Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

SUPPLEMENTARY RESPONDING MOTION RECORD OF KPMG LLP
(Re: Plan Sanction Motion)

June 9, 2021

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Lawyers for KPMG LLP

TO: THE SERVICE LIST

Court File No. CV-20-00638930-00CL

ONTARIO
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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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Tab 1

Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
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Applicants

SUPPLEMENTARY AFFIDAVIT OF NANCY THOMPSON
SWORN JUNE 9, 2021

I, Nancy Thompson, of the City of Brampton, in the Regional Municipality of Peel, MAKE OATH AND SAY:

1. I am a law clerk at Blake, Cassels & Graydon LLP ("**Blakes**"), counsel to KPMG LLP ("**KPMG**") in this matter. As such, I have personal knowledge of the matters contained in this Affidavit.

2. Attached to my affidavit as Exhibit "**A**" is a true copy of a letter from Blakes to Ernst & Young LLP, the Monitor in this matter (the "**Monitor**"), dated June 7, 2021.

3. Attached to my affidavit as Exhibit "**B**" is a true copy of a responding letter from the Monitor to Blakes, dated June 8, 2021.

4. This affidavit is sworn in support of KPMG's response to the Applicants' motion for sanction of the CCAA Plan, and for no other purpose.

SWORN BEFORE ME over video conference on June 9, 2021, administered in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely, under the *Commissioners for Taking Affidavits Act*; the affiant was located at the City of Brampton, in the Regional Municipality of Peel and the commissioner was located at the City of Toronto, in the Province of Ontario.

Commissioner for Taking Affidavits
(or as may be)

Justin Manoryk LSO# 75133S

NANCY THOMPSON

This is **Exhibit "A"** referred to in
the Affidavit of Nancy Thompson

Sworn remotely before me this 9th day of June 2021
in accordance with O. Reg. 431/20,
Administering Oath or Declaration Remotely

Commissioner for Taking Affidavits (or as may be)

Blakes

Blake, Cassels & Graydon LLP
Barristers & Solicitors
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199 Bay Street
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June 7, 2021

VIA E-MAIL

Ernst & Young LLP
EY Tower, 100 Adelaide Street West
Toronto, ON M5H 0B3

Attention: Alex F. Morrison
alex.f.morrison@ca.ey.com

RE: CCAA Proceedings of CannTrust Holdings Inc., CannTrust Inc., CTI Holdings (Osoyoos) Inc. and Elmcliffe Investments Inc. (collectively, "**CannTrust**" or the "**Applicants**") (Court File No. CV-20-00638930-00CL)

Re: Motion for Sanction Order

Dear Mr. Morrison,

We are counsel to KPMG LLP ("**KPMG**") in connection with the above referenced matter. Reference is made to the Eleventh Report of Ernst & Young Inc. in its capacity as monitor (the "**Monitor**") in the above referenced proceedings dated June 2, 2021 (the "**Eleventh Report**") and applicable case law that provides that stakeholders may pose written questions to court-appointed officers in insolvency proceedings. Our questions in respect of the Eleventh Report and these proceedings are set out below[1]:

1. At paragraph 77 and 98 the Monitor states that it understands form the Affidavit of Serge Kalloghlian, affirmed June 2, 2021 that the CCAA Representatives believe that CannTrust potentially has an auditor's negligence claim against KPMG and that the CCAA Representatives ascribe significant value to the potential claim and its proposed assignment to the Securities Claimants Trust. Has the Monitor, as an independent and neutral officer of the Court, done its own assessment as to whether the purported claim does in fact have significant value? If so, what were the conclusions of the Monitor's assessment.

2. At paragraph 128 the Monitor notes certain financial challenges, that in its view, the Applicants would be facing if the CCAA Plan is not sanctioned. Is the Monitor of the view that if the CCAA Plan is not sanctioned on June 11, 2021, that the Applicants would be facing an immediate liquidity crisis that would necessitate it to liquidate?

3. At paragraph 128, the Monitor observes that any alternate debt financing to the proposed exit financing is uncertain and will come at a premium interest rate. Please advise what efforts have

[1] Paragraph references below are references to the Eleventh Report. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Eleventh Report.

been made by the Applicants to canvass potential debt providers and what offers, term sheets or other proposals have been submitted to the Applicants as a result of those efforts, if any.

4. At paragraphs 117 and 118, the Monitor describes the supplemental letter agreement (the "**SLA**") in respect of which the Applicants were granted a sealing order. Is the Monitor of the view that the confidential SLA has no impact or potential impact on KPMG?

5. At paragraph 129 the Monitor notes that the CCAA Sanction Order includes a judgment reduction provision which provides that any judgment against the Non-Settling Defendants will be reduced by the amount that could have been recovered against the Settlement Parties but for the release of Securities-Related Indemnity Claims. KPMG and its counsel are not aware of any precedent for judgment reduction language based on a co-defendant's ability to recover against a settling defendant, but, rather are familiar with traditional "bar orders" such as what was used in the Hollinger, Sears and Cash Stores CCAA Proceedings. Is the Monitor aware of any precedent for the judgment reduction language being proposed by the Applicant?

6. At paragraph 97 the Monitor notes that all rights of CannTrust are to be assigned to and assumed by the Securities Claimant Trust. There is no mention that the trustees of the trust are to be class action counsel themselves, or the Monitor's views on the appropriateness of this proposed structure. Is the Monitor aware of any CCAA precedent where the trustees of a litigation trust, that is to be the recipient of an assigned claim of the debtor, are class action counsel themselves and not an independent third party, court-appointed trustee?

7. Has the Monitor made any assessment as to whether CannTrust has a claim against its insurers despite their denial of coverage and, if so, the value of such a claim?

We ask that you provide responses to the foregoing questions no later than end of day tomorrow, June 8, 2021.

Yours very truly,

Linc Rogers

Linc Rogers

cc: A. Laing & R. Morris, *Blake, Cassels & Graydon LLP*
D. Saldanha & K. Fung – *Ernst & Young Inc.*
S. Graff & J. Yantzi – *Aird & Berlis LLP*

This is **Exhibit "B"** referred to in
the Affidavit of Nancy Thompson

Sworn remotely before me this 9th day of June 2021
in accordance with O. Reg. 431/20,
Administering Oath or Declaration Remotely

Commissioner for Taking Affidavits (or as may be)

Building a better working world

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June 8, 2021

By email

Linc Rogers
Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000
Toronto, Ontario M5L 1A9

Dear Mr. Rogers:

Re: Sanction Order Motion in the CCAA Proceedings of CannTrust Holdings Inc. et al.

Yesterday we received your letter regarding the eleventh report of the Monitor dated June 2, 2021 (the "**Eleventh Report**").

Capitalized terms not otherwise defined in this letter have the meanings ascribed to them in the Eleventh Report.

Our responses to your questions follow:

1. The Monitor has not conducted an independent assessment regarding the value of any potential claim of CannTrust Holdings against KPMG. As noted in the Eleventh Report, the CCAA Representatives ascribe significant value to this potential claim, but the Monitor has not made an assessment.

2. As stated in the Eleventh Report, the Monitor believes that any alternative that does not include resolving the Securities Claims against the Applicants is not viable. This was a key reason for the Applicants seeking, and the Court granting, CCAA protection. As to the timing of the Sanction Order, the DIP Term Sheet requires that the CCAA Sanction Order be granted by June 30, 2021. It is an event of default under the DIP Term Sheet if this milestone is not met. As stated in the supplement to the Eleventh Report dated June 4, 2021, the Applicants forecast that net draws of approximately $18.4 million will be required under the DIP and Exit Loan from May 31, 2021 to the week ending September 5, 2021. The Monitor does not state or imply in the Eleventh Report that the Applicants will face an immediate liquidity crisis if the Sanction Order is not granted on June 11, 2021. Nevertheless, in the Monitor's view, liquidation is by far the most likely outcome if the Applicants are unable to implement a restructuring that resolves the Securities Claims against them in the near future.

3. As noted in the materials filed in support of the Applicants' motion for the DIP Approval Order, the Applicants, with the assistance of their counsel, the CRO and the Monitor, solicited offers for competing proposals from various prospective lenders at the end of 2020. The Applicants contacted more than twenty different parties over five months and received seven proposals. The Monitor was kept apprised of the parties involved, terms being discussed, and was provided with copies of term sheets and was consulted from time to time throughout the solicitation process. The Applicants and their counsel and the CRO, in consultation with the Monitor, reviewed the terms submitted from all prospective financiers. The negotiated term sheet provided by the DIP Lender was selected as the superior proposal based on, among other things:

a. the maximum principal amount of the loan available,

b. the exit financing structure; and

c. the fees, costs and various terms relative to the other term sheets received.

In addition, as stated in several Monitor's reports that have been filed in these CCAA Proceedings, the Monitor believes that it is implausible that any equity financing would be available to a company with the considerable litigation exposure that the Applicants would continue to have if the CCAA Plan is not implemented. Further, any debt financing outside of a CCAA process is uncertain and will come at a premium interest rate and with a smaller credit limit than might otherwise be offered. Finally, if the Securities Claims are not resolved in the CCAA Proceedings, the Applicants will continue to expend a significant amount of its remaining cash resources on litigation costs, possibly for an extended period, rather than using these cash resources in their operations.

4. The Monitor is of the view that the SLA has no impact on KPMG.

5. Every case is unique. The Monitor agrees that the judgment reduction provision in the CCAA Plan and the proposed CCAA Sanction Order is different than the bar orders in Hollinger, Sears and Cash Store.

6. The Monitor is not aware of any such precedents. The Monitor believes that the proposed structure does not impair the fairness and reasonableness of the CCAA Plan.

7. The Monitor has not conducted an independent assessment regarding the existence or value of any claim by the Applicants against their insurers despite their denial of coverage.

Yours truly,

ERNST & YOUNG INC., in its capacity
as the Monitor of the Applicants, and not
in its corporate or personal capacity

Alex Morrison, CPA, CA, CIRP, LIT
Senior Vice President

Cc: K. Fung – Ernst & Young Inc.
S. Graff and J. Yantzi – Aird & Berlis LLP
A. Laing and R. Morris – Blake, Cassels & Graydon LLP

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

SUPPLEMENTARY AFFIDAVIT OF NANCY THOMPSON
SWORN JUNE 9, 2021

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Lawyers for KPMG LLP

Tab 2

Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

TR/ias

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

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Applicants

\- - - - - - - - - - -

This is the Cross-Examination of SERGE KALLOGHLIAN on his Affidavit sworn the 2nd day of June, 2021, taken via videoconference at the offices of VICTORY VERBATIM REPORTING SERVICES INC., Suite 900, 222 Bay Street, Toronto-Dominion Centre, Toronto, Ontario, on the 7th day of June, 2021.

\- - - - - - - - - - -

APPEARANCES:

RYAN MORRIS } ANDREA LAING } LINC ROGERS } JUSTIN MANORYK } CAITLIN McINTYRE }	-- for KPMG LLP
TREVOR COURTIS	-- for the Applicants
MICHAEL KRYGIER-BAUM	-- for the Respondent, Newline Canada Insurance Limited
DAVID VAILLANCOURT	-- for the Respondent, Arch Insurance Canada
JONATHAN YANTZI	-- for the monitor
STEVEN WEISZ	-- CCAA representative counsel for the U.S. securities claimants
ALISTAIR CRAWLEY	-- for Peter Aceto (Canadian counsel)
DAVID WINGFIELD	-- for Serge Kalloghlian

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--- upon convening at 9:00 a.m.
--- upon commencing at 9:02 a.m.

SERGE KALLOGHLIAN, affirmed
CROSS-EXAMINATION BY MR. MORRIS:
1. Q. Good morning. You are Serge Kalloghlian?
A. Yes.
2. Q. You probably better spell that for the reporter.
A. S-E-R-G-E, last name K-A-L-L-O-G-H-L-I-A-N.
3. Q. And you are a member of the Law Society of Ontario?
A. Am I a member? Yes.
4. Q. You were called to the bar in 2008?
A. Yes.
5. Q. You're a partner at the law firm Kalloghlian Myers LLP?
A. Right.
6. Q. Your practice focuses on representing plaintiffs in class action proceedings?
A. Yes.
7. Q. With a focus on securities class actions?

A. Yes.

8. Q. And that has been the case for most of your career since you were called to the bar?

A. Yes.

9. Q. You've been sworn to tell the truth in answering the questions I'm going to ask today?

A. Yes, I was affirmed.

10. Q. Affirmed. And if there is a question you don't understand, you'll let me know?

A. Okay.

11. Q. And if you need a break at any time, you'll let me know?

A. Okay.

12. Q. Now, since this examination is being conducted remotely by videoconference, you'll also let me know if you experience any technical difficulties?

A. Okay.

13. Q. Are you presently located in the City of Toronto?

A. Yes.

14. Q. And I take it there is nobody else in the room with you right now?

A. No.

15. Q. On today's examination, I'll be

referring primarily to documents that are contained in motion records previously filed in this matter. And so to avoid any confusion, I don't propose to mark those as exhibits. Is that acceptable?

A. That's fine with me.

16. Q. And if I do refer to any documents that aren't contained in motion records, I provided those to you in PDF this morning, did you receive those?

A. Yes.

17. Q. Okay, so you're attending today pursuant to a Notice of Examination delivered on June 4th, 2021?

A. I don't remember when it was delivered.

18. Q. Justin, can you pull up the notice of examination on the screen? And can we scroll down just so get the date on it? So, the date is June 4, 2021, you don't have any issue with the date of the notice, I take it?

A. No.

19. Q. And you're here to be cross-examined on your affidavit on a motion to sanction CannTrust's CCAA plan of arrangement?

MR. WINGFIELD: Amongst other things.

20. MR. MORRIS: I'm sorry, I didn't hear that.
MR. WINGFIELD: Well, amongst other things. I think you know we're also seeking an order in relation to the distribution of proceeds.

BY MR. MORRIS:
21. Q. Yes, that's fine. And your affidavit in support of the motion was sworn June 2nd, 2021?
A. Yes.
22. Q. Do you have a copy of the affidavit in front of you?
A. Yes.
23. Q. And the affidavit has Exhibits A through P?
A. That's right.
24. Q. And it's contained in the motion record of the CCAA representatives dated June 2nd, 2021?
A. That's right.
25. Q. Now, you also swore a confidential affidavit in support of the motion, also on June 2nd, 2021?

A. Yes.
26. Q. And that's included in the same motion record?
MR. WINGFIELD: It was filed separately.

BY MR. MORRIS:
27. Q. It's included in the table of contents to the motion record, although it hasn't been provided to us with the motion record?
A. Correct.
28. Q. And you'll be asking the court for a sealing order in respect of that affidavit?
A. Yes.
29. Q. And that affidavit attaches the RSA Supplementary Letter Agreement?
A. That's right.
30. Q. And that agreement, as I understand it, is sealed by an order of the court dated January 29th, 2021?
A. I believe that's right.
31. Q. Okay. You reviewed both of your affidavits in preparation for today's examination, I take it?
A. Both of them, I reviewed...I mean, yes.

32. Q. Are there any changes that you wish to make to your affidavits before I get started?

A. Well, with respect to the affidavit that was sworn in respect of the representation order, there may be statements in there that were true at the time, and I am just saying this because of the amount of time that has passed.

So, there may have been statements in there that were true at the time, but now, given that six months have passed, that they aren't. So, with that exception, then no, there are no other changes I want to make.

33. Q. Okay, so when you said that, you were referring to your January 20th, 2021 affidavit?

A. Yes. The statement I just made was in respect of the affidavit sworn on January 20th.

34. Q. Okay, but in respect of the June 2nd, 2021 affidavit, there is no changes?

A. No change, no.

35. Q. And I take it you also reviewed the most recent version of CannTrust's CCAA plan before the examination today?

A. I've seen it.

36. Q. And this is the version dated June 2nd, 2021 I'm referring to.

A. I've seen it.

37. Q. Can we refer to that document on today's examination simply as "the plan"?

A. Sure.

38. Q. Did you review any other documents in preparation for your cross-examination today?

A. If I reviewed anything outside of the materials that we filed, it doesn't immediately jump to mind.

39. Q. Okay. So, your evidence on this motion is on behalf of the CCAA representative counsel listed at paragraphs 2 and 4 of your affidavit, have I got that right?

A. My evidence is my evidence. To the extent I make statements attributable to the counsel group, then it says what it says, but I wouldn't go as far as to say that when I speak, I am speaking as representative counsel on behalf of all the individual members.

40. Q. Okay, so the other members of the representative counsel group haven't approved the contents of your affidavit?

MR. WINGFIELD: That would be privileged. The question is objected to on the grounds of privilege. /R

BY MR. MORRIS:

41. Q. And the evidence that you're providing is in support of the position of the CCAA representatives on the motion, correct?

A. Yes.

42. Q. And those representatives represent the interest of the securities claimants in the class proceedings in Ontario and in the U.S.?

A. I mean, I would have to go back and look at the exact language of the representation order. The people that you have just described certainly fall under the definition of securities claimants in the representation order. So, I mean, to the extent that they are securities claimants, then yes, and I think they all are.

43. Q. Okay. CCAA representative counsel negotiated and agreed to the RSA on behalf of the securities claimants, correct?

A. Ultimately, it's going to be for the benefit of securities claimants. I mean, securities claimants weren't party to the agreement, it was between the CCAA representatives and the company amongst others, but it's for their benefit.

44. Q. And you were personally involved in

those negotiations?

A. Yes.

45. Q. And it's CCAA representatives' counsel's view that the RSA is fair and reasonable?

A. Yes.

46. Q. And that's your view as well?

A. Yes.

47. Q. And when you say "fair and reasonable", you mean fair and reasonable to the securities claimants?

A. Yes, that's my concern.

48. Q. Now, I take it that CCAA representative counsel also negotiated and agreed to a form of the plan?

MR. WINGFIELD: No, no. That wouldn't be a fair characterization. We had input into the plan insofar as it affected our clients' interests, subject to the RSA.

BY MR. MORRIS:

49. Q. Certainly, there are no terms in the plan that CCAA representative counsel is opposing?

A. I think that's right.

50. Q. And it's also CCAA representative counsel's view that the plan is fair and reasonable?

A. Yes.
51. Q. And by that, you mean fair and reasonable to the securities claimants?
A. I certainly mean that, yes.
52. Q. So, I would like to go to paragraph 38 of your June 2nd affidavit.
A. Okay.
53. Q. You say in paragraph 38 that,
"...Early in the mediation process, CCAA representative counsel concluded that CannTrust Holdings also had a potentially valuable auditor's negligence claim against KPMG..."
You see where I'm reading?
A. Yes.
54. Q. See, you say "early in the mediation process". When did CCAA representative counsel come to that conclusion?
MR. WINGFIELD: That's privileged. /R
55. MR. MORRIS: Well, he has told us it's early in the medication process. I'm not sure how it's any more privileged to put a date on that, or at least a narrower date than sometime between May 8th and January 2021.

MR. WINGFIELD: The actual time when counsel came to that view is privileged.

56. MR. MORRIS: Can we narrow it down to something less than eight months?

MR. WINGFIELD: No.

<u>BY MR. MORRIS</u>:

57. Q. So, the conclusion that CannTrust had a potentially valuable claim against KPMG, I take it, is based on CCAA representative counsel's own evaluation?

A. Yes, for the most part.

58. Q. So, yes?

A. Yes, yes. It's based on our evaluation, that's correct.

59. Q. And in arriving at that conclusion, I take it that representative counsel considered publicly available information from CannTrust?

A. That's right.

60. Q. So, I would like to turn to a document, it's the August 9th, 2019 press release of CannTrust, and it's in the brief of documents that I sent you this morning. If you have got it, that's great. If not, I can get Justin to put it up on the screen.

A. I have it. What tab?
61. Q. It is at tab 3.
MR. WINGFIELD: Can you have Justin pull it up on the screen, please?

BY MR. MORRIS:
62. Q. So, just for the record, this is the August 9th, 2019 press release of CannTrust, it's found in the motion record of KPMG dated March 17th, 2021. It's Exhibit E to the affidavit of Maria Ferache in that volume. So, in making its evaluation of the potential CannTrust claim against KPMG, I take it representative counsel was aware that KPMG had withdrawn its audit reports of CannTrust for 2018, and Q1 of 2019?
A. Yes.
63. Q. And representative counsel was also aware of this press release that CannTrust issued when KPMG withdrew its audit reports?
A. Please repeat that.
64. Q. Representative counsel was aware, in evaluating a potential claim by CannTrust against KPMG, of this press release that CannTrust issued when KPMG withdrew its audit reports?
A. I was aware about this. We were

aware of this, yes.

65. Q. And you had seen the third paragraph here in this press release. It says,

"...KPMG's decision was prompted by recent sharing with KPMG of newly uncovered information from the special committee's investigation, including information that led to senior leadership changes announced on July 25th, 2019.

KPMG was not aware of the information recently shared by the company when it issued the KPMG reports, and had relied upon representations made by individuals who are no longer at the company..."

So, representative counsel was aware of that inclusion in the press release when it was evaluating its CannTrust claim against KPMG?

A. Yes, I saw the statement. As you know, we do not agree with it.

66. Q. But representative counsel considered that information in its evaluation of CannTrust's potential claim against KPMG?

A. Yes.

67. Q. And in evaluating the claim

against...CannTrust's potential claim against KPMG, representative counsel was aware that in the summer of 2019, CannTrust was conducting an internal special committee investigation?

A. I am aware that there was a special committee investigation.

68. Q. And you were aware of that when you were evaluating the potential claim against KPMG?

A. Yes.

69. Q. So, I would like to go to the next tab in the document brief, which is CannTrust's July 11th, 2019 press release. And if we could just scroll down a little bit, about half way down the first page. And so this is the press release in which CannTrust announced its special committee investigation. I take it that the representative counsel were aware of this press release when they were evaluating a potential claim against KPMG?

A. Yes.

70. Q. Now, you say in your affidavit, and I'm taking this from paragraph 54, that,

> "...Representative counsel determined to settle with certain officers and directors with respect to whom no evidence of wrongdoing was found during CannTrust's

internal investigation..."

Do you see where I'm reading from?

A. Yes.

71. Q. And the parties you're referring to at paragraph 54 include the original settlement parties other than CannTrust?

A. That's right.

72. Q. And later, at paragraph 74, you say that you have also settled with Mark Litwin and Stan Abramowitz, at least in part, on the basis that no evidence of wrongdoing was found against them during CannTrust's internal investigation?

A. That's right.

73. Q. Now, when representative counsel was evaluating CannTrust's potential claim against KPMG, I take it you were aware that the same internal investigation didn't result in any findings of wrongdoing against KPMG, correct?

A. I do not. My understanding is not that there was a detailed investigation into KPMG's conduct. So, these have nothing to do with each other. They're not analogous.

74. Q. All right, well, representative counsel was aware that, well, one of the representative counsel, Mr. Wingfield, had written

to CannTrust to request that it commence a derivative action against KPMG, right? You were aware of that when you making an evaluation of a possible case?

A. I don't know if I knew it at the time. I know it now.

75. Q. But certainly other representative counsel were aware of that?

A. Sure. Mr. Wingfield wrote the letter.

76. Q. Right. Justin, can we bring that letter up? It's at tab 5 of the document brief? For the record, the document is a letter from Mr. Wingfield to the directors of CannTrust dated August 20, 2019. It's found at KPMG's responding motion record dated June 4th, 2021. It's Exhibit C to the affidavit of Nancy Thompson.

So, this is the letter in which Mr. Wingfield requested the board of directors to commence a derivative action to commence, among others, against KPMG?

A. It looks like it.

77. Q. And CannTrust's counsel responded to that letter?

A. Are you asking me?

78. Q. Yes. To your knowledge, CannTrust's counsel responded to that letter?

A. Yes.

79. Q. And that's the next tab in the document brief, they responded on September 3rd, 2019 at Exhibit C to the Thompson affidavit in KPMG's record. Do you see that letter before you?

A. Yes.

80. Q. And I want to go to page 4 of that letter. In the second full paragraph on that page, CannTrust's counsel writes,

"...The special committee is not aware of any evidence that KPMG negligently conducted its audit of CannTrust's financial statements..."

Do you see where I'm reading that, halfway through the second paragraph?

A. I do, and I don't think that they conducted an investigation. That's not what the sentence says. It says they're not aware of any evidence.

81. Q. Correct. It says they're not aware of any evidence of wrongdoing. And you considered that when you were evaluating a potential CannTrust claim against KPMG?

A. Yes. I did consider it.

82. Q. And so Mr. Wingfield wrote back to CannTrust's counsel on September 6th, 2019, which is the next document in the brief, and that's, again, for the record, Exhibit C to the Thompson affidavit in KPMG's June 4th record. And in this letter, Mr. Wingfield asserts that,

"...The tests for a derivative action against, among others, KPMG, is met..."

So, have you have a chance to review this letter, Mr. Kalloghlian?

A. Not carefully, no. If you want me to, I will.

83. Q. Well, maybe we can short-circuit that. Do you agree with my assertion that Mr. Wingfield is saying the test for a derivative action against KPMG among others is met in this letter?

A. I would have to read it. If you tell me the paragraph, I'll let you know.

84. Q. Well, it's a pretty short letter, so let me take a look at it, and let me know when you're doing.

MR. WINGFIELD: The letter speaks for itself, obviously.

THE DEPONENT: There you go.

BY MR. MORRIS:

85. Q. So, you don't take issue with my conclusion, Mr. Wingfield is asserting that the test for the derivative action is met?

A. Why don't you just show me a sentence, and I'll let you know, like...

86. Q. It's the very last sentence of the letter.

A. Okay, he is saying that the second test of what appears to be the derivative action section is met.

87. Q. You are aware of no further steps after this letter, by Mr. Wingfield or any of the other representative counsel, to advance a derivative claim against KPMG, are you?

A. Am I? I am not aware.

88. Q. And representative counsel considered all of this correspondence with CannTrust when it was evaluating CannTrust's potential claim against KPMG?

A. Yes.

89. Q. And representative counsel was aware when it was making its evaluation of a potential claim by CannTrust against KPMG that no such claim had actually been commenced by CannTrust as of the

date of the CCAA filing, right?

A. That's right. I was concerned by that.

90. Q. And representative counsel was aware, in making its evaluation, that CannTrust hadn't tolled any claims against KPMG, right?

A. I wasn't aware of any of that, no.

91. Q. So, you were not aware...and I just want to understand the timing, because we saw in your affidavit at Exhibit G that there was some correspondence requesting tolling. At the time you were evaluating your claim, or CannTrust's potential claim against KPMG, you were not aware that KPMG had not tolled any claims? Have I got that right?

A. I was not aware of any discussions regarding totalling of claims because CannTrust and KPMG.

92. Q. Okay. And that was a factor in your evaluation of the potential CannTrust claim against KPMG?

A. Why? I don't understand.

93. Q. Did you consider the fact that no claims had been tolled when you were evaluating your claims against KPMG, or potential claims against KPMG?

A. Well, as you know from the correspondence, our position was that they were tolled as of the issuance of the initial order. So, I don't know what you mean, really.

94. Q. Well, you wrote to KPMG's counsel in late April asking that claims be tolled. Have I get that right? At Exhibit G of your affidavit.

A. Yes.

95. Q. So, I take it from that that you were concerned that the claims may not be told?

A. That's right.

96. Q. And that was because you were not aware of CannTrust itself having entered any tolling with KPMG, right?

A. Yes, that's right.

97. Q. Okay. And you were aware that CannTrust hadn't entered into any tolling with KPMG at the time you were evaluating CannTrust's potential claim against KPMG?

A. That's right.

98. Q. Okay, and that was a fact that you considered in that evaluation, right?

A. Okay, yes.

99. Q. And you were also aware, when you were making that evaluation, that CannTrust's

financial statements for 2018 and Q1 of 2019 had not been restated, right?

A. They had not actually been restated, but CannTrust had announced that they were likely to be restated.

100. Q. Well, think they had announced that they had been withdrawn, but I don't think they had announced that they were likely restated. But in any event, they had not been restated, correct?

A. They had not, because it was...yes, that's right, they had not been.

101. Q. And to your knowledge, they haven't been restated to date, right?

A. No, they haven't, because CannTrust entered insolvency proceedings.

102. Q. And representative counsel was aware, at the time it was evaluating a potential claim against KPMG, that KPMG was still CannTrust's auditor, right?

A. KPMG, at the beginning of the CCAA proceedings, yes, was still CannTrust's auditor.

103. Q. And at the time you were evaluating the claim to arrive at your conclusion that there was a potentially valuable claim, KPMG was still CannTrust's auditor?

A. That's right.

104. Q. And that was a factor that representative counsel considered when it was evaluating the claim, that KPMG sort of hadn't been fired by CannTrust?

A. Yes, that was a big concern to us.

105. Q. But it was a factor in your evaluation of the potential claim?

MR. WINGFIELD: That is privileged, obviously. How representative counsel weighed and considered various factors in coming to the conclusion that KPMG is liable to CannTrust for its failure to perform an audit in accordance with appropriate standards is something that is subject to standard litigation and counsel privilege. /R

106. MR. MORRIS: Well, counsel has put it squarely at issue in his affidavit, so I reject that conclusion, but we'll move on.

MR. WINGFIELD: Where did he put that issue in the affidavit? I don't see that.

107. MR. MORRIS: He has said that, "...Counsel has made an evaluation of the claim and determined it was potentially

significant..."
We're entitled to explore the bases for that evaluation. As I said, I will move on.

BY MR. MORRIS:
108. Q. So, at paragraph 42 of your affidavit, you say that the value of the claim, and this being the potential claim that CannTrust might have against KPMG, is well in excess of 270 million dollars?
A. It says,
"...We estimate potential damages in the proposed action to be well in excess of 27 million..."
With reference to the damages analysis from Livent.
109. Q. And your estimate of 270 million you say was arrived at in consultation with representative counsel's expert?
A. Yes.
110. Q. And was that expert Dr. Serona?
A. Yes.
111. Q. It was a different expert?
A. Yes.
112. Q. And that expert's work is not in

evidence in this motion?

MR. WINGFIELD: Privileged. /R

113. MR. MORRIS: That expert's work is not in evidence in this motion?

MR. WINGFIELD: It is subject to litigation privilege.

114. MR. MORRIS: So, the answer to my question is no, it's not in evidence in this motion?

MR. WINGFIELD: That's correct, it's subject to litigation privilege.

<u>BY MR. MORRIS</u>:

115. Q. Now, my partner Ms. Laing asked you, Ms. Kalloghlian, last Thursday for all communications with CannTrust or its advisors during the course of negotiations of the RSA that relate to CannTrust's potential claim against KPMG. Do you recall that?

A. Yes, she was asking me to breach the mediation order, which I am declining to do.

116. Q. And that correspondence is at Exhibit H to the Thompson affidavit in KPMG's June 4th record. So, I would like to bring that up, that's at tab 9 of the PDF brief that I sent you

this morning. And you responded to Ms. Laing's e-mail last Friday at 12:19 p.m. in the same e-mail chain. Can we, Justin, scroll to that, Serge's response, 12:19 on Friday? And you, among other things, claim privilege over the communications sought, correct?

A. Yes.

117. Q. And you maintain that position now?

A. Yes.

MR. WINGFIELD: Yes.

BY MR. MORRIS:

118. Q. I would like to focus on the last sentence of your response in that 12:19 e-mail. You write,

"...No documents responsive to your request were exchanged with CannTrust that are by themselves not subject to the mediation order or applicable privilege, and CannTrust provided no such documents that were created before the mediation order..."

So, what you mean there is that CannTrust did not provide any documents relating to a potential claim against KPMG that were created before the date of the mediation order? Have I got that right?

A. Yes.
119. Q. And the date of the mediation order was May 8th of 2020? I'm basing that on paragraph 25 of your affidavit.
A. Yes.
120. Q. So, CannTrust didn't provide any documents created before May 8th, 2020 to representative counsel suggesting that a claim against KPMG has potentially significant value?
MR. WINGFIELD: There were no documents, so we're not going to talk about the absence of information in this examination.

BY MR. MORRIS:
121. Q. And so any value that representative counsel is placing on a potential claim against KPMG is based on its own conclusions and not by analysis from CannTrust, I take it?
MR. WINGFIELD: That would be privileged, subject to paragraph 11 of the mediation order. /R
122. MR. MORRIS: I think privilege and mediation order are two different things, but we have your position.
MR. WINGFIELD: There is a

confidentiality protocol that applies to the mediation order, and there is also a privilege that would apply independently of the confidentiality protocol.

BY MR. MORRIS:

123. Q. So, the CCAA representatives, as I understand it, take the position on this motion that the court should determine that the assignment of claims to the litigation trust cannot be challenged. Have I got that right?

MR. WINGFIELD: That is a legal issue, that is not the subject of cross-examination.

124. MR. MORRIS: Well, Mr. Kalloghlian is a lawyer, and you have been involved in the construction of this plan, and the question is perfectly appropriate and can be answered. I am asking what the position being taken on the motion is. It's not a legal question, I'm asking about the position.

MR. WINGFIELD: No, the position will be a brief in the facta. I think you can examine Mr. Kalloghlian on questions on fact, not on legal analysis, or submissions that we intend to make before His Honour.

125. MR. MORRIS: The CCAA representatives taking this position is a fact, is it not?

MR. WINGFIELD: The facts are found in Mr. Kalloghlian's affidavit.

126. MR. MORRIS: Let's go to article...

MR. WINGFIELD: We're not going to debate on the record legal arguments that we intend to advance, or other arguments we intend to advance with His Honour on Friday.

127. MR. MORRIS: So, my colleague has brought up section 8.2(s) of the plan. I take it that the CCAA representatives are concerned that if the court doesn't make a determination that assignability can't be challenged, that claims assigned to the trust may turn out not to be assignable, right?

MR. WINGFIELD: We're not getting into issues of what we may or may not be concerned about. That's clearly a matter of privilege, or it's a question of argument.

<u>BY MR. MORRIS</u>:

128. Q. Representative counsel has provided a draft claim to KPMG, correct? At Exhibit F of your affidavit?

A. Yes.

129. Q. And that draft claim could be the claim that's ultimately pursued by the securities claimants, if they are permitted to do that by the court. Right?

A. It would look something like this, yes.

130. Q. But the CCAA representatives are reserving their rights to bring a different claim, or a claim in a different form?

A. Yes.

131. Q. Now, I take it that the CCAA representatives don't agree that the determination of assignability should be based on an issued claim and a proper record?

MR. WINGFIELD: Again, that's a question of argument that we will undoubtedly be addressing with His Honour on Friday. It's not an appropriate subject for cross-examination.

132. MR. MORRIS: So, you're saying the court

should be forced to make a determination now? That's the position the CCAA representatives are making on this motion?

MR. WINGFIELD: The position we are taking on this motion, on this cross-examination, is that question is inappropriate.

BY MR. MORRIS:

133. Q. You will agree with me that the assigned claims that are proposed in the plan would be pursued for the benefit of the securities claimants?

A. Yes.

134. Q. But that CannTrust retains a residual interest in those claims?

A. I don't know what you mean.

135. Q. Well, if we look at article 4.2(d) of the plan, as I read it, it says that,

"...If the securities claimant trust recovers more than 250 million dollars, CannTrust is entitled to start to be repaid its 50 million dollar settlement payment..."

You were aware of that component of the plan?

A. Yes.

136. Q. Now, the plan also contemplates that CCAA representative counsel will appoint the trustees of the securities claimant trust. Do you agree with that?

A. That's right.

137. Q. And I take it that the intention of representative counsel is to appoint itself as trustee?

A. Yes, that's part of the agreement.

138. Q. And in representative counsel's role as trustee, it will also appoint itself as counsel to the securities claimant trust?

A. Yes, that's the intention.

139. Q. And in that capacity, representative counsel will prosecute any of the assigned claims?

A. Correct.

140. Q. I take it that no trust terms have been established for the securities claimant trust?

A. There is no agreement yet.

141. Q. So, there is no declaration of trust that exists?

A. No.

142. Q. And there is no fee arrangement for the prosecution of the assigned claims at this

point?

MR. WINGFIELD: That's a matter between representative counsel and the class, subject to the supervisory jurisdiction of the court, not a question for you to be asking or for us to be answering in this cross-examination.

143. MR. MORRIS: I don't think there is any magic to answer whether there is an existence of a fee agreement at this point, but...

MR. WINGFIELD: It's refused. /R

<u>BY MR. MORRIS</u>:

144. Q. I take it no consideration has been given as to whether representative counsel will agree with itself to pursue the assigned claims on contingency?

MR. WINGFIELD: Refused. /R

145. MR. MORRIS: What's the basis for the refusal?

MR. WINGFIELD: It's not an appropriate subject of this cross-examination involving KPMG. You can, in fact, infer that as class action counsel, we do act on a contingency basis. That I think is a matter of common knowledge.

BY MR. MORRIS:

146. Q. Now, the proposed assigned claim against KPMG is not a class action though, correct?

A. It's not a class action.

147. Q. So, the provisions of the Class Proceedings Act wouldn't apply to it?

MR. WINGFIELD: Not necessarily.

THE DEPONENT: My intention is to prosecute them concurrently, so, you know, to the extent...it's possible that the court may make an order that is inconsistent with what you just asked.

148. MR. MORRIS: So then CCAA representative counsel has turned its mind to whether it would be seeking approval from the court for events during the pursual of the assigned claims?

MR. WINGFIELD: We have turned our mind to that issue, and we are not going to be answering questions on this examination about the conclusions that we have come to on that issue. /R

<u>BY MR. MORRIS</u>:

149. Q. Now, I would like to discuss the RSA supplemental letter agreement, and I understand this is confidential and sealed by the court. I take it that that letter agreement is the exhibit to your confidential affidavit of June 2nd?

MR. WINGFIELD: It's sealed, so all questions about the document are inappropriate. /R

<u>BY MR. MORRIS</u>:

150. Q. I take it that CCAA representatives wouldn't proceed with the plan in the absence of the supplemental letter agreement, have I got that right?

MR. WINGFIELD: That's refused. /R

<u>BY MR. MORRIS</u>:

151. Q. And that certain sections of the plan are conditional on the terms of the supplemental letter agreement being completed or satisfied?

MR. WINGFIELD: The plan speaks for itself. /R

BY MR. MORRIS:
152. Q. Now, the terms of the supplemental letter agreement don't relate to the pursuit of the ongoing litigation by CCAA representative counsel, correct?
MR. WINGFIELD: That's refused. /R

BY MR. MORRIS:
153. Q. And the terms of the SLA don't relate to fee arrangements for CCAA representative counsel in respect of the class actions?
MR. WINGFIELD: That's refused. /R

BY MR. MORRIS:
154. Q. And the terms of the SLA don't relate to the appointment of the trustee of the securities claimant trust?
MR. WINGFIELD: That's refused. /R

BY MR. MORRIS:
155. Q. And the terms of the SLA don't relate to the assignment of claims to the securities claimant trust?
MR. WINGFIELD: That's refused. /R

BY MR. MORRIS:

156. Q. And the terms of the SLA don't relate to the appointment of counsel to the securities claimant trust?

MR. WINGFIELD: That is also refused. /R

BY MR. MORRIS:

157. Q. And the terms of the SLA don't relate to the fee arrangements for CCAA representative counsel?

MR. WINGFIELD: That is also refused. /R

158. MR. MORRIS: If we could just go off the record for about three minutes, I think those are my questions, but I just want to confer with my colleagues briefly.

--- DISCUSSION OFF THE RECORD

BY MR. MORRIS:

159. Q. All right, I just have one more question before I turn things over to Mr. Krygier-Baum. I just want to go back to paragraph 42 of your affidavit, where you estimate the damages of the claim to be in excess of 270 million dollars.

And I had asked earlier about expert work that you had done on this, and there was a privilege claim made. I just want to confirm that you are not prepared to produce the expert work you've had done at this juncture?

A. What was the question?

160. MR. MORRIS: Sorry, you're not prepared to produce the expert work you've had done in respect of the paragraph 42 estimate?

MR. WINGFIELD: Correct.

161. MR. MORRIS: And that's on the basis of privilege?

MR. WINGFIELD: Correct.

162. MR. MORRIS: All right. Those are my questions.

<u>CROSS-EXAMINATION BY MR. KRYGIER-BAUM</u>:

163. Q. Thank you. As you know, I am counsel here on behalf of Newline. I am going to be asking some questions. Same rules apply, I'm sure you know, as my friend's at Blake's. If you have any difficulty understanding, or if you would like me to repeat it, just ask me, I'm happy to do so. Can we please start at paragraph 30(k) of your affidavit, do you have that before you?

A. Yes.

164. Q. So, you swear, and I'm starting at the top,

"...In coming to these settlement agreements, CCAA representative counsel conducted extensive legal and factual investigation, including..."

And then you skip down to subparagraph (k), you say,

"...Reviewing CannTrust Holdings' responsive insurance policies..."

And I'm going to stop there. Did you personally review these insurance policies?

MR. WINGFIELD: Refused. /R

165. MR. KRYGIER-BAUM: How is that refused?

MR. WINGFIELD: You are aware, I assume, of the provisions of the confidentiality protocol from the mediation order, and any statements and discussions, or other considerations relevant to documents provided as part of that mediation are privileged from disclosure in any form, and therefore the questions are being refused.

166. MR. KRYGIER-BAUM: Well, you know, I don't agree with that, and I think we're going to be taking the same positions as

our friends at Blake's. You are referring, specifically, in your sworn affidavit, to responsive insurance policies, and so you're refusing as to identifying whether in fact he did review those responsive insurance policies?

MR. WINGFIELD: They were reviewed. That is a statement of fact which is one that we can confirm on the record is true. But we are also relying on paragraph 11 of the mediation order as one would expect, and therefore any questions relating to what happened as a result of any examination of documents provided during the mediation process is immune from examination.

167. MR. KRYGIER-BAUM: Counsel, that is not my question, at least at this point. I am asking if he, Mr. Kalloghlian, reviewed them.

MR. WINGFIELD: And you have my position.

168. MR. KRYGIER-BAUM: You have provided the answer that they have been reviewed. I'm assuming you mean by some member of

representative counsel. Are you affirming that, is that correct?

MR. WINGFIELD: You have my position on the record.

169. MR. KRYGIER-BAUM: I'm not sure I do, but okay. So, it's a refusal as to whether the deponent, Mr. Kalloghlian, personally reviewed the insurance policies, is that correct?

MR. WINGFIELD: It is a refusal, and it's a blanket refusal to answer any questions relating to any document provided under the terms of the mediation order.

BY MR. KRYGIER-BAUM:

170. Q. Okay. Well, let's work our way through this, and we'll get your refusals as they come. Do you prefer Serge or Mr. Kalloghlian? What do you prefer to go by?

A. Serge, please.

171. Q. Perfect, I'm the same way. Serge, can you identify who the insurers are on the various responsive insurance policies?

MR. WINGFIELD: That's refused. /R

BY MR. KRYGIER-BAUM:

172. Q. Serge, are you aware that there are two of what we call two towers of insurance, an ABC tower...

MR. WINGFIELD: That's refused. We can short circuit this. All of the information we have about the insurance arose after the mediation order was entered into, and was provided to us as part of the mediation process with your clients, amongst others.

And pursuant to paragraph 11(b) of the mediation order, all evidence about those documents, or subject to the disclosure in relation to insurance, are immune from examination. These questions are going to be refused. /R

173. MR. KRYGIER-BAUM: That's fine, so I'll go through them, and you can refuse them one by one.

BY MR. KRYGIER-BAUM:

174. Q. Sir, you're refusing as to which policies were reviewed, that's a refusal?

MR. WINGFIELD: Refusal. /R

BY MR. KRYGIER-BAUM:

175. Q. You're refusing as to the identity of the insurers, or other reference to pinpoint the specific policies, is that a refusal?

MR. WINGFIELD: That's refused. /R

BY MR. KRYGIER-BAUM:

176. Q. Serge, do you appreciate that there are two different broad types of insurance at issue here, an ABC and just a Side A DIC insurance?

MR. WINGFIELD: That's refused. /R

BY MR. KRYGIER-BAUM:

177. Q. Do you appreciate that different insurance policies will have different responsiveness based on their own terms and conditions and coverages provided?

MR. WINGFIELD: In relation to insurance applicable to these proceedings, that question is refused. /R

178. MR. KRYGIER-BAUM: Is that conditional? I wasn't sure if there was a second part to that.

MR. WINGFIELD: Well, as a general matter, insurance policies are subject to their terms. In relation to the insurance policies applicable to this matter, the question is refused, because those policies were provided as part of the mediation process.

BY MR. KRYGIER-BAUM:

179. Q. In paragraph 30, you identify various experts which were, I guess, of assistance in helping the CCAA representative counsel reach certain determinations. Did you have any experts or outside consultants that assisted with regard to the responsiveness of insurance policies?

MR. WINGFIELD: That's also refused, that's privileged, independently of anything under the mediation protocol. /R

BY MR. KRYGIER-BAUM:

180. Q. If we could turn to paragraph 43 of your affidavit, please? Let me know when you have that in front of you.

A. I have that.

181. Q. Let me start with a bit of a broader question. I think it's a fair read of your affidavit to say that the CCAA representative

counsel's support of the current plan and the sanction order is premised on what you see to be value in claims of the directors and officers of CannTrust as against their insurers, is that fair?

MR. WINGFIELD: No, if there is a precise statement in the affidavit that you wish to ask about, please identify that statement.

182. MR. KRYGIER-BAUM: Counsel, I'm happy to do so, but I am also entitled to ask questions here, and I did say, you know, as a general principle, as a broad statement, and I'm entitled to his evidence on it.

MR. WINGFIELD: We're not answering a gloss of what is a 35-page affidavit. /R

<u>BY MR. KRYGIER-BAUM</u>:

183. Q. All right, paragraph 43. You start with,

"...As indicated in previous affidavits filed in these proceedings, CannTrust Holdings' insurers have denied coverage to it in respect of class action claims..."

Who are CannTrust Holdings' insurers that you refer to in that paragraph?

A. If they're not described in the previous affidavits, and I don't know if they are, then they are under the mediation order, and I don't recall off the top of my head if they are.

184. Q. Is my client Newline one of those insurers you are referring to in the first sentence of paragraph 43?

MR. WINGFIELD: Is it referred to in previous affidavits? Can you help us as to whether that...

185. MR. KRYGIER-BAUM: Sure, and I'm happy to reread it. You say,

"...CannTrust Holdings' insurers have denied coverage to it..."

"It", you know, by grammatical construction, is CannTrust the entity as I read that,

"...in respect of class action claims..."

Is my client, newline, one of those insurers that has denied coverage to the entity CannTrust?

MR. WINGFIELD: Is your client one of CannTrust's insurers?

186. MR. KRYGIER-BAUM: Well, that's a broader question, and I'm happy to have

that answered first, and then have the more specific question answered after.
MR. WINGFIELD: This is a question for you. All of the insurers have denied coverage, as we understand it. If your client is one of the insurers, then your client would be encompassed by that broad statement.
187. MR. KRYGIER-BAUM: Well, you know, today is not my day to be answering questions.

BY MR. KRYGIER-BAUM:
188. Q. Serge, have you reviewed the affidavit of Ben Forrest that we filed with regard to this hearing, ascension order?
A. I did review it, but I don't have that memorized.
189. Q. Okay. Do you recall seeing this statement in it where he swore that as a Side A DIC insurer, Newline does not provide coverage to CannTrust the corporate entity itself? Do you recall seeing that?
MR. WINGFIELD: Let me find it.
190. MR. KRYGIER-BAUM: Sure, thank you.
MR. WINGFIELD: You don't have it handy,

do you? I am going to have to be searching for it.

191. MR. KRYGIER-BAUM: You know what? I wish I had a Justin as well. We are a smaller operation. I don't have it immediately available. If you have trouble, I could pull it up.

THE DEPONENT: I found it.

MR. WINGFIELD: Where is it?

BY MR. KRYGIER-BAUM:

192. Q. So, it's paragraph 3.

A. Yes, I have it.

193. Q. And I assume you're not taking...it's not your position that Newline provides coverage to CannTrust, the corporate entity?

MR. WINGFIELD: It is neither our position nor not our position. We are in the process of mediating insurance coverage issues with respect to all the insurers that have made themselves part of insurance towers, in this case, and therefore not answering questions on this record about the content about the mediation process.

194. MR. KRYGIER-BAUM: I'm not...Counsel, and I've tried to be very clear on this, I'm not asking for you to disclose what's going on in the mediation process.

MR. WINGFIELD: You actually are. You've taken positions in the mediation process, and you are now asking questions on the record in relation to issues that have arisen in the mediation.

We'll know that. And it is entirely inappropriate for you to be asking questions of Mr. Kalloghlian, under cross-examination, in relation to the very matters that we have been discussing as part of the mediation process. It is entirely inappropriate.

195. MR. KRYGIER-BAUM: Counsel, I completely disagree with that characterization. It's overreaching, it's unfair, and it's just simply inaccurate. Serge has sworn. He says,

"...CannTrust Holdings' insurers have denied coverage to it..."

I am simply asking what that means, what these nouns are, you know, what these subjects and objects of a sentence are. And to say that, well, I'm trying to now breach mediation protocol I think is... it's unfair, and it doesn't do this cross-examination process any good. But if I'm going to have a refusal on that, that's fine.

MR. WINGFIELD: Well, you've been engaged in mediation with all the insurers for eight months. To date, there have been no provisions of insurance coverage applicable to the claims that we have made, or which we can settle in relation to that insurance.

The insurers may have provided some coverage to some people on some basis, not in relation to what we have been negotiating with the insurers. You know that.

196. MR. KRYGIER-BAUM: Yes, and I really don't think...well, obviously, I disagree with the way that you are refusing things, but I'll be moving on here.

BY MR. KRYGIER-BAUM:

197. Q. The last sentence of paragraph 43, you swear,

"...In our view, the claims of CannTrust Holdings and other settlement parties against the insurers have significant value..."

Do you see that?

A. Yes.

198. Q. It's my understanding that when you say "against the Insurers", capital I, you are including all insurers, ABC and DIC insurers?

A. Yes.

199. Q. Okay. And of course, that includes my client Newline as a DIC insurer?

A. Yes.

200. Q. Okay. How did you reach that...so, "other settlement parties", settlement parties, I assume you're referring to the original settlement parties and any additional settlement parties that have come in, correct?

A. Yes. Those that have assigned claims to us.

201. Q. Thank you. And this includes directors and officers of CannTrust?

A. Right.

202. Q. So, settlement parties that...claims they have against their insurers, this includes claims of directors and officers against their D&O insurers, correct?

A. That's right.

203. Q. And when you say "have significant value", did you reach that determination for each and every one of the directors and officers of CannTrust?

MR. WINGFIELD: We reached that conclusion based on the totality of the claims and the insurance coverage.

204. MR. KRYGIER-BAUM: Counsel, you know, I appreciate that you're both lawyers here. You're not refusing, you're not objecting, you are now simply answering questions. It's not your affidavit. I would appreciate it from Serge himself.

THE DEPONENT: We haven't gotten into any detail. That sentence says what it says settlement parties collectively against insurers collectively, for the reasons Mr. Wingfield has stated. I don't think it's appropriate to give any further breakdown.

BY MR. KRYGIER-BAUM:

205. Q. So, and I'm not sure...I'm not arguing, I just want some clarity. Are you saying that you have not done it on an individualized basis for directors and officers, or are you saying you're refusing to answer that?

MR. WINGFIELD: Refusing. /R

206. MR. KRYGIER-BAUM: Thank you.

MR. WINGFIELD: The latter, we're refusing.

BY MR. KRYGIER-BAUM:

207. Q. Thank you. And what was the process that you went through in determining that the claims of directors and officers against their D&O policies had significant value?

MR. WINGFIELD: It's refused. /R

THE DEPONENT: It's refused.

BY MR. KRYGIER-BAUM:

208. Q. You're refusing that? Okay. What was the value that you arrived at, or the range of value that you arrived at for the claim of Mr. Paul against his D&O insurers?

MR. WINGFIELD: That's refused. /R

BY MR. KRYGIER-BAUM:

209. Q. Same question, Mr. Aceto.

MR. WINGFIELD: That's refused. /R

BY MR. KRYGIER-BAUM:

210. Q. Same question for any of the directors and officers.

MR. WINGFIELD: Refused. /R

BY MR. KRYGIER-BAUM:

211. Q. In reaching the determination that the claims by the D&Os against their D&O coverage had significant value, did you have access to any documentary production from any of the D&Os themselves?

MR. WINGFIELD: Refused, that's subject to confidentiality protocol. /R

BY MR. KRYGIER-BAUM:

212. Q. Did you conduct any examinations under oath of any of the directors and officers?

MR. WINGFIELD: No, that's a matter of record.

BY MR. KRYGIER-BAUM:

213. Q. No, okay, you did not. Did you obtain any will-say statements of other witnesses concerning this issue?

MR. WINGFIELD: That would be privileged. /R

BY MR. KRYGIER-BAUM:

214. Q. Did you obtain any documentation from CannTrust on this issue?

MR. WINGFIELD: That is subject to confidentiality protocol. /R

BY MR. KRYGIER-BAUM:

215. Q. Did you conduct any kind of audit or forensic examination of computers belonging to any of the directors and officers?

A. That is privileged. /R

BY MR. KRYGIER-BAUM:

216. Q. Same question, their cell phones?

MR. WINGFIELD: Privileged. /R

BY MR. KRYGIER-BAUM:

217. Q. Same question, CannTrust servers?

MR. WINGFIELD: Privileged. /R

BY MR. KRYGIER-BAUM:

218. Q. Aside from what I think you referred to as the original or initial internal investigation at CannTrust, did you obtain any other evidence whatsoever regarding the directors and officers, in informing your opinion that their claims against their insurers had significant value?

MR. WINGFIELD: Privileged and refused. And once again, you know that what you're discussing aree matters directly relevant to these questions in the context of the ongoing mediation with the insurers. So, these questions are entirely inappropriate. You're basing...it's a cross-examination of Mr. Kalloghlian in relation to the mediation process that we are engaged in right now with your very client, with your client.

219. MR. KRYGIER-BAUM: I am not part of that, Counsel, I am...

MR. WINGFIELD: It is entirely inappropriate what you're doing.

220. MR. KRYGIER-BAUM: We have heard

evidence from your client that the, you know, assignment of these claims is valuable, that it's...and I don't want to put words in his mouth, but I understand that, you know, it's a core component of the plan implementation and the agreement reached.

He has sworn in a few spots, it had significant values, the claims against the insurers. I am allowed to probe that, I am allowed to test that, and I disagree with kind of, in my view, going behind the veil of mediation, saying that he is able to put that statement out and I can't test it. But I'll keep asking my questions.

THE DEPONENT: I have told you that in our view, these have significant value.

BY MR. KRYGIER-BAUM:

221. Q. Right, and I'm...you've sworn that...

A. Do you think I'm lying? Are you suggesting that I'm lying that I don't have that view? Because that's what the statement says. You are asking me questions to explain how we came to that view, which is...or whether that view is correct or not. So, he's right, it's not appropriate.

222. MR. KRYGIER-BAUM: I'm certainly not suggesting you're lying. But Counsel, I would think probably whenever you've conducted a cross-examination, you've tried to probe or test to get an explanation of statements in an affidavit. I think that's kind of one of the core purposes.

MR. WINGFIELD: Mr. Krygier-Baum, you know full well what offers the insurers have made to settle the claims against them, and you know those offers have considerable value. You know that.

223. MR. KRYGIER-BAUM: Mr. Wingfield, I would caution now about mediation and disclosure and settlement.

MR. WINGFIELD: Well, this is why your questions are inappropriate and why they're being refused, okay? You're asking questions that you know are in the core of the mediation process, and you know what the answers are to these questions because you're part of the mediation process. And

therefore, you are asking questions that
are entirely inappropriate.

BY MR. KRYGIER-BAUM:

224. Q. All right, I think we have your position on this. We disagree, but that's fine. Did you review...and maybe this is in your blanket refusal, but I want to ask it anyways. Did you review the terms of any of the policies, and whether or not entering into the RSA, or the settlement in general, would compromise or jeopardize coverage under any of the policies?

MR. WINGFIELD: Refused. /R

BY MR. KRYGIER-BAUM:

225. Q. And I'm asking that broadly, about every D&O?

MR. WINGFIELD: Refused. /R

226. MR. KRYGIER-BAUM: This does speed things up, all those refusals, so if you'll just bear with me for a moment.

--- upon recessing at 10:13 a.m.
--- A BRIEF RECESS
--- upon resuming at 10:20 a.m.

SERGE KALLOGHLIAN, resumed

CONTINUED CROSS-EXAMINATION BY MR. KRYGIER-BAUM:

227. Q. Serge, if you could turn to paragraph 54 of your affidavit, please?

A. Yes.

228. Q. So, in this paragraph, you're talking about the original settlement parties, which are defined elsewhere, but it's, you know, CannTrust and certain of their officers and directors, and I think holding company. Partway through the paragraph, do you see where it says, "Our decision not to"? Halfway down?

A. Yes.

229. Q. So, it reads,

"...Our decision not to require separate contributions from such persons was informed by the fact, as well as by our understanding, that such persons were not material sources of recovery because they had limited legal or financial exposure relative to the 50 million dollar payment..."

And then it continues. And it is self-evident in that first sentence of your paragraph, but aside from CannTrust, none of the original settlement parties made a cash contribution towards the settlement, correct?

A. That's right.

230. Q. And aside from the CannTrust internal investigation, did a representative of plaintiffs, did you do anything to satisfy yourself that there was no, quote, "evidence of wrongdoing"?

MR. WINGFIELD: Privileged. /R

BY MR. KRYGIER-BAUM:

231. Q. Privileged, okay. But regardless, you were satisfied that these D&Os that were part of the original settlement parties didn't commit any, quote, "wrongdoing"?

MR. WINGFIELD: Well, just a second.

THE DEPONENT: I'm just reading this.

232. MR. KRYGIER-BAUM: Sure, take your time.

MR. WINGFIELD: The question that you've asked isn't what Mr. Kalloghlian said in his affidavit.

233. MR. KRYGIER-BAUM: Well, that's why I'm asking the question.

MR. WINGFIELD: Right, so the affidavit is something Mr. Kalloghlian can speak to.

234. MR. KRYGIER-BAUM: It's, like, it's a

direct question from the affidavit, Counsel. I do not know how that's being refused.

MR. WINGFIELD: No, it's a twisted interpretation of what Mr. Kalloghlian says.

THE DEPONENT: What I explained here is how we came to the conclusion. What you're asking is a bit different. What I can say is...

BY MR. KRYGIER-BAUM:

235. Q. Exactly, and that's why I'm asking it.

A. Yes, okay. Well, what I will say is, we believe that this settlement is fair and reasonable.

236. Q. To the securities claimants, right? That's what you mean by that statement.

A. Yes. Those are my clients.

237. Q. You haven't provided any assertion that it's fair and reasonable to any of the codefendants or any of the insurers, have you?

A. No.

238. Q. No, you have not.

A. I don't purport to.

239. Q. Okay.

A. Fair and reasonable to my client.

240. Q. Right, and my question is...it's a direct question, I'm not sure why it would provoke that answer. But my question is, in coming to the settlement, were the representatives of the view that the D&Os in the original settlement parties had not conducted any wrongdoing?

MR. WINGFIELD: That is not what the affidavit says.

241. MR. KRYGIER-BAUM: Counsel, I have been clear on this, and, you know, I don't think your refusals and your interruptions are constructive at all. And we may have to go past 11 if this is the way things are going. I know what the affidavit says. I am asking a question at cross-examination. I am entitled to do so.

You could say that's not what the affidavit says. I could read probably decently, you know, I could see what the affidavit says. I am asking a question in cross-examination arising from...based on his affidavit. If you want to refuse it, refuse it, but don't keep telling me that's not what the affidavit says.

MR. WINGFIELD: If you put to the witness, as a factual matter, that he stated something in the affidavit which he in fact did not state, then I'm objecting.

242. MR. KRYGIER-BAUM: Counsel, I didn't do that.

MR. WINGFIELD: You did. Why don't you ask a different question that is not prefaced on a gloss on what Mr. Kalloghlian said in paragraph 54, then feel free to ask that question.

BY MR. KRYGIER-BAUM:

243. Q. Serge, we will all agree that you do not say in paragraph 54 that in coming to the settlement with the original settlement parties, the representatives were of the view that the D&Os did not conduct any wrongdoing. I agree with that. That's not in the affidavit. The affidavit says that CannTrust internal investigation didn't disclose any evidence of wrongdoing. We can agree that's what your affidavit says, correct?

A. That's right.

244. Q. Okay, we've got that basis, great. My question, in cross-examination, not in asking to photocopy the affidavit, but in cross-examination is, in coming to the settlement with the original settlement parties, are the representatives of the view that the original settlement parties' D&Os did not commit any wrongdoing?

A. I am trying to answer that without breaching the mediation order or settlement privilege.

245. Q. Sure, take your time.

A. I'm not really sure how to answer without doing that.

MR. WINGFIELD: In which case, the question is refused. /R

THE DEPONENT: Yes.

<u>BY MR. KRYGIER-BAUM</u>:

246. Q. Okay, it's a refusal. You say later on in that paragraph that the settling D&Os had limited legal or financial exposure relative to the 50 million dollar payment. What do you mean by "limited legal exposure"?

A. That means that if we were to pursue the claims and obtain a judgment, then they would have limited liability, pursuant to...as you know, the part 23.1 regime has a liability limit built into it.

247. Q. Is this assessment not based on common law negligence as well?

A. It's an assessment based on everything.

248. Q. Right, so when you say "limited legal exposure", that's inclusive of common law torts, negligence included, no?

A. It says,

"...Limited legal or financial exposure..."

249. Q. Right, and you chose to use two different words?

A. Yes, legal or financial, or did not have a capacity to pay.

250. Q. Right, so financial exposure, that's one term, but legal exposure, limited legal exposure.

A. Right.

251. Q. That includes an assessment of all claims against them?

A. Yes.

252. Q. Thank you. Can you confirm that as of today's date, no settlement has been reached with

any of the insurers?

MR. WINGFIELD: That is a subject of ongoing mediation.

253. MR. KRYGIER-BAUM: Well, I'll tell you why I think it's relevant. You're supporting a plan, you're supporting a sanction order, which has these bars and releases, and these assignments. But I am asking for confirmation, because I see lots of other settlements referred to, but no insurer has entered a settlement, is that correct?

MR. WINGFIELD: I'm not sure that is correct. The negotiations with the insurers are rather fluid right now, so I'm not entirely sure what you mean by that. If you mean that there was no formal settlement documentation executed with the insurers, then that is correct.

BY MR. KRYGIER-BAUM:

254. Q. I'll take that answer. And in your negotiations with any insurers, have insurers insisted that there be a bar and release, and that other insurers cannot claim against them as part of

their willingness to enter into a settlement?
MR. WINGFIELD: Obviously subject to the mediation protocol.
255. MR. KRYGIER-BAUM: So, that's a refusal?
MR. WINGFIELD: Yes. /R

BY MR. KRYGIER-BAUM:
256. Q. And you'll agree that, as currently drafted and as supported by you, the bar and release from any settling insurer is effective regardless of that insurer's cash contribution to settlement?
MR. WINGFIELD: The plan has whatever legal effect the plan has.
257. MR. KRYGIER-BAUM: Okay, I understand that. I'm asking the question, though.
MR. WINGFIELD: It's not for us to gloss the language of the plan in this cross-examination.

BY MR. KRYGIER-BAUM:
258. Q. You'll agree that regardless of what percentage of policy limits any insurer pays, or where that insurer is positioned in any of the insurance towers, it will be entitled to the benefit of the full bar and release if it settles?

MR. WINGFIELD: That is a question of interpreting the plan in relation to the insurance, and again, that question is refused on this cross-examination. /R

BY MR. KRYGIER-BAUM:
259. Q. Would the CCAA representatives support a plan, and the implementation of a plan, and a sanction order that does not include a bar and release for settling insurers?

MR. WINGFIELD: That's a hypothetical question, and it's refused. To the extent that we have a view on that question, it was
subject to normal privilege. /R

BY MR. KRYGIER-BAUM:
260. Q. Okay, I disagree with that, but we're not going to get into too many arguments on refusals. Would the CCAA representatives support a plan and a sanction order which does not include the assignment of claims by D&Os against their insurers?

MR. WINGFIELD: The same question you asked a second ago, and I give you the same answers. /R

BY MR. KRYGIER-BAUM:

261. Q. Okay, can you please turn to tab H of your affidavit, this is the minutes of settlement with Paul and the Paul Family Trust.

A. Yes.

262. Q. Do you have that in front of you?

A. Yes.

263. Q. Thank you. So, at paragraph 7, do you see where it says...and I'll read it out,

"...If requested, Paul will provide whatever assignment or similar agreement may be necessary for the securities claimant trust to assert without recourse whatever rights he might have has against the insurers, and to agree that any amount paid by the insurers shall be the property of the security claimants' trust..."

Do you see that?

A. Yes.

264. Q. Okay. I have not seen in the evidence on this sanction hearing that's before the court, I have not seen any assignment agreement, or quote, "a similar agreement" entered into with Mr. Paul. Does one exist?

A. There are assignment provisions built into the plan.

265. Q. Okay, but this minutes of settlement...I mean, the minutes of settlement, I think you'll have to agree, is entered into, you know, under the shadow of the plan. The plan has been in existence much before the minutes of settlement, correct?

A. These minutes of settlement are meant to work with the plan.

266. Q. Right, and they make a reference to, as I read it, a future, or future potential, agreement. If requested, Paul will provide whatever assignment or similar agreement may be necessary. So, I'm asking about that assignment or similar agreement. Does any such agreement exist?

A. There is not a separate agreement from this with respect to that, what you just read to me, no.

267. Q. Does a draft of that assignment or similar agreement exist?

MR. WINGFIELD: The problem with that question is that we are in the middle of a mediation, and the issues are ones that we have been considering and evaluating in the context of the mediation against the insurers.

So, when you ask about drafts, or other attributes of an agreement that are not memorialized in a formal agreement, we are treading on very thin ice.

268. MR. KRYGIER-BAUM: Okay, but you'll agree that in supporting this sanction order, that no assignment or similar agreement is getting put before the court?

MR. WINGFIELD: There is no memorialized agreement that is going to be placed before the court as of today.

269. MR. KRYGIER-BAUM: And the expectation is that once the sanction order is in place, once that's all done, then there could be an assignment agreement, but we don't have those terms?

MR. WINGFIELD: There very well could be, yes.

BY MR. KRYGIER-BAUM:

270. Q. In that paragraph I just read you, it says that,

"...Whatever rights he may have as against the insurers..."

Have you formed an opinion or a conclusion or belief on whatever rights, what you're referring to by "whatever rights he may have"?

MR. WINGFIELD: We have, and that's privileged. /R

BY MR. KRYGIER-BAUM:

271. Q. Okay. I understand that Mr. Aceto has not entered into a minutes of settlement, or a similar sort of settlement structure, is that true?

A. There was none appended to my affidavit.

272. Q. I appreciate that first part of the answer, now I'll ask for the rest of that answer, please.

A. I'm not answering the rest of it.

273. Q. You are refusing to answer as to whether, as of this moment, Mr. Aceto has tendered into the settlement?

MR. WINGFIELD: That question is privileged, it's subject to the mediation. /R

BY MR. KRYGIER-BAUM:

274. Q. Okay. You will agree, though, that

there is nothing in the evidentiary record about Ms. Aceto settling, there is no minutes of settlement or anything like that?

A. That's correct.

275. Q. And there is no assignment agreement or "similar agreement" with Mr. Aceto in the evidentiary record, correct?

A. Correct.

276. Q. And there is no assignment agreement or "similar agreement" for any of the directors and officers in the evidentiary record, is that correct?

A. I don't...are you talking about standalone assignment agreements that are separate from the minutes of settlement?

277. Q. That is a fair clarification. Yes, the RSA makes some reference to an assignment. I'm saying outside of the RSA.

A. That's right, there aren't separate standalone assignment agreements for the settlement parties.

278. Q. And when you say in this paragraph,

"...Assignment or similar agreement that may be necessary for the security claimants' trust..."

"Necessary", the people or the party determining necessity are the security claimants, correct?

A. It would be their counsel, likely, yes.

279. Q. Their counsel. So, this would be something unilaterally determined by you?

A. I wouldn't say...I don't know if it would be unilaterally, but the security claimants' counsel would come to that. It would be made by the CCAA representative counsel or other counsel to the securities claimants, or the security lease claimants' trust, with input from the CCAA representatives.

280. Q. And again, only after the sanction hearing?

MR. WINGFIELD: Not necessarily. If we were to settle with the insurers before the sanction hearing, then this wouldn't be necessary.

281. MR. KRYGIER-BAUM: Assuming no global settlement with the insurers...

MR. WINGFIELD: I'm not prepared to make that assumption, because we're in the middle of mediation, and I'm not prepared to make that assumption.

282. MR. KRYGIER-BAUM: Based on what's

currently in the evidentiary record, and I think we have the answer, that the assignment agreement or similar agreement, which will be, you know, drafted based on the strong, if not sole, input of security claimants' counsel, that will only be done after the sanction hearing. Based upon what we have in front of us, three days, four days before the motion.

MR. WINGFIELD: We don't know, for the reasons that you and I are both aware of in terms of the mediation process involving the insurers.

283. MR. KRYGIER-BAUM: But you cannot point to anything today that's in the evidentiary record that would at all look like an assignment or similar agreement that His Honour can adjudicate on, and form a conclusion on?

MR. WINGFIELD: Well, I believe Mr. Kalloghlian said that there is no formal executed document that is in the record. That's his position. And there isn't, you can look at the record.

284. MR. KRYGIER-BAUM: Would the assignment,

or similar agreement, require a consent to judgment on behalf of the D&Os?

MR. WINGFIELD: Well, that's a legal matter, we don't know...that's not an appropriate question for this cross-examination. /R

<u>BY MR. KRYGIER-BAUM</u>:

285. Q. I think it's okay, based on what he has put on the record, but if you want to refuse it, that's fine. And the D&Os, I understand, would have to cooperate with the plaintiffs' representatives in their claim against their D&O insurers?

A. Can you repeat that? Sorry.

286. Q. Sure. In any assignment, you know, when the D&Os assign their claims over to the representatives, I think it's implicit, but I'm asking that the D&Os will be obligated to cooperate and assist the assignees of the claim in advancing the D&O's claim against their own D&O insurers.

A. I don't recall if that language is in any of the agreements.

287. Q. In any of the, I assume, draft agreements you're referring to? Because we haven't seen any agreements.

A. Well, no, I'm referring to the agreements that are in here that speak to assignment.

288. Q. Right, and there is very, kind of, cursory treatment of it in the RSA, but I'm talking about the envisioned assignment over similar agreements.

MR. WINGFIELD: That's something for the future, it's not a matter for today. /R

<u>BY MR. KRYGIER-BAUM</u>:

289. Q. Would the D&Os that enter into settlement, would they be entitled to cooperate and assist their own D&O insurers in defending claims made against them?

MR. WINGFIELD: That's really a legal question that relates to the terms of the policies, and again, that's not something that we can answer today.

290. MR. KRYGIER-BAUM: Counsel, I'm not asking about the terms of the policies, we obviously have our position on the policies. I'm asking about these agreements that, you know, may or may not exist. We haven't seen, we don't know what

they are, but the court is being asked to make a ruling on.

MR. WINGFIELD: Right.

291. MR. KRYGIER-BAUM: I'm asking about what you're entering into, what you're drafting. I'm not asking about the insurance policies.

MR. WINGFIELD: Right, and that's privileged or subject to the mediation protocol.

292. MR. KRYGIER-BAUM: So, it's another refusal?

MR. WINGFIELD: It is. /R

<u>BY MR. KRYGIER-BAUM</u>:

293. Q. Were there ever any negotiations with the settling D&Os in which it was discussed that they would make a larger cash contribution in exchange for not assigning their claims?

MR. WINGFIELD: Privileged. /R

294. MR. KRYGIER-BAUM: If you'll give me two minutes, I think we're almost wrapped up, if not wrapped up.

--- upon recessing at 10:43 a.m.

--- A BRIEF RECESS
--- upon resuming at 10:45 a.m.

SERGE KALLOGHLIAN, resumed
CONTINUED CROSS-EXAMINATION BY MR. KRYGIER-BAUM:
295. Q. If you could please turn to tab E of your affidavit, which is the restructuring support agreement?
A. I'm there.
296. Q. If you could go to article 602?
A. I'm there.
297. Q. Do you see it reads,
"...This agreement may not be assigned by any agreement party without the prior written consent of the other agreement parties..."
Do you see that?
A. Yes.
298. Q. Why is there is no assignment clause included in the RSM?
MR. WINGFIELD: That's privileged and irrelevant. /R

BY MR. KRYGIER-BAUM:
299. Q. Serge, you would agree that it is an

important contractual term of the RSA?

A. It is a term of the RSA.

300. Q. I know that, is it an important contractual term from the perspective of the CCAA representatives?

MR. WINGFIELD: Irrelevant, refused. /R

BY MR. KRYGIER-BAUM:

301. Q. Would they have entered into the RSA if that clause, the no assignment clause, had not been included?

MR. WINGFIELD: Irrelevant. /R

BY MR. KRYGIER-BAUM:

302. Q. You'll agree that there is no guarantee that some or all of the insurers are going to settle?

A. I am aware of that.

303. Q. Right, and if all of the insurers don't settle, would you continue to support the implementation of the plan, or would the plan be killed?

MR. WINGFIELD: Well, that is an entirely inappropriate question, for obvious reasons. /R

304. MR. KRYGIER-BAUM: What are those obvious reasons?

MR. WINGFIELD: Well, it deals with a future conditional event, which is not the subject of cross-examination on this affidavit. You're asking for our legal opinion as to the implication of certain facts that haven't yet come into existence, which would be privileged, because it's part of our litigation brief. I could go on. The question is refused.

305. MR. KRYGIER-BAUM: Okay, well, I disagree with that, we have his evidence that...and, I mean, it's self-evident that there is no guarantee all of the insurers will settle, and the CCAA representatives are supporting the sanction order and the plan, as drafted, and I am not asking for a legal interpretation, this is factual.

I am asking that, will they continue to support the plan if all of the insurers don't settle? That's not a legal, that's a factual. They're supporting it in terms of...I want to know...I'm trying to test what terms are necessary and what terms aren't.

MR. WINGFIELD: It's actually not a factual question, it's a question about a hypothetical set of facts. We're refusing the question on that basis, as well as the fact that to answer the question requires that you ask about our legal analysis, which is a matter of privilege as well.

306. MR. KRYGIER-BAUM: It's not a legal analysis, it's a position.

THE DEPONENT: We come to that position through our legal analysis, and you're asking us to disclose our strategic thinking to you.

BY MR. KRYGIER-BAUM:

307. Q. You're saying you support the plan as currently drafted, correct?

A. Yes.

308. Q. What I'm asking about is, you know, if certain things came to pass, whether or not you would still be supporting it. I don't think that's asking you to disclose your legal analysis, but that's a refusal?

MR. WINGFIELD: That's a refusal. You

have our position.

BY MR. KRYGIER-BAUM:

309. Q. And if settling insurers were removed from the definition of additional settlement party, would you continue to support the plan and its implementation or not?

MR. WINGFIELD: You have our position.

310. MR. KRYGIER-BAUM: What's the position on that?

MR. WINGFIELD: It's the same question you asked previously, and we are providing you the same answer to that question.

311. MR. KRYGIER-BAUM: So, it's another refusal?

MR. WINGFIELD: It is a refusal. It is a hypothetical question. To answer that question, you are necessarily asking about our legal analysis and our strategic analysis, which is privileged. /R

BY MR. KRYGIER-BAUM:

312. Q. Okay, and if the bar and release terms of the plan did not apply to settling insurers, but just to codefendants, would the

representatives continue to support the plan and its implementation or not?

MR. WINGFIELD: Same answer to the previous...this question as the previous questions. /R

BY MR. KRYGIER-BAUM:

313. Q. Okay, is there a threshold or limit of the contribution from all insurers or some insurers, at which point the CCAA representatives would not support the plan and its implementation?

MR. WINGFIELD: That question is refused on the same basis as the previous questions were refused. /R

314. MR. KRYGIER-BAUM: Thank you. I think I am wrapped up, of course, subject to refusals and any motions we may be bringing on them, those are my questions. I'm not sure if there is anything else anyone else wanted to say, but for me and for today, we're finished. Thank you.

MR. MORRIS: I would just add that our exam is also subject to any refusals, motions we may bring.

--- upon adjourning at 10:52 a.m.

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I hereby certify the foregoing to be a true and accurate transcription of the above-noted proceedings held before me on the **7th DAY OF JUNE, 2021**, and taken to the best of my skill, ability and understanding.

Certified Correct:

Tala Rida
Verbatim Reporter

Tab 3

Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

TR/ias

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

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This is the Cross-Examination of GREG GUYATT on his Affidavit sworn the 2nd day of June, 2021, taken via videoconference at the offices of VICTORY VERBATIM REPORTING SERVICES INC., Suite 900, 222 Bay Street, Toronto-Dominion Centre, Toronto, Ontario, on the 7th day of June, 2021.

\- - - - - - - - - -

<u>APPEARANCES</u>:

RYAN MORRIS ANDREA LAING LINC ROGERS DANIEL SZIRMAK	} } } }	-- for KPMG LLP
TREVOR COURTIS		-- for the Applicants
MICHAEL KRYGIER-BAUM		-- for the Respondent, Newline Canada Insurance Limited
JONATHAN YANTZI		-- for the monitor
STEVEN WEISZ		-- CCAA representative counsel for the U.S. securities claimants
ALISTAIR CRAWLEY		-- for Peter Aceto (Canadian counsel)
GLENN VANZURA		-- for Peter Aceto (U.S. counsel)
SHANE D'SOUZA JAMIE GAGE	} }	-- for Greg Guyatt

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--- upon convening at 4:00 p.m.
--- upon commencing at 4:00 p.m.

GREG GUYATT, affirmed

CROSS-EXAMINATION BY MS. LAING:

1. Q. Mr. Guyatt, you have just been affirmed?
A. Yes.
2. Q. And we've agreed that you would prefer to be called Greg, so I will do that. It's not a sign of disrespect, but in the interest of making you feel more comfortable today.
A. Thank you.
3. Q. I am Andrea Laing. You are welcome to call me Andrea. I represent KPMG, who were until recently CannTrust's auditors, correct?
A. Correct.
4. Q. And as this is a virtual cross, and I think you're very familiar with the rules by now, but I will just review them with you quickly. It's very important that we don't speak over one another, and so we make sure that our court reporter can hear everything. Our court reporter is the most important person on the Zoom call.
If at any point you're encountering

technical difficulties, of course, please let us know, and we'll pause to resolve them. If you need a break at any time, please let us know. If you don't understand any of my questions, or if you can't hear them properly, I'm happy to repeat or rephrase them for you.

If you ever feel like you need a document to refresh your memory or confirm a point, please let me know, and we'll help you locate it. I also have to stress that you must not communicate with your counsel or anyone else about your evidence while you are under cross-examination. And from what I saw earlier as we were setting up for this examination, I understand your counsel Mr. D'Souza is sitting beside you?

A. Correct, and understood with everything you just said.

5. Q. And where are you located today?

A. We're in the offices of McCarthy Tetrault in downtown Toronto.

6. Q. Okay. And Greg, you swore an affidavit on June 2nd, 2021, in support of the sanction of the second amended and restated CCAA plan for the CannTrust group of companies, is that correct?

A. Yes.

7. Q. And do you have that affidavit available to you today?

A. I don't have it in front of me. Do you have it available, Shane?

MR. D'SOUZA: It's a few floors down, Andrea, so if you have something to show him, it would be great if you can share the screen.

8. MS. LAING: Okay, we will agree to screen-share. This is a little unconventional because we're doing it virtually, and then normally you would have the affidavit right in front of you. But we'll adapt accordingly.

BY MS. LAING:

9. Q. And speaking about your June 2nd affidavit, as with other affidavits you've sworn in connection with the CCAA process, I take it you reviewed it carefully before you swore or affirmed it?

A. Yes, I did. All 75-odd pages of it.

10. Q. And did you review it again in preparation for this examination?

A. Very briefly.
11. Q. And are there any changes you would like to make?
A. No.
12. Q. Okay. As stated in your affidavit, you are the CEO of CannTrust Holdings Inc.?
A. Yes.
13. Q. And you have been in that role since February 17th, 2020?
A. That's correct.
14. Q. And I'm going to refer to that entity as CannTrust Holdings, I hope you don't mind if I drop the "Inc.", and when I'm talking collectively about the various CannTrust entities that are subject to the CCAA process, I'm going to use the term "CannTrust" to identify the group, but if ever we need to be specific about an entity, we will try and do that. But otherwise, I'll be talking about CannTrust Holdings, and CannTrust generally to represent the group. Is that okay with you?
A. Understood, that's fine.
15. Q. So, prior to becoming CEO of CannTrust Holdings, you were the chief financial officer of CannTrust Holdings, correct?

A. Correct.

16. Q. And you began in that role on February 19th, 2019?

A. That's correct.

17. Q. And you held that role until your promotion to CEO on February 17th, 2020?

A. Yes.

18. Q. I understand you hold a CPA designation?

A. CPA, CA, yes.

19. Q. Okay, and have you maintained your CPA licence?

A. Yes, I have.

20. Q. And it's in CannTrust's record, and we can go to it if we need to, but I take it's common ground that KPMG performed its services pursuant to a written retainer agreement with CannTrust Holdings?

A. Sorry, could you repeat the question?

21. Q. I understand there was a written retainer agreement between CannTrust Holdings and KPMG?

A. Are you referring to their engagement letter?

22. Q. Yes.
A. Yes.
23. Q. Okay. We can go to it if we want to, I just wanted to...
A. That's fine.
24. Q. ...get your confirmation that there was a written...you would call it an engagement agreement.
A. Correct.
25. Q. And that engagement letter was with CannTrust Holdings?
A. I believe so, although I haven't looked at the engagement letter for some time.
26. MS. LAING: Okay, what I would say to your counsel is if you look at it and you take a different position, please let us know.
MR. D'SOUZA: We'll let you know if it's different. U/T

BY MS. LAING:
27. Q. Okay, and I take it you have an understanding of the work KPMG did pursuant to its engagement letter...
A. Yes.

28. Q. ...at least since you joined CannTrust Holdings in February of 2019?
A. Yes.
29. Q. And would you agree with me that KPMG remained CannTrust Holdings' auditor of record until April 19th, 2021?
A. I don't recall the exact date of the resignation, but that sounds about right.
30. Q. It was less than two months ago when they resigned?
A. Correct.
31. Q. And is it fair to say that KPMG and CannTrust reached a mutual decision to part ways?
A. Yes.
32. Q. So, this suggests no one fired anyone?
A. Correct.
33. Q. Have you appointed a new auditor yet?
A. No, we have not.
34. Q. But I take it you're in the process of looking for one?
A. We are.
35. Q. And you're aware that KPMG withdrew its audit report for the full fiscal year of 2018,

and for the first quarter of 2019, because the company press-released that those reports could not be relied upon?

A. Yes.

36. Q. And am I correct that CannTrust has not restated its financial statements for its fiscal years ending in 2018, or that first quarter of 2019?

A. Correct.

37. Q. And there are no audit financial statements for the full year of 2019, either?

A. No.

38. Q. So, it's fair to say that the financial statement impact of the regulatory noncompliance issues that led to the class actions against CannTrust and KPMG has not been set out in any restatement?

A. No, it has not.

39. Q. No auditor has opined on the financial statement impact of these regulatory problems?

A. No.

40. Q. And as you've been examined about it before, you're aware the company pursued a special committee process in connection with the events involving Health Canada, which ultimately led to a

licence suspension for CannTrust?

START OF FILE 3

A. Yes.

41. Q. And I understand that the special committees mandate was to investigate the Health Canada noncompliance matter in its entirety?

A. Among other things, yes.

42. Q. But with respect to that noncompliance, I take it the special committee was given a comprehensive mandate?

A. I'm not completely aware of what their full mandate was, but I understand generally that that is accurate, yes.

43. Q. And in your view, when the special committee announced the completion of its investigation on October 24th, 2019, it had fully investigated the matter?

A. I believe so, but I am not privy to all of the findings that the special committee would have investigated or found.

44. Q. But sitting here today, you believe it was a thorough process?

A. Yes.

45. Q. And that special investigation was conducted with the assistance of professional advisors?
A. Yes, it was.
46. Q. With the assistance of legal counsel, which was McCarthy Tetrault?
A. Yes.
47. Q. And also with the assistance of Ernst & Young?
MR. D'SOUZA: They were not involved.
THE DEPONENT: Yes, I don't believe they were involved, or Shane has just confirmed that they were not involved.
48. MS. LAING: They were not involved?
MR. D'SOUZA: Yes, Mr. Guyatt has very limited knowledge of various things involving the special committee scope, process and conclusions.

BY MS. LAING:
49. Q. All right. Am I correct that Ernst & Young did some work on controls, or remediation?
A. That is correct. Not so much for remediation, but leading up to the noncompliance, they had been engaged to assist with the review of

the design effectiveness and operating effectiveness of our internal controls.

50. MS. LAING: Okay, so it's fair to say they were retained by the company but not by the special committee in connection with its investigation? It's okay for your counsel to answer that.

MR. D'SOUZA: Yes. So, I think to be accurate, they were initially retained by the company. They conducted very preliminary work on the mandate that Mr. Guyatt just described, and then counsel retained them to complete the rest of their work.

BY MS. LAING:

51. Q. Okay. Mr. Guyatt, would you agree with me that one of the objectives of the special committee process was to hold those responsible for the noncompliance accountable?

A. Like I said, I'm not privy to all of the objectives and the responsibilities of the special committee, but that certainly seems like one of the mandates, yes.

MR. D'SOUZA: We can certainly agree

that that certainly was the case for any CannTrust officers, directors and employees.

BY MS. LAING:

52. Q. And indeed, a number of employees departed the company as a result of the special committee investigation?

A. Yes.

53. Q. And that included the former CEO, Peter Aceto?

A. Yes, it did.

54. Q. And the chair of the board, Eric Paul?

A. He resigned...he was asked to resign.

55. Q. As a result of the special committee investigation?

A. Correct.

56. Q. And at the time of the withdrawal of KPMG's audit report, CannTrust issued a press release, and I would like to take you to that press release. It's dated August 9th, 2019. I'm going to ask my colleague, Mr. Szirmak, to screen-share it with you.

MR. D'SOUZA: We see it, if you can just zoom in, please?

THE DEPONENT: I can't really read it.

57. MS. LAING: Could you zoom in? Because I think the witness is some distance back.

THE DEPONENT: Yes, I am.

58. MS. LAING: Are you able to see that?

MR. D'SOUZA: If you can just zoom in maybe two or three clicks more, please?

THE DEPONENT: Maybe one...there we go, that's good.

MR. D'SOUZA: Actually, one more for me, please.

THE DEPONENT: Okay.

MR. D'SOUZA: Perfect, thank you.

BY MS. LAING:

59. Q. All right. So, the paragraphs I wish to focus on are the first one, which discussed the fact that,

"...KPMG has informed the company that effective August 8th, 2019, it was withdrawing its report dated March 27th, 2019 on the company's consolidated financial statements as at and for the year ended December 31st, 2018, and its interim report to the audit committee dated May 13th, 2019 on the unaudited, condensed, interim consolidated financial statements as at and for the three-month period ended March 31st, 2019, and that therefore, the KPMG reports, so defined, should no longer be relied upon..."

I should ask you first of all, were you involved in the preparation of this press release?

A. I don't recall if I prepared it, but I would have reviewed it before it went out.

60. Q. Okay, and the press release goes on to say that,

"...KPMG remains CannTrust's independent auditor..."

That information is all correct, to the best of your knowledge?

A. Yes.

61. Q. Okay, and then as we go down, I would like to actually scroll down to the third paragraph. It says,

"...KPMG's decision was prompted by the company's caution against reliance on its financial statements for the year ended

"December 31st, 2018, and for the three months ended March 31st, 2019, as well as the recent sharing with KPMG of newly uncovered information from the special committee's investigation, including information that led to senior leadership changes announced on July 25th, 2019. KPMG was not aware of the information recently shared by the company..."

And we'll just scroll down to the next page,

"...when it issued the KPMG reports, and had relied upon representations made by individuals who are no longer at the company..."

I take it that is consistent with your understanding of KPMG's...first of all, their reason for withdrawing their reports?

A. Yes.

62. Q. And when...the discussion in this process about KPMG not having received information, or not having had information that was uncovered under the special committee...as a result of the special committee process, that's consistent with your understanding of matters as they stood at the time of this press release?

A. Yes.

63. Q. And KPMG having relied upon representations made by individuals who are no longer at the company, I take it you agree that KPMG had relied on representations by persons no longer at the company?

A. Yes.

64. Q. Were any of those persons no longer at the company terminated or asked to resign as a result of the special committee process?

A. They would have been terminated or asked to resign, one or the other.

65. Q. So, that is a yes?

A. Yes.

66. Q. Okay. I think that was all...

MR. D'SOUZA: And sorry, Counsel, just so there's no mystery, the reference there, the company's position, actually is a reference to Ms. Aceto and Mr. Paul.

67. MS. LAING: Okay, thank you. Mr. D'Souza, would you have any objection to us marking this document as an exhibit to this cross-examination?

MR. D'SOUZA: No objection.

68. MS. LAING: Okay, and we'll share these

with you and with Madam Reporter at the end of this, and to make sure that everything is marked.

--- EXHIBIT NO. 1: CannTrust's Press Release, August 9th, 2019

BY MS. LAING:

69. Q. That's all I had to ask about this document. We can leave it. Just bear with me as I reorganize my screen. Greg, were you aware that the company was asked by two separate law firms to pursue derivative claims against KPMG?

A. I don't know the details of that, but I am aware that there were derivative claim discussions, but I wouldn't have been heavily involved in any of that process.

70. Q. And were you aware that on both occasions, meaning in respect of both requests, the company declined to pursue derivative proceedings?

A. Yes.

71. Q. Okay. I don't think I'll take you to the correspondence about that if that's not something that you would have seen in the normal course at the relevant time. Is it fair to say that

you weren't involved in the decisions to...

A. No. No, like I said, I was generally aware that that was a matter under discussion, but I was not involved in those discussions.

72. Q. Okay. Greg, have you reviewed the affidavit of Serge Kalloghlian, who is a member of the coalition of plaintiffs appointed as representative counsel, and Mr. Kalloghlian filed an affidavit last week also supporting the sanctioning of the CCAA plan? Did you read that?

A. I have not reviewed it.

73. Q. Okay. If it's useful then, maybe what we should do is go to a document which is an exhibit to CannTrust's record in opposition to the sanctioning of the plan, and it's at tab H of that record, just so everyone can find it again, we don't need to mark it as an exhibit. And I'm going to ask Mr. Szirmak if he could screen-share it with everyone.

MR. SZIRMAK: And sorry, what's the name of the document?

74. MS. LAING: This would be the e-mail exchange between myself and Serge Kalloghlian.

MR. SZIRMAK: Just give me one moment.
75. MS. LAING: Yes, tab H of our record. We'll just take a minute while Mr. Szirmak locates that.
MR. SZIRMAK: Got it up, it's just loading.

BY MS. LAING:
76. Q. All right, so if we go to the bottom of this document, because it's an e-mail chain, just to give you a sense of what was discussed here.
A. Do you mind making it one notch bigger?
77. Q. All right. So, the first e-mail in this chain is my e-mail to representative counsel dated June 3rd, and it's me asking to arrange for a cross-examination, and I am noting there that Mr. Kalloghlian was asserting in his affidavit that,

"...The CCAA representatives' compromise with the original settlement parties was driven, among other things, by the significant potential value of CannTrust's potential claim against KPMG..."

And I indicated to Mr. Kalloghlian that we wanted to explore this assertion, and that we were asking for communications between CannTrust and the representative plaintiffs that related to the value of this potential claim between CannTrust and KPMG. So, that's just to give you the background.

A. Okay.

78. Q. And if we move up this chain, he tells me that they are available for cross-examination, but he doesn't respond [inaudible]

MR. D'SOUZA: Just on our end, Ms. Laing has frozen.

MR. SZIRMAK: Likewise. Perhaps we can go off the record for a minute while we get this resolved.

--- DISCUSSION OFF THE RECORD

79. MS. LAING: So, just for the record, my Zoom connection was disconnected briefly. I'm back now, and I just want to reaffirm that we're talking about an e-mail exchange between myself and representative counsel. We've got it up on the screen, this is the document that is Exhibit H from the responding motion record of KPMG.

MR. SZIRMAK: Sorry, just to cut in there, we went off the record, I just want to make sure we're back on the record.

80. MS. LAING: We are back on the record.

MR. D'SOUZA: We've seen these two e-mails, if you can scroll up.

<u>BY MS. LAING</u>:

81. Q. Please scroll up so we can move up. There is another brief exchange where we talk about the timing of the examination, and then we move up again. And I have a communication to me from Mr. Kalloghlian, and he says,

"...Andrea, all discussions that took place during the negotiation of the RSA are covered by the confidentiality provisions in the mediation order and settlement and common interest privilege. The communications and documents you refer to below, if any, fall in that category and will not be produced.

No documents responsive to your request were exchanged with CannTrust that are by themselves not subject to the mediation order or applicable privilege, and CannTrust provided no such documents that were created before the mediation order..."

So, again, just to be fair to you, and your counsel did have someone attending on Mr. Kalloghlian's cross-examination this morning, but he clarified for me that he was saying that CannTrust didn't give the representative plaintiffs any documents that were produced before the date of the mediation order that related to this potential claim by CannTrust against KPMG. And I just wanted to confirm whether that is consistent with your understanding.

MR. D'SOUZA: I can answer, just because we were involved directly.

82. MS. LAING: It's also fine for Counsel to answer it.

MR. D'SOUZA: And that is correct.

BY MS. LAING:

83. Q. Okay, and I think we can stop screen-sharing this document now. Right, and just bear with me, I have to reorganize my screen again. And you say at paragraph 23 of your June 2nd affidavit that the date of the mediation order was May 8th, 2020. Does that sound correct?

A. Yes.

84. Q. So, based on what Mr. Kalloghlian told me about this potential claim by CannTrust against KPMG and what you just told me about the exchange of documents, if any, not including anything that CannTrust had prepared prior to May 8th, 2020, is it fair to say that any value the plaintiffs are placing on a claim by CannTrust against KPMG is a value that they have developed themselves?

MR. D'SOUZA: Yes, I mean, as a factual matter, the company has provided no facts or analyses to assist them in their theory of any potential claim the company might have against KPMG.

85. MS. LAING: Thank you, Mr. D'Souza, and it's absolutely fine for you to answer these questions. But just to clarify, so you would agree with me that whatever value the representative counsel are placing on this potential claim by CannTrust against KPMG, that's not something that is supported by representations that CannTrust has made?

MR. D'SOUZA: I'm struggling with the

question there, Ms. Laing, only because they may have a theory of the case relying on representations in public disclosure documents, but I don't think that was your intention. Certainly...

86. MS. LAING: No, that wasn't.

MR. D'SOUZA: So, the company has not provided them anything, you know, privately, that we believe has assisted them in coming up with the theory of, you know, their case, or valuing damages, or assessing the merits of that case.

BY MS. LAING:

87. Q. Okay, thank you. Greg, is it fair to say that unsecured creditors of CannTrust Holdings are being paid out in full?

A. No. Well, sorry, CannTrust Holdings, yes.

88. Q. So, CannTrust Holdings has the funds to make those payments?

A. Yes, it does.

89. Q. So, when we're talking about CannTrust Holdings, the liability it is seeking to resolve through the CCAA process is its liability in

the securities class actions?
A. Yes.
90. Q. But CannTrust isn't asking the court to excuse it from the liability exposure represented by the class proceedings. It has agreed to pay 50 million dollars to settle them, correct?
A. Correct.
91. Q. Going forward, assuming the second amended and restated plan is sanctioned, and the plan is implemented, do you believe that CannTrust will eventually become profitable?
A. Yes, I do.
92. Q. However, I understand that in the short term, until it reaches a profitable state, CannTrust requires financing assistance?
A. That's correct, and we have obtained financing for that purpose.
93. Q. And speaking of that financing work, that is a DIP and exit loan, to use the terminology used by my CCAA partners. And that DIP and exit loan is in the form of a credit facility for 22.5 million dollars, correct?
A. Correct.
94. Q. And I understand it's for a term of 12 months, but can be renewed on certain terms for

an additional 12 months?
A. That's correct.
95. Q. And this DIP and exit loan is designed to provide funding during the restructuring period covered by the CCAA plan, and to provide working capital upon emergence from CCAA, is that correct?
A. Yes.
96. Q. Would it be fair to describe the DIP and exit loan as an essential bridge that will facilitate the CannTrust Group emerging from the CCAA proceedings and continuing to operate?
A. In my view, yes.
97. Q. And presumably, you believe that that loan, the DIP and exit loan, is sufficient to support the company's financing needs as it restructures and gets itself back to a cash flow positive state?
A. Yes.
98. Q. In other words, you agree with me that 22.5 million dollars should be enough not only to get the company through CCAA, but to provide the working capital it needs to eventually become cash flow positive?
A. That's our assumption today, yes.

99. Q. And you say in your affidavit in support of a plan sanction, at paragraph 14, that,

"...If the CCAA is not implemented in a timely manner, the only realistic alternative would be a liquidation of the assets of the CannTrust plan companies..."

Correct?

A. Yes, correct.

100. Q. And CannTrust has agreed to pay 50 million dollars to settle investor claims on behalf of itself and certain directors and officers?

A. Correct.

101. Q. But you would agree with me that if you didn't need to pay that 50 million dollars, CannTrust would have that money to invest in the business?

A. Yes, but there would still be litigation outstanding, so I'm not sure I understand the question exactly.

102. Q. It's a simple question. If you didn't have to pay the 50 million dollars to the plaintiffs, you could use that to invest in the business?

A. On a temporary basis, yes.

103. Q. And this is just simple math, but 50

million dollars is more than twice the amount you've stated the company needs to return to profitability? You would have 22.5 million and another 27.5 million to fight or settle litigation as you saw fit?

A. Yes.

104. Q. And there has been no admission of liability of CannTrust or other settling defendants to the class action claims?

A. I'm not sure I understand the question.

MR. D'SOUZA: I'll answer it. No, there is no admission of liability. Yes, I'll leave it at that.

BY MS. LAING:

105. Q. Would it be fair to say that the litigation is at a relatively early stage?

MR. D'SOUZA: Well, I'll answer that as well. It's at a relatively early stage, yes.

BY MS. LAING:

106. Q. There have been no discoveries or documentary productions?

A. No.

107. Q. And I understand that CannTrust would have certain cooperation obligations under the plan if it were sanctioned. CannTrust would share documents and information with the representative counsel in the class actions, correct?

A. Yes.

108. Q. But I take it no such cooperation has been provided yet?

A. Correct.

109. Q. Greg, I don't want you to disclose anything privileged you may have heard from the company's counsel, but do you accept that it can take many years to litigate a class action?

A. I am not an expert on class action processes, so I really can't comment on how long it might take.

110. Q. Would it shock you if I told you it could take more than eight years?

MR. D'SOUZA: Sorry, hold on. Ms. Laing, it depends on the nature of the class action, the relevant allegations, the evidence underlying those allegations, the theory of people's cases, and how fast various parties move. So, as a general statement, yes, we don't disagree with that proposition.

111. MS. LAING: That it could take as much as eight years?

MR. D'SOUZA: It could.

<u>BY MS. LAING</u>:

112. Q. Would you agree with me that class action lawsuits can and often do settle for a fraction of their claimed value?

A. Yes.

113. Q. Further, I understand there is a 45 million dollar tower of Side ABC directors and officers liability coverage, is that correct?

A. Yes.

114. Q. And I understand that coverage to the company itself, Mr. Paul and Mr. Aceto has been denied, is that correct?

A. Yes.

115. Q. However, other directors and officers are being covered for their legal fees in the securities class actions?

A. Yes.

116. Q. Is that correct?

A. I believe so.

117. Q. And the litigation costs of these

other officers and directors, which would include yourself, would be covered if there was a settlement with the representative plaintiffs, and if there wasn't a settlement with the representative plaintiffs.

MR. D'SOUZA: Sorry, covered by whom, Ms. Laing? Because they are certainly not being covered by the insurers at this stage.

118. MS. LAING: Sorry, I thought Mr. Guyatt just told me that the directors and officers other than Mr. Aceto and Mr. Paul were having their litigation costs covered.

MR. D'SOUZA: No, I think he meant that coverage had not been denied, which means they are entitled to coverage, but their costs are not being paid for by any insurer.

THE DEPONENT: Thanks for clarifying that.

119. MS. LAING: Are not being paid for or won't be...

MR. D'SOUZA: They are not being paid right now. So, in other words, the company is...and this is in his affidavits as well, and various statements, it's the company that's paying for legal expenses.

THE DEPONENT: Thanks for clarifying.

120. MS. LAING: And is the company intending to seek recovery of those expenses as Side B expenditures under the D&O coverage?

MR. D'SOUZA: The company is assigning its claim, as are the settling directors and officers, to the securities claimants trust, so that will be something the securities claimants trust will be able to look into.

121. MS. LAING: And would you agree with me that if this plan were not sanctioned, and the settlement is not approved, that CannTrust and its directors and officers would still have a claim against the insurers for those amounts?

MR. D'SOUZA: They would still be covered, yes.

122. MS. LAING: And I understand there is an additional layer of 20 million dollar excess Side A DIC coverage, which is being made available to Mr. Aceto and Mr. Paul?

MR. D'SOUZA: Yes, and perhaps others,

but to our knowledge, only those two.

123. MS. LAING: They're being covered under the Side A DIC layer because they have been refused indemnification coverage under the 45 million dollar Side ABC tower, is that correct?

MR. D'SOUZA: That's our understanding.

BY MS. LAING:

124. Q. So, if this plan wasn't sanctioned, there would be coverage under the 45 million dollar tower, for the directors and officers under than Mr. Aceto and Mr. Paul, correct?

A. I believe so.

125. Q. And there would be coverage for Mr. Aceto and Mr. Paul under the 20 million dollar Side A DIC tower, correct?

A. I believe so.

126. Q. So, if this plan weren't sanctioned, the only litigation-related costs the company would face are those relating to its own exposure, separate and apart from its directors and officers?

A. Yes.

MR. D'SOUZA: No.

THE DEPONENT: Oh, no?

MR. D'SOUZA: No, just as a pure matter of the way the insurers have acted in this matter so far. As I said, it's the company that's funding legal expenses, and they have assigned claims...well, on plan implementation, to the securities claimants trust. So...

127. MS. LAING: And if that assignment did not take place, the claim would remain with the company to be pursued?

MR. D'SOUZA: The company would have to pursue it and expend, sure, legal expenditure, time, resources to pursue it, with an uncertain, you know, potential result.

128. MS. LAING: But my understanding is that with respect to the directors and officers, other than Mr. Aceto and Mr. Paul who are covered elsewhere, there has been no denial of coverage, correct?

MR. D'SOUZA: There has been a reservation of rights, but no denial of coverage.

129. MS. LAING: All right, and Mr. D'Souza, I expect you've seen coverage letters

before, reservation of rights by carriers is not uncommon, is it?

MR. D'SOUZA: No, but recision of a contract is pretty uncommon, which has happened to three insureds in this case.

130. MS. LAING: Now, with respect to the recision of the contract, and it's interesting you say that it's unusual, would you agree with me that if this plan is not sanctioned, the company itself would also have the ability to pursue a claim against its carriers?

MR. D'SOUZA: They would have that potential claim, sure.

BY MS. LAING:

131. Q. So, Greg, there is a certain degree of distraction and drain on a company's resources that comes with a lawsuit, when management and directors have to devote time to it. But am I correct that by virtue of the channeled claim provisions that have been added to the plan, everyone including yourself can still be sued for the purpose of claiming under the insurance?

A. Can you repeat the question?

132. Q. I want to talk about the channeled claims, and the fact that all of the directors and officers, even if they were to settle, and the plan were to be implemented, there is still a provision that allows them to be sued for the purposes of claiming under the insurance. Is that correct?

MR. D'SOUZA: Mr. Guyatt may not understand those provisions, Ms. Laing.

BY MS. LAING:

133. Q. He was cross-examined about them previously, and did seem to understand that he could be sued, and he would have to respond to the claim, but that he would not be personally liable on his own assets. Is that your understanding, Mr. Guyatt?

A. That sounds like what my understanding is, yes. It's a fairly complex matter, but the general concept, that sounds accurate.

134. Q. I think you do understand it. So, my point is that there is a certain amount of distraction to a company when its directors and officers are focusing on defending claims. And my basic point is that you're going to face that distraction and inconvenience in any event, even if

the plan is implemented. Do you agree?

MR. D'SOUZA: No, we don't, because you're assuming the insurers do not settle.

135. MS. LAING: If the insurers don't settle. I'm talking about the plan as it stands today.

MR. D'SOUZA: Well, if the insurers settle, then that would not happen.

136. MS. LAING: And if the insurers don't settle, but the plan is still implemented?

MR. D'SOUZA: Then you're right. So, I just wanted to qualify it, Ms. Laing, just so we're accurate.

BY MS. LAING:

137. Q. I understand that one of the RSA terms is that if the coalition plaintiffs recover amounts...I guess I should call them "representative counsel"...recover amounts in the litigation in excess of 250 million dollars, CannTrust will have a right to claim 50 million dollars in excess of legal costs from them. Is that your understanding?

A. Yes.

138. Q. So, CannTrust is keeping a residual interest in the claims it would assign to the

litigation trust if the plan were implemented, correct?

A. Yes.

139. Q. And the more the plaintiffs recover, the more CannTrust stands to recover?

A. Yes.

140. MS. LAING: Okay, I would like to take a break now. I think I am nearly done, but I am just hoping we could go off the record for a few minutes, and I can confer with my partners.

MR. D'SOUZA: Sure, thank you.

--- upon recessing at 4:42 p.m.

--- A BRIEF RECESS

--- upon resuming at 4:44 p.m.

141. MS. LAING: I don't believe we have any undertakings or refusals, so those are my questions for you today.

THE DEPONENT: Thanks, Andrea.

142. MS. LAING: And subject to any re-examination, I think we're done.

--- upon adjourning at 4:45 p.m.

INDEX OF EXHIBITS

EXHIBIT NUMBER	DESCRIPTION	PAGE NUMBER
1	CannTrust's Press Release, August 9th, 2019	20

INDEX OF UNDERTAKINGS

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REPORTER'S NOTE:

Please be advised that any undertakings, objections, under advisements and refusals are provided as a service to all counsel, for their guidance only, and do not purport to be legally binding or necessarily accurate and are not binding upon Victory Verbatim Reporting Services Inc.

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Certified Correct:

Tala Rida
Verbatim Reporter

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

SUPPLEMENTARY RESPONDING MOTION RECORD OF KPMG LLP
(Re: Plan Sanction Motion)

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