

Court File No. 2201 09318

COURT OF KING'S BENCH OF ALBERTA

BETWEEN:

ARNAKI LTD.

Plaintiff

- and -

SOLVAQUA INC.

Defendant

CROSS-EXAMINATION OF PAUL ZOGALA
on his affidavit sworn December 13, 2022
held via Arbitration Place Virtual
on Wednesday, December 21, 2022, at 4:00 p.m.

APPEARANCES:

Michael Crampton on behalf of the Plaintiff

Doug Nishimura on behalf of Export
Development Corporation

Justin Kingston on behalf of Rotating Right
(2016) Inc.

ALSO PRESENT:

Joshua Fenttiman Observing

Arbitration Place © 2022
940-100 Queen Street 900-333 Bay Street
Ottawa, Ontario K1P 1J9 Toronto, Ontario M5H 2R2
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INDEX

	PAGE
AFFIRMED: PAUL ZOGALA	3
CROSS-EXAMINATION BY MR. NISHIMURA	3
CROSS-EXAMINATION BY MR. KINGSTON	52

LIST OF UNDERTAKINGS, REFUSALS,
UNDER ADVISEMENTS

Undertakings (U/T) found at pages:
15

Refusals (REF) found at pages:
28, 32, 33

Under AdviseMENTS (U/A) found at pages:
9, 19, 21, 22, 23, 24, 28, 31, 36, 37, 42, 49, 54

1 Arbitration Place Virtual

2 --- Upon commencing on Wednesday, December 21,
3 2022, at 4:00 p.m.

4 AFFIRMED: PAUL ZOGALA

5 CROSS-EXAMINATION BY MR. NISHIMURA:

6 1 Q. Good afternoon, Mr.
7 Zogala.

8 A. Good afternoon.

9 2 Q. Thank you for attending,
10 Mr. Zogala. Just for the record could you please
11 state your full name?

12 A. Paul Edward Zogala.

13 3 Q. Thank you.

14 And you'll confirm that you
15 are the person that swore an affidavit dated
16 December 13, 2022, in Court of King's Bench
17 Alberta action 2201-09319?

18 A. I believe that was the
19 date and the number. I did sign the affidavit, but
20 I don't have it in front of me to confirm the date
21 and the numbers.

22 4 Q. Right, and just to be 100
23 percent accurate, your document says Court of
24 Queen's Bench of Alberta, but that's been changed.

25 MR. CRAMPTON: I'll take the

1 blame for that one.

2 BY MR. NISHIMURA:

3 5 Q. And you confirm that you
4 have been sworn to tell the truth in these
5 proceedings -- in this questioning?

6 A. I have.

7 6 Q. With respect to your
8 affidavit -- well, before we get to there, we're
9 performing this questioning remotely.

10 So will you confirm that you
11 are alone in whatever space you're occupying?

12 A. I am.

13 7 Q. And you're not in
14 communication electronically or otherwise with any
15 other party?

16 A. I am not.

17 8 Q. Do you have any documents
18 before you or in front of you?

19 A. I have my trading sheet
20 for the day, but not -- I can move them, if you'd
21 like.

22 9 Q. Okay, aside from that,
23 you're on a computer or other device right now?

24 A. An iPad.

25 10 Q. And you will confirm that

1 you have all tabs, aside from the one that we're
2 communicating on, those are all closed?

3 A. Correct.

4 11 Q. Okay, I take it that
5 prior to affirming your affidavit of
6 December 13th, you read it through and were
7 satisfied that it was correct?

8 A. I was.

9 12 Q. Since then, in
10 preparation for this questioning, have you
11 reviewed it again?

12 A. Not substantially, no.

13 13 Q. Okay, nothing you want to
14 change since you signed it, though, right?

15 A. No.

16 14 Q. Okay, you also refer in
17 that affidavit to a larger affidavit by Ariel
18 Belilo, B-E-L-I-L-O, sworn August 15, 2022.

19 Did you read through that
20 affidavit as well?

21 A. Not recently, no.

22 15 Q. You did it prior to
23 swearing your own affidavit?

24 A. Correct.

25 16 Q. And I say that because in

1 paragraph 4 of your affidavit you adopt and rely
2 upon that earlier affidavit, we'll call it, the
3 Belilo affidavit, correct?

4 A. Yes.

5 17 Q. So there's nothing in
6 that affidavit that to your knowledge is untrue?

7 A. Correct.

8 18 Q. In your affidavit in the
9 first paragraph you describe yourself as a partner
10 with Murchinson Ltd.

11 Do you hold any other
12 positions with that firm?

13 A. I have different titles
14 that have been used, just depending on whether
15 you're talking to a bank. But for the most part
16 I'm a partner, also known as the Head of
17 Structuring.

18 19 Q. Are you also a
19 shareholder in that firm?

20 A. I'm not a shareholder.

21 20 Q. A director?

22 A. I am an authorized
23 signatory of Murchinson.

24 21 Q. Okay, and my
25 understanding is that you've been with that firm

1 since about 2014?

2 A. Correct.

3 22 Q. Always in the same
4 position?

5 A. I started as a Trader,
6 became a Portfolio Manager. I was also the Chief
7 Compliance Officer, and now a Partner.

8 23 Q. And once you left the one
9 title, once you got the new title did you leave
10 the other one behind? Or are you still some of
11 those other things?

12 A. Some of the
13 responsibilities carry through all roles.

14 24 Q. Okay, how long have you
15 been a partner?

16 A. One year.

17 25 Q. Okay, so what was your
18 role at the time that the loans with Solvaqua
19 Inc. -- which we'll just call Solvaqua from now
20 on -- what was your role at the time those loans
21 were first negotiated?

22 A. Can you be more specific?
23 When those were negotiated, do you mean was I
24 responsible for negotiation?

25 26 Q. No, I just mean what was

1 your role back in 2020 when these loans first came
2 about?

3 A. Portfolio Manager.

4 27 Q. And now that you mention
5 it, were you involved in the negotiation and
6 agreement to provide those loans?

7 A. I believe in loans 1 and
8 2, or in two of the loans -- for one of them I was
9 on vacation and substantially not involved.

10 28 Q. And we'll get into that
11 more later.

12 Now, in the first paragraph of
13 your affidavit you state that Murchinson has been
14 attempting to recover the plaintiff Arnaki Ltd.,
15 which we'll just say Arnaki -- the loans by Arnaki
16 to the defendant, Solvaqua Inc.

17 Do you have any position with
18 Arnaki?

19 A. No.

20 29 Q. Arnaki, as I understand
21 it, is a wholly owned subsidiary of Murchinson?

22 A. I would have to confirm
23 what the exact corporate structure would be.

24 30 Q. All right, we might be
25 able to make this a little bit easier. I'm going

1 to refer you to the Statement of Claim by Arnaki
2 in this proceeding.

3 A. Mmhhh.

4 31 Q. My partner, Ms. Carrasco,
5 will just throw that up on the screen. I'll just
6 ask you to look at paragraph 1.

7 A. Sure.

8 32 Q. So it says that Arnaki is
9 a corporation in the BVI. It goes on to say that
10 Arnaki's parent, Murchinson Ltd., is an investment
11 firm headquartered in Toronto.

12 So does that help you in
13 recalling whether Arnaki is wholly owned by
14 Murchinson?

15 A. I -- I'm not involved in
16 the corporate structure of how these come
17 together, so I can't say that it is wholly owned.

18 33 Q. Okay.

19 MR. NISHIMURA: I'll just for
20 ask for an undertaking to provide the details of
21 the relationship -- the corporate relationship
22 between Murchinson and Arnaki.

23 U/A MR. CRAMPTON: We'll take that
24 under advisement.

25 BY MR. NISHIMURA:

1 34 Q. I take it, though, that
2 with Arnaki -- Arnaki was the lender to Solvaqua.
3 And Murchinson, for want of a better phrase, took
4 out the day-to-day responsibilities of looking
5 after that loan, is that fair?

6 A. Correct.

7 35 Q. Sorry?

8 A. Correct, yeah.

9 36 Q. Okay, so my understanding
10 is that pretty much all communications between
11 Arnaki and Solvaqua were carried out through
12 Murchinson, is that fair?

13 A. The communications would
14 have either happened through Murchinson, through
15 our counsel -- I would say for the most part
16 through Murchinson or our counsel.

17 37 Q. Okay, and your counsel
18 for the loan, was that Mr. Reeves at Tingle
19 Merrett?

20 A. Correct.

21 38 Q. Okay, and the business of
22 Arnaki is what?

23 A. Make investments.

24 39 Q. Okay, normally through
25 loans like this, or in other fashions?

1 A. Through any transaction
2 that it believes offers a compelling risk reward.

3 40 Q. Okay.

4 Now, if we go back to that
5 Statement of Claim, paragraph 4 describes that
6 Arnaki and Solvaqua entered into a series of loan
7 agreements, and they appear to be of \$2 million US
8 each.

9 That's your understanding?

10 A. It is.

11 41 Q. And paragraph 5 says:
12 "The funds advanced
13 pursuant to the loans
14 were each tied to
15 contracts for overseas
16 sales of Solvaqua's water
17 management systems." (As
18 read)

19 And then it goes on to say
20 that Solvaqua's contracts with their overseas
21 buyers were entered by Export Development Canada,
22 defined as "EDC".

23 So my understanding is that
24 each of these three loan agreements that are
25 described in the Statement of Claim were

1 particularly associated with contracts of
2 Solvaqua. So particular contracts.

3 Is that correct?

4 A. Correct.

5 42 Q. And so the first loan of
6 August 31, 2020, of \$2 million, that loan was
7 associated with, among other things, the contract
8 that Solvaqua had with Vivakor?

9 A. Is that a question?

10 43 Q. Yes. Is that correct?

11 A. I believe so.

12 44 Q. Okay, and every time
13 that -- the next two times that Arnaki advanced
14 funds, there were new contracts that Solvaqua had
15 come to Arnaki and said, 'We have these contracts,
16 we need an advance of additional funds associated
17 with these new contracts', is that correct?

18 A. Correct.

19 45 Q. Okay, and just so that we
20 stick with the Statement of Claim, in paragraph 7
21 you mention that the security for these loans --
22 and there are three General Security Agreements
23 which are described before that -- but the
24 security was registered in Alberta as registration
25 number 20091025542.

1 Are you aware of any other
2 registrations of security for Arnaki against
3 Solvaqua?

4 MR. CRAMPTON: Just before you
5 answer, Mr. Zogala, just because we're in the
6 claim, Mr. Nishimura, you had said, "You say".
7 Clearly, this is the claim and these are Arnaki's
8 allegations and not the affidavit --

9 MR. NISHIMURA: Fair enough.
10 So that's the reference, though, in the Statement
11 of Claim to that registration number in the
12 personal property registry of Alberta.

13 BY MR. NISHIMURA:

14 46 Q. Do you know of any other
15 claim or other registrations of security by
16 Arnaki?

17 A. I believe we had a
18 general GSA on all the property of the company;
19 however, I don't know how that would be
20 registered.

21 47 Q. Right, so you don't know
22 of any other registrations, other than the one
23 referenced in paragraph 7 of the Statement of
24 Claim?

25 MR. CRAMPTON: In relation to

1 loans to Solvaqua, or just generally in Alberta?

2 MR. NISHIMURA: In relation to
3 the loans to Solvaqua.

4 THE WITNESS: I don't believe
5 there was another registration. Just the
6 registration against the equipment.

7 BY MR. NISHIMURA:

8 48 Q. Well, let's not go that
9 far. I'm just referring to this registration
10 number without talking about what it's registered
11 against.

12 A. Okay.

13 49 Q. Okay, but that's correct?
14 There's no other registrations that I need to be
15 looking for?

16 A. Not that I'm aware of.

17 50 Q. Okay.

18 And the total amount owing --
19 or advanced under the loan was \$6 million,
20 correct?

21 A. The face value of the
22 loans was \$6 million. The amount advanced, I
23 believe, was less than that.

24 51 Q. Okay, do you know how
25 much was actually advanced?

1 A. I can't say for certain.

2 MR. NISHIMURA: I'll ask for
3 an undertaking -- and we can short circuit this.
4 I'll ask for an undertaking to provide the amount
5 that was advanced; the amount of interest that's
6 owing on the loans; and any credits for repayment.

7 U/T MR. CRAMPTON: We'll give that
8 undertaking.

9 MR. NISHIMURA: In other
10 words, just a breakdown of the loan amounts being
11 claimed and where those numbers come from.

12 BY MR. NISHIMURA:

13 52 Q. Now, if I can take you to
14 the Belilo affidavit sworn August 15, 2022, which
15 you refer to.

16 Firstly, at paragraph 11,
17 again there's a reference to a security
18 registration. And then you refer to Exhibit N. I
19 believe you referred to that exhibit in your own
20 affidavit.

21 So that's the only
22 registration that you know of? Just so we're
23 clear which registration we're talking about,
24 correct?

25 A. Yes.

1 53 Q. Okay.

2 Now, Exhibit B to the Belilo
3 affidavit is a Loan Agreement dated as of
4 August 30, 2020, between Arnaki and Solvaqua.

5 And I'd like to take you to
6 page 8, paragraph 2.1.

7 So this is a description of
8 the loan in this first Loan Agreement, and there's
9 a line that says, "Total net proceeds,
10 \$1.8 million USD".

11 Is that the amount that was
12 actually advanced, though the Loan Agreement talks
13 about being up to \$2 million?

14 A. The 1.8 seems correct. It
15 may have been reduced slightly for legal fees, if
16 those fees were coming out of the proceeds;
17 however, I remember the 1.8 million.

18 54 Q. Okay.

19 Now, over on the next page but
20 in the same section there's a reference to
21 manufacturing two 25,000 bpd systems.

22 I'm wondering if those are the
23 systems that were to be sold to Vivakor?

24 Is that your understanding?

25 A. No.

1 55 Q. Okay, is the equipment
2 being sold to Vivakor anywhere in this
3 description?

4 A. Is this the Vivakor
5 contract or a different contract? I can't
6 remember the dates for each.

7 56 Q. Well, maybe I can help
8 out a little bit there. If we go to the end of the
9 contract to Exhibit E, which is a list of material
10 contracts, the second entry in this exhibit is
11 Project Charter for WMS Process Water Recovery
12 with VivaVentures Inc., dated April 9, 2020.

13 My understanding is
14 VivaVentures Inc. is related to Vivakor.

15 So does that assist you?

16 A. Again, is this the -- if
17 this is the Vivakor/VivaVentures contract, then it
18 would make sense that the equipment listed in
19 there was for that contract.

20 57 Q. Okay, I just want to make
21 sure that the first loan tranche back in 2020,
22 part of that advance was aimed at the
23 VivaVentures/Vivakor project.

24 So do you recall --

25 A. My understanding is loan

1 1 is related to Vivakor/VivaVentures.

2 58 Q. Okay.

3 A. I'm just unfamiliar with
4 the dates, given that's been so far.

5 59 Q. Fair enough.

6 So going back to page 11 of
7 the Loan Agreement, article 3 is a series of
8 conditions precedent to the loan.

9 And in 3.1(h) on the next page
10 there is a reference to there being, as a
11 condition precedent for the loan, evidence of EDC
12 insurance over the borrower's receivables, and a
13 minimum amount of \$2 million, and evidence of
14 assignment of same to and in favour of lender on
15 terms acceptable to the lender.

16 So my question is: Prior to
17 advancing the \$2 million in the first loan
18 tranche, did Arnaki and Murchinson have that
19 evidence of EDC insurance?

20 A. Our counsel would have
21 been responsible for reviewing and satisfied that
22 the deliverables were in place.

23 60 Q. Okay, do you know what
24 the evidence was of the EDC insurance?

25 A. I do not.

1 61 Q. Okay.

2 MR. NISHIMURA: I'll ask for
3 an undertaking to provide the evidence that
4 satisfied the condition precedent of evidence of
5 EDC's insurance over the borrower's receivables.

6 U/A MR. CRAMPTON: We'll take that
7 under advisement.

8 BY MR. NISHIMURA:

9 62 Q. The second part of the
10 subclause is:

11 "Evidence of assignment
12 of same to and in favour
13 of the lender" (as read)

14 So do you know whether Arnaki
15 received an assignment of the EDC insurance?

16 A. Our counsel would have
17 been satisfied with the conditions prior to
18 closing, otherwise we'd not have been closing.

19 MR. NISHIMURA: So I'll ask
20 for an undertaking to provide the assignment of
21 the EDC insurance in favour of Arnaki.

22 U/A MR. CRAMPTON: I'll take that
23 under advisement.

24 MR. NISHIMURA: And just to be
25 clear, or whatever was provided that was

1 satisfactory in respect of this condition.

2 MR. CRAMPTON: Incorporated
3 into the previous under advisement.

4 MR. NISHIMURA: Sure.

5 BY MR. NISHIMURA:

6 63 Q. A little below that under
7 (k), so 3.1(k), there's a condition that:

8 "The lender shall have
9 received evidence of
10 insurance and loss,
11 paying any endorsements
12 required hereunder and
13 other loan documents in
14 form and substance
15 satisfactory to the
16 lender and certificates
17 of insurance policies
18 and/or endorsements
19 naming the lender as well
20 as payee and additional
21 insured, as applicable."

22 (As read)

23 Will your evidence be that
24 your counsel was responsible for satisfying
25 this -- or for being satisfied of this condition

1 as well?

2 A. If it was a closing
3 deliverable, then yes.

4 64 Q. Okay, do you know what
5 evidence of insurance and third -- of loss payee
6 endorsements that Arnaki or Murchinson received?

7 A. That our counsel
8 received?

9 65 Q. Arnaki, Murchinson or its
10 counsel, yes.

11 A. I would assume that it
12 would be sufficient to satisfy the deliverable.

13 66 Q. Okay.

14 MR. NISHIMURA: I'll ask for
15 whatever was received in respect of this
16 particular condition precedent.

17 U/A MR. CRAMPTON: Also under
18 advisement.

19 BY MR. NISHIMURA:

20 67 Q. Did Arnaki or Murchinson
21 maintain its own file with documents relating to
22 this loan?

23 A. We did.

24 68 Q. And did that file contain
25 documents relating to the EDC policy?

1 A. I believe so.

2 69 Q. Okay.

3 MR. NISHIMURA: I'll ask for
4 copies of whatever related to EDC in that --
5 that's contained in that file.

6 U/A MR. CRAMPTON: That's also
7 under advisement.

8 BY MR. NISHIMURA:

9 70 Q. Would that include notes
10 of conversations with EDC?

11 A. I don't believe so.

12 71 Q. Were notes kept by any of
13 Arnaki, Murchinson, or its counsel's employees
14 with respect to conversations with EDC, or
15 regarding EDC?

16 MR. CRAMPTON: Hold on. Mr.
17 Nishimura, the counsel portion gives me some
18 concern, particularly if there's communication
19 between counsel and clients.

20 MR. NISHIMURA: Right, aside
21 from solicitor-client privileged material,
22 obviously. But these would be notes of
23 communications with EDC, for example. So anything
24 that doesn't fall under privileged material is
25 what I'd be looking for.

1 THE WITNESS: There are emails
2 to EDC back and forth.

3 BY MR. NISHIMURA:

4 72 Q. Right. Are there notes of
5 telephone conversations?

6 A. Not that I'm aware of.

7 MR. NISHIMURA: I'll ask for
8 an undertaking to provide any notes of telephone
9 conversations or internal discussions with respect
10 to the EDC insurance policies; as well as any
11 communications, subject to solicitor-client
12 privilege.

13 And if those -- Mr. Crampton,
14 if those emails include what has already been
15 filed, particularly in Mr. Barona's affidavit,
16 they can just be referenced. They don't need to be
17 physically produced.

18 U/A MR. CRAMPTON: I think it
19 would be easier if we sort of break that up into
20 two portions, just for my own clarity. Notes of
21 internal discussions we'll take under advisement.

22 And I just was unclear when
23 you said "communications", if you were referring
24 to communications with EDC or --

25 MR. NISHIMURA: Yeah, with EDC

1 or with any other party regarding the EDC
2 policies. So that would include communications
3 with either Solvaqua or Mr. Olson, for example.

4 U/A MR. CRAMPTON: I'll take that
5 under advisement as well.

6 MR. NISHIMURA: Okay.

7 BY MR. NISHIMURA:

8 73 Q. Prior to making the
9 advances, did Arnaki or Murchinson actually look
10 at the EDC insurance policies and their terms?

11 A. Our counsel reviewed
12 them.

13 74 Q. Okay, did Murchinson or
14 Arnaki employees or agents, aside from counsel?

15 A. They would have been
16 reviewed; however, it would be up to our counsel
17 to determine whether or not he was satisfied with
18 those documents.

19 75 Q. Right, at this point I'm
20 just looking to see if Murchinson or Arnaki were
21 aware of the provisions of the policy at the time.

22 A. Which provisions?

23 76 Q. All of the provisions. So
24 the policy comes with a certificate, it comes with
25 General Terms and Conditions.

1 probably the largest determining factor in why we
2 executed these transactions.

3 81 Q. Okay, and it was
4 important that Arnaki be the assignee of any
5 insurance proceeds, correct?

6 A. Yes.

7 82 Q. Now, in Mr. Barona's
8 affidavit there is a document which names
9 Murchinson as the payee under a Direction to Pay
10 any insurance proceeds for the policy covering the
11 Vivakor equipment or Vivakor transaction.

12 It's correct to say that that
13 was a Direction to Pay to Murchinson on behalf of
14 Arnaki, correct?

15 A. Correct.

16 MR. CRAMPTON: Did we want to
17 bring up Mr. Barona's affidavit just so that the
18 witness knows exactly which document is being
19 referred to?

20 MR. NISHIMURA: Well, we can,
21 if it's of assistance. So we'd be looking at Mr.
22 Barona's affidavit, and Exhibit E to that
23 affidavit.

24 BY MR. NISHIMURA:

25 83 Q. So this is a Direction to

1 Pay. And if you see under the "Name of Financial
2 Institution", beside that it says "Murchinson
3 Ltd." And the contact is Mr. Reeves of Tingle
4 Merrett.

5 And then at paragraph 1 EDC is
6 directed to pay the financial institution, being
7 Murchinson Ltd., any monies payable under the
8 policy.

9 I just want to confirm that
10 Murchinson was being named as Direction to Pay on
11 behalf of Arnaki.

12 So the monies received by
13 Murchinson, if any, would be applied to Arnaki's
14 loans, correct?

15 A. For the benefit of
16 Arnaki, correct.

17 84 Q. Right, and, indeed, that
18 is stated in the affidavit of Mr. Belilo. And now
19 we'll have to jump back to Mr. Belilo's affidavit
20 at paragraph 15.

21 And so it says at the end of
22 that paragraph, the \$1,386,000 was repaid to
23 Arnaki pursuant to an assignment of the insurance
24 proceeds given by Solvaqua.

25 So is there a document

1 actually assigning the insurance proceeds to
2 Arnaki?

3 A. I don't know.

4 85 Q. Okay.

5 MR. NISHIMURA: I'd like an
6 undertaking to provide any assignment of insurance
7 to Arnaki.

8 U/A MR. CRAMPTON: We'll take that
9 under advisement.

10 BY MR. NISHIMURA:

11 86 Q. How many EDC policies
12 were actually assigned by Solvaqua to Arnaki or
13 Murchinson?

14 MR. CRAMPTON: Sorry, hold on,
15 before you answer, in relation to Solvaqua or just
16 --

17 MR. NISHIMURA: Yes, in
18 relation to Solvaqua.

19 REF MR. CRAMPTON: Refused. I
20 don't see the relevance.

21 MR. NISHIMURA: Well, my
22 understanding is that there are at least two other
23 policies under which a claim has been made. And
24 those are part of the assets that are to be
25 assigned to Arnaki or Murchinson under the

1 proposed sale in the receivership. And those
2 claims are being sought by the plaintiff under
3 their purchase agreement. They require consent,
4 and that consent has not been granted. So they are
5 subject of the proposed order, so they are
6 relevant.

7 MR. CRAMPTON: In relation to
8 Solvaqua?

9 MR. NISHIMURA: Yes.

10 MR. CRAMPTON: Right, I
11 understood your question to be asking generally
12 for any --

13 MR. NISHIMURA: No, just EDC
14 policies relating to Solvaqua.

15 MR. CRAMPTON: You can ask
16 that question. But I was -- if you restate for the
17 witness --

18 MR. NISHIMURA: I'll ask
19 again.

20 BY MR. NISHIMURA:

21 87 Q. So how many EDC policies
22 relating to Solvaqua have been assigned to Arnaki
23 or Murchinson?

24 A. One policy per loan.

25 88 Q. So three?

1 A. Yes.

2 89 Q. Okay, and Murchinson is
3 the payee under a Direction to Pay for each of
4 those?

5 A. I can't say for certain.
6 Arnaki or Murchinson.

7 90 Q. One of either Arnaki or
8 Murchinson, correct?

9 A. I believe so.

10 91 Q. And just from my
11 conversation with Mr. Crampton, you're aware that
12 the policies -- the other two policies relating to
13 Solvaqua, not including the Vivakor/VivaVentures
14 one, were subject to claims made by Solvaqua?

15 Are you aware of that?

16 A. Claims were submitted
17 against both policies.

18 92 Q. And those claims were
19 rejected, correct?

20 A. I'm not familiar with the
21 status. If they've been rejected or if they're in
22 dispute or where they stand.

23 93 Q. Okay, but in any event,
24 those are assets of Solvaqua that Arnaki wishes to
25 acquire in the proposed sale in the receivership,

1 correct?

2 U/A MR. CRAMPTON: Hold on. We'll
3 take that question under advisement.

4 BY MR. NISHIMURA:

5 94 Q. Now, those other two
6 policies would have related to other contracts of
7 Solvaqua with foreign entities, correct?

8 A. Can you re-ask the
9 question?

10 95 Q. So the other two
11 policies -- so not the VivaVentures policies but
12 the other two policies -- related to other
13 Solvaqua contracts with buyers, correct?

14 A. Correct.

15 96 Q. Were those contracts for
16 the manufacture and delivery of equipment, similar
17 to the VivaVentures one?

18 A. I believe so, yes.

19 97 Q. And the -- was the
20 equipment under those other contracts
21 manufactured?

22 A. I can't say for certain.

23 98 Q. Okay.

24 MR. NISHIMURA: I'd like an
25 undertaking to advise whether that -- the

1 equipment under the other contracts, subject to
2 EDC policies, was manufactured.

3 And if so, if those pieces of
4 equipment are still in the possession of Solvaqua,
5 or rather its receiver.

6 REF MR. CRAMPTON: That's refused.
7 That question could be directed to the
8 receiver directly and --

9 MR. NISHIMURA: Well, it could
10 be, but I'm asking your client. I don't have the
11 receiver under oath --

12 MR. CRAMPTON: This is not a
13 discovery so --

14 MR. NISHIMURA: I know it's
15 not a discovery. It relates to arguments that
16 will be put forward in the upcoming application.

17 MR. CRAMPTON: We're refusing
18 that question.

19 BY MR. NISHIMURA:

20 99 Q. So in the proposed sale,
21 Mr. Zogala, Arnaki is proposing to acquire all of
22 the property of Solvaqua, correct?

23 A. I believe we are.

24 100 Q. And that would include
25 any equipment that was being manufactured for

1 contracts for sale with third parties, correct?

2 MR. CRAMPTON: If it requires
3 you to speculate, I don't think it's appropriate
4 to answer.

5 MR. NISHIMURA: Well, I don't
6 think there's any speculation on what the proposed
7 sale includes.

8 MR. CRAMPTON: It's on the
9 face of the document, which is subject of a court
10 order already. So I don't understand why Mr.
11 Zogala's evidence on that is required, but here we
12 are.

13 MR. NISHIMURA: Yes, the
14 question is out there.

15 THE WITNESS: I don't have the
16 document in front of me, I can't say what would be
17 included.

18 BY MR. NISHIMURA:

19 101 Q. Were you aware from the
20 review -- from your knowledge of the EDC policies
21 that the loss is typically calculated by comparing
22 the proposed purchase price under the insured
23 contract with what the equipment would actually --
24 was actually sold for?

25 REF MR. CRAMPTON: That's refused

1 as stated. I'm not sure that Mr. Zogala did review
2 the policy.

3 BY MR. NISHIMURA:

4 102 Q. Well, the policy was
5 available to Arnaki and Murchinson, correct?

6 MR. CRAMPTON: That was
7 established previously, so yes.

8 BY MR. NISHIMURA:

9 103 Q. You were aware that there
10 was a policy, correct, Mr. Zogala?

11 A. Yes.

12 104 Q. You were aware that
13 claims could be made if the deal fell through,
14 correct?

15 A. Correct.

16 105 Q. Did you have an
17 understanding about how the loss would be
18 calculated if a claim was made?

19 A. Our counsel would have
20 been responsible for reviewing those documents and
21 understanding what was in them.

22 106 Q. Right, so if your counsel
23 read it and knew what it said, you didn't care how
24 the loss was calculated, right?

25 A. I can't speak for my

1 counsel.

2 107 Q. No, I'm asking about you.

3 As long as your counsel was happy about how the
4 loss was calculated, you didn't care how the loss
5 was calculated?

6 MR. CRAMPTON: Did Mr. Zogala
7 personally care?

8 MR. NISHIMURA: Right.

9 THE WITNESS: If the closing
10 deliverables within the Loan Agreements were met,
11 I would be satisfied.

12 BY MR. NISHIMURA:

13 108 Q. So neither you nor anyone
14 else at Murchinson cared how losses would be
15 calculated if there was a claim was made under the
16 insurance policy, as long as it was a policy that
17 was delivered?

18 A. If the policy was
19 satisfactory to our counsel to know that our
20 security and our interest was protected.

21 109 Q. Then you didn't care
22 otherwise?

23 A. I can't say I wouldn't
24 care otherwise. That's a very general way of
25 looking at the world.

1 110 Q. And your evidence is that
2 you didn't know how a loss would be calculated, is
3 that what you're saying today?

4 A. It was not my
5 responsibility to review each and every single
6 line item within these contracts.

7 111 Q. I'm aware of that.
8 What I'm asking is whether you
9 knew how losses would be calculated?

10 MR. CRAMPTON: Mr. Zogala
11 personally?

12 MR. NISHIMURA: Yes.

13 THE WITNESS: I did not.

14 BY MR. NISHIMURA:

15 112 Q. Did anyone else at
16 Murchinson know how losses would be calculated?

17 A. I can't speak for anyone
18 else.

19 MR. NISHIMURA: I would ask
20 for an undertaking to inquire and find out whether
21 anyone at Murchinson did know how losses would be
22 calculated when the loan was negotiated and
23 signed.

24 U/A MR. CRAMPTON: It's taken
25 under advisement.

1 BY MR. NISHIMURA:

2 113 Q. When did Arnaki or
3 Murchinson become aware that the VivaVentures
4 transaction was in jeopardy?

5 A. I can't say for certain.

6 114 Q. Well, I'd ask you to
7 review the records and find out and advise me by
8 way of undertaking.

9 U/A MR. CRAMPTON: We'll take that
10 under advisement.

11 BY MR. NISHIMURA:

12 115 Q. Were there discussions
13 with Solvaqua with respect to what it was doing to
14 attempt to close the deal with VivaVentures or
15 otherwise sell the equipment?

16 MR. CRAMPTON: Sorry, I'm just
17 a little confused by the question. Were there
18 discussions? By whom?

19 MR. NISHIMURA: Between
20 Solvaqua and Murchinson and Arnaki with respect to
21 what steps Solvaqua was taking to either finish
22 the deal with VivaVentures or sell to a third
23 party.

24 THE WITNESS: There were
25 conversations about what was happening

1 specifically with Vivakor. No other sales, though.

2 BY MR. NISHIMURA:

3 116 Q. Who was involved in those
4 conversations?

5 A. It could be myself; it
6 could be Scott Reeves; Chris Tesarski.

7 117 Q. Was Mr. Olson involved in
8 those discussions?

9 A. I had conversations with
10 Ralph Olson. I can't say if it was specific to the
11 Vivakor, or for trying to fix the contract, or
12 settle it.

13 118 Q. Now, Mr. Olson has been
14 described in these proceedings as a broker and
15 someone who was a go-between between Murchinson
16 and Arnaki on the one side and Solvaqua on the
17 other.

18 Is that your understanding?

19 A. He introduced me to
20 Chris, and that was his only involvement in the
21 transaction. At times he'd be a communication
22 bridge, but he was only an introductory party to
23 me.

24 119 Q. So he was familiar to
25 Murchinson prior to the Solvaqua deal?

1 A. Correct.

2 120 Q. And for lack of a better
3 phrase, he brought that deal to Murchinson,
4 correct?

5 A. He introduced me to
6 Chris --

7 121 Q. Okay.

8 A. -- is what he did.

9 122 Q. And at times he was -- he
10 facilitated communications between the two sides?

11 A. Correct.

12 123 Q. Mr. Tesarski might tell
13 him something that was then relayed to you or
14 other people at Murchinson, is that right?

15 MR. CRAMPTON: At what times?

16 MR. NISHIMURA: At all times
17 during the commencement of the loan and the
18 receivership.

19 THE WITNESS: I can't say at
20 all times.

21 BY MR. NISHIMURA:

22 124 Q. At various times?

23 A. Ralph was aware of Chris
24 Tesarski's business, and would provide occasional
25 updates on the business itself. Anything specific

1 to one loan or another or into receivership, I
2 can't say for certain.

3 125 Q. So you don't recall
4 whether he was involved in attempting to fix or
5 repair the Vivakor transaction?

6 A. I don't know what his
7 involvement would be to try and fix those
8 transactions.

9 126 Q. At some point you did
10 have an understanding that that transaction was in
11 jeopardy, correct?

12 A. I did.

13 127 Q. And as a result of that,
14 you encouraged Solvaqua to make a claim under the
15 EDC policy, is that correct?

16 A. Someone would have
17 encouraged Chris to make a claim under the policy.
18 I can't say if it was me or one of our
19 representatives.

20 128 Q. Right, so someone from
21 Murchinson?

22 A. Someone either at the
23 investor or me representing the investor.

24 129 Q. Okay, do you know when
25 that was?

1 A. I do not.

2 130 Q. My understanding is that
3 the claim was made in April 2021. I might have got
4 the year wrong, but it was made in April.

5 Do you recall that that's when
6 that encouragement took place?

7 A. When someone is
8 encouraged to do something and when they do
9 something are two different things. Without
10 looking at the dates, I can't say for certain.

11 MR. NISHIMURA: I'm going to
12 understand, Mr. Crampton, that my earlier
13 undertaking request would have included these
14 types of communications, if there's any written
15 evidence of that. Is that fine?

16 MR. CRAMPTON: Written
17 correspondence, yes, would have been included in
18 the earlier request.

19 MR. NISHIMURA: Okay.

20 BY MR. NISHIMURA:

21 131 Q. Mr. Zogala, do you recall
22 any pushback from Mr. Tesarski or anyone else at
23 Solvaqua saying it was not yet time to make a
24 claim under the policy?

25 A. I can't recall.

1 132 Q. And more specifically,
2 that they should try to sell the equipment prior
3 to making a claim so that their loss would be
4 crystallized?

5 A. I can't recall that.

6 133 Q. Okay. I'd like you to
7 undertake to inquire with anyone else that would
8 have been in communication from Murchinson or
9 Arnaki with Solvaqua to see if that was the
10 communication that they received from Solvaqua.

11 U/A MR. CRAMPTON: We'll take that
12 under advisement.

13 BY MR. NISHIMURA:

14 134 Q. After the claim was made
15 by Solvaqua under the policy for VivaVentures, was
16 Murchinson aware that an Assignment Agreement had
17 been provided to Solvaqua assigning its claims by
18 Solvaqua against VivaVentures to EDC?

19 MR. CRAMPTON: If you had
20 trouble understanding the question don't
21 hesitate --

22 THE WITNESS: Please rephrase.

23 BY MR. NISHIMURA:

24 135 Q. Okay, so after the claim
25 was made by Solvaqua, there was an Assignment

1 Agreement provided to Solvaqua by EDC. And that
2 agreement assigned all collection rights with
3 respect to VivaVentures and Vivakor to EDC.

4 Was Arnaki or Murchinson aware
5 of that agreement?

6 MR. CRAMPTON: Just hold on. I
7 don't want to hold you up, counsel, because I
8 don't think it's controversial to some extent, but
9 just -- I'm just a little hesitant, based on the
10 way the premise was stated. I think we need to
11 establish Mr. Zogala's knowledge first of whether
12 he knows about that Assignment Agreement that
13 you're referring to.

14 BY MR. NISHIMURA:

15 136 Q. Well, do you know that
16 about that Assignment Agreement?

17 A. I don't.

18 137 Q. So you didn't read Mr.
19 Barona's affidavit?

20 A. The -- sorry, the
21 question is confusing to me. If you could
22 reference the affidavit or show me where within,
23 that would be very helpful.

24 138 Q. Well, let's bring up Mr.
25 Barona's affidavit and paragraphs 8 and 9.

1 So paragraph 8 describes an
2 agreement with Solvaqua and EDC that EDC had
3 essentially acquired the rights of the equipment
4 and any rights as against Vivakor.

5 Was that type of an agreement
6 known to Arnaki or Murchinson at any time?

7 A. One minute, I'm just
8 reading through.

9 And the question again,
10 please?

11 139 Q. Was Arnaki or Murchinson
12 aware of such an agreement?

13 MR. CRAMPTON: Could you
14 specify the agreement, counsel?

15 BY MR. NISHIMURA:

16 140 Q. The one that's described
17 in the third sentence of paragraph 8.

18 A. I do not recall any
19 agreement referenced there.

20 141 Q. Okay, so the first time
21 you became aware of that type of agreement was
22 when you saw Mr. Barona's affidavit?

23 A. Yes.

24 142 Q. Okay, and then in
25 paragraph 9 of the affidavit there's reference to

1 an actual Assignment Agreement dated February 8,
2 2022. It says in the affidavit it's at Exhibit G.
3 We can look at that. That's actually the date of
4 the notice. The actual agreement is, I believe,
5 dated February 1st.

6 So had you ever seen that
7 document prior to Mr. Barona's affidavit?

8 A. I have not.

9 143 Q. Were you aware that that
10 type of agreement had been sent to Solvaqua in
11 February 2022?

12 MR. CRAMPTON: When, sorry?

13 BY MR. NISHIMURA:

14 144 Q. In February of 2022, I
15 said.

16 A. I don't recall seeing
17 this agreement at all.

18 145 Q. Right, but my question
19 was: Were you aware that that type of agreement
20 had been sent back --

21 MR. CRAMPTON: Sorry, I'm
22 confused, counsel. You're asking: Were you aware
23 in February 2022 that this type of agreement had
24 been sent in February 2022?

25 MR. NISHIMURA: Right.

1 MR. CRAMPTON: It's the
2 earlier one that was confusing me.

3 MR. NISHIMURA: Exactly.

4 THE WITNESS: If I haven't
5 seen that agreement, I wouldn't be aware that it
6 was sent.

7 BY MR. NISHIMURA:

8 146 Q. Well, you might be if
9 someone told you that -- if someone from Solvaqua
10 said, 'Oh, we've received an Assignment
11 Agreement,' you wouldn't have to see it to know
12 that it had been sent.

13 A. I don't recall that.

14 147 Q. Okay.

15 Exhibit F to Mr. Barona's
16 affidavit is a collection of emails between Scott
17 Reeves of Tingle Merrett, Steve Rubayika of EDC,
18 Mr. Tesarski, and yourself, as well as on occasion
19 some other people.

20 So have you seen these emails
21 before?

22 MR. CRAMPTON: The whole set
23 of them that are attached?

24 MR. NISHIMURA: Yes.

25 MR. CRAMPTON: If you need to

1 view them, Mr. Zogala, let us know. I don't
2 know --

3 THE WITNESS: I see that they
4 have been sent to me. I have to read through each
5 one individually to say whether or not I have seen
6 it.

7 BY MR. NISHIMURA:

8 148 Q. Let me ask you first:
9 You did not review them when you received Mr.
10 Barona's affidavit?

11 A. I would have; however,
12 I'm not sure if those are all just from the
13 exhibits.

14 149 Q. Well, I'm only referring
15 to the exhibit.

16 You did look at the exhibit at
17 the time Mr. Barona's affidavit was provided,
18 correct?

19 A. I did review the
20 affidavit.

21 150 Q. Okay, so is it fair to
22 say that between April 27, 2021, and November 2021
23 that Murchinson or its counsel repeatedly
24 requested payment of the EDC claim?

25 A. If we had filed a claim

1 and it was not yet paid, I assume that we'd be
2 requesting payment of that.

3 151 Q. Okay.

4 For example, if we go towards
5 the end of that exhibit, there's an email dated
6 November 15, 2021, and it's from Mr. Reeves. It
7 says -- it's copied to you, Joshua Fenttiman at
8 Murchinson, Mr. Olson, and Mr. Tesarski. And it
9 says:

10 "With respect to the
11 captioned claim initially
12 filed on April 27, 2021,
13 notwithstanding our
14 telephone inquiry of
15 May 30th 2021 and
16 subsequent email
17 inquiries dated
18 October 4th and
19 October 26th, we have yet
20 to receive any meaningful
21 correspondence from you
22 as to the status of this
23 claim" (as read)

24 As far as you're aware, that
25 was an accurate description of the inquiries that

1 were being made by Mr. Reeves?

2 A. To my knowledge, yes.

3 152 Q. And in November 2021

4 Murchinson was again seeking payment of the claim?

5 A. If a claim had been
6 submitted and it was not yet settled, I assume
7 we'd still be seeking the funds.

8 153 Q. Did you have any
9 understanding of why it had not been paid yet at
10 that point?

11 A. I can't say for certain.

12 154 Q. So you don't recall any
13 reason whatsoever that was being given?

14 A. I can't say definitively.

15 155 Q. Well, then I'll ask for
16 an undertaking to go back and review records and
17 speak to the people involved from Murchinson or
18 its counsel and confirm if any reasons were given
19 for the apparent delay in payment, and what those
20 reasons were.

21 U/A MR. CRAMPTON: We'll take that
22 under advisement.

23 BY MR. NISHIMURA:

24 156 Q. And so I'm a little
25 concerned that you are saying you can't say

1 definitively.

2 What I'm asking is if you have
3 any recollection at all as to what reasons had
4 been provided?

5 A. I can't remember what I
6 had for dinner last week. It's a long time ago.

7 157 Q. So you have no memory of
8 anything relating to the reasons the claim had not
9 been paid by November?

10 A. Nothing I could say
11 definitively.

12 158 Q. Well, I'm not asking you
13 to say definitively. I'm asking you to say
14 whatever you remember about it.

15 A. I remember we submitted a
16 claim. It was being processed. It had not yet been
17 paid. I can't say for certain why it was taking so
18 long.

19 159 Q. So, for example, you
20 don't recall any discussion that the equipment
21 should be sold first and then the amount of the
22 claim would be determined?

23 A. I don't recall that.

24 160 Q. And you can't deny that
25 that was a discussion?

1 MR. CRAMPTON: A discussion
2 among who?

3 BY MR. NISHIMURA:

4 161 Q. Among all these parties
5 that were in these emails.

6 A. Can you rephrase the
7 question?

8 162 Q. So you do not recall any
9 discussions with Solvaqua or EDC or Mr. Olson that
10 the claim was not being paid because it was
11 suggested that the equipment be sold first and
12 then the claim processed?

13 A. Be sold to who?

14 163 Q. Anyone.

15 A. To Vivakor?

16 164 Q. Anyone.

17 A. I can't say for certain.

18 165 Q. You can't deny that that
19 was a conversation?

20 A. I don't recall being
21 party to a conversation where it was suggested
22 that the equipment be sold.

23 MR. NISHIMURA: If you give me
24 five minutes, I'll just check my notes, and we may
25 be complete.

1 MR. CRAMPTON: Okay.

2 --- Recess taken at 5:11 p.m.

3 --- On resuming at 5:21 p.m.

4 MR. NISHIMURA: Mr. Zogala, I
5 have nothing further. I don't know if Mr. Kingston
6 does. Subject to undertakings and objections, of
7 course.

8 CROSS-EXAMINATION BY MR. KINGSTON:

9 166 Q. Hi, Mr. Zogala?

10 A. Hi.

11 167 Q. How are you?

12 A. Fantastic.

13 168 Q. I don't think I have too
14 many questions, so I won't drown us out.

15 I'm curious in relation to the
16 General Security Agreements that are referenced in
17 the affidavit of Mr. Belilo that you reference in
18 your affidavit, were there any conversations
19 between Arnaki and Solvaqua in relation to the
20 equipment that was manufactured by Rotating Right
21 that is not yet paid for?

22 And if so -- let's just start
23 with that question.

24 MR. CRAMPTON: You might want
25 to break that up there.

1 THE WITNESS: Do you want to
2 repeat that, please?

3 BY MR. KINGSTON:

4 169 Q. Were there any
5 communications between Solvaqua and Arnaki with
6 regards to the manufactured equipment that was not
7 yet fully paid for by Solvaqua?

8 A. A conversation that I was
9 aware of happened after the receivership.

10 MR. KINGSTON: Could I have an
11 undertaking of any communications in relation to
12 the security documentation and the equipment that
13 was to be secured in relation to Rotating Right's
14 equipment that was manufactured?

15 MR. CRAMPTON: So an
16 undertaking to provide any communications Arnaki
17 or Murchinson had with --

18 MR. KINGSTON: Solvaqua.

19 MR. CRAMPTON: -- with
20 Solvaqua about the GSA and the equipment to be
21 manufactured?

22 MR. KINGSTON: Well, what I'm
23 kind of driving at is, I just want to make sure
24 that it was communicated that not all of the
25 equipment was paid for by Solvaqua.

