VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

LYNNWOOD TECH HOLDINGS LLC,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Case No. 2015-15954**
	)	
NR INT. LLC., *et al.*	)	
	)	
Defendants.	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

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Trial in this matter was held from November 14, 2016 through December 7, 2016. The Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

A. Background.

1. Plaintiff, Lynnwood Tech Holdings, LLC, is a Delaware limited liability company, wholly owned by and managed by ByteGrid Holdings, LLC ("ByteGrid"), a Delaware limited liability company. Plaintiff was formed by ByteGrid for the purpose of acquiring the data center (the "Lynnwood Data Center") owned by Defendants.

2. ByteGrid was formed in 2010 by Manny Mencia ("Mencia"), Todd Ellsworth ("Ellsworth"), and Ken Parent. Mencia was the President and Chief Operating Officer of ByteGrid and Ellsworth was the General Counsel and Senior Vice President for Acquisitions for ByteGrid. Ellsworth Trial Testimony ("TT"): 19:10-12; Mencia TT: 588:10-14.

3. ByteGrid is based in Mclean, Virginia and its principal business is the operation of data centers. During the time that Ellsworth was employed by ByteGrid from 2010 through July 31, 2016, Ellsworth had participated in the negotiation of the purchase agreements for six data centers ByteGrid had purchased in Silver Spring, Maryland, Alpharetta, Georgia, Chicago, Illinois, Cleveland, Ohio, Lynnwood, Washington, and Annapolis, Maryland. Ellsworth TT: 128:15-130:2. The annual gross revenue from those centers was approximately $30,000,000. ByteGrid is a sophisticated company and experienced in all aspects and phases of the acquisition and operation of data centers.[1] Ellsworth TT: 130:14-131:5. Mencia led the technical due diligence for the acquisitions. Mencia TT: 590:1-4.

[1] This includes general, operational, financial, technical and engineering pre-sale due diligence.

4. The majority and controlling owner of ByteGrid is Altpoint Capital Partners, LLC ("Altpoint"), a private equity fund based in New York City that provided funding for the acquisition by ByteGrid of its data centers, including the Lynnwood Data Center. ByteGrid's principal contact at Altpoint was Anish Sheth ("Sheth"). P. Ex. 241, Deposition of Anish Sheth ("Sheth Dep.") 32:19-33:1.[2]

5. Altpoint owns 3,925 of the total 4,000 Class A Units of ByteGrid and has the right to appoint four of the six members of the Board of ByteGrid. Exhibit A to ByteGrid Limited Liability Company Agreement, dated April 12, 2011, and Section 5.3(b)(i) thereof; D. Ex. 202. Decisions made by Altpoint to approve an acquisition are made by an investment committee consisting of Guerman Aliev, Brett Pertuz and Prabhkirat "Yuki" Narula. Sheth reported primarily to Yuki and Aliev. Sheth Dep. 34:7-35:4.

6. Defendant NR INT, LLC, formerly known as NetRiver Int., LLC ("NetRiver"), is a Washington limited liability company. Before June 30, 2014, NetRiver owned and operated the Lynnwood Data Center located in Lynnwood, Washington. Joe TT: 1258:17-22; 2340.6-18. Defendant DREAL 2004, LLC ("DREAL"), a Washington limited liability company, owned the building and real estate where the Lynnwood Data Center was located. Joe TT: 2337:13-23.

7. Joe Vierra ("Joe") is the manager of both NetRiver and DREAL. Joe owns approximately 4% of NetRiver. DREAL is the majority shareholder of NetRiver and is owned by BCA Holding Co. Joe TT: 1259:5-9. There are a total of approximately 28 members of NetRiver. All of the employees of NetRiver were provided membership interests. Joe TT: 2341:2-19.

[2] References to depositions throughout this document relate to video depositions utilized at trial, by stipulation, in lieu of live trial testimony.

8. Joe's son, Adam Vierra ("Adam"), was the sales and marketing manager of the Lynnwood Data Center from 2007 until June 30, 2014 and was thereafter employed by ByteGrid in substantially the same role until Adam was promoted to Vice President and General Manager on April 1, 2015. Adam's employment with ByteGrid terminated on December 1, 2015. Adam owns 4.39% of NetRiver. Adam TT: 2034:20-2035:6; 2231:12-2232:6.

9. The Vierras were dismissed as defendants in this lawsuit on March 11, 2016 for lack of personal jurisdiction. Venue for this case in Virginia was based on Section 11.8 of the Asset Purchase Agreement, dated June 30, 2014 (the "APA"; P. Ex. 124) executed by NetRiver and Plaintiff and on Section 12(f) of the Purchase and Sale Agreement, dated June 30, 2014 (the "DREAL Agreement"; P. Ex. 125), executed by DREAL and Plaintiff.

B. Relationship between NetRiver and Amazon.

(a) History and Organization of Amazon.

10. On June 17, 2008, Amazon Corporate LLC ("Amazon") executed a Master Services Agreement ("MSA") and Work Order No. 1 with NetRiver for Tier II space within the Lynnwood Data Center for 180 racks. P. Exs. 2, 3; Adam TT: 2036:15-24. Data centers are rated in accordance with the redundancy of their systems with Tier I being the lowest and Tier IV being the highest. Adam TT: 2072:10-24; Mencia TT: 593:17-20. A rack is a metal frame on which servers, routers, and other computer equipment are installed. Amazon installed and removed its own racks, with coordination from NetRiver, in a secured room and maintained its equipment on the racks. Adam TT: 2037:12-2038:5.

11. Schedule 4 of Work Order No. 1 describes the Service Level Requirements of Amazon and Amazon's right to claim credits, or noncompliance fees, for violations of those requirements. P. Ex. 3. The term "SLA" that was used by Amazon and NetRiver refers to the Service Level Agreement described in Schedule 4.

12. Section 2.2 of the MSA allowed Amazon to terminate its contract for convenience with NetRiver at any time. Before Addendum No. 9 was executed between Amazon and Plaintiff on August 27, 2014, there was no minimum period between the date of Amazon's notice and the effective date of any such termination. After Addendum No. 9 was executed, the effective date of the termination was required to be at least six months after the notice of termination. P. Ex. 131; Section 4.1.

13. From June 17, 2008 to April 20, 2012, Amazon and NetRiver executed Addenda Nos. 1 through 8 reflecting the increase in the number of Amazon's racks in the Lynnwood Data Center. P. Exs. 4 through 11.

14. Amazon interacted with NetRiver through three separate departments, procurement, engineering, and operations, which were co-equal in Amazon's hierarchy. Adam TT: 2039:22-2040:15.

15. The procurement department was responsible for negotiating new contracts with a vendor, such as NetRiver. Until early 2014, the principal contact with NetRiver from procurement was Jason Mayer ("Mayer"), who was a manager. Mayer's immediate supervisor was JF Berche ("Berche"), who was a senior manager. Berche's supervisor was Ian Wrightson, who was a principal at Amazon. Wrightson's supervisor was Bo Wallace, who was director at Amazon. Wrightson's supervisor was Joe Minarik, who was a vice president and Director at Amazon. Adam TT: 2040:2-2041:20.[3]

[3] Relevant to this case is the Amazon corporate atmosphere as described by many witnesses. The corporate paradigm was "performance by intimidation, fear and a lack of predictability." Employees were constantly watching their backs and worrying about the effects of their actions not only with respect to their superiors but with others further up the chain of command as well as those who were, laterally speaking, on the same level but responsible for complementary or overlapping functions This is pertinent to the constant discussion and formulation of data center exit strategies as a way to plan for inefficiencies without endangering one's employment status or status within the company. As well, Amazon utilized the constant threat of sanctions or loss of business whenever an outside entity actually did (or did not) fulfill expectations by, in bombastic fashion, harshly criticizing, even with profanity, vendors in the hopes of extracting financial concessions (See FF 34, below) This is especially relevant

16. In early June 2014, Berche replaced Mayer with Keith Klein ("Klein"). Adam told Mencia and Ellsworth about the replacement. Adam TT: 2040:21:25; 2043:21-2044:1.

17. The engineering department had the responsibility from an auditing standpoint to ensure the integrity of a facility. Adam TT: 2040:2-9. In 2014, the principal contact with NetRiver from engineering was Mark Egan, a manager. His supervisor was Tyler Hannah, a senior manager. Hannah's supervisor was Tim Amey, who was a principal at Amazon. Amey's supervisor was Mike Czamera, who was a director at Amazon. Czamera's supervisor was Oz Morales, who was vice president at Amazon. Adam TT: 2041:22-2042:18.

18. The operations department had the responsibilities for the day to day operations of the engineering systems with an emphasis on the method of procedure activities. Adam TT: 2040:2-9. In 2014, the principal contact with NetRiver from operations was James Reid, a manager. Reid's supervisor was Bill Hunter, who was a principal at Amazon. Hunter's supervisor was Joe Lindsay, who was a director at Amazon. Lindsay's supervisor was Oz Morales. Adam TT: 2042:19-2043:13.

19. All three departments reported to Andrew Jassey, who was an executive vice president at Amazon and Jerry Hunter who was a senior vice president at Amazon. Adam TT: 2043:14-20.

20. Amazon had its own offices within the Lynnwood Data Center which were staffed 24 hours per day and 7 days per week by six to twelve Amazon personnel. Adam TT: 2038:6-14.

21. Between 2008 and 2014, Amazon's data center requirements had evolved and in 2014 Amazon was demanding increased resiliency/redundancy and a higher Tier rating with

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with regard to the June 12, 2014 Berche email Berche, according to several witnesses, apparently elevated this Amazon ethos to an art form (See FF 35, below)

99.9% to 100% "uptime" or availability from the data centers it occupied. Adam TT: 2083:22-2084:8; P. Ex. 246, Deposition of JF Berche ("Berche Dep); 25:12-13; 37:8-17; P. Ex. 244, Deposition of Keith Klein ("Klein Dep.") 21:18-22:24.

22. The Lynnwood Data Center was an aging Tier II data center. Most aging data centers are Tier II. Berche Dep. 38:14-17. The Lynnwood Data Center was located in an old two story building that used to be occupied by an REI sporting goods and camping equipment store (Joe TT: 2337:13-18) and was comparable in age and had the same Tier rating as other data centers in Seattle. Adam TT: 2036:7-14; 2084:9-2085:9; 2093:9-2094:14.

23. In 2014, NetRiver lacked the capital of approximately $5 million necessary to upgrade the Lynnwood Data Center to a Tier III rating. Adam TT: 2094:15-20.

24. Notwithstanding NetRiver's Tier II rating, NetRiver was able to expand its business with Amazon, and Amazon continued to place racks within the facility, in part, because of NetRiver's responsiveness to Amazon and its willingness to "go the extra mile." Adam TT: 2095:18-23. In its quarterly business reviews, ("QBR's" See FF 32, below) Amazon consistently gave NetRiver high ratings in responsiveness and ease of doing business. D. Exs. 31, 33, 66.

25. The term of Addendum No. 3 for 120 racks was expiring in July 2014. Adam TT: 2037:6-11. As confirmed by Bill Hunter to ByteGrid, because of the interconnections between those 120 racks and the other Amazon racks in the Lynnwood Data Center, it was not possible for Amazon to allow only its agreement for the 120 racks to expire and to remove those racks without adversely affecting the other Amazon racks. Adam TT: 2038:18-2039:22; Sheth Dep. 195:4-197:20.

26. During ByteGrid's due diligence, Amazon was the largest customer of NetRiver and generated approximately 80% of its revenues. Ellsworth TT: 31:12-23.

(b) ***Amazon Confidentiality Requirements.***

27. In connection with the execution of the original MSA, Amazon and NetRiver also executed a Supplier Nondisclosure Agreement, dated May 28, 2008, which restricted NetRiver's use and disclosure of Amazon confidential information. D. Ex. 196. Section 1 of that agreement broadly defines "Confidential Information" as any information that is designated confidential or that, "*given the nature of the information or the circumstances surrounding its disclosure, reasonably should be considered confidential.*"

28 Section 2.3(a)(ii) of the MSA provides that Amazon can terminate the MSA if NetRiver breached its confidentiality obligations.

29. Amazon's confidentiality requirements were very strict and even extended to hiding their presence at the Lynnwood Data Center. D. Ex. 251, Deposition of Paul Harris ("Harris Dep.") 23:9-23.

30. During its due diligence, ByteGrid knew that Amazon was very secretive and that its secrecy was extreme compared to other companies. Mencia TT: 679:25-680:7.

31. During its due diligence, ByteGrid knew that, pursuant to Section 2.3(a)(ii) of the MSA (P. Ex. 2), a breach of the Supplier Nondisclosure Agreement between Amazon and NetRiver (D. Ex. 196) would allow Amazon to terminate its MSA with NetRiver and that accordingly there was substantial risk to NetRiver in providing confidential Amazon information to ByteGrid. Ellsworth TT: 182:13-183:12. ByteGrid nevertheless would have liked to see information about Amazon's future plans. Ellsworth TT: 184:18-185:9.

32. Notwithstanding the risk of termination of the MSA, Joe made the decision that the confidential Amazon quarterly business reports, or "QBRs," which had graded NetRiver's performance under the MSA should be provided to ByteGrid for its due diligence to show both the good and bad in NetRiver's relationship with Amazon. Adam and Paul Harris, the operation

manager for NetRiver, did not want to share the reports out of fear of the MSA's termination due to confidentiality breaches. Joe TT: 1385:4-1387:5; Adam TT: 2101:15-25.

33. ByteGrid admitted that NetRiver tried to facilitate access to and meetings with Amazon. Mencia TT: 686:11-16. Sheth Dep. 72:5-73:1; 209:19-210:8. According to Brian Pryor ("Pryor"), NetRiver's broker, NetRiver's efforts to provide ByteGrid with access to Amazon went "above and beyond." P. Ex. 242, Deposition of Brian Pryor ("Pryor Dep.") 131:11-18

(c) ***Amazon's Management Style.***

34. Amazon's management style in dealing with NetRiver was that it became very upset with NetRiver about an SLA violation, including a power outage, and Amazon then used the violation to coerce concessions from NetRiver. Harris Dep. 22:17-23:8; Joe TT: 1398:10-1399:9. During its due diligence, ByteGrid had been told about that management style. Mencia TT: 738:7-739:2.

35. Berche's management style was to play "good cop, bad cop." Harris Dep: 20:13-18; P. Ex. 245, Deposition of Jason Mayer ("Mayer Dep.") 273:24-274:5. He was described as a "blowhard" and very combative and arrogant. Harris Dep. 20:13-22:01; Adam TT: 2068:25-2069:13; Mencia TT: 8:14:2-815:15.

36. Based on working with Berche for three years, Mayer's opinion of Berche was that he was an emotional guy who over exaggerated and that he could be a bully with his words. Mayer Dep. 273:5-275:10.

C. Letter of Intent with ByteGrid.

37. Brian Pryor ("Pryor") and his company, MVP, were engaged by NetRiver as a broker to find a buyer for the Lynnwood Data Center. An earlier prospective buyer, 365 Main, had signed a letter of intent with NetRiver but the sale did not close. Pryor later called Sheth to see if Altpoint might be interested in acquiring NetRiver. Pryor told Sheth about the deficiencies in the Lynnwood Data Center that 365 Main had identified in its due diligence and the capital expenditures that were necessary to upgrade the Lynnwood Data Center to a Tier III facility and to address the single points of failure issues. (SPOF) Pryor Dep. 42:25-44:17; 157:19-158:24. (For more on SPOF matters, see FF 77, below)

38. ByteGrid and NetRiver signed a Confidentiality and Nondisclosure Agreement, dated October 28, 2013. D. Ex. 204. ByteGrid and Altpoint conducted preliminary due

diligence on the proposed purchase of NetRiver and the real estate owned by DREAL. Sheth Dep. 31:16-36:1; 110:17-115:6.

39. ByteGrid and NetRiver thereafter signed a letter of intent, dated December 27, 2013. P. Ex. 42. As of the date of the execution of the letter of intent, ByteGrid knew about Amazon's termination for convenience clause and that ByteGrid would need to become very comfortable with that clause. Mencia TT: 659:15-25.

40. Paragraph 2 of the letter of intent contained the parties' agreement on the structure of the payment of the purchase price. A base purchase price of $30 million was payable for the data center and real estate. An additional "Earn Out" was payable in the event that Amazon extended the contract set to expire in July 2014. The Earn Out would be equal to 6.75 times the EBITA[4], or cash flow, from Amazon in the first year of a proposed four year extension of the contract. That amount was estimated at that time to be $10.1 million. *This amount would be paid even if Amazon terminated for convenience the day after the anticipated extension.*

41. ByteGrid's intention under the letter of intent was that if the Amazon contract had not been renewed and Amazon had vacated the Lynnwood Data Center in July 2014, ByteGrid would have still closed the purchase of the Lynnwood Data Center and paid the base purchase price of $30M. Ellsworth TT: 141:10-20; P. 42, paragraph 2.

42. Except for the paragraphs on exclusivity and confidentiality, the letter of intent was not binding. Ellsworth TT: 132:23-133:1.

[4] EBITA is an acronym for earnings before interest, taxes and amortization.

D. ByteGrid's Due Diligence.

43. The managers of the Board of ByteGrid signed a unanimous consent, dated June 30, 2014, authorizing the purchase of NetRiver and the accompanying real estate based on the overview of the due diligence that was presented by ByteGrid's management. D. Ex. 206.

44. The managers of the Board, as of that date, consisted of Mencia, Ken Parent, and four representatives from Altpoint: Sheth, Guerman Aliev, Prabhkirat Narula, and Brett Pertuz. D. Ex. 206; Ellsworth TT: 122: 11-16.

45. Mencia, Ellsworth, Sheth, Goodwin, and Ken Parent were primarily responsible for the due diligence and the investigation of NetRiver. Those individuals closely communicated with one another on due diligence, including periodic meetings that are reflected in Manager's Meeting Notes. Ellsworth TT: 123:1-24; 126:1-24; Mencia TT: 676:13-18; Sheth Dep. 31:16-36:1; 110:17-115:6.

46. In its complaint, ByteGrid asserts that from December 2013 through June 2014, it had "*engaged in extensive due diligence of NetRiver's business and DREAL's building and property, including but not limited to, reviewing customer agreements, assessing critical infrastructure at the Lynnwood facility, reviewing NetRiver's employee information, and analyzing the quality of NetRiver's earnings*" Complaint, ¶ 22. The Court agrees. If anything, this understates ByteGrid's due diligence.

(a) Oral Statements by the Vierras.

47. During its due diligence, Joe told ByteGrid that Amazon was satisfied with NetRiver and had continued to contract with NetRiver. Joe TT: 1298:3-25.

48. ByteGrid also claims that Adam told ByteGrid that he believed, but was not sure, that Amazon was using its racks within the Lynnwood Data Center for a combination of Amazon Web Service and some of Amazon's corporate applications. Sheth Dep. 126:16-127:16; 128:9-

12; 185:3-12. ByteGrid claims Adam also said that the Amazon servers in the Lynnwood Data Center were critical for the internal operation of Amazon and that it would be difficult to move its racks to another location. ByteGrid's witnesses conceded that those statements were true. Ellsworth TT: 284:14-285:12; Sheth Dep. 147:18-149:2.

49. Adam testified that he never represented to ByteGrid that Amazon was committed long term to the facility, that Amazon would never vacate the facility, that Amazon would never execute its termination for convenience clause or that NetRiver was the most important facility in Seattle. Adam TT: 2172:2-17.

50. The Court finds that the only oral representations made by NetRiver or the Vierras to ByteGrid was their opinion that Amazon was a satisfied customer and that it would be logistically difficult for Amazon to vacate the facility.[5]

51. ByteGrid however would only move forward with the transaction if it could validate the Vierras' statements directly from Amazon. ByteGrid in fact did validate the representations directly with Amazon. Mencia TT: 665:12-667:5; Sheth Dep. 183:4-187:10; 200:19-203:13.

(b) ByteGrid's Request for Due Diligence Documents.

[5] Defendants, in their final submission, do not address the "thin ice" comment Adam made to a NetRiver vendor in February of 2014. (See Plaintiff's exhibit 59) The court will address the issue This sentiment is consistent with the Mark Egan audit report, (Plaintiff's exhibit 69) that, while confidential even to NetRiver, was shared with NetRiver while it was open on a laptop computer which was "accidentally on purpose" viewable by NetRiver in this time frame. Further, NetRiver, in turn, allowed CH2M Hill (ByteGrid's due diligence engineering firm), to review the same report as well as Mencia

As well, and more importantly, ByteGrid was able to review the QBR dated April 4, 2014 on April 11, 2014 when Harris sent it to Pryor revealing the deficiencies of the facility. Joe sent his notes in that regard to Sheth and Harrison and Sheth discussed it by email addressing the various negative aspects of the facility which went well beyond "thin ice." Sheth testified during his deposition that despite these warnings and stated deficiencies, plaintiff elected to proceed because these issues could be corrected after closing (emphasis added)

Interestingly, Ellsworth testified that Mencia never told him about many of these issues.

52. MVP managed a data room where NetRiver uploaded documents requested by ByteGrid for its due diligence obligations. On January 14, 2014, Ellsworth sent MVP a six page list of due diligence documents ByteGrid wanted to review; that list was forwarded the same day to Joe Vierra, Adam Vierra and Paul Harris, the operations manager at NetRiver. D. Ex. 12.

53. There was no request made by ByteGrid in the due diligence list or otherwise for NetRiver to provide any correspondence or other communications between NetRiver and Amazon. Ellsworth TT: 174:11-16; Adam TT: 2107:24-2108:2.

54. The only communications between NetRiver and Amazon which were shared with ByteGrid were e-mails sent in connection with the negotiation of the Nondisclosure Agreement, the Consent Agreement, and Addendum No. 9, all of which were intended to be executed by Amazon and Plaintiff. Adam TT: 2108:3-8.

55. The firm hosting the MVP data room sent e-mails to the ByteGrid representatives notifying them when a new document had been uploaded. On January 22, 2014, the firm sent an e-mail (D. Ex. 19) to Ellsworth notifying him that the 6/2/12 PDU3 Unexpected Report (D. Ex. 20) and that the NetRiver Incident Report UPS-0 (D. Ex. 21) had been uploaded to the site. On January 29, 2014, an e-mail (D. Ex. 30) was sent to Ellsworth notifying him that Amazon's March 2013 quarterly business review, known as QBR (D. Ex. 33) and the September 2013 QBR (D. Ex. 31) had also been uploaded.

(c) ByteGrid's Meetings with Amazon.

56. Mencia, Ellsworth, Sheth, Ken Parent, and Pryor visited Lynnwood in February 2014. Before that, on January 27, 2014, Ellsworth sent Adam an agenda of topics to discuss with Amazon at a proposed dinner on February 4, 2014 at the restaurant Daniel's Broiler in Seattle between Amazon and ByteGrid representatives. Those topics included the "*strengths and weaknesses of NetRiver facility as it pertains to Amazon's IT infrastructure operations and*

needs" and *"additional improvements or modifications that would further support Amazon's operations at the facility."* P. Ex. 51, p. 2. ByteGrid's intention was to obtain Amazon's opinion of the NetRiver facility, both its strengths and weaknesses, and also to discover any concerns that Amazon might have about the facility that could be addressed by ByteGrid once it owned the facility. Ellsworth TT: 42:17-43:3.

57. The dinner meeting was cancelled by Berche. ByteGrid understood that the meeting had been cancelled because ByteGrid was not in a formal contractual relationship with Amazon and therefore Amazon was not comfortable sharing the information requested in ByteGrid's agenda. Ellsworth TT: 43:14-24; Mencia TT: 600:9-19. An executive in a large public company refusing to talk to a prospective buyer is not unusual. Sheth Dep. 150:5-151:13.

58. After Berche cancelled the dinner meeting, Mencia asked Adam about Berche and his management style. Adam gave Mencia his opinion about Berche. Adam TT: 2070:14-23; 2078:16-2079:9; Mencia TT: 708:11-709:6.

59. After the dinner meeting at Daniel's Broiler between ByteGrid and Amazon was cancelled, Mayer told Adam that he would be at Juanita Pub on the night of February 4, 2014. Adam TT: 2147:10-25. Adam sent an invitation to the ByteGrid representatives to join him at the pub. P. Ex. 50. The ByteGrid representatives understood that the meeting with Mayer had not been approved by Amazon and that they had planned to coincidentally "run into" Mayer at the pub. Ellsworth TT: 44:20-45:5; Pryor Dep. 53:12-18.

60. Mencia, Sheth, Ellsworth, Pryor, and Adam met with Mayer at the pub. Pryor Dep. 5:23-54:7; Adam TT: 2146:22-2147:4. The ByteGrid representatives observed the close relationship between Mayer and Adam. Mayer did not say anything substantive at the pub but he also did not say anything negative about NetRiver or anything raising red flags. ByteGrid used

the occasion to market its other data centers and expressed a willingness to Mayer about selling space in ByteGrid's other data centers. Mayer was intrigued by the prospects of those other data centers. There were later discussions between ByteGrid and Amazon about those prospects. Sheth Dep. 168:2-172:11; Pryor Dep 58:3-16; 139:20-140:9. However, Mayer refused to discuss Amazon's growth plans at the pub. Sheth Dep. 175:3-7.

61. The ByteGrid representatives told Mayer that ByteGrid would be making upgrades to the Lynnwood Data Center to improve its redundancy and operations because ByteGrid was larger than NetRiver,. Adam TT: 2150:20-2151:3.

62. Based on the meeting at the pub, Mayer believed that ByteGrid would be a good vendor because it had easier access to capital to expand the Lynnwood Data Center. D. Ex. 47.

63. The next day, Wednesday, February 5th, NetRiver provided sandwiches on the second floor of its facility next to Amazon's offices in an attempt to lure some Amazon employees to that area. The rouse worked. Mencia and Sheth talked to Bill Hunter from Amazon who was in a senior engineering role at Amazon and responsible for a very large segment of data centers in North and South America. He functioned in an engineering quality assurance role and his opinions were very important to ByteGrid. Mencia TT: 612:16-614:2; Sheth Dep. 190:3-191:4.

64. Hunter informed Sheth and Mencia that there was fear within Amazon of "unplugging" and trying to take servers and equipment out of data centers because its ultimate impact on the network, which was highly interconnected, was unknown. He had never seen Amazon take out servers because Amazon was growing so fast that the last thing that Amazon was thinking about was taking out servers. Hunter said, confidentially, that Amazon had a plan to deploy 60,000 new servers or racks in 2014. Sheth Dep. 195:4-197:20.

(d) ***ByteGrid's Review of NetRiver Incident Reports and QBRs.***

65. During that same day on February 5th, Mencia, Sheth, Ellsworth, Ken Parent, and Brian Harrison met with Harris and Adam. Pursuant to one of the topics on the agenda that Pryor provided (D. Ex. 36) for the meeting, the NetRiver incident reports and the March and September 2013 Amazon QBRs were discussed. Adam TT: 2112:4-7; 2137:15-21; Mencia TT: 715:12-19; 735:7-15.

66. The meeting was held around a small conference table in a conference room at NetRiver, where everyone could hear one another. Adam TT: 2110:3-2111:2.

67. Adam told Mencia how Amazon operated in connection with outages and how Amazon reacted. Mencia TT: 716:24-717:4.

68. The NetRiver incident report, dated June 2, 2012 provided to ByteGrid, disclosed a power outage that occurred on June 2, 2012 (D. Ex. 20). Manny Ang at Amazon was very angry and actually cursed Adam about the outage. Adam TT: 2112:8-2113-14; 2124:20-2125:12. That incident report was discussed in the meeting on February 5th. Mencia TT: 715:20-716:19.

69. The August 3, 2012 incident report provided to ByteGrid disclosed that on July 26, 2012, NetRiver had suffered a "catastrophic failure in one of its two power systems" and that 250 racks belonging to Amazon were without power for 8 hours and 41 minutes. D. Ex. 14. Oz Morales, the Vice President of Operations and Engineering, was very angry and had cursed Adam about the outage. Adam TT: 2128:23-2130:12. Mencia spent a lot of time talking to Adam and/or Harris about this report during the February trip. Mencia TT: 720:7-721:15.

70. The ByteGrid representatives wanted to know how Amazon reacted in connection with the power outages and specifically who at Amazon had interacted with NetRiver. Adam told them. Adam TT: 2137:22-2138:5.

71. Also discussed in the Wednesday meeting were the two Amazon QBRs that were available at that time: the March 2013 QBR and the September 2013 QBR. D. Exs. 33, 31; Adam TT: 2141:1-18.

72. The March 5, 2013 QBR (D. Ex. 33) disclosed (at page Bate Stamp No. 7426) that NetRiver did not meet Amazon's standards for the quality and reliability of its power service, that NetRiver's service was not within the SLA requirements, and that NetRiver and its third party providers did not meet Amazon's service expectations. Page Bate Stamp No. 7424 disclosed that a "Lowlight" was resiliency and power issues and that a December 2012 PTS audit had suggested a high risk in *both* **infrastructure** and **operations**. The bottom of that page showed that an action plan to address the PTS Audit was to be discussed at a meeting planned for March 15th. (emphasis added)

73. The September 2013 QBR (D. Ex. 31) disclosed (at page Bate Stamp No. 7419) a downward arrow from Amazon for the quality and reliability for power service and HVAC[6] and whether NetRiver and its 3rd party providers had met Amazon's service expectations. Page 7420 disclosed that the PTS audit review referenced in the March QBR had been postponed from March 15th to November 5th and that discussions on HVAC capacity and resiliency would then also be reviewed by Mark Egan from Amazon. Egan was to provide his guidance by October 21st. Page 7421 disclosed that the above referenced June 2, 2012 and July 26, 2012 incidents as SLA violations and the credits assessed by Amazon for those violations.

74. ByteGrid was not concerned about the lowlights. It believed that those issues could be taken care of in connection with its planned upgrades of the Lynnwood Data Center. Adam TT: 2141:1-18.

[6] Heating, Ventilation and Air Conditioning

75. The September 2013 QBR also showed however at page Bate Stamp 7420 that NetRiver had exceeded Amazon's requirements in its relationship with Amazon, stating that NetRiver was "*willing to go the extra mile*" D. Ex. 31, p. 1042.

76. A NetRiver incident report, dated November 4, 2013 (D. Ex. 21), was also delivered to ByteGrid and was reviewed by Mencia. Mencia TT: 734:3-10. The report disclosed a power outage lasting 8 minutes and 33 seconds. James Reid was emotional and cursed Adam about the outage. Adam TT: 2141:19-2142:25.

(e) ***ByteGrid's Review of Egan's Audit Report.***

77. By an e-mail, dated March 25, 2014 (P. Ex. 68), Mayer sent Adam an audit report prepared by Mark Egan. P. Ex. 69. Section 1 of that report states that the Lynnwood Data Center

> "*features a minimally resilient architecture, and has witnessed several recent incidents, most notably substantial outages in July 2012 and November 2013. Colo*[7] *Audit identified 27 single points of failure (SPOFs) and an additional 30 at risk areas Risks of additional outages will exist unless NetRiver adopts substantial design and operational improvements outlined in this report.*"

Section 6 of the Egan audit report listed 9 recent incidents at the Lynnwood Data Center.

78. The audit report was confidential. In fact, there are a number of paragraphs which bore the designation, "*Removed per Amazon Data Classification Policies,*" which even NetRiver could not access. Harris Dep. 50:10-22. NetRiver had been allowed however to review those portions on Egan's laptop. Adam TT: 2104:18-2105:14

79. NetRiver allowed ByteGrid's engineering firm, CH2M Hill, and also Mencia to review Egan's audit report on NetRiver laptops in order to facilitate the preparation of a master

[7] *Colo* is shorthand for co-location Co-location means that more than one entity utilizes rack space in a data center at any given time The Lynnwood Facility was a co-location operation (FF 236, below)

plan and cost estimates by CH2M Hill for ByteGrid to upgrade the Lynnwood Data Center after closing to Tier III. Adam TT: 2103:9-18; Harris Dep. 46:6-47:24; Joe TT: 1382:16-1385:3.

80. Portions of the Egan audit report, including its identification of SPOFs were also read to Mencia. Harris Dep. 48:22-50:9; Adam TT: 2103:23-2104:3.

(f) ***ByteGrid's Review of the April 2014 QBR.***

81. On April 11, 2014, Harris sent Pryor the Amazon QBR, dated April 4, 2014. D. Ex. 66.

82. Bate Stamped page 8350 of the April QBR disclosed that NetRiver's power service still did not meet Amazon's requirements for quality and reliability; that NetRiver's service still was not within or better than what was required by the SLA and that NetRiver and its third party providers still did not meet Amazon's service requirements, all of which was reflected by the downward arrow on page 8343.

83. The "Lowlights" on page 8344 disclosed "*uptime and uptime risk. Lack of confidence in infrastructure (electrical plant specifically)*" The action plan at the bottom of the page that was intended to address that lowlight referenced a review of the audit findings with Mark Egan scheduled for April 30, 2014. Page 8343 again revealed that NetRiver exceeded Amazon's requirements by being willing to go the extra mile and maintaining a good overall relationship with Amazon.

84. Joe's notes from the QBR meeting with Amazon during the preceding week were disclosed to Sheth. Sheth Dep. 221:7-11; D. Ex. 69.

85. Brian Harrison of Altpoint sent Sheth an e-mail about the April QBR and remarked "*[c]ertainly more negative than prior years, and very negative on power issues. Based on our debrief call I expected some 'does not meet' type of feedback <u>but not to this extent</u>*" D. Ex. 72. (emphasis added).

86. Sheth knew that the Amazon QBRs represented more accurate and reliable information about Amazon's level of satisfaction than the views expressed by NetRiver. Sheth Dep. 228:19-229:2.

87. Sheth had conversations with Mencia, who told him that the solutions to address some of the issues identified in the QBR were in the process of being implemented in the Lynnwood Data Center. There may have been discussions about pulling the plug on the deal. Sheth testified that, right or wrong, he had relied on Mencia.[8] Sheth Dep. 229:18-230:16.

88. ByteGrid's consensus was to proceed because some of the issues identified in the negative QBRs were then being addressed by NetRiver and the other issues could be addressed and corrected by ByteGrid after closing. Also, based the ongoing discussions on Addendum No. 9, it appeared to ByteGrid that negative QBRs were not impacting the relationship between Amazon and NetRiver in such a way that Amazon was contemplating terminating or not extending the Amazon contract. Sheth Dep. 230:17-231:10.

89. In a meeting at the Lynnwood Data Center in May 2014, NetRiver and ByteGrid discussed the April QBR and also the Egan audit. Mencia said he was not concerned about the reports because ByteGrid was planning to upgrade the Lynnwood Data Center to conform the site to the standards of their other data centers. Adam TT: 2145:10-2146:13.

90. Mencia never told Ellsworth about the negative scores from Amazon on the QBRs. Although Ellsworth was aware of issues with the power service, that was just one factor in ByteGrid's due diligence. Ellsworth TT: 201:9-204:9.

91. At trial, Mencia admitted that ByteGrid was aware that Amazon had negative opinions about the quality of NetRiver's services, especially in the area of power outages, and

[8] Throughout this trial, persons affiliated with the plaintiff would implicate others regarding the transaction Representatives from within ByteGrid or Altpoint would subtly blame this disastrous transaction on others

this was a concern of his. Mencia TT: 750:9-11. Mencia at first testified that he knew from the QBRs that the Lynnwood Data Center was unreliable. He then corrected himself to say "*not necessarily*" Mencia TT: 789:19-790:2. According to Mencia, the unreliability was consistent with the design of the facility. Mencia TT: 845:15-846:9.

92. Mencia also believed that Amazon had contributed to some of the low scores. Amazon's 100% availability requirements were unrealistic and outages were to be expected for a Tier II facility. According to Mencia, no one would be able to meet Amazon's standards.[9] Mencia TT: 753:4-9; 627:16-628:11; 694:2:-695:19.

(g) ByteGrid's Nondisclosed Participation in Amazon Conference Calls.

93. NetRiver allowed ByteGrid representatives to secretly listen in on confidential conference calls between NetRiver and Amazon scheduled every Tuesday morning at 10:00 a.m. ByteGrid representatives, including Mencia, listened in on those calls. The ByteGrid representatives were instructed to call early, not announce their presence, and to keep their phones on mute so Amazon would be unaware of their presence. Mencia TT: 681:23-685:3. Mencia participated in a lot of those calls. Harris Dep. 35:2-36:11; Adam TT: 2106:24-2107:23.

(h) ByteGrid's Review of Competing Facilities.

94. Part of ByteGrid's due diligence before closing was to determine to what extent Amazon would relocate its racks from the Lynnwood Data Center because of alternative sites. ByteGrid investigated and knew that Amazon was building its own data centers, one of which was in Boardman, Oregon, a suburb of Portland. Based on its investigation of the market, ByteGrid determined that Amazon's split in using its own facilities and using colocation providers, such as NetRiver, was 40% in house and 60% for colocation providers. Mencia TT:

[9] And yet the $30M was paid anyway with the earn out of an additional $10M notwithstanding the problems well known to the plaintiff prior to closing

685:5-686:3. ByteGrid knew the Boardman data center was a potential risk and that Amazon could relocate its racks to its own data centers. Sheth Dep. 198:16-200:18.[10] Nevertheless, ByteGrid eagerly closed on the transaction with Altpoint's blessing. (D. Ex 104)

(i) ***ByteGrid's Due Diligence Conclusions and Reasons to Close.***

95. In June 2014, Altpoint summarized the due diligence conducted in connection with the investigation of NetRiver in its Investment Memorandum and gave the reasons to purchase the Lynnwood Data Center. D. Ex. 104; ("Investment Memorandum").

96. The third paragraph on page 9 of the Investment Memorandum confirmed that ByteGrid and Altpoint had performed "*legal review of key customer agreements followed by calls with key NetRiver customers (including Amazon) to obtain feedback on NetRiver's operations, quality of services, and product offerings* "

97. Under "Customer Due Diligence," page 11 of the Investment Memorandum recited that "*ByteGrid and Altpoint met with several Amazon professionals (in both procurement and data center operations) responsible for overseeing Amazon's presence at the NetRiver Lynnwood Data Center.*"

98. The last paragraph on page 3 of the Investment Memorandum stated:

> "*Based on feedback from NetRiver and meeting with Amazon data operations and sales executive Altpoint believes that Amazon intends to continue to maintain its presence in the NetRiver facility. Nevertheless, Altpoint and ByteGrid have conditioned the Earn-Out Purchase Price on the renewal of the Amazon Contract Amazon is currently engaged in active discussions with NetRiver about renewing the Amazon Contract.*"

[10] In fact, at trial, Sheth testified that he considered that Amazon was shifting away from third party data centers to data centers owned by them. He acknowledged it was a potential risk but wagered that when Amazon stood up a large cloud platform, it would not be able to concentrate all of its data at the Boardman facility.

99. During its due diligence, ByteGrid recognized that the combination of the concentration of revenues from Amazon, coupled with that customer's right to terminate for convenience, presented significant risks to the stability of future Amazon revenue.[11] Sheth Dep. 97:21-99:7; Hardwick TT:504:12-506:18. The trade-off for those risks however was the low purchase price for the Lynnwood Center; that price was a discount compared with earnings multiples for comparable transactions. Sheth Dep. 101:22-104:5; Hardwick TT: 526:6-529:12; Pryor Dep. 107:17-113:4; 197:20-203:25. The third paragraph on page 1 of the Investment Memorandum under "Transaction Overview" and the first paragraph on page 8 of the Investment Memorandum accordingly concluded that the purchase price "*represents a discount to precedent transactions in the data center industry" and "represents an opportunity to acquire a stable and growing data center at an attractive, risk-adjusted valuation*" (emphasis added).

100. The second paragraph on page 6 of the Investment Memorandum disclosed that one reason for ByteGrid's acquisition of the Lynnwood Data Center was a strategic opportunity to purchase a cash flow positive data center. The pro-forma on page 4 shows that the addition of NetRiver's revenues would almost double the total projected revenues for ByteGrid. The addition of those revenues would avoid a technical default of ByteGrid's loan covenants with Key Bank. D. Ex. 55; Sheth Dep. 116:22-120:5. "*[T]he acquisition represents a compelling opportunity to further leverage the Company's existing balance sheet at a very attractive valuation*" Investment Memorandum, p. 2, second paragraph (emphasis added).

101. Another reason to purchase the Lynnwood Data Center was to have a relationship with Amazon. Klein Dep. 138:16-139:7. Access to Amazon was important so ByteGrid could

[11] During Sheth's testimony, he was asked straight on if there was risk in relying on Adam for purposes of due diligence. Sheth responded that there was risk to doing that and that he did his best to "connect the dots and that is what we did"

market its other data centers, especially in Aurora, Illinois and Silver Spring, Maryland which were largely vacant at the time. Harris Dep. 29:11-30:12. Ellsworth TT: 151:23-153:7. The Silver Spring data center was not growing as fast as ByteGrid had hoped, which risked non-compliance by ByteGrid of the financial covenants with its lender, Key Bank. Sheth Dep. 120:2-7; D. Ex. 55.

102. ByteGrid did not close the purchase of the Lynnwood Data Center in reliance on Adam providing any confidential plans Amazon had for the Lynnwood Data Center. Adam did not tell ByteGrid about any confidential Amazon plans other than the negotiation of Addendum No. 9 and the possible further expansion that was referenced in the redlined documents Adam sent to ByteGrid. ByteGrid also did not rely on whether Adam would be privy to Amazon confidential information. The reliance on what Adam told ByteGrid was limited to his belief that Addendum No. 9 would be executed. Sheth Dep. 206:4-207:4; 180:20-183:3.

103. ByteGrid instead relied on what Adam told ByteGrid about the strength of NetRiver's relationship with Amazon, ByteGrid's observation of the close relationship between Adam and Mayer, ByteGrid's conversations with Mayer and Hunter, the past contract extensions, and the continued progress on the negotiation of Addendum No. 9. Sheth Dep. 186:11-187:10; 202:17-203:13.

E. <u>ByteGrid's Plans to Upgrade the Lynnwood Data Center</u>.

104. The other data centers owned by ByteGrid were Tier III or better and had fewer power outages than the Lynnwood Data Center. ByteGrid's plan in purchasing the Lynnwood Data Center was to upgrade the Tier rating of the facility. ByteGrid knew NetRiver lacked capital to upgrade the facility and also knew that NetRiver was receptive to ByteGrid's plans. Mencia TT: 689:18-692:3; 709:12-19.

105. ByteGrid budgeted $5 million for expenditures needed to be made to the Lynnwood Data Center immediately after closing and another $5 million to $10 million for the expansion of the Lynnwood Data Center to upgrade its Tier rating. Mencia TT: 710:13-711:3.

106. ByteGrid engaged the engineering firm of CH2M Hill to prepare a master plan and cost estimates to eliminate the single points of failure issues and to increase the reliability of the Lynnwood Data Center after closing. Mencia TT: 711:21-712:18; Adam TT: 2173:9-17.

107. Mencia told both Adam and Joe about its plans to upgrade the Lynnwood Data Center to Tier III after closing. Adam TT: 2172:18-2173:1. Joe TT: 2346:24-2347-13. Sheth confirmed those plans to Joe. Joe TT: 2348:18-24.

108. After Mencia's review of the negative QBRs, Mencia told Harris that ByteGrid was going to improve the reliability of the Lynnwood Data Center after closing to increase Amazon's comfort level. Harris Dep. 27:14-29:3; 45:9-46:5.

109. The reasons for the upgrade were to protect ByteGrid's brand and to mitigate the risks with Amazon. Adam TT: 2173:2-8.

110. Adam worked directly with CH2M Hill on its master planning for the upgrade and in connection with its review of the Egan audit. Mencia told Adam that the budget for the upgrade to Tier III was $5 million and would be completed in the first quarter of 2015. Adam TT: 2173:18-22; 2178:16-25.

111. Mencia also told Adam that ByteGrid would immediately address the potential SLA exposure items after closing: the ultrasonic humidification units costing about $200,000 and air handler units for the UPS rooms costing $200,000. Adam TT: 2181:18-2182-17.

112. The additional capital required to be spent by ByteGrid of $350,000 to $400,000 to meet the requirements of the SLA was also discussed by ByteGrid in its conference call on

June 16, 2014 with Joe and Pryor as one reason to lower the purchase price. Pryor took notes of that call as it was occurring. P. Ex. 108. Pryor Dep. 89:12-90:12. ByteGrid wanted a price reduction because there were a few places where NetRiver was not in compliance with the SLA. Pryor Dep. 172:10-173:11; 174:15-175:5.

113. Notwithstanding Mencia's own testimony (FF 104, 105, 106) and the testimony from Harris (FF 108), Sheth (FF 88), and the Vierras (FF 107) about ByteGrid improving the reliability of the Lynnwood Data Center after closing, Mencia then denied that ByteGrid was going to address the negative QBR scores by upgrading the data center because ByteGrid could not do much in this area anyway. To implement major improvements would have caused a disruption in service and that would have been a non-starter with Amazon. Mencia TT: 754:15-755:17. Mencia similarly testified that a reason for many of the outages at the Lynnwood Data Center was that Amazon's racks were "single-corded", or "N-corded" and that the only investment ByteGrid could make was to try to convince Amazon to not be single-corded. Mencia TT: 687:7-18; 694:19-695:19. Mencia's testimony is contradictory, not credible, and deflects blame away from him, for a poor business decision, onto others.[12]

114. Mencia's testimony conflicts with the facts (a) that Amazon had both N and 2N racks, as expressly reflected in Addendum No. 9 (P. Ex. 131; Adam TT: 2239:3-2241:25) and (b) that even Amazon's N corded racks could accept two power feeds by using a top of the rack ATS or an automatic transfer switch. Adam TT: 2082:13-2083:5

[12] Mencia is not the only one to blame others for this bad deal. Ellsworth in his testimony blames Mencia for not telling him about various technical issues raised in the engineering due diligence such as customer service and delivery problems, negative compliance with service level agreement (SLA) requirements and performance falling below Amazon's service standards. As well, Ellsworth testified that Mencia never told him about concerns relating to power service quality and reliability. Asked on cross examination why he did not know about these issues, Ellsworth simply said it was Mencia's job.

115. Mencia also testified inconsistently that, had he seen the Berche June 12th e-mail, he would have been concerned that the corrective actions and action plans in the QBRs had not been completed. Mencia TT: 802:25-805:9.

116. However, the action plans disclosed in the three QBRs only stated that audits would be performed and later reviewed with NetRiver to address the power outages. (FF 72, 73, 83.) That review had all culminated in Mark Egan's audit, which in turn had been disclosed to ByteGrid and its consultant CH2M Hill for the specific purpose of preparing a master plan to improve the reliability of the Lynnwood Data Center after closing.

117. Notwithstanding Mencia's testimony at trial, he then admitted that he had indeed told Harris that, in response to the negative QBR scores, ByteGrid was going to take steps to improve the scores. Mencia however in his next answer candidly acknowledged that ByteGrid did not spend the $5 million originally budgeted for the facility. Mencia TT: 755:18-756:8.

F. Consent Agreement.

118. On June 5, 2014, Mayer returned to Adam the letter agreement, dated March 11, 2014 (the "Consent Agreement") which had been executed on June 5th by Ellsworth on behalf of Plaintiff and on June 5th by Joe Minarik, Vice President of Amazon. D. Exs. 99, 205.

119. The Consent Agreement was negotiated between Mayer on behalf of Amazon and Ellsworth on behalf of Plaintiff. Ellsworth TT: 222:5-20.

120. Adam did not object to Ellsworth directly contacting Mayer to negotiate the Consent Agreement. P. Ex. 88; Adam TT: 2153:4-7.

121. Ellsworth directly communicated with Mayer to negotiate the Consent Agreement and sent Mayer a redline of the Consent Agreement that Ellsworth had revised to add footnote number 1 to provide assurances requested by Amazon's legal department. D. Ex. 91.

122. The Consent Agreement consented to the assignment of the Amazon contract from NetRiver to Lynwood Tech. Schedule 1 of the Consent Agreement also served as an "estoppel" which ByteGrid wanted to receive from Amazon to confirm that there was no existing default. An estoppel is normally received from larger tenants of properties that ByteGrid had purchased so that it knew it was not buying a lawsuit when the property was purchased. Ellsworth TT: 52: 11-53:9.

123. On June 4, 2014, Adam sent back to Ellsworth a redline of the Consent Agreement that he received from Mayer. D. Ex. 93. The redline had deleted in paragraph 6 of Schedule 1 the language that "*any past defaults have been corrected*" That deletion caused ByteGrid some concern. Ellsworth TT: 239:10-240:7. Nevertheless, the final Consent Agreement executed June 5, 2014 does not contain any representation from Amazon that past defaults had been corrected. D. Ex. 205.

124. Based on his delivery to ByteGrid of the Consent Agreement executed by Joe Minarik, Mayer had been authorized to interact with ByteGrid. Berche also had knowledge of that interaction and only objected to Mayer telling ByteGrid to directly deal with Kozem at finance for Amazon's approval of ByteGrid's financial statements. P. Exs. 75, 76.

125. Even though the June 12th outage could have been considered a default, ByteGrid did not request an updated consent agreement or estoppel from Amazon to confirm Amazon's reaction to the power outage because that would have taken too long to obtain. "*[I]t was not worth taking what could be weeks if not months to get another consent and [ByteGrid] made a business judgment to move forward*" to close by the end of June, 2014. Ellsworth TT: 308:13-312:15 (emphasis added).

126. ByteGrid could have also called Mayer to ask him what Amazon's reaction to the June 12th power outage was but did not do so. Ellsworth TT: 313:1-313:9.

G. Negotiation of Addendum No. 9.

127. During ByteGrid's due diligence, ByteGrid oversaw the discussions between NetRiver and Amazon in connection with the negotiation of Addendum No. 9 and reviewed the interim drafts, which would extend the term of all the addenda to September 30, 2017, including the addenda for 120 racks expiring in July 2014. D. Ex. 104, Investment Memorandum, p. 11.

128. ***ByteGrid had sought to totally eliminate Amazon's right to terminate its contract for convenience but later agreed to Amazon's retention of that right subject however to requiring Amazon to provide six months prior notice***. Ellsworth TT: 249:21-252:15. D. Ex. 100. The six months' notice was deemed to be *"sufficient advanced notice"* by ByteGrid. D. Ex. 104, Investment Memorandum, p. 11. ByteGrid assumed the risk that Amazon might exercise its right to terminate for convenience. Ellsworth TT: 217:5-10.

129. On June 29, 2014, Amazon and NetRiver were still negotiating Addendum No. 9. D. Ex. 149; Ellsworth TT: 331:14-18.

130. In the APA, ByteGrid and NetRiver agreed that if Addendum No. 9, in the form attached as Exhibit H (D. Ex. 209) to the APA, was executed before August 31, 2014, the Earn Out Consideration of $10,100,000 would be paid to NetRiver. P. Ex. 124, p. 4.

131. After the APA was executed by the parties on June 30, 2014, ByteGrid and Amazon continued to negotiate Addendum No. 9. Pursuant to a redline of Addendum No. 9 sent by Amazon to Ellsworth on July 7, 2014, Amazon sought to delete a number of material provisions previously included in Exhibit H, including the deletion of paragraph 6; an indemnification by Amazon of NetRiver of environmental liabilities, and the deletion of paragraph 9 releasing NetRiver from future liabilities under the Amazon contract after the sale to

ByteGrid. Ellsworth agreed to those changes and thereafter on July 31, 2014, proposed further changes. D. Exs. 150, 155. Ellsworth TT: 262:16-265:16.

132. The final Addendum No. 9 was executed on August 27, 2014 between Amazon and Plaintiff as the signatories. P. Ex. 131.

H. Events Between June 12th and June 30, 2014.

133. A power outage occurred at 2:22 a.m. on June 12, 2014 at the Lynnwood Data Center. D. Ex. 109. The power outage lasted approximately one minute.

134. At 10:13 a.m. on June 12th; Adam sent an incident report on the outage to Mayer, Klein, and Berche. D. Ex. 113. The incident report did not disclose the cause of the outage. (Although the time stamp on this exhibit states that the e-mail was sent at 5:13 p.m., the e-mail in response from Berche ((D. Ex. 114)) shows the correct time stamp for this e-mail of 10:13 a.m.).

135. Berche responded eight minutes later by his e-mail sent at 10:21 a.m. which recited Berche's opinions that the Lynnwood Data Center was the most unreliable site in the Amazon portfolio, that something needed to change dramatically, and that all the options were on the table. D. Ex. 114; P. Ex. 1. Berche asked Klein to set up a meeting.

136. Berche's e-mail was consistent with past Amazon reactions to NetRiver power outages. Amazon was very reactive and demanded an immediate response, which NetRiver provided. Amazon would then position itself to see what extra concessions they could extract from NetRiver. Harris Dep. 55:3-56:9.

137. Klein's reaction to Berche's June 12th e-mail was to identify what the outage was and how the problem would be fixed. Klein did not understand that the e-mail was a threat by Berche to NetRiver or that NetRiver needed to make dramatic changes, just a statement that things needed to change. Klein Dep. 92:9-94:15. Mayer also disagreed that dramatic changes needed to be made by NetRiver. According to Mayer, Berche's statement that all options were

on the table was a communication style that Berche used. Mayer Dep. 165:12-21. According to Berche himself, his statement that all the options were on the table was "*more of an open statement.*" Berche Dep. 31:14-17 (emphasis added).

138. Both Klein and Mayer disagreed with Berche's opinion that the Lynnwood Data Center was the most unreliable data center in Amazon's portfolio. Klein Dep. 180:4-180-25; Mayer Dep. 165:8-11. Berche focused primarily on data centers in Japan. Berche Dep. 13:2-8. During the time that Adam was employed at the Lynnwood Data Center, Berche never visited the Lynnwood Data Center. Adam TT: 2069:25-2070:13.

139. Adam sent a calendar invite to Amazon representatives for 3:00 p.m. on June 12th to discuss the outage. D. Ex. 117.

140. At 2:19 p.m., Harris sent a revised incident report to Tyler Hannah, Tim Amey, James Reid and Doug Erickson at Amazon. D. Ex. 118. Adam forwarded Harris' e-mail and the revised incident report to Mayer and Klein. D. Ex. 120.

141. Page 1 of the revised incident report disclosed that the cause of the outage was that a pickup tube in the generator's fuel tank was only 13 inches long while the tank was 28 inches deep making the tank only half useable. Page 2 of the revised report also disclosed that a replacement fuel pickup tube was installed that same day.

142. Adam, Harris Joe, Klein, James Reid, Tyler Hannah, and Berche were on the 3:00 p.m. conference call on June 12th. Klein was initially angry at the outage. Once the explanation of the outage was discussed, Reid laughed. Hannah was happy that the cause had been fixed as of the time of the conference call. *There was no discussion during the conference call of Berche's e-mail or his opinions in the e-mail.* Adam TT: 2199:12-25; Harris Dep. 59:4-60:10

143. When the cause of the outage was discovered, a lot of Amazon people said that the cause of the outage was unique, funny, and an odd thing that one would never have heard of or would never happen again. Mayer Dep. 277:2-277:25. In the October 2014 QBR, Amazon characterized that outage as a "fluke issue that could not have been prevented." D. Ex. 259, p. 2.

144. At 8:31 p.m. on June 12th, Adam sent an e-mail to Amazon representatives memorializing the discussion in the 3:00 p.m. conference call. D. Ex. 122; Adam TT: 215:2-22:16:15.

145. At 9:48 a.m. on June 13th, Adam sent an e-mail to Klein, Mayer, and Berche confirming that the new fuel pick tube had been installed on June 12th and the generator had been tested, run, and placed back into service. D. Ex. 123.

146. At 12:56 p.m. on June 13, 2013, Harris sent the revised incident report to Ellsworth, Sheth, Pryor, and Renee Shaening at MVP. The accompanying e-mail simply stated "Report is attached. Let me know if you have further questions." D. Ex. 125.

147. At 3:57 p.m. on June 13, 2013, Harris sent the revised incident report to Mencia and stated that he would like to update and debrief Mencia. D. Ex. 126. (Although the time stamp on this exhibit states the e-mail was sent at 7:57 p.m., the e-mail in response from Mencia ((D. Ex. 127)) shows the correct time stamp for this e-mail of 3:57 p.m.).

148. At 5:22 p.m. on June 13th, Mencia sent an e-mail (D. Ex. 127) to Goodwin, Ken Parent, Ellsworth and Dawn Beckles stating that NetRiver had experienced "*another outage yesterday*" and that the root cause of the outage was a latent defect in the generator installed by Cummins.

149. In his e-mail, Mencia reports that Sheth was made aware of the outage that same day in the weekly call. Sheth admits that in that call he knew that ByteGrid had been informed

that Amazon was "very upset" and then later Amazon was content and appeased with NetRiver's resolution. NetRiver had been asked questions regarding how Amazon took the outage and how Amazon had reacted. Sheth Dep. 269:9-270:20.

150. Throughout the due diligence, NetRiver and ByteGrid scheduled conference calls on Mondays to discuss the status of ByteGrid's due diligence. The next regularly scheduled conference call was on June 16, 2014. Adam, Joe, Harris, Pryor, Anish, Mencia and Ellsworth participated. Addendum No. 9 and the June 12th outage were discussed. Adam TT: 2217:1-24.

151. Mencia during the June 16th conference call asked to participate in the meeting between NetRiver and Amazon that had been scheduled for June 18th. Adam TT: 2217:25-2218:19.

152. Adam talked to Tim Amey, Tyler Hannah and James Reid to ask whether Mencia could participate in the June 18th meeting. They said no. Adam had not asked Klein about whether Mencia could participate because he had not yet met Klein. Adam knew Amey, Hannah and Reid better and they were senior to Klein. Adam TT: 2220:5-2221:3.

153. On June 16, 2014, Klein provided Adam with his calculation of the SLA credit in the amount of $399.01 for the June 12th outage, which was accepted by Adam and was applied on the July 1st invoice. D. Ex. 132; Adam TT: 2219:2-17.

154. Adam told Mencia by his e-mail of June 16, 2014 at 9:53 p.m. that Amazon was not willing to speak with ByteGrid until the sales process was finalized. Mencia replied "no worries". P. Ex. 109.

155. In a separate conference call on June 16, 2014, Mencia, Ellsworth and Ken Parent discussed with Joe and Pryor the request by ByteGrid for a price adjustment. P. Ex. 108.

156. The proposed conference call with Joe for a price adjustment was scheduled on ByteGrid's agenda, dated June 16, 2014. D. Ex. 134. Paragraph 1 of that agenda notes the call with Joe for 5:00 p.m. that date. There is no reference at all on the agenda about the June 12th power outage.

157. Pryor sent Joe an e-mail on June 16, 2014 at 2:34 p.m. summarizing the discussion. P. Ex. 108. According to Pryor's notes, Ken Parent was concerned about the outage and wanted to be on the call with Amazon that week. Joe stated that he would ask but thought that the answer would be no.

158. In that conference call, Ken Parent explained the reasons for the price adjustment included that the capital required to be spent by ByteGrid for the facility was approximately $1.5 Million, that the capital required to address the SLA exposure was $350,000 to $400,000, and that there were the costs due to a delayed closing. Another reason for the price reduction was that ByteGrid had been hoping to eliminate Amazon's termination for convenience rights and the proposed Addendum No. 9 was only a three year extension, not the four years described in the parties' letter of intent. ByteGrid requested a price reduction of $940,000. P. Ex. 108.

159. By e-mail of June 17, 2014, Joe responded to Ellsworth and offered to split the price reduction by 50%, offering instead a reduction of $470,000. P. Ex. 113. Joe also told Ellsworth about the June 18th meeting with Amazon to go over the June 12th incident and to assess what needed to be done to continue Amazon's comfort level with NetRiver. Joe expressly told Ellsworth that, after that meeting with Amazon, the parties could then discuss the outcome, and if they all were in agreement finish the deal and schedule closing.

160. At 10:00 a.m. on Tuesday, June 17, 2014, Amazon and NetRiver participated in their next regularly scheduled conference call. Mencia secretly listened in on a nondisclosed

basis. During that call there was discussion about validating the condition of pick-up tubes on other generators. Harris Dep. 67:20-68:21. *There was no discussion about Berche's June 12th e-mail or Berche's opinions in that e-mail during that call.* Afterwards Mencia told Adam that he was comfortable with how Amazon was working with NetRiver. Adam TT: 2221:4-22; 2223:16-23.

161. On June 18, 2014, Klein met with Harris, Adam, and Joe to discuss the June 12th outage. Klein was again initially upset about the outage but later calmed down. Harris Dep. 69:24-71:7. Addendum No. 9 was discussed. There was no discussion about Berche's June 12th e-mail or his opinions in that e-mail during that meeting. Adam TT: 2223:24-2224:24.

162. By e-mail of June 19th, Joe reported to Pryor that the meeting with Amazon on June 18th was "typical". Amazon voiced displeasure about the outage but ended the meeting on a pleasant tone. Joe reported that there would be an internal Amazon meeting the next day on June 20th to discuss Addendum No. 9. P. Ex 114; Joe TT: 1343:24-1344:17.

163. Joe, by e-mail the same day reported to Ellsworth that the June 18th meeting with Amazon was "typical," and that Amazon was having an internal meeting on June 20th to discuss Addendum No. 9 and that they could chat then about the price adjustment or wait until Monday. P. Ex. 115; Joe TT: 1343:8-23.

164. On June 20, 2014 at 12:00 a.m., Ellsworth sent Sheth an e-mail stating that he had a call into Pryor to "work" him on the new 50-50 split of the $1.3M. D. Ex. 143. NetRiver and ByteGrid finally agreed on a price discount of $670,000. Ellsworth TT: 165:14-167:15

165. On June 20, 2014 at 12:07 a m., Pryor responded to Ellsworth's message and stated that he had been trading messages with Joe and was now updated on the price discussions. D. Ex. 142.

166. On June 20, 2014 at 5:54 p.m., Adam sent Klein an e-mail requesting information on the status of Addendum No. 9. Klein responded on Sunday at 9:46 p.m. that he would begin the approval process for Addendum No. 9 and anticipated a four week lead time. D. Ex. 145.

167. After receiving Klein's e-mail, NetRiver had no reason to believe that Amazon was thinking about terminating or allowing its contract to expire or that there were any defaults under the contract. Adam TT: 2227:8-16.

168. At the next regularly scheduled conference call on Monday, June 23, 2014 between NetRiver and ByteGrid, Adam reported that Amazon was going ahead with Addendum No. 9. Adam TT: 2227:17-2228:11.

169. After Adam reported to ByteGrid the status of Addendum No. 9 in the June 23rd conference call, the conversation then turned to scheduling a closing date. Sheth stated that it was important for financial reasons to close by the end of the month. Adam TT: 2228:12-18.

170. Joe had conversations with Mencia on Wednesday, June 25, 2014, on the scheduling of closing. Mencia told Joe that ByteGrid needed to close for financial reasons on June 30, 2014. Joe TT: 2348:25-2350:3; 2357:4-17.

171. Because of the risk that Amazon might not execute Addendum No. 9, Adam was not in favor of closing on June 30, 2014. Joe also wanted to postpone closing until Addendum No. 9 was executed. Joe TT: 2350:4-23; Adam TT: 2228:19-2229:2; Pryor Dep. 211:6-213:21.

172. ByteGrid however wanted to close earlier not later. Pryor Dep. 211:2-5. There was no discussion by ByteGrid to delay closing until ByteGrid could confirm Amazon's reaction to the June 12th power outage. Pryor Dep. 214:13-21.

173. ByteGrid however wanted to close by the end of the second quarter in order to include Amazon's revenues in its financial statements. There were potential problems with

KeyBank loan covenants if closing was further delayed beyond June 30, 2014. The failure to close the sale in the first quarter of 2014 already presented a potential technical default in those covenants. FF 100. As described by ByteGrid in its conference call to discuss the price adjustment, there were costs to a delayed closing. FF 158.

I. NetRiver's Disclosure of June 12th E-Mail.

174. The foregoing Findings of Fact 133-173 are, for the most part, based on admitted exhibits or are not otherwise disputed in substantive fashion. What is strongly disputed between the parties is the timing and content of calls about the June 12th power outage between Harris and Adam from NetRiver and Mencia, Anish, and Goodwin from ByteGrid.

175. Harris testified that he talked to Mencia before his e-mail to him of June 13, 2014. D. Ex. 126; Harris Dep. 63:9-12. According to Harris, he would not have sent his e-mail of June 13, 2014 to Ellsworth and Sheth that simply stated "*report is attached*" without extensive previous discussions. Harris Dep. 91:6-19. Harris' testimony is corroborated by his request in the e-mail that ByteGrid should call him if they had "*further questions.*" Harris also testified that after the 3:00 p.m. June 12th conference call with Amazon he participated in a call with Adam and the ByteGrid representatives reporting the results of that call. Harris Dep. 60:11-61:4.

176. Harris also testified that he recalled Adam reading a short document to the ByteGrid representatives that dealt with the June 12th outage although he cannot recall the contents of what was read. Harris Dep. 64:19-65:6; 135:10-16. Harris informed Plaintiff's counsel of that recollection when they met approximately a week before Harris' deposition and before he talked to Defendants' counsel the preceding Friday. Harris Dep. 156:22-157:5; 87:4-23. The fact that documents were sometimes read to ByteGrid representatives because of confidentiality concerns is also corroborated by Harris' testimony that the Egan audit report was read to Mencia. FF 80.

177. Adam testified that after sending out his calendar invite to Amazon, he called Mencia that same morning to tell him about the outage. Mencia asked him about Amazon's reaction and who at Amazon was upset. Adam testified that he read JF Berche's e-mail to Mencia and told Mencia that he would call Mencia back after Adam learned more facts. TT Adam: 2192:11-2194:11.

178. Adam then testified that he received a call from Sheth who heard from Mencia. Adam testified that he started to read JF Berche's e-mail but Sheth began to ask questions about the status of Addendum No. 9. TT Adam: 2194:12-2195:18.[13]

179. Adam testified that he then called Goodwin to discuss the outage and read Berche's e-mail. Adam TT: 2195:19-2196:18. Adam's testimony on the timing of his call to Goodwin is corroborated by Goodwin's testimony that he talked to Adam about the power outage and Adam at that time had not known the cause of the power outage. P. Ex. 243, Deposition of Don Goodwin ("Goodwin Dep.") 162:5-163:14. Although Goodwin could not recall whether the June 12th e-mail was read to him (Goodwin Dep. 167:5-8), Goodwin's testimony does confirm that his call with Adam was before Harris provided his revised incident report at 2:19 p.m. disclosing the cause of the outage.

180 Adam testified that after the 3:00 p.m. conference call, he called Mencia back to report what had happened during the conference call, including the processing of the de minimis SLA credit claim. TT Adam: 2216:16-25.

[13] It is troubling to the court that all of this was omitted from Adam's discovery responses until the day of the discovery cut-off. However, the court was able to carefully consider Adam's testimony, his appearance, attitude and demeanor on the witness stand, his inclination to speak truthfully, and the probability of his testimony The court found Adam to be a credible, truthful and honest witness who testified in accordance with his oath. See also FF 193 and 194, below.

181. In contrast, Mencia testified that the first time he had heard about the outage was Harris' June 13th e-mail. After he had read Harris' attached incident report, Mencia testified that he called Harris to discuss the report and the "*clarifications that [he] needed.*" Mencia learned from Harris that Amazon was upset, but did not ask specifically who was upset. TT Mencia: 635:9-14; 637:5-18; 747:13-748:1.

182. Mencia also testified that he didn't talk to Adam until after Harris' e-mail. TT Mencia: 639:2-8.

183. Mencia testified that after receiving Harris' e-mail on June 13th, he then delegated to Eric Daniels to make sure that he was in lockstep with Harris on getting the defect addressed and that he was taking steps that day to resolve the issue. TT Mencia: 639:20-640:9; 744:5-11.

184. Mencia's testimony about the communications around June 12th is not credible for a number of reasons.

185. First, Harris' June 13th e-mail to Mencia (D. Ex. 126) enclosed the revised incident report of June 12th, which specifically stated on page 2 that the fuel pick up tube had already been replaced that same day. The testimony that Mencia took steps after Harris' e-mail to oversee the fix of the generator is false.

186. Second, Mencia testified that he only talked to Adam after receiving Harris' e-mail. Mencia's e-mail of June 13th (D. Ex. 127) states however that "*Adam is preparing a SLA credit calculation that he will pressure the vendor to absorb,*" which corroborates Adam's testimony that he called Mencia after the 3:00 p.m. conference call on June 12th to tell him that fact.

187. The testimony that Mencia did not specifically ask Harris or Adam who at Amazon was upset is also not believable based on Mencia's other testimony.

188. According to Mencia, he only asked how Amazon as a company had reacted to past outages and was "*expecting to be told who had reacted and how.*" Mencia TT: 737:10-17. According to Mencia, "*they get upset. . . and they ask a lot of questions, and they want to potentially leverage the situation* " Mencia TT: 738:14-19. It is not believable that Mencia, who admitted that he was expecting to be told, would not have affirmatively asked who at Amazon was asking a lot of questions and to further inquire as to the leverage applied by Amazon if he had not been told those facts. That would especially be true in connection with the power outage on July 26, 2012 that had caused a catastrophic loss of power to 250 Amazon racks for over 8 hours. Mencia admitted that he had spent a lot of time talking about that incident with NetRiver. FF 69.

189. Mencia admitted that he may have asked Harris for some "*color*" on the more recent outages. Mencia TT: 736:12-21. Mencia testified that his focus was more the operational and technical questions of how past outages had occurred and the steps taken to resolve the outage. However, for more current outages Mencia admitted that when he was "*looking at incident reports real-time that occur, then, yes, I'm all over what's the customer temperature at that point, what's their reaction. And that's very much part of -- of my questioning* " Mencia TT: 741:4-21. In regard to past outages, Mencia again testified that "*since it wasn't occurring at that time, that . . .that.. that I wouldn't have... I wouldn't have, typically probed into. . into how did people react, what did people say at that point in time. I do that in present mode typically.*" Mencia TT: 742:14-743 1.

190. According to Mencia, Harris told him after Harris' June 13th e-mail that Amazon was "*concerned or upset but that Harris didn't go into detail.*" Mencia TT: 637: 14-18. Mencia testified that he did not ask Harris who at Amazon was upset, that he had expected there would

be a number of people at Amazon who would be upset, and that is why he wanted to participate in the June 18th meeting with Amazon so he "*could gauge the degree and how they reacted to it.*" Mencia TT: 749:5-18. However, according to Mencia's testimony, he never asked Harris or Adam about who was upset even after he had learned from Adam that Amazon had refused to allow him to participate in the June 18th meeting. Mencia TT: 749:5-18.

191. It is undisputed that Mencia had knowledge of the June 12th power outage no later than June 13th, which was shortly before closing, and that he knew that Amazon was "very upset." His e-mail to the ByteGrid representatives (D. Ex. 127) stated that NetRiver had experienced "another outage" and he had directed Goodwin to gauge customer fallout. Based on his own testimony, the June 12th outage was in the "present mode" or "real time" and he would have therefore probed into who at Amazon was very upset. Based on that probe and his questions to Adam or Harris, he would have learned that Berche was the person at Amazon that was very upset. He would have then likely asked how they knew Berche was upset. That inquiry would have resulted in Berche's e-mail being read to him or at least its contents disclosed.

192. That Mencia knew it was Berche at Amazon who was very upset, that he had also known about Berche's management style (FF 58, 217), and that he had known what happened in the 3:00 pm conference call, including the fact that James Reid laughed, is all corroborated by ByteGrid's own agenda for its internal meeting on June 16, 2014. D. Ex. 134. There is no reference to any discussion about the power outage, to what extent Amazon was upset, nor even its impact on the negotiation and terms of Addendum No. 9. The agenda focused instead on finalizing the closing documents, valuation issues, and the pending call with Joe to adjust the price based on the loss of the 4th year in the proposed extension. Had Mencia not known the

above facts, it is simply not believable that ByteGrid, only four days later, scheduled an internal discussion about the outage and its consequences, especially when ByteGrid knew that Amazon was very upset.

193. Plaintiff argues that Adam's testimony that he read Berche's June 12th e-mail to Mencia, Sheth, and Goodwin is not credible because it was not disclosed until Adam's deposition on October 4, 2014. However, NetRiver's Supplemental Answer of April 1, 2016 to Plaintiff's Interrogatory No. 10 clearly stated NetRiver's position that the "*June 12, 2014 e-mail was not sent to Plaintiff or ByteGrid because of Amazon's confidentiality policies and because the power outage that prompted the e-mail and* Amazon's anger over the outage was fully disclosed to Plaintiff and ByteGrid." P. Ex. 216, p. 3.

194. The testimony from Adam that he read the e-mail was not inconsistent with NetRiver's original answer; it only provided more detail on how Amazon's anger had been disclosed. Adam testified that he could not recall more specifically his conversations until after he reviewed the documents produced in discovery and was preparing for his deposition. Adam TT: 2230:20-2231:11.

195. In contrast, Ellsworth on behalf of Plaintiff, signed under penalty of perjury Supplemental Answers to Defendants' First Interrogatories and in the supplemental answer to Interrogatory No. 1 claiming that Plaintiff failed to disclose outages occurring in September 2011 and November 2013. D. Ex. 230. Ellsworth further testified at trial that those answers were still accurate. Ellsworth TT: 355:13-20. That was a lie. Ellsworth directly received from the MVP data room a copy of NetRiver's UPS-0 Incident Report disclosing the power outage on November 4, 2013. D. Exs. 19, 21. The September 2011 SLA violation was disclosed on page 4 of the March 5 QBR which was sent to Ellsworth. D. Exs. 30, 33.

196. Mencia testified at trial, similar to Adam's testimony, that only after discovery did ByteGrid become aware that prior power outages had in fact been disclosed to ByteGrid. Mencia TT: 846:18-848:15. However, that belated knowledge in fact contradicted Plaintiff's complaint in contrast to Adam's testimony that did not conflict with NetRiver's interrogatory answers but only provided more detail which expanded on the originally correct response.

197. Throughout the trial, Plaintiff argued that Adam and Joe were not complying with the Amazon confidentiality requirements by sharing certain Amazon information with ByteGrid. It is not clear what the purpose of those arguments were other than to suggest that the failure of Joe and Adam to comply with the Amazon confidentiality requirements may mean they were not truthful in testifying about the facts in this case. Amazingly, Plaintiff then complains that Adam and Joe should have violated the confidentiality agreement with Amazon to a greater extent to assist this sophisticated and business savvy Plaintiff with its due diligence. Plaintiff, by arguing thusly, not only gets the cake but feasts on it in grand fashion. Plaintiff admits that it was violative of the confidentiality requirements between Amazon and Defendant for the Plaintiff to surreptitiously listen in on confidential conference calls, to read secret materials on laptops and to "accidently on purpose" meet with Amazon representatives, against the wishes of Amazon Management, at both Juanita Pub and at the data center facility. Plaintiff takes the position, frankly, that defendant, in an attempt to provide the Plaintiff with as much information as possible, was not dishonest enough relative to breaching the contractually imposed secrecy obligations with Amazon. The position is absurd.[14] How the Vierras handled Amazon

[14] Further, there is no way any finder of fact could reasonably conclude that the Juanita Pub meeting could be considered part of any bona fide corporate due diligence in anticipation of a transaction of tens of millions of dollars. That Plaintiff would so allege is reflective of just how badly it wanted this facility despite the various red flags which were easily visible.

confidential information has no bearing on those witnesses' propensity for telling the truth or their credibility. In fact, if anything, it shows just how far the defendant was willing to go to get Plaintiff all the information it needed about Amazon, directly from Amazon, good or bad.[15] Joe disclosed Amazon confidential information to ByteGrid in order to provide a more accurate picture of the NetRiver's relationship with Amazon and over the objections of Adam and Harris. FF 32. If the negative QBRs had not been disclosed to ByteGrid, ByteGrid would now likely be asserting that omission as fraud. More cake. More eating.

198. Plaintiff also argues that there is no further reference to Berche's e-mail in any subsequent document in this case. The absence of any further reference however is consistent with the fact that, after the cause of the outage was discovered and settled with a $399 credit, no one paid any attention to or said anything further about Berche's opinions, *including Berche*. FF 141, 142, 143, 153.

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[15] The court notes Ellsworth's testimony at trial When asked about the Juanita Pub meeting he testified that he was not present as it was Mayer's preference that not too many people would be at the pub while he was having an evening out with his parents. Ellsworth also testified that the Plaintiff's representatives were instructed that as this meeting was not sanctioned by Amazon, substantive questions were "off-limits" and that if asked Mayer would not answer which would then cause an uncomfortable situation

Mencia also testified about the Juanita Pub meeting He stated that he was careful to observe the rules regarding confidentiality. He did not want to cross the line and undermine the trust between Mayer and Plaintiff Other than Mayer making generalized statements about Amazon, Mencia acknowledged, other than gleaning some personal information about Mayer, nothing else was learned.

Also, Sheth testified that he personally spoke with Mayer about business matters despite the ground rules forbidding same, without success. Sheth received general and non-specific answers to his questions but nothing substantive or confidential. What was important to Sheth was obtaining a visual that Mayer and Adam were close and knew a lot about each other and their families and that the relationship was strong. Sheth acknowledged that without substantive information, it was important to see Adam and Mayer's relationship which, in the context of the negotiation of Addendum #9 and the renewal of Amazon's contracts, the mission critical and strategic basis of the facility was informed by their close relationship. This is further proof that this sophisticated Plaintiff's due diligence was to some extent "dumbed down" or disregarded given how badly they wanted entrée into the Seattle area and to get their foot into Amazon's door for possible eastward expansion.

From the Plaintiff's witnesses we see that Mayer had limits and lines that were not crossed.

199. Based on the forgoing, the Court finds that the content of Berche's June 12th e-mail was likely disclosed to ByteGrid in one or more conversations by Adam to ByteGrid representatives. In any event, the evidence is insufficient to establish clearly and convincingly, that Berche's opinions in his June 12th e-mail had not been disclosed.

200. The Court also finds that Adam did not have any intent to deceive ByteGrid by not sending a copy of Berche's June 12th e-mail to ByteGrid before June 30, 2014. He in good faith believed that he had disclosed the contents of that e-mail to Mencia, Sheth, and Goodwin by his conversations with them on or about June 12th and that to send the actual e-mail would be contrary to Amazon's confidentiality polices.[16] Also by June 30, 2014, he had received Klein's e-mail (D. Ex. 145) that Klein was moving forward with Addendum No. 9 and therefore believed that Berche's anger had blown over. Adam TT: 2229:3-8.

201. The lack of intent to deceive is corroborated by the fact that Adam neither hid nor deleted the June 12th e-mail. The NetRiver servers that contained copies of the June 12th e-mails between Adam and Berche were acquired by ByteGrid on June 30, 2014. Adam could have easily deleted those e-mails from the server before closing but did not do so. Adam TT: 2254:4-2255:12.

202. The lack of any intent to deceive ByteGrid is also corroborated by NetRiver's prompt disclosure of both the June 12th power outage and that Amazon was very upset about the outage. If there was an intent to deceive, the June 12th power outage and the fact that Amazon was very upset would likely not have been disclosed or would have been minimized in the first place. Similarly, if there were an intent to deceive, Mencia would not have been allowed to

[16] It is important to note that defendant never did anything to prevent Plaintiff from communicating with Amazon about Amazon's intentions. In fact, at trial, Sheth testified that Defendant encouraged such communication and did its best to "make it happen."

participate on a nondisclosed basis in the Amazon conference call on June 17th, where there would have been a substantial risk that Amazon could have discussed Berche's e-mail or his opinions. FF 160.

203. Perhaps, most importantly, the lack of any intent to deceive ByteGrid is also corroborated by the reluctance of Adam and Joe to close on June 30, 2014. They were willing to risk the loss of tens of millions of dollars by willing to wait and to see if Addendum No. 9 would be executed by Amazon. FF 171. That fact also underscores the absence of any knowledge by Adam of any internal Amazon discussions to exit the data center. If there was an intent to deceive or if Adam had knowledge of any internal Amazon discussions relative to exiting the facility, Adam would have wanted to close as soon as possible.[17]

J. Closing and Payment of Purchase Prices.

204. On June 30, 2014, NetRiver and Plaintiff executed the APA and the Cash Purchase Price of $18.23 million was paid by Plaintiff. NetRiver received the sum of $12.23 million and $6 million was deposited in escrow as a holdback pursuant to the terms of the Escrow Holdback Agreement. P. Ex. 126, Recital C.

205. On June 30, 2014, DREAL and Plaintiff executed the DREAL Agreement and $11.1 million was paid to DREAL by Plaintiff for the real property.

206. The structure of when the base purchase price would be paid and the contingent nature of the payment of the Earn-Out in the APA was the same structure as in the letter of

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[17] Section 22 of Plaintiff's Proposed Findings of Fact and Conclusions of law states:

> Defendants presented a large amount of testimony and exhibits to demonstrate what Lynnwood knew about the Amazon relationship in an attempt, apparently, to establish that the information in the June 12th email, and their knowledge of Amazon's plans to leave the facility, were immaterial

That is exactly correct and the defendant's evidence clearly established that the Plaintiff had all the information needed to make a prudent business decision regarding the acquisition of the property. In the context of this mountain of disclosure, the June 12th email, assuming it was not disclosed, is small potatoes.

intent. Ellsworth TT: 142:14-19. *Accordingly, under the APA, even if Amazon had not extended its contract and had vacated the Lynnwood Data Center, ByteGrid would still have paid the Cash Purchase Price.* Ellsworth TT: 141:10-143:21; APA Sections 3.1, 3.6; P. Ex. 124.

207. Before the APA was signed on June 30, 2014, ByteGrid could have, at any time, refused to close based on ByteGrid's due diligence.[18] Ellsworth TT: 167:17-168:2.

208. On August 27, 2014, Amazon and Plaintiff executed Addendum No. 9 in the form that had been later negotiated between those parties after June 30, 2014 and the Earn-Out of $10.1 million was paid by Plaintiff. NetRiver received $8.1 million and $2 million was deposited in escrow as a holdback pursuant to the terms of the Escrow Holdback Agreement. P. Ex. 126, Recital D.

K. Post-Closing Events.

209. After closing, both Harris and Adam were retained by ByteGrid. Adam's employment with ByteGrid terminated on December 1, 2015. Adam TT: 2231:12-16. Harris' employment terminated at the end of May 2016. Harris Dep. 100:23-101:5.

210. Adam was initially employed in the same position he had occupied with NetRiver. In April 2015, he was promoted to Vice President and General Manager. Adam TT: 2231:17-232:6.

211. Mencia was not based at the Lynnwood Data Center and visited only a couple of times during Adam's employment. Adam TT: 22327-11.

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[18] The court notes that up to this time the only contacts that the Plaintiff had with Amazon personnel, beyond the surreptitious participation in the Vierra/Amazon meetings was a brief meeting with Mayer at a pub while he was visiting with his parents and the lunch the next day which allowed about 5 minutes with Hunter before Amazon legal terminated the meeting Other than the voluminous Amazon documents provided to the Plaintiff, (including documents relating to incidents on 9-4-2011, 6-2-12 (catastrophic failure) and 7-26-12 memorializing the SLA violations) no other attempts were made by Plaintiff to meet with or *communicate with* Amazon decision makers Plaintiff closed anyway on an antiquated and non-redundant Tier 2 facility with the concurrent commitment to spend millions of dollars on needed and known upgrades. See FF 212-214, below.

212. Based on Adam's position, he would have known about any improvements made to the Lynnwood Data Center. Adam TT: 2232:16-19.

213. An introductory dinner was held in September 2014 to introduce Mencia to Berche. Adam, Mencia, Berche, Klein, and Ken Parent attended the dinner. Before the dinner, Mencia told Adam not to mention any upgrade to Tier III. Mencia did not want to get into any specifics that would commit ByteGrid to any particular design. Adam TT: 2232:20-2233:19.

214. At the dinner, the ByteGrid representatives only spoke in generalities about improvements it was going to make to the Lynnwood Data Center. The ByteGrid representatives did not mention any upgrade to Tier III. Adam TT: 2233:20-2234:5. If ByteGrid's plans to upgrade to Tier III had been communicated to Berche, that would have caused Amazon to pause and may have changed Amazon's decision to exit the Lynnwood Data Center. Berche Dep. 36:9-40:10

215. Amazon had previously hoped that a good colocation vendor would have taken over the site from NetRiver. The discussions within Amazon had been that ByteGrid would be a better operator than NetRiver. Berche Dep. 34:24-35:17; P. Exs. 74, 103.

216. There was a meeting the next day at Amazon headquarters among Adam, Mencia, Ken Parent, and Tom Traugott, who was on Amazon's procurement team for Canada. Adam TT: 2234:6-12.

217. Based on the familiarity between Mencia and Traugott, Adam asked Mencia about his past relationship with Traugott. Mencia confirmed that ByteGrid had used Traugott as a resource before closing to understand Berche's personality. Adam TT: 2234:16-2235:13.

218. After closing and during the term of Adam's employment, ByteGrid took no action to address the SLA exposure items that were projected to cost $400,000. Adam TT: 2235:17-21; 2236:19-22.

219. After closing and during the term of Adam's employment, ByteGrid took no action to upgrade the Tier rating of the Lynnwood Data Center. Mencia told Adam that it was not in the budget; ByteGrid's other data centers were having trouble getting customers. Adam TT: 2236:2-18; 2236:23-2237:1. (See however, FF 105, 110, & 117 above demonstrating ByteGrid's poor business management and logistics practices in that regard)

220. Contrary to Sinder's testimony but consistent with Mencia's testimony (FF 117), ByteGrid never purchased any generators, UPSs, or floor PDUs nor were any capital expenditures made by NetRiver after closing for the Lynnwood Data Center. Adam TT: 2238:12-2239:2.

221. As of the October 2014 QBR (D. Ex. 159), the Lynnwood Data Center was still struggling and still did not have operational or design maturity. Amazon believed that ByteGrid needed to have stronger technical capabilities. Berche Dep. 42:10-44:8.

222. After closing, Adam was still the main contact with Amazon. The relationship between Amazon and ByteGrid deteriorated substantially after closing. Adam TT: 2242:1-8; 2244:12-2245:6.

223. On March 31, 2015, Amazon asserted a SLA credit claim against ByteGrid for $28M (this is NOT a typographical error) for alleged SLA violations occurring through the end of 2014 based on the failure to comply with Amazon's temperature and humidity requirements. D. Ex. 166. That claim is disputed by ByteGrid claiming corrupt data and an inaccurate

methodology used by Amazon. Amazon offered to retract its claims if ByteGrid waived its termination fee. That offer was refused by ByteGrid. Mencia TT: 850:7:851:23; 853:1-11.

224. After closing and before Amazon's March 31, 2015 claim, Amazon "issued tickets" to ByteGrid on the site environmental conditions of the Lynnwood Data Center. D. Ex. 170; Harris Dep. 76:15-77:12.

225. Berche was concerned about ByteGrid's SLA violations. Berche Dep. 185:18-186:10.

226. On July 29, 2015, Adam received an e-mail from Klein to come to Amazon's offices. D. Ex. 182. Adam did not know the purpose of the visit. Adam TT: 2245:8-23.

227. Berche and Mike Villani were at Amazon's office. Adam TT: 2245:24-2246:3. Adam was handed a Notice of Termination. The notice terminated Amazon's contract for convenience (not for cause) effective January 31, 2016. P. Ex. 166.

228. Drew Fassett, the Chief Revenue Officer from ByteGrid, participated in the July 29th meeting by conference call. In the meeting, the Amazon representatives stated that Amazon had changed strategy and was giving notice of termination. Fassett understood that the change in strategy was a decision by Amazon to move from an "out-sourced" model, using third party providers, to an "in-sourced" model, taking things in-house to its own facilities. Fassett believed that Amazon had built and was building a lot of facilities in the Portland, Oregon area. (Stipulation Regarding Expected Testimony from Drew Fassett, filed November 17, 2016.)[19]

229. Adam was visibly shaken when he was handed the Notice of Termination. Berche Dep. 56:24-57:5; Adam TT: 2248:23-2249:5.

[19] No reference to the Berche email was made.

230. Adam was not entirely surprised by the termination. Adam TT: 2249:3-5. Beginning in March 2015, Adam noticed a number of positions in Amazon's space had become vacant. Adam suspected that Amazon's credit claim of $28M and the adversarial relationship that had developed between Amazon and ByteGrid may have been a factor. Adam TT: 2250:1-10.

231. Adam was also told by Michael Duckett, the CEO of ByteGrid, that he was expecting to receive a notice of termination from Amazon and had thought that Adam and Harris were holding it. Adam TT: 2250:11:2251:14.

232. Adam sent a copy of the Notice of Termination to Ellsworth, Mencia, Duckett, Sinder, and Fassett by his e-mail of July 30, 2015. D. Ex. 184. Adam was not copied on the subsequent e-mails in this e-mail chain but those later e-mails illuminate further the discussions between Fassett and the Amazon representatives in the July 29, 2015 meeting and also ByteGrid's prior knowledge through Plakinger (FF 234, below) of Amazon's plans.

233. Fassett in his e-mail of July 31, 2015 (D. Ex. 184, p. 2) told the other ByteGrid representatives that Amazon was adamant at the July 29th meeting that there was nothing ByteGrid could do to change its decision. Fassett asked about price concessions. Amazon responded that it would not matter even if the Lynnwood Data Center had Tier IV with better pricing. The decision had nothing to do with ByteGrid or its service; Amazon had just changed strategy.

234. Duckett replied to Fassett by his e-mail of July 31, 2014 at 10:07 a.m. that he had been talking to Plakinger about how his team had been migrating "*compute and data*" to their Oregon data center for months. In a later e-mail that same day at 1:38 p.m., Duckett stated "*[a]s mentioned in our conversation yesterday, this has been confirmed to us by multiple sources (one*

inside Amazon) that this effort reduces the Amazon third party data center footprint in 20 markets (21 data centers) totaling almost 25MW of OT load." Amazon vacated the Lynnwood Data Center around February 15, 2016. Klein Dep. 82:20-23.

L. Amazon's Reasons for Terminating the MSA with Plaintiff.

235. Klein was designated by Amazon to testify on its behalf on the reasons for Amazon's decision to terminate the MSA with NetRiver. Klein Dep. 16:4-14. From January 2014 until January 2016, Klein was the colocation transaction manager for Amazon with responsibilities on a global scale for the termination of data center contracts. Klein Dep. 19:14-20:14. Klein had the responsibility of gathering input from various sources on the closure of data centers and then presenting it to management for final approval. Berche Dep. 49:11-50.4. The Amazon employees with whom Klein communicated in connection with his responsibilities included senior Amazon people, whose levels were higher than Berche's level. Berche Dep. 171:20-176:2.

236. As set forth above, a "colocation provider" is a data center where different companies house their servers. By contrast, a "leased facility" is a facility that Amazon owns and operates itself. Klein Dep. 22:6-13. Although Amazon owns the facility, Amazon's jargon nevertheless uses the term "leased facility." Klein Dep. 38:19-39:3. NetRiver is a colocation provider housing other customers besides Amazon. Klein Dep. 23:23-24:3.

237. The term "AZ" means availability zone. The "Seattle cluster" is a cluster of data centers representing multiple availability zones." Klein Dep. 28:2-13.

238. Amazon enters into contracts with colocation providers for data center space in an area requiring rack space without having to build a leased facility. Klein Dep. 24:4-11

239. In June 2014, Klein had been working on a paper called the Seattle Repositioning Strategy. P. Ex. 128. Klein Dep. 30:5-31:15.

240. Over the three years preceding 2014, Amazon had internal discussions about closing Seattle because Amazon built a data center in Boardman, Oregon. P. Ex. 128; Klein Dep. 32:12-33:7.

241. The number of new racks being deployed in Seattle went from 275 racks in 2010 to 89 racks in 2014. According to Klein, that trend showed tremendous progress in diverting demand away from Seattle. The diversion of racks away from the Seattle cluster went not only to Boardman, Oregon but also to Amazon's data centers in Virginia and San Francisco, California and was based on cost savings. P. Ex. 128; Klein Dep. 35:7-36:16.

242. Klein prepared a 2015 Site Exit Proposal which he circulated on July 23, 2014. D. Ex. 153. AWS, or Amazon Web Services, had originally penetrated regions with colocation deployments offering agility and flexibility to deploy in a market quickly with less capital. Many of the regions had now matured and AWS was *deploying large scale leased facilities*. It then became fiscally prudent to re-evaluate the initial colocation deployments. D. Ex. 153, page 1.

243. Klein's Site Exit Proposal sought approval to exit the Lynnwood Data Center, designated by Amazon as SEA031, for two primary reasons: first, engineering concerns and second, "*using Amazon's economies of scale to provide long term savings for Amazon Moving from SEA031 to PDX represents a $28.5M savings over a 10 yr NPV.*" As of May 2015, those two primary reasons were still the basis of the decision to exit the Lynnwood Data Center. D. Ex. 153, page 2; Klein Dep. 185:8-17.

244. The data centers on a site exit proposal are ranked according to engineering concerns and financial characteristics. Klein Dep. 41:7-16

245. The engineering concerns as outlined in Appendix 1 of the proposal notes that the Lynnwood Data Center experienced major outages over the last three years and although the site was trying to reduce those occurrences, the site featured major design flaws that would require substantial capital investment, most likely by Amazon. The site was built in an old REI building with an antiquated wood structural system.[20] Unless substantial capital investment was made to the facility, the Lynnwood Data Center would still be prone to extended outages. D. Ex. 153, p. 4.

246. On August 27, 2014, Klein sought approval for the execution of Addendum No. 9. D. Ex. 157. As of that date, no strategy had been approved by Amazon to exit the Lynnwood Data Center. Amazon needed the execution of Addendum No. 9 so it could continue to use its racks in the Lynnwood Data Center until an exit strategy had been approved by upper management. Klein Dep. 59:9-60:24.

247. The 2015 site exits were approved by Amazon senior leadership. Senior leadership included Jerry Hunter, Chris Vonderharr, Khozem, Carina Schneider, Joe Minarik and Berche. D. Ex. 162; Klein Dep. 61:15-63:6. Approval for the termination of the MSA had not yet occurred.

248. As of February 4, 2015, the decision to close the Lynnwood Data Center had not yet been made. Berche Dep. 48:14-49:9.

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[20] Klein, at trial, discussed internal Amazon emails relating to the *post-closing* considerations for exiting the facility at some **unspecified** point in the future, all of which were known, or should have been known, pre-closing, as a result of the sophisticated and extensive engineering and financial due diligence undertaken by the plaintiff Klein noted the following:

1. Significant engineering concerns;
2. Outages over the past three years;
3. Design flaws in the facility;
4. Fire risk; and
5. The use of wood materials "which is unprecedented even in third world countries."

249. By e-mails, dated June 30, 2015 and July 28, 2015, Klein sought formal sign off and approval for the delivery of the notice to terminate Amazon's contract with NetRiver. D. Exs. 178, 181; Klein Dep. 73:8-75:16.

250. Over six months later, by e-mail of February 12, 2016, Klein was explaining the process of site exit evaluation and was using the exit from the Lynnwood Data Center as an example. The primary evaluation was financial with input from engineering. D. Ex. 195; Klein Dep. 81:4-82:23.

251. The June 12, 2014 power outage was not a factor in Amazon's decision to exit the Lynnwood Data Center in 2016. Klein Dep. 119:11-21; 120:7-121:6; 184:4-20. The discussion of exiting the Lynnwood Data Center, together with other data centers, is reflected in many internal Amazon e-mails before June 12, 2014, including e-mails dated July 3, 2012 (P. Ex. 12); March 26, 2013 (P. Ex. 26); January 13, 2014 (P. Ex. 43); January 22, 2014 (P. Ex. 45); March 5, 2014 (P. Ex. 61); April 17, 2014 (P. Ex. 74); May 20, 2014 (P. Ex. 80); June 5, 2014 (P. Ex. 85).

252. Plaintiff argues that Berche testified that the decision to "pull the plug" was the June 12th outage. Berche Dep. 181:25-182:14. A review of that testimony, however, indicates that it was not responsive to nor in context of any pending question and the inference sought by Plaintiff on the approvals and timing necessary to issue the notice of termination conflicts with the other testimony of Berche and also more importantly with Klein's testimony and his specific chronology relative to termination.

253. Although Berche testified that the financial reasons for exiting the Lynnwood Data Center was only a "cherry on top" compared to the engineering reasons (Berche Dep.

20:17-21:6), Klein's testimony reflects the official Amazon reasons for exiting the Lynnwood Data Center. FF 235.

254. The engineering reasons for Amazon's termination of the Lynnwood Data Center were all disclosed by NetRiver to ByteGrid by the three QBRs and also by the Mark Egan audit. (P. Ex. 69). In fact, the list of recent incidents in Section 6 on page 3 of the audit report lists nine of the ten incidents described in Klein's e-mail of June 12, 2014. P. Ex. 99, p. 2. The 10th incident is the June 12th outage which was separately disclosed by NetRiver to ByteGrid.

255. The Court also weighs heavily the reasons provided by Amazon directly to ByteGrid itself when the Notice of Termination was delivered. Amazon's strategy had changed. Amazon, for cost saving reasons, was moving to an "in-sourced" model and was moving racks to its own data center in Boardman, Oregon. FF 228, 233. ByteGrid was well aware of that risk prior to closing the transaction. FF 94.

M. No Disclosure of Internal Amazon Discussions between the Vierras and Mayer.

256. Plaintiff surmises that Mayer disclosed to Adam the Amazon internal discussions about exiting the Lynnwood Data Center and that this information was then fraudulently concealed from Plaintiff.

(a) No Evidence of Any Disclosure.

257. There is no evidence, much less clear and convincing evidence, that Mayer told Adam of Amazon's internal discussions about exiting the Lynnwood Data Center. Both Adam and Mayer deny that Mayer told Adam about any such discussions. Adam TT: 2049:7-14; 2051:1-11; Mayer Dep. 182:20-183:6; 227:4-10; 229:14-16. Joe also testified that Mayer did not discuss with him any exit plans by Amazon. Joe TT: 1371:10-20.

258. Mayer would not have told Adam about any internal discussions about exiting the Data Center because that information was not something to be shared and also Mayer did not

believe a notice of termination would ever be delivered. Mayer Dep. 227:4-10.[21] Notwithstanding the internal discussions, there was no likelihood, according to Mayer, that Amazon would later serve a notice of termination upon NetRiver. Mayer Dep. 182:20-183:6; 227:4-10; 198:11-199:01. Mayer testified that Amazon was always preparing plans for exiting a data center; every data center had a plan. Mayer Dep. 51:2-12; 113:8-114:13. Every cluster of data centers had site exit proposals. Berche Dep. 18:13-22. This is how Amazon did business. Agility was paramount. The evidence established that Amazon "planned the planning."

259. As of June 12, 2014, Joe Minarik was questioning Klein about what he was asking Oz Morales to do in regard to his e-mail describing the past events at NetRiver. Minarik said that before escalating to Oz, Minarik wanted a plan to review regarding timeline, services impacted, where capacity was going, and how it was projected to be solved going forward. P. Ex. 99; Mayer Dep. 199:11-200:11.

260. There was no evidence in any event that Mayer had knowledge of the final decision made by Amazon in 2015 to exit the Lynnwood Data Center. He was replaced by Klein in early June 2014. At that point Mayer was out of favor with Amazon and out of the loop. At Amazon, your position and access to upper echelon management was a sign of power, prestige and upward momentum. He was shut out. He was effectively yesterday's news. Amazon, on this evidence, was not a sentimental institution with kindness as a corporate aspiration. It moved on from Mayer and never looked back.

(b) No Inference of Disclosure Because of Friendship Between Adam and Mayer.

261. Adam met Mayer in 2012 when Mayer became the procurement manager for NetRiver. They became close friends. Adam TT: 2044:2-5.

[21] As set forth herein, Mayer was cognizant of what disclosures were within the bounds of propriety. The evidence is lacking as to any departure from those boundaries.

262. Plaintiff argues that because of the close friendship between Adam and Mayer, Mayer must have disclosed Amazon's internal discussions to Adam. That inference is purely speculative and not supported by the evidence. Plaintiff invites the court to make the factual leap that because Mayer and Adam were close friends Mayer would have necessarily violated his employment responsibilities in significant fashion subjecting him to termination. This the court declines to do.[22]

263. Klein had no knowledge that Mayer disclosed to Adam any plans to exit the Lynnwood Data Center and, notwithstanding the close relationship between Mayer and Adam, Klein would have been surprised had Mayer disclosed that information because it was confidential. Klein Dep. 116:3-117:6. As well, Klein had no knowledge of any decisions made by Mayer that had been influenced by his relationship with Adam. Klein Dep. 147:4-7.

264. Although Berche replaced Mayer with Klein because he had concerns that Mayer's close relationship might have affected his judgment and that Mayer could be sharing confidential information (Berche Dep. 77:15-22; 83:3-6; 145:15-23), Berche did not testify that Mayer had in fact shared any information pertaining to Amazon's discussions of exiting the Lynnwood Data Center.

265. Plaintiff also speculates that Mayer must have disclosed to Adam the plans to exit the Lynnwood Data Center because Mayer had defied Berche by meeting with the ByteGrid representatives at Juanita Pub. Mayer however disagreed with Berche that he could not meet with ByteGrid representatives and Mayer believed such a social gathering was consistent with

[22] Mayer testified that he never believed that Amazon would actually *ever* leave the NetRiver facility given the complications inherent in such a departure. Mayer believed it was not until after he lost ownership of the facility that Klein initiated the actual exit from the facility in 2015, which was post-closing. Further, Mayer testified credibly that he never even hinted to Adam as to any potential exiting of the facility in the 2014 or 2015 time frame Finally, it was Mayer's understanding that the decision to actually exit the facility was made the day Adam received the termination for convenience (not cause) notice.

his employment responsibilities. Mayer Dep. 155:7-156:10. Moreover, the testimony from the ByteGrid representatives confirms that Mayer had not disclosed any confidential information to ByteGrid in any event, despite ByteGrid's desire that he would do so[23] FF 60.

266. The inference that Mayer must have disclosed internal Amazon information because of his friendship with Adam is also contrary to a number of internal Amazon e-mails from Mayer where it is apparent that Mayer is not acting as an advocate for Adam or NetRiver.

266.1 March 26, 2013 e-mail: ("*Initial feedback from ops and engineering is that [SEA 31 had] no glaring issues with the facility, but I should dig a little deeper.*"), P. Ex. 26.

266.2 January 22, 2014 e-mail: ("*Truth be told, we've had issues here. A lot of handholding and coaching provided by Amazon both Engineering and Ops For these reasons, we should seriously consider an exit.*"), P. Ex. 45.

266.3 April 15, 2014 e-mail: (the "*internal feeling is that [ByteGrid is] better suited to operate the facility than the current operator ((NetRiver)).*"), P. Ex. 74.

266.4 June 13, 2014 e-mail: ("*[Addendum No. 9] is essentially a month to month agreement with all the benefits above, including the sale of operations and assets to ByteGrid, which in theory should give us a more robust operating team and support.*"), P. Ex. 103.

(c) No Inference of Disclosure Because of Alleged Payoff.

267. Plaintiff argues that Mayer must have disclosed to Adam the internal Amazon discussions about exiting the Lynnwood Data Center because that was the quid pro quo for

[23] Plaintiff emphasizes the friendship between Adam and Mayer and argues that the relationship was so close that Mayer must have disclosed Amazon confidential plans to Adam However, and without equivocation, Mayer testified that he knew where the line was and he did not cross it and that he acted in a manner consistent with his job description. The court finds that his testimony was candid and truthful and he still maintained that position notwithstanding evidence indicating that Adam and Joe may have taken advantage of his good nature.

Mayer's trips to Hawaii. That inference requires the court to inappropriately speculate and engage in guesswork.

268. Mayer and his wife, Megan, had been going to Hawaii for vacations during most years. Mayer Dep. 43:22-44:5.

269. In March of 2013, Megan was pregnant and Joe had arranged for the Mayers to stay at the Royal Lahaina because Mayer was Adam's friend and Joe thought it would be a nice thing to do. Because Joe knew the owner of the Royal Lahaina, Mayer was able to book his lodging at the hotel at a discounted rate. Joe TT: 1374:11-1376:23; Mayer Dep. 119:10-119:24.

270. Joe paid for one night's lodging at the Royal Lahaina, which was later reimbursed by Mayer to Adam. Mayer Dep. 120:8-120:18.

271. Adam and Joe communicated to Mayer about the Hawaii trip by e-mails from March 9, 2013 to March 11, 2013. P. Ex. 23. Those e-mails do not reflect, as Plaintiff contends, that Joe was going to simply pay Mayer's lodging at whatever hotel he selected but instead Joe was telling Mayer about hotels where he had a connection with someone at the hotel.

272. The first e-mail sent by Adam to Mayer in P. Ex. 23 was sent on March 9, 2013 at 10:07 p.m. to Mayer's personal e-mail account. Adam also sent Mayer an e-mail, dated March 9, 2013 at 10:21 to Mayer's Amazon e-mail account. P. Ex. 24. Adam sent those e-mails to two different e-mail addresses because the first e-mail was personal and the second e-mail was for business. Adam TT: 2052:20-25. The two e-mails had nothing to do with each other. Mayer Dep. 122:14-123:1.

273. Plaintiff contends that the e-mail to Mayer about Hawaii was a payoff for Mayer's disclosure to the Vierras of Amazon internal confidential information and that internal

confidential information would have included Amazon's plans to leave the NetRiver facility.[24] There is no direct evidence of either contention. In the absence of evidence, Plaintiff argues that the Court should infer those alleged facts from the March 2013 e-mail chains. Mayer, in the top e-mail of P. Ex. 24, states that he would be happy to share current market initiatives, future plans, and how to help NetRiver win more business. Plaintiff focuses on Mayer's statement that "*there are some challenges that could come up if certain plans with Amazon were to come to fruition.*"

274. Plaintiff's argument, and the inferences it asks the Court to draw from this e-mail exchange, are contradicted by both the content and context of P. Ex. 24 and by the other evidence in this case.[25] Therefore, the Court declines to draw the suggested inferences, which would be unreasonable, conjectural and speculative.

275. Mayer's job with Amazon was in fact to share with NetRiver future plans that Amazon was in need of more space and then to determine whether NetRiver could accommodate that need. Klein Dep. 186:1-187:6; Mayer Dep. 104:12-109:2; 253:18-258:6; Berche Dep. 73:4-11; 155:15-157:14; 186:12-187:15.

276. Also Mayer's e-mail must be taken into context with Adam's beginning e-mail in P. Ex. 24. Adam expressly references a previous conversation between Adam and Mayer about

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[24] Plaintiff makes much of the fact that emails between the same parties were being sent to different email addresses in the same period The court finds nothing sinister in this chronology and is not the smoking gun Plaintiff avers that it is

[25] Section 20 of the Plaintiff's Proposed Findings of Fact and Conclusions of Law suggests the following language·

> The court finds that Mr Mayer was willing to violate Amazon's confidentiality requirements, and put his job in jeopardy, in order to assist the Vierras His willingness to do so was *clearly* a product of the "arrangement" he had with the Vierras – the passing of Amazon confidential information from Mayer to the Vierras in exchange for luxury Hawaiian vacations (emphasis added)

It is this type of conclusory leap in the absence of any solid evidence which typifies much of the Plaintiff's "where there is smoke there is fire" approach. The court finds that these various scenarios have equally logical alternative explanations on this evidence which demonstrates the lack of required evidence to prove these very serious claims.

"potential re-structuring of how we provide space to Amazon going forward." Adam in his e-mail told Mayer that he and Joe were open to the idea and had sought a conversation on how to better align NetRiver's contracts with Amazon.

277. The context of the exchange was Amazon's proposal to explore re-structuring NetRiver's contract to accommodate 120 additional racks Amazon wanted to place in Seattle under a more "frontloaded" structure where Amazon would lease space and also be responsible for its own power and associated equipment within that space. Joe TT: 1288:22-1289-2; 1368:11-1369.9. Those discussions continued until the first quarter of 2014 when NetRiver lost its bid to another Seattle data center. Adam TT: 2053:1-2057:8.

278. The competition between NetRiver and another Seattle data center for the 120 racks was also reflected in Mayer's internal Amazon e-mails, dated March 25th and 26th of 2013, or during the same time frame as Mayer's communications with Adam and Joe. Contrary to Plaintiff's argument that P. Ex. 24 creates an inference that Mayer was communicating with Adam or Joe about confidential exit plans, Mayer in his internal e-mail of March 26, 2013 states that *"SEA31 will look very interesting on pricing long term based on conversations with their CEO. I am in the process of working on a 50% reduction on cost per rack after 7 years into each work agreement"* P. Ex. 26.

279. Plaintiff also argues that the Court should infer from Mayer's e-mail, dated October 19, 2012 (P. Ex. 219), that Mayer promised that he would tell Adam about Amazon's internal plans to leave NetRiver and from that inference to further infer that Adam was aware of such plans prior to closing on June 30, 2014. The Court believes that Mayer's e-mail, when read and understood in its proper context, fails to substantiate those conjectural and speculative inferences. In that e-mail, Mayer states that *"when and if we internally were to decide to exit*

NetRiver, you would be the first to know." That e-mail however is in response to Adam's e-mail, where Adam is complaining about another Seattle data center spreading rumors that Amazon was pulling out of the Lynnwood Data Center. The reasonable interpretation of Mayer's e-mail is that NetRiver would be the first to know about a decision by Amazon to exit the Lynnwood Data Center before a third party would know. That interpretation is confirmed by the testimony of not only Adam and Mayer but also by Berche. Adam TT: 2059:16-22; Mayer Dep. 96:6-98:4; 100:12-21; Berche Dep. 140:23-142:1.

280. In the fall of 2014, Joe became aware that Mayer and Megan were having marital problems and offered to help pay for lodging in Hawaii for Mayer's family and Megan's family. Joe TT: 1406:5-25. The gift was a one-time event designed to help Mayer save his marriage. Mayer Dep. 237:1-11; 238:25-239:7; 242:8-18.

281. Joe paid $8,537.95 to Mayer to reimburse him for lodging expenses. P. Ex. 140. The payment was made by check drawn on BCA Holding Company's bank account. Joe had been doing work without pay for BCA Holding Company to wind up its affairs, including the sale of NetRiver, and was authorized to draw money from BCA's account for personal expenses. Joe TT: 1421:8-1422:6; 1429:5-1430:7.

282. The check was deposited by Mayer on November 21, 2014 into his bank account. P. Ex. 143.

283. Joe sent an e-mail, dated November 11, 2014 to Adam on the delivery of the check to Mayer. P. Ex. 138. Joe's e-mail states "[w]e can pay him off and move forward."

284. The use of the words "pay off" in Joe's e-mail is inelegant but is not the dynamic evidence Plaintiff suggests. Joe promised to reimburse Mayer for a portion of his lodging. He

did so.[26] Joe TT: 1406:5-1409: 24. Joe, in his testimony, characterized the "pay off" verbiage as an unfortunate way of identifying his promise. Joe TT: 1409:10-19. Joe's unrebutted testimony was that he did not ask Mayer to do anything for him, NetRiver, or DREAL in exchange for this gesture, nor did Mayer promise or offer anything in exchange. Joe TT: 1407:1-12; Mayer Dep: 245:2-245:23. Mencia saw Joe's e-mail in late 2014 and only said at that time that the words were "careless". The court agrees. Harris Dep. 84:23-86:1. No action was then taken by ByteGrid.

285. Plaintiff argues that Joe's e-mail describing a "pay off" is evidence that Mayer was being paid off for his services that he provided to NetRiver. Originally, Plaintiff in its complaint alleged that the payoff was in consideration of Mayer causing the execution of Addendum No. 9. Complaint, ¶ 58, 59. Zero evidence supporting that allegation was introduced. At trial, Plaintiff instead argued that the pay-off was in consideration of Mayer's disclosure to Adam of Amazon's internal plans to leave NetRiver.

286. The direct evidence is to the contrary. There was no *quid pro quo* for the partial reimbursement of Mayer's lodging. The reimbursement was made as a gift and to help the Mayers with their marital problems. Under any circumstances, the evidence of a *quid pro quo*: lodging for Amazon intelligence is speculative and the proof thereof was utterly lacking.

287. The lack of a *quid pro quo* is corroborated by Joe's e-mail to Megan Mayer, dated October 24, 2014 (P. Ex. 135). Long after Addendum No. 9 was signed or any disclosure of Amazon's exit plans are alleged by Plaintiff to have occurred before closing, Joe states that the *"only good hotel that I have a good contact with is where you stayed the last time "* The more

[26] At worst, if Joe's email is capable of being read one of two ways, even in proper context, the court would really have to work hard to interpret Joe's words as part of a nefarious scheme, when the opposite interpretation is just as likely.

reasonable inference from that e-mail is that Megan had talked to Joe before the date of his response and had asked Joe about contacts to arrange lodging at a discounted rate as he had done in 2013, not that she was claiming or expecting any *quid pro quo*. That claim or expectation would in any event have been more likely asserted by Mayer, not by his wife.

288. Also, it is undisputed that Mayer did not have the authority to cause the execution of Addendum No. 9. He had been removed by Berche in early June, 2014 from his role as procurement manager for NetRiver. He was replaced by Klein who told Adam that he was obtaining justification for the approval of Addendum No. 9. D. Ex. 145; Mayer Dep. 217:25-218:15; Joe TT: 1404:5-1405-20. The direct evidence also is that neither Mayer nor Klein, acting on their own, was authorized to approve Amazon's execution of Addendum No. 9. FF 246.[27]

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[27] The court has reviewed paragraph 45 of the Plaintiff's Proposed Findings of Fact and Conclusions of Law Therein Plaintiff states, in part:

> The Vierras bribed Mr Mayer to disclose confidential information

This very serious allegation is emblematic of the overreaching nature of Plaintiff's claim. There was simply no credible evidence, beyond conjecture, of any bribery. Merely because someone can allege something, and then type the words, and then contort vanilla facts into something sinister and felonious, does not make it so

In Washington State, Bribery (as germane to this matter) is criminalized thusly:

RCW 9A.68 060

Commercial bribery

(d) "Trusted person" means
(i) An agent, employee, or partner of another,
(ii) An administrator, executor, conservator, guardian, receiver, or trustee of a person or an estate, or any other person acting in a fiduciary capacity,
(iii) An accountant, appraiser, attorney, physician, or other professional adviser,
(iv) An officer or director of a corporation, or any other person who participates in the affairs of a corporation, partnership, or unincorporated association, or
(v) An arbitrator, mediator, or other purportedly disinterested adjudicator or referee
(2) A person is guilty of commercial bribery if
(a) He or she offers, confers, or agrees to confer a pecuniary benefit directly or indirectly upon a trusted person under a request, agreement, or understanding that the trusted person will violate a duty of fidelity or trust arising from his or her position as a trusted person,
(b) Being a trusted person, he or she requests, accepts, or agrees to accept a pecuniary benefit for himself, herself, or another under a request, agreement, or understanding that he or she will violate a duty of fidelity or trust arising from his or her position as a trusted person, or
(c) Being an employee or agent of an insurer, he or she requests, accepts, or agrees to accept a pecuniary benefit for himself or herself, or a person other than the insurer, under a request, agreement, or understanding that he or she will or a threat that he or she will not refer or induce claimants to have services performed by a service provider
(3) It is not a defense to a prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because the person had not yet assumed his or her position, lacked authority, or for any other reason

Based on the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

289. Plaintiff nonsuited Counts V, VI, XI, and XII of its Complaint by this Court's order, dated December 7, 2016. Those Counts are dismissed, by nonsuit.

290. The following are the Court's conclusions of law on the remaining counts of Plaintiff's complaint.

N. Count I: Claim of Fraudulent Inducement.

291. Plaintiff alleges in Count I that NetRiver, DREAL and the Vierras fraudulently induced Plaintiff to enter into the APA and the DREAL Agreement by "knowingly and falsely representing to Plaintiff that Amazon was a satisfied customer and by concealing material facts." Complaint, ¶¶ 67, 68.

(a) Elements of Fraud.

292. Plaintiff's claim for actual fraud requires Plaintiff to prove by clear and convincing evidence each of the following elements: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled. *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 367 (2003) (citing *Evaluation Research Corp.* v. *Alequin*, 247 Va. 143,148 (1994)); (citing *Bryant* v. *Peckinpaugh*, 241 Va. 172, 175 (1991)); and *Winn* v. *Aleda Constr. Co* , 227 Va. 304, 308 (1984).

(b) Standard of Proof: Clear and Convincing Evidence Required.

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(4) Commercial bribery is a class B felony

A class B felony is punishable in Washington State as follows confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine (RCW 9A 20 021)

293. Plaintiff must prove each and every element of its actual fraud claims by clear and convincing evidence. *State Farm Mut. Auto. Ins. Co.* v. *Remley*, 270 Va. 209, 218 (2005). Clear and convincing evidence is evidence that creates in the fact finder's mind a firm belief or conviction that plaintiff has proved the issue. *Thompson v. Bacon*, 245 Va. 107, 111 (1993) (providing the elements for actual fraud and stating that "clear and convincing evidence is such proof as will establish in the trier of fact a firm belief or conviction concerning the allegations that must be established.") (citing *Walker Agency, Inc. v. Lucas*, 215 Va. 535, 540-41 (1975)). This is a higher standard of proof in contrast to the ordinary "preponderance of the evidence" standard, under which lower standard the Plaintiff is not required to exclude every other reasonable explanation or possible source of the alleged injury. *United Dentists, Inc v Bryan*, 158 Va. 880, 887 (1932).

294. Where the evidence is in conflict on an essential element of fraud, the "clear and convincing" standard may not be satisfied. *See, e.g., Evaluation Research*, 247 Va. at 148 (jury verdict reversed on appeal because plaintiff failed to prove by clear and convincing evidence that defendant made a false representation); *Langman v. Alumni Ass'n of Univ. of Va* „ 247 Va. 491,503 (1994) (finding conflicting evidence on valuation of property); *Cohn*, 266 Va. at 582 (trial court affirmed due to insufficiency of evidence that defendant was aware of and had knowingly concealed alleged bias).

(c) Findings of the Existence of its Elements May Not be Based On Speculation, Conjecture, Inferences At Odds with Undisputed Evidence, or Inferences Upon Inferences.

295. Fraud is easy to allege, but because of the serious consequences and inherently pejorative nature of the charge, there is a heavy burden to plead and prove fraud. Virginia law requires that the circumstances of the fraud, particularly, the alleged misrepresentation itself, be alleged and proven with specificity.

> "The charge of fraud is one easily made, and the burden is upon the party alleging it to establish its existence, not by doubtful and inconclusive evidence, but clearly and conclusively. Fraud cannot be presumed. It must be proved by clear and satisfactory evidence. It is true that fraud need not be proved by positive and direct evidence, but may be established by facts and circumstances sufficient to support the conclusion of fraud. But whether it be shown by direct and positive evidence, or established by circumstances, the proof must be clear and convincing, and such as to satisfy the conscience of the chancellor, who would be cautious not to lend too ready an ear to the charge."

Malbon v. *Davis*, 185 Va. 748, 756 (1946) (quoting *Redwood v Rogers*, 105 Va. 155, 158 (1906)).

296. "While fraud may be shown by circumstantial evidence, it must have a logical and substantial basis and cannot rest upon vague suspicion and surmise." *French v. Beville*, 191 Va. 842, 856 (1951). "Like presumptions, inferences are never allowed to stand against ascertained and established facts.... an inference which the plaintiff says would impose liability upon the defendants must give way to the positive, uncontradicted evidence which exonerates the defendants from liability and demonstrates that the inference is based upon speculation and conjecture." *Owens v. DRS Automotive Fantomworks*, 288 Va. 489, 496-97 (2014) (quoting *Ragland v. Rutledge*, 234 Va. 216, 219 (1987)).

297. An inference must be based on facts disclosed by the evidence, and may not be founded on another inference, series of inferences, or a mere guess. *Lugo v. Joy*, 215 Va. 39, 42-43 (1974); *Virginia Elec. & Power Co. v. Courtney*, 182 Va. 175, 184 (1943); *see also Conrad* v. *CSX Transp , Inc* , 824 F.3d 103, 109 (4th Cir. 2016) (finding a series of inferences on inferences insufficient to establish defendant employer's knowledge of plaintiff's protected activity; "unsupported inferential leaps are no substitute for actual evidence.").

(d) ***Plaintiff's Claims of Affirmative Fraudulent Misrepresentations.***

298. Plaintiff alleges fraud because of the statements by the Vierras that Amazon was a satisfied customer and the alleged statements that Amazon was committed to a long term

occupancy of the Data Center, that Amazon would not leave the Lynnwood Data Center, and that Amazon would not likely exercise its right to terminate its contract for convenience. Plaintiff's claims fail for a number of reasons.

299. First, fraud must involve "a misrepresentation of a present or a pre-existing fact, and ordinarily cannot be predicated on unfulfilled promises or statements regarding future events." *SuperValu, Inc. v. Johnson,* 276 Va. 356, 367-68 (2008); *Yuzefovsky v. St John's Wood Apartments,* 261 Va. 97, 111–12 (2001)(citing *Soble* v. *Herman,* 175 Va. 489, 500(1940)); *see also Lumbermen's Underwriting Alliance v. Dave's Cabinet, Inc.,* 258 Va. 377, 382 (1999); *Patrick v. Summers,* 235 Va. 452, 454 (1988).

300. Likewise, a mere expression of opinion, or an expectation as to future events is not fraud. *Abi-Najm v. Concord Condo. LLC*, 280 Va. 350, 362 (2010) (quoting *Lloyd v Smith*, 150 Va. 132 (1928) ("[A]n action based upon fraud must aver the misrepresentation of present pre-existing facts, and ordinarily be predicated on unfulfilled promises or statements as to future events.")); *Sales v. Kecoughtan Hous. Co.*, 279 Va. 475, 481-82 (2010).

301. The Virginia Supreme Court has also repeatedly held that " commendatory statements, trade talk, or puffing, do not constitute fraud because statements of this nature are generally regarded as mere expressions of opinion which cannot rightfully be relied upon, at least where the parties deal on equal terms." *Lambert v. Downtown Garage, Inc* , 262 Va. 707, 713 (2001) (quoting *Tate v. Colony House Builders*, 257 Va. 78, 84 (1999)), *cited and quoted in White v. Potocska,* 589 F. Supp. 2d 631, 659 (E.D. Va. 2008); *see Kuczmanski v Gill*, 225 Va. 367, 370 (1983) ("The statement that the house was in excellent condition was mere sales talk. Expressions of opinion such as this do not constitute fraud.").

302. The statement that Amazon was a satisfied customer cannot be the basis of fraud. Nor is there is any clear and convincing evidence in any event either that the statement was in fact false when made or that the Vierras had any knowledge of such falsity. The QBRs, in fact, disclose that Amazon had graded NetRiver as exceeding its requirements for responsiveness and customer relationship. FF 75, 83. That statement is also supportable based on the numerous contract extensions executed between Amazon and NetRiver between 2008 and 2014 that ByteGrid itself found to be compelling evidence of Amazon's satisfaction. FF 103. Plaintiff's argument appears to be that the statement was false because of the termination by Amazon of its contract over a year later. The Vierras however did not purport to state whether Amazon would be satisfied in the future after the Lynnwood Data Center had been operated for 13 months by Plaintiff and after Plaintiff elected not to make the improvements as set forth in FF 219-221 and after Amazon recognized the enormous cost savings as set forth in FF 243.

303. Even assuming that the Vierras made the statements alleged by ByteGrid that Amazon was committed to the long term occupancy of the Data Center, that Amazon would not leave the Lynnwood Data Center, and that Amazon would not likely exercise its right to terminate its contract for convenience, those statements are not representations of an existing fact but are either opinions or statements of future events.

304. The claims also fail because Plaintiff did not rely in any event on those statements. ByteGrid had received the Amazon QBRs which ByteGrid knew were more accurate and reliable sources about Amazon's level of satisfaction than the views expressed by NetRiver. FF 86. ByteGrid would only move forward with the transaction if ByteGrid could validate those representations directly from Amazon. ByteGrid in fact did validate those representations directly from Amazon. FF 51.

305. The claims also fail because no clear and convincing evidence proved the other elements of fraud described in more detail below in connection with Plaintiff's claim for fraudulent concealment.

(e) ***Plaintiff's Claims of Fraudulent Concealment.***

306. Plaintiff argues that Mayer, because of his close friendship with Adam, must have disclosed to Adam the internal discussions within Amazon about exiting the Lynwood Data Center and that NetRiver then fraudulently concealed that information. There is however not clear and convincing evidence that Mayer disclosed those discussions to Adam. FF 257. The evidence affirmatively shows instead that Mayer did not disclose those discussions both because Mayer knew that it was Amazon internal confidential information which should not be disclosed and also because Mayer did not in any event believe a decision to exit the Lynnwood Data Center would ever be made. FF 258. There was also no evidence that Mayer later even had knowledge of Amazon's final decision in 2015 to exit the Lynnwood Data Center. Mayer had been replaced by Klein in early June 2014. FF 260, 16.

307. Plaintiff also alleges that the Vierras failed to disclose Berche's opinions in his June 12th e-mail. For the reasons stated in the Court's finding of facts, it is likely that the contents of Berche's e-mail were in fact disclosed. In any event, there is no clear and convincing evidence that the contents had not been disclosed. FF 199.

308. Even if the contents of the June 12th e-mail had not been disclosed to ByteGrid and assuming also that Mayer had disclosed to Adam the internal Amazon discussions about leaving the Lynnwood Data Center, Plaintiff's claim in any event fails because of the utter lack of clear and convincing evidence of the required elements of fraudulent concealment.

(i) ***No Clear and Convincing Evidence of a Duty to Disclose.***

309. A duty to disclose does not generally arise when parties are engaged in an arm's length transaction. *Costello v. Larsen,* 182 Va. 567, 571-72 (1944); *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 829 (4 Cir. 1999).

310. To impose a duty on NetRiver to disclose either Berche's June 12th e-mail or the alleged knowledge by Adam of Amazon's internal discussions to leave the Lynwood Data Center, Plaintiff must prove by clear and convincing evidence **both** that (1) NetRiver knew that ByteGrid "was acting on the assumption that [Berche's opinions in e-mail and Amazon was not discussing leaving the Lynnwood Data Center] does not exist" **and** (2) that NetRiver's failure to disclose such facts "involves deliberate nondisclosure designed to prevent another from learning the truth". *Van Deusen v. Snead*, 247 Va. 324, 328-29 (1994) (quoting *Spence v. Griffin,* 236 Va. 21, 28 (1988)); Metrocall *of Del., Inc. v Cont'll Cellular Corp.*, 246 Va. 365, 374 (1993); *Allen Realty Corp. v. Holbert*, 227 Va. 441, 450 (1984).

(x) ***No Knowledge by NetRiver of ByteGrid's Assumptions.***

311. Berche's June 12, 2014 email was hyperbole and consistent with the Amazon ethos described in Footnote 3, above. Ultimately and while the argument is seductive, the email is irrelevant insofar as Amazon's ultimate actions are concerned. Even so, ByteGrid failed to prove by clear and convincing evidence that NetRiver knew ByteGrid was acting on the assumption that Berche's three opinions in his June 12th opinions did not exist. In fact the evidence at trial shows the opposite.

312. In regard to Berche's opinion of the unreliability of the Lynnwood Data Center, NetRiver provided ByteGrid with numerous incident reports of past power outages and also, more importantly, the Amazon QBRs that disclosed that Amazon had graded NetRiver's services

in this area to be unreliable. Mark Eagan's audit report provided by NetRiver also extensively described the past incidents and the single points of failure.

313. In regard to Berche's opinion that all the options were on the table, NetRiver also provided to ByteGrid the contracts between Amazon and NetRiver which revealed all of Amazon's options: Amazon could have allowed its contract to expire in July and refused to engage in further negotiations on Addendum 9; it could have terminated the contract for convenience; and it could have declared a breach of the contract on account of the disclosed June 12th power outage. None of those options were concealed.

314. In regard to Berche's opinion that changes needed to be made, ByteGrid already knew that substantial changes, in the range of $10M to $20M, were needed to be made and were planned (and budgeted) to be made by ByteGrid after closing in order to increase the reliability and tier rating of the Data Center. ByteGrid, in fact, had expressly commissioned CH2M Hill to review the Egan audit report and prepare a budget to upgrade the facility to Tier III. FF 104, 105, 106.

315. The lack of proof that NetRiver knew that ByteGrid was acting on the assumption that Berche's three opinions in his June 12th opinions did not exist is also corroborated by the following facts that both NetRiver and ByteGrid had knowledge of before June 30, 2014:

315.1. The June 12th power outage itself was fully disclosed.

315.2. Berche sent his e-mail before he knew about the cause of the outage. FF 140.

315.3. NetRiver told ByteGrid that Amazon was very upset about the outage. FF 149.

315.4 The outage lasted only one minute in contrast to the catastrophic power outage on July 2012 lasting 8 hours and which NetRiver had disclosed to ByteGrid. FF 133 and 69.

315.5 The credit claim for the outage was only $399.01. FF 153.

315.6 In the 3:00 p.m. conference call on June 12th, James Reid laughed about the outage and Tyler Hannah was happy after discovering the cause and that the fix had been done the same day. Berche said nothing further about the outage or his opinions during that call or at any time thereafter. FF 142.

315.7 Berche's e-mail was consistent with his combative style and Amazon's past reactions to power outages. FF 136.

315.8 ByteGrid's primary concern expressed to NetRiver after the outage was whether it would adversely impact the execution of Addendum No. 9. FF 150, 162, 163.

315.9 Mencia eavesdropped on the Amazon conference call scheduled for June 17th. Nothing further was said about Berche's e-mail or his opinions. Mencia, after listening to the whole conversation, reported back to Adam that he was comfortable about how NetRiver was working with Amazon. FF 160.

315.10 Before closing, Adam received Klein's confirmation that Amazon would proceed with Addendum No. 9; that fact was reported to ByteGrid and the closing date was then discussed. FF 166.

316. A major reason that NetRiver had no knowledge of ByteGrid's assumptions about either the June 12th e-mail or the lack of Amazon discussions about exiting the Lynnwood Data Center was the structure of both the letter of intent and the APA. Both agreements provided that Plaintiff would close the purchase of the Lynnwood Data Center even if Addendum No. 9 was never signed and Amazon vacated the Lynnwood Data Center in July 2014. FF 40, 41, 206; Conclusion of Law ("CL") 343 below.

(y) ***No Clear and Convincing Evidence of Any Deliberate Nondisclosure Designed to Prevent ByteGrid from Learning the Truth.***

317. Nor was NetRiver engaging in any deliberate nondisclosure "designed to prevent another from learning the truth." In *Van Deusen v. Snead, supra*, the diversionary action by the defendant was clear. The seller of the house put new mortar in cracks around the foundation and placed materials in front of the cracks to prevent a prospective purchaser from detecting the defects in the house. Not only is there a complete absence of any evidence, much less clear and convincing evidence, supporting the finding of any deliberate scheme by NetRiver to prevent ByteGrid from learning the truth, there is affirmative evidence of the opposite fact. NetRiver disclosed both the June 12th power outage itself and the fact that Amazon was very upset about the outage. NetRiver even facilitated ByteGrid's clandestine participation, at great risk, in its regularly scheduled conference call with Amazon on Tuesday mornings, including the conference call with Amazon on June 17th after the power outage. FF 160. Those disclosures and actions are inconsistent with any intent to deliberately conceal Berche's opinions in his June 12th e-mail or Amazon's internal discussions to exit the facility even assuming that Adam had knowledge of the same. FF 200-203.

318. Plaintiff argues that ByteGrid wanted to participate in the June 18th conference call with Amazon about the June 12th outage but that Adam reported back that Amazon would not agree to ByteGrid's participation. That decision however was Amazon's decision, not NetRiver's deliberate decision to prevent ByteGrid from learning the truth. It is not disputed that NetRiver tried to provide ByteGrid access to Amazon and, in fact, went "above and beyond" in facilitating access. FF 33.

319. ByteGrid could have, in any event, contacted Amazon directly to gauge the impact of the power outage, just as Ellsworth had directly contacted Jason Mayer to obtain the

consent. ByteGrid elected not to contact Amazon because it "*could be weeks if not months to get another consent and [ByteGrid] made a business judgment to move forward*" to close by the end of June, 2014. FF 125, 126.

320. Plaintiff cites Restatement (Second) of Torts, ¶ 551 in support of its argument that NetRiver had a duty to disclose. Similar to *Van Duesen*, that Section requires proof of NetRiver's knowledge that the disclosure of Berche's opinions would have induced ByteGrid to not close the purchase of the Lynnwood Data Center. Subsection (1) applies however only if there is also a duty to exercise reasonable care under the circumstances described in subsection (2). Plaintiff argues that that duty exists under subsection (2)(b) because NetRiver knew that disclosure of Berche's e-mail was necessary to make NetRiver's statements that Amazon was a satisfied customer not misleading. The Restatement's comment to subsection 2(b) explains that a statement may be misleading if it is partial or incomplete or if the statement is ambiguous and could have two different interpretations, one of which is false. In either case, the Restatement's cross references to Sections 527, 528, and 529 clarifying whether a statement is misleading must be decided in the context of all the information provided to the other party.

321. In this case, the statement that Amazon was satisfied is factually supported by the numerous expansions and addenda to the MSA since 2008 and also by Amazon's scores in the QBRs where in certain areas, such as going the extra mile, NetRiver exceeded Amazon's requirements. Even assuming ByteGrid is entitled to rely on 'puffery" by NetRiver that Amazon was a satisfied customer, that puffery was fully explained by the other scores in the QBRs, as recognized by Sheth. FF 86. At the time of closing Plaintiff's eyes were wide open. Any blinders placed thereupon were self-imposed and deliberate.

322. Plaintiff argued in its opposition to NetRiver's motion to strike that NetRiver "made partial disclosures of information that they thought would give a good view of Amazon's relationship with NetRiver, and did not disclose information they thought would show that relationship in a bad light." TT: 1896:11-20. The Court disagreed then and disagrees now. Other than the June 12th e-mail, there is no evidence of any information not being disclosed to Plaintiff. Moreover, the disclosure of the Amazon QBRs and the Mark Egan audit cannot be considered only a selective disclosure that gave a "good view" of Amazon's relationship; those documents showed instead substantial problems that were directly related to the June 12th power outage and also Amazon's opinions that the Lynnwood Data Center was not reliable because of past power outages. The Court notes that the Egan audit report (P. Ex. 69) reviewed by ByteGrid disclosed the same engineering and design limitations of the facility, the single points of failure, and nine of the ten prior incidents, noted by Keith Klein in his e-mail of June 12, 2014 justifying closure of the facility. P. Ex. 99, p. 2. The 10th incident is the June 12th outage that was separately disclosed to ByteGrid.

323. Nor is the alleged failure of NetRiver to disclose the June 12th e-mail evidence of fraudulent concealment. Assuming, arguendo, that the email was not disclosed, the non-disclosure of a fact must be coupled with diversionary actions by the defendant which show a deliberate intent designed to prevent another from learning the truth. "Obviously, the concealment itself cannot constitute one of these diversionary actions—then there would always be a duty to disclose." *White* v. *Potocska*, 589 F.Supp.2d at 642, *quoting Bank of Montreal,* at 829.

(z) ByteGrid Contractually Agreed There Was No Duty to Disclose.

324. A separate and independent reason why there was no duty to disclose imposed on NetRiver is contractual. ByteGrid and NetRiver agreed that there was no duty to disclose. On

October 28, 2013, before NetRiver provided any due diligence information to ByteGrid, they executed the Confidentiality and Non-Disclosure Agreement. (D. Ex. 204). That agreement acknowledged NetRiver and ByteGrid's exploration of a possible transaction and ByteGrid was required to accept the sanctity of the "Confidential Information" provided to ByteGrid and the concurrent obligations contained therein as a condition precedent to receiving any such information. Section 1 broadly defined the "Confidential Information" that NetRiver "may" disclose to ByteGrid. Section 8 provided that although NetRiver would endeavor to include relevant material information in the Confidential Information, ByteGrid understood that NetRiver was not making any representation or warranty as to the completeness of that information and that ByteGrid *"specifically waives and [NetRiver] expressly disclaims all representations or warranties concerning the Confidential Information "*

325. Ellsworth executed the agreement on behalf of ByteGrid and agreed that he had no separate understanding of its terms other than what was stated in the agreement. Ellsworth TT: 174:17-180:1.

326. Nor was there any evidence of any subsequent agreement between NetRiver and ByteGrid creating a duty to disclose the June 12th e-mail. The APA does not contain any such requirement nor any provision or warranty that NetRiver had provided ByteGrid with all material information. According to Ellsworth, a seller would never in any event agree to such a provision. Ellsworth TT: 171:2-172:1.

327. ByteGrid's waiver of claims under the agreement is clearly inconsistent with ByteGrid's argument in this case that the information provided to ByteGrid as part of its due diligence was not complete.

(ii) No Clear and Convincing Evidence of the Nondisclosure of Material Facts.

328. Plaintiff has also not proved by clear and convincing evidence that the statements in Berche's June 12th e-mail were either existing facts or were in any event material to ByteGrid. In order to be "material," an allegedly misrepresented or concealed fact must be proven to "substantially affect the interests of the person alleged to have been defrauded." *Packard Norfolk, Inc. v. Miller*, 198 Va. 557, 563 (1956).

329. Berche's statements were only the opinions by one manager in Amazon's procurement department and within its management hierarchy. Berche's seniority was below the seniority of Amazon management responsible for making the final decision on whether to terminate or extend a contract a year later. FF 14-19. Mencia knew, for example, that Oz Morales was a very senior person at Amazon and above Berche in seniority. Mencia TT: 722:3-10. Berche's opinions did not reflect Amazon's official views; those views instead were reflected in the QBRs that had been provided to ByteGrid. The evidence at trial showed that multiple layers of Amazon approval were required to either extend NetRiver's contract or to terminate it. FF 235, 246, 249.

330. The opinions of Berche on the reliability of the Lynnwood Data Center were in any event disputed by both Klein and Mayer. Berche did not have any direct experience with the Lynnwood Data Center. He was focused on the data centers in Japan and never visited the Lynnwood Data Center. FF 138.

331. The e-mail itself was not Berche's final opinion; he asked Klein to set up a meeting to discuss the outage. Berche's e-mail was more of an open statement of potential future possibilities; the meeting on the outage had not yet been held. By the time of the June 12th conference call that Berche requested, the cause of the outage had been discovered and nothing

further was said by Berche or by others about his opinions in the June 12th e-mail. FF 137, 142, 160, 161.

332. ByteGrid focuses only on the June 12th e-mail in a vacuum and ignores (or conveniently disregards) other information made available to ByteGrid on and after June 12th and before June 30th. The court does not evaluate the evidence in a silo. Rather the court looks to the entirety of the evidence presented holistically. The determination of materiality is made on the basis of the "total mix of information made available". *Atocha Ltd. P'ship v. Witness Tree, LLC*, 65, Va. Cir. 213, 222 (Fairfax County 2004). That total mix of information includes the undisputed facts described in Conclusion of Law 312 above.

333. Indeed, the total mix of information ByteGrid knew about between June 12th and June 16th was sufficient for ByteGrid to omit a discussion about the June 12th power outage in its internal meeting on June 16, 2014 two weeks before closing. FF 156. ByteGrid is populated with smart people possessing sophisticated data center expertise. If they were truly worried about this they would have, at minimum, talked about it. They did not. Moreover, as of June 16th, the information then available to ByteGrid did not include the more important information communicated to ByteGrid on June 23rd that Amazon was in fact proceeding with Addendum No. 9. FF 168.

(iii) No Clear and Convincing Evidence that the Alleged Nondisclosure of the June 12th E-Mail was Made Intentionally and Knowingly With Intent to Induce Action.

334. Plaintiff also failed to establish by clear and convincing evidence that NetRiver or the Vierras intended to conceal a material fact. "[U]nlike fraud for affirmative misrepresentations, concealment requires a showing of intent to conceal a material fact." *Bank of Montreal v. Signet Bank, supra* at 827. *Virginia Natural Gas Co. v. Hamilton*, 249 Va. 449,

455 (1995) (finding no evidence that employee "intentionally and knowingly" made a false statement or concealed a material fact).

335. Even if Plaintiff proved that NetRiver negligently or recklessly did not disclose Berche's e-mail, that evidence would still be insufficient to establish the intentional concealment of a fact. *Bank of Montreal v. Signet Bank, supra* at 827 (stating that "reckless nondisclosure is not actionable.").

336. There was no evidence presented by Plaintiff showing an intent to conceal a material fact. The evidence at trial in fact shows the opposite. FF 200-203; CL 317.

337. The only evidence Plaintiff asserts is the alleged failure by NetRiver to disclose Berche's June 12th e-mail. Even assuming the June 12th e-mail was not disclosed, that single nondisclosure does not constitute evidence of an intent to conceal. CL 323.

(iv) No Clear and Convincing Evidence of ByteGrid's Reliance on the Assumption that Berche Did Not Have the Opinions Stated in his June 12th E-mail or that There Were No Internal Amazon Discussions About Exiting the Lynnwood Data Center.

338. Plaintiff also failed to prove by clear and convincing evidence that it reasonably relied on the assumptions that Berche did not have the opinions stated in his June 12th e-mail or that it relied on the fact that there were no Amazon discussions about exiting the Lynnwood Data Center even assuming that NetRiver had knowledge of the same. Plaintiff's claim of reliance fails for two independent reasons: First, the evidence affirmatively shows that Plaintiff in fact did not rely on such assumptions. Second, the evidence clearly establishes that Plaintiff, a sophisticated entity which was owned by sophisticated entities and advised by sophisticated people, was well versed and experienced in the purchase of like assets, and performed extensive due diligence, including extralegal activities which, as a matter of law, precludes any such reliance.

(x) ***No Reliance in Fact by ByteGrid on its Assumptions.***

339. The QBRs and the NetRiver incident reports provided to ByteGrid extensively showed NetRiver's historical power outages and Amazon's negative scores on the reliability of the Lynnwood Data Center. The negative scores however did not concern ByteGrid because ByteGrid committed to upgrade the reliability of the Lynnwood Data Center by substantial capital expenditures after closing. FF 104-108. Plaintiff's eyes were wide open in that regard. Berche's opinions would then be just that: opinions consistent with the personality previously described. It was bluster and no significance to them is assigned by the court. As admitted by Ellsworth, issues with the power service were in any event only one factor in ByteGrid's due diligence. FF 90.

340. The scores also did not concern ByteGrid because Mencia believed that Amazon was partially at fault for the negative scores and because Amazon's 100% availability requirement was not in any event realistic. FF 91, 92, 113.

341. ByteGrid closed primarily in reliance on the fact that notwithstanding the June 12th power outage Addendum No. 9 was still being negotiated after the outage and before closing. FF 88. 102, 103.

342. ByteGrid closed the purchase of the Lynnwood Data Center at a discounted rate so as to establish a foothold on the West Coast, to gain access to Amazon as a customer with an eye towards expanding Amazon's racks eastward within its vacant or underutilized data centers, and to include Amazon's revenue in its financial statements for the second quarter of 2014, avoiding a technical default of its loan covenants with Key Bank. FF 99-101.

343. A major reason that there is no clear and convincing evidence of reliance by ByteGrid on its assumption that Amazon was not internally discussing exiting the Lynnwood Data Center or that Berche did not have the opinions stated in his June 12th e-mail is that both the

letter of intent and the APA provided that Plaintiff would close the purchase of the Lynnwood Data Center even if Addendum No. 9 were never signed and Amazon vacated the Lynnwood Data Center in July 2014. FF 40, 41, 206. The risk that Amazon would not execute Addendum No. 9 was addressed by the fact that the "Earn-Out Purchase Price" would then not be paid. FF 98. Although only the 120 racks in Addendum No. 3 were expiring in July 2014, both NetRiver and ByteGrid knew that it would not be possible for Amazon to only allow the 120 racks to expire. FF 25, 64.

344. Nor are the terms of the APA to be disregarded in an action claiming fraud to induce Plaintiff to enter into the APA. *Bank of Montreal v. Signet Bank, supra,* at 829 (stating "[M]erely because the fraud in the inducement makes the contract voidable, however, it does not make the terms irrelevant. . . The provisions in the Participation Agreement may affect tort concepts of whether Signet had a duty to disclose and whether BMO's reliance was reasonable"); *Accord, Persaud Companies, Inc. v. IBCS Group., Inc.*, 425 F. App'x 223, 226-27 (4th Cir. 2011) (unpublished) (plaintiff not fraudulently induced to execute bond agreement because plaintiff could "not establish, by clear and convincing evidence, that it reasonably relied on the brochure or any oral statements [by defendant that the bond premium was refundable] because the Agreement clearly stated that the bond premium was nonrefundable.")

345. Plaintiff nevertheless also relies on the APA in its fraudulent inducement claim and argues that Section 10.4(b) of the APA entitles Plaintiff to rely on all the oral representations made by NetRiver notwithstanding ByteGrid's due diligence. That argument fails for two reasons. First, the language of Section 10.4(b) only applies to the "representations, warranties, and covenants of each party set forth in [the APA]", not to all alleged oral representations that Plaintiff is now claiming it relied upon. Second, because the alleged oral representations by

NetRiver were in fact not included in the APA, the integration clause of the APA, Section 11.14, precludes reliance on those representations.

346. Similarly, Joe's testimony that the representations in the APA were intended to induce Plaintiff to execute the APA (Joe TT: 1260:3-12) only excuses the reliance requirement as to those representations, not the alleged oral representations not included in the APA because Ellsworth admitted they would not be or were not acceptable to NetRiver. Ellsworth TT: 212:13-214:20; 216:7-217:10.

(y) No Reliance Under the Law by ByteGrid on its Assumptions.

347. In any event, ByteGrid's substantial, sophisticated and extensive investigation and various types of due diligence (including the use of specialized third parties contracted by ByteGrid and Altpoint to augment their due diligence) makes any reliance on the alleged nondisclosure of the June 12th e-mail unreasonable as a matter of law. (assuming that any substantive significance is placed upon said email which, in reality, the court does not do for the other reasons set forth herein) Where one person seeks to hold another person liable for fraud, he must show that he relied on the representations of that person. *Harris v. Dunham,* 203 Va. 760, 767 (1962). However, where the person makes "his own investigation, whether complete or not, into the subject matter at hand" he may not say that he relied on the representations of another. *Id*

348. Certainly, the evidence is this case affirmatively and conclusively established that the plaintiff's investigation was substantial, complex, multi-layered, multi-disciplinary and comprehensive.

349. As stated, ByteGrid is a sophisticated purchaser and operator of data centers who, in turn, is owned by a sophisticated group of investors. (Altpoint) and, as admitted by its own Complaint, undertook an extensive pre-transaction due diligence investigation. ByteGrid knew

the importance of due diligence evidenced by both the legitimate and surreptitious efforts undertaken to glean all possible information about the data center and its largest customer, Amazon. To claim that it was duped, truly, on this evidence, strains credulity. The Plaintiff undertook a high risk/ high reward proposition. Ultimately it turned out to be a bad business decision. The blame, however, is Plaintiff's alone.

350. Given the undisputed fact that ByteGrid knew about the June 12th power outage and that Amazon had been very upset about the outage, ByteGrid could have directly contacted Amazon and requested direct confirmation from Amazon of its reaction to the outage and the impact on Amazon's continued occupancy of the Lynnwood Data Center. ByteGrid elected not to obtain that direct confirmation from Amazon because it would have taken too long. FF 125.

351. Alternatively, ByteGrid could have insisted that Amazon either delete its right to terminate its contract for convenience or ByteGrid would not agree to close the purchase of the Lynnwood Data Center. Its decision to close without either contacting Amazon or attempting to renegotiate the then existing draft of Addendum No. 9 is a risk that ByteGrid assumed. ByteGrid instead wanted to close by the end of the second quarter of 2014 to include Amazon's revenues and avoid a technical default of its loan covenants. FF 100, 128, 169-173.

352. NetRiver's statement that Amazon was a satisfied or "good" customer cannot be said to have diverted ByteGrid from further inquiry and examination. There was "no guarantee" as to what Amazon would do in the future. A termination for convenience clause is the antithesis of a guarantee. ByteGrid was "permitted to interview" Amazon and learn directly from Amazon its reactions to the June 12th outage. ByteGrid "undertook an extensive examination" of NetRiver's relationship with Amazon but "did not pursue it as far as prudence might have

required of [it]" by directly confirming with Amazon its reaction to the June 12th outage because that would have taken too long.

(v) No Clear and Convincing Evidence of Any Damages Proximately Caused by the Alleged Failure to Disclose the Opinions in Berche's June 12th E-mail or Amazon's Internal Discussions About Exiting the Lynnwood Data Center.

353. Plaintiff also failed to prove by clear and convincing evidence that it suffered any damages that were proximately caused by any failure of NetRiver or the Vierras to disclose either Berche's opinions in his June 12th e-mail or that Amazon was having internal discussions about exiting the Lynnwood Data Center even assuming that Adam had knowledge of the same.

354. "In order to recover under a cause of action for fraud, a plaintiff must prove damages which are caused by his detrimental reliance on a defendant's material misrepresentation." *Murray v. Hadid*, 238 Va. 722, 730-31 (1989); (citing *Winn* v. *Aleda Constr. Co.*, 227 Va. 304, 308 (1984). A person asserting a claim of fraud must prove that the misrepresentation forming the basis of the claim caused damage to the one relying on it. *Evaluation Research*, supra at 148. "The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event and without which that event would not have occurred." *Cohn*, supra at 369. The evidence proving a causal connection must be "sufficient to take the question out of the realm of mere conjecture, or speculation, and into the realm of legitimate inference." *Id citing Beale v. Jones*, 210 Va. 519, 522 (1970) (quoting *Hawkins v. Beecham*, 168 Va. 553, 561 (1937). Inferences drawn from evidence that shows "merely a possibility" of a causal connection between the alleged tort and Plaintiff's harm will not suffice to establish causation, even under a mere preponderance standard. *Norfolk & W. Ry Co. v. Wright*, 217 Va. 515, 520 (1976).

(x) Plaintiff's Causation Argument.

355. Plaintiff conjures causation by supposing that had ByteGrid known about the June 12th e-mail or that Amazon was having internal discussions about exiting the Lynnwood Data Center, it would not have purchased the facility. The theory ignores the history of the transaction and is an attempt to legally justify the remorse of the buyer. The argument appears logical except for the fact that many of the decisions by the Plaintiff and others with control over the Plaintiff were high risk. Hoping that the west coast presence would spread eastward with Amazon coming along for the ride, the evidence is this case clearly demonstrates that the Plaintiff had its eye on that prize and was either willingly blinded by all the other risky attributes of the transaction or voluntarily elected to press forward hoping for a jackpot that would nationalize their business, fill up empty data centers and avoid a Key Bank default. Even assuming that argument is legally valid, there is no clear and convincing evidence supporting it. The undisputed fact is that a three person investment committee at Altpoint controlled the investment decisions made by ByteGrid. There was no evidence presented at trial however that showed what the investment committee would have done had it known about the allegedly concealed information.

356. In fact, Sheth, the primary contract between ByteGrid and Altpoint, testified in regard to the June 12th e-mail that *"considering the timing and* ***with no other information available just looking at this*** *– we would have likely killed the deal "* Sheth Dep. 267:21-268:2. Sheth further testified however that they would have investigated further to obtain other information, not simply killed the deal.

> *"We would have continued to have discussions and understand what Amazon meant by this, what the issues were, what options were on the table, how they could be addressed, resolved, how we could potentially structure for it, whether we could renegotiate the documents so that if whatever issues they were concerned with were addressed, that we would also eliminate and be more adamant about eliminating the termination for convenience language, but this in*

and of itself given the situation, the timing, we would have walked away from the deal."

Sheth Dep. 268:7-20.

357. In fact, further investigation was made by ByteGrid. Sheth was told that Amazon was very upset about the outage and then later became content and appeased with NetRiver's resolution. FF 149. The fact that Amazon had calmed down was confirmed by ByteGrid because of the continued engagement by Amazon relative to Addendum No. 9. FF 88, 102, 103, 168.

358. In any event, Plaintiff's argument that had it known about the June 12th e-mail or the internal Amazon discussions, it would not have purchased the Lynnwood Data Center is speculative and not at all supported by the evidence. In fact, a better case can be made that the Plaintiff was proceeding ahead with this transaction notwithstanding the red flags.[28]

359. Plaintiff's argument that it would not have closed the purchase of the Data Center had it known about the June 12th e-mail or the internal Amazon discussions is an allegation of "fraud in the abstract". Plaintiff must establish by clear and convincing evidence that its damages were proximately caused by and flow directly from the allegedly concealed information. Plaintiff cannot do so for two independent reasons. First, there is no evidence that Amazon's departure from the Lynnwood Data Center 13 months after closing is in fact causally connected to the information allegedly concealed. Secondly, there is no evidence that such departure would have in any event been reasonably foreseeable by NetRiver as a consequence of its alleged fraud. Plaintiff wants the court to view the facts narrowly by looking at the transaction itself without appreciating the Plaintiff's ultimate goal.

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[28] See *White* v. *Potocska*, 589 F.Supp.2d 631 (E.D. Va. 2008) holding that there was no causal link between the concealed information and the departure of the client In fact, there was evidence that the client had terminated its relationship because of its dissatisfaction with the accounting firm now under the control of the buyer.

The Lynwood facility was not an end unto itself. It was the first step of a long term gambit. The Plaintiff knew of Amazon's plans to construct stand-alone data centers (The leased facilities) as well as the ability to terminate the MSA for convenience. Plaintiff knew of the deficiencies in the facility and received a discount. The whole idea was that Lynwood presented a connection to Amazon whether or not the Lynwood transaction was ultimately successful or profitable. That was the plan. With or without the Lynwood facility, Plaintiff still desired Amazon racks in its other facilities on a national scale. This fact alone explodes the causation claim.

The term "proximate cause" or "legal cause" incorporates two separate tests. First, did an act or omission in fact cause a particular event under a "but for" test? "An act or omission is not regarded as a cause of an event if the particular event would have occurred without it." Prosser and Keaton, Torts ¶ 41 at 265 (5th ed. 1984). Second, for policy reasons, should a defendant's responsibility extend to an event which is remote or is not reasonably foreseeable? Prosser and Keaton, Torts ¶ 43 at 280.

(y) No Causal Connection to Any Claimed Damages.

360. Amazon's decision to terminate the MSA with Plaintiff was based on neither the June 12th outage nor Berche's opinions about that outage. The evidence clearly shows that there were instead two primary reasons for Amazon's termination of the MSA, neither of which were caused by the June 12th outage.

361. One reason was the fact Lynnwood Data Center was an aging Tier II facility located in an old REI building. That design and the infrastructure led to a number of power outages which occurred before the June 12th outage and which was fully disclosed to ByteGrid. FF 65-92. The second reason was the substantial cost savings of $28.5 million on a net present value basis over a 10 year period which would be realized by moving Amazon's racks from the

Lynnwood Data Center to Amazon's own data center in Boardman, Oregon. FF 243. Neither the June 12th power outage nor Berche's opinions about that outage caused Amazon's termination for convenience. FF 251-255.

362. The lack of any causal connection between facts allegedly concealed by NetRiver and Amazon's termination of the MSA with Plaintiff is also evident because Plaintiff had operated the Lynnwood Data Center for 13 months after closing. Both Mayer and Berche believed that ByteGrid would have been a better operator with more access to capital to upgrade the facility. FF 215.

363. The explanation of the engineering problems of the Lynnwood Data Center in Klein's Site Exit Proposal specifically mentioned the need for capital upgrades. That capital would most likely be expended by Amazon. FF 245.

364. ByteGrid originally planned, and told NetRiver of its plan, to spend that capital to substantially upgrade the Lynwood Data Center to a Tier III facility. FF 104-108. Had those plans been promptly communicated to Amazon after closing, Amazon may have changed its decision to exit the Lynnwood Data Center. FF 214. But, again, that assertion is as speculative as Plaintiff's claim alleging Amazon would have pulled out.

365. Instead, the October 2014 QBR shows that the Lynnwood Data Center continued to struggle. FF 221.

366. The evidence also shows that NetRiver kept Amazon's business notwithstanding that it was a Tier II facility because it "went the extra mile and was very responsive." FF 24. That all changed after Plaintiff purchased the facility. The relationship between ByteGrid and Amazon instead deteriorated. FF 222.

367. In fact, Amazon demanded that Plaintiff pay $28M as a credit claim in April 2015. Amazon claimed a failure of ByteGrid to comply with Amazon's temperature and humidity requirements. Before that claim, but after closing, Amazon had issued SLA claims on the site environmental conditions. FF 223-225. Amazingly, ByteGrid negotiated and obtained a price reduction of $670,000.00 based, in part, on the potential exposure to SLA claims that it estimated would cost between $350,000.00 and $400,000.00. ByteGrid's promised immediate installation of the ultrasonic humidification units costing about $200,000 and air handler units for the UPS rooms costing $200,000 may have prevented Amazon's credit claim. FF 111, 158, 218. A $400,000 fix to avoid a $28M claim and a failed relationship would have represented a kept promise and would be the smart play to keep the biggest customer in ByteGrid's world happy. ByteGrid was not smart.

368. An overriding reason for the lack of any causal connection between facts allegedly concealed by NetRiver and Amazon's departure from the Lynnwood Data Center is that Amazon properly and pursuant to contractual terms terminated its contract for convenience, not for cause. The termination by Amazon for convenience is causally connected only to ByteGrid's decision to assume that risk. FF 128. Because of that assumed risk, ByteGrid was able to purchase the Lynnwood Data Center at price *much less than its other data centers and less than other comparable data centers in the market.* FF 99, 100.

369. There are a number of possible reasons why Amazon decided to terminate its contract. However, Plaintiff bears the burden to prove by clear and convincing evidence that its damages flow from a reason for which NetRiver is solely responsible. *Page v. Arnold*, 227 Va. 74, 81 (1984) ("In order for a plaintiff to establish a prima facie case of negligence, the evidence

must show more than that the accident resulted from one of two causes for one of which the defendants are responsible and for the other of which they are not.") *See also Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685-86 (7th Cir. 1990) (Finding no liability where plaintiff-investors "knew they were assuming a risk" and "the materializing of that risk caused their loss" and stating, "No social purpose would be served by encouraging everyone who suffers an investment loss... to pick through offering memoranda with a fine-tooth comb in the hope of uncovering a misrepresentation."); *White*, 589 F.Supp.2d at 645. NetRiver is not the Plaintiff's insurer against loss caused by Amazon's proper and contractually negotiated invocation of a termination for convenience. In this case, NetRiver has not been proven responsible for the termination of the contract between Amazon and ByteGrid.

370. The evidence shows instead that Amazon would have terminated its contract with Plaintiff whether or not NetRiver had disclosed the alleged concealed information unless ByteGrid after closing had fulfilled its promises to upgrade the Lynnwood Data Center, as it indicated it would do.

(z) Claimed Damages Were Not in Any Event Foreseeable.

371. A second independent reason why the losses suffered by Plaintiff were not proximately caused by any (alleged and unproven) concealment of information by NetRiver is that even if such damages are deemed to be casually connected under a "but for" test, the damages are in any event too remote and are not reasonably foreseeable.[29] In *Spence v Am. Oil*

[29] During the first week of law school most students learn about *Scott v Shepherd*, and close attention is paid to Justice Blackstone's dissent. This case is popularly known as the lighted squib case. Since 1773, tort law recognizes damages for direct and immediate wrongs and disfavors mediate or consequential damages. (See CL 436 below) In this case, between closing and termination, the *novus actos interveniens* (the breaking of the chain) occurred so often that the chain was subsumed by superseding events. Aside from Amazon's probable reasons for terminating, (FF 361) there are also many other reasons why Plaintiff experienced losses such as not paying attention to the realities of the transaction and due diligence, poor business decisions and planning, and broken promises regarding upgrades The plaintiff lit a squib Then threw it on itself There is no foreseeability relative to defendant's actions here

Co., 171 Va. 62, 69 (1938), a tort case, the alleged sale by a service station of gasoline containing water resulted in the drainage of the gas from the car, the overflow of the drained gas onto the street, and then the gas catching fire which then destroyed the plaintiff's car. Although plaintiff's damages would not have occurred but for the sale of the contaminated gasoline, the Court held that "the alleged tortious act, if a cause at all, was the remote — not the proximate — cause of the injury." *Accord, Yuzefovsky*, 261 Va. at 111–12 ("assault by the third party was remote in time from the execution of the contract and, thus, the damages for which Yuzefovsky sought recovery under the theory of fraud did not directly result from the fraudulent inducement to enter into that contract"); *Smith v. Prater*, 206 Va. 693, 700 (1966) quoting *Scott v Sims*, 188 Va. 817, 818 (1949); ("In order for the defendant's negligence to be a proximate cause of the injury, it is not necessary that the defendant should have foreseen the precise injury that happened. It is sufficient if an ordinary, careful and prudent person ought, under the circumstances, to have foreseen that an injury might probably result from the negligent act.")

372. An ordinary, careful and prudent person could not have foreseen that the result of the failure to disclose Berche's e-mail would have resulted in Amazon terminating for convenience a contract that Amazon had, after closing, negotiated and entered into with Plaintiff and after Plaintiff operated the Lynnwood Data Center for 13 months.

373. The Court concludes that the evidence is insufficient to discharge the Plaintiff's burden of proof of actual fraud by clear and convincing evidence. **The Court grants judgment for Defendants on Count I and dismisses Count I with prejudice.**

O. <u>Count III: Fraud to Obtain the Earn Out Payment</u>.

374. Plaintiff alleges in Count III of its complaint that NetRiver, Joe, and Adam falsely represented to Plaintiff that Amazon intended to remain in the Lynnwood Data Center on a long term basis, they withheld material information from Plaintiff contained in Berche's June 12th e-

mail, and represented that Amazon was a satisfied long term customer while knowing that Addendum No. 9 was executed and negotiated in bad faith. Complaint, ¶ ¶81, 82, and 83.

375. For the reasons stated above for Count I, Plaintiff's fraud claims under Count III fail.

376. The claims also fail because there is no evidence that Addendum No. 9 was either executed or negotiated in bad faith. Plaintiff's argument that Mayer somehow was responsible for the execution of Addendum No. 9 ignores that Mayer was replaced with Klein in early June 2014 before the execution of the addendum. FF 16. Execution of the addendum moreover required more and higher levels of approval than merely the approval of the Amazon procurement manager for the Lynnwood Data Center. FF 246.

377. The claims also fail because Count III is based on the APA. Section 11.14 of the APA expressly states that the APA and the documents executed in connection therewith "supersede all negotiations, agreements and understandings (both written and oral) among the parties with respect to the subject matter of this Agreement." There are no provisions in the APA that contain a representation that Amazon is a satisfied customer intending to remain in the Lynnwood Data Center on a longer term basis.

378. The claims also fail because of the economic loss doctrine. The Virginia Supreme Court has cautioned against "turning every breach of contract into an actionable claim for fraud." *Richmond Metropolitan Authority v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 560 (1998). Accordingly, under Virginia's "economic loss" rule, "losses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts." *Filak v. George*, 267 Va. 612, 618 (2004) (affirming sustaining of demurrer for fraud claim under economic loss rule). "The economic loss rule preserves the

bedrock principle that contract damages are limited to those within the contemplation of the parties in striking the bargain expressed in their contract." G. Ware & W.R. Snow, *The Law of Damages in Virginia,* ¶ 9.1 (2008). In certain circumstances, a plaintiff may show both a breach of contract and a tortious breach of duty. *Foreign Mission Bd. v. Wade*, 242 Va. 234, 241 (1991). However, "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Id.* In order to determine whether a claim is subject to the restrictions imposed by the economic loss rule, a court must first determine the nature and source of the duty allegedly violated. *Richmond Metro.*, 256 Va. at 557-58. If the duty does not exist absent an agreement establishing that duty, then it is a duty based in contract, and the economic loss rule applies. *Id.*

379. In *Richmond Metro.*, the plaintiff alleged fraud based on alleged misrepresentations in the defendant's payment submissions and concealment of its noncompliance with the contract. The circuit court sustained the defendant's demurrer, and the plaintiff appealed. On appeal, because "each particular misrepresentation by [the contractor] related to a duty or an obligation that was specifically required by the [c]ontract," the Virginia Supreme Court concluded that the contractor's misrepresentations did not give rise to a cause of action for actual fraud. *Id.* at 559; *see also Dunn Const Co v. Cloney*, 278 Va. 260, 267-68 (2009). A claim for fraudulent inducement based on a duty assumed by contract can survive the economic loss rule, but only if the promisor had no intention to perform the duty at the time of contracting. In that situation, the claim is premised on a false statement of the promisor's present intent, because when a party "makes a promise, intending not to perform, his promise is a misrepresentation of present fact, and if made to induce the promisee to act to his detriment, is actionable as an actual fraud." *Colonial Ford Truck Sales, Inc. v. Schneider*, 228 Va. 671, 677

(1985); *see also Abi-Najm v. Concord Condo,* 280 Va. at 363 (finding that plaintiff alleged that defendant made statements with a present intention not to perform). Conversely, where a fraud in the inducement claim is based on a specific undertaking in a contract, the source of the duty allegedly breached is the contract, and a tort claim for fraud will not lie. *Dunn Const*, 278 Va. at 267-68 (finding a contractor's false statement that a wall had been repaired to induce novation of contract and payment not actionable as fraud, source of duty was the contract); *Augusta Mutual Ins. Co v Mason*, 274 Va. 199, 208 (2007) (showing false statement that flue had been inspected not actionable as fraud, source of duty to report condition of flue was the contract); *Richmond Metro.*, 256 Va. at 560 (finding no claim for fraud in the inducement when the record failed to show that the contractor did not intend to fulfill its contractual duties when it entered into the agreement).

380. The Court concludes that the evidence is insufficient to discharge the Plaintiff's burden of proof of actual fraud by clear and convincing evidence. **The Court grants judgment for Defendants on Count III and dismisses Count III with prejudice.**

P. <u>Counts II and IV: Claimed Conspiracy to Commit Fraud</u>.

381. In Count II of its complaint, Plaintiff alleges that NetRiver, DREAL, Joe and Adam entered into a conspiracy to fraudulently misrepresent and omit material information to induce Plaintiff to close the APA and DREAL Agreement. Complaint, ¶ 74.

382. In Count IV, Plaintiff alleges that NetRiver, Joe and Adam entered into a conspiracy to fraudulently cause the $10.1 million earn out payment to be paid to NetRiver. Complaint, ¶ 88.

383. There however can be no conspiracy to do an act which the law allows. *Werth v. Fire Adjust. Bureau*, 160 Va. 845, 855 (1933). Because Plaintiff's fraud claims under Counts I and III fail for the reasons stated above, so, too, do its conspiracy claims. *See Waytek Elect.*

Corp v. Rohm & Hass Elect. Mat. LLC, 459 F.Supp.2d 480, 492 (W.D.Va. 2006) (holding conspiracy claim failed for same reasons fraud claim failed).

384. Plaintiff's claims also fail because Joe and Adam were agents of NetRiver and DREAL. Compl. ¶¶ 17-18, 25. In order to prevail, Plaintiff must prove a combination of two or more persons, "to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Heckler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 389 (1985). "The gist of the civil action of conspiracy is the damage caused by the acts committed in pursuance of the conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use unlawful means." *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 28 (1993) (quoting *Gallop v. Sharp*, 179 Va. 335(1942)). The plaintiff must establish a civil conspiracy claim by clear and convincing evidence. *Pierce Oil Corp. v Voran*, 136 Va. 416, 118 S.E. 247, 251 (1923).

385. Plaintiff cannot maintain its conspiracy claims due to the intra-corporate immunity doctrine, which provides that "there must be two persons to comprise a conspiracy, and a corporation, like an individual, cannot conspire with itself." *Nedrich v. Jones*, 245 Va. 465, 473 (quoting *Bowman v. State Bank*, 229 Va. 534, 541 (1985)). This is because when an agent, director, or employee acts in the scope of his employment, i.e., acts as an agent of the corporation, then only a single entity exists – that is, the corporation. *Softwise, Inc. v. Goodrich*, 63 Va. Cir. 576, 577-78 (Roanoke 2004) (citing *Fox v. Deese*, 234 Va. 412, 428 (1987)).

386. As the evidence establishes that Joe and Adam acted as agents of NetRiver, the claim for civil conspiracy cannot stand, because NetRiver cannot conspire with itself. Similarly, because Joe and Adam were agents of DREAL, then the claim for conspiracy with respect to the DREAL Agreement cannot stand, because DREAL cannot conspire with itself. Plaintiff

attempts to plead around this rule by alleging that the Vierras derived a personal benefit from the alleged conspiracy. The Virginia Supreme Court has not recognized the "independent benefit" exception." *E.g., Tomlin v Int'l Bus Machines Corp.*, 84 Va. Cir. 280, 2012 WL 7850902 at *8 (Fairfax 2012) (sustaining demurrer "because Virginia does not recognize the 'independent personal stake' exception to the intra-corporate immunity doctrine"); *Little Professor Book Co v. Reston North Point Vill. Ltd. P'ship.*, 41 Va. Cir. 73, 79 (Fairfax 1996); *Foster v Wintergreen Real Estate Co.*, 81 Va. Cir. 353, 2010 WL 11020447, at *6 (Nelson 2010).

387. Even if Virginia recognized the exception, the Complaint does not allege, nor does the evidence establish, that NetRiver and DREAL derived any benefit other than receipt of the purchase price and the "earn out" portion of it. Nor does the Complaint allege, or the evidence show that the agents of those entities, Joe and Adam, exceeded the scope of their agency or that any benefit to them was separate and distinct from any benefit they derived from the transaction as members and noteholders of the defendant LLCs. Indeed, the Complaint alleges that "Adam and Joe, **as members of NetRiver and/or DREAL**, personally profited . . ." Comp. ¶ ¶76 & 77 (emphasis added). Therefore, the Complaint fails to state and the evidence fails to establish facts sufficient to support the independent personal stake exception, even if it were applicable. *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 225 (4th Cir. 2004); *Ashco Intl, Inc. v. Westmore Shopping Ctr. Assocs.*, 42 Va. Cir. 427, 1997 WL 1070624 at *7 (Fairfax 1997) (declining to apply "independent personal stake" doctrine when agent acted within scope of agency even "[a]ssuming that the independent personal stake exception applies").

388. Plaintiff argues that the intra-corporate immunity doctrine does not apply because Mayer is part of the conspiracy. However, Plaintiff cannot rise above the pleading regarding the

conspiracy counts, and the complaint only alleges that "NetRiver, Joe and Adam entered into a secret conspiracy" Compl. ¶¶ 51, 88 (not Mayer). Further there is no evidence of unlawful means or purposes on Mayer's part.

389. The Court concludes that Plaintiff has failed to establish an actionable conspiracy and that its evidence in support of such a conspiracy to defraud falls short of that required to carry its burden. **The Court grants judgment for Defendants on Counts II and IV and dismisses Counts II and IV with prejudice.**

Q. Count VII: Claimed Breach of Representation on Absence of Certain Changes.

390. Plaintiff alleges in Count VII that NetRiver breached Section 4.9 of the APA. In that section NetRiver represented that since the Latest Balance Sheet, there was no event, occurrence, development, or circumstance or fact that could reasonably be expected to have a Material Adverse Effect. Material Adverse Effect is defined on page 8 of the APA to be any state of facts, change, event, effect or occurrence which "is or may be reasonably likely to be materially adverse to the business, financial condition, results of operations, prospects, properties, assets or Liabilities of the Business or the Assets taken as a whole". Plaintiff alleges that Berche's June 12th e-mail is such a Material Adverse Effect.

391. All of the representations made by NetRiver in the APA were made as of the date of the execution of the APA on June 30, 2014, not as of June 12, 2014. Ellsworth TT: 347:5-9. The representations do not purport to address facts arising after June 30, 2014.

392. In the negotiation of the APA, Joe made it abundantly clear that NetRiver was not agreeing to any representations as to future actions by other third parties over which NetRiver had no control. The exercise by Amazon of its right to terminate for convenience was a risk that Plaintiff willingly assumed. Ellsworth TT: 216:7-217:10.

393. The June 12th power outage was not a Material Adverse Effect. The *de minimis* SLA claim asserted by Amazon and agreed to by NetRiver was $399.01. That amount was credited against the July 1, 2014 invoice to Amazon and the parties continued on as before. FF 153.

394. Berche's opinions in his June 12th e-mail also cannot have been reasonably expected by NetRiver to be materially adverse as of June 30, 2014 for the reasons stated in Conclusion of Law 315.

395. The definition of "Material Adverse Effect" is limited to a material adverse effect on either (1) the business, financial condition, results of operations, prospects, properties, assets or Liabilities of the **Business** or (2) the **Assets** taken as a whole. The term "Business" is defined on page 2 of the APA as the business as conducted by NetRiver on June 30, 2014 and does not include a material adverse effect on the business that had been conducted by Plaintiff 13 months after June 30, 2014 when Amazon later terminated for convenience its contract with Plaintiff it had negotiated and entered into with Plaintiff after closing.

396. The term "Assets" is defined on page 2 of the APA and cross references Section 2.1. That section, together with Section 2.2, defines Assets as the assets reflected on NetRiver's latest balance sheet and thereafter acquired before closing. Section 2.2 specifically defines assets as including the Assumed Contracts identified in Schedule 2.2(d) (P. Ex. 232). Page 7 of that schedule under Customer Contract in turn references only the MSA, Work Order No. 1, and Addenda 1 through 8 in paragraphs 4 through 13. It does not reference the MSA as amended by Addendum No. 9 that was entered into with Plaintiff after closing and was later terminated by Amazon for convenience after Plaintiff had operated the Lynnwood Data Center for 13 months. See also, Conclusion of Law No. 416-423 below.

397. There was no breach by NetRiver of Section 4.9 of the APA.

398. There were no damages proximately caused by the claimed breach nor were there any damages proven with reasonable certainty. See Conclusions of Law 443-458 below.

399. Plaintiff failed to establish breach of contract, causation and damages, and the Court **grants judgment on Count VII of Plaintiff's Complaint in favor of Defendants and dismisses Count VII with prejudice.**

R. Count VIII: Claimed Breach of Representation on Absence of Legal Proceedings.

400. Plaintiff alleges in Count VIII that NetRiver breached Section 4.10 of the APA. There, NetRiver represented that there are no Proceedings pending, or to Seller's Knowledge, threatened against NetRiver by or before any Governmental Entity. The term "Proceedings" is defined on page 9 of the APA and means actions, suits, claims, charges, reviews and investigations and legal, administrative or arbitration proceedings. The term "Governmental Entity" is defined on page 6 of the APA and means the government or any court, department or agency of any government. Seller's "Knowledge" is defined on page 7 of the APA and means the actual knowledge of Joe Vierra, Paul Harris and Adam Vierra. Plaintiff alleges that Section 4.10 is breached because of Berche's June 12th e-mail.

401. Even assuming that Berche's June 12th e-mail was a pending or threatened claim against NetRiver, (it was not) there was no evidence presented at trial that either Joe, Adam, or Harris had any actual knowledge as of June 30, 2014 that that claim would be "by or before a Governmental Entity". Their knowledge was limited to the assessment by Amazon of a credit claim of $399.01 that was applied on July 1st against Amazon's invoice. Similarly, there was no actual knowledge as of June 30, 2014 that that e-mail would result in the termination 13 months later by Amazon *for convenience* of a contract it entered into with Plaintiff after closing.

402. There is no breach by NetRiver of Section 4.10 of the APA.

403. There were no damages proximately caused by the claimed breach nor were there any damages proven with reasonable certainty. See Conclusions of Law 443-458 below.

404. Plaintiff has failed to establish breach of contract, causation and damages, and the **Court grants judgment on Count VIII of Plaintiff's Complaint in favor of Defendants and dismisses Count VIII with prejudice.**

S. Count IX: Claimed Breach of Representation on Seller Contracts.

405. Plaintiff alleges in Count IX that NetRiver breached Section 4.12 of the APA. In that section NetRiver represented:

> "The Assumed Contracts are legal, binding and enforceable in accordance with their respective terms with respect to Seller and with respect to each other party to such Assumed Contracts . . .The Seller has not received any written notice, and has no other reason to believe, that any party to an Assumed Contract intends to, or has made any threat to, cancel, not renew or otherwise terminate such Assumed Contract."

406. Berche's e-mail cannot by itself be considered either a notice of termination or a threat to terminate Amazon's contract in the future. As Berche stated in his e-mail, he wanted to discuss the June 12th outage further in a meeting to be held that day. Berche himself called his e-mail more of "an open statement". FF 137.

407. More importantly, as of June 30, 2014, NetRiver had no reason to believe that Berche's e-mail reflected Amazon's intention or was a threat to terminate, cancel or not renew the Amazon Contract. Amazon and NetRiver, as of June 30, 2014, were still actively negotiating Addendum No. 9 for the renewal of Amazon's contract. By then, the June 12th incident had been closed, Amazon had accepted the explanation and ameliorative steps taken surrounding the brief outage and had moved on, with a credit taken by Amazon of less than $400. CL 315.

408. Even assuming it was a threat, once Addendum No. 9 had been further negotiated and executed by ByteGrid two months after closing, NetRiver had no further responsibility for

the termination of the Amazon Contract. The term "Assumed Contract" in Section 4.12(b) is defined on page 2 of the APA which cross references Section 2.2(d) of the APA. That section, in turn, references Schedule 2.2(d). P. Ex. 232. At page 7 of that schedule under "Customer Contracts," the Amazon Contract is referenced in paragraphs 4 through 13 as the Master Services Agreement, Work Order No. 1 and Addenda 1 through 8. Addendum No. 9 is **not** listed. ByteGrid could have included Addendum No. 9 in the list, and stated in the APA that if Addendum No. 9 is executed in the form of Exhibit H attached to the APA that the parties had agreed to, the MSA, as amended by Addendum No. 9, would then be an Assumed Contract; but it did not do so.

409. Even if ByteGrid had included that language, that proviso still would not have worked. Amazon and ByteGrid after closing negotiated material changes to the form of Addendum No. 9 that had been originally attached as Exhibit H (D. Ex. 209) to the APA. FF 131.

410. Plaintiff argues nevertheless that the catchall definition of "Assumed Contracts" includes the Amazon contract, as amended by Addendum No. 9, citing Section 2.2(d). That section states: "All Contracts and all rights that Seller may have under any and all Contracts pertaining to the Business, including without limitation those Contracts set forth on Schedule 2.2(d)." Plaintiff then argues that the catchall term "Contracts" must include the "Amazon Contract" as modified by Addendum No. 9, because the definition of "Amazon Contract" on page 2 of the APA includes "any subsequent addenda". The term "Amazon Contract" is not used however anywhere in the APA except in the definition of "Amazon Renewal Contract", also on page 2 of the APA, which in turn is used only in the definition of "Earn-Out Consideration" on page 4 of the APA. Those terms and definition merely provide that NetRiver

earns the $10.1M if the Amazon Contract Renewal in the form of Exhibit H is executed before August 31, 2014. It was.

411. Plaintiff's arguments exceed the clear intent of the parties. The fact that the term "Amazon Contract" includes any subsequent addenda was to encompass any interim amendment that may have been executed before closing and before the addendum in the form of Exhibit H was executed within the allotted time deadlines to entitle NetRiver to $10.1 million. That the parties intended to limit NetRiver's representations only to contracts to which it was a party is confirmed by the first line of Section 4.12(b), which states "The Assumed Contracts are legal, binding and enforceable in accordance with their respective terms with respect to **Seller** and with respect to each other party to such Assumed Contracts." The definition of Assets (which includes as a part Assumed Contracts") in Sections 2.1 and 2.2 are assets owned by Seller and "assets, properties and rights **of Seller** as of the close of business on the Closing Date." Section 2.2(d) states "all rights **the Seller** may have under any and all Contracts." After closing, Seller had no rights under any contracts that were assigned to Plaintiff. Section 4.12(b) cannot be reasonably read to cover a future contract that is negotiated and entered into by Plaintiff almost two months after closing; that interpretation would conflict not only with the language of the APA and the fact that the representations speak only as of June 30, 2014 but also the negotiations of the parties when Joe said he did not want to be responsible for future actions by other third parties over which NetRiver had no control.

412. Plaintiff, in defending NetRiver's motion to strike, also offered the untenable argument that the notice of termination was given under the MSA, not Addendum No. 9, implying somehow that the MSA is severable from the addenda and only that contract was terminated. TT: 1928:4-23. It is clear from the text of the executed Addendum No. 9 that the

MSA and the various addenda are not separate severable contracts but one contract that had been amended nine times. The Amendment History on page 1 of Addendum No. 9 reflects, not surprisingly, that MSA and Work Order No. 1 were amended by the addenda. Section 3 of Addendum No. 9 modifies the rack power distribution and redundancy characteristics of all of Amazon's racks and expressly amends Addenda Nos. 1 through 8 in that regard. Section 4 of Addendum No. 9 extends the term of all addenda to September 30, 2017, subject however to Amazon's termination for convenience, as further modified by Plaintiff's requirement for at least six month's advance notice of termination by convenience.

413. There is no breach by NetRiver of Section 4.10 of the APA.

414. There were no damages proximately caused by the claimed breach nor were there any damages proven with reasonable certainty. See Conclusions of Law 443-458 below.

415. Plaintiff has failed to establish breach of contract, causation and damages, and the **Court grants judgment on Count IX of Plaintiff's Complaint in favor of Defendants and dismisses Count IX with prejudice.**

T. Count X: Claimed Breach of Representation on Undisclosed Payments.

416. Plaintiff alleges in Count X that NetRiver breached Section 4.17 of the APA. In that section NetRiver represented that "[n]either Seller, the Members, the officers, directors, or managers of the Seller nor anyone acting on behalf of any of them, had made or received any payments not correctly categorized and fully disclosed in Seller's books and records in connection with or in any way relating to or affecting the Business, the Assets or the Assumed Liabilities [of NetRiver]." Plaintiff alleges that this section was breached by the payments made by Joe to Mayer for lodging in Hawaii.

417. The evidence only shows that Joe made a payment of approximately $200 to Mayer for Mayer's vacation in 2013 and a payment of approximately $8,500 to Mayer for reimbursement of lodging in November 2014. Because the representations are made as of June 30, 2014, the payment for lodging in November 2014 is outside the scope of the representation.

418. The payments were made for personal reasons and as gifts to Mayer and accordingly were not made in connection with the Business, Assets or Assumed Liabilities of NetRiver. There was no evidence presented that such a gift would need to be disclosed and correctly categorized on the books and records of NetRiver. Simply, the whole theme of "vacations for inside information" or "vacations for some inappropriate purpose" were purely speculative, unproven and of no moment in this case. FF 267-288

419. There is no breach by NetRiver of Section 4.17 of the APA.

420. There were no damages proximately caused by the claimed breach nor were there any damages proven with reasonable certainty. See Conclusions of Law 443-458 below.

421. Plaintiff has failed to establish breach of contract, causation and damages, and the **Court grants judgment on Count X of Plaintiff's Complaint in favor of Defendants and dismisses Count X with prejudice.**

U. Count XIII: Claimed Breach of Covenant of Good Faith and Fair Dealing.

422. Plaintiff claims NetRiver breached an implied covenant of good faith and fair dealing by withholding material information, including Berche's June 12th e-mail and by fraudulent omissions and representations in negotiating and closing the APA and DREAL Agreement. Complaint, ¶172.

423. In *Ward's Equipment, Inc v. New Holland North America, Inc.*, 254 Va. 379, 385 (1997), the Supreme Court of Virginia held:

> [W]hen parties to a contract create valid and binding rights, an implied covenant of good faith and fair dealing is inapplicable to those rights . . . Generally, a covenant cannot be the vehicle for rewriting an unambiguous contract in order to create duties that do not otherwise exist.

There are no provisions in the APA which imposed a duty on NetRiver to provide Plaintiff with a copy of Berche's June 12th e-mail or even to generally disclose material information to Plaintiff.

424. Moreover, even assuming a duty of good faith and fair dealing, the duty does not apply to the negotiation of a contract. Bad faith in negotiation of a contract is not within the scope of the duty of good faith and fair dealing and is instead subject to rules as to capacity to contract, mutual assent and consideration, fraud and duress. Restatement (Second) of Contracts, ¶ 205 (1981), comment c. At the end of the day the Plaintiff knew or should have known what it was getting with the APA and DREAL agreement. Ultimately it turned out to be a bad business decision which was made worse by the plaintiff's failure to upgrade as planned. To look backward to a fully explained and contextually placed email to lay the blame at defendants' feet ignores the spectacularly poor business judgement employed by the plaintiff in this case.

425. There were no damages proximately caused by the claimed breach nor were there any damages proven with reasonable certainty. See Conclusions of Law 443-458 below.

426. Plaintiff has failed to establish the applicability of the implied covenant, any cognizable breach of the implied covenant, causation or damages. **The Court grants judgment on Count XIII of Plaintiff's Complaint in favor of Defendants and dismisses Count XIII with prejudice.**

V. Count XIV: Declaratory Judgment.

427. Plaintiff alleges in Count XIV that the Court should grant declaratory judgment that the funds held in escrow should be disbursed to Plaintiff because of NetRiver breaches of the APA and DREAL Agreement. Complaint, ¶176

428. Because there are no breaches by NetRiver of the APA or DREAL Agreement for the reasons stated above, **the Court grants judgment for Defendants on Count XIV of Plaintiff's Complaint and denies the requested relief set forth in Count XIV with prejudice.**

W. Count XV: Claimed Unjust Enrichment.

429. Plaintiff alleges in Count XV that as a result of NetRiver's fraud, NetRiver and DREAL received a combined $40M payment and Plaintiff was impoverished by the same amount.

430. There is no unjust enrichment for the reasons previously stated. There was no fraud proven by the Plaintiff. The parties negotiated at arm's length the APA and the DREAL Agreement. NetRiver and DREAL conveyed to Plaintiff the bargained for consideration and was paid the amount stated in those agreements.

431. **The Court grants judgment for Defendants on Count XV of Plaintiff's Complaint and dismisses Count XV with prejudice.**

X. Plaintiff's Claims for Damages.

(a) Plaintiff's Failure to Prove Proximate Cause for Contract Claims.

432. Plaintiff's claims under the APA and DREAL Agreement also fail because there was no proof of any direct damages that were proximately caused by any alleged breaches of the agreements.

433. Counts VII, VIII, IX, and X all allege that Plaintiff suffered damages from the claimed breach of Sections 4.19, 4.10, 4.12, and 4.17 of the APA because of Berche's June 12th

e-mail and that Plaintiff would not have paid $40M but for Defendants' fraud in not disclosing such e-mail. Plaintiff also alleges lost profits of $6 million per year from Amazon's termination of its contract. Complaint, ¶ ¶ 127, 136, 145.

434. To establish a claim for a breach of contract, a plaintiff must prove damages flowing from such breach. Damages can either be direct or consequential.

> "Direct damages are those which arise 'naturally' or 'ordinarily' from a breach of contract; they are damages which, in the ordinary course of human experience, can be expected to result from a breach. Consequential damages are those which arise from the intervention of 'special circumstances' not ordinarily predictable. If damages are determined to be direct, they are compensable. If damages are determined to be consequential, they are compensable only if it is determined that the special circumstances were within the 'contemplation' of both contracting parties. Whether damages are direct or consequential is a question of law. Whether special circumstances were within the contemplation of the parties is a question of fact."

Roanoke Hosp. Ass'n v Doyle & Russell, Inc., 215 Va. 796, 801 (1975).

435. Consequential damages do not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act. Consequential damages must be foreseeable at the time of the execution of the contract. *Pulte Home Corp v Parex, Inc.*, 265 Va. 518, 527–28 (2003); *Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc.*, 254 Va. 240, 244 (1997).

436. Both direct and consequential damages must in the first instance flow directly from the breach and be casually related under a "but for" test. The second requirement is that the damages must be foreseeable. In the case of consequential damages, a third requirement imposed by law is that the damages must have been contemplated by the parties when the contract was executed.

437. The damages which would be casually connected and foreseeable or which would be expected to flow from the breach of the representation by NetRiver of (i) no material adverse

effect in Section 4.9, (ii) of no legal proceedings in Section 4.10, and (iii) that no notice of a threat existed to terminate a contract in Section 4.12 would be limited to Amazon's termination of the contract with NetRiver for cause soon after the June 12th outage and because of the outage. In the ordinary course of human experience, it could not be expected that a consequence of a breach of those representations would be that Amazon would terminate for convenience a contract it had negotiated and entered into with Plaintiff after closing and after Plaintiff had operated the Lynnwood Data Center for 13 months.

438. The damages which could be expected to flow from the breach of the representation that there were no payments that affected the Business, Assets, or Assumed Liabilities of NetRiver that were not correctly categorized and disclosed on the books and records of NetRiver in Section 4.17 of the APA would be the amount of such payment. However, in this case, the payment of approximately $200 from Joe to Mayer did not result in any loss to Plaintiff because it did not adversely affect the Business, Assets or Assumed Liabilities that were conveyed to or assumed by Plaintiff. The $200 payment is in any event below the "Basket Limitation" of $150,000 in Section 10.1(b) of the APA that would give rise to a claim against NetRiver.

439. In *Saks Fifth Ave., Inc. v. James, Ltd*, 272 Va. 177, 188-91 (2006), the Virginia Supreme Court held that the trial court erred in denying defendants' motion to strike plaintiff's evidence of lost profits damages because of the lack of any evidence of causation. The plaintiff failed to establish that the defendant salesman's breach of his confidentiality and non-solicitation covenants and a competing store's "interference" with that agreement were the proximate cause of the lost profits. The plaintiff in that case "failed to connect the lost profits he claimed [his business] incurred after Thompson's departure to anything other than the mere fact that

Thompson was no longer working at [the business]. This fact alone cannot be a basis for recovering damages, however, because Thompson was an at-will employee who was free to stop working at [the business] any time . . . [Plaintiff] failed to show the necessary factor of proximate causation and thus did not carry its necessary burden of proof as to damages." *Id.* at 190; *see Carr v Citizens Bank & Trust Co.*, 228 Va. 644, 652 (1985) (rejecting trial court's denial of motion to strike where "there was no evidence of the damages solely attributable to [the defendant's wrongful conduct]"); *Barnes v. Graham Virginia Quarries, Inc.*, 204 Va. 414, 417-20 (1963) (approving trial court's denial of damages award because plaintiff failed to prove with reasonable certainty "that the damages sought resulted from the act complained of"). Like Thompson in *Saks Fifth Avenue*, supra, here, Amazon was free to terminate its agreement at will at any time. In *Hop-In Food Stores v. Serv-N-Save, Inc.*, 247 Va. 187 (1994), the Virginia Supreme Court reversed the trial court's award of lost profits, due to an absence of evidence that the lessee plaintiff (who sued lessor defendants for trespass in removing plaintiff lessee's gasoline pumps and tanks) would have continued to sell fuel from the premises, but for the trespass. Because "it is uncertain whether in the future Serv would have earned any profits at all had its equipment not been removed," the Supreme Court held that "Hop-In's trespass did not proximately cause any loss of future profits that Serv may have suffered." *Serv-N-Save, Inc* 247 Va. at 192-93.

440. For the foundation of its "lost profits" damages claim, Plaintiff simply relies on the mere fact that Amazon had terminated its contract. ByteGrid's CFO and expert witness, Jay Sinder ("Sinder") testified that P. Ex. 207 represented his calculation of the "*lost cash associated with the Amazon termination*" (Sinder TT: 1038:9-18) and that the basis of his lost profits projection was "*but for Amazon exiting the facility, what would the revenue have been*" Sinder

TT: 1046:21-1047:9. Plaintiff offers no evidence that the Defendants' alleged breaches, misrepresentations, and non-disclosures caused Amazon to terminate its contract. Moreover, inherent in the Amazon contract, and known to Plaintiff, was the risk of termination for convenience, which materialized in July 2015. *See Cohn,* supra, 266 Va. 362, 369-70 (2003) (holding a motion to strike properly granted where allegedly fraudulently concealed fact could not have been the cause of the claimed injury).

441. Plaintiff also argues that had NetRiver not fraudulently concealed material information, Plaintiff would not have purchased the Lynnwood Data Center. But Plaintiff cannot, consistent with logic and common sense, rely on termination of the very Amazon contract it claims it would have never entered into as the proximate cause of lost Amazon profits damages it seeks. Termination of a contract Plaintiff says it never would have entered cannot be the proximate cause of those lost profits.

(b) Plaintiff's Failure to Prove Lost Profits with Reasonable Certainty.

442. Even assuming the Amazon lost profits were proximately related to either the alleged breach of the APA or NetRiver's alleged fraud, Plaintiff's claim for lost profits is based on speculation and on assumptions contrary to the evidence.

443. Plaintiff's claim of lost profits of $10,165,724, representing loss of Plaintiff's "expected" profits on the Amazon contracts, is based on an average of power consumption and rack space revenues for the 8 months after the closing, extrapolated through September 2017. Sinder TT: 1127:14 -1129:23. For the reasons set forth below, the Court rejects Plaintiff's lost profits damages claim, because it is derived from pure speculation, is self-serving and derived from assumptions contrary to the evidence.

444. Sinder testified that he had measured the "lost Amazon profits" by "expected" monthly revenues, including power revenues, from March 2015 (when, according to him, a "dip"

in Amazon's power usage occurred), through September 2017. Sinder TT: 1043:7-1044:10; 1127:14-1129:23. He testified that Amazon's power was metered, and it paid 150% of the actual power costs, based on the power it actually used. Sinder TT: 1130:12-16. Sinder admitted that Amazon was under no obligation to consume any specific amount of power, but contracted for power strictly on a "pay as you go" basis, paying for what it used, no more or no less. Sinder TT: 1138:6-11. He admitted that: (a) his "expected" power figure of $208,135 per month did not represent money Amazon was contractually committed to pay through the end of the term (Sinder TT:1137:18-1138:5); (b) *as long as it paid for its space, Amazon had the right to use or not use data servers located in the facility, as it wished*, and use or non-use affected power consumption (Sinder TT: 1137:6-14); and (c) that Amazon could reduce power and turn off servers at will. (Sinder TT: 1137:15-17). There is also reason to believe that the "expected" monthly power figure is inflated; Sinder admitted on cross-examination that actual power revenues had never reached his projected "expected" level of $208,135 since October 2014. Sinder TT: 1138:12-16. Accordingly, projecting a "level" $208,135 per month for expected net power revenue from March 2015 through September 2017 is clearly based on assumptions unsupported by the evidence and is also speculative and conjectural.

445. Sinder admitted that he had projected the amounts of monthly revenues through September 2017 (Sinder TT: 1127:19-22) even though he knew that Amazon had the right to terminate for convenience at any time on six months' notice, and, in fact, Amazon did just that in July 2015. Sinder TT: 1136:22-25; 1130:25-1331:2. Sinder admitted that it was not a certainty that Amazon would remain in the facility through September 2017. Sinder TT: 1137:1-4.

446. "It is well settled that ... prospective profits are not recoverable in any case if it is uncertain that there would have been any profits...." *Murray v. Hadid*, 238 Va. 722, 730-31

(1989); *Sinclair v. Hamilton & Dotson*, 164 Va. 203, 211 (1935). Because Amazon's right to terminate for convenience at any time was a risk inherent in the contract, and in the light of clear evidence of Amazon's exit plans, an award of damages based on an assumption that Amazon would certainly have remained in the facility through the entire term is speculative and too uncertain to merit recovery. Such an end to a contract terminable at will can be expected "in the rough and tumble world comprising the competitive market place." *ITT Hartford Grp., Inc v. Virginia Fin. Assocs., Inc.*, 258 Va. 193, 204 (1999). That principle is expressed in Virginia law in the context of claims for tortious interference with a contract terminable at will, where the additional element of improper means is required, because "unlike a party to a contract for a definite term . . . an individual's interest in a contract terminable at will is only an expectancy of future economic gain, and he has no legal assurance that he will realize the expected gain." *Duggin v. Adams*, 234 Va. 221, 226 (1987).

447. Nor are the "established business" line of lost profits cases applicable. Those cases hold that, where an established business is interrupted, past profits of the business before, and profits after, the interruption can be a reasonable basis to estimate damages. *See Mullen v. Brantley*, 213 Va. 765, 768 (1973); *Clark* v. *Scott*, 258 Va. 296 (1999); *Commercial Bus. Sys , Inc v. BellSouth Servs, Inc.*, 249 Va. 39, 50 (1995). Unlike in those cases, Plaintiff did not offer any evidence of the historic profits of NetRiver's established business (operated since at least 2008) to support its lost profits claim. Plaintiff instead projected "expected" Amazon profits from March 2015 through August 2017, not with reference to the historic profits of the established business as a whole, but, rather, based on a single customer's contract (which Plaintiff knew was terminable at will), and an 8 month "baseline" period beginning ***after*** Plaintiff acquired the business in June 2014. *C.f, ITT Hartford*, supra, 258 Va. at 202 (stating 2.5

years of operations insufficient to meet "established business" test, or to support projections of lost profits); *see also Clark v. Scott*, 258 Va. at 304 (finding dental practice open for 8 months not "established business.").

(c) ***Plaintiff's Failure to Prove Diminution in Value.***

448. Plaintiff failed to produce any competent evidence to award damages based on diminution in value of the property purchased by Plaintiff because of Defendants' alleged fraud.

449. Plaintiff based its claim for diminution in value solely on two appraisals prepared by Reagan Hardwick ("Hardwick") for ByteGrid's lender, Key Bank, with effective dates of March 11, 2014 (P. Ex. 211) and September 4, 2015 (P. Ex. 212).

450. The March 2014 appraisal disclosed an "as is" value of $30 million on March 11, 2014 and that a "stabilized value" of $41 million would exist only in the future as of the date that the Amazon contract was extended for "four years or more." P. Ex. 211, p. 2, 3.

451. The September 2015 appraisal indicated that the "as is" value of the data center fifteen months after closing on September 4, 2015 was $28.5 million with a stabilized value as of September 1, 2017 of $35,300,000. Hardwick noted that his earlier appraisal had shown an as-is value of $30 million that had implied a very conservative earnings multiplier because of the potential near term cash flow volatility and that Amazon had "elected not to extend their service agreement in July of this year." P. Ex. 212, p. 2, 3.

452. The two appraisals from Hardwick are flawed. The March 2014 appraisal values the property at $30 million "as-is" without the Amazon extension because of the cash flow volatility that is based on the fact that an extension with Amazon had not yet been executed. The "stabilized" increase of $11.1 million because of the projected execution of a four year extension conflicts with the fact that Addendum No. 9 extended the contract for only three years. More

importantly, the appraisal fails to take into account Amazon's right to terminate for convenience; in other words the cash flow volatility still existed.

453. Moreover, according to the chart on page 3 of the March appraisal, the "effective date of value for the stabilized value scenario" was projected to be July 31, 2014, which was the expiration date for the 120 racks. The appraisal states however that the actual date would be the date that the extension was signed and "could vary widely from the July 31, 2014 date selected." P. Ex. 211, p. 3.

454. To show the necessary element of damage, a party complaining of fraud must prove by clear and convincing evidence that its actual position is worse than it would have been had the fraud not been committed. *Klaiber v. Freemason Assocs.* 266 Va. 478 at 485. Where the alleged fraud occurs in a commercial transaction involving the transfer of real property, the measure of damages is "the difference between the actual value of the property at the time the contract was made and the value that the property would have possessed had the [fraudulent] representation been true." *Id.* at 486(quoting *Prospect Development Co. v. Bershader*, 258 Va. 75, 91 (1999)). Even assuming that the effective date of the March 2014 appraisal for the "as is" value was June 30, 2014 instead of March 11, 2014, that difference is clearly zero under Plaintiff's own appraisal. Under the March 2014 appraisal, the effective date of the higher stabilized value of $41 million only became effective on August 27, 2014.

455. In opposing Defendants' motions to strike, Plaintiff argued that Hardwick's appraisals were not even necessary to establish the diminution in value because the structure of the APA had effectively valued Addendum No. 9 at $10.1 million. However, the values agreed to by a seller and buyer in a purchase contract do not reflect the actual value of property with and without the alleged fraud. A buyer or a seller may contract at prices other than fair market value

for a variety of reasons. To determine to what extent there has been an actual loss requires a determination of actual values both with and without the alleged fraud as of the date of the contract. That was not done by Plaintiff in this case.

456. In *Patel v. Anand, L.L.C.*, 264 Va. 81, 87 (2002), the Court rejected a similar argument by a plaintiff that the diminution in value of a ground lease claimed to have been purchased because of defendant's fraud could be established by proof of the purchase price paid by the plaintiff and other offers that other prospective purchasers had made.

> "[Plaintiff] failed to present evidence of the actual value of the ground lease that it bargained for-a ground lease which would have had a clear title-and the value of the ground lease that it actually received-a ground lease with a cloud on the title. The record simply does not contain this evidence."

457. Plaintiff argues nevertheless that the September 2015 "as is" value of $28.5 million as compared to the March 2014 "stabilized" value," of $41.1 million also corroborates the diminution in value to approximately $10 million.

458. Comparing values as of two months *before* the date of the alleged fraud with fifteen months *later*, while Plaintiff operated the data center, is not probative of the difference in value, with or without the alleged fraud, as of the date the contract was made on June 30, 2014. Obviously, market conditions affecting valuation change over time. For example, the 2015 appraisal, at pages 5 and 100, candidly notes: "Amazon is ceasing operations in multiple Seattle data centers and relocating to owned facilities in Oregon. Amazon has a sizeable footprint in the Seattle market and the increased vacancy pool could potentially limit near term market rent growth." On cross examination, Hardwick testified: "the Amazon event is considered a significant event, enough of an event that, yeah, I noted it as an important risk to consider in the market." Hardwick TT: 548:3-549:14. Also, at page 6, under "Market Trends," the 2015 appraisal notes "anecdotal evidence suggests near term decreased occupancy levels," but that

actual occupancy rates in the market could not be determined because the information is considered proprietary; and, also that "there are available turnkey wholesale data center leasing opportunities in the market area which can support new competition in a relatively short time frame."

459. Hardwick's 2015 appraisal also reflects substantial inherent uncertainty and speculation. While the "Reconciliation and Final Value" section (page 102) states that the appraisal "placed all weighting on the income approach" to valuation, elsewhere (page 100), the appraisal notes: "the forward projection of operations is primarily based on speculative projections. Forward recurring revenues from contractual license agreements will only account for a small portion of projected revenues." The appraisal also notes that the EBITDA[30] multiplier (of 6.0) used to calculate value under the "income approach" reflects "substantial cash flow risks given that over 80% of revenue projections are speculative." Page 73 of the 2015 appraisal expressly acknowledges considerable uncertainty as to how much less the facility is worth compared to its value at the time of the ByteGrid sale: "The subject is worth less than the implied value of the prior sale involving the subject since the primary tenant is vacating. Just how much less is a complicated question that cannot readily be answered based on qualitative comparisons with other sales." Hardwick TT: 552:4-18. Accordingly, Plaintiff failed to prove any diminution of value and certainly not with any credible or non-speculative evidence.

Y. The Court Declines to Order Rescission Because it is Not Reasonably Possible to Restore the Status Quo Ante and Because It Would Substantially Affect the Interests of Persons Not Before the Court.

460. As an alternative to damages, Plaintiff seeks rescission of the APA and DREAL Agreement. Complaint, ¶ 2, Prayer for Relief, items 1 & 2. Even assuming Plaintiff had

[30] EBITDA (unlike EBITA) is an acronym for Earnings Before Interest, Taxes, Depreciation and Amortization

established by clear and convincing evidence its claim for fraud in the inducement. (which it has not) The Court will not grant the remedy of rescission for the following reasons:

461. A necessary incident of equitable restoration of the *status quo* would be to order a credit toward return of the purchase price in at least the amount of the net income derived from Plaintiff's operation of the data center prior to transfer. As of September 2016, according to Plaintiff, that amount stood at $8,423,826.

462. But a court of equity should always be reluctant to rescind, unless it is possible to restore both parties to the *status quo ante*. *Covington v. Skillcorp Publishers, Inc.*, 247 Va. 69, 71 (1994); *Adelman* v. *Conotti Corp.*, 215 Va. 782, 794 (1975). While it is not required that the status quo literally be restored, it still is necessary that the court "be able to *substantially* restore the parties to the position they occupied before entering the contract." *Devine v. Buki*, 289 Va. 162, 173 (2015) (quoting *Millboro Lumber Co v. Augusta Wood Prods Corp.*, 140 Va. 409 (1924)). While it is flexible remedy, rescission is not a viable, fair or equitable remedy where the chancellor is not reasonably able to substantially restore the parties to the *status quo*. *Persinger v. Chapman*, 93 Va. 349, 353 (1896). Nor should rescission be granted where it would substantially affect the interests of persons not parties to the case or before the court. *McDougle v. McDougle*, 214 Va. 636, 637-38 (1974); *Bonsal v. Camp*, 111 Va. 595, 601 (1911). In this case, it is a practical impossibility for the Court to order Defendants to return the purchase price and for Plaintiff to transfer the assets back to Defendants. Moreover, the Court would be unable to do so without substantially affecting the interests of non-parties not before the Court.

463. The first requirement of rescission is that defendants restore the benefits under the contract received by them, here, the purchase price. *Devine*, 289 Va. at 177. DREAL is a limited liability company formed for the sole purpose of owning the real estate where the Lynnwood

Data Center is now located and NetRiver is a limited liability company formed to own and operate the business of the data center. Joe TT: 2340:6-14 Shortly after closing, believing there were no claims or demands from Plaintiff, and having no reason to foresee that Plaintiff, a year and a half later, would accuse them of fraud (Joe TT: 2356:4-14), Defendants disbursed all of the proceeds of the purchase price except the $8 million now held in escrow to financial institutions and the transaction broker to satisfy debts, to other noteholders and, then, to the members of NetRiver and DREAL, pro rata, in accordance with their membership interests, a group consisting of over 70 people. Joe TT: 2341:16-18 (approximately 28 LLC members); 2344:19-25 (40-50 noteholders); 2354-2356:1 (describing distribution of purchase price); P. Ex. 123. None of the debtors, individual members or noteholders who received portions of the purchase price are now parties before this Court. It would be contrary to law and would impair the interests of those absent non-parties, who reside in multiple states (Joe TT: 2354:24- 2355:1-3), for this Court to enter an order compelling non-party noteholders and members to return their distributive shares of the purchase price, assuming they still have them. Nor is it clear that this Court would have jurisdiction over those people.

464. Next, to restore the *status quo,* the Court would be required to order Plaintiff to transfer the purchased assets back to the sellers. But that, too, would not be possible without severely impairing the interests of parties not joined in this action or before the Court. The Lynnwood Data Center is encumbered with interests of absent third parties, including Key Bank. The assets, including equipment, leases and contracts, deposit accounts and other assets, are subject to first priority security interests, memorialized by financing statements and Deeds of Trust, Assignments of Leases and Rents, of record in the State of Washington, in favor of Key Bank, as agent for a syndicate of institutions who loaned money to ByteGrid. D. Exs. 212-216.

Ellsworth testified that the loans from Key Bank are securitized by all of ByteGrid's properties, including the Lynnwood Data Center assets. Ellsworth TT: 344:1-346:6. Moreover, the instruments reflect that the Lynnwood Data Center assets secure the indebtedness, not only of Plaintiff, but also of other ByteGrid subsidiaries which own and operate other data centers in other states. Three Amendments between June 2014 and May 2015 reflect increases in the amount of the credit line secured by those assets, from $40 million in June 2014 to $92.5 million in May 2015. D. Exs. 214-216. The Court cannot order transfer of the assets back to the sellers without impairing the interests of Key Bank. *See e.g., Adelman,* 215 Va. at 792.

Z. Plaintiff Seeks Under its Claim for Rescission Consequential Damages Not Recoverable Under Virginia Law.

(a) Plaintiff Seeks, Under its Rescission Claim, Consequential Damages Which Were Not Within the Contemplation of the Parties and Were Not Pleaded As Required by Virginia Law.

465. Even if rescission were an available remedy, Plaintiff seeks millions of dollars in addition to return of the purchase price, for items not recoverable as a matter of law on Plaintiff's rescission claim for fraud in the inducement.

466. Sinder also offered expert opinion testimony concerning certain amounts, in addition to the purchase price of the Lynnwood Data Center, which Plaintiff appears to contend it (or its parent company) would not have expended had it not purchased the data center. Plaintiff's Exhibit No. 203 describes amounts in various categories which Sinder "attributed" to the transaction. These included not only the amounts paid to Defendants as the purchase price, but, also: $458,000 in Washington sales and use tax; a total of $924,212 in compensation, benefits, and overhead allocated to certain individuals other than the Defendants; $1,468,129 in "capital expenditures;" $813,293 in pre-transaction due diligence and legal expenses; $1,622,747 in interest paid on ByteGrid's bank debt used in part to finance the acquisition; and $5,430,300

in an accrued "preferred return" on AltPoint's equity capital contribution used to finance part of the purchase price. These additional amounts exceed $10.73 million dollars. The Defendants derived no benefit from those expenses. Sinder TT: 1110:12-16. In a decision issued just last year, the Virginia Supreme Court expressly limited the amount of restitution on a rescission claim for fraud in the inducement to the amount of benefit received by the adverse party. A party seeking restitution beyond that amount is required to plead a separate claim for damages resulting from the fraudulent inducement. *Devine,* 289 Va. at 177. In *Devine,* the Court expressly held that mortgage interest, property taxes, and insurance were items for which the seller received no benefit, and therefore, outside the ambit of amounts recoverable on a claim for rescission. According to *Devine*, those items are consequential damages, not restitution related to rescission. *Id.* at 178. *Devine* held that such damages are required to be sought via a *separate claim.* Plaintiff's complaint makes very clear that Plaintiff seeks as a remedy for its claim of fraud in the inducement, rescission OR, IN THE ALTERNATIVE, damages. See Complaint ¶ 2 & Prayer for Relief, items 1 & 2. This is not a mere deficiency of form. In *Devine,* the Virginia Supreme Court held that these types of damages are consequential damages. 289 Va. at 178. *See also Roanoke Hospital Assn.*, supra, 215 Va. at 801. In Virginia, consequential damages must be specially pleaded. *Wood v. American National Bank*, 100 Va. 306, 309 (1902); *Blue Stone Land v. Neff*, 259 Va. 273, 277-78 (2000). This is because they are subject to a special requirement of proof: they must have been within the contemplation of the parties at the time of the contract. *Va. Polytechnic Inst & State Univ. v. Interactive Return Serv., Inc.*, 267 Va. 642, 654-656 (2004).

467. Plaintiff did not seek under a separate count, $10.7M in special damages in addition (but not as an alternative), to rescission.. The prayer for relief on Count I of Plaintiff's

complaint for Fraudulent Inducement (¶ 72) identifies but two items of damage: the "amounts paid in the transaction in the approximate amount of $40 million," a clear reference to the purchase price, and loss of approximately $6 million per year in Amazon profits. Certainly, each of the additional items of consequential damages Plaintiff seeks now for fraud in the inducement were not within the reasonable contemplation of Defendants when they entered the contract, nor were they identified in the complaint with the specificity required under Virginia law. Joe TT: 2346:1-23468. Accordingly, they are not recoverable in this case.

(b) ***Pretransaction Due Diligence and Legal Expenses Were Incurred Before Closing and Not Caused by Any Alleged Nondisclosure by Defendants.***

469. In addition to return of the purchase price, Plaintiff seeks, as part of "rescission" damages, $813,293 in pre-transaction due diligence and legal expenses, including the fees of an array of consultants and lawyers. Pursuant to the December 27, 2015 letter of intent (P. Ex. 42), ByteGrid informed NetRiver that it was willing to expend significant pre-transaction due diligence expenses, regardless of whether the deal closed or not. Plaintiff's Exhibit 203 indicates that the entire amount was incurred before or in June 2014. Sinder admitted on cross examination that these were incurred prior to June 30, 2014, the day the allegedly fraudulently – induced contract was executed, that most of the expenses would have been incurred even if ByteGrid elected not to go forward with the transaction, and that Defendants derived no benefit from these expenses other than the purchase price. Sinder TT 1105:24-1106:22; 1107:20-24. This amount may not be awarded on any theory because the expenses could not have been proximately caused by the alleged fraud and were expenses ByteGrid represented it would assume regardless of whether a contract was entered before any alleged fraud occurred.

(c) ***Altpoint Preferred Return on its Equity Capital Contribution is At Risk and If, When and How Much of it Will Be Payable is Too Uncertain To Be Awarded as Damages.***

470. Plaintiff also seeks, as "rescission damages," $1.622 million in interest on the Key Bank loan used to finance part of the purchase price. It further seeks another $5.430 million representing an accrued 12% preference in favor of Altpoint in connection with its equity capital investment used to finance part of the purchase price. Neither are causally linked to the alleged fraud, and it is beyond dispute that sellers derived no benefit other than the purchase price from Plaintiff's parent company ByteGrid's "financing costs." In any event, the "financing costs" Plaintiff seeks on the Altpoint equity capital investment are subject to contingencies, and too uncertain and speculative to be awarded as damages. The essence of equity capital is that it is at risk. The Altpoint preference amount, like the capital investment itself, is also at risk. After suggesting to the Court on direct examination that this item was a debt *"[w]e pay Altpoint . . . $200,000 per month is 12 percent, 1 percent a month . . . that keeps on accruing to the note"* (Sinder TT: 1032:20-1033:6), Sinder admitted on cross examination that there was no note, and that ByteGrid had paid "zero" on the preferred return to date. Sinder TT: 1112:21-1113:22; 1120:13-15.

471. He further admitted that the return is not treated as a debt obligation on the audited financial statements and balance sheets of ByteGrid, but carried as "Member's Equity." Sinder TT: 1115:6-24. He also admitted that Altpoint's investment was in the form of equity capital, and was at risk. Sinder TT: 1126:17-21. Sinder admitted that a preferred return in an LLC is nothing more than a mechanism for allocating distributions among members of different classes, and that, in this case, it represents the amount that the Class A unit holders here must recover out of any distribution, all of the accrued return before they get the return on their capital investment and before the B and C unit holders get anything. Sinder TT: 1114:7-1115:3; 1122:7-17. Sinder further admitted that no part of this amount had been actually paid to Altpoint

(Sinder TT: 1113:19-22), and would not be payable unless and until the company was sold, or the board, in its discretion, directed it to be paid. Sinder TT: 1122:22-1123:20. The pertinent provisions of the ByteGrid LLC agreement (P. Ex. 202) conclusively identifies this as nothing more than a distribution preference, establishing internally the amounts of net proceeds holders of Class A membership units (like Altpoint) receive in priority over holders of Class B and C units, if, as, and when there are distributions to the ByteGrid LLC members. P. Ex. 220.

472. Sinder admitted that it is uncertain when the company will be sold, or when any other event that might trigger payment may occur is also uncertain. Sinder TT: 1123:21-1124:2. He admitted that whether the payment will be made is uncertain. Sinder TT: 1124:22-1125:2. Sinder further admitted that, even if there were a distribution, no part of it would be paid until all secured creditors, unsecured creditors, and trade payables of ByteGrid were paid in full. Sinder TT: 1124:3-10. In sum, Sinder admitted that whether the accrued preferred return will be paid, when it will be paid, and, if paid, how much if it will be paid, are all uncertain. He further admitted that the return, like Altpoint's capital contribution itself, is at risk. Sinder TT: 1126:17-21.

473. Damages cannot be recovered if they are derived from uncertainties, contingencies, or speculation. *Saks Fifth Ave., Inc.*, supra, 272 Va. at 188. ByteGrid's "obligation" to pay Altpoint the $5.430 million in accrued preferred return on AltPoint's equity capital contribution is contingent on circumstances which Plaintiff's own expert conceded are not certain to occur. Accordingly, the accrued return is too speculative and uncertain to award that amount as damages in this case.

Based on the above findings of fact and conclusions of law, the Court grants judgment for Defendants. Plaintiff's complaint is dismissed with prejudice.

Entered this 24th day of February, 2017.

Thomas P. Mann, Judge