

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

BRUCE MALOTT,

Plaintiff,

vs.

No. D-101-CV-2011-03315

**ANTHONY CORRERA; MARC CORRERA;
GARY BLAND; SAUL MEYER; ALDUS EQUITY
PARTNERS, L.P., a/k/a RENAISSANCE PRIVATE
EQUITY PARTNERS, L.P.; ALDUS MANAGEMENT
CO., LLC; ALDUS EQUITY LLC; ALDUS CAPITAL,
LLC; GSS HOLDINGS (NMERB), INC.; ERASMUS
CAPITAL MANAGEMENT, L.P.; ERASMUS
CAPITAL GP, LLC; MATTHEW O'REILLY;
RICHARD ELLMAN; DEUTSCHE BANK A.G.;
DEUTSCHE BANK AMERICAS HOLDING CORP.,
d/b/a REEF PRIVATE EQUITY, a unit of REEF
ALTERNATIVE INVESTMENTS, a management
business of DEUTSCHE BANK'S ASSET
MANAGEMENT DIVISION; DBAH CAPITAL, LLC;
THE TOPIARY TRUST c/o Caledonian Bank and Trust
Limited; DB INVESTMENT MANAGERS, INC.;
KEVIN PARKER; CHARLES B. LEITNER; TIMOTHY
B. KEITH; THOMAS CURTIS; CESAR A. BAEZ;
BRIAN RICE; JOHN STIMSON; DEUTSCHE BANK
JOHN DOES 1 through 5; VANDERBILT FINANCIAL
TRUST; VANDERBILT CAPITAL ADVISORS,
LLC; VANDERBILT FINANCIAL, LLC; PIONEER
INVESTMENT MANAGEMENT U.S.A., INC.;
PATRICK LIVNEY; KURT WILHELM FLORIAN, JR.;
MARTIN CABRERA; CABRERA CAPITAL
MARKETS, INC.; AJAX INVESTMENTS, LLC;
AJAX ADVISORS, LLC; ARLENE RAE BUSCH;
DAV/WETHERLY FINANCIAL, L.P.; WETHERLY
MANAGEMENT LLC; DANIEL WEINSTEIN;
VICKY LEE SCHIFF; JULIO RAMIREZ; SDN
ADVISERS, LLC; L2 CAPITAL MANAGEMENT, LLC;
L2 INVESTMENT ADVISERS, LLC; L2 ASSET
MANAGEMENT, LLC; and JOHN DOES 1 through 50,**

Defendants.

**PLAINTIFF BRUCE MALOTT'S OMNIBUS RESPONSE TO DEFENDANTS'
SECOND ROUND OF MOTIONS TO DISMISS**

INTRODUCTION

All of the Defendants' pending motions to dismiss are anachronisms. That is, while the Defendants' motions appear on their face to be exhaustively researched, elegantly composed, and no doubt frightfully expensive, it is as if they are speaking an extinct language, completely unknown in the current time and place.

The time, of course, is 2013. The place is the State of New Mexico. In the current time and place, as has been true now for more than *seventy years*, our Courts follow the modern pleading rules first promulgated in the United States Courts in 1938. Indeed, when our Supreme Court adopted the Federal Rules in 1942, New Mexico became only the third state Nationwide to do so. Walden, *The "New Rules" in New Mexico*, 25 F.R.D. 107 (1960). Accordingly, notwithstanding the inevitable early growing pains in moving from Common Law fact pleading to modern notice pleading, our Courts began applying liberal pleading rules a decade before it became commonplace for State Courts to do so. *Id.*, 25 F.R.D. at 107-08.

In 1960, following nearly two decades of experience with modern pleading standards in New Mexico's Courts, Professor Walden discussed the importance of this procedural sea change to the "just settlement of judicial controversies:"

One of the most accurate measures of the success of any procedural reform movement is the extent to which judicial decisions rest upon the merits of controversies rather than upon technical niceties of written documents artifacted by attorneys before trial. Common law pleading with its extreme dialecticism almost guaranteed against this ever occurring except through sheer perserverance or chance. . . . The Federal Rules, on the other hand, provide a refreshing contrast, for nothing could be better designed to eliminate unnecessary controversy over pleadings than the simple requirement that the

pleader state his claim for relief in plain terms, short and to the point. . . . Of course, the federal courts have long recognized that the purpose of Rule 8's modest imposition on the pleader was to obviate the need for detailed particularization of claims and to dispense once and for all with the morass of technicalities that for centuries had been employed to defeat pleadings. For these reasons, the notion that a complaint must contain facts sufficient in themselves to constitute a cause of action has been consistently and emphatically rejected. . . . Flexibility in the framing of pleadings and proof of claims is also an essential ingredient of any comprehensive system of procedural reform. In this respect, the Federal Rules measure up to the highest of standards. The Rules of New Mexico, patterned almost exactly after their federal counterparts, expressly permit unlimited joinder of claims, pleading in the alternative, demanding relief in the alternative, as well as pleading inconsistent claims.

Id., 25 F.R.D. at 108-11 (footnotes omitted). *But see, e.g.*, The Deutsche Bank and Vanderbilt Defendants' Motion to Dismiss the Second Amended Complaint (filed October 30, 2013) (contending, for example, that Plaintiff's pleading supposedly should be dismissed because it pleads in the alternative, Section IV(D), p. 23, and because two Deutsche Bank employees allegedly "did nothing wrong," Section III, pp. 17-18).

Notwithstanding this procedural revolution more than seven decades ago – that is, long before even the most senior members of the current New Mexico Bar took their oath – the "extreme dialecticism" employed by the Defendants here to assert "a morass of technicalities" has hogtied this lawsuit at the starting gate for two years. But for Plaintiff's "sheer perserverance," the Defendants already would have succeeded in frustrating the prospects for a decision "rest[ing] upon the merits . . . rather than upon technical niceties of written documents artifacted by attorneys before trial." *Id.*

In accordance with the governing principles of modern rules of procedure, Rule 1 of New Mexico's Rules of Civil Procedure for the District Courts provides that "[t]hese rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action." Rule 1-001(A) NMRA 2013. Nevertheless, in the instant case, the well-heeled

Defendants have employed apparently limitless litigation budgets to accomplish precisely the opposite. They have done so by retaining an army of preeminent lawyers to derail the judicial process at the pleading stage with 400 pages of motions and counting (not including exhibits), all of which ignore the procedural posture of the case and are calculated both to delay the proceedings and lead this Court into error.

Indeed, the Defendants already succeeded in part during the last round of motions in leading the then presiding Judge into error, by persuading the Court to require Plaintiff to “file an amended pleading supplying additional factual allegations in support of his claims.” Order filed June 14, 2013. *But see, e.g., Kysar v. BP America Production Company*, 2012-NMCA-036, ¶¶ 28-30, 273 P.3d 867, 876 (reversing district court determination that plaintiff’s fraud allegations were inadequate, and holding that – notwithstanding the reference to “particularity” in Rule 1-009(B) – (a) “our rules merely require pleadings to contain a short and plain statement of the claim or defense,” and (b) even the entirely conclusory allegations in *Kysar* were “sufficient to allege issues of misrepresentation, fraud, and mistake,” since they need only put Defendant “on notice that such claims were being made”). The erstwhile presiding Judge’s interlocutory error has been rendered moot, however, by Plaintiff’s filing of his Second Amended Complaint. Plaintiff’s now-pending pleading even would have satisfied our State’s pre-1942 fact pleading rules. Therefore, Plaintiff’s Second Amended Complaint is orders of magnitude more detailed than required under the modern rules that have been in affect for the last seventy-plus years. *See Walden, The “New Rules” in New Mexico*, 25 F.R.D. at 111 (“the purpose of Rule 8’s modest imposition on the pleader was to obviate the need for detailed particularization of claims and to

dispense once and for all with the morass of technicalities that for centuries had been employed to defeat pleadings”).¹

Accordingly, the ongoing proceedings now are governed by the Court’s *second* ruling. That is, despite the Defendants’ best efforts to lead the former presiding Judge into *reversible* error (and not just *interlocutory* error) by insisting that Plaintiff’s case should be dismissed with prejudice, the June 14, 2013 Order provides: “Defendants’ requests for dismissal with prejudice are not well-taken and are DENIED.” Nevertheless, in addition to ignoring the current time and place, the Defendants likewise ignore this inconvenient ruling.

There is nothing new in Defendants’ current requests for dismissal with prejudice; that is, everything in the Defendants’ pending motions first was presented to the Court more than a year and a half ago. The record unequivocally demonstrates that, if any of those arguments had been well-taken during the first round of motions, (a) repleading would have been futile, (b) the Court would have dismissed with prejudice, and (c) if the Court had done so in a timely manner, the Court of Appeals in all likelihood already would have had sufficient time to correct the error.

For example, if there had been any room for doubt about the gravamen of Plaintiff’s claims before the June 4, 2012 Motions Hearing, Plaintiff erased that doubt by responding to the Court’s questions with the following concessions:

¹ If this interlocutory error were not moot, this Court would have had both the authority and the duty to correct it. *See Tabet Lumber Company, Inc. v. Romero*, 117 N.M. 429, 431, 872 P.2d 847, 849 (1994) (a newly-assigned judge “has the inherent authority to reconsider” the prior judge’s “interlocutory orders, and it is not the duty of the [district court] to perpetuate error when it realizes it has mistakenly ruled”) (citation and internal quotation marks omitted) (bracket in original). Given that the erroneous ruling has been rendered moot, however, Your Honor can avoid perpetuating that prior error without reaching the *Tabet* issue.

So if that -- just to be clear, if it's correct, as a matter of law, that [Plaintiff] has to be the object, the primary object of the conspiracy, that's not our case. There are allegations in the Complaint that he was an intended victim, but it's not his money. So it would have to be his money, then he doesn't have a claim. But we don't believe that's correct legally. . . . But, number one, what you're saying is right. It is the impact from the publicity of this. And the question is, is that enough. And in Clark, the Court held that it was enough. . . . The Clark Court thought that it was [enough to get past the standing argument]. . . . But if that's the only issue, the question becomes, is Clark wrong as a matter of law under all factual scenarios? So that even when you have a situation where Defendants specifically put a Plaintiff at risk for just this kind of injury, knowing that they're putting him at risk for just that kind of injury, and that he suffers that injury, but the injury is to his reputation as a result of press reports and other information in the public domain, is that automatically, under all facts, a lack of proximate cause? . . . So the bottom line is, in New Mexico, where we have notice pleadings, so that every conceivable inference goes to the Plaintiff, . . . [t]he question is, is there a black letter rule, in this case, that's so clear, under any facts we might prove, that Mr. Malott can't recover under any theory? I think that's their argument, and I think under Clopp [sic] and Bridge, it fails.

Excerpts from Transcript of June 4, 2012 Motions Hearing, pp. TR-4 through TR-7 and TR-17 through TR-19, included in Exhibit 1 hereto.

Given Plaintiff's above-quoted concessions, if the Judge had disagreed with Plaintiff's legal contentions then the Court necessarily would have agreed with Defendants' arguments for dismissal with prejudice, which are repeated in the current round of defense motions. If so, the Court would have been required to dismiss with prejudice. Indeed, unless the Court had rejected Defendants' arguments, no other result would have been possible on this unequivocal record. The Court certainly would not have squandered public and private resources by unleashing a second tidal wave of defense motions as a mere exercise in futility, if the record already mandated dismissal with prejudice.

Therefore, based on the prior record as well as for the reasons set forth in this Response, Plaintiff Bruce Malott respectfully requests that this Court deny this second round of Defense

motions in its entirety, so that this case finally can begin to proceed in accordance with New Mexico's modern rules of civil procedure.

PROCEDURAL HISTORY

This case was commenced on November 1, 2011; that is, more than two years ago. Nevertheless, not a single represented Defendant has filed an answer, and none will until this Court has disposed of the boatload of pending motions to dismiss.

Plaintiff filed his first amended complaint in late 2011, before a single Defendant had responded to the initial pleading. That first amended complaint added five additional defendants and made other relatively minor changes to Plaintiff's initial pleading. Thereafter, in the *spring of 2012* (following lengthy extensions requested by various Defendants), Defendants filed their first tidal wave of motions to dismiss. The initial group of motions raised all of the primary grounds Defendants asserted the first time around – and have reasserted now – in support of their requests for dismissal.

The then presiding Judge held the first hearing on the motions to dismiss on *May 15, 2012*, and expressed the intention to (a) hold a second hearing quickly, (b) ask the parties to respond to a number of questions, and (c) promptly resolve the then outstanding motions. Excerpts from Transcript of May 15, 2012 Motions Hearing, pp. TR-57 through TR-58, included in Exhibit 2, hereto.

The Court thereafter scheduled the *June 4, 2012* hearing, at which the Judge (a) completed hearings on motions that raised all of the primary arguments for dismissal, (b) set another hearing to occur on *June 20, 2012*, and (c) stated: "I'll try and address the motions that I've already heard by letter opinion between now and then. I'm not sure I'll get to everything,

though. But just to try and give myself a timetable so that you could also anticipate getting some resolution, at least to the issues that have been argued.” Exhibit 1, hereto, p. TR-47.

The Judge did not follow his timetable, however. Indeed, with the exception of a single *in personam* jurisdiction motion, *the Court failed to rule on any of the motions to dismiss until nearly a year later*. Then on *May 28, 2013*, the Court dismissed Plaintiff’s long-languishing pleading with leave to replead Plaintiff’s claims and “modify them with more detail.” Given both the excessive delay and the Court’s decision to send Plaintiff back to the drawing board without identifying a single specific deficiency in Plaintiff’s pleading, Plaintiff’s counsel asked the Judge if he could give Plaintiff some “specific . . . guidance” on what he “thought was lacking.” In response, the Court provided little guidance beyond stating: “whatever additional detail you have that would be helpful.” Excerpts from Transcript of May 28, 2013 Motions Hearing, pp. TR-1 through TR-4, included in Exhibit 3, hereto.

Despite Plaintiff’s confidence that the Judge’s ruling was erroneous and indeed directly-contrary to binding appellate authority, *see, e.g.*, Exhibit 3, p. TR-3, Plaintiff persevered and filed his Second Amended Complaint on August 27, 2013. Plaintiff did so without the benefit of any discovery, and in the absence of any specific guidance from the Court, based solely on Plaintiff’s personal knowledge and publicly-available information, including documents responsive to public records requests. Notwithstanding these constraints, however, which are entirely foreign to modern pleading practice, Plaintiff produced a highly-detailed, 284-page fact pleading. Specifically, Plaintiff’s Second Amended Complaint contains 341 paragraphs of detailed averments, as well as seventeen exhibits directly supporting Plaintiff’s claims.

Plaintiff’s current pleading arguably would be sufficient to withstand motions for summary judgment at the conclusion of pretrial factual development, let alone motions to

dismiss at the initial pleading stage. *See* Rule 1-056(C) NMRA 2013. Predictably, however, each and every one of the represented Defendants once again refused to file an answer simply denying the grave allegations of Defendants' misconduct. Instead, they saw fit to burden this Court once again with hundreds of pages of motions to dismiss pursuant to Rule 1-012(B), which studiously ignore that our Rules "obviate[d] the need for detailed particularization of claims" in 1942. Walden, *The "New Rules" in New Mexico*, 25 F.R.D. at 111. Harkening back to a time when "for centuries" legal gamesmanship regularly "had been employed to defeat pleadings," Defendants once again have sought to lead this Court into error by relying upon "extreme dialecticism" to manufacture a "morass of technicalities" calculated to evade judicial scrutiny on the merits. *Id.*, at 108 and 111.

In sum, contrary to Rule 1-001(A) NMRA 2013, there has been no progress whatsoever toward a resolution upon the merits in the more than two years that this case has been pending. And there will be no such progress until this Court fully and finally disposes of Defendants' motions to dismiss and requires Defendants to answer the allegations of intentional wrongdoing pending against them since 2011.

ARGUMENT

I. IN COMPLIANCE WITH THE COURT'S JUNE 14, 2013 ORDER, PLAINTIFF'S SECOND AMENDED COMPLAINT "SUPPL[IES] ADDITIONAL FACTUAL ALLEGATIONS" FAR MORE DETAILED THAN OUR RULES REQUIRE.

Binding New Mexico appellate authority repeatedly has held that fact pleading is long dead in our State Courts. As the New Mexico Court of Appeals held when reversing the District Court in *Kysar v. BP America Production Company*, 2012-NMCA-036, 273 P.3d 867:

[O]ur rules merely require pleadings to contain a short and plain statement of the claim or defense, and each pleading averment to be “simple, concise and direct,” even when pleading with particularity. . . . The allegations we have quoted above are sufficient to allege issues of misrepresentation, fraud, and mistake and they put BP on notice that such claims were being made.

Id., §§ 28-30, 273 P.3D at 876 (holding that general averments alleging BP “made false representations . . . which tended to and actually did deceive and mislead” were sufficient to plead fraud, and reversing the lower court’s decision to the contrary).

Accordingly, Plaintiff’s highly-detailed, 284-page Second Amended Complaint pleads with far more specificity than our Rules require. In fact, Plaintiff’s pleading would have been sufficient under our modern pleading rules even if the description of Defendants’ misconduct had stopped on page 2, merely alleging as follows:

Plaintiff Bruce Malott brings this Complaint to seek redress for damages he sustained by Defendants’ misconduct. . . . Defendants played a variety of roles in a complex web of corruption that spanned the United States from coast-to-coast, including New Mexico, and resulted in illegal payoffs totaling far in excess of \$ 100,000,000 (\$ 100 Million). The Defendants’ shared criminal objective was to steer the investments of public trust funds nationwide – with assets totaling hundreds of billions of dollars – to firms that were willing to pay bribes to influence-peddlers. Defendants’ criminal misconduct in New Mexico secretly corrupted the integrity of New Mexico State Government including the New Mexico Educational Retirement Board (“ERB”), and resulted in at least \$ 22,000,000 (\$ 22 Million) in illegal payoffs in New Mexico alone.

[T]he majority of Defendants had direct, personal, and repeated dealings with Plaintiff, who was the ERB Chairman, and they intentionally put Plaintiff in harm’s way by knowingly, maliciously, and fraudulently targeting him for deception. They did so in the course and scope of Defendants’ criminal scheme, and as a necessary and integral part of concealing, perpetuating, and furthering Defendants’ fraudulent scheme. As a direct and proximate result thereof, Plaintiff suffered exactly the sorts of injuries to be expected from Defendants doing so. That is, Plaintiff was damaged in precisely the manner foreseeable and in fact foreseen by Defendants.

In addition to Defendants who had direct dealings with Plaintiff, all Defendants – including the minority of Defendants who lacked direct dealings with Plaintiff – combined together, conspired, confederated, and agreed to

participate in the Defendants' concerted criminal misconduct, including the fraudulent concealment of that misconduct. Accordingly, each and every Defendant was legally responsible for the misconduct of each and every other Defendant committed within the course and scope of the Defendants' conspiracy, including the fraudulent targeting of Plaintiff for deception.

Plaintiff's Second Amended Complaint, pp. 1-2, ¶¶ 1-3. Nothing more is required, *see, e.g., Kysar, supra.*, although Plaintiff's pleading obviously provides much, much more.

The factual detail contained in Plaintiff's Second Amended Complaint cannot be summarized in an economical manner; the only way for the Court to appreciate that detail is to review the pleading in its entirety (including the cited portions of its exhibits). In a nutshell, however, Plaintiff's Second Amended Complaint alleges that Defendants (1) combined, confederated and agreed to participate in a criminal partnership that generated far in excess of one-hundred-million dollars (\$ 100,000,000) in illegal payoffs (¶ 1); (2) acted as each other's agents in carrying the conspiracy forward (¶ 11); (3) never withdrew from and therefore at all times remained members of the conspiracy (¶ 12); (4) recognized that their criminal scheme only could operate in secret (¶ 13); (5) knew that if Plaintiff had learned about Defendants' scheme, he would have exposed the true facts and put a stop to their criminal misconduct (¶¶ 13, 144, and 148); (6) intentionally deceived, misled and betrayed plaintiff, in order to conceal, further, and perpetuate Defendants' scheme (¶¶ 13-14 and 148); (7) manipulated Plaintiff by falsely claiming to provide loyal advice and services in the best interests of the ERB when in fact Defendants secretly intended to advance their greedy and selfish interests (¶ 130); and (8) knew full well that – if Defendants' crimes were exposed – Plaintiff would be severely damaged by the false impression that he was complicit in Defendants' scheme (¶ 14). Plaintiff's Second Amended Complaint further alleges that – when Defendants' wrongdoing was exposed – Plaintiff suffered immense damage of precisely the sort anticipated by Defendants, including (among other things)

the loss of his business and his job, and damage to his professional good will, earning capacity, reputation, and standing in the community (¶¶ 2, 14-16, 210, 228, 235, 242-244, 254, and 269-271).

Defendants no doubt will have the right to try to peddle their alternative yarn when this case comes to trial. And it is not entirely impossible that the jury might buy Defendants' dubious claim that the well-connected honestly can "earn" tens of millions of dollars on public investments with the mere stroke of a pen (despite overwhelming evidence of corruption, including a secretly-recorded conversation starkly admitting Defendants' scheme, *see* Second Amended Complaint, ¶¶ 145-147). But even assuming for argument's sake that a finder of fact theoretically could swallow that whopper, factual determinations are reserved for trial. Accordingly, the Defendants' collective assertion that this Court should usurp the jury's role and make findings of fact in Defendants' favor at the pleading stage is directly contrary to more than a half-century of binding New Mexico appellate authority. *See, e.g., Pillsbury v. Blumenthal*, 58 N.M. 422, 427, 272 P.2d 326, 329 (1954) ("the complaint must be construed in a light most favorable to appellees and with all doubts resolved in favor of its sufficiency"); and *ConocoPhillips Company v. Lyons*, 2013-NMSC-009, ¶¶ 8-10, 299 P.3d 844, 849 (even upon motions for summary judgment following a full and fair opportunity for factual development, the record must be viewed "in a light most favorable to the nonmoving party," and where it is "susceptible of conflicting inferences, the meaning must be resolved by the appropriate fact-finder;" not the Court).

At bottom, Defendants' motions ask this Court to turn New Mexico Law squarely on its head by drawing all conceivable inferences *against* the sufficiency of Plaintiff's pleading and resolving all doubts *in favor of* summary dismissal with prejudice. Broken down to their

procedural parts, the stark reality of Defendants' motions are laid bare: (1) Defendants want to skip the answers, skip discovery, and go directly to the jury trial; (2) then they want to skip the trial too; and (3) finally, based solely on their say-so (without regard to such trivialities as cross-examination and the like that concern only lesser litigants), Defendants want Your Honor to dispense with the adversary system in its entirety and adopt their counsel's polished prose as the factual findings of the Court.

And why do Defendants claim the right to all of this extraordinary relief, despite the fact that this is 2013 and the Rules in our State Courts have required the opposite result since the 1940s? Because these Defendants find themselves in the supposedly unique position of insisting that the allegations against them are untrue (and, of course, having the resources to repeat that deliriously incredible mantra year in and year out, in perpetuity).

No matter how elegant the pedigree, however, that dog just won't hunt.

II. THE AJAX DEFENDANTS' *IN PERSONAM* JURISDICTION MOTION IS FRIVOLOUS.

The former presiding Judge erred in requiring Plaintiff to replead his personal jurisdiction allegations against the Ajax Defendants, for the reasons stated in Plaintiff Bruce Malott's Response to Defendants Ajax Investments, LLC, Ajax Advisors, LLC and Arlene Rae Busch's Rule 1-012(B) Motion to Dismiss for Lack of Personal Jurisdiction (filed April 26, 2012) (hereinafter "First Ajax Response"). The Ajax Defendants' pending *in personam* jurisdiction motion raises precisely the same issue. Plaintiff's ongoing investigation has disclosed that this personal jurisdiction motion not only is wrong; it is frivolous.

Initially, as Plaintiff explained in his First Ajax Response, the Ajax Defendants' personal jurisdiction motion merely is a Rule 1-012(B)(6) Motion in Rule 1-012(B)(2) clothing, because it challenges the assertion of specific personal jurisdiction based solely on the false assumption –

refuted above – that Plaintiff has failed to “allege any tortious act” under the Long Arm statute. That is, the Ajax Defendants’ two motions are joined at the hip, and the purported jurisdictional argument would apply if and only if this Court were to dismiss Plaintiff’s pleading for failure to state a claim under Rule 1-012(B). Therefore, the Ajax Defendants’ personal jurisdiction motion is nothing more than a makeweight that serves no purpose other than to burden a busy Court by further multiplying the proceedings.

Worse yet, it now is apparent that there never was a good faith factual basis for the Ajax Defendants to assert lack of personal jurisdiction over them in this or *any* case in our State Courts, because general jurisdiction exists over the Ajax Defendants based on their extensive contacts with the State of New Mexico.

As indicated in Plaintiff’s First Ajax Response (p.1), the Ajax Defendants’ *in personam* jurisdiction challenge always appeared suspicious, because “the six-paragraph Affidavit of Arlene Rae Busch” failed “to include the boilerplate denials of activity supporting the exercise of personal jurisdiction over a nonresident typically included in such affidavits.” Plaintiff’s ongoing investigation has since disclosed that Defendant Busch could not include the typical nonresident allegations in her affidavit without exposing herself to a perjury charge.

Defendant Busch’s testimony on December 16, 2005, in *Renaissance Private Equity Partners, LP v. Walters*, AAA No. 71 180 00205, demonstrates that she began seeking to do business with the State of New Mexico by the fall of 2004 at the latest, and she had extensive contacts with the State in connection with those efforts. Excerpts of that testimony are attached hereto as Exhibit 4. Specifically, Defendant Busch (a) was seeking “anywhere between \$ 100 million and \$ 150 million” in public funds in the fall of 2004 (pp. 24-25), (b) travelled to New Mexico, stayed at the Inn of the Anasazi in Santa Fe, and met here with Defendants Saul Meyer

and Marc Correra (*id.*, at pp. 25-26 and 114-15), and (c) participated extensively in commercial activity directed toward the State of New Mexico (*id.*, at pp. 29-30, 36-38, 40-41, 46-48, 53-56, 63, 67-69, 71-72, 79-81, 93, 102, 114-17, 123-24, 134-35, 147-50, 155-57, 159, 163-67 and 169). Indeed, Defendant Busch also admitted under oath that she secretly accepted “behind-the-scenes” help from Defendant Meyer, despite her knowledge of Defendant Meyer’s undisclosed conflicts of interest. *Id.*, at pp. 29, 36-37, 63, 67-69, 71-72, 147-49, 155-57 and 163-65. Moreover, it is a matter of public record that Defendant Busch authorized the fee-sharing agreement with Defendant Correra, Jr., notwithstanding her sworn admissions at her deposition that his “job” was being “the son of the governor’s best friend” and that he was one of the “decision-makers in New Mexico.” *Id.*, at pp. 117 and 163.

Upon discovering this testimony demonstrating general personal jurisdiction over the Ajax Defendants, Plaintiff’s counsel sent the following e-mail message to their counsel:

Of course, one of the reasons 12(B)(6) dismissals are highly disfavored is the risk that valid claims will be terminated precipitously, without any chance to obtain a fair and honest disclosure of the facts.

I am writing to offer you the opportunity to withdraw your clients’ motions to dismiss. This offer is based, in part, on the December 16, 2005 sworn testimony of Arlene Busch, which was produced to the Securities and Exchange Commission under cover of your erstwhile firm’s September 29, 2009 letter. If you would like to take advantage of this opportunity, please let me know by the end of this week.

Thank you.

The Ajax Defendants’ counsel declined, however, offering the following head-scratching explanation: “I’ve reviewed the transcript and don’t think there’s anything in the testimony that supports personal jurisdiction in New Mexico for your client’s claims.” Exhibit 5, hereto.

Accordingly, for all of these reasons, Plaintiff respectfully requests that this Court deny the Ajax Defendants’ *in personam* jurisdiction motion as frivolous.

III. DEFENDANT BLAND'S TORT CLAIMS ACT MOTION IS MERITLESS.

Defendant Bland's pending motion to dismiss under the Tort Claims Act is meritless, for all of the reasons stated in Plaintiff Bruce Malott's Response To Defendant Bland's Motion To Dismiss Complaint Under The New Mexico Tort Claims Act (filed February 10, 2012). As that Response demonstrates, the Tort Claims Act will not protect Defendant Bland at any stage of the proceedings. But this Court need not look past the current procedural posture to deny Defendant Bland's motion to dismiss at the pleading stage.

Application of the Tort Claims Act involves questions of fact that typically must be resolved by the jury at trial and not by the Court. *See, e.g., Celaya v. Hall*, 2004-NMSC-5, ¶ 28, 135 N.M.115, 122 (summary judgment for defendant overturned, because "[w]hether an employee is acting within the scope of duties is a question of fact, and summary judgment is not appropriate unless 'only one reasonable conclusion can be drawn' from the facts presented"); and *Risk Management Division v. McBrayer*, 129 N.M. 778, 780, 784 and 786, 2000-NMCA-104, ¶¶ 2, 19-20 and 29 (summary judgment for RMD reversed, because "genuine issues of material fact exist, and more than one reasonable conclusion can be drawn"). While summary judgment can be proper upon the completion of discovery if the evidentiary record establishes the absence of any genuine issue of disputed fact, it is apparent from the *Celaya* and *McBrayer* cases that dismissal rarely if ever would be available at the pleading stage.

Once the discovery period is closed, Plaintiff anticipates this case will be one of the rare instances in which summary judgment will be appropriate under the Tort Claims Act; not in favor of Defendant Bland, but in favor of Plaintiff and precluding assertion of the Tort Claims Act defense at trial. This expectation is based on, among other things, Defendant Bland joining the conspiracy *before* he became a public employee of *any* kind and *years before* he assumed his

position as Plaintiff's co-trustee on the ERB. *See, e.g.*, Second Amended Complaint, ¶¶ 29-31, and 163. Accordingly, Defendant Bland's tortious conduct commenced – and at least in part occurred – while he was *not* a “public employee,” and thus while he was *not* “acting within the scope of duty” as a public employee under NMSA 1978, § 41-4-4(A).

Moreover, absent a grant of summary judgment in Plaintiff's favor on this basis, a number of other grounds exist to defeat Defendant Bland's attempt to hide behind the State's immunity under the Tort Claims Act. *See, e.g.*, Plaintiff's February 10, 2012 Response to Bland's First Tort Claims Act Motion, pp. 5-8.

Accordingly, Plaintiff respectfully requests that this Court deny Defendant Bland's motion to dismiss under the Tort Claims Act.

IV. ASSUMING ARGUENDO THAT THIS COURT WISHES TO REVISIT ANY OF THE DEFENDANTS' ARGUMENTS FOR DISMISSAL WITH PREJUDICE DENIED BY THE JUNE 14TH ORDER, THE RECORD DEMONSTRATES THE COURT PROPERLY DISPOSED OF THOSE ARGUMENTS.

**A. *While Defendants' Motions Are Complex,
The Grounds For Denying Them Are Simple.***

Defendants raise countless complex arguments purporting to justify dismissal of Plaintiff's claims with prejudice at the pleading stage. But all of those arguments suffer from the same fatal defect as Defendants' attacks on the specificity of Plaintiff's pleading: they all ignore the modern rules of procedure that have governed practice in our State Courts since 1942. Accordingly, despite the Defendants' attempt to overwhelm this Court with complexity, the grounds for denying their motions are simple.

Defendants' arguments all attempt to turn Rule 1-012(B)(6) – as well as binding New Mexico appellate authority applying that Rule – squarely on its head. Defendants attack and belittle the facts as alleged in Plaintiff's Second Amended Complaint. They dispute every

inference – even the most indisputable ones – on which Plaintiff relies to support his claims. They assume the truth of their own unpled “facts,” which they slip into motions despite their wholesale refusal to file answers denying a single one of Plaintiff’s averments. They purport to resolve all doubts on disputed issues in their own favor, and against Plaintiff. And finally – without a hint of irony – the Defendants attack Plaintiff’s integrity for having the audacity to stand up to their wealth and power by seeking justice in our Courts. But that, of course, is precisely what our Rules are designed to empower Plaintiff to do, and what Defendants have succeeded thus far in frustrating.

As Plaintiff intends to prove at trial, Defendants inflicted grave harm upon him and his family – in total disregard for their well-being – by knowingly, maliciously and fraudulently targeting him for deception, in order to further their greedy, wholly unjustified, and criminal misconduct. Plaintiff has the right to turn to our Courts for a remedy. Nevertheless, for more than two years the Defendants have spared no expense in attempting to defeat Plaintiff’s access to the judicial process with a concerted strategy that is complex in its components yet blunt in its message to Plaintiff; to wit: “Tough luck.” In other words, according to the Defendants, Plaintiff has (1) no right to their answer, (2) no right to discovery, (3) no right to a jury trial, and (4) no right to any remedy whatsoever for the harm they inflicted upon him.

But, notwithstanding the Defendants’ considerable wealth and power, in our Courts they are constrained to follow the same Rules that apply to the humblest of parties. Since Defendants have made it abundantly clear that have no intention of doing so voluntarily, however, Plaintiff respectfully requests that this Court enforce New Mexico Law and require Defendants to begin playing by the rules. *See, e.g., Delfino v. Griffo*, 2011-NMSC-15, ¶ 9, 150 N.M. 97 (our Courts “accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in

favor of sufficiency of the complaint”); *Mendoza v. Tamaya Enterprises, Inc.*, 2011-NMSC-30, ¶¶ 5 and 11, 150 N.M. 258 (“pursuant to Rule 1-026(B)(6) NMRA, we accept as true all facts pleaded in the complaint in order to determine whether plaintiffs may prevail under any state of the facts alleged,” since (“[o]ur review of the motion to dismiss for failure to state a claim requires that we assume the factual allegations made in the complaint are true”) (citation and internal quotation marks omitted); *New Mexico Public Schools Insurance Authority v. Arthur J. Gallagher & Co.*, 2008-NMSC-67, ¶ 11, 145 N.M. 316, 320 (“[a] Rule 12(B)(6) motion is *only* proper when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim,” because our Courts “accept as true all well-pleaded factual allegations in the complaint and resolve all doubts in favor of the complaint’s sufficiency”) (emphasis in original) (quotation marks and citations omitted); *Hambaugh v. Peoples*, 75 N.M. 144, 153, 401 P.2d 777, 782 (1965) (pleading is not “a game of skill,” in which the best lawyers with the largest litigation budgets win; our Rules ““reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of a pleading is to facilitate a proper decision on the merits”) (internal quotation marks and citations omitted); and *Pillsbury v. Blumenthal*, 58 N.M. 422, 427, 272 P.2d 326, 329 (1954) (“the complaint must be construed in a light most favorable to appellees and with all doubts resolved in favor of its sufficiency”). *Cf. ConocoPhillips Company v. Lyons*, 2013-NMSC-009, ¶¶ 8-10, 299 P.3d 844, 849 (on a motion for summary judgment, the record must be viewed “in a light most favorable to the nonmoving party,” and dismissal is improper “[i]f the proffered evidence of surrounding facts and circumstances is in dispute, turns on witness credibility, or is susceptible of conflicting inferences,” because disputes about the evidence “must be resolved by the appropriate fact-finder”) (internal quotation marks and citations omitted).

B. Although This Court Need Not Address The Minutiae Of Defendants' Various Arguments, Since They All Are Built On The Faulty Premise That Defendants Are Free To Ignore Our Rules, All Of Those Arguments Are Fully Refuted In Plaintiff's Previously-Filed Responses.

To the extent that this Court wishes to revisit any of the purported grounds for dismissal with prejudice previously rejected by the Court, Plaintiffs' Counsel will be prepared to respond to any questions the Court may have at any motions hearing the Court sets. In addition, Plaintiff previously has addressed all of that minutiae in the following filings:

- Plaintiff Bruce Malott's Response To Defendant Anthony Corraera's Motion To Dismiss First Amended Complaint (filed February 2, 2012).
- Plaintiff Bruce Malott's Response To Motion To Dismiss Complaint As To Defendant Bland For Failure To State A Cause Of Action Upon Which Relief Can Be Granted (filed February 10, 2012).
- Plaintiff Bruce Malott's Response To The Deutsche Bank And Vanderbilt Defendants' Motion To Dismiss The Complaint (filed April 26, 2012).
- Notice Of Filing (attaching letter demonstrating that *Abrahams v. Young & Rubicam* has been overruled) (filed June 27, 2012)
- Plaintiff Bruce Malott's Notice Of Supplemental Authority Regarding *Madrid v. Village of Chama*, 2012-NMCA-071 (filed August 29, 2012) (explicitly rejecting the federal *Twombly* decision – relied upon in various Defendants' Motions – as inapplicable in our State Courts).
- Plaintiff Bruce Malott's Response To Defendants Cabrera Capital And Martin Cabrera, Jr.'s Motion To Dismiss Amended Complaint (filed Sept. 18, 2012).
- Plaintiff Bruce Malott's Response To The Aldus Defendants' Motion To Dismiss And Supporting Brief (filed March 19, 2013).

C. In Addition, Selected Examples Serve To Demonstrate That The Defendants' Filings Lack Credibility.

i. Defendants' RICO Arguments Are Misleading.

At bottom, Defendants' RICO arguments contend that the Act is so overwhelmingly complicated that no mere mortal could understand it, let alone satisfy its quantum physics-like

requirements. *See, e.g.*, The Deutsche Bank and Vanderbilt Defendants’ Motion to Dismiss the Second Amended Complaint, pp. 18-26. But lawyers Nationwide have brought countless RICO cases to verdict – both criminal and civil – in the more than four decades since the federal RICO statute was enacted. New Mexico lawyers and judges are perfectly capable of doing the same. There is no magic to it.

The United States Supreme Court’s unanimous decision in *Salinas v. United States*, 522 U.S. 52 (1997), on which Plaintiff’s case relies heavily, is an example of how RICO applies in a relatively simple case. In *Salinas*, a sheriff overseeing a county jail accepted bribes from for permitting a single inmate to have “contact visits” with two women. When the sheriff was not available, his chief deputy Mario Salinas arranged for the visits. Salinas received two watches and a pickup truck for his role in the scheme. *Id.*, at 55. That was the entire RICO scheme. It involved no more than five persons, none of whom qualified as classic organized crime figures, and it had one very narrow objective. Yet the scheme was sufficient to satisfy every element of the RICO statute, and the Supreme Court upheld Salinas’s criminal conviction for a RICO conspiracy. If that simple RICO scheme is sufficient to satisfy the requirements of the Act, plainly the far more extensive RICO pattern of racketeering activity charged in Plaintiff’s pleading is more than sufficient to do so. Defendants’ various arguments to the contrary simply are a silly attempt to mislead a busy Court.

Notably, in *Salinas* the Government did not prove that the Defendant committed or agreed to commit two predicate acts, and the Supreme Court explicitly held it was not necessary to do so. *Id.*, at 61-66. As the *Salinas* Court explained:

To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles, but would render most prosecutions for the offence nugatory. . . . The RICO conspiracy statute, §

1962(d), broadened conspiracy coverage by omitting the requirement of an overt act; it did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts.

Id., at 64 (citations and internal quotation marks omitted). The Court then proceeded to emphasize the deep doctrinal roots of its analysis:

Our recitation of conspiracy law comports with contemporary understanding. When Congress passed RICO in 1970, see Pub. L. 91-452, § 901(a), 84 Stat. 941, the American Law Institute’s Model Penal Code permitted a person to be convicted of conspiracy so long as he “agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime.” American Law Institute, Model Penal Code, § 503(1)(a) (1962). . . .

A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime’s completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. *It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.*

Id., at 64-65 (emphasis added).

Plainly, Defendants’ preeminent counsel (haling from two of the finest law firms in New York and New Mexico) undoubtedly have been well aware throughout the proceedings of the United States Supreme Court’s seminal, unanimous decision in *Salinas*. Nevertheless, they neglected to cite the *Salinas* case in their first round of briefs while representing to the Court that – directly contrary to our modern pleading rules as well as the unanimous *Salinas* decision – “each member of the alleged conspiracy must have committed two or more predicate acts, and the complaint here does not enumerate how each defendant separately committed the required multiple racketeering offenses.” The Deutsche Bank and Vanderbilt Defendants Motion to Dismiss the Complaint (filed March 26, 2012), p. 28.

This time around, the Deutsche Bank and Vanderbilt Defendants acknowledge *Salinas* in footnote 9 of their pending motion (cited above). Inexplicably, however, rather than candidly disclosing *Salinas*'s holding and analysis to this Court, Defendants represent as follows:

In opposition to the motion to dismiss his last complaint, Malott argued that *Salinas v. United States*, 522 U.S. 52 (1997), allows a RICO conspiracy count even if his substantive RICO claims are deficient. *Salinas* says nothing of the sort. It holds only that the alleged co-conspirators must “kn[o]w about and agree[] to facilitate” a scheme in which someone intended to commit “at least two acts of racketeering activity.” *Id.* at 63, 66 (emphasis added). Nothing in *Salinas* suggests that a RICO conspiracy can exist without the underlying RICO violation.

Plainly, that contention is more than a little bit puzzling. Perhaps Defendants' counsel can explain how they square their footnote with the *Salinas* language emphasized above; Plaintiff's counsel is at a loss to do so.

Moreover, Defendants fail to explain how they can justify their description of *Salinas*, given the fact that Mr. Salinas was acquitted at trial of the substantive RICO offense, 522 U.S. at 55, and challenged his RICO conspiracy conviction on precisely that basis. Still, the United States Supreme Court unanimously rejected his challenge in no uncertain terms:

Salinas [challenges] his conviction for conspiracy to violate RICO. There could be no conspiracy offense, he says, unless he himself committed or agreed to commit the two predicate acts requisite for a substantive RICO offense under § 1962(c). . . . The jury acquitted on the substantive count. *Salinas* was convicted of conspiracy, however, and he challenges the conviction because the jury was not instructed that he must have committed or agreed to commit two predicate acts himself. His interpretation of the conspiracy statute is wrong.

Id., at 61 and 63. In addition, the *Salinas* Court made all of the following additional observations, each of which is at odds with Defendants' footnote 9:

- “A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense.” *Id.*, at 63.

- “If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.” *Id.*, at 64.
- “As Justice Holmes observed: ‘[P]lainly a person may conspire for the commission of a crime by a third person.’” *Id.* (citation omitted).
- “A person, moreover, may be liable for conspiracy even though he was incapable of committing the substantive offense.” *Id.*
- “To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles, but would render most prosecutions for the offence nugatory.” *Id.* (citation and internal quotation marks omitted).
- The RICO conspiracy statute, § 1962(d), broadened conspiracy coverage by omitting the requirement of an overt act; it did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts.” *Id.*
- “When Congress passed RICO in 1970 . . . the American Law Institute’s Model Penal Code permitted a person to be convicted of conspiracy so long as he ‘agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime.’ . . . As the drafters emphasized, ‘so long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree ‘to commit’ the crime.’” *Id.*, at 64-65 (citations omitted).

Again, perhaps Defendants’ counsel can explain how these quotes can be reconciled with footnote 9 of their Motion, because Plaintiff’s counsel cannot. It certainly should not be necessary for a busy New Mexico trial judge to read all adverse authority for himself (let alone to do his own independent research to ferret out undisclosed adverse authority), simply to avoid being led into error. In any event, Plaintiff’s counsel will submit copies of the *Salinas* and *Clark* decisions to Your Honor upon the completion of briefing, both because they are critical authority and because Plaintiff’s counsel believes it will be essential to the proper administration of justice in this case for Your Honor to have the opportunity to determine where the Court can look for trustworthy advocacy.

ii. ***Defendants’ Standing Arguments Ignore Both Moody v. Stribling And The Relevant Language In Marchmann v. NCNB.***

“A real party in interest is one who owns the right being enforced or who is in a position to discharge the defendant from liability.” *Moody v. Stribling*, 1999-NMCA-94, ¶ 7, 127 N.M. 630, 634. Accordingly, as a “general proposition,” “[a] corporation, not its individual shareholders, may bring claims ‘for injuries that derive from damage to the corporation.’” *Id.*, at ¶ 8, 127 N.M. at 634 (citation omitted). But that general proposition is not universally applicable; its application depends upon the proper “characterization of the claims,” which turns on the facts. *Id.*

When a party has “alleged claims for injuries [he] personally incurred,” he is “the real party in interest” *Id.*, at ¶ 9, 127 N.M. at 634. *Accord, Marchmann v. NCNB Texas National Bank*, 120 N.M. 74, 81-82, 898 P.2d 709, 716-17 (1995) (“The corporation, having suffered the direct injury, has the right to bring an action against the wrongdoer, while other parties suffering indirect injuries cannot individually assert the corporate cause of action. . . . There are exceptions to the general rule . . . [that] arise . . . ‘where the shareholder suffered an injury separate and distinct from that suffered by other shareholders’”).

In his *Marchman* opinion, Justice Franchini explained the rationale underlying the general proposition applicable to an individual’s indirect injuries as well as the exception governing direct injuries:

When a corporation is directly injured, shareholders, employees, and creditors of the corporation may suffer indirect injury. The corporation, having suffered the direct injury, has the right to bring an action against the wrongdoer, while other parties suffering indirect injuries cannot individually assert the corporate cause of action. . . .

The theory behind this rule is that, once the corporation recovers its losses and replenishes its assets, the recovery will be reflected in the price of the stock and will allow the corporation to distribute the proceeds of the recovery, and

thus the shareholders and creditors will also recover for the indirect harm they have suffered. . . . If shareholders were permitted to bring individual actions to recover their indirect losses, there would be a possibility of a double recovery - once by the shareholder and again by the corporation - in the event of a subsequent recovery by or for the corporation.

Id., at 81, 898 P.2d at 716,

Plaintiff Malott plainly is not seeking indirect damages for which there is any possibility of double recovery. He is seeking to recover for harm he suffered personally; *i.e.*, the loss of his business and his job, and damage to his professional good will, earning capacity, reputation, and standing in the community. The ERB cannot sue for these independent damages, nor could the ERB release Defendants from their liability for these damages. Accordingly, Plaintiff and only Plaintiff is the real party in interest in this lawsuit. Plaintiff does not wish to pursue – and is not authorized to pursue – any indirect claims for damages suffered by the ERB or anyone else.

iii. Defendants Have Admitted That Plaintiff in Clark v. Stipe Law Firm, L.L.P., Suffered Direct Harm; Plaintiff Here Suffered Precisely The Same Sort of Harm.

Defendants have admitted that the Plaintiff in *Clark v. Stipe Law Firm, L.L.P.*, 320 F. Supp. 2d 1207 (W.D. Okla. 2004) suffered direct harm as a result of the alleged RICO violations. Exhibit 2, at pp. TR-17 through TR-19. Plaintiff suffered precisely the same sort of harm in this case. Moreover, the United States Supreme Court's *Bridge* decision further supports Plaintiff's entitlement to RICO damages. *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 649 (2009) ("suppose an enterprise that wants to get rid of a rival business mails misrepresentations about them to their customers and suppliers, but not to the rivals themselves. If the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business 'by reason of' a pattern of mail fraud"). Moreover, Plaintiff's claim under the New Mexico RICO Act is stronger than Clark's claim was, because New Mexico's RICO statute permits recovery for personal injury while the federal Act does not.

iv. Binding New Mexico Authority And RICO Authority Hold That Foreseeability And Proximate Cause Are Quintessential Jury Questions.

Our Supreme Court has instructed that “proximate cause” is an “issue[] to be decided by the jury whenever reasonable minds may differ.” *Klopp v. The Wackenhutt Corporation*, 113 N.M. 153, 160 (1992). And regarding RICO in particular, the United States Supreme Court has instructed that “Proximate cause . . . is a flexible concept that does not lend itself to ‘a black-letter rule that will dictate the result in every case.’” *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 654 (2009) (citation omitted). *See also id.*, at 649, and 656-58 (quoted on pages 8-9 of Plaintiff Bruce Malott’s Response To Motion To Dismiss Complaint As To Defendant Bland For Failure To State A Cause Of Action Upon Which Relief Can Be Granted (filed February 10, 2012)). Accordingly, questions of foreseeability and proximate cause cannot be decided against Plaintiff at the pleading stage.

v. Defendants’ Assertion That They Have License Intentionally To Inflict Harm On Plaintiff Without Any Available Remedy is Directly Contrary To New Mexico Law.

Since Rule 1-012(B)(6) NMRA 2013 presumes Plaintiff can prove his allegations, New Mexico Law requires Defendants to assume a jury would find they caused Plaintiff grievous injury by intentionally putting him in harm’s way – and by conspiring with others who intentionally put him in harm’s way – in order to advance their greedy and unlawful purposes. Nevertheless, Defendants are asking this Court to dismiss Plaintiff’s case from the get-go – without any opportunity for factual development – based on the theory that they cannot be held accountable under any theory of New Mexico Law whatsoever for the actual damages caused by their malicious and wholly unjustified criminal conduct.

At the initial pleading stage in particular – before Plaintiff has had any opportunity whatsoever to conduct discovery – Defendants cannot so easily escape the consequences of their

criminal conduct. Indeed, Defendants' contention would fail even absent *Clark v. Stipe Law Firm, L.L.P.*, 320 F. Supp. 2d 1207 (W.D. Okla. 2004), and even assuming *arguendo* and contrary to New Mexico Law that all of the existing causes of action pled in Plaintiff's Complaint were defective. Putting aside for the moment every other erroneous argument proffered by the Defendants, they ignore binding New Mexico Supreme Court authority that recognizes a "residue of tort liability" extending beyond existing tort doctrines. *Schmitz v. Smentowski*, 109 N.M. 386, 396 (1990). As our Supreme Court has explained, based on fundamental concepts of "fairness and morality," *id.*, at 399, New Mexico State Courts will develop new forms of tort action as necessary to provide remedies for egregious wrongs like those committed by these Defendants:

New Mexico has recognized that tort law is not static -- it must expand to recognize changing circumstances that our evolving society brings to our attention. Thus, in other areas, we have recognized that intentional, malicious conduct that injures another, even though it may not have been recognized by the heretofore accepted areas of intentional tort, can serve as a basis for tort liability.

Id., at 396. Moreover, given that our Supreme Court is prepared to develop new torts when necessary to remedy malicious conduct, New Mexico Law undoubtedly forecloses the stingy application of existing doctrines advocated by Defendants here.


CONCLUSION

All Plaintiffs have the right to employ the Rules of Civil Procedure to seek justice in our Courts, and no Defendant is above being held accountable under our Rules. But these principles are theoretical only, as long as Defendants are permitted to employ virtually limitless litigation budgets to flood opposing litigants and this Honorable Court with papers calculated – not to facilitate “the just, speedy and inexpensive determination of every action,” Rule 1-001(A) – but rather to accomplish precisely the opposite.

It is apparent that these Defendants have spent the last two years flooding the judicial system with contentions that are directly contrary to New Mexico Law and procedure, in an attempt to overwhelm the process and lead this Court into error. Enough is enough. Plaintiff Bruce Malott respectfully requests that this Court deny Defendants Motion once and for all, and direct Defendants to file their answers within the time provided by the applicable Rules.

Respectfully submitted,

FALLICKLAW, LTD.

By 
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Attorney for Plaintiff Bruce Malott

DATED: December 2, 2013.

CERTIFICATE OF SERVICE

I, Gregg Vance Fallick, hereby certify that on the 2nd day of December, 2013, I caused a true and correct copy of foregoing Response to be served electronically by the Court's Notice of Electronic Filing (NEF) system, upon:

Monnica Garcia, monnicalgarcia@gmail.com,
B.J. Crow, bj@crow-law-firm.com,
Jason Bowles, jason@Bowles-Lawfirm.com,
Rebecca S. Kenny, rsk@madisonlaw.com,
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Aletheia V. P. Allen, aallen@thearlandlawfirm.com.

In addition, I will cause a true and correct copy to be served upon the following by first-class mail, postage prepaid, upon:

Saul Meyer
4239 Shorecrest Drive
Dallas, TX 75209.

FALLICKLAW, LTD.


By: Gregg Vance Fallick

Attorney for Plaintiff Bruce Malott

EXHIBIT 1

1 STATE OF NEW MEXICO
2 COUNTY OF SANTA FE
3 FIRST JUDICIAL DISTRICT COURT

4 No. D-0101-CV-201100315

5 **BRUCE MALOTT,**

6 Plaintiff,

7 vs.

8 **ANTHONY CORRERA, et al.,**

9 Defendants.

10
11 TRANSCRIPT OF PROCEEDINGS

12 On the 4th day of June 2012, at 3:00 p.m., this matter came
13 for hearing on MISCELLANEOUS MOTIONS, before the HONORABLE T.
14 GLENN ELLINGTON, Judge of the First Judicial District, State of
15 New Mexico, Division VII.

16 The Plaintiff, BRUCE MALOTT, appeared by Counsel of Record,
17 GREGG VANCE FALLICK, FallickLaw, LTD, Attorneys at Law, Suite 205,
18 Gold Avenue Lofts, 100 Gold Avenue, SW, Albuquerque, New Mexico
19 87102.

20 The Defendants, ANTHONY CORRERA, L2 ASSET MANAGEMENT, LLC,
21 SDN ADVISERS, LLC, appeared by Counsel of Record, MONNICA GARCIA,
22 Bowles & Crow, Attorneys at Law, 201 Third Street NW, Suite 1370,
23 Albuquerque, New Mexico 87102; LISA C. TULK, Kessler Collins,
24 Attorneys at Law, 2100 Ross Avenue, Suite 750, Dallas, Texas
25 75201.

1 And there, also, is other authority that I haven't
2 provided to the Court that I could provide to the Court. One of
3 the cases is Khurana, which is a case that was followed in a
4 number of the cases, which analyzes this in detail. And that's
5 also a case that can't be right if the Abrahams was not
6 overruled -- the Abrahams case was not overruled.

7 THE COURT: Okay. I still have questions. Even
8 for the sake of argument, even if there was a RICO-type scheme
9 that occurred, as I understand your Complaint, it was the
10 disclosure that that might have happened that caused injury to
11 your client, not that he was the object of the RICO enterprise.

12 MR. FALLICK: Well, we've actually --

13 THE COURT: It was not his funds that were being
14 invested. He was involved as chair of the ERB.

15 MR. FALLICK: That part is true, Your Honor. So
16 if that -- just to be clear, if it's correct, as a matter of law,
17 that he has to be the object, the primary object of the
18 conspiracy, that's not our case. There are allegations in the
19 Complaint that he was an intended victim, but it's not his money.
20 So it would have to be his money, then he doesn't have a claim.
21 But we don't believe that that's correct legally.

22 And if that were true, then that takes us back to our
23 bank robbery analogy. If that were true, if you have a conspiracy
24 to commit bank robbery, and you have a RICO bank robbery and
25 racketeering scheme, and they go in, it's the bank who's the

1 primary victim. The bank is the one whose money they're after.
2 But if the guard shoots, and that bullet hits a patron, does that
3 patron not have a claim because their claim was as a result of the
4 RICO conspiracy, was caused by the RICO conspiracy? I don't think
5 so. I think they do have a claim, even though, again, the primary
6 victim is the bank. In our --

7 THE COURT: Hang on a minute. Under that
8 analogy, we're all sitting here in the courtroom, you're standing.

9 MR. FALLICK: Correct.

10 THE COURT: And LANB's branch is across the
11 street here, across Catron. If somebody goes over and robs that,
12 we're not victims of that, even though there's 15 people involved
13 in the robbery.

14 MR. FALLICK: Well, we're not victims because we
15 didn't get injured as a result of the RICO conspiracy. The
16 question would be, if we went across the street, we were going to
17 take out our money and, you know, a bullet ricocheted and it hit
18 us.

19 THE COURT: Well, my understanding of the
20 argument is, it was the media's disclosure that there might have
21 been this RICO enterprise in implicating your client that you're
22 claiming is the harm, that's the connection. Some other act,
23 something else happened, someone, for purposes of argument,
24 destroyed his reputation because his name went into the pot with
25 everybody else that was involved in the RICO activity that you're

1 claiming. It was the disclosure of that. It was not that he was
2 the victim, he didn't lose money, that his professional reputation
3 was destroyed or damaged as a result of the disclosure of that in
4 the media, whether correct or not.

5 MR. FALLICK: Well, I think, Your Honor, that's
6 true, just like in the Clark case. It's exactly like the Clark
7 case. That's exactly how he was damaged. And the Court said that
8 was fine. And the Khurana case is another case that's related to
9 that.

10 THE COURT: I don't have Khurana, so I can't ask
11 you about it.

12 MR. FALLICK: I could provide that, but I was
13 trying not to expand the boundaries.

14 But, number one, what you're saying is right. It is the
15 impact from the publicity of this. And the question is, is that
16 enough. And in Clark, the Court held that it was enough.

17 Now, our allegations are specifically -- this was not a
18 case where --

19 THE COURT: Enough to get past the standing
20 argument.

21 MR. FALLICK: What's that?

22 THE COURT: Enough to get past the standing
23 argument, the 1-012(B)(6) argument.

24 MR. FALLICK: The Clark Court thought that it
25 was.

1 THE COURT: Okay.

2 MR. FALLICK: We think that it is. But,
3 certainly, you've honed in on, you know, a primary issue.

4 You know, let me just point out some of the allegations
5 in the Complaint, because I'm sure Your Honor has seen the
6 Complaint, and I can go through, you know, more of the allegations
7 later, when I get a chance to make an affirmative argument about
8 this. But the Complaint has numerous allegations that Bruce
9 Malott was an intended target; it was part of the scheme to use
10 him as part of the scheme, and intentionally put him in harms way
11 as a result of using him.

12 So on page 3, in the preface to the Complaint, we're
13 saying that Plaintiff was one of the intended victims of
14 Defendants' scheme. That's on page 3. And we say, "By
15 intentionally duping Plaintiff and violating his trust for the
16 purpose of concealing and furthering their crimes, Defendants
17 caused Plaintiff to lose the nationally-recognized accounting firm
18 he spent nearly three decades building."

19 So that's not he just happened to be there; the
20 allegation is that they used him, intended to use him to
21 perpetrate their fraud, and they knew that he would be injured if
22 it came out, and it was. It's just like Clark.

23 On page 23, at paragraph 95, we allege: "Defendants
24 also knowingly, intentionally, and fraudulently betrayed Plaintiff
25 and violated his trust, causing the injuries to Plaintiff

1 you don't get in under these other individual causes of actions
2 that you've complained.

3 MR. FALICK: I think that's -- let me just say,
4 Judge, I think that's one of the arguments they've made, and I
5 think that probably is the best argument they've made. Many of
6 the other arguments go all the way from frivolous, they're just
7 completely inapplicable, to weak. And I want to make sure that
8 those arguments aren't troubling you; it doesn't sound like they
9 are.

10 It sounds like the primary argument that's troubling you
11 is the argument that was in your first question, that you raised
12 in your first question, which is: If the injury results from the
13 exposure of the underlying fraud, is that a RICO injury? And
14 Clark says it is. There's nothing in the Supreme Court cases that
15 say it isn't.

16 And the Bridge case, citing the Holmes case, is very
17 clear that there is no bright line rule about what is RICO injury
18 and what isn't RICO injury. All the Defendants who have lost
19 motions to dismiss lost in the Supreme Court, lost in lower court
20 cases, always argue that RICO is special, that there's some
21 special requirement of RICO injury. And the Supreme Court has
22 repeatedly rejected that argument, which I think is why you're
23 getting all these other peripheral arguments that are so much
24 weaker.

25 But if that's the only issue, the question becomes, is

1 Clark wrong as a matter of law under all factual scenarios? So
2 that even when you have a situation where Defendants specifically
3 put a Plaintiff at risk for just this kind of injury, knowing that
4 they're putting him at risk for just that kind of injury, and that
5 he suffers that injury, but the injury is to his reputation as a
6 result of press reports and other information in the public
7 domain, is that automatically, under all facts, a lack of
8 proximate cause?

9 The two things I would look to, to say that that is
10 not true is, No. 1, Clopp [sic] vs. Wackenhutt Corporation.
11 That's the case with the New Mexico Supreme Court, where the Court
12 says that the issue of proximate cause is, "to be decided by the
13 jury whenever reasonable minds may differ." So that's what the
14 Clopp [sic] case says.

15 And then the Bridge case -- the Supreme Court case,
16 excuse me, says, in referring to the definition of proximate
17 cause, "Proximate cause, as we explained, is a flexible concept
18 that does not lend itself to black letter rule that would dictate
19 the result in every case."

20 The Court went on to explain, quote, "We use proximate
21 cause to label generically the judicial tools used to limit a
22 person's responsibility for the consequences of that person's own
23 acts."

24 So the bottom line is, in New Mexico, where we have
25 notice pleadings, so that every conceivable inference goes to the

1 Plaintiff, where proximate cause is only in a case where
2 reasonable minds can't differ, a factual question for the jury.
3 And the Federal RICO cases that they've relied on say we can't
4 have a specific black letter rule. The question is, is there a
5 black letter rule, in this case, that's so clear, under any facts
6 we might prove, that Mr. Malott can't recover under any theory? I
7 think that's their argument, and I think under Clopp and Bridge,
8 it fails.

9 THE COURT: Okay. I wanted to take up -- I think
10 we gave you a new schedule. If you don't have it, we changed it
11 to give you more time. We had you on the 14th, right after I get
12 back, set for a shorter period of time. We've moved it back, not
13 quite a week, and I've given you a larger block of time. That was
14 all e-mailed out this afternoon, and if you don't have one, a hard
15 copy, we can get you one before you leave. That's the only one
16 that we've modified.

17 I would like to get to the 1-012(B)(2) motion. That's
18 also an Ajax Advisors' motion. Who's going to argue that?

19 MR. HEFTER: Yes. I will, Your Honor.

20 Your Honor, there is nothing in the Complaint that
21 alleges that any of these three nonresident Defendants did
22 anything in New Mexico. There's no allegation that they came here
23 and did anything out of which Mr. Malott's claims arise.

24 THE COURT: There were no monies initiated here
25 or returned here, even though the processing happened in Delaware,

1 forward one to me.

2 MS. KINNEY: I will do so. Thank you.

3 THE COURT: We'll see you all back now on the --
4 let's see if it's on my calendar yet. I'll see you on the 20th at
5 three o'clock, and you have the rest of the afternoon on the 20th
6 to take up whatever's left.

7 I'll try and address the motions that I've already heard
8 by letter opinion between now and then. I'm not sure I'll get to
9 everything, though. But just to try and give myself a timetable
10 so that you could also anticipate getting some resolution, at
11 least to the issues that have been argued.

12 Thank you all for your appearance, your preparation, and
13 your pleadings.

14 I do want to see the other case, Counsel, that you
15 referred to in your argument, if you'd get that to me.

16 MR. FALLICK: I may have a copy of that.

17 THE COURT: We're in recess and off the record.

18 (Note: Court in recess at 4:16 p.m.;

19 no further record was taken.)
20
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25

EXHIBIT 2

1 STATE OF NEW MEXICO
COUNTY OF SANTA FE
2 FIRST JUDICIAL DISTRICT COURT

3 No. D-0101-CV-20110315

4 BRUCE MALOTT,
5
6 Plaintiff,

7 vs.

8 ANTHONY CORRERA, et al.
9 Defendants.

10

11 TRANSCRIPT OF PROCEEDINGS

12 On the 15th day of May 2012, at 1:30 p.m., this matter came
13 for hearing on MISCELLANEOUS MOTIONS, before the HONORABLE T.
14 GLENN ELLINGTON, Judge of the First Judicial District, State of
15 New Mexico, Division VII.

16 The Plaintiff, BRUCE MALOTT, appeared by Counsel of Record,
17 GREGG VANCE FALLICK, FallickLaw, LTD, Attorneys at Law, Suite 205,
18 Gold Avenue Lofts, 100 Gold Avenue, SW, Albuquerque, New Mexico
19 87102.

20 The Defendants, ANTHONY CORRERA, L2 ASSET MANAGEMENT, LLC,
21 SDN ADVISERS, LLC, appeared by Counsel of Record, MONNICA GARCIA,
22 Bowles & Crow, Attorneys at Law, 201 Third Street NW, Suite 1370,
23 Albuquerque, New Mexico 87102; LISA C. TULK, Kessler Collins,
24 Attorneys at Law, 2100 Ross Avenue, Suite 750, Dallas, Texas
25 75201.

1 kind of liability on behalf of the Defendants.

2 Now, the Defendants have primarily -- the Plaintiff has
3 primarily two cases that Plaintiff puts forward that have to do
4 with proximate cause and RICO. The first one is a Supreme Court
5 case, Bridge vs. Phoenix Bond and Indemnity, a 2008 Supreme Court
6 case. Now this case is really pretty simple. In this case, they
7 call them the petitioners. It's backed around. But the bad guys
8 submitted fraudulent bids in order to get tax liens. Because of
9 the fraud, they got the -- the bad guys got the tax liens.
10 Because of that fraud, the people suing did not get the tax liens,
11 and, therefore, they sued for damages. That's about as direct as
12 can be. The bad guys' actions directly caused the injury to the
13 people that are bringing the lawsuit.

14 And here's what the Supreme Court says about this case.
15 "And here, unlike in Holmes and Anza, there are no independent
16 factors that account for respondents' injury, there is no risk of
17 duplicative recoveries by plaintiffs removed at different levels
18 of injury from the violation, and no more immediate victim is
19 better situated to sue Respondents and other bidders, and other
20 bidders were the only parties injured by the petitioners'
21 misrepresentations." So this is an example of how proximate cause
22 works, and it's far different from what we have in this case.

23 The final case that Plaintiff put forward is an Oklahoma
24 district court case, which has got some other problems with it for
25 other reasons that I think Mr. Simmons will go into. But just in

TR-17

1 terms of a proximate cause analysis, I think it's pretty easily
2 distinguishable from the case at bar. Here, this is primarily a
3 legal malpractice case, Your Honor, brought by a client named
4 Clark versus his former law firm. His law firm recruited
5 Mr. Clark to be the campaign treasurer for a campaign. And in the
6 course of doing that, they had him sign false campaign
7 disclosures. Well, the FEC made an investigation and found some
8 problems.

9 During the course of those investigations, the law firm
10 continued to represent Mr. Clark and obstructed the investigation.
11 This caused all kinds of problems for Mr. Clark. So Clark had to
12 hire other attorneys to represent him, at his own expense, and his
13 reputation was injured also. So this is an involvement of a law
14 firm throughout the process. The Defendants are involved
15 throughout this, and caused him direct harm. They're the primary
16 movers, they're the ones that directly caused him the harm. You
17 don't have to make a two-step analysis here.

18 The Court's conclusion was, "At least as pled by the
19 plaintiff, each succeeding chapter in the execution of the
20 fraudulent scheme, starting with the underlying violations, and
21 followed by the fraudulent reporting and the obstruction of the
22 ensuing investigation, naturally flowed from the preceding
23 chapters to lead to the ultimate denouement." So it's direct.

24 Under the Holmes analysis, it's a one-step analysis. It
25 happened directly because of a law firms involvement in

1 malpracticing with its client that also constituted a RICO
2 violation.

3 So, essentially, Your Honor, what we've shown the Court,
4 and what the pleadings have shown the Court, some other cases, is
5 that the cases are almost unanimous that in situations like this,
6 where the harm is four or five steps removed from the bad acts,
7 you cannot state a RICO cause of action. This is based clearly
8 just on the pleadings, assuming the facts of the pleadings are
9 true. You take the pleadings by themselves. You've got about a
10 three- or four-step analysis to get from the bad act to the harm
11 that Mr. Malott supposedly suffered.

12 If Mr. Malott suffered harm, it was the harm caused by
13 the press reporting of something, rather than something being
14 done. And because of that, RICO, with its treble damages, with
15 its attorney-fee provisions, is not available for the Plaintiff in
16 this case.

17 THE COURT: Is anyone else going to argue any
18 RICO issues other than yourself?

19 MR. HAMILTON: I think Mr. Simmons may touch on
20 them.

21 THE COURT: Okay. You can do that portion, and
22 then I'll give you an opportunity to respond. We'll break up the
23 issues that way.

24 MR. FALLICK: And there are a multitude of RICO
25 issues they've raised, Judge. If you think it will be more

TR-19

1 MR. MALOTT: Okay. I'm sorry. My apology.

2 THE COURT: Mr. Malott, you probably won't
3 convince them of anything, sir.

4 MR. SIMMONS: Your Honor, my objection to this
5 stands. It's still a red herring. It's got nothing to do with
6 the issues on this motion.

7 THE COURT: Two things: One, return that to him;
8 and your time is up.

9 MR. FALLICK: Thank you.

10 THE COURT: Let's talk about scheduling for a
11 minute. Because of the principal docket I have, I have sent to
12 all of you a Status Conference Order. I have half a dozen or so
13 cases similar in terms of complexity, and what we've found works
14 better is to give you a regular schedule, and we try and resolve
15 motions on that schedule, as opposed to waiting for the pleadings
16 to be filed, and then setting a hearing date once the last
17 document of the reply is in. I generally try to resolve
18 everything that's ready for decision; we failed miserably today.
19 You're not coming back, I think, until the 14th of June,
20 does that sound right? A couple of things have changed. If you
21 all will speak to my administrative assistant in the next day or
22 day and a half, I'll have her look at my schedule and see if we
23 can give you another hour-long block of time. I do have a number
24 of questions from the notes that I've made today. I think you all
25 deserve more time, and I need your assistance in ferreting through

TR-57

1 a couple of the issues that I still have notes about. So I'll try
2 to get that in before June the 14th. That's to finish these four
3 motions, as I count them. Everything else rolls to the next
4 calendar. So if you speak to my administrative assistant -- I'm
5 leaving right now, so she won't get my instructions until I call
6 her from my cell phone from the car -- if you look at your
7 calendars, look at possible dates, she'll tell you when we might
8 have an hour.

9 Usually we'll do these in the afternoon. We do domestic
10 violence hearings almost exclusively in the morning. But mid to
11 late afternoon. And knowing what we're going to actually discuss,
12 you can decide who of all of you would like to be present. You're
13 all welcome, but I know your clients are paying well for your
14 attendance at this hearing. If you're not actually arguing a
15 case, or you agree to allow a combination of you to appear for the
16 remainder of the argument in this motion, then that's fine.

17 Is there anything you'd like to bring up in the next 45
18 seconds? Counsel?

19 MR. SIMMONS: One quick followup question: If
20 it's only to be an hour, since I've made my principal argument,
21 would I be able to participate by telephone since I'm from
22 New York, and it would be a big trip for one hour.

23 THE COURT: Let's talk about that in general. I
24 allow telephonic appearances, pretty much, for everything. The
25 only problems are if you have aids or other things that you want

TR-58

1 to present, unless you have somebody here and you walk through the
2 process, and if you want to use the court room, we're not quite as
3 cluttered as some of the other courtrooms, but if you want to walk
4 through the process and have somebody else here, to appear by
5 phone, that's fine. But I allow both parties and/or counsel for
6 these types of preliminary motions and hearings to appear
7 telephonically. You need to make arrangements through the Court
8 Call System, and that's pretty straightforward.

9 Anything else?

10 MR. SIMMONS: No, thank you.

11 THE COURT: We're in recess.

12 (Note: Court in recess at 3:16 p.m.,

13 and no further record was taken.)

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EXHIBIT 3

1 STATE OF NEW MEXICO
2 COUNTY OF SANTA FE
3 FIRST JUDICIAL DISTRICT COURT

4 D-101-CV-2011-03315

5 BRUCE MALOTT,
6 Plaintiff,

7 vs.

8 ANTHONY CORRERA, et al.,
9 Defendants.

10 TRANSCRIPT OF PROCEEDINGS

11 On the 28th day of May 2013, at approximately 1:20 p.m.,
12 this matter came on for hearing on a STATUS CONFERENCE, before the
13 HONORABLE T. GLENN ELLINGTON, Judge of the First Judicial
14 District, State of New Mexico, Division VII.

15 The Plaintiff, BRUCE MALOTT, appeared by Counsel of
16 Record, GREGG VINCE FALLICK, FallickLaw, Ltd., Attorneys at Law,
17 100 Gold Avenue, Southwest, Suite 205, Albuquerque, New Mexico
18 87102.

19 The Defendants, AJAX INVESTMENTS, LLC and AJAX ADVISORS,
20 LLC, appeared by Counsel of Record, DAVID F. CUNNINGHAM, Thompson,
21 Hickey, Cunningham, Clow, April & Dolan, P.A., Attorneys at Law,
22 460 St. Michael's Drive, Suite 1000, Santa Fe, New Mexico 87505.

23 The Defendant, GARY BLAND, appeared in person and by
24 Counsel of Record, STEPHEN S. HAMILTON, Montgomery & Andrews,
25 P.A., Attorneys at Law, 325 Paseo de Peralta, Santa Fe, New Mexico

1 THE COURT: This is Judge Ellington in Division VII in
2 Santa Fe, New Mexico. We're on the record. This is Santa Fe
3 Cause D-101-CV-2011-03315, Malott, Plaintiff, versus Anthony
4 Carrera, et al.

5 Appearances, please, for the record.

6 MR. FALLICK: Gregg Fallick for the Plaintiff, Your
7 Honor.

8 MR. CUNNINGHAM: David Cunningham for the Ajax
9 Defendants.

10 MR. HAMILTON: Steve Hamilton for Gary Bland, who is
11 in the courtroom with me.

12 MR. SCHULTZ: Andrew Schultz for the Deutsche Bank and
13 Vanderbilt Defendants.

14 MR. OLIVAS: Sean Olivas for the Cabrera Capital
15 Defendants and Martin Cabrera.

16 MS. TULK: Lisa Tulk for Marc Correra.

17 MS. KENNY: Rebecca Kenney for Patrick Livney.

18 MS. TULK: Pardon me, Your Honor, not Marc Correra.
19 SDN Advisors and L2 Investment Advisors, LLC.

20 MR. ROYCE: Steven Royce for the Aldus Defendants,
21 Your Honor.

22 THE COURT: I think that's everybody in the room. We
23 set this up as a status conference. Over the long weekend, I went
24 back and began at the end and then read backwards. And by that, I
25 mean I was reading Mr. Royce's reply to the response on their

1 motion to dismiss, and then I went back and reread four of the
2 other packets.

3 After thinking of it a lot, it was actually in reading
4 Mr. Royce's reply that I remembered an argument, couldn't remember
5 who made it, and went back and read. It was actually you,
6 Mr. Schultz, that made it on behalf of Deutsche Bank and
7 Vanderbilt over a year ago in the motions that are still pending
8 to dismiss out -- or to dismiss out individual Defendants. After
9 reviewing all of that, I am going to dismiss the current petition
10 and claims, allow you to refile them and modify them with more
11 detail.

12 The argument that Mr. Royce made in his pleading, which
13 was really Mr. Schultz's argument over a year ago, was about the
14 need for detail and individual facts as to the various Defendants
15 that remain. The Court previously dismissed out the Ajax group of
16 Defendants and then took under advisement the other pending
17 motions and tried to see if there was a way of dealing with them
18 collectively or if they were all going to be individual decisions.
19 It really wasn't until this weekend when I read the pleadings in
20 Aldus's motion, the response and the reply, that I think the best
21 way to manage the case is to dismiss it out at this point in time
22 with prejudice, allow you to refile. You've made argument in
23 several of your responses that you do have additional facts that
24 you could plead at this point in time. I don't know if that's
25 purely a result of the discovery that's already occurred or just

1 kind of the refinement of the case and the theories as you see
2 them at this point in time.

3 So questions on any of that, first, on behalf of
4 Mr. Malott?

5 MR. FALLICK: Thank you, Your Honor. There's been no
6 discovery, so -- but we have other information. And as the
7 Court -- as the Court knows, our position was that, of course,
8 they were adequate. And I know -- so the next step is we end up,
9 you know, with Groundhog Day all over again, you're going to get a
10 slew -- whatever we file, you will get a slew of motions saying
11 it's not good enough. So as much guidance as you can give me
12 about what kind of things you're talking about. We felt that we
13 pled it pretty explicitly, although we didn't plead the facts.
14 And I'm not questioning your ruling. I'm just trying to
15 understand, because I can do what I think you are looking for, and
16 then they file their motions and I guessed wrong.

17 So if there's anything specific you can give me guidance
18 on that you are troubled by, that you thought was lacking -- I
19 mean, I got that guidance on the Ajax Defendants, and I think I've
20 got a pretty good handle on what I need to do for them. And that
21 was an *in personam* jurisdiction motion. The rest of them are
22 12(B)(6) motions. There were a couple other *in personam*
23 jurisdiction motions.

24 THE COURT: Mr. Hamilton's motion, the Tort Claims
25 Act.

1 MR. FALLICK: Yeah. Has that one been granted, or is
2 that one not granted?

3 THE COURT: No. It's in the group and the -- in terms
4 of direction, I think that needs to be addressed or whatever --
5 it's mostly argument and legal conclusion and legal determination.
6 But the role of some of these individual actors, not the corporate
7 entities, but the people themselves in whatever additional detail
8 you have that would be helpful that could be pled as part of the
9 Second Amended Complaint.

10 As to the -- all of the institutional Defendants, again,
11 detail as to the relationships. I don't know if you know detail
12 as to individual transactions or other communications that were
13 occurring that may give New Mexico, under some Long Arm Statute
14 theory, the ability to do that. I'm asking you to address a
15 number of legal defenses that have come up by pleading facts that
16 would allow us to make a decision on those. Beyond that, I don't
17 really want to direct one way or the other how you plead your
18 case.

19 MR. FALLICK: I'm trying to think if there's anything
20 else -- anything more specific I can provide to get better
21 guidance. So you're talking about more specifics on the 12(B)(6)
22 issues, not just on the 12(B)(1) issues.

23 THE COURT: Yes.

24 MR. FALLICK: And I'm not sure that we can do this
25 now, but that was what -- the reference to Mr. Correra is a segue

EXHIBIT 4

1 AMERICAN ARBITRATION ASSOCIATION

2 COMMERCIAL ARBITRATION RULES

3 - - -

4 RENAISSANCE PRIVATE EQUITY)
5 PARTNERS, LP, ALDUS)
6 MANAGEMENT CO., LLC,)
7 SAUL M. MEYER, MATTHEW M.)
O'REILLY, PETRARCH HOLDINGS,)
8 LP, MARCELLUS TAYLOR,)
ERASMUS ADVISORS, LLC,)

9 Claimants,)

10 vs.) No. 71 180 00205

11 REED WALTERS,)

12 Respondent.)

13
14
15
16 DEPOSITION OF

17 ARLENE BUSCH

18 CHICAGO, ILLINOIS

19 DECEMBER 16, 2005

20
21 ATKINSON-BAKER, INC.
22 COURT REPORTERS
23 (800) 288-3376
www.depo.com

24 REPORTED BY: HEATHER PERKINS, CSR NO. 84-3714

25 FILE NO.: 9FOA08A

9FOA08A
ARLENE BUSCH DECEMBER 16, 2005

1 09:26:59 Reed was on the other, and we all talked about
2 09:27:00 L.A. firemen. Nothing more than just that
3 09:27:02 conversation ever came of that.
4 09:27:03 Q. You mentioned earlier -- and please
5 09:27:06 correct me if I'm mischaracterizing
6 09:27:09 anything -- that Reed felt that he had good
7 09:27:20 connections in the pension world; is that
8 09:27:20 correct?
9 09:27:20 A. Correct.
10 09:27:20 Q. Was it your estimation that he had
11 09:27:20 good connections in the pension world?
12 09:27:20 A. I didn't know. I was disappointed,
13 09:27:20 when we went through the effort of doing the
14 09:27:23 RFP for Texas Teachers, that they turned us
15 09:27:30 down because we weren't large enough, and
16 09:27:32 that's fine. You know, anyone can have any
17 09:27:34 criteria that they wanted, but I wasn't so
18 09:27:44 happy that my partner spent a lot of time on
19 09:27:44 the work. Nothing came of it.
20 09:27:44 Q. Were you disappointed that you spent
21 09:27:44 the time on the work when you guys didn't even
22 09:27:46 satisfy the prerequisite criteria?
23 09:27:50 A. Yes.
24 09:27:50 Q. And did you look to Reed to inform you
25 09:27:52 of what criteria existed?

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1 09:28:55 A. No, he wasn't. He was a marketer for
2 09:28:58 a hedge fund.
3 09:28:58 Q. Okay. I'm sorry. Thank you for the
4 09:29:01 correction.
5 09:29:01 Did that end up going anywhere?
6 09:29:04 A. No. We just talked about it at one
7 09:29:08 point. Nothing ever more came of it.
8 09:29:09 Q. And we will get into some more detail
9 09:29:11 later, but briefly can you just explain to me
10 09:29:13 the experience with New Mexico?
11 09:29:16 A. As I remember it, I heard that
12 09:29:25 New Mexico was looking to invest in hedge
13 09:29:29 funds, or a fund of funds, and they had three
14 09:29:32 buckets of money. I don't remember the size
15 09:29:35 of each of the buckets, but I think that the
16 09:29:38 bucket that we were going to go up for was
17 09:29:45 anywhere between \$100 million and
18 09:29:54 \$150 million.
19 09:29:54 I went out to New Mexico with my
20 09:29:54 husband and met Saul, and we went and saw a
21 09:29:55 consultant named Mark -- excuse me, I'm going
22 09:30:00 to screw up his last name -- it is like
23 09:30:02 Carruso, Carruso, something like that. Mark.
24 09:30:07 Q. Okay.
25 09:30:08 A. And we went to his office. We spent a

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1 09:27:54 A. I wasn't sure if that was his fault or
2 09:27:56 not.
3 09:27:59 Q. When was the Texas Teachers' RFP
4 09:28:03 submitted; do you recall?
5 09:28:04 A. It had to be in the winter, like March
6 09:28:07 time, because Caroline didn't go on a ski
7 09:28:12 holiday to do it, and that part I remember.
8 09:28:17 You can tell me a date, and I could confirm
9 09:28:19 it, but I don't remember.
10 09:28:21 Q. Do you believe it to be this year,
11 09:28:23 earlier this year?
12 09:28:26 A. Yes.
13 09:28:27 THE WITNESS: You think?
14 09:28:32 Yes.
15 09:28:32 BY MR. WICK:
16 09:28:32 Q. And what happened with that RFP?
17 09:28:35 A. It went in.
18 09:28:36 Q. It went in.
19 09:28:37 Was it turned down?
20 09:28:42 A. Yes. I told you that we were
21 09:28:42 told -- or Caroline was told that we didn't
22 09:28:44 get it because we weren't large enough.
23 09:28:47 Q. Let's talk a little bit more about the
24 09:28:50 meeting with the marketer from the L.A. fire
25 09:28:53 and police pension fund.

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1 09:30:11 short time there, and Saul and I went to lunch
2 09:30:17 with him, and it was a very light conversation
3 09:30:18 about what we did. We didn't get into serious
4 09:30:21 detail, but I did explain who we were and what
5 09:30:24 we did, and then Reed and Caroline took over
6 09:30:35 the RFP process.
7 09:30:48 Q. And then what happened?
8 09:30:49 A. And then we found out that we didn't
9 09:30:54 get it, and the way we found out that we
10 09:30:56 didn't get it was Carl Thoma, who was still an
11 09:31:02 investor at that time, has a home in Santa Fe,
12 09:31:08 and he e-mailed me that he had spoken to
13 09:31:12 someone who told him that we didn't get it,
14 09:31:14 and that is how I found out.
15 09:31:17 Q. Okay. When was the meeting with
16 09:31:23 Mr. Meyer and the consultant in New Mexico; do
17 09:31:26 you recall?
18 09:31:26 A. Sometime in the fall, I think, because
19 09:31:28 I had on a jacket, and there were still leaves
20 09:31:31 on the tree.
21 09:31:33 Q. Okay. Not this fall, but perhaps last
22 09:31:42 fall?
23 09:31:42 A. No, it definitely wasn't this fall.
24 09:31:42 That I would have remembered better, I think.
25 09:31:42 So it must have been the fall before. We

Page 25

7 (Pages 22 to 25)

9F0A08A
ARLENE BUSCH DECEMBER 16, 2005

1 09:31:44 stayed at the Inn At Anasazi. That I can tell
2 09:31:50 you.
3 09:31:50 Q. Do you recall at what time Mr. Walters
4 09:31:54 and your partner Caroline took over the RFP
5 09:31:57 process for New Mexico?
6 09:31:58 A. No. I'm sorry. I don't know if it
7 09:32:01 was before, during or after, but I would
8 09:32:04 imagine it had to have been after because I
9 09:32:10 don't think an RFP was given, and now that I'm
10 09:32:10 thinking about it a little more -- I really
11 09:32:12 haven't prepped for this at all. Sorry.
12 09:32:13 Q. That's okay.
13 09:32:15 A. Now that I'm thinking about it a
14 09:32:16 little more, I remember like asking all the
15 09:32:21 time: "When is the RFP coming out? When is
16 09:32:21 the RFP coming out?" and no one seemed to know
17 09:32:24 exactly, and then the RFP came out, and then
18 09:32:28 Reed and Caroline starting working on it.
19 09:32:32 Q. Let me divert a little bit. We will
20 09:32:35 come back to some more specifics about the
21 09:32:37 New Mexico and the Texas Teachers RFPs.
22 09:32:45 Your telephone number, what is
23 09:32:45 your work telephone number?
24 09:32:45 A. (312) 202-0205.
25 09:32:45 Q. And your home telephone?

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1 09:32:46 A. I don't have a home phone that I use,
2 09:32:48 but my cell number is (312) 498-9595.
3 09:32:53 Q. In the last year or so, did you and
4 09:33:02 Mr. Walters exchange any e-mail?
5 09:33:05 A. I would imagine so.
6 09:33:08 Q. Just trying to get a rough estimate
7 09:33:11 here. I mean, did you exchange very often?
8 09:33:13 A. I would have no idea. We would have
9 09:33:17 exchanged e-mails when it was necessary to
10 09:33:21 communicate that way. I mostly communicate
11 09:33:24 via e-mail and not via phone because I travel
12 09:33:27 a lot.
13 09:33:28 Q. Do you have any -- I mean, if I were
14 09:33:31 to say did you guys e-mail more than 20 times
15 09:33:33 in the last year, would that be safe to say?
16 09:33:36 A. Yes. You could probably say more than
17 09:33:38 20 times.
18 09:33:39 Q. Okay. Do you recall the last time you
19 09:33:41 received an e-mail from Mr. Walters?
20 09:33:44 A. A long time ago.
21 09:33:45 Q. More than six months ago?
22 09:33:47 A. What that would have to do with was
23 09:33:53 when I realized that Saul and Reed were having
24 09:34:11 some difficulty in their relationship, and
25 09:34:11 when that realization came about, Dave told me

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1 09:34:12 that I couldn't communicate with either of
2 09:34:14 them again, and I didn't, and then I had no
3 09:34:17 more e-mails, and that's why I was looking to
4 09:34:27 Dave because maybe he would remember when that
5 09:34:27 happened, but he doesn't have a say in
6 09:34:27 anything because he is not the one being
7 09:34:27 deposed. So I don't remember, but at that
8 09:34:29 time both of them were pretty good about not
9 09:34:34 contacting me ever again.
10 09:34:43 Q. How did you realize that Mr. Walters
11 09:34:43 and Mr. Meyer were having difficulties?
12 09:34:46 A. Two ways: One was I spoke with Saul,
13 09:34:49 who told me that Reed was going to no longer
14 09:34:52 be involved in the private equity group.
15 09:34:54 Q. Okay.
16 09:34:55 A. That he was going to be doing only
17 09:34:57 hedge fund work, and that he was going to be
18 09:35:01 working with us; and that Saul, if he did
19 09:35:03 anything at all, it was going to be just hands
20 09:35:07 removed, kind of behind-the-scenes stuff.
21 09:35:14 I don't remember if that was
22 09:35:14 before, during or after New Mexico, or exactly
23 09:35:18 when it was, but I remember that conversation,
24 09:35:21 and then Reed told me the same thing.
25 09:35:27 When I asked Saul why, he just

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1 09:35:32 said because that was Reed's skill set more,
2 09:35:37 and that's what they decided. When I asked
3 09:35:39 Reed why, he said that he and Saul didn't see
4 09:35:44 eye-to-eye on the way new pension business was
5 09:35:48 going to come into the private equity fund of
6 09:35:50 funds, and that he decided to spin out and do
7 09:35:57 his own thing.
8 09:35:58 Q. When you had the conversation with
9 09:36:04 Saul, did you understand that he was going to
10 09:36:04 stay somewhat involved in the hedge fund
11 09:36:05 process?
12 09:36:05 A. He was going to, from what I remember,
13 09:36:18 just be behind the scenes and kind of help
14 09:36:18 from a networking side.
15 09:36:20 Q. Okay. But he was going to have some
16 09:36:22 involvement, even if just behind-the-scenes
17 09:36:26 involvement?
18 09:36:27 A. Yes, I think so. Yes, from a
19 09:36:33 networking side, though, not from anything
20 09:36:34 else.
21 09:36:59 Q. Have you had any interaction with
22 09:37:02 either Matt O'Reilly or Marcellus Taylor?
23 09:37:06 A. Yes, with both of them, very little.
24 09:37:09 Marcellus just a little bit more than Matt.
25 09:37:12 Q. Okay.

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1 09:37:13 A. First, we have some hedge funds that
 2 09:37:16 we invested in Dallas, and I was in Dallas,
 3 09:37:25 and I came to visit Reed and Saul, who were
 4 09:37:25 together, and I met all the guys, and we went
 5 09:37:25 out to dinner, I think, one night, and maybe
 6 09:37:28 lunch, although I don't remember lunch, but
 7 09:37:31 Jon and I saw them then; and then when I was
 8 09:37:34 in New Mexico, Matt was there, and we wound up
 9 09:37:40 having dinner at the same restaurant,
 10 09:37:43 ironically enough, but my husband and I sat
 11 09:37:44 here, and Saul was with Matt, and they sat
 12 09:37:48 here. I don't think that he had dinner with
 13 09:37:51 us that night -- I don't remember -- but Matt
 14 09:37:53 was at the restaurant. Maybe you had dinner
 15 09:37:55 with us, and Matt was sitting with another
 16 09:37:57 group, but, any way, he was at the restaurant
 17 09:37:58 also, and I saw him there, and Marcellus
 18 09:38:02 contacted me a couple of times.
 19 09:38:05 One time was because Saul was
 20 09:38:08 going to put on some kind of conference, and
 21 09:38:11 wanted to know if I knew any hedge funds that
 22 09:38:13 might be willing to talk at whatever he was
 23 09:38:18 doing, and I put him in touch with a couple of
 24 09:38:21 Dallas hedge funds; and the second time was to
 25 09:38:24 contact Lee Mitchell about the

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1 09:38:29 potential -- actually, to see if I could help
 2 09:38:31 him with the potential of raising money.
 3 09:38:36 Thoma Cressey was launching a new fund, and he
 4 09:38:38 wanted to come in to potentially invest in the
 5 09:38:40 fund or help raise money for the fund or
 6 09:38:43 something, do something with the fund, and I
 7 09:38:46 just passed him over to Lee, and that's what I
 8 09:38:50 recall in dealing with Marcellus.
 9 09:38:59 Q. Did you have any dealings with either
 10 09:38:59 of those gentlemen in connection with
 11 09:39:04 New Mexico?
 12 09:39:04 A. No.
 13 09:39:05 Q. Let's talk for a minute about the
 14 09:39:06 relationship between Contego and Aldus. Do
 15 09:39:10 you believe at some point there was a
 16 09:39:11 relationship between those two entities?
 17 09:39:12 A. What do you mean by a relationship?
 18 09:39:14 Q. Well, was there a --
 19 09:39:18 MR. WICK: Let's take a look at this
 20 09:39:19 document.
 21 09:39:37 (Document marked as Exhibit 5
 22 09:39:37 for identification.)
 23 09:39:37 BY MR. WICK:
 24 09:39:38 Q. I show you what has been marked as
 25 09:39:39 Exhibit 5.

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1 09:39:56 A. Okay. What about this?
 2 09:39:57 Q. Do you recognize this document?
 3 09:39:58 A. Now that I see my signature on it, I
 4 09:40:00 do. Typically -- we are a small organization,
 5 09:40:07 and because of that, we are very good at all
 6 09:40:13 working in our own area of expertise. Since
 7 09:40:19 Dave is our partner and general counsel, most
 8 09:40:22 of this type of thing he would have done. He
 9 09:40:25 would have told me about it, asked me to sign
 10 09:40:29 it. But would I have necessarily sat there
 11 09:40:31 and read the whole thing? No.
 12 09:40:33 Q. And I'm not asking for any legal
 13 09:40:35 conclusions or such from you.
 14 09:40:40 A. Right. Clearly, my signature is
 15 09:40:40 there, and that is me, yes.
 16 09:40:40 Q. Okay. As a businessperson, what was
 17 09:40:49 your understanding as to the -- was there a
 18 09:40:49 proposed relationship? Did a relationship
 19 09:40:49 ever form between Contego and Aldus?
 20 09:40:49 A. There was a proposed relationship that
 21 09:40:54 we would form a joint venture, and the joint
 22 09:40:57 venture would be for the specific purpose of
 23 09:41:04 raising and investing money with pension
 24 09:41:10 funds. To my recollection, that's how it was
 25 09:41:15 going to work.

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1 09:41:17 Q. Did any other agreements or did any
 2 09:41:20 agreements ever -- were any agreements ever
 3 09:41:23 entered between Aldus and Contego following
 4 09:41:26 this correspondence, Exhibit 5?
 5 09:41:28 A. I wouldn't know. Dave would know that
 6 09:41:30 more than me, but I know that we never
 7 09:41:32 culminated in actually doing anything.
 8 09:41:35 Q. So the joint venture never proceeded?
 9 09:41:37 A. Correct.
 10 09:41:46 Q. About halfway through the first
 11 09:41:48 paragraph on the second page of Exhibit 5 --
 12 09:41:53 MR. SPALDING: Second page? I'm
 13 09:42:03 sorry.
 14 09:42:03 MR. WICK: I'm sorry. The page that
 15 09:42:03 you were looking at.
 16 09:42:03 MR. SPALDING: Which is 3339?
 17 09:42:05 MR. WICK: That's correct.
 18 09:42:05 MR. SPALDING: Okay.
 19 09:42:06 BY MR. WICK:
 20 09:42:06 Q. -- there is a reference to a phase:
 21 09:42:06 "The formation of a fund with hedge funds
 22 09:42:06 vehicle." Can you just describe what that is
 23 09:42:07 for me?
 24 09:42:07 A. Well, a fund of hedge funds vehicle
 25 09:42:10 would be equivalent, although I don't know

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1 09:42:13 what it meant in this context, but I can tell
2 09:42:17 you, if you ask me the question, what it would
3 09:42:20 mean.
4 09:42:20 Q. Sure.
5 09:42:20 A. What it would mean is you are forming
6 09:42:23 a flagship product where you are investing in
7 09:42:26 anywhere, depending on the criteria, anywhere
8 09:42:30 from ten to forty different hedge funds for
9 09:42:33 the purpose of raising assets to go in there
10 09:42:36 to work.
11 09:42:40 Q. Okay. Would the assets you are
12 09:42:42 raising, are they commingled assets?
13 09:42:45 A. They could be or they don't have to
14 09:42:46 be. It just depends on what the client wants.
15 09:42:49 Like what we do, there is no commingled
16 09:42:52 assets.
17 09:42:53 Q. I'm so sorry. I didn't mean to
18 09:42:54 interrupt you.
19 09:42:55 A. That's all right.
20 09:42:57 Q. Would you characterize them as
21 09:42:58 separate accounts?
22 09:42:59 A. Yes. I would say what we do is
23 09:43:01 investment advisory work in separate accounts
24 09:43:04 right now.
25 09:43:04 MR. SPALDING: Bryan, are you talking

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1 09:44:55 A. Correct.
2 09:44:56 Q. Was there ever any discussion that
3 09:44:58 the -- now, the New Mexico RFP we talked about
4 09:45:02 earlier, who was your understanding that that
5 09:45:04 was a joint venture between, or was it at all
6 09:45:06 a joint venture?
7 09:45:07 A. That was going to be a joint venture
8 09:45:09 between -- that was part of, although we
9 09:45:14 never -- I don't believe that we ever actually
10 09:45:17 signed a binding joint venture agreement, but
11 09:45:22 it was supposed to be a joint venture between
12 09:45:34 Aldus, maybe, and Contego, and the reason I
13 09:45:37 say Aldus maybe is I don't remember when Reed
14 09:45:42 split out or spun out and called his firm
15 09:45:46 Onesto, if that joint venture was Onesto and
16 09:45:50 Contego or Aldus and Contego.
17 09:45:54 I don't remember the timeline,
18 09:45:55 but it was supposed to be a joint venture, and
19 09:45:58 we changed the name. It had to have been
20 09:46:00 Aldus. I don't think the split out was at
21 09:46:03 that point, and it was going to be called
22 09:46:05 Vallo.
23 09:46:06 Q. So ultimately there was the New Mexico
24 09:46:09 RFP, though, and that was a joint venture
25 09:46:13 between Contego and Onesto?

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1 09:43:09 hypothetically or are you talking about actual
2 09:43:09 examples?
3 09:43:09 MR. WICK: I'm sorry. I'm just
4 09:43:09 talking generally Contego's business, what do
5 09:43:12 you do.
6 09:43:13 THE WITNESS: Yes, that's what we do.
7 09:43:41 MR. WICK: Okay. Thank you.
8 09:43:41 MR. SPALDING: Are we through with
9 09:43:42 Exhibit 5?
10 09:43:43 MR. WICK: We are.
11 09:43:43 MR. SPALDING: For the time being?
12 09:43:44 MR. WICK: For the time being, yes.
13 09:44:18 BY MR. WICK:
14 09:44:19 Q. Are you familiar with an entity or a
15 09:44:26 project known as Vallo?
16 09:44:26 A. Yes.
17 09:44:26 Q. Can you explain your familiarity or
18 09:44:26 what you believe that to be?
19 09:44:27 A. Yes. When we originally started out
20 09:44:37 the joint venture, we were going to have a new
21 09:44:37 name for it. It was going to be called Vallo,
22 09:44:45 and that's what I know about it. We were
23 09:44:46 going to call the joint venture Vallo.
24 09:44:49 Q. The joint venture between Aldus and
25 09:44:51 Contego was going to be known as Vallo?

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1 09:46:13 A. Or Contego and Aldus. I don't
2 09:46:16 remember the timeline, but it was Contego
3 09:46:20 and --
4 09:46:20 Q. And someone?
5 09:46:21 A. Right. Reed for sure, and I don't
6 09:46:30 remember if it was still Reed and Saul or if
7 09:46:30 it was just Reed, but I believe it was Reed
8 09:46:30 and Saul because Saul came with me, and we
9 09:46:32 talked a lot about Vallo. So I believe it was
10 09:46:34 with Aldus.
11 09:46:35 Q. So Mr. Meyer was helping you along
12 09:46:38 with this joint venture project, along with
13 09:46:40 Mr. Walters?
14 09:46:41 A. Yes. We all kind of chose the name
15 09:46:44 together. We went back and forth a lot about
16 09:46:46 that.
17 09:46:48 Q. Was anybody else assisting with the
18 09:46:50 Vallo project from the Aldus side?
19 09:46:53 A. No.
20 09:46:54 MR. SCHWEGMANN: Objection to form.
21 09:46:56 Just as long as we are clear about what "Vallo
22 09:47:00 project" is, I don't have an objection.
23 09:47:02 MR. WICK: If you understand the
24 09:47:02 question, you can answer it.
25 09:47:03 THE WITNESS: Yes. No, no one, just

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1 09:47:05 Saul was the only person I spoke to on it.
2 09:47:29 BY MR. WICK:
3 09:47:29 Q. Was there ever a discussion as to what
4 09:47:33 projects would be involved within Vallo? We
5 09:47:38 had a discussion that Vallo included
6 09:47:39 New Mexico.
7 09:47:40 A. Pensions.
8 09:47:53 Q. Were there any other specific pensions
9 09:47:53 other than New Mexico? For example, Texas
10 09:47:53 Teachers.
11 09:47:53 A. Texas Teachers, and then, as I said,
12 09:47:53 we spoke about -- but nothing ever came of
13 09:47:53 it -- very lightly we spoke about some other
14 09:47:54 things that could potentially be; New York,
15 09:47:57 New Jersey. I remember those two.
16 09:48:21 (Document marked as Exhibit 6
17 09:48:21 for identification.)
18 09:48:21 BY MR. WICK:
19 09:48:22 Q. I'm going to hand you what has been
20 09:48:23 marked as Exhibit 6 and ask you to review that
21 09:48:26 document.
22 09:48:28 MR. SPALDING: You handed us two
23 09:48:30 copies.
24 09:48:31 MR. WICK: Oh, would you throw one
25 09:48:33 over there? Thank you.

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1 09:49:43 because I'm still unclear by what you mean by
2 09:49:45 "the Vallo project."
3 09:49:50 MR. WICK: Are we objecting to form or
4 09:49:50 are we going to have a speaking objection?
5 09:49:51 Because I can play that game, as well, as long
6 09:49:54 as we go down.
7 09:49:54 MR. SCHWEGMANN: No. No.
8 09:49:56 MR. WICK: All you need to do is
9 09:49:56 object to form, and I will understand you have
10 09:49:56 a problem with the question, and it's
11 09:49:58 preserved.
12 09:49:58 MR. SCHWEGMANN: Okay. I will not do
13 09:49:59 that. I honestly am only doing it to make the
14 09:50:00 record clear. If you prefer I don't do that,
15 09:50:02 that's fine.
16 09:50:03 MR. WICK: Yes, I would.
17 09:50:04 MR. SCHWEGMANN: Fair.
18 09:50:05 BY MR. WICK:
19 09:50:05 Q. Do you recall ever presenting or -- do
20 09:50:11 you recall ever presenting this marketing
21 09:50:12 brochure, Exhibit 6, to any third party?
22 09:50:15 A. There is a possibility that we could
23 09:50:27 have presented it when we went to that lunch,
24 09:50:27 when we went to New Mexico, and Saul and I
25 09:50:27 went. I don't remember a hundred percent.

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1 09:48:33 BY MR. WICK:
2 09:48:52 Q. Have you had a chance to look through
3 09:48:54 Exhibit 6?
4 09:48:54 A. No, I just looked at the front page,
5 09:48:59 but it is a marketing brochure.
6 09:48:59 Q. It is a marketing brochure; is that
7 09:49:01 what you said?
8 09:49:01 A. Yes.
9 09:49:02 Q. And it is a marketing brochure for
10 09:49:05 Vallo Investment Partners?
11 09:49:07 A. Correct.
12 09:49:08 Q. Was this marketing brochure ever
13 09:49:10 presented to anybody outside of Vallo?
14 09:49:17 MR. SPALDING: I'm going to object to
15 09:49:18 the question because we have already, I think,
16 09:49:20 established that Vallo never actually existed.
17 09:49:25 The joint venture wasn't consummated. So I'm
18 09:49:26 just going to object to your characterization
19 09:49:31 of "outside of Vallo." Maybe you could
20 09:49:31 specify that in a little different way.
21 09:49:33 MR. WICK: I will object to your
22 09:49:34 characterization of Vallo never being formed,
23 09:49:37 but my question is --
24 09:49:39 MR. SCHWEGMANN: Just so it is a part
25 09:49:41 of it, I object to the question as well

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1 09:50:29 I'm really sorry. I know that this is
2 09:50:31 probably important, and I don't, but it is
3 09:50:34 possible I could have. It is possible I
4 09:50:37 didn't.
5 09:50:37 Q. Do you recall there being discussions
6 09:50:39 with New Mexico about Vallo?
7 09:50:41 A. Oh, yes. We talked about the name
8 09:50:42 Vallo when we were with Mark.
9 09:50:45 MR. WICK: Okay. We are finished with
10 09:51:02 that exhibit for now.
11 09:51:15 Do you want to go off the record?
12 09:51:18 THE WITNESS: Yes.
13 09:51:18 MR. SPALDING: Can we go off the
14 09:51:18 record? Sorry.
15 09:51:19 MR. WICK: Sure.
16 09:51:19 THE VIDEOGRAPHER: We are going off
17 09:51:28 record at 9:51 a.m.
18 09:51:28 (Recess taken.)
19 09:59:32 THE VIDEOGRAPHER: We are back on
20 09:59:33 record at 9:59 a.m.
21 09:59:33 (Document marked as Exhibit 7
22 09:59:36 for identification.)
23 09:59:36 BY MR. WICK:
24 09:59:37 Q. Ms. Busch, let me show you what has
25 09:59:38 been marked as Exhibit 7. I ask you to please

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11 (Pages 38 to 41)

1 10:04:15 BY MR. WICK:
2 10:04:17 Q. Do you believe that Contego and Onesto
3 10:04:21 were working together in connection with
4 10:04:24 providing investment advisory services or
5 10:04:26 attempting to secure contracts to provide
6 10:04:28 investment advisory services to both
7 10:04:33 New Mexico and Texas Teachers?
8 10:04:34 A. No, I think the Texas Teachers was
9 10:04:36 before Onesto came together, and I think
10 10:04:40 New Mexico kind of straddled the relationship,
11 10:04:44 and then not the relationship, and I don't
12 10:04:47 remember exactly when things changed in that
13 10:04:53 process with New Mexico.
14 10:04:54 Q. Following New Mexico, have there been
15 10:04:57 any further dealings between Contego and
16 10:05:00 Onesto?
17 10:05:08 MR. SCHWEGMANN: Object to form.
18 10:05:09 MR. WICK: Do you understand the
19 10:05:10 question?
20 10:05:11 THE WITNESS: Yes, I understand the
21 10:05:12 question. I don't know what you mean by
22 10:05:13 "dealings." Did we continue to communicate?
23 10:05:13 BY MR. WICK:
24 10:05:18 Q. Are you continuing to attempt to do
25 10:05:18 business together?

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1 10:06:42 just wasn't the right fit.
2 10:06:42 So I can't talk necessarily for
3 10:06:42 my partners, but I can talk for myself: I was
4 10:06:46 getting disillusioned that it was taking a lot
5 10:06:49 of time to do this work, and I didn't see a
6 10:06:53 natural fit, with the best intentions by
7 10:06:56 everyone. I just didn't see a natural fit
8 10:07:01 there.
9 10:07:01 Q. And when you say "this work" are you
10 10:07:03 generalizing the institutional --
11 10:07:05 A. Pension. Institutional. Large
12 10:07:07 institutional pension business that would come
13 10:07:09 from states.
14 10:08:07 Q. How did you decide to submit an RFP
15 10:08:15 for Texas Teachers? What was the process that
16 10:08:15 you undertook to make the decision to expend
17 10:08:18 those resources?
18 10:08:20 A. Reed contacted us and said that he
19 10:08:22 believed we had a shot at getting it, and that
20 10:08:25 we needed to fill out an RFP, and that's what
21 10:08:29 we did.
22 10:08:30 Q. Did he explain to you why he thought
23 10:08:33 you had a shot at getting a contract from
24 10:08:35 Texas Teachers?
25 10:08:37 A. I don't remember.

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1 10:05:19 A. Oh, no, not since Dave told me we
2 10:05:21 couldn't talk any more.
3 10:05:23 Q. Following when you heard that you were
4 10:05:28 not awarded the contract from New Mexico, do
5 10:05:33 you recall where in the time frame that edict
6 10:05:36 from Dave came down? Did Dave tell you to
7 10:05:40 stop talking to these guys before or after
8 10:05:42 that?
9 10:05:42 A. It was after that.
10 10:05:44 Q. So after you heard that you were not
11 10:05:45 awarded the New Mexico contract, was there a
12 10:05:47 determination within Contego as to whether or
13 10:05:50 not Contego would continue to attempt to do
14 10:05:55 business with Mr. Walters and Onesto?
15 10:05:55 A. I think we, as Contego, were a little
16 10:05:58 disappointed that it didn't happen, and my
17 10:06:04 confidence in anything else happening was
18 10:06:08 starting to go down, but in saying that I
19 10:06:12 think a lot of the problem was Contego's, not
20 10:06:17 that we did anything wrong, but what was
21 10:06:20 happening was we were trying to put a square
22 10:06:26 peg in a round hole, and that we didn't have
23 10:06:26 the right business model, we weren't at the
24 10:06:29 right size. Much of our business involves
25 10:06:32 leverage -- not all, but a lot of it -- and it

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1 10:08:45 Q. Did he express to you that -- did he
2 10:08:47 have a relationship that would assist in
3 10:08:49 securing that contract?
4 10:08:50 A. I'm sure that something like that must
5 10:08:52 have been the reason; otherwise, we wouldn't
6 10:08:55 have gone through the effort. I mean, we
7 10:08:57 wouldn't have just arbitrarily decided to do
8 10:09:00 this.
9 10:09:12 Q. Did Contego and Onesto ever seek
10 10:09:16 Mr. Meyer's assistance with Texas Teachers?
11 10:09:19 A. Contego?
12 10:09:20 MR. SCHWEGMANN: Objection to form.
13 10:09:23 THE WITNESS: I'm sorry?
14 10:09:25 MR. SCHWEGMANN: I'm sorry. When I
15 10:09:27 object to form, you can answer. I just want
16 10:09:29 to preserve my objection for the record.
17 10:09:33 THE WITNESS: Oh, okay.
18 10:09:36 Contego did not. I don't know if
19 10:09:40 Onesto did.
20 10:09:40 BY MR. WICK:
21 10:09:40 Q. Were there ever any conversations
22 10:09:42 between yourself and Mr. Walters concerning
23 10:09:44 Texas Teachers and the fact that we should
24 10:09:53 seek assistance from Mr. Meyer or anyone at
25 10:09:53 Aldus?

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1 10:09:53 A. No. I would have relied on Reed doing
2 10:09:55 that -- that was his job -- doing that side of
3 10:09:58 it, and that wouldn't have come from me.
4 10:10:49 (Document marked as Exhibit 8
5 10:10:55 for identification.)
6 10:10:55 BY MR. WICK:
7 10:10:56 Q. Let me show you what has been marked
8 10:11:00 as Exhibit 8 and ask you to review that
9 10:11:00 document, and my question is: Have you ever
10 10:11:10 seen it before? I will represent to you that
11 10:11:13 it appears to be signed by David Schink.
12 10:11:18 A. No, but -- I might have seen it, but I
13 10:11:33 can't imagine that I spent a lot of time
14 10:11:35 reading it because we rely on Dave to do that.
15 10:11:39 Q. Well, do you ever recall any
16 10:11:42 discussions that there was a document entered
17 10:11:43 into between Contego and Onesto concerning
18 10:11:48 Texas Teachers?
19 10:11:49 A. I don't remember. I'm sorry.
20 10:11:58 Q. This document --
21 10:12:08 A. Excuse me one second. I don't know if
22 10:12:11 it was this document or another one, but I do
23 10:12:15 remember that Dave was getting cranky because
24 10:12:20 he was going back and forth with Reed over
25 10:12:29 stating that everyone was in SEC

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1 10:12:40 compliance -- not that he wasn't -- but that
2 10:12:40 his lawyers were saying it had to be signed,
3 10:12:40 it had to look like this, and Dave was saying,
4 10:12:41 no, it had to look like this, and they were
5 10:12:43 going back and forth. I don't know if it was
6 10:12:44 this document or another one, and I guess it
7 10:12:47 got worked out to everyone's satisfaction, but
8 10:12:51 I remember that.
9 10:12:52 So your question, if you ask me
10 10:12:55 if I remember this document, I remember a
11 10:12:58 document just because of that. It might have
12 10:13:01 been this one or another one.
13 10:13:03 Q. Generally speaking, not you
14 10:13:05 personally, but Contego as a whole, you having
15 10:13:07 said that, did Contego view the relationship
16 10:13:10 with Mr. Walters as difficult?
17 10:13:13 MR. SCHWEGMANN: Objection to form.
18 10:13:15 THE WITNESS: Not with Reed
19 10:13:17 personally, but with that whole side, Reed and
20 10:13:24 Saul, and not necessarily me, but my partners
21 10:13:27 never really felt that anything was going to
22 10:13:31 ever develop from it, and they were all very
23 10:13:33 cranky with me about having to put the work
24 10:13:36 in.
25 10:13:37 Jon kind of washed his hands of

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1 10:13:43 the whole thing and said: "I'm not going to
2 10:13:43 even be involved." Caroline missed a couple
3 10:13:46 of trips, and was working day and night,
4 10:13:50 around the clock, really hard on some of the
5 10:13:53 RFP stuff; and, in fairness, so was Reed
6 10:13:58 because he came to New York and worked really
7 10:14:00 hard on some of the RFP stuff with Caroline,
8 10:14:04 but no one ever thought anything was going to
9 10:14:08 amount from it, and from that point of view
10 10:14:13 they thought the relationship was difficult,
11 10:14:13 but not difficult because of the people
12 10:14:15 involved.
13 10:14:16 BY MR. WICK:
14 10:14:16 Q. You said Mr. Walters worked very hard
15 10:14:21 on the RFP stuff with Caroline. Was that in
16 10:14:22 particular the Texas RFP?
17 10:14:24 A. No, that was more -- I don't remember.
18 10:14:27 It was the -- sorry, I don't remember, but I
19 10:14:29 do know that he flew to New York and spent a
20 10:14:32 lot of time in the office with her working on
21 10:14:34 it, and he spent the time. He mailed it out.
22 10:14:39 He collated it. He did a lot of work.
23 10:14:43 I was hearing this as a
24 10:14:47 third-party because I was not involved in the
25 10:14:48 slightest bit, and, in fact, I don't think I

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1 10:14:57 even read it completely. So I wasn't involved
2 10:14:57 in it, but I know he worked hard on it, either
3 10:14:57 on both or on one or the other.
4 10:15:02 Q. That RFP for New Mexico was submitted
5 10:15:03 under the name of Contego; is that correct?
6 10:15:05 A. Correct.
7 10:15:06 Q. And not Vallo?
8 10:15:07 A. Correct.
9 10:15:08 Q. Vallo is an entity, however, that you
10 10:15:13 have had discussions with the State of
11 10:15:13 New Mexico about?
12 10:15:13 A. Vallo and Contego, yes.
13 10:15:15 Q. Vallo and Contego?
14 10:15:18 A. Yes. They clearly knew that we were
15 10:15:20 Contego also.
16 10:15:21 Q. And why do you say that?
17 10:15:22 A. Why do I say that they knew that we
18 10:15:24 were Contego also?
19 10:15:26 Q. Yes.
20 10:15:27 THE VIDEOGRAPHER: Excuse me. I need
21 10:15:27 you to flip your mike up.
22 10:15:27 THE WITNESS: Sorry. Is it better
23 10:15:27 like this?
24 10:15:27 THE VIDEOGRAPHER: Yes.
25 10:15:43 THE WITNESS: Okay. Sorry.

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9FOA08A
ARLENE BUSCH DECEMBER 16, 2005

1 10:15:43 MR. SPALDING: Maybe you can read the
2 10:15:47 question back.
3 10:15:47 MR. WICK: I can repeat the question
4 10:15:47 or rephrase it.
5 10:15:48 BY MR. WICK:
6 10:15:48 Q. I was just curious as to why you
7 10:15:50 assumed that the folks in New Mexico knew that
8 10:15:54 you were both Vallo and Contego.
9 10:15:54 A. Well, I know Mark did because I told
10 10:16:00 him that I was Contego also, and the reason
11 10:16:00 that we didn't use the name Vallo was because
12 10:16:08 the track record and the AUM were associated
13 10:16:11 with Contego, and when Dave looked at it
14 10:16:16 legally --
15 10:16:18 MR. SPALDING: Hold on. I want you to
16 10:16:19 be very careful about what you say. I don't
17 10:16:22 want you to tell them what Dave told you about
18 10:16:25 why you were doing it.
19 10:16:26 MR. WICK: That's where you are
20 10:16:27 roaming into that area where you are not
21 10:16:28 supposed to.
22 10:16:31 THE WITNESS: Sorry. Sorry.
23 10:16:32 What we decided was that legally
24 10:16:41 we couldn't use the name Vallo because Vallo
25 10:16:41 had nothing to do with the track record and

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1 10:17:59 on the RFP. It just wasn't at the beginning
2 10:18:04 of it, but I know it was incorporated in the
3 10:18:07 RFP somewhere. As I said, I didn't read it,
4 10:18:11 but I'm 90 percent sure that I remember my
5 10:18:15 partners and I talking about it, and Vallo was
6 10:18:18 incorporated in that RFP.
7 10:18:24 Q. Do you remember when the Texas
8 10:18:28 Teachers' RFP was submitted?
9 10:18:31 A. No, but I know it was submitted on
10 10:18:34 time.
11 10:18:34 Q. Okay.
12 10:18:37 A. Because there was a huge deal about
13 10:18:43 that.
14 10:18:43 (Document marked as Exhibit 9
15 10:18:43 for identification.)
16 10:18:55 BY MR. WICK:
17 10:18:55 Q. I hand you what has been marked as
18 10:18:57 Exhibit 9. Exhibit 9 is a series of e-mails.
19 10:19:04 I would like for you to just take a minute to
20 10:19:08 read those e-mails. You are not the author,
21 10:19:19 nor the recipient of all of them, but you are
22 10:19:19 at least copied on some, and I have a few
23 10:19:19 questions about some of the statements made in
24 10:19:20 those e-mails.
25 10:19:20 MR. SPALDING: Would you like her to

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1 10:16:41 the AUM that we had to show, and that's why we
2 10:16:47 didn't use it.
3 10:16:47 BY MR. WICK:
4 10:16:47 Q. Did you ever relate to Mr. Meyer or
5 10:16:48 anyone at Aldus that there was a decision to
6 10:16:50 submit the RFP for New Mexico under Contego
7 10:16:54 for those reasons as opposed to submitting it
8 10:16:56 under the name Vallo?
9 10:16:58 A. I know that Reed knew. I don't
10 10:17:08 remember if I ever said anything to Saul about
11 10:17:09 it, but I will tell you that when we didn't
12 10:17:11 get it, and I spoke with Saul, he was very
13 10:17:19 surprised that we used the name Contego. I
14 10:17:19 don't remember if I ever told him we were
15 10:17:21 using the name Contego, but I do know that I
16 10:17:27 told him that Reed knew we were using Contego,
17 10:17:30 and I expected that the two of them would have
18 10:17:32 spoken. I might have told Saul. I don't
19 10:17:33 remember.
20 10:17:33 Q. Okay. And do you think when you told
21 10:17:36 Saul that Reed knew that you were going to use
22 10:17:39 the name Contego, was that conversation after
23 10:17:41 you had already heard from New Mexico that you
24 10:17:43 were not being awarded the contract?
25 10:17:52 A. Correct. But I do know that Vallo was

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1 10:19:22 read the entire string of e-mails?
2 10:19:24 MR. WICK: I would like you to. It is
3 10:19:31 only about a page. It just barely rolls onto
4 10:19:45 the second page.
5 10:20:06 THE WITNESS: That's when I was in
6 10:20:07 L.A. That is when I went to that reception.
7 10:20:24 MR. SPALDING: Let him ask you
8 10:20:26 questions.
9 10:20:26 THE WITNESS: Sorry. Okay.
10 10:20:29 BY MR. WICK:
11 10:20:30 Q. The bottom of the first page of
12 10:20:32 Exhibit 9, it appears to be an e-mail from
13 10:20:37 Reed Walters to you amongst others at Contego.
14 10:20:41 Do you recall receiving this e-mail from
15 10:20:45 Mr. Walters?
16 10:20:45 A. Not offhand. Sorry.
17 10:20:51 Q. Okay. There is a reference in the
18 10:20:51 first paragraph there where it states: "Now
19 10:20:58 that I have a base to work from, I hope I can
20 10:20:58 relieve a lot of time and stress from you all
21 10:21:00 by taking responsibility for managing any of
22 10:21:02 our combined RFP efforts going forward." Do
23 10:21:08 you see that?
24 10:21:08 A. Uh-huh -- well, I don't see it, but it
25 10:21:10 is right there.

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15 (Pages 54 to 57)

9FOA08A
ARLENE BUSCH DECEMBER 16, 2005

1 10:26:00 about potentially doing some networking or
2 10:26:05 marketing with him and/or with us, but not
3 10:26:10 necessarily just with us.
4 10:26:14 Q. Okay. Do you know why Mr. Straw was
5 10:26:16 copied on this e-mail concerning the Texas
6 10:26:24 Teachers' RFP? I'm sorry, Exhibit 9. If you
7 10:26:24 look at the e-mail from —
8 10:26:26 A. No.
9 10:26:26 Q. Did Mr. Straw have anything to do with
10 10:26:28 the Texas Teachers' project that Contego and
11 10:26:33 Onesto engaged in?
12 10:26:33 A. Not that I know, no.
13 10:26:48 Q. Did you ever ask Mr. Meyer or anyone
14 10:26:52 at Aldus to stop contacting you or fellow
15 10:26:56 members of your team at Contego?
16 10:26:58 A. Yes.
17 10:26:58 Q. Are you referring to the letter from
18 10:27:02 Mr. Schink?
19 10:27:03 A. Yes.
20 10:27:03 Q. Was there any other time that you
21 10:27:06 asked the gentlemen at Aldus not to contact
22 10:27:10 you or Contego?
23 10:27:11 A. No.
24 10:27:12 Q. With the exception of Mr. Schink's
25 10:27:14 letter, was there ever any discussions that

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1 10:28:45 had asked members of Aldus not to contact
2 10:28:48 anyone at Contego?
3 10:28:49 A. No.
4 10:29:20 (Document marked as Exhibit 10
5 10:29:20 for identification.)
6 10:29:20 BY MR. WICK:
7 10:29:21 Q. I'm handing you what has been marked
8 10:29:23 as Exhibit 10. I don't suspect you have ever
9 10:29:25 seen this document before. I will represent
10 10:29:28 to you that this document, Exhibit 10, bearing
11 10:29:30 Bates number RW 8284 and 8287, is a portion of
12 10:29:37 a document that was produced by Mr. Walters.
13 10:29:41 It appears to be handwritten notes concerning
14 10:29:43 a conversation that Mr. Walters may or may not
15 10:29:48 have had with you, and I would like to just
16 10:29:48 kind of run through some of those notes and
17 10:29:51 see if you recall this conversation.
18 10:29:54 So if you would like to take a
19 10:30:02 minute to review, please do. It is just two
20 10:30:02 pages.
21 10:30:02 MR. SPALDING: It is just two pages?
22 10:30:02 MR. WICK: Yes.
23 10:30:03 MR. SPALDING: But out of order? 8284
24 10:30:06 to 8287?
25 10:30:11 THE VIDEOGRAPHER: Excuse me. You

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1 10:27:23 the persons working at Contego should not
2 10:27:23 contact Mr. Meyer or anyone at Aldus?
3 10:27:24 A. Not that I recall.
4 10:27:34 Q. Do you recall Mr. Meyer ever
5 10:27:35 contacting you to offer his assistance in
6 10:27:37 connection with the submission to New Mexico?
7 10:27:43 A. What do you mean by helping with the
8 10:27:49 submission?
9 10:27:50 Q. Did he ever call and offer his
10 10:27:52 assistance to help with either
11 10:27:56 behind-the-scenes marketing or actual work on
12 10:28:08 the RFP, any type of assistance whatsoever?
13 10:28:08 A. No assistance on working on the RFP.
14 10:28:08 Yes, I went down to New Mexico with him. So
15 10:28:10 clearly he was offering assistance to help us.
16 10:28:16 Q. Do you recall him contacting you in
17 10:28:18 the first part of this year, prior to the time
18 10:28:21 that you received notice from New Mexico that
19 10:28:24 Contego was not awarded the contract, to offer
20 10:28:28 any assistance?
21 10:28:29 MR. SCHWEGMANN: Objection to form.
22 10:28:30 THE WITNESS: I don't remember.
23 10:28:34 Sorry.
24 10:28:43 BY MR. WICK:
25 10:28:43 Q. Did Mr. Walters ever tell you that he

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1 10:30:12 have to put that mike back on.
2 10:30:14 MR. WICK: What I have done is I have
3 10:30:16 extracted excerpts that reference Ms. Busch
4 10:30:21 rather than admitting the entirety of the
5 10:30:24 document.
6 10:30:25 MR. SPALDING: That's fine. Read both
7 10:30:27 pages, please.
8 10:30:28 (Brief pause.)
9 10:33:03 MR. WICK: I'm going to ask you some
10 10:33:08 questions. We can take a break if Mr. Schink
11 10:33:08 would like to read it.
12 10:33:08 MR. SPALDING: That's all right. Go
13 10:33:08 ahead.
14 10:33:08 Keep it there, and he will ask
15 10:33:09 you some questions about it.
16 10:33:10 MR. WICK: Okay. I have a few
17 10:33:11 questions for you about this, and I would like
18 10:33:13 to kind of walk through those two paragraphs
19 10:33:15 that you have just reviewed.
20 10:33:24 THE WITNESS: Yes.
21 10:33:24 BY MR. WICK:
22 10:33:24 Q. The first sentence states that:
23 10:33:24 "Talked with Arlene Bush today, and she
24 10:33:24 revealed to me that Saul had contacted her
25 10:33:24 directly this week while she was in New York,"

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17 (Pages 62 to 65)

9F0A08A
ARLENE BUSCH DECEMBER 16, 2005

1 10:33:27 and the date on this entry is February 9th,
2 10:33:31 2005. Do you recall this conversation having
3 10:33:33 read the handwritten notes dated February 9th,
4 10:33:39 2005?
5 10:33:39 A. Do I recall what? I'm sorry.
6 10:33:39 Q. Do you recall the conversation with
7 10:33:39 Mr. Walters on February 9th, 2005? Do these
8 10:33:56 handwritten notes refresh your recollection?
9 10:33:56 A. It helps refresh it. I wouldn't
10 10:33:56 specifically remember that I had it on that
11 10:33:56 day, but I do remember speaking with Saul. I
12 10:33:57 had no reason to think I couldn't speak with
13 10:34:00 Saul, and he called. I also could have called
14 10:34:04 him on occasion because I didn't know I wasn't
15 10:34:08 supposed to. Nobody ever told me not to speak
16 10:34:11 with him, but I do remember that I told
17 10:34:15 Reed - this is all, the parts of this, are
18 10:34:19 true - that I told Reed that Saul had talked
19 10:34:24 to me.
20 10:34:26 Q. Did Mr. Walters relay to you that he
21 10:34:29 had specifically asked Mr. Meyer not to
22 10:34:32 contact you?
23 10:34:33 A. No.
24 10:34:37 Q. Did you feel that Saul was going
25 10:34:39 around Reed's back by calling you or by

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1 10:36:03 been after Texas. But when the relationship
2 10:36:05 split up, and it became Onesto, he made it
3 10:36:11 clear that he was the person that I was to go
4 10:36:11 to and to go through for anything that had to
5 10:36:13 do with New Mexico, that this was his project
6 10:36:21 with Contego at that point.
7 10:36:21 Q. And to only go through Reed, not to
8 10:36:22 talk with Mr. Meyer?
9 10:36:23 A. No, not to talk to him, but to only go
10 10:36:26 through Reed on issues that had to do with
11 10:36:29 New Mexico.
12 10:36:30 Q. Okay.
13 10:36:30 A. Or issues that had to do with pension
14 10:36:38 fund consulting in general.
15 10:36:44 Q. The next page is some handwritten
16 10:36:47 notes that I will represent to you were
17 10:36:49 produced by Mr. Walters. The date is
18 10:36:54 February 15th, 2005. It states: "Spoke to
19 10:36:54 Arlene Busch today, and after making me agree
20 10:36:58 not to tell anyone, she proceeded to tell me
21 10:37:00 that Saul contacted her again, against my
22 10:37:02 direct request for him to cease and desist."
23 10:37:09 A. No.
24 10:37:10 Q. That's not true?
25 10:37:11 A. Not all of it. I would have told him

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1 10:34:41 talking with you?
2 10:34:43 A. No. I felt that he was just trying to
3 10:34:49 help.
4 10:34:49 Q. Did Mr. Meyer's conversations with
5 10:34:52 you, did that damage your relationship in any
6 10:34:54 way with Mr. Walters?
7 10:34:56 A. No. You are not asking me this, but
8 10:35:00 I'm going to tell you something any way: In
9 10:35:02 all fairness, Saul and Reed never said
10 10:35:05 anything bad about each other to me.
11 10:35:20 Q. Did Mr. Meyer ever tell you he
12 10:35:26 believed Reed was trying to get the New Mexico
13 10:35:26 account on his own and cut out Contego?
14 10:35:30 A. I don't remember. Sorry.
15 10:35:33 Q. The last sentence here on this first
16 10:35:36 page of Exhibit 10 says: "My trust in her has
17 10:35:39 been damaged, and I am not sure she has the
18 10:35:42 respect for me that she should given the fact
19 10:35:46 that she is listening to Saul and Ignored my
20 10:35:49 direction to her a few weeks ago to go through
21 10:35:51 me only." Did Mr. Walters ever direct you to
22 10:35:56 go through him only in connection with
23 10:35:58 New Mexico?
24 10:35:58 A. Yes. I don't remember if it was
25 10:36:00 New Mexico. It must have been. It must have

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1 10:37:14 that Saul had called. I might have said: "I
2 10:37:19 don't want to be in the middle. Don't go back
3 10:37:21 and tell Saul," but I don't remember Reed ever
4 10:37:25 telling me not to speak to Saul.
5 10:37:34 Q. Did Mister - I'm continuing to read,
6 10:37:37 and I have a question where it says: "He
7 10:37:40 asked" - "he" being Mr. Meyer - "asked to
8 10:37:44 see the RFP for New Mexico before it goes
9 10:37:48 out." Do you recall Mr. Meyer ever asking to
10 10:37:49 see the RFP?
11 10:37:50 A. Yes.
12 10:37:50 Q. And was it provided to him before it
13 10:37:50 went out?
14 10:37:54 A. That I don't know. That wouldn't have
15 10:37:55 been my bit. That would have been the other
16 10:37:57 people and Contego's bit; however, if I read
17 10:38:03 later, it says that David -
18 10:38:03 THE WITNESS: May I say this?
19 10:38:06 MR. SPALDING: Yes, sure. I mean, you
20 10:38:07 can read it.
21 10:38:07 THE WITNESS: -- that David denied
22 10:38:12 Saul. So I wouldn't have ever gone around a
23 10:38:16 partner. I don't think so. I wouldn't have
24 10:38:17 given him the RFP.
25 10:38:22 MR. WICK: I apologize. I didn't mean

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1 10:38:22 to interrupt you.
 2 10:38:23 THE WITNESS: That's okay.
 3 10:38:23 BY MR. WICK:
 4 10:38:23 Q. Do you ever recall a
 5 10:38:28 conversation -- and I'm just asking for the
 6 10:38:28 substance, not any details -- where Mr. Schink
 7 10:38:29 said: "No, we can't provide Saul a copy of
 8 10:38:31 the RFP before it goes out?"
 9 10:38:34 A. No, I don't remember. I was traveling
 10 10:38:41 a lot.
 11 10:38:41 Q. Okay.
 12 10:38:41 A. But that would have been someone
 13 10:38:41 else's decision, not mine.
 14 10:38:46 Q. It goes on to say: "Arlene was very
 15 10:38:48 concerned about the call and said she would
 16 10:38:51 not be willing to give Saul that information."
 17 10:38:56 A. Yes.
 18 10:38:57 Q. Do you recall being very concerned
 19 10:38:58 about a telephone call with Mr. Meyer in
 20 10:39:00 February of 2005?
 21 10:39:02 MR. SCHWEGMANN: Objection to form.
 22 10:39:04 THE WITNESS: I don't think I would
 23 10:39:07 have been concerned. I don't know why I would
 24 10:39:09 have been concerned, but I would imagine, in
 25 10:39:12 reading this, that I would not have given Saul

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1 10:40:05 the hedge funds, but I didn't think it was for
 2 10:40:05 any bad reason.
 3 10:40:07 BY MR. WICK:
 4 10:40:08 Q. Okay. Did you still at this point
 5 10:40:09 think Mr. Meyer, in your opinion, was he
 6 10:40:11 attempting to assist Contego in their efforts
 7 10:40:14 with New Mexico?
 8 10:40:16 A. Yes, I thought so.
 9 10:40:22 MR. WICK: Okay. Let's take a short
 10 10:40:24 break and let the videographer change the
 11 10:40:27 tape.
 12 10:40:27 THE WITNESS: We are going off record
 13 10:40:30 at 10:40 a.m.
 14 10:40:34 (Recess taken.)
 15 10:56:24 THE VIDEOGRAPHER: We are back on
 16 10:56:26 record at 10:56 a.m.
 17 10:56:28 BY MR. WICK:
 18 10:56:29 Q. Ms. Busch, I'm going to read to you
 19 10:56:32 two different sentences. I'm going to
 20 10:56:33 represent that these statements come from
 21 10:56:35 Mr. Walters' claim against Aldus, Mr. Meyer,
 22 10:56:39 and some of the other members of Aldus.
 23 10:56:41 MR. SPALDING: I'm sorry, Bryan. This
 24 10:56:42 is the complaint in the arbitration or the
 25 10:56:44 demand?

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1 10:39:15 any information that my partners didn't feel
 2 10:39:18 was appropriate.
 3 10:39:19 MR. WICK: Sure. Okay.
 4 10:39:21 THE VIDEOGRAPHER: We have
 5 10:39:24 approximately ten minutes until end of tape.
 6 10:39:27 MR. WICK: Let me just finish with
 7 10:39:28 this exhibit, and then we can take a short
 8 10:39:30 break.
 9 10:39:31 BY MR. WICK:
 10 10:39:36 Q. If you go on to read the rest of this
 11 10:39:38 entry, did you get the feeling that Mr. Meyer
 12 10:39:41 was trying to extract information from you for
 13 10:39:44 any nefarious purpose during any of your
 14 10:39:47 telephone calls with him?
 15 10:39:51 MR. SCHWEGMANN: Objection to form.
 16 10:39:51 THE WITNESS: What does "nefarious"
 17 10:39:55 mean?
 18 10:39:55 BY MR. WICK:
 19 10:39:55 Q. Did you get the feeling that he was
 20 10:39:55 trying to extract information from you during
 21 10:39:58 any of your calls or was it just a normal
 22 10:39:58 conversation that you have had with him in the
 23 10:40:00 past?
 24 10:40:00 MR. SCHWEGMANN: Objection to form.
 25 10:40:01 THE WITNESS: He wanted the name of

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1 10:56:45 MR. WICK: The counterclaim. I'm just
 2 10:56:47 going to read two statements. I just want to
 3 10:56:49 see whether or not you agree with those
 4 10:56:58 statements.
 5 10:56:58 BY MR. WICK:
 6 10:56:58 Q. The first statement is: "Mr. Meyer
 7 10:56:58 successfully undermined the relationship
 8 10:56:58 between Mr. Walters and Contego." Do you
 9 10:57:00 agree with that?
 10 10:57:00 A. No.
 11 10:57:03 Q. Do you agree with the next statement:
 12 10:57:06 "Mr. Meyer made it impossible for the parties
 13 10:57:08 to fulfill their respective obligations?"
 14 10:57:13 MR. SCHWEGMANN: Objection to form.
 15 10:57:14 MR. WICK: Actually, let me withdraw
 16 10:57:16 that question.
 17 10:57:16 BY MR. WICK:
 18 10:57:17 Q. Let me read this statement: "As a
 19 10:57:20 result of Mr. Meyer's interference, Contego
 20 10:57:23 refused to establish Vallo Investment
 21 10:57:31 Partners," the joint venture entity that we
 22 10:57:31 have been talking about here today.
 23 10:57:31 A. Because of Saul?
 24 10:57:32 Q. Yes, Ma'am.
 25 10:57:33 A. No.

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1 11:03:36 It, but let me just represent for the record
2 11:03:45 that it is a document bearing Bates number
3 11:03:45 RW 1 through 134.
4 11:03:45 THE WITNESS: Excuse me. Do we have
5 11:03:47 any tissue in here?
6 11:03:49 MR. WICK: Let's take a break. We are
7 11:03:58 going off the record briefly.
8 11:03:58 THE VIDEOGRAPHER: We are going off
9 11:04:01 record at 11:03 a.m.
10 11:04:11 (Recess taken.)
11 11:05:36 THE VIDEOGRAPHER: We are back on
12 11:05:37 record at 11:05 a.m.
13 11:05:39 BY MR. WICK:
14 11:05:40 Q. I'm going to hand you what has been
15 11:05:41 marked Exhibit 13. It is a document that
16 11:05:51 bears Bates number RW 1 through RW 134. I
17 11:05:51 believe this to be the proposal submitted by
18 11:05:51 Contego to New Mexico for the hedge fund
19 11:05:53 business.
20 11:05:54 A. Now you can see why Caroline was so
21 11:06:00 cranky.
22 11:06:00 Q. Can you please take a minute to review
23 11:06:02 that exhibit and let me know whether you are
24 11:06:07 able to identify it as being a --
25 11:06:07 A. It is definitely an RFP. I would

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1 11:06:10 imagine, if you are telling me it is the one
2 11:06:19 that Contego prepared, then it is, but, as I
3 11:06:19 told you before, I didn't really look at it
4 11:06:19 much.
5 11:06:19 Q. Okay. What was Contego and Onesto
6 11:06:24 shooting for? What would have been the
7 11:06:34 contract if it had been awarded to Contego
8 11:06:34 pursuant to the RFP, which we believe may be
9 11:06:34 Exhibit 13?
10 11:06:34 A. I'm not sure I understand your
11 11:06:34 question. Sorry.
12 11:06:34 Q. What would have the contract entailed?
13 11:06:35 What were the parameters of the contract?
14 11:06:37 What services would Contego and/or Onesto been
15 11:06:45 providing?
16 11:06:45 MR. SCHWEGMANN: Objection to form.
17 11:06:45 THE WITNESS: Okay. Contego would
18 11:06:45 have been providing hedge fund selection, due
19 11:06:48 diligence, and ongoing monitoring, risk
20 11:06:51 management of a portfolio of hedge funds.
21 11:06:55 BY MR. WICK:
22 11:07:04 Q. Were there discussions that
23 11:07:05 Mr. Walters would or not would play a
24 11:07:08 continued role in the servicing of the
25 11:07:10 New Mexico relationship if it had, in fact,

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1 11:07:14 been awarded to Contego?
2 11:07:19 A. Yes, there were discussions that Reed
3 11:07:19 would have sat in on part of our investment
4 11:07:22 committee meetings and that he would have gone
5 11:07:25 on some due diligence meetings with us or
6 11:07:29 probably more specifically with me.
7 11:07:44 Q. Did you have any discussions with
8 11:07:54 Mr. Walters after you were informed that
9 11:07:54 New Mexico had declined the RFP that was
10 11:07:54 presented by Contego?
11 11:07:55 A. Did I have any discussions with him?
12 11:08:00 Q. Yes.
13 11:08:00 A. What do you mean by "discussions"?
14 11:08:00 Q. Did you talk with him after you heard
15 11:08:01 the news?
16 11:08:02 A. Yes.
17 11:08:03 Q. And generally what were those? Do you
18 11:08:04 recall what those discussions were?
19 11:08:06 A. I think we had -- we talked for a
20 11:08:09 while afterwards on why we didn't get the
21 11:08:14 business, and I don't remember what was
22 11:08:25 actually said. My real frustration,
23 11:08:25 "frustration" being a mild term, my real
24 11:08:28 frustration was the way that we found out that
25 11:08:34 we didn't get the business, that no one was

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1 11:08:34 clued in enough, that Carl had to send me an
2 11:08:37 e-mail telling me that we didn't get the
3 11:08:40 business. I was real unhappy about that. The
4 11:08:43 fact that we didn't get it, you know,
5 11:08:47 something fell apart. I wasn't sure how or
6 11:08:50 where, and I would imagine I discussed it.
7 11:08:54 Q. Do you generally remember the
8 11:08:58 substance of the conversation concerning why
9 11:08:58 we didn't get the contract?
10 11:09:01 A. I know that -- I don't remember what
11 11:09:09 Reed said. I know Saul said that he felt it
12 11:09:14 was because Vallo wasn't prominent in the
13 11:09:19 marketing documents, but I don't remember. I
14 11:09:25 mean, I didn't see it as being anyone's fault.
15 11:09:30 You know, it is what it is. You make your
16 11:09:36 best efforts. You go forward. You try your
17 11:09:36 hardest. You get it or you don't.
18 11:09:38 Q. Do you remember how many RFPs were
19 11:09:41 submitted to New Mexico?
20 11:09:42 A. No. I wasn't involved in that process
21 11:09:45 at all.
22 11:09:45 (Document marked as Exhibit 14
23 11:09:45 for identification.)
24 11:10:00 BY MR. WICK:
25 11:10:00 Q. I'm going to hand you what has been

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21 (Pages 78 to 81)

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1 11:18:26 Q. And I think he asked, but just for the
2 11:18:28 record, who are your partners?
3 11:18:29 A. Jon Norberg and Dave Schink.
4 11:18:32 Q. Okay. And at some point you had
5 11:18:34 another partner named Ms. Gillespie?
6 11:18:45 A. Correct.
7 11:18:45 Q. And where is Ms. Gillespie today?
8 11:18:45 A. She resigned from Contego in May and
9 11:18:45 in June took a job with a firm called
10 11:18:47 The Common Fund in Wilton, Connecticut.
11 11:18:48 Q. And how within Contego is work
12 11:18:51 generally divided amongst the partners?
13 11:18:54 A. I do marketing and some due diligence;
14 11:18:56 Jon does due diligence and research; and Dave
15 11:19:00 does legal/compliance, and he runs the
16 11:19:02 day-to-day business.
17 11:19:03 Q. And without getting into too much
18 11:19:05 detail, is Contego owned equally between the
19 11:19:09 partners?
20 11:19:09 A. No.
21 11:19:09 Q. Who owns the majority share?
22 11:19:11 A. Jon and I own an equal amount. Dave
23 11:19:15 owns less.
24 11:19:16 Q. And I think I heard you say earlier
25 11:19:18 that decisions within Contego are agreed to by

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1 11:19:21 all the partners; is that right?
2 11:19:23 A. Right, all business decisions.
3 11:19:25 Q. Okay. So no one person has a say, but
4 11:19:31 together all partners make decisions for
5 11:19:31 Contego; is that right?
6 11:19:31 A. Correct.
7 11:19:32 Q. Does Contego have any other employees
8 11:19:35 apart from the partners?
9 11:19:39 A. Yes.
10 11:19:39 Q. About how many?
11 11:19:39 A. We have three other employees.
12 11:19:39 Q. And would you tell me their names and
13 11:19:41 just a very brief description of what they do?
14 11:19:43 A. Sure. Alan Cheng is an analyst who
15 11:19:47 works for Contego out of New York, and Joon
16 11:19:51 Jeong is an analyst who works for Contego in
17 11:19:54 Chicago, and Lauren Rachid is our office
18 11:20:05 assistant.
19 11:20:05 Q. And I know that you noted a number of
20 11:20:05 other cities. Should I take that to mean that
21 11:20:05 Contego has offices in other cities?
22 11:20:06 A. Right. San Francisco, Jon works out
23 11:20:09 of San Francisco; Alan out of New York; and us
24 11:20:17 out of Chicago.
25 11:20:17 Q. Let me circle back around to the

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1 11:20:17 telephone calls you had with Mr. Meyer. You
2 11:20:18 had the one a week ago, and then
3 11:20:28 between -- this is going to be difficult to
4 11:20:28 answer -- between January and today,
5 11:20:28 approximately how many times?
6 11:20:28 A. I would have no idea.
7 11:20:29 Q. Let me ask if you can give me a range.
8 11:20:35 Would it be more than ten conversations on the
9 11:20:35 phone?
10 11:20:35 A. Sorry. I can't. I would have no
11 11:20:36 idea. If there was a reason to talk to him, I
12 11:20:46 would pick up the phone and call. I could
13 11:20:46 call him four times in one day. I could go
14 11:20:46 two months without speaking to him. I would
15 11:20:46 have no idea.
16 11:20:48 Q. Okay. Thank you.
17 11:20:49 A. Sorry.
18 11:20:49 Q. Maybe if I ask it in a different way:
19 11:20:52 Would you agree with me that between January
20 11:20:54 and now, you have spoken with Mr. Meyer on the
21 11:20:56 phone more than three times?
22 11:20:57 A. Yes.
23 11:21:02 Q. And when you spoke with him, would you
24 11:21:03 typically use your cell phone, your office
25 11:21:07 phone?

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1 11:21:07 A. Wherever I was, whatever I was doing.
2 11:21:09 If I was in the office, I always use my office
3 11:21:11 phone. If I'm traveling, I always use my cell
4 11:21:15 phone.
5 11:21:15 Q. And when you spoke with Mr. Meyer,
6 11:21:17 generally what was the content of those
7 11:21:24 conversations? And let me be clear.
8 11:21:24 Did you speak with Mr. Meyer
9 11:21:26 about anything other than the New Mexico
10 11:21:32 business that Mr. Wick asked you about?
11 11:21:32 A. We spoke about New Mexico,
12 11:21:33 restaurants, art, hotels, his family.
13 11:21:36 Q. Was there any other business apart
14 11:21:38 from the New Mexico business that you guys
15 11:21:40 discussed?
16 11:21:41 A. Maybe Texas Teachers. I don't recall
17 11:21:51 anything else.
18 11:21:52 Q. Do you recall speaking with
19 11:21:55 Mr. O'Reilly or Mr. Taylor about the
20 11:21:57 New Mexico business?
21 11:21:58 A. No.
22 11:22:09 MR. SCHWEGMANN: I'm about to get into
23 11:22:12 some documents, and I'm afraid I will
24 11:22:12 burden -- I don't want to get too bogged down
25 11:22:16 on the documents. It might be a good time to

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1 12:15:15 Q. I imagine that's right.
2 12:15:17 If you will look with me in the
3 12:15:21 very first paragraph, it says: "In connection
4 12:15:24 with the proposed joint venture fund of hedge
5 12:15:27 funds arrangement, referred to as the
6 12:15:29 transaction," and it continues. Would you
7 12:15:31 agree with me that the transaction refers to
8 12:15:34 the Vallo/New Mexico set of deals? Is that
9 12:15:48 right?
10 12:15:48 A. Not just New Mexico. I think what it
11 12:15:48 refers to is doing pension business,
12 12:15:48 New Mexico or Texas Teachers being an example
13 12:15:51 of, but not exclusively.
14 12:15:53 Q. Okay. Thank you for that
15 12:15:55 clarification.
16 12:15:56 Either the New Mexico or Texas
17 12:15:59 Teachers would have been run through Vallo,
18 12:16:01 correct?
19 12:16:01 A. Yes, that's correct.
20 12:16:10 Q. So if I use "Vallo" during this
21 12:16:10 deposition, I can also use the word
22 12:16:10 "transaction" interchangeably, fair?
23 12:16:10 MR. SPALDING: That's up to you.
24 12:16:11 THE WITNESS: Yes.
25 12:16:12 MR. SPALDING: If you understand.

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1 12:17:05 speaks to Vallo, correct?
2 12:17:05 A. Yes.
3 12:17:05 Q. -- "between the company," and the
4 12:17:06 company is Contego, fair?
5 12:17:08 A. Yes.
6 12:17:09 Q. So "You agree that unless and until a
7 12:17:11 definitive agreement regarding the transaction
8 12:17:13 between the company and you has been executed,
9 12:17:16 neither the company nor you will be under any
10 12:17:27 legal obligation of any kind whatsoever with
11 12:17:27 respect to such a transaction by virtue of
12 12:17:27 this agreement, except for the matters
13 12:17:27 specifically referred to herein." Do you see
14 12:17:30 that language?
15 12:17:31 A. Uh-huh.
16 12:17:32 Q. What is your understanding of the
17 12:17:34 reason that that provision was inserted into
18 12:17:36 this letter agreement?
19 12:17:37 A. I'm not very good at lawyering, and
20 12:17:39 I'm not even sure that I understand what all
21 12:17:41 that means. If you would like to explain it
22 12:17:43 to me in simple terms, I can then tell you if
23 12:17:47 what you are telling me makes sense.
24 12:17:48 Q. Well, fair. Let me ask you another
25 12:17:50 question.

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1 12:16:14 THE WITNESS: Yes. If I have a
2 12:16:14 question, I will just ask you.
3 12:16:23 MR. SCHWEGMANN: Fair. I'm not trying
4 12:16:23 to trick you. I'm just trying to make it
5 12:16:23 easier.
6 12:16:23 THE WITNESS: No, no. I will ask you
7 12:16:23 if I have a question.
8 12:16:24 BY MR. SCHWEGMANN:
9 12:16:24 Q. Okay. If you will flip with me to
10 12:16:26 Page 3 of that agreement.
11 12:16:33 MR. SPALDING: RW 1928?
12 12:16:36 MR. SCHWEGMANN: Yes. Unfortunately,
13 12:16:41 I'm using a Contego document, but, in any
14 12:16:41 event, it is Page 3.
15 12:16:42 MR. WICK: That's correct. It is
16 12:16:44 1928.
17 12:16:44 MR. SPALDING: Okay.
18 12:16:45 BY MR. SCHWEGMANN:
19 12:16:45 Q. And if you will look down with me to
20 12:16:47 the third full paragraph, it says: "You
21 12:16:49 agree" -- and "you" is Mr. Walters, correct?
22 12:16:51 A. I presume so.
23 12:16:53 Q. -- "you agree that unless and until a
24 12:16:56 definitive agreement regarding the
25 12:16:59 transaction," and we agree the transaction

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1 12:17:50 Was it your understanding,
2 12:17:59 at least on January 10th of this year, that
3 12:17:59 Mr. Walters, he was never an employee of
4 12:17:59 Contego; was he?
5 12:17:59 A. No.
6 12:17:59 Q. And he wasn't a partner with you or
7 12:18:02 with anyone with Contego; was he?
8 12:18:04 A. No.
9 12:18:04 Q. And, indeed, he wasn't a joint venture
10 12:18:07 partner with you, at least until the
11 12:18:09 transaction was funded, correct?
12 12:18:10 A. Correct, or at least until we signed a
13 12:18:13 definitive agreement, which I believe we never
14 12:18:16 did.
15 12:18:16 Q. And because he wasn't an employee, and
16 12:18:19 because he wasn't a partner, or even a joint
17 12:18:28 venture partner, he didn't have any authority
18 12:18:28 to speak for Contego; did he?
19 12:18:28 A. No.
20 12:18:28 Q. And if he didn't have authority to
21 12:18:30 speak for Contego, I take it he also didn't
22 12:18:33 have any authority to sign a contract on
23 12:18:35 behalf of Contego?
24 12:18:38 A. I would hope not.
25 12:18:38 Q. And, indeed, that is something that

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1 12:26:29 to tell them, and they wouldn't have to sign
2 12:26:29 anything, but I wouldn't just go out and talk
3 12:26:29 about it just with anyone.
4 12:26:31 Q. Okay. But in general the names of the
5 12:26:41 institutional clients, the names of the hedge
6 12:26:41 fund managers, those were the sorts of things
7 12:26:41 you typically require an NDA to disclose?
8 12:26:43 A. Correct, if at all.
9 12:26:44 Q. Would you put that type of information
10 12:26:46 in your marketing materials?
11 12:26:47 A. No.
12 12:26:54 Q. I want to talk a little bit about some
13 12:26:56 meetings you had with the State of New Mexico
14 12:27:00 or at least with some people in Santa Fe.
15 12:27:03 Mr. Wick asked you some questions, and I think
16 12:27:08 you talked about a trip to Santa Fe, correct?
17 12:27:08 A. Correct.
18 12:27:09 Q. Do you recall when was that trip?
19 12:27:12 A. As I said, it was in the fall, I
20 12:27:21 believe.
21 12:27:21 Q. And do you recall who did you meet
22 12:27:21 with?
23 12:27:21 A. Yes, I met with Saul, and we met with
24 12:27:23 this gentleman Mark, whose last name begins
25 12:27:26 with a C, that I can't pronounce or remember.

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1 12:28:26 A. Correct. So I talked about my
2 12:28:27 background, which we have all heard, a very
3 12:28:30 similar conversation, and I talked about
4 12:28:33 Contego as a firm, how many people we had, our
5 12:28:41 offices, due diligence a little bit, how we
6 12:28:41 chose hedge funds, the value-added proposition
7 12:28:45 of customization, those types of things.
8 12:28:47 Q. And when you said "We explained what
9 12:28:49 we did," you meant what Contego did, correct?
10 12:28:52 A. Correct.
11 12:28:52 Q. So it was no mystery to Mr. Corraera
12 12:28:57 that you were meeting with him on behalf of
13 12:29:10 Contego, fair?
14 12:29:10 A. No, that's correct.
15 12:29:10 Q. And I think you showed him a
16 12:29:10 presentation, or at least Mr. Wick showed you
17 12:29:10 a presentation today, and let me pull that
18 12:29:10 out. I think it is Exhibit 6.
19 12:29:10 A. Yes. It is the Vallo marketing
20 12:29:11 material.
21 12:29:13 Q. And if you will look on the front
22 12:29:16 page, which is Bates stamped 2480, do you see
23 12:29:19 that?
24 12:29:19 A. Yes.
25 12:29:19 Q. It is the e-mail I think.

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1 12:27:29 Q. Could it be Corraera?
2 12:27:31 A. Yes, Corraera. That's it.
3 12:27:33 Q. And you said, I think, that you had a
4 12:27:35 lunch meeting, and maybe you met with him in
5 12:27:37 his office, correct?
6 12:27:37 A. I met with him in his office first and
7 12:27:39 then we went to lunch.
8 12:27:40 Q. Do you recall what, if anything, you
9 12:27:42 said during that meeting?
10 12:27:43 A. In general we talked about the fact
11 12:27:47 that he was doing some consulting work and
12 12:27:51 that there was a possibility he would
13 12:27:54 represent us. We talked about what Contego
14 12:27:59 did, how we did our business.
15 12:28:02 Q. Right. And I think in response to his
16 12:28:04 question you said, quote, and I think I got it
17 12:28:06 right, "We explained who we were and what we
18 12:28:09 did," correct?
19 12:28:10 A. Uh-huh. Yes.
20 12:28:11 Q. And when you gave him that response,
21 12:28:13 would you state for the record - can you
22 12:28:16 expand on that? Let me ask the question.
23 12:28:26 When you said "We explained who
24 12:28:26 we were," do you mean that you explained who
25 12:28:26 Contego was?

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1 12:29:21 A. Yes.
2 12:29:21 Q. And you will see the date on that is
3 12:29:24 November 3rd, 2004.
4 12:29:25 A. Right.
5 12:29:25 Q. Would that have been during the right
6 12:29:34 time frame during which you were in Santa Fe
7 12:29:34 for that meeting?
8 12:29:34 A. Yes, November.
9 12:29:34 Look. See.
10 12:29:34 Q. Does this refresh your recollection
11 12:29:34 that this presentation was most likely given
12 12:29:35 to Mr. Corraera during that time frame?
13 12:29:37 A. Correct.
14 12:29:38 Q. And, by the way, what did you
15 12:29:40 understand Mr. Corraera's job was?
16 12:29:49 A. He was the son of the governor's best
17 12:29:49 friend.
18 12:29:49 Q. And who was the governor?
19 12:29:50 A. I have no idea.
20 12:29:51 Q. And who was the best friend?
21 12:29:57 A. His father, Mr. Corraera.
22 12:29:57 Q. Okay. Do you know his first name?
23 12:29:58 A. No.
24 12:29:58 Q. What did you understand the reason for
25 12:30:00 the meeting?

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1 12:34:54 Bates number of 521. It appears to be an
2 12:34:58 e-mail from a Kelly Yepsen.
3 12:35:06 A. She is my assistant.
4 12:35:06 Q. You anticipated my question.
5 12:35:06 And you will see the date is
6 12:35:06 October 11th, 2004?
7 12:35:06 A. Yes.
8 12:35:06 Q. And that is about a month before the
9 12:35:07 document we just looked at, correct?
10 12:35:11 A. Uh-huh, yes.
11 12:35:16 Q. Do you recall when the actual
12 12:35:16 presentation was made?
13 12:35:17 I'm sorry, when the presentation
14 12:35:19 was written.
15 12:35:21 A. No.
16 12:35:21 MR. WICK: Objection, form.
17 12:35:22 MR. SCHWEGMANN: You don't know.
18 12:35:23 BY MR. SCHWEGMANN:
19 12:35:24 Q. Do you know who created this
20 12:35:25 presentation?
21 12:35:25 A. I would imagine that it was Jon and
22 12:35:30 Caroline. It was not me.
23 12:35:32 Q. And if you have in one hand Exhibit 15
24 12:35:34 and in your other hand Exhibit 16, as you sit
25 12:35:37 here today, can you tell me --

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1 12:36:38 correct.
2 12:36:38 Q. And it sounds like a silly question,
3 12:36:41 but I take it your business cards say Contego
4 12:36:45 Capital Partners?
5 12:36:45 A. Yes, they do.
6 12:36:48 Q. I want to ask you -- Mr. Wick asked
7 12:36:50 you some questions about the RFP itself, and I
8 12:36:54 want to ask you just a few brief questions. I
9 12:36:57 don't think he marked it, so let me do that.
10 12:36:59 MR. WICK: I think I did. I just
11 12:37:01 didn't have extra copies of it.
12 12:37:03 MR. SCHWEGMANN: No, you marked the
13 12:37:04 submission. I actually want to mark the
14 12:37:06 actual RFP.
15 12:37:07 MR. WICK: Okay. Sure.
16 12:37:18 He is just marking these so his
17 12:37:21 load on the way home is a little lighter.
18 12:37:24 MR. SCHWEGMANN: He has caught me.
19 12:37:25 MR. SPALDING: It is a common play
20 12:37:29 among lawyers.
21 12:37:29 (Document marked as Exhibit 17
22 12:37:29 for identification.)
23 12:37:29 BY MR. SCHWEGMANN:
24 12:37:29 Q. I'm going to call this Exhibit 17. It
25 12:37:31 says "New Mexico State Investment Council

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1 12:35:39 MR. SPALDING: 15 and 16?
2 12:35:49 MR. SCHWEGMANN: Oh, I'm sorry, 6.
3 12:35:49 BY MR. SCHWEGMANN:
4 12:35:49 Q. If you have in one hand Exhibit 6 and
5 12:35:49 in your other hand Exhibit 16, can you tell me
6 12:35:49 which of the two presentations was given to
7 12:35:50 Mr. Corraa?
8 12:35:51 A. No, I'm sorry, I can't, except, by
9 12:35:53 reading what Kelly said, it appears that I had
10 12:35:57 given this one, but I don't remember right
11 12:35:59 now.
12 12:35:59 Q. And "by this one" you mean exhibit?
13 12:36:02 A. 16, but I really don't remember.
14 12:36:06 Q. And if you will stay with me on
15 12:36:08 Exhibit 16 and just flip through the
16 12:36:10 presentation, will you confirm for me that
17 12:36:12 Contego Capital Partners appears on every page
18 12:36:17 of the presentation?
19 12:36:17 A. Yes.
20 12:36:29 Q. By the way, do you have business
21 12:36:31 cards?
22 12:36:31 A. Yes.
23 12:36:31 Q. And would you have given one of your
24 12:36:33 business cards to Mr. Corraa?
25 12:36:35 A. I would imagine that I would have,

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1 12:37:32 Request For Proposals for Investment
2 12:37:35 Management Services," and it bears Bates stamp
3 12:37:36 Claimants 2115 through 2171.
4 12:37:50 There are some extra pages
5 12:37:51 attached at the end that aren't part of the
6 12:37:54 RFP, which I can rip apart, but in the
7 12:37:57 interest of speed I won't do that now.
8 12:38:13 Apparently, some documents got caught in the
9 12:38:16 copying machine, so it is a little bit bigger
10 12:38:19 than it normally would be.
11 12:38:21 Ms. Busch, you can take a minute
12 12:38:23 to flip through it, but I want to ask: Have
13 12:38:25 you seen this document before?
14 12:38:26 A. No.
15 12:38:27 Q. And you didn't review the RFP itself
16 12:38:32 prior to it going out?
17 12:38:34 A. Correct.
18 12:38:34 Q. Did anyone with Contego have the
19 12:38:37 responsibility of reviewing the RFP to
20 12:38:39 determine whether Contego met the
21 12:38:41 qualifications, et cetera?
22 12:38:43 A. Yes.
23 12:38:43 Q. And who would that person have been?
24 12:38:46 A. Dave.
25 12:38:46 Q. And by "Dave" you mean Mr. Schlink?

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1 12:46:37 Q. Were you aware that Mr. Walters was
2 12:46:39 drafting some of the RFP sections and working
3 12:46:44 with Ms. Gillespie and Mr. Schink on the RFP?
4 12:46:51 A. Yes.
5 12:46:56 MR. SCHWEGMANN: Let me mark as 21 an
6 12:47:03 e-mail from Mr. Walters bearing Bates stamp
7 12:47:09 Reed Walters 253.
8 12:47:23 MR. SPALDING: You marked this 21? I
9 12:47:25 think we just marked the prior exhibit as 18.
10 12:47:33 MR. SCHWEGMANN: Swap this for me,
11 12:47:38 which makes this one 19.
12 12:47:38 MR. SPALDING: Yes. RW 253 is
13 12:47:41 Exhibit 19.
14 12:47:45 MR. WICK: Do you have an extra one?
15 12:47:48 MR. SCHWEGMANN: Yes. I'm sorry.
16 12:47:55 MR. SPALDING: Are we done with
17 12:47:56 Exhibit 18?
18 12:47:57 MR. SCHWEGMANN: Yes, sir.
19 12:47:57 (Document marked as Exhibit 19
20 12:47:58 for identification.)
21 12:47:58 BY MR. SCHWEGMANN:
22 12:48:00 Q. My questions are pretty simple: Who
23 12:48:05 is the individual referenced in the "to"
24 12:48:07 column?
25 12:48:07 A. Don Zugay was an analyst who worked

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1 12:48:56 (Document marked as Exhibit 20
2 12:48:59 for identification.)
3 12:48:59 BY MR. SCHWEGMANN:
4 12:49:00 Q. And this is a document bearing Bates
5 12:49:10 numbers 246 to 249.
6 12:50:08 A. Okay.
7 12:50:09 Q. Again, Ms. Busch, my questions will be
8 12:50:11 quick, I think. It is dated March 8th, and it
9 12:50:15 is between Mr. Walters and Mr. Schink,
10 12:50:16 correct?
11 12:50:17 A. Correct.
12 12:50:17 Q. And on the very first line on the
13 12:50:19 first page, Mr. Walters says: "David, I have
14 12:50:21 attached some items requested in the RFP that
15 12:50:24 you haven't seen yet." Do you see that?
16 12:50:26 A. Yes.
17 12:50:30 Q. And if you will flip with me, I think
18 12:50:30 Page 247 and 248 and 249 are the attachments.
19 12:50:31 They are certainly parts of the RFP, correct?
20 12:50:34 A. Yes.
21 12:50:34 Q. And are you surprised to learn today
22 12:50:35 that Mr. Walters drafted those and submitted
23 12:50:38 those to Mr. Schink?
24 12:50:39 A. No. He was working on the RFP.
25 12:50:41 Q. Right. And those were among the

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1 12:48:10 with us in Chicago.
2 12:48:11 Q. And he was working on the New Mexico
3 12:48:13 RFP as well?
4 12:48:14 A. Based on this thing, I presume
5 12:48:16 everyone kind of was with me.
6 12:48:17 Q. And it says: "Per Arlene" — Reed
7 12:48:21 says in the e-mail: "Per Arlene's request, I
8 12:48:24 am e-mailing you to ask if you could help me
9 12:48:28 with a couple of answers for the New Mexico
10 12:48:28 RFP." Do you see that?
11 12:48:29 A. Uh-huh.
12 12:48:29 Q. So you were aware that Mr. Walters was
13 12:48:31 not only drafting some portions of the RFP, he
14 12:48:35 was working on some particular answers as
15 12:48:40 well?
16 12:48:40 A. Yes.
17 12:48:40 Q. And that's not surprising to you?
18 12:48:40 A. No, no. He was working on that,
19 12:48:41 uh-huh.
20 12:48:42 Q. Let me see if I can empty my box just
21 12:48:45 a little bit more here.
22 12:48:46 A. Are we done with this one?
23 12:48:48 Q. Yes, Ma'am.
24 12:48:54 MR. SCHWEGMANN: So that makes this
25 12:48:55 one 20.

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1 12:50:46 things that he was responsible for, correct?
2 12:50:46 A. Yes. I wasn't exactly sure what he
3 12:50:55 was responsible for, but I knew that he was
4 12:50:55 working on it in conjunction with Caroline.
5 12:50:55 Q. And Mr. Schink?
6 12:50:55 A. And Mr. Schink, yes.
7 12:51:14 MR. SCHWEGMANN: I realize this is
8 12:51:16 tedious, but let me get through these, and
9 12:51:19 this one is 22.
10 12:51:28 MR. WICK: 21.
11 12:51:28 MR. SPALDING: 21.
12 12:51:36 (Document marked as Exhibit 21
13 12:51:45 for identification.)
14 12:51:45 BY MR. SCHWEGMANN:
15 12:51:56 Q. Again, Ms. Busch, this is an e-mail
16 12:51:59 from Mr. Walters to Mr. Schink. Again, you
17 12:52:01 are not copied, correct?
18 12:52:02 A. Correct.
19 12:52:11 Q. And it is dated March 9th, and
20 12:52:11 Mr. Walters says: "Got your PDF of things to
21 12:52:11 sign," and he sent that work to Mr. Schink,
22 12:52:21 correct?
23 12:52:21 A. Correct.
24 12:52:21 Q. And even though you are not copied,
25 12:52:21 again, this e-mail is consistent with the

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35 (Pages 134 to 137)

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1 13:00:15 Q. Okay. And we looked at a couple of
2 13:00:17 exhibits earlier, the October 8th letter
3 13:00:20 agreement and the January 10th letter
4 13:00:22 agreement, and I think you said you
5 13:00:27 understood, going forward, your formal
6 13:00:27 business relationship, to the extent one
7 13:00:29 existed, was with Onesto, correct?
8 13:00:32 A. Correct.
9 13:00:32 Q. Did you have at any given point in
0 13:00:33 time, with respect to the New Mexico project,
1 13:00:36 any formal relationship with Mr. Meyer?
2 13:00:46 A. No.
3 13:00:46 Q. Did you ask Mr. Meyer to, for lack of
4 13:00:46 a better word, to lobby on behalf of you with
5 13:00:46 the State of New Mexico?
6 13:00:47 A. When the relationship split up, I had
7 13:00:57 some concerns that Saul's help was going to
8 13:01:01 stop, which I didn't want because I liked him.
9 13:01:06 I thought he provided some added value. We
0 13:01:12 might have spoken about: "Will you still be
1 13:01:18 able to help us at all now that the
2 13:01:19 relationship has moved over?"
3 13:01:21 Q. You might have asked Mr. Meyer?
4 13:01:23 A. I might have asked him, but I don't
5 13:01:26 remember for sure, but that's something that's

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1 13:02:37 criteria of making sure he wasn't doing
2 13:02:41 anything conflicted to help us.
3 13:02:42 Q. And what did you understand that to
4 13:02:45 be?
5 13:02:45 A. Well, from what I know about his
6 13:02:49 business, they do private equity fund of
7 13:02:52 funds, and it is hard -- you can't go into a
8 13:02:56 pension fund and say: "I do this work. I
9 13:02:59 would also like to recommend these people over
10 13:03:02 here, too." It gets conflicted, the same
11 13:03:05 reason that we don't recommend hedge funds to
12 13:03:09 clients that we do business with typically.
13 13:03:11 It is conflicted. So I thought that, where he
14 13:03:15 could, he would help us.
15 13:03:16 Q. Did he ever explain to you the steps
16 13:03:18 he was taking to help you where he could?
17 13:03:20 A. No.
18 13:03:20 Q. So you never knew what he was doing?
19 13:03:30 A. Correct, other than he brought me to
20 13:03:30 meet Mark.
21 13:03:30 Q. And that was in the fall of 2004?
22 13:03:31 A. Yes. After that, no, nothing.
23 13:03:34 Q. So you didn't ask him to meet with
24 13:03:36 anybody in particular?
25 13:03:36 A. No, no, no, no.

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1 13:01:31 consistent with my personality and what I
2 13:01:34 could see myself doing.
3 13:01:35 Q. When you asked if you can call
4 13:01:37 Mr. Meyer to continue to assist you, was
5 13:01:42 Mr. Walters included in those conversations?
6 13:01:44 A. No, that would be something that I
7 13:01:46 would just be talking with Saul about.
8 13:01:48 Q. And you had a formal written
9 13:01:51 relationship with Mr. Walters?
0 13:01:52 A. Correct.
1 13:01:53 Q. What are the reasons, if any, you
2 13:01:55 didn't include Mr. Walters in your
3 13:02:05 conversations with Mr. Meyer?
4 13:02:05 A. I don't know. Saul was my friend, and
5 13:02:05 so was Reed, and I didn't have any reason to
6 13:02:06 think that they weren't speaking with each
7 13:02:08 other. No one ever told me. I knew the
8 13:02:12 business stuff was supposed to go through
9 13:02:14 Reed, but in my opinion it didn't mean that I
0 13:02:22 couldn't be friends with Saul.
1 13:02:22 Q. Fair. Fair.
2 13:02:22 Did you have an understanding of
3 13:02:22 what Saul was doing "behind the scenes"?
4 13:02:29 A. All I knew is that Saul said that he
5 13:02:32 would do whatever he could that met his

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1 13:03:37 Q. You didn't ask him to provide any
2 13:03:39 particular information, correct?
3 13:03:40 A. No.
4 13:03:41 Q. So anything he did -- and as you sit
5 13:03:43 here today, you can't tell me what he did
6 13:03:46 precisely?
7 13:03:46 A. Correct.
8 13:03:47 Q. You don't know who he met with?
9 13:03:48 A. No.
10 13:03:49 Q. Or what he spoke about during any of
11 13:03:51 those meetings if he had them?
12 13:03:52 A. No.
13 13:03:53 Q. Did Saul -- I'm sorry, did Mr. Meyer
14 13:03:56 ever represent to you that he could influence
15 13:03:59 the outcome of the New Mexico RFP process?
16 13:04:05 A. No.
17 13:04:05 Q. Did he ever represent to you that he
18 13:04:07 had a relationship with the decision-makers?
19 13:04:11 A. No more than everyone does. Everyone
20 13:04:15 says they have a relationship with the
21 13:04:17 decision-makers, but, no, nothing. Nothing
22 13:04:29 more specific, no. He knew Mark for a while.
23 13:04:29 Q. Okay. Fair.
24 13:04:29 A. A friend.
25 13:04:29 MR. SCHWEGMANN: Why don't we take a

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1 13:04:33 quick break, just so I can reorganize, and I
 2 13:04:34 think maybe about an hour left.
 3 13:04:37 THE WITNESS: Okay.
 4 13:04:40 THE VIDEOGRAPHER: We are going off
 5 13:04:41 record at 1:04 p.m.
 6 13:04:48 (Recess taken.)
 7 13:21:34 THE VIDEOGRAPHER: We are back on
 8 13:21:35 record at 1:21 p.m.
 9 13:21:39 MR. SCHWEGMANN: Right before the
 10 13:21:39 break, we were talking about Mr. Meyer's
 11 13:21:42 involvement with the New Mexico RFP, and I
 12 13:21:50 would like to mark as Exhibit 24 an e-mail
 13 13:21:53 string with control numbers 2099 through 2101.
 14 13:21:53 (Document marked as Exhibit 24
 15 13:21:53 for identification.)
 16 13:21:53 BY MR. SCHWEGMANN:
 17 13:22:33 Q. Ms. Busch, this looks like, to me, a
 18 13:22:35 string of e-mails between you and Mr. Meyer,
 19 13:22:38 fair?
 20 13:22:38 A. Yes.
 21 13:22:39 Q. And it is dated -- and I believe all
 22 13:22:41 of them are dated March 4th.
 23 13:22:43 A. Yes.
 24 13:22:43 Q. And if you will jump with me to the
 25 13:22:46 very last e-mail, which I think is the first

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1 13:23:34 there, asset levels, institutional clients,
 2 13:23:43 that data, is that the sort of thing that you
 3 13:23:43 typically give away without an NDA?
 4 13:23:43 A. No, I wouldn't talk about
 5 13:23:45 institutional clients in any case, and I can't
 6 13:23:48 imagine that I told Saul anything specific on
 7 13:23:51 the clients.
 8 13:23:52 Q. And that's because you told me earlier
 9 13:23:54 this morning that's confidential information?
 10 13:23:56 A. Correct. Latest performance, I would
 11 13:23:58 give him; asset levels, I would tell him,
 12 13:24:03 maybe give it to him in an e-mail, but, yes, I
 13 13:24:07 would give him that; and new events, I'm not
 14 13:24:09 exactly sure what that means.
 15 13:24:10 Q. When you get a request for
 16 13:24:12 confidential information such as institutional
 17 13:24:15 clients, is that the sort of thing that you
 18 13:24:16 would speak with Mr. Schink about prior to
 19 13:24:18 giving it to the person who requests it?
 20 13:24:20 A. I might, or I might just say: "I'm
 21 13:24:23 sorry, we don't give out that information,"
 22 13:24:33 and not bother Dave with something like that.
 23 13:24:33 Q. And in this situation do you recall
 24 13:24:33 what you did?
 25 13:24:33 A. No, I don't, but, as I said, I can't

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1 13:22:50 in time at the bottom of Page 2100, do you see
 2 13:22:51 that?
 3 13:22:51 A. Yes.
 4 13:22:52 Q. And that's an e-mail from Mr. Meyer to
 5 13:22:54 you where Mr. Meyer says: "I need a copy of
 6 13:22:56 the latest performance, asset levels, and
 7 13:23:00 institutional clients, and new events." Do
 8 13:23:03 you see that?
 9 13:23:03 A. Yes.
 10 13:23:03 Q. Do you recall Mr. Meyer asking you for
 11 13:23:05 that information?
 12 13:23:06 A. No.
 13 13:23:06 Q. Do you have any reason to doubt that
 14 13:23:08 he asked you for that information now that you
 15 13:23:10 see this e-mail?
 16 13:23:11 A. No, no. Obviously, he did.
 17 13:23:13 Q. Did he ever explain to you why he
 18 13:23:16 needed that information?
 19 13:23:16 A. Well, if I read up the e-mail chain,
 20 13:23:20 it looks like he was going to have some
 21 13:23:22 meetings with someone and wanted information
 22 13:23:24 to speak about Contego in a more informative
 23 13:23:28 way.
 24 13:23:28 Q. Okay. And I'm going to ask you about
 25 13:23:30 those meetings in a second, but before we get

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1 13:24:33 Imagine that I would have given him a list of
 2 13:24:34 our clients clearly.
 3 13:24:35 Q. And you anticipated my question. If
 4 13:24:39 you go up the page on 2100, Mr. Meyer
 5 13:24:42 responded and said: "Okay, I really need your
 6 13:24:46 response before" -- I think that is -- "the
 7 13:24:49 end of the day as I'm having additional
 8 13:24:51 face-to-face conversations this weekend and
 9 13:24:53 next week." Do you see that?
 10 13:24:55 A. Yes.
 11 13:24:55 Q. Do you know who he was having
 12 13:24:56 face-to-face conversations or those meetings
 13 13:25:00 with?
 14 13:25:01 A. No.
 15 13:25:01 Q. You will see the date is March 4th.
 16 13:25:03 That's a Friday?
 17 13:25:11 A. Yes.
 18 13:25:11 Q. So if he was having meetings this
 19 13:25:11 weekend, that would have been the 5th and 6th,
 20 13:25:11 and over the next week would have been the 7th
 21 13:25:13 and 8th, fair?
 22 13:25:14 A. Yes. Those would be the dates, yes.
 23 13:25:15 Q. And did he ever report back to you on
 24 13:25:18 any of the meetings that may have happened the
 25 13:25:20 5th, 6th, 7th, 8th?

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1 13:25:22 A. No, not that I recall.
2 13:25:23 Q. And did you ever follow up with him to
3 13:25:25 figure out what, if anything, was said about
4 13:25:27 Contego to the people he says he was meeting
5 13:25:30 with?
6 13:25:31 MR. WICK: Objection, form.
7 13:25:32 THE WITNESS: No, I wouldn't have done
8 13:25:33 that. I would have assumed, in all instances,
9 13:25:36 that everyone was trying to work toward the
10 13:25:39 same goal, and that they would only be good
11 13:25:48 and complimentary things.
12 13:25:48 BY MR. SCHWEGMANN:
13 13:25:48 Q. And that's true for Mr. Walters as
14 13:25:48 well?
15 13:25:48 A. Yes, of course.
16 13:25:48 Q. And a few quick questions.
17 13:25:50 If you go to the front page,
18 13:25:59 which I think is 2099 --
19 13:25:59 A. Yes.
20 13:25:59 Q. -- and, again, starting at the bottom,
21 13:25:59 it is from you to Mr. Meyer. It says: "Just
22 13:26:08 spoke with Andy. He will have something
23 13:26:08 before the end of the day." My only question
24 13:26:08 is: Who was Andy?
25 13:26:08 A. Andy was one of our analysts.

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1 13:26:09 Q. And I take it you asked Andy to give
2 13:26:12 Mr. Meyer --
3 13:26:13 A. Performance data. That would have
4 13:26:15 been the only thing Andy would have been
5 13:26:25 working on.
6 13:26:25 Q. And if you will go up one more e-mail,
7 13:26:25 it is from Mr. Meyer to you. It says:
8 13:26:25 "Arlene, great talking to you. Is there
9 13:26:25 anything else you can think of that I can do
10 13:26:28 or anything else I should know that would help
11 13:26:28 to firm up our position or increase our
12 13:26:30 changes? 150 requests for the RFP is pretty
13 13:26:33 daunting."
14 13:26:34 I think Mr. Wick asked you if you
15 13:26:36 knew how many submissions there were. Does
16 13:26:38 this e-mail refresh your recollection that
17 13:26:41 there were at least 150 submissions?
18 13:26:43 A. I wouldn't have known, but obviously
19 13:26:52 Saul did, and so I will take that as fact that
20 13:26:52 there were 150 at least.
21 13:26:52 Q. And would you agree that any time you
22 13:26:52 are submitting a proposal, if there is 150
23 13:26:55 submissions, your chances are, as Saul said,
24 13:26:58 daunting?
25 13:26:59 A. Yes, I would agree with that.

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1 13:27:02 MR. SCHWEGMANN: And let me mark as
2 13:27:06 Exhibit 25 an e-mail with control numbers 2111
3 13:27:16 to 2112.
4 13:27:20 (Document marked as Exhibit 25
5 13:27:27 for identification.)
6 13:27:27 Mr. Spalding, what's the number,
7 13:27:31 25?
8 13:27:31 MR. SPALDING: 25.
9 13:27:48 BY MR. SCHWEGMANN:
10 13:27:52 Q. And this appears to be an e-mail
11 13:27:55 from -- or it is an exchange between and you
12 13:27:58 Mr. Meyer again, correct?
13 13:27:59 A. Yes.
14 13:27:59 Q. And if you will look with me on the
15 13:28:02 bottom half of the page, the second paragraph,
16 13:28:04 it is an e-mail from Mr. Meyer to you, and
17 13:28:06 Mr. Meyer says: "I have relayed everything
18 13:28:08 that you have given me to New Mexico." Do you
19 13:28:12 see that?
20 13:28:12 A. Uh-huh.
21 13:28:12 Q. Apart from the information that we saw
22 13:28:14 in the last exhibit, did you give Mr. Meyer
23 13:28:17 any other information?
24 13:28:19 A. Not that I can recall.
25 13:28:21 Q. Do you know whether anyone else within

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1 13:28:23 Contego gave Mr. Meyer information for the
2 13:28:27 purpose of relaying it to New Mexico?
3 13:28:30 A. I would have no idea, but I would
4 13:28:32 doubt it.
5 13:28:35 Q. Okay. And on the next page -- I'm
6 13:28:35 sorry, the same page, the e-mail at the top is
7 13:28:36 from you to Mr. Meyer. You said: "I asked
8 13:28:40 Dave about sending you the RFP." Do you see
9 13:28:43 that?
10 13:28:43 A. Yes.
11 13:28:43 Q. Does that refresh your recollection
12 13:28:47 that you, in fact, asked Mr. Schink about
13 13:28:47 sending the RFP?
14 13:28:49 A. I did because I wrote it there.
15 13:28:50 Q. And without getting into the content
16 13:28:51 of any of those communications, do you recall
17 13:28:53 whether Mr. Schink gave a thumbs up or a
18 13:29:03 thumbs down to providing the RFP?
19 13:29:03 A. I believe he said no.
20 13:29:03 Q. And do you recall the reasons
21 13:29:03 Mr. Schink said: "No, don't give the RFP to
22 13:29:05 Mr. Meyer"?
23 13:29:06 MR. SPALDING: That I'm going to
24 13:29:07 object to. I think that is going into the
25 13:29:09 attorney/client privilege.

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1 13:29:11 MR. SCHWEGMANN: Would you answer yes
2 13:29:12 or no, do you recall the reasons?
3 13:29:13 THE WITNESS: Yes.
4 13:29:16 BY MR. SCHWEGMANN:
5 13:29:17 Q. And can you answer that question
6 13:29:18 without telling me the substance of any of the
7 13:29:20 communications from Mr. Schlink? That is: Can
8 13:29:23 you tell me the reasons for not giving
9 13:29:32 Mr. Meyer the RFP without telling me the
10 13:29:32 content of those conversations?
11 13:29:32 A. I would imagine, if I was using my own
12 13:29:32 recollections, that the reasons were probably
13 13:29:35 that the relationship was with Onesto, and not
14 13:29:41 with Aldus, and that we felt that we could
15 13:29:44 only give the RFP to the person who was doing
16 13:29:48 this with us.
17 13:29:49 Q. And if you will --
18 13:29:51 A. Those would be my thoughts.
19 13:29:54 Q. Thank you, and I will leave the topic.
20 13:29:55 I'm not trying to get into that.
21 13:29:57 The next sentence -- or, sorry,
22 13:29:58 two sentences into that e-mail, you say: "It
23 13:30:01 is nice to have friends that look out for us."
24 13:30:05 And you referred to Mr. Meyer as a friend,
25 13:30:07 which is true?

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1 13:31:24 copies of the letter agreements that we looked
2 13:31:26 at this morning between Contego and Reed?
3 13:31:38 A. I believe so.
4 13:31:38 Q. He did.
5 13:31:38 Do you recall when he asked for
6 13:31:38 that information?
7 13:31:38 A. No.
8 13:31:38 Q. And did he tell you the reasons he was
9 13:31:38 looking for that information?
10 13:31:39 A. No, I don't remember.
11 13:31:44 Q. And did he ask for that information in
12 13:31:47 an e-mail or was it a telephone call?
13 13:31:49 A. I don't remember that either.
14 13:31:55 Q. Did Mister -- well, I think we said
15 13:32:01 Mr. Meyer, in fact, did ask for a copy of the
16 13:32:01 RFP, and Mr. Schlink said no, correct?
17 13:32:02 A. Correct.
18 13:32:03 Q. Because -- well, okay.
19 13:32:06 Did Mr. Meyer ask you for the
20 13:32:08 names of the hedge fund managers that were
21 13:32:10 included in the RFP?
22 13:32:13 A. Yes.
23 13:32:13 Q. And do you recall when he asked you
24 13:32:22 for that information?
25 13:32:22 A. No.

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1 13:30:08 A. Yes.
2 13:30:08 Q. And at that point would you agree with
3 13:30:09 me that that's all he was, he was a friend;
4 13:30:11 there was no formal relationship with
5 13:30:13 Mr. Meyer with respect to New Mexico at least
6 13:30:14 on April 4th, 2005?
7 13:30:16 MR. WICK: Objection, form.
8 13:30:17 THE WITNESS: That is correct.
9 13:30:25 MR. SCHWEGMANN: I'm sorry?
10 13:30:25 THE WITNESS: That is correct.
11 13:30:27 BY MR. SCHWEGMANN:
12 13:30:27 Q. Do you recall, as you sit here today,
13 13:30:31 whether you abided Mr. Schlink's instruction
14 13:30:35 not to give the RFP to Mr. Meyer?
15 13:30:37 A. I always listen to Dave. So the
16 13:30:47 answer would have to be yes.
17 13:30:47 Q. So it is your testimony that you never
18 13:30:47 gave Mr. Meyer the RFP?
19 13:30:47 A. No. No.
20 13:31:10 Q. Mr. Wick asked you some questions
21 13:31:13 about some of the types of information
22 13:31:15 Mr. Meyer asked for, and I showed you some
23 13:31:18 e-mails where he asked for some information.
24 13:31:20 Let me ask you some specific questions.
25 13:31:21 Did Mr. Meyer ever ask you for

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1 13:32:22 Q. Did he explain to you why he wanted
2 13:32:22 that information?
3 13:32:22 A. I believe he thought it would be
4 13:32:24 helpful in speaking with New Mexico.
5 13:32:29 Q. And helpful in what way?
6 13:32:30 A. More information. Helpful like that.
7 13:32:35 Q. And that's the extent of his
8 13:32:38 explanation?
9 13:32:38 A. That's the extent of what I remember.
10 13:32:46 Q. And you didn't -- do you recall
11 13:32:46 whether you asked any follow-up questions such
12 13:32:46 as: "Listen, why do you want this
13 13:32:46 information? What are you going to do with
14 13:32:48 this information?"
15 13:32:48 A. I would imagine that I would have
16 13:32:50 asked why he would have wanted it. I would
17 13:32:53 imagine he would have given me an answer that
18 13:32:54 would have made sense, but I don't remember.
19 13:32:56 It wasn't important at the time.
20 13:32:57 Q. Fair.
21 13:32:58 Mr. Wick asked a series of
22 13:33:02 questions about the name that was included in
23 13:33:04 the submission. That's that whole discussion
24 13:33:06 do we call it Contego, do we call it Vallo.
25 13:33:08 Do you recall generally that topic?

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41 (Pages 158 to 161)

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1 13:33:10 A. Yes.
2 13:33:10 Q. Okay. And would you agree with me
3 13:33:15 that the name of the RFP was a decision that
4 13:33:19 was made amongst all of you? And when I say
5 13:33:24 "you" I mean you, your partners, Mr. Schink
6 13:33:26 and Mr. Walters.
7 13:33:27 A. Yes.
8 13:33:29 Q. So if you had said on one of those
9 13:33:35 audio recordings, that Mr. Meyer recorded
10 13:33:36 without your permission, if you had said:
11 13:33:39 "That was Reed's decision," that would have
12 13:33:42 been inaccurate, correct?
13 13:33:43 A. Yes.
14 13:33:45 Q. Because, in fact, it was a decision
15 13:33:47 made amongst everyone?
16 13:33:48 A. Yes.
17 13:33:49 Q. And, indeed, as we learned this
18 13:33:53 morning, Reed didn't have authority from
19 13:33:55 Contego to make those kinds of decisions,
20 13:34:00 correct?
21 13:34:00 A. Correct.
22 13:34:00 Q. Reed didn't sign the RFP?
23 13:34:02 A. No, no.
24 13:34:02 Q. That was Mr. Schink?
25 13:34:03 A. Yes.

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1 13:35:13 from Mr. Walters' counterclaim. I want to
2 13:35:16 take a moment and read you some statements
3 13:35:19 from their demand.
4 13:35:21 And you understand they sued
5 13:35:24 Mr. Walters, correct?
6 13:35:25 A. No, I didn't know.
7 13:35:26 Q. And if -- okay. Well, let me read a
8 13:35:31 statement from their demand, and you tell me
9 13:35:33 whether you agree or disagree.
10 13:35:35 "Rather than submit the
11 13:35:43 proposal," by proposal it is the New Mexico
12 13:35:43 submission, "Rather than submit the proposal
13 13:35:43 under the name Vallo and utilize the goodwill
14 13:35:45 and traction that had been developed over
15 13:35:55 months of lobbying by Aldus, Walters
16 13:35:55 unilaterally submitted a proposal under the
17 13:35:55 name Contego without informing Aldus of the
18 13:35:56 change."
19 13:35:57 Is it fair to say or is it an
20 13:35:59 accurate statement to say "Walters
21 13:36:01 unilaterally submitted the proposal under the
22 13:36:05 name Contego"?
23 13:36:05 A. No, he would never have done that in
24 13:36:08 isolation. We wouldn't have allowed him to.
25 13:36:19 Q. And that's because he didn't have the

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1 13:34:05 Q. And I think, as we talked about this
2 13:34:07 morning, the reason Contego didn't submit it
3 13:34:10 as Vallo was because Vallo couldn't make the
4 13:34:14 minimum requirements that we saw in the RFP,
5 13:34:18 correct?
6 13:34:18 A. Correct.
7 13:34:19 Q. And, in any event, is it fair to say
8 13:34:21 that you thought that the name change, Vallo
9 13:34:25 to Contego, if, indeed, it is a change, that
10 13:34:31 you thought it was obvious and clear and that
11 13:34:31 everyone knew it?
12 13:34:31 MR. WICK: Objection, form.
13 13:34:32 THE WITNESS: Yes, I believe that
14 13:34:34 everyone knew -- well, everyone knew that
15 13:34:37 Contego and Vallo were similar, and I believe
16 13:34:39 in the RFP Vallo was mentioned. So anyone
17 13:34:47 should have known that it was one in the same.
18 13:34:50 BY MR. SCHWEGMANN:
19 13:34:50 Q. And when we are using the term
20 13:34:52 "everyone," that includes the decision-makers
21 13:34:54 in New Mexico?
22 13:34:54 A. Correct.
23 13:34:55 Q. And that would include Mr. Corraera?
24 13:34:57 A. Correct.
25 13:35:10 Q. Mr. Wick read to you some statements

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1 13:36:19 authority to make those decisions, correct?
2 13:36:19 A. Correct.
3 13:36:19 Q. So that's an inaccurate statement?
4 13:36:19 A. Yes.
5 13:36:23 Q. Let me read you another sentence from
6 13:36:28 their --
7 13:36:28 A. That part was an inaccurate part.
8 13:36:28 Q. The part where Walters unilaterally
9 13:36:31 submitted a proposal?
10 13:36:35 A. Correct.
11 13:36:35 Q. That's inaccurate?
12 13:36:35 A. Correct.
13 13:36:35 Q. And I take it you don't know, as you
14 13:36:37 sit here today, whether Mr. Walters informed
15 13:36:41 Aldus about the change to the extent there
16 13:36:43 was?
17 13:36:43 A. No, but I do know that when I spoke
18 13:36:49 with Saul, because I called both Reed and Saul
19 13:36:49 after we didn't get it, and I was real
20 13:36:55 unhappy, I do know that Saul was surprised
21 13:36:55 that we didn't use the name.
22 13:36:56 Q. And I believe if Saul said -- well,
23 13:37:00 strike that. I will come back.
24 13:37:08 A. Okay.
25 13:37:10 Q. Let me read another sentence from

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1 13:37:12 their demand. It says: "In addition, Walters
2 13:37:14 failed to act in good faith and sabotaged his
3 13:37:18 first chance at obtaining funding for Onesto
4 13:37:26 by abandoning Vallo." Did you hear that?
5 13:37:26 A. Yes, I heard that.
6 13:37:27 Q. Do you think it is fair to say, given
7 13:37:28 your involvement with Mr. Walters during this
8 13:37:30 period, that Mr. Walters sabotaged the RFP
9 13:37:35 process?
10 13:37:35 A. No, absolutely not.
11 13:37:36 Q. Indeed, Mr. Walters stood to make
12 13:37:39 money off this deal had it been consummated,
13 13:37:41 correct?
14 13:37:42 A. Clearly.
15 13:37:42 Q. And he would have no incentive, fair,
16 13:37:46 to sabotage it?
17 13:37:47 A. No.
18 13:37:48 Q. And, by the way, did Mr. Meyer have
19 13:37:52 any skin in the game, for lack of a better
20 13:37:56 word, with respect to the New Mexico deal?
21 13:37:59 A. Not that I am aware.
22 13:38:03 Q. He wasn't going to make any money off
23 13:38:05 this deal one way or the other?
24 13:38:06 MR. WICK: Objection, form.
25 13:38:08 THE WITNESS: Correct, not that I am

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1 13:40:02 FURTHER EXAMINATION
2 13:40:02 BY MR. WICK:
3 13:40:02 Q. Ms. Busch, I just have a few follow-up
4 13:40:11 questions.
5 13:40:11 A. Yes.
6 13:40:11 Q. Do you recall approximately when the
7 13:40:11 RFP was submitted to New Mexico?
8 13:40:11 A. Yes. It was submitted on
9 13:40:19 approximately March 11th, 2005.
10 13:40:21 Q. After RFPs -- and there is an example
11 13:40:29 in Exhibit 23 -- are submitted to public
12 13:40:31 institutions such as the State of New Mexico,
13 13:40:34 do they become public documents?
14 13:40:34 A. Yes.
15 13:40:34 Q. And they are publicly available?
16 13:40:36 A. Yes, I think.
17 13:40:38 MR. SPALDING: If you know, you know.
18 13:40:40 If you don't, you don't know.
19 13:40:42 THE WITNESS: I'm pretty sure.
20 13:40:45 BY MR. WICK:
21 13:40:46 Q. Okay. So looking back at
22 13:40:47 Exhibit 25 -- and this was the series of
23 13:40:53 e-mails where Mr. Meyer is asking for a copy
24 13:40:56 of the RFP, and I believe Dave had said
25 13:41:00 no -- this document was actually already

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1 13:38:09 aware.
2 13:38:16 BY MR. SCHWEGMANN:
3 13:38:16 Q. As you sit here today, do you have any
4 13:38:16 business relationship -- and by "you" does
5 13:38:17 Contego have any business relationship -- with
6 13:38:20 Mr. Meyer or Aldus?
7 13:38:21 A. No.
8 13:38:21 Q. There are no plans for a business
9 13:38:23 relationship going forward?
10 13:38:24 A. No. No.
11 13:38:31 MR. SCHWEGMANN: Let me take a
12 13:38:39 two-minute break. You don't even have to
13 13:38:35 leave the room. Let me just confer with him
14 13:38:37 briefly, and I think we are about done. So it
15 13:38:40 is even under the hour that I said I would be.
16 13:38:43 THE VIDEOGRAPHER: We are going off
17 13:38:44 record at 1:38 p.m.
18 13:38:46 (Recess taken.)
19 13:39:51 THE VIDEOGRAPHER: We are back on
20 13:39:52 record at 1:39 p.m.
21 13:39:54 MR. SCHWEGMANN: Thank you, Ms. Busch,
22 13:39:56 for your time today.
23 13:39:56 And, with that, I will pass.
24 13:39:58 THE WITNESS: Thank you also.
25 13:39:58

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1 13:41:02 available publicly through the state, at least
2 13:41:04 to your understanding that after an RFP is
3 13:41:07 submitted, it becomes publicly available?
4 13:41:13 A. Yes. I don't think it was publicly
5 13:41:13 available on -- oh, yes, it was. It was
6 13:41:13 already April, right. It was after March.
7 13:41:32 Q. Did Contego ask the State of
8 13:41:35 New Mexico to sign a confidentiality agreement
9 13:41:36 or non-disclosure in connection with the
10 13:41:45 submission of the RFP?
11 13:41:45 A. Not that I know of, but I wouldn't
12 13:41:45 have been involved on that side. So it is
13 13:41:45 possible they did, but I'm not aware.
14 13:41:51 Q. And looking at Exhibit 23, Contego did
15 13:41:51 disclose at least three of its clients to the
16 13:41:56 State of New Mexico in connection with the
17 13:41:57 RFP?
18 13:41:58 A. Where would I see that?
19 13:42:03 Q. I'm looking at Tab 8.
20 13:42:04 MR. SPALDING: We are using the other
21 13:42:06 copy.
22 13:42:06 MR. WICK: Exhibit 23?
23 13:42:07 MR. SPALDING: Yes.
24 13:42:08 MR. WICK: Okay. No. 8 says client
25 13:42:10 references.

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EXHIBIT 5

From: Dan Hefter dhefter@hefter-law.com
Subject: RE: Malott v. Correra, et al.
Date: November 11, 2013 at 1:39 PM
To: Gregg Vance Fallick GVF@FallickLaw.com
Cc: David Cunningham dfc@catch-law.com

Gregg –

I've reviewed the transcript and don't think there's anything in the testimony that supports personal jurisdiction in New Mexico for your client's claims.

Dan

Daniel S. Hefter
Hefter Law, Ltd.
22 W. Washington
Suite 1500
Chicago, IL 60602
(312) 264-6565 (office phone)
(312) 403-9292 (cell phone)

From: Gregg Vance Fallick [mailto:GVF@FallickLaw.com]
Sent: Monday, November 04, 2013 2:54 PM
To: Dan Hefter
Cc: David Cunningham
Subject: Malott v. Correra, et al.

Message:

Dan --

Of course, one of the reasons 12(B)(6) dismissals are highly disfavored is the risk that valid claims will be terminated precipitously, without any chance to obtain a fair and honest disclosure of the facts.

I am writing to offer you the opportunity to withdraw your clients' motions to dismiss. This offer is based, in part, on the December 16, 2005 sworn testimony of Arlene Busch, which was produced to the Securities and Exchange Commission under cover of your erstwhile firm's September 29, 2009 letter. If you would like to take advantage of this opportunity, please let me know by the end of this week.

Thank you. -- Gregg

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