SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
--X
NEW MEDIA HOLDING COMPANY, LLC,

Plaintiff,

-against- Index No. 603742/09

KONSTANTIN KAGALOVSKY, IOTA LP, ASPIDA VENTURES LTD. and SERAGILL HOLDINGS LTD.,

Defendants,
and

KONSTANTIN KAGALOVSKY and IOTA LP,

Defendants-Counterclaim Plaintiffs,

-against-

VLADIMIR GUSINSKI AND NEW MEDIA DISTRIBUTION COMPANY LTD.,

Counterclaim Defendants.

--X

NEW MEDIA DISTRIBUTION COMPANY LTD.,

Plaintiff,

-against- Index No. 650754/09

VENTURES, LLP, IOTA LP, and KONSTANTIN KAGALOVSKY,

Defendants.
--X

Hon. Charles Edward Ramos, J.S.C.

FINDINGS OF FACT

1. Vladimir Gusinski and Konstantin Kagalovsky, two former friends, each a remarkable and successful businessman, agreed to form a partnership to create and operate a television network in Ukraine, the to be known as the TVi Channel.

2. The plaintiff New Media Holding (New Media), is Mr. Gusinski's nominee to a partnership, Iota Ventures LP (the "Partnership,"), that in turn, owned TVi. New Media filed suit alleging that Mr. Kagalovsky and his nominee to the Partnership, Iota LP ("Iota") breached contractual and fiduciary obligations by transferring, without Mr. Gusinski's and New Media's knowledge or consent, ownership of TVi and its trademarks from the Partnership to entities owned and controlled by Mr. Kagalovsky. New Media refers to this throughout as the theft of TVi. New Media originally sought the return of TVi and its trademarks, but following this Court's decision on summary judgment to strike that requested relief from the Complaint, the plaintiff is only pursuing monetary damages.

3. Separately, New Media Distribution Company Ltd., (NMDC), which licensed programming content to the Partnership, filed suit alleging that the Partnership owed $3,681,870 in unpaid license fees due under license agreements dated January 1, January 14, and April 10, 2009 (the "License Agreements"). NMDC seeks payment of those fees, plus interest, in damages.

4. In response, Mr. Kagalovsky, Iota, and the Partnership filed counterclaims alleging that Mr. Gusinski, New Media, and NMDC mismanaged TVi in breach of fiduciary and contractual obligations, and fraudulently induced the formation of the Partnership and the execution of the License Agreements. Each seeks rescission of the agreements that they are a party to, and monetary damages.

5. These actions were consolidated for discovery and for trial. Trial took place over 24 days from December 7, 2011 to April 26, 2012. Thirteen witnesses testified, including Mr. Gusinski and Mr. Kagalovsky. The parties also submitted designated deposition transcripts for 10 individuals, moved over 250 exhibits into evidence, and supplied expert reports.

6. Mr. Gusinski currently owns 85 percent of NMDC through New Media, a Delaware limited liability company.

7. NMDC is a producer of Russian language media and owns a large Russian language media library.

8. NMDC has another investor: In August 2008, AIG Investments ("AIG") acquired 13.5 percent of NMDC through AIG GEM Viaduct Media Holdings, L.P. AIG has the right to appoint two directors on NMDC's Board of Directors, and veto rights over related-party transactions.

9. Mr. Gusinski is a Russian national currently residing in Israel. He serves as NMDC's Chairman and CEO, and as New Media's Manager.

10. Mr. Kagalovsky is a Russian and British national currently residing in London, United Kingdom since 2004.

11. Before he moved to London, Mr. Kagalovsky enjoyed a career in government service and private business in Russia. In 1991, Mr. Kagalovsky served as President Boris Yeltsin's personal envoy to British Prime Minister John Major, who was the Chairman of the G7 Group at the time, to discuss how to support the Russian Democracy. Also in 1991, President Yeltsin appointed

Mr. Kagalovsky to the position of Russia's Plenipotentiary Representative on cooperation with international financial organizations. In 1992, Mr. Kagalovsky was appointed to be Russia's representative on the Board of the International Monetary Fund.

12. In 1994, Mr. Kagalovsky left civil service and joined the Board of Menetep Bank, where he worked closely with Mikhail Khodorkovsky for the next nine years. Mr. Kagalovsky also became a Deputy Chairman and member of Yukos, the leading Russian privately-owned oil company at the time. In 2004, after a failed bid for parliament, Mr. Kagalovsky left Russia and moved to London.

13. Mr. Kagalovsky, who in 1987 earned a Ph.D. in Economics from the leading economic academic institution in the country at the time, the U.S.S.R.'s Academy of Science also has been actively involved in establishing, funding, and leading a number of institutes for economic research and study in Russia. In 1989, Mr. Kagalovsky established the International Center for Economic Research of Economic Reforms, a joint venture with the UK Institute of Economic Affairs and Mr. Kagalovsky's alma mater. Mr. Kagalovsky served as the Director General of this Center. Mr. Kagalovsky also established and financed the Institute for Contemporary Economic Research. Additionally, Mr. Kagalovsky has served as the President of the Institute of Open Economy.

14. Mr. Kagalovsky owns and controls defendants Iota, Aspida Ventures Ltd. ("Aspida"), and Seragill Holdings Ltd.

("Seragill"). He does so through various trusts that he settled and of which he is a beneficiary.

15. Formally, the Iota Trust owns Iota, the Beta Trust owns Aspida, and the Highgate Trust owns Seragill. Mr. Kagalovsky is the settlor and a beneficiary of the Iota, Beta, and Highgate Trusts. There are no other beneficiaries in these trusts besides Mr. Kagalovsky and his family.

16. Mr. Kagalovsky has complete and unfettered control over Iota, Aspida, and Seragill, through the trusts. According to the trust document for the Iota Trust, as Settlor, Mr. Kagalovsky is entitled to give the Trustee written directions with respect to the investment and management of the Trust Fund, including any Entity the shares, interests, or other securities of which are held in the Trust Fund. The trust instrument provides that this power "shall be exercisable in the absolute and uncontrolled discretion of the Settlor" and further states that "[t]he Trustee shall comply" with the Settlor's instructions. Mr. Kagalovsky also has the power to request that the Trustee and Protector issue income and capital from the trust remove and replace the Trustee or Protector for any reason, including if they do not comply with his instructions and amend any of the terms of the trust instrument at any time.

17. Nearly identical provisions exist in the trust documents for the Beta and Highgate trusts.

18. Mr. Kagalovsky's many trusts and business entities are managed by Capita Fiduciary Group Ltd. ("Capita"), a trust

services company located on the Isle of Jersey.

19. Grant Brown, an accountant who is the Head of Private Clients at Capita is responsible for Capita's client relationship with Mr. Kagalovsky.

20. In early 2007, Mr. Gusinski decided to create a television channel in Ukraine. He believed that the Ukrainian television market was promising.

21. Mr. Gusinski shared his plans for a Ukrainian television channel with Mr. Kagalovsky, whom Mr. Gusinski had known socially for years. Mr. Kagalovsky expressed an interest and a desire to become involved. Over the next several months, the two discussed the project.

22. In late 2007 and continuing in 2008, Mr. Gusinski and Mr. Kagalovsky had a series of meetings in Mr. Gusinski's offices in New York City and in London in which they negotiated the formation of their Partnership and came to several agreements about the Partnership.

23. Their meetings culminated in the formation of the Partnership and the execution of a Partnership Agreement on April 14, 2008. The purpose of this Partnership and the Partnership Agreement was to develop, own, and operate a Ukrainian television network, later named TVi. Mr. Gusinski and Mr. Kagalovsky would own and control TVi equally.

24. The partners understood that it would take several years after TVi began broadcasting before the network would break even financially.

25. Mr. Kagalovsky took primary responsibility for "the financial oversight and the establishment of the holding structure" for the television network. This included organizing the legal and financial structure of the Partnership.

26. Mr. Kagalovsky used Capita to help set up and administer the various corporate entities needed to hold TVi. Upon instructions from Mr. Kagalovsky, Mr. Brown and Mr. Kagalovsky's attorney, Alexis Maitland Hudson, worked together to establish an ownership structure for TVi.

27. After the initial entity was formed to own what would become TVi, Mr. Kagalovsky and his advisors decided that TVi should be held in a partnership entity rather than a corporation. Mr. Gusinski agreed to this arrangement. That entity, IOTA Ventures LLC, was converted into Iota Ventures LP early in 2008.

28. The Partnership held TVi through a series of intermediate subsidiary companies organized in Ukraine and Cyprus. Specifically, the ownership structure was as Mr. Kagalovsky approved in January 2008. The Partnership owned 100 percent of Winslow Enterprises Ltd. ("Winslow"), a Cyprus entity, and 0.1 percent of International Media Technologies LLC ("IMT"), a Ukrainian entity; Winslow owned the remaining 99.9 percent of IMT, and 99 percent of International Media Company LLC ("IMC"), a Ukrainian entity; IMT owned the remaining 1 percent of IMC, and IMC owned 100 percent of Teleradiocompany TeleRadioSvit LLC ("TRS"), a Ukrainian entity. TRS operated as TVi.

29. On April 14, 2008, New Media, Mr. Gusinski's nominee, acquired a 50 percent interest in the Partnership. Mr. Kagalovsky's initial nominee to the Partnership, Petal Capital Holdings Ltd. ("Petal") owned the other 50 percent interest in the Partnership. Mr. Kagalovsky later replaced Petal with Iota LP, his current nominee to the Partnership. As a result, through the equal ownership interests in the Partnership of their respective nominees New Media (Mr. Gusinski), and Iota (Mr. Kagalovsky), Mr. Kagalovsky and Mr. Gusinski owned and controlled the entirety of TVi.

30. Mr. Kagalovsky is the settlor and the beneficiary of the trusts that own Petal.

31. On April 14, 2008, contemporaneous with the New Media's acquisition of a 50 percent interest in the Partnership, Mr. Kagalovsky and Mr. Gusinski entered into an Amended and Restated Partnership Agreement of Iota Ventures LLP (the "Partnership Agreement") through their respective nominees.

32. The Partnership Agreement was to be governed by and construed in accordance with the internal law, and not the law of conflicts, of the State of New York. Nonetheless, the Partnership Agreement provided that "[e]xcept as otherwise provided herein, all rights, liabilities and obligations of the Partners, both as between themselves and as to persons not parties to this Agreement, shall be as provided in the [Delaware Revised Uniform Partnership Act]."

33. Under the Partnership Agreement, Mr. Brown was named the Manager of the Partnership. Mr. Brown was selected by Mr. Kagalovsky for that role.

34. Mr. Brown had never spoken with Mr. Gusinski before, and other than the Partnership, neither he nor Capita handled any accounts for Mr. Gusinski. Nonetheless, Mr. Brown understood that he had a duty to be honest to both partners of the Partnership.

35. While Mr. Brown was the nominal Manager of the Partnership, the partners retained joint management and decision-making authority as they had agreed to during their negotiations. Before he executed any contract on the Partnership's behalf, Mr. Brown made sure that the partners had agreed to its terms.

36. The Partnership Agreement provided that the management of the Partnership was vested solely in the Manager "[e]xcept as reserved to the Partners pursuant to the [Delaware Revised Uniform Partnership Act.]" Among other things, the Delaware Revised Uniform Partnership Act provided that (I) "[e]ach partner has equal rights in the management and conduct of the partnership business and affairs"; (ii) "[a] difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners"; and (iii) "[a]n act outside the ordinary course of business of a partnership may be undertaken only with the consent of all of the partners." (Del. Code Ann. tit. 6, § 15-401(f), (j).)

37. The Partnership Agreement also provided that "[u]nless otherwise specifically provided in this Agreement (or as required by the [Delaware Revised Uniform Partnership Act]), any action requiring the approval of the Partners shall be deemed approved if approved by the affirmative vote of the Partners holding Interests constituting at least a majority interest (50.1%) (a 'Majority Vote')." Because of the fact that each partner had an equal 50 percent share in the Partnership, this provision effectively required the consent of both partners.

38. The Partnership Agreement did not contain any mandatory funding provisions.

39. The Partnership Agreement contained an integration clause: "This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith."

40. In April 2008, after being asked twice by Mr. Kagalovsky to take the job, Andrei Dementiev, a young Russian economist, started working as TVi's financial comptroller. He was paid as a consultant to the Partnership.

41. This Court finds that Mr. Dementiev served as Mr. Kagalovsky's representative at TVi. Mr. Kagalovsky told Mr. Brown that Mr. Dementiev's involvement in TVi ensured that Mr. Kagalovsky maintained control over the financial and legal

aspects of the Partnership, particularly in Ukraine.

42. Mr. Kagalovsky instructed Mr. Dementiev to perform work in connection with TVi "[a]ccording to old friendships." The two have been working together since meeting in June 2003. Mr. Dementiev interviewed with and was supervised by Mr. Kagalovsky at the Institute of Open Economy in Moscow. When Mr. Kagalovsky created and agreed to finance the Institute for Contemporary Economic Research, Mr. Dementiev followed, becoming the head of the Department of Network Economics. He has also consulted on at least five other projects in which Mr. Kagalovsky is involved, and explores ideas with Mr. Kagalovsky about potential future projects. This work is a significant portion of Mr. Dementiev's income: Consulting income was a majority of Mr. Dementiev's income from at least 2010 onwards, and from 2005-2010, over 50 percent of Mr. Dementiev's consulting income had been from projects associated with Mr. Kagalovsky. Mr. Dementiev's nickname for Mr. Kagalovsky was "chief".

43. Mr. Dementiev also held himself out to others as Mr. Kagalovsky's representative to the Partnership. In financial documents that he helped prepare, Mr. Dementiev is listed as the IOTA/Kagalovsky Representative.

44. In light of the above, this Court finds that Mr. Dementiev was not credible when he denied that he was Mr. Kagalovsky's representative to the Partnership and that he held himself out to others as Mr. Kagalovsky's representative.

45. Initially, Mr. Gusinski and Mr. Kagalovsky agreed that the Chief Executive Officer of TVi, Mykola Knyazhitsky, would be responsible for establishing the operations of the channel.

46. By August 2008 it had become apparent to both partners that Mr. Knyazhitsky was not capably performing his responsibilities of creating and developing the broadcasting infrastructure. Mr. Gusinski thus proposed to Mr. Kagalovsky that they offer Yevgeny Yakovich, the former head of NTV Plus, the opportunity to serve both as Executive Director of TVi, with duties like those of a Chief Operating Officer, and that he would also act as Mr. Gusinski's representative to the Partnership. Mr. Kagalovsky agreed to Mr. Gusinski's proposal to hire Mr. Yakovich.

47. Like Mr. Dementiev, Mr. Yakovich was hired as a consultant to the Partnership. Mr. Yakovich was paid through an entity called Rimatara. The parties understood that Mr. Yakovich was Mr. Gusinski's and New Media's representative to the Partnership and that Mr. Dementiev was Mr. Kagalovsky's representative to the Partnership.

48. In the beginning of November 2008, Mr. Yakovich moved to Kiev to assume his new position. Mr. Yakovich was responsible for the day-to-day operations of the channel, overseeing most of the channel's organizational and administrative tasks. He took over most of Mr. Knyazhitsky's

responsibilities at this time, and Mr. Knyazhitsky — who, in title, remained TVi's CEO — was re-assigned to the job of trying to acquire free-to-air rebroadcasting rights from regional Ukrainian television distributors.

49. At the direction of Mr. Gusinski and Mr. Kagalovsky, Mr. Knyazhitsky issued Mr. Yakovich a power of attorney so that Mr. Yakovich could execute documents and otherwise act on behalf of TVi.

50. Mr. Kagalovsky and his representative, Mr. Dementiev, were primarily responsible for managing TVi's finances at the beginning of the Partnership. Nonetheless, all significant financial decisions — including decisions concerning the budget for the channel, the acquisition of programming, and advertising — were made jointly by the partners. Mr. Dementiev prepared a monthly budget and then submitted it to Mr. Kagalovsky and Mr. Gusinski for their approval. In 2009, after Mr. Yakovich was hired, Mr. Dementiev and Mr. Yakovich worked together, as representatives of the two partners, to create monthly and quarterly integrated budgets for the Partnership and TVi and payment schedules, which subsequently were approved by Mr. Kagalovsky and Mr. Gusinski.

51. Each month, Mr. Dementiev would prepare a list of payments that TVi would have to make. Mr. Yakovich reviewed that list, and discussed it with Mr. Dementiev. Mr. Dementiev and Mr. Yakovich would then submit the list to Mr. Kagalovsky and Mr.

Gusinski, respectively, for joint approval.

52. After giving their approval of the monthly budget, Mr. Kagalovsky and Mr. Gusinski funded the Partnership. Mr. Dementiev would then submit the final payment instructions as agreed to by the partners to the Partnership's manager, Mr. Brown. Mr. Brown would make payments in accordance with these instructions and report back confirming the payments that he made.

53. Partnership funding generally arrived monthly: Once funding arrived from a partner in any given month, no additional funds were expected from that partner until at least one month later. Formally, the Partnership sent the partners "loan requests," but these requests were "predetermined" as the partners told the Partnership how much to ask for.

54. While the partners provided funding in the form of loans, these were effectively capital contributions.

55. On January 14 and 23, 2008, respectively, Mr. Gusinski and Mr. Kagalovsky began financing TVi, contributing $500,000 each. In 2008, they contributed approximately $7,750,000 each to the Partnership.

56. From January to September 2009, Mr. Gusinski contributed another $4,300,000 to the Partnership: $700,000 in January; $250,000 in February; $1,000,000 in March; $500,000 in April; $500,000 in May; $500,000 in June; and $850,000 in

September.

57. From January to September 2009, Mr. Kagalovsky contributed another $3,750,000 to the Partnership: $700,000 in January; $250,000 in February; $500,000 in April; $500,000 on June 3; $500,000 on June 28; $650,000 in July; and $650,000 in August.

58. Ultimately Mr. Gusinski contributed $12.05 million to the Partnership. (Gusinski Aff. ¶ 10.) Mr. Kagalovsky contributed slightly less, approximately $11.59 million.

59. TVi began broadcasting over Ukrainian airwaves in March 2008.

60. TVi did not yet have its own broadcasting facilities, so the Partnership retained the services of a company affiliated with Mr. Gusinski – Overseas Media, Inc. ("Overseas Media") – to compose and integrate TVi's programming content from its New York City facilities, and then transmit the programming to TVi in Ukraine via satellite.

61. Initially, TVi was distributed solely by cable and satellite. But in late 2008, through the collective efforts of Mr. Knyazhitsky, Mr. Kagalovsky and Mr. Gusinski, TVi signed several rebroadcasting agreements for free-to-air distribution of TVi in large cities in Ukraine (cities of over one million in population). "Free-to-air" refers to the type of television broadcast that can be received by anyone with an antennae; it is broader than cable distribution, which requires each receiving household to be wired for cable.

62. As there were no available free-to-air licenses available in Ukraine at the time, free-to-air rebroadcasting agreements allowed networks like TVi to obtain free-to-air distribution without purchasing a license directly from the government of Ukraine.

63. Signing rebroadcasting agreements in major cities, as TVi was doing, was an accepted method of building a nationwide free-to-air network.

64. By the summer of 2009, although still a start-up company, TVi had progressed, with its audience share increasing. From June 2008 to January 2009, TVi's market share had increased from 0.05 percent to 0.8 percent. In the summer of 2009, TVi was the 14th-ranked broadcaster in Ukraine, up from 47th in the fall of 2008.

65. Mr. Kagalovsky understood from the start that the Partnership would be licensing content from NMDC.

66. Mr. Gusinski and Mr. Kagalovsky agreed that the availability of rights to substantial content owned and produced by NMDC would provide a major competitive advantage to a new channel in the Ukrainian market. Mr. Gusinski credibly testified at trial that under ordinary circumstances, NMDC would not sell to small networks like TVi at market prices because NMDC preferred that its content be aired on larger networks. Defendants' own expert confirmed that smaller networks with limited coverage would not be able to obtain such popular programming because programming distributors "would want to get

as much coverage as possible."

67. In 2009, NMDC and the Partnership executed the License Agreements. These agreements were dated January 1, January 14, and April 10, 2009, respectively.

68. Under the January 1, 2009 License Agreement, NMDC agreed to license 365 episodes of non-exclusive programming for pay television broadcast on TVi for $547,500 payable in three installments: (I) $54,750 upon execution; (ii) $219,000 due on June 1, 2009; and (iii) $273,750 due on December 31, 2009. Under this agreement, TVi could broadcast the licensed programs over wired cable, but not over free-to-air channels.

69. Under the January 14, 2009 License Agreement, NMDC agreed to license 36 episodes of programming for non-exclusive pay television and exclusive free-to-air broadcast on TVi for $216,000 payable in two installments: (I) $21,600 due on January 31, 2009; and (ii) $194,400 due on August 1, 2009. This was the first license agreement to grant TVi the more valuable rights for exclusive, free-to-air broadcasting, which Mr. Kagalovsky and Mr. Gusinski agreed was necessary to realize their goal of growing TVi. The per-episode price of the programming in this agreement is higher than the one executed on January 1.

70. Under the April 10, 2009 License Agreement, NMDC agreed to license 276 episodes of exclusive programming and 12 episodes of non-exclusive programming for pay television and free-to-air broadcast on TVi. The Partnership agreed to pay NMDC $3,743,400 in five installments of $748,680, which were due on

(I) May 25, 2009; (ii) September 30, 2009; (iii) December 31, 2009; (iv) March 31, 2010; and (v) June 30, 2010.

71. Under the April 10, 2009 License Agreement, the price per episode was $15,300 for premier programming, and $8,000 for repeat programming. While the license agreement did not list the per-episode price, Mr. Kagalovsky admitted that he had knowledge of these prices before the agreement was executed.

72. NMDC delivered all the programs licensed under the January 1 and 14 License Agreements. Of the 24 series licensed under the April 10, 2009 License Agreement, NMDC delivered all but one series. NMDC failed to deliver the series Investigative Mysteries 8.

73. By the spring of 2009, Mr. Kagalovsky and Mr. Gusinski began to have serious disagreements over TVi's operations. It became apparent that they needed a resolution mechanism in the Partnership Agreement to resolve their disputes, but all attempts failed.

74. In the summer of 2009, Mr. Kagalovsky invited Mr. Knyazhitsky to Mr. Kagalovsky's home in the French Riviera to discuss TVi. Mr. Kagalovsky admitted that he and Mr. Knyazhitsky agreed that if Mr. Gusinski refused to step down from TVi's management voluntarily, Mr. Kagalovsky would oust Mr. Gusinski from TVi using "the traditional Russian and Ukrainian method" — diluting Mr. Gusinski's interest in TVi.

75. Subsequently, at Mr. Kagalovsky's instruction, Mr.

Maitland Hudson began preparing a corporate reorganization under which ownership of TVi would be transferred to the Beta Trust, a trust that Mr. Kagalovsky established for his own benefit.

76. Mr. Brown and his colleagues at Capita — Caroline Whittingham and Cherleen O'Connell — were involved in discussions concerning the structure of the transfer of ownership of TVi to Mr. Kagalovsky's trusts.

77. Additionally, on September 23, 2009, Ms. Whittingham circulated an "Iota Re-Structure Chart as at 22 September 2009" that was "based on [Mr. Maitland Hudson's] conversations with Grant [Brown]" to Mr. Maitland Hudson, Mr. Brown, Ms. O'Connell, and Mr. Kagalovsky's tax advisors, Mary Ryan and Simon Jennings. The chart reflected a structure under which the Beta Trust would own 100 percent of TVi — and the Partnership (and, by extension, New Media) would be left without any direct or indirect interest in the network.

78. Separately, on August 25, 2009, Mr. Knyazhitsky contacted Mr. Brown and requested that Mr. Brown execute a power of attorney on the Partnership's behalf. Mr. Brown discussed and confirmed Mr. Knyazhitsky's request with Mr. Kagalovsky on a telephone call later that day.

79. The resulting power of attorney to Mr. Knyazhitsky, dated September 1, 2009, and executed by Mr. Brown, gave Mr. Knyazhitsky the power to effect the dilution: It

authorized Mr. Knyazhitsky to issue shares in the Partnership's subsidiaries IMT, IMC, and TRS.

80. Mr. Brown confirmed the issuance of this power of attorney to Mr. Kagalovsky but did not discuss this subject with Mr. Gusinski or New Media.

81. The actions of Mr. Maitland Hudson, Mr. Brown, Ms. Whittingham, and Ms. O'Connell are all imputable to Iota and Mr. Kagalovsky. Throughout this time, they had responsibilities in connection with Iota: Mr. Maitland Hudson was counsel to Mr. Kagalovsky and a number of Mr. Kagalovsky's entities including Iota, Mr. Brown was a director of Iota's general partner entity and a director of the trustee of the Iota Trust, and Ms. Whittingham and Ms. O'Connell assisted Mr. Brown in Iota's administration.

82. The defendants successfully concealed the plan and their actions from New Media and Mr. Gusinski.

83. On August 17, 2009, New Media received assurances from Mr. Kagalovsky's initial nominee Petal that it was "very pleased with the way that the two companies have been able to collaborate in the TVi project in the Ukraine" and that "New Media has been able to sell a large variety of TV series to that station and up to this point Petal has been happy with those aspects." Two days later, a substantively identical letter arrived from Mr. Kagalovsky's current nominee Iota.

84. Mr. Kagalovsky requested and authorized the sending of the letters from Petal and Iota. Mr. Kagalovsky also discussed the draft of the letters with Mr. Maitland Hudson before they were sent.

85. This Court finds that the letters were an attempt by Mr. Kagalovsky and Iota to mislead Mr. Gusinski and New Media. They were sent at approximately the same time that Mr. Kagalovsky and Mr. Knyazhitsky agreed at Mr. Kagalovsky's home in the French Riviera to dilute the ownership, in an apparent effort to lull Mr. Gusinski and New Media into believing that the parties remained at peace.

86. Mr. Kagalovsky conceded at trial that the letters were inaccurate: He admitted that at that time, he and Iota were not happy with the large variety of TV series that NMDC had supplied to TVi. Despite knowing that the letters were inaccurate, Mr. Kagalovsky never told Mr. Maitland Hudson that he needed to correct the text of the letters, nor did he reprimand Mr. Maitland Hudson for making false statements in the letters. This Court finds that the letters were part of a preconceived plan to keep any suspicions of New Media and Mr. Gusinski at bay while Defendants carried out their plan to consolidate their control over the network.

87. Mr. Kagalovsky's conflicting explanation that these letters were intended to "mention[] the conflict of interest created by [Mr. Gusinski's] ownership of NMDC and ask[]

for a detailed explanation of how that conflict of interest was policed to avoid detriment to our joint project" was not credible. While the August 17 and 19 letters mentioned that New Media's relationship with NMDC "may give rise to concerns about possible conflicts of interest," the only action requested was that Mr. Maitland Hudson be sent a copy of TVi's programming schedule for 2010 in September.

88. This Court finds that Mr. Kagalovsky agreed – in a meeting with Mr. Gusinski on September 6, 2009 – that the parties would refrain from any aggressive actions towards each other and meet again in mid-October.

89. With no reason to believe that Defendants were engaged in a scheme to dilute his interest in the network, on September 25, Mr. Gusinski contributed another $850,000 to the Partnership. This Court finds that the funds never would have been contributed had Mr. Gusinski or New Media known the truth.

90. In a series of corporate transactions that began on or about September 22, 2009, and that were completed by September 24, 2009, the Partnership's ownership interest in TVi was reduced to less than one percent through the dilution of its interests in IMC and TRS.

91. As a result of these transactions, Aspida and Seragill today own the remaining 99 percent of TVi.

92. Aspida and Seragill are companies owned by trusts of which Mr. Kagalovsky was the beneficiary – the Beta Trust and

the Highgate Trust.

93. Neither Mr. Gusinski nor New Media were informed of any plans to reorganize TVi's ownership or to issue shares in the Partnership's subsidiaries. Neither Mr. Gusinski nor New Media were informed about the plan to transfer ownership of the network to Mr. Kagalovsky's trusts.

94. Mr. Kagalovsky funded the transactions by which TVi was transferred away from the Partnership from his own personal bank accounts. This Court finds that Mr. Kagalovsky's cost to "acquire" the equity of TVi was less than $68,000.

95. By the time Mr. Gusinski contributed his additional $850,000 in funding to the Partnership on September 25, 2009, the dilution of his interest had already occurred, and the Partnership owned less than one percent of TVi. Mr. Gusinski was unaware that when he contributed $850,000, TVi had been transferred to Mr. Kagalovsky's trusts.

96. Mr. Kagalovsky knew that the Partnership's ownership interest in TVi was being transferred from the Partnership when Mr. Gusinski was making this contribution to the Partnership. Nonetheless, Mr. Kagalovsky did not tell Mr. Gusinski about the dilution.

97. Contemporaneous with Mr. Kagalovsky's dilution of the Partnership's ownership interest in TVi and without prior notice or consent, the Partnership stopped paying NMDC license fees due under the License Agreements.

98. By September 2009, the Partnership had made only

the first payments due to NMDC under each of the License Agreements; payments of $219,000 due on June 1, 2009 under the January 1, 2009 License Agreement, and $194,400 due on August 1, 2009 under the January 14, 2009 License Agreement were long overdue. A payment of $748,680 also was to become due on September 30, 2009 under the April 10, 2009 License Agreement, but NMDC was willing to forgo collection of that amount in September 2009 provided that it received payment that month of the other overdue fees.

99. Mr. Gusinski and Mr. Yakovich credibly testified that the payments of $219,000 and $194,400 were to be made to NMDC from the funding that the partners agreed to provide to the Partnership in September 2009. Mr. Dementiev admitted that Mr. Yakovich "desired that the payments be made when the funding arrived from NMDC at the end of September." Mr. Dementiev also admitted that "[w]hen it came time to make payments, Mr. Yakovich ultimately decided which line items in the monthly budget would be paid or not paid depending on the level of financing available at the time."

100. Documents confirm that the Partnership was to make payments to NMDC when funding arrived in September 2009.

101. On September 24, 2009, the same day that Mr. Kagalovsky seized ownership of over 99 percent of TVi, Mr. Dementiev – Mr. Kagalovsky's representative to the Partnership – instructed Mr. Brown and his Capita colleagues not to make any payments to NMDC when Mr. Gusinski's funding arrived that month.

102. The next day, on September 25, 2009, at around 11 a.m. Jersey time, Mr. Kagalovsky, Mr. Brown, and Mr. Dementiev received confirmation that Mr. Gusinski had contributed $850,000 to the Partnership, and the Partnership had used those funds to make the payments as Mr. Dementiev directed, with no funds used to pay NMDC's outstanding fees.

103. It was not until six hours later — around 5 p.m. Jersey time (7 p.m. Kiev time) that Mr. Brown sent Mr. Yakovich a list of the payments that were made. Before then, no one informed Mr. Yakovich or Mr. Gusinski about Mr. Dementiev's payment instructions, the payments that were made, or the decision not to pay NMDC.

104. Upon receiving the list of payments, Mr. Yakovich objected immediately. Mr. Yakovich first tried to contact Mr. Dementiev about the discrepancies in Mr. Brown's payment list, but Mr. Dementiev did not return his telephone calls. Mr. Yakovich then sent Mr. Brown an email requesting that Mr. Brown stop all payments because the payment list did not match the one approved by the partners. Finally, Mr. Yakovich emailed Mr. Kagalovsky to tell Mr. Kagalovsky that Mr. Brown's list of payments did not match the approved list, and that he had been trying unsuccessfully to reach Mr. Dementiev and Mr. Brown about the situation.

105. On September 26, 2009, Mr. Kagalovsky responded to Mr. Yakovich's email by asking Mr. Yakovich to identify the payments that were improperly made or withheld. Mr. Yakovich

responded later that day with such a list, which identified the two missing payments to NMDC totaling $413,400 as among those improperly withheld.

106. Mr. Yakovich never received any further response from Mr. Kagalovsky, nor was he able to get in touch with Mr. Brown or Mr. Dementiev.

107. Mr. Kagalovsky, Mr. Brown, and Mr. Dementiev were in contact with each other throughout September 26 concerning Mr. Yakovich's objections to the payments made a day earlier.

108. Mr. Brown finally responded to Mr. Yakovich five days later on September 30, 2009 by informing Mr. Yakovich that he had confirmed the payments with Mr. Dementiev, and that he would leave it to Mr. Dementiev to provide further details. This Court was not surprised to find that Mr. Yakovich never heard from Mr. Dementiev or Mr. Brown again.

109. A few minutes before 11 a.m. on September 30, 2009, Mr. Yakovich was ousted from TVi. Mr. Knyazhitsky informed Mr. Yakovich that (I) he had revoked Mr. Yakovich's power of attorney, which left Mr. Yakovich with no authority to act on TVi's behalf; (ii) he had revoked Mr. Yakovich's security clearance at TVi's offices in Kiev, thus barring Mr. Yakovich's access to the building; and (iii) Mr. Yakovich should report to an off-site apartment that Mr. Knyazhitsky owned, several miles from TVi's offices, where Mr. Yakovich was to work alone, separated from TVi and the personnel whom Mr. Yakovich was responsible for managing.

110. Mr. Yakovich was not given any advance warning of any of these changes. Mr. Knyazhitsky refused to discuss whether these changes were being made at the direction of Mr. Kagalovsky and Mr. Gusinski.

111. Mr. Yakovich tried to contact both Mr. Kagalovsky and Mr. Gusinski but was unable to reach Mr. Kagalovsky. Mr. Gusinski was surprised and upset by Mr. Yakovich's news and told Mr. Yakovich that the changes in Mr. Yakovich's status at TVi had been made without Mr. Gusinski's knowledge or consent.

112. The next day, on October 1, 2009, Mr. Gusinski's and New Media's outside counsel, Mr. Berezin, wrote to Mr. Brown to request that steps be taken to redress Mr. Yakovich's ouster, including by convening an immediate telephone meeting with the partners to initiate Mr. Knyazhitsky's termination.

113. Mr. Berezin sent a copy of this letter to Mr. Maitland Hudson by email, requesting his assistance, as counsel to Iota and Mr. Kagalovsky, in arranging an urgent telephone conference to discuss Mr. Yakovich's abrupt termination and what to do going forward.

114. Mr. Berezin's requests to arrange a call among the partners and Mr. Brown were ignored. Mr. Berezin subsequently demanded, among other things, that Mr. Yakovich be restored to his position at TVi, but these requests were ignored as well.

115. Mr. Yakovich was never again able to return to TVi or to resume his responsibilities. Since the revocation of Mr. Yakovich's power of attorney, Mr. Knyazhitsky has been managing

TVi.

116. Since Mr. Yakovich's ouster, Mr. Gusinski and New Media have been deprived to access such information regarding TVi and the Partnership.

117. On October 1, 2009, NMDC demanded payment of all license fees that were due at the time — $1,162,080 in total — or to stop broadcasting the licensed NMDC content.

118. TVi continued to broadcast NMDC content that the Partnership did not pay for.

119. On October 12, 2009, Mr. Brown informed NMDC that the Partnership would not be making the $748,680 fee due to NMDC on September 30, 2009 under the April 10, 2009 License Agreement.

120. Mr. Kagalovsky, Iota, and their representatives received confirmation that Mr. Kagalovsky was the new owner of TVi no later than September 30 and October 1, 2009 — contemporaneous with Mr. Yakovich's ouster.

121. On September 30, 2009, Mr. Knyazhitsky confirmed the dilution to Mr. Dementiev in Kiev. That same day or the next day, Mr. Dementiev spoke with Mr. Kagalovsky about the dilution. In November 2009, after speaking with Mr. Kagalovsky but not Mr. Gusinski, Mr. Dementiev began working for Seragill in connection with TVi, doing similar work to the work he did for the Partnership.

122. After Mr. Knyazhitsky told him about the dilution, Mr. Dementiev advised Mr. Brown and Mr. Kagalovsky on September

30, 2009 that contracts with Myrmidon, Overseas Media, and Rimatara — the company through which Mr. Yakovich was paid — "can be considered as economically inefficient [sic] form the business perspectives and have to be stopped the sooner the better." For the Rimatara contract, Mr. Dementiev advised that "there is a need to look at the contract and obey all the procedural requirements implied by the contract to cancel it from September 30", the day of Mr. Yakovich's abrupt ouster.

123. On October 1, 2009, Mr. Brown's colleagues at Capita expressed concern that New Media should be notified of the requested contract terminations because "some of these are key contracts (production and transmission of station) and you don't want to be exposed." Mr. Brown advised them to keep quiet: "Sensitive on NM [New Media] at the moment so wouldn't inform them. I think we prepare everything and then we discuss with Andrei [Dementiev] and Amh [Alexis Maitland Hudson]." Mr. Brown then advised his colleagues at Capita that he was meeting Mr. Kagalovsky for lunch later that day.

124. That afternoon, Mr. Maitland Hudson joined Mr. Brown and Mr. Kagalovsky for lunch in Mr. Kagalovsky's home in London. At this meeting, Mr. Kagalovsky told Mr. Brown and Mr. Maitland Hudson that a controlling interest in TVi had been transferred outside of the Partnership.

125. Specifically, Mr. Kagalovsky told Mr. Brown that "we have taken a controlling interest."

126. Mr. Kagalovsky told Mr. Brown that he would not be

telling Mr. Gusinski about the dilution and transfer of interest.

127. At the time, Mr. Brown was a director of Iota's general partner entity, a director of the trustee of the Iota Trust, and the Manager of the Partnership. Mr. Maitland Hudson was also serving in multiple capacities: He attended the October 1, 2009 meeting to provide advice to Mr. Kagalovsky's entities – Iota Trust, Iota LP, and Iota GP Ltd. – as well as the Partnership.

128. When Mr. Brown returned from lunch, he told his colleagues at Capita about his conversation with Mr. Kagalovsky, and discussed the actions that had to take place as a result. Paul Hucker – a colleague of Mr. Brown's who was also a director of Iota's general partner at the time – was surprised to hear that TVi had been transferred outside of the Partnership. According to Mr. Hucker, what had occurred was not something that could be effected under Jersey law without the agreement of the interested party.

129. Mr. Brown understood that Mr. Gusinski did not yet know about the dilution, thought that Mr. Gusinski had a right to know about the dilution and even asked Mr. Kagalovsky at lunch whether or not Mr. Gusinski knew about the dilution.

130. Nevertheless, no one from Capita informed Mr. Gusinski or New Media about the dilution or Mr. Brown's lunch meeting with Mr. Kagalovsky.

131. On October 8, 2009, Mr. Kagalovsky sent Mr. Maitland Hudson documents that confirmed the dilution and TVi's

new ownership structure, which Mr. Maitland Hudson then forwarded to Mr. Brown.

132. On October 8 and 9, 2009, Mr. Brown received additional records confirming the dilution, including documents concerning the corporate directors of the entities involved in the dilution.

133. Mr. Brown did not inform New Media about any of the documents he received on October 8 and 9, 2009 confirming the dilution and the identity of TVi's new owners.

134. On October 14, 2009, Mr. Brown executed an assignment deed that transferred trademark rights associated with TVi from the Partnership to TRS, which was now 99 percent owned by Mr. Kagalovsky's trusts. Mr. Kagalovsky was aware of this assignment of trademark rights, having been kept informed of discussions on the topic.

135. However, neither Mr. Brown nor anyone else informed New Media about the assignment of trademark rights to TRS. The trademarks were assigned without New Media's knowledge or consent notwithstanding its letter to Mr. Brown, dated October 1, 2009, directing that "any action by [Mr. Brown] as the Company's Manager, including, but not limited to, any payments by the Company, be taken subject to a preliminary written approval by NMDC."

136. This Court finds that Mr. Brown's testimony that the Partnership agreed to assign the trademark rights to TRS on September 30, 2009 — before the receipt of New Media's letter

demanding that all actions be subject to its prior written approval — was not credible. Not only is the assignment deed bearing Mr. Brown's signature dated October 14, 2009, but Mr. Brown, Mr. Dementiev, Mr. Maitland Hudson, and Mr. Brown's colleagues at Capita exchanged correspondence through October 15, 2009 concerning the prospective transfer of the trademark rights associated with TVi from the Partnership to TRS.

137. Mr. Brown, Mr. Dementiev, Mr. Maitland Hudson, and Mr. Brown's colleagues at Capita all knew that Mr. Kagalovsky had taken ownership and control of TVi before the Partnership assigned the trademark rights to TRS.

138. Mr. Dementiev's testimony to the effect that the trademark rights were not assigned to TRS in order to complete Mr. Kagalovsky's transfer of the equity of TVi, was not credible. On October 6, 2009, five days after Mr. Kagalovsky confirmed over lunch that he had taken control of TVi, Mr. Brown wrote to Mr. Maitland Hudson to ask about the remaining steps: "The one issue that is outstanding on Iota Ventures is the transfer of the trademarks for TBi from Iota Ventures LLP to TeleradioSVIT." Mr. Brown, who knew that Mr. Kagalovsky had taken TVi when he sent this email to Mr. Maitland Hudson wanted to know: "[a]re we compromising the position by arranging this transfer of trademarks?" Mr. Maitland Hudson replied later that day: "I don't think so, as they are useless without the company and therefore of no commercial value."

139. Additionally, in separate correspondence, Mr.

Dementiev also confirmed that the trademark assignment was necessary because, after the dilution, TRS needed to have the right to use the trademark when TVi was broadcasting.

140. Finally, this Court finds that Mr. Brown would have transferred the trademarks regardless of what the Partnership received in return. While Mr. Brown believed that the trademark rights had value, he admitted at trial that the amount of consideration that the Partnership received had no bearing on his decision to execute the trademark assignment deed.

141. Throughout October and November 2009, the Defendants repeatedly and intentionally misled Mr. Gusinski into believing that the Partnership still owned 100 percent of TVi.

142. In a letter to Mr. Gusinski's and New Media's New York counsel dated October 16, 2009, Mr. Kagalovsky's and Iota's counsel Mr. Maitland Hudson wrote that "IVL has a single potential asset . . . namely its indirect shareholding in TRS, which runs the TVi TV station in the Ukraine", and described the partners as "equal participant[s]" in the "TVi business". When Mr. Maitland Hudson wrote the letter, he was aware that the Partnership's ownership interest in TVi had been diluted to less than one percent, but omitted this fact from his letter.

143. Mr. Maitland Hudson made similarly misleading representations to NMDC about two weeks earlier. In an email sent around 6:17 p.m. on October 1, 2009 to NMDC's counsel, Mr. Maitland Hudson warned that the "failure to provide the content needed to maintain the broadcasts of programs in the Ukraine

would cause irreparable damage to the major investment of Iota Ventures LLP." Neither Mr. Maitland Hudson nor Mr. Brown, who also received the email, mentioned that in a lunch meeting earlier that day, Mr. Kagalovsky had confirmed that over 99 percent of the ownership interests in TVi now belonged to his trusts; the Partnership's ownership interest in its "major investment" had been reduced to less than one percent.

144. Additionally, on November 12, 2009, Iota filed suit against New Media and Mr. Gusinski in federal court in New York, and continued to claim in its complaint that the partnership owned TVi.

145. Notwithstanding the fact that he knew that neither New Media nor Mr. Gusinski were aware of the dilution of the Partnership's ownership interest in TVi, Mr. Brown continued to request that Mr. Gusinski and New Media provide additional funding for TVi operations. Before doing so, Mr. Brown checked with Mr. Kagalovsky and Mr. Maitland Hudson to see whether it was appropriate that he request funding. On October 6, 2009, Mr. Maitland Hudson told Mr. Brown that he "d[id] not see any reason not to call for payment from the partners, if only to see the reaction from NMDC."

146. On November 11, 2009, Mr. Brown asked Mr. Gusinski and New Media to provide $250,000 in funding, which would be "fully secured on all Iota Ventures LLP assets[.]" Mr. Brown did not disclose to New Media or Mr. Gusinski that the Partnership's ownership interest in TRS had been reduced to less than one

percent. Six days later, on November 17, 2009, Mr. Brown sent Mr. Gusinski and New Media an email requesting that Mr. Gusinski and New Media contribute an additional $2.1 million to cover various operational expenses of TVi through January 20, 2010. These TVi expenses included rent, transportation, telecommunications, dubbing, advertiser expenses, employee salaries, and expenses associated with regional coverage. Mr. Dementiev prepared this list of expenses at Mr. Brown's request so that Mr. Brown could justify his funding request to Mr. Gusinski and New Media.

147. Mr. Brown knew that these funding requests were materially false and misleading when he sent them. At trial, Mr. Brown conceded that the TVi expenses were "fantasy." And when Mr. Brown was requesting these funds from Mr. Gusinski and New Media, Mr. Brown was helping Mr. Kagalovsky transfer money from his personal accounts to Aspida in order to fund TVi.

148. In late November, Mr. Gusinski's representatives discovered that Mr. Kagalovsky and Iota had nearly completely diluted the Partnership's ownership interest in the corporate subsidiaries that owned TVi.

149. Mr. Berezin immediately wrote Mr. Brown on November 24, 2009 to demand an explanation of how the Partnership had been stripped of its core asset, as well as to demand that Mr. Brown take action to ensure that the Partnership continued to be the full legal beneficial owner of TRS and TVi.

150. The next day, in response, Mr. Brown denied all

knowledge of the transfer of TRS shares outside the Partnership, writing "I was not aware of the transfer of the shares of TeleradioSvit." This could not have been truthful. Mr. Brown was well aware of the transfer of the TRS shares outside of the Partnership at the time. To further the deception, Mr. Brown again asked for funding from New Media for TVi's operations.

151. Mr. Berezin replied to Mr. Brown later that day, writing that he was "appalled at this development", and that "[t]he Ukrainian business embodied in TRS is the core and the only business of [the Partnership]". Mr. Berezin demanded that Mr. Brown "contact immediately [the Partnership's] subsidiaries to find out what happened and to confirm and receive all adequate assurances that [the Partnership] continues to be the full legal beneficial owner of 100% of TRS."

152. On November 26, 2009, Mr. Brown responded to Mr. Berezin, writing "I am making enquiries today as to the ownership of the subsidiary companies. I will let you know what the outcome is." Later that day, with the intention of forwarding it to Mr. Berezin, Mr. Brown drafted an email to Ms. Vassiliou – who on October 8 and 9 had sent him various corporate documents confirming the dilution – writing "[i]t has come to my attention that potentially our shareholding in the underlying Ukrainian entity Teleradiosvit has been diluted and is now held by a third party. Is that correct?"

153. On December 1, 2009, Ms. Vassiliou responded to Mr. Brown's email by denying knowledge of the dilution. Mr.

Brown forwarded this response and his original November 26, 2009 email to Ms. Vassiliou to Mr. Berezin, and informed Mr. Berezin that he "will be in contact as soon as [he] receive[s] a substantive reply." These deceptive emails appeared to be yet another effort to conceal and deny responsibility for the misappropriation of TVi, as both Mr. Brown and Ms. Vassiliou were by then well aware of the dilution and transfer of the Partnership's interest in the network, as reflected in their October 8 and 9 correspondence. Additionally, two weeks earlier, on November 19, 2009, Mr. Brown and Mr. Vassiliou received instructions from Mr. Dementiev to direct funds from Mr. Kagalovsky's personal bank accounts to TVi through Aspida.

154. Neither Mr. Brown nor Ms. Vassiliou mentioned anything to Mr. Berezin about their October 8 and 9 correspondence, which included structure charts, lists of transactions, and various corporate documents, all confirming that ownership of TVi had been transferred to entities outside of the Partnership. Nor did Mr. Brown and Ms. Vassiliou disclose to Mr. Berezin that as recently as November 19, 2009, they both had assisted in the transfer of monies from Mr. Kagalovsky's bank accounts to TRS to fund TVi's operations.

155. On December 11, 2009, Mr. Brown continued the deception by forwarding to Mr. Berezin another email from Ms. Vassiliou in which she again denied receiving any information about the dilution of the Partnership's interest in TRS. Mr. Brown informed Mr. Berezin that he "continue[d] to insist on a

response immediately."

156. Mr. Brown testified that he made a conscious decision not to tell Mr. Gusinski or New Media anything about the dilution. He has provided no credible justification for withholding from New Media the information concerning the dilution, including the documents planning the dilution in mid-September 2009, the documents he received from Mr. Maitland Hudson and Ms. Vassiliou on October 8 and 9 confirming the dilution, and information about his lunch meeting with Mr. Kagalovsky on October 1, 2009 where Mr. Kagalovsky confirmed the dilution. No conflict or adversity existed that would have prevented Mr. Brown from revealing what he knew to New Media or Mr. Gusinski. Mr. Brown also conceded at trial that he should have revealed what he knew about the dilution to New Media earlier.

157. Mr. Brown's responses misled Mr. Berezin, who was counsel to New Media and Mr. Gusinski, into believing that Mr. Brown knew nothing about the transactions.

158. Mr. Kagalovsky has provided no justification for his taking of TVi and its trademarks. Mr. Kagalovsky acknowledged at trial that to resolve his dispute with Mr. Gusinski, "[t]here were a few options," including selling TVi to Mr. Gusinski. But Mr. Kagalovsky did not want to become disassociated with TVi because "[i]f I just left, that would be a big blow to my reputation in the Ukraine."

159. The Defendants have offered no credible testimony

that there was ever any agreement to defer payment of all outstanding NMDC license fees past September 30, 2009.

160. Each of the License Agreements contain "no oral modification" and "no waiver" clauses. The January 1 and April 10 agreements provide:

> Any provision of this Agreement may be amended or modified, and the observance of any term of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively) only if such amendment or modification is agreed to, or such waiver is set forth, in writing and signed by a duly authorized officer of the relevant Party.

Similarly, the January 14 License Agreement provides:

> No provisions of this Agreement may be amended, modified, or waived unless such amendment or modification is agreed to in writing signed by a duly authorized officer of Licensor or Licensee, and such waiver is set forth in writing and signed by the party to be charged.

161. No writing exists that would qualify as a written modification or waiver under the License Agreements.

162. Additionally, NMDC's conduct is also inconsistent with any agreement to defer payment of all outstanding license fees past September 30, 2009. Immediately after being notified that the Partnership had not paid $413,400 in license fees outstanding under the January 1 and 14 License Agreements when New Media's funding arrived in September 2009, Mr. Yakovich objected, and sought to contact Mr. Brown, Mr. Dementiev, and Mr. Kagalovsky to find out why NMDC was not paid.

163. The Partnership also recognized its obligation to

pay NMDC license fees no later than September 30, 2009. After receiving NMDC's October 1, 2009 demand for the payment of all overdue fees under the License Agreements – $1,162,080 in total – Capita personnel reviewed the Partnership's records and confirmed in an email to Mr. Dementiev and Mr. Brown that "[t]he payments which New Media are requesting are due and payable according to our records." Neither Mr. Dementiev nor Mr. Brown objected to the contents of this email.

164. Mr. Dementiev is the only witness who claims to have any personal knowledge of an alleged agreement to defer the payment of all outstanding license fees to NMDC past September 30, 2009. Mr. Brown – the Partnership's Manager – admitted on cross-examination that he never personally heard anything about such a deferral from either Mr. Gusinski, Mr. Yakovich, or NMDC and could not rule out the possibility that NMDC never agreed to defer payments under the License Agreements.

165. This Court finds that Mr. Dementiev's testimony as to the existence of an agreement to defer payment of all outstanding NMDC license fees past September 30, 2009 was not credible. Among other things, he testified on direct examination that he circulated various emails that reflected an agreement to defer NMDC payments until October 20, 2009, but admitted on cross-examination that he never sent anyone an email that said that NMDC payments could be delayed until October 20, 2009.

166. Similarly, Mr. Dementiev's testimony at trial that an agreement to defer payment until October 20, 2009 is reflected

on cash flow spreadsheets circulated among Mr. Dementiev, Mr. Yakovich, and Mr. Brown is not credible. At trial, Mr. Dementiev testified that Defendants' Exhibit R-4 was not an agreement between the parties; he claimed it was nothing more than a proposed budgeting exercise. As for Defendants' Exhibit I-3, Mr. Dementiev admitted on cross-examination that he was not sure whether he sent it to Mr. Yakovich or not and Mr. Brown testified that he did not send it to either Mr. Gusinski or Mr. Yakovich. Mr. Yakovich's testimony that he never received Defendants' Exhibit I-3 is credible.

167. At trial, Mr. Dementiev provided a new reason why NMDC was not paid the $413,400 it was expecting in September 2009: an unexpected invoice of $61,600 to TV Channel Russia, a third party, had to be paid, and occasioned a shortfall in the Partnership's available funds.

168. Mr. Dementiev's testimony is not credible. In his September 24, 2009, payment instruction to Mr. Brown, Mr. Dementiev does not refer to the $61,600 invoice as unexpected. After Mr. Yakovich objected to payments made that month, Mr. Dementiev did not inform Mr. Yakovich or Mr. Brown that any unexpected third-party payments had to be made in lieu of NMDC payments. Mr. Dementiev also failed to mention any unexpected payments in previous affidavits filed with this court on this subject. And when confronted with this inconsistent testimony at trial, Mr. Dementiev began listing a litany of other unexpected payments that are not identified as such elsewhere, and conceded

that there still may be others that he did not name.

169. Mr. Dementiev's testimony that Mr. Gusinski's decision to fund $850,000 in September 2009 helped "ma[ke] it impossible to make the January 1 and 14 licenses on or about September 25" was not credible. Any resulting funding shortfall was Mr. Kagalovsky's fault, not Mr. Gusinski's. Mr. Gusinski and Mr. Yakovich credibly testified that Mr. Kagalovsky agreed that he would contribute $300,000 and Mr. Gusinski would contribute $850,000 in September 2009. Mr. Yakovich credibly testified that Mr. Dementiev confirmed this understanding to him on September 16, 2009. In fact, a cash flow spreadsheet that Mr. Dementiev sent Mr. Yakovich reflects a planned $850,000 contribution from New Media and a planned $300,000 contribution from Iota on September 20, 2009. But Mr. Kagalovsky never made his agreed-upon contribution.

170. Mr. Dementiev's testimony that Mr. Kagalovsky was excused from contributing $300,000 because it would put the partners out of parity was not credible. According to Mr. Dementiev, to maintain parity in September 2009, Mr. Gusinski would need to contribute an additional $750,000 in funding — for a total of $1.6 million — if Mr. Kagalovsky contributed $300,000. This does not add up. If Mr. Gusinski contributed that additional $750,000 in September 2009, his total contribution to the Partnership would be $12.8 million. If Mr. Kagalovsky contributed $300,000 in September 2009, his total contribution would have been $11.9 million. This results in a $900,000

disparity in funding.

171. Mr. Dementiev's testimony that this $900,000 disparity in funding can be accounted for by an alleged $500,000 loan between Mr. Gusinski and Mr. Kagalovsky also is not credible. According to Mr. Kagalovsky, "because I provided [Mr. Gusinski] with that loan, that would be the sum by which my funding of Iota would be reduced." Thus, to account for this loan, Iota's total contribution should be increased by $500,000, which is precisely how Mr. Dementiev treated this loan in the past. But doing so still leaves a $400,000 disparity in funding between the partners, and does not justify Mr. Kagalovsky's failure to provide the agreed-upon $300,000 in September 2009 funding.

172. Mr. Dementiev's testimony on redirect examination that he could unilaterally instruct Mr. Brown to make payments to third parties instead of related parties without Mr. Yakovich's prior knowledge and consent was not credible. As he testified to repeatedly on direct examination, Mr. Dementiev could not unilaterally make any payment decisions; he needed Mr. Yakovich's approval. Indeed, Mr. Dementiev could not change any agreed-upon payment schedule without Mr. Yakovich's consent. This included any decision that a related party payment should be deferred in favor of a third-party payment; as Mr. Dementiev described the process, "Mr. Yakovich conferred with TRS's chief financial officer, Irina Tkachuk, regarding which payments could be deferred, and they informed me regarding the aggregate

requirement for the obligations."

173. Mr. Kagalovsky has claimed that Mr. Gusinski fraudulently induced his participation in the Partnership by agreeing to provide NMDC programming content at or near Mr. Gusinski's cost. Similarly, the Partnership has claimed that NMDC fraudulently induced its execution of the License Agreements with the same representation. The evidence at trial does not support those claims.

174. Mr. Kagalovsky has already admitted at trial that any alleged agreement to provide NMDC programming content at or near cost was not critical to his decision to invest in the Partnership. The documents disprove that any such alleged agreement was reached.

175. No writing reflects any alleged agreement or representation that NMDC would provide programming content at or near Mr. Gusinski's costs; if made, any such agreement or representation was oral.

176. The Partnership Agreement and each of the license agreements with NMDC contain merger clauses, however, that provide that the written agreements supersede any prior representations, understandings, and agreements. Specifically, the Partnership Agreement provides:

> This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith.

The January 1 and April 10 License Agreements provide:

> This Agreement sets forth the entire agreement of the Parties in respect of the subject matter contained herein and supersedes all prior agreements, promises[,] covenants, arrangements, communications, representations or warranties, whether oral or written, by any officer, employee, or representative of any Party in respect of such subject matter.

Similarly, the January 14 License Agreement provides:

> This Agreement sets forth the entire agreement of the parties hereto in respect of the subject matter contained herein and supercedes all prior agreements, promises, covenants, arrangements, communications, representations or warranties, whether oral or written, by any officer, employee or representative of any party hereto in respect of such subject matter. Any prior agreement of the parties hereto in respect of the subject matter contained herein is hereby terminated and canceled as of the Effective Date.

177. The Partnership Agreement is silent on the provision of programming content and each of the license agreements between NMDC and the Partnership clearly lists the price for the programming content licensed without mentioning anything about Mr. Gusinski's or NMDC's costs.

178. Mr. Kagalovsky, who is a sophisticated investor, approved of each of these agreements before they were executed.

179. Before he executed them on the Partnership's behalf, Mr. Brown confirmed with Mr. Dementiev that the partners had agreed to the License Agreements. Mr. Brown also checked to see if the content listed in the schedules attached to each License Agreement was confirmed as being accurate. Mr. Brown represented in a corporate resolution that he gave each agreement

"due and careful consideration" before executing it.

180. Mr. Gusinski credibly denied ever representing to Mr. Kagalovsky that NMDC would license programming to TVi at or near cost.

181. Instead, Mr. Gusinski and Mr. Berezin credibly testified that Mr. Kagalovsky and Mr. Gusinski discussed and agreed that NMDC would charge TVi market prices for its programming. Otherwise, Mr. Gusinski would be subsidizing the Partnership at NMDC's expense; the partners provided the Partnership with equal funding, so Mr. Gusinski would be contributing more to the Partnership financially than Mr. Kagalovsky if Mr. Gusinski caused NMDC to provide programming at below-market prices.

182. Additionally, on December 3, 2007, Mr. Gusinski's attorney Mr. Berezin sent Mr. Kagalovsky and his attorney Mr. Maitland Hudson a "TVI Shareholder Agreement Term Sheet" that represented that "[a]ll content acquisition from the related parties shall be on market terms." Mr. Kagalovsky and Mr. Maitland Hudson received this term sheet and neither responded with any objections. Instead, Mr. Maitland Hudson responded amicably, writing "[n]oted with thanks." Mr. Kagalovsky and his attorney Mr. Maitland Hudson were therefore aware from the outset that NMDC content would be charged "on market terms."

183. Moreover, Mr. Kagalovsky understood that the prices NMDC charged for its programming content could vary

significantly regardless of production costs. For example, Mr. Kagalovsky understood that when TVi moved from cable and satellite programming and began broadcasting free-to-air, the Partnership would have to pay more for free-to-air broadcasting rights than it did for cable and satellite rights, even for the same television series. Mr. Kagalovsky even tried to negotiate lower prices for NMDC programming. This evidences the lack of any agreement or representation that NMDC would supply programming content at or near cost.

184. In light of the above, Mr. Kagalovsky's testimony that Mr. Gusinski agreed to supply NMDC programming "at or near his direct cost with only a nominal profit" was not credible.

185. Mr. Kagalovsky has claimed that Mr. Gusinski concealed that NMDC's production costs for programming licensed for broadcast on TVi had already been paid for through contracts with Russian broadcasters. Both documents and testimony show otherwise.

186. Mr. Gusinski credibly testified that he orally informed Mr. Kagalovsky that the production costs for NMDC's programming were already paid for through NMDC's contracts with Russian television networks.

187. Additionally, on January 12, 2008, Mr. Gusinski sent Mr. Kagalovsky a Confidential Offering Memorandum for NMDC, dated September 25, 2007, so that Mr. Kagalovsky could have a

full understanding of how NMDC worked. The Offering Memorandum described NMDC's cost structure in several places, and notes specifically that the rights to the series NMDC sold in Ukraine had very low marginal costs, since they were originally produced for the Russian market.

188. The first page, the Offering Memorandum states:

- "In order to finance production efficiently and to mitigate risk, NMDC receives advance cash payments from NTV for programming license fees ahead of and during production, and in advance of NTV's broadcasting the series. NMDC retains all future distribution rights to its television episodes produced for NTV (i.e., international FTA, domestic and international pay-television, home video, Internet and mobile), other than the FTA rights in Russia and Belarus";

- "NMDC has not incurred any pilot production risk to date in its arrangement with NTV or other broadcasters, since the Company has only produced series which these broadcasters have agreed to purchase in advance of production"; and

- "The Company has sold some of its recently produced programs for NTV to Inter TV Channel and One Plus One TV, the Ukraine's leading independently owned FTA broadcasters. . . . These sales generate incremental cash flow margins of nearly 100.0% since the television programs were profitably sold previously to NTV."

189. The Offering Memorandum is replete with similar disclosures.

190. Mr. Kagalovsky admitted to receiving the NMDC Confidential Offering Memorandum from Mr. Gusinski on January 12, 2008. Although he denied reading the substance of the Offering Memorandum or otherwise learning the information referenced therein about NMDC's production costs until the summer of 2009 these denials are not credible in light of his sophistication as

a businessman.

191. Defendants claim that Mr. Gusinski, New Media ,and NMDC breached fiduciary duties in connection with the Partnership's operations. The evidence adduced at trial shows otherwise.

192. Mr. Kagalovsky always understood that the Partnership would be licensing content from companies affiliated with Mr. Gusinski, including NMDC, and that other companies affiliated with Mr. Gusinski, such as Overseas Media, would be providing services to the Partnership.

193. Mr. Brown, who executed agreements on behalf of the Partnership, also understood that NMDC and Overseas Media were affiliated with Mr. Gusinski.

194. Mr. Kagalovsky approved of all the agreements that Mr. Brown signed on the Partnership's behalf, including all agreements with companies affiliated with Mr. Gusinski. Mr. Brown understood that all the agreements between the Partnership and any company affiliated with Mr. Gusinski had been agreed to by Mr. Kagalovsky and Mr. Gusinski.

195. Mr. Gusinski actively sought Mr. Kagalovsky's approval for any related-party transactions. For example, Mr. Gusinski sought Mr. Kagalovsky's approval for all films sold by Mr. Gusinski's companies to the Partnership for broadcast on TVi.

196. Mr. Kagalovsky also made it a point to approve of

TVi's schedule to protect against any conflict of interest that may arise from Mr. Gusinski's ownership interests in both the content supplier — including NMDC — and the content acquirer — the Partnership.

197. Mr. Kagalovsky admitted at trial that he was informed about the main terms of the license agreements between the Partnership and NMDC, including the License Agreements executed in 2009, before those agreements were executed. When he had questions about the agreements, Mr. Kagalovsky discussed them with Mr. Gusinski

198. Similarly, Mr. Kagalovsky also received drafts of the agreements with Overseas Media before they were executed. Mr. Kagalovsky also had access to all the contracts the Partnership entered into with any company affiliated with Mr. Gusinski.

199. Additionally, Mr. Gusinski credibly testified that Mr. Kagalovsky received information about the shares and ratings that NMDC programs achieved in similar markets or channels.

200. Mr. Gusinski credibly testified that before Mr. Kagalovsky approved of license agreements between the Partnership and NMDC, Mr. Gusinski provided him with copies of NMDC's license agreements with other broadcasters in Ukraine so that he could review the prices NMDC was charging. Mr. Kagalovsky admitted that he regularly discussed with Mr. Gusinski the pricing for

content aired on TVi.

201. Mr. Kagalovsky participated in negotiations of agreements with Overseas Media and NMDC, some of which occurred in New York.

202. Mr. Gusinski credibly testified that Mr. Kagalovsky was personally involved in selecting the television content that TVi licensed from NMDC and other content providers. Mr. Gusinski credibly testified that Mr. Kagalovsky asked NMDC to send all of its series to him for him to watch, which NMDC did. Mr. Gusinski also credibly testified that Mr. Kagalovsky always had his own opinion about whether a series was good or bad, and selected the programs he liked for inclusion in the license agreements with NMDC.

203. In light of the above, Mr. Kagalovsky's testimony that he did not negotiate the terms of the April 10, 2009 License Agreement is not credible. In addition, Mr. Brown understood that Mr. Kagalovsky was involved in the negotiation of this particular agreement.

204. Mr. Kagalovsky's testimony that he "deferred to [Mr. Gusinski's] judgment on all matters related to programming" is also not credible. Mr. Kagalovsky admitted at trial that he was involved in the approval of specific programming schedules for TVi and discussed many proposed schedules for TVi's programming. In April 2008, Mr. Kagalovsky attended Mipcom, one

of the largest markets for television programming held in Cannes, France, to investigate and determine the content that could be acquired for TVi. He also contacted Mikhail Galkin many times to discuss programming and scheduling.

205. With Mr. Gusinski's encouragement, Mr. Kagalovsky obtained independent and objective information about NMDC's programming. Specifically, in negotiations with NMDC about programming, Mr. Kagalovsky and the Partnership were advised independently by at least three knowledgeable individuals: (I) Mr. Romanets, who was the former Deputy Head of Acquisitions at one of TVi's competitors, ICTV; (ii) Mr. Knyazhitsky, who had many years of Ukrainian television experience including experience running television channels; and (iii) Mr. Dementiev, who was an economist.

206. In 2008 and 2009, Mr. Romanets and Mr. Kagalovsky corresponded often about programming. Mr. Kagalovsky sometimes would call up Mr. Romanets to ask Mr. Romanets' opinion on programs that TVi was considering to show. Mr. Kagalovsky also discussed programming acquisitions with Mr. Romanets, and Mr. Romanets sent Mr. Kagalovsky proposed programming schedules and ratings for programs that TVi would potentially acquire, including from NMDC. From August 2008 to April 2009 – when the Partnership executed its final license agreement with NMDC – Mr. Kagalovsky and Mr. Romanets exchanged at least 46 emails on the subjects of scheduling and programming.

207. In August 2008, Mr. Romanets prepared for Mr. Kagalovsky an analysis of the programs aired on TVi and the major Ukrainian television networks. Among other things, Mr. Romanets reviewed TVi's programming strategy and made suggestions about what TVi should air at different time slots. Mr. Romanets also outlined the typical programming acquisition costs for the major networks. This analysis was not sent to Mr. Gusinski.

208. At Mr. Kagalovsky's request, Mr. Romanets also used his experience and professional judgment to grade the programs that NMDC made available for licensing. Mr. Romanets communicated his grades to Mr. Kagalovsky, but not Mr. Gusinski.

209. Mr. Knyazhitsky advised Mr. Kagalovsky about the price of programming. Likewise, Mr. Romanets and Mr. Knyazhitsky regularly informed Mr. Kagalovsky about prices for programming from non-NMDC providers. And Mr. Dementiev, whom Mr. Brown consulted before he executed license agreements, discussed the license agreements with Mr. Romanets before they were executed.

210. Mr. Knyazhitsky and Mr. Romanets were involved in the negotiation process for the License Agreements. Mr. Knyazhitsky had responsibilities for final decisions on programming, and his approval was necessary before programs could be broadcast on TVi.

211. Before the April 10, 2009 License Agreement was executed, Mr. Knyazhitsky sent Mr. Gusinski and Mr. Kagalovsky a

formal written offer for the purchase of NMDC series for TVi that included a list of programs, a proposed schedule for these series, the rights to be licensed, and the price and terms of payment. After some negotiations over price and content, Mr. Knyazhitsky signed a letter accepting terms that NMDC counter-offered, and the April 10, 2009 License Agreement was agreed to in principle. The agreement was then drafted based on the terms outlined in Mr. Knyazhitsky's letter.

212. In light of the above, Mr. Kagalovsky's testimony that Mr. Gusinski negotiated the terms of that agreement with himself was not credible. No one ever expressed any concern to Mr. Brown that there was ever any inability to negotiate the April 10, 2009 License Agreement.

213. Mr. Gusinski, Marc Kasher, and Chris Renaud credibly testified that NMDC licensed programming to the Partnership at or below market prices.

214. As Mr. Gusinski and Mr. Renaud credibly testified, while NMDC was licensing content to the Partnership, the highest per-episode price NMDC charged the Partnership was lower than the lowest per-episode price that NMDC charged other Ukrainian broadcasters for similar programming content and broadcasting rights.

215. Mr. Kasher also credibly testified that NMDC had the opportunity to sell content to much larger broadcasters for

$23,000 to $24,000 per episode, but instead sold to the Partnership at $15,300 per episode.

216. Correspondence and analysis performed by Mr. Romanets and sent to Mr. Kagalovsky confirm the below-market nature of the prices NMDC charged the Partnership. The prices that NMDC charged the Partnership for free-to-air premier programming — approximately $15,300 per episode — were lower than the prices reflected in Mr. Romanets' analysis.

217. Additionally, around the time of the April 10, 2009 License Agreement, other distributors were shopping their available programming at much higher prices than NMDC charged the Partnership.

218. NMDC also increased its Ukrainian licensing revenues after it stopped licensing content to TVi. Mr. Kasher testified that NMDC's sales to Ukraine increased from $6.9 million in 2009 to $8.4 million in 2010 after NMDC stopped selling content to TVi.

219. The services provided by Overseas Media were also on a cost-plus basis, as agreed. The Production Services Agreement contains a schedule that delineates the up-front and recurring costs that Overseas Media incurred, and that the Partnership would be reimbursing.

220. Defendants have offered no competent or credible evidence that NMDC charged the Partnership anything but market

prices for content. Even Mr. Kagalovsky conceded that NMDC was providing content "at prices at least equal to . . . market rates."

221. Defendants have offered no competent evidence that Overseas Media charged the Partnership excessive prices for its services. The Partnership advised in a letter dated September 12, 2008: "We can advise that we are satisfied with the quality of programming as well as production and broadcast services that you provide us with."

222. All major management decisions of the Partnership and TVi were made with Mr. Kagalovsky's knowledge and consent. Mr. Kagalovsky called Mr. Gusinski and his colleagues regularly to discuss the details of operations. Mr. Kagalovsky also traveled to Ukraine and held numerous meetings there with TVi's management, employees, and journalists in connection with managing and operating TVi.

223. AIG owns a 13.5 percent interest in NMDC. As part of that investment in NMDC, AIG negotiated a "call option" that would allow AIG to invest in TVi at a later time. By exercising the call option, AIG would cause NMDC to purchase New Media's 50 percent interest in the Partnership at cost — the amount of Mr. Gusinski's investment at the time. NMDC would replace New Media as Iota's partner in the Partnership, and AIG would invest in TVi through its investment in NMDC, including by funding the network going forward. Dividends paid to AIG would be reduced to support

the additional investment.

224. In 2008 and 2009, AIG explored the potential exercise of the call option. Among other things, AIG representatives including Mr. Kasher traveled to TVi's offices and studios in Ukraine in September 2008 and June 2009 to meet with TVi's management and gather more information on the network's finances.

225. In 2009, AIG was actively evaluating opportunities in Ukraine. This included looking at Channel 1+1 – one of the top channels in Ukraine – and TVi. Around that same time, Time Warner had invested $210 million into CEME, which owned a variety of television broadcasting assets, including two television networks in Ukraine.

226. In June 2009, Mr. Kasher returned with his team and the Chief Executive Officer of his AIG investment fund, Charlotte Philipps, to do additional diligence on TVi.

227. During its June 2009 trip to Ukraine, AIG collected and reviewed updated financial information for TVi, and under Mr. Kasher's supervision, reassessed its projections for TVi. In late July 2009, AIG created an internal report containing projections from TVi's management concerning the network's future performance, as well as AIG's own analysis and conclusions about TVi's prospects.

228. AIG's analysis showed that by 2012-13, TVi could

become one of the top 5 networks and break even financially.

229. AIG's analysis reflected that TVi had an enterprise value of $56.9 million.

230. AIG was interested in purchasing TVi for $56.9 million provided that it had superior management in the company, like Mr. Gusinski. AIG believed that Mr. Gusinski would continue to manage TVi if NMDC acquired an interest in TVi because Mr. Gusinski's and AIG's equity interests were aligned through their joint ownership of NMDC.

231. After the June 2009 trip, AIG informed Mr. Gusinski that, after studying the situation and extensive due diligence, it wanted to exercise the call option.

232. If TVi had been worth less than $24 million, it would have been economically irrational for AIG to exercise the call option and AIG would have had no interest in doing so. Exercising the call option in September 2009, at the time of the dilution, would have required NMDC to purchase Mr. Gusinski's 50 percent share in the Partnership for $12.05 million. AIG obviously had no interest in causing NMDC, in which AIG was heavily invested, to pay an excessive price to acquire this stake in TVi.[1]

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[1] Since AIG owned 13.5 percent of NMDC, and NMDC would become a 50 percent partner in TVi, AIG would receive a 6.75 percent ownership interest in TVi if it exercised the call option.

233. Mr. Kagalovsky had knowledge of and consented to the granting of this call option. When Mr. Gusinski and Mr. Kagalovsky were negotiating the terms of the Partnership, Mr. Gusinski was separately negotiating with AIG concerning AIG's interest in investing in NMDC. Mr. Gusinski's testimony that he told AIG and Mr. Kagalovsky about his negotiations with the other was credible. Mr. Kasher met Mr. Kagalovsky at a September 2008 dinner to celebrate AIG's investment in NMDC, which had closed in August 2008.

234. Mr. Gusinski credibly testified that in a meeting in Mr. Kagalovsky's London home prior to AIG's investment, Mr. Kagalovsky consented to the granting of the call option.

235. Mr. Kagalovsky was also aware that AIG was considering whether or not to exercise the call option in 2008 and 2009. In a September 6, 2008 email, Mr. Renaud informed Mr. Dementiev — Mr. Kagalovsky's representative in the Partnership — that AIG would be visiting TVi and that the call option would likely be exercised. Mr. Renaud also credibly testified that AIG's call option was discussed during meetings in Ukraine between Mr. Renaud, AIG representatives, and Mr. Dementiev. Mr. Dementiev admitted that he knew that Mr. Gusinski was considering transferring his 50 percent interest into NMDC, where AIG was an investor. Mr. Dementiev also knew in 2008 that he was working with Mr. Renaud to prepare a financial model for TVi in connection with AIG's potential exercise of the call option.

236. Because of the actions of the defendants in September of 2009, AIG lost all interest in exercising its call option.

237. Plaintiffs' valuation expert was John Kane, a member of the American Society of Appraisers who has significant experience valuing media companies, including television networks, around the world. Mr. Kane has personally conducted over 500 enterprise valuations over nearly the past 30 years, and before that was in a media operating company involved in mergers and acquisitions. Mr. Kane has been involved in dozens of enterprise valuations and due diligence in media companies in Europe, including Poland, Romania, Czech Republic, Hungary, and Russia. He has personally conducted enterprise valuation and appraisal studies, rendered opinions, and provided due diligence services of business and business interests with aggregate values of over $1 trillion. Mr. Kane's clients include various major media companies like Comcast, NBC Universal, NewsCorp., Liberty Global, and Time Warner.

238. Mr. Kane and his team reviewed Ukrainian and Russian market information, market research from industry research firms, various documents and testimony exchanged and given during discovery and trial, and interviewed various individuals including Mr. Gusinski, members of his team, and AIG personnel. PricewaterhouseCoopers' office in Kiev, Ukraine, assisted Mr. Kane and his team in gathering information and

market research.

239. Based on this information, as well as Mr. Kane's professional experience, Mr. Kane concluded that the business enterprise value of TVi as of the dilution was $50.0 million. In his opinion this represents the value of TVi's assets working together.

240. Mr. Kane concluded that TVi was a going concern, and valued it on a going concern basis. According to Mr. Kane, there had been $24 million in funding put into the network, there was an expectation that there was going to be continued funding for the network as evidenced by Mr. Gusinski's $850,000 contribution on September 25, 2009, and TVi was actually operating at the time.

241. Mr. Kane relied upon the detailed analysis prepared by AIG in the summer of 2009, contemporaneously with Mr. Kagalovsky's plan to dilute New Media's interest in the television network, as a reference point. Mr. Kane benchmarked AIG's projections against historical and projected financials for publicly-traded companies operating in the local markets. Mr. Kane and his team also relied upon independent studies and materials published by independent analysts. Mr. Kane used this information to review AIG's work, spoke with the AIG personnel responsible for conducting AIG's analysis in summer 2009, spoke with various other individuals who were working on or otherwise familiar with TVi around the time of the theft, and developed his

own discounted cash flow analysis for TVi. Where applicable, he applied his own industry expertise in reviewing financial projections and valuations.

242. In contrast, Defendants' valuation expert, Stamos Nicholas, concluded that "TVi was not and could not operate as a going concern." Mr. Nicholas then applied a liquidation analysis to TVi's assets, determined that those assets were worth negative $318,000, and assessed TVi's value at $0. Mr. Nicholas would not have applied a liquidation analysis if TVi were a going concern.

243. Mr. Nicholas' conclusion is not credible. As Mr. Kane observed, "the two parties are the ones that control it. So, in particular, if there's something to fight over, that means there's asset value[.]"

244. Indeed, even though he decided not to value TVi as a going concern, Mr. Nicholas conceded that TVi was an ongoing business enterprise when the dilution occurred. Mr. Nicholas also understood that there was funding provided to TVi. Mr. Nicholas was never told that there was a need to liquidate TVi's assets, and TVi did not materially curtail its operations or liquidate its assets as of the valuation date or thereafter. Nor did TVi ever shut down; Mr. Nicholas confirmed that it has always continued to operate, including by hiring employees, paying its employees, broadcasting content, producing the news every day, and licensing programming content from everyone except for Mr. Gusinski. Mr. Nicholas was unaware of any media companies in

Ukraine that became insolvent in 2009.

245. To reach his conclusion that "TVi was not and could not operate as a going concern." To be considered a "going concern" for the purposes of Mr. Nicholas' analysis, a business must not only be an ongoing enterprise, it also has to receive a "fair return." For TVi, that meant that Mr. Nicholas would not consider it to be a going concern unless an investor received a 30 percent rate of return on his investment.

246. Mr. Nicholas' definition is inconsistent with the definitions found in the standards of the American Society of Appraisers, which Mr. Nicholas purports to follow, the International Glossary of Business Valuation Terms, and the International Accounting Standards Board. None of those definitions mention anything about a rate of return, let alone what constitutes a fair rate of return.

247. Mr. Kane credibly testified that liquidation analysis is not the appropriate method of valuing a media company like TVi because "media companies are intellectual property driven -- they are driven by programming and driven by management ability to deliver ratings and to deliver revenues."

248. Mr. Nicholas purported to assess TVi's fair market value — the price at which property would exchange hands between a hypothetical willing and able buyer and a hypothetical willing and able seller acting in arm's length in an open and

unrestricted market. But, Mr. Nicholas' analysis either does not apply to or completely excludes a number of potential buyers.

249. On cross-examination, Mr. Nicholas admitted that his analysis does not take into account any offer made by Mr. Gusinski to purchase TVi; he was not even aware that Mr. Gusinski had made such an offer. Mr. Nicholas needed to know more about Mr. Gusinski's offer, and admitted that what he learned could make a difference in his analysis.

250. Similarly, Mr. Nicholas failed to take into account buyers who might assign a higher value to the network because they would have competitive advantages in operating the network. Mr. Nicholas conceded that his analysis is inapplicable to potential buyers with privileged access to programming content. Mr. Nicholas' analysis is also inapplicable to potential buyers with advantages in management expertise. The analysis thus ignored three of the most likely potential buyers of the network — Mr. Gusinski, NMDC and AIG, each of whom had competitive advantages over other competitors, and all of whom actually had interest in purchasing TVi at the time of the dilution.

251. Strategic buyers, whom Mr. Nicholas labeled a "common" and increasing presence in the marketplace were also ignored in Mr. Nicholas' analysis. As Mr. Nicholas conceded, strategic buyers possess competitive advantages like access to programming that may provide incentives for purchasing television networks that other market players may not have.

252. Mr. Nicholas also excluded as potential buyers anyone who might want to buy TVi for something other than the profit motive associated with simply owning TVi. While he recognized that there were other types of analyses that would include as hypothetical buyers those who might buy TVi for a reason other than its stand-alone profitability, Mr. Nicholas conceded that he did not perform such an analysis in this case.

253. Mr. Nicholas' analysis thus excludes from its list of willing buyers Mr. Kagalovsky, who acquired TVi for a nominal, but still positive, amount. Mr. Kagalovsky testified that he diluted TVi for reasons other than profit. Additionally, according to Mr. Nicholas, Mr. Kagalovsky understood Mr. Nicholas' conclusion that Mr. Kagalovsky is better off shutting TVi down, but Mr. Kagalovsky still funds and operates TVi.

254. Mr. Nicholas' analysis also apparently excludes other potential buyers like the "oligarchs" he mentions in his report, notwithstanding his denial that he does so. According to Mr. Nicholas, the oligarchs "have a profit motive for what they are doing, but it may not necessarily be in the station itself. It benefits them in other ways that they believe is [sic] worthwhile endeavors. So it's not simply looking at it as a stand-alone entity. It's looking at their various businesses that they had, and also any political influence they want to use these stations for."

255. Mr. Nicholas conceded that there are at least several "oligarchs" with the ability or appetite to buy media

companies. In his report, he acknowledged that "Ukraine's media companies were controlled and influenced by oligarchs, who have a concentrated ownership of the commercial broadcasters." Such individuals also exist outside Ukraine; at trial, Mr. Nicholas could not rule out wealthy non-Ukrainians like Rupert Murdoch or Ron Lauder from qualifying.

256. In contrast, Mr. Kane's analysis did not exclude Mr. Gusinski, NMDC, AIG, or Mr. Kagalovsky — all of whom had interest in acquiring, and in Mr. Kagalovsky's case actually did acquire, TVi — from his universe of potential buyers for TVi.

257. Mr. Kane also correctly recognized that, although there was insufficient publicly-available information to value TVi based solely on comparable transactions in the marketplace, there was sufficient information to indicate interest and liquidity in the market for television networks like TVi in 2008 and 2009. Indeed, Mr. Nicholas acknowledged that from 2008 to January 2010, there were at least seven transactions involving the transfer of ownership interests in Ukrainian television channels and networks. This included CEME's February 2009 acquisition of 39.9 percent of Kino — an unprofitable Ukrainian channel with less technical penetration and a smaller audience share than TVi — for approximately $11 million, which implies a value for 100 percent of Kino for $27.6 million before adding any control premium.

258. Mr. Nicholas, however, dismissed the publicly-filed prices and details of this sale of interests in Kino, among

other transactions, as unreliable because he received some information from auditors he spoke with that indicated "[i]t's not a clean analysis in terms of what the values are[.]" This is not a credible explanation.

259. Mr. Nicholas arrived at his definition of fair market value after discussions with Mr. Kagalovsky and counsel for Defendants. He admitted that if he had defined it differently, he could have reached a different value for TVi.

260. Mr. Kane valued TVi as it was taken. He assessed the value of the assets that were in TVi at the time of the dilution, including the programming that was being aired, the management that existed, and the distribution that was in place.

261. Mr. Nicholas' conclusion that TVi was not a going concern, however, was not based on an assessment of TVi as a whole. Mr. Nicholas used a Greenfield methodology to reach his conclusion that TVi was not a going concern. The Greenfield methodology only values TVi's distribution agreements — TVi's agreements for free-to-air, cable, and satellite broadcasting. It does not value TVi's programming or any other assets.

262. Nor did Mr. Nicholas perform a discounted cash flow analysis for TVi, which Mr. Kasher testified was the typical method that a major investor in a market like Ukraine's would use to value a company. The Greenfield methodology considers what would happen if a hypothetical buyer purchased TVi's distribution agreements and built a new business around those agreements.

Thus, although it is not identified as such, the discounted cash flow analysis included in Mr. Nicholas's report as Exhibit 2 is not for TVi, but for a hypothetical company that is built up around TVi's distribution agreements.

263. Mr. Nicholas' analysis also assumes away many of the assets that were in place at the time of the dilution. For example, it assumes that the NMDC programming would not be broadcasted. It also assumes that "typical management" would be in place; no special value was ascribed to the management that was in place at the time, even though the market sometimes does recognize value in particular management.

264. The television station that Mr. Nicholas analyzed is a different asset than what Mr. Kagalovsky took from Mr. Gusinski.

265. Mr. Nicholas also relied on information unavailable at the time of the dilution in his analysis. For example, Mr. Nicholas' analysis incorporated audience share numbers from projections that Mr. Dementiev and Mr. Knyazhitsky created in 2010 — well after this litigation had begun. Mr. Nicholas also admitted at trial that his viewer ship share and power ratio for 2010 and 2011 is "basically mimicking reality." Indeed, his 2009 power ratio is TVi's actual power ratio, which includes end of year financial information that was not available as of dilution. Finally, "[e]xpenses forecasted for 2009 through 2011 were based on TVi's actual operating expenses," which Mr.

Nicholas "used as a proxy for the expenses a new television channel in the Ukraine market would expect to incur[.]"

266. Mr. Nicholas' application of the liquidation analysis is also unreasonable. For example, he assumed that TVi's property, plant, and equipment would be sold at salvage value. The book value for these assets, which were at most 1.5 years old and purchased for about $2.5 million, is $1.8 million. But because he made the assumption that they would be sold at salvage value, Mr. Nicholas valued them at $121,000 — less than 6.75 percent of their book value.

267. At trial, Mr. Nicholas revealed that he performed his analysis without knowledge of certain important facts in this case, and that he had an inaccurate understanding of others.

268. Mr. Nicholas admitted at trial that he was unaware that Mr. Gusinski had made Mr. Kagalovsky an offer to purchase TVi, and that had he known, it could have affected his analysis. Mr. Kane, who knew about the offer, testified that Mr. Kagalovsky's rejection of it indicates a value well in excess of $0 for TVi. There is no question that Mr. Gusinski made an offer; Mr. Kagalovsky verified it.

269. Mr. Nicholas also was unaware that New Media sought the return of TVi to the Partnership when it filed this lawsuit. He could not explain why Mr. Kagalovsky and Mr. Gusinski, who probably knew more about TVi as of September 2009 than he did, are spending millions of dollars fighting over its

ownership and control, when Mr. Nicholas concluded that it was worth nothing.

270. Additionally, Mr. Nicholas claimed that a "key weakness for [TVi] was that it was not represented by any of the major advertising sales houses in Ukraine[.]" He was unaware, however, that Mr. Gusinski had relationships with major advertising houses Prioritet and Sfera TV. And while he knew that Mr. Gusinski had a relationship with Video International, he incorrectly understood that Video International was a very small operation; in fact, publicly available SEC filings that Mr. Nicholas consulted in his due diligence show that Video International is the owner of Prioritet.

271. In contrast, Mr. Kane, who spoke with Mr. Gusinski about it, was aware of Mr. Gusinski's relationships with the major advertising sales houses in Ukraine, and factored these relationships into his analysis.

272. Mr. Nicholas also rejected valuing TVi using an income approach — the approach that both AIG and Mr. Kane used — based on faulty assumptions. Mr. Nicholas testified that did not use the income approach for three reasons: (I) TVi was a start-up; (ii) he had uncertainty about TVi's ability to operate as a going concern; and (iii) he thought there were no management projections around the valuation date. But Mr. Nicholas acknowledged at trial that an income approach can be appropriately used to value start-up companies and companies whose future as a going concern is uncertain.

273. Management projections also existed: Page six of the analysis that AIG prepared in late July 2009 contains projections that TVi management created and presented to AIG after June 2009. Mr. Kasher, who supervised AIG's analysis and traveled to TVi's offices in Ukraine in connection with it, "did testify this was the management case. This was the raw data they got from management, and that he made adjustments later on in the other schedules." Mr. Nicholas mistakenly believed that these projections were not from management based on discussions he had with Mr. Kagalovsky, Mr. Dementiev, and Mr. Knyazhitsky.

274. In contrast, Mr. Kane appropriately treated the AIG projections as a starting point for analysis, which was then supplemented by due diligence. AIG's analysis and projections may even be more reliable than TVi management's. He stated that AIG's projections "come from a firm that invests in emerging markets, private equity. They are going to plunk money down. So, I think you better be right. You would like to be right if you're going to put money into it."

275. Mr. Nicholas also made errors in connection with his liquidation analysis of TVi's assets. He assumed that TVi's 1.5-year-old studios and other equipment, which he claimed had a book value of $679,615, would be sold at salvage value – 12.0 percent of book value – for $81,554. But Mr. Nicholas, who did not visit the studios, incorrectly believed that the studios were "the standard type of studio" and not necessarily state of the art. A number of witnesses including Mr. Kagalovsky testified to

this Court that these studios were, in fact, state of the art. Salvage value is not an appropriate measure of these assets' worth.

276. In preparing his analysis, Mr. Nicholas never spoke with Mr. Gusinski, Mr. Yakovich, Mr. Renaud, or Mr. Kasher. Instead, he relied on Mr. Kagalovsky, Mr. Brown, Mr. Dementiev, and Mr. Knyazhitsky, and assumed that they spoke truthfully and supplied him with accurate and complete information. Mr. Nicholas' assumption is suspect. Not only have Mr. Kagalovsky, Mr. Brown, and Mr. Dementiev supplied this Court with testimony that is not credible, they have supplied Mr. Nicholas with such information as well: Mr. Dementiev told Mr. Nicholas that a 3 percent audience share for a channel using TVi's distribution agreements was generous, but Mr. Dementiev testified in this Court that a 4.2 percent audience share was realistic for TVi.

277. One of the major differences between the two expert reports is their conclusion concerning audience and market share. Mr. Kane concludes that TVi will grow to an audience share of 6 percent, with a market share of 7.2 percent. Mr. Nicholas concludes that anything above a 3 percent audience share and 3 percent market share is unreasonable.

278. Both experts agree that programming is an important factor in developing audience and market share, and with it revenues. As Mr. Nicholas described it, programming is "one of the key drivers in developing the market share through the audience share and the power ratio". According to Mr.

Nicholas, the quality of the programming is a major variable in determining the power ratio. Audience share, market share, and power ratio are all factors that affect the amount of revenue that a network can generate. Also, quality programming attracts advertisers and helps build relationships with advertising houses. Thus, as Mr. Kane put it, "[p]rogramming drives everything[.]"

279. Notwithstanding its importance, Mr. Nicholas paid programming very little attention when conducting his analysis. The only programming ratings and share information that Mr. Nicholas even looked at were for 30 individual broadcasts, all of which occurred in September 2009. Mr. Nicholas looked at ratings information for TVi generally, but did not look at ratings that distinguished between NMDC and non-NMDC programming. He also did not look at the ratings of NMDC programming in Russia, or otherwise determine how well those programs translated when aired in Ukraine.

280. Mr. Nicholas also demonstrated little knowledge of the programming that Ukrainian networks were airing. Mr. Nicholas did not know whether the major Ukrainian television networks aired Russian scripted dramas on prime time. He did not know whether the major Ukrainian television networks aired any content that was produced or aired first in Russia before airing in Ukraine. He did not know whether you could build a very successful Ukrainian television network by showing Russian-scripted dramas.

281. Instead, Mr. Nicholas relied on the arbitrary assumption that the station being built on TVi's distribution agreements would purchase "programming of a more focused nature" because it would want to be a "niche player", broadcasting "programming similar to the History Channel or the Bravo Channel or MTV or something of that nature that has a more specific type of demographics." This was never the plan for TVi; Mr. Gusinski and Mr. Kagalovsky always agreed that TVi would be a general entertainment channel. Indeed, Mr. Nicholas conceded that NMDC programming, which Mr. Gusinski and Mr. Kagalovsky always intended to broadcast on TVi, is not the type of programming that Mr. Nicholas assumed his hypothetical television station would be airing.

282. Mr. Nicholas admitted, though, that there was programming available in the market as of September 2009 that could give a nationally distributed channel greater than 3 percent audience share, even up to 6 percent. Mr. Nicholas' hypothetical station built around TVi's distribution agreements was to become nationally distributed in 2013. If so, then under Mr. Nicholas' own analysis, a 6 percent share should be achievable in 2013, when the station becomes nationally broadcast. This is consistent with both Mr. Kane's analysis, AIG's analysis, and TVi's own management goals from the summer of 2009: Mr. Kane projected that TVi would achieve an audience share of 6 percent in 2013 (Kane Rep. Schedule 3.1); AIG projected that TVi would achieve an audience share of around 6.5

or 7 percent in 2013 and TVi's management targeted achieving a 6 percent audience share in 2012-13

283. Mr. Nicholas' concession about available programming underscores the arbitrariness and lack of support for Mr. Nicholas' 3 percent cap on audience share. It is more a function of Mr. Nicholas' assumption that the station should grow as a "niche player", which was never TVi's goal, instead of any actual analysis about programming, a key driver of audience share. Indeed, even Mr. Dementiev would disagree with Mr. Nicholas' conclusion; Mr. Dementiev testified that it was realistic for TVi to obtain a 4.2 percent audience share.

284. In contrast to Mr. Nicholas, Mr. Kane conducted a thorough analysis of programming commensurate with its importance. Mr. Kane reviewed the ratings information for NMDC programming both in Russia and Ukraine. He did not just look at how this programming fared on TVi; he also considered other Ukrainian television channels. This information confirmed the popularity of NMDC programming: On the chart that Mr. Kane provided, audience share for Ukrainian broadcasts of NMDC programming ranged from 5.0 percent to 29.09 percent. He concluded that "NMDC dramas which were successful in Russia also achieved ratings success in Ukraine, albeit at a lower viewership share. This has been demonstrated to be true over a number of years and for several well established Ukrainian channels." In other words, Russian programming "translates very well" in Ukraine. Accordingly, he determined that TVi, which was airing

NMDC programming at the time of the dilution, could achieve an audience share of 6 percent.

285. Historical growth of Ukrainian television networks validates the accuracy of Mr. Kane's conclusions, and highlights the deficiencies in Mr. Nicholas' analysis. As Mr. Nicholas acknowledged, ICTV grew its audience share from 2.8 percent to 6.9 percent in 2000 to 2003 airing Russian-made television series, and STB grew its audience share from 3.6 percent to 7.0 percent in 2004 to 2007, also based on Russian-made television series. As Mr. Nicholas acknowledged, at least STB's growth occurred in a similar competitive marketplace as the one that existed in September 2009. In fact, according to the audience share chart included in Mr. Nicholas' report, from January 2009 to September 2009, TVi was on a similar growth trajectory as ICTV and STB: TVi's audience share increased by 52.6 percent; the next highest share increase for a top-20 network was TET at 20.4 percent. Most of the rest of the top-20 networks lost share.

286. Mr. Kane concluded that it was appropriate to apply a 20 percent discount rate in his analysis of TVi's business enterprise value. Mr. Nicholas used a 30 percent discount rate for his Greenfield methodology. This higher discount rate results in a lower value.

287. Mr. Kane's discount rate is reasonable; Mr. Nicholas' is not. Among other things, Mr. Nicholas' rate is 50 percent higher than what AIG — a private equity firm — determined to be an appropriate discount rate in its summer 2009 analysis:

nothing more than 20 percent. Not surprisingly, Mr. Nicholas admits that his discount rate was, among other things, intended to "approximate venture capital returns."

288. To compound the error, Mr. Nicholas applied the same 30 percent discount rate to all future cash flows, including the terminal value, when he should have made adjustments for changing conditions in future years. Mr. Nicholas' selection of a 30 percent discount rate is based on his belief that the Ukrainian economy was one of the worst performing economies at the time TVi's status as a start-up and the riskiness of the Ukrainian economy relative to other economies. But as Mr. Nicholas acknowledges, the Ukrainian economy was expected to improve. Also, at some point in time, TVi would cease to become a start-up. And 2009 was the high watermark for riskiness of the Ukrainian economy relative to the U.S. economy. None of these changes are reflected in Mr. Nicholas' discount rate calculation.

289. In other words, as Mr. Kane credibly summarized, "[w]hat Mr. Nicholas is doing particularly in the context of a start-up company is not thinking anything gets better, including 10 years out. Everything is 30 percent forever, and this thing never gets off the ground. If you're reading any literature on valuating start-up companies, you would find that you should be thinking about differential discount rates. As the company starts getting along, you would start relaxing that discount rate from a start-up mode[.]"

290. In contrast, both Mr. Kane and AIG made adjustments to their discount rates for years further into the future. For example, although he started with a discount rate of 22 percent in 2009, Mr. Kane applied a discount rate of 17.5 percent for his terminal value calculation.

291. The literature also supports considering making adjustments to account for changing conditions.

292. Other parts of Mr. Nicholas' discount rate analysis are also flawed. For example, Mr. Nicholas' selection of a debt to equity ratio of 15 to 85 was important to his discount rate determination. Mr. Nicholas claimed in his report that he "weighted the cost of equity and cost of debt based on the low end of the debt to capital structures exhibited by the comparable companies." But a review of Mr. Nicholas' comparable companies shows otherwise. The 15 percent debt to capital percentage that he selected is lower than the percentage for the lowest of his comparable companies. It also is 52.4 percentage points below the percentage of his second-lowest comparable company. Conversely, Mr. Nicholas' selection of a 85 percent equity to capital percentage is higher than the percentage of any of his comparable companies, and 52.4 percent higher than the percentage of his second-highest comparable company.

293. Nonetheless, Mr. Nicholas explained that he chose the 15 to 85 debt to equity ratio because he believed that "[t]here were no real functioning markets or liquidity in the

marketplace." This conclusion is belied by a report that his colleagues at Deloitte released around late July 2009. Mr. Nicholas did not factor these numbers into his analysis.

294. Deloitte's report also recognized that the Ukrainian economy would recover. Among other things, it notes that the EURO 2012 Football Championship will be held in Ukraine and Poland, which means that "[a] massive direct impact on the Ukrainian economy is expected, with preparation set to cost some USD 25 billion in Ukraine alone." These views are consistent with Mr. Kane's understanding of the Ukrainian economy.

295. Mr. Nicholas also did not provide a credible reason for ignoring the country spread model when calculating his discount rate. Mr. Kane used the country spread model. His application of this model is consistent with firm-wide policy at his company, Duff & Phelps, which is the largest independent appraiser on the planet.

296. Mr. Nicholas, however, used a country risk rating model to calculate his discount rate. This model compares the cost of equity across all industries; it does not differentiate between media and other industries.

297. According to Mr. Nicholas, he is familiar with the country spread model, but did not believe it reliable or commonly used, and so he did not even consider using it, not even to confirm his own analysis. This is not credible. According to

the report Mr. Nicholas consulted to obtain the numbers necessary for his country risk rating model, the country spread model is an "international model in current use." The report also notes that the country spread model "provide[s] a good reference point to check against other models." Mr. Nicholas admitted that the report is a common source used by valuation professionals.

298. Mr. Nicholas also did not credibly claim any deficiencies in Mr. Kane's application of the country spread model. According to Mr. Nicholas, Mr. Kane did not make necessary adjustments to capture equity elements. But as Mr. Kane explained, "by using comparable companies that operate in a region, the Beta picks up a substantial amount of risk, which is an equity component." Mr. Kane's Beta – a statistical measure of the volatility of the price of a specific stock relative to the movement of a general group – is about 77 percent higher than Mr. Nicholas'.

299. Mr. Kane also made additional reasonable adjustments in his discount rate calculation to account for TVi's size. To make further adjustments for size-related risks, Mr. Kane used a small stock premium of 3.74 percent, the listed small stock premium for "micro-cap" companies – those with market capitalizations of approximately 1.5 million to approximately 453 million – in the Morningstar Risk Premium Report, 2009. This micro-cap category refers to the 9th and 10th deciles of the Morningstar report, and represents the companies within the two

smallest market capitalizations in the report. Mr. Kane credibly testified that while TVi would fall into the 10th decile if only market capitalization were considered, it would have been incorrect to use the small stock premium associated with the 10th decile alone. The 10th decile is subdivided into two categories one of which, 10b, Mr. Kane and other appraisers never use by itself because it includes bankrupt companies. Indeed, not even Mr. Nicholas has used the 10b category by itself. In any event, had Mr. Kane used the small stock premium associated with the 10a category, it would not have made much difference in his ultimate analysis.

300. Mr. Nicholas disagreed with Mr. Kane's selection of a small stock premium that included the 9th decile. He agreed, however, that valuation is both an art and a science, which means that it requires professional judgment as well as analysis.

301. Indeed, instead of picking a small stock premium listed in the Morningstar report, Mr. Nicholas elected to average the small stock premiums listed for the 10a — companies with market capitalizations between $136 million and $453 million — and 10b — companies with market capitalizations between $1.5 million and $136 million — categories. A small stock premium of 6.82 percent resulted.

302. Mr. Kagalovsky has testified that TVi was valuable when he took it from the Partnership. For example, Mr.

Kagalovsky decided that there was no need to do a full-blown analysis of TVi's profitability at the end of 2009, not long after the dilution, because "it is quite clear this is going to be very profitable."

303. Mr. Kagalovsky also conceded that TVi had commercial prospects at the time he took control of TVi. He testified that had TVi stopped broadcasting in early October 2009, it "would, on any view, have very seriously damaged its business and therefore commercial prospects." Indeed, he has continued to provide funding to TVi to "keep it going."

304. Despite performing its obligations under the License Agreements, NMDC never received payment of any overdue license fees, and TVi continued broadcasting the content it had licensed, but not paid for, from NMDC.

305. To date, the Partnership owes NMDC $3,681,870 in unpaid license fees.

306. Mr. Brown admitted at trial that he believes that NMDC should be compensated for programs that were shown. Nonetheless, he has authorized the Partnership to spend at least $1,720,000 in legal fees to defend against NMDC's lawsuit.

CONCLUSIONS OF LAW

307. Mr. Kagalovsky and Iota have breached, and aided and abetted the breach of fiduciary duties owed to New Media.

308. Delaware law governs New Media's fiduciary duty-related claims as the Partnership is a Delaware limited liability partnership. *See, e.g., Am. Int'l Grp., Inc. v Greenberg*, 23

Misc.3d 278, 285, 877 N.Y.S.2d 614, 620 (N.Y. Sup. Ct. 2008) (Ramos, J.) ("Generally, issues concerning the internal affairs of a corporation and the conduct of its directors are governed by the laws of the state of incorporation[.]" (citing *Hart v Gen. Motors Corp.*, 129 A.D.2d 179, 182, 517 N.Y.S.2d 490, 492 (1st Dep't 1987)).

309. "To establish liability for the breach of a fiduciary duty, a plaintiff must demonstrate that the defendant owed her a fiduciary duty and that the defendant breached it." *Estate of Eller v Bartron*, 31 A.3d 895, 897 (Del. 2011); *see also Kurtzman v Bergstol*, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644, 646 (2d Dep't 2007) ("In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct[.]").

310. As an equal partner in the Partnership, Iota owes New Media fiduciary duties of loyalty, candor, and care. *See* Del. Code Ann. tit. 6, § 15-404 (outlining the scope of a partner's statutory duties to other partners); *Anglo Am. Sec. Fund, L.P. v S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 157 (Del. Ch. 2003) (holding that former limited partners had an actionable claim against the general partner for concealing a withdrawal of partnership funds because "[u]nder Delaware law, fiduciaries are required, at the very least, to be honest and truthful when communicating with their principals."); *Boxer v*

Husky Oil Co., 429 A.2d 995, 997 (Del. Ch. 1981) ("[A] partner owes a fiduciary duty to the other partners at common law."); *see also Frame v Maynard*, 83 A.D.3d 599, 602, 922 N.Y.S.2d 48, 51 (1st Dep't 2011) (noting that a partner's fiduciary duties to the other partners "imposes a stringent standard of conduct that requires a fiduciary to act with undivided and undiluted loyalty" and "the fiduciary is strictly obligated to make full disclosure of all material facts" (internal quotations and citations omitted)).

311. Section 1 of the Partnership Agreement also provides that "all rights, liabilities and obligations of the Partners, both as between themselves and as to persons not parties to this Agreement, shall be as provided in the [Delaware Revised Uniform Partnership Act.]" (Pls.' Ex. 5, § 1.) Accordingly, Iota's duty of loyalty to New Media includes the obligation to (I) "hold as trustee for [the partnership] any property, profit or benefit derived by the partner in the conduct . . . of the partnership business or affairs or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity"; (ii) "refrain from dealing with the partnership in the conduct . . . of the partnership business or affairs as or on behalf of a party having an interest adverse to the partnership"; and (iii) "refrain from competing with the partnership in the conduct of the partnership business or affairs before the dissolution of the partnership." Del. Code Ann. tit. 6, § 15-404(b).

312. For the same reasons, Iota must also "in the conduct . . . of the partnership business or affairs . . . refrain[] from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." Del. Code Ann. tit. 6, § 15-404©.

313. New Media has established that Iota breached its fiduciary duties by agreeing to, planning, participating in, and covering up, the dilution of the Partnership's ownership interest in TVi and its trademarks to companies owned by Mr. Kagalovsky's family trusts, all without New Media's knowledge or consent. As this Court stated on summary judgment "there is ample evidence in the record that individuals whose actions are imputable to Iota excluded NMDC from the primary asset of the Partnership by its unilateral dilution of [the Partnership's] interest in TVi from [100] percent to less than one percent, which amounts to a breach of fiduciary duty." Summ. J. Decision at 25 (Mot. Seq. No. 021 & 022), *New Media Co. LLC v Kagalovsky, et al.*, No. 603742/2009 (filed July 22, 2011).

314. Specifically, the dilution of the Partnership's ownership interest in TVi and its trademarks was a classic self-dealing transaction; Mr. Kagalovsky stood on both sides of those transactions. *In re USACafes, L.P. Litig.*, 600 A.2d 43, 49 (Del. Ch. 1991); *see also Gibbs v Breed, Abbot & Morgan*, 271 A.D.2d 180, 184, 710 N.Y.S.2d 578, 581 (1st Dep't 2000) ("The members of a partnership owe each other a duty of loyalty and good faith,

and as a fiduciary, a partner must consider his or her partners' welfare, and refrain from acting for purely private gain[.]" (internal quotations and citation omitted)).

315. Mr. Kagalovsky completely dominated and controlled Iota, Aspida, and Seragill, and used his domination and control over those entities to dilute the Partnership's ownership interest in TVi and its trademarks. *See Morris v N.Y.S. Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141, 623 N.E.2d 1157, 1160-61, 603 N.Y.S.2d 807, 810-11 (1993). (holding that a court may pierce the corporate veil where (1) "the owners exercised complete domination of the corporation in respect to the transaction attacked;" and (2) "such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury").

316. Thus, Mr. Kagalovsky's actions are imputable to Iota, Aspida, and Seragill as his alter egos. As this Court stated on summary judgment, "the totality of the evidence clearly supports the conclusion that Kagalovsky dominated Iota with respect to these transactions, that such domination was used to commit a wrong against NMDC. Kagalovsky not only stood on both sides of the transactions in that he personally benefitted [sic] from the unilateral dilution of IVL's interest in TVi in that he is the beneficiary of and has authority with respect to the trusts that now o[w]n[] ninety-nine percent interests in the network. He also had direct knowledge of, and was directly

involved in, devising, approving, and concealing the transactions from NMDC." Summ. J. Decision at 25 (Mot. Seq. No. 021 & 022), *New Media Co. LLC v Kagalovsky, et al.*, No. 603742/2009 (filed July 22, 2011).

317. Directors and agents of Iota — including Grant Brown, other directors and administrators at Capita involved with Iota, and Iota's counsel Mr. Maitland Hudson — helped plan and cause the dilution and transfer of TVi's trademarks to Mr. Kagalovsky's family trusts. These actions are imputable to Iota. As this Court held on summary judgment, "there is evidence that Grant Brown was involved in facilitating the structuring and execution of these transactions and the efforts to conceal them. His actions may also be imputed to Iota. He clearly used his dual role as manager of [the Partnership] and his various positions within the Iota structure to further Kagalovsky's interests to the detriment of [the Partnership] and ultimately NMDC." Summ. J. Decision at 26 (Mot. Seq. No. 021 & 022), *New Media Co. LLC v Kagalovsky, et al.*, No. 603742/2009 (filed July 22, 2011).

318. After the dilution was complete, Iota — again through the actions of Grant Brown, other directors and administrators at Capita, its counsel Mr. Maitland Hudson, and its alter ego Mr. Kagalovsky — breached the duty of candor by concealing information about the dilution and trademark transfer from New Media, including by withholding all information from New

Media about these transactions, falsely representing the Partnership's remaining ownership interest in TVi to fraudulently induce additional monetary contributions from New Media, and lying to New Media about the changes in the ownership of TVi in response to New Media's inquiries. *See Anglo Am. Sec. Fund, L.P.*, 829 A.2d at 157; *Mills Acquisition Co. v Macmillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1988) ("[T]he duty of candor is one of the elementary principles of fair dealing[.]"); *see also Frame*, 83 A.D.3d at 602, 922 N.Y.S.2d at 51. As this Court held on summary judgment, "there is evidence that Brown and Hudson were involved in concealing the transactions from New Media, and they may have even misle[]d New Media in this regard." Summ. J. Decision at 23 (Mot. Seq. No. 021 & 022), *New Media Co. LLC v Kagalovsky, et al.*, No. 603742/2009 (filed July 22, 2011).

319. New Media also has established that Mr. Kagalovsky aided and abetted Iota's breach of fiduciary duties by knowingly agreeing to the dilution, funding the dilution, and creating and acquiring the companies necessary to effect the dilution. *See Jackson Nat'l Life Ins. Co. v Kennedy*, 741 A.2d 377, 386 (Del. Ch. 1999) (aiding and abetting liability established upon proof of the following elements: "(1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary" (internal quotations and citation omitted)); *see also Yuko Ito v*

Suzuki, 57 A.D.3d 205, 208, 869 N.Y.S.2d 28, 31 (1st Dep't 2008) ("A cause of action for aiding and abetting breach of fiduciary duty merely requires a prima facie showing of a fiduciary duty owed to plaintiff a breach of that duty, and defendant's substantial assistance in effecting the breach, together with resulting damages" (internal quotations and citation omitted)).

320. As an aider and abettor, Mr. Kagalovsky is jointly and severally liable for Iota's breach of fiduciary duty. *See Gotham Partners, L.P. v Hallwood Realty Partners, L.P.*, 817 A.2d 160, 172 (Del. 2002); *see also Visual Arts Found., Inc. v Egnasko*, 91 A.D.3d 578, 579, 939 N.Y.S.2d 13, 14 (1st Dept. 2012).

321. New Media has established that these breaches of fiduciary obligations have resulted in injury to New Media.

322. Defendants' actions also have breached the express and implied terms of the Partnership Agreement.

323. "The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage." *Clearmont Prop., LLC v Eisner*, 58 A.D.3d 1052, 1055, 872 N.Y.S.2d 725, 728 (3d Dep't 2009) (internal quotations and citation omitted); *see also H-M Wexford LLC v Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003) ("Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation

by the defendant; and 3) a resulting damage to the plaintiff.").

324. New York law applies to New Media breach of contract-related claims as provided by the Partnership Agreement's choice-of-law provision. (*See* Pls.' Ex. 5, § 17; *Hugh O'Kane Elec. Co., LLC v MasTec N. Am., Inc.*, 19 A.D.3d 126, 127, 797 N.Y.S.2d 45, 46 (1st Dep't 2005) ("It is the policy of the courts of New York to enforce choice-of-law clauses, provided that the law chosen has a reasonable relationship to the agreement and does not violate a fundamental public policy of New York[.]").)

325. The Partnership Agreement was executed for the sole purpose of owning and operating TVi.

326. As provided under Sections 6 and 7(b) of the Partnership Agreement, and the Delaware Revised Uniform Partnership Act, all major decisions affecting the Partnership require the consent of both partners.

327. Specifically, Section 7(b) expressly reserves to the partners all managerial powers specified in the Delaware Revised Uniform Partnership Act. (Pls.' Ex. 5, § 7(b).) This incorporates the Act's guarantees that (I) partners shall have "equal rights in the management and conduct of the partnership business and affairs"; (ii) consent from "a majority of the partners" – which means both partners here – is necessary to resolve "difference[s] arising as to a matter in the ordinary course of business of a partnership"; and (iii) "[a]n act outside the ordinary course of business of a partnership may be

undertaken only with the consent of all of the partners." (Del. Code Ann. tit. 6, § 15-401(f), (j); *see also* Trial Tr., Dec. 21, 2012, at 82:7-87:23 (holding that Section 7(b) expressly excepts from the Manager's authority and reserves to the partners all management rights under the Delaware Revised Uniform Partnership Act).)

328. Similarly, Section 6 of the Partnership Agreement provides that a majority vote is necessary for any actions that require the approval of the partners.

329. New Media has established that it performed its obligations under the Partnership Agreement.

330. New Media has established that the dilution and transfer of the Partnership's ownership interest in TVi and its trademarks to Mr. Kagalovsky's trusts was accomplished without New Media's knowledge or consent, and thus in breach of Sections 6 and 7(b) of the Partnership Agreement.

331. New Media also has established that the dilution and transfer of the Partnership's ownership interest in TVi and its trademarks to Mr. Kagalovsky's trusts frustrated the entire purpose of the Partnership Agreement, and injured and destroyed New Media's right to receive the fruits of the Partnership Agreement, all in breach of the implied covenant of good faith and fair dealing. *See ABN AMRO Bank, N.V. v MBIA Inc.*, 17 N.Y.3d 208, 228, 952 N.E.2d 463, 475, 928 N.Y.S.2d 647, 659 (2011) (noting that the implied covenant of good faith and fair dealing "embraces a pledge that neither party shall do anything which

will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (internal quotations and citation omitted)); *see also PAMI-LEMB I Inc. v EMB-NHC, L.L.C.*, 857 A.2d 998, 1016 (Del. Ch. 2004) ("That implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract." (internal quotations and citation omitted)).

332. New Media has established that Mr. Kagalovsky tortiously interfered with the Partnership Agreement: he had knowledge of Iota's obligations under the Partnership Agreement, and intentionally caused Iota to breach them by taking ownership and control of TVi and its trademarks without New Media's knowledge and consent, and without justification. *See Hoag v Chancellor, Inc.*, 246 A.D.2d 224, 228, 677 N.Y.S.2d 531, 533 (1st Dep't 1998) ("The elements of a tortious interference with contract claim are well established—the existence of a valid contract, the tortfeasor's knowledge of the contract and intentional interference with it, the resulting breach and damages."); *see also NACCO Indus., Inc. v Applica Inc.*, 997 A.2d 1, 34 (Del. Ch. 2009) ("As traditionally framed, a claim for tortious interference with contract requires (1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury." (internal

quotations and citation omitted)).

333. Finally, New Media has established that it was injured by Iota's breach of the Partnership Agreement, and Mr. Kagalovsky's tortious interference.

334. Under Delaware law, "[d]amages resulting from a breach of the fiduciary duty of loyalty are liberally calculated." *Auriga Capital Corp. v Gatz Props., LLC*, 40 A.3d 839, 879 n.167 (Del. Ch. 2012). "Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly. The strict imposition of penalties under Delaware law are designed to discourage disloyalty." *Bomarko, Inc. v Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999) (internal quotations and citation omitted).

335. For breach of contract claims, "[i]t is a fundamental principle of contract law that an award of damages should place the plaintiff in the same position as he or she would have been in if the contract had not been breached." *Island Fed. Credit Union v Hillside Auto Mall, Inc.*, 91 A.D.3d 599, 601, 937 N.Y.S.2d 87, 89 (2d Dep't 2012) (internal quotations and citation omitted). "Absent a special provision of law or contractual limitation, it is a basic tenet of the law of damages that where there has been a violation of a contractual obligation the injured party is entitled to fair and just compensation commensurate with his loss." *Terminal Cent., Inc. v Henry Modell & Co., Inc.*, 212 A.D.2d 213, 218, 628 N.Y.S.2d 56, 59 (1st Dep't 1995); *see also Duncan v Theratx, Inc.*, 775 A.2d

1019, 1022 (Del. 2001) ("Expectation damages thus require the breaching promisor to compensate the promisee for the promisee's reasonable expectation of the value of the breached contract, and, hence, what the promisee lost.").

336. The effect of the dilution, which breached contractual and fiduciary obligations owed to New Media, was to deprive New Media of its 50 percent ownership interest in TVi. New Media is entitled to damages equal to 50 percent of TVi's value as measured at the time of the dilution. *See Boyer v Wilmington Materials, Inc.*, 754 A.2d 881, 902-05 (Del. Ch. 1999) (awarding damages equal to plaintiff's pro rata share in a company that defendants, in breach of fiduciary duties, rendered worthless through their sale of substantially all of the company's assets for the principal purpose of eliminating plaintiff from continued ownership and management of the business).

337. New Media has established that the value of TVi at the time of the dilution was $56.9 million, as reflected in the contemporaneous analysis that AIG performed in the summer of 2009. Thus, New Media is entitled to $28.45 million, plus interest, in damages.

338. New Media has also established that the value of TVi at the time of the dilution was $50 million, as reflected in the analysis of its expert, Mr. Kane. Thus, this Court determines that New Media is entitled to $25 million, plus interest, in damages.

339. NMDC has established that the License Agreements are valid and enforceable contracts between NMDC and the Partnership.

340. NMDC has established that it performed its obligations under the License Agreements.

341. NMDC has established that the Partnership breached the License Agreements by failing to make a total of $3,681,870 in payments. *See, e.g., Republic Nat'l Bank of N.Y. v Olshin Woolen Co. Inc.*, 304 A.D.2d 401, 402, 758 N.Y.S.2d 45, 46 (1st Dep't 2003) (holding that "defendants were in default of the agreement" where defendants did not make a payment on the date specified by the contract); *Titan Corp. v Cellular Vision Tech. & Telecomms., L.P.*, 271 A.D.2d 437, 437, 706 N.Y.S.2d 125, 126 (2d Dep't 2000) ("The plaintiff established its entitlement to summary judgment on its first cause of action, as the defendant did not dispute that it had failed to make the payments due under the terms of the parties' 1997 letter agreement."). Indeed, TVi broadcast the licensed programming on TVi throughout 2009, even after NMDC demanded payment of the overdue license fees.

342. NMDC did not waive its right to seek payment of any license fees. Each of the License Agreements contained "no waiver" clauses that are enforceable, and the Partnership has not identified any written waivers that would excuse it payment of the license fees owed. *See Excel Graphics Techs., Inc. v CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 A.D.3d 65, 70, 767 N.Y.S.2d 99, 103 (1st Dep't 2003) (holding waiver arguments barred as

contrary to "no waiver" provisions).

343. There exists no enforceable modification of the payment schedules contained in the License Agreements. Each of the License Agreements contain a "no oral modification" clause, and the Partnership has identified no qualifying written modification of those agreements. Thus, the payment schedules contained in the License Agreements are enforceable. *Israel v Chabra*, 12 N.Y.3d 158, 163, 906 N.E.2d 374, 377, 878 N.Y.S.2d 646, 649 (2009) ("[W]here a contract contains a 'no oral modification' clause, that clause will be enforceable.").

344. While an oral modification may be enforceable if "a party to a written agreement has induced another's significant and substantial reliance upon an oral modification," the "conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written[.]" *Rose v Spa Realty Assocs.*, 42 N.Y.2d 338, 344, 366 N.E.2d 1279, 1283, 397 N.Y.S.2d 922, 927 (1977).

345. The Partnership has failed to offer credible evidence that an alleged agreement to defer payments under the License Agreements has induced any significant and substantial reliance on its part, as required by *Rose v Spa Realty Associates*, 2 N.Y.2d 338, 366 N.E.2d 1279, 397 N.Y.S.2d 922 (1977).

346. The Partnership also has failed to offer credible evidence of any agreement to defer payments under the License Agreements past September 30, 2009. The evidence at trial

demonstrates that the Partnership agreed to pay NMDC $413,400 in already overdue license fees when New Media's funding arrived on September 25, 2009. These promised payments were never made, nor any payments made since then, all in breach of the License Agreements.

347. As a result, the Partnership is liable to NMDC for $3,681,870, plus interest, in damages.

348. "A cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor[.]" *Sergeants Benevolent Ass'n Annuity Fund v Renck*, 19 A.D.3d 107, 111, 796 N.Y.S.2d 77, 81 (1st Dep't 2005) (internal citation and quotations omitted).

349. NMDC has provided TVi with $3,681,870-worth of programming content that TVi has aired without any reimbursement to NMDC.

350. As the owner of beneficial interests in over 99 percent of TVi, Mr. Kagalovsky has benefitted from TVi's unpaid broadcasts of NMDC content.

351. Mr. Kagalovsky has been unjustly enriched by TVi's broadcasts of NMDC content in the sum of at least $3,681,870.

352. Defendants have failed to establish a fraudulent inducement claim against Mr. Gusinski, New Media, or NMDC. As this Court observed at trial that "[t]he problem I see is almost overwhelming. There are no documents at all that I have seen

anyway that support Mr. Kagalovsky's claim that he was defrauded. He has the burden of proof on it. If anything, Mr. Phillips has satisfied the burden he doesn't have to establish a defense that there was no fraud. Gusinski revealed these things."

353. To establish fraudulent inducement of contract, Defendants must show "that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged[.]" *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498, 918 N.Y.S.2d 423, 426 (1st Dep't 2011); *see also Frank Crystal & Co., Inc. v Dillmann*, 84 A.D.3d 704, 704, 925 N.Y.S.2d 430, 431 (1st Dep't 2011).

354. The Partnership Agreement and the License Agreements are agreements negotiated at arm's length by sophisticated parties, including Mr. Kagalovsky and Mr. Gusinski.

355. The Partnership Agreement contains a merger clause that bars Mr. Kagalovsky and Iota from asserting that they were induced to form the Partnership or to execute the Partnership Agreement by any misrepresentation or agreement alleged. *See McFarland v Opera Owners, Inc.*, 92 A.D.3d 428, 429, 937 N.Y.S.2d 591, 591 (1st Dep't 2012) ("The court properly dismissed the fraud claim as barred by the merger clause, 'as is' clause, and other disclaimers[.]"); *Appel v Giddins*, 89 A.D.3d 543, 544, 933 N.Y.S.2d 229, 230 (1st Dep't 2011) ("[W]hether it alleges fraud in the inducement or negligent misrepresentation, the tenth cause of action is barred by the merger clause in the contract[.]");

Chappo & Co., Inc. v Ion Geophysical Corp., 83 A.D.3d 499, 500, 921 N.Y.S.2d 227, 227 (1st Dep't 2011) (same).

356. Similarly, each License Agreement contains a merger clause that bars the Partnership from asserting it was fraudulently induced to enter into the License Agreements by the alleged misrepresentations or agreements. *See Valassis Commc'ns, Inc. v Weimer*, 304 A.D.2d 448, 448, 758 N.Y.S.2d 311, 312 (1st Dep't 2003) (holding that "plaintiffs possess no viable claim for fraud" where the "provisions of the parties' Purchase Agreement specifically prohibiting plaintiffs' reliance on extra-contractual representations such as those upon which plaintiffs' fraud claim is premised"); *Capstone Enters. of Port Chester, Inc. v Cnty. of Westchester*, 262 A.D.2d 343, 344, 691 N.Y.S.2d 574, 575 (2d Dep't 1999) ("[I]it is well established that where an agreement contains a clear disclaimer of reliance on oral representations a party is precluded from making subsequent assertions of fraudulent inducement based on oral representations[.]"); *see also Bostwick v Christian Oth, Inc.*, 91 A.D.3d 463, 464, 936 N.Y.S.2d 176, 177-78 (1st Dep't 2012) (holding alleged oral agreement invalid "in view of the written contract's integration clause explicitly prohibiting oral agreements.").

357. Additionally, Defendants have offered no credible evidence that Mr. Gusinski, New Media, or NMDC made any false representation to them. Instead, among other things, Mr. Gusinski sent Mr. Kagalovsky a term sheet confirming an agreement

that NMDC and other related parties would supply programming content to the Partnership at market prices, and NMDC's Confidential Offering Memorandum, which openly informed Mr. Kagalovsky of the cost structure for NMDC's programming.

358. Even if Mr. Gusinski agreed to supply NMDC programming at or near cost, Mr. Kagalovsky admitted that it was not critical to his decision to invest in the Partnership. Therefore, it was immaterial and cannot be the basis for a fraudulent inducement claim. *See Kleinman v Blue Ridge Foods, LLC*, No. 9603/2010, 2011 WL 2899428, at *5 (N.Y. Sup. Ct. July 7, 2011) (noting that plaintiff's concession that an alleged misrepresentation of a fact was not critical to him meant that the alleged misrepresentation was immaterial and could not sustain a fraudulent inducement claim).

359. Additionally, "[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations[.]" *Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 A.D.2d 96, 98-99, 665 N.Y.S.2d 415, 417 (1st Dep't 1997).

360. Moreover, "New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring." *Global Minerals & Metals Corp. v Holme*, 35

A.D.3d 93, 100, 824 N.Y.S.2d 210, 215-16 (1st Dep't 2006).

361. Defendants, who acknowledged receipt of the NMDC Confidential Offering Memorandum and the term sheet before the Partnership Agreement was executed, any significant funding for TVi was provided, or any license agreement was signed, could not have reasonably or justifiably relied on any alleged oral representation that content would be supplied at or near cost. *See Stuart Silver Assocs.*, 245 A.D.2d at 98-99, 665 N.Y.S.2d at 417-18 (holding that it was not reasonable for a limited partner, who was sent offering materials in connection with the investment, to rely on alleged false oral promises alone when entering into the partnership); *see also Arfa v Zamir*, 76 A.D.3d 56, 59, 905 N.Y.S.2d 77, 79 (1st Dep't 2010) *aff'd* 17 N.Y.3d 737, 952 N.E.2d 1003, 929 N.Y.S.2d 11 (2011).

362. Even if any false representations were made, Defendants have offered no credible evidence that Mr. Gusinski, New Media, or NMDC had the requisite fraudulent intent. To the contrary, the evidence at trial demonstrates that Mr. Gusinski, New Media, and NMDC openly disclosed all material information to Defendants.

363. Finally, Defendants enjoyed benefits from the agreements between the parties – including by airing NMDC programming on TVi after NMDC demanded payment in October 2009 – without any objection, and thus cannot successfully attack the validity of any of the agreements. *See, e.g., Barrier Sys., Inc. v A.F.C. Enters., Inc.*, 264 A.D.2d 432, 433, 694 N.Y.S.2d 440,

442 (2d Dep't 1999) ("Whether under a waiver or ratification analysis, a party may not avoid an agreement on grounds of fraud if, after acquiring knowledge of the fraud, he affirms the contract by accepting a benefit under it" (internal quotations and citations omitted)); *Jaywyn Video Prods., Ltd. v Servicing All Media, Inc.*, 179 A.D.2d 397, 398, 577 N.Y.S.2d 847, 848 (1st Dep't 1992).

364. Defendants have failed to establish a breach of any fiduciary duty owed to them.

365. Defendants have failed to establish that NMDC owes any fiduciary duties to any of them. NMDC's relationship with Defendants is purely contractual; NMDC dealt at arm's length with Defendants — sophisticated parties who were independently advised by economic advisor Mr. Dementiev and Ukrainian media advisors Mr. Knyazhitsky and Mr. Romanets before the execution of each of the License Agreements. *See Wilhelmina Artist Mgmt. LLC v Knowles*, No. 601151/03, 2005 WL 1617178, at *8 (N.Y. Sup. Ct. June 6, 2005) ("[A] fiduciary relationship generally will not be implied between parties to a commercial transaction where the parties are each represented by counsel and other professional advisors retained to protect their interests." (citing *Pan Am Corp. v Delta Air Lines, Inc.*, 175 B.R. 438, 512 (S.D.N.Y. 1994)) (Cahn, J.); *see also Grumman Allied Indus., Inc. v Rohr Indus., Inc.*, 748 F.2d 729, 739 (2d Cir. 1984) (holding that no fiduciary relationship existed where a party to a transaction relied on their own advisors to protect its best interests); *WIT Holding*

Corp. v Klein, 282 A.D.2d 527, 529, 724 N.Y.S.2d 66, 68 (2d Dep't 2001) ("[A]n arms-length business relationship does not give rise to a fiduciary obligation[.]").

366. Nor does a fiduciary relationship arise simply because NMDC licensed programming content to the Partnership. *Reuben H. Donnelley Corp. v Mark I Mktg. Corp.*, 893 F. Supp. 285, 289-90 (S.D.N.Y. 1995) ("As New York law holds, however, an arms-length licensor/licensee type relationship, without more, is not fiduciary in nature." (collecting cases)).

367. Finally, no fiduciary duties of New Media or Mr. Gusinski are imputable to NMDC. To establish that NMDC is either New Media's or Mr. Gusinski's alter ego, Defendants must demonstrate that (1) "the owners exercised complete domination of the corporation in respect to the transaction attacked;" and (2) "such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris*, 82 N.Y.2d at 141, 623 N.E.2d at 1160-61, 603 N.Y.S.2d at 810-11. Defendants have offered no credible evidence of either of these elements. Not only was no fraud or wrong committed against Defendants, but also NMDC is 13.5 percent owned by independent investor AIG, which has, among other things, the ability to veto any related-party transactions.

368. Defendants have not provided credible evidence of any misconduct by Mr. Gusinski, New Media, or NMDC to sustain claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, or conspiracy to breach fiduciary duty.

369. Defendants had full knowledge of, and consented to, all of the Partnership's related-party transactions with companies affiliated with Mr. Gusinski. Mr. Kagalovsky actively participated in negotiations for NMDC programming content, and was sent and approved of all agreements between the Partnership and entities affiliated with Mr. Gusinski prior to their execution. Thus, none of the related-party transactions are in breach of any fiduciary duties. *See, e.g.*, *Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 A.D.3d 261, 263, 779 N.Y.S.2d 485, 487 (1st Dep't 2004) ("While partners are ordinarily limited by their fiduciary duties to the partnership and their other partners from engaging in self-dealing, . . . if the asserted self-dealing was actually contemplated and authorized, it would not, *ipso facto*, be impermissible and deemed wrongful[.]" (internal quotations and citations omitted)); *Ramsey v Toelle*, No. 3404-S, 2008 WL 4570580, at *7 (Del. Ch. Sept. 30, 2008) ("Of course, a fiduciary may engage in a self-dealing transaction involving her principal, but only where the principal has consented to the self-dealing after full disclosure by the fiduciary.").

370. The related-party transactions are protected by the business judgment rule. *See Solomon v Armstrong*, 747 A.2d 1098, 1115 (Del.Ch. 1999) ("[I]n a classic self-dealing transaction the effect of a fully-informed shareholder vote in favor of that particular transaction is to maintain the business judgment rule's presumptions."). Defendants have offered no

credible evidence to rebut the business judgment rule's presumptions. Indeed, the prices the Partnership paid NMDC for programming were at or below market rates.

371. Defendants also have not established that Mr. Gusinski, New Media, or NMDC breached the duty of candor. For example, Defendants had knowledge of, and consented to, all major decisions affecting the Partnership and TVi, including all agreements between the Partnership and entities affiliated with Mr. Gusinski, hiring decisions for TVi's top managers, decisions concerning TVi's operational budget and advertising, decisions concerning free-to-air distribution, and other TVi operational issues.

372. Finally, Defendants offered no credible evidence that Mr. Gusinski, New Media, or NMDC violated any duty of care. *See* Del. Code Ann. tit. 6, § 15-404© ("A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business or affairs is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."). For example, while Mr. Gusinski and his representatives were involved in the Partnership, TVi rose from the 47th-ranked broadcaster in Ukraine to the 14th-ranked broadcaster in a little over one and a half years. TVi, in which the partners had invested around $24 million to develop, was worth nearly $57 million at that point in time.

373. Since there is no underlying breach of fiduciary duty, Defendants' conspiracy and aiding and abetting claims must fail. *See Jackson Nat'l Life Ins. Co.*, 741 A.2d at 386 (requiring proof of an underlying breach of fiduciary duty to establish an aiding and abetting claim); *NACCO Indus. Inc.*, 997 A.2d at 35 ("Although the elements of a claim for civil conspiracy are flexible, it is essential that there be an underlying wrongful act, such as a tort or a statutory violation.").

374. Defendants' remaining counterclaims, which are not included in their trial brief, are meritless.

375. Iota has offered no credible evidence that New Media breached the express or implied terms of the Partnership Agreement, including the implied covenant of good faith and fair dealing.

376. Similarly, the Partnership has offered no credible evidence that NMDC breached the express or implied terms of the License Agreements, including the implied covenant of good faith and fair dealing.

377. As there has been no breach of contract, Defendants' tortious interference of contract claims must fail. *See Hoag*, 246 A.D.2d at 228, 677 N.Y.S.2d at 533 (requiring a "resulting breach" of contract to sustain a tortious interference claim); *see also NACCO Indus., Inc.*, 997 A.2d at 34.

378. Defendants' unjust enrichment claims must fail because the Partnership Agreement and the License Agreements

govern the subject matter they complain about, and "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter[.]" *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 N.Y.2d 382, 388, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987); *see also* Summ. J. Decision at 12 (Mot. Seq. No. 021 & 022), *New Media Co. LLC v Kagalovsky, et al.*, No. 603742/2009 (filed July 22, 2011) (dismissing Plaintiff's unjust enrichment claim because "there is no allegation that the Partnership Agreement is not applicable to the ownership of TVi or invalid").

379. In any event, Defendants have offered no credible evidence that Mr. Gusinski, New Media, or NMDC were unjustly enriched at Defendants' expense. *See Sergeants Benevolent Ass'n Annuity Fund*, 19 A.D.3d at 111, 796 N.Y.S.2d at 81 (1st Dep't 2005) ("A cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor[.]" (internal citation and quotations omitted)).

Conclusion

With regard to the measure of damages to be awarded to New Media by reason of the unwarranted dilution, this Court, upon the application of defendants' counsel, permitted both sides to submit expert testimony on the question of damages. The defendants' defense to the dilution claim was almost entirely to assert that damages in this case are speculative or that the enterprise value was zero. As set forth above, this Court does not agree. The credible evidence is that the enterprise of the partnership at the time of dilution was $50 million.

Settle judgment in case number 603742/09 in favor of New Media against all defendants in that action, jointly and severally liable, for the loss of New Media's interest in the Partnership calculated upon an enterprise value of TVi of $50 million, plus interest.

Settle judgment in case number 650754/09 favor of NMDC against all defendants, jointly and severally liable, in the full amount of its unpaid invoices, plus interest.

Dated: August 10, 2012

J.S.C.

CHARLES E. RAMOS