

Connell Affirmation Exhibit 1

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK - CIVIL TERM - PART 15
-----X

3 NATIONAL RIFLE ASSOCIATION OF AMERICA,
4
5 Plaintiff,

6 -against-

7 LETITIA JAMES, IN HER OFFICIAL
8 CAPACITY AS THE ATTORNEY GENERAL
9 OF THE STATE OF NEW YORK,

10 Defendant.

11 -----X
12 Index # 158019/2019 Proceedings

13 71 Thomas Street
14 New York, New York
15 August 19, 2019

16 B E F O R E:

17 THE HONORABLE MELISSA A. CRANE,
18 Justice.

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

20 BREWER ATTORNEYS & COUNSELORS
21 750 Lexington Avenue - 14th Floor
22 New York, New York 10022
23 BY: SVETLANA M. EISENBERG, ESQ.
24 ALEXANDRIA GOLDFARB, ESQ.
25 Attorneys for Plaintiff

(Continued next page.)

DEBORAH ANN ROTHROCK, RPR
OFFICIAL COURT REPORTER

-Proceedings-

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(A P P E A R A N C E S (Continued)

OFFICE OF THE ATTORNEY GENERAL
28 Liberty Street
New York, New York 10005

BY: EMILY STERN, ESQ.
Yael Fuchs, ESQ.
MONICA A. CONNELL, ESQ.
WILLIAM WANG, ESQ.
Attorneys for Defendant

DEBORAH A. ROTHROCK, RPR
Official Court Reporter

-Proceedings-

1 (Whereupon, the following takes place in open
2 court, in the presence of the Court, Ms. Eisenberg, Ms.
3 Goldfarb, Ms. Stern, Ms. Connell, Mr. Wang and Ms. Fuchs.)

4 THE COURT: All right.

5 So I understand you're having a bit of a fight over
6 late papers, is that resolved?

7 MS. STERN: No, it is not resolved, your Honor.
8 Because we literally have not been able to read the papers.

9 THE COURT: Do you want to take ten minutes to read
10 them?

11 MS. CONNELL: I don't even have a full set. We
12 were not able to print them, we were having difficulties.
13 Counsel is waiting for someone to bring hard copies over.

14 THE COURT: Okay. Do you have someone bringing
15 over the hard copies?

16 MS. EISENBERG: My assistant will be here shortly.
17 I did not want to be late for court so I left before they
18 were e-filed.

19 THE COURT: Okay.

20 MS. STERN: I guess we will sort of formally make
21 an application that the Reply papers be disregarded.

22 And if in the event the Court is going to consider
23 the Reply papers, we would just like to have an opportunity
24 to review them; of course the Court is aware that we are
25 under an incredible tight timeframe.

-Proceedings-

1 THE COURT: Yes, well that is why I feel like I
2 should allow them --I did give you very tight deadlines and
3 I appreciate everyone's work and turning this around so
4 quickly. So why don't we just take whatever time you need,
5 I'm here all day.

6 So if you want to, you know, I mean, I'm not going
7 to read it now-- I was because I thought you had it -- I'm
8 going to put it aside until you have a chance to look at it
9 and then I will look at it.

10 So I'm looking at the page numbers and it is not
11 that long and then I guess there it is exhibits.

12 MS. STERN: Yes, we just wanted to at least be able
13 to review what the Court has reviewed.

14 THE COURT: Is a half hour enough time?

15 MS. STERN: Yes. I want to thank the Court for
16 taking the time over your weekend and Friday afternoon, and
17 this morning to handle this in an expedited fashion.

18 THE COURT: Of course. I did have one other
19 question:

20 While I was going through everything I did notice
21 that there were several other lawsuits in the Commercial
22 Division, I think. I'm not sure where the main case is on
23 this, who it is in front of --

24 MS. EISENBERG: There's a matter, your Honor, that
25 is referenced and it is an action before Judge Cohen.

-Proceedings-

1 THE COURT: Right, that one I saw.

2 MS. EISENBERG: Right. The other ones are in
3 Virginia.

4 THE COURT: All right. Okay; never mind.

5 MS. EISENBERG: I just wanted to thank you for what
6 I understood to be the denial of Ms. Stern's application.
7 Obviously I can represent to the Court that I was in the
8 office until 4:30.

9 THE COURT: Yes, I know--

10 MS. EISENBERG: And at seven and barely slept. And
11 the only reason for the delay is waiting for everything to
12 come together and to address the voluminous filings that
13 counsel made. And I was in the office at 11 as soon as they
14 filed it but...

15 THE COURT: Well, I appreciate everyone's hard
16 work. I remember those days very well so I know what you
17 went through and I appreciate it very much. It is why I
18 don't do it any more --one of the reasons. I also was not
19 very good at it. I'm much better at this. I always saw
20 both sides so it was hard to invest in any one, you know, it
21 was hard for me to advocate for any one side, I'm better
22 here.

23 MS. EISENBERG: Thank you.

24 MS. STERN: Thank you.

25 THE COURT: I'll step out to allow you to read and

-Proceedings-

1 I'll come back in half hour. Anyone who needs anything,
2 coffee, water, we have it in the back, just let me know.

3 MS. EISENBERG: Thank you.

4 MS. STERN: Thank you.

5 (Pausing.)

6 THE COURT: Okay. All right. So I think I'll
7 still hear from the petitioner first.

8 I have a question: Why did you file a separate
9 proceedings instead of, I guess, it is pending in Virginia
10 the main action?

11 MS. EISENBERG: I'm sorry, your Honor.

12 The case that is pending in Virginia is against Mr.
13 North's employer.

14 THE COURT: No. No. Where is -- okay -- so I get
15 it. This is just an investigation so it's not pending any
16 where. It seems like there's a lot of litigation going on
17 so I just was wondering why you didn't pick one of those
18 courts.

19 MS. EISENBERG: This seemed to be the appropriate
20 venue to address our concerns.

21 THE COURT: Okay, I wasn't sure. Thanks.

22 So proceed.

23 MS. EISENBERG: Thank you very much, your Honor.

24 This weekend was a shocker. We received the papers
25 from the opposing counsel. And last week they said we don't

-Proceedings-

1 intend to inquire into privileged information. Mr. North's
2 attorney is saying he's going to be sensitive to it. Two
3 days later they file papers in which they say, on Page 16,
4 although not required, Office of Attorney General has agreed
5 that it will not seek to elicit privileged information.

6 Your Honor, before we leave today, please issue an
7 order directing the Office of the Attorney General that they
8 can not inquire into privileged information.

9 THE COURT: Well, I don't think that is in dispute,
10 they are not going to; am I correct?

11 MS. STERN: Correct.

12 MR. WANG: Correct.

13 MS. EISENBERG: Are they making that representation
14 on the record?

15 MS. STERN: Your Honor, we made that representation
16 last week.

17 THE COURT: I thought you did.

18 MS. STERN: I believe we made that routinely before
19 we came to court to actually obviate the whole situation and
20 nothing has changed.

21 THE COURT: Okay.

22 MS. STERN: Your Honor, we appreciate the
23 opportunity to submit additional evidence. One of them is a
24 letter that is attached to my affirmation as Exhibit 3.

25 This is a letter dated April 25th, 2019, from the

-Proceedings-

1 Chief Executive Officer and, second, the Executive Vice
2 President of the National Rifle Association: Wayne LaPierre
3 informed the entire board of what had just happened the day
4 before. Mr. North extorted Mr. LaPierre, he alluded to,
5 supposed allegations, of improper spending and he threatened
6 Mr. LaPierre that unless Mr. LaPierre resigned, those
7 allegations would be made public; of course Mr. LaPierre did
8 not circum to the demand.

9 I also submitted an affidavit from Mr. Tom King.

10 THE COURT: Which eDoc is that?

11 MS. EISENBERG: This was the last document that was
12 submitted, your Honor.

13 THE COURT: Okay.

14 MS. EISENBERG: It is a three page affidavit. If
15 you would like I would be happy to hand up a copy.

16 (Showing.)

17 THE COURT: No, I got it.

18 MS. EISENBERG: Mr. King is a Board member of the
19 N.R.A, he's a life member of the N.R.A., he's a proud member
20 of the N.R.A. and he is a supporter of the N.R.A. He cares
21 about the N.R.A. He's also the head of the New York State
22 Rifle and Pistol Association.

23 What Mr. King states in his affidavit, that in
24 light of what happened on April 24th, and in light of the
25 documents that were mysteriously leaked shortly thereafter,

-Proceedings-

1 and the fact that it was reported that Mr. North's threat to
2 release documents if Mr. LaPierre did not resign in fact
3 came to fruition.

4 For all of those reasons he, Mr. King, filed an
5 official complaint. This is a complaint that he filed with
6 the Ethics Committee of the N.R.A Board. That complaint
7 requests that Mr. North be expelled from the N.R.A. and
8 removed from the Board of Directors.

9 And in Paragraph 3 of his affidavit Mr. King
10 states, that it is his view that Mr. North intentionally
11 breached his fiduciary duty to the N.R.A. in the past. And
12 as relates to the matter at hand, your Honor, he is
13 concerned that Mr. North may compromise the N.R.A.'s
14 confidences, including by disclosing potentially privileged
15 information.

16 In light of this, your Honor, it is truly farcical
17 for anyone to suggest that Mr. North is in a position to
18 protect the N.R.A's privileges or to protect its
19 confidences.

20 Another piece of information that we submitted,
21 your Honor, is Exhibit 4 to my affirmation. If you would be
22 so kind to please take a look at Page of that document.

23 This is the document that Mr. North's attorneys
24 almost produced to the New York Attorney General in
25 partially redacted form. The yellow redactions designate

-Proceedings-

1 the text that they did not redact. This designates the text
2 that, when I looked at it, like when I mentioned to you last
3 Friday, I said to myself how can anybody not redact this?
4 This is classic work product, classic attorney-client
5 privilege. And this is almost a visual example of why
6 there's no way that the N.R.A could be comfortable that its
7 basic rights under our jurisprudence system to be able to
8 maintain the attorney-client privilege, can be protected by
9 Mr. North or his attorneys. So now let's step back for a
10 second.

11 Let's be clear about the standard. As much as the
12 opposing counsel would like to put us through the higher
13 standard, we are not seeking injunctive relief. We are
14 seeking relief under Rules 3103 and 2304 of the CPLR. And
15 as our brief makes clear, the standard is, it is up to you,
16 your Honor, it is in your discretion. It is your discretion
17 to do what is just and what is fair and to avoid
18 unreasonable prejudice and unreasonable disadvantage.

19 Next, opposing counsel cites two cases for their
20 main proposition that the relief is not warranted here. And
21 I would like to discuss them here because those cases do not
22 stand for the proposition that opposing counsel cites them
23 for.

24 THE COURT: Are you talking about the Supreme Court
25 CFTC Weintraub.

-Proceedings-

1 MS. EISENBERG: Yes, your Honor, as well as this
2 other district case, Wechsler.

3 To begin with Weintraub which your Honor mentioned,
4 it is a supreme court case where the sole issue was where
5 you have a company that seeks protection under the
6 bankruptcy code and there's a Chapter 7 Trustee who is
7 appointed. The question was: Who at that point owns the
8 privileges; and the Court held that it was the Chapter 7
9 Trustee. There is nothing in that case that compels the
10 result they seek. There is nothing in that case that allows
11 them to exclude us from being present at the examination, to
12 exercise the N.R.A's basic right to protect its privilege
13 which, frankly, like I said, Mr. North cannot be trusted to
14 protect.

15 The second case is Wechsler from 1989. The
16 magistrate judge made a report and recommendation, again, in
17 the bankruptcy case. And the issue there was the bankruptcy
18 trustee wanted to sue a law firm which had conspired with
19 the pre-bankruptcy entity to defraud its shareholders.
20 Under the Wagoner doctrine, the trustee cannot do so. It
21 does not have standing unless they can find a board member
22 who was unaware of the fraud, and on top of that, could have
23 done something to prevent it.

24 THE COURT: Right.

25 MS. EISENBERG: So in discussing in hypothetical

-Proceedings-

1 terms, whether the director who was not aware, could have
2 done something had they been; what the magistrate judge
3 does, is confront the defendant's argument that they could
4 not have gone to the SEC because of the attorney-client
5 privilege. And the Court, of course, in very unremarkable
6 holding holds that of course they could have.

7 Again, that case is 100 percent in opposite. It
8 has nothing to do without fact, it has nothing to do without
9 procedural posture, and it does nothing to compel the result
10 that the opposing counsel seeks.

11 THE COURT: I would agree that Wagoner is not
12 really applicable in this proceeding.

13 MS. EISENBERG: Your Honor, there are also
14 additional logistical matters that I would like to address.
15 If I may reserve additional time for the end of the
16 argument?

17 THE COURT: That is fine.

18 MS. EISENBERG: Thank you.

19 THE COURT: All right. So I had a question for the
20 AG.

21 So this is an investigatory deposition, right, it
22 is not part of -- it is not attached to a court case so it's
23 not going to be something that is public record immediately
24 anyway, right?

25 MS. STERN: Correct, your Honor.

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-Proceedings-

1 THE COURT: So is there, you know, just in the
2 interest of working this out, is there a way that the N.R.A
3 could see the deposition at some point, so that --I don't
4 know if you agree to this or not --and I don't know if it is
5 necessary --so that they could see if anything needs to be
6 redacted?

7 MS. STERN: Your Honor, our investigatory process
8 is done in a nonpublic confidential manner.

9 The Attorney General has authority under the law
10 and its empathically to the whole scheme.

11 THE COURT: No, not that they would be there, but
12 after the deposition is taken.

13 MS. STERN: We cited some of the cases to which
14 parties that have been witnesses that appeared before the
15 Attorney General sought transcripts of their investigatory
16 examination and they have no legal right. And that is
17 really -- that is in the public interest that we not, in the
18 course of our investigation, publish or allow others to have
19 access to the information because we are investigating
20 something to determine if there is any basis to bring a
21 claim. And so we don't want to prematurely have factual
22 information out there before the court is going to assess as
23 to whether there's any legal significance to that factual
24 information.

25 So the concept of the privilege argument that they

-Proceedings-

1 make, which, you know, we have argued in our opposition, is
2 there is no sort of factual basis and we are prepared to
3 discuss that with your Honor that there is a risk here.

4 They certainly don't have a legal basis to appear
5 there and I think that they are skipping over the
6 fundamental legal point, which is, do they have a right at
7 this point, in this investigation, and I think we have shown
8 that they don't have a right. And they have not shown this
9 Court that there's a reason to vary in this circumstance and
10 allow them to sit there. And I think that the presentation
11 of the Reply --and the Court is aware we had very limited
12 time to consider and we have now listened to the oral
13 arguments --really sort of almost proves too much. That
14 their focus is on their issues with Mr. North, and that they
15 are really -- it could be interrupted --that they are trying
16 to sit there to hear and monitor the witnesses' testimony;
17 and that is, of course, completely inconsistent with the
18 investigatory process, would interfere with what the
19 attorney general is doing. And we are certainly prepared to
20 answer any other question the Court has and to address the
21 issues that have raised in the Reply, but I will take
22 direction from the Court.

23 THE COURT: No, you could address the issues raised
24 in the Reply.

25 MS. CONNELL: If I may, Monica Connell for the

-Proceedings-

1 Attorney General's Office.

2 The issue of the application of Wechsler and
3 Weintraub is not on point with the case directly because
4 those cases involve bankruptcy. They are almost a side
5 issue. Because we have stated on the record, before this
6 Court, in papers, we are not going to seek to elicit
7 privileged information, Mr. North will have his counsel
8 there, able counsel who will be guiding him in this regard.
9 This counsel voluntarily told the N.R.A about the subpoena
10 when he did not have to do so. He also agreed to redact
11 information and protect the privilege. There's no showing
12 that there's a realistic of revelation. Those cases were
13 cited, like the other authorities we have cited, to show
14 that where there's an interest in revealing potential
15 illegal conduct, in certain instances the board of directors
16 insider can reveal privileged information, should they deem
17 it to be in the corporation's fiduciary interest. And the
18 remedy is something else, not that the corporation attorneys
19 get to take part and monitor the investigation. But that is
20 irrelevant because was we are not seeking or we are not
21 asking for it and we are going to cut him off if he tries to
22 speak about privileged information.

23 The bigger picture issue is, on the Reply, the
24 N.R.A hasn't really challenged the foundation of this
25 investigation. They made a passing swipe at alleged bias

-Proceedings-

1 that should be disregarded by the Court. If you are not
2 going to put forward evidence showing that there's no basis
3 for this investigation, that shouldn't, you know, you really
4 aren't challenging the investigation. Even if they had
5 there's case law showing that the attorney general has to
6 carry out their duties to supervise charities; most recently
7 in Underwood versus Trump, where the Court said I'm not
8 going to get into trying to read the minds of the Office of
9 the Attorney General. I'm going to allow a well-founded
10 prosecution to proceed. They have a high burden if they
11 want to show otherwise; they have not come close or haven't
12 really tried.

13 Another bigger issue is taking swipes at Mr. North,
14 as my colleague Ms. Stern said it is clear there's been
15 disagreement and problems with the government. That is
16 fine. That is neither here, nor there. That doesn't allow
17 the N.R.A to come and monitor this investigation.

18 Another issue that I want to bring up which they
19 raised in their Reply paper; having counsel for the Board
20 sit in on the questioning of Mr. North.

21 Well, first of all, the Board, we don't believe is
22 separate from the N.R.A. They have separate counsel, okay,
23 that is fine; but that counsel is not here making that
24 application. So, I think that request should also be
25 disregarded by the Court.

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-Proceedings-

1 And, Judge, just I'm sorry to go back for one
2 second to Wechsler.

3 While it is in the setting as counsel described
4 Wechsler specifically discusses the rights of directors of
5 shareholders to take stand and take steps where they believe
6 there is a problem --

7 THE COURT: And then if it is improperly taken the
8 remedies of breach of fiduciary duty. Do you want to
9 address that; that your remedy would be a cause of action
10 for a breach of fiduciary duty.

11 MS. EISENBERG: Your Honor, a little too late.

12 As I said on Friday, the Assistant Attorney General
13 is conducting this investigation. They are not deep in the
14 facts. I have no doubt to, no reason to doubt their ethical
15 obligation and that they would comply to those utmost of
16 their ability. That is not the problem. They are not
17 familiar with the facts.

18 Everybody knows when you go to a class, when you're
19 sitting there to object, sitting at the edge of their seat,
20 witnesses say things before you know it. You are sitting
21 listening for eight hours closely. They are not in a
22 position to prevent this is happening. The moment they
23 become aware of information they are not entitled to know,
24 the answer is sue Mr. North for breach of fiduciary duty.
25 The moment they become aware of information, even if they

-Proceedings-

1 ultimately can't introduce it into evidence in the court of
2 law, they will be able to use it to conduct their
3 investigation. Fruit of the poison tree. Derivative use of
4 the evidence. That is the real danger. They are not
5 equipped to prevent it.

6 I have additional comments that I would like to
7 make but since you asked me that specific question, I will
8 sit down.

9 THE COURT: Fine.

10 MS. CONNELL: If I may address just that very
11 narrow issue.

12 Again, I think this is a side issue. North has
13 experienced counsel. The Attorney General has experienced
14 counsel. We are well aware how to avoid listening and
15 hearing privileged information.

16 Putting that aside, Wechsler discusses public
17 policy reasons for this. I think they are also reflected in
18 the comments to New York Ethical Rule 4.2, that the
19 government has an obligation to investigate in certain
20 circumstances where it is statutorily allowed. It is
21 allowed to speak to corporate officers.

22 If it were otherwise, the N.R.A. or other
23 corporations could use the speculative potential privilege
24 as a shield to prevent any government review; and that is
25 not the law and it can't be. And what is missing is any

-Proceedings-

1 support, not one single authority that would justify their
2 presence in the investigatory questioning, they have not
3 come up with one.

4 Notably, they have not addressed the issue of the
5 bias and the potential conflict of the Brewer firm itself,
6 which is in the underlying fact.

7 MS. STERN: Your Honor, I would just like to
8 address also the evidence that they have offered with
9 respect to the risk of disclosure and they point to the
10 production of the documents that Mr. North proffered in
11 which they have reviewed. And over the weekend we had an
12 opportunity to look at that more closely than we had when we
13 were before the Court on Friday, having only just received
14 the documents that were really at issue. And they are
15 overstating the issue dramatically and which we talked about
16 on Friday, they lead with the outrage that North's counsel
17 intended to produce a document which they claim should be
18 withheld and I think today demonstrates to the court,
19 through this redacted document the difference. And, of
20 course, we have no ability to know what is behind these
21 redactions.

22 THE COURT: Right.

23 MS. STERN: And if there was really an issue here,
24 they could offer to the Court an in-camera review of the two
25 different options. And we raised that in our papers and

-Proceedings-

1 they chose not to. I think the Court should take that for
2 what it is worth.

3 With respect to the 37 redactions, again we are not
4 capable of looking at what they actually redacted. But we
5 do know that there's only a few documents, I believe, it's
6 six documents in total, two of which --

7 THE COURT: Most of which were duplicates.

8 MS. STERN: Yes, that's right. Two of those
9 documents, which were among the most critical documents we
10 received in the production, were authored by Colonel North
11 himself. One was a memo to general counsel and the audit
12 committee and another was directed to the Board of the
13 N.R.A.; both of those documents are publicly available to
14 the Court, and to anyone else, on this court system in the
15 lawsuit that the N.R.A brought suing Lieutenant Colonel
16 Oliver North with respect to his claim that he's entitled to
17 indemnification. Those documents, in completely unredacted
18 form, has been on this court's docket for a month. They
19 were also publicly available for months before. So this
20 notion that there's this prejudice that is going to ensue is
21 also just a fiction.

22 THE COURT: Who put them on the website? Who put
23 them in conjunction with Judge Cohen's case?

24 MS. STERN: My understanding is that counsel for
25 North submitted them in support of a counterclaim, is that

-Proceedings-

1 correct?

2 MS. EISENBERG: Yes.

3 MS. STERN: And there's correspondence in there.

4 The documents are in our opposition papers, in which the
5 Brewer firm raised the issue. And my understanding is the
6 North's counsel refused to remove them or redact them. And
7 no motion, no effort has been made to seal them, to redact
8 them or otherwise.

9 MS. EISENBERG: It's drafted, your Honor.

10 THE COURT: Okay.

11 MS. STERN: In any event, it is also my
12 understanding that those very same documents, and that
13 affidavit of Mr. Stephen Cady was produced to us, as part of
14 the North documents, and it is my understanding that when
15 they produced it in connection with the AG production, they
16 took the additional precaution; this is Williams & Conley
17 firm and made redactions. So the idea that they are somehow
18 not going to act in good faith is also belied by that
19 conduct.

20 So just with respect to Williams & Conley, they
21 chose to give notice to the N.R.A of the subpoena; they
22 agreed to allow the N.R.A to review documents that they had
23 already reviewed for privilege. They told us right from the
24 outset that they were going to take steps to protect the
25 privilege. We also told them that we would, consistent with

-Proceedings-

1 our ethical obligations, to act accordingly.

2 So the idea that Lieutenant Colonel North's counsel
3 and he, himself, are not going to act appropriately, there's
4 no evidence of that either, your Honor.

5 THE COURT: All right.

6 MS. EISENBERG: Your Honor, counsel has made a lot
7 of representations in court on Friday and today, and in
8 their filing; that is not evidence, that is just their
9 statements. The Court cannot take into consideration ranked
10 hearsay.

11 What the Court has before it is a basic right to
12 have a corporation attorney-client privilege protected.
13 They keep saying we cited no authority. If they think the
14 Supreme Court case law of the United States Supreme Court is
15 not authority, I beg to differ. It is a sacrosanct right in
16 our system according to Upjohn and the Court goes
17 beautifully why it is important and why it serves the public
18 good and why it is important to uphold this privilege and
19 how, as Officers of the Court, we are all obligated to do
20 so. I'm frankly puzzled and concerned when the opposing
21 counsel says, well, it is not 37, it is 19.

22 Your Honor, as counsel for the N.R.A, one is too
23 many.

24 What is happening here is that they are asking us
25 to assume the risk of Mr. North's counsel making a mistake

-Proceedings-

1 and living with it, that is not good enough.

2 Your Honor, they concede standing, they themselves
3 have just said, Ms. Connell's application cited are not on
4 point. Of course, like I said, the representations they
5 have made is not evidence. There's no showing that Mr.
6 North is a whistle blower. There's no evidence they put in
7 front of you that you could rely on. It is undisputed that
8 Mr. North's attorney has a conflict, he could not both
9 zealously represent his client and at the same time
10 zealously guard the N.R.A's privilege.

11 On that record, your Honor, they are simply no
12 other way to provide a reasonable accommodation to the
13 subpoena as the rules mandate, then to allow us the relief
14 that we seek. And to reiterate, there's no intent to
15 interfere. We have all done depositions, we have all done
16 examinations. We all know that whoever is questioning needs
17 to be in charge. We want to be in the room to prevent the
18 preverbal cat from getting out of the bag.

19 I was going to ask your Honor to see if opposing
20 counsel would agree that at the very least, share the
21 transcripts with us.

22 And of course, the cases that they cite, don't have
23 anything to do with privilege. In those cases no one ever
24 raised the concerns that we are raising here, which is a
25 very sharp and acute concern.

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-Proceedings-

1 As far as their regulatory inquiry, we don't have a
2 problem with that. They are welcomed to conduct their
3 regulatory inquire; but what they cannot do is do it in an
4 unlawful way. They cannot trample over our rights.

5 Your Honor, finally, again, I have a couple of sort
6 of logistical matters that I will reverse if you allow me to
7 speak later.

8 THE COURT: Well, this is it.

9 MS. EISENBERG: Okay. Almost as a logistical
10 matter, I don't know how your Honor will rule, I have to be
11 prepared --hope for the best, prepare for the worst.
12 Obviously if your Honor is not inclined to grant the relief
13 that we seek, we will be appealing it and there are a couple
14 of issues.

15 Obviously a signed order so that we can file our
16 notice of appeal.

17 Second, issues of stay. On Friday clearly what we
18 discussed was that the N.R.A's position is that if you look
19 at Rule 3101(b). The moment we filed our Order to Show
20 Cause, that gave rise to a stay as a matter of law. And it
21 wasn't 100 percent clear whether your Honor agrees with that
22 and --

23 THE COURT: I don't see how you get that I would --
24 I don't understand why I would stay my own ruling. You can
25 try to get one from the Appellate Division; but my ruling is

-Proceedings-

1 my ruling, so I'm not issuing a stay. I don't know why you
2 get a stay automatic, I have never heard of that.

3 MS. EISENBERG: So, if I may, your Honor,
4 Rule 3102(b) of the CPLR, which is obviously we moved under
5 3103(a). B says, Suspension of Disclosure Pending
6 Application For a Protective Order. Service of a notice of
7 motion for a protective order shall suspend disclosure of
8 the particular matter in the dispute. So...

9 THE COURT: But once I rule then it is no longer --

10 MS. EISENBERG: Okay. I guess I'm asking --I don't
11 know if your Honor intends to rule off the bench.

12 THE COURT: I am ruling in three minutes, I think.
13 Well, actually I want to go look at a few more things, maybe
14 ten minutes.

15 MS. EISENBERG: I guess I have a few more things,
16 sorry.

17 THE COURT: Sure.

18 MS. EISENBERG: So, in that case, that is really
19 helpful to know, you do have the power pursuant to Rules
20 2201 and 5519(c) to issue a stay to give us the opportunity
21 in a very orderly fashion to appeal, should your Honor rule
22 against us. And we would certainly hope that you would
23 consider our request.

24 Rule 2201 talks about how it's appropriate for
25 courts to do so in circumstances that are just. I would

-Proceedings-

1 respectfully submit that it certainly is in the circumstance
2 that require it, otherwise I would like to believe that the
3 examination is going to proceed tomorrow and the risk of
4 attorneys on the other side being exposed to information
5 they are not supposed to know is great.

6 And, lastly, your Honor -- I'm trying to read your
7 body language and kind of figure out where things are going.
8 To the extent that I have to be prepared for the worst, I
9 would also ask you to please ask opposing counsel to
10 represent on the record that given the stringent position
11 that they have taken, they will not argue that if Mr. North
12 does disclose privileged information, that that constitutes
13 waiver.

14 MS. CONNELL: May I speak to that?

15 THE COURT: Yes, that is important.

16 MS. CONNELL: There's case law which, if we had
17 more notice I would have been happy to provide to the
18 Court --

19 THE COURT: I am aware of it.

20 MS. CONNELL: I will be happy to represent. A
21 director's decision to waive privilege where it is
22 appropriate, does not waive it on behalf of the corporation.

23 THE COURT: Right.

24 MS. CONNELL: So we absolutely agree with it here.
25 And we reiterate our position that we are not going to deem

-Proceedings-

1 that a waiver for all purposes.

2 Again, we are, Lieutenant Colonel Oliver North, his
3 attorney, the Attorney General's Office have clearly stated,
4 we are not seeking to get privileged information, seeking to
5 get underlying facts which, of course, are not protected by
6 privilege. We all know privilege is important. We don't
7 disagree with Upjohn. The point is whether that means that
8 no corporation can ever be confidentially investigated,
9 which of course it does not.

10 THE COURT: Thank you.

11 MS. CONNELL: Thank you.

12 THE COURT: I need 10 to 15 minutes to look at a
13 few things and I will be right back.

14 MS. EISENBERG: Thank you.

15 MS. STERN: Thank you.

16 (Pausing.)

17 THE COURT: So I'm not allowing the N.R.A to sit in
18 on the investigatory deposition of Mr. North. And it is
19 mainly because the balance of the equities does not favor
20 the N.R.A.

21 The Attorney General has reiterated time and again
22 that they are not seeking privileged information and just
23 now represented that if Mr. North somehow goes down the road
24 of disclosing privileged information, they are going to cut
25 him off.

-Proceedings-

1 Moreover, Mr. North has his own counsel who can
2 protect the privilege, as it would be in his client's best
3 interest not to lead himself up for a claim of breach of
4 fiduciary duty.

5 On the other side, though, having the N.R.A or its
6 Board sit in on an investigatory deposition by law
7 enforcement, could have a serious consequence of
8 compromising the integrity of that investigation,
9 particularly, given the seemingly acronymous relationship
10 between Mr. North and the N.R.A Board. And for the purpose
11 of this investigation, the N.R.A. and the Board are really
12 one of the same because their interests seems to be alined.

13 It would also likely compromise the investigation
14 or the transcript to be handed over to the N.R.A during the
15 investigation. I'm not sure of the harm once the
16 investigation is over, but that issue is not ripe yet so I'm
17 not ruling on it.

18 In reaching this conclusion, the Court notes that
19 Mr. North and his counsel appear to be operating in good
20 faith. They gave notice to the N.R.A of the subpoena and
21 filed at least some documents in redacted form in a case in
22 the Commercial Division. And that some documents were filed
23 in non redacted form. The Court notes that it has been at
24 least a month and there has been no motion to seal it from
25 the N.R.A. And, similarly, there was no effort made to have

-Proceedings-

1 the Court review an in camera the document that appeared
2 completely redacted in yellow and black and attached as an
3 exhibit to the N.R.A.'s papers. And, consequently, the
4 Court is unable to assess the depth, if any, to which the
5 privilege would have been compromised.

6 So, for these reasons, I'm denying the application
7 and dismissing the petition.

8 And if you rush, you may make it to 25th Street.

9 MS. EISENBERG: Yes, your Honor.

10 One request, if I may. You alluded to sort of what
11 happens down the road, who knows how it will evolve.

12 We, respectfully, request that the Court maintain
13 jurisdiction over this.

14 THE COURT: I thought you were going to asked me
15 that.

16 MS. EISENBERG: Yes. 3103(c) specifically talks
17 about suppression of information improperly obtained. And
18 given our concerns about that we discussed earlier and the
19 use -- and the derivative use of the information, we would
20 be grateful if your Honor would be inclined to retain
21 jurisdiction.

22 THE COURT: Yes, I will do that as long as there's
23 no objection; I assume not.

24 MS. STERN: No objection.

25 THE COURT: Thank you.

-Proceedings-

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MS. EISENBERG: Thank you.

THE COURT: Thank you all for working so hard, I really appreciate it.

What I'm going to do, actually, for you, is fix up the notes so that you have --usually what I say is, the motion is decided in accordance with the reasoning on the record and that will force you to get the transcript. And you will not have it in time to go to the Appellate Division. I'm going to take a quick -- you're going to go up there with the gray sheet.

MS. EISENBERG: Yes.

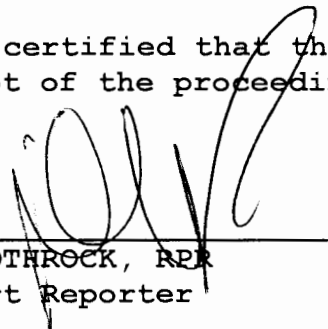
THE COURT: All right. I think that is the best approach to get there today.

MS. EISENBERG: Yes, thank you.

(Whereupon, the proceedings concluded.)

* * *

It is hereby certified that the foregoing is a true and accurate transcript of the proceedings.



DEBORAH A. ROTHROCK, RPR
Official Court Reporter

1	<p>accordance [1] - 30:6 according [1] - 22:16 accordingly [1] - 22:1 accurate [1] - 30:18 acronymous [1] - 28:9 act [3] - 21:18, 22:1, 22:3 action [3] - 4:25, 6:10, 17:9 acute [1] - 23:25 additional [5] - 7:23, 12:14, 12:15, 18:6, 21:16 address [8] - 5:12, 6:20, 12:14, 14:20, 14:23, 17:9, 18:10, 19:8 addressed [1] - 19:4 advocate [1] - 5:21 affidavit [5] - 8:9, 8:14, 8:23, 9:9, 21:13 affirmation [2] - 7:24, 9:21 afternoon [1] - 4:16 AG [2] - 12:20, 21:15 agree [4] - 12:11, 13:4, 23:20, 26:24 agreed [3] - 7:4, 15:10, 21:22 agrees [1] - 24:21 ALEXANDRIA [1] - 1:20 alined [1] - 28:12 allegations [2] - 8:5, 8:7 alleged [1] - 15:25 allow [9] - 4:2, 5:25, 13:18, 14:10, 16:9, 16:16, 21:22, 23:13, 24:6 allowed [2] - 18:20, 18:21 allowing [1] - 27:17 allows [1] - 11:10 alluded [2] - 8:4, 29:10 almost [5] - 9:24, 10:5, 14:13, 15:4, 24:9 AMERICA [1] - 1:3 ANN [1] - 1:24 answer [2] - 14:20, 17:24 anyway [1] - 12:24 appeal [2] - 24:16, 25:21 appealing [1] - 24:13 appear [2] - 14:4, 28:19</p>	<p>appeared [2] - 13:14, 29:1 Appellate [2] - 24:25, 30:8 applicable [1] - 12:12 Application [1] - 25:6 application [6] - 3:21, 5:6, 15:2, 16:24, 23:3, 29:6 appointed [1] - 11:7 appreciate [5] - 4:3, 5:15, 5:17, 7:22, 30:3 approach [1] - 30:13 appropriate [3] - 6:19, 25:24, 26:22 appropriately [1] - 22:3 April [2] - 7:25, 8:24 argue [1] - 26:11 argued [1] - 14:1 argument [3] - 12:3, 12:16, 13:25 arguments [1] - 14:13 AS [1] - 1:6 aside [2] - 4:8, 18:16 assess [2] - 13:22, 29:4 Assistant [1] - 17:12 assistant [1] - 3:16 Association [2] - 8:2, 8:22 ASSOCIATION [1] - 1:3 assume [2] - 22:25, 29:23 attached [3] - 7:24, 12:22, 29:2 ATTORNEY [2] - 1:6, 2:5 attorney [9] - 7:2, 10:4, 10:8, 12:4, 14:19, 16:5, 22:12, 23:8, 27:3 Attorney [11] - 7:4, 7:7, 9:24, 13:9, 13:15, 15:1, 16:9, 17:12, 18:13, 27:3, 27:21 attorney-client [4] - 10:4, 10:8, 12:4, 22:12 attorneys [4] - 9:23, 10:9, 15:18, 26:4 ATTORNEYS [1] - 1:18 Attorneys [2] - 1:21, 2:9 audit [1] - 20:11 August [1] - 1:11</p>	<p>authored [1] - 20:10 authorities [1] - 15:13 authority [4] - 13:9, 19:1, 22:13, 22:15 automatic [1] - 25:2 available [2] - 20:13, 20:19 Avenue [1] - 1:19 avoid [2] - 10:17, 18:14 aware [7] - 3:24, 12:1, 14:11, 17:23, 17:25, 18:14, 26:19</p>	<p>brought [1] - 20:15 burden [1] - 16:10 but.. [1] - 5:14 BY [2] - 1:20, 2:7</p>
2	<p>2019 [2] - 1:11, 7:25 2201 [2] - 25:20, 25:24 2304 [1] - 10:14 24th [1] - 8:24 25th [2] - 7:25, 29:8 28 [1] - 2:6</p>		B	
3	<p>3 [2] - 7:24, 9:9 3101(b) [1] - 24:19 3102(b) [1] - 25:4 3103 [1] - 10:14 3103(a) [1] - 25:5 3103(c) [1] - 29:16 37 [2] - 20:3, 22:21</p>		<p>bag [1] - 23:18 balance [1] - 27:19 bankruptcy [5] - 11:6, 11:17, 11:19, 15:4 barely [1] - 5:10 basic [3] - 10:7, 11:12, 22:11 basis [4] - 13:20, 14:2, 14:4, 16:2 beautifully [1] - 22:17 become [2] - 17:23, 17:25 beg [1] - 22:15 begin [1] - 11:3 behalf [1] - 26:22 behind [1] - 19:20 belied [1] - 21:18 bench [1] - 25:11 best [3] - 24:11, 28:2, 30:12 better [2] - 5:19, 5:21 between [1] - 28:10 bias [2] - 15:25, 19:5 bigger [2] - 15:23, 16:13 bit [1] - 3:5 black [1] - 29:2 blower [1] - 23:6 board [3] - 8:3, 11:21, 15:15 Board [9] - 8:18, 9:6, 9:8, 16:19, 16:21, 20:12, 28:6, 28:10, 28:11 body [1] - 26:7 breach [4] - 17:8, 17:10, 17:24, 28:3 breached [1] - 9:11 BREWER [1] - 1:18 Brewer [2] - 19:5, 21:5 brief [1] - 10:15 bring [3] - 3:13, 13:20, 16:18 bringing [1] - 3:14</p>	<p style="text-align: center;">C</p> <p>Cady [1] - 21:13 camera [2] - 19:24, 29:1 cannot [5] - 11:13, 11:20, 22:9, 24:3, 24:4 capable [1] - 20:4 CAPACITY [1] - 1:6 cares [1] - 8:20 carry [1] - 16:6 case [17] - 4:22, 6:12, 11:2, 11:4, 11:9, 11:10, 11:15, 11:17, 12:7, 12:22, 15:3, 16:5, 20:23, 22:14, 25:18, 26:16, 28:21 cases [7] - 10:19, 10:21, 13:13, 15:4, 15:12, 23:22, 23:23 cat [1] - 23:18 certain [2] - 15:15, 18:19 certainly [4] - 14:4, 14:19, 25:22, 26:1 certified [1] - 30:17 CFTC [1] - 10:25 challenged [1] - 15:24 challenging [1] - 16:4 chance [1] - 4:8 changed [1] - 7:20 Chapter [2] - 11:6, 11:8 charge [1] - 23:17 charities [1] - 16:6 Chief [1] - 8:1 chose [2] - 20:1, 21:21 circum [1] - 8:8 circumstance [2] - 14:9, 26:1 circumstances [2] - 18:20, 25:25 cite [1] - 23:22 cited [5] - 13:13, 15:13, 22:13, 23:3 cites [2] - 10:19, 10:22 CIVIL [1] - 1:1 claim [4] - 13:21, 19:17, 20:16, 28:3 class [1] - 17:18 classic [2] - 10:4 clear [4] - 10:11, 10:15, 16:14, 24:21 clearly [2] - 24:17,</p>
4	<p>4 [1] - 9:21 4.2 [1] - 18:18 4:30 [1] - 5:8</p>			
5	<p>5519(c) [1] - 25:20</p>			
7	<p>7 [2] - 11:6, 11:8 71 [1] - 1:10 750 [1] - 1:19</p>			
A	<p>ability [2] - 17:16, 19:20 able [6] - 3:8, 3:12, 4:12, 10:7, 15:8, 18:2 absolutely [1] - 26:24 access [1] - 13:19 accommodation [1] - 23:12</p>			

<p>27:3 client [5] - 10:4, 10:8, 12:4, 22:12, 23:9 client's [1] - 28:2 close [1] - 16:11 closely [2] - 17:21, 19:12 code [1] - 11:6 coffee [1] - 6:2 Cohen [1] - 4:25 Cohen's [1] - 20:23 colleague [1] - 16:14 Colonel [4] - 20:10, 20:15, 22:2, 27:2 comfortable [1] - 10:6 comments [2] - 18:6, 18:18 Commercial [2] - 4:21, 28:22 Committee [1] - 9:6 committee [1] - 20:12 company [1] - 11:5 compel [1] - 12:9 compels [1] - 11:9 complaint [3] - 9:5, 9:6 completely [3] - 14:17, 20:17, 29:2 comply [1] - 17:15 compromise [2] - 9:13, 28:13 compromised [1] - 29:5 compromising [1] - 28:8 concede [1] - 23:2 concept [1] - 13:25 concern [1] - 23:25 concerned [2] - 9:13, 22:20 concerns [3] - 6:20, 23:24, 29:18 concluded [1] - 30:15 conclusion [1] - 28:18 conduct [4] - 15:15, 18:2, 21:19, 24:2 conducting [1] - 17:13 confidences [2] - 9:14, 9:19 confidential [1] - 13:8 confidentially [1] - 27:8 conflict [2] - 19:5, 23:8 confront [1] - 12:3 conjunction [1] - 20:23 Conley [2] - 21:16, 21:20</p>	<p>connection [1] - 21:15 CONNELL [9] - 2:8, 3:11, 14:25, 18:10, 26:14, 26:16, 26:20, 26:24, 27:11 Connell [2] - 3:3, 14:25 Connell's [1] - 23:3 consequence [1] - 28:7 consequently [1] - 29:3 consider [3] - 3:22, 14:12, 25:23 consideration [1] - 22:9 consistent [1] - 21:25 conspired [1] - 11:18 constitutes [1] - 26:12 Continued [2] - 1:23, 2:2 copies [2] - 3:13, 3:15 copy [1] - 8:15 corporate [1] - 18:21 corporation [4] - 15:18, 22:12, 26:22, 27:8 corporation's [1] - 15:17 corporations [1] - 18:23 correct [5] - 7:10, 7:11, 7:12, 12:25, 21:1 correspondence [1] - 21:3 counsel [29] - 3:13, 5:13, 6:25, 10:12, 10:19, 10:22, 12:10, 15:7, 15:8, 15:9, 16:19, 16:22, 16:23, 17:3, 18:13, 18:14, 19:16, 20:11, 20:24, 21:6, 22:2, 22:6, 22:21, 22:22, 22:25, 23:20, 26:9, 28:1, 28:19 COUNSELORS [1] - 1:18 counterclaim [1] - 20:25 COUNTY [1] - 1:1 couple [2] - 24:5, 24:13 course [12] - 3:24, 4:18, 8:7, 12:5, 12:6, 13:18, 14:17, 19:20, 23:4, 23:22, 27:5, 27:9 Court [35] - 2:22, 3:2,</p>	<p>3:22, 3:24, 4:13, 4:15, 5:7, 10:24, 11:8, 12:5, 14:9, 14:11, 14:20, 14:22, 15:6, 16:1, 16:7, 16:25, 19:13, 19:24, 20:1, 20:14, 22:9, 22:11, 22:14, 22:16, 22:19, 26:18, 28:18, 28:23, 29:1, 29:4, 29:12, 30:21 COURT [54] - 1:1, 1:24, 3:4, 3:9, 3:14, 3:19, 4:1, 4:14, 4:18, 5:1, 5:4, 5:9, 5:15, 5:25, 6:6, 6:14, 6:21, 7:9, 7:17, 7:21, 8:10, 8:13, 8:17, 10:24, 11:24, 12:11, 12:17, 12:19, 13:1, 13:11, 14:23, 17:7, 18:9, 19:22, 20:7, 20:22, 21:10, 22:5, 24:8, 24:23, 25:9, 25:12, 25:17, 26:15, 26:19, 26:23, 27:10, 27:12, 27:17, 29:14, 29:22, 29:25, 30:2, 30:12 court [10] - 3:2, 3:17, 7:19, 11:4, 12:22, 13:22, 18:1, 19:18, 20:14, 22:7 court's [1] - 20:18 courts [2] - 6:18, 25:25 CPLR [2] - 10:14, 25:4 CRANE [1] - 1:14 critical [1] - 20:9 cut [2] - 15:21, 27:24</p>	<p>19:18 denial [1] - 5:6 denying [1] - 29:6 deposition [5] - 12:21, 13:3, 13:12, 27:18, 28:6 depositions [1] - 23:15 depth [1] - 29:4 derivative [2] - 18:3, 29:19 described [1] - 17:3 designate [1] - 9:25 designates [1] - 10:1 determine [1] - 13:20 differ [1] - 22:15 difference [1] - 19:19 different [1] - 19:25 difficulties [1] - 3:12 directed [1] - 20:12 directing [1] - 7:7 direction [1] - 14:22 directly [1] - 15:3 director [1] - 12:1 director's [1] - 26:21 Directors [1] - 9:8 directors [2] - 15:15, 17:4 disadvantage [1] - 10:18 disagree [1] - 27:7 disagreement [1] - 16:15 disclose [1] - 26:12 disclosing [2] - 9:14, 27:24 Disclosure [1] - 25:5 disclosure [2] - 19:9, 25:7 discretion [2] - 10:16 discuss [2] - 10:21, 14:3 discussed [2] - 24:18, 29:18 discusses [2] - 17:4, 18:16 discussing [1] - 11:25 dismissing [1] - 29:7 dispute [2] - 7:9, 25:8 disregarded [3] - 3:21, 16:1, 16:25 district [1] - 11:2 Division [4] - 4:22, 24:25, 28:22, 30:9 docket [1] - 20:18 doctrine [1] - 11:20 document [6] - 8:11, 9:22, 9:23, 19:17, 19:19, 29:1</p>	<p>documents [16] - 8:25, 9:2, 19:10, 19:14, 20:5, 20:6, 20:9, 20:13, 20:17, 21:4, 21:12, 21:14, 21:22, 28:21, 28:22 done [5] - 11:23, 12:2, 13:8, 23:15 doubt [2] - 17:14 down [3] - 18:8, 27:23, 29:11 drafted [1] - 21:9 dramatically [1] - 19:15 duplicates [1] - 20:7 during [1] - 28:14 duties [1] - 16:6 duty [5] - 9:11, 17:8, 17:10, 17:24, 28:4</p>
E				
<p>e-filed [1] - 3:18 edge [1] - 17:19 eDoc [1] - 8:10 effort [2] - 21:7, 28:25 eight [1] - 17:21 Eisenberg [1] - 3:2 EISENBERG [34] - 1:20, 3:16, 4:24, 5:2, 5:5, 5:10, 5:23, 6:3, 6:11, 6:19, 6:23, 7:13, 8:11, 8:14, 8:18, 11:1, 11:25, 12:13, 12:18, 17:11, 21:2, 21:9, 22:6, 24:9, 25:3, 25:10, 25:15, 25:18, 27:14, 29:9, 29:16, 30:1, 30:11, 30:14 either [1] - 22:4 elicit [2] - 7:5, 15:6 EMILY [1] - 2:7 empathically [1] - 13:10 employer [1] - 6:13 end [1] - 12:15 enforcement [1] - 28:7 ensue [1] - 20:20 entire [1] - 8:3 entitled [2] - 17:23, 20:16 entity [1] - 11:19 equipped [1] - 18:5 equities [1] - 27:19 ESQ [6] - 1:20, 1:20, 2:7, 2:7, 2:8, 2:8 ethical [2] - 17:14, 22:1 Ethical [1] - 18:18</p>				
D				
<p>danger [1] - 18:4 dated [1] - 7:25 days [2] - 5:16, 7:3 deadlines [1] - 4:2 DEBORAH [3] - 1:24, 2:21, 30:20 decided [1] - 30:6 decision [1] - 26:21 deem [2] - 15:16, 26:25 deep [1] - 17:13 Defendant [2] - 1:8, 2:9 defendant's [1] - 12:3 defraud [1] - 11:19 delay [1] - 5:11 demand [1] - 8:8 demonstrates [1] -</p>				
dar				

<p>Ethics [1] - 9:6 event [2] - 3:22, 21:11 evidence [9] - 7:23, 16:2, 18:1, 18:4, 19:8, 22:4, 22:8, 23:5, 23:6 evolve [1] - 29:11 examination [3] - 11:11, 13:16, 26:3 examinations [1] - 23:16 example [1] - 10:5 exclude [1] - 11:11 Executive [2] - 8:1 exercise [1] - 11:12 Exhibit [2] - 7:24, 9:21 exhibit [1] - 29:3 exhibits [1] - 4:11 expedited [1] - 4:17 expelled [1] - 9:7 experienced [2] - 18:13 exposed [1] - 26:4 extent [1] - 26:8 extorted [1] - 8:4</p>	<p>21:5, 21:17 fix [2] - 6:7, 16:21 fix [1] - 30:4 Floor [1] - 1:19 focus [1] - 14:14 following [1] - 3:1 force [1] - 30:7 foregoing [1] - 30:17 form [4] - 9:25, 20:18, 28:21, 28:23 formally [1] - 3:20 forward [1] - 16:2 foundation [1] - 15:24 founded [1] - 16:9 frankly [2] - 11:13, 22:20 fraud [1] - 11:22 Friday [7] - 4:16, 10:3, 17:12, 19:13, 19:16, 22:7, 24:17 front [2] - 4:23, 23:7 fruit [1] - 18:3 fruition [1] - 9:3 FUCHS [1] - 2:7 Fuchs [1] - 3:3 full [1] - 3:11 fundamental [1] - 14:6</p>	<p>handle [1] - 4:17 happy [3] - 8:15, 26:17, 26:20 hard [6] - 3:13, 3:15, 5:15, 5:20, 5:21, 30:2 harm [1] - 28:15 head [1] - 8:21 hear [2] - 6:7, 14:16 heard [1] - 25:2 hearing [1] - 18:15 hearsay [1] - 22:10 held [1] - 11:8 helpful [1] - 25:19 HER [1] - 1:6 hereby [1] - 30:17 high [1] - 16:10 higher [1] - 10:12 himself [3] - 20:11, 22:3, 28:3 holding [1] - 12:6 holds [1] - 12:6 Honor [37] - 3:7, 4:24, 6:11, 6:23, 7:6, 7:15, 7:22, 8:12, 9:12, 9:16, 9:21, 10:16, 11:1, 11:3, 12:13, 12:25, 13:7, 14:3, 17:11, 19:7, 21:9, 22:4, 22:6, 22:22, 23:2, 23:11, 23:19, 24:5, 24:10, 24:12, 24:21, 25:3, 25:11, 25:21, 26:6, 29:9, 29:20 HONORABLE [1] - 1:14 hope [2] - 24:11, 25:22 hour [2] - 4:14, 6:1 hours [1] - 17:21 hypothetical [1] - 11:25</p>	<p>inconsistent [1] - 14:17 incredible [1] - 3:25 indemnification [1] - 20:17 Index [1] - 1:9 information [22] - 7:1, 7:5, 7:8, 9:15, 9:20, 13:19, 13:22, 13:24, 15:7, 15:11, 15:16, 15:22, 17:23, 17:25, 18:15, 26:4, 26:12, 27:4, 27:22, 27:24, 29:17, 29:19 informed [1] - 8:3 injunctive [1] - 10:13 inquire [3] - 7:1, 7:8, 24:3 inquiry [1] - 24:1 insider [1] - 15:16 instances [1] - 15:15 instead [1] - 6:9 integrity [1] - 28:8 intend [1] - 7:1 intended [1] - 19:17 intends [1] - 25:11 intent [1] - 23:14 intentionally [1] - 9:10 interest [5] - 13:2, 13:17, 15:14, 15:17, 28:3 interests [1] - 28:12 interfere [2] - 14:18, 23:15 interrupted [1] - 14:15 introduce [1] - 18:1 invest [1] - 5:20 investigate [1] - 18:19 investigated [1] - 27:8 investigating [1] - 13:19 investigation [15] - 6:15, 13:18, 14:7, 15:19, 15:25, 16:3, 16:4, 16:17, 17:13, 18:3, 28:8, 28:11, 28:13, 28:15, 28:16 investigatory [7] - 12:21, 13:7, 13:15, 14:18, 19:2, 27:18, 28:6 involve [1] - 15:4 irrelevant [1] - 15:20 issue [17] - 7:6, 11:4, 11:17, 15:2, 15:5, 15:23, 16:13, 16:18, 18:11, 18:12, 19:4, 19:14, 19:15, 19:23, 21:5, 25:20, 28:16 issues [5] - 14:14,</p>	<p>14:21, 14:23, 24:14, 24:17 issuing [1] - 25:1 itself [1] - 19:5</p>
F				J
				<p>JAMES [1] - 1:6 judge [2] - 11:16, 12:2 Judge [3] - 4:25, 17:1, 20:23 jurisdiction [2] - 29:13, 29:21 jurisprudence [1] - 10:7 Justice [1] - 1:15 justify [1] - 19:1</p>
				K
				<p>keep [1] - 22:13 kind [2] - 9:22, 26:7 King [1] - 8:9 king [4] - 8:18, 8:23, 9:4, 9:9 knows [2] - 17:18, 29:11</p>
				L
<p>fact [4] - 9:1, 9:2, 12:8, 19:6 facts [3] - 17:14, 17:17, 27:5 factual [3] - 13:21, 13:23, 14:2 fair [1] - 10:17 faith [2] - 21:18, 28:20 familiar [1] - 17:17 far [1] - 24:1 farcical [1] - 9:16 fashion [2] - 4:17, 25:21 favor [1] - 27:19 few [4] - 20:5, 25:13, 25:15, 27:13 fiction [1] - 20:21 fiduciary [6] - 9:11, 15:17, 17:8, 17:10, 17:24, 28:4 fight [1] - 3:5 figure [1] - 26:7 file [3] - 6:8, 7:3, 24:15 filed [7] - 3:18, 5:14, 9:4, 9:5, 24:19, 28:21, 28:22 filing [1] - 22:8 filings [1] - 5:12 finally [1] - 24:5 fine [4] - 12:17, 16:16, 16:23, 18:9 firm [4] - 11:18, 19:5,</p>	G			
	<p>General [9] - 7:4, 7:7, 9:24, 13:9, 13:15, 16:9, 17:12, 18:13, 27:21 GENERAL [2] - 1:6, 2:5 general [3] - 14:19, 16:5, 20:11 General's [2] - 15:1, 27:3 given [3] - 26:10, 28:9, 29:18 Goldfarb [1] - 3:3 GOLDFARB [1] - 1:20 government [3] - 16:15, 18:19, 18:24 grant [1] - 24:12 grateful [1] - 29:20 gray [1] - 30:10 great [1] - 26:5 guard [1] - 23:10 guess [5] - 3:20, 4:11, 6:9, 25:10, 25:15 guiding [1] - 15:8</p>			
	H			
	<p>half [2] - 4:14, 6:1 hand [2] - 8:15, 9:12 handed [1] - 28:14</p>			
		I		
		<p>idea [2] - 21:17, 22:2 illegal [1] - 15:15 immediately [1] - 12:23 important [4] - 22:17, 22:18, 26:15, 27:6 improper [1] - 8:5 improperly [2] - 17:7, 29:17 IN [1] - 1:6 in-camera [1] - 19:24 inclined [2] - 24:12, 29:20 including [1] - 9:14</p>		

likely ^[1] - 28:13 limited ^[1] - 14:11 listened ^[1] - 14:12 listening ^[2] - 17:21, 18:14 literally ^[1] - 3:8 litigation ^[1] - 6:16 living ^[1] - 23:1 logistical ^[3] - 12:14, 24:6, 24:9 look ^[7] - 4:8, 4:9, 9:22, 19:12, 24:18, 25:13, 27:12 looked ^[1] - 10:2 looking ^[2] - 4:10, 20:4	moved ^[1] - 25:4 MR ^[1] - 7:12 MS ^[62] - 3:7, 3:11, 3:16, 3:20, 4:12, 4:15, 4:24, 5:2, 5:5, 5:10, 5:23, 5:24, 6:3, 6:4, 6:11, 6:19, 6:23, 7:11, 7:13, 7:15, 7:18, 7:22, 8:11, 8:14, 8:18, 11:1, 11:25, 12:13, 12:18, 12:25, 13:7, 13:13, 14:25, 17:11, 18:10, 19:7, 19:23, 20:8, 20:24, 21:2, 21:3, 21:9, 21:11, 22:6, 24:9, 25:3, 25:10, 25:15, 25:18, 26:14, 26:16, 26:20, 26:24, 27:11, 27:14, 27:15, 29:9, 29:16, 29:24, 30:1, 30:11, 30:14 mysteriously ^[1] - 8:25	20:10, 20:16, 20:25, 21:14, 23:6, 26:11, 27:2, 27:18, 27:23, 28:1, 28:10, 28:19 North's ^[9] - 6:13, 7:1, 9:1, 9:23, 19:16, 21:6, 22:2, 22:25, 23:8 notably ^[1] - 19:4 notes ^[3] - 28:18, 28:23, 30:5 nothing ^[6] - 7:20, 11:9, 11:10, 12:8, 12:9 notice ^[6] - 4:20, 21:21, 24:16, 25:6, 26:17, 28:20 notion ^[1] - 20:20 numbers ^[1] - 4:10	opportunity ^[4] - 3:23, 7:23, 19:12, 25:20 opposing ^[8] - 6:25, 10:12, 10:19, 10:22, 12:10, 22:20, 23:19, 26:9 opposite ^[1] - 12:7 opposition ^[2] - 14:1, 21:4 options ^[1] - 19:25 oral ^[1] - 14:12 order ^[3] - 7:7, 24:15, 25:7 Order ^[2] - 24:19, 25:6 orderly ^[1] - 25:21 otherwise ^[4] - 16:11, 18:22, 21:8, 26:2 outrage ^[1] - 19:16 outset ^[1] - 21:24 overstating ^[1] - 19:15 own ^[2] - 24:24, 28:1 owns ^[1] - 11:7	19:9, 23:4, 27:7 poison ^[1] - 18:3 policy ^[1] - 18:17 position ^[5] - 9:17, 17:22, 24:18, 26:10, 26:25 posture ^[1] - 12:9 potential ^[3] - 15:14, 18:23, 19:5 potentially ^[1] - 9:14 power ^[1] - 25:19 pre ^[1] - 11:19 pre-bankruptcy ^[1] - 11:19 precaution ^[1] - 21:16 prejudice ^[2] - 10:18, 20:20 prematurely ^[1] - 13:21 prepare ^[1] - 24:11 prepared ^[4] - 14:2, 14:19, 24:11, 26:8 presence ^[2] - 3:2, 19:2 present ^[1] - 11:11 presentation ^[1] - 14:10 President ^[1] - 8:2 prevent ^[5] - 11:23, 17:22, 18:5, 18:24, 23:17 preverbal ^[1] - 23:18 print ^[1] - 3:12 privilege ^[18] - 10:5, 10:8, 11:12, 12:5, 13:25, 15:11, 18:23, 21:23, 21:25, 22:12, 22:18, 23:10, 23:23, 26:21, 27:6, 28:2, 29:5 privileged ^[12] - 7:1, 7:5, 7:8, 9:14, 15:7, 15:16, 15:22, 18:15, 26:12, 27:4, 27:22, 27:24 privileges ^[2] - 9:18, 11:8 problem ^[3] - 17:6, 17:16, 24:2 problems ^[1] - 16:15 procedural ^[1] - 12:9 proceed ^[3] - 6:22, 16:10, 26:3 proceeding ^[1] - 12:12 Proceedings ^[1] - 1:9 proceedings ^[3] - 6:9, 30:15, 30:18 process ^[2] - 13:7, 14:18 produce ^[1] - 19:17
M	N	O	P	
magistrate ^[2] - 11:16, 12:2 main ^[3] - 4:22, 6:10, 10:20 maintain ^[2] - 10:8, 29:12 mandate ^[1] - 23:13 manner ^[1] - 13:8 matter ^[5] - 4:24, 9:12, 24:10, 24:20, 25:8 matters ^[2] - 12:14, 24:6 mean ^[1] - 4:6 means ^[1] - 27:7 MELISSA ^[1] - 1:14 member ^[4] - 8:18, 8:19, 11:21 memo ^[1] - 20:11 mentioned ^[2] - 10:2, 11:3 mind ^[1] - 5:4 minds ^[1] - 16:8 minutes ^[4] - 3:9, 25:12, 25:14, 27:12 missing ^[1] - 18:25 mistake ^[1] - 22:25 moment ^[3] - 17:22, 17:25, 24:19 Monica ^[1] - 14:25 MONICA ^[1] - 2:8 monitor ^[3] - 14:16, 15:19, 16:17 month ^[2] - 20:18, 28:24 months ^[1] - 20:19 moreover ^[1] - 28:1 morning ^[1] - 4:17 most ^[3] - 16:6, 20:7, 20:9 motion ^[4] - 21:7, 25:7, 28:24, 30:6	N.R.A ^[28] - 8:19, 8:20, 8:21, 9:6, 9:7, 9:11, 10:6, 13:2, 15:9, 15:24, 16:17, 16:22, 18:22, 20:13, 20:15, 21:21, 21:22, 22:22, 27:17, 27:20, 28:5, 28:10, 28:11, 28:14, 28:20, 28:25 N.R.A's ^[4] - 9:18, 11:12, 23:10, 24:18 N.R.A.'s ^[2] - 9:13, 29:3 narrow ^[1] - 18:11 NATIONAL ^[1] - 1:3 National ^[1] - 8:2 necessary ^[1] - 13:5 need ^[2] - 4:4, 27:12 needs ^[3] - 6:1, 13:5, 23:16 never ^[2] - 5:4, 25:2 NEW ^[3] - 1:1, 1:1, 1:7 New ^[9] - 1:11, 1:19, 2:6, 8:21, 9:24, 18:18 next ^[2] - 1:23, 10:19 non ^[1] - 28:23 nonpublic ^[1] - 13:8 North ^[26] - 8:4, 9:7, 9:10, 9:13, 9:17, 10:9, 11:13, 14:14, 15:7, 16:13, 16:20, 17:24, 18:12, 19:10,	object ^[1] - 17:19 objection ^[2] - 29:23, 29:24 obligated ^[1] - 22:19 obligation ^[2] - 17:15, 18:19 obligations ^[1] - 22:1 obtained ^[1] - 29:17 obviate ^[1] - 7:19 obviously ^[4] - 5:7, 24:12, 24:15, 25:4 OF ^[7] - 1:1, 1:1, 1:3, 1:7, 2:5 offer ^[1] - 19:24 offered ^[1] - 19:8 OFFICE ^[1] - 2:5 Office ^[5] - 7:4, 7:7, 15:1, 16:8, 27:3 office ^[2] - 5:8, 5:13 Officer ^[1] - 8:1 Officers ^[1] - 22:19 officers ^[1] - 18:21 Official ^[2] - 2:22, 30:21 official ^[1] - 9:5 OFFICIAL ^[2] - 1:6, 1:24 Oliver ^[2] - 20:16, 27:2 once ^[2] - 25:9, 28:15 one ^[16] - 4:18, 5:1, 5:18, 5:20, 5:21, 6:17, 7:23, 17:1, 19:1, 19:3, 20:11, 22:22, 23:23, 24:25, 28:12, 29:10 ones ^[1] - 5:2 open ^[1] - 3:1 operating ^[1] - 28:19	page ^[3] - 1:23, 4:10, 8:14 Page ^[2] - 7:3, 9:22 paper ^[1] - 16:19 papers ^[10] - 3:6, 3:8, 3:21, 3:23, 6:24, 7:3, 15:6, 19:25, 21:4, 29:3 Paragraph ^[1] - 9:9 part ^[3] - 12:22, 15:19, 21:13 PART ^[1] - 1:1 partially ^[1] - 9:25 particular ^[1] - 25:8 particularly ^[1] - 28:9 parties ^[1] - 13:14 passing ^[1] - 15:25 past ^[1] - 9:11 Pausing ^[2] - 6:5, 27:16 Pending ^[1] - 25:5 pending ^[3] - 6:9, 6:12, 6:15 percent ^[2] - 12:7, 24:21 petition ^[1] - 29:7 petitioner ^[1] - 6:7 pick ^[1] - 6:17 picture ^[1] - 15:23 piece ^[1] - 9:20 Pistol ^[1] - 8:22 place ^[1] - 3:1 Plaintiff ^[2] - 1:4, 1:21 point ^[8] - 11:7, 13:3, 14:6, 14:7, 15:3,	

<p>produced [3] - 9:24, 21:13, 21:15</p> <p>product [1] - 10:4</p> <p>production [3] - 19:10, 20:10, 21:15</p> <p>proffered [1] - 19:10</p> <p>proposition [2] - 10:20, 10:22</p> <p>prosecution [1] - 16:10</p> <p>protect [7] - 9:18, 11:12, 11:14, 15:11, 21:24, 28:2</p> <p>protected [3] - 10:8, 22:12, 27:5</p> <p>protection [1] - 11:5</p> <p>Protective [1] - 25:6</p> <p>protective [1] - 25:7</p> <p>proud [1] - 8:19</p> <p>proves [1] - 14:13</p> <p>provide [2] - 23:12, 26:17</p> <p>public [5] - 8:7, 12:23, 13:17, 18:16, 22:17</p> <p>publicly [2] - 20:13, 20:19</p> <p>publish [1] - 13:18</p> <p>purpose [1] - 28:10</p> <p>purposes [1] - 27:1</p> <p>pursuant [1] - 25:19</p> <p>put [6] - 4:8, 10:12, 16:2, 20:22, 23:6</p> <p>putting [1] - 18:16</p> <p>puzzled [1] - 22:20</p>	<p>14:9, 17:14</p> <p>reasonable [1] - 23:12</p> <p>reasoning [1] - 30:6</p> <p>reasons [4] - 5:18, 9:4, 18:17, 29:6</p> <p>received [3] - 6:24, 19:13, 20:10</p> <p>recently [1] - 16:6</p> <p>recommendation [1] - 11:16</p> <p>record [6] - 7:14, 12:23, 15:5, 23:11, 26:10, 30:7</p> <p>redact [5] - 10:1, 10:3, 15:10, 21:6, 21:7</p> <p>redacted [7] - 9:25, 13:6, 19:19, 20:4, 28:21, 28:23, 29:2</p> <p>redactions [4] - 9:25, 19:21, 20:3, 21:17</p> <p>referenced [1] - 4:25</p> <p>reflected [1] - 18:17</p> <p>refused [1] - 21:6</p> <p>regard [1] - 15:8</p> <p>regulatory [2] - 24:1, 24:3</p> <p>reiterate [2] - 23:14, 26:25</p> <p>reiterated [1] - 27:21</p> <p>relates [1] - 9:12</p> <p>relationship [1] - 28:9</p> <p>release [1] - 9:2</p> <p>relief [5] - 10:13, 10:14, 10:20, 23:13, 24:12</p> <p>rely [1] - 23:7</p> <p>remedies [1] - 17:8</p> <p>remedy [2] - 15:18, 17:9</p> <p>remember [1] - 5:16</p> <p>remove [1] - 21:6</p> <p>removed [1] - 9:8</p> <p>Reply [7] - 3:21, 3:23, 14:11, 14:21, 14:24, 15:23, 16:19</p> <p>report [1] - 11:16</p> <p>reported [1] - 9:1</p> <p>REPORTER [1] - 1:24</p> <p>Reporter [2] - 2:22, 30:21</p> <p>represent [4] - 5:7, 23:9, 26:10, 26:20</p> <p>representation [2] - 7:13, 7:15</p> <p>representations [2] - 22:7, 23:4</p> <p>represented [1] - 27:23</p> <p>request [4] - 16:24, 25:23, 29:10, 29:12</p>	<p>requests [1] - 9:7</p> <p>require [1] - 26:2</p> <p>required [1] - 7:4</p> <p>reserve [1] - 12:15</p> <p>resign [1] - 9:2</p> <p>resigned [1] - 8:6</p> <p>resolved [2] - 3:6, 3:7</p> <p>respect [4] - 19:9, 20:3, 20:16, 21:20</p> <p>respectfully [2] - 26:1, 29:12</p> <p>result [2] - 11:10, 12:9</p> <p>retain [1] - 29:20</p> <p>reveal [1] - 15:16</p> <p>revealing [1] - 15:14</p> <p>revelation [1] - 15:12</p> <p>reverse [1] - 24:6</p> <p>review [6] - 3:24, 4:13, 18:24, 19:24, 21:22, 29:1</p> <p>reviewed [3] - 4:13, 19:11, 21:23</p> <p>RIFLE [1] - 1:3</p> <p>Rifle [2] - 8:2, 8:22</p> <p>rights [3] - 10:7, 17:4, 24:4</p> <p>ripe [1] - 28:16</p> <p>rise [1] - 24:20</p> <p>risk [4] - 14:3, 19:9, 22:25, 26:3</p> <p>road [2] - 27:23, 29:11</p> <p>room [1] - 23:17</p> <p>ROTHROCK [3] - 1:24, 2:21, 30:20</p> <p>routinely [1] - 7:18</p> <p>RPR [3] - 1:24, 2:21, 30:20</p> <p>rule [4] - 24:10, 25:9, 25:11, 25:21</p> <p>Rule [4] - 18:18, 24:19, 25:4, 25:24</p> <p>rules [1] - 23:13</p> <p>Rules [2] - 10:14, 25:19</p> <p>ruling [5] - 24:24, 24:25, 25:1, 25:12, 28:17</p> <p>rush [1] - 29:8</p>	<p>see [4] - 13:3, 13:5, 23:19, 24:23</p> <p>seek [5] - 7:5, 11:10, 15:6, 23:14, 24:13</p> <p>seeking [6] - 10:13, 10:14, 15:20, 27:4, 27:22</p> <p>seeks [2] - 11:5, 12:10</p> <p>seemingly [1] - 28:9</p> <p>sensitive [1] - 7:2</p> <p>separate [3] - 6:8, 16:22</p> <p>serious [1] - 28:7</p> <p>serves [1] - 22:17</p> <p>service [1] - 25:6</p> <p>set [1] - 3:11</p> <p>setting [1] - 17:3</p> <p>seven [1] - 5:10</p> <p>several [1] - 4:21</p> <p>shall [1] - 25:7</p> <p>share [1] - 23:20</p> <p>shareholders [2] - 11:19, 17:5</p> <p>sharp [1] - 23:25</p> <p>sheet [1] - 30:10</p> <p>shield [1] - 18:24</p> <p>shocker [1] - 6:24</p> <p>shortly [2] - 3:16, 8:25</p> <p>Show [1] - 24:19</p> <p>show [2] - 15:13, 16:11</p> <p>showing [5] - 8:16, 15:11, 16:2, 16:5, 23:5</p> <p>shown [2] - 14:7, 14:8</p> <p>side [5] - 5:21, 15:4, 18:12, 26:4, 28:5</p> <p>sides [1] - 5:20</p> <p>signed [1] - 24:15</p> <p>significance [1] - 13:23</p> <p>similarly [1] - 28:25</p> <p>simply [1] - 23:11</p> <p>single [1] - 19:1</p> <p>sit [6] - 14:10, 14:16, 16:20, 18:8, 27:17, 28:6</p> <p>sitting [3] - 17:19, 17:20</p> <p>situation [1] - 7:19</p> <p>six [1] - 20:6</p> <p>skipping [1] - 14:5</p> <p>slept [1] - 5:10</p> <p>so.. [1] - 25:8</p> <p>sole [1] - 11:4</p> <p>someone [2] - 3:13, 3:14</p> <p>soon [1] - 5:13</p> <p>sorry [3] - 6:11, 17:1, 25:16</p>	<p>sort [5] - 3:20, 14:2, 14:13, 24:5, 29:10</p> <p>sought [1] - 13:15</p> <p>specific [1] - 18:7</p> <p>specifically [2] - 17:4, 29:16</p> <p>speculative [1] - 18:23</p> <p>spending [1] - 8:5</p> <p>stand [2] - 10:22, 17:5</p> <p>standard [3] - 10:11, 10:13, 10:15</p> <p>standing [2] - 11:21, 23:2</p> <p>State [1] - 8:21</p> <p>STATE [2] - 1:1, 1:7</p> <p>statements [1] - 22:9</p> <p>states [2] - 8:23, 9:10</p> <p>States [1] - 22:14</p> <p>statutorily [1] - 18:20</p> <p>stay [6] - 24:17, 24:20, 24:24, 25:1, 25:2, 25:20</p> <p>step [2] - 5:25, 10:9</p> <p>Stephen [1] - 21:13</p> <p>steps [2] - 17:5, 21:24</p> <p>STERN [22] - 2:7, 3:7, 3:20, 4:12, 4:15, 5:24, 6:4, 7:11, 7:15, 7:18, 7:22, 12:25, 13:7, 13:13, 19:7, 19:23, 20:8, 20:24, 21:3, 21:11, 27:15, 29:24</p> <p>Stern [2] - 3:3, 16:14</p> <p>Stern's [1] - 5:6</p> <p>still [1] - 6:7</p> <p>Street [3] - 1:10, 2:6, 29:8</p> <p>stringent [1] - 26:10</p> <p>submit [2] - 7:23, 26:1</p> <p>submitted [4] - 8:9, 8:12, 9:20, 20:25</p> <p>subpoena [4] - 15:9, 21:21, 23:13, 28:20</p> <p>sue [2] - 11:18, 17:24</p> <p>suggest [1] - 9:17</p> <p>suing [1] - 20:15</p> <p>supervise [1] - 16:6</p> <p>support [2] - 19:1, 20:25</p> <p>supporter [1] - 8:20</p> <p>supposed [2] - 8:5, 26:5</p> <p>suppression [1] - 29:17</p> <p>SUPREME [1] - 1:1</p> <p>Supreme [3] - 10:24, 22:14</p> <p>supreme [1] - 11:4</p>
Q				
<p>questioning [3] - 16:20, 19:2, 23:16</p> <p>quick [1] - 30:9</p> <p>quickly [1] - 4:4</p>				
R				
<p>raised [6] - 14:21, 14:23, 16:19, 19:25, 21:5, 23:24</p> <p>raising [1] - 23:24</p> <p>ranked [1] - 22:9</p> <p>reaching [1] - 28:18</p> <p>read [6] - 3:8, 3:9, 4:7, 5:25, 16:8, 26:6</p> <p>real [1] - 18:4</p> <p>realistic [1] - 15:12</p> <p>really [12] - 12:12, 13:17, 14:13, 14:15, 15:24, 16:3, 16:12, 19:14, 19:23, 25:18, 28:11, 30:3</p> <p>reason [3] - 5:11,</p>				
		S		
		<p>sacrosanct [1] - 22:15</p> <p>saw [2] - 5:1, 5:19</p> <p>scheme [1] - 13:10</p> <p>seal [2] - 21:7, 28:24</p> <p>seat [1] - 17:19</p> <p>SEC [1] - 12:4</p> <p>second [5] - 8:1, 10:10, 11:15, 17:2, 24:17</p>		
		dar		

<p>suspend ^[1] - 25:7 Suspension ^[1] - 25:5 SVETLANA ^[1] - 1:20 swipe ^[1] - 15:25 swipes ^[1] - 16:13 system ^[3] - 10:7, 20:14, 22:16</p>	<p>Trump ^[1] - 16:7 trusted ^[1] - 11:13 Trustee ^[2] - 11:6, 11:9 trustee ^[2] - 11:18, 11:20 try ^[1] - 24:25 trying ^[3] - 14:15, 16:8, 26:6 turning ^[1] - 4:3 two ^[5] - 7:2, 10:19, 19:24, 20:6, 20:8</p>	<p>waive ^[2] - 26:21, 26:22 waiver ^[2] - 26:13, 27:1 WANG ^[2] - 2:8, 7:12 Wang ^[1] - 3:3 warranted ^[1] - 10:20 water ^[1] - 6:2 Wayne ^[1] - 8:2 website ^[1] - 20:22 Wechsler ^[6] - 11:2, 11:15, 15:2, 17:2, 17:4, 18:16 week ^[2] - 6:25, 7:16 weekend ^[3] - 4:16, 6:24, 19:11 Weintraub ^[3] - 10:25, 11:3, 15:3 welcomed ^[1] - 24:2 well-founded ^[1] - 16:9 whistle ^[1] - 23:6 whole ^[2] - 7:19, 13:10 WILLIAM ^[1] - 2:8 Williams ^[2] - 21:16, 21:20 withheld ^[1] - 19:18 witnesses ^[2] - 13:14, 17:20 witnesses' ^[1] - 14:16 wondering ^[1] - 6:17 worst ^[2] - 24:11, 26:8 worth ^[1] - 20:2</p>
T	U	Y
<p>talks ^[2] - 25:24, 29:16 ten ^[2] - 3:9, 25:14 TERM ^[1] - 1:1 terms ^[1] - 12:1 testimony ^[1] - 14:16 text ^[2] - 10:1 THE ^[57] - 1:1, 1:6, 1:7, 1:14, 2:5, 3:4, 3:9, 3:14, 3:19, 4:1, 4:14, 4:18, 5:1, 5:4, 5:9, 5:15, 5:25, 6:6, 6:14, 6:21, 7:9, 7:17, 7:21, 8:10, 8:13, 8:17, 10:24, 11:24, 12:11, 12:17, 12:19, 13:1, 13:11, 14:23, 17:7, 18:9, 19:22, 20:7, 20:22, 21:10, 22:5, 24:8, 24:23, 25:9, 25:12, 25:17, 26:15, 26:19, 26:23, 27:10, 27:12, 27:17, 29:14, 29:22, 29:25, 30:2, 30:12 themselves ^[1] - 23:2 thereafter ^[1] - 8:25 Thomas ^[1] - 1:10 threat ^[1] - 9:1 threatened ^[1] - 8:5 three ^[2] - 8:14, 25:12 tight ^[2] - 3:25, 4:2 timeframe ^[1] - 3:25 today ^[4] - 7:6, 19:18, 22:7, 30:13 together ^[1] - 5:12 Tom ^[1] - 8:9 tomorrow ^[1] - 26:3 took ^[1] - 21:16 top ^[1] - 11:22 total ^[1] - 20:6 trample ^[1] - 24:4 transcript ^[3] - 28:14, 30:7, 30:18 transcripts ^[2] - 13:15, 23:21 tree ^[1] - 18:3 tried ^[1] - 16:12 tries ^[1] - 15:21 true ^[1] - 30:17 truly ^[1] - 9:16</p>	<p>ultimately ^[1] - 18:1 unable ^[1] - 29:4 unaware ^[1] - 11:22 under ^[7] - 3:25, 10:7, 10:14, 11:5, 11:20, 13:9, 25:4 underlying ^[2] - 19:6, 27:5 understood ^[1] - 5:6 Underwood ^[1] - 16:7 undisputed ^[1] - 23:7 United ^[1] - 22:14 unlawful ^[1] - 24:4 unless ^[2] - 8:6, 11:21 unreasonable ^[2] - 10:18 unredacted ^[1] - 20:17 unremarkable ^[1] - 12:5 up ^[7] - 8:15, 10:15, 16:18, 19:3, 28:3, 30:4, 30:10 uphold ^[1] - 22:18 Upjohn ^[2] - 22:16, 27:7 utmost ^[1] - 17:15</p>	<p>YAEL ^[1] - 2:7 yellow ^[2] - 9:25, 29:2 YORK ^[3] - 1:1, 1:1, 1:7 York ^[9] - 1:11, 1:19, 2:6, 8:21, 9:24, 18:18</p>
V	W	Z
<p>vary ^[1] - 14:9 venue ^[1] - 6:20 versus ^[1] - 16:7 Vice ^[1] - 8:1 view ^[1] - 9:10 Virginia ^[3] - 5:3, 6:9, 6:12 visual ^[1] - 10:5 voluminous ^[1] - 5:12 voluntarily ^[1] - 15:9</p>	<p>Wagoner ^[2] - 11:20, 12:11 waiting ^[2] - 3:13, 5:11</p>	<p>zealously ^[2] - 23:9, 23:10</p>
	dar	