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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LUIS A. GARCIA SAZ,
MARIA DEL ROCIO BURGOS GARCIA,

Plaintiffs,

vs.

CASE NO.8:13-cv-220-T-27TBM
September 5, 2013
Tampa, Florida
2:00 p.m. - 3:00 p.m.

CHURCH OF SCIENTOLOGY RELIGIOUS TRUST,
et al.,

Defendants.

_____ /

TRANSCRIPT OF MOTION HEARING
(Document No.70)
BEFORE THE HONORABLE THOMAS B. MCCOUN, III
UNITED STATES MAGISTRATE JUDGE

Proceedings digitally recorded and transcribed by
Official Court Reporter using computer-aided
transcription.

1 A P P E A R A N C E S:

2 Theodore Babbitt, Esquire
3 Babbitt, Johnson, Osborne & Leclainche, PA
4 1641 Worthington Rd, Suite 100
5 West Palm Beach, FL 33409
6 561/684-2500
7 On Behalf of the Plaintiff.

8 Amanda Marie McGovern, Esquire
9 Weil, Quaranta, McGovern, P.A.
10 200 S. Biscayne Blvd., Suite 900
11 Miami, FL 33131
12 305/372-5352
13 On Behalf of the Plaintiff.

14 F. Wallace Pope , Jr., Esquire
15 Johnson, Pope, Bokor, Ruppel & Burns, LLP
16 911 Chestnut St
17 Clearwater, FL 33757
18 727/461-1818
19 On behalf of the Defendants

20 Robert Vernon Potter, Esquire
21 Johnson, Pope, Bokor, Ruppel & Burns, LLP
22 911 Chestnut St
23 Clearwater, FL 33757
24 727/461-1818
25 On behalf of the Defendants

Nathan Michael Berman, Esquire
Zuckerman Spaeder, LLP
101 E Kennedy Blvd, Suite 1200
Tampa, FL 33602
813/221-1010
On behalf of the Defendants

Marie Tomassi, Esquire
Trenam Kemker
200 Central Ave, Suite 1600
St Petersburg, FL 33701
727/820-3952
On behalf of the Defendants

Also Present: Richard Zabak, Esquire

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CERTIFICATE OF COURT REPORTER 46

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E X H I B I T S

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P R O C E E D I N G S

(Court called to order.)

THE COURT: Let's call the case, please.

THE DEPUTY CLERK: The matter of Luis Garcia Saz vs. Church of Scientology Religious Trust, case number 8:13-cv-220-T-27TBM.

THE COURT: Okay. Again, we're recording the proceedings electronically, feeds off the microphone there in front of you. If you wish to remain seated and just speak into the mic, that's fine. If you want to come to the podium, you can do that as well.

Let's go ahead and get everybody to state their appearance.

MR. JOHNSON: Bob Johnson, here -- although I'm not a attorney of record in the case, I was subpoenaed in the case.

THE COURT: Okay.

MR. ZABAK: Your Honor, Richard Zabak with GrayRobinson, and I'm also here in my capacity not as an attorney of record but as a subpoenaed individual.

THE COURT: All right. Counsel?

MR. POTTER: Robert Potter here on behalf of the Church of Scientology Flag Service Organization and Church of Scientology Flag Ship Service Organization, and I believe that Mr. Pope is on the phone. And I'm not sure -- yeah --

1 THE COURT: Thank you.

2 MR. POPE: I am on the phone, thank you.

3 THE COURT: Mr. Pope, we also have Amanda McGovern
4 and Ted Babbitt; is that correct?

5 MR. BABBITT: That's correct, Your Honor.

6 MS. MCGOVERN: That's correct, Your Honor.

7 MS. TOMASSI: I'm Marie Tomassi from the Trenam
8 Kemker law firm, and I'm here for IAS Administrations and
9 U.S. IAS Trust.

10 THE COURT: All right.

11 MR. BERMAN: And Nate Berman from Zuckerman
12 Spaeder here on behalf of Church of Scientology Religious
13 Trust.

14 THE COURT: All right. Anybody else on the phone
15 that I missed?

16 (No audible response.)

17 THE COURT: Got a hearing scheduled today on the
18 dispute with regards to certain discovery initiated by the
19 defendants. Initially plaintiffs filed a Motion for
20 Protective Order regarding the numerous requests for
21 production, then we've got a response and another
22 memorandum. Who wants to begin addressing this for the
23 plaintiffs?

24 MR. BABBITT: That would be -- I think that would
25 be me, Your Honor.

1 MR. JOHNSON: And, Judge, if I might. Bob
2 Johnson. I have a scheduling issue. I didn't -- this
3 didn't get on my calendar. I have a flight at 3:50 today.
4 So I will be here until 2:30. My wife is anxiously waiting
5 for me downstairs.

6 THE COURT: Who subpoenaed you?

7 MR. JOHNSON: I was subpoenaed by, I believe, all
8 of the entities.

9 Bob, is that correct, or was it just FSO?

10 MR. POTTER: Well, I don't believe that you were
11 subpoenaed for this hearing. You were subpoenaed for the
12 evidentiary hearing on the Motion to Disqualify.

13 MR. JOHNSON: Correct. However, I was subpoenaed
14 to produce documents at a certain date, which I then filed
15 -- I then served on Mr. Potter a response to that. And,
16 Judge, what I have done today is I brought in a privilege
17 log, if I might approach and provide the Court with a copy
18 of the privilege log. And I have brought with me all of the
19 documents in this envelope, delivered to the Court, should
20 the Court decide to review those documents in camera.

21 THE COURT: Okay.

22 MR. JOHNSON: But as far as making any argument is
23 concerned, I don't have any argument to make. I will rely
24 on Mr. Babbitt, and I am just here to tend to the documents.

25 THE COURT: Okay. Well, you're welcome to stay,

1 you're welcome to leave. It's your choice.

2 Now who spoke up to make argument? Is that Mr.
3 Babbitt?

4 MR. BABBITT: That's correct, Your Honor.

5 THE COURT: Why don't we begin and see where we go
6 on this. And let me just ask at the outset, Ms. McGovern
7 has filed a pleading which she styles a Report of the
8 Parties Meet and Confer, basically outlines six areas that
9 she says have been addressed and which apparently assume all
10 of the disputes. Is that correct? Can we work from this
11 document as sort of a guide to our discussion?

12 MR. BABBITT: That was my plan, Your Honor. I
13 would just ask, do you want me to take one at a time or do
14 you want me to just make an argument as to all five that are
15 left?

16 THE COURT: Well, hold on one second.

17 MR. POTTER: Yes, Your Honor. I worked with Miss
18 McGovern in filing that document with you. That is our
19 effort to try to identify the issues to be addressed today.

20 THE COURT: Okay. All right. Mr. Babbitt, begin
21 any way you wish. I will likely interrupt and ask questions
22 to serve my needs. But in any way, begin whichever way you
23 wish.

24 MR. BABBITT: Sure. The first item requests are
25 essentially the party to represent the clients. It relates

1 to Mr. Johnson's party. We have stipulated that he is in
2 fact hired as an attorney by the plaintiffs. We object to
3 and don't understand the relevance of the contents of our
4 fee agreement, which is the only offer of relevance
5 (indiscernible) to recuse him and they need to prove that
6 he's hired. So we've agreed to that, and I think that meets
7 the issue. The defendants disagree with that.

8 THE COURT: Do you claim any sort of -- do you
9 claim any sort of privilege in relation to any retainer
10 agreement or fee agreement?

11 MR. BABBITT: Yes, Your Honor. I think that the
12 relationship with our clients and what we have denied to do
13 and the contents of what we intend to do for our clients is
14 not only irrelevant, but it is privileged. It is
15 attorney-client.

16 THE COURT: Now, there is -- I'm looking at the
17 Document 60 (indiscernible), which is this report, and
18 basically what plaintiffs stipulate is that there is a
19 retainer agreement among GrayRobinson, Babbitt Johnson, and
20 Weil Quaranta and the plaintiffs.

21 MR. BABBITT: That's right.

22 THE COURT: And then additionally there is a fee
23 agreement among GrayRobinson, Babbitt Johnson and Weil
24 Quaranta.

25 MR. BABBITT: I'm not even sure that is asked for,

1 Your Honor, the second document. But certainly how we're
2 going to split the fee has no relevance to this case. The
3 only possible evidence that I see is that Mr. Johnson is, in
4 fact, employed.

5 THE COURT: The reference to GrayRobinson, is that
6 your reference to Mr. Johnson?

7 MR. BABBITT: That's right. He is employed by
8 GrayRobinson.

9 THE COURT: And so are you suggesting there that
10 there is an agreement with Mr. Johnson, or is there an
11 agreement broadly with GrayRobinson?

12 MR. BABBITT: There's an agreement with
13 GrayRobinson, and Mr. Johnson signed that agreement on
14 behalf of that parent corporation.

15 THE COURT: Okay. So essentially what you --
16 you're suggesting that the stipulation that such retainer
17 agreement exists and that such a fee agreement exists is all
18 they need to know for purposes of the upcoming hearing; is
19 that it?

20 MR. BABBITT: That's correct, Your Honor. Other
21 than that it's intrusive, it's unnecessary, and it's
22 attorney-client as to our relationship with our client.
23 It's an agreement between us and our client. And there is
24 no possible reason I can see that they would do that.

25 THE COURT: Okay. Do you want to weigh in on that

1 one?

2 MR. POTTER: Yes, Your Honor. The agreements are
3 -- the fact that the agreements themselves exist is both
4 relevant and highly so. Once the agreements themselves are
5 relevant, then there is no privilege that prevents their
6 full disclosure.

7 We have already made a substantial showing in our
8 motion for disqualification, and that's what all this
9 discovery goes to. Obviously we have filed that motion, it
10 is supported by numerous affidavits which talk about Mr.
11 Johnson's involvement in the defendants' past litigation
12 history, their litigation tactics, their litigation
13 strategies, the so-called litigation play book information.

14 The fact that Mr. Johnson has now signed both an
15 agreement with the plaintiffs to represent them and also an
16 agreement with the plaintiffs' counsel of record to assist
17 them in this litigation obviously raises the question of
18 what is his role, what is he doing, is he going to
19 communicate this play book of litigation information to the
20 plaintiffs and their counsel.

21 THE COURT: Let me ask Mr. Johnson, have you
22 entered a Notice of Appearance?

23 MR. JOHNSON: No, Your Honor.

24 THE COURT: Okay.

25 MR. POTTER: So the fact that these agreements

1 exist are themselves proof of their relevance. Now there is
2 no privilege that prevents their disclosure. I assume that
3 the fee agreement between the three law firms is probably a
4 fee splitting agreement. And certainly how the fees are
5 being split is going to be somewhat indicative of what Mr.
6 Robert Johnson's role in this litigation is. And that's
7 really the whole crux of this matter.

8 Mr. Johnson himself has confidential information.
9 There is no question about it. He was the defendants'
10 attorney for 16 years. He's handled 32 other cases that are
11 virtually identical to the issues and claims raised in this
12 case. The information that we have already provided in our
13 Motion to Disqualify shows, in fact, that he appears to be
14 trading on that information, that past history, and anything
15 that goes to show that he is providing information to the
16 plaintiffs and their counsel is very, very much relevant to
17 the issues in this case, specifically the Motion to
18 Disqualify. In our motion --

19 THE COURT: Let me jump in here and go back to
20 this table.

21 Has GrayRobinson entered an appearance in this
22 case?

23 MR. JOHNSON: No, Your Honor.

24 THE COURT: Okay.

25 MR. BABBITT: Your Honor, I can reply to that. I

1 didn't know we were arguing the main motion that's before us
2 in October.

3 THE COURT: We're not. We're not, but that helps
4 frame the relevance of the discovery. And let me suggest --

5 MR. BABBITT: That is not correct.

6 THE COURT: Let me suggest this --

7 MR. BABBITT: It is completely incorrect.

8 THE COURT: Let me suggest this, sir. First,
9 let's wait until everybody's finished before we interject.
10 And I would recommend if you want a record here, before you
11 speak you identify yourself.

12 MR. BABBITT: Appreciate that, Your Honor.

13 THE COURT: All right. So let me go back to you,
14 Mr. Babbitt, now.

15 MR. BABBITT: Okay. I could argue with what
16 counsel has just told you. It is completely false. Mr.
17 Johnson could probably do a better job of doing that than I.
18 I don't see the necessity for doing that except to say that
19 Mr. Johnson's representation was a long time ago, it related
20 to completely different matters, it is almost all entirely
21 relative to property transfers --

22 THE COURT: Okay. All of that will be argued in
23 front of Judge Whittemore. I --

24 MR. BABBITT: Well that --

25 THE COURT: The finer points of that I think are

1 left for the next motion. The fact that he had
2 representation of the defendants, one or more of the
3 defendants for a number of years, though, is germane here.

4 The question is whether or not -- frankly, I'm not
5 aware of any privilege necessarily tied into a retainer
6 agreement or the fee agreement here, and you suggest --

7 MR. BABBITT: But, Your Honor -- excuse me, this
8 is Ted Babbitt. A similar issue arose in a case I had
9 within the Eastern District of New York, not that that's
10 dispositive of this, but with respect to that, those fee
11 agreements, what the Court decided there was to allow the
12 defendants to show the first page which shows the date, and
13 the last page which shows the signature, and not the body
14 which really just relates to a contractual arrangement
15 between the client and the lawyers.

16 And as to the fee sharing agreement, if there's --
17 we don't have any problem really with telling counsel what
18 our fee sharing arrangement is. It seems awfully intrusive
19 and unnecessary, but I don't see the relevance of it.
20 Suffice it to say that we have a near equal fee sharing
21 arrangement -- not equal, but Mr. Johnson's involvement is
22 certainly substantial in the sense of his remuneration. But
23 I just think this is an unnecessary witch hunt. It's just
24 got nothing to do with this case and it's just a
25 distraction.

1 THE COURT: Okay. Let's move ahead to point
2 number two. There may be questions of Mr. Johnson that may
3 come up here on that one.

4 MR. BABBITT: (Indiscernible) --

5 THE COURT: This is identified as evidence of
6 communications between Robert Johnson or his agent and any
7 of the following individuals: Rinder, Rathbun, and then the
8 law firms, multiple law firms. Again there's -- well, the
9 plaintiffs respond to this one: Bob Johnson agrees to
10 provide a log of all privileged documents that are
11 responsive to this request. And to the extent there are
12 unprivileged documents, he agrees to produce those.

13 Have you provided a privilege log to the
14 defendants?

15 MR. JOHNSON: Yes, Your Honor, which I provided to
16 the defendants today. And, Your Honor, if I might respond,
17 Judge, I don't have any documents that would not fall
18 outside of the privilege.

19 THE COURT: Okay. So you claim privilege on any
20 document that you have?

21 MR. JOHNSON: Correct. And again, Your Honor, I
22 do have the three hundred and some odd pages of documents
23 that would be responsive. And, Your Honor, we have prepared
24 a privilege log from the date that I was first contacted in
25 this matter through the filing of the lawsuit. I haven't

1 gone beyond that date. If the Court directs me to, I can do
2 that, but just at this stage I have not done that.

3 THE COURT: What's the magic of January 1, 2007?

4 MR. POTTER: I don't know, Your Honor. I mean we
5 want all of his documents. We don't have any -- oh, I'm
6 sorry. In our subpoena?

7 THE COURT: Yeah.

8 MR. POTTER: Oh, we just picked that as a -- we
9 didn't think there was anything prior to that time, Your
10 Honor, and we didn't want to send out a subpoena asking for
11 everything since the creation of the Earth. We thought that
12 might be a little broad so we just picked a date that --

13 THE COURT: And your past relationship with the
14 defendant entities, any of the defendant entities, ended
15 when?

16 MR. JOHNSON: My best recollection was -- and
17 don't hold me to that -- I put in my declaration it was
18 2007, 2008, I think was the -- maybe -- I apologize, Judge.
19 Maybe --

20 THE COURT: Somewhere around 2007, 2008?

21 MR. JOHNSON: Whenever the --

22 THE COURT: That's fine. As a ballpark, that's
23 fine.

24 And then we record these proceedings
25 electronically. It feeds off that mic. So frankly you're

1 better off --

2 MR. JOHNSON: Sitting here, yes.

3 THE COURT: All right. It's painful to see you
4 half crouched, half standing.

5 MR. ZABAK: I apologize, Judge. Mr. Zabak. It
6 was about 15 years.

7 THE COURT: And it ended when?

8 MR. ZABAK: About 15 years ago.

9 THE COURT: About 15 years ago?

10 MR. ZABAK: Yes.

11 THE COURT: Gotcha. All right.

12 Well, let me go to you on this second request
13 then.

14 MR. POTTER: Thank you, Your Honor. Obviously the
15 communications that Mr. Johnson has had in this case with
16 both the plaintiff and the plaintiff attorneys and the other
17 players is very critical. Again --

18 THE COURT: Let me jump in. Do you seek any
19 communication he would have had when he was acting as
20 counsel for -- assuming you go back 15 years, that would be,
21 say, 2008, which would involve the time frame you've got in
22 your subpoena there. Is he requesting matters that he's --
23 communications he would have made with the defendants when
24 he was acting as their counsel?

25 MR. POTTER: No. No. That -- no. We are not

1 requesting those. We are requesting the communications from
2 that date forward with the people specified in category two,
3 none of which are the defendants or any representatives of
4 the defendants, Your Honor. Our purpose is to focus on his
5 involvement in this litigation. And we simply picked that
6 as kind of an arbitrary date so that we didn't have just a
7 vastly open-ended subpoena.

8 MR. JOHNSON: And if I might interject, Judge, I
9 don't have any files related to these entities in my
10 possession, so.

11 THE COURT: There is -- in any of the
12 stipulations, is there anything I read as suggesting -- and
13 I'm just bouncing around here, but bounce with me, if you
14 would.

15 There's no suggestion in anything that I've read
16 or in the proposed stipulation or this -- how this had been
17 formulated that there would be communications with Morgan &
18 Morgan, Brian Leung, Holcomb & Leung?

19 MR. POTTER: Those are attorneys that previously
20 represented the Garcias, Your Honor. This case had a life
21 in the State court system before it was brought into the
22 Federal court system, and those law firms were representing
23 the Garcias at one point or another. That's why they're
24 included in the subpoena.

25 THE COURT: All right.

1 MR. JOHNSON: And, Judge, in my privilege log I do
2 have communications with John Morgan, Tucker Byrd (ph),
3 representatives of Morgan & Morgan. I don't have any
4 written communications with this Brian -- and I forget what
5 his name is -- although I have spoken with him.

6 THE COURT: Leung, Lueng (ph)?

7 MR. JOHNSON: Leung, yeah.

8 THE COURT: What is -- just give me the
9 highlights. You've had the opportunity over at this table
10 to look at this privilege log. What is the privilege here?
11 How do you have a privilege in relation to communications
12 with Rinder or Rathbun or one of the other law firms?
13 What's the nature of the privilege here?

14 MR. JOHNSON: (No response.)

15 THE COURT: What's your claim --

16 MR. JOHNSON: I was going to let Mr. Babbitt
17 respond on that.

18 THE COURT: No, I'm asking you first.

19 MR. JOHNSON: Oh. As far as my response is --

20 THE COURT: You're the one claiming privilege.
21 What is the privilege?

22 MR. JOHNSON: The privilege is Mr. Rinder was a
23 consultant who was retained by the attorneys to advise them
24 in the case. And, of course, the communication that I had
25 with the attorneys would have been discussions regarding

1 potential clients and in preparation for filing of the
2 lawsuit. And again, my role, Judge, was fairly limited --
3 is fairly limited in the case.

4 THE COURT: Well what would be privileged about
5 any communication you would have had with Mr. Mike Rinder or
6 Mr. Marty Rathbun?

7 MR. JOHNSON: The communication is restricted to
8 Rinder. I didn't have any communication with Rathbun. But
9 the communication with Rinder would have been discussions
10 about the potential claims that could be asserted, the
11 potential plaintiffs that were going to be involved in what
12 work Mr. Rinder would provide to attorneys who would be
13 representing these plaintiffs.

14 MR. BABBITT: Excuse me. Ted Babbitt. I think
15 the technical privilege would be work product. He is an
16 attorney in the case, he is representing the plaintiffs, he
17 is working with us in this case, as all of us are, and I
18 think that each -- he's filed a privilege log, so each one
19 will have to stand on its own. But I would assume that
20 without looking at the documents the Court can't really tell
21 whether that's the case or not.

22 THE COURT: Okay. Thank you, Mr. Babbitt.

23 MR. POTTER: Your Honor, again, the issues in this
24 case from our perspective is Mr. Johnson's communication of
25 privileged information to the plaintiffs, to the plaintiffs'

1 attorneys, and the plaintiffs' litigation consultants, which
2 I think is the hat that Mr. Rinder and Mr. Rathbun have put
3 on their heads in this matter.

4 Any way that Mr. Johnson or any potential for Mr.
5 Johnson to communicate the privileged information of the
6 defendants to the plaintiffs' team is relevant to the Motion
7 to Disqualify. His -- we know that Mr. Rinder is now a
8 trial consultant for them, has a compensation agreement with
9 them, and is actively working with them in this case.

10 Again, when this case was in the State court
11 system he did file an affidavit. That affidavit is attached
12 to the Motion to Disqualify, so it's in the record. And in
13 that affidavit he professes that he has great knowledge of
14 the defendants' litigation tactics and strategies, he
15 professes that he was involved in attorney-client
16 communications, and he seeks -- he discloses the substance
17 of those communications.

18 Mr. Rathbun also serves that same role in other
19 litigation. He has filed an affidavit in this litigation
20 professing of his involvement in litigation matters for the
21 defendants and in other cases, not in this case, but in
22 other cases pending before this Court. He has also filed
23 affidavits saying I was involved in attorney-client
24 communications and here is what was said.

25 So both of these individuals are very much

1 involved in sharing the defendants' litigation strategies
2 and tactics. They, along with Mr. Johnson, at least to some
3 degree, developed those tactics and strategies. And the
4 three of them are now basically in the business of sharing
5 that information with potential litigants, and specifically
6 actual litigants.

7 THE COURT: Put aside Mr. Johnson. We're jumping
8 ahead. Let's just talk about Mr. Johnson for a moment.

9 MR. POTTER: Right.

10 THE COURT: Put aside the other two.

11 MR. POTTER: Well, I'm sorry. I was trying to
12 focus on Mr. Rinder and Mr. Rathbun because you mentioned
13 specifically those people. They are included in this
14 particular category, the subpoenas. So, any communications
15 that Mr. Johnson has had with those individuals is relevant
16 to the issue of whether or not disqualification should
17 occur.

18 THE COURT: Would it not -- assuming that it's in
19 relation to this litigation, would it not be work product --

20 MR. POTTER: Well there is a big --

21 THE COURT: -- the fact you identify those two as
22 consultants hired by the plaintiffs?

23 MR. POTTER: They're -- to the -- twofold answer,
24 Your Honor. First of all, if work product applies, it has
25 been waived, because there was no privilege log provided

1 until about 30 minutes before this hearing. We've cited in
2 Paragraph 20 of our motion the cases that support a waiver
3 of the privilege in those sorts of situations.

4 Second of all, there is a huge exception to the
5 work product privilege, and that specifically is that if the
6 party seeking the information has a substantial need for
7 that information and cannot obtain it elsewhere the
8 privilege does not shield it.

9 Obviously in this case there is no other way to
10 find out the substance of the communications other than to
11 get the communications themselves. And obviously we have a
12 substantial need for it, it goes to a very material issue in
13 the case, that being disqualification.

14 THE COURT: Would you agree with me that on its
15 face the subpoena is overbroad to the extent that you want
16 any and all communications since -- what did I say?

17 MR. JOHNSON: 2007.

18 THE COURT: Yeah, the date in 2007, January 1,
19 2007?

20 MR. POTTER: Respectfully, no, Your Honor. We
21 believe that Mr. Johnson began working with the Garcias some
22 time ago. We don't know exactly or precisely when --

23 THE COURT: Well then shouldn't I limit the
24 communication of any production, assuming that I require
25 some production, I don't know if I will or not, but

1 shouldn't I limit it to communications related strictly to
2 the Garcia matter?

3 MR. POTTER: Well, yes. I think that's the intent
4 of our subpoena, Your Honor. We are trying to get those
5 communications that pertain to this case. To the extent
6 that Mr. Johnson has communicated privileged information to
7 other people in other matters, other cases not involving the
8 Garcias, we're not trying to obtain that through this
9 subpoena. We are trying to focus on the Garcias. The point
10 being that this case has been going on for some time before
11 it was filed in this court. So, for that reason, no, I
12 don't believe that it's overbroad. Our intent was to limit
13 it to the Garcias, however.

14 THE COURT: Okay.

15 MR. POTTER: And/or their prior attorneys.

16 THE COURT: All right.

17 MR. BABBITT: Do you want to hear from me, Your
18 Honor? This is Ted Babbitt.

19 THE COURT: Go ahead.

20 MR. BABBITT: First of all, as to the waiver
21 argument, our original response was that we didn't have to
22 file a privilege log because the defendants are -- have
23 never proven, and in our opinion will never prove, that
24 there was a conflict to begin with. And as you can see from
25 the amount of work that Mr. Johnson has done creating this

1 privilege log, we felt that to go through all of our files
2 and essentially -- this is like any other lawsuit --
3 essentially go through hundreds and hundreds, if not
4 thousands and thousands of pages, all of which would be
5 privileged, this log, communications between us and our
6 clients, communications among counsel in matters not lightly
7 invaded by the law.

8 Defendants have -- just simply espousing they have
9 a need for this and, therefore, a privilege to look into the
10 files of lawyers that are representing a client should be
11 ignored is not enough, in my opinion. I would think that
12 before the Court would entertain a waiver of work product
13 there would be a lot more that would have to be shown. For
14 example, they could take a deposition in this case and ask
15 Mr. Johnson some questions. They could do a lot of things
16 before we would have to start revealing everything that is
17 in our files, which is -- remember, Mr. Johnson has a copy
18 of everything that I have written, everything that -- I mean
19 we copy each other on everything.

20 So it is essentially using this what I think is
21 nothing more than a distraction, this motion, which purports
22 to not have Mr. Johnson be recused, but every other lawyer
23 for the plaintiff being recused for (indiscernible) 15 years
24 ago in which -- and in Mr. Rinder's case have been on the
25 Internet over and over and over again.

1 And with respect to Mr. Rinder, they've never
2 tried to stop him from speaking about whatever he knows.
3 There has been no legal action taken apart from going
4 through his garbage and following him relentlessly, him and
5 his family, with private detectives. The defendants have
6 never sought to try to stop him, and we don't -- there's no
7 privilege between the defendants and Mr. Rinder, that I'm
8 aware of, and we can hire anybody we want.

9 And to start saying people we hire -- it would be
10 no different than them asking, which in a sense they have,
11 give us the information that you have communicated between
12 you and one of the people in your office, you know, an
13 investigator or an associate. There's no difference. There
14 are much easier ways and less intrusive ways to get them the
15 information that they think they need. And so (a) we
16 haven't waived anything, and (b) I think that they have all
17 but admitted that this is work product.

18 THE COURT: Mr. Zabak, let me bring you into the
19 loop. It's not identified -- you're not identified -- the
20 documents that you've identified that you have are not
21 mentioned anywhere here in this report. But as I understand
22 it, you have been subpoenaed and you acknowledge that you
23 have 25 or so documents, I don't know, some body of
24 documents. Are we still fighting about that?

25 MR. ZABAK: Apparently not. I had a brief

1 discussion with Mr. Potter before our hearing today. The
2 documents that I have -- all of the documents I have I got
3 from Mr. Johnson. All or most of the documents, if not all,
4 are in possession of other attorneys. The only reason why I
5 was involved in this case to begin with was we received --
6 our firm received letters from Mr. Potter's firm. I believe
7 they were authored by either Mr. Pope or Mr. Potter. And I
8 was asked by our managing shareholder to review the matter
9 with Mr. Johnson and to respond to those letters about a
10 course of action to take.

11 So I'm very tangentially involved. I'm not
12 actually involved in the substance of the case itself. I
13 spoke with Mr. Potter and he said, I believe, that since Mr.
14 Johnson now has been subpoenaed and since Mr. Johnson would
15 have whatever I have, that the subpoena served on me is
16 duplicative and unnecessary at this point.

17 THE COURT: Do you agree?

18 MR. POTTER: As I understand, Mr. Zabak told me
19 earlier that any documents he has are the same documents
20 that Mr. Johnson has. We don't need to subpoena both of
21 them.

22 MR. ZABAK: Right. A bunch of them are subs,
23 actually. I don't have -- I only have about 25 or so
24 documents that could arguably be responsive.

25 MR. JOHNSON: Judge, may I be excused if there's

1 no further --

2 THE COURT: Up to you.

3 MR. JOHNSON: I'd appreciate that if --

4 THE COURT: You're not of record and you weren't
5 subpoenaed, so you're free to leave. At this point, leave
6 your documents here. I haven't decided whether --

7 MR. JOHNSON: And I have left these with Mr.
8 Zabak, and Mr. Zabak will be here for the duration of the
9 hearing. Thank you, Judge.

10 THE COURT: Let's talk about Rinder and Rathbun
11 here, and let me begin with the defendants.

12 Let me just throw this out. Why shouldn't either
13 party be able to take discovery of Rathbun or Rinder?

14 MR. POTTER: Well --

15 THE COURT: Without limitation.

16 MR. POTTER: Certainly they would be able to take
17 their deposition. But in those depositions, the defendants
18 would be entitled to assert a privilege to any question that
19 would --

20 THE COURT: And the privilege would be what?

21 MR. POTTER: Pardon me?

22 THE COURT: The privilege would be what? You
23 don't claim -- you're -- the defendants lawyers do not claim
24 an attorney-client relationship with Rinder or Rathbun.
25 This would be purely -- they act as consultants as I

1 understand that?

2 MR. BABBITT: That's correct, Your Honor. Not
3 Rathbun. We have -- I think we should take Rathbun out of
4 the mix here. The only communication any of us have had
5 with Mr. Rathbun was to get an affidavit, which is of
6 record. We have not hired him, he hasn't communicated to us
7 anything. So I think that we're really only talking about
8 Rinder.

9 MR. POTTER: Again, Your Honor, if we're in a
10 deposition and either Mr. Rathbun or Mr. Rinder is asked a
11 question that seeks to discover the defendants' confidential
12 information, such as what conversations did you have with
13 such-and-such attorney representing the defendant and what
14 did he say, we obviously would object to that as being
15 confidential, privileged information. That is exactly, we
16 think, the type of information that Mr. Rinder is giving to
17 the plaintiffs in this case.

18 And the reason we think that is because he filed
19 an affidavit in this case when it was pending in the State
20 court system revealing exactly that information. His
21 affidavit was I was intensely involved in litigation for the
22 defendant for many, many years, I was involved in the
23 drafting of these documents, this is why we drafted them
24 this way, this is what we were trying to accomplish, this is
25 what our attorneys --

1 THE COURT: But what prevents him from coming out
2 and saying that?

3 MR. POTTER: Pardon me?

4 THE COURT: Going on the Internet apparently as he
5 has. I mean what prevents him from doing that?

6 MR. POTTER: That is confidential --

7 THE COURT: And I'm asking that in the context of
8 why I should, you know, structure discovery.

9 MR. POTTER: Well, again, we believe that the
10 answers to those questions seek privileged, confidential
11 information for which the defendants have a privilege, i.e.,
12 attorney-client privilege, they're not entitled to discover
13 our litigation tactics and strategies, they're not entitled
14 -- they are not entitled to discover the opinions of our
15 counsel, they're not entitled to determine or discover our
16 litigation --

17 THE COURT: Is that what he's being asked to
18 produce here, or is it simply, you know, based on his 25
19 years' experience with the defendant organizations,
20 whichever ones he may have been involved with? He knows
21 that the practices are this and this is their approach or,
22 you know, whatever.

23 MR. POTTER: Well, again, I think that what we
24 need to look at to answer that question is the affidavit
25 that he filed in this case.

1 MR. POPE: Your Honor, Wally Pope. May I just
2 make one small point here?

3 THE COURT: You can.

4 MR. POPE: I believe that Mr. Rinder signed a
5 rather extensive confidentiality agreement with one or more
6 of the defendants which prohibits him from revealing this
7 sort of information and a whole host of other sorts of
8 information. And to my recollection, that agreement is
9 somewhere in the massive papers relating to the
10 disqualification motion. That's all I wanted to put in.

11 MR. BABBITT: This is Ted Babbitt. May I respond
12 to that?

13 THE COURT: Yes.

14 MR. BABBITT: I didn't hear you, is that a yes,
15 Your Honor?

16 THE COURT: Yes.

17 MR. BABBITT: Oh, I'm sorry. If there is a
18 confidentiality agreement with Mr. Rinder, we are not a
19 party to it and our clients are not a party to it. How
20 would that prevent -- if he breaches that agreement, how
21 does that then somehow affect us? If he breaches that
22 agreement there are, I assume, remedies that the defendants
23 can utilize against Mr. Rinder. He has a right of free
24 speech only affected by whatever agreement he's entered into
25 with them, and they have a way of stopping him if he -- or

1 seeking damages or whatever else, we are not in any way
2 bound by that confidentiality agreement if it exists.

3 And to answer Your Honor's initial question, there
4 is absolutely nothing wrong -- not only is there nothing
5 wrong with Mr. Rinder saying whatever he knows about the
6 church, which, by the way, he has put on the Internet over
7 and over and over again, and without objection, and without
8 any attempt to try and stop him.

9 So it is unusual, at least, to say the least, that
10 suddenly because we are representing the defendants in this
11 lawsuit the defendants, after years and years -- I don't
12 think Mr. Rinder has worked for them for years and years --
13 suddenly wish to engage in this -- in this charade of that
14 there's secrets that are being given out that have not been
15 previously given out in every blog and thousands of times.
16 There's nothing that prevents -- there is no privilege that
17 has been enunciated that I'm aware of. And, in fact, the
18 law specifically says you have a right to contact prior
19 employees --

20 THE COURT: Well, if he's been retained -- if he's
21 been retained as a consultant --

22 MR. BABBITT: Absolutely.

23 THE COURT: And you say Rathbun has not?

24 MR. BABBITT: Has not, Your Honor. We've had very
25 limited communications with Mr. Rathbun. The only

1 communications we've had is to ask him to sign an affidavit.
2 He did that; the affidavit was filed. That's it. We have
3 had no other communications. I've never spoken to him. But
4 one lawyer in my office spoke to him about obtaining an
5 affidavit. That's it. The affidavit speaks for itself.

6 THE COURT: To the extent that Mr. Rinder has
7 information, basic communications with defendants' lawyers,
8 would that not remain privileged?

9 MR. BABBITT: Well I don't know, Your Honor. But,
10 first of all, we've never spoken -- no one has ever spoken
11 with Mr. Rinder about any communications with any lawyers.
12 If -- I don't know whether or not we depend -- as you know,
13 the attorney-client privilege is not -- it is limited and it
14 depends on whether it was the providing of advice. There
15 are several elements to it. I don't know whether there is
16 that privilege between him and Mr. Rinder, but I can, as an
17 officer of the court tell the Court we have not discussed
18 with Mr. Rinder anything about what any lawyer has told him
19 ever.

20 In fact, to the contrary, his position is that he
21 was the one, not any lawyers that had created these
22 documents. That's what he said in his affidavit. And he
23 was a higher-up of the church for a long time. And as I
24 said, you can look on the Internet and find everything that
25 he's said. It's all there, and has been for years.

1 THE COURT: Let me ask, let me go to the
2 defendants.

3 Do you have, apart from this claim, a
4 confidentiality agreement which Mr. Pope references, and I
5 assume that there is one, apart from that do you have some
6 other legal basis to protest his production in the matter?

7 MR. POPE: Yes, Your Honor. Again, I don't think
8 the issue is whether or not Mr. Rinder is subject to
9 discovery or subject to a deposition. The issue is whether
10 or not plaintiffs' counsel is disqualified once they have
11 obtained the play book of litigation information. And we
12 suspect that that's exactly what they are getting from Mr.
13 Rinder.

14 THE COURT: And if they obtain -- let's assume
15 you're correct and say that they obtained it from Mr.
16 Rinder. Would that be a disqualifying event?

17 MR. POTTER: Yes.

18 THE COURT: Why so?

19 MR. POTTER: Again, the case law that says that
20 former employees are subject to discovery also say that
21 they're subject to discovery but not to the extent that they
22 can reveal confidential privileged information. And that's
23 exactly what Mr. Rinder is doing.

24 If you look at the affidavit that he filed in this
25 case, he talks about communications he had with church

1 attorneys. And Mr. Rathbun has done the exact same thing in
2 other cases. He says I was involved in these conversations
3 and this is what attorneys told me. And that is privileged
4 information in any deposition.

5 If the question at his deposition was what did the
6 defendant's attorney tell you, that would be objected to,
7 and I think that would be sustained by most courts.

8 THE COURT: What about Mr. Rathbun -- Mr. Babbitt
9 says we should take him out of the discussion here, he
10 occupies a different position?

11 MR. POTTER: Well we do not think he is in a
12 different position. The plaintiffs are representing that
13 they have no compensation agreement with him, but there is
14 no question that he has participated in this litigation,
15 he's filed an affidavit in this case --

16 THE COURT: And if he wishes to come forward and
17 to testify as any witness would have the right to do, or
18 perhaps even reluctantly do?

19 MR. POTTER: He can do that. It's a free country.
20 He's entitled to participate in anything that he wants to.
21 But again, he's not entitled to disclose confidential
22 information that belongs to the defendants.

23 If we're in a deposition setting, then we've got
24 counsel there, we can ferret those things out. But when
25 there's these communications going on one way, there's no

1 way that we know what's going on in those communications.

2 That's why we're asking to see the communications.

3 They won't give us the communications, they won't
4 even give us a privilege log. So we don't know what's going
5 on except that when we look at the affidavits that both Mr.
6 Rinder and Mr. Rathbun have filed in this court and others,
7 we see that not only are they professing to have the
8 confidential information but they're also professing a
9 willingness to disclose it. In fact, they have disclosed
10 it.

11 So it's not just us speculating as to what they
12 are going to do. We have documented proof of what they are
13 doing. They are revealing those conversations.

14 THE COURT: The last two categories relate to
15 communications which relate to the payment of compensation
16 or remuneration to Mr. Rinder and Mr. Rathbun.

17 Plaintiffs say we stipulate that Mr. Rinder has
18 received compensation. If you wish to see documents
19 sufficient to demonstrate the amount of compensation, we
20 will provide them.

21 Are we asserting any claim of privilege there?
22 It's hard to read that as reserving anything that needs the
23 Court's interference on.

24 MR. BABBITT: Well, first of all, as to number
25 six, that's been agreed to. And I just think it's a waste

1 of time, I guess. But if they want, I offered -- if they
2 want us to go through and get our bookkeeper to find the
3 bills and give them to him. All they'll find out is -- and
4 I suppose that the amount that he has received would be
5 relevant if he -- if we decide to use him as a witness at
6 any time to show his, you know, his interest in the outcome.
7 But we just -- we didn't see the need. We were offering
8 this as an agreement to just, you know -- we have paid him.
9 If you want to know how much we paid him? We'll tell you
10 that too. Or if they ask, we'll give them a copy of the
11 checks or the bills or whatever they want. It's just --
12 it's another distraction, Your Honor.

13 THE COURT: Is there a retainer agreement with
14 this witness -- with this consultant?

15 MR. BABBITT: Um, I don't remember, Your Honor.
16 There probably is. With Mr. Rinder.

17 THE COURT: Right. Right. With regard to Mr.
18 Rathbun, just to put it on the record, the plaintiffs'
19 response says we've confirmed that he received -- that he
20 has received no compensation and there is no agreement to
21 compensate him, and defendants says they accept that at this
22 point; is that correct?

23 MR. POTTER: Yes. We accept their representation,
24 Your Honor. We have no evidence to the contrary at this
25 point in time. If we come up with something, we'll

1 certainly challenge that.

2 THE COURT: Okay.

3 MR. POTTER: Because we suspect otherwise. But we
4 have no proof.

5 THE COURT: All right.

6 MR. BABBITT: Your Honor, as an officer of the
7 court -- and this is Mr. Babbitt -- as an officer of the
8 court we have represented we don't have an agreement. And I
9 take umbrage at someone saying we suspect otherwise. You
10 know, if there were such an agreement I would not lie to a
11 federal judge.

12 MR. POTTER: Mr. Babbitt, I cast no dispersions in
13 your direction. I'm -- my comment was more with respect to
14 Mr. Rathbun than it was to you. I have told the Court that
15 I accept your representation.

16 Your Honor, if we could go back just a tad,
17 categories two, three and four, we have also specifically
18 asked for time records. The reason that we asked for those
19 time records is while they would not disclose the content of
20 any of the communications, they would be relevant to the
21 amount, the degree, the frequency and the extent of
22 communications between Mr. Johnson, Mr. Rinder and Mr.
23 Rathbun. And the reason that that is important is that
24 there is case law. We have cited it in our Motion for
25 Disqualification, and that case law says that if there is a

1 showing that former counsel has had substantial
2 communications with co-counsel then a rebuttable presumption
3 arises that confidential information was exchanged.

4 So I just wanted to bring that to the Court's
5 attention. We are asking for those time records for that
6 reason. There is case law that says that it's relevant. It
7 allows us to at least establish a presumption. There has
8 been absolutely no claim of privilege to those records.
9 They are not on the privilege log. No one has even
10 addressed the issue, other than me, that I wanted to bring
11 that to the Court's attention. We have specifically asked
12 for time records for Mr. Johnson, as well as the three law
13 firms, GrayRobinson, Babbitt Johnson, and Weil & Quaranta,
14 because those records themselves, while they should contain
15 no privileged information whatsoever, are in fact very
16 relevant to our motion.

17 And I also wanted to point out that we're not just
18 doing this discovery for the fun of it. The district court
19 has set an evidentiary hearing. We're going to be put to
20 the proof of our test -- the test of our proof, rather --
21 and we need this information for purposes of that
22 evidentiary hearing.

23 MR. BABBITT: If I may respond, this is Ted
24 Babbitt.

25 THE COURT: You don't need to. Let me back up a

1 little bit myself.

2 Respond to Mr. Potter's argument that -- let's
3 deal with Mr. Rinder, but I suppose this aspect of it
4 applies to Rathbun as well -- that they possess confidential
5 information by reason of their positions, their former
6 positions with the defendants, and that accordingly the
7 defendants may claim privilege for their disclosure of such
8 confidential things. And I'm not talking about
9 communications they may have had with church counsel, but in
10 the broad context of being in possession of what might be
11 viewed as confidential and proprietary information. May
12 they assert -- may the defendants assert that as a bar to
13 any type of disclosure?

14 MR. BABBITT: No, Your Honor, I don't believe so.
15 Not -- if you look at the H.B.A. case, which we cited in the
16 paper that you're looking at, that's a (indiscernible) case.
17 It's a case involving a nursing home in which the plaintiff
18 sought to interview former employees of a nursing home and
19 discover exactly the same thing that they're talking about
20 here, which is essentially the way they handle things and
21 the doctors that they use and things like that.

22 If -- if they are going to claim some sort of a
23 privilege for that, they have to enunciate what it is. I
24 have not heard why it is, and I have not heard a response to
25 your question as to why Mr. Rinder is foreclosed apart from

1 this confidentiality rule, and I've already spoken to that,
2 from saying anything that he knows. He's told me -- if
3 we're not talking about attorney matters, I've talked about
4 that as well, but they haven't met any burden whatsoever to
5 show any kind of a privilege that they can enunciate. He
6 has a right and he has exercised that right over and over
7 again without objection. And I don't understand what it is
8 or how it is that he is foreclosed from doing that. When an
9 employee of a corporation finds out how they do things -- I
10 mean, this happens with lobbyists all the time, you know.
11 People that are formerly congressmen become lobbyists
12 because they know the inner workings of the Congress.
13 That's not privileged. And neither is a nursing home,
14 either is this corporation, the Scientology Corporation.
15 It's just not -- it doesn't create any kind of a bar against
16 telling us whatever he knows about the way they conduct
17 their business. That's at the heart of it.

18 THE COURT: Mr. Pope points out there is a
19 confidentiality agreement, which I assume would allow them
20 to protest if the person was doing this.

21 But let me ask the defendants, why wouldn't that
22 -- assuming there is such a thing -- have you not waived any
23 objection under that by reason of allowing him to do what
24 he's apparently done in the past, which is broadcast to the
25 world, if you will, his views and statements that are

1 germane to this litigation as well, without taking steps to
2 enforce the confidentiality agreement? Shouldn't I find a
3 waiver in that?

4 MR. POTTER: Well, first of all, Your Honor, we
5 don't necessarily agree with Mr. Babbitt's representation
6 that Mr. Rathbun and Mr. Rinder have broadcast all of this
7 information.

8 The information that we're seeking to protect is
9 not the fact that these two gentlemen no longer like my
10 client. What we're trying to protect is this so-called
11 litigation play book information. There's no question that
12 that information is confidential, it is protected, it is
13 privileged, and the privilege belongs to the defendant
14 entity, not to the players, the individual players that were
15 the developers of that information.

16 To the extent that Mr. Rinder or Mr. Rathbun seeks
17 to disclose that litigation play book information, they
18 cannot do so. It's privileged, and the privilege belongs to
19 their former employer. There is simply no question about
20 that. Those cases are in the Motion to Disqualify. And
21 that's what we are trying to protect here, but more
22 importantly, again, it's not a question of whether those
23 gentlemen are subject to discovery. It's a question of
24 whether the plaintiffs' firms are disqualified because they
25 have sought that information, they have obtained that

1 information, and they are now seeking to use it to their
2 advantage and to the disadvantage of the defendant. This is
3 a motion about whether they are to be disqualified. It's
4 not a motion about whether Mr. Rinder or Mr. Rathbun are
5 subject to a deposition.

6 MR. BABBITT: Your Honor, I just -- this is Ted
7 Babbitt again. I just pulled up on my computer under Google
8 Mike Rinder, and there's probably hundreds of sites where he
9 has talked about not just he doesn't like this company, but
10 what they do, their practices, how they -- what --
11 everything about their so-called strategy, the way they
12 conduct business. If this is not a waiver, I cannot imagine
13 what would be. In any case, we're not a party to this
14 confidentiality agreement. That would be between them and
15 Mr. Rinder.

16 The first thing on this is Mike Rinder's blog in
17 which he says that David Miscavige has lost his way, he's
18 giving money to people he shouldn't, he's turning over cash,
19 provides case names and (indiscernible) remarkable -- I mean
20 this is all about the president of their company. And
21 nothing's been done to stop it.

22 THE COURT: Okay. I've run out of question marks
23 on my notes here. Anybody have anything else to offer?

24 MR. POTTER: Your Honor, we did find a couple of
25 additional cases if I could give you the citations.

1 THE COURT: All right.

2 MR. POTTER: We cited some cases holding that fee
3 agreements are not privileged. We cited those in our
4 motion, but we found two additional cases, both of which are
5 Middle District of Florida cases. The first case is 230
6 Federal Rules Decision 688. It's a case -- a 2005 case out
7 of the Middle -- out of the Orlando Division, *Universal City*
8 *Development*. The other case is out of Fort Myers, it's
9 *Arthrex vs. Parkus Medical*. It's at 2012 WL 5382050. And
10 then there is one case that we were able to find involving
11 litigation trial consultant fee agreements. It's a case out
12 of New York. It's found at 166 Federal Rules Decision 284.
13 And that's *State of New York vs. Solvent Chemical Company*.

14 Thank you, Your Honor.

15 THE COURT: Anything else from the plaintiffs?

16 MR. BABBITT: No, Your Honor.

17 THE COURT: Mr. Zabak, go ahead and leave the
18 documents. I'm still undecided about this. Every time I
19 wade into an in camera review I get extreme headaches.

20 MR. ZABAK: I'll leave them with you then.

21 THE COURT: I'm less than 24 hours back from
22 vacation. I'm not looking at getting that sort of response
23 as of yet. But anyway, leave them and we'll -- if we
24 determine that we need to do that we will, and we'll notify
25 counsel.

1 MR. ZABAK: And, Your Honor, I did understand, if
2 I might ask for clarification, that pursuant to my
3 discussion with Mr. Potter, that I'm excused from the
4 subpoena.

5 THE COURT: For the hearing?

6 MR. ZABAK: No, excuse me, from the subpoena for
7 the production or for -- at the hearing given that --

8 THE COURT: At present you are, as I understand
9 it.

10 MR. POTTER: Yeah, I'm not -- yes.

11 MR. ZABAK: Mr. Johnson has everything I have, and
12 more.

13 MR. POTTER: We don't need to subpoena the same
14 documents twice.

15 THE COURT: All right. Thank you.

16 MR. ZABAK: Thank you, Your Honor.

17 (Proceedings concluded at 3:00 p.m.)
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C E R T I F I C A T E

I, Howard W. Jones, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s Howard W. Jones

Howard W. Jones, RPR
Official Court Reporter
United States District Court
Middle District of Florida
Tampa Division

1	20/4 20/10 22/8 23/1 26/2 26/24 27/9 27/23 28/10 29/7 32/5 33/1 33/11 33/18 34/25 35/8 40/8 40/19 41/3 41/3 41/7 41/16 42/19 43/3 43/4 43/9 43/11 43/20 44/18 above [1] 46/3 above-entitled [1] 46/3 absolutely [3] 32/4 32/22 39/8 accept [3] 37/21 37/23 38/15 accomplish [1] 29/24 accordingly [1] 40/6 acknowledge [1] 26/22 act [1] 28/25 acting [2] 17/19 17/24 action [2] 26/3 27/10 actively [1] 21/9 actual [1] 22/6 actually [2] 27/12 27/23 additional [2] 43/25 44/4 additionally [1] 9/22 addressed [3] 8/9 8/19 39/10 addressing [1] 6/22 Administrations [1] 6/8 admitted [1] 26/17 advantage [1] 43/2 advice [1] 33/14 advise [1] 19/23 affect [1] 31/21 affected [1] 31/24 affidavit [15] 21/11 21/11 21/13 21/19 29/5 29/19 29/21 30/24 33/1 33/2 33/5 33/5 33/22 34/24 35/15 affidavits [3] 11/10 21/23 36/5 after [1] 32/11 again [18] 5/7 15/8 15/21 17/17 20/2 20/23 21/10 25/25 29/9 30/9 30/23 32/7 34/7 34/19 35/21 41/7 42/22 43/7 against [2] 31/23 41/15 agent [1] 15/6 ago [5] 13/19 17/8 17/9 23/22 25/24 agree [3] 23/14 27/17 42/5 agreed [2] 9/6 36/25 agreement [37] 9/4 9/10 9/10 9/19 9/23 10/10 10/11 10/12 10/13 10/17 10/17 10/23 11/15 11/16 12/3 12/4 14/6 14/6 14/16 21/8 31/5 31/8 31/18 31/20 31/22 31/24 32/2 34/4 35/13 37/8 37/13 37/20 38/8 38/10 41/19 42/2 43/14 agreements [7] 11/2 11/3 11/4 11/25 14/11 44/3 44/11 agrees [2] 15/9 15/12 ahead [5] 5/12 15/1 22/8 24/19 44/17 aided [1] 1/22 al [1] 1/10 all [42] 5/21 6/10 6/14 7/7 7/18 8/9 8/14 8/20 10/17 11/8 13/13 13/20 13/22 15/10 16/5 17/3 17/11 18/25 20/17 22/24 23/4 23/16 24/16 24/20 25/1 25/4 26/16 27/2 27/3 27/3 31/10 33/10 33/25 36/24 37/3 38/5 41/10 42/4 42/6 43/20 44/1 45/15 allow [2] 14/11 41/19 allowing [1] 41/23 allows [1] 39/7 almost [1] 13/20 along [1] 22/2 already [3] 11/7 12/12 41/1 also [10] 2/23 5/19 6/3 11/15 21/18 21/22 34/20 36/8 38/17 39/17 although [2] 5/14 19/5 am [2] 6/2 7/24 Amanda [2] 2/5 6/3 among [3] 9/19 9/23 25/6 amount [4] 24/25 36/19 37/4 38/21	And/or [1] 24/15 another [2] 6/21 18/23 37/42 answer [3] 22/23 30/24 32/3 answers [1] 30/10 anxiously [1] 7/4 any [47] anybody [3] 6/14 26/8 43/23 anything [12] 12/14 16/9 18/12 18/15 26/16 29/7 33/18 35/20 36/22 41/2 43/23 44/15 anyway [1] 44/23 anywhere [1] 26/21 apart [4] 26/3 34/3 34/5 40/25 apologize [2] 16/18 17/5 apparently [4] 8/9 26/25 30/4 41/24 appearance [3] 5/13 11/22 12/21 appears [1] 12/13 applies [2] 22/24 40/4 appreciate [2] 13/12 28/3 approach [2] 7/17 30/21 arbitrary [1] 18/6 are [62] areas [1] 8/8 arguably [1] 27/24 argue [1] 13/15 argued [1] 13/22 arguing [1] 13/1 argument [6] 7/22 7/23 8/2 8/14 24/21 40/2 arises [1] 39/3 arose [1] 14/8 around [2] 16/20 18/13 arrangement [3] 14/14 14/18 14/21 Arthrex [1] 44/9 as [52] aside [2] 22/7 22/10 ask [10] 8/6 8/13 8/21 11/21 25/14 33/1 34/1 37/10 41/21 45/2 asked [7] 9/25 27/8 29/10 30/17 38/18 38/18 39/11 asking [6] 16/10 19/18 26/10 30/7 36/2 39/5 aspect [1] 40/3 assert [3] 28/18 40/12 40/12 asserted [1] 20/10 asserting [1] 36/21 assist [1] 11/16 associate [1] 26/13 assume [7] 8/9 12/2 20/19 31/22 34/5 34/14 41/19 assuming [4] 17/20 22/18 23/24 41/22 at [32] 7/3 7/14 8/6 8/13 9/16 16/2 18/23 19/9 19/10 20/20 22/2 27/16 28/5 30/24 32/9 34/24 35/5 36/5 37/5 37/21 37/24 38/9 39/7 40/15 40/16 41/17 44/9 44/12 44/22 45/7 45/8 45/17 attached [1] 21/11 attempt [1] 32/8 attention [2] 39/5 39/11 attorney [15] 5/15 5/20 9/2 9/15 10/22 12/10 20/16 21/15 21/23 28/24 29/13 30/12 33/13 35/6 41/3 attorney-client [7] 9/15 10/22 21/15 21/23 28/24 30/12 33/13 attorneys [11] 17/16 18/19 19/23 19/25 20/12 21/1 24/15 27/4 29/25 35/1 35/3 audible [1] 6/16 authored [1] 27/7 Ave [1] 2/20 aware [3] 14/5 26/8 32/17 awfully [1] 14/18	
2	20 [1] 23/2 200 [2] 2/6 2/20 2005 [1] 44/6 2007 [6] 16/3 16/18 16/20 23/17 23/18 23/19 2008 [3] 16/18 16/20 17/21 2012 [1] 44/9 2013 [1] 1/8 230 [1] 44/5 24 [1] 44/21 25 [3] 26/23 27/23 30/18 2500 [1] 2/4 27TBM [2] 1/7 5/6 284 [1] 44/12 2:00 [1] 1/9 2:30 [1] 7/4	20/4 20/10 22/8 23/1 26/2 26/24 27/9 27/23 28/10 29/7 32/5 33/1 33/11 33/18 34/25 35/8 40/8 40/19 41/3 41/3 41/7 41/16 42/19 43/3 43/4 43/9 43/11 43/20 44/18 above [1] 46/3 above-entitled [1] 46/3 absolutely [3] 32/4 32/22 39/8 accept [3] 37/21 37/23 38/15 accomplish [1] 29/24 accordingly [1] 40/6 acknowledge [1] 26/22 act [1] 28/25 acting [2] 17/19 17/24 action [2] 26/3 27/10 actively [1] 21/9 actual [1] 22/6 actually [2] 27/12 27/23 additional [2] 43/25 44/4 additionally [1] 9/22 addressed [3] 8/9 8/19 39/10 addressing [1] 6/22 Administrations [1] 6/8 admitted [1] 26/17 advantage [1] 43/2 advice [1] 33/14 advise [1] 19/23 affect [1] 31/21 affected [1] 31/24 affidavit [15] 21/11 21/11 21/13 21/19 29/5 29/19 29/21 30/24 33/1 33/2 33/5 33/5 33/22 34/24 35/15 affidavits [3] 11/10 21/23 36/5 after [1] 32/11 again [18] 5/7 15/8 15/21 17/17 20/2 20/23 21/10 25/25 29/9 30/9 30/23 32/7 34/7 34/19 35/21 41/7 42/22 43/7 against [2] 31/23 41/15 agent [1] 15/6 ago [5] 13/19 17/8 17/9 23/22 25/24 agree [3] 23/14 27/17 42/5 agreed [2] 9/6 36/25 agreement [37] 9/4 9/10 9/10 9/19 9/23 10/10 10/11 10/12 10/13 10/17 10/17 10/23 11/15 11/16 12/3 12/4 14/6 14/6 14/16 21/8 31/5 31/8 31/18 31/20 31/22 31/24 32/2 34/4 35/13 37/8 37/13 37/20 38/8 38/10 41/19 42/2 43/14 agreements [7] 11/2 11/3 11/4 11/25 14/11 44/3 44/11 agrees [2] 15/9 15/12 ahead [5] 5/12 15/1 22/8 24/19 44/17 aided [1] 1/22 al [1] 1/10 all [42] 5/21 6/10 6/14 7/7 7/18 8/9 8/14 8/20 10/17 11/8 13/13 13/20 13/22 15/10 16/5 17/3 17/11 18/25 20/17 22/24 23/4 23/16 24/16 24/20 25/1 25/4 26/16 27/2 27/3 27/3 31/10 33/10 33/25 36/24 37/3 38/5 41/10 42/4 42/6 43/20 44/1 45/15 allow [2] 14/11 41/19 allowing [1] 41/23 allows [1] 39/7 almost [1] 13/20 along [1] 22/2 already [3] 11/7 12/12 41/1 also [10] 2/23 5/19 6/3 11/15 21/18 21/22 34/20 36/8 38/17 39/17 although [2] 5/14 19/5 am [2] 6/2 7/24 Amanda [2] 2/5 6/3 among [3] 9/19 9/23 25/6 amount [4] 24/25 36/19 37/4 38/21	And/or [1] 24/15 another [2] 6/21 18/23 37/42 answer [3] 22/23 30/24 32/3 answers [1] 30/10 anxiously [1] 7/4 any [47] anybody [3] 6/14 26/8 43/23 anything [12] 12/14 16/9 18/12 18/15 26/16 29/7 33/18 35/20 36/22 41/2 43/23 44/15 anyway [1] 44/23 anywhere [1] 26/21 apart [4] 26/3 34/3 34/5 40/25 apologize [2] 16/18 17/5 apparently [4] 8/9 26/25 30/4 41/24 appearance [3] 5/13 11/22 12/21 appears [1] 12/13 applies [2] 22/24 40/4 appreciate [2] 13/12 28/3 approach [2] 7/17 30/21 arbitrary [1] 18/6 are [62] areas [1] 8/8 arguably [1] 27/24 argue [1] 13/15 argued [1] 13/22 arguing [1] 13/1 argument [6] 7/22 7/23 8/2 8/14 24/21 40/2 arises [1] 39/3 arose [1] 14/8 around [2] 16/20 18/13 arrangement [3] 14/14 14/18 14/21 Arthrex [1] 44/9 as [52] aside [2] 22/7 22/10 ask [10] 8/6 8/13 8/21 11/21 25/14 33/1 34/1 37/10 41/21 45/2 asked [7] 9/25 27/8 29/10 30/17 38/18 38/18 39/11 asking [6] 16/10 19/18 26/10 30/7 36/2 39/5 aspect [1] 40/3 assert [3] 28/18 40/12 40/12 asserted [1] 20/10 asserting [1] 36/21 assist [1] 11/16 associate [1] 26/13 assume [7] 8/9 12/2 20/19 31/22 34/5 34/14 41/19 assuming [4] 17/20 22/18 23/24 41/22 at [32] 7/3 7/14 8/6 8/13 9/16 16/2 18/23 19/9 19/10 20/20 22/2 27/16 28/5 30/24 32/9 34/24 35/5 36/5 37/5 37/21 37/24 38/9 39/7 40/15 40/16 41/17 44/9 44/12 44/22 45/7 45/8 45/17 attached [1] 21/11 attempt [1] 32/8 attention [2] 39/5 39/11 attorney [15] 5/15 5/20 9/2 9/15 10/22 12/10 20/16 21/15 21/23 28/24 29/13 30/12 33/13 35/6 41/3 attorney-client [7] 9/15 10/22 21/15 21/23 28/24 30/12 33/13 attorneys [11] 17/16 18/19 19/23 19/25 20/12 21/1 24/15 27/4 29/25 35/1 35/3 audible [1] 6/16 authored [1] 27/7 Ave [1] 2/20 aware [3] 14/5 26/8 32/17 awfully [1] 14/18
3	30 [1] 23/1 305/372-5352 [1] 2/7 32 [1] 12/10 33131 [1] 2/7 33409 [1] 2/3 33602 [1] 2/17 33701 [1] 2/21 33757 [2] 2/10 2/14 3952 [1] 2/21 3:00 [2] 1/9 45/17 3:50 [1] 7/3	20/4 20/10 22/8 23/1 26/2 26/24 27/9 27/23 28/10 29/7 32/5 33/1 33/11 33/18 34/25 35/8 40/8 40/19 41/3 41/3 41/7 41/16 42/19 43/3 43/4 43/9 43/11 43/20 44/18 above [1] 46/3 above-entitled [1] 46/3 absolutely [3] 32/4 32/22 39/8 accept [3] 37/21 37/23 38/15 accomplish [1] 29/24 accordingly [1] 40/6 acknowledge [1] 26/22 act [1] 28/25 acting [2] 17/19 17/24 action [2] 26/3 27/10 actively [1] 21/9 actual [1] 22/6 actually [2] 27/12 27/23 additional [2] 43/25 44/4 additionally [1] 9/22 addressed [3] 8/9 8/19 39/10 addressing [1] 6/22 Administrations [1] 6/8 admitted [1] 26/17 advantage [1] 43/2 advice [1] 33/14 advise [1] 19/23 affect [1] 31/21 affected [1] 31/24 affidavit [15] 21/11 21/11 21/13 21/19 29/5 29/19 29/21 30/24 33/1 33/2 33/5 33/5 33/22 34/24 35/15 affidavits [3] 11/10 21/23 36/5 after [1] 32/11 again [18] 5/7 15/8 15/21 17/17 20/2 20/23 21/10 25/25 29/9 30/9 30/23 32/7 34/7 34/19 35/21 41/7 42/22 43/7 against [2] 31/23 41/15 agent [1] 15/6 ago [5] 13/19 17/8 17/9 23/22 25/24 agree [3] 23/14 27/17 42/5 agreed [2] 9/6 36/25 agreement [37] 9/4 9/10 9/10 9/19 9/23 10/10 10/11 10/12 10/13 10/17 10/17 10/23 11/15 11/16 12/3 12/4 14/6 14/6 14/16 21/8 31/5 31/8 31/18 31/20 31/22 31/24 32/2 34/4 35/13 37/8 37/13 37/20 38/8 38/10 41/19 42/2 43/14 agreements [7] 11/2 11/3 11/4 11/25 14/11 44/3 44/11 agrees [2] 15/9 15/12 ahead [5] 5/12 15/1 22/8 24/19 44/17 aided [1] 1/22 al [1] 1/10 all [42] 5/21 6/10 6/14 7/7 7/18 8/9 8/14 8/20 10/17 11/8 13/13 13/20 13/22 15/10 16/5 17/3 17/11 18/25 20/17 22/24 23/4 23/16 24/16 24/20 25/1 25/4 26/16 27/2 27/3 27/3 31/10 33/10 33/25 36/24 37/3 38/5 41/10 42/4 42/6 43/20 44/1 45/15 allow [2] 14/11 41/19 allowing [1] 41/23 allows [1] 39/7 almost [1] 13/20 along [1] 22/2 already [3] 11/7 12/12 41/1 also [10] 2/23 5/19 6/3 11/15 21/18 21/22 34/20 36/8 38/17 39/17 although [2] 5/14 19/5 am [2] 6/2 7/24 Amanda [2] 2/5 6/3 among [3] 9/19 9/23 25/6 amount [4] 24/25 36/19 37/4 38/21	And/or [1] 24/15 another [2] 6/21 18/23 37/42 answer [3] 22/23 30/24 32/3 answers [1] 30/10 anxiously [1] 7/4 any [47] anybody [3] 6/14 26/8 43/23 anything [12] 12/14 16/9 18/12 18/15 26/16 29/7 33/18 35/20 36/22 41/2 43/23 44/15 anyway [1] 44/23 anywhere [1] 26/21 apart [4] 26/3 34/3 34/5 40/25 apologize [2] 16/18 17/5 apparently [4] 8/9 26/25 30/4 41/24 appearance [3] 5/13 11/22 12/21 appears [1] 12/13 applies [2] 22/24 40/4 appreciate [2] 13/12 28/3 approach [2] 7/17 30/21 arbitrary [1] 18/6 are [62] areas [1] 8/8 arguably [1] 27/24 argue [1] 13/15 argued [1] 13/22 arguing [1] 13/1 argument [6] 7/22 7/23 8/2 8/14 24/21 40/2 arises [1] 39/3 arose [1] 14/8 around [2] 16/20 18/13 arrangement [3] 14/14 14/18 14/21 Arthrex [1] 44/9 as [52] aside [2] 22/7 22/10 ask [10] 8/6 8/13 8/21 11/21 25/14 33/1 34/1 37/10 41/21 45/2 asked [7] 9/25 27/8 29/10 30/17 38/18 38/18 39/11 asking [6] 16/10 19/18 26/10 30/7 36/2 39/5 aspect [1] 40/3 assert [3] 28/18 40/12 40/12 asserted [1] 20/10 asserting [1] 36/21 assist [1] 11/16 associate [1] 26/13 assume [7] 8/9 12/2 20/19 31/22 34/5 34/14 41/19 assuming [4] 17/20 22/18 23/24 41/22 at [32] 7/3 7/14 8/6 8/13 9/16 16/2 18/23 19/9 19/10 20/20 22/2 27/16 28/5 30/24 32/9 34/24 35/5 36/5 37/5 37/21 37/24 38/9 39/7 40/15 40/16 41/17 44/9 44/12 44/22 45/7 45/8 45/17 attached [1] 21/11 attempt [1] 32/8 attention [2] 39/5 39/11 attorney [15] 5/15 5/20 9/2 9/15 10/22 12/10 20/16 21/15 21/23 28/24 29/13 30/12 33/13 35/6 41/3 attorney-client [7] 9/15 10/22 21/15 21/23 28/24 30/12 33/13 attorneys [11] 17/16 18/19 19/23 19/25 20/12 21/1 24/15 27/4 29/25 35/1 35/3 audible [1] 6/16 authored [1] 27/7 Ave [1] 2/20 aware [3] 14/5 26/8 32/17 awfully [1] 14/18
4	46 [1] 3/2	And/or [1] 24/15 another [2] 6/21 18/23 37/42 answer [3] 22/23 30/24 32/3 answers [1] 30/10 anxiously [1] 7/4 any [47] anybody [3] 6/14 26/8 43/23 anything [12] 12/14 16/9 18/12 18/15 26/16 29/7 33/18 35/20 36/22 41/2 43/23 44/15 anyway [1] 44/23 anywhere [1] 26/21 apart [4] 26/3 34/3 34/5 40/25 apologize [2] 16/18 17/5 apparently [4] 8/9 26/25 30/4 41/24 appearance [3] 5/13 11/22 12/21 appears [1] 12/13 applies [2] 22/24 40/4 appreciate [2] 13/12 28/3 approach [2] 7/17 30/21 arbitrary [1] 18/6 are [62] areas [1] 8/8 arguably [1] 27/24 argue [1] 13/15 argued [1] 13/22 arguing [1] 13/1 argument [6] 7/22 7/23 8/2 8/14 24/21 40/2 arises [1] 39/3 arose [1] 14/8 around [2] 16/20 18/13 arrangement [3] 14/14 14/18 14/21 Arthrex [1] 44/9 as [52] aside [2] 22/7 22/10 ask [10] 8/6 8/13 8/21 11/21 25/14 33/1 34/1 37/10 41/21 45/2 asked [7] 9/25 27/8 29/10 30/17 38/18 38/18 39/11 asking [6] 16/10 19/18 26/10 30/7 36/2 39/5 aspect [1] 40/3 assert [3] 28/18 40/12 40/12 asserted [1] 20/10 asserting [1] 36/21 assist [1] 11/16 associate [1] 26/13 assume [7] 8/9 12/2 20/19 31/22 34/5 34/14 41/19 assuming [4] 17/20 22/18 23/24 41/22 at [32] 7/3 7/14 8/6 8/13 9/16 16/2 18/23 19/9 19/10 20/20 22/2 27/16 28/5 30/24 32/9 34/24 35/5 36/5 37/5 37/21 37/24 38/9 39/7 40/15 40/16 41/17 44/9 44/12 44/22 45/7 45/8 45/17 attached [1] 21/11 attempt [1] 32/8 attention [2] 39/5 39/11 attorney [15] 5/15 5/20 9/2 9/15 10/22 12/10 20/16 21/15 21/23 28/24 29/13 30/12 33/13 35/6 41/3 attorney-client [7] 9/15 10/22 21/15 21/23 28/24 30/12 33/13 attorneys [11] 17/16 18/19 19/23 19/25 20/12 21/1 24/15 27/4 29/25 35/1 35/3 audible [1] 6/16 authored [1] 27/7 Ave [1] 2/20 aware [3] 14/5 26/8 32/17 awfully [1] 14/18	
5	5352 [1] 2/7 5382050 [1] 44/9 561/684-2500 [1] 2/4	And/or [1] 24/15 another [2] 6/21 18/23 37/42 answer [3] 22/23 30/24 32/3 answers [1] 30/10 anxiously [1] 7/4 any [47] anybody [3] 6/14 26/8 43/23 anything [12] 12/14 16/9 18/12 18/15 26/16 29/7 33/18 35/20 36/22 41/2 43/23 44/15 anyway [1] 44/23 anywhere [1] 26/21 apart [4] 26/3 34/3 34/5 40/25 apologize [2] 16/18 17/5 apparently [4] 8/9 26/25 30/4 41/24 appearance [3] 5/13 11/22 12/21 appears [1] 12/13 applies [2] 22/24 40/4 appreciate [2] 13/12 28/3 approach [2] 7/17 30/21 arbitrary [1] 18/6 are [62] areas [1] 8/8 arguably [1] 27/24 argue [1] 13/15 argued [1] 13/22 arguing [1] 13/1 argument [6] 7/22 7/23 8/2 8/14 24/21 40/2 arises [1] 39/3 arose [1] 14/8 around [2] 16/20 18/13 arrangement [3] 14/14 14/18 14/21 Arthrex [1] 44/9 as [52] aside [2] 22/7 22/10 ask [10] 8/6 8/13 8/21 11/21 25/14 33/1 34/1 37/10 41/21 45/2 asked [7] 9/25 27/8 29/10 30/17 38/18 38/18 39/11 asking [6] 16/10 19/18 26/10 30/7 36/2 39/5 aspect [1] 40/3 assert [3] 28/18 40/12 40/12 asserted [1] 20/10 asserting [1] 36/2	

B
 Babbitt... [15] 9/19 9/23 13/14 14/8
 19/16 20/14 20/22 24/18 31/11 35/8
 38/7 38/12 39/13 39/24 43/7
 Babbitt's [1] 42/5
 back [6] 12/19 13/13 17/20 38/16 39/25
 44/21
 ballpark [1] 16/22
 bar [2] 40/12 41/15
 based [1] 30/18
 basic [1] 33/7
 basically [3] 8/8 9/18 22/4
 basis [1] 34/6
 be [43] 6/24 6/25 7/4 8/19 12/5 12/13
 13/22 15/2 15/23 16/12 17/20 18/17
 20/4 20/10 20/11 20/12 20/15 22/19
 25/4 25/10 25/13 25/13 25/22 26/9
 27/24 27/25 28/8 28/13 28/16 28/18
 28/20 28/22 28/25 34/16 35/6 35/7 37/4
 38/20 39/19 40/10 43/3 43/13 43/14
 Beach [1] 2/3
 because [9] 22/12 22/25 24/22 29/18
 32/10 38/3 39/14 41/12 42/24
 become [1] 41/11
 been [19] 8/9 18/16 19/25 20/9 22/25
 24/10 25/24 26/3 26/22 27/14 30/20
 32/14 32/17 32/20 32/21 33/25 36/25
 39/8 43/21
 before [11] 1/16 13/1 13/9 13/10 18/21
 21/22 23/1 24/10 25/12 25/16 27/1
 began [1] 23/21
 begin [7] 6/22 8/5 8/20 8/22 24/24 27/5
 28/11
 behalf [9] 2/4 2/8 2/11 2/15 2/18 2/22
 5/22 6/12 10/14
 being [8] 12/5 23/13 24/10 25/23 29/14
 30/17 32/14 40/10
 believe [10] 5/24 7/7 7/10 23/21 24/12
 27/6 27/13 30/9 31/4 40/14
 belongs [3] 35/22 42/13 42/18
 Berman [2] 2/16 6/11
 best [1] 16/16
 better [2] 13/17 17/1
 between [10] 10/23 12/3 14/15 15/6
 25/5 26/7 26/11 33/16 38/22 43/14
 beyond [1] 16/1
 big [1] 22/20
 bills [2] 37/3 37/11
 Biscayne [1] 2/6
 bit [1] 40/1
 blog [2] 32/15 43/16
 Blvd [2] 2/6 2/17
 Bob [4] 5/14 7/1 7/9 15/9
 body [2] 14/13 26/23
 Bokor [2] 2/9 2/13
 book [5] 11/13 11/19 34/11 42/11 42/17
 bookkeeper [1] 37/2
 both [7] 11/3 11/14 17/16 21/25 27/20
 36/5 44/4
 bounce [1] 18/13
 bouncing [1] 18/13
 bound [1] 32/2
 breaches [2] 31/20 31/21
 Brian [2] 18/18 19/4
 brief [1] 26/25
 bring [3] 26/18 39/4 39/10
 broad [2] 16/12 40/10
 broadcast [2] 41/24 42/6
 broadly [1] 10/11
 brought [3] 7/16 7/18 18/21
 bunch [1] 27/22
 burden [1] 41/4

BURGOS [1] 1/5
 Burns [2] 2/9 2/13
 business [3] 22/4 41/17 43/12
 but [41] 5/20 7/22 8/22 9/14 10/1 13/3
 14/7 14/10 14/19 14/21 14/22 16/2
 18/13 20/8 20/19 21/21 23/25 25/22
 26/17 26/21 28/17 30/1 33/3 33/9 33/16
 34/21 35/13 35/21 35/24 36/8 37/1 37/7
 38/3 40/3 40/9 41/4 41/21 42/21 43/9
 44/4 44/23
 Byrd [1] 19/2

C
 calendar [1] 7/3
 call [1] 5/3
 called [4] 5/2 11/13 42/10 43/11
 camera [2] 7/20 44/19
 can [15] 5/11 8/10 10/24 12/25 16/1
 24/24 26/8 31/3 31/23 33/16 33/24
 34/22 35/19 35/24 41/5
 can't [1] 20/20
 cannot [3] 23/7 42/18 43/12
 capacity [1] 5/19
 case [50]
 cases [11] 12/10 21/21 21/22 23/2 24/7
 35/2 42/20 43/25 44/2 44/4 44/5
 cash [1] 43/18
 cast [1] 38/12
 categories [2] 36/14 38/17
 category [2] 18/2 22/14
 Central [1] 2/20
 certain [2] 6/18 7/14
 certainly [5] 10/1 12/4 14/22 28/16 38/1
 CERTIFICATE [1] 3/2
 certify [1] 46/2
 challenge [1] 38/1
 charade [1] 32/13
 checks [1] 37/11
 Chemical [1] 44/13
 Chestnut [2] 2/10 2/13
 choice [1] 8/1
 church [9] 1/10 5/5 5/23 5/23 6/12 32/6
 33/23 34/25 40/9
 citations [1] 43/25
 cited [5] 23/1 38/24 40/15 44/2 44/3
 City [1] 44/7
 claim [11] 9/8 9/9 15/19 19/15 28/23
 28/23 34/3 36/21 39/8 40/7 40/22
 claiming [1] 19/20
 claims [2] 12/11 20/10
 clarification [1] 45/2
 Clearwater [2] 2/10 2/14
 client [12] 9/15 10/22 10/22 10/23 14/15
 21/15 21/23 25/10 28/24 30/12 33/13
 42/10
 clients [6] 8/25 9/12 9/13 20/1 25/6
 31/19
 co [1] 39/2
 co-counsel [1] 39/2
 come [4] 5/10 15/3 35/16 37/25
 coming [1] 30/1
 comment [1] 38/13
 communicate [2] 11/19 21/5
 communicated [3] 24/6 26/11 29/6
 communication [9] 17/19 19/24 20/5
 20/7 20/8 20/9 20/24 23/24 29/4
 communications [34] 15/6 17/15 17/23
 18/1 18/17 19/2 19/4 19/11 21/16 21/17
 21/24 22/14 23/10 23/11 23/16 24/1
 24/5 25/5 25/6 32/25 33/1 33/3 33/7
 33/11 34/25 35/25 36/1 36/2 36/3 36/15
 38/20 38/22 39/2 40/9
 company [3] 43/9 43/20 44/13

compensation [1] 37/21
 compensation [6] 21/8 35/13 36/15
 36/18 36/19 37/20
 completely [3] 13/7 13/16 13/20
 computer [2] 1/22 43/7
 computer-aided [1] 1/22
 concerned [1] 7/23
 concluded [1] 45/17
 conduct [2] 41/16 43/12
 Confer [1] 8/8
 confidential [13] 12/8 29/11 29/15 30/6
 30/10 34/22 35/21 36/8 39/3 40/4 40/8
 40/11 42/12
 confidentiality [8] 31/5 31/18 32/2 34/4
 41/1 41/19 42/2 43/14
 confirmed [1] 37/19
 conflict [1] 24/24
 Congress [1] 41/12
 congressmen [1] 41/11
 consultant [5] 19/23 21/8 32/21 37/14
 44/11
 consultants [3] 21/1 22/22 28/25
 contact [1] 32/18
 contacted [1] 15/24
 contain [1] 39/14
 content [1] 38/19
 contents [2] 9/3 9/13
 context [2] 30/7 40/10
 contractual [1] 14/14
 contrary [2] 33/20 37/24
 conversations [3] 29/12 35/2 36/13
 copy [4] 7/17 25/17 25/19 37/10
 corporation [4] 10/14 41/9 41/14 41/14
 correct [14] 6/4 6/5 6/6 7/9 7/13 8/4 8/10
 10/20 13/5 15/21 29/2 34/15 37/22 46/2
 could [8] 13/15 13/17 20/10 25/14 25/15
 27/24 38/16 43/25
 counsel [16] 5/21 11/16 11/20 12/16
 13/16 14/17 17/20 17/24 25/6 30/15
 34/10 35/24 39/1 39/2 40/9 44/25
 country [1] 35/19
 couple [1] 43/24
 course [2] 19/24 27/10
 court [26] 1/1 1/22 3/2 5/2 7/17 7/19
 7/20 14/11 16/1 18/21 18/22 20/20
 21/10 21/22 24/11 25/12 29/20 33/17
 33/17 36/6 38/7 38/8 38/14 39/18 46/6
 46/7
 Court's [3] 36/23 39/4 39/11
 courts [1] 35/7
 create [1] 41/15
 created [1] 33/21
 creating [1] 24/25
 creation [1] 16/11
 critical [1] 17/17
 crouched [1] 17/4
 crux [1] 12/7
 cv [2] 1/7 5/6

D
 damages [1] 32/1
 date [8] 7/14 14/12 15/24 16/1 16/12
 18/2 18/6 23/18
 David [1] 43/17
 deal [1] 40/3
 decide [2] 7/20 37/5
 decided [2] 14/11 28/6
 Decision [2] 44/6 44/12
 declaration [1] 16/17
 defendant [7] 16/14 16/14 29/13 29/22
 30/19 42/13 43/2
 defendant's [1] 35/6
 defendants [36] 1/11 2/11 2/15 2/18

D
 defendants... [32] 2/22 6/19 9/7 14/2
 14/3 14/12 15/14 15/16 17/23 18/3 18/4
 21/6 21/21 24/22 25/8 26/5 26/7 28/11
 28/17 28/23 30/11 31/6 31/22 32/10
 32/11 34/2 35/22 37/21 40/6 40/7 40/12
 41/21
 defendants' [6] 11/11 12/9 21/14 22/1
 29/11 33/7
 degree [2] 22/3 38/21
 DEL [1] 1/5
 delivered [1] 7/19
 demonstrate [1] 36/19
 denied [1] 9/12
 depend [1] 33/12
 depends [1] 33/14
 deposition [8] 25/14 28/17 29/10 34/9
 35/4 35/5 35/23 43/5
 depositions [1] 28/17
 detectives [1] 26/5
 determine [2] 30/15 44/24
 developed [1] 22/3
 developers [1] 42/15
 Development [1] 44/8
 did [8] 21/11 23/16 29/12 29/14 33/2
 35/5 43/24 45/1
 didn't [10] 7/2 7/3 13/1 16/9 16/10 18/6
 20/8 24/21 31/14 37/7
 difference [1] 26/13
 different [4] 13/20 26/10 35/10 35/12
 digitally [1] 1/21
 direction [1] 38/13
 directs [1] 16/1
 disadvantage [1] 43/2
 disagree [1] 9/7
 disclose [4] 35/21 36/9 38/19 42/17
 disclosed [1] 36/9
 discloses [1] 21/16
 disclosure [4] 11/6 12/2 40/7 40/13
 discover [5] 29/11 30/12 30/14 30/15
 40/19
 discovery [10] 6/18 11/9 13/4 28/13 30/8
 34/9 34/20 34/21 39/18 42/23
 discussed [1] 33/17
 discussion [4] 8/11 27/1 35/9 45/3
 discussions [2] 19/25 20/9
 dispersions [1] 38/12
 dispositive [1] 14/10
 dispute [1] 6/18
 disputes [1] 8/10
 disqualification [5] 11/8 22/16 23/13
 31/10 38/25
 disqualified [3] 34/10 42/24 43/3
 Disqualify [6] 7/12 12/13 12/18 21/7
 21/12 42/20
 disqualifying [1] 34/16
 distraction [3] 14/25 25/21 37/12
 district [7] 1/1 1/1 14/9 39/18 44/5 46/7
 46/7
 DIVISION [3] 1/2 44/7 46/8
 do [32] 5/11 8/13 8/13 9/8 9/8 9/12 9/13
 10/24 10/25 13/17 14/24 15/22 16/1
 17/18 19/1 19/11 24/17 25/15 27/17
 28/23 34/3 34/5 35/11 35/17 35/18
 35/19 36/12 41/9 41/23 42/18 43/10
 44/24
 doctors [1] 40/21
 document [6] 1/16 8/11 8/18 9/17 10/1
 15/20
 documented [1] 36/12
 documents [25] 7/14 7/19 7/20 7/24
 15/10 15/12 15/17 15/22 16/5 20/20

26/20 26/23 26/24 27/2 27/2 27/3 27/3 27/19
 27/19 27/24 28/6 29/23 33/22 36/18
 44/18 45/14
 does [2] 23/8 31/21
 doesn't [2] 41/15 43/9
 doing [9] 11/18 13/17 13/18 30/5 34/23
 36/13 39/18 41/8 41/20
 don't [34] 7/10 7/23 8/5 9/3 13/18 14/17
 14/19 15/17 16/4 16/5 16/17 18/9 19/3
 23/22 23/25 24/12 26/6 26/23 27/20
 27/23 28/23 32/11 33/9 33/12 33/15
 34/7 36/4 37/15 38/8 39/25 40/14 41/7
 42/5 45/13
 done [6] 7/16 16/2 24/25 35/1 41/24
 43/21
 downstairs [1] 7/5
 drafted [1] 29/23
 drafting [1] 29/23
 duplicative [1] 27/16
 duration [1] 28/8

E
 each [3] 20/18 20/18 25/19
 earlier [1] 27/19
 Earth [1] 16/11
 easier [1] 26/14
 Eastern [1] 14/9
 effort [1] 8/19
 either [4] 27/7 28/12 29/10 41/14
 electronically [2] 5/8 16/25
 elements [1] 33/15
 else [4] 6/14 32/1 43/23 44/15
 elsewhere [1] 23/7
 employed [2] 10/4 10/7
 employee [1] 41/9
 employees [3] 32/19 34/20 40/18
 employer [1] 42/19
 ended [3] 16/14 17/7 18/7
 enforce [1] 42/2
 engage [1] 32/13
 enough [1] 25/11
 entered [3] 11/22 12/21 31/24
 entertain [1] 25/12
 entirely [1] 13/20
 entities [4] 7/8 16/14 16/14 18/9
 entitled [8] 28/18 30/12 30/13 30/14
 30/15 35/20 35/21 46/3
 entity [1] 42/14
 enunciate [2] 40/23 41/5
 enunciated [1] 32/17
 envelope [1] 7/19
 equal [2] 14/20 14/21
 espousing [1] 25/8
 Esquire [7] 2/2 2/5 2/9 2/12 2/16 2/19
 2/23
 essentially [6] 8/25 10/15 25/2 25/3
 25/20 40/20
 establish [1] 39/7
 et [1] 1/10
 even [4] 9/25 35/18 36/4 39/9
 event [1] 34/16
 ever [2] 33/10 33/19
 every [3] 25/22 32/15 44/18
 everybody [1] 5/12
 everybody's [1] 13/9
 everything [8] 16/11 25/16 25/18 25/18
 25/19 33/24 43/11 45/11
 evidence [4] 4/3 10/3 15/5 37/24
 evidentiary [3] 7/12 39/19 39/22
 exact [1] 35/1
 exactly [6] 23/22 29/15 29/20 34/12
 34/23 40/19
 example [1] 25/14

except [2] 13/18 36/5
 exception [1] 23/4
 exchanged [1] 39/3
 excuse [3] 14/7 20/14 45/6
 excused [2] 27/25 45/3
 exercised [1] 41/6
 exist [2] 11/3 12/1
 exists [3] 10/17 10/17 32/2
 experience [1] 30/19
 extensive [1] 31/5
 extent [7] 15/11 23/15 24/5 33/6 34/21
 38/21 42/16
 extreme [1] 44/19

F
 face [1] 23/15
 fact [13] 9/2 10/4 11/3 11/14 11/25
 12/13 14/1 22/21 32/17 33/20 36/9
 39/15 42/9
 fairly [2] 20/2 20/3
 fall [1] 15/17
 false [1] 13/16
 family [1] 26/5
 far [2] 7/22 19/19
 federal [4] 18/22 38/11 44/6 44/12
 fee [14] 9/4 9/10 9/22 10/2 10/17 12/3
 12/4 14/6 14/10 14/16 14/18 14/20 44/2
 44/11
 feeds [2] 5/8 16/25
 fees [1] 12/4
 felt [1] 25/1
 ferret [1] 35/24
 fighting [1] 26/24
 file [2] 21/11 24/22
 filed [14] 6/19 7/14 8/7 11/9 20/18 21/19
 21/22 24/11 29/18 30/25 33/2 34/24
 35/15 36/6
 files [4] 18/9 25/1 25/10 25/17
 filing [3] 8/18 15/25 20/1
 find [7] 23/10 33/24 37/2 37/3 42/2
 43/24 44/10
 finds [1] 41/9
 fine [3] 5/10 16/22 16/23
 finer [1] 13/25
 finished [1] 13/9
 firm [3] 6/8 27/6 27/6
 firms [7] 12/3 15/8 15/8 18/22 19/12
 39/13 42/24
 first [12] 8/24 13/8 14/12 15/24 19/18
 22/24 24/20 33/10 36/24 42/4 43/16
 44/5
 five [1] 8/14
 FL [6] 2/3 2/7 2/10 2/14 2/17 2/21
 Flag [2] 5/23 5/24
 flight [1] 7/3
 FLORIDA [4] 1/1 1/8 44/5 46/7
 focus [3] 18/4 22/12 24/9
 following [2] 15/7 26/4
 foreclosed [2] 40/25 41/8
 foregoing [1] 46/2
 forget [1] 19/4
 former [5] 34/20 39/1 40/5 40/18 42/19
 formerly [1] 41/11
 formulated [1] 18/17
 Fort [1] 44/8
 forward [2] 18/2 35/16
 found [2] 44/4 44/12
 four [1] 38/17
 frame [2] 13/4 17/21
 frankly [2] 14/4 16/25
 free [3] 28/5 31/23 35/19
 frequency [1] 38/21
 front [2] 5/9 13/23

F
 FSO [1] 7/9
 full [1] 11/6
 fun [1] 39/18
 further [1] 28/1

G
 garbage [1] 26/4
 GARCIA [4] 1/5 1/5 5/4 24/2
 Garcias [6] 18/20 18/23 23/21 24/8 24/9 24/13
 gentlemen [2] 42/9 42/23
 germane [2] 14/3 42/1
 get [8] 5/12 7/3 23/11 24/4 26/14 29/5 37/2 44/19
 getting [2] 34/12 44/22
 give [7] 19/8 26/11 36/3 36/4 37/3 37/10 43/25
 given [3] 32/14 32/15 45/7
 giving [2] 29/16 43/18
 go [13] 5/12 8/5 12/19 13/13 17/12 17/20 24/19 25/1 25/3 34/1 37/2 38/16 44/17
 goes [3] 11/9 12/15 23/12
 going [14] 10/2 11/18 12/5 19/16 20/11 24/10 26/3 30/4 35/25 36/1 36/4 36/12 39/19 40/22
 gone [1] 16/1
 Google [1] 43/7
 got [6] 6/17 6/21 14/24 17/21 27/2 35/23
 Gotcha [1] 17/11
 GrayRobinson [9] 5/19 9/19 9/23 10/5 10/8 10/11 10/13 12/21 39/13
 great [1] 21/13
 guess [1] 37/1
 guide [1] 8/11

H
 H.B.A [1] 40/15
 had [19] 14/1 14/8 17/15 17/19 18/16 18/20 19/9 19/24 20/5 22/15 26/25 29/4 32/24 33/1 33/3 33/21 34/25 39/1 40/9
 half [2] 17/4 17/4
 handle [1] 40/20
 handled [1] 12/10
 happens [1] 41/10
 hard [1] 36/22
 has [47]
 hasn't [1] 29/6
 hat [1] 21/2
 have [99]
 haven't [4] 15/25 26/16 28/6 41/4
 he [69]
 he's [16] 9/6 12/10 17/22 20/18 30/17 31/24 32/20 32/20 33/25 35/15 35/20 35/21 41/2 41/24 43/17 43/18
 headaches [1] 44/19
 heads [1] 21/3
 hear [2] 24/17 31/14
 heard [2] 40/24 40/24
 hearing [12] 1/15 6/17 7/11 7/12 10/18 23/1 27/1 28/9 39/19 39/22 45/5 45/7
 heart [1] 41/17
 helps [1] 13/3
 here [28] 5/14 5/19 5/22 6/8 6/12 7/4 7/24 12/19 13/10 14/3 14/6 15/3 17/2 18/13 19/10 19/13 21/24 26/21 28/6 28/8 28/11 29/4 30/18 31/2 35/9 40/20 42/21 43/23
 higher [1] 33/23
 higher-up [1] 33/23
 highlights [1] 19/9
 highly [1] 11/4

him [25] 9/5 19/5 26/2 26/4 26/6 29/6 30/1 30/5 31/6 31/25 32/8 33/1 33/3 33/4 33/16 33/18 35/9 35/13 37/3 37/5 37/8 37/9 37/21 41/23
 himself [1] 12/8
 hire [2] 26/8 26/9
 hired [4] 9/2 9/6 22/22 29/6
 his [20] 11/18 14/22 15/6 16/5 18/4 19/5 21/7 21/20 26/4 26/5 29/20 30/18 33/20 33/22 34/6 35/5 37/6 37/6 41/25 43/17
 history [2] 11/12 12/14
 Holcomb [1] 18/18
 hold [2] 8/16 16/17
 holding [1] 44/2
 home [3] 40/17 40/18 41/13
 Honor [50]
 Honor's [1] 32/3
 HONORABLE [1] 1/16
 host [1] 31/7
 hours [1] 44/21
 how [10] 10/1 12/4 18/16 19/11 31/19 31/20 37/9 41/8 41/9 43/10
 Howard [3] 46/2 46/5 46/6
 however [2] 7/13 24/13
 huge [1] 23/4
 hundred [1] 15/22
 hundreds [3] 25/3 25/3 43/8
 hunt [1] 14/23

I
 I'd [1] 28/3
 I'll [1] 44/20
 I'm [25] 5/14 5/19 5/25 6/7 6/8 9/16 9/25 14/4 16/5 18/13 19/18 22/11 26/7 27/11 27/11 30/7 31/17 32/17 38/13 40/8 44/18 44/21 44/22 45/3 45/10
 I've [5] 18/15 33/3 41/1 41/3 43/22
 i.e [1] 30/11
 IAS [2] 6/8 6/9
 identical [1] 12/11
 identified [4] 15/5 26/19 26/19 26/20
 identify [3] 8/19 13/11 22/21
 if [53]
 ignored [1] 25/11
 Ill [1] 1/16
 imagine [1] 43/12
 important [1] 38/23
 importantly [1] 42/22
 in [139]
 included [2] 18/24 22/13
 incorrect [1] 13/7
 indicative [1] 12/5
 indiscernible [6] 9/5 9/17 15/4 25/23 40/16 43/19
 individual [2] 5/20 42/14
 individuals [3] 15/7 21/25 22/15
 information [40] 11/13 11/19 12/8 12/12 12/14 12/15 20/25 21/5 22/5 23/6 23/7 24/6 26/11 26/15 29/12 29/15 29/16 29/20 30/11 31/7 31/8 33/7 34/11 34/22 35/4 35/22 36/8 39/3 39/15 39/21 40/5 40/11 42/7 42/8 42/11 42/12 42/15 42/17 42/25 43/1
 initial [1] 32/3
 Initially [1] 6/19
 initiated [1] 6/18
 inner [1] 41/12
 intend [1] 9/13
 intensely [1] 29/21
 intent [2] 24/3 24/12
 interest [1] 37/6
 interference [1] 36/23
 interject [2] 13/9 18/8

L
 last [2] 14/13 36/14
 law [13] 6/8 12/3 15/8 15/8 18/22 19/12 25/7 32/18 34/19 38/24 38/25 39/6 39/12
 lawsuit [4] 15/25 20/2 25/2 32/11

Internet [4] 25/25 30/4 32/6 33/24
 interrupt [1] 8/21
 interview [1] 40/18
 into [7] 5/10 14/5 18/21 25/9 26/18 31/24 44/19
 intrusive [3] 10/21 14/18 26/14
 invaded [1] 25/7
 investigator [1] 26/13
 involve [1] 17/21
 involved [11] 20/11 21/15 21/23 22/1 27/5 27/11 27/12 29/21 29/22 30/20 35/2
 involvement [4] 11/11 14/21 18/5 21/20
 involving [3] 24/7 40/17 44/10
 irrelevant [1] 9/14
 is [167]
 issue [8] 7/2 9/7 14/8 22/16 23/12 34/8 34/9 39/10
 issues [4] 8/19 12/11 12/17 20/23
 it [64]
 it's [31] 8/1 10/21 10/21 10/21 10/23 14/23 14/24 17/3 21/12 22/18 24/12 26/19 33/25 35/19 36/11 36/22 36/25 37/11 37/12 39/6 40/17 41/15 42/18 42/22 42/23 43/3 44/6 44/8 44/9 44/11 44/12
 item [1] 8/24
 its [2] 20/19 23/14
 itself [2] 27/12 33/5

J
 January [2] 16/3 23/18
 job [1] 13/17
 John [1] 19/2
 Johnson [40] 2/2 2/9 2/13 5/14 7/2 9/19 9/23 10/3 10/6 10/10 10/13 11/14 11/21 12/8 13/17 15/2 15/6 15/9 17/15 21/4 21/5 22/2 22/7 22/8 22/15 23/21 24/6 24/25 25/15 25/17 25/22 27/3 27/9 27/14 27/14 27/20 38/22 39/12 39/13 45/11
 Johnson's [6] 9/1 11/11 12/6 13/19 14/21 20/24
 Jones [3] 46/2 46/5 46/6
 Jr [1] 2/9
 judge [13] 1/17 7/1 7/16 13/23 15/17 16/18 17/5 18/8 19/1 20/2 27/25 28/9 38/11
 jump [2] 12/19 17/18
 jumping [1] 22/7
 just [34] 5/9 7/9 7/24 8/6 8/13 8/14 13/16 14/14 14/23 14/23 14/24 16/2 16/8 16/12 18/6 18/13 19/8 22/8 25/8 28/12 31/1 36/11 36/25 37/7 37/8 37/11 37/18 38/16 39/4 39/17 41/15 43/6 43/7 43/9

K
 Kemker [2] 2/20 6/8
 Kennedy [1] 2/17
 kind [3] 18/6 41/5 41/15
 know [23] 10/18 13/1 16/4 21/7 23/22 23/25 26/12 26/23 30/8 30/18 30/22 33/9 33/12 33/12 33/15 36/1 36/4 37/6 37/8 37/9 38/10 41/10 41/12
 knowledge [1] 21/13
 knows [5] 26/2 30/20 32/5 41/2 41/16

L

L
 lawyer [3] 25/22 33/4 33/18
 lawyers [6] 14/15 25/10 28/23 33/7
 33/11 33/21
 least [4] 22/2 32/9 32/9 39/7
 leave [6] 8/1 28/5 28/5 44/17 44/20
 44/23
 Leclairche [1] 2/2
 left [3] 8/15 14/1 28/7
 legal [2] 26/3 34/6
 less [2] 26/14 44/21
 let [17] 8/6 11/21 12/19 13/4 13/6 13/8
 13/13 17/12 17/18 19/16 26/18 28/11
 28/12 34/1 34/1 39/25 41/21
 let's [8] 5/3 5/12 13/9 15/1 22/8 28/10
 34/14 40/2
 letters [2] 27/6 27/9
 Leung [4] 18/18 18/18 19/6 19/7
 lie [1] 38/10
 life [1] 18/20
 lightly [1] 25/6
 like [4] 25/2 40/21 42/9 43/9
 likely [1] 8/21
 limit [3] 23/23 24/1 24/12
 limitation [1] 28/15
 limited [4] 20/2 20/3 32/25 33/13
 litigants [2] 22/5 22/6
 litigation [24] 11/11 11/12 11/12 11/13
 11/17 11/19 12/6 18/5 21/1 21/14 21/19
 21/19 21/20 22/1 22/19 29/21 30/13
 30/16 34/11 35/14 42/1 42/11 42/17
 44/11
 little [2] 16/12 40/1
 LLP [3] 2/9 2/13 2/16
 lobbyists [2] 41/10 41/11
 log [14] 7/17 7/18 15/10 15/13 15/24
 19/1 19/10 20/18 22/25 24/22 25/1 25/5
 36/4 39/9
 long [2] 13/19 33/23
 longer [1] 42/9
 look [7] 19/10 25/9 30/24 33/24 34/24
 36/5 40/15
 looking [4] 9/16 20/20 40/16 44/22
 loop [1] 26/19
 lost [1] 43/17
 lot [2] 25/13 25/15
 Lueng [1] 19/6
 LUIS [2] 1/5 5/4

M
 made [2] 11/7 17/23
 magic [1] 16/3
 MAGISTRATE [1] 1/17
 main [1] 13/1
 make [4] 7/23 8/2 8/14 31/2
 making [1] 7/22
 managing [1] 27/8
 many [2] 29/22 29/22
 MARIA [1] 1/5
 Marie [3] 2/5 2/19 6/7
 marks [1] 43/22
 Marty [1] 20/6
 massive [1] 31/9
 material [1] 23/12
 matter [8] 5/4 12/7 15/25 21/3 24/2 27/8
 34/6 46/3
 matters [6] 13/20 17/22 21/20 24/7 25/6
 41/3
 may [11] 15/2 15/2 27/25 30/20 31/1
 31/11 39/23 40/7 40/9 40/11 40/12
 maybe [2] 16/18 16/19
 MCCOUN [1] 1/16

McGovern [5] 2/5 2/6 6/3 8/6 8/18
 me [37] 6/25 7/5 7/18 8/6 8/13 8/14
 11/21 12/19 13/4 13/6 13/8 13/13 14/7
 16/1 16/17 17/12 17/18 18/13 19/8
 20/14 23/14 24/17 26/18 27/15 27/18
 28/11 28/12 28/21 30/3 34/1 34/1 35/3
 39/10 39/25 41/2 41/21 45/6
 mean [5] 16/4 25/18 30/5 41/10 43/19
 Medical [1] 44/9
 Meet [1] 8/8
 meets [1] 9/6
 memorandum [1] 6/22
 mentioned [2] 22/12 26/21
 met [1] 41/4
 Miami [1] 2/7
 mic [2] 5/10 16/25
 Michael [1] 2/16
 microphone [1] 5/8
 MIDDLE [4] 1/1 44/5 44/7 46/7
 might [7] 7/1 7/17 15/16 16/12 18/8
 40/10 45/2
 Mike [3] 20/5 43/8 43/16
 minutes [1] 23/1
 Miscavige [1] 43/17
 Miss [1] 8/17
 missed [1] 6/15
 mix [1] 29/4
 moment [1] 22/8
 money [1] 43/18
 more [7] 14/2 25/13 25/21 31/5 38/13
 42/21 45/12
 Morgan [5] 18/17 18/18 19/2 19/3 19/3
 most [2] 27/3 35/7
 motion [21] 1/15 6/19 7/12 11/8 11/9
 12/13 12/17 12/18 13/1 14/1 21/6 21/12
 23/2 25/21 31/10 38/24 39/16 42/20
 43/3 43/4 44/4
 move [1] 15/1
 Mr [116]
 Ms [1] 8/6
 much [4] 12/16 21/25 26/14 37/9
 multiple [1] 15/8
 my [19] 5/19 7/3 7/4 8/12 8/22 16/16
 16/17 18/9 19/1 19/19 20/2 25/11 31/8
 33/4 38/13 42/9 43/7 43/23 45/2
 Myers [1] 44/8
 myself [1] 40/1

N
 name [1] 19/5
 names [1] 43/19
 Nate [1] 6/11
 Nathan [1] 2/16
 nature [1] 19/13
 near [1] 14/20
 necessarily [2] 14/5 42/5
 necessity [1] 13/18
 need [13] 9/5 10/18 23/6 23/12 25/9
 26/15 27/20 30/24 37/7 39/21 39/25
 44/24 45/13
 needs [2] 8/22 36/22
 neither [1] 41/13
 never [6] 24/23 24/23 26/1 26/6 33/3
 33/10
 New [3] 14/9 44/12 44/13
 next [1] 14/1
 no [43] 6/16 10/2 10/24 11/5 11/23 12/2
 12/9 12/23 17/25 17/25 17/25 18/15
 19/14 19/18 22/25 23/9 23/20 24/11
 26/3 26/6 26/10 26/13 28/1 32/16 33/3
 33/10 35/13 35/14 35/25 37/20 37/20
 37/24 38/4 38/12 39/8 39/9 39/15 40/14
 42/9 42/11 42/19 44/16 45/6

No.70 [1] 1/16
 NO 8:13 [1] 1/7
 NO 8:13-cv-220-1-27-TBM [1] 1/7
 none [2] 4/3 18/3
 not [84]
 notes [1] 43/23
 nothing [5] 14/24 25/21 32/4 32/4 32/16
 nothing's [1] 43/21
 Notice [1] 11/22
 notify [1] 44/24
 now [9] 8/2 9/16 11/14 12/1 13/14 21/7
 22/4 27/14 43/1
 number [4] 5/5 14/3 15/2 36/24
 numerous [2] 6/20 11/10
 nursing [3] 40/17 40/18 41/13

O
 object [2] 9/2 29/14
 objected [1] 35/6
 objection [3] 32/7 41/7 41/23
 obtain [3] 23/7 24/8 34/14
 obtained [3] 34/11 34/15 42/25
 obtaining [1] 33/4
 obviously [6] 11/9 11/17 17/14 23/9
 23/11 29/14
 occupies [1] 35/10
 occur [1] 22/17
 October [1] 13/2
 odd [1] 15/22
 off [3] 5/8 16/25 17/1
 offer [2] 9/4 43/23
 offered [1] 37/1
 offering [1] 37/7
 office [2] 26/12 33/4
 officer [3] 33/17 38/6 38/7
 Official [2] 1/22 46/6
 oh [4] 16/5 16/8 19/19 31/17
 Okay [17] 5/7 5/17 7/21 7/25 8/20 10/15
 10/25 11/24 12/24 13/15 13/22 15/1
 15/19 20/22 24/14 38/2 43/22
 on [49]
 once [2] 11/4 34/10
 one [20] 8/13 8/16 11/1 14/2 15/3 15/9
 18/23 19/12 19/20 20/18 26/12 31/2
 31/5 33/4 33/10 33/21 34/5 35/25 39/9
 44/10
 ones [1] 30/20
 only [11] 9/4 9/14 10/3 27/4 27/23 29/4
 29/7 31/24 32/4 32/25 36/7
 open [1] 18/7
 open-ended [1] 18/7
 opinion [2] 24/23 25/11
 opinions [1] 30/14
 opportunity [1] 19/9
 or [48]
 order [2] 5/2 6/20
 Organization [2] 5/23 5/24
 organizations [1] 30/19
 original [1] 24/21
 Orlando [1] 44/7
 Osborne [1] 2/2
 other [23] 10/20 12/10 17/16 19/12
 21/18 21/21 21/22 22/10 23/9 23/10
 24/7 24/7 24/7 25/2 25/19 25/22 27/4
 31/7 33/3 34/6 35/2 39/10 44/8
 others [1] 36/6
 otherwise [2] 38/3 38/9
 our [37] 8/11 8/18 9/3 9/12 9/13 10/22
 10/22 10/23 11/7 12/12 12/18 14/18
 16/6 18/4 20/24 23/2 24/4 24/12 24/21
 24/23 25/1 25/5 25/17 27/1 27/6 27/8
 29/25 30/13 30/14 30/15 31/19 37/2
 38/24 39/16 39/20 39/20 44/3

<p>O out [18] 16/10 23/10 28/12 29/3 30/1 32/14 32/15 35/9 35/24 37/3 39/17 41/9 41/18 43/22 44/6 44/7 44/8 44/11 outcome [1] 37/6 outlines [1] 8/8 outset [1] 8/6 outside [1] 15/18 over [10] 19/9 25/25 25/25 25/25 32/6 32/7 32/7 41/6 41/6 43/18 overbroad [2] 23/15 24/12 own [1] 20/19</p>	<p>Potter [7] 2/12 5/22 7/15 27/1 27/7 27/13 45/3 Potter's [2] 27/6 40/2 practices [2] 30/21 43/10 precisely [1] 23/22 preparation [1] 20/1 prepared [1] 15/23 present [2] 2/23 45/8 president [1] 43/20 presumption [2] 39/2 39/7 prevent [1] 31/20 prevents [5] 11/5 12/2 30/1 30/5 32/16 previously [2] 18/19 32/15 prior [3] 16/9 24/15 32/18 private [1] 26/5 privilege [45] 7/16 7/18 9/9 11/5 12/2 14/5 15/13 15/18 15/19 15/24 19/1 19/10 19/10 19/11 19/13 19/20 19/21 19/22 20/15 20/18 22/25 23/3 23/5 23/8 24/22 25/1 25/9 26/7 28/18 28/20 28/22 30/11 30/12 32/16 33/13 33/16 36/4 36/21 39/8 39/9 40/7 40/23 41/5 42/13 42/18 privileged [17] 9/14 15/10 20/4 20/25 21/5 24/6 25/5 29/15 30/10 33/8 34/22 35/3 39/15 41/13 42/13 42/18 44/3 probably [4] 12/3 13/17 37/16 43/8 problem [1] 14/17 proceedings [5] 1/21 5/8 16/24 45/17 46/2 produce [3] 7/14 15/12 30/18 product [6] 20/15 22/19 22/24 23/5 25/12 26/17 production [5] 6/21 23/24 23/25 34/6 45/7 professes [2] 21/13 21/15 professing [3] 21/20 36/7 36/8 prohibits [1] 31/6 proof [5] 12/1 36/12 38/4 39/20 39/20 property [1] 13/21 proposed [1] 18/16 proprietary [1] 40/11 protect [3] 42/8 42/10 42/21 protected [1] 42/12 Protective [1] 6/20 protest [2] 34/6 41/20 prove [2] 9/5 24/23 proven [1] 24/23 provide [4] 7/17 15/10 20/12 36/20 provided [4] 12/12 15/13 15/15 22/25 provides [1] 43/19 providing [2] 12/15 33/14 pulled [1] 43/7 purely [1] 28/25 purports [1] 25/21 purpose [1] 18/4 purposes [2] 10/18 39/21 pursuant [1] 45/2 put [8] 16/17 21/2 22/7 22/10 31/10 32/6 37/18 39/19</p>	<p>29/3 29/5 29/10 32/23 32/25 35/1 35/8 36/6 36/16 37/18 38/14 38/23 40/4 42/6 42/16 43/4 rather [2] 31/5 39/20 Rd [1] 2/3 read [3] 18/12 18/15 36/22 really [5] 12/7 14/14 14/17 20/20 29/7 reason [9] 10/24 24/11 27/4 29/18 38/18 38/23 39/6 40/5 41/23 rebuttable [1] 39/2 received [7] 4/3 27/5 27/6 36/18 37/4 37/19 37/20 recollection [2] 16/16 31/8 recommend [1] 13/10 record [10] 5/15 5/20 11/16 13/10 16/24 21/12 28/4 29/6 37/18 46/2 recorded [1] 1/21 recording [1] 5/7 records [6] 38/18 38/19 39/5 39/8 39/12 39/14 recuse [1] 9/5 recused [2] 25/22 25/23 reference [2] 10/5 10/6 references [1] 34/4 regard [1] 37/17 regarding [2] 6/20 19/25 regards [1] 6/18 relate [2] 36/14 36/15 related [3] 13/19 18/9 24/1 relates [2] 8/25 14/14 relating [1] 31/9 relation [3] 9/9 19/11 22/19 relationship [4] 9/12 10/22 16/13 28/24 relative [1] 13/21 relentlessly [1] 26/4 relevance [6] 9/3 9/4 10/2 12/1 13/4 14/19 relevant [9] 11/4 11/5 12/16 21/6 22/15 37/5 38/20 39/6 39/16 RELIGIOUS [3] 1/10 5/5 6/12 reluctantly [1] 35/18 rely [1] 7/23 remain [2] 5/9 33/8 remarkable [1] 43/19 remedies [1] 31/22 remember [2] 25/17 37/15 remuneration [2] 14/22 36/16 reply [1] 12/25 report [3] 8/7 9/17 26/21 Reporter [3] 1/22 3/2 46/6 represent [2] 8/25 11/15 representation [5] 13/19 14/2 37/23 38/15 42/5 representatives [2] 18/3 19/3 represented [2] 18/20 38/8 representing [7] 18/22 20/13 20/16 25/10 29/13 32/10 35/12 request [2] 15/11 17/12 requesting [3] 17/22 18/1 18/1 requests [2] 6/20 8/24 require [1] 23/24 reserving [1] 36/22 respect [3] 14/10 26/1 38/13 Respectfully [1] 23/20 respond [7] 15/9 15/16 19/17 27/9 31/11 39/23 40/2 response [9] 6/16 6/21 7/15 19/14 19/19 24/21 37/19 40/24 44/22 responsive [3] 15/11 15/23 27/24 restricted [1] 20/7 retained [3] 19/23 32/20 32/21 retainer [5] 9/9 9/19 10/16 14/5 37/13 reveal [1] 34/22</p>
<p>P P.A [1] 2/6 p.m [3] 1/9 1/9 45/17 PA [1] 2/2 page [2] 14/12 14/13 pages [2] 15/22 25/4 paid [2] 37/8 37/9 painful [1] 17/3 Palm [1] 2/3 paper [1] 40/16 papers [1] 31/9 Paragraph [1] 23/2 Pardon [2] 28/21 30/3 parent [1] 10/14 Parkus [1] 44/9 participate [1] 35/20 participated [1] 35/14 particular [1] 22/14 Parties [1] 8/8 party [7] 8/25 9/1 23/6 28/13 31/19 31/19 43/13 past [4] 11/11 12/14 16/13 41/24 payment [1] 36/15 pending [2] 21/22 29/19 people [7] 18/2 22/13 24/7 26/9 26/12 41/11 43/18 perhaps [1] 35/18 person [1] 41/20 perspective [1] 20/24 pertain [1] 24/5 Petersburg [1] 2/21 ph [2] 19/2 19/6 phone [3] 5/25 6/2 6/14 picked [3] 16/8 16/12 18/5 plaintiff [6] 2/4 2/8 17/16 17/16 25/23 40/17 plaintiffs [19] 1/6 6/19 6/23 9/2 9/18 9/20 11/15 11/20 12/16 15/9 20/11 20/13 20/16 20/25 22/22 29/17 35/12 36/17 44/15 plaintiffs' [7] 11/16 20/25 21/1 21/6 34/10 37/18 42/24 plan [1] 8/12 play [5] 11/13 11/19 34/11 42/11 42/17 players [3] 17/17 42/14 42/14 pleading [1] 8/7 please [1] 5/3 podium [1] 5/11 point [9] 15/1 18/23 24/9 27/16 28/5 31/2 37/22 37/25 39/17 points [2] 13/25 41/18 Pope [9] 2/9 2/9 2/13 5/25 6/3 27/7 31/1 34/4 41/18 position [3] 33/20 35/10 35/12 positions [2] 40/5 40/6 possess [1] 40/4 possession [3] 18/10 27/4 40/10 possible [2] 10/3 10/24 potential [5] 20/1 20/10 20/11 21/4 22/5</p>	<p>P P.A [1] 2/6 p.m [3] 1/9 1/9 45/17 PA [1] 2/2 page [2] 14/12 14/13 pages [2] 15/22 25/4 paid [2] 37/8 37/9 painful [1] 17/3 Palm [1] 2/3 paper [1] 40/16 papers [1] 31/9 Paragraph [1] 23/2 Pardon [2] 28/21 30/3 parent [1] 10/14 Parkus [1] 44/9 participate [1] 35/20 participated [1] 35/14 particular [1] 22/14 Parties [1] 8/8 party [7] 8/25 9/1 23/6 28/13 31/19 31/19 43/13 past [4] 11/11 12/14 16/13 41/24 payment [1] 36/15 pending [2] 21/22 29/19 people [7] 18/2 22/13 24/7 26/9 26/12 41/11 43/18 perhaps [1] 35/18 person [1] 41/20 perspective [1] 20/24 pertain [1] 24/5 Petersburg [1] 2/21 ph [2] 19/2 19/6 phone [3] 5/25 6/2 6/14 picked [3] 16/8 16/12 18/5 plaintiff [6] 2/4 2/8 17/16 17/16 25/23 40/17 plaintiffs [19] 1/6 6/19 6/23 9/2 9/18 9/20 11/15 11/20 12/16 15/9 20/11 20/13 20/16 20/25 22/22 29/17 35/12 36/17 44/15 plaintiffs' [7] 11/16 20/25 21/1 21/6 34/10 37/18 42/24 plan [1] 8/12 play [5] 11/13 11/19 34/11 42/11 42/17 players [3] 17/17 42/14 42/14 pleading [1] 8/7 please [1] 5/3 podium [1] 5/11 point [9] 15/1 18/23 24/9 27/16 28/5 31/2 37/22 37/25 39/17 points [2] 13/25 41/18 Pope [9] 2/9 2/9 2/13 5/25 6/3 27/7 31/1 34/4 41/18 position [3] 33/20 35/10 35/12 positions [2] 40/5 40/6 possess [1] 40/4 possession [3] 18/10 27/4 40/10 possible [2] 10/3 10/24 potential [5] 20/1 20/10 20/11 21/4 22/5</p>	<p>Quaranta [4] 2/6 9/20 9/24 39/13 question [15] 11/17 12/9 14/4 28/18 29/11 30/24 32/3 35/5 35/14 40/25 42/11 42/19 42/22 42/23 43/22 questions [4] 8/21 15/2 25/15 30/10</p>
<p>R raised [1] 12/11 raises [1] 11/17 Rathbun [27] 15/7 19/12 20/6 20/8 21/2 21/18 22/12 28/10 28/13 28/24 29/3</p>	<p>Q Quaranta [4] 2/6 9/20 9/24 39/13 question [15] 11/17 12/9 14/4 28/18 29/11 30/24 32/3 35/5 35/14 40/25 42/11 42/19 42/22 42/23 43/22 questions [4] 8/21 15/2 25/15 30/10</p>	<p>R raised [1] 12/11 raises [1] 11/17 Rathbun [27] 15/7 19/12 20/6 20/8 21/2 21/18 22/12 28/10 28/13 28/24 29/3</p>

R
 revealing [4] 25/16 29/20 31/6 36/13
 review [3] 7/20 27/8 44/19
 Richard [2] 2/23 5/18
 right [23] 5/21 6/10 6/14 8/20 9/21 10/7
 13/13 17/3 17/11 18/25 22/9 24/16
 27/22 31/23 32/18 35/17 37/17 37/17
 38/5 41/6 41/6 44/1 45/15
 Rinder [43] 15/7 19/12 19/22 20/5 20/8
 20/9 20/12 21/2 21/7 22/12 26/1 26/7
 28/10 28/13 28/24 29/8 29/10 29/16
 31/4 31/18 31/23 32/5 32/12 33/6 33/11
 33/16 33/18 34/8 34/13 34/16 34/23
 36/6 36/16 36/17 37/16 38/22 40/3
 40/25 42/6 42/16 43/4 43/8 43/15
 Rinder's [2] 25/24 43/16
 Robert [4] 2/12 5/22 12/6 15/6
 ROCIO [1] 1/5
 role [4] 11/18 12/6 20/2 21/18
 RPR [1] 46/6
 rule [1] 41/1
 Rules [2] 44/6 44/12
 run [1] 43/22
 Ruppel [2] 2/9 2/13

S
 said [5] 21/24 27/13 33/22 33/24 33/25
 same [5] 21/18 27/19 35/1 40/19 45/13
 say [10] 13/18 14/20 17/21 23/16 29/14
 32/9 32/23 34/15 34/20 36/17
 saying [6] 21/23 26/9 30/2 32/5 38/9
 41/2
 says [10] 8/9 32/18 34/19 35/2 35/9
 37/19 37/21 38/25 39/6 43/17
 SAZ [2] 1/5 5/4
 scheduled [1] 6/17
 scheduling [1] 7/2
 SCIENTOLOGY [6] 1/10 5/5 5/23 5/24
 6/12 41/14
 seated [1] 5/9
 second [4] 8/16 10/1 17/12 23/4
 secrets [1] 32/14
 see [11] 8/5 10/3 10/24 13/18 14/19
 17/3 24/24 36/2 36/7 36/18 37/7
 seek [2] 17/18 30/10
 seeking [4] 23/6 32/1 42/8 43/1
 seeks [3] 21/16 29/11 42/16
 seems [1] 14/18
 send [1] 16/10
 sense [2] 14/22 26/10
 September [1] 1/8
 serve [1] 8/22
 served [2] 7/15 27/15
 serves [1] 21/18
 Service [2] 5/23 5/24
 set [1] 39/19
 setting [1] 35/23
 several [1] 33/15
 shareholder [1] 27/8
 sharing [5] 14/16 14/18 14/20 22/1 22/4
 she [2] 8/7 8/9
 shield [1] 23/8
 Ship [1] 5/24
 should [7] 7/19 22/16 25/10 29/3 30/8
 35/9 39/14
 shouldn't [5] 23/23 24/1 28/12 42/2
 43/18
 show [4] 12/15 14/12 37/6 41/5
 showing [2] 11/7 39/1
 shown [1] 25/13
 shows [3] 12/13 14/12 14/13
 sign [1] 33/1

signature [1] 14/13
 signed [3] 10/13 11/14 31/4
 similar [1] 14/8
 simply [4] 18/5 25/8 30/18 42/19
 since [4] 16/11 23/16 27/13 27/14
 sir [1] 13/8
 sites [1] 43/8
 Sitting [1] 17/2
 situations [1] 23/3
 six [2] 8/8 36/25
 small [1] 31/2
 so [34] 7/4 9/6 10/9 10/15 11/4 11/13
 11/25 13/13 15/19 16/12 16/25 18/6
 18/10 20/18 21/12 21/25 22/14 24/11
 25/20 26/15 26/23 27/11 27/23 28/5
 29/7 32/9 34/18 36/4 36/11 39/4 40/14
 42/10 42/18 43/11
 so-called [3] 11/13 42/10 43/11
 Solvent [1] 44/13
 some [10] 15/22 22/2 23/21 23/25 24/10
 25/15 26/23 34/5 40/22 44/2
 somehow [1] 31/21
 someone [1] 38/9
 something [1] 37/25
 somewhat [1] 12/5
 somewhere [2] 16/20 31/9
 sorry [3] 16/6 22/11 31/17
 sort [6] 8/11 9/8 9/9 31/7 40/22 44/22
 sorts [2] 23/3 31/7
 sought [3] 26/6 40/18 42/25
 Spaeder [2] 2/16 6/12
 speak [2] 5/10 13/11
 speaking [1] 26/2
 speaks [1] 33/5
 specifically [7] 12/17 22/5 22/13 23/5
 32/18 38/17 39/11
 specified [1] 18/2
 speculating [1] 36/11
 speech [1] 31/24
 split [2] 10/2 12/5
 splitting [1] 12/4
 spoke [3] 8/2 27/13 33/4
 spoken [5] 19/5 33/3 33/10 33/10 41/1
 St [3] 2/10 2/13 2/21
 stage [1] 16/2
 stand [1] 20/19
 standing [1] 17/4
 start [2] 25/16 26/9
 state [5] 5/12 18/21 21/10 29/19 44/13
 statements [1] 41/25
 STATES [3] 1/1 1/17 46/7
 stay [1] 7/25
 steps [1] 42/1
 still [2] 26/24 44/18
 stipulate [2] 9/18 36/17
 stipulated [1] 9/1
 stipulation [2] 10/16 18/16
 stipulations [1] 18/12
 stop [4] 26/2 26/6 32/8 43/21
 stopping [1] 31/25
 strategies [5] 11/13 21/14 22/1 22/3
 30/13
 strategy [1] 43/11
 strictly [1] 24/1
 structure [1] 30/8
 styles [1] 8/7
 subject [6] 34/8 34/9 34/20 34/21 42/23
 43/5
 subpoena [13] 16/6 16/10 17/22 18/7
 18/24 23/15 24/4 24/9 27/15 27/20 45/4
 45/6 45/13
 subpoenaed [10] 5/15 5/20 7/6 7/7 7/11
 7/11 7/13 26/22 27/14 28/5

subpoenas [1] 22/14
 subs [1] 27/22
 substance [3] 21/16 23/10 27/12
 substantial [5] 11/7 14/22 23/6 23/12
 39/1
 such [8] 10/16 10/17 29/12 29/13 29/13
 38/10 40/7 41/22
 such-and-such [1] 29/13
 suddenly [2] 32/10 32/13
 Suffice [1] 14/20
 sufficient [1] 36/19
 suggest [4] 13/4 13/6 13/8 14/6
 suggesting [3] 10/9 10/16 18/12
 suggestion [1] 18/15
 Suite [4] 2/3 2/6 2/17 2/20
 support [1] 23/2
 supported [1] 11/10
 suppose [2] 37/4 40/3
 sure [3] 5/25 8/24 9/25
 suspect [3] 34/12 38/3 38/9
 sustained [1] 35/7
 system [4] 18/21 18/22 21/11 29/20

T
 table [2] 12/20 19/9
 tactics [5] 11/12 21/14 22/2 22/3 30/13
 tad [1] 38/16
 take [8] 8/13 25/14 27/10 28/13 28/16
 29/3 35/9 38/9
 taken [1] 26/3
 taking [1] 42/1
 talk [3] 11/10 22/8 28/10
 talked [2] 41/3 43/9
 talking [4] 29/7 40/8 40/19 41/3
 talks [1] 34/25
 TAMPA [4] 1/2 1/8 2/17 46/8
 tangentially [1] 27/11
 team [1] 21/6
 technical [1] 20/15
 Ted [7] 6/4 14/8 20/14 24/18 31/11
 39/23 43/6
 tell [4] 20/20 33/17 35/6 37/9
 telling [2] 14/17 41/16
 tend [1] 7/24
 test [2] 39/20 39/20
 testify [1] 35/17
 than [8] 10/21 13/17 23/10 25/21 26/10
 38/14 39/10 44/21
 thank [8] 6/1 6/2 17/14 20/22 28/9 44/14
 45/15 45/16
 that [287]
 that's [30] 5/10 6/5 6/6 8/4 9/21 10/7
 10/20 11/8 12/6 13/1 14/9 16/22 16/22
 18/23 20/21 24/3 29/2 31/10 33/2 33/5
 33/22 34/12 34/22 36/2 36/25 40/16
 41/13 41/17 42/21 44/13
 their [23] 5/12 11/5 11/12 11/12 11/20
 12/1 12/2 12/16 17/24 21/3 24/15 28/17
 30/21 37/23 40/5 40/5 40/7 41/17 42/19
 43/1 43/10 43/11 43/20
 them [21] 11/15 11/17 19/23 21/8 21/9
 21/9 22/4 26/10 26/14 27/21 27/22
 29/23 31/25 32/12 36/20 37/3 37/10
 41/19 43/14 44/20 44/23
 themselves [5] 11/3 11/4 12/1 23/11
 39/14
 then [14] 6/21 7/14 7/15 9/22 11/5 15/7
 16/24 17/13 23/23 31/21 35/23 39/2
 44/10 44/20
 Theodore [1] 2/2
 there [51]
 there's [13] 10/12 14/16 15/8 18/15 26/6
 26/13 27/25 32/14 32/16 35/25 35/25

T
there's... [2] 42/11 43/8
therefore [1] 25/9
these [11] 11/25 16/24 18/9 20/13 21/25
28/7 29/23 33/21 35/2 35/25 42/9
they [59]
they'll [1] 37/3
they're [8] 18/23 22/23 30/12 30/13
30/15 34/21 36/8 40/19
they've [1] 26/1
thing [4] 35/1 40/19 41/22 43/16
things [6] 25/15 35/24 40/8 40/20 40/21
41/9
think [25] 6/24 9/6 9/11 13/25 14/23
16/9 16/18 20/14 20/18 21/2 24/3 25/11
25/20 26/15 26/16 29/3 29/7 29/16
29/18 30/23 32/12 34/7 35/7 35/11
36/25
this [113]
THOMAS [1] 1/16
those [26] 7/20 14/10 15/12 18/1 18/19
18/22 21/17 22/3 22/13 22/15 22/21
23/3 24/4 27/9 28/17 30/10 35/24 36/1
36/13 38/18 39/5 39/8 39/14 42/20
42/22 44/3
though [1] 14/3
thought [1] 16/11
thousands [3] 25/4 25/4 32/15
three [5] 12/3 15/22 22/4 38/17 39/12
through [6] 15/25 24/8 25/1 25/3 26/4
37/2
throw [1] 28/12
tied [1] 14/5
time [16] 8/13 13/19 16/9 17/21 23/22
24/10 33/23 37/1 37/6 37/25 38/18
38/19 39/5 39/12 41/10 44/18
times [1] 32/15
today [6] 6/17 7/3 7/16 8/19 15/16 27/1
told [6] 13/16 27/18 33/18 35/3 38/14
41/2
Tomassi [2] 2/19 6/7
too [1] 37/10
trading [1] 12/14
transcribed [1] 1/21
transcript [2] 1/15 46/2
transcription [1] 1/22
transfers [1] 13/21
Trenam [2] 2/20 6/7
trial [2] 21/8 44/11
tried [1] 26/2
TRUST [4] 1/10 5/5 6/9 6/13
try [3] 8/19 26/6 32/8
trying [7] 22/11 24/4 24/8 24/9 29/24
42/10 42/21
Tucker [1] 19/2
turning [1] 43/18
twice [1] 45/14
two [8] 15/2 18/2 22/10 22/21 36/14
38/17 42/9 44/4
twofold [1] 22/23
type [2] 29/16 40/13

U
U.S [1] 6/9
Um [1] 37/15
umbrage [1] 38/9
undecided [1] 44/18
under [2] 41/23 43/7
understand [7] 9/3 26/21 27/18 29/1
41/7 45/1 45/8
UNITED [3] 1/1 1/17 46/7
Universal [1] 44/7

unnecessary [4] 10/21 14/19 14/23
27/16
unprivileged [1] 15/12
until [3] 7/4 13/9 23/1
unusual [1] 32/9
up [7] 8/2 15/3 28/2 33/23 37/25 39/25
43/7
upcoming [1] 10/18
us [15] 10/23 13/1 20/17 20/17 25/5
26/11 29/4 29/6 31/21 36/3 36/4 36/11
37/2 39/7 41/16
use [3] 37/5 40/21 43/1
using [2] 1/22 25/20
utilize [1] 31/23

V
vacation [1] 44/22
vastly [1] 18/7
Vernon [1] 2/12
very [8] 12/16 12/16 17/17 21/25 23/12
27/11 32/24 39/15
viewed [1] 40/11
views [1] 41/25
virtually [1] 12/11

W
wade [1] 44/19
wait [1] 13/9
waiting [1] 7/4
waived [3] 22/25 26/16 41/22
waiver [5] 23/2 24/20 25/12 42/3 43/12
Wallace [1] 2/9
Wally [1] 31/1
want [14] 5/10 8/13 8/14 10/25 13/10
16/5 16/10 23/15 24/17 26/8 37/1 37/2
37/9 37/11
wanted [4] 31/10 39/4 39/10 39/17
wants [2] 6/22 35/20
was [49]
waste [1] 36/25
way [15] 8/21 8/22 8/22 21/4 23/9 29/24
31/25 32/1 32/6 35/25 36/1 40/20 41/16
43/11 43/17
ways [2] 26/14 26/14
we [107]
we'll [5] 37/9 37/10 37/25 44/23 44/24
we're [16] 5/7 10/1 13/3 13/3 22/7 24/8
29/7 29/9 35/23 36/2 39/17 39/19 41/3
42/8 42/10 43/13
we've [8] 6/21 9/6 23/1 32/24 33/1 33/10
35/23 37/19
weigh [1] 10/25
Weil [4] 2/6 9/20 9/23 39/13
welcome [2] 7/25 8/1
well [24] 5/11 7/10 7/25 8/16 13/24 15/8
17/12 20/4 22/11 22/20 23/23 24/3
28/14 30/9 30/23 32/20 33/9 35/11
36/24 39/12 40/4 41/4 42/1 42/4
were [11] 7/10 7/11 13/1 18/22 20/11
27/7 29/24 37/7 38/10 42/14 44/10
weren't [1] 28/4
West [1] 2/3
what [49]
what's [5] 16/3 19/13 19/15 36/1 36/4
whatever [8] 26/2 27/15 30/22 31/24
32/1 32/5 37/11 41/16
whatsoever [2] 39/15 41/4
when [10] 16/15 17/7 17/19 17/23 21/10
23/22 29/19 35/24 36/5 41/8
Whenever [1] 16/21
where [2] 8/5 43/8
whether [13] 14/4 20/21 22/16 28/6
33/12 33/14 33/15 34/8 34/9 42/22

42/24 43/3 43/4
which [31] 7/14 8/7 8/9 9/1 9/17 11/10
14/12 14/13 14/14 15/15 17/21 18/3
21/1 25/4 25/17 25/21 25/24 26/10 29/5
30/11 31/6 32/6 34/4 36/15 40/15 40/17
40/20 41/19 41/24 43/17 44/4
whichever [2] 8/22 30/20
while [2] 38/19 39/14
Whittemore [1] 13/23
who [5] 6/22 7/6 8/2 19/23 20/12
whole [2] 12/7 31/7
why [11] 8/5 18/23 27/4 28/12 29/23
30/8 34/18 36/2 40/24 40/25 41/21
wife [1] 7/4
will [11] 7/4 7/23 8/21 13/22 20/19 23/25
24/23 28/8 36/20 41/25 44/24
willingness [1] 36/9
wish [5] 5/9 8/21 8/23 32/13 36/18
wishes [1] 35/16
witch [1] 14/23
within [1] 14/9
without [6] 20/20 28/15 32/7 32/7 41/7
42/1
witness [3] 35/17 37/5 37/14
WL [1] 44/9
won't [2] 36/3 36/3
work [9] 8/10 20/12 20/15 22/19 22/24
23/5 24/25 25/12 26/17
worked [2] 8/17 32/12
working [3] 20/17 21/9 23/21
workings [1] 41/12
world [1] 41/25
Worthington [1] 2/3
would [52]
wouldn't [1] 41/21
written [2] 19/4 25/18
wrong [2] 32/4 32/5

Y
yeah [5] 5/25 16/7 19/7 23/18 45/10
years [13] 12/10 14/3 17/6 17/8 17/9
17/20 25/23 29/22 32/11 32/11 32/12
32/12 33/25
years' [1] 30/19
yes [14] 8/17 9/11 11/2 15/15 17/2
17/10 24/3 31/13 31/14 31/16 34/7
34/17 37/23 45/10
yet [1] 44/23
York [3] 14/9 44/12 44/13
you [90]
you're [11] 7/25 8/1 10/16 16/25 19/20
26/19 28/4 28/5 28/23 34/15 40/16
you've [3] 17/21 19/9 26/20
your [61]
yourself [1] 13/11

Z
Zabak [8] 2/23 5/18 17/5 26/18 27/18
28/8 28/8 44/17
Zuckerman [2] 2/16 6/11