

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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|-----------------------------|---|-------------------------------|
| IN RE: |) | Chapter 11 |
| |) | |
| TELEGLOBE COMMUNICATIONS |) | Case No. 02-11518 (MFW) |
| CORP. et al., |) | |
| |) | |
| Debtors. |) | |
| _____ |) | Jointly Administered |
| |) | |
| TELEGLOBE USA, INC. et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Adversary No. A-04-53733(MFW) |
| |) | |
| BCE INC. et al., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

FINDINGS OF FACT¹

A. The Parties

1. The Plaintiffs are the Debtors² and the Official Unsecured Creditors' Committee in the Debtors' bankruptcy cases commenced in the United States Bankruptcy Court for the District of Delaware.

2. At all relevant times, the Debtors were wholly owned subsidiaries of Teleglobe, Inc. ("Teleglobe").

¹ These Findings of Fact and the accompanying Opinion constitute the findings of fact and conclusions of law of the Court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

² The Debtors are Teleglobe USA, Inc.; Teleglobe Holdings (U.S.) Corp.; Teleglobe Communications Corp.; Teleglobe Holding Corp.; Teleglobe Investment Corp.; Teleglobe Telecom Corp.; Optel Communications, Inc.; Teleglobe Marine (U.S.) Inc.; Teleglobe Submarine, Inc.; Teleglobe Luxembourg, LLC; Teleglobe Puerto Rico, Inc.

3. The Defendants are BCE, Inc. ("BCE") and several of its officers and directors.

B. BCE Acquires Teleglobe, Inc.

4. In May 1999, Teleglobe announced its intention to build the GlobeSystem. (Admitted Facts ¶ 23.)³

5. At that time, BCE held (through its subsidiary Bell Canada, Inc.) approximately 23% of Teleglobe's common stock. (Admitted Facts ¶ 4.)

6. Citing its interest in the GlobeSystem as a means to expand "operational capability" outside Canada and thereby "inject growth" into BCE, BCE declared its plan to purchase the remaining outstanding shares of Teleglobe in February 2000. (Admitted Facts ¶¶ 25, 26; Hr'g Tr. 9:8-11:17, Dec. 14, 2007.)

7. On February 15, 2000, BCE and Teleglobe executed an agreement (the "Support Agreement") pursuant to which BCE would acquire all of the shares of Teleglobe that were not already owned by Bell Canada (the "Acquisition"). (Admitted Facts ¶¶ 25, 30; Hr'g Tr. 62:13-16, Dec. 12, 2007.)

8. During the first and second quarters of 2000, Teleglobe had disappointing earnings and revenues and did not meet projections. (Hr'g Tr. 63:24-65:5, Dec. 12, 2007; PX 490 at 13, 31-32.)

9. By March 2000, Teleglobe knew that it would be in violation of its EBITDA covenants on its credit facility and sought (and obtained) a waiver from its banks. As a result, the banks reduced Teleglobe's funding by \$250 million, to \$750 million. (Hr'g Tr. 64:20-65:1, Dec. 12, 2007; PX 490 at 30; PX 196.)

³ References to the record are as follows: (1) "Admitted Facts" for the Statement of Facts Which Are Admitted and Require No Proof, attached to the parties' Pre-Hearing Order as Exhibit 1A, (2) "Tr. [page no.: line no.], [date]" for the transcript of the hearings, (3) "PX #" for the Plaintiffs' exhibits, (4) "DX #" for the Defendants' exhibits, (5) "D.Ct. D.I. #" for the docket in the District Court case, (6) "B.Ct. D.I. #" for the docket in the main case in the Bankruptcy Court, (7) "B.Ct. Adv. D.I. #" for the docket in the adversary proceeding in the Bankruptcy Court, and (8) "Priv. Doc. Tab #" for the privileged documents cited in the Special Masters' Final Report dated February 22, 2006.

10. Before closing on the Acquisition, BCE asserted in June 2000 that there had been a "material adverse event" at Teleglobe and as a result negotiated a reduction in the purchase price. (Hr'g Tr. 65:13-66:7, Dec. 12, 2007; PX 490 at 30-31; Hr'g Tr. 50:2-15, Dec. 14, 2007.)
11. In exchange, BCE agreed to remove all conditions to closing and to commit at least \$1 billion in funding (\$100 million immediately) to Teleglobe. (Admitted Facts ¶ 29; PX 14 at 5; PX 17; Hr'g Tr. 66:8-13, Dec. 12, 2007; PX 490 at 31.)
12. In July 2000, Teleglobe and Teleglobe Holdings (U.S.) Corp. entered into new \$1.25 billion credit facilities. To facilitate the bank financing, BCE guaranteed the banks that it would close the Teleglobe transaction and provide \$1 billion in financing to Teleglobe. (PX 14 at 5; PX 17; Hr'g Tr. 66:8-67:6, Dec. 12, 2007; PX 490 at 31-32.)
13. On November 1, 2000, the Acquisition was consummated. (Admitted Facts ¶ 30; PX 490 at 32.)
14. BCE's \$1 billion funding commitment to Teleglobe was fully exhausted by December 6, 2001. (Hr'g Tr. 10:7-13, Dec. 13, 2007.)
15. On October 24, 2001, the BCE Board authorized the investment of an additional \$75 million in Teleglobe or its subsidiaries. (Admitted Facts ¶ 34; PX 39 at 516-17.)
16. On November 28, 2001, the BCE Board authorized the investment of an additional \$850 million in Teleglobe or its subsidiaries. (Admitted Facts ¶ 35; PX 40 at 531-32.)
17. On April 5, 2002, Moody's downgraded Teleglobe's credit rating. (Hr'g Tr. 38:4-14, Dec. 13, 2007.)
18. On April 8, 2002, BCE issued a press release stating that it was reassessing its funding of Teleglobe. (DX 430; Hr'g Tr. 37:25-38:14, Dec. 13, 2007.)
19. On April 23, 2002, BCE's board of directors voted to cease providing long-term funding to Teleglobe. (Admitted Facts ¶¶ 37, 46.)
20. On May 15, 2002, Teleglobe and the Debtors filed cases under the "Canadian Companies' Creditors Arrangement Act," or "CCCAA," in Canada. (B.Ct. D.I. 18 at ¶ 2; Admitted Facts ¶ 47.)

21. On that same day, the Debtors filed applications under section 304 of the Bankruptcy Code in this Court. (B.Ct. D.I. 18 at ¶ 2; Admitted Facts ¶ 47.)

22. The Section 304 ancillary proceedings were subsequently dismissed and on May 28, 2002, the Debtors filed chapter 11 cases in Delaware. (Admitted Facts ¶ 48.)

C. History of Discovery Dispute

23. During the bankruptcy case, the Debtors and the Creditors' Committee filed a Motion under Rule 2004 of the Federal Rules of Bankruptcy Procedure seeking discovery from BCE. (B.Ct. D.I. 1402, 2169.)

24. The Court directed BCE to produce to the Debtors documents which were privileged but covered by a "common interest" shared by BCE and the Debtors. (B.Ct. D.I. 3572 at 77.)

25. On May 26, 2004, the Plaintiffs filed the present adversary action. (B.Ct. Adv. D.I. 1.)

26. On September 8, 2004, the District Court withdrew the reference of the adversary proceeding. (D.Ct. D.I. 1.)

27. Subsequently, on February 11, 2005, the Plaintiffs filed a Motion to Compel production of documents withheld as privileged by the Defendants. (D.Ct. D.I. 74, 76.)

28. The District Court referred the Motion to Compel to Special Master Collins J. Seitz, Jr., on August 25, 2005. (D.Ct. D.I. 160.)

29. On December 1, 2005, the Special Master issued a preliminary decision which required the production of all documents reflecting work performed by Davies Ward after April 8, 2002, the date on which the Defendants represented that Davies Ward began representing Teleglobe. (See PX 1235 at 11-13.)

30. To verify the accuracy of the Defendants' representations regarding the nature of the remaining withheld documents, the Special Master allowed the Plaintiffs to select 50 documents from the privilege logs for in camera review before rendering a final decision. (PX 1235 at 13, 28.)

31. After his in camera review of the 50 documents, the Special Master concluded that 3 of them did not involve any legal advice and several others related to a joint representation of BCE and

Teleglobe or the Debtors on matters of common interest. (PX 1235 at 14, 28-29.)

32. As a result, the Special Master issued a supplemental decision on December 9, 2005, directing the Defendants to submit for in camera inspection all of the withheld documents. (PX 1233 at 4-5.)

33. On February 22, 2006, the Special Master issued his Final Decision concluding that, based on his in camera review of all of the documents, the Defendants had "not demonstrated that the documents on the privilege log reflect advice from BCE's in-house and outside counsel provided exclusively to BCE" but that "the withheld documents demonstrate that there was a joint representation by BCE's attorneys of BCE and Teleglobe relating to a matter of common interest." (PX 1235 at 31.)

34. On June 2, 2006, the District Court adopted the findings in the Special Master's Final Decision. (PX 1241.)

35. On July 17, 2007, the Third Circuit reversed. Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345 (3d Cir. 2007).

36. The Third Circuit remanded for additional findings of fact on the following issues: (1) Whether any attorneys jointly represented BCE and the Debtors on a matter of common interest, in which case any documents within the scope of that joint representation would be discoverable. (2) Whether the fiduciary exception to the attorney-client privilege is applicable. (3) Whether the attorney-client privilege should be abrogated as a sanction for the Defendants' abuse of the discovery process because of "bad faith, wilfulness, or fault" on the part of the Defendants or their counsel. Id. at 386-87.

37. On remand, the District Court referred the matter to this Court for disposition. (D.Ct. D.I. 297.)

D. Spoliation Motion

38. The Spoliation Motion was originally filed on May 23, 2006, in the District Court. (D.Ct. D.I. 269.)

39. On December 20, 2006, the District Court denied the Spoliation Motion without prejudice to it being renewed after the appeal was concluded. (D.Ct. D.I. 296.)

40. After the matter was referred to the Bankruptcy Court, the Defendants renewed the Spoliation Motion in this Court, which was briefed by the parties. (B.Ct. Adv. D.I. 34.)

41. A hearing on the Spoliation Motion was held on October 24, 2007, at which time the Court denied the Spoliation Motion, but directed counsel for the Plaintiffs to produce (to the Defendants and to the Court) its notes of a meeting held between counsel and the experts on March 1, 2006, and copies of emails or other communications in which counsel or other experts had forwarded comments or information to the experts for consideration in forming their opinions. (B.Ct. Adv. D.I. 62, 63.)

42. In compliance with the October 26 Order, the Plaintiffs produced 11 boxes of documents. (B.Ct. Adv. D.I. 64.)

43. On December 3, 2007, the Defendants filed a response to that document production contending that the documents produced are no substitute for the destroyed documents and reiterating their request that the Court preclude the experts' testimony and/or reports at trial. (B.Ct. Adv. D.I. 86.)

44. The Court held hearings on the Motion to Compel on December 11 to 14, 2007. (B.Ct. Adv. D.I. 108-111.)

45. The Court permitted the experts to testify, reserving decision on whether to exclude their reports. (Hr'g Tr. 5:6-10, 48:23-51:14, Oct. 24, 2007.)

46. The Plaintiffs' experts testified at trial that they did not keep any notes of the March 1, 2006, meeting or notes of the few telephone conferences they had with the other experts or the attorneys. (Hr'g Tr. 188:1-190:23, Dec. 11, 2007; Hr'g Tr. 167:3-170:20, Dec. 12, 2007.)

47. While Taylor typically did not save drafts of her report, one draft was apparently saved on her laptop and was produced. (Hr'g Tr. 191:11-192:10, Dec. 11, 2007; B.Ct. Adv. D.I. 61.)

48. That report was dated February 24, 2006, before the March 1 meeting and does not differ in any meaningful respect from the final report filed on March 8, 2006. (B.Ct. Adv. D.I. 61.)

49. The Defendants' expert, Livnat, also consulted with counsel and incorporated counsel's comments into his report or excluded items from his report at counsel's suggestion. (Hr'g Tr. 166:5-168:13, Dec. 13, 2007.)

50. The Defendants were able to cross-examine the Plaintiffs' experts adequately at the December hearings. (Hr'g Tr. 178:13-22, 190:12-14, 197:20-198:1, Dec. 11, 2007; Hr'g Tr. 167:3-169:19, 184:7-20, 187:17-188:12, Dec. 12, 2007.)

51. Both Plaintiffs' experts testified that comments from the attorneys and the other experts at the March 1 meeting (or in phone calls) did not change their opinions. (Hr'g Tr. 190:12-14, Dec. 11, 2007; Hr'g Tr. 168:8-18, Dec. 12, 2007.)

E. Sanctions for Discovery Misconduct

1. Court's Review of Privileged Documents

52. At the status hearing held on December 3, 2007, the Court stated its intention to conduct an in camera review of the 202 privileged documents cited by the Special Master in his Final Decision. (Hr'g Tr. 30:19-32:16, Dec. 3, 2007.)

53. After review, the Court finds that the vast majority of those documents represent legal advice given to BCE alone.

54. The Court finds that there are some documents which arguably could involve the provision of legal advice on a matter of common interest to BCE and Teleglobe.

55. The Court found no document which could arguably involve the provision of legal advice on a matter of common interest to BCE and the Debtors.

2. The Defendants' "Misrepresentations"

56. During the Rule 2004 discovery, BCE acknowledged that the "common interest privilege" it shared with Teleglobe and the Debtors could not be asserted by BCE against those entities in any litigation between them and agreed to produce any such documents. (B.Ct. D.I. 2182 at 18.)

57. Nonetheless, BCE withheld hundreds of documents on grounds of privilege. (PX 1268.)

58. In response to the Motion to Compel, the Defendants disclaimed any right to withhold any "documents reflecting legal work in which BCE and Teleglobe had a common legal interest." (D.Ct. D.I. 87 at 15.)

59. The Defendants represented to the District Court that they had produced all the documents reflecting a matter on which they

had a common interest with Teleglobe and that the withheld documents involved the provision of legal advice solely to BCE and were protected by the attorney-client privilege. (D.Ct. D.I. 87.)

60. Before the Special Master in October 2005, the Defendants renounced any right to withhold any documents in which BCE and Teleglobe or the Debtors had a "common interest" and represented that the documents being withheld on the ground of privilege involved the provision of legal advice solely to BCE. (PX 1232 at 81, 92-93; PX 1235 at 11.)

61. The Third Circuit noted, however, that there was a serious difference in understanding between the parties as to what the "common interest" and joint representation was. Teleglobe, 493 F.3d at 378 (concluding that the Defendants had not waived the privilege by agreeing to produce documents sought in the Rule 2004 Motion because "it appears that BCE agreed to produce documents that fell within its understanding of the BCE/Teleglobe joint representation, not the masses of documents that [the Plaintiffs sought and] the Special Master eventually found to fall within that category.").

62. Therefore, the Court is not prepared to find that the Defendants' representations that they would produce "common interest" documents was a misrepresentation which mandates that they now be required to produce all privileged documents.

3. Review and Update of Privilege Logs

63. Overall, the Defendants have produced approximately 900,000 pages of documents in this case. (B.Ct. Adv. D.I. 71 at ¶ 4.)

64. Under the Confidentiality Stipulation and Order entered in this case, the Defendants were entitled to recall inadvertently produced documents, which they did from time to time. (D.Ct. D.I. 102.)

65. The documents that the Defendants asserted were privileged are listed on three privilege logs: one dated July 2004 for documents produced in response to the Rule 2004 requests; one dated February 2005; and one dated September 2005. (B.Ct. Adv. D.I. 71 at ¶ 3.)

66. Following the filing of the Plaintiffs' Motion to Compel on February 11, 2005, the Defendants reviewed and undesignated in excess of 20,000 pages of documents they had initially withheld for privilege. (B.Ct. Adv. D.I. 95 at Exs. L, M, N, P, Q, S, T.)

67. After the discovery dispute was referred to the Special Master on August 16, 2005, the Defendants continued to review and undesignate in excess of 18,000 pages of documents from their privilege logs. (B.Ct. Adv. D.I. 95 at Exs. W, X, AA, BB, CC, EE.)

68. The vast majority of the documents produced between August 25 and December 9, 2005, were not documents as to which the Defendants had asserted a claim of privilege, but instead were documents that had been set aside in the ongoing document review for purposes of a further privilege review. (B.Ct. Adv. D.I. 94 at ¶ 3.)

69. A small number of the documents had been logged as privileged, but the Defendants corrected these mis-designations as they were discovered. (B.Ct. Adv. D.I. 94 at ¶¶ 2, 4.)

70. Before the Special Master's in camera inspection of the 50 documents in December, 2005, the Defendants reviewed the 50 documents and withdrew privilege assertions for 6 of them. (PX 1235 at 14, 28-29.)

71. At the direction of the Special Master in his supplemental decision on December 9, 2005, the Defendants again reviewed the privileged documents and undesignated in excess of 22,000 pages of documents. (PX 1233 at 4-5; B.Ct. Adv. D.I. 95 at Exs. PP, SS, UU.)

72. While Special Master Seitz was conducting his in camera review of all the privileged documents in December, 2005, the Defendants continued to review and undesignate another 33,000 pages of documents from their privilege logs. (B.Ct. Adv. D.I. 95 at Exs. YY, AAA, DDD, EEE, GGG.)

73. Of the 33,000 pages of mis-designated documents which were removed from the Defendants' privilege logs in December 2005 and early 2006, many were blank (or redacted), duplicative of documents previously produced to Plaintiffs, duplicative of one another, re-productions of pages that had been previously produced, or were not at issue in the Plaintiffs' Motion to Compel but were produced by the Defendants as a result of their voluntary review of privileged documents. (B.Ct. Adv. D.I. 71 at ¶ 7.)

74. Approximately 90% of the documents mis-designated as privileged had been listed on the September 2005 log. (B.Ct. Adv. D.I. 71 at ¶ 3.)

75. The September 2005 privilege log contained over 5,000 entries. (B.Ct. Adv. D.I. 71 at ¶ 3.)

76. The fact discovery deadline was originally September 2005; the District Court extended the time to January 31, 2006. (D.Ct. D.I. 23.)

77. Many of the mis-designations on the September 2005 log were corrected by January 31, 2006, within the extended discovery period. (B.Ct. Adv. D.I. 71 at ¶¶ 5, 7, 15.)

78. The review of documents for privilege and the preparation of the privilege log produced in September 2005 was a large and difficult undertaking. (B.Ct. Adv. D.I. 71 at ¶ 5.)

79. The Defendants admit that mistakes were made in the process of reviewing documents to determine if they were privileged. (B.Ct. Adv. D.I. 71 at ¶ 5.)

80. The Court finds that any mistakes made by the Defendants in their review of privileged documents were not intentional or strategic in nature but were the result of the joint representation issues and the challenge of determining whether a document reflected legal advice given to or sought by the Debtors.

81. Based upon the factual record presented, the Court finds that there has been no demonstration that any over-designation was the product of the Defendants' bad faith, wilfulness, or fault.

82. The Plaintiffs acknowledge that some of the over-designated documents were "completely redacted, and marginally relevant, materials." (B.Ct. Adv. D.I. 75 at 29.)

83. The Plaintiffs identified only 48 of the undesignated documents on their list of 1,062 trial exhibits. (B.Ct. Adv. D.I. 71 ¶ 8; 78 ¶ 8, Ex. D; 94 ¶ 7.)

84. Of those 48, 9 were duplicates of documents already produced, another 13 had previously been produced in substantially the same form, and 8 had not been produced because of an error by the Defendants' electronic discovery vendor rather than on grounds of privilege. (B.Ct. Adv. D.I. 71 at ¶ 8; 94 at ¶¶ 3, 7.)

85. To date, the Plaintiffs have not sought to re-depose any witness with respect to any of the undesignated documents that have been produced. (B.Ct. Adv. D.I. 71 at ¶ 6.)

86. The Defendants have not objected to producing witnesses for further depositions. (B.Ct. Adv. D.I. 71 at ¶ 6.)

87. The Court finds that the Defendants' delay in the production of documents originally claimed as privileged did not prejudice the Plaintiffs because they will have an opportunity to re-notice depositions relating to those documents.

88. As a result of his finding that the Defendants had over-designated privileged documents, the Special Master shifted the costs of his in camera review to the Defendants; the Defendants did not challenge this assessment. (PX 1235 at 16, n.10.)

89. The Court finds that the mis-designated documents it reviewed are not the "smoking guns" that the Plaintiffs urge but rather are subject to interpretation and cover issues for which the Plaintiffs already have non-privileged evidence.

90. Therefore, the Court concludes that the Plaintiffs' assertion of prejudice because of the over-designation of privileged documents is not supported by the evidence.

91. As a result, the Court finds that an order requiring the Defendants to turn over all documents still being withheld for privilege is not an appropriate sanction.

4. Issue Waiver

92. At the hearing, BCE's Chief Legal Officer Martine Turcotte testified that she never heard from any lawyer (for the Plaintiffs or BCE) that BCE had a funding obligation to Teleglobe beyond the initial \$1 billion referenced in BCE's public disclosures. (Hr'g Tr. 21:4-21:10, 63:9-23, Dec. 13, 2007.)

93. The Court finds that Turcotte's testimony did not discuss the contents of any legal advice BCE received; in fact, her testimony was that there was no communication.

94. Therefore, the Court rejects the Plaintiffs' contention that this testimony put at issue all legal advice received by BCE relating to whether BCE had a funding obligation to Teleglobe or the Debtors.

95. Furthermore, the Court rejects as unfounded the Plaintiffs' assertion that this testimony of Turcotte put at issue: (i) whether BCE had concluded that the Debtors were insolvent; (ii) whether BCE understood that it owed, or may owe, fiduciary duties to the Debtors; (iii) whether BCE knowingly breached its

fiduciary duty of loyalty to the Debtors; (iv) whether BCE was under a contractual obligation to continue to fund the Debtors (under Jean Monty's December 12, 2001, announcement, or otherwise); and (v) whether BCE was stopped from denying a commitment to fund, to the extent of the December 12, 2001, announcement or the representations made in letters to Teleglobe's auditors executed by Monty on January 23 and February 27, 2002.

96. On direct examination, Turcotte also testified about her personal belief as to whether BCE would ultimately elect to cease funding Teleglobe. (Hr'g Tr. 40:22-41:5, Dec. 13, 2007.)

97. The Court finds that Turcotte's personal belief on this point is irrelevant to the discovery issues tried at the December hearings.

98. The Court further rejects the Plaintiffs' contention that Turcotte's testimony warrants compelling the production of all privileged communications from or to her bearing on the matter of whether it was likely that BCE would ultimately elect to cease funding Teleglobe.

99. Turcotte also testified that April 8, 2002, was the "first time we felt that the interests of BCE and Teleglobe could diverge." (Hr'g Tr. 39:3-7, 64:22-65:15, Dec. 13, 2007.)

100. The Court finds that this testimony did not raise the substance of any legal advice in order to prove a claim or defense of the Defendants.

101. The Court rejects the Plaintiffs' contention that this testimony warrants the production of all privileged documents and communications relating to whether the interests of BCE, Teleglobe and the Debtors were aligned or not, when BCE recognized the potential for divergence of interest, and BCE's consideration of restructuring alternatives or discontinuance of funding prior to April 8, 2002.

102. On direct examination, Turcotte testified that BCE's April 8, 2002, press release which stated that BCE was reviewing its "strategic alternatives" regarding Teleglobe was issued as a result of the April 5 press release by Moody's downgrading Teleglobe's debt securities. (Hr'g Tr. 37:25-38:16, Dec. 13, 2007.)

103. Turcotte's testimony did not refer to the substance of any legal advice in order to prove a claim or defense of the Defendants.

104. The Court rejects Plaintiffs' contention that Turcotte's testimony put at issue the reasons BCE issued the April 8 press release; the advice of counsel regarding whether and why to issue the press release; the drafts and substance of the press release; communications to or from counsel regarding issuance of the release; and when BCE began to consider ceasing support for Teleglobe and its subsidiaries.

105. At the hearing, Turcotte testified that she was giving legal advice with respect to Project X to BCE and explained generally how that project "came about." (Hr'g Tr. 33:19-34:14, Dec. 13, 2007.)

106. The Plaintiffs contend that there were other motivating factors for Project X, including the prospect of an SBC put, although Turcotte denied that. (Hr'g Tr. 62:7-24, Dec. 13, 2007.)

107. Turcotte admitted that there are memos listed on BCE's privilege log that deal with how Project X came about and what Project X was supposed to accomplish. (Hr'g Tr. 62:25-63:8, Dec. 13, 2007.)

108. The Plaintiffs contend that Turcotte's statements were offered by BCE in order to support its defense to Plaintiffs' fiduciary duty claim, but the Court finds that that claim was not the subject of the December hearings which dealt only with the discovery dispute.

109. The Court rejects the Plaintiffs' contention that Turcotte's statements implicitly place at issue all privileged communications to or from her relating to how Project X arose and what it was to accomplish.

110. Turcotte testified that the disclosures in the Teleglobe Annual Information Form ("AIF") and audit representation letter dated February 27, 2002, were reviewed and amended as a part of Project X, including changing language stating that BCE had committed to fund Teleglobe to language stating that BCE intended to fund Teleglobe. (Hr'g Tr. 103:8-119:6, Dec. 13, 2007.)

111. The Court finds that Turcotte's testimony did not refer to the substance of any legal advice given to BCE.

112. The Court rejects the Plaintiffs' contention that Turcotte's testimony put "at issue" all privileged documents and communications relating to the reasons for these amendments.

113. Turcotte testified that she first learned that Monty had decided to cease funding Teleglobe on April 17, 2002. (Hr'g Tr. 59:11-19, Dec. 13, 2007.)

114. The Court finds that this testimony did not refer to the substance of any legal advice given to BCE.

115. On direct examination, Turcotte testified that the Davies Ward law firm was assigned by her to represent Teleglobe "because of the time that had been left and because of the knowledge that Davies had already on the Teleglobe matters." (Hr'g Tr. 38:21-40:3, Dec. 13, 2007.)

116. In her testimony, Turcotte stated that BCE "w[as] concerned" about Teleglobe's creditors (including banks and bondholders) and Teleglobe's employees and explained that many of these creditors were also creditors of BCE. (Hr'g Tr. 53:17-54:7, 56:4-59:8, Dec. 13, 2007.)

117. The Court finds that this testimony did not refer to the substance of any legal advice given to BCE.

118. The Court finds that none of Turcotte's testimony put at issue the substance of any privileged documents or communications.

119. The Court finds that the Plaintiffs would not be materially disadvantaged if they are denied the opportunity to review the privileged documents relating to Turcotte's testimony.

F. Co-Client Privilege

1. Express Representation

120. There is no contract or other writing establishing an attorney-client relationship between the Debtors and any attorney representing BCE.

a. Single Enterprise

i. Separate Corporate Entities

121. BCE is, and at all relevant times was, a publically held corporation governed by the Canada Business Corporations Act ("CBCA") with its principal place of business in Montreal, Province of Quebec, Canada. (Admitted Facts ¶¶ 2, 3.)

122. Teleglobe was a corporation governed by the CBCA with its principal place of business in Montreal, Province of Quebec, Canada. (Admitted Facts ¶ 1.)

123. Each of the Debtors is a Delaware corporation or limited liability company (except for Teleglobe Puerto Rico, Inc., which is a Puerto Rico corporation) and is either a direct or indirect subsidiary of Teleglobe. (Admitted Facts ¶ 1.)

124. Many subsidiaries of Teleglobe other than the Debtors were involved in building the GlobeSystem, including foreign subsidiaries of Teleglobe governed by foreign law. (Brunette Dep. 119:12-19, 122:20-25, 396:9-397:15; Lalande Dep. 119:7-121:10.)

125. In addition, not all of the Debtors were part of the buildout of the GlobeSystem. (Brunette Dep. 119:12-19, 122:20-25, 396:9-397:15; Lalande Dep. 119:7-121:10.)

126. Debtors Teleglobe Holding Corp., Teleglobe Holdings (U.S.) Corp., and Teleglobe Investment Corp. were non-operational holding companies. (Lalande Dep. 120:11-121:3.)

127. The Debtors were separate legal entities and did not constitute a single enterprise with Teleglobe or with BCE.

ii. Separate Legal Departments

128. After the Acquisition, Teleglobe did not have its own separate in-house legal department in Montreal and its legal work was handled by BCE. (Hr'g Tr. 16:4-19, Dec. 13, 2007; Lalande Dep. 113:21-114:12, 136:3-138:2, 420:3-21.)

129. After the Acquisition, BCE's General Counsel, Michel Lalande, did legal work for Teleglobe on an ad hoc basis in securities compliance, capital markets activities, and to a certain extent mergers and acquisitions. (Hr'g Tr. 17:20-18:8, Dec. 13, 2007; Lalande Dep. 113:21-114:12, 136:3-138:2.)

130. Lalande never gave advice to Teleglobe which related to the operating subsidiaries of Teleglobe (including the Debtors). (Brunette Dep. 78:12-79:5.)

131. During the relevant period in 2001 and 2002, the Debtors had a separate legal department with 12 attorneys located in Reston, Virginia, which was headed by John Brunette, an officer of Teleglobe Communications Corporation and Teleglobe USA Inc. (Hr'g Tr. 34:9-35:4, Dec. 11, 2007; Hr'g Tr. 16:20-17:9, Dec. 13, 2007; Brunette Dep. 8:20-22, 131:17-132:3.)

132. The Debtors' legal department was not responsible for Teleglobe's legal activities, and Brunette did not know what

information Teleglobe provided to BCE. (Brunette Dep. 110:1-7, 270:1-5, 354:22-355:11.)

133. Turcotte did not interact with the Debtors' legal department on a day-to-day basis, nor did the Debtors provide regular reports on the activities of their legal department to Turcotte or BCE. (Hr'g Tr. 73:20-22, 75:5-23, Dec. 11, 2007; Hr'g Tr. 16:20-17:19, Dec. 13, 2007.)

134. BCE did not set the legal budgets for the Debtors. (Hr'g Tr. 73:20-74:1, 75:5-23, Dec. 11, 2007; Hr'g Tr. 16:20-17:19, Dec. 13, 2007.)

135. The Debtors' in-house lawyers had the authority to hire outside counsel on their own, and they regularly did so. For example, in connection with the plan in 2002 to integrate certain operations of Bell Canada and certain of the Debtors, Brunette (without any input from BCE) hired an outside law firm to represent the Debtors in negotiating the agreement with Bell Canada. (Hr'g Tr. 73:20-74:1, 75:5-23, Dec. 11, 2007; Hr'g Tr. 16:20-17:19, Dec. 13, 2007; Brunette Dep. 131:17-132:3; Morgan Dep. 61:7-64:7, 65:17-22, 66:2-68:23; Snyder Dep. 130:24-131:10.)

136. Brunette rendered legal advice to Patrick Pichette, Vice President of Finance and Operations for Debtor Teleglobe Communications Corp. (Hr'g Tr. 76:6-10, Dec. 13, 2007; Brunette Dep. 134:11-135:21, 141:16-142:21.)

137. In Brunette's view, the BCE in-house lawyers were representing BCE, and Brunette advised Pichette not to speak to the BCE lawyers because Brunette wanted communications to go through the lawyers for the respective parties. (Brunette Dep. 134:11-135:21, 141:16-142:21.)

138. Kathleen Morgan, the Plan Administrator for the Debtors, started work as an in-house lawyer for one of the Debtors in Reston, Virginia in 1999. (Hr'g Tr. 32:12-13, 33:7-15, 34:9-35:4, Dec. 11, 2007.)

139. Morgan and other in-house lawyers for the Debtors handled the Debtors' corporate governance matters. (Hr'g Tr. 33:16-34:2, 69:18-70:15, Dec. 11, 2007.)

140. Turcotte never had a solicitor-client relationship with any of the Debtors. (Hr'g Tr. 18:9-19:3, 33:19-24, 37:14-21, Dec. 13, 2007.)

iii. Overlap of Board Members

141. Most of the officers and directors of Teleglobe were not officers, directors, or employees of any of the Debtors. (DX 498; DX 1004; Admitted Facts at ¶¶ 4-22.)

142. The Teleglobe directors who were not officers or directors of any of the Debtors were Jean Monty, Richard Currie, Thomas Kierans, Michael Sabia, Anthony Fell, and Arnold Steinberg. (DX 498; DX 1004; Admitted Facts at ¶¶ 4-22.)

143. The Teleglobe officers who were not officers or directors of any of the Debtors were Jean Monty, Michael Sabia, Stephen Skinner, and Marc Ryan. (DX 498; DX 1004; Admitted Facts at ¶¶ 4-22.)

144. The Debtors' board acted by written resolutions in lieu of board meetings or took action by unanimous written consent. (Hr'g Tr. 72:4-14, Dec. 11, 2007; DX 826; DX 827.)

145. There was no reason to convene board meetings for the Debtors because the board members were the management teams, which met on a regular basis. (Verge Dep. 137:22-138:5; Bouchard Dep. 199:3-200:13; Brunette Dep. 121:6-10, 124:18-125:6, 188:16-189:14.)

146. The board of directors of BCE and Teleglobe did not act as a de facto board for the Debtors.

3. Implied Joint Representation

a. Public Filings

147. Because it had issued public debt, Teleglobe was a reporting issuer under the securities laws of Canada and the United States. (Hr'g Tr. 15:6-13, Dec. 13, 2007.)

148. As the ultimate parent company, BCE was subject to control liability for disclosures made by Teleglobe. (Hr'g Tr. 16:4-19, Dec. 13, 2007; Lalande Dep. 420:16-21.)

149. As a result, to assure Teleglobe's filings were accurate and consistent with BCE's disclosures, BCE drafted the disclosures and provided them to Teleglobe for review and comment. (Hr'g Tr. 16:4-19, Dec. 13, 2007; Lalande Dep. 420:16-21.)

150. The Debtors were not required to report because they were not public companies and had no public debt. (Hr'g Tr. 15:14-16, Dec. 13, 2007.)

151. In Brunette's view, Teleglobe's public filings were not the responsibility of the Debtors or their lawyers. (Brunette Dep. 9:7-10:6.)

152. Morgan's involvement in the Teleglobe public filings was simply "fact checking" to ensure that they were accurate. (Hr'g Tr. 39:8-23, Dec. 11, 2007.)

b. Separate Advisers

153. It was BCE's intention to have separate advisers for BCE apart from the advisers for Teleglobe, once BCE began to consider whether to cease funding Teleglobe. (Hr'g Tr. 38:21-39:19, Dec. 13, 2007.)

154. On April 8, 2002, Jones Day was retained to represent Teleglobe and the Debtors. (Hr'g Tr. 39:3-19, Dec. 13, 2007.)

i. Davies Ward

155. Before April 8, 2002, Davies Ward represented only BCE. (Hr'g Tr. 39:13-19, Dec. 13, 2007; Turcotte Dep. 486:10-487:10; Lalande Dep. 379:17-382:5.)

156. On April 8, 2002, BCE decided that Davies Ward should represent Teleglobe because of its knowledge of Teleglobe's business. (Hr'g Tr. 39:3-40:3, Dec. 13, 2007.)

157. Davies Ward ceased its representation of Teleglobe on April 17, 2001, only 9 days after being engaged, so that it could continue to represent BCE on other matters. (Hr'g Tr. 54:6-9, Dec. 11, 2007.)

158. Teleglobe then engaged other Canadian counsel, Ogilvy Renault. (Hr'g Tr. 54:10-16, Dec. 11, 2007.)

159. While it was representing Teleglobe, Davies Ward continued to advise BCE with respect to the SBC put and BCE's overall corporate organization and capital structure, including whether writeoffs of BCE's investment in Teleglobe would have an effect on BCE's credit facilities. (Turcotte Dep. 71:4-72:11; Priv. Doc. Tabs 10, 27, 153.)

ii. Shearman and Stikeman

160. BCE engaged its own separate counsel, Shearman & Sterling ("Shearman") and Stikeman Elliott ("Stikeman"), to provide legal advice solely to BCE. (Hr'g Tr. 41:6-16, 137:2-4, Dec. 13, 2007; Hr'g Tr. 138:20-139:20, Dec. 14, 2007.)

161. At all times, both Shearman and Stikeman represented only BCE; neither firm acted as counsel for Teleglobe or any of the Debtors. (Hr'g Tr. 41:6-16, 137:2-4, Dec. 13, 2007; Hr'g Tr. 138:20-139:20, Dec. 14, 2007.)

162. All invoices for legal services rendered by Shearman were sent to BCE. (Hr'g Tr. 138:20-139:20, Dec. 14, 2007.)

163. During the course of Shearman's representation of BCE in 2002, the only requests for legal advice came from BCE and specifically from Turcotte. (Hr'g Tr. 159:17-160:7, 167:9-18, Dec. 14, 2007.)

164. The Debtors' general counsel, Brunette, considered Stikeman and Shearman to be lawyers for BCE. (Brunette Dep. 320:21-322:1.)

165. As part of Shearman's representation of BCE, Shapiro reviewed draft public filings of BCE and Teleglobe, but all comments he made were provided only to BCE. (Hr'g Tr. 145:16-146:19, 153:14-154:21, 155:14-23, Dec. 14, 2007; Priv. Doc. Tab 26.)

166. In providing such comments, Shearman was acting as counsel for BCE, not Teleglobe. (Hr'g Tr. 145:16-146:19, 153:14-154:21, 155:14-23, Dec. 14, 2007; Priv. Doc. Tab 26.)

167. Shearman also provided legal advice to BCE on a number of issues relating to a possible bankruptcy filing by Teleglobe. (Hr'g Tr. 138:20-139:24, Dec. 14, 2007.)

168. One of the issues on which Shapiro advised BCE was the possible actions that Teleglobe might take in a bankruptcy. Even though this advice related to Teleglobe, it was provided to BCE as the parent of a subsidiary that was potentially entering an insolvency proceeding. (Hr'g Tr. 139:21-140:8, Dec. 14, 2007.)

169. During the course of his representation of BCE, Shapiro occasionally communicated with representatives of Teleglobe about how the Teleglobe insolvency proceedings would be structured (given the complex cross-border issues involved) and how the DIP financing would be provided by BCE. (Hr'g Tr. 140:9-142:9, 167:9-169:16, Dec. 14, 2007.)

170. The purpose of the communications with Teleglobe representatives was to be able to advise BCE as to the possible legal and financial outcomes. (Hr'g Tr. 140:9-142:9, 167:9-169:16, Dec. 14, 2007.)

171. Teleglobe representatives did not participate in any discussions between BCE and Shearman in which legal advice was given to BCE concerning the consequences of a potential Teleglobe bankruptcy, such as BCE's role during that bankruptcy, the provision of DIP financing by BCE, or the potential legal liabilities that BCE could face as a result of a Teleglobe bankruptcy. (Hr'g Tr. 166:12-167:18, 167:24-169:16, Dec. 14, 2007.)

172. Shearman prepared a memorandum dated April 3, 2002, and a bullet-point version of the memorandum for BCE, which was a slightly modified version of a standard memorandum on the bankruptcy process. (Hr'g Tr. 144:15-145:15, 146:20-147:8, Dec. 14, 2007; Priv. Doc. Tabs 12, 47, 58, 198, 199.)

173. Although the memorandum was addressed "to Teleglobe," it was sent only to BCE and not to Teleglobe and was prepared to explain to BCE what might occur in a potential Teleglobe bankruptcy. (Hr'g Tr. 144:15-145:15, 146:20-147:8, Dec. 14, 2007; Priv. Doc. Tabs 12, 47, 58, 198, 199.)

174. In order to advise BCE properly and comprehensively, BCE's counsel had to analyze the courses of action available to Teleglobe, what it was likely to do in response to actions by BCE, and how its actions might affect BCE. (Hr'g Tr. 139:21-140:8, Dec. 14, 2007.)

175. After the decision to cease funding Teleglobe, Shapiro negotiated the DIP financing of the Debtors on behalf of BCE. (Hr'g Tr. 141:17-142:9, Dec. 14, 2007.)

176. At no time was Shapiro acting as counsel for Teleglobe or the Debtors. (Hr'g Tr. 139:8-16, 139:25-140:1, Dec. 14, 2007.)

iii. Lazard and Ernst & Young

177. Monty decided that an investment banker should be retained to assist Teleglobe and asked Turcotte for advice on how best to do so; Turcotte recommended that Lazard be engaged by Teleglobe. (Monty Dep. 298:1-18.)

178. Turcotte negotiated the engagement letter between Lazard and Teleglobe. (Hr'g Tr. 37:4-13, Dec. 13, 2007; Turcotte Dep. 444:24-445:10, 455:23-456:10.)

179. Brunette and Jones Day were sent copies of the draft engagement letter with Lazard for review. (Turcotte Dep. 456:15-457:6.)

180. Although Turcotte drafted the Lazard engagement letter, it was executed by Pichette in his capacity as an officer of the Debtors. (Hr'g Tr. 37:4-13, Dec. 13, 2007; PX 537 at LZR 002657.)

181. BCE also determined that Teleglobe needed a financial adviser and selected Ernst and Young ("E&Y") for it. (Hr'g Tr. 81:23-85:18, Dec. 13, 2007; PX 549.)

182. Turcotte's role with respect to the E&Y engagement was even more ministerial, and that letter was executed by Davies Ward as counsel for Teleglobe and the Debtors. (Hr'g Tr. 81:23-87:24, Dec. 13, 2007; PX 1201 at BCE-AD 04026249.)

183. The letters reflect the Debtors and/or Teleglobe as the client; not BCE. (PX 537; PX 1201.)

184. BCE typically negotiated retention letters for its subsidiaries to ensure that no unfavorable precedents for BCE or other BCE-affiliated companies were established in the process. (Hr'g Tr. 37:4-13, Dec. 13, 2007.)

185. The engagement letters permitted the Debtors and/or Teleglobe to disclose the advisors' work product to BCE, but BCE could not demand disclosure. (PX 537 at 7; PX 1201 at App. 1 ¶ 12.)

186. Brunette and Pichette were the primary contacts for Lazard's engagement. (Brunette Dep. 158:14-159:5, 159:13-163:9, 166:23-169:7, 174:9-25, 318:23-319:7; Morgan Dep. 87:4-20, 90:12-91:20.)

187. Before April 24, 2002, Brunette (and to some extent, Morgan) participated in numerous discussions and meetings with Lazard, some of which BCE attended. (Brunette Dep. 158:9-159:5, 159:13-163:9, 166:23-169:7, 174:9-25, 318:23-319:7; Morgan Dep. 87:4-20, 90:12-91:20.)

188. According to Brunette, Lazard considered "[a]nything that you could imagine, liquidation, reorganization, restructuring, merger, sale, . . . equity investment, securing debt, I think every form of transaction was probably discussed at one level or another." (Brunette Dep. 159:3-5.)

189. Brunette also discussed with Lazard in April 2002 which third parties might be interested in doing a transaction with Teleglobe and potential sources of funding. (Brunette Dep. 166:23-170:2.)

190. Shapiro testified that Lazard was not involved in calls or meetings where legal advice was given to BCE. (Hr'g Tr. 166:12-167:8, Dec. 14, 2007.)

c. Project X

191. Project X was an undertaking begun in February 2002 by BCE to identify a viable business plan for Teleglobe so that BCE could make an informed business decision relating to its continued funding of Teleglobe. (Hr'g Tr. 33:4-35:6, Dec. 13, 2007.)

192. Turcotte testified that BCE intended to exclude Teleglobe (and the Debtors) from any legal advice given to BCE with respect to Project X, as evidenced by the retention of separate advisers for Teleglobe and BCE regarding Project X. (Hr'g Tr. 134:21-135:5, 140:12-141:2, Dec. 13, 2007.)

193. Turcotte further testified that BCE did not share Project X documents prepared for the BCE board with the Debtors. (Hr'g Tr. 140:12-141:2, Dec. 13, 2007.)

194. Although the Debtors may have been the subject of some Project X communications drafted by Turcotte, Turcotte testified that at no time did she act as legal counsel to the Debtors. (Hr'g Tr. 15:17-17:24, 18:9-12, 18:17-19:3, 33:19-24, 37:14-18, 140:12-140:20, Dec. 13, 2007.)

195. During the period April 9 to 23, 2002, Morgan, as a lawyer for the Debtors, attended meetings and participated in telephone calls during which a number of subjects related to Project X were discussed. (PX 935 at RES052694, RES052697-98, RES052702-05, RES052711-12, RES052714.)

196. These meetings were after Jones Day was hired to represent Teleglobe and the Debtors. (Hr'g Tr. 38:21-39:10, Dec. 13, 2007.)

197. In connection with Project X, there were general discussions among representatives of BCE, Teleglobe and the Debtors relating to the bankruptcy process, such as financing during bankruptcy, as well as cross-jurisdictional issues that would have to be resolved. (Hr'g Tr. 166:12-167:18, 167:24-169:16, Dec. 14, 2007.)

198. Brunette directed Pichette "not to speak with BCE lawyers" and "not to disclose confidential information" to them because he felt that BCE's interests were different from the Debtors. (Brunette Dep. 141:16-142:21.)

199. Turcotte was representing BCE, not Teleglobe or any of the Debtors, with respect to Project X. (Hr'g Tr. 33:19-24, 37:14-21, Dec. 13, 2007.)

200. As part of Project X, BCE held internal meetings with its lawyers and executives to discuss legal issues relating to how Teleglobe's situation might affect BCE. (Hr'g Tr. 134:4-135:5, Dec. 13, 2007.)

201. The materials discussed at the internal meetings were not given to Teleglobe or its lawyers, as many of them related to the potential consequences to BCE of certain options, as well as the potential legal exposure that BCE might face if it decided to cease funding of Teleglobe. (Hr'g Tr. 134:4-135:5, Dec. 13, 2007.)

202. In connection with Project X, Turcotte asked BCE's lawyers at Shearman and Stikeman to prepare legal memoranda assessing BCE's potential legal exposure. (Hr'g Tr. 43:17-21, Dec. 13, 2007.)

203. Those legal memoranda are covered by the attorney-client privilege and constitute attorney work product because they were prepared in the context and in contemplation of litigation. (Hr'g Tr. 43:4-44:15, Dec. 13, 2007.)

204. The memoranda prepared by BCE's counsel were never shared with Teleglobe, the Debtors, or any of their advisors. (Hr'g Tr. 44:5-15, Dec. 13, 2007.)

205. BCE's legal interests as articulated in those memoranda were not aligned with those of Teleglobe or the Debtors because they were prepared to evaluate BCE's legal exposure in the event it decided to cease funding Teleglobe. (Hr'g Tr. 43:4-44:15, Dec. 13, 2007.)

206. The Special Master referred to a presentation entitled "Preliminary Legal Review Process" made by Turcotte to Monty on April 12, 2002. (PX 1235 at 33-34; Priv. Doc. Tabs 29, 33, 157.)

207. The April 12 presentation was for the purpose of rendering legal advice to BCE and was not shared with Teleglobe, the Debtors, or any of their lawyers. (Hr'g Tr. 138:18-140:4, 141:16-18, 143:8-20, Dec. 13, 2007; Priv. Doc. Tabs 29, 33, 157.)

208. The page cited by the Special Master does not provide a basis for concluding that the document was intended as advice to Teleglobe rather than BCE. (Hr'g Tr. 138:18-140:4, 141:16-18, 143:8-20, Dec. 13, 2007; Priv. Doc. Tabs 29, 33, 157.)

209. Turcotte also prepared a presentation for the BCE board meeting to be held on April 23, 2002. (Hr'g Tr. 140:5-141:9, 141:16-18, Dec. 13, 2007; Priv. Doc. Tabs 13, 15, 31, 49, 57.)

210. That presentation was for the BCE board alone and was not addressed to or sent to Teleglobe, the Debtors, their lawyers, or their boards of directors. (Hr'g Tr. 140:5-141:9, 141:16-18, Dec. 13, 2007; Priv. Doc. Tabs 13, 15, 31, 49, 57.)

211. The interests of BCE with respect to the board presentation were different from those of Teleglobe and the Debtors, because the document discussed the possible legal consequences to BCE in the event the BCE board decided to discontinue funding of Teleglobe. (Hr'g Tr. 140:5-141:9, 141:16-18, Dec. 13, 2007; Priv. Doc. Tabs 13, 15, 31, 49, 57.)

212. The Special Master found that Lalande had reviewed and assisted in drafting the April 23 presentation to the BCE board entitled "Teleglobe Legal Review" and that this draft presentation included a section entitled "Risks and Exposure - Teleglobe Director Requirements." (PX 1235 at 33; Priv. Doc. Tabs 13, 15, 31, 49, 57.)

213. The 3 page section of the 52-page draft entitled "Risks and Exposure - Teleglobe Director Requirements" does not reflect the substance of duties of directors of Teleglobe or the Debtors, but relates to BCE's potential indemnity obligations and insurance. (Priv. Doc. Tabs 13, 15, 31, 49, 57.)

214. The remainder of the draft of the April 23 presentation contains advice to BCE, not Teleglobe or the Debtors. (Priv. Doc. Tabs 13, 15, 31, 49, 57.)

215. At the April 23, 2002, BCE board meeting, Turcotte gave the presentation to the BCE board relating to the consequences and risks to BCE of a decision to cease funding Teleglobe. (Hr'g Tr. 140:5-141:9, Dec. 13, 2007.)

216. At that board meeting, BCE decided to cease funding Teleglobe. (PX 45 at 126803-04.)

F. Garner Exception to Attorney-Client Privilege

1. Market Conditions at Time BCE Acquired Teleglobe

217. At the time BCE signed the agreement to purchase the remainder of Teleglobe's stock on February 15, 2000, the telecommunications industry was at the peak of its market value.

(Admitted Facts ¶ 25; PX 1288 at 43; Hr'g Tr. 63:2-5, Dec. 12, 2007.)

218. By the time BCE's acquisition of Teleglobe closed in November 2000, telecom company valuations had declined dramatically and continued to do so thereafter. (Admitted Facts ¶ 30; Hr'g Tr. 63:6-16, Dec. 12, 2007; PX 490 at 13, 30-32, 43.)

219. Although its advisors warned BCE in late 2000 that the telecom industry was having problems and that Teleglobe's value was declining, BCE closed the Acquisition and continued to be optimistic about Teleglobe's business plans. (PX 221 at 5, 8; PX 1288 at 13-14.)

220. As a result of the adverse market developments, at least ten telecom companies filed for bankruptcy in the year after BCE acquired Teleglobe. (Hr'g Tr. 72:19-73:17, Dec. 12, 2007; PX 490 at 15-17.)

221. After the Acquisition, the banks extended Teleglobe's \$1.25 billion credit facility in July 2001 for another year. While BCE refused to guarantee or "commit" it would continue to fund Teleglobe, BCE told the banks and analysts at that time that it intended to continue to support Teleglobe and the building of the GlobeSystem. (PX 188; Hr'g Tr. 81:16-84:9, Dec. 12, 2007; PX 490 at 34.)

222. By the fall of 2001, BCE's original \$1 billion funding commitment to Teleglobe had almost expired; Turcotte confirmed that BCE had funded all of its original commitment by December 6, 2001. (Hr'g Tr. 10:7-10, Dec. 13, 2007.)

223. On October 24, 2001, the BCE Board approved a resolution authorizing BCE to provide additional financial assistance up to \$75 million to Teleglobe or its subsidiaries. (Admitted Facts ¶ 34.)

224. At that time several investment bankers hired by BCE opined that Teleglobe had no equity and advised that they were unable to raise money for it in the private equity market. (PX 1127 at 9, 14, 15; PX 1129 at 10-13; PX 490 at 35, 63.)

225. Nonetheless, on November 28, 2001, the BCE board approved a resolution authorizing BCE to provide additional financial assistance to Teleglobe or its subsidiaries up to \$850 million. (Admitted Facts ¶ 35; PX 1271 at 531-32; Monty Dep. 204:10-18, 205:22-208:6.)

226. The funding authorized by the November board resolution was to be provided to Teleglobe at the discretion of Monty, the CEO of both BCE and Teleglobe. (PX 1271 at 532; Monty Dep. 204:10-18, 205:22-208:6.)

227. Monty testified that additional BCE funding was conditioned on "the possibility of getting back [BCE's] money with a proper return." (Monty Dep. 204:10-18, 205:22-208:6, 297:18-25.)

228. Boychuk, the Chief Financial Officer of Teleglobe and Treasurer of BCE, stated that BCE's commitment to Teleglobe was "based on Teleglobe meeting its financial plan and on . . . generating an appropriate return" for BCE. (Boychuk Dep. 214:19-24.)

229. Between November 2001 and April 2002, BCE actually provided approximately \$300 million to Teleglobe. (Hr'g Tr. 10:19-11:8, Dec. 13, 2007; DX 1022; DX 1027.)

230. In addition, in January 2002 BCE approved Teleglobe's use of BCE's name and trademark and anticipated agreeing to further accommodations to permit Teleglobe's bank facility to be renewed in July 2002. (Hr'g Tr. 47:7-24, 66:18-67:10, Dec. 11, 2007; Hr'g Tr. 49:15-50:17, Dec. 13, 2007.)

2. When Debtors Became Insolvent

231. Insolvency occurs when a company has "1) a deficiency of assets below liabilities with no reasonable prospect that the business can be successfully continued in the face thereof, or 2) an inability to meet maturing obligations as they fall due in the ordinary course of business." Teleglobe, 493 F.3d at 384 (quoting Production Resources Group, LLC v. NCT Group, Inc., 863 A.2d 772, 782 (Del. Ch. 2004)).

a. Defendants' Expert

232. The Defendants' expert, Joshua Livnat, was not a solvency expert. (Hr'g Tr. 146:23-151:1, 164:21-165:10, Dec. 13, 2007.)

233. Livnat did not do a solvency analysis of Teleglobe or the Debtors, but instead critiqued the analysis of the Plaintiff's expert. (Hr'g Tr. 157:16-158:11, 171:25-172:24, 177:5-11, 184:2-185:2, Dec. 13, 2007.)

234. Rather than apply the standard solvency tests (the cash flow and balance sheet tests), Livnat applied his own test: did the Debtors actually pay their debts as they came due and was there a

virtual certainty that the Debtors would be unable to pay their debts in the future. (Hr'g Tr. 151:7-10, 157:24-158:11, 173:15-174:23, Dec. 13, 2007.)

235. The Court rejects the "virtual certainty" test as being contrary to the standard articulated by the Third Circuit in this case. Teleglobe, 493 F.3d at 384.

b. Plaintiffs' Solvency Expert

236. The Plaintiffs' solvency expert, Paul Charnetzki, testified that he applied the standard cash flow and balance sheet tests to conclude that Teleglobe and a majority of the Debtors were insolvent between November 2001 and April 2002. (Hr'g Tr. 53:25-54:18, 119:21-121:7, Dec. 12, 2007; PX 490 at 4-5, 43-49.)

237. Charnetzki's conclusion was based largely on the fact that the original \$1 billion commitment by BCE to fund Teleglobe had been exhausted by the end of November 2001 and BCE's funding thereafter was not legally binding. (Hr'g Tr. 106:16-109:4, 127:9-13, Dec. 12, 2007.)

i. Balance Sheet Test

238. Charnetzki testified that he applied the balance sheet test to evaluate Teleglobe's solvency, which compares the fair market value of Teleglobe's assets to its liabilities. (Hr'g Tr. 139:19-23, Dec. 12, 2007.)

239. Charnetzki did not perform the valuation analysis himself; instead he relied on some contemporaneous asset valuations of Teleglobe done by investment bankers. (Hr'g Tr. 135:2-136:6, Dec. 12, 2007; PX 490 at 47.)

240. Charnetzki did not include all contemporaneous valuations done of Teleglobe in his analysis unless he concluded that reliance on those valuations was reasonable. (Hr'g Tr. 136:1-138:2, Dec. 12, 2007; PX 1292 at 2-3; DX 1006; Vanaselja Dep. 221:3-14; PX 1129 at 12-13; PX 1086 at 4; PX 221 at 12, 14.)

241. Charnetzki determined that using contemporaneous investment banker valuations of Teleglobe would be conservative (and favorable to the Defendants) for purposes of conducting the balance sheet test, "because they in effect assumed that GlobeSystem [would] become operational [and accordingly] they overvalue Teleglobe." (Hr'g Tr. 138:13-19, Dec. 12, 2007; PX 490 at App. VIII.)

242. In Charnetzki's opinion, the investment bankers' valuations would not change if BCE's November 2001 \$850 million "intention" to fund was included, because the valuations already assumed that all necessary funding would be provided. (Hr'g Tr. 138:20-139:3, Dec. 12, 2007; PX 490 at 5, 47-48, App. VIII at 1.)

243. Charnetzki did not apply the balance sheet test to the individual Debtors because there were no contemporaneous third party assessments of the fair market value of the Debtors' assets. (Hr'g Tr. 148:8-15, Dec. 12, 2007.)

244. Charnetzki grouped the investment banker valuations of Teleglobe that he used by quarter and averaged their conclusions. (Hr'g Tr. 136:12-18, Dec. 12, 2007; PX 490 at App. VIII.)

245. Based on those valuations, Charnetzki determined that the fair market value of Teleglobe's assets was \$2.09 billion at September 2001 and \$2.013 billion at December 2001. (Hr'g Tr. 139:10-140:20, Dec. 12, 2007; PX 490 at 4-5, 47, App. VIII.)

246. Subtracting Teleglobe's net debt (total debt less cash), Charnetzki concluded that Teleglobe had equity of -\$1.023 billion at September 2001 and -\$565 million at December 2001. (PX 490 at App. VIII.)

247. Thus, Charnetzki concluded that Teleglobe was insolvent under the balance sheet test beginning in September 2001 and continuing into 2002. (Hr'g Tr. 139:19-140:22, Dec. 12, 2007; PX 490 at 4-5, 47, App. VIII.)

248. Charnetzki's assumptions could not be tested, however, because none of the investment bankers were called to testify about the methods they used or the information they relied upon in arriving at their opinions of value.

249. The investment bankers used a variety of methodologies and did not have all the internal detail regarding Teleglobe's business plans and performance. (Vanaselja Dep. 244:5-25.)

250. The Court finds that Charnetzki did not do a balance sheet test himself and his testimony based on what others concluded was the value of Teleglobe is not credible.

251. In addition, Charnetzki improperly applied the balance sheet test by ignoring the support BCE was providing to Teleglobe. (Hr'g Tr. 108:5-15, 182:25-183:13, Dec. 12, 2007; PX 490 at 48.)

252. When a parent company funds a subsidiary, that assistance should be considered in analyzing the value of the subsidiary. (Hr'g Tr. 159:18-160:5, 160:10-17, Dec. 13, 2007.)

253. Charnetzki acknowledged that, under the "likelihood of success" standard for application of the balance sheet test, solvency hinged upon the likelihood that BCE would continue funding. (Hr'g Tr. 182:7-24, Dec. 12, 2007.)

254. In evaluating the Debtors' prospects of continuing in business, Charnetzki relied on contemporaneous industry reports reflecting troubled times for the data and telecommunications businesses rather than the positive outlooks expressed contemporaneously by Teleglobe and BCE. (Hr'g Tr. 160:24-161:18, Dec. 12, 2007; PX 221 at 1-9.)

255. The balance sheet test is not a good measure of insolvency of a start-up company because it ignores important non-balance sheet factors such as support from shareholders or the market when calculating a company's value.

ii. Cash Flow Test

256. The cash flow test used by Charnetzki "evaluates the resources you have, and compares those to the liabilities you have over the next year, and sees if you will have sufficient cash to meet them." (Hr'g Tr. 121:11-13, Dec. 12, 2007.)

257. In evaluating Teleglobe's solvency under the cash flow test, Charnetzki considered cash, the entire principal balance of the bank loans, bank overdrafts, current maturities of long term debt, the June 2000 BCE commitment, and capital expenditure commitments. (Hr'g Tr. 122:19-124:15, Dec. 12, 2007; PX 490 at 45-46, App. VII.)

258. Considering all of this information and applying the cash flow test, Charnetzki concluded that Teleglobe and the Debtors had substantial projected deficits at all relevant dates: approximately \$1.55 billion on September 30, 2001; \$1.66 billion on December 31, 2001; \$2.02 billion on March 31, 2002; and \$1.63 billion on April 30, 2002. (Hr'g Tr. 128:3-131:8, Dec. 12, 2007; PX 490 at 45-46, App. VII.)

259. Charnetzki's cash flow test did not consider the \$850 million in funding for Teleglobe authorized by BCE's board of directors on November 28, 2001, because it was not a binding contractual obligation. Charnetzki even failed to consider the approximately \$300 million of that commitment BCE actually spent

on Teleglobe and the Debtors between November 2001 and April 2002. (Hr'g Tr. 108:5-109:4, 127:9-127:13, Dec. 12, 2007; Hr'g Tr. 10:19-11:8, Dec. 13, 2007; DX 1022; DX 1027.)

260. Charnetzki's failure to consider the \$850 million in funding authorized by BCE was improper.

261. It is common for parent companies to support their subsidiaries without a binding agreement to do so. (Hr'g Tr. 153:18-154:14, 155:14-157:15, Dec. 13, 2007.)

262. Charnetzki included the entire balance of the \$1.275 billion credit facility which was due in the summer of 2002 as a debt because he believed the facility would not be extended for another year. (Hr'g Tr. 122:13-123:8, Dec. 12, 2007; PX 490 at 45-46, App. VII at 1.)

263. There is no evidence that Teleglobe was not paying the bank loan as it came due between November 2001 and April 2002. (Hr'g Tr. 151:7-14, Dec. 13, 2007.)

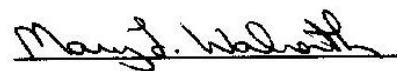
264. Charnetzki's conclusion that the banks would not agree to extend Teleglobe's loan when it matured in July 2002, because there was no legally binding commitment of BCE's support, is not persuasive. (Hr'g Tr. 119:6-20, 122:23-123:8, Dec. 12, 2007; Hr'g Tr. 158:15-23, Dec. 13, 2007.)

265. In July 2001 the banks had agreed to extend Teleglobe's financing even though the original BCE funding was almost fully expended and BCE did not agree to a further legally binding commitment but merely stated its intention to continue to fund Teleglobe. (Hr'g Tr. 8:17-22, Dec. 13, 2007; DX 194.)

266. Consequently, the Court finds that Teleglobe and the Debtors did not become insolvent until April 23, 2002, when BCE decided that it would cease funding Teleglobe, because at that point the Debtors did not have sufficient assets to pay all their obligations nor did they have a reasonable prospect to generate sufficient cash flow to pay their debts. (Hr'g Tr. 151:2-152:3, Dec. 13, 2007.)

Dated: August 7, 2008

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge