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1 ORAL ARGUMENT VIA ZOOM - JANUARY 25, 2022

2 PROCEEDINGS

3 THE COURT: The matter before the court is in re:  
4 Highland Capital Management bankruptcy appeal oral argument.

5 Before we begin I have some housekeeping matters to  
6 cover.

7 First of all, if at some point we lose the court  
8 reporter, obviously, we need to stop. I hope that will not  
9 happen, but if that occurs we will.

10 And if we have any technical difficulties that interrupt  
11 counsel's argument time, then I will add to your time so that  
12 you have your full allocated time.

13 The law clerk is aware of the time warnings that you  
14 want and I have advised him to interrupt you or interrupt me  
15 so that he can announce those time warnings as needed.

16 At this time then we'll begin with counsel for the  
17 appellants. I believe that's going to be divided time, so if  
18 you would proceed at this time.

19 MR. RUKAVINA: Your Honor, good morning.

20 Davor Rukavina of Munsch Hardt Kopf & Harr for two of  
21 the appellants we call the advisors. I'll be discussing the  
22 substance of the appeal, and my co-counsel, Douglas Draper,  
23 who represents the Dugaboy Trust, will be addressing the two  
24 motions to dismiss.

25 Your Honor, may it please the court.

1           Let me first reiterate what we argued in our brief,  
2           which is that this matter is very much a matter about  
3           substance. This is not a matter of procedure. This is not a  
4           case where -- where someone can say harmless error or where  
5           someone can say, okay, so what, the wrong procedure was  
6           followed. It is substance that goes to the core of the  
7           bankruptcy court's jurisdiction and what it does, because it  
8           deals with a confirmed plan. It is substance because the  
9           Bankruptcy Code has an express section dealing with plan  
10          modifications, if this is a plan modification.

11           THE COURT: Counsel, could I ask you a couple of  
12          questions before you continue on?

13           First of all, would you address the difference between  
14          indemnifying out of reserves and indemnifying out of the  
15          subtrust.

16           And second, would you address the assertion that the  
17          bankruptcy court order does not really add to the universe of  
18          entities who are eligible for indemnification.

19           MR. RUKAVINA: Thank you, Your Honor.

20           I think both of those questions revolve around the same  
21          answer, which is that the plan created originally three legal  
22          entities, the reorganized debtor, the litigation subtrust,  
23          and then the master claim and trust. Each of those entities  
24          was originally obligated to indemnify its own logistical and  
25          professionals. It's a little bit broader than that. There

1 was no cross indemnification. And it's my understanding  
2 that, yes, the claim and trust could reserve funds for the  
3 indemnification purposes. That is correct. But what the  
4 litigation trust or the claim and trust could reserve from  
5 its own funds on hand is different than what we have now.  
6 For example, we have a \$22.5 million promissory note. That's  
7 not just reserving funds on hand. That is the future  
8 obligation that needs to be repaid before any creditors can  
9 be repaid.

10 But I think more importantly -- Your Honor, I apologize.  
11 Someone is typing and I can hear them and it's -- it's  
12 interfering with my ability to talk. But it might just be  
13 the court reporter, so I'll continue.

14 But, Your Honor -- and we have discussed this our reply  
15 brief in detail. There is no question that under this new  
16 order the claim and trust now is responsible for indemnifying  
17 people whom it was not responsible to indemnify in the  
18 beginning.

19 And another thing that I'll point out, Your Honor, with  
20 this indemnification subtrust, they're going to have to hold  
21 the \$25 million until all possible indemnification claims are  
22 asserted and resolved. Under Texas law that's four years for  
23 breach of fiduciary duty.

24 So it's not a matter of the debtor's trustee in the  
25 exercise of his business judgment reserving some funds at any

1 given point to address conceived of or potential or  
2 threatened indemnification claims. It is a matter of tying  
3 up \$25 million for years to come and by the claim and trust  
4 indemnifying people whom it alone -- or it itself was not  
5 indemnifying before.

6 Assume, Your Honor, arguendo, that -- that the  
7 litigation trust created under the plan didn't have the money  
8 to indemnify its personnel. That it -- it -- it ran through  
9 its seed money, it -- it-- it prosecuted litigation --

10 THE COURT: We've lost your sound.

11 (Pause.)

12 Now you're back on.

13 And I'll instruct the law clerk to add a minute to his  
14 time.

15 MR. RUKAVINA: Thank you.

16 Your Honor, what I was saying is that hypothetically the  
17 original litigation trust could just not have money to  
18 indemnify its personnel. Well, now, the claim and trust from  
19 its own funds, from its \$25 million, does so. So I hope  
20 I've addressed that portion of the court's question.

21 If I return to -- to what is a plan modification, Your  
22 Honor. Well, first, a plan is a contract. That's black  
23 letter bankruptcy law. The contract can be sued upon in  
24 state court. So I think Congress, just like fundamental  
25 contract law, they say a debtor can't unilaterally modify its

1 contract. No -- no contract party can just unilaterally  
2 modify a contract. So you have to follow the 1127(b)  
3 prescribed mechanism for a plan modification. And that has  
4 extreme safeguards. Your Honor, you have to have a  
5 disclosure statement that goes to all the creditors that  
6 discloses the economic impact in detail, the length, for  
7 example, I mentioned four years, that -- that tells the  
8 creditors and other parties in interest everything that the  
9 debtor knows in an approved format so that it's reasonably  
10 accurate for the creditors to make a decision.

11 That's the second point. A modification is voted upon.  
12 Here the creditors originally rejected the plan. We believe  
13 that they would likely reject the modification. But the  
14 creditor democracy is critical to Chapter 11 proceedings.  
15 The way that the bankruptcy court proceeded here, we didn't  
16 have that.

17 And third, and most importantly, this motion was  
18 approved under a very flexible, equitable, multifactor  
19 business judgment test. Section 1129 that governs  
20 confirmation has something like 14 elements, not factors,  
21 each of which must be proven with competent evidence.

22 And if the bankruptcy court proceeds on what's called  
23 cram down to confirm a plan that's been rejected, now you  
24 have two additional very heightened elements. That's what I  
25 mean that this is about substance.

1 And -- and we believe that if this proceeded as a plan  
2 modification it would have been rejected and denied.

3 Briefly, Your Honor, before I defer to Mr. Draper, we've  
4 briefed this at length, but a plan modification is something  
5 that changes a plan. We know that from U.S. Brass. In U.S.  
6 Brass the plan provided for litigation by trial of claims.  
7 It was changed later on to provide for litigation by  
8 arbitration. It didn't change the economics of the plan. It  
9 didn't change how much creditors were being paid. Yet the  
10 Fifth Circuit had no problem in -- in construing that as a  
11 plan modification, something that was prohibited in that  
12 case.

13 So the burden is pretty slight to find that a change to  
14 a plan is a plan modification. Again, because a debtor ought  
15 not to be able to unilaterally change its contract and  
16 creditor democracy in Chapter 11 is the key.

17 Here, Your Honor, there is no question that a new trust  
18 is being created, the indemnification subtrust. Your Honor,  
19 Chapter 11 trusts are created under plans. They're not  
20 created by motion. I would urge any -- any counsel who is a  
21 bankruptcy expert to give the court a single case where a  
22 trust was created by motion. That's a plan issue.

23 \$25 million is potentially being removed from creditors.  
24 It may turn out to be a zero, that's true. But we won't know  
25 for many years to come. And in the meantime that \$25 million

1 is tied up.

2 You have this increased indemnification of professionals  
3 by the creditor trust that you did not have before. There  
4 was no cross indemnification before. There was no guarantee  
5 under indemnification. And you have the fact that the plan  
6 expressly contemplated as a condition precedent DNO  
7 insurance, which could be waived, and they did waive it, but  
8 the plan required DNO insurance and now you're substituting  
9 that with this new trust. That, Your Honor, is a  
10 modification. It changes what is in the plan, both each of  
11 those things individually, and certainly I would argue in the  
12 totality of the circumstances.

13 Mr. Draper will now handle the motions to dismiss.

14 I would just point out as counsel for NexPoint that  
15 NexPoint did have five claims, known claims, when this appeal  
16 was commenced, and until recently NexPoint had the sixth  
17 claim, Hunter Covitz, which there was confusion internally at  
18 the HR department, but it always had that claim. That claim  
19 has been disallowed very recently. We are appealing that  
20 disallowance order because it was disallowed without a  
21 hearing and on negative notice, in violation of Rule 55.

22 And most importantly for standing, the plan requires the  
23 creditor -- creditor trust to reserve more than \$200,000 for  
24 that claim until that claim is definitively and finally  
25 adjudicated by final order. We also have \$14 million of

1 administrative claims that we're going to go to trial on  
2 probably now in April. They have not been disallowed. They  
3 have not been paid.

4 Your Honor, with that, I'll yield the balance of our 15  
5 minutes to Mr. Draper.

6 MR. DRAPER: Your Honor, Douglas Draper.

7 Thank you very much for allowing this by zoom.

8 I'm going to address a few items that will be very quick  
9 and certainly things that are I believe lost in the pleadings  
10 and the papers that have been filed. The first one is citing  
11 Judge Jones in Pacific Lumber. Equitable mootness should be  
12 employed with a scalpel and not an axe. So it has to be  
13 narrow in its scope. I'd ask -- though we're talking about  
14 plan modifications, understand that the matter before you is  
15 not an appeal of the confirmation order. It is appeal of a  
16 separate order that is not the confirmation order.

17 And I'd ask the court to look at two cases, really three  
18 cases. Number 1 is the -- the concept of substantial  
19 consummation. And in U.S. Brass the Fifth Circuit held that  
20 substantial consummation was not a bar to a -- a equitable  
21 mootness and was not a cause for equitable mootness.

22 The next two cases are probably even more important. In  
23 Walker Hospital, which is in Sneed Shipbuilding, the Fifth  
24 Circuit expressly said equitable movements only applies to  
25 two types of orders: One an order confirming a plan, that's

1 not this case; and number two, an order under 363-M. This is  
2 not a sale order either.

3 So by virtue of the Fifth Circuit's express provisions  
4 in both Sneed and in Walker equitable mootness is not a -- is  
5 not a bar and should not be the cause of dismissal of this  
6 debtor's appeal.

7 The last issue I'd like to address, and I'd ask the  
8 court to take a look at, is a recent case out of the Eighth  
9 Circuit, which is VeroBlue. That is a very well-written  
10 opinion.

11 THE COURT: I think we've lost Mr. Draper's sound.

12 MR. DRAPER: Can you hear me?

13 THE COURT: Now I can. Okay. Go ahead, Mr.  
14 Draper.

15 MR. DRAPER: Where did you lose me?

16 Was I mentioning VeroBlue?

17 THE COURT: You had started VeroBlue, yes, and then  
18 and turned to your right to get some papers.

19 MR. DRAPER: Okay. What I would ask you to look --  
20 take a hard look at is VeroBlue, 6 Fed 4th 880, the court  
21 there did not uphold a dismissal on equitable mootness.  
22 Enormous distributions had been made. The plan had been  
23 virtually substantially consummated, but the court said,  
24 wait, we can -- we can fashion a relief here that is minimal  
25 and that is -- is not problematic.

Let's talk about what relief can be fashioned here. The

1 court can apply a scalpel and just go back and say, look, the  
2 parties who were originally covered by the indemnity are  
3 covered, anybody else who you just picked up is not covered.

4 And -- and the truth is when you look at the equitable  
5 mootness cases they fall into two categories. Category 1 is  
6 a creditor who had made concessions is now being asked to  
7 alter its treatment but still leave the concessions in place.  
8 That's not the case here. We don't have a creditor being  
9 asked to make a concession. In fact, the people now being  
10 covered by this had no expectation. In fact, the plan had no  
11 expectation of an indemnification. It was specific insurance  
12 coverage that, again, you can apply a scalpel and just go  
13 back to what the plan covered and limit it.

14 And number two is our third-party creditors before the  
15 court who were affected by the order. Well, that's not the  
16 case either, because the employees and the parties who were  
17 being covered by the indemnification are not before the  
18 bankruptcy, are not before the court here, were not  
19 creditors, who were not insiders. They were just outsiders  
20 who they're picking up.

21 Let me address now the -- the constitutional mootness.  
22 And I think there are a few issues here. The first is -- and  
23 when you look at it in their papers there's a footnote to a  
24 case where they cite that the Fifth Circuit says the --  
25 the -- the -- the effect must be pecuniary. That's not true.

1 In CMS it's a footnote in the pleading that they filed on the  
2 21st, the court there, and that's the Fifth Circuit, said a  
3 trustee who has no --

4 THE CLERK: Two minutes remain.

5 MR. DRAPER: -- who has no pecuniary interest in  
6 fact is -- it doesn't -- doesn't have to have one and can  
7 appeal.

8 Number two, Dugaboy has a real pecuniary interest.  
9 Though they have forgotten this, we are a contingent creditor  
10 under that plan. Simple mathematics says if the \$20 million  
11 or \$25 million is available for distribution to creditors my  
12 capability to being paid increases. The -- the test to  
13 whether I have a pecuniary interest is not a dollar test.  
14 It's a mathematical test. It's a pretty clear that this  
15 trust falls, or this trust is reduced to where it should be,  
16 my capability or my ability for my contingent interest is --  
17 is increased.

18 Again, thank you very much. And, again, I would ask the  
19 court to look at the cases I've cited on the equitable  
20 mootness side because I think they are dispositive of the  
21 Fifth Circuit standing at issue.

22 THE COURT: Thank you, Mr. Draper.

23 And the appellants have reserved some time for rebuttal.

24 Mr. Pomerantz.

25 MR. POMERANTZ: Good morning, Your Honor.

1 Can you hear me?

2 THE COURT: I can.

3 MR. POMERANTZ: Thank you, Your Honor.

4 I will be focusing my comments this morning on the  
5 equitable mootness motion and the merits. We filed our reply  
6 in connection with the constitutional mootness motion and  
7 I'll largely stand on that unless Your Honor has any  
8 questions.

9 But I do want to highlight one point, Your Honor.  
10 Appellant's standing throughout the bankruptcy case has been  
11 an issue, so much so that Judge Jernigan issued an  
12 extraordinary order in June 2021 requiring NexPoint and other  
13 Dondero related entities to disclose all claims they had and  
14 all their relationships with the debtor. She entered the  
15 order so she could evaluate whether parties had standing to  
16 take positions before the bankruptcy court.

17 In July 2021 NexPoint filed their disclosure. They  
18 identified each employee claim by name, but they did not  
19 mention the COVID's claim. They had multiple chances to  
20 correct this error when its standing was questioned and many  
21 times after before the bankruptcy court.

22 Only now, after agreeing to withdraw all their other  
23 claims does the COVID's claim miraculously appear on the  
24 docket ten months -- ten months after it was transferred.  
25 Your Honor, they said confusion, there's a huge credibility

1 issue here, and the statement in the declaration that the  
2 transferred document was not backdated just doesn't cut it.  
3 In any event, Your Honor, that claim has been disallowed and  
4 can't support standing under the first and agreed standard.

5 Your Honor, with respect to equitable mootness the Fifth  
6 Circuit acknowledges that an appeal of a bankruptcy court  
7 order can become equitably moot. And appellants are  
8 incorrect equitable mootness doesn't apply here.

9 First they argue that it doesn't apply because there is  
10 not a planned confirmation order, but the circuit has  
11 considered equitable mootness of orders other than  
12 confirmation orders. In *GWI* and in *Skull Pack*. And *Sneed* is  
13 not to the contrary. *Sneed* only stands for the proposition  
14 that a confirmed plan in the case is required, and we have  
15 that here.

16 Second, consistent with other circuits, the Fifth  
17 Circuit does not limit equitable mootness to the  
18 organizations as opposed to liquidations. *Manges* found  
19 equitable mootness in a litigation case as -- and also a  
20 litigation -- a liquidation was at issue in *Superior*  
21 *Offshore*.

22 Lastly, while the complexity of the case can be a  
23 factor, it's not a litmus test. *Berryman* found equitable  
24 mootness in a simple case. And while both *Texas Prairie* and  
25 *Superior Offshore* rejected equitable mootness, neither case

1 was complex and that didn't factor into the decision.

2 In any event, Your Honor, the asset monetization under  
3 this plan is complex and requires sophisticated management.  
4 As a result of serious allegations of mismanagement and fraud  
5 against Mr. Dandero, the bankruptcy court appointed Mr. Seery  
6 based upon his experience managing complex financial assets  
7 similar to the debtor in his work as a restructuring  
8 professional. He is the debtor -- reorganized debtor's CEO  
9 and the claimant trustee and his knowledge of the estate's  
10 assets the bankruptcy court found was vital to the plan  
11 success.

12 The assets consist of operating companies, undeveloped  
13 land, structured products, distressed debt, and other unique  
14 assets that will only deteriorate in value quickly if not  
15 managed effectively. Dismissal upon equitable mootness is  
16 appropriate under Manges if it effects either the rights of  
17 parties not before the court such that the court cannot order  
18 effective relief or the success of the plan, and we meet  
19 both, Your Honor.

20 Since the summer of 2020 Mr. Dandero and the other  
21 appellants have embarked on a litigation onslaught that's  
22 been designed to harass Mr. Seery and the other debtor  
23 representatives that has resulted in a TRO against Mr.  
24 Debtor -- Mr. Dandero, and a contempt order for violating the  
25 TRO.

1           Although the plan confirmed in February 2021, the  
2 effective date was conditioned upon obtaining acceptable DNO  
3 coverage. Why? Because Mr. Seery and the other  
4 post-confirmation management -- post effective date  
5 management was simply unwilling to accept their roles without  
6 a guarantee of their indemnification rights to protect  
7 against Mr. Dandero's attacks.

8           DNO coverage on an acceptable basis wasn't available  
9 because of Dandero, and the debtor and the committee pivoted  
10 to self-insurance and sought the court authority to implement  
11 the indemnity trust. Had the bankruptcy court not authorized  
12 the indemnity trust, the plan would not have gone effective,  
13 Highland would have remained in Chapter 11 without the  
14 ability to make distribution to creditors. But the  
15 bankruptcy court did approve the indemnity trust, management  
16 did rely on it, and the plan did go effective.

17           The court simply cannot order any effective relief in  
18 this appeal that would reinstate the status quo for the  
19 managers, and reinstatement of the status quo is a key that  
20 comes out of the cases. If the court reverses, management  
21 loses protection for their indemnification rights for actions  
22 taken after the August 11th effective date. And as the  
23 Dandero litigation onslaught has intensified post effective  
24 date and post confirmation, DNO insurance, not an option six  
25 months ago, will not be an option now. So security for the

1 indemnification rights, which was the only reason that the  
2 plan went effective, will no longer exist.

3 Reversal will not only pull out the rug from management  
4 but will also materially jeopardize the plan. Mr. Seery  
5 would resign if the order is reversed and believe the  
6 subtrust -- litigation subtrustee and the oversight members  
7 would follow suit. This a big deal. Mistake can't be easily  
8 replaced. As the court found in the confirmation order in  
9 the findings of fact, stripped of the ability to guarantee  
10 indemnification rights and without DNO coverage it would be  
11 impossible to find replacement managers with the  
12 sophistication necessary to monetize the assets, and the  
13 result would be a void in management, a likely default under  
14 the exit facility, and it would seriously jeopardize the  
15 plan's success.

16 Your Honor, equitable mootness cases involve an  
17 appellate trying to resolve its appellate rights which if  
18 successful will unquestionably enhance their rights. Courts  
19 have to balance the rights of the appellant to enhance their  
20 rights against parties' expectations and the success of the  
21 plan. But this is not the paradigm we have here.

22 Appellants filed this appeal in the name of unsecured  
23 creditors who they said were armed by the indemnity trust,  
24 but unsecured creditors were not armed by the indemnity  
25 trust. The committee, the statutory fiduciary for unsecured

1 creditors, supported the indemnity trust, and not one  
2 creditor with an allowed claim objected to it. The committee  
3 supported the order because they recognized protecting  
4 management, and having the plan go effective, a plan that was  
5 accepted by 99.8 percent in amount of unsecured creditors,  
6 was in the bankruptcy's word -- bankruptcy court's words a  
7 miracle. Voiding the trust, losing competent management, and  
8 jeopardizing success will significantly harm creditors.

9 Stripped of their unsecured claims appellant's  
10 motivation in this appeal becomes clear. It never had  
11 anything to do with protecting unsecured creditor's rights.  
12 They want to do everything they can to destroy the plan.  
13 That's not a basis for standing or a basis for allowing this  
14 court -- this appeal to continue. The court should dismiss  
15 the appeal as equitably moot.

16 Your Honor, turning to the merits, the indemnity trust  
17 order is not a plan modification because it did not alter the  
18 parties' rights, expectations, and obligations under the  
19 plan.

20 I want to spend a minute on the -- on the nature of  
21 appellant's interest, because it really goes to what their  
22 expectations could have been under the plan. NexPoint  
23 Advisors is owned and controlled by James Dandero. NexPoint  
24 along with appellant HCFMA (sic), also owned and controlled  
25 by Dandero, assert a \$14 million administrative claim which

1 will be soon tried in the bankruptcy court. But any allowed  
2 administrative claim is not affected by the trust because it  
3 will be paid by the approximately 195 million that was  
4 available projected to be paid to junior unsecured creditors.  
5 There is no circumstance under which this claim will not be  
6 paid.

7 Appellants could not as trust beneficiaries have had any  
8 expectations of how indemnification claims would be paid  
9 under the plan because they were not trust beneficiaries at  
10 the time of confirmation. Their unsecured claims were  
11 acquired after confirmation.

12 Appellants are not like the creditors in U.S. Brass and  
13 the asbestos cases. In those cases the creditors withdrew  
14 their objections to the plan based upon changes specifically  
15 made in the plan to address their concerns and when  
16 post-confirmation the debtor tried to undo those changes.  
17 That's not what's happening here. Here, as I said, the  
18 committee and other creditors representing 99 percent in  
19 dollar amount of unsecured claims supported the plan. The  
20 committee actively participated in drafting the indemnity  
21 trust and supported the order which is being appealed, as it  
22 was the only way to protect the independent managers and have  
23 the plan go effective.

24 The only reason that the unsecured creditor class  
25 rejected the plan was because of a handful of votes of former

1 employees who were being terminated under the plan, who were  
2 Dandero loyalists, whose claims are disputed, and who now  
3 work for Dandero related entities, and none of whom objected  
4 to the plan.

5 Before I have turn to the merits on the indemnification,  
6 Your Honor, I want to describe the post-confirmation  
7 structure because I think it's very important. The debtor  
8 was reconstituted as the reorganized debtor, a limited  
9 partnership. Its limited partner is the claim and trust and  
10 its general partner is the corporate entity which is a  
11 subsidiary of the claim and trust. The reorganized debtor  
12 retained its management contracts with third-party funds and  
13 other related assets to avoid regulatory complications. The  
14 majority of the remaining assets were transferred to the  
15 claim and trust and Mr. Seery is the claim and trustee.

16 A litigation subtrust was created because the creditors  
17 wanted prosecution of claims separated from asset  
18 monetization and controlled by a different person. The claim  
19 and trust transferred litigation claims to the subtrust to be  
20 pursued by the litigation trustee, but proceeds generated by  
21 the reorganized debtor assets and the litigation --

22 THE COURT: I think we lost our sound just then,  
23 Mr. Pomerantz.

24 MR. RUKAVINA: Your Honor, what happened to  
25 Mr. Draper and I is somehow we were muted without pressing

1 the button. I don't know how. But perhaps Mr. Pomerantz has  
2 been also muted.

3 MR. DRAPER: If there could be a message to him to  
4 reengage his microphone it might work. That's what I did.

5 MR. POMERANTZ: Your Honor, can you hear me?  
6 I'm not sure where you lost me, Your Honor.

7 THE COURT: All right.

8 MR. POMERANTZ: I was talking about the corporate  
9 structure of the three -- of the different entities.

10 THE COURT: Yes. You were just transitioning into  
11 that. And we'll add two minutes to your time.

12 MR. POMERANTZ: Okay, Your Honor. Sorry.

13 I talked about the general -- the -- the limited  
14 partnership and that the claim and trust is the limited  
15 partner and is the owner of the subsidiary who is the general  
16 partner. And the reorganized debtor remained -- retained its  
17 management contracts with third-party funds and other related  
18 assets to avoid regulatory complications.

19 The majority of the debtor's remaining assets were  
20 transferred to the claim and trust, and Mr. Seery is the  
21 claim and trustee. A litigation subtrust was created because  
22 creditors wanted prosecution of claims separated from asset  
23 monetization and controlled by a different person. The claim  
24 and trust transferred litigation claims to the subtrust to be  
25 pursued by the litigation trustee.

1           So the way these assets work together is proceeds  
2 generated by the reorganized debtor's assets and the  
3 litigation subtrust claims are upstreamed to the claim and  
4 trust for distribution to trust beneficiaries along with the  
5 proceeds of claim and trust assets. They work together as a  
6 symbiotic group to upstream these assets. All of the  
7 preconfirmation debtor assets are -- end up being upstreamed  
8 to the claim and trust after expenses are paid.

9           Your Honor, turning to the merits, the appellant's  
10 principal argument is that the indemnity --

11                   THE LAW CLERK: 10 minutes remaining.

12                   MR. POMERANTZ: Thank you.

13           Turning to the merits, the principal argument is that  
14 the indemnity trust expanded the people who were to be  
15 indemnified by the claim and trust to include people  
16 indemnified by the litigation subtrust of the reorganized  
17 debtor.

18           Your Honor, first, under the Fifth Circuit's McKenzie  
19 decision and Your Honor's All Track Transportation decision,  
20 the appellant's have waived this argument by not making it in  
21 their pleadings or in the argument below. Even if not  
22 waived, Your Honor, the argument mischaracterizes the  
23 indemnity trust and the provisions of the plan and its  
24 implemented documents.

25           As a threshold matter, Your Honor, neither the indemnity

1 trust order or the indemnity trust create any obligations to  
2 any party. The turn sheet attached to the motion states that  
3 the purpose of the trust is to provide collateral security  
4 supporting the indemnification obligations created under the  
5 claim and trust agreement, the litigation subtrust agreement,  
6 and the reorganized debtor limited partnership. The  
7 indemnity trust is only a mechanism to satisfy the indemnity  
8 claims that become due under the various plan documents and  
9 which are not satisfied first by the claim and trust, the  
10 litigation subtrust, and the reorganized debtor. It does not  
11 create any new indemnification obligations. Rather, the  
12 indemnity obligations are created under the plan documents.  
13 8.2 of the claim and trust, 8.2 of the litigation trust, and  
14 Section 10 of the reorganized debtor limited partnership.

15 Therefore, the real question, Your Honor, is whether the  
16 funding of the indemnification trust is consistent with the  
17 plan, and that the answer is yes. The indemnification trust  
18 was to be funded with two and a half million dollars of cash,  
19 of debtor cash upon inception, and a 22 and a half million  
20 dollar note. The claim and trust, the litigation subtrust,  
21 and the reorganized debtor are all co-obligors under the 22  
22 and a half million dollar note. The assets of all those  
23 entities will fund the note.

24 Appellants dismiss the claim and trust ability to create  
25 reserves and -- and obligation to fund litigation subtrust

1 expenses and the right to contribute capital to the  
2 reorganized debtor to preserve its value. Various provisions  
3 of the plan and its implementing documents provide the claim  
4 and trust with such authority, discretion, and obligation.

5 In addition to the cases cited in our brief, Your Honor,  
6 I direct the court's attention to Article 4, Capital A and B  
7 of the plan, and Section 3.3(b)(vi) of the claim and trust  
8 agreement.

9 The bankruptcy court also ruled correctly that the  
10 creation of the indemnity trust to securitize plan approved  
11 indemnification obligations was an action to implement the  
12 plan authorized by Article 4(d) of the plan.

13 So several principals flow from these provisions.

14 First, the plan authorized the claim and trust and other  
15 post-effected date entities to complete reserves and fund  
16 expenses of all post-confirmation entities.

17 Second, claim and trust beneficiaries were only entitled  
18 to the proceeds net after all expenses were paid and reserved  
19 for.

20 Third, the debtor was authorized to take actions to  
21 implement the terms of the plan and supporting documents.

22 Fourth, as the bankruptcy court found, nothing in the  
23 plan prohibits self-insurance through the creation of the  
24 indemnity trust in lieu of DNO insurance.

25 And, last, the structure was consistent with creditor

1 expectations key for the plan modification argument. Asset  
2 proceeds would flow up to the claim and trust, go and  
3 distribute the net proceeds to creditors after payment of all  
4 expenses relating to the asset monetization process.

5 Appellants argue in their briefing that the creditors'  
6 rights were fundamentally changed because while the plan  
7 created discretion to set reserves, the indemnity trust  
8 transformed that discretion into a legal obligation. But  
9 appellants are wrong for two reasons.

10 First, the indemnity trust authorized the creation of  
11 the indemnity -- the order authorized the creation of the  
12 indemnity trust. It did not become a legal obligation unless  
13 and until the claim and trust oversight board authorized the  
14 execution of the indemnity trust agreement. The claim and  
15 trust board actually did authorize the execution of the  
16 indemnity trust on August 11th, the effective date of the  
17 plan. So the premise of the argument that the indemnity  
18 trust order took away discretion is not correct. The claim  
19 and trust oversight board retained such discretion --  
20 discretion and exercised it.

21 Moreover, Your Honor, under the plan all creditors  
22 seated decision-making authority to the claim and trust and  
23 the oversight board over administration of the trust,  
24 including the discretion of whether to create reserves to  
25 fund litigation trust expenses and reorganize debtor

1 expenses, the amount of those reserves, how much money could  
2 be spent on DNO coverage. All that discretion was given to  
3 those -- those governing bodies. Because no creditor  
4 influenced how the claim and trust was administered, the  
5 fact --

6 THE CLERK: Five minutes remain.

7 MR. POMERANTZ: Excuse me?

8 THE COURT: I think the clerk said five minutes  
9 remain.

10 MR. POMERANTZ: Okay. Thank you.

11 Because no creditor could influence how the claim and  
12 trust was administered, the fact that the claim and trust and  
13 the oversight board could reserve and fund expenses as they  
14 deemed appropriate was within creditors' expectations under  
15 the plan and did not change the legal relationship between  
16 the debtor and its creditors thereby requiring a plan  
17 modification.

18 I want to briefly mention the issue of DNO coverage,  
19 Your Honor. The plan effective date was contingent upon  
20 obtaining acceptable DNO insurance. As I said, the condition  
21 was essential, because Seery and the other managers would not  
22 agree to serve without protection. The debtor could not have  
23 found post-confirmation effective date management without it,  
24 and though the -- the condition was waivable, unfortunately  
25 acceptable insurance was not available because of Dondero's

1 threats and litigation onslaught, but rather than not going  
2 effective, the debtor made -- decided to self-insure.

3 And who objects to the self-insurance?

4 Appellants. Who did not hold general unsecured claims  
5 of confirmation, who are not trust beneficiaries now,  
6 notwithstanding Mr. Draper's comments of this contingent  
7 right, that's clearly not sufficient under the Fifth Circuit  
8 standing to be a person aggrieved, who are the reason  
9 acceptable DNO insurance cannot be obtained and really who  
10 have no legitimate basis to contest the indemnity trust,  
11 other than to be, in the words of the bankruptcy court's  
12 confirmation order, disrupters.

13 The indemnity trust is the functional equivalent of DNO  
14 coverage. Both are designed to secure indemnity obligations  
15 under the plan. The cost of DNO insurance reserves are claim  
16 and trust expenses or expenses otherwise necessary to  
17 preserve the value of the reorganized debtor and are senior  
18 to the payment of trust beneficiaries.

19 And while payment of DNO premiums are some costs never  
20 to be recovered and potentially distributed to beneficiaries,  
21 any funds from the indemnity trust may be freed up to pay  
22 trust beneficiary claims if no indemnity claims are asserted.

23 Appellants argument that the change to an indemnity  
24 trust modified the prayer's rights, obligations, and  
25 expectations, is not supported by the plan or any of the

1 documents executed in support of the plan, and it's not  
2 supported by the case law.

3 The parties have briefed the leading cases of what  
4 constitutes a plan modification, and they don't support  
5 appellant's argument. In the Fifth Circuit's Brass case,  
6 Your Honor, the debtor modified a plan prior to confirmation  
7 to resolve an insurance company's plan objection. The change  
8 provided that future disputes would be resolved by litigation  
9 and not arbitration. That change was critical to the  
10 insurance company. Why? Because it believed arbitration  
11 could result in conducive settlements detrimental to its  
12 coverage defenses.

13 When post-confirmation the debtor through a settlement  
14 agreement tried to change the way in which the claims would  
15 be resolved through arbitration, the insurance company  
16 objected. Because this change modified a fundamental plan  
17 provision, which the insurance company relied upon in  
18 withdrawing its objection to confirmation, the Fifth Circuit  
19 easily found it to be a plan modification.

20 THE LAW CLERK: Two minutes remain.

21 MR. POMERANTZ: Thank you.

22 This is nothing like what's going on in here.

23 In the Second Circuit's Joint Asbestos case the plan  
24 carefully created a priority and distribution mechanism to  
25 satisfy asbestos claims against the post-confirmation trust.

1 Post confirmation the trust became insolvent and could not  
2 satisfy its plan obligations. Certain parties agreed to  
3 modify the trust to change the payment timing, the priority  
4 scheme, and how claims would be resolved. The Second Circuit  
5 found that this restructuring of the trust was a plan  
6 modification. As with U.S. Brass this case is stark -- in  
7 stark contrast to what's going on here.

8 In conclusion, Your Honor, this appeal is nothing but a  
9 continuation of James Dandero and his related entities'  
10 efforts to throw every roadblock into the debtor's  
11 restructuring process. The indemnity order did not alter  
12 appellant's expectations of their treatment under the plan.  
13 How could it? They didn't have any unsecured claims when the  
14 plan was confirmed. Nor does it modify the rights or  
15 treatment of creditors' claims or effect the relationship in  
16 any way. The plan board fall contemplated asset proceeds  
17 being upstream to the claim and trust who would fund those  
18 expenses, create reserves, and distribute the remaining to  
19 the trust beneficiaries. The indemnity trust is entirely  
20 faithful to this principle.

21 Thank you, Your Honor.

22 THE COURT: Thank you, Mr. Pomerantz.

23 Rebuttal?

24 MR. RUKAVINA: Yes, Your Honor. Can the court hear  
25 me?

1 THE COURT: Very well.

2 MR. RUKAVINA: Thank you.

3 Your Honor, in U.S. Brass the Fifth Circuit rejected the  
4 very argument just made, which is that, well, under the plan  
5 the debtor had the discretion to compromise claims, so  
6 switching from litigating them to arbitration was no harm, no  
7 foul. So that argument is not a sound argument. Nor is the  
8 no harm, no foul argument. The bankruptcy code provides for  
9 a mechanism and that mechanism must be complied with. I took  
10 Your Honor's questioning of me earlier to -- to go to that  
11 argument, no harm, no foul. Respectfully, they are changing  
12 a plan, whether it's actually no harm, no foul doesn't  
13 matter. That's an argument to be made at the new  
14 confirmation hearing.

15 Your Honor, we're not talking about stripping Mr. Seery  
16 of indemnification. The allegation that he and the others  
17 will resign, it's baseless. They can set aside several  
18 million dollars -- they have indemnification rights under the  
19 plan. We're not challenging that. They can set aside  
20 millions of dollars for themselves. For the notion that  
21 reversing this order will defeat the plan because the  
22 professionals will quit is not supported by the record and  
23 it's certainly not a logical one.

24 But most importantly, what I take real exception with  
25 is, and I'm quoting "the Dandero litigation onslaught". Your

1 Honor, my two clients represent thousands of investors who  
2 have trusted them with billions of dollars. We're not some  
3 cowboys litigating with everyone. In fact, we are not taking  
4 offensive litigation to the bankruptcy case. We are not  
5 Mr. Dondero. We have not been sanctioned. If the -- if the  
6 debtor is concerned, the debtor has Rule 11 rights. The  
7 debtor has Section 1927 rights.

8 We are the defendants in multiple lawsuits filed by the  
9 debtor. In one lawsuit, Your Honor, we had a final trial on  
10 six days notice on a mandatory injunction the debtor sought  
11 against us. And they lost. The bankruptcy court denied them  
12 that.

13 I am -- I -- I hear my clients being maligned nonstop,  
14 but listen to what they're saying. They're saying James  
15 Dondero. They're saying James Dondero was sanctioned.  
16 Whatever the merits of those arguments are, they simply do  
17 not apply to my clients. My clients are enjoined by the  
18 plan. They're enjoined from properly representing their  
19 constituents. That is why we are appealing the plan to the  
20 Fifth Circuit. That is why we are involved in this  
21 bankruptcy case. As we said at the confirmation hearing,  
22 don't enjoin us and we'll go home.

23 So -- so the allegation that we are picking this fight,  
24 that we are cowboy litigants, that we are vexatious, is not  
25 in the record, Your Honor, and again it shouldn't matter for

1 purposes of this appellant argument.

2 Also not in the record is what Mr. Pomerantz was talking  
3 about, the terms of the promissory note here. I just had my  
4 associate look and he could not find it and I don't remember  
5 it. It's part of the problem, Your Honor. If this had been  
6 handled as a plan modification with a disclosure statement,  
7 all of these documents that have now been signed would have  
8 been public, would have been -- would have been known by  
9 everyone. That's, again, the whole point that the -- the  
10 democracy, not only of the creditors in a Chapter 11, Your  
11 Honor, but all the other parties in interest, and certainly  
12 my clients are parties in interest, were alleged to owe tens  
13 of millions of dollars to the debtor. We're -- we're subject  
14 to final and permanent injunctions in the plan.

15 We've also made that argument on standing, Your Honor.  
16 The record is clear that the plan itself would not have gone  
17 effective but for this order. My client right now, and  
18 Mr. Dondero -- I'm sorry, Mr. Draper's client right now would  
19 not be looking down a permanent injunction and exculpations  
20 of their claims and releases of their claims without this  
21 order. It takes multiple orders to get to an effective plan  
22 in Chapter 11, Your Honor, disclosure statement, plans  
23 estimation, plan confirmation, et cetera. This is merely the  
24 last link in that chain. Whether the court agrees with me or  
25 not that we have creditor standing, we have standing --

1 THE CLERK: One minute remains.

2 MR. RUKAVINA: Thank you.

3 -- because the plan would not be effective.

4 Your Honor, very quickly, this court I submit has a duty  
5 to supervise the Article I bankruptcy court. That's the  
6 whole point of Northern Pipeline -- Northern Marathon. We  
7 have cited and quoted Stern v. Marshall, a recent Supreme  
8 Court case, where the Supreme Court says, "Any party may  
9 appeal those determinations to the Federal District Court  
10 where the Federal District Judge will review them," et  
11 cetera. The bankruptcy jurisdictional system does not work  
12 if this court can't review it. And your law clerk can find  
13 it for you, Your Honor. It came out yesterday. It's a  
14 Second Circuit opinion. It's case number 20-2548. In that  
15 Second Circuit opinion standing was iffy. The Second Circuit  
16 didn't find standing under traditional notions, but it says,  
17 "But the fact that this case is a one-off --

18 THE CLERK: Time.

19 THE COURT: All right. Thank you, counsel.

20 All right. Thank you, counsel for your arguments.

21 I'm going to ask that you remain on the link after I  
22 leave the courtroom in case the court reporter has any  
23 questions about any portion of your argument or any cases  
24 that you cited. Sometimes she does, sometimes she doesn't.  
25 And then once that process is completed then you're welcome

1 to sign-off.

2 At this time the court takes the appeal under submission  
3 and will issue its ruling.

4 Thank you, counsel.

5 The court will stand in recess.

6 (End of proceedings.)

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17  
18  
19  
20  
21  
22  
23  
24  
25

**I N D E X - O R A L A R G U M E N T**

<b>ORAL ARGUMENT</b>	<b>Page</b>	<b>Li ne</b>
MR. RUKAVI NA .....	3	19
MR. DRAPER .....	10	4
MR. POMERANTZ .....	13	23
MR. RUKAVI NA .....	30	13

< Dates >  
**February 2021**  
 16: 21  
**JANUARY 25,**  
**2022** 1: 18, 3: 1  
**July 2021** 14: 13  
**June 2021** 14: 8  
**March, 2022**  
 35: 29  
**\$14** 9: 23, 19: 18  
**\$20** 13: 7  
**\$200,000** 9: 21  
**\$22.5** 5: 6  
**\$25** 5: 20, 6: 1,  
 6: 18, 8: 21,  
 8: 23, 13: 8

< 1 >  
**1** 10: 16, 12: 2  
**10** 23: 4, 24: 4,  
 35: 8  
**10100** 1: 29  
**11** 7: 13, 8: 14,  
 8: 17, 17: 8,  
 31: 20, 32: 24,  
 33: 11  
**1100** 2: 41  
**1127(b** 7: 1  
**1129** 7: 18  
**11th** 17: 17,  
 26: 7  
**13** 35: 10, 35: 12  
**13th** 1: 30  
**14** 7: 19  
**15** 10: 2  
**1535** 2: 41  
**15th** 35: 29  
**19** 35: 6  
**1927** 31: 21  
**195** 19: 21

< 2 >  
**20-2548** 34: 3  
**2020** 16: 15  
**21-CV-1895-D**  
 1: 5  
**214-855-7587**  
 2: 7

**214.662.1557**  
 2: 43  
**21st** 12: 23  
**22** 24: 10, 24: 12  
**23** 35: 10  
**2500** 2: 13

< 3 >  
**3** 1: 5, 35: 6  
**3.3(b)(vi** 24: 23  
**30** 35: 12  
**310-201-0760**  
 1: 33  
**310-227-6910**  
 1: 32  
**363-M** 10: 24  
**3800** 2: 5

< 4 >  
**4** 24: 22, 35: 8  
**4(d** 25: 3  
**4th** 11: 16

< 5 >  
**500** 2: 4  
**504-299-3300**  
 2: 15  
**504-299-3399**  
 2: 16  
**55** 9: 19

< 6 >  
**6** 11: 16  
**650** 2: 12

< 7 >  
**70130** 2: 14  
**75201** 2: 6  
**75242** 2: 42

< 8 >  
**8.2** 24: 3, 24: 4  
**880** 11: 16

< 9 >  
**90067** 1: 31  
**99** 20: 11  
**99.8** 18: 23

< A >  
**A.** 1: 21  
**ability** 5: 11,  
 13: 13, 17: 8,  
 18: 4, 24: 15  
**able** 8: 13  
**accept** 16: 25  
**acceptable**  
 16: 22, 17: 3,  
 27: 10, 27: 15,  
 27: 24  
**accepted** 18: 23  
**accurate** 7: 8  
**acknowledges**  
 15: 2  
**acquired** 20: 3  
**action** 25: 2  
**actions** 17: 16,  
 25: 11  
**actively** 20: 13  
**actually** 26: 6,  
 31: 2  
**add** 3: 11, 4: 17,  
 6: 12, 22: 4  
**addition** 24: 21  
**additional** 7: 23  
**address** 4: 13,  
 4: 16, 5: 25,  
 10: 6, 11: 5,  
 12: 18, 20: 8  
**addressed** 6: 19  
**addressing** 3: 23  
**adjudicated**  
 9: 23  
**administered**  
 26: 20, 27: 2  
**administration**  
 26: 14  
**administrative**  
 9: 24, 19: 18,  
 19: 20  
**advised** 3: 14  
**Advisors** 1: 10,

3: 21, 19: 16  
**affected** 12: 12,  
 19: 20  
**aggrieved** 27: 23  
**ago** 17: 20  
**agree** 27: 12  
**agreed** 14: 25,  
 29: 17  
**agreeing** 14: 18  
**agreement**  
 23: 21, 24: 24,  
 26: 5, 29: 4  
**agrees** 33: 13  
**ahead** 11: 10  
**Akard** 2: 4  
**al** 1: 11  
**allegation**  
 31: 5, 32: 12  
**allegations**  
 15: 24  
**alleged** 33: 1  
**allocated** 3: 12  
**allowed** 18: 21,  
 19: 19  
**allowing** 10: 5,  
 19: 7  
**alone** 6: 3  
**alter** 12: 3,  
 19: 11, 30: 1  
**Although** 16: 21  
**amount** 18: 24,  
 20: 12, 26: 17  
**Angel es** 1: 31  
**announce** 3: 15  
**answer** 4: 21,  
 24: 8  
**anybody** 11: 25  
**apologize** 5: 9  
**appeal** 3: 4,  
 3: 22, 9: 13,  
 10: 13, 11: 4,  
 13: 4, 15: 2,  
 17: 13, 18: 16,  
 19: 4, 19: 7,  
 19: 8, 29: 23,  
 33: 22, 34: 16  
**appealed** 20: 14  
**appealing** 9: 17,  
 32: 8  
**appear** 14: 19

<p><b>Appellant</b> 14: 6, 18: 13, 19: 3, 19: 14, 19: 17, 23: 2, 23: 12, 28: 20, 30: 2, 32: 15</p> <p><b>Appellants</b> 1: 12, 2: 2, 3: 17, 3: 21, 13: 20, 15: 3, 16: 16, 18: 16, 19: 25, 20: 5, 24: 15, 25: 21, 25: 25, 27: 19, 28: 13</p> <p><b>appellate</b> 18: 10, 18: 11</p> <p><b>APPELLEE</b> 1: 18, 1: 27</p> <p><b>applies</b> 10: 22</p> <p><b>apply</b> 11: 23, 12: 9, 15: 4, 15: 5, 32: 6</p> <p><b>appointed</b> 15: 25</p> <p><b>appropriate</b> 16: 11, 27: 4</p> <p><b>approve</b> 17: 10</p> <p><b>approved</b> 7: 8, 7: 16, 25: 1</p> <p><b>approximately</b> 19: 21</p> <p><b>April</b> 9: 25</p> <p><b>arbitration</b> 8: 6, 28: 24, 28: 25, 29: 5, 30: 21</p> <p><b>argue</b> 9: 9, 15: 5, 25: 21</p> <p><b>argued</b> 4: 1</p> <p><b>arguendo</b> 6: 5</p> <p><b>ARGUMENT</b> 1: 20, 3: 1, 3: 4, 3: 11, 23: 3, 23: 6, 23: 12, 23: 13, 23: 14, 25: 17, 26: 8, 28: 13, 28: 20, 30: 19, 30: 22, 30: 23, 31: 1, 31: 3, 32: 15, 33: 4,</p>	<p>34: 12, 35: 1, 35: 4</p> <p><b>arguments</b> 32: 5, 34: 9</p> <p><b>armed</b> 18: 17, 18: 18</p> <p><b>around</b> 4: 20</p> <p><b>Article</b> 24: 22, 25: 3, 33: 19</p> <p><b>Asbestos</b> 20: 6, 29: 13, 29: 15</p> <p><b>aside</b> 31: 6, 31: 8</p> <p><b>assert</b> 19: 18</p> <p><b>asserted</b> 5: 21, 28: 12</p> <p><b>assertion</b> 4: 16</p> <p><b>Asset</b> 15: 22, 21: 10, 22: 15, 25: 17, 25: 20, 30: 6</p> <p><b>assets</b> 16: 1, 16: 5, 16: 7, 16: 9, 18: 7, 21: 6, 21: 7, 21: 14, 22: 11, 22: 12, 22: 19, 22: 20, 22: 23, 22: 24, 22: 25, 24: 13</p> <p><b>associate</b> 32: 18</p> <p><b>Assume</b> 6: 5</p> <p><b>attached</b> 23: 18</p> <p><b>attacks</b> 17: 2</p> <p><b>attention</b> 24: 22</p> <p><b>August</b> 17: 17, 26: 7</p> <p><b>authority</b> 17: 5, 24: 20, 26: 13</p> <p><b>authorize</b> 26: 6</p> <p><b>authorized</b> 17: 6, 25: 3, 25: 5, 25: 11, 26: 1, 26: 2, 26: 4</p> <p><b>available</b> 13: 8, 17: 3, 19: 22, 27: 15</p> <p><b>avoid</b> 21: 6, 22: 11</p>	<p><b>aware</b> 3: 13</p> <p><b>away</b> 26: 9</p> <p><b>axe</b> 10: 10</p> <p>&lt; B &gt;</p> <p><b>back</b> 6: 11, 11: 23, 12: 9</p> <p><b>backdated</b> 14: 23</p> <p><b>balance</b> 10: 2, 18: 13</p> <p><b>Bankruptcy</b> 3: 4, 4: 6, 4: 8, 4: 17, 6: 22, 7: 14, 7: 21, 8: 19, 12: 15, 14: 6, 14: 12, 14: 17, 15: 2, 15: 25, 16: 5, 17: 6, 17: 9, 18: 25, 19: 19, 24: 25, 25: 13, 28: 1, 30: 23, 31: 18, 31: 25, 32: 9, 33: 19, 33: 25</p> <p><b>bar</b> 10: 18, 11: 3</p> <p><b>based</b> 16: 1, 20: 7</p> <p><b>basel ess</b> 31: 6</p> <p><b>basis</b> 17: 3, 19: 6, 19: 7, 27: 25</p> <p><b>became</b> 29: 16</p> <p><b>become</b> 15: 3, 23: 24, 26: 3</p> <p><b>becomes</b> 19: 4</p> <p><b>begin</b> 3: 5, 3: 16</p> <p><b>beginning</b> 5: 17</p> <p><b>believe</b> 3: 17, 7: 11, 7: 25, 10: 7, 17: 25</p> <p><b>believed</b> 28: 25</p> <p><b>below</b> 23: 13</p> <p><b>beneficiaries</b> 19: 25, 20: 2, 22: 22, 25: 8, 27: 20, 28: 8, 28: 10, 30: 9</p> <p><b>beneficiary</b> 28: 12</p>	<p><b>Berryman</b> 15: 18</p> <p><b>big</b> 18: 2</p> <p><b>billions</b> 31: 16</p> <p><b>bit</b> 4: 25</p> <p><b>black</b> 6: 21</p> <p><b>Bld</b> 1: 29</p> <p><b>board</b> 26: 4, 26: 6, 26: 10, 26: 14, 27: 3, 30: 6</p> <p><b>bodies</b> 26: 19</p> <p><b>Brass</b> 8: 4, 8: 5, 10: 17, 20: 5, 28: 20, 29: 21, 30: 18</p> <p><b>breach</b> 5: 22</p> <p><b>brief</b> 4: 1, 5: 14, 24: 21</p> <p><b>briefed</b> 8: 3, 28: 18</p> <p><b>briefing</b> 25: 21</p> <p><b>Briefly</b> 8: 2, 27: 8</p> <p><b>broader</b> 4: 25</p> <p><b>burden</b> 8: 11</p> <p><b>business</b> 5: 24, 7: 17</p> <p><b>button</b> 21: 19</p> <p>&lt; C &gt;</p> <p><b>CA</b> 1: 31</p> <p><b>call</b> 3: 21</p> <p><b>called</b> 7: 21</p> <p><b>capability</b> 13: 9, 13: 13</p> <p><b>Capital</b> 1: 5, 1: 9, 1: 16, 3: 4, 24: 17, 24: 22</p> <p><b>carefully</b> 29: 14</p> <p><b>case</b> 4: 3, 8: 10, 8: 19, 10: 24, 11: 6, 12: 5, 12: 13, 12: 21, 14: 6, 15: 10, 15: 15, 15: 17, 15: 19, 15: 20, 28: 16, 28: 20, 29: 13, 29: 21, 31: 18, 32: 10,</p>
--	--	--	---

<p>33: 22, 34: 3, 34: 6, 34: 11 <b>cases</b> 10: 15, 10: 16, 10: 20, 12: 2, 13: 16, 17: 15, 18: 10, 20: 6, 24: 21, 28: 18, 34: 12 <b>cash</b> 24: 9, 24: 10 <b>categories</b> 12: 2 <b>Category</b> 12: 2 <b>cause</b> 10: 19, 11: 3 <b>CEO</b> 16: 3 <b>Certain</b> 29: 17 <b>certainly</b> 9: 9, 10: 7, 31: 12, 32: 25 <b>certify</b> 35: 19, 35: 24 <b>cetera</b> 33: 12, 33: 24 <b>chain</b> 33: 13 <b>challenge</b> 31: 8 <b>chances</b> 14: 15 <b>change</b> 8: 7, 8: 11, 8: 13, 27: 5, 28: 13, 28: 22, 28: 24, 29: 4, 29: 6, 29: 18 <b>changed</b> 8: 6, 25: 22 <b>changes</b> 8: 4, 9: 8, 20: 7, 20: 9 <b>changing</b> 31: 1 <b>Chapter</b> 7: 13, 8: 14, 8: 17, 17: 8, 32: 24, 33: 11 <b>Circuit</b> 8: 8, 10: 17, 10: 22, 11: 1, 11: 6, 12: 21, 12: 24, 13: 18, 15: 2, 15: 6, 15: 12, 23: 10, 27: 22, 28: 20, 29: 8,</p>	<p>29: 13, 29: 19, 30: 18, 32: 9, 34: 2, 34: 3, 34: 4 <b>circuits</b> 15: 12 <b>circumstance</b> 19: 23 <b>circumstances</b> 9: 10 <b>cite</b> 12: 21 <b>cited</b> 13: 16, 24: 21, 33: 21, 34: 13 <b>citing</b> 10: 8 <b>claimant</b> 16: 4 <b>claims</b> 5: 20, 6: 1, 8: 5, 9: 13, 9: 24, 14: 9, 14: 19, 19: 3, 20: 1, 20: 3, 20: 12, 20: 20, 21: 10, 21: 12, 22: 15, 22: 17, 22: 21, 23: 23, 27: 19, 28: 12, 29: 4, 29: 15, 29: 19, 30: 3, 30: 5, 30: 20, 33: 9 <b>class</b> 20: 17 <b>clear</b> 13: 11, 19: 4, 33: 5 <b>clearly</b> 27: 22 <b>CLERK</b> 3: 13, 6: 12, 13: 1, 23: 4, 26: 21, 26: 23, 29: 10, 33: 15, 34: 1, 34: 7 <b>client</b> 33: 6, 33: 7 <b>clients</b> 31: 15, 32: 2, 32: 6, 33: 1 <b>CMS</b> 12: 22 <b>co-counsel</b> 3: 22 <b>co-obligors</b> 24: 12 <b>Code</b> 4: 8, 30: 23 <b>collateral</b></p>	<p>23: 19 <b>comes</b> 17: 15 <b>commenced</b> 9: 14 <b>comments</b> 14: 1, 27: 21 <b>Commerce</b> 2: 41 <b>committee</b> 17: 4, 18: 19, 18: 21, 20: 11, 20: 13 <b>companies</b> 16: 7 <b>company</b> 28: 22, 28: 25, 29: 5, 29: 7 <b>competent</b> 7: 20, 19: 1 <b>complete</b> 25: 6 <b>completed</b> 34: 14 <b>complex</b> 15: 20, 15: 23, 16: 1 <b>complexity</b> 15: 17 <b>complaints</b> 21: 6, 22: 11 <b>complied</b> 30: 24 <b>comply</b> 35: 24 <b>compromise</b> 30: 20 <b>computer</b> 2: 48 <b>conceived</b> 5: 25 <b>concept</b> 10: 16 <b>concerned</b> 31: 20 <b>concerns</b> 20: 8 <b>concession</b> 12: 6 <b>concessions</b> 12: 3, 12: 4 <b>conclusion</b> 29: 23 <b>condition</b> 9: 4, 27: 10, 27: 14 <b>conditioned</b> 16: 22 <b>conductive</b> 29: 1 <b>Conference</b> 35: 25 <b>confirm</b> 7: 22 <b>confirmation</b> 7: 18, 10: 13, 10: 14, 15: 6, 15: 8, 17: 19, 18: 3, 20: 3,</p>	<p>20: 4, 27: 20, 28: 2, 28: 21, 29: 8, 29: 16, 31: 3, 32: 10, 33: 12 <b>confirmed</b> 4: 8, 15: 10, 16: 21, 30: 4 <b>confirming</b> 10: 23 <b>confusion</b> 9: 15, 14: 21 <b>Congress</b> 6: 23 <b>connection</b> 14: 3 <b>considered</b> 15: 7 <b>consistent</b> 15: 12, 24: 7, 25: 16 <b>constituents</b> 32: 8 <b>constitutes</b> 28: 19 <b>constituti onal</b> 12: 18, 14: 3 <b>construing</b> 8: 9 <b>consummated</b> 11: 19 <b>consummation</b> 10: 17, 10: 18 <b>contemplated</b> 9: 4, 30: 6 <b>contempt</b> 16: 19 <b>contest</b> 27: 25 <b>contingent</b> 13: 6, 13: 13, 27: 9, 27: 21 <b>continuati on</b> 29: 24 <b>continue</b> 4: 12, 5: 12, 19: 8 <b>contract</b> 6: 21, 6: 22, 6: 23, 6: 24, 6: 25, 7: 1, 8: 13 <b>contracts</b> 21: 5, 22: 10 <b>contrary</b> 15: 9 <b>contrast</b> 29: 22 <b>contribute</b></p>
--	--	--	--

<p>24: 17  <b>controlled</b>  19: 16, 19: 17,  21: 11, 22: 16  <b>core</b> 4: 6  <b>corporate</b> 21: 3,  22: 1  <b>correct</b> 5: 3,  14: 16, 26: 9  <b>correctly</b> 24: 25  <b>cost</b> 28: 5  <b>costs</b> 28: 9  <b>Counsel</b> 3: 11,  3: 16, 4: 11,  8: 18, 9: 12,  34: 8, 34: 9,  34: 18  <b>couple</b> 4: 11  <b>courtroom</b> 34: 11  <b>Courts</b> 18: 12  <b>cover</b> 3: 6  <b>coverage</b> 12: 9,  16: 23, 17: 3,  18: 5, 26: 18,  27: 8, 28: 4,  29: 2  <b>covered</b> 11: 24,  11: 25, 12: 7,  12: 10, 12: 14  <b>COVID</b> 14: 15,  14: 19  <b>Covitz</b> 9: 15  <b>cowboy</b> 32: 13  <b>cowboys</b> 31: 17  <b>cram</b> 7: 22  <b>create</b> 23: 17,  24: 1, 24: 15,  26: 15, 30: 8  <b>created</b> 4: 21,  6: 6, 8: 16,  8: 17, 8: 18,  8: 20, 21: 9,  22: 14, 23: 20,  24: 3, 25: 23,  29: 14  <b>creation</b> 25: 1,  25: 14, 26: 1,  26: 2  <b>credibility</b>  14: 21</p>	<p><b>creditor</b> 7: 13,  8: 14, 9: 1,  9: 21, 12: 3,  12: 5, 13: 6,  18: 20, 19: 5,  20: 17, 25: 16,  26: 19, 27: 1,  33: 14  <b>creditors</b> 5: 8,  7: 4, 7: 6, 7: 9,  7: 11, 8: 8,  8: 21, 12: 11,  12: 15, 13: 8,  17: 9, 18: 17,  18: 18, 18: 20,  18: 24, 19: 2,  19: 22, 20: 5,  20: 6, 20: 11,  21: 9, 22: 15,  25: 19, 25: 21,  26: 12, 27: 4,  27: 6, 30: 5,  32: 24  <b>critical</b> 7: 13,  28: 24  <b>cross</b> 5: 1, 9: 2  <b>CRR</b> 2: 39, 36: 6  <b>CSR</b> 35: 19  <b>cut</b> 14: 23</p> <p>&lt; D &gt;  <b>Dallas</b> 1: 3,  1: 11, 2: 6,  2: 42, 36: 9  <b>Dandero</b> 15: 25,  16: 15, 16: 19,  17: 2, 17: 4,  17: 18, 19: 16,  19: 18, 20: 20,  20: 21, 29: 24,  31: 14  <b>date</b> 16: 22,  16: 24, 17: 17,  17: 19, 25: 6,  26: 7, 27: 9,  27: 13  <b>Davor</b> 2: 2, 3: 20  <b>day</b> 35: 29  <b>days</b> 31: 24</p>	<p><b>ddraper@hellerd  raper.com</b> 2: 17  <b>deal</b> 18: 2  <b>dealing</b> 4: 9  <b>deals</b> 4: 7  <b>debt</b> 16: 8  <b>decided</b> 27: 17  <b>decision</b> 7: 9,  15: 21, 23: 11  <b>decision-making</b>  26: 13  <b>declaration</b>  14: 22  <b>deemed</b> 27: 4  <b>default</b> 18: 8  <b>defeat</b> 31: 10  <b>defendants</b>  31: 22  <b>defenses</b> 29: 2  <b>defer</b> 8: 2  <b>definitively</b>  9: 22  <b>democracy</b> 7: 13,  8: 14, 32: 24  <b>denied</b> 8: 1,  31: 25  <b>department</b> 9: 16  <b>describe</b> 20: 24  <b>designed</b> 16: 17,  28: 4  <b>destroy</b> 19: 6  <b>detail</b> 5: 14,  7: 5  <b>deteriorate</b>  16: 9  <b>determinations</b>  33: 23  <b>detrimental</b>  29: 1  <b>difference</b> 4: 13  <b>different</b> 5: 5,  21: 11, 22: 2,  22: 16  <b>difficulties</b>  3: 10  <b>direct</b> 24: 22  <b>disallowance</b>  9: 18  <b>disallowed</b>  9: 17, 9: 18,</p>	<p>9: 25, 14: 24  <b>disclose</b> 14: 9  <b>discloses</b> 7: 4  <b>disclosure</b> 7: 3,  14: 13, 32: 20,  33: 11  <b>discretion</b>  24: 20, 25: 23,  25: 24, 26: 9,  26: 10, 26: 15,  26: 18, 30: 20  <b>discussed</b> 5: 13  <b>discussing</b> 3: 21  <b>dismiss</b> 3: 24,  9: 11, 19: 8,  24: 15  <b>Dismissal</b> 11: 3,  11: 17, 16: 10  <b>dispositive</b>  13: 17  <b>disputed</b> 20: 20  <b>disputes</b> 28: 23  <b>disrupters</b> 28: 2  <b>distressed</b> 16: 8  <b>distribute</b>  25: 19, 30: 8  <b>distributed</b>  28: 10  <b>distribution</b>  13: 8, 17: 9,  22: 22, 29: 14  <b>distributions</b>  11: 18  <b>District</b> 1: 1,  1: 2, 1: 22,  33: 23, 33: 24,  36: 8  <b>divided</b> 3: 17  <b>Division</b> 1: 3,  36: 9  <b>DNO</b> 9: 4, 9: 6,  16: 22, 17: 3,  17: 19, 18: 5,  25: 15, 26: 17,  27: 8, 27: 10,  27: 24, 28: 3,  28: 5, 28: 9  <b>docket</b> 14: 20  <b>document</b> 14: 23  <b>documents</b></p>
---	---	--	---

23: 15, 23: 24,  
24: 3, 24: 19,  
25: 12, 28: 15,  
32: 21  
**dollar** 13: 10,  
20: 12, 24: 11,  
24: 13  
**dollars** 24: 9,  
31: 7, 31: 9,  
31: 16, 33: 2  
**Dondero** 14: 9,  
27: 15, 31: 19,  
32: 4, 33: 7  
**Douglas** 2: 10,  
3: 22, 10: 4  
**down** 7: 22, 33: 8  
**drafting** 20: 13  
**DRAPER** 2: 10,  
2: 11, 3: 22,  
8: 2, 9: 11,  
10: 3, 10: 4,  
11: 8, 11: 9,  
11: 10, 11: 11,  
11: 15, 13: 2,  
13: 19, 21: 18,  
21: 21, 27: 21,  
33: 7, 35: 8  
**drukavi na@muncsc**  
**h.com** 2: 8  
**due** 23: 24  
**Dugaboy** 3: 23,  
13: 5  
**duty** 5: 22,  
33: 18

< E >

**earlier** 30: 25  
**easily** 18: 2,  
29: 8  
**economic** 7: 5  
**economics** 8: 7  
**effect** 12: 22,  
30: 5  
**effective**  
16: 13, 16: 22,  
16: 24, 17: 7,  
17: 11, 17: 12,  
17: 17, 17: 18,  
17: 22, 18: 23,

20: 16, 26: 7,  
27: 9, 27: 13,  
27: 17, 33: 6,  
33: 10, 33: 17  
**effectively**  
16: 10  
**effects** 16: 11  
**efforts** 29: 25  
**Eighth** 11: 6  
**either** 10: 25,  
12: 13, 16: 11  
**elements** 7: 19,  
7: 23  
**eligible** 4: 18  
**Email** 1: 34,  
2: 8, 2: 17  
**embarked** 16: 16  
**employed** 10: 10  
**employee** 14: 14  
**employees**  
12: 13, 20: 19  
**End** 22: 25,  
34: 20  
**enhance** 18: 12,  
18: 13  
**enjoin** 32: 10  
**enjoined** 32: 6,  
32: 7  
**Enormous** 11: 18  
**entered** 14: 10  
**entirely** 30: 9  
**entities** 4: 18,  
4: 22, 4: 23,  
14: 9, 20: 21,  
22: 2, 24: 14,  
25: 6, 25: 7,  
29: 24  
**entitled** 25: 8,  
35: 21  
**entity** 21: 3  
**Equitable** 7: 17,  
10: 9, 10: 18,  
10: 19, 10: 22,  
11: 2, 11: 17,  
12: 1, 13: 16,  
14: 2, 15: 1,  
15: 4, 15: 7,  
15: 13, 15: 14,  
15: 18, 15: 20,  
16: 10, 18: 10

**equitably** 15: 3,  
19: 8  
**equivalent** 28: 3  
**error** 4: 4,  
14: 16  
**essential** 27: 11  
**estate** 16: 4  
**estimation**  
33: 12  
**et** 1: 11, 33: 12,  
33: 24  
**evaluate** 14: 11  
**event** 14: 24,  
15: 22  
**everyone** 31: 17,  
32: 23  
**everything** 7: 7,  
19: 6  
**evidence** 7: 20  
**example** 5: 6,  
7: 5  
**exception** 31: 13  
**excusations**  
33: 8  
**Excuse** 26: 22  
**executed** 28: 15  
**execution** 26: 5,  
26: 6  
**exercise** 5: 24  
**exercised** 26: 11  
**exist** 17: 22  
**exit** 18: 8  
**expanded** 23: 7  
**expectation**  
12: 7, 12: 8  
**expectations**  
18: 14, 19: 12,  
19: 15, 20: 1,  
25: 17, 27: 4,  
28: 14, 30: 2  
**expenses** 23: 1,  
24: 17, 25: 7,  
25: 9, 25: 20,  
26: 16, 27: 3,  
28: 6, 30: 8  
**experience** 16: 1  
**expert** 8: 19  
**express** 4: 9,  
11: 1  
**expressly** 9: 4,

10: 22  
**extraordinary**  
14: 8  
**extreme** 7: 2

< F >

**facility** 18: 8  
**fact** 9: 3, 12: 6,  
12: 7, 13: 3,  
18: 4, 26: 20,  
27: 2, 31: 17,  
34: 5  
**factor** 15: 17,  
15: 21  
**factors** 7: 19  
**faithful** 30: 9  
**fall** 12: 2, 30: 6  
**falls** 13: 12  
**fashion** 11: 20  
**fashioned** 11: 22  
**Fax** 1: 33, 2: 16  
**Fed** 11: 16  
**Federal** 33: 23,  
33: 24  
**fees** 35: 24  
**few** 10: 6, 12: 19  
**fiduciary** 5: 22,  
18: 19  
**Fifth** 8: 8,  
10: 17, 10: 21,  
11: 1, 12: 21,  
12: 24, 13: 18,  
15: 1, 15: 12,  
23: 10, 27: 22,  
28: 20, 29: 8,  
30: 18, 32: 9  
**fight** 32: 12  
**filed** 10: 8,  
12: 23, 14: 2,  
14: 13, 18: 16,  
31: 22  
**final** 9: 23,  
31: 23, 33: 3  
**finally** 9: 22  
**financial** 16: 1  
**find** 8: 11,  
18: 5, 32: 18,  
34: 1, 34: 4  
**findings** 18: 3

<p><b>First</b> 3: 7, 4: 1, 4: 13, 6: 21, 10: 8, 12: 19, 14: 25, 15: 5, 23: 10, 23: 25, 25: 5, 26: 1</p> <p><b>FITZWATER</b> 1: 21</p> <p><b>Five</b> 9: 13, 26: 21, 26: 23</p> <p><b>flexible</b> 7: 17</p> <p><b>Floor</b> 1: 30</p> <p><b>flow</b> 25: 4, 25: 18</p> <p><b>focusing</b> 14: 1</p> <p><b>follow</b> 7: 1, 18: 1</p> <p><b>followed</b> 4: 5</p> <p><b>footnote</b> 12: 20, 12: 23</p> <p><b>foregoing</b> 35: 19, 35: 20</p> <p><b>forgotten</b> 13: 6</p> <p><b>format</b> 7: 8, 35: 24</p> <p><b>former</b> 20: 18</p> <p><b>foul</b> 30: 22, 30: 23, 31: 1, 31: 2</p> <p><b>found</b> 15: 14, 15: 18, 16: 5, 18: 3, 25: 13, 27: 13, 29: 8, 29: 20</p> <p><b>four</b> 5: 21, 7: 6</p> <p><b>Fourth</b> 25: 13</p> <p><b>fraud</b> 15: 24</p> <p><b>freed</b> 28: 11</p> <p><b>full</b> 3: 12</p> <p><b>functional</b> 28: 3</p> <p><b>FUND</b> 1: 10, 24: 14, 24: 16, 25: 6, 26: 15, 27: 3, 30: 7</p> <p><b>fundamental</b> 6: 23, 29: 6</p> <p><b>fundamentally</b> 25: 22</p> <p><b>funded</b> 24: 9</p> <p><b>funding</b> 24: 7</p> <p><b>funds</b> 5: 2, 5: 5,</p>	<p>5: 7, 5: 24, 6: 18, 21: 5, 22: 10, 28: 11</p> <p><b>future</b> 5: 7, 28: 23</p> <p>&lt; G &gt;</p> <p><b>general</b> 21: 3, 22: 6, 22: 8, 27: 19</p> <p><b>generated</b> 21: 13, 22: 20</p> <p><b>give</b> 8: 19</p> <p><b>given</b> 5: 25, 26: 18</p> <p><b>governi ng</b> 26: 19</p> <p><b>governors</b> 7: 18</p> <p><b>group</b> 22: 24</p> <p><b>guarantee</b> 9: 2, 16: 25, 18: 4</p> <p><b>GWI</b> 15: 8</p> <p>&lt; H &gt;</p> <p><b>hal f</b> 24: 9, 24: 10, 24: 13</p> <p><b>hand</b> 5: 5, 5: 7</p> <p><b>handful</b> 20: 18</p> <p><b>handl e</b> 9: 11</p> <p><b>handl ed</b> 32: 20</p> <p><b>happen</b> 3: 9</p> <p><b>happened</b> 21: 17</p> <p><b>happeni ng</b> 20: 10</p> <p><b>harass</b> 16: 17</p> <p><b>hard</b> 11: 16</p> <p><b>Hardt</b> 2: 3, 3: 20</p> <p><b>harm</b> 19: 2, 30: 21, 30: 23, 31: 1, 31: 2</p> <p><b>harmless</b> 4: 4</p> <p><b>Harr</b> 2: 3, 3: 20</p> <p><b>HCFMA</b> 19: 17</p> <p><b>hear</b> 5: 10, 11: 9, 13: 23, 21: 23, 30: 14, 32: 2</p> <p><b>heari ng</b> 9: 18, 31: 3, 32: 10</p> <p><b>hei ghtened</b> 7: 23</p>	<p><b>held</b> 10: 17</p> <p><b>Heller</b> 2: 11</p> <p><b>Highl and</b> 1: 5, 1: 9, 1: 16, 3: 4, 17: 8</p> <p><b>highl ight</b> 14: 5</p> <p><b>hold</b> 5: 19, 27: 19</p> <p><b>home</b> 32: 11</p> <p><b>HONORABLE</b> 1: 21</p> <p><b>hope</b> 3: 8, 6: 18</p> <p><b>Horn</b> 2: 11</p> <p><b>Hospi tal</b> 10: 21</p> <p><b>housekeepi ng</b> 3: 5</p> <p><b>HR</b> 9: 16</p> <p><b>huge</b> 14: 21</p> <p><b>Hunter</b> 9: 15</p> <p><b>hypotheti cal l y</b> 6: 15</p> <p>&lt; I &gt;</p> <p><b>i denti fi ed</b> 14: 14</p> <p><b>iffy</b> 34: 4</p> <p><b>impact</b> 7: 5</p> <p><b>imple ment</b> 17: 5, 25: 2, 25: 12</p> <p><b>impl ement ed</b> 23: 15</p> <p><b>impl ementi ng</b> 24: 19</p> <p><b>import ant</b> 10: 20, 20: 25</p> <p><b>import antl y</b> 5: 9, 7: 16, 9: 20, 31: 13</p> <p><b>impossi bl e</b> 18: 5</p> <p><b>incepti on</b> 24: 10</p> <p><b>incl ude</b> 23: 8</p> <p><b>incl udi ng</b> 26: 14</p> <p><b>incorrec t</b> 15: 3</p> <p><b>increased</b> 8: 25, 13: 14</p> <p><b>increases</b> 13: 9</p> <p><b>indemni fi cati on</b> 4: 18, 5: 1, 5: 3, 5: 19, 5: 20, 6: 1, 8: 16,</p>	<p>8: 25, 9: 2, 9: 3, 12: 8, 12: 14, 17: 1, 17: 16, 17: 21, 18: 4, 20: 1, 20: 23, 23: 20, 24: 2, 24: 7, 24: 8, 25: 2, 31: 5, 31: 7</p> <p><b>indemni fi ed</b> 23: 7, 23: 8</p> <p><b>indemni fy</b> 4: 24, 5: 16, 6: 7, 6: 17</p> <p><b>indemni fyi ng</b> 4: 14, 5: 15, 6: 3, 6: 4</p> <p><b>indemni ty</b> 11: 24, 17: 6, 17: 7, 17: 10, 18: 17, 18: 18, 18: 20, 19: 10, 20: 13, 23: 3, 23: 7, 23: 14, 23: 16, 23: 17, 23: 22, 23: 23, 24: 2, 25: 1, 25: 15, 25: 23, 26: 1, 26: 2, 26: 3, 26: 5, 26: 7, 26: 8, 27: 25, 28: 3, 28: 4, 28: 11, 28: 12, 28: 13, 30: 1, 30: 9</p> <p><b>independent</b> 20: 15</p> <p><b>INDEX</b> 34: 21</p> <p><b>indi vi dual l y</b> 9: 9</p> <p><b>infl uence</b> 27: 1</p> <p><b>infl uenced</b> 26: 19</p> <p><b>injuncti on</b> 31: 24, 33: 8</p> <p><b>injuncti ons</b> 33: 3</p> <p><b>insi ders</b> 12: 16</p> <p><b>insolvent</b> 29: 16</p> <p><b>instru ct</b> 6: 12</p> <p><b>insuranc e</b> 9: 4,</p>
--	--	---	--

9: 6, 12: 8,  
17: 19, 25: 15,  
27: 10, 27: 15,  
27: 24, 28: 5,  
28: 22, 28: 25,  
29: 5, 29: 7  
**i ntensi fi ed**  
17: 18  
**i nterest** 7: 7,  
13: 2, 13: 5,  
13: 10, 13: 13,  
19: 14, 32: 25,  
33: 1  
**i nterferi ng**  
5: 11  
**i nternally** 9: 15  
**i nterrupt** 3: 10,  
3: 14  
**i nvestors** 31: 15  
**i nvolve** 18: 10  
**i nvol ved** 32: 9  
**i ssue** 8: 20,  
11: 5, 13: 18,  
14: 7, 14: 22,  
15: 16, 27: 8,  
34: 17  
**i ssued** 14: 7  
**i ssues** 12: 19  
**i t--** 6: 8  
**i tems** 10: 6  
**i tself** 6: 3,  
33: 5

< J >  
**J.** 2: 39, 35: 19,  
36: 4, 36: 6  
**James** 19: 16,  
29: 24, 32: 3,  
32: 4  
**JEFFREY** 1: 27  
**jeopardi ze**  
17: 24, 18: 9  
**jeopardi zi ng**  
19: 2  
**Jerni gan** 14: 7  
**Joint** 29: 13  
**Jones** 1: 28,  
10: 9  
**j pomerantz@pszj**

**law.com** 1: 34  
**Judge** 1: 22,  
10: 9, 14: 7,  
33: 24  
**judgment** 5: 24,  
7: 18  
**Judi ci al** 35: 25  
**j uni or** 19: 22  
**j uri sdi cti on**  
4: 7  
**j uri sdi cti onal**  
33: 25

< K >  
**key** 8: 14,  
17: 14, 25: 17  
**knowl edge** 16: 4  
**known** 9: 13,  
32: 22  
**knows** 7: 7  
**Kopf** 2: 3, 3: 20

< L >  
**LA** 2: 14  
**land** 16: 8  
**largely** 14: 4  
**last** 11: 5,  
25: 16, 33: 13  
**Lastly** 15: 17  
**later** 8: 6  
**LAW** 3: 13, 5: 21,  
6: 12, 6: 22,  
6: 24, 23: 4,  
28: 17, 29: 10,  
34: 1  
**lawsui t** 31: 23  
**lawsui ts** 31: 22  
**leadi ng** 28: 18  
**leave** 12: 4,  
34: 11  
**legal** 4: 21,  
25: 24, 26: 3,  
27: 5  
**legi ti mate**  
27: 25  
**length** 7: 5, 8: 3  
**letter** 6: 22  
**lieu** 25: 15

**likely** 7: 12,  
18: 8  
**limit** 12: 10,  
15: 13  
**limited** 21: 1,  
21: 2, 22: 6,  
22: 7, 23: 22,  
24: 5  
**Line** 35: 4  
**link** 33: 13,  
34: 10  
**li qui dati on**  
15: 15  
**li qui dati ons**  
15: 14  
**listen** 32: 3  
**liti gants** 32: 13  
**liti gati ng**  
30: 21, 31: 17  
**liti gati on**  
4: 22, 5: 4, 6: 5,  
6: 8, 6: 16, 8: 5,  
8: 6, 15: 15,  
16: 16, 17: 18,  
18: 1, 21: 9,  
21: 12, 21: 13,  
21: 14, 22: 14,  
22: 17, 22: 18,  
22: 21, 23: 9,  
23: 21, 23: 25,  
24: 4, 24: 11,  
24: 16, 26: 16,  
27: 16, 28: 23,  
31: 14, 31: 18  
**litmus** 15: 18  
**little** 4: 25  
**LLP** 1: 28  
**logi cal** 31: 12  
**logi sti cal** 4: 24  
**longer** 17: 22  
**look** 10: 15,  
11: 6, 11: 15,  
11: 16, 11: 23,  
12: 1, 12: 20,  
13: 16, 32: 18  
**looki ng** 33: 8  
**Los** 1: 31  
**lose** 3: 7, 11: 11  
**loses** 17: 16  
**losi ng** 19: 1

**lost** 6: 9, 10: 7,  
11: 8, 21: 15,  
21: 24, 31: 25  
**loyalists** 20: 20  
**Lumber** 10: 9

< M >  
**majori ty** 21: 7,  
22: 12  
**mal igned** 32: 2  
**managed** 16: 10  
**Management** 1: 6,  
1: 10, 1: 17,  
3: 4, 15: 23,  
16: 24, 17: 10,  
17: 15, 17: 23,  
18: 8, 18: 22,  
19: 1, 21: 5,  
22: 10, 27: 13  
**managers** 17: 14,  
18: 6, 20: 15,  
27: 11  
**managi ng** 16: 1  
**mandatory** 31: 24  
**Manges** 15: 14,  
16: 11  
**Marathon** 33: 20  
**Marshall** 33: 21  
**master** 4: 23  
**material ly**  
17: 24  
**mathemati cal**  
13: 11  
**mathemati cs**  
13: 7  
**matter** 3: 3,  
4: 2, 4: 3, 5: 23,  
6: 1, 10: 12,  
23: 16, 31: 2,  
32: 14, 35: 21  
**matters** 3: 5  
**Mckenzie** 23: 10  
**mean** 7: 23  
**meanti me** 8: 23  
**mechani cal** 2: 47  
**mechani sm** 7: 2,  
23: 23, 29: 14,  
30: 24  
**meet** 16: 13

<p>members 18: 1  mention 14: 15,  27: 8  mentioned 7: 6  mentioning  11: 12  merely 33: 12  merits 14: 2,  19: 10, 20: 23,  23: 2, 23: 6,  32: 5  message 21: 21  microphone  21: 22  million 5: 6,  5: 20, 6: 2,  6: 18, 8: 21,  8: 23, 9: 23,  13: 7, 13: 8,  19: 18, 19: 21,  24: 9, 24: 10,  24: 13, 31: 7  millions 31: 9,  33: 2  minimal 11: 20  minute 6: 12,  19: 13, 33: 15  minutes 10: 3,  13: 1, 22: 4,  23: 4, 26: 21,  26: 23, 29: 10  miracle 18: 25  miraculously  14: 19  mischaracterize  s 23: 14  mismanagement  15: 24  Mistake 18: 2  modification  4: 10, 6: 20,  7: 2, 7: 10,  7: 12, 8: 1, 8: 3,  8: 9, 8: 12, 9: 7,  19: 11, 25: 17,  27: 7, 28: 19,  29: 9, 29: 21,  32: 20  modifications  4: 9, 10: 12</p>	<p>modified 28: 14,  28: 21, 29: 6  modify 6: 24,  6: 25, 29: 18,  30: 4  monetization  15: 22, 21: 10,  22: 16, 25: 20  monetize 18: 7  money 6: 6, 6: 8,  6: 16, 26: 17  Monica 1: 29  months 14: 20,  17: 20  moot 15: 3, 19: 9  mootness 10: 9,  10: 19, 11: 2,  11: 17, 12: 2,  12: 18, 13: 17,  14: 2, 14: 3,  15: 1, 15: 4,  15: 7, 15: 13,  15: 14, 15: 18,  15: 20, 16: 10,  18: 10  morning 3: 19,  13: 22, 14: 1  motion 7: 16,  8: 18, 8: 20,  14: 2, 14: 3,  23: 18  motions 3: 24,  9: 11  motivation 19: 3  movements 10: 22  MR. POMERANTZ  13: 22, 13: 25,  21: 23, 22: 1,  22: 5, 26: 22,  26: 25  MR. RUKAVINA  3: 19, 4: 19,  6: 14, 21: 17,  30: 14, 30: 17,  33: 16  multifactor  7: 17  multiple 14: 15,  31: 22, 33: 10  Munsch 2: 3,</p>	<p>3: 20  muted 21: 18,  21: 20    &lt; N &gt;  N. 1: 27  name 14: 14,  18: 16  narrow 10: 11  nature 19: 13  necessary 18: 6,  28: 6  need 3: 8  needed 3: 15  needs 5: 8  negative 9: 19  neither 15: 20,  23: 16  net 25: 9, 25: 19  New 2: 14, 5: 14,  8: 15, 9: 7,  24: 2, 31: 3  Nexpoint 9: 12,  9: 13, 9: 14,  14: 8, 14: 13,  19: 15, 19: 16  next 10: 20  none 20: 21  nonstop 32: 2  Nor 30: 4, 30: 22  Northern 1: 2,  33: 20, 36: 8  note 5: 6,  24: 11, 24: 13,  24: 14, 32: 17  nothing 25: 13,  29: 12, 29: 23  notice 9: 19,  31: 24  notion 31: 9  notions 34: 5  notwithstanding  27: 21  Number 10: 16,  10: 24, 12: 11,  13: 5, 34: 3    &lt; O &gt;</p>	<p>objected 18: 21,  20: 21, 29: 5  objection  28: 22, 29: 8  objections 20: 7  objects 27: 18  obligated 4: 24  obligation 5: 7,  24: 16, 24: 20,  25: 24, 26: 3  obligations  19: 12, 23: 17,  23: 20, 24: 2,  24: 3, 25: 2,  28: 4, 28: 14,  29: 17  obtained 27: 24  obtaining  16: 22, 27: 9  obviously 3: 8  occurs 3: 9  offensive 31: 18  Official 36: 7  Offshore 15: 16,  15: 20  Okay 4: 5,  11: 10, 11: 15,  22: 5, 26: 25  once 34: 14  One 10: 8,  10: 23, 13: 3,  14: 5, 18: 20,  31: 12, 31: 23,  33: 15  one-off 34: 6  onslaught  16: 16, 17: 18,  27: 16, 31: 14  operating 16: 7  opinion 11: 7,  34: 2, 34: 3  opposed 15: 14  option 17: 19,  17: 20  ORAL 1: 20, 3: 1,  3: 4, 35: 1, 35: 4  order 4: 17,  5: 15, 9: 18,  9: 23, 10: 13,  10: 14, 10: 23,</p>
---	---	---	---

10: 24, 10: 25,  
 12: 12, 14: 8,  
 14: 11, 15: 3,  
 15: 6, 16: 12,  
 16: 19, 17: 12,  
 17: 25, 18: 3,  
 18: 22, 19: 11,  
 20: 14, 23: 17,  
 26: 2, 26: 9,  
 28: 2, 30: 1,  
 31: 10, 33: 6,  
 33: 9  
**orders** 10: 23,  
 15: 7, 15: 8,  
 33: 10  
**organi zati ons**  
 15: 13  
**ori gi nal** 6: 16  
**ori gi nal ly**  
 4: 21, 4: 24,  
 7: 11, 11: 24  
**Orleans** 2: 14  
**others** 31: 5  
**otherwi se** 28: 6  
**ought** 8: 12  
**outsid ers** 12: 16  
**oversi ght** 18: 1,  
 26: 4, 26: 10,  
 26: 14, 27: 3  
**owe** 33: 1  
**own** 4: 24, 5: 5,  
 6: 18  
**owned** 19: 16,  
 19: 17  
**owner** 22: 8

< P >

**Pachul ski** 1: 28  
**Paci fi c** 10: 9  
**Pack** 15: 8  
**Page** 35: 4  
**pai d** 8: 8, 10: 1,  
 13: 9, 19: 21,  
 19: 22, 19: 24,  
 20: 1, 23: 1,  
 25: 9  
**pam\_wi lson@txnd**  
**.uscourts.gov**  
 2: 40

**PAMELA** 2: 39,  
 35: 19, 36: 6  
**papers** 10: 8,  
 11: 14, 12: 20  
**paradi gm** 18: 15  
**part** 32: 19  
**parti ci pated**  
 20: 13  
**parti es** 7: 7,  
 11: 24, 12: 13,  
 14: 11, 16: 12,  
 18: 14, 19: 12,  
 28: 18, 29: 17,  
 32: 25, 33: 1  
**partner** 21: 2,  
 21: 3, 22: 8,  
 22: 9  
**partnershi p**  
 21: 2, 22: 7,  
 23: 22, 24: 5  
**party** 6: 25,  
 23: 18, 33: 22  
**Pause.** 6: 10  
**pay** 28: 11  
**payment** 25: 19,  
 28: 8, 28: 9,  
 29: 18  
**PC** 2: 3  
**pecuni ary**  
 12: 22, 13: 2,  
 13: 5, 13: 10  
**peopl e** 5: 16,  
 6: 3, 12: 6,  
 23: 7, 23: 8  
**percent** 18: 24,  
 20: 11  
**perhaps** 21: 19  
**permanent** 33: 3,  
 33: 8  
**person** 21: 11,  
 22: 16, 27: 23  
**personnel** 6: 7,  
 6: 17  
**pick ed** 11: 25  
**pi cki ng** 12: 17,  
 32: 12  
**Pi pel i ne** 33: 20  
**pi voted** 17: 4  
**pl ace** 12: 4  
**pl anned** 15: 6

**pl ans** 8: 17,  
 33: 11  
**pl eadi ng** 12: 23  
**pl eadi ngs** 10: 7,  
 23: 13  
**pl ease** 3: 25  
**poi nt** 3: 7,  
 5: 18, 5: 25,  
 7: 10, 9: 12,  
 14: 5, 32: 23,  
 33: 20  
**POMERANTZ** 1: 27,  
 13: 21, 21: 16,  
 21: 19, 23: 5,  
 29: 11, 30: 12,  
 32: 16, 35: 10  
**porti on** 6: 19,  
 34: 12  
**posi ti ons** 14: 12  
**possi bl e** 5: 20  
**Post** 16: 24,  
 17: 18, 17: 19,  
 29: 16  
**post-confi rmati**  
**on** 16: 24, 20: 9,  
 20: 24, 25: 7,  
 27: 13, 29: 3,  
 29: 15  
**post-effected**  
 25: 6  
**potenti al** 5: 25  
**potenti al ly**  
 8: 21, 28: 10  
**Poydras** 2: 12  
**Prai ri e** 15: 19  
**prayer** 28: 14  
**precedent** 9: 4  
**preconfi rmati on**  
 22: 25  
**premi se** 26: 8  
**premi ums** 28: 9  
**prescri bed** 7: 1,  
 35: 25  
**preserve** 24: 18,  
 28: 6  
**pressi ng** 21: 18  
**pretty** 8: 11,  
 13: 11  
**pri nci pal** 23: 3,  
 23: 6

**pri nci pal s** 25: 4  
**pri nci pl e** 30: 10  
**pri or** 28: 21  
**pri ori ty** 29: 14,  
 29: 18  
**probabl y** 9: 25,  
 10: 20  
**probl em** 8: 9,  
 32: 19  
**probl emati c**  
 11: 21  
**procedure** 4: 3,  
 4: 5  
**proceed** 3: 18  
**proceeded** 7: 14,  
 7: 25  
**Proceedi ngs**  
 2: 47, 7: 13,  
 35: 20  
**proceedi ngs.**  
 34: 20  
**proceeds** 7: 21,  
 21: 13, 22: 19,  
 22: 23, 25: 9,  
 25: 18, 25: 19,  
 30: 6  
**process** 25: 20,  
 30: 1, 34: 14  
**produced** 2: 48  
**products** 16: 8  
**professi onal**  
 16: 3  
**professi onal s**  
 4: 25, 8: 25,  
 31: 11  
**prohi bi ted** 8: 10  
**prohi bi ts** 25: 14  
**project ed** 19: 22  
**promi ssory** 5: 6,  
 32: 17  
**properl y** 32: 7  
**proposi ti on**  
 15: 9  
**prosecuted** 6: 8  
**prosecuti on**  
 21: 10, 22: 15  
**protect** 17: 1,  
 20: 15  
**protecti ng**  
 18: 22, 19: 5

protecti on  
17: 16, 27: 12  
proven 7: 20  
provi de 8: 6,  
23: 19, 24: 19  
provi ded 8: 5,  
28: 23  
provi des 30: 23  
provi si on 29: 6  
provi si ons  
11: 1, 23: 15,  
24: 18, 25: 4  
publ ic 32: 22  
pul l 17: 23  
purpose 23: 19  
purposes 5: 3,  
32: 15  
pursued 21: 12,  
22: 18

< Q >

questi on 5: 14,  
6: 19, 8: 15,  
24: 6  
questi oned  
14: 16  
questi oni ng  
30: 25  
questi ons 4: 12,  
4: 20, 14: 4,  
34: 12  
quic k 10: 6  
quic kly 16: 9,  
33: 18  
qui t 31: 11  
quo 17: 13,  
17: 14  
quoted 33: 21  
quoti ng 31: 14

< R >

ran 6: 7  
Rather 24: 2,  
27: 16  
RE 1: 5, 3: 3  
real 13: 5,  
24: 6, 31: 13  
real ly 4: 17,

10: 15, 19: 14,  
27: 24  
reason 17: 21,  
20: 17, 27: 23  
reasonabl y 7: 8  
reasons 25: 25  
Rebuttal 13: 20,  
30: 13  
recent 11: 6,  
33: 21  
recently 9: 14,  
9: 17  
recess 34: 19  
recogni zed  
18: 22  
reconsti tuted  
21: 1  
record 31: 11,  
32: 14, 32: 16,  
33: 5, 35: 20  
recovered 28: 10  
reduced 13: 12  
reengage 21: 22  
regul atory  
21: 6, 22: 11  
rei nstate 17: 13  
rei nstatement  
17: 14  
rei terate 4: 1  
reject 7: 12  
rejected 7: 11,  
7: 22, 8: 1,  
15: 20, 20: 18,  
30: 18  
related 14: 9,  
20: 21, 21: 6,  
22: 10, 29: 24  
rel ati ng 25: 20  
rel ati onshi p  
27: 5, 30: 5  
rel ati onshi ps  
14: 10  
rel eases 33: 9  
rel ied 29: 7  
rel ief 11: 20,  
11: 22, 16: 13,  
17: 12  
rel y 17: 10  
remai n 13: 1,  
26: 21, 26: 24,

29: 10, 34: 10  
remai ned 17: 8,  
22: 9  
remai ni ng 21: 7,  
22: 12, 23: 4,  
30: 8  
remai ns 33: 15  
remember 32: 18  
removed 8: 21  
reorgani ze  
26: 16  
reorgani zed  
4: 22, 16: 3,  
21: 1, 21: 4,  
21: 14, 22: 9,  
22: 20, 23: 9,  
23: 22, 24: 1,  
24: 5, 24: 12,  
24: 18, 28: 7  
repai d 5: 8  
repl aced 18: 2  
repl acement  
18: 6  
reply 5: 13,  
14: 2  
reported 2: 47  
Reporter 2: 39,  
3: 8, 5: 12,  
34: 11, 36: 7  
represent 31: 15  
representati ves  
16: 18  
representi ng  
20: 11, 32: 7  
represents 3: 23  
requi red 9: 6,  
15: 10  
requi res 9: 20,  
15: 23  
requi ri ng 14: 8,  
27: 6  
reserve 5: 2,  
5: 4, 9: 21, 27: 3  
reserved 13: 20,  
25: 9  
reserves 4: 14,  
24: 16, 25: 6,  
25: 23, 26: 15,  
26: 17, 28: 5,  
30: 8

reservi ng 5: 7,  
5: 24  
resi gn 17: 25,  
31: 6  
resol ve 18: 11,  
28: 22  
resol ved 5: 21,  
28: 23, 29: 5,  
29: 19  
respect 15: 1  
Respectful ly  
31: 1  
responsi ble  
5: 15, 5: 16  
restructuri ng  
16: 2, 29: 20,  
30: 1  
resul t 15: 24,  
18: 7, 29: 1  
resul ted 16: 18  
retai ned 21: 5,  
22: 9, 26: 10  
return 6: 20  
Reversal 17: 23  
reversed 17: 25  
reverses 17: 15  
reversi ng 31: 10  
revi ew 33: 24,  
34: 1  
revol ve 4: 20  
ri ghts 16: 11,  
17: 1, 17: 16,  
17: 21, 18: 5,  
18: 11, 18: 12,  
18: 13, 19: 5,  
19: 12, 25: 22,  
28: 14, 30: 4,  
31: 7, 31: 20,  
31: 21  
RMR 2: 39, 36: 6  
roadbl ock 29: 25  
rol es 16: 25  
Room 2: 41  
rug 17: 23  
RUKAVI NA 2: 2,  
3: 20, 35: 6,  
35: 12  
Rul e 9: 19,  
31: 20  
rul ed 24: 25

ruling 34: 17

< S >

s/pamela 36: 4  
safeguards 7: 3  
sale 10: 25  
sanctioned  
31: 19, 32: 4  
Santa 1: 29  
satisfied 23: 25  
satisfy 23: 23,  
29: 15, 29: 17  
sayi ng 6: 15,  
32: 3, 32: 4  
says 12: 21,  
13: 7, 33: 22,  
34: 5  
scal pel 10: 10,  
11: 23, 12: 9  
scheme 29: 19  
scope 10: 11  
seated 26: 12  
Second 4: 16,  
7: 10, 15: 12,  
25: 8, 29: 13,  
29: 19, 34: 2,  
34: 3, 34: 4  
Section 4: 9,  
7: 18, 24: 4,  
24: 23, 31: 21  
secure 28: 4  
securi tize 25: 1  
securi ty 17: 20,  
23: 19  
seed 6: 8  
Seery 15: 25,  
16: 17, 16: 23,  
17: 24, 21: 8,  
22: 13, 27: 11,  
31: 4  
sel f-i nsurance  
17: 5, 25: 14,  
27: 18  
sel f-i nsure  
27: 17  
seni or 28: 7  
separate 10: 14  
separated  
21: 10, 22: 15

seri ous 15: 24  
seri ously 18: 9  
serve 27: 12  
set 25: 23,  
31: 6, 31: 8  
settlem ent 29: 3  
settlem ents  
29: 1  
several 25: 4,  
31: 6  
sheet 23: 18  
Shi pbui l di ng  
10: 21  
shoul dn' t 32: 14  
sic 19: 17  
side 13: 17  
SIDNEY 1: 21  
si gn-off 34: 15  
si gned 32: 21  
si gni fi cantl y  
19: 2  
si mi lar 16: 2  
Si mple 13: 7,  
15: 19  
si mply 16: 25,  
17: 12, 32: 5  
si ngle 8: 19  
si x 17: 19,  
31: 24  
si xth 9: 14  
Skull 15: 8  
sl i ght 8: 11  
Sneed 10: 21,  
11: 2, 15: 8,  
15: 9  
somehow 21: 18  
Someone 4: 4,  
5: 10  
Someti mes 34: 13  
soon 19: 19  
sophi sti cated  
15: 23  
sophi sti cati on  
18: 6  
Sorry 22: 5,  
33: 7  
sought 17: 5,  
31: 24  
sound 6: 9,  
11: 8, 21: 15,

30: 22  
speci fi c 12: 8  
speci fi cal l y  
20: 7  
spend 19: 13  
spent 26: 17  
St 2: 4  
stand 14: 4,  
34: 19  
standard 14: 25  
standi ng 9: 20,  
13: 18, 14: 6,  
14: 11, 14: 16,  
14: 25, 19: 7,  
27: 23, 33: 4,  
33: 14, 34: 4  
stands 15: 9  
Stang 1: 28  
stark 29: 21,  
29: 22  
starte d 11: 13  
state 6: 22  
statement 7: 4,  
14: 22, 32: 20,  
33: 11  
States 1: 1,  
1: 22, 23: 18,  
35: 26  
status 17: 13,  
17: 14  
statutory 18: 19  
Ste 2: 5  
stenography  
2: 47  
Stern 33: 21  
stop 3: 8  
Street 2: 12,  
2: 41  
Stri pped 18: 4,  
19: 3  
stri ppi ng 31: 4  
structure  
20: 24, 22: 2,  
25: 16  
structured 16: 8  
subj ect 33: 2  
submi ssi on  
34: 16  
submi t 33: 18  
subsidi ary

21: 4, 22: 8  
substanc e 3: 22,  
4: 2, 4: 6, 4: 8,  
7: 24  
substanti al  
10: 16, 10: 18  
substanti al l y  
11: 19  
substi tuti ng  
9: 6  
subtrust 4: 15,  
4: 22, 5: 19,  
8: 16, 17: 25,  
21: 9, 21: 12,  
22: 14, 22: 17,  
22: 21, 23: 9,  
23: 21, 24: 1,  
24: 11, 24: 16  
subtrustee 18: 1  
success 16: 6,  
16: 13, 18: 9,  
18: 14, 19: 2  
successful  
18: 11  
sued 6: 22  
suffi ci ent  
27: 22  
sui t 18: 2  
Sui te 2: 13  
summer 16: 15  
Superi or 15: 16,  
15: 19  
supervi se 33: 19  
support 14: 25,  
28: 16, 28: 19  
supported  
18: 20, 18: 21,  
20: 12, 20: 14,  
28: 15, 28: 16,  
31: 11  
supporti ng  
23: 20, 25: 12  
Supreme 33: 21,  
33: 22  
swi tchi ng 30: 21  
sympi otic 22: 24  
system 33: 25

< T >

<p> <b>talked</b> 22: 6  <b>technical</b> 3: 10  <b>tells</b> 7: 6  <b>ten</b> 14: 20  <b>tens</b> 33: 1  <b>terminated</b>  20: 19  <b>terms</b> 25: 12,  32: 17  <b>test</b> 7: 18,  13: 9, 13: 10,  13: 11, 15: 18  <b>Texas</b> 1: 2,  1: 11, 2: 42,  5: 21, 15: 19,  36: 8  <b>themselves</b> 31: 9  <b>thereby</b> 27: 6  <b>Third</b> 7: 16,  25: 11  <b>third-party</b>  12: 11, 21: 5,  22: 10  <b>Though</b> 10: 11,  13: 6, 27: 14  <b>thousands</b> 31: 15  <b>threatened</b> 5: 25  <b>threats</b> 27: 16  <b>three</b> 4: 21,  10: 15, 22: 2  <b>threshold</b> 23: 16  <b>throughout</b> 14: 6  <b>throw</b> 29: 25  <b>tied</b> 8: 24  <b>timing</b> 29: 18  <b>together</b> 22: 19,  22: 23  <b>took</b> 26: 9,  30: 24  <b>totality</b> 9: 9  <b>Track</b> 23: 11  <b>traditional</b>  34: 5  <b>TRANSCRIPT</b>  1: 20, 2: 48,  35: 20, 35: 24  <b>transferred</b>  14: 20, 14: 23,  21: 7, 21: 12,  22: 13, 22: 17 </p>	<p> <b>transformed</b>  25: 24  <b>transiti oning</b>  22: 3  <b>Transportati on</b>  23: 11  <b>treatment</b> 12: 4,  30: 2, 30: 5  <b>trial</b> 8: 5,  9: 24, 31: 23  <b>tried</b> 19: 19,  20: 9, 29: 4  <b>TRO</b> 16: 18,  16: 20  <b>true</b> 8: 22,  12: 22  <b>trusted</b> 31: 16  <b>trustee</b> 5: 23,  12: 24, 16: 4,  21: 8, 21: 13,  22: 14, 22: 18  <b>trusts</b> 8: 17  <b>truth</b> 12: 1  <b>trying</b> 18: 11  <b>turn</b> 8: 22,  20: 23, 23: 18  <b>turned</b> 11: 14  <b>Turni ng</b> 19: 10,  23: 2, 23: 6  <b>Two</b> 3: 20, 3: 23,  7: 23, 10: 15,  10: 20, 10: 22,  10: 24, 12: 2,  12: 11, 13: 1,  13: 5, 22: 4,  24: 9, 25: 25,  29: 10, 31: 15  <b>TX</b> 2: 6  <b>tyi ng</b> 6: 1  <b>types</b> 10: 23  <b>typi ng</b> 5: 10 </p> <p>&lt; U &gt;</p> <p> <b>understand</b>  10: 12  <b>understandi ng</b>  5: 1  <b>undevel oped</b>  16: 7 </p>	<p> <b>undo</b> 20: 9  <b>unfortunatel y</b>  27: 14  <b>uni lateral l y</b>  6: 24, 6: 25,  8: 13  <b>unique</b> 16: 8  <b>United</b> 1: 1,  1: 22, 35: 26  <b>uni verse</b> 4: 17  <b>unl ess</b> 14: 4,  26: 3  <b>unquesti onabl y</b>  18: 12  <b>unsecured</b>  18: 16, 18: 18,  18: 19, 18: 24,  19: 3, 19: 5,  19: 22, 20: 3,  20: 12, 20: 17,  27: 19, 30: 3  <b>until</b> 5: 20,  9: 14, 9: 22,  26: 4  <b>unwilling</b> 16: 25  <b>uphol d</b> 11: 17  <b>upstream</b> 22: 24,  30: 7  <b>upstreamed</b>  22: 21, 22: 25  <b>urge</b> 8: 18 </p> <p>&lt; V &gt;</p> <p> <b>v.</b> 33: 21  <b>val ue</b> 16: 9,  24: 18, 28: 7  <b>Vari ous</b> 23: 24,  24: 18  <b>Verobl ue</b> 11: 7,  11: 12, 11: 13,  11: 16  <b>vexati ous</b> 32: 13  <b>VIA</b> 1: 20, 3: 1  <b>vi ol ati ng</b> 16: 19  <b>vi ol ati on</b> 9: 19  <b>vi rtual l y</b> 11: 19  <b>vi rtue</b> 11: 1  <b>vi tal</b> 16: 5  <b>voi d</b> 18: 7 </p>	<p> <b>Voi di ng</b> 19: 1  <b>voted</b> 7: 10  <b>votes</b> 20: 18  <b>VS</b> 1: 14 </p> <p>&lt; W &gt;</p> <p> <b>wai t</b> 11: 19  <b>wai vabl e</b> 27: 14  <b>wai ve</b> 9: 5  <b>wai ved</b> 9: 5,  23: 12, 23: 13  <b>Wal ker</b> 10: 21,  11: 2  <b>wanted</b> 21: 10,  22: 15  <b>warni ngs</b> 3: 13,  3: 15  <b>wel come</b> 34: 14  <b>wel l -wri tten</b>  11: 7  <b>Whatever</b> 32: 5  <b>Whether</b> 13: 10,  14: 11, 24: 6,  26: 15, 31: 2,  33: 13  <b>whole</b> 32: 23,  33: 19  <b>whom</b> 5: 16, 6: 3,  20: 21  <b>will</b> 3: 8, 3: 9,  3: 11, 3: 23,  9: 11, 10: 6,  14: 1, 16: 9,  17: 20, 17: 22,  17: 23, 17: 24,  18: 12, 19: 2,  19: 18, 19: 21,  19: 23, 24: 14,  31: 6, 31: 10,  31: 11, 33: 24,  34: 17, 34: 19  <b>WILSON</b> 2: 39,  35: 19, 36: 4,  36: 6  <b>wi thdraw</b> 14: 18  <b>wi thdrawi ng</b>  29: 7  <b>wi thdrew</b> 20: 6  <b>wi thi n</b> 27: 4 </p>
---	---	--	--

**wi thout** 9: 18,  
16: 25, 17: 8,  
18: 5, 21: 18,  
27: 12, 27: 13,  
33: 9

**word** 18: 25  
**words** 18: 25,  
28: 1

**work** 16: 2,  
20: 20, 21: 22,  
22: 19, 22: 23,  
33: 25

< Y >

**years** 5: 21,  
6: 2, 7: 6, 8: 23

**yesterday** 34: 2

**yi el d** 10: 2

< Z >

**zero** 8: 22

**Zi ehl** 1: 28

**ZOOM** 1: 20, 3: 1,  
10: 5

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T I O N

I, PAMELA J. WILSON, CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 15th day of March, 2022.

s/Pamela J. Wilson

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PAMELA J. WILSON, RMR, CRR  
Official Court Reporter  
The Northern District of Texas  
Dallas Division