

Court of Queen's Bench of Alberta

Citation: Kostic v Scott Venturo Rudakoff LLP, 2022 ABQB 188

Date: 20220303
Docket: 1901 06547
Registry: Calgary

Between:

Liliana Kostic

Plaintiff

- and -

**Scott Venturo Rudakoff LLP, Dominic Venturo, Dan Horner,
Katrina Edgerton-McCutchan also known as Katrina Edgerton-McGhan**

Defendant

**Memorandum of Decision
of the
Associate Chief Justice
J.D. Rooke**

I. Introduction & Prime Issues for Decision

[1] This Memorandum of Decision (Decision) is about the limits, on the cross-examination and requests for undertakings, by Liliana Kostic (Kostic), of an affidavit sworn by the Defendant, Katrina Edgerton-McGhan (KEM) on June 8, 2021 (the KEM, or KEM's, Affidavit) filed on behalf of the Defendants (Applicants in this application), Scott Venturo Rudakoff LLP et al (SVR), in their cross-application, under Rules 4.22 – 4.23, for Security for Costs (filed the same date). The cross application is in response to a Summary Judgment Application (filed May 11, 2021) by Kostic against SVR on its defence to the within action commenced by Kostic on May 9, 2019. All of this culminated, after filing further affidavits and briefs, in a hearing on

these issues on December 15, 2021.¹ This is the Decision that results from that hearing. However, some background is necessary to understand this litigation.

II. Background

[2] I say “some background” because all the background, most not relevant, would take a book. I shall try to limit the background to some major points – a very short story – without all the details, with some corners being rounded (i.e., this background will not be detailed or intended to be precise), merely for the purpose of giving some context to the need for this Decision. The details can be found, by those interested, in searching the Court records and CanLII decisions in relation to *inter alia*, the Piikani Nation (Nation), Kostic and AIG/Thom (defined below).

[3] Since 2010, I have been case managing much of the litigation involving the Piikani Nation in relation to various disputes over, *inter alia*, the management of approximately \$65 million, paid to the Nation (and related entities) for the purchase of the Nation’s lands used for the Oldman River Project. As part of that case management, since 2012, I have dealt with litigation involving Kostic who was an investment adviser who worked with the Nation on behalf of two successive trust companies, the latter being Raymond James Ltd. Search either name on CanLII and you will get more details of the history – and other tangents related thereto.

[4] In November 2006, the Nation sued Kostic and Raymond James in Action #0601-13081 (0601 Action), and she called on her insurer, subsequently identified on the public record, as American Home Assurance Ltd. (later known as AIG)² to provide a defence and defence counsel for her.

[5] In November 2006, AIG appointed Counsel on behalf of AIG, Kostic, and Raymond James, namely, Jeffrey N. Thom, Q.C. (Thom) and his then firm, Miller Thomson LLP (collectively, Thom), who acted for her and/or AIG, as well as Raymond James³, until the Fall of 2013 when he resigned from that role. Later, on September 22, 2015, Kostic sued Thom in Action #1501-11111 (1501 Action) for \$15,000,000 in damages, alleging, *inter alia*, breach of duty⁴, negligence and conflicts of interest (between her and Raymond James, and by Thom). As Case Management Justice (CMJ) from the date of the Statement of Defence on February 26, 2016, in the 1501 Action filed, in due course, I issued a decision for summary judgment in Thom’s favour (2020 ABQB 324), which was reversed by the Court of Appeal (2021 ABCA 406). To my knowledge, both the 0601 Action and the 1501 Action remain unresolved.

¹ There is also an extant application by Kostic for “public interest funding” from SRV, for which there is little written material on the record, and for which I did not permit oral argument on December 15, 2021, because I will not deal with the substance of that herein, but separately – I will discuss this briefly at the end of this Decision.

² There is much subsequent litigation between AIG and Kostic, most of which I have case managed, and on much of which I have made decisions – again, search CanLII under either name.

³ There is an issue in that litigation as to who (AIG, Raymond James and/or Kostic) had the authority to instruct Thom.

⁴ Primary among them was the alleged failure of Thom to bring a summary judgment application against the Nation to dismiss the claims against Kostic in the 0601 Action, which she now continues to allege against SVR in this action.

[6] According to paras 3 – 9 of KEM’s Affidavit, in January and February 2017⁵, AIG retained/appointed SVR (Kostic says “unilaterally”) as Counsel for Kostic in the 0601 Action, which KEM stated it did under the terms of a produced retainer letter (Retainer), dated February 15, 2017 (Exhibit “A” to KEM’s Affidavit), prepared by SVR, but that “Kostic never signed the Retainer. She objected to SVR acting on her behalf...”.

[7] KEM also asserts that the subsequent legal services were performed by the Defendant, Domenic Venturo, but never by the Defendant, Dan Horner (relevant to an allegation by Kostic of an SVR conflict) who “had no access to ... Kostic’s file and was subject to a privacy screen”. KEM further testified that: during this period, Kostic had “other independent legal advice”; on May 12, 2017 (letter so advising on the said date is Exhibit “C” to the KEM Affidavit⁶), AIG instructed SVR to take no further steps; and, as instructed by AIG, SVR filed Withdrawals as Counsel of Record (Exhibit “D” to the KEM Affidavit) filed May 19, 2017, as to the 0601 Action.

[8] Paras 10 – 19 of the KEM Affidavit, discusses the steps taken by SVR to obtain Kostic’s file on the 0601 Action. KEM’s Affidavit asserts that SVR requested Kostic’s 0601 Action file from her Counsel, Zinner, in January and February 2017, but did not receive it until March 8, under trust conditions that could not be accepted by SVR, such that all the file material was returned to Zinner unopened on March 9, 2017 (see letter of SVR doing so, at Exhibit “E” to the KEM Affidavit). The KEM Affidavit further asserts that Kostic refused to cooperate with SVR to swear an affidavit to obtain her file from Zinner (para 13 of and Exhibit “H” to the KEM Affidavit). While an agreement was apparently reached by AIG and Kostic for the Kostic file to be produced from Zinner (para 14 to and Exhibit “I” of the KEM Affidavit), it never was. On April 4 & 5, 2017, SVR gave notice (para 15 of, and Exhibit “J” to the KEM Affidavit) to Kostic that they could not provide a timeline for the defence of the 0601 Action without the Kostic file from Zinner, and the failure to provide it would jeopardize the defence, but the file was still not provided and SVR was advised by the Zinner office that Kostic would not release it to SVR (paras 17 & 18, and Exhibit L to the KEM Affidavit), and it never was.

[9] The KEM Affidavit, at para 20 – 23, also asserts that SVR filed certain appeals on behalf of Kostic, which Kostic elected to continue, although they were ultimately dismissed on their merits. In the interval, SVR sought to stay the appeals so that they could obtain Kostic’s files to represent her in the appeals, but a consent order agreed to by all parties (absent Kostic) was denied when, on May 4, 2017, Kostic appeared in the Court of Appeal representing herself and “objected to ... the appeals being stayed, ... advising the Court that she did not have a retainer with SVR”⁷. Kostic claims in her Statement of Claim in this Action that AIG terminated SVR’s representation in late May 2017.

⁵ It is apparent from the record that there were discussions in late 2016 between SVR and AIG, about a potential retainer of SVR by AIG – Kostic was against same and never cooperated with either on a retainer. Nevertheless, KEM’s Affidavit, para 3, and SVR Statement of Defence, para 4, state that this SVR/AIG relationship officially began on January 20, 2017, when AIG requested SVR to act; on February 3, 2017, when SVR was retained by AIG; and on February 16, 2017 when the Notice of Change of Representation was filed with the Court (Exhibit “B” to the KEM Affidavit) at the direction of AIG (para 11 of the Statement of Defence herein says that was done on March 16, 2017, but that appears to be in error when looking at the face of Exhibit “B”, although it does not appear that anything herein turns on these exact dates).

⁶ It states that, as at this date, AIG has “denied coverage” to Kostic in relation to her defence of the 0601 Action.

⁷ Para 22 of the KEM Affidavit – see pp 4 – 11 of the Transcript of the May 4, 2017 hearing before Justice O’Ferrall, being Exhibit 15 of Kostic’s Affidavit (apparently) filed on May 11, 2021, in support of her Summary

[10] Two years later (+/-), on May 9, 2019, Kostic sued SVR in this Action, bearing many claims similar⁸ to her claim against Thom⁹, with some new nuances related to SVR. Additionally, she blamed SVR for things that happened as far back as 10 years before SVR commenced acting in respect of the 0601 Action – see para 117 of the Statement of Claim herein.

[11] On June 10, 2021, before I became CMJ, Justice Jeffrey, on June 10, 2021, granted an Order, which directed (without limiting the number of documents or page numbers for filings), *inter alia*, that: (para 1) the application by SVR for Security for Costs and Kostic for advance costs would be heard before the Kostic Application for Summary Judgment and the SRV Application for Summary Dismissal; (para 8) initial briefs would be filed by each party by November 22, 2021; (para 9) respondent briefs would be filed by November 29, 2021; and (para 10) any reply briefs will be filed by December 2, 2021.

[12] Except for the November 30, 2021 Application of Kostic, for which leave was granted in part, as discussed below, no appeal or variation of that Order has been granted.

[13] I have been CMJ in this Action since June 24, 2021.

III. History of the Actia

[14] There have been over 1937 pages of material filed by Kostic in this matter, 1371 since the Kostic cross-examination on the KEM Affidavit, including 845 pages of briefs masquerading as “affidavits” (see comments herein on Kostic’s failure to distinguish the difference) and 363 pages of written briefs – see paras 4 & 11 of the SVR Brief of December 13, 2021. I won’t go through all of the material, because even doing so gets off the real issue before me, namely the relevance and materiality of Kostic’s cross-examination on the KEM Affidavit on September 2, 2021, which is the root of the issue which I must decide in this Decision.

[15] On September 14, 2021, filed a 7 page “Cross Application to Oppose on Security for Costs” and “Application for Advance Costs” and a supporting 196 page Affidavit, which, while dated after, apparently was largely prepared before the September 2, 2021 cross-examination of the KEM Affidavit (note para 5 of the Affidavit that supports this timing). While I note that the Kostic Affidavit complained about that cross-examination experience, I note too that it did not demand answers to questions refused and undertakings declined on the cross-examination. Thus, while I will have some comments on its content herein, in a broader context, I believe it is primarily relevant to the next applications in the chain (Security for Costs and Advanced Costs) and thus I will not deal with the substance of these documents further in the within application to compel answers and undertakings from that cross-examination.

Judgment Application (which I have only cursorily reviewed as it is not directly relevant to the application before me, although it provides evidence (and argument – Kostic doesn’t seem to know or follow the difference) as to the merits of her claim.

Kostic took a similar position, on May 2, 2017, before Justice Nation, that SVR did not act for her on Mr. Zinner’s application to interplead Kostic’s records in his possession – (see para 19 of, and Exhibit “M” to, the KEM Affidavit, being the Transcript of the hearing that day, at pp 8/24-9/3, 10/11-12, 11/7-10 & 12/30-31).

⁸ Indeed, some are identical – see paras 31 of the Statements of Claim in the 1501 Action and para 107 of the within action. There are undoubtedly others, although that is not the focus of the Court in this Decision.

⁹ A reading of both Statements of Claim in the 1501 Action and this action makes this readily apparent. Which Kostic continued to do, based on her interpretation of the Court of Appeal’s decision in *Kostic v Thom*, 2021 ABCA 406 at para 24-26 – see D15 TR 16/25 – 17/23.

[16] On November 16, 2021, Kostic, by letter, sought leave to file an application to, *inter alia*, adjourn the December 15, 2021 hearing that had been set, following her September 14, 2021 Application, to consider the questions refused and the undertaking declined from the cross-examination by Kostic on the KEM Affidavit. That application was later formally filed on November 30, 2021, with my leave, and on the same date, I issued an Order granting leave for Kostic to argue certain parts thereof at the December 15, 2021 hearing. I permitted the parties to file briefs in relation thereto: SVR – initial brief by December 2, 2021, with a 10 page limit; Kostic – a reply brief by December 9, 2021, with a 10 page limit; and SVR – a rebuttal brief by December 15, 2021, with a 5 page limit.

[17] On November 23, 2021 (date approved by para 8 of Justice Jeffrey’s order of June 10, 2021 without prescribing any page limits), Kostic filed a 43 page, 377 para, Brief, with 268 pages of attachments (the Kostic Nov 23 Brief). Much of this is in advance of, and in anticipation of her Nov 30 application, so that, focusing on the leave I have granted therein, I will not give much credence to it herein as not directly relevant to the cross-examination – of the KEM Affidavit. Moreover, most of it is repetitive of earlier submissions, or completely irrelevant to the application before the Court herein, or raises issues not yet scheduled (e.g., advanced costs). Moreover, the detailed arguments of Kostic are well beyond what is relevant and material to this relatively simple application as to the relevant cross-examination questions on an affidavit in relation to a Security for Costs Application, such that I will not address them further in this process. In essence, this is a continued obstructification by Kostic of a relatively simple security for costs application. The attached 260 pages of material deals with, and repeats, the application that was ultimately filed on November 30, 2021, which I will not deal with further at this time.

[18] On Dec 2, SVR filed its Brief. The matters raised and my response thereto include (by para #):

(12-16) further questioning should be only by written interrogatories or alternatively limited of number/volume and relevant only to the Security for Costs application – later on herein I have given Kostic an opportunity to ask a maximum of 3 1/2 hours of questions relevant and material (as defined by this Decision) to the underlying Security for Costs application;

(17-21) the principles applicable to cross-examination on an affidavit relevant to the Security for Costs application – I agree as outlined herein;

(22 -3) the rules on a need of a witness to inform are related to knowledge and control over a process and the people with knowledge, and are the same for discovery or cross-examination – I find no reason to be critical of KEM in this process;

(24-28) repeated questions or questions not within the knowledge of the witness and better answered by others are not appropriate, nor is it appropriate to try to argue for a difference answer – I agree with both the facts and law argued (see also the Court’s ruling to the objection at p 61 of the cross-examination of KEM in Appendix “A”) going to the merits of the application as determined in Appendix “A” hereto; moreover, I would not hesitate to award costs when this is abused;

(29-30) irrelevant questions need not be answered - I agree with SVR to all submissions, and have so ruled in Appendix “A”, except for 29. c) which may be relevant, for another witness, to answer potentially related to conflicts;

(31-2) questions based on facts that are not in evidence, or are disputed or are argumentative (“loaded questions”), are not appropriate – I agree, although the 40+ page provided by SVR is not helpful, because there is no reference to the passages in the text relied upon (*R v Elder-Nilson*);

(34-9) questions on legal opinions and conclusions, rather than facts, and questions that seek an opinion, are not appropriate, whether the witness has a legal background or not – I agree, but will only address pp. 118-20 of the cross-examination, if at all, in Appendix “A”;

(42-6) the right to ask undertakings in a cross-examination is restricted – I agree, based on the cases quoted by SVR in para 42, and I note that the submissions and cases in paras 43-5 deal with discoveries, not cross-examinations, but I do not agree with para. 46 that the witness can or should await the conclusion of questioning to provide the answers to undertakings – rather, if appropriate to be volunteered or ordered, they should be provided on a timely fashion, as soon as available, without the case being bifurcated, although this Court will not opine further on all the cases cited; and

(47-8) cost remedies – costs are provided for at the end of this Decision, the parties can renew arguments briefly (perhaps orally) on the points raised, if they wish, which further arguments may, themselves, be the subject of costs.

[19] On Dec 9, Kostic sent a 10 page, single space, 105 para Reply Brief, and, in addition, ignoring the page limits in my November 30, 2021 Order, para 3.b), attached a 60 page Appendix (which I have not reviewed as it is unauthorized, and for which cost consequences may follow as set out below, as warned in communication with the parties on Nov 30th). Additionally, I have not reviewed what Counsel for SVR calls an included “Exhibit Cheat Sheet” (which I cannot identify on the Court record), which he alleges, *inter alia*, “(4) may be subject to the implied undertaking rule or a sealing order in other actions”.

[20] On Dec 13, SVR filed a 3 1/2 page Rebuttal Brief. It raises several points in response to Kostic’s Reply Brief (by para #):

(5) the ability of SVR to recover costs from third parties is not relevant: *Piikani Nation v Kostic*, 2018 ABCA 275 at para 13;

(6-8) re Kostic’s Reply Brief paras 54-56, Rule 13.18(3) does not apply to applications under Rule 4.22 – I agree, contrary to what is argued by Kostic at para 56, an application for security for costs is not an application to end the action, but only to have security for cost if the action continues - whether it ends the action depends on whether the application is successful and, if so, the respondent puts up the ordered security; and

(10-12) SVR makes reference to Kostic’s “escalating ... conduct”, “unsubstantiated allegations of [SVR] misconduct”, the “sheer volume of materials” of Kostic, and the history of Kostic’s non-payment of costs, all demand a “lump sum cost award at an escalated level of column 5” – these can be dealt

with, if desired, by arguments for further costs as permitted at the end of this Decision.

IV. Substantive Issue in this Decision

[21] With this general background, and the Action History in place, the substantive issue in this Decision is largely what is the role of, and what are the limits to, exploration of the merits in the underlying litigation, culminating in the Summary Judgment application by Kostic filed May 11, 2021, that are relevant to the issue of security for costs application brought by SVR against Kostic, arising from her cross-examination of KEM Affidavit, and requests for undertakings in the process.

[22] To be very clear, I am not now hearing or deciding the security for costs application of SVR, but only the appropriateness of questions and undertakings sought by Kostic on her cross-examination of a former associate (TR 6/8-10) of SVR and affiant, KEM, in support of the security for costs application that SVR has brought.

V. Rules of Court and the Role of Merits in Security for Costs Applications

[23] Security for costs is regulated by Rule 4.22(a) to (e). Rule 4.22 is clear, but the jurisprudence in respect of it – not so much, although I decipher some boundaries and conclusions.

[24] The most important and relevant part of Rule 4.22 for this application is 4.22(c), which, of course, reads:

The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following: ... (c) the merits of the action in which the application is filed...

Leaving aside “instructive” cases from other jurisdictions, there have been a number of Alberta cases that have interpreted the limits of cross-examinations on affidavits and the requests for undertakings during that process, in the context of Rule 4.22(c). With the assistance of the SVR Nov 22 Brief (much of which is even more relevant to the actual security for costs hearing), those cases, include, in rough chronological order, *inter alia*, the following: ***BH-BC Holdings Ltd. v Regent Holdings UCL***, 2021 ABQB 911; ***Edmonton (City) v Gosine***, 2020 ABQB 546; ***Real Estate Council of Alberta v Moser***, 2019 ABQB 106; ***Blough v Busy Music Inc.***, 2018 ABQB 560; ***Gas Plus Inc. v Levelton Consultants Ltd.***, 2017 ABQB 655; ***Bechir v Gowling Lafleur Henderson LLP***, 2017 ABQB 214; ***PM & C Specialist Contractors Inc v Horton CBI Limited***, 2015 ABQB 400 (*PM & C #2*); ***PM & C Specialist Contractors Inc v Horton CBI Limited***, 2015 ABQB 248 (*PM & C #1*)¹⁰; ***Parkland Industries Ltd. v 897728 Alberta Ltd***, 2015 ABQB 10; ***1251165 Alberta Ltd v Wells Fargo Equipment Co***, 2013 ABQB 533; ***Arhum & Huzaiifa Enterprises Ltd v 1231993 Alberta Ltd***, 2013 ABQB 333; ***Autoweld Systems Limited v CRC-Evans Pipeline International, Inc***, 2011 ABQB 265; and ***Attila Dogan Construction & Installation Co v AMEC Americas Ltd***, 2011 ABQB 175. There may well be other relevant

¹⁰ This is, perhaps, one of the more relevant decisions as it was specifically in relation to questioning on an affidavit sworn in support of the Defendant’s application for security for costs.

Alberta cases, and, certainly, there are, as noted, other instructive cases in jurisdictions outside Alberta, although I will not go to those, except incidentally.

[25] Without making this Decision a thesis on this subject, I draw the following principles (not in any particular order) from these cases (generally working from the most recent to the oldest decision):

- a. an objection to a question as being previously “asked and answered” (or the equivalent) is a valid objection: *Moser* at para 6, relying on *Milavsky v Lashyn*, 2016 ABQB 410 at para 180, and *Allan v Epp*, 2018 ABQB 85 at para 65;
- b. repetitive and abusive questions have never been allowed: *Moser* at para 6, relying on *Rozak (Estate)*, 2011 ABQB 239 at para 31, *Allan* at para 65, and *Milavsky* at para 183;
- c. there is an exception to the previous principle where the question has not actually been answered, despite being asked, and new information is revealed that calls for re-visiting previous testimony and/or counsel is simply reminding a witness of a topic previously discussed and confirming a previous answer; *Moser* at para 7, relying on *Allan* at para 65, *Braden v Knisley Estate*, 2010 SKQB 335 at para 43, and *Milavsky* at paras 180-2;
- d. on cross-examination on an affidavit, a witness must only inform themselves on matters within their knowledge, and there is no obligation to attest to information outside their knowledge, or to inform themselves on matters outside their control: *Moser* at paras 8 – 9, relying on *Wright v Schulz*, 1992 ABCA 305 at para 25 and *Canadian Western Bank v Alberta*, 2003 ABQB 254 at para 12;
- e. while hypothetical questions are not improper in themselves, they cannot become speculative, unrealistic or lack an air of reality, and, even there, cannot go beyond the pleadings, or ask a patently overbroad or vague question, or ask for comments on other persons actions or inactions: *Moser*, at paras 10 - 12, relying on *Maple Trade Finance Inc v Euler Hermes Canada*, 2015 NSSC 37 at para 47, *Dow Chemical Canada ULC v Nova Chemical Corporation (Dow/Nova)*, 2014 ABCA 244 at paras 17 & 21, and on Fradsham, *Alberta Rules of Court Annotated* 2019 (Toronto: Thomson Reuters, 2018) at 119, for the proposition that questions on an affidavit must not “extend to matters wholly immaterial and irrelevant to the affidavit;
- f. questions on cross-examination on an affidavit need not be confined to the “four corners of the affidavit”, but must be relevant to the underlying application [here one of security for costs], and, if within this scope, may be ordered to be answered: *Moser* at paras 13 - 14, relying on *Rozak* at paras 30 & 32, *Dow Chemical Canada ULC v Shell Chemicals Canada Ltd (Dow/Shell)*, 2008 ABQB 671 at para 7, and *Bond Street Properties Inc v Alberta Permit Pro*, 2010 ABQB 416, at para 45;
- g. there are limits concerning relevance and materiality, especially where answering the questions or providing the undertakings [note the restrictions referenced below] would be grossly disproportionate¹¹ to the benefits of the answers: *Moser* at para 32, and *Gas Plus* at para 52, each referencing *PM & C #1* at paras 8, where Michalyshyn J., in turn, referenced *Medicine Shoppe Canada Inc v Devchand*, 2012 ABQB 375 at para 21 and *Dow/Shell*; see also *PM & C #1*, at para 9 & 10, in reference, in support,

¹¹ I will discuss proportionality in a separate section on the law, below.

- to *Civil Procedure Handbook* (Edmonton: Juriliber, 2015) at pp 6-60-61 and ***HSBC Bank Canada v 1100336***, 2005 ABQB 658;
- h. Part 6 of the Rules, applicable to examination on an affidavit filed relevant to an application (specifically, Rules 6.7 and 6.20) provides guidance on the form of questioning on an affidavit and is “distinct from questioning for discovery in an action” pursuant to Part 5¹², and “cross-examination on an affidavit should not be utilized as a gate into the field of examination for discovery¹³: ***Blough*** at paras 35 – 37, relying on ***Colortech Painting & Decorating Ltd v Toh***, 2000 ABQB 814 at para 26, and ***Luo v. Wang***, 2003 AQB 356 at para 72; ***Bond*** at para 45; ***Bechir***; and ***Rozak*** at para 30;
 - i. relevant to a security for costs application itself, not this application on required answers or production of undertakings, it is noted that security for cost may not be granted in relation to steps that have taken place before security was sought: ***PM & C #1*** at para 4;
 - j. undertakings should only be directed on a cross-examination on an affidavit where the affiant has referred to information or documents in the affidavit or could only have made the assertions contained in the affidavit after reviewing same, or the undertakings relate to an important issue in the specific application in play (one that would significantly help the court in determining the application), all that would not be overly onerous to provide; the court should be slow to direct an affiant to inform him/herself after the questioning and provide further answers; and there is greater restraint than on undertakings taken on questioning for discovery under Part 5 of the Rules: ***PM & C #1***, at para 6, relying on ***Dow/Shell***, followed by, and quoting from ***Rozak***, at paras 37 – 42; see also ***Bechir*** at para 33, referenced at para 42 of the SVR Nov 22 Brief; ***BH-BC Holdings Ltd*** at paras 3 - 4, referring in the latter to ***Gosine*** at para 16, where Mah J stated:
1. The scope of cross-examination on affidavit is more restrictive than on questioning for discovery, given the different objectives and purposes for each. The former [cross examination on affidavit] should not be used as an impermissible gateway to a foray in[to] the latter [questioning for discovery]. (Emphasis added).
 - ...
 2. Credibility is a legitimate field of inquiry in an examination on affidavit, but is restricted to the credibility of statements in the affidavit. (Emphasis added).
- k. especially for security for costs applications brought early in a proceeding, what is required under Rule 4.22(c) is not a question of “which party has a stronger case”, but rather “an inquiry into the merits ... that suggests that a reasonably meritorious defence, when considered together with the other factors set out in Rule 4.22, is

¹² SVR asserts, at para 35 of the SVR Nov 22 Brief, that “No Part 5 questioning has taken place”. That is consistent with the Court record, although Kostic tried to convert the cross-examination on KEM’s Affidavit under Part 6 to a questioning for discovery under Part 5.

¹³ Here, at Bar, the affiant, KEM, is both a party and an affiant, but her examination, I find, is not one of questioning for discovery, and thus, at best, her answers are only binding on her as a party (see the discussion at D15 – TR27/17-27). I will deal later in this Decision with the issue of questioning of other of the Defendants.

sufficient to weigh in favour of granting security for costs”, remembering that in such cases it may be “neither possible, nor desirable, for the Court at this stage to determine which party’s case is stronger”¹⁴, with focus on the “relative strengths of each party’s position”: *Bechir* at paras 14 (quoted at para 44 of the SVR Nov 22 Brief) & 17; and *PM & C #1* at paras 11 – 15, referencing and quoting from *Attila*, at paras 17; and

1. a “more nuanced” analysis is to a “balanced view” of both the claim and defence, early in the proceedings: *PM & C #1* at paras 16 – 24, referencing *Autoweld* at para 22, *Arhum, Wells Fargo*, at paras 43-4, and *Parkland* at paras 35 – 6.

[26] Picking up on the issue of disproportionate or proportionate in g above, this requires further analysis. In *Dow/Shell*, the Court, at paras 11 – 12, addresses the “goals of justice” and, I find, the balance is set (not just in undertakings, but also in relevance and materiality in cross-examination, on affidavits in relation to security for cost applications), extremely relevant to the case at Bar, in the statement at para 12:

... the provision of undertakings arising during the cross-examination of deponents will provide additional evidence to the court, but the price to pay is additional expense and delay for the litigants. To allow a cross-examiner, as of right, to demand that undertakings be given on any relevant issue would be to give every respondent in a summary judgment application the right to a full examination for discovery prior to the hearing of the summary judgment application. This would defeat¹⁵ the whole rationale for a summary judgment procedure, which is to allow a meritless position to be disposed of summarily (i.e., without the time and expense typically incurred if the matter proceed through examinations for discovery to trial). (Emphasis and double emphasis added).

[27] The same principle applies also to merits relative to the actual security for costs application (not merely this application on cross-examination) – if every detail of the merits of an action or a summary judgment application were required to be answered before one looked at the ability of the respondent to pay costs of unmeritorious/unsuccessful positions, that would defeat the very purpose for a security for costs application – the lack of logic is self supporting, and “would go around and around in circles”, as I tried to articulate at D15 TR 123/14-26 & 130/40-131/10-15 & 131/36-132/3 & 133/12-21.

[28] Other cases relevant to the actual determination of a Security for Costs application, not before me on this application relevant only to cross-examination on affidavits in support, include: *Xpress Lube & Car Wash Ltd. v Gill*, 2011 ABQB 457 at paras 8-10; *Patton v Horse Racing Alberta*, 2019 ABCA 182 at paras 12-14; *Freeman v Kooimann*, 2019 ABQB 857 at paras 48 & 54; *Hashman v Kanji*, 2020 ABCA 283 at para 9; *Matty v Rammasoot*, 2013 ABCA 170 at para 17; and *Jager Estate v Deadman*, 2019 ABCA 99, at para 29.

¹⁴ With this in mind, I will do a separate analysis on the issue of relative merits below, where, at an early stage in the litigation, they cannot really be determined on any basis, or are neutral. It appears from Kostic’s submissions at para 58 of her Reply Brief, filed Dec 9, 2021, that she agrees.

¹⁵ See also *Bechir* and para 40 of the SVR Nov 22 Brief as to “defeating the very purpose of the security for costs application”.

[29] Indeed, in the case at Bar, this is even more significant in that the question before me is not the merits of the summary judgment application, but the very issue of security for costs relating to it. In my view, even if the issue of the relative merits of the security for costs application under Rule 4.22(c) cannot be significantly determined at the early stages of litigation (or the determination is relatively neutral), each party must be able to reasonably satisfy the potential for the costs of losing the substantive application, and, in the result, the depth of the cross-examination and undertakings as to the merits must be severely curtailed on a security for costs application, because otherwise, again, it would “defeat the whole rationale” for it.

[30] Following the earlier decision on the appropriateness of cross-examination questions and undertakings on affidavits in support (*PM & C #1*), in the later decision on the actual security for costs application, in (*PM & C #2*), at, *inter alia*, paras 42 and 57-8, the Court found, in essence, that where the merits are unable to be determined, or are neutral, the decision moves away from the merits to the ability to pay. See also the quotation at para 50 of the SVR Nov 22 Brief, the citation for which (2017 ABQB 14 at paras 13 & 15) seems in error and the case name is not given.

[31] As Kostic is the respondent on that issue, it leads us back to her ability to pay if unsuccessful, without evaluating her chances of success, unless they are disproportionately high which, recognizing that this question is ultimately one for the security for costs application, like in *PM & C #2*, I must make some determination at this stage. However, she has provided no positive evidence of an ability to pay reasonable costs if unsuccessful on her summary judgment application and/or the action itself, although failure to provide such evidence is a factor to consider on such an application (*Attila* at paras 13 & 24) - indeed, she hints that she is impecunious (and appears to admit same at paras 42 and 43 of her September 14, 2021 Cross Application to Oppose Security for Costs Application, and para 18 of Exhibit 3, and Exhibit 6 to her Affidavit of the same date), but blames the Defendants and others for that condition. Nevertheless, she has not yet provided any evidence on her assets as to her ability to pay, only a 2019 tax document.

A. Relative Merits

[32] Remembering that I am neither deciding the merits of SVR’s Security for Costs Application, nor Kostic’s Summary Judgment Application, and definitely not the actual full action by Kostic against SVR, if the latter goes to trial, I need to make clear what “evidence” is on the record, to the extent that merits are, at least somewhat, of relevance to the cross-examination of the KEM Affidavit, relevant to Rule 4.22(c) as interpreted by the law I have set out above.

[33] The “evidence”¹⁶ from Kostic in support of the Summary Judgment Application is contained in Kostic’s Affidavit (the first of an endless stream of affidavits from Kostic) dated

¹⁶ I say “evidence” because, as SVR points out at para. 3 of its Brief filed November 22, 2021 (SVR Nov 22 Brief), Kostic doesn’t seem to know or follow the difference between evidence and argument as to the merits of her claim “much of [Kostic’s] Affidavit(s) contain(s) written argument, which is not properly before the court” – as she should well know after all her years in litigation, including the Court of Appeals’ admonition in *Piikani Nation v Raymond James Ltd.*, 2020 ABCA 116 at para 7. Evidence is to be by affidavit, but affidavits are not to contain arguments – the latter for briefs of (or oral) argument only, which she conveniently ignores. Instead, Kostic throws them all together in a jumble as she did on May 11, 2021 and November 30, 2021 in this proceeding. I will try to look through this abuse to deal with the substance of the material she provides as to the relative merits of her

May 6, 2021, apparently filed on May 11, 2021¹⁷. To the extent that the merits of that application are relevant and able to be assessed at this early stage (her Summary Judgment Application appears to have been filed without any steps being taken in the action, other than the filing of SVR's Statement of Defence and Affidavits of Records on August and October 2019) under Rule 4.22 (c) to the Security for Costs Application, the following certain Kostic's evidence and arguments in that regard.

[34] Kostic's May 11, 2021 Affidavit is, as noted in the footnote 17, a hodgepodge of alleged facts, assertions (mostly wrong) as to the law and her own opinion of success. However, there are some many other limitations as to its usefulness in this litigation between her and SVR, some of which include:

- a. much of it goes back to litigation (between Kostic and the Nation¹⁸; Kostic and AIG; Kostic and Thom; and other actions) that were commenced much before SVR came on the scene, but which are still continuing, and for which no conclusions as to their merits have been established;
- b. the intertwining of many actions in this Court and the Federal Court;
- c. her opinion of where Court decisions were wrong – she is entitled to her opinion, but it is not relevant in law and does not establish merits;
- d. it denies matters that are otherwise conclusively proven – a simple example is that Kostic alleges paras 22 & 24, that SVR “never provided the retainer”, which was, in fact, provided, dated February 15, 2017, as Exhibit “A” to KEM's Affidavit;
- e. her own affidavit establishes that the time limits of the involvement of SVR were from communications between SVR and AIG in the “fall of 2016” (para 25), to the retainer between them on February 15, 2017 (see last bullet), to the termination by AIG of the retainer on May 12, 2017 (Exhibits “C” and “D” of KEM's Affidavit and para. 40 of Kostic's affidavit) – an informal period of communication of 4 months, and a formal retainer of less than 3 months (SVR forcefully asserted at paras 16.b., 17 & 77 of the SVR Nov 22 Brief that it was only 86 days), and yet she claims all of her injuries and damages result from SVR (one example is para 45 y) concluding all the previous claims in para 45 a) to x);
- f. she raises issues that have absolutely nothing to do with SVR and, in any event, ones that have been resolved (e.g., SWIFT transfer of funds, in para 51 and elsewhere); and

application relevant to Security for Costs under Rule 4.22(c). However, as part of court access restrictions, in the future, the Court will entertain applications against Kostic, with cost penalties for such breaches of the applicable Court rules.

¹⁷ Of 138 paras over 25 pages, with 17 exhibits attached, consisting of an estimated 300+ pages, not numbered (Ms. Kostic seems to only follow the rules and procedures of the Court that she wishes to follow) there seemingly being no remedy in costs or sanctions under Rule 10.49 because she seems to pay neither – a very telling situation as the respondent in a Security for Costs application.

¹⁸ Much of her affidavit deals only with the merits of her 0601 Action, which is not directly relevant to anything relating to SVR because, while retained to do so, due to her interference, Kostic would not allow SVR to act in her interests. Moreover, many of the facts she alleges are completely irrelevant to even that 0601 action (e.g., paras 65 and 72).

- g. refers to documents with missing references, even though, if completed, would not be relevant to the merits between her and SVR (e.g., paras 64 – 65, and others, of Kostic’s May 11, 2021 Affidavit).

[35] In summary, SVR makes the point succinct at paras 18 and 22 of the SVR Nov 22 Brief that “Nothing prejudicial happened during the 86 days in which SVR was involved”. I tend to agree, without specifically finding. Moreover, SVR asserts, with reference to KEM evidence on cross-examination that SVR made no coverage decisions.

[36] I could make reference to many other passages of her May 11, 2021 Affidavit of similar or different matters of complete or partial irrelevance to the issues of the merits of her Summary Judgment Application. The bottom line is that its contents, if anything, are antithetical to any conclusion that would support a finding of merits to her application. At very best, which is not enough to “move the needle”, it is merely neutral to the merits of her substantive applications.

[37] Next, Kostic, on September 14, 2021, filed what she called a Cross Application to Oppose Security for Costs and Application for Advance Costs Award (“PICA”) and an Affidavit bearing the same title. I would call these documents as mostly replete with rambling and scandalous allegations, often outside the law (e.g., *Charter* breach allegations, when this action has not connection with the Charter or parties bound by the *Charter*) and outside the jurisdiction of the Court (e.g., allegations of breaches of the Law Society’s Code of Conduct), and unrealistic as to their temporal connection with the facts, at best, and not convincing at the least. I will, at this time, ignore the submissions on PICA, for the reasons that are otherwise addressed herein. At its best, the Cross Application is an attack on and a response to SVR’s Security for Costs Application. It asks, *inter alia*, that the Security for Costs Application be struck or stayed, which I will not do; rather it will be heard on its merits, once the results of this Decision have been finalized.

[38] The Kostic Affidavit of September 14, 2021 continues in the same vein as the Cross Application, with an earlier draft of the Cross Application and supporting arguments (“Draft Brief”) attached as Exhibit 4 which rambles on for 44 pages, often going into new allegations regarding the Nation (e.g. the subsequent in time “Piikani Publicized 2020/21 Petition” – para 59 *et seq*; the Piikani Removal Appeal Board – para 79 *et seq*; and the 65 page decision in Exhibit 5), or arguments about the viability of the Nations claims in the 0601 Action, referencing irrelevant Federal Court litigation, etc., all usually with no connection to SVR (even admitted in para 64), and the occasional reference to court decisions irrelevant to anything now before the Court in this application (e.g. paras 20 & 38, and numerous others). Moreover, as the September 14, 2021 Affidavit only purports to be a draft, I have not read it completely, but only scanned it. As with the case of other Kostic affidavits, as referenced above, there is no recognition of the difference in affidavits being related to facts, not arguments, another basis to reject Exhibit 4.

[39] I note for the record that, by letter dated November 16, 2021, Kostic sought an adjournment of the application scheduled for December 15, 2021, and provided a draft application (unfiled until November 30th) purporting to follow the procedure for leave set out in the Conditions and Guidelines for Case Management of June 24, 2021. SVR provided written submissions in opposition thereto, dated November 18, 2021 (also unfiled). On November 30th, by Order, the Court granted leave of certain of Kostic’s paragraphs of proposed relief (in essence, varying and extending deadlines, compelling KEM to submit to further questioning on

answers refused and records to which she objected). Those applications were argued on December 15, 2021, and the decisions thereon are included herein.

[40] On that basis, and otherwise, I find that the chances of Kostic success in the summary judgment application, and indeed the Action itself, are relatively weak (a factor in favour of granting the application for security for costs (which, of course,) I do not now decide – *Amex Electrical Ltd. v 726934 Alberta Ltd.*, 2014 ABQB 66 at para 74), having regard to a number of factors, including the following:

- a. the fact that SVR only acted for her for about 3 months (SRV says 86 days), as opposed to Thom acting in that capacity for about 7 years, over the same allegations (see discussions at D15 TR 17/41-18/7 *et seq*) – this is particularly relevant in that, even if SVR agreed to take the steps that Kostic alleged they should have taken, there was neither sufficient time nor records (which Kostic failed or refused to supply – see below) for them to do so within that time. To particularize that, SVR asserts at paras 9-10 & 19 (and other places) in the SVR Nov 22nd Brief, which the Court accepts, that “as set out in [KEM’s] Affidavit, at no point during the period of time in which SVR was retained to defend Kostic did [SVR] have Kostic’s legal file from here previous counsel, or otherwise”, Kostic would not cooperate with SVR to obtain the file and Kostic instructed the withholding of the file materials from SVR;
- b. as noted at paras 78 & 86 of the SVR Nov 22 Brief, Kostic’s allegations against SVR are not based on SVR’s actions and inactions, or the circumstances surrounding the retainer (see *Pilote v Gilbert*, 2016 ONSC 494 at para 39), but rather are based on theories of conspiracy or conflict of interest, including that SVR should not have accepted AIG’s retainer, should have advised Kostic on various issues, and failed to take certain steps (without having Kostic’s file);
- c. as an example of the inability to determine the relative merits of the litigation, Kostic claims that SVR was in a conflict, which SVR denies – see D15 – TR 19/31-2; and
- d. Kostic failed to cooperate with SVR from the very beginning, including:
 - Refusing to sign the Retainer letter;
 - Failed on request from SVR, to provide her file on the 0601 Action¹⁹, or cooperate in swearing an affidavit to obtain same from Zinner; and
 - stating in this Court and the Court of Appeal that SVR did not represent her (*inter alia*, paras 10 & 13 of the SVR Nov 22 Brief);
- e. KEM asserts at para 26 in her Affidavit, supported by Exhibit “Q” thereto, the Amended Statement of Claim in the 1501 Action against Thom filed September 7, 2017, that “Kostic has alleged in other actions, that the damages she alleges have been suffered as a result of action on the part of SVR, were caused by others” – this is clear evidence of Kostic’s duplicative claims for the same alleged damages - it is noted that, in para 23 of the Statement of Defence herein, SVR denies that any alleged damages suffered by Kostic were “causally connected” to SVR;
- f. at paras 27 – 31, KEM’s Affidavit positively asserts that: a review of the Personal Property Registry Search, shows \$153,631 in judgments believed to be substantially

¹⁹ See para 9 of the SVR Statement of Defence.

- for costs against Kostic²⁰; a security for costs order will not unduly prejudice Kostic's ability to continue the action to the contrary; that it is unlikely that SVR would be able to enforce a judgment for costs against Kostic (all of the previous assertions Kostic has not challenged); that Kostic's claim is without merit; and SVR produces draft Bills of Costs through Kostic's application for summary judgment and to trial (Exhibits "R" and "S" to the KEM Affidavit), which demonstrate potential cost claims of \$12,000 and \$55,000 (rounded) respectively;
- g. Kostic brought similar or identical claims as against her previous Counsel, Thom (and repeated many of those or similar claims in her Statement of Claim against SVR), including conflicts of interest, refusal to follow her instructions on a number of actions against other parties, or inactions in the 06 Action, which (specifically to bring a Summary Judgment Application against the Nation's allegations) she claimed rendered her impecunious – it seems incongruous that if Thom rendered her impecunious, that she can also use that as a defence against SVR, but more significantly²¹ the evidence is that AIG cancelled her coverage because she was not providing the information required for her defence and she failed to cooperate with SVR in her defence, such that I believe that any impecuniosity resulting arguably lays at her feet;
 - h. Kostic claimed a breached duty of care, and negligent and recklessness by SVR;
 - i. Kostic claimed that both Thom and SVR only took instructions from AIG (numerous references, including D15 TR14/26-8 & 17/18-31), without any legal ruling that it was inappropriate for them to do so;
 - j. Kostic claimed that SVR was aware of Kostic's long-term disability, as a result of which "Kostic became permanently disabled and unsuitable to work as an investment advisor", and suffered from PTSD – the short-term relationship between Kostic and SVR would appear to be insufficient time for SVR to have caused or contributed to any such condition;
 - k. additionally, Kostic claims, as late as it is (AIG did not retain SVR until early 2017) that "she remains under a cloud of suspicion from November 2006 until present, *as a result of SVR negligence*"; and [emphasis added]
 - l. in the result, she claims damages against SVR in an undisclosed amount (I perceive the latter so as to avoid a high costs column or a high multiple thereof, when costs or security for costs are considered)

[41] However, as noted above, and recognizing that the summary judgment application has been brought early in this Action, even if there is an inability to determine the relative merits or determining that they are neutral, that merely means that the merits have less importance and the ability to pay is the real issue.

²⁰ While relevant to the Security for Costs Application itself, not directly to this Decision which deals with the limits of cross-examination on affidavits in support thereof, see *Parker v Parker*, 2019 ABCA 114 at para 4 (and the conclusion at para 18), quoted at para 43 of the SVR Nov 22 Brief, as to what will be sufficient for a Security for Costs Order.

²¹ Note that while conduct by a defendant can be a basis for/cause of a plaintiff's financial position, as *Wells Fargo* states, at para 43, and as Kostic argues at paras 70, 76 & 78 of her Reply Brief, the facts here do not support that conclusion.

VI. Decision on Objected Questions and Undertakings Refused

[42] It is with these principles and conclusions in mind that I turn my analysis to the specific questions and undertakings which are sought to be answered/provided, and the objections thereto, from the September 2, 2021 cross-examination of KEM's Affidavit by Kostic.

[43] Attached to this Decision, as Appendix "A", is a list of the objected questions and undertakings refused taken directly from the transcript²² of the cross-examination of KEM by Kostic; *my brief and summary assessment* of the position of the parties from their affidavits, briefs and written arguments filed before the hearing (the details of which are extremely lengthy in some cases, as is apparent in the material filed – often referencing material that I find irrelevant to the issue at hand), and oral submissions in the transcript during the hearing (identified as the December 15, 2022 Transcript, abbreviated as "D15 TR"); and my brief conclusions and reason for conclusions.

[44] All of this may be very difficult for anyone to follow, because the reference numbers are not always clear, there are cross-references to many sources, conflation (or overlaps) between questions and undertakings and repetition of, in essence, the same issue(s) using different words. Thus, as I say, in the result of all the material and submissions, the nature of the question or objection, and the undertaking and/or the refusal are not always clear – unassisted by interjections between Kostic and Counsel. However, the bottom line is that I have tried to concentrate on the transcript of the questions that were asked, as recorded in the transcript (TR), not what Kostic didn't ask, but intended or concluded or argued since (D15 TR, including 125/5-7 & 126/28-9).

[45] The material that was provided between the questioning by Kostic of KEM Affidavit on September 2, 2021 and the hearing included the documents listed in para 4 of SVR's Rebuttal Brief.

VII. Other Issues

A. For Whom does KEM Speak in her Affidavit and Cross-Examination Thereon

[46] KEM's Affidavit, sworn on June 3 and filed on June 8, 2021, is entitled "Affidavit of the Defendants", and, in the first para, she says that it is made "on behalf of all Defendants". She was cross-examined thereon by Kostic on September 2, 2021. However, relevant to this issue, she advised that in about February 2019 she had moved from SVR to another law firm (TR 4/6-5/6).

[47] It is clear from the proceedings that the other SVR Defendants adopt KEM's Affidavit but, through Counsel, advised that they do not consider themselves bound by the answers of KEM on cross-examination on her Affidavit, and, rather, they bind her only. As I noted at D15 TR/1/41-2/3, "Kostic has raised the issue of whether others [other Defendants] should be required to attend" and I advised that there was no specific or formal application that before the Court and I would not be ruling on same – see also D15 TR10/20-40.

²² In the transcript, the refusals of undertakings were separated from the objections to questions, and I followed that process at the hearing, but on further examination, I have now considered them chronologically (page by page of the transcript), because the issues are often dealing with the same subject.

B. Continued Examination

[48] From the very beginning of the cross-examination on the KEM Affidavit (TR 3/16-10), Kostic complained about not having enough time, with delays and refusals/objections to “complete all my questions”. Again, at the end, she similarly complained about interruptions and objections (TR 120/22-3 – see also D15 TR 11/31-9). Later she referenced Justice Jeffrey’s direction to “cooperate with flexibility”, which she alleged had been completely absent – indeed the atmosphere at the questioning was toxic, as I noted “harping” at D15 TR 134/9-17 and later at D15 TR 136/10-19. However, the Court has now ruled in Appendix “A” against Kostic on most of the questions requested and undertakings refused, that were not volunteered to be answered by Counsel for SVR. Moreover, the Court has only directed about 4 questions to be answered so that wouldn’t take long for any continued cross-examination.

[49] Whether Kostic should have known that KEM was not answering for all Defendants or not, she now does. Moreover, from the Court’s outline of the law (above) and rulings in Appendix “A”, Kostic (as she acknowledged, somewhat, at D15 TR 134/31-36) should be able to complete relevant, material, and non-objectional questions in a relatively short time. Moreover, any objections to questions, contrary to what happened in this cross-examination (see discussion at, *inter alia*, D15 – TR 11/7-15 & 12/5-26) should be conducted by a short statement as to the objection and reason for objection by Counsel for SVR, any response by Kostic, and, if not resolved based thereon, continuation to the next question. It was the detailed arguments and interjections that caused a loss of time.

[50] In the result, absent an agreement by the parties to the contrary, I grant a maximum (no extension is to be expected) of 3 ½ hours further cross-examination by Kostic on the KEM’s Affidavit on the conditions of para 14 and the first alternative order proposed by SVR’s Counsel, as attached to SVR’s Rebuttal Brief of Dec 13, 2021.

[51] To be clear, the additional cross-examination on the KEM Affidavit will be limited to questions relevant and material to the underlying application, the Security for Costs Application, not the Summary Judgment Application(s) or the main action.

C. “Public Interest” Funding

[52] Part of the applications for which Justice Jeffery gave leave to Ms. Kostic, to have heard, before I became CMJ, included Kostic’s application for “public interest”²³ funding, claimed, pursuant to Rule 12.36. Kostic’s Cross-Application to Oppose Security for Cost and Application for Advance Costs Award (“PICA”) filed on September 14, 2021 deal with these issues and would normally be the next phase for the arguments before the Court, before any Summary Judgment of Dismissal Arguments are heard. Thus, I will say little about them now. Accordingly, I have not concentrated on what has been filed in that regard because I was focused on the objections to questions and refusal of undertakings requested on Kostic’s cross-examination on KEM’s Affidavit. Therefore, I did not hear oral submissions on either the substance of the security for costs application, or the cross application for “public interest”

²³ See D15 TR7/31-8/40. While I won’t get into the substance of Kostic’s arguments at this time, I am not sure how this is “public interest”, it appearing to me very much like only “private interest”. Moreover, and even more pertinent, Rule 12.36 is in Part 12 of the Rules which only relate to “Family Law Rules” applicable to family matters as enumerated therein. This action is not a family law matter, and thus, *prima facie*, Rule 12.36 has no application to this action, as Kostic’s submissions at para 48) iv of her Exhibit 4 to her Affidavit of September 14, 2021 demonstrate.

funding. However, Kostic submitted (D15 TR 7/32-4 *et seq*) that Justice Jeffrey had directed them to be heard together, and I am prepared, as CMJ, once the ruling in this Decision is final, to do a new Procedural Order for any further material that may be filed (and limited) in respect the substance of the security for costs application and cross “public interest” funding application, and for them to be heard together, absent a successful application to strike the latter application as having no merit in law.

D. Further Case Management & Court Access Restrictions

[53] Earlier I mentioned the “endless stream of affidavits” (so called) filed by Kostic. Moreover, in her Cross Application Affidavit filed September 14, 2021, Kostic (para 4) indicated that she will be “submitting an amended application and reserve any and all of my rights to file a further supplemental affidavit(s)” and at para 19 thereof refers to further applications. In SVR’s Nov 22 Brief, they seek (paras 1c, 37 & 114-8) “court access restriction being placed on [Kostic] filing material”, in the form of a *Grepe v Loam Order: Unrau v National Dental Examining Board*, 2019 ABQB 283 at paras 343-50.

[54] As CMJ, from this date forward, and consistent with the Conditions and Guidelines for CM, dated June 24, 2021, Kostic can file no documents (whether applications, affidavits, submissions or otherwise) in this action without my prior leave. While SVR has not taken any action to date that is inconsistent with the way litigation should be conducted, to create a “level playing field”, from this date forward, the same will also apply to Counsel for SVR. In the result, any further steps in this litigation should only proceed under, and within the strict limits, of a Procedural Order approved or set by me, as CMJ, or my delegate or successor. Moreover, in the future, Kostic must comply with the rules distinguishing between evidence and argument as discussed above, or be liable to an application to strike, with cost sanctions. Any material attempted to be filed contrary to this direction will be subject to application by parties opposite and/or immediately struck, without notice, by the Court, on its own motion.

VIII. Costs

[55] As it has been largely successful, SVR will, for whatever it is worth (Kostic has a very poor record of ever paying costs as the material filed by SVR attests), have costs of this application in Column 4²⁴ of Schedule C, in such amount as may be agreed, or set by the Court on future application under a Procedural Order. Moreover, SVR has leave to seek further costs as proposed in paras 47-8 of its December 2, 2021 Brief and para 19 and 26 above.

Heard on the 15th day of December 2021.

Dated at the City of Calgary, Alberta this 3rd day of March, 2022.

²⁴ I note that in the arguments related to the quantum of any Security for Costs (not otherwise relevant to this application), SVR raises the issue as to whether the proper column is Column 5, but I award Column 4 to reflect that Kostic has had some small success, offset by her litigation misconduct (a matter relevant to security for costs): *Parker* at paras 16-18; and *MUA v Four Points*, 2017 ABQB 804, at paras 29-31.) herein by the level and degree of irrelevance and immateriality to many (if not most) of her submissions herein, as identified above. It could be worse for Kostic – I note that, at para 105 of her Reply Brief or Dec 9, 2012, she suggests “costs under multipliers x 5, Column 5”.

J.D. Rooke
A.C.J.C.Q.B.A.

Appearances:

Liliana Kostic
Self Represented Litigant
as the Plaintiff

John R. Gilbert, Field LLP
for the Defendant

APPENDIX “A”

List of Undertakings & Questions Objected to & Positions/Decision

Question (Q)/Undertaking (U) Refused ²⁵		Description	Kostic Position ²⁶	SVR Position	Judicial Ruling: Answer (A)/ Not Answer (N/A)/ Reason(s)
#1/p. 5	U	To provide the exact date that KEM left SVR	Kostic Affidavit filed November 30, 2021, pp 59/61 (KA, pp 59/61) ²⁷ – “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially ²⁸ .” Otherwise, unclear on, and unresponsive to, the specifics of this U.	TR 4/20 – 5/2 – Irrelevant and not Material (D15 TR 99/16-21)	A – KEM having provided the month and year of departure (TR 5/5-6), further details are not demonstrated to be either relevant or material. However, it is innocuous and common sense suggests an answer be provided (D15 TR 99/32-100/4).

²⁵ This refers to the question (Q) to which there was an objection “OBJECTION TAKEN”, which were not numbered, but for which there is a page reference, and undertakings (U) refused “UNDERTAKING” (numbered from 1 - 26), and the page reference each from the transcript of the September 2, 2021 cross-examination of Kostic on KEM’s Affidavit sworn on June 3, 2021.

²⁶ In addition to broader submissions, I rely to some small extent (see exceptions and limitations below) on “Kostic’s Response” in pages 51-165 of Kostic’s Affidavit filed November 30, 2021, and oral submissions in the December 15, 2021 Transcript (D15 TR) of the hearing.

²⁷ Hereinafter I will define this as KA, pp 59/61.

²⁸ This is a lengthy repetitive statement repeated in the Kostic Affidavit for every undertaking, but not specifically related to the undertaking. I will repeat below an abbreviated version of this for some of the Kostic positions below not necessarily all.

p. 5	Q	Did SVR provide authorizations of any kind for you to continue to give evidence on their behalf considering that you're not with SV?	KA, pp 51/52) – “Relevance: SVR appointed KEM as representative under para 1 of her affidavit; ... no cause of action” Also: “breaches of Rules 5.29(1); 5.30(1); 5.22: officer has obligation to respond fully”. See also D15 TR 26/18-28. Otherwise, unclear on, and unresponsive to, the specifics of this Q.	TR 24/40 – 23/2 – the other Defendants accepting her affidavit does not “bind the other” Defendants on cross-examination – see also D15 TR 8/1-7 & 9/24-10/3	N/A – This issue has been addressed more in the last paragraphs of the Decision – but the short version is that this is not questioning (previously referenced as “discovery”) ²⁹ under Part 5 of the Rules, and KEM is not an “officer” on behalf of other Defendants. Nor are the other Defendants (in this cross-examination on an affidavit – this not being an examination for discovery), bound by the answers by KEM – the fact that they accept her affidavit evidence does not require them to be bound to her answers on cross-examination – there is no law that requires the other Defendants (in this circumstances) to be bound, absent a further
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²⁹ I use “questioning” on its own or the old term of “discovery”, or “examination for discovery” interchangeably herein.

					application (if leave were to be sought and granted) and ruling in support of Kostic
p. 6	Q	Why did you leave SV? Were you terminated?	KA p. 52 – “Relevance: SVR appointed KEM as representative under para 1 of her affidavit; BUT AS KEM NO LONGER WITH SVR HER EVIDENCE CANNOT BE PROVIDED FOR SVR CORPORATION” D15 TR 28/12-16	Irrelevant	N/A – Kostic’s submissions are contradictory – SVR agreed to be bound by her affidavit but not her answers to questioning thereon. The Q asked has no apparent relevance to anything in the litigation – note my comments at D15 TR 28/2-5. Moreover, speculation as to why KEM left SVR is clearly an inflammatory statement that is merely a “fishing expedition”
#2/ p. 15	U	For KEM to ask Mr. Horner as to whether or not he was the president of the Norwegian corporation, and to provide his response.	KA, pp 61/62 – “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review	SRV agrees to provide. (D15 TR 93/13-4 & 26-39)	NO DECISION - SVR AGREES TO PROVIDE

			of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.		
#3/ p. 15	U	KEM to ask Horner to provide all information related to those exhibits that Kostic referred to KEM.	KA, pp. 62-4 – “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	Request is overly broad (TR 15/20). Refused (D15 TR 94/11-30). D15 TR 107/31 - 33)” Horner wasn’t retained -- he wasn’t involved in the action, so ... [not] material... [and not a Part 5 questioning].	N/A – This undertaking is not clear and is not a specific cross-examination question under Part 6, but more like a discovery question or undertaking under Part 5, that is too broad and uncertain in the context of the underlying application of security for costs.
p. 18	Q	“... you understand that anything you do state, revise, alter, or change your answers binds all the SVR defendants pursuant to your affidavit”	KA p.52-3 – “1. Relevance: SVR appointed KEM as representative under para 1 of her affidavit; 2. Misled court and Kostic – Kostic lost opportunity to compel at that time the appropriate defendants; 3. If KEM was not giving evidence	TR 17/22 – 18/3 “... her evidence today is not binding on all the other defendants. Her affidavit ... was sworn on behalf of the defendants. She’s here today to give her evidence in her personal capacity.”	N/A – The other Defendants adopting the affidavit as filed, does not require them to accept the answers of the witness on cross-examination as binding on them and, absent current non-existing agreement, there is no power of the Court, on

			on behalf of all as deposed to the court and Kostic should have informed both the court and Kostic; 4...."		the application before it to so order.
p. 19	Q	I will be asking you questions today, and to avoid redundancy, you will agree that when I refer to "you," that I am referring to you and to all the defendants in Action 47, including the Norwegians at times. Do you understand this?	KA p.53 –" Officer or litigation representative appointed must reasonably prepare; bring all records likely required". See D15 TR 29 – 30) re Rules 13.18 and 13.20.	Refused – TR 19/1-2. If the question is intended to relate to other Defendants, it should be specifically so asked.	N/A – KEM has not been appointed as an officer or litigation representative of SVR, nor is it required for cross-examination on an affidavit. Rules 13.18 and 13.20 to not apply, as I tried to make clear at D15 TR28/21-30/27. If Kostic wants to try to compel other Defendants, she will have to make an appropriate application(s) (with leave of the Court).
#4/p. 21	U	To obtain from Venturo all correspondence ...; emails, phone calls, letters, notes; regarding what KEM doesn't know occurred with Venturo and AIG when SVR was first consulted by AIG,	KA, pp. 64-6 – "Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review	SVR agrees to provide. (D15 TR 93/14-16 & 94/1-8).	NO DECISION - SVR AGREES TO PROVIDE

		assuming they have not already been produced.	of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.		
#5/ p. 25	U	To provide how the file was opened and all those particulars: Who was entered as the client; the insurer, name; insured, name; and then re whatever the claim is - TAKEN UNDER ADVISEMENT	KA – pp. 66-68. ³⁰ “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U. D15 TR 111/37-9: “... it’s very material because if I wasn’t listed as the client at the firm, it goes to the materiality about the whole cooperation [sic], who they took instructions from, why they didn’t	Not material, but the Court could order – D15 KR 4/22-6 & 111/27-31.	A – at worst, the request is innocuous and, even if not determinative of anything, it may have some relevance and materiality. See D15 TR 111/33-5 & 112/28-32.

³⁰ As can be seen in these identical responses to each undertaking, this material is, in fact, argument, not evidence, although Kostic conveniently ignores the difference. Moreover, it seems to be re-produced as a matter of rout regardless of the question or undertaking sought, and seem to have no specific relevance to same. This continues to be repeated and is not only extremely unhelpful but requires an unnecessary need to review in the result – all relevant to costs against Kostic on this application.

			take instructions from me...".		
#6/ p. 27	U	To produce all correspondence between AIG and SVR and others, including coverage counsel, regarding this file – REFUSED.	KA – pp. 68-9 "Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially" Otherwise, unclear on, and unresponsive to, the specifics of this U. D15 TR 113/4-16 & 114/22-32: No submissions made that are relevant to this issue.	TR 26/4-5 "This is not a cross-examine on [an] Affidavit of Records, so no."	N/A – Not relevant to the underlying application of security for costs – at best it is a discovery question or an affidavit of records question on the substantive issues. see D15 TR 112/34-113/2 & 18-41.
#7/ p. 30	U	To produce all those communications that KEM had with Ms. Sanderson and what KEM says is already on the record – REFUSED.	KA – pp. 69-79 "Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially"	TR 30/5-7: "We'll object to that production to the extent it's not already done on the basis of... relevance."	N/A – This is <u>production</u> that is not required under part 6 of the Rules and is – and too broad to deal with merits relevant to the underlying summary judgment application. Thus, it is, at best relevant only to the

			Otherwise, unclear on, and unresponsive to, the specifics of this U. D15 TR 113/4-16 & 114/22-32: No submissions that are relevant to this issue.		substance of the main litigation not the underlying application: TR 117/30-2.
#8/ p. 31	U	Produce all KEM time records since the first communications with AIG on this file. TAKEN UNDER ADVISEMENT.	KA – pp. 71-3 “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U. D15 TR 113/4-16 & 114/22-32: No submissions that are relevant to this issue.	TR 32/3-11. Not relevant to a cross-examination on an affidavit, and this is not an examination on an Affidavit of Records or Part 5 of the Rules. D15 TR 4/28-33 & 117/41-118/1 & 15-17: Not material, and, at best, a fishing expedition.	N/A – I agree with the first submissions of Counsel for SVR. At best, this may go only to the substance of the action and had no clear relevance or materiality to even the level of merits to be considered in the underlying application of security for costs.
#9/ p. 41	U	Provide the communications as between Mr. Venturo and AIG when AIG conveyed to them that	KA – pp. 73-74 “Negligence of the defendants or any of them... KEM provided only partial responses	Under advisement.	This morphed into Undertaking #10 – see below.

		position that AIG had - TAKEN UNDER ADVISEMENT.	concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U. D15 TR 113/4-16 & 114/22-32: No submissions that are relevant to this issue.		
p. 45	O	So, when were you advised that those were the terms of the policy? That is my question. My question is, under the terms of which policy were you advised? When were you advised of that policy, of those policy terms? What number was that policy?	KA pp 53-4: “If no terms were available to SVR and no Policy, question material, to how SVR came to its own conclusion and complained to AIG that the insured is not cooperating ³¹ ; Records & information concealed, relevant and material. If no retainer and no AIG litigation guidelines and no time records, SVR no statement of		This morphed into Undertaking #10 – see below

³¹ Much of this response to this objection and others (which I understood was the purpose of her Exhibit 2 to her affidavit) constitute Kostic giving her own evidence as an unsworn attachment/exhibit to her “affidavit”.

			Defence; no proof of how SVR could complain about Kostic, which directly caused her loss of coverage”		
#10/ p. 46	U	Produce the exact time and that evidence pertaining to the question: "When did AIG inform you of the terms of the policy, that those were the terms in the policy?" – TAKEN UNDER ADVISEMENT.	KA – pp. 74-89 “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U. D15 TR 113/4-16 & 114/22-32: No submissions that are relevant to this issue.	SVR agrees to “give reasonable efforts to identify when terms of the policy were communicated to the Defendants.” (D15 TR 5/1-9 & 93/9-11)	NO DECISION - SVR AGREES TO PROVIDE.
p. 49	O	TR 47/12-51/4 - Kostic requests that the policies in her affidavit be marked as full exhibits		TR 47/12-51/4 - KEM has already stated she isn't able to identify the policies, so I'd object to them being entered as full exhibits. You can	N/A - The Court rules in favour of SVR that, because KEM does not accept the policies identified by Kostic in Kostic's affidavit as being the applicable policies, in accordance

				enter them as exhibits for identification for that purpose.	with the practice of the Court, they are not given a numeric reference as an exhibit, but merely a letter reference for identification. See discussion on this at D15 -TR 44/13-46/28.
p. 53	O	You'll agree then ... that you advised Kostic that you were not taking instructions from Kostic based on that retainer letter, based on the concealed ³² conversations and communications that SVR had with AIG.	TR 54 ³³ ; Records & information concealed, relevant and material; If no retainer and no AIG litigation guidelines and no time records, SVR no Statement of Defence; no proof of how SVR could complain about Kostic, which directly caused her loss of coverage"	Under advisement – on review the assertion has been answered, in the negative. D15 -TR 575-13.	N/A This is an assertion by Kostic but not a question or objection to a question that requires the Court to rule. Moreover, at TR 53/10 KEM answered that there was no other policy.
p. 53	O	... it's fair to say that you did come to understand there was another policy.... I want you to confirm that.		TR 53/10-54/7: KEM denied that, so the premise of the question is absent.	N/A The Court agrees with Counsel.
p. 56	O	You say there's no merit to my action, and you		Objection to how the question was asked.	N/A There is no objection to a question

³² There was an unresolved argument between Kostic and Counsel for SVR over the use of the word "concealed".

³³ Much of this response to this objection and others (which I understood was the purpose of her Exhibit 2 to her affidavit) constitute Kostic giving her own evidence as an unsworn attachment/exhibit to her "affidavit".

		say a whole host of things in paragraphs 28 to 30.			that requires the Court to rule – see D15 TR 60/3-61/14.
p. 58	O	So that is where you opened the door for me to go through the merits.		No question asked.	N/A This is an assertion by Kostic but no question or objection to a question that requires the Court to rule.
p. 61	O	I don't want the same answer.		Objection to Kostic asking the same question multiple times.	N/A The underlying question goes back to TR 43/18 – 44/16, KEM stating at TR 45/1- 11, that KEM's understanding was not based on the policy but the retainer letter. After much discussion, this was restated at TR 61/14 – 23, as, in essence, why KEM concluded "that you don't take instructions from me", and I find, on review that was answered at TR 62/1- 16. Thus, notwithstanding some misunderstanding by the Court that the underlying question was not answered (D15

					TR 62/13-27 & 63/29-64/10), there is no new question asked, in relation to this objection, that was not answered. Moreover, there is no legal ability (see case reference in the main body of the Decision) for a questioner to ask the question multiple times in an attempt to get a different answer, as Kostic admitted she tried to do – see Kostic’s Dec. 9 Reply Brief, paras 23, 62 & 65. The objection by Counsel for SVR is upheld – in effect, there is no new question – see D15 TR 61/27-38.
#11/ p. 63	U	To go back to review the policies 4 and 7 that were just sent to KEM, and then to go specifically to the different language in both of them, Clause 2, and then to advise if	KA – pp 76-8: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review	TR 63/5-9 The question asks for an opinion and the question is not relevant.	N/A This is an assertion by Kostic but not a proper question, as it asks for an opinion, irrelevant to the underlying application. Moreover, at best, it is a purely legal question

		KEM will agree now that her conclusion that Kostic had no right to appoint counsel is inconsistent with Clause 2 of the 7 policy – REFUSED.	of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.		that goes only to the substance of the action and had no clear relevance to even the level of merits to be considered in the underlying application
p. 64	Q	She stated that she didn’t have time to review the policies		TR 64/14-17 Counsel objected to the assertion by Kostic.	N/A - This is an assertion by Kostic but no question or objection to a question that requires the Court to rule. Counsel’s objection to Kostic’s assertion is justified.
p. 65	Q	[KEM] deposed that she ...reviewed my affidavit, she deposed that she hasn’t reviewed it with any sort of proper effect.		TR 65/22 Counsel objected to the assertion by Kostic.	N/A - This is an assertion by Kostic but no question or objection to a question that requires the Court to rule. Counsel’s objection to Kostic’s assertion is justified.
p. 67	Q	So then when you deposed your affidavit, it's fair to say that you -- on behalf of all of SVR, that perhaps you shouldn't have deposed		TR 66/21-2 Counsel objected to the assertion by Kostic as inappropriate.	N/A - This is an assertion/opinion by Kostic but not a proper question or objection to a question that requires the Court to rule. To the extent that it is a

		and stated that in your affidavit?			question, the Court agrees with Counsel that it is not appropriate, as it seeks an opinion, irrelevant to the underlying application.
#12/ p. 69	U	Review Exhibits 12 and 15 in Kostic's affidavit that were marked today for identification as A and B, and to advise if it is still KEM's opinion that Kostic could not appoint her own counsel -REFUSED.	KA – pp 78-9: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	TR 67/15-9 The question asks for an opinion (impermissible) and the question is not relevant.	N/A - This is an assertion by Kostic but not a proper question (an opinion cannot be sought); nor is it an objection to a question that requires the Court to rule. To the extent that it is a question, the Court agrees with Counsel that it is not appropriate, as it is a legal question that seeks an opinion, irrelevant to the underlying application.
#13/ p.72	U	To provide the communications that were between AIG and KEM and any communications that she had between anybody at SVR and AIG related to taking	KA – pp 80-1: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review	TR 121/39-122/17 – This is an records issue, at best, appropriate for discovery, not cross-examination on an affidavit in support of security for costs.	N/A – Not a proper question for cross-examination on an affidavit for security for costs – goes to the issue of merits much broader than the limit of that in the early stage of the

		instructions from Kostic or not taking instructions from Kostic. In other words, to provide any communications between AIG and KEM and any communications between KEM and SVR with AIG regarding who they take instructions from – TAKEN UNDER ADVISEMENT.	of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U. TR 122/19-30 “All of this goes to ... success in my action and to the security and to impecuniosity.”		litigation, as noted in the authorities above. See, <i>inter alia</i> , TR 123/18-26 & 30-35.
p. 75	O	Who did you report the facts to? On what basis did you come to those conclusions that ... there was no cooperation?		TR 75/18-20 Counsel for SVR objects on the basis that KEM did not testify that she came to a conclusion, but rather she said that she only reported the facts	N/A This question is answered at TR74/11-76/20.
#14/p. 79	U	Identify where in the AOR is the reporting letter referred to for the CoA that was sent to AIG.	KA – pp 81-3: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review	TR 79/5-25 “We’re not going to undertake to identify documents for you throughout the Affidavit of Records.... She’s advised you that the documents are produced.”	N/A – There is no requirement of an affiant on the cross-examination on and affidavit to so identify documents, but that is for the questioner to do and to then ask relevant

			of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	However, see undertaking volunteered in #17.	questions, if any, thereon. However, see undertaking volunteered in #17.
#15/p. 79	U	To identify if there are any other reporting letters that were sent to AIG that are contained in KEM’s Affidavit of Records.	KA – pp 83-5: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	(Same as #14)	N/A (Same as #14).
#16/p. 81	Q	Produce any and all reporting letters that were sent to AIG. Undertake to produce it or AoR or answer the question that it was not sent to me, and then produce it.	KA – pp 85-6: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially”	(Same as #14)	N/A (Same as #14).

			Otherwise, unclear on, and unresponsive to, the specifics of this U.		
#17/p. 81	Q	To identify whether the reporting letter to the Court of Appeal was sent to Kostic.	KA – pp 86-8: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	TR 80/14-16 “We will undertake to identify whether the reporting letter to the Court of Appeal was sent to you. SVR agreed (D15 TR 94/35-40) & 95	NO DECISION - SVR VOLUNTEERED TO PROVIDE.
#18/p. 85	U	Produce and find out what SVR charged for the conduct of Ms. Kostic's defence REFUSED.	KA – pp 88-90: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	TR 84/23-25 & 85/18-9, Not relevant.	N/A The question has not relevance to the cross-examination on the underlying application of security for costs. More specifically whatever were the SVR fees is not relevant to whether or not SVR had a conflict or any other basis of liability to Kostic D15 TR 127/20-2 & 128/720.

			TR 85/20-86/11 – Relevant to conflicts and further general argument.		
pp. 85-6	Q	[In reality just a repeat of an argument by Kostic as to why she claims the undertaking sought in #18 is relevant.]			N/A Repeat of same issue addressed in Undertaking #18 above.
#19/p. 94	U	Produce any and all communications that SVR had in 2016 with AIG and to produce the document referenced by Kostic that didn't include her, being the exhibit that they went through that KEM identified from DV to AIG which discussed the guidelines and how the payment of SVR would occur, or to identify it TAKEN UNDER ADVISEMENT.	KA – pp 90-1: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	D15 KR 5/11-19 – not material to the present application.	N/A This an Affidavit of Records (AoR) issue, not appropriate for an answer on this cross-examination. Nevertheless, to the extent the litigation proceeds Counsel for SVR has agreed to take this request under advisement in the substantive litigation: D15 TR 94/1-23.
pp. 96-7	Q	I’m not going to go through your legal analogy. If you’re going to give me a legal	TR 96/19-22 Beyond a characterization by Kostic that KEM was giving a legal answer,	TR 96/14-8 Objection to the characterization by Kostic that KEM was providing a legal	N/A No question was posed that sought an answer.

		opinion ... [KEM], then I'm going to ask you legal questions. You now opened the door.	no question was asked – "I don't need to go into that with you right now."	answer, but rather it was a factual discussion.	
p. 99	Q	"It's -- the litigation guideline is right in front of me.... It does go to the administration of a firm. It has to be signed by the counsel who is going to retain defence coverage – defence conduct of a file that's been accepted...."		TR 99/23 We'll object on the basis of relevance to further questions with respect to the litigation guidelines.	N/A There is no specific question asked, only an assertion by Kostic. While Counsel's objection was of a blanket nature, the Court cannot rule on that basis, but only on the basis of specific question(s). Moreover, Kostic has not established, in the context of the arguments that litigation guidelines are specifically relevant to the underlying application of security for costs.
#20/p. 101	U	Produce the document that was signed ["the AIG financial lines claim litigation guidelines"] REFUSED.	KA – pp 92-3: "Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to		N/A – This is an Affidavit of Records issue, not a question for a cross-examination on an affidavit for security for costs.

			the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.		
#21/p. 103	U	KEM to ask DV that he will agree that, based on the conflicts that Kostic raised with him prior to SVR acting, i.e., the Norwegian conflicts and the other ones listed in those communications that were attached as an exhibit or identification and in her affidavits, that SVR took the position that they were not in a conflict for those reasons, and then they continued to act because they believed that they weren't in a conflict – REFUSED	KA – pp 93-5: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	TR 102/14-9 “I will grant an undertaking that KEM will make reasonable efforts to ask DV as to what his conclusions were regarding the presence of a conflict of interest as between SVR and Kostic.”	N/A - Nothing on which the Court need rule, as Counsel has volunteered the undertaking as stated.
#22/p. 103	U	[Similar to Undertaking # 21] KEM to make reasonable efforts to	KA – pp 95-7: “Negligence of the defendants or any of them... KEM provided	SVR agrees to have DV advise “as to what conclusions he reached with regard to ...	NO DECISION - SVR AGREES TO PROVIDE

		ask DV as to what his conclusions were regarding the presence of a conflict of interest as between SVR and Kostic.	only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	conflict(s) of interest.” (D15 TR 96/3-17)	
p. 104	Q	So, has SVR done any work for AIG in the past?		TR 104/6-16. Objection on the basis of privilege, and materiality: D15 TR 75/15-6 & 76.1-6.	N/A – The fact that SVR has done unrelated work for AIG in the past is privileged and thus materiality does not arise.
#23/p. 105	U	Produce any and all communications between SVR and AIG and any conversations between coverage counsel or anybody else and produce those – REFUSED.	KA – pp 97-8: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.		N/A: D15 TR 130/13-25. That is a basket clause ...provide everything. An Affidavit of Records questions, not a proper question for a cross-examination on an affidavit in support of security for costs.

p. 105	Q	How much work did you do for AIG in the previous 24 months prior to acting for me?		TR 105/13-4. Objection on the basis of privilege.	N/A - Privileged
#24/p. 108	U	To make reasonable inquiries to determine and advise who drafted the retainer letter.	KA – pp 98-100: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	D15 TR 5/21-6: Not material, but SVR agrees to make reasonable efforts (D15 TR 96/25-28)	NO DECISION - SVR AGREES TO PROVIDE
#25/p. 110	U	Produce a signed engagement signed by AIG to retain SVR, and to explain if one wasn't signed and accepted by AIG – REFUSED.	KA – pp 100-2: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially”	TR110/4-5 – 111/21: Refused on the basis that the guidelines referenced are billing guidelines that are irrelevant to these proceedings. D15 TR 5/28-34: Refusal maintained.	N/A – Kostic has not established that these billing guidelines are relevant to issues pertinent to security for costs, and, moreover, it appears that KEM was not personally familiar with them.

			Otherwise, unclear on, and unresponsive to, the specifics of this U.		
#26/p. 112	U	Produce the litigation guidelines referred to in Exhibit 2 to today's questioning, the one that Kostic read to KEM earlier that KEM was copied on in 2016 – REFUSED.	KA – pp 102-3: “Negligence of the defendants or any of them... KEM provided only partial responses concerning only fragmented aspects to the questions – review of context KEM only responds partially” Otherwise, unclear on, and unresponsive to, the specifics of this U.	D15 TR 5/36-6/3: Refusal maintained – not material.	N/A – Undertaking sought is not clear, and a matter of relevance only to the substance of the action and an Affidavit of Records in relation thereto, with no relevance and materiality being established in the context of the security for costs application.
p. 113	Q	KEM earlier said that she never had them. That SVR never had any guidelines.	[Argument as to KEM’s evidence on cross-examination.]	[Argument as to KEM’s evidence on cross-examination.]	N/A There is no question here on which the Court needs to rule.
p. 114	Q	So SVR understood ... by that letter ... that AIG would not be happy if SVR took instructions from Kostic then?	D15 TR 83/40- 84/5 and 15-16: as an employee of SVR she has to answer on behalf of SVR under the Rules.	TR 114/5-6: I'll object to that question. She can't speak to the state of mind of a corporation.	N/A Counsel’s objection is upheld. Moreover, KEM is not responding, or required to respond, for SVR in a Part 6 questioning on an affidavit.
pp. 115/116	Q	So where in your evidence is there		TR 115/25-116/ Objection because it	N/A – Objection upheld for reason stated.

		evidence that ... this wasn't the case. [Rephrased by Kostic]: Where in your evidence can you point me to that SVR didn't get involved because SVR agreed that they wouldn't take instructions from Kostic?		asks the affiant to prove a negative.	Moreover, KEM need not point Kostic to any evidence, but only to answer relevant and material questions.
p. 116	Q	You cite various judgments in your application since 2018. You'll agree that those costs otherwise would have been covered – had coverage not been terminated?		TR116/18-9 Objection – You're asking for a legal opinion.	N/A Counsel's objection is upheld. The factual side of the question (that AIG paid some costs), was answered at TR 117/8-17 – see D15 TR 89/12-3, but this question asks for a legal conclusion as to why – they are "wholly different questions" (D15 TR 89/18 & 27-29 & 90/11-15 & 92/30-3).
p. 118	Q	But you said what's your understanding of the general policies in defending insureds? The policies under the guidelines say that any		TR 118/2-8 Objection that it "may be asking for a legal opinion"	A – the question is not what the legal conclusion is, but what is the witnesses' understanding of the assertion by Kostic – "if

		costs and judgment will be payable by the insured policy holder. Are you saying now that you didn't understand those policy guidelines even generally?			she understood the guidelines.", although that was not the specific question asked (D15 TR 91/31-34 & 92/2)
p. 120	Q	You'll agree, if you look at the judgments that are outstanding against me, it was because AIG cancelled coverage, otherwise they'd be paid; correct?		TR 120/10-1 Objection – You're asking for a legal conclusion.	N/A It seeks a legal conclusion, or it was a matter over which the witness had no information as to why, as asserted, that the judgments were outstanding. In either case, on the basis of the way in the question was asked, the Court does not require the witness to answer.