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Between the beginning of 2010 and the end of 2011, while Eastwood engaged in much talk about reaching a real solution to the Mall's problems, no real action was taken. The City, tenants, and the public were told that progress was being made at the same time as the Nazarians tried to sell the Mall or to refinance it to get more money out of their investment. Although the City received clear warnings of potential structural deficiencies at the Mall, it did nothing to see that any repairs were carried out.

January–May 2010: Iftikhar Hossain continues to explore acquiring the Mall but does not close the deal

Iftikhar Hossain's interest in acquiring the Mall continued in 2010. On January 4, 2010, Mr. Hossain met with Mr. Bauthus. Mr. Bauthus's notes of the meeting indicate that Mr. Hossain was "interested in Mall." Mr. Bauthus testified that, although he told Mr. Hossain that the Mall was important to the City, he did not tell him anything about the leaking.¹

Mr. Hossain identifies discrepancies in reported financial performance

On January 25, 2010, Mr. Hossain emailed Marty Ditchburn, a real estate broker who represented the Nazarians, regarding discrepancies between the figures in the financial statements provided to Mr. Hossain and the figures that purported to show the financial performance of the Mall and Hotel for the year 2008 presented in a sale's brochure prepared by Levon Nazarian. Specifically, Mr. Hossain wrote:

With my accountant, we have tried to make sense of the bottom line from the financials that they have provided compared to what was disclosed in the brochure. With all the adjustments in the financials, it appears that the Net is approximately \$425k below than [*sic*] it was shown in the brochure for the year 2008.²

Levon Nazarian testified he was not sure which of the many financial statements that had been prepared for 2008 were provided to Mr. Hossain.³ As I explained in the previous chapter, he was unable to explain the discrepancies between the numbers in the brochure and those in the many financial statements prepared for the same period other than to blame Eastwood's accountant, Sam Hurmizi.⁴ He did later testify that he would "take responsibility for that" because he had not taken the necessary steps to ascertain accurate numbers.⁵

Mr. Hossain enters into another agreement of purchase and sale

In spite of his questions about the discrepancy in the figures provided on the Mall's financial performance, Mr. Hossain entered into a further agreement of purchase and sale on January 29, 2010, in which the offered purchase price was \$7.7 million. This price was \$2.5 million less than his original offer of October 2009. When Bob Nazarian was asked whether the reduction in price was as a result of the financial statements provided to Mr. Hossain, he replied that he accepted a lower price because he "just wanted to sell at that time."⁶

For his part, Levon Nazarian testified he did not know that the reduction in price was a result of the financial information given to Mr. Hossain, but he assumed so. Levon Nazarian had given Mr. Hossain the 2009 M.R. Wright engineering report but he did not think the report had an effect on the price offered.⁷

The offer included a financing condition that had to be fulfilled by March 15, 2010.

Levon Nazarian provides false information to purchaser to facilitate financing

On February 12, 2010, Mr. Hossain's lawyer, Roger Nainby, wrote to Eastwood's lawyer, Daniel Botelho, requesting current financial statements and answers to a list of due diligence related questions. Included among the questions and requests were:

- "Details of any disputes with tenants (particularly Bank of Nova Scotia) and any tenant defaults, including rental arrears"; and
- "What is the status of repairs to the rooftop parking surface and mall roof?"⁸

Levon Nazarian testified that he read the letter and subsequently sent it back to his lawyer. He testified that he was not sure whether he saw the list of due diligence questions, but said he would have forwarded the questions to the Mall manager or to their accountant.⁹

On February 17, 2010, Mr. Nainby wrote to Mr. Hossain: "We have gone through the leases and the rent roll and there are many questions we have as to discrepancies between the lease files and the rent roll, as well as missing files on some tenants."¹⁰ On February 24, 2010, Levon Nazarian replied to Mr. Nainby's correspondence of February 12.¹¹ He testified he would not have drafted the answers to the due diligence questions that he enclosed with his letter and did not know if he had read them.¹² In answer to the question "What is the status of the repairs to the rooftop parking surface and mall roof?" the answer provided was "Perfect."¹³ Levon Nazarian agreed that statement was false. The repairs to the parking surface and the Mall roof were not perfect.¹⁴

In answer to the question "Details of any dispute with tenants (particularly Bank of Nova Scotia) and any tenant defaults, including rental arrears," the answer provided was simply "Scotia Bank." Levon Nazarian acknowledged that the Bank of Nova Scotia was, at that time, withholding between \$100,000 and \$150,000 for expenses related to the cleanup from leaks. He acknowledged that the response could have been much more thorough but that, unfortunately, it was not.¹⁵

Levon Nazarian was aware that the responses were very important for Mr. Hossain to satisfy the financing condition of the agreement of purchase and sale, which, if the transaction was completed, would allow the Nazarians to finally divest themselves of their unwanted Mall. He testified:

Q. I mean that's what happened. Obviously the purchaser's lawyer has written your lawyer. He's passed it on to you and said we need these questions answered. You got this information and then you passed it on; right?

A. Well, somebody drafted these answers and sent it to me and I sent it on, yes.

Q. Is that what happened?

A. I believe so.

Q. Do you know that?

A. Well, sir . . .

Q. There are only two possibilities. Somebody drafted it or you wrote it; which is it?

A. It wouldn't be me because I would have my letterhead on it.

Q. Okay. Did you read it before you sent it on?

A. I don't know. I don't – I don't think so.

Q. Well, sir, you've been working on trying to sell this property at this stage for over a year; right?

A. Correct.

- Q. And your father seriously wanted to sell the property.
- A. Yes. Absolutely.
- Q. He wanted it off his hands?
- A. That's a fair statement.
- Q. And you agreed with that.
- A. I would agree with that, yes.
- Q. You wanted your father to get it off his hands?
- A. Yes.
- Q. Because it was not – your father was not happy with it and you wanted to see the problem removed; right?
- A. I think, personally speaking, I think it was killing his health so, yes, I wanted it off his hands.
- Q. So you knew this was very important.
- A. Yes.
- Q. And you knew that the information which is requested by the lawyer as part of the due diligence process, was very important because if it didn't satisfy the purchaser, the deal would not close; right?
- A. If it didn't satisfy the purchaser, then the purchaser has the ability to counter offer or, yes, leave.
- Q. And in this particular Agreement of Purchase and Sale, the condition was a financing condition; right?
- A. Yes, sir.
- Q. And so what was needed, as Mr. Nainby says in his letter, was information to satisfy the lender; right?
- A. That's correct.
- Q. And if the lender was not satisfied, the loan would not be offered and the condition would not be met and the land would not be sold; right?
- ...
- A. Correct.
- Q. So, to sell the land you needed to satisfy the lender?
- A. Yes.
- Q. Okay. And so I suggest to you that you would have carefully reviewed the information which was provided to ensure: a) that it was accurate; b) that it would provide the information which was asked for, so the lender would be satisfied; is that fair?
- A. That would have been prudent.
- Q. Is that not what you did?
- A. Well, like I said, I would forward this information because I would not know the answers to these questions. I would forward it to probably the mall manager at the time, get the answers and forward it over. Whether I reviewed it or not, Mr. Doody, I can't say because I don't know. I – right now, I don't recall ...¹⁶

Levon Nazarian stated that he could not remember reviewing the document. It is difficult to accept at face value that he neither drafted nor read the information he provided to Mr. Hossain. What interest would the accountant or the Mall manager have in making these false statements? But, even if what he says is true, there can be no doubt that Eastwood was conveying a deliberate falsehood to the purchaser. That is hardly surprising, in the light of previously described actions by its principals.

The agreement with Mr. Hossain is terminated: Mr. Hossain could not get financing

On March 9, 2010, Mr. Botelho wrote Mr. Nainby stating that Eastwood would not be extending the financing condition that was then scheduled to expire on March 15, 2010, because Mr. Hossain had disclosed the existence of the transaction in contravention of the confidentiality provisions of the agreement of purchase and sale.¹⁷ Levon Nazarian testified that he instructed Mr. Botelho to send this letter because Mr. Hossain had told Mall staff he had acquired the Mall and notified the power company that he now owned the Mall.¹⁸

By March 15, 2010, Mr. Hossain had not met the financing condition.¹⁹ As a result, the deal between Eastwood and Mr. Hossain had been terminated and the agreement was null and void.²⁰ On March 16, 2010, Mr. Nainby wrote to his client confirming that the deal was terminated and advising that, if he was going to pursue further negotiations in connection with buying the Mall, the prior negotiations should not get in the way. Mr. Nainby added, “I am distrustful of the vendor.”²¹

Mr. Hossain responded the same day, indicating he was going to meet with Bob Nazarian the next day to “get a sense of what he is up to.” Mr. Hossain also indicated the following:

Please note that BDC [Business Development Bank of Canada] was not willing to finance because of Scotia non-payment of the rent and Shoppers leaving. Yesterday we have explained the situation, which was well received. Dollarama is already waiting to get additional space that might become vacant if Shoppers leave. So there will not be any net loss. At this time we do not want to jeopardize the financing process as you know no one else wants to finance this property other than private fund which is expensive.²²

Levon Nazarian agreed that, between the time this letter was written and the time of the collapse, Dollarama had not signed an agreement to get additional space, although he testified Eastwood was “just about to sign that agreement” before the collapse.²³

The dealings between the Nazarians and Mr. Hossain are typical of the way the Nazarians conducted business generally. Eastwood and the Nazarians repeatedly provided Mr. Hossain with information that was either misrepresentative or false. Mr. Hossain’s counsel had good reason to be “distrustful” of the Nazarians.

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Mr. Hossain tries again to buy the Mall and again cannot obtain financing

By letter dated March 18, 2010, Mr. Nainby wrote to Mr. Botelho indicating his client had requested that the Business Development Bank of Canada continue to look at Mr. Hossain’s request for financing of the purchase of the Mall from Eastwood. Levon Nazarian testified that he was aware of this letter and he was agreeable to attempting to reach an agreement with Mr. Hossain.²⁴ On May 16, 2010, Eastwood entered into another agreement of purchase and sale with Mr. Hossain for \$7.7 million, the same price as the earlier aborted agreement. It was subject to a financing condition that had to be satisfied by May 31, 2010.²⁵

Mr. Hossain actively attempted to close this deal. On May 12, 2010, he provided a deposit of \$100,000. Levon Nazarian agreed this indicated that Mr. Hossain was making a serious attempt to revive the deal; Levon himself was hopeful that the deal would close.²⁶ Mr. Hossain retained Pinchin Environmental to follow up on

its 2009 building condition assessment. Pinchin understood that Mr. Hossain was a potential purchaser of the Mall. Although Pinchin conducted an inspection on behalf of Mr. Hossain, it never disseminated a report of its 2010 inspection.²⁷

On May 31, 2010, however, Mr. Hossain's solicitor advised Mr. Botelho that Mr. Hossain had been unable to secure financing, and that, accordingly, the financing condition was not met and the offer to purchase the Mall was null and void.²⁸

July–October 2010: The Nazarians try unsuccessfully to “get rid of” or refinance the Mall

Many offers, no sales

The Nazarians' interest in getting the Mall off their hands did not end with their frustrated efforts to sell it to Mr. Hossain. They continued to entertain multiple offers. Levon Nazarian received a “non-binding letter of intent” from Value Centres of Concord, Ontario, on July 28, 2010, to purchase the Mall for \$7 million. The payment schedule included a cash payment of \$4.5 million and required Eastwood to take back a mortgage on a 10-year term for the balance of the purchase price. Levon Nazarian testified that they took every offer to purchase the Mall seriously but that there were also many offers and it was not clear whether all of them were serious. There were a lot of speculators or “tire kickers,” who at one time or another expressed an interest in acquiring the Mall.²⁹

On July 30, 2010, Levon Nazarian responded to the broker for Value Centres. He wrote:

I looked at the LOI [letter of intent] that you had sent me, and I showed it to the owner of the property. Please don't take this the wrong way, but to be very blunt, I consider this offer a joke as well as insulting. We are not at all interested in this LOI nor will we even respond. The asking price is \$9.9 million. We do have room to negotiate but nowhere near to what your client has offered us. Let us know when he is more serious.³⁰

In his testimony, Levon Nazarian characterized his reaction as being a negotiation tactic.³¹ He testified that, at that time, he was very keen on selling the property. Indeed, he wanted to “get rid of it.”³²

On August 8, 2010, a signed offer to purchase was received from another prospective purchaser, BBM Properties Inc. The agreement had a purchase price of \$8 million and proposed a vendor-take-back mortgage of \$3.78 million. Levon Nazarian testified that Eastwood was not interested in a vendor-take-back mortgage of that size because they wanted to realize more cash proceeds on any sale of the Mall. Nor were they interested in offers to purchase that included a due diligence period of longer than 30 to 45 days because they locked the property up, effectively preventing it from being sold during the due diligence period.³³

Levon Nazarian could not recall what happened with this offer.³⁴

On August 12, 2010, Eastwood received an offer from Winchester Financial Corporation to purchase the Mall for \$7.7 million.³⁵ Levon Nazarian testified he was excited about this offer because Winchester was the owner of a mall in Espanola, which he characterized as “essentially another B market.”³⁶ Levon Nazarian testified that, when he followed up, he learned that the prospective purchaser had already acquired another property and was no longer interested in buying the Mall in Elliot Lake.³⁷

On August 23, 2010, Eastwood received an offer to purchase from a prospective purchaser named Ochiltree Management Inc. for \$9 million.³⁸ It proposed an assumption of the first mortgage (then in the amount of approximately \$3 million to \$4 million) by the prospective purchaser and Eastwood taking back a second mortgage of \$2 million. Levon Nazarian testified he was hesitant to proceed with this offer because, as the second mortgagee, Eastwood would be assuming significant risk. If the first mortgage being administered by the Royal Bank went into default, it would receive the first money from any sale; if Eastwood was the second mortgagee, it would receive only whatever money was left over after the first mortgage debt had been paid.³⁹ The Nazarians did not appear confident about the Mall's value.

Between September 7 and 12, 2010, Bob Nazarian exchanged offers with a prospective purchaser who had, by a letter of intent, offered to purchase the Mall for \$6.5 million. Bob Nazarian counter-offered \$8.5 million, and the prospective purchaser responded with an offer of \$7 million. Levon Nazarian testified that, from his recollection, an agreement was reached to sell the Mall for \$8 million. He further testified that the prospective purchaser was from Libya but that the offer never went anywhere. There was no deposit and, although Levon Nazarian attempted to contact the prospective purchaser on numerous occasions, he never heard back from him.⁴⁰

Levon Nazarian testified that, in his efforts to sell the Mall in 2010, he "just wanted to get rid of it" in order to protect his father's health. His father shared that view.⁴¹

Eastwood Mall Inc. attempts to secure financing

According to Levon Nazarian, in October 2010, the Nazarians started the process of trying to secure a loan from the Business Development Bank of Canada in order to build a new parking lot and eliminate the rooftop parking. He testified that Eastwood needed about \$1.5 million but wanted as much as it could get.⁴² As will be seen, the efforts to borrow from BDC continued up to the date of the collapse.

At the same time, Eastwood was seeking financing from the Canadian Imperial Bank of Commerce (CIBC), but Levon Nazarian testified that, ultimately, CIBC did not want to lend to a business located in Elliot Lake.⁴³

Conclusion: Eastwood wanted to sell the Mall but could not because of its own actions

It is clear to me that, throughout 2010, Eastwood concentrated its efforts on selling the Mall rather than fixing the leaks and maintaining the building. There was a great deal of interest from prospective purchasers, but no purchase came to fruition. This was, to a great degree, the result of the Nazarians' own actions – the duplicitous financial information, failure to deal in a forthright manner, and, most importantly for this Inquiry, their failure to fix the leaks.

It is clear to me that, throughout 2010, Eastwood concentrated its efforts on selling the Mall rather than fixing the leaks and maintaining the building.

Water continues to leak into the Mall

While Bob and Levon Nazarian were evidently spending a lot of their time trying to get the Mall off their hands, water continued its incessant infiltration of the rooftop parking deck.

Leaks continue in the Bank of Nova Scotia and Zellers

The leaks persisted in the Bank of Nova Scotia branch. On March 18, 2010, Judy McCulloch, the bank's branch manager of customer service, called her head office to advise that there were no leaks in the bank but that the lack of carpeting had caused a customer to fall.⁴⁴ However, by April 8, 2010, the branch was leaking again. Ms. McCulloch testified that she alerted the Mall management about the leaks at that time.⁴⁵

Although there were fewer communications between Brian Cuthbertson, Zellers' manager, and the Mall management about the leaks in his store between 2010 and 2012 than before, he testified that the leaks continued. On June 22, 2010, Mr. Cuthbertson reported that there were 33 different leaks in Zellers after the first day of heavy rain in the summer of 2010.⁴⁶

The leaking continued to be problematic in the bank. The branch manager, Laurie Wiens, took photographs of the effect of the leaking on September 10, 2010, which showed, among other things, the buckets that the bank staff used to catch the leaks⁴⁷ (see figure 1.11.1). Later that month, the bank staff complained about various symptoms related to the conditions at the branch. As a result, Pinchin conducted a mould and indoor air-quality assessment.⁴⁸ Its report noted:

Water continues to leak through to the ceiling of the teller area, waiting area, open office area and kitchen / storage room during periods of heavy rain. Buckets have been placed on locations where some of the water leaks have repeatedly occurred. Affected lay-in ceiling tiles are routinely replaced after every heavy rainfall;

The wall and ceiling finishes removed in August 2008 and June 2009 have not been replaced ...⁴⁹



Figure 1.11.1 Conditions in the Mall's Bank of Nova Scotia branch, September 2010

Source Exhibits 5127 and 5112

Although Pinchin did not find the presence of concealed mould growth, it recommended that the source of the roof leaks be repaired.⁵⁰ This report was provided to Eastwood, but Ms. McCulloch testified that she did not believe that Eastwood took any steps to repair the roof beyond its established practices.⁵¹

On October 4, 2010, Antoine-René Fabris, Eastwood's lawyer, sent a letter to Kim McAllister at the Bank of Nova Scotia's head office, writing that the actions of the bank's staff at the branch in Elliot Lake "mirror their wish to have a new facility built ... There have been no substantial leaks in the area, and I think that hysteria is taking over your staff."⁵² Ms. McCulloch testified that she did not see this letter at the time it was sent but, when she did see it, she was angry. It was her evidence, which I accept, that – despite Mr. Fabris's bald assertions to the contrary – the leaks in the branch continued throughout 2010–11, until the branch moved out of the Mall permanently. Eastwood should have taken the bank's concerns seriously.⁵³

Report for Royal Bank observes rusting and leaking

On September 17, 2010, Canadian Mortgage Rating Service Ltd. prepared an inspection report for the Royal Bank Mortgage Corporation. It detailed numerous observations about the state of disrepair in the Mall. The observations provide a troubling glimpse into the Mall that were manifestly apparent to the RBC inspector. Although Bob Nazarian did not have access to this report, he was asked about the accuracy of its observations, which noted that

- the management of the property appeared to be "inadequate." Bob Nazarian did not agree with that observation.
- the outdoor walkway was leaking and had rusting metal support beams. Bob Nazarian testified that, at one point, the outdoor walkway was probably leaking and rusting.
- there was an active roof leak in the main Mall corridor. Bob Nazarian testified that this was "very much possible."
- there was an active roof leak in Dollarama. Bob Nazarian testified that this was "possible."
- there were numerous active roof leaks in Zellers. When asked whether this was accurate, Bob Nazarian testified that "everything is possible, yes."
- there were active roof leaks in the public library space. Bob Nazarian testified that this was possible.
- "[t]he overriding issue with the exterior is the continued problems with water infiltration from the parking deck. Previous repairs that were thought to be satisfactory during the previous inspection have not held up." Bob Nazarian testified that this was "possible."
- the "rusting steel support columns are a structural concern." Bob Nazarian testified that Eastwood had retained a welder to reinforce the exterior staircase but the welders did not do anything with the structural steel that was supporting the core slabs inside the Mall.⁵⁴

Bob Nazarian did not deny the existence of such disrepair and water infiltration. But, as was his custom throughout so much of his testimony, he chose to equivocate, repeatedly resorting to words such as "possibly" rather than answering a question directly. The exchanges summarized above confirm my earlier observation that Mr. Nazarian's credibility was problematic throughout his evidence.

The City takes no steps to stop water from infiltrating the Mall

Mr. Hossain makes inquiries with Mr. Bauthus about the Mall

Mr. Bauthus testified that he had spoken to “some individuals” around Christmas 2009 who had said they were interested in the Mall.⁵⁵ He had made a note on January 4, 2010, writing “Iftikhar” (Mr. Hossain’s first name), a phone number, and “re meeting in Dec. re business opportunity in E.L. – interested in Mall – what City wants with the Mall.”⁵⁶ Mr. Bauthus recalled telling him what the City was doing “and that the Mall was important to the City.” He did not tell him anything about the leaks.⁵⁷ It was his evidence that he probably told Bruce Ewald, chief building official, that there were some people interested in the Mall.⁵⁸

As I have indicated above, an agreement of purchase and sale was entered into between Mr. Hossain and Eastwood on January 29, 2010.

Mr. Ewald rescinds the 2009 Property Standards Order

On February 11, 2010, Mr. Ewald sent a letter to Bob Nazarian advising him that:

Subsequent to an inspection today February 11, 2010 of the Algo Mall ... I find that all conditions of the Property Standards Order issued on September 25, 2009 have been completed ... Please accept this letter as your notification that all matters pertaining to the order have been labelled complete and this order is now rescinded.⁵⁹

The order required two things – that a report be obtained from a structural engineer and that the leaks be fixed. Mr. Ewald agreed with this when he testified.⁶⁰ Mr. Ewald testified he did not notice any leaks during his inspection that day. It was his evidence that the inspection would have lasted between half an hour and an hour, although “[a]ctually, I don’t have any recollection of doing it, other than the fact that this letter says that I went over and did it.” He took no notes.⁶¹

Mr. Ewald testified he sent the letter because he had concluded that the leaks had been fixed. Mr. Ewald explained how he arrived at such a conclusion:

Q. I assume by issuing this order on February 11th, you concluded that the leaks had been fixed, right?

A. Yes.

Q. What caused you to come to that conclusion?

A. My inspection in November, and I’d been back over to the mall on three or four occasions after that, to take a look at the fireproofing material. Obviously, when looking at the fireproofing material I was looking – I mean, if I saw leaks coming through, I would have stopped them from doing the fireproofing material, because it can’t be applied onto a wet surface. So I’d been in the mall probably upwards of a half-dozen times from November through to the end of December. I don’t believe – I believe by the latter part of December or, you know, or even the early part of January, all of the fireproofing, I believe, was completed, so I don’t know that I was there later in January at all.

Q. And typically it didn’t leak in the winter?

A. It would be unusual, I think, if it did with – with – unless we had very warm weather.

Q. Right. And in order to come to that conclusion, that the leaks had been fixed, I take it from your earlier evidence, you did not determine how they’d gone about doing it?

A. Well, I was aware that they had routed out a – quite a number of the grout lines and re-caulked everything.

Q. Everything?

A. Well to the best of my knowledge, yes. I don’t know whether it was everything.

Q. Did you ask?

A. I may have. I have no – no distinct recollection of doing that.

Q. Do you have an indistinct recollection of asking?

A. No. No.⁶²

Although Mr. Ewald testified that no one from the City spoke to him about dealing with the September 2009 order before issuing this letter,⁶³ Mr. Bauthus's evidence was that Mr. Ewald "probably" mentioned that he was sending a letter to Mr. Nazarian.⁶⁴ He also testified:

Q. And, sir, you knew at this time that the building still leaked, right?

A. Yes, sir.

Q. And did you say to Mr. Ewald, well, how can you send this letter if the order said fix the leaks and the building was still leaking?

A. I didn't take note of that. I looked at the aspect of the structural issue and that part had been responded to by the engineer.

Q. Or so you had been told?

A. That is what – yes, sir.⁶⁵

Mr. Hossain inquires about outstanding work orders

On February 18, 2010, Mr. Nainby, on behalf of Mr. Hossain, wrote to Lesley Sprague, City clerk, asking for a certificate indicating outstanding work orders or orders about building infractions for the Mall.⁶⁶

Mr. Ewald agreed that if there were outstanding work orders, it might have impeded the closing of the transaction. He testified, however, that he did not know that the Mall was in the process of being sold when he rescinded the order on February 11, 2010. Mr. Ewald also denied having been told by Mr. Bauthus that he had spoken to Mr. Hossain or someone on his behalf regarding his possible purchase of the Mall.⁶⁷

Conclusion: Mr. Ewald may well have rescinded the order in order to facilitate a sale of the Mall

Mr. Ewald's rescission of the 2009 Property Standards Order in February 2010 is, in retrospect, difficult to justify. He had no reliable basis to conclude that the leaks had stopped. Mr. Ewald's inspection of the Mall was manifestly cursory – he had no recollection of it and took no notes. Moreover, his inspection was in wintertime, when the Mall rarely leaked. It was unreasonable for him to conclude that the leaks had stopped. There is no evidence that anyone told him that the leaks were stopped. Nor had he asked.

Further, it is perplexing that no one else from the City – officials who were doubtlessly aware or ought to have been aware that the Mall's leaks probably had not been fixed – raised a concern about rescinding the order. Mr. Ewald could have waited until spring to see if the leaks had been fixed if that was the reason that he wanted to rescind the order. I accept Mr. Bauthus's evidence that he probably told Mr. Ewald, before the order was rescinded on February 11, 2010, that someone was interested in purchasing the Mall. I would be surprised if he were not aware that the Mall appeared to have deteriorated during Eastwood's ownership.

There was a commonly held view at city hall that the Mall was important to the community. One need not be particularly cynical to at least suspect that the rescission of the order was related to the knowledge that a third party was interested in the purchase of the Mall.

Building inspectors do not see leaks in the Mall in 2010

Chris Clouthier, building inspector, testified that he conducted several inspections at the Mall in 2010. All were about tenants' renovations for plumbing. None were in respect of a complaint under the Property Standards By-law. Mr. Clouthier testified that he did not recall seeing any leaks during these inspections or at any time since his inspection of October 2006 with Mr. Allard that had resulted in the Notice of Violation.⁶⁸

The City fails to address leaks in the Library in 2010

The City's senior management team met on September 29, 2010 and discussed the damage suffered by the Library due to rain. Mr. deBortoli testified that he was aware, at that time, that the leaks in the Library were continuing.⁶⁹ At a subsequent meeting of the senior management team on October 19, 2010, the issue of damage in the Library was again discussed. The meeting minutes indicate that "[t]here are 30 tiles in total that need replacing. The CAO [chief administrative officer] advised that he will be calling also [the Mall manager]."⁷⁰ Mr. deBortoli testified that he did not discuss with Mr. Ewald, either at this meeting or afterward, what could or would be done about leaks in the Library because it was his understanding that Mr. Ewald and Fire Chief Paul Officer were dealing with the issues at the Mall. Mr. deBortoli also acknowledged that, even though he was aware that the City's 2009 Property Standards Order included a requirement that Eastwood fix the rooftop parking deck, he did not ask Mr. Ewald why – a year later – the Mall roof was still leaking.⁷¹

The librarian's monthly reports to the Library board in April, May, June, July, August, September, and November 2010 show that the Library continued to have concerns about, and was having to address, the impact of the leaks in the Library premises.⁷²

Despite this ongoing reporting to the Library board (which included two representatives from City Council), it appears the City continued its failure to take notice of, or at least acknowledge taking notice of, the true state of affairs in the Library. Mayor Richard Hamilton testified that he did not see any of the librarian's reports to the Library board and did not ask any questions about the leaks in 2010. Mayor Hamilton acknowledged his incuriosity:

- Q. Can you tell me why you would not have asked questions, given the concern of the library which had been strong and about not wanting to renew the lease because of the leaks and given the history of concerns with the leaks and the possible structural damage, why didn't you ask any questions about what was happening?
- A. Well I didn't think to ask the questions. And we did have a member on the Library Board; I believe there was two at that time, and they never raised any issues with us.
- Q. Would you agree with me that the dispute with the library about renewing the lease was the very contentious item in 2009?
- A. Yeah, it was contentious, yeah.
- Q. It was one of the more contentious things that you had to deal with in your term as mayor; correct?
- A. I don't know if I would say that.
- Q. Okay, well, we won't ask you about the other ones.
- A. It is just – there was a few of them out there, yeah.
- Q. And it was resolved and the Library was not happy?
- A. Correct.
- Q. And you continued – well, let me back up. The library was not happy and yet you asked no questions about what the situation was thereafter?

- A. No.
- Q. Nor did you ask any questions about what was happening with the order issued in September of 2009 that the leaks be fixed; is that right?
- A. That's correct, yes.⁷³

I cannot understand this apathy.

Fall 2010: Engineer Philip Sarvinis retained to provide advice on the roof

In November 2010, Eastwood contacted Philip Sarvinis, an engineer with the firm of Read Jones Christoffersen (RJC).⁷⁴ Mr. Sarvinis had more than 20 years' experience, with a particular focus on the areas of building science (including waterproofing) and parking planning.⁷⁵ He met with Bob and Levon Nazarian in Toronto on November 5, 2010. Mr. Sarvinis testified that Eastwood's primary concern was to eliminate the parking on the roof and maximize parking elsewhere on the lot. A secondary concern was to waterproof the roof. Levon Nazarian agreed that he and his father told Mr. Sarvinis at this meeting that they wanted to eliminate parking on the roof – because “it just didn't make sense, both structurally, I believe, and as a design component, as well as a convenience to the elderly people.”

On November 8, 2010, Mr. Sarvinis sent a letter to Bob Nazarian confirming that his firm had accepted the assignment to act as engineering consultants on a proposed “revitalization project” for the Mall. The letter stated that the firm's services would include:

- Addressing the roof leakage problem.
- Reviewing options for solar panel installation on the roof.
- Re-structuring of the parking layout to maximize the use of the land and eliminate the excessive slope in the parking fields.
- Review possibility of structured parking to eliminate roof top parking.
- Develop a parking lot for the wooden [*sic*] land in the southwest corner of the site.⁷⁶

The item “[r]eviewing options for solar panel installation on the roof” referred to an Ontario government program that paid solar companies a premium for solar power. This possibility was interesting for Eastwood because the solar company, if placing panels on the Mall roof, would typically pay for the installation of a waterproofing membrane, pay rent for use of the roof space, and maintain the roof throughout the 20-year lease.⁷⁷ The “parking lot for the woode[d] land in the southwest corner of the site” was a reference to the treed area between the fire station and the Mall that Eastwood had proposed purchasing from the City (actually in the northwest corner).⁷⁸

Mr. Sarvinis's preliminary review: The solar solution will not work – either remove all parking on the roof or put on a thin membrane; The price is too high for Eastwood

Mr. Sarvinis's letter of November 8 went on to say that, since it was not possible to determine the exact amount of time required, he proposed to charge on an hourly basis, with a budget of \$15,000 to \$18,000.⁷⁹ Levon Nazarian testified that he had “spearheaded” this project and he was “okay with” Mr. Sarvinis's proposal. He was not sure if he had consulted his father.⁸⁰ Mr. Sarvinis requested copies of prior engineering reports but was not provided with any. He was therefore not aware of the Trow, Halsall, and other engineering reports until his involvement with this Commission. When asked, he agreed that they would have been very useful information to have.⁸¹

Mr. Sarvinis visited the Mall on November 25, 2010, to get a sense of the available land and layout of the property. He went alone, stayed only for a day, and did not meet with Mall management. During this brief visit,

During this brief visit, Mr. Sarvinis noticed the multitude of repairs that had been carried out on the roof over the years, including localized concrete repairs and the use of different types of sealants. He also saw signs of ponding water. Some of the repairs seemed to work, some were poorly done, and others looked older and in need of replacement. His overall impression was that Eastwood was not able keep ahead of the leaks through repairs.

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Mr. Sarvinis worked only from the original drawings and designed load capacity of the roof. Using this information, he was confident, without having inspected its actual condition, that the roof could support the loads associated with the proposals he would make, including the extra weight of the solar panelling.⁸³

In late 2010, Mr. Sarvinis met with three major roofing manufacturers who also had involvement with the solar panel industry. All three showed initial interest in putting solar panels on the Mall roof but, after crunching numbers, soon returned to say they were not prepared to pay to install a new roof-waterproofing system, install solar panels, and pay rent to Eastwood. All three companies were, however, willing to sell Eastwood a

new roofing system and solar panels for it to install itself. This was a huge financial undertaking (\$4 million to \$5 million) that Mr. Nazarian was not interested in taking on.⁸⁴ The solar panel option was off the table, at least at that time. As will be seen, the idea was revived in 2011.

On December 22, 2010, Mr. Sarvinis emailed Bob Nazarian and Levon Nazarian, advising that he did not yet have the necessary information to allow Eastwood to approach the City with a proposal about the proposed parking lot changes. After reporting about the lack of interest from the roofing manufacturers in the solar panel idea, he wrote:

I think we need to discuss how we wish to proceed. I know that your primary objectives were to stop the roof leaks, produce a relatively flat parking area for the food store and give the mall a complete face lift. We need to work through what the most cost effective options are to accomplish this now that the PV system may not materialize. With respect to roof leak, the options are:

1. to put a traditional roofing system and eliminate parking on the roof which will then require us to create additional parking space on the site to meet the parking by-laws
2. to put a traffic bearing waterproofing system on the roof and keep the roof top parking

Either option will cost in the order of \$4 to \$5 [per square foot] for the roofing / waterproofing option but option No. 1 will also have financial implication associated with creating new parking somewhere else on the site.⁸⁵

The roof deck had an approximate area of 120,000 square feet.⁸⁶ The proposed cost of either waterproofing system proposed by Mr. Sarvinis was between \$480,000 and \$600,000. Mr. Sarvinis testified that this was more than the Nazarians had anticipated spending.⁸⁷ Bob Nazarian testified that he thought that the first option was the right one – that “we had to eliminate the trouble with the roof, once forever, not a patch or not a thin layer and this kind of things. It would not work in this country.”⁸⁸

Fall 2010: Bob Nazarian continues to believe that the leaks cannot be fixed and cars have to come off the roof

Mr. Sarvinis testified that the Nazarians told him that there were ongoing leaks and “they just couldn’t catch up with fixing them.”* Bob and Levon Nazarian both admitted before me that that was accurate – as Bob Nazarian testified: “Obviously, obviously.”⁸⁹ Levon Nazarian testified that “we couldn’t have a permanent solution to the leaks.”⁹⁰

As I have indicated above, Bob Nazarian testified that he had concluded by the fall of 2008 that the roof could not be fixed in a way that allowed cars to drive on it. He had not changed his mind on that point two years later. Nevertheless, despite many opportunities, he never followed through with his solution of purchasing the land between city hall and the Mall, removing the parking from the roof, and putting a conventional waterproofing system on the roof.

December 2010: Architect Paul Mitchell is retained to improve the Mall and terminated when his proposal was too costly

Eastwood also hired architect Paul Mitchell, from North Bay, Ontario, at this stage. Levon Nazarian testified that Mr. Mitchell was retained to make the Mall more appealing, to attempt to obtain a grant from the City under a program called the Community Improvement Plan for those improvements, and to consider putting another elevator in the Mall.⁹¹ On December 9, 2010, Levon Nazarian emailed both Mr. Mitchell and Mr. Sarvinis, explaining the intended role of each and asking them to work together “so we may seek the utmost compensation from the City of Elliot Lake.”⁹²

On December 13, 2010, Mr. Mitchell emailed Levon Nazarian, advising him that he had spoken to Mr. Sarvinis to discuss their combined efforts. He suggested that both he and Mr. Sarvinis needed to gather “a detailed understanding of what is there and design of a series of exterior, interior and parking lot improvements.” He then proposed that, because the work in the early phases could not be completely defined, he and his staff work on an hourly fee basis. He estimated the number of hours for him and his staff on a spreadsheet that he enclosed. The total fees estimated by him were \$98,979.⁹³ Both Mr. Mitchell and Bob Nazarian signed the agreement he attached which stated that Eastwood would pay to Mr. Mitchell’s firm his fees and expenses as per the estimate.⁹⁴

On January 12, 2011, Levon Nazarian emailed Mr. Mitchell, writing:

I have reviewed your quote, as you advised, I believe to begin with, it would be wise to take your advise [sic] and to move forward on an hourly basis, mainly because we still do not know as to what is feasible and whatnot. Also, Bob has advised me that he would like you to go ahead and make the formal application to the City of Elliot Lake for the painting of the mall.⁹⁵

Levon Nazarian testified that, although Mr. Mitchell had come up with an elaborate plan to renovate the Mall by adding glass panelling and other features that would have cost more than \$3 million, this was not what he and his father wanted. He testified that they wanted “just a minor facelift of the Mall, basically spruce it up, whether it’s landscaping, painting some exterior features, some interior features.”⁹⁶ It was Levon Nazarian’s evidence that, when he wrote the email, he told Mr. Mitchell he wanted to reduce the scope of the proposed changes and apply to the City of Elliot Lake only for reimbursement for painting the Mall.⁹⁷

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* Sarvinis testimony, June 5, 2013, pp. 12891–2. See also Levon Nazarian testimony, July 16, 2013, pp. 16554–64; Exhibit 733. Eastwood was also initially looking at improving the layout of the ground level parking lot, which had apparently become a trip-and-fall hazard. This potential improvement appears to have quickly fallen by the wayside.

January 2011: Eastwood tells Foodland of changes to come, including the elimination or reduction of rooftop parking when no such decisions had been made

On January 19, 2011, Levon Nazarian emailed Pierre Vaillancourt, the owner of Foodland, writing:

We are still moving forward to revitalize the mall, our three main priorities at the moment are:

1. Painting the Entire Façade of the Mall
2. Flattening the ground level of the parking lot and increase the number of stalls
3. Making 50% (if not all of it) a conventional roof and eliminate the leaks once and for all.
4. Revitalizing the entire exterior façade of the mall (other than painting).
5. Introduce more signage (elegant, illuminating, eye catching).

...

I have just spoken to Paul Mitchell from Mitchell Architects from North Bay. He has been working steadily on the new design concepts he proposes for the mall. I have yet to see them, but he assures me that I will be very impressed. I'm hoping to have their proposal, cost and outline within two weeks. Once I receive them, I will send you a copy.

Philip Sarvinis from RJC Engineering is spearheading the flattening of the land. He is currently in the works to maximize the entire ground level parking to balance off the elimination of the roof top parking. He will also update me more within the next two weeks.⁹⁸

Levon Nazarian testified that, just one week before he sent this email, he had told Mr. Mitchell to stop working on anything other than painting the Mall. He could not explain why, given those instructions, he wrote to Mr. Vaillancourt and told him that Mr. Mitchell was “working steadily on the new design concepts” and that he was hoping to have their proposal, cost, and outline within two weeks. He suggested that perhaps Mr. Mitchell proposed something elaborate in the intervening seven days, but he had no memory of that occurring.⁹⁹ In fact, a subsequent email from Mr. Mitchell indicated that he presented design drawings to Levon Nazarian on February 4, 2011, and Levon Nazarian told him that the proposed design was not affordable.¹⁰⁰ Perhaps Levon Nazarian was mistaken when he testified before me that he had limited Mr. Mitchell’s involvement on January 12. He certainly had not decided by January 19 to revitalize the entire exterior façade of the Mall and introduce elegant, illuminating, and eye-catching signage.

The January 19 email also suggests that a decision had been made to flatten the ground level parking lot, increase the number of parking stalls, and remove at least half the parking from the roof deck. In fact, no such decisions had yet been made, because the Nazarians were still waiting to hear from Mr. Sarvinis about the cost of those projects. As events would show, none of those things were done. Once again, false promises were made to a tenant.

Bob Nazarian testified that he signed Mr. Mitchell’s contract but then decided that what Mr. Mitchell was proposing was too expensive. So “[w]e decide to pay him and eliminate his participation.”¹⁰¹ That payment was not made until after Mr. Mitchell wrote on March 17, 2011, demanding payment in accordance with the contract.¹⁰²

February 2011: Mr. Sarvinis's detailed costing gives Eastwood a number of options including a thin membrane or eliminating rooftop parking – Eastwood does none of them

On February 15, 2011, Mr. Sarvinis wrote to Eastwood with a more detailed proposal and pricing. He first advised Eastwood that, after having reviewed the designed capacity of the roof structure, he had determined that the roof could not support the loading created by an asphaltic waterproofing system. He wrote, however, “if the PV [photo-voltaic, or solar] panel option does not materialize something will need to be done with the roof to stop the leaks as a minimum and then if possible add parking.” He proposed a number of options, some of which could be combined, depending on the number of parking spaces needed:

- (a) installing a “thin-set” traffic deck coating over the entire roof deck, allowing parking over the entire area, at a cost of \$850,000 to \$950,000; the system would not be resilient to snowplough damage, and the ploughs would have to have rubber-tipped blades to minimize the damage; it would require additional maintenance each year to repair the damage;
- (b) installing a thin-set coating over only the area around the Hotel and office building for 66 cars, covering the rest of the roof in a traditional membrane that could not be driven on, at a cost of \$600,000 to \$700,000 plus an additional \$1.5 million to \$1.7 million to create a new parking lot with approximately 174 parking spots on the land proposed to be purchased from the City; and
- (c) modifying the parking lot along Ontario Street east of the Mall, making it flat, at a cost of \$1.4 million to \$1.6 million.¹⁰³

The roof provided approximately 334 parking spaces in total. As I indicated earlier, Eastwood needed to make up at least some portion of that to comply with zoning by-laws. It appears from the evidence that option (b) above would have satisfied those by-law requirements.¹⁰⁴

Bob and Levon Nazarian testified that, by late February, Eastwood had decided that the levelling of the Ontario Avenue parking lot was cost prohibitive.¹⁰⁵ This decision was confirmed in an email on February 22, 2011.¹⁰⁶ Therefore, if Mr. Sarvinis's recommendations were to be followed, Eastwood had two options: either put a thin membrane on the entire roof, or put it on only part of the roof and build a new parking lot on land to be purchased from the City.

Levon Nazarian testified that he and his father rejected the first option because of Mr. Sarvinis's description of its inherent problems. He testified:

[O]ne of the statements that he made to me is: We can do the thin layer parking – a thin layer waterproof membrane system, but I will not guarantee it.

And for us, I mean, as a prudent landlord, you are not going to venture off into a million dollar investment that's not going to be guaranteed. It just doesn't make sense.

... He said in order to minimize the damage, he would suggest a rubberized blade on the snow plow, but even then he advised that it is still problematic, it will still require ongoing maintenance, and it will not be a permanent solution or a perfect fix.

Obviously we already – we had already known this. So we were going forward with a new parking – parking lot structure.¹⁰⁷

This decision was consistent with what Bob Nazarian testified had been his belief since at least 2008 – that the rooftop parking had to be removed. For that to happen with the Mall remaining open, Eastwood would have to buy land from the City and construct a parking lot there. Despite this long-professed conclusion, however, the project did not proceed. Bob Nazarian maintained his usual pattern of balking at the prospect of investing significant amounts of money in the Mall and properly fixing the roof. He was not willing to pay for the necessary renovations using his own assets. The only source of financing being explored at the time was the securing of a BDC loan, which I discuss below.¹⁰⁸

In keeping with Mr. Nazarian's pattern of behaviour with hired professionals, Mr. Sarvinis's relationship with Eastwood soon soured. He did not pay Mr. Sarvinis's account in the amount of \$23,825.34.¹⁰⁹ On March 17, 2011, Read Jones Christoffersen registered a construction lien on the Algo Mall property in that amount.¹¹⁰ Eastwood and Mr. Sarvinis eventually reached an agreement on payment (at a lesser amount than originally requested) and the lien was lifted. However, the professional relationship was temporarily suspended.¹¹¹

I think it important to recall that, after the collapse, NORR found that the Algo Mall roof was in critical condition at this point in time and had been for years. If a proper structural condition assessment had been carried out in 2011 by Mr. Sarvinis or someone else, Eastwood would likely have learned that, for the building to be capable of bearing even its designed loads, let alone additional load, much of the steel throughout the structure needed retrofitting and reinforcement, in addition to the application of a waterproofing membrane. (See chapter 3, Causes of the Collapse.) Mr. Sarvinis was not aware of these deeper structural issues¹¹² and told the Commission that, had he been aware of the past engineering reports and the true history of the leaks at the Mall, he would not have made any of the proposals he did without first doing a complete structural review.¹¹³

December 2010–March 2011: Eastwood moves slowly on buying the City land for a new parking lot

A new City Council was sworn in on December 3, 2010. On December 7, 2010, while Mr. Sarvinis was preparing his preliminary report, Mr. Fabris wrote to Daniel Gagnon, the chief administrative officer, offering to purchase the land for the new parking lot for \$10,000.¹¹⁴ Although the letter stated: "We had offered the prior CAO as well as counsel, \$10,000 for the attached land; this offer still stands," the previous offer, made more than a year earlier on November 18, 2009, was to pay \$15,000.¹¹⁵

On the same day, there was a meeting at city hall between Mr. Mitchell, Alex Sennett (who worked for the Nazarians on various projects), Levon Nazarian, Mr. Gagnon, and Mr. deBortoli (who had become the City's chief operating officer in October 2010, directly supervising Mr. Ewald, the chief building officer, and would become the chief administrative officer in March 2011). Notes made by Mr. deBortoli during the meeting indicate that Levon Nazarian wanted to "break down barriers and restore a better relationship between the Mall and the community." Levon Nazarian said that Eastwood was planning to revitalize the Mall both inside and out, with plans to level off the entire front façade and put solar panels on 50,000 square feet of the roof, with the remainder of the roof being used for parking. They also discussed the Community Improvement Program from which Eastwood hoped to get a grant to improve the Mall. Mr. deBortoli did not recall the subject of the roof parking being brought up during the meeting.¹¹⁶

I saw no evidence of a response to the offer to purchase the land for \$10,000 over the next three months until, on March 8, 2011, Mayor Hamilton ran into Bob Nazarian when walking through the Mall. Mr. Nazarian told the mayor that he was still interested in acquiring land from the City for parking. Mayor Hamilton told Mr. Nazarian to have his lawyer call Mr. deBortoli, and sent Mr. deBortoli, Ms. Sprague, and Mr. Ewald an email letting them know he had done so. At the time, Mayor Hamilton understood that the potential land purchase related to Eastwood's attempts to deal with the leaks at the Mall.¹¹⁷

Mr. deBortoli knew about the leaks at the Mall. In his earlier position as director of operations, he was part of the City's senior management team when it was dealing with the problems at the Library and the possibility of renewing the lease in 2008.¹¹⁸ He had regularly attended City Council meetings while he held that position.¹¹⁹ In addition, over the previous five months, he had met regularly with Mr. Ewald to learn more about the Building Department.¹²⁰ During those meetings, he was advised of the ongoing problem with leaks at the Algo Mall. He was aware of the 2006 Notice of Violation issued to Eastwood, but not the fact that no one had followed up on it. He also learned of the 2009 Order to Remedy, but again not the fact that it had been rescinded. In addition, he was aware of the 2009 M.R. Wright engineering report, but he did not see it himself.¹²¹

On March 14, 2011, Mr. Fabris wrote to Mr. deBortoli asking about the status of the offer made on December 7, 2010, saying that his client was anxious to purchase.¹²² Mr. deBortoli made a note on the document asking City staff to inquire about the offer, whether there were previous offers, and for how much. He raised the question of whether the matter should be brought to council's attention.¹²³ At the time, he was unaware that Eastwood had made a previous offer for the land that had been rejected by the City because the price offered was too low.¹²⁴

Mr. deBortoli wrote to Mr. Fabris on March 24, 2011, after having reviewed the file related to the sale of the City land, including the earlier indication to Mr. Fabris that the City had obtained an appraisal of the land's value as being \$55,000. Again, the City informed Eastwood that the purchase price needed to reflect the fair market value of the property to comply with the *Municipal Act*:*

Accordingly, should your client be willing to submit an offer to purchase which more accurately reflects fair market value, I would then be in a position to present that offer to Council for consideration.¹²⁵

By the time that letter was sent, the relationship between Eastwood and Mr. Sarvinis, who would have to be involved if the new parking lot was going to be constructed, had come to an end. Mr. Nazarian had not paid his bill, and Mr. Sarvinis had filed a construction lien a week earlier. If Eastwood wanted to proceed with the plan to fix the leaks by moving the cars off the roof and applying a new conventional roof, it was in no hurry to do so.

.....

* The *Municipal Act, 2001*, SO 2001, c 25, s 106(1), provides that "a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose." Sub-section 106(2) provides, among other things, that a municipality shall not grant assistance by leasing or selling property at below fair market value.

October 2010–April 2011: Eastwood tries to refinance the Mall but encounters strict conditions, including a potential structural engineering report

As I have discussed earlier, Eastwood was hoping to refinance, discharge its current mortgage being administered by the Royal Bank of Canada, and borrow from a new lender. Both Levon and Bob Nazarian testified that the intent of this new financing was to acquire funds to properly fix the roof.¹²⁶

New financing was sought from the Business Development Bank of Canada (BDC) in the fall of 2010. On October 22, 2010, Ara Movsessian, a senior account manager at the BDC, emailed Levon Nazarian with a list of information he needed, including an appraisal, financial information, a quote for the renovation work proposed, the amount requested and the exact use to which it would be put, and proof of an agreement with the Royal Bank to discharge the prior mortgage.¹²⁷ Bob Nazarian testified that this marked the start of his attempt to get a loan from the BDC.¹²⁸ One week later, on October 29, Eastwood's accountant, Mr. Hurmizi, sent an email to Levon Nazarian, writing: "Here is the f.s. [financial statement] ... Please review it before you release. Because it is going to a bank I can't play too much."¹²⁹

On March 21, 2011, the BDC, after reviewing preliminary material provided in support of financing, sent a discussion paper to Eastwood in which it contemplated a \$5 million loan, with \$3.35 million to pay off the existing mortgage and the other \$1.65 million to pay for "Parking Lot Paving & Building Exterior Improvements." However, before actually granting the loan, the Business Development Bank needed an appraisal to confirm the value of the property was \$8 million or more, an environmental site assessment, and Eastwood's financial statements for 2010. The document also said that a "structural report may be required (to be determined in the course of due diligence)."¹³⁰

The BDC sent another letter on April 25, 2011, reducing to \$3.3 million the amount it was willing to consider lending. Bob Nazarian testified that this significant decrease was a result of the lender learning about the Bank of Nova Scotia leaving the Mall.¹³¹ (I am not convinced that this was the reason. Although the bank had been considering leaving because of the leaks since 2009, at least internally,¹³² it did not decide to leave until later in 2011 and, as I describe below, was still attempting to facilitate a resolution of the leaks in June 2011.) The new arrangement under consideration contemplated \$3.713 million being available to Eastwood (\$3.3 million from the new mortgage loan, \$300,000 by the release by the Royal Bank (once that mortgage was paid off) of approximately that amount held in a reserve fund, and \$113,000 of investment by Bob Nazarian himself). Of this money, \$3.313 million would then have to be used to pay off the mortgage administered by the Royal Bank, \$345,000 to "flatten / service / prepare" the new parking lot, and \$55,000 to purchase the adjacent land from the City.¹³³ The loan arrangement therefore contemplated Eastwood paying the City \$55,000, exactly what it had asked for and Eastwood never offered. The conditions remained the same as in the letter of March 21, although the appraisal required was reduced to \$5.077 million, 65 percent of the reduced loan amount.¹³⁴

I note that \$345,000, the amount contemplated by the loan discussion document to be used to "flatten / service / prepare" the new parking lot, was nowhere near the amount of \$1.5 million to \$1.7 million estimated by Mr. Sarvinis in February as the cost of creating the new parking lot, let alone the additional amount of \$600,000 to \$700,000 he had estimated would be required to put a membrane on the roof.

Spring 2011: Eastwood continues to try to sell the Mall, without success

Offers made in early 2011, but none concluded

On February 3, 2011, Eastwood entered into an agreement to sell the Mall for \$7.6 million to Wilsondale Assets Management Inc.¹³⁵ It was to close on March 31, 2011, and contained a clause allowing the purchaser to terminate the agreement if it was not satisfied with information obtained during a due diligence period of 45 days. As part of that due diligence, the purchaser obtained an appraisal of the property that valued it at \$6.4 million.¹³⁶ The appraisal noted that the parking deck was subject to leaks and stated that the Mall manager had indicated that Eastwood was proposing to eliminate the upper deck parking. The appraisal was based on an assumption the leaks would be fixed without relocation of the upper deck parking.¹³⁷ Levon Nazarian testified that the deal did not close because, after the due diligence investigation, the purchaser wanted to lower the price. It was his evidence that a number of other agreements were entered into, at prices between \$5 million and \$5.9 million, but none of them closed because the purchaser wanted to reduce the price further.¹³⁸

On March 7, 2011, Eastwood received an offer of \$9 million from Morley Beallor, in trust.¹³⁹ It does not appear to have been accepted, perhaps because the Wilsondale Assets Management agreement was alive at the time. Levon Nazarian could not recall the details of this offer.¹⁴⁰

On March 15, 2011, Bremont Acquisitions Corporation offered \$8.9 million.¹⁴¹ It was not accepted. Levon Nazarian could not recall the details in respect of this offer.¹⁴²

On February 3, 2011, Eastwood entered into an agreement to sell the Mall for \$7.6 million to Wilsondale Assets Management Inc. It was to close on March 31, 2011, and contained a clause allowing the purchaser to terminate the agreement if it was not satisfied with information obtained during a due diligence period of 45 days.

May 2011: Potential purchase by McCowan and Associates falls through

What appeared to be a serious potential offer came from McCowan and Associates, a real estate development company in Barrie. Ron McCowan, the founder and sole owner of McCowan and Associates, has been in the real estate business for many years. He specializes in purchasing commercial real estate assets in secondary markets, typically outside the Greater Toronto Area. He estimated that his business's real estate portfolio had a value in excess of \$600 million. His business model was to buy properties that needed fixing up and repositioning in the marketplace, and do the necessary work to increase their value.¹⁴³

Mr. McCowan first looked at the Algo Centre in 2009. Based on the net income indicated in the sales materials, the property had a value of around \$12 million or \$13 million, but was being offered for \$10 million. He considered it a good deal.¹⁴⁴ He testified that he signed an offer to purchase for that price¹⁴⁵ and arranged to meet the Nazarians to finalize the deal, on the understanding that Eastwood had agreed to the price. He testified that at that meeting Bob Nazarian surprised him by increasing the price to \$10.5 million. He left the meeting immediately because he objected to this way of doing business.¹⁴⁶

Bob Nazarian's evidence was different. He testified that he never thought that Mr. McCowan's \$10 million offer was *bona fide*. It was not accompanied by a deposit, and it proposed to pay the \$10 million purchase price by having Mr. McCowan's company assume the existing first mortgage (which then amounted to \$3,714,870), and transferring to Eastwood Mr. McCowan's company's interest in a mortgage on another property which had a face value of \$6.5 million. In addition, on closing, Eastwood was to pay to Mr. McCowan's company \$214,870 in cash.¹⁴⁷ It was effectively a swap of Eastwood's equity in the Mall for Mr. McCowan's company's rights in the mortgage on the other property, with a cash payment from the seller to the purchaser to equalize the two interests.¹⁴⁸

Bob Nazarian testified that he never agreed to this proposal, and, although he recalled the meeting, his evidence was that he asked only that Mr. McCowan provide a deposit, at which point Mr. McCowan walked out.¹⁴⁹ Levon Nazarian's evidence was to the same effect as his father's, although he gave more details – that Bob Nazarian had asked for a deposit of \$500,000, to be kept by Eastwood on closing, because he believed that the land securing Mr. McCowan's company's mortgage was not worth \$6.5 million. The effect of that, if accepted, would have been to have money being paid to Eastwood by the purchaser – something that may well have been understood by Mr. McCowan as an increase in price.¹⁵⁰ Neither Bob nor Levon Nazarian explained why he thought the mortgage was not worth \$6.5 million.

Mr. McCowan did not look again at purchasing the Algo Centre until May 2011. He testified that he worked initially through an intermediary named Tom Kovacevic, a real estate developer. Mr. Kovacevic had come to him, suggesting that he could negotiate with the Nazarians and get a deal done on Mr. McCowan's behalf. Mr. McCowan was not interested in working directly with the Nazarians because of the way he had been treated in 2009. It was his evidence that Mr. Kovacevic was to make \$100,000 by purchasing the property and immediately flipping it to Mr. McCowan's company.¹⁵¹

Mr. McCowan testified that he visited the Mall on three occasions, although he could not recall exactly when. He observed water stains indicating the roof leaked, along with missing ceiling tiles. He went onto the parking deck and observed that work was being done there. He also saw buckets in Zellers and noticed vacancies. These observations did not bother him, however, because most of the properties he purchased were in need of repair and more tenants.¹⁵²

On May 9, 2011, Mr. McCowan entered into an agreement to purchase the land from Mr. Kovacevic in trust for \$6.1 million.¹⁵³ In order for Mr. Kovacevic to be able to sell it to Mr. McCowan, he would have had to buy it from Eastwood. Mr. McCowan was not sure why this agreement did not come to fruition.¹⁵⁴

Levon Nazarian testified that on May 6, 2011, an agreement of purchase and sale of the Mall, at a price of \$5.5 million was entered into between Eastwood as vendor and Tom Kovacevic in trust as purchaser. Both Bob Nazarian and Mr. Kovacevic signed it. It was to close on June 30, 2011. Levon Nazarian testified that Eastwood entered into this agreement because it wanted to sell the Mall and Mr. Kovacevic seemed very serious.¹⁵⁵

The agreement was subject to a condition whereby the buyer had 15 days – until May 21, 2011 – to conduct due diligence inquiries. If he was not satisfied, the agreement became null and void.¹⁵⁶ On May 20, 2011, both parties agreed to an amendment extending the time for due diligence inquiries to May 31, 2011, and the closing date to June 30, 2011.¹⁵⁷ Levon Nazarian testified that it did not close because Mr. Kovacevic "backed off."¹⁵⁸ Since Mr. Kovacevic did not buy the Mall, he could not sell it to Mr. McCowan.

May 2011: The City and Mr. Nazarian receive warning of possible structural damage from the leaks

The City's Economic Development Advisory Committee was not a committee of City Council. It was composed of residents of Elliot Lake. It was established by the City to work in collaboration with council and staff to enhance economic development within the community.¹⁵⁹ Bob Nazarian and Mr. deBortoli attended a meeting of the committee on May 11, 2011.¹⁶⁰

Bob Nazarian spoke directly to Mr. deBortoli outside the meeting about the need to get the parking off the Mall roof. Bob Nazarian testified that he told him "enough is enough" and that they had to take "drastic action" to eliminate parking on the roof of the Mall.¹⁶¹ Mr. deBortoli could only recall that Mr. Nazarian wanted him to help him purchase the City land for less than the \$55,000 being asked by the City, and that he (Mr. deBortoli) told him of the provisions of the *Municipal Act* which had to be complied with.¹⁶²

The committee's minutes state:

Mr. Nazarian spoke to the committee regarding the current state of the mall. It is not at its best. He is looking for ideas / suggestions to turn the 80 room hotel into an income property. The mall is suffering because of a loss of tenants. He is looking for help and is open to suggestions. He discussed his plans for a new parking lot and possibly purchasing land from the City to facilitate this.

The Chair advised Mr. Nazarian that we are an advisory committee. She then provided him with one of the proposals that was put forward by a member respecting the Algo Mall.¹⁶³

The proposal that was provided to Mr. Nazarian may well have been a report prepared by Keith Moyer, a local citizen, member of the committee, and chair of Seniors' Action Group of Elliot Lake, a Participant at this Inquiry. Mr. Nazarian acknowledged having received a copy of this report, although he thought that he got it a few days after the meeting.¹⁶⁴ Mr. Moyer's report warned of the danger of corrosion caused by the leaks. He wrote:

One major problem that continually repeats itself in the mall is the penetration of water into the areas directly below the roof parking area. Concrete, by nature, is a porous material, into which, water will penetrate. Given the decades of water, mixed with road salt and other contaminants penetrating into the slab, one may have serious concerns as to the continued viability of the reinforcing steel within this slab, thus, possibly, compromising the structural integrity of the structure. Not being an engineer, I have no way of verifying the soundness of the structure, and quite possibly, the owner has undertaken a study by professional engineers already. Having had some experience in similar problems with concrete surfaced parking areas over usable interior spaces, any remediation of a lasting nature will definitely be costly and involved, requiring the exposure of reinforcing steel and repair thereof, usually from the top side and the interior; replacement of concrete chipped away to expose the steel; and, installation of a rubberized membrane, covered by a layer of asphalt paving, to effect a permanent fix. The sealing of expansion joints and cracks has, in my experience, never been a lasting solution. Having said that, I stress, I am not a professional engineer, and any lasting solution should come from such a qualified company or individual.

I can say, with some confidence, that such an undertaking could be cost prohibitive for the owner, and, may not be fully recoverable for many years to come.¹⁶⁵

Bob Nazarian told the Commission that he did not agree with Mr. Moyer's assessment. He did not have any doubts about the structural integrity of the building because, at this point in time, he had the 2009 M.R. Wright engineering report which said the building was sound "and we should be resting comfortable."¹⁶⁶ Bob Nazarian testified that he dismissed Mr. Moyer's concerns as being an "idea from a citizen."¹⁶⁷

May and June 2011: Mr. Sarvinis is rehired and solar panels create new potential revenue stream

Scotiabank threatens to leave, prompting Eastwood to revive Mr. Sarvinis's plans

The relationship with Mr. Sarvinis was revived again in May and June 2011. Eastwood contacted Mr. Sarvinis following discussions with Scotiabank. Levon Nazarian testified that he had learned that the bank had purchased land elsewhere in Elliot Lake to construct a new branch and move out of the Mall. At a meeting Scotiabank executives told him that the bank was willing to stay in the Mall provided a new lease allowed it to leave if the leaks continued. Levon Nazarian told them that Eastwood was prepared to get new financing on the Mall and was "going ahead to build a new parking structure and to eliminate the rooftop parking." He showed them the drawings Mr. Sarvinis had prepared. Levon Nazarian and Bob Nazarian both testified, and Mr. Sarvinis confirmed, that Scotiabank was willing to consider staying in the Mall if RJC was involved in fixing the leaks because the bank trusted that firm.¹⁶⁸ Mr. Sarvinis was willing to consider returning to assist Eastwood, despite the history, out of a sense of obligation to Scotiabank, an important RJC client.¹⁶⁹

Mr. Sarvinis met with Bob Nazarian and Levon Nazarian on June 3, 2011. They told him that they needed a letter from him to show Scotiabank stating that they were going to waterproof the roof. He agreed and on June 8 gave them a letter which stated:

[I]t is our understanding that the Ownership of the Algo Centre Shopping Mall has decided to eliminate the majority of the rooftop parking at the site and waterproof the roof structure to eliminate the existing leakage problem and protect the building for the very long term.

In areas where the parking is to remain; namely two rows around the tower above the mall, the waterproofing system will be a very heavy duty thin set urethane traffic deck coating, which will protect the building against future moisture and chloride ingress in these areas. It is our understanding that snow removal in this area will be by means of hand to minimize damage to the waterproofing, and localized repairs will be undertaken on an as needed basis to ensure the integrity of the system is maintained over its full 15 to 18 year service life.

In areas where the parking is going to be eliminated from the roof of the mall (i.e. south and east legs of the roof), the roof structure will be waterproofed with a traditional roofing system (i.e. EPDM or TPO Fully Adhered System) to stop the current leaks and protect the building from future leaks. The effective service life of a roofing system of this type is typically 25 to 30 years, provided routine maintenance of the system is continually performed.

Unlike past repair programs performed on the roof structure, the proposed retrofit work noted above will involve coating the roof with an impervious membrane system, and not simply sealing the leaking cracks. With our involvement during the design and construction review phases of the project, Read Jones Christoffersen is confident the above action plan will protect the roof of the building for the long term and eliminate the leaks through the existing roof structure.¹⁷⁰

This letter was then sent the same day, June 8, by Levon Nazarian to the Bank of Nova Scotia, attached to an email that stated: "As per our discussion, I have attached the certification from RJC regarding the roof retrofit for the mall, as well as the Amending Lease Proposal."¹⁷¹ As Bob Nazarian admitted, the letter was sent to the bank so that it would be convinced that he was going to waterproof the roof and RJC was going to be involved.¹⁷²

The RJC letter followed by a few weeks a letter which Mr. Fabris had sent to Scotiabank on May 20, 2011, in which he wrote:

I can advise you that Mr. Nazarian is in the process of remortgaging procedures and upon receipt of funding; there are substantial renovations to take place at the mall.

All this work, including repairs to the roof and lighting, will be commenced once funding is received and the ground thaws sufficiently.¹⁷³

It was misleading of Levon Nazarian to send the “certification” from Mr. Sarvinis to the bank. Eastwood had not “decided” to do all the things set out in the letter. As Bob Nazarian admitted in his testimony before me, he had no contracts in place to do the work. He did not even have quotes from interested contractors. If the rooftop parking was eliminated, it would have to be replaced with new parking on the City land. Eastwood had not yet reached an agreement to buy that land – it had not even responded to Mr. deBortoli’s last letter of March 24, 2011. Eastwood was not prepared to do any of these things without financing, which it did not have.¹⁷⁴ Furthermore, as I explain below, Eastwood had not yet agreed on payment for the work with RJC, and so could not be sure that the firm would be involved in the repair work.

It was similarly misleading for Mr. Fabris to send the letter of May 20 to the bank. It left the impression that financing was imminent and that the work was ready to proceed. Mr. Fabris admitted that he did not believe, at the time he sent the letter, that these plans would proceed unless there was “some major refinancing.”¹⁷⁵ As I have indicated above, the last loan proposal from the BDC would have advanced only enough funds to pay off the existing mortgage loan being administered by the Royal Bank – with all other funds to do any work having to come from other sources, including cash from Bob Nazarian.

Once again, Eastwood was willing to make misleading statements about its plans to fix the leaks to placate tenants and preserve its own financial interests.

New opportunities for revenue from solar panels on the roof

Mr. Sarvinis told Eastwood about a California company called Solar Energy Hub looking to come to Ontario to take advantage of the Ontario government program that purchased solar power at a premium price.¹⁷⁶ He again suggested installing the thin traffic-bearing waterproofing membrane around the Hotel, coupled with the renewed possibility of solar panels on the rest of the roof and the creation of the 174-stall parking on the City land.¹⁷⁷ On June 8, 2011, Mr. Sarvinis wrote a formal letter to Bob Nazarian outlining the services he proposed to provide and his anticipated fees, which amounted to a total of \$125,500 plus anticipated disbursements of \$35,000. He described the project, for which RJC would provide most engineering services and act as the prime consultant, as follows:

1. Installation of a new roofing system complete with solar panels on the south and east legs of the roof decks.
2. Repairing and waterproofing the structure with a thin set traffic bearing waterproofing membrane in the area around the commercial building and hotel, which is to remain as a parking area.
3. Construction of a new 174 car parking lot to the northwest of the Shopping Centre, complete with lighting and drainage system.
4. Provision of structural and building envelope engineering services for the re-construction of two main entrance-ways to the mall and the enclosure of the ground floor sidewalk on the east side of the building once the sidewalk slope is revised. It is our understanding that Yorkdale Group will retain the architect and other engineering consultants for this portion of the project to provide design input.¹⁷⁸

Although Bob Nazarian agreed to the services proposed, he did not agree on the price. He signed the proposal after crossing out the portion dealing with fees.¹⁷⁹ On June 13, Mr. Sarvinis presented a revised proposal, eliminating the portion of the project dealing with the reconstruction of the Mall entrance and reducing the proposed fees to \$102,000 and disbursements of \$24,000.¹⁸⁰ After further discussion, a third proposal was sent on June 20, 2011, which broke the proposed work into two parts – one for waterproofing the roof and the other for constructing the new parking lot. Bob Nazarian had decided to delay the work on the parking lot and tell Mr. Sarvinis he was going to proceed only with the roof work – including the installation of the revenue-producing solar panels – at that time. As Mr. Sarvinis wrote in that letter,

[i]t is our understanding that the acquisition of the neighbouring property to construct the new on-grade parking lot ... may take some time, and therefore may not be able to be completed simultaneously with the other two projects ... It is further our understanding that this retrofit project will have to be completed in two phases, with Phase One being work on the roof of the building ... and Phase Two being construction of new parking lot.¹⁸¹

On June 17, 2011, Bob Nazarian and Solar Energy Hub's representative, Jim Randolph, signed a letter of intent in which they agreed to "enter into good faith negotiations" to achieve an agreement that would provide that Solar Energy Hub would take a 20-year lease of approximately 75,000 square feet of the roof deck and pay rent of 45 cents per square foot. In addition, the American company would install a new roof cover with a 30-year dry roof warranty on the portion of the roof deck used by its solar equipment.¹⁸² As Bob Nazarian testified, this was a great opportunity for Eastwood – the roof would be fixed at no cost and would become a revenue source.¹⁸³

This project could not proceed unless Eastwood purchased the adjacent land from the City and built a parking lot on it. As I will explain below, by the fall of 2011, it became apparent that it would not proceed.

Foodland is misled about Eastwood's plans to fix the leaks and build the new parking lot

On July 8, 2001, Mr. Vaillancourt emailed Levon Nazarian, writing:

Regarding the roof-top parking ... I trust that you won't be closing that off until such time as the back parking lot is ready for consumers??? Also, have you completed the deal with the City regarding the purchase.¹⁸⁴

Levon responded the same day:

We are in the process of buying the land from the City, however, from what I've been told, we have been going through processes and obstacles that have not been very unproductive or inefficient [*sic*] in terms of timing from the City's end ... I hope we can finalize soon, because we do not want to start construction in the winter.

In regards to the construction process, from my understanding, everything will be done at once, however, we will not jeopardize the mall parking. Will we [*sic*] start blocking and constructing in places where cars will still have access to parking on the roof ...¹⁸⁵

Levon Nazarian testified that this email was accurate in its suggestion that the failure to purchase the land was the City's fault.¹⁸⁶ I do not accept that. The City had been straightforward with Eastwood since the subject came up. It agreed to sell the land for a price that could be defended on a fair market value basis, in accordance with its policies and the requirements of the *Municipal Act*. Eastwood had let the matter drag on for three years, fussing over a relatively insignificant amount in a project that would cost more than \$1 million to complete.

When asked whether his statement in the email that “everything will be done at once” was accurate, Levon Nazarian initially testified that it was, because “our intent was to do it all at once.” He admitted on further examination, however, that, by the time this email was sent, Eastwood had agreed with Mr. Sarvinis that the work would proceed in two parts, with only the rooftop work – which would be done at very little cost to Eastwood – proceeding first. He testified: “I don’t think that was willingly done false, sir, but it could have been a mistake on my part.”¹⁸⁷ This email was misleading; it was evidently intended to mollify Mr. Vaillancourt into believing that his concerns were being met.

Summer 2011: Eastwood continues to try to convince the City to sell the land for parking at less than market value; City warned again of structural damage and does nothing

Mall manager states that rooftop parking has to end

In May 2011, Eastwood hired Rhonda Bear as the new Mall manager. She remained in that position until the collapse. She had no prior experience managing a mall; her background was in communications and design, with some additional course work in business marketing and management.¹⁸⁸ She was given the task of attempting to reach an agreement with the City to purchase the land.¹⁸⁹

On June 29, 2011, Ms. Bear wrote to City Council and the By-law and Planning Committee about Eastwood’s proposal to expand the Algo Mall’s parking facilities. She offered to have Eastwood pay \$20,000 for the land and, in addition, provide the City with exclusive use of four parking slots that she valued at \$5,000 each. She wrote:

In order to fix the roof we need to end the parking / driving on its upper level, which requires us to seek alternative land for the purpose of expanding our parking.¹⁹⁰

This letter was received by Mayor Hamilton, the entire City Council, Mr. deBortoli, Ms. Sprague, and the By-law and Planning Committee.¹⁹¹

Mayor Hamilton testified he was not surprised to read that parking on the roof needed to be eliminated in order to fix the roof. He said he was concerned about the leaks at the Mall at this point in time, but admitted the City did not do anything itself to address the problem.¹⁹² Ms. Sprague’s reaction to the letter was that the \$20,000 offer was still well below market value. She was not sure what happened to the letter. No evidence was presented to indicate that it was sent to the By-law and Planning Committee, as was done with other such letters.¹⁹³

Mr. deBortoli was asked why he did not direct the letter to Mr. Ewald’s attention to determine if there was a problem that needed some action, since Ms. Bear was advising the City and council that the problem with the leaks was so bad that they had to get the cars off the roof, and

- he knew the leaks had been a problem for years and years;
- he knew the leaks had caused significant problems for the Library;
- he knew that the chief building official had issued at least one, if not two, orders to fix the leaks;
- Ms. Bear was acknowledging that the leaks were still not fixed;
- Eastwood had been talking about buying the land for three years and council had approved its sale at market value in 2009 yet was still attempting to bargain about the price; and
- Bob Nazarian had a history of making promises and not fulfilling them.¹⁹⁴

Mr. deBortoli's only answer was:

We were looking at ways and means to assist the Mall. They had come to us again with another request to entertain their offer to purchase on the property, and I simply directed this towards the mechanism I felt would best meet their needs.¹⁹⁵

On July 15, 2011, Ms. Bear wrote to Mr. Hamilton, Ms. Sprague, and Mr. deBortoli, again attaching Mr. Sarvinis's drawings, renewing the offer to purchase at \$20,000 plus the free parking spaces for the City. Ms. Bear wrote: "Being that we are well into July, and will need time to complete plans and construct before the cold hits, we ask for the City to consider an earlier meeting than August?"¹⁹⁶ The implication was that if the City would just sell the land, construction could begin very quickly. That was not so. The financing had not been arranged. The deal with Solar Hub had not been finalized. Contracts had not been entered into. Even after purchase, a site plan agreement would have to be reached with the City. No preparations for that had been made.¹⁹⁷

Mayor Hamilton, council, and the chief building official are told once again that the leaks have caused serious structural problems; again nothing is done

On July 22, 2011, Ms. Sprague provided a copy of Eastwood's proposal to numerous individuals within the City administration, including Chief Officer and Mr. Ewald.¹⁹⁸ That same day, Ms. Bear wrote to both the By-law and Planning Committee and City Council about the plan to build the new parking lot, again saying: "In order to fix the roof, we need to end the parking / driving on its upper level."¹⁹⁹

On July 26, 2011, Ms. Sprague, in a report approved by Mr. deBortoli, recommended to the mayor and members of council that they accept Mr. Nazarian's offer to purchase the City land at \$20,000, based on what she understood to be the authority the council had pursuant to the *Municipal Act* to accept a lower price where doing so would be in the interests of the municipality.* The rationale cited was the improved access for senior citizens that the new parking would create and the environmentally responsible nature of the planned installation of solar panels.²⁰⁰

Ms. Sprague stated in this document that the sale of the land was also required in order to create an alternative parking area because "[t]he Mall building is currently facing serious structural problems associated with leakage from the rooftop parking area."²⁰¹ She explained that the reference to "serious structural problems" in this report to the mayor and council was actually just a cut and paste of the same language she had used back in her November 30, 2009, report on this same issue.²⁰²

Mr. Ewald was pressed on why he did not conduct an inspection of the Mall in July 2011 or take other action given that it was clear the leaks at the Mall persisted. Despite being aware of the long history of leaks, the 2006 Notice of Violation that had been ignored, and the 2009 Order to Remedy that had required the leaks to be fixed, Mr. Ewald told the Commission he felt he could not act because he had not received an actual complaint:

Q. Well, by July of 2011, had you concluded that the leaks weren't fixed anymore?

A. They'd started leaking again, yes.

• • • • •

* Subsection 106(2) of the *Municipal Act, 2001*, SO 2001, c 25, provides: "[A] municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose." Subsection 106(2) provides, "the municipality shall not grant assistance by, ... (c) ... selling any property of the municipality at below fair market value." Subsection 107(1) provides "... subject to section 106, a municipality may make grants, on such terms as the council considers appropriate, to any person ... for any purpose that the council considers to be in the interests of the municipality" [emphasis added]. Subsection 107(2) provides "the power to make a grant includes the power ... (b) to sell or lease land for nominal consideration." On its face, section 107 does not appear to allow a sale at below fair market value, because the power to do so is expressly indicated to be "subject to section 106" which expressly prohibits such a sale. Although these two sections appear contradictory, it is not necessary for me to decide whether Ms. Sprague's view to the contrary is correct.

Q. Then why – if you'd come to that conclusion, why did you not conduct an inspection and consider whether to issue an order?

A. Again, the enforcement of the Property Standards By-law is ... by complaint only, and nobody was complaining.

Q. And that was enough for you?

A. Well, you've got to realize I had a lot of other work. I wasn't sitting around waiting for something to happen at the Mall so that I could do something over there.

I – I had plenty of work to do.²⁰³

Mr. Ewald saw Ms. Sprague's report and noticed the particular reference to structural problems related to the leaks. He testified that he did not give it much thought, although, in hindsight, it was obviously a correct statement.²⁰⁴ Although he knew the roof was leaking again, he insisted that he did not know that the roof had serious structural problems, especially given that he'd received an engineering report 18 months before that said the opposite:

Well, in 2011, obviously, I knew that the mall roof was leaking again, at least, periodically. I also knew that they were, again, putting caulking on ... the roof.

Again, this ... business of facing serious structural problems – and obviously, in hindsight, it most definitely was, but I had an engineer's report from less than a year prior ... that said it wasn't.²⁰⁵

City Planning Committee, council, and senior staff are asked by Eastwood to support land sale because it was imperative to eliminate parking on the roof; nothing is done

On August 2, 2011, Ms. Bear presented Eastwood's case for the purchase of the City land to the By-law and Planning Committee. Present were Mayor Hamilton, four councillors, Mr. Ewald, Ms. Sprague, and Mr. deBortoli.²⁰⁶ In a slide presentation, Ms. Bear described Eastwood's plan to put solar panels on the roof, eliminate most of the parking there, and build the new lot on the City land. The slides included the following information:²⁰⁷

- The statement that “[a]fter 30 years, time has taken a toll on the mall's roof. The Problem: Driving on the roof. No material available can handle the weight of vehicles AND continuously seal and protect the roof from the weather.” (This slide includes a photograph taken by Ms. Bear in July 2011 (see figure 1.11.2).
- The leaking roof is forcing out tenants. (Ms. Bear in testimony referred to this as “stating the obvious.”²⁰⁸)



Figure 1.11.2 Photograph taken by Rhonda Bear in July 2011 showing missing drywall in the ceiling only 20 feet from the eventual collapse

Source Exhibit 155

- It is “imperative to make the decision to eliminate the driving and parking on the roof!”
- “It will be difficult to lease to new tenants when buckets and hoses are located in the entrance ways of our stores and there are holes in our ceiling due to leaks.” This slide includes a picture of a store entrance, with hoses coming down from the roof funnelling water into a bucket; and
- “The entire roof will be waterproofed – a conventional roofing system will be installed and a thin-set traffic bearing waterproofing will be installed on the roof within the area designated for parking. Solar panels are being discussed, but will not be contemplated until a later date.”

According to Mayor Hamilton, no one at this meeting raised the issue of potential structural problems created by the leaks. No one discussed a potential referral of the leakage problem to the chief building official for investigation.²⁰⁹

Following this meeting, the By-law and Planning Committee directed City staff to request additional information about timelines for the project, guarantees of construction, and reasons to justify the request for a lowered price. The committee also wanted to be certain that the new parking lot was completed before the old one was closed. Generally, the committee was not in favour of selling the land at the lower price without more information, but nevertheless recommended that the matter be forwarded to the next council meeting for discussion.²¹⁰ According to Mr. deBortoli, one of the points of hesitation for the committee was Bob Nazarian’s past history of making promises and not following through.²¹¹

On August 3, 2011, Mr. Ewald, in his capacity as secretary of the By-law and Planning Committee, wrote to the mayor and council advising them of the committee’s recommendation that the Eastwood proposal be forwarded to council for discussion. Attached to the letter were Ms. Sprague’s report and Ms. Bear’s July 22, 2011, letter.²¹² Mr. deBortoli could recall no discussion by councillors of Ms. Sprague’s warning in her report that the Mall was facing serious structural damage because of the rooftop leaking.²¹³

On August 5, 2011, the former mayor, Mr. Farkouh, wrote to Mayor Hamilton encouraging him to sell the property to Eastwood:

I encourage you to make a deal with them and find a way to sell it below the appraised value. After all there are no other buyer[s] who would be interested in this property. Another good reason to work with the mall owner is to help them solve the leakage problem and start leasing more property on the second level.

...

I am sure you support this request, now you must ask the administration to find the legal way to do it.

We have precedents for such disposal of land below market value. After all what is market value, a willing buyer and a willing seller.²¹⁴

On August 8, 2011, Ms. Bear appeared before City Council to address the concerns raised by the By-law and Planning Committee. She repeated her slide show presentation.²¹⁵ One councillor, Al Collett, did not perceive the concerns raised about the leaks and the need to get parking off of the roof as an indication of a structural problem at the time. Instead, he saw it as a positive indication that there was a plan to fix the leaks. He did not recall any council questions about structural problems at the Mall. His view was that everyone present knew there were leaks but did not think the problem was at a critical stage.²¹⁶

Council's questions focused instead on the timing of construction, specifics of the plan, and where the funds would come from. Council wanted assurance that the parking would not come off the roof until the other parking lot was built (something Ms. Bear could not promise), and also had worries about Eastwood's ability to finance the project. Mr. Collett and others also expressed concerns that Eastwood was simply trying to make money from having solar panels on the roof and was not serious about fixing the leaks. As with the By-law and Planning Committee, members of City Council questioned Bob Nazarian's true intentions.²¹⁷

Mayor Hamilton testified that the presentation to council did not result in a decision. Instead, it was simply a presentation for discussion. He said, "at the end of the discussion, I advised Ms. Bear that we don't negotiate property in the public realm and referred her back to staff, where the matter was at that time."²¹⁸

The attempt to purchase the land for a new parking lot does not appear to have been discussed after the council meeting of August 8, 2011. Other than a quick follow-up email, Eastwood did not contact the City again about this land purchase before the collapse, and the City took no further action as a result.²¹⁹

Eastwood appears to have taken few meaningful steps to proceed with the construction of the new parking lot thereafter. On September 20, 2011, the company received two different proposals for the provision of geotechnical services to understand the nature of the terrain underneath the proposed parking lot. Neither company was retained to do this work. Instead, Eastwood had the Mall manager's husband and Mr. Fabris's son take core samples.²²⁰

As I explain below, Eastwood was unable to obtain sufficient funding, either from Solar Hub or a new loan, to pay for the new parking lot without a significant injection of Bob Nazarian's personal assets. Bob Nazarian told me, however, that he saw the Algo Mall as a "black hole" and was not willing to risk his own money in an attempt to fix the leaks.²²¹ It is difficult to avoid the suspicion that this refusal to spend on the Mall was the reason for the lack of continued interest in the land purchase. The result was that nothing changed in the way that the leaks had been dealt with since the Mall was built – the same ineffective practice of caulking and re-caulking continued until the collapse.

As I explain below, Eastwood was unable to obtain sufficient funding, either from Solar Hub or a new loan, to pay for the new parking lot without a significant injection of Bob Nazarian's personal assets. Bob Nazarian told me, however, that he saw the Algo Mall as a "black hole" and was not willing to risk his own money in an attempt to fix the leaks.

Conclusion: Mr. Ewald's continued lack of action of great concern

I deliberately repeat and emphasize that I find the City's inaction, and particularly that of Mr. Ewald, to be very disturbing. Although Mr. Ewald had received the 2009 M.R. Wright engineering report, it was deficient on its face, the inspection being limited to certain specific areas in the Mall. Mr. Ewald, Mayor Hamilton, and other City officials knew about the long history of leaks at the Mall and the potential for those leaks to cause structural damage. They knew of former chief administrative official Tom Derreck's apprehension in 2006 about structural damage, the 2006 Notice of Violation which required an engineering report and that the leaks be fixed, and the 2009 Order to Remedy to the same effect. They knew that, despite everything, the leaks had not stopped. They were explicitly told that the Mall had serious structural problems. The owner openly admitted that the situation at the Mall had become desperate. Despite all this accumulated knowledge, and continued lack of action by Eastwood, the City did not use the Property Standards By-law enforcement mechanisms to force Eastwood to act.²²²

July 2011: The BDC refinancing offer is insufficient to pay for roof repairs and a new parking lot

A formal offer for financing was sent by the Business Development Bank of Canada to Eastwood on July 18, 2011. It proposed a loan of \$3.3 million, all of which would be required to pay off the existing mortgage being administered by the Royal Bank. In addition, Eastwood was required to use the refund of the reserve being held by the Royal Bank (at that time \$266,660) and funds to be invested by Bob Nazarian in the amount of \$471,632 to purchase the adjoining land for \$55,000, make realty improvements in the amount of \$445,000, and pay a GST debt of \$232,292. The financing was subject to numerous conditions, including:

- the provision of quotes or invoices for the improvements, including “all necessary roof repairs and resealing of roof membrane to ensure it is waterproof going forward, and the relocation of the roof-top parking to the ground level” at a cost of \$445,000; and
- the provision of “an Inspection Report, satisfactory to BDC, prepared by an engineering firm approved by BDC confirming that the structure, mechanical and electrical systems and elevators for the buildings ... are sound and in operating order.”²²³

The requirement for an engineering report would lead to Robert Wood being retained again in May 2012, just weeks before the Mall collapse. His report found no structural issues in the Mall. I deal with this report in the following chapter.

As Levon Nazarian admitted, this loan would not have given Eastwood enough money, without a greater investment from Bob Nazarian, to buy the land from the City and build the new parking lot, even if Solar Energy Hub paid to waterproof the roof.²²⁴

July–August 2011: Eastwood continues to try to sell the property, to no avail

On July 15, 2011, Eastwood entered into a signed agreement to sell the Mall to Homayon Zehtab for \$7.9 million.²²⁵ On August 2, 2011, a new agreement was entered into, signed by both parties, to sell the Mall for \$5 million with a prospective closing of September 30, 2011. The new agreement provided for the property to be purchased “on an as is, where is, with all faults basis and without representation or warranty of any kind.” It also stated that “the Buyer acknowledges that they each have inspected the respective property and is satisfied with the physical state of such property.”²²⁶ On August 8, 2011, when Eastwood made its presentation to City Council outlining its plans for the Mall, it was party to a binding and firm agreement to sell it. As Levon Nazarian acknowledged in his evidence before me, this was one of the two or three agreements to sell the property that “went firm.”²²⁷

The transaction did not close. On August 15, 2011, Mr. Zehtab’s lawyer wrote to Eastwood’s lawyer, claiming that the agreement was void because there was no “meeting of the minds” and because of what he claimed to be “false and misleading representations by both the seller and the seller’s agent / broker relating to the substantial divergence on revenues and the cap rate.”* Litigation resulted.²²⁸

• • • • •

* Exhibits 1314 and 1873; Levon Nazarian testimony, July 16, 2013, pp. 16744–9; Bob Nazarian testimony, July 26, 2013, pp. 18501–3. Mr. Zehtab initiated litigation in an attempt to recover the \$50,000 deposit he had provided Eastwood: Exhibits 1315, 5681, and 5695; Levon Nazarian testimony, July 16, 2013, pp. 16751–3.

August 2011–December 2011: The Solar Energy Hub deal sweetens, then disappears

On August 30, 2011, perhaps because it still did not have sufficient loans available, Eastwood asked Solar Energy Hub whether, in lieu of paying rent for the space on the roof, the company would pay for the construction of the new parking lot. Mr. Sarvinis sent Solar Energy Hub his estimate of costs for the parking lot. The company considered the proposal but rejected it. Jim Randolph, the company's director of sales, wrote back to say that, if the parking issues were becoming problematic for Eastwood, the company "may have to let this project go and consider others that may be more viable. Please advise."²²⁹

The same day, August 31, 2011, Mr. Sarvinis wrote to Levon Nazarian, advising him that he now estimated the total soft and hard costs of constructing the new parking lot would be between \$1 million and \$1.4 million.²³⁰

Levon Nazarian came up with a new proposal in late September 2011 to raise the funds to pay for the project. He suggested that Solar Energy Hub make an up-front payment in lieu of paying total rent of \$900,000 over the course of the 20-year lease. He testified that the company was willing to entertain this idea, and agreed, subject to some conditions, to pay \$675,000 immediately in addition to paying for the waterproofing of the deck. This evidence is corroborated by an email from Solar Hub's lawyer to Eastwood's lawyer dated September 29, 2011, attaching a draft lease that had changed the rent to be paid from a monthly sum to a \$675,000 payment on commencement of the lease.²³¹ Levon Nazarian was extremely happy with this possibility because he saw it as a means to finance the parking construction.²³²

The deal remained uncertain, however. Solar Energy Hub was still waiting for approval from the Ontario Power Authority before being able to do business in Ontario.²³³ Eastwood had a possible source of at least partial financing, but now had to wait for the solar company to receive government approval to proceed. The deal was never consummated. On December 15, 2011, Solar Energy Hub emailed Levon Nazarian, advising him that it was still waiting for the Ontario government's decision on changes to the government subsidy program.²³⁴ Levon Nazarian testified that the program came to an end just before the Mall collapsed. As it turned out, Eastwood could not have gone ahead with the Solar Energy Hub proposal.²³⁵

October 2011: Mr. Sarvinis ends his relationship with Bob Nazarian

On October 14, 2011, Mr. Sarvinis sent an email to Levon Nazarian, with a copy to Bob Nazarian. He noted that three invoices, the earliest of which had been sent June 30, 2011, remained unpaid, in the total amount of \$20,291. He threatened to place a lien on the property if payment was not received in a week's time.²³⁶ He was eventually paid but, as Bob Nazarian acknowledged, he did no more work for Eastwood and nothing more was done by the Nazarians on the second parking lot thereafter.²³⁷

Fall 2011: Mr. McCowan revives his interest in purchasing the Mall

Signed agreement of purchase and sale to close November 30, 2011

Mr. McCowan testified that on July 26, 2011, he spoke to Jim Davison of the Royal Bank, who had been dealing with Eastwood on the mortgage administered by that bank. Mr. McCowan said that he learned from Mr. Davison that the bank was advising Computershare Trust Company (the actual mortgage holder) to get out of the mortgage because of all the trouble Royal Bank was having with the property – that the Mall was not in good shape and was losing tenants. Mr. McCowan offered to buy the mortgage at a discount, something he occasionally did because it allowed him to profit from the mortgage and, if the owner defaulted, put the property up for sale and profit in that way as well. It would also have given him leverage with Bob Nazarian because he would have been dealing with him as his lender. Mr. McCowan did not ultimately pursue this avenue because Computershare wanted full price for the mortgage and the payment of a penalty.²³⁸

On October 14, 2011, Mr. McCowan's company entered into an agreement of purchase and sale, signed by him and Bob Nazarian, agreeing to purchase the Mall for \$5.7 million, to close November 30, 2011.²³⁹ Both Levon Nazarian and Mr. McCowan testified that the lower price, compared with the \$10 million he had been willing to consider in 2009, was a reflection, among other things, of the fact that two major tenants (Shoppers and the Bank of Nova Scotia) had moved out in the interim.²⁴⁰ Mr. McCowan added that he had learned, because he owned other malls that had Zellers stores, that Zellers, which occupied 60,000 square feet, would be leaving as well.²⁴¹ Mr. McCowan still saw the purchase as a great opportunity:

It was that good of a deal. I mean, the replacement cost on this mall was 40 million dollars and you are buying it for, you know, 12 or 15 percent replacement cost. It is a good deal.²⁴²

The closing date for the transaction was extended from November 30 to December 2 because Eastwood was unable to get Computershare to agree to a discharge of its mortgage without payment of a significant penalty of approximately \$450,000. The terms of the mortgage required that this penalty be paid, but the Nazarians were attempting to convince the mortgagee to waive it. Bob Nazarian was not prepared to pay it and reduce his proceeds from the sale from \$5.7 million to \$5.25 million. He attempted to have the fee waived by contacting the Royal Bank directly but was unsuccessful. As a result, the agreement terminated on December 2 when it did not close.²⁴³

The evidence appears to support the conclusion that Mr. Wood warned Mr. McCowan that the roof urgently needed critical repairs

During the due diligence process, Mr. McCowan acquired M.R. Wright's October 28, 2009, report on the state of the Mall.²⁴⁴ Mr. McCowan testified that he looked at the report and quickly concluded that the parking deck was in bad shape. He immediately contacted Mr. Wood by phone and asked him about the roof. Although he could only paraphrase Mr. Wood's words, Mr. McCowan recalled the engineer telling him the roof needed to be fixed immediately as it had been poorly maintained and was being eroded by salt. According to Mr. McCowan, Mr. Wood said words to the effect that, if the roof was not fixed, it was going to fall down. However, what

Mr. McCowan actually understood from the comment was that, if the roof wasn't fixed, it could be a problem.²⁴⁵ He explained as follows:

Well, when you do a lot of roofs, people use that phrase very loosely, so I didn't mean it to mean that it is going to fall down tomorrow. I didn't interpret it that way ...

So I didn't really take it to mean that it is going to collapse the next day. But it needed to be dealt with in a very short period of time, be it two months, be it three months, be it four months.²⁴⁶

Mr. McCowan testified that he then asked Mr. Wood what it would cost to fix the roof and was told that it would cost around \$1.5 million.²⁴⁷ He also recalled Mr. Wood telling him that he had told the Nazarians that the roof needed to be fixed right away.²⁴⁸

Ashley Sherrard, Mr. McCowan's broker, was present in the room during Mr. McCowan's conversation with Mr. Wood. She testified that, after he hung up the phone, he confirmed what she had thought – that there was major damage to the roof. She recalled asking Mr. McCowan after the phone conversation how much the engineer thought it would cost to fix the roof. Mr. McCowan replied that it would be \$1.5 million overall, and that \$500,000 needed to be spent immediately.²⁴⁹

Mr. Wood testified three days before Mr. McCowan. He testified that he was not aware of ever having had a conversation with Mr. McCowan about the condition of the Mall and did not actually know who Mr. McCowan was. However, he had a vague recollection about having a conversation with a developer who might have been Mr. McCowan who said he had a copy of the 2009 report. He gave the following evidence:

A. I have a vague recollection from what I was cross-examined or – gave evidence to the OPP. They questioned me about "a developer". If Mr. McCowan is that "a developer" I believe that I may have had a conversation a developer [*sic*]. A developer I believe called me at one time, indicated that he had a copy of my 2009 report that he'd been given by a Mr. Nazarian.

Q. Yes.

A. I was asked questions about it. I was asked questions about roofing and was the roofing a problem. I believe I would have told him that my report indicated that roofing needed to be fixed. I believe the developer went on to question other items that were in the report. I don't know who that person was. But he's obviously been given my report by Mr. Nazarian, that's basically all I can recall.

I never came up with a – I was never asked to look at what the roofing repairs would be. I was never asked to come up with a figure of a value of the roofing repairs, so what you've just presented to me doesn't sound factual.

...

Q. Okay. And did you confirm to that person that there were problems with the roof?

A. It said that in my report so I would have confirmed that.

...

Q. Thank you. And did you tell him that over the years mall staff had pushed snow to the side and salted?

A. Absolutely not.

Q. Did you tell him that salt had leaked down the columns and made them not sound?

A. Absolutely not.

Q. Did you tell him everything had to be reinforced and a new roof had to be put on?

A. I would have told him that a new – someone should be putting a new roof on I would have thought. But I wouldn't have told him everything would have to be reinforced.

- Q. But you may have told him that a new roof had to be put on?
- A. I think that was what I'd been telling Mr. Nazarian.
- Q. Okay. So the answer is yes, you might well have told him?
- A. That portion, yes.
- Q. All right. And then on to the next. Did you tell Mr. McCowan that it would cost \$1.5 million to fix the roof?
- A. No.
- Q. And did you tell him that – that when he asked when this money would have to be spent did you reply that it would have to be right away? Do you recall that?
- A. No.
- Q. Did you – are you saying you didn't say it?
- A. I would never – it's probably what I would have thought but no, I didn't say that.
- Q. Might you have said it?
- A. It would be an appropriate thing to say.
- Q. All right. And then Mr. McCowan asked why he couldn't fix it in ten years, do you recall being asked that?
- A. No.
- Q. And you replied that it had to be fixed right away or the roof would cave. Did you say that?
- A. No.
- Q. And did you say anything like that?
- A. No.
- Q. And apparently Mr. McCowan asked when it would cave in and you advised him that you couldn't tell him when but it would be – it would if it was not fixed right away. Did you say those words to him?
- A. Absolutely not.
- Q. And then lastly, did you tell Mr. McCowan that you had told all this to the mall owners?
- A. No.
- Q. All right. So – do you understand that based on the accuracy of this this would imply that the report that you wrote on May 3rd was not accurate because you knew the mall was in trouble, you understand that?
- A. I understand that.
- ...
- Q. My question, Mr. Wood, is did you ever say that there were any problems with the structure of the Algo Mall building to anyone?
- A. No.²⁵⁰

I am satisfied that Mr. Wood and Mr. McCowan spoke, and the weight of the evidence is that Mr. Wood conveyed to Mr. McCowan that it was urgent and critical that the Algo Mall roof be repaired. I conclude that it is also probable that Mr. Wood also told Mr. McCowan that he had told the Nazarians that the roof needed to be fixed right away. Mr. McCowan recalled Mr. Wood saying that, and Mr. Wood testified he thought he had been telling Mr. Nazarian that.

Mr. McCowan seeks a reduction in price because of the roof condition; Eastwood refuses

Mr. McCowan said that, if he had purchased the Mall, he would have started work on the roof immediately, as soon as he could get engineers and quotes. After viewing the M.R. Wright report and speaking to Mr. Wood, the proper thing to do, in his view, was to obtain a detailed engineering assessment of the building, including destructive testing where necessary and use of a camera insertion to get into hidden areas to see how bad the damage was and whether the load capacity of the beams had been affected. He viewed doing this as a moral obligation (“a high test of morality”), and had done similar things in the past when necessary.²⁵¹ From this point on, he viewed the need to fix the roof as critical.²⁵²

Following his conversation with Mr. Wood, Mr. McCowan told Ms. Sherrard to get a reduction in price from Eastwood of at least \$1 million to compensate for the state of the roof. He testified that, although he felt he could address the roof problem, at this point his intention was to walk away from the deal if he did not get the credit he was looking for.²⁵³ Eastwood refused to give the reduction in price that Mr. McCowan was seeking.²⁵⁴ Mr. McCowan therefore attempted to find other ways to compensate himself for the money he knew he would have to spend on the roof by, for example, seeking credit for the costs to repair fire deficiencies, attribution of rents, and the receipt from Eastwood of the rebate it was going to receive following a reassessment of the amount of property tax it owed. These credits amounted to approximately \$585,000. He also proposed an arrangement that would have had Eastwood pay the penalty for the mortgage discharge and have this sum go to Mr. McCowan if he could convince the bank to waive the penalty. The net effect of all of these would have amounted to a reduction of the price by approximately \$1 million if the penalty were paid to Mr. McCowan.²⁵⁵

Levon Nazarian denied that Mr. McCowan claimed an entitlement to these price reductions because of the condition of the roof. He claimed that Mr. McCowan was “skimming away and trying to get the best absolute deal on the property.”²⁵⁶ Ms. Sherrard testified that it was clear throughout the negotiations that the reason for the price reduction was the need for repairs, but that Levon Nazarian had told her that the documents could not contain any reference to the physical condition of the building.²⁵⁷

Bob Nazarian did not agree to Mr. McCowan’s proposal, and the deal fell through in December 2011.²⁵⁸ Ms. Sherrard and Levon Nazarian briefly revived negotiations in February 2012 for a purchase price of \$5.1 million, but those negotiations were quickly abandoned.²⁵⁹ Eastwood could have sold the Mall months before the collapse but refused to do so.

Mr. McCowan was asked what he would have done if he had actually purchased the Algo Centre, only to discover that the building needed steel reinforcement, in addition to a new roof, at a potential cost of \$3 million or more. He said this would have been his business gamble, but that it would still have been worthwhile to own the Algo Centre because he would have been acquiring the property for \$7 million in total costs (he likely meant \$8 million), where it would have cost \$40 million to build it from scratch. It was still a “very good deal.”²⁶⁰

It may very well be that, if Mr. McCowan had acquired the property, he would have attempted to take the necessary steps to repair it properly. The sad truth, however, is that, at this juncture, the building was on the verge of collapsing. It needed much more than a membrane on the roof.

It may very well be that, if Mr. McCowan had acquired the property, he would have attempted to take the necessary steps to repair it properly. The sad truth, however, is that, at this juncture, the building was on the verge of collapsing. It needed much more than a membrane on the roof.

Notes

- ¹ Bauthus testimony, May 21, 2013, pp. 10622–3.
- ² Exhibit 5495.
- ³ Levon Nazarian testimony, July 15, 2013, p. 16399.
- ⁴ Levon Nazarian testimony, July 15, 2013, pp. 16355–7.
- ⁵ Levon Nazarian testimony, July 15, 2013, p. 16400.
- ⁶ Bob Nazarian testimony, July 26, 2013, pp. 18322–3.
- ⁷ Levon Nazarian testimony, July 15, 2013, pp. 16400–3.
- ⁸ Exhibit 1305.
- ⁹ Levon Nazarian testimony, July 15, 2013, pp. 16404–6.
- ¹⁰ Exhibit 5499.
- ¹¹ Exhibit 1305.
- ¹² Levon Nazarian testimony, July 15, 2013, pp. 16406–7.
- ¹³ Exhibit 1305.
- ¹⁴ Levon Nazarian testimony, July 15, 2013, pp. 16410–2.
- ¹⁵ Levon Nazarian testimony, July 15, 2013, pp. 16413–16.
- ¹⁶ Levon Nazarian testimony, July 15, 2013, pp. 16406–10.
- ¹⁷ Exhibit 5504.
- ¹⁸ Levon Nazarian testimony, July 15, 2013, pp. 16428–31.
- ¹⁹ Levon Nazarian testimony, July 15, 2013, pp. 16432–3.
- ²⁰ Levon Nazarian testimony, July 15, 2013, p. 16433.
- ²¹ Exhibit 1639.
- ²² Exhibit 1639.
- ²³ Levon Nazarian testimony, July 15, 2013, pp. 16436–9.
- ²⁴ Exhibit 1635; Levon Nazarian testimony, July 15, 2013, pp. 16445–7.
- ²⁵ Levon Nazarian testimony, July 16, 2013, pp. 16474–6; Exhibit 1633.
- ²⁶ Levon Nazarian testimony, July 16, 2013, pp. 16476–7; Exhibit 5529.
- ²⁷ Jamie Hass testimony, June 14, 2013, pp. 14599–60.
- ²⁸ Exhibit 1638.
- ²⁹ Levon Nazarian testimony, July 16, 2013, pp. 16479–82; Exhibit 1308.
- ³⁰ Exhibit 5551.
- ³¹ Levon Nazarian testimony, July 16, 2013, p. 16488.
- ³² Levon Nazarian testimony, July 16, 2013, p. 16490.
- ³³ Levon Nazarian testimony, July 16, 2013, pp. 16493–8; Exhibit 5552.
- ³⁴ Levon Nazarian testimony, July 16, 2013, pp. 16493–7; Exhibit 5552.
- ³⁵ Exhibit 1351.
- ³⁶ Levon Nazarian testimony, July 16, 2013, pp. 16491–3.
- ³⁷ Levon Nazarian testimony, July 16, 2013, p. 16493.
- ³⁸ Exhibit 5553.
- ³⁹ Levon Nazarian testimony, July 16, 2013, pp. 16500–4.
- ⁴⁰ Levon Nazarian testimony, July 16, 2013, pp. 16504–6.
- ⁴¹ Levon Nazarian testimony, July 16, 2013, pp. 16503–4.
- ⁴² Levon Nazarian testimony, July 16, 2013, p. 16545.
- ⁴³ Levon Nazarian testimony, July 16, 2013, pp. 16543–8.
- ⁴⁴ McCulloch testimony, June 13, 2013, pp. 14480–1; Exhibit 13-44.
- ⁴⁵ McCulloch testimony, June 13, 2013, p. 14482; Exhibit 13-45.
- ⁴⁶ Cuthbertson testimony, May 1, 2013, p. 7886.
- ⁴⁷ Exhibit 13-197.
- ⁴⁸ Exhibits 13-50 and 13-51.
- ⁴⁹ Exhibit 13-51.
- ⁵⁰ Exhibit 13-51.
- ⁵¹ McCulloch testimony, June 13, 2013, pp. 14483–6.
- ⁵² Exhibit 13-53.
- ⁵³ McCulloch testimony, June 13, 2013, pp. 14488–9.
- ⁵⁴ Bob Nazarian testimony, July 26, 2013, pp. 18334–43; Exhibit 1422.
- ⁵⁵ Bauthus testimony, May 21, 2013, pp. 10621–2.
- ⁵⁶ Exhibit 3543.
- ⁵⁷ Bauthus testimony, May 21, 2013, pp. 10622–3.
- ⁵⁸ Bauthus testimony, May 21, 2013, p. 10623.
- ⁵⁹ Ewald testimony, May 27, 2013, pp. 11720–1; Exhibit 168, p. 43.
- ⁶⁰ Exhibit 102, p. 006; Ewald testimony, May 27, 2013, pp. 11674–5.
- ⁶¹ Ewald testimony, May 27, 2013, pp. 11722–4.
- ⁶² Ewald testimony, May 27, 2013, pp. 11725–7.
- ⁶³ Ewald testimony, May 27, 2013, p. 11725.
- ⁶⁴ Bauthus testimony, May 21, 2013, p. 10620.
- ⁶⁵ Bauthus testimony, May 21, 2013, pp. 10620–1.
- ⁶⁶ Exhibit 3549.
- ⁶⁷ Ewald testimony, May 27, 2013, p. 11729.
- ⁶⁸ Clouthier testimony, April 23, 2013, pp. 6472–3.
- ⁶⁹ deBortoli testimony, June 12, 2013, pp. 14220–1; Exhibit 931.
- ⁷⁰ Exhibit 930.
- ⁷¹ deBortoli testimony, June 12, 2013, pp. 14221–4; Exhibit 930.
- ⁷² Exhibits 11-229, 11-230, 11-231, 11-232, 11-233, 11-234.
- ⁷³ Hamilton testimony, July 9, 2013, pp. 15320–5.
- ⁷⁴ Sarvinis testimony, June 5, 2013, p. 12890; Levon Nazarian testimony, July 16, 2013, pp. 16548–53.
- ⁷⁵ Sarvinis testimony, June 5, 2013, pp. 12886–90, 12961.
- ⁷⁶ Exhibit 733.
- ⁷⁷ Levon Nazarian testimony, July 16, 2013, pp. 16564–5; Sarvinis testimony, June 5, 2013, p. 12904.
- ⁷⁸ Levon Nazarian testimony, July 16, 2013, p. 16564.
- ⁷⁹ Exhibit 733.
- ⁸⁰ Levon Nazarian testimony, July 16, 2013, pp. 16567–8.
- ⁸¹ Sarvinis testimony, June 5, 2013, pp. 12899–900.
- ⁸² Sarvinis testimony, June 5, 2013, pp. 12896–9, 12958–9.
- ⁸³ Sarvinis testimony, June 5, 2013, pp. 12906–7.
- ⁸⁴ Exhibit 732; Sarvinis testimony, June 5, 2013, p. 12903.
- ⁸⁵ Exhibit 732.
- ⁸⁶ Exhibit 499.
- ⁸⁷ Sarvinis testimony, June 5, 2013, p. 12906.
- ⁸⁸ Bob Nazarian testimony, July 26, 2013, pp. 18406–7.
- ⁸⁹ Bob Nazarian testimony, July 26, 2013, p. 18359; Levon Nazarian testimony, July 16, 2013, p. 16566.
- ⁹⁰ Levon Nazarian testimony, July 16, 2013, p. 16566.
- ⁹¹ Levon Nazarian testimony, July 16, 2013, pp. 16578–9.
- ⁹² Exhibit 5585.
- ⁹³ Exhibit 5588.
- ⁹⁴ Exhibit 1288.
- ⁹⁵ Exhibit 5600.
- ⁹⁶ Levon Nazarian testimony, July 16, 2013, pp. 16584–5.
- ⁹⁷ Levon Nazarian testimony, July 16, 2013, pp. 16597, 16615.
- ⁹⁸ Exhibit 4597.
- ⁹⁹ Levon Nazarian testimony, July 16, 2013, pp. 16615–18.
- ¹⁰⁰ Exhibit 5626.
- ¹⁰¹ Bob Nazarian testimony, July 26, 2013, pp. 18385–6; see also Levon Nazarian testimony, July 16, 2013, p. 16598.
- ¹⁰² Exhibit 5626.
- ¹⁰³ Exhibit 728.
- ¹⁰⁴ Exhibit 155; Exhibit 341; Sprague testimony, July 12, 2013, pp. 16109–13.
- ¹⁰⁵ Bob Nazarian testimony, July 26, 2013, pp. 18424–31; Levon Nazarian testimony, July 16, 2013, pp. 16649–52.

- ¹⁰⁶ Exhibit 729.
- ¹⁰⁷ Levon Nazarian testimony, July 16, 2013, pp. 16600–1.
- ¹⁰⁸ Levon Nazarian testimony, July 16, 2013, p. 16649.
- ¹⁰⁹ Sarvinis testimony, June 5, 2013, p. 12914.
- ¹¹⁰ Exhibit 734.
- ¹¹¹ Bob Nazarian testimony, July 26, 2013, pp. 18438–41; Levon Nazarian testimony, July 16, 2013, pp. 16661–4; Sarvinis testimony, June 5, 2013, p. 12915.
- ¹¹² Sarvinis testimony, June 5, 2013, p. 12912.
- ¹¹³ Sarvinis testimony, June 5, 2013, pp. 12948–9.
- ¹¹⁴ Exhibit 355.
- ¹¹⁵ Exhibit 356, p. 5403.
- ¹¹⁶ Exhibit 1741; deBortoli testimony, June 12, 2013, pp. 14227–31.
- ¹¹⁷ Hamilton testimony, July 9, 2013, pp. 15331–2; Exhibit 1542.
- ¹¹⁸ Exhibit 11–155.
- ¹¹⁹ deBortoli testimony, June 12, 2013, pp. 14151–7.
- ¹²⁰ deBortoli testimony, June 12, 2013, pp. 14164–5.
- ¹²¹ deBortoli testimony, June 12, 2013, pp. 14179–80, 14215–17.
- ¹²² Exhibit 361.
- ¹²³ Exhibit 361.
- ¹²⁴ deBortoli testimony, June 12, 2013, pp. 14241–3; Sprague testimony, July 12, 2013, p. 16103.
- ¹²⁵ Exhibit 360; Sprague testimony, July 12, 2013, pp. 16103–4; deBortoli testimony, June 12, 2013, pp. 14243–5.
- ¹²⁶ Bob Nazarian testimony, July 29, 2013, pp. 18344–6; July 29, 2013, p. 18637; Levon Nazarian testimony, July 16, 2013, pp. 16544–5.
- ¹²⁷ Exhibit 5569.
- ¹²⁸ Bob Nazarian testimony, July 26, 2013, pp. 18344–5; July 29, 2013, pp. 18636–7.
- ¹²⁹ Exhibit 5571.
- ¹³⁰ Exhibit 6212.
- ¹³¹ Bob Nazarian testimony, July 29, 2013, p. 18642.
- ¹³² Exhibit 13–40.
- ¹³³ Exhibit 6216; Bob Nazarian testimony, July 29, 2013, pp. 18640–42.
- ¹³⁴ Exhibit 6216; Exhibit 5646.
- ¹³⁵ Exhibit 1348.
- ¹³⁶ Exhibit 1485.
- ¹³⁷ Exhibit 1485, p. 328.
- ¹³⁸ Levon Nazarian testimony, July 16, 2013, pp. 16672–5.
- ¹³⁹ Exhibit 5624.
- ¹⁴⁰ Levon Nazarian testimony, July 16, 2013, pp. 16675–6.
- ¹⁴¹ Exhibit 5625.
- ¹⁴² Levon Nazarian testimony, July 16, 2013, pp. 16676–7.
- ¹⁴³ McCowan testimony, June 10, 2013, pp. 13544–7.
- ¹⁴⁴ McCowan testimony, June 10, 2013, p. 13785.
- ¹⁴⁵ Exhibit 5163.
- ¹⁴⁶ McCowan testimony, June 10, 2013, pp. 13553–64.
- ¹⁴⁷ Exhibit 5163.
- ¹⁴⁸ Levon Nazarian testimony, July 15, 2013, p. 16366.
- ¹⁴⁹ Bob Nazarian testimony, July 25, 2013, pp. 18289–91.
- ¹⁵⁰ Levon Nazarian testimony, July 15, 2013, pp. 16371–4.
- ¹⁵¹ McCowan testimony, June 10, 2013, pp. 13567–70.
- ¹⁵² McCowan testimony, June 10, 2013, pp. 13570–5.
- ¹⁵³ Exhibit 1233 p. 0035; McCowan testimony, June 10, 2013, pp. 13568–70.
- ¹⁵⁴ McCowan testimony, June 10, 2013, pp. 13570–1.
- ¹⁵⁵ Exhibit 5638, Levon Nazarian testimony, July 16, 2013, pp. 16680–1.
- ¹⁵⁶ Exhibit 5638, p. 0046.
- ¹⁵⁷ Exhibit 1497.
- ¹⁵⁸ Levon Nazarian testimony, July 16, 2013, p. 16703.
- ¹⁵⁹ deBortoli testimony, June 12, 2013, pp. 14245–6.
- ¹⁶⁰ deBortoli testimony, June 12, 2013, p. 14254.
- ¹⁶¹ Bob Nazarian testimony, July 26, 2013, pp. 18394–5; Exhibit 922.
- ¹⁶² deBortoli testimony, June 12, 2013, pp. 14256–62.
- ¹⁶³ Exhibit 922, p. 003.
- ¹⁶⁴ Bob Nazarian testimony, July 26, 2013, p. 18398.
- ¹⁶⁵ Exhibit 156.
- ¹⁶⁶ Bob Nazarian testimony, July 26, 2013, p. 18399.
- ¹⁶⁷ Bob Nazarian testimony, July 26, 2013, pp. 18399–400.
- ¹⁶⁸ Bob Nazarian testimony, July 26, 2013, pp. 18474–6; Levon Nazarian testimony, July 16, 2013, pp. 16703–7; Sarvinis testimony, June 5, 2013, p. 12916.
- ¹⁶⁹ Sarvinis testimony, June 5, 2013, pp. 12916–17.
- ¹⁷⁰ Exhibit 107.
- ¹⁷¹ Exhibit 1072, p. 0031.
- ¹⁷² Bob Nazarian testimony, July 26, 2013, p. 18489.
- ¹⁷³ Exhibit 1080.
- ¹⁷⁴ Bob Nazarian testimony, July 26, 2013, pp. 18481–2.
- ¹⁷⁵ Fabris testimony, July 11, 2013, p. 15771.
- ¹⁷⁶ Sarvinis testimony, June 5, 2013, p. 12917.
- ¹⁷⁷ Sarvinis testimony, June 5, 2013, p. 12918; Exhibit 4715.
- ¹⁷⁸ Exhibit 4715.
- ¹⁷⁹ Exhibit 5657.
- ¹⁸⁰ Exhibit 108.
- ¹⁸¹ Exhibit 4724.
- ¹⁸² Exhibit 4722.
- ¹⁸³ Bob Nazarian testimony, July 26, 2013, pp. 18490–1.
- ¹⁸⁴ Exhibit 4781.
- ¹⁸⁵ Exhibit 4781.
- ¹⁸⁶ Levon Nazarian testimony, July 16, 2013, pp. 16738–9.
- ¹⁸⁷ Levon Nazarian testimony, July 16, 2013, p. 16742.
- ¹⁸⁸ Bear testimony, June 11, 2013, pp. 13826–33.
- ¹⁸⁹ Bear testimony, June 11, 2013, pp. 13851–5.
- ¹⁹⁰ Exhibit 1772.
- ¹⁹¹ Hamilton testimony, July 9, 2013, pp. 15332–4.
- ¹⁹² Hamilton testimony, July 9, 2013, pp. 15332–4.
- ¹⁹³ Sprague testimony, July 12, 2013, pp. 16104–7.
- ¹⁹⁴ deBortoli testimony, June 12, 2013, pp. 14264–7.
- ¹⁹⁵ deBortoli testimony, June 12, 2013, p. 14267.
- ¹⁹⁶ Exhibit 3664.
- ¹⁹⁷ Sprague testimony, July 12, 2013, pp. 16113–15; Exhibit 3664.
- ¹⁹⁸ Sprague testimony, July 12, 2013, pp. 16115–16.
- ¹⁹⁹ Exhibit 3669.
- ²⁰⁰ Exhibit 130.
- ²⁰¹ Exhibit 130.
- ²⁰² Exhibit 1034; Sprague testimony, July 12, 2013, pp. 16117–20.
- ²⁰³ Ewald testimony, May 27, 2013, p. 11739.
- ²⁰⁴ Ewald testimony, May 27, 2013, pp. 11732–4.
- ²⁰⁵ Ewald testimony, May 27, 2013, p. 11733.
- ²⁰⁶ Exhibit 311.
- ²⁰⁷ Exhibit 155.
- ²⁰⁸ Bear testimony, June 11, 2013, p. 13876.
- ²⁰⁹ Hamilton testimony, July 9, 2013, pp. 15338–42.
- ²¹⁰ Exhibits 3674 and 311; Hamilton testimony, July 9, 2013, pp. 15338–42; Sprague testimony, July 12, 2013, pp. 16120–4.
- ²¹¹ deBortoli testimony, June 12, 2013, p. 14277.
- ²¹² Exhibit 3676.

- ²¹³ deBortoli testimony, June 12, 2013, pp. 14280–1.
- ²¹⁴ Exhibit 3677.
- ²¹⁵ Exhibits 155 and 918; Collett testimony, May 24, 2013, pp. 11297–303.
- ²¹⁶ Collett testimony, May 24, 2013, pp. 11302–3.
- ²¹⁷ Collett testimony, May 24, 2013, pp. 11305–6.
- ²¹⁸ Hamilton testimony, July 10, 2013, p. 15358.
- ²¹⁹ Collett testimony, May 24, 2013, pp. 11306–7, 11362–5; Hamilton testimony, July 10, 2013, pp. 15357–63; Bear testimony, June 11, 2013, pp. 13899–902; Exhibit 3682.
- ²²⁰ Bear testimony, June 11, 2013, pp. 13899–902; Exhibits 4851 and 4862.
- ²²¹ Bob Nazarian testimony, July 25, 2013, p. 18265.
- ²²² Hamilton testimony, July 10, 2013, pp. 15357–63; deBortoli testimony, June 12, 2013, pp. 14288–9; Ewald testimony, May 27, 2013, pp. 11746–7.
- ²²³ Exhibit 5668.
- ²²⁴ Levon Nazarian testimony, July 17, 2013, pp. 16946–7.
- ²²⁵ Exhibit 1873, pp. 006–011.
- ²²⁶ Exhibit 1878, pp. 001–010.
- ²²⁷ Levon Nazarian testimony, July 16, 2013, p. 16748.
- ²²⁸ Levon Nazarian testimony, July 16, 2013, pp. 16744–53; Exhibits 5695, 5681, 1315.
- ²²⁹ Exhibits 730, 5685.
- ²³⁰ Exhibit 5685.
- ²³¹ Exhibits 5700, 5701.
- ²³² Exhibit 5701; Levon Nazarian testimony, July 17, 2013, pp. 16833–9.
- ²³³ Exhibit 5696; Levon Nazarian testimony, July 17, 2013, pp. 16822–8.
- ²³⁴ Exhibit 5763.
- ²³⁵ Levon Nazarian testimony, July 17, 2013, p. 16921.
- ²³⁶ Exhibit 4740.
- ²³⁷ Sarvinis testimony, June 5, 2013, p. 12940; Bob Nazarian testimony, July 26, 2013, pp. 18536–9; Levon Nazarian testimony, July 17, 2013, p. 16854; Exhibit 4740.
- ²³⁸ Exhibit 1776; McCowan testimony, June 10, 2013, pp. 13575–81.
- ²³⁹ Exhibit 1344, pp. 431–44.
- ²⁴⁰ Levon Nazarian testimony, July 17, 2013, pp. 16842–3.
- ²⁴¹ McCowan testimony, June 10, 2013, pp. 13584–6.
- ²⁴² McCowan testimony, June 10, 2013, p. 13587.
- ²⁴³ Levon Nazarian testimony, July 17, 2013, pp. 16887–95; Exhibits 5176, 5177, 5182, 5745, 5755, 5756.
- ²⁴⁴ McCowan testimony, June 10, 2013, pp. 13614–15; Exhibit 5164, pp. 0032, 070–7; Sherrard testimony, August 6, 2013, pp. 19653–4, 19672; Levon Nazarian testimony, July 17, 2013, p. 16858.
- ²⁴⁵ McCowan testimony, June 10, 2013, pp. 13635–42, 13740-1.
- ²⁴⁶ McCowan testimony, June 10, 2013, p. 13642.
- ²⁴⁷ McCowan testimony, June 10, 2013, pp. 13641–3, 13740.
- ²⁴⁸ McCowan testimony, June 10, 2013, p. 13644.
- ²⁴⁹ Sherrard testimony, August 6, 2013, pp. 19668–9.
- ²⁵⁰ Wood testimony, June 7, 2013, pp. 13401–5, 13512.
- ²⁵¹ McCowan testimony, June 10, 2013, pp. 13642, 13649–51.
- ²⁵² McCowan testimony, June 10, 2013, p. 13643.
- ²⁵³ McCowan testimony, June 10, 2013, p. 13644; Sherrard testimony, August 6, 2013, pp. 19682–3.
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- ²⁵⁵ McCowan testimony, June 10, 2013, pp. 13658–60, 13670–85; Levon Nazarian testimony, July 17, 2013, pp. 16921–32; Exhibit 5184; Sherrard testimony, August 6, 2013, pp. 19681–92.
- ²⁵⁶ Levon Nazarian testimony, July 17, 2013, pp. 16930–1.
- ²⁵⁷ Sherrard testimony, August 6, 2013, pp. 19683–4.
- ²⁵⁸ McCowan testimony, June 10, 2013, p. 13800; Levon Nazarian testimony, July 17, 2013, pp. 16931–2; Sherrard testimony, August 6, 2013, p. 19692.
- ²⁵⁹ McCowan testimony, June 10, 2013, pp. 13690–6; Levon Nazarian testimony, July 17, 2013, pp. 16934–41; Exhibits 5779, 5295, and 5296.
- ²⁶⁰ McCowan testimony, June 10, 2013, pp. 13803–5.