

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE COLUMBIA PIPELINE : CONSOLIDATED
GROUP, INC. MERGER LITIGATION : Civil Action
: No. 2018-0484-JTL

Chancery Courtroom 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, July 19, 2022
9:15 a.m.

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

TRIAL TRANSCRIPT - VOLUME II

CHANCERY COURT REPORTERS
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CHANCERY COURT REPORTERS

1 THE COURT: Welcome back, everyone.
2 Thank you for being here. Thank you,
3 the witness, for being ready to go. Let's resume.
4 ATTORNEY HARRELL: Thank you, Your
5 Honor.
6 ROBERT SMITH, having been previously
7 affirmed, resumed and testified as follows:
8 DIRECT EXAMINATION (Cont'd)
9 BY ATTORNEY HARRELL: -- --
10 Q. Good morning.
11 A. Good morning.
12 Q. When we finished yesterday, we were
13 talking about the January 7 meeting and leading up to
14 the January 25 discussions.
15 Let's look at Exhibit No. 564, please.
16 This is an email from Mr. Skaggs to the board, dated
17 January 11, 2016. And in the email, Mr. Skaggs says,
18 "Since our recent discussions, TransCanada sent a data
19 request to Steve on Friday evening (1/8) -- in
20 contemplation of 'developing a preliminary proposal'
21 that apparently, [TransCanada's] CEO would communicate
22 to me 'early in the week of 1/25'."
23 I want to first ask you about this
24 reference to recent discussions. And I want to ask it

CHANCERY COURT REPORTERS

1 in connection with the annual strategic board meeting
2 that occurred at the end of January.
3 Leading up to that meeting, were there
4 one-on-one meetings with each of the board members?
5 A. There were.
6 Q. And what was the purpose of that?
7 A. So Mr. Skaggs -- I've seen many CEOs
8 communicate with boards before and manage boards, and
9 Mr. Skaggs was by far the best board manager, as I'd
10 say, as you manage up, that I've experienced.
11 And so he would have regular
12 one-on-ones, certainly prior to the strategic meeting
13 in January. Every year he would have one-on-ones with
14 each director and make sure he understood what their
15 expectations were, get their feedback on the substance
16 of the meetings. And so he certainly did that in this
17 meeting as well, and he would have updated them on our
18 financial position and just what we were experiencing
19 post-equity issuance, I'm sure.
20 Q. So when he sent out this email, which
21 is Exhibit No. 564, on 1/11/16, and said, "Since our
22 recent discussions ..., " he's referring to the fact
23 that he had already had one-on-one meetings with some
24 of the board members. Right?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 320

1 **A.** **That's correct.**
2 Q. Let's go, please, to Joint Exhibit
3 No. 4. And let's look at page 46.
4 And, by the way, to identify the
5 exhibit, this is the Schedule 14A from the
6 transaction. Right?
7 **A.** **I'm sorry. Is there a reference**
8 **number for a tab?**
9 Q. Yes. This is Exhibit 1291.
10 **A.** **It's the big one. I see it. Thank**
11 **you.**
12 Q. Why don't you identify what the
13 exhibit is, and then we'll talk about just a paragraph
14 in it.
15 **A.** **This appears to be the proxy statement**
16 **that we filed -- I'm looking for a date -- in**
17 **connection with the approval of the merger. I don't**
18 **see the date.**
19 Q. Let's go to Exhibit No. 46 -- I'm
20 sorry, page number 46, please, and the second to last
21 paragraph.
22 **A.** **Okay.**
23 Q. And you see it says, "On January 25,
24 2016, Mr. Girling contacted Mr. Skaggs and indicated

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 322

1 **that were indicative in nature, we were told that that**
2 **was not improper under the standstill agreement, did**
3 **not breach that provision.**
4 Q. Was a range of 25 to \$28 an offer that
5 could have been accepted, in your mind?
6 **A.** **No.**
7 Q. Now, at this time, could Dominion or
8 NextEra or Berkshire also have provided indicative
9 proposals?
10 **A.** **Yes.**
11 Q. One moment, please.
12 And, by the way, is that what happened
13 in November of 2015; that is, indicative proposals
14 were made by the parties?
15 **A.** **Yes.**
16 Q. On November 24th, 2015 -- sorry.
17 Yes, let's look at one other thing in
18 the proxy, and that's on page 45. So just go back a
19 page. And you see where it says here, "On
20 November 24th, 2015, TransCanada and Party D each made
21 verbal indications of interest to Mr. Skaggs."
22 And if you skip down, you see in that
23 paragraph, "The Chief Executive Officer of Party D
24 indicated that Party D was interested in acquiring CPG

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 321

1 that TransCanada would be interested in pursuing an
2 all-cash acquisition of CPG at a price per share of
3 CPG common stock in the range of \$25 to \$28.
4 Mr. Skaggs expressed the view that any transaction
5 would need to be at the top end of that range."
6 I want to talk to you about the
7 discussions that led up to -- the internal discussions
8 that led up to this meeting. Before TransCanada made
9 this indication of interest on January 25, did you
10 have additional discussions with Sullivan about
11 whether TransCanada providing a proposed range was
12 permissible under the standstill provision?
13 **A.** **I did.**
14 Q. And did you seek Mr. Frumkin's advice
15 on that?
16 **A.** **I did.**
17 Q. And did you have an understanding,
18 having talked to him, about why a range of 25 to \$28
19 did not violate the standstill?
20 **A.** **I did. From the advice that we**
21 **received, we were allowed to have discussions without**
22 **violating the terms of the standstill to the point of**
23 **entertaining whether or not an actual offer would be**
24 **made. And so the discussions that were informal and**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 323

1 at a price per share of CPG common stock of \$23.50 in
2 cash."
3 Do you see that?
4 **A.** **I do.**
5 Q. And so is that an indication or an
6 example of one of the indicative proposals made by
7 another one of the parties?
8 **A.** **It is.**
9 Q. And Party D, do you recall that that
10 was Berkshire?
11 **A.** **I do not recall.**
12 Q. Okay.
13 **A.** **I'm sorry.**
14 Q. It's been a while.
15 **A.** **That would make sense, though.**
16 Q. So leading up to this January 25
17 meeting, did you have a conversation and exchange
18 emails with Chris Johnston?
19 **A.** **I did.**
20 Q. Let's look at Exhibit No. 620, please.
21 Is Exhibit 620 an exchange of emails that you had with
22 Ms. Johnston and then later with Mr. Frumkin?
23 **A.** **It is.**
24 Q. Let's start with the email at the

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 324

1 bottom. This is an email from Chris Johnston to you.
2 This is January 25, 2016. And it says, "Good Morning
3 Bob."
4 And then in the second paragraph it
5 says, "As I expect you may be aware, your CFO has been
6 involved in arranging a call between Taurus' CEO and
7 Capricorn's CEO which is to take place at the end of
8 the day today. My understanding is that while there
9 may be some broad discussion regarding valuation of
10 Capricorn, this conversation will not constitute an
11 offer nor a proposal to acquire the securities of
12 Capricorn nor constitute any other action that would
13 be precluded by the standstill provisions"
14 Do you recall her asking that?
15 **A. I do.**
16 Q. And then if you look up at the email
17 in the middle of the page, you sent that to
18 Mr. Frumkin. Right?
19 **A. I did.**
20 Q. And in your email, you said -- you
21 referred to what Ms. Johnston was asking, and
22 Mr. Frumkin said, "[I] agree."
23 **A. That's correct.**
24 Q. That is, he agreed with her

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 326

1 when Ms. Johnston reached out for confirmation that
2 the standstill did not preclude the talks that were
3 getting ready to happen, in your mind, did that waive
4 or breach the "don't ask, don't waive" provision?
5 **A. No. Based on advice of counsel, it**
6 **did not.**
7 Q. Okay. And you had discussions with
8 Sullivan about that?
9 **A. Yes.**
10 Q. And why is it that you believed it did
11 not waive that "don't ask, don't waive" provision?
12 **A. I think I noted it earlier. But,**
13 **again, the discussions were in an attempt to decide**
14 **whether there would be pursuit of an offer or whether**
15 **there would be an actual offer being made. And so the**
16 **indicative discussions leading up to that, we were --**
17 **we were informed and counseled that that would not be**
18 **a breach.**
19 Q. And she was not asking for a waiver.
20 Right?
21 **A. That's correct.**
22 Q. Just a confirmation.
23 Now, let's look at -- correct?
24 **A. Yes.**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 325

1 supposition or her thesis of the fact that the
2 standstill agreement did not preclude the
3 conversations that were going to happen. Right?
4 **A. Yes. I think his "Agree" is he's**
5 **agreeing with my statement that I will call Chris back**
6 **and I will acknowledge that it is not an offer in**
7 **contradiction of the standstill.**
8 Q. Now, if we go back to the bottom of
9 the first page of this exhibit, the third paragraph of
10 Ms. Johnston's email, I want to focus on that for just
11 a minute.
12 She says, "If however, after that
13 meeting and after discussions with your board, your
14 board is receptive to continuing the discussions, we
15 would like assurance that in the event a verbal or
16 written offer or proposal is made by Taurus to the
17 Capricorn CEO or board, Taurus would not be in
18 contravention or breach of its obligations under the
19 Standstill."
20 So she did ask that. Right?
21 **A. That's correct.**
22 Q. Let's go to Joint Exhibit No. 621,
23 please.
24 Before we talk about 621, by the way,

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 327

1 Q. Let's look at Exhibit 621, please.
2 These are some more emails that occurred on the same
3 day. And if we look at the second page of the
4 exhibit, we see that same email from Ms. Johnston to
5 you that starts, "Good Morning Bob." And it has what
6 we just discussed. Right?
7 **A. Correct.**
8 Q. Now, if we read up from that, your
9 response back to Ms. Johnston was, "Thanks Chris. I
10 confirm by this email that receipt of an offer to
11 purchase our securities in this context would not
12 violate or be in contravention with the terms of the
13 NDA, including the standstill provision."
14 Right?
15 **A. That's correct.**
16 Q. And that was the advice that you got
17 from Sullivan --
18 **A. Yes.**
19 Q. -- correct?
20 And then she writes back, "I am
21 comfortable with the conversation planned to take
22 place this afternoon."
23 So the conversation hadn't taken place
24 yet. Right?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 328

1 **A. That's correct.**
2 Q. "As indicated, if we were to move
3 forward, the words in the standstill that we agreed
4 would appear to require more explicit Board direction
5 for an offer (even if conditioned). Perhaps we can
6 discuss tomorrow after the conversation between CEOs
7 takes place"
8 And you sent that to Mr. Frumkin also.
9 Right?
10 **A. That's correct.**
11 Q. And Mr. Frumkin then sent back an
12 email to you saying, "I think a formal proposal they
13 are right, but what we're doing now is fine. Just
14 emphasize that what we approve them doing is making a
15 private, non-public indication for discussion of a
16 negotiated transaction and discussion of whether
17 aboard wants to initiate negotiations."
18 So what was Mr. Frumkin saying, in
19 your mind?
20 **A. That discussions that were preliminary**
21 **in order to determine they wanted to make an offer**
22 **were permissible under the clause.**
23 Q. And we will save for another day a
24 discussion about whether and to what extent a formal

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 330

1 consistent in giving management and the board at
2 Columbia?
3 **A. That's correct.**
4 Q. Let's go to Joint Exhibit 627, please.
5 The first page of this exhibit is an email from
6 Mr. Frumkin to you. And it says, "Bob, Here is the
7 material, reformatted, with just a couple of points
8 added. We can discuss [it]"
9 And if we turn to the attachment, do
10 you recall that this is a PowerPoint that Sullivan
11 prepared on directors' duties?
12 **A. I do.**
13 Q. And how did it come about that
14 Sullivan was preparing this and was it -- for what
15 purpose?
16 **A. It was to advise our board -- I'm**
17 **looking for the date. And I don't see a date in the**
18 **email. I'm sorry.**
19 Q. If you look at the date on the
20 email --
21 **A. Yes.**
22 Q. -- it's 1/26.
23 **A. So it would have been to advise the**
24 **board at that strategic meeting when we were doing our**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 329

1 proposal might fall into a different category. Yes?
2 **A. Yes.**
3 Q. And when Mr. Frumkin sent that back to
4 you, was that consistent with your understanding?
5 **A. It was consistent with our previous**
6 **conversations, yes.**
7 Q. By the way, throughout these
8 negotiations with TransCanada, did Sullivan ever
9 advise you or the board that TransCanada violated the
10 standstill?
11 **A. They did not.**
12 Q. Did you ever advise Columbia's
13 management or the board that TransCanada violated the
14 standstill?
15 **A. I did not.**
16 Q. Why not?
17 **A. Because we were watching the activity**
18 **and gauging it very carefully and were within the**
19 **bounds of the advice that we had been given.**
20 Q. And did you believe that TransCanada
21 or Columbia in any way violated the standstill at any
22 time?
23 **A. I did not.**
24 Q. And was that the advice that you were

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 331

1 **executive session to have the discussion regarding the**
2 **potential discussions that were occurring.**
3 Q. And that was a big board meeting, an
4 annual meeting. Right?
5 **A. It was.**
6 Q. And it lasted two days?
7 **A. That's correct. Maybe three.**
8 Q. Pardon me?
9 **A. Yeah, maybe three. I don't recall.**
10 **But two to three days.**
11 Q. And was this presentation actually
12 given at that meeting?
13 **A. It would have been.**
14 Q. Let's go to Exhibit 587, please. This
15 is an email, and it's dated 1/20/2016, which is also
16 right before that annual meeting, from Florence Zhang
17 to you, with copies to the Sullivan & Cromwell team.
18 And if we go to the second page, you
19 will see on Sullivan & Cromwell letterhead it's a
20 memorandum to the board of directors of Columbia, and
21 it's regarding fiduciary duties of directors under
22 Delaware law. Correct?
23 **A. That's correct.**
24 Q. Do you recall that Sullivan also

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 332

1 prepared this memorandum for the board?
2 **A. I do.**
3 Q. And it was prepared to be handed out
4 at that annual meeting. Right?
5 **A. That's correct.**
6 Q. Was it handed out at that meeting?
7 **A. Yes.**
8 Q. What was the purpose of this memo?
9 **A. The purpose of the memo was to make**
10 **sure that our board had all of the information**
11 **necessary in order to understand what their fiduciary**
12 **duties were and what the information would be that**
13 **they should be getting and just the whole context of**
14 **their decision-making. So we wanted them to be fully**
15 **informed.**
16 Q. Did this memorandum provide a lot more
17 detailed information as opposed to the PowerPoint that
18 was given during the meeting?
19 **A. Yes, it did.**
20 Q. Turn to page 8 of the exhibit. It's
21 actually page 7 of the memorandum but page 8 of the
22 exhibit, the top paragraph. Tell me when you're
23 there.
24 **A. I'm there.**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 334

1 Q. Let's go to the minutes again, please,
2 on page 5. And that's Exhibit 191. And this top
3 paragraph is long, and I'm going to try to break it
4 down into three parts here so we can digest it. The
5 first part starts on about the eighth line with the
6 sentence "Mr. Skaggs."
7 **A. Okay.**
8 Q. And it says, "Mr. Skaggs reported that
9 Mr. Girling had indicated that TransCanada would not
10 be willing to undertake the additional time and
11 expense required to do further due diligence and
12 negotiate definitive transaction documentation unless
13 the Company were to agree to provide TransCanada with
14 exclusivity."
15 Do you recall that discussion at the
16 board meeting?
17 **A. I do.**
18 Q. And then if we go down to the very end
19 of that paragraph, you can see the third line from the
20 top -- I'm sorry, the third line from the bottom the
21 words "advantages and disadvantages of granting
22 TransCanada exclusivity"
23 Were those advantages and
24 disadvantages debated by the board?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 333

1 Q. It reads, "A third form of deal
2 protection device is a standstill (though standstills
3 are typically put in place before a deal is signed)."
4 And then it goes on to discuss standstills.
5 Do you see that?
6 **A. I do.**
7 Q. Were standstills actually discussed
8 with the board at that annual meeting?
9 **A. I don't recall if there was a specific**
10 **discussion, but certainly they would have seen it here**
11 **in this memo. Although I have to believe that in the**
12 **context of our discussion we would have been talking**
13 **about potential process that would take place. And so**
14 **the standstill and the waiver of the standstill or the**
15 **invitation by the board would have been discussed in**
16 **that context.**
17 Q. We're going to now turn to this issue
18 of exclusivity, which you dealt with as a general
19 counsel. Right?
20 **A. Yes.**
21 Q. At some point, did the board authorize
22 entering into an exclusivity agreement with
23 TransCanada?
24 **A. They did.**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 335

1 **A. They were.**
2 Q. Did the board just -- or did the board
3 just rubber-stamp what management had recommended?
4 **A. No. There was -- there was extensive**
5 **discussion. We understood the importance of**
6 **exclusivity and the ramifications of that. And so we**
7 **wanted to make sure that the board was very informed**
8 **as we moved into that important step. And not only**
9 **would we have discussed it extensively, but their**
10 **advisors would also have talked about it in the**
11 **context of valuation analysis and competition and all**
12 **of those factors.**
13 Q. And Sullivan was there as well at the
14 board meeting. Right?
15 **A. That's correct. And they would have**
16 **weighed in as well.**
17 Q. So I want to just focus on a couple of
18 the topics that were actually a point of discussion
19 when the exclusivity issue came up.
20 If we can go up about six or seven
21 lines from "advantages and disadvantages," maybe it's
22 eight or nine, there's a sentence that says, "The
23 board then discussed with management and the Company's
24 advisors TransCanada's indicative offer [] Goldman

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 336

1 Sachs' financial analyses, the Company's strategic
2 positioning in the industry and whether the Company
3 should solicit interest from, or re-engage with, other
4 potentially interested counterparties, including
5 Spectra, Dominion and others."
6 That's a mouthful, but does that
7 refresh your recollection of some of the issues that
8 were debated by the board in this effort to decide
9 whether to agree to exclusivity?
10 **A. It does.**
11 Q. And then at the very bottom of the
12 paragraph, it says that the board agreed to enter into
13 exclusivity, which they did. Right?
14 **A. That's correct.**
15 Q. At the time that Columbia entered into
16 exclusivity, was any other party showing interest in a
17 potential transaction, other than TransCanada?
18 **A. Not at that time.**
19 Q. You negotiated the exclusivity
20 agreement. Right?
21 **A. I did.**
22 Q. But that was with Sullivan?
23 **A. Sullivan would have drafted that**
24 **agreement, and then I would have given comments, and**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 338

1 **A. Yes, I believe so.**
2 Q. And tell us what the purpose of this
3 was, in your mind. And if you need a minute -- have
4 you found it there?
5 **A. I think I have. Let me read it again,**
6 **please.**
7 Q. It's on your screen also.
8 **A. My screen is not working, so I turned**
9 **it off. But it's highlighted.**
10 Q. It might be easier to see on your
11 screen.
12 **A. It keeps blinking on and off, or it**
13 **was.**
14 THE COURT: Hold on a second. At the
15 next break, can we figure out what's going on with the
16 witness's screen. Thank you.
17 THE COURT CLERK: Yes, Your Honor.
18 THE COURT: Okay.
19 THE WITNESS: Seems to be fine now.
20 ATTORNEY HARRELL: It's fine now?
21 THE WITNESS: I think.
22 THE COURT: We will keep our fingers
23 crossed. But if it acts up, please let us know so we
24 can look into it. Thank you.

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 337

1 **then we would have negotiated it with the other side.**
2 Q. Look at Exhibit 681, please. This is
3 an email that you sent to Ms. Johnston with the signed
4 exclusivity agreement. Right?
5 **A. That's correct.**
6 Q. And if we go to the second page of the
7 exhibit, that's the first page of the actual
8 exclusivity agreement. Right?
9 **A. Yes.**
10 Q. And I want you to look near the bottom
11 of the first page. And you will see at the beginning
12 of the line "Transaction Proposal;" and then,
13 "provided that in response to a bona fide written
14 unsolicited Transaction Proposal that did not result
15 from a breach of this letter [] (an 'Unsolicited
16 Proposal') Capricorn may, after providing notice to
17 Taurus as required by this letter agreement, [] enter
18 into or participate in [] discussions" And then
19 it goes on.
20 Are you familiar with this provision
21 of the exclusivity agreement?
22 **A. I am.**
23 Q. And is this what has been referred to
24 the "fiduciary out"?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 339

1 BY ATTORNEY HARRELL:
2 Q. Because it's such a long paragraph,
3 looking at what we have highlighted on the screen
4 might make it a little easier. So just take your time
5 and look at that, please.
6 **A. Yes. So this -- this provision is the**
7 **written response saying that the board has authorized**
8 **them to now move forward.**
9 Q. Right. And this says that if -- so we
10 have an exclusivity agreement here. But if a bona
11 fide written unsolicited transaction proposal should
12 come in from somebody else, the board can consider it
13 at Columbia. Right?
14 **A. That's correct.**
15 Q. And that was -- that was an extra
16 protection for Columbia. Correct?
17 **A. Yes, that's correct. I misstated**
18 **earlier, and that's correct.**
19 Q. By the way, did Spectra ever have an
20 NDA with Columbia?
21 **A. Not to my recollection.**
22 Q. Regardless, was there anything to keep
23 Spectra from reaching out to Columbia at any time,
24 including around this time?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 340

1 **A. No. In fact, there was a soft**
2 **outreach later in the process.**
3 Q. Which we'll get to in just a moment.
4 Let's go to Exhibit No. 827, please.
5 **A. Okay.**
6 Q. 827 is a set of emails, the top one
7 being from you to the lawyers at Sullivan, dated
8 3/3/2016. And then below that, there is
9 correspondence between you and Chris Johnston. Right?
10 **A. That's correct.**
11 Q. So I want to start with the very
12 bottom of the first page. And do you see an email
13 from you, on March 3, to Chris Johnston?
14 Take a second to look at that email,
15 which goes to the second page of the exhibit.
16 **A. Okay.**
17 Q. What were you asking Ms. Johnston in
18 that email?
19 **A. We were trying to coordinate and**
20 **ensure that both parties were comfortable with how the**
21 **process should take place based on our respective**
22 **outside counsels' input and moving forward on that.**
23 Q. Okay. And this was with the
24 expectation that Columbia and TransCanada were going

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 342

1 you to Joseph Frumkin. Right?
2 **A. That's correct.**
3 Q. And the rest the Sullivan team?
4 **A. Yes.**
5 Q. "See below. Please call me [at] the
6 office to discuss."
7 And so did you have discussions with
8 the Sullivan team about this email?
9 **A. I did. I -- this was an obvious**
10 **crucial point for us, and I wanted the advice of this**
11 **team, which had trillions of dollars of deal**
12 **experience, to help me through it.**
13 Q. Okay. I believe the record will show
14 that you talked directly with Mr. Sampas on this. And
15 what were you advised by Mr. Sampas?
16 And if you want to refresh your
17 recollection, we can go to the next exhibit.
18 THE COURT: Why don't we see if he
19 needs his recollection refreshed first. He might be
20 able to answer your question.
21 **A. I don't recall the specific**
22 **conversation as I sit here, but I appreciate the**
23 **refreshment.**
24 Q. I kind of saw that look on your face.

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 341

1 to be meeting around that time to discuss perhaps more
2 definitive offers?
3 **A. That's correct.**
4 Q. And so I note in your email, you say,
5 "In expectation of your making an offer ..., I wanted
6 to touch base regarding a discussion [] we had in
7 January"
8 So in your email, you're referring
9 back to her questions that she asked earlier. Right?
10 **A. That's correct.**
11 Q. And then in the middle of page 1, we
12 have Ms. Johnston's response to you. And I would like
13 to refer you to the second paragraph of her response.
14 **A. I've read it.**
15 Q. Okay. And she says, "Accordingly,
16 please confirm by reply e-mail, in advance of the
17 March 5 discussions, that the Capricorn board of
18 directors has specifically requested in writing in
19 advance that Taurus make an offer to acquire, or seek
20 or propose to acquire, securities of Capricorn at the
21 meeting between [] Taurus and Capricorn"
22 That's what she had to say. Right?
23 **A. That's correct.**
24 Q. And at the top, there is an email from

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 343

1 Let's look at Joint Exhibit 836,
2 please.
3 **A. Thank you.**
4 Q. And 836 is an email from Mr. Sampas to
5 you, dated March the 4th. And why don't you take a
6 moment to read what is in the email.
7 **A. I've read it.**
8 Q. And tell us what it is.
9 **A. It is the language for the email**
10 **response that I would send back to Chris regarding the**
11 **meeting that informed them that the board had, in**
12 **fact, given them authorization.**
13 Q. Okay. And does that refresh your
14 recollection that you would have had a conversation
15 with Mr. Sampas or somebody at Sullivan who told you
16 that at this point now a board authorization was in
17 order?
18 **A. It does. And just to be clear, my**
19 **memory was clear on the ultimate result. It was the**
20 **timing, that I just wasn't sure of the specific**
21 **conversation.**
22 Q. It's been six years ago. So --
23 **A. Yes.**
24 Q. -- that's certainly understandable.

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 344

1 If we go to Exhibit No. 844, please.
2 And the lower part of this exhibit -- well, there's
3 two emails. And the lower one is an email from you to
4 Chris Johnston.
5 And does that email contain that
6 authorization that Mr. Sampas sent you?
7 **A. It does.**
8 Q. And so at this point, you then sent
9 this email that you had sent to Ms. Johnston back to
10 the Sullivan team. We see that at the top. Right?
11 **A. I do.**
12 Q. From Bob Smith to Sampas, Frumkin, and
13 Heyden?
14 **A. That's correct.**
15 Q. Okay. "And so it begins...."
16 **A. Yeah, that's a reference to Lord of**
17 **the Rings. Just saying we're getting serious now.**
18 **Probably no one else got that joke in the email either**
19 **at the time, by the way.**
20 Q. You might be dating yourself.
21 **A. Probably.**
22 Q. One moment, please. Let's go to Joint
23 Exhibit 1918, please. Actually, first, let's go to
24 Exhibit 191.

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 346

1 management to reject TransCanada's offer."
2 Do you recall that happening?
3 **A. I do.**
4 Q. And so do you recall Columbia at that
5 time, then, pushing back against that \$25.25 offer to
6 TransCanada?
7 **A. I do. We rejected that offer.**
8 Q. At that point, what was the state of
9 the discussions between Columbia and TransCanada?
10 **A. We ceased discussions. And I'm fuzzy**
11 **on the timing, but the exclusivity arrangement was**
12 **expiring around that time as well.**
13 Q. Okay. Why don't we refresh your
14 recollection with another exhibit. This would be
15 Joint Exhibit 1918. And this exhibit is, I believe,
16 three -- it's three or four emails dated March 6 --
17 March 5 and 6, excuse me, 2016, between you and
18 Ms. Johnston. Is that right?
19 **A. That's correct.**
20 Q. And if you look at the very bottom of
21 the page, there's an email from you to Ms. Johnston
22 that carries over to the second page. And you see it
23 says, "Hi Chris. Based on the value discussions
24 occurring earlier this afternoon. We are standing

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 345

1 And let's look at page 10. So we
2 talked about the fact that TransCanada was going to
3 make an offer, and we talked about the authorization.
4 Now we're going to talk about the actual offer that
5 was made.
6 If you look at the minutes for
7 March 5, 2016, that's after the offer was made. And
8 you will see here that -- you might not recollect
9 this, but the first offer was \$24, which was rejected,
10 and then it was followed up by an offer of \$25.25.
11 And that's discussed here.
12 Do you remember this at all?
13 **A. I do.**
14 Q. Okay. And if you look at these
15 minutes, you can see the \$25.25 per share following up
16 on the \$24 number that was rejected.
17 And why don't we just read what this
18 says. "As a result of these discussions, TransCanada
19 subsequently raised its offer to \$25.25 per share,
20 which TransCanada characterized as its best and final
21 offer. Mr. Skaggs conveyed to the Board management's
22 recommendation that the \$25.25 offer be rejected.
23 After discussion with management and the Company's
24 legal and financial advisors, the Board directed

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 347

1 down."
2 Is that what you conveyed to her?
3 **A. That's correct.**
4 Q. And then look at the email in the
5 middle of the page to her. And why don't you just
6 read what you said to her. This was at 6:31 p.m.
7 **A. "Hi Chris - Just a heads-up that I am**
8 **having the 'return or destroy' letter prepared. It**
9 **will likely not be sent until Monday morning because I**
10 **am letting the team rest for the remainder of the**
11 **weekend."**
12 Q. So, indeed, were you having a
13 return-or-destroy letter prepared?
14 **A. Yes.**
15 Q. And that would be to cause TransCanada
16 to return or destroy the confidential information that
17 had been given to it?
18 **A. Yes.**
19 Q. And did you actually start working on
20 such a letter?
21 **A. We did.**
22 Q. And what did this signal to
23 TransCanada about the position of Columbia?
24 **A. That we were -- we weren't negotiating**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 348

1 at that point. If that was their best and final, we
2 were done.
3 Q. And Columbia was ready to walk away?
4 A. That's correct.
5 Q. Let's look at Joint Exhibit 885,
6 please.
7 Look at the middle email to refresh
8 your recollection, please, because I suspect you
9 haven't looked at this in a long time.
10 This is an email from Tim Ingrassia to
11 the management at Columbia. And it says, "Very short
12 call with Eric."
13 That would be Eric Fornell. Are you
14 familiar with that name?
15 A. I believe he was at Wells Fargo.
16 Q. Right. And does this refresh -- and
17 if you look at the date, it's Sunday, March the 6th.
18 Does this refresh your recollection that after you
19 sent that email, that we're preparing the
20 return-or-destroy letter, that -- like right after
21 that, the bankers got together and had a discussion,
22 and now Goldman is reporting on that discussion?
23 A. Yes.
24 Q. And if you look in the middle of this

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 350

1 the leak was announced in the Wall Street Journal?
2 A. I do recall.
3 Q. So those two things, the expiration of
4 the exclusivity agreement and the Wall Street Journal
5 leak, were happening almost simultaneously, weren't
6 they?
7 A. Yes.
8 Q. How did Columbia view the expiration
9 of exclusivity, as far as negotiating tactics with
10 TransCanada?
11 A. We were surprised that they did not
12 ask for an extension of the exclusivity, but it also
13 reinforced the view that discussions were -- that
14 there was a delta between the two that may not be
15 bridgeable.
16 They were struggling with valuation
17 and not -- trying to not get downgraded, and we were
18 struggling with trying to maximize shareholder value
19 in a declining market, rapidly declining market.
20 Q. So did this situation of the
21 expiration of the exclusivity agreement provide an
22 opportunity to reach out to and talk to Dominion,
23 NextEra, Berkshire, others?
24 A. It did.

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 349

1 email from Tim Ingrassia, number 3, it says, "Bottom
2 line, they'll do 26. Not a penny less. Straight from
3 [the] Board."
4 Do you recall that was the message
5 back --
6 A. I do.
7 Q. -- to TransCanada?
8 A. I do.
9 Q. So at that point, were discussions
10 between \$25.25 and \$26?
11 A. Those were the boundaries.
12 Q. Let's look at Exhibit 191, please.
13 And go to page 13. There's a long paragraph there
14 under what's going on on March 10. And we want to
15 just look at the last sentence.
16 "At the [end] of [the] presentation,
17 Mr. Skaggs informed the Board that the exclusivity
18 period had expired at 11:59 p.m., Central Time, on
19 March 8, 2016 and that TransCanada had not yet
20 requested to renew exclusivity."
21 Do you recall that happening?
22 A. I do.
23 Q. And do you recall on that same day --
24 and we'll go to the very top of that March 10 email --

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 351

1 Q. So did you-all take advantage of
2 TransCanada's oversight?
3 A. We did.
4 Q. And were there actual reach-outs to
5 Dominion, Berkshire, and NextEra?
6 A. Yes. I sent a letter to each of the
7 potential counterparties that were subject to the NDAs
8 and subject to the standstill agreements with a clear
9 message of discussions that were going on. I mean,
10 clear -- as clear as you could be without saying,
11 please come and get back into this competition. And
12 then I also called each one directly and left a
13 voicemail.
14 Q. And what reaction or response did you
15 get to your reach-outs?
16 A. There was no response.
17 Q. Let's look at Exhibit 954, please.
18 A. Okay.
19 Q. So if you look at the bottom of the
20 second page, this is March 10th still. You sent an
21 email to the Sullivan people, and you say, "Taurus
22 just asked for an additional week of exclusivity.
23 Joe/George - can you call me quickly to discuss?"
24 So you were reaching out to them for

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 352

1 advice on that. Right?
2 **A. I was.**
3 Q. So the exclusivity agreement had
4 expired. They're asking for an additional week or
5 two. And, actually, I think the record is that they
6 wanted two weeks. But regardless, they were asking
7 for more time. Right?
8 **A. That's correct.**
9 Q. And so did you then have a discussion
10 or exchange emails with Sullivan about what do we do
11 about this?
12 **A. I did.**
13 Q. If you look at the email at the top of
14 the first page, that's Mr. Frumkin's email to his
15 team. And he refers to a conversation he had with
16 you. And it says, "Just talked to Bob. [Saying] we
17 should say told board they hadn't asked for extension,
18 so need to go back to board. That gives us tomorrow
19 to see if we get inbound calls."
20 **A. Correct.**
21 Q. And so what was that all about?
22 **A. The natural gas transmission business**
23 **and the midstream business was rapidly declining, and**
24 **so we were trying to stir up competition. We were in**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 354

1 **those parties.**
2 Q. Now, if you scroll down to part B, it
3 says, "Release of Standstill Provision in other NDAs
4 ([for] [example], Dominion).
5 "- To align with our Fiduciary duties,
6 prior to executing a new Exclusivity Agreement with
7 Taurus, we will release the standstill provision in
8 the other NDAs."
9 Now, do you recall that discussion?
10 **A. I do.**
11 Q. And why was the plan to waive the
12 standstills at that time, prior to executing a new
13 exclusivity agreement with TransCanada?
14 **A. It was to make it abundantly clear to**
15 **those parties that they could reengage. And, again,**
16 **the goal in this whole process was to increase**
17 **shareholder value. And so it was for that purpose.**
18 Q. And did the lapse of -- tell us, what
19 did the lapse of exclusivity have to do, that and the
20 leak, as far as the ability to waive the standstills
21 without having to discuss it with TransCanada?
22 **A. Can you repeat the question?**
23 Q. Yeah. So just to set the table again,
24 we've had the lapse of exclusivity. We've had the

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 353

1 **a position where we felt that it was in the best**
2 **interest of shareholders to sell the company and to**
3 **extract the value that way. And so we were trying to**
4 **introduce competition in order to push the price up**
5 **again.**
6 Q. Okay. And so was the advice to try to
7 buy some time when it says here, "That gives us
8 tomorrow to see if we get inbound calls"?
9 **A. That's correct. From inbound calls**
10 **after the reach-outs that were occurring through the**
11 **letter or the phone calls.**
12 Q. Okay. So these are your reach-outs,
13 and you're buying more time?
14 **A. That's correct.**
15 Q. Let's look at Joint Exhibit 970,
16 please. And this is an email dated March 11 from
17 Mr. Skaggs to the board and to advisors. Right?
18 **A. That's correct.**
19 Q. And he says here, "For this evening's
20 meeting, I would suggest that we use the following
21 discussion outline:"
22 And what do you take from that when it
23 says, "For this evening's meeting ..."?
24 **A. That we were having a meeting among**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 355

1 leak. And now there's a discussion of waiving the
2 standstills. Did the lapse of exclusivity give
3 Columbia the opportunity to waive the standstills,
4 along with the leak?
5 **A. It did.**
6 Q. Do you recall that Mr. Sampas advised
7 that the standstills with these other companies needed
8 to be waived before the signing of a merger agreement
9 with TransCanada? Do you recall that discussion at
10 all?
11 **A. I do. My recollection is that it was**
12 **in the context of best practice and that it would be**
13 **best to do that, not required, but certainly a good**
14 **thing, and that in the context of competition, it was**
15 **absolutely a good thing.**
16 Q. And was it easier to get those waived
17 after -- or easier to waive those after the
18 exclusivity had expired?
19 **A. Absolutely.**
20 Q. Let's look at Exhibit 1024, please.
21 This is an email, at the top, from you to the Sullivan
22 team, entitled "NDA - Standstill Waiver." And it's
23 a -- this is a transmittal letter, is it not,
24 enclosing a letter to the Sullivan team?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 356

1 **A.** **That's correct.**
2 Q. And this letter, if we turn to the
3 third page of the exhibit, is addressed to NextEra
4 Energy, and it's dated March 11th. Right?
5 **A.** **That's correct.**
6 Q. And what do you understand that this
7 letter was designed to do? If you need to take a
8 minute to look at it, feel free.
9 **A.** **This is the letter that waives the**
10 **standstill.**
11 Q. Okay. And who prepared the draft of
12 this letter?
13 **A.** **Sullivan & Cromwell.**
14 Q. Did you as general counsel work with
15 them on this letter?
16 **A.** **Yes. And can I correct one of my**
17 **statements earlier? I had said that Sullivan &**
18 **Cromwell would have prepared the exclusivity**
19 **agreement. But the stamp at the bottom indicates that**
20 **it came from TransCanada. And TransCanada's counsel**
21 **would have prepared it, I'm sure.**
22 Q. But Sullivan & Cromwell --
23 **A.** **Would have reviewed it.**
24 Q. -- would have been involved in

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 358

1 call. Again, I may have the date wrong. But when we
2 went through that one, I thought that was a date after
3 you sent it out. So it wasn't the minutes that was
4 creating the issue for me; it's the JX 970. So why
5 don't we take a look at that one, and you can help me
6 parse through it.
7 THE WITNESS: Sure.
8 THE COURT: So it looks like this is
9 March 11th. Thank you.
10 THE WITNESS: Yes. There was a lot
11 going on on that day.
12 BY ATTORNEY HARRELL:
13 Q. So let's go to Joint Exhibit 1920,
14 please. And you see these are emails that involve you
15 on March 10th. And --
16 **A.** **Excuse me. I don't have 1983 in my**
17 **book.**
18 Q. Oh, sorry. I might have --
19 **A.** **1923, or whatever you said.**
20 Q. It's 1920.
21 **A.** **I have '20. Okay. I'm there.**
22 Q. So Exhibit 1920 is emails between you
23 and Alison Heyden of Sullivan. And there's also an
24 email with a David Phillips.

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 357

1 reviewing it, giving comments or whatever, and
2 advising on the execution. Right?
3 **A.** **Absolutely. Absolutely.**
4 THE COURT: So I just want to clarify
5 something from a timing perspective. It looks to me
6 like, from the documents that we have just looked at,
7 that your letter waiving the standstills goes out
8 before the board meeting where Skaggs gives these
9 things as action items to the board. Is that
10 accurate, or is this just a chronology weirdness?
11 THE WITNESS: I need to refresh the
12 dates. Which exhibit?
13 BY ATTORNEY HARRELL:
14 Q. Let's go back to Exhibit No. 191.
15 THE COURT: Exhibit 970, that was the
16 one that for me was creating the disconnect.
17 THE WITNESS: I believe the March 11
18 minutes, on page 15, indicate that on March 11th we
19 had a call with the board that would have discussed
20 the standstill and the waiving of the standstill.
21 THE COURT: Yes, but this wasn't the
22 document that was creating the disconnect for me. The
23 document that was creating the disconnect for me was
24 970, which is where Skaggs was setting up the board

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 359

1 Who is David Phillips; do you recall,
2 with Bennett Jones?
3 **A.** **I believe he was our Toronto counsel.**
4 Q. And he says -- let's look at the
5 second page of the letter, please. And it's basically
6 in the middle of the page before the links. And it's
7 easy to miss this sentence: "Taurus trading is halted
8 on the TSX."
9 Do you see that? It might be easier
10 on the screen, if your screen is working.
11 **A.** **I do see it.**
12 Q. So does that refresh your recollection
13 that because of the leak, the TransCanada trading of
14 its stock was halted on the TSX?
15 **A.** **I do recall our stock was halted as**
16 **well for trading.**
17 Q. Do you recall that TransCanada issued
18 a press release after the trading was halted?
19 **A.** **I do.**
20 Q. Let's look at Exhibit 1919, please.
21 And if you go to the bottom of the first page, there
22 is an email to you from Ms. Johnston.
23 Do you see that?
24 **A.** **I do.**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 360

1 Q. "Bob -- here is the draft release.
2 The TSX is looking to halt our stock so we will be
3 issuing imminently once we have appropriate internal
4 sign off."
5 And so do you recall that TransCanada
6 did issue a press release?
7 A. I do.
8 Q. And did you get a chance actually to
9 look at it before it went out?
10 A. I did.
11 Q. And I take it you signed off on it?
12 A. I did.
13 Q. Did Columbia get legal advice on
14 whether TransCanada might be required to issue this
15 press release? In other words, were you talking with
16 the Sullivan people about this?
17 A. I don't recall a specific
18 conversation. But absolutely. I mean, every major
19 thing that was happening, we were in contact.
20 Q. Later on in the negotiations, do you
21 recall that TransCanada indicated that if no deal was
22 reached, it would have to issue another press release?
23 A. I do.
24 Q. And what do you recall about that?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 362

1 refresh your recollection --
2 A. Oh, please do.
3 Q. -- with a document, if that would
4 help.
5 A. Thank you. That would be great.
6 Q. Let's go to Exhibit 971, please. And
7 this is dated March 11th. And it's an email from
8 Mr. Skaggs to the board and to advisors and other
9 people.
10 And let's look at the first sentence.
11 A. Oh, thank you. Yes.
12 Q. "Working with GS and S&C, we have
13 developed a balanced approach to manage inbound
14 overtures; comply with a new Exclusivity Agreement;
15 [and] apply pressure for expedited deal closure; and
16 maintain a constructive relationship with Taurus."
17 Do you recall that discussion?
18 A. I do.
19 Q. And what do you recall about that
20 discussion? Let me just ask you that.
21 A. So I recall that we were wanting to
22 push the envelope in our response in a way that if
23 someone did want to join the negotiation party, so to
24 speak, that we could send them a very direct signal,

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 361

1 A. I recall that we were agnostic to the
2 information going out. While I was upset because
3 there was a leak and we had to deal with the stock
4 exchange regarding it, you know, we were not feeling
5 any pressure or anything like that to do a deal,
6 except for our own financial situation and our own
7 ability to move forward.
8 Q. So they issue a press release with the
9 leak; and then there is this discussion about if no
10 deal was reached, TransCanada is saying we've got to
11 issue another press release.
12 Did that surprise you?
13 A. No. We were both thinking through our
14 respective responsibilities to the exchange that we
15 were listed on. And so we were having similar
16 discussions with New York Stock Exchange about how the
17 deal would resolve as well. So, you know, I don't
18 recall the specific conversation, but it doesn't
19 strike me as something that I would have been
20 surprised by.
21 Q. Did you consider that a threat?
22 A. I did not.
23 Q. After the leak, did Columbia
24 anticipate possible inbound inquiries? And I can

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 363

1 but we wanted to be careful not to violate the newly
2 entered exclusivity agreement. So we carefully
3 crafted language in a way that someone would know what
4 we were trying to communicate with them without being
5 explicit.
6 Q. Okay. And this Exhibit 971 actually
7 has that language in it, doesn't it?
8 A. That's correct.
9 Q. And I see here under cc's that a copy
10 of this went to Joe Frumkin and to others. But was
11 Mr. Frumkin involved in drafting this language?
12 A. Yes, he was.
13 Q. This also went to the -- excuse me, to
14 the Goldman people. Were they involved?
15 A. Yes, they were.
16 Q. And we see in the middle of the page
17 of this exhibit the language, "We will not comment on
18 market speculation or rumors. With respect to
19 indications of interest in pursuing a transaction, we
20 will not respond to anything other than serious
21 written proposals."
22 A. That's correct.
23 Q. So that's what you came up with.
24 Right?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 364

1 **A. It is.**
2 Q. There's not many words in that. Does
3 the relative lack of words reflect the amount of time
4 that went into drafting this?
5 **A. It does not. There was much time and**
6 **much thought put into this. And the -- if I had**
7 **received a response like this, it would be very clear**
8 **to me that the responding party could not respond more**
9 **fully or could not talk because they were locked up in**
10 **an agreement.**
11 Q. Okay. So if -- let's look very
12 quickly at the bottom of this email under "Rationale."
13 And you see that Mr. Skaggs is
14 relaying three different points of the rationale for
15 what's going on.
16 Do you see that?
17 **A. I do.**
18 Q. And without reading all this, can you
19 just summarize what the approach was here. Read it to
20 yourself.
21 **A. So it was as I was describing earlier,**
22 **that the response would make it clear to a party that**
23 **there was discussions going on which would put**
24 **pressure on TransCanada to come back to the table and**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 366

1 **A. I do recall.**
2 Q. Let's go to Exhibit 1059, please. And
3 you see at the top, this is an email from Will
4 Bousquette with Goldman. And down below that, there's
5 an email from Robert Skaggs. And then below that,
6 there's an email from Mr. Bousquette.
7 Do you see that?
8 **A. I do.**
9 Q. And let's focus on the one from
10 Mr. Bousquette there in the middle of the page. And I
11 note the time. It's 9:49 a.m. And he says, "Just
12 spoke with spectra cfo.
13 "Short conversation.
14 "Let me know if you want me to call
15 you for a quick post or email."
16 Does that refresh your recollection
17 that it was Goldman that reached out to Spectra at
18 this time?
19 **A. That's correct.**
20 Q. Okay. And that was -- and we see
21 9:49 a.m. there. Right?
22 **A. That's correct.**
23 Q. All right. Let's go to Exhibit 1055,
24 please. And this is an email from you at the top and,

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 365

1 **negotiate in good faith and hopefully get the**
2 **price up.**
3 Q. Okay. Now, if you recall, at this
4 point, on March 11th, was there an exclusivity
5 agreement in place between TransCanada and Columbia?
6 We know that it had expired on the 8th, but do you
7 recall if a new exclusivity agreement was in place
8 yet?
9 **A. My recollection was not.**
10 Q. Okay.
11 **A. It was beginning the 12th that it went**
12 **into effect.**
13 Q. So at this time, were there
14 negotiations on whether to renew exclusivity?
15 **A. There were.**
16 Q. By the way, so we talked about the
17 leak, and we talked about the lack of exclusivity and
18 your reaching out to these other parties.
19 Did any of them ever come back?
20 **A. They did not.**
21 Q. So, again, to refresh your
22 recollection -- it's been a long time -- do you recall
23 that Spectra did make a call, but it was a very soft
24 reach-out?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 367

1 actually, an email from you at the bottom also.
2 Let's focus first on the one at the
3 bottom. Is this an email to Chris Johnston?
4 **A. It is.**
5 Q. And why don't you take a minute to
6 read to yourself what you said to Chris, to
7 Ms. Johnston.
8 **A. So this was my email forwarding the**
9 **draft response to inbounds to her so that we could get**
10 **comfortable that they would not say we were violating**
11 **the exclusivity agreement.**
12 Q. Okay. And then right above that,
13 there's an email from you to the Goldman people,
14 Sullivan & Cromwell, and management at Columbia.
15 Right?
16 **A. That's correct.**
17 Q. And so what are you saying there when
18 you're reporting back to the company?
19 **A. After sending the email, Chris and I**
20 **had a call. And this was a summary of that call,**
21 **which indicated that they -- that she would circulate**
22 **it and then get back to us with their concurrence.**
23 Q. Okay. So I want to just focus on the
24 timing of this. Your email to Chris Smith [sic] at

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 368

1 the bottom is 11:24. Is that right?
2 **A. Yes.**
3 Q. And if we look back quickly at
4 Exhibit 1059, in the middle of the page --
5 **A. Yes.**
6 Q. -- Will Bousquette's reach-out to
7 Spectra was at 9:49, before your call and your email
8 to Ms. Johnston. Right?
9 **A. That's correct.**
10 Q. And was that important to Columbia,
11 that the reach-out to Spectra happened before
12 communicating with TransCanada on this?
13 **A. I don't recall if we had choreographed**
14 **it that tightly, but I do know that when I forwarded**
15 **it to her, it really wasn't for comment and it wasn't**
16 **asking as much as it was saying for information. And**
17 **then if they had a real problem with it, we would**
18 **expect to hear from them. So that was the tone of our**
19 **sending it to them.**
20 Q. Look at the bottom of the email on
21 Exhibit 1055, please. This is your email to Chris
22 Johnston. And the last sentence is, "One last note --
23 as we discussed, this language was heavily vetted and
24 reviewed/approved at the board level, so we are not

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 370

1 **didn't want them to go through that same analysis and**
2 **discount it. And so we wanted them to feel**
3 **competition in the price negotiation and know that**
4 **there was another party that was in play, but not,**
5 **again, not let them evaluate who it was.**
6 Q. Let's look at Joint Exhibit 1732. And
7 we need to go to page 10.
8 ATTORNEY HARRELL: And, Your Honor,
9 this is one of those that's really difficult to read.
10 So the screen is very helpful here.
11 Q. So at the top of page 10, we see a
12 text at 3/12/2016. And at the very top it says,
13 "From: [] Robert Smith ..."
14 That would be you. Right?
15 **A. Correct.**
16 Q. And it says, "Just texted
17 back-and-forth with Matt. Was getting ready to update
18 you. He spoke with Wells. Said everything went fine.
19 Said they seemed to be ok with the language. He said
20 it felt like Francois sent them to sniff out any
21 issues, none were found."
22 This is a long time ago, and this is
23 just a text, but do you understand the context of --
24 **A. I do.**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 369

1 intending to receive comments on it, just [] confirm
2 in the record that this would not be interpreted to
3 violate a renewed EA."
4 **A. That's correct.**
5 Q. That was your message to her. Right?
6 **A. Absolutely.**
7 Q. By the way, did you tell her that
8 Goldman had already delivered the script to Spectra?
9 And if you don't recall, that's fine.
10 **A. I spoke with her about -- I just don't**
11 **remember the timing. But I know I had a conversation**
12 **regarding the receipt of a credible large player.**
13 Q. And, by the way, why did you provide
14 the script to TransCanada as you did here in this
15 email to Chris Johnston?
16 **A. So we provided it to, just to document**
17 **that there was no -- that they would not view it as a**
18 **violation of the exclusivity agreement.**
19 Q. And why is it that you did not name
20 Spectra to her, but instead, as you said, spoke in
21 terms of a big player in the industry, or whatever
22 words you used?
23 **A. Because we did not view Spectra as a**
24 **credible acquisition party on our company, and we**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 371

1 Q. -- of this?
2 Tell me what was going on, please.
3 **A. So after we sent over the -- the**
4 **script for the response, Wells Fargo reached out to**
5 **Goldman to have a conversation about it. And in that**
6 **discussion, they -- you know, they talked about the**
7 **context.**
8 **And it was our understanding, as I**
9 **relayed here, that Francois was trying to make sure**
10 **that we weren't playing games with them. And yet we**
11 **wanted to make sure that we had the optionality. So**
12 **they did not sense that we were playing games and**
13 **believed that we were fine to move forward as**
14 **proposed.**
15 ATTORNEY HARRELL: Could I have just
16 one moment, Your Honor?
17 (Brief pause.)
18 BY ATTORNEY HARRELL:
19 Q. So I'm told I have seven more minutes
20 with you. So if I talk fast, please forgive me.
21 **A. That's okay.**
22 Q. Let's look very briefly at the next
23 text right below it. And this is a text from -- let's
24 see if we can get it here. Yes, from you to the

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 372

1 group. It says, "Did you talk to Francois?"
2 And then let's go to the next one
3 below that. And this is from Steve Smith. "I think
4 we are done. Francois wanted to know the
5 rationale - I explained it and pointed out how
6 important the Fiduciary protections were for our
7 Board. Told him we wanted to get this deal done with
8 them and this would help us achieve that goal. They
9 were circling the wagons one last time and Francois
10 said he would have Chris reach out to Bob to get it
11 signed up once their meeting was concluded."
12 So do you recall that Steve Smith was
13 involved in this exchange of emails as well?
14 **A. I do.**
15 **Q.** And was there anything about his email
16 that caused you any concern when you saw that?
17 **A. No.**
18 **Q.** Was it the plan to have him discuss
19 the script with Francois?
20 **A. I don't recall.**
21 **Q.** Well, the board was aware of this
22 plan. Right?
23 **A. Yes.**
24 **Q.** Bottom line, reaching out to

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 374

1 **A. It was.**
2 **Q.** Let's go to Exhibit 1271, please. And
3 in the interest of time, I'm going to make this very
4 short. 1271 is an email exchange that you had with
5 Alison Heyden at Sullivan. Right?
6 **A. Correct.**
7 **Q.** And if you look at her email at the
8 top, this is "Updates to Forecasts Section of Proxy."
9 You're saying, "I'm good with these changes (including
10 the standstill language if we deem it necessary or
11 prudent). Let me know if this is in shape enough to
12 circulate to Bob, Steve and Glen."
13 So does this refresh your recollection
14 that Sullivan & Cromwell ran the drafting of the
15 prospectus?
16 **A. They did. The proxy.**
17 **Q.** I'm sorry, the proxy.
18 And then later, when changes had to be
19 made, do you recall they came in and were responsible
20 for helping make those changes?
21 **A. That's correct.**
22 **Q.** And did you rely on them for that?
23 **A. I did.**
24 **Q.** Because I'm out of time, I want to ask

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 373

1 TransCanada to discuss the inbound script, this was a
2 team effort. Right? It involved Goldman. It
3 involved you. And it involved Steve Smith. Right?
4 **A. That's correct.**
5 **Q.** Let's look at Joint Exhibit 1072,
6 please. And this is an email that you sent to
7 management and to Goldman, with a copy to the lawyers.
8 Right?
9 **A. That's correct.**
10 **Q.** And it is a protocol for inbound
11 responses. Correct?
12 **A. Correct.**
13 **Q.** And if we go to the third page of the
14 exhibit.
15 **A. Yes.**
16 **Q.** Since we're running out of time, we
17 won't go into any detail. But No. 6 says, "If
18 proposal is serious, Board to be convened to consider
19 proposal and next steps." Right?
20 **A. Correct.**
21 **Q.** So was this something else that was
22 thought out between you and Goldman and the bankers on
23 how you would deal with a response to this script that
24 had gone out?

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 375

1 you just a couple more questions.
2 So you were general counsel of
3 Columbia during all of these discussions, all of these
4 negotiations. Right?
5 **A. I was.**
6 **Q.** Did you take your job seriously?
7 **A. I did.**
8 **Q.** Did you at any time during this
9 negotiation process observe or become aware of any
10 effort of Mr. Skaggs or Mr. Smith to tilt the playing
11 field toward TransCanada in pursuit of a cash deal
12 that would maximize the value of their retirement
13 benefits?
14 **A. Absolutely not.**
15 **Q.** Did you at any time observe or become
16 aware of any other act or omission by Mr. Skaggs or
17 Mr. Smith that at the time or in hindsight could be
18 considered a breach of fiduciary duty?
19 **A. Absolutely not.**
20 **Q.** If you at any time during this process
21 had been aware of any breach of fiduciary duty by
22 either Mr. Skaggs or Mr. Smith, what would you have
23 done?
24 **A. I would have called an executive**

CHANCERY COURT REPORTERS

R. Smith - Direct

Page 376

1 session of the board, without them being present, and
2 I would have advised the board.

3 Q. And you would have addressed whatever
4 issue there was?

5 A. Absolutely.

6 ATTORNEY HARRELL: I will pass the
7 witness.

8 THE COURT: All right. Let's break
9 there for the morning. We will resumed at 11:00.

10 (A recess was taken at 10:44 a.m.)

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 378

1 Mr. Smith, you testified that you were admitted to
2 practice in Arizona and Michigan. Do I have that
3 right?

4 A. That's correct.

5 Q. And do I also have it right that
6 you've never been admitted to practice in Delaware?

7 A. That's correct.

8 Q. During your direct examination, you
9 described the process around board executive session
10 meetings; is that right?

11 A. That's correct.

12 Q. And as a careful general counsel, you
13 would have wanted to create an accurate and complete
14 record of those meetings; is that fair to say?

15 A. That's correct.

16 Q. And in connection with that process,
17 if I understand you correctly, you had Sullivan &
18 Cromwell taking minutes at those meetings; right?

19 A. That's correct.

20 Q. And Sullivan & Cromwell, I believe,
21 sent you a complete set of those minutes for your
22 review before they were sent to the board; isn't that
23 right?

24 A. That's correct.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 377

1 (Resumed at 11:00 a.m.)

2 THE COURT: Welcome back, everyone.
3 Please be seated. Thank you for being ready to go.

4 ATTORNEY JAMES: Good morning, Your
5 Honor.

6 CROSS-EXAMINATION

7 BY ATTORNEY JAMES:

8 Q. Good morning, Mr. Smith. My name is
9 Tom James. We haven't met. I represent plaintiffs in
10 this action.

11 You should have a witness binder in
12 front of you. I am going to refer from time to time
13 to JTX tabs, Joint Exhibit tabs in that binder. You
14 will also note that that binder -- the first two tabs
15 should be a deposition transcript of your deposition
16 in this action, as well as the pretrial order.

17 THE COURT: You should also know that
18 Mr. James is one of my former clerks, so he's going to
19 get a lot of leeway on his questioning.

20 THE WITNESS: It's a pleasure to meet
21 you.

22 ATTORNEY JAMES: Likewise. Thank you.

23 BY ATTORNEY JAMES:

24 Q. During your direct examination,

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 379

1 Q. Okay. And you reviewed those minutes
2 before you sent them to the board for final approval?

3 A. That's correct.

4 Q. Fair to say that you wouldn't have
5 sent minutes to the board for final approval that you
6 knew or believed were inaccurate in any respect?

7 A. That's correct.

8 Q. Okay. And just to wrap that up, it's
9 true, isn't it, that the board ultimately did approve
10 those minutes?

11 A. That's correct.

12 Q. Now, we heard a lot on -- in your
13 direct testimony about the nondisclosure agreement
14 with TransCanada. Fair to say that that was an
15 important document in the sale process?

16 A. It was.

17 Q. And if I understood you correctly,
18 Sullivan & Cromwell prepared all of the NDAs with the
19 various bidders at your direction; correct?

20 A. That's correct.

21 Q. And you would have given comments on
22 the nondisclosure agreements to Sullivan & Cromwell;
23 right?

24 A. That's correct.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 380

1 Q. You were the point person at Columbia
2 for negotiating the NDAs with the various bidders,
3 including TransCanada; right?

4 A. I was.

5 Q. Okay. Now, the board didn't negotiate
6 or oversee the negotiation of the nondisclosure
7 agreements directly; is that right?

8 A. They did not directly, but they were
9 informed as we were in the process.

10 Q. Mr. Smith, who is Sigmund Cornelius?

11 A. Can you repeat the question?

12 Q. Sure. Who is Sigmund Cornelius?

13 A. He was the chairman of our board.

14 Q. And as the -- I may be mistaken. I
15 thought he was the lead independent director for the
16 board.

17 A. Lead independent director. I'm sorry,
18 you're correct.

19 Q. As Columbia's general counsel, did you
20 have occasion to work with Mr. Cornelius?

21 A. I did.

22 Q. Did you find Mr. Cornelius to be a
23 generally honest person?

24 A. Absolutely.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 382

1 Q. You reviewed the nondisclosure
2 agreement with TransCanada before it was actually
3 executed; right?

4 A. I did.

5 Q. And you knew that nondisclosure
6 agreement contained a standstill provision, and you
7 generally understood what it said; right?

8 A. I did.

9 Q. Now, as I recall your testimony from
10 your deposition in this action, you admitted that you
11 were not a standstill expert and you would have looked
12 to Sullivan & Cromwell for advice about the
13 standstill; is that right?

14 A. That's true.

15 Q. I want to turn quickly to an exhibit
16 in your book. It should be Exhibit 568. Let me know
17 when you are there.

18 A. I'm there.

19 Q. Okay. And if look at the cover email
20 and then the subsequent page, this appears to be a
21 memorandum that Sullivan & Cromwell prepared on
22 January 12th, 2016, summarizing the standstills and
23 the various NDAs, including with TransCanada; correct?

24 A. That's correct.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 381

1 Q. One of my colleagues asked
2 Mr. Cornelius about the board's involvement in
3 negotiating the nondisclosure agreements.

4 ATTORNEY JAMES: Joe, can you play
5 Cornelius clip 3, which, for reference, is page 47,
6 line 11 through 18, of his transcript.

7 (A video clip was played as follows:)

8 Question: Mr. Cornelius, just to be
9 clear, it's true that the Columbia NDA and standstill
10 provisions were negotiated and entered into with
11 counterparties, including TransCanada, without the
12 board's oversight, right? You guys weren't
13 negotiating the terms of the NDA. Fair to say?

14 Answer: Yes.

15 (End of video clip.)

16 BY ATTORNEY JAMES:

17 Q. Sitting here today, do you have any
18 basis to disagree with Mr. Cornelius's sworn testimony
19 in this action?

20 A. I think it was two questions in one.
21 And so with regard to the first question regarding the
22 board's oversight, they certainly were exerting their
23 oversight. With regard to were they negotiating the
24 standstill, absolutely. I agree with his response.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 383

1 Q. This was a memo that you asked
2 Sullivan & Cromwell to prepare; right?

3 A. Correct.

4 Q. Okay. And based on this advice, this
5 memorandum itself that Sullivan & Cromwell prepared,
6 you understood that the standstills were binding
7 unless the other parties' board of directors so
8 specifically requests in writing in advance; right?

9 A. That's correct.

10 Q. In other words, it was the board's
11 power whether or not to waive the standstill with
12 respect to any other NDA counterparty; right?

13 A. That's correct.

14 Q. So let's actually talk about the
15 standstill itself. You can find that language in
16 Exhibit 307 in your binder. That language starts at
17 page 4 of that. So let me know when you are there.

18 A. I'm there.

19 Q. Okay. So having had a chance to take
20 a look at this language, it's true, isn't it, that one
21 of the things that the standstill forbids, as in prior
22 written board authorization, is for TransCanada, or
23 any counterparty, for that matter, to propose to
24 acquire beneficial ownership or constructive economic

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 384

1 ownership of Columbia; right?
2 **A. That's correct.**
3 Q. So focusing on the term "proposed," do
4 I understand your testimony correctly that you viewed
5 the term "proposed" in this context to mean a proposal
6 that would be binding, rather than discussing whether
7 to make an offer in a formal binding proposal; is that
8 fair?
9 **A. That's correct, based on advice of**
10 **counsel.**
11 Q. Okay. You interpreted the term
12 "proposed" to mean a formal proposal; right?
13 **A. Correct.**
14 Q. And in your view, an informal
15 proposal, by contrast, was not a true proposal, but it
16 was, rather, trying to figure out if TransCanada was
17 going to make a proposal to acquire Columbia that
18 Columbia would accept; right?
19 **A. That's correct.**
20 Q. You will agree with me, won't you,
21 that when you look at the language in this standstill,
22 the terms "formal," "informal," "binding," they don't
23 qualify that term "proposal" in this language, do
24 they?

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 386

1 Do you recall that?
2 **A. I do.**
3 Q. Okay. And I believe you had testified
4 during your deposition that you read every page of the
5 proxy before it was filed; right?
6 **A. That's correct.**
7 Q. Fair to say that you would have
8 corrected anything in the proxy that you knew to be
9 inaccurate?
10 **A. That's correct.**
11 Q. So I'd like to take a very quick look
12 at the proxy. That is -- in your book, it's Joint
13 Exhibit 1291. And I would specifically like to take a
14 look at page -- at the Joint Exhibit page 50, which I
15 believe is the internal page 43.
16 **A. I'm there.**
17 Q. And you'll see here, around the middle
18 of this page, there is a paragraph that starts, "Later
19 on March 4, 2016, the Board held a telephonic
20 meeting"
21 Do you see that?
22 **A. I do.**
23 Q. And if you look at the penultimate
24 sentence of that paragraph, you'll see written the

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 385

1 **A. That's correct.**
2 Q. Okay. They don't appear anywhere in
3 this paragraph or in this standstill, do they?
4 **A. They do not.**
5 Q. Now, I think you testified previously,
6 and I know that you testified in your deposition, that
7 Sullivan & Cromwell gave you advice that the
8 standstill allowed a proposal and a range and that the
9 board would have to extend permission to go beyond
10 that to a firm offer; is that right?
11 **A. That's correct.**
12 Q. But looking at the standstill that
13 Sullivan & Cromwell drafted, and you had an
14 opportunity to review, it literally prohibited
15 TransCanada from proposing to acquire Columbia absent
16 prior board authorization; isn't that right?
17 **A. So it depends on the interpretation of**
18 **what that language means. But I agree with your**
19 **premise that the word "propose" is there and it says**
20 **you will not propose.**
21 Q. Thank you.
22 Now, on direct examination, you were
23 asked about the proxy filed in connection with this
24 merger.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 387

1 following: "Because the non-disclosure agreement
2 between TransCanada and CPG prohibit[s] TransCanada
3 from making a proposal absent an invitation to do so
4 from the Board, the Board authorized management to
5 send a written communication to TransCanada requesting
6 on behalf of the board that TransCanada make a
7 proposal to acquire CPG."
8 Did I read that correctly?
9 **A. You did.**
10 Q. Okay. And you would agree with me,
11 wouldn't you, that this language is correct; right?
12 **A. I do.**
13 Q. You were also asked on your direct
14 examination about the executive session minutes that
15 we were just discussing.
16 Do you recall that?
17 **A. I do.**
18 Q. I'd like to look quickly at those
19 executive session minutes. Those are at Joint
20 Exhibit 191 in your binder.
21 Are you with me?
22 **A. I am.**
23 Q. Thank you.
24 It's true, isn't it, the word

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 388

1 "standstill" doesn't appear in the executive session
2 minutes until the March 4th meeting; right?
3 **A. I'm at a disadvantage. I haven't read**
4 **these minutes for a very long time. So I can't speak**
5 **to that.**
6 Q. Okay. Are you aware of any other
7 written reference in these minutes, sitting here
8 today, to the term "standstill" that appears on its
9 face in the minutes?
10 **A. I'm not. But I'm not aware that it**
11 **says that on March 4th either.**
12 Q. Well, let's take a look at --
13 **A. I believe you, and stipulate that it**
14 **does, but I just have not read through these minutes**
15 **to know how to answer your question. I'm sorry.**
16 Q. Sure. Well, then let's actually look
17 at the March 4th minutes. That's on page 009 of this
18 document. It actually starts on 008 and carries on
19 over to 009.
20 **A. To be clear, I wasn't disputing that**
21 **it says it on March 4th. I just don't know how to**
22 **respond to the rest of the dates. I believe you that**
23 **it does.**
24 Q. Okay. And I'm not playing games. I

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 390

1 **early January. And so the context here would support**
2 **our position, what we believed. Whether or not in the**
3 **current day that's the right view, I mean, that is**
4 **certainly what we believed at the time.**
5 Q. Understood. But I believe, as you
6 testified earlier, these were minutes that Sullivan &
7 Cromwell drafted, you reviewed, sent to the board for
8 approval, and the board approved. And I believe your
9 testimony was that there were no inaccuracies in these
10 minutes.
11 **A. That's correct.**
12 Q. Right. So --
13 **A. And I still believe that.**
14 Q. Okay. Great.
15 Now, when you, with the assistance of
16 Sullivan & Cromwell, prepared these minutes, you knew
17 that the board needed to establish a clear record that
18 it consciously and carefully employed the standstill
19 provision to maximize stockholder value; isn't that
20 right?
21 **A. That's correct.**
22 Q. Okay. Now, on your direct
23 examination, you were asked about a memorandum from
24 January that Sullivan & Cromwell prepared. Let's take

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 389

1 want to be completely transparent with you. I
2 actually wanted to ask you about these minutes anyway.
3 **A. Okay. Sounds good.**
4 Q. They are all from the same handbook.
5 Okay?
6 **A. Okay.**
7 Q. So looking at the paragraph, it is
8 three paragraphs up from the bottom, starting with,
9 "The representative from Sullivan & Cromwell"
10 Do you see that paragraph?
11 **A. I do.**
12 Q. And the first sentence of that
13 paragraph reads, in full, "A representative from
14 Sullivan & Cromwell then explained that, as a result
15 of a 'standstill' provision in the confidentiality
16 agreement between the Company and TransCanada,
17 TransCanada was prohibited from making a proposal
18 absent an invitation to do so from the Board."
19 Did I read that correctly?
20 **A. Yes.**
21 Q. Okay. These minutes don't refer to a
22 firm or formal or binding proposal, do they?
23 **A. They do not. But the board was aware**
24 **that we had been having discussions with them since**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 391

1 a look at that. That is JTX 587 in your book.
2 **A. I'm there.**
3 Q. So based on the cover email, fair to
4 say that this is a memo that Sullivan & Cromwell sent
5 you on January 20th, 2016? Right?
6 **A. That's correct.**
7 Q. And the memorandum itself, if you flip
8 to the next page, is dated January 2016. Right?
9 **A. Correct.**
10 Q. Let's turn to page 7 of the memo,
11 which is .008 in the JTX numbers. Let me know when
12 you are there.
13 **A. I'm there.**
14 Q. And so I believe your counsel --
15 excuse me -- counsel for TransCanada pointed you
16 towards the top full paragraph. It starts with "A
17 third form of deal protection," and read from the
18 first full sentence of that.
19 Do you recall?
20 **A. I do.**
21 Q. Okay. Now, I actually want to look at
22 the last sentence of this paragraph. And the last
23 sentence of this paragraph, starting with "Because,"
24 states, "Because of the potency of these provisions,

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 392

1 the court has emphasized that a target board will need
2 to establish a clear record that it consciously and
3 carefully employed the standstill provision to
4 maximize stockholder value"
5 Did I read that correctly?
6 **A. I do.**
7 **Q.** So putting this in context, as of
8 January 20th, both you and Sullivan & Cromwell knew
9 the standstill provisions that were present in the
10 NDAs, including the NDA with TransCanada, were potent;
11 right?
12 **A. Correct.**
13 **Q.** Okay. And you and Sullivan & Cromwell
14 knew the board would need to establish a clear record
15 that it consciously and carefully employed that
16 standstill provision to maximize stockholder value;
17 right?
18 **A. That's correct.**
19 **Q.** And while you have not had a chance to
20 peruse the minutes, the executive session minutes that
21 we've been discussing, accepting my representation
22 that the word "standstill" doesn't appear in these
23 minutes until March 4th; isn't that right?
24 **A. I'm not disputing what you are saying,**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 394

1 presentation, does it?
2 **A. It does not. But it was clearly in**
3 **the memo that went along with it.**
4 **Q.** Well, we'll get there.
5 **A. Okay.**
6 **Q.** But on the face of this
7 presentation --
8 **A. The word "standstill" is not in the**
9 **presentation that I saw.**
10 **Q.** Neither is the word "nondisclosure
11 agreement" or "NDA"; right?
12 **A. Correct.**
13 **Q.** Now, flipping back to the executive
14 session minutes, I believe it was your testimony that
15 this presentation and this memo were discussed at the
16 January 28th executive session; is that right?
17 **A. Correct. I don't recall the date, but**
18 **it would have been at that strategic offsite.**
19 **Q.** Got it. So let's just take a look.
20 This is Joint Exhibit 191. And it's at page 4,
21 carrying over to 5, of that document.
22 **A. Okay.**
23 **Q.** And take a second to peruse these
24 minutes. But there's no mention in these minutes

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 393

1 **but I just don't have, you know, current knowledge of**
2 **that.**
3 **Q.** Okay. On your direct exam, you were
4 shown a presentation, PowerPoint presentation, that
5 Sullivan & Cromwell had prepared from January 26th.
6 Do you recall that?
7 **A. I do.**
8 **Q.** Okay. Let's quickly take a look at
9 that presentation. It's not in your binder, but it
10 was used on your direct. I think we can put it up on
11 your screen. It's Joint Exhibit 627.
12 **A. I have a 21 and a 28.**
13 **Q.** And I apologize. This was a
14 presentation you were shown in your direct
15 examination. I'm putting it up on the screen now.
16 **A. It's on the screen.**
17 **ATTORNEY JAMES:** Joe, if you wouldn't
18 mind flipping through it for the witness.
19 **Q.** This is a three-page presentation;
20 right?
21 **A. That's correct.**
22 **Q.** And having had a chance to take a look
23 at it, but we can go back through again, the word
24 "standstill" never appears in any -- in this

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 395

1 about any discussion about the standstill, is there?
2 **A. There is not.**
3 **Q.** There's actually no indication in
4 these minutes that Sullivan & Cromwell gave a
5 presentation, is there?
6 **A. There is not.**
7 **Q.** So returning our attention to this
8 memorandum on the board's fiduciary duties that we've
9 been discussing, it's true, isn't it, that the
10 memorandum itself did not actually appear in the board
11 package that was given to the board before a meeting
12 until March 16th? Is that right?
13 **A. I don't believe that that's true, no.**
14 **Q.** Okay. Let's take a look, if you
15 wouldn't mind, at Joint Exhibit 1107 --
16 **A. But, again, it was six years ago. I**
17 **don't recall. But I know we prepared it, and I'm sure**
18 **that we would have provided it.**
19 **Q.** And I completely understand. That's
20 why I'm trying to help you along with documents.
21 **A. Thank you.**
22 **Q.** So take a minute to turn to Joint
23 Exhibit 1107 in your binder.
24 **A. Yes.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 396

1 Q. And do you have in front of you a
2 board package for a board meeting scheduled for
3 March 16th, 2016?
4 A. I do.
5 Q. And in your experience as general
6 counsel of Columbia, this is typically the way that
7 the board would receive information prior to a
8 meeting; is that right?
9 A. So it depends if it was a formal
10 meeting or if it was more of an *ad hoc* meeting.
11 Q. Okay.
12 A. So at the time where we were having
13 very frequent meetings, they were not always done this
14 formal with the material provided in this manner. But
15 they would have generally been provided through
16 Boardvantage. That was our delivery mechanism.
17 Q. For clarity, the January 28 and 29
18 meeting that we were talking about, that was a formal
19 board meeting; right?
20 A. Yes.
21 Q. It was not *ad hoc*? It was a two-day
22 offsite thing that was planned; right?
23 A. That's correct. But there also are
24 some meetings where you just hand out materials, and

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 398

1 order that includes facts that the parties have
2 stipulated to?
3 A. Sure.
4 Q. And if you turn to paragraph 428 of
5 the pretrial order.
6 A. It was indeed announced March 17th,
7 2016.
8 Q. Thank you. You can put that to the
9 side for now.
10 I want to actually shift gears, and I
11 want to talk a little bit about the sale process for
12 Columbia. I think you testified previously that in
13 connection with a potential sale process, Columbia had
14 signed NDAs with Dominion, NextEra, Berkshire, and
15 TransCanada; is that right?
16 A. That's correct.
17 Q. And on, I believe it is,
18 November 25th, 2015, the board decided that it was
19 going to terminate merger discussions and proceed with
20 an equity offering; right?
21 A. Correct.
22 Q. And at the board's direction, Columbia
23 sent out what we've heard mention of return or destroy
24 letters to those four bidders; is that right?

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 397

1 you don't provide them in advance because -- just for
2 best practices, you hand them out and receive them
3 back. I don't recall the fiduciary memo falling into
4 that. I'm just explaining that not everything gets
5 sent out in a formal package like this.
6 Q. I completely understand, and I
7 appreciate the context.
8 But looking with me at this document,
9 you will see, on page 3 of this document, the same
10 Sullivan & Cromwell memo that we were just discussing;
11 correct?
12 A. That's correct.
13 Q. It's now dated March 15th, 2016.
14 That's the only difference; right?
15 A. I see that.
16 Q. Okay. For context, the merger with
17 TransCanada was announced on March 17th; right?
18 A. I don't recall the date. I'm not
19 disputing. I just -- the dates blend together.
20 Q. I completely understand.
21 Let's just quickly, so we can have a
22 record of it, look at the second tab in your binder
23 that says "PTO."
24 So you are aware this is a pretrial

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 399

1 A. That's correct.
2 Q. And it's true, isn't it, that the
3 purpose of sending those letters was to shut down
4 discussions with bidders and to officially terminate
5 the M&A process that was going on at the time; right?
6 A. Correct.
7 Q. I think you testified on direct, but I
8 just want to make sure I understand this: Standstills
9 in those various NDAs continued to be effective even
10 after Columbia officially shut down the process;
11 right?
12 A. That's correct.
13 Q. Now, it's true, isn't it, that
14 Francois Poirier called Steve Smith in around
15 mid-December 2015 to request a January 7th, 2016,
16 meeting; right?
17 A. I don't recall the timing of the
18 reach-out, but I know that there was a January 7th-ish
19 meeting.
20 Q. Okay. Just to make sure we're on the
21 same page about timing, let's look back at the
22 pretrial order. And let's look in particular at
23 paragraph 279.
24 A. I do see that.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 400

1 Q. Does that refresh your recollection?
2 **A. It does. I mean, I see it and don't**
3 **dispute it, at the very least.**
4 Q. Thank you. I appreciate that.
5 It's also true at that time that
6 TransCanada had indicated that they could be at around
7 \$28 a share; is that correct?
8 **A. That's correct.**
9 Q. And, you know, we established earlier
10 that you are, concededly, not a standstill expert and
11 you looked to Sullivan & Cromwell for advice about the
12 standstill; right?
13 **A. That's correct.**
14 Q. And it's also true, isn't it, that you
15 had not previously been in a situation where a party
16 had been cut off and came back into deal discussions;
17 right?
18 **A. I am not aware of a public company**
19 **deal where that had occurred, to me.**
20 Q. Understood. Thank you.
21 And that's what had happened here;
22 right? TransCanada had been cut off when the board
23 terminated merger discussions on November 25th, and it
24 came back in December; right?

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 402

1 Q. It's true, isn't it, that the board
2 did not give prior written authorization for Poirier
3 to actually inform Smith that TransCanada was
4 interested in acquiring Columbia; right?
5 **A. That's correct.**
6 Q. Now, on direct, do you recall having
7 testified about the call between Mr. Girling from
8 TransCanada and Mr. Skaggs on January 25th, 2016?
9 **A. I do.**
10 Q. And in that call, Mr. Girling
11 indicated that TransCanada was interested in pursuing
12 an all-cash deal for Columbia from \$25 to \$28 a share?
13 **A. That's correct.**
14 Q. The board also did not give prior
15 written authorization for Mr. Girling to tell
16 Mr. Skaggs that TransCanada was interested in
17 acquiring Columbia for \$25 to \$28 a share; right?
18 **A. That's correct. But they were**
19 **informed. And we had been having discussions with**
20 **them, so they knew where we were in the process.**
21 Q. Fair to say that you're also aware
22 that the -- let me ask a better question.
23 You are aware, aren't you, that the
24 Court found in the post-trial decision in the

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 401

1 **A. They did approach us in December to**
2 **begin discussions, yes.**
3 Q. Now, it's true, isn't it, that there
4 was no prior written board authorization for
5 TransCanada to indicate that they could be at about
6 \$28 a share; right?
7 **A. That's correct.**
8 Q. And you are aware, aren't you, that
9 the Court has already found in the post-trial opinion
10 in the appraisal action that this call from Poirier
11 breached the standstill; right?
12 **A. So I have not read that opinion, but I**
13 **was informed of that by your able co-counsel back in**
14 **the deposition.**
15 Q. Co-counsel is many things, and able is
16 definitely one of them, more than able.
17 Now, Poirier and Mr. Smith did, in
18 fact, meet on January 7th, 2016; right?
19 **A. Yes.**
20 Q. And during that meeting, Mr. Poirier
21 told Mr. Smith that TransCanada was interested in
22 acquiring Columbia; right?
23 **A. They indicated that they were**
24 **interested in seeing if there was a path forward, yes.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 403

1 appraisal action that this call from Mr. Girling
2 breached the standstill; right?
3 **A. Same as before.**
4 Q. Okay. Now, during your direct
5 examination, you testified about email correspondence
6 that you had had with Christine Johnston of
7 TransCanada earlier that day, on January 25th, about
8 this call between Mr. Skaggs and Mr. Girling; right?
9 **A. Yes.**
10 Q. Let's look at that email
11 correspondence, if we can. It's at Joint Exhibit 620
12 in your binder. Let me know when you are there.
13 **A. I'm there.**
14 Q. So looking at the second full
15 paragraph, starting with "I expect" -- sorry -- "As I
16 expect"
17 Christine Johnston is asking you to
18 confirm that this conversation between Mr. Skaggs and
19 Mr. Girling "will not constitute an offer nor a
20 proposal to acquire the securities of Capricorn nor
21 constitute any other action that would be precluded by
22 the standstill"
23 Did I read that correctly?
24 **A. That's correct.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 404

1 Q. And so you forwarded the email to
2 Mr. Frumkin at Sullivan & Cromwell; right?
3 **A. Agreed.**
4 Q. And what you said to Mr. Frumkin was
5 that you would "call Chris back shortly acknowledging
6 that an offer is not in contravention with the
7 standstill agreement."
8 **A. Correct.**
9 Q. Did I read that correctly?
10 **A. Correct.**
11 Q. Now, I'm happy to go back and look at
12 the standstill with you again, the language of the
13 standstill with you again. But under the terms of the
14 standstill, TransCanada could not acquire or offer to
15 acquire Columbia without prior written board
16 authorization; right?
17 **A. That's correct.**
18 Q. And we had established previously that
19 there was no prior written board authorization?
20 **A. That's correct.**
21 Q. And Mr. Frumkin responds to you, if
22 you look at the top email.
23 Do you see that?
24 **A. I do.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 406

1 Q. That response should be the next tab
2 in your binder. That's Joint Exhibit 621. You write,
3 "I confirm by this email that receipt of an offer to
4 purchase our securities in this context would not
5 violate or be in contravention with the terms of the
6 NDA, including the standstill provision."
7 Right?
8 **A. Correct.**
9 Q. But receipt of an offer to purchase
10 Columbia securities would literally violate the
11 standstill, would it not?
12 **A. So this was not a real offer. This**
13 **was a discussion about whether we were in the range or**
14 **not. As the question and answer from earlier in the**
15 **direct testimony stated, we could not have said, "I**
16 **accept," to their offer. It was merely us talking to**
17 **see if there was impetus to move forward and then get**
18 **to a place where there would be an actual offer that**
19 **could take place.**
20 Q. That's helpful. And I understood and
21 listened to your testimony.
22 It's true, isn't it, that the
23 standstill does not qualify the word "offer" with real
24 offer; right?

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 405

1 Q. His response is one word. He says,
2 "Agree."
3 Did I read that correctly?
4 **A. That's correct. Because we had**
5 **discussed this in detail prior. I mean, that's why I**
6 **was informed about what I was suggesting my comment**
7 **would be, and his response was yes.**
8 Q. Sure. But there's no -- putting aside
9 your prior discussions with Mr. Frumkin, there's no
10 sort of legal advice in this email. There's no
11 authorities or substances. It's just the one word,
12 "Agree"; right?
13 **A. I don't agree that that's not legal**
14 **advice.**
15 Q. That was a poor question. Let me
16 reask the question.
17 **A. Sure.**
18 Q. Other than the word "agree," there is
19 no citation to any authority that Mr. Frumkin is
20 providing; right?
21 **A. That's correct.**
22 Q. Now, you responded to Ms. Johnston
23 later that same day, didn't you?
24 **A. I did.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 407

1 **A. It doesn't. And if you look up the**
2 **definition of an offer, that is what the definition of**
3 **an offer is.**
4 Q. Right.
5 **A. But I'm also not trying to argue that**
6 **that's the current state of the law, because I do**
7 **understand this Court's and Your Honor's decision at**
8 **this point moving forward. But at the time, that's**
9 **what we understood the state of law to be.**
10 Q. That's fair. And I apologize, by the
11 way, for cutting you off previously. I didn't mean to
12 do that.
13 The standstill also prevents
14 TransCanada from seeking to acquire Columbia; right?
15 **A. That's correct.**
16 Q. And it's your testimony that when
17 Mr. Girling says -- or when Ms. Johnston says that she
18 understands that Mr. Girling wants to have a
19 conversation with Mr. Skaggs about putting a value on
20 Columbia, that's not seeking to acquire Columbia?
21 **A. That's correct.**
22 Q. So looking at Ms. Johnston's email, in
23 response to you, she says -- even she seems to
24 indicate that if deal discussions "were to move

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 408

1 forward, the words in the standstill that we agreed to
2 would *appear* to require more explicit Board direction
3 for an offer (even if conditioned)."
4 Right?
5 **A. That's correct. But she's saying it**
6 **in the context of she has received advice as well and**
7 **it's fine to have that meeting. And so I agree with**
8 **the words that you are reading, but I don't agree with**
9 **how you are interpreting it.**
10 Q. That's fine.
11 You forwarded Ms. Johnston's email to
12 Mr. Frumkin for advice again; right?
13 **A. Correct.**
14 Q. And this time Mr. Frumkin had more to
15 say. And what he says is, "I think a formal proposal
16 they are right, but what we're doing now is fine.
17 Just emphasize that what we approve them doing is
18 making a private, non-public indication for discussion
19 of a negotiated transaction and discussion of whether
20 aboard wants to initiate negotiations."
21 Did I read that correctly?
22 **A. You did.**
23 Q. Look, I understand that you looked to
24 Mr. Frumkin for advice about the standstill. But it's

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 410

1 Q. And it's true, isn't it, that the
2 standstill doesn't speak in terms of formal proposals,
3 does it?
4 **A. Does not.**
5 Q. The standstill doesn't have a
6 carve-out for a private, nonpublic indication for a
7 discussion of a negotiated transaction; right?
8 **A. It does not.**
9 Q. You also understood the nondisclosure
10 agreement contained a "don't ask, don't waive"
11 provision. Right?
12 **A. That's correct.**
13 Q. And you understood that if either
14 party made a request for a waiver of the standstill,
15 the request itself would violate the standstill;
16 right?
17 **A. That's correct.**
18 Q. And so sticking with JTX 621 in front
19 of you, and going to the second page, the last full
20 paragraph of Ms. Johnston's email, starting with "If
21 however"
22 And I believe counsel for TransCanada
23 directed your attention to this previously. She asks,
24 "If however, after that meeting and after discussions

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 409

1 true, isn't it, that he never described to you where
2 he came up with this idea that the standstill required
3 something different for a formal proposal as opposed
4 to any other proposal, did he?
5 **A. He did not in this email. And I don't**
6 **recall the specific conversations that we would have**
7 **had. But I know that we had lengthy conversations**
8 **around this early on in the process. Not everything**
9 **was distilled to writing, as it is in this email.**
10 **This was the quick, this is happening; we need to make**
11 **sure we're on the same page based on your earlier**
12 **advice.**
13 Q. Right. And despite agreeing with
14 Mr. Frumkin's reading of the standstill generally, you
15 didn't know where he got the concept that a private,
16 nonpublic indication of interest was not required or,
17 rather, did not require prior written board
18 authorization, did you?
19 **A. They indicated that it was market**
20 **practice and that this was how the standstills worked**
21 **in the M&A context. And again, they -- between George**
22 **and Joe, I mean, they have trillions of dollars of M&A**
23 **experience. And so I relied on their comments about**
24 **market practice.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 411

1 with your board, your board is receptive to continuing
2 the discussions, we would like assurances that in the
3 event a verbal or written offer or proposal is made by
4 Taurus to the Capricorn CEO or Board, Taurus would not
5 be in contravention or breach of its obligations under
6 the Standstill."
7 Did I read that correctly?
8 **A. You did.**
9 Q. The standstill, the "don't ask, don't
10 waive" provision of the standstill forbade TransCanada
11 from making a request to amend or waive this
12 provision; right?
13 **A. That's correct.**
14 Q. And it's your testimony that this
15 request from Ms. Johnston did not violate the "don't
16 ask, don't waive"?
17 **A. I did not read this and do not read**
18 **this as an actual request. It's us getting on the**
19 **same page on process moving forward.**
20 Q. So when Ms. Johnston asks, "we would
21 like assurance ..., " you don't view that as a request?
22 **A. No. She said in order to move forward**
23 **more than this, is how she interprets what they would**
24 **need.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 412

1 Q. That's helpful.
2 You are aware, aren't you, that this
3 Court has already found in the appraisal decision in
4 this action that Ms. Johnston's email effectively
5 sought a waiver of the "don't ask, don't waive"?
6 A. Yes, based on -- again, I've tried to
7 not read the material regarding the case until it's
8 over. And so -- but based on the earlier comments
9 that I made with your counsel, I do understand that.
10 Q. Great. So continuing forward in time,
11 I believe it is the January 28th/29th, 2016, time
12 period, the board authorized Columbia management and
13 Sullivan & Cromwell to negotiate an exclusivity
14 agreement with TransCanada; right?
15 A. Correct.
16 Q. And I believe it was your testimony in
17 the deposition in this action that after considering
18 the firmness of this offer Columbia received on
19 January 25th, you felt that it was a firm enough
20 proposal to grant exclusivity to TransCanada, right?
21 A. That's correct.
22 Q. So I understand your testimony, the
23 proposal that Mr. Girling had made on January 25th was
24 firm enough to grant exclusivity to TransCanada, but

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 414

1 would expire by a date certain; right?
2 A. That's correct.
3 Q. And in this case, that date certain
4 was March 2nd, 2016; right?
5 A. That's correct.
6 Q. Now, do you recall that on March 1,
7 TransCanada reached out and asked for an extension of
8 exclusivity?
9 A. I do not recall.
10 Q. Let's take a look at a document that
11 TransCanada's counsel showed you. It's not in your
12 book. It will be up on the screen. This is that
13 series of text messages that we looked at. This is
14 JTX 1732. So it will be up on the screen for you,
15 Mr. Smith.
16 And I want to look at page 3 of this
17 document. I want to focus in on the series of texts
18 from March 1st, 2016. Are you with me?
19 A. I am.
20 Q. And they are a little hard to read,
21 but I understand this is sort of a group chat between
22 you and Bob Smith, Glen Kettering, Steve Smith --
23 sorry. Sorry, you are Bob Smith.
24 A. Bob Skaggs.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 413

1 insufficiently firm to trigger the standstill
2 obligations; is that your testimony?
3 A. So firm enough in the context of, you
4 know, how I interpret your question, is that it was
5 meaningful enough and that there was enough potential
6 to it that it was in the company's and shareholders'
7 best interest to move forward to the next step, but it
8 was not a firm enough offer that we could have said, I
9 accept.
10 Q. Sort of like midpoint of firm?
11 A. It was an indicative offer that had
12 enough credibility. I mean, a "certainty to close" is
13 a term that we use a lot. And as we were looking at
14 it, there was enough substance behind the discussion
15 that it warranted.
16 Q. Now, it's true, isn't it, that
17 TransCanada and Columbia did end up executing an
18 exclusivity agreement; right?
19 A. Correct.
20 Q. That happened on February 1st, 2016;
21 right?
22 A. I stipulate that it did.
23 Q. Well, I guess the more important
24 question is, it's true, isn't it, that exclusivity

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 415

1 Q. Bob Skaggs. Is that right?
2 A. Yes.
3 Q. And the first text on this chain from
4 10:15 on March 1st, 2016, is from you. And it says,
5 "They just asked for an extension of the exclusivity
6 agreement. They asked for it through 3/14. We are
7 inclined to give it through next Wed[nesday].
8 Thoughts?"
9 A. Yes. So the context of this is in the
10 negotiations that were going on realtime. And if you
11 recall, they had proposed 25.25 and -- yeah, that's
12 correct. And we -- and I don't have the exact
13 timeline, but we would have pulled up -- as you
14 recall, we had the cease-and-destroy letter -- I'm
15 sorry, return-or-destroy letter that I sent out in
16 this same time frame, as I recall. And so there were
17 parallel tracks of things happening where if we were
18 continuing in negotiations, then this is where the
19 exclusivity extension would have come into play. But
20 when we terminated and pulled out because they were at
21 a best and final at the time, then that would explain,
22 you know, both sets of emails and texts.
23 Q. Thank you for that. My question was a
24 little bit simpler. It was just simply to refresh --

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 416

1 **A.** **I'm sorry.**
2 **Q.** No. That's okay. Simply to refresh
3 your recollection that on March 1st, as exclusivity
4 was about to expire on March 2nd, TransCanada reached
5 out and asked for an extension; right?
6 **A.** **Yes.**
7 **Q.** And you knew that the reason they were
8 asking for an extension was because TransCanada was
9 afraid that Columbia would shop the deal in the
10 meantime; right?
11 **A.** **Correct.**
12 **Q.** I want to move on to a new topic. You
13 spoke on your direct examination about waiving the
14 standstill with other bidders.
15 Do you recall?
16 **A.** **I do.**
17 **Q.** I just want to make sure I understand
18 that, the timeline on that sequence of events.
19 So true, isn't it, that on March 2,
20 2016, Sullivan & Cromwell had advised you that
21 Columbia should release the other bidders from their
22 standstills; right?
23 **A.** **Correct.**
24 **Q.** And Sullivan & Cromwell advised you

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 418

1 **A.** **That's correct.**
2 **Q.** So you could have and, consistent with
3 your prior testimony, should have waived the
4 standstills on the morning of March 9th; right? That
5 was the earliest possible time you could have waived
6 the standstills; correct?
7 **A.** **That's correct.**
8 **Q.** But you didn't actually waive the
9 standstills for other bidders until three days later,
10 on a Friday night, on March 11th, between 11:00 p.m.
11 and midnight, Central Time; right?
12 **A.** **That's correct.**
13 **Q.** Anyone on the East Coast would have
14 gotten that email after midnight on Saturday morning;
15 right?
16 **A.** **That's correct.**
17 **Q.** I want to turn back to the
18 nondisclosure agreement, and I want to focus on a
19 different provision of it. The nondisclosure
20 agreement is Joint Exhibit 307 in your binder. And
21 the provision I want to focus on is on page 2. It's
22 paragraph 1(b).
23 **A.** **I'm there.**
24 **Q.** This is a paragraph about whether or

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 417

1 that if Columbia got to a place where contractually it
2 could release the standstill, then that's what
3 Columbia should do; right?
4 **A.** **That's correct.**
5 **Q.** And you thought that the appropriate
6 opportunity to release other bidders from their
7 standstills was when the exclusivity agreement with
8 TransCanada expired; right?
9 **A.** **Correct.**
10 **Q.** Now, on March 4th, the board decided
11 that, if feasible, the standstill provisions and the
12 other NDAs should be waived; right?
13 **A.** **That's correct.**
14 **Q.** And on March 4th, Columbia and
15 TransCanada were still in exclusivity; right?
16 **A.** **That's correct.**
17 **Q.** That exclusivity agreement lapsed at
18 11:59 p.m., Central Time, on March 8th; right?
19 **A.** **I don't recall specifically, but I**
20 **don't dispute it.**
21 **Q.** Well, let's just point your attention
22 to it just so we may have a clean record.
23 Flip back to the pretrial order, the
24 PTO tab, and look at paragraph 368.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 419

1 not a party can disclose the fact that discussions
2 during negotiations may take place, are taking place,
3 or have taken place concerning the transaction; right?
4 **A.** **Yes.**
5 **Q.** And neither party, nor TransCanada,
6 nor Columbia, could make such disclosure without
7 Columbia's prior written consent; correct?
8 **A.** **Correct.**
9 **Q.** There's an exception to this
10 prohibition, which was, if TransCanada, or Columbia,
11 for that matter, "received the written advice of its
12 outside counsel that it is required to make such
13 disclosure in order to avoid violating applicable
14 securities laws or stock exchange rules"
15 Right?
16 **A.** **That's correct.**
17 **Q.** And even at that point, TransCanada
18 would have needed to provide Columbia with the text of
19 the intended disclosure at least 24 hours prior to
20 making the disclosure; right?
21 **A.** **I don't see the 24 hours in here, but**
22 **sure.**
23 **Q.** So if you look at the bottom of
24 page 2, it starts with (y), in parens. "To the extent

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 420

1 legally permissible" --
2 **A. "... Party will notify ... at least 24**
3 **hours"**
4 Q. Yes.
5 **A. Okay.**
6 Q. Now, going back in time, Goldman Sachs
7 had previously advised that a sale process that
8 becomes public puts pressure on the board to take the
9 best price offered and may lead to a bidder trying to
10 push a deal at a low price; right?
11 **A. I have seen an email in the deposition**
12 **that asserted that, but I do not believe that was our**
13 **management team's view or our board's view.**
14 Q. Okay. Well, let's just quickly look
15 at that email. It's JTX 290 in your book.
16 The bottom chain is an internal
17 Goldman Sachs email with a bunch of numbers. And that
18 email makes its way from Goldman to Steve Smith and
19 then from Steve Smith to you, all on November 3rd;
20 right?
21 **A. That's correct.**
22 Q. Point 4 of that email states that
23 "[a]ny sale process that is public (whether leaked or
24 announced) puts pressure on [the] board to 'take' best

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 422

1 Q. Understood. And in that statement,
2 which you looked at on direct, TransCanada disclosed
3 that it was in discussions regarding a potential
4 acquisition or transaction with a third party, but it
5 doesn't disclose the identity of that party; right?
6 **A. That's correct.**
7 Q. Moving ahead in the timeline, on
8 March 14th, TransCanada made an offer to acquire
9 Columbia at \$25.50 in cash; right?
10 **A. That's correct.**
11 Q. And in connection with making that
12 offer, TransCanada management told Columbia management
13 that if Columbia were not to accept that offer,
14 TransCanada planned to issue a press release within
15 the next couple of days indicating its acquisition
16 discussions had been terminated; right?
17 **A. You said they -- I disagree with how**
18 **you've stated it, but I agree in concept. They**
19 **indicated that if a deal were not negotiated and if**
20 **the terms of the -- if a transaction did not happen,**
21 **that they would have a second time to go out. But the**
22 **price -- even if they said that, it would have been a**
23 **negotiating tactic.**
24 Q. Okay. I wasn't trying to paraphrase

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 421

1 price at a premium to market that is offered [] absent
2 competition may lead to any given bidder trying to
3 push [that] [premium] at a lower price."
4 Did I read that correctly?
5 **A. You did.**
6 Q. All right. In your deposition, you
7 testified that you agreed with that advice as a
8 general matter; right?
9 **A. I don't recall saying that. I recall**
10 **saying that our board was not overly concerned about**
11 **the leak, other than it being a leak, and that,**
12 **honestly, it was an opportunity for competition to be**
13 **inserted. So I know Tim said that; I just -- I don't**
14 **agree with that statement.**
15 Q. Okay. On the morning of March 10, the
16 Wall Street Journal reported that TransCanada was in
17 talks to acquire Columbia; right?
18 **A. March 10th, I can agree with that.**
19 Q. And I believe it was after that point,
20 Toronto Stock Exchange halted trading of TransCanada
21 stock until TransCanada released a public statement
22 about that leak; right?
23 **A. That's correct. And we had the same**
24 **dynamic happening on the New York Stock Exchange.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 423

1 or anything. I was actually reading from the pretrial
2 order.
3 **A. Fair enough.**
4 Q. I'm happy to direct your attention to
5 that paragraph.
6 **A. That's fine.**
7 Q. It's true, isn't it, the board never
8 released TransCanada from the provision of the NDA
9 prohibiting public statements about the acquisition;
10 right?
11 **A. That's correct. They were**
12 **interpreting their securities laws and the Canadian**
13 **stock exchange rules.**
14 Q. But you couldn't recall whether anyone
15 at TransCanada ever actually told you that TransCanada
16 got written advice from its outside counsel where they
17 were required to publicly announce termination of
18 discussions with Columbia; right?
19 **A. I don't recall specific conversations.**
20 **But beyond these emails, Chris and I were in very,**
21 **very regular conversation, especially around the leak.**
22 **So we were having discussions about our conversations**
23 **with outside counsel and the advice that we were being**
24 **given.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 424

1 Q. So are you saying that in those
2 discussions, on March 14th, in or around March 14th,
3 Chris Johnston told you that TransCanada's outside
4 counsel had opined as a matter of Canadian, Toronto
5 Stock Exchange rules that they would be required to
6 make that disclosure?
7 A. I believe that she, at the very least,
8 informed me that they were required to make that
9 disclosure. And I would have checked with our outside
10 counsel as well to confirm that. And, again, we were
11 dealing with it with the New York Stock Exchange, and
12 we were required to make disclosures. So what was
13 happening was not foreign and did not surprise me.
14 Q. But you never actually received that
15 written advice, did you? She never told you that they
16 had received written advice?
17 A. I don't recall. I recall not
18 receiving it. I wouldn't have expected to receive it.
19 But I don't recall if she said that she got it.
20 Q. And you never -- focusing on
21 March 14th, you never received a draft press release
22 on March 14th about what TransCanada planned on
23 disclosing; right?
24 A. I thought we reviewed the press

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 426

1 inbound scripts to use for potential inbound offers;
2 right?
3 A. Correct.
4 Q. And I believe your attention was drawn
5 to Joint Exhibit 971, which isn't in your binder, but
6 we can put it up on your screen.
7 And this email from Mr. Skaggs to the
8 board, copying members of management, is dated March
9 11th, 2016; right?
10 A. That's correct.
11 Q. And he's talking about -- rather, he's
12 actually sending the draft inbound script to the board
13 and to management; right?
14 A. That's correct.
15 Q. I believe on your direct testimony you
16 said that you wanted to be careful not to violate the
17 newly entered into exclusivity agreement with
18 TransCanada; right?
19 A. I believe I may have said that, but I
20 think we entered into the exclusivity agreement maybe
21 the next day or several days following.
22 Q. It's actually March 14th. That was my
23 next question.
24 A. Thank you.

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 425

1 release on direct testimony.
2 Q. That press release was dated
3 March 10th.
4 A. Okay. And the release you are talking
5 about is?
6 Q. March 14th.
7 A. Was the March 14th release ever --
8 Q. I'm asking you if, after TransCanada
9 made this --
10 A. I'm sorry. You lost me. I'm not
11 trying to be coy.
12 Q. I understand, and I'm trying to help
13 you.
14 A. Okay.
15 Q. But TransCanada told Columbia on
16 March 14th that if Columbia were not to accept that
17 \$25.50 all-cash offer, TransCanada planned to issue a
18 press release within the next few days indicating the
19 discussions had been terminated --
20 A. I did not see a press release about
21 that.
22 Q. That's helpful. Thank you.
23 On direct, you were asked some
24 questions and you gave some testimony about the

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 427

1 Q. It's true, isn't it, that exclusivity
2 wasn't actually given until March 14th? Right?
3 A. That's correct. But we were still
4 very cognizant of keeping the deal together, and we
5 wanted the language to be such that we could say it
6 after exclusivity had come into play.
7 Q. Okay. You were also asked a couple of
8 questions about Spectra. Do you recall?
9 A. I do.
10 Q. And I believe that counsel for
11 TransCanada asked you about your reach-out to Spectra;
12 right?
13 A. I don't recall how he phrased it, but
14 I believe they reached out to us, and then we reached
15 out back to them.
16 Q. That's helpful. That's exactly what I
17 was going after.
18 It's true, isn't it, that Spectra made
19 an inbound request? Right?
20 A. They did, very softly.
21 Q. Okay. Now, I want to make sure I
22 understand the timing of how this all worked. So turn
23 with me, if you will, to the proxy, which, again, is
24 at JTX 1291. And I want to focus your attention

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 428

1 specifically on page 48 of the proxy, which is page
2 .005 [sic] of this document.
3 **A. I'm there.**
4 Q. So looking at the third full
5 paragraph, starting with, "Later on March 11th,
6 2016" I just want to understand the timing.
7 So March 11th, 2016, the board has a
8 telephonic meeting; right?
9 **A. That's correct.**
10 Q. Okay. And at that meeting -- this is
11 the second sentence -- Skaggs tells the board about
12 the Wall Street Journal leak.
13 And in the third sentence, he also
14 informed the board of Party A's communications to him
15 and Goldman Sachs earlier that day; right?
16 **A. That's correct.**
17 Q. And "Party A" is Spectra; right?
18 **A. I believe so.**
19 Q. Okay. So Spectra reaches out early on
20 March 11th. Later on March 11th, you have this board
21 meeting. Mr. Skaggs informs the board about the
22 reach-out from Spectra. Do I have that timeline
23 correct?
24 **A. Yes.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 430

1 Right?
2 **A. That's correct.**
3 Q. Now, looking further down in this
4 paragraph -- it is six lines up from the bottom --
5 you'll see a sentence starting with, "The Board also
6 approved"
7 **A. I see it.**
8 Q. Okay. It says, "The Board also
9 approved a script that management had prepared with
10 the assistance of Sullivan & Cromwell for use in
11 responding to Party A's inquiry as well as any future
12 inquiries from any other interested parties."
13 Correct?
14 **A. That's correct.**
15 Q. So the sequence is, at this meeting on
16 March 12th, the board is again told about Spectra's
17 inbound interest, and the board approves the inbound
18 script that you guys had been working on; right?
19 **A. That's correct.**
20 Q. Internally with Sullivan & Cromwell
21 and everybody else.
22 And then the next sentence reads,
23 "Prior to using such script, Mr. R. Smith" -- that's
24 you; right?

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 429

1 Q. Okay. So if you go a little further
2 down, I believe it was the third to last sentence,
3 starting with, "Because CPG and Goldman Sachs"
4 Do you see that?
5 **A. I do.**
6 Q. It says, "Because CPG and Goldman
7 Sachs had received Party A's inbound inquiry only a
8 short while before the Board meeting, management
9 requested additional time to formulate a
10 recommendation to the Board as to how to respond"
11 **A. Correct.**
12 Q. So there was an agreement that the
13 board would reconvene the next morning, the morning of
14 the 12th; right?
15 **A. Correct.**
16 Q. And so the next paragraph of the proxy
17 talks about that board meeting on March the 12th;
18 right?
19 **A. That's correct.**
20 Q. And during that meeting, looking at
21 the second sentence of that last paragraph, it says,
22 "Mr. Skaggs presented management's recommendation that
23 CPG not engage with Party A, given that Party A had
24 not made a specific proposal"

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 431

1 **A. That's correct.**
2 Q. -- "would send the proposed language
3 to a representative of TransCanada to obtain
4 confirmation that using such script in responding to
5 unsolicited proposals would not constitute a breach of
6 CPG's obligations under the new exclusivity agreement
7 once ... [it] [was] [entered]."
8 Right?
9 **A. Correct.**
10 Q. Again, I just want to make sure I
11 understand the sequence. Before Spectra was --
12 actually read the script, you wanted to get sign-off
13 from Chris Johnston at TransCanada that doing so
14 wouldn't violate the new exclusivity agreement you
15 guys were going to enter into; right?
16 **A. That's correct.**
17 Q. And that's what you did; right? You
18 got confirmation from Chris Johnston that the script
19 wouldn't violate the new exclusivity agreement?
20 **A. So, again, as you recall, my email was**
21 **very specific. It said, here is what we intend to**
22 **say, and we wanted to get on the record that it was**
23 **your view that it would not violate the exclusivity**
24 **agreement. So that's correct.**

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 432

1 Q. That's helpful. And, again, I'm not
2 quibbling with the substance. I'm just trying to
3 establish a timeline.
4 So fair to say that Spectra was not
5 actually read the inbound script until after
6 TransCanada had an opportunity to give you that
7 confirmation? Right?
8 A. I think the direct testimony earlier
9 showed the timeline that the Goldman call with Wells
10 Fargo occurred before my email to Chris. But I don't
11 recall specifically, other than seeing that chronology
12 in the discussion earlier.
13 Q. You referred to a Goldman call with
14 Wells Fargo. Wells Fargo is TransCanada's financial
15 advisor, right?
16 A. And Goldman was ours.
17 Q. Okay. Just so I understand the
18 timing, Goldman talks to Wells Fargo about the inbound
19 script; that's what your testimony is?
20 A. I'm just trying to recall the
21 discussion earlier. And I don't have it in front of
22 me, but that's what I recall reading in the direct
23 testimony.
24 Q. Understood. And then just so I

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 434

1 SIIM VANASELJA, having first been duly
2 affirmed, was examined and testified as follows:
3 DIRECT EXAMINATION
4 BY ATTORNEY OLSEN:
5 Q. Good afternoon, sir. Can you please
6 tell me a little bit about your educational
7 background.
8 A. Yes. I hold an honors bachelor of
9 business administration degree from the Schulich
10 School of Business. I am a fellow member of the
11 Canadian Institute of Chartered Accountants.
12 Did you want my work history as well?
13 Q. That was my next question. Go ahead,
14 please give me your work history briefly as well.
15 A. Yes. From 1979 to 1994, I worked with
16 KPMG. I was a partner in the Toronto office of KPMG.
17 In 1994, I left that firm to join BCE.
18 And from 2001 until 2015, until June 2015, I was the
19 executive vice president and chief financial officer
20 for BCE and Bell Canada.
21 Since my retirement mid-2015, I've
22 remained active and involved in certain boards,
23 including TC Energy.
24 Q. How did you come to serve on the TC

CHANCERY COURT REPORTERS

R. Smith - Cross

Page 433

1 understand clearly, after Goldman and Wells Fargo had
2 that call about the inbound script, at that point
3 Goldman read the inbound script to Spectra; correct?
4 A. Again, I'm only recalling -- I believe
5 that's correct, based on what I read this morning, but
6 I don't have a current recollection of what happened
7 realtime.
8 Q. That's helpful.
9 ATTORNEY JAMES: I have nothing
10 further at this time.
11 ATTORNEY HARRELL: Nothing further,
12 Your Honor.
13 THE COURT: Mr. Smith, thank you for
14 your time. I appreciate it.
15 THE WITNESS: Thank you very much.
16 Pleasure meeting you and an honor.
17 THE COURT: I appreciate it.
18 (Witness excused.)
19 ATTORNEY OLSEN: Defendants would call
20 Siim Vanaselja to the stand next.
21 Your Honor, may I approach with the
22 binders?
23 THE COURT: Why don't we do the
24 affirmation before we do the housekeeping.

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 435

1 Energy board?
2 A. I was approached by either the chair
3 of the board or the chair of the governance of TC
4 Energy, which was TransCanada at the time. They
5 gauged my interest in exploring joining their board
6 and seeing if there was a good fit for me on their
7 board. I met with Barry Jackson, who was the chair of
8 the board of TransCanada at that time. I met with
9 Russ Girling, who was the CEO.
10 Sorry. There's a fly on my book.
11 Q. I'm sure that's my fault. I
12 apologize.
13 A. I think you brought that,
14 notwithstanding it's nicely disinfected here.
15 I met with Russ Girling as well. And
16 I had a telephone conversation with the chair of the
17 governance committee. Following those meetings, they
18 offered me to put my name on the slate of directors at
19 the AGM of 2014.
20 Q. Were you named board chair in around
21 December 2016?
22 A. Yes, that's correct.
23 Q. Do you have experience as a director
24 on other corporate boards?

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 436

1 **A. I do. I am currently on the board**
2 **of -- public company boards would include Power**
3 **Corporation, where I'm the chair of the audit**
4 **committee; Great-West Lifeco, where I also chair the**
5 **audit committee; and RioCan Real Estate REIT, where I**
6 **am the lead director.**

7 Q. Did you support the acquisition of
8 Columbia by TransCanada?

9 **A. I did, yes.**

10 Q. What made Columbia an attractive
11 potential acquisition for TransCanada in early 2016?

12 **A. I supported the view of management and**
13 **the rest of the board that Columbia was an attractive**
14 **strategic fit and had, you know, good industrial logic**
15 **to being acquired by TransCanada. The footprint of**
16 **natural gas transmission assets of Columbia were a**
17 **good complement to the footprint of TransCanada. And**
18 **the footprint of Columbia extended TransCanada's gas**
19 **operations into the Appalachian basin in the U.S. and**
20 **the attractive Permian and Utica gas fields.**

21 **And I would also add that Columbia at**
22 **the time had, I believe, over \$5 billion of**
23 **development opportunities that were viewed as**
24 **attractive growth opportunities. And TransCanada had**

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 438

1 Q. There's been a lot of discussion in
2 this trial about a meeting that took place between
3 Francois Poirier and Steve Smith from Columbia on
4 January 7th, 2016, to discuss reengaging in a
5 potential transaction with Columbia. At the time were
6 you aware of that particular meeting?

7 **A. I'm not aware that I was made aware of**
8 **that particular meeting, and I'm not aware of the**
9 **Court's dialogues around that.**

10 Q. Would you expect to be made aware of
11 the particular back-and-forths during the course of
12 the negotiation between Columbia and TransCanada by
13 management?

14 **A. There's a role for management, and**
15 **there's a role for the board. So the board would not**
16 **be kept abreast of all of the deal team efforts to see**
17 **if there's a meeting of minds to execute a**
18 **transaction. But certainly with regard to the**
19 **material elements of the transaction, like**
20 **back-and-forth negotiations over the offer price, key**
21 **terms, those would have come to the board.**

22 Q. I'm showing you what is marked as
23 Joint Exhibit 829. And you have the exhibits in your
24 binder, or you could look at the screen in front of

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 437

1 **the financial capacity and the technical expertise to**
2 **execute the build-out of those projects.**

3 **So those were largely the reasons that**
4 **I can recall.**

5 Q. How was the board kept informed of
6 TransCanada's efforts to explore a transaction with
7 Columbia?

8 **A. Through board meetings where we would**
9 **have been brought up to date on the transaction.**

10 Q. Which members of management
11 principally kept you apprised of their activity?

12 **A. The board meetings were typically**
13 **attended by all or at least a majority of the**
14 **executive leadership team on the transaction. In**
15 **particular, Russ Girling would have taken the lead and**
16 **would be the principal individual that the board would**
17 **look to for views with regard to the transaction.**

18 **In addition, Alex Pourbaix, who was**
19 **the chief operating officer; Francois Poirier, who was**
20 **the head of corporate development; the chief financial**
21 **officer, Don Marchand; the treasurer; the chief legal**
22 **officer. We would have had a broad range of**
23 **discussions around, you know, the various parameters**
24 **of the opportunity.**

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 439

1 you, whichever is easier for you, sir.

2 I'm showing you what has been marked
3 as Joint Exhibit 829, which are preread materials for
4 a March 5th, 2016, special meeting of the TransCanada
5 board of directors. And I'd like to turn your
6 attention, in particular, to pages 12 and 13 of 113.

7 So there's a header on the section on
8 page 12 called "Project Constellation." What was
9 Project Constellation?

10 **A. That was the code name for**
11 **TransCanada's evaluation of acquiring Columbia**
12 **Pipeline Group.**

13 Q. And if you look at page 13, there are
14 some key findings. There's a reference to Capricorn
15 there. Was that the nickname for Columbia at the
16 time?

17 **A. Yes.**

18 Q. I want to ask you about the last
19 bullet under the "Key Findings" that says, "Awaiting
20 responses from Rating[] Agencies on proposed actions
21 based on [a] revised finance plan."

22 Can you tell me what that issue was
23 about?

24 **A. Yes. This related to plans with**

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 440

1 regard to financing the acquisition of the purchase
2 price.
3 TransCanada operates in a very
4 capital-intensive industry and a cyclical industry.
5 The company at the time had an A rating from Moody's
6 and S&P. I don't recall what its rating with DBRS
7 was, but it was either A or slightly higher than that
8 even. And, you know, just recognizing, as I say, the
9 capital intensity of its operations and the potential
10 for volatility in the sector, it was important for the
11 company to preserve that rating.

12 This comment, "Awaiting response[]"
13 from the Rating[] Agencies ..., " I believe, would
14 refer to the fact that management retained the
15 advisory services of either S&P or Moody's or both of
16 them to evaluate potential combinations of equity and
17 asset sales and other means for financing this
18 acquisition with a view to getting the rating
19 agencies' confirmation ahead of executing a
20 transaction that it would preserve the A rating.

21 Q. Thank you. Did management present
22 valuations of Columbia to the board over time?

23 A. I do recall that, yes.

24 Q. Did TransCanada management settle on a

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 442

1 His view was that it would take a very sizable premium
2 for the board of Columbia and ultimately its
3 shareholders to move forward with a transaction and
4 that that was likely at least \$24.

5 At the same time, you know, Russ
6 indicated that because of the debt, the leverage that
7 TransCanada would be assuming on the acquisition,
8 which was considerable, we really had no latitude with
9 the rating agencies to issue debt consideration. And
10 consequently, we had to look to both equity and asset
11 sales. The most expensive form of capital for an
12 organization such as TransCanada at least, with a
13 significant dividend attached to its common shares, is
14 the issuance of common stocks.

15 So those were really the
16 considerations.

17 Q. And based on those considerations --

18 A. Sorry. I just wanted to add to that
19 that those were -- those were the considerations that
20 led Russ to believe that from TransCanada's
21 perspective, you know, going above \$25 would really
22 create challenges because the higher the price,
23 ultimately, the more equity or asset sales were going
24 to need to execute. And the transaction becomes less

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 441

1 valuation range with respect to Columbia by that
2 March 2016 time frame?

3 A. Um ...

4 Q. Let me ask a better question. Do you
5 have a recollection, based on your discussions with
6 the board, as to what the sense of valuation for
7 Columbia was as management and the board were
8 discussing it over the life of those discussions in
9 that February/March 2016 time frame?

10 A. Yeah. Thank you. That clarification
11 is helpful.

12 What I would say is that the valuation
13 materials that were presented had a broad range of
14 valuation for Columbia. My experience in M&A
15 transactions is that they often do because the
16 methodologies range from discounted cash flow analyses
17 to EBITDA multiples to EPS multiples to dividend yield
18 valuation methodologies and then looking at comparable
19 market transactions as well. So there was a broad
20 football field range that was presented.

21 At the same time, I would recall that,
22 you know, Russ Girling had a very firm view that there
23 was a -- that there was, in fact, a narrow valuation
24 range in which a successful deal could be agreed to.

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 443

1 accretive and, you know, risks potentially a negative
2 reaction from the marketplace or that the equity
3 component that we need to issue becomes something that
4 is of a scale that couldn't be executed in the
5 marketplace.

6 ATTORNEY ORRICO: Real quick, Your
7 Honor. I apologize. I do not like to object. I
8 just -- real quick, TransCanada had an opportunity to
9 identify Mr. Girling as a witness at this trial. And
10 so we would appreciate if we could limit the hearsay
11 from a witness that's not coming to trial. I'll leave
12 it at that.

13 THE COURT: Do you want to -- let's
14 treat this as a hearsay objection. Do you want to
15 respond to the hearsay objection?

16 ATTORNEY OLSEN: Sure, Your Honor.
17 The witness is talking about discussions that took
18 place at the board. We're not offering it for the
19 truth of the matter asserted but, rather, what his
20 perspective is on what was presented to him about
21 valuation.

22 THE COURT: Proceed on that basis.
23 BY ATTORNEY OLSEN:

24 Q. I want to show you what has been

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 444

1 marked as Joint Exhibit 869, which are the board
2 minutes from the March 5th, 2016, special meeting of
3 the TransCanada board of directors.

4 Did you attend this meeting, I guess,
5 at least by phone?

6 **A. Yes, I did.**

7 Q. I want to look at the final page of
8 this document. In the last paragraph, there is a
9 reference to "Management requested approval for the
10 [CEO] to enter discussions on price subject to final
11 approval [from] the Board. Members noted the
12 sensitivities around price with the credit rating
13 advisory service and agreed that negotiations should
14 commence at [\$24 with a high range of approximately
15 \$25.25."

16 Do you recall management requesting
17 authorization to enter discussions on price with
18 Columbia on March 5th, consistent with what's
19 expressed in the minutes?

20 **A. Yes, I do.**

21 Q. And what does the reference in the
22 minutes there to the board noting the sensitivities
23 around price with the credit rating advisory services
24 refer to?

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 446

1 back-and-forth from Columbia of 26.50. And then 25.25
2 from TransCanada. And then Columbia delivering a
3 board-authorized price of \$26.

4 Is that consistent with your

5 recollection of what was discussed at the board about
6 the state of play with respect to price at that time?

7 **A. Generally, that's correct. I don't
8 know if these were -- you know, I don't know what the
9 words "board authorized" necessarily means. But these
10 weren't board-approved, firm bids. They were, you
11 know, agreements by the board to move forward with an
12 offer subject to definitive agreements and final board
13 approval.**

14 Q. Fair enough.

15 Did the TransCanada board meet to
16 consider that \$26 indication from Columbia?

17 **A. We did, yes.**

18 Q. I want to ask you about that. If you
19 would turn to Joint Exhibit 944, which are board
20 minutes from the March 9th, 2016, meeting of the
21 TransCanada board of directors.

22 And, again, you attended by phone, it
23 appears?

24 **A. Present by phone, yes. I was there by**

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 445

1 **A. I think that's consistent with my
2 earlier comment today that as the price increases, you
3 know, the execution risks with regard to issuing
4 equity and asset sales increases, and the concerns of
5 preserving the A rating with the rating agencies
6 becomes more challenging.**

7 Q. I'm showing you what has been marked
8 as Joint Exhibit 912, which is an email from Andrew
9 Isherwood to Russ Girling and others dated March 9 and
10 attaching slides that would be presented at that board
11 meeting later that day.

12 And I want to ask you about Slide 3
13 here that has a "Situation Update." And there is a
14 summary.

15 Taurus was the code name for
16 TransCanada at that time in these discussions;
17 correct?

18 **A. Sorry, sir. Are you on --**

19 Q. Slide 3, 912.004.

20 **A. .004. Apologies.**

21 **Taurus was the code name for
22 TransCanada, yes.**

23 Q. And the "Situation Update" describes
24 TransCanada's initial price of 24. And then a

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 447

1 **phone.**

2 Q. I want to ask you about the first
3 paragraph under "Project Constellation" at the bottom
4 of the page.

5 "The Chief Executive Officer [] led
6 the discussion by providing an update on the status of
7 the discussions with Capricorn since the previous
8 meeting. He reviewed the [\$24 per common share offer
9 made to Capricorn's CEO on March 5th [] and []
10 Capricorn CEO's counter proposal of \$26.50 ... was
11 conveyed to members that after deliberation[s],
12 Mr. Girling delivered the Board[] authorized price of
13 \$25.25 per share and that the Capricorn board had
14 rejected the new offer. After subsequent discussion,
15 on March [25th] [], Capricorn's management conveyed
16 its potential receptiveness to an offer of \$26 per []
17 share."

18 That's just a recap of the situation,
19 summary that we just saw; correct?

20 **A. Correct.**

21 Q. And with respect to valuation, what
22 was your recollection of the discussion about
23 management and the board's willingness to go back to
24 Columbia with an improved offer?

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 448

1 **A.** I do recall the board dialogue with
2 regard to that meeting. As I said, Mr. Girling felt
3 quite strongly that proceeding with an offer above
4 what had been agreed with the board of 25.25 would be
5 very challenging for the company. An all-cash offer
6 of \$26, therefore, was out of the question to be
7 offered and accepted by the company.

8 Ultimately -- and it wasn't
9 Mr. Girling, but one or more directors, you know,
10 said, could we stretch ourselves beyond 25.25? We've
11 been working on this transaction, you know, for over
12 three months, and it does -- we should look to the
13 median and longer-term value creation potential that
14 this brings. It would be regrettable if, after all
15 this work and effort, we can't find common grounds to
16 execute this transaction.

17 **Q.** And to that regard, if you look at the
18 last paragraph in the minutes on this March 9th
19 meeting, "After further deliberation, the Board
20 authorized management to make a counter offer to
21 Capricorn [of] []\$26 per share but which would include
22 TransCanada[s] common shares as a portion
23 (10 percent) of [that] consideration. It was noted
24 that the offer would remain subject to formal Board

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 450

1 **Q.** One more question before we have to
2 break for lunch. Why was TransCanada willing to go to
3 \$26 per share with a mixed stock component but the
4 board was unwilling to go to \$26 per share with an
5 all-cash offer?

6 **A.** Just because of the execution risks.
7 But an all-cash offer would have to be financed with a
8 combination of asset sales and subscription receipts.

9 In order to eliminate execution risk
10 on the subscription receipts issuance, TransCanada
11 looked to its bankers to undertake that on a bought
12 deal basis, meaning the risk with regard to the
13 pricing of that subscription receipts issue would be
14 borne by the bankers.

15 Now, those subscription receipts would
16 be bought by the bankers at a discount to the
17 then-trading price of TransCanada shares, but it would
18 be the bankers' risks to execute those. The banker --
19 there was engagements between management and the
20 bankers on what the amount of that discount would be
21 and what, you know, amount of subscription receipts
22 the bankers were comfortable moving forward with the
23 bought deal.

24 And we believe -- management indicated

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 449

1 approval to enter into the merger once all the terms
2 had been negotiated."

3 Why did the board decide to authorize
4 a \$26 per share mixed consideration indicative offer
5 at that time?

6 **A.** Because we wanted to get a transaction
7 executed. And, you know, the only way to reasonably
8 do that was to issue more equity or, alternatively,
9 sell more assets. And we were at a point where, you
10 know, the noncore assets that were feasible to divest
11 and that we would have comfort within a reasonable
12 time period to be able to execute a divestiture -- I
13 mean, we essentially had run out of those kinds of
14 assets. And that left equity.

15 We were aware that Columbia had
16 indicated its strong preference for cash. And I think
17 those discussions had transpired earlier between the
18 two companies. But the board sort of turned its
19 attention back to, what about a small component of
20 equity that the shareholders of Columbia would take
21 back? If that was a possibility, then would we be --
22 would we consider going to the \$26? And that's where
23 this proposal to offer \$26 with a 10 percent equity
24 consideration component came in.

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 451

1 that they were sort of at the limits of what the
2 bankers thought they could do in the marketplace at
3 that time. And, therefore, the idea came up, well,
4 what about offering 10 percent to the Columbia
5 shareholders? That's just a share-for-share exchange.
6 And, again, from our perspective, it de-risks the
7 execution of the sale without increasing the
8 subscription receipts issuance and causing a problem
9 on executing for the bankers.

10 **Q.** Thank you, sir.

11 ATTORNEY OLSEN: Should we break for
12 lunch now?

13 THE COURT: Let's break for lunch.
14 We'll be in break until 1:30. We'll stand in recess
15 until then.

16 (Recess taken at 12:31 p.m.)

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CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 452

AFTERNOON SESSION

(Resumed at 1:30 p.m.)

THE COURT: Welcome back, everyone.

Please be seated. Thank you for being ready to go.

ATTORNEY OLSEN: Thank you, Your

Honor.

BY ATTORNEY OLSEN:

Q. Just to reorient you, sir, before the

lunch break, we were talking about the March 9th board

meeting and that the board had approved an indicative

offer of \$26 per share, mixed consideration with a

10 percent stock component. Are you with me?

A. I am.

Q. Was the \$26 indication of interest

with that stock component subject to further

conditions?

A. Yes.

Q. What were those conditions?

A. The conditions included, first,

TransCanada shares continuing to trade at or above a

level of \$49; secondly, that the credit rating

agencies took no action to downgrade TransCanada's

credit ratings; and third, that the underwriters

continued to give comfort that a bought deal

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 454

leak was beneficial in the sense that it would be
informative to us as to what the market receptivity,
both from the perspective of TransCanada's
stakeholders and analysts, as well as Columbia's
stakeholders and analysts, would be. We would be able
to see what the impact on our respective share prices
would be. So it would help -- help inform how the
transaction was viewed.

And then, as well, having public
knowledge out there of negotiations between the two
companies would create an expectation of a potential
transaction and a potential premium to be earned by
Columbia's stakeholders.

Q. I want to show you what's been marked
as Joint Exhibit 1093, which are board minutes from
the March 14th meeting of the TransCanada board of
directors.

And I think we can see you were again
present by phone for this meeting. Correct?

A. Yes.

Q. I want to turn to the last paragraph
on the first page. It says, "The meeting discussed
the impact of the media story on TransCanada's most
recent offer, ability to pay and execution risk. In

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 453

subscription receipts issuance would be available.

And then obviously, lastly, you know, definitive
agreements and TransCanada's board approval and
Columbia's board approval, obviously.

Q. Was TransCanada's board ever

supportive of an all-cash offer of \$26 per share?

A. No.

Q. Do you recall that on March 10th the

negotiations were leaked to the Wall Street Journal?

A. Yes.

Q. I'm showing you what's been marked as

Joint Exhibit 1735, which is a set of text messages.

And I want to ask you about text 20680, from you to

Russ Girling on March 11, 2016, where you say, "I

think the leak may be the best development for us!"

Do you have a sense of what you meant

by that at the time?

A. I can tell you that I don't recall
having sent this leak.

Q. Text?

A. Sorry, this text. I was reading, I
think, "the leak." I don't recall having sent this
text. I can speculate that I was likely indicating --
this was sent to Russ -- indicating to Russ that the

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 455

light of these developments, management indicated that
it would communicate to Capricorn that its latest
offer could no longer be supported as the conditions
of that offer were no longer met. Management reviewed
the challenges of a proposed share-for-share exchange
with the Board members including valuation and
execution risk."

Do you see that?

A. Yes, I do. That's in the second
paragraph.

Q. Why did TransCanada decide not to
proceed with the \$26 mixed consideration indication of
interest?

A. Prior to the leak, TransCanada was
trading at between 49 and \$50 per share. The leak
caused TransCanada to trade below \$48, in sort of the
mid-\$47 range. So it didn't achieve one of the
conditions. And, again, that would have meant that,
at a lower share price, TransCanada would have had to
issue more equity, more common-share equity, the most
expensive form of capital for the company, to finance
the same acquisition.

So that objective was -- or condition
was not achieved. And then, again, because of the

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 456

1 lower share price, I have a recollection of
2 indications from management that the subscription
3 receipts bought deal would be -- would be jeopardized,
4 either with respect to the amount of the bought deal
5 or with respect to the amount of discount that that
6 bought deal on the subscription receipts would entail.
7 But I don't recall the specific reasons, but I do
8 recall that, you know, there was a view that this
9 subscription receipt offering on a bought deal basis
10 would be jeopardized.

11 Q. In connection with the simultaneous
12 issuance of stock as part of that 26?

13 A. Correct. Correct. All predicated on
14 our \$26 offer, including 10 percent equity
15 consideration.

16 Q. If you look at the last paragraph of
17 the minutes, ultimately the board approved increasing
18 the all-cash offer to \$25.50. Can you tell me the
19 discussions at the board meeting that led to that
20 conclusion?

21 A. I could give you my best
22 recollections. We had already offered \$25.25, all
23 cash. As I commented earlier, there was a significant
24 desire to get this transaction done on TransCanada's

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 458

1 So that's kind of how we got to 25.50.
2 It wasn't -- it was essentially the \$25.25 cash offer
3 with no additional need for asset divestitures, but
4 increasing the bought deal component of the
5 subscription receipts likely.

6 Sorry, that was long-winded, but --

7 Q. Thank you.

8 A. -- I feel like I communicated it okay.

9 Q. I think you did.

10 Based on the discussions you had
11 throughout this process, do you think that 25.50 was
12 as high as the board would have been willing to go?

13 A. Yes, I'm very confident in saying
14 that. In terms of an all-cash offer, 25.50, if not
15 accepted, we would have walked away.

16 Q. Did Columbia accept the 25.50?

17 A. Yes, they did.

18 Q. And the deal was announced on
19 March 17th?

20 A. I don't recall the precise date the
21 transaction was announced.

22 Q. Sound about right?

23 A. Yes.

24 Q. Okay. I want to show you what's been

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 457

1 part, and we believed, after three or however many
2 months both parties had worked on this transaction,
3 that there was a desire on the part of the other side
4 to conclude the transaction as well. Our CEO, Russ
5 Girling, was still reasonably firmly of the view that
6 going above 25.25 on a cash basis is not something
7 that we should undertake. And board members
8 challenged Mr. Girling, including myself, I believe,
9 to say, again, that this is a strategic acquisition
10 and, you know, could we stretch an all-cash offer a
11 little bit higher. And that's how we got to 25.50.

12 And I believe it was also relayed at
13 this meeting that, you know, the bankers,
14 notwithstanding that they couldn't do a subscription
15 receipts issue at a price of 47-something for
16 TransCanada shares while issuing 10 percent additional
17 equity consideration, that would be too much for the
18 market to absorb; that shifting the weighting of the
19 subscription receipts without 10 percent share
20 consideration being issued to Capricorn shareholders
21 is -- shifting the bought deal subscription receipts
22 slightly higher while reducing the non-guaranteed, or
23 greenshoe, component of that offering, that that may
24 be feasible.

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 459

1 marked as Exhibit 1244, which are materials relating
2 to a board meeting that took place on April 28 and
3 April 29, 2016, approximately a month after the
4 transaction was announced.

5 In the merger agreement, did
6 TransCanada secure a right to match a superior
7 proposal, if they wanted to?

8 A. Yes. That's not uncommon in
9 transactions. And in reviewing materials for this
10 trial, I've become aware of that. I didn't
11 specifically recall it until reading about it in the
12 minutes and other materials.

13 Q. I want to turn to the agenda on
14 1244.005. That's page 5 of 347. And the agenda has a
15 number of items --

16 A. Sorry, can you repeat the page number.

17 Q. 1244.005.

18 A. Thank you.

19 Q. The agenda has a number of items at
20 the top. It says "Committee Reports (for approval)," and then "Consent Items (for approval)," and then it
21 has "Active Items (for information)."

22 Do you see that?

23 A. Yes.

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 460

1 Q. What's the significance of the items
2 on your agenda for approval versus those items that
3 are just for information?
4 **A. The items for approval would be**
5 **matters that require a board resolution put forward**
6 **and seconded and voted by a majority of the directors.**
7 **The items for information purposes were just updates,**
8 **some of which, as a board, we would have spent time on**
9 **and some of which, you know, we might have spent very**
10 **little or no time on.**
11 Q. If you turn to the next page, 006,
12 item 9 is the "Columbia Pipeline Acquisition," and
13 there's "Interloper Strategy" under there.
14 Do you see that?
15 **A. I do.**
16 Q. I would like to turn to page 242,
17 which is 1244.242.
18 **A. I have that in front of me.**
19 Q. Okay. And do these board materials
20 contain a few pages on a potential interloper strategy
21 in the event another possible buyer emerged to acquire
22 Columbia?
23 **A. They do.**
24 Q. And I want to go to the next page,

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 462

1 per share as of 2017. Do you see that?
2 **A. I do.**
3 Q. Based on your recollection of the
4 discussions at the board about this issue, is this
5 model designed to answer the question as to whether or
6 not TransCanada could or would increase its offer to
7 match a superior proposal?
8 **A. Certainly not.**
9 Q. Why not?
10 **A. As I -- as I said, this document,**
11 **which I see on the cover page is marked draft, I don't**
12 **have any real recollection of whether the board**
13 **actually discussed this. But as I said, this was**
14 **after the announcement of the transaction and after**
15 **execution of agreements.**
16 **I think the draft is poorly worded.**
17 **There wasn't any recommendation that was being brought**
18 **forward for action by the board with respect to**
19 **interlopers. The wording "TransCanada can afford to**
20 **increase its offer" doesn't mean it should increase**
21 **its offer. And even addressing that at a board level**
22 **before an interloper has come forward is, at least in**
23 **my view, nonsensical.**
24 Q. Do you remember any discussion

CHANCERY COURT REPORTERS

S. Vanaselja - Direct

Page 461

1 243. At the top, the first bullet there in the
2 executive summary says, "Risk of interloper will exist
3 until Columbia shareholder vote."
4 In your recollection, was
5 TransCanada's board particularly concerned about the
6 risk of an interloper derailing this acquisition?
7 **A. I only have vague recollections of**
8 **interlopers being discussed. The view held by**
9 **management was that this would be a very hard**
10 **transaction for others in the industry to be able to**
11 **finance, as it was for us. And we had one of the**
12 **strongest balance sheets, if not the strongest balance**
13 **sheet, in the industry.**
14 **So we didn't spend considerable time**
15 **talking about the potential for interlopers. We**
16 **appreciated that the risk was there. And, you know,**
17 **nothing for us to really do about it until if and when**
18 **an interloper were to arise.**
19 Q. If you stay with the executive
20 summary, if you go down to the bullet that says,
21 "Recommendation: TransCanada can afford to increase
22 its offer." And that section very briefly outlines
23 the differential between Columbia's actual offer of
24 25.50 that was expected and a potential offer of \$28

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 463

1 whatsoever at the board about whether or not
2 TransCanada would match an interloper offer above
3 25.50?
4 **A. No.**
5 ATTORNEY OLSEN: I have no further
6 questions at this time, Your Honor.
7 ATTORNEY ORRICO: Good afternoon, Your
8 Honor. C.J. Orrico on behalf of plaintiffs. With the
9 Court's permission, I would like to handle the
10 cross-examination of Mr. Vanaselja.
11 We have some binders that my colleague
12 will hand up to the Court and my friends on the other
13 side.
14 CROSS-EXAMINATION
15 BY ATTORNEY ORRICO:
16 Q. **Good afternoon, Mr. Vanaselja. We**
17 **haven't met.**
18 **A. Good afternoon, sir.**
19 Q. But I am a colleague of Mr. Varallo's,
20 who took your deposition in this matter. And I
21 watched the deposition, and I've read it. So it's
22 nice to meet you this afternoon, sir.
23 **A. Good to meet you.**
24 Q. Okay. And so just to orient you, sir,

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 464

1 we're handing you a witness binder. Okay? And the
2 first tab in your binder will be your deposition. The
3 second tab is a pretrial order that the parties have
4 stipulated to some facts in. Okay? And the remainder
5 of the binder are some documents that we may look at.
6 My friend Joe Wills will also put them up on the
7 screen for you so you know what I'm talking about.
8 Sound okay?

9 A. Thank you.

10 Q. Great. So I just want to establish
11 some basic facts that I think we can agree on.
12 So before joining the TransCanada
13 board, you did not have any professional background in
14 the oil, gas, or energy business. Correct?

15 A. Correct.

16 Q. And I think we can agree on this, that
17 as a director of TransCanada, you were in favor of and
18 supported TransCanada's purchase of Columbia Pipeline
19 in 2016. Correct?

20 A. Correct.

21 Q. And you viewed the acquisition of
22 Columbia as a good strategic fit for TransCanada.
23 Right?

24 A. Yes.

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 466

1 negotiations and inform you about them. Correct, sir?

2 A. Correct, together with the various
3 advisors supporting management.

4 Q. Okay. Now, I'm orienting you in time.
5 We're going to go to the fall of 2015. Okay?

6 A. Okay.

7 Q. Okay. And it's fair to say that
8 TransCanada and Columbia entered into a nondisclosure
9 agreement on or around November 9th, 2015. Correct?

10 A. I've come to learn that there was a --
11 a nondisclosure agreement that was entered into. I
12 don't know the precise date at which it was entered
13 into.

14 Q. Okay. I'll represent to you it was on
15 November 9th, 2015.

16 A. Okay.

17 Q. And it's fair to say that after
18 signing that NDA on November 24th, 2015, Mr. Girling
19 informed Mr. Skaggs of Columbia that TransCanada's
20 management team was supportive of pursuing an all-cash
21 acquisition of Columbia at a price in the range of 25
22 to \$26 per share.

23 Do you have any basis to disagree with
24 that?

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 465

1 Q. Okay. And before the merger,
2 TransCanada did not have a meaningful presence in the
3 Marcellus or Utica basins. Right?

4 A. Correct.

5 Q. And one reason you supported the
6 merger, sir, was because Columbia's projects were in
7 the Marcellus and Utica basins, which were the
8 lowest-cost basins in North America. Correct?

9 A. That's my understanding, yes.

10 Q. And you also supported the merger
11 because the acquisition of Columbia allowed
12 TransCanada to diversify its asset base away from the
13 Western Canadian Sedimentary Basin. Right?

14 A. Correct.

15 Q. Okay. And I want to now talk about
16 the sales process. I will orient you in time
17 throughout the cross-examination.

18 But before we do that, you didn't
19 personally negotiate the merger with the Columbia
20 counterparty. Right?

21 A. No, that would not be a role for a
22 director to play.

23 Q. Right. You relied on the senior
24 management team at TransCanada to handle those

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 467

1 A. Sorry, could you tell me what the date
2 of that was?

3 Q. Sure. November 24th, 2015.

4 A. I'm not familiar with that.

5 Q. Sure. So I'm going to pull up the
6 PTO. It's Tab 2 in your binder.

7 ATTORNEY ORRICO: Joe, can we pull up
8 paragraph 243.

9 Q. And this is a stipulated fact between
10 the parties, sir. And it states, "On November 24,
11 2015 --"

12 A. Sorry. Would you mind if I -- would
13 you mind if I look at the hard copy? It's just easier
14 with my glasses.

15 Q. Be my guest. It's paragraph 243.

16 A. 243.

17 Q. Do you have it in front of you?

18 A. I do.

19 Q. It states, "On November 24, 2015,
20 Girling informed Skaggs that TransCanada's management
21 was supportive of pursuing an all-cash acquisition of
22 Columbia at a price in the range of \$25 to \$26 per
23 share."

24 Do you see that?

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 468

1 **A.** **I do.**
2 Q. Any basis to dispute that fact?
3 **A.** **I'm not familiar with what this**
4 **document is or what a pretrial stipulation order is.**
5 **So is that something you can orient me on?**
6 Q. It's an agreement between plaintiffs
7 and TransCanada of the facts of this case, sir.
8 **A.** **Okay.**
9 Q. Do you have any basis to dispute that
10 fact?
11 **A.** **Not if both parties have agreed that**
12 **that's a fact.**
13 Q. Okay. And you have no basis to
14 dispute that the agreement -- that Mr. Girling
15 informed Mr. Skaggs "that although TransCanada's board
16 of directors had been informed of and was supportive
17 of the non-binding indication of interest, a binding
18 offer would be subject to its further approval."
19 Do you see that?
20 **A.** **I do see that.**
21 Q. Okay. My question is very simple. Do
22 you have any basis to dispute that the board, as of
23 November 2015, was supportive of TransCanada
24 management pursuing an all-cash acquisition in the

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 470

1 secretary, to take accurate minutes of the TransCanada
2 board meetings. Correct?
3 **A.** **I would just modify that. It's**
4 **correct. But it would be the practice of the chairs**
5 **of the boards, as well as the board members, to review**
6 **those minutes and make appropriate adjustments.**
7 Q. Thank you.
8 **A.** **Before they were finalized.**
9 Q. I appreciate that answer.
10 So I actually want to look at some
11 board minutes. We're going to orient us in time with
12 the Court. We're moving to the December 2015 time
13 period. And it's JTX 05 -- or 450. And these are the
14 December 2nd and December 3rd, 2015, board meeting --
15 minutes of the board meeting, which you'll see that
16 you were in person, and you'll see that Ms. Johnston
17 acted as the secretary of the meeting.
18 Do you have it in front of you, sir?
19 **A.** **I do.**
20 Q. Okay. And I would actually like to
21 turn to page 12 of the document. And we're going
22 under the heading "M&A and Capital Market Trends."
23 It's 14.
24 Do you have that, sir?

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 469

1 range of \$25 or \$26 per share?
2 **A.** **As I've indicated, I just have no**
3 **knowledge of that discussion being reported to the**
4 **board.**
5 Q. Okay. But you don't dispute that
6 TransCanada has agreed to that fact in this
7 litigation. Right, sir?
8 **A.** **If you're telling me that this is a**
9 **document that both TransCanada and you, as plaintiff,**
10 **have agreed to as to facts, and that this is one of**
11 **the facts, I have no reason to dispute it.**
12 Q. Okay. And we can agree that the
13 number 26 is in the range of 25 to 26. Correct?
14 **A.** **It's included in that range, yes.**
15 Q. Changing gears a bit, Christine
16 Johnston, she's TransCanada's vice president of law
17 and corporate secretary. Correct, sir?
18 **A.** **Correct.**
19 Q. Okay. And Ms. Johnston took and
20 prepared minutes of the meetings of TransCanada's
21 board of directors. Correct?
22 **A.** **Yes.**
23 Q. Okay. And it's fair to say that you
24 would rely on Ms. Johnston, as TransCanada's corporate

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 471

1 **A.** **I do.**
2 Q. Okay. And we're going about three
3 lines into the board minutes, at that section. It
4 says, "Management provided an overview of its
5 discussions with the target[] (Capricorn) executives.
6 Ultimately, management learned that Capricorn's board
7 determined it would instead issue equity rather than
8 pursue a transaction with a third party at this time.
9 Management relayed its view that [the] board may wish
10 to re-engage with TransCanada in 2016 and it was noted
11 that TransCanada had signed a non-disclosure and
12 standstill agreement to allow it to initially engage
13 with Capricorn, under which the standstill survives 12
14 months."
15 Did I read that correctly, sir?
16 **A.** **Yes, you did.**
17 Q. And you don't dispute the accuracy of
18 these board minutes. Correct, sir?
19 **A.** **Nope.**
20 Q. And so it's fair to say that during
21 the December 2nd and 3rd, 2015, TransCanada board
22 meeting, TransCanada management informed the board
23 that TransCanada had signed a nondisclosure and
24 standstill agreement to allow TransCanada to initially

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 472

1 engage with Columbia, under which the standstill
2 survives 12 months. Correct?
3 **A. Correct.**
4 Q. Okay. And it's true that other than
5 what is stated in these board minutes, you do not have
6 a specific recollection of being briefed on the terms
7 of the standstill provision and the nondisclosure
8 agreement between Columbia and TransCanada?
9 **A. Correct. I do not recall this.**
10 Q. So, again, I'm a timeline person. The
11 Court knows that. So do my friends, your counsel.
12 I'm moving to the March 2016 time period, which you
13 discussed on your direct.
14 And we can go through the board
15 minutes again. But it's fair to say that on
16 March 9th, 2016, the TransCanada board authorized
17 management to make a counteroffer to Capricorn at \$26
18 per share, but which would include TransCanada common
19 shares as a portion, 10 percent of the consideration.
20 Right?
21 **A. Yes.**
22 Q. And I want to talk a little bit about
23 those deliberations from the March 9th, 2016, board
24 meeting. So if you could turn to JTX 0913, which is a

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 474

1 Question: Did you see anything in it
2 that you thought was not correct?
3 Answer: If you don't mind, I'll take
4 a minute to read it again, and then I can answer your
5 question.
6 I don't see -- I don't see anything
7 that I think is incorrect in this document.
8 (End of video clip.)
9 Q. Were you asked that question and
10 provided the opportunity to review the document and
11 provided that answer at your deposition, sir?
12 **A. Sorry. Could you repeat the question?**
13 Q. Were you asked that question, and did
14 you provide that answer at your deposition, sir?
15 **A. Apparently I did, yes.**
16 Q. Okay. So I want to look at the notes
17 of Ms. Johnston, which you reviewed at your
18 deposition, which is JTX 0913. And I want to move to
19 page 3 of Ms. Johnston's notes. And you'll see about
20 midway through the page, there's a note that says,
21 "Directionally - don't walk from this deal - try to
22 get financing organized."
23 Do you see that?
24 **A. I do.**

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 473

1 document I believe you saw on your direct but you
2 definitely saw at your deposition. And these are the
3 March 9th, 2016, notes of the board meeting taken by
4 Chris Johnston.
5 Do you have it in front of you?
6 **A. I do, sir.**
7 Q. Okay. And Mr. Varallo went over this
8 in depth with you during your deposition. My question
9 is very simple to you, sir. It's fair to say that you
10 do not see anything in Ms. Johnston's notes from the
11 March 9, 2016, board meeting that you think is
12 incorrect. Correct?
13 **A. I -- without reading these notes, I**
14 **can't comment on that.**
15 Q. I'm happy to --
16 **A. It was not my practice or the practice**
17 **of any directors to read Chris Johnston's notes. We**
18 **would have read draft minutes and ultimately approved**
19 **minutes.**
20 Q. Okay. Well, I will refresh your
21 recollection with your deposition. It's page 62,
22 lines 10 through 16. It's clip SV 10, which shows you
23 reviewed the notes.
24 (A video clip was played as follows:)

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 475

1 Q. And you have no basis to dispute the
2 accuracy of that note. Right?
3 **A. I think it's consistent with my**
4 **earlier testimony that we wanted to see a successful**
5 **transaction concluded, and we believed the other side**
6 **did as well.**
7 Q. Right. I think you'll agree with what
8 my next question is. There was consensus on the
9 TransCanada board at the March 9th, 2016, meeting that
10 TransCanada should continue to try to make the
11 acquisition work with Columbia. Right?
12 **A. Yes.**
13 Q. Now, I want to draw your attention a
14 little further down in these notes. It says, "EA
15 expired yesterday."
16 And it's true that the exclusivity
17 agreement with Columbia had expired on March 8th,
18 2016. Correct?
19 **A. I don't know that as a fact.**
20 ATTORNEY ORRICO: Just blow up the PTO
21 real quick, Joe. It's paragraph 368.
22 Q. It's on your screen, Mr. Vanaselja.
23 It says, "On March 8, 2016, the
24 exclusivity period under the Exclusivity Agreement, as

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 476

1 extended on March 2, 2016, expired."
2 Do you see that, sir?
3 **A. I see that.**
4 Q. Do you have any basis to dispute that
5 the exclusivity agreement had expired by the
6 March 9th, 2016, TransCanada board meeting?
7 **A. I have no reason not to believe this**
8 **statement, if it's a statement of fact.**
9 Q. So it's fair to say that TransCanada
10 was no longer in exclusivity with Columbia when the
11 TransCanada board authorized management on March 9,
12 2016, to make an offer to Columbia at \$26 per share of
13 mixed stock and cash consideration. Right?
14 **A. It appears that way.**
15 Q. Okay. And, again, staying in the
16 notes on JTX 0913, after it says "EA expired
17 yesterday," there's notes stating "Interloper risk is
18 low. Could change in a few months."
19 "Spoke to potential media leak.
20 Impact on each parties share price."
21 Do you see that?
22 **A. I do.**
23 Q. Okay. And it's fair to say that the
24 board learned during the March 9th board meeting that

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 478

1 (A video clip was played as follows:)
2 Question: Next sentence reads:
3 "Impact on each party's share price." Obviously, if
4 there's a leak about negotiations, one could -- one
5 would expect an impact on share price.
6 Do you recall a discussion around what
7 impact on share price of the parties to the deal might
8 be as a result of a leak?
9 Answer: No, other than potentially,
10 you know, the reality that a leak of this nature would
11 cause Columbia's share price to go up in the
12 marketplace and, you know, could potentially have a
13 negative impact on TC Energy's share price.
14 (End of video clip.)
15 Q. Were you asked that question and
16 provided that answer at your deposition, sir?
17 **A. I did. I was and I did, yes.**
18 Q. So I want to stay on the notes at 913.
19 At the bottom, there is a note, "BJ." And Barry
20 Jackson, he was the chair of TransCanada at the time.
21 Am I right, sir?
22 **A. Correct.**
23 Q. It says, "BJ - if management
24 recommendation is not to do this deal at [26 then

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 477

1 there may be a media leak of deal discussions between
2 TransCanada and Columbia. Right?
3 **A. Yes.**
4 Q. Okay. And it's fair to say that the
5 TransCanada board became informed of the potential
6 media leak of the deal before it authorized management
7 to make that \$26 per share mixed consideration offer
8 on March 9, 2016. Correct?
9 **A. When was the \$26 offer made?**
10 Q. On March 9, 2016.
11 **A. Okay.**
12 Q. So it's fair to say that the board
13 became aware of a potential leak when it authorized
14 management to make that offer?
15 **A. I believe so.**
16 Q. Okay. And it's fair to say that the
17 media leak would likely cost Columbia's share price to
18 go up and have a negative impact on TransCanada's
19 share price. Correct?
20 **A. I don't necessarily agree with that,**
21 **no.**
22 Q. Okay. So we're going to look at your
23 deposition. It's page 101 to 102.
24 ATTORNEY ORRICO: Joe, it's clip 27.

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 479

1 the board will hear that recommendation."
2 Do you see that?
3 **A. Yes.**
4 Q. And it's true. TransCanada management
5 did not voice opposition at the March 9th, 2016,
6 meeting to making the offer for \$26 per share of mixed
7 consideration. Correct?
8 **A. Yes.**
9 Q. And you also -- it's also true that
10 you do not recall anyone at TransCanada conditioning
11 the bid for \$26 per share of mixed consideration
12 expressly on the renewal of exclusivity with Columbia.
13 Right?
14 **A. I don't recall a discussion around**
15 **exclusivity at all.**
16 Q. Okay. Again timeline, okay?
17 So I'll represent to you that after
18 this March 9, 2016, board meeting, the message was
19 delivered to Columbia that TransCanada would offer to
20 pursue a deal at \$26 per share. And then the next
21 morning, on March 10th, 2016, the Wall Street Journal
22 published an article leaking the deal.
23 And so I'd like to turn to an email
24 chain. It's JTX 0952.

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 480

1 And Wells Fargo was the financial
2 advisor for TransCanada in this transaction. Correct,
3 sir?

4 A. Correct.

5 Q. Okay. And I know you're not on this
6 email. But if you look in the middle, there's an
7 email from Eric Fornell, who the Court has heard some
8 testimony from. And he was the lead banker for
9 TransCanada. I'll represent to you that he sent this
10 email after the leak. And he states, "That was an
11 accurate statement.

12 "They think they now have an
13 opportunity to hear what their investors think about
14 this. The Capricorn board is freaking out and told
15 the management team to get a deal done with 'whatever
16 it takes' .. Oddly, the Capricorn team has relayed
17 this info to Taurus."

18 Do you see that?

19 A. I do.

20 Q. And then above, his colleague,
21 Mr. Kipp, responds, "Turmoil provides opportunity.
22 Taurus would appear to be well positioned."

23 And Mr. Fornell responds, "Yes."

24 And I have a very simple question.

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 482

1 But I think, you know, there are many
2 transactions conducted in the public marketplace where
3 the shares of both the acquirer and the acquired
4 company are -- go up on announcement. I'm involved
5 with Power Corporation, for example, I testified
6 earlier. Power Corporation acquired Power Financial.
7 And on announcement, there was a significant increase
8 in both shares.

9 We -- when we were conducting this
10 transaction, the reason we put in that -- I've
11 explained the reason we put in the condition of \$49.
12 But we were hoping that there would -- you know, that
13 there would be a minimal, if any, impact on the shares
14 of TransCanada.

15 THE COURT: Let me give you some
16 guidance.

17 When you are on direct, your counsel
18 is supposed to ask open-ended questions, and you're
19 supposed to give that type of explanatory answer. You
20 are allowed to go on and give that type of full
21 discussion.

22 On cross, counsel's entitled to ask
23 targeted questions and get direct answers. So none of
24 that was responsive to his question. He asked a very

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 481

1 You do not dispute that TransCanada's financial
2 advisor, including the lead banker, Mr. Fornell,
3 exchanged these emails on March 10th, 2016, after the
4 media leak of the deal discussions. Right?

5 A. That's what I interpret here, yes.

6 Q. Okay. And it's true, Mr. Vanaselja,
7 that TransCanada's senior management team also viewed
8 the Wall Street Journal leak and Columbia's reaction
9 to it as an opportunity for TransCanada to benefit.
10 Right?

11 A. I think, as I testified earlier, the
12 leak was informative to both parties in the
13 transaction. And, also, I provided my view earlier
14 that I believed, you know, that after significant time
15 invested in trying to conclude a transaction, you
16 know, over many months, we believe that there was an
17 interest on both parties' sides to continue to
18 navigate a path to try to get this transaction
19 concluded.

20 When the Wall Street Journal happened,
21 TransCanada's share price went down. I testified in
22 what you showed me earlier, I think I said I don't
23 know what that means. And then I speculated that
24 TransCanada's share price could have gone down.

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 483

1 targeted question, which was simply: Did TransCanada
2 management view the leak as an opportunity to
3 renegotiate, or as an advantage? I don't remember
4 exactly what he said. It's a yes-or-no question.

5 So try to focus in on his questions
6 and answer his questions. Cross is not the time to
7 give speeches. If you want to give speeches, your
8 lawyer can ask you an open-ended question on direct,
9 and you can give that type of discussion.

10 Let's repeat the question.

11 THE WITNESS: Thank you, Your Honor.
12 I apologize.

13 THE COURT: No worries.

14 THE WITNESS: It's my first time in
15 court.

16 THE COURT: No, no. I get it. And I
17 will tell you, I've never been in Canadian court. So
18 I don't know if they do cross in Canadian court the
19 same way. I have no idea. I will also tell you that
20 this happens almost every trial. So there's nothing
21 about your experience or your response that singles
22 you out in any way.

23 So, anyway, let's rewind.

24 ATTORNEY ORRICO: Let's restart.

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 484

1 Thank you, Your Honor. And, Mr. Vanaselja, no offense
2 here either. Yeah, let's just start over.

3 THE WITNESS: I will respect the
4 judge's advice. Thank you.

5 BY ATTORNEY ORRICO:

6 Q. The question was very simple. It's
7 true that TransCanada's senior management team also
8 viewed the Wall Street Journal leak and Columbia's
9 reaction to it as an opportunity for TransCanada to
10 benefit?

11 A. And where am I supposed to conclude
12 that?

13 Q. I'm asking you based off your
14 knowledge, yes or no?

15 A. Insofar as it would be informative as
16 to the market reaction, yes.

17 Q. Basic questions right now. It's true
18 that Alex Pourbaix was the TransCanada chief operating
19 officer at the time in 2016. Right?

20 A. Yes.

21 Q. And Karl Johansson was the president
22 of TransCanada's natural gas pipelines at the time?

23 A. Yes.

24 Q. They are members of the senior

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 486

1 Mr. Pourbaix responds on March 9th,
2 "We may have killed Russ. I'm not sure he will make
3 it through this. I completely left him off the hook
4 and he turned and bid that. Truly bizarre."

5 Did I read those correctly, those
6 texts?

7 A. Yes.

8 Q. Okay. And you do not dispute that on
9 March 9th, 2016, Mr. Johansson, who was the president
10 of the natural gas pipelines business, texted
11 Mr. Pourbaix, "Wow. We went from killing it to a done
12 deal that fast."

13 Right?

14 A. Yes.

15 Q. And it's true that on March 9, 2016,
16 TransCanada made the \$26 per share mixed consideration
17 offer. Right?

18 A. Sorry. On which date?

19 Q. March 9th.

20 A. Yes.

21 Q. Okay. And let me ask you this,
22 Mr. Vanaselja. It's true that after TransCanada made
23 that offer on March the 9th, Columbia didn't come back
24 and say, no deal, we're not happy with 26. Right?

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 485

1 management team at TransCanada?

2 A. Yes.

3 Q. Okay. I want to show you 1779. I'm
4 sorry, it's -- yes, 1779. Okay, sir. These are a
5 series of text messages that were sent between
6 Mr. Pourbaix and Mr. Johansson on March 9th and 10th,
7 2016.

8 Have you seen these before today?

9 A. I have not.

10 Q. Okay. So I just want to take a look
11 at them. And we're going to start from the top to the
12 bottom, okay?

13 So the first text is from Mr. Pourbaix
14 to Mr. Johansson on March 9: It says, "Russ is going
15 to kill this."

16 Continues, "Did you hear. Francois
17 spoke to the CFO and they are thinking about the 10%
18 equity. They might just do it."

19 Mr. Johansson responds, "Yeah ... I
20 just talked to Francois and he is confident they will
21 do it. They have called a board meeting for tomorrow
22 morning. Wow. We went from killing it to a done deal
23 that fast. We will not let you down. We will make it
24 work and get the synergies."

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 487

1 A. No.

2 Q. And it's true, I think we talked, or
3 your counsel talked about it on direct, that when
4 TransCanada offered 25.25 per share earlier in March,
5 Columbia said, no deal, we're walking away. Right?

6 A. I thought after we offered 25.25, they
7 came back and said their board may be receptive to
8 \$26.

9 Q. Okay. They came back with feedback
10 saying we're not accepting 25.25. Right?

11 A. Yes.

12 Q. You didn't get that feedback after
13 TransCanada offered 26. Right?

14 A. The feedback that they don't like
15 25.25?

16 Q. No. The feedback -- sir, listen
17 carefully to my question. Did Columbia come back
18 after TransCanada offered 26 and say, we're not happy
19 with 26?

20 A. No.

21 Q. Okay. Now, let's see what else
22 Mr. Pourbaix and Mr. Johansson from TransCanada have
23 to say.

24 I'm going down to the fifth text

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 488

1 messages. These are from, now, March 10th.
2 Mr. Johansson writes, "Are you in today? How is Russ
3 doing with the offer."
4 Pourbaix responds, "Just landed in
5 Toronto. We had a deal as offered. But now it is
6 all ..." -- I won't read that -- "with the leak that
7 we are in discussions. What a cluster [problem]."
8 Do you see that?
9 **A. Mm-hmm.**
10 Q. Mr. Johansson responds, "It is. What
11 a disappointment."
12 Pourbaix then states, "Russ just got
13 off the phone with the CEO. They really want to do
14 the deal still which makes sense. This is more their
15 problem than our problems."
16 Continuing, "He actually had come full
17 circle to wanting to do it. We need to see where this
18 shakes out. On the good side it may be an opp to go
19 back to Capricorn with a lower price."
20 Mr. Johansson responds, "I agree.
21 Maybe we will benefit through this. It is nice to see
22 Russ was on board. I was getting worried."
23 Did I read those text messages
24 correctly?

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 490

1 Q. And that was from March the 11th.
2 Correct?
3 **A. I don't recall.**
4 Q. I will show you.
5 **A. I will take your word for it.**
6 Q. I actually want to show you. It's a
7 demonstrative we made, so it's a little more readable.
8 It X-6, Joe.
9 It's going to be on your screen, too,
10 sir. And you will see, Mr. Vanaselja, on March 11th,
11 you text Russ Girling, the CEO of TransCanada, "I
12 think the leak may be the best development for us!"
13 Do you see that?
14 **A. I do.**
15 Q. Okay. And you wrote that text.
16 Right?
17 **A. I testified that I don't recall**
18 **writing it, but this is a clear indication that I did.**
19 Q. Okay. And it's fair to say that by
20 March 11th, when you wrote this text, the market had
21 moved in response to the leak. Right?
22 **A. Correct.**
23 Q. Okay. And you wrote this text after
24 the March 10th Wells Fargo email I showed you earlier.

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 489

1 **A. Yes.**
2 Q. And, again, you don't dispute that
3 Mr. Johansson and Mr. Pourbaix exchanged these text
4 messages on March 10th, 2016. Correct?
5 **A. That's what you've indicated to me.**
6 Q. Right. And you do not dispute that
7 Mr. Pourbaix texted Mr. Johansson, "We need to see
8 where this shakes out. On the good side it may be an
9 opp[ortunity] to go back to [Columbia] with a lower
10 price"?
11 Do you dispute that?
12 **A. I do not.**
13 Q. Okay. And you don't dispute that
14 Mr. Johansson responded to Mr. Pourbaix, "I agree,"
15 and that "It [was] nice to see [that] Russ was on
16 board"? Any basis to dispute that?
17 **A. No.**
18 Q. And these text messages were sent the
19 same day as the Wells Fargo email I showed you a few
20 exhibits ago, correct, March 10th?
21 **A. If that was dated March 10th, yes.**
22 Q. Yes. And -- well, you were shown a
23 text message that you sent on your direct. Correct?
24 **A. Correct.**

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 491

1 Right?
2 **A. Yes.**
3 Q. And you wrote this text after the
4 March 9th and March 10th text chains --
5 **A. Yes.**
6 Q. -- between your senior management
7 team, Mr. Pourbaix and Mr. Johansson, on March 9th and
8 10th. Correct?
9 **A. March 11th is after March 9th and**
10 **10th.**
11 Q. Okay. And you stated this on your
12 direct. You have no recollection of why you wrote
13 this text message or why -- what you were intending to
14 convey in it. Correct?
15 **A. Yes.**
16 Q. Okay. So it's true, you don't know
17 one way or the other whether you wrote this text to
18 the CEO of TransCanada, because the leak and
19 Columbia's reaction to the leak provided an
20 opportunity for TransCanada to renegotiate or lower
21 its bid. Right?
22 **A. I have -- I think I gave my view on**
23 **why I might have written this text. That was not one**
24 **of them.**

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 492

1 Q. You have no specific recollection one
2 way or the other. Right?
3 A. Well, I know how I think. And I'm --
4 if -- if I had of thought -- I wrote this text because
5 it somehow created on opportunity for us to have some
6 leverage to reduce the price at which the transaction
7 is being conducted, I think I would have remembered
8 that. That would be a significant event.
9 Q. Okay. Well, the timing of the
10 different communications are what they are. But
11 there's a fact that you will agree with me on; that
12 after the leak, TransCanada lowered its offer to
13 25.50, all cash. Right?
14 A. Yes.
15 Q. Okay. And that was messaged to
16 Columbia on March 14th, 2016. Correct?
17 A. I believe thereabouts, yes.
18 Q. Okay. And I want to just reorient us
19 in time. Well, we'll just go to March 14th. Okay?
20 And it's true that Mr. Pourbaix -- you just looked at
21 his text messages -- and Mr. Poirier communicated to
22 Columbia on March 14th, 2016, that if Columbia didn't
23 accept the offer of 25.50 per share, TransCanada
24 planned to issue a press release indicating its

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 494

1 A. I would ask -- I think Mr. Poirier
2 should be the one that confirms that, but -- if this
3 is a document prepared by Columbia. But I have no
4 reason to dispute it.
5 Q. And it's true that you don't recall,
6 as a member of the board, receiving any legal advice
7 on or before March 14th, 2016, of whether it would be
8 appropriate or not to disclose the termination of
9 negotiations if Columbia did not accept the 25.50 in a
10 few days. Right?
11 A. As I've said, there's sort of
12 transaction considerations for management, and then
13 there's considerations for the board.
14 Q. Right. So you don't --
15 A. To my recollection, this is not a
16 level of detail that the board would have gotten
17 involved with.
18 Q. Now, I want to turn to the March 14th
19 board minutes. It is JTX 1092. And you were there by
20 phone. These are the signed minutes.
21 Do you see that?
22 A. Yes.
23 Q. Okay. And you have no basis to
24 dispute the accuracy of these minutes. Right?

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 493

1 acquisition discussions had been terminated. Right?
2 A. My screen is blank right now, so I
3 don't know where you're referencing that from.
4 Q. I'm just asking if you remember that.
5 A. I don't recall that.
6 Q. Okay. I will refresh your
7 recollection. Let's go to JTX 1774. And, sir, just
8 so you know what this is, it's an excerpt from the
9 proxy statement. There's the cover. And we took a
10 page out so it wasn't a huge thing. But in the middle
11 of the page, there's an entry that says, on the
12 afternoon of March 14, 2016, Mr. Pourbaix joined a
13 call with Mr. Poirier and Mr. Kettering. And we're
14 going down a few sentences, and it says that "if CPG
15 were not to accept the offer, TransCanada planned to
16 issue a press release within the next few days
17 indicating its acquisition discussions had been
18 terminated."
19 Do you see that?
20 A. I do see that, yes.
21 Q. And you have no basis to dispute that
22 that message was delivered by Mr. Pourbaix and
23 Mr. Poirier to Mr. Kettering of Columbia on
24 March 14th, 2016. Right?

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 495

1 A. Correct.
2 Q. Okay. I want to go to the very
3 bottom. It says, "With the support and approval of
4 the Board, the Chief Executive Officer indicated that
5 he would engage in discussions with Capricorn's
6 management regarding an all-cash offer at US\$25.50 per
7 common share."
8 Do you see that, sir?
9 A. Yes.
10 Q. Now, I studied these minutes. And I
11 want to ask you a simple question. Do the minutes
12 state that the authorization for management to engage
13 in discussions regarding an all-cash 25.50 per share
14 was a best and final offer?
15 A. No, but -- I mean, the reality is that
16 after, you know, a significant period of back and
17 forth, that's how we -- that's how the board viewed
18 it, and that's how management viewed it.
19 Q. But the words "best and final" don't
20 appear in these minutes. Right, sir?
21 A. I'm sure there's a lot that took place
22 and transpired at this board that are not in these
23 minutes.
24 Q. But the 25.25, that was authorized as

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 496

1 a best and final price, was it not?
2 **A. I don't recall.**
3 Q. Let's turn to 1775. I believe your
4 counsel looked at this.
5 ATTORNEY OLSEN: Your Honor, just one
6 quick objection to 1775. It's a 34-page excerpt of
7 Joint Exhibit 1244. So I would object to the excerpt
8 being added to evidence. I don't have a problem with
9 counsel short-circuiting this in his cross-examination
10 if he wants to refer to certain pages in that longer
11 exhibit, as long as the witness can have the longer
12 exhibit in case he needs it.
13 ATTORNEY ORRICO: I will use yours,
14 Michael. Not a problem.
15 Joe, let's pull up 1244.
16 BY ATTORNEY ORRICO:
17 Q. This is what you looked at,
18 Mr. Vanaselja.
19 **A. This is JTX 1244?**
20 Q. It's not going to be in that binder,
21 sir, because I'm using TransCanada's. But it will be
22 presented to you on the video. Okay?
23 **A. Thank you.**
24 Q. All right. And so these are the board

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 498

1 your deposition.
2 ATTORNEY ORRICO: It's page 194 to
3 195. Clip 34, Joe.
4 (A video clip was played as follows:)
5 Question: I have no doubt, sir, and I
6 would expect a respected company like yours to do a
7 lot of analysis before you made a decision like that.
8 And I don't mean to minimize for a second, by focusing
9 only on one line, the depth of the research and
10 analysis that you want to do. But I do want to leave
11 this page with the understanding that management was
12 recommending to the board as of this point in time
13 that TransCanada could afford to increase its offer.
14 That's fair, isn't it?
15 Answer: I -- I believe in this
16 interloper analysis, the recommendation is that
17 TransCanada could afford to increase its offer. I
18 don't believe it was making a recommendation that if
19 an interloper offer came forward, that we would just
20 move forward and match it.
21 (End of video clip.)
22 BY ATTORNEY ORRICO:
23 Q. Were you asked that question and
24 provided that answer at your deposition, sir?

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 497

1 materials that were provided to TransCanada in
2 April 2016. And I want to draw your attention to page
3 242, where there's the interloper strategy. And you
4 discussed this on your direct. Remember?
5 **A. I do.**
6 Q. Okay. And we're going to go to the
7 next page, where there's an executive summary. And
8 the fourth bullet point down says, "Recommendation:
9 TransCanada can afford to increase its offer." Then
10 there's some more bullet points. "Positive market
11 reaction to [the] acquisition. No market concerns
12 over valuation at 25.50. Combination analysis
13 supports a higher offer price."
14 Did I read that correctly?
15 **A. You did.**
16 Q. Okay. And it's true that management
17 was recommending in this interloper strategy
18 presentation that it provided to the board in
19 April 2016 that TransCanada could afford to increase
20 its offer. Right?
21 **A. You said management recommended. I've**
22 **commented before that this is ill-drafted, and I don't**
23 **know how to interpret those words.**
24 Q. Okay. Well, we're going to look at

CHANCERY COURT REPORTERS

S. Vanaselja - Cross

Page 499

1 **A. Yes.**
2 Q. Okay. Last question. You have no
3 recollection of anyone objecting in the April 2016
4 board meeting by this recommendation -- to this
5 recommendation by management that TransCanada could
6 afford to increase its offer. Right?
7 **A. I've testified previously that this**
8 **was not an actionable item at the board. It was for**
9 **information purposes. And I don't recall the board**
10 **dialogue with regard to the document.**
11 Q. Do you think your management team just
12 makes up stuff when they send it to you, as a board
13 member?
14 **A. No, of course not.**
15 Q. Okay. And I also just want to play
16 your deposition.
17 ATTORNEY ORRICO: Let's look at page
18 195. And play 35, please.
19 (A video clip was played as follows:)
20 Question: Okay. That's fair.
21 At the board meeting at which these
22 materials were presented, did anyone voice an
23 objection to the recommendation that TransCanada could
24 afford to increase its offer?

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 500

1 Answer: I don't recall specifically
2 this discussion at a board meeting.
3 (End of video clip.)
4 ATTORNEY ORRICO: No further
5 questions, Your Honor. Thank you.
6 ATTORNEY OLSEN: Nothing from me, Your
7 Honor.
8 THE COURT: Thank you for being here.
9 I really appreciate your time.
10 THE WITNESS: Thank you, sir.
11 (Witness excused.)
12 ATTORNEY OLSEN: Your Honor, we're
13 going to call Christine Johnston to the stand next, if
14 you could give me 30 seconds to say good-bye to the
15 witness.
16 CHRISTINE RAE JOHNSTON, having first
17 been duly affirmed, was examined and testified as
18 follows.
19 ATTORNEY OLSEN: Your Honor, may I
20 approach?
21 DIRECT EXAMINATION
22 BY ATTORNEY OLSEN:
23 Q. Good afternoon, Ms. Johnston. Could
24 you tell me a little bit about your educational

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 502

1 resolutions that would come to the board before the
2 meetings. In addition to that, amongst other things,
3 I'm also responsible for the public disclosure
4 requirements, as we're a large public company.
5 Q. Do you have experience with M&A
6 transactions?
7 A. I do.
8 Q. Can you describe that experience for
9 me briefly, please.
10 A. During a good part of the course of my
11 career with TransCanada, I worked on a number of
12 acquisitions and dispositions, mostly private
13 companies. But did quite a few of those, and a
14 smaller number of public companies.
15 Q. Talking about the Columbia transaction
16 in particular, did you rely on outside counsel for
17 advice throughout the Columbia transaction?
18 A. I did.
19 Q. And who was that?
20 A. Primarily, I worked with the lawyers
21 at Mayer Brown, partners Marc Sperber and Andrew
22 Noreuil, and also relied on our Canadian counsel for
23 some matters, which is our -- usually our Canadian
24 corporate securities counsel, Blake Cassles.

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 501

1 background.
2 A. Yes. I graduated from law school
3 after doing a four-year undergrad degree. Graduated
4 from law school in 1994. Articled for a year with the
5 firm of Bennett Jones in Calgary, Canada.
6 Q. Can you tell me a little bit about
7 your work history.
8 A. While I was at Bennett Jones, I worked
9 in the corporate securities department. And after
10 approximately three years at Bennett Jones, was
11 recruited to join what was then TransCanada, now TC
12 Energy Corporation, as a lawyer in their corporate
13 secretarial department.
14 Q. How long have you been the corporate
15 secretary at TransCanada?
16 A. I've been corporate secretary for
17 approximately ten years.
18 Q. What do you do in your role as
19 corporate secretary?
20 A. I do a number of things. I facilitate
21 and provide the governance around our board and
22 committees of the board meetings. That means I work
23 on the board agendas, I review draft materials, I
24 attend the meetings, take minutes. I also draft any

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 503

1 Q. What were your responsibilities at
2 TransCanada in connection with the Columbia
3 acquisition?
4 A. I came in from the beginning. I
5 worked on the initial agreement, which was the
6 nondisclosure agreement. Helped conduct due
7 diligence. Worked on negotiations of agreements.
8 Provided advice to our management team. And basically
9 worked with the deal team to get us to a transaction.
10 Q. You referenced the NDA. In the fall
11 of 2015, did you negotiate an NDA with Columbia?
12 A. Yes, I did.
13 Q. Who did the first draft of the NDA?
14 A. The first draft came over from
15 Columbia's general counsel.
16 Q. Did you advise the members of the
17 TransCanada deal team with respect to their
18 obligations under the NDA?
19 A. I did.
20 Q. I'm showing you what's been marked as
21 Joint Exhibit 299, which includes an email dated
22 November 6th, 2015, from you to Bob Smith, which
23 provides your comments on the initial draft of the NDA
24 that Columbia sent to TransCanada.

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 504

1 Do you recognize this email?
2 **A. I do.**
3 Q. I want to ask you about some comments
4 on page 2 of the draft, under (b).
5 Are you with me?
6 **A. I am.**
7 Q. There is a change from you in that
8 section that reads, "either Party may disclose
9 Transaction Information to the extent [] required by,
10 and pursuant to, Section 1(d), or [] it has received
11 the written advice of its outside counsel that it is
12 required to make such disclosure in order to avoid
13 violating applicable securities laws or stock exchange
14 rules to which it is subject"
15 Do you see that?
16 **A. Yes.**
17 Q. You changed "federal securities laws"
18 to "applicable securities laws."
19 Why did you do that?
20 **A. In Canada, we don't have federal**
21 **securities laws, per se, but securities laws govern**
22 **provincially.**
23 Q. You also changed "rules of national
24 securities exchange" to "stock exchange rules."

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 506

1 **deal.**
2 **The standstill is there to protect the**
3 **target company from any hostile or unwelcome actions**
4 **by the bidder.**
5 Q. I'm showing you what's been marked as
6 Joint Exhibit 305, which is the final NDA that you
7 negotiated with Columbia. I want to turn your
8 attention to Section 3 of this agreement on pages 4
9 and 5, which is the standstill provision.
10 In your understanding, what did the
11 standstill in this NDA prohibit?
12 **A. Generally speaking, it would preclude**
13 **TransCanada from offering or acquiring -- offering to**
14 **acquire, to acquire any securities or material assets**
15 **of the target company, Columbia. Nor could we try to**
16 **seek representation on its board or influence the**
17 **board, either through a proxy solicitation or other.**
18 **We could also not try to make a public disclosure that**
19 **would force them into a public disclosure. Nor could**
20 **we ask to amend or waive the agreement.**
21 Q. When did the standstill go into
22 effect?
23 **A. November 9th, 2015.**
24 Q. Is that when you signed the agreement?

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 505

1 Why did you do that?
2 **A. The term "national securities**
3 **exchange" isn't one that's ordinarily used in Canadian**
4 **law. But "stock exchange rules" was something that**
5 **made more sense to me.**
6 Q. Did Columbia accept these changes that
7 you proposed?
8 **A. Yes.**
9 Q. Did you have experience with
10 standstill provisions prior to this transaction?
11 **A. I had some limited experience, yes.**
12 Q. Does the NDA between Columbia and
13 TransCanada contain a standstill provision?
14 **A. It does.**
15 Q. What's your understanding of the
16 purpose of a standstill provision?
17 **A. The purpose of a standstill provision**
18 **is that it is usually contained in the broader**
19 **document -- in this case, the nondisclosure**
20 **agreement -- and it allows the potential bidding**
21 **party -- in this case, TransCanada -- to receive the**
22 **valuation material from the target company -- in this**
23 **case, Columbia -- so that they can kind of work in a**
24 **mutual, cooperative fashion to advance a potential**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 507

1 **A. Yes.**
2 Q. Did the standstill, in your
3 understanding, prohibit TransCanada from having
4 discussions with Columbia's management?
5 **A. No.**
6 Q. Why not?
7 **A. I think the expectation is that these**
8 **types of standstills actually permit those kinds of**
9 **discussions to happen, to allow those discussions to**
10 **happen in a cooperative way, knowing that the bidding**
11 **company, TransCanada, can't take unwelcome action.**
12 Q. Was your understanding of this
13 standstill agreement informed by advice of outside
14 counsel?
15 **A. No, not -- during various stages**
16 **during the process, yes.**
17 Q. And you said no. You mean -- at the
18 beginning, did you negotiate it on your own?
19 **A. I negotiated it on my own.**
20 Q. Over the course of the negotiations,
21 was your view and understanding of the standstill
22 agreement informed by advice of outside counsel?
23 **A. Yes, informed and confirmed.**
24 Q. I want to turn to Joint Exhibit 397,

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 508

1 which is an email from Bob Smith to you, dated
2 November 25th, 2015, attaching a return-or-destroy
3 request letter.
4 Do you recognize this document?
5 **A. I do.**
6 **Q.** In your understanding, why did
7 Mr. Smith send you this letter around this time?
8 **A. At that time, Columbia decided it was**
9 **in their best interest to pursue an equity offering,**
10 **and they shut off all discussions and asked to return**
11 **and destroy the confidential information that was**
12 **provided to us.**
13 **Q.** Did you, in fact, ensure that
14 TransCanada and its advisors, in fact, destroyed all
15 confidential information it had received from
16 Columbia?
17 **A. Yes, I did. We have a process -- I've**
18 **been through it many times before -- where I go**
19 **through and send out emails and confirm destruction or**
20 **return before certifying back to the target company.**
21 **Q.** In your understanding, did this letter
22 change any of the terms and obligations under the
23 standstill agreement in the NDA?
24 **A. No. And, in fact, I think if you look**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 510

1 offer or agree to acquire ownership of equity
2 securities or material assets."
3 What did you think that meant at the
4 time?
5 **A. Well, we couldn't make an outright**
6 **acquisition of their shares on the stock exchange or**
7 **anything like that. Nor could we offer or agree to**
8 **acquire, which would mean that we couldn't make any**
9 **offer that was capable of being accepted.**
10 **Q.** If you go to the second item, it says,
11 "Seek to influence, advise, change or control its
12 management or the board"
13 What did you think that meant at the
14 time?
15 **A. I think the main expectation of this**
16 **provision is that we could not seek to do a proxy**
17 **contest or try to replace members of their board,**
18 **amongst other things that would be unwelcome.**
19 **Q.** And the last point refers to "[m]ake
20 any public disclosure or take any actions that [would]
21 require] [Columbia] to make public disclosure"
22 What did you think that meant at the
23 time?
24 **A. That would mean we couldn't do**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 509

1 **at the last line of the first page of that letter, it**
2 **actually repeats that all the -- yes, all the duties**
3 **and obligations under the confidentiality agreement**
4 **remain in full force and effect, notwithstanding the**
5 **return or destruction.**
6 **Q.** Did the return-or-destroy letter have
7 any effect on the standstill provision, pursuant to
8 your understanding?
9 **A. No.**
10 **Q.** I want to show you what's been marked
11 as Joint Exhibit 424, which is an email from you to
12 Francois Poirier, dated December 1st, 2015, and
13 another email Mr. Poirier forwards on to Mr. Girling.
14 And I want to ask you about your email to Mr. Poirier
15 on December 1st.
16 What is this discussion about?
17 **A. This is meant to provide him with a**
18 **high-level explanation of the actions that we could**
19 **not take under the standstill, unless with the written**
20 **invitation of the Columbia board.**
21 **Q.** You list three items there that the
22 standstill prohibits without written authorization
23 from the Columbia board. I want to ask you about
24 those. The first item you list is to "[a]cquire,

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 511

1 **something that would put them in a position where they**
2 **would have to respond by way of a news release or any**
3 **other public disclosure.**
4 **Q.** At some point shortly after this email
5 exchange, did you have a further discussion with
6 Mr. Poirier about the standstill provisions and what
7 they meant?
8 **A. Yes, I talked to Francois several**
9 **times, many times throughout the course of the**
10 **transaction.**
11 **Q.** And in particular, did you have a
12 follow-up discussion with him or discussions with him
13 about what the standstill provision meant in
14 particular?
15 **A. Yes, I had that discussion with him**
16 **from time to time.**
17 **Q.** Did you just relay to him essentially
18 what you just described to me as to what these
19 provisions mean?
20 **A. Yes. And I think from time to time he**
21 **even asked me specific questions, and I responded to**
22 **them. I just don't recall dates or when.**
23 **Q.** I'm showing you what's been marked as
24 Joint Exhibit 520, which is an email exchange between

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 512

1 you and Mr. Poirier and others, dated January 5th,
2 2016.
3 Do you recognize these emails?
4 **A. Yes.**
5 Q. I want to ask you about Mr. Poirier's
6 email to you and Don Marchand, in the middle of that
7 first page, on January 5th, at 1:19 p.m.
8 Mr. Poirier's commenting on the
9 Mayer Brown memo and says, "I don't know what the
10 threshold is for a verbal conversation to constitute
11 an 'offer', but I am not sure that Russ's
12 conversations with Capricorn's CEO would meet that
13 test"
14 Do you see that?
15 **A. Yes.**
16 Q. What is your understanding of what's
17 being discussed here?
18 **A. Yeah, I think that the -- what they**
19 **were looking at doing is have the CEOs speak to each**
20 **other to see if the target company, Columbia, was**
21 **still interested in potentially transacting with us.**
22 Q. And in particular -- and that's what's
23 referenced -- I want to ask you about what he says in
24 that first line. "I don't know what the threshold is

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 514

1 **A. Sorry. Yes, I had those discussions,**
2 **and they confirmed my understanding.**
3 Q. Thank you.
4 At some point after Columbia's equity
5 offering, TransCanada reengaged with Columbia.
6 Correct?
7 **A. Correct.**
8 Q. Do you remember when that took place?
9 **A. I think it was just -- well, early**
10 **January, after the holidays.**
11 Q. Do you know how that reengagement
12 happened?
13 **A. I'm not exactly sure. I think there**
14 **was an outreach in mid-December to see if they had any**
15 **interest in speaking to us. And I do recall speaking**
16 **to Bob Smith, Columbia's general counsel, early in the**
17 **new year.**
18 Q. And so do you remember that it was
19 Mr. Poirier who ended up talking to Steve Smith in
20 that early January meeting?
21 **A. Yeah, I understood that there was**
22 **going to be meetings amongst our executives, yes.**
23 Q. Before that meeting between
24 Mr. Poirier and Mr. Smith you referenced -- I guess

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 513

1 for a verbal conversation to constitute an
2 'offer'"
3 Do you know what he meant by that?
4 **A. Yeah. I think he was just saying that**
5 **they're having just a discussion about whether**
6 **Columbia is still interested in transacting with us.**
7 **Would that constitute an offer? And, of course, it's**
8 **not.**
9 Q. And did you confirm that understanding
10 to Mr. Poirier?
11 **A. Yes.**
12 Q. And was that consistent with the
13 advice you received from your outside counsel?
14 **A. I'm not sure if I had spoken to**
15 **Mayer Brown at this point about this specific**
16 **provision, but I know that they had confirmed that**
17 **explanation later on.**
18 Q. Whether it was before or after
19 January 5th, 2016, do you know whether you had
20 specific discussions with outside counsel about this
21 question and whether they confirmed that
22 understanding?
23 **A. Yes.**
24 Q. Yes, you did?

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 515

1 let me just ask the question.
2 Before that meeting between
3 Mr. Poirier and Mr. Smith, did you talk to Bob Smith
4 about the parties' reengagement?
5 **A. Yes.**
6 Q. What did you and Bob Smith discuss?
7 **A. I think there were a few things that**
8 **we discussed on that call. I think one of the things**
9 **was to make sure that we both were of the view that**
10 **the nondisclosure agreement was still effective and**
11 **that we didn't have to enter into a new one to the**
12 **extent that Columbia was still interested in engaging**
13 **with us. So we confirmed each other's understanding**
14 **that that NDA was still operative.**
15 **We also discussed -- you know, because**
16 **we had returned and destroyed all the confidential**
17 **information, so that he would have to make**
18 **arrangements to get us back into the data room.**
19 **And we may have also discussed, I**
20 **think, the -- the standstill, that the actions of just**
21 **reengaging would not violate the standstill.**
22 Q. Did you believe that reengaging with
23 Columbia was prohibited by the standstill provision?
24 **A. No.**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 516

1 Q. Why not?
2 A. I think, again, if it was just a broad
3 conversation to see if they are interested, that
4 wouldn't in itself violate the standstill.
5 Q. Did Bob Smith or anybody at Columbia
6 ever indicate to you that they thought reengagement
7 was a violation of the standstill?
8 A. No.
9 Q. In fact, did Mr. Smith tell you the
10 opposite?
11 A. Yeah. In fact, he was perfectly fine
12 with it. I think if he had said otherwise, I would
13 have been surprised. But we would have held firm on
14 having any conversation until we understood our
15 obligations better under the NDA.
16 Q. I'm showing you what has been marked
17 as Joint Exhibit 1905, which is an email exchange
18 between you and Christopher Joseph on January 9th,
19 2016.
20 Do you recognize this email?
21 A. Yes.
22 Q. Who is Christopher Joseph?
23 A. I haven't met him, but he was working
24 for Goldman Sachs, which is the financial advisor to

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 518

1 email at the bottom of the page.
2 Do you see that?
3 A. Yes.
4 Q. Why did you send this email?
5 A. So at that point, I knew that there
6 were going to be more conversations that were being
7 arranged between the CEO of TransCanada and the CEO of
8 Columbia. And having had a look and taking a very
9 cautious view of the standstill, I wanted to ensure
10 that that conversation met his understanding of not
11 being violative of the NDA or standstill.
12 Q. I want to look at the third paragraph
13 of your initial email. You say, "If however, after
14 that meeting and after discussions with your board,
15 your board is receptive to continuing the discussions,
16 we would like assurance that in the event a verbal or
17 written proposal is made by Taurus to the Capricorn
18 CEO or Board, Taurus would not be in contravention or
19 breach of its obligations under the Standstill. I
20 note specifically that the Capricorn board of
21 directors is to 'specifically request in writing in
22 advance' any of the matters covered in section 3."
23 Do you see that?
24 A. Yes.

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 517

1 Columbia.
2 Q. In the bottom email, there are a
3 significant number of Wells Fargo and TransCanada
4 personnel in the "to" line. And the message says,
5 "You should have all received access to the Project
6 Constellation data room around midnight last night."
7 Do you know who these people in the
8 "to" line are?
9 A. Yeah, I recognize most of those names
10 that have the transcanada.com as people that were on
11 the -- the Constellation deal team, which is what we
12 were calling that transaction.
13 Q. So around January 9th, the TransCanada
14 and Wells Fargo deal teams were engaging with Goldman
15 Sachs about due diligence and getting access to the
16 data room?
17 A. Correct.
18 Q. I want to show you what's been marked
19 as Exhibit 623, Joint Exhibit 623, which is an email
20 exchange between you and Bob Smith dated,
21 January 25th, 2016.
22 Do you recognize these emails?
23 A. I do.
24 Q. I want to start with your original

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 519

1 Q. In this email, in that paragraph, are
2 you asking for that written assurance from Columbia's
3 board?
4 A. No.
5 Q. What do you mean?
6 A. Well, we weren't at a point of making
7 an offer. So I was just basically reiterating my
8 interpretation of the standstill that when we got to
9 that point, after the meeting and after discussions
10 with their board, that we would not be making an offer
11 unless at the invitation of his board.
12 Q. Did you consider your email to be
13 requesting a waiver of the standstill provision?
14 A. No.
15 Q. Why not?
16 A. I was, again, just really providing my
17 interpretation of the standstill; that we would not be
18 making an offer unless specifically with the
19 invitation of the board, in compliance with the
20 standstill.
21 Q. And how did you understand Mr. Smith's
22 response?
23 A. Can you turn to it?
24 Q. Pull it up.

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 520

1 **A.** **There we go.**
2 **So here, I think he's confirming that**
3 **the discussion that was going to happen with the**
4 **CEOs -- that's the one in this context -- would not**
5 **violate the terms of the NDA.**
6 Q. In response to this email exchange, or
7 anytime shortly after this email exchange, did
8 TransCanada actually receive a written invitation from
9 the Columbia board to make an offer?
10 **A.** **Well, that was in January. So not at**
11 **that time. Not until much later, when negotiations**
12 **had progressed.**
13 Q. Well, why didn't you follow up with
14 Bob Smith on the fact that you didn't get that written
15 authorization in January?
16 **A.** **We didn't need it. We weren't making**
17 **an offer, and we didn't need to have that**
18 **confirmation.**
19 Q. Did you advise Mr. Poirier on the
20 operation of the standstill provision and how these
21 things worked, from your perspective?
22 **A.** **Yes.**
23 Q. At some point after these January
24 discussions, did TransCanada seek exclusivity with

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 522

1 Do you have a recollection that
2 Columbia had suggested that instead of a written
3 exclusivity agreement at this time, they might be
4 prepared in executing a handshake deal on exclusivity
5 without committing it to writing?
6 **A.** **Yes.**
7 Q. What was TransCanada's reaction to
8 that?
9 **A.** **I think we took it away and decided**
10 **that we would rather have a written agreement.**
11 Q. Ultimately, is that what happened?
12 **A.** **Yes.**
13 Q. I want to show you what has been
14 marked as Joint Exhibit 682, which is the executed
15 initial exclusivity agreement with Columbia. And I
16 want to ask you about the bottom of the first page.
17 It's about seven lines up from the bottom, starting
18 with "provided"
19 It says, "in response to a bona fide
20 written unsolicited Transaction Proposal that did not
21 result from a breach of this letter
22 agreement ... Capricorn may, after providing notice to
23 Taurus as required by this letter agreement ..." -- it
24 goes on to essentially say discuss a transaction,

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 521

1 Columbia?
2 **A.** **Yes, it was shortly after that**
3 **January 25th meeting.**
4 Q. Why were you looking for exclusivity?
5 **A.** **Well, at that time, we had already**
6 **invested quite a bit of time and resources, our own**
7 **people, outside advisors. And we were thinking that**
8 **if we were going to put all that time and effort into**
9 **pursuing a deal, we would like to know that we**
10 **weren't -- that that -- Columbia wasn't also outside**
11 **seeking other suitors.**
12 Q. Did you negotiate the exclusivity
13 agreement?
14 **A.** **Andrew Noreuil from Mayer Brown**
15 **provided the first draft.**
16 Q. Were you involved in the discussions
17 with Columbia about it?
18 **A.** **Yes, I think we did it through**
19 **exchange of emails.**
20 Q. I want to show you what's been marked
21 as Joint Exhibit 647, which is an email exchange
22 between you and Mayer Brown dated January 28th, 2016.
23 And I want to look at your email to
24 Mr. Noreuil on the top of this exhibit.

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 523

1 provide due diligence, or even enter a transaction
2 with another party.
3 What was your understanding of the
4 purpose of this provision in the exclusivity
5 agreement?
6 **A.** **I think this is what's commonly known**
7 **as a fiduciary doubt -- fiduciary out. Sorry. And**
8 **that would only allow the board of Columbia to**
9 **consider unsolicited proposals, and they couldn't go**
10 **out and seek other potential bidders.**
11 Q. Why is this fiduciary out in this
12 agreement?
13 **A.** **I don't think it was in the draft that**
14 **we provided to Columbia, but they put it in.**
15 Q. I want to show you what's been marked
16 as Joint Exhibit 813, which is an email exchange dated
17 March 3rd, 2016, where you forward an email from
18 Bob Smith to outside counsel for comment.
19 Can you tell me about what is going on
20 here?
21 **A.** **I'm sorry, Mike. Can you repeat?**
22 Q. Sure. Let's start with the initial
23 email that triggered this email exchange from Bob
24 Smith to you on March 3rd at 7:35.

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 524

1 Can you tell me what is happening here
2 with respect to this email exchange?
3 **A. Right. So we had just concluded our**
4 **second round of in-person negotiations on the merger**
5 **agreement with mostly just the legal teams. And at**
6 **that point, we hadn't decided on some of the important**
7 **terms like price or break fees. So I think Bob here**
8 **is recalling that we weren't going to take --**
9 **TransCanada was not going to take any action that was**
10 **prohibitive under the standstill, including we would**
11 **not be making an offer or putting a price forward**
12 **unless with the express invitation of his board.**
13 Q. Why did you forward the email from
14 Bob Smith to outside counsel?
15 **A. I wanted to ensure I had their exact**
16 **interpretation to be correct as mine.**
17 Q. And what did -- all right. That's
18 your email forwarding it on to Mr. Noreuil and
19 Mr. Sperber.
20 Can you go up to what their response
21 was.
22 What did Mayer Brown advise?
23 **A. They confirmed that it would probably**
24 **be a good idea to have an email that the board**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 526

1 **A. Yes.**
2 Q. What is this?
3 **A. So now I've taken Mayer Brown's**
4 **suggested email, and I've taken that text and**
5 **forwarded it on to Bob.**
6 Q. So Mayer Brown prepared an initial
7 draft of this email?
8 **A. They did.**
9 Q. Were you asking Columbia to waive the
10 standstill here?
11 **A. No.**
12 Q. Can you explain?
13 **A. Again, I think everything that was**
14 **discussed in this email to the general counsel, to**
15 **Bob, was to ensure that we were complying with the**
16 **exact terms of the standstill that they drafted. In**
17 **no way was I asking for a waiver.**
18 Q. I'm showing you what's been marked as
19 Joint Exhibit 1907, which is an email from Bob Smith
20 to you dated March 5th, 2016.
21 Did you, in fact, receive confirmation
22 that the Columbia board authorized a formal offer?
23 **A. Yes.**
24 Q. Is that reflected here in this email?

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 525

1 **consents to discussion.**
2 Q. Did you rely on that advice from Mayer
3 Brown?
4 **A. Yes.**
5 Q. In your email --
6 ATTORNEY OLSEN: Go back to the last
7 one, please, Kentaro.
8 Q. In your email to Mayer Brown, you say
9 that "Russ will be [discussing] range of price with
10 their CEO"
11 If Mr. Girling was going to discuss a
12 range and not make an offer that could have been
13 accepted, why did you think that you might need to
14 take these steps?
15 **A. I think I was just being overly**
16 **cautious and giving a very conservative read to the**
17 **standstill. Also, I was going to be part of that**
18 **discussion. Sometimes a discussion on range can go**
19 **somewhere else. But -- not that I was expecting it**
20 **to, but, again, just being conservative in terms of**
21 **ensuring compliance with the standstill.**
22 Q. If you go to Joint Exhibit 816, which
23 is an email exchange between you and Bob Smith dated
24 March 6th, 2016, do you recognize these emails?

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 527

1 **A. Yes.**
2 Q. Ms. Johnston, do you believe that at
3 any point TransCanada violated the standstill
4 provision?
5 **A. No. In my view, it was certainly top**
6 **of mind for me as a lawyer. I had frequent**
7 **conversations and communications with Francois and our**
8 **management team about the terms of the standstill.**
9 **Sought outside advice. I think I did everything I**
10 **could do to ensure we were in compliance with the**
11 **standstill.**
12 Q. At any point in time did anyone at
13 Columbia or any of your legal or financial advisors
14 tell you or, to your knowledge, anyone at TransCanada
15 that they believed that TransCanada had violated the
16 NDA or the standstill provision?
17 **A. No.**
18 Q. I want to ask you a little bit about
19 The Wall Street Journal leak.
20 Do you remember that?
21 **A. Yes.**
22 Q. And I want to turn to Joint Exhibit
23 929, which is an email exchange between you and
24 Ross Bentley on March 9, 2016.

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 528

1 Who is Ross Bentley?
2 **A. Ross Bentley is the main partner that**
3 **I work with at Bennett Jones, who is corporate**
4 **securities counsel there.**
5 Q. And why --
6 **A. Sorry. Blake Cassels.**
7 Q. Blake Cassels. Thank you.
8 Why did you send this email?
9 **A. I had alerted Ross to the fact that I**
10 **had heard that there might be a leak of the Columbia**
11 **deal through The Wall Street Journal. And I wanted to**
12 **ensure I gained his advice and understanding as to**
13 **what our obligations were with respect to disclosure,**
14 **given that the deal had been leaked.**
15 Q. Now, on page 2 of the exhibit, Ross
16 writes to you, "if we have to issue a press release in
17 these circumstances it is because there has been an
18 actual leak and so something we could previously keep
19 confidential now is being required to be disclosed --
20 we thus have to disclose the material
21 information"
22 What did you understand that to mean?
23 **A. That meant that there would have to be**
24 **an actual leak. And at that point there hadn't been**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 530

1 **we did so.**
2 Q. Was trading of TransCanada stock, in
3 fact, halted?
4 **A. Yes, it was.**
5 ATTORNEY OLSEN: Would now be a good
6 time for break, Your Honor?
7 THE COURT: It would be. Thank you so
8 much.
9 So we will stand in recess until 3:15.
10 (A recess was taken at 2:59 p.m.)
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CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 529

1 **one, but it was to come. And if that was the case,**
2 **what was otherwise meant to be kept confidential under**
3 **the terms of the NDA would have to be disclosed under**
4 **our Toronto Stock Exchange rules.**
5 Q. And then on March 10, those
6 discussions actually were leaked to the Journal?
7 **A. They were.**
8 Q. Did you get a call from the Toronto
9 Stock Exchange following that leak?
10 **A. I certainly did.**
11 Q. What do you recall about that call?
12 **A. So I took the call from the Toronto**
13 **Stock Exchange. They asked me if there was any --**
14 **they noted that there was some unusual trading**
15 **activity in our shares, and was there anything**
16 **material that TransCanada ought to be disclosing?**
17 **And, of course, at that point in time, we didn't have**
18 **a deal. So I said, No. We're in discussions, but**
19 **there's -- nothing has crystallized that requires a**
20 **disclosure obligation by us. And they essentially**
21 **advised that, based on the trading activity and the**
22 **leak and the fact that we were, in fact, in**
23 **negotiations, that we needed to do a clarifying news**
24 **release and that they would be halting our stock until**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 531

1 (Resumed at 3:15 p.m.)
2 THE COURT: Welcome back, everyone.
3 Please be seated. Let's resume.
4 ATTORNEY OLSEN: Thank you, Your
5 Honor.
6 BY ATTORNEY OLSEN:
7 Q. Just to reorient you, we were talking
8 about the leak in the discussion with the Toronto
9 Stock Exchange.
10 **A. Yes.**
11 Q. I want to show you what's been marked
12 as Joint Exhibit 1908, which is an email chain between
13 you and Bob Smith, dated March 10th, 2016.
14 Do you recognize this email exchange?
15 **A. I do.**
16 Q. What's going on here?
17 **A. We had pretty close to a final draft**
18 **of our news release, and I sent it to Bob, which I**
19 **think was required under the nondisclosure agreement.**
20 Q. At some point, did TransCanada also
21 tell Columbia that after they offered their \$25.50 a
22 share, that if a deal was not reached, TransCanada
23 would issue a press release that discussions had
24 terminated?

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 532

1 **A. Yes, I understand that conversation**
2 **took place.**
3 Q. Why did TransCanada feel like it
4 needed to issue a press release at some point if
5 discussions ended with no deal?
6 ATTORNEY VARALLO: Your Honor, before
7 the witness answers, I rise. To the extent the
8 witness is about to give some information about
9 foreign law, Rule 44.1 of this Court's rules would
10 have required us to have advance notice in writing of
11 that. And under the Supreme Court's precedent in
12 *Germaninvestments*, which is from just a year or so
13 ago, our Supreme Court held that it is my friend's
14 burden to prove foreign law. If my friend is about to
15 adduce testimony seeking to rely on foreign law to
16 negate scienter, doing so would be in violation of
17 both the rules of this Court and the *Germaninvestments*
18 precedent. We have no expert. We have no professor
19 on foreign law. We have no cases cited. We have no
20 affidavit. We have nothing.
21 I apologize if that's not what my
22 friend was trying to do, but I wanted to make sure the
23 record was clear before the answer came in.
24 THE COURT: Do you want to respond?

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 534

1 question.
2 THE COURT: That's fine.
3 BY ATTORNEY OLSEN:
4 Q. Do you have any experience dealing
5 with the market and leaks and how you interact with
6 the markets with respect to leaks?
7 THE COURT: Hold on. Did I say I was
8 going to sustain it or overrule it?
9 ATTORNEY OLSEN: I thought you said
10 "sustain."
11 THE COURT: If I said sustain, that's
12 wrong. I meant to say I was going to overrule it
13 because I didn't think you were offering it for the
14 truth. I thought you were asking --
15 ATTORNEY OLSEN: I apologize, Your
16 Honor. I misheard you.
17 THE COURT: No, no, I very easily
18 could have misspoke. The point is, I am going to
19 allow the testimony. Let's keep going.
20 BY ATTORNEY OLSEN:
21 Q. What were you told that gave you the
22 impression that you would need to issue such a press
23 release?
24 **A. Since the public record would be**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 533

1 ATTORNEY OLSEN: Your Honor, this
2 witness is not offering opinion on foreign law. This
3 witness is offering her recollection of factually what
4 happened, what she was told, and what she told
5 Columbia with respect to this issue.
6 THE COURT: Why don't you reframe it
7 to be more targeted in that regard.
8 ATTORNEY OLSEN: Okay.
9 BY ATTORNEY OLSEN:
10 Q. So you told -- somebody at TransCanada
11 told Columbia that if at some point a deal was not
12 reached, TransCanada would have to issue a press
13 release that discussions had terminated; correct?
14 **A. Correct.**
15 Q. What were you told with respect to why
16 that needed to be done?
17 ATTORNEY VARALLO: Objection.
18 Hearsay, Your Honor.
19 THE COURT: I am going to sustain it
20 for what I assume is going to be the answer, which is
21 that it's going to be offered for her understanding
22 and why she had a good-faith belief and what the
23 course of action was.
24 ATTORNEY OLSEN: I'll ask a new

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 535

1 **incomplete if we were to not transact on a deal -- for**
2 **instance, if you look at the actual language of the**
3 **news release, it leaves it very open-ended. I know in**
4 **my experience, at that time even more than a 20-year**
5 **lawyer, dealing with public disclosure issues every**
6 **day, that we would need to close the loop on the**
7 **release, as our investor relations would be getting**
8 **numerous inbound calls over the course of the next**
9 **weeks. Even if we had terminated the transactions or**
10 **the discussions, they would need to put all investors**
11 **and potential investors on a level playing field so**
12 **that they all had the same disclosure at the same**
13 **time.**
14 Q. In your view, was telling Columbia
15 that you would have to issue that press release if
16 discussions terminated intended to put pressure on
17 Columbia?
18 **A. No. In fact, it was telling them what**
19 **our -- in line with the obligations under the**
20 **nondisclosure agreement, letting them know that a**
21 **press release would likely be imminent in that regard.**
22 Q. Did TransCanada ever actually issue
23 that press release?
24 **A. No. We didn't have to because we**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 536

1 **didn't terminate discussions.**
2 THE COURT: What does a press release
3 that says something like that after transaction
4 termination generally look like, in your experience?
5 In other words, does it have the bland feel of the
6 press release you issue on trading activity, or is it
7 more specific?
8 THE WITNESS: It would be very
9 general. In fact, as you see, we didn't even name
10 Columbia in this news release. It would be as simple
11 as -- and, again, just to allow our investor relations
12 team not to have to take all these calls and worry
13 about somebody having more information than somebody
14 else, it would be very simple to say that pursuant to
15 our news release as of March 10th, we can now confirm
16 that negotiations ended without conclusion of a
17 transaction.
18 BY ATTORNEY OLSEN:
19 Q. I'm showing you what's been marked as
20 Joint Exhibit 1909, which is an email exchange between
21 you and Bob Smith, dated March 12th, 2016, relating to
22 an inbound inquiry Columbia had received.
23 Did you also receive a call from Bob
24 Smith around this time relating to an inbound inquiry?

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 538

1 **back to my room, which became my office for the**
2 **weekend.**
3 **So after I received that inbound from**
4 **Bob, I forwarded it on to kind of the main people on**
5 **the deal team for discussion.**
6 Q. Did you ultimately have a call with
7 the deal team and Mayer Brown and decide what to do?
8 A. **Yes, we did.**
9 Q. And what did you decide?
10 A. **I think the ultimate decision was that**
11 **their scripted response was just fine. We didn't see**
12 **any reason to make any changes or not agree to it.**
13 Q. Prior to closing, did you ever learn
14 who that inbound was from?
15 A. **No.**
16 Q. I want to ask you about Joint Exhibit
17 1206, which is an email exchange between you and Mayer
18 Brown, dated April 6th, 2016. And in your email, you
19 reference that "now [] we know that there were 4
20 companies that were interested in Columbia"
21 How did you know that?
22 A. **So we had received a draft form of the**
23 **proxy. The section called "Background of the Merger"**
24 **was a very detailed explanation of the events that**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 537

1 A. **Yes, I recall that.**
2 Q. What did Mr. Smith tell you?
3 A. **He had let me know that they had had**
4 **an inbound inquiry and were looking to respond to it**
5 **but didn't want to do anything that was outside their**
6 **own obligations.**
7 **At that point, they had, I think,**
8 **verbally agreed to extend our exclusivity agreement.**
9 **We just hadn't traded execution pages yet. And I**
10 **think he was just being cautious that whatever they**
11 **had as a scripted response going forward would not be**
12 **violative of any of the -- the type of agreement they**
13 **were entering into.**
14 Q. Did he tell you who the inbound was
15 from?
16 A. **No.**
17 Q. And so in this email exchange between
18 you and Bob, can you tell me what happened at
19 TransCanada as a result of this call and this email?
20 A. **Well, of course it was -- I can**
21 **remember it quite vividly. It was a Saturday morning.**
22 **I was on a ski weekend with my girlfriends and I was**
23 **about to click on my skis and go, and I got the phone**
24 **call from Bob. So I promptly turned around and headed**

CHANCERY COURT REPORTERS

C. Johnston - Direct

Page 539

1 **were taking place at that time. And in there, in this**
2 **background section of the proxy, it named that there**
3 **were four companies that were also -- had been**
4 **interested in Columbia at the same period of time that**
5 **we were, and noted that three of them had signed**
6 **confidentiality agreements.**
7 Q. Before you saw the draft of the proxy
8 statement, did you know if there were any other
9 bidders for Columbia or whether or not they had
10 standstill agreements or NDAs?
11 A. **No. We speculated, but we did not**
12 **know.**
13 Q. Why were you interested in finding out
14 if they had those types of agreements?
15 A. **Well, it would be interesting from the**
16 **perspective of having signed a merger agreement,**
17 **understanding that they might have a standstill**
18 **themselves, that it would be interesting to know**
19 **whether we had more competition or less competition**
20 **because of that.**
21 Q. Did you ever ask Bob Smith or anybody
22 else at Columbia if the other bidders had standstills?
23 A. **No. I think I thought about it at one**
24 **point, but I thought better of it, as I knew it -- it**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 540

1 **wasn't a fair question to ask Bob.**
2 ATTORNEY OLSEN: I have no more
3 questions at this time, Your Honor.
4 THE COURT: Thank you.
5 ATTORNEY VARALLO: While I gather my
6 materials, I would ask my colleague to hand out our
7 cross books.
8 And, Jay, can you please provide the
9 witness with a copy of the pretrial stipulation.
10 **CROSS-EXAMINATION**
11 BY ATTORNEY VARALLO:
12 Q. Ms. Johnston, nice to see you in
13 person. We met by Zoom for a day. It's nice to see
14 you again.
15 **A. Same to you.**
16 Q. I want to start by asking you a few
17 questions about your custom and practices with respect
18 to executing your job as corporate secretary of
19 TransCanada.
20 Correct that one of the things you do
21 as a corporate secretary is attend board meetings and
22 take minutes of those meetings?
23 **A. Yes.**
24 Q. And am I also correct, ma'am, that

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 542

1 Q. So am I correct that these are not
2 only -- all of your corporate minutes, at least it's
3 your attempt to make them relatively contemporaneous
4 in time and not once, but twice tested for accuracy
5 and changed, as necessary, to be as accurate as
6 possible?
7 **A. Yes.**
8 Q. And you're a careful corporate lawyer,
9 having been an in-house corporate lawyer for a long
10 time; isn't that right?
11 **A. I'd like to think so, yes.**
12 Q. And you do your very best to make sure
13 those minutes are accurate, as corporate secretary;
14 correct?
15 **A. Yes.**
16 Q. And if you believe something is
17 material, it goes in the minutes; fair to say?
18 **A. Yes.**
19 Q. Let me shift topics for a moment. I
20 want to talk a little about your role.
21 Just to be clear, you were the
22 day-to-day person running the legal side of this deal
23 for TransCanada; correct?
24 **A. Yes, internally, I was the lead on**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 541

1 after you attend the meeting, you do your best to get
2 a draft out as quickly as possible so that that draft
3 reflects your relatively recent recollection of the
4 actual facts? Is that right?
5 **A. Yes. I always do my best to do so.**
6 Q. And after you do that, the draft first
7 goes to senior management of the company for their
8 comments; correct?
9 **A. Yes, if they had an interest in that**
10 **particular item.**
11 Q. And then to the extent they make
12 comments, you make whatever changes you need to make
13 in your minutes, and then you send them out to the
14 board; correct?
15 **A. Correct. The board sees a draft.**
16 Q. And then the board reviews them. And
17 to the extent the board have comments, you make
18 changes based on board comments; right?
19 **A. Correct.**
20 Q. And then they are presented for vote,
21 and they are either voted up or down. And if they're
22 voted up, you sign them and they become part of the
23 corporate records; correct?
24 **A. Correct.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 543

1 **this transaction.**
2 Q. And I think we had heard earlier, you
3 negotiated the NDA on TransCanada's behalf; is that
4 right?
5 **A. Correct.**
6 Q. And Bob Smith, who we heard earlier in
7 this trial -- in fact, earlier today -- he provided
8 that draft to you, and you reviewed it and made
9 comments; right?
10 **A. Yes.**
11 Q. And just to be clear, you did not seek
12 outside counsel in connection with your review and
13 negotiation of the NDA at the NDA negotiation phase;
14 right?
15 **A. Yes.**
16 Q. And specifically with respect to the
17 standstill provision in the NDA, you read it, you
18 understood it, and you proposed changes back to
19 Mr. Smith; right?
20 **A. Yes.**
21 Q. You also understood what a "don't ask,
22 don't waive" provision was, and you knew that this
23 particular standstill had one; correct?
24 **A. Correct.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 544

1 Q. You also gave advice regarding the
2 standstill to your clients at TransCanada from time to
3 time throughout the transaction; right?
4 A. Correct.
5 Q. And your clients, the senior
6 management of TransCanada, understood TransCanada's
7 obligations under the standstill; right?
8 A. Yes. I think they had a general
9 understanding, and then they would come to me for
10 specific questions.
11 Q. That's terrific. Thank you.
12 And you know they understood it
13 because you made sure you understood it in discharging
14 your role as counsel on the deal; right?
15 A. Yes.
16 Q. All right. So let's spend a few
17 minutes on your understanding of the standstill
18 provisions in the NDA.
19 Within a day or so of the NDA being
20 signed in November of 2015, there was a kickoff
21 meeting of the internal TransCanada team; right?
22 A. I believe there was, yes.
23 Q. Sorry?
24 A. Yes.

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 546

1 calling Columbia at that time; right?
2 A. I actually don't recall the name
3 Matchstick, but I'll agree that's what we were talking
4 about here.
5 Q. And it goes on to say, "bar is high on
6 disclosure. Standstill. 12 months can't make a run
7 at them."
8 Have I correctly read that?
9 A. Yes.
10 Q. And those notes are consistent, at
11 least on a high level, with your understanding of the
12 standstill; correct?
13 A. Yes, very high.
14 Q. Now, fair for me to say you don't
15 specifically recall attending this meeting?
16 A. It was almost seven years ago. I'm
17 sorry. I wish I did.
18 Q. It's quite all right. But it would be
19 true, isn't it, that at least based on the list of
20 individuals we saw in the upper right-hand corner of
21 this document -- and I'll ask Joe to go back up
22 again -- no one other than you was there that would
23 have been giving advice that you can't take a run at
24 Columbia for 12 months; right?

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 545

1 Q. And you were in attendance at that
2 meeting; right?
3 A. Yes.
4 Q. So I'll ask my colleague, Mr. Wills,
5 to -- and would you please open in your book to
6 JX 314. And I want to talk about 314 for just a
7 moment.
8 314 is full of handwriting, and it
9 relates -- it's the materials or the package for this
10 kickoff meeting on November 10th; right?
11 A. Yes.
12 Q. And you're noted as attending the
13 meeting; correct? If you look in the upper right-hand
14 corner, it says "Chris J"?
15 A. Yes.
16 Q. And you've got the November 10th,
17 2015, date there.
18 And then down a little bit, under the
19 picture on the right side, there are a series of
20 entries. And we saw these once before in this trial,
21 but I just want to focus for a moment on them.
22 The first entry appears to read, "NDA
23 signed [with] [Match] [Stick]."
24 "Matchstick" was what you all were

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 547

1 A. No. It looks like -- hard to tell.
2 But obviously I'm a lawyer at the meeting.
3 Q. And by not making a run at Columbia
4 for 12 months, you understand that TransCanada
5 couldn't enter into an unfriendly negotiation;
6 correct?
7 A. Correct.
8 Q. And by that, you mean that if you were
9 negotiating with them, you would need to do so in a
10 cooperative way; fair to say?
11 A. Fair to say.
12 Q. And you understand the standstill to
13 allow friendly conversations with Columbia, but to
14 prohibit unfriendly ones; correct?
15 A. I disagree with that. I think you
16 could have an unfriendly conversation, and that
17 wouldn't necessarily trigger the standstill. It
18 depends what you mean. As long as you don't take any
19 actions that were violative of the standstill.
20 Q. You remember we had some fun meeting
21 for a deposition some number of months ago?
22 A. I do.
23 Q. And when you gave that deposition, you
24 were under oath, and you did your best to tell the

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 548

1 truth; correct?
2 **A. I did.**
3 Q. All right. Let me just take a look
4 here. Let's take a look, if we can, at your
5 deposition together. And I'll go ahead and play the
6 clip.
7 ATTORNEY VARALLO: Counsel, for your
8 purposes, this is at deposition page 87, lines 8
9 through 23.
10 (A video clip was played as follows:)
11 Question: In what regard would the
12 context inform your advice?
13 Answer: My understanding is the
14 provisions of a standstill are to allow for what I'll
15 call friendly conversations, but would preclude us
16 from reaching out to shareholders directly through,
17 for instance, by way of a proxy solicitation, going
18 around the board or management.
19 Question: So is it your view that to
20 the extent you were making friendly overtures, those
21 were permitted by the standstill as opposed to
22 unfriendly ones?
23 Attorney Massengill: Objection to
24 form.

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 550

1 Q. Let's pause for a moment to take a
2 look at the language of the standstill itself.
3 ATTORNEY VARALLO: Your Honor, I
4 have -- rather than just go to 305, which is the JTX,
5 I pulled it out and made parts of it a demonstrative.
6 So I'll ask my friend to put up Plaintiffs'
7 Demonstrative 7a, which hopefully will be a little
8 easier to use than the standstill itself.
9 Q. Ma'am, the standstill is also in its
10 original form at JTX 305, if you want to see the whole
11 thing, but I tried to pull it out to make it a little
12 bit easier to use. I want to focus on Section 3(a).
13 ATTORNEY OLSEN: Do you have a copy of
14 the demonstrative?
15 ATTORNEY VARALLO: It's on the screen.
16 BY ATTORNEY VARALLO:
17 Q. So let's look at what the standstill
18 prohibits. In paragraph 3 -- and I'm focused in on
19 Roman A here, or capital A -- it prohibits a party
20 from acquiring or offering to acquire or seeking or
21 proposing or agreeing to acquire by means of tender
22 offer and so forth, ownership in the other party.
23 Have I fairly summarized that?
24 **A. Yes.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 549

1 Answer: Yes.
2 (End of video clip.)
3 BY ATTORNEY VARALLO:
4 Q. Ma'am, were you asked those questions,
5 and did you give those answers at your deposition?
6 **A. Sorry, what's the question?**
7 Q. Were you asked those questions, and
8 did you give those answers at your deposition?
9 **A. Yes.**
10 Q. You don't recall whether you confirmed
11 the view you just saw, testified about, with your
12 outside counsel at Mayer Brown; correct?
13 **A. Sorry, repeat the question.**
14 Q. Yeah, it's got a negative.
15 You don't remember confirming that
16 advice with Mayer Brown; right?
17 **A. Oh, during the course of the**
18 **transaction?**
19 Q. Well, at any time. Do you recall
20 whether or not you confirmed the views you just
21 testified about with your outside counsel at Mayer
22 Brown?
23 **A. I don't recall specifically. We**
24 **talked of the standstill.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 551

1 Q. Now, in that language -- and I'm happy
2 to go to 305 for the whole context, if you want -- but
3 in that language, do you see any distinction
4 whatsoever that would give you comfort about
5 distinguishing between friendly overtures and
6 unfriendly overtures?
7 **A. I'm not sure if I understand the**
8 **question. I'm sorry.**
9 Q. I guess the question I'm asking, to be
10 a little bit more clear, is, you told me that your
11 understanding of the standstill was that you could do
12 friendly overtures, but that unfriendly ones were
13 permitted. Where in the standstill, in the text of
14 the standstill, do you find support for the idea that
15 you can make friendly overtures?
16 **A. So I'm using the term colloquially.**
17 **But if you could turn to the first page of the**
18 **standstill, the beginning line.**
19 ATTORNEY VARALLO: Let's open, Joe, to
20 305, please.
21 Q. So here is the standstill itself.
22 **A. So if you go to page 1, "In connection**
23 **with a [possibly] mutually agreed transaction"**
24 Q. Okay.

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 552

1 **A.** **And I think I take from that -- my**
2 **understanding of standstills generally is that it's**
3 **there to allow the parties to negotiate cooperatively.**
4 **And then there are certain very specified items that**
5 **we can't do that would be deemed unfriendly.**

6 **Q.** I see. Now, a mutually agreed
7 transaction contemplates that parties have agreed on
8 terms; correct?

9 **A.** **If used in the past tense, yes.**

10 **Q.** I want to go back to Section 3 for a
11 moment and make sure I understand your answer.

12 ATTORNEY VARALLO: Could you please go
13 back to 7a, demonstrative 7a.

14 **Q.** Just so I understand it, is your
15 testimony, your understanding of the standstill, that
16 the introductory words on page 1, "In connection with
17 a possible mutually agreed transaction ...," that you
18 read that as modifying the standstill dos and don'ts,
19 the prohibitions of the standstill in Section 3(a)?
20 Is that your testimony?

21 **A.** **It sets the stage for the standstill.**

22 **Q.** Sets the stage for the standstill.
23 Okay.

24 And when you distinguish between

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 554

1 **Q.** Why don't you open, if you would, to
2 JTX 413. And let's see if we can identify that as --
3 at least on the second page, I believe -- we can
4 identify that as part of these thoughts from your
5 boss, Mr. Poirier -- or your client, Mr. Poirier.

6 ATTORNEY VARALLO: Joe, move to the
7 second page of that, please.

8 **Q.** So I mentioned an email from Poirier
9 to you and others. Is this the email you had in mind
10 when you answered my question just a moment ago?

11 **A.** **Yes.**

12 **Q.** So let's just take a look at this
13 because I believe that it is this email which is the
14 precursor to your memo to him on the standstill; is
15 that right?

16 **A.** **Yes.**

17 **Q.** We'll walk through it and see if it
18 makes sense.

19 So this is dated November 28th, 2015.

20 And the people on the recipient list are the senior
21 officer core of the company; right?

22 **A.** **Correct.**

23 **Q.** And it was sent just a few days after
24 Columbia sent the "pencils down" letter; is that

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 553

1 friendly transactions or friendly overtures as being
2 allowed, the basis for that, just so I understand it,
3 is this language at the beginning of 305, "In
4 connection with a possible mutually agreed
5 transaction ...," that signals to you that you can
6 make friendly overtures; right?

7 **A.** **That signals to me that the intent is**
8 **that the parties are working together with potentially**
9 **the same endpoint in sight. And then how we get there**
10 **is determined through the provisions of the standstill**
11 **to ensure that each party is in compliance.**

12 **Q.** Ma'am, how to get there is structured,
13 at least in part, by the prohibitions of Section 3;
14 isn't that fair to say.

15 **A.** **That's fair.**

16 **Q.** So we saw your advice to Mr. Poirier
17 earlier after the "pencils down" letter. I want to
18 back up a step. And to borrow from my friend C.J., I
19 want to talk about timelines for a second.

20 Do you recall after the "pencils down"
21 letter, Mr. Poirier writing a memo to you and the
22 members of the deal team setting forth his thoughts on
23 what to do next?

24 **A.** **Yes.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 555

1 right?

2 **A.** **Yes.**

3 ATTORNEY VARALLO: Joe, would you
4 please open to page 003.

5 **Q.** And I want to focus in, Ms. Johnston,
6 on two paragraphs up from the heading "Timeline."
7 You'll see a timeline towards the bottom. I want to
8 focus in on that, two paragraphs up.

9 After noting his perspective that
10 Columbia's management would support a sale and that
11 the Columbia board does not appear to be wed to that
12 path, Mr. Poirier suggests that TransCanada should
13 convey its sincere interest and ability to move
14 quickly to the extent that TransCanada has strong
15 relationships with any board members; right?

16 **A.** **Yes.**

17 **Q.** And then two paragraphs down --

18 ATTORNEY VARALLO: Joe, if you'd skip
19 down two paragraphs.

20 **Q.** -- he appears to suggest that
21 TransCanada should immediately try to reengage if
22 Columbia doesn't complete an equity offering; right?

23 **A.** **Yes.**

24 **Q.** And flipping over to the next page,

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 556

1 .004, in the second full paragraph here, Mr. Poirier
2 also suggests that if an equity offering goes forward,
3 he should check in with Columbia's CFO, and
4 Mr. Girling should check in with Bob -- that would be
5 Bob Skaggs; right?
6 **A. Likely, yes.**
7 Q. -- before the holidays leading towards
8 reengagement in January; correct?
9 **A. Yes.**
10 Q. And then finally, on the last
11 paragraph, Mr. Poirier suggests that the group should
12 "spend more time thinking about how to create time
13 pressure" on Columbia; is that right?
14 **A. I'm sorry. I don't see that language**
15 **there.**
16 Q. I'm down at the last paragraph here.
17 "I think we should spend more time
18 thinking about how to create time pressure."
19 Do you see that?
20 **A. I do.**
21 Q. So this comes out just days after the
22 "pencils down" letter. It's the head of corporate
23 development, who is the business lead on the team and
24 your client, and he's sending it to the senior

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 558

1 equity securities or material assets."
2 Right?
3 **A. Yes.**
4 Q. That's consistent with your
5 understanding at the time; right?
6 **A. Yes.**
7 Q. I noted, ma'am, that your summary does
8 not include the language from the standstill itself,
9 which is seek or propose to acquire. You weren't
10 meaning to leave those out for any reason; right?
11 **A. No. But it was a summary. And I**
12 **think that the words on the page here captured the**
13 **same sense of those words.**
14 Q. But you do agree, don't you, that
15 seeking or proposing is also prohibited by the
16 standstill?
17 **A. Yes.**
18 Q. And going back to 424, in the second
19 numbered paragraph here, that basically summarizes the
20 "don't ask, don't waive" provision; correct?
21 **A. I think that's right, yes.**
22 Q. So your summary talks about amending.
23 You also acknowledge, don't you, that asking for a
24 waiver would be prohibited by "don't ask, don't

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 557

1 executive core and his lawyer, you; right?
2 **A. Correct.**
3 Q. And he's giving some thoughts about
4 how TransCanada might want to proceed; fair to say?
5 **A. Yes.**
6 Q. So when you got this, you read it, and
7 it raised the possibility for you that reaching out to
8 Columbia might implicate the NDA. So you reminded
9 Mr. Poirier of the need to be careful under the
10 standstill; right?
11 **A. Yes. I sent up a summary of the**
12 **standstill, and I believe we had some conversations**
13 **around that time.**
14 Q. And let's take a look at that summary
15 once again. I believe it's at 424. And we saw it a
16 few moments ago, but I'd like to bring it up again, if
17 we could.
18 So you write to your client,
19 Mr. Poirier, a summary. And you say, "For 12
20 months ... TransCanada ...," through it's officers and
21 representatives, et cetera, "unless Capricorn[] []
22 specifically requests in writing in advance" -- it
23 can't acquire, offer to acquire -- I'm sorry --
24 "Acquire, offer or agree to acquire ownership of

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 559

1 waive"?)
2 **A. Yes.**
3 Q. So let's see. I think you told me
4 earlier your executives understood the standstill
5 based on your advice?
6 **A. Yes.**
7 Q. Let's see how your client responds and
8 indicates his understanding.
9 ATTORNEY VARALLO: Joe, can we go up
10 to the top email, please.
11 Q. So now this is Mr. Poirier writing to
12 Mr. Girling on 1st December 2015. Just to save
13 context, Mr. Girling at the time was CEO of the
14 company; is that right?
15 **A. Correct.**
16 Q. So Mr. Poirier is writing to his
17 direct boss; right?
18 **A. Yes -- indirect. I think there was**
19 **another executive in between them.**
20 Q. Indirect, but ultimate?
21 **A. Yes.**
22 Q. So he says, "Hi Russ, See below." And
23 he's passing along your advice.
24 And he says, "We basically must get

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 560

1 Capricorn's acquiescence to pursue this transaction,
2 or even to seek to influence them."
3 "We basically must get Capricorn's
4 acquiescence to pursue this transaction"
5 He didn't ask you for that advice;
6 right? He didn't send this to you in advance for your
7 review?
8 **A. No.**
9 Q. But you didn't disagree with his
10 businessperson's understanding of the standstill;
11 right?
12 **A. I think I could parse the words and**
13 **come up with a better summary. But, yes, we would**
14 **need to have an invitation of the board to make an**
15 **offer, for instance. But not -- "pursue the**
16 **transaction," I don't think those words exist in the**
17 **NDA.**
18 Q. You don't think he's incorrect in his
19 assessment of the standstill's obligations, do you?
20 **A. I actually -- as a lawyer, I probably**
21 **would take a different summary of it. But what I do**
22 **like is that he understands that we can't reach out to**
23 **the board members.**
24 Q. Let's see what you said on your

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 562

1 Q. And your view was that reaching out to
2 tell Columbia that TransCanada might still be
3 interested in proposing a deal wouldn't violate the
4 standstill; right?
5 **A. Correct.**
6 Q. And your view in that regard was
7 informed both by your reading of the plain language
8 and your understanding of the context in which the
9 standstill was intended -- what the standstill was
10 intended to allow or prohibit; correct?
11 **A. Yes.**
12 Q. And the understanding that you had was
13 that the purpose of the standstill was to allow for
14 friendly conversations, to prohibit unfriendly ones.
15 I think we saw that earlier, including going directly
16 to Columbia shareholders; right?
17 **A. Yes.**
18 Q. But you also understood, didn't you,
19 that even the friendliest of conversations which
20 contained an offer would violate the standstill if not
21 preceded by an invitation to bid in writing from the
22 board of Columbia; right?
23 **A. If, in fact, it was an offer.**
24 Q. And you understood as well that a

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 561

1 deposition.
2 ATTORNEY VARALLO: Counsel, for your
3 purposes, it's deposition page 80, lines 18 through
4 21.
5 (A video clip was played as follows:)
6 Question: You think Poirier is wrong?
7 Attorney Massengill: Objection to
8 form.
9 Answer: No.
10 (End of video clip.)
11 BY ATTORNEY VARALLO:
12 Q. Is it fair to say you were asked that
13 question and gave that answer? And in context, it was
14 about this particular email. I'll make that
15 representation to you.
16 You don't think he was wrong; right?
17 **A. Do I think he was wrong? Again, I**
18 **would characterize it differently. I'm glad that he**
19 **was thinking about it, and I'm glad he understood that**
20 **he couldn't go around and talk to the board directly.**
21 Q. So it's correct, isn't it, that
22 Mr. Poirier reached out to Mr. Smith of Columbia in
23 December of 2015 after the "pencils down" letter?
24 **A. I think that's right, yes.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 563

1 proposal to acquire securities could violate the
2 standstill without a prior invitation to make such a
3 proposal; correct?
4 **A. Yes. The word "proposal" is used**
5 **there.**
6 Q. And it's correct as well that you
7 viewed an "offer," quote/unquote, as something that
8 was capable of being accepted by Columbia? That's
9 your definition of an offer; right?
10 **A. Yes.**
11 Q. But you also agree with me, don't you,
12 that a proposal is typically something less than an
13 offer?
14 **A. I actually think it's very similar. I**
15 **think a proposal also has to be capable of being**
16 **accepted.**
17 Q. You are making me do this again. I'm
18 reaching for it again. Let's go to your deposition.
19 ATTORNEY VARALLO: Counsel, page 99,
20 beginning at line 23.
21 (A video clip was played as follows:)
22 Question: Do you distinguish in your
23 mind between an offer and a proposal?
24 Attorney Massengill: Objection to

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 564

1 form.
2 Answer: Semantics.
3 Question: Okay.
4 Answer: If a proposal could be
5 accepted from a legal perspective, then maybe it's an
6 offer. But typically a proposal is something less
7 than an offer.
8 (End of video clip.)
9 BY ATTORNEY VARALLO:
10 Q. You were asked that question, and you
11 gave that answer, ma'am?
12 A. **Yes, that's right.**
13 Q. And you agree that seeking or
14 proposing to acquire is also prohibited by the
15 standstill; right?
16 A. **Yes.**
17 Q. But, in your view, expressing a range
18 of possible prices at which TransCanada might be
19 prepared to buy Columbia was not prohibited by the
20 standstill; was that right?
21 A. **Yes.**
22 Q. And your view regarding giving a range
23 of prices at which TransCanada might transact not
24 being prohibited, that's based on your view that

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 566

1 leverage against Capricorn," that sentence begins, "We
2 have considered whether Taurus could increase its
3 bargaining leverage by threatening to disclose the
4 existence of its \$26 per share offer." Let me stop
5 right there.
6 So this memo was generated by your
7 most excellent lawyers at Mayer Brown in response to a
8 question that was asked by a board member from your
9 TransCanada board; correct?
10 A. **Yes.**
11 Q. And that question had to do very
12 specifically with whether disclosure of an offer could
13 be used to exert leverage in negotiation; correct?
14 A. **I don't recall what the language was,**
15 **but it was something along those lines.**
16 Q. Along those lines.
17 And when our friends at Mayer Brown
18 answered that question, they set forth the question
19 they are answering. And they say, we've considered
20 this; right? We've considered whether you could
21 increase your bargaining leverage by threatening to
22 disclose the existence of the \$26 offer; correct?
23 A. **That's what they say here, yes.**
24 Q. And they go on to say, we don't think

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 565

1 expressing a range isn't an offer since a range can't
2 be accepted; fair to say?
3 A. **Yes. I think it's just an indication**
4 **of interest.**
5 Q. And you don't recall whether or not
6 you sought Mayer Brown's advice on that point; right?
7 A. **I don't recall if I sought it at that**
8 **point. I might have sought it later.**
9 Q. You also told Mr. Poirier that
10 expressing a verbal indication of interest would not
11 constitute an offer; right?
12 A. **Correct.**
13 Q. But you did get advice from Mayer
14 Brown in December of 2015 that TransCanada couldn't
15 increase its bargaining leverage by threatening to
16 disclose its offer; correct?
17 A. **That was in the memo, yes.**
18 Q. So let's take a few moments and take a
19 look at that memo. It is in your book at JTX 517.
20 And when you get to it, I'd like you to open to
21 page 007. And I'd like to spend a moment with you on
22 that.
23 So drawing your attention to the
24 paragraph down the bottom under the heading "Possible

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 567

1 it's viable: "(1) [because] the standstill agreement
2 between the parties bars [TransCanada] from making
3 such a disclosure without Capricorn's consent;" and
4 then they go on to identify a number of other reasons
5 why they don't think it would work. Fair to say?
6 A. **Yes.**
7 Q. Now, you got this in the middle of
8 December of 2015; correct?
9 A. **Yes.**
10 Q. You read it?
11 A. **Uh-huh.**
12 Q. You understood it?
13 A. **Yes.**
14 Q. Fair to say you talked with your
15 lawyers about it?
16 A. **I don't think we talked at all about**
17 **it.**
18 Q. Okay. So you got it, you read it, you
19 understood it. And then you sent it to your client,
20 Francois Poirier; correct?
21 A. **I sent a summary of it about three**
22 **weeks later.**
23 Q. Well, let's go to the first page of
24 this exhibit, if we can, please. So this is your

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 568

1 summary of it; correct?
2 **A. Yes.**
3 Q. And let's scroll down and look
4 specifically at the summary of this particular point.
5 I think it's number 3.
6 ATTORNEY VARALLO: Keep going, Joe.
7 There we go.
8 Q. "Potential leverage — generally no."
9 And your summary is "Taurus cannot
10 disclose a superior offer without their consent (under
11 the standstill)."
12 Have I correctly read that?
13 **A. Yes.**
14 Q. You say you sent a summary, but you
15 questioned whether you sent the actual document.
16 Let's go up to the header on this particular summary
17 document.
18 It's from you to Poirier and Marchand.
19 It copies Kristine. Kristine was the general counsel,
20 your boss; is that right?
21 **A. Yes.**
22 Q. It says, forward -- "FW" is forward;
23 correct?
24 **A. Yes.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 570

1 **them.**
2 Q. But just to be clear --
3 ATTORNEY VARALLO: And, by the way,
4 can we go back to that paragraph 3 in the memo itself,
5 Joe.
6 Q. I just want to focus on how Mayer
7 Brown thinks about this for a second.
8 ATTORNEY VARALLO: I'm sorry. On
9 page 007, the memo itself.
10 Q. You know, it's funny. They refer to
11 this as the "existence of its \$26 per share offer."
12 And just a few moments ago, my partner, Mr. Orrico,
13 was examining your lead director, I guess now
14 chairman, Mr. Vanaselja, about whether there was a \$26
15 offer made back in the November time period.
16 It sure looks like our friends at
17 Mayer Brown thought there was a \$26 offer, doesn't it?
18 **A. I don't think so, necessarily. I**
19 **think they are using shorthand and imprecise**
20 **terminology.**
21 Q. Imprecise terminology. Well, you got
22 this in draft, and you read it. And before you sent
23 it on to your client, you had the opportunity to ask
24 counsel to correct imprecise terminology; right?

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 569

1 Q. And that's the name of the Mayer Brown
2 advice memo we just looked at, right, "Project
3 constellation Issues"?
4 **A. Yes. I think that's right, yes.**
5 Q. And then right under "Sent," there's
6 that wonderful word -- I don't even know what it's
7 called. Description in Word software for the "Project
8 constellation Issues" memo; right?
9 **A. Yes. And I'm happy to cut to the**
10 **chase and say I attached the memo.**
11 Q. No doubt you passed the memo on;
12 right?
13 **A. Yes.**
14 Q. And so Mr. Poirier, being an
15 intelligent guy -- by the way, is Mr. Poirier schooled
16 in law as well?
17 **A. I don't think so.**
18 Q. So Poirier, being an intelligent guy,
19 now the CEO of the entire company, he certainly read
20 this and your summary as well; fair to say?
21 **A. I expect he may have read the summary.**
22 **I don't know if he would have -- I wouldn't expect our**
23 **executives, who are very busy people, to read the**
24 **memo. That's why I try and do a rough summary for**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 571

1 **A. If I wanted to. I think we had**
2 **already moved on to some other things. And I -- it**
3 **wasn't something that was pressing. As you can tell,**
4 **I only sent out the summary a few weeks later.**
5 Q. This was created in response to a
6 request from a board member; correct?
7 **A. Yes. It was what I would characterize**
8 **as an offhand comment that I felt I should follow up**
9 **on.**
10 Q. And did you convey this advice back to
11 the board member?
12 **A. No. They never asked for it again.**
13 **They never got to that position.**
14 Q. But you thought it was -- an offhand
15 comment, but an offhand comment from somebody who is
16 sitting on the board. And it was important to you, as
17 a member of the legal team, to be responsive to that
18 offhand comment; right?
19 **A. Yes. We prepared a memo or had a memo**
20 **prepared.**
21 Q. So notwithstanding that you get this
22 from Mayer Brown in November, calling this a "\$26 per
23 share offer," you didn't ask them to correct it
24 because you didn't think it was important?

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 572

1 **A. No. I mean, I think, if anything, I**
2 **probably told them to keep their memo short, and they**
3 **probably used shorthand.**

4 Q. So whether as a result of reading the
5 standstill itself and negotiating or getting this
6 memo, you clearly understood, right, that the
7 standstill could not be used to exert leverage through
8 disclosure?

9 **A. That the standstill could not be used?**
10 **I'm sorry.**

11 Q. Yes.

12 **A. Is that the question you mean to ask?**
13 **I'm sorry. It doesn't make sense to me.**

14 Q. So just so I've got it, we're talking
15 about Mayer Brown's advice here. First sentence;
16 right?

17 **A. Right.**

18 Q. "[C]onsidered whether [TransCanada]
19 could increase its bargaining leverage by threatening
20 to disclose the existence of its \$26 ... offer" -- I'm
21 sorry, my question wasn't clear. I see your problem.

22 Under the standstill --

23 ATTORNEY OLSEN: Still wrong.

24 ATTORNEY VARALLO: I appreciate that,

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 574

1 by the standstill; right?

2 **A. Yes.**

3 Q. And you believe that making a verbal
4 indication of interest is also not prohibited; true?

5 **A. True.**

6 Q. And you understood that the standstill
7 prohibited TransCanada from using -- or the NDA
8 prohibited TransCanada from using disclosure to exert
9 leverage in the negotiations; true?

10 **A. Correct, unless required by stock**
11 **exchange rules.**

12 Q. So let's move on to how TransCanada
13 actually operated under the agreement.

14 You recall, don't you, that early in
15 the New Year, Mr. Poirier reached out and had a
16 conversation with Mr. Steve Smith to request a meeting
17 to reengage with Columbia?

18 **A. Yes, I recall that.**

19 Q. And then the same day that Poirier and
20 Stephen Smith spoke, Mr. Robert Smith, the general
21 counsel of Columbia, reached out to you to discuss the
22 overture; right? And I can help set the time, if
23 you'd like.

24 **A. If you could, yeah.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 573

1 Counsel.

2 Q. Under the NDA, you couldn't use the
3 threat of disclosure to exert leverage against your
4 bargaining partner; correct?

5 **A. Yes.**

6 Q. And you understood that, and that's
7 part of what you told Francois and that was in answer
8 to your board member's question; all fair to say?

9 **A. Yes.**

10 Q. So let me see if I can't sum up your
11 positions on the standstill. You agree that making an
12 offer would violate the standstill unless waived in
13 advance; right?

14 **A. Yes.**

15 Q. Or invited in advance.

16 You understand that a proposal is
17 something less than an offer; fair to say?

18 **A. I'll say semantics again.**

19 Q. Okay. And that making a proposal
20 could violate the standstill unless you are invited;
21 right?

22 **A. Yes.**

23 Q. And you say that expressing a range of
24 prices at which you might transact is not prohibited

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 575

1 Q. Let's take a look at 506, JTX 506.

2 **A. Yes, January 4th.**

3 Q. So he says, "Happy New Year! Can [we]
4 call I want to touch base regarding a
5 conversation between Francois and Steve Smith earlier
6 today."

7 Right?

8 **A. Yes.**

9 Q. So just to be clear, this
10 communication from general counsel of your
11 counterparty comes after the communication between
12 Francois and Steve; right?

13 **A. Yes.**

14 Q. And in your call with Bob Smith, you
15 discussed that TransCanada was reengaging, and you
16 also probably discussed the standstill; right?

17 **A. Yes.**

18 Q. And you and Mr. Bob Smith spoke after
19 the call between the principals took place that's
20 referred to in this email; yes?

21 **A. I don't recall. But from that email,**
22 **it looked like it was early -- it was after Francois**
23 **and Steve had a conversation.**

24 Q. Thank you.

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 576

1 And then in January, you reached out
2 to Bob Smith to tell him that Girling and Skaggs were
3 going to speak and advised them that this conversation
4 would not constitute an offer or otherwise be
5 precluded by the standstill; correct?
6 **A. Is this the later in January one?**
7 **Q.** Let's look at 623.
8 **A. Yes. I recall this chain of emails,**
9 **and I shared my interpretation of the standstill and**
10 **that it was -- the conversation that was going to**
11 **happen was, in my view, not violative of the**
12 **standstill.**
13 **Q.** And this is -- your original email to
14 Bob is on January 25th, at about 11:51 in the morning;
15 correct?
16 **A. Yes.**
17 **Q.** And you are in Calgary; is that right?
18 **A. Yes.**
19 **Q.** Is that Pacific or Mountain Time?
20 **A. Mountain Time.**
21 **Q.** And your January 25th email notes your
22 understanding that you would need a written invitation
23 from the Columbia board to discuss any of the matters
24 covered in Section 3 of the standstill; right?

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 578

1 **Q.** Isn't the making of an offer, by
2 definition, the central thing that's prohibited in the
3 standstill, or did I misread that?
4 **A. Yes, agreed. But we weren't making an**
5 **offer.**
6 **Q.** I see. And you get this, and you are
7 not comfortable with this. You respond to him; right?
8 **A. What do I say?**
9 **Q.** In fact, you call him out. You tell
10 him he's wrong. "Thanks Bob. I am comfortable with
11 the conversation planned to take place this afternoon.
12 As indicated, if we were to move forward, the words in
13 the standstill that we agreed would appear" -- and you
14 underline "appear" -- "to require more explicit Board
15 direction for an offer (even if conditioned)."
16 That's your language; right?
17 **A. Yes. I'm telling him an offer would**
18 **require explicit board invitation or direction.**
19 **Q.** So you say, there's a meeting; I want
20 to confirm it's not a violation. He says, I'll tell
21 you what, an offer isn't a violation in this context.
22 And then you say, wait a minute, wait a minute, wait a
23 minute; it appears that you need more.
24 Fair to say?

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 577

1 **A. Yes.**
2 **Q.** And the matters covered in Section 3
3 are acquisition, proposal, seeking to acquire, the
4 kinds of things we talked about earlier; right?
5 **A. Yes.**
6 **Q.** Mr. Smith responded to your email; is
7 that true?
8 **A. Yes, he did.**
9 **Q.** So let's look at Smith's response.
10 You share with him your view that a range isn't an
11 offer. And he writes, in part, "I confirm by this
12 email that receipt of an offer to purchase our
13 securities in this context would not violate or be in
14 contravention with the terms of the NDA, including the
15 standstill provision."
16 So you write to share your legal
17 interpretation that a meeting and conversation
18 wouldn't constitute an offer, and he writes back to
19 say an offer doesn't violate the standstill?
20 **A. He says "in this context."**
21 **Q.** "In this context."
22 **A. And, again, the word "offer," again,**
23 **is being used as shorthand. He was referring to the**
24 **broad discussions that were to take place.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 579

1 **A. I'm not sure if I'm capturing what you**
2 **are saying there. But I know that -- I think the**
3 **understanding that we had between the two of us was**
4 **that the conversation taking place that afternoon**
5 **would not constitute an offer. If, however, down the**
6 **road, we ever got to a place that there was an offer,**
7 **I would expect that it would only be a -- an offer**
8 **would only be provided by TransCanada in compliance**
9 **with the standstill under the NDA, which required**
10 **express board invitation.**
11 **Q.** Why did you write back to Bob Smith
12 after he told you an offer doesn't require -- doesn't
13 violate the standstill?
14 **A. I don't think that's what he meant.**
15 **He said "in this context." And I think when he used**
16 **"offer," he meant the conversation, which of course**
17 **wasn't an offer. I think it was just poor choice of**
18 **language on his part. But I think we understood each**
19 **other as to what was happening at the time.**
20 **Q.** So he thought a conversation was an
21 offer?
22 **A. No.**
23 **Q.** I'm sorry, I must have misheard you
24 just a moment ago.

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 580

1 **A. No, of course not.**
2 Q. You said he said an offer "in this
3 context."
4 Regardless of how you interpreted it,
5 why did you write back to him?
6 **A. I wanted to confirm that -- I just**
7 **said, the conversation that's going to take place this**
8 **afternoon was not an offer, it was just a**
9 **conversation, but in the future, if an offer was going**
10 **to happen, we would not do so unless under the**
11 **standstill, which required express board invitation.**
12 Q. You actually referred him to the
13 language of the standstill; right?
14 **A. Yes.**
15 Q. Because you knew that his
16 interpretation, at least one possible reading of his
17 interpretation, was just plain wrong; that an offer
18 was prohibited by the standstill; correct?
19 **A. I think it was just a poor choice of**
20 **words for him in his very brief email. I can't speak**
21 **for him.**
22 Q. Instead of responding to him, Bob,
23 what do you mean, that's a poor choice of words, you
24 went right to the language of the standstill and wrote

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 582

1 of Columbia, recapped the call. And I want to focus
2 you on JTX 622. And you'll see -- if we go to the
3 second page of this and work our way up from the
4 bottom, you see somebody by the name of Jeffrey
5 Cliver. And he mentions a call. He says, "We[']ll be
6 getting a debrief then." And this is entitled "CPG
7 debrief call."
8 And let's move up the chain, if we
9 can. And you'll see two above that --
10 ATTORNEY VARALLO: One more up,
11 please, Joe.
12 Q. -- there's a request to Mr. Cliver's
13 colleague that minutes be taken of the call; right?
14 **A. It's not my -- I don't know these**
15 **people, but I see there's some bullet points where**
16 **they are summarizing a punchline.**
17 Q. All right. So let's look at the first
18 page, and let's see -- after Mr. Cliver's colleague
19 was asked to take notes or minutes of the call, let's
20 see how his colleague recites the call.
21 ATTORNEY VARALLO: And I'd ask you to
22 blow the first page up, Joe, please. Let's focus on
23 the first paragraph, actually.
24 Q. So it says, "Note: Punchline: - [J]25

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 581

1 him back language that was very clearly intended to
2 preserve your position that this was not intended to
3 be an offer; correct?
4 **A. Yes.**
5 Q. Thank you.
6 Now, you learned, didn't you, either
7 before or after the January 25th call, that
8 Mr. Girling communicated a range of 25 to \$28 per
9 share?
10 **A. I think that's right. I'll take your**
11 **word for it. I don't have it in front of me.**
12 Q. And you are okay with that because, in
13 your view, expression of a range is only an indicative
14 intent and isn't an offer because it can't be
15 accepted; fair to say?
16 **A. Correct.**
17 Q. So let's look at how your -- Lazard
18 was one of the firms representing you in this deal; is
19 that right?
20 **A. No, they were not.**
21 Q. I'm sorry. Lazard was representing
22 Columbia; right?
23 **A. Correct.**
24 Q. So let's look at how Lazard, on behalf

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 583

1 to [\$]28/share all-cash offer." And it continues.
2 So you weren't on the call at which
3 Girling made the 25 to \$28 indicative intent,
4 according to you, or offer, according to Lazard;
5 right?
6 **A. Again, I don't know them. I don't**
7 **know how they use the term "offer," if they used it as**
8 **shorthand.**
9 Q. I appreciate that, but that's not the
10 question I asked you. I asked you, were you on the
11 call?
12 **A. No.**
13 Q. And Girling didn't report to you what
14 happened during the call; right?
15 **A. Not directly, no.**
16 Q. In fact, you were giving advice to
17 Poirier, and Poirier was choosing to pass it on or not
18 to Girling, but you weren't speaking directly to
19 Girling; fair to say?
20 **A. Correct. I'm not sure about the word**
21 **"choosing." But that's not for me to say, whether he**
22 **chose to pass advice on or not.**
23 Q. My point is, you weren't advising
24 Girling directly? To the extent you were advising

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 584

1 him, you were advising him through Poirier?
2 **A. For the most part, yes.**
3 Q. And you weren't invited to sit on the
4 call that Girling made on the 25th of January?
5 **A. No, I wasn't.**
6 Q. But someone who was referred to it as
7 an "all cash offer." Any reason to dispute that
8 person's recitation of what happened during that call?
9 **A. I don't know anything about them. I**
10 **don't know.**
11 Q. Let's skip forward, if we can, in time
12 to early March. You recall, don't you, that in early
13 March, you learned that your CEO was going to discuss
14 a range of prices at which TransCanada might be
15 willing to transact, and you reached out to Mayer
16 Brown for advice in this regard?
17 **A. Sorry. Can you tell me the date**
18 **again.**
19 Q. Early March. Take a look at 813,
20 JTX 813.
21 ATTORNEY VARALLO: And let's blow up,
22 if we can, the middle email from Johnston to Noreuil,
23 from March 3rd, please.
24 Q. So this is your email to your lawyers

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 586

1 he says, "A short e-mail from you to Bob asking him to
2 confirm that the board consents to the discussion
3 would make sense to us."
4 Fair to say?
5 **A. Yes.**
6 Q. Now, you specifically note that the
7 NDA and standstill require that you get an express
8 written invite from the Columbia board to make an
9 offer; right?
10 **A. Yes.**
11 Q. But you were asking for advice here,
12 even though you believed Mr. Girling would be talking
13 about a range; fair to say?
14 **A. Yes.**
15 Q. And your lawyers then suggest an email
16 for you to send; right?
17 **A. Yes.**
18 Q. And if you would open to 814, perhaps
19 we can identify that as the advice you got.
20 So this is the draft email your
21 lawyers sent to you; right?
22 **A. Yes.**
23 Q. And 814 notes the upcoming discussion
24 of a price range, quotes the standstill, and asks for

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 585

1 at Mayer Brown; correct?
2 **A. Correct.**
3 Q. And it begins, "Given the terms of our
4 NDA — that is — the standstill and that we need
5 express written invite from their board to make an
6 offer — is there anything we should do to ensure that
7 we are not offside."
8 And then you continue in the second
9 paragraph, "Russ will be discussion range of price
10 with their CEO Saturday morning" -- "Russ" is
11 Mr. Girling here; is that right?
12 **A. Correct.**
13 Q. And what you are intending to
14 communicate is that you believed Mr. Girling would be
15 discussing a range of indicative pricing on that
16 coming Saturday; right?
17 **A. Yes.**
18 Q. And you go on to say in the next
19 paragraph, "Should I get something in writing or is it
20 enough that we have their board approval of the Merger
21 Agreement."
22 Correct?
23 **A. Yes.**
24 Q. And then Mr. Noreuil comes back, and

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 587

1 confirmation that the Columbia board expressly
2 requested an offer; correct?
3 **A. Yes.**
4 Q. And you actually sent something
5 substantially similar to this to Mr. Bob Smith at
6 Columbia; correct?
7 **A. Yes.**
8 Q. And if you open to 827 -- I think we
9 had talked about 827 in your direct -- that's what you
10 actually sent to Bob Smith; right?
11 **A. Yes.**
12 Q. And it's almost verbatim identical to
13 what your friends at Mayer Brown drafted for you; is
14 that right?
15 **A. Yes.**
16 Q. And your email expressly notes that
17 TransCanada needed Capricorn board's written
18 invitation before TransCanada sought to propose or
19 require securities of Columbia; correct?
20 **A. Yes.**
21 Q. So help me here. In January, when you
22 sent your email to Mr. Bob Smith saying that your
23 CEO's call, which was about range, would not violate
24 the standstill -- we have looked at that, at JTX 623,

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 588

1 earlier -- you didn't ask for a waiver because you
2 expected your boss to propose a range; right?
3 **A. Yes. It was very broad discussions at**
4 **that time. We had actually advanced discussions along**
5 **the merger agreement substantially at that point. So**
6 **it was a bit of a different context than early**
7 **January.**
8 Q. Okay. But on March 3rd, you also
9 expected your CEO to propose a range; right?
10 **A. That's what I expected, but I wasn't**
11 **going to be in the room and I wasn't sure where the**
12 **conversation would go.**
13 Q. Well, you weren't sure on January 25th
14 either; right?
15 **A. Yes, but we weren't even close. We**
16 **were just basically kicking the proverbial tires to**
17 **see if they were even interested in transacting still.**
18 **At that point, we had advanced a merger agreement**
19 **substantively, and I was feeling to the point we're**
20 **getting really close here. In fact, Bob was the one**
21 **who initiated the email to me, saying probably the**
22 **same thing: We're getting close here. Is there**
23 **anything that you need to do?**
24 **And so, if anything, I was probably**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 590

1 don't waive" provisions of the standstill; yes or no?
2 **A. Yes. Yes.**
3 Q. You agree, don't you, that if
4 Mr. Girling had made a specific offer during that
5 call, the standstill would have required that the
6 Columbia board give TransCanada a written invitation
7 to make an offer before you did so?
8 **A. If it was an offer that was capable of**
9 **being accepted under the terms of the standstill.**
10 Q. Is that lawyer speak for yes?
11 **A. I think so. I'm just saying that we**
12 **were trying to comply with the standstill.**
13 Q. I've been a lawyer for almost 40
14 years. I speak lawyer pretty well. But I think that
15 was intended to be yes; fair to say?
16 **A. I think so, yes.**
17 Q. You don't think that this email you
18 sent at 4:44 on 3/3/16, you don't think that this
19 particular email you sent in advance of Girling
20 discussing a range of prices was in any way violative
21 of the "don't ask, don't waive" provisions of the
22 standstill; correct?
23 **A. Correct.**
24 Q. But if you are asking for Columbia's

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 589

1 **bending over backward to make sure that we were in**
2 **compliance with the standstill.**
3 Q. Okay. You thought that you were
4 getting close and your CEO might actually go beyond a
5 range and make a proposal?
6 **A. Things were happening very fluidly at**
7 **this point. We had finished negotiations. There was**
8 **only a few places of the -- in the merger agreement**
9 **that were needing to be finally negotiated. And I**
10 **also know that our boards were meeting in the coming**
11 **days, and I wanted to -- well, again, Bob was checking**
12 **in with me, and I just wanted to make sure that every**
13 **"T" was crossed and "I" was dotted.**
14 Q. When you said this, you were aware of
15 the "don't ask, don't waive"; correct?
16 **A. Again, he sent me the email.**
17 Q. I'm sorry?
18 **A. I think this email was initiated by**
19 **Bob.**
20 Q. When you sent your email to Bob that
21 we got up on the screen, at JX 827, dated March 3rd,
22 2016, at 4:44:47 p.m., CST --
23 **A. I'm with you.**
24 Q. -- you understood the "don't ask,

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 591

1 permission in advance of a potential pinpoint offer
2 from Girling, you were, in fact, violating the "don't
3 ask, don't waive," weren't you?
4 **A. Not my view. Not my interpretation.**
5 **Certainly that wouldn't be in Mayer Brown's**
6 **interpretation either. They drafted the email.**
7 Q. You, in fact, sent this email because,
8 while you thought Girling was going to talk about a
9 range, you couldn't be sure what he would say and you
10 wanted to protect TransCanada in case he made a
11 pinpoint offer; isn't that true?
12 **A. Yes. We were being very conservative**
13 **to ensure that we didn't violate the standstill.**
14 Q. I don't get it. I really don't get
15 it. If you thought he might go to a pinpoint offer,
16 you were asking for approval in violation of the
17 "don't ask, don't waive," weren't you?
18 **A. No, that's not my interpretation. It**
19 **never was. Nor was it Mayer Brown's. Nor was it,**
20 **presumably, Bob Smith's or his counsel's.**
21 Q. It's true, isn't it, that when the
22 appraisal decision came out, you're not even sure that
23 you read the whole thing; you probably read it?
24 **A. When the appraisal decision came out,**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 592

1 I was halfway around the world in a different time
2 zone trying to enjoy vacation.
3 Q. You were in Bali; right?
4 A. Yes.
5 Q. And you think, if you read it, you may
6 have read it on your telephone; is that right?
7 A. That's right.
8 Q. And when I took your deposition --
9 this seems like just yesterday, but it's actually a
10 few months ago when we had a chance to meet by Zoom --
11 you didn't know -- you didn't know at that point, just
12 a few months ago, that this very Court had found that
13 a number of your senior management's communications
14 violated the standstill; correct?
15 A. I did not know, no.
16 Q. And you had no recollection, just a
17 few months ago, of this Court finding that you
18 personally violated the standstill; right?
19 A. Correct.
20 Q. I take it you disagree with the
21 Court's findings about your personal breach and
22 TransCanada's breach of the standstill as well; is
23 that right?
24 A. I respect the Court's decision.

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 594

1 sorry. That's the only dictionary we had. I wish I
2 could have done better.
3 Q. I'm happy to share this with your
4 counsel so he can make sure I'm reading it correctly.
5 Let me read to you the Merriam Webster --
6 ATTORNEY OLSEN: I trust you are
7 reading correctly.
8 ATTORNEY VARALLO: Thank you, Counsel.
9 Q. Your counsel is such a gentleman, such
10 a great guy.
11 Let me read you from the Merriam
12 Webster Dictionary, New Edition, 2004 -- it's the 11th
13 edition -- the definition of "seek." "Seek, sought,
14 seeking. To search for." That's one. Two, "To try
15 to reach or obtain." Three, "Attempt -- seeker."
16 Is that consistent with your basic
17 English-language understanding of the word "seek"?
18 A. I don't disagree with the dictionary
19 definition you just quoted; but I think in the legal
20 context of a standstill, it would mean something
21 different.
22 Q. Well, if it means "offer," then it's
23 duplicative of offer in the standstill; right?
24 A. That's typical in legal documents,

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 593

1 Q. But you don't agree with it?
2 A. I don't agree with it, but I respect
3 the Court's decision.
4 Q. We talked a little while ago about
5 seeking, the language "seeking" or "proposed to
6 acquire." And I want to explore that with you a
7 little bit.
8 How do you define "seek"?
9 A. I would define "seek" to be similar to
10 offer or proposal. It's something that can be
11 accepted or granted. For instance, if you were in
12 court looking to seek an injunction, there would be a
13 formal response to that.
14 Q. So you think "seeking" means making an
15 offer?
16 A. It's something similar to that.
17 Q. I know Canada is bilingual. English
18 is your first language; is that true?
19 A. Yes.
20 Q. So I've got here my home -- I borrowed
21 it from my wife this morning, the Merriam Webster
22 dictionary, New Edition. It's got 2,000 new words.
23 Very special document. It was 2004.
24 ATTORNEY VARALLO: Your Honor, I'm

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 595

1 though, isn't it?
2 Q. Well, except when we come into court
3 and we ask a Court to parse language. One of the
4 doctrines, as you know, that is used in parsing
5 language in agreements is to avoid rendering any
6 language surplusage.
7 Can you agree with that as a general
8 matter of contract interpretation?
9 A. I'll go along with that, yes.
10 Q. And you write documents as part of
11 what you do; right?
12 A. Correct.
13 Q. And you don't just put duplicative
14 stuff in it. You try to write clearly so that if the
15 document is ever disputed, there's no issue as to what
16 was meant; fair to say?
17 A. Yes. I also know that lawyers were
18 paid by the word back in the day, and often they'd use
19 the same word three different ways to say the same
20 thing just to be fulsome.
21 Q. Not all lawyers are paid by the word.
22 Some of us actually care about time and clarity.
23 When you requested exclusivity in
24 January of 2016, was TransCanada seeking to do a deal

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 596

1 at that point, when it sought exclusivity?
2 **A. We were still undergoing due**
3 **diligence, valuation. We were still interested in**
4 **potentially transferring a deal with Columbia, yes.**
5 Q. So you were seeking to do a
6 transaction?
7 **A. I'm not sure I would use the word**
8 **"seek." But if that is the word you want to use,**
9 **that's fine.**
10 Q. Oh, yeah, I like you going there.
11 What I really want is for you to give me your best
12 understanding. Honestly, I want your best
13 understanding.
14 **A. Yeah, absolutely. We were very**
15 **interested in acquiring Columbia. We wanted to do so**
16 **in a way that was, obviously, in the best interests of**
17 **our company. And we were doing so in compliance with**
18 **all our agreements and using all our best practices.**
19 **And we had advisors helping us along the way.**
20 Q. So I want to spend a couple of minutes
21 on your understanding of "seeking" here. And I've
22 asked my colleague to put before you a copy of the
23 pretrial order. The pretrial order has stipulations
24 of fact in it. And I can refer you to the specific

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 598

1 that right?
2 **A. That looks to be the case, yes.**
3 Q. Let's look at the pretrial stipulation
4 at paragraph 273. And you'll see both sides have
5 agreed as a fact that "On December 2nd, [], Fornell
6 provided Poirier with a proposed engagement
7 letter" Right?
8 **A. Yes.**
9 Q. At that point, was the company seeking
10 to acquire Columbia?
11 **A. Colloquially, yes.**
12 Q. How about if we turn to mid-December,
13 when Poirier called Steve Smith to request a meeting
14 to pursue TransCanada's interest in the deal. At that
15 point, are you seeking to acquire Columbia?
16 **A. Using "seeking" as the colloquial**
17 **term, we were not violating the standstill.**
18 Q. I think we know as well that no later
19 than December 19th, 2015, someone told Mr. Skaggs or
20 Mr. Smith that TransCanada remained "quite interested"
21 in an acquisition and that it could be at
22 approximately \$28 per share.
23 And for that I would refer you to
24 paragraph 282 of the pretrial stipulation. This is

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 597

1 stipulations if you are unaware of a particular fact.
2 And I want you to have it handy because I want to go
3 through a couple of these and ask you about whether
4 you were seeking to acquire at these various
5 junctures.
6 So let's start, if we can, with the
7 December 2nd, 2015, conversation between Mr. Girling
8 and Mr. Skaggs. And for your reference that's
9 described at pretrial order paragraph 272.
10 ATTORNEY VARALLO: Joe, maybe you can
11 bring it up on the screen so that we all have it.
12 Q. It just says -- because we were being
13 paid by the word, I guess -- it just says, "Skaggs and
14 Girling had a phone call on December 2, 2015."
15 Is it your view that your company was
16 not seeking to acquire Columbia in early December of
17 2015?
18 **A. We were seeking in the commonplace**
19 **usage of the word "seek," yes.**
20 Q. By the way, is it just plain
21 coincidence that Wells Fargo sent TransCanada its
22 retention letter to act as financial advisor to
23 TransCanada in its potential acquisition of Columbia
24 that very same day? It came over on the 2nd; isn't

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 599

1 Matthew Gibson reporting that there was a meeting
2 scheduled at the request -- at TransCanada's request,
3 and that TransCanada had indicated that they could be
4 at \$28 a share. It actually says "approximately,"
5 using the -- I don't know what you call that. A
6 tilde, I think it's called.
7 Fair to say that at least using the
8 commonly understood definition of "seeking," you were
9 seeking to acquire Columbia at that point?
10 **A. Yes.**
11 Q. And then we know that "On January 7th,
12 2016, Mr. Poirier informed Mr. Stephen Smith that
13 TransCanada was interested in acquiring Columbia, and
14 wanted ... due diligence"
15 And that's from paragraph 290 of the
16 pretrial order. Again, colloquially understood to be
17 seeking to acquire the company at that point; is that
18 right?
19 **A. Yes.**
20 Q. We know as well that Wells Fargo was
21 formally engaged in connection with a potential
22 Columbia bid. That's at paragraph 300 of the pretrial
23 order.
24 At the point you signed up Wells

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 600

1 Fargo, given that this was sort of middle of July -- I
2 think the stipulation says July 19th.
3 **A. January 19th.**
4 Q. Colloquially seeking to acquire;
5 correct?
6 **A. On January 19th.**
7 Q. I'm sorry. I apologize.
8 January 19th. You are absolutely right.
9 **A. Yes.**
10 Q. Colloquially, anyway, you were seeking
11 to acquire the company by then?
12 **A. Yes.**
13 Q. And if I asked you a series of, I
14 don't know, two or three pages of questions about
15 every point after that, fair to say you'd give me the
16 same answer?
17 **A. Yes. I guess in no way were any of**
18 **these options, in my mind or in my interpretation,**
19 **prohibited under the standstill agreement.**
20 Q. We can save some time. I'll move on.
21 I want to talk about fiduciary duties
22 for a couple minutes. True, isn't it, that as part of
23 your work on this deal, you became generally familiar
24 with fiduciary duties imposed by Delaware law on the

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 602

1 questions. Right?
2 **A. Yes.**
3 Q. You got this email; right? No doubt
4 about it?
5 **A. Yes, it looks like I was. I don't**
6 **recollect it specifically. It's been a while since**
7 **I've seen it.**
8 Q. Sorry?
9 **A. It's been a long time since I've**
10 **looked at this email.**
11 Q. I absolutely appreciate that. Take a
12 moment to read it. I'll just have one or two
13 questions about it. I want to focus on numbered
14 paragraph 3. Let me know when you are ready.
15 **A. Go ahead.**
16 Q. Numbered paragraph 3, one of the
17 questions that counsel at Mayer Brown suggested you
18 ask the Columbia folks is: "How could the
19 independence of the Capricorn board be attacked with
20 respect to these matters? Did any board member have
21 personal reasons ([whether or] not shared by
22 shareholders generally) for supporting these
23 decisions?"
24 Correct?

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 601

1 Columbia board?
2 **A. Yes.**
3 Q. And you understood that one of those
4 duties was that the Columbia board would have to do
5 its very best to maximize price in the deal; correct?
6 **A. Correct.**
7 Q. Indeed, you even got advice about a
8 case that was famous in Delaware called the *Revlon*
9 case.
10 Do you remember getting advice about
11 *Revlon*?
12 **A. Yes.**
13 Q. And at one point or another, Mayer
14 Brown gave you a list of diligence questions to ask
15 which were addressed to the question of whether
16 Columbia was fulfilling its fiduciary duties; right?
17 **A. Correct.**
18 Q. So let's look at Exhibit 711 in your
19 book. And I'll ask Joe to pull it up as well and see
20 if you can identify that.
21 You'll see right in the middle of this
22 email to you from Andrew Noreuil from Mayer Brown he
23 says, "As a diligence matter, the basic questions to
24 ask Capricorn are:" and then he lists a series of

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 603

1 **A. Yes.**
2 Q. Now, after you got this memo, you set
3 up, didn't you, a call to talk about board and
4 fiduciary matters?
5 **A. Sorry. Who did I set up a call with?**
6 Q. Sorry?
7 **A. I set up a call with Mayer Brown?**
8 Q. Well, let's look at JX 824, and
9 specifically .003. And we'll see if we can focus in
10 here.
11 So take a look at the March 2nd email
12 at the bottom. Bob Smith writing to you,
13 "Chris - Just following up on the Board/Fiduciary
14 discussion. Joe and I are available tomorrow at noon
15 or 4 [Eastern Time] for a call. Please let [me]
16 know"
17 You in the email in response say,
18 "Thanks ... I would [] like somebody from Mayer Brown
19 to join"
20 And then moving up, an attorney by the
21 name of Medow joins you on that call.
22 Fair for me to understand from this
23 that there was a call set up in which you involved
24 Mayer Brown lawyer to talk about Columbia's fiduciary

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 604

1 duties?
2 **A. That's fair, yes.**
3 Q. And also fair for me to understand
4 that Mr. Medow, who you asked to join, was a litigator
5 brought in to help you assess litigation risk in the
6 deal?
7 **A. Yes.**
8 Q. You don't recall one way or the other
9 whether this call addressing the board and fiduciary
10 duties addressed whether one or more Columbia board
11 members had different interests not shared by
12 shareholders; right?
13 **A. I don't recollect the conversation.**
14 Q. But would it be fair for me to assume
15 that, given that you asked for and received a list of
16 questions to ask, you would have asked the questions
17 you were given to ask?
18 **A. Yes. It seems like there could have**
19 **been a time difference there between the questions and**
20 **asking. So I don't know if it is the same discussion,**
21 **but it may very well have been.**
22 Q. Let's talk about exclusivity for a
23 moment. I take it that TransCanada wanted exclusivity
24 in this deal; fair to say?

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 606

1 heard through Francois that the Capricorn[] board is
2 keen to move forward." This is on January 28th of
3 2016.
4 And you go on, "While they are
5 apparently not adverse to giving us exclusivity, They
6 do not want to have an executed agreement in concern
7 that plaintiffs counsel will get their hands on it
8 (???)." And then you continue, "Instead - they have
9 offered a gentleman's agreement between the two CEOs."
10 Have I correctly read your email?
11 **A. Yes.**
12 Q. Now, this idea of a gentleman's
13 agreement to keep this out of the prying hands of
14 plaintiffs' counsel, that was something that was a
15 Sullivan & Cromwell idea; wasn't that right?
16 **A. I don't know whose idea it was, but**
17 **it's not something that we generally do.**
18 ATTORNEY VARALLO: Can we put up -- do
19 you have, Joe, the pretrial brief of my friends at
20 TransCanada at page 20? Do we have that loaded
21 somewhere? Oh, lovely.
22 Your Honor, this is the pretrial brief
23 that was filed in your court in this action.
24 Q. Let's see. The second sentence in the

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 605

1 **A. Yes.**
2 Q. And it's correct, isn't it, that you
3 are aware that when TransCanada initially asked for
4 exclusivity, Columbia suggested that in order to avoid
5 the fact of exclusivity coming to the attention of
6 unnamed plaintiffs' lawyers -- they are pesky, those
7 plaintiffs' lawyers -- that they were prepared to
8 offer you a gentleman's agreement instead of a written
9 agreement on exclusivity.
10 Do you recall that?
11 **A. I do.**
12 Q. And I think we had looked in your
13 counsel's direct examination at at least part of that
14 email or the email referencing this. Maybe we didn't,
15 but let's pull up JTX 647.
16 So I want to focus on the email up top
17 from you to Andrew Noreuil and others. Andrew Noreuil
18 was one of the day-to-day guys who advised you as a
19 deal lawyer at Mayer Brown; right?
20 **A. Yes.**
21 Q. And you sent this to Andrew and Marc,
22 Marc being Marc Sperber, another deal lawyer?
23 **A. Yes.**
24 Q. And you say, "Andrew/Marc I have just

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 607

1 first full paragraph: "Sullivan had proposed a form
2 of 'informal exclusivity' - which Frumkin explained
3 meant 'that we would tell them if we started to work
4 with anybody else ...'" -- and it goes on.
5 So the only Sullivan here is
6 Sullivan & Cromwell; right?
7 **A. Yes.**
8 Q. And Sullivan & Cromwell was the firm
9 that Mr. Frumkin worked for; right?
10 **A. Correct.**
11 Q. Did it concern you at all that the
12 lawyers for your merger partner were proposing that
13 you enter into an agreement to violate the law?
14 **A. I can't surmise that they were -- I**
15 **don't think an unwritten agreement in itself violates**
16 **the law. It's not a practice that we would follow**
17 **generally.**
18 Q. You are an expert on disclosure law;
19 right?
20 **A. Does it say that they wouldn't**
21 **disclose it here? I don't think so.**
22 Q. You do a lot of disclosure law; is
23 that fair to say?
24 **A. Yes, it is.**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 608

1 Q. So let's go back to this email that
2 you wrote just a moment ago -- that we looked at just
3 a moment ago. I think it's 647. I'm reading from the
4 second sentence again. "They do not want to have an
5 executed agreement in concern that plaintiffs counsel
6 will get their hands on it"

7 Well, Madam, how were you going to
8 keep it out of plaintiffs' hands if you were going to
9 disclose it? If you disclose the gentleman's
10 agreement, that would be something that would be
11 picked up by those pesky plaintiffs' lawyers; isn't
12 that right?

13 A. Well, that's what I was -- it's kind
14 of hearsay in this email, but that's why I have a
15 number of question marks. And we ultimately decided
16 that we wouldn't do that. And I knew that it would be
17 something that had to be disclosed.

18 Q. I understand that you were ready to
19 follow the law. But my question is, did it give you
20 concern that the lead counsel for the other side was
21 proposing that you enter into a gentleman's agreement
22 to keep this out of the disclosure document?

23 A. It wasn't my knowledge who was
24 proposing it from Capricorn. It could have been one

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 610

1 counsel will get their hands on it," you put "(???)".
2 Right?

3 A. Yes.

4 Q. That was your way of saying, this is
5 strange; what's going on. Right?

6 A. Yeah. I mean, I don't agree with
7 trying to keep things out of plaintiffs' counsel
8 hands. That's not our practice.

9 Q. Now, after you got --

10 A. My question marks could be I don't
11 even know if that's what was said. It was also, I
12 don't know, it was a little bit of indirect
13 conversation.

14 Q. It was meant to call attention to this
15 and to focus further conversation; is that fair to
16 say?

17 A. Between me and my counsel, yes, that
18 we wanted to ensure.

19 Q. Exactly.

20 So after you got by the idea of a
21 gentleman's agreement on exclusivity that would be
22 kept from those prying plaintiffs' lawyers, you got
23 down to exchanging drafts of a written exclusivity
24 agreement; correct?

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 609

1 of their financial advisors, for instance. It didn't
2 say here.

3 Q. Somebody on the other side proposed
4 that we do this as a gentleman's agreement "in concern
5 that plaintiffs counsel will get their hands on
6 it" Is that correct?

7 A. Yeah. And I have question marks there
8 because I may have interpreted what I heard wrong.
9 All I knew is that somebody -- it wasn't necessarily
10 Sullivan & Cromwell, but somebody proposed that.

11 Q. Well, we looked at the brief that was
12 filed in court, and your side, your lawyers ascribed
13 this to Sullivan; right?

14 A. You have to turn back. Sorry. My
15 memory is ...

16 Q. Well, did this occur to you as
17 unusual? Or was this something that was par for the
18 course at your practice, or did you find this to be
19 somewhat unusual?

20 A. I hadn't done a lot of exclusivity
21 agreements; but it was just something that typically
22 we want to have our agreements in writing, so that's
23 what we asked for.

24 Q. In fact, you put after "plaintiffs

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 611

1 A. Yes.

2 Q. And the first draft of an exclusivity
3 agreement that Mayer Brown put forward included a
4 provision prohibiting Columbia from waiving any other
5 standstill agreements that it had entered into with
6 other companies; correct?

7 A. Yes.

8 Q. And that provision was initially
9 asserted by your lawyers, and it made it through a
10 second draft of the agreement; correct?

11 A. I can't remember what the order, but
12 eventually I don't think it ended up --

13 Q. I'm happy to show it to you. So take
14 a look at 643, page 003.

15 ATTORNEY VARALLO: And, Joe, if you'd
16 bring that up, I'd appreciate it. Go to page 003.

17 Q. Drawing your attention, if I may, to
18 643, on page 003, take a look at the last sentence on
19 the first page of the document. That's where you are
20 asking for that provision; right?

21 A. Yes.

22 Q. So now let's look at the second draft,
23 which is JTX 654.

24 And I'll ask Joe to pull that up. And

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 612

1 it's page 005.
2 Take a look at the first full sentence
3 on the top of the second page of this. The same
4 language makes it there; right?
5 **A. Correct.**
6 Q. And then let me show you the third
7 draft, which is JTX 655. And we can look at this all
8 you want, but you are not going to find the language
9 in 655.
10 Would you accept that representation?
11 **A. Yes.**
12 Q. So this provision had some value to
13 TransCanada, because if Columbia couldn't waive other
14 standstills, then other potential bidders couldn't
15 compete without TransCanada's consent; right?
16 **A. Correct.**
17 Q. And given the inclusion of the
18 provision in the first two rounds of the draft
19 exclusivity agreements, it's fair for me to
20 understand, isn't it, that Columbia knew that
21 TransCanada didn't want other standstills waived?
22 **A. I don't know what Columbia wanted.**
23 Q. I guess that's fair. I guess that's
24 fair. We'll let the Court take whatever the Court

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 614

1 **management needed to take that away and confirm.**
2 Q. So let's look at the bottom line.
3 **A. That's what I'm looking at.**
4 Q. Bottom two lines, actually, of the
5 first page. You indicate in parentheses, "(Wells
6 withdrew)."
7 So Fornell and whoever else was there
8 from Wells left the meeting at this point; right?
9 **A. Yes.**
10 Q. And then somebody from the board says,
11 "Does fairness opinion hold at \$26?"
12 Correct?
13 **A. Yep.**
14 Q. And then it says, "Yes - page 5 of
15 materials."
16 Was that the football chart?
17 **A. Likely. I know there's a lot of**
18 **information, different metrics.**
19 Q. And then, "FP will confirm."
20 That's Francois Poirier was going to
21 go back to and talk to Mr. Fornell and find out
22 whether they could do an opinion at \$26; right?
23 **A. Yes, although I'll also just note**
24 **these are, of course, draft minutes. We don't just**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 613

1 wants to take from that; fair to say?
2 **A. Sure.**
3 Q. Let's turn to March 9. I want to
4 focus for a moment on the March 9 meeting. I think
5 we've seen earlier in this trial that you took notes
6 of that meeting; correct?
7 **A. Correct.**
8 Q. And the notes were taken
9 contemporaneously by you, either on a computer or some
10 sort of portable device; correct?
11 **A. iPad. Yes.**
12 Q. And you used those notes to help
13 create the draft minutes; fair to say?
14 **A. Yes.**
15 Q. So please open to JTX 913. And I hope
16 you can tell me that these are the notes of your
17 March 9 meeting.
18 **A. Yes.**
19 Q. Am I correct that at this meeting the
20 board directed management to determine whether \$26 per
21 share was a price at which Wells Fargo could issue a
22 fairness opinion?
23 **A. There is some conversation around**
24 **whether the fairness opinion still held at 26. But**

CHANCERY COURT REPORTERS

C. Johnston - Cross

Page 615

1 **rely on our financial advisors. We were also relying**
2 **on our own internal valuations.**
3 Q. That's fair.
4 The board was also told at this
5 meeting that there was a real possibility of a media
6 leak coming about the process; right?
7 **A. Correct.**
8 Q. And the board was also --
9 THE COURT: Mr. Varallo, I need to
10 interrupt you. We've reached that time of day. So
11 we'll recess. We'll resume at 9:15 tomorrow.
12 (Proceedings adjourned at 4:45 p.m.)
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CHANCERY COURT REPORTERS

1	I N D E X	
2	WITNESSES:	<u>Page</u>
3	ROBERT SMITH	
4	Direct Resumed by Attorney Harrell	318
	Cross by Attorney James	377
5	SIIM VANASELJA	
6	Direct by Attorney Olsen	434
7	CHRISTINE JOHNSTON	
	Direct by Attorney Olsen	500
8	Cross by Attorney Varallo	540
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		

CHANCERY COURT REPORTERS

<p>ATTORNEY HARRELL: [6] 318/4 338/20 370/8 371/15 376/6 433/11 ATTORNEY JAMES: [5] 377/4 377/22 381/4 393/17 433/9 ATTORNEY OLSEN: [21] 433/19 443/16 451/11 452/5 463/5 496/5 500/6 500/12 500/19 525/6 530/5 531/4 533/1 533/8 533/24 534/9 534/15 540/2 550/13 572/23 594/6 ATTORNEY ORRICO: [10] 443/6 463/7 467/7 475/20 477/24 483/24 496/13 498/2 499/17 500/4 ATTORNEY VARALLO: [26] 532/6 533/17 540/5 548/7 550/3 550/15 551/19 552/12 554/6 555/3 555/18 559/9 561/2 563/19 568/6 570/3 570/8 572/24 582/10 582/21 584/21 593/24 594/8 597/10 606/18 611/15 BY ATTORNEY HARRELL: [5] 318/9 339/1 357/13 358/12 371/18 BY ATTORNEY JAMES: [3] 377/7 377/23 381/16 BY ATTORNEY OLSEN: [9] 434/4 443/23 452/7 500/22 531/6 533/9 534/3 534/20 536/18 BY ATTORNEY ORRICO: [4] 463/15 484/5 496/16 498/22 BY ATTORNEY VARALLO: [5] 540/11 549/3 550/16 561/11 564/9 THE COURT CLERK: [1] 338/17 THE COURT: [35] 317/19 338/14 338/18 338/22 342/18 357/4 357/15 357/21 358/8 376/8 377/2 377/17 433/13 433/17 433/23 443/13 443/22 451/13 452/3 482/15 483/13 483/16 500/8 530/7 531/2 532/24 533/6 533/19 534/2 534/7 534/11 534/17 536/2 540/4 615/9 THE WITNESS: [13]</p>	<p>338/19 338/21 357/11 357/17 358/7 358/10 377/20 433/15 483/11 483/14 484/3 500/10 536/8 \$ \$23.50 [1] 323/1 \$24 [5] 345/9 345/16 442/4 444/14 447/8 \$25 [6] 321/3 402/12 402/17 442/21 467/22 469/1 \$25.25 [8] 345/10 345/15 345/19 345/22 346/5 349/10 456/22 458/2 \$25.50 [4] 422/9 425/17 456/18 531/21 \$26 [37] 349/10 446/3 446/16 448/6 448/21 449/4 449/22 449/23 450/3 450/4 452/11 452/14 453/6 455/12 456/14 466/22 467/22 469/1 472/17 476/12 477/7 477/9 479/6 479/11 479/20 486/16 487/8 566/4 566/22 570/11 570/14 570/17 571/22 572/20 613/20 614/11 614/22 \$28 [12] 321/3 321/18 322/4 400/7 401/6 402/12 402/17 461/24 581/8 583/3 598/22 599/4 \$47 [1] 455/17 \$48 [1] 455/16 \$49 [2] 452/21 482/11 \$5 [1] 436/22 \$50 [1] 455/15 ' '20 [1] 358/21 'developing [1] 318/20 'early [1] 318/22 'informal [1] 607/2 'll [1] 582/5 'offer' [2] 512/11 513/2 'return [1] 347/8 's [1] 448/22 'specifically [1] 518/21 'standstill' [1] 389/15 'take' [1] 420/24 'that [1] 607/3 'Unsolicited [1] 337/15 'whatever [1] 480/15 - -and [4] 317/3 317/5 317/8 317/13 [5] 447/10 522/22 557/20 599/14 603/18 ... [1] 607/4 .003 [1] 603/9 .004 [2] 445/20 556/1</p>	<p>.005 [1] 428/2 .008 [1] 391/11 0 003 [4] 555/4 611/14 611/16 611/18 005 [1] 612/1 006 [1] 460/11 007 [2] 565/21 570/9 008 [1] 388/18 009 [2] 388/17 388/19 05 [1] 470/13 0526 [1] 316/22 0913 [3] 472/24 474/18 476/16 0952 [1] 479/24 1 1/11/16 [1] 319/21 1/20/2016 [1] 331/15 1/25' [1] 318/22 1/26 [1] 330/22 1/8 [1] 318/19 10 [10] 345/1 349/14 349/24 370/7 370/11 421/15 473/22 473/22 485/17 529/5 10 percent [8] 448/23 449/23 451/4 452/12 456/14 457/16 457/19 472/19 101 [1] 477/23 102 [1] 477/23 1024 [1] 355/20 1055 [2] 366/23 368/21 1059 [2] 366/2 368/4 1072 [1] 373/5 1092 [1] 494/19 1093 [1] 454/15 10:15 [1] 415/4 10:44 [1] 376/10 10th [20] 351/20 358/15 421/18 425/3 453/8 479/21 481/3 485/6 488/1 489/4 489/20 489/21 490/24 491/4 491/8 491/10 531/13 536/15 545/10 545/16 11 [5] 318/17 353/16 357/17 381/6 453/14 1107 [2] 395/15 395/23 113 [1] 439/6 11400 [1] 316/21 11:00 [3] 376/9 377/1 418/10 11:24 [1] 368/1 11:51 [1] 576/14 11:59 [1] 417/18 11:59 p.m [1] 349/18 11th [16] 356/4 357/18 358/9 362/7 365/4 418/10 426/9 428/5 428/7 428/20 428/20 490/1 490/10 490/20 491/9 594/12 12 [9] 439/6 439/8 470/21 471/13 472/2 546/6 546/24 547/4</p>	<p>557/19 1206 [1] 538/17 1244 [4] 459/1 496/7 496/15 496/19 1244.005 [2] 459/14 459/17 1244.242 [1] 460/17 1271 [2] 374/2 374/4 1291 [3] 320/9 386/13 427/24 12:31 [1] 451/16 12A [1] 316/9 12th [6] 365/11 382/22 429/14 429/17 430/16 536/21 13 [3] 349/13 439/6 439/13 14 [3] 415/6 470/23 493/12 14A [1] 320/5 14th [17] 422/8 424/2 424/2 424/21 424/22 425/6 425/7 425/16 426/22 427/2 454/16 492/16 492/19 492/22 493/24 494/7 494/18 15 [1] 357/18 15th [1] 397/13 16 [3] 319/21 473/22 590/18 16th [2] 395/12 396/3 1732 [2] 370/6 414/14 1735 [1] 453/12 1774 [1] 493/7 1775 [2] 496/3 496/6 1779 [2] 485/3 485/4 17th [3] 397/17 398/6 458/19 18 [2] 381/6 561/3 19 [1] 316/11 1905 [1] 516/17 1907 [1] 526/19 1908 [1] 531/12 1909 [1] 536/20 191 [6] 334/2 344/24 349/12 357/14 387/20 394/20 1918 [2] 344/23 346/15 1919 [1] 359/20 1920 [3] 358/13 358/20 358/22 1923 [1] 358/19 194 [1] 498/2 195 [2] 498/3 499/18 1979 [1] 434/15 19801 [1] 316/21 1983 [1] 358/16 1994 [3] 434/15 434/17 501/4 19th [5] 598/19 600/2 600/3 600/6 600/8 1:19 p.m [1] 512/7 1:30 [1] 451/14 1:30 p.m [1] 452/2 1st [7] 413/20 414/18 415/4 416/3 509/12 509/15 559/12</p>	<p>2 2,000 [1] 593/22 20 [1] 606/20 20-year [1] 535/4 2001 [1] 434/18 2004 [2] 593/23 594/12 2014 [1] 435/19 2015 [35] 322/13 322/16 322/20 398/18 399/15 434/18 434/18 434/21 466/5 466/9 466/15 466/18 467/3 467/11 467/19 468/23 470/12 470/14 471/21 503/11 503/22 506/23 508/2 509/12 544/20 545/17 554/19 559/12 561/23 565/14 567/8 597/7 597/14 597/17 598/19 2016 [86] 318/17 320/24 324/2 331/15 340/8 345/7 346/17 349/19 370/12 382/22 386/19 391/5 391/8 396/3 397/13 398/7 399/15 401/18 402/8 412/11 413/20 414/4 414/18 415/4 416/20 426/9 428/6 428/7 435/21 436/11 438/4 439/4 441/2 441/9 444/2 446/20 453/14 459/3 464/19 471/10 472/12 472/16 472/23 473/3 473/11 475/9 475/18 475/23 476/1 476/6 476/12 477/8 477/10 479/5 479/18 479/21 481/3 484/19 485/7 486/9 486/15 489/4 492/16 492/22 493/12 493/24 494/7 497/2 497/19 499/3 512/2 513/19 516/19 517/21 521/22 523/17 525/24 526/20 527/24 531/13 536/21 538/18 589/22 595/24 599/12 606/3 2017 [1] 462/1 2018-0484-JTL [1] 316/4 2022 [1] 316/11 20680 [1] 453/13 20th [2] 391/5 392/8 21 [2] 393/12 561/4 23 [2] 548/9 563/20 24 [6] 419/19 419/21 420/2 445/24 467/10 467/19 242 [2] 460/16 497/3 243 [4] 461/1 467/8 467/15 467/16 24th [4] 322/16 322/20 466/18 467/3 25 [12] 318/14 320/23 321/9 321/18 322/4</p>
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2 25... [7] 323/16 324/2 466/21 469/13 581/8 582/24 583/3 25' [1] 318/22 25.25 [12] 415/11 444/15 446/1 447/13 448/4 448/10 457/6 487/4 487/6 487/10 487/15 495/24 25.50 [12] 457/11 458/1 458/11 458/14 458/16 461/24 463/3 492/13 492/23 494/9 495/13 497/12 255-0526 [1] 316/22 25th [15] 398/18 400/23 402/8 403/7 412/19 412/23 447/15 508/2 517/21 521/3 576/14 576/21 581/7 584/4 588/13 26 [12] 330/22 349/2 447/16 456/12 469/13 469/13 478/24 486/24 487/13 487/18 487/19 613/24 26.50 [1] 446/1 26.50 ... was [1] 447/10 26th [1] 393/5 27 [1] 477/24 272 [1] 597/9 273 [1] 598/4 279 [1] 399/23 28 [3] 393/12 396/17 459/2 28/share [1] 583/1 282 [1] 598/24 28th [4] 394/16 521/22 554/19 606/2 28th/29th [1] 412/11 29 [2] 396/17 459/3 290 [2] 420/15 599/15 299 [1] 503/21 29th [1] 412/11 2:59 [1] 530/10 2nd [8] 414/4 416/4 470/14 471/21 597/7 597/24 598/5 603/11	3 3/12/2016 [1] 370/12 3/14 [1] 415/6 3/3/16 [1] 590/18 3/3/2016 [1] 340/8 30 [1] 500/14 300 [1] 599/22 302 [1] 316/22 305 [6] 506/6 550/4 550/10 551/2 551/20 553/3 307 [2] 383/16 418/20 314 [3] 545/6 545/6 545/8 34 [1] 498/3 34-page [1] 496/6 347 [1] 459/14	35 [1] 499/18 368 [2] 417/24 475/21 397 [1] 507/24 3:15 [2] 530/9 531/1 3rd [8] 420/19 470/14 471/21 523/17 523/24 584/23 588/8 589/21	4 40 [1] 590/13 413 [1] 554/2 424 [3] 509/11 557/15 558/18 428 [1] 398/4 43 [1] 386/15 44.1 [1] 532/9 45 [1] 322/18 450 [1] 470/13 46 [3] 320/3 320/19 320/20 47 [1] 381/5 47-something [1] 457/15 48 [1] 428/1 49 [1] 455/15 4:44 [1] 590/18 4:44:47 [1] 589/22 4:45 [1] 615/12 4th [9] 343/5 388/2 388/11 388/17 388/21 392/23 417/10 417/14 575/2	5 50 [1] 386/14 500 [2] 316/10 316/21 506 [2] 575/1 575/1 517 [1] 565/19 520 [1] 511/24 564 [2] 318/15 319/21 568 [1] 382/16 587 [2] 331/14 391/1 5th [8] 439/4 444/2 444/18 447/9 512/1 512/7 513/19 526/20	6 62 [1] 473/21 620 [3] 323/20 323/21 403/11 621 [5] 325/22 325/24 327/1 406/2 410/18 622 [1] 582/2 623 [4] 517/19 517/19 576/7 587/24 627 [2] 330/4 393/11 643 [2] 611/14 611/18 647 [3] 521/21 605/15 608/3 654 [1] 611/23 655 [2] 612/7 612/9 681 [1] 337/2 682 [1] 522/14 6:31 p.m [1] 347/6 6th [4] 348/17 503/22 525/24 538/18	7 711 [1] 601/18	7:35 [1] 523/24 7a [3] 550/7 552/13 552/13 7th [4] 399/15 401/18 438/4 599/11 7th-ish [1] 399/18	8 80 [1] 561/3 813 [3] 523/16 584/19 584/20 814 [2] 586/18 586/23 816 [1] 525/22 824 [1] 603/8 827 [5] 340/4 340/6 587/8 587/9 589/21 829 [2] 438/23 439/3 836 [2] 343/1 343/4 844 [1] 344/1 869 [1] 444/1 87 [1] 548/8 885 [1] 348/5 8th [3] 365/6 417/18 475/17	9 912 [1] 445/8 912.004 [1] 445/19 913 [2] 478/18 613/15 929 [1] 527/23 944 [1] 446/19 954 [1] 351/17 970 [4] 353/15 357/15 357/24 358/4 971 [3] 362/6 363/6 426/5 99 [1] 563/19 9:15 [2] 316/11 615/11 9:49 [1] 368/7 9:49 a.m [2] 366/11 366/21 9th [24] 418/4 446/20 448/18 452/9 466/9 466/15 472/16 472/23 473/3 475/9 476/6 476/24 479/5 485/6 486/1 486/9 486/19 486/23 491/4 491/7 491/9 506/23 516/18 517/13	A A's [3] 428/14 429/7 430/11 a.m [5] 316/11 366/11 366/21 376/10 377/1 ability [4] 354/20 361/7 454/24 555/13 able [7] 342/20 401/13 401/15 401/16 449/12 454/5 461/10 aboard [2] 328/17 408/20 above [8] 367/12 442/21 448/3 452/20 457/6 463/2 480/20 582/9 abreast [1] 438/16 absent [4] 385/15	387/3 389/18 421/1 absolutely [14] 355/15 355/19 357/3 357/3 360/18 369/6 375/14 375/19 376/5 380/24 381/24 596/14 600/8 602/11 absorb [1] 457/18 abundantly [1] 354/14 accept [11] 384/18 406/16 413/9 422/13 425/16 458/16 492/23 493/15 494/9 505/6 612/10 accepted [12] 322/5 448/7 458/15 510/9 525/13 563/8 563/16 564/5 565/2 581/15 590/9 593/11 accepting [2] 392/21 487/10 access [2] 517/5 517/15 according [2] 583/4 583/4 Accordingly [1] 341/15 Accountants [1] 434/11 accretive [1] 443/1 accuracy [4] 471/17 475/2 494/24 542/4 accurate [6] 357/10 378/13 470/1 480/11 542/5 542/13 achieve [2] 372/8 455/17 achieved [1] 455/24 acknowledge [2] 325/6 558/23 acknowledging [1] 404/5 acquiescence [2] 560/1 560/4 acquire [38] 324/11 341/19 341/20 383/24 384/17 385/15 387/7 403/20 404/14 404/15 407/14 407/20 421/17 422/8 460/21 506/14 506/14 510/1 510/8 550/20 550/21 557/23 557/23 557/24 557/24 558/9 563/1 564/14 577/3 593/6 597/4 597/16 598/10 598/15 599/9 599/17 600/4 600/11 acquired [3] 436/15 482/3 482/6 acquirer [1] 482/3 acquiring [9] 322/24 401/22 402/4 402/17 439/11 506/13 550/20 596/15 599/13 acquisition [28] 321/2 369/24 422/4 422/15 423/9 436/7 436/11 440/1 440/18 442/7 455/22 457/9 460/12	461/6 464/21 465/11 466/21 467/21 468/24 475/11 493/1 493/17 497/11 503/3 510/6 577/3 597/23 598/21 acquisitions [1] 502/12 act [2] 375/16 597/22 acted [1] 470/17 action [18] 316/3 324/12 357/9 377/10 377/16 381/19 382/10 401/10 403/1 403/21 412/4 412/17 452/22 462/18 507/11 524/9 533/23 606/23 actionable [1] 499/8 actions [6] 439/20 506/3 509/18 510/20 515/20 547/19 active [2] 434/22 459/22 activity [5] 329/17 437/11 529/15 529/21 536/6 acts [1] 338/23 actual [13] 321/23 326/15 337/7 345/4 351/4 406/18 411/18 461/23 528/18 528/24 535/2 541/4 568/15 ad [2] 396/10 396/21 add [2] 436/21 442/18 added [2] 330/8 496/8 addition [2] 437/18 502/2 additional [7] 321/10 334/10 351/22 352/4 429/9 457/16 458/3 addressed [4] 356/3 376/3 601/15 604/10 addressing [2] 462/21 604/9 adduce [1] 532/15 adjourned [1] 615/12 adjustments [1] 470/6 administration [1] 434/9 admitted [3] 378/1 378/6 382/10 advance [12] 341/16 341/19 383/8 397/1 505/24 532/10 557/22 560/6 573/13 573/15 590/19 591/1 advance' [1] 518/22 advanced [2] 588/4 588/18 advantage [2] 351/1 483/3 advantages [3] 334/21 334/23 335/21 adverse [1] 606/5 advice [58] 321/14 321/20 326/5 327/16 329/19 329/24 342/10 352/1 353/6 360/13 382/12 383/4 384/9 385/7 400/11 405/10
---	--	---	---	---	--	-----------------------------------	---	---	---	---	--	---

A	328/3 336/12 404/3 408/1 421/7 441/24 444/13 448/4 468/11 469/6 469/10 537/8 551/23 552/6 552/7 552/17 553/4 578/4 578/13 598/5 agreeing [3] 325/5 409/13 550/21 agreement ... Capricorn [1] 522/22 agreements [18] 351/8 379/22 380/7 381/3 446/11 446/12 453/3 462/15 503/7 539/6 539/10 539/14 595/5 596/18 609/21 609/22 611/5 612/19 ahead [5] 422/7 434/13 440/19 548/5 602/15 ake [1] 510/19 alerted [1] 528/9 Alex [2] 437/18 484/18 align [1] 354/5 Alison [2] 358/23 374/5 all [69] 321/2 332/10 335/11 345/12 351/1 352/21 355/10 364/18 366/23 375/3 375/3 376/8 379/18 389/4 402/12 420/19 421/6 425/17 427/22 437/13 438/16 448/5 448/14 449/1 450/5 450/7 453/6 456/13 456/18 456/22 457/10 458/14 466/20 467/21 468/24 479/15 488/6 492/13 495/6 495/13 496/24 508/10 508/14 509/2 509/2 515/16 517/5 521/8 524/17 535/10 535/12 536/12 542/2 544/16 545/24 546/18 548/3 567/16 573/8 582/17 583/1 584/7 595/21 596/18 596/18 597/11 607/11 609/9 612/7 all-cash [16] 321/2 402/12 425/17 448/5 450/5 450/7 453/6 456/18 457/10 458/14 466/20 467/21 468/24 495/6 495/13 583/1 allow [11] 471/12 471/24 507/9 523/8 534/19 536/11 547/13 548/14 552/3 562/10 562/13 allowed [5] 321/21 385/8 465/11 482/20 553/2 allows [1] 505/20 almost [5] 350/5 483/20 546/16 587/12 590/13 along [9] 355/4 394/3	395/20 559/23 566/15 566/16 588/4 595/9 596/19 alternatively [1] 449/8 although [3] 333/11 468/15 614/23 always [2] 396/13 541/5 am [23] 327/20 337/22 347/7 347/10 377/12 387/22 400/18 414/19 434/10 436/1 436/6 452/13 463/19 478/21 484/11 504/6 512/11 533/19 534/18 540/24 542/1 578/10 613/19 amend [2] 411/11 506/20 amending [1] 558/22 America [1] 465/8 among [1] 353/24 amongst [3] 502/2 510/18 514/22 amount [5] 364/3 450/20 450/21 456/4 456/5 analyses [2] 336/1 441/16 analysis [6] 335/11 370/1 497/12 498/7 498/10 498/16 analysts [2] 454/4 454/5 Andrew [8] 445/8 502/21 521/14 601/22 605/17 605/17 605/21 605/24 Andrew/Marc [1] 605/24 announce [1] 423/17 announced [7] 350/1 397/17 398/6 420/24 458/18 458/21 459/4 announcement [3] 462/14 482/4 482/7 annual [5] 319/1 331/4 331/16 332/4 333/8 another [12] 323/7 328/23 346/14 360/22 361/11 370/4 460/21 509/13 523/2 559/19 601/13 605/22 answer [29] 342/20 381/14 388/15 406/14 462/5 470/9 474/3 474/4 474/11 474/14 478/9 478/16 482/19 483/6 498/15 498/24 500/1 532/23 533/20 548/13 549/1 552/11 561/9 561/13 564/2 564/4 564/11 573/7 600/16 answered [2] 554/10 566/18 answering [1] 566/19 answers [4] 482/23 532/7 549/5 549/8 anticipate [1] 361/24	anybody [3] 516/5 539/21 607/4 anyone [7] 418/13 423/14 479/10 499/3 499/22 527/12 527/14 anytime [1] 520/7 anyway [3] 389/2 483/23 600/10 anywhere [1] 385/2 Apologies [1] 445/20 apologize [8] 393/13 407/10 435/12 443/7 483/12 532/21 534/15 600/7 Appalachian [1] 436/19 apparently [3] 318/21 474/15 606/5 appear [11] 328/4 385/2 388/1 392/22 395/10 408/2 480/22 495/20 555/11 578/13 578/14 APPEARANCES [1] 316/22 appears [9] 320/15 382/20 388/8 393/24 446/23 476/14 545/22 555/20 578/23 applicable [3] 419/13 504/13 504/18 apply [1] 362/15 appraisal [5] 401/10 403/1 412/3 591/22 591/24 appreciate [12] 342/22 397/7 400/4 433/14 433/17 443/10 470/9 500/9 572/24 583/9 602/11 611/16 appreciated [1] 461/16 apprised [1] 437/11 approach [5] 362/13 364/19 401/1 433/21 500/20 approached [1] 435/2 appropriate [4] 360/3 417/5 470/6 494/8 approval [18] 320/17 379/2 379/5 390/8 444/9 444/11 446/13 449/1 453/3 453/4 459/20 459/21 460/2 460/4 468/18 495/3 585/20 591/16 approve [3] 328/14 379/9 408/17 approved [8] 368/24 390/8 430/6 430/9 446/10 452/10 456/17 473/18 approves [1] 430/17 approximately [6] 444/14 459/3 501/10 501/17 598/22 599/4 April [6] 459/2 459/3 497/2 497/19 499/3 538/18 April 2016 [3] 497/2	497/19 499/3 April 28 [1] 459/2 April 29 [1] 459/3 aren't [3] 401/8 402/23 412/2 argue [1] 407/5 arise [1] 461/18 Arizona [1] 378/2 around [29] 339/24 341/1 346/12 378/9 386/17 399/14 400/6 409/8 423/21 424/2 435/20 437/23 438/9 444/12 444/23 466/9 478/6 479/14 501/21 508/7 517/6 517/13 536/24 537/24 548/18 557/13 561/20 592/1 613/23 arranged [1] 518/7 arrangement [1] 346/11 arrangements [1] 515/18 arranging [1] 324/6 article [1] 479/22 Articled [1] 501/4 ascribed [1] 609/12 Ashby [1] 317/10 aside [1] 405/8 ask [66] 318/23 318/24 325/20 326/4 326/11 350/12 362/20 374/24 389/2 402/22 410/10 411/9 411/16 412/5 439/18 441/4 445/12 446/18 447/2 453/13 482/18 482/22 483/8 486/21 494/1 495/11 504/3 506/20 509/14 509/23 512/5 512/23 515/1 522/16 527/18 533/24 538/16 539/21 540/1 540/6 543/21 545/4 546/21 550/6 558/20 558/24 560/5 570/23 571/23 572/12 582/21 588/1 589/15 589/24 590/21 591/3 591/17 595/3 597/3 601/14 601/19 601/24 602/18 604/16 604/17 611/24 asked [39] 341/9 351/22 352/17 381/1 383/1 385/23 387/13 390/23 414/7 415/5 415/6 416/5 425/23 427/7 427/11 474/9 474/13 478/15 482/24 498/23 508/10 511/21 529/13 549/4 549/7 561/12 564/10 566/8 571/12 582/19 583/10 583/10 596/22 600/13 604/4 604/15 604/16 605/3 609/23 asking [25] 324/14 324/21 326/19 340/17
----------	--	--	---	--

<p>A</p> <p>asking... [21] 352/4 352/6 368/16 403/17 416/8 425/8 484/13 493/4 519/2 526/9 526/17 534/14 540/16 551/9 558/23 586/1 586/11 590/24 591/16 604/20 611/20</p> <p>asks [3] 410/23 411/20 586/24</p> <p>asserted [3] 420/12 443/19 611/9</p> <p>assess [1] 604/5</p> <p>assessment [1] 560/19</p> <p>asset [7] 440/17 442/10 442/23 445/4 450/8 458/3 465/12</p> <p>assets [7] 436/16 449/9 449/10 449/14 506/14 510/2 558/1</p> <p>assistance [2] 390/15 430/10</p> <p>assume [2] 533/20 604/14</p> <p>assuming [1] 442/7</p> <p>assurance [4] 325/15 411/21 518/16 519/2</p> <p>assurances [1] 411/2</p> <p>attached [2] 442/13 569/10</p> <p>attaching [2] 445/10 508/2</p> <p>attachment [1] 330/9</p> <p>attacked [1] 602/19</p> <p>attempt [3] 326/13 542/3 594/15</p> <p>Attempt -- seeker [1] 594/15</p> <p>attend [4] 444/4 501/24 540/21 541/1</p> <p>attendance [1] 545/1</p> <p>attended [2] 437/13 446/22</p> <p>attending [2] 545/12 546/15</p> <p>attention [15] 395/7 410/23 417/21 423/4 426/4 427/24 439/6 449/19 475/13 497/2 506/8 565/23 605/5 610/14 611/17</p> <p>attorney [4] 548/23 561/7 563/24 603/20</p> <p>attractive [4] 436/10 436/13 436/20 436/24</p> <p>audit [2] 436/3 436/5</p> <p>authorities [1] 405/11</p> <p>authority [1] 405/19</p> <p>authorization [16] 343/12 343/16 344/6 345/3 383/22 385/16 401/4 402/2 402/15 404/16 404/19 409/18 444/17 495/12 509/22 520/15</p> <p>authorize [2] 333/21 449/3</p>	<p>authorized [13] 339/7 387/4 412/12 446/3 446/9 447/12 448/20 472/16 476/11 477/6 477/13 495/24 526/22</p> <p>available [2] 453/1 603/14</p> <p>avoid [4] 419/13 504/12 595/5 605/4</p> <p>Awaiting [2] 439/19 440/12</p> <p>aware [24] 324/5 372/21 375/9 375/16 375/21 388/6 388/10 389/23 397/24 400/18 401/8 402/21 402/23 412/2 438/6 438/7 438/7 438/8 438/10 449/15 459/10 477/13 589/14 605/3</p> <p>away [6] 348/3 458/15 465/12 487/5 522/9 614/1</p> <p>B</p> <p>bachelor [1] 434/8</p> <p>background [5] 434/7 464/13 501/1 538/23 539/2</p> <p>backward [1] 589/1</p> <p>balance [2] 461/12 461/12</p> <p>balanced [1] 362/13</p> <p>Bali [1] 592/3</p> <p>banker [3] 450/18 480/8 481/2</p> <p>bankers [10] 348/21 373/22 450/11 450/14 450/16 450/20 450/22 451/2 451/9 457/13</p> <p>bankers' [1] 450/18</p> <p>bar [3] 317/7 317/15 546/5</p> <p>bargaining [5] 565/15 566/3 566/21 572/19 573/4</p> <p>Barry [2] 435/7 478/19</p> <p>bars [1] 567/2</p> <p>base [3] 341/6 465/12 575/4</p> <p>based [21] 326/5 340/21 346/23 383/4 384/9 391/3 409/11 412/6 412/8 433/5 439/21 441/5 442/17 458/10 462/3 484/13 529/21 541/18 546/19 559/5 564/24</p> <p>basic [4] 464/11 484/17 594/16 601/23</p> <p>basically [7] 359/5 503/8 519/7 558/19 559/24 560/3 588/16</p> <p>basin [2] 436/19 465/13</p> <p>basins [3] 465/3 465/7 465/8</p> <p>basis [16] 381/18 443/22 450/12 456/9</p>	<p>457/6 466/23 468/2 468/9 468/13 468/22 475/1 476/4 489/16 493/21 494/23 553/2</p> <p>BCE [2] 434/17 434/20</p> <p>became [4] 477/5 477/13 538/1 600/23</p> <p>become [4] 375/9 375/15 459/10 541/22</p> <p>becomes [4] 420/8 442/24 443/3 445/6</p> <p>begin [1] 401/2</p> <p>beginning [7] 337/11 365/11 503/4 507/18 551/18 553/3 563/20</p> <p>begins [3] 344/15 566/1 585/3</p> <p>behalf [4] 387/6 463/8 543/3 581/24</p> <p>behind [1] 413/14</p> <p>belief [1] 533/22</p> <p>believed [11] 326/10 371/13 379/6 390/2 390/4 457/1 475/5 481/14 527/15 585/14 586/12</p> <p>Bell [1] 434/20</p> <p>below [8] 340/8 342/5 366/4 366/5 371/23 372/3 455/16 559/22</p> <p>bending [1] 589/1</p> <p>beneficial [2] 383/24 454/1</p> <p>benefit [3] 481/9 484/10 488/21</p> <p>benefits [1] 375/13</p> <p>Bennett [5] 359/2 501/5 501/8 501/10 528/3</p> <p>Bentley [3] 527/24 528/1 528/2</p> <p>Berger [2] 317/4 317/8</p> <p>Berkshire [5] 322/8 323/10 350/23 351/5 398/14</p> <p>Bernstein [2] 317/4 317/8</p> <p>best [27] 319/9 345/20 348/1 353/1 355/12 355/13 397/2 413/7 415/21 420/9 420/24 453/15 456/21 490/12 495/14 495/19 496/1 508/9 541/1 541/5 542/12 547/24 596/11 596/12 596/16 596/18 601/5</p> <p>better [6] 402/22 441/4 516/15 539/24 560/13 594/2</p> <p>between [59] 324/6 328/6 340/9 341/21 346/9 346/17 349/10 350/14 358/22 365/5 373/22 387/2 389/16 402/7 403/8 403/18 409/21 414/21 418/10 438/2 438/12 449/17 450/19 454/10 455/15</p>	<p>461/23 467/9 468/6 472/8 477/1 485/5 491/6 505/12 511/24 514/23 515/2 516/18 517/20 518/7 521/22 525/23 527/23 531/12 536/20 537/17 538/17 551/5 552/24 559/19 563/23 567/2 575/5 575/11 575/19 579/3 597/7 604/19 606/9 610/17</p> <p>beyond [4] 385/9 423/20 448/10 589/4</p> <p>bid [5] 479/11 486/4 491/21 562/21 599/22</p> <p>bidder [3] 420/9 421/2 506/4</p> <p>bidders [12] 379/19 380/2 398/24 399/4 416/14 416/21 417/6 418/9 523/10 539/9 539/22 612/14</p> <p>bidding [2] 505/20 507/10</p> <p>bids [1] 446/10</p> <p>big [3] 320/10 331/3 369/21</p> <p>bilingual [1] 593/17</p> <p>billion [1] 436/22</p> <p>binder [18] 377/11 377/13 377/14 383/16 387/20 393/9 395/23 397/22 403/12 406/2 418/20 426/5 438/24 464/1 464/2 464/5 467/6 496/20</p> <p>binders [2] 433/22 463/11</p> <p>binding [7] 383/6 384/6 384/7 384/22 389/22 468/17 468/17</p> <p>bit [16] 398/11 415/24 434/6 457/11 469/15 472/22 500/24 501/6 521/6 527/18 545/18 550/12 551/10 588/6 593/7 610/12</p> <p>bizarre [1] 486/4</p> <p>BJ [2] 478/19 478/23</p> <p>Blake [3] 502/24 528/6 528/7</p> <p>bland [1] 536/5</p> <p>blank [1] 493/2</p> <p>blend [1] 397/19</p> <p>blinking [1] 338/12</p> <p>blow [3] 475/20 582/22 584/21</p> <p>board [299] 318/16 319/1 319/4 319/9 319/24 325/13 325/14 325/17 328/4 329/9 329/13 330/1 330/16 330/24 331/3 331/20 332/1 332/10 333/8 333/15 333/21 334/16 334/24 335/2 335/2 335/7 335/14 335/23 336/8 336/12 339/7</p>	<p>339/12 341/17 343/11 343/16 345/21 345/24 349/3 349/17 352/17 352/18 353/17 357/8 357/9 357/19 357/24 362/8 368/24 372/7 372/21 373/18 376/1 376/2 378/9 378/22 379/2 379/5 379/9 380/5 380/13 380/16 383/7 383/22 385/9 385/16 386/19 387/4 387/4 387/6 389/18 389/23 390/7 390/8 390/17 392/1 392/14 395/10 395/11 396/2 396/2 396/7 396/19 398/18 400/22 401/4 402/1 402/14 404/15 404/19 408/2 409/17 411/1 411/1 411/4 412/12 417/10 420/8 420/24 421/10 423/7 426/8 426/12 428/7 428/11 428/14 428/20 428/21 429/8 429/10 429/13 429/17 430/5 430/8 430/16 430/17 435/1 435/3 435/5 435/7 435/8 435/20 436/1 436/13 437/5 437/8 437/12 437/16 438/15 438/15 438/21 439/5 440/22 441/6 441/7 442/2 443/18 444/1 444/3 444/11 444/22 445/10 446/3 446/5 446/9 446/10 446/11 446/12 446/15 446/19 446/21 447/12 447/13 448/1 448/4 448/19 448/24 449/3 449/18 450/4 452/9 452/10 453/3 453/4 453/5 454/15 454/16 455/6 456/17 456/19 457/7 458/12 459/2 460/5 460/8 460/19 461/5 462/4 462/12 462/18 462/21 463/1 464/13 468/15 468/22 469/4 469/21 470/2 470/5 470/11 470/14 470/15 471/3 471/6 471/9 471/18 471/21 471/22 472/5 472/14 472/16 472/23 473/3 473/11 475/9 476/6 476/11 476/24 476/24 477/5 477/12 479/1 479/18 480/14 485/21 487/7 488/22 489/16 494/6 494/13 494/16 494/19 495/4 495/17 495/22 496/24 497/18 498/12 499/4 499/8 499/9 499/12 499/21 500/2 501/21 501/22 501/23 502/1 506/16</p>
---	---	--	---	--

<p>B</p> <p>board... [61] 506/17 509/20 509/23 510/12 510/17 518/14 518/15 518/18 518/20 519/3 519/10 519/11 519/19 520/9 523/8 524/12 524/24 526/22 540/21 541/14 541/15 541/16 541/17 541/18 548/18 555/11 555/15 560/14 560/23 561/20 562/22 566/8 566/9 571/6 571/11 571/16 573/8 576/23 578/14 578/18 579/10 580/11 585/5 585/20 586/2 586/8 587/1 590/6 601/1 601/4 602/19 602/20 603/3 603/13 604/9 604/10 606/1 613/20 614/10 615/4 615/8</p> <p>board's [9] 381/2 381/12 381/22 383/10 395/8 398/22 420/13 447/23 587/17</p> <p>board-approved [1] 446/10</p> <p>board-authorized [1] 446/3</p> <p>Board/Fiduciary [1] 603/13</p> <p>boards [7] 319/8 319/8 434/22 435/24 436/2 470/5 589/10</p> <p>Boardvantage [1] 396/16</p> <p>Bob [57] 324/3 327/5 330/6 344/12 352/16 360/1 372/10 374/12 414/22 414/23 414/24 415/1 503/22 508/1 514/16 515/3 515/6 516/5 517/20 520/14 523/18 523/23 524/7 524/14 525/23 526/5 526/15 526/19 531/13 531/18 536/21 536/23 537/18 537/24 538/4 539/21 540/1 543/6 556/4 556/5 575/14 575/18 576/2 576/14 578/10 579/11 580/22 586/1 587/5 587/10 587/22 588/20 589/11 589/19 589/20 591/20 603/12</p> <p>Bob Smith [2] 523/18 524/14</p> <p>bona [3] 337/13 339/10 522/19</p> <p>book [10] 358/17 382/16 386/12 391/1 414/12 420/15 435/10 545/5 565/19 601/19</p> <p>books [1] 540/7</p> <p>borne [1] 450/14</p> <p>borrow [1] 553/18</p>	<p>borrowed [1] 593/20</p> <p>boss [4] 554/5 559/17 568/20 588/2</p> <p>both [18] 340/20 361/13 392/8 415/22 440/15 442/10 454/3 457/2 468/11 469/9 481/12 481/17 482/3 482/8 515/9 532/17 562/7 598/4</p> <p>bottom [35] 324/1 325/8 334/20 336/11 337/10 340/12 346/20 349/1 351/19 356/19 359/21 364/12 367/1 367/3 368/1 368/20 372/24 389/8 419/23 420/16 430/4 447/3 478/19 485/12 495/3 517/2 518/1 522/16 522/17 555/7 565/24 582/4 603/12 614/2 614/4</p> <p>bought [10] 450/11 450/16 450/23 452/24 456/3 456/4 456/6 456/9 457/21 458/4</p> <p>boundaries [1] 349/11</p> <p>bounds [1] 329/19</p> <p>Bousquette [3] 366/4 366/6 366/10</p> <p>Bousquette's [1] 368/6</p> <p>breach [13] 322/3 325/18 326/4 326/18 337/15 375/18 375/21 411/5 431/5 518/19 522/21 592/21 592/22</p> <p>breached [2] 401/11 403/2</p> <p>break [10] 334/3 338/15 376/8 450/2 451/11 451/13 451/14 452/9 524/7 530/6</p> <p>BRENDAN [1] 317/2</p> <p>BRIAN [1] 317/14</p> <p>bridgeable [1] 350/15</p> <p>brief [5] 371/17 580/20 606/19 606/22 609/11</p> <p>briefed [1] 472/6</p> <p>briefly [4] 371/22 434/14 461/22 502/9</p> <p>bring [3] 557/16 597/11 611/16</p> <p>brings [1] 448/14</p> <p>broad [7] 324/9 437/22 441/13 441/19 516/2 577/24 588/3</p> <p>broader [1] 505/18</p> <p>brought [4] 435/13 437/9 462/17 604/5</p> <p>Brown [33] 317/16 502/21 512/9 513/15 521/14 521/22 524/22 525/3 525/8 526/6 538/7 538/18 549/12 549/16 549/22 565/14 566/7 566/17 569/1 570/7 570/17 571/22 584/16 585/1 587/13</p>	<p>601/14 601/22 602/17 603/7 603/18 603/24 605/19 611/3</p> <p>Brown's [5] 526/3 565/6 572/15 591/5 591/19</p> <p>build [1] 437/2</p> <p>build-out [1] 437/2</p> <p>bullet [6] 439/19 461/1 461/20 497/8 497/10 582/15</p> <p>bunch [1] 420/17</p> <p>burden [1] 532/14</p> <p>business [7] 352/22 352/23 434/9 434/10 464/14 486/10 556/23</p> <p>businessperson's [1] 560/10</p> <p>busy [1] 569/23</p> <p>but [205] 326/12 328/13 331/10 332/21 333/10 335/9 336/6 336/22 338/9 338/23 339/10 342/22 345/9 346/11 350/12 352/6 355/13 356/19 356/22 357/21 358/1 360/18 361/18 363/1 363/10 365/6 365/23 368/14 369/11 369/20 370/4 370/23 373/17 380/8 384/15 385/12 385/18 388/10 388/14 389/23 390/5 393/1 393/9 393/23 394/2 394/6 394/17 394/24 395/16 395/17 396/14 396/23 397/8 399/7 399/18 401/12 402/18 404/13 405/8 406/9 407/5 407/8 408/5 408/8 408/16 408/24 409/7 412/8 412/24 413/7 414/21 415/13 415/19 417/19 418/8 419/21 420/12 422/4 422/18 422/21 423/14 423/20 424/14 424/19 425/15 426/5 426/19 427/3 427/13 432/10 432/22 433/5 438/18 440/7 443/19 446/9 448/9 448/21 449/18 450/3 450/7 450/17 456/7 456/7 458/3 458/6 462/13 463/19 465/18 469/5 470/4 472/15 472/18 473/1 480/6 482/1 482/12 488/5 490/18 492/10 493/10 494/2 494/3 495/15 495/19 495/24 496/21 498/10 502/13 504/21 505/4 512/11 513/16 516/13 516/23 523/14 525/19 525/20 529/1 529/18 532/22 537/5 539/11 539/24 542/4 545/21 546/3 546/18</p>	<p>547/2 547/13 548/15 550/11 551/2 551/12 551/17 557/16 558/11 558/14 559/20 560/9 560/13 560/15 560/21 562/18 563/11 564/6 564/17 565/13 566/15 568/14 570/2 571/14 571/15 575/21 578/4 579/2 579/18 580/9 582/15 583/9 583/18 583/21 584/6 586/11 588/8 588/10 588/15 590/14 590/24 592/9 593/1 593/2 594/19 596/8 604/14 604/21 605/15 606/16 608/14 608/19 609/10 609/21 611/11 612/8 613/24</p> <p>buy [2] 353/7 564/19</p> <p>buyer [1] 460/21</p> <p>buying [1] 353/13</p> <p>bye [1] 500/14</p> <hr/> <p>C</p> <p>C.J [2] 463/8 553/18</p> <p>Calgary [2] 501/5 576/17</p> <p>call [61] 324/6 325/5 342/5 348/12 351/23 357/19 358/1 365/23 366/14 367/20 367/20 368/7 401/10 402/7 402/10 403/1 403/8 404/5 432/9 432/13 433/2 433/19 493/13 500/13 515/8 529/8 529/11 529/12 536/23 537/19 537/24 538/6 548/15 575/4 575/14 575/19 578/9 581/7 582/1 582/5 582/7 582/13 582/19 582/20 583/2 583/11 583/14 584/4 584/8 587/23 590/5 597/14 599/5 603/3 603/5 603/7 603/15 603/21 603/23 604/9 610/14</p> <p>called [10] 351/12 375/24 399/14 439/8 485/21 538/23 569/7 598/13 599/6 601/8</p> <p>calling [3] 517/12 546/1 571/22</p> <p>calls [6] 352/19 353/8 353/9 353/11 535/8 536/12</p> <p>can't [15] 388/4 448/15 473/14 507/11 546/6 546/23 552/5 557/23 560/22 565/1 573/10 580/20 581/14 607/14 611/11</p> <p>Canada [4] 434/20 501/5 504/20 593/17</p> <p>Canadian [9] 423/12 424/4 434/11 465/13 483/17 483/18 502/22</p>	<p>502/23 505/3</p> <p>capable [4] 510/9 563/8 563/15 590/8</p> <p>capacity [1] 437/1</p> <p>capital [6] 440/4 440/9 442/11 455/21 470/22 550/19</p> <p>capital-intensive [1] 440/4</p> <p>Capricorn [32] 324/10 324/12 325/17 337/16 341/17 341/20 341/21 403/20 411/4 439/14 447/7 447/10 447/13 448/21 455/2 457/20 471/5 471/13 472/17 480/14 480/16 488/19 518/17 518/20 522/22 557/21 566/1 587/17 601/24 602/19 606/1 608/24</p> <p>Capricorn's [9] 324/7 447/9 447/15 471/6 495/5 512/12 560/1 560/3 567/3</p> <p>captured [1] 558/12</p> <p>capturing [1] 579/1</p> <p>care [1] 595/22</p> <p>career [1] 502/11</p> <p>careful [5] 363/1 378/12 426/16 542/8 557/9</p> <p>carefully [6] 329/18 363/2 390/18 392/3 392/15 487/17</p> <p>carries [2] 346/22 388/18</p> <p>carrying [1] 394/21</p> <p>carve [1] 410/6</p> <p>carve-out [1] 410/6</p> <p>case [12] 412/7 414/3 468/7 496/12 505/19 505/21 505/23 529/1 591/10 598/2 601/8 601/9</p> <p>cases [1] 532/19</p> <p>cash [27] 321/2 323/2 375/11 402/12 422/9 425/17 441/16 448/5 449/16 450/5 450/7 453/6 456/18 456/23 457/6 457/10 458/2 458/14 466/20 467/21 468/24 476/13 492/13 495/6 495/13 583/1 584/7</p> <p>Cassels [2] 528/6 528/7</p> <p>Cassles [1] 502/24</p> <p>category [1] 329/1</p> <p>cause [2] 347/15 478/11</p> <p>caused [2] 372/16 455/16</p> <p>causing [1] 451/8</p> <p>cautious [3] 518/9 525/16 537/10</p> <p>cc's [1] 363/9</p> <p>cease [1] 415/14</p>
--	--	--	--	---

C	check [2] 556/3 556/4 checked [1] 424/9 checking [1] 589/11 chief [8] 322/23 434/19 437/19 437/20 437/21 447/5 484/18 495/4 choice [3] 579/17 580/19 580/23 choosing [2] 583/17 583/21 choreographed [1] 368/13 chose [1] 583/22 Chris [27] 323/18 324/1 325/5 327/9 340/9 340/13 343/10 344/4 346/23 347/7 367/3 367/6 367/19 367/24 368/21 369/15 372/10 404/5 423/20 424/3 431/13 431/18 432/10 473/4 473/17 545/14 603/13 Chris - Just [1] 603/13 Christine [5] 403/6 403/17 469/15 500/13 500/16 CHRISTOPHER [3] 317/6 516/18 516/22 chronology [2] 357/10 432/11 circle [1] 488/17 circling [1] 372/9 circuiting [1] 496/9 circulate [2] 367/21 374/12 circumstances [1] 528/17 citation [1] 405/19 cited [1] 532/19 Civil [1] 316/3 clarification [1] 441/10 clarify [1] 357/4 clarifying [1] 529/23 clarity [2] 396/17 595/22 clause [1] 328/22 clean [1] 417/22 clear [21] 343/18 343/19 351/8 351/10 351/10 354/14 364/7 364/22 381/9 388/20 390/17 392/2 392/14 490/18 532/23 542/21 543/11 551/10 570/2 572/21 575/9 clearly [5] 394/2 433/1 572/6 581/1 595/14 clerks [1] 377/18 click [1] 537/23 client [6] 554/5 556/24 557/18 559/7 567/19 570/23 clients [2] 544/2 544/5 clip [21] 381/5 381/7 381/15 473/22 473/24 474/8 477/24 478/1 478/14 498/3 498/4 498/21 499/19 500/3	548/6 548/10 549/2 561/5 561/10 563/21 564/8 Cliver [1] 582/5 Cliver's [2] 582/12 582/18 close [7] 413/12 531/17 535/6 588/15 588/20 588/22 589/4 closing [1] 538/13 closure [1] 362/15 cluster [1] 488/7 co [2] 401/13 401/15 co-counsel [2] 401/13 401/15 Coast [1] 418/13 code [3] 439/10 445/15 445/21 cognizant [1] 427/4 coincidence [1] 597/21 colleague [9] 463/11 463/19 480/20 540/6 545/4 582/13 582/18 582/20 596/22 colleagues [1] 381/1 colloquial [1] 598/16 colloquially [5] 551/16 598/11 599/16 600/4 600/10 COLUMBIA [207] 316/3 329/21 330/2 331/20 336/15 339/13 339/16 339/20 339/23 340/24 346/4 346/9 347/23 348/3 348/11 350/8 355/3 360/13 361/23 365/5 367/14 368/10 375/3 380/1 381/9 384/1 384/17 384/18 385/15 396/6 398/12 398/13 398/22 399/10 401/22 402/4 402/12 402/17 404/15 406/10 407/14 407/20 407/20 412/12 412/18 413/17 416/9 416/21 417/1 417/3 417/14 419/6 419/10 419/18 421/17 422/9 422/12 422/13 423/18 425/15 425/16 436/8 436/10 436/13 436/16 436/18 436/21 437/7 438/3 438/5 438/12 439/11 439/15 440/22 441/1 441/7 441/14 442/2 444/18 446/1 446/2 446/16 447/24 449/15 449/20 451/4 458/16 460/12 460/22 461/3 464/18 464/22 465/11 465/19 466/8 466/19 466/21 467/22 472/1 472/8 475/11 475/17 476/10 476/12 477/2 479/12 479/19 486/23 487/5 487/17 489/9 492/16 492/22 492/22 493/23 494/3 494/9	502/15 502/17 503/2 503/11 503/24 505/6 505/12 505/23 506/7 506/15 508/8 508/16 509/20 509/23 510/21 512/20 513/6 514/5 515/12 515/23 516/5 517/1 518/8 520/9 521/1 521/10 521/17 522/2 522/15 523/8 523/14 526/9 526/22 527/13 528/10 531/21 533/5 533/11 535/14 535/17 536/10 536/22 538/20 539/4 539/9 539/22 546/1 546/24 547/3 547/13 554/24 555/11 555/22 556/13 557/8 561/22 562/2 562/16 562/22 563/8 564/19 574/17 574/21 576/23 581/22 582/1 586/8 587/1 587/6 587/19 590/6 596/4 596/15 597/16 597/23 598/10 598/15 599/9 599/13 599/22 601/1 601/4 601/16 602/18 604/10 605/4 611/4 612/13 612/20 612/22 Columbia's [22] 329/12 380/19 419/7 453/4 454/4 454/13 461/23 465/6 477/17 478/11 481/8 484/8 491/19 503/15 507/4 514/4 514/16 519/2 555/10 556/3 590/24 603/24 combination [2] 450/8 497/12 combinations [1] 440/16 comes [3] 556/21 575/11 585/24 comfort [3] 449/11 452/24 551/4 comfortable [6] 327/21 340/20 367/10 450/22 578/7 578/10 coming [5] 443/11 585/16 589/10 605/5 615/6 commence [1] 444/14 comment [11] 363/17 368/15 405/6 440/12 445/2 473/14 523/18 571/8 571/15 571/15 571/18 commented [2] 456/23 497/22 commenting [1] 512/8 comments [13] 336/24 357/1 369/1 379/21 409/23 412/8 503/23 504/3 541/8 541/12 541/17 541/18 543/9 committee [4] 435/17 436/4 436/5 459/20	committees [1] 501/22 committing [1] 522/5 common [10] 321/3 323/1 442/13 442/14 447/8 448/15 448/22 455/20 472/18 495/7 common-share [1] 455/20 commonly [2] 523/6 599/8 commonplace [1] 597/18 communicate [5] 318/21 319/8 363/4 455/2 585/14 communicated [3] 458/8 492/21 581/8 communicating [1] 368/12 communication [3] 387/5 575/10 575/11 communications [4] 428/14 492/10 527/7 592/13 companies [8] 355/7 449/18 454/11 502/13 502/14 538/20 539/3 611/6 company [31] 334/13 336/2 353/2 367/18 369/24 389/16 400/18 436/2 440/5 440/11 448/5 448/7 455/21 482/4 498/6 502/4 505/22 506/3 506/15 507/11 508/20 512/20 541/7 554/21 559/14 569/19 596/17 597/15 598/9 599/17 600/11 company's [4] 335/23 336/1 345/23 413/6 comparable [1] 441/18 compete [1] 612/15 competition [10] 335/11 351/11 352/24 353/4 355/14 370/3 412/2 421/12 539/19 539/19 complement [1] 436/17 complete [3] 378/13 378/21 555/22 completely [5] 389/1 395/19 397/6 397/20 486/3 compliance [7] 519/19 525/21 527/10 553/11 579/8 589/2 596/17 comply [2] 362/14 590/12 complying [1] 526/15 component [8] 443/3 449/19 449/24 450/3 452/12 452/15 457/23 458/4 computer [1] 613/9 Conaway [1] 317/13 concededly [1] 400/10 concept [2] 409/15
----------	--	---	---	--

<p>C</p> <p>concept... [1] 422/18</p> <p>concern [6] 372/16 606/6 607/11 608/5 608/20 609/4</p> <p>concerned [2] 421/10 461/5</p> <p>concerning [1] 419/3</p> <p>concerns [2] 445/4 497/11</p> <p>conclude [3] 457/4 481/15 484/11</p> <p>concluded [4] 372/11 475/5 481/19 524/3</p> <p>conclusion [2] 456/20 536/16</p> <p>concurrence [1] 367/22</p> <p>condition [2] 455/23 482/11</p> <p>conditioned [3] 328/5 408/3 578/15</p> <p>conditioning [1] 479/10</p> <p>conditions [5] 452/16 452/18 452/19 455/3 455/18</p> <p>conduct [1] 503/6</p> <p>conducted [2] 482/2 492/7</p> <p>conducting [1] 482/9</p> <p>confident [2] 458/13 485/20</p> <p>confidential [6] 347/16 508/11 508/15 515/16 528/19 529/2</p> <p>confidentiality [3] 389/15 509/3 539/6</p> <p>confirm [15] 327/10 341/16 369/1 403/18 406/3 424/10 508/19 513/9 536/15 577/11 578/20 580/6 586/2 614/1 614/19</p> <p>confirmation [9] 326/1 326/22 431/4 431/18 432/7 440/19 520/18 526/21 587/1</p> <p>confirmed [8] 507/23 513/16 513/21 514/2 515/13 524/23 549/10 549/20</p> <p>confirming [2] 520/2 549/15</p> <p>confirms [1] 494/2</p> <p>connection [13] 319/1 320/17 378/16 385/23 398/13 422/11 456/11 503/2 543/12 551/22 552/16 553/4 599/21</p> <p>consciously [3] 390/18 392/2 392/15</p> <p>consensus [1] 475/8</p> <p>consent [5] 419/7 459/21 567/3 568/10 612/15</p> <p>consents [2] 525/1 586/2</p>	<p>consequently [1] 442/10</p> <p>conservative [3] 525/16 525/20 591/12</p> <p>consider [7] 339/12 361/21 373/18 446/16 449/22 519/12 523/9</p> <p>considerable [2] 442/8 461/14</p> <p>consideration [15] 442/9 448/23 449/4 449/24 452/11 455/12 456/15 457/17 457/20 472/19 476/13 477/7 479/7 479/11 486/16</p> <p>considerations [5] 442/16 442/17 442/19 494/12 494/13</p> <p>considered [4] 375/18 566/2 566/19 566/20</p> <p>considering [1] 412/17</p> <p>consistent [12] 329/4 329/5 330/1 418/2 444/18 445/1 446/4 475/3 513/12 546/10 558/4 594/16</p> <p>CONSOLIDATED [1] 316/3</p> <p>constellation [7] 439/8 439/9 447/3 517/6 517/11 569/3 569/8</p> <p>constitute [12] 324/10 324/12 403/19 403/21 431/5 512/10 513/1 513/7 565/11 576/4 577/18 579/5</p> <p>constructive [2] 362/16 383/24</p> <p>Cont'd [1] 318/8</p> <p>contact [1] 360/19</p> <p>contacted [1] 320/24</p> <p>contain [3] 344/5 460/20 505/13</p> <p>contained [4] 382/6 410/10 505/18 562/20</p> <p>contemplates [1] 552/7</p> <p>contemplation [1] 318/20</p> <p>contemporaneous [1] 542/3</p> <p>contemporaneously [1] 613/9</p> <p>contest [1] 510/17</p> <p>context [33] 327/11 332/13 333/12 333/16 335/11 355/12 355/14 370/23 371/7 384/5 390/1 392/7 397/7 397/16 406/4 408/6 409/21 413/3 415/9 520/4 548/12 551/2 559/13 561/13 562/8 577/13 577/20 577/21 578/21 579/15 580/3 588/6 594/20</p> <p>continue [4] 475/10 481/17 585/8 606/8</p> <p>continued [2] 399/9</p>	<p>452/24</p> <p>continues [2] 485/16 583/1</p> <p>continuing [7] 325/14 411/1 412/10 415/18 452/20 488/16 518/15</p> <p>contract [1] 595/8</p> <p>contractually [1] 417/1</p> <p>contradiction [1] 325/7</p> <p>contrast [1] 384/15</p> <p>contravention [7] 325/18 327/12 404/6 406/5 411/5 518/18 577/14</p> <p>control [1] 510/11</p> <p>convened [1] 373/18</p> <p>conversation [43] 323/17 324/10 327/21 327/23 328/6 342/22 343/14 343/21 352/15 360/18 361/18 366/13 369/11 371/5 403/18 407/19 423/21 435/16 512/10 513/1 516/3 516/14 518/10 532/1 547/16 574/16 575/5 575/23 576/3 576/10 577/17 578/11 579/4 579/16 579/20 580/7 580/9 588/12 597/7 604/13 610/13 610/15 613/23</p> <p>conversations [14] 325/3 329/6 409/6 409/7 423/19 423/22 512/12 518/6 527/7 547/13 548/15 557/12 562/14 562/19</p> <p>convey [3] 491/14 555/13 571/10</p> <p>conveyed [4] 345/21 347/2 447/11 447/15</p> <p>cooperative [3] 505/24 507/10 547/10</p> <p>cooperatively [1] 552/3</p> <p>coordinate [1] 340/19</p> <p>copies [2] 331/17 568/19</p> <p>copy [6] 363/9 373/7 467/13 540/9 550/13 596/22</p> <p>copying [1] 426/8</p> <p>core [2] 554/21 557/1</p> <p>Cornelius [7] 380/10 380/12 380/20 380/22 381/2 381/5 381/8</p> <p>Cornelius's [1] 381/18</p> <p>corner [2] 545/14 546/20</p> <p>corporate [19] 435/24 437/20 469/17 469/24 501/9 501/12 501/14 501/16 501/19 502/24 528/3 540/18 540/21 541/23 542/2 542/8 542/9 542/13 556/22</p> <p>Corporation [5] 317/16</p>	<p>436/3 482/5 482/6 501/12</p> <p>correct [304]</p> <p>corrected [1] 386/8</p> <p>correctly [21] 378/17 379/17 384/4 387/8 389/19 392/5 403/23 404/9 405/3 408/21 411/7 421/4 471/15 486/5 488/24 497/14 546/8 568/12 594/4 594/7 606/10</p> <p>correspondence [3] 340/9 403/5 403/11</p> <p>cost [2] 465/8 477/17</p> <p>counsel's [3] 482/22 591/20 605/13</p> <p>counseled [1] 326/17</p> <p>counsels' [1] 340/22</p> <p>counter [2] 447/10 448/20</p> <p>counteroffer [1] 472/17</p> <p>counterparties [3] 336/4 351/7 381/11</p> <p>counterparty [4] 383/12 383/23 465/20 575/11</p> <p>couple [8] 330/7 335/17 375/1 422/15 427/7 596/20 597/3 600/22</p> <p>course [15] 438/11 499/14 502/10 507/20 511/9 513/7 529/17 533/23 535/8 537/20 549/17 579/16 580/1 609/18 614/24</p> <p>Court's [8] 407/7 438/9 463/9 532/9 532/11 592/21 592/24 593/3</p> <p>Courtroom [1] 316/9</p> <p>cover [4] 382/19 391/3 462/11 493/9</p> <p>covered [3] 518/22 576/24 577/2</p> <p>coy [1] 425/11</p> <p>CPG [11] 321/2 321/3 322/24 323/1 387/2 387/7 429/3 429/6 429/23 493/14 582/6</p> <p>CPG's [1] 431/6</p> <p>cquire [1] 509/24</p> <p>crafted [1] 363/3</p> <p>create [6] 378/13 442/22 454/11 556/12 556/18 613/13</p> <p>created [2] 492/5 571/5</p> <p>creating [4] 357/16 357/22 357/23 358/4</p> <p>creation [1] 448/13</p> <p>credibility [1] 413/12</p> <p>credible [2] 369/12 369/24</p> <p>credit [4] 444/12 444/23 452/21 452/23</p> <p>Cromwell [39] 331/17 331/19 356/13 356/18 356/22 367/14 374/14</p>	<p>378/18 378/20 379/18 379/22 382/12 382/21 383/2 383/5 385/7 385/13 389/9 389/14 390/7 390/16 390/24 391/4 392/8 392/13 393/5 395/4 397/10 400/11 404/2 412/13 416/20 416/24 430/10 430/20 606/15 607/6 607/8 609/10</p> <p>cross [10] 377/6 463/10 463/14 465/17 482/22 483/6 483/18 496/9 540/7 540/10</p> <p>cross-examination [6] 377/6 463/10 463/14 465/17 496/9 540/10</p> <p>crossed [2] 338/23 589/13</p> <p>crucial [1] 342/10</p> <p>crystallized [1] 529/19</p> <p>CST [1] 589/22</p> <p>current [4] 390/3 393/1 407/6 433/6</p> <p>currently [1] 436/1</p> <p>custom [1] 540/17</p> <p>cut [3] 400/16 400/22 569/9</p> <p>cutting [1] 407/11</p> <p>cyclical [1] 440/4</p> <hr/> <p>D</p> <p>data [4] 318/18 515/18 517/6 517/16</p> <p>date [19] 320/16 320/18 330/17 330/17 330/19 348/17 358/1 358/2 394/17 397/18 414/1 414/3 437/9 458/20 466/12 467/1 486/18 545/17 584/17</p> <p>dated [28] 318/16 331/15 340/7 343/5 346/16 353/16 356/4 362/7 391/8 397/13 425/2 426/8 445/9 489/21 503/21 508/1 509/12 512/1 517/20 521/22 523/16 525/23 526/20 531/13 536/21 538/18 554/19 589/21</p> <p>dates [4] 357/12 388/22 397/19 511/22</p> <p>dating [1] 344/20</p> <p>David [2] 358/24 359/1</p> <p>day [24] 324/8 327/3 328/23 349/23 358/11 390/3 396/21 403/7 405/23 426/21 428/15 445/11 489/19 535/6 540/13 542/22 542/22 544/19 574/19 595/18 597/24 605/18 605/18 615/10</p> <p>days [11] 331/6 331/10 418/9 422/15 425/18 426/21 493/16 494/10 554/23 556/21 589/11</p>
---	---	--	---	---

D	declining [3] 350/19 350/19 352/23 deem [1] 374/10 deemed [1] 552/5 Defendant [1] 317/16 Defendants [1] 433/19 define [2] 593/8 593/9 definitely [2] 401/16 473/2 definition [7] 407/2 407/2 563/9 578/2 594/13 594/19 599/8 definitive [4] 334/12 341/2 446/12 453/2 DEGNAN [1] 317/9 degree [2] 434/9 501/3 DELAWARE [7] 316/1 316/10 316/21 331/22 378/6 600/24 601/8 deliberation [2] 447/11 448/19 deliberations [1] 472/23 delivered [4] 369/8 447/12 479/19 493/22 delivering [1] 446/2 delivery [1] 396/16 delta [1] 350/14 demonstrative [5] 490/7 550/5 550/7 604/6 604/24 605/19 605/22 deal - try [1] 474/21 dealing [3] 424/11 534/4 535/5 dealt [1] 333/18 debated [2] 334/24 336/8 debrief [2] 582/6 582/7 debt [2] 442/6 442/9 December [21] 399/15 400/24 401/1 435/21 470/12 470/14 470/14 471/21 509/12 509/15 514/14 559/12 561/23 565/14 567/8 597/7 597/14 597/16 598/5 598/12 598/19 December 1st [2] 509/12 509/15 December 2015 [1] 470/12 December 2nd [2] 470/14 471/21 December 3rd [1] 470/14 decide [6] 326/13 336/8 449/3 455/11 538/7 538/9 decided [6] 398/18 417/10 508/8 522/9 524/6 608/15 decision [10] 332/14 402/24 407/7 412/3 498/7 538/10 591/22 591/24 592/24 593/3 decision-making [1] 332/14 decisions [1] 602/23	declining [3] 350/19 350/19 352/23 deem [1] 374/10 deemed [1] 552/5 Defendant [1] 317/16 Defendants [1] 433/19 define [2] 593/8 593/9 definitely [2] 401/16 473/2 definition [7] 407/2 407/2 563/9 578/2 594/13 594/19 599/8 definitive [4] 334/12 341/2 446/12 453/2 DEGNAN [1] 317/9 degree [2] 434/9 501/3 DELAWARE [7] 316/1 316/10 316/21 331/22 378/6 600/24 601/8 deliberation [2] 447/11 448/19 deliberations [1] 472/23 delivered [4] 369/8 447/12 479/19 493/22 delivering [1] 446/2 delivery [1] 396/16 delta [1] 350/14 demonstrative [5] 490/7 550/5 550/7 550/14 552/13 department [2] 501/9 501/13 depends [3] 385/17 396/9 547/18 deposition [33] 377/15 377/15 382/10 385/6 386/4 401/14 412/17 420/11 421/6 463/20 463/21 464/2 473/2 473/8 473/21 474/11 474/14 474/18 477/23 478/16 498/1 498/24 499/16 547/21 547/23 548/5 548/8 549/5 549/8 561/1 561/3 563/18 592/8 depth [2] 473/8 498/9 derailing [1] 461/6 describe [1] 502/8 described [4] 378/9 409/1 511/18 597/9 describes [1] 445/23 describing [1] 364/21 Description [1] 569/7 designed [2] 356/7 462/5 desire [2] 456/24 457/3 despite [1] 409/13 destroy [9] 347/13 347/16 348/20 398/23 415/14 415/15 508/2 508/11 509/6 destroy' [1] 347/8 destroyed [2] 508/14 515/16 destruction [2] 508/19 509/5 detail [3] 373/17 405/5	494/16 detailed [2] 332/17 538/24 determine [2] 328/21 613/20 determined [2] 471/7 553/10 developed [1] 362/13 development [5] 436/23 437/20 453/15 490/12 556/23 developments [1] 455/1 device [2] 333/2 613/10 dialogue [2] 448/1 499/10 dialogues [1] 438/9 dictionary [4] 593/22 594/1 594/12 594/18 did [250] 319/16 321/9 321/13 321/14 321/16 321/17 321/19 321/20 322/2 323/17 323/19 324/19 325/2 325/20 326/2 326/3 326/6 326/10 329/8 329/11 329/12 329/15 329/20 329/23 330/13 332/16 332/19 333/21 333/24 335/2 335/2 336/13 336/21 337/14 339/19 342/7 342/9 347/19 347/21 347/22 350/8 350/11 350/20 350/24 351/1 351/3 351/14 352/9 352/12 354/18 354/19 355/2 355/5 356/14 360/6 360/8 360/10 360/12 360/13 361/12 361/21 361/22 361/23 362/23 365/19 365/20 365/23 369/7 369/13 369/14 369/19 369/23 371/12 372/1 374/16 374/22 374/23 375/6 375/7 375/8 375/15 379/9 380/8 380/19 380/21 380/22 382/4 382/8 387/8 387/9 389/19 392/5 395/10 401/1 401/17 402/2 402/14 403/23 404/9 405/3 405/24 408/21 408/22 409/4 409/5 409/17 409/18 411/7 411/8 411/15 411/17 413/17 413/22 421/4 421/5 422/20 424/13 424/15 425/20 427/20 431/17 434/12 434/24 436/7 436/9 440/21 440/24 444/4 444/6 446/15 446/17 449/3 455/11 458/9 458/16 458/17 459/5 464/13 465/2 471/15 471/16 474/1 474/13 474/15 475/6 478/17	478/17 479/5 483/1 485/16 486/5 487/17 488/23 490/18 494/9 497/14 497/15 499/22 502/13 502/16 502/18 503/11 503/12 503/13 503/16 503/19 504/19 505/1 505/6 505/9 506/10 506/21 507/2 507/18 508/6 508/13 508/17 508/21 509/6 510/3 510/13 510/22 511/5 511/11 511/17 513/9 513/24 515/3 515/6 515/22 516/5 516/9 518/4 519/12 519/21 520/7 520/19 520/24 521/12 521/18 522/20 524/13 524/17 524/22 525/2 525/13 526/8 526/21 527/9 527/12 528/8 528/22 529/8 529/10 530/1 531/20 532/3 534/7 535/22 536/23 537/2 537/14 538/6 538/8 538/9 538/13 538/21 539/8 539/11 539/21 543/11 546/17 547/24 548/2 549/5 549/8 565/13 571/10 577/8 578/3 579/11 580/5 590/7 592/15 602/20 603/5 607/11 608/19 609/16 609/18 didn't [41] 370/1 380/5 405/23 407/11 409/15 418/8 455/17 459/10 461/14 465/18 486/23 487/12 492/22 515/11 520/13 520/14 520/16 520/17 529/17 534/13 535/24 536/1 536/9 537/5 538/11 560/5 560/6 560/9 562/18 571/23 571/24 581/6 583/13 588/1 591/13 592/11 592/11 603/3 605/14 609/1 612/21 difference [2] 397/14 604/19 different [12] 329/1 364/14 409/3 418/19 492/10 560/21 588/6 592/1 594/21 595/19 604/11 614/18 differential [1] 461/23 differently [1] 561/18 difficult [1] 370/9 digest [1] 334/4 diligence [8] 334/11 503/7 517/15 523/1 596/3 599/14 601/14 601/23 direct [37] 318/8 362/24 377/24 378/8 379/13 385/22 387/13 390/22 393/3 393/10 393/14 399/7 402/6	403/4 406/15 416/13 422/2 423/4 425/1 425/23 426/15 432/8 432/22 434/3 472/13 473/1 482/17 482/23 483/8 487/3 489/23 491/12 497/4 500/21 559/17 587/9 605/13 directed [3] 345/24 410/23 613/20 direction [6] 328/4 379/19 398/22 408/2 578/15 578/18 Directionally [1] 474/21 Directionally - don't [1] 474/21 directly [10] 342/14 351/12 380/7 380/8 548/16 561/20 562/15 583/15 583/18 583/24 director [8] 319/14 380/15 380/17 435/23 436/6 464/17 465/22 570/13 directors [15] 331/20 331/21 341/18 383/7 435/18 439/5 444/3 446/21 448/9 454/17 460/6 468/16 469/21 473/17 518/21 directors' [1] 330/11 disadvantage [1] 388/3 disadvantages [3] 334/21 334/24 335/21 disagree [7] 381/18 422/17 466/23 547/15 560/9 592/20 594/18 disappointment [1] 488/11 discharging [1] 544/13 disclose [13] 419/1 422/5 494/8 504/8 528/20 565/16 566/3 566/22 568/10 572/20 607/21 608/9 608/9 disclosed [4] 422/2 528/19 529/3 608/17 disclosing [2] 424/23 529/16 disclosure [28] 387/1 419/6 419/13 419/19 419/20 424/6 424/9 471/11 502/3 504/12 506/18 506/19 510/20 510/21 511/3 528/13 529/20 535/5 535/12 546/6 566/12 567/3 572/8 573/3 574/8 607/18 607/22 608/22 disclosures [1] 424/12 disconnect [3] 357/16 357/22 357/23 discount [4] 370/2 450/16 450/20 456/5 discounted [1] 441/16 discuss [16] 328/6 330/8 333/4 341/1
----------	---	---	--	---	---

<p>D</p> <p>discuss... [12] 342/6 351/23 354/21 372/18 373/1 438/4 515/6 522/24 525/11 574/21 576/23 584/13</p> <p>discussed [23] 327/6 333/7 333/15 335/9 335/23 345/11 357/19 368/23 394/15 405/5 446/5 454/22 461/8 462/13 472/13 497/4 512/17 515/8 515/15 515/19 526/14 575/15 575/16</p> <p>discussing [9] 384/6 387/15 392/21 395/9 397/10 441/8 525/9 585/15 590/20</p> <p>discussion [58] 324/9 328/15 328/16 328/24 331/1 333/10 333/12 334/15 335/5 335/18 341/6 345/23 348/21 348/22 352/9 353/21 354/9 355/1 355/9 361/9 362/17 362/20 371/6 395/1 406/13 408/18 408/19 410/7 413/14 432/12 432/21 438/1 447/6 447/14 447/22 462/24 469/3 478/6 479/14 482/21 483/9 500/2 509/16 511/5 511/12 511/15 513/5 520/3 525/1 525/18 525/18 531/8 538/5 585/9 586/2 586/23 603/14 604/20</p> <p>discussions [90] 318/14 318/18 318/24 319/22 321/7 321/7 321/10 321/21 321/24 325/13 325/14 326/7 326/13 326/16 328/20 331/2 337/18 341/17 342/7 345/18 346/9 346/10 346/23 349/9 350/13 351/9 361/16 364/23 375/3 389/24 398/19 399/4 400/16 400/23 401/2 402/19 405/9 407/24 410/24 411/2 419/1 422/3 422/16 423/18 423/22 424/2 425/19 437/23 441/5 441/8 443/17 444/10 444/17 445/16 447/7 449/17 456/19 458/10 462/4 471/5 477/1 481/4 488/7 493/1 493/17 495/5 495/13 507/4 507/9 507/9 508/10 511/12 513/20 514/1 518/14 518/15 519/9 520/24 521/16 529/6 529/18 531/23 532/5 533/13</p>	<p>535/10 535/16 536/1 577/24 588/3 588/4</p> <p>disinfected [1] 435/14</p> <p>dispositions [1] 502/12</p> <p>dispute [22] 400/3 417/20 468/2 468/9 468/14 468/22 469/5 469/11 471/17 475/1 476/4 481/1 486/8 489/2 489/6 489/11 489/13 489/16 493/21 494/4 494/24 584/7</p> <p>disputed [1] 595/15</p> <p>disputing [3] 388/20 392/24 397/19</p> <p>distilled [1] 409/9</p> <p>distinction [1] 551/3</p> <p>distinguish [2] 552/24 563/22</p> <p>distinguishing [1] 551/5</p> <p>diversify [1] 465/12</p> <p>divest [1] 449/10</p> <p>divestiture [1] 449/12</p> <p>divestitures [1] 458/3</p> <p>dividend [2] 441/17 442/13</p> <p>doctrines [1] 595/4</p> <p>documentation [1] 334/12</p> <p>documents [5] 357/6 395/20 464/5 594/24 595/10</p> <p>does [33] 336/6 336/10 343/13 343/18 344/5 344/7 348/16 348/18 359/12 364/2 364/5 366/16 374/13 388/14 388/23 394/1 394/2 400/1 400/2 406/23 410/3 410/4 410/8 444/21 448/12 505/12 505/14 536/2 536/5 555/11 558/7 607/20 614/11</p> <p>doesn't [15] 361/18 363/7 388/1 392/22 407/1 410/2 410/5 422/5 462/20 555/22 570/17 572/13 577/19 579/12 579/12</p> <p>doing [11] 328/13 328/14 330/24 408/16 408/17 431/13 488/3 501/3 512/19 532/16 596/17</p> <p>dollars [2] 342/11 409/22</p> <p>Dominion [6] 322/7 336/5 350/22 351/5 354/4 398/14</p> <p>Don [2] 437/21 512/6</p> <p>don't [182] 320/12 320/17 326/4 326/4 326/11 326/11 330/17 331/9 333/9 342/18 342/21 343/5 345/17 346/13 347/5 358/5</p>	<p>358/16 360/17 361/17 367/5 368/13 369/9 369/10 372/20 384/22 385/2 388/21 389/21 393/1 394/17 395/13 395/17 397/1 397/3 397/18 399/17 400/2 405/13 408/8 409/5 410/10 410/10 411/9 411/9 411/15 411/16 411/21 412/5 412/5 415/12 417/19 417/20 419/21 421/9 421/13 423/19 424/17 424/19 427/13 432/10 432/21 433/6 433/23 440/6 446/7 446/8 453/18 453/22 456/7 458/20 462/11 466/12 469/5 471/17 474/3 474/6 474/6 474/21 475/19 477/20 479/14 481/22 483/3 483/18 487/14 489/2 489/13 490/3 490/17 491/16 493/3 493/5 494/5 494/14 495/19 496/2 496/8 497/22 498/8 498/18 499/9 500/1 504/20 511/22 512/9 512/24 523/13 533/6 543/21 543/22 546/2 546/14 547/18 549/10 549/15 549/23 554/1 556/14 558/14 558/20 558/20 558/23 558/24 558/24 560/16 560/18 561/16 563/11 565/5 565/7 566/14 566/24 567/5 567/16 569/6 569/17 569/22 570/18 574/14 575/21 579/14 581/11 582/14 583/6 583/6 584/9 584/10 584/12 589/15 589/15 589/24 590/1 590/3 590/17 590/18 590/21 590/21 591/2 591/3 591/14 591/14 591/17 591/17 593/1 593/2 594/18 595/13 599/5 600/14 602/5 604/8 604/13 604/20 606/16 607/15 607/21 610/6 610/10 610/12 611/12 612/22 614/24</p> <p>don'ts [1] 552/18</p> <p>done [12] 348/2 372/4 372/7 375/23 396/13 456/24 480/15 485/22 486/11 533/16 594/2 609/20</p> <p>dos [1] 552/18</p> <p>dotted [1] 589/13</p> <p>doubt [4] 498/5 523/7 569/11 602/3</p> <p>down [32] 322/22 334/4 334/18 347/1 354/2 366/4 399/3</p>	<p>399/10 429/2 430/3 461/20 475/14 481/21 481/24 485/23 487/24 493/14 497/8 541/21 545/18 553/17 553/20 554/24 555/17 555/19 556/16 556/22 561/23 565/24 568/3 579/5 610/23</p> <p>downgrade [1] 452/22</p> <p>downgraded [1] 350/17</p> <p>draft [34] 356/11 360/1 367/9 424/21 426/12 462/11 462/16 473/18 501/23 501/24 503/13 503/14 503/23 504/4 521/15 523/13 526/7 531/17 538/22 539/7 541/2 541/2 541/6 541/15 543/8 570/22 586/20 611/2 611/10 611/22 612/7 612/18 613/13 614/24</p> <p>drafted [7] 336/23 385/13 390/7 497/22 526/16 587/13 591/6</p> <p>drafting [3] 363/11 364/4 374/14</p> <p>drafts [1] 610/23</p> <p>draw [2] 475/13 497/2</p> <p>drawing [2] 565/23 611/17</p> <p>drawn [1] 426/4</p> <p>due [6] 334/11 503/6 517/15 523/1 596/2 599/14</p> <p>duly [2] 434/1 500/17</p> <p>uplicative [2] 594/23 595/13</p> <p>during [22] 332/18 375/3 375/8 375/20 377/24 378/8 386/4 401/20 403/4 419/2 429/20 438/11 471/20 473/8 476/24 502/10 507/15 507/16 549/17 583/14 584/8 590/4</p> <p>duties [12] 330/11 331/21 332/12 354/5 395/8 509/2 600/21 600/24 601/4 601/16 604/1 604/10</p> <p>duty [2] 375/18 375/21</p> <p>dynamic [1] 421/24</p>	<p>432/8 432/12 432/21 445/2 449/17 456/23 475/4 481/11 481/13 481/22 482/6 487/4 490/24 543/2 543/6 543/7 553/17 559/4 562/15 575/5 577/4 588/1 613/5</p> <p>earliest [1] 418/5</p> <p>early [14] 390/1 409/8 428/19 436/11 514/9 514/16 514/20 574/14 575/22 584/12 584/12 584/19 588/6 597/16</p> <p>earned [1] 454/12</p> <p>easier [9] 338/10 339/4 355/16 355/17 359/9 439/1 467/13 550/8 550/12</p> <p>easily [1] 534/17</p> <p>East [1] 418/13</p> <p>Eastern [1] 603/15</p> <p>easy [1] 359/7</p> <p>EBITDA [1] 441/17</p> <p>economic [1] 383/24</p> <p>edition [3] 593/22 594/12 594/13</p> <p>educational [2] 434/6 500/24</p> <p>effect [4] 365/12 506/22 509/4 509/7</p> <p>effective [2] 399/9 515/10</p> <p>effectively [1] 412/4</p> <p>effort [5] 336/8 373/2 375/10 448/15 521/8</p> <p>efforts [2] 437/6 438/16</p> <p>eight [1] 335/22</p> <p>eighth [1] 334/5</p> <p>either [16] 344/18 375/22 388/11 410/13 435/2 440/7 440/15 456/4 484/2 504/8 506/17 541/21 581/6 588/14 591/6 613/9</p> <p>elements [1] 438/19</p> <p>eliminate [1] 450/9</p> <p>else [10] 339/12 344/18 373/21 430/21 487/21 525/19 536/14 539/22 607/4 614/7</p> <p>else ... [1] 607/4</p> <p>email [179] 318/16 318/17 319/20 323/24 324/1 324/16 324/20 325/10 327/4 327/10 328/12 330/5 330/18 330/20 331/15 337/3 340/12 340/14 340/18 341/4 341/8 341/24 342/8 343/4 343/6 343/9 344/3 344/5 344/9 344/18 346/21 347/4 348/7 348/10 348/19 349/1 349/24 351/21 352/13 352/14 353/16 355/21 358/24 359/22 362/7 364/12</p>
---	--	---	---	--

E	endpoint [1] 553/9 energy [7] 317/16 356/4 434/23 435/1 435/4 464/14 501/12 Energy's [1] 478/13 engage [7] 336/3 429/23 471/10 471/12 472/1 495/5 495/12 engaged [1] 599/21 engagement [1] 598/6 engagements [1] 450/19 engaging [2] 515/12 517/14 English [2] 593/17 594/17 English-language [1] 594/17 enjoy [1] 592/2 enough [12] 374/11 412/19 412/24 413/3 413/5 413/5 413/8 413/12 413/14 423/3 446/14 585/20 ensure [11] 340/20 508/13 518/9 524/15 526/15 527/10 528/12 553/11 585/6 591/13 610/18 ensuring [1] 525/21 entail [1] 456/6 enter [11] 336/12 337/17 431/15 444/10 444/17 449/1 515/11 523/1 547/5 607/13 608/21 entered [10] 336/15 363/2 381/10 426/17 426/20 431/7 466/8 466/11 466/12 611/5 entering [2] 333/22 537/13 entertaining [1] 321/23 entire [1] 569/19 entitled [3] 355/22 482/22 582/6 entries [1] 545/20 entry [2] 493/11 545/22 envelope [1] 362/22 EPS [1] 441/17 equity [23] 319/19 398/20 440/16 442/10 442/23 443/2 445/4 449/8 449/14 449/20 449/23 455/20 455/20 456/14 457/17 471/7 485/18 508/9 510/1 514/4 555/22 556/2 558/1 Eric [3] 348/12 348/13 480/7 especially [1] 423/21 ESQ [15] 317/2 317/2 317/4 317/5 317/6 317/6 317/7 317/9 317/9 317/11 317/12 317/12 317/14 317/14 317/15 essentially [5] 449/13	458/2 511/17 522/24 529/20 establish [5] 390/17 392/2 392/14 432/3 464/10 established [2] 400/9 404/18 Estate [1] 436/5 et [1] 557/21 evaluate [2] 370/5 440/16 evaluation [1] 439/11 even [23] 328/5 399/9 407/23 408/3 419/17 422/22 440/8 462/21 511/21 523/1 535/4 535/9 536/9 560/2 562/19 569/6 578/15 586/12 588/15 588/17 591/22 601/7 610/11 evening [1] 318/19 evening's [2] 353/19 353/23 event [5] 325/15 411/3 460/21 492/8 518/16 events [2] 416/18 538/24 eventually [1] 611/12 everybody [1] 430/21 everyone [4] 318/1 377/2 452/3 531/2 everything [5] 370/18 397/4 409/8 526/13 527/9 evidence [1] 496/8 exact [3] 415/12 524/15 526/16 exactly [4] 427/16 483/4 514/13 610/19 exam [1] 393/3 examination [18] 318/8 377/6 377/24 378/8 385/22 387/14 390/23 393/15 403/5 416/13 434/3 463/10 463/14 465/17 496/9 500/21 540/10 605/13 examined [2] 434/2 500/17 examining [1] 570/13 example [3] 323/6 354/4 482/5 excellent [1] 566/7 except [2] 361/6 595/2 exception [1] 419/9 excerpt [3] 493/8 496/6 496/7 exchange [44] 323/17 323/21 352/10 361/4 361/14 361/16 372/13 374/4 419/14 421/20 421/24 423/13 424/5 424/11 451/5 455/5 504/13 504/24 504/24 505/3 505/4 510/6 511/5 511/24 516/17 517/20 520/6 520/7 521/19 521/21 523/16 523/23 524/2 525/23	527/23 529/4 529/9 529/13 531/9 531/14 536/20 537/17 538/17 574/11 exchanged [2] 481/3 489/3 exchanging [1] 610/23 exclusivity [86] 333/18 333/22 334/14 334/22 335/6 335/19 336/9 336/13 336/16 336/19 337/4 337/8 337/21 339/10 346/11 349/17 349/20 350/4 350/9 350/12 350/21 351/22 352/3 354/6 354/13 354/19 354/24 355/2 355/18 356/18 362/14 363/2 365/4 365/7 365/14 365/17 367/11 369/18 412/13 412/20 412/24 413/18 413/24 414/8 415/5 415/19 416/3 417/7 417/15 417/17 426/17 426/20 427/1 427/6 431/6 431/14 431/19 431/23 475/16 475/24 475/24 476/5 476/10 479/12 479/15 520/24 521/4 521/12 522/3 522/4 522/15 523/4 537/8 595/23 596/1 604/22 604/23 605/4 605/5 605/9 606/5 609/20 610/21 610/23 611/2 612/19 exclusivity' [1] 607/2 exclusivity' - which [1] 607/2 excuse [4] 346/17 358/16 363/13 391/15 excused [2] 433/18 500/11 execute [6] 437/2 438/17 442/24 448/16 449/12 450/18 executed [6] 382/3 443/4 449/7 522/14 606/6 608/5 executing [7] 354/6 354/12 413/17 440/19 451/9 522/4 540/18 execution [9] 357/2 445/3 450/6 450/9 451/7 454/24 455/7 462/15 537/9 executive [19] 322/23 331/1 375/24 378/9 387/14 387/19 388/1 392/20 394/13 394/16 434/19 437/14 447/5 461/2 461/19 495/4 497/7 557/1 559/19 executives [4] 471/5 514/22 559/4 569/23 exert [4] 566/13 572/7 573/3 574/8 exerting [1] 381/22	exhibit [102] 318/15 319/21 320/2 320/5 320/9 320/13 320/19 323/20 323/21 325/9 325/22 327/1 327/4 330/4 330/5 331/14 332/20 332/22 334/2 337/2 337/7 340/4 340/15 342/17 343/1 344/1 344/2 344/23 344/24 346/14 346/15 346/15 348/5 349/12 351/17 353/15 355/20 356/3 357/12 357/14 357/15 358/13 358/22 359/20 362/6 363/6 363/17 366/2 366/23 368/4 368/21 370/6 373/5 373/14 374/2 377/13 382/15 382/16 383/16 386/13 386/14 387/20 393/11 394/20 395/15 395/23 403/11 406/2 418/20 426/5 438/23 439/3 444/1 445/8 446/19 453/12 454/15 459/1 496/7 496/11 496/12 503/21 506/6 507/24 509/11 511/24 516/17 517/19 517/19 521/21 521/24 522/14 523/16 525/22 526/19 527/22 528/15 531/12 536/20 538/16 567/24 601/18 Exhibit 1059 [1] 368/4 exhibits [2] 438/23 489/20 exist [2] 461/2 560/16 existence [4] 566/4 566/22 570/11 572/20 expect [10] 324/5 368/18 403/15 403/16 438/10 478/5 498/6 569/21 569/22 579/7 expectation [5] 340/24 341/5 454/11 507/7 510/15 expectations [1] 319/15 expected [5] 424/18 461/24 588/2 588/9 588/10 expecting [1] 525/19 expedited [1] 362/15 expense [1] 334/11 expensive [2] 442/11 455/21 experience [13] 342/12 396/5 409/23 435/23 441/14 483/21 502/5 502/8 505/9 505/11 534/4 535/4 536/4 experienced [1] 319/10 experiencing [1] 319/18 expert [4] 382/11 400/10 532/18 607/18
----------	--	--	---	--

<p>E</p> <p>expertise [1] 437/1</p> <p>expiration [3] 350/3 350/8 350/21</p> <p>expire [2] 414/1 416/4</p> <p>expired [10] 349/18 352/4 355/18 365/6 417/8 475/15 475/17 476/1 476/5 476/16</p> <p>expiring [1] 346/12</p> <p>explain [2] 415/21 526/12</p> <p>explained [4] 372/5 389/14 482/11 607/2</p> <p>explaining [1] 397/4</p> <p>explanation [3] 509/18 513/17 538/24</p> <p>explanatory [1] 482/19</p> <p>explicit [5] 328/4 363/5 408/2 578/14 578/18</p> <p>explore [2] 437/6 593/6</p> <p>exploring [1] 435/5</p> <p>express [5] 524/12 579/10 580/11 585/5 586/7</p> <p>expressed [2] 321/4 444/19</p> <p>expressing [4] 564/17 565/1 565/10 573/23</p> <p>expression [1] 581/13</p> <p>expressly [3] 479/12 587/1 587/16</p> <p>extend [2] 385/9 537/8</p> <p>extended [2] 436/18 476/1</p> <p>extension [7] 350/12 352/17 414/7 415/5 415/19 416/5 416/8</p> <p>extensive [1] 335/4</p> <p>extensively [1] 335/9</p> <p>extent [10] 328/24 419/24 504/9 515/12 532/7 541/11 541/17 548/20 555/14 583/24</p> <p>extra [1] 339/15</p> <p>extract [1] 353/3</p>	<p>464/11 468/7 469/10 469/11 541/4</p> <p>factually [1] 533/3</p> <p>fair [63] 378/14 379/4 379/14 381/13 384/8 386/7 391/3 402/21 407/10 423/3 432/4 446/14 466/7 466/17 469/23 471/20 472/15 473/9 476/9 476/23 477/4 477/12 477/16 490/19 498/14 499/20 540/1 542/17 546/14 547/10 547/11 553/14 553/15 557/4 561/12 565/2 567/5 567/14 569/20 573/8 573/17 578/24 581/15 583/19 586/4 586/13 590/15 595/16 599/7 600/15 603/22 604/2 604/3 604/14 604/24 607/23 610/15 612/19 612/23 612/24 613/1 613/13 615/3</p> <p>fairly [1] 550/23</p> <p>fairness [3] 613/22 613/24 614/11</p> <p>faith [2] 365/1 533/22</p> <p>fall [3] 329/1 466/5 503/10</p> <p>falling [1] 397/3</p> <p>familiar [5] 337/20 348/14 467/4 468/3 600/23</p> <p>famous [1] 601/8</p> <p>far [3] 319/9 350/9 354/20</p> <p>Fargo [16] 348/15 371/4 432/10 432/14 432/14 432/18 433/1 480/1 489/19 490/24 517/3 517/14 597/21 599/20 600/1 613/21</p> <p>fashion [1] 505/24</p> <p>fast [3] 371/20 485/23 486/12</p> <p>fault [1] 435/11</p> <p>favor [1] 464/17</p> <p>feasible [3] 417/11 449/10 457/24</p> <p>February [2] 413/20 441/9</p> <p>February/March [1] 441/9</p> <p>federal [2] 504/17 504/20</p> <p>feedback [5] 319/15 487/9 487/12 487/14 487/16</p> <p>feel [5] 356/8 370/2 458/8 532/3 536/5</p> <p>feeling [2] 361/4 588/19</p> <p>fees [1] 524/7</p> <p>fellow [1] 434/10</p> <p>felt [5] 353/1 370/20 412/19 448/2 571/8</p> <p>few [20] 425/18 460/20</p>	<p>476/18 489/19 493/14 493/16 494/10 502/13 515/7 540/16 544/16 554/23 557/16 565/18 570/12 571/4 589/8 592/10 592/12 592/17</p> <p>fide [3] 337/13 339/11 522/19</p> <p>fiduciary [19] 331/21 332/11 337/24 354/5 372/6 375/18 375/21 395/8 397/3 523/7 523/7 523/11 600/21 600/24 601/16 603/4 603/13 603/24 604/9</p> <p>field [3] 375/11 441/20 535/11</p> <p>fields [1] 436/20</p> <p>fifth [1] 487/24</p> <p>figure [2] 338/15 384/16</p> <p>filed [5] 320/16 385/23 386/5 606/23 609/12</p> <p>final [13] 345/20 348/1 379/2 379/5 415/21 444/7 444/10 446/12 495/14 495/19 496/1 506/6 531/17</p> <p>finalized [1] 470/8</p> <p>finally [2] 556/10 589/9</p> <p>finance [3] 439/21 455/21 461/11</p> <p>financed [1] 450/7</p> <p>financial [16] 319/18 336/1 345/24 361/6 432/14 434/19 437/1 437/20 480/1 481/1 482/6 516/24 527/13 597/22 609/1 615/1</p> <p>financing [3] 440/1 440/17 474/22</p> <p>find [7] 380/22 383/15 448/15 551/14 609/18 612/8 614/21</p> <p>finding [2] 539/13 592/17</p> <p>findings [3] 439/14 439/19 592/21</p> <p>fine [14] 328/13 338/19 338/20 369/9 370/18 371/13 408/7 408/10 408/16 423/6 516/11 534/2 538/11 596/9</p> <p>fingers [1] 338/22</p> <p>finished [2] 318/12 589/7</p> <p>firm [14] 385/10 389/22 412/19 412/24 413/1 413/3 413/8 413/10 434/17 441/22 446/10 501/5 516/13 607/8</p> <p>firmly [1] 457/5</p> <p>firmness [1] 412/18</p> <p>firms [1] 581/18</p> <p>fit [3] 435/6 436/14 464/22</p> <p>flip [2] 391/7 417/23</p> <p>flipping [3] 393/18 394/13 555/24</p>	<p>Florence [1] 331/16</p> <p>flow [1] 441/16</p> <p>fluidly [1] 589/6</p> <p>fly [1] 435/10</p> <p>focus [22] 325/10 335/17 366/9 367/2 367/23 414/17 418/18 418/21 427/24 483/5 545/21 550/12 555/5 555/8 570/6 582/1 582/22 602/13 603/9 605/16 610/15 613/4</p> <p>focused [1] 550/18</p> <p>focusing [3] 384/3 424/20 498/8</p> <p>folks [1] 602/18</p> <p>follow [5] 511/12 520/13 571/8 607/16 608/19</p> <p>follow-up [1] 511/12</p> <p>followed [1] 345/10</p> <p>following [7] 345/15 353/20 387/1 426/21 435/17 529/9 603/13</p> <p>follows [11] 318/7 381/7 434/2 473/24 478/1 498/4 499/19 500/18 548/10 561/5 563/21</p> <p>football [2] 441/20 614/16</p> <p>footprint [3] 436/15 436/17 436/18</p> <p>forbade [1] 411/10</p> <p>forbids [1] 383/21</p> <p>force [2] 506/19 509/4</p> <p>Forecasts [1] 374/8</p> <p>foreign [6] 424/13 532/9 532/14 532/15 532/19 533/2</p> <p>forgive [1] 371/20</p> <p>form [10] 333/1 391/17 442/11 455/21 538/22 548/24 550/10 561/8 564/1 607/1</p> <p>formal [16] 328/12 328/24 384/7 384/12 384/22 389/22 396/9 396/14 396/18 397/5 408/15 409/3 410/2 448/24 526/22 593/13</p> <p>formally [1] 599/21</p> <p>former [1] 377/18</p> <p>formulate [1] 429/9</p> <p>Fornell [7] 348/13 480/7 480/23 481/2 598/5 614/7 614/21</p> <p>forth [7] 370/17 438/20 446/1 495/17 550/22 553/22 566/18</p> <p>forths [1] 438/11</p> <p>forward [32] 328/3 339/8 340/22 361/7 371/13 401/24 406/17 407/8 408/1 411/19 411/22 412/10 413/7 442/3 446/11 450/22 460/5 462/18 462/22 498/19 498/20 523/17</p>	<p>524/11 524/13 537/11 556/2 568/22 568/22 578/12 584/11 606/2 611/3</p> <p>forwarded [5] 368/14 404/1 408/11 526/5 538/4</p> <p>forwarding [2] 367/8 524/18</p> <p>forwards [1] 509/13</p> <p>found [6] 338/4 370/21 401/9 402/24 412/3 592/12</p> <p>four [4] 346/16 398/24 501/3 539/3</p> <p>four-year [1] 501/3</p> <p>fourth [1] 497/8</p> <p>FP [1] 614/19</p> <p>frame [3] 415/16 441/2 441/9</p> <p>Francois [21] 370/20 371/9 372/1 372/4 372/9 372/19 399/14 437/19 438/3 485/16 485/20 509/12 511/8 527/7 567/20 573/7 575/5 575/12 575/22 606/1 614/20</p> <p>freaking [1] 480/14</p> <p>free [1] 356/8</p> <p>frequent [2] 396/13 527/6</p> <p>Friday [2] 318/19 418/10</p> <p>friend [5] 464/6 532/14 532/22 550/6 553/18</p> <p>friend's [1] 532/13</p> <p>friendliest [1] 562/19</p> <p>friendly [10] 547/13 548/15 548/20 551/5 551/12 551/15 553/1 553/1 553/6 562/14</p> <p>friends [6] 463/12 472/11 566/17 570/16 587/13 606/19</p> <p>front [10] 377/12 396/1 410/18 432/21 438/24 460/18 467/17 470/18 473/5 581/11</p> <p>Frumkin [22] 323/22 324/18 324/22 328/8 328/11 328/18 329/3 330/6 342/1 344/12 363/10 363/11 404/2 404/4 404/21 405/9 405/19 408/12 408/14 408/24 607/2 607/9</p> <p>Frumkin's [3] 321/14 352/14 409/14</p> <p>fulfilling [1] 601/16</p> <p>full [13] 389/13 391/16 391/18 403/14 410/19 428/4 482/20 488/16 509/4 545/8 556/1 607/1 612/2</p> <p>fully [2] 332/14 364/9</p> <p>fulsome [1] 595/20</p> <p>fun [1] 547/20</p> <p>funny [1] 570/10</p>
<p>F</p> <p>face [3] 342/24 388/9 394/6</p> <p>facilitate [1] 501/20</p> <p>fact [42] 319/22 325/1 340/1 343/12 345/2 401/18 419/1 440/14 441/23 467/9 468/2 468/10 468/12 469/6 475/19 476/8 492/11 508/13 508/14 508/24 516/9 516/11 520/14 526/21 528/9 529/22 529/22 530/3 535/18 536/9 543/7 562/23 578/9 583/16 588/20 591/2 591/7 596/24 597/1 598/5 605/5 609/24</p> <p>factors [1] 335/12</p> <p>facts [7] 398/1 464/4</p>	<p>face [3] 342/24 388/9 394/6</p> <p>facilitate [1] 501/20</p> <p>fact [42] 319/22 325/1 340/1 343/12 345/2 401/18 419/1 440/14 441/23 467/9 468/2 468/10 468/12 469/6 475/19 476/8 492/11 508/13 508/14 508/24 516/9 516/11 520/14 526/21 528/9 529/22 529/22 530/3 535/18 536/9 543/7 562/23 578/9 583/16 588/20 591/2 591/7 596/24 597/1 598/5 605/5 609/24</p> <p>factors [1] 335/12</p> <p>facts [7] 398/1 464/4</p>	<p>face [3] 342/24 388/9 394/6</p> <p>facilitate [1] 501/20</p> <p>fact [42] 319/22 325/1 340/1 343/12 345/2 401/18 419/1 440/14 441/23 467/9 468/2 468/10 468/12 469/6 475/19 476/8 492/11 508/13 508/14 508/24 516/9 516/11 520/14 526/21 528/9 529/22 529/22 530/3 535/18 536/9 543/7 562/23 578/9 583/16 588/20 591/2 591/7 596/24 597/1 598/5 605/5 609/24</p> <p>factors [1] 335/12</p> <p>facts [7] 398/1 464/4</p>	<p>face [3] 342/24 388/9 394/6</p> <p>facilitate [1] 501/20</p> <p>fact [42] 319/22 325/1 340/1 343/12 345/2 401/18 419/1 440/14 441/23 467/9 468/2 468/10 468/12 469/6 475/19 476/8 492/11 508/13 508/14 508/24 516/9 516/11 520/14 526/21 528/9 529/22 529/22 530/3 535/18 536/9 543/7 562/23 578/9 583/16 588/20 591/2 591/7 596/24 597/1 598/5 605/5 609/24</p> <p>factors [1] 335/12</p> <p>facts [7] 398/1 464/4</p>	<p>face [3] 342/24 388/9 394/6</p> <p>facilitate [1] 501/20</p> <p>fact [42] 319/22 325/1 340/1 343/12 345/2 401/18 419/1 440/14 441/23 467/9 468/2 468/10 468/12 469/6 475/19 476/8 492/11 508/13 508/14 508/24 516/9 516/11 520/14 526/21 528/9 529/22 529/22 530/3 535/18 536/9 543/7 562/23 578/9 583/16 588/20 591/2 591/7 596/24 597/1 598/5 605/5 609/24</p> <p>factors [1] 335/12</p> <p>facts [7] 398/1 464/4</p>

F further [13] 334/11 429/1 430/3 433/10 433/11 448/19 452/15 463/5 468/18 475/14 500/4 511/5 610/15 future [2] 430/11 580/9 fuzzy [1] 346/10 FW [1] 568/22	583/3 583/13 583/18 583/19 583/24 584/4 585/11 585/14 586/12 590/4 590/19 591/2 591/8 597/7 597/14 given [18] 329/19 331/12 332/18 336/24 343/12 347/17 379/21 395/11 421/2 423/24 427/2 429/23 528/14 585/3 600/1 604/15 604/17 612/17 gives [3] 352/18 353/7 357/8 giving [8] 330/1 357/1 525/16 546/23 557/3 564/22 583/16 606/5 glad [2] 561/18 561/19 glasses [1] 467/14 Glen [2] 374/12 414/22 goal [2] 354/16 372/8 goes [10] 333/4 337/19 340/15 357/7 522/24 541/7 542/17 546/5 556/2 607/4 Goldman [25] 335/24 348/22 363/14 366/4 366/17 367/13 369/8 371/5 373/2 373/7 373/22 420/6 420/17 420/18 428/15 429/3 429/6 432/9 432/13 432/16 432/18 433/1 433/3 516/24 517/14 gone [2] 373/24 481/24 good [28] 318/10 318/11 324/2 327/5 355/13 355/15 365/1 374/9 377/4 377/8 389/3 434/5 435/6 436/14 436/17 463/7 463/16 463/18 463/23 464/22 488/18 489/8 500/14 500/23 502/10 524/24 530/5 533/22 good-bye [1] 500/14 good-faith [1] 533/22 got [34] 327/16 344/18 348/21 361/10 394/19 409/15 417/1 423/16 424/19 431/18 457/11 458/1 488/12 519/8 537/23 545/16 549/14 557/6 567/7 567/18 570/21 571/13 572/14 579/6 586/19 589/21 593/20 593/22 601/7 602/3 603/2 610/9 610/20 610/22 gotten [2] 418/14 494/16 govern [1] 504/21 governance [3] 435/3 435/17 501/21 graduated [2] 501/2 501/3 grant [2] 412/20 412/24 granted [1] 593/11	granting [1] 334/21 great [6] 362/5 390/14 412/10 436/4 464/10 594/10 Great-West [1] 436/4 greenshoe [1] 457/23 GREGORY [1] 317/4 Grossmann [2] 317/4 317/8 grounds [1] 448/15 group [5] 316/3 372/1 414/21 439/12 556/11 growth [1] 436/24 GS [1] 362/12 guaranteed [1] 457/22 guess [9] 413/23 444/4 514/24 551/9 570/13 597/13 600/17 612/23 612/23 guest [1] 467/15 guidance [1] 482/16 guy [3] 569/15 569/18 594/10 guys [4] 381/12 430/18 431/15 605/18	467/13 547/1 haven't [5] 348/9 377/9 388/3 463/17 516/23 having [26] 318/6 321/18 347/8 347/12 353/24 354/21 361/15 383/19 389/24 393/22 396/12 402/6 402/19 423/22 434/1 453/19 453/22 454/9 500/16 507/3 513/5 516/14 518/8 536/13 539/16 542/9 he's [11] 319/22 325/4 377/18 426/11 426/11 520/2 556/24 557/3 559/23 560/18 578/10 head [2] 437/20 556/22 headed [1] 537/24 header [2] 439/7 568/16 heading [3] 470/22 555/6 565/24 heads [1] 347/7 heads-up [1] 347/7 hear [4] 368/18 479/1 480/13 485/16 heard [8] 379/12 398/23 480/7 528/10 543/2 543/6 606/1 609/8 hearsay [5] 443/10 443/14 443/15 533/18 608/14 heavily [1] 368/23 held [5] 386/19 461/8 516/13 532/13 613/24 help [12] 342/12 358/5 362/4 372/8 395/20 425/12 454/7 454/7 574/22 587/21 604/5 613/12 Helped [1] 503/6 helpful [8] 370/10 406/20 412/1 425/22 427/16 432/1 433/8 441/11 helping [2] 374/20 596/19 her [17] 324/14 324/24 325/1 341/9 341/13 347/2 347/5 347/6 367/9 368/15 369/5 369/7 369/10 369/20 374/7 533/3 533/21 Heyden [3] 344/13 358/23 374/5 Hi [3] 346/23 347/7 559/22 high [6] 444/14 458/12 509/18 546/5 546/11 546/13 high-level [1] 509/18 higher [5] 440/7 442/22 457/11 457/22 497/13 highlighted [2] 338/9 339/3 him [28] 321/18 372/7	372/18 428/14 443/20 486/3 509/17 511/12 511/12 511/15 511/17 516/23 554/14 576/2 577/10 578/7 578/9 578/10 578/17 580/5 580/12 580/20 580/21 580/22 581/1 584/1 584/1 586/1 hindsight [1] 375/17 his [34] 325/4 342/19 352/14 372/15 377/19 381/6 381/24 405/1 405/7 442/1 443/19 480/20 482/24 483/5 483/6 492/21 496/9 518/10 519/11 524/12 528/12 553/22 555/9 557/1 559/8 559/16 560/9 560/18 579/18 580/15 580/16 580/20 582/20 591/20 history [3] 434/12 434/14 501/7 hmm [1] 488/9 hoc [2] 396/10 396/21 hold [4] 338/14 434/8 534/7 614/11 holidays [2] 514/10 556/7 home [1] 593/20 HON [1] 316/13 honest [1] 380/23 honestly [2] 421/12 596/12 Honor's [1] 407/7 honors [1] 434/8 hook [1] 486/3 hope [1] 613/15 hopefully [2] 365/1 550/7 hoping [1] 482/12 hostile [1] 506/3 hours [3] 419/19 419/21 420/3 house [1] 542/9 housekeeping [1] 433/24 however [6] 325/12 410/21 410/24 457/1 518/13 579/5 huge [1] 493/10 huh [1] 567/11
G gained [1] 528/12 games [3] 371/10 371/12 388/24 gas [7] 352/22 436/16 436/18 436/20 464/14 484/22 486/10 gather [1] 540/5 gauged [1] 435/5 gauging [1] 329/18 gave [10] 385/7 395/4 425/24 491/22 534/21 544/1 547/23 561/13 564/11 601/14 gears [2] 398/10 469/15 Geddes [1] 317/10 general [16] 333/18 356/14 375/2 378/12 380/19 396/5 421/8 503/15 514/16 526/14 536/9 544/8 568/19 574/20 575/10 595/7 generally [13] 380/23 382/7 396/15 409/14 446/7 506/12 536/4 552/2 568/8 600/23 602/22 606/17 607/17 generated [1] 566/6 gentleman [1] 594/9 gentleman's [7] 605/8 606/9 606/12 608/9 608/21 609/4 610/21 George [2] 351/23 409/21 Germaninvestments [2] 532/12 532/17 gets [1] 397/4 getting [15] 326/3 332/13 344/17 370/17 411/18 440/18 488/22 517/15 535/7 572/5 582/6 588/20 588/22 589/4 601/10 Gibson [1] 599/1 girlfriends [1] 537/22 Girling [49] 320/24 334/9 402/7 402/10 402/15 403/1 403/8 403/19 407/17 407/18 412/23 435/9 435/15 437/15 441/22 443/9 445/9 447/12 448/2 448/9 453/14 457/5 457/8 466/18 467/20 468/14 490/11 509/13 525/11 556/4 559/12 559/13 576/2 581/8	giving [8] 330/1 357/1 525/16 546/23 557/3 564/22 583/16 606/5 glad [2] 561/18 561/19 glasses [1] 467/14 Glen [2] 374/12 414/22 goal [2] 354/16 372/8 goes [10] 333/4 337/19 340/15 357/7 522/24 541/7 542/17 546/5 556/2 607/4 Goldman [25] 335/24 348/22 363/14 366/4 366/17 367/13 369/8 371/5 373/2 373/7 373/22 420/6 420/17 420/18 428/15 429/3 429/6 432/9 432/13 432/16 432/18 433/1 433/3 516/24 517/14 gone [2] 373/24 481/24 good [28] 318/10 318/11 324/2 327/5 355/13 355/15 365/1 374/9 377/4 377/8 389/3 434/5 435/6 436/14 436/17 463/7 463/16 463/18 463/23 464/22 488/18 489/8 500/14 500/23 502/10 524/24 530/5 533/22 good-bye [1] 500/14 good-faith [1] 533/22 got [34] 327/16 344/18 348/21 361/10 394/19 409/15 417/1 423/16 424/19 431/18 457/11 458/1 488/12 519/8 537/23 545/16 549/14 557/6 567/7 567/18 570/21 571/13 572/14 579/6 586/19 589/21 593/20 593/22 601/7 602/3 603/2 610/9 610/20 610/22 gotten [2] 418/14 494/16 govern [1] 504/21 governance [3] 435/3 435/17 501/21 graduated [2] 501/2 501/3 grant [2] 412/20 412/24 granted [1] 593/11	H hadn't [6] 327/23 352/17 524/6 528/24 537/9 609/20 halfway [1] 592/1 halt [1] 360/2 halted [6] 359/7 359/14 359/15 359/18 421/20 530/3 halting [1] 529/24 hand [6] 396/24 397/2 463/12 540/6 545/13 546/20 handbook [1] 389/4 handed [2] 332/3 332/6 handing [1] 464/1 handle [2] 463/9 465/24 hands [7] 606/7 606/13 608/6 608/8 609/5 610/1 610/8 handshake [1] 522/4 handwriting [1] 545/8 handy [1] 597/2 happen [8] 325/3 326/3 422/20 507/9 507/10 520/3 576/11 580/10 happened [12] 322/12 368/11 400/21 413/20 433/6 481/20 514/12 522/11 533/4 537/18 583/14 584/8 happening [11] 346/2 349/21 350/5 360/19 409/10 415/17 421/24 424/13 524/1 579/19 589/6 happens [1] 483/20 happy [10] 404/11 423/4 473/15 486/24 487/18 551/1 569/9 575/3 594/3 611/13 hard [4] 414/20 461/9	467/13 547/1 haven't [5] 348/9 377/9 388/3 463/17 516/23 having [26] 318/6 321/18 347/8 347/12 353/24 354/21 361/15 383/19 389/24 393/22 396/12 402/6 402/19 423/22 434/1 453/19 453/22 454/9 500/16 507/3 513/5 516/14 518/8 536/13 539/16 542/9 he's [11] 319/22 325/4 377/18 426/11 426/11 520/2 556/24 557/3 559/23 560/18 578/10 head [2] 437/20 556/22 headed [1] 537/24 header [2] 439/7 568/16 heading [3] 470/22 555/6 565/24 heads [1] 347/7 heads-up [1] 347/7 hear [4] 368/18 479/1 480/13 485/16 heard [8] 379/12 398/23 480/7 528/10 543/2 543/6 606/1 609/8 hearsay [5] 443/10 443/14 443/15 533/18 608/14 heavily [1] 368/23 held [5] 386/19 461/8 516/13 532/13 613/24 help [12] 342/12 358/5 362/4 372/8 395/20 425/12 454/7 454/7 574/22 587/21 604/5 613/12 Helped [1] 503/6 helpful [8] 370/10 406/20 412/1 425/22 427/16 432/1 433/8 441/11 helping [2] 374/20 596/19 her [17] 324/14 324/24 325/1 341/9 341/13 347/2 347/5 347/6 367/9 368/15 369/5 369/7 369/10 369/20 374/7 533/3 533/21 Heyden [3] 344/13 358/23 374/5 Hi [3] 346/23 347/7 559/22 high [6] 444/14 458/12 509/18 546/5 546/11 546/13 high-level [1] 509/18 higher [5] 440/7 442/22 457/11 457/22 497/13 highlighted [2] 338/9 339/3 him [28] 321/18 372/7	372/18 428/14 443/20 486/3 509/17 511/12 511/12 511/15 511/17 516/23 554/14 576/2 577/10 578/7 578/9 578/10 578/17 580/5 580/12 580/20 580/21 580/22 581/1 584/1 584/1 586/1 hindsight [1] 375/17 his [34] 325/4 342/19 352/14 372/15 377/19 381/6 381/24 405/1 405/7 442/1 443/19 480/20 482/24 483/5 483/6 492/21 496/9 518/10 519/11 524/12 528/12 553/22 555/9 557/1 559/8 559/16 560/9 560/18 579/18 580/15 580/16 580/20 582/20 591/20 history [3] 434/12 434/14 501/7 hmm [1] 488/9 hoc [2] 396/10 396/21 hold [4] 338/14 434/8 534/7 614/11 holidays [2] 514/10 556/7 home [1] 593/20 HON [1] 316/13 honest [1] 380/23 honestly [2] 421/12 596/12 Honor's [1] 407/7 honors [1] 434/8 hook [1] 486/3 hope [1] 613/15 hopefully [2] 365/1 550/7 hoping [1] 482/12 hostile [1] 506/3 hours [3] 419/19 419/21 420/3 house [1] 542/9 housekeeping [1] 433/24 however [6] 325/12 410/21 410/24 457/1 518/13 579/5 huge [1] 493/10 huh [1] 567/11 I I'd [11] 319/9 386/11 387/18 439/5 479/23 542/11 557/16 565/20 565/21 582/21 611/16 I'll [22] 443/11 466/14 474/3 479/17 480/9 533/24 545/4 546/3 546/21 548/5 548/14 550/6 561/14 573/18 578/20 581/10 595/9 600/20 601/19 602/12 611/24 614/23 I'm [123] 319/19 320/7 320/16 320/19 323/13

I	454/23 476/20 477/18 478/3 478/5 478/7 478/13 482/13 impetus [1] 406/17 implicate [1] 557/8 importance [1] 335/5 important [9] 335/8 368/10 372/6 379/15 413/23 440/10 524/6 571/16 571/24 imposed [1] 600/24 imprecise [3] 570/19 570/21 570/24 impression [1] 534/22 improper [1] 322/2 improved [1] 447/24 in-house [1] 542/9 in-person [1] 524/4 inaccuracies [1] 390/9 inaccurate [2] 379/6 386/9 inbound [25] 352/19 353/8 353/9 361/24 362/13 373/1 373/10 426/1 426/1 426/12 427/19 429/7 430/17 430/17 432/5 432/18 433/2 433/3 535/8 536/22 536/24 537/4 537/14 538/3 538/14 inbounds [1] 367/9 INC [1] 316/3 inclined [1] 415/7 include [4] 436/2 448/21 472/18 558/8 included [3] 452/19 469/14 611/3 includes [2] 398/1 503/21 including [17] 327/13 336/4 339/24 374/9 380/3 381/11 382/23 392/10 406/6 434/23 455/6 456/14 457/8 481/2 524/10 562/15 577/14 inclusion [1] 612/17 incomplete [1] 535/1 incorrect [3] 473/12 474/7 560/18 increase [16] 354/16 461/21 462/6 462/20 462/20 482/7 497/9 497/19 498/13 498/17 499/6 499/24 565/15 566/2 566/21 572/19 increases [2] 445/2 445/4 increasing [3] 451/7 456/17 458/4 indeed [3] 347/12 398/6 601/7 independence [1] 602/19 independent [2] 380/15 380/17 indicate [5] 357/18 401/5 407/24 516/6 614/5	indicated [20] 320/24 322/24 328/2 334/9 360/21 367/21 400/6 401/23 402/11 409/19 422/19 442/6 449/16 450/24 455/1 469/2 489/5 495/4 578/12 599/3 indicates [2] 356/19 559/8 indicating [6] 422/15 425/18 453/23 453/24 492/24 493/17 indication [15] 321/9 323/5 328/15 395/3 408/18 409/16 410/6 446/16 452/14 455/12 468/17 490/18 565/3 565/10 574/4 indications [3] 322/21 363/19 456/2 indicative [12] 322/1 322/8 322/13 323/6 326/16 335/24 413/11 449/4 452/10 581/13 583/3 585/15 indirect [3] 559/18 559/20 610/12 individual [1] 437/16 individuals [1] 546/20 industrial [1] 436/14 industry [6] 336/2 369/21 440/4 440/4 461/10 461/13 influence [3] 506/16 510/11 560/2 info [1] 480/17 inform [4] 402/3 454/7 466/1 548/12 informal [3] 321/24 384/14 384/22 information [19] 332/10 332/12 332/17 347/16 361/2 368/16 396/7 459/22 460/3 460/7 499/9 504/9 508/11 508/15 515/17 528/21 532/8 536/13 614/18 informative [3] 454/2 481/12 484/15 informed [23] 326/17 332/15 335/7 343/11 349/17 380/9 401/13 402/19 405/6 424/8 428/14 437/5 466/19 467/20 468/15 468/16 471/22 477/5 507/13 507/22 507/23 562/7 599/12 informs [1] 428/21 Ingrassia [2] 348/10 349/1 initial [7] 445/24 503/5 503/23 518/13 522/15 523/22 526/6 initially [4] 471/12 471/24 605/3 611/8 initiate [2] 328/17	408/20 initiated [2] 588/21 589/18 injunction [1] 593/12 input [1] 340/22 inquiries [2] 361/24 430/12 inquiry [5] 429/7 430/11 536/22 536/24 537/4 inserted [1] 421/13 Insofar [1] 484/15 instance [5] 535/2 548/17 560/15 593/11 609/1 instead [6] 369/20 471/7 522/2 580/22 605/8 606/8 Institute [1] 434/11 insufficiently [1] 413/1 intelligent [2] 569/15 569/18 intend [1] 431/21 intended [7] 419/19 535/16 562/9 562/10 581/1 581/2 590/15 intending [3] 369/1 491/13 585/13 intensity [1] 440/9 intensive [1] 440/4 intent [3] 553/7 581/14 583/3 interact [1] 534/5 interest [23] 321/9 322/21 336/3 336/16 353/2 363/19 374/3 409/16 413/7 430/17 435/5 452/14 455/13 468/17 481/17 508/9 514/15 541/9 555/13 565/4 565/10 574/4 598/14 interested [22] 321/1 322/24 336/4 401/21 401/24 402/4 402/11 402/16 430/12 512/21 513/6 515/12 516/3 538/20 539/4 539/13 562/3 588/17 596/3 596/15 598/20 599/13 interesting [2] 539/15 539/18 interests [2] 596/16 604/11 interloper [12] 460/13 460/20 461/2 461/6 461/18 462/22 463/2 476/17 497/3 497/17 498/16 498/19 interlopers [3] 461/8 461/15 462/19 internal [6] 321/7 360/3 386/15 420/16 544/21 615/2 internally [2] 430/20 542/24 interpret [3] 413/4 481/5 497/23 interpretation [13]	385/17 519/8 519/17 524/16 576/9 577/17 580/16 580/17 591/4 591/6 591/18 595/8 600/18 interpreted [4] 369/2 384/11 580/4 609/8 interpreting [2] 408/9 423/12 interprets [1] 411/23 interrupt [1] 615/10 introduce [1] 353/4 introductory [1] 552/16 invested [2] 481/15 521/6 investor [2] 535/7 536/11 investors [3] 480/13 535/10 535/11 invitation [17] 333/15 387/3 389/18 509/20 519/11 519/19 520/8 524/12 560/14 562/21 563/2 576/22 578/18 579/10 580/11 587/18 590/6 invite [2] 585/5 586/8 invited [3] 573/15 573/20 584/3 involve [1] 358/14 involved [13] 324/6 356/24 363/11 363/14 372/13 373/2 373/3 373/3 434/22 482/4 494/17 521/16 603/23 involvement [1] 381/2 iPad [1] 613/11 is [419] ish [1] 399/18 Isherwood [1] 445/9 isn't [42] 378/22 379/9 383/20 385/16 387/24 390/19 392/23 395/9 399/2 399/13 400/14 401/3 402/1 406/22 409/1 410/1 413/16 413/24 416/19 423/7 426/5 427/1 427/18 498/14 505/3 542/10 546/19 553/14 561/21 565/1 577/10 578/1 578/21 581/14 591/11 591/21 595/1 597/24 600/22 605/2 608/11 612/20 issuance [6] 319/19 442/14 450/10 451/8 453/1 456/12 issue [33] 333/17 335/19 358/4 360/6 360/14 360/22 361/8 361/11 376/4 422/14 425/17 439/22 442/9 443/3 449/8 450/13 455/20 457/15 462/4 471/7 492/24 493/16 528/16 531/23 532/4 533/5 533/12 534/22
----------	---	---	---	--

I	JEROEN [1] 317/5 job [2] 375/6 540/18 Joe [28] 351/23 363/10 381/4 393/17 409/22 464/6 467/7 475/21 477/24 490/8 496/15 498/3 546/21 551/19 554/6 555/3 555/18 559/9 568/6 570/5 582/11 582/22 597/10 601/19 603/14 606/19 611/15 611/24 Joe/George [1] 351/23 Johannson [12] 485/6 485/14 485/19 486/9 487/22 488/2 488/10 488/20 489/3 489/7 489/14 491/7 Johansson [1] 484/21 Johnston [43] 323/18 323/22 324/1 324/21 326/1 327/4 327/9 337/3 340/9 340/13 340/17 344/4 344/9 346/18 346/21 359/22 367/3 367/7 368/8 368/22 369/15 403/6 403/17 405/22 407/17 411/15 411/20 424/3 431/13 431/18 469/16 469/19 469/24 470/16 473/4 474/17 500/13 500/16 500/23 527/2 540/12 555/5 584/22 Johnston's [9] 325/10 341/12 407/22 408/11 410/20 412/4 473/10 473/17 474/19 join [5] 362/23 434/17 501/11 603/19 604/4 joined [1] 493/12 joining [2] 435/5 464/12 joins [1] 603/21 Joint [47] 320/2 325/22 330/4 343/1 344/22 346/15 348/5 353/15 358/13 370/6 373/5 377/13 386/12 386/14 387/19 393/11 394/20 395/15 395/22 403/11 406/2 418/20 426/5 438/23 439/3 444/1 445/8 446/19 453/12 454/15 496/7 503/21 506/6 507/24 509/11 511/24 516/17 517/19 521/21 522/14 523/16 525/22 526/19 527/22 531/12 536/20 538/16 joke [1] 344/18 Jones [5] 359/2 501/5 501/8 501/10 528/3 Joseph [3] 342/1 516/18 516/22 Journal [12] 350/1 350/4 421/16 428/12 453/9 479/21 481/8 481/20 484/8 527/19	528/11 529/6 JR [1] 317/12 JTL [1] 316/4 JTX [27] 377/13 391/1 391/11 410/18 414/14 420/15 427/24 470/13 472/24 474/18 476/16 479/24 493/7 494/19 496/19 550/4 550/10 554/2 565/19 575/1 582/2 584/20 587/24 605/15 611/23 612/7 613/15 JTX 05 [1] 470/13 JTX 1092 [1] 494/19 JTX 1244 [1] 496/19 JTX 1291 [1] 427/24 JTX 1732 [1] 414/14 JTX 1774 [1] 493/7 JTX 290 [1] 420/15 JTX 305 [1] 550/10 JTX 413 [1] 554/2 JTX 506 [1] 575/1 JTX 517 [1] 565/19 JTX 587 [1] 391/1 JTX 621 [1] 410/18 JTX 622 [1] 582/2 JTX 623 [1] 587/24 JTX 647 [1] 605/15 JTX 654 [1] 611/23 JTX 655 [1] 612/7 JTX 813 [1] 584/20 JTX 913 [1] 613/15 JTX numbers [1] 391/11 JTX tabs [1] 377/13 judge's [1] 484/4 July [3] 316/11 600/1 600/2 junctures [1] 597/5 June [1] 434/18 Justice [2] 316/9 316/20 JX [4] 358/4 545/6 589/21 603/8 JX 314 [1] 545/6 JX 827 [1] 589/21	killed [1] 486/2 killing [2] 485/22 486/11 kind [5] 342/24 458/1 505/23 538/4 608/13 kinds [3] 449/13 507/8 577/4 King [2] 316/10 316/21 Kipp [1] 480/21 knew [15] 379/6 382/5 386/8 390/16 392/8 392/14 402/20 416/7 518/5 539/24 543/22 580/15 608/16 609/9 612/20 knowing [1] 507/10 knowledge [6] 393/1 454/10 469/3 484/14 527/14 608/23 known [1] 523/6 knows [1] 472/11 KPMG [2] 434/16 434/16 Kristine [2] 568/19 568/19 KWAWEGEN [1] 317/5	law [19] 331/22 407/6 407/9 469/16 501/2 501/4 505/4 532/9 532/14 532/15 532/19 533/2 569/16 600/24 607/13 607/16 607/18 607/22 608/19 laws [7] 419/14 423/12 504/13 504/17 504/18 504/21 504/21 lawyer [15] 483/8 501/12 527/6 535/5 542/8 542/9 547/2 557/1 560/20 590/10 590/13 590/14 603/24 605/19 605/22 lawyers [17] 340/7 373/7 502/20 566/7 567/15 584/24 586/15 586/21 595/17 595/21 605/6 605/7 607/12 608/11 609/12 610/22 611/9 Lazard [4] 581/17 581/21 581/24 583/4 lead [12] 380/15 380/17 420/9 421/2 436/6 437/15 480/8 481/2 542/24 556/23 570/13 608/20 leadership [1] 437/14 leading [5] 318/13 319/3 323/16 326/16 556/7 leak [49] 350/1 350/5 354/20 355/1 355/4 359/13 361/3 361/9 361/23 365/17 421/11 421/11 421/22 423/21 428/12 453/15 453/19 453/22 454/1 455/14 455/15 476/19 477/1 477/6 477/13 477/17 478/4 478/8 478/10 480/10 481/4 481/8 481/12 483/2 484/8 488/6 490/12 490/21 491/18 491/19 492/12 527/19 528/10 528/18 528/24 529/9 529/22 531/8 615/6 leaked [4] 420/23 453/9 528/14 529/6 leaking [1] 479/22 leaks [2] 534/5 534/6 learn [2] 466/10 538/13 learned [4] 471/6 476/24 581/6 584/13 least [17] 400/3 419/19 420/2 424/7 437/13 442/4 442/12 444/5 462/22 542/2 546/11 546/19 553/13 554/3 580/16 599/7 605/13 leave [3] 443/11 498/10 558/10 leaves [1] 535/3 led [5] 321/7 321/8 442/20 447/5 456/19
J	Jackson [2] 435/7 478/20 JAMES [4] 317/6 317/12 377/9 377/18 January [58] 318/13 318/14 318/17 319/2 319/13 320/23 321/9 323/16 324/2 341/7 382/22 390/1 390/24 391/5 391/8 392/8 393/5 394/16 396/17 399/15 399/18 401/18 402/8 403/7 412/11 412/19 412/23 438/4 512/1 512/7 513/19 514/10 514/20 516/18 517/13 517/21 520/10 520/15 520/23 521/3 521/22 556/8 575/2 576/1 576/6 576/14 576/21 581/7 584/4 587/21 588/7 588/13 595/24 599/11 600/3 600/6 600/8 606/2 January 11 [1] 318/17 January 19th [1] 600/8 January 25 [5] 318/14 320/23 321/9 323/16 324/2 January 25th [2] 517/21 521/3 January 28th [1] 521/22 January 5th [3] 512/1 512/7 513/19 January 7 [1] 318/13 January 9th [2] 516/18 517/13 Jay [1] 540/8 Jeffrey [1] 582/4 JENKINS [1] 317/9 jeopardized [2] 456/3 456/10	K Karl [1] 484/21 keen [1] 606/2 keep [10] 338/22 339/22 528/18 534/19 568/6 572/2 606/13 608/8 608/22 610/7 keeping [1] 427/4 keeps [1] 338/12 Kentaro [1] 525/7 kept [5] 437/5 437/11 438/16 529/2 610/22 Kettering [3] 414/22 493/13 493/23 KEVIN [1] 317/12 key [3] 438/20 439/14 439/19 kicking [1] 588/16 kickoff [2] 544/20 545/10 kill [1] 485/15	L Labaton [1] 317/3 lack [2] 364/3 365/17 landed [1] 488/4 language [40] 343/9 363/3 363/7 363/11 363/17 368/23 370/19 374/10 383/15 383/16 383/20 384/21 384/23 385/18 387/11 404/12 427/5 431/2 535/2 550/2 551/1 551/3 553/3 556/14 558/8 562/7 566/14 578/16 579/18 580/13 580/24 581/1 593/5 593/18 594/17 595/3 595/5 595/6 612/4 612/8 lapse [4] 354/18 354/19 354/24 355/2 lapsed [1] 417/17 large [2] 369/12 502/4 largely [1] 437/3 last [23] 320/20 349/15 368/22 368/22 372/9 391/22 391/22 410/19 429/2 429/21 439/18 444/8 448/18 454/21 456/16 499/2 509/1 510/19 517/6 525/6 556/10 556/16 611/18 lasted [1] 331/6 LASTER [1] 316/13 lastly [1] 453/2 later [17] 323/22 340/2 360/20 374/18 386/18 405/23 418/9 428/5 428/20 445/11 513/17 520/11 565/8 567/22 571/4 576/6 598/18 latest [1] 455/2 latitude [1] 442/8	

<p>L</p> <p>leeway [1] 377/19</p> <p>legal [14] 345/24 360/13 405/10 405/13 437/21 494/6 524/5 527/13 542/22 564/5 571/17 577/16 594/19 594/24</p> <p>legally [1] 420/1</p> <p>lengthy [1] 409/7</p> <p>Leonard [2] 316/9 316/20</p> <p>less [6] 349/2 442/24 539/19 563/12 564/6 573/17</p> <p>LESSNER [1] 317/11</p> <p>let [28] 338/5 338/23 362/20 366/14 370/5 374/11 382/16 383/17 391/11 402/22 403/12 405/15 441/4 482/15 485/23 486/21 515/1 537/3 542/19 548/3 566/4 573/10 594/5 594/11 602/14 603/15 612/6 612/24</p> <p>let's [111] 318/3 318/15 320/2 320/3 320/19 322/17 323/20 323/24 325/22 326/23 327/1 330/4 331/14 334/1 340/4 343/1 344/22 344/23 345/1 348/5 349/12 351/17 353/15 355/20 357/14 358/13 359/4 359/20 362/6 362/10 364/11 366/2 366/9 366/23 367/2 370/6 371/22 371/23 372/2 373/5 374/2 376/8 383/14 388/12 388/16 390/24 391/10 393/8 394/19 395/14 397/21 399/21 399/22 403/10 414/10 417/21 420/14 443/13 451/13 483/10 483/23 483/24 484/2 487/21 493/7 496/3 496/15 499/17 523/22 531/3 534/19 544/16 548/4 550/1 550/17 551/19 554/2 554/12 557/14 559/3 559/7 560/24 563/18 565/18 567/23 568/3 568/16 574/12 575/1 576/7 577/9 581/17 581/24 582/8 582/17 582/18 582/19 582/22 584/11 584/21 597/6 598/3 601/18 603/8 604/22 605/15 606/24 608/1 611/22 613/3 614/2</p> <p>letter [33] 337/15 337/17 347/8 347/13 347/20 348/20 351/6 353/11 355/23 355/24</p>	<p>356/2 356/7 356/9 356/12 356/15 357/7 359/5 415/14 415/15 508/3 508/7 508/21 509/1 509/6 522/21 522/23 553/17 553/21 554/24 556/22 561/23 597/22 598/7</p> <p>letterhead [1] 331/19</p> <p>letters [2] 398/24 399/3</p> <p>letting [2] 347/10 535/20</p> <p>level [7] 368/24 452/21 462/21 494/16 509/18 535/11 546/11</p> <p>leverage [12] 442/6 492/6 565/15 566/1 566/3 566/13 566/21 568/8 572/7 572/19 573/3 574/9</p> <p>life [1] 441/8</p> <p>Lifeco [1] 436/4</p> <p>light [1] 455/1</p> <p>likely [8] 347/9 442/4 453/23 458/5 477/17 535/21 556/6 614/17</p> <p>Likewise [1] 377/22</p> <p>limit [1] 443/10</p> <p>limited [1] 505/11</p> <p>limits [1] 451/1</p> <p>LINDA [1] 317/15</p> <p>line [16] 334/5 334/19 334/20 337/12 349/2 372/24 381/6 498/9 509/1 512/24 517/4 517/8 535/19 551/18 563/20 614/2</p> <p>lines [10] 335/21 430/4 471/3 473/22 522/17 548/8 561/3 566/15 566/16 614/4</p> <p>lines 10 [1] 473/22</p> <p>links [1] 359/6</p> <p>list [6] 509/21 509/24 546/19 554/20 601/14 604/15</p> <p>listed [1] 361/15</p> <p>listen [1] 487/16</p> <p>listened [1] 406/21</p> <p>lists [1] 601/24</p> <p>literally [2] 385/14 406/10</p> <p>litigation [3] 316/3 469/7 604/5</p> <p>litigator [1] 604/4</p> <p>Litowitz [2] 317/4 317/8</p> <p>little [22] 339/4 398/11 414/20 415/24 429/1 434/6 457/11 460/10 472/22 475/14 490/7 500/24 501/6 527/18 542/20 545/18 550/7 550/11 551/10 593/4 593/7 610/12</p> <p>LLP [5] 317/3 317/4 317/8 317/13 317/16</p> <p>loaded [1] 606/20</p> <p>locked [1] 364/9</p>	<p>logic [1] 436/14</p> <p>long [13] 334/3 339/2 348/9 349/13 365/22 370/22 388/4 458/6 496/11 501/14 542/9 547/18 602/9</p> <p>long-winded [1] 458/6</p> <p>longer [6] 448/13 455/3 455/4 476/10 496/10 496/11</p> <p>longer-term [1] 448/13</p> <p>looked [18] 348/9 357/6 382/11 400/11 408/23 414/13 422/2 450/11 492/20 496/4 496/17 569/2 575/22 587/24 602/10 605/12 608/2 609/11</p> <p>looking [19] 320/16 330/17 339/3 360/2 385/12 389/7 397/8 403/14 407/22 413/13 428/4 429/20 430/3 441/18 512/19 521/4 537/4 593/12 614/3</p> <p>looks [6] 357/5 358/8 547/1 570/16 598/2 602/5</p> <p>loop [1] 535/6</p> <p>Lord [1] 344/16</p> <p>lost [1] 425/10</p> <p>lot [11] 332/16 358/10 377/19 379/12 413/13 438/1 495/21 498/7 607/22 609/20 614/17</p> <p>lovely [1] 606/21</p> <p>low [2] 420/10 476/18</p> <p>lower [8] 344/2 344/3 421/3 455/19 456/1 488/19 489/9 491/20</p> <p>lowered [1] 492/12</p> <p>lowest [1] 465/8</p> <p>lowest-cost [1] 465/8</p> <p>LOWING [1] 317/7</p> <p>lunch [4] 450/2 451/12 451/13 452/9</p> <hr/> <p>M</p> <p>ma'am [6] 540/24 549/4 550/9 553/12 558/7 564/11</p> <p>Madam [1] 608/7</p> <p>mail [2] 341/16 586/1</p> <p>main [3] 510/15 528/2 538/4</p> <p>maintain [1] 362/16</p> <p>major [1] 360/18</p> <p>majority [2] 437/13 460/6</p> <p>make [72] 319/14 323/15 328/21 332/9 335/7 339/4 341/19 345/3 354/14 364/22 365/23 371/9 371/11 374/3 374/20 384/7 384/17 387/6 399/8 399/20 409/10 416/17 419/6 419/12 424/6 424/8 424/12 427/21</p>	<p>431/10 448/20 470/6 472/17 475/10 476/12 477/7 477/14 485/23 486/2 504/12 506/18 510/5 510/8 510/21 515/9 515/17 520/9 525/12 532/22 538/12 541/11 541/12 541/12 541/17 542/3 542/12 546/6 550/11 551/15 552/11 553/6 560/14 561/14 563/2 572/13 585/5 586/3 586/8 589/1 589/5 589/12 590/7 594/4</p> <p>makes [5] 420/18 488/14 499/12 554/18 612/4</p> <p>making [26] 328/14 332/14 341/5 387/3 389/17 408/18 411/11 419/20 422/11 479/6 498/18 519/6 519/10 519/18 520/16 524/11 547/3 548/20 563/17 567/2 573/11 573/19 574/3 578/1 578/4 593/14</p> <p>manage [3] 319/8 319/10 362/13</p> <p>management [77] 329/13 330/1 335/3 335/23 345/23 346/1 348/11 367/14 373/7 387/4 412/12 420/13 422/12 422/12 426/8 426/13 429/8 430/9 436/12 437/10 438/13 438/14 440/14 440/21 440/24 441/7 444/9 444/16 447/15 447/23 448/20 450/19 450/24 455/1 455/4 456/2 461/9 465/24 466/3 466/20 467/20 468/24 471/4 471/6 471/9 471/22 472/17 476/11 477/6 477/14 478/23 479/4 480/15 481/7 483/2 484/7 485/1 491/6 494/12 495/6 495/12 495/18 497/16 497/21 498/11 499/5 499/11 503/8 507/4 510/12 527/8 541/7 544/6 548/18 555/10 613/20 614/1</p> <p>management's [3] 345/21 429/22 592/13</p> <p>manager [1] 319/9</p> <p>manner [1] 396/14</p> <p>Marc [5] 502/21 605/21 605/22 605/22 605/24</p> <p>Marcellus [2] 465/3 465/7</p> <p>March [142] 340/13 341/17 343/5 345/7 346/16 346/17 348/17 349/14 349/19 349/24</p>	<p>351/20 353/16 356/4 357/17 357/18 358/9 358/15 362/7 365/4 386/19 388/2 388/11 388/17 388/21 392/23 395/12 396/3 397/13 397/17 398/6 414/4 414/6 414/18 415/4 416/3 416/4 416/19 417/10 417/14 417/18 418/4 418/10 421/15 421/18 422/8 424/2 424/2 424/21 424/22 425/3 425/6 425/7 425/16 426/8 426/22 427/2 428/5 428/7 428/20 428/20 429/17 430/16 439/4 441/2 441/9 444/2 444/18 445/9 446/20 447/9 447/15 448/18 452/9 453/8 453/14 454/16 458/19 472/12 472/16 472/23 473/3 473/11 475/9 475/17 475/23 476/1 476/6 476/11 476/24 477/8 477/10 479/5 479/18 479/21 481/3 485/6 485/14 486/1 486/9 486/15 486/19 486/23 487/4 488/1 489/4 489/20 489/21 490/1 490/10 490/20 490/24 491/4 491/4 491/7 491/9 491/9 492/16 492/19 492/22 493/12 493/24 494/7 494/18 523/17 523/24 525/24 526/20 527/24 529/5 531/13 536/15 536/21 584/12 584/13 584/19 584/23 588/8 589/21 603/11 613/3 613/4 613/17</p> <p>March 10 [3] 349/14 349/24 529/5</p> <p>March 10th [11] 351/20 358/15 453/8 479/21 481/3 488/1 489/4 489/20 489/21 490/24 491/4</p> <p>March 11 [3] 353/16 357/17 453/14</p> <p>March 11th [8] 356/4 357/18 358/9 362/7 365/4 490/10 490/20 491/9</p> <p>March 14 [1] 493/12</p> <p>March 14th [7] 454/16 492/16 492/19 492/22 493/24 494/7 494/18</p> <p>March 16th [1] 396/3</p> <p>March 17th [1] 458/19</p> <p>March 2 [1] 476/1</p> <p>March 2016 [1] 472/12</p> <p>March 3 [1] 340/13</p> <p>March 3rd [2] 523/17 523/24</p> <p>March 5 [3] 341/17</p>
--	---	---	--	--

M	502/23 518/22 576/23 577/2 602/20 603/4 Matthew [1] 599/1 maximize [6] 350/18 375/12 390/19 392/4 392/16 601/5 may [31] 324/5 324/9 337/16 350/14 358/1 380/14 417/22 419/2 420/9 421/2 426/19 433/21 453/15 457/23 464/5 471/9 477/1 486/2 487/7 488/18 489/8 490/12 500/19 504/8 515/19 522/22 569/21 592/5 604/21 609/8 611/17 maybe [8] 331/7 331/9 335/21 426/20 488/21 564/5 597/10 605/14 Mayer [38] 317/16 502/21 512/9 513/15 521/14 521/22 524/22 525/2 525/8 526/3 526/6 538/7 538/17 549/12 549/16 549/21 565/6 565/13 566/7 566/17 569/1 570/6 570/17 571/22 572/15 584/15 585/1 587/13 591/5 591/19 601/13 601/22 602/17 603/7 603/18 603/24 605/19 611/3 Mayer Brown [2] 512/9 513/15 mean [27] 351/9 360/18 384/5 384/12 390/3 400/2 405/5 407/11 409/22 413/12 449/13 462/20 495/15 498/8 507/17 510/8 510/24 511/19 519/5 528/22 547/8 547/18 572/1 572/12 580/23 594/20 610/6 meaning [2] 450/12 558/10 meaningful [2] 413/5 465/2 means [8] 385/18 440/17 446/9 481/23 501/22 550/21 593/14 594/22 meant [17] 453/16 455/18 509/17 510/3 510/13 510/22 511/7 511/13 513/3 528/23 529/2 534/12 579/14 579/16 595/16 607/3 610/14 meantime [1] 416/10 mechanism [1] 396/16 media [7] 454/23 476/19 477/1 477/6 477/17 481/4 615/5 median [1] 448/13 Medow [2] 603/21 604/4	meet [7] 377/20 401/18 446/15 463/22 463/23 512/12 592/10 meeting [110] 318/13 319/1 319/3 319/12 319/17 321/8 323/17 325/13 330/24 331/3 331/4 331/12 331/16 332/4 332/6 332/18 333/8 334/16 335/14 341/1 341/21 343/11 353/20 353/23 353/24 357/8 372/11 386/20 388/2 395/11 396/2 396/8 396/10 396/10 396/18 396/19 399/16 399/19 401/20 408/7 410/24 428/8 428/10 428/21 429/8 429/17 429/20 430/15 433/16 438/2 438/6 438/8 438/17 439/4 444/2 444/4 445/11 446/20 447/8 448/2 448/19 452/10 454/16 454/19 454/22 456/19 457/13 459/2 470/14 470/15 470/17 471/22 472/24 473/3 473/11 475/9 476/6 476/24 479/6 479/18 485/21 499/4 499/21 500/2 514/20 514/23 515/2 518/14 519/9 521/3 541/1 544/21 545/2 545/10 545/13 546/15 547/2 547/20 574/16 577/17 578/19 589/10 598/13 599/1 613/4 613/6 613/17 613/19 614/8 615/5 meetings [19] 319/4 319/16 319/23 378/10 378/14 378/18 396/13 396/24 435/17 437/8 437/12 469/20 470/2 501/22 501/24 502/2 514/22 540/21 540/22 member [8] 434/10 494/6 499/13 566/8 571/6 571/11 571/17 602/20 member's [1] 573/8 members [16] 319/4 319/24 426/8 437/10 444/11 447/11 455/6 457/7 470/5 484/24 503/16 510/17 553/22 555/15 560/23 604/11 memo [28] 332/8 332/9 333/11 383/1 391/4 391/10 394/3 394/15 397/3 397/10 512/9 553/21 554/14 565/17 565/19 566/6 569/2 569/8 569/10 569/11 569/24 570/4 570/9 571/19 571/19 572/2 572/6 603/2	memorandum [10] 331/20 332/1 332/16 332/21 382/21 383/5 390/23 391/7 395/8 395/10 memory [2] 343/19 609/15 mention [2] 394/24 398/23 mentioned [1] 554/8 mentions [1] 582/5 merely [1] 406/16 merger [21] 316/3 320/17 355/8 385/24 397/16 398/19 400/23 449/1 459/5 465/1 465/6 465/10 465/19 524/4 538/23 539/16 585/20 588/5 588/18 589/8 607/12 Merriam [3] 593/21 594/5 594/11 message [8] 349/4 351/9 369/5 479/18 489/23 491/13 493/22 517/4 messaged [1] 492/15 messages [8] 414/13 453/12 485/5 488/1 488/23 489/4 489/18 492/21 met [9] 377/9 435/7 435/8 435/15 455/4 463/17 516/23 518/10 540/13 methodologies [2] 441/16 441/18 metrics [1] 614/18 MICHAEL [2] 317/14 496/14 Michigan [1] 378/2 mid [5] 399/15 434/21 455/17 514/14 598/12 mid-\$47 [1] 455/17 mid-2015 [1] 434/21 mid-December [3] 399/15 514/14 598/12 middle [17] 324/17 341/11 347/5 348/7 348/24 359/6 363/16 366/10 368/4 386/17 480/6 493/10 512/6 567/7 584/22 600/1 601/21 midnight [3] 418/11 418/14 517/6 midpoint [1] 413/10 midstream [1] 352/23 midway [1] 474/20 might [27] 329/1 338/10 339/4 342/19 344/20 345/8 358/18 359/9 360/14 460/9 478/7 485/18 491/23 522/3 525/13 528/10 539/17 557/4 557/8 562/2 564/18 564/23 565/8 573/24 584/14 589/4 591/15	Mike [1] 523/21 mind [13] 322/5 326/3 328/19 338/3 393/18 395/15 467/12 467/13 474/3 527/6 554/9 563/23 600/18 minds [1] 438/17 mine [1] 524/16 minimal [1] 482/13 minimize [1] 498/8 minute [9] 325/11 338/3 356/8 367/5 395/22 474/4 578/22 578/22 578/23 minutes [70] 334/1 345/6 345/15 357/18 358/3 371/19 378/18 378/21 379/1 379/5 379/10 387/14 387/19 388/2 388/4 388/7 388/9 388/14 388/17 389/2 389/21 390/6 390/10 390/16 392/20 392/20 392/23 394/14 394/24 394/24 395/4 444/2 444/19 444/22 446/20 448/18 454/15 456/17 459/12 469/20 470/1 470/6 470/11 470/15 471/3 471/18 472/5 472/15 473/18 473/19 494/19 494/20 494/24 495/10 495/11 495/20 495/23 501/24 540/22 541/13 542/2 542/13 542/17 544/17 582/13 582/19 596/20 600/22 613/13 614/24 misheard [2] 534/16 579/23 misread [1] 578/3 miss [1] 359/7 misspoke [1] 534/18 misstated [1] 339/17 mistaken [1] 380/14 mixed [9] 449/4 450/3 452/11 455/12 476/13 477/7 479/6 479/11 486/16 Mm [1] 488/9 Mm-hmm [1] 488/9 model [1] 462/5 modify [1] 470/3 modifying [1] 552/18 moment [18] 322/11 340/3 343/6 344/22 371/16 542/19 545/7 545/21 550/1 552/11 554/10 565/21 579/24 602/12 604/23 608/2 608/3 613/4 moments [3] 557/16 565/18 570/12 Monday [1] 347/9 month [1] 459/3 months [14] 448/12 457/2 471/14 472/2 476/18 481/16 546/6 546/24 547/4 547/21
----------	--	---	--	--

M	466/19 468/14 468/15 473/7 475/22 480/21 480/23 481/2 481/6 484/1 485/6 485/6 485/13 485/14 485/19 486/1 486/9 486/11 486/22 487/22 487/22 488/2 488/10 488/20 489/3 489/3 489/7 489/7 489/14 489/14 490/10 491/7 491/7 492/20 492/21 493/12 493/13 493/13 493/22 493/23 493/23 494/1 496/18 508/7 509/13 509/13 509/14 511/6 512/1 512/5 512/8 513/10 514/19 514/24 514/24 515/3 515/3 516/9 519/21 520/19 521/24 524/18 524/19 525/11 537/2 543/19 545/4 553/16 553/21 554/5 554/5 555/12 556/1 556/4 556/11 557/9 557/19 559/11 559/12 559/13 559/16 561/22 561/22 565/9 569/14 569/15 570/12 570/14 574/15 574/16 574/20 575/18 577/6 581/8 582/12 582/18 585/11 585/14 585/24 586/12 587/5 587/22 590/4 597/7 597/8 598/19 598/20 599/12 599/12 604/4 607/9 614/21 615/9 Mr. Bob [3] 575/18 587/5 587/22 Mr. Bousquette [2] 366/6 366/10 Mr. Cliver's [2] 582/12 582/18 Mr. Cornelius [4] 380/20 380/22 381/2 381/8 Mr. Cornelius's [1] 381/18 Mr. Fornell [3] 480/23 481/2 614/21 Mr. Frumkin [18] 323/22 324/18 324/22 328/8 328/11 328/18 329/3 330/6 363/11 404/2 404/4 404/21 405/9 405/19 408/12 408/14 408/24 607/9 Mr. Frumkin's [3] 321/14 352/14 409/14 Mr. Girling [29] 320/24 334/9 402/7 402/10 402/15 403/1 403/8 403/19 407/17 407/18 412/23 443/9 447/12 448/2 448/9 457/8 466/18 468/14 509/13 525/11 556/4 559/12 559/13 581/8 585/11	585/14 586/12 590/4 597/7 Mr. James [1] 377/18 Mr. Johannson [12] 485/6 485/14 485/19 486/9 487/22 488/2 488/10 488/20 489/3 489/7 489/14 491/7 Mr. Kettering [2] 493/13 493/23 Mr. Kipp [1] 480/21 Mr. Medow [1] 604/4 Mr. Noreuil [3] 521/24 524/18 585/24 Mr. Orrico [1] 570/12 Mr. Poirier [31] 401/20 492/21 493/13 493/23 494/1 509/13 509/14 511/6 512/1 513/10 514/19 514/24 515/3 520/19 553/16 553/21 554/5 554/5 555/12 556/1 556/11 557/9 557/19 559/11 559/16 561/22 565/9 569/14 569/15 574/15 599/12 Mr. Poirier's [2] 512/5 512/8 Mr. Pourbaix [12] 485/6 485/13 486/1 486/11 487/22 489/3 489/7 489/14 491/7 492/20 493/12 493/22 Mr. R [1] 430/23 Mr. Robert [1] 574/20 Mr. Samps [6] 342/14 342/15 343/4 343/15 344/6 355/6 Mr. Skaggs [29] 318/16 318/17 319/7 319/9 320/24 321/4 322/21 334/6 334/8 345/21 349/17 353/17 362/8 364/13 375/10 375/16 375/22 402/8 402/16 403/8 403/18 407/19 426/7 428/21 429/22 466/19 468/15 597/8 598/19 Mr. Smith [19] 375/10 375/17 375/22 377/8 378/1 380/10 401/17 401/21 414/15 433/13 508/7 514/24 515/3 516/9 537/2 543/19 561/22 577/6 598/20 Mr. Smith's [1] 519/21 Mr. Sperber [1] 524/19 Mr. Stephen [1] 599/12 Mr. Steve [1] 574/16 Mr. Vanaselja [9] 463/10 463/16 475/22 481/6 484/1 486/22 490/10 496/18 570/14 Mr. Varallo [2] 473/7 615/9 Mr. Varallo's [1] 463/19 Mr. Wills [1] 545/4	Ms. [33] 323/22 324/21 325/10 326/1 327/4 327/9 337/3 340/17 341/12 344/9 346/18 346/21 359/22 367/7 368/8 405/22 407/17 407/22 408/11 410/20 411/15 411/20 412/4 469/19 469/24 470/16 473/10 474/17 474/19 500/23 527/2 540/12 555/5 Ms. Johnston [25] 323/22 324/21 326/1 327/4 327/9 337/3 340/17 344/9 346/18 346/21 359/22 367/7 368/8 405/22 407/17 411/15 411/20 469/19 469/24 470/16 474/17 500/23 527/2 540/12 555/5 Ms. Johnston's [8] 325/10 341/12 407/22 408/11 410/20 412/4 473/10 474/19 much [7] 364/5 364/6 368/16 433/15 457/17 520/11 530/8 multiples [2] 441/17 441/17 must [3] 559/24 560/3 579/23 mutual [1] 505/24 mutually [4] 551/23 552/6 552/17 553/4 my [91] 324/8 325/5 338/8 339/21 343/18 355/11 356/16 358/16 365/9 367/8 377/8 377/18 381/1 392/21 405/6 415/23 426/22 431/20 432/10 434/12 434/13 434/21 435/5 435/10 435/11 435/18 441/14 445/1 456/21 462/23 463/11 463/12 464/6 465/9 467/14 467/15 468/21 472/11 473/8 473/16 475/3 475/8 481/13 483/14 487/17 491/22 493/2 494/15 502/10 507/19 514/2 519/7 519/16 527/5 532/13 532/14 532/21 535/4 537/22 537/23 538/1 538/1 540/5 540/6 541/5 545/4 548/13 550/6 552/1 553/18 554/10 570/12 572/21 576/9 576/11 582/14 583/23 591/4 591/4 591/18 593/20 593/21 596/22 600/18 600/18 606/19 608/19 608/23 609/14 610/10 610/17 myself [1] 457/8	N name [12] 348/14 369/19 377/8 435/18 439/10 445/15 445/21 536/9 546/2 569/1 582/4 603/21 named [2] 435/20 539/2 names [1] 517/9 narrow [1] 441/23 national [2] 504/23 505/2 natural [4] 352/22 436/16 484/22 486/10 nature [2] 322/1 478/10 navigate [1] 481/18 NDA [41] 327/13 339/20 355/22 381/9 381/13 383/12 392/10 394/11 406/6 423/8 466/18 503/10 503/11 503/13 503/18 503/23 505/12 506/6 506/11 508/23 515/14 516/15 518/11 520/5 527/16 529/3 543/3 543/13 543/13 543/17 544/18 544/19 545/22 557/8 560/17 573/2 574/7 577/14 579/9 585/4 586/7 NDAs [11] 351/7 354/3 354/8 379/18 380/2 382/23 392/10 398/14 399/9 417/12 539/10 near [1] 337/10 necessarily [5] 446/9 477/20 547/17 570/18 609/9 necessary [3] 332/11 374/10 542/5 NED [1] 317/2 need [30] 321/5 338/3 352/18 356/7 357/11 370/7 392/1 392/14 409/10 411/24 442/24 443/3 458/3 488/17 489/7 520/16 520/17 525/13 534/22 535/6 535/10 541/12 547/9 557/9 560/14 576/22 578/23 585/4 588/23 615/9 needed [8] 355/7 390/17 419/18 529/23 532/4 533/16 587/17 614/1 needing [1] 589/9 needs [2] 342/19 496/12 negate [1] 532/16 negative [4] 443/1 477/18 478/13 549/14 negotiate [9] 334/12 365/1 380/5 412/13 465/19 503/11 507/18 521/12 552/3
----------	---	---	--	---

N	471/11	November 2015 [1] 468/23	345/3 345/4 345/7	571/14 571/15 571/18
negotiated [12] 328/16	non-binding [1] 468/17	November 24 [2] 467/10 467/19	345/9 345/10 345/19	office [3] 342/6 434/16 538/1
336/19 337/1 381/10	non-disclosure [2] 387/1 471/11	November 24th [4] 322/16 322/20 466/18 467/3	345/21 345/22 346/1	officer [9] 322/23
408/19 410/7 422/19	non-guaranteed [1] 457/22	November 25th [2] 398/18 508/2	346/5 346/7 384/7	434/19 437/19 437/21
449/2 506/7 507/19	non-public [2] 328/15 408/18	November 6th [1] 503/22	385/10 403/19 404/6	437/22 447/5 484/19
543/3 589/9	noncore [1] 449/10	November 9th [3] 466/9 466/15 506/23	404/14 406/3 406/9	495/4 554/21
negotiating [9] 347/24	nondisclosure [19] 379/13 379/22 380/6	number [17] 320/8	406/12 406/16 406/18	officers [1] 557/20
350/9 380/2 381/3	381/3 382/1 382/5	320/20 345/16 349/1	406/23 406/24 407/2	officially [2] 399/4
381/13 381/23 422/23	394/10 410/9 418/18	459/15 459/16 459/19	407/3 408/3 411/3	399/10
547/9 572/5	418/19 466/8 466/11	469/13 501/20 502/11	412/18 413/8 413/11	offside [1] 585/7
negotiation [9] 362/23	471/23 472/7 503/6	502/14 517/3 547/21	422/8 422/12 422/13	offsite [2] 394/18
370/3 375/9 380/6	505/19 515/10 531/19	567/4 568/5 592/13	425/17 438/20 446/12	396/22
438/12 543/13 543/13	535/20	608/15	447/8 447/14 447/16	often [2] 441/15 595/18
547/5 566/13	none [2] 370/21 482/23	number 3 [1] 349/1	447/24 448/3 448/5	Oh [6] 358/18 362/2
negotiations [24]	nonpublic [2] 409/16 410/6	numbered [3] 558/19	448/20 448/24 449/4	362/11 549/17 596/10
328/17 329/8 360/20	nonsensical [1] 462/23	602/13 602/16	449/23 450/5 450/7	606/21
365/14 375/4 408/20	noon [1] 603/14	numbers [2] 391/11	452/11 453/6 454/24	oil [1] 464/14
415/10 415/18 419/2	Nope [1] 471/19	420/17	455/3 455/4 456/14	ok [1] 370/19
438/20 444/13 453/9	nor [11] 324/11 324/12	numerous [1] 535/8	456/18 457/10 458/2	OLSEN [1] 317/14
454/10 466/1 478/4	403/19 403/20 419/5	ny [1] 420/23	458/14 461/22 461/23	omission [1] 375/16
494/9 503/7 507/20	419/6 506/15 506/19	O	461/24 462/6 462/20	once [7] 360/3 372/11
520/11 524/4 529/23	510/7 591/19 591/19	oath [1] 547/24	462/21 463/2 468/18	431/7 449/1 542/4
536/16 574/9 589/7	Noreuil [9] 502/22	object [2] 443/7 496/7	476/12 477/7 477/9	545/20 557/15
neither [2] 394/10	521/14 521/24 524/18	objecting [1] 499/3	477/14 479/6 479/19	one-on-one [2] 319/4
419/5	584/22 585/24 601/22	objection [8] 443/14	486/17 486/23 488/3	319/23
nesday [1] 415/7	605/17 605/17	443/15 496/6 499/23	492/12 492/23 493/15	one-on-ones [2]
never [12] 378/6	North [3] 316/10	533/17 548/23 561/7	495/6 495/14 497/9	319/12 319/13
393/24 409/1 423/7	316/21 465/8	563/24	497/13 497/20 498/13	ones [6] 319/12 319/13
424/14 424/15 424/20	note [11] 341/4 366/11	objective [1] 455/23	498/17 498/19 499/6	547/14 548/22 551/12
424/21 483/17 571/12	368/22 377/14 474/20	obligation [1] 529/20	499/24 510/1 510/7	562/14
571/13 591/19	475/2 478/19 518/20	obligations [14]	510/9 513/7 519/7	onsidered [1] 572/18
new [21] 317/7 354/6	582/24 586/6 614/23	325/18 411/5 413/2	519/10 519/18 520/9	open [11] 482/18 483/8
354/12 361/16 362/14	noted [8] 326/12	431/6 503/18 508/22	520/17 524/11 525/12	535/3 545/5 551/19
365/7 416/12 421/24	444/11 448/23 471/10	509/3 516/15 518/19	526/22 550/22 557/23	554/1 555/4 565/20
424/11 431/6 431/14	529/14 539/5 545/12	528/13 535/19 537/6	557/24 560/15 562/20	586/18 587/8 613/15
431/19 447/14 514/17	558/7	544/7 560/19	562/23 563/7 563/9	open-ended [3] 482/18
515/11 533/24 574/15	notes [20] 473/3	observe [2] 375/9	563/13 563/23 564/6	483/8 535/3
575/3 593/22 593/22	473/10 473/13 473/17	375/15	564/7 565/1 565/11	operated [1] 574/13
594/12	473/23 474/16 474/19	obtain [2] 431/3 594/15	565/16 566/4 566/12	operates [1] 440/3
newly [2] 363/1 426/17	475/14 476/16 476/17	obvious [1] 342/9	566/22 568/10 570/11	operating [2] 437/19
news [6] 511/2 529/23	478/18 546/10 576/21	obviously [5] 453/2	570/15 570/17 571/23	484/18
531/18 535/3 536/10	582/19 586/23 587/16	453/4 478/3 547/2	572/20 573/12 573/17	operation [1] 520/20
536/15	613/5 613/8 613/12	596/16	576/4 577/11 577/12	operations [2] 436/19
NextEra [5] 322/8	613/16	occasion [1] 380/20	577/18 577/19 577/22	440/9
350/23 351/5 356/3	nothing [7] 433/9	occur [1] 609/16	578/1 578/5 578/15	operative [1] 515/14
398/14	433/11 461/17 483/20	occurred [4] 319/2	578/17 578/21 579/5	opined [1] 424/4
nice [5] 463/22 488/21	500/6 529/19 532/20	327/2 400/19 432/10	579/6 579/7 579/12	opinion [7] 401/9
489/15 540/12 540/13	notice [3] 337/16	346/24 353/10	579/16 579/17 579/21	401/12 533/2 613/22
nicely [1] 435/14	522/22 532/10	Oddly [1] 480/16	580/2 580/8 580/9	613/24 614/11 614/22
nickname [1] 439/15	notify [1] 420/2	off [12] 338/9 338/12	580/17 581/3 581/14	opp [2] 488/18 489/9
night [2] 418/10 517/6	noting [2] 444/22	360/4 360/11 400/16	583/1 583/4 583/7	opportunities [2]
nine [1] 335/22	555/9	400/22 407/11 431/12	584/7 585/6 586/9	436/23 436/24
No. [10] 318/15 319/21	notwithstanding [4]	484/13 486/3 488/13	587/2 590/4 590/7	opportunity [17]
320/3 320/19 323/20	435/14 457/14 509/4	508/10	590/8 591/1 591/11	350/22 355/3 385/14
325/22 340/4 344/1	571/21	offense [1] 484/1	591/15 593/10 593/15	417/6 421/12 432/6
357/14 373/17	November [22] 322/13	offer [181] 321/23	594/22 594/23 605/8	437/24 443/8 474/10
No. 191 [1] 357/14	322/16 322/20 398/18	322/4 324/11 325/6	offered [13] 420/9	480/13 480/21 481/9
No. 4 [1] 320/3	400/23 420/19 466/9	325/16 326/14 326/15	421/1 435/18 448/7	483/2 484/9 491/20
No. 46 [1] 320/19	466/15 466/18 467/3	327/10 328/5 328/21	456/22 487/4 487/6	492/5 570/23
No. 564 [2] 318/15	467/10 467/19 468/23	335/24 341/5 341/19	487/13 487/18 488/5	opposed [3] 332/17
319/21	503/22 506/23 508/2		531/21 533/21 606/9	409/3 548/21
No. 6 [1] 373/17	544/20 545/10 545/16		offering [15] 398/20	opposite [1] 516/10
No. 620 [1] 323/20	554/19 570/15 571/22		443/18 451/4 456/9	opposition [1] 479/5
No. 621 [1] 325/22			457/23 506/13 506/13	optionality [1] 371/11
No. 827 [1] 340/4			508/9 514/5 533/2	options [1] 600/18
No. 844 [1] 344/1			533/3 534/13 550/20	order [23] 328/21
non [6] 328/15 387/1			555/22 556/2	332/11 343/17 353/4
408/18 457/22 468/17			offers [2] 341/2 426/1	377/16 398/1 398/5
			offhand [4] 571/8	

O	384/1 510/1 550/22 557/24	particularly [1] 461/5	412/12 449/12 470/13 472/12 475/24 495/16 539/4 570/15	425/17 492/24 493/15 578/11
order... [16] 399/22 411/22 417/23 419/13 423/2 450/9 464/3 468/4 504/12 596/23 596/23 597/9 599/16 599/23 605/4 611/11 ordinarily [1] 505/3 organization [1] 442/12	P	parties [19] 322/14 323/7 340/20 354/1 354/15 365/18 398/1 430/12 457/2 464/3 467/10 468/11 476/20 478/7 481/12 552/3 552/7 553/8 567/2	Permian [1] 436/20 permissible [3] 321/12 328/22 420/1 permission [3] 385/9 463/9 591/1 permit [1] 507/8 permitted [2] 548/21 551/13 person [7] 380/1 380/23 470/16 472/10 524/4 540/13 542/22 person's [1] 584/8 personal [2] 592/21 602/21 personally [2] 465/19 592/18 personnel [1] 517/4 perspective [9] 357/5 442/21 443/20 451/6 454/3 520/21 539/16 555/9 564/5 peruse [2] 392/20 394/23 pesky [2] 605/6 608/11 phase [1] 543/13 Phillips [2] 358/24 359/1 phone [10] 353/11 444/5 446/22 446/24 447/1 454/19 488/13 494/20 537/23 597/14 phrased [1] 427/13 picked [1] 608/11 picture [1] 545/19 pinpoint [3] 591/1 591/11 591/15 PIPELINE [4] 316/3 439/12 460/12 464/18 pipelines [2] 484/22 486/10 place [28] 324/7 327/22 327/23 328/7 333/3 333/13 340/21 365/5 365/7 406/18 406/19 417/1 419/2 419/2 419/3 438/2 443/18 459/2 495/21 514/8 532/2 539/1 575/19 577/24 578/11 579/4 579/6 580/7 places [1] 589/8 plain [3] 562/7 580/17 597/20 plaintiff [1] 469/9 plaintiffs [8] 317/10 377/9 463/8 468/6 606/7 608/5 609/5 609/24 plaintiffs' [8] 550/6 605/6 605/7 606/14 608/8 608/11 610/7 610/22 plan [4] 354/11 372/18 372/22 439/21 planned [8] 327/21 396/22 422/14 424/22	plans [1] 439/24 play [9] 370/4 381/4 415/19 427/6 446/6 465/22 499/15 499/18 548/5 played [8] 381/7 473/24 478/1 498/4 499/19 548/10 561/5 563/21 player [2] 369/12 369/21 playing [5] 371/10 371/12 375/10 388/24 535/11 please [61] 318/15 320/2 320/20 322/11 323/20 325/23 327/1 330/4 331/14 334/1 337/2 338/6 338/23 339/5 340/4 341/16 342/5 343/2 344/1 344/22 344/23 348/6 348/8 349/12 351/11 351/17 353/16 355/20 358/14 359/5 359/20 362/2 362/6 366/2 366/24 368/21 371/2 371/20 373/6 374/2 377/3 434/5 434/14 452/4 499/18 502/9 525/7 531/3 540/8 545/5 551/20 552/12 554/7 555/4 559/10 567/24 582/11 582/22 584/23 603/15 613/15 pleasure [2] 377/20 433/16 point [57] 321/22 333/21 335/18 342/10 343/16 344/8 346/8 348/1 349/9 365/4 380/1 407/8 417/21 419/17 420/22 421/19 433/2 449/9 497/8 498/12 510/19 511/4 513/15 514/4 518/5 519/6 519/9 520/23 524/6 527/3 527/12 528/24 529/17 531/20 532/4 533/11 534/18 537/7 539/24 565/6 565/8 568/4 583/23 588/5 588/18 588/19 589/7 592/11 596/1 598/9 598/15 599/9 599/17 599/24 600/15 601/13 614/8 pointed [2] 372/5 391/15 points [4] 330/7 364/14 497/10 582/15 Poirier [50] 399/14 401/10 401/17 401/20 402/2 437/19 438/3 492/21 493/13 493/23 494/1 509/12 509/13 509/14 511/6 512/1
organized [1] 474/22 orient [4] 463/24 465/16 468/5 470/11 orienting [1] 466/4 original [3] 517/24 550/10 576/13 ORRICO [3] 317/6 463/8 570/12 ortunity [1] 489/9 other's [1] 515/13 others [8] 336/5 350/23 363/10 445/9 461/10 512/1 554/9 605/17 otherwise [3] 516/12 529/2 576/4 ought [1] 529/16 ours [1] 432/16 ourselves [1] 448/10 outline [1] 353/21 outlines [1] 461/22 outreach [2] 340/2 514/14 outright [1] 510/5 outs [4] 351/4 351/15 353/10 353/12 outside [21] 340/22 419/12 423/16 423/23 424/3 424/9 502/16 504/11 507/13 507/22 513/13 513/20 521/7 521/10 523/18 524/14 527/9 537/5 543/12 549/12 549/21 over [20] 346/22 371/3 388/19 394/21 412/8 436/22 438/20 440/22 441/8 448/11 473/7 481/16 484/2 497/12 503/14 507/20 535/8 555/24 589/1 597/24 overly [2] 421/10 525/15 overrule [2] 534/8 534/12 oversee [1] 380/6 oversight [4] 351/2 381/12 381/22 381/23 overture [1] 574/22 overtures [8] 362/14 548/20 551/5 551/6 551/12 551/15 553/1 553/6 overview [1] 471/4 own [7] 361/6 361/6 507/18 507/19 521/6 537/6 615/2 ownership [5] 383/24	P.A [1] 317/10 p.m [11] 347/6 349/18 417/18 418/10 451/16 452/2 512/7 530/10 531/1 589/22 615/12 Pacific [1] 576/19 package [4] 395/11 396/2 397/5 545/9 page 007 [1] 570/9 page 62 [1] 473/21 pages [6] 439/6 460/20 496/10 506/8 537/9 600/14 paid [3] 595/18 595/21 597/13 par [1] 609/17 paragraph [62] 320/13 320/21 322/23 324/4 325/9 332/22 334/3 334/19 336/12 339/2 341/13 349/13 385/3 386/18 386/24 389/7 389/10 389/13 391/16 391/22 391/23 398/4 399/23 403/15 410/20 417/24 418/22 418/24 423/5 428/5 429/16 429/21 430/4 444/8 447/3 448/18 454/21 455/10 456/16 467/8 467/15 475/21 518/12 519/1 550/18 556/1 556/11 556/16 558/19 565/24 570/4 582/23 585/9 585/19 597/9 598/4 598/24 599/15 599/22 602/14 602/16 607/1 paragraphs [5] 389/8 555/6 555/8 555/17 555/19 parallel [1] 415/17 parameters [1] 437/23 paraphrase [1] 422/24 Pardon [1] 331/8 parens [1] 419/24 parentheses [1] 614/5 parse [3] 358/6 560/12 595/3 parsing [1] 595/4 part [18] 334/5 344/2 354/2 456/12 457/1 457/3 502/10 525/17 541/22 553/13 554/4 573/7 577/11 579/18 584/2 595/10 600/22 605/13 participate [1] 337/18 particular [17] 399/22 437/15 438/6 438/8 438/11 439/6 502/16 511/11 511/14 512/22 541/10 543/23 561/14 568/4 568/16 590/19 597/1	partners [1] 502/21 parts [2] 334/4 550/5 party [30] 322/20 322/23 322/24 323/9 336/16 362/23 364/8 364/22 369/24 370/4 400/15 410/14 419/1 419/5 420/2 422/4 422/5 428/14 428/17 429/7 429/23 429/23 430/11 471/8 504/8 505/21 523/2 550/19 550/22 553/11 Party D [4] 322/20 322/23 322/24 323/9 party's [1] 478/3 pass [3] 376/6 583/17 583/22 passed [1] 569/11 passing [1] 559/23 past [1] 552/9 path [3] 401/24 481/18 555/12 pause [2] 371/17 550/1 pay [1] 454/24 pencils [5] 553/17 553/20 554/24 556/22 561/23 penny [1] 349/2 penultimate [1] 386/23 people [12] 351/21 360/16 362/9 363/14 367/13 517/7 517/10 521/7 538/4 554/20 569/23 582/15 per [36] 321/2 323/1 345/15 345/19 447/8 447/13 447/16 448/21 449/4 450/3 450/4 452/11 453/6 455/15 462/1 466/22 467/22 469/1 472/18 476/12 477/7 479/6 479/11 479/20 486/16 487/4 492/23 495/6 495/13 504/21 566/4 570/11 571/22 581/8 598/22 613/20 percent [8] 448/23 449/23 451/4 452/12 456/14 457/16 457/19 472/19 perfectly [1] 516/11 perhaps [3] 328/5 341/1 586/18 period [9] 349/18		

P	409/24 470/4 473/16 473/16 607/16 609/18 610/8 practices [3] 397/2 540/17 596/18 preceded [1] 562/21 precedent [2] 532/11 532/18 precise [2] 458/20 466/12 preclude [4] 325/2 326/2 506/12 548/15 precluded [3] 324/13 403/21 576/5 precursor [1] 554/14 predicated [1] 456/13 preference [1] 449/16 preliminary [2] 318/20 328/20 premise [1] 385/19 premium [4] 421/1 421/3 442/1 454/12 prepare [1] 383/2 prepared [24] 330/11 332/1 332/3 347/8 347/13 356/11 356/18 356/21 379/18 382/21 383/5 390/16 390/24 393/5 395/17 430/9 469/20 494/3 522/4 526/6 564/19 571/19 571/20 605/7 preparing [2] 330/14 348/19 pread [1] 439/3 presence [1] 465/2 present [5] 376/1 392/9 440/21 446/24 454/19 presentation [13] 331/11 349/16 393/4 393/4 393/9 393/14 393/19 394/1 394/7 394/9 394/15 395/5 497/18 presented [8] 429/22 441/13 441/20 443/20 445/10 496/22 499/22 541/20 preserve [3] 440/11 440/20 581/2 preserving [1] 445/5 president [4] 434/19 469/16 484/21 486/9 press [24] 359/18 360/6 360/15 360/22 361/8 361/11 422/14 424/21 424/24 425/2 425/18 425/20 492/24 493/16 528/16 531/23 532/4 533/12 534/22 535/15 535/21 535/23 536/2 536/6 pressing [1] 571/3 pressure [8] 361/5 362/15 364/24 420/8 420/24 535/16 556/13 556/18 presumably [1] 591/20	pretrial [18] 377/16 397/24 398/5 399/22 417/23 423/1 464/3 468/4 540/9 596/23 596/23 597/9 598/3 598/24 599/16 599/22 606/19 606/22 pretty [2] 531/17 590/14 prevents [1] 407/13 previous [2] 329/5 447/7 previously [10] 318/6 385/5 398/12 400/15 404/18 407/11 410/23 420/7 499/7 528/18 price [50] 321/2 323/1 353/4 365/2 370/3 420/9 420/10 421/1 421/3 422/22 438/20 440/2 442/22 444/10 444/12 444/17 444/23 445/2 445/24 446/3 446/6 447/12 450/17 455/19 456/1 457/15 466/21 467/22 476/20 477/17 477/19 478/3 478/5 478/7 478/11 478/13 481/21 481/24 488/19 489/10 492/6 496/1 497/13 524/7 524/11 525/9 585/9 586/24 601/5 613/21 price up [1] 365/2 prices [6] 454/6 564/18 564/23 573/24 584/14 590/20 pricing [2] 450/13 585/15 Primarily [1] 502/20 principal [1] 437/16 principally [1] 437/11 principals [1] 575/19 prior [22] 319/12 354/6 354/12 383/21 385/16 396/7 401/4 402/2 402/14 404/15 404/19 405/5 405/9 409/17 418/3 419/7 419/19 430/23 455/14 505/10 538/13 563/2 private [5] 328/15 408/18 409/15 410/6 502/12 probably [10] 344/18 344/21 524/23 560/20 572/2 572/3 575/16 588/21 588/24 591/23 problem [7] 368/17 451/8 488/7 488/15 496/8 496/14 572/21 problems [1] 488/15 proceed [4] 398/19 443/22 455/12 557/4 proceeding [1] 448/3 Proceedings [1] 615/12 process [24] 333/13 340/2 340/21 354/16	375/9 375/20 378/9 378/16 379/15 380/9 398/11 398/13 399/5 399/10 402/20 409/8 411/19 420/7 420/23 458/11 465/16 507/16 508/17 615/6 professional [1] 464/13 professor [1] 532/18 progressed [1] 520/12 prohibit [6] 387/2 506/11 507/3 547/14 562/10 562/14 prohibited [15] 385/14 389/17 515/23 558/15 558/24 564/14 564/19 564/24 573/24 574/4 574/7 574/8 578/2 580/18 600/19 prohibiting [2] 423/9 611/4 prohibition [1] 419/10 prohibitions [2] 552/19 553/13 prohibitive [1] 524/10 prohibits [3] 509/22 550/18 550/19 Project [6] 439/8 439/9 447/3 517/5 569/2 569/7 projects [2] 437/2 465/6 promptly [1] 537/24 proposal [48] 324/11 325/16 328/12 329/1 337/12 337/14 339/11 373/18 373/19 384/5 384/7 384/12 384/15 384/15 384/17 384/23 385/8 387/3 387/7 389/17 389/22 403/20 408/15 409/3 409/4 411/3 412/20 412/23 429/24 447/10 449/23 459/7 462/7 518/17 522/20 563/1 563/3 563/4 563/12 563/15 563/23 564/4 564/6 573/16 573/19 577/3 589/5 593/10 proposal' [2] 318/20 337/16 proposals [7] 322/9 322/13 323/6 363/21 410/2 431/5 523/9 propose [8] 341/20 383/23 385/19 385/20 558/9 587/18 588/2 588/9 proposed [16] 321/11 371/14 384/3 384/5 384/12 415/11 431/2 439/20 455/5 505/7 543/18 593/5 598/6 607/1 609/3 609/10 proposing [8] 385/15 550/21 558/15 562/3 564/14 607/12 608/21	608/24 prospectus [1] 374/15 protect [2] 506/2 591/10 protection [3] 333/2 339/16 391/17 protections [1] 372/6 protocol [1] 373/10 prove [1] 532/14 proverbial [1] 588/16 provide [11] 332/16 334/13 350/21 369/13 397/1 419/18 474/14 501/21 509/17 523/1 540/8 provided [23] 322/8 337/13 369/16 395/18 396/14 396/15 471/4 474/10 474/11 478/16 481/13 491/19 497/1 497/18 498/24 503/8 508/12 521/15 522/18 523/14 543/7 579/8 598/6 provides [2] 480/21 503/23 providing [6] 321/11 337/16 405/20 447/6 519/16 522/22 provincially [1] 504/22 provision [45] 321/12 322/3 326/4 326/11 327/13 337/20 339/6 354/3 354/7 382/6 389/15 390/19 392/3 392/16 406/6 410/11 411/10 411/12 418/19 418/21 423/8 472/7 505/13 505/16 505/17 506/9 509/7 510/16 511/13 513/16 515/23 519/13 520/20 523/4 527/4 527/16 543/17 543/22 558/20 577/15 611/4 611/8 611/20 612/12 612/18 provisions [13] 324/13 381/10 391/24 392/9 417/11 505/10 511/6 511/19 544/18 548/14 553/10 590/1 590/21 proxy [19] 320/15 322/18 374/8 374/16 374/17 385/23 386/5 386/8 386/12 427/23 428/1 429/16 493/9 506/17 510/16 538/23 539/2 539/7 548/17 prudent [1] 374/11 prying [2] 606/13 610/22 PTO [4] 397/23 417/24 467/6 475/20 public [20] 328/15 400/18 408/18 420/8 420/23 421/21 423/9 436/2 454/9 482/2 502/3 502/4 502/14 506/18 506/19 510/20
----------	---	--	---	--

<p>P</p> <p>public... [4] 510/21 511/3 534/24 535/5</p> <p>publicly [1] 423/17</p> <p>published [1] 479/22</p> <p>pull [8] 467/5 467/7 496/15 519/24 550/11 601/19 605/15 611/24</p> <p>pulled [3] 415/13 415/20 550/5</p> <p>punchline [2] 582/16 582/24</p> <p>purchase [6] 327/11 406/4 406/9 440/1 464/18 577/12</p> <p>purpose [11] 319/6 330/15 332/8 332/9 338/2 354/17 399/3 505/16 505/17 523/4 562/13</p> <p>purposes [4] 460/7 499/9 548/8 561/3</p> <p>pursuant [3] 504/10 509/7 536/14</p> <p>pursue [7] 471/8 479/20 508/9 560/1 560/4 560/15 598/14</p> <p>pursuing [7] 321/1 363/19 402/11 466/20 467/21 468/24 521/9</p> <p>pursuit [2] 326/14 375/11</p> <p>push [4] 353/4 362/22 420/10 421/3</p> <p>pushing [1] 346/5</p> <p>put [23] 333/3 364/6 364/23 393/10 398/8 426/6 435/18 460/5 464/6 482/10 482/11 511/1 521/8 523/14 535/10 535/16 550/6 595/13 596/22 606/18 609/24 610/1 611/3</p> <p>puts [2] 420/8 420/24</p> <p>putting [5] 392/7 393/15 405/8 407/19 524/11</p>	<p>364/12 368/3 382/15 387/18 393/8 397/21 420/14 541/2 555/14</p> <p>quite [6] 448/3 502/13 521/6 537/21 546/18 598/20</p> <p>quote [1] 563/7</p> <p>quote/unquote [1] 563/7</p> <p>quoted [1] 594/19</p> <p>quotes [1] 586/24</p> <p>R</p> <p>RAE [1] 500/16</p> <p>raised [2] 345/19 557/7</p> <p>ramifications [1] 335/6</p> <p>ran [1] 374/14</p> <p>range [42] 321/3 321/5 321/11 321/18 322/4 385/8 406/13 437/22 441/1 441/13 441/16 441/20 441/24 444/14 455/17 466/21 467/22 469/1 469/13 469/14 525/9 525/12 525/18 564/17 564/22 565/1 565/1 573/23 577/10 581/8 581/13 584/14 585/9 585/15 586/13 586/24 587/23 588/2 588/9 589/5 590/20 591/9</p> <p>rapidly [2] 350/19 352/23</p> <p>rather [8] 384/6 384/16 409/17 426/11 443/19 471/7 522/10 550/4</p> <p>rating [13] 439/20 440/5 440/6 440/11 440/13 440/18 440/20 442/9 444/12 444/23 445/5 445/5 452/21</p> <p>ratings [1] 452/23</p> <p>rationale [3] 364/12 364/14 372/5</p> <p>rationale - I [1] 372/5</p> <p>re [3] 316/3 336/3 471/10</p> <p>re-engage [2] 336/3 471/10</p> <p>reach [14] 350/22 351/4 351/15 353/10 353/12 365/24 368/6 368/11 372/10 399/18 427/11 428/22 560/22 594/15</p> <p>reach-out [6] 365/24 368/6 368/11 399/18 427/11 428/22</p> <p>reach-outs [4] 351/4 351/15 353/10 353/12</p> <p>reached [17] 326/1 360/22 361/10 366/17 371/4 414/7 416/4 427/14 427/14 531/22 533/12 561/22 574/15 574/21 576/1 584/15 615/10</p> <p>reaches [1] 428/19</p>	<p>reaching [8] 339/23 351/24 365/18 372/24 548/16 557/7 562/1 563/18</p> <p>reaction [8] 351/14 443/2 481/8 484/9 484/16 491/19 497/11 522/7</p> <p>read [62] 327/8 338/5 341/14 343/6 343/7 345/17 347/6 364/19 367/6 370/9 386/4 387/8 388/3 388/14 389/19 391/17 392/5 401/12 403/23 404/9 405/3 408/21 411/7 411/17 411/17 412/7 414/20 421/4 431/12 432/5 433/3 433/5 463/21 471/15 473/17 473/18 474/4 486/5 488/6 488/23 497/14 525/16 543/17 545/22 546/8 552/18 557/6 567/10 567/18 568/12 569/19 569/21 569/23 570/22 591/23 591/23 592/5 592/6 594/5 594/11 602/12 606/10</p> <p>readable [1] 490/7</p> <p>reading [14] 364/18 408/8 409/14 423/1 432/22 453/21 459/11 473/13 562/7 572/4 580/16 594/4 594/7 608/3</p> <p>reads [5] 333/1 389/13 430/22 478/2 504/8</p> <p>ready [8] 318/3 326/3 348/3 370/17 377/3 452/4 602/14 608/18</p> <p>real [9] 368/17 406/12 406/23 436/5 443/6 443/8 462/12 475/21 615/5</p> <p>reality [2] 478/10 495/15</p> <p>realtime [2] 415/10 433/7</p> <p>reask [1] 405/16</p> <p>reason [10] 416/7 465/5 469/11 476/7 482/10 482/11 494/4 538/12 558/10 584/7</p> <p>reasonable [1] 449/11</p> <p>reasonably [2] 449/7 457/5</p> <p>reasons [4] 437/3 456/7 567/4 602/21</p> <p>recall [115] 323/9 323/11 324/14 330/10 331/9 331/24 333/9 334/15 342/21 346/2 346/4 349/4 349/21 349/23 350/2 354/9 355/6 355/9 359/1 359/15 359/17 360/5 360/17 360/21 360/24 361/1 361/18 362/17</p>	<p>362/19 362/21 365/3 365/7 365/22 366/1 368/13 369/9 372/12 372/20 374/19 382/9 386/1 387/16 391/19 393/6 394/17 395/17 397/3 397/18 399/17 402/6 409/6 414/6 414/9 415/11 415/14 415/16 416/15 417/19 421/9 421/9 423/14 423/19 424/17 424/17 424/19 427/8 427/13 431/20 432/11 432/20 432/22 437/4 440/6 440/23 441/21 444/16 448/1 453/8 453/18 453/22 456/7 456/8 458/20 459/11 472/9 478/6 479/10 479/14 490/3 490/17 493/5 494/5 496/2 499/9 500/1 511/22 514/15 529/11 537/1 546/2 546/15 549/10 549/19 549/23 553/20 565/5 565/7 566/14 574/14 574/18 575/21 576/8 584/12 604/8 605/10</p> <p>recalling [2] 433/4 524/8</p> <p>recap [1] 447/18</p> <p>recapped [1] 582/1</p> <p>receipt [6] 327/10 369/12 406/3 406/9 456/9 577/12</p> <p>receipts [13] 450/8 450/10 450/13 450/15 450/21 451/8 453/1 456/3 456/6 457/15 457/19 457/21 458/5</p> <p>receive [8] 369/1 396/7 397/2 424/18 505/21 520/8 526/21 536/23</p> <p>received [17] 321/21 364/7 408/6 412/18 419/11 424/14 424/16 424/21 429/7 504/10 508/15 513/13 517/5 536/22 538/3 538/22 604/15</p> <p>receiving [2] 424/18 494/6</p> <p>recent [5] 318/18 318/24 319/22 454/24 541/3</p> <p>receptive [4] 325/14 411/1 487/7 518/15</p> <p>receptiveness [1] 447/16</p> <p>receptivity [1] 454/2</p> <p>recess [6] 376/10 451/14 451/16 530/9 530/10 615/11</p> <p>recipient [1] 554/20</p> <p>recitation [1] 584/8</p> <p>recites [1] 582/20</p> <p>recognize [8] 504/1 508/4 512/3 516/20</p>	<p>517/9 517/22 525/24 531/14</p> <p>recognizing [1] 440/8</p> <p>recollect [3] 345/8 602/6 604/13</p> <p>recollection [36] 336/7 339/21 342/17 342/19 343/14 346/14 348/8 348/18 355/11 359/12 362/1 365/9 365/22 366/16 374/13 400/1 416/3 433/6 441/5 446/5 447/22 456/1 461/4 462/3 462/12 472/6 473/21 491/12 492/1 493/7 494/15 499/3 522/1 533/3 541/3 592/16</p> <p>recollections [2] 456/22 461/7</p> <p>recommendation [13] 345/22 429/10 429/22 461/21 462/17 478/24 479/1 497/8 498/16 498/18 499/4 499/5 499/23</p> <p>recommended [2] 335/3 497/21</p> <p>recommending [2] 497/17 498/12</p> <p>reconvene [1] 429/13</p> <p>record [12] 342/13 352/5 369/2 378/14 390/17 392/2 392/14 397/22 417/22 431/22 532/23 534/24</p> <p>records [1] 541/23</p> <p>recruited [1] 501/11</p> <p>reduce [1] 492/6</p> <p>reducing [1] 457/22</p> <p>reengage [3] 354/15 555/21 574/17</p> <p>reengaged [1] 514/5</p> <p>reengagement [4] 514/11 515/4 516/6 556/8</p> <p>reengaging [4] 438/4 515/21 515/22 575/15</p> <p>refer [9] 341/13 377/12 389/21 440/14 444/24 496/10 570/10 596/24 598/23</p> <p>reference [10] 318/24 320/7 344/16 381/5 388/7 439/14 444/9 444/21 538/19 597/8</p> <p>referenced [3] 503/10 512/23 514/24</p> <p>referencing [2] 493/3 605/14</p> <p>referred [6] 324/21 337/23 432/13 575/20 580/12 584/6</p> <p>referring [3] 319/22 341/8 577/23</p> <p>refers [2] 352/15 510/19</p> <p>reflect [1] 364/3</p> <p>reflected [1] 526/24</p>
<p>Q</p> <p>qualify [2] 384/23 406/23</p> <p>questioned [1] 568/15</p> <p>questioning [1] 377/19</p> <p>questions [27] 341/9 375/1 381/20 425/24 427/8 463/6 482/18 482/23 483/5 483/6 484/17 500/5 511/21 540/3 540/17 544/10 549/4 549/7 600/14 601/14 601/23 602/1 602/13 602/17 604/16 604/16 604/19</p> <p>quibbling [1] 432/2</p> <p>quick [7] 366/15 386/11 409/10 443/6 443/8 475/21 496/6</p> <p>quickly [10] 351/23</p>				

R	423/8	557/22	572/4	423/13 424/5 504/14
reflects [1] 541/3	relied [3] 409/23	require [10] 328/4	resume [3] 318/3 531/3	504/23 504/24 505/4
reformatted [1] 330/7	465/23 502/22	408/2 409/17 460/5	615/11	529/4 532/9 532/17
reframe [1] 533/6	rely [6] 374/22 469/24	510/21 578/14 578/18	resumed [5] 318/7	574/11
refresh [18] 336/7	502/16 525/2 532/15	579/12 586/7 587/19	376/9 377/1 452/2	rumors [1] 363/18
342/16 343/13 346/13	615/1	required [21] 334/11	531/1	run [4] 449/13 546/6
348/7 348/16 348/18	relying [1] 615/1	337/17 355/13 360/14	retained [1] 440/14	546/23 547/3
357/11 359/12 362/1	remain [2] 448/24	409/2 409/16 419/12	retention [1] 597/22	running [2] 373/16
365/21 366/16 374/13	509/4	423/17 424/5 424/8	retirement [2] 375/12	542/22
400/1 415/24 416/2	remainder [2] 347/10	424/12 504/9 504/12	434/21	Russ [22] 435/9 435/15
473/20 493/6	464/4	522/23 528/19 531/19	return [10] 347/13	437/15 441/22 442/5
refreshed [1] 342/19	remained [2] 434/22	532/10 574/10 579/9	347/16 348/20 398/23	442/20 445/9 453/14
refreshment [1] 342/23	598/20	580/11 590/5	415/15 508/2 508/10	453/24 453/24 457/4
regard [15] 381/21	remember [14] 345/12	requirements [1] 502/4	508/20 509/5 509/6	485/14 486/2 488/2
381/23 437/17 438/18	369/11 462/24 483/3	requires [1] 529/19	return-or-destroy [5]	488/12 488/22 489/15
440/1 445/3 448/2	493/4 497/4 514/8	research [1] 498/9	347/13 348/20 415/15	490/11 525/9 559/22
448/17 450/12 499/10	514/18 527/20 537/21	resolution [1] 460/5	508/2 509/6	585/9 585/10
533/7 535/21 548/11	547/20 549/15 601/10	resolutions [1] 502/1	returned [1] 515/16	Russ's [1] 512/11
562/6 584/16	611/11	resolve [1] 361/17	returning [1] 395/7	S
regarding [15] 324/9	remembered [1] 492/7	resources [1] 521/6	review [7] 378/22	Sachs [7] 420/6 420/17
331/1 331/21 341/6	reminded [1] 557/8	respect [21] 363/18	385/14 470/5 474/10	428/15 429/3 429/7
343/10 361/4 369/12	rendering [1] 595/5	379/6 383/12 441/1	501/23 543/12 560/7	516/24 517/15
381/21 412/7 422/3	renegotiate [2] 483/3	446/6 447/21 456/4	reviewed [11] 356/23	Sachs' [1] 336/1
495/6 495/13 544/1	491/20	456/5 462/18 484/3	368/24 379/1 382/1	said [46] 319/21
564/22 575/4	renew [2] 349/20	503/17 524/2 528/13	390/7 424/24 447/8	324/20 324/22 347/6
regardless [3] 339/22	365/14	533/5 533/15 534/6	455/4 473/23 474/17	356/17 358/19 367/6
352/6 580/4	renewal [1] 479/12	540/17 543/16 592/24	543/8	369/20 370/18 370/19
regrettable [1] 448/14	renewed [1] 369/3	593/2 602/20	reviewed/approved [1]	370/19 372/10 382/7
regular [2] 319/11	reorient [3] 452/8	respected [1] 498/6	368/24	404/4 406/15 411/22
423/21	492/18 531/7	respective [3] 340/21	reviewing [2] 357/1	413/8 421/13 422/17
reinforced [1] 350/13	repeat [6] 354/22	361/14 454/6	459/9	422/22 424/19 426/16
REIT [1] 436/5	380/11 459/16 474/12	respond [9] 363/20	reviews [1] 541/16	426/19 431/21 448/2
reiterating [1] 519/7	523/21 549/13	364/8 388/22 429/10	revised [1] 439/21	448/10 462/10 462/13
reject [1] 346/1	repeats [1] 509/2	443/15 511/2 532/24	Revlon [2] 601/8	481/22 483/4 487/5
rejected [5] 345/9	replace [1] 510/17	537/4 578/7	601/11	487/7 494/11 497/21
345/16 345/22 346/7	reply [1] 341/16	responded [4] 405/22	rewind [1] 483/23	507/17 516/12 529/18
447/14	report [1] 583/13	489/14 511/21 577/6	RICKERT [1] 317/12	534/9 534/11 560/24
related [1] 439/24	reported [3] 334/8	responding [4] 364/8	right-hand [2] 545/13	579/15 580/2 580/2
relates [1] 545/9	421/16 469/3	430/11 431/4 580/22	546/20	580/7 589/14 610/11
relating [3] 459/1	REPORTERS [1]	responds [9] 404/21	Rings [1] 344/17	sale [7] 379/15 398/11
536/21 536/24	316/20	480/21 480/23 485/19	RioCan [1] 436/5	398/13 420/7 420/23
relations [2] 535/7	reporting [3] 348/22	486/1 488/4 488/10	rise [1] 532/7	451/7 555/10
536/11	367/18 599/1	488/20 559/7	risk [9] 450/9 450/12	sales [6] 440/17
relationship [1] 362/16	Reports [1] 459/20	response [33] 327/9	454/24 455/7 461/2	442/11 442/23 445/4
relationships [1]	represent [4] 377/9	337/13 339/7 341/12	461/6 461/16 476/17	450/8 465/16
555/15	466/14 479/17 480/9	341/13 343/10 351/14	604/5	same [32] 327/2 327/4
relative [1] 364/3	representation [4]	351/16 362/22 364/7	risks [5] 443/1 445/3	349/23 370/1 389/4
relatively [2] 541/3	392/21 506/16 561/15	364/22 367/9 371/4	450/6 450/18 451/6	397/9 399/21 403/3
542/3	612/10	373/23 381/24 405/1	road [1] 579/6	405/23 409/11 411/19
relay [1] 511/17	representative [3]	405/7 406/1 407/23	ROBERT [4] 318/6	415/16 421/23 441/21
relayed [4] 371/9	389/9 389/13 431/3	440/12 483/21 490/21	366/5 370/13 574/20	442/5 455/22 483/19
457/12 471/9 480/16	representatives [1]	519/22 520/6 522/19	role [6] 438/14 438/15	489/19 535/12 535/12
relaying [1] 364/14	557/21	524/20 537/11 538/11	465/21 501/18 542/20	539/4 540/15 553/9
release [39] 354/3	representing [2]	566/7 571/5 577/9	544/14	558/13 574/19 588/22
354/7 359/18 360/1	581/18 581/21	593/13 603/17	Roman [1] 550/19	595/19 595/19 597/24
360/6 360/15 360/22	reput [1] 483/10	responses [2] 373/11	room [5] 515/18 517/6	600/16 604/20 612/3
361/8 361/11 416/21	request [17] 318/19	439/20	517/16 538/1 588/11	Sampas [7] 342/14
417/2 417/6 422/14	399/15 410/14 410/15	responsibilities [2]	Ross [5] 527/24 528/1	342/15 343/4 343/15
424/21 425/1 425/2	411/11 411/15 411/18	361/14 503/1	528/2 528/9 528/15	344/6 344/12 355/6
425/4 425/7 425/18	411/21 427/19 508/3	responsible [2] 374/19	Ross Bentley [1]	SANBORN [1] 317/7
425/20 492/24 493/16	518/21 571/6 574/16	502/3	527/24	SANBORN-LOWING
511/2 528/16 529/24	582/12 598/13 599/2	responsive [2] 482/24	rough [1] 569/24	[1] 317/7
531/18 531/23 532/4	599/2	571/17	round [1] 524/4	Saturday [4] 418/14
533/13 534/23 535/3	requested [6] 341/18	rest [4] 342/3 347/10	rounds [1] 612/18	537/21 585/10 585/16
535/7 535/15 535/21	349/20 429/9 444/9	388/22 436/13	rubber [1] 335/3	save [3] 328/23 559/12
535/23 536/2 536/6	587/2 595/23	restart [1] 483/24	rubber-stamp [1]	600/20
536/10 536/15	requesting [3] 387/5	result [8] 337/14	335/3	saw [13] 342/24
released [2] 421/21	444/16 519/13	343/19 345/18 389/14	Rule [1] 532/9	372/16 394/9 447/19
	requests [2] 383/8	478/8 522/21 537/19	rules [11] 419/14	

S	538/11	407/23 592/9 604/18	session [10] 331/1	shift [2] 398/10 542/19
saw... [9] 473/1 473/2	scripts [1] 426/1	seen [6] 319/7 333/10	376/1 378/9 387/14	shifting [2] 457/18
539/7 545/20 546/20	scroll [2] 354/2 568/3	420/11 485/8 602/7	387/19 388/1 392/20	457/21
549/11 553/16 557/15	se [1] 504/21	613/5	394/14 394/16 452/1	shop [1] 416/9
562/15	search [1] 594/14	sees [1] 541/15	set [10] 340/6 354/23	short [7] 348/11
saying [23] 328/12	seated [3] 377/3 452/4	sell [2] 353/2 449/9	378/21 453/12 566/18	366/13 374/4 429/8
328/18 339/7 344/17	531/3	semantics [2] 564/2	574/22 603/2 603/5	496/9 572/2 586/1
351/10 352/16 361/10	second [37] 320/20	573/18	603/7 603/23	short-circuiting [1]
367/17 368/16 374/9	324/4 327/3 331/18	send [12] 343/10	sets [3] 415/22 552/21	496/9
392/24 408/5 421/9	337/6 338/14 340/14	362/24 387/5 431/2	552/22	shorthand [4] 570/19
421/10 424/1 458/13	340/15 341/13 346/22	499/12 508/7 508/19	setting [2] 357/24	572/3 577/23 583/8
487/10 513/4 579/2	351/20 359/5 394/23	518/4 528/8 541/13	553/22	shortly [4] 404/5 511/4
587/22 588/21 590/11	397/22 403/14 410/19	560/6 586/16	settle [1] 440/24	520/7 521/2
610/4	422/21 428/11 429/21	sending [5] 367/19	seven [4] 335/20	should [31] 332/13
says [79] 318/17	455/9 464/3 498/8	368/19 399/3 426/12	371/19 522/17 546/16	336/3 339/11 340/21
320/23 322/19 324/2	510/10 524/4 553/19	556/24	several [2] 426/21	352/17 377/11 377/15
324/5 325/12 330/6	554/3 554/7 556/1	senior [10] 465/23	511/8	377/17 382/16 406/1
334/8 335/22 336/12	558/18 570/7 582/3	481/7 484/7 484/24	shakes [2] 488/18	416/21 417/3 417/12
339/9 341/15 345/18	585/8 606/24 608/4	491/6 541/7 544/5	489/8	418/3 444/13 448/12
346/23 348/11 349/1	611/10 611/22 612/3	554/20 556/24 592/13	shape [1] 374/11	451/11 457/7 462/20
352/16 353/7 353/19	seconded [1] 460/6	sense [11] 323/15	share [64] 321/2 323/1	475/10 494/2 517/5
353/23 354/3 359/4	secondly [1] 452/21	371/12 441/6 453/16	345/15 345/19 400/7	555/12 555/21 556/3
366/11 370/12 370/16	seconds [1] 500/14	454/1 488/14 505/5	401/6 402/12 402/17	556/4 556/11 556/17
372/1 373/17 385/19	secretarial [1] 501/13	554/18 558/13 572/13	447/8 447/13 447/17	571/8 585/6 585/19
388/11 388/21 397/23	secretary [9] 469/17	586/3	448/21 449/4 450/3	show [15] 342/13
405/1 407/17 407/17	470/1 470/17 501/15	sensitivities [2] 444/12	450/4 451/5 451/5	443/24 454/14 458/24
407/23 408/15 415/4	501/16 501/19 540/18	444/22	452/11 453/6 454/6	485/3 490/4 490/6
429/6 429/21 430/8	540/21 542/13	sent [57] 318/18	455/5 455/5 455/15	509/10 517/18 521/20
439/19 454/22 459/20	section [16] 374/8	319/20 324/17 328/8	455/19 455/20 456/1	522/13 523/15 531/11
461/2 461/20 471/4	439/7 461/22 471/3	328/11 329/3 337/3	457/19 462/1 466/22	611/13 612/6
474/20 475/14 475/23	504/8 504/10 506/8	344/6 344/8 344/9	467/23 469/1 472/18	showed [5] 414/11
476/16 478/23 485/14	518/22 538/23 539/2	347/9 348/19 351/6	476/12 476/20 477/7	432/9 481/22 489/19
493/11 493/14 495/3	550/12 552/10 552/19	351/20 358/3 370/20	477/17 477/19 478/3	490/24
497/8 510/10 512/9	553/13 576/24 577/2	371/3 373/6 378/21	478/5 478/7 478/11	showing [11] 336/16
512/23 517/4 522/19	sector [1] 440/10	378/22 379/2 379/5	478/13 479/6 479/11	438/22 439/2 445/7
536/3 545/14 559/22	secure [1] 459/6	390/7 391/4 397/5	479/20 481/21 481/24	453/11 503/20 506/5
559/24 568/22 575/3	securities [24] 324/11	398/23 415/15 453/19	486/16 487/4 492/23	511/23 516/16 526/18
577/20 578/20 582/5	327/11 341/20 403/20	453/22 453/24 480/9	495/7 495/13 531/22	536/19
582/24 586/1 597/12	406/4 406/10 419/14	485/5 489/18 489/23	566/4 570/11 571/23	shown [3] 393/4
597/13 599/4 600/2	423/12 501/9 502/24	503/24 531/18 554/23	577/10 577/16 581/9	393/14 489/22
601/23 614/10 614/14	504/13 504/17 504/18	554/24 557/11 567/19	583/1 594/3 598/22	shows [1] 473/22
scale [1] 443/4	504/21 504/21 504/24	567/21 568/14 568/15	599/4 613/21	shut [3] 399/3 399/10
Schedule [1] 320/5	505/2 506/14 510/2	569/5 570/22 571/4	shared [3] 576/9	508/10
Schedule 14A [1]	528/4 558/1 563/1	586/21 587/4 587/10	602/21 604/11	sic [2] 367/24 428/2
320/5	577/13 587/19	587/22 589/16 589/20	shareholder [3] 350/18	side [12] 337/1 398/9
scheduled [2] 396/2	Sedimentary [1]	590/18 590/19 591/7	354/17 461/3	457/3 463/13 475/5
599/2	465/13	597/21 605/21	shareholders [9] 353/2	488/18 489/8 542/22
school [3] 434/10	seeing [3] 401/24	sentence [24] 334/6	442/3 449/20 451/5	545/19 608/20 609/3
501/2 501/4	432/11 435/6	335/22 349/15 359/7	457/20 548/16 562/16	609/12
schooled [1] 569/15	seek [18] 321/14	362/10 368/22 386/24	602/22 604/12	sides [2] 481/17 598/4
Schulich [1] 434/9	341/19 506/16 510/11	389/12 391/18 391/22	shareholders' [1]	sight [1] 553/9
scienter [1] 532/16	510/16 520/24 523/10	391/23 428/11 428/13	413/6	Sigmund [2] 380/10
screen [22] 338/7	543/11 558/9 560/2	429/2 429/21 430/5	shares [11] 442/13	380/12
338/8 338/11 338/16	593/8 593/9 593/12	430/22 478/2 566/1	448/22 450/17 452/20	sign [3] 360/4 431/12
339/3 359/10 359/10	594/13 594/13 594/17	572/15 606/24 608/4	457/16 472/19 482/3	541/22
370/10 393/11 393/15	596/8 597/19	611/18 612/2	482/8 482/13 510/6	sign-off [1] 431/12
393/16 414/12 414/14	seeker [1] 594/15	sentences [1] 493/14	529/15	signal [2] 347/22
426/6 438/24 464/7	seeking [26] 407/14	sequence [3] 416/18	she [22] 325/12 325/20	362/24
475/22 490/9 493/2	407/20 521/11 532/15	430/15 431/11	326/19 327/20 341/9	signals [2] 553/5 553/7
550/15 589/21 597/11	550/20 558/15 564/13	series [6] 414/13	341/15 341/22 367/21	signed [14] 333/3
script [17] 369/8	577/3 593/5 593/5	414/17 485/5 545/19	407/17 407/23 407/23	337/3 360/11 372/11
369/14 371/4 372/19	593/14 594/14 595/24	600/13 601/24	408/6 410/23 411/22	398/14 471/11 471/23
373/1 373/23 426/12	596/5 596/21 597/4	serious [3] 344/17	411/23 424/7 424/15	494/20 506/24 539/5
430/9 430/18 430/23	597/16 597/18 598/9	363/20 373/18	424/19 424/19 533/4	539/16 544/20 545/23
431/4 431/12 431/18	598/15 598/16 599/8	seriously [1] 375/6	533/4 533/22	599/24
432/5 432/19 433/2	599/9 599/17 600/4	serve [1] 434/24	she's [2] 408/5 469/16	significance [1] 460/1
433/3	600/10	service [1] 444/13	sheet [1] 461/13	significant [7] 442/13
scripted [2] 537/11	seemed [1] 370/19	services [2] 440/15	sheets [1] 461/12	456/23 481/14 482/7
	seems [4] 338/19	444/23	SHI [1] 317/15	492/8 495/16 517/3

S	514/24 515/3 515/3 515/6 516/5 516/9 517/20 520/14 523/18 523/24 524/14 525/23 526/19 531/13 536/21 536/24 537/2 539/21 543/6 543/19 561/22 574/16 574/20 574/20 575/5 575/14 575/18 576/2 577/6 579/11 587/5 587/10 587/22 598/13 598/20 599/12 603/12 Smith's [3] 519/21 577/9 591/20 sniff [1] 370/20 soft [2] 340/1 365/23 softly [1] 427/20 software [1] 569/7 solicit [1] 336/3 solicitation [2] 506/17 548/17 somebody [12] 339/12 343/15 533/10 536/13 536/13 571/15 582/4 603/18 609/3 609/9 609/10 614/10 somehow [1] 492/5 someone [4] 362/23 363/3 584/6 598/19 something [30] 357/5 361/19 373/21 409/3 443/3 457/6 457/15 468/5 505/4 511/1 528/18 536/3 542/16 563/7 563/12 564/6 566/15 571/3 573/17 585/19 587/4 593/10 593/16 594/20 606/14 606/17 608/10 608/17 609/17 609/21 Sometimes [1] 525/18 somewhat [1] 609/19 somewhere [2] 525/19 606/21 sort [9] 405/10 413/10 414/21 449/18 451/1 455/16 494/11 600/1 613/10 sought [8] 412/5 527/9 565/6 565/7 565/8 587/18 594/13 596/1 Sound [2] 458/22 464/8 Sounds [1] 389/3 speak [8] 362/24 388/4 410/2 512/19 576/3 580/20 590/10 590/14 speaking [4] 506/12 514/15 514/15 583/18 special [3] 439/4 444/2 593/23 specific [19] 333/9 342/21 343/20 360/17 361/18 409/6 423/19 429/24 431/21 456/7 472/6 492/1 511/21 513/15 513/20 536/7 544/10 590/4 596/24	specifically [19] 341/18 383/8 386/13 417/19 428/1 432/11 459/11 500/1 518/20 519/18 543/16 546/15 549/23 557/22 566/12 568/4 586/6 602/6 603/9 specified [1] 552/4 spectra [20] 336/5 339/19 339/23 365/23 366/12 366/17 368/7 368/11 369/8 369/20 369/23 427/8 427/11 427/18 428/17 428/19 428/22 431/11 432/4 433/3 Spectra's [1] 430/16 speculate [1] 453/23 speculated [2] 481/23 539/11 speculation [1] 363/18 speeches [2] 483/7 483/7 spend [6] 461/14 544/16 556/12 556/17 565/21 596/20 spent [2] 460/8 460/9 Sperber [3] 502/21 524/19 605/22 spoke [9] 366/12 369/10 369/20 370/18 416/13 476/19 485/17 574/20 575/18 spoken [1] 513/14 stage [2] 552/21 552/22 stages [1] 507/15 stakeholders [3] 454/4 454/5 454/13 stamp [2] 335/3 356/19 stand [4] 433/20 451/14 500/13 530/9 standing [1] 346/24 standstill [209] 321/12 321/19 321/22 322/2 324/13 325/2 325/7 325/19 326/2 327/13 328/3 329/10 329/14 329/21 333/2 333/14 333/14 351/8 354/3 354/7 355/22 356/10 357/20 357/20 374/10 381/9 381/24 382/6 382/11 382/13 383/11 383/15 383/21 384/21 385/3 385/8 385/12 388/1 388/8 390/18 392/3 392/9 392/16 392/22 393/24 394/8 395/1 400/10 400/12 401/11 403/2 403/22 404/7 404/12 404/13 404/14 406/6 406/11 406/23 407/13 408/1 408/24 409/2 409/14 410/2 410/5 410/14 410/15 411/6 411/9 411/10 413/1 416/14	417/2 417/11 471/12 471/13 471/24 472/1 472/7 505/10 505/13 505/16 505/17 506/2 506/9 506/11 506/21 507/2 507/13 507/21 508/23 509/7 509/19 509/22 511/6 511/13 515/20 515/21 515/23 516/4 516/7 518/9 518/11 518/19 519/8 519/13 519/17 519/20 520/20 524/10 525/17 525/21 526/10 526/16 527/3 527/8 527/11 527/16 539/10 539/17 543/17 543/23 544/2 544/7 544/17 546/6 546/12 547/12 547/17 547/19 548/14 548/21 549/24 550/2 550/8 550/9 550/17 551/11 551/13 551/14 551/18 551/21 552/15 552/18 552/19 552/21 552/22 553/10 554/14 557/10 557/12 558/8 558/16 559/4 560/10 562/4 562/9 562/9 562/13 562/20 563/2 564/15 564/20 567/1 568/11 572/5 572/7 572/9 572/22 573/11 573/12 573/20 574/1 574/6 575/16 576/5 576/9 576/12 576/24 577/15 577/19 578/3 578/13 579/9 579/13 580/11 580/13 580/18 580/24 585/4 586/7 586/24 587/24 589/2 590/1 590/5 590/9 590/12 590/22 591/13 592/14 592/18 592/22 594/20 594/23 598/17 600/19 611/5 standstill's [1] 560/19 standstills [23] 333/2 333/4 333/7 354/12 354/20 355/2 355/3 355/7 357/7 382/22 383/6 399/8 409/20 416/22 417/7 418/4 418/6 418/9 507/8 539/22 552/2 612/14 612/21 Stargatt [1] 317/13 start [9] 323/24 340/11 347/19 484/2 485/11 517/24 523/22 540/16 597/6 started [1] 607/3 starting [8] 389/8 391/23 403/15 410/20 428/5 429/3 430/5 522/17 starts [7] 327/5 334/5 383/16 386/18 388/18 391/16 419/24	state [6] 316/1 346/8 407/6 407/9 446/6 495/12 stated [4] 406/15 422/18 472/5 491/11 statement [10] 320/15 325/5 421/14 421/21 422/1 476/8 476/8 480/11 493/9 539/8 statements [2] 356/17 423/9 states [6] 391/24 420/22 467/10 467/19 480/10 488/12 stating [1] 476/17 status [1] 447/6 stay [2] 461/19 478/18 staying [1] 476/15 step [3] 335/8 413/7 553/18 STEPHEN [3] 317/9 574/20 599/12 steps [2] 373/19 525/14 Steve [16] 318/19 372/3 372/12 373/3 374/12 399/14 414/22 420/18 420/19 438/3 514/19 574/16 575/5 575/12 575/23 598/13 Stick [1] 545/23 sticking [1] 410/18 still [17] 351/20 390/13 417/15 427/3 457/5 488/14 512/21 513/6 515/10 515/12 515/14 562/2 572/23 588/17 596/2 596/3 613/24 stipulate [2] 388/13 413/22 stipulated [3] 398/2 464/4 467/9 stipulation [5] 468/4 540/9 598/3 598/24 600/2 stipulations [2] 596/23 597/1 stir [1] 352/24 stock [30] 321/3 323/1 359/14 359/15 360/2 361/3 361/16 419/14 421/20 421/21 421/24 423/13 424/5 424/11 450/3 452/12 452/15 456/12 476/13 504/13 504/24 505/4 510/6 529/4 529/9 529/13 529/24 530/2 531/9 574/10 stockholder [3] 390/19 392/4 392/16 stocks [1] 442/14 stop [1] 566/4 story [1] 454/23 Straight [1] 349/2 strange [1] 610/5 strategic [8] 319/1 319/12 330/24 336/1 394/18 436/14 457/9
----------	---	--	--	---

S	358/23 360/16 367/14 374/5 374/14 378/17 378/20 379/18 379/22 382/12 382/21 383/2 383/5 385/7 385/13 389/9 389/14 390/6 390/16 390/24 391/4 392/8 392/13 393/5 395/4 397/10 400/11 404/2 412/13 416/20 416/24 430/10 430/20 606/15 607/1 607/5 607/6 607/8 609/10 609/13 sum [1] 573/10 summarize [1] 364/19 summarized [1] 550/23 summarizes [1] 558/19 summarizing [2] 382/22 582/16 summary [24] 367/20 445/14 447/19 461/2 461/20 497/7 557/11 557/14 557/19 558/7 558/11 558/22 560/13 560/21 567/21 568/1 568/4 568/9 568/14 568/16 569/20 569/21 569/24 571/4 Sunday [1] 348/17 superior [3] 459/6 462/7 568/10 support [5] 390/1 436/7 495/3 551/14 555/10 supported [5] 436/12 455/3 464/18 465/5 465/10 supporting [2] 466/3 602/22 supportive [5] 453/6 466/20 467/21 468/16 468/23 supports [1] 497/13 supposed [3] 482/18 482/19 484/11 supposition [1] 325/1 Supreme [2] 532/11 532/13 sure [50] 319/14 319/19 332/10 335/7 343/20 356/21 358/7 371/9 371/11 380/12 388/16 395/17 398/3 399/8 399/20 405/8 405/17 409/11 416/17 419/22 427/21 431/10 435/11 443/16 467/3 467/5 486/2 495/21 512/11 513/14 514/13 515/9 523/22 532/22 542/12 544/13 551/7 552/11 570/16 579/1 583/20 588/11 588/13 589/1 589/12 591/9 591/22 594/4 596/7 613/2 surmise [1] 607/14	surplusage [1] 595/6 surprise [2] 361/12 424/13 surprised [3] 350/11 361/20 516/13 survives [2] 471/13 472/2 suspect [1] 348/8 sustain [4] 533/19 534/8 534/10 534/11 SV [1] 473/22 sworn [1] 381/18 synergies [1] 485/24	T tab [7] 320/8 397/22 406/1 417/24 464/2 464/3 467/6 table [2] 354/23 364/24 tabs [3] 377/13 377/13 377/14 tactic [1] 422/23 tactics [1] 350/9 take [72] 324/7 327/21 333/13 339/4 340/14 340/21 343/5 351/1 353/22 356/7 358/5 360/11 367/5 375/6 383/19 386/11 386/13 388/12 390/24 393/8 393/22 394/19 394/23 395/14 395/22 406/19 414/10 419/2 420/8 442/1 449/20 470/1 474/3 485/10 490/5 501/24 507/11 509/19 510/20 524/8 524/9 525/14 536/12 540/22 546/23 547/18 548/3 548/4 550/1 552/1 554/12 557/14 560/21 565/18 565/18 575/1 577/24 578/11 580/7 581/10 582/19 584/19 592/20 602/11 603/11 604/23 611/13 611/18 612/2 612/24 613/1 614/1 taken [11] 327/23 376/10 419/3 437/15 451/16 473/3 526/3 526/4 530/10 582/13 613/8 takes [1] 328/7 takes' [1] 480/16 taking [5] 378/18 419/2 518/8 539/1 579/4 talk [23] 320/13 321/6 325/24 345/4 350/22 364/9 371/20 372/1 383/14 398/11 465/15 472/22 515/3 542/20 545/6 553/19 561/20 591/8 600/21 603/3 603/24 604/22 614/21 talked [19] 321/18 335/10 342/14 345/2 345/3 352/16 365/16 365/17 371/6 485/20	487/2 487/3 511/8 549/24 567/14 567/16 577/4 587/9 593/4 talking [17] 318/13 333/12 360/15 396/18 406/16 425/4 426/11 443/17 452/9 461/15 464/7 502/15 514/19 531/7 546/3 572/14 586/12 talks [5] 326/2 421/17 429/17 432/18 558/22 target [7] 392/1 471/5 505/22 506/3 506/15 508/20 512/20 targeted [3] 482/23 483/1 533/7 Taurus [20] 325/16 325/17 337/17 341/19 341/21 351/21 354/7 359/7 362/16 411/4 411/4 445/15 445/21 480/17 480/22 518/17 518/18 522/23 566/2 568/9 Taurus' [1] 324/6 Taylor [1] 317/13 TC [6] 317/16 434/23 434/24 435/3 478/13 501/11 TC Energy's [1] 478/13 team [33] 331/17 342/3 342/8 342/11 344/10 347/10 352/15 355/22 355/24 373/2 437/14 438/16 465/24 466/20 480/15 480/16 481/7 484/7 485/1 491/7 499/11 503/8 503/9 503/17 517/11 527/8 536/12 538/5 538/7 544/21 553/22 556/23 571/17 team's [1] 420/13 teams [2] 517/14 524/5 technical [1] 437/1 telephone [2] 435/16 592/6 telephonic [2] 386/19 428/8 tell [34] 332/22 338/2 343/8 354/18 369/7 371/2 402/15 434/6 439/22 453/18 456/18 467/1 483/17 483/19 500/24 501/6 516/9 523/19 524/1 527/14 531/21 537/2 537/14 537/18 547/1 547/24 562/2 571/3 576/2 578/9 578/20 584/17 607/3 613/16 telling [4] 469/8 535/14 535/18 578/17 tells [1] 428/11 ten [1] 501/17 tender [1] 550/21 tense [1] 552/9 term [11] 384/3 384/5	384/11 384/23 388/8 413/13 448/13 505/2 551/16 583/7 598/17 terminate [3] 398/19 399/4 536/1 terminated [10] 400/23 415/20 422/16 425/19 493/1 493/18 531/24 533/13 535/9 535/16 termination [3] 423/17 494/8 536/4 terminology [3] 570/20 570/21 570/24 terms [24] 321/22 327/12 369/21 381/13 384/22 404/13 406/5 410/2 422/20 438/21 449/1 458/14 472/6 508/22 520/5 524/7 525/20 526/16 527/8 529/3 552/8 577/14 585/3 590/9 terrific [1] 544/11 test [1] 512/13 tested [1] 542/4 testified [20] 318/7 378/1 385/5 385/6 386/3 390/6 398/12 399/7 402/7 403/5 421/7 434/2 481/11 481/21 482/5 490/17 499/7 500/17 549/11 549/21 testimony [26] 379/13 381/18 382/9 384/4 390/9 394/14 406/15 406/21 407/16 411/14 412/16 412/22 413/2 418/3 425/1 425/24 426/15 432/8 432/19 432/23 475/4 480/8 532/15 534/19 552/15 552/20 text [32] 370/12 370/23 371/23 371/23 414/13 415/3 419/18 453/12 453/13 453/20 453/21 453/23 485/5 485/13 487/24 488/23 489/3 489/18 489/23 490/11 490/15 490/20 490/23 491/3 491/4 491/13 491/17 491/23 492/4 492/21 526/4 551/13 texted [3] 370/16 486/10 489/7 texts [3] 414/17 415/22 486/6 thank [48] 318/2 318/2 318/4 320/10 338/16 338/24 343/3 358/9 362/5 362/11 377/3 377/22 385/21 387/23 395/21 398/8 400/4 400/20 415/23 425/22 426/24 433/13 433/15 440/21 441/10 451/10 452/4 452/5 458/7 459/18 464/9 470/7
----------	--	--	---	---	--

T	571/14 579/20 589/3 591/8 591/15 thoughts [4] 415/8 553/22 554/4 557/3 threat [2] 361/21 573/3 threatening [4] 565/15 566/3 566/21 572/19 three [20] 331/7 331/9 331/10 334/4 346/16 346/16 364/14 389/8 393/19 418/9 448/12 457/1 471/2 501/10 509/21 539/5 567/21 594/15 595/19 600/14 three-page [1] 393/19 threshold [2] 512/10 512/24 through [35] 342/12 353/10 358/2 358/6 361/13 370/1 381/6 388/14 393/18 393/23 396/15 415/6 415/7 437/8 472/14 473/22 474/20 486/3 488/21 506/17 508/18 508/19 521/18 528/11 548/9 548/16 553/10 554/17 557/20 561/3 572/7 584/1 597/3 606/1 611/9 throughout [6] 329/7 458/11 465/17 502/17 511/9 544/3 thus [1] 528/20 tightly [1] 368/14 tilde [1] 599/6 tilt [1] 375/10 Tim [3] 348/10 349/1 421/13 timeline [10] 415/13 416/18 422/7 428/22 432/3 432/9 472/10 479/16 555/6 555/7 timelines [1] 553/19 times [3] 508/18 511/9 511/9 timing [11] 343/20 346/11 357/5 367/24 369/11 399/17 399/21 427/22 428/6 432/18 492/9 tires [1] 588/16 today [8] 324/8 381/17 388/8 445/2 485/8 488/2 543/7 575/6 together [6] 348/21 397/19 427/4 466/2 548/5 553/8 told [27] 322/1 343/15 352/17 371/19 372/7 401/21 422/12 423/15 424/3 424/15 425/15 430/16 480/14 533/4 533/4 533/10 533/11 533/15 534/21 551/10 559/3 565/9 572/2 573/7 579/12 598/19 615/4 Tom [1] 377/9	tomorrow [6] 328/6 352/18 353/8 485/21 603/14 615/11 tone [1] 368/18 too [2] 457/17 490/9 took [15] 438/2 443/17 452/22 459/2 463/20 469/19 493/9 495/21 514/8 522/9 529/12 532/2 575/19 592/8 613/5 top [25] 321/5 332/22 334/2 334/20 340/6 341/24 344/10 349/24 352/13 355/21 366/3 366/24 370/11 370/12 374/8 391/16 404/22 459/20 461/1 485/11 521/24 527/5 559/10 605/16 612/3 topic [1] 416/12 topics [2] 335/18 542/19 Toronto [9] 359/3 421/20 424/4 434/16 488/5 529/4 529/8 529/12 531/8 touch [2] 341/6 575/4 toward [1] 375/11 towards [3] 391/16 555/7 556/7 tracks [1] 415/17 trade [2] 452/20 455/16 traded [1] 537/9 trading [11] 359/7 359/13 359/16 359/18 421/20 450/17 455/15 529/14 529/21 530/2 536/6 transact [4] 535/1 564/23 573/24 584/15 transacting [3] 512/21 513/6 588/17 transaction [68] 320/6 321/4 328/16 334/12 336/17 337/12 337/14 339/11 363/19 408/19 410/7 419/3 422/4 422/20 437/6 437/9 437/14 437/17 438/5 438/18 438/19 440/20 442/3 442/24 448/11 448/16 449/6 454/8 454/12 456/24 457/2 457/4 458/21 459/4 461/10 462/14 471/8 475/5 480/2 481/13 481/15 481/18 482/10 492/6 494/12 502/15 502/17 503/9 504/9 505/10 511/10 517/12 522/20 522/24 523/1 536/3 536/17 543/1 544/3 549/18 551/23 552/7 552/17 553/5 560/1 560/4 560/16 596/6 transactions [7] 441/15 441/19 459/9	482/2 502/6 535/9 553/1 TransCanada [268] 318/18 321/1 321/8 321/11 322/20 329/8 329/9 329/13 329/20 333/23 334/9 334/13 334/22 336/17 340/24 345/2 345/18 345/20 346/6 346/9 347/15 347/23 349/7 349/19 350/10 354/13 354/21 355/9 356/20 359/13 359/17 360/5 360/14 360/21 361/10 364/24 365/5 368/12 369/14 373/1 375/11 379/14 380/3 381/11 382/2 382/23 383/22 384/16 385/15 387/2 387/2 387/5 387/6 389/16 389/17 391/15 392/10 397/17 398/15 400/6 400/22 401/5 401/21 402/3 402/8 402/11 402/16 403/7 404/14 407/14 410/22 411/10 412/14 412/20 412/24 413/17 414/7 416/4 416/8 417/8 417/15 419/5 419/10 419/17 421/16 421/20 421/21 422/2 422/8 422/12 422/14 423/8 423/15 423/15 424/22 425/8 425/15 425/17 426/18 427/11 431/3 431/13 432/6 435/4 435/8 436/8 436/11 436/15 436/17 436/24 438/12 439/4 440/3 440/24 442/7 442/12 443/8 444/3 445/16 445/22 446/2 446/15 446/21 448/22 450/2 450/10 450/17 452/20 454/16 455/11 455/14 455/16 455/19 457/16 459/6 461/21 462/6 462/19 463/2 464/12 464/17 464/22 465/2 465/12 465/24 466/8 468/7 468/23 469/6 469/9 470/1 471/10 471/11 471/21 471/22 471/23 471/24 472/8 472/16 472/18 475/9 475/10 476/6 476/9 476/11 477/2 477/5 478/20 479/4 479/10 479/19 480/2 480/9 481/9 482/14 483/1 484/9 484/18 485/1 486/16 486/22 487/4 487/13 487/18 487/22 490/11 491/18 491/20 492/12 492/23 493/15 497/1 497/9 497/19 498/13 498/17 499/5 499/23	501/11 501/15 502/11 503/2 503/17 503/24 505/13 505/21 506/13 507/3 507/11 508/14 514/5 517/3 517/13 518/7 520/8 520/24 524/9 527/3 527/14 527/15 529/16 530/2 531/20 531/22 532/3 533/10 533/12 535/22 537/19 540/19 542/23 544/2 544/6 544/21 547/4 555/12 555/14 555/21 557/4 557/20 562/2 564/18 564/23 565/14 566/9 567/2 572/18 574/7 574/8 574/12 575/15 579/8 584/14 587/17 587/18 590/6 591/10 595/24 597/21 597/23 598/20 599/3 599/13 604/23 605/3 606/20 612/13 612/21 TransCanada's [42] 318/21 335/24 346/1 351/2 356/20 414/11 424/3 432/14 436/18 437/6 439/11 442/20 445/24 452/22 453/3 453/5 454/3 454/23 456/24 461/5 464/18 466/19 467/20 468/15 469/16 469/20 469/24 477/18 481/1 481/7 481/21 481/24 484/7 484/22 496/21 522/7 543/3 544/6 592/22 598/14 599/2 612/15 transcanada.com [1] 517/10 transcript [3] 316/16 377/15 381/6 transferring [1] 596/4 transmission [2] 352/22 436/16 transmittal [1] 355/23 transparent [1] 389/1 transpired [2] 449/17 495/22 TRAVIS [1] 316/13 treasurer [1] 437/21 treat [1] 443/14 Trends [1] 470/22 trial [11] 316/16 401/9 402/24 438/2 443/9 443/11 459/10 483/20 543/7 545/20 613/5 tried [2] 412/6 550/11 trigger [2] 413/1 547/17 triggered [1] 523/23 trillions [2] 342/11 409/22 true [46] 379/9 381/9 382/14 383/20 384/15 387/24 395/9 395/13 399/2 399/13 400/5 400/14 401/3 402/1
----------	---	--	---	---

<p>T</p> <p>true... [32] 406/22 409/1 410/1 413/16 413/24 416/19 423/7 427/1 427/18 472/4 475/16 479/4 479/9 481/6 484/7 484/17 486/15 486/22 487/2 491/16 492/20 494/5 497/16 546/19 574/4 574/5 574/9 577/7 591/11 591/21 593/18 600/22</p> <p>Truly [1] 486/4</p> <p>trust [1] 594/6</p> <p>truth [3] 443/19 534/14 548/1</p> <p>try [13] 334/3 353/6 474/21 475/10 481/18 483/5 506/15 506/18 510/17 555/21 569/24 594/14 595/14</p> <p>trying [22] 340/19 350/17 350/18 352/24 353/3 363/4 371/9 384/16 395/20 407/5 420/9 421/2 422/24 425/11 425/12 432/2 432/20 481/15 532/22 590/12 592/2 610/7</p> <p>TSX [3] 359/8 359/14 360/2</p> <p>Tuesday [1] 316/11</p> <p>Turmoil [1] 480/21</p> <p>turned [4] 338/8 449/18 486/4 537/24</p> <p>twice [1] 542/4</p> <p>two-day [1] 396/21</p> <p>type [4] 482/19 482/20 483/9 537/12</p> <p>types [2] 507/8 539/14</p> <p>typical [1] 594/24</p> <p>typically [6] 333/3 396/6 437/12 563/12 564/6 609/21</p>	<p>524/10 529/2 529/3 531/19 532/11 535/19 544/7 545/18 547/24 557/9 565/24 568/10 569/5 572/22 573/2 574/13 579/9 580/10 590/9 600/19</p> <p>undergoing [1] 596/2</p> <p>undergrad [1] 501/3</p> <p>underline [1] 578/14</p> <p>understand [35] 332/11 356/6 370/23 378/17 384/4 395/19 397/6 397/20 399/8 407/7 408/23 412/9 412/22 414/21 416/17 425/12 427/22 428/6 431/11 432/17 433/1 519/21 528/22 532/1 547/4 547/12 551/7 552/11 552/14 553/2 573/16 603/22 604/3 608/18 612/20</p> <p>understandable [1] 343/24</p> <p>understanding [42] 321/17 324/8 329/4 371/8 465/9 498/11 505/15 506/10 507/3 507/12 507/21 508/6 508/21 509/8 512/16 513/9 513/22 514/2 515/13 518/10 523/3 528/12 533/21 539/17 544/9 544/17 546/11 548/13 551/11 552/2 552/15 558/5 559/8 560/10 562/8 562/12 576/22 579/3 594/17 596/12 596/13 596/21</p> <p>understands [2] 407/18 560/22</p> <p>understood [34] 319/14 335/5 379/17 382/7 383/6 390/5 400/20 406/20 407/9 410/9 410/13 422/1 432/24 514/21 516/14 543/18 543/21 544/6 544/12 544/13 559/4 561/19 562/18 562/24 567/12 567/19 572/6 573/6 574/6 579/18 589/24 599/8 599/16 601/3</p> <p>undertake [3] 334/10 450/11 457/7</p> <p>underwriters [1] 452/23</p> <p>unfriendly [8] 547/5 547/14 547/16 548/22 551/6 551/12 552/5 562/14</p> <p>unless [11] 334/12 383/7 509/19 519/11 519/18 524/12 557/21 573/12 573/20 574/10 580/10</p> <p>unnamed [1] 605/6</p>	<p>unquote [1] 563/7</p> <p>unsolicited [5] 337/14 339/11 431/5 522/20 523/9</p> <p>unusual [3] 529/14 609/17 609/19</p> <p>unwelcome [3] 506/3 507/11 510/18</p> <p>unwilling [1] 450/4</p> <p>unwritten [1] 607/15</p> <p>upcoming [1] 586/23</p> <p>update [4] 370/17 445/13 445/23 447/6</p> <p>updated [1] 319/17</p> <p>updates [2] 374/8 460/7</p> <p>upper [2] 545/13 546/20</p> <p>upset [1] 361/2</p> <p>US\$25.50 [1] 495/6</p> <p>usage [1] 597/19</p> <p>use [12] 353/20 413/13 426/1 430/10 496/13 550/8 550/12 573/2 583/7 595/18 596/7 596/8</p> <p>used [14] 369/22 393/10 505/3 552/9 563/4 566/13 572/3 572/7 572/9 577/23 579/15 583/7 595/4 613/12</p> <p>using [11] 430/23 431/4 496/21 551/16 570/19 574/7 574/8 596/18 598/16 599/5 599/7</p> <p>usually [2] 502/23 505/18</p> <p>Utica [3] 436/20 465/3 465/7</p>	<p>437/23 466/2 507/15 597/4</p> <p>verbal [8] 322/21 325/15 411/3 512/10 513/1 518/16 565/10 574/3</p> <p>verbally [1] 537/8</p> <p>verbatim [1] 587/12</p> <p>versus [1] 460/2</p> <p>vetted [1] 368/23</p> <p>viable [1] 567/1</p> <p>vice [3] 316/13 434/19 469/16</p> <p>video [17] 381/7 381/15 473/24 474/8 478/1 478/14 496/22 498/4 498/21 499/19 500/3 548/10 549/2 561/5 561/10 563/21 564/8</p> <p>view [40] 321/4 350/8 350/13 369/17 369/23 384/14 390/3 411/21 420/13 420/13 431/23 436/12 440/18 441/22 442/1 456/8 457/5 461/8 462/23 471/9 481/13 483/2 491/22 507/21 515/9 518/9 527/5 535/14 548/19 549/11 562/1 562/6 564/17 564/22 564/24 576/11 577/10 581/13 591/4 597/15</p> <p>viewed [9] 384/4 436/23 454/8 464/21 481/7 484/8 495/17 495/18 563/7</p> <p>views [2] 437/17 549/20</p> <p>violate [26] 321/19 327/12 363/1 369/3 406/5 406/10 410/15 411/15 426/16 431/14 431/19 431/23 515/21 516/4 520/5 562/3 562/20 563/1 573/12 573/20 577/13 577/19 579/13 587/23 591/13 607/13</p> <p>violated [7] 329/9 329/13 329/21 527/3 527/15 592/14 592/18</p> <p>violates [1] 607/15</p> <p>violating [6] 321/22 367/10 419/13 504/13 591/2 598/17</p> <p>violation [6] 369/18 516/7 532/16 578/20 578/21 591/16</p> <p>violative [5] 518/11 537/12 547/19 576/11 590/20</p> <p>vividly [1] 537/21</p> <p>voice [2] 479/5 499/22</p> <p>voicemail [1] 351/13</p> <p>volatility [1] 440/10</p> <p>VOLUME [1] 316/16</p> <p>vote [2] 461/3 541/20</p>	<p>voted [3] 460/6 541/21 541/22</p>
<p>U</p> <p>U.S [1] 436/19</p> <p>Uh [1] 567/11</p> <p>Uh-huh [1] 567/11</p> <p>ultimate [3] 343/19 538/10 559/20</p> <p>ultimately [10] 379/9 442/2 442/23 448/8 456/17 471/6 473/18 522/11 538/6 608/15</p> <p>Um [1] 441/3</p> <p>unaware [1] 597/1</p> <p>uncommon [1] 459/8</p> <p>under [45] 321/12 322/2 325/18 328/22 331/21 349/14 363/9 364/12 404/13 411/5 431/6 439/19 447/3 460/13 470/22 471/13 472/1 475/24 503/18 504/4 508/22 509/3 509/19 516/15 518/19</p>				<p>W</p> <p>wagons [1] 372/9</p> <p>wait [3] 578/22 578/22 578/22</p> <p>waive [26] 326/3 326/4 326/11 326/11 354/11 354/20 355/3 355/17 383/11 410/10 411/10 411/11 411/16 412/5 418/8 506/20 526/9 543/22 558/20 559/1 589/15 590/1 590/21 591/3 591/17 612/13</p> <p>waived [7] 355/8 355/16 417/12 418/3 418/5 573/12 612/21</p> <p>waiver [9] 326/19 333/14 355/22 410/14 412/5 519/13 526/17 558/24 588/1</p> <p>waives [1] 356/9</p> <p>waiving [5] 355/1 357/7 357/20 416/13 611/4</p> <p>walk [3] 348/3 474/21 554/17</p> <p>walked [1] 458/15</p> <p>walking [1] 487/5</p> <p>Wall [11] 350/1 350/4 421/16 428/12 453/9 479/21 481/8 481/20 484/8 527/19 528/11</p> <p>wanted [35] 328/21 332/14 335/7 341/5 342/10 352/6 363/1 370/2 371/11 372/4 372/7 378/13 389/2 426/16 427/5 431/12 431/22 442/18 449/6 459/7 475/4 518/9 524/15 528/11 532/22 571/1 580/6 589/11 589/12 591/10 596/15 599/14 604/23 610/18 612/22</p> <p>wanted ... due [1] 599/14</p> <p>wanting [2] 362/21 488/17</p> <p>wants [5] 328/17 407/18 408/20 496/10 613/1</p> <p>warranted [1] 413/15</p> <p>watched [1] 463/21</p> <p>watching [1] 329/17</p> <p>way [37] 320/4 322/12 325/24 329/7 329/21 339/19 344/19 353/3 362/22 363/3 365/16 369/7 369/13 396/6 407/11 420/18 449/7 476/14 483/19 483/22 491/17 492/2 507/10 511/2 526/17 547/10 548/17 569/15 570/3 582/3 590/20 596/16</p>

<p>W</p> <p>way... [5] 596/19 597/20 600/17 604/8 610/4</p> <p>ways [1] 595/19</p> <p>we'll [12] 320/13 340/3 349/24 394/4 451/14 451/14 492/19 554/17 603/9 612/24 615/11 615/11</p> <p>we've [11] 354/24 354/24 361/10 392/21 395/8 398/23 448/10 566/19 566/20 613/5 615/10</p> <p>Webster [3] 593/21 594/5 594/12</p> <p>wed [2] 415/7 555/11</p> <p>week [3] 318/22 351/22 352/4</p> <p>weekend [3] 347/11 537/22 538/2</p> <p>weeks [4] 352/6 535/9 567/22 571/4</p> <p>weighed [1] 335/16</p> <p>weighting [1] 457/18</p> <p>WEINBERGER [1] 317/2</p> <p>weirdness [1] 357/10</p> <p>Welcome [4] 317/19 377/2 452/3 531/2</p> <p>Wells [19] 348/15 370/18 371/4 432/9 432/14 432/14 432/18 433/1 480/1 489/19 490/24 517/3 517/14 597/21 599/20 599/24 613/21 614/5 614/8</p> <p>went [13] 358/2 360/9 363/10 363/13 364/4 365/11 370/18 394/3 473/7 481/21 485/22 486/11 580/24</p> <p>weren't [19] 347/24 350/5 371/10 381/12 446/10 519/6 520/16 521/10 524/8 558/9 578/4 583/2 583/18 583/23 584/3 588/13 588/15 591/3 591/17</p> <p>West [1] 436/4</p> <p>Western [1] 465/13</p> <p>what's [25] 338/15 349/14 364/15 444/18 453/11 454/14 458/24 460/1 503/20 505/15 506/5 509/10 511/23 512/16 512/22 517/18 521/20 523/6 523/15 526/18 531/11 531/16 536/19 549/6 610/5</p> <p>whatever [7] 357/1 358/19 369/21 376/3 537/10 541/12 612/24</p> <p>whatsoever [2] 463/1 551/4</p> <p>when [62] 318/12 319/20 326/1 329/3</p>	<p>330/24 332/22 335/19 353/7 353/22 358/1 367/17 368/14 372/16 374/18 382/17 383/17 384/21 390/15 391/11 400/22 403/12 407/16 407/17 411/20 415/20 417/7 461/17 476/10 477/9 477/13 481/20 482/9 482/17 487/3 490/20 499/12 506/21 506/24 511/22 514/8 519/8 520/11 547/23 552/24 554/10 557/6 565/20 566/17 579/15 587/21 589/14 589/20 591/21 591/24 592/8 592/10 595/2 595/23 596/1 598/13 602/14 605/3</p> <p>whether [48] 321/11 321/23 326/14 326/14 328/16 328/24 336/2 336/9 360/14 365/14 383/11 384/6 390/2 406/13 408/19 418/24 420/23 423/14 462/5 462/12 463/1 491/17 494/7 513/5 513/18 513/19 513/21 539/9 539/19 549/10 549/20 565/5 566/2 566/12 566/20 568/15 570/14 572/4 572/18 583/21 597/3 601/15 602/21 604/9 604/10 613/20 613/24 614/22</p> <p>whichever [1] 439/1</p> <p>while [13] 323/14 324/8 361/2 392/19 429/8 457/16 457/22 501/8 540/5 591/8 593/4 602/6 606/4</p> <p>whoever [1] 614/7</p> <p>whole [5] 332/13 354/16 550/10 551/2 591/23</p> <p>whose [1] 606/16</p> <p>wife [1] 593/21</p> <p>Williams [2] 316/9 316/20</p> <p>willing [4] 334/10 450/2 458/12 584/15</p> <p>willingness [1] 447/23</p> <p>Wills [2] 464/6 545/4</p> <p>Wilmington [2] 316/10 316/21</p> <p>winded [1] 458/6</p> <p>wish [3] 471/9 546/17 594/1</p> <p>withdrew [1] 614/6</p> <p>within [6] 329/18 422/14 425/18 449/11 493/16 544/19</p> <p>without [19] 321/21 351/10 354/21 363/4 364/18 376/1 381/11 404/15 419/6 451/7 457/19 473/13 509/22</p>	<p>522/5 536/16 563/2 567/3 568/10 612/15</p> <p>witness [17] 318/3 376/7 377/11 393/18 433/18 443/9 443/11 443/17 464/1 496/11 500/11 500/15 532/7 532/8 533/2 533/3 540/9</p> <p>witness's [1] 338/16</p> <p>WITNESSES [1] 616/2</p> <p>won't [3] 373/17 384/20 488/6</p> <p>wonderful [1] 569/6</p> <p>word [25] 385/19 387/24 392/22 393/23 394/8 394/10 405/1 405/11 405/18 406/23 490/5 563/4 569/6 569/7 577/22 581/11 583/20 594/17 595/18 595/19 595/21 596/7 596/8 597/13 597/19</p> <p>worded [1] 462/16</p> <p>wording [1] 462/19</p> <p>words [22] 328/3 334/21 360/15 364/2 364/3 369/22 383/10 408/1 408/8 446/9 495/19 497/23 536/5 552/16 558/12 558/13 560/12 560/16 578/12 580/20 580/23 593/22</p> <p>work [15] 356/14 380/20 434/12 434/14 448/15 475/11 485/24 501/7 501/22 505/23 528/3 567/5 582/3 600/23 607/3</p> <p>worked [12] 409/20 427/22 434/15 457/2 501/8 502/11 502/20 503/5 503/7 503/9 520/21 607/9</p> <p>working [8] 338/8 347/19 359/10 362/12 430/18 448/11 516/23 553/8</p> <p>world [1] 592/1</p> <p>worried [1] 488/22</p> <p>worries [1] 483/13</p> <p>worry [1] 536/12</p> <p>wouldn't [15] 379/4 387/11 393/17 395/15 424/18 431/14 431/19 516/4 547/17 562/3 569/22 577/18 591/5 607/20 608/16</p> <p>Wow [2] 485/22 486/11</p> <p>wrap [1] 379/8</p> <p>write [7] 406/2 557/18 577/16 579/11 580/5 595/10 595/14</p> <p>writes [5] 327/20 488/2 528/16 577/11 577/18</p> <p>writing [15] 341/18 383/8 409/9 490/18 518/21 522/5 532/10 553/21 557/22 559/11</p>	<p>559/16 562/21 585/19 603/12 609/22</p> <p>written [39] 325/16 337/13 339/7 339/11 363/21 383/22 386/24 387/5 388/7 401/4 402/2 402/15 404/15 404/19 409/17 411/3 419/7 419/11 423/16 424/15 424/16 491/23 504/11 509/19 509/22 518/17 519/2 520/8 520/14 522/2 522/10 522/20 576/22 585/5 586/8 587/17 590/6 605/8 610/23</p> <p>wrong [9] 358/1 534/12 561/6 561/16 561/17 572/23 578/10 580/17 609/8</p> <p>wrote [9] 490/15 490/20 490/23 491/3 491/12 491/17 492/4 580/24 608/2</p> <hr/> <p>X</p> <hr/> <p>X-6 [1] 490/8</p> <hr/> <p>Y</p> <hr/> <p>years [6] 343/22 395/16 501/10 501/17 546/16 590/14</p> <p>Yep [1] 614/13</p> <p>yes-or-no [1] 483/4</p> <p>yesterday [4] 318/12 475/15 476/17 592/9</p> <p>yet [5] 327/24 349/19 365/8 371/10 537/9</p> <p>yield [1] 441/17</p> <p>YOCH [1] 317/12</p> <p>York [4] 317/7 361/16 421/24 424/11</p> <p>you'd [4] 555/18 574/23 600/15 611/15</p> <p>you'll [12] 386/17 386/24 430/5 470/15 470/16 474/19 475/7 555/7 582/2 582/9 598/4 601/21</p> <p>you-all [1] 351/1</p> <p>Young [1] 317/13</p> <p>yours [2] 496/13 498/6</p> <p>yourself [3] 344/20 364/20 367/6</p> <hr/> <p>Z</p> <hr/> <p>Zhang [1] 331/16</p> <p>zone [1] 592/2</p> <p>Zoom [2] 540/13 592/10</p>
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