

ONTARIO
SUPERIOR COURT OF JUSTICE

HD/pp

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 K. WILLIAM MCKENZIE, on his Affidavits sworn the 2nd day of October, 2009, the 26th day of November, 2009, the 7th day of January, 2010 and the 23rd day of April, 2010, taken at the offices of VICTORY VERBATIM REPORTING SERVICES, Ernst & Young Tower, 222 Bay Street, Suite 900, Toronto, Ontario, on the 4th day of May, 2010.

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

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

GERALD L.R. RANKING) -- for the Defendant,
EMMELINE MORSE) PricewaterhouseCoopers East Caribbean Firm

MAANIT T. ZEMEL -- for the Defendants, Eric Iain Stewart Deane and Estate of Colin Deane

IAN S. EPSTEIN -- for Jessica Duncan
JEFFREY W. KRAMER) -- for K. William McKenzie
LEAH ANDERSON VOJDANI)

INDEX OF PROCEEDINGS

	PAGE NUMBER
K. WILLIAM MCKENZIE, resumed Continued Cross-Examination by: MR. SILVER	602 - 916
Index of Exhibits	917
Index of Undertakings	918
Index of Refusals	919
Certificate	920

1 K. WILLIAM MCKENZIE, resumed

2 CONTINUED CROSS-EXAMINATION BY MR. SILVER :

3 2182. MR. SILVER: Can you put his two
4 affidavits in front of him, please.

5 MR. KRAMER: That is the...

6 2183. MR. SILVER: One of them is an exhibit,
7 the first one.

8 MR. KRAMER: The October 2nd affidavit
9 and the recent one that I filed?

10 2184. MR. SILVER: Yes.

11 MR. KRAMER: Okay.

12

13 BY MR. SILVER:

14 2185. Q. Mr. McKenzie, you continue to be
15 under oath?

16 A. Yes, sir.

17 2186. Q. I am showing to you, your October 2,
18 2009 affidavit.

19 A. Got it.

20 2187. Q. When you swore that affidavit, did
21 you verily believe everything to be true in the
22 affidavit?

23 A. Yes.

24 2188. Q. If I understand your position, to
25 the extent that it isn't true or things are

1 inaccurate, you think that others are responsible
2 for the inaccuracies, right?

3 A. I was in a box and I stayed in the
4 box. That is how I think of it.

5 2189. Q. So, am I right that to the extent
6 there are inaccuracies, you think others are
7 responsible for it? You did the best you could, you
8 thought Jessica Duncan was going to look at it, you
9 thought Dewart was handling it with her, and...

10 A. I did the best I could.

11 2190. Q. ...you didn't intend to be
12 inaccurate, and if other people had done the best
13 they could, there wouldn't have been the
14 inaccuracies; that is your position, isn't it?

15 A. I don't like to throw blame around,
16 but I did the best I could.

17 2191. Q. Well, we will get to the content of
18 your April 23rd affidavit and we will see if you
19 like to throw blame around. It seems to me the
20 April 23rd affidavit blames Jessica Duncan for not
21 reviewing the affidavit. You only found out after
22 that she hadn't reviewed it at all, right?

23 A. Do you want me to read it? I am not
24 sure I agree with you.

25 MR. KRAMER: Well, do we have to come up

1 with a characterization of what it says?

2 It says what it says.

3

4 BY MR. SILVER:

5 2192. Q. In respect of your October 2nd
6 affidavit, as I recall, in your April 23rd affidavit
7 you say, "Well, I made a list. I wanted to create a
8 list of inaccuracies and deal with them and it never
9 got out." Is that what you said?

10 A. When I...

11 2193. Q. Paragraph 14, if it helps you, of
12 the April 23rd. Paragraph 13 and 14.

13 A. No, you see it wasn't when I
14 reviewed the affidavit. It was after I had been
15 cross-examined.

16 2194. Q. That is right.

17 A. I can't remember the dates, but two
18 days, I read it...

19 2195. Q. February 3rd and 8th.

20 A. I read them and...

21 2196. Q. You noted inaccuracies. You say in
22 paragraph 13, "They appeared out of context", and
23 then you remembered other things that you didn't
24 recall, correct? That is what paragraph 13 says.

25 A. Fair enough.

1 am reading from Exhibit A, "for correcting
2 evidence given on a cross-examination".

3 THE DEPONENT: Yes, but he was very firm
4 in the conversation. Stop. You can't do
5 it. End of story.

6

7 BY MR. SILVER:

8 2200. Q. Okay.

9 A. Those aren't his words, by the way,
10 but that was...

11 2201. Q. Do you have the list of corrections?
12 Did you ever forward a list of corrections to Mr.
13 Dewart?

14 A. I would have to check his file, but
15 my e-mail might have had...

16 2202. Q. His file? Why don't you check your
17 file?

18 MR. KRAMER: Well, it doesn't appear
19 that there was an e-mail...the one that
20 went to Dewart, concerning an attachment
21 with a list. Do you believe there was a
22 list? I haven't seen a list.

23 THE DEPONENT: Okay. Well, to refresh
24 my memory I would have to look at the e-
25 mail that I sent him which must be...

1 MR. KRAMER: Well, it is right here.

2 THE DEPONENT: I am talking about this
3 morning...call. Which was either I said
4 something or I said for instance...I can't
5 remember exactly but I alerted him to the
6 fact somehow in an e-mail...

7

8 BY MR. SILVER:

9 2203. Q. Sir...

10 A. That is my recollection.

11 2204. Q. Your paragraph 14 says, "I began to
12 prepare a list of corrections." Do you have the
13 list that you began to prepare? And secondly did
14 you send it or anything else to Dewart?

15 A. I would have to refresh my memory by
16 looking at his file to see if I sent him anything.
17 And, do I have a list? I have scribbled all over my
18 transcript.

19 2205. Q. So, you don't have the list?

20 A. Throughout time. It was then and
21 then more stuff came in and more stuff...

22 2206. Q. Can I see that?

23 A. What?

24 2207. Q. Your transcript with your scribble
25 notes on it.

1 MR. KRAMER: He doesn't have it with
2 him.

3 2208. MR. SILVER: You don't? How do you know
4 that?

5 MR. KRAMER: Because we talked about it
6 this morning. Gerry asked about it.

7 THE DEPONENT: How to do it efficiently.

8 2209. MR. SILVER: About this same issue?

9 MR. RANKING: I asked...just so it is
10 clear for the record, I wrote to Mr. Kramer
11 and served a notice of examination
12 requesting that Mr. McKenzie bring to this
13 cross-examination the list, his transcripts
14 that he reviewed as well as accounting and
15 other documents that were referred to in
16 the affidavit.

17 2210. MR. SILVER: And so, you have that but
18 you don't have it here, the transcript with
19 the notes on it?

20 THE DEPONENT: I am not sure that is
21 what Mr. Ranking's letter says.

22 MR. KRAMER: In any case, he is asking
23 for it now. If you don't have it with you,
24 can you bring it for tomorrow morning?

25 THE DEPONENT: As we discussed off the

1 record, I will entrust it tomorrow morning
2 to my counsel because there is a lot of
3 solicitor/client stuff where I am talking
4 to and from Mr. Dewart. It is kind of
5 like, over to you, Mr. Kramer.

6 MR. RANKING: Mr. McKenzie, can I ask
7 this question? Why didn't you bring it
8 today? I specifically put your counsel on
9 notice, I wanted a copy of your transcript
10 as well as the list that you say you began
11 to prepare.

12 THE DEPONENT: Mr. Ranking, my counsel
13 brought a clean copy of the transcript,
14 which was my understanding...

15 MR. RANKING: I didn't ask for that. I
16 asked for your copy of the transcript and
17 the list that you began to prepare. Why
18 didn't you bring it?

19 MR. KRAMER: Well, he doesn't know if he
20 has the list.

21 THE DEPONENT: I will have to look at
22 the letter again.

23 MR. KRAMER: I take your point. There
24 may have been some confusion as to whether
25 you wanted the transcript...

1 2211. MR. SILVER: It isn't making a point.
2 It is getting an answer to a question. Why
3 didn't you bring it today?

4 THE DEPONENT: Can we get the letter
5 out, if we are going to have this debate
6 about Mr. Ranking. You guys keep putting
7 in evidence all the time and then I read it
8 and it is not what you said.

9 MR. KRAMER: We don't seem to have the
10 letter here. I take your point. I am not
11 sure we can add much to it. Mr. McKenzie
12 seems to be able to bring the transcript
13 for tomorrow morning. If he does that I
14 will have it. We are going to have to
15 figure out how to deal with it. If there
16 are scribbles, some of which may be
17 privileged communications, some which may
18 not, some which may have been related to
19 the paragraphs 13 and 14, some which may be
20 subsequent. I am not sure how we are going
21 to deal with that, but we will do our best.
22 But it is not clear at this point if there
23 is a list other than that.

24
25 BY MR. SILVER:

1 A. I will have to refresh my memory if
2 I wrote down the list of numbers of questions or
3 something on a separate piece of paper.

4 2219. Q. Well, will you produce whatever list
5 you have in its current form?

6 MR. KRAMER: He is going to bring the
7 transcript. He is going to look for the
8 list if it exists, and if the list exists
9 you are going to produce it.

10 THE DEPONENT: I am going to use my best
11 efforts to get you those two things you
12 asked for, a list if it is separate. And I
13 will give Mr. Kramer...

14 2220. MR. SILVER: Currently existing list.

15 THE DEPONENT: ...my copy of the
16 transcript.

U/T

17 MR. KRAMER: Very good.

18 THE DEPONENT: Mr. Kramer can make all
19 the decisions from there on in.

20 MR. KRAMER: Very good.

21

22 BY MR. SILVER:

23 2221. Q. A list that already exists. I am
24 not asking you to go and make a list now, although I
25 probably should. And finally, my last question in

1 this area, which I didn't think would take this long
2 is, did you send any kind of list or indication to
3 Mr. Dewart of what you thought had to be corrected?

4 A. I will refresh memory. I believe
5 Mr. Kramer has Mr. Dewart's box.

6 2222. Q. So, you will inquire of Dewart or
7 his files...

8 MR. KRAMER: Well, no, here is what I
9 think we should do. Mr. McKenzie...I have
10 Mr. Dewart's file. Mr. McKenzie will look
11 through it and if you see a list in there
12 that you sent to him and you can't
13 otherwise find it in your own files, we
14 will produce that list, if there is such a
15 list. Mr. McKenzie can look for it.

U/T

16 THE DEPONENT: It will let me know where
17 my head was that day as opposed to
18 everything that happened after, which is
19 why I think we recall having problems.

20

21 BY MR. SILVER:

22 2223. Q. Why you think what? I heard the
23 first part.

24 A. I started off on a job. He says,
25 "You can't do this", but I kept updating my

1 transcript up to...as stuff arrived. So, time is an
2 issue because there was a privilege and then there
3 wasn't and it goes on and on. I am saying...ask Mr.
4 Kramer to sort out...if we can figure out when I
5 changed what and what day, because different
6 information was known to me. I got Jessica Duncan's
7 affidavit...and I thought okay...

8 2224. Q. I understand all that. Sir, please.
9 We moved off the transcript. You have explained all
10 that. We have got an undertaking. You are going to
11 provide Mr. Kramer with the transcript with your
12 handwritten notations and he is going to try and
13 deal with those issues. Why are you telling me that
14 again, other than to waste time? We are onto the
15 list. So, the undertaking is you are going to
16 review the Dewart list and produce any list of
17 inaccuracies or corrections that might have been
18 forwarded by Mr. McKenzie.

19 MR. KRAMER: Yes, we will review the
20 Dewart file.

21 THE DEPONENT: Right.

22
23 BY MR. SILVER:

24 2225. Q. We will come back to the October 2nd
25 affidavit. The April 23rd affidavit,

1 similarly...you verily believe everything to be
2 true? You swore it under oath?

3 A. Sorry, I didn't catch the date. The
4 recent one?

5 2226. Q. April 23rd.

6 A. Yes.

7 2227. Q. I just want to ask you some
8 questions about the content of this affidavit.
9 Paragraph 1 to start with. You describe yourself as
10 a former partner of the law firm Crawford McKenzie
11 McLean Anderson?

12 A. I do.

13 2228. Q. Do you agree with me that until or
14 at...it was only after February 24th and the cost
15 submissions before Justice Shaughnessy were aborted
16 that the defence side found out for the first time
17 that you were no longer a partner of that law firm?

18 A. No.

19 2229. Q. When do you say the defence first
20 knew that you were a former partner of the law firm?

21 A. Well, I had a conversation with you
22 as we walked out the door after that motion before
23 Justice Shaughnessy. I said, "That is it, I am
24 finished, I am quitting, good bye". I didn't say
25 have a nice life. But, "I am done. I am going

1 surfing", is what I was telling everybody. And then
2 I am saying...

3 2230. Q. You knew. You are not saying that
4 you told me that you withdrew as a partner from the
5 law firm?

6 A. I was withdrawing from the whole
7 shebang.

8 2231. Q. From life?

9 A. Well, no.

10 MR. KRAMER: From business life.

11 THE DEPONENT: It didn't work out that
12 way or I wouldn't be here.

13

14 BY MR. SILVER:

15 2232. Q. Sir, you never advised that you had
16 or were withdrawing as a partner from Crawford
17 McKenzie? It was more of a social comment?

18 A. Well, did I write you guys a letter
19 and say, "I am no longer a partner"?

20 2233. Q. Right.

21 A. No, I didn't.

22 2234. Q. No. And counsel on your behalf, Mr.
23 Dewart, there is no letter from him that says that
24 you are no longer a partner of that law firm until
25 after February 24th, right?

1 A. Are you asking me if he wrote a
2 letter?

3 2235. Q. Whether you know of a letter that he
4 wrote where we were advised that you were no longer
5 a partner before February 24th? You don't know of
6 any?

7 A. I just don't know that he did or
8 not.

9 2236. Q. Of course, on the cross-examination,
10 February 3rd and 8th, it didn't come out that you
11 were no longer a partner? I checked the transcript.

12 A. Okay. Well, then the transcript
13 says what it says.

14 2237. Q. Well, I am suggesting to you that is
15 a fact and I would like you to let me know if you
16 disagree with it.

17 A. My recollection is off the record we
18 were talking about how I bought a surfboard and
19 abandoned life...

20 2238. Q. I am not so sure.

21 A. Well, that is my recollection.

22 2239. Q. I would rather just deal with the
23 stuff on the record. So, leaving aside the off the
24 record discussions, on the record we were not
25 advised that you were no longer a partner until

1 after February 24th, right?

2 A. I can't believe you didn't know from
3 our off the record conversation because it was, "Get
4 the stuff from Mr. Dewart"...all of us, get the
5 stuff from the office. They have got it, I don't.

6 2240. Q. Okay.

7 A. But, did I make a formal statement
8 to you? I don't think I did. I don't have a
9 recollection.

10 2241. Q. In fact, your October 2nd affidavit
11 you were specifically speaking for both yourself and
12 the firm? Paragraph 3.

13 "...This affidavit is sworn in response to
14 the motions filed by seeking costs against
15 me and my firm personally..."

16 A. That is what it says.

17 2242. Q. Right. So, on October 2nd you swore
18 this affidavit responding to the costs claims
19 against you and the firm. You were responding for
20 both?

21 A. My affidavit was sworn and delivered
22 to you, my evidence, yes, on responding to your
23 factum as I recall...

24 2243. Q. On behalf of yourself and the firm.

25 A. Well, whatever it says, yes.

1 2244. Q. Well, that is what it says, right?

2 A. That is what it says, yes.

3 2245. Q. When you were cross-examined on
4 February 3rd and 8th, you were being cross-examined
5 both personally and as a representative of the firm.
6 You understood that, right?

7 A. I think that is accurate, yes.
8 Retroactively. I wasn't a member of the firm at the
9 time. But you are asking me questions about when I
10 was back there, right?

11 2246. Q. You were a full partner of...yes, of
12 course, but we didn't know that. We have
13 established that already. Other than your off the
14 record "going surfing" comment. And so, just by way
15 of historical background, when were you called to
16 the bar?

17 MR. KRAMER: It says in his first
18 affidavit, 1977.

19 2247. MR. SILVER: 1977.

20 MR. KRAMER: Paragraph 1.

21

22 BY MR. SILVER:

23 2248. Q. Okay. When did you join the firm
24 that was McKenzie Crawford McLean Anderson & Duncan
25 at the end of '09?

1 A. I came out of...the Bar admission
2 course existed in those days as I recall, six
3 months. And then I went to Orillia and got a job
4 with them.

5 2249. Q. Mr. Crawford?

6 A. Well, there was other guys there,
7 but yes.

8 2250. Q. So, you have only been at one firm?

9 A. I have been in that one office my
10 entire life...well, working.

11 2251. Q. Was it always on Coldwater?

12 A. That building has been my home,
13 professionally.

14 2252. Q. Since 1978.

15 A. Well, I was called to the Bar in
16 '77, right.

17 2253. Q. Whenever.

18 A. I can't remember because the Bar
19 admission course was before or after.

20 2254. Q. I got the point. When did you
21 become a partner?

22 A. Soon after.

23 2255. Q. You always practised litigation,
24 commercial litigation?

25 A. Basically been my...I did a lot of

1 criminal law. Quite a mix, but latterly
2 litigation...

3 2256. Q. For what periods of time were you a
4 managing...

5 A. I wasn't finished.

6 2257. Q. Oh, sorry.

7 A. Also latterly I became a litigator
8 and morphed into what I will call a problem solver,
9 because I started to go all over the world. You
10 know, you are there to fix problems such as in
11 foreign countries...

12 2258. Q. Okay, you are not allowed...

13 A. ...get people together. You draw on
14 the tools that you have and litigation is one of
15 them. That is how I characterize it.

16 2259. Q. Okay. For what periods of time were
17 you the managing partner of the firm?

18 A. You know, I heard that and I
19 thought, "I was?" I say that with a question mark.
20 I don't ever consider that I was the...it was a
21 joint...it was always small.

22 2260. Q. You were one of the managing
23 partners?

24 A. Well, over the last ten years I
25 wouldn't think I did a whole lot of managing.

1 2261. Q. Well, did you have authority over
2 the firm's bank accounts?

3 A. We always could sign trust cheques
4 up until I couldn't anymore, which probably started
5 in 2008. I was taken off by mutual...

6 2262. Q. You were?

7 A. Yes.

8 2263. Q. When were you taken off the
9 authority to the bank?

10 A. That is something I don't know. I
11 know when I was told I was off, because cheques,
12 they are a day-to-day thing that I don't pay much
13 attention to. I mean you have got to understand, I
14 was not very often at the office anyway, so writing
15 cheques...I don't think I signed a pay cheque in a
16 long, long, long time, and that kind of thing. I
17 certainly didn't do the day-to-day stuff you need to
18 do in an office.

19 2264. Q. Sunny Ware did that for you in your
20 practice?

21 A. No, no, whoever were partners. The
22 only people that could sign were partners. Well, I
23 think the accountant had...she could sign up to X
24 dollars on the general account. And other than
25 that...the problem is there is a time problem here,

1 but I am saying in the last few years, no, I wasn't
2 allowed to or I did not sign trust cheques at a
3 certain point. And then they made it clear to me I
4 better not.

5 2265. Q. Who made it clear to you and when?

6 A. I would say Bill McLean is kind of
7 in charge of the trust account. He fills out all
8 those forms you have to fill out to make sure
9 everything balances. So, he keeps an eye on it.
10 So, I think he said to me, or mutually it was,
11 "Don't do it anymore". And Jessica Duncan, last
12 February...February, 2009 I came back from England,
13 Marc and I were doing something over in England, and
14 she fired my secretary and told me I wouldn't be
15 able to sign anything again.

16 2266. Q. Who is Marc?

17 A. Marc Lemieux. He was a lawyer...

18 2267. Q. I know who he is.

19 A. I am just saying we had gone off to
20 England and we came back and they fired Stacey Ball.
21 All the crazy things that happened. Like, enough is
22 enough. But I will tell you...

23 2268. Q. Ms. Duncan indicated that you

24 delivered a notice of withdrawal from the
25 partnership in October, 2009. Is that true?

1 A. I did in reaction to nonsensical...a
2 meeting that was surreal.

3 2269. Q. Sir...

4 A. But I didn't...anyway, go ahead.

5 2270. Q. You delivered...do you have a copy
6 of it?

7 A. I probably do have a copy. I did
8 keep copies of the stuff that was going on in the
9 firm.

10 2271. Q. Where would you have that, at home?

11 A. Yes.

12 2272. Q. Would it be an electronic copy you
13 would have at home?

14 A. No. I kind of kept a file. There
15 was a lot of interaction. It started in August of
16 2008, and that is when I withdrew and said, "I have
17 had it. You guys...whatever...shenanigans". It was
18 back and forth and stuff and I kept a paper file, I
19 printed out stuff. Stuff I would need because
20 ultimately we had to settle up financially. In a
21 legal partnership there is formulas and all that.

22 2273. Q. Can you bring that file in tomorrow,
23 please?

24 A. No, I can't.

25 MR. RANKING: No you can't, or no you

1 won't?

2 THE DEPONENT: Well, I am not going home
3 tonight.

4

5 BY MR. SILVER:

6 2274. Q. Well, how are you going to get the
7 transcripts that you are delivering to Mr. Kramer
8 tomorrow morning?

9 A. Good point. Okay, I take it back.
10 I may not be able to deliver the transcript tomorrow
11 morning unless you let me out of here...

12 2275. Q. You are going to get out of here at
13 5:30.

14 A. Well, I am not going home.

15 2276. Q. So, is the refusal to produce...

16 A. Well, wait a minute, I have got an
17 idea.

18 2277. Q. Okay.

19 A. Call my office, Mr. Epstein, because
20 they have the other end of all these things. It was
21 done by e-mail...

22 MR. KRAMER: Hold on a second. I am not
23 sure what would be in that file that would
24 be producible in this action, in any
25 case...in this motion. I let you go on and

1 I am not sure it is particularly relevant.
2 The notice of withdrawal, I am happy to
3 produce it if he can put his hands on it.
4 But why does he have to come up with a file
5 for you to...about his dealings with the
6 firm. What does this have to do with
7 anything?

8 2278. MR. SILVER: I will tell you what I
9 think it has to do. There is at least two
10 crucial issues and I am going to explore
11 both of them. One is accounting records.
12 Jessica Duncan gave evidence yesterday, or
13 over the last few days, that Mr. McKenzie
14 unilaterally stopped, or caused trust
15 funds, in particular monies coming from
16 Allard into these files, to be moved from
17 the trust fund at the firm into a general
18 account that he had opened for himself. I
19 may be wrong, but I expect some sort of
20 denial. And there may be correspondence.
21 You know, when partnerships break up...I
22 have never been involved with one, but one
23 of the issues is usually money and who is
24 controlling it, and I suspect that this
25 file will address that. And secondly...

1 MR. KRAMER: Just to deal with that
2 first, though, let me deal with that first.
3 That is fine. And if you want him to
4 produce anything he has got that relates to
5 this movement of trust money from Allard
6 and Nelson Barbados into his account, I
7 have no problem with that.

8 2279. MR. SILVER: I am not asking for a
9 limited production. I would like to see
10 the file. You could take the position that
11 you want. Secondly, there is a whole issue
12 about the files, the electronic files. And
13 Jessica Duncan said under oath that at some
14 point in...I have got the date marked,
15 November, 2009 I think it was, that Mr.
16 McKenzie, without consent or notice to
17 anybody, took the whole electronic file for
18 his files that was sitting on the firm's
19 server and moved it.

20 MR. KRAMER: I know all about that and
21 you will examine him on it, and I think you
22 will hear a different version. And I am
23 happy to produce anything he has got that
24 relates to that. What I suggested was that
25 a miscellaneous file about his dealings

1 with his partners, I don't see in principle
2 why that would be relevant. If there is
3 anything in there that relates to the two
4 issues you raised, I agree with you, we
5 should produce them. Now, I don't know
6 what we are going to do about the timing
7 issue, but if Mr. McKenzie delivers that
8 file to me I am happy to go through and
9 pull out of it anything that connects with
10 either of the two issues you raised.

11 2280. MR. SILVER: Or any other issue...

12 MR. KRAMER: Or any other issue that is
13 relevant, absolutely. But if he and his
14 partners are debating things that have
15 nothing to do with this action...sorry,
16 with this pending motion, I don't see why
17 that would be producible.

18 2281. MR. SILVER: That is acceptable to me so
19 long as when production is made we are
20 advised whether or not anything was removed
21 on the basis of relevance.

22 MR. KRAMER: Well, here is the problem I
23 have with that. Presumably there are
24 millions of pieces of paper at the Crawford
25 McKenzie firm. I don't think I have the

1 responsibility to tell you about every
2 piece of paper that doesn't have to do with
3 this action.

4 2282. MR. SILVER: I am only talking about
5 this file that he just said he is keeping.

6 MR. KRAMER: Yes, well, what is in that
7 file and what is in all of the files, if it
8 is in his power, possession or control, he
9 is going to produce it if it relates to an
10 issue. But we don't have to tell you every
11 single piece of paper we didn't produce
12 that doesn't have to do with this issue.

13 2283. MR. SILVER: I just want to know that if
14 he gives you a file this big, and you
15 produce this half of it, I want to know
16 that there was another half that you
17 determined wasn't relevant.

18 MR. KRAMER: I am not going to give you
19 that undertaking.

20 2284. MR. SILVER: So, I have to guess whether
21 anything was removed from the file?

22 MR. KRAMER: No. That is not the way it
23 works in my respectful view. The way it
24 works is, you ask a question. If there is
25 documents that exist that are relevant to

1 it and he has got them, I have to produce
2 them. I don't have to tell you all the
3 things that he has that don't relate to
4 your question.

5 2285. MR. SILVER: I didn't say that. I just
6 want to know whether you remove anything on
7 the purpose of...I didn't say tell me what
8 you are removing.

9 MR. KRAMER: No, I am not going to give
10 you that undertaking. When you create an
11 Affidavit of Documents you don't say I am
12 giving you this and I took out this. It is
13 the same test. It is the same process.
14 So, I don't see why I would have to do
15 that.

16 2286. MR. SILVER: So, what I think I have is
17 an undertaking for Mr. McKenzie to produce
18 to Mr. Kramer his miscellaneous file re
19 dealings with the partnership, is how I
20 describe it. And that you will review it
21 and you will produce any document that has
22 some relevance to the issues in these cost
23 submissions?

24 MR. KRAMER: That is fine.

U/T

25 2287. MR. SILVER: And you refuse to advise

1 THE DEPONENT: This is relating to my
2 interaction with my partners on matters...

3 MR. KRAMER: Mr. Silver has, I think,
4 accurately described it as, you seem to say
5 that you have this miscellaneous file that
6 you created through '08 or '09 relating to
7 dealings with your partners.

8 THE DEPONENT: Okay.

9

10 BY MR. SILVER:

11 2290. Q. Ms. Duncan testified under oath that
12 there was a serious breakdown in the partnership
13 relationship in or about September or August of
14 2008. Do you agree with that?

15 A. That is fair.

16 2291. Q. And she said up until that time you
17 were operating as the managing partner of the firm?

18 A. I don't agree with that.

19 2292. Q. You agree that you and others
20 operated as the managing partners of the firm?

21 A. I think by then...can you remind me
22 when she became a partner?

23 2293. Q. Ms. Duncan?

24 A. Did she tell you? I will just say
25 five or six years before.

1 2294. Q. Became a partner in 2002.

2 A. We had one year where we had a
3 Monday morning meeting that I jokingly called law
4 office management 101, because it was like, "You
5 guys, you have got to take over all of this. I am
6 out of the country, I am out of my career, or my
7 business is such that this office has got to be able
8 to run without me", and we would go through jobs and
9 stuff like that. I think that is...by 2008
10 managing? Doing the day-to-day stuff? I wasn't
11 doing that kind of stuff.

12 2295. Q. You had authority over trust
13 accounts?

14 A. I could sign...I am not sure if two
15 of us...I think two people had to sign a trust
16 cheque, but I think I had signing authority.

17 2296. Q. You were receiving the financial
18 reports relating to the law firm? You knew where
19 the bank was?

20 A. I think we got monthly PCLaw
21 printouts, so I will say probably got them to the
22 end of '08 that I can be sure about, and after
23 that...

24 2297. Q. Up until October of '08, at least,
25 and I will move forward from there, you were sharing

1 profits with your partners in accordance with the
2 terms of the operating partnership agreement?

3 A. Yes, we had a formula.

4 2298. Q. A formula, like a point system? Or
5 units?

6 A. It was sort of a step up thing. If
7 you billed X, you got X percent of it. If you
8 billed the next 100,000 you got a bigger chunk, but
9 only of that 100,000. And it stepped up to...so it
10 was a formula.

11 2299. Q. To divide profits?

12 A. Yes, the accountants did it.

13 2300. Q. So, to the extent that the firm
14 benefitted from these files, the Allard file and
15 then the Nelson Barbados file, you know, all the
16 money that has come in and we can go over, all of
17 the partners benefitted?

18 A. Yes, we would share, but the bigger
19 billing, you got a bigger share.

20 2301. Q. You got the biggest share?

21 A. Well, I billed more than they did in
22 that period, yes.

23 2302. Q. Right. You billed more than they
24 did combined in that period?

25 A. Probably in some years, yes.

1 2303. Q. But, they were getting their share
2 in accordance with the partnership agreement.

3 A. The other thing is I am not sure,
4 even, who the partners were, looking that far back.
5 Because there was other people that came and went.
6 But yes. I mean, generally it was like that. It
7 was like, we shared...

8 2304. Q. There was a partnership agreement
9 and you were sharing...

10 A. We were all sharing and were happy
11 campers, but yes, I got more because I billed more.

12 2305. Q. And then Ms. Duncan said that, she
13 said there was a dispute in August, 2008 and then in
14 September, 2008 a serious breakdown in the
15 partnership relationship.

16 A. You said August, '08?

17 2306. Q. There was a dispute. And then
18 September of '08 a serious breakdown in the
19 partnership relationship, at which time you dictated
20 the terms upon which you would continue to deal with
21 the firm. And it was at that point that you
22 started, in October of 2008, to contribute a pre-set
23 amount to the firm for overhead? Is all that right?

24 A. Can I tell you what I think
25 happened?

1 2307. Q. First if you answer my question. Is
2 that right or wrong?

3 A. I don't share her version as being
4 100 percent accurate.

5 2308. Q. Okay.

6 A. It has got some...but I am just
7 trying to...

8 MR. EPSTEIN: Mr. McKenzie, could you
9 raise your voice a little bit, please? It
10 is hard for us to hear your evidence down
11 at this end of the table.

12 THE DEPONENT: My hearing is failing. I
13 am not sure I heard what you said. I'm
14 sorry?

15 MR. KRAMER: He just asked you to raise
16 your voice.

17 THE DEPONENT: And I am not kidding. I
18 just got diagnosed with missing some
19 frequency...

20 MR. KRAMER: I think there is a question
21 on the table, does he agree with what you
22 put to him about what Jessica had said
23 about the partnership. What are you
24 responding?

25 THE DEPONENT: I am thinking. Give me

1 one minute because I can't think as fast.
2 I am just trying to get dates in my head,
3 that is the problem.

4

5 BY MR. SILVER:

6 2309. Q. I can ask...

7 A. Yes, okay. 2007 was my birthday,
8 February 26th, that is the start date.

9 2310. Q. Sir...

10 A. Just a second...

11 2311. Q. No, I'm sorry. I have asked for a
12 response to my question first. I will give you an
13 opportunity to explain, but the way this works is I
14 ask questions and you give me the answers.

15 A. I think your question was, was there
16 a lot of trouble by August, '08? The answer is yes.

17 2312. Q. Okay, let's start there. There was
18 a dispute in August of '08, right?

19 A. Yes, there was a dispute.

20 2313. Q. Was that, in any way related to the
21 Nelson Barbados/Allard matter?

22 A. No.

23 2314. Q. Okay. In September of...Duncan said
24 in September of 2008 there was a further erosion.

25 She called it a serious breakdown in the partnership

1 relationship; is that true?

2 A. There were serious changes that
3 happened in the period.

4 2315. Q. And one of those changes was, you
5 started to contribute a pre-set amount of overhead,
6 right?

7 A. I did do that. I am not sure what
8 date we started doing it. But I'm sure by '09 we
9 were doing it.

10 2316. Q. She said October, 2008. You are not
11 in a position to contradict or deny that?

12 A. I would have to check documents.

13 2317. Q. Well, let me know if she has got it
14 wrong. She said it under oath.

15 MR. KRAMER: Does it matter if it is
16 October? He said '09, so we are talking
17 about a couple of months.

18 2318. MR. SILVER: It does matter.

19 MR. KRAMER: All right. So, he has
20 confirmed that by January, '09 he is paying
21 a pre-set amount, and he doesn't know...

22 2319. MR. SILVER: It could have been a little
23 bit earlier.

24 MR. KRAMER: And it could have been a
25 little earlier.

1 BY MR. SILVER:

2 2320. Q. From that point in time you weren't
3 sharing profits anymore in accordance with the
4 partnership agreement, correct?

5 A. We had a new agreement.

6 2321. Q. Well, she says that...did you have a
7 new agreement signed? Did you have a new signed
8 agreement?

9 A. My recollection...I hope I have this
10 document, but she sure has it, because she insisted
11 on me signing it. When I came back from England in
12 February of '09 there was a piece of paper there.
13 And I had to sign it, which I did. And she took
14 off...took it.

15 2322. Q. Can you produce that, please? A
16 signed document...

17 A. I don't think I ever got it back
18 with...she was supposed to get it signed by the
19 others and then informed me...the day I said I am
20 not a partner anymore in the fall of '09 she said,
21 "Oh, well, we never agreed with that". They were
22 taking my money, by the way, but there were some
23 other conditions in there that she denied that they
24 agreed to.

25 MR. KRAMER: Your question was do you

1 have this piece of paper that you signed?

2 Do you have a copy of it?

3 THE DEPONENT: I don't think...I may
4 have a draft of it. I don't think I have
5 the one that I actually put my signature
6 on, because she took it to get it signed by
7 other people.

8 MR. KRAMER: So, he doesn't have it.

9 THE DEPONENT: That is my recollection.

10 2323. MR. SILVER: Will you produce the draft
11 that you have?

12 MR. KRAMER: Do you have the draft?

13 THE DEPONENT: Well, it would be in that
14 file.

15 2324. MR. SILVER: Perfect.

16 THE DEPONENT: If I have it.

17 MR. KRAMER: All right. If he has it,
18 it is in this miscellaneous file, and we
19 have already undertaken to give you what is
20 in that file that is relevant, and this one
21 would be, so we will give it to you if it
22 is in that file.

U/T

23 2325. MR. SILVER: Mr. Epstein, I know that
24 your client is...her cross-examination is
25 over, but we didn't know about this

1 February, 2009 document. So, I would ask
2 you to ask your client if it exists and to
3 produce it if it does.

4 THE DEPONENT: It might have been later
5 than February, '09.

6 MR. EPSTEIN: This is not my client's
7 examination. I will discuss that with you
8 off the record, Mr. Silver.

9 2326. MR. SILVER: Okay, well, I am making my
10 request. I would be pleased to discuss it
11 with you off the record, but I am obliged
12 to make my request on the record. So I
13 have and you have responded to it.

14
15 BY MR. SILVER:

16 2327. Q. So, now you don't think it is a
17 February, 2009 document?

18 A. Well, I am going from memory and I
19 checked with Marc Lemieux on Sunday as I told you.
20 When we came back from England it was February, '09
21 according to his recollection, but I don't remember.
22 He said, "Yes, that was when they had fired Stacey",
23 and so that is the best I can do for you. That made
24 me recall that that is about the time that this
25 document...

1 2328. Q. What did the document say, to the
2 best of your recollection?

3 A. Well, I remember my part which was,
4 "You will pay this much towards overhead", right?
5 There was a number on it. And then, "And they
6 will"...and I am just saying there was a quid pro
7 quo in there of some nature. That is all I can
8 recall.

9 2329. Q. What were they going to do?

10 A. Well, they...she was crying the
11 blues, like we are having a lot of trouble here. I
12 said, "I will stay. I can't take this anymore. You
13 guys run the firm. I mean, I am out of here. I
14 mean mentally I am still working, but I can't take
15 this anymore. I come back, you fired my secretary,
16 you have got this, they are all in tears."

17 2330. Q. Was it a cash flow problem?

18 A. I don't know what their problem was,
19 but she was moaning...oh, yes, she said, "Bill
20 McLean", my partner for, he has been a partner a
21 long time, "He is going to have to sell his house",
22 and...

23 2331. Q. There was financial problems, when
24 you pulled your Allard and Nelson Barbados billings
25 out of the mix...

1 A. No, it was over. No, that file...I
2 mean, that file was pretty well done in December.
3 In the can. We were ready to argue the motion give
4 or take. As a matter of fact, Jessica was running
5 the file, yes, because she was doing all that...the
6 stuff on the Miller Thomson motion. That wasn't me
7 at all.

8 2332. Q. The motion...

9 A. Let me finish. Marc was doing
10 the...chasing after the videoing that was
11 nonsensical too and I was abdicating. I was just
12 going, I will argue the motion in April, whatever.
13 But that file, it was done. I was off on another
14 matter completely out west, doing something else
15 completely.

16 2333. Q. So, you didn't put much effort into
17 the April hearing?

18 A. I thought I whipped your butt there,
19 Mr. Silver.

20 2334. Q. You seemed to be as prepared as you
21 could be.

22 A. I say my tongue is in my cheek. I
23 say with the greatest respect you guys did a great
24 job. I was ready to argue it more or less in
25 December and all that happened.

1 2335. Q. We will come back to that, because
2 of course you stopped billing the client, is that
3 right?

4 A. The client strangled all of us by
5 then, I think.

6 2336. Q. You didn't bill the client for your
7 time in April, to argue the motion?

8 A. That is still not a happy subject
9 with my client, believe me.

10 2337. Q. He wants you to bill him?

11 A. No, no, no, the other way around.

12 2338. Q. Oh, you did bill him and he is
13 unhappy about it?

14 A. The thing with clients is, you bill
15 them when they are happy and when they are not happy
16 you let it go and take it up some other time.

17 2339. Q. So, when did you stop billing your
18 client?

19 A. You got me. Get the files out and
20 we will take a look.

21 2340. Q. We will.

22 A. Okay.

23 2341. Q. You have seen it in the dockets
24 where there is activity described by multiple time
25 keepers and zero fee credit or zero dollar

1 allocations. You haven't seen those?

2 A. What are you talking about? I am
3 saying by that time Jessica was the main player in
4 that file because of the Miller Thomson thing which,
5 I think was a lot of work. Well, not a lot of work,
6 not compared to the big file. But it was a motion
7 and Marc was running around after you guys trying to
8 get the video recordings, with students showing up
9 and forgetting to bring the cameras and I would just
10 get these memos and I would just delete them...

11 2342. Q. We will come back to it.

12 A. We ended up on a Sunday there with
13 Justice Shaughnessy hovering over us the day before
14 because...it was just ridiculous. I am just saying
15 it was frustrating is a better word for it. No
16 thanks to you guys on your video recording foray,
17 thank you.

18 2343. Q. Yes...

19 A. It was Gerry that wanted it, and he
20 is the guy that wrote that memo to us that said,
21 "Sorry, guys", remember?

22 2344. Q. In any event, I think it is res
23 judicata. The courts ruled on the videos.

24 A. I agree, but I am just saying, you
25 were asking what I was doing in '09...

1 2345. Q. Mr. McKenzie, if I have got it
2 right, in or about October, 2008; or at the latest
3 by January, 2009 you had started to contribute an
4 amount on a monthly basis to overhead. Jessica
5 Duncan said October, 2008, you say at least by the
6 beginning of January. And to the extent that there
7 was any agreement or anything in writing, that came
8 after. In other words, whatever date is on this
9 agreement, the new arrangement had already been in
10 effect?

11 A. There is a day where I had a fixed
12 rate to pay, either...I paid more because...now that
13 you remind me, part of the agreement was if I used
14 the staff of the firm, except Sunny Ware, I had to
15 pay for that too. Now, Stacey Ball is worth her
16 weight in gold, so I probably would have used her on
17 other files, I don't know. But I am just going...

18 2346. Q. Can you undertake to...you have your
19 own accounting records? How would you make the
20 payment to the firm, by cheque?

21 A. This was haggled out ad nauseam
22 between Sunny and...

23 2347. Q. Sir, please stop. How did you make
24 the payment to the firm? By cheque?

25 A. Either that or a contra credit of

1 some kind.

2 2348. Q. And Sunny Ware handled that on your
3 behalf with the firm?

4 A. Well, Julie Jones was the
5 accountant, and it was a triangle between Jessica,
6 Julie Jones and Sunny. Every month...I don't know
7 there was too many months I actually had to write a
8 cheque, because we were closing files and billing
9 them, and I was getting credit for that. There was
10 all sorts of things going on.

11 2349. Q. Is that accounting all set out in
12 paper that is in this miscellaneous file re dealings
13 with partnership?

14 A. No, that would be at the law firm.
15 I got a memo...or, I asked for a memo at the end
16 saying, "You are square".

17 2350. Q. Is that in the file that you have?

18 A. I would have to check.

19 2351. Q. I would like to know, if you can
20 check your records and tell me the date that you
21 started paying a fixed rate towards overhead.

22 A. I can't do that. They know.

23 MR. KRAMER: Does it really matter if it
24 is October, '08 or January, '09?

25

1 BY MR. SILVER:

2 2352. Q. No. So, you accept what they know.
3 They said it was October, 2008.

4 A. I won't accept that until I see the
5 accounting. I am not going to agree with it. Show
6 me the accounting. They sorted it out. At the end
7 everybody said, "On that arrangement we are square",
8 and I went to Florida.

9 2353. Q. I am asking for an undertaking to
10 advise the date that he started paying fixed rate
11 towards overhead, if it was other than October,
12 2008.

13 MR. KRAMER: Are you able to figure this
14 out?

15 THE DEPONENT: I would have to go to the
16 firm and ask the accountant.

17 MR. KRAMER: You don't have any records?

18 THE DEPONENT: I have no...

19 2354. MR. SILVER: Well, it is best efforts.
20 If he can't then you will tell us best
21 efforts he can't.

22 THE DEPONENT: Well, my best efforts
23 are...

24 MR. KRAMER: Have you already asked Ms.
25 Duncan to produce those records?

1 A. There was a second general account
2 in the same name of the same law firm, so we had
3 two. And that is how they kept track, I guess, by
4 dividing it up, because there was, as I said,
5 contras all over the place and whatnot.

6 2359. Q. So, you agree that there was a
7 separate general account set up for your files?
8 Yes?

9 A. I wouldn't say for my files. For...

10 2360. Q. For money coming in.

11 A. To keep track of it all without
12 mixing it all up.

13 2361. Q. And Ms. Duncan said that money would
14 come in, let's say from Allard, go into the firm's
15 trust account and then be transferred from the
16 firm's trust account to this separate new general
17 account, or trust account. Is that what happened?

18 A. That would make sense.

19 2362. Q. Right, that is what happened.

20 A. I don't...you would have to check
21 the accounts, because they just took care of it, and
22 as I say at the end we had done it.

23 2363. Q. Can you produce the records of the
24 general account that was set up and operated in the
25 manner that we have just established?

1 MR. KRAMER: Do you have those records?

2 THE DEPONENT: They have them.

3 MR. KRAMER: He has indicated that it
4 wasn't his account; it was a second firm
5 general account.

6 2364. MR. SILVER: But Ms. Duncan is giving
7 evidence to the contrary.

8 MR. KRAMER: Well, he says he doesn't
9 have the records and you have heard his
10 explanation for why...

11 2365. MR. SILVER: So, you can't produce it?

12 MR. KRAMER: No, he can't produce it.

13 THE DEPONENT: It would be the
14 accounting department would have kept track
15 of the whole thing.

16

17 BY MR. SILVER:

18 2366. Q. Who kept track of it?

19 A. Well, there was an accountant there.

20 Her name is Julie Jones. Jessica and her were
21 closely managing every penny of this, or keeping
22 track of it.

23 2367. Q. But your understanding was after
24 January of 2009, money that would come into trust,
25 or money that would come in to pay accounts that

1 were rendered by the law firm, to the extent that
2 they related to your clients, that money was
3 transferred from one account to a new separate
4 account?

5 A. It might have been a dual flow. In
6 other words, as I was saying to you, let's say...I
7 know they were getting credit for some of
8 Stacey's...all of, I don't know, some of Stacey
9 Ball's work. So, they would take the account and
10 go, "Hey, that belongs to us", and they would go put
11 it in their general account, and whatever was my
12 part would go to my general account.

13 2368. Q. Ms. Duncan said that the firm is
14 seeking an accounting from you in respect of post-
15 January, 2009 billings and receipts. Is that true?

16 A. That is news to me.

17 2369. Q. So, she has made that up?

18 A. I have been begging these guys for a
19 meeting to settle all our...

20 2370. Q. Is the firm asking for an accounting
21 from you, Mr. McKenzie?

22 A. As I said, that is news to me.

23 2371. Q. She also said that there are various
24 e-mails and letters back and forth on these
25 partnership/financial issues. Is that true?

1 A. They owe me a buy-out. They still
2 owe me...

3 MR. KRAMER: He just asked if there was
4 e-mails and letters.

5 THE DEPONENT: There were e-mails.

6 2372. MR. SILVER: Can you produce them,
7 please?

8 MR. KRAMER: I am just wondering about
9 the connection. I mean, I appreciate your
10 point about the money that was from Allard
11 or Nelson Barbados, or otherwise, but
12 what...if there is some e-mails relating to
13 money issues between McKenzie and the
14 partners that have nothing to do with this
15 case, why do you get to see that?

16 2373. MR. SILVER: Well, principally for the
17 reason that you first described, because
18 there was money coming in from Allard in
19 that time frame, in '09.

20 MR. KRAMER: All right. But if there
21 are e-mails that have nothing to do with
22 that, it seems to me that is not proper
23 subject matter of this examination.

24 2374. MR. SILVER: Well, I will leave it to
25 you on the same basis.

1 MR. KRAMER: All right.

2

3 BY MR. SILVER:

4 2375. Q. Would those e-mails and letters back
5 and forth be in this file that you have, your
6 copies? This miscellaneous file.

7 A. The ones that I felt were important
8 to keep.

9 2376. Q. So, you will make them available to
10 Mr. Kramer, whether they are in the file or not.

11 A. I just want to be clear. You are
12 looking for stuff that had this Nelson Barbados file
13 as a topic...

14 2377. Q. No.

15 A. ...of which I think there are
16 probably none.

17 MR. KRAMER: I think what he is looking
18 for are e-mails that relate to any money
19 issues, if they are in some way connected
20 to the money that was received from Nelson
21 Barbados or the Allard file. So, you will
22 give me any such e-mails that you have, and
23 we are going to go through them, and if
24 there is any of them that could in any way
25 air on the money that came in on these

1 files, we are going to produce them.

2 2378. MR. SILVER: I don't put it that way.

3 MR. KRAMER: How do you want to put it?

4 2379. MR. SILVER: I want to put it that he is
5 going to produce e-mails and letters re
6 money issues with the firm, and you are
7 going to review them and produce any that
8 have a semblance of relevance to issues in
9 dispute.

10 MR. KRAMER: That is fine. U/T

11 THE DEPONENT: So, this period is
12 from...

13 MR. KRAMER: Post '09 is what I am
14 taking. Is that correct, Mr. Silver?

15 2380. MR. SILVER: Well, it is either post
16 '09...

17 MR. KRAMER: Post January, I should say.

18 2381. MR. SILVER: Or post October, 2008,
19 whenever this separate account was set up.

20 MR. KRAMER: Okay.

21 2382. MR. SILVER: That time period.

22 THE DEPONENT: Just a second now. I
23 have no idea when the account was set up.
24 Have no recollection and only they know.

25 MR. KRAMER: Well, you will dig out your

1 e-mails and letters, whatever they have,
2 and if they connect...obviously they are
3 not going to be about the separate account
4 if that didn't exist yet.

5

6 BY MR. SILVER:

7 2383. Q. What other files were you working on
8 in '09? When I say that, I mean, were there files
9 other than Nelson Barbados/Allard/Kingsland related
10 matters that you were working on in '09?

11 A. I was working on other stuff that
12 had nothing to do with those files.

13 2384. Q. And getting paid for that?

14 A. They pretty well had taken that, run
15 of that thing.

16 2385. Q. Well, that would be nice, but you
17 know what? It is 2010 and we are all sitting
18 around...

19 A. I am just saying...

20 2386. Q. Sir, did you receive money from
21 other clients in '09 in payment for bills rendered?

22 A. In '09 they were cleaning out every
23 file I had. They were billing, they were getting
24 trust things, they were crashing them. So, the
25 answer is absolutely, for sure. The idea was there

1 would be no trust money left in my account. It
2 would be zero. Nothing would be owed by the
3 clients. All my files would be parcelled off to
4 other people. So, yes. And the accounting would
5 be...they were controlling it month to month.

6 2387. Q. To the extent that bills were
7 rendered in '09, were they being rendered as law
8 firm bills?

9 A. Everything went through that
10 accounting department...

11 2388. Q. So the answer is yes?

12 A. Well, just a second. I better think
13 about that for a minute. I am saying they ran it.

14 2389. Q. Did they render accounts in the name
15 of the law firm is my question?

16 A. That I can say...

17 2390. Q. Or did they render accounts in the
18 name of you personally?

19 A. The law firm rendered accounts to
20 clean up...yes.

21 2391. Q. So, to the extent that accounts were
22 rendered in '09 for work that you were doing, or
23 cleaning up the files that you were trying to close,
24 they would have been prepared by the law firm and
25 rendered under the law firm name; is that right?

1 A. I think what you said is right. The
2 law firm did all the cleaning up stuff of all the
3 files that were there, as I recall. Now, I am just
4 trying to go...because I ended up getting a bunch of
5 them back when Marc quit right at the last
6 minute...I am totally mixed up now.

7 2392. Q. Got a bunch of what back when Marc
8 quit?

9 A. Well...have you got a minute?

10 2393. Q. The accounts?

11 A. Just as I was leaving for Florida
12 and I thought everything was fine because Marc
13 Lemieux had taken...

14 2394. Q. When is this...sorry to interrupt.

15 A. 2009.

16 2395. Q. When in '09?

17 A. The fall of '09 I was mostly absent.
18 Took my family on trips and stuff like that, and I
19 am saying I had pushed off files, right, to other
20 people. And Marc had taken the guts...a bunch of
21 files that were mine, he had taken them over.

22 2396. Q. At your firm?

23 A. Yes, he was still there. And then
24 he announced he was leaving. And there was...just
25 almost macabre what happened. I was getting calls

1 in Florida, "Take the files back". I'm going, "I
2 don't want them back".

3 2397. Q. Nobody wanted your files.

4 A. I am just saying...and these were
5 what I would call pretty profitable looking files.
6 I mean, if they were having money problems I can't
7 believe...I had one 50,000 buck retainer on a big
8 bankruptcy mess and I said, "You guys do it, I will
9 mentor you. It is complicated stuff but"..."No, get
10 it out of here. Get everything out of here, blah
11 blah blah." And Marc...I think they loaded his van
12 up with these files and he drove around until I got
13 back from Florida and dumped them in my garage
14 because he was going to a firm that was doing PI and
15 they wouldn't take them either, literally. And it
16 was like I was...all of a sudden had all these
17 motions. I didn't even have a calendar. Thank God
18 Marc was there because the firm wouldn't even talk
19 to me anymore. Marc was saying, "There is a motion
20 on February 10th in Commercial Court". I'm going,
21 "Did you do a factum?" "Well, partly."

22 2398. Q. Not February 10th because...I just
23 want to make sure I understand when this happened.

24 A. It happened...I am just saying...

25 2399. Q. There were motions...when did this

1 happen?

2 A. I was done.

3 2400. Q. I am just asking you when it
4 happened?

5 A. I was going to Florida thinking,
6 there, I am done. And all of a sudden...

7 2401. Q. When?

8 A. Well, I am going to say the
9 beginning of December was the news and then over
10 Christmas, when I am supposed to be surfing, I'm
11 getting...

12 2402. Q. Of '09?

13 A. Yes, '09 and January get back
14 maybe...

15 2403. Q. 2010?

16 A. Yes, in 2010 I'm still trying to
17 hang on down there and all of a sudden somebody
18 says, "By the way, you have a motion next week in
19 Commercial Court". And I'm saying, "Tim, you handle
20 it. No, I don't want to." Tim is my other partner,
21 ex-partner, and saying, "I don't want to. It's too
22 complicated. There's a factum done." We haggled
23 like this. Tim, at least, I could get along with.
24 Jessica just would not deal with it. Tim, another
25 one...

1 2404. Q. By this time, though...

2 A. Tim did all the work and I said, "I
3 will argue it, but I am not taking the file. You
4 stay on the file, but I will do the argument. I
5 will do the factum and the argument, but it is all
6 yours. Clean it up, deal with the client, bill it,
7 do whatever you want." That was what was going on
8 much to my...

9 2405. Q. In late '09, early '10...

10 A. Yes, I remember Tim saying, "Yes".
11 Marc literally announced it at the beginning of
12 December he was leaving.

13 2406. Q. Of '09. Okay. So, let me just
14 recap. You have this new arrangement is...Duncan
15 says October of '08; you say January. That sort of
16 stays in place for close to a year while you are
17 winding down?

18 A. To zero.

19 2407. Q. Right. And in that time period the
20 law firm Crawford McKenzie continues to operate in
21 that name, right?

22 A. Yes.

23 2408. Q. It continues to operate as a
24 partnership in that name?

25 A. I don't agree with that. The

1 dispute about...

2 2409. Q. Well, the legal status of Crawford
3 McKenzie didn't change. It was a partnership before
4 October, '08 and January, '09 and remained as such
5 until December 31, 2009.

6 A. Well, apparently there is the
7 dispute because we have already said two things. I
8 said one date and then you said, somewhere in the
9 fall of '09 I actually wrote them a letter or an e-
10 mail and said...because they had given me...we had
11 this meeting, another macabre meeting where Jessica
12 was in tears and she said, "You are still a
13 partner". I said, "What are you talking about? I
14 am done." So, I went home and thought...

15 2410. Q. So, whatever...

16 A. Just let me finish. It was official
17 notice, "I am not a partner", just so you know.
18 Because I had gone over to the bank and said, "What
19 is going on here?"

20 2411. Q. No, you sent an official notice in
21 October of 2009...

22 A. Yes, okay.

23 2412. Q. But you didn't say you were with
24 withdrawing from the partnership. You said you were
25 withdrawing from the partnership effective December

1 31st, '09.

2 A. Well, show it to me.

3 2413. Q. Okay, I am not going to show it to
4 you because you have it and we can't seem to get it.

5 A. Jessica doesn't have it? Come on.

6 2414. Q. She has undertaken to produce it and
7 I'm sure we will get it from her.

8 A. I want to see it because I think it
9 said something like, "Much to my surprise you
10 seem"...whatever. If you think I am still a
11 partner...

12 2415. Q. The point is...

13 A. Just a minute, just a minute. Which
14 I don't, effective today, tack it on your forehead.
15 I ain't.

16 2416. Q. Not effective today, effective
17 December 31st, 2009.

18 A. Yes, that is another story, right,
19 the building, I forgot. They were going to leave
20 it.

21 2417. Q. There is lots of stories but the
22 legal reality...and this is what I am trying to get.
23 The legal reality is Crawford McKenzie continued to
24 operate as a legal entity until...with you as a
25 partner legally until December 31st, 2009.

1 A. I don't agree with that.

2 2418. Q. And Exhibit 3 to the Jessica Duncan
3 affidavit says that that business name, Crawford
4 McKenzie, expired on February 20, 2010. You don't
5 dispute that, do you?

6 A. I do dispute that. I have never
7 seen that before. They were supposed to look at all
8 this way before that. I mean there is a whole bunch
9 of chaos to...

10 MR. RANKING: When do you say, Mr.
11 McKenzie, that your former firm dissolved?

12 THE DEPONENT: I don't think I was a
13 partner there in '09 at all, now that you
14 mention it. I mean, I am just
15 saying...they are saying...

16 MR. RANKING: You don't need to be a
17 partner for the firm to dissolve.

18 THE DEPONENT: No, no, the dissolution
19 is a different thing. And, now that
20 you...I will tell you another meeting
21 because just so we will get this straight.
22 They called me into a meeting in...when I
23 came back from Spain. That would have been
24 maybe October, and said to me, "We are
25 dissolving the partnership, we can't do

1 this anymore". Jessica is in tears because
2 she felt she had been ripped off on a PI
3 settlement. And I said, "Look, if you have
4 got money problems"...they owed me a
5 mortgage, like they pay me every month.
6 "If you have got money problems I can
7 forebear for a while or don't worry about
8 it. But I have got to know, if you are
9 shutting down the partnership", which they
10 told me they were, "are you leaving the
11 building?" Because, (a) I got a mortgage
12 on it, and (b) there is about 10,000 boxes
13 of files in the attic and the basement that
14 I think we have got to figure out what to
15 do with, right? "Will you get back to me
16 on this?" So, that happened, I left. I
17 don't think I was in the office for more
18 than five minutes at a time since then.
19 Then, two weeks before I left they said,
20 "Get all your boxes out of here, or shred
21 them all". And I said, "Come on, I get two
22 weeks, we will do it when I get back"...

23 2419. MR. SILVER: Mr. Kramer, will you...

24 THE DEPONENT: Because, just a minute,
25 they are staying in the building now. They

1 changed their mind again.

2 2420. MR. SILVER: Can you instruct your
3 client to just answer the questions.

4 MR. KRAMER: I will do my best to help
5 you with the examination. What is the
6 question?

7 MR. RANKING: I have two questions and
8 they are responsive by simply a date. I
9 would like to know Mr. McKenzie's evidence
10 as to when he says the firm, Crawford
11 McKenzie, was dissolved.

12 MR. KRAMER: Can you answer that simply?

13 THE DEPONENT: I don't think it has
14 dissolved to date.

15 MR. KRAMER: All right, you got his
16 answer.

17 MR. RANKING: We know from Exhibit 3
18 that that is not...

19 THE DEPONENT: Well, wait a minute. Can
20 I see that? Because there is a difference
21 between removing a partner and continuing
22 in a partnership and actually ending the
23 partnership.

24 MR. KRAMER: I think the question was,
25 when it dissolved, not when you withdrew.

1 MR. RANKING: I am going to ask the
2 second question. So, your evidence, Mr.
3 McKenzie, is that the firm has not yet
4 dissolved as of today's date? I just need
5 to know what your evidence is.

6 THE DEPONENT: Hold that thought. I
7 have no knowledge of what they have done
8 since that ill-fated...I shouldn't say ill-
9 fated...curious meeting when they said, "We
10 are dissolving the partnership". Then they
11 apparently changed their mind and they
12 changed it again, they were going to leave,
13 then they weren't going to leave, until I
14 just washed my hands of it. And I know...

15 MR. KRAMER: I think he said he doesn't
16 know when it dissolved.

17 MR. RANKING: I take it that your
18 evidence is it might well still be existing
19 today?

20 THE DEPONENT: The norm has been the
21 partnership has carried on since I was
22 there, '75.

23 MR. KRAMER: I am not sure the expiry of
24 the business name means that the firm has
25 dissolved, but...

1 MR. RANKING: I take that point.

2 MR. KRAMER: ...he is saying he doesn't
3 know when, or even if it dissolved, right?
4 Is that correct?

5 THE DEPONENT: Correct.

6 MR. KRAMER: Okay.

7 MR. RANKING: And when do you say you
8 withdrew as a partner of the Crawford
9 McKenzie firm?

10 THE DEPONENT: I would have to check my
11 file, and talk to my accountant because we
12 had these discussions. There is a date.

13 MR. RANKING: Can you tell us that date
14 today?

15 THE DEPONENT: No.

16 MR. RANKING: Will you undertake to
17 advise us?

18 MR. KRAMER: There is a specific date
19 that you determined when you filed your tax
20 return that you can get, is that the idea?

21 THE DEPONENT: No, no. I have the...in
22 the file that I am going to produce there
23 is a, I believe, a memo that I sent to them
24 and said we are done. Don't quote me...

25 MR. KRAMER: You have already mentioned

1 this memo, right?

2 THE DEPONENT: Yes, yes, but it was
3 certainly...

4 2421. MR. SILVER: This notice of withdrawal?

5 MR. KRAMER: Is that what you are
6 talking about, the notice of withdrawal

7 THE DEPONENT: No, no, no. The notice
8 of withdrawal was me saying, "You've got to
9 be kidding me."

10 MR. KRAMER: How about this. When we
11 get this miscellaneous file, in accordance
12 with everything I already gave you, I am
13 certainly going to give you anything in
14 there which appears to be notice by Mr.
15 McKenzie to his firm of withdrawal or
16 anything connected with that.

U/T

17 MR. RANKING: May I follow up? Because
18 as we all know, a notice of withdrawal is
19 not effective if it isn't accepted. Do
20 you, Mr. McKenzie...

21 THE DEPONENT: I don't agree with that
22 either. Let me have a look at this. This
23 is...

24 MR. RANKING: Please, if I might ask the
25 question.

1 THE DEPONENT: ...unbelievable.

2 MR. KRAMER: I thought the Partnerships
3 Act says once you delivered the notice the
4 firm is effectively dissolved. Maybe I am
5 wrong about that. But anyway, let's hear
6 Mr. Ranking's question.

7 MR. RANKING: Were you ever informed by
8 any of your former partners that they
9 accepted the withdrawal and that you were
10 no longer liable for partnership debts as
11 of a specific date?

12 THE DEPONENT: I had a meeting with Bill
13 McLean on...I sent a memo on a certain
14 date. I will have to find it for you. I
15 think it was August, September '08. Said,
16 "If you guys don't do some stuff, I am
17 done", and I remember meeting with him. He
18 is this level-headed...we have been
19 together a long time. And he said, "I gave
20 it to them". I said, "Did they get the
21 message". He said, "I gave it to them".
22 So, I said, "Fine, we have got to clean
23 this up at the bank".

24 By this time I had sold the building
25 and there was a loan at the bank and I

1 said, "You and I will go to the bank and
2 say I am not"...it wasn't a big loan,
3 60,000 or something maybe, but it was like,
4 I'm off it. They may call...I remember
5 telling Bill, "They may call it if I tell
6 them I am off it, that is all, but I am
7 done."

8 He, I think, went to the bank and
9 sorted it out because I never heard about
10 it again. So, I am going to tell you that
11 was '08. And I will check my memos to
12 refresh my memory, but that is...

13 MR. RANKING: Did Mr. McLean, in fact,
14 inform the bank to the best of your
15 knowledge that you were no longer a
16 partner?

17 THE DEPONENT: I can't say what he told
18 them, but I know what our conversation was
19 and I know what I told the bank, which is,
20 I don't want to be responsible for that
21 loan any more.

22 MR. RANKING: And you, in fact, spoke to
23 the bank?

24 THE DEPONENT: Yes.

25 MR. RANKING: This is the TD Bank in

1 Orillia?

2 THE DEPONENT: Yes.

3 MR. RANKING: And you told them that as
4 of a specific date in the fall of '08 that
5 you consider yourself no longer to be a
6 partner?

7 THE DEPONENT: I am not sure about the
8 date, but yes. Because I was trying to
9 clean up my mess, and I wanted to know what
10 was still hanging out there. I had a
11 mortgage from these guys and there was a
12 loan. It is a long story. I think there
13 was two partnerships running, one for the
14 building, one for the partnership. So the
15 building...I have to refresh my memory a
16 bit, but I think that is exactly right. I
17 think I sold the building and there was a
18 loan.

19 MR. RANKING: You sold the building in
20 July of 2008? You mean when you sold your
21 interest to Jessica Duncan?

22 THE DEPONENT: Yes, I sold it to the
23 three of them, because I think I owned half
24 the building. Bill McLean and I had it
25 in...

1 MR. RANKING: I think, in fact, you sent
2 it to Ms. Duncan and Mr. Anderson?

3 THE DEPONENT: Well, Bill and I were
4 partners and we sold my partnership
5 interest to the two of them.

6 MR. RANKING: Before we go on, will you
7 undertake to make inquiries of the
8 individual to whom...first of all, do you
9 know who you spoke with at the TD Bank?

10 THE DEPONENT: I just dealt with two
11 guys, so I don't know which one I spoke to.

12 MR. RANKING: Who are the names of the
13 two individuals with whom you dealt?

14 THE DEPONENT: Tony LeBlanc and Ron Hehn
15 (phon), something like that.

16 2422. MR. SILVER: How do you spell that?

17 THE DEPONENT: I am not sure how to
18 spell it.

19 MR. RANKING: Will you make inquiries of
20 Mr. LeBlanc and Mr. Hehn to determine if
21 they recall the discussion with you and/or
22 with Mr. McLean, and if they do, their best
23 recollection as to the date of the
24 discussion and the particulars of the
25 discussion?

1 THE DEPONENT: I will use my best
2 efforts.

U/T

3 MR. RANKING: Thank you. And would you
4 also, when you are making inquiries of the
5 TD, advise us when, if ever, they removed
6 you on the covenant, on the mortgage, or on
7 any obligation to repay any debt that was
8 otherwise on Crawford McKenzie?

9 THE DEPONENT: It wasn't a mortgage. I
10 don't think the bank ever had a mortgage on
11 my...I had...well, again, I haven't got a
12 reporting letter from my partners, but I
13 have a mortgage.

14 MR. RANKING: Just before you get to the
15 mortgage, I take your evidence that you
16 don't have a mortgage with the TD Bank, but
17 I would be interested to know just so I can
18 finish that line of questioning, when the
19 TD Bank, if ever, removed you as an obligor
20 with respect to the debts of Crawford
21 McKenzie?

22 MR. KRAMER: We will ask the bank if
23 they did, and if they did, when they did.

U/T

24 MR. RANKING: Thank you.

25 2423. MR. SILVER: Okay?

1 MR. RANKING: I am just showing across
2 to Mr. McKenzie a copy of...

3 THE DEPONENT: I would like a copy of
4 that, actually. I have been asking them
5 for a reporting letter since they closed
6 the deal.

7 2424. MR. SILVER: You don't have to ask for a
8 copy; it was marked as an exhibit.

9 MR. RANKING: We will give you copies,
10 though.

11 2425. MR. SILVER: Well, Mr. Kramer will have
12 it. I just want to confirm the undertaking
13 before the TD Bank rep undertaking, which I
14 think is clear on the record. But before
15 that, I've written down I want confirmation
16 that the undertaking we got was to produce
17 memo or memos that first indicate a notice
18 of intention to withdraw from the firm
19 and/or a desire to come off the firm's bank
20 obligations and subsequent correspondence
21 back and forth on those issues?

22 MR. KRAMER: I think that is covered in
23 what I think the undertaking was, which is
24 to look through this miscellaneous
25 partnership file and produce to you any

1 documents which relate to withdrawal from
2 the firm and those sorts of issues. So,
3 you will certainly see the first one and
4 you will see any other ones.

5 2426. MR. SILVER: And coming off the firm's
6 bank obligations.

7 MR. KRAMER: Yes.

8

9 BY MR. SILVER:

10 2427. Q. Thank you. Mr. McKenzie, I would
11 like to change focus now and talk to you about the
12 electronic records that were maintained at Crawford
13 McKenzie. So, I take you, without wanting to get
14 into too much detail, but when you first started
15 practising there weren't any computers at all,
16 right?

17 A. We used quill pens in those days.

18 2428. Q. It is funny that you say that
19 because I started practising a little bit after you,
20 but I remember the photocopier with the carbon
21 paper. I had the old Gestetner that the secretaries
22 had to...so we've all come along.

23 A. We had the first fax machine in
24 Orillia. I bought it.

25 2429. Q. Right. So, at what point did you

1 become computerized in terms of financial records
2 and/or file management and data preservation? It
3 has probably been the last ten years or longer?

4 A. Oh, more than ten...I remember Doug
5 Lewis who went on to become cabinet minister in
6 government and all that, so I am trying to think
7 when he was elected, but he was a chartered
8 accountant and got things going. And then we bought
9 one computer that ran one segment of PCLaw, I
10 remember that. That might have been when I was
11 paying attention to, perhaps, all that stuff. And
12 after that you know what happened. So, now we have
13 got BlackBerrys that can do accounting.

14 2430. Q. On the accounting side you started
15 with a PCLaw software when you first...

16 A. Well, I shouldn't say that, but I
17 remember we bought an IBM AT computer. We had to
18 have it because it could run this software package
19 that, for the first time ever actually with a
20 computer running...you used to have cards to put in
21 stuff like that.

22 2431. Q. By 2005 the firm had a computerized
23 accounting system?

24 A. Oh, yes.

25 2432. Q. And it was PCLaw?

1 A. I don't think that in 2005 I was
2 connected to the server at all. I know there was a
3 date...I am just saying...I can't remember but there
4 was a date when they had upgraded something and
5 tried to train me and I said, "You know what? You
6 guys handle all of this."

7 2438. Q. So, how did you handle your files if
8 not through the firm's server?

9 A. Well, I had very, very good people.
10 So, for instance on this file I had Stacey Ball.
11 She knew where everything was, could answer every
12 question, she could handle my life and it was like,
13 I never had to worry about that stuff.

14 2439. Q. But she was maintaining all that on
15 the firm's server?

16 A. She was, absolutely.

17 2440. Q. Right. So, whether it was you or
18 her, your files were being maintained on the firm's
19 server?

20 A. Yes, right.

21 2441. Q. And therefore, through Stacey Ball,
22 all of the correspondence, e-mails, memos, work
23 product in relation to a file, would be on the
24 firm's server?

25 A. Right. Everything that went through

1 the firm was on the server.

2 2442. Q. Everything that went through the
3 firm was on the server, right.

4 A. Well, I mean they had crashes and
5 burns and backup problems...don't quote me on that.
6 But, I just tried to stay above it.

7 2443. Q. Then, did you ever remove your
8 files, your electronic files from the firm's server?

9 A. I personally never did anything on
10 the server since that day when I
11 couldn't...training. I sort of walked away from the
12 training saying I am never going to do this again.

13 2444. Q. Wow. For a guy who spent 922 hours
14 of blogging and Internet, you couldn't master the
15 firm's file maintenance server; is that what you are
16 saying?

17 A. I think you have confused yourself
18 with what I said yesterday to what you are telling
19 me now. But my answer stands as follows. One day I
20 never...I shouldn't say never. With one exception I
21 just thought of, went near a computer terminal. I
22 don't want to be too dramatic and say never, never,
23 never, because I remember now I asked them to put in
24 a stand-alone Skype thing for one client that, if I
25 was in the office I could do it because I couldn't

1 get into the system to do it, blah blah. But other
2 than that, the answer is there was a day when that
3 was it.

4 2445. Q. Did you ever ask anybody to
5 remove...if you didn't do it yourself, which is what
6 I think the last three minutes of answers tended to
7 tell me, did you ever ask anybody else to move the
8 electronic data for your files that were on the
9 firm's server, off of that server?

10 A. You said move?

11 2446. Q. Take, transfer, move.

12 A. I left standing orders throughout
13 2009. I had...as I understand it you have a giant
14 folder and it is called B. McKenzie, yours would be
15 called L. Silver. I said, by the time I leave I
16 want it empty. I want nothing left on that. Push
17 it over to whoever needs to have it. So, for
18 instance Marc Lemieux took a file, I gather...he
19 confirmed this on Sunday because I am trying to
20 refresh my memory. He sat down with Stacey and
21 said, "I am taking over this file" and they did
22 something and moved it to wherever he wanted it to
23 be.

24 2447. Q. Where were the Nelson Barbados and
25 Allard files moved?

1 A. I spoke with...they seemed to have a
2 general situation, whether it's a generic drive.
3 They called it the "G drive", that is all I know.
4 So, that file would have been removed from B.
5 McKenzie, which is meant to be empty the day I left
6 which it was, as far as I know, to the G drive, as I
7 think it's called, the G or the general drive.

8 2448. Q. So, it was moved from the McKenzie
9 subfile within the server to the G drive which is
10 within the firm's overall computer system?

11 A. The same server.

12 2449. Q. Yes, the same server.

13 A. It was taken off my...

14 2450. Q. Ms. Duncan testified on April 30th
15 that on a date in November, 2009 she discovered that
16 there was nothing on the server relating to your
17 files. That they had been removed from the server
18 completely, let alone from your file. What do you
19 say about that? That is not true?

20 A. I don't know what she testified to.
21 I didn't hear her.

22 2451. Q. Well, I am telling you what she
23 testified.

24 A. When I left in December and went to
25 Florida, there was nothing on my drive and it was

1 all, either by then, deleted, because it was old
2 trash that didn't need to be hung around. That was
3 their call. Or moved to whoever needed to have it,
4 who wanted to have it. And also open files,
5 obviously were trashed, taken off the computer
6 system.

7 2452. Q. Sir, Ms. Duncan testified under oath
8 that in November of 2009 she discovered that nothing
9 was...that your files had been totally removed from
10 the server, and that she had a conversation with you
11 about that. Do you agree with that?

12 A. November, '09?

13 2453. Q. Yes.

14 A. I don't recall a conversation with
15 her.

16 2454. Q. You are not denying that there was a
17 conversation then?

18 A. I am just trying to remember if I
19 was even in the office in '09, November, '09.

20 2455. Q. She didn't say you were in the
21 office. She said she had a conversation with you.

22 A. By telephone?

23 2456. Q. I have no idea. Sir, do you
24 remember a conversation with her about...

25 A. I have no recollection of a

1 conversation with her.

2 2457. Q. So, you are denying that there was a
3 conversation?

4 A. If she says it was in the office, it
5 can't be. If she said she phoned me...

6 MR. RANKING: I am somewhat taken aback,
7 because you heard her evidence, Mr.
8 McKenzie, because after that evidence was
9 given I pointed to your counsel and asked
10 for a specific undertaking. You were in
11 the room. You were in the very room, Mr.
12 McKenzie.

13 THE DEPONENT: I am getting there. I
14 recall her saying something about backup
15 tapes, which I am just kind of going...so,
16 if she is saying she couldn't find it on
17 the computer...they backup...they had a ton
18 of backup tapes...

19 2458. MR. SILVER: Sir...

20 THE DEPONENT: Just a second. Let me
21 finish now, because this sounds pretty
22 serious.

23 MR. RANKING: It is pretty serious.

24 THE DEPONENT: Okay, if you go through a
25 thing and say the computer, the file is

1 missing on the computer, say, well, just
2 restore it from the backup tape if you lost
3 it. I mean, that happens all...well, I
4 shouldn't say...it happened...

5 2459. MR. SILVER: Sir...

6 THE DEPONENT: Just let me finish. I am
7 trying to get to the bottom of this. It
8 doesn't even...

9 2460. MR. SILVER: You are thinking out loud,
10 you are not answering questions.

11 THE DEPONENT: I am answering the
12 question to say to you that...well, I don't
13 recall such a conversation then. It
14 doesn't make sense to me what you are
15 saying.

16

17 BY MR. SILVER:

18 2461. Q. Mr. McKenzie, Ms. Duncan...

19 A. By the way, the file is still there.
20 I saw Stacey Ball call it up one day...

21 2462. Q. Which file is still there, 543?

22 A. The file.

23 2463. Q. The Nelson Barbados file?

24 A. I was asking her to look for

25 something, and she called the file up.

1 2464. Q. 543 or 568?

2 A. I don't know which file it would
3 have been.

4 2465. Q. Ms. Duncan testified that she had a
5 conversation with you and you advised her that you
6 had a copy of everything and that you could provide
7 a CD or a copy of anything she required. Is that
8 true?

9 A. I did not have a conversation with
10 her that said I have a CD disc or whatever...

11 2466. Q. I didn't say that.

12 A. Just...of a file. Not for sure.

13 2467. Q. She said you said that you had a
14 copy of the electronic data or had access to it and
15 you could provide a CD or a copy of anything she
16 required. Did that happen? No. You are shaking
17 your head. You have to answer for the record.

18 A. That is not anywhere close to what
19 my recollection is.

20 2468. Q. Well, what is your recollection of
21 the conversation?

22 A. Well, I keep telling you and you
23 keep stopping me. Do you want me now to tell you?

24 2469. Q. You keep telling me you can't recall
25 the conversation.

1 A. No, wait a minute. I am telling you
2 what happened.

3 2470. Q. Okay.

4 A. I am just saying, move everything
5 off my hard drive...or, excuse me, off my folder.
6 All of it. Put it someplace else. All of it. Now,
7 if somebody had lost the file in that transition and
8 asked me, I would have said, we have a backup
9 system...

10 MR. RANKING: That is hypothetical.

11 THE DEPONENT: Just a second now.

12 MR. RANKING: No, that is irrelevant.
13 You are not answering the question.

14 MR. KRAMER: Let him fully answer...

15 THE DEPONENT: So, I am saying if it
16 is...this is what we do, you know. You
17 don't like my answer and you stop me, so
18 stop doing this.

19 MR. RANKING: I don't like your answer
20 because it is not responsive, Mr. McKenzie.
21 Plain and simple.

22 THE DEPONENT: I need a break. I am
23 losing my...

24 MR. KRAMER: It's probably not a bad
25 idea to break now. Let's all agree on

1 this. Just stop for a second, Bill. It is
2 20 to 12:00. Do you want to take a five
3 minute break? Let's take five or ten
4 minutes.

5

6 --- A BRIEF RECESS

7

8 K. WILLIAM MCKENZIE, resumed

9 CONTINUED CROSS-EXAMINATION BY MR. SILVER :

10 2471. Q. Before we broke for the morning
11 break, we were talking about electronic files. I
12 was suggesting to you that, or I was putting to you
13 Jessica Duncan's evidence in respect of events of
14 November, 2009. Do you recall that? I think that
15 is where...

16 A. Vaguely, but I forgot what your last
17 question was, so go ahead.

18 2472. Q. I suggested to you that...or I asked
19 you whether Ms. Duncan was right when she testified
20 under oath that in November, 2009 all of your files
21 were off of the server that they previously were on,
22 namely the McKenzie subfiles within the computer
23 server. And your evidence is, that is what you were
24 striving for, but to the extent that they were off,
25 you didn't take any of them; have I got that right?

1 Or did you take some of the files in November, 2009
2 and move them to some personal computer or personal
3 server?

4 A. To be clear, I didn't do anything,
5 but...

6 2473. Q. Were you directly...sorry, let me
7 interrupt. You, directly or indirectly? I mean, if
8 you instructed somebody to do that everybody, I
9 think, would understand that that is still you doing
10 it.

11 A. I, with respect to these two files,
12 understand they were put on the G drive, number one.
13 Number two, I did not take those electronic files
14 with me. I think that might answer both your
15 questions.

16 2474. Q. Okay. So, Ms. Duncan testified that
17 she had a conversation with you and you advised that
18 you did take them, and that you could provide a CD
19 or return a version of anything she required. You
20 deny that? That didn't happen?

21 A. That is not correct.

22 2475. Q. She also said that she requested
23 that you return the Nelson Barbados content,
24 specifically the BMC568 and 586 file material, and
25 that you did that. You, in fact, restored it to the

1 computer. Is that false as well?

2 A. I did not direct any of those things
3 to be done, if I understand your question.

4 2476. Q. My question, she testified that she
5 asked you to cause the Nelson Barbados file content
6 to be restored to the computer and that you caused
7 that to happen. Is that true?

8 A. Well, I had no such conversation
9 with her, so I am kind of going...they ended up on
10 the G drive, is my understanding. So, that would
11 have been my wish, that they get off of the B.
12 McKenzie drive to whatever other drive they wanted.
13 So, that is my answer.

14 2477. Q. But it is not responsive to my
15 question. So, she is not telling the truth when she
16 testified that she asked you to return the Nelson
17 Barbados content, and that you did so? That is not
18 a true statement by her, according to you, right?

19 A. I don't recall having a conversation
20 with her, and what you just said, in the tone you
21 are putting it sounds absurd. But...so, I am saying
22 no.

23 2478. Q. She is not telling the truth?

24 A. That is for somebody else to decide,
25 I guess. If you are being accurate, because I don't

1 know what she said.

2 2479. Q. I am telling you exactly what she
3 said under oath, so don't be confused by what she
4 said. The one thing I can do is take notes. I am
5 not a very good cross-examiner, but a note-taker I
6 am.

7 A. You have my answer.

8 2480. Q. She also testified that she spoke to
9 McLean and Anderson and they agreed to go to backup
10 tapes, but after that conversation with her partners
11 you were again asked to put everything back.

12 A. She asked me to put everything back.

13 2481. Q. She or McLean or Anderson. True or
14 false?

15 A. I have no recollection of it being
16 that way.

17 2482. Q. And she testified that your response
18 was, you would do it piecemeal and you would give
19 back the files that she specifically requested, and
20 that that was done in respect of the Nelson Barbados
21 file. Is that true?

22 A. I am a bit confused by what you
23 said. Piecemeal being...

24 2483. Q. You said...

25 A. ...a little bit at a time?

1 2484. Q. One file at a time, or what she
2 needed at a time.

3 A. A document at a time? And we are
4 talking about accounting, too, or the...

5 2485. Q. File content.

6 A. I don't even know how they would run
7 this but I am just saying...

8 2486. Q. I am talking about the file.

9 A. ...the file. The stuff that
10 would...meetings and stuff like that.

11 2487. Q. Correspondence, memos, client's
12 material.

13 A. Piecemeal doesn't make sense either.

14 2488. Q. Piecemeal to the extent that on a
15 file-by-file basis. Did that conversation happen or
16 not? Or any conversation of that nature?

17 A. If you are saying that she says that
18 everything had been removed and she demanded it be
19 put back and I agreed to put it back piecemeal, that
20 can't be right. I have no recollection of such a
21 discussion, or she is confused somehow.

22 2489. Q. What discussion did you have with
23 her, McLean or Anderson, in that time frame about
24 removal and restoration of file content from the
25 firm's server?

1 A. I think I answered that, but I have
2 no recollection of conversations. My standing
3 instructions were, and I have recently asked the
4 people that would have been involved in this who had
5 the same recollection I do that the crucial files
6 that you are talking about here were on the G drive.

7 MR. RANKING: When you are speaking of
8 crucial drives what files are you referring
9 to?

10 2490. MR. SILVER: 543...

11 THE DEPONENT: I don't want to get
12 myself confused, but I think it is 568 or
13 is it 586? 586 and 543 are sort of
14 two...in Jessica's affidavit she seems to
15 have two piles of documents.

16 MR. RANKING: Right.

17 THE DEPONENT: Okay, there is two files
18 there. We will call one...I call it,
19 because I know Stacey ran it, the Nelson
20 Barbados litigation file.

21 MR. RANKING: And that is 586 or 568?

22 THE DEPONENT: Right. So, we will call
23 them one packet, right?

24 MR. RANKING: So we are clear for the
25 record, that packet are your files 568 and

1 586?

2 THE DEPONENT: In my head I have...the
3 files that are the subject matter of this
4 entire mess, okay, that we are talking
5 about, were on...well, I guess they were on
6 the B. McKenzie drive, and they ended up on
7 the G drive before I left. That is a sure
8 thing. I double checked it with two people
9 who would know.

10

11 BY MR. SILVER:

12 2491. Q. Who did you check it with?

13 A. I called Sunny Ware and Marc Lemieux
14 and said, "Help me make sense of this since I wasn't
15 paying attention to it. What happened?" And they
16 said, "These files were removed"...

17 MR. RANKING: Which files?

18 THE DEPONENT: Well...

19 MR. RANKING: Can we just have some
20 certainty here, just so that I...because I
21 am not certain with respect to the files we
22 are talking about. Ms. Duncan spoke of the
23 Nelson Barbados files being the files
24 related to the litigation as file numbers
25 BMC 568 and 586.

1 2492.

MR. SILVER: Correct.

2 MR. RANKING: She then referred to the
3 Peter Allard and Kingsland Estates file as
4 the BMC 543.

5 THE DEPONENT: Okay.

6 MR. RANKING: So, for the purposes of my
7 questions and those of Mr. Silver, if we
8 could please be specific with respect to
9 the files to which we were referring?

10 THE DEPONENT: Those are the files I am
11 referring to.

12 MR. RANKING: Right. But that is not
13 responsive. When you say "those", you mean
14 collectively? The BMC 568, 586 and the BMC
15 543.

16 THE DEPONENT: As far as I know, the
17 files you just said were taken off of my
18 folder...if they were there in the first
19 place because I am not sure about that.
20 Because my direction was there will be
21 nothing left on the B. McKenzie drive; get
22 rid of it. Now, these files you just spoke
23 of ended up, before I left or when I was
24 leaving, on the G drive. The electronic
25 file. The boxes of paper were left in the

1 office.

2 MR. RANKING: We are not talking about
3 the boxes of paper.

4 THE DEPONENT: Well, I am, because I am
5 saying I checked all of this to say, have I
6 missed anything? With one exception of a
7 box that ended up in my garage in January,
8 that is the answer.

9 MR. RANKING: Is it your evidence, Mr.
10 McKenzie, that you at no time replaced the
11 electronic files for BMC 568 and 586?

12 THE DEPONENT: I am not sure what you
13 mean by "replaced". But...okay, if
14 something starts in one place and ends up
15 in the other place, right, I am happy, I am
16 satisfied.

17 MR. RANKING: I am not asking what makes
18 you happy. I am asking you to answer the
19 question...

20 THE DEPONENT: At the time...

21 MR. RANKING: ...with respect to...

22 THE DEPONENT: Just a second. Let me
23 rephrase that. You are right. I read my
24 transcript and I say words...at the time I
25 left the premises on, I am going to say,

1 the 1st of December. I was satisfied by
2 things I was told by everybody I talked to
3 including Ms. Duncan, who was lurking as my
4 partners were, to make sure everything was
5 fine. Everything on my B. McKenzie drive
6 was gone. I was told this. I don't know
7 how to access it. And that these files,
8 okay, which are obviously still open in a
9 sort of a format, and other files, were
10 still on the server. Now, they call it the
11 G drive. That is all I can tell you,
12 period.

13 MR. RANKING: Okay.

14

15 BY MR. SILVER:

16 2493. Q. I just want to wrap this up with
17 some specific questions. The suggestion was that
18 you removed this file content and put it onto your
19 personal computer or somewhere else. That is false?

20 A. My personal computer?

21 2494. Q. Or anywhere. Anywhere. You
22 removed...

23 A. There is no way a file, these
24 files...I would not cross the border with my
25 personal computer with client files on it. So, no,

1 it cannot be possible. It is my practice...

2 2495. Q. You have...

3 A. Just a moment. Just a minute. It
4 is my practice. I have a personal computer. I have
5 been all around the world, I have taken instruction
6 from experts beyond anything you have ever heard, do
7 not cross the border with client's stuff, because
8 you are breaching about 25...they can seize it and
9 they can look through it. So, when I left for
10 Florida with my computer, same issue.

11 2496. Q. That doesn't mean you didn't have a
12 computer at home with...

13 A. No, no, wait a minute. I have one
14 notebook computer that is my...that I...

15 2497. Q. Okay, so, sir...

16 A. Just a second.

17 2498. Q. No, stop. I don't want a ten-minute
18 answer. I asked a simple question. The allegation
19 is that you caused data to be taken off the firm
20 computer and took it for yourself. Is that false?

21 A. Of these files?

22 2499. Q. Of these files or any other McKenzie
23 files?

24 A. They were left at the office.

25 2500. Q. Okay, so...

1 A. Now, false...I am saying now...wait
2 a minute. Anything at all from those files, copies
3 of anything at all from those files, I would
4 equivocate on that.

5 2501. Q. You took some of that?

6 A. But I am just saying it would have
7 been...possibly, but I am saying nothing was removed
8 from the firm, if you see what I mean.

9 2502. Q. It was copied?

10 A. I am just saying I have been back
11 and forth. Today somebody could e-mail me something
12 that is a copy of a document. That is how...

13 2503. Q. Okay. So, here is how I want to
14 leave. Will you please review your computers,
15 wherever you stored data, if it is on one computer
16 or Sunny Ware has got it, directly or indirectly,
17 can you please produce anything and everything that
18 you have on your personal computers directly or
19 indirectly that in any way relate to the Allard and
20 the Nelson Barbados matters. By Allard I am really
21 meaning this 543 file and by Nelson Barbados I am
22 meaning the 568 and 586 files. Will you do that?

23 A. Too complicated.

/R

24 2504. Q. Too complicated. So it is a
25 refusal.

1 A. Let's take January 1st, 2010...

2 2505. Q. How about October, 2008 to date
3 which is when you had the problem with the firm.
4 Will you do that?

5 A. It is impossible. /R

6 2506. Q. So that is a refusal. And
7 secondly...

8 A. It is impossible. Yes, it is a
9 refusal.

10 2507. Q. Why is it impossible? Use your best
11 efforts.

12 A. Pick December 15th when I was safely
13 in Florida and ask me that question. It will be
14 very simple.

15 2508. Q. No. So, I want everything and
16 anything on your computers from October, 2008 to
17 date.

18 MR. KRAMER: Let me get involved in...I
19 can't see how it could be relevant for him
20 to tell you what he may have had on his
21 personal computer prior to the date of Ms.
22 Duncan's allegation that he withdrew it.
23 That is the subject of the question. But
24 is there anything on your personal computer
25 from these files?

1 2509. MR. SILVER: He just said there was.

2 MR. KRAMER: I don't think he said that.
3 The answer is there is nothing. That
4 answers Mr. Silver's question as stated.

5 THE DEPONENT: When I left for Florida
6 there was nothing on my computer, and I am
7 going...

8 MR. KRAMER: All right, presuming there
9 is nothing now...

10 2510. MR. SILVER: That is why he is picking a
11 time.

12 THE DEPONENT: Well, that is what I am
13 saying. I mean that is when I ended...

14 2511. MR. SILVER: Listen, I have asked for my
15 request, you have refused. The second
16 request I am making is, will you please
17 make your personal computer and/or personal
18 server and/or hard drives, whatever you
19 have, available for forensic examination...

20 THE DEPONENT: No.

21 2512. MR. SILVER: ...so that we may determine
22 the current content relating to these
23 files, and see the activity in and out of
24 those computer records from October, 2008
25 to date?

1 THE DEPONENT: No. /R

2 MR. KRAMER: You have heard from the
3 witness and that is his answer, but I would
4 say I invited you, Mr. Silver, to pursue
5 that with Mr. Epstein and Ms. Duncan...

6 2513. MR. SILVER: We have.

7 MR. KRAMER: All right. Well, because
8 here is my point. If what Ms. Duncan said
9 is true, presumably there would be an
10 electronic record of the removal of these
11 files from the firm's server.

12 2514. MR. SILVER: We have got an under
13 advisement...

14 MR. KRAMER: So then you will get your
15 answer.

16 2515. MR. SILVER: No, we are going to get
17 that answer from them and we are going to
18 get our answer if he is ordered to provide
19 it. We have got a refusal and I will move
20 on it.

21 MR. RANKING: When you say that you
22 didn't remove files directly, Mr. McKenzie,
23 who did you direct to remove the file?

24 MR. KRAMER: Well, that is a bit of an
25 unfair question, Mr. Ranking.

1 THE DEPONENT: I haven't stopped beating
2 my wife, either.

3 MR. KRAMER: I believe he said that he
4 asked that the files be removed from his B
5 drive, not that they be removed.

6 MR. RANKING: I am talking about being
7 removed from his drive.

8 MR. KRAMER: Right, onto other parts of
9 the server. As long as it is clear that is
10 what you are asking about, he can answer
11 the question.

12 MR. RANKING: Yes, that is what I am
13 asking about.

14 THE DEPONENT: The answer was I left
15 standing orders to clean off that drive.

16 MR. RANKING: I understand.

17 THE DEPONENT: To whoever was motivated
18 to do it, and various people would have
19 done it, I am sure.

20 MR. RANKING: I want to take it
21 piecemeal. First of all, to whom did you
22 give what you have referred to as standing
23 orders?

24 THE DEPONENT: The entire firm.
25 Everybody. "Get it off my drive, close the

1 files, close everything."
2 MR. RANKING: Did you do it orally or...
3 THE DEPONENT: We took...I picked my
4 diplomas off the wall.
5 MR. RANKING: Did you do it orally or in
6 writing?
7 THE DEPONENT: I don't recall. I mean
8 there was a standing order.
9 MR. RANKING: When do you say you did
10 it?
11 THE DEPONENT: Throughout 2009.
12 MR. RANKING: If it was in writing will
13 you produce the memorandum that contains
14 those standing orders?
15 THE DEPONENT: Well, I have no
16 recollection of what...
17 MR. RANKING: To your knowledge...
18 2516. MR. SILVER: Well, will you give an
19 undertaking?
20 MR. RANKING: Sorry. If there was a
21 written memo, do you have access to it such
22 that you could find it and produce it, or
23 is that something which would be at the
24 firm?
25 THE DEPONENT: Well, if there is

1 something it would be at the firm, I
2 presume.

3 2517. MR. SILVER: Well, I don't accept that.
4 Hang on, Gerry. Sorry, I mean if you send
5 an e-mail from your computer there is a
6 sent file. I don't accept that.

7 MR. KRAMER: No, you are quite right
8 but...

9 2518. MR. SILVER: So use best efforts to
10 produce any memorandum that he might find
11 that reflects a request to move his
12 electronic files off of the McKenzie drive.

13 MR. KRAMER: But, what I was trying to
14 establish, if Mr. McKenzie is able to say
15 that any...if there is such a memorandum it
16 would not have come from his personal e-
17 mail, but it would have been a firm
18 document, then he is able to answer the
19 question right now. Are you able to say
20 that? If there is an e-mail or other
21 direction to the firm about this, is it
22 something that you would have a copy in
23 your personal possession? If that is
24 possible, then you should go look for it.
25 If you are able to say with certainty that

1 it is not...any such document would not be
2 in your personal possession, that answers
3 the question.

4 THE DEPONENT: I hear you. That would
5 be in that file or not. I mean short
6 stuff...stuff like that.

7 2519. MR. SILVER: It would be in the file.

8 MR. KRAMER: All right. Well, you are
9 going to get the file and we will
10 certainly...it certainly would be included
11 in the list of things that we would
12 produce, any e-mails about the removal of
13 things from the McKenzie drive or related
14 matters.

15 2520. MR. SILVER: Thank you.

16 MR. RANKING: Do we understand your
17 evidence to be that your standing
18 instructions were to remove all of the
19 electronic data from your personal Bill
20 McKenzie file to the G drive?

21 THE DEPONENT: No.

22 MR. RANKING: What did you ask be
23 removed from your personal file?

24 THE DEPONENT: I want my B. McKenzie
25 drive empty. Gosh knows what was on there,

1 but I wanted it empty. Do what needs to be
2 done, period.

3 MR. RANKING: To whom did you give those
4 instructions?

5 THE DEPONENT: I believe everybody
6 that...because I kept pushing. I kept
7 pushing near the end to get it done, get it
8 done, get it done.

9 MR. RANKING: You may be pushing to get
10 it done but to whom did you give the
11 instructions?

12 THE DEPONENT: I don't recall, except
13 anybody that dealt with things constantly
14 was...I was, "Get it done". Because I even
15 got them to sign off at the end that it had
16 been...like I was finished.

17 MR. RANKING: Who signed off at the end?

18 THE DEPONENT: I think there is a memo,
19 and I will have to check my file, or maybe
20 they have it, which is, "So, we are done".
21 I can go.

22 MR. RANKING: All right. And if you
23 find that memo, you will produce it?

24 MR. KRAMER: I think we have already...

25 THE DEPONENT: Well, that is the other

1 end of it because...

2 MR. RANKING: Would you have spoken with
3 Sunny Ware about this?

4 THE DEPONENT: Ever? I mean, I was
5 nagging them, I guess is a good word.
6 Every time I would go in, "How is it going?
7 Get me cleaned up".

8 MR. RANKING: Would you have spoken with
9 Ms. Stacey Ball?

10 THE DEPONENT: I am telling you that it
11 was a constant message from me to get it
12 done.

13 MR. RANKING: Right. I am trying to
14 find individuals to whom this message...

15 THE DEPONENT: Well, I think everybody
16 in the office should be told, or whatever.

17 MR. RANKING: I would like a list.
18 Stacey Ball and Sunny Ware, you are saying
19 were two people that you would have spoken
20 with?

21 THE DEPONENT: Over the 2009, pick a
22 list of the staff...I'm sure there are
23 exceptions, and say, whatever, get your
24 stuff off my drive.

25 MR. RANKING: This was an important

1 matter for you, was it?

2 THE DEPONENT: There was only one
3 important matter. December 1st I was done.

4 MR. RANKING: But it was important
5 because you said you were nagging them to
6 do it, correct? That is your evidence.

7 THE DEPONENT: Well, it looked like
8 by...I think there was a bit of a crisis
9 going on right near the end of November and
10 the beginning of December that it was
11 totally out of control.

12 MR. RANKING: What was totally out of
13 control?

14 THE DEPONENT: Whatever they were doing.
15 I mean that is why...I remember going...I
16 mean there was so much chaos going on, I
17 remember going, "Get it done".

18 MR. RANKING: When you say it was
19 totally out of control, what was totally
20 out of control?

21 THE DEPONENT: Well, let's start at the
22 beginning. Jessica was, were they or were
23 they not going to shut the office down?
24 Were they or not going to dissolve the
25 partnership? Were they, were not going to

1 shred all the files or keep them, or
2 document them or do stuff? Marc Lemieux
3 was leaving. Sunny was selling her house.
4 This is my long-term secretary and totally
5 out of it. I am trying to be fair to her.
6 It was more important to her to finish and
7 go off with her new life. Her house deal,
8 she was emptying a house out that was
9 37...she had been living 37 with her
10 recently deceased husband. It was a
11 totally emotional...

12 MR. RANKING: Mr. McKenzie...

13 THE DEPONENT: Just a second, let me
14 finish. I am not even halfway through.

15 MR. RANKING: Let me stop you.

16 THE DEPONENT: No, don't stop because I
17 want to tell you the whole story. I would
18 come in and I would look and I would think,
19 oh, my God, I'm not going to get out of
20 here. Because can somebody...I mean,
21 Jessica, Bill, whoever, "Could you just get
22 this all done? I want out."

23 MR. RANKING: All right.

24 THE DEPONENT: I am just saying...even
25 to the point where I will take my own

1 diploma and take it out to the car because
2 nobody is going to do this for me. That is
3 what I am saying. And we had big arguments
4 about all these boxes. They wanted me to
5 pay to do them and shred stuff. I said, "I
6 am not going to do it", as I said. So, I
7 can tell you that it was a total nightmare
8 for me.

9 MR. RANKING: Have you finished?

10 THE DEPONENT: Now I am finished.

11 MR. RANKING: All right.

12 THE DEPONENT: Thank you.

13 MR. RANKING: I perfectly understand
14 that there may have been issues with
15 respect to the future of the firm and what
16 might happen to the firm and the documents
17 that might be shredded or not shredded. I
18 personally appreciate that Ms. Ware may
19 have been going through personal
20 circumstances. That wasn't my question.
21 My question was in answer to my specific
22 inquiry, what do you say was in chaos when
23 it came to the removal of your files, and
24 so I am clear, the removal of your
25 electronic files from your personal file to

1 the G drive?

2 THE DEPONENT: The B. McKenzie was in
3 total chaos.

4 MR. RANKING: What do you say was in
5 total chaos with respect to those files?

6 THE DEPONENT: Well, now, there you go,
7 right, and this is why it was like...pick a
8 file. Marc, "I am taking it". Great,
9 because it moved. "Are you sure? Is it
10 still on my drive? Are you sure?" "Oh,
11 you know, we lost it." "Oh? Well, find
12 it." And then just that was the kind of
13 thing that went on.

14 2521. MR. SILVER: We will read this to
15 Shaughnessy and we will go from there.

16 MR. RANKING: Fine.

17

18 BY MR. SILVER:

19 2522. Q. I have a couple more questions and
20 then I am going to move on. Who did you assign the
21 Allard and the Nelson Barbados file to when you were
22 winding down in '09? I take it nobody?

23 A. Well, Jessica...let's go back to
24 February, '09. She jumped onto the file because she
25 was in charge of the Zemel, Miller Thomson side

1 trip, little sideshow. It wasn't a sideshow, but,
2 yes, a side issue which I look back now and say, you
3 guys trying to get me kicked off the record. But
4 maybe I am wrong. But she took control of it. Marc
5 took control of the video recording, okay. Except
6 for pretty well right near the end I...when I had to
7 get back in and finally get the video recording
8 because I had an expert coming in from the Caribbean
9 and I think it was on a weekend...

10 2523. Q. Sir, I asked you...

11 A. Hear me out.

12 2524. Q. We have to get to the answer.

13 A. Just a second. Then I argued the
14 case. I prepared to argue the case.

15 2525. Q. So, you continued to be the lawyer
16 in charge...

17 A. I walked away from it, waiting for a
18 motion record for costs, which was going to be on...

19 2526. Q. You appealed first before you walked
20 away?

21 A. Well, I put in a notice of appeal.
22 I think that is as far as I got, because it was
23 eventually lost or something. Not lost lost, I
24 mean...

25 2527. Q. Abandoned for delay.

1 A. It got lost in the shuffle.

2 2528. Q. Dismissed for delay.

3 A. It was dismissed after I was off the

4 record. So, whatever happened there. but I am

5 saying a motion record finally arrived which had

6 been promised and promised. I think there is

7 letters in the file, where is it, when is it? When

8 are you guys going to send it? What is the story

9 here? And you guys kept saying, "You will see it

10 when you see it". And it arrived...just a second.

11 I called LawPro or...no, wait a minute. That wasn't

12 my job. I'm pretty sure it would be Bill McLean or

13 Jessica, would have reported it to LawPro. I was

14 assigned to this gentleman, Mr. Dewart. We were

15 assigned, okay? And I think I went to Spain.

16 2529. Q. So, you didn't assign the file to

17 anybody?

18 A. Well, Jessica and Bill, the inside

19 people handling the insurance side of life because

20 that was their job, not mine. And by the way, we

21 always had a policy if one person was taking a hit

22 from a Law Society problem or a negligence problem,

23 he was excluded and the other guys had to take over,

24 and we had been doing that for years. And I did it

25 for Jessica many times.

1 So, I was gone. They were, I am going to
2 say, in my mind, in charge of the whole freakin'
3 thing. I came back from Spain. I met with Mr.
4 Dewart in the airport. He was coming back from New
5 York that day. "How you doing?" I was in his
6 office the next day for a week. He had files, he
7 had all sorts of stuff, whatever. We probably
8 contacted Stacey to send us more stuff. We did an
9 affidavit and I was gone. And that is about it.

10 2530. Q. And he got all those files that were
11 in his office from Jessica Duncan?

12 A. I have...as I said, I don't know
13 what he had. I mean, there was talk of him going up
14 and...

15 2531. Q. I didn't ask...I asked who he got it
16 from?

17 A. I got a lecture from Sean Dewart
18 right when he was hired that was basically...

19 2532. Q. Please, Mr. McKenzie. I asked you
20 who did Mr. Dewart get the files from?

21 A. Mr. Dewart told me, okay...read us
22 the riot act basically. "I am in charge, I do the
23 file, it is a lot of boxes. Well, whatever,
24 whatever, whatever." "Okay, you're done, I'm going
25 to Spain." That is about what my recollection is.

1 2533. Q. Mr. Kramer, did you hear an answer
2 to my question in there? Can you help, please?

3 MR. KRAMER: I don't think I can help,
4 Mr. Silver. I don't think I can.

5 THE DEPONENT: Okay, go ahead.
6

7 BY MR. SILVER:

8 2534. Q. Mr. Justice Shaughnessy will see
9 that I reached out for help to his own counsel. I
10 don't know what else I can do. The question was,
11 who provided Mr. Dewart with the files that you
12 reviewed when you were at his office?

13 A. Okay. He had stuff.

14 2535. Q. Who provided it?

15 A. Well, it wasn't me because I was in
16 Spain.

17 2536. Q. So you don't know who provided it?

18 A. But, I also can say while I was
19 there I am sure...I shouldn't say sure. It is
20 likely that he said, "What about this?" and I said,
21 "Well, somebody has to call or get a hold of the
22 firm", because there is a letter about that. I
23 mean, I think there are a bunch of exhibits in
24 there. They would have come from...my normal
25 procedure would be to say to Stacey, "Stacey, there

1 was a letter back in August about this, could you
2 please send it"...

3 MR. KRAMER: It was a simple question.
4 You are not answering it.

5

6 BY MR. SILVER:

7 2537. Q. Of course he's not. I am just
8 saying who provided...

9 A. All of the above.

10 2538. Q. So, when you got to his office after
11 your trip to Spain, he had boxes of stuff that had
12 been provided to him by someone other than you.

13 A. Okay, I stop you right there. I was
14 in the boardroom and he kept flitting in and out and
15 bring stuff in. So, I don't know whether he had
16 boxes but he had stuff.

17 2539. Q. You said he had boxes of stuff. You
18 said that two minutes ago.

19 A. Well, no, but I am saying whether he
20 went to get the boxes...go ahead.

21 2540. Q. He didn't get...whatever, whether it
22 was in a box or not, he didn't get it from you?

23 A. No, I am just saying I had seen
24 boxes in Mr. Kramer's office that...

25 2541. Q. Mr. McKenzie, please, answer my

1 question.

2 A. Okay. He got it all from the firm,
3 yes, because we would have requested it, yes, that
4 is correct.

5 2542. Q. The stuff that he had when you got
6 there, he got from the firm and then there was
7 further stuff that you thought, the two of you
8 thought you needed and you got that from the firm as
9 well on your request that they send?

10 A. Whatever.

11 2543. Q. Is that true?

12 A. Whatever he had came from the firm,
13 sure, had to be. That would be my...

14 2544. Q. So, here is the big mystery. Nobody
15 can seem to find the electronic file content for the
16 543 file. And Jessica Duncan says it is because you
17 have it and you didn't restore it. What do you say
18 as to why, between you and the firm, we can't locate
19 the electronic file for 543, the Allard/Kingsway
20 matter?

21 A. Okay. Other than a glitch, it would
22 have been in the backup tape. I mean they had them
23 for weeks and weeks and weeks and weeks. So, if it
24 is being said that it was missing, just restore it.
25 That has happened many times in our firm.

1 the examination, but if you put to the
2 witness that Ms. Duncan said that the firm
3 is missing the 543 file, I understand that
4 to be inaccurate. She said she wasn't able
5 to confirm that they recovered all of it.
6 They may well have recovered all of it...

7 2548. MR. SILVER: We will find out...

8 MR. KRAMER: Because the point is there
9 may or may not be anything missing.

10 2549. MR. SILVER: Well, but there may or may
11 not be anything missing. We will find out
12 from the answers to undertakings, but it
13 doesn't solve a very serious allegation of
14 a removal by McKenzie of the files and a
15 failure to return them.

16 MR. KRAMER: Yes, you can...

17

18 BY MR. SILVER:

19 2550. Q. And what I am trying to get at is, a
20 simple answer that notwithstanding all this
21 evidence, you don't have any electronic file for
22 543; is that right?

23 A. That is right.

24 2551. MR. SILVER: I would like to change
25 subjects and should we go on for a bit?

1 MR. KRAMER: Why don't we just go off
2 the record and figure out what we are
3 doing.
4

5 --- DISCUSSION OFF THE RECORD
6

7 BY MR. SILVER:

8 2552. Q. Mr. McKenzie, Ms. Duncan has
9 produced the ledgers from PCLaw for each of the 543
10 and 568, 586 files. You have seen that?

11 MR. KRAMER: This is A and B?
12

13 BY MR. SILVER:

14 2553. Q. Exhibit A and B.

15 A. I have seen Exhibit A and B.

16 2554. Q. Right. And as she confirmed for me
17 that Exhibit A, the ledger for 543, all starts with
18 dockets, right? I mean, the system...the billing
19 system, your firm...and they might be different than
20 my firm, but you and I are the same. We all start
21 with doing some work for our client and accurately
22 reflecting what was done in a docket and how much
23 time was spent?

24 A. We try. That is the right system.
25 I am not sure...

1 2555. Q. You said in paragraph 22 of your
2 affidavit that you don't enter your own docket,
3 "...Rather I provided instructions to my
4 assistant and she entered the docket..."

5 The assistant is Sunny Ware?

6 A. Correct.

7 2556. Q. How would you communicate your
8 dockets to Sunny Ware? Would you handwrite...like,
9 I handwrite mine and then give my secretary a sheet
10 of handwritten...

11 A. Any old way.

12 2557. Q. What was your practice?

13 A. Orally. On a memo to her.

14 Handwritten.

15 2558. Q. You didn't have a practice?

16 A. Well, I am just saying...

17 2559. Q. Over 25 years?

18 A. Well, I am just...I am going...near
19 the end, as I said, any way.

20 2560. Q. So, you didn't have a practice for
21 docketing?

22 A. Well, the practice was I wanted some
23 docketing done.

24 2561. Q. Would you record them during the
25 course of a day as you were doing the work? Or

1 would you do that listing at the end of a day or the
2 end of a week or the end of a month?

3 A. No, not always.

4 2562. Q. So, you didn't have any real defined
5 practice; you just got them in?

6 A. Many ways. It would just depend.

7 2563. Q. We looked, and I'm sure you have.
8 These dockets that find their way into the ledger
9 for your time in the manner that you have just
10 described, then move over to the account through the
11 accounting system?

12 A. That is the way PCLaw works.

13 2564. Q. And PCLaw, would you hit the right
14 buttons and from the entries that get entered into
15 the ledger, out would come a draft account that you
16 could then edit and approve and send to the client?

17 A. That sounds right, yes.

18 2565. Q. In each of the accounts that were
19 sent in each of these two files, you were the lawyer
20 responsible for the account at your firm? They were
21 your clients?

22 A. Yes.

23 2566. Q. And you signed each account?

24 A. Yes.

25 2567. Q. To the best of your ability and

1 knowledge, you were sending out accounts that had
2 accurate service descriptions and time charges for
3 what you did?

4 A. I would not agree with that
5 entirely. I mean, they did the best they could.

6 2568. Q. Well, can you show me anything in
7 any of the accounts that you billed to your client
8 where there isn't an accurate description of the
9 service that you rendered?

10 A. What they are...I am going...I
11 didn't check them for 100 percent accuracy at the
12 time, so I certainly can't do it now.

13 2569. Q. And so, you can't point to a single
14 entry in an account that isn't an accurate
15 description of what you did?

16 A. Did you say inaccurate?

17 2570. Q. Inaccurate. Well, accurate. Most
18 of them are accurate?

19 A. I am presuming they are accurate. I
20 am not going to...

21 2571. Q. And for the purposes of this motion
22 we can all presume that the ledgers, A and B,
23 reflect an accurate docket description and time
24 charge, right?

25 A. They are an accurate reflection of

1 what is put into the system; I think that is fair.

2 2572. Q. Right. And therefore an accurate
3 description of what you did?

4 A. I wouldn't be as strong on that.

5 2573. Q. Well, you can't point me to a single
6 one that isn't accurate?

7 A. Look, if you have got something you
8 want to show me, I will look at it, but I am not
9 going to go through 5,000 pages.

10 2574. Q. Generally speaking you accept that
11 the ledgers accurately describe what you did. And
12 that was accurately transferred through PCLaw
13 from...you don't agree with that?

14 A. In my docket, right, to say they
15 accurately, 100 percent described everything I did,
16 I cannot say that.

17 2575. Q. No, I didn't say that.

18 A. Well, I think that is what you said.

19 2576. Q. No, what I said is what is described
20 in the docket is an accurate description of what
21 you did?

22 A. Of what was entered.

23 2577. Q. Of what was entered.

24 A. Of what was entered, yes, I agree.

25 2578. Q. Right. So, that is another way of

1 saying that if I read one of your dockets, you might
2 have done other stuff but you did the stuff that is
3 described in the docket, right?

4 A. Presuming that it was accurately
5 transcribed from my hand into whoever did it, yes,
6 fair enough.

7 2579. Q. These ledgers also record trust
8 activity in respect to the file?

9 A. Okay.

10 2580. Q. Do you agree with that?

11 A. Can you just point me to something.
12 I am not sure what you are talking about.

13 2581. Q. The first page of Exhibit A.

14 A. Okay.

15 2582. Q. You will see that, for example, on
16 the first page of Exhibit A, the very first trust
17 activity is the receipt of the retainer, a wire
18 transfer from Peter Allard, retainer for October
19 6th. And \$5,000 goes into the trust account and
20 increases the balance in the trust account from zero
21 to \$5,000. Do you see that on the ledger?

22 A. Oh, this column over here. Yes,
23 that looks right.

24 2583. Q. You have never seen these before,
25 Mr. McKenzie? You practised there for 25 years.

1 You mean to tell me you have never seen a ledger
2 sheet like this before?

3 A. These docketts?

4 2584. Q. Yes, this ledger sheet.

5 A. They are not familiar to me as I
6 look at them now. But anyway...this is the original
7 stuff, right?

8 2585. Q. You agree with me that these show
9 trust activity in the manner I have just described?

10 A. Yes.

11 2586. Q. And to the best of your knowledge,
12 are all the indications of activity in and out of
13 the trust account accurate as shown on the ledger?

14 A. Well, I would prefer to look at the
15 actual, like the printout of the trust account. The
16 people that did this are trustworthy and accurate
17 and Bill McLean signs off at the end of the year
18 that it is all done properly, so sure.

19 2587. Q. But to the best of your knowledge,
20 all of the entries in the ledgers, Exhibits A and B,
21 for trust activity are accurate?

22 A. Well, with the caveat that sometimes
23 they put them in the wrong place and move them
24 around.

25 2588. Q. Well, will you let me know by way of

1 undertaking whether there are any inaccurate trust
2 activity entries in either Exhibits A or B?

3 A. I can't.

4 2589. Q. Why not?

5 MR. KRAMER: Well, he doesn't have the
6 records.

7 THE DEPONENT: I have no frame of
8 reference.

9 2590. MR. SILVER: So...

10 THE DEPONENT: So, if the wire transfer
11 came in I would take your word for it.

12 2591. MR. SILVER: So, you are refusing to
13 advise of any...

14 MR. KRAMER: No, no, it is not a
15 refusal. The only way one could check is
16 to have all the bank records and compare
17 it, and we don't have the bank records, so
18 we can't answer the question.

19 2592. MR. SILVER: But it must start with a
20 suspicion or a belief that something is
21 wrong, and then we can chase it.

22 MR. KRAMER: Do you have any suspicion
23 or belief about any of the trust records in
24 here?

25 THE DEPONENT: No, other than the

1 normal, things get fouled up sometimes.

2

3 BY MR. SILVER:

4 2593. Q. So, you have no suspicion or belief
5 that there are any inaccuracies in the trust
6 activities described in Exhibit A and B?

7 A. You are talking about a number and I
8 agree it is unlikely that the numbers are
9 not...because they have to reconcile against the
10 bank statement, don't they?

11 2594. Q. The accounts that you rendered to
12 Peter Allard and Nelson Barbados, which are in these
13 productions, included trust statements or not?

14 A. I don't know exactly how they did
15 it.

16 2595. Q. Well, you signed the account, sir.
17 Let's look at Exhibit K.

18 MR. KRAMER: Exhibit K?

19 2596. MR. SILVER: Well, let's just use
20 Exhibit K as an example.

21 MR. KRAMER: Which page in Exhibit K?

22 2597. MR. SILVER: Well, start at the first
23 page.

24 MR. KRAMER: My K starts with an e-mail
25 and then a letter and the account...

1 2603. Q. This one is a revised account. But
2 let's look at page 6. There is a computer signature
3 for Bill McKenzie.

4 A. That is not a good choice, because
5 that is not my digital signature. We can probably
6 find one.

7 2604. Q. Right. Well, if you go to the next
8 account, the ninth page. December 6, the next
9 account.

10 A. That is my signature.

11 2605. Q. Okay. So, let's look at the
12 December 6th account because it is better. You
13 signed that after the account was prepared?

14 A. This is the December 6th account? I
15 just want to make sure we are talking about the same
16 thing. December 6, 2005, and I signed it.

17 2606. Q. And you signed it.

18 A. On page 9, agreed.

19 2607. Q. And this one doesn't have a trust
20 statement?

21 A. Agreed.

22 2608. Q. Well, at least not in the version
23 that we have been provided. So, let's go to the
24 next one, for example, January 20th.

25 A. Okay. I am up to page 9 where I

1 signed, because that is my digital signature. And
2 10 is the trust statement. So, the answer is yes,
3 it would have gone out like that.

4 2609. Q. Right, with the pages...

5 A. Well, pages 1 to 10 would have gone
6 out, I am presuming, all together.

7 2610. Q. And you would have had all of those
8 pages in front of you before you signed the account?

9 A. Yes.

10 2611. Q. And you would have reviewed them or
11 had the opportunity to review them to ensure that
12 they were accurate and wouldn't have signed it
13 unless you thought it was accurate?

14 A. I stand responsible for signing it,
15 yes.

16 2612. Q. Okay. So that in most cases when
17 you signed an account, it included a trust
18 statement?

19 A. It looks like it often did, yes.

20 2613. Q. And to the best of your knowledge,
21 at the time you signed the account, you believed
22 that the docket entries were an accurate description
23 of the services rendered, right?

24 A. Within reason.

25 2614. Q. And the time allocations were

1 accurate?

2 A. Subject to the people who entered
3 them, they would be accurate.

4 2615. Q. The overall amounts being charged to
5 the client for those services was accurate? You
6 wouldn't have signed it if you thought it wasn't?

7 A. I presume this system worked, so I
8 signed it because it looked right.

9 2616. Q. The disbursements on the file looked
10 right, and you wouldn't have signed it if they
11 weren't accurate, correct?

12 A. I agree.

13 2617. Q. And the trust statement...and the
14 trust activity was accurate, otherwise you wouldn't
15 have signed it?

16 A. Generally I agree.

17 2618. MR. SILVER: Thank you. Shall we take a
18 break for lunch?

19 MR. KRAMER: Okay.

20

21 --- A LUNCHEON RECESS

22

23 K. WILLIAM MCKENZIE, resumed

24 CONTINUED CROSS-EXAMINATION BY MR. SILVER :

25 2619. Q. Mr. McKenzie, you want to clarify

1 something from this morning?

2 A. The answers I gave this morning are
3 to the best of my recollection. I am going to check
4 one more time, and this will be the fourth time, for
5 electronic data being taken with me.

6 2620. Q. I appreciate that. I asked...

7 MR. KRAMER: Did you say you were going
8 to check one more time for electronic data?
9 Where are you going to check?

10 THE DEPONENT: It dawned on me there is
11 a place I should look.

12

13 BY MR. SILVER:

14 2621. Q. Where is that?

15 A. Well, in my garage there is a big
16 pile of stuff. Could be a disc in there. Or a
17 storage device or something.

18 MS. ZEMEL: I apologize, I don't mean to
19 interrupt, but we can't hear you guys down
20 here. What was the last thing?

21 MR. KRAMER: He said a disc in there or
22 some sort of storage device.

23 MS. ZEMEL: Thank you.

24 2622. MR. SILVER: So, I had asked for an
25 undertaking to produce anything and

1 everything on your computers or otherwise
2 relating to Nelson Barbados and Allard
3 files from October, 2008 to date, and you
4 gave a refusal. Are we now converting that
5 into an undertaking?

6 MR. KRAMER: No. He said...I believe
7 the way we responded to that request was
8 that Mr. McKenzie said he did not have
9 anything on his personal computer, so that
10 answered the question, it seemed to me. He
11 now says that he might have something in
12 his garage, so you can take...there is an
13 undertaking to look for that storage
14 device. If it exists in his garage and if
15 we find it we will let you know what it is
16 and produce it, et cetera, as may be U/T
17 required.

18

19 BY MR. SILVER:

20 2623. Q. Before we broke for lunch we were
21 looking at the accounts in the trust statements and
22 the ledgers, and may go to some in particular later
23 on, tomorrow unfortunately, but let's see if I can't
24 cover off a lot of what I have to ask by way of
25 general questions. Do you agree with me that all of

1 the money that came into either of the files
2 originated with Peter Allard?

3 A. No.

4 2624. Q. Who else sent money that got
5 deposited into trust into either of those two
6 accounts?

7 A. I saw three versions...no, not
8 versions, names, in a trust document somewhere.

9 2625. Q. What three names?

10 A. I think it was something like
11 Peterco, something like...

12 MR. EPSTEIN: I can't hear you. Could
13 you please speak up, Mr. McKenzie?

14

15 BY MR. SILVER:

16 2626. Q. He said he saw three names in the
17 trust records. Peterco, and then I didn't hear the
18 second one.

19 A. Peter Allard.

20 2627. Q. Peter Allard.

21 A. And Nelson Barbados on a trust
22 document. To the best of my recollection, it has
23 all three or a combination of those.

24 2628. Q. Right. So, the receipts from
25 Peterco originate with Peter Allard? That is his

1 company?

2 A. I would expect they were directed by
3 him. I am not sure if it is his company.

4 2629. Q. And certainly the receipts from
5 Peter Allard originated from Peter Allard?

6 A. That is what the trust entry said
7 that I saw.

8 2630. Q. When you are talking about trust
9 entries, are you talking about the ledger, or on the
10 accounts?

11 A. The account.

12 2631. Q. The account?

13 A. Something...

14 MR. KRAMER: These are the accounts.

15

16 BY MR. SILVER:

17 2632. Q. Well, let's look...I think I know
18 what you are talking about. Let's look at the
19 accounts in Exhibit I. These are the accounts in
20 568. Just so that I have this right, you produced
21 the accounts through Dewart but you removed the
22 trust statements, and now Jessica Duncan has
23 produced the accounts with the trust statements,
24 correct?

25 A. I produced the accounts...

1 2633. Q. Without the trust statements.

2 A. ...and what is in here has trust
3 statements. This is...

4 2634. Q. Not what you produced?

5 MR. KRAMER: What you are looking at is
6 the exhibits to Jessica Duncan's affidavit.
7 What Mr. Silver is referring to is the
8 accounts that were produced by Mr. Dewart
9 in response to an answer to an undertaking,
10 which do not have the trust statement
11 portion attached to them. Whether or not
12 it is fair to say that Mr. McKenzie
13 produced them like that, I am not sure.
14 But the point he is making is that the
15 trust statement portion of the accounts is
16 included in the Duncan exhibit, but not in
17 the Dewart answer to undertakings.

18 THE DEPONENT: It may have been from a
19 judge's order of January 15th. I am
20 looking at, as an example here...I picked
21 one at random, a trust statement.

22 MR. KRAMER: But you are looking at an
23 exhibit to Jessica Duncan's affidavit. Mr.
24 Silver is pointing out that these very
25 accounts don't have the trust statement in

1 the form they were previously delivered.

2 Have I got that right?

3 2635. MR. SILVER: By Mr. Dewart.

4 MR. KRAMER: Yes.

5

6 BY MR. SILVER:

7 2636. Q. The Exhibit I documents that you are
8 looking at were what Ms. Duncan produced. And I am
9 just getting your confirmation that through Dewart
10 you had produced these same accounts, i.e. the
11 accounts for 568, but you omitted the trust
12 statements, right?

13 A. Do you have a copy of what came from
14 Mr. Dewart?

15 2637. Q. No. Exhibit 10 to your cross-
16 examination last time.

17 MR. KRAMER: Do we have it? Actually we
18 have it. We have it right here. Look at
19 that. Okay, we are looking at Exhibit 10
20 to the cross-examination.

21 2638. MR. SILVER: What does it say on this
22 tab? On the stamp on the document.

23 THE DEPONENT: Okay, Exhibit 10. I am
24 looking at Exhibit 10, statement of
25 account.

1 2645. Q. We only got the trust statements
2 when Ms. Duncan came forward with them.

3 A. Okay, I don't see trust statements,
4 so I will agree that I produced accounts without
5 trust statements.

6 2646. Q. Even though, when you send an
7 account to a client it includes the trust statement,
8 right? You said that?

9 A. Even though these...yes.

10 2647. Q. And you explained that in your
11 affidavit that you didn't...you thought the firm
12 should be...you are blaming it on the firm. They
13 should have cross...you thought they should cross-
14 check the trust statements to the ledgers...

15 MR. KRAMER: Actually, that is not his
16 response in his affidavit.

17 2648. MR. SILVER: Yes, it is.

18 MR. KRAMER: No. If you look at
19 paragraph...

20 2649. MR. SILVER: Thirty-eight.

21 MR. KRAMER: Well, I think you have to
22 go earlier than that, Mr. Silver.

23 2650. MR. SILVER: I have looked at it all.

24 MR. KRAMER: Thirty-four is where you
25 want to look.

1 2651. MR. SILVER: Well, 34 it says that the
2 judge ordered him to provide the accounts.
3 The order did not require the production of
4 trust statements and they were not sent.

5 MR. KRAMER: That is the explanation
6 that he gives.
7

8 BY MR. SILVER:

9 2652. Q. So, your first explanation is
10 Justice Shaughnessy's order should have been more
11 specific. It should have said the accounts and the
12 trust statements, even though the trust statements
13 were sent to your client with the account. Have I
14 got that right?

15 A. I am not arguing with Justice
16 Shaughnessy's order; it was followed.

17 2653. Q. Sir, Justice Shaughnessy ordered you
18 to deliver the accounts. Those accounts included
19 trust statements, and you decided without getting
20 any clarification that you would remove the trust
21 statements from the accounts before they were
22 produced, right?

23 A. They were removed and paragraph 34
24 is accurate.

25 2654. Q. Okay. We will see what Justice

1 Shaughnessy thinks about that. And then at cross-
2 examination we followed up on that and wanted to see
3 the trust statements. And you had Stacey Ball
4 compile them, but then decided not to deliver them
5 because you thought that they should be checked by
6 the firm before they were delivered, right?

7 A. Paragraph 35 is accurate. Paragraph
8 36 is accurate.

9 2655. Q. I didn't ask that. You know what?
10 Forget it. I am just going to read these answers to
11 the judge and not fight to get clear answers to
12 simple questions, Mr. Kramer.

13 MR. KRAMER: Well, don't direct your
14 comments to me.

15 2656. MR. SILVER: I am directing it to you
16 because you are going to have to argue the
17 other side.

18 MR. KRAMER: My job as counsel is to
19 object to improper questions and if I don't
20 object it means that I don't think the
21 question is improper. After that, you are
22 here with the witness.

23
24 BY MR. SILVER:

25 2657. Q. Mr. McKenzie, just drilling down on

1 this point about who sent money that got deposited
2 into the trust accounts, let's look at an Exhibit I
3 account that shows funds coming from Nelson
4 Barbados. So, the first account...well, let's just
5 deal with them in order to get going on this. So,
6 the first account is April 20, 2007, and before
7 April 20th there was nothing in the trust account
8 for this file, correct?

9 A. I don't know.

10 2658. Q. Well, the first entry on the file is
11 April 2, and the first entry on the trust statement
12 is April 20th. And it shows that you put 1,100 in
13 and the balance was 1,100. So, can we assume that
14 before you put the 1,100 in there was no money in
15 the trust account? It seems pretty obvious.

16 A. Is there an actual ledger?

17 2659. Q. Of course, that is B. Exhibit B is
18 the ledger. So, keep the account open and open
19 ledger B if you want to.

20 MR. KRAMER: What happened to our copies
21 of the affidavit? Okay, no problem. We
22 are looking at B? We are looking for that
23 \$1,100 deposit?

24

25 --- DISCUSSION OFF THE RECORD

1 MR. KRAMER: This was produced by
2 Jessica Duncan. It is an exhibit to her
3 affidavit where you supposedly...what we
4 are looking at is the ledger for 568, which
5 is part way through B, and I have found
6 where we start, which is at April, '07, and
7 in particular the \$1,100 deposit.

8 2660. MR. SILVER: Let's look at the two, just
9 to get our bearings here. The first entry
10 on the ledger for that page is the April 2
11 docket of a student engaged in research.

12 MR. KRAMER: Hold on for a second, let
13 me just find that. That would be right
14 here.

15 2661. MR. SILVER: Engaged in researching
16 state Immunity Act and it is the second
17 entry, the 2.1 hours. You can see it in
18 the ledger and it gets transposed into the
19 account.

20 MR. KRAMER: Okay. Then, if you go two
21 pages over, Mr. Silver, you will find that
22 \$1,100 trust deposit.

23 2662. MR. SILVER: Right, which is the first
24 entry into the trust account. Where do you
25 see that?

1 MR. KRAMER: Three pages beyond where
2 you were looking.
3

4 BY MR. SILVER:

5 2663. Q. Right, \$1,100, right? So, that is
6 the first deposit into the trust account for that
7 file. And it happened to come from you.

8 A. If I am following all of this, I
9 agree with you, and...

10 2664. Q. Most of us can. You are following
11 it, aren't you? I don't want to hear "if you are
12 following it". You are following it?

13 A. Well, I am just saying if this was
14 the first account by BMC 568, then that is the first
15 trust entry. I would agree with that.

16 2665. Q. Right. And you put that money in.

17 "...Received U.S. funds from K. William
18 McKenzie. Excess funds withdrawn to pay
19 expenses in Barbados to be retained in
20 trust pending further payment for process
21 serving and related expenses..."

22 So, you had taken out money from trust, didn't spend
23 it all, and were putting back the extra into this
24 trust account?

25 A. Seems to be so.

1 2666. Q. Right. And then, if you go to the
2 next account, the trust statement, we see that
3 \$15,000 came into trust. And unfortunately, in your
4 trust statement it doesn't say where it came from.
5 But if we go with the ledger, it is clear that that
6 money came from Peterco Holdings.

7 A. Okay.

8 2667. Q. And so, you will agree with me that
9 the \$15,000 that went into trust into this file on
10 June 18th originated with Peter Allard, this one
11 through his company Peterco Holdings? Right?

12 A. I agree.

13 2668. Q. And I suggest to you, and we could
14 do this for the next couple of hours, but every
15 deposit into trust originated with Peter Allard,
16 even those, for example...maybe we should take one
17 as an example, even though your trust statement...

18 A. If you look at the next one,
19 received from Nelson Barbados Group.

20 2669. Q. Right.

21 MR. KRAMER: That is July 4, '07, so
22 let's look at that. How much money did you
23 take, \$44,000?

24 2670. MR. SILVER: Where is that? What
25 account is that? I want to...

1 MR. KRAMER: Actually, you know, Mr.
2 McKenzie I think...the next one is
3 inconsistent with what you said, Mr.
4 Silver.

5 2671. MR. SILVER: Okay, well where is it?

6 MR. KRAMER: It is July 20 something.

7 MR. RANKING: The July 23rd account,
8 which would reflect the receipt of
9 44,376.64 on July the 4th.

10 2672. MR. SILVER: Right. Oh, yes, I see
11 that. In the Canadian dollar account.

12 MR. KRAMER: When we go to the ledger it
13 says that Nelson Barbados Group Ltd. paid
14 accounts by wire transfer.

15 2673. MR. SILVER: Right. Okay.

16 MR. KRAMER: That doesn't appear to be
17 Allard or Peterco.

18

19 BY MR. SILVER:

20 2674. Q. Right. And I am suggesting to you,
21 sir, that it is Peterco or Allard even though it
22 says Nelson Barbados Group Ltd. What do you say?

23 A. This amount?

24 2675. Q. Right.

25 A. I can't say.

1 2676. Q. That the wire transfer came from
2 Peter Allard?

3 A. I can't say.

4 2677. Q. You think it came from Nelson
5 Barbados?

6 MR. KRAMER: His answer was he can't
7 say. I think that is equivalent to, "I
8 don't know". Or maybe I shouldn't get
9 involved, sorry.

10

11 BY MR. SILVER:

12 2678. Q. Did Nelson Barbados wire transfer
13 money to you, ever? Here is another way of putting
14 it. Did Nelson Barbados ever wire transfer money to
15 you?

16 A. I don't know.

17 2679. Q. You don't know. Who would know?

18 A. Accounting department, I guess.

19 2680. Q. Accounting department? So, we will
20 wait for the wire transfer information and see where
21 this wire transfer came from, because you can't
22 admit that it came from Allard; is that what we are
23 left with?

24 A. That is my position.

25 2681. Q. Do you say under oath that you know

1 for sure that on at least one or some occasions,
2 money was actually wire transferred to you by Nelson
3 Barbados Group? Or do you say, "I don't even know
4 that"?

5 A. I think you asked me this already.
6 The only way to be sure would be to check the bank
7 record.

8 2682. Q. Sir, we are doing that, but I am
9 asking you a question. Do you say under oath that
10 you are aware or believe that at least some of the
11 wire transfers came directly from Nelson Barbados?
12 Or are you saying you don't even know that?

13 A. I don't know.

14 2683. Q. You are not saying they did, you are
15 just saying you don't know?

16 A. Check with the bank. It has been my
17 position...

18 2684. Q. I am going to, but I am still
19 entitled to your knowledge...

20 A. I understand.

21 2685. Q. ...and information.

22 A. My knowledge, I don't know, exactly.

23 2686. Q. We tried to get this information on
24 February 3rd and 8th, and we were met with all the
25 privileges. I take it that you accept that all

1 privileges have been waived? In other words, Nelson
2 Barbados can't assert privilege over any of its
3 communications with you, and similarly Allard in
4 respect of Kingsland related matters, right?

5 A. I would have to check the orders,
6 but I think that is what they say.

7 2687. Q. Right. So, what was the deal? Let
8 me ask this. When did you first meet Allard?

9 A. I don't recall.

10 2688. Q. Was it before August of 2005?

11 A. I don't recall.

12 2689. Q. You don't recall? Well, look at
13 account K, the accounts at K. The very first
14 account is a November 4th account. It says "Call",
15 and this is for you, "BM", an hour and a half on
16 September 30th.

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

19 Do you see that?

20 A. Yes.

21 2690. Q. Was that the first time that you
22 ever spoke to Mr. Allard, September 30, 2005?

23 A. Ever?

24 2691. Q. Yes.

25 A. I don't think so.

- 1 2692. Q. No. You knew him before that?
- 2 A. That is my recollection.
- 3 2693. Q. Did you get to know him through the
- 4 telecommunication files?
- 5 A. Well, that had been hanging around.
- 6 Yes.
- 7 2694. Q. So, you knew him before September,
- 8 2005?
- 9 A. To the best of my recollection.
- 10 2695. Q. How did Mr. Best first get to meet
- 11 Mr. Allard? Did you introduce them?
- 12 A. I put them in touch with each other.
- 13 2696. Q. So, you were the connector between
- 14 Best and Allard? You put them in touch with each
- 15 other?
- 16 A. Yes.
- 17 2697. Q. So, what was the deal? How did
- 18 Allard acquire an interest in these shares? Tell us
- 19 about it. In "these shares" being Marjorie Knox's,
- 20 Kingsland shares.
- 21 A. He has a mortgage or charge or some
- 22 security on them is the best of my recollection.
- 23 Had.
- 24 2698. Q. Had? Why, he doesn't have it
- 25 anymore?

1 A. Well, you are saying back then? Had
2 is what I know.

3 2699. Q. In August of 2005 he had already
4 acquired an existing charge over her shares.

5 A. To the best of my recollection he
6 had an existing charge in August of 2005.

7 2700. Q. Which, we saw that charge. It has
8 been produced in the record. That is a charge that
9 first dates to May, 2002, right?

10 A. I won't disagree. I am having a
11 hard time remembering exactly.

12 2701. Q. So, when you spoke to him in August
13 or September of 2005, if not before then, he already
14 had that charge over Marjorie Knox's shares, right?

15 A. I agree.

16 2702. Q. In that time period before the
17 summer of 2005, he was funding Marjorie Knox's
18 litigation in Barbados, right?

19 A. Sorry, before?

20 2703. Q. Before August of 2005, he was
21 funding the litigation that Marjorie Knox was
22 pursuing in Barbados?

23 A. He advanced funds is what I know.

24 2704. Q. That he advanced funds to Marjorie
25 Knox's lawyers so that she could continue with

1 litigation against Kingsland and others in Barbados?

2 A. I can't say exactly what the funds
3 were advanced for at that time.

4 2705. Q. You can't say that they were for
5 legal fees? We know that.

6 A. For sure, I can't say.

7 2706. Q. At least partially? Were some of
8 the funds used for legal fees?

9 A. I think that is a reasonable
10 statement. To the best of my recollection.

11 2707. Q. Well, that is the best we can do
12 with you, so I accept that. And then, in July of
13 2005 the privy council rendered its decision in
14 respect of the appeal from the Barbados Court of
15 Appeal, right?

16 A. I am not sure of the date.

17 2708. Q. Well, take it from me. I am sure of
18 it. July, 2005.

19 A. I appreciate you were involved with
20 it and so I will take it from you.

21 2709. Q. Yes, okay. I wasn't involved in the
22 say you are suggesting, but there was an opinion
23 requested under Ontario law that was utilized in the
24 privy council argument, and I provided the opinion
25 on Ontario law. So, to the extent that I was

1 involved, you are right. But I don't know what that
2 has to do with anything. The fact is that the privy
3 council dismissed the appeal of the Barbados Court
4 of Appeal decision in July, 2005.

5 A. I will take your word for that.

6 2710. Q. And up until that point, i.e. the
7 dismissal of the appeal by by the privy council,
8 there had been no Ontario involvement or suggestion
9 of involvement in Ontario, right? In all the
10 proceedings that had existed up until that time,
11 there was never any suggestion of an Ontario angle
12 to the litigation, right?

13 A. Are you talking of the litigation
14 that went to the privy council?

15 2711. Q. Yes.

16 A. I can't say.

17 2712. Q. Okay. Well, I am putting that to
18 you as a proposition of fact, and if you disagree
19 with me will you let me know?

20 MR. KRAMER: How is he supposed to find
21 that out? He examined the file and how
22 could he possibly do that?

23 2713. MR. SILVER: Mr. Kramer, he knows this
24 file.

25 MR. KRAMER: Well, I don't know if he

1 does or he doesn't.

2 2714. MR. SILVER: Well, I am telling you he
3 knows it because I know...

4 MR. KRAMER: Are you able to answer the
5 question? Because it sounds to me like it
6 is a question that he can't answer, but
7 maybe I am mistaken. Can you determine
8 whether or not there was an Ontario angle
9 to that litigation before August of '05?

10 2715. MR. SILVER: SBG was never raised...

11 THE DEPONENT: Other than Mr. Silver
12 being involved, which I have seen him on an
13 account, I have no recollection one way or
14 the other, to answer your question.

15
16 BY MR. SILVER:

17 2716. Q. Perfect. SBG, for example, this is
18 that company that made an offer to buy the Kingsland
19 shares in 1992. That had never come up in any of
20 the Barbados proceedings, correct?

21 A. I don't agree with that.

22 2717. Q. Brian Turner was never named in any
23 of the Barbados proceedings?

24 A. I really have no recollection
25 of...that is a file some place?

1 2718. Q. And so...

2 A. Canadians were involved with SBG for
3 sure. We determined that in this lawsuit.

4 2719. Q. I know, but that was never raised or
5 suggested or hinted at before August of 2005, right?

6 A. In the Barbados litigation I cannot
7 say. I have no recollection.

8 2720. Q. We have seen from documentation that
9 Jessica Duncan produced...can you put the Exhibit C
10 documents in front of the witness, please?

11 MR. KRAMER: Okay, we have got them.

12 2721. MR. SILVER: Okay, well I don't have
13 mine.

14 MR. KRAMER: Do you want to share ours?

15 2722. MR. SILVER: No, I want to find mine.

16 MR. KRAMER: Actually, we have two
17 copies. Do you want to borrow it, or you
18 have got to look through your notes?

19 2723. MR. SILVER: Can you look at them?

20 THE DEPONENT: I am reading them right
21 now.

22 2724. MR. SILVER: Okay, good. We are not
23 wasting time when I look for mine. Mr.
24 McKenzie, are you still looking at them?

25 THE DEPONENT: Go ahead. I scanned

1 them.

2

3 BY MR. SILVER:

4 2725. Q. Have you seen these before?

5 A. Mr. Kramer showed them to me.

6 2726. Q. Well, Sunny Ware sent an e-mail to
7 you that is Exhibit C1. Do you agree that Sunny
8 Ware sent the e-mail to you?

9 A. I don't recall it, but it says what
10 it says.

11 2727. Q. You don't deny that it was sent to
12 you?

13 A. I just don't recall.

14 2728. Q. Then C2 is...actually, if you go to
15 C3 first, did you assist in drafting this document
16 at C3?

17 A. I don't recall.

18 2729. Q. You might have. You put Best and
19 Allard together.

20 A. Yes.

21 2730. Q. Did you meet with the two of them
22 when they were discussing that?

23 A. I am going to say that, from looking
24 at it it is likely I was...saw it, but...

25 2731. Q. I take it by the time this document

1 was done, it was contemplated that an action in
2 Ontario would be brought, correct?

3 A. No. Well...no. Contemplated always
4 was a possibility, yes.

5 2732. Q. At the time this agreement was
6 signed, or was prepared, because we only have it
7 signed by one party, but at the time that it was
8 prepared there was a contemplation of an action in
9 Ontario?

10 A. It was a possibility, for sure.

11 2733. Q. Why did you introduce Best to
12 Allard?

13 A. Allard wanted to get rid of his
14 financial involvement.

15 2734. Q. Okay.

16 A. Best is an entrepreneur, so...

17 2735. Q. I am going to suggest to you that
18 you introduced Mr. Best to Mr. Allard because you
19 were looking to move the fight into a different
20 jurisdiction and you considered that Ontario might
21 be a good jurisdiction and in the event that you
22 went that way you wanted an Ontario plaintiff and
23 you introduced Mr. Best to Mr. Allard for that
24 purpose; is that true?

25 A. The contemplation was a deal would

1 be made, money would be made. Jurisdiction was
2 important because of various things, taxes and
3 things. And that is why it happened.

4 2736. Q. So, you were looking to move the
5 fight into a different jurisdiction and if Best
6 could make money at it, that would be good too, but
7 one of the purposes of introducing Best to Allard
8 was to create an opportunity to move the fight into
9 a different jurisdiction, right?

10 A. I don't think a fight was the first
11 priority. Allard had no fight, he just wanted out.

12 2737. Q. He just wanted out? Well, he didn't
13 sell his whole interest to Best; he only sold part
14 of it. So, he only wanted half out?

15 A. Well, he wanted out, and my
16 recollection was you put enough entrepreneurs
17 together with money, somebody can get taken out if
18 he wants to go.

19 2738. Q. But he didn't go out? He didn't get
20 out. He is still involved now. He still has an
21 interest, right?

22 A. As far as I know. It is in Miami
23 that I saw it on a claim.

24 2739. Q. At the same time in July, August,
25 2005, was there also contemplation of moving the

1 fight to Miami, i.e. having Miami assume
2 jurisdiction over the fight? That was part of the
3 plan at the time?

4 A. As I analyzed this, and should the
5 unfortunate happen that it had to turn into a fight
6 and not a deal which everybody was hoping for, that
7 was one of the places...

8 2740. Q. Under consideration.

9 A. ...under consideration.

10 2741. Q. Miami and Ontario were the two
11 places under consideration?

12 A. I think there were more than two.

13 2742. Q. Well, your dockets seem to reflect
14 that the focus was on Miami and on Ontario.

15 A. I considered analyzing it. I think
16 there were four or five.

17 2743. Q. Where were the other jurisdictions
18 that you were shopping around?

19 A. The U.S., Alaska, because there was
20 all that stuff up there.

21 2744. Q. Veco.

22 A. There was Cyprus. Money had...part
23 of the SBG deal had, I was told, gone through
24 Cyprus. And Barbados.

25 2745. Q. Why Miami? Why was Miami an

1 attractive jurisdiction? What involvement was there
2 in Miami before August, 2005? I suggest to you
3 none, but you thought that if we could create a
4 trust, Miami might be able to assume jurisdiction,
5 right?

6 A. That is not the way I recall it.
7 There are people in Miami at the time, who have
8 interest in this.

9 2746. Q. Tess Rohman.

10 A. That rings a bell. Kathy Davis.
11 Ian Davis. They would be beneficiaries of an
12 estate.

13 2747. Q. So, what I take from that is after
14 the privy council dismissed the appeal, you, in
15 conjunction with Mr. Allard and Mr. Best entered
16 into arrangements. Part of the purpose was to move
17 the fight to a different jurisdiction; have I got
18 that right?

19 A. I was giving advice. They entered
20 into a transaction.

21 2748. Q. Can you please produce the letter
22 dated June 9, 2004 that is referred to in C3?

23 MR. KRAMER: Do you have that or have
24 access to it?
25

1 BY MR. SILVER:

2 2749. Q. If you don't, just ask Allard for
3 it. Or your friends, Marjorie Knox, Jane Goddard,
4 John Knox.

5 A. I have no recollection that I have
6 it. I can't do better than that.

7 2750. Q. Can you make inquiries of Allard,
8 Marjorie Knox, John Knox, or Jane Goddard to see if
9 they have it so they can provide it to you so you
10 can produce it to us?

11 MS. ZEMEL: Kathleen Davis too.

12 2751. MR. SILVER: And Kathleen Davis, thank
13 you. Will you do that, please?

14 MR. KRAMER: Are you prepared to do
15 that?

16 THE DEPONENT: No.

/R

17 2752. MR. SILVER: So, that is a refusal to
18 make inquiries of others.

19 MR. KRAMER: Well, I don't think there
20 is any obligation. We don't have any power
21 or control over any of those people, I
22 don't think. By the way, was it clear from
23 Ms. Duncan that this, the attachment is not
24 in the firm files?

25 2753. MR. SILVER: She has undertaken to have

1 a look. It wasn't provided to us when she
2 provided these documents to Mr. Epstein.

3 MR. KRAMER: Well, presumably that would
4 solve the problem.

5 2754. MR. SILVER: If we have it, we have it.

6 MR. KRAMER: Yes, okay.

7 2755. MR. SILVER: But so far we don't have
8 it.

9 MR. KRAMER: I don't think he is obliged
10 to go ask non-parties who he has no
11 particular relationship with.

12 2756. MR. SILVER: Well, Mr. Kramer, can you
13 really say that with a straight face, no
14 particular relationship with Allard? I
15 mean, he has got a thousand...anyway, I
16 will just take the refusal. I won't argue
17 with you. And he is not going to look for
18 it himself?

19 MR. KRAMER: No, I didn't say that. Is
20 there any...he said...if you possibly have
21 this letter in your possession, you should
22 go and get it. Is it possible?

23 THE DEPONENT: I am curious, this came
24 out of the file, that is the only place I
25 would look. So, if Ms. Duncan is

1 looking...

2 2757. MR. SILVER: But you have files. You
3 have got a garage, you have got a CD, you
4 have got...

5 MR. KRAMER: Now, come on, be fair. He
6 said there might be a CD which...

7 2758. MR. SILVER: Might have the files.

8 MR. KRAMER: I don't think so.

9 2759. MR. SILVER: So, you are not giving the
10 undertaking? That is another refusal?

11 MR. KRAMER: I am happy to give the
12 undertaking if Mr. McKenzie thinks that
13 there is some possibility he has got it.
14 Do you think there is some possibility you
15 have this letter? If so, you should look
16 for it.

17 THE DEPONENT: That is me?

18 MR. KRAMER: Yes. If there is no chance
19 you have it, there is no reason to give the
20 undertaking.

21 THE DEPONENT: I am going to do a fourth
22 scouring of my records.

23 MR. KRAMER: Sure, all right. So he
24 will look for it.

U/T

25

1 BY MR. SILVER:

2 2760. Q. Then, looking at C3 now, with C2
3 beside it...sorry, C2 with C3 beside it. C3 was a
4 document that is dated August 1, 2005, and then it
5 appears that there was another agreement in January
6 1st of 2007 which we know is a month or two before
7 the claim in Ontario was issued. Did you prepare
8 the January 1st, 2007 document?

9 A. I don't recall.

10 2761. Q. You recall seeing it at the time?

11 A. This is January, 2007?

12 2762. Q. Yes.

13 A. Or June 13, 2007? I don't recall.

14 2763. Q. It is clear that the August 1, 2005
15 document, which is entered into with Donald Best in
16 trust for a company to be incorporated, that company
17 turned out to be Nelson Barbados Group Ltd.?

18 A. That is what this document says.

19 2764. Q. Right, and that is what happened.

20 A. I have no reason to believe it is
21 not true.

22 2765. Q. Well, you don't remember any of
23 this?

24 A. Vague recollections.

25 2766. Q. And so, it is true that the company

1 to be incorporated turned out to be Nelson Barbados
2 Group Ltd., right? You just said that.

3 A. As I said, I can't recall but it
4 seems sensible from this document.

5 2767. Q. It also says in the second recital
6 on C2, it says,

7 "...And whereas Nelson Barbados Group Ltd.
8 accepted and adopted the contract on
9 November 15, 2005 and Donald Best had no
10 further liability thereunder..."

11 A. That is what I was reading too. It
12 makes sense.

13 2768. Q. And so, at the time that Nelson
14 Barbados Group Ltd. was incorporated, it was clearly
15 within the contemplation of you and Allard and Best
16 that that company might be used to advance a claim
17 in Ontario, correct?

18 A. It was definitely within that frame
19 of possibility, yes.

20 2769. Q. Then the next recital says,
21 "...Whereas since August 1, 2005 Peter
22 Allard has advanced further monies to
23 Marjorie Knox to defend her minority
24 shareholdings..."

25 That, of course, had to all be in respect of

1 proceedings in Barbados, because the proceeding in
2 Ontario hadn't started yet, right?

3 A. I can't say for sure.

4 2770. Q. But in any event, because of the
5 further monies that he advanced there was a new
6 agreement between him and the Knox family which
7 increased his interest, his upside interest from 15
8 percent to 33 and a third, right? So, can you
9 answer my question?

10 A. Sorry, I lost you. You are reading
11 the third and the fourth...

12 2771. Q. Between August...

13 A. Has advanced money and has increased
14 his...

15 2772. Q. Right, between August 1st, 2005 and
16 January 1st, 2007 Allard had increased his interest
17 in the upside of these litigations from 15 percent
18 to 33 and a third.

19 A. Whatever the chosen in action is.

20 2773. Q. Is there a new agreement between
21 Allard and Knox that reflects that?

22 A. I don't know.

23 2774. Q. Can you look for it and produce it
24 and make inquiries of Allard and the Knoxes to
25 produce that?

1 MR. KRAMER: We are not going to make
2 inquiries of Allard and the Knoxes, but do
3 you believe that you might have this
4 document, Mr. McKenzie?

/R

5 THE DEPONENT: Again, we will look in
6 the file at the office...

U/T

7 MR. KRAMER: Well, hold on, looking in
8 the file in the office...but the files in
9 your garage, if you think it might be in
10 there.

11 THE DEPONENT: As I have said, I will
12 make a fourth scouring of my...

13 MR. KRAMER: How about this, Mr. Silver?
14 Mr. McKenzie is going to do another
15 scouring, as he says, of whatever he has
16 got, and these documents you have
17 identified, and any other documents that
18 seem relevant to this matter will be
19 produced. So, you can take that generally,
20 but certainly we will take...

21 2775. MR. SILVER: The specific undertaking
22 that I think I got was on a best efforts
23 basis to search for and locate a subsequent
24 agreement, subsequent to June 9, 2004
25 between Allard and Knox which increased

1 Allard's stake in upside from 15 percent to
2 33 and a third.

3 MR. KRAMER: Right.

4

5 BY MR. SILVER:

6 2776. Q. Thank you. Mr. Ranking has a
7 question.

8 MR. RANKING: This might speed things
9 up. In the second paragraph, Mr. McKenzie,
10 there is reference to Nelson Barbados Group
11 Ltd. accepting and adopting a contract on
12 November 15, 2005. Do you know what
13 contract that paragraph is referring to?

14 THE DEPONENT: It looks like it is
15 referring to the previous paragraph. I
16 mean, I am just...

17 MR. RANKING: Do you have a copy of that
18 agreement? The November 15, 2005
19 agreement?

20 MR. KRAMER: Are you sure that is the
21 agreement or that is the date it was
22 adopted?

23 MR. RANKING: I took it that there would
24 be a separate agreement adopting the
25 contract.

1 MR. KRAMER: That is not how I read it.

2 2777. MR. SILVER: Me neither.

3 MR. KRAMER: Wouldn't it be a

4 resolution, the company adopting...

5 2778. MR. SILVER: I think the company was

6 incorporated on...what date was the company

7 incorporated?

8 MR. RANKING: I think it was November

9 5th, 2005.

10 2779. MR. SILVER: I think it was November the

11 15th.

12 MR. KRAMER: It doesn't say, "Whereas

13 Nelson Barbados [et cetera] accepted and

14 adopted that contract on November 15,

15 2005", meaning the contract...

16 2780. MR. SILVER: Of August 1st.

17 MR. RANKING: I accept that. What I am

18 asking, is there a document that evidences

19 the adoption on November the 15th?

20 2781. MR. SILVER: Well, that is a whole other

21 conundrum because we have asked for the

22 minutes of Nelson Barbados and of course

23 those have been taken by Mr. Best and he

24 can't be found. So, that is another dead

25 end for us, conveniently.

1 MR. RANKING: Well, I am asking Mr.
2 McKenzie if he might be able to assist?

3 THE DEPONENT: I can't add anything. We
4 went through this last time.

5 2782. MR. SILVER: No, we didn't go through
6 it. You took positions of privilege and
7 confidentiality, so we didn't go through it
8 last time. Don't say that.

9 MR. RANKING: My simple question is
10 whether or not Mr. McKenzie has any
11 documents that might evidence the
12 acceptance of adoption on November 15th of
13 what appears to be the August 1st, 2005
14 agreement that has been marked as Exhibit
15 C3?

16 THE DEPONENT: I gave you all the
17 corporate documents that I could dredge up
18 last time around.

19 MR. RANKING: Okay, thank you.
20

21 BY MR. SILVER:

22 2783. Q. Mr. McKenzie, the August 1st
23 agreement seems to call for a \$150,000 payment by
24 Mr. Best to Mr. Allard to acquire this half of 15
25 percent of the upside. Do you see that? That is in

1 C3. Was that ever paid?

2 A. The 150,000 in that paragraph, I
3 can't say.

4 2784. Q. There is also, we have seen in these
5 documents, a promissory note created for the 150, so
6 isn't it fair to say that the agreement calls for
7 \$150,000, but Best never paid it. Instead he gave a
8 promissory note for the said amount?

9 A. I see the promissory note due
10 November 15th. I cannot say.

11 2785. Q. Well, it is due November 15th, '07,
12 but it is dated November 15th, '05. So, on the date
13 of the incorporation of the company, it gave a
14 promissory note to Allard for 150, being the 150
15 that was the consideration for the purchase of 50
16 percent of the 15 percent interest. Right?

17 A. I am back at C2 where it says Nelson
18 is going to borrow from Allard, so I guess you have
19 to look at their books.

20 2786. Q. But you can't help us?

21 A. No.

22 2787. Q. So, even today you can't tell us
23 what the deal is between Best and Allard? Best
24 acquires this interest, but you can't tell us if he
25 paid the 150, whether there is any other contracts

1 or documents? All you can do is look at the
2 documents that we all have in front of us and
3 interpret them in the same way as a court can do
4 without you? Is that it?

5 A. I was not involved in their
6 bookkeeping.

7 2788. Q. You were involved in the creation of
8 these documents, though. Isn't that true?

9 A. Well, as I said, I am vague on the
10 details, but I was aware of transactions between
11 these guys or these companies.

12 2789. Q. And you were aware that one of the
13 purposes of the transaction between these guys was
14 in connection with a possible action in Ontario?

15 A. I think I said that was a
16 possibility, yes.

17 MR. KRAMER: Can I have a two-minute
18 break before we go on?

19
20 --- A BRIEF RECESS

21
22 K. WILLIAM MCKENZIE, resumed

23 CONTINUED CROSS-EXAMINATION BY MR. SILVER :

24 2790. Q. I would like to look at Exhibit J to
25 Jessica Duncan's affidavit. She tendered this

1 document in response to the indication on your
2 cross-examination that your accounts for Nelson
3 Barbados were left in some drawer and were at
4 reception and picked up by Best. Do you agree now
5 that that was false? That that is not how Nelson
6 Barbados' accounts were sent?

7 A. The client got them.

8 2791. Q. Which client?

9 A. Jane Turnbull got them.

10 2792. Q. Well, you didn't tell us that last
11 time.

12 A. Show me. Show me.

13 2793. Q. Show you what?

14 A. Well, I am just saying, I am not
15 going to take your word for it. I am saying...

16 MR. KRAMER: You want to see what you
17 said about this last time around?

18 THE DEPONENT: Well, I have a...

19 2794. MR. SILVER: Show you what? What you
20 said the last time?

21 THE DEPONENT: Well, you are just
22 saying...

23 MR. KRAMER: Here you are.

24 THE DEPONENT: I want to look at what
25 you say I said last time that is contrary

1 to what I am saying now...

2

3 BY MR. SILVER:

4 2795. Q. Whatever you want.

5 A. ...which is the whole...

6 MR. RANKING: I will tell you what you
7 said. You said that the accounts were left
8 at reception and picked up by Donald Best.

9 THE DEPONENT: Right.

10

11 BY MR. SILVER:

12 2796. Q. And you didn't tell us whether that
13 is true or not, you didn't tell us that they were
14 also sent to Allard. And Jessica Duncan is
15 commenting on that saying, Mr. McKenzie is not
16 right. He sent the accounts through Sunny Ware to
17 Allard. And all you have to do is look at Exhibit J
18 to her affidavit.

19 MR. KRAMER: Sure. So, you want to look
20 at pages 294 and 295. Hold on a minute.
21 Okay, I am showing...

22 2797. MR. SILVER: Your 5:00 deadline tomorrow
23 is in jeopardy, Mr. McKenzie. I can tell
24 you that right now.

25 MR. KRAMER: You might want to look at

1 these answers as well.

2 MR. RANKING: Just for the record, what
3 is it that Mr. McKenzie is reading?

4 2798. MR. SILVER: He is trying to refresh his
5 memory as to what he told us...

6 MR. KRAMER: That is fine. I will
7 clarify it for you, Mr. Ranking.

8 MR. RANKING: Thank you.

9 MR. KRAMER: I have pulled out Ms.
10 Duncan's affidavit, paragraph 24, on this
11 issue, where she refers to Mr. McKenzie's
12 evidence at pages 294 and 295 of his cross-
13 examination. He is looking at that. I
14 have also turned up for him page 247 of his
15 previous...of his cross-examination where
16 he talks about the accounts being picked up
17 at reception. So that this way he will be
18 able to remember what his previous evidence
19 was and then he can answer Mr. Silver's
20 question.

21 MR. RANKING: Thank you.

22

23 BY MR. SILVER:

24 2799. Q. Okay, are you ready?

25 A. Jane got them. That was borrowed

1 money from Nelson Barbados or to Nelson Barbados,
2 according to that agreement you just showed me. I
3 am just putting two and two together. And Nelson
4 Barbados...

5 2800. Q. Instead of putting two and two
6 together...

7 A. ...saw the accounts, got the
8 accounts.

9 2801. Q. So, you say that Nelson Barbados saw
10 the accounts because you left them in some box at
11 reception and Nelson Barbados picked it up? I mean
12 Donald Best picked them up, right?

13 A. They got them, yes.

14 2802. Q. What is also now clear with thanks
15 to Jessica Duncan is that you are also sending them
16 to Jane Turnbull, Allard's secretary, right?

17 A. "Please find our account"...yes.

18 2803. Q. Jane Turnbull is Allard's secretary?

19 A. Accounting department, something.

20 2804. Q. Sunny Ware, on December 19th sent
21 her the December account for 543 and the December
22 account for 568...

23 A. Okay.

24 2805. Q. ...right?

25 A. M'hmm.

1 2806. Q. And she said,
2 "...The payments for these can, as usual,
3 be wired to our regular trust account..."
4 Right?

5 A. Yes.

6 2807. Q. So, you were sending the two
7 accounts to Mr. Allard for payment, and he paid
8 them, right?

9 A. They were being sent for payment. I
10 guess we would have to look at the ledgers again to
11 see what...

12 2808. Q. Well, I looked. The December
13 accounts were paid by Mr. Allard.

14 A. I will take your word for it.

15 2809. Q. To the extent that the money was
16 showing on the trust statements as coming from
17 Nelson Barbados, that was sort of a legal fiction
18 that there was...I guess as I now understand it,
19 there was an intermediary step where Allard was
20 paying them, but really by way of loan to Nelson
21 Barbados, and Nelson Barbados was really paying them
22 and owed a like amount to Allard. Is that it now?

23 A. The document that I looked at said,
24 a minute ago, that Allard is lending money to Nelson
25 Barbados. Is that what you just said?

1 2810. Q. I didn't say that. Is that what you
2 say was happening?

3 A. That is...just refreshing my memory
4 here, because I am trying to...

5 MR. KRAMER: Pull back up Exhibit C.

6 THE DEPONENT: Yes, so that is
7 consistent with Allard lending money to
8 Nelson, which is in this C2, right? So, I
9 think...did I just answer your question?

10

11 BY MR. SILVER:

12 2811. Q. Is that what was happening?

13 A. Well...

14 2812. Q. Or, you had an understanding that
15 you are piecemealing together?

16 A. My recollection is a bit confused,
17 but that seems to be logical.

18 2813. Q. The fact is that whether or not
19 below the records, or outside of the records Allard
20 was sending money that was actually being loaned to
21 Nelson Barbados. That is is not reflected in the
22 records. What the records reflect is that the
23 accounts for both files were being sent to Allard
24 and he was sending money in to pay them just as
25 Sunny Ware confirms in this e-mail.

1 A. Well, I am only going to...I don't
2 want to go back into the ledgers again, but we saw
3 money in our trust account that said it was coming
4 in from Nelson Barbados, which...

5 2814. Q. But it didn't come from Nelson
6 Barbados. You admitted that it came from Allard.

7 A. We were going to look to see who had
8 wired that money that showed in our trust account as
9 coming from Nelson Barbados. They seemed to be
10 consistent with a payment or loan.

11 2815. Q. Mr. McKenzie, am I not right that
12 just as Sunny Ware sets out in this document, she
13 was sending the accounts for both files to Mr.
14 Allard and requesting payment as usual by wire
15 transfer? That is what this says, isn't it?

16 A. Well...

17 2816. Q. In the rest...isn't that right?

18 A. Well, I am just saying...I don't
19 want to take 20 minutes to trace back through the
20 whole thing, but if you had the wire coming in that
21 says Nelson Barbados, and it came from Peter
22 Allard...I am just saying it sounds to me like this
23 is correct, that Allard was advancing money to
24 Nelson Barbados and sending it to our trust account.
25 I am okay with that.

1 2817. Q. That is not what this shows.

2 A. Well...

3 2818. Q. Exhibit J shows that the accounts
4 were being sent to Allard and he was paying them, in
5 both files.

6 A. Well, we can argue that. I am just
7 saying that this is out of my knowledge at this
8 point.

9 2819. Q. Well, whose knowledge is it in?

10 A. Well, I am just saying I agree money
11 was being wired in. I agree there was a loan
12 agreement. And those guys did the bookkeeping.

13 2820. Q. Who is "those guys"?

14 A. Well, Nelson Barbados and Peter
15 Allard have their own books. In other words, I am
16 thinking Nelson Barbados' balance sheet must look
17 like money received, loan owing.

18 2821. Q. Do you know of any repayment from
19 Nelson Barbados to Allard?

20 A. I don't know of...

21 2822. Q. You don't know of any repayment?

22 A. ...transactions. Unless there is
23 some reflected in here. I haven't been through it
24 all.

25 2823. Q. Well, trust me, I have and I don't

1 find it. Then, if I have got it right, you docketed
2 your time to 543 exclusively until you opened a file
3 568?

4 A. I take your word for it. I haven't
5 done that match.

6 2824. Q. So, there was a year and a
7 half...the first account in 568 was April 20, 2007,
8 and the first docket was April 2. Before April 2,
9 2007 all of your time spent with respect to Allard
10 and Best and Nelson Barbados was docketed to 543,
11 the Peter Allard account?

12 A. I think that I saw that in the...we
13 started docketing and then all of a sudden the
14 Nelson Barbados file started to be docketed.

15 2825. Q. And up until then all of it got
16 docketed to the Allard file, 543, right?

17 A. Yes.

18 2826. Q. And billed to Allard, right?

19 A. I am not sure. The documents say
20 what they say.

21 2827. Q. Well, they all...

22 A. I understand, but I am saying they
23 all went to Seaview in Barbados.

24 2828. Q. They all went to Peter Allard at
25 Seaview.

1 A. No, I am just saying...I understand
2 that.

3 2829. Q. Every one of them?

4 A. Yes. Those from 543 to the best of
5 my recollection were directed to Peter Allard,
6 Seaview, Barbados.

7 2830. Q. And they were paid for by Peter
8 Allard?

9 A. I haven't cross-checked all the
10 trusts but that sounds reasonable.

11 2831. Q. Right. And then...so, if we get
12 into the content of the work that you did starting
13 with the first account...

14 A. Sorry, go ahead.

15 2832. Q. Then we get into the content of the
16 accounts, but I suggest to you that you set up the
17 568 file, not because there was any real change in
18 who your client was, but because in the event that
19 you were successful in the action in Ontario, you
20 wanted to have a separate file of time charges that
21 might be assessable on a cost submission, right?

22 A. My best recollection is a separate
23 file was opened more or less when the litigation
24 started. And so what you are saying is logical. To
25 keep track...keep it away from...because the Allard

1 file had all sorts of jobs in it.

2 2833. Q. Including...the Allard file had all
3 sorts of jobs in it, including the consideration of
4 an action in Miami, and the consideration of an
5 action in Ontario?

6 A. That is all part of the analysis as
7 time progressed.

8 2834. Q. And billed to Allard?

9 A. I think you are right. Again, I
10 haven't checked all the records, but that sounds
11 about right.

12 2835. Q. Right. And just to start looking at
13 some of these accounts, to get a feel for them, so
14 we are starting with a revised statement of account.

15 MR. KRAMER: Sorry, which tab are you
16 in?

17 2836. MR. SILVER: K.

18 MR. KRAMER: So, we are looking at the
19 first one, November 4, '05?

20 2837. MR. SILVER: Right.

21 MR. KRAMER: Okay.

22

23 BY MR. SILVER:

24 2838. Q. PA in your accounts is Peter Allard?

25 A. Yes.

1 2839. Q. JG is Jane Goddard?
2 A. Yes.
3 2840. Q. JK is John Knox?
4 A. Yes.
5 2841. Q. KWM is you?
6 A. Yes.
7 2842. Q. Who is SM? Sean Moore?
8 A. Likely.
9 2843. Q. Who is Sean Moore?
10 A. Gowlings.
11 2844. Q. A lawyer...so, he is counsel to
12 Allard?
13 A. I can't remember exactly.
14 2845. Q. Well, you say in your first entry,
15 "...Calls from and to PA and conference
16 call with PA and Gowlings..."
17 A. One moment. I am just saying Sean
18 Moore and Gowlings are the same in my head. And
19 counsel...
20 2846. Q. Well, why was Gowlings involved?
21 A. They gave advice...
22 2847. Q. To?
23 A. ...I guess they gave it to Peter
24 Allard.
25 2848. Q. And so, right from the very first

1 entry it is clear that, and then throughout, and I
2 don't have to take you through all these, just turn
3 to any page and you will see the initials PA or JK
4 or JG. So, throughout, from the very beginning you
5 were in a regular communication with your client,
6 Peter Allard, and members of the Knox family, right?

7 MR. KRAMER: Do you want to look at the
8 account?

9 THE DEPONENT: Well, I am saying...they
10 say what they say. I mean, I was in
11 communication with lots of people,
12 including them, sure.

13

14 BY MR. SILVER:

15 2849. Q. Including them, and you were in
16 regular communication with them throughout?

17 A. Regular.

18 2850. Q. Right. The October 20th docket says
19 that you did a memo re strategy. Do you remember
20 that very first memo? Did that set out the strategy
21 of moving jurisdictions to Ontario and/or Miami?

22 A. I don't recall.

23 2851. Q. It might have?

24 A. The big picture of...there's tax,
25 there's if money is made or lost on the deals.

1 2852. Q. Can you look through your files and
2 see if you can produce that memo?

3 MR. KRAMER: Surely that would be in the
4 firm file?

5 2853. MR. SILVER: I have asked for that
6 undertaking, but I have learned not to take
7 chances.

8 THE DEPONENT: I wouldn't have it.
9 Well, other than...

10 MR. KRAMER: Mr. McKenzie doesn't think
11 he would have it. I mean, you have got our
12 general undertaking that he is going to
13 rescure yet again. If that pops up...but
14 that does not seem possible. But that
15 should be in the firm file, shouldn't it?

16 2854. MR. SILVER: No, not if he removed the
17 firm file.

18 THE DEPONENT: Not everything finds its
19 way into the file.

20

21 BY MR. SILVER:

22 2855. Q. Not everything finds its way into
23 the file. And then you will see on the second page
24 in the tab, you are talking to Allard and Knox
25 and...I mean Goddard and Knox, and then October 16th

1 it says,

2 "...Preliminary drafting of claim..."

3 I take it that that was a very first crack at the
4 Ontario claim?

5 A. I have to see this.

6 2856. Q. Well, I can't show you a document.
7 You have that, or your firm would have that. You
8 don't know. But it could be the earliest draft of
9 the Ontario claim?

10 A. Anything is possible. It might have
11 been the BIT thought they were using.

12 2857. Q. The what?

13 A. Well, I am just noticing that on
14 there, there is a business investment treaty type of
15 direction.

16 2858. Q. Did you have a retainer with Allard?
17 Because on October 20th it seems as though Sunny
18 Ware drafted a retainer letter. Did you have a
19 retainer letter with Allard?

20 A. I have no recollection.

21 2859. Q. And then Sunny Ware on the same date
22 says,

23 "...Review various e-mails exchanged. KWM,
24 PA, KGE re blog strategy..."

25 What was the blog strategy?

1 A. Where is that?

2 2860. Q. October 20th,

3 "...Review various e-mails exchanged, KWM,

4 PA, KGE re blog strategy..."

5 Do you see that?

6 A. I see it.

7 2861. Q. What was the blog strategy, Mr.

8 McKenzie?

9 A. I don't recall what that was.

10 2862. Q. Who is KGE?

11 A. I can't recall.

12 2863. Q. I am going to suggest to you, Mr.

13 McKenzie, that from your first involvement in '05,

14 you and your client and the others involved had

15 agreed and determined that, "We are going to

16 litigate this in the courts and in cyberspace". And

17 you developed a blog strategy that was intended to

18 cause damage and put pressure on any number of

19 defendants through the blogging. Isn't that true?

20 A. I don't agree.

21 2864. Q. But you can't tell me what the blog

22 strategy was? And Ms. Zemel showed you 900 hours of

23 blogging and I am suggesting to you all that was

24 part of a blog strategy that you were in the middle

25 of, and you can't tell me what the blog strategy

1 was; is that it?

2 A. I can't recall.

3 2865. Q. October 23, page 4 of the account.

4 October 22nd, let's go to.

5 "...Call to investigator in PA. Review
6 blog strategy..."

7 Is the investigator Best?

8 A. What date is that, sorry?

9 2866. Q. October 22.

10 A. I don't recall.

11 2867. Q. And you don't know what the blog
12 strategy was that was being discussed in October of
13 '05?

14 A. I don't recall.

15 2868. Q. Then, October 23 you work on
16 security documents. I suggest to you that those are
17 the security documents that are the Exhibit C
18 documents?

19 A. Review security documents. Review
20 PwC documents.

21 2869. Q. From Peterco.

22 A. I don't recall. Which...

23 MR. KRAMER: Those dates don't seem to
24 fit, though, do they Mr...

25 2870. MR. SILVER: Well, you can date a

1 document any date that is convenient. It
2 is the same time period.

3 MR. KRAMER: Okay.

4

5 BY MR. SILVER:

6 2871. Q. Then on October 24th you call Peter
7 Allard and the security documents that you worked
8 on, that you reviewed on the 23rd, you then reviewed
9 them with Knox and Goddard. It says,

10 "...Review documents from JK, JG and
11 security documents. Call to make plans for
12 incorporation of Canadian company..."

13 So, isn't that what you were doing, you were working
14 out the set of documents with Best, reviewing it
15 with Allard, discussing it with John Knox and Jane
16 Goddard, all with a view to making plans to
17 incorporate the Canadian company so that at some
18 point you would advance with the Canadian action?
19 That is what was going on, right?

20 A. I don't recall.

21 2872. Q. You can't deny that, though? What I
22 just suggested. You can't deny that? Can you?

23 A. Well, I can't recall, but...

24 2873. Q. So, you can't deny what I just
25 suggested?

1 A. That is logical, if I can't recall.

2 2874. Q. The call to make plans for the
3 incorporation of a company was a call or calls that
4 you had with, at least, Allard, John Knox, Jane
5 Goddard and Donald Best, right?

6 A. I don't think that is right.

7 2875. Q. Well, who would you have been
8 talking to incorporation of the Canadian company
9 with?

10 A. I'll go through this. Can I just
11 look at the transcript, the first one? I think I
12 remember reading this similar question in the
13 transcript from February, and my memory has not
14 improved and so I'll just say I adopt those.

15 2876. Q. You adopt what? You didn't answer
16 in February. You took positions of privilege and
17 confidentiality.

18 A. Okay, just give me a minute. Okay,
19 well I will say I don't recall. I can't find it.

20 2877. Q. Let's look at the December 6th
21 account next, please, the next account in Exhibit K.

22 A. Got it.

23 2878. Q. I am doing it from the accounts
24 because we both accept that the ledgers are
25 consistent with the accounts, but if at any time you

1 want to go check a docket against what was entered
2 into the ledger, you are free to do that.

3 A. Okay.

4 2879. Q. So, in the December 6th account,
5 this is an account that you actually signed, and we
6 have established that. Right?

7 A. Okay.

8 2880. Q. Then there is a docket entry for, I
9 guess, November 4th Sunny Ware was looking into the
10 Law Society as to whether or not you could act in
11 Barbados, right?

12 A. It doesn't ring a bell, but that
13 would be a standard...a standard consideration.

14 2881. Q. Well, at the bottom on the November
15 7th docket entry for Sunny she says she sent you an
16 e-mail re info received from LSUC re licence to
17 appear in Barbados Court. So, you don't remember it
18 but that is what happened?

19 A. Yes.

20 2882. Q. And then, on November 7th your
21 docket entry says "Travel at half", which I don't
22 know where you travelled to, but assuming that
23 Allard was in Barbados, it was probably to Barbados
24 where you had discussions with Peter Allard and
25 drafted 15 percent assignment contract. Do you see

1 that?

2 A. I do.

3 2883. Q. That is an accurate docket?

4 A. That is whatever was put in there.

5 I am just looking at it. It is a long time ago.

6 2884. Q. In fact, as I suggested to you
7 earlier and you weren't clear, your answer wasn't
8 clear, you drafted the documents that, in this
9 regard are probably more than likely the C3 and C4
10 documents, the ones that have August 1, 2005 dates
11 on it? Right?

12 A. My recollection is being involved in
13 the interaction, drafting...I mean...

14 2885. Q. I know your docket says that that
15 interaction included a drafting of 15 percent
16 assignment contract. You wouldn't have docketed
17 that if you didn't do it. That would be fraud. You
18 wouldn't docket something you didn't do and then
19 charge your client and collect the money?

20 A. I am jumping around here. You are
21 jumping around. I am saying I don't recall his
22 docket. I don't recall what I did. But it is...

23 2886. Q. But you can't contradict or deny
24 that...

25 A. Accurately docketed.

1 2887. Q. You can't contradict it is
2 accurately docketed, and you can't contradict or
3 deny that what it reflects is that you drafted the
4 documents that we find at C3 and C4 of the exhibits?
5 Right?

6 A. Well, the dates don't match. I
7 don't know if there is another one. But I don't
8 recall what I did on that day.

9 2888. Q. On November 7th you could have
10 docketed...drafted an agreement and put an August
11 date on it?

12 A. Well, anything could be possible, I
13 agree with that.

14 2889. Q. And then, moving to the bottom of
15 the account.

16 A. Bottom of the account?

17 2890. Q. Well, to page 8. There is two
18 disbursements on there for "Pay to NIS Inc.". Those
19 were actually invoices received and paid?

20 A. Two?

21 2891. Q. \$2,500 and \$5,000.

22 A. Okay.

23 2892. Q. And NIS Inc. was Best's company.
24 You knew that at the time?

25 A. Yes, that was likely his work or his

1 people's work, and that is his company, yes.

2 2893. Q. You knew when you got an NIS invoice
3 that it was Best's company?

4 A. Yes, he was the contact, no doubt
5 about that.

6 2894. Q. What was he doing with the special
7 blog research? Is that part of the blog strategy?

8 A. Have we got the...I mean, we already
9 went through this with Mr...but I am just saying, is
10 there an invoice that might refresh my memory?

11 2895. Q. There are NIS invoices thanks to Ms.
12 Duncan. They are at tab G.

13 A. What does this one say?

14 2896. Q. I beg your pardon?

15 A. I am just saying, show me the
16 account. Might just help.

17 MR. KRAMER: I think it is the first one
18 in G?

19 2897. MR. SILVER: No, it isn't.

20 MR. KRAMER: You are right, that is for
21 a different lab.

22 2898. MR. SILVER: It is the second one.

23 MR. KRAMER: The second one is for
24 \$2,600. The third one is for \$5,000, that
25 means the third one.

1 2006 account. You will remember that on February
2 8th I cross-examined you about e-mails sent and
3 received to Richard Cox in late December, 2005 and
4 setting up and meeting with him in January, on
5 January 7th, 2006. You couldn't really remember
6 that, and you couldn't remember your e-mail address,
7 and you couldn't admit that those e-mails were sent.
8 Remember all that?

9 A. Could I just see...

10 MR. KRAMER: What are you looking for?

11 THE DEPONENT: The transcript that he is
12 talking about. But anyway, go ahead, ask
13 your question.

14

15 BY MR. SILVER:

16 2903. Q. You remember all that exchange we
17 had?

18 A. There was quite an exchange of these
19 documents.

20 2904. Q. Where are the exhibits from...are
21 these the exhibits?

22 MR. KRAMER: No.

23 2905. MR. SILVER: You have the exhibits from
24 the cross-examinations where you found
25 Exhibit 10 before.

1 MR. KRAMER: Right.

2 2906. MR. SILVER: Can I see them. There were
3 a bunch of e-mails that I had put to you.

4 MR. KRAMER: There is another volume by
5 the way.

6 2907. MR. SILVER: Where is the other one?
7 All right. You will recall that I put a
8 series of e-mails to you, starting at
9 Exhibit 23?

10 MR. KRAMER: You want to look at where
11 this is dealt with in the transcript?

12 THE DEPONENT: He is asking me to recall
13 what I did at another day.

14

15 BY MR. SILVER:

16 2908. Q. No, I am asking you whether you
17 recall me putting these e-mails to you.

18 A. Let me have a look.

19 2909. Q. Well, we have to look together.

20 A. Yes, I am going to give it right
21 back to you, I am just saying you put this document
22 in front of me, I agree with that.

23 2910. Q. I put this document and I put a
24 whole series of e-mails from Exhibit 23 through to
25 31 inclusive.

1 A. You put...

2 2911. Q. A series of them.

3 A. Yes, I am just saying, you put a
4 series of documents in front of me, I agree.

5 2912. Q. And I asked you questions aimed at
6 confirming that your involvement with these matters
7 pre-dated what you had said on cross-examination,
8 namely the fall of '06, and they use these documents
9 to show that you had been involved long before that,
10 and you wouldn't admit that. You took positions of
11 privilege, confidentiality, memory loss, not being
12 familiar with the e-mail address.

13 I mean, there was a whole host of reasons
14 why you couldn't accept that as I was suggesting to
15 you, that you had been involved long before the fall
16 of '06 and that involvement included meeting with my
17 client in January of '06?

18 A. You forgot authenticity, because we
19 specifically said that it didn't look authentic.
20 But you were trying to refresh my memory is my
21 recollection.

22 2913. Q. And it didn't help. It didn't
23 refresh your memory.

24 A. Well, my answers are what they are.

25 2914. Q. Do your accounts now refresh your

1 memory, sir?

2 A. I recall meeting with Mr. Cox.

3 2915. Q. In January of '06.

4 A. That time frame...

5 2916. Q. If you are looking...

6 A. I am just saying I met him...I won't
7 be specific with the date, but I recall having a
8 meeting with him and his son and another gentleman
9 from Toronto.

10 2917. Q. But you couldn't recall that when I
11 asked you the last time. So, your memory has
12 improved since the last time?

13 A. Well, as you said, I looked at...

14 2918. Q. The accounts?

15 A. ...more stuff and...

16 2919. Q. So, if you look at the January 20th
17 account and go to the December 22nd entry?

18 MR. KRAMER: December 22nd?

19 2920. MR. SILVER: Yes.

20 MR. KRAMER: All right, we have got it.

21

22 BY MR. SILVER:

23 2921. Q. You have an entry, "Calls with SM",
24 that is Sean Moore, I guess. That is Allard's
25 lawyer at Gowlings, right?

1 A. I gather.

2 2922. Q. "And Nathan". We have established
3 Nathan is a pseudonym for Best?

4 A. The Nathan project, yes.

5 2923. Q. But when it says "Calls with
6 Nathan", it meant you spoke to Best?

7 A. More than likely.

8 2924. Q. Then it says, "With Richard Cox".
9 Do you see that in your docket?

10 A. Yes.

11 2925. Q. That is exactly consistent with
12 Exhibit 23 which speaks of a call that you had on
13 Thursday, 22 December, 2005.

14 A. I don't recall the call with Mr.
15 Cox, or a call with Mr. Cox.

16 2926. Q. But you admit that one happened?

17 A. No.

18 2927. Q. But, you have docketed it and you
19 have billed it to your client and you collected.

20 A. I am just saying I don't recall it.
21 If it is in there...

22 2928. Q. It happened.

23 A. Probably happened. I mean, I don't
24 think the dockets are that inaccurate.

25 2929. Q. And then just as these e-mails show

1 that there was further activity through the end of
2 December into January to schedule the meeting, so do
3 your accounts.

4 A. I met with Mr. Cox, I agree with
5 you.

6 2930. Q. You met with him on January the 7th
7 as indicated in your docket on page 6. Meeting with
8 Michael Berry January 7, '06. Who is Michael Berry?

9 A. Banker.

10 2931. Q. In Barbados?

11 A. What date was it, sorry?

12 2932. Q. January 7th.

13 A. Must have been in Barbados if I was
14 having lunch or a meeting with Mr. Cox.

15 2933. Q. And meeting with JG and JK. In
16 fact, you say that in the e-mails, that you backed
17 up the lunch to a later date because you were going
18 to meet with Goddard and Knox before that, and in
19 fact, your docket confirms that that is what you
20 did.

21 A. I agree that those things happened.

22 2934. Q. Right. And then you met with
23 Richard and you said Gerald Cox's name is really
24 Gerard. There is a typo by a letter.

25 A. Well, as I say my docket is more

1 or less accurate. I don't get everything right.

2 2935. Q. Then on January 9th you do an e-
3 mail. Of course, like most other days you get an e-
4 mail from Knox and Goddard and you review documents
5 that you got from Knox. You call PA and TH. TH is
6 Tony Hoyos, the guy that you got involved in the
7 meeting with Cox, right?

8 A. My recollection is Tony Hoyos is
9 another wheeler/dealer that this is all part of
10 trying to get some money together, and we could
11 buy/sell or do something, yes.

12 2936. Q. Yes, but you got him involved in the
13 meeting with Cox.

14 A. It is not my recollection.

15 2937. Q. Then, in any event you say,
16 "...E-mailed to PA and discussion with him
17 about strategy for this month, and then we
18 need a final repercussions discussion
19 before taking the next major step..."

20 Do you see that?

21 A. Yes.

22 2938. Q. And you did that on January the 9th,
23 right?

24 A. Likely I spoke with Mr. Allard, I
25 just don't remember the date.

1 2939. Q. I suggest to you that what you were
2 discussing with Mr. Allard is, have this meeting
3 with Cox. We give him...let's set a strategy for
4 when we are going to hear from him, because we have
5 got to let him know that there is repercussions, a
6 final repercussion discussion before taking the next
7 major step, which was what? What was the next major
8 step that you are referring to in this document?

9 A. I don't recall.

10 2940. Q. I will suggest to you that the next
11 major step that you are referring to in this docket
12 is launching the Ontario action.

13 A. I don't think so.

14 2941. Q. Well, what was it, then?

15 A. My recollection is, I had the whole
16 issue with Cox who was representing himself as being
17 in a position, which I didn't ever know was accurate
18 or not, was there was a deal to be made that
19 required money. He said he had things, Tony Hoyos
20 had other things, or had a story and a gentleman
21 from Canada who could raise money and was interested
22 in the deal. Allard wanted out. And that
23 interaction in that period was, there is a deal to
24 be made. I mean, it is just money...solve
25 everybody's problem. That is my recollection.

1 2942. Q. Sir, you gave me a nice answer, but
2 you didn't answer my question.

3 A. Well, the next major step was that I
4 said negotiate, mortgage, whatever. My best
5 recollection.

6 2943. Q. But you talk about final
7 repercussion discussion which suggests that you were
8 preparing for what would happen if you didn't have a
9 settlement, not if you did.

10 A. ...To my recollection...

11 2944. Q. Well, let me help you. You will
12 recall an e-mail that you sent...this goes out a
13 little bit, into April of 2006, because we saw
14 through the e-mails that the discussions with
15 Richard went on, but in April of 2006 you sent an e-
16 mail to...actually it was through Hoyos, he got to
17 my client, that you said,

18 "...I will target the week of April 17th to
19 visit Barbados if that will help, and it
20 will give you time to go over things with
21 Richard..."

22 You are writing to Hoyos.

23 "...The thing is, we are running out of
24 time until things wrap up in the litigation
25 scene outside of Barbados and it may then

1 party to a second party. Mr. Dewart said
2 we are not accepting its authenticity. Put
3 an affidavit in and we will test it, or
4 something like that...

5 2948. MR. SILVER: No, he didn't.

6 THE DEPONENT: Excuse me. I am
7 paraphrasing, and I am saying..."an exhibit
8 yet to be identified". So in the meantime
9 I am just saying (a) I have a
10 confidentiality problem. I am just giving
11 you my recollection, but the transcript
12 speaks for itself.

13 MR. RANKING: Do you take any issue with
14 the authenticity of the document today?

15 THE DEPONENT: Well, nothing has
16 changed. I mean, Mr. Silver gave a ton of
17 evidence which, I thought it would be
18 backed up with an affidavit so it could be
19 tested.

20 MR. RANKING: I would just like to know,
21 do you take any issue with respect to the
22 authenticity of the documents that Mr.
23 Silver previously put to you that he has
24 put to you again today? If you do, I want
25 to know with what you take issue?

1 THE DEPONENT: All I can say is the
2 position hasn't changed since whatever Mr.
3 Dewart did whatever he did there.

4 2949. MR. SILVER: I think I just established
5 that his docket is consistent with the
6 communications in those e-mails but he is
7 still going to take issue with the
8 authenticity, so...

9 MR. RANKING: I just want to know if he
10 is taking issue with the authenticity, I
11 just want to know that. I want to make
12 sure that notwithstanding your cross-
13 examination, that Mr. McKenzie, on the
14 record today, continues to take issue with
15 all of the exhibits that you put to him...

16 2950. MR. SILVER: Twenty-three to 31.

17 MR. RANKING: Start at Exhibit 23 to 31.
18 Is that your position, Mr. McKenzie?

19 THE DEPONENT: Mr. Cox is documentarily
20 challenged.

21 MR. RANKING: I am not asking whether
22 Mr. Cox is documentarily challenged or not.

23 THE DEPONENT: I am just saying...

24 MR. RANKING: No, no. With the greatest
25 of respect, and I have been sitting here

1 and Mr. Silver has had to weather the storm
2 longer than I have, I need an answer to my
3 question. I am putting to you that you are
4 continuing to take issue with those very
5 documents. Is that not, in fact, the case?
6 Yes or no?

7 THE DEPONENT: Whatever Mr. Dewart said
8 is still the position.

9 MR. KRAMER: Well, look, I am counsel
10 now, and I don't see any basis to suggest
11 these aren't authentic documents. If you
12 think so, speak up and tell us why. They
13 look like e-mails to me, some of which you
14 sent. Is there some reason for you to
15 think that these aren't real, that these
16 were fabricated somehow?

17 THE DEPONENT: Can I just have a look...

18 2951. MR. SILVER: And he said he didn't know
19 what KWM External is and so Jessica Duncan
20 comes in with an affidavit that says, that
21 is the e-mail address he was using.

22 MR. KRAMER: Well, if you don't think
23 those are what they appear to be tell us
24 why and then maybe we will assert that in
25 court. But if you don't say that, I won't

1 be asserting that in court.

2 THE DEPONENT: I understand but I think
3 it is on the record, but my recollection is
4 that Mr. Silver stated that just yesterday
5 a lady called Judy Cox had sent something
6 that purported to be a copy of something
7 from years ago, and I think Mr. Dewart put
8 the kibosh on it sort of saying,
9 "Authenticate it, Mr. Silver". The
10 transcripts speak for themselves.

11 MR. KRAMER: Whether something is
12 admissible is a different question.

13 THE DEPONENT: I understand.

14 MR. KRAMER: There is a bunch of e-mails
15 here. They are asking if you are disputing
16 that these things are what they appear to
17 be. Whether they are admissible in court
18 because there ought to be an affidavit is a
19 different question.

20 THE DEPONENT: Whatever answers I gave
21 last time, I can't improve on. Nothing has
22 changed since last time with regard to the
23 transcript.

24 2952. MR. SILVER: Sir, it isn't about last
25 time or this time. It is, are you

1 challenging the authenticity of Exhibits 23
2 to 31 today?

3 THE DEPONENT: I don't want to get into
4 legal argument with anybody.

5 MR. KRAMER: You have to say...it is a
6 proper question, Bill. You have to say,
7 are you admitting or not that these
8 documents appear to be what they are.

9 2953. MR. SILVER: Or sent and received as
10 they appear on the documents.

11 THE DEPONENT: From this lady Judith
12 Cox, I cannot.

13 MR. KRAMER: There is a whole bunch of
14 them. There is some from Richard, they
15 are to you and from you, some of them.

16 2954. MR. SILVER: Mr. Kramer, so that you
17 understand...

18 MR. KRAMER: I think I understand.

19 2955. MR. SILVER: ...on February 3rd...

20 MR. RANKING: No, Mr. Kramer...

21 2956. MR. SILVER: I want this on the record.
22 On February 3rd we heard this evidence that
23 he only got involved in the fall of '06.
24 My client who is married to Judith Cox was
25 on holiday. I spoke to him and I said, "Is

1 A. I don't have the original e-mails
2 and you don't because of my problem. These are,
3 perhaps not accurately representative of what the
4 transmissions were.

5 MR. RANKING: I think we can proceed on
6 the basis that Mr. McKenzie stands by his
7 earlier evidence and notwithstanding the
8 cross-examination by Mr. Silver, unless
9 advised to the contrary, Mr. McKenzie
10 continues to dispute the authenticity of
11 the exhibits that have been marked as
12 Exhibits 23 through 31.

13 2958. MR. SILVER: Right.

14 MR. RANKING: We will move on.

15
16 BY MR. SILVER:

17 2959. Q. Let's go to the account of February
18 28th, as the next account. You will see, for
19 example, an entry on February 8th and 9th.

20 "...E-mails from JK re Iain Deane e-mail,
21 e-mail to Brian Casey, review documents in
22 Deane v. Knox case. Webnation and blogging
23 search. Call PA in LA..."

24 Is that accurate? Did I just read your docket
25 accurately?

1 A. You did.

2 2960. Q. What were you doing re Webnation and
3 blog searching in February of 2006?

4 A. I don't recall, but we were looking
5 at arbitration. I am wondering if that is what it
6 was. I am just saying that Brian Casey is an
7 arbitrator or something like that.

8 2961. Q. Nation is a blog site?

9 A. I think it is the...well...

10 2962. Q. Webnation is a blog location, a blog
11 site? Where stuff relating to Nelson Barbados is
12 posted?

13 A. I am thinking it is the electronic
14 version of a newspaper that is called The Nation,
15 but I could have called it a blog, perhaps. But The
16 Nation sounds right.

17 2963. Q. And then you turn to the next page,
18 February 10th,

19 "...Blogging, review documents from and
20 call JG and JG blogging. Call re blogging
21 and to Allard..."

22 February 14th...I am just using this as an example.

23 "...Blogging, review Nation, review
24 documents..."

25 So, I suggest to you, sir, that as your early

1 docketts indicated there was a blogging strategy and
2 you actively participated in whatever that strategy
3 was, right?

4 A. I think I went over this all on the
5 first day, which is what the Internet researching
6 and et cetera was, that I did. These are, I think,
7 on the same list that I got from Mr...

8 2964. Q. Can you tell me what you did in
9 February? Look at page 4.

10 "...February 16th, blogging. February
11 17th, blogging. February 22nd, blogging.
12 24th, blogging..."

13 Do you see all that? What were you doing? In
14 charging the clients thousands and thousands of
15 dollars for blogging, what were you doing? Were you
16 writing the blogs?

17 A. No, no. In the various jobs. I
18 think I went through this with Mr. Roman, but
19 stuff...

20 2965. Q. Mr. Roman didn't have the accounts
21 in front of you and the specific docket entries when
22 you gave your general answer to him.

23 A. Okay, well my general answer is the
24 answer I am going to give to you. The blogging,
25 interneting, searching, researching, all of that,

1 were done in the way I said on the various subjects
2 that I was involved in.

3 2966. Q. Well, then let's look at the next
4 account and see how this fits in. February 27th.
5 This is a March 30th account. February 27th you got
6 a call from PA and more blogging. And then on March
7 1st,

8 "...Calls with cameraman and plans for
9 footage we need for litigation. Blogging
10 and plans for pictures to be taken in
11 Barbados to be submitted to blogs..."

12 Now sir, let's stop. Really, I mean I don't know
13 how to put it, but can we under oath have it that
14 there was a blog strategy, and you were in the
15 middle of it to the point of calling cameraman and
16 taking pictures for submission to the blogs. I
17 mean, how can you continue to put up this
18 nonsensical position that blogging was just my way
19 of describing that I surfed the Internet?

20 A. My best recollection is that we had
21 a film team come from Vancouver, were Discovery
22 Channel calibre, to make a movie, and we did make a
23 movie eventually, and took pictures for the Graeme
24 Hall Nature Sanctuary.

25 2967. Q. To be submitted to the blogs?

1 A. Well, there is...the Graeme Hall
2 Nature Sanctuary has a whole Internet presence of
3 its own. And my recollection is, I said, "While you
4 are at it, fly over Kingsland and film the whole
5 thing for future use".

6 2968. Q. On blogs?

7 A. Well...

8 2969. Q. That is what it says. "Pictures to
9 be taken in Barbados to be submitted to blogs." You
10 wouldn't have marked that down, billed it to your
11 client, collected the fee from your client if it
12 wasn't true, right?

13 A. That part of it is 99 percent true
14 of Graeme Hall Nature Sanctuary, because I remember
15 making the movie after...you know what I mean, being
16 involved in the movie.

17 2970. Q. You had a separate file for the
18 Graeme Hall. Why would you be docketing that to
19 this file?

20 A. I don't agree with that.

21 MR. KRAMER: I haven't seen evidence of
22 a separate file...

23 MR. RANKING: I will get it for you.

24 Hold on.

25 2971. MR. SILVER: There is transfers from

1 trust from this file...

2 MR. RANKING: Hold on.

3 MR. KRAMER: I am just asking for
4 confirmation.

5 2972. MR. SILVER: Well, you remember that
6 there was a Graeme Hall file?

7 THE DEPONENT: Well, they are all one...

8 MR. RANKING: Just a minute. Hold on a
9 second.

10 THE DEPONENT: Well, anyway, it is the
11 best of my recollection...

12 MR. RANKING: Just hold on.

13 MR. KRAMER: There are some docket
14 entries in this file for Graeme Hall Nature
15 Sanctuary, aren't there?

16 MR. RANKING: I think so.

17 THE DEPONENT: And there are probably
18 dockets in the other one, but they got
19 mixed up, there is no doubt about it.

20 MR. RANKING: We will find it. I just
21 didn't bring my marked up copy.

22

23 BY MR. SILVER:

24 2973. Q. Just to clarify the question, I had
25 understood that the Graeme Hall Nature Sanctuary

1 docketed were also in this file. Was there previous
2 evidence that there is another file that is...

3 A. Yes.

4 MR. RANKING: That is the evidence that
5 was done. It will be identified in three
6 other Peter Allard files which Ms. Duncan
7 testified were not the subject matter of
8 this litigation.

9 MR. KRAMER: And one of them was for the
10 Nature Sanctuary?

11 MR. RANKING: One of them was the Nature
12 Sanctuary, one of them was entitled
13 "Political Matters" and one of them was
14 entitled "Long View".

15 THE DEPONENT: That is probably fair but
16 there would be a lot of cross-over.

17

18 BY MR. SILVER:

19 2974. Q. Well, let's just move on, because if
20 what you say is true, maybe you could explain your
21 next entry. "Transfers to here." Mr. Ranking has
22 pulled up trust ledger A, which would be in the 543
23 file, the first file that we are in. And an August
24 2, 2006 entry at the bottom of page 34.

25 MR. KRAMER: August, 2006, hold on a

1 second.

2 THE DEPONENT: August 2?

3

4 BY MR. SILVER:

5 2975. Q. The Sanctuary file was 552.

6 "Transfer to political matters. Transfer to
7 sanctuary matter, a July invoice."

8 A. Right.

9 MR. RANKING: Right.

10 THE DEPONENT: We have got the time
11 dockets for the sanctuary files?

12 2976. MR. SILVER: No. MR. RANKING: We were
13 told that they wouldn't be produced.

14 THE DEPONENT: Anyway, to the best of my
15 recollection.

16 MR. RANKING: But the bottom line is,
17 Mr. McKenzie, you will agree that to the
18 extent that you were doing work on the
19 sanctuary, you had a separate file, you
20 were docketing to a separate file, and in
21 fact you were transferring funds to pay
22 accounts with respect to that file?

23 THE DEPONENT: Well, money came in in
24 sort of one lump and went to where it went
25 to.

1 MR. RANKING: But to the extent you gave
2 evidence with respect to this team of
3 people coming from Vancouver, I take it you
4 were suggesting to Mr. Silver that that had
5 to do with the movie for the Graeme Hall
6 Nature Sanctuary?

7 THE DEPONENT: That is what those guys
8 were there for.

9 MR. RANKING: Right, and I am going to
10 suggest to you as well, that those dockets
11 would have been properly docketed to the
12 sanctuary file that you had a separate file
13 for?

14 THE DEPONENT: Well, it fit together
15 somehow obviously.

16 MR. RANKING: Well, let's just
17 understand. Am I not correct that you had
18 a separate file with respect to
19 matters...when I say a file here, at the
20 bottom of this page to which Mr. Silver has
21 just taken you, the entry 516931 referring
22 to the sanctuary file, that that is
23 relating to the Graeme Hall Nature
24 Sanctuary?

25 THE DEPONENT: I would have to see the

1 file, but I also...

2 MR. RANKING: Is there more than one
3 sanctuary, Mr. McKenzie?

4 THE DEPONENT: Well, there is Fogh,
5 which is the national park file, there is
6 the nature sanctuary file, there is the
7 Splash file. I am just saying...and there
8 is all sorts of cross-over. So, I am just
9 saying...

10 MR. RANKING: I am not asking about
11 cross-over. I am asking about the
12 sanctuary. Am I not correct that the
13 Graeme Hall Nature Sanctuary is one and the
14 same matter that was referred to and for
15 which you opened a file called "The
16 Sanctuary"?

17 2977. MR. SILVER: File number 552?

18 THE DEPONENT: Well, there was only one
19 sanctuary.

20 MR. RANKING: And that is the Graeme
21 Hall Nature Sanctuary, correct?

22

23 BY MR. SILVER:

24 2978. Q. And if you were arranging for a
25 photo shoot relating to that you would have docketed

1 your time to that file?

2 A. That is a little too sophisticated
3 for what we are talking about.

4 2979. Q. Well, let me see if I can help you.
5 Did Nathan have to help with respect to this photo
6 shoot for the sanctuary? He wasn't involved in the
7 sanctuary file, was he?

8 A. He is...

9 2980. Q. A good cameraman?

10 A. ...a good techie...the guy has been
11 involved in making movies and that kind of stuff...

12 2981. Q. Sir, was he involved in the
13 sanctuary file or not?

14 A. Probably. There is research...as I
15 have said, "Get a job done. I need to know what is
16 being said about this." Graeme Hall Nature
17 Sanctuary is sort of an international grants...

18 2982. Q. Was Jane Goddard involved in the
19 sanctuary file?

20 A. I recall her being involved. I
21 don't think very deeply, though.

22 2983. Q. Because if you look at that and I am
23 going to read you your March 3, '06 entry on the
24 Allard file, 543. It says,

25 "...Blogging issues, arrangements re video

1 shoot and retain Nathan. Calls to PA, JG
2 and MVR..."

3 Who is MVR? I am suggesting to you , sir, that
4 Nathan was retained to do a video shoot in Barbados
5 in respect of this matter which you intended to
6 submit to the blogs, right? You know, when you are
7 caught, you are caught.

8 A. That is not the way I recall it. I
9 am just saying, that is not the way I recall it.
10 So, show me a picture...

11 2984. Q. Show you a picture...

12 A. I'm kidding, I'm saying...

13 2985. Q. You know what, Mr. McKenzie, it is
14 ridiculous already. You say show me something and
15 we show you ten things and you say, well show me new
16 evidence.

17 A. Somebody call up the Graeme Hall
18 Nature Sanctuary and let's see if there is a picture
19 from a helicopter, because I am saying...you are
20 trying to...I don't know.

21 2986. Q. So, the fact is...

22 A. Excuse me for a second.

23 2987. Q. The fact is, you established along
24 with your clients and the rest, a blogging strategy.
25 And that strategy was intended to put pressure on my

1 clients and other clients and it was all part of a
2 strategy to move jurisdiction out of Barbados and at
3 the same time put pressure on through the blogs and
4 you, sir, were right in the middle of it. Isn't
5 that right?

6 A. Well, I disagree with that.

7 2988. Q. How do you explain the March 5th
8 entry? It says,

9 "...Blogging issues. Drafting for JG and
10 JK..."

11 I suggest to you, sir, that they were putting
12 entries on blogs and you were drafting them for
13 them. That is John Knox and Jane Goddard.

14 A. I don't agree with that.

15 2989. Q. Well, how else do you explain that
16 entry? March 5, "Blogging issues"...

17 A. The pleadings...was something going
18 on in the Barbados case that I was...

19 2990. Q. ..."drafting for JG and JK".

20 A. ...same thing as you did, was going
21 and talking to Mr. Shepherd and giving him a...or
22 something that involved doing lots of stuff down
23 there. But no. Blogging...exactly what I said the
24 other day, was my participating...

25 2991. Q. Your what?

1 A. I explained it the other day. So,
2 shorthand...

3 2992. Q. You probably couldn't explain it the
4 same way again today. Do you remember what your
5 explanation was the other day?

6 A. Do you mind if I do it? Take 15
7 minutes.

8 2993. Q. No, I will rely on what you said the
9 other day. Why did you start sending encrypted e-
10 mail to John Knox, as indicated on your March 10th
11 docket? You were concerned that his e-mails were
12 being read?

13 A. We became concerned about these
14 things. Security of communications.

15 MR. RANKING: In one of your answers you
16 indicated that you referred to something
17 called the "Nathan project". What were you
18 referring to?

19 THE DEPONENT: Everything that was
20 assigned to that group.

21 MR. RANKING: What do you mean by that,
22 sir?

23 THE DEPONENT: I need something done and
24 I explained this to Mr. Roman the best I
25 could. I need something done, get it done.

1 Lots of things.

2 MR. RANKING: I had taken from your
3 phrase that there was a specific project
4 that you were referring to. Is that not
5 correct?

6 THE DEPONENT: Project, as I said, was a
7 global catch phrase. The Nathan project.
8 It is all of these invoices that you see
9 for the various...all sorts of things being
10 done at my request, to brief me or educate
11 me or help people...I think I went through
12 that with Mr. Roman. Could probably expand
13 on it for a day.

14

15 BY MR. SILVER:

16 2994. Q. Can you turn to the April 26
17 account, please?

18 A. Got it.

19 2995. Q. And again, just sort of using your
20 eyes to flip through here, which I have highlighted,
21 but blogging seems to be a daily activity for you.
22 You would agree with me that you, at least, docket
23 an activity called blogging continually through this
24 period?

25 A. I think I used the word the other

1 day called avalanche.

2 2996. Q. I don't see that in your dockets. I
3 see "blogging".

4 A. I just adopt what I said to Mr.
5 Roman.

6 2997. Q. What were the blogging issues that
7 you were dealing with on March 29, '06?

8 A. I don't recall.

9 2998. Q. And throughout this, you will agree
10 with me that you are getting e-mails on almost a
11 daily basis from and to John Knox and Jane Goddard?

12 A. Very regularly.

13 2999. Q. They are directly involved in this?

14 A. They were part of the avalanche.

15 3000. Q. Blogging. And then there is an
16 April 10th entry that I am particularly interested
17 in. It says,

18 "...Draft article to send to bloggers..."

19 Can you explain, what did you do on that day?

20 A. Sorry, April 10th, right?

21 3001. Q. Ninth.

22 A. Sorry.

23 3002. Q. That is your docket?

24 A. Yes. That, I did write some stuff
25 for the park, nature sanctuary project and probably

1 would send it to Stewart Heaslet. There is other
2 people that worked on the project.

3 3003. Q. Can you produce the articles that
4 you drafted for blogs relating to the Graeme Hall
5 Nature Sanctuary?

6 A. No.

/R

7 MR. RANKING: What blogs did relate to
8 the Graeme Hall Nature Sanctuary?

9 3004. MR. SILVER: So we have a refusal on
10 that?

11 THE DEPONENT: I can't.

12 3005. MR. SILVER: Why not? Go to the website
13 and find the articles that you drafted and
14 that were posted.

15 THE DEPONENT: It doesn't mean I put
16 them up, anyway. These things went around
17 a committee. As you can imagine by the
18 time the committee...anyway, sorry, I think
19 I lost the question.

20 MR. RANKING: My question was what blogs
21 do you say...

22 MR. KRAMER: Before you get into that
23 question, there was an outstanding question
24 I think from Mr. Silver. He asked for
25 production of the article he drafted. He

1 said he can't.

2 3006. MR. SILVER: Or any articles he has
3 drafted.

4 MR. KRAMER: You can't, does that mean
5 it is beyond your control or does that mean
6 you are unwilling to?

7 THE DEPONENT: No, no, it is beyond my
8 control.

9 3007. MR. SILVER: Well, how would he know
10 unless he tries?

11 MR. KRAMER: Well, maybe he knows. It
12 depends on why he says it is beyond his
13 control. Why do you say it is not in your
14 control? Do you have either a copy of it
15 or a way to get a copy of it?

16 THE DEPONENT: Well, look in the files.

17 MR. KRAMER: Well, that is outside of
18 your direct control.

19 THE DEPONENT: Yes, it is out of my
20 control. And I am saying that is it.

21 MR. KRAMER: Do you have another way of
22 getting it? Which maybe leads to Mr.
23 Ranking's question which is for what blog
24 was it sent? Maybe that is the place to
25 get it?

1 THE DEPONENT: Well, things would be
2 written and sent out to the team of people
3 that did all the researching, whatnot, and
4 what they did with it. I mean, I am not
5 quite sure I ever took pride in having
6 something actually published that I had
7 written.

8

9 BY MR. SILVER:

10 3008. Q. That is fine. I accept all that.

11 But you did the same thing in respect to the Nelson
12 Barbados or Kingsland. You wrote stuff that you
13 circulated through your team, NIS or Wanphen Panna
14 or the Knoxes, and they either got it on the blog or
15 they didn't. Isn't that right?

16 A. No.

17 3009. Q. Well, why would you write something
18 for a nature sanctuary blog, but not on the
19 Kingsland matter?

20 A. Well, the nature sanctuary is a bit
21 of a passion.

22 3010. Q. Oh, so you would write a blog
23 because of a passion as opposed to a blog because of
24 a blog strategy that you agreed to with the client?
25 Is that what you mean? Who was going to draft the

1 blogs for the Kingsland blogging strategy, if not
2 you?

3 A. You are mixing apples and oranges
4 here, but the stuff I wrote...

5 3011. Q. I doubt you are confused, sir.

6 A. Let's stick with, my recollection is
7 I wrote stuff for, to get out...Stewart and I were
8 sort of interacting. He is the Graeme Hall guy and
9 the national park, and I was doing that.

10 3012. Q. Why? Are you a good blog writer?
11 Why were you doing that?

12 A. I have a view of
13 international...whatever was needed for the nature
14 sanctuary.

15 3013. Q. Why were you billing that to an
16 Allard re Knox and Kingsland estate action file?

17 A. I am saying, without looking at the
18 other dockets, but I am just saying, there is a lot
19 of cross-over here. I am looking at these time
20 dockets. You are sort of saying they all stick
21 together and I am going, draft article to send to
22 bloggers, apple. Blogging, orange. Preview notes
23 for interview, pear.

24 3014. Q. Sir, I know you are saying that
25 because that is convenient. That is your only out

1 when you are confronted with docket entries on a
2 particular file that prove, in my submission, beyond
3 any shadow of a doubt, that you are not telling the
4 truth about your involvement in blogging as it
5 relates to Knox and Kingsland estates?

6 A. No more convenient than your theory.

7 3015. Q. Well, we will see whose theory, to
8 Justice Shaughnessy, makes most sense.

9 MR. RANKING: Can you tell me, Mr.
10 McKenzie, what was your blogging strategy?

11 3016. MR. SILVER: Re this file.

12 MR. RANKING: Yes.

13 THE DEPONENT: Cope with the avalanche.

14 MR. RANKING: No, no. I have and am
15 entitled to an answer to my question. You
16 entered dockets indicating that you were
17 preparing a...

18 3017. MR. SILVER: He has actually answered
19 that. He said he can't recall.

20 THE DEPONENT: Well, just a minute, I do
21 recall, because I told Mr. Roman. Do you
22 want me to go over it again? Your
23 clients...

24 MR. RANKING: You are looking at all the
25 defendants.

1 THE DEPONENT: All of you, right,
2 have...I am not going to say taken over,
3 but driven me crazy by a prolific amount of
4 threats and all sorts of stuff that
5 unfortunately I had to digest. At part 1,
6 I mean, there is a million. I went over
7 this with Mr. Roman. I am saying that my
8 strategy was coping with it. In that
9 regard, right.

10 MR. RANKING: So, I understand your
11 strategy to be dealing with the defendants
12 in this action; is that your evidence?

13 3018. MR. SILVER: That is the avalanche that
14 you were dealing with?

15 THE DEPONENT: Yes, but pick one. The
16 MTO publication from your affidavit, which
17 I think is totally offside, ended up almost
18 immediately on the Barbados underground...

19 MR. RANKING: I'm sorry...

20 THE DEPONENT: Just a minute, just a
21 minute. And I am saying I had to deal with
22 that. I saw it, and whatever...I am just
23 saying because I wasn't on the case any
24 more, it came to me and I thought, here we
25 go again.

1 MR. RANKING: I'm sorry, what is the MTO
2 application?

3 THE DEPONENT: In one of your affidavits
4 from your student, you have an MTO search
5 which, according to what I know is not
6 supposed to be publicized and....

7 MR. RANKING: Well, that is...

8 THE DEPONENT: Excuse me, excuse me.
9 Well, Fasken probably has an agreement with
10 MTO not to publicize and keep...there is
11 PIPEDA and everything. All of a sudden I
12 see it. It comes to me and I go, what the
13 heck is this. Anyway, I don't know, but I
14 am just saying that probably took me half
15 an hour to go, doesn't look right to me,
16 but a guy sent it. What are you going to
17 do?

18 MR. RANKING: So then, when you talk
19 about your blogging strategy in the dockets
20 that we are examining you upon, is it fair
21 for me to say that what you are referring
22 to is a strategy to respond to the various
23 entries and blogs that contain information
24 with respect to the litigation?

25 THE DEPONENT: Analyze would be a better

1 word.

2 MR. RANKING: All right. So, analyze
3 and try to deal with them; is that fair,
4 sir?

5 THE DEPONENT: Well, in the context of
6 the litigation was to see whether they were
7 of any use to furthering the litigation.
8 My look at dealing with that type of
9 information that came to me. As I said the
10 other day, there was all sorts of research
11 required and protection of the bloggers.
12 And I went through this with Mr. Roman.

13 MR. RANKING: But the research and
14 protection that you are referring to is
15 research and protection to respond to what
16 you say is information that was otherwise
17 put on to the blogs by others?

18 THE DEPONENT: My analysis covered a lot
19 of territory. The sort of antenna was, do
20 I need to deal with this?

21 MR. RANKING: But it was antenna...

22 THE DEPONENT: And in some cases I had
23 to. For instance, the threats against
24 Marjorie Knox...

25 MR. RANKING: But it was dealing with

1 matters concerning...that were posted with
2 respect to this litigation, correct?

3 THE DEPONENT: Or situations related to
4 it, yes.

5 MR. RANKING: All right. Well, I am
6 having real problems with that, sir,
7 because every single docket entry that Mr.
8 Silver has just examined you on, predates
9 the litigation by at least a year. Let me
10 take you back, sir, to the entries that Mr.
11 Silver took you to on March the 1st of
12 2006.

13 THE DEPONENT: Okay, well...

14 MR. RANKING: No, just a minute.

15 THE DEPONENT: Let me stop you before
16 you go too far.

17 MR. RANKING: In fact, I can ask the
18 questions and you are entitled to answer
19 them after I put my question on the record.
20 You will agree with me, sir, the litigation
21 commenced on February of 2007, correct?

22 THE DEPONENT: Agreed.

23 MR. RANKING: All right. Can you please
24 help me, sir, how almost a year earlier in
25 March of 2006 you are devising a strategy

1 to deal with litigation, which at that time
2 was still 11 months off concerning every
3 single one of the defendants to which you
4 cavalierly point to my side of the table?

5 THE DEPONENT: As an example, in March,
6 '06 I was dealing with Kyffin Simpson on
7 Project Care, docketed in here, okay.

8 Nothing to do with the litigation.
9 Research was required on financing, grants,
10 international, European Union, blah, blah,
11 blah, it all had to be done, it came to me.
12 Phone call to Graeme Hall Nature Sanctuary.
13 I am saying you are picking points in time
14 and not matching them well, so that is why
15 I was trying to stop you. Arbitration.

16 I mean, there is an enormous body of
17 information that came to me from various
18 places, all the arbitration possibilities
19 ...to trial, Washington Convention. I
20 mean, you see you have to pick times that
21 match them, because as I said to Mr. Roman,
22 blogging was a catch-all for...what are my
23 words, research, review, questions,
24 discussions, et cetera, et cetera, on a
25 myriad of, you know, depending on the time.

1 MR. RANKING: And you would agree with
2 me, sir, that the answer you gave to my
3 first question doesn't make any sense, now
4 that I have brought to your attention, the
5 temporal difficulty, namely the fact that
6 any response to any matters that may have
7 been posted in connection with the
8 litigation occurred some 12 months after
9 the very dockets that Mr. Silver was
10 examining you on?

11 THE DEPONENT: I am not going to argue
12 with you, Mr. Ranking. I think my answers
13 are clear.

14

15 BY MR. SILVER:

16 3019. Q. Okay, let's move on. I think your
17 answers are clear, too, and so are your dockets.
18 Again, we are focusing on dockets, time charges in
19 the 543 document file that were billed to and paid
20 for by Peter Allard, okay?

21 And now we are on the May 18, 2006 account.
22 And that file is the Knox and Kingsland Estate
23 action file. We see at the beginning, April 24,
24 there is...just by way of examples, it is fairly
25 common, but, "E-mails from JG, PA, JK". That is the

1 same three, that is Goddard, Allard and Knox, right?

2 A. Same initials.

3 3020. Q. Right. And then April 26 is,
4 "Review Marjorie affidavit, procedure for motion in
5 Barbados, update file re priorities, blogging,
6 Nathan planning". So, that is more of the same.
7 Nathan planning is Best and that is in respect of
8 the potential Ontario action, right?

9 A. We were...you are asking me about
10 one thing here? Nathan planning...

11 3021. Q. Confer with KWM...

12 A. Sorry, yes, it is one person.

13 3022. Q. So, you are continuing to work with
14 Allard, Goddard, and Knox to prepare for an action
15 in Ontario?

16 A. I think we were still trying to make
17 a deal there in April.

18 3023. Q. Right. In fact, this is the exact
19 time that I showed you the memo where you said, you
20 know, if we don't get somewhere quick, we are going
21 to have to move it outside of Barbados. I showed
22 you that again today?

23 A. Well, I was guessing arbitration
24 here. I see also Allan Jones, who was the Prime
25 Minister's assistant who was willing to help make a

1 deal work.

2 3024. Q. Right. But it is all related to
3 Kingsland Estate action, right?

4 A. Well, in that one Allan Jones,
5 would; arbitration file, marginally; Graeme Hall
6 Nature Sanctuary, no; blogging, all of the above;
7 Nathan, Nathan had, my recollection anyway was other
8 things he was doing, his own entrepreneurial...

9 3025. Q. The Graeme Hall Nature Sanctuary
10 issue got tied in with the Kingsland Estate action
11 as we saw from the Heaslet transcripts, right?
12 Because Allard was behind the sanctuary, people in
13 Barbados were seeing all this Marjorie Knox
14 activity. They were tying it to Allard and it was
15 affecting the nature sanctuary, and the national
16 park.

17 A. You mean when they called Heaslet
18 and tied them together and threatened...well, made
19 those not very nice remarks?

20 3026. Q. However you want to characterize it,
21 sir.

22 A. I am just saying...

23 3027. Q. Let's move on.

24 A. There is no sense to...doing nasty
25 things to birds because you are having a business

1 issue, but...

2 3028. Q. Sir, that is your delusional...and
3 with the greatest of respect, that is your view of
4 things, which nobody else accepts.

5 A. No, no...

6 3029. Q. It doesn't mean your view of it is
7 right.

8 A. I am saying that seems to be what
9 Mr. Simmons and Mr. Heaslet were talking about, if I
10 read them properly.

11 3030. Q. May 6th and May 7th your dockets
12 speak to "Splash documentation" and "Splash
13 composition". What is that? Is that a code name
14 for something?

15 A. Splash was another entrepreneur out
16 of New York who had a lot of money. Was going to do
17 a deal that, I guess, had an impact on the nature
18 sanctuary with something about some water park or
19 something, and I interacted with him because he had
20 a lot of money. He was interacting with Kyffin
21 Simpson. All these entrepreneurs, but it was kind
22 of like, what are we going to do, what are we going
23 to do? And he started to...the nature sanctuary, or
24 the national park was kind of in conflict with
25 Splash because chemicals are spilling or something

1 like that. It just became another...

2 3031. Q. What is Splash?

3 A. Well, my recollection is Splash was
4 a project that was upstream in the watershed of the
5 national park as it was going to be, and then I had
6 to interact with this shooter from New York who had
7 lots of money. And they...they wanted to be in this
8 deal. Everybody is a dealer, entrepreneur.

9 3032. Q. So, did the Splash guy have an
10 interest in the Kingsland Estates?

11 A. He had money and he was looking for
12 deals, and these lands are all within...

13 3033. Q. Are you talking to guys with money
14 who might be able to afford land that wasn't up for
15 sale, but you thought you might be able to get
16 through the Kingsland Estates litigation?

17 A. No, I think Cox said it was up for
18 sale. Or it would lend him money to buy him out, or
19 lend the company money or lend the company money to
20 buy Marjorie out, or buy the whole thing out. It
21 was one of these...there is a deal in here
22 someplace, because there is lots of money and there
23 is lots of entrepreneurs. And I am saying, that is
24 my recollection of this guy.

25 3034. Q. May 11th you have an entry in your

1 docket about drafting blogging again.

2 A. Right.

3 3035. Q. May I suggest that despite your
4 protestations to the contrary, you, in fact, did
5 draft blogging with respect to Kingsland Estates
6 limited issues?

7 A. It is not my recollection. And with
8 all fairness to Mr. Ranking, we have a timing issue
9 here. But it looks more like drafting blogging was
10 about environmental park, blah, blah, blah, blah,
11 which is, as I said, one of the things...

12 3036. Q. Blah, blah, blah, blah, I don't see
13 the blah, blah, blah, blah. But what I do see, and
14 you will confirm for me is that it is a docket entry
15 made in the 543 file, which is re Knox and Kingsland
16 Estate action. It was billed to Mr. Allard in that
17 file, and paid for him in that file. Do you agree
18 with all that, first?

19 A. I don't agree. But...

20 3037. Q. You don't agree...

21 A. ...let me...

22 3038. Q. No, stop.

23 A. I don't agree.

24 3039. Q. Well, I want to take you through one
25 by one. Do you agree with me that in the Knox and

1 Kingsland Estate file you have a May 11th entry that
2 says, "Drafting blogging"?

3 A. That is one entry in this whole
4 paragraph, I agree.

5 3040. Q. Right. And that file was the file
6 in which you were charging Mr. Allard for activities
7 in respect of Knox and Kingsland Estates, right?

8 A. Apparently not.

9 3041. Q. Well, that was the intention. That
10 is why you docketed it to that file.

11 A. Let me go through the docket.

12 3042. Q. No. No. Just answer my question.

13 A. Can I read it?

14 3043. Q. I thought you had.

15 A. You picked out two words and I am
16 saying, okay, let's see what I charged him for. Is
17 that fair? Okay. "Meet with Alair, Shepherd",
18 whatever that was. "Review documents"...

19 3044. Q. No...well, read it all. Why would
20 you skip...I will read it.

21 A. Okay. No, I am going to read it...

22 3045. Q. "...Meet with Alair Shepherd..."

23 A. Comma.

24 3046. Q. "...Jane Goddard..."

25 A. Comma.

1 3047. Q. "...John Knox..."

2 A. Comma.

3 3048. Q. They are not involved in the Graeme
4 Hall Sanctuary, right?

5 A. That was undoubtedly with respect to
6 something to do with Kingsland. Okay, now...

7 3049. Q. "...Review documents and meet with
8 DL to discuss key...strategy..."

9 What does that mean?

10 A. Well, that is politics. Dennis Lowe
11 is the...

12 3050. Q. That is politics?

13 A. Hold on, let me just get this
14 straightened out. Dennis Lowe was a politician to
15 be and Paul Devillers is the next Cabinet Minister,
16 an acquaintance of mine, and they were interacting,
17 and this is a typical day for me in Barbados about
18 how do you get people to the polls, that kind of
19 stuff, to get elected. Then the Splash issues is
20 the next thing, which has nothing to do with the
21 first two. This is me...just let me finish. I am
22 just saying is a typical day of mine. Splash
23 issues.

24 3051. Q. You said before that the Splash
25 issue might have a connection to Kingsland.

1 A. I don't interrupt you. Drafting
2 blogging, as we have discussed. Graeme Hall issues.
3 In that four lines I have got about six jobs going
4 here. All five hours, which is a typical day for
5 me. And it got paid by Allard.

6 3052. Q. No, it got billed to Allard in the
7 Knox and Kingsland Estates file, and paid by Allard.
8 Right? It got billed...

9 A. BMC 543, yes.

10 3053. Q. It got billed to Allard in the Knox
11 and Kingsland Estates file and paid by Allard in
12 that file, right? Sir, am I right? I mean, it is
13 obvious. You know what, don't answer that.

14 A. All docketed and billed and paid by
15 Allard on BMC 543, we agree.

16 3054. Q. Then, look at the May 15th entry for
17 Sunny Ware. It says halfway through, and it is on
18 page 5, it says,

19 "...E-mail from KWN and format draft 3 of
20 claim to be issued in Ontario Superior
21 Court..."

22 A. Okay.

23 3055. Q. Then, looking at that entry, go back
24 to the 14th and you have an entry saying, "Draft
25 claim". So, am I right that in May of 2006 you were

1 working on the Ontario claim?

2 A. Apparently, yes.

3 3056. Q. It was Allard who was...looking at
4 May 16th,

5 "...Review e-mails from Allard re revisions
6 required to claim..."

7 A. Agreed, that is what it says.

8 3057. Q. So, Allard was your client when you
9 were working on the claim.

10 A. Yes, was on that file, 543.

11 3058. Q. Right. And so, sir, in your cross-
12 examination of February 3rd and February 8th when
13 you said you had no involvement in this until the
14 fall of '06 when Best came to you with a problem and
15 you...that is complete nonsense, right?

16 A. Just make note of that...

17 3059. Q. What, you have some scripted answer
18 you want to read? What do you mean you have a note
19 of that?

20 A. No, no, I am just trying to go to
21 the transcript.

22 3060. Q. Well, why are you looking at notes,
23 then?

24 A. Well, I am just saying...

25 3061. Q. Can I see the notes you are looking

1 at?

2 A. ...you are putting something to me
3 that I am inconsistent and I would like to get what
4 it says and see if I agree with you or not. So, if
5 you want to do that, I will.

6 3062. Q. Do what?

7 A. Well, I would like to get the
8 transcript and...

9 3063. Q. Sir, let me start again. Did you
10 tell us on February 3rd or 8th that your involvement
11 with the claim started in the fall of 2006?

12 A. Can I have that transcript?

13 3064. Q. We are going to be here for days,
14 Mr. Kramer.

15 MR. KRAMER: Maybe we should go off the
16 record while Mr. McKenzie is looking at it
17 and we can talk about timing. Did you not
18 want to look at the transcript?

19 THE DEPONENT: Yes, I do. Go ahead, go
20 off the record.

21 3065. MR. SILVER: Why don't we take ten
22 minutes now?

23

24 --- A BRIEF RECESS

25

1 K. WILLIAM MCKENZIE, resumed

2 CONTINUED CROSS-EXAMINATION BY MR. SILVER :

3 MR. KRAMER: In Mr. McKenzie's affidavit
4 of April 23, I forget the paragraph number.

5 THE DEPONENT: Paragraph 7.

6 MR. KRAMER: Paragraph 7, he refers to a
7 box that was in his garage. That box was
8 transferred to my office, it is now in my
9 office. I had my law clerk catalogue the
10 box. It contains a number of file folders.
11 The name of each file folder is listed on
12 the two-page document that we are going to
13 mark as the next exhibit. There are also a
14 few other file folders that aren't
15 accounting related that are also described.
16 And I have had a discussion with Mr.
17 Epstein. It seems to me that all of this
18 material is firm material, and I have asked
19 him how he wants to deal with it. My
20 preference is to return it to him and have
21 him deal with it in whatever way seems
22 appropriate. But I am disclosing to you
23 what the current state of that is. So, I
24 guess we are marking this as what, Exhibit
25 14 or something?

1 --- EXHIBIT NO. 14: List of BMC 568 file folders
2 prepared by Mr. Kramer's office
3

4 MR. RANKING: I think that is entirely
5 reasonable. The only request that I would
6 make is if Mr. Epstein could get back to us
7 by tomorrow morning so that to the extent
8 we wish to cross-examine Mr. McKenzie on
9 those documents, that they be made
10 available to us so that we can cross-
11 examine.

12 MR. EPSTEIN: No, I won't get back to
13 you tomorrow morning. It is now 5:15, I
14 haven't even seen the documents and I am
15 not going to express any view on it until I
16 have had a chance to see it, review it, and
17 we will get back to you. Sorry, but it is
18 just impossible. I can't do that tonight.

19 3066. MR. SILVER: I am not so sure that I
20 agree that you should be turning them over
21 to Mr. Epstein, and not just producing
22 them.

23 MR. KRAMER: Well, I will tell you, on a
24 quick review it seems to me a lot of it is
25 non-controversial. You wouldn't care about

1 receipts, expense reports backing up the
2 disbursement items on the accounts. Beyond
3 that, there seems to be things in there
4 that might not be relevant that are not
5 producible. I don't think you have the
6 right to ransack through the firm's files.

7 If there is something...if there is
8 things in the file that had to do with the
9 lawsuit that don't have to do with this
10 cost submission, I don't see why that is
11 producible. I think there are likely
12 things in those files that are just that.
13 So, why would I just produce it? Just as I
14 don't think you have the right to go look
15 through the 20 boxes in the firm's...on
16 this entire file.

17 3067. MR. SILVER: I am not sure I agree with
18 you.

19 MR. KRAMER: I am happy to speak with
20 you about it, but that is why I wouldn't
21 just produce it. It is part of the overall
22 work product on the firm's side. And even
23 though a lot has become relevant and has
24 been produced, I don't think everything
25 is...

1 3068. MR. SILVER: I don't want to get into a
2 big argument, but one way to look at it is,
3 you know, the firm's stuff that should have
4 been returned earlier. Another way to look
5 at it is he references a box of information
6 for the purposes of preparing his
7 affidavit, and he mentions it in an
8 affidavit. And I think on that basis alone
9 we are entitled to see the box and the
10 content.

11 MR. KRAMER: I am not sure I agree with
12 that. Anything in that box that is
13 relevant in any way to any of these cost
14 issues, I agree, you get to see. But I
15 suspect there are things in there that
16 don't fall in that...

17 3069. MR. SILVER: I just don't want my
18 silence to be seen as consenting to the
19 protocol that you...I can't stop you from
20 doing what you think is right. I just
21 didn't want my silence to be some sort of
22 indication that I agree that the right
23 protocol is for you to turn it over and
24 leave it up to Mr. Epstein.

25 MR. KRAMER: That is fine.

1 3070. MR. SILVER: And I echo Mr. Ranking's
2 request that however you do it, the sooner
3 the better.

4 MR. RANKING: The only position that I
5 have, I actually don't take issue with Mr.
6 Kramer's position, notwithstanding
7 the...submissions of my friend, Mr. Silver.
8 I want an opportunity to cross-examine Mr.
9 McKenzie on those materials, and if we
10 can't do it at this current sitting, then
11 we will have to make another time to do it
12 later.

13

14 BY MR. SILVER:

15 3071. Q. Okay. So, let's carry on then.
16 When we broke you were going to look at the
17 transcript to see whether I had it right when I
18 suggested to you that your position under oath on
19 February 3rd and 8th was that your first involvement
20 in the Nelson Barbados litigation was in the fall of
21 '06. And I was using your dockets in May of '06 and
22 before, to suggest to you that you were just
23 mistaken when you said that under oath on February
24 3rd and 8th, and in fact, there is a docket in May
25 where you are reviewing the third draft of the very

1 claim that you said you first got involved in five
2 or six months later. So, am I right, sir, that when
3 you gave evidence under oath on February 3rd and 8th
4 about when your first involvement, that has proven
5 to be false?

6 A. I will expand on...

7 3072. Q. Why don't you answer my question
8 first?

9 A. I don't consider it to be false.
10 But...

11 3073. Q. You just agree that it is not
12 accurate?

13 A. Well, remember a lot of things have
14 come to my attention to refresh my memory in the
15 meantime.

16 3074. Q. So it was false, and now that you
17 have seen things that refresh your memory, you can
18 admit that it was false at the time you said it?

19 A. Well, I don't want to quibble.

20 3075. Q. You don't want to quibble.

21 A. It is incorrect. Incorrect is the
22 word. I am just saying that...

23 3076. Q. I will take "incorrect".

24 A. Requires explanation, perhaps, now
25 that I have seen the rest of it and had my memory

1 refreshed.

2 3077. Q. Okay, thank you. We are moving on,
3 then, to the next page of the account of May 18th.
4 And on page 6 you will see there is some asterisk
5 explanation notes.

6 A. Sorry?

7 3078. Q. We were on the May 18th account.

8 A. Thank you.

9 3079. Q. We were looking at docket entries on
10 the 5th page in the account. Now I would like to
11 turn to the 6th page.

12 A. Thank you.

13 3080. Q. You will see that there is a
14 disbursement pay Wanphen Panna, an invoice for
15 Agency, computer related Internet server. What was
16 Wanphen Panna doing? We know that she got paid some
17 \$175,000.

18 A. I explained it. I can't expand much
19 on what I explained to Mr. Roman.

20 3081. Q. What did you explain to Mr. Roman?
21 Re-explain it to me.

22 A. Well, I explained it and I don't
23 want to read it back and you are the one that says I
24 am taking too long. I can't expand on what I said.

25 3082. Q. I am going to suggest to you, sir,

1 that the wife of Best was rendering third party
2 services to a file that Allard was the client and
3 Allard was paying for. Do you agree with that?
4 That is what this seems to...

5 A. Allard is paying for the services of
6 this person.

7 3083. Q. Of Wanphen Panna?

8 A. We agree.

9 3084. Q. And the work that Wanphen Panna was
10 doing was in relation to internet services and
11 research relating to Kingsland?

12 A. It was.

13 3085. Q. Did Allard know that you were paying
14 out amounts to Best's wife? Did he know who Wanphen
15 Panna was?

16 A. Doubtful.

17 3086. Q. So, you didn't tell your own client
18 that the guy that you entered into...when you were
19 talking to Allard, you didn't say, "Hey Peter, do
20 you know that you entered into an agreement with
21 Best to incorporate a company become involved in
22 this litigation, you should know his wife...I have
23 retained his wife and she is providing third party
24 services that she is billing and you are paying
25 for"? Allard wouldn't have known that?

1 A. Not specifically.

2 3087. Q. Did Allard know that NIS was Best?
3 Did you tell him that?

4 A. I don't recall.

5 3088. Q. Well, do you believe that Allard
6 knew that he was paying amounts to the very guy that
7 he entered into a contract and sold half of the
8 upside to? And was apparently loaned money to? I
9 guess he was loaning money to Best to pay himself.
10 Did Allard know all that?

11 A. He knew what was being done and was
12 happy with it. If we get into specifics of who did
13 what and all that stuff, it would be more like he
14 would make a suggestion maybe. "How about we make a
15 movie?" And would never ask another question. I
16 would turn it over to the teams of people and stuff
17 like that.

18 3089. Q. So, he didn't know that part of the
19 money he was sending to you was being paid out to
20 Best and his wife for third party services on the
21 file?

22 A. He has all these accountants, and I
23 am just saying I think he just okays the bill
24 because he is happy with how things are going. So,
25 the answer...

1 3090. Q. Sir, he didn't know?

2 A. I can't say whether he did or not,
3 but I would be surprised if he paid attention to
4 that details or such like that.

5 3091. Q. Then...I am not going to take you
6 through every account, but through June and July,
7 and you can flip through the accounts if you want,
8 it seems to be a lot more of the same. In other
9 words, regular communications with John Knox and
10 Jane Goddard, right?

11 A. Agreed.

12 3092. Q. And regular conversations with
13 Nathan?

14 A. Agreed.

15 3093. Q. And regular entries with respect to
16 blogging?

17 A. Agreed.

18 3094. Q. And communications with bloggers?

19 A. Agreed.

20 3095. Q. In particular communications that
21 you were having with bloggers? Right?

22 A. Agreed.

23 3096. Q. Who is Winston Best? His name shows
24 up in the September 25th account. In particular an
25 August 24th entry on the September 25th account.

1 A. I don't recall. He might have been
2 a lawyer or an accountant.

3 3097. Q. Is it any relation to Donald Best?

4 A. I am not sure, but I don't believe
5 so. I think a different race...

6 3098. Q. What?

7 A. No.

8 3099. Q. They are a different race?

9 A. Well, I am just...

10 3100. Q. That would be one indicator.

11 A. I am just saying...I am not 100
12 percent sure.

13 3101. Q. You are not 100 percent sure?

14 A. Come on. Anyway, no, I don't know
15 that they are related.

16 3102. Q. Who is Marnie?

17 A. Another Allard staff or person.

18 3103. Q. Then, in the October 20th account
19 there was an October 19th entry,

20 "...E-mails to and from PA, Justice Farley,
21 JG, JK..."

22 What were you communicating to Justice Farley about
23 in respect of Knox and Kingsland Estates?

24 A. Well, we established earlier when
25 this started, always a possibility that we would

1 arbitrate, litigate, blah, blah, blah, but the
2 priority was to make a deal. Justice Farley
3 actually wasn't...I think he had retired. I didn't
4 communicate with Justice Farley, but he had gone to
5 a law firm and I think he is a great problem solver.
6 A lot of respect for him that way. And I conferred
7 with him to see if he had some views and could help
8 get a deal made everybody would make money on rather
9 than fight.

10 3104. Q. Then, October 27th...just let me see
11 something here. Does anybody have Justice
12 Shaughnessy's Reasons and Jurisdiction Motion here?
13 Was that marked as an exhibit to anything?

14 MR. RANKING: As a separate...there was
15 a separate book that was filed for the
16 purpose of the cross motion that deals with
17 all the endorsements.

18 MS. MORSE: The book of reasons.

19 3105. MR. SILVER: But nobody has it here?

20 MR. RANKING: I don't believe so.

21 MS. MORSE: Do you have a copy of that?

22 3106. MR. SILVER: Can I see that?

23 MS. MORSE: Of course.

24 3107. MR. SILVER: This is the
25 supplementary...right. I would like to

1 look at the November 27th account, '06.

2 MR. KRAMER: Okay, we have got it.

3

4 BY MR. SILVER:

5 3108. Q. Sir, you will see an entry for

6 October 27th,

7 "...Calls, drafting for derivative action

8 and reviewing transcripts..."

9 And then the next day,

10 "...Draft derivative action

11 insufficiency..."

12 What derivative action were you drafting in October

13 of '06?

14 A. The way I work is, I am always

15 drafting stuff in parallel. I was working on an

16 arbitration brief, a derivative. Any possibility

17 that could, if we had to get...if we couldn't make a

18 deal, couldn't bang people's heads into. So, that

19 is the way I do it.

20 3109. Q. Sir, can you answer my question now?

21 A. I don't have a recollection of

22 exactly what it was, but I know what a derivative

23 action is.

24 3110. Q. Well, let me help you. Am I right,

25 sir, that in late 2006 a derivative action was

1 commenced in Barbados against a number of the
2 parties including my clients, Richard Ivan Cox,
3 Gerard Cox, Alan Cox, Kingsland, the Attorney
4 General of Barbados and Mr. Ranking's client,
5 PricewaterhouseCoopers, for leave to bring a
6 derivative action in the name of Kingsland against
7 the Attorney General for compensation for the
8 compulsory acquisition of certain lands in
9 Kingsland? That was the claim you were drafting in
10 October, 2006. So, it was a claim that was actually
11 issued in Barbados?

12 A. Could have been.

13 3111. Q. Right. And so, the very claims in
14 Barbados that Justice Shaughnessy found were the
15 same or similar to the claim advanced in Ontario,
16 you had drafted. Because he specifically mentions
17 suit number 2141 of 2006, which is the derivative
18 action that you drafted, right?

19 A. I would have assisted Mr. Shepherd.
20 I mean, he is...I can't bring an action in Barbados.

21 3112. Q. Right, but you drafted the action
22 that Shepherd issued that Shaughnessy subsequently
23 found to be the same or similar to the action that
24 you were advancing in Ontario, right?

25 A. I think it is the same one.

1 BY MR. SILVER:

2 3118. Q. I take it from...do you agree with
3 me that paragraph 20 is inaccurate?

4 A. I don't think so.

5 3119. Q. Or was supposed to be. Do you agree
6 with me that notwithstanding that everything was
7 supposed to be docketed to the Nelson Barbados file
8 once the Ontario litigation commenced, that is not
9 what happened?

10 A. There were cross-overs.

11 3120. Q. There weren't cross-overs. There
12 was a continued docketing directly in respect of the
13 Ontario litigation to the Peter Allard file after
14 the litigation was issued, right?

15 A. I think that is correct.

16 3121. Q. In fact, we had seen through the
17 last hour or two, in looking at all the accounts in
18 543, that the contemplation of the Ontario action
19 arose from your very first involvement in '05, and
20 continued to be a subject matter including
21 discussions with Cox about settling, that you
22 docketed in 543 and billed Allard and Allard paid
23 for it?

24 A. I don't agree with that. In my
25 thinking...

1 3122. Q. Well, we just went through all the
2 dockets and you confirmed it.

3 A. In my thinking the new file was sort
4 of focused on the Ontario action issued and getting
5 going. You talked about that before about making
6 sure, in case there need to be docketing or taxation
7 or something like that, and I agreed with that.

8 3123. Q. Well, anyways, let's look at this
9 February 19th account in detail. January 18th you
10 have got,

11 "...Calls from Goddard and Alair Shepherd.
12 Review plans laid out with JG, JK..."
13 That is all about the Ontario action, right? More
14 than likely.

15 A. They would be interspersed.

16 3124. Q. Then the 21st,
17 "...Call from PA. Review his draft
18 documents and reply e-mail..."

19 Is that his comments on the draft Statement of
20 Claim?

21 A. I don't recall.

22 3125. Q. You don't have any of these e-mails.
23 I am not asking you for production because you say
24 you don't have anything. You are going to check
25 your files and see what you have?

1 A. I don't keep e-mails. I keep
2 selective or I might have excerpts.

3 3126. Q. January 24th it says,
4 "...Calls with AS [that is Alair Shepherd]
5 and Jane Goddard re updates and strategy
6 for February 5th..."

7 I take it February 5th was the day that was
8 earmarked to issue the claim? Because I think the
9 first claim was issued on the 5th?

10 A. Okay.

11 3127. Q. "...Research re new claim. Final
12 draft and possible avenues for service,
13 blogging, call with Nathan..."

14 That is all in respect of the Ontario action? At
15 least the drafting new claim and possible avenues
16 for service?

17 A. Likely, yes.

18 3128. Q. Right. And you travelled to
19 Barbados. The very next day, the 5th,
20 "...Research abuse of process and prepare
21 for briefing of Alair tomorrow..."

22 MR. KRAMER: What day, February 5th?

23 3129. MR. SILVER: January 25th.

24 MR. KRAMER: Twenty-fifth.

25

1 BY MR. SILVER:

2 3130. Q. And I suggest, sir, that you knew
3 that you might be facing an abuse of process claim
4 after you issued the Ontario Statement of Claim?
5 You were at least concerned about that, right?

6 A. I don't recall.

7 3131. Q. You were...actually, your docket...a
8 fair reading of your docket would indicate that at a
9 minimum you had enough of a concern about that to
10 have the issue researched, right?

11 A. Or I was briefing Mr. Shepherd...

12 3132. Q. Somebody was...

13 A. I can't remember what it was.

14 3133. Q. Somebody was concerned about an
15 abuse of process attack that might be coming upon
16 issuance of the Ontario Statement of Claim, and you
17 were researching...

18 A. I don't recall.

19 3134. Q. You can't deny that, right?

20 A. Let's agree when I don't recall that
21 I can't deny it either.

22 3135. Q. This work that you are doing on the
23 new Statement of Claim is for Allard. That is why
24 you billed it to him and that is why he paid it,
25 right?

1 A. That is accurate. The plaintiff was
2 a company. You know the whole story.

3 3136. Q. I know the whole, certainly.
4 Plaintiff was a company, but you were actually
5 working for Allard, right?

6 A. Both of them.

7 3137. Q. And you were also working for
8 Goddard, John Knox, Kathy Davis and Marjorie Ilma
9 Knox because the rights that Allard had derived from
10 them, right?

11 A. I wouldn't go that far.

12 3138. Q. Pretty close.

13 A. I mean, Allard and Best wanted their
14 money back. These other people may have had other
15 agendas. I am saying I wouldn't go that far. It
16 developed a cooperation strategy.

17 3139. Q. We are going to come to the
18 cooperation strategy and agreement. In fact, they
19 received money for their cooperation, right?

20 A. You already asked me that.

21 3140. Q. I did?

22 A. What the money was for?

23 3141. Q. No, we will come to it probably
24 tomorrow now, but it was clear that the money was in
25 furtherance of the cooperation agreement that you

1 entered into with them. You don't accept that? I
2 will take you there.

3 A. I will try to follow you tomorrow.

4 3142. Q. Yes, tomorrow is fine.

5 A. I am getting foggy here. Not my
6 good time of day.

7 3143. Q. Well, you were the one who wanted to
8 stay until...

9 A. I know, I am just saying if I had a
10 half an hour and a bun or something, I would be in
11 better shape.

12 3144. Q. I need a half an hour and a nap.

13 A. Yes, I am just saying this time of
14 day I fade.

15 3145. Q. Well, you let me know if you are too
16 weak to continue.

17 A. No, no, I am just saying give me a
18 bun and half an hour and I will stay...

19 3146. Q. Well, we are only staying for
20 another 45 minutes.

21 MR. KRAMER: Actually, Mr. Epstein has
22 asked us to end at 6:00.

23 MR. EPSTEIN: If you want to go on...I
24 will have to leave but if you guys want to
25 continue on that is fine.

1 3147. MR. SILVER: Okay good, thank you.

2

3 BY MR. SILVER:

4 3148. Q. In any event, whether you were
5 drafting this claim for everybody including John
6 Knox, Jane Goddard, the Knox family, you were
7 certainly in regular communication with them
8 throughout the years preceding the issuance of the
9 Statement of Claim?

10 A. I think we established that.

11 3149. Q. And you were seeking their input and
12 you wanted their clearance and their signoff on the
13 Statement of Claim before it got issued, correct?

14 A. There are a lot of facts in there
15 which required...well, you have got to be careful.

16 3150. Q. Right. And you were making sure
17 that you were careful. And then you are in...on
18 January 26th you are in Barbados and you,

19 "...Meet at AS's office [that is Alair
20 Shepherd] and arrange for service of
21 process. Calls with Miami lawyers and JG
22 and JK..."

23 What were you calling Miami lawyers about in January
24 of 2007?

25 A. I don't recall, but I know in a

1 period in there that threats...I may have the timing
2 wrong. Okay, I don't recall.

3 3151. Q. You don't recall?

4 A. I consulted lawyers in Miami about a
5 lot of stuff.

6 3152. Q. Well, what did you consult lawyers
7 in Miami about in respect of this matter in January
8 of 2007?

9 A. I don't recall.

10 3153. Q. I am going to suggest to you, sir,
11 that the plan, issue and action in Ontario was
12 connected to a plan to launch or have activity in
13 respect of the same action, the same subject matter
14 in Miami. And so you were calling Miami lawyers to
15 coordinate what was going on in Ontario with what
16 was planned for Miami, right?

17 A. I am not sure, what do you mean by
18 "activity"?

19 3154. Q. Well, as it turns out, the creation
20 of a trust within a month or two of issuing the
21 action. And I would suggest to you, ultimately,
22 this declaration for declaratory relief that you
23 attached as an exhibit to your April 23rd affidavit.
24 It all comes out of the same strategy or plan.
25 Right?

1 A. I really can't recall why I
2 contacted Miami lawyers, except to say...Keltruth
3 was there, attacks on Keltruth could be a
4 possibility.

5 3155. Q. Sir, you know what? I am going to
6 do you a favour. Before you make things up, let's
7 look at some more of the dockets, because it wasn't
8 about the Keltruth blog...

9 A. I am trying to help you. I am
10 saying focus, and I am going...but activity in
11 parallel, I don't really understand what you are
12 saying.

13 3156. Q. Well, we will come to it. So, you
14 can't tell me without...you don't know what you were
15 calling Miami lawyers...

16 A. That is how this started. I said I
17 don't recall and I was trying to help you.

18 3157. Q. January 28th. Read through this
19 with me, sir, please.

20 A. I am listening.

21 MR. KRAMER: January 28th?

22 THE DEPONENT: Yes, I have got it.

23

24 BY MR. SILVER:

25 3158. Q. "...Call with PA. Final read-

1 through of Canadian action for
2 accuracy..."

3 That is the Statement of Claim that got issued,
4 right, here in Ontario?

5 A. Yes.

6 3159. Q. The next day,
7 "...Redraft Statement of Claim and consider
8 possible new parties. Call with John, Jane
9 Goddard, review check and update claim..."

10 Sorry, that is Sunny Ware. So, on the 28th and the
11 29th you are still drafting the claim and talking to
12 Jane Goddard about it, right?

13 A. My recollection it was John Knox.

14 3160. Q. Well, it says "call with JG". You
15 can't remember?

16 A. I don't recall, exactly.

17 3161. Q. And then January 30th you actually
18 travelled to Miami, "Calls to lawyers". You don't
19 remember who you called in Miami? You have to
20 answer for the record.

21 A. I don't recall.

22 3162. Q. And then it says, "Call with PA", we
23 know who that is.

24 MR. RANKING: It wouldn't have been
25 anybody other than Broad and Cassel.

1 BY MR. SILVER:

2 3163. Q. Well, we are going to get there.

3 "...Prepare for meetings with lawyers
4 finalizing Canadian claim. E-mail from
5 AS..."

6 You see that on the 30th?

7 A. Yes, so...

8 3164. Q. So, you are preparing for a meeting
9 with lawyers in Miami for the next day and
10 finalizing the Canadian claim, right?

11 A. On the 30th?

12 3165. Q. Yes.

13 A. Okay.

14 3166. Q. And then on the 31st you,

15 "...Meet and brief Mike Dribin..."

16 Mike Dribin is the lawyer at Broad and Cassel,
17 correct?

18 A. He is a lawyer at Broad and Cassel.

19 3167. Q. He is a lawyer who is now acting for
20 Kathy Davis in this Probate Division action that you
21 attach as Exhibit B to your April 23rd affidavit,
22 right?

23 A. I think Mark Raymond is the
24 litigator.

25 3168. Q. They are both on it.

1 A. Okay.

2 3169. Q. Dribin just moved law firms a month
3 ago, and they both stayed on it, right?

4 A. Okay.

5 3170. Q. So, why are you briefing Mike Dribin
6 on January 31st if the plan for activity in Miami
7 wasn't connected with the plan for activity in
8 Ontario?

9 A. Dribin, Jane, Kathy?

10 3171. Q. It says,
11 "...Meet and brief with Mike Dribin and
12 later with Jane and Kathy..."

13 Right, that is the entry I am talking about. And my
14 question is, why were you meeting and briefing Mike
15 Dribin if not because what you had planned for Miami
16 was connected to what was planned for Ontario?

17 A. I don't recall.

18 3172. Q. Did Broad and Cassel review the
19 Canadian claim and provide you with comments on it?

20 A. Doubtful. But I don't recall.

21 3173. Q. Do you have a Broad and Cassel file?
22 I noted in Exhibit 14 there is a file folder that is
23 labelled "Mike Dribin", so we will see. But do you
24 have a Broad and Cassel file?

25 A. I don't recall. He was a lawyer for

1 the family because of an estate plan for Marjorie.

2 3174. Q. Exactly. So, why are you meeting
3 him to finalize the Canadian plan? That is exactly
4 my question. If he was the lawyer just for the
5 trust and for the family, why were you meeting with
6 him to finalize the Canadian claim?

7 MR. KRAMER: Where does it say that?

8

9 BY MR. SILVER:

10 3175. Q. January 31st you travel to Miami,
11 you call lawyers,
12 "...Call with PA. Prepare for meetings
13 with lawyers finalizing Canadian claim..."
14 And then the next day you meet and brief with Mike
15 Dribin, and later with Jane and Kathy. So, are you
16 suggesting to me that your meeting with Mike Dribin
17 had nothing to do with the Canadian claim? You are
18 not suggesting that?

19 A. I don't recall him being involved in
20 the Canadian claim.

21 3176. Q. I'm sure you don't, but that is what
22 the document indicates.

23 A. Well, you are taking the commas out.
24 But anyway, whatever.

25 3177. Q. So, do you have a file that has

1 Broad and Cassel...I mean we see in here that you
2 sent them retainer monies, I am going to come to
3 that. Allard paid them a \$50,000 retainer as
4 recently as late '09. Are you aware of that? That
5 is \$50,000 that went through you, your trust
6 account. You are not aware of that?

7 A. I wouldn't argue. I mean a trust
8 account is what it is. Which is money comes in and
9 gets fired off in all directions, that is for sure.

10 3178. Q. So, that 50,000 that was sent in
11 '09, that is a retainer in respect of the
12 application for declaratory relief, right? That you
13 say in your affidavit you are vaguely aware of.

14 A. I don't recall, because you are
15 being vague. I mean, show me all the stuff and...

16 3179. Q. I will, I will. I will get to it.
17 I was hoping to short circuit it but that is not
18 possible with this amount of detail. On February
19 7th...we see February 6th,

20 "...Seeing to service of claim..."
21 That is the Ontario action, right? Right?

22 A. Must be.

23 3180. Q. And then February 7th you are,
24 "...Researching conspiracy, UN convention
25 and Berne Convention..."

1 And then you have an entry,

2 "...Meet with JG and JK to outline Miami
3 plan and challenges..."

4 This is the day that you are issuing the Statement
5 of Claim in Ontario. Mr. McKenzie, what was the
6 Miami plan?

7 A. February, '07, I don't recall.

8 3181. Q. You don't recall? Were you
9 contemplating starting a parallel action in Miami as
10 against some or all of the defendants that you were
11 suing in Ontario?

12 A. Was I?

13 3182. Q. You or the client. Or the Knoxes.
14 What was the Miami plan? You can't remember?

15 A. I don't recall.

16 3183. Q. What was being discussed with
17 Goddard and Knox in February of '07 with respect to
18 Miami? You can't recall?

19 A. In February of '07 I can't recall.

20 MR. RANKING: Will you make inquiries of
21 Mr. Dribin and advise?

22 THE DEPONENT: No. /R

23 MR. RANKING: Make inquiries of Mr.
24 Raymond...

25 THE DEPONENT: No, you have already

1 written to him, Mr. Ranking, and back a few
2 times.

/R

3 3184. MR. SILVER: What about this lawyer
4 Kelly, will you make inquiries of him and
5 advise whether he knows what the Miami plan
6 was that was being considered at that time?

7 THE DEPONENT: You can ask him.

/R

8 3185. MR. SILVER: Okay, so it is a refusal.

9 MR. RANKING: Is there a refusal on Mr.
10 McKenzie to inquire of Mr. Dribin or Mr.
11 Raymond as to the Miami plans?

12

13 BY MR. SILVER:

14 3186. Q. Or Kelly, is another lawyer. You
15 know who Kelly is?

16 A. John Kelly.

17 3187. Q. Yes, he was a litigation lawyer in
18 Miami that gave you an opinion?

19 A. I don't recall an opinion but I
20 recall consulting.

21 3188. Q. So, you won't inquire of Dribin,
22 Raymond or Kelly and advise what they were consulted
23 on in 2007? What they were consulted on by McKenzie
24 in 2007?

25 MR. RANKING: And their understanding of

1 the Miami plan?

2 MR. KRAMER: They are not mentioned in
3 the same docket as the Miami plan, though.

4 3189. MR. SILVER: Yes, I know, but when you
5 read these dockets, the natural conclusion
6 is that they were the lawyers that were
7 consulted to implement the Miami plan,
8 whatever it was, so they may have knowledge
9 of what the plans for Miami...and Miami
10 plan shouldn't be capital M, capital P. It
11 should be smaller...lower case. Or the
12 plans for activity in Miami. So, he has
13 refused to do that. February 8th there
14 is...

15 MR. RANKING: Just before you go on, I
16 am also going to ask for an undertaking to
17 see production of the file of each of those
18 individuals and the file of Broad and
19 Cassel with respect to the very docket
20 entries upon which Mr. Silver has examined.

21 MR. KRAMER: Surely there is no power,
22 either in Mr. McKenzie, or even the court
23 to...

24 MR. RANKING: I totally disagree with
25 that, Mr. Kramer, because the reality is

1 when you look at the dockets in their
2 entirety and who, in fact, retained the
3 Broad and Cassel firm, it is quite clear
4 the Broad and Cassel firm was retained by
5 Mr. McKenzie. The relationship is with Mr.
6 McKenzie.

7 THE DEPONENT: I don't agree with that.

8 MR. KRAMER: But subject to us debating
9 that further, the documents you are looking
10 for are outside of the jurisdiction. How
11 could any order...how could the court...

12 3190.

13 MR. SILVER: All that Mr. Ranking is
14 asking is that Mr. McKenzie call Broad and
15 Cassel and call Mike Dribin at his new firm
16 and say, "Can you please provide me with a
17 copy of your file relating to activity with
18 me in and following January, 2007?" In
19 which case, there is no need for court
20 orders or special letters rogatory. Broad
21 and Cassel will give McKenzie the file and
22 you will produce it to us.

23 MR. KRAMER: Well, maybe they would,
24 maybe they wouldn't. Mr. McKenzie is not
25 agreeing to do it. I don't think it is a
requirement that he do it. But

1 anyways...you have asked the question, it
2 is clear.

/R

3

4 BY MR. SILVER:

5 3191. Q. We are requesting that Mr. McKenzie
6 requests Broad and Cassel's file re activity with
7 McKenzie in and following January, 2007 as reflected
8 in accounts dated February 19th, 2007 and following.
9 And you are refusing.

10 A. Just to be clear, they didn't act
11 for me, and so you have the equivalent right to
12 contact them as I do.

13 3192. Q. But you know that that is a dead
14 end. We are going to contact them and they are
15 going to tell us to "F off", excuse my language.

16 A. As they might tell me.

17 3193. Q. Well, you have got a better chance
18 to get it if you are asking for it than if we are.

19 A. Whatever.

20 MR. RANKING: Mr. McKenzie, do you
21 dispute that you are, in fact, the
22 individual who selected and retained Mr.
23 Dribin of the Broad and Cassel firm?

24 THE DEPONENT: I did not retain Mr.
25 Dribin.

1 MR. RANKING: Let's deal with them one
2 at a time. Did you select Mr. Dribin?

3 THE DEPONENT: What do you mean,
4 "select"?

5 MR. RANKING: Were you the individual
6 who identified Mr. Dribin as the individual
7 from whom you would seek counsel in Miami?

8 3194. MR. SILVER: It is in the dockets. Are
9 you going to answer that question?

10 THE DEPONENT: I am having trouble
11 understanding it. So, I'm saying select,
12 identify a lawyer as Mr. Dribin. That is
13 somebody else's lawyer.

14 3195. MR. SILVER: Let's...

15 THE DEPONENT: And spend the money for
16 Allard is what I admit. That is as far as
17 I can go.

18 3196. MR. SILVER: Just hang on. Let's look
19 at the March 23rd account. Keep your
20 finger on February 19th, because we are
21 going to come back to it, but the next
22 account March 23rd and go to the U.S. trust
23 account statement.

24
25 BY MR. SILVER:

1 3197. Q. And again, this is in the Peter
2 Allard file, not the Nelson Barbados file. And so
3 am I right, as I read this, that \$12,490 came in,
4 which was 12,500 less a \$10 wire transfer fee, of
5 which you sent \$2,500 to Broad and Cassel as a
6 retainer?

7 A. Yes.

8 3198. Q. Yes.

9 A. So Mr. Allard's money was sent to
10 Broad and Cassel.

11 3199. Q. Who was Broad and Cassel acting for?

12 A. Kathy Davis, the trust...it was an
13 estate plan type of thing, as I recall.

14 3200. Q. It was an estate plan kind of thing
15 that you arranged and paid for through monies that
16 came through your trust account that originated with
17 Peter Allard, right?

18 A. Out of the funds that came to me, I
19 was directed to send some to Broad and Cassel...

20 3201. Q. No, in fact...

21 A. Just a second.

22 3202. Q. ...the funds came to you to pay
23 Miami lawyers. That is what it says:

24 "...Receive from Peter Allard U.S. funds
25 retainer for Miami lawyers..."

1 Paul and Beiley. Who are they? They gave an
2 opinion letter. Who were they?

3 A. Well, they are lawyers in Florida.

4 3207. Q. Right. They are lawyers in Florida
5 that you...

6 A. I recall the guy's name is Richard
7 Zelman. That is why I am saying this, and I
8 think...I can't remember.

9 3208. Q. Well, let me suggest to you that you
10 were interviewing lawyers in Miami to find a
11 suitable counsel to launch an action in Miami
12 similar to the action that was being launched in
13 Ontario.

14 A. That is not correct, saying that
15 Michael Dribin was an estate lawyer or a trust
16 lawyer. He was doing a family plan and I believe
17 identified, or somebody identified Zelman as being a
18 guy that could do...make sure Peter Allard's
19 security he had in Barbados was translated to...with
20 the shares, which as you know, were transferred to
21 the trust somewhere in there.

22 3209. Q. Did you get a copy of Zelman's
23 opinion letter?

24 A. I don't recall.

25 3210. Q. Can you make inquiries of Kathy

1 Davis or otherwise search your record and produce
2 the Zelman opinion letter referred to in the trust
3 statement for the March 23rd, 2007 account?

4 MR. KRAMER: Let's take them one at a
5 time. Is there any possibility that you
6 have the Zelman opinion letter, such that a
7 search of your records would make any
8 sense?

9 THE DEPONENT: Well, it is in the file,
10 but I...

11 MR. KRAMER: No, your records. He is
12 not asking about the firm records.

13 THE DEPONENT: I don't...I can't imagine
14 I have a copy of an opinion letter from
15 them.

16 MR. KRAMER: He says he doesn't have it,
17 so there is no sense searching for it and
18 we are not going to ask Kathy Davis for it. /R

19 3211. MR. SILVER: Well, I don't agree with
20 that. I don't agree that because he says
21 he doesn't have it, there is no sense in
22 searching for it because he may not think
23 he has it, but he might find it. And in
24 any event, I am also asking that you get it
25 from...

1 BY MR. SILVER:

2 3212. Q. Who was Zelman's client? Allard,
3 presumably.

4 A. I...

5 3213. Q. Allard was paying him.

6 A. ...think he is a UCC lawyer, and
7 therefore I am thinking he put the security on the
8 shares after they were transferred to the trust.

9 3214. Q. He is a U.S. attorney. He was a UCC
10 grad who was down in Miami?

11 A. No, sorry. Uniform Commercial Code.
12 Like, he would be a...

13 3215. Q. I don't care. I don't know why that
14 is relevant. Who was his client, Allard?

15 A. Yes, it would have been Allard.

16 3216. Q. So you shouldn't inquire of Kathy
17 Davis. Inquire of Allard and produce the Zelman
18 opinion letter.

19 MR. KRAMER: Well, I don't see why we
20 have to get that.

21 3217. MR. SILVER: So it is a refusal?

22 MR. KRAMER: It is a refusal.

/R

23 THE DEPONENT: Enough work to do.

24 3218. MR. SILVER: And then just carrying this
25 through, I want to look at the next

1 account, the April 20th account. Gerry has
2 got a question.

3 MR. RANKING: Just before...because I
4 want to be fair to you because I don't
5 accept your answer to the extent that I got
6 one. I had asked you if you were
7 responsible for selecting Mr. Dribin as
8 counsel. And to be fair to you, I am going
9 to take you to the second page of the
10 February 19th account where there is a
11 docket entry at the top of the second page
12 by Ms. Ware:

13 "...Searching to locate names of attorneys,
14 law firms in Miami who specialize in wills
15 and trusts. E-mailed coordinates to
16 KWM..."

17 Does that refresh your memory to the fact
18 you instructed Ms. Ware to identify names
19 of U.S. counsel?

20 THE DEPONENT: That's the same thing as
21 the blogging. It would be, "Find some
22 lawyers in Miami." In other words, these
23 folks needed an estate lawyer. I
24 identified a UCC lawyer. They need a
25 garbage collector...I mean, in other words,

1 research are us, if you see what I mean.

2 MR. RANKING: Right, and she provided
3 you with a list of names and you were the
4 individual that selected Mr. Dribin and
5 provided that name to Mr. Allard?

6 3219. MR. SILVER: Gerry, it is worse than
7 that. If you go to February 12th...

8 MR. RANKING: I will get there in a
9 minute. Is that not the case, Mr.
10 McKenzie? Your firm was actively
11 involved...

12 THE DEPONENT: To identify...

13 MR. RANKING: I will ask the question.
14 Your firm was actively involved in
15 researching and identifying counsel for Mr.
16 Allard in Miami, correct?

17 THE DEPONENT: Identifying and
18 researching, yes.

19 MR. RANKING: Right, and after you
20 identified...and I take it you were the
21 individual who identified and recommended
22 Mr. Dribin to Mr. Peter Allard, correct?

23 THE DEPONENT: It is Kathy Davis, as I
24 recall, that selected and retained this
25 guy.

1 MR. RANKING: You were the individual
2 who recommended him?

3 THE DEPONENT: You can take a horse to
4 water, so to speak, and they have to drink.

5 MR. RANKING: And if I take you to the
6 entry on February the 12th you, in fact,
7 were the individual who travelled to Miami
8 and, in fact, conducted the interviews?

9 3220. MR. SILVER: Well, he prepared for them
10 on the 12th and conducted them on the 13th.

11 MR. RANKING: Is that correct?

12 3221. MR. SILVER: Yes. Well, that is what
13 his dockets show, if you go to the next
14 page. On the 13th he meets with
15 litigators. That is not Dribin. Is that
16 right?

17 THE DEPONENT: I met with lots of
18 lawyers and flushed out whether they had
19 the talent. For instance, you don't use a
20 litigator to do an estate. Once a guy
21 knows an estate, then they interviewed and
22 retained him.

23 MR. RANKING: But the reality is that
24 Ms. Davis or Mr. Allard retained you and
25 were relying upon you for your

1 recommendation with respect to the
2 selection of counsel in Miami. Isn't that
3 fair?

4 THE DEPONENT: Identify, yes. Recommend
5 or cull out down to a short list, yes.
6 That would be my job, but I didn't do the
7 selection or the retaining, which is, I
8 think, the word you were using.

9

10 BY MR. SILVER :

11 3222. Q. You drafted the retainer agreements,
12 though. Feb 14th:
13 "...Retainer agreements with..."

14 A. I drafted the retainer agreement by
15 Dribin?

16 3223. Q. Not Dribin, probably the litigators.
17 It says:
18 "...Retainer agreements with two

19 litigators. E-mailed to PA..."

20 A. I can't believe I drafted it, or the
21 retainer letter:

22 "...E-mail to John Kelly re retainer
23 letter..."

24 So he drafts the retainer letter.

25 3224. Q. Where are you reading?

1 MR. KRAMER: No...

2 THE DEPONENT: "...Retainer agreements

3 with two litigators..."

4 Yes, so they are drafting them and I am...

5

6 BY MR. SILVER :

7 3225. Q. Reviewing them?

8 A. ...reviewing them to make sure they

9 are retainer letters.

10 3226. Q. And then you send an e-mail to PA

11 about the retainer agreements?

12 A. Well, as an example, Zelman has got

13 the skill set and his retainer agreement looks like

14 a decent retainer agreement. Carry on. He is all

15 yours.

16 3227. Q. And then:

17 "...E-mails from and to JG and JK.

18 Reviewed draft trust agreements..."

19 That is now...

20 A. That is Dribin.

21 3228. Q. ...Dribin?

22 A. Yes.

23 3229. Q. Then you meet with MD, Mike Dribin:

24 "...re contating trust..."

25 Whatever that is.

1 MR. RANKING: Should be "constating
2 trust".

3

4 BY MR. SILVER:

5 3230. Q. "...constating trust. Opinion
6 for..."

7 So this trust that now gives rise to the claim for
8 declaratory relief in Barbados was a trust that you
9 were involved in retaining the lawyer for, Mike
10 Dribin, right?

11 A. They retained him.

12 3231. Q. You were involved in...

13 A. I identified him and I kept an eye
14 on what he was doing.

15 3232. Q. You are right. You assisted in the
16 drafting of the trust, reviewed it?

17 A. Well, I don't...trusts is not my
18 strength in anything, but I would review it.

19 3233. Q. And redrafted it?

20 A. I don't think so.

21 3234. Q. Well, look at your February 16th
22 docket.

23 A. That is fine.

24 3235. Q. "...Call with lawyers re creation of
25 trust, redrafting..."

1 A. You keep missing the...I cannot
2 believe I drafted it, a trust...

3 3236. Q. What were you redrafting on the
4 16th?

5 A. I don't recall.

6 3237. Q. Are you denying that you were
7 redrafting the trust, that you were meeting with
8 Dribin about and reviewing and speaking to him
9 about? I guess you are, Mr. McKenzie?

10 A. No, I am saying it would be unlikely
11 I am drafting a Florida trust agreement.

12 3238. Q. I didn't say that. You were
13 redrafting it.

14 A. Or redrafting it.

15 3239. Q. So that docket entry is wrong and
16 you just must have billed Mr. Allard for something
17 you didn't do?

18 A. Well, I read it differently than you
19 do, but...

20 3240. Q. How do you read it:
21 "...Calls with lawyers re..."

22 A. "...Calls with lawyers re creation
23 of trust..."

24 Comma, full stop, okay:

25 "...redrafting..."

1 something. Who knows what it was.

2 3241. Q. Well, I am suggesting to you that
3 you were redrafting the trust document.

4 A. Well, there you go, and I am saying
5 that is not my recollection. It is unlikely I would
6 be drafting or redrafting...

7 MR. RANKING: What is your recollection?

8 THE DEPONENT: You just had it.

9 MR. RANKING: You don't have a
10 recollection, isn't that fair?

11

12 BY MR. SILVER:

13 3242. Q. What is your recollection as to what
14 you were redrafting on that day?

15 A. I don't have a recollection.

16 3243. Q. And to your knowledge and
17 information, it was Kathy Davis who retained Dribin,
18 and not Allard? Is that a yes?

19 A. Well, listen, Kathy Davis became the
20 trustee, so I gather she would have retained a
21 lawyer.

22 MR. RANKING: Then can you explain,
23 given that answer, how it is that you came
24 to pay the Broad and Cassel firm \$12,500 of
25 Mr. Allard's money?

1 THE DEPONENT: Well, as I said, we
2 appeared to be the clearing house. Peter
3 would send a ton of money and direct my
4 office to send it to various places...

5 MR. RANKING: So on that, Mr. Allard was
6 not only paying for the litigation, he was
7 also paying for the creation of the trust
8 by which Kathleen Davis was going to become
9 the trustee of the irrevocable trust that
10 was formed by Mr. Dribin? And that has
11 been attached as an exhibit to your
12 affidavit sworn April the...

13 THE DEPONENT: Different pockets.

14 MR. RANKING: ...23rd, correct?

15 THE DEPONENT: We already established
16 that he was advancing money to the Knox
17 family for various things, and I presume
18 this was in that pocket.

19

20 BY MR. SILVER:

21 3244. Q. Was there ever an accounting between
22 Allard and the Knoxes as to what he was advancing
23 and for what?

24 A. Well, I saw...I have only seen what
25 you have seen, which is step up of a...

1 3245. Q. The up stepping?

2 A. Yes, and then...

3 3246. Q. You have never seen...

4 A. And then I think that is where
5 Zelman came in and made sure the identical security
6 was on the shares after they transferred them into
7 the trust.

8 3247. Q. And then that security was, in fact,
9 placed in Miami, after the trust was created?

10 A. I think I...okay. I think I read it
11 in the Miami documents, but...that it is a
12 registered security, but you would know more about
13 that than I do.

14 3248. Q. No, I wouldn't, because I can't
15 follow these shenanigans, quite frankly. I just
16 want to cover off...we are obviously very interested
17 in the Broad and Cassel retainer and I am just
18 confirming that you are refusing to take any steps
19 to get it, whether it is calling Mike Dribin and
20 asking or the other Raymond guy, or Kathy Davis, or
21 Allard, who paid for it. You are refusing to do any
22 of that to get the retainer agreement to us?

23 A. I think we have refused, yes. I
24 have refused...

25 3249. Q. And you are doing the same in

1 respect of Zelman?

2 A. Zelman, all the lawyers.

3 3250. Q. Right.

4 A. I mean, you can call them.

5 3251. Q. Yes, I know I can call them, but I
6 don't think it is going to take me very far. And
7 then, looking at the...and this would be the last
8 document, maybe. It is 620, but looking at the
9 trust statements for the next account, which is
10 April 20th, you will see that you got more money in
11 from Allard on April 18th:

12 "...U.S. funds retainer for Miami
13 lawyers..."

14 So he had sent in \$12,500 earlier, and apparently
15 that got used up and I take it you asked him and he
16 sent in another \$10,000 for more retainer funds for
17 Miami lawyers, right?

18 A. My office was...kept track of all
19 the money and what...

20 3252. Q. Sir, I am just asking you to look at
21 this...

22 A. Well, I didn't ask...

23 3253. Q. Somebody did. Sunny Ware did?

24 A. That is up to...my office took care
25 of...

1 3254. Q. Sunny Ware asked?

2 A. ...the clearing house. The
3 accounting department, Sunny...

4 3255. Q. Not the accounting department, Sunny
5 Ware.

6 A. Well, between them they did it,
7 because it came into...

8 3256. Q. And then when the money came in you
9 sent out \$2,904.07 for an invoice of April 11th.
10 That was to Broad and Cassel, right?

11 A. Right.

12 3257. Q. So notwithstanding that Kathy Davis
13 was the client, you continued to be the clearing
14 house for Allard's money and Allard not only paid
15 the retainer, but also paid Broad and Cassels
16 invoice, right?

17 A. Clearing house, yes.

18 3258. Q. Right.

19 A. The money seemed to go through...

20 3259. Q. And can you make inquiries of Dribin
21 and produce a copy of the invoice of April 11th,
22 2007:

23 "...Dribin arraignment..."

24 A. Same answer. No, you can ask him.

/R

25 MR. RANKING: Well, in fact, I would

1 3265.

MR. SILVER: We get road blocks every
2 way we turn.

3 MR. KRAMER: Well, we are not putting up
4 any road block to retrieving it from the
5 firm, if it is in the firm file. Maybe it
6 is in the box that I just got in my office.
7 I don't know.

8 MR. RANKING: I am sorry, can I just
9 follow up on that, Mr. Kramer, because I am
10 having some difficulty and I know that you
11 are being cooperative, but I do have some
12 difficulty with a position where you are
13 not objecting to having it produced by the
14 firm, and yet you are not going to make a
15 reasonable inquiry of Mike Dribin or Broad
16 and Cassel.

17 MR. KRAMER: I don't see why he would...
18 maybe you can help me here, but I don't see
19 why Mr. McKenzie has any ability or
20 obligation to inquire of a lawyer retained
21 by...who is not his lawyer, to get some
22 document which would be between that lawyer
23 and his client.

24 MR. RANKING: Well, simply because it
25 was Mr. McKenzie to whom the account was

1 addressed, and if it was Mr. McKenzie...

2 3266. MR. SILVER: And who caused...

3 MR. KRAMER: Well, how do we know that?

4 MR. RANKING: It was Mr. McKenzie...

5 MR. KRAMER: How do we know the account
6 was addressed to Mr. McKenzie?

7 MR. RANKING: Well, it was certainly
8 sent to Mr. McKenzie because he was the
9 individual who was the interface with the
10 Broad and Cassel firm.

11 MR. KRAMER: With all due respect, all
12 we know is that it was paid out of trust
13 money in McKenzie's firm. That is all I
14 see.

15 MR. RANKING: No, we know a lot more
16 than that.

17 MR. KRAMER: Okay, with respect to this
18 account, as far as I can tell, that is all
19 we know. I mean, you might be right, but
20 why do you say the account was addressed to
21 Mr. McKenzie?

22 MR. RANKING: Well, certainly it was
23 sent to Mr. McKenzie. I don't know whether
24 it was addressed. I don't know the
25 individual to whom it was addressed. All

1 I..

2 3267. MR. SILVER: That is why we want to see
3 it.

4 MR. RANKING: All I do know...

5 MR. KRAMER: Yes, okay.

6 MR. RANKING: ...is the only interface
7 with the Broad and Cassel firm is Mr.
8 McKenzie.

9 MR. KRAMER: Well, I am not sure we know
10 that either. Presumably the clients,
11 whether it is Davis or whoever the
12 interface...

13 MR. RANKING: To be fair to us, we know
14 that it was Mr. McKenzie that provided the
15 names from which the individual was
16 selected. We know it was Mr. McKenzie that
17 went down and interviewed. We know it was
18 Mr. McKenzie that was the individual that
19 remitted the deposits, and we know it was
20 Mr. McKenzie or his firm to whom the
21 accounts were sent and the accounts were
22 paid.

23 MR. KRAMER: Well, the last one I am not
24 sure I agree with, but assuming that is all
25 right, McKenzie is still not the client. I

1 don't agree with you and you have got a
2 refusal. Perhaps the problem will be
3 solved if the accounts are found in the
4 firm files and if they are not, I guess we
5 will revisit it.

6 3268.

MR. SILVER: But let me just...one last
7 comment on that, Jeff, to appeal to your
8 sense of reasonableness. Bill McKenzie has
9 been...it would appear from these records
10 that Bill McKenzie has been working with
11 Dribin since the beginning of '07 and he
12 now puts in his affidavit, you know, that
13 it is...he is vaguely aware of...he got
14 some notification by where...I started my
15 cross with this, but those are sort of
16 curious words to be used, given that his
17 dockets show that he had been involved with
18 the guy for two years before this complaint
19 for declaratory relief, and so there seems
20 to be a long term relationship between
21 McKenzie on behalf of Allard or Kathy
22 Davis, I don't know, and Dribin, and we are
23 pushed for time.

24 We are making a claim against Mr.
25 McKenzie. The basis of the claim for costs

1 is that he is in the middle. He is the hub
2 of the wheel and orchestrated all this
3 abuse of process in Ontario and in Miami
4 that should give rise to full indemnity
5 cost award against him, his firm, and
6 perhaps others. And we are trying to get
7 information to assist in making those cases
8 arising out of trust statements that he
9 refused to provide at first instance, or
10 didn't provide, and sort of came out
11 through the firm, and we need some help in
12 getting this evidence as quickly as
13 possible.

14 And I think you and I know that if
15 we are left to our own devices, all these
16 other parties will find other ways to
17 ignore us, avoid us, and so our best chance
18 in getting this stuff in time is through
19 Mr. McKenzie. And that is why we are
20 asking for his assistance because if he
21 calls and says, "You know, Mr. Dribin, your
22 client is Kathy Davis, but I have got," or
23 Peter Allard or whoever it is, "but I have
24 got their instructions to authorize you to
25 send us a copy of all the invoices that you

1 have rendered and sent to my law firm. Can
2 you please send them to"...it will happen.
3 Any other way it won't happen.

4 MR. KRAMER: But how could he say, "I
5 have got your client's instructions for you
6 to release this to me"?

7 3269. MR. SILVER: He will call his client,
8 Allard, and make sure that he has got his
9 instruction and then he will call Dribin.

10 MR. KRAMER: Well, that seems to me to
11 be several steps removed from what he is
12 required to do. Look, I take your point.
13 I think you make a proper argument that if
14 any of those documents are within his
15 power, possession or control, he has to
16 produce them, but I don't think they are in
17 his power, possession or control, and I
18 mean, if he...

19 3270. MR. SILVER: Well, just so that you have
20 the...

21 MR. KRAMER: I mean, you are not asking
22 him to make the request now. You are
23 asking him to go and get a hold of Dribin's
24 clients, get their authority.

25 3271. MR. SILVER: He talks to them every day,

1 Jeff.

2 MR. KRAMER: Well...

3 3272. MR. SILVER: He did up until a certain
4 point. I expect that that probably
5 continues.

6 MR. KRAMER: All right, I will...

7 3273. MR. SILVER: Anyways...

8 MR. KRAMER: Can I suggest this? I take
9 your point. Let's consider this further,
10 especially...I am hopeful that this problem
11 will be resolved by discovery of these
12 documents elsewhere.

13 3274. MR. SILVER: I am going to treat it...we
14 have got a refusal...

15 MR. KRAMER: Treat it as a refusal....

16 3275. MR. SILVER: ...and if it changes, it
17 changes.

18 MR. KRAMER: Okay.

19

20 BY MR. SILVER:

21 3276. Q. And in that regard, the last one I
22 want to deal with today is the last trust entry on
23 the April 20th account, which is this payment of
24 \$2,271 to the Kelly Law Firm in Florida, again made
25 through the trust account with Allard's money. And

1 I am asking Mr. McKenzie, do you have a copy of the
2 account or the opinion letter referred to in that
3 trust statement description?

4 A. If it is in the file at the office,
5 it is there.

6 3277. Q. Okay. Well, we have asked for an
7 undertaking from the firm. You don't have...

8 A. That is what I would do. I would
9 ask them.

10 3278. Q. Okay. Well, I am not sure that they
11 are going to find it because of the evidence of
12 Jessica Duncan with respect to the files, so I would
13 like you to inquire of Kelly or Allard or Kathy
14 Davis and produce the opinion letter and the account
15 referred to in the trust account for U.S. funds
16 statement, which is part of the April 20th, 2007
17 account. Will you do that?

18 MR. KRAMER: That is in the category as
19 the previous discussion. /R

20 3279. MR. SILVER: You refuse.

21 THE DEPONENT: So we are done?

22 MR. KRAMER: Thank you, gentlemen.

23 3280. MR. SILVER: Thank you.

1			
2		INDEX OF EXHIBITS	
3			
4			
5	EXHIBIT		PAGE
6	NUMBER	DESCRIPTION	NUMBER
7			
8			
9	14	List of BMC 568 file folders	
10		prepared by Mr. Kramer's office	856

INDEX OF UNDERTAKINGS

REFERENCE NUMBER	PAGE NUMBER	QUESTION NUMBER
1	615	2220
2	616	2222
3	633	2286
4	634	2289
5	643	2324
6	658	2379
7	672	2421
8	677	2422
9	677	2422
10	738	2622
11	768	2759
12	772	2774

INDEX OF REFUSALS

REFERENCE NUMBER	PAGE NUMBER	QUESTION NUMBER
1	634	2287
2	702	2503
3	703	2505
4	705	2512
5	766	2751
6	772	2774
7	834	3003
8	884	3183
9	885	3183
10	885	3184
11	888	3190
12	891	3205
13	893	3210
14	895	3217
15	907	3259
16	907	3260
17	915	3278

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