

ONTARIO
SUPERIOR COURT OF JUSTICE

HD/kp

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 BARBADOES INC., KINGSLAND ESTATES LIMITED, CLASSIC INVESTMENTS LIMITED, THORNBROOK INTERNATIONAL CONSULTANTS INC., THORNBROOK INTERNATIONAL INC., S.B.G. DEVELOPMENT CORPORATION, THE BARBADOS AGRICULTURAL CREDIT TRUST, HOENIX 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 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
DUNCAN on her Affidavit sworn the 22nd day of April, 2010,
taken at the offices of VICTORY VERBATIM REPORTING
SERVICES, Suite 900, Ernst & Young Tower, Toronto-Dominion
Centre, Toronto, Ontario, on the 3rd day of May, 2010.

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

| | | |
|------------------------|-----|---|
| K. WILLIAM McKENZIE | --- | for the Plaintiff |
| GERALD L.R. RANKING} | --- | for the Defendants, |
| EMMELINE MORSE } | | 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 |
| LORNE 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

--- for the Witness

IAN S. EPSTEIN

ALSO PRESENT:

Leah Anderson Vojdani

Jeffrey W. Kramer

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1 JESSICA DUNCAN, resumed

2 CONTINUED CROSS-EXAMINATION BY MR. SILVER :

3 1600. Q. Ms. Duncan, were you re-sworn this
4 morning or you to continue to be sworn from Friday?

5 A. I continue to be sworn from Monday
6 last week.

7 1601. Q. Okay, Mr. Best. What is your
8 information as to his current whereabouts or last
9 known...we have had some trouble locating him and I
10 am just interested in knowing what you know.

11 A. As I said in my testimony on the
12 26th of April, I don't know his current whereabouts
13 and it came as somewhat of a surprise to me, but
14 when his whereabouts first became an issue, I did
15 discover that the only contact and address
16 information that most of the people at the firm had
17 were the post office boxes.

18 1602. Q. Different post office boxes?

19 A. Well, there were two post office box
20 addresses mentioned in your...in an affidavit, and
21 those were the addresses that we had. Subsequently,
22 obviously we have discovered the NIS affidavit...
23 sorry, the NIS invoices with a Bloor Street address,
24 but we have reason to believe that is another post
25 office box.

1 1603. Q. And through '06 and '07 he was in
2 the office a lot?

3 A. Yes.

4 1604. Q. McKenzie was in the office and Mr.
5 Best would be in to see Mr. McKenzie?

6 A. Mr. McKenzie was not in the office
7 very often ever, really, but on days, he would
8 arrange to meet with Mr. Best. Obviously they would
9 be there at the same time, but there were also times
10 Mr. Best would drop in and just meet with Sunny
11 Ware.

12 1605. Q. And you understood that he was
13 working on this file, or did you have an
14 understanding?

15 A. I knew he was working on a number of
16 files. I knew he had been doing certainly a lot of
17 work on...starting in 2007, in September of 2007, I
18 was aware he was working on this file.

19 1606. Q. In what capacity?

20 A. That was initially unclear to me. I
21 initially thought he was acting as a security
22 consultant and then it...I was advised that he was
23 the principal of Nelson Barbados.

24 1607. Q. And that would have been in and
25 around the time the new file was opened, showing

1 Nelson Barbados as a client in '07?

2 A. No, that was around the time that I
3 was working on the security issues in...as I said,
4 it started in August of '07 and through September of
5 '07.

6 1608. Q. So it was later than when the new
7 file was opened?

8 A. Correct.

9 1609. Q. And does Mr. Best own property in
10 Ontario, to your knowledge?

11 A. I thought he did, but at this point
12 I don't know.

13 1610. Q. And when you say you thought he did,
14 you thought he owned property at locations that
15 turned out to be post office boxes, or did you know
16 of some location other than those addresses?

17 A. Well, he had...in various
18 discussions we had while we working, especially on
19 the satellite files, he talked about, you know,
20 doing renovations to his home, and various other
21 things.

22 1611. Q. And where was that home located?

23 A. Well, I thought it was one of the
24 addresses that I had been given, but obviously I was
25 wrong about that.

1 1612. Q. Do you have any information about
2 property ownership in the Parry Sound area?

3 A. No.

4 1613. Q. And Wanphen Panna, you knew her to
5 be his wife?

6 A. Yes.

7 1614. Q. And you knew her, you know her?

8 A. I have met her. I think she came to
9 the office with him once because she was quite close
10 with Sunny Ware. They were actually friends.

11 1615. Q. I see, so Mr. McKenzie's
12 relationship with Mr. Best, it would appear, goes
13 beyond professional. They appear to be friends and
14 Sunny Ware, Mr. McKenzie's assistant, is friends
15 with Mr. Best's wife. Would that be consistent with
16 your understanding?

17 A. They appeared to be close. I can't
18 speak to Mr. McKenzie's definition of friendship,
19 but they spent a really significant amount of time
20 together. They worked very closely together and Mr.
21 McKenzie spent a great deal of time with Mr. Best
22 outside of necessarily directly work-related things.

23 1616. Q. Like doing what? They shared
24 hobbies?

25 A. Well, as I mentioned in my testimony

1 on April 26th, both Mr. McKenzie and his assistant,
2 Ms. Ware, vacationed in Thailand with Wanphen
3 Panna's family. They stayed at the family home.
4 Mr. Best and Mr. McKenzie were assisting in a film
5 project of some kind that Mr. Best's son, I think,
6 was running, and that was in...somewhere in that
7 area. I am not sure. It was Thailand or Burma or
8 something of that nature.

9 1617. Q. And what time period would this be?

10 A. Certainly the summer of 2008 both
11 Mr. McKenzie and Ms. Ware spent a lot of time in
12 Thailand.

13 1618. Q. In Thailand. Was Ms. James there
14 also?

15 A. I don't know about that.

16 1619. Q. Okay.

17 A. I didn't see her in any of the
18 pictures that were shown around, so I don't know.

19 1620. Q. Well, if you come into any
20 information about Mr. Best, if he surfaces or
21 contacts the firm in terms of his whereabouts, can
22 you let us know what you learn?

23 MR. EPSTEIN: Yes, if we come across
24 that information, we will.

25

1 BY MR. SILVER:

2 1621. Q. I am just going to ask you some
3 questions about the Exhibit C documents that were
4 marked on Friday.

5 A. It is Exhibit C to this examination
6 and not to the...

7 MR. EPSTEIN: That is right. It is
8 Exhibit C. We marked it as Exhibit C for
9 identification and we did as C1 to C6.
10 That is the one, Mr. Silver, you are
11 referring to?

12 1622. MR. SILVER: Yes.

13 MR. EPSTEIN: Yes.

14 1623. MR. SILVER: Just excuse me for one
15 second.

16 THE DEPONENT: Are we off the record for
17 a moment?

18

19 --- DISCUSSION OFF THE RECORD

20

21 BY MR. SILVER:

22 1624. Q. So Ms. Duncan, I put before you
23 Exhibit C1 to C6, and these were documents that you
24 located while searching for other information to
25 answer undertakings after last Monday's cross-

1 examination.

2 A. That is correct.

3 1625. Q. And you don't know whether you found
4 them in that portion of the electronic record the
5 firm has through the recovery by Muskoka Computer or
6 that portion of the electronic file that Mr.
7 McKenzie returned after he removed everything of his
8 off the server and was asked to put the Nelson
9 Barbados stuff back?

10 A. That is correct.

11 1626. Q. But you are going to try and find
12 that out for us?

13 A. I have given the undertaking to
14 inquire, yes.

15 1627. Q. All right, and those, of course, are
16 the only electronic records that the firm has...

17 A. As far as I know.

18 1628. Q. ...relating to these subject
19 matters?

20 A. Yes, to the best of my knowledge.

21 1629. Q. And you took under advisement with
22 your counsel about making those servers available to
23 us, subject to working out something on
24 confidentiality of other clients?

25 MR. EPSTEIN: Correct.

1 BY MR. SILVER:

2 1630. Q. And in the meantime the information,
3 including...and I am going to admit I really don't
4 know what this means, but I think it is the right
5 word. The information and the metadata that now
6 exists will be preserved. And by metadata, I
7 mean...

8 A. I was going to say I don't know what
9 that means.

10 1631. Q. Well, I think metadata means all
11 this information within the server about access to
12 and moving of content within the files.

13 A. Well, I don't know how much will be
14 there because what we are accessing is on DVDs.

15 1632. Q. In both cases?

16 A. Yes.

17 1633. Q. The Muskoka...well, I guess the best
18 I could do is make sure you preserve whatever it is
19 that you have and you will, right?

20 A. Yes.

21 MR. EPSTEIN: I mean, there is no...what
22 we have and what she has been able to
23 recover will remain...

24 1634. MR. SILVER: As it is?

25 MR. EPSTEIN: ...as is. We have no...

1 Marjorie Knox doesn't appear to be through your law
2 firm?

3 A. I don't believe it was, no.

4 1641. Q. And then it says:
5 "...increased his face value of the shows
6 in action from 15 percent to 33 1/3
7 percent..."

8 A. I see that paragraph.

9 1642. Q. Do you have any information in
10 respect of that?

11 A. There may be something about that in
12 the documents I provided to my counsel.

13 1643. Q. For example, the C3 document, and
14 these documents...I don't know if anybody else cared
15 to read them over the weekend, but I did. The
16 interest is all driven off of a letter agreement
17 dated June 9th, 2004, which appears to be between
18 the Allards and the Knoxs. Is that what you think
19 you have now seen, the June 9th letter?

20 A. I think so, yes.

21 1644. Q. Can you please produce it?

22 MR. EPSTEIN: You are asking for
23 production of the June 9, 2004...

24 1645. MR. SILVER: Yes. If the file has a
25 copy of the letter agreement dated June

1 4th, 2004 that is referred to in Exhibit
2 C3, I would like it produced.

3 MR. EPSTEIN: Yes, if we have it, we
4 will produce it. U/T

5 1646. MR. SILVER: I don't want to be tricky,
6 but Ms. Duncan just said that she has it.

7 THE DEPONENT: Well, I think I...as I
8 said, I have a series of documents with a
9 series of dates. That may be one of them
10 and if we have it, we will produce it.

11 MS. MORSE: And just to be clear for the
12 record, that is June 9th, 2004. I think
13 there was...you said June 4th.

14 1647. MR. SILVER: Sorry. And so will you
15 please produce all of the documents that
16 appear to be related in any way to this
17 issue dated June 9, 2004 or otherwise.

18 MR. EPSTEIN: Yes. I mean, we will look
19 through and review what documents have been
20 located. U/T

21 1648. MR. SILVER: And produce any...

22 MR. EPSTEIN: Yes.

23 1649. MR. SILVER: You will produce the June
24 9th letter if you have it, and any other
25 documents relevant to the subject matter of

1 arrangements amongst and between Allard,
2 the Knoxs and Best and Nelson Barbados.
3 And that would cover all of the
4 relationships that we think are relevant.
5 And by the Knoxs, I mean John Knox, Jane
6 Goddard and Kathy Davis, as well as
7 Marjorie Ilma Knox.

8 MR. EPSTEIN: Can you just repeat who
9 you mean by the Knoxs? John Knox.

10 1650. MR. SILVER: John Knox.

11 MR. EPSTEIN: Yes.

12 1651. MR. SILVER: Marjorie Knox, the mother.

13 MR. EPSTEIN: Marjorie Knox.

14 1652. MR. SILVER: Jane Goddard is the
15 daughter, and Kathleen Davis is another
16 daughter. I have that undertaking?

17 MR. EPSTEIN: Yes.

U/T

18

19 BY MR. SILVER:

20 1653. Q. Now, in the document C2 it speaks of
21 advances that...the last full paragraph on the first
22 page, it says:

23 "...From time to time PA shall advance
24 reasonable funds to Nelson in an amount to
25 be agreed upon from time to time..."

1 Have you seen anything in your files indicating
2 additional agreements between Allard and Nelson or
3 Allard and Best consistent with that sentence?

4 A. The contents of Exhibit C, 1 to 6,
5 are the full extent of the agreements that we found
6 between Peter Allard and Donald Best or between
7 Peter Allard and Nelson Barbados at this time.
8 Again, I can't promise we won't find anything else.

9 1654. Q. And if you do, it is covered by the
10 last undertaking?

11 MR. EPSTEIN: Yes.

12 THE DEPONENT: Yes.

13

14 BY MR. SILVER:

15 1655. Q. But that is another way of saying
16 you didn't see in your file additional agreements
17 between Allard and Nelson of the kind suggested in
18 the first sentence of that last paragraph on the
19 first page of C2?

20 A. No, not yet.

21 1656. Q. Right. And then C3, which goes back
22 to August 1st, 2005 , it is signed by Allard and not
23 Best and speaks to the June 9th agreement. Also
24 speaks to consideration to be paid by Best to Allard
25 of \$150,000?

1 MR. EPSTEIN: Yes.

2 THE DEPONENT: Yes.

3

4 BY MR. SILVER:

5 1657. Q. In your review of the files have you
6 seen any evidence of a payment being made by Best to
7 Allard in the amount of \$150,000?

8 A. I don't believe I saw the evidence
9 of any money flowing in that direction.

10 1658. Q. In any amount?

11 A. Not that I could see, no.

12 1659. Q. Right, and there is a promissory
13 note for 150. Do you know whether that relates to
14 the...

15 MR. EPSTEIN: You are referring her
16 to...

17 1660. MR. SILVER: C4.

18 MR. EPSTEIN: ...C4?

19 1661. MR. SILVER: Right.

20 THE DEPONENT: No, I believe that is C5,
21 because C4 is an agreement that looks like
22 the same August 1st agreement with Donald
23 Best's signature on it.

24 1662. MR. SILVER: Right.

25 MR. EPSTEIN: Right.

1 1663. MR. SILVER: That has both signatures on
2 it and there is a change in it from...in
3 sub B in C3 it says 15 percent upside and
4 sub B in C4 speaks about a 0.562 interest.

5 MR. EPSTEIN: It speaks for itself.

6

7 BY MR. SILVER:

8 1664. Q. It is probably that somebody did
9 some research, probably on champerty. Anyways, you
10 don't know anything about that?

11 A. No.

12 1665. Q. And then there is a promissory note
13 at C5 for \$150,000, but that is dated in November
14 15th, 2007 and...

15 A. 2005. I am sorry, there is a 2007
16 at the top and a 2005 at the bottom.

17 MR. EPSTEIN: Sorry, just to clarify for
18 the record, it says due November 15, 2007,
19 dated November 15, 2005.

20

21 BY MR. SILVER:

22 1666. Q. I see. But I take it you don't know
23 if that is connected to the consideration called for
24 in C3?

25 A. No, I don't know.

1 at this with me, the first...

2 MR. EPSTEIN: This is entry 486335?

3 1672. MR. SILVER: Right.

4 MR. EPSTEIN: Right.

5

6 BY MR. SILVER:

7 1673. Q. And I would like you to produce, if
8 you can, this memo re strategy. It would appear
9 from the document that Mr. McKenzie had a call with
10 Peter Allard on the 30th and then the next day he
11 speaks to Goddard and Knox and sends e-mails, and
12 then he does a memo, re strategy. Can you produce
13 it, please?

14 A. If I can find it.

U/T

15 1674. Q. Thank you. It is cross-referenced
16 to Exhibit A, October 2, 2005 ledger 486335. And
17 then I am going to ask you some questions about
18 Exhibit K. This is 543 file, and rather than do it
19 from the ledger, I am going to ask some questions
20 through the accounts. Is that okay with you?

21 A. Yes.

22 1675. Q. Exhibit K.

23 A. Yes.

24 1676. Q. So you will see again the memo re
25 strategy is being transferred to the account and

1 billed to the client?

2 A. This is dated November 4th, 2005,
3 this account.

4 1677. Q. Yes, and do you see it says
5 "revised" on the account?

6 A. Yes, I do.

7 1678. Q. Do you know why? Do you know how
8 that came to be?

9 A. I believe so. There was a large
10 bunch of correspondence in the accounting folder
11 surrounding taxation issues. Mr. Allard felt he was
12 tax exempt as a Barbados resident, so an account was
13 issued that had GST as is the usual practice, and
14 there were...Mr. Allard provided, I believe, a legal
15 opinion suggesting that his accounts could be issued
16 as tax exempt, and I understand that is why,
17 incidentally, there are stars beside disbursements
18 on the ledger, because that is tax exempt status.

19 1679. Q. Mr. Ranking asked you about that?

20 A. Yes.

21 MR. EPSTEIN: It answers her earlier
22 undertakings.

23

24 BY MR. SILVER:

25 1680. Q. And that is all it means?

1 1687. Q. Yes. There is an entry for Sunny
2 Ware. It says:
3 "...E-mail from K.W.M. Draft retainer
4 letter and reply to him..."

5 Can you produce the e-mail from McKenzie to Ware and
6 her reply, including a draft retainer letter?

7 MR. EPSTEIN: We will undertake to make
8 our best efforts.

U/T

9

10 BY MR. SILVER:

11 1688. Q. You don't know who the draft
12 retainer letter was with?

13 A. No.

14 1689. Q. Did you see in your file any
15 retainer letters, or the firm's file, between Allard
16 and McKenzie?

17 A. I think there is something, at least
18 a draft, in the file. I have not had a chance to
19 examine it closely.

20 1690. Q. Okay. If it is not the same draft
21 retainer letter that is being referred to on October
22 20th, 2005, can you produce the document that you
23 think you might have seen?

24 A. Yes.

25 1691. Q. So the undertaking is for you to

1 produce what is mentioned on October 20th and/or any
2 other retainer related documents re McKenzie and/or
3 the law firm and Allard directly or indirectly,
4 okay?

5 A. Yes.

U/T

6 1692. Q. And then, Sunny Ware in the next
7 entry says...this is back on October 20th?

8 A. Yes.

9 1693. Q. I guess she put more than one docket
10 in for the same day, right?

11 A. Yes, she would do a separate...she
12 would...

13 1694. Q. Docket events?

14 A. She would docket events as they
15 happened.

16 1695. Q. And so she says:

17 "...Review various e-mails exchanged.

18 K.W.M. P.A. K.G.E. re blog strategy..."

19 Do you know who K.G.E. is?

20 A. No.

21 1696. Q. Can you produce any or all of the e-
22 mails referred to in that docket entry, please?

23 MR. EPSTEIN: And we will make our best
24 efforts to see if we can locate them.

U/T

25

1 BY MR. SILVER:

2 1697. Q. Okay, thank you. You would agree
3 with me that if we start with the assumption that
4 the dockets are accurate, the records that you have
5 produced indicate that McKenzie was directly
6 involved in a blog strategy from virtually the very
7 outset of his involvement in the matter?

8 A. That is what the docket entries
9 reflect.

10 1698. Q. And the subsequent docket entries in
11 respect of blogging reflect hundreds of hours of Mr.
12 McKenzie's time dealing with blogging?

13 A. I haven't counted the hours, but I
14 did see a large number of entries that were titled
15 "Blogging".

16 1699. Q. Right, and we assume the accuracy is
17 because you believe people entered accurate dockets
18 and because it got billed to the client and paid?

19 A. Correct.

20 1700. Q. Your firm wouldn't bill the client
21 for something that wasn't done and wouldn't accept
22 money for something that was done, and so...

23 A. That is not my policy.

24 1701. Q. Right, so from the firm's
25 perspective, Mr. McKenzie spent hours and hours on

1 blogging related matters and he billed it to the
2 client and the client paid for it?

3 A. Yes.

4 1702. Q. On October 23rd...this is page 4.
5 Again, starting at the top. It is just to give
6 context...Mr. McKenzie calls an investigator and
7 Allard and reviews blog strategy, "review blog
8 strategy." I mean, to the extent that the blog
9 strategy is confirmed in writing in any regard, will
10 you produce documents?

11 A. So would this just be an expansion
12 of the fourth undertaking?

13 1703. Q. Yes, exactly, in the same way that I
14 expanded the one before that with respect to
15 retainer letters. If you see anything that sheds
16 light on blogging or an overall blog strategy, we
17 would like it produced.

18 MR. EPSTEIN: We will look for that.

19 1704. MR. SILVER: And then in the same day on
20 October 20, it says:

21 "...Prepare copies of..."

22 MR. EPSTEIN: Sorry, where are you?

23 THE DEPONENT: What is the date?

24

25 BY MR. SILVER:

1 1705. Q. October 22.

2 A. Okay.

3 1706. Q. It says:

4 "...Prepare copies of PA loan documents..."

5 I would like the same undertaking, produce any and
6 all documents that relate to "PA loan documents"
7 referred to in the October 22nd account entry, and
8 security documents, because I think that in the
9 same...may be related to the same thing. The
10 October 23rd entry for McKenzie says:

11 "...Review security documents. Review PWC
12 documents from Peterco..."

13 So in the same undertaking, that is the
14 information...

15 MR. EPSTEIN: We will make our best
16 efforts to look for those.

U/T

17

18 BY MR. SILVER:

19 1707. Q. And again, without getting into
20 every detail, but you say you are not sure who JK
21 and JG are, but you will agree with me that your
22 firm's accounts show extensive communication between
23 McKenzie and JK and JG?

24 A. Yes.

25 1708. Q. E-mails to and from and telephone

1 conversations and just...they appear to reflect a
2 direct and active participation by JK and JG.

3 A. Well, I can't speculate on direct or
4 active. I can only state that the blog entries...

5 MR. EPSTEIN: And the records speak for
6 themselves.

7 THE DEPONENT: ...will speak for
8 themselves, yes.

9 MR. EPSTEIN: The docket entries speak
10 for themselves.

11

12 BY MR. SILVER:

13 1709. Q. All right, and it would appear that
14 the Canadian company was part of the plan as early
15 as October 24th, 2005?

16 A. That seems to be the statement in
17 the ledger entry, yes.

18 1710. Q. Okay, and the disbursements reflect,
19 on page 6...sorry, let's go to page 5 for a second
20 and make sure that we understand...we, the rest of
21 us, understand that on this billing to Allard of
22 November 4th, total fees of \$37,307 were billed, of
23 which \$33,920 were allocated to Mr. McKenzie,
24 \$1,787.50 to a student, Andrew Treash, and 1,600 to
25 Sunny Ware?

1 A. Yes.

2 1711. Q. And disbursements that were claimed
3 on this invoice included an agency account to NIS?

4 A. On page 6?

5 1712. Q. On page 6.

6 A. Yes.

7 1713. Q. And then I actually you have
8 produced that invoice, if you go to the other...

9 A. Yes.

10 1714. Q. And what this appears to reflect is
11 that right from the very beginning money was going
12 out to Donald Best.

13 A. It was going at least to his
14 company, yes.

15 1715. Q. To his company, and it appeared to
16 be money being spent as a third party disbursement
17 on a file?

18 A. Yes.

19 1716. Q. And your records and the firm
20 records don't reflect any of those payments to NIS
21 as being anything but a payment for a third party
22 disbursement on a file?

23 A. Our firm records show an invoice
24 coming in from NIS, as we have produced, and a
25 payment to NIS, yes.

1 1717. Q. And all of those appear to be in the
2 nature of a third party disbursement on a file?

3 A. Correct.

4 1718. Q. Turning to the December 6th account,
5 which is the next one, the November 7th entry...

6 A. On the first page?

7 1719. Q. Yes. It is Mr. McKenzie's, and it
8 speaks to a drafting of a 15 percent assignment
9 agreement?

10 A. Assignment contract, yes.

11 1720. Q. Yes. Now, do you know what that is?

12 A. No.

13 1721. Q. Can you look in your file and see
14 whether you can locate this 15 percent assignment
15 contract that Mr. McKenzie appears to have drafted
16 on November 7th?

17 A. Assuming it is not one of the
18 documents in Exhibit C.

19 1722. Q. I am assuming, just because there
20 are dates.

21 A. Right.

22 1723. Q. If it is, then...I mean, if you can
23 confirm by looking at your file that it is one of
24 the documents in C, then I would accept that
25 information.

1 A. I can't...I don't have the direct
2 knowledge. All I can do is...

3 MR. EPSTEIN: I mean, are you going to
4 have any better...how are you going to...
5 other than looking at these documents, are
6 you going to have any other source of
7 information available to answer that
8 question?

9 THE DEPONENT: No.

10

11 BY MR. SILVER:

12 1724. Q. Why? She can go back into the
13 server and see what was restored by Muskoka Computer
14 and/or McKenzie. Mr. McKenzie has only given you
15 the Nelson Barbados...

16 A. That is on DVD.

17 1725. Q. ...on a DVD.

18 A. I mean, we have been searching on
19 the DVD.

20 1726. Q. So I would like you to go back to
21 the DVD in November of 2005 and see whether you can
22 find anything that refers to a 15 percent assignment
23 contract. If you can, you can. You can't, you
24 can't.

25 A. So we will try that best efforts,

1 then.

2 1727. Q. They are all best efforts.

3 MR. EPSTEIN: Yes.

4 THE DEPONENT: Thank you.

5

6 BY MR. SILVER:

7 1728. Q. And Ms. Duncan, to your understand,
8 Mr. McKenzie has got a whole electronic data at his
9 house? I mean, if I understand you correctly, he
10 took everything and gave you back the Nelson
11 Barbados stuff, which didn't include November 7th,
12 2005. It probably started at a later date, and
13 therefore all these records that might exist,
14 McKenzie has them, to the best of your knowledge?

15 A. I don't know what he has or doesn't
16 have. I can only speak to what we know. We have
17 Stacey Ball witnessing. I can speak to the practice
18 of Mr. McKenzie, which was that he kept...

19 1729. Q. Everything.

20 A. He liked to keep a paperless office
21 as much as possible. He liked to have all his
22 documents scanned and sent to him by e-mail. So
23 insofar as that practice would have been followed by
24 Sunny Ware, he should have copies of most of this,
25 but I don't know if he has got them or not.

1 1730. Q. Certainly you don't have all of
2 that, because he took it and only gave some back,
3 right?

4 A. I don't know. That is the...I mean,
5 I don't know.

6 1731. Q. Well, you know he took it. You told
7 us that...

8 A. I told you...

9 1732. Q. ...the server had all of his files
10 and then one day they were all cleaned out.

11 A. That is correct.

12 1733. Q. And then you know that he gave
13 back...you know what he gave back. He gave back one
14 file.

15 A. To my knowledge, yes.

16 1734. Q. And you don't even know if he gave
17 everything back within that file?

18 A. As I said, I have no knowledge of
19 that.

20 1735. Q. And he didn't give back any of the
21 other files?

22 A. When you say any of the other files,
23 I am not sure if that is accurate because there were
24 people working on other files with him. I am not
25 sure if there were other files replaced for their

1 use.

2 1736. Q. But in terms of the Nelson Barbados
3 Kingsland, he only gave back the Nelson Barbados
4 file, not the Allard file?

5 A. Correct. The Allard file was not
6 restored to our server.

7 1737. Q. Right, so that is the point. One
8 day the Allard file was there. He removed it, and
9 then you asked for stuff back and he put back Nelson
10 Barbados' stuff, but not the Allard stuff?

11 A. Yes. At the time we thought the
12 Nelson Barbados stuff was the extent of it.

13 1738. Q. Right. Okay, the disbursements on
14 page 6...

15 A. Of this same account?

16 1739. Q. Yes. NIS was paid twice?

17 A. I am sorry, which account?

18 1740. Q. Page 8, sorry.

19 A. Thank you.

20 1741. Q. NIS was paid twice for a total of
21 \$7,500 and it relates to...

22 A. Yes, there were two different...

23 1742. Q. ...two invoices. Once is special
24 blog research?

25 A. Yes.

1 1743. Q. To the extent that Mr. Best was
2 doing that and based upon your knowledge, would he
3 have been working directly with Mr. McKenzie on
4 special blog research?

5 MR. EPSTEIN: Do you know?

6 THE DEPONENT: I don't know.

7

8 BY MR. SILVER:

9 1744. Q. And then moving to the January 20th
10 account, you read Mr. McKenzie's cross-examination
11 from February 3rd and 8th?

12 A. Yes.

13 1745. Q. You will recall that I cross-
14 examined him on meetings that he appeared to have
15 with my client, Richard Knox, in the beginning of
16 2006?

17 A. Richard...

18 1746. Q. Cox.

19 A. Thank you. He is not a member of
20 the Knox family.

21 1747. Q. No. He is not looking to join
22 either. You recall that in the cross-examination...

23 A. Yes, I do.

24 1748. Q. ...and then we had e-mails and it
25 showed that he had been involved a lot earlier than

1 he claimed under oath? And I just want confirmation
2 that these accounts reflect that Mr. McKenzie did,
3 in fact, contact Mr. Cox starting on December 22nd,
4 so page 4 of the account.

5 A. There is a mention of Richard Cox in
6 that entry, yes.

7 1749. Q. Right, calls would have been then on
8 January 7th, which the exhibits to the cross-
9 examination show was the meeting date. If you look
10 at the entry for January 7th, there in fact was a
11 meeting that Mr. McKenzie had with Richard and he
12 has got it as "Gerald". It is really Gerard Cox.

13 A. Yes, I see that.

14 1750. Q. So the meetings that Mr. McKenzie
15 was cross-examined on were, in fact, reflected in
16 billings from the firm to the client and paid for by
17 Peter Allard?

18 A. Yes.

19 1751. Q. And Mr. McKenzie has an entry for
20 January 9th.

21 A. I see it.

22 1752. Q. It says:
23 "...E-mails from JK, JG. Review documents
24 from JK. Called PA, TH..."

25 Which I think is Tony Hoyos:

1 "...E-mail to PA and discussion with him
2 about strategy for this month, and then we
3 need a final repercussions discussion
4 before taking the next major step..."

5 Do you see that?

6 A. I do.

7 1753. Q. Do you know what that refers to?

8 A. No.

9 1754. Q. Is there anything in your records
10 that...or can you look at your records in and around
11 that time frame and see whether you can find any
12 communications that relate in any way to the January
13 9th, 2006 account entry?

14 MR. EPSTEIN: We will make our best
15 efforts to look for that.

U/T

16

17 BY MR. SILVER:

18 1755. Q. Okay, and then looking at the March
19 30th account...

20 A. The March 30th, 2006?

21 1756. Q. Yes, the March 1 entry.

22 A. On the first page?

23 1757. Q. Yes, it says:

24 "...Calls with cameramen and plans for
25 footage we need for litigation. Blogging

1 and plans for pictures to be taken in
2 Barbados to be submitted to blogs..."

3 A. I see that.

4 1758. Q. Can you search your file and produce
5 any documents that in any way relate to that account
6 entry?

7 MR. EPSTEIN: This account entry just
8 makes reference to calls. It doesn't make
9 a reference to any documents.

10 1759. MR. SILVER: No, I know, but you
11 might...I know that Jessica doesn't have
12 this file, but if she had the file, you
13 might see a reference to what they were
14 taking pictures for and of who and what
15 blog they were going to submit it to,
16 because there are e-mails, you know, before
17 and after. Like, if you look at March 2nd,
18 the next day, it says:

19 "...Blogging issues. Review e-mails. JG
20 and JK, PA. Calls with PA..."

21 Like, there is a good chance that those e-
22 mails dealt with the picture taking that is
23 referred to the day before.

24 MR. EPSTEIN: I will make best efforts
25 to see if we can find documents relating to

1 the March 1 entry. U/T

2 1760. MR. SILVER: And similarly, the March
3 3rd entry, if there is any documents
4 relating to the retainer of Nathan to do
5 the video shoot.

6 MR. EPSTEIN: All right. U/T

7

8 BY MR. SILVER:

9 1761. Q. Thank you. On March 10th it speaks
10 of an encrypted e-mail to JK. IT says:

11 "...Blogging, encrypted e-mail to JK..."

12 A. It is March?

13 1762. Q. Tenth. Do you know what that refers
14 to, "encrypted e-mail"?

15 A. When I worked with Mr. McKenzie on
16 the satellite files, he used a program called PGP to
17 encrypt e-mail. I don't know if that is what went
18 on here.

19 1763. Q. Well, what does encrypting e-mail
20 mean? What happens if I sent an encrypted e-mail?

21 A. Both parties have to have the key.
22 The e-mail is then placed essentially in a code, a
23 computer generated code, so that if someone were to
24 intercept it on its travels between your computer
25 and my computer, for example, they would need the

1 key to unscramble it, or they would need a very
2 sophisticated computer program and a lot of time.

3 1764. Q. And to your understanding, were all
4 of Mr. McKenzie's e-mails to JK encrypted or not
5 encrypted?

6 A. I have no idea.

7 1765. Q. Well, if you see anything in your
8 file about encrypted e-mails to anybody, can you
9 produce it?

10 MR. EPSTEIN: You know, that is such an
11 enormous undertaking. You know, that is
12 saying is there anything in any of her
13 files. I mean, it is just massive. You
14 know, it has got to be reasonable
15 undertakings and we have gone...

16 1766. MR. SILVER: As you go through the
17 files...

18 MR. EPSTEIN: If, when we go through the
19 files, we come across something that makes
20 reference to encrypted e-mails, we will
21 produce it, but we are not going to review
22 all of our files to see if there is any
23 reference to encrypted e-mails. It is
24 too big of an undertaking.

U/T

25 1767. MR. SILVER: I accept that.

1 BY MR. SILVER:

2 1768. Q. Do you know whether...or is there
3 any indication of Mr. McKenzie's e-mails to Nathan
4 being encrypted?

5 A. Other than the March 13th docket
6 entry refers to a PGP key, but that is JK's, so that
7 is John Knox, I assume, PGP key.

8 1769. Q. Where are you seeing that?

9 A. March 13th.

10 1770. Q. Oh, yes:

11 "...Download JK..."

12 MR. EPSTEIN: Do you have any
13 information with regard to Nathan...

14 THE DEPONENT: But I have no independent
15 information, other than what is in the
16 docket entries.

17 1771. MR. SILVER: So can you produce any and
18 all e-mails between McKenzie and Nathan,
19 which would include Best and NIS?

20 MR. EPSTEIN: Again, this is maybe a...
21 you are saying to go through each and every
22 file and produce each and every document.

23 1772. MR. SILVER: Relating to this subject
24 matter.

25 MR. EPSTEIN: I mean, at some point I

1 have got to say if you are, you know, going
2 to ask for that kind of...it is going to be
3 enormous time. Are you prepared to pay for
4 that, the time that is going to be involved
5 in going through all of the records? It is
6 one thing to ask for a specific document
7 relating to a specific entry and she can go
8 to a specific date and look for it. That
9 is one thing. It is another thing to say,
10 "Go through all of your files and produce
11 each and every document reference, e-mail."
12 I mean, it is a huge undertaking, so...

13 1773. MR. SILVER: Well, why don't you take it
14 under advisement?

15 MR. EPSTEIN: Well, are you prepared to
16 pay for the cost of that?

17 1774. MR. SILVER: We will have to discuss
18 that.

19 MR. EPSTEIN: So just for the record...

20 1775. MR. SILVER: I want to put the request
21 on the record.

22 MR. EPSTEIN: ...what it is that you are
23 asking for?

24 1776. MR. SILVER: Produce all e-mails between
25 Nathan and McKenzie, Nathan defined to mean

1 Best, NIS directly or indirectly.

2 THE DEPONENT: What do you mean directly
3 or indirectly?

4 1777. MR. SILVER: Well, if it is not Best or
5 NIS or Nathan but it is clear that it is a
6 Best production, I would still like to see
7 it.

8 MR. EPSTEIN: I don't know what that
9 means, indirectly. What we have taken
10 under advisement is to...whether or not we
11 will produce all of the e-mails between and
12 Nathan and McKenzie and as I say, I would
13 like your position on...if this undertaking
14 is going to be answered, what your position
15 on the cost will be. U/A

16

17 BY MR. SILVER:

18 1778. Q. Thank you. Let's look at the April
19 26th account. It is clear that the blogging
20 continues, or activity on blogging continues.

21 A. That is the first entry in the
22 account.

23 1779. Q. Well, throughout. Blogging...

24 MR. EPSTEIN: They speak for themselves.

25

1 BY MR. SILVER:

2 1780. Q. I am looking at April 6th:

3 "...Discussion with bloggers..."

4 And then it says on April the 9th:

5 "...Draft article to send to bloggers..."

6 A. Yes.

7 1781. Q. Can you search your file and see if

8 you can find anything that relates to this entry:

9 "...Draft article to send bloggers..."

10 of April 9th, 2006?

11 MR. EPSTEIN: We will make our best
12 efforts.

U/T

13 1782. MR. SILVER: And then there is one on
14 April 19th and it says:

15 "...Drafting agreement with Barbados..."

16 Can you produce anything you might find
17 that has any relevance to that? And I take
18 it that the Barbados is a reference to
19 Nelson Barbados, but if it isn't and he is
20 drafting agreements with the country, maybe
21 we should see that too. I think it Nelson
22 Barbados.

23 MR. EPSTEIN: Probably. We will look to
24 see if we can find reference to that
25 agreement.

U/T

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BY MR. SILVER:

1783. Q. And April 23rd it says:
"...Communicate with Nathan [we know that
is Best] and BFP..."

Do you know who BFP is?

A. No.

1784. Q. Do you know if that is Barbados Free
Press?

A. I don't know.

1785. Q. And on the May 18 account, please?
There is entries for May 6th and 7th, and it says:
"...Review all Splash documentation and
strategize re Splash opposition..."

In your review of the files and your knowledge, did
you come across those phrases before?

A. No.

1786. Q. Do you know what that is about, what
this is in relation to?

A. No.

1787. Q. Can you produce any documentation
that in any way relates to Splash documentation and
Splash opposition referred to in the May 6 and 7
accounts entries?

MR. EPSTEIN: Yes.

U/T

1 1788. MR. SILVER: On May 11th it appears as
2 though Mr. McKenzie was drafting blogging.
3 Can you produce any documentation that
4 might assist us in knowing what he was
5 drafting in around that time frame?

6 MR. EPSTEIN: This is May 11th.

7 1789. MR. SILVER: Yes, he meets with Alair
8 Shepherd, Jane Goddard, John Knox:
9 "...Review documents and meet with DL..."
10 I don't know who that is:
11 "...to review PD strategy, Splash issues,
12 drafting, blogging..."

13 MR. EPSTEIN: All right.

14 1790. MR. SILVER: I would like to...if your
15 file show what is....

16 MR. EPSTEIN: You want to know if there
17 is drafting of blogging?

18 1791. MR. SILVER: Yes, and if so, what he
19 drafted.

20 THE DEPONENT: Well, I am just noticing
21 also that there is GHNS issues, and I
22 believe that is the Graeme Hall Nature
23 Sanctuary, which is not related.

24 1792. MR. SILVER: Well, I am not so sure I
25 would come to the same conclusion, but I

1 see that, and maybe it was blogging with
2 respect to Graeme Hall. I don't know. It
3 may be that Graeme Hall was all part of a
4 strategy that involved Kingsland. We are
5 trying to uncover all that.

6 MR. EPSTEIN: In any event, we will give
7 you the undertaking to look to see if we
8 can find what...the drafting, blogging
9 documentation.

U/T

10

11 BY MR. SILVER:

12 1793. Q. Wanphen Panna, to the best of your
13 knowledge, was taking her instructions from
14 McKenzie?

15 A. I have no knowledge of instructions
16 or anything else, other than the invoices and the
17 payments that are reflected on the ledger.

18 1794. Q. I would like to skip all the way to
19 the October 20th account.

20 MS. ZEMEL: Lorne, do you mind if we go
21 off the record for one second?

22 1795. MR. SILVER: Not at all.

23

24 --- DISCUSSION OFF THE RECORD

25

1 1796. MR. SILVER: On October 19th, 2006 there
2 is an entry that seems to involve Justice
3 Farley and e-mails to or from Justice
4 Farley.

5 MR. EPSTEIN: Which account is this now?

6 1797. MR. SILVER: The October...

7 THE DEPONENT: 20th.

8 1798. MR. SILVER: ...20th account. Can you
9 produce any documentation to or from
10 Justice Farley? This is before the action
11 was started.

12 MR. EPSTEIN: Okay.

U/T

13
14 BY MR. SILVER:

15 1799. Q. And then February 19th is the next
16 account, and I just want...we know that the claim in
17 Ontario was issued in February of 2007, and I want
18 confirmation that your firm billed Peter Allard for
19 the drafting and finalizing and issuing and
20 attempted service of the Ontario action, all that is
21 reflected in this February 19th account.

22 A. As I stated in my affidavit, yes, I
23 believe that is the case.

24 1800. Q. And as indicated on the January 30th
25 and 31st entry, your firm billed Mr. Allard and he

1 paid for meetings between McKenzie and Mike Dribin,
2 a Miami lawyer, in respect of finalizing the
3 Canadian claim?

4 A. Correct. That is what the docket
5 entries reflect.

6 1801. Q. Right. And the docket entries also
7 reflect that in finalizing the claim, Mr. McKenzie
8 was specifically speaking with Allard, Goddard, John
9 Knox and Kathy Davis, all as set out in these
10 accounts?

11 A. As I said, these docket entries have
12 all of those things in proximity to each other, so
13 that seems to be...

14 MR. EPSTEIN: And the docket entries
15 speak for themselves. She is not...she has
16 given the information earlier on that she
17 believes that the docket entries in the
18 accounts are accurate and that is the best
19 information she has. So you can assume
20 that anything contained in these docket
21 entries, the balance of them, are accurate
22 as well.

23
24 BY MR. SILVER:

25 1802. Q. Thank you. On February 8th there is

1 an indication of e-mails to Miami and Bridgetown
2 lawyers?

3 A. Yes.

4 1803. Q. Can you produce whatever you can
5 locate of e-mails at that time with Miami and
6 Bridgetown lawyers?

7 MR. EPSTEIN: We will look for those. U/T

8 1804. MR. SILVER: And there is also an
9 indication of further e-mails...yes, Miami.
10 Okay, specifically, I am looking for the e-
11 mails addressed in either McKenzie's docket
12 entry or Sunny Ware's of February 8th.
13 Okay?

14 THE DEPONENT: That is undertaking 19 of
15 this morning. U/T

16 1805. MR. SILVER: And then February 13th or
17 14th is:
18 "...Retainer agreement with two
19 litigators..."
20 I think we might have covered this before,
21 but here is the specific reference, and I
22 would like to see any and all documentation
23 re retainers with two litigators. I think
24 those are Miami related, but we will find
25 out when we see what you have got. Okay,

1 and the next account. I just want to get
2 these requests on the record. The March
3 23rd account, there is a February 21st
4 entry about re draft revokable trust.

5 MR. EPSTEIN: What is the date of the
6 entry?

7 1806. MR. SILVER: Feb 21st. Can you produce
8 anything and everything in your file that
9 relates to that docket entry, namely the...

10 MR. EPSTEIN: Well, we will...

11 1807. MR. SILVER: I mean, if there are drafts
12 of the revokable trust in the files, we
13 would like to see them.

14 MR. EPSTEIN: Yes, we will look to see
15 if there are drafts of the revokable trust.

U/T

16 1808. MR. SILVER: And any other documentation
17 that relates to the revokable trust in that
18 time frame, so the search will be focused
19 on a time frame.

20 MR. EPSTEIN: Okay.

U/T

21 1809. MR. SILVER: On March 1 it says:
22 "...Travel Miami to Toronto and recap of
23 week with memos to concerned people..."
24 If you can find the memo to concerned
25 people, can you produce it?

1 MR. EPSTEIN: For?

2 1810. MR. SILVER: March 1, 2007.

3

4 BY MR. SILVER:

5 1811. Q. And then on the April 20th account
6 there is a March 28th entry where it seems as though
7 Mr. McKenzie is drafting a Miami claim.

8 A. Sorry, what is the date?

9 1812. Q. March 28th, 2007.

10 A. Is that from the next account?

11 1813. Q. Yes.

12 MR. EPSTEIN: Which account are you
13 referring to? April 20th?

14 1814. MR. SILVER: April 20th, yes.

15 MR. EPSTEIN: Right.

16 1815. MR. SILVER: March 28th entry. Mr.
17 McKenzie is billing his client to draft the
18 Miami claim and I would like to see a draft
19 or the draft that he prepared.

20 MR. EPSTEIN: We will look for it. U/T

21 1816. MR. SILVER: Then on the trust statement
22 for this account, there is an indication
23 that a Broad and Cassel invoice is being
24 paid. Can you produce the Broad and Cassel
25 invoice...

1 MR. EPSTEIN: We will do that.

2 1817. MR. SILVER: ...of April 11, 2007.

3 MR. EPSTEIN: Are you saying page...

4 1818. MR. SILVER: Page 9.

5 MR. EPSTEIN: Page 9.

6 1819. MR. SILVER: Of the account.

7 MR. EPSTEIN: Okay.

U/T

8 THE DEPONENT: We may not have that
9 invoice in our possession because our...we
10 have one box of accounting records that
11 ends in 2007.

12
13 BY MR. SILVER:

14 1820. Q. It is all best efforts.

15 A. Yes. Now, what I may be able to
16 produce is a record of the payment through our US
17 trust account.

18 1821. Q. Well, I don't think there is any
19 doubt. I mean, unless McKenzie denies it, but there
20 is no doubt that that is what page 9 shows, is that
21 that invoice was paid out of the US trust account.

22 A. Right.

23 MR. EPSTEIN: So what we will do, we
24 will take a look. If we have got the
25 invoice, we will produce it. If not, not.

1 1822. MR. SILVER: And if you could, while you
2 are looking, produce any other Broad and
3 Cassel invoices that were received.

4 MR. EPSTEIN: Okay. U/T

5 1823. MR. SILVER: And the same request in
6 respect of the next entry on the trust
7 statement, being this Kelly Law Firm
8 invoice for an opinion, and it actually
9 appears that an invoice was received.

10 MR. EPSTEIN: We will look to see if we
11 can obtain the invoice. U/T

12 1824. MR. SILVER: Okay, May 24th, 2007. I
13 think there are pages missing from what you
14 have produced. I am sure that was
15 inadvertent, but mine goes from page 1 to
16 page 14.

17 MR. EPSTEIN: May 20, May 24, '07. This
18 is the statement of account?

19 1825. MR. SILVER: Yes.

20 MR. EPSTEIN: All right.

21 1826. MR. SILVER: Mine goes from the first
22 page to the 14th page.

23 THE DEPONENT: Yes.

24 1827. MR. SILVER: And it may be somewhere
25 else, but I couldn't find it. So can you

1 produce just...I am sure it was
2 inadvertent, but produce a complete copy of
3 the May 24th account?

4 MR. EPSTEIN: Yes.

U/T

5 THE DEPONENT: If we have a complete
6 copy.

7

8 BY MR. SILVER:

9 1828. Q. Well, where did you get these for
10 the purposes of production?

11 A. As I said, we have one box of
12 accounting records.

13 1829. Q. I thought that was McKenzie's.
14 Everybody has got one box, okay. Anyways, you will
15 see if you can find it and...

16 MR. EPSTEIN: Yes, we will produce it if
17 we have got it.

18 1830. MR. SILVER: Okay, subject to the
19 undertakings, those are my questions.
20 Thank you for your patience.

21

22 --- A BRIEF RECESS

23

24 JESSICA DUNCAN, resumed

25 CROSS-EXAMINATION BY MS. ZEMEL:

1 1831. Q. Good morning/afternoon, Ms. Duncan.
2 I am Maanit Zemel and as you know, I am the lawyer
3 for Iain Deane and the Estate of Colin Deane. I
4 will be asking you questions that mostly arise out
5 of the motion before Justice Brown, okay?

6 A. Yes.

7 1832. Q. Not only, but mostly, and I
8 understand that you had argued that motion?

9 A. I did.

10 MR. EPSTEIN: Sorry, can I just go off
11 the record a second?

12

13 --- DISCUSSION OFF THE RECORD

14

15 BY MS. ZEMEL:

16 1833. Q. Just when we were off the record,
17 Mr. Epstein was wondering whether the documents
18 produced by Ms. Duncan in her affidavit are relevant
19 to the issues before Justice Brown and our position
20 is that they are, but obviously if any question you
21 find is irrelevant, you are more than welcome to,
22 you know, respond to it in time. So just before we
23 proceed, on February 23rd when you were at court,
24 you were there because you were planning to argue
25 the motion that was brought by your firm respecting

1 the costs of the Justice Brown motion. Is that
2 correct?

3 A. Yes.

4 1834. Q. Okay, and your firm or, I guess,
5 your current firm, was seeking the costs arising out
6 of the Justice Brown motion?

7 A. Yes.

8 1835. Q. Now, just so I am clear, is your
9 firm still seeking the costs arising out of the
10 Justice Brown motion, because I am not clear about
11 that?

12 MR. EPSTEIN: You know what? Can we go
13 off the record a second?

14

15 --- DISCUSSION OFF THE RECORD

16

17 1836. MS. ZEMEL: Just off the record Mr.
18 Epstein advised that it is unclear whether
19 the firm is seeking the costs, so therefore
20 we will just leave that there and if...how
21 about you undertake to advise us as soon as
22 you can whether or not the firm intends to
23 seek the cost, because obviously that is
24 something we would like to know. Do I have
25 that undertaking?

1 MR. EPSTEIN: Yes. U/T

2

3 BY MS. ZEMEL:

4 1837. Q. Thank you. Now, do you recall...
5 let's get back to the Justice Brown motion. It was
6 argued on April 1st, 2009 and do you recall, Ms.
7 Duncan, that in addition it involved a motion
8 brought by Miller Thompson and my clients respecting
9 some defamatory blogs, or what we alleged was
10 defamatory blogs?

11 A. Yes.

12 1838. Q. Okay, and in addition to our motion,
13 which we brought, there was another motion argued
14 that day that was brought by your firm and was
15 argued by Mr. McKenzie?

16 A. Yes.

17 1839. Q. And that motion was...I am just
18 paraphrasing...a motion to strike our motion on the
19 basis of what your firm argued was an abuse of
20 process? I am paraphrasing.

21 A. I think there was something of that
22 nature there, yes.

23 1840. Q. Okay, and just to be fair, I just
24 want to to make sure I understand. Do you recall
25 what were the results of that motion?

1 A. Yes.

2 1841. Q. What was it?

3 A. Your motion was dismissed.

4 1842. Q. No. Again, maybe I should be clear.

5 Again, there were two motions. There was a motion
6 argued by McKenzie...before we proceeded to argue a
7 motion, there was a motion brought by your firm to
8 dismiss our motion and Justice Brown specifically
9 scheduled it before our motion because had your
10 motion succeeded, our motion wouldn't proceed,
11 correct?

12 MR. EPSTEIN: You didn't argue that
13 motion.

14 1843. MS. ZEMEL: No, but she was there.

15 THE DEPONENT: I was there.

16 MR. EPSTEIN: Right.

17 1844. MS. ZEMEL: If you don't recall, we have
18 ordered the transcript. You can
19 review...advise me otherwise if you
20 remember otherwise, okay? How about that?

21 MR. EPSTEIN: No. I mean, the record
22 speaks for itself.

23 THE DEPONENT: The record speaks for
24 itself and I really don't remember.

25

1 BY MS. ZEMEL:

2 1845. Q. Okay, so let's just say this: Would
3 you agree that that motion that was brought by your
4 firm, your firm lost it because it was dismissed,
5 your motion was dismissed?

6 A. I thought Justice Brown reserved on
7 all the motions. I can't recall...

8 1846. Q. No, how about...

9 A. You know what? I can't recall. I
10 recall him reserving on all the motions and
11 releasing reasons a few days late, so I...

12 1847. Q. Okay. Well, how about this? What
13 our recollection is and what the record would show
14 is that the motion that was brought by your firm to
15 dismiss our motion and was argued by Mr. McKenzie
16 was, in fact, dismissed orally by Justice Brown. If
17 you have information to suggest otherwise, will you
18 advise?

19 MR. EPSTEIN: Yes. Again, the record
20 will speak for itself. We don't take issue
21 with whatever order was made.

22
23 BY MS. ZEMEL:

24 1848. Q. Okay. So again, I want to be clear
25 on this. If you have...

1 A. Can I put it this way?

2 1849. Q. Yes.

3 A. I don't have any recollection, so
4 giving that undertaking is kind of...

5 1850. Q. No, let me...

6 A. ...superfluous to the fact that I
7 have nothing one way or the other.

8 1851. Q. You don't remember, okay.

9 MR. EPSTEIN: Perhaps the question is
10 best put to Mr. McKenzie, who argued the
11 motion, and he would be able to...

12 1852. MS. ZEMEL: No, I am putting the
13 question to Ms. Duncan because she was
14 there.

15 MR. EPSTEIN: So she has indicated to
16 you that she has no recollection. She has
17 no information as to what the outcome of
18 that, Mr. McKenzie's motion, was.

19 1853. MS. ZEMEL: Okay, that is fine. I
20 appreciate that. What I am saying is if
21 you have any information that comes up any
22 time after this, your recollection gets
23 better or you go over your notes or
24 whatever it is, and it is different than
25 what I just said, please advise, okay?

1 MR. EPSTEIN: If her memory is refreshed
2 in some way, then she will advise you of
3 her refreshed memory.

U/T

4

5 BY MS. ZEMEL:

6 1854. Q. Okay. Now, after your firm was
7 served with our notice of motion that was ultimately
8 argued before Justice Brown, what steps did you
9 personally take to investigate the issues that were
10 raised in our motion?

11 A. Me personally?

12 1855. Q. Yes.

13 A. My role was to appear at the
14 hearings and argue in defence of the motion. I did
15 not take any part in anything else really that went
16 on. I think I had some involvement on one
17 particular day in January or February when...around
18 the time that the motion came up, Mr. McKenzie was
19 out of the country and I was needed to listen to a
20 teleconference with Justice Shaughnessy, I think.
21 There were letters flowing back and forth. I was
22 asked to review the motion materials, but the
23 drafting of the material that our firm filed was
24 carried out by Mr. McKenzie. I don't know. He may
25 have had assistance from Krista McKenzie or some

1 other associate, but my role was I was given
2 materials and told to argue the motion.

3 1856. Q. So beside the actual arguing of the
4 motion and any other appearances, and we will get to
5 it, that there were other appearances before Justice
6 Brown, you are saying now that that was the extent
7 of your involvement in this entire motion?

8 A. Well, yes. Arguing it, yes.

9 1857. Q. So did you otherwise instruct anyone
10 at the firm to investigate the issues in this
11 motion, or to do work on the motion, did you
12 personally?

13 A. Me, no. I was acting under the
14 instruction of Mr. McKenzie.

15 1858. Q. Did anyone else beside...sorry, any
16 of the other partners have any involvement in this
17 motion?

18 A. No.

19 1859. Q. Now, again, because you say you
20 don't have any recollection, so whatever I
21 recollect, I will refresh your memory and if you
22 know otherwise, please advise, okay, or you remember
23 otherwise, please. I would ask you to advise.

24 A. Sorry, you were asking me if I had
25 any contact. I think at one point I may have looked

1 at the blog entries that were complained about, so I
2 may have gone online and looked at the websites that
3 were mentioned in the motion record. Sorry, I just
4 wanted to be accurate.

5 1860. Q. No, that is fine.

6 A. I think I may have done that after
7 reading the material and wanting to prepare for the
8 motion, but I think that was the extent of it.

9 1861. Q. Did you take any steps to determine
10 if Mr. McKenzie and/or anyone at your firm had any
11 involvement in posting those particular blogs that
12 were the subject matter of that motion?

13 A. No, I accepted what I was told.

14 1862. Q. And what were you told?

15 A. I was told that our firm had not
16 posted it to those blogs.

17 1863. Q. Now, there was also...one of the
18 issues that was raised by my firm was that there
19 were documents posted onto those blogs. Those
20 documents were...again, if I am incorrect, you can
21 always correct me, but my recollection is those
22 documents were the transcript of the cross-
23 examination of my client, Mr. Deane, and there was a
24 couple...there were two letters flowing between
25 myself and Mr. McKenzie. One, I believe, was

1 January 19th, and the other one was January 21st,
2 2009. And we had argued that those documents were
3 sent, to whoever posted those blogs, by someone at
4 your firm. Now, did you investigate how those
5 documents got onto the blogs?

6 MR. EPSTEIN: I think she answered the
7 question that her involvement, her total
8 with involvement with the file was being
9 instructed by Mr. McKenzie to argue the
10 motion. She indicated that she had
11 participated in one conference call with
12 Justice Shaughnessy when McKenzie was out
13 of the office, and she did look at the
14 website to prepare for the motion, but I
15 think she has indicated that beyond that,
16 she had no other involvement with the
17 motion. So that may shorten some of your
18 questions.

19 1864. MS. ZEMEL: That is okay.

20 MR. EPSTEIN: Have I correctly
21 summarized your...

22 THE DEPONENT: Correct.

24 BY MS. ZEMEL:

25 1865. Q. Okay, that is fine. I just want to

1 be clear. All right. So you said you spoke to Mr.
2 McKenzie about it. He said there was no
3 involvement. What else did he say? Did he say
4 anything else? Did you ask him any other questions?
5 Do you recall any discussions regarding this
6 particular matter?

7 A. Well, he said that the documents
8 complained of had been distributed to everybody in
9 the proceeding, so anybody could have posted them.
10 He pointed out a number of extremely nasty blog
11 postings about himself and various other parties. I
12 believe he had gained the nickname of Billy goat and
13 that there were a number of jokes about goats
14 relating to him. So all my information essentially
15 came from Mr. McKenzie.

16 1866. Q. Could you just undertake to ask your
17 partners the same questions and advise if they have
18 any other information?

19 MR. EPSTEIN: Did they have any
20 involvement at all? I mean, I think she
21 can answer that today. They had no
22 involvement in this motion.

23 THE DEPONENT: No, they get...I reported
24 to them as to what was going on with the
25 motion.

1 BY MS. ZEMEL:

2 1867. Q. That is fine. Now, again, this is
3 my recollection, and I believe there is also a
4 transcript, but I am just going to sort of put this
5 on the record and let me know if you remember
6 otherwise. As you mentioned, there were two
7 appearances before Justice Brown. There was one to
8 argue the motion April 1st, and then there was a
9 previous appearance somewhere in February 2009 that
10 you appeared on. Do you remember?

11 A. I think there might have been two
12 previous appearances in February.

13 1868. Q. There could have been, and I...

14 A. I think there was one very brief one
15 that it was supposed to be argued, and on the date
16 it was supposed to be argued in February, there were
17 cross-examinations set up, and then the argument
18 proceeded on the first, I think.

19 1869. Q. Right, and so that first
20 appearance...there was an appearance before Justice
21 Brown in February 2009 and we were there to argue
22 the scheduling of the cross-examinations and the
23 scheduling of the actual motion, correct?

24 A. I think that is how that date turned
25 out, yes.

1 1870. Q. And you were there to argue on
2 behalf of Mr. McKenzie and the firm?

3 A. Yes.

4 1871. Q. Okay, and just to be fair to you,
5 you indicated that in February 2010 you were in
6 court before Justice Shaughnessy to argue the cost
7 of that particular matter...

8 A. Yes.

9 1872. Q. ...and you had filed materials in
10 support of your motion for the cost, correct?

11 A. Mr. McKenzie had prepared materials,
12 yes.

13 1873. Q. Have you reviewed those materials,
14 the ones that you were...

15 A. Briefly, yes.

16 1874. Q. I just want to point out that in
17 those materials, and you can look back and check if
18 you would like, there is, in fact, an excerpt from
19 the transcript of arguments made to Justice Brown in
20 that February 20, 2010 appearance. So in other
21 words...

22 A. In 2009, you mean?

23 1875. Q. In 2009, sorry. 2009 appearance,
24 correct.

25 A. Yes.

1 1876. Q. Have you read those transcripts?

2 A. The transcripts themselves? No.

3 1877. Q. Okay.

4 A. I do recall there being an excerpt
5 in the materials.

6 1878. Q. So I am going to ask you questions
7 regarding what took place that day. If your
8 recollection is different than what I say...why
9 don't you go back to the transcripts and confirm.

10 MR. EPSTEIN: You know, it is in the
11 transcripts, it is in the transcripts.
12 There is no point in asking her...I mean,
13 you did mention that this arises...I mean,
14 she is here to be cross-examined on the
15 affidavit that she gave, which she sets out
16 certain information to correct the record
17 of Mr. McKenzie, and I am not understanding
18 how your questions are directed toward...

19 1879. MS. ZEMEL: Let me ask my question. How
20 about that, okay, before you go...and I
21 understand your position. All I am trying
22 to do is to tell her that if she doesn't
23 have a recollection, she herself in her
24 file should have transcripts to refresh her
25 recollection that is all I am saying, okay?

1 So during that first appearance that we had
2 in February 2009, okay, you appeared and
3 you had argued that you would need, you,
4 would need a full day to cross-examine our
5 particular students on their affidavits,
6 and...

7 MR. EPSTEIN: Sorry, can you explain to
8 me how this line of questioning relates to
9 the affidavit she gave?

10 1880. MS. ZEMEL: Well, the affidavit she gave
11 was with respect to the cost motion, the
12 entirety, and as you know, the questions on
13 the cross-examination do not stick to the
14 scope of the affidavit, but actually issues
15 on the motion, which is the cost motion.
16 And we are right now...the questions I am
17 asking are relevant to the issues on the
18 cost motion, okay, and how much and why
19 were costs spent with respect to the
20 Justice Brown motion. And her firm, as of
21 today, is still seeking the cost of that
22 motion, and so I am entitled to ask
23 questions.

24 MR. EPSTEIN: Counsel, with respect,
25 that is a different issue. She has been

1 produced to answer questions that relate to
2 the questions that she asked and she has
3 produced various accounts and documents and
4 we have answered as best we can.

5 1881. MS. ZEMEL: I get it.

6 MR. EPSTEIN: And Ms. Duncan has all the
7 questions relating to the accounts and what
8 was produced. I think what you are asking
9 now goes beyond the scope of what her
10 affidavit was or what I think is...you
11 know, it may be that this is appropriate
12 for some other venue or some other hearing,
13 but not...this is not cross-examination
14 arising out of her affidavit.

15 1882. MS. ZEMEL: Okay, I see your position
16 and that is fine and you can refuse the
17 questions. We can argue it later, okay?
18 How about I ask the question and then you
19 can refuse it? Let's do it that way, okay?

20 MR. EPSTEIN: Can you explain to me how
21 this relates to her...or point to me
22 something in her affidavit that discusses
23 the events of the Brown motion. If you can
24 point out to me something in her affidavit
25 that specifically refers to it, you know, I

1 am not here to be difficult...

2 1883. MS. ZEMEL: I can do that, Mr. Epstein,
3 but, you know, in the interest of time, I
4 am not going to. Anyway, I could. I just
5 want to be as fast as possible in my
6 questions, but sure I can. I can just
7 quickly paraphrase. She refers to blogging
8 and blogs in her affidavit, and this
9 particular Brown motion had to do with
10 blogging and blogs, and all relevant to the
11 blogging and the blogs. And this
12 information that she produced right now in
13 her affidavit is information that was
14 relevant to the Brown motion. In other
15 words, had it been produced to the Brown
16 motion, things might have been different
17 and we wouldn't be having to argue the
18 costs of the Brown motion, okay?

19 MR. EPSTEIN: If you want specifically
20 to ask questions, and she does make
21 reference to the blogging in paragraph 19
22 and 20 of her affidavit, and you want to
23 ask her questions about that, by all means
24 go ahead.

25 1884. MS. ZEMEL: Again, let me ask my

1 questions. If you want to refuse, that is
2 fine, but I gave you my position, okay?

3

4 BY MS. ZEMEL:

5 1885. Q. So in the first appearance, okay,
6 you had particularly argued that you or your firm
7 would need a full day to cross-examine our
8 particular students on their affidavits. Was that
9 argument based on something...like, why did you made
10 that...was it based on your own observation that you
11 would need a full day or was it something McKenzie
12 told you he would need?

13 A. Mr. McKenzie was the one who was
14 planning on doing the cross-examinations, so my
15 instructions came from Mr. McKenzie as to how long
16 he felt he would need.

17 1886. Q. That is fine, thanks. And now that
18 you have...sorry, you indicated what you based your
19 information on when you argued the Brown motion.
20 Now that you have reviewed all these documents that
21 you have produced to us, which as Lorne mentioned,
22 has countless references to blogging by Mr.
23 McKenzie, what is your current, after reviewing all
24 these documents, your current knowledge, information
25 and belief as to who posted those particular blogs

1 that were the subject matter of the Brown motion?

2 A. I have no idea.

3 1887. Q. You have no idea. Do you have any
4 belief as to who did it?

5 A. No. I can't tell what was...what
6 physical actions and what specific things were done.
7 It just says "blogging" in the docket entries, so I
8 don't know what that means.

9 1888. Q. Okay, but do you have any, besides
10 the docket entries, any other information or belief
11 that you can share with us today?

12 A. No.

13 1889. Q. Okay, that is fine. Could you
14 undertake to ask Stacey Ball or Sunny Ware the same
15 question, if there is any information that they have
16 regarding who posted those blogs that has not been
17 produced thus far?

18 A. Well, Stacey Ball would not have any
19 information because she had no contact with this
20 file .

21 1890. Q. Well, she filed quite a few
22 affidavits in that motion.

23 A. Which were drafted by Mr. McKenzie.
24 I mean, it is...

25 1891. Q. Okay, so just ask. Undertake and if

1 she has no information, that is fine. Ask Sunny
2 Ware, that is fine, not a problem.

3 MR. EPSTEIN: All right, so we will
4 ask...to ask Sunny Ware and Stacey Ball if
5 they have any information as to who posted
6 the blogs. U/T

7
8 BY MS. ZEMEL:
9 1892. Q. And same thing as do you have any
10 current knowledge, information or belief as to who
11 had sent the transcript of the cross-examination of
12 Iain Deane to the bloggers?

13 A. No, I don't.

14 1893. Q. Could you undertake to ask Stacey
15 Ball and Sunny Ware the same question?

16 MR. EPSTEIN: Yes. U/T

17
18 BY MS. ZEMEL:
19 1894. Q. And the same with respect to the two
20 letters between counsel that was sent to the
21 bloggers. Do you have any current information or
22 belief?

23 A. Okay, I thought you...

24 MR. EPSTEIN: Which letter are you
25 referring to?

1 1895. MS. ZEMEL: Sorry, I will be more...

2 THE DEPONENT: You have asked me for

3 three undertakings and they all seem to be

4 relating to the same thing because it was

5 to ask Sunny Ware and Stacey Ball if they

6 have knowledge or information or belief as

7 to who posted...

8 1896. MS. ZEMEL: The blogs.

9 MR. EPSTEIN: The blogs.

10

11 BY MS. ZEMEL:

12 1897. Q. The blogs. Second question is...

13 A. When you say "the blogs", what do

14 you mean?

15 1898. Q. I mean who wrote and posted those

16 blogs?

17 A. What dates?

18 1899. Q. All the blogs that were the subject

19 matter of the Justice Brown motion. Simple.

20 A. Okay...

21 1900. Q. I am finding it a little hard to

22 believe...

23 A. You are talking about specific blog

24 entries or you are talking about the entire

25 websites...

1 1901. Q. No, the blogs...

2 A. ...because the entire website is the
3 blog.

4 1902. Q. No, the actual blog entries that
5 were the subject matter...to be clear, that were the
6 subject matter of the Justice Brown...I believe
7 there were about three or four. I can't remember,
8 but you can certainly go back to the file and
9 determine that.

10 MR. EPSTEIN: So the three or four blogs
11 that are referred to in the Justice Brown
12 motion materials?

13 1903. MS. ZEMEL: That were the subject matter
14 of the Justice Brown motion, very simple.

15 MR. EPSTEIN: Okay, and so you...
16 firstly, we undertook to ask where are
17 all...

18 1904. MS. ZEMEL: Who wrote and/or posted.

19 MR. EPSTEIN: Who wrote them, if they
20 know. Second undertaking, who sent the
21 transcripts to the bloggers, again,
22 referring to the same thing.

23 1905. MS. ZEMEL: And who sent the letters
24 between counsel, and those are letters
25 dated January 19th, 2009 and January 21st,

1 2009 between myself and Mr. McKenzie. Who
2 sent those letters to the bloggers, if they
3 have any knowledge, information or belief.
4 And if they do, A, to advise and B, to
5 produce any documents to show that. I
6 could be asking these questions in more
7 detail, but I am trying to be short and to
8 the point, okay? Do I have that
9 undertaking?

10 MR. EPSTEIN: Yes.

U/T

11

12 BY MS. ZEMEL:

13 1906. Q. Thank you. Now, I understand you
14 were talking to Mr. Ranking and Mr. Silver about
15 whatever you have mentioned in your examination, by
16 one of either Mr. Ranking or Mr. Silver, that your
17 firm still has in its possession some documents,
18 particularly the correspondence file...I am sorry,
19 you are writing something to your counsel? Just on
20 the record, could you tell me what it is?

21 A. Yes:

22 "...She seems to be asking for undertakings
23 to speak to a judgement that has already
24 been made and if I recall, made on grounds
25 that suggested....."

1 I believe the grounds were even if all of your
2 allegations were true, the case wasn't made out, so
3 I am just...we are going over ground that is res
4 judicata to a certain degree, so I was just asking
5 my counsel if I have to spend more time and money
6 chasing this down.

7 1907. Q. Once again, I have the undertaking,
8 if you change your mind and want to refuse it, that
9 is fine, but I can tell you right now that it is
10 entirely relevant and I am not sure what res
11 judicata is...how this refers to this, but it is not
12 res judicata because the costs of that particular
13 motion are at issue, okay, and we also have a lot of
14 evidence right now to show that there is a direct
15 relationship between...and you can disagree with
16 me...a direct relationship between Mr. McKenzie and
17 bloggers and the blogging, and so all that
18 information, which is new and produced to us right
19 now, sheds new light on the issues before Justice
20 Brown, and so I am asking that question and you can
21 either...you have given me the undertaking and we
22 will move on.

23 Now, you have said you have correspondence
24 relating to the file, I believe, hard copies of
25 correspondence. You said Stacey Ball has it and I

1 know you have said that to Mr. Ranking or Mr.
2 Silver. I would like an undertaking to review all
3 the files you have and produce any document that
4 shows that Mr. McKenzie or someone else at the firm
5 had posted information and/or documents to the blogs
6 that were the subject of...and I am just being more
7 clear about what I have asked before, just to be
8 specific...the blogs that were the subject matter of
9 the Brown motion.

10 MR. EPSTEIN: Can you repeat that
11 question before we decide whether or not we
12 are going to answer it. I am not clear
13 what you are asking.

14 1908. MS. ZEMEL: I get it.

15 MR. EPSTEIN: Could you just take it
16 slowly, please?

17 1909. MS. ZEMEL: Yes. Ms. Duncan
18 indicated...

19 MR. EPSTEIN: You want to ask her to
20 review all of her files and...

21 1910. MS. ZEMEL: And to produce any document,
22 whether electronic or paper that indicates
23 that Mr. McKenzie and/or anyone else at the
24 firm had posted information or documents
25 onto the blogs that were the subject

1 matter...sorry, of the blog entries that
2 were subject matter of...

3 MR. EPSTEIN: So and/or the firm had
4 posted information...can we take this real
5 slow, because I am just having to write
6 this down...that had posted information or
7 documents...

8 1911. MS. ZEMEL: That were the subject
9 matter...sorry, to the blog entries that
10 were the subject matter of the Brown
11 motion.

12 MR. EPSTEIN: To produce any documents
13 that McKenzie and/or the firm had posted...
14 if there are any documents that McKenzie
15 and/or the firm had posted...

16 1912. MS. ZEMEL: No, any documents that
17 indicate that McKenzie and/or the firm...

18 MR. EPSTEIN: Right.

19 1913. MS. ZEMEL: ...had posted information or
20 documents onto the blog entries that were
21 the subject matter of the Brown motion.

22 MR. EPSTEIN: Okay, and will you pay for
23 this? This is a...I understand from my
24 client this is a large...

25 1914. MS. ZEMEL: I will pay for copies of

1 whatever you have...

2 MR. EPSTEIN: No, will you pay for the
3 search? Apparently there are three...at
4 least three large boxes of documents that
5 will have to be reviewed.

6 THE DEPONENT: That is just the
7 correspondence.

8 1915. MS. ZEMEL: Well, if I can help you...

9 THE DEPONENT: There are 14 boxes full
10 of paper...

11 1916. MS. ZEMEL: Well, if I can help you...

12 hold on, let me just stop right there,
13 okay, if I can help you. It is going to be
14 very easy and I can tell you why. There is
15 a very short time frame in which those
16 blogs were entered. They were entered on
17 January...actually, specific dates,
18 January...if I recall, and you can correct
19 me by looking at the Brown motion, but
20 January 26th, 28th and 29th the blogs were
21 entered, okay, 2009. And so it would be in
22 or around January...actually, only in
23 January 2009. How about that? Just focus
24 on January 2009. I think that would make
25 things very easy, okay?

1 MR. EPSTEIN: All right, we will look in
2 January of 2009, but that is all we will
3 look for. U/T

4 1917. MS. ZEMEL: That is all I want.

5 MR. EPSTEIN: Okay.

6 1918. MS. ZEMEL: And then I also would like a
7 copy of all correspondence between McKenzie
8 or anyone else at the firm and Kathleen
9 Davis from December 1, 2008...

10 MR. EPSTEIN: Between McKenzie and...

11 1919. MS. ZEMEL: Or anyone else at the firm.

12 MR. EPSTEIN: ...and Kathleen Davis?

13 1920. MS. ZEMEL: And Kathleen Davis from
14 December 1, 2008 to February 28th, 2009.

15 MR. EPSTEIN: December 1, '08 to...

16 MR. SILVER: December 8?

17 1921. MS. ZEMEL: December 1st, 2008 to
18 February 28, 2009. Basically December,
19 January, February of '08 and '09.

20 MR. EPSTEIN: Relating to...surely it
21 has got to relate to something? Relating
22 specifically to...

23 1922. MS. ZEMEL: No, just with Kathleen Davis
24 relating to anything. Kathleen Davis. It
25 is very specific. It is actually much

1 smaller than any undertaking you have given
2 so far. Any correspondence with Kathleen
3 Davis.

4 MR. EPSTEIN: No, but it has got to...
5 relating to the blogging?

6 1923. MS. ZEMEL: No. Generally anything with
7 Kathleen Davis.

8 MR. EPSTEIN: Well, I...

9 1924. MS. ZEMEL: And Mr. Epstein, just to be
10 clear so you understand why we are asking
11 that, Ms. Davis had at least...we don't
12 know if we agree, but she had advised that
13 she was the one who posted the blogs and
14 so...one of the blogs, Keltruth blog, and
15 so it is our position that those blogs were
16 either...the information that Ms. Davis had
17 so-called posted on her blog was either
18 sent to her by Mr. McKenzie or someone else
19 at the firm, and so I would like to see the
20 correspondence with Ms. Davis, and that is
21 something that is relevant to the entire...
22 actually, this entire motion.

23 MR. EPSTEIN: What we will do...it has
24 got to be relating to the blogs, though. I
25 am not going to...

1 1925. MS. ZEMEL: No. Why?

2 MR. EPSTEIN: Because I am not going to
3 give you...

4 1926. MS. ZEMEL: It is not related to the
5 blogs.

6 MR. EPSTEIN: Because I am not going to
7 give you an undertaking if somebody had a
8 discussion with Ms. Davis or sent her a
9 letter that is completely unrelated to
10 this litigation or the blogs... /R

11 1927. MS. ZEMEL: No, not unrelated to the
12 litigation. Related to this litigation,
13 the subject matter of the litigation, to
14 Nelson Barbados and the entire litigation.
15 That is what we want to see.

16 MR. EPSTEIN: If you say that she was
17 the person...the reason that you want it is
18 that you want her information or you want
19 this correspondence with regard to the...
20 because she was the person that posted the
21 blogs, we will look and provide any
22 documents that relate to that issue.

23 1928. MS. ZEMEL: Okay, but by that issue, I
24 mean the litigation.

25 MR. EPSTEIN: The blogs.

1 through it and find what we are interested
2 in. So Ms. Zemel, why don't you ask for an
3 undertaking that they make the 13 boxes or
4 all the records...

5 1935. MS. ZEMEL: You can ask, Mr. Silver. Go
6 ahead.

7 MR. EPSTEIN: No, Mr. Silver is done his
8 examination, thank you.

9 1936. MS. ZEMEL: All right, then I will
10 certainly ask for that. Now, that being
11 said, I am actually only interested in this
12 particular time frame. I gave you a very
13 short time frame.

14 MR. EPSTEIN: You have done your
15 examination and when we get asked for the
16 undertaking we will deal with it.

17 1937. MS. ZEMEL: Okay, so are not you going
18 to make the 13 boxes...are you going to
19 make the 13 boxes available for inspection?

20 MR. EPSTEIN: You haven't asked for it.
21 Is that what you are asking?

22 1938. MS. ZEMEL: I will ask you for that
23 undertaking and you can either...we will
24 review it...for the defendants to review.

25 MR. EPSTEIN: All right, and...

1 1939. MS. ZEMEL: And that is in addition to
2 the particular undertaking that I have just
3 asked regarding the correspondence with Ms.
4 Davis.

5 MR. SILVER: And it would be to make all
6 physical files available to the defendants'
7 counsel for inspection.

8 MR. EPSTEIN: I will take the question
9 with regard to producing the 13 boxes under
10 advisement.

U/A

11 1940. MS. ZEMEL: That is fine. And just on
12 the same request...going back to my request
13 regarding Kathleen Davis, everything I am
14 asking right now, I am not talking about
15 the 13 boxes. Any of the previous
16 undertakings, make sure that it also
17 relates to any electronic documents. So in
18 other words, whatever you do have on your
19 server or on your disks electronically, I
20 would also like you to produce that, and
21 the metadata associated with it.

22 MR. EPSTEIN: Sorry, this is with regard
23 to your previous undertakings...

24 1941. MS. ZEMEL: Undertakings, yes, which are
25 very specific by the way, so I am not

1 talking about a big search here. It is
2 very date and subject matter specific.

3 MR. EPSTEIN: Okay.

4 1942. MS. ZEMEL: Now, I would like to take
5 you to a table that my firm has prepared,
6 and for the record, it is the breakdown of
7 all the entries we could find in Exhibits A
8 and B of your affidavit, which relate to
9 disbursements paid to Kathleen Davis
10 regarding web hosting cost or services, and
11 I am going to show you this particular
12 breakdown, and I would to, if possible,
13 mark it as an exhibit and ask you to...if
14 you would like review it and then advise if
15 we missed anything or we got it incorrect.
16 But that is, at least, my...taken directly
17 from the Exhibits A and B, instead of
18 taking her directly to the...

19 MR. EPSTEIN: I appreciate that. What
20 we will do is we will review just to
21 confirm that these indeed accurately set
22 out the...these particular entries are
23 correct.

U/T

24 1943. MS. ZEMEL: Thank you. And maybe we can
25 just mark...I am going to refer to it, so

1 mark it as the next exhibit.

2 MR. EPSTEIN: Yes, let's mark this for
3 identification purposes.

4 1944. MS. ZEMEL: Yes, for identification. I
5 am not interested in entering it as
6 evidence. It is just to save time.
7 Exhibit D for identification.

8 MR. EPSTEIN: Okay, and this is ledger
9 entries for disbursements paid to Kathleen
10 Davis re webhosting.

11
12 --- EXHIBIT D: Ledger entries for disbursements
13 paid to Kathleen Davis re web
14 hosting (taken from Exhibits A and B
15 to Duncan affidavit)

16
17 MR. SILVER: So you are going to review
18 it against...

19 MR. EPSTEIN: We are going to review to
20 ensure...

21 MR. SILVER: ...the ledgers?

22 MR. EPSTEIN: ...that these entries
23 referred in here are accurate.

24 1945. MS. ZEMEL: Thank you.

25 MR. SILVER: And if there are any

1 missing?

2 MR. EPSTEIN: No.

3 1946. MS. ZEMEL: If there is anything else...

4 MR. EPSTEIN: No, we are not going to
5 undertake to do that. You can do that
6 yourself.

7 1947. MS. ZEMEL: No, that is fine. I don't
8 want that. I just want to advise if you
9 believe I made an...you know, there could
10 be errors, you know, typos, et cetera.
11 Just let me know okay?

12 MR. EPSTEIN: Yes.

13 MR. SILVER: Do you have a copy of that
14 for everybody?

15

16 BY MS. ZEMEL:

17 1948. Q. Yes, I will make copies for
18 everybody. Don't worry. Now, just for the record I
19 am going to read out...there is 5 entries that we
20 found, okay. The first one is dated November 21st,
21 2007 and the entry in the ledger says:

22 "...Kathleen I. Davis paid webhosting costs
23 for Keltruth by bank draft..."

24 And it is for a total of 1,084.44, and the next one
25 is October 9th, 2008:

1 sure. However, I could check.

2 MR. SILVER: Well, can we just find one
3 of them.

4 1952. MS. ZEMEL: Why don't we go off the
5 record for a minute and I will find it.

6

7 --- DISCUSSION OFF THE RECORD

8

9 BY MS. ZEMEL:

10 1953. Q. We just had a chance to review some
11 of the ledgers and attempt to correlate them with
12 Exhibit D, and so far it appears to be accurate. So
13 just to ask you again because I am not sure if you
14 answered this, Ms. Duncan, you said you have no
15 knowledge as to any of these payments?

16 MR. EPSTEIN: That is what she...

17 THE DEPONENT: Other than what is
18 reflected in the ledger, no.

19

20 BY MS. ZEMEL:

21 1954. Q. Okay, and I want you to confirm
22 this, but...what these indicate, at least according
23 to what the ledgers say and what you have advised
24 Mr. Silver before about payments made out of the
25 trust account, is that payments were made to Ms.

1 Davis for webhosting costs or webhosting charges,
2 whatever it says, from your firm's trust account and
3 then paid, but actually paid for by the client, Mr.
4 Allard. In other words...

5 MR. EPSTEIN: She has answered that
6 already.

7 1955. MS. ZEMEL: All right.

8 MR. SILVER: For the record, all of them
9 are in A.

10 MR. EPSTEIN: Thank you. So that
11 will...I guess Mr. Silver has been kind
12 enough to answer our previous undertaking
13 we gave that we would confirm that they are
14 accurate disbursements, but...

15 MR. SILVER: No, but you can't...

16 MR. EPSTEIN: We have no reason to
17 disagree with what Mr. Silver has
18 indicated.

19 MR. SILVER: All I am saying is that all
20 of those entries on Exhibit D are found in
21 ledger A.

22 MR. EPSTEIN: Right.

23 1956. MS. ZEMEL: In BMC543, okay.

24 MR. SILVER: No, hang on. Sorry...

25 1957. MS. ZEMEL: I think there is an entry...

1 anyway, it doesn't matter.

2

3 BY MS. ZEMEL:

4 1958. Q. When you were before Justice Brown
5 on April 1st, you had argued and again, if you
6 recollection says otherwise, let me know, but my
7 recollection is that you had argued that there was
8 no evidence connecting Mr. McKenzie and/or your firm
9 to the blogs that were the subject matter of that
10 motion. Do you agree that you made that argument?

11 A. I don't argue with the transcript.

12 1959. Q. Now that you have had a chance to
13 review the documents that you have produced in your
14 affidavit which, as you have mentioned in your
15 cross-examination thus far have many references to
16 blogging, and as I have just pointed out, payments
17 made to Kathleen Davis to host the Keltruth blog, do
18 you have a different position on the issue of the
19 relationship between the blogs and Mr. McKenzie? Do
20 you take a different position?

21 MR. EPSTEIN: I think she sets out what
22 her information is in her affidavit. When
23 she says, paragraph 19:

24 "...Paragraphs 137 to 140 of Mr. McKenzie's
25 affidavit indicates he did not follow the

1 internet blogs that contained postings
2 relating to..."

3 1960. MS. ZEMEL: Sorry, I don't mean to cut
4 you off, Mr. Epstein. I know what it says
5 and I am trying to save time. I just want
6 to hear from your witness if, with respect
7 specifically to the position she took
8 before Justice Brown on April 1st, does she
9 now take a different position. I would
10 like to hear the answer to that now that
11 she has had a chance to review these
12 documents. That is my question. I would
13 like to know her answer.

14 MR. EPSTEIN: She has indicated in her
15 affidavit that there is now information...
16 she has now provided you with additional
17 information, her further understanding, as
18 to the fact that McKenzie was involved in
19 the blogs and she agrees with what you
20 have...what Mr. Silver has indicated, that
21 there were numerous references to blogs in
22 the accounts and in the documents. So I
23 mean, we are not rearguing the motion here.
24 What we are here to do is provide you with
25 any additional information that we have

1 that she did not have before, and she has
2 provided that and you want to ask her some
3 questions about that, that is fine.

4

5 BY MS. ZEMEL:

6 1961. Q. Again, I would like an answer to my
7 question, and the question is does she take a
8 different position as the one that she took before
9 Justice Brown on April 1st now that she has had a
10 chance to review all this information. I would like
11 to hear an answer from the witness. What is her
12 position?

13 A. I recall making the argument that
14 even if all of the allegations were true, your case
15 wasn't made out. That position hasn't changed. If
16 you are asking specifically about my knowledge about
17 any potential links between Mr. McKenzie and the
18 blogs...

19 1962. Q. No, that is not what I asked.

20 A. ...obviously that has changed
21 because I have different information now.

22 1963. Q. Okay, so what is your position now
23 in that regard?

24 A. Well, my position is that there
25 appears to have been some connection.

1 1964. Q. Now, just going back to the BMC543
2 client ledgers at Exhibit A, upon reviewing them, I
3 don't believe Mr. Ranking or Mr. Silver asked you
4 about this, but they end...BMC543 ledgers, and in
5 particular, the docket and the docket of Mr.
6 McKenzie, end around, I believe, November 2008. I
7 think the last entry by Mr. McKenzie for a docket is
8 around October 5th, 2008. You had mentioned that
9 Mr. McKenzie...

10 MR. SILVER: In either file?

11 1965. MS. ZEMEL: No, in BMC543, okay? If you
12 look at BMC543...

13 MR. EPSTEIN: You are looking at Exhibit
14 A?

15 1966. MS. ZEMEL: Exhibit A.

16 MR. EPSTEIN: You are saying the last
17 entry is October 5, '08?

18 1967. MS. ZEMEL: No, I am sorry. No, that is
19 incorrect. I apologize. They end in and
20 around, I believe, November 2008, so let me
21 just look at that, double check. Yes, I
22 think the last entry of the docket by Mr.
23 McKenzie is November 23rd, 2008. That is a
24 few pages down from the end of Exhibit A,
25 correct?

1 MR. EPSTEIN: Which specific date? Can
2 you give us the date that you say the last
3 entry is?

4 1968. MS. ZEMEL: November 23rd, 2008. Can I
5 ask you just to undertake and to review
6 your records again and see if there are any
7 dockets by Mr. McKenzie beyond November
8 23rd, 2008 that your firm has?

9 MR. EPSTEIN: With regard to 543?

10 1969. MS. ZEMEL: No, with regard to anything.
11 I don't believe there is any dockets in the
12 other file as well by Mr. McKenzie. Yes,
13 with regard to 543, anything regarding...

14 MR. EPSTEIN: Sorry, what was the date?

15 THE DEPONENT: November 23rd, 2008.

16 MR. SILVER: Well, check the other one
17 too.

18 1970. MS. ZEMEL: I am pretty sure, but I
19 could be wrong. Let's just say I would
20 like to see all dockets entered by Mr.
21 McKenzie past November 23rd, 2008, that
22 you...

23 MR. EPSTEIN: Are they available in any
24 of the records...

25 1971. MS. ZEMEL: ...or your firm might have.

1 Now, to be fair...

2 MR. EPSTEIN: Please hold on.

3 THE DEPONENT: Wait, you are talking
4 about in any file?

5 1972. MS. ZEMEL: No, with respect to this
6 litigation. Not with respect...

7 THE DEPONENT: Okay.

8 1973. MS. ZEMEL: And to be fair to you...

9 MR. EPSTEIN: Do you have anything else?

10 THE DEPONENT: We have produced all of
11 the ledgers.

12

13 BY MS. ZEMEL:

14 1974. Q. So to be fair to you, you mentioned
15 before that, I think, beyond October 2008 Mr.
16 McKenzie was doing his own accounting?

17 A. Essentially, yes.

18 1975. Q. Okay, so I am just going to tell you
19 what, sort of, I am going at. He has very detailed
20 and regular dockets in BMC543 and the other, BMC568,
21 going until about November 2008. Past that, we have
22 got nothing, or maybe here and there in 568 there is
23 an appearance, okay? Would you have some form of
24 explanation as to why we don't have any more dockets
25 for Mr. McKenzie, time entries?

1 A. I am looking at one in BMC568 for
2 January 11th, of 2009.

3 1976. Q. All right, and what does it say?

4 A. It is a call to Lorne Silver and PA
5 re settlement and first draft of settlement
6 agreement.

7 1977. Q. I see that, and I am saying there
8 are sporadic entries, but if you look at 543 up
9 until November of 2008, there are regular entries by
10 Mr. McKenzie for his time. Now, that is something
11 you might not be able to answer, but I would like to
12 know what would be your or the firm's understanding
13 as to why suddenly there is very sporadic entries as
14 to his time spent on any one of these files?

15 A. I imagine because he didn't want us
16 to know how much he was spending on these files.

17 MR. EPSTEIN: I think we did indicate
18 before, either to Mr. Ranking or Mr.
19 Silver, that there was documents that Mr.
20 McKenzie took with him that we requested
21 ourselves to see. We don't know what he
22 has, but it may be that the answer to your
23 question rests there. I am assume you will
24 be asking Mr. McKenzie that question.

25 1978. MS. ZEMEL: We will be asking him, of

1 course.

2 MR. EPSTEIN: I am sure you will, but I
3 think this witness has indicated that she
4 has produced the firm records, to the best
5 of their ability, with regard to the
6 docketing.

7 1979. MS. ZEMEL: Well, if you do find
8 anything else that might explain this, will
9 you please undertake to produce or advise?
10 Do I have that undertaking?

11 MR. EPSTEIN: Yes.

U/T

12

13 BY MS. ZEMEL:

14 1980. Q. Thank you. All right, so I would
15 like to take you just directly to the exhibits and
16 Exhibit A of your affidavit. At page 14 of the
17 client ledgers, on the last bottom entry...the
18 bottom one of page 14, and February 8th, 2006. It
19 is entry number 497266, and it is three hours there
20 by Mr. McKenzie and it says:

21 "...E-mails from JK re Iain Deane e-mail.
22 E-mail..."

23 MR. SILVER: What date?

24

25 BY MS. ZEMEL:

1 1981. Q. February 8th, 2006. Then it says:
2 "...E-mail to Brian Case. Review documents
3 in Deane v Knox case, web nation and blog
4 searching. Call PA and..."

5 Could you please look in your files and produce all
6 these e-mails referenced, if you have them, any of
7 the e-mails referenced in that particular entry?

8 MR. EPSTEIN: We will look for them. U/T

9 1982. MS. ZEMEL: Or any other documents you
10 have relating to this entry?

11 MR. SILVER: Can we just stop for one
12 second?

13 1983. MS. ZEMEL: Off the record.

14
15 --- DISCUSSION OFF THE RECORD

16
17 1984. MS. ZEMEL: We had noticed that there
18 are some pages missing from various formats
19 of the exhibit, so we ask that, I guess,
20 Mr. Epstein ensure that the exhibits that
21 are filed with the court are complete.

22 MR. EPSTEIN: Yes. U/T

23
24 BY MS. ZEMEL:

25 1985. Q. All right, the next one would be

1 page 77 of Exhibit A, and the entry is on July 24th,
2 2007. There is an entry by lawyer 12. Is lawyer 12
3 Sunny Ware?

4 A. I believe so.

5 1986. Q. And there is an entry that says:

6 "...Review of many e-mails re classic BS&T
7 et cetera from JK and JG, from Iain Deane
8 to KD..."

9 I would like a copy of the e-mail from Iain Deane to
10 KD that was reviewed by Sunny Ware on July 24th,
11 2007.

12 MR. EPSTEIN: The e-mail from...

13 1987. MS. ZEMEL: Iain Deane to KD.

14 MR. EPSTEIN: Okay.

U/T

15

16 BY MS. ZEMEL:

17 1988. Q. And then go to Exhibit B, page 1,
18 first page so it is easy to find. Entry on February
19 23rd, 2009. There is an entry there by lawyer 18,
20 and is that Stacey Ball?

21 A. Yes.

22 1989. Q. It says:

23 "...Review of e-mail from SW..."

24 And I would assume that is Sunny Ware, but you could
25 tell me otherwise:

1 A. No.

2 1993. Q. Do you have any belief as to why
3 that is?

4 A. It was a source of disagreement
5 between Mr. McKenzie and the firm.

6 1994. Q. Okay, and what was that?

7 A. Our expectation was that when he
8 utilized the staff and the resources of the firm,
9 that we would be reimbursed.

10 1995. Q. And were you reimbursed?

11 A. Not for the staff time, no.

12 1996. Q. It appears as though, based on at
13 least these accounts, that some time passed, and I
14 am not sure when it starts, but somewhere around the
15 beginning of 2009 onwards that client was not
16 charged any money for any of the work done, at least
17 not in 568. Do you know if McKenzie sent Allard
18 separate accounts for that time?

19 A. No, I don't know.

20 1997. Q. And so you know if you got paid for
21 any of that time?

22 A. I don't know.

23 1998. Q. Thank you. The firm certainly
24 didn't get paid. Is that correct?

25 A. No, we did not.

1 1999. Q. On page 2 of Exhibit B, at February
2 20...I am sorry. I am incorrect, sorry. I am
3 sticking to page 1. I apologize. I stick to page
4 1. There is an entry, also on February 23rd, 2009,
5 and...I again made a mistake. It is page 2. It is
6 February 25th, 2009. I apologize. My notes are
7 unclear. And the entry is 617505. It is by Stacey
8 Ball and it says:

9 "...Preparation of e-mail to KWM et al re
10 who has Deane transcripts..."

11 Do you see that?

12 MR. EPSTEIN: Yes.

13 THE DEPONENT: Yes.

14 2000. MS. ZEMEL: Okay, I would like an
15 undertaking to ask Stacey Ball who does she
16 mean by et al or to check her e-mails to
17 determine who does she mean by et al? In
18 other words, who besides Bill McKenzie
19 received that e-mail, and I would like, of
20 course, a copy of that e-mail and any
21 responses to it. In other words, any e-
22 mails arising out of that particular e-
23 mail.

24
25 BY MS. ZEMEL:

1 2001. Q. And then on March 2nd, 2009, same
2 page, on the bottom, the last entry, 617532. I am
3 going to read it out. Again, this is an entry by
4 Stacey Ball. It says:

5 "...Conference with office staff, KWM,
6 JAD..."

7 That JAD, that is you?

8 A. That is me.

9 2002. Q. "ML", that is Mark Lemieux?

10 A. Yes.

11 2003. Q. "...re strategize for April 1st
12 motions re blogs and Mar 20th exams..."

13 MR. EPSTEIN: What?

14

15 BY MS. ZEMEL:

16 2004. Q. I guess M-A-R 20th exams, which I am
17 assuming means March 20th exams. Do you recall that
18 conference she is referring to?

19 A. Yes, I recall attending a
20 conference. I don't have much recollection of
21 specifics, but yes.

22 2005. Q. Do you recall what was discussed
23 regarding strategizing for the blogs motion?

24 A. Well, as far as the motion was
25 concerned, I was present for that part of the

1 meeting, and it was just Mr. McKenzie discussing how
2 the motion was to be argued and giving instructions,
3 basically.

4 2006. Q. What were his instructions regarding
5 how the motion should be argued?

6 A. Well, you saw them in action.

7 2007. Q. I surely did. Is that how the
8 motion was argued and proceeded? It was entirely in
9 accordance with what McKenzie instructed you or
10 anyone else at the firm?

11 A. The overall strategy came from Mr.
12 McKenzie. I think I formulated my arguments based
13 on the materials and based on my meeting with Mr.
14 McKenzie.

15 2008. Q. And the materials, you mean the
16 materials that were filed with the court?

17 A. Correct.

18 2009. Q. Do you know if anyone, including
19 Stacey Ball...actually, I would ask you to undertake
20 to ask Stacey Ball if she has any recollection of
21 that conference, and if she has any notes or you or
22 anyone else have notes in file arising out of that
23 conference and if you do, undertake to produce it,
24 please?

25 MR. EPSTEIN: We will make that inquiry

U/T

1 of Ms. Ball.

2 THE DEPONENT: This is just notes of the
3 meeting?

4 MR. EPSTEIN: Yes.

5 2010. MS. ZEMEL: Yes, I am looking for the
6 notes from that meeting.

7 MR. EPSTEIN: Yes, the notes of the
8 meeting and we will ask Ms. Ball if she has
9 got any notes of the meeting.

10

11 BY MS. ZEMEL:

12 2011. Q. And then December 4th, 2008. So
13 that goes back down a little bit and I will go all
14 the way down to...in Exhibit B there is an entry on
15 page...the pages here are oddly numbered at this
16 point. It is almost...if you go towards the end of
17 Exhibit B, on September 4th, 2008.

18 A. I think it has just been put in
19 reverse order.

20 2012. Q. Not reverse order, but they are not
21 exactly organized chronologically. And the entry is
22 number 614480.

23 MR. SILVER: Is it right at the back?

24 2013. MS. ZEMEL: It is towards the end. I am
25 actually going to focus mostly at the end

1 of Exhibit B now.

2 THE DEPONENT: So what was the date in
3 2008?

4 2014. MS. ZEMEL: December 4th, 2008 and the
5 entry is 614480.

6 MR. SILVER: At the top of the page it
7 has a number 14 on it.

8 2015. MS. ZEMEL: Yes, that page is number...

9 MR. EPSTEIN: What was the number of the
10 entry, please?

11

12 BY MS. ZEMEL:

13 2016. Q. 614480, and it says...this is,
14 again, Stacey Ball and it says:

15 "...Review of e-mail from VV..."

16 which I will assume is Victory Verbatim, but if you
17 know otherwise, let me know:

18 "...enclosing transcript of Deane and
19 FWD..."

20 which again, I presume is forward:

21 "...to KWM team..."

22 Do you see that?

23 A. M'hm.

24 2017. Q. Could you please undertake to review
25 the file and/or ask Stacey Ball who is KWM team and

1 to provide a copy of this e-mail he references?

2 MR. EPSTEIN: What possible relevance
3 could...this is an e-mail from the reporter
4 enclosing a copy of the transcript. What
5 possible relevance can this...

6 2018. MS. ZEMEL: I would like to see the e-
7 mail forwarding it to KWM team.

8 MR. EPSTEIN: The e-mail forwarding it,
9 okay. That is fine. U/T

10 2019. MS. ZEMEL: That is what I mean. I
11 don't need to see the e-mail coming in.

12 MR. EPSTEIN: Okay, so you want to know
13 who is KWM team and...

14 2020. MS. ZEMEL: A copy of the e-mail.

15 MR. EPSTEIN: ...a copy of the e-mail
16 forwarding the transcript to KWM team.

17 2021. MS. ZEMEL: While I am here, actually,
18 could I ask you...further down there is
19 entries by lawyer 16 and...

20 MR. EPSTEIN: Do you know who KWM team
21 is?

22 THE DEPONENT: I know who KWM is, but I
23 don't know what the "team" is.

24 2022. MS. ZEMEL: That is my question.

25 MR. EPSTEIN: Right.

1 BY MS. ZEMEL:

2 2023. Q. There is entries coming up here by
3 lawyer 16 and I had asked your counsel to advise and
4 they had told me that they believe it is Krista
5 McKenzie, but to confirm with you. Do you know who
6 lawyer 16 is in the entries?

7 A. No, other than what they...if they
8 have said Krista McKenzie, that is, I think, based
9 on looking at accounts and comparing it to the
10 entries.

11 2024. Q. Okay. Well, again, your counsel
12 when they answered, they said they are not sure,
13 could you undertake to review your accounts and
14 double-check and to advise who lawyer 16 is?

15 A. Well, that is...

16 2025. Q. If it is otherwise.

17 A. ...information we could get.

U/T

18 2026. Q. Okay, if you see otherwise, other
19 than Krista McKenzie, advise, okay? And on December
20 7th, 2008, so if you just go down a little bit from
21 where we were before...the next page, sorry. Entry
22 number 614499.

23 MR. EPSTEIN: Sorry, 61...

24 2027. MS. ZEMEL: 614499.

25 MR. EPSTEIN: Okay.

1 BY MS. ZEMEL:

2 2028. Q. It says lawyer 18, that is Stacey
3 Ball again. It says:

4 "...Preparation of e-mail to KJM..."

5 And who is KJM?

6 A. That would be Krista McKenzie.

7 2029. Q. "...enclosing transcripts of Deane
8 and Knox..."

9 And then it says:

10 "...Review of e-mail from KWM and reply..."

11 And so I would like to get a copy of those two e-
12 mails referenced there.

13 2030. MS. ZEMEL: And because I had promised I
14 am going to ask only for an hour, I have a
15 couple more questions and then the rest I
16 am going to put to you in writing, Mr.
17 Epstein, okay?

18 MR. EPSTEIN: Fine.

19

20 BY MS. ZEMEL:

21 2031. Q. So I am not going to take you to the
22 entries, but there is some references to some
23 individuals in the ledgers that if you can assist me
24 in who they are or their identity or ask anyone at
25 the firm to advise of who they are and their

1 relationship to this litigation, that would be my
2 question. There is a reference in the docket entry
3 on January 27, 2009 by Sunny Ware that says:

4 "...Confer with TGA..."

5 Who is TGA?

6 A. That is Tim Anderson.

7 2032. Q. Who is Tim Anderson?

8 A. One of my partners.

9 2033. Q. Okay, if that is the case, then

10 let's just go to that entry quickly. January 27th,
11 2009. That will be towards the end, I am assuming,
12 of Exhibit B. Okay, here we go.

13 MR. EPSTEIN: Which entry was this?

14 2034. MS. ZEMEL: Entry number 615644.

15 MR. EPSTEIN: All right.

16
17 BY MS. ZEMEL:

18 2035. Q. I am actually going to read the
19 entire entry. It says:

20 "...Meet with KWM [that is Mr. McKenzie],
21 review Zemel letter and scan same. Calls
22 with KWM, confer with TGA, draft letter
23 back to Zemel, e-mail to KWM..."

24 I would like you to ask Mr. Anderson and Ms. Ware,
25 actually, both of them, what was discussed during

1 attachment from DK? That is what you are
2 referring to?

3 2040. MS. ZEMEL: Yes, and it says...it is
4 exactly. It says...

5 MR. EPSTEIN: Re their...letter?

6 2041. MS. ZEMEL: Re their focusing letter
7 from Miller Thomson, okay. I would like to
8 know who DK is in this particular entry.
9 If it is Dave Kleiman, fine, and if so I
10 would like to know...

11 MR. EPSTEIN: Okay, she has indicated...
12 you don't have any...

13 THE DEPONENT: I don't.

14 MR. EPSTEIN: She has no information.

15 2042. MS. ZEMEL: To ask Stacey Ball. This is
16 Stacey Ball's answer.

17 MR. EPSTEIN: Ask or confirm if DK is
18 David Kleiman.

U/T

19 2043. MS. ZEMEL: And if not, who is he or
20 she, and I would like a copy of that e-mail
21 referenced here:

22 "...Review of e-mail and attachment from DK
23 re webhosting letter from Miller
24 Thomson..."

25 MR. SILVER: The e-mail and the

1 attachment...

2 2044. MS. ZEMEL: Yes, absolutely. Sorry.
3 Thank you, Mr. Silver. And the attachment
4 of course, and any replies to that e-mail.
5 In other words, any documents relevant to
6 this particular entry, I would like to see
7 them.

8 MR. EPSTEIN: We will give you any
9 replies to the e-mail.

U/T

10 2045. MS. ZEMEL: Thank you. And in the
11 interests of time, Mr. Epstein, any other
12 questions I have, and I do have a few
13 questions, they can be answered by
14 undertaking I will put to you in writing.
15 Is that agreed upon?

16 MR. EPSTEIN: Yes.

17 2046. MS. ZEMEL: Thank you very much.

18

19 --- A BRIEF RECESS

20

21 JESSICA DUNCAN, resumed

22 CROSS-EXAMINATION BY MR. BRISTOW:

23 2047. Q. Ms. Duncan, I act for Philip
24 Nicholls and his law firm in Barbados, something
25 like your situation only the reverse over your

1 period of being cross-examined, so sometimes like
2 you were falling into a black hole. And so you can
3 understand the three years that my clients have been
4 in that same position. I would like to see this
5 matter finished as soon as possible. I am sure
6 everybody here would, and we are all...all the
7 lawyers here are paying for this indirectly through
8 our LawPro payments every year, which means I should
9 be speaking probably quicker than before. You are a
10 litigation lawyer, are you?

11 A. Yes.

12 2048. Q. You do litigation, and when did you
13 say you were called to the Bar?

14 A. February of 1995.

15 2049. Q. Now, if I could turn to the
16 insurance policies, have you got the LawPro policy?

17 A. Me?

18 MR. EPSTEIN: No, not in front of us.

19 2050. MR. BRISTOW: You were asked to produce
20 it. You have been asked to produce it
21 since about August of last year.

22 MR. EPSTEIN: And I believe an answer
23 has been given in that regard. We have
24 advised counsel, Mr. Dewart, I noticed,
25 advised counsel, and we have since advised

1 counsel this too, where this policy can be
2 located. It is the same policy that we all
3 have and we have identified for counsel
4 where this policy can be located.

5 2051. MR. BRISTOW: Wouldn't it be easier, Mr.
6 Epstein, if you just produced the policy?

7 MR. EPSTEIN: It is available. We have
8 told you where it is. It is on the website
9 and we have told you exactly where you can
10 find it.

11 2052. MR. BRISTOW: I want to see your policy.

12 MR. EPSTEIN: Well, we have told you
13 where...

14 2053. MR. BRISTOW: And I have been trying to
15 get it for a year and you still give the
16 same problem. "You can find it on the
17 website." The problem is, Mr. Epstein, we
18 couldn't, and that is in affidavit
19 material. Have you read the affidavit
20 material? I have been after Mr. Dewart for
21 a year. You have the affidavits of our
22 people trying to get it and you need a pin
23 number or a code number. Now, you are
24 saying you won't produce it. Is that your
25 position, sir?

1 MR. EPSTEIN: No, that is not our
2 position.
3 2054. MR. BRISTOW: Well, why didn't you just
4 bring it?
5 MR. EPSTEIN: Because we advised you
6 where it was available.
7 2055. MR. BRISTOW: Sure.
8 MR. EPSTEIN: It is the same policy that
9 you have, Mr. Bristow, that we all have,
10 and...
11 2056. MR. BRISTOW: Okay, why don't we take
12 five minutes. You get it for me. You hit
13 the buttons, wherever we are supposed to
14 get it. You are just stonewalling this
15 thing and you have been for a year, and I
16 am fed up with this.
17 MR. EPSTEIN: Mr. Bristow, we have not
18 been on the record for a year. We have not
19 been stonewalling.
20 2057. MR. BRISTOW: Well, you or Dewart have.
21 MR. EPSTEIN: Is there a question there?
22 2058. MR. BRISTOW: Yes, the question is you
23 won't produce the policy. All right, fine.
24 Now...
25 MR. EPSTEIN: I have told you, Mr.

1 Bristow, that is not our position.

2 2059. MR. BRISTOW: No, you are saying I get
3 it, I find it.

4 MR. EPSTEIN: I have told you...

5 2060. MR. BRISTOW: Is that your position? I
6 got out and try to find it?

7 MR. EPSTEIN: I told you...I identified
8 for you where you can get it. If you have
9 difficulty getting it, let us know and if
10 you require assistance, we will assist you.

11 2061. MR. BRISTOW: You didn't read any of the
12 material, the sworn material that was filed
13 on the motion that we had tried to get it
14 and couldn't get it? Did you read that,
15 sir?

16 MR. EPSTEIN: Mr. Bristow, this is a
17 cross-examination of Ms. Duncan.

18 2062. MR. BRISTOW: Well, I am asking you.
19 You are refusing to produce the policy.

20 MR. EPSTEIN: I am not refusing to
21 produce the policy.

22 2063. MR. BRISTOW: Yes, you are. You are
23 saying I can find it somewhere.

24 MR. EPSTEIN: You have not listened to
25 my answer.

1 MR. EPSTEIN: We have.

2 2068. MR. BRISTOW: Pardon?

3 MR. EPSTEIN: We have. We sent it to
4 you.

5 2069. MR. BRISTOW: Do you have a copy of it
6 there?

7 MR. EPSTEIN: No, I don't have a copy
8 here.

9 2070. MR. BRISTOW: You don't have a copy of
10 it. I want to cross-examine on it.

11 MR. EPSTEIN: This is not a cross-
12 examination of Ms. Duncan on the insurance
13 policies.

14 2071. MR. BRISTOW: All right, fine. Your
15 answer is you don't have an excess policy,
16 okay.

17 MR. EPSTEIN: I did not say that. That
18 was not the answer.

19 2072. MR. BRISTOW: Yes, but you haven't got
20 one with you.

21 MR. EPSTEIN: The answer is, Mr.
22 Bristow, we provided a copy of the excess
23 policy to everybody...

24 2073. MR. BRISTOW: Yes?

25 MR. EPSTEIN: ...including yourself.

1 2074. MR. BRISTOW: Okay, now I have got one
2 and it is all marked up beautifully and we
3 can use that if you want, but it is going
4 to take forever.

5 MR. EPSTEIN: The point is she is not...
6 this is not a cross-examination of her on
7 the insurance policy.

8 2075. MR. BRISTOW: That is your position.

9 MR. EPSTEIN: Yes.

10 2076. MR. BRISTOW: All right.

11 MR. EPSTEIN: Yes, this is not a...

12 2077. MR. BRISTOW: We have heard your
13 position.

14 MR. EPSTEIN: We have indicated and the
15 orders provide that we are to provide you
16 with the information with regard to
17 insurance, which we have done.

18 2078. MR. BRISTOW: And that is it?

19 MR. EPSTEIN: That is...

20 2079. MR. BRISTOW: That is it?

21 MR. EPSTEIN: We are obliged to comply
22 with the order and that is what we have
23 done, yes.

24 2080. MR. BRISTOW: All right, you say you
25 have complied by not producing today here

1 anything, and never producing the LawPro
2 policy.

3 MR. EPSTEIN: This is not...

4 2081. MR. BRISTOW: You have complied, have
5 you?

6 MR. EPSTEIN: This is not a cross-
7 examination...this is a cross-examination
8 of Ms. Duncan on her affidavit. There is a
9 specific revision that you have in your
10 order with regard to an examination of Mr.
11 McKenzie. If you will read the order of
12 Justice Shaughnessy dated April the 12th,
13 you will see there is a specific reference
14 to a cross-examination of Mr. McKenzie with
15 regard to insurance. There is no reference
16 in the orders that were issued on April the
17 12th with regard to any cross-examination
18 of this witness with regard to insurance
19 issues, and...

20 2082. MR. BRISTOW: So you are not going to
21 allow her to answer any questions on
22 insurance issues. Is that your position,
23 sir?

24 MR. EPSTEIN: What are your questions,
25 because...

1 MR. EPSTEIN: Of Cecilia Hoover's two e-
2 mails of April 11th, when she first sent
3 over the policy at 3:01 and at 3:14 she
4 sent over the cover page and declaration
5 page. I have both of those e-mails here,
6 Mr. Bristow, if you want to use them.

7 2086. MR. BRISTOW: All right, let's use that.
8 Do you have the LawPro policy?

9 MR. SILVER: No.

10 2087. MR. BRISTOW: Well, then, we are going
11 to have to do it the hard way. I have got
12 a copy of it, and I got it out...

13 MR. EPSTEIN: I thought you said you
14 didn't have a copy.

15 2088. MR. BRISTOW: Just a minute, sir. I got
16 a copy out of my own office, all right,
17 because you wouldn't give us one.

18 MR. EPSTEIN: It is the same policy that
19 we all have.

20 2089. MR. BRISTOW: You have said that for a
21 year, sir. You and Dewart have been saying
22 that for a year.

23 MR. EPSTEIN: So you have a copy of the
24 policy?

25 2090. MR. BRISTOW: Yes, out of our office.

1 MR. EPSTEIN: Then you have a copy of
2 the policy.

3 2091. MR. BRISTOW: Of course I got it, but I
4 don't know if it is the same one.

5 MR. EPSTEIN: It is. I am telling you
6 the LawPro policy is the same policy that
7 all of us have. The one that you have that
8 covers you for errors and omissions,
9 negligence is the same policy that I have
10 and the same policy that Ms. Duncan has.

11

12 BY MR. BRISTOW:

13 2092. Q. All right, I hear what you are
14 saying. You won't produce it, okay. Now, the non-
15 waiver agreement. Do you have a non-waiver
16 agreement. I am asking you. Did you sign a non-
17 waiver agreement on your insurance?

18 A. I don't know what a non-waiver
19 agreement is.

20 2093. Q. You are in litigation? You don't
21 know what a non-waiver agreement is? Well, let me
22 tell you what a non-waiver agreement is. You
23 have...

24 MR. EPSTEIN: I can shorten this,
25 perhaps, and assist you. It is my

1 understanding that there was no non-waiver
2 agreement signed by Ms. Duncan.

3 2094. MR. BRISTOW: Was there any non-waiver
4 agreement signed by anyone in the firm?

5 MR. EPSTEIN: Not that I am aware of.

6

7 BY MR. BRISTOW:

8 2095. Q. All right, when was the matter
9 reported to LawPro, what date?

10 A. I don't know off the top of my head.

11 2096. Q. Would you find that out for me,
12 please?

13 MR. EPSTEIN: Can you advise me what the
14 relevance of it is, that question?

15 2097. MR. BRISTOW: I am asking the question
16 when was it reported?

17 MR. EPSTEIN: I am asking what the
18 relevance is.

19 2098. MR. BRISTOW: The relevance is crystal
20 clear.

21 MR. EPSTEIN: What is the relevance?

22 2099. MR. BRISTOW: Well, if you don't report
23 it in time, they dump you, they deny on
24 you, okay?

25 MR. EPSTEIN: All right. So Mr.

1 Bristow, do you have any indication that
2 either LawPro or the excess insurers are
3 denying because of late reporting? Is that
4 your position that you take?

5 2100. MR. BRISTOW: I want to know if you...
6 now, let me ask you this: Is LawPro
7 covering you and will they pay?

8 MR. EPSTEIN: Don't answer that
9 question. We have provided you with
10 LawPro's position. LawPro has separate
11 coverage counsel as does the excess
12 insurers and we have provided you with the
13 position that is taken...the coverage
14 position that has been taken by LawPro has
15 been communicated to you. /R

16
17 BY MR. BRISTOW:

18 2101. Q. The coverage position? Do you
19 understand the difference between counsel that is
20 defending you and coverage counsel at LawPro?

21 A. Yes.

22 2102. Q. Okay, fine. Have you ever talked to
23 the coverage counsel?

24 MR. EPSTEIN: Don't answer that
25 question. /R

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BY MR. BRISTOW:

2103. Q. And is that Ms. Ip?

MR. EPSTEIN: Don't answer that question.

/R

2104. MR. BRISTOW: Has anyone in the firm spoken to coverage counsel?

MR. EPSTEIN: Don't answer that question.

/R

2105. MR. BRISTOW: And who is advising you as to whether you are going to be covered or not covered? Who tells you that?

MR. EPSTEIN: Don't answer that question.

/R

2106. MR. BRISTOW: Was it Mr. Dewart or was it Mr. Epstein that is communicating with you and saying, "Yes, you are covered," or, "You are not covered"?

MR. EPSTEIN: Don't answer that question.

/R

2107. MR. BRISTOW: Where do you get the information from LawPro that you are either covered or not covered?

MR. EPSTEIN: The position has been communicated by LawPro to...

1 2108. MR. BRISTOW: Who?

2 MR. EPSTEIN: ...Ms. Duncan and to Mr.

3 McKenzie.

4 2109. MR. BRISTOW: Who? Who communicates

5 that?

6 MR. EPSTEIN: It is by LawPro.

7 2110. MR. BRISTOW: I beg your pardon?

8 MR. EPSTEIN: The position is being

9 communicated by LawPro.

10 2111. MR. BRISTOW: Who?

11 MR. EPSTEIN: What difference does it

12 make who? It has been communicated...

13 2112. MR. BRISTOW: You won't answer that,

14 sir?

15 MR. EPSTEIN: What you are entitled to

16 know...

17 2113. MR. BRISTOW: You are the client. Will

18 you answer that or not?

19 MR. EPSTEIN: What you are entitled to

20 know, Mr. Bristow, you are entitled to know

21 what the coverage position is that the

22 insurers have taken and we have provided

23 that information to you.

24 2114. MR. BRISTOW: What is the position?

25 MR. EPSTEIN: It is set out to you in an

1 e-mail. We have sent it to you. I think
2 you have a copy of it here.

3 2115. MR. BRISTOW: Well, let's look at it
4 now. Could we look at that, please? It is
5 not in this package of documents here, but
6 we did provide you with what LawPro's
7 position was. I believe it was done in an
8 e-mail and all counsel were provided that
9 information.

10 2116. MR. BRISTOW: Can you tell me who
11 Cecilia Hoover is?

12 MR. EPSTEIN: Cecilia Hoover is an
13 associate in my office.

14

15 BY MR. BRISTOW:

16 2117. Q. Yes, so it is coming from your
17 office and I am showing you that. Can you tell me
18 if you have ever seen that before?

19 A. I don't recall seeing this
20 particular e-mail.

21 2118. Q. Has anyone discussed it with you?

22 MR. EPSTEIN: What specific portion of
23 the e-mail are you talking about?

24 2119. MR. BRISTOW: Anything. Anything in the
25 e-mail at all.

1 MR. EPSTEIN: Can we go off the record a
2 second?

3 2120. MR. BRISTOW: No, I don't want to go off
4 the record.

5 MR. EPSTEIN: Well, I do.

6 2121. MR. BRISTOW: I want an answer.

7 MR. EPSTEIN: Well, I do.

8 2122. MR. BRISTOW: Well, put it on the
9 record, then.

10 MR. EPSTEIN: I will tell you what this
11 e-mail purports to discuss.

12 MR. SILVER: You are on the record.

13 MR. EPSTEIN: Well, Mr. Bristow...

14 2123. MR. BRISTOW: You don't have to tell me
15 what it purports to discuss.

16 MR. EPSTEIN: Well, I am telling you
17 what this...

18 2124. MR. BRISTOW: I want to ask the witness
19 if she has ever been told about what is in
20 there or discussed it.

21 MR. EPSTEIN: What has it got to do with
22 her affidavit that...

23 2125. MR. BRISTOW: You are not going to
24 answer the question.

25 MR. EPSTEIN: No, this e-mail...no, let

1 me just make it very clear for the record.
2 This is an e-mail...and I do want to go off
3 the record.

4 2126. MR. BRISTOW: Well, you are not going
5 off the record.

6 MR. EPSTEIN: All right.

7 2127. MR. BRISTOW: Say whatever you want.

8 MR. EPSTEIN: This was a discussion
9 between counsel to settle the terms of an
10 order the day before there was a motion
11 before Justice Shaughnessy, and there was
12 an exchange between counsel with regard to
13 the wording of the order that was
14 ultimately agreed to by all counsel and was
15 ordered by Justice Shaughnessy on April the
16 12th. That is what this e-mail deals with.
17 This came from our office, it was sent to
18 all counsel, including yourself, and that
19 has got nothing to do with the affidavit
20 that she has sworn, which she has yet to be
21 cross-examined on. If you have any
22 questions about her affidavit, we would be
23 pleased to answer it. We are not going to
24 answer any questions on this e-mail. /R

25 MR. SILVER: What date is the e-mail,

1 anyway?

2 MR. EPSTEIN: It is April the 11th,
3 2010, one day before...

4 MR. SILVER: At what time?

5 MR. EPSTEIN: At 2:36 p.m., and it was
6 an e-mail from my office to Mr. Ranking and
7 Ms. Morse with cc to all other counsel
8 going through on a paragraph by paragraph
9 basis comments on the order that was to be
10 dealt with the next day by Justice
11 Shaughnessy, resulted in an agreement on
12 the wording of that particular order, and
13 that order ultimately issued. So if you
14 have any questions about...

15

16 BY MR. BRISTOW:

17 2128. Q. I have a number of them. Would you
18 look at it, witness, please? I don't want your
19 client, or rather your advisor, Mr. Epstein. I am
20 going to ask questions and he can refuse, you see,
21 or you can refuse, but you see, you don't have to
22 refuse just because he says so.

23 A. Well, I will say that I am not
24 prepared to give up my solicitor/client privilege
25 and I am not prepared to give up the firm's

1 solicitor/client privilege.

2 2129. Q. And you think this is
3 solicitor/client privilege?

4 A. Well, you are asking me what I
5 discussed with my counsel...

6 2130. Q. Yes.

7 A. ...yes, that is solicitor/client
8 privilege.

9 2131. Q. All right, you won't answer any of
10 that. All right, here we go, from Mr. Epstein's
11 office, and you see the first paragraph:

12 "...Below is our response with respect to
13 your request for disclosure for insurance
14 information..."

15 Do you see that?

16 MR. EPSTEIN: No.

17 2132. MR. BRISTOW: "...It is tendered on
18 behalf of..."

19 MR. EPSTEIN: Where is that?

20 2133. MR. BRISTOW: First paragraph.

21 THE DEPONENT: That is not what this...

22 MR. EPSTEIN: That is not what this e-
23 mail is.

24 2134. MR. BRISTOW: Excuse me, I am sorry.

25 MR. EPSTEIN: Give us a copy of the e-

1 mail that you are referring to, then we
2 will look at it.

3 2135. MR. BRISTOW: I am sorry, you are quite
4 right, and I am going to have to use my
5 copy, if I can find it. Maybe I will just
6 read it to you, because Mr. Epstein says he
7 is not going to answer any questions
8 anyway. I want it on the record.

9 MR. EPSTEIN: I didn't say we won't
10 answer any questions.

11 2136. MR. BRISTOW: All right.

12 MR. EPSTEIN: I said to you let's just
13 be clear for the record because you don't
14 want to put anything off the record. What
15 I told you was you asked me certain
16 questions about an e-mail that had been put
17 to us dated April the 11th, 2010 and you
18 asked us if she would advise as to what she
19 had discussed with her counsel regarding
20 that e-mail, and we said to you that we
21 would not answer any questions about that
22 e-mail. You are now indicating to me that
23 there is another e-mail that you were...in
24 error, and that that was not the e-mail
25 that you were talking about.

1 2137. MR. BRISTOW: You want to read that one.

2 MR. EPSTEIN: And now there is another
3 e-mail you want us to look at and we will
4 do so, and then we will consider your
5 questions and determine if we will answer
6 them.

7 2138. MR. BRISTOW: All right.

8 MR. EPSTEIN: Okay, we have looked at
9 the e-mail.

10 2139. MR. BRISTOW: All right, thank you.

11 This is an e-mail, April 11, from Cecilia
12 Hoover...

13 MR. EPSTEIN: Let's just get the time so
14 that we...because the previous...

15

16 BY MR. BRISTOW:

17 2140. Q. 2:18 p.m. All right, and it is to
18 Mr. Ranking, copies to everyone else, and I take it
19 that you haven't seen this before?

20 A. That particular e-mail?

21 2141. Q. Yes.

22 A. No, I don't believe I have.

23 2142. Q. All right. Well, I am going to ask
24 you if this is the position of your firm as
25 enunciated in this particular memo. So I am going

1 to the first paragraph, and it says:

2 "...Below is our response with respect to
3 your request for disclosure for insurance
4 information..."

5 MR. EPSTEIN: Correct.

6 2143. MR. BRISTOW: "...It is tendered on
7 behalf of CMAD and Mr. McKenzie..."

8 MR. EPSTEIN: Correct.

9

10 BY MR. BRISTOW:

11 2144. Q. Were you aware that information was
12 being tendered on behalf of both Mr. McKenzie and
13 your firm?

14 MR. EPSTEIN: I can tell you in that
15 regard the position of LawPro was the same
16 with regard to...well, the response that we
17 got was a collective response from LawPro
18 and I discussed it with Mr. Kramer. We
19 reviewed the wording, the proposed wording,
20 that we had planned to circulate to other
21 counsel with regard to LawPro's position
22 with regard to coverage and he agreed that
23 that could be sent on behalf of both the
24 firm and on behalf of Mr. McKenzie as well.

25 2145. MR. BRISTOW: All right, then next

1 paragraph:

2 "...As you know..."

3 MR. SILVER: So does that mean to say
4 that e-mail was sent out with Kramer's
5 consent?

6 MR. EPSTEIN: Yes.

7 MR. SILVER: Thank you.

8 2146. MR. BRISTOW: And is that Kramer's
9 position, then, this e-mail is his
10 position?

11 MR. EPSTEIN: I believe...you can
12 confirm it with him, but I believe it was.
13 We did discuss the contents of that.
14 Essentially it is the same position with
15 regard to both insured, so I did discuss
16 that with him when we got the response and
17 Mr. Kramer agreed that that could go out on
18 behalf of both the firm and Mr. McKenzie,
19 but you can confirm that with Mr. Kramer,
20 but I believe he will confirm it for you.

21

22 BY MR. BRISTOW:

23 2147. Q. Next paragraph:

24 "...As you know, Mr. McKenzie and Crawford
25 McKenzie Anderson and Duncan are covered

1 under the standard LawPro policy, which is
2 readily available to you..."

3 All right, she was saying the same thing to Mr.
4 Ranking as LawPro was saying for me for a year,
5 okay? "Go find it." Isn't that what she says?

6 MR. EPSTEIN: Don't answer that. It
7 speaks for itself. /R

8 2148. MR. BRISTOW: And you see, one of the
9 reasons the defence team wants to at least
10 look at the insurance policy is to see if
11 there is a lot of writing on it, see if
12 there is anything on it that would help us.
13 I don't know if this is the only policy. I
14 don't know exactly what your insurer is
15 insuring. Now, you don't have to answer
16 that. I am just putting this on the
17 record. Now, let's go on. She says in the
18 next paragraph:

19 "...In my view, the examiner is entitled to
20 disclosure in full of the terms of any
21 agreements, understanding notice of
22 position taken, written or oral, that may
23 affect the availability of insurance
24 proceeds, but no more than that..."

25 MR. EPSTEIN: Can I just take a look at

1 the e-mail for one second, please?

2 2149. MR. BRISTOW: No.

3 MR. EPSTEIN: I just want to take a look
4 at the e-mail. Sorry, where were you
5 reading from, Mr. Bristow?

6 2150. MR. BRISTOW: I am reading from right
7 here, see?

8 MR. EPSTEIN: You are reading from here?

9 2151. MR. BRISTOW: Yes, I am reading from
10 there.

11 MR. EPSTEIN: This portion over here,
12 the second highlighted blue portion?

13 2152. MR. BRISTOW: Yes, that is right.

14 MR. EPSTEIN: What the second
15 highlighted blue portion is, a quote from
16 the Seaway and Markel case.

17 2153. MR. BRISTOW: Excuse me. Whether it is
18 a quote or whether that is what she said,
19 is that LawPro's position as enunciated in
20 that paragraph?

21 MR. EPSTEIN: This e-mail does reflect
22 LawPro's position communicated to us by
23 LawPro that we were authorized to advise
24 the defendants and yes, this does outline
25 LawPro's position and you can take...

1 on that, which is outlined in that e-mail,
2 and we were authorized by LawPro to provide
3 that information to you, which we have done
4 in accordance with our obligations.

5 2161. MR. BRISTOW: All right, let me go on to
6 the next paragraph:

7 "...We advise that LawPro is providing a
8 defence on behalf of Mr. McKenzie..."

9 So I take it you had discussed this with
10 Mr. Kramer?

11 MR. EPSTEIN: Yes.

12 2162. MR. BRISTOW: Because this is a joint...

13 MR. EPSTEIN: Yes.

14 2163. MR. BRISTOW: All right, so it is your
15 joint position?

16 MR. EPSTEIN: Yes.

17 2164. MR. BRISTOW: "...subject to the
18 reservation of rights..."

19 And this would mean that the McKenzie
20 position and the law firm's position are
21 identical?

22 MR. EPSTEIN: Yes, the position...just
23 so you understand, Mr. Bristow, the way it
24 works is that each of us have an insurance
25 policy that insures us. The LawPro policy

1 doesn't insure law firms. It insures
2 individuals, and there is innocent party
3 coverage as part of that coverage for
4 individuals, but it is individuals, not law
5 firms, that have a policy. So when LawPro
6 communicates their position with regard to
7 Mr. McKenzie by extension, to the extent it
8 may impact on the firm, it is really the
9 one policy that we are referring to, which
10 was Mr. McKenzie's policy.

11

12 BY MR. BRISTOW:

13 2165. Q. Did you know that?

14 A. Yes.

15 2166. Q. When did you know that?

16 MR. EPSTEIN: Why is it relevant when
17 she knew that?

18 2167. MR. BRISTOW: I am asking the questions.
19 You can say don't answer.

20 MR. EPSTEIN: I don't think that is
21 relevant.

22 2168. MR. BRISTOW: Well, that is you won't
23 answer?

24 MR. EPSTEIN: We won't answer that
25 question.

1 2169. MR. BRISTOW: All right. Going back to
2 the paragraph that I just started:
3 "...We advised that LawPro is providing a
4 defence on behalf of Mr. McKenzie..."
5 Now:
6 "...subject to the reservation of rights,
7 entitlements and defences available to it
8 under the policy..."
9 Is that your position in that...

10 MR. EPSTEIN: Yes, as outlined in...that
11 is our position. That is not our position,
12 it is LawPro's position. We are
13 communicating to you, as we are obliged to
14 do, what the insurer's position is with
15 regard to coverage, and that is what
16 LawPro's position is.

17
18 BY MR. BRISTOW:

19 2170. Q. LawPro is paying all of the fees for
20 your firm?

21 MR. EPSTEIN: Don't answer that
22 question.

/R

23
24 BY MR. BRISTOW:

25 2171. Q. Are you paying Mr. Epstein anything?

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

3 2172. MR. BRISTOW: Any retainer assigned for
4 Mr. Epstein?

5 MR. EPSTEIN: Don't answer that
6 question. /R

7 2173. MR. BRISTOW: My bet is you don't. I
8 bet that he is acting for LawPro, I bet.
9 And if he is acting for LawPro, he is not
10 acting for you, that is, your firm.

11 MR. EPSTEIN: What is your question, Mr.
12 Bristow?

13 2174. MR. BRISTOW: Just say don't answer.
14 That is my question.

15 MR. EPSTEIN: What is your question? I
16 didn't hear a question there.

17 2175. MR. BRISTOW: Right.

18 MR. EPSTEIN: What is the question?

19 2176. MR. BRISTOW: They are acting for
20 themselves, not you, aren't they?

21 MR. EPSTEIN: Don't answer that
22 question. We are on the record
23 representing the law firm. That is clear. /R

24 2177. MR. BRISTOW: You may be on the record,
25 but did you ever ask who these people are

1 acting for?

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

/R

4 2178. MR. BRISTOW: Because you see, the
5 object of LawPro is not to pay any money on
6 a policy. Don't answer that question, all
7 right, and let me go on. Let me go on with
8 that.

9 MR. EPSTEIN: That is offensive,
10 actually. I found that question offensive.

11 2179. MR. BRISTOW: Well, you may find it
12 offensive...

13 MR. EPSTEIN: And I am certainly not
14 going to...

15 2180. MR. BRISTOW: ...but I am going to ask
16 you who you are acting for, Mr. Epstein?
17 Are you acting for LawPro or are you acting
18 for the firm, and I want to know that?

19 MR. EPSTEIN: You know we are on the
20 record representing the law firm. If you
21 have got any relevant questions about the
22 cross-examination with regard to the
23 affidavit, please put them to us and we
24 will be happy to answer them. We are not
25 going to...

1 MR. EPSTEIN: You have a copy of the
2 policy, Mr. Bristow. You can take a look
3 at it and see what 3(a) refers to.

4 2185. MR. BRISTOW: I am asking do you know,
5 witness? Do you know?

6 MR. EPSTEIN: I have indicated to you it
7 is...you have got a copy of the policy.
8 You can take a look at it and see what 3(a)
9 refers to.

10 2186. MR. BRISTOW: I know what 3(a) refers
11 to. I am asking the witness does she.

12 MR. EPSTEIN: Don't answer that
13 question.

/R

14 2187. MR. BRISTOW: Don't answer the question,
15 all right. Did we find another copy of it?

16 MR. SILVER: What are you looking for?

17 2188. MR. BRISTOW: Of the LawPro policy?

18 MR. SILVER: I don't have it at all. I
19 told you that. I gave you the copy I had
20 of the excess policy.

21 2189. MR. BRISTOW: Okay, let's go through it.
22 By the way, the coverage was \$1,000,000,
23 was it?

24 MR. EPSTEIN: The coverage under the
25 LawPro policy is \$1,000,000, subject to

1 whatever else the policy sets out.

2 2190. MR. BRISTOW: Subject to, you say,
3 deductions and I believe there was
4 correspondence that said it had been
5 reduced by around 146,000?

6 MR. EPSTEIN: Right, that is correct.
7 It is subject to the reservation of rights
8 as outlined, and it is subject to other
9 expenses that are incurred.

10 2191. MR. BRISTOW: So all of the expenses
11 that LawPro incurs in defending you comes
12 off your coverage. Is that correct?

13 MR. EPSTEIN: It is outlined in the e-
14 mail, I believe, that we sent you.

15

16 BY MR. BRISTOW:

17 2192. Q. All right, did you know that?

18 MR. EPSTEIN: Don't answer that
19 question.

/R

20 2193. MR. BRISTOW: Okay, and part 3
21 exclusions, and I am going to read it to
22 you from my copy:
23 "...Dishonest, fraudulent, criminal or
24 malicious act or omission of the
25 insured..."

1 Once you get into that territory, they
2 don't cover you. Would you agree with
3 that?

4 MR. EPSTEIN: That is outlined in our e-
5 mail.

6 2194. MR. BRISTOW: Is that your position?

7 MR. EPSTEIN: This is the position of
8 the insurer.

9 2195. MR. BRISTOW: All right.

10 MR. EPSTEIN: I have indicated to you it
11 is not her position. It is the position
12 expressed by the insurer because you asked,
13 and we are obliged to give, the details of
14 the insurance coverage and we have done
15 that and Ms. Duncan is not in a position to
16 know what LawPro thinks or doesn't think or
17 what position they are taking on coverage.
18 They are entitled to take whatever position
19 they want.

20 2196. MR. BRISTOW: Well, as of today they
21 have not denied your firm coverage.

22 MR. EPSTEIN: We have indicated in the
23 e-mail that it is being defended on a
24 reservation of rights basis and the basis
25 for the reservation is set out for you so

1 that you know.

2 2197. MR. BRISTOW: That wasn't my question.
3 My question was to date have they denied
4 coverage?

5 MR. EPSTEIN: No, they have not denied
6 coverage.

7 2198. MR. BRISTOW: All right, and it has now
8 been nine months since Mr. Dewart came in.
9 When do you think you might come to decide
10 whether you are going to cover these people
11 or not?

12 MR. EPSTEIN: Well, don't ask me. I am
13 not coverage counsel, but they...

14 2199. MR. BRISTOW: Well, then, would you ask
15 coverage counsel, please?

16 MR. EPSTEIN: Well, I can tell you that
17 coverage counsel and LawPro...LawPro is
18 advised by coverage counsel, but LawPro
19 takes its position, makes whatever decision
20 they want, presumably on the advice of
21 counsel, and that is the position that has
22 been communicated to you. You know, they
23 obviously are not in a position at this
24 time to make a final determination on
25 coverage, and they have indicated that they

1 are prepared to defend on a reservation of
2 rights basis as outlined in our e-mail.

3 It may be that they will make a
4 determination at that conclusion of this
5 matter. Once a finding has been made by
6 Justice Shaughnessy or Court of Appeal or
7 whomever this ultimately ends up going to,
8 and they will make a determination then.
9 We have no information to assist you in
10 determining when specifically LawPro will
11 make that final determination, but I can
12 tell you that that information that was
13 provided to you, which is fairly recent, it
14 is April, is current. That is the
15 information that we were provided a few
16 weeks ago and I have not been advised that
17 LawPro's position on coverage has changed
18 since we sent that e-mail to all counsel.

19

20 BY MR. BRISTOW:

21 2200. Q. Let me ask the witness: Is that fair
22 that LawPro can go on forever and then after this
23 thing is all over, then dump you?

24 MR. EPSTEIN: Don't answer that
25 question.

1 assume that any questions that you ask her
2 about interpreting the policy or what the
3 policy may mean or doesn't mean are not
4 relevant for this witness. I don't think
5 it is relevant to this cross-examination at
6 all, but even if it were, this witness has
7 got no information to assist with regard to
8 those questions.

9 2204. MR. BRISTOW: Is there any communication
10 between you or any of the people in your
11 firm with LawPro's counsel about this
12 matter?

13 MR. EPSTEIN: I can advise you that
14 LawPro has obviously provided their
15 position to the law firm.

16 2205. MR. BRISTOW: Yes, when? When and who,
17 please? That is what I am asking?

18 MR. EPSTEIN: Well, they have provided
19 the position. The position that you have
20 seen here is the position that has been
21 outlined to the firm and as to who from
22 LawPro provided that to them is...well,
23 their position is not relevant.

24
25 BY MR. BRISTOW:

1 2211. MR. BRISTOW: Well, his Honour is going
2 to decide this thing. I am just getting a
3 string of don't answer its, and then we
4 will be going back to Justice Shaughnessy.

5 MR. EPSTEIN: Fine.

6 2212. MR. BRISTOW: I want to know what this
7 witness knows and you have just said "No,
8 no, no, she is not going to answer." Let's
9 just go to now the page 9 of a LawPro
10 policy which came out of our office, okay,
11 because counsel is saying it is the usual
12 one, all right? So you tell me if what I
13 am reading is not the right policy, okay?

14 MR. EPSTEIN: I will take it one step
15 further. It is not the usual one, it is
16 the same one. It is the same policy that
17 we all have, so we are prepared to accept
18 that the policy...

19 2213. MR. BRISTOW: You may be absolutely
20 right in going back in front of Justice
21 Shaughnessy and saying, "I don't have to
22 give them a policy and I am not giving it
23 and I didn't even bring one."

24 MR. EPSTEIN: I didn't say that.

25 2214. MR. BRISTOW: Yes, you did.

1 MR. EPSTEIN: I didn't. My position is
2 outlined very clearly at the outset of this
3 examination, Mr. Bristow, and if you aren't
4 going to listen to it, then that is your
5 choice...

6 2215. MR. BRISTOW: That is fine.

7 MR. EPSTEIN: ...but I have made it very
8 clear.

9

10 BY MR. BRISTOW:

11 2216. Q. That is fine. All right, damages.

12 I am reading from page 9 under definitions,
13 "damages". And of course, this is what LawPro's
14 position was, that it doesn't satisfy the definition
15 of damages. Do you understand that?

16 A. Yes.

17 2217. Q. All right, fine. So let's look at
18 damages. Means:

19 "...compensatory damages that the insured
20 is legally obligated to pay arising out of
21 a claim, provided the insured's liability
22 is the result of an error, omission or
23 negligent act in the performance of
24 professional services for others to which
25 the insurance applies..."

1 Can you help me out with that, tell me what that
2 means?

3 MR. EPSTEIN: No. I have already
4 indicated to you, Mr. Bristow, and I will
5 repeat it again, this witness is not going
6 to answer any questions regarding
7 interpreting the LawPro policy. The
8 position that has been expressed is not her
9 position. It is the position of LawPro.
10 The interpretation of what is meant by
11 damages is something that a judge will have
12 to undertake at some point after argument,
13 but I can just shorten this by telling you
14 she is not going to answer any questions
15 regarding the interpretation of the policy
16 or the position taken by LawPro because
17 that is there position, not hers. I don't
18 know how many times I need to repeat that
19 point. /R

20 2218. MR. BRISTOW: And I put it to you that
21 it is outside of this damages because it is
22 services for others. Do you see that?

23 MR. EPSTEIN: Don't answer that
24 question. /R

25 2219. MR. BRISTOW: And therefore you are

1 taking the position that it wasn't services
2 for others and therefore they are not going
3 to pay, or reserving their rights?

4 MR. EPSTEIN: Is there a question there?

5 2220. MR. BRISTOW: Yes, that is my question.

6 MR. EPSTEIN: What is the question? I
7 told you if it is a question about
8 interpreting the policy, which I think you
9 are asking her to do, we are not going to
10 answer that question, and nor are we going
11 to answer any other questions about
12 interpreting the policy, so don't... /R

13 2221. MR. BRISTOW: All right, fine.

14 MR. EPSTEIN: You can just assume it is
15 a blanket refusal for any questions that
16 you have regarding the policy.

17 2222. MR. BRISTOW: All right, that is fine.

18 MR. EPSTEIN: It is a blanket refusal.

19 2223. MR. BRISTOW: Well, with respect to this
20 question, did they discuss it with you day
21 1 when Mr. Dewart took over? This seems to
22 be an easy one to say yes, your costs
23 doesn't fall within the policy. I mean,
24 you don't have to have a lot of
25 investigation. It is just a simple you are

1 covered or not covered? Did they have any
2 discussion with you? That is Mr. Dewart,
3 day 1, about that subject?

4 MR. EPSTEIN: What discussions Mr.
5 Dewart had with Ms. Duncan is protected by
6 solicitor and client privilege and you
7 should know that, Mr. Bristow. /R

8 2224. MR. BRISTOW: Solicitor for who?

9 MR. EPSTEIN: Discussions between...

10 2225. MR. BRISTOW: Who is Dewart acting for,
11 LawPro or the firm?

12 MR. EPSTEIN: Mr. Dewart was...

13 2226. MR. BRISTOW: Or do they have a dual
14 duty?

15 MR. EPSTEIN: Mr. Dewart was
16 representing the law firm. That is his
17 mandate.

18 2227. MR. BRISTOW: That is what you said.

19 MR. EPSTEIN: That is what I am telling
20 you, is the fact. I am telling you is the
21 fact...

22 2228. MR. BRISTOW: No, that is your position
23 from LawPro. We are going to have this
24 out.

25 MR. EPSTEIN: He may well have been

1 appointed by LawPro, but he is appointed to
2 defend the position of both. In fact, his
3 mandate was to defend Mr. McKenzie and the
4 law firm. That mandate subsequently
5 changed...

6 2229. MR. BRISTOW: And LawPro? And LawPro?

7 MR. EPSTEIN: No, he is not representing
8 LawPro on the coverage position. That, I
9 think, is fairly clear. I haven't
10 discussed this with Mr. Dewart, but I can
11 tell you that based on my information, and
12 you can take this as, I think, a fairly
13 correct position in this, that Mr. Dewart
14 was not nor has ever provided any advice to
15 LawPro regarding coverage.

16 2230. MR. BRISTOW: Well, what about the other
17 way around? The other way around? Are you
18 still in the dark about coverage?

19 MR. EPSTEIN: Don't answer that
20 question.

/R

21 2231. MR. BRISTOW: Don't answer that? It
22 looks like she wants to answer that.

23 MR. EPSTEIN: Can you tell me...

24 2232. MR. BRISTOW: You may be speaking out of
25 the mouth of LawPro, you see, in...

1 MR. EPSTEIN: I am not speaking out...

2 2233. MR. BRISTOW: ...saying don't answer
3 that. I say to you that LawPro is in a
4 dual role. They are acting for themselves
5 and they are acting for the firm and you
6 have got a definite conflict of interest.

7 MR. EPSTEIN: LawPro is not acting for
8 anybody in this, Mr. Bristow.

9 2234. MR. BRISTOW: They are not acting for
10 anybody?

11 MR. EPSTEIN: They are not acting for
12 anybody.

13 2235. MR. BRISTOW: I see.

14 MR. EPSTEIN: LawPro is not a lawyer,
15 they are not a law firm. They are an
16 insurance company.

17 2236. MR. BRISTOW: Yes, which we all pay for,
18 Law Society, right?

19 MR. EPSTEIN: No, it is not the Law
20 Society. LawPro and the Law Society are...
21 they are not one and the same thing.

22 2237. MR. BRISTOW: All right. Did you
23 undertake, or did I get that far, as to
24 have all of the monies that have been
25 discounted right to date? The letter of

1 April 11 said \$136,350.75. Could you
2 undertake to find out right now, today, and
3 as we go along, how much is being bitten
4 out of that million?

5 MR. EPSTEIN: Mr. Bristow, that is a
6 fair question, and that is the latest
7 information that we have as to what it is.
8 We will advise as to what...I guess prior
9 to the motion before Justice Shaughnessy,
10 if that number is changed, so that you all
11 have that information.

12 2238. MR. BRISTOW: My question was will you
13 provide it as of today's date and what is
14 your answer, yes or no?

15 MR. EPSTEIN: As of today's date, as I
16 say, my information is...

17 2239. MR. BRISTOW: It can't be the same.

18 MR. EPSTEIN: Well, my information is as
19 of today's date...

20 2240. MR. BRISTOW: Mr. Epstein, just listen
21 to me for a moment:

22 "...Policy includes fees and costs. We are
23 advised that to this date [you see, it says
24 "this date"] the potential coverage
25 available has been eroded by \$136,000..."

1 MR. EPSTEIN: Correct.

2 2241. MR. BRISTOW: "...This does not include
3 Blaney McMurtry's accounts..."

4 MR. EPSTEIN: Correct.

5 2242. MR. BRISTOW: "...Or Mr. McKenzie's
6 current counsel, Esterbauer, who is no
7 longer here..."

8 MR. EPSTEIN: Correct.

9 2243. MR. BRISTOW: "...Nor does it include
10 Kramer..."

11 MR. EPSTEIN: Correct.

12 2244. MR. BRISTOW: Right.

13 MR. EPSTEIN: That is what...

14 2245. MR. BRISTOW: So wouldn't it be easy if
15 you just got a total, because Ms. Duncan
16 would love to know it too, how much the
17 million has been eroded. I mean...

18 MR. EPSTEIN: And I am not saying to you
19 that that...

20 2246. MR. BRISTOW: She may be down to half a
21 million dollars, and going down fast.

22 MR. EPSTEIN: I am not saying that that
23 is an irrelevant question or an
24 inappropriate question. Hold on. I am
25 just telling you that that is the

1 information, and I did tell you that we
2 will update that information for you.

3 2247. MR. BRISTOW: Well, I would think she
4 and I would like to know that.

5 MR. EPSTEIN: So you want to know as of
6 today's date...you want to know if that
7 information has changed as of today's date.
8 I will make that inquiry for you. U/T

9 2248. MR. BRISTOW: Yes, and just keep us in
10 the loop as to how much this has eroded by
11 because...

12 MR. EPSTEIN: And I told you what...I
13 think the information that you are going to
14 want, and this is what I think would be
15 probably of most assistance to you, is
16 prior to the hearing before Justice
17 Shaughnessy, you want to know how much is
18 available and at least as of that date, it
19 will further erode, obviously, during the
20 course of the week long hearing, but if
21 what you want to know is before you
22 commence the hearing with Justice
23 Shaughnessy to what extent the policy has
24 eroded, we will make that inquiry for you
25 and provide you with that information. U/T

1 MR. EPSTEIN: Sorry, just so that we
2 have got that undertaking clear, so you
3 want to advise as of May 3rd of update of
4 the expenses under the policy, and then
5 advise prior to hearing with Shaughnessy J.
6 of update. Is that correct? U/T

7 2252. MR. BRISTOW: Yes, that is right. You
8 have said that the policy was on
9 individuals rather than firms?

10 MR. EPSTEIN: The LawPro policy, yes.

11 2253. MR. BRISTOW: Yes, that is right. Is
12 that 1,000,000 on each of the partners or
13 is that the collective total?

14 MR. EPSTEIN: It is 1,000,000
15 collective. As I say, it is not
16 collectively. It is 1,000,000 for each
17 lawyer, but in this...it is a 1,000,000 for
18 each lawyer and to the extent that there is
19 innocent partner coverage under that, the
20 total amount is 1,000,000. In other words,
21 if there is innocent partner coverage for a
22 portion of that, which I believe is a half
23 a million dollars, it is not 1.5 million.
24 It is 1,000,000 in total, and that is my
25 understanding of it.

1 2254. MR. BRISTOW: That was mine, too.

2 MR. EPSTEIN: Yes.

3 2255. MR. BRISTOW: And in the last paragraph:

4 "...We attach a copy of the excess

5 insurance policy. Advise of the

6 position..."

7 Is LawPro going to take over the position

8 of Lloyds, the excess insurer?

9 MR. EPSTEIN: No, I don't believe they

10 would take over the position. Lloyds, as

11 you know, the policy has been reported to

12 them. We received on Friday an indication

13 from Lloyds as to their preliminary view on

14 coverage and I will be communicating that

15 to all counsel. I did orally advise

16 counsel on Friday of what their position

17 was going to be.

18 MR. SILVER: What did you tell us?

19 MR. EPSTEIN: Well, the position that I

20 indicated was...well, I will set it out in

21 an e-mail to you and I will discuss it with

22 you off the record. I will tell you what

23 it is, but we will formally communicate

24 that position to you.

25 2256. MR. BRISTOW: Well, why don't you do it

1 now so we can all hear it, because I have
2 been left out of the loop. I didn't know
3 anything about this.

4 MR. EPSTEIN: Well, the position is no
5 big surprise. The position, as I
6 communicated to counsel on Friday, that
7 Lloyds is taking is similar to the position
8 that LawPro is taking with regard to
9 providing coverage subject to a reservation
10 of rights letter. The excess policy,
11 according to the information I have, is a
12 \$4,000,000 policy, but they are reserving
13 rights. I believe it is on a similar basis
14 to LawPro's. It is not the identical
15 policy. I don't have the information in
16 front of me right now, but I can tell you
17 that is essentially what the position is
18 and I will be formally communicating that
19 to you in due course.

20 2257. MR. BRISTOW: I am going to ask some
21 questions on it.

22 MR. EPSTEIN: Okay.

23 2258. MR. BRISTOW: Unless you want to put
24 this examination with respect to the excess
25 over...

1 MR. EPSTEIN: No.

2 2259. MR. BRISTOW: ...I have a lot of
3 questions.

4 MR. EPSTEIN: I can you tell their
5 position is going to be the same. She is
6 not in a position to answer any questions
7 with regard to the coverage position that
8 is taken by the excess insurer.

9 2260. MR. BRISTOW: Well, they haven't taken a
10 position yet.

11 MR. EPSTEIN: Well, they have taken a
12 position that they are providing coverage
13 subject to a reservation of rights, and
14 that is the position that they have taken
15 to date and I expect that they will await
16 further information and perhaps a decision
17 of Shaughnessy. I don't know. I can't
18 speak for the excess insurer, but they will
19 make a final determination on coverage in
20 due course.

21
22 BY MR. BRISTOW:

23 2261. Q. Excess coverage people ever spoken
24 to you or your firm?

25 MR. EPSTEIN: The excess coverage

1 people, the Lloyds...

2 2262. MR. BRISTOW: Lloyds.

3 MR. EPSTEIN: ...you are asking for?

4 2263. MR. BRISTOW: Yes.

5 MR. EPSTEIN: No, Lloyds would never
6 have had a discussion with her directly.

7

8 BY MR. BRISTOW:

9 2264. Q. Well, I asked you. That is true?

10 A. That is correct.

11 2265. Q. When did you report to the excess
12 insurer?

13 MR. EPSTEIN: Again, can you advise me
14 what the relevance of that question is? I
15 can tell you that it is my information, Mr.
16 Bristow, that certainly in the information
17 that has been communicated to me, that
18 Lloyds is not taking the position that
19 there has been late reporting.

20 2266. MR. BRISTOW: All right.

21 MR. EPSTEIN: If that changes, then we
22 will let you know and if there is an issue
23 that arises with regard to late reporting,
24 then you...

25 2267. MR. BRISTOW: That is fine. As long as

1 there...

2 MR. EPSTEIN: ...will be entitled to ask
3 any questions you want about reporting, but
4 at this point they have not taken any
5 position with regard to late reporting.

6 MR. SILVER: That question may be
7 relevant.

8 2268. MR. BRISTOW: Go ahead.

9 MR. SILVER: Ian, it could be relevant
10 to when the firm had knowledge of things
11 that they claimed to only have gained...for
12 example, if the firm reported it before
13 February 23rd, that might be relevant, and
14 then who reported at the firm and who knew
15 whether it was reported. So I don't agree
16 with you...

17 MR. EPSTEIN: Okay, that is fine.

18 MR. SILVER: ...that when it was
19 reported is only relevant to whether or not
20 Lloyds is taking a position of late
21 reporting. And on that basis, I think you
22 should reconsider your views on that.

23 2269. MR. BRISTOW: All right, will you take
24 that at least under consideration?

25 MR. EPSTEIN: I will take that under

1 advisement as to when the firm...and I
2 can't speak for Mr. McKenzie, of course.
3 You will have to ask Mr. McKenzie that
4 question, but I will take under advisement
5 when the firm reported to their excess
6 insurer.

U/A

7 2270. MR. BRISTOW: And when you are at it, I
8 would ask the same thing about when they
9 reported it to LawPro.

10 MR. EPSTEIN: I will take question also
11 under advisement.

U/A

12 2271. MR. BRISTOW: All right, thank you.

13

14 BY MR. BRISTOW:

15 2272. Q. Ms. Duncan, did you say you have
16 read your LawPro policy?

17 A. I didn't answer that question.

18 2273. Q. You said you are not going to answer
19 it. All right, fine. And page 18 in the LawPro
20 policy, "named insured", great big black line.
21 "Named insured: The Law Society of Upper Canada".
22 Now, I am asking you, and you have refused to tell
23 me whether you have read it or not, so you couldn't
24 tell me what it means, and I want you to tell me
25 what it means.

1 MR. EPSTEIN: I have told you you can
2 take this with all the questions you have
3 what particular clause or wording in that
4 policy means are not questions that Ms.
5 Duncan is going to answer. /R

6 2274. MR. BRISTOW: All right.

7 MR. EPSTEIN: So you can assume there is
8 a refusal.

9 2275. MR. BRISTOW: All right.

10 MR. EPSTEIN: Take it as you will. Her
11 opinion as to what the LawPro policy means
12 is not relevant to this discussion.

13 2276. MR. BRISTOW: That covers the policy
14 then, pretty well.

15 MR. EPSTEIN: It does. It does.

16

17 BY MR. BRISTOW:

18 2277. Q. All right. Now, I want to turn your
19 attention now to the Statement of Claim, and I think
20 in that pile I left a copy of the Statement of Claim
21 for...this is the copy of the original Statement of
22 Claim in this action. Now, did you or any members
23 of your firm, other than McKenzie, have a part in
24 assisting in the preparation of the Statement of
25 Claim?

1 A. No.

2 2278. Q. And were you aware of the Statement
3 of Claim when it was issued?

4 A. Tim Anderson and I were asked to
5 read a copy for grammatical or spelling or
6 punctuation errors.

7 2279. Q. Did you?

8 A. Yes.

9 2280. Q. All right, so the answer is you did
10 read the Statement of Claim?

11 A. Yes.

12 2281. Q. And did you ask who is the
13 plaintiff, who is this plaintiff? It was
14 \$530,000,000, wasn't it?

15 A. If that is what the claim says.

16 2282. Q. Well, it does. It says more than
17 that. It says more than that. There is costs and
18 everything else thrown in, but it is \$500,000,000
19 for damages. You read that, didn't you? Exemplary
20 damages, \$10,000,000. Special damages, \$20,000,000.
21 You saw that, didn't you?

22 A. If that was in the claim that I
23 read, yes.

24 2283. Q. Yes, and you saw who the plaintiff
25 was, Nelson Barbados, a company that was

1 incorporated within your firm?

2 A. Well, I didn't know it was
3 incorporated within my firm at the time.

4 2284. Q. You didn't know that?

5 A. No.

6 2285. Q. Did anybody from your firm know
7 that?

8 A. Well, Mr. McKenzie must have.

9 2286. Q. Yes, and others in the firm must
10 have known that.

11 MR. EPSTEIN: She has given you her
12 answer.

13 THE DEPONENT: I can't talk about
14 anybody else.

15 MR. EPSTEIN: She has indicated...

16 2287. MR. BRISTOW: Would you please ask the
17 other members of your firm?

18 MR. EPSTEIN: Well, this states
19 specifically who...do you want us to ask
20 the other...

21 2288. MR. BRISTOW: Well, anybody else...

22 MR. EPSTEIN: ...partners?

23 2289. MR. BRISTOW: Yes. Well, no, the
24 partners or juniors or anything that...
25 anybody. You see, I can't really get my

1 head around a half a billion dollar claim.
2 You knew and Anderson knew what was in the
3 claim because you say you read it. Now,
4 did any of the others read it or know
5 anything about this?

6 MR. EPSTEIN: Well, I...want to know...I
7 mean, there are people, there are students,
8 there are associates that have come in and
9 out. There are secretaries. There are all
10 sorts of people. If you want, we will ask
11 the other partners in the firm if they...
12 your question, I think, specifically is did
13 they know...did she know about the
14 incorporation of Nelson Barbados, and she
15 has given you her answer. I will give you
16 a reasonable undertaking to ask other
17 people, if we can identify who it is. If
18 it is a reasonable...if you want me to ask,
19 for example, the other partners in the
20 firm...

21 2290. MR. BRISTOW: Well, start with the
22 partners.

23 MR. EPSTEIN: Okay.

U/T

24 2291. MR. BRISTOW: Then go to McKenzie's
25 daughter. Was she there at the time?

1 MR. EPSTEIN: Well, I don't believe you
2 have got any contact with McKenzie's
3 daughter, do you?

4 THE DEPONENT: No.

5 2292. MR. BRISTOW: No, she was in the firm.

6 MR. EPSTEIN: No, I am saying you are
7 asking us to make an inquiry of her and
8 she...you had best ask that question of
9 McKenzie. We can ask people who we deal
10 with. We will ask the partners at the
11 time.

U/T

12 2293. MR. BRISTOW: What happened to the
13 student?

14 MR. EPSTEIN: Hold on. Let's just get
15 the undertaking down. So we will ask the
16 partners at the time if they were aware
17 that Nelson Barbados Group Limited had been
18 incorporated. We will make that inquiry.

U/T

19 THE DEPONENT: I believe the question
20 was incorporated within the firm.

21 MR. EPSTEIN: Within the firm, that is
22 right.

U/T

23 THE DEPONENT: So who am I asking?

24 MR. EPSTEIN: The partners at the time.
25 And just so that we are clear, it would be

1 the partners at the time as of February
2 2007.

U/T

3 THE DEPONENT: Thank you.

4 2294. MR. BRISTOW: Well, yes. If there was a
5 person at the firm and...

6 MR. EPSTEIN: It should be as of this
7 date, the partners as of this date.

8

9 BY MR. BRISTOW:

10 2295. Q. Yes. I just want to know who in the
11 firm knew about the Statement of Claim. I want to
12 know who read it. I mean, this isn't Faskens, where
13 there are a million people in it. There is just
14 one, small group, and it is a half a billion dollar
15 claim and surely you must be talking about it in the
16 firm. Am I right in that?

17 A. Not really, no.

18 2296. Q. I see. Well, just looking at a few
19 of these matters, if you look at paragraph 40, the
20 plaintiff has security rights and ownership rights.
21 Did you ever discuss that with any of your partners
22 or Mr. McKenzie?

23 A. You are asking me if I discussed the
24 particulars of the claim?

25 2297. Q. Yes.

1 MR. EPSTEIN: Of paragraph 40, yes. Did
2 you discuss that with Mr. McKenzie?

3 THE DEPONENT: No.
4

5 BY MR. BRISTOW:

6 2298. Q. Your partners?

7 A. As I said, we were asked to read
8 this over for grammatical, spelling and punctuation,
9 essentially.

10 2299. Q. Yes.

11 A. I think my comment was that I really
12 couldn't follow the narrative in this claim and I
13 was told that that is because I didn't know the
14 story and I didn't understand what was going on.

15 2300. Q. Who told you that?

16 A. That would have been Mr. McKenzie,
17 and that was just a concern I expressed after
18 reading through it, that I really couldn't follow
19 the narrative.

20 2301. Q. Yes, and I will tell you another
21 thing. When my client was served with a half a
22 billion dollars claim, he couldn't follow it either.
23 I don't think anybody could follow it. So you
24 didn't make any further inquiries at all? He just
25 said, "Okay, it is all right," and then you just

1 stopped investigating?

2 MR. EPSTEIN: She didn't say she was
3 investigating. She...

4 THE DEPONENT: I wasn't investigating.

5 MR. EPSTEIN: ...very clearly indicated
6 in her evidence that she was asked to
7 review it for punctuation and grammar and
8 the like, and she did.

9

10 BY MR. BRISTOW:

11 2302. Q. And in reading it, you saw that
12 Marjorie Knox was a defendant. You saw that, didn't
13 you?

14 A. I don't know that I paid that close
15 attention to the style. If she is mentioned
16 specifically...

17 2303. Q. Look on the style of cause. You see
18 Marjorie Knox there?

19 A. I am not denying that she is in the
20 style. I am just saying...

21 2304. Q. Yes, all right. Marjorie...

22 A. You know, you are asking me about my
23 knowledge about whether specific people were
24 defendants and that wasn't the part of the claim
25 that I was really paying attention to. I mean, I

1 believe there may be a paragraph describing who she
2 is, but that is the extent of my knowledge.

3 2305. Q. All right, but from what you have
4 told on cross-examination in the latter days, sounds
5 like there is evidence to show that McKenzie, the
6 Knox group and Allard were the ones running this
7 thing.

8 A. Based on what is in the ledger, yes.

9 2306. Q. Yes, so that in fact, the defendant
10 in this case should have been one of the plaintiffs.
11 Isn't that right?

12 MR. EPSTEIN: I don't think she can
13 answer that question about who should be
14 the parties to this lawsuit. You know, she
15 has indicated to you that...you know, she
16 has described as best she can the role of
17 Mr. Allard and Mr. Best and others. As to
18 who should be the parties to the lawsuit is
19 not really probably a question for her.

20 2307. MR. BRISTOW: Well, all right.

21 MR. EPSTEIN: Again, you may ask...it
22 may be a proper question for Mr. McKenzie.

23 2308. MR. BRISTOW: Well, I am putting this
24 because we are claiming against the firm.

25 MR. EPSTEIN: No, I appreciate that.

1 2309. MR. BRISTOW: And if LawPro denies, we
2 are still going after all the assets of the
3 firm.

4 MR. EPSTEIN: Understood, and I am just
5 saying that she has indicated to you that
6 she, as of the time that this claim was
7 issued, she didn't have any direct
8 knowledge, other than a cursory knowledge
9 of the claim because of having reviewed it.
10 But in terms of...

11 2310. MR. BRISTOW: Well, that is what she
12 says.

13 MR. EPSTEIN: ...Marjorie Knox's role
14 or...

15 2311. MR. BRISTOW: That is what she says now.

16 MR. EPSTEIN: Well, that is her
17 evidence.

18

19 BY MR. BRISTOW:

20 2312. Q. One of the problems is, you see, the
21 more questions I ask, the more questions the defence
22 counsel ask, the more LawPro can say, "Now we find
23 some more things to deny." That circle goes round
24 and round, and so if I really cross-examine you on
25 everything, I may put you out of coverage, and this

1 is the conundrum of this whole relationship with
2 LawPro, you see? Let me go on anyway. I have to do
3 this, all right?

4 So look back at the Statement of Claim, if
5 we could, and if you look at paragraph 57...and I
6 don't want to go through all these things, but I am
7 saying to you that there are so many red flags in
8 this particular Statement of Claim, that you must
9 have had extensive questions. You must have, with
10 your partner Anderson and with McKenzie said, "What
11 is going on here? What is going on?" So that...

12 A. I don't accept your telling me what
13 I had or didn't have.

14 2313. Q. All right, I am just...let's look at
15 paragraph 57, "Particulars of Conspiracy," because
16 of course it was a conspiracy of all these people,
17 were there 63 defendants, something like that,
18 including the Chief Justice?

19 MR. EPSTEIN: Mr. Bristow, we will take
20 your word for it. We haven't counted them
21 all, but if you tell us there is 63 or
22 67...

23 2314. MR. BRISTOW: Well, I don't know.

24 MR. EPSTEIN: ...we will take your word
25 for it.

1 with regard to this claim, and you are
2 perfectly free to ask questions on that.
3 You have asked the question and she has
4 given you her information, and as to
5 exactly what the meaning of a...you know
6 whether something constitutes fraud or not
7 within the meaning of the policy is really
8 not...

9 2318. MR. BRISTOW: What I am simply
10 suggesting to you is that this was so
11 serious and so much money and such far
12 reaching allegations, that you would have
13 spoken to Mr. McKenzie and your partners.
14 You would have discussed all this to find
15 out what was going on, but you say you
16 didn't. You say you talked to him.

17 MR. EPSTEIN: She did say...she did tell
18 you earlier in her evidence that she did...
19 she couldn't follow the narrative because
20 it was very complex, and she did say that
21 when she spoke to Mr. McKenzie, Mr.
22 McKenzie's answer to her was that she
23 didn't know the full story, therefore she
24 couldn't understand what was going on.
25 Have I correctly...

1 THE DEPONENT: That is correct.

2 MR. EPSTEIN: ...related your evidence?

3 THE DEPONENT: Mr. McKenzie told us that
4 the contents of this claim were true.

5

6 BY MR. BRISTOW:

7 2319. Q. Yes, but if, in fact, the plaintiff,
8 as we are now alleging, is simply a straw company,
9 no assets, a set up, wouldn't you think that your
10 firm might be liable to pay all the costs if we were
11 able to prove that? I am talking way back, right
12 back at the very start of this thing, Ms. Duncan.

13 MR. EPSTEIN: You are suggesting that...
14 just so I understand your question, you are
15 asking her when she read this claim, would
16 she have anticipated that their law firm
17 would personally have been responsible for
18 the cost order against them?

19 2320. MR. BRISTOW: Yes.

20 MR. EPSTEIN: Is that something that you
21 anticipated when you read this claim, that
22 your law firm might be responsible for the
23 costs?

24 THE DEPONENT: No.

25

1 BY MR. BRISTOW:

2 2321. Q. Did anyone in the firm?

3 A. I am sorry?

4 2322. Q. Did anyone in your firm?

5 A. Did anyone in my firm...

6 2323. Q. Yes, think that the firm might be
7 responsible for the costs?

8 A. Not to my knowledge.

9 2324. Q. Will you try to find out for me?

10 MR. EPSTEIN: Again, we will give an
11 undertaking with regard to...ask the
12 partners at the time...

13 2325. MR. BRISTOW: Well, let's go to...

14 MR. EPSTEIN: Hold on. I just want to
15 get the undertaking down so I get it.

16 2326. MR. BRISTOW: I am sorry.

17 MR. EPSTEIN: I will ask the partners at
18 the time if they felt at the time the
19 Statement of Claim was issued that the firm
20 could be held personally responsible for a
21 cost order for the claim, presumably?

U/T

22 2327. MR. BRISTOW: Yes.

23 MR. EPSTEIN: Okay.

24

25 BY MR. BRISTOW:

1 BY MR. BRISTOW:

2 2330. Q. And because of this conduct of the
3 defendants, the plaintiff was asking for full costs.

4 A. Is that in paragraph 61?

5 MR. EPSTEIN: It is, I believe, what is
6 being claimed...let's see here.

7 2331. MR. BRISTOW: It may be back in the
8 claim. I believe it is in the claim.

9 THE DEPONENT: I wouldn't find it
10 unusual that a plaintiff would claim costs.

11 2332. MR. BRISTOW: Yes, and you...

12 MR. EPSTEIN: I don't see it here.

13 MR. SILVER: It is in there for relief
14 and I think full indemnity costs.

15 MR. EPSTEIN: Yes, I don't doubt that at
16 all.

17 2333. MR. BRISTOW: Yes, full indemnity.

18 THE DEPONENT: I don't there is many
19 Statement of Claims issued that don't claim
20 full indemnity costs.

21 MR. EPSTEIN: Yes.

22 MR. SILVER: What does it say, again?

23 MR. EPSTEIN: It says:

24 "...For costs of this action on a full
25 indemnity scale..."

1 BY MR. BRISTOW:

2 2334. Q. Yes, and if you could... when I say
3 "you could", if the plaintiff could prove
4 allegations such as it set out, you would be asking
5 for full indemnity for costs? You said that would
6 be usual. I think you said that.

7 A. I think I am saying that I don't
8 know of many plaintiffs in this province who don't
9 include a prayer for costs in their prayer for
10 relief.

11 2335. Q. That is not what I asked you. I
12 have been talking about full costs. Because of the
13 conduct, you, the firm...

14 A. Well, I wasn't.

15 2336. Q. No, the plaintiff...

16 MR. EPSTEIN: The plaintiff.

17 2337. MR. BRISTOW: ...was asking for full
18 costs.

19 MR. EPSTEIN: The plaintiff was asking
20 for full costs, correct.

21 2338. MR. BRISTOW: Because of all these acts
22 that happened, full costs. Not substantial
23 or anything else. Full. Do you follow me?
24 That is what was being asked.

25 MR. EPSTEIN: We don't disagree with

1 that.

2 2339. MR. BRISTOW: All right, fine.

3 MR. EPSTEIN: That is what is being
4 sought.

5

6 BY MR. BRISTOW:

7 2340. Q. And then would you agree with me
8 that if you, the plaintiff, went through...

9 A. Well, I am not the plaintiff.

10 2341. Q. I know you are not the plaintiff.

11 A. Okay, well, you keep using the word
12 "you" and pointing at me.

13 2342. Q. But all right, the plaintiff...but
14 just a moment. The plaintiff goes through and
15 loses, all right?

16 A. The plaintiff loses, all right.
17 Yes.

18 2343. Q. You would expect the plaintiff would
19 pay full costs of alleging all these terrible things
20 and not proving them?

21 MR. EPSTEIN: Or whatever a court would
22 award.

23 2344. MR. BRISTOW: Yes.

24 MR. SILVER: It is possible.

25 2345. MR. BRISTOW: That is right.

1 MR. EPSTEIN: That would be up to a
2 court.

3

4 BY MR. BRISTOW:

5 2346. Q. And if, in fact, the plaintiff was a
6 man of straw and your firm pushed this through two
7 or three years, you could expect that a court may
8 say the firm pays the cost, wouldn't you?

9 MR. EPSTEIN: I thought you just said if
10 they were successful, then they would claim
11 their full costs, and she indicated that
12 that was correct. She...

13 2347. MR. BRISTOW: That wasn't my question.

14 MR. EPSTEIN: Okay, then perhaps you can
15 rephrase your question because that is what
16 I understood your question to be.

17

18 BY MR. BRISTOW:

19 2348. Q. If you had or knew or ought to have
20 known that the plaintiff, Nelson Barbados, was a
21 person of straw, had no assets at all, but you
22 pushed this case through for two or three years and
23 lost it, which you did...

24 A. Me, no.

25 MR. EPSTEIN: Again, the plaintiff lost

1 the case and the plaintiff...let's just
2 make it clear. Let's get our terminology
3 correct.

4 2349. MR. BRISTOW: Well, you were counsel and
5 it got lost.

6 MR. EPSTEIN: Just let's...

7 2350. MR. BRISTOW: The plaintiff lost the
8 case.

9 MR. EPSTEIN: Let's correct the
10 terminology here. So as I understand it,
11 and I have come in fairly late to the game,
12 but I understand that there was a motion
13 for a stay of the Ontario action and that
14 the court ordered that there be a stay of
15 this action. That is my understanding of
16 what happened. I don't believe that there
17 has ever been any determination on the
18 merits of this claim. So let's just be
19 clear in our terminology here. And so to
20 the extent that there was a stay, yes, you
21 are correct, and that was ordered by the
22 court. I think it is a matter of public
23 record.

24 2351. MR. BRISTOW: Well, I am putting it to
25 you that if you pursued, you, your firm

1 pursued on behalf of a plaintiff, that
2 you...and when I am saying "you", you and
3 your firm, knew it was a person of straw or
4 should have known it was a person of straw,
5 you could expect that someone would claim
6 costs against your firm.

7 MR. EPSTEIN: I think she answered that
8 already, that she said ...

9 2352. MR. BRISTOW: What did she say?

10 MR. EPSTEIN: She said that she didn't
11 expect that that would happen and we
12 undertook to ask the partners as of
13 February of 2007 if they were aware or
14 thought that there might be a cost order
15 against the plaintiff...against the firm
16 directly.

17 THE DEPONENT: And if you are suggesting
18 that I am expected to disbelieve the
19 statements of my partners at all times, I
20 don't agree with you.

21
22 BY MR. BRISTOW:

23 2353. Q. I think what I am asking you is
24 this: After reviewing a Statement of Claim like
25 this, surely you would have done some more

1 questioning and investigation, other than having
2 your partner say everything was cool, "Everything is
3 fine. Don't worry."

4 A. No, I wouldn't. Mr. McKenzie, as I
5 have testified earlier, has done a large number of
6 claims on this scale. This was not something out
7 of...

8 2354. Q. I am not talking about scale. I am
9 talking about what is put in it.

10 A. Well, you seem to be talking about
11 the scale. You keep mentioning the amount of the
12 claim.

13 2355. Q. Well, you don't think a half a
14 billion dollars is much in your office?

15 MR. EPSTEIN: No, she didn't say that.

16 THE DEPONENT: I didn't say that at all.

17 MR. EPSTEIN: She didn't say that. What
18 she did say and what she had answered
19 before was that large claims were not...
20 this was not a large claim in the office...

21 2356. MR. BRISTOW: I heard that.

22 MR. EPSTEIN: ...for Mr. McKenzie, and
23 that was her point.

24

25 BY MR. BRISTOW:

1 with...obviously weren't involved in the
2 claim. At that point what I am just not
3 clear of, and I don't think the witness is
4 clear either, when there is a reference to
5 "Barbados", and I see the question that you
6 have asked in paragraph 62. If that was a
7 term "Barbados" intending to refer to the
8 plaintiff or it is intended to refer to the
9 country of Barbados or the island of
10 Barbados.

11 2361. MR. BRISTOW: No, I didn't ask anything
12 about plaintiff. I simply started off by
13 asking this witness if she read paragraph
14 62...whether she read it.

15 MR. EPSTEIN: That is a question you can
16 ask her.

17 2362. MR. BRISTOW: Yes, that is right, and it
18 says that:

19 "...Barbados has rendered itself so
20 indebted or has become insolvent as a
21 result of transactions which have sold off
22 or encumbered certain public assets and has
23 guaranteed loans for insolvent companies to
24 the extent that it is unable to meet its
25 day to day financial obligations, including

1 paying its civil servants..."

2 MR. EPSTEIN: Right.

3 2363. MR. BRISTOW: "...and paying for
4 expropriated lands, et cetera..."

5 MR. EPSTEIN: Right.

6

7 BY MR. BRISTOW:

8 2364. Q. Didn't that jump off the page at you
9 when you read that, say, "What is going on here?"

10 A. I have no independent recollection.

11 2365. Q. All right.

12 A. So if I don't, I don't imagine it
13 jumped off the page at me.

14 2366. Q. And then you find, of course, that
15 the country of Barbados is a defendant? You saw
16 that?

17 A. Yes.

18 2367. Q. And as litigation counsel, you would
19 know that in this application, simply to strike out
20 the Statement of Claim for want of jurisdiction, we
21 will call it, the defence team, couldn't bring any
22 motions or particulars or anything else because we
23 would have turned to the jurisdiction?

24 A. I believe that is the rule of court,
25 yes.

1 2368. Q. So I put it to you, Ms. Duncan, that
2 you and the firm were getting huge amounts of money
3 from this file from Mr. Allard, and that therefore
4 you just pulled the wool down over your eyes at what
5 was happening or going on here and marched ahead.
6 Isn't that the truth?

7 A. No.

8 2369. Q. All right, and I am putting it to
9 you that you knew or you ought to have known right
10 from day 1 or as this thing progressed that this
11 whole thing was simply a shakedown by the minority
12 shareholders who were supposed to be the defendants,
13 the Knox group, shaking down the majority
14 shareholders in Kingsland Estates so that they could
15 get a better deal in the price for their shares in
16 Kingsland Estates.

17 A. Absolutely not.

18 2370. Q. You didn't know that?

19 A. We didn't know that. We were, in
20 fact, told lots of stories about corruption, endemic
21 in the government and the operation in Barbados.

22 2371. Q. I am not talking about the
23 government and corruption. I am talking about a
24 scheme whereby your Mr. McKenzie and Allard and the
25 Knox family set this action in motion so that they

1 would force the majority shareholders to come to a
2 deal and resolve the difference between the majority
3 and minority shareholders.

4 MR. EPSTEIN: So your question is is she
5 aware of that?

6 2372. MR. BRISTOW: Yes.

7 MR. EPSTEIN: Was she aware that that
8 was the strategy? Were you aware of that?

9 THE DEPONENT: Absolutely not.

10

11 BY MR. BRISTOW:

12 2373. Q. Did you ever become aware of that?

13 A. In reviewing the documents that I
14 have produced with my affidavit, I became aware that
15 these parties were a lot more involved in this
16 proceeding than I was aware of. I don't have
17 specific knowledge as to the whole of what was going
18 on.

19 2374. Q. Now, Mr. Dewart was first retained
20 or came into the picture about August 12 of 2009.

21 A. If that was the date of the
22 conference call with Justice Shaughnessy, very close
23 to that day, yes.

24 2375. Q. Let's call it August of 2009.

25 MR. EPSTEIN: That sounds right.

1 BY MR. BRISTOW:

2 2376. Q. What documents do you know were
3 given to Mr. Dewart in order to review this matter?

4 MR. EPSTEIN: Firstly by, just so that
5 we are clear for the record, by whom?

6 2377. MR. BRISTOW: Well, that was going...

7 MR. EPSTEIN: By Mr. McKenzie?

8 2378. MR. BRISTOW: ...to be my next...

9 MR. EPSTEIN: By Mr. McKenzie?

10 2379. MR. BRISTOW: No, by anyone in the firm.

11 MR. EPSTEIN: The communications between
12 anyone in the firm and Mr. Dewart, either
13 in writing or orally, are privileged. /R

14 2380. MR. BRISTOW: Why?

15 MR. EPSTEIN: Because Mr. Dewart was
16 their counsel and their discussions and
17 their communications with counsel are
18 privileged. I thought that was a non-
19 controversial and well-known aspect of the
20 law.

21 2381. MR. BRISTOW: Looks to me like Mr.
22 McKenzie and the firm waived the privilege.
23 He put right on the record one of Dewart's
24 e-mails.

25 MR. EPSTEIN: You would have to ask Mr.

1 McKenzie that question, but the firm has
2 never waived any privilege with Mr. Dewart.

3 2382. MR. BRISTOW: That is your position.

4 MR. EPSTEIN: That is our position.

5

6 BY MR. BRISTOW:

7 2383. Q. That is your position, all right,
8 but I want to know exactly what was given or
9 withheld from counsel because at some time, Ms.
10 Duncan, your evidence was that you got all these
11 records back from Mr. McKenzie and Mr. McKenzie...

12 A. I am sorry, which records?

13 2384. Q. ...had taken all the records out of
14 the file, all of the docket time, all of the
15 billings and things like that.

16 A. No, the ledger in the PCLaw was
17 never affected. That was not something that was
18 capable of being removed.

19 2385. Q. Okay, all right. Well, did that
20 information go over to Mr. Dewart?

21 MR. EPSTEIN: Again, you can assume that
22 any questions with regard to discussions
23 with Mr. Dewart or communications with Mr.
24 Dewart, certainly by the law firm, are
25 privileged.

1 2386. MR. BRISTOW: All right.

2 MR. EPSTEIN: So we are not going to
3 answer any questions about that.

4

5 BY MR. BRISTOW:

6 2387. Q. Do you know why the plaintiff
7 discontinued its action against my clients, Philip
8 Nicholls and Cottle, Catford on March 23 of '09,
9 that is, 2009?

10 A. No.

11 MR. EPSTEIN: Sorry, can you just
12 identify...I didn't catch that. All of
13 your clients are who?

14 2388. MR. BRISTOW: Philip Nicholls, a
15 lawyer...

16 MR. EPSTEIN: Philip Nicholls.

17 2389. MR. BRISTOW: ...personally.

18 MR. EPSTEIN: Yes?

19 2390. MR. BRISTOW: And Cottle, Catford. That
20 is his firm.

21 MR. EPSTEIN: All right, so your
22 question was does this witness know why the
23 plaintiff discontinued against your
24 clients?

25 2391. MR. BRISTOW: Well, when I ask this

1 witness, I mean anyone in the firm.

2 MR. EPSTEIN: All right.

3 THE DEPONENT: I don't know. I can't
4 speak for everyone in the firm.

5

6 BY MR. BRISTOW:

7 2392. Q. Were you aware at or about that time
8 that a number of the defendants had been
9 discontinued against?

10 A. I don't recall that.

11 2393. Q. Would you ask the other members of
12 your firm if they knew?

13 MR. EPSTEIN: Again, we will ask the
14 partners...

15 THE DEPONENT: I will ask the partners.

16 2394. MR. BRISTOW: Well, at least I got the
17 partners. We will start with them.

18 MR. EPSTEIN: Okay, so you want us to
19 ask the partners if they were aware that
20 the claim against your clients was
21 discontinued. We will ask them that.

U/T

22

23 BY MR. BRISTOW:

24 2395. Q. And the dockets that you have been
25 going over and the bills and the trust accounts and

1 the rest of it, when again was the first time you
2 looked at them?

3 A. For BMC543 and 587?

4 2396. Q. Yes.

5 A. Some time in March of 2010.

6 2397. Q. But you did have them in your
7 possession before that time?

8 A. Has the firm?

9 2398. Q. Yes.

10 A. They were in the possession of the
11 firm. There is a lot of files in the possession of
12 the firm.

13 2399. Q. And was that information ever passed
14 on to Mr. Dewart? I know you are going to say no.
15 That is okay. I am just asking the question.

16 MR. EPSTEIN: Okay. Don't answer.

/R

17

18 BY MR. BRISTOW:

19 2400. Q. Now, I want to go to your firm's
20 notice of motion returnable April 12 on behalf of
21 Crawford McLean Anderson and Duncan, and grounds
22 for...do you have that in front of you?

23 MR. EPSTEIN: No.

24 2401. MR. BRISTOW: Well, let me just read it
25 to you. The grounds for the motion are...

1 and one of them was:
2 "...CMAD and McKenzie formally represented
3 jointly by Mr. Sean Dewart have now
4 retained new and separate counsel due to a
5 conflict of interest..."

6 What was that conflict?

7 MR. EPSTEIN: The conflict was that
8 certain information had come to light by
9 Ms. Duncan, which she has testified to,
10 which potentially put Mr. Dewart, who was
11 representing both the firm and Mr.
12 McKenzie, in a position where he was in a
13 conflict of interest as between the firm
14 and Mr. McKenzie, and therefore it was
15 decided that separate counsel would be
16 appointed for each.

17

18 BY MR. BRISTOW:

19 2402. Q. Okay, let's go to your first
20 affidavit, which is April 7, 2010, and maybe I will
21 just read you a part of it because...unless you have
22 it right in front of you.

23 A. Are you talking about the one for
24 the April 12th motion? I don't have that one in
25 front of me.

1 2403. Q. Okay, let me just read it to you.

2 MR. EPSTEIN: What I can tell you is
3 that, maybe assisting, Mr. Bristow, that
4 affidavit was prepared...was sort of a
5 preliminary affidavit prepared with limited
6 information before Ms. Duncan had an
7 opportunity to review the file documents
8 more extensively, and her position was set
9 up more extensively and more appropriately
10 in the affidavit which she has filed...

11 2404. MR. BRISTOW: All right.

12 MR. EPSTEIN: ...in these proceedings,
13 which you have before then. So I mean, she
14 is here to be cross-examined on her...

15 2405. MR. BRISTOW: Both affidavits.

16 MR. EPSTEIN: And as I said, the purpose
17 of that initial affidavit was really just
18 for the purpose of getting leave to file
19 this affidavit and this affidavit, which is
20 more comprehensive and...

21

22 BY MR. BRISTOW:

23 2406. Q. All right. I am just going to read

24 to you from paragraph 11 where you state that:

25 "...CMAD has another client not

1 contemplated by the order who has asserted
2 privilege over the trust documents..."

3 Who is that client?

4 A. Mr. Allard.

5 MR. EPSTEIN: We can now tell you it is
6 Mr. Allard.

7

8 BY MR. BRISTOW:

9 2407. Q. Okay, and you say in paragraph 11:
10 "...The client has thus far not waived
11 privilege over these documents or
12 information..."

13 Correct?

14 A. That is correct.

15 2408. Q. And at paragraph 12 you say:
16 "...I wrote to the client on April 6th
17 advising the client that I would be seeking
18 the court's direction with respect to
19 production of the said document..."

20 May I have a copy of that document, please?

21 MR. EPSTEIN: No. /R

22 2409. MR. BRISTOW: Why?

23 MR. EPSTEIN: It is not relevant to...

24 2410. MR. BRISTOW: All right.

25 MR. EPSTEIN: ...this...

1 nothing..."

2 Is that Mr. Allard?

3 A. Yes.

4 2414. Q. All right, and:

5 "...As the client has retained another
6 lawyer to review the matter and provide
7 advice..."

8 Is that what he told you?

9 A. That is correct.

10 2415. Q. Who is that lawyer? Do you know?

11 A. There was a number of them.

12 MR. EPSTEIN: Mr. Bristow, I don't know
13 if we knew at the time who the lawyer was.
14 We do know that he was having difficulty
15 retaining counsel. He attempted to retain
16 BOG and I believe that they had a conflict,
17 and he then consulted with counsel in
18 Vancouver and ultimately, he got counsel
19 whose name escapes me, who was counsel
20 representing him at the time of the April
21 12th hearing, but my understanding is that
22 that counsel was discharged the day after
23 the hearing. That is the information I
24 have.

25 2416. MR. BRISTOW: Well, is it fair to say

1 copying all counsel.

2 2421. MR. BRISTOW: And does anybody have his
3 address or contact or anything?

4 MR. RANKING: As I said, I will be
5 writing to him this afternoon, Mr. Bristow.

6 2422. MR. BRISTOW: Okay, good.

7

8 BY MR. BRISTOW:

9 2423. Q. And do you or did you have any
10 contact particulars for Mr. Allard, that is,
11 address, phone numbers, et cetera, when you had been
12 instructed to do nothing and things like that? Do
13 you have that or did you have that?

14 A. I did have...I did use material that
15 was in the file.

16 2424. Q. And could you produce that?

17 MR. EPSTEIN: I believe that was the
18 address that Mr...

19 2425. MR. BRISTOW: Someone else asked for?

20 MR. EPSTEIN: Yes.

21 2426. MR. BRISTOW: All right, and do you...

22 MR. SILVER: I am sorry, there is too
23 much information between friends here, but
24 I am missing it, so I must not be friendly
25 with anybody. Do you have contact

1 particulars for Mr. Allard and if so, can
2 we have it?

3 MR. EPSTEIN: There was a letter that
4 you wrote to Mr. Allard.

5 MR. SILVER: What happened to the
6 letter?

7 MR. EPSTEIN: What happens?

8 THE DEPONENT: I can't recall.

9 MR. SILVER: Is that the letter that Mr.
10 Bristow asked for production and you
11 refused?

12 MR. EPSTEIN: Yes.

13 MR. SILVER: Well, why don't you just
14 produce the letter? It is relevant to the
15 address.

16 MR. EPSTEIN: Yes, we will give you the
17 address.

U/T

18 MR. SILVER: And that letter was mailed?

19 THE DEPONENT: No, it was faxed.

20 MR. SILVER: So can we have the fax
21 number too?

22 MR. EPSTEIN: Yes.

23 THE DEPONENT: Would it be fair to say
24 that you were asking for the contact
25 information we used to contact Mr. Allard

1 with that letter?

2 MR. SILVER: Well, it worked for you, so
3 maybe it will work for us.

4 2427. MR. BRISTOW: Okay, I am finished, and I
5 thank you very much for this...

6 MR. EPSTEIN: Thank you, Mr. Bristow.

7 2428. MR. BRISTOW: ...torturous morning that
8 you had to spend with me. The others were
9 far more civil, I am sure. The excess
10 policy I am not going into because we will
11 pick that up later.

12 MS. ZEMEL: Just before...sorry.

13 2429. MR. BRISTOW: Yes, by all means, go
14 ahead.

15

16 CONTINUED CROSS-EXAMINATION BY MS. ZEMEL :

17 2430. MS. ZEMEL: Just before we proceed, I
18 know I, in the interests of time, suggested
19 that I will ask some questions in writing
20 to you, but however, one of the questions
21 involves a Mr. Olson, so maybe I should
22 just follow up right now with that
23 particular question, since we have just
24 discussed him. How about we do that, get
25 that on the record.

1 MR. EPSTEIN: What is the question?

2 2431. MS. ZEMEL: Well, there is references to
3 an R. Olson in the ledgers, and I will tell
4 you which one. If I could just already put
5 that on the record...we might as well,
6 since it is going to be done either in
7 writing and it is better it be done now
8 since we just discussed him.

9 MR. EPSTEIN: Mr. Ranking, what was Mr.
10 Olson's first name? Do you recall?

11 MR. RANKING: I am sorry, Mr. Epstein.
12 I don't.

13 2432. MS. ZEMEL: Okay, well, what if I just
14 put this question...

15 MR. SILVER: I believe it is Richard.

16 2433. MS. ZEMEL: Richard, there you go.
17 Okay, so I am going to just take you to
18 those, and that way I can put those
19 questions to you right now, and I know I am
20 going over my time, but just...

21 MR. EPSTEIN: That is all right.

22 2434. MS. ZEMEL: It just seems easier right
23 now.

24 MR. SILVER: Is this A or B, Maanit?

25 2435. MS. ZEMEL: These would be in B and the

1 entries are on...they start at December
2 11th, 2008, so let me just look for those.
3 Here we go. Yes, if you look at page 15
4 of...

5 MR. SILVER: Exhibit B?

6 2436. MS. ZEMEL: Yes, Exhibit B, page 15,
7 there is an entry on December 11th, 2008.
8 It is entry number 614548.

9 MR. EPSTEIN: Right.

10 2437. MS. ZEMEL: And it is an entry by Stacey
11 Ball and it says:
12 "...Engaged in gathering documents
13 electronically to burn..."

14 MR. RANKING: Sorry, I don't mean to ask
15 you to slow down, but please, slow down.

16 2438. MS. ZEMEL: Sure. I will certainly slow
17 down.

18 MR. SILVER: Here it is.

19 MR. EPSTEIN: I see it.

20 2439. MS. ZEMEL: Until everybody finds it.
21 614548. Anyway, this is an entry by Stacey
22 Ball and it says:
23 "...Engaged in gathering documents
24 electronically to burn to DVD for R. Olson.
25 Conference with office staff, SW..."

1 You know, I am going to take you to just
2 all those entries. There is another one on
3 December 19th, 2008, so that is a couple
4 pages down, and that would be entry number
5 614575, again by Stacey Ball. It says:
6 "...Engaged in gathering electronic
7 documents to burn to DVD for R. Olson..."

8 MR. EPSTEIN: M'hm.

9 2440. MS. ZEMEL: And then once again, we have
10 got it...

11 MR. SILVER: I can't find the 575...

12 MR. EPSTEIN: It is in the middle of the
13 page. No, it is on another page...page
14 15...

15 2441. MS. ZEMEL: On another page. Three
16 pages down.

17 MR. EPSTEIN: On page 15.

18 MR. SILVER: They are all page 15.

19 2442. MS. ZEMEL: No, no, no. This one
20 is...just go down to December...

21 MR. EPSTEIN: December the 19th.

22 2443. MS. ZEMEL: 19th, 2008.

23 MR. SILVER: 614575, there it is.

24 MR. EPSTEIN: Right.

25 THE DEPONENT: I think that is 150

1 something actually.

2 2444. MS. ZEMEL: Yes, it probably is, it is
3 just lost in the copy. And then the next
4 one is January 13, 2009.

5 MR. RANKING: There is another one.

6 MR. SILVER: There is another one.

7 2445. MS. ZEMEL: Sorry, I missed one.

8 MR. SILVER: 614579.

9 MR. EPSTEIN: Is that on the same page?

10 MR. SILVER: Yes.

11 2446. MS. ZEMEL: There you go, I missed one,
12 too.

13 MR. EPSTEIN: Sorry, where is it?

14 MR. SILVER: 614579.

15 MR. RANKING: And 614578.

16 2447. MS. ZEMEL: 578, yes, not 79.

17 MR. SILVER: Sorry, 8.

18 2448. MS. ZEMEL: "...Preparation of
19 electronic documents to burn to DVD for R.
20 Olson..."

21 Right, and then again, I have my...

22 MR. EPSTEIN: Hold on. That is December
23 22. All right, and then there is...

24 2449. MS. ZEMEL: And then there is another
25 one on January 13th. The entry is 614620,

1 and that says, again, Stacey Ball:
2 "...Conference with office staff, SW.
3 Preparation of Richard Olson DVD of
4 documents and burn..."
5 So I guess that is Richard Olson. Here we
6 have the answer to R. Olson. And once
7 again on January 14th, so just further down
8 from there, 614623...

9 MR. EPSTEIN: January the 4th?

10 THE DEPONENT: 14th.

11 2450. MS. ZEMEL: Yes, just scroll a little
12 further down. 614623:
13 "...Preparation of documents to be burned
14 to DVD for Richard Olson. Conference with
15 office staff, SW..."
16 That is the extent of the ones I found.
17 There may be more. My question in that
18 regard is to advise who R. or Richard Olson
19 is. Now, we...

20 MR. EPSTEIN: I can advise you we have
21 some information. I have spoken to Mr.
22 Olson myself and my understanding is that
23 he... well, he is a lawyer in Vancouver and
24 he appears to...I mean, I can't speak for
25 him and I don't know his relationship with

1 Mr. Allard, but it appears that he
2 represents Mr. Allard to some extent at
3 least, because when I communicated with him
4 before the motion before Justice
5 Shaughnessy, where we were trying to get
6 counsel for Mr. Allard to attend to speak
7 to the privilege issues, and I communicated
8 with Mr. Olson in that regard.

9 2451. MS. ZEMEL: Well, first of all, I would
10 like to know the contact information for
11 Mr. Olson if, in fact, it is the same Mr.
12 Olson. Chances are probably 99.9 percent
13 sure that it is.

14 MR. EPSTEIN: I think I already gave
15 that to Mr. Ranking.

16
17 BY MS. ZEMEL:

18 2452. Q. If Mr. Ranking has that, I will take
19 that from him, that is fine. And I would also like
20 to know...ask Stacey Ball, okay, or anyone else at
21 the firm...let me ask you first. Do you know who he
22 is? Have you ever had any contact with him?

23 A. Me? No.

24 2453. Q. Okay, so if you don't mind asking
25 Stacey Ball or anyone else, Sunny Ware as well,

1 with me before the motion and I called him
2 and we spoke.

3 2457. MS. ZEMEL: Okay, and did he say how he
4 knew to call you about this?

5 MR. EPSTEIN: Again, I can't remember
6 exactly. I am assuming that it must have
7 been from the letter that Ms. Duncan had
8 written to...Ms. Duncan had written a
9 letter to Mr. Allard a few days earlier,
10 the contents of which related to the issue
11 of privilege and the upcoming motion and
12 really said to him, "You need to get your
13 own counsel to represent your position at
14 the motion," and we suggested that...Ms.
15 Duncan suggested that he retain counsel
16 ASAP and I was contacted by Mr. Olson and I
17 called him back and...

18 MR. SILVER: Was your name in the
19 letter?

20 MR. EPSTEIN: No.

21 MR. SILVER: Well, how did he know to
22 contact you, then?

23 MR. EPSTEIN: I am sorry, Ms. Duncan
24 reminds me that she did reference in the
25 letter to him that I was her counsel.

1 MR. SILVER: And what was the position
2 on that letter? Are you producing it or
3 not?

4 MR. EPSTEIN: No. /R

5 MR. SILVER: No? You might want to take
6 that under reconsideration.

7 MR. EPSTEIN: As I have said, we have
8 advised you of the contents of that letter.
9 I don't know...

10 MR. SILVER: All the more reason why we
11 are entitled to see it, then.

12 2458. MS. ZEMEL: Anyway, that is the extent
13 of my questions on the Mr. Olson issue.
14 Thank you.

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I hereby certify the foregoing to be a true and accurate the above noted proceedings held before me on the 3rd DAY OF MAY, 2010 and taken to the best of my skill, ability and understanding.

}
} Certified Correct:
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}

} Heidi Dümmler
} Verbatim Reporter
}

