

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : CIVIL TERM : PART 53

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REBECCA HAUSSMANN, trustee of  
KONSTANTINS HAUSSMANN TRUST,  
and JACK E. CATTAN, derivatively on behalf  
Of BAYER AG,  
Plaintiffs,

-against-

Index No.  
651500/20

WERNER BAUMANN, et al

Defendants.

and

BAYER AG,

Nominal defendant.

----- X  
(VIA TEAMS)  
December 13, 2021

B E F O R E:

HONORABLE ANDREW BORROK,

Justice, Supreme Court

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## PROCEEDINGS

1 THE COURT: Rebecca Haussman, Trustee of  
2 Konstantins Haussman Trust and Jack Cattan derivatively on  
3 behalf of Bayer AG vs. Werner Baumann, et al. 651500 of  
4 2020.

5 Your appearances for the record, please.

6 MR. ROBERT: Clifford Robert on behalf of  
7 plaintiff with my partner Michael Farina along with Jamie  
8 Baskin, Frank Bottini (ph), Albert Chang (ph) and Benjamin  
9 Brafman, Mr. Baskin, who the Court has granted a pro hac  
10 vice application, will be arguing this morning. Thank you.

11 THE COURT: Mr. Baskin, I want you to check your  
12 microphone.

13 MR. SAVITT: William Savitt here. We are here for  
14 the Bayer defendants. With me is my partner John Lynch, my  
15 colleagues Lara Samet Buchwald representing Bank of America  
16 Corporation and B of A. With me is Larry Portnoy.

17 MR. KURTZBERG: Joel Kurtzberg of Cahill Gordon  
18 and Reindel. With me today is Adam Mintz. We are appearing  
19 on behalf of Credit Suisse defendants.

20 THE COURT: I was starting to say that we have a  
21 lot to discuss this morning and I'm happy to start with any  
22 one of the three motions that we have to talk about. My  
23 preference would be to start with bank defendants' motion,  
24 but I leave it to all of you.

25 I am hearing an echo. You really need to mute if

## PROCEEDINGS

1       you're not speaking. Whoever does start for the defendants,  
2       I would really appreciate if we made a record as to the  
3       background transaction and then I'll hear the motion. But,  
4       I would suggest that we start with the bank defendants'  
5       motion unless you all have discussed this and you want to  
6       start in a different place.

7               MS. BUCHWALD: This is Lara Samet Buchwald on  
8       behalf of Bank of America and B of A Securities. I'm quite  
9       happy to start. Although, I'm looking over to Mr. Savitt.  
10      If he has a preference, that's fine as well.

11             THE COURT: Mr. Savitt, I think it may be your  
12      speakerphone that's causing the issue. Let's start with  
13      either one of your motions. Then we can either do the Bayer  
14      Corp or wherever you want to start, but I would like a  
15      background --

16             MR. SAVITT: Thank you, your Honor.

17             THE COURT: -- about the deal.

18             MR. SAVITT: I appreciate that and I think it may  
19      make sense for us to start in some sense and by that, I mean  
20      the various defendants, that some of the other  
21      motions -- we will do the best we can and if you want to  
22      jump to the other folks, of course. We're really here  
23      principally to answer your questions, your Honor, so we will  
24      try to be responsive. Any time I'm not addressing --

25             THE COURT: Don't worry. I'm not shy.

## PROCEEDINGS

1 MR. SAVITT: By the background transaction, your  
2 Honor, I think you're asking about the merger between Bayer  
3 and Monsanto that is in some sense the fulcrum that the  
4 plaintiffs are operating under. So I'll say just a word  
5 about that. That transaction was what? Was a 2016  
6 transaction and it was in a consolidating industry  
7 where -- and it involved Bayer's -- essentially, its life  
8 science and agricultural division. Bayer is a very large  
9 company. Of course, everyone knows it for its aspirin and  
10 its various health sciences and pharmaceuticals, but it has  
11 a very large, very large footprint in agriculture and life  
12 scientists as well. And the idea of the transaction was to  
13 create scale and scope in a consolidating industry by  
14 pairing Bayer with Monsanto.

15 That transaction was consummated after a fairly  
16 lengthy anti-trust review both in the United States and  
17 internationally and was consummated, I think, in 2018. Yes,  
18 2018. Now, that in some important respect, the merger  
19 itself is fairly traditional. It reflected a large  
20 transaction between two international brands with very  
21 substantial operational and commercial synergies in a  
22 consolidating industry where the industrial logic as it was  
23 reported was to ensure that the brands of both companies  
24 could continue to compete at a high level and increasingly  
25 difficult global marketplace.

## PROCEEDINGS

1                   There were certain divestitures made in connection  
2                   with the transaction as your Honor, of course, knows are  
3                   customary and the merger was consummated more or less along  
4                   the normal course. My friends on the plaintiff's side have  
5                   drawn attention in their pleadings to much of the criticism  
6                   that was made of the transaction. There was criticism of  
7                   the transaction. There was praise for the transaction as is  
8                   often the case and the deal closed.

9                   Now, that --

10                  THE COURT: And the deal itself involved companies  
11                  from -- that are formed where?

12                  MR. SAVITT: Bayer is a German-chartered company  
13                  with its seat in Leverkusen, which I think is spelled  
14                  L-E-B-E-N-K-A-U-S-E-N, and the judicial seat by which I mean  
15                  the court, the regional court that oversees is it is in  
16                  Cologne, Germany. That was one side of the transaction.  
17                  The other side of the transaction was the Monsanto  
18                  Corporation, a Delaware-chartered corporation headquartered  
19                  in Missouri.

20                  After the merger was consummated, there were some  
21                  adverse litigation results associated with the Roundup  
22                  pesticide product. Those lawsuits were all pending in  
23                  California. They were tried by a California jury, by  
24                  California lawyers, presided by a California judge with no  
25                  visible nexus to New York. And I think it's fair to say,

## PROCEEDINGS

1 and I don't want to speak for my good friends on the other  
2 side, but I think it is fair to say that the essence of the  
3 complaint is that the litigation exposures turned out to be  
4 very substantial that gives rise to a cause of action.  
5 Those litigation exposures were all generated in connection  
6 with California legal proceedings here. Again, no nexus to  
7 New York.

8 That I think or I hope, your Honor, supplies some  
9 of the transactional background to the complaint in our  
10 motion to dismiss. There are a few other framing facts that  
11 we think are important.

12 THE COURT: Where is the transaction approved?  
13 And I kind of was hoping you would in light of the basis for  
14 your motion, I kind of was hoping that you'd make a more  
15 substantial record as it relates to how this transaction was  
16 put together, and how the approvals were done, and where the  
17 due diligence took place, and how that relates to the  
18 gravamen of the complaint which is that the board failed to  
19 meet its obligations as it relates to estimating this risk  
20 that we've now talked about.

21 MR. SAVITT: Thank you, your Honor. So let me try  
22 to address that. The board met many, many times. I think  
23 it is fair to say dozens and dozens of times in connection  
24 with the transaction. The board of directors -- let me  
25 step back for a second. There are two boards of directors

## PROCEEDINGS

1 of Bayer because --

2 THE COURT: Right.

3 MR. SAVITT: There's a supervisory board whose  
4 main job in life is to watch the managers and there is a  
5 management board whose main job in life is to manage the  
6 business. Both of those boards are comprised overwhelmingly  
7 of German nationals. They met in Germany. Every single  
8 meeting of the board was in Germany. I can't say that every  
9 person at every board meeting was physically in Germany  
10 because, of course, some of the -- some of the members of  
11 the various boards participated by telephone or video which  
12 wasn't nearly as common in those days as they are now.

13 THE COURT: The situs of all those meet meetings  
14 was in Germany.

15 MR. SAVITT: Yes, the situs of every single one of  
16 the board meetings was in Germany. Now, moreover, the  
17 diligence and I don't -- in response to your Honor's  
18 request to make a record, you have the pleadings in front of  
19 you, which we accept will be taken as true for purposes of  
20 the motion.

21 It is correct that among other advisors, Bayer  
22 hired some New York-based advisors. It is true that there  
23 were some e-mails in and out of New York. It is not true  
24 that any part of the negotiation of the transaction happened  
25 in New York.



## PROCEEDINGS

1                   Let me say that again. It is not true -- it is  
2 not even alleged that any part of the negotiation of the  
3 transaction happened in New York. It is alleged that some  
4 part of the due diligence happened in New York. Whether  
5 that's true or not, we think is highly open to question. It  
6 is not even alleged that all of it took place in New York.

7                   I don't want to fight against the hypothetical of  
8 a motion to dismiss, your Honor, respecting as I do the  
9 pleading standard. But, even on the account of the  
10 complaint, the following is true. None of the members of  
11 the board of direct- -- of the supervisory board is a  
12 resident of New York. Nearly all of them reside in Europe.  
13 The vast majority reside in Germany. None of the meetings  
14 at which this transaction was considered, negotiated,  
15 deliberated upon happened in New York, none of them. All  
16 happened in Germany.

17                   The transaction did not involve a New York company  
18 on either side, not a New York-chartered company, not a New  
19 York-headquartered company. The best that can be said of  
20 the allegations is that there were some incidental contacts  
21 and the hiring of a New York banker with respect to the  
22 transaction. And I think the -- that is a fair statement  
23 of the pleadings and that's a fair statement of the record.

24                   And boiled down, your Honor, that's the ground  
25 that we think that a motion needs to be decided upon because

## PROCEEDINGS

1 we think the law tells the Court what to do in connection  
2 with that. And at the end of it, if we proceed beyond this  
3 motion, there will be a quarrel between the defendants and  
4 the plaintiffs regarding the accuracy of their allegations  
5 about the New York scope of this.

6 We think they've overstated it rather  
7 substantially. However, even taking the pleadings as true,  
8 I think what I set before the Court represents a fair  
9 summary of the pleadings record for the motion. Let me stop  
10 there, your Honor, and ask if that's in a sense responsive  
11 to the Court's question.

12 THE COURT: That's what I wanted you to get at.  
13 Thank you.

14 MR. SAVITT: Thank you, your Honor. And I mean,  
15 just to make a few further points a little bit along the  
16 same lines, not only is Bayer a German company organized  
17 under German law, but the certificate of incorporation  
18 requires that litigation like this be brought in the courts  
19 of Germany, specifically in Cologne, which is why I made  
20 reference to Cologne a little bit earlier. 27 of the 31  
21 individual defendants, your Honor, reside in Europe. None  
22 reside in New York.

23 Additionally, and this is a further point that  
24 goes to several branches of our motion that are already  
25 pending in the German court, securities actions addressing

## PROCEEDINGS

1 the exact same matters as this lawsuit. Those lawsuits have  
2 been brought by New York-based investors represented by  
3 well-known securities lawyers. They are pending where they  
4 are supposed to be pending, in Cologne, Germany.

5 Now, I think what -- there are some background  
6 facts and photos. We have essentially four issues before  
7 the Court in our motion. One having to do with personal  
8 jurisdiction, one having to do with venue, German corporate  
9 law and New York corporate law. I'm happy to march through  
10 them in the order that seems sensible to us, but I'm  
11 particularly interested in what's on your mind.

12 THE COURT: No, we can go through the way that you  
13 want to go through this. I read the papers and I'm very  
14 comfortable with the allegations in this case and any way  
15 that you want to serve it up is fine.

16 MR. SAVITT: Thank you, your Honor. Let me try  
17 and say a word about what strikes us as the highlights with  
18 respect to each of these issues. I'll start with personal  
19 jurisdiction because personal jurisdiction is generally  
20 thought to be a gating item. It needn't be, of course, and  
21 the Court is free to decide this motion on any one of the  
22 four issues that we set in front of it. But, ever since the  
23 first day of law school, we are thought to think of  
24 jurisdiction as a preliminary. So we will talk about it as  
25 a preliminary item. There are --

## PROCEEDINGS

1 THE COURT: Some might say standing might come  
2 before and I know that's probably an issue that you want to  
3 talk to me about, so we can start at personal jurisdiction.  
4 We can start at standing and the internal affairs doctrine  
5 and whether or not BCL displaces the internal affairs. We  
6 can start any way you want. I'm locked and loaded as they  
7 say. I'm ready to go.

8 MR. SAVITT: Ready to go. All right. So we'll  
9 try to keep with you. On personal jurisdiction, there  
10 are -- the issue -- the real issue is whether the long  
11 arms statute 302A captures this case and there are two  
12 branches to that provision. One asks whether the defendants  
13 transacted business in New York and the other asks whether  
14 the claims arose from New York contacts.

15 To get the relief of jurisdiction under the  
16 statute, the plaintiff has to satisfy both pieces, not just  
17 one. So taking the transacting business prong first, the  
18 question is whether a defendant here has what the courts  
19 call a continuing relationship with the forum involving, and  
20 I'm quoting now, "sustained and substantial transaction of  
21 business in New York." It's not an easy test to satisfy.  
22 We cited numerous cases involving contacts much greater in  
23 our view than what's alleged here. We want  
24 to -- I want to draw attention to the Aquiline case.

25 Thank you for the interruption, Madam Court

## PROCEEDINGS

1 Reporter. I know how hard this is for you, so don't  
2 hesitate to interrupt any time that's useful.

3 The reason we say it is instructive is because in  
4 some sense, it seems fairly similar to this case by a big  
5 degree. It involved Belgium nationals that repeatedly came  
6 to New York, negotiated the transaction here, but were still  
7 held to be beyond the reach of the long arm statute. Those  
8 business meetings in New York didn't indicate an intention  
9 to seek out a New York forum said the court and so it just  
10 wasn't enough.

11 Those facts, which were the key facts there, are  
12 ones that just aren't present here. It can't be alleged  
13 that Bayer, its principals, its directors, its managers came  
14 to New York. It didn't happen. Nothing that happened in  
15 Aquiline happened here. And yet that case was held to be  
16 beyond the scope of the long arm statute because those  
17 contacts don't meet the statutory bar.

18 And we have a bunch of cases, your Honor, in our  
19 papers that -- the Paine Webber case and the Spencer Trask  
20 Ventures case, they should control here because the contacts  
21 here, which boiled all the way down, involved the retention  
22 of New York advisors and a meeting after the deal was  
23 entered into between one member of the management board and  
24 then President Elect Trump in New York are far, far in  
25 theory to other series of contacts that were held in

## PROCEEDINGS

1 Aquiline under 302 (a)(1).

2 And it is important to notice and this is  
3 something that I think lends to the briefing, your Honor,  
4 that the plaintiffs don't even try to harmonize their claim  
5 to jurisdiction. They don't even try. What they do instead  
6 is invoke what they call the agency theory of jurisdiction.  
7 The idea is that all of the defendants, the individual  
8 defendants and the entity defendants are subject to  
9 jurisdiction because of incidental contact with New York.  
10 That is to say there was incidental contact and all of the  
11 agents are swept in by virtue of that agency theory.

12 Now, as threshold, there's nothing to solve the  
13 problem that those incidental contacts don't cut it under  
14 the agency theory put in front of the Court. But, even  
15 worse for this theory, the agency principles just isn't  
16 available under these facts. That requires detailed  
17 allegations describing how every defendant controlled the --

18 THE COURT: Are you talking about the Kreutter  
19 analysis?

20 MR. SAVITT: Exactly, your Honor. It just -- it  
21 is an analysis that isn't remotely alleged here and your  
22 Honor has got it and there's just no possible showing that  
23 the agents here who are sought to be brought into court can  
24 be subject to that analysis.

25 I wanted to say a word because I want to go right

## PROCEEDINGS

1 into this issue. It is an interesting one. I know the  
2 Court will be very familiar with the Renren decision.

3 THE COURT: I take it you don't mean the decision  
4 that I issued in the last few days on that case.

5 MR. SAVITT: I do not, your Honor, nor do I really  
6 mean the First Department's affirmance of your lengthier  
7 decision of a little while ago which has a lot of relevance.  
8 I'm sure I'm going to hear about this from our good  
9 adversary. Our view is that that case is a really good case  
10 for us. You know far more about it than we ever will.

11 But, the reason I say that is as your Honor knows,  
12 the pleadings there included really detailed allegations as  
13 to the New York action of every defendant repeated availment  
14 of New York to create a de facto venture capital fund in New  
15 York, reliance on New York law, reliance on New York banking  
16 licenses, approvals by New York regulators, notice  
17 provisions pointed to New York in the relevant contracts.

18 The Court took care to enumerate those contacts in  
19 its analysis. We interpret the Court's care to enumerate  
20 those contacts to seem that they were important to the  
21 analysis just as the precedented courts require. That kind  
22 of factual allegation, your Honor, is completely lacking  
23 here. Nothing close is alleged. Nothing close can be  
24 alleged and that pleading failure, we think, precludes  
25 plaintiffs from establishing that the defendants here

## PROCEEDINGS

1 transacted business in New York within 302(a)(1).

2 I'll say a word about the New York contacts branch  
3 of the inquiry, too, because in some sense, it is even  
4 simpler. The key case as we put in our case is Justice  
5 Scarpula's Poms decision. In response to our invocation of  
6 that authority, the plaintiffs ignored it, made no attempt  
7 to engage it. Plaintiff's position on New York contacts  
8 can't be squared with Poms, we submit, your Honor.

9 The issue there, as the Court knows, is that  
10 plaintiff sought to sue Canadian defendants here, but  
11 plaintiff pointed out to satisfy the contacts requirement  
12 that the company was listed on a New York Exchange and  
13 agreed to New York forum selection provision and  
14 deal-related documents, hired New York advisors.

15 Those contacts again were superior to contacts  
16 here. There is no forum selection provision for New York.  
17 It's to the contrary. Forum was good according to the  
18 documents in Germany and only Germany.

19 The court there, your Honor, had no trouble  
20 holding that the list of unconnected relationships that I'm  
21 quoting now is insufficient to show the required affiliation  
22 between New York and the underlying controversy. Plaintiffs  
23 provided literally no answer to this question.

24 And so we submit that the New York contacts are  
25 very thin, are thinner than those rejected in Poms and



## PROCEEDINGS

1 that's an independent basis to require dismissal.

2 THE COURT: It seems that the decision is  
3 consistent with what Judge Nathan was thinking about in the  
4 Holzman decision when in her dicta in the Holzman decision.

5 MR. SAVITT: Yes, your Honor. We think those  
6 cases are. We rely on them both. We cited them both and we  
7 think they point in the same direction, your Honor,  
8 absolutely. I was going to pass to the forum non issue,  
9 your Honor, if that's convenient to the Court.

10 THE COURT: Sure. That's fine.

11 MR. SAVITT: So forum, your Honor, is a common law  
12 doctrine, but it's been codified in New York in 327 of the  
13 CPLR and it is another threshold issue in a notion that has  
14 many of them as the Court of Appeals set out in the Pahlavi  
15 decision. The boiled down question under 327 is whether the  
16 lawsuit before the court will be better adjudicated  
17 elsewhere. Those are the words of the Court of Appeals.  
18 Then the court set out six factors to guide that inquiry and  
19 we think and we try to set in our papers why all of them  
20 point to dismissal here in favor of German forum non.

21 The first one is whether the lawsuit imposes an  
22 unnecessary burden on New York courts. This case is a  
23 German law case. Everybody knows it is and we understand  
24 and agree that the Court is fully capable of applying German  
25 law.

## PROCEEDINGS

1 THE COURT: Thank you.

2 MR. SAVITT: There is no doubt about that. There  
3 is no doubt about it, but avoiding the burden of doing so  
4 when it is proper under the law is also a good thing, a  
5 virtue. It's something that's been indicated in other  
6 cases. And there are a whole raft of lawsuits as we  
7 mentioned much like this that have been filed in New York  
8 courts, all of which collectively are reasonably likely to  
9 create a burden on this court.

10 A forum non conveniens dismissal here would curb  
11 those filings and spare the justices of this court the need  
12 to hear those foreign cases especially in circumstances like  
13 these where there's already a lawsuit about the same subject  
14 matter seeking substantially the same relief pending in  
15 Germany.

16 The second factor is whether the litigation would  
17 impose a burden on the defendants. The answer is, of  
18 course, it would. Nearly all of the witnesses here would  
19 have to travel from Germany to Centre Street to appear  
20 before the Court. And beyond that substantial  
21 burden -- look, it may be that depositions will be taken in  
22 Germany if the depositions proceed, but when the case is  
23 tried, with any luck, we will be able to get together  
24 downtown and try the case and you are going to have a couple  
25 of dozen Europeans who are coming into this lawsuit and

## PROCEEDINGS

1           there is no way around it. It is a very substantial burden.

2                   And on top of it, and this is as a matter of law,  
3           as an outside of the United States Supreme Court, there is a  
4           unique burden requiring foreign nationals to defend  
5           themselves in our courts. That's the Asahi decision that we  
6           cite in our papers. That's just the burden that we're  
7           trying to-- I think the plaintiffs are trying to impose  
8           here and we're trying to avoid. And here, I will again  
9           point out the fact there is essentially a parallel  
10          litigation in Germany, so there will be the additional  
11          burden of duplicative litigation in circumstances where it  
12          is not necessary.

13                   The third factor under Pahlavi is whether the  
14          lawsuit arises from actions taken in New York. We've talked  
15          a bit about that, your Honor, in discussing factual  
16          predicate and discussing personal jurisdiction. But, to  
17          re-emphasize the claim at the bottom of it here is that the  
18          board members of Bayer didn't take adequate care in  
19          considering the Monsanto deal.

20                   Nearly all of those board members were residents  
21          in Germany or elsewhere in New York every part of the  
22          relevant time period. No board meeting was held in this  
23          jurisdiction. There is no allegation that the board ever  
24          met or deliberated here. Germany was the locus of all of  
25          that activity.

## PROCEEDINGS

1                   The third factor thus points towards dismissal.  
2                   The fourth factor under Pahlavi says where are the  
3                   document's witnesses. Here again, we talked about it. The  
4                   answer is they are all in Germany. The answer is they are  
5                   all in Germany. There is really no alternative way of  
6                   looking at the problem.

7                   The next factor is whether there's an available  
8                   alternative forum. The German courts are an available  
9                   alternative. I've mentioned a couple of times that there is  
10                  another case pending and I think it is an important  
11                  consideration. But, as to Germany, we don't need to guess.  
12                  The First Department has told us that Germany is an  
13                  available alternative forum and this is a point to emphasize  
14                  the Porsche case, Viking Global decision of the First  
15                  Department. In that case, a recent decision, five years  
16                  old, of the First Department.

17                  The First Department held as a matter of law that  
18                  Germany, I'm quoting, "provides adequate alternative forum  
19                  in circumstances very much like these." In fact, this case  
20                  is about as all-fours with that one as you're likely to  
21                  find. Some investors of Viking were unhappy about an  
22                  investment they made in Volkswagen Securities in connection  
23                  with a potential bid for Porsche. The trial court, Justice  
24                  Ramos, here in the commercial division kept the case over  
25                  forum non conveniens motion.

## PROCEEDINGS

1           The First Department reversed. It held that a  
2 smattering a secondary communications and actions just like  
3 these, just like these in New York didn't establish an  
4 adequate nexus in New York, that the great majority of  
5 what's alleged was centered in Germany just like here, just  
6 like here and Germany's courts provided an adequate  
7 alternative forum.

8           That's clear, recent, controlling authority that  
9 says dismissal is in order here, too. We submit, in fact,  
10 that our case is even more compelling given that there is  
11 already a case pending out there and that German law  
12 requires that these cases proceed in Germany. That's  
13 remarkable and we say it is a nullable [sic] concession,  
14 your Honor, that plaintiffs don't even address the Porsche  
15 case. They don't even try to explain how its defense under  
16 forum non conveniens can survive the First Department's  
17 analysis. The reason we think is that there is no answer.  
18 The First Department authority essentially says that this  
19 case does not belong in this court.

20           Finally, your Honor, the last factor, Germany's  
21 interest in adjudicating the matter at issue talks  
22 decisively towards dismissal. Case after case recognizes  
23 the nation's interest in adjudicating questions involving  
24 the internal affairs of its corporation. We cited the  
25 Fernie case where it was held that New York courts should

## PROCEEDINGS

1 defer to the interest of the Bahama court in resolving  
2 corporate governance issues under their law.

3 The Holzman case, your Honor, that we spoke about,  
4 exactly the same effect. Plaintiffs don't try to harmonize  
5 their position in --

6 THE COURT: Admittedly, Holzman is dicta, but I  
7 understand what you're saying.

8 MR. SAVITT: The Holzman case was dictum, but  
9 nevertheless, it is judicial learning on the point that  
10 points in the same direction. What they do instead is they  
11 cite a few other cases without saying how the ones that seem  
12 to control don't. Principally, the HSBC case, the Mason  
13 Mahon case. And here again, the differences provide all the  
14 teaching because there, the wrongdoing that was alleged all  
15 happened in New York.

16 There, the main defendants lived in New York. The  
17 main defendants worked in New York. The corporate  
18 defendants were incorporated in New York. The whole thing  
19 was in New York. So, of course, that's a different case.  
20 The Broida case having everything to do with the lawsuit  
21 happened in New York, everything. Not even disputed. The  
22 only thing pointing anywhere else in that case was the fact  
23 that the corporate defendant was a Delaware-chartered  
24 entity. Here, again, different in nearly every way that  
25 matters to the analysis. Same is true with some of the

## PROCEEDINGS

1 other cases.

2 The differences are so stark between the  
3 plaintiff's principal cases and the facts even that they  
4 allege that we think will confirm the lack of a satisfactory  
5 New York nexus here. They certainly can't do anything to  
6 undermine the clear teaching of Porsche and some of these  
7 other cases or change the analysis under the forum non. I  
8 want to talk a bit about German law derivative standing, but  
9 here again happy to --

10 THE COURT: Before you get there, I would think  
11 that this might be a moment where Ms. Buchwald wants to  
12 weigh in on the forum non analysis as it relates to her  
13 argument that the wrong bank defendants are in this lawsuit,  
14 period, because and as it relates to the engagement letter  
15 and what was in the various engagement letters because I  
16 think what she is going to tell me is that that is an  
17 additional factor that the Court should consider as it  
18 relates to the forum non analysis.

19 Right, Ms. Buchwald?

20 MS. BUCHWALD: Thank you, your Honor. With  
21 respect to our forum non argument, what I would say is  
22 everything that Mr. Savitt just said we agree with  
23 100 percent. With respect to our argument about the wrong  
24 entities, at least analytically the way that we think about  
25 it is that is an independent reason why the bank should be

## PROCEEDINGS

1 out. That under 3211 --

2 THE COURT: I get that, but weren't there  
3 designations in the various engagement letters that the  
4 Court maybe should consider as it relates to a forum non  
5 analysis?

6 MS. BUCHWALD: Correct, your Honor. So that what  
7 your Honor is --

8 THE COURT: That's really what I was asking you to  
9 weigh in on because I thought this was the magic moment to  
10 make that point. I'll give you a bit of time to make your  
11 other arguments, but I just thought that for the purpose of  
12 review, this might be the moment to make that point.

13 MS. BUCHWALD: That's fair, your Honor, and it is  
14 frankly two related points. One is the entities being  
15 non-U.S. entities at least with respect to the B of A  
16 entities that were engaged. That counts as in the same  
17 direction. It is also the fact that the forum selection  
18 clauses point to either Germany or in one case Singapore  
19 against supporting it. So thank you for the opportunity.

20 THE COURT: Let's keep going, Mr. Savitt, on the  
21 standing argument and I think this is where you're going to  
22 talk to me about the internal affairs doctrine.

23 MR. SAVITT: I am, but first I'm going to do a  
24 little detour in the law in central Europe.

25 THE COURT: Go right ahead.



## PROCEEDINGS

1 MR. SAVITT: Thank you, your Honor. The issue of  
2 how German law structures the derivative standing question  
3 is one that the Court needn't reach. It follows only if it  
4 is the right forum and there is jurisdiction, but if the  
5 Court wants to get into those merits, the first issue we  
6 think analytically that comes next is the German law  
7 questions as to whether the case can proceed.

8 There are a lot of obstacles to suit under German  
9 law. Some of them parallel to what we have in U.S. law in  
10 New York. Some are a little different. All of them arise  
11 under the German Stock Corporation Act and the Court has  
12 before it two expert affidavits by Mr. Jens Koch and there's  
13 also an expert report in rebuttal that's been submitted by  
14 our friends on the other side whose name not only escapes  
15 me, but I wouldn't dare try to pronounce. It would be a bit  
16 of delay for all of us.

17 There is a bit of a predicate, your Honor, for you  
18 to take a look at the German law. To be -- to bring a  
19 derivative action on behalf of a German company, a plaintiff  
20 first must be a registered stockholder of the company. The  
21 plaintiffs here are not. The plaintiff must show, must  
22 plead facts showing that before learning of the basis of  
23 their derivative actions, they own shares. The plaintiffs  
24 here have not done that.

25 A plaintiff seeking to bring a derivative claim in

## PROCEEDINGS

1 the name of the German corporation must show it owns at  
2 least 100,000 Euro's worth of company stock. The plaintiffs  
3 here don't allege that either. The plaintiff, and this is a  
4 familiar requirement, must ask the board to bring suit  
5 first. That's essentially the German equivalent of demand  
6 futility. The plaintiffs here didn't do that either.

7 A German derivative plaintiff has to plead  
8 specific facts showing a bases to suspect dishonest conduct.  
9 For the reasons we set out in our papers, that standard  
10 hasn't been met either.

11 And finally, the plaintiff must obtain permission  
12 from a German court before filing derivatively. That hasn't  
13 happened here either. As I say, some number of these things  
14 are very substantially like our rules. They have an echo in  
15 the requirement of being an owner of shares and an owner of  
16 shares at all relevant times, an owner of shares in a way  
17 that's reliable having a significant interest in the matter.  
18 And, of course, the demand futility issue, which the Court  
19 knows to ensure that in most cases, the decision whether to  
20 pursue corporate litigation rests with the board of the  
21 corporation.

22 I don't think it is really controverted that these  
23 are the prerequisites of a derivative suit under German law.  
24 I don't think there is a lot of space between plaintiffs and  
25 us on that. I think it is pretty much black and white in

## PROCEEDINGS

1 the statute. And generally speaking, the plaintiffs don't  
2 contend that they satisfy those prerequisites. In fact, in  
3 their briefing --

4 THE COURT: They do argue demand futility.

5 MR. SAVITT: Fair enough. They say -- they say  
6 demand futility sort of, I'll get to that and they do say  
7 that they are registered shareholders, but they may be sued,  
8 and they say that they have satisfied the appropriate level  
9 of pleading. They do join us on those points.

10 The reason I say what I do about demand futility,  
11 your Honor, is there is this wrinkle that's more a question  
12 of the New York side of the house than the German side of  
13 the house of the two boards. And the relevant question for  
14 suit against all of the supervisory board defendants which,  
15 your Honor, is the vast majority of them, is whether there's  
16 a demand futility as to the management board. And there  
17 just isn't. There just isn't.

18 There's no allegations at all as to three of the  
19 five members of the management board, nothing that can  
20 possibly satisfy the burden there. And there's a question  
21 on the other side of the house as to whether there is  
22 allegation as to the supervisory board for claims against  
23 two members of the management board. But, look at -- as to  
24 the great majority of these factors, the plaintiffs don't  
25 even contend that they've met the German law requirement,

## PROCEEDINGS

1 but they say a portion of the German law doesn't apply.

2 It is pretty well-settled in New York. The  
3 corporate governance questions are governed by the law of  
4 the state where the entity is chartered. That's the  
5 internal affairs doctrine. It is well-settled in this  
6 court, in the First Department, at the level of the United  
7 States Supreme Court and accordingly, over and over, courts  
8 in New York, courts of the commercial division have looked  
9 to the state of incorporation to determine whether a  
10 derivative litigant has met the requirements to standing.

11 As your Honor said in Renren, the company, and I'm  
12 quoting from that decision, was incorporated in the Cayman  
13 Islands. So Cayman Islands law governs the issue of  
14 derivative standing. So, too, here, the company is  
15 incorporated in Germany, so German law governs the issue of  
16 derivative standing. If that's the law on this issue, we  
17 submit the plaintiffs can't possibly meet the bar and they  
18 may know it, too, because what they say is that's not the  
19 law.

20 They invoke Section 1319 of the BCL and claim that  
21 that overrides the internal affairs doctrine and they rely  
22 on the First Department's very brief Culligan decision to  
23 support that proposition. We think the 1319 argument cannot  
24 reasonably be reconciled with the vast, vast bulk of the  
25 cited cases. Justice Cohen --

## PROCEEDINGS

1 THE COURT: I agree.

2 MR. SAVITT: Okay. Well, I won't gild that lilly  
3 in that case if your Honor has had a chance to look at those  
4 authorities. We don't think that's a --

5 THE COURT: I think that I necessarily spoke to  
6 the issue in Renren and Judge Cohen wrote more about it in  
7 his decision and I think that they're conflating  
8 jurisdiction with standing which are two different issues.

9 MR. SAVITT: Your Honor, thank you, and I  
10 won't -- as I said, that is precisely our argument and we  
11 think it is the only way to make sense of this case law and  
12 the text of the statute.

13 So the right way to look at the question of  
14 derivative standing is to look at the law of the state of  
15 incorporation. And there's one other escape hatch the  
16 plaintiffs try to devise for the matter of the German rules.  
17 It has to do with the distinction between procedural rules  
18 and substantive rules.

19 The substantive issue is a German law question.  
20 The issue whether it is procedural or substantive, that's a  
21 New York law question. What does that law tell us? Well,  
22 first of all, the question of derivative standing generally  
23 is substantive. The First Department said so expressly in  
24 the In Re Hakimian case. More specifically, the pre-suit  
25 demand requirement is substantive. The First Department

## PROCEEDINGS

1 told us that in part. The requirement to have registered  
2 shares, that's substantive. This Court said so in the  
3 Aventura case. Minimum ownership requirements, that's  
4 substantive. The Second Circuit said so applying New York  
5 in the Hausman case.

6 There is no viable argument that these German law  
7 requirements can be pushed to the side as procedural. The  
8 best the plaintiffs can muster on this point is to observe  
9 that most of these requirements appear under a heading in  
10 Section 148 of the German Corporation Law that includes the  
11 word "procedure." Leave to the side that the plaintiffs  
12 haven't done anything to show that Germany intended to  
13 deprive all of those provisions by substantive force by that  
14 heading.

15 The point that matters is that whether a standing  
16 requirement is substantive is a question of New York law.  
17 The reason they are substantive, it is not for nothing  
18 they're substantive. The reason is they determine whether a  
19 stockholder has rights and that's what determines under New  
20 York law whether a matter is substantive or procedural. A  
21 heading in a German statute can't change that.

22 Also, to the extent that this is -- this point  
23 should ever have any traction, we should note that the  
24 requirement that the derivative plaintiff hold registered  
25 shares, which the plaintiffs cannot possibly meet here,

## PROCEEDINGS

1 isn't under Section 148. It is not subject to this  
2 argument, this procedure versus substantive argument at any  
3 rate.

4 The one area where the procedure versus  
5 substantive question becomes intricate is in the matter of  
6 the leave of court requirement. Resolving that issue isn't  
7 necessarily a decision because there are so many other  
8 aspects of the German requirement that haven't been  
9 satisfied, but it is an interesting loophole of the law the  
10 Scottish Re HSBC and Aventura decision.

11 They essentially set up the following inquiry  
12 about that requirement about that one issue. What they say  
13 is that if the rule is one that is a court rule, that any  
14 derivative litigant who goes in front of this court needs to  
15 get approval, that's a procedural rule.

16 But, if it is a corporation rule, that anywhere  
17 someone seeks to bring a derivative claim, they need to get  
18 approval of the court. It is a corporate law rule and,  
19 therefore, substantive. It makes a lot of sense ultimately  
20 because one does simply pertain to the procedures of the  
21 court and the other is something that attaches to the rights  
22 of the stockholders and, therefore, substantive.

23 The Aventura decision is actually very -- parses  
24 this issue quite clearly and as we set out in our papers, in  
25 this case, the right answer is that the rule is substantive.

## PROCEEDINGS

1 So I'll stop there on that excursion into German law and see  
2 if you have any further questions on it.

3 THE COURT: I don't.

4 MR. SAVITT: Thank you, your Honor. I'll be quick  
5 with the last issue which is the matter of New York  
6 derivative standing. Putting everything we talked about to  
7 the aside, everything, jurisdiction, forum non, German law,  
8 take a look at New York law. There are two standing rules  
9 that have to be surmounted here before the claim can proceed  
10 even imagining and we think imagining contrary to the right  
11 analysis, that this issue is one that the Court needs to get  
12 to.

13 One is the futility issue and your Honor made  
14 reference to it a little bit ago, and the other is  
15 contemporaneous ownership. Let me address that rule first,  
16 the contemporaneous ownership rule because it is very  
17 straightforward. This is a common law rule. It is codified  
18 at 626 of the BCL and it permits derivative standing only  
19 for plaintiffs who held shares at the time of the legal  
20 alleged wrongdoing and throughout the litigation from  
21 beginning to end.

22 It is a rule that is strictly enforced as the  
23 First Department has made clear. A derivative plaintiff  
24 must make a particularized pleaded showing of ownership at  
25 all relevant times. Plaintiffs here made no showing that



## PROCEEDINGS

1       they owned shares at the time of the action they complained  
2       of. All they do is make a reference to common stock  
3       ownership at the time of the transaction.

4               Let's be clear. The plaintiffs do not plead when  
5       they acquired Bayer shares. They do not allege they owned  
6       shares at the time of the harms complained of. This is a  
7       fatal pleading deficiency, grounds to dismiss without  
8       anything more.

9               The demand futility inquiry, your Honor, is a  
10       little more complicated as it often is. And I know the  
11       Court knows the Marx against Akers case very well. I'll  
12       only say that we're happy to rely principally on our papers  
13       in this matter, but I would suggest that this wrinkle in  
14       German law is one of note because as the affidavits I think  
15       make clear and stands to reason about the structure of the  
16       German law and why there are two boards.

17               The management board can sue the supervisory  
18       board. The supervisory board can sue the management board.  
19       So the question has to be with respect to claims against the  
20       one whether the other board's majority is unconflicted.

21               There is no showing at all as to all of the  
22       supervisory board members that the management board majority  
23       is incapable of bringing suit and was otherwise  
24       unconflicted. That leaves the claims against the two  
25       defendant members of the board of management, Mr. Baumann

## PROCEEDINGS

1 and Mr. Convent. And the question here is whether the  
2 allegations excuse the plaintiff's failure to make demand  
3 upon the supervisory board. They say demand was futile  
4 because it was interested in the Monsanto transaction.

5 Why was it interested in the Monsanto transaction?  
6 Did they get a personal benefit from it? No. Did they have  
7 Monsanto shares? No. Did they hold Bayer shares? Yes.  
8 You might ask where is the interest? Here is where it is.  
9 The conclusory allegation that the board was entrenched. We  
10 cited numerous cases in our opening brief showing that such  
11 conclusory allegations don't clear the bar. Not a single  
12 one of them was addressed.

13 So I'll stop there, your Honor. We have other  
14 arguments under Marx. This is an argument of last resort  
15 that we think the Court needn't get to. I am happy to take  
16 questions on this or any other aspect of our argument should  
17 the Court desire.

18 THE COURT: I think I'm clear.

19 But, Ms. Robinson, is this a moment where you'd  
20 like a minute before we let Mr. Baskin because he's going to  
21 want significant time to address all of this for lack of  
22 better words and if you're going to take two minutes or four  
23 minutes, this is the right moment to do it because,  
24 otherwise, we are going to go for a good hour. Let's take  
25 one minute.

## PROCEEDINGS

1                   Look back and see if you have any questions for  
2                   Mr. Savitt and I'll just check in with my team meanwhile and  
3                   Mr. Baskin could have a minute to see where he wants to  
4                   start.

5                   (Whereupon, a recess was taken.)

6                   THE COURT: I may interrupt you and I may ask some  
7                   questions along the way. Sorry in advance, but I'm going to  
8                   probably do that. I'm all ears.

9                   MR. BASKIN: All right. First, let me ask your  
10                  Honor is my volume understandable or echoing anywhere?

11                  THE COURT: No. I think it's working quite well  
12                  at least for me right now. Ms. Robinson gave us a  
13                  thumbs-up. She's happy and I'm happy and I'm happy that  
14                  she's happy.

15                  MR. BASKIN: I'll try to speak slowly which is my  
16                  native tongue anyway. So as you could imagine, the  
17                  background facts as Mr. Savitt laid them out are we're not  
18                  exactly in agreement with all of that. This was -- this  
19                  transaction is in the top five all-time worse merger and  
20                  acquisition transactions of all time.

21                  This was a \$66 billion cash deal rushed through,  
22                  according to our pleading and in a fairly detailed pleading,  
23                  for among other reasons to deal with the threat of an  
24                  imminent takeover by Pfizer or some other shark as Mr.  
25                  Savitt mentioned several times.

## PROCEEDINGS

1                   At this point in 2016, the industry was undergoing  
2                   a lot of M&A transactions. Bayer was at risk. Bayer was at  
3                   risk. The story starts really with the former CEO Mr.  
4                   Decker. Mr. Decker, as we plead, was against, very much  
5                   against trying to take over Monsanto. There were already a  
6                   number of health issues with Monsanto. World Health  
7                   Organization already had declared its main product to be a  
8                   carcinogenic product. There were career terrific problems.

9                   We plead in some detail, not in just passing  
10                  fashion, about how Pfizer had a big deal cooking. It blew  
11                  up for tax reasons and within days, CEO Decker was out in a  
12                  power struggle. The new CEO Baumann was in and within  
13                  another ten days or so, he was in the office of Monsanto in  
14                  Missouri with a \$60 million cash offer in hand. So this is  
15                  not something that one can just wave away the entrenchment  
16                  motive. The entrenchment allegations are made quite  
17                  particularly.

18                 Now, we also disagree about the New York contacts  
19                 and how New York-centric the deal was. German board members  
20                 were in Germany, yes, but the deal was proposed first in the  
21                 United States. The deal was largely negotiated, according  
22                 to the Monsanto proxy statement, in New York City. Bankers  
23                 were in New York City and I will get to that point in just a  
24                 moment. I'll sidetrack and speak to that.

25                 The lawyers were in New York City and the

## PROCEEDINGS

1 description of how the deal came together in the Monsanto  
2 proxy is Manhattan-centric. As I mentioned, they made it an  
3 all-cash offer and had to put out many billions of dollars  
4 of debt in order to make the acquisition. Much of that  
5 debt, \$15 billion initially, was New York-centric. It was  
6 put out --

7 THE COURT: You're client is not a debt holder,  
8 though, right?

9 MR. BASKIN: No, your Honor.

10 THE COURT: So that debt to do the transaction,  
11 that's not what gives rise to your client's claim, right?  
12 That's not the complaint. It's the transaction itself and  
13 the alleged lack of diligence in connection with the  
14 transaction.

15 MR. BASKIN: It is really two things, your Honor.  
16 It's the entrenchment motive and the debt does play directly  
17 into that entrenchment motive. The way that they created  
18 sort of a poisoned pill was by creating \$50 billion worth of  
19 debt they didn't have before, an amount of debt that would  
20 be very unattractive to a suitor whereas before, they had  
21 very little debt and were very attractive to a suitor. In  
22 order to pull the deal together, they had to --

23 THE COURT: Are you saying that -- I just want to  
24 make sure I understand. Are you arguing that Bayer should  
25 have been acquired by someone else, that that was the

## PROCEEDINGS

1 mistake? Or is the mistake that this particular target in  
2 raising the debt was the problem meaning -- I guess what I'm  
3 trying to understand is the way that I understood the  
4 gravamen of your complaint, it was that this company should  
5 never have been bought. This company had risks. It was  
6 this company that they should have known would have a  
7 problem with the herbicide that gave rise to the allegations  
8 that -- in the litigation and the substantial awards in  
9 California, but it wasn't the debt itself that caused the  
10 problem. In other words, if they had picked another company  
11 that didn't have these problems and taken on this debt, we  
12 might not be here today.

13 MR. BASKIN: I think that's fair to say, your  
14 Honor.

15 THE COURT: Right? Is that fair to say?

16 MR. BASKIN: It is fair to say, but it's not fair  
17 to say that the debt is an issue that's off to the side. It  
18 is a culmination of rushing to the alter with a company with  
19 huge risks, with a background of two failed M&A transactions  
20 already largely because of problems with due diligence  
21 creating the poison pill of \$50 billion worth of debt in  
22 order to buy this company and those two things work  
23 together.

24 Now, just buying Monsanto may not have been a  
25 poison pill and if that was the motivation or a very

## PROCEEDINGS

1 significant motivation, just buying Monsanto may not have  
2 done it. If they had done it with stock, for example, that  
3 may not have taken Bayer off the market. By doing it with  
4 debt, it took Bayer off the market and as chairman Werner  
5 admitted, it --

6 THE COURT: I don't understand that. Are you  
7 saying that that wouldn't have been diluted?

8 MR. BASKIN: If they had done a deal with stock,  
9 it would have been diluted, yes, but --

10 THE COURT: Right. So how would that have been  
11 different?

12 MR. BASKIN: An acquirer would not have had to  
13 take on debt. They could have done a stock for stock  
14 transaction. They could have financed it in other ways, but  
15 when there is pre-existing \$50 billion worth of debt, you're  
16 going to have to take the debt on one way or the other and  
17 that's a big bite to swallow.

18 THE COURT: Okay. I hear what you're saying. I'm  
19 not so sure I see the distinction in that character of the  
20 compensation as it relates to the gravamen of your  
21 complaint, but keep going.

22 MR. BASKIN: Okay. Just the intrinsic motive and  
23 we have about 12 paragraphs early on starting from paragraph  
24 22, I think, in the complaint about just that.

25 Let me back up just a moment and address the bank

## PROCEEDINGS

1 identity issue.

2 THE COURT: Sure.

3 MR. BASKIN: It may be that there were other bank  
4 entities that were engaged. Those letters don't negate the  
5 idea that there were the banks that we have sued, that those  
6 banks were involved. Again --

7 THE COURT: I haven't given Ms. Buchwald an  
8 opportunity to make that argument yet, so if that's where  
9 you want to start, that's okay. But, for the purposes of  
10 just noting for the record, she and I didn't develop that  
11 point really fully. I only let her weigh in on the 327  
12 piece of how that argument fits in, but she didn't really  
13 get into that. But, we can develop that and if she feels  
14 like she wants to address it, she certainly can after you're  
15 finished with the rest of your comments.

16 But, go ahead. Talk to me about where you think  
17 in the complaint you make allegations as it relates to these  
18 particular defendants, that the documentary evidence doesn't  
19 utterly refute as it relates to each specific defendant.  
20 Let's go through the complaint that way.

21 MR. BASKIN: Let's start with Bank of America's  
22 Securities, Inc. and I'm sorry --

23 THE COURT: So let's -- that's NYSCEF 44 on the  
24 second amended complaint?

25 MR. BASKIN: Yes, your Honor.



## PROCEEDINGS

1 THE COURT: No problem. It is NYSCEF 44. Let me  
2 just pull it up and we can go through each one of these  
3 defendants. It is going to take a minute to load. I  
4 apologize. I wasn't expecting this to be our beginning, but  
5 it's fine. I'm not complaining.

6 MR. BASKIN: One of the reasons I'm going --

7 THE COURT: Give me a minute to pull it up. It is  
8 okay. You don't need to explain that to me. It is your  
9 case. You start anywhere you want. I'm here -- you may  
10 not like what I do you. You may like what I do. I don't  
11 know, but we will see where it goes. I think it is 64 of  
12 your complaint, right, where you talk about the -- page 64;  
13 is that right? Is that where it starts about Bank of  
14 America?

15 MR. BASKIN: Your Honor, my complaint is on my  
16 computer and I am not at my computer.

17 THE COURT: It is fine. It is paragraph 102, Bank  
18 of America Securities.

19 MR. BASKIN: Yes, Bank of America Securities, Inc.

20 THE COURT: Paragraph 102, Bank of America  
21 Securities, Inc. and Bank of America Corporation.

22 MR. BASKIN: Right. Some of our information comes  
23 from the Monsanto proxy which of course is filed with the  
24 SCC and has some very detailed descriptions of what  
25 happened. There is considerable discussion about Merrill

## PROCEEDINGS

1       Lynch Pierce Fenn er & Smith, Inc. being one of the primary  
2       due diligence banks on behalf of Bayer.

3               The reason I mention Merrill Lynch Pierce Fenn er  
4       & Smith, Inc. is because that entity became B of A  
5       Securities, Inc. in a transaction after this deal. So  
6       according to that proxy, Bank of America Securities, Inc. in  
7       its prior form was going back and forth in New York City  
8       doing due diligence, valuation work and the like. It is not  
9       a name that we picked out of nowhere. That's where that  
10      came from.

11             THE COURT: Okay.

12             MR. BASKIN: Bank of America Corporation is the  
13      parent and it picks up B of A Securities, Inc. and whichever  
14      other of the several hundred B of A entities were involved.  
15      The public paperwork talked about Bank of America and it  
16      talks about Merrill Lynch Pierce Fenner & Smith, Inc. The  
17      former being a broad designation that we tried to capture  
18      with corporation. The latter being a very specific New  
19      York-based corporation that according to the Monsanto proxy  
20      was heavily involved in the due diligence and negotiation of  
21      the deal. So that's where those came from.

22             Similarly, in the Monsanto proxy, there was  
23      discussion of Credit Suisse AG which is a specific Credit  
24      Suisse entity and that's where we drew that information  
25      from. Now, it may be that there was another Credit Suisse.

## PROCEEDINGS

1 They suggest the New York-based investment bank of Credit  
2 Suisse was involved. That is possibly true, but the fact  
3 that one was involved does not negate that Credit Suisse AG  
4 was involved as Monsanto said.

5 So we had very good reasons and unless the  
6 Monsanto proxy was simply wrong to name those entities, it  
7 may be that we have to name additional entities. But, by  
8 saying that Credit Suisse USA was involved does not negate  
9 that Credit Suisse AG was involved. The reason I went back  
10 there is that all of those entities, B of A Securities, Inc.  
11 is a New York entity. Credit Suisse --

12 THE COURT: Let me stop you. So the allegations  
13 in the complaint are as it relates to the bank defendants,  
14 are that they violated the German Corporation Act. That's  
15 what you tell me in your opposition papers, right?

16 MR. BASKIN: Correct.

17 THE COURT: Show me where in the complaint you  
18 tell me that that's what it is that you say that these  
19 particular bank defendants did.

20 MR. BASKIN: There is a particular paragraph, and  
21 I'm looking through my now scattered notes to find it, that  
22 alleges that Section 117 of the German Stock Corporation Act  
23 is alleged against all of the defendants.

24 THE COURT: Show me where. I see where you  
25 talk -- paragraph 143 of your complaint, where you review,

## PROCEEDINGS

1 cite the different portions of the German Corporation Act  
2 and what you say is as it relates to 117, exertion of  
3 influence of the company in paragraph 144, the corporate  
4 governance provisions of Section 161 of the German Stock  
5 Corporation Act also apply and control as the defendants  
6 were bound by Section 161.

7 MR. BASKIN: It is the 117 allegation, your Honor,  
8 against the bank and we say that that is made against all of  
9 these defendants.

10 THE COURT: Where do you say that, though, and  
11 where do you -- because Section 116 is the duty of care and  
12 responsibility of members of the supervisory board. And  
13 where do you say what it is that you think that they did as  
14 it relates to violating Section 117, what each one of these  
15 entities did? One of the things that the movants tell me is  
16 that you don't do that and I was looking and I had a lot of  
17 trouble finding it.

18 MR. BASKIN: Okay. The 117 allegation itself is  
19 in paragraph 143. Then --

20 THE COURT: 143? The one that I just read you  
21 cite the statute for sure, but what is the allegation that  
22 provide legal basis for their liability? But, you don't  
23 tell me what it is that you did. Don't you have to do that  
24 factually? Don't you have to have a factual allegation that  
25 they violated the statute by doing or failing to do

## PROCEEDINGS

1 something?

2 I mean, I understand where we are in the lawsuit,  
3 but don't you have to tell me that, what, by way of example,  
4 B of A Securities, Inc. did, they did this, they did that,  
5 they did the other thing, they provided -- they led the  
6 board to believe? Don't you have to -- by doing something?

7 MR. BASKIN: Starting at page 114, your Honor.

8 THE COURT: Okay.

9 MR. BASKIN: Let me scroll down.

10 THE COURT: Okay. I'm sorry.

11 MR. BASKIN: I know it is a lengthy complaint.

12 THE COURT: No, it is okay. We get them here all  
13 the time. I know it is our first conversation on any case  
14 at all and I appreciate you -- your patience while we do  
15 this, but I think -- I hope you'll walk away feeling like  
16 okay, I got my day here, the Court took very seriously  
17 saying regardless of what I end up doing page 114, right?

18 MR. BASKIN: Starting at paragraph 197, page 114.

19 THE COURT: Okay. Let me go there. In the wake  
20 of the great stock market crash of 1929?

21 MR. BASKIN: That's where the section starts.

22 THE COURT: That's where you want me to go, right,  
23 the exposure of wrongdoing.

24 MR. BASKIN: It identifies that the banks knew  
25 about Baumann and Werner's desire to avoid being in a

## PROCEEDINGS

1 position where they could be taken over. Going to Baumann  
2 and Werner, hoping to propose the deal, being financially  
3 compromised by having their compensation contingent upon the  
4 closing of the deal and failing in their due diligence in  
5 particular around the litigation risk. It has it in a  
6 number of paragraphs. I suppose it could have been  
7 condensed, but that's the nub of it. It encouraged the  
8 boards to do the deal.

9 THE COURT: Are you suggesting that any time a  
10 bank pitches a deal to a client, that they necessarily will  
11 have liability under Section 117?

12 MR. BASKIN: I'm not.

13 THE COURT: Okay. That's what I'm getting at.  
14 What did these bank defendants do?

15 MR. BASKIN: When they pitch a bad deal that has  
16 an entrenchment motive and fail in the due diligence, all of  
17 which happening with their entire fee contingent on closing,  
18 that set of circumstances we believe states a 117 claim.

19 THE COURT: Are you aware of a situation where the  
20 bank gets paid when a deal doesn't close?

21 MR. BASKIN: I am aware of situations where banks  
22 get partial fees and then success fees.

23 THE COURT: If they are retained as advisors, like  
24 an advisory fee?

25 MR. BASKIN: Right.

## PROCEEDINGS

1 THE COURT: That's different than the pitch to  
2 deal example that I gave, right? Then they're retained for  
3 a particular -- like an investment bank is retained for a  
4 particular purpose and then so the -- I just want to  
5 understand the theory. The theory is that 117 creates  
6 liability whenever -- I'm not so sure I have to reach this,  
7 but I want to flesh out this point for the record. 117  
8 creates liability for a bank whenever they go out and pitch  
9 a deal as opposed to when they are retained in an advisory  
10 capacity by a board. That's the theory?

11 MR. BASKIN: It is an aiding and abetting type of  
12 theory, your Honor, set out in different language because it  
13 is the way the German code works.

14 THE COURT: I see. Okay. That's the theory.  
15 Okay. Keep going.

16 MR. BASKIN: I'll move to another area where I  
17 heard some concern from the Court and that's the Section  
18 1319 argument.

19 THE COURT: Well, I wasn't expressing concern over  
20 the notion. If you got the notion that I thought -- I  
21 think that just because there is an engagement letter, that  
22 necessarily is dispositive of the issue, I don't think that.  
23 But, that isn't my issue as it relates to the allegations  
24 here. I think there is a different problem as it relates to  
25 the allegations here.

## PROCEEDINGS

1 MR. BASKIN: As to the banks you say, your Honor?

2 THE COURT: Right. I'm not so sure I have to  
3 reach that and if I don't, then I'm not going to.

4 MR. BASKIN: Okay. Let me back up then and start  
5 with the internal affairs or Section 1319 issue.

6 THE COURT: Sure.

7 MR. BASKIN: The cases and there are several trial  
8 level cases that have said the internal affairs doctrine  
9 should apply. Most of have not analyzed 1319 at all. The  
10 few that analyzed 1319 or mentioned it simply said well,  
11 1319 is not a choice of law statute and they go no further  
12 than that in their analysis.

13 Again, I would suggest stepping back and saying if  
14 it is not a choice of law provision, what the heck is it?  
15 The provision is that, and it goes back to the 1920s, if a  
16 corporation, a foreign corporation is doing business in New  
17 York, you're going to be stuck with Section 626, Section 627  
18 and a list of others. It is an unusual provision. We point  
19 out in our briefing that only two states, California and New  
20 York, have this kind of provision and a number of courts  
21 that have said what the provision does is reject the  
22 internal affairs doctrine, which after all is a common law  
23 doctrine, and has to give way to statutory law where it  
24 operates.

25 THE COURT: Don't I have to respect the law in



## PROCEEDINGS

1 another jurisdiction as it relates to the state of  
2 incorporation and what laws govern the way the internal  
3 affairs of that corporation work?

4 MR. BASKIN: I think the analysis, and we set out  
5 the restatement of conflicts that says this, where this  
6 state, where New York has a statutory choice of law, it must  
7 be respected.

8 THE COURT: I don't know that this is a conflict  
9 of law issue as it relates to this question. I think I told  
10 you that I think you're conflating two different concepts,  
11 which is the subject matter jurisdiction and --

12 MR. BASKIN: Let me tell you where I think it does  
13 matter, your Honor. So Mr. Savitt argued quite a bit about  
14 the registered stock issue.

15 THE COURT: Sure.

16 MR. BASKIN: I'll have some other --

17 THE COURT: Because it is a derivative thing.

18 MR. BASKIN: Right.

19 THE COURT: Right.

20 MR. BASKIN: Under 626, either an owner or a  
21 beneficial owner of stock has the right to sue.

22 THE COURT: Sure.

23 MR. BASKIN: Mr. Savitt is saying well, forget  
24 that. In Germany, a beneficial owner doesn't have the right  
25 to sue, a beneficial owner being an owner of stock whose

## PROCEEDINGS

1 stock is held by an intermediary. So there, you have a  
2 question does New York law apply or does German law apply.

3 You have 1319 saying this corporation is going to  
4 be subject to Section 626 which is specific ownership for  
5 standing. The German law actually we think is not that  
6 different because the new provisions recognizing  
7 intermediaries as owners, but if there were a difference,  
8 New York law would trump based on that statute as opposed to  
9 the common law choice of law provisions.

10 THE COURT: I hear what you're saying. I can't  
11 say that I agree with you, but I hear what you're saying.

12 MR. BASKIN: It's hard to say, your Honor, where  
13 1319 has any effect at all unless it has that effect. It is  
14 hard to say --

15 THE COURT: Because if there wasn't a substantive  
16 law impediment from another jurisdiction, you wouldn't have  
17 the right to sue necessarily in New York as an individual  
18 owner and you can and the long arm statute gives the court  
19 jurisdiction over even a derivative action of a foreign  
20 corporation provided that you can satisfy either general  
21 jurisdiction or specific jurisdiction, or you can satisfy  
22 statutory requirements, but to have the individual come  
23 forward, that's right.

24 I can't agree with your analysis. I would not  
25 have had to address the fraud on the minority exception in

## PROCEEDINGS

1 the Renren case. I wouldn't have had to do that and you  
2 would be displacing the substantive law of every other  
3 jurisdiction if that were the case and New York is a  
4 powerful state. It is an important state, but it is not  
5 that powerful.

6 MR. BASKIN: With respect -- I'd ask the Court to  
7 look at the German American Coffee case that Justice Cardozo  
8 wrote so many years ago where he said basically yes, we are  
9 and when we say that our law applies, that was specifically  
10 in the context of New Jersey law, and it was a New Jersey  
11 incorporated company, says only the shareholders get to  
12 bring a dividend case.

13 New York law said well, the company can bring it  
14 and Justice Cardozo looked at it and said they have come to  
15 New York. They have consented and that's a big part of it,  
16 is their consent to being bound by the particular New York  
17 laws, 1319 and its predecessors 626, 627 and their  
18 predecessors and that helps explain. And that German  
19 American Coffee case goes into some depth about this entire  
20 consent which is why at least Justice Cardozo and his  
21 successors explained --

22 THE COURT: Sure. I understand what it is that  
23 you're saying and under the circumstances, I understand what  
24 you're saying.

25 MR. BASKIN: Okay. Let me then go through the

## PROCEEDINGS

1 German law. A couple of comments first. Mr. Savitt said  
2 over and over that there is a parallel case in Germany.  
3 There is not. There is no derivative case in Germany.  
4 That's a securities case alleging different things about the  
5 same transaction against different people. So it is  
6 not -- there is a parallel derivative case for breach of  
7 fiduciary duty happening in Germany. There is not. If this  
8 case doesn't go forward, there will be no derivative case in  
9 Europe.

10 THE COURT: Tell me why that's necessarily the  
11 case. Why is that necessarily the case and if this case  
12 doesn't go forward -- well, let's address why you think  
13 that's not the case and let's start with that.

14 MR. BASKIN: Okay. So we go to Section 148 of the  
15 German code and if you look at the structure of Section 148,  
16 it is all about asking permission of the German court to  
17 bring a case in the German court.

18 THE COURT: Sure.

19 MR. BASKIN: There's nothing in there about asking  
20 permission in the German court to bring a case elsewhere.  
21 The prerequisites are the prerequisites to bringing the  
22 petition for permission, not explicitly prerequisites for  
23 bringing the damage case.

24 THE COURT: Doesn't the certificate of formation  
25 require the case to be brought in Germany?

## PROCEEDINGS

1 MR. BASKIN: It does not because a derivative case  
2 is not a case between shareholders and company. It is a  
3 case in which where the shareholders in the company or  
4 effectively on the same side. There is a second reason.

5 German law gives way to European Union Law and  
6 there is a large body of European law and Professor  
7 Mankowski is one of the leading authorities in Europe on  
8 European law and how European law is an overlay to national  
9 law in Europe and the national -- the countries have to  
10 comport themselves with European law.

11 As he says, this kind of case cannot be an  
12 exclusive jurisdiction case in an EU country. There's a  
13 fairly detailed explanation in his affidavit about why that  
14 is. Moreover, he says Germany does not and cannot dictate  
15 to other EU countries what their procedure would be.  
16 Therefore, just as a matter of European law, a German  
17 company derivative case could be brought in another EU  
18 country and that EU country would apply its own procedural  
19 law whether it had a permission requirement or not.

20 Now, the same is true here. It is not exclusively  
21 German both because of the reading of that part of the  
22 charter, but also because that overlay of European law. By  
23 definition, it cannot be exclusively German.

24 Now, if you look at the 148 provision, it says if  
25 you do these things, we'll entertain your request for

## PROCEEDINGS

1 permission, your petition for permission. And if we grant  
2 your petition for permission, you have to bring your case  
3 here in that same court. So it doesn't have  
4 extraterritorial effect. It cannot have extraterritorial  
5 effect and the way the statute is written does not say if  
6 you take your case to France or some other EU country, you  
7 have to meet these prerequisites. It is just not in the  
8 statute, just not statute.

9 Let me talk about some of those. The registered  
10 stock issue, all the stock at Bayer is registered stock.  
11 Now, there is a question of who is the person appearing on  
12 the registration list. In Germany, based on the way they  
13 hold stock there, it generally is the holder, so you get a  
14 stock certificate. You put it in your sock drawer and they  
15 have a list that you've got your name, your birthday and  
16 everything.

17 Seven years ago, Europe -- again, the EU was  
18 having a difficulty with cross-border stock ownership issues  
19 and it issued some guidelines which resulted in German  
20 legislation in 2017. The whole purpose of the European  
21 Union guidelines, directives, actually directives to all its  
22 membered countries was to make it easy for the ultimate  
23 shareholder to exercise shareholder rights no matter which  
24 of the five kinds of stock ownership models were followed.

25 Now, in the United States, most shareholders of

## PROCEEDINGS

1 listed companies hold their shares through the DTC and CD &  
2 Company. That's just the way it is. And France, there's a  
3 different listing and holding convention. There are five of  
4 them. Professor Mankowski goes through them. The European  
5 directive was to make it clear that however you held your  
6 stock, if you were the shareholder, you were the shareholder  
7 and you got to exercise your shareholder rights.

8 And that's what resulted in the 2017 legislation  
9 recognizing that those who held through intermediaries,  
10 which is what our clients are, were shareholders with full  
11 shareholder rights.

12 The Section 67 was amended. We will tell your  
13 Honor that the translation given the Court of the new  
14 Section 67 is not accurate. It was amended to reflect that  
15 the shares had to be in the registry, but not the individual  
16 end shareholder. None of the rest of the statute would make  
17 sense if that were so and the German word for shareholder  
18 does not appear in the sentence that has it. It is a little  
19 bit of a nuance, but German law simply, the old law required  
20 registered shareholders.

21 Now, the new law, because the European directive  
22 allows shareholders who hold through intermediaries. It is  
23 kind of boring, but it's the law and that's where we are on  
24 that one. To say that you have to be a German with your  
25 stock certificate in your sock drawer to sue is just not

## PROCEEDINGS

1 right and it would be discriminatory not only against U.S.  
2 holders, but against holders in other countries in Europe  
3 which the EU just won't do.

4 THE COURT: Okay.

5 MR. BASKIN: Moving to the next issue, again, it  
6 is the permission statute. It is not a statute having to do  
7 with explicitly with standing to bring the damage suit. It  
8 is a statute explicitly having to do with the permission  
9 which is only in Germany, so the contemporaneous ownership  
10 issue. Their real argument is that while you're not a  
11 registered stockholder, therefore, you're not  
12 contemporaneous and you had to be registered before you  
13 learned of the bad acts. There's nothing in the German law  
14 that says that.

15 THE COURT: I don't know -- they say you need to  
16 be an owner I think is the way they put it, but putting that  
17 aside, I had asked you why isn't this case going forward in  
18 Germany. That was my question, remember, just to refocus  
19 our conversation. You can go back to this, but I'm very  
20 curious why you say the derivative action couldn't go  
21 forward in Germany.

22 MR. BASKIN: Let me say that very few derivative  
23 actions have gone forward at all since 2005 when the statute  
24 was passed. The overall reason is that there's a fee  
25 shifting provision that if you don't get permission, you



## PROCEEDINGS

1 have -- the shareholder has to pay for the companies and  
2 the defendant's fees in seeking permission. Secondly --

3 THE COURT: You're saying that because during the  
4 course of the litigation, your clients would have to bear  
5 the cost of the litigation if it were brought in Germany,  
6 the case doesn't go forward? But, if we come to New York  
7 where defendants have to lift their own bell along the way,  
8 we can go forward and, therefore, this Court should take  
9 that into consideration?

10 MR. BASKIN: I think the Court should take it into  
11 consideration. Why one should ask with all that has  
12 happened in the German corporate world over the last several  
13 years, all of the scandals, why is there no derivative  
14 litigation? Because the statute is set up with significant  
15 disincentives to bring derivative litigation there.

16 I think Professor Mankowski said since 2005, there  
17 have been two, two derivative cases brought in Germany under  
18 Section 148. That's not for lack of bad acts or bad actors  
19 I would suggest. It is for extreme incentives because look,  
20 the plaintiff doesn't get anything personally and the  
21 plaintiff puts himself, herself significantly at risk by  
22 bringing the case in Germany. It's --

23 THE COURT: Well, unless the risk calculus is such  
24 that they have a claim or they have made the demand and the  
25 corporation has deemed it in the best interest of the

## PROCEEDINGS

1 corporation to bring the derivative action and to incur the  
2 cost, right?

3 MR. BASKIN: Certainly, the company can say yes,  
4 we will take over this action. We could say in the U.S.  
5 even with very meritorious suits, that rarely ever happens.  
6 It rarely happens because --

7 THE COURT: Sure.

8 MR. BASKIN: -- the directors having to say we  
9 made a mistake --

10 THE COURT: But isn't that the whole point of the  
11 advisory, though, here, to watch over the board and to make  
12 that decision?

13 MR. BASKIN: The point of the demand here is to  
14 give the board the chance to correct the problem.

15 THE COURT: Isn't that what the advisory -- there  
16 are two boards, right? So one board is supposedly --

17 MR. BASKIN: Actually, we disagree with that, too.  
18 Yes, there is a board of supervisors and a board of  
19 managers. There's nothing in the German statute suggesting  
20 the board of managers which is really another word for the  
21 management team, the CEO, the CFO, the people who operate  
22 the company. There's nothing in the German statute giving  
23 them the right to go bring suit against the board of  
24 supervisors. And imagine since --

25 THE COURT: That doesn't make sense. Why would

## PROCEEDINGS

1           they?

2                   MR. BASKIN: That's not their job, is to bring a  
3           suit against the supervisors, the people that hired them.  
4           German law doesn't require suicide missions and what they're  
5           saying --

6                   THE COURT: Neither does New York.

7                   MR. BASKIN: Right. They're saying three of  
8           the -- the three junior executive members of the management  
9           team, I guess they are saying, should have teamed up and  
10          said we're going to sue Werner Baumann and Vinna [sic] and  
11          all the board of supervisors for the deal that was sort of  
12          the crowning achievement for good or for bad of their  
13          careers. And which, by the way, even before we filed the  
14          suit, management and the supervisors had heavily defended  
15          the deal.

16                   Here's a point. At a shareholder meeting, the  
17          shareholders voted a vote of no confidence against  
18          management. Never happened in German corporate history  
19          before. 55 percent voted no confidence based on this deal  
20          and they still said we don't care. We think it is a great  
21          deal. We're going forward. So the idea that the board of  
22          managers --

23                   THE COURT: Sounds look a very compelling argument  
24          to make to the court in Germany as to why the suit should go  
25          forward, right?

## PROCEEDINGS

1 MR. BASKIN: If someone wants to stand up and take  
2 on that burden with the fee shifting and the other problem  
3 going forward in Germany, fine. Our clients are not and I  
4 have not seen anybody else do that. If there are actually  
5 parallel litigations there, if there are actually a  
6 derivative case there, in this case, I mean, one being one  
7 of the worse M&A deals with the loss of 50 or \$60 billion in  
8 market cap, if that doesn't get a derivative case in  
9 Germany, what will? What will?

10 THE COURT: Wouldn't it be interesting to find  
11 out?

12 MR. BASKIN: Well -- but who's going to risk it?

13 THE COURT: Isn't this -- isn't this the test  
14 case?

15 MR. BASKIN: It could be the test case if there  
16 was somebody willing to take that expense and that risk for  
17 no personal gain for themselves. The incentive structure is  
18 set up, so that it is virtually unheard of.

19 THE COURT: So you're asking me to hold that as a  
20 matter of law that Germany does not provide an adequate  
21 forum for derivative actions involving German companies  
22 because the cost of maintaining those actions in Germany is  
23 an effective barred litigation? That's what you're asking  
24 me to do. And I can tell you right now there are no chances  
25 of that happening today here at 60 Centre Street, period.

## PROCEEDINGS

1 MR. BASKIN: I understand that, your Honor. But,  
2 not as a matter of law, but as a matter of fact and  
3 practicality, we have history --

4 THE COURT: Let's talk about forum non. Let's  
5 talk about personal jurisdiction and forum non and  
6 let's -- we have to get to the heart of what's likely to be  
7 the critical issues that I need to consider at this stage of  
8 the litigation.

9 MR. BASKIN: Right. Indulge me for a moment.

10 THE COURT: It is okay. Take your time. We have  
11 time.

12 MR. BASKIN: Personal jurisdiction, we largely  
13 agree on. On the agency theory --

14 THE COURT: Let's do the Kreutter discussion. So  
15 that's where I go back to my concerns particularly as it  
16 relates to the bank defendants as to the specific  
17 allegations to satisfy Kreutter. Don't you need them?

18 MR. BASKIN: I think we -- personal jurisdiction,  
19 these are New York residents that we have sued.

20 THE COURT: Well, you said on the agency theory.  
21 I thought we were talking about --

22 MR. BASKIN: With regard to the Germans, their  
23 agents in New York.

24 THE COURT: I'm sorry. I apologize. I apologize.  
25 Go ahead.

## PROCEEDINGS

1 MR. BASKIN: As to the banks that we have sued,  
2 they are New York residents or banks with heavy, heavy New  
3 York --

4 THE COURT: I understand that. You don't need to  
5 spend time on that. I misspoke.

6 MR. BASKIN: Okay. As to the Germans, we go back  
7 and recall there are only two basic sets of allegations.  
8 One, the entrenchment allegations and second, the terrible  
9 due diligence allegation and really we think they go hand in  
10 hand if one is so enthralled of making the deal in order to  
11 create a poison pill, in order to entrench. One might not  
12 ask the hard questions even though the hard questions about  
13 legal risk are out there to be seen. Everybody says how did  
14 they miss the legal risk. How did they end up in a  
15 situation where \$50 billion of market cap is lost.

16 Effectively, the entire purchase price of Monsanto  
17 is lost in terms of market cap because of legal risk that  
18 should have been much better identified during due  
19 diligence. And if there were no entrenchment motive should  
20 have been identified as a deal stopper during due diligence  
21 particularly when it was over a two-year period. There were  
22 various points, and we identify in the complaint, when a  
23 board and management should have said this is too risky. We  
24 don't know enough. We can't finalize the deal.

25 Now, who was doing the due diligence? Lawyers in

## PROCEEDINGS

1 New York, bankers in New York. German supervisors weren't  
2 doing it themselves. They had obligations, but they had the  
3 bankers and the lawyers do it. Maybe took too much from  
4 Monsanto itself. The description --

5 THE COURT: Wasn't their analysis done in Germany?  
6 If they were dissatisfied with -- wasn't their alleged  
7 failure when they reviewed whatever materials came to them,  
8 the failure to ask questions and say hey, this is not  
9 sufficient? This doesn't answer our question. I mean, they  
10 certainly would not be meeting their obligations by blindly  
11 accepting whatever materials came in and whatever  
12 recommendations they may have gotten from their third-party  
13 professionals, right? They'd have to do their own analysis  
14 to meet their own duty of care.

15 MR. BASKIN: There's no indication they did so.

16 THE COURT: That's not what I'm asking, though.  
17 That analysis, that what the board did, didn't that take  
18 place in Germany?

19 MR. BASKIN: What the board did or didn't do?

20 THE COURT: Right. Or didn't do. I'm sorry. I  
21 wasn't trying to --

22 MR. BASKIN: To be sure, most of the supervisors  
23 were in Germany. Although, the chairman and the CEO were  
24 often in New York, closed the deal in New York.

25 THE COURT: The fact that the papers were

## PROCEEDINGS

1       exchanged in -- so the due diligence on this company that  
2       is not a New York-based company took place presumably, as it  
3       relates to that company, by the professionals by reviewing  
4       the company's records, war, that was set up for the company,  
5       all of that sort of a thing in the context of the M&A deal  
6       and I'm just --

7               MR. BASKIN: All of that was in New York. All of  
8       that was in New York.

9               THE COURT: Well, except for the board didn't meet  
10      in New York. It didn't go to the war room. It didn't do  
11      any of that in New York. It -- I'm uncompelled by the  
12      raising of the debt argument. That, to me, is a  
13      non-starter, but as it relates to the -- in terms of  
14      contacts because I don't think that that gives rise to the  
15      same things that you do for all of the reasons we discussed  
16      at the beginning of our colloquy.

17              But, as it relates to the diligence and the  
18      decision making of the board which forms the gravamen of  
19      your complaint, I think that the -- if the board met in New  
20      York less the transaction in New York, if the board  
21      regularly got together in New York, then we would be talking  
22      about the kinds of contacts that would have given rise to  
23      your allegations.

24              The fact that reports were prepared here and  
25      experts come from here as it relates to a company outside of



## PROCEEDINGS

1 New York and then was sent off to Germany for review and  
2 determination and approval in meeting their fiduciary  
3 responsibilities under German law, I'm having trouble  
4 understanding why that's a New York contact for the purposes  
5 of this analysis.

6 Because let's say by way of example, and I don't  
7 obviously have the discovery or whatever. Let's say that  
8 one of the advisors highlighted the potential risk in your  
9 best case scenario and the board went ahead and made a  
10 decision anyway to go forward.

11 That's your extremely right now as it relates to  
12 evidence supporting your client's claim, very happy. Let's  
13 say it is the opposite. That there was nothing that was  
14 disclosed to this board, but the report specifically didn't  
15 investigate certain things and it specifically says in the  
16 report we didn't do -- we didn't look at this or that or  
17 the other thing, this product and one of the products they  
18 didn't look at is the one that caused all of the issues.  
19 And in doing the moonshot, the decision not to go back to  
20 the advisor and say no, you need to get information about  
21 that is really what this ultimately comes down to.

22 That decision isn't made here is what I keep  
23 coming back here. That decision is made in Germany. That's  
24 what you're really upset about, right, is that the  
25 supervisors didn't ask enough questions or when they did

## PROCEEDINGS

1 answer the questions, got answers to their questions, the  
2 questions that they got were so unsatisfactory, right, that  
3 they could not have reasonably gone forward with the  
4 transaction and meeting their duty of care under the  
5 circumstances, right? That's essentially what you're  
6 saying.

7 MR. BASKIN: What I'm saying is that people doing  
8 the due diligence were their agents and 302 talks about  
9 agents. It doesn't require the supervisors to have been  
10 physically in New York as they were performing that  
11 function.

12 THE COURT: Okay.

13 MR. BASKIN: Some of the questions you're raising  
14 are very good questions, but they're questions for discovery  
15 including, if necessary, jurisdictional discovery. Your  
16 positing this and you're positing that.

17 THE COURT: I'm just asking you questions as to  
18 where you think the injury took place is really what I'm  
19 getting at.

20 MR. BASKIN: The injury took place in New York  
21 because that's where the due diligence was done. That's  
22 where speaking to some of the forum non conveniens issues,  
23 the documents are on due diligence, the witnesses are on due  
24 diligence, where the discovery would be done on due  
25 diligence, and due diligence is really very much at the

## PROCEEDINGS

1 center of the case.

2 THE COURT: Okay. Keep going. Then I'm going to  
3 let Ms. Buchwald address what she didn't get a chance to  
4 address and then I'm probably going to think about this for  
5 a little bit.

6 MR. BASKIN: Okay. I could speak for sometime on  
7 doing business aspect of 1319. I have a sense the Court is  
8 not particularly interested in that right now.

9 THE COURT: I respectfully disagree. As it  
10 relates to the interplay and whether or not the internal  
11 affairs doctrine has been set aside by statute, I don't  
12 agree with that. The law is settled.

13 MR. BASKIN: I hear you. I will agree to  
14 disagree.

15 THE COURT: That's why I said we will agree to  
16 disagree.

17 MR. BASKIN: On demand futility, I will be quick  
18 on that. We meet the Marx test. We meet the HSBC test. Is  
19 there really some reasonable chance that they could have  
20 acted impartially? More than that, by the time this lawsuit  
21 was filed, we met the common sense test with the board and  
22 supervisors already having been challenged on the  
23 transaction at the annual meeting, already having withstood  
24 a vote of no confidence, and already having said we hear  
25 you, we disagree, we're not going to do anything.

## PROCEEDINGS

1 We have a number of paragraphs in the complaint  
2 starting at paragraph 287 about demand excused, but that  
3 really is the nub of it. As to the forum non conveniens  
4 factors, again, there is no parallel suit. There is no real  
5 realistic possibility of this suit going forward in Germany.  
6 History shows it both specific to this case and over the  
7 last 16 years since the derivative device was passed in  
8 Germany.

9 I think the other factors particularly with the  
10 New York plaintiff and the difficulty of throwing a case out  
11 on forum non conveniens grounds with a New York plaintiff,  
12 they have simply not met the test. I think this is a good  
13 point for me to pass and I may have a couple of closing  
14 comments, but the if the Court has any further questions, I  
15 will be happy to entertain them.

16 THE COURT: I don't. I think that the big issues  
17 that I will be thinking about relate to forum non and  
18 jurisdiction.

19 All right, Ms. Buchwald. I am all ears. It is  
20 your turn. You have been very patient. I appreciate that.  
21 So do your colleagues.

22 MS. BUCHWALD: Thank you, your Honor. Can you  
23 hear me okay?

24 THE COURT: I'm good.

25 MS. BUCHWALD: For the record, Lara Samet Buchwald

## PROCEEDINGS

1 from Davis Polk & Wardwell on behalf of Bank of America  
2 Corporation and B of A Securities, Inc. I am with Joe  
3 Kurtzberg from Cahill Gordon & Reindel on behalf of Credit  
4 Suisse AG and Credit Suisse Group AG. And for efficiency  
5 purposes because our motions were made together, I'll be  
6 arguing. But, if Credit Suisse has specific questions, Mr.  
7 Kurtzberg is here and will be happy to answer them.

8 I want to start with the wrong entity issue in  
9 part because I think it is a gating one. Starting with the  
10 Bank of America entities, Bayer engaged two entities. It  
11 was Bank of America Merrill Lynch International or BAMLI,  
12 which is a U.K. entity and a Frankfurt branch of that U.K.  
13 entity and they engaged DSP Merrill Lynch which is an Indian  
14 entity. Those entities weren't named as defendants. They  
15 are not here. I don't represent them.

16 But instead, plaintiffs named the two entities  
17 that are on the caption. They named Bank of America  
18 Corporation which is the ultimate parent which doesn't  
19 provide advisory services generally and wasn't engaged to  
20 provide advisory services here. And they named B of A  
21 Securities, Inc. which is a New York sub of BAC which,  
22 again, wasn't engaged in provide any services here.

23 There was a similar pattern with respect to Credit  
24 Suisse. Only one Credit Suisse entity was engaged. That's  
25 Credit Suisse Securities USA, L.L.C., but instead, the

## PROCEEDINGS

1 plaintiffs named two Swiss entities, Credit Suisse AG and  
2 Credit Suisse Group AG.

3 I want to pause on that point because while  
4 plaintiff keeps saying they engaged New York banks, the  
5 Credit Suisse defendants in particular are Swiss and they  
6 made a personal jurisdiction motion as well.

7 THE COURT: Right.

8 MS. BUCHWALD: And so the --

9 THE COURT: Just to focus where I think  
10 this -- you could provide some clarity for the record --

11 MS. BUCHWALD: Sure.

12 THE COURT: -- so one of the things that Mr.  
13 Baskin discussed was he said in the Monsanto papers, they  
14 identify the predecessor and interest to your client as  
15 having been an advisor on the transaction. Can we look at  
16 what he attaches to his papers, which I think is NYSCEF 170,  
17 and we can take a look at that and you could help me  
18 understand? I think -- go ahead.

19 MS. BUCHWALD: It is 170 and I have it open. It  
20 is pages 31 and 32 by the proxy page numbers is what I'm  
21 looking at.

22 THE COURT: Give me one second.

23 MS. BUCHWALD: Sure.

24 THE COURT: Do you have the PDF number or no?

25 MS. BUCHWALD: The PDF number --

## PROCEEDINGS

1 THE COURT: It is okay if you don't.

2 MS. BUCHWALD: At the bottom of the page, it looks  
3 like it is 38 of 194 and 39 of 194. Would that help? I  
4 have it open electronically.

5 THE COURT: We'll see. Give me one second. So  
6 the bottom of the page, I have -- you said 38?

7 MS. BUCHWALD: 38 of 194 is at the bottom.

8 THE COURT: Sure. I'm right there. 38 of 194.

9 MS. BUCHWALD: So I think a couple of threshold  
10 points before we get to NYSCEF 170. I want to make sure I  
11 adequately explain what our thinking is before we get there.  
12 The first is the buyer engaged the banks and those  
13 engagement letters are in the record. They are clear.  
14 They're unambiguous. Not Monsanto.

15 Number two is that there is a whole wealth of case  
16 law out there that talks about, for example, the use of  
17 trade names and how that in and of itself isn't sufficient  
18 to pierce the corporate veil. What this argument really is  
19 nobody is using the word, but it is a veil piercing argument  
20 that they're trying to advocate to bring in affiliates and  
21 parents as --

22 THE COURT: I'm not sure -- see, I thought that,  
23 too, when I first read the papers and that's why I think  
24 that going through the statement here on when it was issued  
25 and all of that is important because he points to Merrill

## PROCEEDINGS

1       Lynch Pierce Fenner & Smith, Inc., and then he defines it B  
2       of A, Merrill Lynch. He says that's really your client is  
3       what he says to me.

4               Right, Mr. Baskin?

5               Just to make sure I'm not missing because I want  
6       you to address this and I want to make sure I got this.

7               Right, Mr. Baskin, that's what you're essentially  
8       looking at?

9               MR. BASKIN: Yes, specific Merrill Lynch Pierce &  
10       Fenner, Inc. which became in a reorganization B of A  
11       Securities, Inc.

12              THE COURT: I got it. So that's what he's looking  
13       at and he says well, look, this statement was -- went out  
14       and here is the detail of the transaction. That necessarily  
15       means that your client was involved.

16              MS. BUCHWALD: Yes, and, your Honor, what I would  
17       say is this. We have a June 25th conversation where Merrill  
18       Lynch Pierce Fenner & Smith, Inc. is then defined as B of A  
19       Merrill Lynch. You also have on the next page a July 16th  
20       conversation where Credit Suisse AG is defined as Credit  
21       Suisse.

22              THE COURT: One second. B of A Credit and Suisse  
23       AG. Sure. Got it.

24              MS. BUCHWALD: Again, I think the important point  
25       is Monsanto didn't engage any of the defendant banks. It



## PROCEEDINGS

1 was buyer that engaged them. And then with respect to these  
2 specific conversations, there are two conversations that are  
3 being identified which aren't anywhere in the complaint.

4 THE COURT: Well, that's a different issue, right?  
5 That's what I was getting at in terms of the specific  
6 factual allegations, right?

7 MS. BUCHWALD: And your Honor, I think that's  
8 important, right, because what we get to it essentially and  
9 I understand this is the way that you were looking at it,  
10 but it is certainly the way we are looking at it, which is  
11 that we have a complaint that names these four bank  
12 defendants and we have the engagement letters that make  
13 abundantly clear that none of those four were ever engaged  
14 to do this work.

15 THE COURT: That proves too much, right? That  
16 doesn't necessarily mean that other entities didn't provide  
17 advisory services. The fact that the engagement  
18 letters -- that argument respectfully, I don't think that  
19 that gets you where you need to get to. But, it's certainly  
20 prima facie evidence that these were the specific entities  
21 that were engaged for the purpose. But, I don't think you  
22 necessarily get to say hey, look, no one else was involved  
23 period, full stop, based on these letters.

24 MS. BUCHWALD: I think the important point is this  
25 was never pleaded and so you have an excerpt of a proxy

## PROCEEDINGS

1 attached to an opposition brief and they're trying to use  
2 that as a basis to belt and suspenders their naming of  
3 defendants in the pleading.

4 We don't think that's an appropriate way to do it.  
5 We don't think it circumvents their other pleading failures.  
6 And to make a clearer point about it, I want to quickly go  
7 to what I think is our 3211(a)(7) prong, the absence of  
8 allegations against the bank defendants, because I think --

9 THE COURT: We -- I talked about that with Mr.  
10 Baskin, the fact that he cites the statute and says that  
11 liability arises under the statute without specifically  
12 telling me which bank did what. I think that's a problem.  
13 Even under notice pleading standard, I think that that's a  
14 problem.

15 MS. BUCHWALD: Your Honor, we do, too. I think  
16 paragraph 143 to which they point which just has a block  
17 quote of the statute doesn't in any way put us on notice.  
18 But, I think we would go one step forward to say notice  
19 isn't the touchdown. It is actually particularity because  
20 these are fiduciary claims which require a heightened level  
21 of pleading.

22 There is another technical piece of this as well  
23 which is if you look at CPLR 3016, and when you talk about  
24 the absence of tying it together, 3016 (e) says that when  
25 you rely on foreign law, it has to be expressly stated in

## PROCEEDINGS

1 the pleading. And while they have the one block quote,  
2 there is nothing in there and I have done multiple reads  
3 through this complaint to try to find it.

4 There's nothing in there that says Section 117 is  
5 our doctrinal hook for our claim against the banks. It is  
6 just not there and so we think that's a real problem, which  
7 kind of leads us to a bit of head scratching, right. What  
8 are their claims and what are they trying to say and I  
9 would -- at least I heard three things maybe from  
10 plaintiffs earlier. The first is that there is some sort of  
11 per se conflict of interest when financial institutions  
12 perform both advisory work and financing work.

13 THE COURT: That doesn't work.

14 MS. BUCHWALD: It doesn't work. It doesn't work  
15 under New York law. They cite Delaware law. It doesn't  
16 work under Delaware law either.

17 THE COURT: It is just not the way deals are done.

18 MS. BUCHWALD: Exactly. Exactly.

19 THE COURT: I understand.

20 MS. BUCHWALD: The second claim that they seem to  
21 say well, we got 117 and all that requires is exerted  
22 influence and we've pleaded that. We don't think they've  
23 pleaded that each of those four entities exerted any  
24 influence, number one.

25 Number two, and this is a point that we made in

## PROCEEDINGS

1 our reply, they haven't cited a German law expert for  
2 anything with respect to Section 117. They --

3 THE COURT: That's the problem, too, isn't it?

4 MS. BUCHWALD: There's not a single sentence about  
5 117. There is not a single sentence about the law, about  
6 the claims against the banks.

7 And then you get to the third problem with 117 is  
8 we actually think they misquoted. The interpretation that  
9 they cite which has a standard of exert influence is quite  
10 different from the German interpretation that we have seen  
11 which requires that it be an intentional compulsion.

12 THE COURT: Yeah, I don't know that I could  
13 resolve that discrepancy between the experts at this stage,  
14 but I understand what you're saying.

15 MS. BUCHWALD: And I acknowledge that and I think  
16 that part of that points to the forum non analysis, right?  
17 We have all of these conflicting interpretations of what  
18 German law should be and how it should be construed and we  
19 are left with a whole bunch of what are they claiming  
20 against us and what are we supposed to do about it. So it  
21 is a bit of shadow-boxing to try to respond to each of the  
22 arguments.

23 I do want to respond quickly to two quick points  
24 on forum non. I recognize we already covered the  
25 waterfront, but let me make two points. First was the point

## PROCEEDINGS

1       that Germany isn't an adequate forum for shareholder  
2       derivative cases. I think Mr. Savitt covered that well in  
3       his citation to the Porsche case, which is the Viking case,  
4       was spot on.

5               But, I think the Porsche case is illustrative for  
6       the point that that has been proceeded on to shareholder  
7       derivative litigation in Germany right now. It is a matter  
8       of public record. It is still going on. And so while I'm  
9       not a German law expert and obviously buyer's German law  
10      expert has said many things about what is going on in  
11      Germany, that case not only stands for the proposition that  
12      a German forum is adequate, it also proves or disproves the  
13      point that there are no German shareholder litigations going  
14      on.

15             The second point on forum non that I wanted to  
16      make is I heard a number of times during this argument that  
17      all the diligence happened in New York, all the diligence  
18      happened in New York. Respectfully, that's nowhere in the  
19      second amended complaint. And other than the handful of  
20      references in the proxy to which were referenced, which  
21      identify a U.S. entity, we don't see anything that supports  
22      that argument.

23             And so instead what we're left with are three  
24      dozen defendants, the vast majority who are overseas  
25      defendants. We are left with boards that operated in

## PROCEEDINGS

1 Germany. We're left with a German forum that's perfectly  
2 well-equipped to do this. And I think one of the things  
3 that I do when I try to reconcile the various German law  
4 declarations, I see a very specific, very intentional, very  
5 planful statute trying to prescribe how these litigations  
6 are to be handled. And so I'm happy to answer any questions  
7 your Honor has, but trying not to tread over ground that  
8 others have already covered.

9 THE COURT: That's fine.

10 Mr. Savitt, was there anything that you wanted to  
11 address before I let Mr. Baskin say one more thing?

12 MR. SAVITT: Only very briefly, your Honor. Thank  
13 you for the Court's indulgence. Picking up on a point or  
14 two that my colleague just made, first to say the Porsche  
15 case really is a huge obstacle and it has become even more  
16 so listening to Mr. Baskin present his case.

17 Ms. Buchwald is entirely correct. There is a  
18 derivative action. Mr. Baskin drew a lot of attention in  
19 his discussion with the Court to the fact that the plaintiff  
20 here or one of them is a New York resident. So, too, in  
21 Porsche was a New York resident. First Department ruled  
22 that Germany was an appropriate forum and it was. And the  
23 real point about the parallel proceedings even in this case  
24 are that you can go to Germany. Relief is available in  
25 Germany and boiled all the way down, plaintiff's case on

## PROCEEDINGS

1 forum non is to say that Porsche was decided wrong and it  
2 wasn't as a practical matter and certainly wasn't as a  
3 matter of law.

4 It is the law of the First Department and it bears  
5 observation that to the extent what's being said here is we  
6 need to export U.S. litigation on German fiduciary matters  
7 by importing German defendants. That's exactly the  
8 proposition that the sixth forum non-factor is designed to  
9 obviate. As a matter of comity and respect, Germany is a  
10 sovereign state. It has an advanced economy of course. It  
11 has elaborate and well-respected corporate governance  
12 devices and they do provide an alternative forum.

13 THE COURT: I just keep coming back to this case  
14 strikes me as exactly what Judge Nathan was concerned about  
15 in the Holzman case as it relates to just a single  
16 unconnected step in a series of different things that  
17 happened, but where the gravamen of the real harm happened  
18 elsewhere. I just --

19 MR. SAVITT: I think that's entirely right and the  
20 only other observation I wanted to make is and it follows on  
21 the Court's remarks is it connects a little more with the  
22 Kreutter analysis is to say that this case is about what the  
23 board of Bayer did or didn't do.

24 THE COURT: Right.

25 MR. SAVITT: That board did or didn't do what it

## PROCEEDINGS

1 did or didn't do in Germany. There is --

2 THE COURT: It didn't come here to do it. I mean,  
3 that's what's so critically important, I think, as it  
4 relates to this case is that they didn't come here to close  
5 the -- the board didn't show up in New York and meet and go  
6 through the war room and that's not what happened here.  
7 That's just not what's alleged.

8 MR. SAVITT: It is not what's alleged because it  
9 couldn't be alleged. It didn't happen. If the Court has  
10 questions, we are happy --

11 THE COURT: I really don't. I just don't see that  
12 in doing this deal -- I'm going to think about it, Mr.  
13 Baskin. I'm going to let you say what you want to say to  
14 me, but I question seriously whether or not you have  
15 personal jurisdiction over the individual Bayer sup- -- I  
16 don't respectfully question it, but I'm substantially  
17 concerned about this case being litigated here in New York  
18 because I don't think it belongs here.

19 There isn't the kind of purposeful availment of  
20 the New York forum as it relates to the specific harm that  
21 you're alleging, sir. Our nexus is very small. We have a  
22 very, very low interest in this case and the burden of this  
23 Court is -- would be substantial in managing this  
24 litigation. All right, Mr. Baskin, I'll hear what you have  
25 to say.



## PROCEEDINGS

1 MR. BASKIN: I will wrap up fairly quickly. First  
2 of all, I'd say again that German law is explicitly  
3 non-exclusive, non-exclusive. They don't pretend to have an  
4 exclusive hold on these cases. Secondly, this transaction  
5 did close in New York. Virtually everything that happened  
6 in terms of the due diligence happened in New York. The  
7 agency leg of personal jurisdiction either --

8 THE COURT: You said closed in New York. Let's  
9 get more granular. So Monsanto, where are they located?

10 MR. BASKIN: Missouri.

11 THE COURT: So when the consideration flowed from  
12 Bayer, where did it flow to?

13 MR. BASKIN: Flowed to New York.

14 THE COURT: Where did it flow to ultimately?

15 MR. BASKIN: Most of the consideration was in the  
16 form of these bonds and notes raised primarily here in New  
17 York and it flowed through --

18 THE COURT: Where the money came from isn't the  
19 issue. The issue is where did it go to.

20 MR. BASKIN: It went through the New York closing  
21 bank ultimately to the former shareholders of Monsanto all  
22 around the country.

23 THE COURT: All around the country, right.

24 MR. BASKIN: All around the country --

25 THE COURT: All around the country.

## PROCEEDINGS

1 MR. BASKIN: Right.

2 THE COURT: Right. Where did the shares go of  
3 Monsanto, Germany?

4 MR. BASKIN: No. Monsanto is still a Bayer  
5 subsidiary.

6 THE COURT: They own stock now of Monsanto, right?

7 MR. BASKIN: Correct.

8 THE COURT: And that's held where?

9 MR. BASKIN: That's a metaphysical question, your  
10 Honor.

11 THE COURT: It's not metaphysical to me. This  
12 didn't happen here. The fact that the lawyers are located  
13 here, so what. I mean, we've got -- I'd like to say with  
14 respect to California, London, Paris, Germany and all over  
15 the world, that the comm/fed bar and the members of the  
16 comm/fed bar located in New York, amongst the finest lawyers  
17 anywhere in the world. It is of no -- it is of no  
18 significance that they happen to have hired the best and the  
19 brightest to me as it relates to this particular  
20 transaction. That's not -- that's not the criteria.

21 I'm going to think about this, Mr. Baskin. I told  
22 you I would. We are going to get together again in this  
23 case. I'm going to have Mr. Savitt order a copy of the  
24 transcript because he took the lead on this one and he's  
25 going to send it to me and we'll get together and we are at

## PROCEEDINGS

1 December 13th. I guess we will have to get together after  
2 the new year at this point because Ms. Robinson is very,  
3 very busy and I don't want to -- how is like January -- I  
4 don't want to impose on anybody if they have holiday plans,  
5 but either end of first full week or beginning of second  
6 week of January, whatever is more convenient for you, Mr.  
7 Baskin, your colleagues and the defendants' lawyers. I'm  
8 going to be doing pain client work regardless, so you tell  
9 me and we will see if that works for them.

10 MR. BASKIN: Any of those dates are fine.

11 THE COURT: How is January 6th?

12 MR. BASKIN: January 6th is fine for me. I'd like  
13 Mr. Robert to be available. Robert, how is January 6th in  
14 the afternoon.

15 MR. ROBERT: January 6th works for me.

16 MR. SAVITT: I was going to ask if the 10th or  
17 11th would work.

18 THE COURT: Make sure. You want the 10th in the  
19 afternoon?

20 MR. ROBERT: I can do the 10th.

21 MR. BASKIN: 10th is fine for me.

22 THE COURT: Mr. Robert is not available, so that  
23 doesn't work.

24 MR. ROBERT: I can do the 10th, your Honor. Just  
25 not the 11th, sir.

## PROCEEDINGS

1 THE COURT: 2:30 on the 10th?

2 MR. ROBERT: Yes.

3 THE COURT: Ms. Buchwald?

4 MS. BUCHWALD: I'll make it work.

5 THE COURT: Very accommodating. I appreciate our  
6 long discussion this morning. Thank you all for bearing  
7 with me and your patience. You all are terrific and I  
8 greatly appreciate you letting me ask my questions. Thank  
9 you.

10 MR. SAVITT: Thank you.

11 MR. BASKIN: Thank you.

12 MS. BUCHWALD: Thank you.

13 \*\*\*\*\*

14 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE  
15 ORIGINAL MINUTES TAKEN OF THIS PROCEEDING.

16



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NICOLE C. ROBINSON, CSR  
Senior Court Reporter

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\$	2020 [1] - 3:4 2021 [1] - 1:11 22 [1] - 39:24 25th [1] - 72:17 27 [1] - 10:20 287 [1] - 68:2 2:30 [1] - 84:1	accept [1] - 8:19 accepting [1] - 63:11 accommodating [1] - 84:5 according [5] - 16:17, 35:22, 36:21, 42:6, 42:19 accordingly [1] - 28:7 account [1] - 9:9 accuracy [1] - 10:4 ACCURATE [1] - 84:13 accurate [1] - 55:14 achievement [1] - 59:12 acknowledge [1] - 76:15 acquired [2] - 33:5, 37:25 acquirer [1] - 39:12 acquisition [2] - 35:20, 37:4 Act [5] - 25:11, 43:14, 43:22, 44:1, 44:5 acted [1] - 67:20 action [9] - 7:4, 15:13, 25:19, 33:1, 50:19, 56:20, 58:1, 58:4, 78:18 actions [7] - 10:25, 19:14, 21:2, 25:23, 56:23, 60:21, 60:22 activity [1] - 19:25 actors [1] - 57:18 acts [2] - 56:13, 57:18 Adam [1] - 3:18 additional [3] - 19:10, 23:17, 43:7 additionally [1] - 10:23 address [12] - 7:22, 21:14, 32:15, 34:21, 39:25, 40:14, 50:25, 52:12, 67:3, 67:4, 72:6, 78:11 addressed [1] - 34:12 addressing [2] - 4:24, 10:25 adequate [7] - 19:18, 20:18, 21:4, 21:6, 60:20, 77:1, 77:12 adequately [1] - 71:11 adjudicated [1] - 17:16 adjudicating [2] - 21:21, 21:23 admitted [1] - 39:5 admittedly [1] - 22:6 advance [1] - 35:7 advanced [1] - 79:10	adversary [1] - 15:9 adverse [1] - 6:21 advisor [2] - 65:20, 70:15 advisors [6] - 8:21, 8:22, 13:22, 16:14, 46:23, 65:8 advisory [8] - 46:24, 47:9, 58:11, 58:15, 69:19, 69:20, 73:17, 75:12 advocate [1] - 71:20 affairs [11] - 12:4, 12:5, 21:24, 24:22, 28:5, 28:21, 48:5, 48:8, 48:22, 49:3, 67:11 affidavit [1] - 53:13 affidavits [2] - 25:12, 33:14 affiliates [1] - 71:20 affiliation [1] - 16:21 affirmance [1] - 15:6 afternoon [2] - 83:14, 83:19 AG [12] - 1:4, 1:9, 3:3, 42:23, 43:3, 43:9, 69:4, 70:1, 70:2, 72:20, 72:23 agency [7] - 14:6, 14:11, 14:14, 14:15, 61:13, 61:20, 81:7 agents [5] - 14:11, 14:23, 61:23, 66:8, 66:9 ago [4] - 15:7, 32:14, 51:8, 54:17 agree [9] - 17:24, 23:22, 29:1, 50:11, 50:24, 61:13, 67:12, 67:13, 67:15 agreed [1] - 16:13 agreement [1] - 35:18 agricultural [1] - 5:8 agriculture [1] - 5:11 ahead [5] - 24:25, 40:16, 61:25, 65:9, 70:18 aiding [1] - 47:11 Akers [1] - 33:11 al [2] - 1:7, 3:3 Albert [1] - 3:8 all-cash [1] - 37:3 all-fours [1] - 20:20 all-time [1] - 35:19 allegation [9] - 15:22, 19:23, 27:22, 34:9, 44:7, 44:18, 44:21, 44:24, 62:9 allegations [20] - 9:20,	10:4, 11:14, 14:17, 15:12, 27:18, 34:2, 34:11, 36:16, 38:7, 40:17, 43:12, 47:23, 47:25, 61:17, 62:7, 62:8, 64:23, 73:6, 74:8 allege [3] - 23:4, 26:3, 33:5 alleged [17] - 9:2, 9:3, 9:6, 12:23, 13:12, 14:21, 15:23, 15:24, 21:5, 22:14, 32:20, 37:13, 43:23, 63:6, 80:7, 80:8, 80:9 alleges [1] - 43:22 alleging [2] - 52:4, 80:21 allows [1] - 55:22 alter [1] - 38:18 alternative [7] - 20:5, 20:8, 20:9, 20:13, 20:18, 21:7, 79:12 amended [4] - 40:24, 55:12, 55:14, 77:19 America [14] - 3:15, 4:8, 41:14, 41:18, 41:19, 41:20, 41:21, 42:6, 42:12, 42:15, 69:1, 69:10, 69:11, 69:17 AMERICA [1] - 2:2 America's [1] - 40:21 American [2] - 51:7, 51:19 amount [1] - 37:19 analysis [21] - 14:19, 14:21, 14:24, 15:19, 15:21, 21:17, 22:25, 23:7, 23:12, 23:18, 24:5, 32:11, 48:12, 49:4, 50:24, 63:5, 63:13, 63:17, 65:5, 76:16, 79:22 analytically [2] - 23:24, 25:6 analyzed [2] - 48:9, 48:10 AND [1] - 84:13 ANDREW [1] - 1:13 annual [1] - 67:23 answer [11] - 4:23, 16:23, 18:17, 20:4, 21:17, 31:25, 63:9, 66:1, 69:7, 78:6 answers [1] - 66:1 anti [1] - 5:16 anti-trust [1] - 5:16 anyway [2] - 35:16, 65:10
1	3			
100 [1] - 23:23 100,000 [1] - 26:2 10005 [1] - 2:7 10017 [1] - 2:3 10019 [1] - 1:21 102 [2] - 41:17, 41:20 10th [6] - 83:16, 83:18, 83:20, 83:21, 83:24, 84:1 114 [3] - 45:7, 45:17, 45:18 11556 [1] - 1:17 116 [1] - 44:11 117 [14] - 43:22, 44:2, 44:7, 44:14, 44:18, 46:11, 46:18, 47:5, 47:7, 75:4, 75:21, 76:2, 76:5, 76:7 11th [2] - 83:17, 83:25 12 [1] - 39:23 13 [1] - 1:11 1319 [11] - 28:20, 28:23, 47:18, 48:5, 48:9, 48:10, 48:11, 50:3, 50:13, 51:17, 67:7 13th [1] - 83:1 143 [4] - 43:25, 44:19, 44:20, 74:16 144 [1] - 44:3 148 [6] - 30:10, 31:1, 52:14, 52:15, 53:24, 57:18 16 [1] - 68:7 161 [2] - 44:4, 44:6 16th [1] - 72:19 170 [3] - 70:16, 70:19, 71:10 1920s [1] - 48:15 1929 [1] - 45:20 194 [4] - 71:3, 71:7, 71:8 197 [1] - 45:18	3016 [2] - 74:23, 74:24 302 [2] - 14:1, 66:8 302(a)(1) [1] - 16:1 302A [1] - 12:11 31 [2] - 10:20, 70:20 32 [2] - 2:6, 70:20 3211 [1] - 24:1 3211(a)(7) [1] - 74:7 327 [3] - 17:12, 17:15, 40:11 38 [4] - 71:3, 71:6, 71:7, 71:8 39 [1] - 71:3			
	4			
	44 [2] - 40:23, 41:1 450 [1] - 2:3			
	5			
	50 [1] - 60:7 51 [1] - 1:21 526 [1] - 1:17 52nd [1] - 1:21 53 [1] - 1:1 55 [1] - 59:19			
	6			
	60 [1] - 60:25 626 [5] - 32:18, 48:17, 49:20, 50:4, 51:17 627 [2] - 48:17, 51:17 64 [2] - 41:11, 41:12 651500 [1] - 3:3 651500/20 [1] - 1:6 67 [2] - 55:12, 55:14 6th [4] - 83:11, 83:12, 83:13, 83:15			
	A			
	a)(1) [1] - 14:1 abetting [1] - 47:11 able [1] - 18:23 absence [2] - 74:7, 74:24 absolutely [1] - 17:8 abundantly [1] - 73:13			
2				
2005 [2] - 56:23, 57:16 2016 [2] - 5:5, 36:1 2017 [2] - 54:20, 55:8 2018 [2] - 5:17, 5:18				

<p><b>apologize</b> [3] - 41:4, 61:24</p> <p><b>Appeals</b> [2] - 17:14, 17:17</p> <p><b>appear</b> [3] - 18:19, 30:9, 55:18</p> <p><b>appearances</b> [1] - 3:5</p> <p><b>appearing</b> [2] - 3:18, 54:11</p> <p><b>application</b> [1] - 3:10</p> <p><b>applies</b> [1] - 51:9</p> <p><b>apply</b> [6] - 28:1, 44:5, 48:9, 50:2, 53:18</p> <p><b>applying</b> [2] - 17:24, 30:4</p> <p><b>appreciate</b> [6] - 4:2, 4:18, 45:14, 68:20, 84:5, 84:8</p> <p><b>appropriate</b> [3] - 27:8, 74:4, 78:22</p> <p><b>approval</b> [3] - 31:15, 31:18, 65:2</p> <p><b>approvals</b> [2] - 7:16, 15:16</p> <p><b>approved</b> [1] - 7:12</p> <p><b>Aquiline</b> [3] - 12:24, 13:15, 14:1</p> <p><b>area</b> [2] - 31:4, 47:16</p> <p><b>argue</b> [1] - 27:4</p> <p><b>argued</b> [1] - 49:13</p> <p><b>arguing</b> [3] - 3:10, 37:24, 69:6</p> <p><b>argument</b> [22] - 23:13, 23:21, 23:23, 24:21, 28:23, 29:10, 30:6, 31:2, 34:14, 34:16, 40:8, 40:12, 47:18, 56:10, 59:23, 64:12, 71:18, 71:19, 73:18, 77:16, 77:22</p> <p><b>arguments</b> [3] - 24:11, 34:14, 76:22</p> <p><b>arise</b> [1] - 25:10</p> <p><b>arises</b> [2] - 19:14, 74:11</p> <p><b>arm</b> [3] - 13:7, 13:16, 50:18</p> <p><b>arms</b> [1] - 12:11</p> <p><b>arose</b> [1] - 12:14</p> <p><b>Asahi</b> [1] - 19:5</p> <p><b>aside</b> [3] - 32:7, 56:17, 67:11</p> <p><b>aspect</b> [2] - 34:16, 67:7</p> <p><b>aspects</b> [1] - 31:8</p> <p><b>aspirin</b> [1] - 5:9</p> <p><b>associated</b> [1] - 6:21</p> <p><b>attached</b> [1] - 74:1</p> <p><b>attaches</b> [2] - 31:21, 70:16</p>	<p><b>attempt</b> [1] - 16:6</p> <p><b>attention</b> [3] - 6:5, 12:24, 78:18</p> <p><b>Attorney</b> [2] - 1:16, 2:6</p> <p><b>Attorneys</b> [2] - 1:20, 2:2</p> <p><b>attractive</b> [1] - 37:21</p> <p><b>authorities</b> [2] - 29:4, 53:7</p> <p><b>authority</b> [3] - 16:6, 21:8, 21:18</p> <p><b>available</b> [7] - 14:16, 20:7, 20:8, 20:13, 78:24, 83:13, 83:22</p> <p><b>availment</b> [2] - 15:13, 80:19</p> <p><b>Aventura</b> [3] - 30:3, 31:10, 31:23</p> <p><b>Avenue</b> [1] - 2:3</p> <p><b>avoid</b> [2] - 19:8, 45:25</p> <p><b>avoiding</b> [1] - 18:3</p> <p><b>awards</b> [1] - 38:8</p> <p><b>aware</b> [2] - 46:19, 46:21</p>	<p>34:11, 82:15, 82:16</p> <p><b>barred</b> [1] - 60:23</p> <p><b>based</b> [9] - 8:22, 11:2, 42:19, 43:1, 50:8, 54:12, 59:19, 64:2, 73:23</p> <p><b>bases</b> [1] - 26:8</p> <p><b>basic</b> [1] - 62:7</p> <p><b>basis</b> [5] - 7:13, 17:1, 25:22, 44:22, 74:2</p> <p><b>Baskin</b> [16] - 3:8, 3:9, 3:11, 34:20, 35:3, 70:13, 72:4, 72:7, 74:10, 78:11, 78:16, 78:18, 80:13, 80:24, 82:21, 83:7</p> <p><b>BASKIN</b> [93] - 1:18, 35:9, 35:15, 37:9, 37:15, 38:13, 38:16, 39:8, 39:12, 39:22, 40:3, 40:21, 40:25, 41:6, 41:15, 41:19, 41:22, 42:12, 43:16, 43:20, 44:7, 44:18, 45:7, 45:9, 45:11, 45:18, 45:21, 45:24, 46:12, 46:15, 46:21, 46:25, 47:11, 47:16, 48:1, 48:4, 48:7, 49:4, 49:12, 49:16, 49:18, 49:20, 49:23, 50:12, 51:6, 51:25, 52:14, 52:19, 53:1, 56:5, 56:22, 57:10, 58:3, 58:8, 58:13, 58:17, 59:2, 59:7, 60:1, 60:12, 60:15, 61:1, 61:9, 61:12, 61:18, 61:22, 62:1, 62:6, 63:15, 63:19, 63:22, 64:7, 66:7, 66:13, 66:20, 67:6, 67:13, 67:17, 72:9, 81:1, 81:10, 81:13, 81:15, 81:20, 81:24, 82:1, 82:4, 82:7, 82:9, 83:10, 83:12, 83:21, 84:11</p> <p><b>Baumann</b> [6] - 3:3, 33:25, 36:12, 45:25, 46:1, 59:10</p> <p><b>BAUMANN</b> [1] - 1:7</p> <p><b>Bayer</b> [26] - 3:3, 3:14, 4:13, 5:2, 5:8, 5:14, 6:12, 8:1, 8:21, 10:16, 13:13, 19:18, 33:5, 34:7, 36:2, 37:24, 39:3, 39:4, 42:2, 54:10, 69:10, 79:23, 80:15, 81:12,</p>	<p>82:4</p> <p><b>BAYER</b> [2] - 1:4, 1:9</p> <p><b>Bayer's</b> [1] - 5:7</p> <p><b>BCL</b> [3] - 12:5, 28:20, 32:18</p> <p><b>BE</b> [1] - 84:13</p> <p><b>bear</b> [1] - 57:4</p> <p><b>bearing</b> [1] - 84:6</p> <p><b>bears</b> [1] - 79:4</p> <p><b>became</b> [2] - 42:4, 72:10</p> <p><b>become</b> [1] - 78:15</p> <p><b>becomes</b> [1] - 31:5</p> <p><b>beginning</b> [4] - 32:21, 41:4, 64:16, 83:5</p> <p><b>behalf</b> [9] - 1:3, 3:3, 3:6, 3:19, 4:8, 25:19, 42:2, 69:1, 69:3</p> <p><b>Belgium</b> [1] - 13:5</p> <p><b>bell</b> [1] - 57:7</p> <p><b>belong</b> [1] - 21:19</p> <p><b>belongs</b> [1] - 80:18</p> <p><b>belt</b> [1] - 74:2</p> <p><b>beneficial</b> [3] - 49:21, 49:24, 49:25</p> <p><b>benefit</b> [1] - 34:6</p> <p><b>Benjamin</b> [1] - 3:8</p> <p><b>best</b> [6] - 4:21, 9:19, 30:8, 57:25, 65:9, 82:18</p> <p><b>better</b> [3] - 17:16, 34:22, 62:18</p> <p><b>between</b> [10] - 5:2, 5:20, 10:3, 13:23, 16:22, 23:2, 26:24, 29:17, 53:2, 76:13</p> <p><b>beyond</b> [4] - 10:2, 13:7, 13:16, 18:20</p> <p><b>bid</b> [1] - 20:23</p> <p><b>big</b> [5] - 13:4, 36:10, 39:17, 51:15, 68:16</p> <p><b>billion</b> [7] - 35:21, 37:5, 37:18, 38:21, 39:15, 60:7, 62:15</p> <p><b>billions</b> [1] - 37:3</p> <p><b>birthday</b> [1] - 54:15</p> <p><b>bit</b> [13] - 10:15, 10:20, 19:15, 23:8, 24:10, 25:15, 25:17, 32:14, 49:13, 55:19, 67:5, 75:7, 76:21</p> <p><b>bite</b> [1] - 39:17</p> <p><b>black</b> [1] - 26:25</p> <p><b>blew</b> [1] - 36:10</p> <p><b>blindly</b> [1] - 63:10</p> <p><b>block</b> [2] - 74:16, 75:1</p> <p><b>board</b> [57] - 7:18, 7:22, 7:24, 8:3, 8:5, 8:8, 8:9, 8:16, 9:11, 13:23, 19:18, 19:20,</p>	<p>19:22, 19:23, 26:4, 26:20, 27:14, 27:16, 27:19, 27:22, 27:23, 33:17, 33:18, 33:22, 33:25, 34:3, 34:9, 36:19, 44:12, 45:6, 47:10, 58:11, 58:14, 58:16, 58:18, 58:20, 58:23, 59:11, 59:21, 62:23, 63:17, 63:19, 64:9, 64:18, 64:19, 64:20, 65:9, 65:14, 67:21, 79:23, 79:25, 80:5</p> <p><b>board's</b> [1] - 33:20</p> <p><b>boards</b> [8] - 7:25, 8:6, 8:11, 27:13, 33:16, 46:8, 58:16, 77:25</p> <p><b>body</b> [1] - 53:6</p> <p><b>boiled</b> [4] - 9:24, 13:21, 17:15, 78:25</p> <p><b>bonds</b> [1] - 81:16</p> <p><b>border</b> [1] - 54:18</p> <p><b>boring</b> [1] - 55:23</p> <p><b>BORROK</b> [1] - 1:13</p> <p><b>Bottini</b> [1] - 3:8</p> <p><b>bottom</b> [4] - 19:17, 71:2, 71:6, 71:7</p> <p><b>bought</b> [1] - 38:5</p> <p><b>bound</b> [2] - 44:6, 51:16</p> <p><b>boxing</b> [1] - 76:21</p> <p><b>Brafman</b> [1] - 3:9</p> <p><b>branch</b> [2] - 16:2, 69:12</p> <p><b>branches</b> [2] - 10:24, 12:12</p> <p><b>brands</b> [2] - 5:20, 5:23</p> <p><b>breach</b> [1] - 52:6</p> <p><b>brief</b> [3] - 28:22, 34:10, 74:1</p> <p><b>briefing</b> [3] - 14:3, 27:3, 48:19</p> <p><b>briefly</b> [1] - 78:12</p> <p><b>brightest</b> [1] - 82:19</p> <p><b>bring</b> [15] - 25:18, 25:25, 26:4, 31:17, 51:12, 51:13, 52:17, 52:20, 54:2, 56:7, 57:15, 58:1, 58:23, 59:2, 71:20</p> <p><b>bringing</b> [4] - 33:23, 52:21, 52:23, 57:22</p> <p><b>broad</b> [1] - 42:17</p> <p><b>Broida</b> [1] - 22:20</p> <p><b>brought</b> [7] - 10:18, 11:2, 14:23, 52:25, 53:17, 57:5, 57:17</p> <p><b>BUCHWALD</b> [27] - 2:4, 4:7, 23:20, 24:6,</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>24:13, 68:22, 68:25, 70:8, 70:11, 70:19, 70:23, 70:25, 71:2, 71:7, 71:9, 72:16, 72:24, 73:7, 73:24, 74:15, 75:14, 75:18, 75:20, 76:4, 76:15, 84:4, 84:12</p> <p><b>Buchwald</b> [10] - 3:15, 4:7, 23:11, 23:19, 40:7, 67:3, 68:19, 68:25, 78:17, 84:3</p> <p><b>bulk</b> [1] - 28:24</p> <p><b>bunch</b> [2] - 13:18, 76:19</p> <p><b>burden</b> [12] - 17:22, 18:3, 18:9, 18:17, 18:21, 19:1, 19:4, 19:6, 19:11, 27:20, 60:2, 80:22</p> <p><b>business</b> [8] - 8:6, 12:13, 12:17, 12:21, 13:8, 16:1, 48:16, 67:7</p> <p><b>busy</b> [1] - 83:3</p> <p><b>buy</b> [1] - 38:22</p> <p><b>buyer</b> [2] - 71:12, 73:1</p> <p><b>buyer's</b> [1] - 77:9</p> <p><b>buying</b> [2] - 38:24, 39:1</p> <p><b>BY</b> [4] - 1:18, 1:22, 2:4, 2:7</p>	<p><b>career</b> [1] - 36:8</p> <p><b>careers</b> [1] - 59:13</p> <p><b>case</b> [102] - 6:8, 11:14, 12:11, 12:24, 13:4, 13:15, 13:19, 13:20, 15:4, 15:9, 16:4, 17:22, 17:23, 18:22, 18:24, 20:10, 20:14, 20:15, 20:19, 20:24, 21:10, 21:11, 21:15, 21:19, 21:22, 21:25, 22:3, 22:8, 22:12, 22:13, 22:19, 22:20, 22:22, 24:18, 25:7, 29:3, 29:11, 29:24, 30:3, 30:5, 31:25, 33:11, 41:9, 45:13, 51:1, 51:3, 51:7, 51:12, 51:19, 52:2, 52:3, 52:4, 52:6, 52:8, 52:11, 52:13, 52:17, 52:20, 52:23, 52:25, 53:1, 53:2, 53:3, 53:11, 53:12, 53:17, 54:2, 54:6, 56:17, 57:6, 57:22, 60:6, 60:8, 60:14, 60:15, 65:9, 67:1, 68:6, 68:10, 71:15, 77:3, 77:5, 77:11, 78:15, 78:16, 78:23, 78:25, 79:13, 79:15, 79:22, 80:4, 80:17, 80:22, 82:23</p> <p><b>cases</b> [18] - 12:22, 13:18, 17:6, 18:6, 18:12, 21:12, 22:11, 23:1, 23:3, 23:7, 26:19, 28:25, 34:10, 48:7, 48:8, 57:17, 77:2, 81:4</p> <p><b>cash</b> [3] - 35:21, 36:14, 37:3</p> <p><b>Cattan</b> [1] - 3:2</p> <p><b>CATTAN</b> [1] - 1:3</p> <p><b>caused</b> [2] - 38:9, 65:18</p> <p><b>causing</b> [1] - 4:12</p> <p><b>Cayman</b> [2] - 28:12, 28:13</p> <p><b>CD</b> [1] - 55:1</p> <p><b>center</b> [1] - 67:1</p> <p><b>centered</b> [1] - 21:5</p> <p><b>central</b> [1] - 24:24</p> <p><b>Centre</b> [2] - 18:19, 60:25</p> <p><b>centric</b> [3] - 36:19, 37:2, 37:5</p> <p><b>CEO</b> [5] - 36:3, 36:11, 36:12, 58:21, 63:23</p>	<p><b>certain</b> [2] - 6:1, 65:15</p> <p><b>certainly</b> [7] - 23:5, 40:14, 58:3, 63:10, 73:10, 73:19, 79:2</p> <p><b>certificate</b> [4] - 10:17, 52:24, 54:14, 55:25</p> <p><b>CERTIFIED</b> [1] - 84:13</p> <p><b>CFO</b> [1] - 58:21</p> <p><b>chairman</b> [2] - 39:4, 63:23</p> <p><b>challenged</b> [1] - 67:22</p> <p><b>chance</b> [4] - 29:3, 58:14, 67:3, 67:19</p> <p><b>chances</b> [1] - 60:24</p> <p><b>Chang</b> [1] - 3:8</p> <p><b>change</b> [2] - 23:7, 30:21</p> <p><b>character</b> [1] - 39:19</p> <p><b>charter</b> [1] - 53:22</p> <p><b>chartered</b> [5] - 6:12, 6:18, 9:18, 22:23, 28:4</p> <p><b>check</b> [2] - 3:11, 35:2</p> <p><b>choice</b> [4] - 48:11, 48:14, 49:6, 50:9</p> <p><b>Circuit</b> [1] - 30:4</p> <p><b>circumstances</b> [6] - 18:12, 19:11, 20:19, 46:18, 51:23, 66:5</p> <p><b>circumvents</b> [1] - 74:5</p> <p><b>citation</b> [1] - 77:3</p> <p><b>cite</b> [6] - 19:6, 22:11, 44:1, 44:21, 75:15, 76:9</p> <p><b>cited</b> [6] - 12:22, 17:6, 21:24, 28:25, 34:10, 76:1</p> <p><b>cites</b> [1] - 74:10</p> <p><b>City</b> [4] - 36:22, 36:23, 36:25, 42:7</p> <p><b>CIVIL</b> [1] - 1:1</p> <p><b>claim</b> [12] - 14:4, 19:17, 25:25, 28:20, 31:17, 32:9, 37:11, 46:18, 57:24, 65:12, 75:5, 75:20</p> <p><b>claiming</b> [1] - 76:19</p> <p><b>claims</b> [7] - 12:14, 27:22, 33:19, 33:24, 74:20, 75:8, 76:6</p> <p><b>clarity</b> [1] - 70:10</p> <p><b>clauses</b> [1] - 24:18</p> <p><b>clear</b> [10] - 21:8, 23:6, 32:23, 33:4, 33:15, 34:11, 34:18, 55:5, 71:13, 73:13</p> <p><b>clearer</b> [1] - 74:6</p> <p><b>clearly</b> [1] - 31:24</p> <p><b>client</b> [6] - 37:7, 46:10, 70:14, 72:2, 72:15,</p>	<p>83:8</p> <p><b>client's</b> [2] - 37:11, 65:12</p> <p><b>clients</b> [3] - 55:10, 57:4, 60:3</p> <p><b>CLIFFORD</b> [1] - 1:18</p> <p><b>Clifford</b> [1] - 3:6</p> <p><b>close</b> [5] - 15:23, 46:20, 80:4, 81:5</p> <p><b>closed</b> [3] - 6:8, 63:24, 81:8</p> <p><b>closing</b> [4] - 46:4, 46:17, 68:13, 81:20</p> <p><b>code</b> [2] - 47:13, 52:15</p> <p><b>codified</b> [2] - 17:12, 32:17</p> <p><b>Coffee</b> [2] - 51:7, 51:19</p> <p><b>Cohen</b> [2] - 28:25, 29:6</p> <p><b>colleague</b> [1] - 78:14</p> <p><b>colleagues</b> [3] - 3:15, 68:21, 83:7</p> <p><b>collectively</b> [1] - 18:8</p> <p><b>colloquy</b> [1] - 64:16</p> <p><b>Cologne</b> [4] - 6:16, 10:19, 10:20, 11:4</p> <p><b>comfortable</b> [1] - 11:14</p> <p><b>coming</b> [3] - 18:25, 65:23, 79:13</p> <p><b>comity</b> [1] - 79:9</p> <p><b>comm/fed</b> [2] - 82:15, 82:16</p> <p><b>comments</b> [3] - 40:15, 52:1, 68:14</p> <p><b>commercial</b> [3] - 5:21, 20:24, 28:8</p> <p><b>common</b> [7] - 8:12, 17:11, 32:17, 33:2, 48:22, 50:9, 67:21</p> <p><b>communications</b> [1] - 21:2</p> <p><b>companies</b> [5] - 5:23, 6:10, 55:1, 57:1, 60:21</p> <p><b>company</b> [31] - 5:9, 6:12, 9:17, 9:18, 9:19, 10:16, 16:12, 25:19, 25:20, 26:2, 28:11, 28:14, 38:4, 38:5, 38:6, 38:10, 38:18, 38:22, 44:3, 51:11, 51:13, 53:2, 53:3, 53:17, 58:3, 58:22, 64:1, 64:2, 64:3, 64:4, 64:25</p> <p><b>Company</b> [1] - 55:2</p> <p><b>company's</b> [1] - 64:4</p> <p><b>compelling</b> [2] -</p>	<p>21:10, 59:23</p> <p><b>compensation</b> [2] - 39:20, 46:3</p> <p><b>compete</b> [1] - 5:24</p> <p><b>complained</b> [2] - 33:1, 33:6</p> <p><b>complaining</b> [1] - 41:5</p> <p><b>complaint</b> [24] - 7:3, 7:9, 7:18, 9:10, 37:12, 38:4, 39:21, 39:24, 40:17, 40:20, 40:24, 41:12, 41:15, 43:13, 43:17, 43:25, 45:11, 62:22, 64:19, 68:1, 73:3, 73:11, 75:3, 77:19</p> <p><b>completely</b> [1] - 15:22</p> <p><b>complicated</b> [1] - 33:10</p> <p><b>comport</b> [1] - 53:10</p> <p><b>comprised</b> [1] - 8:6</p> <p><b>compromised</b> [1] - 46:3</p> <p><b>compulsion</b> [1] - 76:11</p> <p><b>computer</b> [2] - 41:16</p> <p><b>concepts</b> [1] - 49:10</p> <p><b>concern</b> [2] - 47:17, 47:19</p> <p><b>concerned</b> [2] - 79:14, 80:17</p> <p><b>concerns</b> [1] - 61:15</p> <p><b>concession</b> [1] - 21:13</p> <p><b>conclusory</b> [2] - 34:9, 34:11</p> <p><b>condensed</b> [1] - 46:7</p> <p><b>conduct</b> [1] - 26:8</p> <p><b>confidence</b> [3] - 59:17, 59:19, 67:24</p> <p><b>confirm</b> [1] - 23:4</p> <p><b>conflating</b> [2] - 29:7, 49:10</p> <p><b>conflict</b> [2] - 49:8, 75:11</p> <p><b>conflicting</b> [1] - 76:17</p> <p><b>conflicts</b> [1] - 49:5</p> <p><b>connection</b> [6] - 6:1, 7:5, 7:23, 10:1, 20:22, 37:13</p> <p><b>connects</b> [1] - 79:21</p> <p><b>consent</b> [2] - 51:16, 51:20</p> <p><b>consented</b> [1] - 51:15</p> <p><b>consider</b> [3] - 23:17, 24:4, 61:7</p> <p><b>considerable</b> [1] - 41:25</p> <p><b>consideration</b> [5] - 20:11, 57:9, 57:11,</p>
<b>C</b>				
<p><b>Cahill</b> [2] - 3:17, 69:3</p> <p><b>CAHILL</b> [1] - 2:5</p> <p><b>calculus</b> [1] - 57:23</p> <p><b>California</b> [8] - 6:23, 6:24, 7:6, 38:9, 48:19, 82:14</p> <p><b>Canadian</b> [1] - 16:10</p> <p><b>cannot</b> [6] - 28:23, 30:25, 53:11, 53:14, 53:23, 54:4</p> <p><b>cap</b> [3] - 60:8, 62:15, 62:17</p> <p><b>capable</b> [1] - 17:24</p> <p><b>capacity</b> [1] - 47:10</p> <p><b>capital</b> [1] - 15:14</p> <p><b>caption</b> [1] - 69:17</p> <p><b>capture</b> [1] - 42:17</p> <p><b>captures</b> [1] - 12:11</p> <p><b>carcinogenic</b> [1] - 36:8</p> <p><b>Cardozo</b> [3] - 51:7, 51:14, 51:20</p> <p><b>care</b> [7] - 15:18, 15:19, 19:18, 44:11, 59:20, 63:14, 66:4</p>				

<p>81:11, 81:15  <b>considered</b> [1] - 9:14  <b>considering</b> [1] - 19:19  <b>consistent</b> [1] - 17:3  <b>consolidating</b> [3] - 5:6, 5:13, 5:22  <b>construed</b> [1] - 76:18  <b>consummated</b> [4] - 5:15, 5:17, 6:3, 6:20  <b>contact</b> [3] - 14:9, 14:10, 65:4  <b>contacts</b> [18] - 9:20, 12:14, 12:22, 13:17, 13:20, 13:25, 14:13, 15:18, 15:20, 16:2, 16:7, 16:11, 16:15, 16:24, 36:18, 64:14, 64:22  <b>contemporaneous</b> [4] - 32:15, 32:16, 56:9, 56:12  <b>contend</b> [2] - 27:2, 27:25  <b>context</b> [2] - 51:10, 64:5  <b>contingent</b> [2] - 46:3, 46:17  <b>continue</b> [1] - 5:24  <b>continuing</b> [1] - 12:19  <b>contracts</b> [1] - 15:17  <b>contrary</b> [2] - 16:17, 32:10  <b>control</b> [3] - 13:20, 22:12, 44:5  <b>controlled</b> [1] - 14:17  <b>controlling</b> [1] - 21:8  <b>controversy</b> [1] - 16:22  <b>controverted</b> [1] - 26:22  <b>conveniens</b> [6] - 18:10, 20:25, 21:16, 66:22, 68:3, 68:11  <b>convenient</b> [2] - 17:9, 83:6  <b>Convent</b> [1] - 34:1  <b>convention</b> [1] - 55:3  <b>conversation</b> [4] - 45:13, 56:19, 72:17, 72:20  <b>conversations</b> [2] - 73:2  <b>cooking</b> [1] - 36:10  <b>copy</b> [1] - 82:23  <b>Corp</b> [1] - 4:14  <b>corporate</b> [13] - 11:8, 11:9, 22:2, 22:17, 22:23, 26:20, 28:3, 31:18, 44:3, 57:12,</p>	<p>59:18, 71:18, 79:11  <b>corporation</b> [14] - 6:18, 21:24, 26:1, 26:21, 31:16, 42:18, 42:19, 48:16, 49:3, 50:3, 50:20, 57:25, 58:1  <b>Corporation</b> [12] - 3:16, 6:18, 25:11, 30:10, 41:21, 42:12, 43:14, 43:22, 44:1, 44:5, 69:2, 69:18  <b>Correct</b> [1] - 82:7  <b>correct</b> [5] - 8:21, 24:6, 43:16, 58:14, 78:17  <b>cost</b> [3] - 57:5, 58:2, 60:22  <b>countries</b> [4] - 53:9, 53:15, 54:22, 56:2  <b>country</b> [8] - 53:12, 53:18, 54:6, 81:22, 81:23, 81:24, 81:25  <b>counts</b> [1] - 24:16  <b>COUNTY</b> [1] - 1:1  <b>couple</b> [5] - 18:24, 20:9, 52:1, 68:13, 71:9  <b>course</b> [12] - 4:22, 5:9, 6:2, 6:4, 8:10, 11:20, 18:18, 22:19, 26:18, 41:23, 57:4, 79:10  <b>COURT</b> [149] - 1:1, 3:1, 3:11, 3:20, 4:11, 4:17, 4:25, 6:10, 7:12, 8:2, 8:13, 10:12, 11:12, 12:1, 14:18, 15:3, 17:2, 17:10, 18:1, 22:6, 23:10, 24:2, 24:8, 24:20, 24:25, 27:4, 29:1, 29:5, 32:3, 34:18, 35:6, 35:11, 37:7, 37:10, 37:23, 38:15, 39:6, 39:10, 39:18, 40:2, 40:7, 40:23, 41:1, 41:7, 41:17, 41:20, 42:11, 43:12, 43:17, 43:24, 44:10, 44:20, 45:8, 45:10, 45:12, 45:19, 45:22, 46:9, 46:13, 46:19, 46:23, 47:1, 47:14, 47:19, 48:2, 48:6, 48:25, 49:8, 49:15, 49:17, 49:19, 49:22, 50:10, 50:15, 51:22, 52:10, 52:18, 52:24, 56:4, 56:15, 57:3, 57:23, 58:7,</p>	<p>58:10, 58:15, 58:25, 59:6, 59:23, 60:10, 60:13, 60:19, 61:4, 61:10, 61:14, 61:20, 61:24, 62:4, 63:5, 63:16, 63:20, 63:25, 64:9, 66:12, 66:17, 67:2, 67:9, 67:15, 68:16, 68:24, 70:7, 70:9, 70:12, 70:22, 70:24, 71:1, 71:5, 71:8, 71:22, 72:12, 72:22, 73:4, 73:15, 74:9, 75:13, 75:17, 75:19, 76:3, 76:12, 78:9, 79:13, 79:24, 80:2, 80:11, 81:8, 81:11, 81:14, 81:18, 81:23, 81:25, 82:2, 82:6, 82:8, 82:11, 83:11, 83:18, 83:22, 84:1, 84:3, 84:5  <b>court</b> [26] - 6:15, 10:25, 13:9, 14:23, 16:19, 17:16, 17:18, 18:9, 18:11, 20:23, 21:19, 22:1, 26:12, 28:6, 31:6, 31:13, 31:14, 31:18, 31:21, 50:18, 52:16, 52:17, 52:20, 54:3, 59:24  <b>Court</b> [42] - 1:14, 2:11, 3:9, 10:1, 10:8, 11:7, 11:21, 12:25, 14:14, 15:2, 15:18, 16:9, 17:9, 17:14, 17:17, 17:24, 18:20, 19:3, 23:17, 24:4, 25:3, 25:5, 25:11, 26:18, 28:7, 30:2, 32:11, 33:11, 34:15, 34:17, 45:16, 47:17, 51:6, 55:13, 57:8, 57:10, 67:7, 68:14, 78:19, 80:9, 80:23, 84:16  <b>Court's</b> [4] - 10:11, 15:19, 78:13, 79:21  <b>courts</b> [12] - 10:18, 12:18, 15:21, 17:22, 18:8, 19:5, 20:8, 21:6, 21:25, 28:7, 28:8, 48:20  <b>covered</b> [3] - 76:24, 77:2, 78:8  <b>CPLR</b> [2] - 17:13, 74:23  <b>crash</b> [1] - 45:20  <b>create</b> [4] - 5:13, 15:14, 18:9, 62:11  <b>created</b> [1] - 37:17</p>	<p><b>creates</b> [2] - 47:5, 47:8  <b>creating</b> [2] - 37:18, 38:21  <b>Credit</b> [21] - 3:19, 42:23, 42:25, 43:1, 43:3, 43:8, 43:9, 43:11, 69:3, 69:4, 69:6, 69:23, 69:24, 69:25, 70:1, 70:2, 70:5, 72:20, 72:22  <b>CREDIT</b> [1] - 2:6  <b>criteria</b> [1] - 82:20  <b>critical</b> [1] - 61:7  <b>critically</b> [1] - 80:3  <b>criticism</b> [2] - 6:5, 6:6  <b>cross</b> [1] - 54:18  <b>cross-border</b> [1] - 54:18  <b>crowning</b> [1] - 59:12  <b>CSR</b> [1] - 2:10  <b>Culligan</b> [1] - 28:22  <b>culmination</b> [1] - 38:18  <b>curb</b> [1] - 18:10  <b>curious</b> [1] - 56:20  <b>customary</b> [1] - 6:3  <b>cut</b> [1] - 14:13</p>	<p><b>December</b> [2] - 1:11, 83:1  <b>decide</b> [1] - 11:21  <b>decided</b> [2] - 9:25, 79:1  <b>decision</b> [24] - 15:2, 15:3, 15:7, 16:5, 17:2, 17:4, 17:15, 19:5, 20:14, 20:15, 26:19, 28:12, 28:22, 29:7, 31:7, 31:10, 31:23, 58:12, 64:18, 65:10, 65:19, 65:22, 65:23  <b>decisively</b> [1] - 21:22  <b>Decker</b> [3] - 36:4, 36:11  <b>declarations</b> [1] - 78:4  <b>declared</b> [1] - 36:7  <b>deemed</b> [1] - 57:25  <b>defend</b> [1] - 19:4  <b>defendant</b> [8] - 1:10, 12:18, 14:17, 15:13, 22:23, 33:25, 40:19, 72:25  <b>defendant's</b> [1] - 57:2  <b>defendants</b> [36] - 3:14, 3:19, 4:1, 4:20, 10:3, 10:21, 12:12, 14:7, 14:8, 15:25, 16:10, 18:17, 22:16, 22:17, 22:18, 23:13, 27:14, 40:18, 41:3, 43:13, 43:19, 43:23, 44:5, 44:9, 46:14, 57:7, 61:16, 69:14, 70:5, 73:12, 74:3, 74:8, 77:24, 77:25, 79:7  <b>Defendants</b> [2] - 1:8, 1:20  <b>defendants'</b> [3] - 3:23, 4:4, 83:7  <b>defended</b> [1] - 59:14  <b>defense</b> [1] - 21:15  <b>defer</b> [1] - 22:1  <b>deficiency</b> [1] - 33:7  <b>defined</b> [2] - 72:18, 72:20  <b>defines</b> [1] - 72:1  <b>definition</b> [1] - 53:23  <b>degree</b> [1] - 13:5  <b>Delaware</b> [4] - 6:18, 22:23, 75:15, 75:16  <b>Delaware-chartered</b> [2] - 6:18, 22:23  <b>delay</b> [1] - 25:16  <b>deliberated</b> [2] - 9:15, 19:24  <b>demand</b> [14] - 26:5,</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## D

**damage** [2] - 52:23, 56:7  
**dare** [1] - 25:15  
**dates** [1] - 83:10  
**DAVIS** [1] - 2:2  
**Davis** [1] - 69:1  
**days** [4] - 8:12, 15:4, 36:11, 36:13  
**de** [1] - 15:14  
**deal** [35] - 4:17, 6:8, 6:10, 13:22, 16:14, 19:19, 35:21, 35:23, 36:10, 36:19, 36:20, 36:21, 37:1, 37:22, 39:8, 42:5, 42:21, 46:2, 46:4, 46:8, 46:10, 46:15, 46:20, 47:2, 47:9, 59:11, 59:15, 59:19, 59:21, 62:10, 62:20, 62:24, 63:24, 64:5, 80:12  
**deal-related** [1] - 16:14  
**deals** [2] - 60:7, 75:17  
**debt** [18] - 37:4, 37:5, 37:7, 37:10, 37:16, 37:19, 37:21, 38:2, 38:9, 38:11, 38:17, 38:21, 39:4, 39:13, 39:15, 39:16, 64:12



<p>26:18, 27:4, 27:6, 27:10, 27:16, 29:25, 33:9, 34:2, 34:3, 57:24, 58:13, 67:17, 68:2</p> <p><b>Department</b> [12] - 20:12, 20:15, 20:16, 20:17, 21:1, 21:18, 28:6, 29:23, 29:25, 32:23, 78:21, 79:4</p> <p><b>Department's</b> [3] - 15:6, 21:16, 28:22</p> <p><b>depositions</b> [2] - 18:21, 18:22</p> <p><b>deprive</b> [1] - 30:13</p> <p><b>depth</b> [1] - 51:19</p> <p><b>derivative</b> [38] - 23:8, 25:2, 25:19, 25:23, 25:25, 26:7, 26:23, 28:10, 28:14, 28:16, 29:14, 29:22, 30:24, 31:14, 31:17, 32:6, 32:18, 32:23, 49:17, 50:19, 52:3, 52:6, 52:8, 53:1, 53:17, 56:20, 56:22, 57:13, 57:15, 57:17, 58:1, 60:6, 60:8, 60:21, 68:7, 77:2, 77:7, 78:18</p> <p><b>derivatively</b> [3] - 1:3, 3:2, 26:12</p> <p><b>describing</b> [1] - 14:17</p> <p><b>description</b> [2] - 37:1, 63:4</p> <p><b>descriptions</b> [1] - 41:24</p> <p><b>designation</b> [1] - 42:17</p> <p><b>designations</b> [1] - 24:3</p> <p><b>designed</b> [1] - 79:8</p> <p><b>desire</b> [2] - 34:17, 45:25</p> <p><b>detail</b> [2] - 36:9, 72:14</p> <p><b>detailed</b> [5] - 14:16, 15:12, 35:22, 41:24, 53:13</p> <p><b>determination</b> [1] - 65:2</p> <p><b>determine</b> [2] - 28:9, 30:18</p> <p><b>determines</b> [1] - 30:19</p> <p><b>detour</b> [1] - 24:24</p> <p><b>develop</b> [2] - 40:10, 40:13</p> <p><b>device</b> [1] - 68:7</p> <p><b>devices</b> [1] - 79:12</p> <p><b>devise</b> [1] - 29:16</p> <p><b>dicta</b> [2] - 17:4, 22:6</p>	<p><b>dictate</b> [1] - 53:14</p> <p><b>dictum</b> [1] - 22:8</p> <p><b>difference</b> [1] - 50:7</p> <p><b>differences</b> [2] - 22:13, 23:2</p> <p><b>different</b> [18] - 4:6, 22:19, 22:24, 25:10, 29:8, 39:11, 44:1, 47:1, 47:12, 47:24, 49:10, 50:6, 52:4, 52:5, 55:3, 73:4, 76:10, 79:16</p> <p><b>difficult</b> [1] - 5:25</p> <p><b>difficulty</b> [2] - 54:18, 68:10</p> <p><b>diligence</b> [25] - 7:17, 8:17, 9:4, 37:13, 38:20, 42:2, 42:8, 42:20, 46:4, 46:16, 62:9, 62:19, 62:20, 62:25, 64:1, 64:17, 66:8, 66:21, 66:23, 66:24, 66:25, 77:17, 81:6</p> <p><b>diluted</b> [2] - 39:7, 39:9</p> <p><b>direct</b> [1] - 9:11</p> <p><b>direction</b> [3] - 17:7, 22:10, 24:17</p> <p><b>directive</b> [2] - 55:5, 55:21</p> <p><b>directives</b> [2] - 54:21</p> <p><b>directly</b> [1] - 37:16</p> <p><b>directors</b> [4] - 7:24, 7:25, 13:13, 58:8</p> <p><b>disagree</b> [6] - 36:18, 58:17, 67:9, 67:14, 67:16, 67:25</p> <p><b>disclosed</b> [1] - 65:14</p> <p><b>discovery</b> [4] - 65:7, 66:14, 66:15, 66:24</p> <p><b>discrepancy</b> [1] - 76:13</p> <p><b>discriminatory</b> [1] - 56:1</p> <p><b>discuss</b> [1] - 3:21</p> <p><b>discussed</b> [3] - 4:5, 64:15, 70:13</p> <p><b>discussing</b> [2] - 19:15, 19:16</p> <p><b>discussion</b> [5] - 41:25, 42:23, 61:14, 78:19, 84:6</p> <p><b>dishonest</b> [1] - 26:8</p> <p><b>disincentives</b> [1] - 57:15</p> <p><b>dismiss</b> [3] - 7:10, 9:8, 33:7</p> <p><b>dismissal</b> [6] - 17:1, 17:20, 18:10, 20:1, 21:9, 21:22</p>	<p><b>displaces</b> [1] - 12:5</p> <p><b>displacing</b> [1] - 51:2</p> <p><b>dispositive</b> [1] - 47:22</p> <p><b>disproves</b> [1] - 77:12</p> <p><b>disputed</b> [1] - 22:21</p> <p><b>dissatisfied</b> [1] - 63:6</p> <p><b>distinction</b> [2] - 29:17, 39:19</p> <p><b>divestitures</b> [1] - 6:1</p> <p><b>dividend</b> [1] - 51:12</p> <p><b>division</b> [3] - 5:8, 20:24, 28:8</p> <p><b>doctrinal</b> [1] - 75:5</p> <p><b>doctrine</b> [9] - 12:4, 17:12, 24:22, 28:5, 28:21, 48:8, 48:22, 48:23, 67:11</p> <p><b>document's</b> [1] - 20:3</p> <p><b>documentary</b> [1] - 40:18</p> <p><b>documents</b> [3] - 16:14, 16:18, 66:23</p> <p><b>dollars</b> [1] - 37:3</p> <p><b>done</b> [12] - 7:16, 25:24, 30:12, 39:2, 39:8, 39:13, 63:5, 66:21, 66:24, 75:2, 75:17</p> <p><b>doubt</b> [2] - 18:2, 18:3</p> <p><b>down</b> [6] - 9:24, 13:21, 17:15, 45:9, 65:21, 78:25</p> <p><b>downtown</b> [1] - 18:24</p> <p><b>dozen</b> [2] - 18:25, 77:24</p> <p><b>dozens</b> [2] - 7:23</p> <p><b>draw</b> [1] - 12:24</p> <p><b>drawer</b> [2] - 54:14, 55:25</p> <p><b>drawn</b> [1] - 6:5</p> <p><b>drew</b> [2] - 42:24, 78:18</p> <p><b>DSP</b> [1] - 69:13</p> <p><b>DTC</b> [1] - 55:1</p> <p><b>due</b> [20] - 7:17, 9:4, 38:20, 42:2, 42:8, 42:20, 46:4, 46:16, 62:9, 62:18, 62:20, 62:25, 64:1, 66:8, 66:21, 66:23, 66:24, 66:25, 81:6</p> <p><b>duplicative</b> [1] - 19:11</p> <p><b>during</b> [4] - 57:3, 62:18, 62:20, 77:16</p> <p><b>duty</b> [4] - 44:11, 52:7, 63:14, 66:4</p>	<p><b>ears</b> [2] - 35:8, 68:19</p> <p><b>easy</b> [2] - 12:21, 54:22</p> <p><b>echo</b> [2] - 3:25, 26:14</p> <p><b>echoing</b> [1] - 35:10</p> <p><b>economy</b> [1] - 79:10</p> <p><b>effect</b> [5] - 22:4, 50:13, 54:4, 54:5</p> <p><b>effective</b> [1] - 60:23</p> <p><b>effectively</b> [2] - 53:4, 62:16</p> <p><b>efficiency</b> [1] - 69:4</p> <p><b>either</b> [13] - 4:13, 9:18, 24:18, 26:3, 26:6, 26:10, 26:13, 49:20, 56:20, 75:16, 81:7, 83:5</p> <p><b>elaborate</b> [1] - 79:11</p> <p><b>Elect</b> [1] - 13:24</p> <p><b>electronically</b> [1] - 71:4</p> <p><b>elsewhere</b> [4] - 17:17, 19:21, 52:20, 79:18</p> <p><b>emphasize</b> [2] - 19:17, 20:13</p> <p><b>encouraged</b> [1] - 46:7</p> <p><b>end</b> [6] - 10:2, 32:21, 45:17, 55:16, 62:14, 83:5</p> <p><b>enforced</b> [1] - 32:22</p> <p><b>engage</b> [2] - 16:7, 72:25</p> <p><b>engaged</b> [12] - 24:16, 40:4, 69:10, 69:13, 69:19, 69:22, 69:24, 70:4, 71:12, 73:1, 73:13, 73:21</p> <p><b>engagement</b> [7] - 23:14, 23:15, 24:3, 47:21, 71:13, 73:12, 73:17</p> <p><b>ensure</b> [2] - 5:23, 26:19</p> <p><b>entered</b> [1] - 13:23</p> <p><b>entertain</b> [2] - 53:25, 68:15</p> <p><b>enthrall</b> [1] - 62:10</p> <p><b>entire</b> [3] - 46:17, 51:19, 62:16</p> <p><b>entirely</b> [2] - 78:17, 79:19</p> <p><b>entities</b> [18] - 23:24, 24:14, 24:15, 24:16, 40:4, 42:14, 43:6, 43:7, 43:10, 44:15, 69:10, 69:14, 69:16, 70:1, 73:16, 73:20, 75:23</p> <p><b>entity</b> [12] - 14:8, 22:24, 28:4, 42:4, 42:24, 43:11, 69:8,</p>	<p>69:12, 69:13, 69:14, 69:24, 77:21</p> <p><b>entrench</b> [1] - 62:11</p> <p><b>entrenched</b> [1] - 34:9</p> <p><b>entrenchment</b> [7] - 36:15, 36:16, 37:16, 37:17, 46:16, 62:8, 62:19</p> <p><b>enumerate</b> [2] - 15:18, 15:19</p> <p><b>equipped</b> [1] - 78:2</p> <p><b>equivalent</b> [1] - 26:5</p> <p><b>er</b> [2] - 42:1, 42:3</p> <p><b>escape</b> [1] - 29:15</p> <p><b>escapes</b> [1] - 25:14</p> <p><b>especially</b> [1] - 18:12</p> <p><b>ESQ</b> [5] - 1:18, 1:18, 1:22, 2:4, 2:7</p> <p><b>essence</b> [1] - 7:2</p> <p><b>essentially</b> [9] - 5:7, 11:6, 19:9, 21:18, 26:5, 31:11, 66:5, 72:7, 73:8</p> <p><b>establish</b> [1] - 21:3</p> <p><b>establishing</b> [1] - 15:25</p> <p><b>estimating</b> [1] - 7:19</p> <p><b>et</b> [2] - 1:7, 3:3</p> <p><b>EU</b> [7] - 53:12, 53:15, 53:17, 53:18, 54:6, 54:17, 56:3</p> <p><b>Euro's</b> [1] - 26:2</p> <p><b>Europe</b> [8] - 9:12, 10:21, 24:24, 52:9, 53:7, 53:9, 54:17, 56:2</p> <p><b>European</b> [10] - 53:5, 53:6, 53:8, 53:10, 53:16, 53:22, 54:20, 55:4, 55:21</p> <p><b>Europeans</b> [1] - 18:25</p> <p><b>evidence</b> [3] - 40:18, 65:12, 73:20</p> <p><b>exact</b> [1] - 11:1</p> <p><b>exactly</b> [7] - 14:20, 22:4, 35:18, 75:18, 79:7, 79:14</p> <p><b>example</b> [5] - 39:2, 45:3, 47:2, 65:6, 71:16</p> <p><b>except</b> [1] - 64:9</p> <p><b>exception</b> [1] - 50:25</p> <p><b>excerpt</b> [1] - 73:25</p> <p><b>Exchange</b> [1] - 16:12</p> <p><b>exchanged</b> [1] - 64:1</p> <p><b>exclusive</b> [4] - 53:12, 81:3, 81:4</p> <p><b>exclusively</b> [2] - 53:20, 53:23</p> <p><b>excursion</b> [1] - 32:1</p>
<b>E</b>				
<p><b>e-mails</b> [1] - 8:23</p> <p><b>early</b> [1] - 39:23</p>				

<p><b>excuse</b> [1] - 34:2 <b>excused</b> [1] - 68:2 <b>executive</b> [1] - 59:8 <b>exercise</b> [2] - 54:23, 55:7 <b>exert</b> [1] - 76:9 <b>exerted</b> [2] - 75:21, 75:23 <b>exertion</b> [1] - 44:2 <b>existing</b> [1] - 39:15 <b>expecting</b> [1] - 41:4 <b>expense</b> [1] - 60:16 <b>expert</b> [5] - 25:12, 25:13, 76:1, 77:9, 77:10 <b>experts</b> [2] - 64:25, 76:13 <b>explain</b> [4] - 21:15, 41:8, 51:18, 71:11 <b>explained</b> [1] - 51:21 <b>explanation</b> [1] - 53:13 <b>explicitly</b> [4] - 52:22, 56:7, 56:8, 81:2 <b>export</b> [1] - 79:6 <b>exposure</b> [1] - 45:23 <b>exposures</b> [2] - 7:3, 7:5 <b>expressing</b> [1] - 47:19 <b>expressly</b> [2] - 29:23, 74:25 <b>extent</b> [2] - 30:22, 79:5 <b>extraterritorial</b> [2] - 54:4 <b>extreme</b> [1] - 57:19 <b>extremely</b> [1] - 65:11</p>	<p><b>failed</b> [2] - 7:18, 38:19 <b>failing</b> [2] - 44:25, 46:4 <b>failure</b> [4] - 15:24, 34:2, 63:7, 63:8 <b>failures</b> [1] - 74:5 <b>fair</b> [12] - 6:25, 7:2, 7:23, 9:22, 9:23, 10:8, 24:13, 27:5, 38:13, 38:15, 38:16 <b>fairly</b> [6] - 5:15, 5:19, 13:4, 35:22, 53:13, 81:1 <b>familiar</b> [2] - 15:2, 26:4 <b>far</b> [3] - 13:24, 15:10 <b>Farina</b> [1] - 3:7 <b>fashion</b> [1] - 36:10 <b>fatal</b> [1] - 33:7 <b>favor</b> [1] - 17:20 <b>fee</b> [4] - 46:17, 46:24, 56:24, 60:2 <b>fees</b> [3] - 46:22, 57:2 <b>Fenn</b> [2] - 42:1, 42:3 <b>Fenner</b> [4] - 42:16, 72:1, 72:10, 72:18 <b>Fernie</b> [1] - 21:25 <b>few</b> [6] - 7:10, 10:15, 15:4, 22:11, 48:10, 56:22 <b>fiduciary</b> [4] - 52:7, 65:2, 74:20, 79:6 <b>fight</b> [1] - 9:7 <b>filed</b> [4] - 18:7, 41:23, 59:13, 67:21 <b>filing</b> [1] - 26:12 <b>filings</b> [1] - 18:11 <b>finalize</b> [1] - 62:24 <b>finally</b> [2] - 21:20, 26:11 <b>financed</b> [1] - 39:14 <b>financial</b> [1] - 75:11 <b>financially</b> [1] - 46:2 <b>financing</b> [1] - 75:12 <b>fine</b> [10] - 4:10, 11:15, 17:10, 41:5, 41:17, 60:3, 78:9, 83:10, 83:12, 83:21 <b>finest</b> [1] - 82:16 <b>finished</b> [1] - 40:15 <b>First</b> [15] - 15:6, 20:12, 20:14, 20:16, 20:17, 21:1, 21:16, 21:18, 28:6, 28:22, 29:23, 29:25, 32:23, 78:21, 79:4 <b>first</b> [20] - 11:23, 12:17, 17:21, 24:23, 25:5, 25:20, 26:5, 29:22, 32:15, 35:9,</p>	<p>36:20, 45:13, 52:1, 71:12, 71:23, 75:10, 76:25, 78:14, 81:1, 83:5 <b>fits</b> [1] - 40:12 <b>five</b> [5] - 20:15, 27:19, 35:19, 54:24, 55:3 <b>flesh</b> [1] - 47:7 <b>flow</b> [2] - 81:12, 81:14 <b>flowed</b> [3] - 81:11, 81:13, 81:17 <b>focus</b> [1] - 70:9 <b>folks</b> [1] - 4:22 <b>followed</b> [1] - 54:24 <b>following</b> [2] - 9:10, 31:11 <b>follows</b> [2] - 25:3, 79:20 <b>footprint</b> [1] - 5:11 <b>force</b> [1] - 30:13 <b>foreign</b> [5] - 18:12, 19:4, 48:16, 50:19, 74:25 <b>forget</b> [1] - 49:23 <b>form</b> [2] - 42:7, 81:16 <b>formation</b> [1] - 52:24 <b>formed</b> [1] - 6:11 <b>former</b> [3] - 36:3, 42:17, 81:21 <b>forms</b> [1] - 64:18 <b>forth</b> [1] - 42:7 <b>forum</b> [4] - 12:19, 13:9, 16:13, 16:16, 16:17, 17:8, 17:11, 17:20, 18:10, 20:8, 20:13, 20:18, 20:25, 21:7, 21:16, 23:7, 23:12, 23:18, 23:21, 24:4, 24:17, 25:4, 32:7, 60:21, 61:4, 61:5, 66:22, 68:3, 68:11, 68:17, 76:16, 76:24, 77:1, 77:12, 77:15, 78:1, 78:22, 79:1, 79:8, 79:12, 80:20 <b>forward</b> [15] - 50:23, 52:8, 52:12, 56:17, 56:21, 56:23, 57:6, 57:8, 59:21, 59:25, 60:3, 65:10, 66:3, 68:5, 74:18 <b>four</b> [6] - 11:6, 11:22, 34:22, 73:11, 73:13, 75:23 <b>fours</b> [1] - 20:20 <b>fourth</b> [1] - 20:2 <b>framing</b> [1] - 7:10 <b>France</b> [2] - 54:6, 55:2 <b>Frank</b> [1] - 3:8</p>	<p><b>Frankfurt</b> [1] - 69:12 <b>frankly</b> [1] - 24:14 <b>fraud</b> [1] - 50:25 <b>free</b> [1] - 11:21 <b>friends</b> [3] - 6:4, 7:1, 25:14 <b>front</b> [4] - 8:18, 11:22, 14:14, 31:14 <b>fulcrum</b> [1] - 5:3 <b>full</b> [3] - 55:10, 73:23, 83:5 <b>fully</b> [2] - 17:24, 40:11 <b>function</b> [1] - 66:11 <b>fund</b> [1] - 15:14 <b>futile</b> [1] - 34:3 <b>futility</b> [9] - 26:6, 26:18, 27:4, 27:6, 27:10, 27:16, 32:13, 33:9, 67:17</p>	<p><b>Germans</b> [2] - 61:22, 62:6 <b>Germany</b> [65] - 6:16, 8:7, 8:8, 8:9, 8:14, 8:16, 9:13, 9:16, 10:19, 11:4, 16:18, 18:15, 18:19, 18:22, 19:10, 19:21, 19:24, 20:4, 20:5, 20:11, 20:12, 20:18, 21:5, 21:12, 24:18, 28:15, 30:12, 36:20, 49:24, 52:2, 52:3, 52:7, 52:25, 53:14, 54:12, 56:9, 56:18, 56:21, 57:5, 57:17, 57:22, 59:24, 60:3, 60:9, 60:20, 60:22, 63:5, 63:18, 63:23, 65:1, 65:23, 68:5, 68:8, 77:1, 77:7, 77:11, 78:1, 78:22, 78:24, 78:25, 79:9, 80:1, 82:3, 82:14 <b>Germany's</b> [2] - 21:6, 21:20 <b>gild</b> [1] - 29:2 <b>given</b> [4] - 21:10, 40:7, 55:13, 64:22 <b>global</b> [1] - 5:25 <b>Global</b> [1] - 20:14 <b>Gordon</b> [2] - 3:17, 69:3 <b>GORDON</b> [1] - 2:5 <b>govern</b> [1] - 49:2 <b>governance</b> [4] - 22:2, 28:3, 44:4, 79:11 <b>governed</b> [1] - 28:3 <b>governs</b> [2] - 28:13, 28:15 <b>grant</b> [1] - 54:1 <b>granted</b> [1] - 3:9 <b>granular</b> [1] - 81:9 <b>gravamen</b> [5] - 7:18, 38:4, 39:20, 64:18, 79:17 <b>great</b> [4] - 21:4, 27:24, 45:20, 59:20 <b>greater</b> [1] - 12:22 <b>greatly</b> [1] - 84:8 <b>ground</b> [2] - 9:24, 78:7 <b>grounds</b> [2] - 33:7, 68:11 <b>Group</b> [2] - 69:4, 70:2 <b>guess</b> [4] - 20:11, 38:2, 59:9, 83:1 <b>guide</b> [1] - 17:18 <b>guidelines</b> [2] - 54:19, 54:21</p>
<p><b>F</b></p>			<p><b>G</b></p>	
<p><b>facie</b> [1] - 73:20 <b>fact</b> [14] - 19:9, 20:19, 21:9, 22:22, 24:17, 27:2, 43:2, 61:2, 63:25, 64:24, 73:17, 74:10, 78:19, 82:12 <b>facto</b> [1] - 15:14 <b>factor</b> [8] - 18:16, 19:13, 20:1, 20:2, 20:7, 21:20, 23:17, 79:8 <b>factors</b> [4] - 17:18, 27:24, 68:4, 68:9 <b>facts</b> [9] - 7:10, 11:6, 13:11, 14:16, 23:3, 25:22, 26:8, 35:17 <b>factual</b> [4] - 15:22, 19:15, 44:24, 73:6 <b>factually</b> [1] - 44:24 <b>fail</b> [1] - 46:16</p>			<p><b>gain</b> [1] - 60:17 <b>gating</b> [2] - 11:20, 69:9 <b>general</b> [1] - 50:20 <b>generally</b> [5] - 11:19, 27:1, 29:22, 54:13, 69:19 <b>generated</b> [1] - 7:5 <b>German</b> [8] - 6:12, 8:7, 10:16, 10:17, 10:25, 11:8, 17:20, 17:23, 17:24, 20:8, 21:11, 23:8, 25:2, 25:6, 25:8, 25:11, 25:18, 25:19, 26:1, 26:5, 26:7, 26:12, 26:23, 27:12, 27:25, 28:1, 28:15, 29:16, 29:19, 30:6, 30:10, 30:21, 31:8, 32:1, 32:7, 33:14, 33:16, 36:19, 43:14, 43:22, 44:1, 44:4, 47:13, 50:2, 50:5, 51:7, 51:18, 52:1, 52:15, 52:16, 52:17, 52:20, 53:5, 53:16, 53:21, 53:23, 54:19, 55:17, 55:19, 55:24, 56:13, 57:12, 58:19, 58:22, 59:4, 59:18, 60:21, 63:1, 65:3, 76:1, 76:10, 76:18, 77:9, 77:12, 77:13, 78:1, 78:3, 79:6, 79:7, 81:2 <b>German-chartered</b> [1] - 6:12</p>	

<p><b>H</b></p> <p><b>hac</b> [1] - 3:9</p> <p><b>Hakimian</b> [1] - 29:24</p> <p><b>hand</b> [3] - 36:14, 62:9, 62:10</p> <p><b>handful</b> [1] - 77:19</p> <p><b>handled</b> [1] - 78:6</p> <p><b>happy</b> [15] - 3:21, 4:9, 11:9, 23:9, 33:12, 34:15, 35:13, 35:14, 65:12, 68:15, 69:7, 78:6, 80:10</p> <p><b>hard</b> [5] - 13:1, 50:12, 50:14, 62:12</p> <p><b>harm</b> [2] - 79:17, 80:20</p> <p><b>harmonize</b> [2] - 14:4, 22:4</p> <p><b>harms</b> [1] - 33:6</p> <p><b>hatch</b> [1] - 29:15</p> <p><b>Hausman</b> [1] - 30:5</p> <p><b>Haussman</b> [2] - 3:1, 3:2</p> <p><b>HAUSSMANN</b> [2] - 1:2, 1:3</p> <p><b>head</b> [1] - 75:7</p> <p><b>heading</b> [3] - 30:9, 30:14, 30:21</p> <p><b>headquartered</b> [2] - 6:18, 9:19</p> <p><b>Health</b> [1] - 36:6</p> <p><b>health</b> [2] - 5:10, 36:6</p> <p><b>hear</b> [10] - 4:3, 15:8, 18:12, 39:18, 50:10, 50:11, 67:13, 67:24, 68:23, 80:24</p> <p><b>heard</b> [3] - 47:17, 75:9, 77:16</p> <p><b>hearing</b> [1] - 3:25</p> <p><b>heart</b> [1] - 61:6</p> <p><b>heavily</b> [2] - 42:20, 59:14</p> <p><b>heavy</b> [2] - 62:2</p> <p><b>heck</b> [1] - 48:14</p> <p><b>heightened</b> [1] - 74:20</p> <p><b>held</b> [12] - 13:7, 13:15, 13:25, 19:22, 20:17, 21:1, 21:25, 32:19, 50:1, 55:5, 55:9, 82:8</p> <p><b>help</b> [2] - 70:17, 71:3</p> <p><b>helps</b> [1] - 51:18</p> <p><b>herbicide</b> [1] - 38:7</p> <p><b>herself</b> [1] - 57:21</p> <p><b>hesitate</b> [1] - 13:2</p> <p><b>high</b> [1] - 5:24</p> <p><b>highlighted</b> [1] - 65:8</p> <p><b>highlights</b> [1] - 11:17</p> <p><b>highly</b> [1] - 9:5</p>	<p><b>himself</b> [1] - 57:21</p> <p><b>hired</b> [4] - 8:22, 16:14, 59:3, 82:18</p> <p><b>hiring</b> [1] - 9:21</p> <p><b>history</b> [3] - 59:18, 61:3, 68:6</p> <p><b>hold</b> [7] - 30:24, 34:7, 54:13, 55:1, 55:22, 60:19, 81:4</p> <p><b>holder</b> [2] - 37:7, 54:13</p> <p><b>holders</b> [2] - 56:2</p> <p><b>holding</b> [2] - 16:20, 55:3</p> <p><b>holiday</b> [1] - 83:4</p> <p><b>Holzman</b> [6] - 17:4, 22:3, 22:6, 22:8, 79:15</p> <p><b>Honor</b> [66] - 4:16, 4:23, 5:2, 6:2, 7:8, 7:21, 9:8, 9:24, 10:10, 10:14, 10:21, 11:16, 13:18, 14:3, 14:20, 14:22, 15:5, 15:11, 15:22, 16:8, 16:19, 17:5, 17:7, 17:9, 17:11, 19:15, 21:14, 21:20, 22:3, 23:20, 24:6, 24:7, 24:13, 25:1, 25:17, 27:11, 27:15, 28:11, 29:3, 29:9, 32:4, 32:13, 33:9, 34:13, 35:10, 37:9, 37:15, 38:14, 40:25, 41:15, 44:7, 45:7, 47:12, 48:1, 49:13, 50:12, 55:13, 61:1, 68:22, 72:16, 73:7, 74:15, 78:7, 78:12, 82:10, 83:24</p> <p><b>Honor's</b> [1] - 8:17</p> <p><b>HONORABLE</b> [1] - 1:13</p> <p><b>hook</b> [1] - 75:5</p> <p><b>hope</b> [2] - 7:8, 45:15</p> <p><b>hoping</b> [3] - 7:13, 7:14, 46:2</p> <p><b>hour</b> [1] - 34:24</p> <p><b>house</b> [3] - 27:12, 27:13, 27:21</p> <p><b>HSBC</b> [3] - 22:12, 31:10, 67:18</p> <p><b>huge</b> [2] - 38:19, 78:15</p> <p><b>hundred</b> [1] - 42:14</p> <p><b>hypothetical</b> [1] - 9:7</p>	<p><b>I</b></p> <p><b>idea</b> [4] - 5:12, 14:7, 40:5, 59:21</p> <p><b>identified</b> [3] - 62:18, 62:20, 73:3</p> <p><b>identifies</b> [1] - 45:24</p> <p><b>identify</b> [3] - 62:22, 70:14, 77:21</p> <p><b>identity</b> [1] - 40:1</p> <p><b>ignored</b> [1] - 16:6</p> <p><b>illustrative</b> [1] - 77:5</p> <p><b>imagine</b> [2] - 35:16, 58:24</p> <p><b>imagining</b> [2] - 32:10</p> <p><b>imminent</b> [1] - 35:24</p> <p><b>impartially</b> [1] - 67:20</p> <p><b>impediment</b> [1] - 50:16</p> <p><b>important</b> [11] - 5:18, 7:11, 14:2, 15:20, 20:10, 51:4, 71:25, 72:24, 73:8, 73:24, 80:3</p> <p><b>importing</b> [1] - 79:7</p> <p><b>impose</b> [3] - 18:17, 19:7, 83:4</p> <p><b>imposes</b> [1] - 17:21</p> <p><b>Inc</b> [17] - 40:22, 41:19, 41:21, 42:1, 42:4, 42:5, 42:6, 42:13, 42:16, 43:10, 45:4, 69:2, 69:21, 72:1, 72:10, 72:11, 72:18</p> <p><b>incapable</b> [1] - 33:23</p> <p><b>incentive</b> [1] - 60:17</p> <p><b>incentives</b> [1] - 57:19</p> <p><b>incidental</b> [4] - 9:20, 14:9, 14:10, 14:13</p> <p><b>included</b> [1] - 15:12</p> <p><b>includes</b> [1] - 30:10</p> <p><b>including</b> [1] - 66:15</p> <p><b>incorporated</b> [4] - 22:18, 28:12, 28:15, 51:11</p> <p><b>incorporation</b> [4] - 10:17, 28:9, 29:15, 49:2</p> <p><b>increasingly</b> [1] - 5:24</p> <p><b>incur</b> [1] - 58:1</p> <p><b>independent</b> [2] - 17:1, 23:25</p> <p><b>Index</b> [1] - 1:5</p> <p><b>Indian</b> [1] - 69:13</p> <p><b>indicate</b> [1] - 13:8</p> <p><b>indicated</b> [1] - 18:5</p> <p><b>indication</b> [1] - 63:15</p> <p><b>individual</b> [6] - 10:21, 14:7, 50:17, 50:22, 55:15, 80:15</p>	<p><b>indulge</b> [1] - 61:9</p> <p><b>indulgence</b> [1] - 78:13</p> <p><b>industrial</b> [1] - 5:22</p> <p><b>industry</b> [4] - 5:6, 5:13, 5:22, 36:1</p> <p><b>influence</b> [4] - 44:3, 75:22, 75:24, 76:9</p> <p><b>information</b> [3] - 41:22, 42:24, 65:20</p> <p><b>injury</b> [2] - 66:18, 66:20</p> <p><b>inquiry</b> [4] - 16:3, 17:18, 31:11, 33:9</p> <p><b>instead</b> [5] - 14:5, 22:10, 69:16, 69:25, 77:23</p> <p><b>institutions</b> [1] - 75:11</p> <p><b>instructive</b> [1] - 13:3</p> <p><b>insufficient</b> [1] - 16:21</p> <p><b>intended</b> [1] - 30:12</p> <p><b>intention</b> [1] - 13:8</p> <p><b>intentional</b> [2] - 76:11, 78:4</p> <p><b>interest</b> [9] - 21:21, 21:23, 22:1, 26:17, 34:8, 57:25, 70:14, 75:11, 80:22</p> <p><b>interested</b> [4] - 11:11, 34:4, 34:5, 67:8</p> <p><b>interesting</b> [3] - 15:1, 31:9, 60:10</p> <p><b>intermediaries</b> [3] - 50:7, 55:9, 55:22</p> <p><b>intermediary</b> [1] - 50:1</p> <p><b>internal</b> [11] - 12:4, 12:5, 21:24, 24:22, 28:5, 28:21, 48:5, 48:8, 48:22, 49:2, 67:10</p> <p><b>International</b> [1] - 69:11</p> <p><b>international</b> [1] - 5:20</p> <p><b>internationally</b> [1] - 5:17</p> <p><b>interplay</b> [1] - 67:10</p> <p><b>interpret</b> [1] - 15:19</p> <p><b>interpretation</b> [2] - 76:8, 76:10</p> <p><b>interpretations</b> [1] - 76:17</p> <p><b>interrupt</b> [2] - 13:2, 35:6</p> <p><b>interruption</b> [1] - 12:25</p> <p><b>intricate</b> [1] - 31:5</p> <p><b>intrinsic</b> [1] - 39:22</p> <p><b>investigate</b> [1] - 65:15</p> <p><b>investment</b> [3] - 20:22, 43:1, 47:3</p>	<p><b>investors</b> [2] - 11:2, 20:21</p> <p><b>invocation</b> [1] - 16:5</p> <p><b>invoke</b> [2] - 14:6, 28:20</p> <p><b>involve</b> [1] - 9:17</p> <p><b>involved</b> [14] - 5:7, 6:10, 13:5, 13:21, 40:6, 42:14, 42:20, 43:2, 43:3, 43:4, 43:8, 43:9, 72:15, 73:22</p> <p><b>involving</b> [4] - 12:19, 12:22, 21:23, 60:21</p> <p><b>Islands</b> [2] - 28:13</p> <p><b>issue</b> [38] - 4:12, 12:2, 12:10, 15:1, 16:9, 17:8, 17:13, 21:21, 25:1, 25:5, 26:18, 28:13, 28:15, 28:16, 29:6, 29:19, 29:20, 31:6, 31:12, 31:24, 32:5, 32:11, 32:13, 38:17, 40:1, 47:22, 47:23, 48:5, 49:9, 49:14, 54:10, 56:5, 56:10, 69:8, 73:4, 81:19</p> <p><b>issued</b> [3] - 15:4, 54:19, 71:24</p> <p><b>issues</b> [11] - 11:6, 11:18, 11:22, 22:2, 29:8, 36:6, 54:18, 61:7, 65:18, 66:22, 68:16</p> <p><b>item</b> [2] - 11:20, 11:25</p> <p><b>itself</b> [7] - 5:19, 6:10, 37:12, 38:9, 44:18, 63:4, 71:17</p> <p><b>J</b></p> <p><b>Jack</b> [1] - 3:2</p> <p><b>JACK</b> [1] - 1:3</p> <p><b>Jamie</b> [1] - 3:7</p> <p><b>JAMIE</b> [1] - 1:18</p> <p><b>January</b> [6] - 83:3, 83:6, 83:11, 83:12, 83:13, 83:15</p> <p><b>Jens</b> [1] - 25:12</p> <p><b>Jersey</b> [2] - 51:10</p> <p><b>job</b> [3] - 8:4, 8:5, 59:2</p> <p><b>Joe</b> [1] - 69:2</p> <p><b>JOEL</b> [1] - 2:7</p> <p><b>Joel</b> [1] - 3:17</p> <p><b>John</b> [1] - 3:14</p> <p><b>join</b> [1] - 27:9</p> <p><b>Judge</b> [3] - 17:3, 29:6, 79:14</p> <p><b>judge</b> [1] - 6:24</p>
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<p><b>judicial</b> [2] - 6:14, 22:9  <b>July</b> [1] - 72:19  <b>jump</b> [1] - 4:22  <b>June</b> [1] - 72:17  <b>junior</b> [1] - 59:8  <b>jurisdiction</b> [30] -  11:8, 11:19, 11:24,  12:3, 12:9, 12:15,  14:5, 14:6, 14:9,  19:16, 19:23, 25:4,  29:8, 32:7, 49:1,  49:11, 50:16, 50:19,  50:21, 51:3, 53:12,  61:5, 61:12, 61:18,  68:18, 70:6, 80:15,  81:7  <b>jurisdictional</b> [1] -  66:15  <b>jury</b> [1] - 6:23  <b>Justice</b> [6] - 1:14,  16:4, 20:23, 51:7,  51:14, 51:20  <b>justice</b> [1] - 28:25  <b>justices</b> [1] - 18:11</p>	<p><b>laid</b> [1] - 35:17  <b>language</b> [1] - 47:12  <b>LARA</b> [1] - 2:4  <b>Lara</b> [3] - 3:15, 4:7,  68:25  <b>large</b> [5] - 5:8, 5:11,  5:19, 53:6  <b>largely</b> [3] - 36:21,  38:20, 61:12  <b>Larry</b> [1] - 3:16  <b>last</b> [6] - 15:4, 21:20,  32:5, 34:14, 57:12,  68:7  <b>latter</b> [1] - 42:18  <b>law</b> [97] - 10:1, 10:17,  11:9, 11:23, 15:15,  17:11, 17:23, 17:25,  18:4, 19:2, 20:17,  21:11, 22:2, 23:8,  24:24, 25:2, 25:6,  25:9, 25:18, 26:23,  27:25, 28:1, 28:3,  28:13, 28:15, 28:16,  28:19, 29:11, 29:14,  29:19, 29:21, 30:6,  30:16, 30:20, 31:9,  31:18, 32:1, 32:7,  32:8, 32:17, 33:14,  33:16, 48:11, 48:14,  48:22, 48:23, 48:25,  49:6, 49:9, 50:2,  50:5, 50:8, 50:9,  50:16, 51:2, 51:9,  51:10, 51:13, 52:1,  53:5, 53:6, 53:8,  53:9, 53:10, 53:16,  53:19, 53:22, 55:19,  55:21, 55:23, 56:13,  59:4, 60:20, 61:2,  65:3, 67:12, 71:16,  74:25, 75:15, 75:16,  76:1, 76:5, 76:18,  77:9, 78:3, 79:3,  79:4, 81:2  <b>Law</b> [2] - 30:10, 53:5  <b>laws</b> [2] - 49:2, 51:17  <b>lawsuit</b> [10] - 11:1,  17:16, 17:21, 18:13,  18:25, 19:14, 22:20,  23:13, 45:2, 67:20  <b>lawsuits</b> [3] - 6:22,  11:1, 18:6  <b>lawyers</b> [8] - 6:24,  11:3, 36:25, 62:25,  63:3, 82:12, 82:16,  83:7  <b>lead</b> [1] - 82:24  <b>leading</b> [1] - 53:7  <b>leads</b> [1] - 75:7  <b>learned</b> [1] - 56:13</p>	<p><b>learning</b> [2] - 22:9,  25:22  <b>least</b> [6] - 23:24,  24:15, 26:2, 35:12,  51:20, 75:9  <b>leave</b> [3] - 3:24, 30:11,  31:6  <b>leaves</b> [1] - 33:24  <b>LEBENKAUSEN</b> [1] -  6:14  <b>led</b> [1] - 45:5  <b>left</b> [4] - 76:19, 77:23,  77:25, 78:1  <b>leg</b> [1] - 81:7  <b>legal</b> [6] - 7:6, 32:19,  44:22, 62:13, 62:14,  62:17  <b>legislation</b> [2] - 54:20,  55:8  <b>lends</b> [1] - 14:3  <b>lengthier</b> [1] - 15:6  <b>lengthy</b> [2] - 5:16,  45:11  <b>less</b> [2] - 6:3, 64:20  <b>letter</b> [2] - 23:14,  47:21  <b>letters</b> [7] - 23:15,  24:3, 40:4, 71:13,  73:12, 73:18, 73:23  <b>letting</b> [1] - 84:8  <b>level</b> [5] - 5:24, 27:8,  28:6, 48:8, 74:20  <b>Leverkausen</b> [1] -  6:13  <b>Lexington</b> [1] - 2:3  <b>liability</b> [5] - 44:22,  46:11, 47:6, 47:8,  74:11  <b>licenses</b> [1] - 15:16  <b>life</b> [4] - 5:7, 5:11, 8:4,  8:5  <b>lift</b> [1] - 57:7  <b>light</b> [1] - 7:13  <b>likely</b> [3] - 18:8, 20:20,  61:6  <b>lilly</b> [1] - 29:2  <b>lines</b> [1] - 10:16  <b>LIPTON</b> [1] - 1:20  <b>list</b> [4] - 16:20, 48:18,  54:12, 54:15  <b>listed</b> [2] - 16:12, 55:1  <b>listening</b> [1] - 78:16  <b>listing</b> [1] - 55:3  <b>literally</b> [1] - 16:23  <b>litigant</b> [2] - 28:10,  31:14  <b>litigated</b> [1] - 80:17  <b>litigation</b> [20] - 6:21,  7:3, 7:5, 10:18,  18:16, 19:10, 19:11,</p>	<p>26:20, 32:20, 38:8,  46:5, 57:4, 57:5,  57:14, 57:15, 60:23,  61:8, 77:7, 79:6,  80:24  <b>litigations</b> [3] - 60:5,  77:13, 78:5  <b>lived</b> [1] - 22:16  <b>LLP</b> [2] - 2:2, 2:5  <b>load</b> [1] - 41:3  <b>loaded</b> [1] - 12:6  <b>located</b> [3] - 81:9,  82:12, 82:16  <b>locked</b> [1] - 12:6  <b>locus</b> [1] - 19:24  <b>logic</b> [1] - 5:22  <b>London</b> [1] - 82:14  <b>look</b> [20] - 18:21,  25:18, 27:23, 29:3,  29:13, 29:14, 32:8,  35:1, 51:7, 52:15,  53:24, 57:19, 59:23,  65:16, 65:18, 70:15,  70:17, 72:13, 73:22,  74:23  <b>looked</b> [2] - 28:8,  51:14  <b>looking</b> [9] - 4:9, 20:6,  43:21, 44:16, 70:21,  72:8, 72:12, 73:9,  73:10  <b>looks</b> [1] - 71:2  <b>loophole</b> [1] - 31:9  <b>loss</b> [1] - 60:7  <b>lost</b> [2] - 62:15, 62:17  <b>low</b> [1] - 80:22  <b>luck</b> [1] - 18:23  <b>Lynch</b> [11] - 3:14,  42:1, 42:3, 42:16,  69:11, 69:13, 72:1,  72:2, 72:9, 72:18,  72:19</p>	<p>8:5, 13:23, 27:16,  27:19, 27:23, 33:17,  33:18, 33:22, 33:25,  58:21, 59:8, 59:14,  59:18, 62:23  <b>managers</b> [5] - 8:4,  13:13, 58:19, 58:20,  59:22  <b>managing</b> [1] - 80:23  <b>Manhattan</b> [1] - 37:2  <b>Manhattan-centric</b> [1]  - 37:2  <b>Mankowski</b> [3] - 53:7,  55:4, 57:16  <b>march</b> [1] - 11:9  <b>market</b> [6] - 39:3,  39:4, 45:20, 60:8,  62:15, 62:17  <b>marketplace</b> [1] - 5:25  <b>Marx</b> [3] - 33:11,  34:14, 67:18  <b>Mason</b> [1] - 22:12  <b>materials</b> [2] - 63:7,  63:11  <b>matter</b> [21] - 18:14,  19:2, 20:17, 21:21,  26:17, 29:16, 30:20,  31:5, 32:5, 33:13,  49:11, 49:13, 53:16,  54:23, 60:20, 61:2,  77:7, 79:2, 79:3,  79:9  <b>matters</b> [4] - 11:1,  22:25, 30:15, 79:6  <b>mean</b> [11] - 4:19, 6:14,  10:14, 15:3, 15:6,  45:2, 60:6, 63:9,  73:16, 80:2, 82:13  <b>meaning</b> [1] - 38:2  <b>means</b> [1] - 72:15  <b>meanwhile</b> [1] - 35:2  <b>meet</b> [11] - 7:19, 8:13,  13:17, 28:17, 30:25,  54:7, 63:14, 64:9,  67:18, 80:5  <b>meeting</b> [9] - 8:8, 8:9,  13:22, 19:22, 59:16,  63:10, 65:2, 66:4,  67:23  <b>meetings</b> [4] - 8:13,  8:16, 9:13, 13:8  <b>member</b> [1] - 13:23  <b>membered</b> [1] - 54:22  <b>members</b> [12] - 8:10,  9:10, 19:18, 19:20,  27:19, 27:23, 33:22,  33:25, 36:19, 44:12,  59:8, 82:15  <b>mention</b> [1] - 42:3  <b>mentioned</b> [5] - 18:7,</p>
<p><b>K</b></p>				
<p><b>KATZ</b> [1] - 1:20  <b>keep</b> [7] - 12:9, 24:20,  39:21, 47:15, 65:22,  67:2, 79:13  <b>keeps</b> [1] - 70:4  <b>kept</b> [1] - 20:24  <b>key</b> [2] - 13:11, 16:4  <b>kind</b> [8] - 7:13, 7:14,  15:21, 48:20, 53:11,  55:23, 75:7, 80:19  <b>kinds</b> [2] - 54:24,  64:22  <b>known</b> [2] - 11:3, 38:6  <b>knows</b> [7] - 5:9, 6:2,  15:11, 16:9, 17:23,  26:19, 33:11  <b>Koch</b> [1] - 25:12  <b>Konstantins</b> [1] - 3:2  <b>KONSTANTINS</b> [1] -  1:3  <b>Kreutter</b> [4] - 14:18,  61:14, 61:17, 79:22  <b>Kurtzberg</b> [3] - 3:17,  69:3, 69:7  <b>KURTZBERG</b> [2] -  2:7, 3:17</p>				
<p><b>L</b></p>				
<p><b>L.L.C</b> [1] - 69:25  <b>lack</b> [4] - 23:4, 34:21,  37:13, 57:18  <b>lacking</b> [1] - 15:22</p>				
			<p><b>M</b></p>	
			<p><b>M&amp;A</b> [4] - 36:2, 38:19,  60:7, 64:5  <b>Madam</b> [1] - 12:25  <b>magic</b> [1] - 24:9  <b>Mahon</b> [1] - 22:13  <b>mails</b> [1] - 8:23  <b>main</b> [5] - 8:4, 8:5,  22:16, 22:17, 36:7  <b>maintaining</b> [1] -  60:22  <b>majority</b> [7] - 9:13,  21:4, 27:15, 27:24,  33:20, 33:22, 77:24  <b>manage</b> [1] - 8:5  <b>management</b> [14] -</p>	

<p>20:9, 35:25, 37:2, 48:10</p> <p><b>merger</b> [5] - 5:2, 5:18, 6:3, 6:20, 35:19</p> <p><b>meritorious</b> [1] - 58:5</p> <p><b>merits</b> [1] - 25:5</p> <p><b>Merrill</b> [10] - 41:25, 42:3, 42:16, 69:11, 69:13, 71:25, 72:2, 72:9, 72:17, 72:19</p> <p><b>met</b> [9] - 7:22, 8:7, 19:24, 26:10, 27:25, 28:10, 64:19, 67:21, 68:12</p> <p><b>metaphysical</b> [2] - 82:9, 82:11</p> <p><b>Michael</b> [1] - 3:7</p> <p><b>microphone</b> [1] - 3:12</p> <p><b>might</b> [7] - 12:1, 23:11, 24:12, 34:8, 38:12, 62:11</p> <p><b>million</b> [1] - 36:14</p> <p><b>mind</b> [1] - 11:11</p> <p><b>minimum</b> [1] - 30:3</p> <p><b>minority</b> [1] - 50:25</p> <p><b>Mintz</b> [1] - 3:18</p> <p><b>minute</b> [5] - 34:20, 34:25, 35:3, 41:3, 41:7</p> <p><b>MINUTES</b> [1] - 84:14</p> <p><b>minutes</b> [2] - 34:22, 34:23</p> <p><b>misquoted</b> [1] - 76:8</p> <p><b>miss</b> [1] - 62:14</p> <p><b>missing</b> [1] - 72:5</p> <p><b>missions</b> [1] - 59:4</p> <p><b>Missouri</b> [3] - 6:19, 36:14, 81:10</p> <p><b>misspoke</b> [1] - 62:5</p> <p><b>mistake</b> [3] - 38:1, 58:9</p> <p><b>models</b> [1] - 54:24</p> <p><b>moment</b> [8] - 23:11, 24:9, 24:12, 34:19, 34:23, 36:24, 39:25, 61:9</p> <p><b>money</b> [1] - 81:18</p> <p><b>Monsanto</b> [29] - 5:3, 5:14, 6:17, 19:19, 34:4, 34:5, 34:7, 36:5, 36:6, 36:13, 36:22, 37:1, 38:24, 39:1, 41:23, 42:19, 42:22, 43:4, 43:6, 62:16, 63:4, 70:13, 71:14, 72:25, 81:9, 81:21, 82:3, 82:4, 82:6</p> <p><b>moonshot</b> [1] - 65:19</p> <p><b>moreover</b> [2] - 8:16,</p>	<p>53:14</p> <p><b>morning</b> [3] - 3:10, 3:21, 84:6</p> <p><b>most</b> [6] - 26:19, 30:9, 48:9, 54:25, 63:22, 81:15</p> <p><b>motion</b> [15] - 3:23, 4:3, 4:5, 7:10, 7:14, 8:20, 9:8, 9:25, 10:3, 10:9, 10:24, 11:7, 11:21, 20:25, 70:6</p> <p><b>motions</b> [4] - 3:22, 4:13, 4:21, 69:5</p> <p><b>motivation</b> [2] - 38:25, 39:1</p> <p><b>motive</b> [6] - 36:16, 37:16, 37:17, 39:22, 46:16, 62:19</p> <p><b>movants</b> [1] - 44:15</p> <p><b>move</b> [1] - 47:16</p> <p><b>moving</b> [1] - 56:5</p> <p><b>MR</b> [127] - 3:6, 3:13, 3:17, 4:16, 4:18, 5:1, 6:12, 7:21, 8:3, 8:15, 10:14, 11:16, 12:8, 14:20, 15:5, 17:5, 17:11, 18:2, 22:8, 24:23, 25:1, 27:5, 29:2, 29:9, 32:4, 35:9, 35:15, 37:9, 37:15, 38:13, 38:16, 39:8, 39:12, 39:22, 40:3, 40:21, 40:25, 41:6, 41:15, 41:19, 41:22, 42:12, 43:16, 43:20, 44:7, 44:18, 45:7, 45:9, 45:11, 45:18, 45:21, 45:24, 46:12, 46:15, 46:21, 46:25, 47:11, 47:16, 48:1, 48:4, 48:7, 49:4, 49:12, 49:16, 49:18, 49:20, 49:23, 50:12, 51:6, 51:25, 52:14, 52:19, 53:1, 56:5, 56:22, 57:10, 58:3, 58:8, 58:13, 58:17, 59:2, 59:7, 60:1, 60:12, 60:15, 61:1, 61:9, 61:12, 61:18, 61:22, 62:1, 62:6, 63:15, 63:19, 63:22, 64:7, 66:7, 66:13, 66:20, 67:6, 67:13, 67:17, 72:9, 78:12, 79:19, 79:25, 80:8, 81:1, 81:10, 81:13, 81:15, 81:20, 81:24, 82:1, 82:4, 82:7, 82:9, 83:10,</p>	<p>83:12, 83:15, 83:16, 83:20, 83:21, 83:24, 84:2, 84:10, 84:11</p> <p><b>MS</b> [26] - 4:7, 23:20, 24:6, 24:13, 68:22, 68:25, 70:8, 70:11, 70:19, 70:23, 70:25, 71:2, 71:7, 71:9, 72:16, 72:24, 73:7, 73:24, 74:15, 75:14, 75:18, 75:20, 76:4, 76:15, 84:4, 84:12</p> <p><b>multiple</b> [1] - 75:2</p> <p><b>must</b> [8] - 25:20, 25:21, 26:1, 26:4, 26:11, 32:24, 49:6</p> <p><b>muster</b> [1] - 30:8</p> <p><b>mute</b> [1] - 3:25</p>	<p><b>negotiation</b> [3] - 8:24, 9:2, 42:20</p> <p><b>never</b> [3] - 38:5, 59:18, 73:25</p> <p><b>nevertheless</b> [1] - 22:9</p> <p><b>new</b> [5] - 36:12, 50:6, 55:13, 55:21, 83:2</p> <p><b>NEW</b> [2] - 1:1, 1:1</p> <p><b>New</b> [139] - 1:17, 1:21, 2:3, 2:7, 6:25, 7:7, 8:22, 8:23, 8:25, 9:3, 9:4, 9:6, 9:12, 9:15, 9:17, 9:18, 9:21, 10:5, 10:22, 11:2, 11:9, 12:13, 12:14, 12:21, 13:6, 13:8, 13:9, 13:14, 13:22, 13:24, 14:9, 15:13, 15:14, 15:15, 15:16, 15:17, 16:1, 16:2, 16:7, 16:12, 16:13, 16:14, 16:16, 16:22, 16:24, 17:12, 17:22, 18:7, 19:14, 19:21, 21:3, 21:4, 21:25, 22:15, 22:16, 22:17, 22:18, 22:19, 22:21, 23:5, 25:10, 27:12, 28:2, 28:8, 29:21, 30:4, 30:16, 30:19, 32:5, 32:8, 36:18, 36:19, 36:22, 36:23, 36:25, 37:5, 42:7, 42:18, 43:1, 43:11, 48:16, 48:19, 49:6, 50:2, 50:8, 50:17, 51:3, 51:10, 51:13, 51:15, 51:16, 57:6, 59:6, 61:19, 61:23, 62:2, 63:1, 63:24, 64:2, 64:7, 64:8, 64:10, 64:11, 64:19, 64:20, 64:21, 65:1, 65:4, 66:10, 66:20, 68:10, 68:11, 69:21, 70:4, 75:15, 77:17, 77:18, 78:20, 78:21, 80:5, 80:17, 80:20, 81:5, 81:6, 81:8, 81:13, 81:16, 81:20, 82:16</p> <p><b>next</b> [4] - 20:7, 25:6, 56:5, 72:19</p> <p><b>nexus</b> [5] - 6:25, 7:6, 21:4, 23:5, 80:21</p> <p><b>NICOLE</b> [2] - 2:10, 84:16</p> <p><b>nobody</b> [1] - 71:19</p> <p><b>Nominal</b> [1] - 1:10</p>	<p><b>non</b> [26] - 17:8, 17:20, 18:10, 20:25, 21:16, 23:7, 23:12, 23:18, 23:21, 24:4, 24:15, 32:7, 61:4, 61:5, 64:13, 66:22, 68:3, 68:11, 68:17, 76:16, 76:24, 77:15, 79:1, 79:8, 81:3</p> <p><b>non-exclusive</b> [2] - 81:3</p> <p><b>non-factor</b> [1] - 79:8</p> <p><b>non-starter</b> [1] - 64:13</p> <p><b>non-U.S</b> [1] - 24:15</p> <p><b>none</b> [6] - 9:10, 9:13, 9:15, 10:21, 55:16, 73:13</p> <p><b>normal</b> [1] - 6:4</p> <p><b>note</b> [2] - 30:23, 33:14</p> <p><b>notes</b> [2] - 43:21, 81:16</p> <p><b>nothing</b> [13] - 13:14, 14:12, 15:23, 27:19, 30:17, 52:19, 56:13, 58:19, 58:22, 65:13, 75:2, 75:4</p> <p><b>notice</b> [5] - 14:2, 15:16, 74:13, 74:17, 74:18</p> <p><b>noting</b> [1] - 40:10</p> <p><b>notion</b> [3] - 17:13, 47:20</p> <p><b>nowhere</b> [2] - 42:9, 77:18</p> <p><b>nuance</b> [1] - 55:19</p> <p><b>nub</b> [2] - 46:7, 68:3</p> <p><b>nullable</b> [1] - 21:13</p> <p><b>number</b> [11] - 26:13, 36:6, 46:6, 48:20, 68:1, 70:24, 70:25, 71:15, 75:24, 75:25, 77:16</p> <p><b>numbers</b> [1] - 70:20</p> <p><b>numerous</b> [2] - 12:22, 34:10</p> <p><b>NYSCEF</b> [4] - 40:23, 41:1, 70:16, 71:10</p>
<b>N</b>				
<p><b>name</b> [6] - 25:14, 26:1, 42:9, 43:6, 43:7, 54:15</p> <p><b>named</b> [5] - 69:14, 69:16, 69:17, 69:20, 70:1</p> <p><b>names</b> [2] - 71:17, 73:11</p> <p><b>naming</b> [1] - 74:2</p> <p><b>Nathan</b> [2] - 17:3, 79:14</p> <p><b>nation's</b> [1] - 21:23</p> <p><b>national</b> [2] - 53:8, 53:9</p> <p><b>nationals</b> [3] - 8:7, 13:5, 19:4</p> <p><b>native</b> [1] - 35:16</p> <p><b>nearly</b> [5] - 8:12, 9:12, 18:18, 19:20, 22:24</p> <p><b>necessarily</b> [10] - 29:5, 31:7, 46:10, 47:22, 50:17, 52:10, 52:11, 72:14, 73:16, 73:22</p> <p><b>necessary</b> [2] - 19:12, 66:15</p> <p><b>need</b> [12] - 3:25, 18:11, 20:11, 31:17, 41:8, 56:15, 61:7, 61:17, 62:4, 65:20, 73:19, 79:6</p> <p><b>needn't</b> [3] - 11:20, 25:3, 34:15</p> <p><b>needs</b> [3] - 9:25, 31:14, 32:11</p> <p><b>negate</b> [3] - 40:4, 43:3, 43:8</p> <p><b>negotiated</b> [3] - 9:14, 13:6, 36:21</p>				
<b>O</b>				
<p><b>obligations</b> [3] - 7:19, 63:2, 63:10</p> <p><b>observation</b> [2] - 79:5, 79:20</p> <p><b>observe</b> [1] - 30:8</p> <p><b>obstacle</b> [1] - 78:15</p> <p><b>obstacles</b> [1] - 25:8</p> <p><b>obtain</b> [1] - 26:11</p> <p><b>obviate</b> [1] - 79:9</p> <p><b>obviously</b> [2] - 65:7,</p>				

<p>77:9  <b>OF</b> [6] - 1:1, 1:1, 2:2, 84:13, 84:14  <b>offer</b> [2] - 36:14, 37:3  <b>office</b> [1] - 36:13  <b>often</b> [3] - 6:8, 33:10, 63:24  <b>old</b> [2] - 20:16, 55:19  <b>Old</b> [1] - 2:6  <b>one</b> [62] - 3:22, 4:13, 6:16, 8:15, 11:7, 11:8, 11:21, 12:12, 12:17, 13:23, 15:1, 17:21, 20:20, 24:14, 24:18, 25:3, 29:15, 31:4, 31:12, 31:13, 31:20, 32:11, 32:13, 33:14, 33:20, 34:12, 34:25, 36:15, 39:16, 41:2, 41:6, 42:1, 43:3, 44:14, 44:15, 44:20, 53:7, 55:24, 57:11, 58:16, 60:6, 62:8, 62:10, 62:11, 65:8, 65:17, 65:18, 69:9, 69:24, 70:12, 70:22, 71:5, 72:22, 73:22, 74:18, 75:1, 75:24, 78:2, 78:11, 78:20, 82:24  <b>ones</b> [2] - 13:12, 22:11  <b>open</b> [3] - 9:5, 70:19, 71:4  <b>opening</b> [1] - 34:10  <b>operate</b> [1] - 58:21  <b>operated</b> [1] - 77:25  <b>operates</b> [1] - 48:24  <b>operating</b> [1] - 5:4  <b>operational</b> [1] - 5:21  <b>opportunity</b> [2] - 24:19, 40:8  <b>opposed</b> [2] - 47:9, 50:8  <b>opposite</b> [1] - 65:13  <b>opposition</b> [2] - 43:15, 74:1  <b>order</b> [8] - 11:10, 21:9, 37:4, 37:22, 38:22, 62:10, 62:11, 82:23  <b>Organization</b> [1] - 36:7  <b>organized</b> [1] - 10:16  <b>ORIGINAL</b> [1] - 84:14  <b>otherwise</b> [2] - 33:23, 34:24  <b>outside</b> [2] - 19:3, 64:25  <b>overall</b> [1] - 56:24  <b>overlay</b> [2] - 53:8, 53:22</p>	<p><b>overrides</b> [1] - 28:21  <b>overseas</b> [1] - 77:24  <b>oversees</b> [1] - 6:15  <b>overstated</b> [1] - 10:6  <b>overwhelmingly</b> [1] - 8:6  <b>own</b> [6] - 25:23, 53:18, 57:7, 63:13, 63:14, 82:6  <b>owned</b> [2] - 33:1, 33:5  <b>owner</b> [10] - 26:15, 26:16, 49:20, 49:21, 49:24, 49:25, 50:18, 56:16  <b>owners</b> [1] - 50:7  <b>ownership</b> [9] - 30:3, 32:15, 32:16, 32:24, 33:3, 50:4, 54:18, 54:24, 56:9  <b>owns</b> [1] - 26:1</p> <p style="text-align: center;"><b>P</b></p> <p><b>page</b> [8] - 41:12, 45:7, 45:17, 45:18, 70:20, 71:2, 71:6, 72:19  <b>pages</b> [1] - 70:20  <b>Pahlavi</b> [3] - 17:14, 19:13, 20:2  <b>paid</b> [1] - 46:20  <b>pain</b> [1] - 83:8  <b>Paine</b> [1] - 13:19  <b>pairing</b> [1] - 5:14  <b>papers</b> [12] - 11:13, 13:19, 17:19, 19:6, 26:9, 31:24, 33:12, 43:15, 63:25, 70:13, 70:16, 71:23  <b>paperwork</b> [1] - 42:15  <b>paragraph</b> [10] - 39:23, 41:17, 41:20, 43:20, 43:25, 44:3, 44:19, 45:18, 68:2, 74:16  <b>paragraphs</b> [3] - 39:23, 46:6, 68:1  <b>parallel</b> [7] - 19:9, 25:9, 52:2, 52:6, 60:5, 68:4, 78:23  <b>parent</b> [2] - 42:13, 69:18  <b>parents</b> [1] - 71:21  <b>Paris</b> [1] - 82:14  <b>parses</b> [1] - 31:23  <b>part</b> [9] - 8:24, 9:2, 9:4, 19:21, 30:1, 51:15, 53:21, 69:9, 76:16  <b>PART</b> [1] - 1:1  <b>partial</b> [1] - 46:22</p>	<p><b>participated</b> [1] - 8:11  <b>particular</b> [10] - 38:1, 40:18, 43:19, 43:20, 46:5, 47:3, 47:4, 51:16, 70:5, 82:19  <b>particularity</b> [1] - 74:19  <b>particularized</b> [1] - 32:24  <b>particularly</b> [6] - 11:11, 36:17, 61:15, 62:21, 67:8, 68:9  <b>partner</b> [2] - 3:7, 3:14  <b>party</b> [1] - 63:12  <b>pass</b> [2] - 17:8, 68:13  <b>passed</b> [2] - 56:24, 68:7  <b>passing</b> [1] - 36:9  <b>patience</b> [2] - 45:14, 84:7  <b>patient</b> [1] - 68:20  <b>pattern</b> [1] - 69:23  <b>pause</b> [1] - 70:3  <b>pay</b> [1] - 57:1  <b>PDF</b> [2] - 70:24, 70:25  <b>pending</b> [7] - 6:22, 10:25, 11:3, 11:4, 18:14, 20:10, 21:11  <b>people</b> [4] - 52:5, 58:21, 59:3, 66:7  <b>per</b> [1] - 75:11  <b>percent</b> [2] - 23:23, 59:19  <b>perfectly</b> [1] - 78:1  <b>perform</b> [1] - 75:12  <b>performing</b> [1] - 66:10  <b>period</b> [5] - 19:22, 23:14, 60:25, 62:21, 73:23  <b>permission</b> [12] - 26:11, 52:16, 52:20, 52:22, 53:19, 54:1, 54:2, 56:6, 56:8, 56:25, 57:2  <b>permits</b> [1] - 32:18  <b>person</b> [2] - 8:9, 54:11  <b>personal</b> [14] - 11:7, 11:18, 11:19, 12:3, 12:9, 19:16, 34:6, 60:17, 61:5, 61:12, 61:18, 70:6, 80:15, 81:7  <b>personally</b> [1] - 57:20  <b>pertain</b> [1] - 31:20  <b>pesticide</b> [1] - 6:22  <b>petition</b> [3] - 52:22, 54:1, 54:2  <b>Pfizer</b> [2] - 35:24, 36:10  <b>ph</b> [2] - 3:8</p>	<p><b>pharmaceuticals</b> [1] - 5:10  <b>photos</b> [1] - 11:6  <b>physically</b> [2] - 8:9, 66:10  <b>picked</b> [2] - 38:10, 42:9  <b>picking</b> [1] - 78:13  <b>picks</b> [1] - 42:13  <b>piece</b> [2] - 40:12, 74:22  <b>pieces</b> [1] - 12:16  <b>pierce</b> [1] - 71:18  <b>Pierce</b> [6] - 42:1, 42:3, 42:16, 72:1, 72:9, 72:18  <b>piercing</b> [1] - 71:19  <b>pill</b> [4] - 37:18, 38:21, 38:25, 62:11  <b>pitch</b> [3] - 46:15, 47:1, 47:8  <b>pitches</b> [1] - 46:10  <b>place</b> [7] - 4:6, 7:17, 9:6, 63:18, 64:2, 66:18, 66:20  <b>plaintiff</b> [18] - 3:7, 12:16, 16:10, 16:11, 25:19, 25:21, 25:25, 26:3, 26:7, 26:11, 30:24, 32:23, 57:20, 57:21, 68:10, 68:11, 70:4, 78:19  <b>Plaintiff</b> [1] - 1:16  <b>plaintiff's</b> [5] - 6:4, 16:7, 23:3, 34:2, 78:25  <b>Plaintiffs</b> [1] - 1:4  <b>plaintiffs</b> [27] - 5:4, 10:4, 14:4, 15:25, 16:6, 16:22, 19:7, 21:14, 22:4, 25:21, 25:23, 26:2, 26:6, 26:24, 27:1, 27:24, 28:17, 29:16, 30:8, 30:11, 30:25, 32:19, 32:25, 33:4, 69:16, 70:1, 75:10  <b>planful</b> [1] - 78:5  <b>plans</b> [1] - 83:4  <b>play</b> [1] - 37:16  <b>Plaza</b> [1] - 1:17  <b>plead</b> [5] - 25:22, 26:7, 33:4, 36:4, 36:9  <b>pleaded</b> [4] - 32:24, 73:25, 75:22, 75:23  <b>pleading</b> [11] - 9:9, 15:24, 27:9, 33:7, 35:22, 74:3, 74:5, 74:13, 74:21, 75:1  <b>pleadings</b> [6] - 6:5,</p>	<p>8:18, 9:23, 10:7, 10:9, 15:12  <b>PLLC</b> [1] - 1:16  <b>point</b> [34] - 10:23, 17:7, 17:20, 19:9, 20:13, 22:9, 24:10, 24:12, 24:18, 30:8, 30:15, 30:22, 36:1, 36:23, 40:11, 47:7, 48:18, 58:10, 58:13, 59:16, 68:13, 70:3, 72:24, 73:24, 74:6, 74:16, 75:25, 76:25, 77:6, 77:13, 77:15, 78:13, 78:23, 83:2  <b>pointed</b> [2] - 15:17, 16:11  <b>pointing</b> [1] - 22:22  <b>points</b> [11] - 10:15, 20:1, 22:10, 24:14, 27:9, 62:22, 71:10, 71:25, 76:16, 76:23, 76:25  <b>poison</b> [3] - 38:21, 38:25, 62:11  <b>poisoned</b> [1] - 37:18  <b>Polk</b> [1] - 69:1  <b>POLK</b> [1] - 2:2  <b>Poms</b> [3] - 16:5, 16:8, 16:25  <b>Porsche</b> [9] - 20:14, 20:23, 21:14, 23:6, 77:3, 77:5, 78:14, 78:21, 79:1  <b>portion</b> [1] - 28:1  <b>portions</b> [1] - 44:1  <b>Portnoy</b> [1] - 3:16  <b>positing</b> [2] - 66:16  <b>position</b> [3] - 16:7, 22:5, 46:1  <b>possibility</b> [1] - 68:5  <b>possible</b> [1] - 14:22  <b>possibly</b> [4] - 27:20, 28:17, 30:25, 43:2  <b>potential</b> [2] - 20:23, 65:8  <b>power</b> [1] - 36:12  <b>powerful</b> [2] - 51:4, 51:5  <b>practical</b> [1] - 79:2  <b>practicality</b> [1] - 61:3  <b>praise</b> [1] - 6:7  <b>pre</b> [2] - 29:24, 39:15  <b>pre-existing</b> [1] - 39:15  <b>pre-suit</b> [1] - 29:24  <b>precedented</b> [1] - 15:21  <b>precisely</b> [1] - 29:10  <b>precludes</b> [1] - 15:24</p>
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<p><b>predecessor</b> [1] - 70:14</p> <p><b>predecessors</b> [2] - 51:17, 51:18</p> <p><b>predicate</b> [2] - 19:16, 25:17</p> <p><b>preference</b> [2] - 3:23, 4:10</p> <p><b>preliminary</b> [2] - 11:24, 11:25</p> <p><b>prepared</b> [1] - 64:24</p> <p><b>prerequisites</b> [6] - 26:23, 27:2, 52:21, 52:22, 54:7</p> <p><b>prescribe</b> [1] - 78:5</p> <p><b>present</b> [2] - 13:12, 78:16</p> <p><b>presided</b> [1] - 6:24</p> <p><b>President</b> [1] - 13:24</p> <p><b>presumably</b> [1] - 64:2</p> <p><b>pretend</b> [1] - 81:3</p> <p><b>pretty</b> [2] - 26:25, 28:2</p> <p><b>price</b> [1] - 62:16</p> <p><b>prima</b> [1] - 73:20</p> <p><b>primarily</b> [1] - 81:16</p> <p><b>primary</b> [1] - 42:1</p> <p><b>principal</b> [1] - 23:3</p> <p><b>principally</b> [3] - 4:23, 22:12, 33:12</p> <p><b>principals</b> [1] - 13:13</p> <p><b>principles</b> [1] - 14:15</p> <p><b>pro</b> [1] - 3:9</p> <p><b>problem</b> [14] - 14:13, 20:6, 38:2, 38:7, 38:10, 41:1, 47:24, 58:14, 60:2, 74:12, 74:14, 75:6, 76:3, 76:7</p> <p><b>problems</b> [3] - 36:8, 38:11, 38:20</p> <p><b>procedural</b> [6] - 29:17, 29:20, 30:7, 30:20, 31:15, 53:18</p> <p><b>procedure</b> [4] - 30:11, 31:2, 31:4, 53:15</p> <p><b>procedures</b> [1] - 31:20</p> <p><b>proceed</b> [5] - 10:2, 18:22, 21:12, 25:7, 32:9</p> <p><b>proceeded</b> [1] - 77:6</p> <p><b>PROCEEDING</b> [1] - 84:14</p> <p><b>proceedings</b> [2] - 7:6, 78:23</p> <p><b>product</b> [4] - 6:22, 36:7, 36:8, 65:17</p> <p><b>products</b> [1] - 65:17</p> <p><b>professionals</b> [2] - 63:13, 64:3</p> <p><b>Professor</b> [3] - 53:6,</p>	<p>55:4, 57:16</p> <p><b>prong</b> [2] - 12:17, 74:7</p> <p><b>pronounce</b> [1] - 25:15</p> <p><b>proper</b> [1] - 18:4</p> <p><b>propose</b> [1] - 46:2</p> <p><b>proposed</b> [1] - 36:20</p> <p><b>proposition</b> [3] - 28:23, 77:11, 79:8</p> <p><b>proves</b> [2] - 73:15, 77:12</p> <p><b>provide</b> [9] - 22:13, 44:22, 60:20, 69:19, 69:20, 69:22, 70:10, 73:16, 79:12</p> <p><b>provided</b> [4] - 16:23, 21:6, 45:5, 50:20</p> <p><b>provides</b> [1] - 20:18</p> <p><b>provision</b> [10] - 12:12, 16:13, 16:16, 48:14, 48:15, 48:18, 48:20, 48:21, 53:24, 56:25</p> <p><b>provisions</b> [5] - 15:17, 30:13, 44:4, 50:6, 50:9</p> <p><b>proxy</b> [10] - 36:22, 37:2, 41:23, 42:6, 42:19, 42:22, 43:6, 70:20, 73:25, 77:20</p> <p><b>public</b> [2] - 42:15, 77:8</p> <p><b>pull</b> [3] - 37:22, 41:2, 41:7</p> <p><b>purchase</b> [1] - 62:16</p> <p><b>purpose</b> [4] - 24:11, 47:4, 54:20, 73:21</p> <p><b>purposeful</b> [1] - 80:19</p> <p><b>purposes</b> [4] - 8:19, 40:9, 65:4, 69:5</p> <p><b>pursue</b> [1] - 26:20</p> <p><b>pushed</b> [1] - 30:7</p> <p><b>put</b> [8] - 7:16, 14:14, 16:4, 37:3, 37:6, 54:14, 56:16, 74:17</p> <p><b>puts</b> [1] - 57:21</p> <p><b>putting</b> [2] - 32:6, 56:16</p>	<p><b>quickly</b> [3] - 74:6, 76:23, 81:1</p> <p><b>quite</b> [6] - 4:8, 31:24, 35:11, 36:16, 49:13, 76:9</p> <p><b>quote</b> [2] - 74:17, 75:1</p> <p><b>quoting</b> [4] - 12:20, 16:21, 20:18, 28:12</p>	<p><b>recognize</b> [1] - 76:24</p> <p><b>recognizes</b> [1] - 21:22</p> <p><b>recognizing</b> [2] - 50:6, 55:9</p> <p><b>recommendations</b> [1] - 63:12</p> <p><b>reconcile</b> [1] - 78:3</p> <p><b>reconciled</b> [1] - 28:24</p> <p><b>record</b> [12] - 3:5, 4:2, 7:15, 8:18, 9:23, 10:9, 40:10, 47:7, 68:25, 70:10, 71:13, 77:8</p> <p><b>records</b> [1] - 64:4</p> <p><b>reference</b> [3] - 10:20, 32:14, 33:2</p> <p><b>referenced</b> [1] - 77:20</p> <p><b>references</b> [1] - 77:20</p> <p><b>reflect</b> [1] - 55:14</p> <p><b>reflected</b> [1] - 5:19</p> <p><b>refocus</b> [1] - 56:18</p> <p><b>refute</b> [1] - 40:19</p> <p><b>regard</b> [1] - 61:22</p> <p><b>regarding</b> [1] - 10:4</p> <p><b>regardless</b> [2] - 45:17, 83:8</p> <p><b>regional</b> [1] - 6:15</p> <p><b>registered</b> [10] - 25:20, 27:7, 30:1, 30:24, 49:14, 54:9, 54:10, 55:20, 56:11, 56:12</p> <p><b>registration</b> [1] - 54:12</p> <p><b>registry</b> [1] - 55:15</p> <p><b>regularly</b> [1] - 64:21</p> <p><b>regulators</b> [1] - 15:16</p> <p><b>Reindel</b> [2] - 3:18, 69:3</p> <p><b>REINDEL</b> [1] - 2:5</p> <p><b>reject</b> [1] - 48:21</p> <p><b>rejected</b> [1] - 16:25</p> <p><b>relate</b> [1] - 68:17</p> <p><b>related</b> [2] - 16:14, 24:14</p> <p><b>relates</b> [28] - 7:15, 7:17, 7:19, 23:12, 23:14, 23:18, 24:4, 39:20, 40:17, 40:19, 43:13, 44:2, 44:14, 47:23, 47:24, 49:1, 49:9, 61:16, 64:3, 64:13, 64:17, 64:25, 65:11, 67:10, 79:15, 80:4, 80:20, 82:19</p> <p><b>relationship</b> [1] - 12:19</p> <p><b>relationships</b> [1] - 16:20</p> <p><b>relevance</b> [1] - 15:7</p>	<p><b>relevant</b> [5] - 15:17, 19:22, 26:16, 27:13, 32:25</p> <p><b>reliable</b> [1] - 26:17</p> <p><b>reliance</b> [2] - 15:15</p> <p><b>relief</b> [3] - 12:15, 18:14, 78:24</p> <p><b>rely</b> [4] - 17:6, 28:21, 33:12, 74:25</p> <p><b>remarkable</b> [1] - 21:13</p> <p><b>remarks</b> [1] - 79:21</p> <p><b>remember</b> [1] - 56:18</p> <p><b>remotely</b> [1] - 14:21</p> <p><b>Renren</b> [4] - 15:2, 28:11, 29:6, 51:1</p> <p><b>reorganization</b> [1] - 72:10</p> <p><b>repeated</b> [1] - 15:13</p> <p><b>repeatedly</b> [1] - 13:5</p> <p><b>reply</b> [1] - 76:1</p> <p><b>report</b> [3] - 25:13, 65:14, 65:16</p> <p><b>reported</b> [1] - 5:23</p> <p><b>Reporter</b> [3] - 2:11, 13:1, 84:16</p> <p><b>reports</b> [1] - 64:24</p> <p><b>represent</b> [1] - 69:15</p> <p><b>represented</b> [1] - 11:2</p> <p><b>representing</b> [1] - 3:15</p> <p><b>represents</b> [1] - 10:8</p> <p><b>request</b> [2] - 8:18, 53:25</p> <p><b>require</b> [6] - 15:21, 17:1, 52:25, 59:4, 66:9, 74:20</p> <p><b>required</b> [2] - 16:21, 55:19</p> <p><b>requirement</b> [12] - 16:11, 26:4, 26:15, 27:25, 29:25, 30:1, 30:16, 30:24, 31:6, 31:8, 31:12, 53:19</p> <p><b>requirements</b> [5] - 28:10, 30:3, 30:7, 30:9, 50:22</p> <p><b>requires</b> [5] - 10:18, 14:16, 21:12, 75:21, 76:11</p> <p><b>requiring</b> [1] - 19:4</p> <p><b>reside</b> [4] - 9:12, 9:13, 10:21, 10:22</p> <p><b>resident</b> [3] - 9:12, 78:20, 78:21</p> <p><b>residents</b> [3] - 19:20, 61:19, 62:2</p> <p><b>resolve</b> [1] - 76:13</p> <p><b>resolving</b> [2] - 22:1, 31:6</p> <p><b>resort</b> [1] - 34:14</p>
<b>R</b>				
<p><b>raft</b> [1] - 18:6</p> <p><b>raised</b> [1] - 81:16</p> <p><b>raising</b> [3] - 38:2, 64:12, 66:13</p> <p><b>Ramos</b> [1] - 20:24</p> <p><b>rarely</b> [2] - 58:5, 58:6</p> <p><b>rate</b> [1] - 31:3</p> <p><b>rather</b> [1] - 10:6</p> <p><b>Re</b> [2] - 29:24, 31:10</p> <p><b>re</b> [1] - 19:17</p> <p><b>re-emphasize</b> [1] - 19:17</p> <p><b>reach</b> [4] - 13:7, 25:3, 47:6, 48:3</p> <p><b>read</b> [3] - 11:13, 44:20, 71:23</p> <p><b>reading</b> [1] - 53:21</p> <p><b>reads</b> [1] - 75:2</p> <p><b>ready</b> [2] - 12:7, 12:8</p> <p><b>real</b> [6] - 12:10, 56:10, 68:4, 75:6, 78:23, 79:17</p> <p><b>realistic</b> [1] - 68:5</p> <p><b>really</b> [25] - 3:25, 4:2, 4:22, 15:5, 15:9, 15:12, 20:5, 24:8, 26:22, 36:3, 37:15, 40:11, 40:12, 58:20, 62:9, 65:21, 65:24, 66:18, 66:25, 67:19, 68:3, 71:18, 72:2, 78:15, 80:11</p> <p><b>reason</b> [12] - 13:3, 15:11, 21:17, 23:25, 27:10, 30:17, 30:18, 33:15, 42:3, 43:9, 53:4, 56:24</p> <p><b>reasonable</b> [1] - 67:19</p> <p><b>reasonably</b> [3] - 18:8, 28:24, 66:3</p> <p><b>reasons</b> [6] - 26:9, 35:23, 36:11, 41:6, 43:5, 64:15</p> <p><b>Rebecca</b> [1] - 3:1</p> <p><b>REBECCA</b> [1] - 1:2</p> <p><b>rebuttal</b> [1] - 25:13</p> <p><b>recent</b> [2] - 20:15, 21:8</p> <p><b>recess</b> [1] - 35:5</p>	<b>Q</b>			
<p><b>quarrel</b> [1] - 10:3</p> <p><b>questions</b> [24] - 4:23, 21:23, 25:7, 28:3, 32:2, 34:16, 35:1, 35:7, 62:12, 63:8, 65:25, 66:1, 66:2, 66:13, 66:14, 66:17, 68:14, 69:6, 78:6, 80:10, 84:8</p> <p><b>quick</b> [3] - 32:4, 67:17, 76:23</p>				

<p><b>respect</b> <sup>[14]</sup> - 5:18, 9:21, 11:18, 23:21, 23:23, 24:15, 33:19, 48:25, 51:6, 69:23, 73:1, 76:2, 79:9, 82:14</p> <p><b>respected</b> <sup>[2]</sup> - 49:7, 79:11</p> <p><b>respectfully</b> <sup>[4]</sup> - 67:9, 73:18, 77:18, 80:16</p> <p><b>respecting</b> <sup>[1]</sup> - 9:8</p> <p><b>respond</b> <sup>[2]</sup> - 76:21, 76:23</p> <p><b>response</b> <sup>[2]</sup> - 8:17, 16:5</p> <p><b>responsibilities</b> <sup>[1]</sup> - 65:3</p> <p><b>responsibility</b> <sup>[1]</sup> - 44:12</p> <p><b>responsive</b> <sup>[2]</sup> - 4:24, 10:10</p> <p><b>rest</b> <sup>[2]</sup> - 40:15, 55:16</p> <p><b>restatement</b> <sup>[1]</sup> - 49:5</p> <p><b>rests</b> <sup>[1]</sup> - 26:20</p> <p><b>resulted</b> <sup>[2]</sup> - 54:19, 55:8</p> <p><b>results</b> <sup>[1]</sup> - 6:21</p> <p><b>retained</b> <sup>[4]</sup> - 46:23, 47:2, 47:3, 47:9</p> <p><b>retention</b> <sup>[1]</sup> - 13:21</p> <p><b>reversed</b> <sup>[1]</sup> - 21:1</p> <p><b>review</b> <sup>[4]</sup> - 5:16, 24:12, 43:25, 65:1</p> <p><b>reviewed</b> <sup>[1]</sup> - 63:7</p> <p><b>reviewing</b> <sup>[1]</sup> - 64:3</p> <p><b>rights</b> <sup>[5]</sup> - 30:19, 31:21, 54:23, 55:7, 55:11</p> <p><b>rise</b> <sup>[5]</sup> - 7:4, 37:11, 38:7, 64:14, 64:22</p> <p><b>risk</b> <sup>[12]</sup> - 7:19, 36:2, 36:3, 46:5, 57:21, 57:23, 60:12, 60:16, 62:13, 62:14, 62:17, 65:8</p> <p><b>risks</b> <sup>[2]</sup> - 38:5, 38:19</p> <p><b>risky</b> <sup>[1]</sup> - 62:23</p> <p><b>Robert</b> <sup>[4]</sup> - 3:6, 83:13, 83:22</p> <p><b>ROBERT</b> <sup>[8]</sup> - 1:16, 1:18, 3:6, 83:15, 83:20, 83:24, 84:2</p> <p><b>ROBINSON</b> <sup>[1]</sup> - 2:10</p> <p><b>Robinson</b> <sup>[3]</sup> - 34:19, 35:12, 83:2</p> <p><b>ROBINSON,CSR</b> <sup>[1]</sup> - 84:16</p> <p><b>room</b> <sup>[2]</sup> - 64:10, 80:6</p> <p><b>ROSEN</b> <sup>[1]</sup> - 1:20</p> <p><b>Roundup</b> <sup>[1]</sup> - 6:21</p>	<p><b>rule</b> <sup>[10]</sup> - 31:13, 31:15, 31:16, 31:18, 31:25, 32:15, 32:16, 32:17, 32:22</p> <p><b>ruled</b> <sup>[1]</sup> - 78:21</p> <p><b>rules</b> <sup>[5]</sup> - 26:14, 29:16, 29:17, 29:18, 32:8</p> <p><b>rushed</b> <sup>[1]</sup> - 35:21</p> <p><b>rushing</b> <sup>[1]</sup> - 38:18</p> <p><b>RXR</b> <sup>[1]</sup> - 1:17</p> <p style="text-align: center;"><b>S</b></p> <p><b>Samet</b> <sup>[3]</sup> - 3:15, 4:7, 68:25</p> <p><b>SAMET</b> <sup>[1]</sup> - 2:4</p> <p><b>satisfactory</b> <sup>[1]</sup> - 23:4</p> <p><b>satisfied</b> <sup>[2]</sup> - 27:8, 31:9</p> <p><b>satisfy</b> <sup>[8]</sup> - 12:16, 12:21, 16:11, 27:2, 27:20, 50:20, 50:21, 61:17</p> <p><b>SAVITT</b> <sup>[30]</sup> - 1:22, 3:13, 4:16, 4:18, 5:1, 6:12, 7:21, 8:3, 8:15, 10:14, 11:16, 12:8, 14:20, 15:5, 17:5, 17:11, 18:2, 22:8, 24:23, 25:1, 27:5, 29:2, 29:9, 32:4, 78:12, 79:19, 79:25, 80:8, 83:16, 84:10</p> <p><b>Savitt</b> <sup>[14]</sup> - 3:13, 4:9, 4:11, 23:22, 24:20, 35:2, 35:17, 35:25, 49:13, 49:23, 52:1, 77:2, 78:10, 82:23</p> <p><b>scale</b> <sup>[1]</sup> - 5:13</p> <p><b>scandals</b> <sup>[1]</sup> - 57:13</p> <p><b>Scarpula's</b> <sup>[1]</sup> - 16:5</p> <p><b>scattered</b> <sup>[1]</sup> - 43:21</p> <p><b>SCC</b> <sup>[1]</sup> - 41:24</p> <p><b>scenario</b> <sup>[1]</sup> - 65:9</p> <p><b>school</b> <sup>[1]</sup> - 11:23</p> <p><b>science</b> <sup>[1]</sup> - 5:8</p> <p><b>sciences</b> <sup>[1]</sup> - 5:10</p> <p><b>scientists</b> <sup>[1]</sup> - 5:12</p> <p><b>scope</b> <sup>[3]</sup> - 5:13, 10:5, 13:16</p> <p><b>Scottish</b> <sup>[1]</sup> - 31:10</p> <p><b>scratching</b> <sup>[1]</sup> - 75:7</p> <p><b>scroll</b> <sup>[1]</sup> - 45:9</p> <p><b>se</b> <sup>[1]</sup> - 75:11</p> <p><b>seat</b> <sup>[2]</sup> - 6:13, 6:14</p> <p><b>second</b> <sup>[12]</sup> - 7:25, 18:16, 40:24, 53:4, 62:8, 70:22, 71:5, 72:22, 75:20, 77:15,</p>	<p>77:19, 83:5</p> <p><b>Second</b> <sup>[1]</sup> - 30:4</p> <p><b>secondary</b> <sup>[1]</sup> - 21:2</p> <p><b>secondly</b> <sup>[2]</sup> - 57:2, 81:4</p> <p><b>section</b> <sup>[1]</sup> - 45:21</p> <p><b>Section</b> <sup>[21]</sup> - 28:20, 30:10, 31:1, 43:22, 44:4, 44:6, 44:11, 44:14, 46:11, 47:17, 48:5, 48:17, 50:4, 52:14, 52:15, 55:12, 55:14, 57:18, 75:4, 76:2</p> <p><b>securities</b> <sup>[3]</sup> - 10:25, 11:3, 52:4</p> <p><b>Securities</b> <sup>[15]</sup> - 4:8, 20:22, 40:22, 41:18, 41:19, 41:21, 42:5, 42:6, 42:13, 43:10, 45:4, 69:2, 69:21, 69:25, 72:11</p> <p><b>see</b> <sup>[13]</sup> - 32:1, 35:1, 35:3, 39:19, 41:11, 43:24, 47:14, 71:5, 71:22, 77:21, 78:4, 80:11, 83:9</p> <p><b>seek</b> <sup>[1]</sup> - 13:9</p> <p><b>seeking</b> <sup>[3]</sup> - 18:14, 25:25, 57:2</p> <p><b>seeks</b> <sup>[1]</sup> - 31:17</p> <p><b>seem</b> <sup>[3]</sup> - 15:20, 22:11, 75:20</p> <p><b>selection</b> <sup>[3]</sup> - 16:13, 16:16, 24:17</p> <p><b>send</b> <sup>[1]</sup> - 82:25</p> <p><b>Senior</b> <sup>[2]</sup> - 2:11, 84:16</p> <p><b>sense</b> <sup>[12]</sup> - 4:19, 5:3, 10:10, 13:4, 16:3, 29:11, 31:19, 55:17, 58:25, 67:7, 67:21</p> <p><b>sensible</b> <sup>[1]</sup> - 11:10</p> <p><b>sent</b> <sup>[1]</sup> - 65:1</p> <p><b>sentence</b> <sup>[3]</sup> - 55:18, 76:4, 76:5</p> <p><b>series</b> <sup>[2]</sup> - 13:25, 79:16</p> <p><b>seriously</b> <sup>[2]</sup> - 45:16, 80:14</p> <p><b>serve</b> <sup>[1]</sup> - 11:15</p> <p><b>services</b> <sup>[4]</sup> - 69:19, 69:20, 69:22, 73:17</p> <p><b>set</b> <sup>[15]</sup> - 10:8, 11:22, 17:14, 17:18, 17:19, 26:9, 31:11, 31:24, 46:18, 47:12, 49:4, 57:14, 60:18, 64:4, 67:11</p> <p><b>sets</b> <sup>[1]</sup> - 62:7</p>	<p><b>settled</b> <sup>[3]</sup> - 28:2, 28:5, 67:12</p> <p><b>seven</b> <sup>[1]</sup> - 54:17</p> <p><b>several</b> <sup>[5]</sup> - 10:24, 35:25, 42:14, 48:7, 57:12</p> <p><b>shadow</b> <sup>[1]</sup> - 76:21</p> <p><b>shadow-boxing</b> <sup>[1]</sup> - 76:21</p> <p><b>shareholder</b> <sup>[13]</sup> - 54:23, 55:6, 55:7, 55:11, 55:16, 55:17, 57:1, 59:16, 77:1, 77:6, 77:13</p> <p><b>shareholders</b> <sup>[10]</sup> - 27:7, 51:11, 53:2, 53:3, 54:25, 55:10, 55:20, 55:22, 59:17, 81:21</p> <p><b>shares</b> <sup>[15]</sup> - 25:23, 26:15, 26:16, 30:2, 30:25, 32:19, 33:1, 33:5, 33:6, 34:7, 55:1, 55:15, 82:2</p> <p><b>shark</b> <sup>[1]</sup> - 35:24</p> <p><b>shifting</b> <sup>[2]</sup> - 56:25, 60:2</p> <p><b>show</b> <sup>[7]</sup> - 16:21, 25:21, 26:1, 30:12, 43:17, 43:24, 80:5</p> <p><b>showing</b> <sup>[7]</sup> - 14:22, 25:22, 26:8, 32:24, 32:25, 33:21, 34:10</p> <p><b>shows</b> <sup>[1]</sup> - 68:6</p> <p><b>shy</b> <sup>[1]</sup> - 4:25</p> <p><b>sic</b> <sup>[2]</sup> - 21:13, 59:10</p> <p><b>side</b> <sup>[13]</sup> - 6:4, 6:16, 6:17, 7:2, 9:18, 25:14, 27:12, 27:21, 30:7, 30:11, 38:17, 53:4</p> <p><b>sidetrack</b> <sup>[1]</sup> - 36:24</p> <p><b>significance</b> <sup>[1]</sup> - 82:18</p> <p><b>significant</b> <sup>[4]</sup> - 26:17, 34:21, 39:1, 57:14</p> <p><b>significantly</b> <sup>[1]</sup> - 57:21</p> <p><b>similar</b> <sup>[2]</sup> - 13:4, 69:23</p> <p><b>similarly</b> <sup>[1]</sup> - 42:22</p> <p><b>simpler</b> <sup>[1]</sup> - 16:4</p> <p><b>simply</b> <sup>[5]</sup> - 31:20, 43:6, 48:10, 55:19, 68:12</p> <p><b>Singapore</b> <sup>[1]</sup> - 24:18</p> <p><b>single</b> <sup>[6]</sup> - 8:7, 8:15, 34:11, 76:4, 76:5, 79:15</p> <p><b>situation</b> <sup>[2]</sup> - 46:19,</p>	<p>62:15</p> <p><b>situations</b> <sup>[1]</sup> - 46:21</p> <p><b>situs</b> <sup>[2]</sup> - 8:13, 8:15</p> <p><b>six</b> <sup>[1]</sup> - 17:18</p> <p><b>sixth</b> <sup>[1]</sup> - 79:8</p> <p><b>Slip</b> <sup>[1]</sup> - 2:6</p> <p><b>slowly</b> <sup>[1]</sup> - 35:15</p> <p><b>small</b> <sup>[1]</sup> - 80:21</p> <p><b>smattering</b> <sup>[1]</sup> - 21:2</p> <p><b>Smith</b> <sup>[5]</sup> - 42:1, 42:4, 42:16, 72:1, 72:18</p> <p><b>sock</b> <sup>[2]</sup> - 54:14, 55:25</p> <p><b>solve</b> <sup>[1]</sup> - 14:12</p> <p><b>someone</b> <sup>[3]</sup> - 31:17, 37:25, 60:1</p> <p><b>sometime</b> <sup>[1]</sup> - 67:6</p> <p><b>sorry</b> <sup>[5]</sup> - 35:7, 40:22, 45:10, 61:24, 63:20</p> <p><b>sort</b> <sup>[5]</sup> - 27:6, 37:18, 59:11, 64:5, 75:10</p> <p><b>sought</b> <sup>[2]</sup> - 14:23, 16:10</p> <p><b>sounds</b> <sup>[1]</sup> - 59:23</p> <p><b>sovereign</b> <sup>[1]</sup> - 79:10</p> <p><b>space</b> <sup>[1]</sup> - 26:24</p> <p><b>spare</b> <sup>[1]</sup> - 18:11</p> <p><b>speakerphone</b> <sup>[1]</sup> - 4:12</p> <p><b>speaking</b> <sup>[3]</sup> - 4:1, 27:1, 66:22</p> <p><b>specific</b> <sup>[15]</sup> - 26:8, 40:19, 42:18, 42:23, 50:4, 50:21, 61:16, 68:6, 69:6, 72:9, 73:2, 73:5, 73:20, 78:4, 80:20</p> <p><b>specifically</b> <sup>[6]</sup> - 10:19, 29:24, 51:9, 65:14, 65:15, 74:11</p> <p><b>spelled</b> <sup>[1]</sup> - 6:13</p> <p><b>Spencer</b> <sup>[1]</sup> - 13:19</p> <p><b>spend</b> <sup>[1]</sup> - 62:5</p> <p><b>spot</b> <sup>[1]</sup> - 77:4</p> <p><b>squared</b> <sup>[1]</sup> - 16:8</p> <p><b>stage</b> <sup>[2]</sup> - 61:7, 76:13</p> <p><b>stand</b> <sup>[1]</sup> - 60:1</p> <p><b>standard</b> <sup>[4]</sup> - 9:9, 26:9, 74:13, 76:9</p> <p><b>standing</b> <sup>[17]</sup> - 12:1, 12:4, 23:8, 24:21, 25:2, 28:10, 28:14, 28:16, 29:8, 29:14, 29:22, 30:15, 32:6, 32:8, 32:18, 50:5, 56:7</p> <p><b>stands</b> <sup>[2]</sup> - 33:15, 77:11</p> <p><b>stark</b> <sup>[1]</sup> - 23:2</p> <p><b>start</b> <sup>[20]</sup> - 3:21, 3:23, 4:1, 4:4, 4:6, 4:9,</p>
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<p>4:12, 4:14, 4:19, 11:18, 12:3, 12:4, 12:6, 35:4, 40:9, 40:21, 41:9, 48:4, 52:13, 69:8</p> <p><b>starter</b> [1] - 64:13</p> <p><b>starting</b> [6] - 3:20, 39:23, 45:7, 45:18, 68:2, 69:9</p> <p><b>starts</b> [3] - 36:3, 41:13, 45:21</p> <p><b>state</b> [8] - 28:4, 28:9, 29:14, 49:1, 49:6, 51:4, 79:10</p> <p><b>STATE</b> [1] - 1:1</p> <p><b>statement</b> [5] - 9:22, 9:23, 36:22, 71:24, 72:13</p> <p><b>States</b> [5] - 5:16, 19:3, 28:7, 36:21, 54:25</p> <p><b>states</b> [2] - 46:18, 48:19</p> <p><b>statute</b> [28] - 12:11, 12:16, 13:7, 13:16, 27:1, 29:12, 30:21, 44:21, 44:25, 48:11, 50:8, 50:18, 54:5, 54:8, 55:16, 56:6, 56:8, 56:23, 57:14, 58:19, 58:22, 67:11, 74:10, 74:11, 74:17, 78:5</p> <p><b>statutory</b> [4] - 13:17, 48:23, 49:6, 50:22</p> <p><b>step</b> [3] - 7:25, 74:18, 79:16</p> <p><b>stepping</b> [1] - 48:13</p> <p><b>still</b> [4] - 13:6, 59:20, 77:8, 82:4</p> <p><b>Stock</b> [3] - 25:11, 43:22, 44:4</p> <p><b>stock</b> [21] - 26:2, 33:2, 39:2, 39:8, 39:13, 45:20, 49:14, 49:21, 49:25, 50:1, 54:10, 54:13, 54:14, 54:18, 54:24, 55:6, 55:25, 82:6</p> <p><b>stockholder</b> [3] - 25:20, 30:19, 56:11</p> <p><b>stockholders</b> [1] - 31:22</p> <p><b>stop</b> [5] - 10:9, 32:1, 34:13, 43:12, 73:23</p> <p><b>stopper</b> [1] - 62:20</p> <p><b>story</b> [1] - 36:3</p> <p><b>straightforward</b> [1] - 32:17</p> <p><b>Street</b> [3] - 1:21, 18:19, 60:25</p>	<p><b>strictly</b> [1] - 32:22</p> <p><b>strikes</b> [2] - 11:17, 79:14</p> <p><b>structure</b> [3] - 33:15, 52:15, 60:17</p> <p><b>structures</b> [1] - 25:2</p> <p><b>struggle</b> [1] - 36:12</p> <p><b>stuck</b> [1] - 48:17</p> <p><b>sub</b> [1] - 69:21</p> <p><b>subject</b> [6] - 14:8, 14:24, 18:13, 31:1, 49:11, 50:4</p> <p><b>submit</b> [4] - 16:8, 16:24, 21:9, 28:17</p> <p><b>submitted</b> [1] - 25:13</p> <p><b>subsidiary</b> [1] - 82:5</p> <p><b>substantial</b> [8] - 5:21, 7:4, 7:15, 12:20, 18:20, 19:1, 38:8, 80:23</p> <p><b>substantially</b> [4] - 10:7, 18:14, 26:14, 80:16</p> <p><b>substantive</b> [19] - 29:18, 29:19, 29:20, 29:23, 29:25, 30:2, 30:4, 30:13, 30:16, 30:17, 30:18, 30:20, 31:2, 31:5, 31:19, 31:22, 31:25, 50:15, 51:2</p> <p><b>success</b> [1] - 46:22</p> <p><b>successors</b> [1] - 51:21</p> <p><b>sue</b> [8] - 16:10, 33:17, 33:18, 49:21, 49:25, 50:17, 55:25, 59:10</p> <p><b>sued</b> [4] - 27:7, 40:5, 61:19, 62:1</p> <p><b>sufficient</b> [2] - 63:9, 71:17</p> <p><b>suggest</b> [5] - 4:4, 33:13, 43:1, 48:13, 57:19</p> <p><b>suggesting</b> [2] - 46:9, 58:19</p> <p><b>suicide</b> [1] - 59:4</p> <p><b>SUISSE</b> [1] - 2:6</p> <p><b>Suisse</b> [21] - 3:19, 42:23, 42:24, 42:25, 43:2, 43:3, 43:8, 43:9, 43:11, 69:4, 69:6, 69:24, 69:25, 70:1, 70:2, 70:5, 72:20, 72:21, 72:22</p> <p><b>suit</b> [13] - 25:8, 26:4, 26:23, 27:14, 29:24, 33:23, 56:7, 58:23, 59:3, 59:14, 59:24, 68:4, 68:5</p>	<p><b>suitor</b> [2] - 37:20, 37:21</p> <p><b>suits</b> [1] - 58:5</p> <p><b>summary</b> [1] - 10:9</p> <p><b>sup</b> [1] - 80:15</p> <p><b>superior</b> [1] - 16:15</p> <p><b>supervisors</b> [10] - 58:18, 58:24, 59:3, 59:11, 59:14, 63:1, 63:22, 65:25, 66:9, 67:22</p> <p><b>supervisory</b> [9] - 8:3, 9:11, 27:14, 27:22, 33:17, 33:18, 33:22, 34:3, 44:12</p> <p><b>supplies</b> [1] - 7:8</p> <p><b>support</b> [1] - 28:23</p> <p><b>supporting</b> [2] - 24:19, 65:12</p> <p><b>supports</b> [1] - 77:21</p> <p><b>suppose</b> [1] - 46:6</p> <p><b>supposed</b> [2] - 11:4, 76:20</p> <p><b>supposedly</b> [1] - 58:16</p> <p><b>SUPREME</b> [1] - 1:1</p> <p><b>Supreme</b> [3] - 1:14, 19:3, 28:7</p> <p><b>surmounted</b> [1] - 32:9</p> <p><b>survive</b> [1] - 21:16</p> <p><b>suspect</b> [1] - 26:8</p> <p><b>suspenders</b> [1] - 74:2</p> <p><b>sustained</b> [1] - 12:20</p> <p><b>swallow</b> [1] - 39:17</p> <p><b>swept</b> [1] - 14:11</p> <p><b>Swiss</b> [2] - 70:1, 70:5</p> <p><b>synergies</b> [1] - 5:21</p>	<p><b>test</b> [7] - 12:21, 60:13, 60:15, 67:18, 67:21, 68:12</p> <p><b>text</b> [1] - 29:12</p> <p><b>THE</b> [150] - 1:1, 3:1, 3:11, 3:20, 4:11, 4:17, 4:25, 6:10, 7:12, 8:2, 8:13, 10:12, 11:12, 12:1, 14:18, 15:3, 17:2, 17:10, 18:1, 22:6, 23:10, 24:2, 24:8, 24:20, 24:25, 27:4, 29:1, 29:5, 32:3, 34:18, 35:6, 35:11, 37:7, 37:10, 37:23, 38:15, 39:6, 39:10, 39:18, 40:2, 40:7, 40:23, 41:1, 41:7, 41:17, 41:20, 42:11, 43:12, 43:17, 43:24, 44:10, 44:20, 45:8, 45:10, 45:12, 45:19, 45:22, 46:9, 46:13, 46:19, 46:23, 47:1, 47:14, 47:19, 48:2, 48:6, 48:25, 49:8, 49:15, 49:17, 49:19, 49:22, 50:10, 50:15, 51:22, 52:10, 52:18, 52:24, 56:4, 56:15, 57:3, 57:23, 58:7, 58:10, 58:15, 58:25, 59:6, 59:23, 60:10, 60:13, 60:19, 61:4, 61:10, 61:14, 61:20, 61:24, 62:4, 63:5, 63:16, 63:20, 63:25, 64:9, 66:12, 66:17, 67:2, 67:9, 67:15, 68:16, 68:24, 70:7, 70:9, 70:12, 70:22, 70:24, 71:1, 71:5, 71:8, 71:22, 72:12, 72:22, 73:4, 73:15, 74:9, 75:13, 75:17, 75:19, 76:3, 76:12, 78:9, 79:13, 79:24, 80:2, 80:11, 81:8, 81:11, 81:14, 81:18, 81:23, 81:25, 82:2, 82:6, 82:8, 82:11, 83:11, 83:18, 83:22, 84:1, 84:3, 84:5, 84:13</p> <p><b>themselves</b> [4] - 19:5, 53:10, 60:17, 63:2</p> <p><b>theory</b> [12] - 13:25, 14:6, 14:11, 14:14, 14:15, 47:5, 47:10,</p>	<p>47:12, 47:14, 61:13, 61:20</p> <p><b>therefore</b> [5] - 31:19, 31:22, 53:16, 56:11, 57:8</p> <p><b>they've</b> [3] - 10:6, 27:25, 75:22</p> <p><b>thin</b> [1] - 16:25</p> <p><b>thinking</b> [3] - 17:3, 68:17, 71:11</p> <p><b>thinner</b> [1] - 16:25</p> <p><b>third</b> [4] - 19:13, 20:1, 63:12, 76:7</p> <p><b>third-party</b> [1] - 63:12</p> <p><b>THIS</b> [1] - 84:14</p> <p><b>threat</b> [1] - 35:23</p> <p><b>three</b> [6] - 3:22, 27:18, 59:7, 59:8, 75:9, 77:23</p> <p><b>threshold</b> [3] - 14:12, 17:13, 71:9</p> <p><b>throughout</b> [1] - 32:20</p> <p><b>throwing</b> [1] - 68:10</p> <p><b>thumbs</b> [1] - 35:13</p> <p><b>thumbs-up</b> [1] - 35:13</p> <p><b>TO</b> [1] - 84:13</p> <p><b>today</b> [3] - 3:18, 38:12, 60:25</p> <p><b>together</b> [11] - 7:16, 18:23, 37:1, 37:22, 38:23, 64:21, 69:5, 74:24, 82:22, 82:25, 83:1</p> <p><b>tongue</b> [1] - 35:16</p> <p><b>took</b> [10] - 7:17, 9:6, 15:18, 39:4, 45:16, 63:3, 64:2, 66:18, 66:20, 82:24</p> <p><b>top</b> [2] - 19:2, 35:19</p> <p><b>touchdown</b> [1] - 74:19</p> <p><b>towards</b> [2] - 20:1, 21:22</p> <p><b>traction</b> [1] - 30:23</p> <p><b>trade</b> [1] - 71:17</p> <p><b>traditional</b> [1] - 5:19</p> <p><b>transacted</b> [2] - 12:13, 16:1</p> <p><b>transacting</b> [1] - 12:17</p> <p><b>transaction</b> [40] - 4:3, 5:1, 5:5, 5:6, 5:12, 5:15, 5:20, 6:2, 6:6, 6:7, 6:16, 6:17, 7:12, 7:15, 7:24, 8:24, 9:3, 9:14, 9:17, 9:22, 12:20, 13:6, 33:3, 34:4, 34:5, 35:19, 37:10, 37:12, 37:14, 39:14, 42:5, 52:5, 64:20, 66:4, 67:23, 70:15, 72:14, 81:4,</p>
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82:20 <b>transactional</b> [1] - 7:9 <b>transactions</b> [3] - 35:20, 36:2, 38:19 <b>transcript</b> [1] - 82:24 <b>TRANSCRIPT</b> [1] - 84:13 <b>translation</b> [1] - 55:13 <b>Trask</b> [1] - 13:19 <b>travel</b> [1] - 18:19 <b>tread</b> [1] - 78:7 <b>trial</b> [2] - 20:23, 48:7 <b>tried</b> [3] - 6:23, 18:23, 42:17 <b>trouble</b> [3] - 16:19, 44:17, 65:3 <b>true</b> [10] - 8:19, 8:22, 8:23, 9:1, 9:5, 9:10, 10:7, 22:25, 43:2, 53:20 <b>TRUE</b> [1] - 84:13 <b>trump</b> [1] - 50:8 <b>Trump</b> [1] - 13:24 <b>Trust</b> [1] - 3:2 <b>trust</b> [1] - 5:16 <b>TRUST</b> [1] - 1:3 <b>Trustee</b> [1] - 3:1 <b>trustee</b> [1] - 1:2 <b>try</b> [16] - 4:24, 7:21, 11:16, 12:9, 14:4, 14:5, 17:19, 18:24, 21:15, 22:4, 25:15, 29:16, 35:15, 75:3, 76:21, 78:3 <b>trying</b> [11] - 19:7, 19:8, 36:5, 38:3, 63:21, 71:20, 74:1, 75:8, 78:5, 78:7 <b>turn</b> [1] - 68:20 <b>turned</b> [1] - 7:3 <b>two</b> [31] - 5:20, 7:25, 12:11, 24:14, 25:12, 27:13, 27:23, 29:8, 32:8, 33:16, 33:24, 34:22, 37:15, 38:19, 38:22, 48:19, 49:10, 57:17, 58:16, 62:7, 62:21, 69:10, 69:16, 70:1, 71:15, 73:2, 75:25, 76:23, 76:25, 78:14 <b>two-year</b> [1] - 62:21 <b>tying</b> [1] - 74:24 <b>type</b> [1] - 47:11	79:6 <b>ultimate</b> [2] - 54:22, 69:18 <b>ultimately</b> [4] - 31:19, 65:21, 81:14, 81:21 <b>unambiguous</b> [1] - 71:14 <b>unattractive</b> [1] - 37:20 <b>uncompelled</b> [1] - 64:11 <b>unconflicted</b> [2] - 33:20, 33:24 <b>unconnected</b> [2] - 16:20, 79:16 <b>under</b> [31] - 5:4, 10:17, 12:15, 14:1, 14:13, 14:16, 17:15, 18:4, 19:13, 20:2, 21:15, 22:2, 23:7, 24:1, 25:8, 25:11, 26:23, 30:9, 30:19, 31:1, 34:14, 46:11, 49:20, 51:23, 57:17, 65:3, 66:4, 74:11, 74:13, 75:15, 75:16 <b>undergoing</b> [1] - 36:1 <b>underlying</b> [1] - 16:22 <b>undermine</b> [1] - 23:6 <b>understandable</b> [1] - 35:10 <b>understood</b> [1] - 38:3 <b>unhappy</b> [1] - 20:21 <b>unheard</b> [1] - 60:18 <b>Union</b> [2] - 53:5, 54:21 <b>Uniondale</b> [1] - 1:17 <b>unique</b> [1] - 19:4 <b>United</b> [5] - 5:16, 19:3, 28:6, 36:21, 54:25 <b>unless</b> [4] - 4:5, 43:5, 50:13, 57:23 <b>unnecessary</b> [1] - 17:22 <b>unsatisfactory</b> [1] - 66:2 <b>unusual</b> [1] - 48:18 <b>up</b> [19] - 11:15, 31:11, 35:13, 36:11, 39:25, 41:2, 41:7, 42:13, 45:17, 48:4, 57:14, 59:9, 60:1, 60:18, 62:14, 64:4, 78:13, 80:5, 81:1 <b>upset</b> [1] - 65:24 <b>USA</b> [2] - 43:8, 69:25 <b>useful</b> [1] - 13:2 <b>utterly</b> [1] - 40:19	<b>V</b> <b>valuation</b> [1] - 42:8 <b>various</b> [7] - 4:20, 5:10, 8:11, 23:15, 24:3, 62:22, 78:3 <b>vast</b> [5] - 9:13, 27:15, 28:24, 77:24 <b>veil</b> [2] - 71:18, 71:19 <b>venture</b> [1] - 15:14 <b>Ventures</b> [1] - 13:20 <b>venue</b> [1] - 11:8 <b>versus</b> [2] - 31:2, 31:4 <b>VIA</b> [1] - 1:11 <b>viable</b> [1] - 30:6 <b>vice</b> [1] - 3:10 <b>video</b> [1] - 8:11 <b>view</b> [2] - 12:23, 15:9 <b>Viking</b> [3] - 20:14, 20:21, 77:3 <b>Vinna</b> [1] - 59:10 <b>violated</b> [2] - 43:14, 44:25 <b>violating</b> [1] - 44:14 <b>virtually</b> [2] - 60:18, 81:5 <b>virtue</b> [2] - 14:11, 18:5 <b>visible</b> [1] - 6:25 <b>Volkswagen</b> [1] - 20:22 <b>volume</b> [1] - 35:10 <b>vote</b> [2] - 59:17, 67:24 <b>voted</b> [2] - 59:17, 59:19 <b>vs</b> [1] - 3:3	<b>well-respected</b> [1] - 79:11 <b>well-settled</b> [2] - 28:2, 28:5 <b>Werner</b> [4] - 3:3, 39:4, 46:2, 59:10 <b>WERNER</b> [1] - 1:7 <b>Werner's</b> [1] - 45:25 <b>West</b> [1] - 1:21 <b>whereas</b> [1] - 37:20 <b>whichever</b> [1] - 42:13 <b>white</b> [1] - 26:25 <b>whole</b> [6] - 18:6, 22:18, 54:20, 58:10, 71:15, 76:19 <b>WILLIAM</b> [1] - 1:22 <b>William</b> [1] - 3:13 <b>willing</b> [1] - 60:16 <b>withstood</b> [1] - 67:23 <b>witnesses</b> [3] - 18:18, 20:3, 66:23 <b>word</b> [8] - 5:4, 11:17, 14:25, 16:2, 30:11, 55:17, 58:20, 71:19 <b>words</b> [3] - 17:17, 34:22, 38:10 <b>works</b> [3] - 47:13, 83:9, 83:15 <b>world</b> [3] - 57:12, 82:15, 82:17 <b>World</b> [1] - 36:6 <b>worry</b> [1] - 4:25 <b>worse</b> [3] - 14:15, 35:19, 60:7 <b>worth</b> [4] - 26:2, 37:18, 38:21, 39:15 <b>wrap</b> [1] - 81:1 <b>wrinkle</b> [2] - 27:11, 33:13 <b>written</b> [1] - 54:5 <b>wrongdoing</b> [3] - 22:14, 32:20, 45:23 <b>wrote</b> [2] - 29:6, 51:8	15:13, 15:14, 15:15, 15:16, 15:17, 16:1, 16:2, 16:7, 16:12, 16:13, 16:14, 16:16, 16:22, 16:24, 17:12, 17:22, 18:7, 19:14, 19:21, 21:3, 21:4, 21:25, 22:15, 22:16, 22:17, 22:18, 22:19, 22:21, 23:5, 25:10, 27:12, 28:2, 28:8, 29:21, 30:4, 30:16, 30:20, 32:5, 32:8, 36:18, 36:19, 36:22, 36:23, 36:25, 37:5, 42:7, 42:19, 43:1, 43:11, 48:17, 48:20, 49:6, 50:2, 50:8, 50:17, 51:3, 51:13, 51:15, 51:16, 57:6, 59:6, 61:19, 61:23, 62:2, 62:3, 63:1, 63:24, 64:2, 64:7, 64:8, 64:10, 64:11, 64:20, 64:21, 65:1, 65:4, 66:10, 66:20, 68:10, 68:11, 69:21, 70:4, 75:15, 77:17, 77:18, 78:20, 78:21, 80:5, 80:17, 80:20, 81:5, 81:6, 81:8, 81:13, 81:17, 81:20, 82:16 <b>York-based</b> [5] - 8:22, 11:2, 42:19, 43:1, 64:2 <b>York-centric</b> [2] - 36:19, 37:5 <b>York-chartered</b> [1] - 9:18 <b>York-headquartered</b> [1] - 9:19
<b>U</b> <b>U.K</b> [2] - 69:12 <b>U.S</b> [6] - 24:15, 25:9, 56:1, 58:4, 77:21,		<b>W</b> <b>WACHTELL</b> [1] - 1:20 <b>wake</b> [1] - 45:19 <b>walk</b> [1] - 45:15 <b>wants</b> [5] - 23:11, 25:5, 35:3, 40:14, 60:1 <b>war</b> [3] - 64:4, 64:10, 80:6 <b>WARDWELL</b> [1] - 2:2 <b>Wardwell</b> [1] - 69:1 <b>watch</b> [2] - 8:4, 58:11 <b>waterfront</b> [1] - 76:25 <b>wave</b> [1] - 36:15 <b>ways</b> [1] - 39:14 <b>wealth</b> [1] - 71:15 <b>Webber</b> [1] - 13:19 <b>week</b> [2] - 83:5, 83:6 <b>weigh</b> [3] - 23:12, 24:9, 40:11 <b>well-equipped</b> [1] - 78:2 <b>well-known</b> [1] - 11:3	<b>Y</b> <b>year</b> [2] - 62:21, 83:2 <b>years</b> [5] - 20:15, 51:8, 54:17, 57:13, 68:7 <b>YORK</b> [2] - 1:1, 1:1 <b>York</b> [137] - 1:17, 1:21, 2:3, 2:7, 6:25, 7:7, 8:22, 8:23, 8:25, 9:3, 9:4, 9:6, 9:12, 9:15, 9:17, 9:18, 9:19, 9:21, 10:5, 10:22, 11:2, 11:9, 12:13, 12:14, 12:21, 13:6, 13:8, 13:9, 13:14, 13:22, 13:24, 14:9,	