Sunny Ware who

1 would enter his docket for him on a weekly basis.

2 1108. Q. Once a week, you mean?

3 A. I think so.

4 1109. Q. So, to the best of your knowledge,  
5 when I read an entry for lawyer number 4 in Exhibit  
6 A or B, would that be Mr. McKenzie's language for  
7 the entry?

8 A. Yes.

9 1110. Q. Right. So, for example, on the very  
10 first page of Exhibit A, there's the very first  
11 entry,

12 "...Call at September 30, 2005..."

13 Do you see that?

14 A. Yes, I see it.

15 1111. Q. And lawyer 4 is Mr. McKenzie.

16 "...Calls from and to PA and conference  
17 call with PA and Gowlings..."

18 That would be what Mr. McKenzie wrote down or sent  
19 over to Sunny, that's his language for his docket?

20 A. That's my understanding. You would  
21 have to ask Mr. McKenzie and Ms. Ware about that.

22 1112. Q. And this ledger A, for account 543,  
23 reflects a compilation of all of the docket entries  
24 that any timekeeper has submitted onto the file,  
25 right?

1                   A.       I believe so.

2       1113.           Q.       And then information about monies in  
3                   and out as well?

4                   A.       Yes.

5       1114.           Q.       Do you believe that ledger A  
6                   accurately reflects the docketts properly entered?

7                   A.       When you say ledger A...

8       1115.           Q.       Exhibit A.  And B, these are for the  
9                   two files.

10                   A.       I believe so.

11       1116.           Q.       Am I right that it's off of these  
12                   ledgers that, then through the PCLaw software,  
13                   accounts are generated?

14                   A.       I think so.  I don't pretend to be  
15                   an expert in the software, but there's a heading  
16                   that you click on that says "pre-bill".

17       1117.           Q.       Well, you do your own accounts,  
18                   don't you?

19                   A.       Yes.

20       1118.           Q.       So, you input docketts and then  
21                   somehow through the magic of the computer an account  
22                   will appear that you can then edit and decide how  
23                   you want to send it out?

24                   A.       Right.  You click "pre-bill" and it  
25                   comes up with a draft bill.

1       1119.           Q.       I don't know if you've looked at,  
2                    but the correlation between the ledgers and the  
3                    accounts, that's what appears to have happened.

4                    A.       Well, I think it's the same  
5                    database, yes.

6       1120.           Q.       It's the same database.  So, you  
7                    start with a belief that accurate entries are being  
8                    made into the ledgers.  And then from that comes  
9                    accounts that I suggest to you, you accept contain  
10                   accurate descriptions of what was done, right?

11                   A.       That's my believe, yes.

12       1121.           Q.       And that's your belief in respect of  
13                    the system and also these ledgers and these  
14                    accounts?

15                   A.       Yes.

16       1122.           Q.       Of course, it's a software system  
17                    that was owned by the firm.

18                   A.       Licensed, yes.

19       1123.           Q.       Licensed by the firm.  And it was  
20                    the same system that the firm used for all of its  
21                    legal accounting purposes?

22                   A.       That's the base software, yes.

23       1124.           Q.       For example, is this the same  
24                    software that once this information is inputted into  
25                    the system, all the information that flows

1 ultimately into a financial statement is driven off  
2 the same system and the same inputs?

3 A. I believe so.

4 1125. Q. And so WIP, work in progress, at any  
5 time, would be something that you can go to the  
6 system and it would tell you.

7 A. That's a report you can generate,  
8 yes.

9 1126. Q. Same with accounts receivable...it's  
10 an overall accounting system used by the firm?

11 A. Yes.

12 1127. Q. And therefore it's the same system  
13 and therefore the same raw material, the inputs,  
14 starting with docket that ultimately drives the  
15 determination of the profit of the firm. Or at  
16 least gross revenue.

17 A. It gives us a record, yes.

18 1128. Q. And that's the record upon which you  
19 do your year end and all of your financial dealings?

20 A. I believe so, yes.

21 1129. Q. So, a dollar of profit that you  
22 would receive in a year would be connected to each  
23 and every docket that's input into the system that  
24 you're talking...ultimately?

25 A. I'm looking confused. I'm not sure



1 what the proposition is.

2 1130. Q. When the firm at the end of the year  
3 calculates its profit, it looks at gross revenue,  
4 which is off of these inputs that we're talking  
5 about, deducts all the expenses, and at the end,  
6 there's a profit for distribution to partners.

7 A. One hopes.

8 1131. Q. But my point is the determination of  
9 that profit and therefore whatever your percentage  
10 is is connected to the input of dockets like Mr.  
11 McKenzie's that we're looking at?

12 A. Well, the records on which we base  
13 that determination are, yes.

14 1132. Q. So, in the years that Mr. McKenzie  
15 was working on 543, in '06, let's say, at the end of  
16 the year when the four partners were dividing up  
17 profits, all of the revenue that came in from 543  
18 would have been part of the equation?

19 A. In the year-end determination, I'm  
20 sure it would have, yes.

21 1133. Q. And so, to the extent that the firm  
22 had profit in '06...did it, or do you know?

23 MR. EPSTEIN: Don't answer.

/R

24

25 BY MR. SILVER:

1           1134.           Q.       Okay, don't answer. You just sort  
2                           of made a face that suggested that maybe you didn't.  
3                           It's okay, it doesn't matter. My point is that  
4                           these files drove profit that you and Mr. McLean and  
5                           Mr. Anderson shared in, correct?

6                           MR. EPSTEIN:        Again, you're assuming  
7                           profits...

8           1135.           MR. SILVER:        Or reduced the loss.

9                           MR. EPSTEIN:        I think it's fair to say  
10                          that the accounts drove the revenues. I  
11                          think the way you put it formally, it drove  
12                          gross revenues. And who knows if they  
13                          collect accounts, there's all sorts of  
14                          issues, as you know, but I think it's fair  
15                          to say that these drove the gross revenues  
16                          that the firm might get at the end of the  
17                          year, from which an assessment would be  
18                          made if there's a profit or a loss.

19

20           BY MR. SILVER:

21           1136.           Q.       And if there was a profit, it was  
22                           distributed to the partners, it was profit that at  
23                           least partially was derived from Mr. McKenzie's  
24                           involvement in these files. In other words, the  
25                           firm shared the profits.

1           A.       If there was a distribution of  
2 profit, that's a fair assumption.

3       1137.       Q.       So, in respect of these files that  
4 started in '05, you'll agree with me that the firm's  
5 resources were used throughout?

6           A.       I'll agree with that, yes.

7       1138.       Q.       And it's not just hardware,  
8 software, and accounting records, it's also the  
9 human resource of the firm?

10          A.       Correct.

11       1139.       Q.       Sunny Ware was paid a salary by the  
12 firm.

13          A.       That's correct.

14       1140.       Q.       And students were used and lawyers  
15 were used, it was a firm file.

16          A.       Yes.

17       1141.       Q.       And to the extent that profit was  
18 derived, it was for the whole firm to share as  
19 appropriate.

20               MR. EPSTEIN:       For the partners, I think,  
21 to share.

22

23 BY MR. SILVER:

24       1142.       Q.       Well, it also helped pay the bills,  
25 paid for the lights, and paid for Sunny Ware's

1 salary.

2 A. Well, that's overhead. I'm sure  
3 that some of our overhead costs were paid by that  
4 file, and any other files, yes.

5 1143. Q. You might have answered this  
6 generally to Mr. Ranking, but we've seen in some of  
7 the exhibits that Mr. Ranking provided that, for  
8 example, Exhibit 10 is showing their, being  
9 Fasken's, calculations. They're pretty good at  
10 adding numbers over there, but \$2.2 million going  
11 into the trust account in 543 and another...do you  
12 have a copy of this? \$1.177 million going into  
13 trust in 568. We recognize that there were some  
14 transfers, but do you agree with me that at least \$3  
15 million of client money came into the firm in  
16 consequence of these files?

17 A. I don't agree with the figure. My  
18 bookkeeper is going over that compilation.

19 MR. EPSTEIN: We gave an undertaking in  
20 that regard Mr. Silver, so I think our  
21 answer should wait for that undertaking.

22 THE DEPONENT: Yes.

23

24 BY MR. SILVER:

25 1144. Q. Would you agree with me that it's

1 more than two, without waiting for the bookkeeping?

2 MR. EPSTEIN: Let's wait until we get  
3 the bookkeeper. We did give an undertaking  
4 to verify the information and then we will  
5 all see what the amount was.

6

7 BY MR. SILVER:

8 1145. Q. I want to get back to some of the  
9 accounting stuff, but I'm just going to follow up on  
10 some of the areas that Mr. Ranking asked you about,  
11 even though I was interjecting more than I should  
12 have, and I thank everybody for that. I still have  
13 some additional follow-up questions. You were asked  
14 about Mr. McKenzie's affidavit of April 23rd. Mr.  
15 Ranking asked you if you had any comment and you  
16 said you had no comment. I only have one question.  
17 Do you believe that Mr. McKenzie's affidavit of  
18 April 23rd is truthful?

19 A. I can't speak to Mr. McKenzie's....

20 1146. Q. Well, do you know whether he said  
21 anything in there that you do not believe to be  
22 true?

23 A. Well, whether I believe it to be  
24 true is not necessarily an indication of whether Mr.  
25 McKenzie believes it to be true. That's why, the

1 way your question is phrased, I can't...

2 MR. EPSTEIN: That's a very broad...

3 1147. MR. SILVER: I'm not asking you whether  
4 you think he thought he was being truthful.

5 MR. EPSTEIN: I know, but it's a very  
6 broad question. Perhaps, Mr. Silver, if  
7 you want to address any specific paragraph  
8 to her and then she can tell you, but  
9 that's a very difficult, sort of general  
10 question, to answer.

11 1148. MR. SILVER: No, but I've done that  
12 purposely. If she believes everything to  
13 be truthful, then I won't ask any  
14 questions...or I may ask questions about  
15 every one of them. But I'm asking a  
16 general question.

17

18 BY MR. SILVER:

19 1149. Q. Do you believe the content of Mr.  
20 McKenzie's affidavit to be truthful?

21 A. I think perhaps my difficulty is  
22 with the word "truthful", which is kind of a value  
23 judgement and suggests Mr. McKenzie's outlook in the  
24 paragraphs, whether he's being truthful. If you  
25 were to ask me about the accuracy of specific facts,

1 in my view, I might have a different view.

2 1150. Q. In fact, you've said that already.

3 A. I have said that.

4 MR. EPSTEIN: She's already commented on  
5 some of the issues. For example, she was  
6 asked about the issue...he described the  
7 relationship with Mr. Dewart as a parallel  
8 relationship, and she answered no, that's  
9 not accurate.

10

11 BY MR. SILVER:

12 1151. Q. Does the firm have an indemnity from  
13 Mr. McKenzie?

14 A. No.

15 1152. Q. Was one requested?

16 A. Yes.

17 1153. Q. When was that?

18 A. That would have been in or about  
19 September 2009.

20 1154. Q. When you say you requested an  
21 indemnity from Mr. McKenzie, was it specific to this  
22 matter?

23 A. It was in respect of the cost claim  
24 that had been served on the partners and the firm.

25 1155. Q. And that's why it was requested,

1           because the cost claim had been served?

2                   A.     Yes.

3     1156.           Q.     And he said no, he wouldn't give  
4           that indemnity?

5                   A.     I can't recall his exact words. We  
6           were assured that the client would take care of  
7           this, I think, was what we took away from that  
8           conversation.

9     1157.           Q.     I take it that you understood the  
10          client in that regard to be who? Peter Allard?

11                   A.     At that time, Mr. McKenzie was very  
12          careful to phrase it as Nelson Barbados Group Ltd.

13     1158.           Q.     So, that's what he told you, that  
14          Nelson Barbados Group Ltd. would take care of it?

15                   A.     Yes. He pointed out that the  
16          corporation had met previous cost awards made  
17          against it, which had been substantial and that the  
18          corporation would do that again.

19     1159.           Q.     Did he tell you that the corporation  
20          had funded those previous cost obligations?

21                   A.     I don't think the conversation got  
22          that deeply into those issues.

23     1160.           Q.     Well, you now know that Allard  
24          funded those.

25                   A.     Yes.



1 1161. Q. So, did you know that then when he  
2 told you this in September 2009?

3 A. I believe we suspected that there  
4 was involvement by Mr. Allard because we were then  
5 aware that he had certainly contributed to some of  
6 the accounts, at the very least.

7 1162. Q. Well, yes, that's the part I'm a  
8 little bit confused about. Cassels Brock is bigger  
9 than your firm, and everybody's situation is  
10 different, so I'll stay out of it, but are you  
11 meaning to tell me that Peter Allard was sending in  
12 a million, two million, your bookkeeper is going to  
13 track it down, but it's huge amounts of money, and  
14 that you and your partners didn't know that this  
15 money was coming from Peter Allard?

16 MR. EPSTEIN: She did. Her evidence was  
17 that they suspected it was coming from  
18 Allard, but Mr. McKenzie indicated that it  
19 was Nelson Barbados.

20

21 BY MR. SILVER:

22 1163. Q. I know, but by September 2009 when  
23 Mr. McKenzie says to you, he's careful and says,  
24 "Nelson Barbados will take care of it, just like  
25 last time", I suggest to you that you knew that was

1 Peter Allard.

2 MR. EPSTEIN: Well, I think she did give  
3 her evidence was that they suspected. I  
4 think the question is did she know for a  
5 fact it was Allard. I think her answer is  
6 no, they didn't know for sure, but they  
7 suspected it was him.

8

9 BY MR. SILVER:

10 1164. Q. Right. And the only reason you  
11 didn't know for sure is because you chose not to go  
12 in and look in the accounting records which would  
13 have shown it, right? You could have found out for  
14 sure if you suspected it.

15 A. The question wasn't whether Peter  
16 Allard personally was going to pay. The question  
17 was what's going on with this cost award. I mean,  
18 if you're asking did we have an inkling that Peter  
19 Allard was funding it, certainly we did, as I said.  
20 I mean, it's not...the conversation did not occur in  
21 the way that you're framing it.

22 1165. Q. I know, but all I'm suggesting to  
23 you is in September of 2009 when you were talking to  
24 Mr. McKenzie and he told you, "Don't worry, Nelson  
25 Barbados Group Ltd. will take care of that", you

1           knew that he was using those words carefully to  
2           mean, and you knew that it meant, that Allard would  
3           take care of it, right?

4                   A.       I believe that was something that  
5           the three of us suspected for sure, yes.

6       1166.           Q.       Did you suspect that when the  
7           payments were being made for those prior costs?

8                   A.       Well, once again, the other three  
9           partners were not really...

10       1167.           Q.       Looking over his shoulder?

11                   A.       ...looking over his shoulder. It  
12           wasn't something that we were up to date on to that  
13           extent that we would know when costs were being  
14           paid. We were aware that Peter Allard was deeply  
15           involved in this litigation.

16       1168.           Q.       Of course, these were cost awards  
17           that were paid...I get the years mixed up, and I've  
18           been involved throughout, but those were cost awards  
19           paid for in respect of a motion for directions that  
20           was related principally to security issues which,  
21           when they broke, you had been delegated to deal with  
22           all of the security issues, right?

23                   A.       For a period of time, but not at the  
24           time that that judgment came out. I believe that  
25           judgment came out in the spring at some point, April

1 or May.

2 1169. Q. It came in May of 2008.

3 A. As I testified earlier, I believe  
4 that my last real contact with the security issues  
5 was in December or January.

6 1170. Q. Of 2008?

7 A. No, December 2007 to January 2008.

8 1171. Q. Yes, I accept that. But your office  
9 isn't that big, I would suggest, that this kind of  
10 file that Mr. McKenzie was involved in and a  
11 \$250,000 cost award wasn't taking place in your  
12 office without some talk about it that you would  
13 have heard, right?

14 A. Mr. McKenzie operated very  
15 independently. I think we were aware that there had  
16 been a big cost aware because he had Mr. Lemieux  
17 working with him I think at that point. And Mr.  
18 Lemieux had made some mention of the calculation...I  
19 guess there was a period of time when there were  
20 calculations going back and forth quite rapidly.  
21 And Mr. Lemieux had talked about a battle over  
22 decimal points or something. So, we were aware  
23 there was a cost award being paid. However, Mr.  
24 McKenzie, as I stated earlier, had over the years  
25 quite a number of files of this magnitude, so it

1                   wasn't...

2           1172.           Q.       He had a lot of files that had cost  
3                   awards like this?

4                   A.       I believe that some of the satellite  
5                   files may have involved awards like this. I'm not  
6                   sure if they were ever against Mr. McKenzie's  
7                   client, they may have gone the other way.

8           1173.           Q.       How old is Ms. Ware?

9                   A.       She's over the age of 65.

10          1174.           Q.       How long has she worked with Bill  
11                   McKenzie?

12                   A.       At her retirement party I believe it  
13                   was something like 27 years.

14          1175.           Q.       And to your knowledge, is she still  
15                   working with Mr. McKenzie?

16                   A.       I have no knowledge of that. My  
17                   understanding is she's retired. In a few emails to  
18                   the firm where she was thanking us for a retirement  
19                   party or just giving a report on her move...she  
20                   moved away from the Orillia area to the area in  
21                   which her current partner lives. So, she was  
22                   talking about how much she was enjoying retirement.  
23                   But I can't say if she still...

24          1176.           Q.       Well, I don't plan to ruin it for  
25                   her in any way, but can you provide me with her

1 contact particulars?

2 MR. EPSTEIN: I think we've already  
3 undertaken to do that.

4 1177. MR. SILVER: Did you?

5 THE DEPONENT: I don't think we did.

6 MR. EPSTEIN: All right, if we didn't,  
7 then we will. U/T

8 1178. MR. SILVER: And that will be in her new  
9 retirement haven.

10

11 BY MR. SILVER:

12 1179. Q. And from your observations, would  
13 you say that Ms. Ware's business relationship with  
14 Mr. McKenzie was close?

15 A. Absolutely.

16 1180. Q. She knew what was going on in his  
17 professional life and files?

18 A. Often Ms. Ware was the only one who  
19 knew where he was.

20 1181. Q. And she wasn't an assistant to  
21 anybody else, she worked exclusively for Mr.  
22 McKenzie?

23 A. She worked exclusively for Mr.  
24 McKenzie in most cases. There might be some things  
25 she would help other people with. She is a very,

1 very competent person. She handled a lot of things  
2 like keeping the orders up on subscriptions to  
3 things like our Rules. So, she was one of the two  
4 authorized people who dealt with our Cyberbahn  
5 account and I think she handled the ticklers...

6 1182. Q. She was paid by the firm?

7 A. Yes.

8 1183. Q. Okay. Mr. Ranking marked as  
9 Exhibits 12 and 13 the answers to undertakings that  
10 were delivered from Mr. Dewart's office and then  
11 some clarifications that you gave?

12 A. That's what my list says, yes.

13 1184. Q. Had you seen the Exhibit 12 version,  
14 the one that Mr. Dewart had sent before it got  
15 released to counsel, to us?

16 A. To be fair to Mr. Dewart, I'm not  
17 sure in relation to when it was sent to anybody else  
18 he sent it, but certainly a copy was emailed to  
19 myself and Ms. Ball. Again, I did not review it.

20 1185. Q. You didn't?

21 A. No.

22 1186. Q. You only reviewed it after February  
23 23rd and it was after that that you prepared what we  
24 see as Exhibit 13?

25 A. Yes.

1 1187. Q. Again, there was nothing to stop you  
2 from reviewing it, you just thought it was in Mr.  
3 McKenzie's hands? Is that it?

4 A. Yes. I felt that he was the one  
5 with the knowledge and my partners and I have been  
6 busy trying to keep our practice running.

7 1188. Q. I understand that, but by this time,  
8 by the time Mr. Dewart is sending you an email with  
9 proposed answers to undertakings, you're in a full  
10 blown dispute with Mr. McKenzie. We're now talking  
11 about 2010. He has left the firm, right?

12 A. Well, the dispute had remained at  
13 about the same level throughout 2009.

14 1189. Q. It didn't elevate when you found out  
15 that he had removed his files from the server and  
16 you had to ask him for specific files before he  
17 returned them?

18 A. Well, that was...

19 1190. Q. That was late '09.

20 A. Yes, but that was kind of a piece  
21 with other issues that had come up throughout the  
22 year. What I'm saying is there hadn't been a change  
23 in the level of dispute, if I can put it that way,  
24 throughout this period. And we were under the  
25 impression that we had a common cause in dealing



1 with this motion as effectively as possible.

2 1191. Q. And I'm suggesting to you, whether  
3 it was right or wrong, or at least I'm trying to  
4 understand your evidence, whether it was right or  
5 wrong, you and Mr. McLean and Mr. Anderson decided  
6 the best way to deal with this as late as February  
7 of 2010 where there's answers to undertakings that  
8 are being provided to you was just "let Mr. McKenzie  
9 handle it"?

10 A. Yes.

11 1192. Q. Notwithstanding that he had  
12 withdrawn from the partnership by that time,  
13 correct?

14 A. Well, as I testified earlier, that  
15 had been going on since 2008.

16 1193. Q. But it happened at the end of 2009?

17 A. Officially.

18 1194. Q. Notwithstanding that he had removed  
19 files, that happened in September of '09, when did  
20 you say?

21 A. No, I believe it was late November  
22 when we discovered it.

23 MR. EPSTEIN: Also bear in mind, of  
24 course, I don't know if you know this, but  
25 Mr. Dewart was acting for both the firm and

1 for Mr. McKenzie at the time. So, specific  
2 questions would have been obviously  
3 directed to McKenzie for his answers and  
4 been provided to their joint counsel, who  
5 was providing the responses.

6 1195. MR. SILVER: I understand all that. But  
7 I'm acting for clients who think that the  
8 parties responsible for all these costs  
9 should be ordered to pay them. And I'm  
10 trying to understand how the law firm could  
11 sit back and...at least I'm examining on  
12 the law firm's apparent conduct of sitting  
13 back, notwithstanding all these red flags,  
14 and saying, "Well, McKenzie is dealing with  
15 it." I guess I'll just get the facts and  
16 we'll make the arguments later.

17  
18 BY MR. SILVER:

19 1196. Q. Am I right, Ms. Duncan, that Mr.  
20 McKenzie's first affidavit, which is Exhibit C to  
21 your affidavit, and I think you've said that Mr.  
22 Dewart probably sent it to you and you could have  
23 reviewed it, but you didn't, before it was signed?

24 A. That's correct.

25 1197. Q. Am I right, though, that you knew at

1           that time that it was being filed on behalf of  
2           McKenzie personally and your firm?

3                    A.       Mr. Dewart was representing all of  
4           us, yes.

5       1198.           Q.       You knew that this was the evidence  
6           that was being put in on behalf of the firm?

7                    A.       Yes.

8       1199.           Q.       As well as Mr. McKenzie?

9                    A.       Yes.

10      1200.           Q.       And you knew or assumed that  
11           whatever information Mr. Dewart was getting from Mr.  
12           McKenzie, he was getting it for Mr. McKenzie  
13           personally and the firm?

14                   A.       Could you rephrase that?

15      1201.           Q.       That Mr. Dewart was getting  
16           information from Mr. McKenzie not just in respect of  
17           his representation of McKenzie, but also in respect  
18           of his representation of the firm, and you knew  
19           that?

20                   A.       Well, he was representing all of us,  
21           so yes.

22      1202.           Q.       And the firm didn't do anything to  
23           change that or have some other information flow put  
24           in place?

25                   A.       You're asking me to speak to matters

1           that are solicitor/client privileged.

2       1203.           Q.       I am? Let me ask you a different  
3       question. Did you feel that the arrangement that  
4       was in place to give information to Mr. Dewart was  
5       improper? In other words, leaving it to Mr.  
6       McKenzie to give the information to Mr. Dewart?

7                   A.       Mr. McKenzie was the only one with  
8       the information to give to Mr. Dewart.

9       1204.           Q.       So, you didn't think that was  
10      improper? You were comfortable...

11                  A.       I didn't consider whether it was  
12      proper or improper. It was simply a matter of who  
13      had the knowledge to instruct Mr. Dewart on those  
14      issues.

15                  MR. EPSTEIN:       In fairness, I think you  
16      have to look at what those undertakings  
17      were and as undertakings related to  
18      specific questions about the litigation and  
19      the things that were being done and the  
20      accounts that were being rendered and these  
21      were things that Mr. McKenzie...

22      1205.           MR. SILVER:       I accept that, but I've  
23      gone beyond the undertakings and I've moved  
24      back to the provision of the facts to the  
25      lawyer.

1 MR. EPSTEIN: I thought you were asking  
2 specifically about the undertakings and  
3 asking whether or not she felt that she  
4 should have had some role in intervening  
5 with regard to answering the undertakings.

6 1206. MR. SILVER: I'm actually more subtle  
7 than I intend to be because I've moved on  
8 from that.

9

10 BY MR. SILVER:

11 1207. Q. Anyway, I think the point that I'm  
12 making, the suggestion that I'm making is, for all  
13 the reasons that you express, Mr. McKenzie was  
14 providing information to counsel in respect of the  
15 defence of these cost awards on his own behalf and  
16 the firm's behalf and the firm was comfortable that  
17 that be the process, right?

18 A. Yes.

19 1208. Q. Now, I just want to make sure...I  
20 just want go back on the different stages of the end  
21 of Mr. McKenzie's partnership with you. And I've  
22 looked back at the notes that I made from Mr.  
23 Ranking's examination. Have I got this right, that  
24 as a serious breakdown in September 2008, at that  
25 time he was dictating the terms upon which he would

1 continue to deal with firm, no agreement was signed,  
2 and then in October 2008, he started contributing a  
3 preset amount or a specified amount.

4 A. I believe the first breakdown was  
5 actually August 2008, but otherwise, yes, that's  
6 correct.

7 1209. Q. Was it from October 2008 until the  
8 end of December of 2009 that he was just  
9 contributing an amount to overhead?

10 A. Sorry, October 2008 until December  
11 2009? Yes.

12 1210. Q. And the partners didn't agree to  
13 that, he just imposed that himself?

14 A. Yes.

15 1211. Q. And I think you said that he set up  
16 his own business bank account?

17 A. He set up his own general account,  
18 yes.

19 1212. Q. So, when Peter Allard or any client  
20 sent in money to Crawford, McKenzie after October  
21 2008, he would somehow direct the accounting  
22 department to move that money into a separate  
23 general account that he had opened?

24 A. I think what happened was the monies  
25 would be placed in trust in the firm's trust

1 account, which he continued to use. And then after  
2 billing, the funds would be transferred...the funds  
3 would be billed and transferred to his general  
4 account.

5 1213. Q. And no one stopped him? Did anyone  
6 say to him, "You can't do that, we're a  
7 partnership"? I'm missing something. Here's the  
8 question. Did you just allow that to happen?

9 A. Once again, I don't necessarily  
10 agree with the wording you're using, in the sense of  
11 "just allowing it to happen". I'm saying that that  
12 was the end result. It's not something that was  
13 necessarily in the sense of agreeing or allowing, it  
14 was...we had to find a means of continuing to  
15 operate, to find a means to keep our bank account  
16 open, we had to find a means to keep our existing  
17 mortgage and loans in good standing with the bank at  
18 a time when the economic situation was creating a  
19 great deal of uncertainty with the banks.

20 1214. Q. Did you care to concern yourself  
21 about notifying the clients that while they're  
22 paying Crawford, McKenzie, or monies are going into  
23 trust, all of the monies are going to him except for  
24 a preset amount for overhead? Do you know of any  
25 notification to clients?

1 MR. EPSTEIN: Is that what happened?  
2 Maybe I misunderstood her evidence, but I  
3 didn't understand that necessarily to be  
4 the case.

5 THE DEPONENT: That was only after the  
6 bills were issued. Nothing changed insofar  
7 as the clients were concerned.

8 MR. EPSTEIN: ...the way that the money  
9 was distributed...the money that was paid  
10 by a client would go into the firm's trust  
11 account, and then an account would be  
12 rendered and...

13 1215. MR. SILVER: An account would be  
14 rendered by the firm, and then all the  
15 money for that account would be transferred  
16 to Bill McKenzie himself?

17 THE DEPONENT: No, not necessarily.

18 MR. EPSTEIN: No, that's not the case.

19

20 BY MR. SILVER:

21 1216. Q. You said that after billing, the  
22 money was transferred from trust to his personal  
23 general account.

24 MR. EPSTEIN: His share of it.

25 THE DEPONENT: His share of it.



1 MR. EPSTEIN: His share of it, not all  
2 of it. I thought we were missing  
3 something. Accounts would be rendered by  
4 Crawford, McKenzie, as I understand it,  
5 monies would be paid into the trust  
6 account, and then the firm would render an  
7 account and McKenzie's share would go  
8 into...he had a separate account that would  
9 go into his account and presumably the  
10 others would be into a firm general  
11 account.

12

13 BY MR. SILVER:

14 1217. Q. Is that what happened?

15 A. I believe that's it, yes.

16 1218. Q. So, the firm continued to

17 participate in the profitability of the files to the  
18 extent that there was...

19 A. I'm sorry?

20 1219. Q. You and Mr. McLean and Mr. Anderson  
21 continued to participate in the revenue generated by  
22 these files right up to December 2009, right?

23 A. I don't think that's what I said at  
24 all.

25 1220. Q. Is that the effect to you? I mean,

1 I thought that once he started to pay overhead, that  
2 the participation was limited to the amount that he  
3 was paying towards overhead.

4 A. Yes. He wasn't paying...he would  
5 repay things that were not covered by the overhead.  
6 Like, he had a set contribution amount that was  
7 supposed to contribute to Ms. Ware's salary.

8 1221. Q. How much was that?

9 MR. EPSTEIN: Don't answer that. /R

10 1222. MR. SILVER: Well, why?

11 MR. EPSTEIN: It's not relevant.

12 1223. MR. SILVER: Sure it is.

13 MR. EPSTEIN: I disagree.

14 1224. MR. SILVER: It's totally relevant to  
15 the firm's participation in this file.

16 MR. EPSTEIN: Internally how much Ms.  
17 Ware was paid or how much they were  
18 reimbursed...

19 1225. MR. SILVER: I didn't ask how much...

20 MR. EPSTEIN: Well, she said monies were  
21 reimbursed, were paid by McKenzie to the  
22 firm to cover the overhead, including Ms.  
23 Ware's salary.

24

25 BY MR. SILVER:

1 1226. Q. All I want to know, my question is,  
2 is how much did he contribute on a monthly basis  
3 towards overhead after October 2008.

4 MR. EPSTEIN: That's irrelevant. /R

5 1227. MR. SILVER: Okay.

6

7 BY MR. SILVER:

8 1228. Q. But I still need to understand how  
9 it worked. He contributed an amount, let's say a  
10 dollar, towards overhead. And then \$100,000 comes  
11 in from Mr. Allard into trust. He renders an  
12 account for \$100,000. Are you with me?

13 MR. EPSTEIN: The firm renders an  
14 account.

15

16 BY MR. SILVER:

17 1229. Q. The firm renders an account for  
18 \$100,000. Where does the money go that's in trust?  
19 Into the firm's general account, which is the way it  
20 was before September 2008, right?

21 A. Yes.

22 1230. Q. After 2008, in my hypothetical,  
23 where did the \$100,000 go?

24 A. After the agreed upon amount was  
25 paid into the firm, there would be discussion about

1           what other expenses should be paid. For example, if  
2           our general account had paid for disbursements such  
3           as photocopying or couriers or long distance, that  
4           was supposed to be repaid. But any balance after  
5           those things were paid was transferred to Mr.  
6           McKenzie.

7           1231.           Q.       All of it?

8                           A.       Yes.

9           1232.           Q.       So, if I understand it correctly,  
10           after September 2008, he would make a preset amount  
11           payment towards overhead, you won't tell me how  
12           much. And then in addition to that, if there's  
13           \$100,000 in a trust account, Mr. Allard's trust  
14           account, and the firm rendered a bill to Mr. Allard,  
15           the firm would only get reimbursement for expenses  
16           incurred that were part of that billing, and the  
17           rest would go into Mr. McKenzie's general account?

18                          A.       Yes.

19           1233.           Q.       Did the firm agree to that? Or was  
20           that what Mr. McKenzie imposed and the firm felt to  
21           stay alive we had no choice but to play along?

22                          A.       That's correct.

23           1234.           Q.       The latter?

24                          A.       Yes.

25           1235.           Q.       And is that what happened

1 consistently from after October 2008 until December  
2 2009?

3 A. Yes.

4 1236. Q. So, you say the fight isn't  
5 escalating with Mr. McKenzie in 2009. I guess it  
6 was high enough by the time that this arrangement  
7 was in place that there wasn't much room to go up.

8 MR. EPSTEIN: It was continuing.

9 THE DEPONENT: It was a very  
10 tension-filled year.

11

12 BY MR. SILVER:

13 1237. Q. And notwithstanding that when you  
14 got sued for the costs, the firm concluded that it  
15 was best to just leave it in Mr. McKenzie's hands?

16 A. As I said, he was the only one with  
17 any knowledge of what had gone on and he had given  
18 us his assurance that he would look after it.

19 1238. Q. In any event, notwithstanding this  
20 internal arrangement that came in October 2008, am I  
21 right that he continued to send letters on the  
22 firm's letterhead?

23 A. Yes, he did.

24 1239. Q. He sent out his accounts on the  
25 firm's letterhead?

1 A. Yes.

2 1240. Q. The money came in. Maybe your  
3 practice is a little different than mine, I don't  
4 always have trust money when I render an account.  
5 Sometimes I render an account and then the client  
6 pays it. In those situations, the accounts would be  
7 rendered by Mr. McKenzie under the firm name and the  
8 payment would be made to the firm.

9 A. That was the way it was supposed to  
10 be.

11 1241. Q. Was that not what happened?

12 A. We don't know. We believe that  
13 there may be an accounting to be done there.

14 1242. Q. Beautiful. Now, looking at the  
15 accounting records again. So, Exhibit A and B are  
16 sort of the raw data inputted into the software for  
17 the file?

18 A. Yes.

19 1243. Q. And then Exhibits I and K are the  
20 accounts generated from that raw data for each of  
21 the two matters?

22 A. Yes.

23 MR. EPSTEIN: That's right.

24

25 BY MR. SILVER:

1       1244.           Q.       And you believe that the docket  
2                    were properly or accurately made, and therefore the  
3                    accounts accurately describe the activity?

4                    MR. EPSTEIN:        I think she's answered to  
5                    the best of her knowledge, that's the case.

6

7       BY MR. SILVER:

8       1245.           Q.       The entries, and I can take you to  
9                    them, speak about a cooperation agreement with the  
10                   Knoxes. Have you seen that?

11                   MR. EPSTEIN:        Do you want to take us,  
12                    specifically, the entries?

13       1246.           MR. SILVER:        Yes, if I can find it.

14

15       BY MR. SILVER:

16       1247.           Q.       Well, for example, if you go to  
17                    Exhibit I...

18                    A.       Exhibit I, the account?

19       1248.           Q.       Yes. But now, these are the  
20                    accounts that Mr. McKenzie had provided previously,  
21                    but with trust statements.

22                    A.       Without trust statements.

23       1249.           Q.       No, you've now given...

24                    A.       No, these have trust statements.

25       1250.           Q.       These have them. Mr. McKenzie had

1           previously provided them without...

2                   MR. EPSTEIN:       Right, without the trust  
3                   statements.

4  
5       BY MR. SILVER:  
6       1251.           Q.       So, just to get us some focus, there  
7                   is June 19, 2007. So, on the April 20th  
8                   account...no. Sorry about this. There is a June  
9                   22nd account. This is in BMC 568.

10                   MR. EPSTEIN:       Sorry, let us just find  
11                   it.

12                   THE DEPONENT:       What's the date?

13  
14       BY MR. SILVER:  
15       1252.           Q.       June 22nd account.

16                   A.       Of 2007?

17       1253.           Q.       Yes.

18                   MR. EPSTEIN:       Okay, the June 22nd  
19                   account, all right.

20  
21       BY MR. SILVER:  
22       1254.           Q.       And the trust statement in US funds.

23                   A.       Do you want me to go to the trust  
24                   statement on this account?

25       1255.           Q.       Please.



1                   A.       Yes.

2       1256.           Q.       It says that on the 18th, \$15,000  
3                   came in into the US dollar account?

4                   A.       That's what's showing on this trust  
5                   statement, yes.

6       1257.           Q.       But you believe that to be true,  
7                   right?

8                   A.       I do.

9       1258.           Q.       Because if we went to the ledger in  
10                   Exhibit A or B on that date, we would see \$15,000.  
11                   Let's just do that by way of an exercise. Now, this  
12                   would be B, right? A is 543 and B is 586. So,  
13                   which one would we look in, A or B?

14                   A.       B.

15       1259.           Q.       So, we have got to go to June 19,  
16                   and there it is. There's a bank wire receipt for  
17                   \$15,000, right?

18                   A.       Yes.

19       1260.           Q.       Am I right that that money came from  
20                   Peter Allard?

21                   A.       I can't tell that based on what I  
22                   see. That is something that I believe one of our  
23                   undertakings will cover.

24       1261.           Q.       Well, I know that Mr. Ranking only  
25                   wanted a sampling of wire transfers into the US

1 account. This is one of the ones that I want  
2 sampled.

3 MR. RANKING: Just for Mr. Silver and  
4 the record, the undertaking that was  
5 requested was for everything, but I want to  
6 start with samples.

7 MR. EPSTEIN: Right. And I think we  
8 said we would, subject to the issue of  
9 costs, which we did not agree upon, that we  
10 would make that inquiry subject to that  
11 issue.

12 1262. MR. SILVER: That's all great and I'm  
13 not detracting from whatever else was said,  
14 but I would like an undertaking that we get  
15 the wire transfer particulars for the  
16 \$15,000 that came in on June 18, 2007.

17 MR. EPSTEIN: Yes, subject to the  
18 previous qualifications, we will include  
19 that as part of our sampling. U/T

20  
21 BY MR. SILVER:

22 1263. Q. Ms. Duncan, when you say you think  
23 it came in from Allard but you can't really be sure,  
24 do you have knowledge that money came in from  
25 anybody but Mr. Allard?

1                   A.       Well, this is somewhat informed by a  
2                   conversation that I had with the bookkeeper over the  
3                   past week. For incoming wire transfers, a staff  
4                   member would tell the bookkeeper that we were  
5                   expecting a wire transfer from a particular person  
6                   in a particular amount. And the bookkeeper would  
7                   then watch the account for when that wire came in  
8                   and would then advise a staff member. So, I believe  
9                   that the record that we have shows that we were  
10                  expecting those amounts from Mr. Allard, but until  
11                  we get the banking information, I can't confirm it.  
12                  So, my understanding and belief is yes, I did.

13       1264.           Q.       Another way to put that, until you  
14                  get the banking information, your best belief is all  
15                  the money that came into these files came from  
16                  Allard?

17                   A.       Ultimately, yes.

18       1265.           Q.       I don't know what "ultimately"  
19                  means.

20                   A.       I mean that at some points it was  
21                  shown as coming from Nelson Barbados Group Ltd., but  
22                  I believe that the banking records show that the  
23                  funds actually were coming in from Mr. Allard and  
24                  then allocated that way.

25       1266.           Q.       Exactly. I'm not even sure that the

1 records show that the money came from Nelson  
2 Barbados. That's how Mr. McKenzie chose to reflect  
3 it.

4 A. Yes. When I say that, what I mean  
5 is, as I said, when a staff member directed our  
6 bookkeeper, that was the direction that was given to  
7 the bookkeeper.

8 1267. Q. So, in looking at this, we're now  
9 looking at it in two places, in the trust statement  
10 for June 19, US funds, and in the ledger in Exhibit  
11 B, we see that \$15,000 came in probably from Mr.  
12 Allard on the 18th and on the 19th of June, Mr.  
13 McKenzie withdrew \$6,000 in cash that was destined  
14 for Jane Goddard?

15 A. Yes.

16 1268. Q. And we also know that, to the extent  
17 that...let me ask this. When you look back at the  
18 trust statement and it says, "Paid to Jane Goddard  
19 to pay account owing to L. St. Hill for services  
20 rendered", where did that language come from? The  
21 trust statement language, Sunny Ware?

22 A. Yes.

23 1269. Q. On instruction from Bill McKenzie?

24 A. I would imagine, yes.

25 1270. Q. Because that's not coming out of the

1 ledger?

2 A. No. Ms. Ware and Mr. McKenzie's  
3 practice, I believe, was that they would have the  
4 account as generated by PCLaw. They would then  
5 place it in the editing software, and Ms. Ware would  
6 then change the account in accordance with  
7 instructions from Mr. McKenzie.

8 1271. Q. You've read Mr. McKenzie's  
9 cross-examination from the 3rd and the 8th?

10 A. Yes.

11 1272. Q. So, we know from that that a  
12 cooperation agreement was entered into with the Knox  
13 family, right?

14 A. Yes.

15 1273. Q. Have you ever seen a copy of that  
16 cooperation agreement?

17 A. I believe I have. I believe it's in  
18 the documents I have turned over to my counsel.

19 1274. Q. Can I have an undertaking to produce  
20 any and all documents that either are or relate to  
21 the cooperation agreement that we've referred to and  
22 that Mr. McKenzie referred to in cross-examination  
23 on February 3rd and 8th?

24 A. I can't be sure that it's the same  
25 document that he referred to, but we can use our

1 best efforts to produce anything we find that would  
2 fit that description.

3 1275. Q. Whether he referred to it or not,  
4 anything that fits a description of a cooperation  
5 agreement with the Knox family in respect of the  
6 litigation.

7 MR. EPSTEIN: We'll undertake to do  
8 that.

U/T

9 1276. MR. SILVER: Including emails that may  
10 have gone back and forth with the Knoxes to  
11 negotiate the terms of that agreement, any  
12 and all.

13 MR. EPSTEIN: We'll make our best  
14 efforts to see what's there.

U/T

15  
16 BY MR. SILVER:

17 1277. Q. We also know that additional  
18 payments were made. Before I get there, do you  
19 remember reading the cooperation agreement?

20 A. It was among the documents that were  
21 located this past week. I have skimmed it.

22 1278. Q. When you say they were located this  
23 past week, you're talking about the computer Muskoka  
24 search or what?

25 A. Well, what I'm talking about...as we

1           were getting a start on the undertakings already  
2           issued we started to really examine the electronic  
3           documents that we had, we came across them and I  
4           think it was either a date search or a name search  
5           that we did.

6       1279.           Q.       But do you know if you found them in  
7           the documents that Muskoka Computer were able to  
8           retrieve, or in the part of the file that Mr.  
9           McKenzie gave back to you?

10                    A.       That I can't say. I would have to  
11           ask Ms. Ball.

12       1280.           Q.       When you produce documents, can you  
13           let us know where they came from, as between those  
14           two places?

15                    MR. EPSTEIN:       Whether she found the  
16           documents from either...

17       1281.           MR. SILVER:       From Computer Muskoka  
18           retrieval or McKenzie return of electronic  
19           data. And we should all know what that  
20           means.

21                    MR. EPSTEIN:       We'll ask Ms. Ball.                   U/T

22

23       BY MR. SILVER:

24       1282.           Q.       So, you skimmed the agreement. Do  
25           you remember any of the terms?

1                   A.       In general, it appears to be an  
2                   agreement that Mr. Allard agrees to contribute funds  
3                   to litigation involving Kingsland Estates in  
4                   exchange for security.

5       1283.           Q.       So, that would be an agreement  
6                   between Mr. Allard and the Knoxes?

7                   A.       Yes, I believe they were signed by  
8                   Marjorie Knox.

9       1284.           Q.       Do you know when that was signed?

10                   A.       There was a series of dates. I  
11                   think the earliest one I saw goes back to 1998.

12       1285.           Q.       So, you're going to produce that.  
13                   But that's a cooperation agreement between, I guess,  
14                   Knox and Allard?

15                   A.       That's correct.

16       1286.           Q.       But it wasn't specific to  
17                   cooperation in the lawsuit? Or maybe it was  
18                   amended...

19                   A.       Some of the later documents may be  
20                   related to this lawsuit. But, again, I'm not  
21                   entirely certain.

22       1287.           Q.       Just so that I get what I need, the  
23                   cooperation agreement that I was referring to that  
24                   Mr. McKenzie testified about in cross-examination  
25                   was a cooperation in the lawsuit. And so, I would



1           actually like any and all...so, if there was a  
2           cooperation agreement between Allard and the Knoxes  
3           before the lawsuit was started, that's fine. And if  
4           it extends to include the lawsuit, that's fine. But  
5           if there's also separate documentation indicating  
6           cooperation in respect of a lawsuit, I'm  
7           specifically interested in that.

8                     A.       I think that's covered by the  
9           undertaking. I understand it to be covered by that.

10                    MR. EPSTEIN:       We'll produce any  
11           cooperation agreements relating in any way  
12           to Kingsland Estates. U/T

13

14       BY MR. SILVER:

15       1288.           Q.       Because it came to pass that through  
16       McKenzie, Allard was paying money to the Knoxes for  
17       their cooperation, right? That's what it would  
18       appear from what we're looking at.

19                    MR. EPSTEIN:       Sorry, Allard was paying  
20       money to...

21

22       BY MR. SILVER:

23       1289.           Q.       Through McKenzie, Allard was paying  
24       money to the Knoxes for their cooperation in the  
25       lawsuit.

1                   A.       I can't say whether it was for  
2 cooperation in the lawsuit, because the information  
3 that I have just relates to payments for I believe  
4 lawyer's fees and other expenses. But I believe  
5 they were related to the subject matter of this  
6 lawsuit, one way or another.

7       1290.           Q.       And what's clear is in June of '07,  
8 at least \$6,000 in cash went to Jane Goddard. And  
9 it appears to be in respect of a third party,  
10 Leonard St. Hill.

11                   A.       Yes.

12       1291.           Q.       And then if you go in the same  
13 Exhibit I, if you can find the February 23, 2009  
14 account. No, it's the trust statement. And it  
15 happens to be a very useful trust history that's  
16 attached to the February 23rd, 2009 account.

17                   A.       What exhibit is that?

18       1292.           Q.       It's I. So, if you find the  
19 account...it's really a lengthy account. And it's  
20 got handwriting on the top saying, "Transferred".  
21 Whose handwriting is that?

22                   A.       I believe that's Sunny Ware's.

23       1293.           Q.       What does that mean, to your  
24 knowledge?

25                   A.       I don't know.

1           1294.           Q.       But you believe this to be a copy of  
2                            an account rendered by Crawford, McKenzie, McLean,  
3                            Anderson and Duncan to its client, Nelson Barbados  
4                            Group Ltd. on or about February 23rd?

5                            A.       Yes.

6           1295.           Q.       And you believe that the actual  
7                            account that was rendered, notwithstanding that it  
8                            totals now, if you go to page...well, the pages  
9                            aren't numbered, but the end of the account.

10                          A.       Yes.

11          1296.           Q.       Go back a couple of pages, please,  
12                            to the page that has the totals. And the last entry  
13                            on the account is February 23rd, 2009, and it says,  
14                            Final account. Do you see that?

15                          A.       Yes, I do.

16          1297.           Q.       And I take it that notwithstanding  
17                            that it said "final account", it wasn't of course  
18                            the final account.

19                          A.       Well, it doesn't appear to have  
20                            been.

21          1298.           Q.       Well, we had better make sure of  
22                            that, because...

23                          A.       Well, there's a further account of  
24                            March 23rd. And I think on a few other dates.

25          1299.           Q.       Did you figure out what's going on,

1           why the file is being indicated as a final account  
2           in February of '09?

3                   A.       No, I don't.

4       1300.           Q.       And you'll see that on that date  
5           there were 233 hours of docket entries?

6                   A.       Yes.

7       1301.           Q.       That got billed out for \$9,760.

8                   A.       Yes.

9       1302.           Q.       With all of the time allocated to  
10           Mr. McKenzie.

11                   A.       Yes.

12       1303.           Q.       To give him an effective rate on his  
13           12.4 hours of \$787 an hour?

14                   A.       Yes.

15       1304.           Q.       And when did you first discover this  
16           wonderful account? Did you know about this at the  
17           time it was being rendered?

18                   A.       I did not know these specific  
19           details. We did have some discussions about paying  
20           time. For example, this is when I started to be  
21           involved in the Miller Thomson motion. You will see  
22           that I have 11.9 hours on this account.

23       1305.           Q.       And you don't get anything for it.

24                   A.       Well, there were some arrangements  
25           to pay for my time.

1 1306. Q. So, what that means is in February  
2 '09 you knew that the file wasn't being billed in  
3 the way that it had previously, i.e., where  
4 timekeepers got their time billed and collected?

5 A. Yes, we were aware that there seemed  
6 to be a change.

7 1307. Q. And what did he tell you? How did  
8 he explain this change?

9 A. There were a number of discussions  
10 about paying for the staff time that was being used  
11 and the other resources that were being used. Mr.  
12 McKenzie, I believe, told us on a number of  
13 occasions that the client was getting upset.

14 1308. Q. With what? With you?

15 A. Me personally?

16 1309. Q. Yes.

17 A. No. Just length of time or how the  
18 file was progressing.

19 1310. Q. Amount of money spent for results  
20 achieved?

21 A. Could be. We were given...

22 1311. Q. I'm sorry, and the answer to that at  
23 your firm was Mr. McKenzie will take his time at an  
24 effective rate of \$787 and everybody else will get  
25 nothing. And then there will be a side deal

1 arranged with you so that you got compensated for  
2 your 11.9 hours. Have I got that right?

3 A. I think so, yes.

4 1312. Q. And that was something that you on  
5 behalf of your firm and Mr. McKenzie came to an  
6 agreement on in February of '09 or March, at that  
7 time?

8 A. There were discussions. I think  
9 from my partners' and my perspective, those  
10 discussions were never really completed. It was a  
11 continuing dialogue and a continuing point of  
12 disagreement. That's what actually happened.

13 1313. Q. And notwithstanding all of that, the  
14 firm allowed him to continue to bill, use the  
15 letterhead, give the appearance to the world that  
16 this was a Crawford, McKenzie law firm undertaking,  
17 at least insofar as this file was concerned.

18 A. At that time, yes.

19 1314. Q. And I take it if you could do it  
20 over again, you wouldn't do that again?

21 MR. EPSTEIN: Don't answer that.

/R

22

23 BY MR. SILVER:

24 1315. Q. Now, let's get to this trust  
25 statement which I find to be pretty handy. Again,

1           this is a firm trust statement? This is a trust  
2           statement prepared by Sunny Ware but it's a firm  
3           document.

4                   A.       It's attached to a firm account,  
5           yes.

6       1316.           Q.       The firm is responsible for the  
7           accuracy of this document, ultimately?

8                   A.       Ultimately, yes.

9       1317.           Q.       Have you reviewed it?

10                   A.       This trust statement?

11       1318.           Q.       Yes.

12                   A.       Yes.

13       1319.           Q.       And do you believe it to be  
14           accurate?

15                   A.       I do.

16       1320.           Q.       Me, too. This is attached '09, but  
17           for some reason it goes back to the beginning, maybe  
18           because there was some intention to make it a final  
19           account. So, you're giving a full trust summary at  
20           that time.

21                   A.       I believe so.

22       1321.           Q.       Do you remember why Bill McKenzie  
23           would put \$1,100 of his money into this file?

24                   A.       No.

25       1322.           Q.       Have you made any inquiries to find

1 out?

2 A. I have asked our bookkeeper to  
3 investigate the source of those funds.

4 1323. Q. Because it says "Excess funds  
5 withdrawn to pay expenses in Barbados." So, he may  
6 have...

7 MR. EPSTEIN: It looks like it was some  
8 kind of reimbursement.

9 1324. MR. SILVER: Except that he never had  
10 cash withdrawals to fund expenses for his  
11 business travelling. He always came back  
12 and put his vouchers in. So, will you give  
13 us an undertaking to advise of details...

14 MR. EPSTEIN: This account, again, just  
15 so that I got it, this is on Exhibit I,  
16 account number...

17 THE DEPONENT: Account February 23rd,  
18 2009, trust statement.

19 1325. MR. SILVER: Yes, but it's in BMC 568.  
20 So, to advise of the details of deposited  
21 trust in 568 of \$1,100 by McKenzie on or  
22 about April 20, 2007.

23 THE DEPONENT: To the extent that we can  
24 determine that information from our  
25 records.



1 1326. MR. SILVER: They're all best efforts.

2 THE DEPONENT: Yes.

3

4 BY MR. SILVER:

5 1327. Q. And then, looking down, we see  
6 received from Peterco Holdings, that's this June 18  
7 one. We know that's Peter Allard, right?

8 A. Yes.

9 1328. Q. So, we can get the bank wire  
10 transfer, but you accept that \$15,000 that came in  
11 in June of 2007 came from Allard?

12 A. I accept that, yes, based on our  
13 records, yes.

14 1329. Q. And then \$6,000 of it went out in  
15 cash to Mr. McKenzie to give to Jane Goddard.

16 A. That's the appearance, yes.

17 1330. Q. And you would agree with me that  
18 that is in furtherance of a cooperation agreement  
19 that existed between Mr. Allard and the Knox family?

20 A. That I don't know.

21 1331. Q. But you're going to find the  
22 documents and we'll find out?

23 A. We're going to do our best to find  
24 out.

U/T

25 1332. Q. And then you see on June 9, 2007...

1 A. July the 9th?

2 1333. Q. July the 9th in 2007, there's  
3 another \$8,000 that's paid to Mr. McKenzie in cash,  
4 and it indicates that he's to give that to Jane  
5 Goddard.

6 A. Yes.

7 1334. Q. And you believe that's what  
8 happened?

9 A. I do.

10 1335. Q. And that money really comes from the  
11 same \$15,000 that Allard deposited on June 18th,  
12 because he sends...

13 MR. EPSTEIN: There's another deposit of  
14 \$44,000...

15 1336. MR. SILVER: Yes, but it satisfies the  
16 account.

17 MR. EPSTEIN: True.

18 1337. MR. SILVER: So, it's really going back  
19 to the 15.

20

21 BY MR. SILVER:

22 1338. Q. Either way, whether it comes from  
23 the 44 or the 15, it comes from Allard?

24 A. I would agree with you that it  
25 appears that all of these funds were coming from Mr.

1 Allard.

2 1339. Q. So, on this specific one, what you  
3 say these records reflect is that Mr. Allard gave  
4 Mr. McKenzie money or deposited into trust into one  
5 of the firm's trust accounts money that Mr. McKenzie  
6 withdrew in cash and gave to Jane Goddard.

7 A. That is what is reflected in this  
8 record, yes.

9 1340. Q. And to the best of your knowledge,  
10 all of these receipts are from Mr. Allard?

11 A. As I answered earlier, I believe  
12 that ultimately is true, although you will note that  
13 a number of times it shows transferred funds to  
14 Nelson Group to pay account. So, received from  
15 Nelson Group, it says, and a number of entries. I  
16 believe though, that, according to our records,  
17 those funds ultimately had been received from Mr.  
18 Allard.

19 1341. Q. Not ultimately, directly had been  
20 received from Allard and Mr. McKenzie advised Sunny  
21 Ware to describe it on this statement as having been  
22 received from Nelson Barbados.

23 A. Yes.

24 1342. Q. Even though they came from Allard.  
25 Another way of putting that is Allard is Nelson

1 Barbados.

2 A. I don't think that's fair.

3 MR. EPSTEIN: Just so we're clear on one  
4 point, do you know for a fact that Mr.  
5 McKenzie instructed Ms. Ware to describe it  
6 in this way?

7 THE DEPONENT: I don't have that direct  
8 evidence. We have located some discussions  
9 which suggest that this was a concern that  
10 it be shown as coming from Nelson Barbados.

11

12 BY MR. SILVER:

13 1343. Q. Do you have that in writing?

14 A. I believe that's something we found.

15 1344. Q. Are you producing that?

16 A. I have provided that to my counsel  
17 for review and it's part of the undertakings we're  
18 preparing.

19 1345. Q. Well, does one of the undertakings  
20 call for the production of that document?

21 A. I believe it related to the source  
22 of the funds in our firm records.

23 MR. EPSTEIN: My client gave me some  
24 documents this morning.

25 1346. MR. SILVER: Well I'll just ask...I'm

1 going to take emails re...

2 MR. EPSTEIN: We'll give you an  
3 undertaking to provide a written...what do  
4 you think, this was a written instruction?

5 THE DEPONENT: I believe it was emails.

6 MR. EPSTEIN: Or an email.

7 1347. MR. SILVER: Emails re descriptions on  
8 accounts. Is that what it was about?

9 MR. EPSTEIN: Is this from Mr. McKenzie?

10 THE DEPONENT: It was exchanges  
11 involving Mr. McKenzie and Ms. Ware and it  
12 was discussions about protecting the  
13 ability to collect costs in this proceeding  
14 by ensuring that we differentiated the  
15 funds in that matter.

16 MR. EPSTEIN: So, we will provide those  
17 emails, too.

U/T

18

19 BY MR. SILVER:

20 1348. Q. And that's another way of saying he  
21 wanted the records to show that the money was coming  
22 in from Nelson Barbados even though it was coming in  
23 from Allard, because if he got successful down the  
24 road, it would be easier to advance his cost  
25 arguments.

1                   A.       I believe that was the gist of the  
2                   communications.

3       1349.           Q.       Thank you, and we'll wait to see  
4                   those emails. So, just flipping through this trust  
5                   statement, there's a couple more entries that I'm  
6                   interested in. And that would be your view in  
7                   respect of all of these indications that money came  
8                   from Nelson Barbados. It happened in the same way?

9                   A.       I believe so. I believe that the  
10                  documents we produced today suggest that as well.

11       1350.           Q.       The trust documents?

12                  A.       Yes.

13       1351.           Q.       So, on October 2nd...

14                  A.       Of which year?

15                  A.       ...of '07, in net effect, this entry  
16                  is showing that money came from Allard and was  
17                  paying Alair Shepherd. That's the lawyer in  
18                  Barbados.

19                  MR. EPSTEIN:       Again, it shows it from  
20                  Nelson Barbados Group, but based on her  
21                  earlier answer, she believes that the  
22                  ultimate source of that was Allard and paid  
23                  Alair Shepherd.

24

25       BY MR. SILVER:

1 1352. Q. So, in effect, Allard was paying  
2 Alair Shepherd?

3 A. I believe that's accurate.

4 1353. Q. And Allard was paying for the  
5 security expert, Allan Bell?

6 A. Yes.

7 1354. Q. And Allard was paying for Globe Risk  
8 International. That's another one of the security  
9 investigations.

10 A. I'm pretty sure that's Allan Bell's  
11 company. That was the part of the file I was  
12 involved in. It seems to be Allan Bell's company.

13 1355. Q. Allan Bell's company got a retainer  
14 and then another \$18,000 on January 3rd?

15 A. I believe that was the account for  
16 their investigation and report.

17 1356. Q. And then February 4th, 154 comes in  
18 and that all goes to Crawford, McKenzie, the law  
19 firm?

20 A. Well, that's how the money flowed,  
21 yes.

22 1357. Q. And then on February 5, 2008, Mr.  
23 Allard sends in \$2,840 and \$2,850 goes out to David  
24 Kleiman.

25 A. Yes.

1 1358. Q. Do you know who David Kleiman is?

2 A. In December of 2009 there was one in  
3 a series of discussions between myself and Mr.  
4 McKenzie over a number of disbursements. One of  
5 those was an account for Mr. Kleiman that he wanted  
6 paid out of our general account or out of the trust  
7 account, I can't remember which. And when I looked  
8 at that invoice, it appeared that Mr. Kleiman is  
9 some sort of computer professional in the United  
10 States, I believe in Florida.

11 1359. Q. So, in February of '08, Mr. Allard  
12 through Mr. McKenzie was paying an account for some  
13 computer specialist in Florida?

14 A. Right, yes.

15 1360. Q. Have you seen anywhere a copy of Mr.  
16 Kleiman's account that was being paid?

17 A. This particular one? No. As I  
18 said, I saw an account in December of 2009.

19 1361. Q. And was that one in respect of  
20 Kingsland?

21 A. It seemed to have something to do  
22 with...I don't think I saw the names Kingsland and  
23 Nelson Barbados on it, but the request was to pay it  
24 in respect of this file.

25 1362. Q. Can you produce any and all Kleiman



1 accounts re this subject matter? So,  
2 Kingsland/Nelson Barbados?

3 A. Those that may be in our possession. U/T

4 1363. Q. Right.

5 MS. ZEMEL: And I don't mean to  
6 interrupt, but while we're on that issue, I  
7 noticed references to Mr. Kleiman also with  
8 respect to the Miller Thomson motion. So,  
9 just to broaden that with respect to  
10 anything that arose out of the Miller  
11 Thomson...anything relevant to that motion  
12 as well.

13 1364. MR. SILVER: Will you give that  
14 undertaking, produce any and all accounts  
15 re KEM and Nelson Barbados and/or the  
16 Miller Thomson dispute?

17 MR. EPSTEIN: Yes. U/T

18 THE DEPONENT: But that was part of the  
19 Nelson Barbados file.

20 MS. VOJDANI: I know, just to make sure  
21 that we're clear, it may not reference  
22 Kingsland.

23 1365. MR. SILVER: Thank you. So, the  
24 undertaking includes that. Will you  
25 produce any and all communications, too,

1 please, back and forth?

2 THE DEPONENT: Again, those that we can  
3 locate. U/T

4 MR. EPSTEIN: This is communications  
5 with...

6 1366. MR. SILVER: Between McKenzie/the law  
7 firm, et cetera, and Kleiman re the same  
8 subject matter as the undertaking to  
9 produce accounts.

10 MR. EPSTEIN: Yes. U/T

11

12 BY MR. SILVER:

13 1367. Q. And then, and we're going to come to  
14 more of these, but on February 8th, 2008, money is  
15 transferred from 568 to 543. So, that's from one of  
16 the two files to the other one.

17 A. Yes.

18 1368. Q. And it was for the purposes of  
19 covering a Broad and Cassel wire?

20 A. That's what that entry says.

21 1369. Q. Do you know what that means?

22 A. No.

23 1370. Q. You know that Broad and Cassel is a  
24 law firm in Miami?

25 A. I do now, yes.

1       1371.           Q.       And we'll go back there, I think  
2                    you've given these undertakings, but you know that  
3                    Mr. McKenzie has been in touch, in connection with  
4                    these matters, Mr. McKenzie was in contact with  
5                    Broad & Cassel as early as early 2007?

6                    A.       I believe that was the evidence from  
7                    last day, yes.

8       1372.           Q.       And monies were paid to them through  
9                    the trust account in 2007?

10                   A.       Yes.

11       1373.           Q.       And as reflected here, then a  
12                    \$50,000 retainer in 2009?

13                    MR. BRISTOW:       '09.

14                    THE DEPONENT:       I can't recall the exact  
15                    years. I recall that discussion from the  
16                    last...

17       1374.           MR. SILVER:       Anyways, I'll come back to  
18                    Broad and Cassel. Let's get through this  
19                    trust statement.

20                    MR. RANKING:       While you're looking,  
21                    would you like a break? Would that be all  
22                    right?

23                    MR. EPSTEIN:       That would be a good idea.

24

25       ---    A BRIEF RECESS

1 JESSICA DUNCAN, resumed

2 CONTINUED CROSS-EXAMINATION BY MR. SILVER :

3 1375. Q. We're dealing with conclusions that  
4 are reasonably reachable based upon the financial  
5 records that you've produced. And in particular, I  
6 want to focus on the Broad and Cassel law firm at  
7 this stage. And I know that you gave undertakings  
8 to Mr. Ranking to search files and produce  
9 documentation relating to retainers and  
10 correspondence and letters and work product. Since  
11 Monday, and since your involvement in the file,  
12 have you been finding that kind of stuff?

13 A. We've found some documents. We  
14 haven't found exactly what we were looking for with  
15 respect to Broad and Cassel. That search is still  
16 underway.

17 1376. Q. From the records, and maybe we could  
18 do it this way, what I would like you to do is turn  
19 to Exhibit K, these are the accounts in 543 to the  
20 February 19, 2007 account. Maybe it's better to do  
21 it from the ledger.

22 A. The ledger is more complete.

23 1377. Q. So, the corresponding ledger for 543  
24 is...

25 A. Exhibit A.

1 1378. Q. ...Exhibit A. So, let's go to  
2 Exhibit A and turn up January 2007.

3 A. All right.

4 1379. Q. And maybe it's best to have the  
5 account open at the same time. That was Exhibit K,  
6 February 19 account.

7 A. Yes.

8 1380. Q. And we start on January 18, and this  
9 is a good way to...

10 MR. EPSTEIN: Hold on. January 18,  
11 that's the...

12 1381. MR. SILVER: Ledger entry 538629...

13 MR. EPSTEIN: Right.

14 1382. MR. SILVER: ...is exactly the same  
15 description as in the account for Mr.  
16 McKenzie for that date. So, it's showing  
17 how it tracks from the ledger to the  
18 account.

19 THE DEPONENT: So, that's BMC 543 and  
20 the date of the account is?

21

22 BY MR. SILVER:

23 1383. Q. February 19, 2007.

24 A. Sorry. It jumps from January to  
25 March, so I'm just trying to find it.

1 1384. Q. There is a January 22, '07 account.  
2 And then right after that.

3 A. Right. It's a short account.

4 MR. EPSTEIN: So, just to confirm, your  
5 question was...you made reference to the  
6 538629 entry and you asked if it correlated  
7 with the account review plans...yes it  
8 does.

9 1385. MR. SILVER: Right.

10

11 BY MR. SILVER:

12 1386. Q. So, what Mr. McKenzie was entering  
13 into the docket that day was that he spoke to Jane  
14 Goddard...JG is Jane Goddard?

15 A. I believe that was his testimony in  
16 his previous examination.

17 1387. Q. You wouldn't deny that?

18 A. I don't deny that. I don't take  
19 issue with that.

20 1388. Q. And AS, to the best of your  
21 knowledge, is Alair Shepherd?

22 A. Again, I believe that was his  
23 testimony at cross-examination.

24 1389. Q. And JK is John Knox?

25 A. Yes, that's my knowledge.

1 1390. Q. Because we believe his docket to be  
2 accurate, he spoke to Jane Goddard, then he spoke to  
3 Alair Shepherd, and then he reviewed plans laid out  
4 with Goddard and Shepherd.

5 A. And Knox.

6 1391. Q. Goddard and Knox. And then  
7 travelled home from Barbados.

8 A. That's what's reflected in the  
9 materials.

10 1392. Q. And you believe that's what happened  
11 that day?

12 A. Yes.

13 1393. Q. Then on the 21st, PA is Peter  
14 Allard? And you could follow it in the ledger. He  
15 calls Allard. And then on the 22nd, "Call with DF".  
16 Do you know who DF is?

17 A. No.

18 1394. Q. And Nathan, we know Nathan is Mr.  
19 Best?

20 A. I believe so.

21 MR. EPSTEIN: Sorry...22nd.

22 1395. MR. SILVER: For lawyer 4, Ian, you have  
23 to go...it's 536593. You haven't spent  
24 enough time with these ledgers. Lower  
25 down.

1 MR. EPSTEIN: I got it.

2 1396. MR. SILVER: That's the same that's...

3 MR. EPSTEIN: Okay, I see that one.

4 1397. MR. SILVER: So, he speaks to Best and  
5 takes emails from...

6

7 BY MR. SILVER:

8 1398. Q. I'm not going to go through each  
9 one, but he's busy with Nathan and Allard and Knox  
10 and Goddard.

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

12 1399. Q. And on January 24th he's researching  
13 "Re new claim, final draft, and possible avenues for  
14 service". Stopping there for a second...

15 MR. EPSTEIN: Hold on, which one is  
16 this?

17 1400. MR. SILVER: January 24th. That would  
18 be 536599 in the ledger. I'm just looking  
19 at it in the account.

20 MR. EPSTEIN: Yes, I see it.

21

22 BY MR. SILVER:

23 1401. Q. And we know that the claim was  
24 issued in early February. So, would you agree with  
25 me that a reasonable conclusion was, the week before



1 the 24th he's talking to Best and Goddard and Knox  
2 and Allard and they're preparing to issue a new  
3 claim.

4 A. Yes.

5 1402. Q. And at the same time, he's blogging.  
6 Stopping there for a second, and we see that  
7 throughout his accounts.

8 A. Yes.

9 1403. Q. Do you know what he was doing when  
10 he describes "blogging"?

11 A. No, I don't. In fact, when I was  
12 participating in the Miller Thomson motion, I was  
13 told that he had nothing to do with any blogging or  
14 any websites, so I was somewhat taken aback to find  
15 this in the ledger.

16 1404. Q. Somewhat taken aback? I would say  
17 you were probably shocked. He lied to you. Right?  
18 He didn't tell you the truth.

19 A. It was certainly very different from  
20 what I was told, yes.

21 1405. Q. Have you seen these entries? I can  
22 take you to them, where it actually talks about  
23 drafting blog entries, or drafting article for blog,  
24 did you see that?

25 A. When I pulled that ledger, yes, I

1 did.

2 MR. EPSTEIN: I think she makes  
3 reference to it in her affidavit.

4

5 BY MR. SILVER:

6 1406. Q. So, based upon the records which you  
7 believe to be accurate, he was involved in blogging  
8 throughout and it would appear from some of the  
9 entries that he was actually writing the stuff that  
10 went into blogs.

11 A. That is what I took from that  
12 ledger, that's correct.

13 1407. Q. That ledger being the firm's  
14 accounting record that starts with docketts made by  
15 him into the system.

16 A. In BMC 543, yes.

17 1408. Q. And then you see, looking back at  
18 the account, he flew back to Toronto on the 18th and  
19 then he's flying back to...BGI is Barbados?

20 A. Yes.

21 1409. Q. On the 25th. And if you flip the  
22 page on the account, it says,

23 "...On January 26, my birthday..."

24 January 26, '07, he's in Barbados and he's meeting  
25 at Shepherd's office, right?

1 A. Yes.

2 1410. Q. And he's arranging for service of  
3 process, I take that that's of the Ontario action?

4 A. I believe that was the first Ontario  
5 action that got withdrawn.

6 1411. Q. Right. And then he calls with Miami  
7 lawyers and Goddard and Knox.

8 A. That's the January 26 entry, yes.

9 1412. Q. And independently, you wouldn't know  
10 who the Miami lawyers are?

11 A. No.

12 1413. Q. But if we read down, we may get some  
13 illumination on that. On the 27th he does different  
14 things...blogging, and then the 28th, he's got a  
15 call with Peter Allard and the final read-through of  
16 the Canadian action for accuracy, right?

17 A. That's January 28, yes.

18 MR. EPSTEIN: January 28, what...

19 1414. MR. SILVER: It's in the ledger, Ian.

20 MR. EPSTEIN: Okay, I see that.

21

22 BY MR. SILVER:

23 1415. Q. And then, on the 29th, there's a  
24 redraft of the statement of claim and...that's all  
25 the Canadian statement of claim?

1                   A.       That is my belief based on the  
2                   ledger entries, as I stated in my affidavit.

3       1416.           Q.       And it's being billed on 543, which  
4                   is Peter Allard.

5                   A.       Directly to Peter Allard, yes.

6       1417.           Q.       Not Nelson Barbados, no reference to  
7                   Nelson Barbados?

8                   A.       Yes.

9       1418.           Q.       And he was paid. So, Peter Allard  
10                   paid him to draft the statement of claim in the  
11                   Canadian action.

12                   A.       Yes.

13       1419.           Q.       And it wasn't even a charade of  
14                   Nelson Barbados being in between, this was directly  
15                   McKenzie and Allard?

16                   A.       Yes.

17       1420.           Q.       And for that matter, Crawford,  
18                   McKenzie and Allard.

19                   A.       Well, it was billed through our  
20                   firm.

21       1421.           Q.       And then, if you read on, he's  
22                   redrafting on the 29th. And then on the 30th, he  
23                   actually travels to Miami.

24                   A.       Yes.

25       1422.           Q.       And calls to lawyer, "calls with

1 PA", that's Allard again,

2 "...Prep for meetings with lawyers;  
3 finalizing Canadian claim..."

4 So, from this record, would you agree with me that  
5 it's reasonable to conclude that he took the  
6 Canadian statement of claim and specifically  
7 travelled to Miami to meet with Miami lawyers to get  
8 their approval of the Canadian statement of claim  
9 before it was issued?

10 MR. EPSTEIN: Well, it doesn't say  
11 exactly what was done. I mean, you can  
12 draw inferences from that, but I don't  
13 think that's...

14 1423. MR. SILVER: Well, he says,  
15 "...Prepare for meetings with lawyers,  
16 finalizing Canadian claim..."

17 THE DEPONENT: Yes, that's what it says.

18 1424. MR. SILVER: With a comma in between the  
19 two.

20 MR. EPSTEIN: You can draw the same  
21 inferences that she can. I don't believe  
22 that this witness has got any independent  
23 knowledge of what transpired in those  
24 meetings. So, you may well be correct, I'm  
25 not disagreeing with the inferences that

1                   you're drawing from those records, but  
2                   she's not in a position to...

3       1425.           MR. SILVER:       I got it.

4

5       BY MR. SILVER:

6       1426.           Q.       And then it says on January 31,  
7                   "...Meet and brief with Mike Dribin..."

8                   Well, we know that Mike Dribin is the lawyer at  
9                   Broad and Cassel, which are lawyers in Miami.

10                   A.       Correct.

11       1427.           Q.       So, the reasonable conclusion that I  
12                   suggest you can draw from your own firm's records is  
13                   that in late January he was going down, he met with  
14                   Mike Dribin of this Broad and Cassel firm, and one  
15                   of the things it appears they were discussing is the  
16                   Canadian claim?

17                   A.       Yes.

18       1428.           Q.       We know from the trust statement  
19                   attached to the next account...

20                   A.       The March account?

21       1429.           Q.       Yes, the March 23rd account. Got  
22                   that?

23                   A.       Yes.

24       1430.           Q.       He pays...you see that, US account,  
25                   page 11 of the March 23rd account.

1                   A.     So, we're looking at the US trust  
2 funds?

3     1431.           Q.     Yes.

4                   A.     Yes.

5     1432.           Q.     So, you'll agree with me that what  
6 the records appear to show is that on some date, it  
7 doesn't say when, he paid to Broad and Cassel a  
8 retainer by wire transfer in the amount of \$2,500.

9                   A.     Yes.

10    1433.           Q.     Would ledger A tell us when that  
11 payment was made?

12                   A.     It may. I think there's an entry on  
13 page 53, in late February.

14    1434.           Q.     Yes. It actually flips over to the  
15 top of 54. So, there it is, the Broad and Cassel  
16 trust account was injected on February 28, 2007,  
17 with \$2,500, which originated from Allard?

18                   A.     Yes.

19    1435.           Q.     And we know that the revocable trust  
20 was created immediately after that, March 5, 2007.

21                   A.     I'm sorry, which revocable trust?

22    1436.           Q.     There was a trust created by Broad  
23 and Cassel in Florida.

24                   A.     Are you referring to the document  
25 attached to Mr. Dribin's letter?

1 1437. Q. Yes.

2 A. Yes.

3 1438. Q. That's dated March 5, 2007.

4 A. I will take your word for it.

5 1439. Q. So, it appears as though a retainer  
6 was paid by Mr. Allard through Mr. McKenzie's office  
7 immediately before that revocable trust was drafted.

8 A. Yes.

9 1440. Q. And in fact, and I don't know if I  
10 need to take you to it, but Mr. McKenzie  
11 participated in the drafting of the revocable trust.

12 A. If that's set out in the ledger,  
13 then...

14 1441. Q. That's set out in the ledger.

15 MR. EPSTEIN: Where is that?

16 THE DEPONENT: Is that 540317?

17 MR. EPSTEIN: Is it March 2, '07?

18 1442. MR. SILVER: Say that again.

19 MS. ZEMEL: Yes, entry on March 2, 2007,  
20 page 54.

21 THE DEPONENT: The 2nd of March, 2007.

22

23 BY MR. SILVER:

24 1443. Q. Yes, well, I mean, it goes

25 throughout. There's a call, you're right, March



1 2nd...

2 A. Although I believe that's Sunny  
3 Ware's entry, I believe...

4 MS. VOJDANI: There's one down below of  
5 lawyer 4.

6 1444. MR. SILVER: No, but I'll find it...

7 THE DEPONENT: Yes, 540406, March 2,  
8 2007.

9

10 BY MR. SILVER:

11 1445. Q. Well, let me just go through the  
12 account. I'm back in the account of February 19,  
13 this is in Exhibit K, and I'm doing it from the  
14 account as opposed to the ledger.

15 A. Yes, I have it again.

16 1446. Q. So, just reading on, we dealt with  
17 January 30. January 31st, he meets and greets with  
18 Dribin and later with Jane and Kathy?

19 A. Yes.

20 1447. Q. And then if you flip over the page  
21 or even go two pages, there's a February 7th entry,  
22 Research conspiracy UN Convention, Berne Convention.  
23 It says,

24 "...Meet with JG [that's Jane Goddard] and  
25 JK to outline Miami plan and challenges..."

1 A. I see that.

2 1448. Q. Do you know what that refers to and  
3 have you seen anything in the correspondence or the  
4 files described as the "Miami plan" or the like?

5 A. There may be reference to that in  
6 the documents I've turned over to my counsel.

7 1449. Q. Well, I would like an undertaking to  
8 produce anything and everything relating to a "Miami  
9 plan", and it can be a reference to the February 7,  
10 '07 docket or otherwise relating to a strategy that  
11 involved lawyers in Miami.

12 THE DEPONENT: Can we go off record for  
13 a moment?

14 1450. MR. SILVER: Yes.

15  
16 --- DISCUSSION OFF THE RECORD

17  
18 MR. EPSTEIN: Yes, we'll give that  
19 undertaking. Off the record, Ms. Duncan  
20 has indicated there may be some privilege  
21 issues, so obviously, it will be subject to  
22 privilege issues. U/T

23 1451. MR. SILVER: Off the record, we also  
24 discussed that it might relate to other  
25 lawyers, other than Broad and Cassel. I'm

1 going to come to it, but there seems to be  
2 a Mr. Kelly who was also involved and I'm  
3 interested in all written communication or  
4 documentation to or from Mr. Kelly,  
5 assuming that he's a lawyer in Florida that  
6 was part of the Miami plan. So, will you  
7 also undertake to produce all documentation  
8 and communications back and forth with Mr.  
9 Kelly, a lawyer in Miami, a lawyer in  
10 Florida?

11 MR. EPSTEIN: Again, subject to any  
12 privilege issues.

U/T

13 1452. MR. SILVER: Right. And it will become  
14 clear that I'm entitled to this in two  
15 seconds.

16  
17 BY MR. SILVER:

18 1453. Q. So, I'm still on the February 19  
19 account, Ms. Duncan?

20 A. Yes.

21 1454. Q. And he's outlining a Miami plan,  
22 "he" being McKenzie, is outlining a Miami plan to  
23 Goddard and Knox. And your undertaking, to the  
24 extent that he outlined that plan in writing and  
25 he's outlined what the challenges are, you'll

1 produce it?

2 MR. EPSTEIN: We've undertaken to  
3 provide that.

4 BY MR. SILVER:

5 1455. Q. And then you'll see Sunny Ware...or  
6 February 8th, it says "Calls from PA", that's  
7 Allard, and,  
8 "...Emails to Miami and Bridgetown lawyers,  
9 fax to Trevor Carmichael..."

10 Do you see that?

11 A. Yes, I do.

12 1456. Q. You found the fax to Trevor  
13 Carmichael?

14 A. I don't know specifically. It may  
15 be in the bundle of documents, it may not.

16 1457. Q. Okay, will you produce the fax to  
17 Trevor Carmichael if you locate it?

18 A. If we can locate it.

19 MR. EPSTEIN: Yes.

U/T

20 THE DEPONENT: That's the February 18th  
21 document.

22

23 BY MR. SILVER:

24 1458. Q. And then February 9th, he's amending  
25 the claim and adding Leonard Nurse, one of my

1 clients.

2 MR. EPSTEIN: February 18th docket? I  
3 think we...I thought we had February 18th.

4 THE DEPONENT: Yes, sorry, 8th, I may  
5 have misspoken.

6 1459. MR. SILVER: No, February 8th.

7

8 BY MR. SILVER:

9 1460. Q. And then February 9th there is a  
10 docket entry amending the claim and add Leonard  
11 Nurse, calls with Florida lawyers.

12 MR. EPSTEIN: February 9th?

13 1461. MR. SILVER: Yes.

14 MR. EPSTEIN: Yes, we see that.

15

16 BY MR. SILVER:

17 1462. Q. And then he actually, on the next  
18 page, I'm not going to go through it specifically,  
19 but there's more of the same, but he actually  
20 travels to Miami to interview lawyers for the  
21 purposes of deciding who to retain on behalf of  
22 Allard and the Knoxes, right?

23 A. That's the February 12th of '07  
24 docket?

25 1463. Q. Yes. Do you agree with me that

1           that's what it reflects?

2                       MR. EPSTEIN:       Well, that's what it says.

3                       It speaks for itself.

4                       THE DEPONENT:       Yes.

5

6       BY MR. SILVER:

7       1464.           Q.       And then on the next page, he  
8                       prepares for, meets with litigation lawyers, "and  
9                       choose to call with PA."

10                      A.       I see that, yes.

11       1465.           Q.       Then in the next entry on the 14th,  
12                      it says,

13                      "...Retainer agreements with two  
14                      litigators..."

15                      Have you see those? Do you know what documents he's  
16                      talking about?

17                      A.       No, that is something we're  
18                      searching for. We have not located it.

19       1466.           Q.       So, the undertaking that you're  
20                      searching for...there should be a specific reference  
21                      to produce retainer agreements with two litigators  
22                      referenced in the February 14th docket. And then it  
23                      says, February 16th,

24                      "...Calls with lawyers re: creation of  
25                      trust, redrafting instructions..."

1           So, you agree with me that it's Mr. McKenzie that's  
2           having the discussions with the lawyers about  
3           creating a trust?

4                    A.       That is what is reflected in that  
5           docket entry.

6       1467.           Q.       And then if you go to the March 23rd  
7           account, which picks up in this time period, he's  
8           researching alternate service arrangements for WIP,  
9           that's on the 17th?

10                   A.       Yes.

11       1468.           Q.       And again, that's the Canadian  
12           action, right, it would appear?

13                   A.       I believe so based on the timing. I  
14           don't know independently.

15       1469.           Q.       And then if you look down at  
16           February 21, this is what I was getting at, it says,  
17                    "...Redraft revocable trust, emails to and  
18                    from JG..."

19           Let me start at the beginning. It says, "Calls with  
20           Alair", so he speaks to Shepherd, he speaks to  
21           Goddard. Who is Curtis? You don't know?

22                   A.       I don't know.

23       1470.           Q.       Do you know who Marnie is?

24                   A.       Marnie is Peter Allard's assistant,  
25           one of them.

1 1471. Q. And then it says,  
2 "...Redraft revocable trust, emails to and  
3 from Jane Goddard and the Miami lawyers..."  
4 That's presumably Dribin. I would like specifically  
5 to see a copy of any and all emails that passed  
6 between Mr. McKenzie and Mr. Dribin.

7 A. That we have copies of.

8 MR. EPSTEIN: Yes, we'll look for that.

9 1472. MR. SILVER: To and from.

10 THE DEPONENT: Are you talking about on  
11 that particular date or any date?

12 1473. MR. SILVER: No, any date.

13

14 BY MR. SILVER:

15 1474. Q. So, sticking with the focus of Broad  
16 and Cassel, from the accounts it seems as though  
17 that they were retained in the January and February  
18 2007 time period.

19 A. That's what seems to be the case  
20 from this ledger, yes.

21 1475. Q. A retainer of \$2,500 was paid to  
22 them at that time?

23 A. In February of 2007, that's what the  
24 ledger shows, yes.

25 1476. Q. Payments were made to them for



1 invoices after that?

2 A. I think the ledger shows that as  
3 well, yes.

4 1477. Q. And now, if we go to the ledger,  
5 which is the Exhibit A document...look at page 53 of  
6 the ledger first. I just want to go back to...

7 A. 53?

8 1478. Q. Yes.

9 A. Yes.

10 1479. Q. Just look at the bottom and help me  
11 understand it. This is receipts. So, it says...

12 A. I'm sorry, which entry?

13 1480. Q. Let's start with February 28th.  
14 Allard sends in \$72,135, right?

15 A. Yes. But that's for...

16 1481. Q. \$64,959 gets applied to one of your  
17 firm's accounts?

18 A. Yes.

19 1482. Q. \$2,976 transfers to the sanctuary  
20 matter to pay an account?

21 A. Yes.

22 1483. Q. And there's \$4,200 left, when  
23 another \$12,490 comes in from Allard as a retainer  
24 for Miami lawyers.

25 A. Correct.

1 1484. Q. Bringing the balance in the trust  
2 account to \$16,690, of which he then pays out \$2,500  
3 to Broad and Cassel.

4 A. Yes.

5 1485. Q. And \$4,200 to Wanphen Panna.

6 A. Yes.

7 1486. Q. And we've seen other entries where  
8 other amounts are paid to Mr. Dribin.

9 A. Yes.

10 1487. Q. For example, on page 62, \$2,904 is  
11 paid to Mr. Dribin.

12 A. On the 18th of April, 2007?

13 1488. Q. Yes.

14 A. Yes.

15 1489. Q. That's what that shows. And there  
16 are other accounts that are rendered and paid and  
17 you're going to produce for us whatever you can.  
18 But then if you skip to page 113, am I right that  
19 this document reveals...this is entry 611454.

20 MR. EPSTEIN: What date is it?

21 1490. MR. SILVER: January 15, 2009.

22

23 BY MR. SILVER:

24 1491. Q. Peterco funds the trust account with  
25 \$45,000, less the \$10 wire transfer fee.

1 A. Yes.

2 1492. Q. To put \$67,120 into the trust  
3 account. And on the 22nd, a Broad and Cassel IOLTA  
4 trust account bank wire transfer retainer of \$50,000  
5 is paid.

6 A. Yes.

7 1493. Q. And you're going to give me any and  
8 all details or documents surrounding that trust  
9 payment?

10 MR. EPSTEIN: We gave that undertaking.

11 THE DEPONENT: We did.

12

13 BY MR. SILVER:

14 1494. Q. In your review of the files, did you  
15 see a lot of stuff to or from the Broad and Cassel  
16 firm?

17 A. We found some references. We did  
18 not find the same amount of material as we had found  
19 for perhaps Mr. Kelly.

20 1495. Q. Do you accept that there's a  
21 possibility that between the time Mr. McKenzie  
22 removed his files from the server and the time that  
23 he had Sunny Ware restore the Nelson Barbados  
24 section, the file was cleansed by him?

25 A. There is a possibility that changes

1                   were made.

2           1496.           Q.       Have you had a computer expert look  
3                   at that issue?

4                   A.       No.

5           1497.           Q.       Will you agree to make that portion  
6                   of the file that he has...let me ask you  
7                   differently. Will you agree to make your server  
8                   available for expert analysis to be paid for by the  
9                   defendants to examine the possibility of cleansing  
10                  of the file by Mr. McKenzie or other kind of  
11                  conduct?

12                   MR. EPSTEIN:       I understand what you're  
13                   asking for. My concern is, and I have the  
14                   same concern that Ms. Duncan has, is that  
15                   the server has, of course, all of the  
16                   client documentation, not only relating to  
17                   this matter which we've included, but  
18                   others. In other words, an expert going in  
19                   there is going to have access to all of  
20                   this other information and I don't know if  
21                   there's a technical way of discretely  
22                   setting out or giving access to an expert  
23                   just to look at this issue. In principle,  
24                   I understand what you're looking for and  
25                   it's relevant, I'm not disagreeing

1 with...you're right to be able to determine  
2 if there have been records that have been  
3 cleansed. But I don't want to give an  
4 undertaking in that regard, if there's a  
5 technical way of doing it.

6 1498. MR. SILVER: Here, let me rephrase my  
7 question. Subject to appropriate  
8 protections for confidentiality, will you  
9 make the law firm server available to the  
10 defendants' experts for forensic analysis  
11 of the KEL/Nelson Barbados/Blogging/Miller  
12 Thomson related matters?

13 MR. EPSTEIN: We'll take that under  
14 advisement. I won't agree to that without  
15 understanding exactly what's involved.

U/A

16 1499. MR. SILVER: Well, it's subject to  
17 appropriate protection for confidentiality.

18 MS. ZEMEL: Can we just get off the  
19 record for one second?

20

21 --- DISCUSSION OFF THE RECORD

22

23 1500. MR. SILVER: So, we're back on the  
24 record and the under advisement that...we  
25 couldn't shake Mr. Epstein from his

1 position. So, the under advisement remains  
2 as he stated before we went off the record.

3

4 MR. EPSTEIN: Correct.

5

6 BY MR. SILVER:

7 1501. Q. Ms. Duncan, I would like to just  
8 look at a couple more entries in your Exhibit A.  
9 And I'm, in particular, now going to look at an  
10 entry for, and this is off the ledger, because not  
11 everything gets into the account.

12 A. Correct.

13 1502. Q. So, I'm looking at page 5. And  
14 entry 487453.

15 A. What date is it?

16 1503. Q. November 7th.

17 A. Yes.

18 1504. Q. And it says, he travels at half rate  
19 down to, I don't know where, it doesn't say. And  
20 then it says "Discussions with PA", we know that's  
21 Allard. And "drafting 15 percent assignment  
22 contract." Do you know what that is?

23 A. No, I don't.

24 1505. Q. Have you seen any reference to a 15  
25 percent assignment contract in your file?

1                   A.       I have not found a document that  
2                   corresponds with that at this point.

3     1506.           Q.       Can you undertake to continue the  
4                   search and produce any documentation or information  
5                   that might be connected to the 15 percent assignment  
6                   contract referred to on a November 7th docket?

7                   MR. EPSTEIN:       Yes.                                   U/T

8

9     BY MR. SILVER:

10    1507.           Q.       And then I would like to go to  
11                   491468, that's the ledger number.

12                   A.       And the date, please?

13    1508.           Q.       December 5.

14                   A.       2005?

15    1509.           Q.       Actually, it's on the next page,  
16                   it's actually December 13, sorry. And the docket  
17                   entry is,

18                   "...Review memos from John and Jane re  
19                   monies is not accounted for. Call Nathan  
20                   for update..."

21                   Do you know what he's talking about there?

22                   A.       No, I don't.

23    1510.           Q.       Have you seen memos from John and  
24                   Jane re monies is not accounted for?

25                   A.       There's a large volume of material

1 from James Knox and Jane Goddard, so it may be in  
2 that volume of material.

3 1511. Q. Can you look and produce anything  
4 that seems to relate to this docket entry?

5 MR. EPSTEIN: We'll look. U/T

6 1512. MR. SILVER: And that's re the December  
7 13 docket.

8

9 BY MR. SILVER:

10 1513. Q. In your review of the file, did you  
11 see anything that looked like McKenzie writing blog  
12 entries?

13 A. No, I have not found anything that  
14 seems to be related to that, other than the docket  
15 entries.

16 1514. Q. Other than docket entries which seem  
17 to reflect an obsession with blogging.

18 MR. EPSTEIN: The documents speak for  
19 themselves, in any event.

20

21 BY MR. SILVER:

22 1515. Q. Did you know Mr. McKenzie to be a  
23 person who spent a lot of time on the internet? Or  
24 do you know?

25 A. I knew he spent a lot of time



1           emailing clients back and forth because he was quite  
2           often working away from the office, so email was a  
3           primary means of communication.  However, prior to  
4           my looking at this ledger, I was always told that he  
5           had nothing to do with blogging.

6           1516.           Q.       Well, that's what he told you?

7                        A.       That's what he told me, yes.

8           1517.           Q.       And you didn't know enough to  
9           suspect that that wasn't true?

10                      A.       No, I didn't suspect anything of the  
11           nature.

12           1518.           Q.       You didn't suspect that it wasn't  
13           true?

14                      A.       No, I didn't.

15           1519.           Q.       My colleague asked you about Wanphen  
16           Panna and you gave all sorts of undertakings  
17           to...based upon your involvement in the file, do you  
18           know what role she played?

19                      A.       Other than the invoices which we've  
20           produced, I've been unable to find anything defining  
21           what it was that was being done.

22           1520.           Q.       It's related to internet research.

23                      A.       That's the statement in the  
24           invoices.

25           1521.           Q.       And you accept that a number in

1 excess of \$150,000 got paid out to her for that? I  
2 think that's what the schedule to Gerry...

3 A. Yes, that's what seems to be  
4 reflected in the ledger.

5 1522. Q. And then we've already established  
6 that the \$250,000 that was paid for the cost of the  
7 motion for directions was funded by Allard.

8 A. That is what's reflected in the  
9 trust statements.

10 1523. Q. Can we look at Exhibit D?

11 A. To my affidavit?

12 1524. Q. Yes. You've produced this with the  
13 redactions because you've looked at them and the  
14 document descriptions tell you that it's not related  
15 to Kingsland?

16 A. That's correct. In fact, I'm noting  
17 that some of the redactions are incomplete.

18 1525. Q. And you can see part of the name.

19 A. Yes.

20 1526. Q. But the whole point of providing all  
21 of these exhibits is that in one of them you didn't  
22 complete, I won't say it out loud, the last one, but  
23 is that supposed to be redacted?

24 A. Yes.

25 1527. Q. So, we'll treat it as redacted. But

1 the whole point of doing this is to show us that the  
2 usual method in which companies get incorporated out  
3 of your law office wasn't followed here.

4 A. That's correct.

5 1528. Q. And that you've gone a little bit  
6 further, and I can't remember exactly how you came  
7 to...by doing corporate searches and finding out  
8 that the PAF, which is the...

9 A. The person authorizing filing.

10 1529. Q. ...the person authorizing filing was  
11 McKenzie's wife.

12 A. That's correct.

13 1530. Q. His second wife.

14 A. Yes.

15 1531. Q. Carolyn James?

16 A. Lisa Carolyn James.

17 1532. Q. She did some work for Bill through  
18 the office.

19 A. Yes.

20 MR. EPSTEIN: Yes, I think we've given  
21 some evidence on that last time.

22 THE DEPONENT: Yes, over the spring and  
23 summer of 2004, she was assisting with some  
24 renovations we were doing to a bathroom,  
25 some painting we were having done, some

1 purchases of office equipment.

2

3 BY MR. SILVER:

4 1533. Q. And she got paid for that?

5 A. She submitted accounts through her  
6 letterhead, on her letterhead as a lawyer. And she  
7 was paid that way.

8 1534. Q. Did you produce those accounts?

9 A. No, I didn't.

10 1535. Q. Can you, please?

11 MR. EPSTEIN: What is the relevance of  
12 that?

13 1536. MR. SILVER: Well, the relevance is  
14 that...first of all, I want to look at them  
15 to see whether she submitted any account  
16 for her services relating to the  
17 incorporation of the company.

18 THE DEPONENT: I was not able to find  
19 anything of that nature. I did search for  
20 that specifically.

21

22 BY MR. SILVER:

23 1537. Q. Is the firm saying that they're not  
24 responsible for the incorporation somehow, because  
25 he asked her to do it as opposed to Sunny Ware or

1           you or someone else?

2                   A.       The firm is saying that we did not  
3           have a corporate file for Nelson Barbados, which  
4           would be the usual procedure if we were  
5           incorporating a company. We did not have any  
6           evidence that anyone at our firm used our firm's  
7           Cyberbahn account to conduct the incorporation. And  
8           other than the docket references in paragraph 16 of  
9           my affidavit, we could find no evidence that our  
10          firm billed anyone in relation to the incorporation.  
11          So, the appearance is that Lisa James actually  
12          carried out the incorporation separately, under her  
13          own practice.

14   1538.           Q.       And you didn't know that until April  
15          of 2010?

16                   A.       That's correct.

17   1539.           Q.       Did she operate her practice out of  
18          your office?

19                   A.       No. She occasionally used our  
20          address, but she operated her practice out of the  
21          home.

22   1540.           Q.       Just looking at Exhibit E for a  
23          moment to your affidavit.

24                   A.       Yes.

25   1541.           Q.       Do you know what the change notice

1 was that was filed by Best in '09? Is that here?

2 A. No. We weren't sure how to access  
3 that.

4 1542. Q. Or the change notice of '07 that  
5 Best authorized?

6 A. No, I don't know. It is not  
7 something I have found...to date.

8 1543. Q. Then there's the NIS invoices at  
9 Exhibit G.

10 A. Yes.

11 1544. Q. Which Mr. Ranking examined you on.  
12 To cut to the chase, have I got it right that based  
13 upon your understanding, NIS was providing  
14 investigative type services to Mr. McKenzie in  
15 respect of the Kingsland matter and was billing Mr.  
16 McKenzie through the law firm for those services and  
17 those accounts were ultimately paid by Mr. Allard.

18 A. That's my understanding based on  
19 what I found in the file, yes.

20 1545. Q. And you would agree with me that it  
21 would be uncommon for a client who is a plaintiff to  
22 bill services to his own file.

23 A. Absolutely, except that this is the  
24 Allard file. It was not billed in the Nelson  
25 Barbados.

1 1546. Q. Right. This was billed to the  
2 Allard file.

3 A. That's correct.

4 1547. Q. So, these are payments to Best for  
5 services, to the best of your knowledge?

6 A. That's the best of my knowledge.

7 1548. Q. How do you know this is a company  
8 that's owned by Best?

9 A. The reason that we initially  
10 discovered that was looking at the bottom of the  
11 invoices.

12 1549. Q. donaldbest@rogers.com?

13 A. The email is donaldbest@rogers.com.

14 1550. Q. Have you ever seen emails in the  
15 file from Mr. McKenzie to that email address? Or  
16 was it all hush mail?

17 A. I'm not certain. I didn't do all  
18 the searching, but we have produced everything we  
19 could find through our counsel as of today. There  
20 may be more.

21 1551. Q. And do you know this address,  
22 whether that actually ever existed, an office ever  
23 existed at 3044 Bloor Street West?

24 A. I don't know that.

25 1552. Q. You assume that the invoices

1 accurately describe the services rendered?

2 A. I would assume so.

3 1553. Q. You don't have any reason to believe  
4 to the contrary?

5 A. I have no knowledge one way or the  
6 other.

7 1554. Q. So, when you look at the second  
8 account, November 7th, there's \$2,500 being invoice  
9 to blog research.

10 A. I see that.

11 1555. Q. You agree with me that based on this  
12 account and Wanphen Panna's time and all the docket  
13 entries, the strategy that Mr. McKenzie was involved  
14 in included a defined internet portion? Part of the  
15 strategy was to litigate through the internet, if I  
16 could put it that way?

17 MR. EPSTEIN: Well, I think it's  
18 really...you can ask Mr. McKenzie that. I  
19 mean, you can ascertain the same as she  
20 can...

21

22 BY MR. SILVER:

23 1556. Q. To the best of your knowledge, there  
24 was nobody named Nathan. You had said that you  
25 thought Nathan was...



1                   A.       Well, to the best of my knowledge,  
2                   Nathan was a name used by Donald Best.

3                   1557.           Q.       How did you find that out again?

4                   A.       I was speaking with Ms. Ball in our  
5                   offices about the type of documents we were looking  
6                   for. And we were talking about the lack of  
7                   documents directly from Donald Best or any reference  
8                   to Donald Best. She remembered that for some period  
9                   of time, at least, she knew that he had been using  
10                  the code name of Nathan. And when I pointed out  
11                  some entries to her on the ledger, she believed that  
12                  that was in relation to Donald Best.

13                  1558.           Q.       And the April 14 account, which has  
14                  an indication, "Special research investigation,  
15                  Miami project."

16                  A.       I see that.

17                  1559.           Q.       Do you know what that is?

18                  A.       No, I don't.

19                  1560.           Q.       Well, if you come across any  
20                  documentation in the file relating to Miami project  
21                  or Miami plan and Best involvement, you'll produce  
22                  it to us?

23                  A.       I've given an undertaking to produce  
24                  whatever we can find in relation to the Miami  
25                  project.

1       1561.           Q.       All right.  And there's a guy named  
2                    Sankey referred to in here.  Have you seen that,  
3                    "Call Mike Sankey."  This is in Best time and charge  
4                    docket.  For example, attached to that account of  
5                    April 14, you see the third entry, "call Mike  
6                    Sankey"?

7                    A.       I see that, March 30, 2007.

8       1562.           Q.       And then lower down, "Research with  
9                    Sankey"?

10                   A.       Yes.

11       1563.           Q.       Sankey invoice.

12                   A.       Yes.

13       1564.           Q.       He adds a \$2,200 invoice to his bill  
14                    which Allard pays.

15                    A.       Yes, I believe the total of  
16                    \$2,575.62.

17       1565.           Q.       Right.  And who was Sankey, do you  
18                    know?

19                    A.       I have no idea.

20       1566.           Q.       And have you seen any correspondence  
21                    to or from Sankey in the file?

22                    A.       No, other than this reference.

23       1567.           Q.       If you do, will you produce any  
24                    correspondence to or from Sankey?

25                    MR. EPSTEIN:        If we come across it.

U/T

1 1568. MR. SILVER: And the reference there  
2 would be Exhibit G.

3

4 BY MR. SILVER:

5 1569. Q. Okay. Then on July 23rd there's an  
6 account that interested me, July 23rd, 2007.

7 MR. EPSTEIN: Yes.

8

9 BY MR. SILVER:

10 1570. Q. And I'm looking at the first page of  
11 the time and charge docket.

12 A. So, that's the page after...okay,  
13 yes.

14 1571. Q. May 28, there's actually time  
15 charges to shred stuff.

16 A. Sorry, what's the date?

17 1572. Q. May 28th,  
18 "...Sort and scan shredding..."

19 A. I see that.

20 1573. Q. Have you seen anything that sheds  
21 any light on what that activity was?

22 A. No.

23 1574. Q. And then you'll see it says, lower  
24 down, June 12th, conference call with BMC and Peter  
25 Allard. I take it that's Bill McKenzie and Peter

1 Allard?

2 A. I believe so.

3 1575. Q. And then on the next page there's  
4 some research being conducted on Lynne-Marie  
5 Simmons. Do you see that, July 14th? That's the  
6 Chief Justice's daughter, isn't it? Former Chief  
7 Justice.

8 A. I don't know who that is. I  
9 recognize the last name, but I don't know who  
10 Lynne-Marie Simmons is.

11 1576. Q. And then research on Clyde Gitten  
12 Turney, that's my client.

13 A. I believe you.

14 MR. EPSTEIN: Where is that?

15 1577. MR. SILVER: The next entry.

16

17 BY MR. SILVER:

18 1578. Q. And then research on David Simmons,  
19 Leonard Nurse, Lionel Nurse, Mia Mottley and Richard  
20 Ivan Cox, who is my client. In your review of the  
21 files, have you seen anything that gives you any  
22 idea about what they were looking for or what they  
23 found?

24 A. No. One of the things that we were  
25 looking was work product arising from these invoices

1 and we've been unable to find any reports...

2 1579. Q. And I think you gave that  
3 undertaking to Gerry, any work product.

4 A. That's correct. That's why we were  
5 searching for it. We've, so far, been unable to  
6 locate anything.

7 1580. Q. And it's actually on the next page  
8 of the same...July 21, there's a "genealogy target  
9 research." Do you know what that is?

10 A. No, I don't.

11 1581. Q. If you can't find anything on the  
12 person, you just research his genes or something?

13 MR. EPSTEIN: I don't think it's genes,  
14 I think it's genealogy. Relatives.

15 THE DEPONENT: I have no idea. Sorry.

16

17 BY MR. SILVER:

18 1582. Q. October 18th account. And you'll  
19 see now Mr. Best, through his company, is involved  
20 with the Keltruth blog September 6, 2007.

21 A. Sorry, you're looking at the account  
22 that's labelled August 21st to October 17th?

23 1583. Q. No, I'm looking at the account dated  
24 October 18th.

25 A. I'm sorry, I couldn't find it.

1           Okay.

2       1584.           Q.       And there's entries in the time and  
3       charge docket with respect to an Anthony Reyes?

4                   MR. EPSTEIN:       What date?

5       1585.           MR. SILVER:       September 4th.

6

7       BY MR. SILVER:

8       1586.           Q.       Do you know who Anthony Reyes is,  
9       did that name ever come up?

10                   A.       No, I don't.

11       1587.           Q.       And you'll see lower down, September  
12       6th, he's speaking to McKenzie re Keltruth.

13                   A.       Yes, I see that.

14       1588.           Q.       Was NIS or Best writing entries for  
15       these blogs to your knowledge?

16                   A.       I have no idea.  However, when we  
17       were discussing security issues at that time, Donald  
18       Best was involved in those conversations.  And one  
19       of the pieces of information given to me was that  
20       the blogs contained various threats.  That was my  
21       understanding of the involvement with the blogs, was  
22       that there was threats or something contained in  
23       some of the blogs, and I was told about that.  That  
24       was the extent of my knowledge of any involvement at  
25       that time.

1 1589. Q. In the same time and charge docket  
2 you'll see an October 9th entry, "Calls and writing  
3 re Keltruth."

4 A. I see that.

5 1590. Q. And then right below that, "Called  
6 Dave Kleiman."

7 A. Yes.

8 1591. Q. Is Dave Kleiman somebody who wrote  
9 blogs or you don't know?

10 A. I have no knowledge.

11 1592. Q. We're going to try and get his  
12 account.

13 A. Yes.

14 1593. Q. And turning to an account, we've got  
15 that hush mail, we saw that before. And then right  
16 after that, November 19th. And then there's a time  
17 and charge docket for November 19th.

18 A. Yes.

19 1594. Q. It says, October 18th...it seems I  
20 understand how he docketed. He spent 2.1 hours  
21 working on the Keltruth blog and in the middle of  
22 that he had an 18 minute conversation with Bill  
23 McKenzie.

24 A. That seems to be...I agree that  
25 that's what the time and charge docket...

1       1595.           Q.       And immediately after that, he  
2                    called Dave Kleiman.

3                    A.       October 18, 12:15, yes, that's what  
4                    that says.

5       1596.           Q.       Talked to him, and then a couple of  
6                    hours later Bill McKenzie after that?

7                    A.       Yes.

8       1597.           Q.       And Kathy, that's probably Kathy  
9                    Davis.

10                   A.       I have no knowledge.

11       1598.           MR. SILVER:       I propose that we break for  
12                    the day, and I'll regroup and reorganize.  
13                    And I think I'll be 15 minutes or less on  
14                    Monday.

15                   MR. EPSTEIN:       Okay, we'll hold you to  
16                    that.

17       1599.           MR. SILVER:       But if I do it now, it will  
18                    be a half an hour or more. I think it's  
19                    better to reorganize.



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C2	Agreement between Peter Allard and Donald Best in Trust for a company to be incorporated, dated January 1, 2007	251
C3	Agreement between Peter Allard and Donald Best in Trust for a company to be incorporated, dated August 1, 2005, partially executed	252
C4	Agreement between Peter Allard and Donald Best in Trust for a company to be incorporated, dated August 1, 2005, executed by both parties	252
C5	Signed promissory note dated November 15, 2005, executed on behalf of Nelson Barbados Group Ltd., signed	253
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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 30th DAY OF APRIL, 2010 and taken to the best of my skill, ability and understanding.

}  
} Certified Correct:  
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}  
}  
}

\_\_\_\_\_

} Heidi Dummler  
} Verbatim Reporter  
}

