

1. OVERVIEW	1
a) 5 year lease terms: MFP’s bait and switch	1
b) MFP always intended to enhance its deal with the City	3
c) MFP always tried to leave itself room to maneuver.....	4
d) MFP obtained the room to maneuver through the Jakobek Amendment	5
e) The only reason to extend the lease terms was to lower payments in the short term	6
f) Domi and Wilkinson delivered: they enhanced the deal	7
g) The absence of a paper trail.....	9
h) Liczyk decided that the City would put the equipment on 5 year leases	10
2. MFP CONTEMPLATED SWITCHING TO 5 YEAR LEASE TERMS BEFORE IT WON THE DEAL	13
a) MFP prepared to switch lease terms before Council awarded the contract	13
b) MFP proposed 5 year leases at August 3, 1999 breakfast meeting	15
c) Meetings between MFP and I&T in August and September, 1999.....	17
i) Viinamae’s testimony	17
ii) Andrew’s testimony	18
iii) Wilkinson’s testimony	18
3. SEPTEMBER 20, 1999: WILKINSON FAXED HANDWRITTEN MATERIAL TO LICZYK	22
4. SEPTEMBER 21, 1999: WILKINSON AND DOMI MET WITH LICZYK AND BRITTAIN	24
a) MFP called for the meeting.....	24
b) Wilkinson’s presentation at the meeting	25
i) Liczyk’s recollection of the meeting	25
ii) Brittain’s recollection of the meeting	28
iii) Wilkinson’s recollection of the meeting	29
c) The City did not tell MFP to write 5 year leases on September 21, 1999.....	31
d) Domi made calls to Liczyk, Andrew and Jakobek on September 21, 1999	32
e) September 21, 1999 internal Finance meeting	33
f) September 21, 1999 email from Liczyk	34

5. SEPTEMBER 22, 1999	35
a) Wilkinson sent 3 to 5 year chart to Andrew.....	35
b) Internal I&T and Treasury meeting	36
i) MFP lease snapshot	42
ii) Neither Liczyk nor Brittain told MFP to prepare 5 year lease documents on September 21 or 22, 1999	42
c) September 21, 1999 – October 1, 1999 communications	44
i) Domi ACC expense	44
ii) Yellow sheet.....	44
6. SEPTEMBER 23, 1999 - MFP GOLF INVITATIONAL TOURNAMENT & BRITTAIN ANALYSIS	45
a) Brittain’s September 23, 1999 analysis	46
7. MFP PREPARED EQUIPMENT SCHEDULE	48
a) Wilkinson believed that the City had decided to extend lease terms to 5 years	48
b) MFP did not provide the City with the necessary information to decide	48
8. WHO AT THE CITY MADE THE DECISION TO APPROVE 5 YEAR LEASE TERMS	51
a) Overview.....	51
b) Viinamae version of events	51
c) Marks’s version of events	53
d) Liczyk’s version of events.....	54
e) Power’s version of events	54
9. DRAFT LETTER TO THE COMMISSIONERS INDICATED I&T THOUGHT LEASES WOULD BE 3 YEARS LONG	57
a) Origins of Commissioners’ draft letter.....	57
b) September 17, 1999 first draft	58
c) September 29, 1999 second draft	58
d) September 30, 1999 letter went to Liczyk for signature	59
10. OCTOBER 1, 1999	62
a) Viinamae signed lease documents.....	62

- i) Certificate of acceptance 62
- ii) Viinamae signed Program Agreement 1 62
- iii) Amending Agreement (from October 1, 1999 to July 30, 1999) 63
- iv) Program Agreement 1-1 63
- v) Bill of Sale 63
- vi) Direction 63
- vii) Signing authority 64

- b) Viinamae announced that she had signed the 5 year leases 65**

- c) MFP emails lease rate factors to Power 69**

1. Overview

1. The City of Toronto issued the computer leasing RFQ on May 31, 1999. The respondents were to propose options to lease tier one servers, desktops, notebooks, software, and associated peripheral devices for a period of 3 years. In July 1999, the City of Toronto awarded the contract to MFP. The first lease schedule resulting from the 1999 RFQ commenced on October 1, 1999. The lease term of this lease schedule was 5 years. There was no documentation supporting the change from 3 year to 5 year lease terms.¹ Similarly, there was no indication that any analysis or competitive process was initiated at the time the City decided to enter the 5 year lease option.²

a) 5 year lease terms: MFP's bait and switch

2. A bait and switch is a fraudulent or deceptive sales practice in which a purchaser is attracted by the advertisement of a low-priced item but then is deceived and purchases a higher-priced one. A bait and switch has two elements:

- a. the bait, an attractive proposal designed by the vendor to capture the attention of the customer; and
- b. the switch, where the vendor deceives and manipulates the customer to purchase a higher-priced product that the customer does not really need.

3. MFP's substitution of 5 year leases for the 3 year leases the City tendered was a pure bait and switch. MFP submitted an extremely attractive bid for 3 year leases. MFP offered the City a 36 month deal that was \$2 million cheaper than any other bidder. If the City had exercised its purchase option at the end of the 3 years, MFP's bid offered the City savings of almost \$3 million over any other bid.

¹ COT080176 at COT080185, 61:1:Report.

² COT080176 at COT080188, 61:1:Report.

4. Instead, MFP quietly resiled from the commitments made in its response to the RFQ. MFP then offered the City a product that it did not need, failed to provide any of the necessary information for the City to assess the product offered, effectively divided and conquered staff from I&T and Finance, and locked the City into a long term relationship with MFP.

5. The City did not need 5 year leases; indeed, the long term budgetary effects were adverse. According to the AssetLinx Report, the extension of lease terms beyond the useful life of the assets reduced lease payments in the early years, but increased costs from the time of the first replacement.³

6. Five year lease terms were to MFP’s advantage, and were not in the City’s best interest. MFP failed to act in the best interests of the City, and indeed, failed to act as an ethical and reasonable leasing provider. Specifically:

- a. MFP acknowledged that it could only profit from the City transaction if it “enhanced” the deal it had already committed to in the response to the RFQ;
- b. MFP ensured that the MLA governed the transaction to the exclusion of its response to the 1999 RFQ;
- c. MFP failed to provide any specific pricing information to allow the City to analyze MFP’s proposal;
- d. MFP never made a written proposal on 5 year leases before it presented contract documents for the City to sign; and
- e. MFP acknowledged that 5 year lease terms rarely, if ever, make sense for a lessee.

³ COT080176 at COT080187, 61:1:Report.

7. MFP promised to “customize” solutions for its clients. The only solutions that MFP presented to the City in order to manage the City’s supposed concerns with budgetary pressures and refresh options were:

- a. A 5 year lease with a 3 year refresh option; or
- b. A 5 year lease with a staggered refresh option.

8. MFP did not present any other possibilities to the City, including the option to purchase the equipment at 3 years or the option to extend only a portion of the lease. Instead, MFP presented the most expensive and restrictive option. This option had the dual benefit of (i) being the most profitable for MFP and (ii) locking the City into a long term relationship with MFP from which extrication would be very difficult and expensive.

9. Five year leases benefited MFP, not the City. The weight of the evidence supports the conclusion that MFP orchestrated the extension of the lease term from 3 to 5 years.

b) MFP always intended to enhance its deal with the City

10. The 3 year leasing transaction in MFP’s response to the 1999 RFQ was unlikely to generate any profit for MFP. MFP booked the 3-year leasing program with the City at a loss.⁴ Wolfram confirmed that if the City had exercised its purchase option at the end of the 3 year lease, MFP would have lost money.⁵ He explained that MFP relied on its prediction that the City would not have the wherewithal to determine that its best interests required it to purchase the equipment at the end of 3 years:

But I don't -- I -- and I guess the reason we were prepared to make the investment in the pricing that we did was -- was because we thought that that wasn't what was going to happen.⁶

⁴ Wolfram 09/28/2004 at 94.

11. MFP predicted that the City would begin a refresh strategy that would cause it to renew some of the equipment on lease and to return the remainder and likely incur additional expenses.⁷

12. MFP claimed to be a “relationship company.” Wolfrain confirmed that MFP tried to win a bid on price, and then used the leasing relationship to enhance the deal.⁸ The leasing relationship was necessary to provide enhancements to a successful bid. Wolfrain referred to such enhancements as the ability to “find other ways to serve the customer”. He agreed that such enhancements included restructuring the leases and extending the lease terms.

Q: Find other ways to restructure, refresh, release, extend the leases --

A: And other leases.

Q: -- and continue to be in a long term commitment with the customer?

A: I wouldn't use those -- those are a few of many, many examples. We're looking for other services to provide to the customer, other assets to be financed.⁹

c) MFP always tried to leave itself room to maneuver

13. MFP drafted the MLA specifically to resile from the terms in its response to the 1999 RFQ without legal consequences. The terms of the MLA permitted MFP not to be bound by its response to the 1999 RFQ. Wolfrain testified that the practice of the leasing industry was to exclude the RFP from subsequent contract documents.¹⁰ He explained that MFP’s Legal Department made the effort to exclude the RFQ and to

⁵ Wolfrain 09/28/2004 at 94.

⁶ Wolfrain 09/28/2004 at 94.

⁷ Wolfrain 09/28/2004 at 95-96.

⁸ Wolfrain 09/28/2004 at 97-98.

⁹ Wolfrain 09/28/2004 at 98.

¹⁰ Wolfrain 09/28/2004 at 132.

ensure that the terms of the lease took precedence.¹¹ This view was confirmed by two internal MFP documents.

14. First, on July 14, 1999, Kim Harle wrote to Pessione and Stevens.¹² Harle sent her message after MFP submitted its bid and before Council awarded MFP the contract. Harle criticized Pessione for not including a clause that would specifically allow MFP to avoid being held to its response to the RFQ:

P.S. Sandy, I could not find in our response the standard qualification paragraph set out in section 1 of my June 4 memo. There is case law which suggests that upon acceptance of a proposal under an RFP/RFQ, a binding contract is formed. This qualification would help preclude an argument based on this case law that our proposal forms a binding contract. Since we want our relationships to be governed by our master lease or other acceptable formal, negotiated documentation, this qualification is imperative.¹³

15. This position was reinforced by the position MFP's Legal Department took with respect to the City fleet leasing RFP.

Proposal a binding offer.

The RFP states that each proposal constitutes an irrevocable and binding offer. This means that if the City accepts our proposal we are bound to our response, without any changes and cannot walk away unless we are prepared to be sued for damages. Drafting of the response in such a way that we do not provide definitive "yes" or "no" answers will be very important.¹⁴

16. MFP's own internal documents made it clear that MFP never intended to be held to its response to the RFQ. In fact, they demonstrate that MFP was prepared to go to extraordinary lengths to ensure that it would not be held to its word.

d) MFP obtained the room to maneuver through the Jakobek Amendment

¹¹ Wolfraim 09/28/2004 at 132.

¹² COT080060, 18:3:36.

¹³ COT080060, 18:3:36.

¹⁴ COT083836 at COT083837, 18:3:14.

17. As described in Chapter 8, Jakobek amended the P&F Report that recommended that the City award MFP the contract for computer leasing. This innocuous looking amendment was the thin edge of the wedge that allowed MFP to walk away from its response to the RFQ and to write a much more favourable deal.

e) The only reason to extend the lease terms was to lower payments in the short term

18. Two days after the September 21, 1999 meeting between MFP, Liczyk and Brittain (discussed below), Brittain undertook a very rudimentary analysis of 5 year lease terms.¹⁵ He simply made up lease rate factors and other numbers to determine whether the idea of 5 year lease terms had any merit. He testified that:

And again, I didn't take this through, but once I had looked at it, it – it very quickly became obvious to me that it – that it didn't make any sense and I didn't take it any further than that.¹⁶

19. The City submits that 5 year lease terms did not make sense for three reasons:
- a. if the City intended to replace the computers at the 3 year mark, then the most expensive course of action to take was to lease the computers for 5 years;
 - b. if the City wished to acquire computers for 5 years the economical way, then the City should have purchased, not leased, them; and
 - c. if the City decided to keep the computers it had leased for 3 years for a longer time, then it was less expensive for the City to purchase those computers at 17% of fair market value than to pay two more years of lease rent.

¹⁵ Brittain 07/09/2003 at 233-234.

¹⁶ Brittain 07/09/2003 at 234.

20. Extending the leases by two years was the most expensive way for the City to attain the “maximum flexibility”.

21. Wolfraim effectively agreed with Brittain’s assessment. He confirmed that it did not make sense for the City to put its computer equipment on 5 year leases if it planned to replace the computers before the 5 year mark.¹⁷ Otherwise, Wolfraim explained, the City would end up replacing equipment before the cost of the leases had been fully amortized, and it would become caught in a vicious circle.¹⁸

22. However, Wolfraim offered one caveat: 5 year lease terms made sense for the purpose of relieving budget pressure.¹⁹ He affirmed that budget relief was the only reason to put computer equipment on 5 year leases, because longer lease terms created reduced lease payments.²⁰ Wolfraim agreed that the City did not need to extend the leases in order to replace its computers gradually,²¹ but that once the 5 year lease term was decided upon for budget reasons, MFP discussed the advantages of the longer lease term for the City’s refresh policy.²² MFP communicated the idea that a more orderly refresh could be accomplished during a 5 year lease by refreshing one third of the assets on lease per year, for 3 years.²³ Wilkinson exploited the obvious inexperience with leasing of I&T staff to promote the longer lease terms by misstating the advantages of longer lease terms and hiding the disadvantages.

f) Domi and Wilkinson delivered: they enhanced the deal

23. The City submits that the refresh strategy that followed from a 5 year lease term restricted the City’s ability to tender for competitive rates at each cycle. Kerr arrived at the same conclusion.²⁴ Wolfraim would not initially concede that the City’s ability to

¹⁷ Wolfraim 09/28/2004 at 90-91.

¹⁸ Wolfraim 09/27/2004 at 148.

¹⁹ Wolfraim 09/28/2004 at 90-91.

²⁰ Wolfraim 09/28/2004 at 103.

²¹ Wolfraim 09/28/2004 at 103.

²² Wolfraim 09/28/2004 at 121.

²³ Wolfraim 09/28/2004 at 121.

²⁴ Wolfraim 09/28/2004 at 97.

release its refresh assets to another leasing provider was restricted by 5 year lease terms,²⁵ but later conceded that it was possible.²⁶ Although he admitted that the tendering process and subsequent transfer to another leasing provider would be more costly for the City,²⁷ because this process would incur administrative costs, he would not admit that, in addition to the costs of leasing or purchasing the new equipment, the City would incur costs for terminating the relevant portion of lease.²⁸

24. Wolfrain’s denial is telling. He denied that the City had to extinguish all of its ongoing obligations with MFP in order to purchase or lease its refresh assets from a new provider. Instead, it could simply terminate the appropriate portion of the relevant lease schedule.²⁹ However, Wolfrain noted that, while the lease should have expressly permitted the City to terminate only part of a lease schedule, MFP’s leases did not provide for such termination.³⁰ The City submits that the fact that the MFP leases did not provide for termination of a portion of the lease schedule is yet another component of MFP’s grander plan to lock the City into inflexible 5 year lease terms.

25. Part of MFP’s bait and switch involved dramatically increasing the deal’s effective interest rate and the difference between the effective interest rate and the equivalent term bond rate (“Interest Spread”). The 5-year deal MFP wrote in October 1999 was significantly more profitable than the 3-year deal it bid.³¹ This additional profit came at the City’s expense and, because it was purely a financing charge, provided the City with no additional value.

26. Because the change from 3 to 5 years was never tendered, MFP dramatically increased the effective interest rate it charged the City free from competition. Because MFP never provided a 5-year quote to the City before the contracts were MFP

²⁵ Wolfrain 09/28/2004 at 92.

²⁶ Wolfrain 09/28/2004 at 97.

²⁷ Wolfrain 09/28/2004 at 92-93

²⁸ Wolfrain 09/28/2004 at 92-93.

²⁹ Wolfrain 09/28/2004 at 93.

³⁰ Wolfrain 09/28/2004 at 93.

³¹ The July 2000 rewrites further increased the Interest Spread and made the rewritten leases more profitable still.

presented the contracts to the City, MFP's deception went undetected. MFP never advised the City that it changed its approach to interest rates and had increased the Interest Spread so dramatically.

27. One of the reasons that MFP's 3-year bid was so attractive was because its effective interest rate was so low. If the City exercised its purchase option at the end of the lease at the maximum value of 17%, then the effective interest rate of the MFP Bid was 4.64%. At that time, the equivalent term bond rate was 5.46%. The Interest Spread was therefore -0.82%.

28. In other words, MFP promised the City a lower effective interest rate than the available equivalent term bond rate. MFP would have done better putting its money in bonds than doing this deal. MFP made this bid to get a foot in the door. It would not have made money.

29. However, when MFP extended the lease term from 3 to 5 years, it seized that opportunity to enhance its deal. Equipment Schedule 838-1's effective interest rate was 9.08% (assuming end of term purchase at the maximum value of 9%). The five year bond rate was only 5.77%. Therefore, the Interest Spread on 838-1 was 3.31%, which was 4.13% above the bid's effective interest rate.³²

g) The absence of a paper trail

30. There was a complete absence of a paper trail on the decision to extend the lease terms from 3 to 5 years.³³ As noted above, MFP never provided the City with a written proposal or a quote. There were no documents from the City confirming the terms and conditions of extending the leases or directing MFP to proceed with extending the lease terms, other than the signed contract documents.

³² See Assetlinx Report, COT080176 at COT080197, and Appendix H, 61:1:Report.

³³ Wolfram 09/28/2004 at 111.

31. No one at MFP identified the individual at the City who gave the direction to extend the lease terms to 5 years. Further, neither Wilkinson nor Domi, the two MFP individuals charged with the City account, said that he received the instructions to prepare the 5 year lease term schedules. These were the only MFP representatives that would have received such a direction. The City submits that the inability of anyone at MFP to identify an individual at the City who directed the lease rewrites is immensely troubling. Wolfraim agreed.³⁴ These difficulties lead to the inescapable conclusion that MFP did not receive a clear direction from the City to rewrite the leases, but proceeded to do so regardless.

32. The failure of MFP to provide covering letters for significant contractual documents was completely contrary to normal and prudent business practice. It was standard business practice to record in a covering memo, for both the sender and the receiver, that contract documents were attached, that the documents were requested by a named individual, and that the documents should be returned with signature to another named individual. Moreover, the contractual documents pertained to transactions worth millions of dollars. Wolfraim defended the lack of covering documents. He testified that MFP sales representatives often personally hand delivered the documents.³⁵ Indeed, Wolfraim considered personal delivery of contracts to be a normal business practice.³⁶ The lack of formality revealed by MFP’s failure to provide covering letters corresponded with MFP’s eagerness to push the lease contracts through the City without fully disclosing their terms and conditions.

h) Liczyk decided that the City would put the equipment on 5 year leases

33. Viinamae executed the 5 year lease documents on or about October 1, 1999. On that same afternoon, she sent an email to Andrew, which she copied to Brittain, Pagano, Power, Spizarsky, and Liczyk.³⁷ The email announced the extension of all

³⁴ Wolfraim 09/28/2004 at 108.

³⁵ Wolfraim 09/28/2004 at 114-115.

³⁶ Wolfraim 09/28/2004 at 114.

³⁷ COT015649, 52:1:9; COT013087, 63:3:1a; COT013065, 63:3:1a.

lease terms to 5 years, and confirmed the approval of the first MFP Certificate of Acceptance:

This is to confirm that we have approved the first MFP "Certificate of Acceptance". This covers the majority of our hardware acquisitions to date for 1999 as outlined in the Council report recommending leasing.

*As requested by Finance, the lease term of 60 months has been used for this certificate. We can expect our first MFP invoice within the next 2 weeks.*³⁸

34. Although Viinamae's reference to Finance was imprecise, Viinamae testified that she was referring to Liczyk. Viinamae's evidence should be believed on this point. She was not a supporter of 5 year leases and Andrew confirmed her displeasure with the outcome. There would be no reason for an IT specialist to adopt lease terms longer than the expected life of the asset. Such lease terms made it more difficult, not less difficult, to replace aging equipment.

35. Viinamae would not have made the decision to go to 5 year leases on her own. She would only have done so, as her email indicates, at the request of Finance. She and Brittain agreed that Brittain did not instruct her to execute 5 year leases.

36. Brittain's evidence was credible and uncontradicted that he would not have provided such instructions without having analyzed the economics of the 5 year proposal. There was no evidence to suggest he ever had such information: MFP confirmed that they did not send him 5 year lease rate factors; I&T confirmed that they did not send him information about the lifespan of the various assets being placed on lease.

37. Without data, Brittain could not have performed a meaningful analysis. Without a detailed analysis, Brittain would never have instructed Viinamae to put the equipment on 5 year leases. Nor would he have advised Liczyk to put all of the equipment on 5

³⁸ COT015649, 52:1:9 [emphasis added].

year leases. In fact, the only analysis Brittain did perform told him that MFP’s proposal made no financial sense for the City.

38. Viinamae stated that in late September 1999, she ran into Liczyk in the lobby of City Hall.³⁹ They had a brief conversation in the lobby, during which Liczyk reiterated the decision to extend the lease terms to 5 years and told Viinamae that the extension was necessary in order to address budget constraints.⁴⁰ Viinamae communicated her dissatisfaction with the decision, telling Liczyk that a 5 year lease term was longer than the life cycle of technology assets.⁴¹

39. Liczyk testified that she could not recall this meeting with Viinamae.⁴² She doubted that she would have had such a “decision making” conversation on the spot, as described by Viinamae.⁴³ Liczyk testified that she would recall a conversation in which Viinamae was visibly upset with her about a decision.⁴⁴

40. Liczyk has either forgotten her instruction to Viinamae to put the equipment on 5 year leases or has chosen not to remember it. Liczyk was the only person identified as having made that decision. It was a decision that Liczyk made without any financial analysis. It was a decision that she likely regretted having made. Liczyk’s failure to accept responsibility for making this decision is, unfortunately, typical of her testimony at this Inquiry.

³⁹ Viinamae Affidavit, para.59, 10/15/2003 at 29-30; Viinamae 10/16/2003 at 164-165.

⁴⁰ Viinamae Affidavit, para.59, 10/15/2003 at 29.

⁴¹ Viinamae Affidavit, para.59, 10/15/2003 at 29.

⁴² Liczyk 11/18/2003 at 38.

⁴³ Liczyk 11/18/2003 at 38.

⁴⁴ Liczyk 11/18/2003 at 38.

2. MFP contemplated switching to 5 year lease terms before it won the deal

a) MFP prepared to switch lease terms before Council awarded the contract

41. In May 1999, the City of Toronto issued an RFQ seeking quotations for the provision of 3 year computer leases. MFP submitted an extremely aggressive bid in response to the City RFQ. The monthly lease rate factor was low and the City could purchase the equipment at the end of 3 years fairly inexpensively. The bid was bait.

42. It was so attractive that MFP's internal documents indicated that MFP would lose money on the transaction. Long before Council awarded MFP the computer leasing contract, MFP was calculating how much more lucrative it would be for MFP to extend the lease term from 3 to 5 years. This was the switch.

43. Wilkinson confirmed that MFP was doing preparatory work in connection with the potential outcome of the 1999 tender process.⁴⁵ Wilkinson concluded that MFP had reason to believe that it would be successful in attracting part, if not all, of the City's leasing program.⁴⁶ Accordingly, he performed some preliminary analysis regarding potential lease scenarios with the City.⁴⁷

44. Wilkinson created two documents after MFP submitted its bid for the 1999 RFQ, but prior to learning that it was the successful bidder. Each document contained rough calculations for lease scenarios with 36 month, 48 month, and 60 month lease terms.⁴⁸ Wilkinson explained that he used three different lease terms, including a 5 year lease term, in preliminary analysis because it was "common knowledge" that the City was under considerable budget pressure.⁴⁹ According to Wilkinson, it was "highly unlikely" that the City would be in a position to conduct a full refresh on the scale of the Y2K project in 3 years. It followed from that, he argued, that in all likelihood, the leases would

⁴⁵ Wilkinson Affidavit, para.50, 09/16/2003 at 56.

⁴⁶ Wilkinson Affidavit, para.50, 09/16/2003 at 57.

⁴⁷ COT026737, 18:3:35; COT026739, 18:3:35; Wilkinson Affidavit, para.50, 09/16/2003 at 57.

⁴⁸ COT026737, 18:3:35; COT026739, 18:3:35.

⁴⁹ Wilkinson Affidavit, para.50, 09/16/2003 at 57-58.

have been extended and the City would have considered a more gradual refresh program.⁵⁰ Wilkinson continually conflated lower monthly lease costs that arise from a longer lease term with the City's interest in a gradual refresh of its computers. The two concepts are entirely independent.

45. Wilkinson's preliminary documents clearly showed that the total 5 year lease revenue would have been \$3 million dollars more than the 3 year lease revenue.⁵¹ Despite this obvious advantage to MFP, Wolfraim continued to deny that extending the lease terms benefited MFP.⁵² Wilkinson denied that the longer lease terms in his documents reflected any plan or intention on MFP's part to change its response to the RFQ.⁵³ He further denied that MFP intended to use a "bait and switch" strategy.

46. Wolfraim testified that the bids for most tenders go through material changes by the time the lease contracts are drafted.⁵⁴ He explained that Wilkinson's experience in the leasing business would have provided the basis for such preliminary calculations. However, Wolfraim agreed that such material changes were not "necessarily this material", meaning that the changes to the City leases were particularly significant.⁵⁵

47. Neither Wolfraim nor Wilkinson should be believed that the idea of 5 year leases was innocent or benign or initiated by the City and of no benefit to MFP. The City requested a 3 year contract and MFP bid on a 3 year contract. Had the City wanted a longer lease term, it would have requested one in its RFQ. The change from 3 to 5 years was much more dramatic than the usual type of post-bid tinkering that might have been anticipated. The change radically affected the economics of the deal, which was never put out to market.

⁵⁰ Wilkinson Affidavit, para.50, 09/16/2003 at 57.

⁵¹ COT026737, 18:3:35; Wolfraim 09/28/2004 at 129-130.

⁵² Wolfraim 09/28/2004 at 130.

⁵³ Wilkinson Affidavit, para.50, 09/16/2003 at 57.

⁵⁴ Wolfraim 09/28/2004 at 125.

⁵⁵ Wolfraim 09/28/2004 at 125.

b) MFP proposed 5 year leases at August 3, 1999 breakfast meeting

48. MFP initiated the first meeting with the City after the Council approval. In late July or early August 1999, Domi telephoned Andrew to set up a breakfast meeting to discuss the meaning of the Jakobek Amendment.⁵⁶ On August 3, 1999, Domi, Wilkinson, Andrew, and Bulko (at Andrew's request) met at the Holiday Inn coffee shop on King Street.⁵⁷ Wilkinson testified that this meeting marked the beginning of a series of meetings between MFP and City staff.⁵⁸ In his affidavit, Andrew gave evidence that the meeting lasted less than an hour and that MFP (Wilkinson and Domi) appeared keen on extending the leases to 5 years:

Q: And at that meeting, you told Ms. Bulko, Mr. Wilkinson, Mr. Domi, what you thought the amendment meant?

A: If I was asked to do that, I would have told them what it was. I think we talked about the amendment maybe going out to five (5) years.

Q: Is that what you thought it meant?

A: No, that's not what I thought it meant.

Q: Well --

A: But there was a lot of feeling that this amendment would allow them to go to five (5) years.⁵⁹

49. Andrew recalled that Wilkinson brought charts and graphs outlining the financial options for 3 year, 4 year, and 5 year lease terms.⁶⁰ Andrew testified that at the end of the meeting, he suggested that Wilkinson meet with senior representatives in Finance to review the financial options.⁶¹ Andrew considered the issue of financing the acquisitions

⁵⁶ Andrew Affidavit, para.151, 09/24/2003 at 70.

⁵⁷ Andrew Affidavit, para.151, 09/24/2003 at 70.

⁵⁸ Wilkinson 09/18/2003 at 77-78.

⁵⁹ Andrew 09/29/2003 at 77-78.

⁶⁰ Andrew Affidavit, para.52, 09/24/2003 at 31-32.

⁶¹ Andrew Affidavit, para.52, 09/24/2003 at 31-32.

to be a Treasury matter because the money to finance the acquisitions was not coming from the I&T budget.

50. Bulko was clear that not only was the Jakobek Amendment discussed, it was the purpose of the meeting:

Q: Okay and what, if any, other decisions or conclusions do you recall from that [August 3, 1999] meeting?

A: I don't recall how it ended. There was no decision made on anything. It was just, I was there to talk about the assets that we were deploying and if they could last for five (5) years. *We were there to discuss the -- how we could make the terms more flexible according to Councillor Jakobek's motion.* And no decision was made whether to stick with thirty-six (36) months or -- or move to sixty (60), because that definitely was a Treasury issue.⁶²

51. Wilkinson stated that he did not have a clear recollection of the breakfast meeting, although he believed its purpose was to discuss how the City intended to proceed with its leasing program.⁶³ He did not recall that Bulko attended the meeting or that he brought charts to the meeting, although he allowed that he may have scribbled charts during the meeting.⁶⁴

52. He could not recall any discussion of the Jakobek Amendment during this meeting.⁶⁵ Wilkinson testified that he came across the P&F Report in September 1999, when he was searching the Internet; he had no recollection of knowing about the Jakobek Amendment during the August to September 1999 timeframe.⁶⁶ Wilkinson had no recollection of any discussions at MFP about the Jakobek Amendment, and testified that he did not discuss it with Domi.⁶⁷

53. The City submits that the evidence of Bulko and Andrew should be preferred to Wilkinson's evidence on this point. Bulko and Andrew clearly recall discussing the Jakobek Amendment. Bulko remembers the discussion of the Jakobek Amendment

⁶² Bulko 08/12/2003 at 111 [emphasis added].

⁶³ Wilkinson Affidavit, para.53, 09/16/2003 at 60.

⁶⁴ Wilkinson 09/22/2003 at 134-45.

⁶⁵ Wilkinson 09/22/2003 at 136.

⁶⁶ Wilkinson 09/18/2003 at 57-58; Wilkinson 09/22/2003 at 143.

being such a significant component of the meeting that she described it as the reason for the meeting. The City submits that the Commissioner should find that MFP showed up for the August 3rd, 1999 breakfast meeting with a plan to use the Jakobek Amendment as the City’s authority to enter into longer term, un-tendered leases with MFP.

c) Meetings between MFP and I&T in August and September, 1999

i) Viinamae’s testimony

54. Viinamae agreed that she participated in “two or three” meetings with Wilkinson and Domi.⁶⁸ She later testified that it was probably four meetings.⁶⁹ She indicated that Power, Marks, Bulko, and Leggieri were also in attendance.⁷⁰ Viinamae recalled that the meetings were procedural and focused on the logistics of issuing purchase orders and acquiring the goods.⁷¹

55. She did not recall the issue of refresh coming up during these meetings.⁷² Viinamae testified that neither Domi nor Wilkinson informed her that Wilkinson was having discussions with Finance, and Liczyk in particular, about extending the leases from 3 years to 5 years.⁷³ She testified that there were no discussions at the meetings about 5 year leases with a staggered refresh strategy.⁷⁴

56. The first entry in Viinamae’s calendar for a meeting with Wilkinson and Domi during this time period was dated August 12, 1999.⁷⁵ She testified that during this meeting they briefed her on their leasing process, including the Certificate of Acceptance, the Equipment Schedules, and the purchase orders.⁷⁶ Viinamae testified

⁶⁷ Wilkinson 09/22/2003 at 145.

⁶⁸ Viinamae 10/22/2003 at 6-7.

⁶⁹ Viinamae 10/23/2003 at 148.

⁷⁰ Viinamae 10/22/2003 at 6.

⁷¹ Viinamae 10/22/2003 at 8-9.

⁷² Viinamae 10/23/2003 at 152.

⁷³ Viinamae 10/16/2003 at 83.

⁷⁴ Viinamae 10/22/2003 at 7.

⁷⁵ Viinamae 10/22/2003 at 8.

⁷⁶ Viinamae 10/22/2003 at 15-16.

that MFP did not brief her on the lease rate factors or the 90 day rate guarantee period set out in MFP's response to the RFQ.⁷⁷

ii) Andrew's testimony

57. Andrew agreed he was aware that Wilkinson and Domi were meeting with City staff to move the leasing program forward in August and September 1999.⁷⁸

58. Andrew agreed that during the months of August and September 1999, discussions were ongoing with respect to the life of the assets and the financial structure of the leases between MFP, I&T, and Finance.⁷⁹ However, Andrew testified that no one from I&T was acting as the point person in these discussions, and that he was not part of them.⁸⁰ Andrew did not recall hearing about the concept of a more gradual refresh strategy during this time period.⁸¹

59. In his affidavit, Andrew indicated that he had no further involvement with the City leasing program until September 1999, and that he could not recall and did not attend any meetings that appeared in his calendar.⁸²

iii) Wilkinson's testimony

60. Wilkinson described a series of meeting during August and September 1999 with Domi and various City staff, including Viinamae, Bulko, Power, and Marks.⁸³ Wilkinson agreed that he was the only one in these meetings, apart from Power, with leasing experience.⁸⁴ He estimated that there were between eight and ten of these meetings

⁷⁷ Viinamae 10/22/2003 at 16-17.

⁷⁸ Andrew 10/01/2003 at 137-138.

⁷⁹ Andrew 09/30/2003 at 146-148.

⁸⁰ Andrew 09/30/2003 at 149-150.

⁸¹ Andrew 10/01/2003 at 144.

⁸² Andrew Affidavit, paras.153-154, 09/24/2003 at 70-71

⁸³ Wilkinson Affidavit, paras. 63-64, 09/16/2003 at 64-65; Viinamae 10/23/2003 at 147-148.

⁸⁴ Wilkinson 09/18/2003 at 209-210.

prior to September 21, 1999.⁸⁵ He indicated that occasionally Andrew “popped in and out of the odd meeting”.⁸⁶

61. Wilkinson testified that he understood that Viinamae was the lead person for the City in these meetings.⁸⁷ He later testified that it was hard to pinpoint any one individual as leading the discussion during the meetings, and that Viinamae and Power were the most senior I&T staff present at these meetings.⁸⁸

62. Wilkinson testified that the discussion at these meetings was primarily IT-centered.⁸⁹ He recalled that, during the course of these meetings, it became apparent to him that the City was under considerable budgetary pressure.⁹⁰ Although he could not recall who made such comments or the precise comments themselves, he “realized” that the City would welcome suggestions as to how reduce or smooth out the annual operating costs associated with the leasing program.⁹¹

63. Wilkinson could not point to a specific meeting or a comment that led to MFP presenting longer lease terms to the City.⁹² However, he was certain that he indicated during their discussions that two of the ways to alleviate the City’s budgetary concerns were:

- a. a gradual refresh policy; and
- b. a longer term for the leased assets.⁹³

64. Wilkinson testified that there was a general consensus at the meetings that certain assets had a longer life span than 3 years, specifically servers and network

⁸⁵ Wilkinson 09/18/2003 at 78.

⁸⁶ Wilkinson Affidavit, para. 63, Wilkinson 09/16/2003 at 64.

⁸⁷ Wilkinson 09/16/2003 at 221.

⁸⁸ Wilkinson 09/18/2003 at 79; Wilkinson 09/22/2003 at 139.

⁸⁹ Wilkinson 09/22/2003 at 141-142.

⁹⁰ Wilkinson Affidavit, para. 65, 09/16/2003 at 65.

⁹¹ Wilkinson Affidavit, para. 65, 09/16/2003 at 65.

⁹² Wilkinson Affidavit, para. 67, 09/16/2003 at 66.

⁹³ Wilkinson Affidavit, para. 67, 09/16/2003 at 66.

gear.⁹⁴ Throughout these meetings with the City, Wilkinson claimed that he recalled no reference to the Jakobek Amendment and swore that he did not know that the City was considering the authority for extending the lease terms.⁹⁵ For the reasons set out above, Wilkinson should not be believed on this point. The fact of the Jakobek Amendment set the stage for the entire discussion between I&T and MFP on these points.

65. Wilkinson testified that the lease term issue led into a discussion about the City's refresh strategy.⁹⁶ He explained that the decision to extend the lease terms to 5 years permitted the City some breathing space to consider its refresh strategy.⁹⁷ Wilkinson indicated that the refresh issue came up during these meetings. He testified that the industry norm at the time projected a 3 year life span for IT assets, but that it became obvious that the City could not complete a full refresh in 2002.⁹⁸

It also became apparent from the discussions that the City representatives recognized that it was highly unlikely and from a financial/political point of view that a full refresh of all of the equipment would occur in three years' time.⁹⁹

66. He testified that Viinamae was the point person for Y2K and that he saw the refresh strategy as the next step in the Y2K process.¹⁰⁰ Wilkinson agreed that MFP knew that the basis upon which the City had issued the bid had logistical difficulties (including refresh) attached to it, and that part of the reason MFP could make such a large investment was because it knew the likelihood of receiving monthly rent at the end of 3 years was very high.¹⁰¹ He testified that no one remarked on the discrepancies between the RFQ and the extended lease term and staggered refresh policy being advanced by MFP.¹⁰² Wilkinson indicated that "a lot" of time at each meeting was spent

⁹⁴ Wilkinson 09/18/2003 at 79-80.

⁹⁵ Wilkinson Affidavit, para. 68, 09/16/2003 at 66-67.

⁹⁶ Wilkinson 09/18/2003 at 81.

⁹⁷ Wilkinson 09/18/2003 at 227.

⁹⁸ Wilkinson 09/16/2003 at 224.

⁹⁹ Wilkinson Affidavit, para. 66, 09/16/2003 at 65-66.

¹⁰⁰ Wilkinson 09/18/2003 at 226.

¹⁰¹ Wilkinson 09/18/2003 at 215-216.

¹⁰² Wilkinson 09/18/2003 at 222-223.

educating City staff about the processes associated with leasing.¹⁰³ There can be little doubt the City's inexperience with leasing shone through during these meetings. It would have been obvious to Wilkinson that I&T staff knew precious little about administering leases and even less about their economics.

67. After this series of IT-centered meetings, Wilkinson testified that longer lease terms were up for consideration.¹⁰⁴ At this point, he testified, someone from the City indicated that someone from Finance should be involved.¹⁰⁵ Wilkinson could not recall who decided that it was time to involve Finance.¹⁰⁶

¹⁰³ Wilkinson 09/18/2003 at 211.

¹⁰⁴ Wilkinson 09/22/2003 at 142.

¹⁰⁵ Wilkinson 09/22/2003 at 142.

¹⁰⁶ Wilkinson 09/22/2003 at 142-143.

3. September 20, 1999: Wilkinson faxed handwritten material to Liczyk

68. Wilkinson was scheduled to meet Liczyk on September 21, 1999. Late the day before the meeting, in response to a request from Liczyk, Wilkinson faxed Liczyk some handwritten material for reference at the meeting.¹⁰⁷ The material included two chart scenarios projecting lease payments over ten years using a:

- a. 36 month lease term and a 36 month refresh cycle; and
- b. 60 month lease term and a 36 month refresh cycle.¹⁰⁸

69. In his explanatory note, Wilkinson highlighted the following:

You will notice that the 60 month lease gives you a more constant annual lease payment than 36 months.

The model we will show you tomorrow is designed to be interactive between both of us. We will go through several scenario's [sic] including the sale lease back credits.¹⁰⁹

70. Liczyk testified that, prior to the September 20, 1999 fax, she had never discussed extending the lease terms from 3 years to 5 years with Wilkinson.¹¹⁰ Consistent with the experience of I&T staff in August, Liczyk recalled that Wilkinson not only initiated the meeting but asked for it to propose MFP's interpretation of the Jakobek Amendment.¹¹¹

71. Wilkinson's handwritten explanatory note to Liczyk was the only written 'proposal' that MFP gave to the City with respect to 5 year lease terms.¹¹² As a proposal, it was

¹⁰⁷ COT036589, 52:2:17; COT036590, 99:1:2; Liczyk Affidavit, para.181, 11/03/2003 at 71-72; Liczyk 11/13/2003 at 77-78.

¹⁰⁸ COT036590, 99:1:2; COT036591, 99:1:3; COT36592, 99:1:4.

¹⁰⁹ COT036590, 99:1:2.

¹¹⁰ Liczyk 11/13/2003 at 79.

¹¹¹ Liczyk 11/13/2003 at 79-80.

¹¹² Wolfram 09/28/2004 at 107.

inadequate and did not permit the City to do any meaningful analysis of the proposal's costs and benefits.

4. September 21, 1999: Wilkinson and Domi met with Liczyk and Brittain

a) MFP called for the meeting

72. On September 21, 1999 at 10:00 a.m., Liczyk and Brittain met with Wilkinson and Domi in Liczyk's 7th floor boardroom.¹¹³ Liczyk testified that MFP initiated the meeting to present MFP's interpretation of how the Jakobek Amendment could be applied.¹¹⁴

73. In his affidavit, Wilkinson stated that the City initiated this meeting, not MFP.¹¹⁵ Wilkinson presumed that someone in Finance requested the meeting, but could not recall who specifically requested the presentation.¹¹⁶

74. Liczyk testified that MFP told her that MFP saw no need for I&T to be at the meeting because MFP had already had several meetings with I&T:

Q: This meeting -- the earlier meeting on September 21 involving Finance and MFP, why was IT not invited there?

A: I think what had been expressed to me by MFP is that they'd already had numerous meetings with IT.

Q: I see.¹¹⁷

75. Consequently, there was no one at the meeting who knew anything about the lifespan of the assets.¹¹⁸ Liczyk agreed that the lifespan of the assets was the starting point of any analysis of the applicability of the Jakobek Amendment.¹¹⁹ Liczyk made a fatal error by not insisting that I&T attend the September 21, 1999 meeting. By meeting with MFP without I&T, Liczyk permitted MFP to divide and conquer the City staff.

¹¹³ COT013063, 33:2:88; COT064004, 63:8:54; COT013253, 63:8:55; COT013190, 63:3:3a; COT013665, 63:4:1a; Liczyk Affidavit, para.181, 11/03/2003 at 71-72.

¹¹⁴ Liczyk 11/05/2003 at 179; Liczyk 11/13/2003 at 70; Liczyk 11/17/2003 at 182.

¹¹⁵ Wilkinson Affidavit, para. 70, 09/16/2003 at 67.

¹¹⁶ Wilkinson 09/16/2003 at 227.

¹¹⁷ Liczyk 11/13/2003 at 70, 76; Liczyk 11/17/2003 at 182.

¹¹⁸ Liczyk 11/17/2003 at 195.

¹¹⁹ Liczyk 11/17/2003 at 195-196.

76. Liczyk confirmed that both Domi and Wilkinson would have known that the Jakobek Amendment gave her the discretion to decide whether these leases would be extended.¹²⁰

b) Wilkinson's presentation at the meeting

77. Wilkinson used a computer and projector for his presentation.¹²¹ In his affidavit, Wilkinson agreed that MFP used a blank model that was not fixed or formal, and into which one inserted different variables and assumptions.¹²² Wilkinson testified that he received questions and input from both Liczyk and Brittain during the meeting.¹²³

78. Wilkinson stated that the objective of his models was to “lower the annual costs and flatten out those costs”.¹²⁴ Liczyk did not consider this to be a particular concern for the City.¹²⁵ Wilkinson knew that the City's annual budget was \$6 billion dollars, but insisted that the annual cost difference between a 3 year lease and a 5 year lease was still worthwhile to the City.¹²⁶

i) Liczyk's recollection of the meeting

79. Liczyk recalled that the presentation revolved around a 5 year lease concept with a 3 year refresh cycle.¹²⁷ She also remembered that a key assumption of Wilkinson's analysis was that the future cost of technology replacements would decline, thereby allowing annual lease payments to stabilize over the years with no annual impact on the operating budget.¹²⁸ She testified that Wilkinson used a model that showed different technology prices and assumptions about future refresh programs.¹²⁹

¹²⁰ Liczyk 11/05/2003 at 179-180.

¹²¹ Wilkinson Affidavit, para. 72, 11/03/2003 at 69.

¹²² Wilkinson Affidavit, para. 72, 09/16/2003 at 69.

¹²³ Wilkinson 09/16/2003 at 240.

¹²⁴ Wilkinson Affidavit, para. 72, 09/16/2003 at 69.

¹²⁵ Liczyk 11/17/2003 at 208-209.

¹²⁶ Wilkinson 09/16/2003 at 242-243.

¹²⁷ Liczyk Affidavit, para.181, 11/03/2003 at 71-72.

¹²⁸ Liczyk Affidavit, para.181; 11/03/2003 at 71-72.

¹²⁹ Liczyk 11/06/2003 at 62.

80. Kerr described the presentation as follows:

Rob Wilkinson (Vice President, Operations, MFP) made a presentation, using charts and graphs, to conceptualize the financial impact of entering into a 36-month lease term vs. a 60-month lease term.

The MFP charts (COT026780 - Tab 54) referred to by Ms. Liczyk demonstrate the payment obligations of the City if it entered into five-year lease terms and replaced the technology at the three-year point. The MFP charts show a more level (or equal) payment stream due to lower monthly payments in the first three years, as a result of making payments over a 5-year term. MFP assumed that the cost of technology would decline at a rate of 12% per year resulting in reduced cost for replacing technology at the 3, 6 9 and 12 year points. When the equipment is replaced at the end of Year 3, new equipment is purchased (at a lower cost), and the remaining lease payments on the original lease are then rolled up and factored into the new lease price.

...

The total payments under this new approach would be \$69,269,643 versus \$62,638,973 using the original 3 year term lease rates. In addition, when the MFP analysis stops at the year 2009, there are payment obligations remaining for the City. In the case of the 5 Year Term option, there are another four years of payments remaining at \$5,079,324 each, totaling \$20,317, 296 vs. the 3 Year Term option, which has two years of payments remaining at \$2,935,086 each, totaling \$5,870,171. When these remaining obligations are factored in, the total cost of the 5 Year option is \$89,586,939 vs. the 3 year option at \$68,509,145.

The 5 Year Term Lease approach would result in a longer term commitment to MFP and restrict the ability of the City to tender for competitive rates at each cycle. This may be the reason the City did not accept this particular proposal. It did however accept a 5 Year Term Lease.¹³⁰

81. Wilkinson testified that the meeting lasted approximately one hour and thirty minutes.¹³¹ In her affidavit, Liczyk swore that she left the meeting after fifteen minutes because the material was progressing into the financial details of modeling, and because she had another meeting regarding a tax sale issue.¹³² She claimed that she instructed Brittain to let her know if the presentation had any applicability to the

¹³⁰ COT080176 at COT080185-80186, 61:1:Report.

¹³¹ Wilkinson 09/18/2003 at 82-83.

¹³² Liczyk Affidavit, para.181, 11/03/2003 at 71-72.

concerns of the City.¹³³ During the time that she remained in the meeting, Wilkinson just modeled different options:

Mr. Wilkinson had set up his laptop and the light pro and he went through a couple of examples, explained conceptually what they had flexibility to be able to do as a lease provider. And then he wanted to go into detail with some of the particular scenarios and it was at that point, where I said, I'm going to leave, I have another meeting that's very important coming up.¹³⁴

82. Liczyk testified that she attended this meeting with MFP primarily because Council had delegated authority to her, and also to introduce Brittain to MFP.¹³⁵ When she left the meeting, Liczyk did not think any of the information provided was immediately applicable for the City.¹³⁶ She testified that the presentation communicated prospective concepts that the City would consider in the future.¹³⁷

Q: And so, I take it, that it wouldn't have taken you very long to come to the conclusion that that was contrary to your goal of matching lifespan and lease term; fair?

A: Yes, I recall that part of my thinking as I was sitting there listening to this, was that this was a very large departure from what we were talking about, and that it was an interesting concept because it was trying to incorporate refreshing the technology, but *it certainly wasn't something that I saw as something you could immediately make a decision on. It would have needed more analysis to have actually assessed whether this would have applicability.*

Q: Right. And if I can rephrase what you've just said, would it be fair to say, that if Mr. Jakobek's motion had left the door on three (3) years leases, which were the subject of the RFQ, slightly ajar, this proposal took it right off the hinges?

A: Well, it was a very different proposal than -- from what Len and I already had as a working understanding of how we were going to be dealing with the Councillor's amendment that was approved by Council.¹³⁸

83. Liczyk agreed that extending the lease terms in the manner proposed by MFP would have been outside the authority provided by the Jakobek Amendment.¹³⁹ Liczyk

¹³³ Liczyk Affidavit, para.181, 11/03/2003 at 71-72.

¹³⁴ Liczyk 11/13/2003 at 95.

¹³⁵ Liczyk 11/17/2003 at 188.

¹³⁶ Liczyk 11/13/2003 at 95.

¹³⁷ Liczyk 11/13/2003 at 95.

¹³⁸ Liczyk 11/17/2003 at 191-192.

also agreed that the extension of lease terms would have been contrary to what the City had tendered and approved, and would have permitted MFP to set the terms of their lease with the City without facing any competition.¹⁴⁰

ii) Brittain's recollection of the meeting

84. At the time Brittain swore his affidavit, he could not recall attending this meeting, nor could he recall the content of the discussion at the meeting.¹⁴¹ Brittain subsequently located and reviewed some spreadsheets that he had prepared, which refreshed his memory of the meeting.¹⁴²

85. Brittain recalled that MFP provided a generic conceptual presentation, with hypothetical numbers.¹⁴³ He could not specifically recall discussions about extending the lease terms to 5 years, but assumed such discussions had occurred based on a spreadsheet he compiled a couple of days later that contemplated a 5 year lease.¹⁴⁴ Later, Brittain explained that there were two reasons for this meeting:

- a. to discuss whether it made financial sense to extend the term of the leases beyond 3 years; and
- b. to ensure that the City did not end up becoming locked in a long-term arrangement that it would be difficult to end.¹⁴⁵

86. Brittain did not recall Liczyk leaving the meeting and giving him instructions to follow up on the presentation.¹⁴⁶ He had no recollection of a specific request from Liczyk to undertake analysis at any point in the process.¹⁴⁷ Indeed, he had no independent recollection that there was an electronic presentation at the meeting, or that it occurred

¹³⁹ Liczyk 11/17/2003 at 198-199.

¹⁴⁰ Liczyk 11/17/2003 at 198-199.

¹⁴¹ Brittain Affidavit, para. 38, 07/09/2003 at 153-154.

¹⁴² Brittain 07/28/2003 at 54; Brittain 07/30/2003 at 133-134, 137.

¹⁴³ Brittain 07/28/2003 at 54.

¹⁴⁴ Brittain 07/30/2003 at 149.

¹⁴⁵ Brittain 07/31/2003 at 96.

¹⁴⁶ Brittain 07/31/2003 at 99.

in Liczyk's boardroom.¹⁴⁸ Brittain agreed that it was reasonable that Liczyk would have looked to him for analysis of the presentation.¹⁴⁹ Brittain explained that even if Liczyk had assigned him the responsibility for the concepts at this meeting, MFP had provided no real data that could have been meaningfully analyzed.¹⁵⁰

iii) Wilkinson's recollection of the meeting

87. Wilkinson recalled meeting Brittain for the first time at this meeting.¹⁵¹ He testified that, although nothing was said directly, he understood that Brittain was charged with performing the analysis with respect to longer term leases and gradual refresh strategies.¹⁵² In his affidavit, he swore that he had a vague recollection that Liczyk excused herself for part of the meeting.¹⁵³ However, he believed that she returned toward the end of the meeting.¹⁵⁴

88. Wilkinson testified that the purpose of the September 21, 1999 meeting was to confirm whether or not Finance would approve I&T's plan to extend lease terms with a staggered refresh strategy.¹⁵⁵ He had already determined that there was a consensus among the I&T staff to extend the lease term for the hardware to 5 years with a staggered refresh policy.¹⁵⁶ Wilkinson specifically recalled discussions about establishing a gradual refresh policy for the City.¹⁵⁷

89. This testimony must be rejected. There was never any consensus among I&T staff to extend the lease terms although they may have in principle favoured a gradual refresh policy. The idea that it was appropriate for MFP to take an I&T plan to Finance for approval is ludicrous. As is now clear, MFP had only its interests in mind.

¹⁴⁷ Brittain 07/31/2003 at 142.

¹⁴⁸ Brittain 07/31/2003 at 98-99.

¹⁴⁹ Brittain 07/31/2003 at 101.

¹⁵⁰ Brittain 07/31/2003 at 112.

¹⁵¹ Wilkinson Affidavit, para. 71, 09/16/2003 at 67-69.

¹⁵² Wilkinson 09/23/2003 at 140-141.

¹⁵³ Wilkinson Affidavit, para. 71, 09/16/2003 at 67-69.

¹⁵⁴ Wilkinson 09/16/2003 at 239.

¹⁵⁵ Wilkinson 09/18/2003 at 82. Wilkinson Affidavit, para. 71, 09/16/2003 at 67-69.

¹⁵⁶ Wilkinson 09/18/2003 at 82.

¹⁵⁷ Wilkinson Affidavit, para. 71, 09/16/2003 at 67-69.

Wilkinson’s evidence was contradicted by Andrew’s conversation with him on September 22, 1999, and the content of the meeting between I&T and Finance on September 22, 1999. When I&T met Finance on that date, there was absolutely no discussion between them regarding a 5 year lease term for all of the equipment. Wilkinson fabricated this consensus to help justify MFP’s successful bait and switch. The City may have been careless, but I&T did not direct MFP to plead its case to Finance.

90. When asked about the nature of his presentation, Wilkinson testified that MFP could have entered into a series of leases with staggered durations based on the varying lifespans of the equipment.¹⁵⁸ However, he indicated that such an option would have required very detailed analysis and identification of the patterns of equipment usage by particular groups of City users.¹⁵⁹ Wilkinson agreed that the City should have established such a detailed plan prior to issuing the RFQ, and that he believed that Andrew as the Executive Director, I &T, would have been responsible for establishing such a plan.¹⁶⁰ He testified that he saved the last version of the model on his screen at the end of the September 21, 1999 meeting, and that this version compared staggered lease terms.¹⁶¹

91. Wilkinson agreed that the practical effect of a longer term lease with possible refreshes was that it put the leasing company in an advantageous position relative to its competitors. He testified that it seemed “logical” to him that MFP would have discussed this effect with the City, albeit in slightly different terms, but he could not recall any specific conversations:¹⁶²

Q: But that it [City staff understanding practical effect of longer lease term] wasn't as a result of you asking them directly and telling them directly that that was one (1) of the implications of it?

¹⁵⁸ Wilkinson 09/22/2003 at 148.

¹⁵⁹ Wilkinson 09/22/2003 at 148.

¹⁶⁰ Wilkinson 09/22/2003 at 149.

¹⁶¹ Wilkinson 09/22/2003 at 150; COT026815, 18:3:6.

¹⁶² Wilkinson 09/22/2003 at 162.

A: Well, I mean, it -- I -- I can't tell you -- I cannot tell you the exact words that were used, or the exact conversations, I can just tell you what -- you know, the general gist of everything that was being discussed.¹⁶³

92. Wilkinson also agreed with Flanagan's evidence that MFP considered 5 year leases to have low residual value.¹⁶⁴ The value of the equipment at the end of 5 years would be negligible. Accordingly, with the City's move from 3 year to 5 year lease terms, MFP made significantly less of an investment in the transaction, but there was also a lesser probability that the leases would be extended.¹⁶⁵

93. Wilkinson's key assumption that the future cost of technology replacements would have declined was flawed. This assumption was critical to Wilkinson's forecasts. First, no evidence of such a steep decline in the future cost of technology has ever been demonstrated in practice. Second, Wilkinson's assumption would have been rendered meaningless if the customer ultimately spent the same amount of money in order to receive more functionality. Third, Wilkinson's assumption was very speculative. As Chris Kerr noted:

The assumption that the hardware prices would decrease by 12% per year has not been validated by the actual purchase history at the City. While it is agreed that the price of technology does decrease, the purchaser may continue to spend the same amount and receive more functionality. Appendix N shows the desktop purchase history as of May 2001 for the equipment on Lease.¹⁶⁶

c) The City did not tell MFP to write 5 year leases on September 21, 1999

94. Wilkinson agreed that no conclusion was reached at the end of the September 21, 1999 meeting.¹⁶⁷ However, despite his evidence that no conclusion was reached at the end of the meeting, Wilkinson stated:

¹⁶³ Wilkinson 09/22/2003 at 167.

¹⁶⁴ Wilkinson 09/22/2003 at 172.

¹⁶⁵ Wilkinson 09/22/2003 at 171-173.

¹⁶⁶ COT080176 at COT080185, 61:1:Report.

¹⁶⁷ Wilkinson Affidavit, para. 73, 09/16/2003 at 69.

It seemed to me that Ms. Liczyk and Mr. Brittain reacted positively to the ideas that I had presented, and that the City was going to go away and consider them further.¹⁶⁸

95. Wilkinson testified that neither Liczyk nor Brittain returned to him with questions arising from his presentation.¹⁶⁹ He could not recall who told him, or how he was told, that the City wanted to use 5 year lease terms for the contract.¹⁷⁰ Liczyk disagreed with Wilkinson's opinion. She testified that he was overstating her view of the presentation.¹⁷¹ Liczyk did not know how Wilkinson could have read into her actions and words any support for the MFP concepts or modeling.¹⁷²

96. As will be discussed below, on September 22, 1999, Brittain performed some rudimentary analysis based on the extremely limited information that MFP had given to him. He quickly concluded that the MFP proposal made no sense for the City.

d) Domi made calls to Liczyk, Andrew and Jakobek on September 21, 1999

97. On September 21, 1999, Domi placed two phone calls to Liczyk's office. The first call occurred at 9:52 a.m. Liczyk testified that the purpose of this phone call may have been to advise Liczyk that he and Wilkinson were on their way, on time for the meeting.¹⁷³

98. After the meeting with Liczyk and Brittain, Domi called Andrew at 12:48 p.m.¹⁷⁴

99. At 1:36 p.m. that afternoon, Domi had a brief conversation with Jakobek.¹⁷⁵

¹⁶⁸ Wilkinson Affidavit, para. 74, 09/16/2003 at 69-70.

¹⁶⁹ Wilkinson 09/16/2003 at 243-44.

¹⁷⁰ Wilkinson 09/16/2003 at 244; Wilkinson 09/22/2003 at 167.

¹⁷¹ Liczyk 11/17/2003 at 210-211.

¹⁷² Liczyk 11/17/2003 211.

¹⁷³ Liczyk 11/18/2003 19-20.

¹⁷⁴ COT079376 at COT079383, 63:15:3.

¹⁷⁵ COT061285 at COT061286, 15:2:51.

100. At 1:54 p.m. that afternoon, Domi placed a second call to Liczyk's office. Liczyk could not recall what the purpose of this call might have been.¹⁷⁶ Liczyk testified that she could not recall ever discussing the meeting or the 5 year lease term issue directly with Domi, nor could she recall Domi following up with her after this meeting.¹⁷⁷

101. At 3:04 p.m. Domi had another telephone conversation with Jakobek.¹⁷⁸

102. At 4:57 p.m., Andrew returned Domi's phone call and the two spoke for approximately three minutes.¹⁷⁹

103. The City submits that this cluster of calls was not a coincidence: it is evidence which supports the finding that Jakobek was assisting MFP behind the scenes.

e) September 21, 1999 internal Finance meeting

104. Later on September 21, 1999 at 2:30 p.m., Brittain, Willschick, and Altman met to discuss the material from the morning meeting.¹⁸⁰

105. Altman testified that his refreshed recollection was that the focus of the meeting was on how to operationalize the relatively vague and inconclusive recommendations in the Council Report.¹⁸¹ Specifically, Finance had to figure out, from a budget perspective, how to set up the accounting system to make the lease payments.

106. Liczyk testified that she did not attend this meeting.¹⁸² Liczyk testified that she was not aware of this meeting at the time, and that Brittain did not report to her about it.¹⁸³

¹⁷⁶ Liczyk 11/18/2003 at 20.

¹⁷⁷ Liczyk 11/05/2003 at 126; Liczyk 11/17/2003 at 211.

¹⁷⁸ COT061285 at COT061286, 15:2:51.

¹⁷⁹ COT079376 at COT079383, 63:15:3.

¹⁸⁰ COT013064, 63:3:1a; Brittain 07/09/2003 at 233; Brittain 07/28/2003 at 49; COT074888, 52:1:33

¹⁸¹ Altman 07/08/2003 at 207.

¹⁸² Liczyk Affidavit, para.182, 11/03/2003 at 72.

¹⁸³ Liczyk 11/13/2003 at 96.

f) September 21, 1999 email from Liczyk

107. At some point on September 21, 1999, Andrew telephoned Liczyk to ask her how Finance would be resolving and finalizing the outstanding issues from the July 1999 Council meeting.¹⁸⁴ Andrew agreed that he asked Liczyk specifically to speak to Brittain because he knew Brittain was the point person for Finance with respect to the leasing program.¹⁸⁵ As a result of that phone call, Liczyk emailed Brittain at 3:49 p.m. on September 21, 1999.¹⁸⁶ She advised him to meet with Andrew, with or without Glenn Vollebregt to “finalize this computer leasing stuff”.¹⁸⁷ Liczyk testified that one of the outstanding issues was the treatment of the leases in the budget.¹⁸⁸

108. Liczyk testified that at no point during her conversation with Andrew did she state that she wanted all of the equipment to be placed on 5 year term leases. She denied that she even mentioned that the meeting went well; explaining that, as she had only stayed for fifteen minutes, it would be difficult for her to make that kind of assessment.¹⁸⁹

¹⁸⁴ Liczyk 11/18/2003 at 12-13.

¹⁸⁵ Andrew 09/30/2003 at 151.

¹⁸⁶ COT015551, 99:1:6.

¹⁸⁷ COT015551, 99:1:6.

¹⁸⁸ Liczyk 11/18/2003 at 13.

¹⁸⁹ Liczyk 11/18/2003 at 14.

5. September 22, 1999

a) Wilkinson sent 3 to 5 year chart to Andrew

109. In his affidavit, Wilkinson stated that Andrew telephoned him on September 22, 1999.¹⁹⁰ Andrew told him that he had heard that the meeting with Liczyk and Brittain had gone well. Wilkinson indicated that he briefly summarized the key points of the meeting for Andrew, and then Andrew asked Wilkinson to send him a copy of his 3 year versus 5 year lease term analysis from the meeting.¹⁹¹ Wilkinson prepared and sent Andrew a one-page graph showing the difference between 3 year leases and 5 year leases based on the assumption that technology prices were decreasing over time.¹⁹²

110. Andrew agreed that he may have made this comment to Wilkinson and that he requested the analysis, but could not recall who would have told him that the meeting went well.¹⁹³ Liczyk denied that she made the comment to Andrew, and testified that it was equally unlikely that Brittain would have made such a comment.¹⁹⁴ The City submits that the only other source of Andrew's information that the meeting went well was Domi. Domi had the opportunity pass this information along in one of his telephone conversations with Andrew. It is precisely the type of information that Domi was capable of transferring, and it was to MFP's advantage to have I&T believe that the meeting went well.

111. Andrew did not disagree that he may have been informed by Wilkinson about his analysis, which was discussed at the meeting and which showed the possibility of 5 year lease term with a 3 year refresh option.¹⁹⁵ Andrew agreed that this analysis, along with ongoing discussions about a staggered refresh strategy, were inconsistent with the City's prior expectations.¹⁹⁶ He was not alarmed by these discussions and models

¹⁹⁰ Wilkinson Affidavit, para.75, 09/16/2003 at 70.

¹⁹¹ Wilkinson Affidavit, para.75, 09/16/2003 at 70.

¹⁹² COT029302, 6:3:36; Wilkinson 09/18/2003 at 13.

¹⁹³ Andrew 09/30/2003 at 96-97; COT029302, 6:3:36; Andrew 10/01/2003 at 151-152.

¹⁹⁴ Liczyk 11/18/2003 at 13-15.

¹⁹⁵ Andrew 10/01/2003 at 152-153; COT029302, 6:3:36.

¹⁹⁶ Andrew 10/01/2003 at 153.

because he considered all of it to be exploratory, and relied on the fact that no decisions were made.¹⁹⁷ Andrew assumed that Finance would be examining the issue further.¹⁹⁸ Unfortunately, Andrew failed to raise his concerns with Liczyk or Brittain. Had he done so, it is possible that the City would have realized on September 22, 1999 that the people who wanted all the equipment on 5 year leases were Wilkinson and Domi.

b) Internal I&T and Treasury meeting

112. Brittain’s calendar contains an entry for a meeting regarding “Computer Lease” on September 22, 1999 at 11:00 a.m. with Vollebregt, Altman, Viinamae, and Andrew, all of whom attended the meeting.¹⁹⁹ Viinamae believed that Power may have also attended.²⁰⁰ Brittain testified that the items to be finalized included the budget treatment of the leases, as well as any “whatever else might have gone along with implementing the deal with MFP.”²⁰¹

113. Brittain testified that this meeting was first scheduled on September 15, 1999.²⁰² Accordingly, he did not think that it resulted entirely from Liczyk’s direction in her September 21, 1999 email, and it was not scheduled arising out of the meeting with Wilkinson.

114. Viinamae’s calendar contained an entry for a meeting for September 20, 1999 with Brittain and Elaine.²⁰³ She testified that she probably did not attend this meeting as there was a Budget meeting scheduled for the same time that took priority.²⁰⁴ She recalled that the purpose of the meeting was to discuss the leasing program, and that it was rescheduled to September 22, 1999.²⁰⁵

¹⁹⁷ Andrew 10/01/2003 at 154.

¹⁹⁸ Andrew 10/01/2003 at 154.

¹⁹⁹ COT074704, 99:1:10; COT064006, 52:1:25; COT015770, 52:1:19; Brittain 07/31/2003 at 115.

²⁰⁰ Viinamae Affidavit, para.60, 10/15/2003 at 30.

²⁰¹ Brittain 07/28/2003 at 164.

²⁰² Brittain 07/30/2003 at 190.

²⁰³ COT040000 at COT040005, 64:4:6; Viinamae 10/22/2003 at 183.

²⁰⁴ Viinamae 10/22/2003 at 183-184.

²⁰⁵ Viinamae 10/22/2003 at 184.

115. Brittain agreed that his notes from the meeting suggested that there was some discussion at the meeting of different kinds of equipment having different useful lives.²⁰⁶

A couple of the bullet points in Brittain's notes are worthy of recitation:

Lease Terms 3/4/5 years.
Software – Acquisition at 5 yrs.
Upgrades = part of maintenance.²⁰⁷

116. Brittain could not recall any discussion at the meeting with respect to his role in analyzing different lease terms.²⁰⁸ He did not believe that he was directed to follow up on any issues arising from the meeting.²⁰⁹ Brittain recalled that there were upcoming responsibilities for others, which pertained to budget treatments and drafting a letter to the departments regarding the computer leases.²¹⁰ From his notes, Brittain surmised that someone mentioned that the amount of equipment on lease could exceed \$43 million dollar over time as other agencies, boards, and commissions wished to put equipment on lease through their separate approvals process.²¹¹

117. Altman had no independent recollection of the meeting.²¹² After the meeting, Altman created a document titled "Analysis of Computer Leasing".²¹³ It showed five columns:

- a. Year (1 to 10); above the title "year" appeared \$40,000,000;
- b. Value (declining from 0.9 to 0.34 over the 10 years);
- c. Annual price reduction = 0.1, which was then multiplied by the \$40 million to show a declining balance;

²⁰⁶ Brittain 07/09/2003 at 227; COT064006, 52:1:25.

²⁰⁷ COT064006, 52:1:25.

²⁰⁸ Brittain 07/09/2003 at 227.

²⁰⁹ Brittain 07/28/2003 at 170-171.

²¹⁰ Brittain 07/28/2003 at 170-171.

²¹¹ Brittain 07/09/2003 at 228-229.

²¹² Altman 07/07/2003 at 77-78.

²¹³ COT074879, 49:1:8.

- d. lease length 3, with no other data; and
- e. lease length 5, with no other data.

118. Altman could no longer recall the significance of the numbers used in the document.²¹⁴ He agreed with the suggestion that the document may have modeled a decrease in technology prices at 10 per cent per annum from a present \$40 million value, and that this concept may have been raised in the September 21, 1999 meeting the day before.²¹⁵

119. The evidence was contradictory as to whether Andrew attended this meeting and, if so, whether he stayed for the entirety of the meeting.²¹⁶ In his affidavit, Andrew swore that he had two meetings scheduled for 11:00 a.m. on September 22, 1999.²¹⁷ The other meeting was with Brenda Glover, the Acting Commissioner of Corporate Services, to discuss the I&T operating budget. Glover's calendar contained an entry for a meeting with Andrew on September 22, 1999, however the entry was from 8:30 a.m. to 9:30 a.m.²¹⁸ The calendar entry showed that meeting was scheduled to occur in her office, and referenced the I&T budget.

120. Andrew stated that the meeting with Glover would obviously have taken priority.²¹⁹ However, he indicated that he may have briefly attended the meeting between I&T and Finance, but only to advise the attendees that he was unavailable.²²⁰ Andrew testified that he escorted Viinamae to City Hall and stayed at the meeting for salutations, then left and attended at Glover's office for the operating budget meeting.²²¹ He could not recall hearing anything at the meeting about extending the leases, nor did

²¹⁴ Altman 07/07/2003 at 82.

²¹⁵ Altman 07/09/2003 at 25-26.

²¹⁶ Liczyk 11/18/2003 at 21.

²¹⁷ Andrew Affidavit, para.158, 09/24/2003 at 72.

²¹⁸ COT075622, 63:14:11.

²¹⁹ Andrew Affidavit, para. 158, 09/24/2003 at 72.

²²⁰ Andrew Affidavit, para.158, 09/24/2003 at 72.

²²¹ Andrew 09/29/2003 at 107.

he remember Viinamae being upset.²²² Andrew testified that he delegated authority to make decisions on his behalf at the meeting to Viinamae.²²³

121. Viinamae testified that there was some discussion as to the lifespan of various kinds of computer equipment and software, and the various lengths of lease terms.²²⁴ She agreed that 5 year lease terms were discussed at the meeting, particularly for software, which she believed had a longer life cycle.²²⁵ Viinamae also recalled discussion about servers having a longer life span and possibly a longer lease term.²²⁶ They also discussed the principle that, whenever possible, the City should project costs over 5 years to ensure a flat line budget forecast.²²⁷

There was the discussion of capital budgets and the fact that what Finance was looking for, in general, was for us to do a five (5) year forecast and that they were asking us to move to a five (5) year plan as opposed to a three (3) year plan on everything.²²⁸

122. This budgeting process did not require equipment and software to be placed on 5 year leases and is not evidence that this meeting included a discussion about putting the majority of the equipment on 5 year leases.

123. In addition to the discussions about including the leases in the capital budget, they also talked about departmental requests for leasing terms exceeding 3 years.²²⁹ Viinamae testified that I&T was opposed to the department using lease terms exceeding 3 years, and that the issue was discussed at the meeting to ensure consistency.²³⁰ Viinamae characterized the discussion as vague and non-conclusive:

²²² Andrew 09/29/2003 at 107-108.

²²³ Andrew 09/30/2003 at 156.

²²⁴ Viinamae Affidavit, para.60, 10/15/2003 at 30.

²²⁵ Viinamae 10/21/2003 at 65.

²²⁶ Viinamae 10/21/2003 at 66.

²²⁷ Viinamae Affidavit, para.60, 10/15/2003 at 30.

²²⁸ Viinamae 10/17/2003 at 68.

²²⁹ Viinamae 10/21/2003 at 63.

²³⁰ Viinamae 10/21/2003 at 65-66.

We did have some discussion about you know, three (3) years, four (4) years, five (5) years as it relates to Departments, we had some discussion about how we would do the refresh, but to my knowledge we didn't actually sit down and say, yes, we're looking at extending the -- the leases.²³¹

124. Viinamae clarified that there was no discussion of extending the leases on hardware; rather, the discussion centered on how the City would refresh the equipment.²³² She later conceded that extending the leases on hardware was discussed in the context of refreshing the equipment.²³³

125. Viinamae testified that she left the meeting with the expectation that Brittain would provide additional information to Power, in order to assess transferring funds to and from operating departments.²³⁴

126. However, Viinamae had not asked and did not expect Brittain to analyze 5 year lease terms.²³⁵ Staff from I&T testified that they did not provide Brittain with a list of assets that would last more than 3 years.²³⁶ Liczyk agreed that Brittain could not perform any meaningful analysis of extending the terms of the leases without such information.²³⁷

127. Marks also attended this meeting. She took minutes, but did not actively participate.²³⁸ She recalled that five or six individuals attended the meeting, including Brittain, Viinamae, and Vollebregt.²³⁹ The minutes contained references to 5 year leases. She testified that she wrote down "software for 5 years - is a 3 year refresh - as long as cost of technology decreases" because somebody at the meeting said it.²⁴⁰ She could not recall who made this comment, nor could she recall any discussion around the

²³¹ Viinamae 10/21/2003 at 68.

²³² Viinamae 10/22/2003 at 29; Liczyk 11/18/2003 at 21.

²³³ Viinamae 10/22/2003 at 29-31.

²³⁴ Viinamae 10/22/2003 at 32.

²³⁵ Viinamae 10/22/2003 at 31-32.

²³⁶ Liczyk 11/18/2003 at 21-22.

²³⁷ Liczyk 11/18/2003 at 22-23.

²³⁸ COT015770, 52:2:19; Marks 08/14/2003 at 142.

²³⁹ Marks 08/14/2003 at 31.

²⁴⁰ Marks 08/14/2003 at 42.

comment.²⁴¹ The issue of staggering the refresh was also discussed. For example, the minutes contained the following reference:

Cost of desktops are 50 percent less than a year ago.
PC's - can we afford 12,000 refresh after the first 36 months - may want to do 1/3 at 36 1/3 at 48 and so on.²⁴²

128. Marks recalled that Viinamae brought up the subject of staggered refresh to discuss the difficulties of rolling out 12,000 desktops at one time.²⁴³ Marks could not recall any other discussion about this comment. On the last page, Marks wrote:

If we have 5 year maintenance, should have 5 year lease. Over 3 year warranty going on time and material – 1/2 3 year and 1/2 4 year replace - finance over 4 years.²⁴⁴

129. Marks explained that the City could lease the equipment over 5 years, but draw the funding from the various City departments over 4 years.²⁴⁵ This method would have allowed the City to refresh the equipment while maintaining funds in Finance.²⁴⁶ This suggestion was not implemented.²⁴⁷ Apart from these comments, Marks could not recall any other discussion about whether the City should use 3 year term leases or 5 year term leases.²⁴⁸

130. Viinamae recalled a different discussion than Marks. She testified that the method was based on charging departments for a 4 year lease but providing them with a 3 year lease, thereby retaining funds in the fourth year to do a refresh:

It was that it was an extra year with a three (3) lease, with the idea being that that would be one (1) of the mechanisms for funding that service component, so that

²⁴¹ Marks 08/14/2003 at 42.

²⁴² COT015770 at COT015774, 52:1:19.

²⁴³ Marks 08/14/2003 at 43, 145.

²⁴⁴ COT015770 at COT015774, 52:1:19

²⁴⁵ Marks 08/14/2003 at 47.

²⁴⁶ Marks 08/14/2003 at 146.

²⁴⁷ Marks 08/14/2003 at 145-146.

²⁴⁸ Marks 08/14/2003 at 49.

we would actually have the dollars to look at the staff required to roll out the equipment.²⁴⁹

i) MFP lease snapshot

131. MFP created an internal document called a lease snapshot on September 22, 1999.²⁵⁰ This is one day after the MFP meeting with Liczyk and Brittain. The lease snapshot referred to a 60 month lease term for the 838-1 lease, which Viinamae ultimately signed on either September 30, 1999 or October 1, 1999.²⁵¹

132. The only basis for MFP to have prepared this document on September 22, 1999, was either the meeting with Liczyk and Brittain, conversations between Domi and Liczyk and Andrew, or MFP’s own intention to proceed with 5 year leases because it was to MFP’s economic advantage to do so.

ii) Neither Liczyk nor Brittain told MFP to prepare 5 year lease documents on September 21 or 22, 1999

133. Liczyk testified that she was surprised that MFP would have prepared such a document only one day after their meeting, and that she did not give MFP a direction to do so.²⁵²

For the fifteen (15) minutes that I was in the meeting, I certainly would not have given the impression in any way, shape or form, that I was accepting of that as a go forward proposal on which to change the lease terms and conditions.²⁵³

134. Liczyk would not have expected Brittain to give any such direction either, as he had to consult with I&T to finalize outstanding issues.²⁵⁴ Liczyk did not believe that Brittain would have given this direction without any indication of lease rates or prices.²⁵⁵ She testified that Brittain was “very thorough and analytical” and would not have given

²⁴⁹ Viinamae 10/22/2003 at 195.

²⁵⁰ COT036444, 62:20:29; COT036380, 63:20:29.

²⁵¹ Liczyk 11/17/2003 at 213.

²⁵² Liczyk 11/17/2003 at 214-215.

²⁵³ Liczyk 11/18/2003 at 9.

²⁵⁴ Liczyk 11/17/2003 at 215.

²⁵⁵ Liczyk 11/17/2003 at 216.

MFP the impression that he or Liczyk were attracted to the 5 year lease term proposals in the absence of such analysis.²⁵⁶

135. Liczyk agreed that if the majority of the leases were to be extended to 5 years, then financial analysis should have been performed.²⁵⁷ She could not think of any benefits to extending the majority of the lease terms to 5 years without financial analysis. Liczyk testified that extending the term of all leases to 5 years would not have materially reduced the annual payment, such that the City's annual cash flow would have been affected in any significant way. Nor would 5 year lease terms have provided a more constant annual lease payment – lease payments were always constant, albeit at a different level depending on the lease term.²⁵⁸

136. In his affidavit, Brittain swore that he did not request the use of a 5 year lease term and did not believe that any of his staff did either.²⁵⁹ Brittain testified that he would never have given instructions on a transaction of that magnitude without Liczyk's express instructions to do so:

[S]omething of that -- that magnitude would be something I would have confirmed with Ms. Liczyk before I would authorize it. I wouldn't, you know, laterally authorize something like that.²⁶⁰

137. In his affidavit, Wilkinson stated that neither he nor anyone else at MFP could recall who informed MFP that the City had decided to extend the lease terms for its equipment,²⁶¹ but he recalled being informed of the decision shortly after the September 21, 1999 meeting.

²⁵⁶ Liczyk 11/18/2003 at 10-11.

²⁵⁷ Liczyk 11/17/2003 at 174.

²⁵⁸ Liczyk 11/17/2003 at 175.

²⁵⁹ Brittain Affidavit, para. 41, 07/09/2003 at 155.

²⁶⁰ Brittain 07/09/2003 at 238.

²⁶¹ Wilkinson Affidavit, para.76, 09/16/2003 at 70-71.

c) September 21, 1999 – October 1, 1999 communications

i) Domi ACC expense

138. During this timeframe, Domi filed a \$220.23 receipt for the Air Canada Centre, which he attributed to the City of Toronto.²⁶² The date of the receipt was September 28, 1999.

ii) Yellow sheet

139. There were two internal MFP yellow sheets that pertained to the City of Toronto leases. The first yellow sheet referred to a debt rate of 6.5%.²⁶³ It referred to a 60 month lease term. The most recent legible date and signature on this yellow sheet was October 6, 1999.

140. The second yellow sheet referred to a debt rate of 6.75%.²⁶⁴ It also referred to a 60 month lease term. The most recent legible date and signature on this yellow sheet was October 5, 1999. However, there was an illegible date and signature under the title "Sales Adm." The details on this yellow sheet matched the details of the transaction that MFP entered with the City of Toronto.

²⁶² COT025860, 99:1:17.

²⁶³ COT023259, 5:1:99.

²⁶⁴ COT029457, 6:1:58.

6. September 23, 1999 - MFP Golf Invitational Tournament & Brittain analysis

141. On September 23, 1999, MFP hosted its MFP Invitational Golf Tournament at Glen Abbey.²⁶⁵ The day began with registration at 10:00 a.m., and ended with dinner at 6:30 p.m.

142. Domi invited: Jakobek, Liczyk, Berardinetti, Andrew, Viinamae, Franey, Power, and Bulko from City of Toronto.²⁶⁶ He also invited Nigro and Lyons. According to internal MFP documents the confirmed attendees were Jakobek, Nigro, Andrew, Viinamae, and Power. The majority of the invitees from the City of Toronto were from I&T – Liczyk was the only individual invited from Finance.²⁶⁷

143. Viinamae testified that she attended the golf tournament on September 23, 1999.²⁶⁸ Her calendar contained an entry for the MFP tournament.²⁶⁹ This calendar entry also showed the confirmed attendees as Andrew and Franey. Viinamae believed that Janice Cowie (“Cowie”) from MFP invited her and she recalled that Andrew told her that he was attending.²⁷⁰ She testified that there was general discussion about the City’s leasing program, but nothing of substance.²⁷¹ She placed the timing of the golf tournament prior to her discussion with Andrew about the equipment being placed on 5 year leases.²⁷²

144. Andrew testified that he attended the MFP Invitational Golf Tournament on September 23, 1999.²⁷³ Andrew agreed that, by the time of the golf tournament, his

²⁶⁵ COT029106, 33:2:82.

²⁶⁶ COT029107, 33:2:83.

²⁶⁷ COT029107, 33:2:83.

²⁶⁸ Viinamae 10/29/2003 at 71.

²⁶⁹ COT013712, 99:1:13.

²⁷⁰ Viinamae 10/29/2003 at 72.

²⁷¹ Viinamae 10/29/2003 at 72-73.

²⁷² Viinamae 10/29/2003 at 73.

²⁷³ Andrew 09/25/2003 at 122-123.

guard was down and his ability to fully and objectively assess MFP's proposals was compromised.²⁷⁴

145. Liczyk testified that she did not attend the MFP Invitational Golf Tournament on September 23, 1999.²⁷⁵ She recalled that she was in Niagara Falls that day.²⁷⁶

146. Jakobek denied attending the tournament and did not believe that he would have said that he was going to attend.²⁷⁷

147. In retrospect, Viinamae and Andrew made a significant mistake by attending the MFP golf tournament at this time. Negotiations with MFP were still ongoing. It was only one week before Viinamae signed the Equipment Schedules for the 5 year lease terms that had never been put out to tender.

a) Brittain's September 23, 1999 analysis

148. On September 23, 1999, when Andrew and Viinamae were golfing with MFP, Brittain drafted a document titled "Analysis of Lease Option Proposal".²⁷⁸ Brittain explained that the document was a very rudimentary and basic analysis of the MFP proposal discussed at the September 21, 1999 meeting.²⁷⁹ The document showed a 5 year lease term with a 3 year refresh. In his testimony, Brittain surmised that MFP must have presented this option at the meeting. Brittain pointed out that all of the numbers were hypothetical.²⁸⁰ He wanted to evaluate whether the MFP proposal had any merit, and quickly realized that it did not.²⁸¹

²⁷⁴ Andrew 10/08/2003 at 123.

²⁷⁵ Liczyk 11/18/2003 at 18.

²⁷⁶ Liczyk 11/18/2003 at 18.

²⁷⁷ Jakobek 05/22/2003 at 51.

²⁷⁸ COT074916, 52:1:28; Brittain 07/09/2003 at 235.

²⁷⁹ Brittain 07/09/2003 at 233.

²⁸⁰ Brittain 07/09/2003 at 233-234.

²⁸¹ Brittain 07/09/2003 at 234.

149. Brittain could not recall whether he had any discussions with Liczyk resulting from this analysis.²⁸²

²⁸² Brittain 07/09/2003 at 234.

7. MFP prepared Equipment Schedule

a) Wilkinson believed that the City had decided to extend lease terms to 5 years

150. On September 28, 1999, Wilkinson performed some calculations based on a 5 year lease term.²⁸³ His analysis compared the purchase and debenture option to the leasing option, but this time over a 5 year lease term. Wilkinson believed that the City would likely consider the debenture option in deciding whether to lease equipment over a longer term. His financial analysis demonstrated that debenture financing was far less costly than 5 year leases. Wilkinson did not share his analysis with the City.

151. Wilkinson believed that by the time of this analysis, he knew that the City intended to extend the lease terms to 5 years.²⁸⁴ He indicated that he performed this analysis in order to arrive at a reasonable quarterly lease rate factor for the revised lease term, such that MFP would retain the City's leasing business.²⁸⁵ The lease rate factor in the September 28, 1999 document showed a lower hardware lease rate (19.05) than the hardware lease rate factor used in Equipment Schedule 838-1, executed just three days later.²⁸⁶ Equipment Schedule 838-1 used a lease rate of 19.58.

b) MFP did not provide the City with the necessary information to decide

152. If the City had done an analysis in October 1999 comparing the 5 year rates to the RFQ rates, they would have noted a significant increase in costs.²⁸⁷ Assuming the City of Toronto intended to replace the computer equipment every 3 years, the City would pay \$20 million dollars more by choosing the 5 year term.²⁸⁸

²⁸³ COT026824, 99:1:16.

²⁸⁴ Wilkinson Affidavit, para. 76, 09/16/2003 at 71.

²⁸⁵ Wilkinson Affidavit, para.76, 09/16/2003 at 71.

²⁸⁶ COT026824, 99:1:16; Wolfram 09/28/2004 at 99.

²⁸⁷ COT080176 at COT080187, 61:1:Report.

²⁸⁸ COT080176 at COT080187, 61:1:Report.

153. There was no evidence that, between the September 21, 1999 and the date that Viinamae signed Equipment Schedule 838-1, MFP provided the City of Toronto with any written prices, quotes, proposals, or lease rate factors.²⁸⁹ The first written evidence of the lease rate MFP was charging the City of Toronto was contained in an email dated October 6, 1999.²⁹⁰ Connie Johns (“Johns”) from MFP sent the email on behalf of Domi. The email referred to Power’s request for the lease rate factors for the first quarter. The lease rate that MFP was charging the City of Toronto was not spelled out in the Equipment Schedule that Viinamae signed on October 1, 1999.²⁹¹ The Equipment Schedule only contained the monthly rent the City had to pay.

154. At no point during the course of the Inquiry has MFP ever suggested that it provided the City with any prices, quotes or proposals other than the lease schedule itself.²⁹² MFP has not challenged the conclusion that the first document containing specific prices was Equipment Schedule 838-1.²⁹³ In his affidavit, Wilkinson agreed that MFP provided the initial lease rate factors on or around October 6, 1999, at Power’s request.²⁹⁴ Wilkinson indicated that he could not recall receiving any other inquiries or questions about any of the lease rate factors provided to the City.²⁹⁵ He did not believe that it was MFP’s responsibility to advise the City about lease rate factors or to provide any financial analysis in connection with them.²⁹⁶

155. MFP never provided the City with the information necessary to conduct a meaningful assessment of the option to extend lease terms to 5 years.²⁹⁷ Wolfram agreed that some of this necessary information could only be obtained from MFP.²⁹⁸ For example, pricing information, including the relevant lease rate factor, was only available from MFP.

²⁸⁹ Liczyk 11/17/2003 at 212.

²⁹⁰ COT024971, 99:1:33; Liczyk 11/17/2003 at 207.

²⁹¹ Liczyk 11/17/2003 at 207.

²⁹² Liczyk 11/17/2003 at 212.

²⁹³ Liczyk 11/17/2003 at 212.

²⁹⁴ Wilkinson Affidavit, para.86, 09/16/2003 at 76.

²⁹⁵ Wilkinson Affidavit, para.86, 09/16/2003 at 76.

²⁹⁶ Wilkinson Affidavit, para.87, 09/16/2003 at 77.

²⁹⁷ Wolfram 09/28/2004 at 74-76.

²⁹⁸ Wolfram 09/28/2004 at 74.

156. None of MFP’s documents or presentations contained any specific pricing information or lease rate factors. For example, the handwritten memo that Wilkinson faxed to Liczyk on September 20, 1999 did not contain any such information.²⁹⁹ Wilkinson testified that his September 21, 1999 presentation consisted of models and assumptions, and that the presentation did not provide any specific pricing information.³⁰⁰ Wilkinson indicated that he did not receive any inquiries about lease rate factor(s) from the City until after Viinamae signed and executed Equipment Schedule 838-1 with a 5 year lease term.³⁰¹ Equipment Schedule 838-1 contained the initial lease rate factor, but the City did not realize this fact and returned the signed Equipment Schedule to MFP without noting the relevant lease rate factor.³⁰²

157. Wolfraim agreed that Finance could not actually cost MFP’s 5 year lease term model without a price from MFP.³⁰³

158. In his affidavit, Wilkinson suggested that he understood that the City was analyzing and considering the options in the follow up from the September 21, 1999 meeting.³⁰⁴ He “assumed” that the City would come to some conclusion about the ideas and models that he presented.

159. Wilkinson’s explanation should be rejected. He knew the City would be unable to arrive at any conclusions about its options without the most basic pricing information. He knew MFP never gave the City that information. His failure to provide such information was part of MFP’s attempt to switch the terms of the deal that it bid on, a larger effort designed to convince the City to extend lease terms without providing the proper pricing material that would reveal such extensions were not in the City’s best interest.

²⁹⁹ COT036589, 18:3:9; Wolfraim 09/28/2004 at 76.

³⁰⁰ Wolfraim 09/28/2004 at 77, 80-81; Wilkinson 09/22/2003 at 152-153, 155-157.

³⁰¹ Wilkinson Affidavit, para.86, 09/16/2003 at 76-77.

³⁰² Wolfraim 09/28/2004 at 84.

³⁰³ Wolfraim 09/28/2004 at 83.

³⁰⁴ Wilkinson Affidavit, para.73, 09/16/2003 at 69.

8. Who at the City made the decision to approve 5 year lease terms

a) Overview

160. The City submits that Liczyk has either forgotten her instruction to Viinamae to put the equipment on 5 year leases or has chosen not to remember it. Liczyk was the only person identified as having made that decision. It was a decision that Liczyk made without any financial analysis. It was a decision that she likely regrets having made. Nevertheless, she made the decision. Liczyk's failure to accept responsibility for making this decision is, unfortunately, typical of her testimony.

b) Viinamae version of events

161. In her affidavit, Viinamae stated that she was first informed of the decision to extend the lease terms to 5 years by Andrew during the last week of September 1999.³⁰⁵ Andrew told her that Finance proposed the extension of lease terms.³⁰⁶ Andrew did not specify which individual in Finance proposed this change, but Viinamae considered only Liczyk and Brittain senior enough to make such a decision.³⁰⁷

162. During this conversation, Viinamae expressed her concern to Andrew about this change. She indicated in her affidavit that she told Andrew that 3 year lease terms were preferable for the majority of the equipment because then the lease terms would coincide with both the life of the assets and the warranties.³⁰⁸ Viinamae deposed that Andrew responded that the 5 year lease terms were the directive of Finance, that a 5 year lease program was better than having no refresh program at all, and that longer lease terms would ameliorate budget pressures.³⁰⁹ Viinamae testified that she did not

³⁰⁵ Viinamae Affidavit, para.56, 10/15/2003 at 28; Viinamae 10/21/2003 at 85-86.

³⁰⁶ Viinamae Affidavit, para.56,10/15/2003 at 28.

³⁰⁷ Viinamae Affidavit, para.56, 10/15/2003 at 28.

³⁰⁸ Viinamae Affidavit, para.57, 10/15/2003 at 28-29.

³⁰⁹ Viinamae Affidavit, para.57, 10/15/2003 at 28-29.

agree with the decision but had to implement it.³¹⁰ She explained that she did not think Andrew had much choice either:

We were faced with budgetary constraints and he had been given information from Finance which said, this is the way it's going to be.³¹¹

163. In her affidavit, Viinamae recounted that a few days after this conversation she asked Power if there was authority for extending the lease terms to 5 years.³¹² She testified the meeting took place in Metro Hall on the 15th floor, probably in her office.³¹³ Power informed her that the Jakobek Amendment permitted 5 year lease terms.³¹⁴ He told her that the lease rate factors were the rates that applied for the next quarter, that the lease rates were based on industry standards such as bond rates, and that they were consistent with MFP's response to the RFQ.³¹⁵ Viinamae testified that she relied on his assessment.³¹⁶ She explained that she had only spoken to Power and Andrew about the Jakobek Amendment.³¹⁷ She testified that Power informed her of the Jakobek Amendment.³¹⁸ At some point thereafter, Viinamae confirmed her understanding of the Jakobek Amendment with Andrew in a cursory conversation in which he informed her that Jakobek had passed a clause that permitted 5 year lease terms.³¹⁹

164. Viinamae deposed that, around the same time as her discussion with Power, in late September 1999, she ran into Liczyk in the lobby of City Hall.³²⁰ They had a brief conversation in the lobby, during which Liczyk reiterated the decision to extend the lease terms and told Viinamae that the extension was necessary in order to address budget constraints.³²¹ Viinamae stated that she communicated her dissatisfaction with the decision, telling Liczyk that a 5 year lease term was longer than the life cycle of

³¹⁰ Viinamae 10/15/2003 at 114-115.

³¹¹ Viinamae 10/15/2003 at 115.

³¹² Viinamae Affidavit, para.58, 10/15/2003 at 29.

³¹³ Viinamae 10/21/2003 at 91.

³¹⁴ Viinamae Affidavit, para.58, 10/15/2003 at 29.

³¹⁵ Viinamae 10/21/2003 at 90-91.

³¹⁶ Viinamae 10/16/2003 at 175-176.

³¹⁷ Viinamae 10/16/2003 at 176.

³¹⁸ Viinamae 10/28/2003 at 152.

³¹⁹ Viinamae 10/16/2003 at 177; Viinamae 10/29/2003 at 20-21.

³²⁰ Viinamae Affidavit, para.59, 10/15/2003 at 29-30; Viinamae 10/16/2003 at 164.

technology assets.³²² Viinamae believed that she told Liczyk during this conversation of her understanding that Liczyk and Andrew had agreed that printers and storage technology were excepted, and could be placed on 3 year leases.³²³ Viinamae was confident that this conversation occurred after her discussion with Andrew.³²⁴

c) Marks's version of events

165. Marks testified to a version of events similar to Viinamae's. She recalled that Liczyk told Viinamae that the lease terms would be extended to 5 years.³²⁵ Viinamae told Marks that Liczyk had extended the lease terms.³²⁶ Marks testified that Viinamae was unhappy with this decision, as desktops generally need to be refreshed after 3 years, and spoke to Andrew.³²⁷ Andrew told Viinamae to go ahead and put the equipment on 5 year leases.³²⁸ Marks was not privy to these discussions, nor did Liczyk ever mention the change in lease terms to her directly.³²⁹ Marks placed the timing of these discussions during the sale leaseback period, in August and September 1999.³³⁰

166. Marks testified that she always understood that the lease terms with MFP would be flexible – 3 years, 4 years, or 5 years.³³¹ She derived this understanding from the ITLA form and the draft letter to the Commissioners explaining the leasing program, which provided for 4 or 5 year lease terms.³³² Marks believed that she had discussions with Viinamae about the assets for each lease term.³³³ She was responsible mainly for the sale leaseback equipment and testified that she understood that the desktops were to be placed on 5 year leases, that the Oracle software was to be placed on 5 year

³²¹ Viinamae Affidavit, para.59, 10/15/2003 at 29-30.

³²² Viinamae Affidavit, para.59, 10/15/2003 29-30.

³²³ Viinamae Affidavit, para.59, 10/15/2003 at 29-30; Viinamae 10/22/2003 at 198.

³²⁴ Viinamae 10/16/2003 at 180.

³²⁵ Marks 08/14/2003 at 55.

³²⁶ Marks 08/14/2003 at 56.

³²⁷ Marks 08/14/2003 at 56.

³²⁸ Marks 08/14/2003 at 57.

³²⁹ Marks 08/14/2003 at 56.

³³⁰ Marks 08/14/2003 at 58.

³³¹ Marks 08/14/2003 at 135-136.

³³² Marks 08/14/2003 at 135.

³³³ Marks 08/14/2003 at 136-137.

leases and the remaining software was to be placed on 3 year leases.³³⁴ Marks believed that MFP and Liczyk were directing Viinamae to place the equipment on varying lease terms, and that Viinamae was instructing her accordingly.³³⁵

d) Liczyk's version of events

167. Liczyk testified that she could not recall a City Hall lobby meeting with Viinamae.³³⁶ She doubted that she would have had such a “decision making” conversation on the spot, as Viinamae described³³⁷ and that she would recall a conversation in which Viinamae was visibly upset with her about a decision.³³⁸

e) Power's version of events

168. Power testified that after the July 1999 Council Report, Viinamae instructed him to implement the agreement with MFP.³³⁹ Power agreed that he was MFP's point of contact with I&T throughout August and September 1999.³⁴⁰ He also agreed that he was the lead negotiator for the City with respect to issues related to the leasing contract.³⁴¹

169. Discussion about the Jakobek Amendment ensued and Power testified that Andrew, Viinamae, and Bulko agreed that certain items could properly be placed on 5 year lease terms.³⁴² There was a consensus that this was the proper interpretation of the Jakobek Amendment – namely, that certain items could be placed on extended

³³⁴ Marks 08/14/2003 at 137.

³³⁵ Marks 08/14/2003 at 138.

³³⁶ Liczyk 11/18/2003 at 38.

³³⁷ Liczyk 11/18/2003 at 38.

³³⁸ Liczyk 11/18/2003 at 38.

³³⁹ Power 03/27/2003 at 242.

³⁴⁰ Power 03/26/2003 at 154.

³⁴¹ Power 03/26/2003 at 154-155.

³⁴² Power 03/27/2003 at 243.

lease terms.³⁴³ Power testified that I&T perceived the Jakobek Amendment to be beneficial because it broadened the exercise of their discretion.³⁴⁴

170. Power testified that the decision to place the majority of the equipment on 5 year lease terms was driven by a financial need, not a technological one.³⁴⁵ He had “several” conversations with Viinamae about the useful life of desktops approximating 3 years, not 5 years.³⁴⁶ During these conversations, Power expressed his concern that placing desktops on 5 year lease terms would increase the overall cost of the leasing program, including maintenance costs.³⁴⁷ He testified that Viinamae was “very technical” and would not have recommended a 5 year lease term for the City’s hardware.³⁴⁸

171. Power did not know if it was MFP’s suggestion to place the equipment on 5 year leases.³⁴⁹ He was not involved in communications between MFP and Liczyk, or anyone in Finance.³⁵⁰ After the decision to place the desktops on a 5 year lease term was made, Power did not reiterate to Viinamae that a broad 5 year lease term was detrimental to the City.³⁵¹ Power testified that the 3 year lease analysis done by Rabadi would have been useless in understanding why MFP was selected for a 5 year lease term.³⁵² He agreed that changing the lease term for all equipment from 3 years to 5 years probably required a re-tendering process, but testified that he did not propose this to anyone at the City.³⁵³

172. Power was not sure when he first became aware that the equipment was put on 5 year leases. Initially, he testified that he was aware of the extended 5 year lease terms before Viinamae’s October 1, 1999 email.³⁵⁴ Prior to October 1, 1999, Viinamae

³⁴³ Power 03/27/2003 at 244.

³⁴⁴ Power 03/27/2003 at 249.

³⁴⁵ Power 03/25/2003 at 39.

³⁴⁶ Power 03/25/2003 at 33.

³⁴⁷ Power 03/25/2003 at 33-34.

³⁴⁸ Power 03/27/2003 at 255.

³⁴⁹ Power 03/26/2003 at 36.

³⁵⁰ Power 03/27/2003 at 253-254.

³⁵¹ Power 03/25/2003 at 33-34.

³⁵² Power 03/26/2003 at 235; COT013929, 23:3:73.

³⁵³ Power 03/25/2003 at 37-38.

³⁵⁴ Power 03/25/2003 at 29-30.

asked him to request lease rate factors for 5 year lease terms from MFP.³⁵⁵ However, Power did not receive a response to his request until October 6, 1999, when he was sent lease rates for the period of December 1 - 31, 1999.³⁵⁶

173. Later, Power testified that when he heard that the first lease rate schedule was executed with a 5 year lease term, it was a “big surprise”³⁵⁷ and he only learned of it through Viinamae's October 1, 1999 email.³⁵⁸ Power testified that he did not provide MFP's 5 year lease rate factors to Viinamae prior to this email.³⁵⁹ He played no role in the process by which the 5 year lease rate factors were set for the first Equipment Schedule.³⁶⁰ Power indicated that Andrew was “not too happy” about the decision to extend the lease terms to 5 years, but that he accepted that the decision resulted from a financial issue.³⁶¹

³⁵⁵ Power 03/25/2003 at 30; Power 03/27/2003 at 248.

³⁵⁶ COT014234, 23:1:71.

³⁵⁷ Power 03/27/2003 at 256.

³⁵⁸ Power 03/27/2003 at 256-257.

³⁵⁹ Power 03/27/2003 at 262.

³⁶⁰ Power 03/27/2003 at 262-263.

³⁶¹ Power 03/27/2003 at 259.

9. Draft letter to the Commissioners indicated I&T thought leases would be 3 years long

a) Origins of Commissioners' draft letter

174. In his affidavit, Andrew indicated that I&T considered sending a formal letter to the Commissioners and senior executives of the City to notify them that IT equipment was now on lease.³⁶²

175. Viinamae testified that a decision was made at the September 22, 1999 meeting to send a letter to the Commissioners.³⁶³ She indicated that the letter was initially intended for the IT Directors but that, due to the City protocol whereby Commissioners distributed information to the appropriate parties within their department, the letter was later addressed to the Commissioners.³⁶⁴ Viinamae agreed that the viewpoint of I&T at this point was that all the equipment would be placed on 3 year leases.³⁶⁵

176. Marks's notes from the September 22, 1999 meeting contain the following details:

Action

Mail to all Commissioners SIS Directors

- going to MFP
- buying back all equipment
- library – 200 desktops??
- other ABCs??

12,000 replaced Desktop was not budgeted in each operating Dept.

- letter from Finance + IT
- All 99 acquisition to provide info to Brendan and where is the funding source³⁶⁶

177. Marks testified that she had no involvement or input into the content of the letter.³⁶⁷

³⁶² Andrew Affidavit, para.159, 09/24/2003 at 72-73.

³⁶³ Viinamae 10/21/2003 at 59.

³⁶⁴ Viinamae 10/21/2003 at 59-60.

³⁶⁵ Viinamae 10/21/2003 at 62.

³⁶⁶ COT015770 at COT015770-15771, 52:2:19.

³⁶⁷ Marks 08/14/2003 at 55.

b) September 17, 1999 first draft

178. On September 17, 1999, Power sent an email to Viinamae, which attached the drafts of the forms and a letter to the IT Directors.³⁶⁸ He asked Viinamae to review and comment on the attachments.³⁶⁹ In the letter addressed to the IT Directors, Power listed the benefits of the leasing program. He included his understanding that the leases would be for 3 years in the letter:³⁷⁰

A three-year lease term coinciding with the manufacturer’s warranty period resulting in lower maintenance costs.³⁷¹

179. The email also attached three approval forms.³⁷² Power testified that he included these forms to demonstrate that this procedure was authorized by Council.³⁷³ These forms suggest that Power thought that the leasing program fell under Year 2000 delegated authority. For example, the “Year 2000 Delegated Approval Form” read:

Approved Pursuant to the Delegated Authority contained in Clause No. 2 of Report No. 24 of the Strategic Policies and Priorities Committee entitled “Year 2000 Business Continuity Plan” adopted by City Council on November 25, 26, and 27, 1998.³⁷⁴

c) September 29, 1999 second draft

180. On September 29, 1999 at 3:15 p.m., Power emailed the second draft of the letter for the Commissioners to Marks for Viinamae to sign.³⁷⁵ This document was in the form of a memorandum.³⁷⁶ Marks agreed that she probably read the letter and then she reformatted it.³⁷⁷ She testified that the letter accorded with her understanding and with

³⁶⁸ COT015677, 63:8:51a.

³⁶⁹ COT015678, 63:8:51a.

³⁷⁰ Power 03/25/2003 at 21-22.

³⁷¹ COT015678, 63:8:51a.

³⁷² COT015679, 63:8:51a; COT015680, 63:8:51a; COT015683, 63:8:51a.

³⁷³ Power 03/25/2003 at 23.

³⁷⁴ COT015680, 63:8:51a.

³⁷⁵ COT057787, 56:1:42; COT012248, 2:1:14; Marks Affidavit, para.27, 08/13/2003 at 220.

³⁷⁶ COT057787, 56:1:42; Power 03/25/2003 at 26.

³⁷⁷ Marks 08/14/2003 at 222.

discussions from the September 22, 1999 meeting.³⁷⁸ The letter attached to Power's email still referred to a 3 year lease term, but contained the option of extending lease terms for 4 or 5 years.³⁷⁹

A three (3) year lease term coinciding with the manufacturers warranty period resulting in lower maintenance costs. Leasing terms of four (4) and five (5) years are also available.³⁸⁰

181. Power agreed that at the end of September 1999, he turned this memo into the draft letter of September 29, 1999.³⁸¹

182. Viinamae testified that she read the letter at some point during the last week of September 1999.³⁸² She attributed the 4 or 5 year lease term option to the discussions that had been ongoing and to departmental requests for leasing terms exceeding 3 years.³⁸³ Marks agreed that Viinamae likely told her that the equipment was being placed on 5 year leases at some point between receiving this email from Power and Viinamae's October 1, 1999 email announcing that lease terms had been changed to 5 years.³⁸⁴

d) September 30, 1999 letter went to Liczyk for signature

183. On October 1, 1999 at 12:22 p.m., Marks sent an email to Ceccon, with the request that the letter be placed on formal letterhead and signed by Liczyk, then returned to Marks.³⁸⁵ The email, which was copied to Liczyk, Andrew, Viinamae, and Power, attached the September 30, 1999 letter to be sent to the Commissioners advising them of the leasing program.³⁸⁶ The email was sent to Ceccon, and Marks

³⁷⁸ Marks 08/14/2003 at 119-120.

³⁷⁹ COT057787, 56:1:42.

³⁸⁰ COT012248, 2:1:14.

³⁸¹ Power 03/25/2003 at 26-27.

³⁸² Viinamae 10/16/2003 at 94.

³⁸³ Viinamae 10/16/2003 at 96.

³⁸⁴ Marks 08/14/2003 at 226.

³⁸⁵ COT015587, 55:1:7.

³⁸⁶ COT012817, 52:2:20.

intended to pass Liczyk's signed letter on to Andrew for his signature.³⁸⁷ The letter contained the same reference to lease terms as found in the version of the letter sent to Viinamae, and demonstrated the continued reference to 4 or 5 year lease terms:

A three (3) year lease term coinciding with the manufacturers warranty period resulting in lower maintenance costs. Leasing terms of four (4) and five (5) years are also available.³⁸⁸

184. Andrew agreed that this statement did not accord with his own understanding of the leasing program.³⁸⁹ However, he testified that he did not make a comment to anyone about the discrepancy.³⁹⁰

185. In her affidavit, Liczyk swore that she later learned that her assistant, Giuliana Ceccon, received this October 1, 1999 email from Marks.³⁹¹ Liczyk could not recall either reading or signing this letter.³⁹² She did not believe that the letter was ever finalized or sent out to the Commissioners.³⁹³ In his affidavit, Andrew swore that, to the best of his knowledge, the letter was never distributed.³⁹⁴ Marks could not recall receiving the letter back.³⁹⁵ She testified that if the letter had been returned to her, she would have made a photocopy of it.³⁹⁶ She could not find a photocopy of the signed letter in her records.³⁹⁷ Altman believed that the letter was sent out.³⁹⁸ Brittain testified that he received a copy of the letter in draft form.³⁹⁹ Power testified that to he did not know whether the letter was ever sent out to the Commissioners, but to his knowledge

³⁸⁷ Marks 08/14/2003 at 228.

³⁸⁸ COT012817, 52:2:20.

³⁸⁹ Andrew 09/30/2003 at 25.

³⁹⁰ Andrew 09/30/2003 at 26.

³⁹¹ COT015587, 55:1:7; Liczyk Affidavit, para.185, 11/03/2003 at 73.

³⁹² Liczyk Affidavit, para.185, 11/03/2003 at 73.

³⁹³ Liczyk Affidavit, para.185, 11/03/2003 at 73; Brittain 07/29/2003 at 11.

³⁹⁴ Andrew Affidavit, para.159, 09/24/2003 at 72-73.

³⁹⁵ Marks 08/14/2003 at 228.

³⁹⁶ Marks 08/14/2003 at 228.

³⁹⁷ Marks 08/14/2003 at 228.

³⁹⁸ Brittain 07/29/2003 at 11.

³⁹⁹ Brittain 07/29/2003 at 11.

he did not think it had been.⁴⁰⁰ He could not recall receiving any inquiries about the option to extend lease terms up to 5 years.⁴⁰¹

186. Viinamae testified she would not have reviewed the final letter before Marks sent it to Liczyk unless she had been informed that there was a significant change.⁴⁰² She presumed that Power would have notified her of any changes.⁴⁰³ She testified that the letter was drafted prior to the change of the lease terms to 5 years and she did not review it after the change.⁴⁰⁴ Viinamae believed that, after her conversation with Power about the Jakobek Amendment, he would have made the necessary changes to the letter to reflect the extended lease terms.⁴⁰⁵

⁴⁰⁰ Power 03/25/2003 at 28, 155-156.

⁴⁰¹ Power 03/25/2003 at 28.

⁴⁰² Viinamae 10/22/2003 at 37-38.

⁴⁰³ Viinamae 10/22/2003 at 38.

⁴⁰⁴ Viinamae 10/22/2003 at 38.

⁴⁰⁵ Viinamae 10/22/2003 at 39.

10. October 1, 1999**a) Viinamae signed lease documents****i) Certificate of acceptance**

187. Viinamae signed the Certificate of Acceptance on October 1, 1999.⁴⁰⁶ She recalled that she signed an MFP document the same day that she sent the email to Andrew announcing the 5 year lease terms.⁴⁰⁷ She could not recall whether she signed the first Equipment Schedule the same day, together with the Certificate of Acceptance, or later.⁴⁰⁸ The first Equipment Schedule, 838-1, was dated to commence October 1, 1999. The equipment schedules all showed a 60 month lease term.⁴⁰⁹ In February 2000, Liczyk re-executed the equipment schedules.⁴¹⁰

188. Appendix B to Equipment Schedule 838-1 contained additional terms for the early purchase option and the end of term options.⁴¹¹ Appendix B had no date, and was signed by Liczyk.

189. The Certificate of Acceptance to Equipment Schedule 838-1 confirmed delivery of the equipment to the lessee.⁴¹² The acceptance date on this document was October 1, 1999, and it was also signed by Liczyk.

ii) Viinamae signed Program Agreement 1

190. Viinamae testified that her affidavit was in error, and she signed the first Program Agreement (“Program Agreement 1”).⁴¹³ Program Agreement 1 was also dated October 1, 1999. She testified that she had no reason to believe that she signed the agreement on a date other than October 1, 1999, but that she signed a “whole lot” of MFP

⁴⁰⁶ Viinamae 10/28/2003 at 201-202; COT020892, 18:1:6.

⁴⁰⁷ Viinamae 10/28/2003 at 202.

⁴⁰⁸ Viinamae 10/28/2003 at 202-203; COT020648, 18:3:23.

⁴⁰⁹ Viinamae 10/30/2003 at 37.

⁴¹⁰ Viinamae 10/30/2003 at 38.

⁴¹¹ COT003093 at COT003096, 99:1:18.

⁴¹² COT020892, 18:1:6.

⁴¹³ Viinamae 10/29/2003 at 59; COT020610, 18:1:2; COT036693, 99:1:26.

documents around the same time.⁴¹⁴ Viinamae testified that she read the Program Agreement 1 “from the business side” prior to signing it.⁴¹⁵ She agreed that, at the time she signed Program Agreement 1, she had not seen the 1999 RFQ or MFP's response to the RFQ.⁴¹⁶

191. Viinamae also signed Schedule A to Program Agreement 1.⁴¹⁷ Schedule A set out the equipment description and lease rate factors for the quarter from October 1, 1999 to December 31, 1999. Schedule A was dated October 1, 1999.

iii) Amending Agreement (from October 1, 1999 to July 30, 1999)

192. Viinamae signed the Amending Agreement, which changed the effective date of the Program Agreement 1 from October 1, 1999 to July 30, 1999.⁴¹⁸

iv) Program Agreement 1-1

193. Liczyk signed the re-executed Program Agreement (“Program Agreement 1-1”) in February 2000.⁴¹⁹ This agreement was also dated October 1, 1999.

v) Bill of Sale

194. Liczyk signed the Bill of Sale to Equipment Schedule 838-1.⁴²⁰ The Bill of Sale was also dated October 1, 1999.

vi) Direction

195. Viinamae signed a Direction to the Bill of Sale.⁴²¹ The Direction directed the payment of \$14,371,704.83 to MFP in connection with the Bill of Sale. It was dated October 15, 1999.

⁴¹⁴ Viinamae 10/29/2003 at 75.

⁴¹⁵ Viinamae 10/29/2003 at 79.

⁴¹⁶ Viinamae 10/29/2003 at 79.

⁴¹⁷ COT021720, 99:1:27.

⁴¹⁸ COT020617, 18:1:3.

⁴¹⁹ COT036693, 99:1:26; Viinamae 10/30/2003 at 33.

⁴²⁰ COT006764, 99:1:38.

vii) Signing authority

196. Viinamae testified that she derived her signing authority from a standard clause in the Council Report, which she added to the report in its early stages, which authorized the appropriate City officials to carry out the recommendations.⁴²² She testified that she also made sure that Andrew and Power knew what she was signing.⁴²³

197. Viinamae did not seek any further confirmation of her authority to sign agreements with MFP on behalf of the City.⁴²⁴ She testified that she relied on Power to raise any leasing issues arising from the MFP agreements with her, including lease rate factors.

⁴²¹ COT011029, 99:1:35.

⁴²² Viinamae 10/29/2003 at 63.

⁴²³ Viinamae 10/29/2003 at 65-66.

⁴²⁴ Viinamae 10/29/2003 at 23-24.

b) Viinamae announced that she had signed the 5 year leases

198. On October 1, 1999, at 3:47 p.m., Viinamae sent an email to Andrew, which she copied to Brittain, Pagano, Power, Spizarsky, and Liczyk.⁴²⁵ The email announced the extension of all lease terms to 5 years, and confirmed the approval of the first MFP Certificate of Acceptance:

This is to confirm that we have approved the first MFP "Certificate of Acceptance". This covers the majority of our hardware acquisitions to date for 1999 as outlined in the Council report recommending leasing.

As requested by Finance, the lease term of 60 months has been used for this certificate. We can expect our first MFP invoice within the next 2 weeks.⁴²⁶

199. This email was sent only three hours after Marks' sent the final draft of the Commissioners' letter to Ceccon. No one took responsibility for why the earlier email attaching the final draft of the letter referred to a 3 year lease term with an option to extend, while the later email referred to a 5 year lease term for the "majority" of assets.⁴²⁷

200. In her affidavit, Viinamae stated that she did not receive any responses to her email, nor did anyone contact her to express concerns about the 5 year lease term or the date of the Certificate of Acceptance.⁴²⁸

201. Andrew's evidence was that Viinamae's email was the first time that he learned that the City had entered into 5 year leases;⁴²⁹ he did not follow up.⁴³⁰ He relied on Finance to determine whether or not the 5 year lease term made sense. If so, then Andrew considered such a decision to be within its mandate, as conferred by the Jakobek Amendment.⁴³¹ On the issue of authority, he was contradictory: on the one

⁴²⁵ COT015649, 52:1:9; COT013087, 63:3:1a; COT013065, 63:3:1a.

⁴²⁶ COT015649, 52:1:9.

⁴²⁷ Andrew 09/29/2003 at 120-121.

⁴²⁸ Viinamae Affidavit, para.62, 10/15/2003 at 31.

⁴²⁹ Andrew Affidavit, para.160, 09/24/2003 at 73; Andrew 09/29/2003 at 104.

⁴³⁰ Andrew Affidavit, para.161, 09/24/2003 at 73.

⁴³¹ Andrew Affidavit, para.161, 09/24/2003 at 73.

hand, his testimony was that he did not consider the actions of City staff to have extended the lease terms without authority. On the other hand, he agreed that the CFO and Treasurer did not have the authority to alter City Council's authorization, which authorization was for 3 year lease terms.⁴³²

202. Andrew did not recall any discussion with Viinamae in September 1999, in which she raised the 5 year lease issue.⁴³³ He could not recall telling her that the 5 year leases were a directive from Finance, and that the only individuals with the authority to issue such a directive were Brittain and Liczyk.⁴³⁴ Andrew did recall telling Viinamae that 5 year lease terms were better than no refresh program at all and that longer lease terms would ameliorate budget pressures, but he believed that this discussion occurred after the 5 year leases were signed.⁴³⁵ He testified that during this conversation, he did not ask Viinamae why she wrote "as requested by Finance".⁴³⁶

203. With some probing, Andrew later conceded that Viinamae was upset about the extended lease terms:

THE WITNESS: [S]he mentioned to me that when I saw the letter, she had mentioned to me that the Finance had decided to put things on 5 (5) year leases and I said, well, that must their decision, their call, and that was it, I didn't follow up anymore.

MADAM COMMISSIONER: And did she seem upset by that or --

THE WITNESS: I think she was a little bit upset, I think she, you know, I've read her affidavit, I -- she wasn't stamping her feet and pulling her hair out or something --

MADAM COMMISSIONER: Well, apart from -- forget about her affidavit, when you were there --

THE WITNESS: No, no, she -- no, she was a bit upset --

MADAM COMMISSIONER: Okay.

⁴³² Andrew 09/29/2003 at 114-115.

⁴³³ Andrew 09/29/2003 at 104.

⁴³⁴ Andrew 09/29/2003 at 104.

⁴³⁵ Andrew 09/29/2003 at 104-105.

⁴³⁶ Andrew 09/29/2003 at 109.

THE WITNESS: -- she was angry.⁴³⁷

204. Andrew testified that he had a mental image of this meeting, that it occurred between his office and her office in Metro Hall, and that it was unplanned.⁴³⁸ He indicated that he did not have much of a reaction to Viinamae's information.⁴³⁹ Andrew did not raise the issue with anybody at Finance or elsewhere.⁴⁴⁰ In fact, he did not take any action.⁴⁴¹ Andrew explained that this nonchalance was partly based on his preconception that the City could continue to work with MFP cooperatively downstream, that the City could trust MFP, and that such issues did not have to be resolved right away.⁴⁴²

205. Liczyk could not recall reading Viinamae's October 1, 1999 email.⁴⁴³ In her affidavit, Liczyk indicated that if she had read the email, she would have assumed that Brittain had given Viinamae the authority to proceed on changed lease terms.⁴⁴⁴ She testified that she "assumed" Brittain was working with I&T staff to determine which assets should be placed on extended lease terms.⁴⁴⁵ Liczyk agreed that, in hindsight, she and Brittain should have read the email and reacted to the news that the majority of the equipment was placed on 5 year leases.⁴⁴⁶

206. Brittain could not specifically recall receiving Viinamae's email.⁴⁴⁷ He agreed that prior to receiving this email, he was unaware of any decision to place the majority of hardware and software on 5 year leases with MFP.⁴⁴⁸ Viinamae's email was the first he learned of it.⁴⁴⁹ He testified that the email did not raise any concerns for him, or sound

⁴³⁷ Andrew 10/01/2003 at 159-160.

⁴³⁸ Andrew 10/02/2003 at 221.

⁴³⁹ Andrew 10/02/2003 at 222.

⁴⁴⁰ Andrew 10/01/2003 at 161-162.

⁴⁴¹ Andrew 10/01/2003 at 158.

⁴⁴² Andrew 10/02/2003 at 223-224, 228.

⁴⁴³ Liczyk Affidavit, para.186, 11/03/2003 at 73.

⁴⁴⁴ Liczyk Affidavit, para.186, 11/03/2003 at 73.

⁴⁴⁵ Liczyk 11/04/2003 at 81.

⁴⁴⁶ Liczyk 11/13/2003 at 101-102.

⁴⁴⁷ Brittain 07/28/2003 at 171.

⁴⁴⁸ Brittain 07/29/2003 at 6-7; Brittain Affidavit, para. 40, 07/09/2003 at 154-155.

⁴⁴⁹ Brittain 07/29/2003 at 6-7.

any alarm bells.⁴⁵⁰ Brittain admitted that he did not follow up on this email, and probably should have done so.⁴⁵¹ He explained that he read the email as pertaining to receipt of the hardware, and did not pay much attention to the balance of the email.⁴⁵²

207. He admitted that his lack of concern was based on two assumptions. First, that the City was on track for acquiring the majority of its equipment within the 90 day period set out in the Council Report, and the role of Treasury was coming to an end.⁴⁵³ Second, that Viinamae was adamant about recording sign-offs for each and every aspect of the Y2K program, and that this email was typical of her approach of copying numerous people.⁴⁵⁴ Brittain further indicated that specifics about the percentage of equipment that was placed on 5 year leases was a matter of ongoing contract administration falling within the purview of I&T.⁴⁵⁵

208. Brittain testified that he relied on I&T to request further participation from Treasury if they thought that additional financial analysis was required.⁴⁵⁶ He left that determination to I&T. Brittain felt secure in his reliance because he believed that I&T had sufficient leasing expertise to request further financial analysis if lease terms changed.⁴⁵⁷ He was particularly confident in this assessment because Power was involved in the process.⁴⁵⁸

209. Brittain agreed that he forwarded Viinamae's email to Altman at 6:22 p.m. the same day.⁴⁵⁹ He explained that he often scanned emails and then forwarded them to the appropriate individuals in his Division.⁴⁶⁰ Altman testified that Viinamae's October 1, 1999 email did not sound any alarms for him because he understood that Council had

⁴⁵⁰ Brittain 07/28/2003 at 172.

⁴⁵¹ Brittain 07/28/2003 at 173.

⁴⁵² Brittain 07/30/2003 at 205.

⁴⁵³ Brittain 07/28/2003 at 173.

⁴⁵⁴ Brittain 07/28/2003 at 173.

⁴⁵⁵ Brittain 07/29/2003 at 27.

⁴⁵⁶ Brittain 07/29/2003 at 16.

⁴⁵⁷ Brittain 07/29/2003 at 17-18.

⁴⁵⁸ Brittain 07/29/2003 at 17.

⁴⁵⁹ COT064348, 52:2:56; Brittain 07/29/2003 at 15.

⁴⁶⁰ Brittain 07/29/2003 at 15-16.

authorized 5 year lease terms.⁴⁶¹ He believed the email to be consistent with the direction in the Council Report.

c) MFP emails lease rate factors to Power

210. On October 6, 1999, Johns emailed Power the lease rate factors per his request to Domi.⁴⁶² There were two sets of lease rate factors: one for hardware at 60 months and one for software at 36 months. The lease rate factors provided pertained to the October 1, 1999 to December 31, 1999 timeframe.

211. In her affidavit, Viinamae agreed that she signed Schedule A (the first lease rate factor sheet) for the first transaction that occurred on October 1, 1999.⁴⁶³ Marks informed Viinamae that Power had provided the sheet for her signature. Viinamae indicated that she was the first signatory on all leasing documents, such as the Schedule As (“Lease Rate Factor Sheets”), Certificates Of Acceptance, and Equipment Schedules.⁴⁶⁴ In the result, Viinamae was the only signatory on the documents that she signed.⁴⁶⁵ Viinamae swore that when she was asked to sign the Lease Rate Factor Sheet she did not know what lease rate factors were.⁴⁶⁶ She asked Power for an explanation of the sheet prior to signing and he explained that the lease rate factors were the rates to be used for the next quarter for any new lease agreements and that they would change on a quarterly basis according to industry factors such as the bond rates.⁴⁶⁷ He also told Viinamae that the lease rate factors were consistent with MFP's response to the RFQ. Viinamae swore that she understood that no further analysis was required of her, or anyone else in I&T.⁴⁶⁸

⁴⁶¹ Altman 07/08/2003 at 211.

⁴⁶² COT024971, 99:1:33

⁴⁶³ Viinamae Affidavit, para.75, 10/15/2003 at 36; COT021720, 18:3:38.

⁴⁶⁴ Viinamae Affidavit, para.75, 10/15/2003 at 36.

⁴⁶⁵ Viinamae 10/17/2003 at 7.

⁴⁶⁶ Viinamae Affidavit, para.78, 10/15/2003 at 37-38

⁴⁶⁷ Viinamae Affidavit, para.75, 10/15/2003 at 36.

⁴⁶⁸ Viinamae Affidavit, para.75, 10/15/2003 at 36.

212. Power's evidence was inconsistent with Viinamae's recitation of events. He testified that the lease rate factors were not tied to any external benchmark and that the lease rate factors were different from the original MFP bid.⁴⁶⁹ Viinamae testified that he "never, ever" shared this contradictory information with her.⁴⁷⁰

213. Viinamae signed all but one of the Lease Rate Factor Sheets. She was the signatory for the following quarters:

- a) October 1, 1999 – December 31, 1999;⁴⁷¹
- b) January 1, 2000 – March 31, 2000;⁴⁷²
- c) July 1, 2000 – September 30, 2000;⁴⁷³
- d) January 1, 2001 – March 31, 2001.⁴⁷⁴

214. Liczyk signed the lease rate factor sheet for the quarter October 1, 2000 to December 31, 2000.⁴⁷⁵ Viinamae did not know why Liczyk signed this lease rate factor sheet.⁴⁷⁶ However, Viinamae testified that the documents were first sent to the CMO for assessment from an I&T perspective, and were then sent to Finance for assessment from a financial perspective.⁴⁷⁷ Finance was responsible for returning the documents to MFP. Viinamae believed that the lease rate factors were non-negotiable, and that the only purpose for which Finance used the lease rate factors was to calculate the debt charges.⁴⁷⁸

⁴⁶⁹ Viinamae 10/17/2003 at 13; Power 03/24/2003 at 54-55.

⁴⁷⁰ Viinamae 10/17/2003 at 14.

⁴⁷¹ COT021720, 18:3:38.

⁴⁷² COT021794, 18:3:41.

⁴⁷³ COT021825, 18:3:44.

⁴⁷⁴ COT022825, 18:3:52.

⁴⁷⁵ Viinamae 10/17/2003 at 12.

⁴⁷⁶ Viinamae 10/17/2003 at 12-13.

⁴⁷⁷ Viinamae 10/17/2003 at 12.

⁴⁷⁸ Viinamae 10/17/2003 at 16.