

1 IN THE UNITED STATES DISTRICT COURT  
2 IN AND FOR THE DISTRICT OF DELAWARE

3 PHL VARIABLE INSURANCE COMPANY, : CIVIL ACTION  
4 :  
5 Plaintiff, :  
6 v :  
7 ESF QIF TRUST, by and through its :  
8 trustee, DEUTSCHE BANK TRUST COMPANY, :  
9 INC., : NO. 12-317-LPS  
10 Defendant. :

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12 PHL VARIABLE INSURANCE COMPANY, : CIVIL ACTION  
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14 Plaintiff, :  
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16 ESF QIF TRUST, by and through its :  
17 trustee, DEUTSCHE BANK TRUST COMPANY, :  
18 INC., : NO. 12-319-LPS  
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BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

APPEARANCES:

CONNOLLY BOVE LODGE & HUTZ, LLP  
BY: CHAD S.C. STOVER, ESQ.

and

EDISON, McDOWELL & HETHERINGTON, LLP  
BY: JARRETT E. GANER, ESQ., and  
EUNICE KUO, ESQ.  
(Houston, Texas)

Counsel for Plaintiff

1 APPEARANCES: (Continued)

2  
3 FARNAN, LLP  
4 BY: BRIAN E. FARNAN ESQ.

5 and

6 SUSMAN GODFREY L.L.P., LLP  
7 BY: STEVEN G. SKLAVER, ESQ.  
8 (Los Angeles, California)

9 Counsel for Defendants

10  
11 Brian P. Gaffigan  
12 Registered Merit Reporter

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14 - oOo -  
15 P R O C E E D I N G S  
16 (REPORTER'S NOTE: The following oral argument  
17 hearing was held in open court, beginning at 2:36 p.m.)

18 THE COURT: Good afternoon.  
19 (The attorneys respond, "Good afternoon, Your  
20 Honor.")

21 THE COURT: Let's have you put your appearances  
22 on the record for me, please.

23 MR. STOVER: Good afternoon, Your Honor. Chad  
24 Stover from Connolly Bove Lodge & Hutz for plaintiff. And  
25 with me today are Jarrett Ganer and Eunice Kuo from Edison,

1 insurance policies governed by Delaware law were void for  
2 lack of insurable interest. Two of those policies are  
3 involved, are owned by the defendant ESF QIF Trust, which  
4 I'm going to refer to as "the trust" today because those  
5 letters I can't quite keep straight, and were brought in two  
6 separate actions.

7 That trust responded by, in the Griggs action,  
8 filing a counterclaim seeking to expand the action to  
9 include 14 additional policies issued by PHL Variable  
10 Insurance Company purportedly also owned by the same trust  
11 that Phoenix has not sought to invalidate. Under all 14 of  
12 those policies, there are zero debts, zero claims submitted.  
13 There has been no representation by Phoenix that it intends  
14 to collect, that it intends to challenge the policies or  
15 that it will not pay the policies if a death claim is  
16 submitted. Quite simply, PHL Variable has taken no action  
17 with respect to those 14 policies.

18 Despite that fact, the trust seeks a declaration  
19 that the policies were issued in compliance with Delaware  
20 insurable interest law and that a death claim submitted in  
21 the future must be paid. This is an advisory opinion, pure  
22 and simple, and is simply a way to try to expand what is  
23 otherwise already a complicated action involving a \$10  
24 million death claim into a much larger case.

25 THE COURT: Do you acknowledge that if your

1 McDowell, and Hetherington in Houston, Texas.

2 THE COURT: And you are here for the plaintiff;  
3 correct?

4 MR. STOVER: Plaintiff, yes. Correct.

5 THE COURT: Thank you.

6 Mr. Farnan looks familiar.

7 MR. FARNAN: Good afternoon, Your Honor. Brian  
8 Farnan on behalf of ESF QIF. With me is Steven Sklaver from  
9 Susman Godfrey in Los Angeles, California.

10 THE COURT: Good afternoon to you as well. We  
11 are here on two different cases to hear argument on the  
12 plaintiff's motion to dismiss the counterclaims from the  
13 defendant. So we'll hear from the plaintiff first, please.

14 MR. GANER: Good afternoon, Your Honor. Jarrett  
15 Ganer with Edison, McDowell, and Hetherington.

16 Earlier this year, following last year's opinion  
17 by the Delaware Supreme Court in the *Price Dawe* case which  
18 reaffirmed that under Delaware law, an insurer can contest  
19 the validity of the life insurance policy even after the  
20 expiration of the policy's contestability period and setting  
21 out various factors to determine whether a policy was in  
22 fact issued in compliance with Delaware's insurable interest  
23 law or is an illegal and prohibited wage earner contract.

24 Following that decision, PHL Variable Insurance  
25 Company filed suits to seek to have a declaration that six

1 client has no intention of paying on those policies that  
2 you're not providing insurance and you are not providing any  
3 benefit to whoever holds that policy?

4 MR. GANER: If my client had actually formed an  
5 intent and actually followed through with that intent, that  
6 is the key. Even if my client has an intent, until they  
7 actually get a claim and deny it, they have not failed to  
8 provide anything that they're contractually obligated to  
9 provide.

10 THE COURT: Is that quite true even if what  
11 you're providing is insurance? Let's just stipulate for the  
12 moment, let's take a hypothetical policy, your client has no  
13 intention of paying it today. They could change their mind  
14 tomorrow, but today they have no intention of paying it.  
15 What product or service are you providing at that point?  
16 Are you really providing insurance today if your intention  
17 is not to pay?

18 MR. GANER: Well, you have to look at what the  
19 contract says. And the contract says that there is nothing  
20 that is actually due, there is no payment that is affirmatively  
21 due until the insurer's death.

22 What the company is providing, these are universal  
23 insurance policies so they're going to accumulate value based  
24 on the performance of the company. So there actually is,  
25 even if the company had an intent not to pay a death benefit

1 when it became due, there is still an accumulation of value  
2 and a savings component that is occurring within the policy.  
3 So even in that situation, there is still some value that is  
4 being transmitted, a service that is being provided.

5 THE COURT: What about this New York Supreme  
6 Court case? Doesn't that go against you on this very point?

7 MR. GANER: The lower court did go against  
8 Phoenix but it was a very different issue. The issue in  
9 that case was a discrete issue of whether or not Phoenix had  
10 the ability to challenge a policy after due to the fact that  
11 the contestability period had expired. In other words, the  
12 plaintiff came to Court and says I've got a policy that the  
13 contestability period has expired. There is a New York  
14 Superior Court opinion that says that an insurance company  
15 cannot challenge a policy even for lack of insurable  
16 interest after that.

17 I think Phoenix is going to do that based on the  
18 fact that they're doing that in these other cases, and I  
19 want a declaration that under this particular area of New  
20 York law and under this particular contestability statute  
21 that legally they don't have the right to do that. That is  
22 very different than here where they're coming in and saying  
23 here is 14 policies and I want an adjudication of whether  
24 all of these policies comply with Delaware insurable  
25 interest law and where Phoenix has taken no position to the

1 contrary with respect to any of those policies.

2 Then, of course, there is the much more similar  
3 opinion out of the Central District of California that was  
4 submitted as a supplemental briefing that was decided a day  
5 after this case, which is directly on point, which deals  
6 with a receiver trying to get an affirmation from Phoenix  
7 that Phoenix was going to pay for the policy and basically  
8 making the same allegations: that Phoenix has a pattern  
9 and practice of denying claims, challenging other policies.  
10 The Court there correctly held that all they were looking  
11 for was an advisory opinion and that Phoenix had taken no  
12 position to the contrary and indicated they weren't going to  
13 pay.

14 THE COURT: What about *Step-Saver*? You don't  
15 say much about that in your briefing.

16 MR. GANER: Well, we don't say much about  
17 *Step-Saver* within our initial brief. We do address it in  
18 our reply brief. Our initial brief relies on sort of the  
19 initial cases that underlie on *Step-Saver*.

20 But when you take a look at the *Step-Saver*  
21 factors, the first item is: adversity of interest.

22 They haven't shown adversity of interest here.  
23 They are saying that we believe our policies are valid  
24 and you have taken no opinion on the issue. Where is the  
25 adversity there? The adversity is, well, we think the

1 market is devaluing our policies and we think the market  
2 is doing that as a result of actions you are taking with  
3 other policies and just generally your business practices  
4 and your litigation practices. That is not a adversity of  
5 interest between the two parties on the subject matter  
6 they're trying to sue on.

7 THE COURT: Now, would you say that even if it  
8 were a fact that today your client does not intend to pay  
9 these policies upon death?

10 MR. GANER: If my client had communicated their  
11 intent. The fact that my client privately holds an intent  
12 that has been communicated to no one I think is completely  
13 irrelevant.

14 THE COURT: All right. Your client, of course,  
15 is an entity. What if there is an internal document from  
16 your client that says the following 14 policies will not be  
17 paid upon death? Do we have adversity yet?

18 MR. GANER: Not until they actually either  
19 communicate that to the party, to the other side. You know,  
20 my client is one side of a contract. Until we actually take  
21 some action that communicates our intentions to the other  
22 side of the contract, or they -- you know, that would  
23 actually be a communication towards them. That would put  
24 them on notice. That would create an adversity between the  
25 two parties.

1 THE COURT: What if it's not a communication  
2 directly to them but it sort of slips out and the newspaper  
3 gets ahold of it, so they learn of it but you didn't intend  
4 for them to learn of it?

5 MR. GANER: If my client has publicly disclosed  
6 it to the point where it has gotten into a newspaper, I  
7 think that would be a different story.

8 However, if it's just a matter of, well, there is  
9 other litigation going on and the newspapers are talking about  
10 your denial rates and it's nothing specific to where there is  
11 a newspaper article that says "here is this internal document,"  
12 and it identifies these four policies, and it says at the  
13 bottom, "we will not under any circumstances pay these  
14 claims," and my client is essentially allowed that to become  
15 a press release, that is a different story.

16 Right now, all there is is there is speculation  
17 that my client has formed an internal intent that hasn't  
18 been disclosed or described to anyone.

19 THE COURT: And address the other factors on  
20 *Step-Saver*, please.

21 MR. GANER: Certainly. Conclusiveness.

22 Of course, this Court would have the ability  
23 to go through the *Dawe* factors and provide a conclusive  
24 opinion. I understand there are some technicalities of  
25 areas where if they didn't pay premiums, the way the

1 pleading is addressed, but I think those are more pleading  
2 deficiencies than anything else. Obviously, the Court would  
3 have the ability to provide a conclusive opinion.

4 The utility factor I think is very important in  
5 the broader context.

6 We're dealing here right now with one defendant  
7 who is coming in and saying I want a declaratory judgment.  
8 I want to get damages based on this undisclosed intent on  
9 these 14 policies with \$100 million in face value.

10 If the Court starts entertaining these type of  
11 challenges where anybody can just come in and start saying,  
12 hey, I'm in a contractual relationship with someone and  
13 they've been involved in other litigation and I just want  
14 the Court to weigh in on the validity of my contract, you  
15 are just opening the Court up to hundreds of policies being  
16 brought in and being litigated where there isn't actually any  
17 adversity of interest.

18 There is not actually a controversy. There  
19 is no actual dispute between the parties. One party just  
20 decides, hey, I want to go and get the Court to tell me my  
21 policy is okay. I just think that the utility of that under  
22 the grand scheme of things is negligible.

23 I didn't keep a real good eye on my time.

24 I think the claims in general in the broader  
25 context, outside of the fact that they're not ripe, the tort

1 initial premium; correct?

2 MR. GANER: That is one of the factors.

3 THE COURT: It is alleged in the counterclaims  
4 that the first premium payments were made by the individuals  
5 in the two different cases. Isn't it correct that that is  
6 alleged?

7 MR. GANER: That is alleged.

8 THE COURT: So I need to take that as true at  
9 this point; correct?

10 MR. GANER: Yes, Your Honor.

11 THE COURT: All right. So given that that is  
12 an important factor and that that is true for purposes of  
13 these motions, how can I grant all of the relief that you  
14 are asking for?

15 MR. GANER: Because, the *Dawe* factors, that is  
16 one of the *Dawe* factors. That is certainly not an exclusive  
17 listing of the *Dawe* factors. If you look through the *Dawe*  
18 opinion, the *Dawe* Court was emphatic that while that would  
19 provide strong evidence that the person actually intended  
20 to procure the policy for legitimate insurance purposes, it  
21 is that the policy needs to be procured not for wagering  
22 purposes but for legitimate insurance purposes; and there is  
23 no allegations within the complaint that would suggest that  
24 the policies were procured for legitimate insurance purposes  
25 other than that sole allegation related to the premiums.

1 claims all fall, have a fundamental flaw of not showing  
2 either a lack of duty or a lack of causation to the alleged  
3 damages.

4 This is essentially a case of someone who has  
5 alleged just a general diminution of value of an asset and  
6 looking for a cause of action, but they're saying, well, you  
7 sued on these other policies. You have had this litigation  
8 strategy. That is causing the market to interpret that  
9 data, and the market interpretation of that data is that  
10 my policy is not valuable anymore. That is the very idea of  
11 a proximate cause chain that is far too nebulous to actually  
12 be legally sufficient on probable -- on proximate cause.

13 There is also just no showing that my client has  
14 any duty or obligation to ensure that their policies are  
15 valuable on the secondary market, to assure that we don't  
16 take the litigation actions with respect to unrelated  
17 policies that might cause the market to have a different  
18 view of their other assets that we have taken no action on.

19 If I could reserve the rest of my time for a  
20 rebuttal.

21 THE COURT: I have some other questions for you.

22 MR. GANER: Okay.

23 THE COURT: On the analysis that the Delaware  
24 Supreme Court tells us to do as to the validity of these  
25 policies, of course, one of the issues is who paid the

1 And the fact that someone has paid the premiums, even if we  
2 were going to take that as true, is not dispositive of  
3 whether or not the policy was issued with an insurable  
4 interest.

5 THE COURT: So you acknowledge they have  
6 adequately alleged a strong factor; correct?

7 MR. GANER: Correct.

8 THE COURT: But that is just not enough, even on  
9 a motion to dismiss. That is your view; right?

10 MR. GANER: It's my view that simply alleging  
11 that the insured paid the initial premium would not allow  
12 the Court to find that an insurable interest existed. I  
13 think they need to satisfy all of the *Dawe* factors which  
14 included that the purpose for insurance was legitimate.

15 THE COURT: For purposes of this motion, I'm not  
16 finding whether there is an insurable interest. I'm finding  
17 whether you have persuaded me that they have failed to even  
18 adequately plead an insurable interest. Isn't that what I  
19 have to decide?

20 MR. GANER: Right. But even if you accept the  
21 fact that they have paid the first premium, even if you  
22 accept that as true, that fact alone would not be adequate  
23 to grant the relief that they had requested, which is that  
24 the policy be declared -- that it be declared that the  
25 policy was issued with a valid insurable interest. They

1 need to allege more.

2 It would be like if you allege fraud and you  
3 made a bunch of great arguments about what the person said  
4 wrong but you made no allegations related to duty. You have  
5 to make allegations, factual allegations if taken as true,  
6 would satisfy all of the factors of your cause of action or  
7 would allow the Court to look at the policy and say, okay,  
8 you have adequately alleged all of the factors that under  
9 *Dawe* would allow me to say the policy issued with an  
10 insurable interest. Just alleging factors relating to one  
11 of those factors is insufficient.

12 THE COURT: So you read *Dawe* as holding that  
13 it's never adequate to find insurable interest based solely  
14 on who paid the first premium. That is never going to be  
15 enough.

16 MR. GANER: No, the *Dawe* court requires that  
17 courts scrutinize the entire transaction. You can't look  
18 at one cancelled check and say that is enough to find that  
19 there is insurable interest. Absolutely not. You have  
20 to look at the entire transaction. You know, why was the  
21 insured paying that premium? Was the insured told, hey,  
22 I'm going to write you a check right now. You are going to  
23 deposit that into your account, and then you are going to  
24 write me a check right back out of that account, and that is  
25 going to be you paying the premiums, which is what happened

1 in a lot of these cases. That is not adequate under *Dawe*.

2 If the insured isn't actually paying that  
3 premium themselves, I'm digressing a little bit too much  
4 here I think, but there has to be a scrutiny of the factors.  
5 That one factor alone is not dispositive.

6 THE COURT: Do you object to the defendant's  
7 request that the Court take judicial notice of your client's  
8 filings of numerous other cases?

9 MR. GANER: I don't. My client has filed. It's  
10 all a matter of public record.

11 THE COURT: And it's alleged by the defendant  
12 that you request "judicial immunity from the equitable  
13 doctrines of waiver and estoppel;" is that correct?

14 MR. GANER: We don't request judicial immunity,  
15 we request that the Court acknowledge the holding of *Dawe*,  
16 which is that a court can never enforce an illegal criminal  
17 regardless of the intentions of the parties. That is what  
18 we're arguing. They've made an allegation that the court  
19 should enforce a contract even if it is illegal because they  
20 think my client has waived a right or should be equitably  
21 estopped from not participating in the payment on an illegal  
22 contract.

23 THE COURT: And the defendant asks that if I  
24 find any deficiencies, if I were thinking of granting your  
25 motion in any regard, that instead I should given them leave

1 to amend their counterclaims. Should I do that? And, if  
2 so, if not, why or why not?

3 MR. GANER: Well, Your Honor, I believe leave  
4 should be freely granted. I would not disparage you if you  
5 gave them leave to amend.

6 THE COURT: Okay. Well, you can reserve the  
7 rest of your time. Thank you very much.

8 MR. GANER: Thank you.

9 THE COURT: We'll hear from the defendant.

10 Good afternoon.

11 MR. SKLAVER: Good afternoon. One moment while  
12 I set this up.

13 THE COURT: Certainly.

14 (Pause.)

15 MR. SKLAVER: May I approach, Your Honor?

16 THE COURT: You may. Do you have another copy  
17 of this?

18 MR. SKLAVER: I do.

19 THE COURT: We'll take two then. Thank you.

20 MR. SKLAVER: I apologize.

21 (Documents passed forward.)

22 THE COURT: Do you need help with that?

23 MR. SKLAVER: I may.

24 THE COURT: Ron?

25 The screen here came on. I do have it on my

1 screen. Can you see it on counsel table?

2 MR. FARNAN: Yes, Your Honor.

3 THE COURT: Okay. The big screen may come on.  
4 In fact, it looks like it is.

5 MR. SKLAVER: I may lose the jury on this one.

6 THE COURT: You may go ahead. We've all got it.

7 MR. SKLAVER: Thank you, Your Honor. Let me

8 make start by making a concession. The trust is going to  
9 withdraw and dismiss without prejudice its Delaware Consumer

10 Fraud Act claim. And while we seek leave amend in the

11 alternative on the other claim, even if granted, we wouldn't

12 seek to amend for that particular claim. So I just want

13 to focus the Court at this point on the ripeness and tort

14 claims.

15 THE COURT: Okay. Before you come to that, I  
16 think we saw enough in the briefing to know that you're also  
17 willing to dismiss or withdraw your declaratory judgment  
18 claim on validity of the policies, the one that is redundant  
19 of one of their claims; is that right?

20 MR. SKLAVER: Correct. With respect

21 specifically to the Griggs policy and the Szalay policy.

22 THE COURT: Thank you. You may go ahead.

23 MR. SKLAVER: As for ripeness, the core of the

24 trust counterclaims is the same as Phoenix claims: Phoenix

25 through the trust in two different lawsuits here, five other

1 policies in Delaware, 25 plus other lawsuits across the  
 2 country, that all raise the same issue. And if their claims  
 3 are ripe, our claims are ripe. We seek the same thing.  
 4 They want to have a policy declared void. We want our  
 5 policies declared valid. And,

6 Under binding U.S. Supreme Court law, *Maryland*  
 7 *Casualty*, the analysis is the same regardless of who brings  
 8 the claim. That is the case we cite in our brief where the  
 9 Court said: "It is immaterial that frequently, in the  
 10 declaratory judgment suit, the positions of the parties in  
 11 the conventional suit are reversed; the ripeness inquiry is  
 12 the same in either case."

13 So what Phoenix is asking for here is an  
 14 asymmetrical right where only they can come in and get the  
 15 private contract rights adjudicated and we can't. And that  
 16 causes harm that the CSSEL Bare Trust decision explained is  
 17 ripe for adjudication, and it's ripe for two separate  
 18 reasons. One is there is a present injury, and that is  
 19 the impaired marketability of our policies. We're not just  
 20 in the business as alleged in the complaint, of holding  
 21 policies until maturity. We also are investors who sell it  
 22 on a tertiary market. There is a secondary market and then  
 23 a tertiary market.

24 Phoenix's only argument on the impaired  
 25 marketability point is an argument about lack of causation.

1 So, for example, in the *Simmonds Accessories*  
 2 case which is a Third Circuit case from 1958, that is a case  
 3 that actually uses the language "implicit threats are  
 4 sufficient to help establish adversity prong."

5 Here, under adversity, we have four factors in  
 6 our favor. It's a factor-based test that obviously has  
 7 some room in the joints to maneuver. But if you look at the  
 8 factors, there is two STOLI lawsuits against my client; and  
 9 we have cited the *Teva Pharmaceuticals v Novartis* case.  
 10 It's a patent case from the Federal Circuit, but that stands  
 11 for the proposition if you have similar litigation involving  
 12 similar parties, and there it's similar technology, that is  
 13 one factor that points to a likely imminent injury, that  
 14 there is adversity between the parties.

15 You also have here 25 plus similar STOLI  
 16 lawsuits that the Court can take judicial notice of.

17 And helpful on this fact is a Third Circuit  
 18 case, I think it's called *Surrick v Killion*. That is the  
 19 case where the Office of Disciplinary Counsel had brought a  
 20 claim against a different lawyer, a nonparty to the  
 21 litigation, and it had to do with he was disbarred in the  
 22 state of Pennsylvania, and he wanted to open an office  
 23 because he was still able to practice in federal court even  
 24 though he was disbarred in state court. And the Office of  
 25 Disciplinary Counsel said I never brought a claim against

1 We don't establish some link to their misconduct or alleged  
 2 misconduct and the depressed value; and that is a fact  
 3 question. We certainly do state in the complaint  
 4 affirmatively, and it makes sense. You have got a party  
 5 that sued not just us, they've sued us twice, they've sued  
 6 the participants in our policy: Steven Lockwood, who is the  
 7 broker on a lot of the policies; John Berck, the trustee;  
 8 Lockwood Pension Services. They sued them for civil RICO  
 9 violations and made statements in pleadings that these guys  
 10 are essentially STOLI recidivists, some of the language they  
 11 used, who are engaged in wagering of hundreds of millions of  
 12 dollars of policies. So for Phoenix to say we have never  
 13 taken a stand against these policies is really we think a  
 14 linguistic game.

15 It is true they have not uttered this policy  
 16 number in the same sentence that we're going to void the  
 17 policy but they have made X or implicit threats related to  
 18 the participants in the policies that, as we go through the  
 19 *Step-Saver* factor, plainly establish that the claims are  
 20 ripe.

21 THE COURT: Well, do you concede then that at  
 22 least implicit threats, as you put it, are necessary in  
 23 order for this to be redressable?

24 MR. SKLAVER: I concede they're sufficient. I  
 25 don't think they're necessary.

1 this lawyer, this isn't ripe. The Court said let's look at  
 2 all the factors. You don't disavow any intent to sue. I  
 3 find that to be "significant." That is the language from  
 4 the Third Circuit as part of the adversity prong. And you  
 5 showed a tendency to enforce these type of claims by suing  
 6 someone else.

7 Here, we don't even need to make that leap  
 8 because this is not just that they sued other third parties,  
 9 they sued the trust. So all four of these factors strongly  
 10 point to a finding of adversity.

11 This sort of plays into the waiver point, the  
 12 argument from opposing counsel. They are also arguing no  
 13 matter how long they wait, no matter how long of a delay,  
 14 the fact that they know that they are going to rescind these  
 15 policies, they'll never waive a claim for lack of insurable  
 16 interest. In fact, I think logically that applies that they  
 17 stood up and said we will never sue the trust for lack of  
 18 insurable interest. They can come back and say we can never  
 19 waive a claim, the Court can't enforce a legal contract.  
 20 All of that technique, all of these factors strongly point  
 21 to finding of adversity.

22 And that is not only the *Surrick* case, there is  
 23 a Supreme Court case, *Babbitt v Farm Workers* where the  
 24 Attorney General there would not disavow any intent. There  
 25 was a criminal statute to prosecute someone. Their only

1 position is that we haven't taken a position yet, but the  
2 fact that they won't disavow any intent is a strong factor.  
3 The conclusiveness factor --

4 THE COURT: So it follows in your mind, it  
5 doesn't matter what their intent is. If they do anything  
6 short of give you the express assurance you want, you think  
7 you have stated a claim that you can bring to federal court.

8 MR. SKLAVER: Well, fortunately in this case we  
9 have both. We have allegations based on strong circumstantial  
10 evidence that they already reached that intent internally.  
11 That they had the intent internally they're not going to pay  
12 these claims.

13 A good example of that or an inference that can  
14 be drawn for these purposes is the Fuld action. You have a  
15 case in Florida that we cite where they sued to rescind the  
16 policy and a disclosure of your counsel in that case and  
17 esteemed opposing counsel was counsel for Phoenix in that  
18 case in Florida. And in that case, they sued to rescind the  
19 life insurance Policy of Edward Fuld. They waited two more  
20 years, collected all their premiums on another policy on  
21 this gentlemen's life and sued in Delaware seeking the same  
22 type of relief.

23 By the way, one of the investors in the Fuld  
24 case was White Cliff who the counterclaim explained is an  
25 investor on four of the policies at issue on our

1 The Third Circuit defines utility to mean, would  
2 a decision impact the parties plans of action? So, for  
3 example, in the *Surrick v Killion* case, you have a lawyer  
4 who said I would like to open an office in Pennsylvania.  
5 The Court said, you know, a ruling would affect that plan of  
6 action. That satisfies that test.

7 Or there is a case we cite, *Hurley v Minor* where  
8 you had someone who wanted to buy wine from an out-of-state  
9 winery directly via mail rather than through wholesalers.  
10 The Court said your intent to buy wine would be impacted if  
11 I issued a ruling that affects the parties plans of action.

12 There is *Lewis v Alexander* which is a reasonably  
13 recent Third Circuit case that came out in June where the  
14 Court said -- this decision had to do with complicated  
15 Medicaid regulations that impacted the administration of  
16 trusts. There, the Court held: If I issue a decision, it  
17 will impact how the trust administrators will work on the  
18 trust. It will actually impact administration of the trust.

19 We're the same thing. We want to know how we  
20 should handle our assets. Whether we can sell them? Could  
21 we resell them to investors, which is what we want to do, or  
22 if we can to keep paying premiums going forward, but we  
23 can't be stuck in this never-land of not knowing whether  
24 they're going provide coverage because we're prohibited from  
25 reselling them to investors.

1 counterclaim.

2 So there is a strong inference that the Court  
3 can take now that Phoenix has reached a conclusion  
4 internally about what policies they're going to rescind and  
5 what they don't. They have internal tracking mechanisms or  
6 they have red flags where they know if a broker is involved,  
7 a trustee is involved, and all these policies match those  
8 characteristics which is on all fours with the *CESSEL Bare*  
9 case from the New York Supreme Court.

10 So the parties apparently have an agreement  
11 based on the oral argument on the conclusiveness factor.  
12 And I just want to highlight, since this is a factor-based  
13 test, and you look at all that, this is a unique case where  
14 all the facts exist. They're frozen in time in a box. The  
15 issue is was there an insurable interest at issuance five or  
16 six years ago?

17 There are no further facts that can develop that  
18 will help that adjudication. But what makes this unique is  
19 actually the facts get worse, or the adjudication, the  
20 ability to adjudicate gets harder not just because memories  
21 fade over time but the insured dies.

22 Here, Roberta Griggs, on the \$10 million claim,  
23 she is not going to be able to testify what her intent was  
24 when the policy was procured.

25 The last factor is utility.

1 THE COURT: Well, you say stuck, and I know  
2 it's advocacy, but in doing that, your client bought these  
3 policies in a free market. Didn't your client take certain  
4 risks that the policies were or were not valid?

5 MR. SKLAVER: Well, that is true. You always  
6 take a risk, but that argument would really overturn a  
7 substantial amount of ripeness jurisprudence. I will give  
8 you an example.

9 In the Supreme Court case, we cite, both  
10 parties cite *Village of Euclid* that talks about impaired  
11 marketability. There, you have a zoning ordinance that was  
12 passed that limited the ability of the land to be developed  
13 so that it couldn't be developed for industrial use. It  
14 could only be used for residential use. And the Court held  
15 that impaired the value of the property and so it's ripe for  
16 adjudication.

17 But if this logic applies you always take a risk  
18 and therefore you are subject to some impaired marketability  
19 were true, there wouldn't be ripeness in that case. And  
20 that is not how any of these cases come out. It is true  
21 there is risks when you make a position. That doesn't mean  
22 a claim isn't ripe for future adjudication when their  
23 conduct has caused us harm, and that is what we alleged.

24 Another case on that point is *SCA Services of*  
25 *Indiana* that we cite. That is from the Northern District of

1 Indiana. Where the EPA gave a score, kind of a score to a  
 2 piece of property that essentially labeled it close to being  
 3 hazardous dump based on their analysis of the environmental  
 4 contaminants. Is there always a risk you get labeled a  
 5 dump? Yes, it depends on what you do on the property, but  
 6 the Court said that label diminished the value of the  
 7 property and said the claim is ripe for adjudication.

8 THE COURT: What about, and I think counsel for  
 9 the plaintiffs brought it up, conclusiveness? What is the  
 10 practical risk to the Court that if we agree with you that  
 11 we will be potentially flooded with claims of impaired  
 12 marketability of various assets?

13 MR. SKLAVER: Well, the *Village of Euclid*  
 14 decision about impaired marketability is from 1926. We sort  
 15 of address this in our briefs. So we there is -- courts  
 16 tend to be flooded anyway, but at least empirically we  
 17 certainly have data to show that the court-clogging  
 18 prediction is not really valid in this situation.

19 What is unique about this case are these factors  
 20 about the same participants they have sued before for RICO  
 21 violations involving STOLI: the broker Steven Lockwood,  
 22 Lockwood Pension Services, John Berck, Robert Fink who they  
 23 also sued. He was involved in the Fuld case. He was  
 24 actually third party defendant in the case where Phoenix was  
 25 as well as White Cliff. So that, really, if there is going

1 same reason on the pleadings, the fact we made such an  
 2 allegation is sufficient.

3 On the waiver issue, really conceptually we  
 4 think the argument is pretty simple. Phoenix is coming to  
 5 court seeking equity. They want a declaratory judgment that  
 6 the policies are deemed void. And when you come to Court in  
 7 equity, you are subject to equitable defenses.

8 It is our position that alleged carrier misconduct  
 9 is not immune from these defenses just because their claim is  
 10 that the contract is illegal. And the trust alleges it is an  
 11 innocent purchaser and that Phoenix's misconduct started years  
 12 ago before they acquired the policies, when it knowingly  
 13 encouraged agents to write these alleged STOLI policies. And  
 14 whether Phoenix is or is not more culpable than the trust is a  
 15 fact question that should be decided on summary judgment or  
 16 trial, not on the pleadings. And we cite some cases on this  
 17 proposition.

18 It is true there is language in the *Dawe*  
 19 decision that Phoenix quotes that says void policies are  
 20 never enforced, but the issue is not squarely before the  
 21 Court about whether or not it is subject to waiver or  
 22 estoppel-type defenses. When that issue is squarely before  
 23 the Court -- we cite two cases from Pennsylvania; one from  
 24 the Supreme Court, one from a lower court; and one from  
 25 Oregon.

1 to be any of these public policy arguments about court  
 2 clogging, this certainly makes that case unique.

3 THE COURT: By the way, your argument is  
 4 impaired marketability. You don't contend that these assets  
 5 are not marketable, do you?

6 MR. SKLAVER: We do. We actually state in our  
 7 complaint that they are effectively destroyed. I guess I  
 8 will, we do allege that the marketability has been destroyed.  
 9 I think if we went back and pushed further through the  
 10 documents, would someone be willing to buy that for \$100 or  
 11 something above zero? Realistically, that is right, but  
 12 functionally it's been destroyed and it certainly is  
 13 substantially impaired. The level of that impairment could  
 14 be the subject of testimony and expert testimony, if  
 15 necessary, but certainly on the pleadings we think we have  
 16 sufficiently established it.

17 That is all I have on the ripeness issue.

18 As far as the Rule 8 issue involving declaratory  
 19 judgment claim, we just respectfully disagree. We think  
 20 we have adequately stated that the policy is supported by  
 21 insurable interest. We point out that there was the recent  
 22 *Rutgers* decision which was decided on a motion for summary  
 23 judgment just in the last three months where the evidence  
 24 was that the insured paid the first premium, and the Court  
 25 said that is enough to get to a jury. So we think for the

1 It's the Oregon case that is pretty strong.  
 2 That's the *Hammond v Oregon & California Railroad Company*.  
 3 In that case, you have a plaintiff who bought some railroad  
 4 land from a defendant. And it turned out that was an  
 5 illegal contract because there was a federal law that  
 6 prohibited that transfer based on that price. So the  
 7 plaintiff had to pay the government some money to clear up  
 8 title and then sued the defendant. And the defendant said,  
 9 look, that is an illegal contract. It was in violation of  
 10 the law here, and it should be deemed void. Therefore, we  
 11 don't have to pay for those damages. And the Court said,  
 12 look, in this situation, I'm going to look at who was the  
 13 more innocent party even though it's a void contract and  
 14 unless the parties are in *pari delicto* or accomplices in the  
 15 crime -- the language there is, I can't remember the Latin  
 16 phrase, but *percipius preminus* (phonetic). Unless they're  
 17 in *pari delicto* and *percipius preminus*, I'm going to give  
 18 relief to the more innocent party.

19 We alleged that we're the more innocent party  
 20 and therefore the waiver and estoppel defenses are claimed.  
 21 We have an estoppel claim and a waiver defense as part of  
 22 our declaratory judgment claim, should exist.

23 Unless the Court has other questions?

24 THE COURT: Do you admit that there were  
 25 misrepresentations made on the applications for these

1 insurance policies?  
 2 MR. SKLAVER: No.  
 3 THE COURT: That's denied at this point.  
 4 MR. SKLAVER: Well, let me just -- on the  
 5 policies at issue, there is one thing that needs to be  
 6 clear. On all 15 policies, they're incontestable, and so  
 7 issues of misrepresentation shouldn't be relevant at least  
 8 for some type of fraud.  
 9 THE COURT: The contestability period has run.  
 10 MR. SKLAVER: Right. That doesn't bar the  
 11 insurable interest challenge, that is what *Dawe* held, but it  
 12 does bar claims of misrepresentation. We haven't done our  
 13 full investigation on what was said on the application.  
 14 They are signed by the insured, that is not my client. They  
 15 are signed by the broker, that is not my client. The broker  
 16 who they sued for RICO violation.  
 17 Right now, in our answer to their claim, I think  
 18 we either denied it or stated that we don't have enough  
 19 information right now to reach a conclusion.  
 20 THE COURT: Thank you very much.  
 21 Is there any rebuttal?  
 22 MR. GANER: I'll try to be brief, Your Honor.  
 23 I just want to respond very briefly to the  
 24 allegation that we're playing coy, that we will not disavow  
 25 intent to sue. My client has never been asked to disavow an

1 intent to sue. We were served with a counterclaim in our  
 2 lawsuit. It would have been inappropriate for my client to  
 3 affirmatively state what its intentions were in moving to  
 4 dismiss that complaint. Just simply, the question has never  
 5 been asked: What are your intentions with respect to these  
 6 policies?  
 7 THE COURT: It was certainly argued about in the  
 8 brief. Are you saying your client is prepared to represent  
 9 whether it intends to sue on the other 12 or 13 policies?  
 10 MR. GANER: I do not know that, one way or the  
 11 other. My client has no present intent to sue on any of  
 12 those policies. I don't believe my client has any intent  
 13 with respect to them as we sit here today.  
 14 But, once again, I think that is getting too  
 15 much into a fact issue. That they have alleged we have this  
 16 intent, we're going to deny we had this intent if we have to  
 17 answer the complaint. But the idea that we're playing coy  
 18 by not affirmatively disavowing this, we have never been  
 19 asked to affirmatively disavow it outside of the litigation.  
 20 You can't file a piece of litigation and then say, well, you  
 21 have never affirmatively disavowed this, so therefore there  
 22 is a case in controversy. There has to be an actual dispute  
 23 ahead of time. And,  
 24 There is an actual dispute from Phoenix's side.  
 25 Phoenix is a party to a contract. Phoenix is standing up

1 and saying this contract is not valid. We're seeking a  
 2 declaratory judgment that the contract is not valid. If  
 3 they came in and said we agree with you the contract is not  
 4 valid, there is no case or controversy. That is a different  
 5 story. It's not two sides of the same coin.  
 6 THE COURT: What if they refuse to take a  
 7 position?  
 8 MR. GANER: If they refuse -- they have to  
 9 answer the lawsuit or they have to move to dismiss. They're  
 10 the ones that are sending in premium payments. They're the  
 11 ones that are the party to the contract.  
 12 It's a different story when one party stands up  
 13 and says we're a party to this contract and I am affirmatively  
 14 stating this contract does not exist. I want a declaration  
 15 this contract is void. That is different than someone stand-  
 16 ing up and saying I want a declaration that this contract is  
 17 valid. It's just it's two different. They're related but  
 18 they're not the exact flip side. And,  
 19 With the Griggs case, there was a claim for  
 20 death benefits submitted so there is definitely a dispute as  
 21 to whether or not Phoenix is going to pay a death benefit.  
 22 They have asked for us to pay a death benefit and we have  
 23 refused, and we paid to file this lawsuit.  
 24 With respect to the allegation that Phoenix  
 25 has been involved in litigation with Mr. Berck, with

1 Mr. Lockwood, with Mr. Fink. Yes, we have. So have  
 2 numerous other carriers. Mr. Berck is involved in a lot of  
 3 litigation, most of which, many of which are cited within  
 4 Phoenix's -- within, I'm sorry, the trust's opposition. Mr.  
 5 Berck is involved in this litigation with Lincoln, with Penn  
 6 Mutual, with the Pruco Insurance Company. This isn't a  
 7 Phoenix specific issue. You know, I'm sure Your Honor is  
 8 aware there is litigation. I think Lincoln is party to  
 9 about a dozen cases in this District, as is Phoenix, as are  
 10 other insurance carriers.  
 11 This is a much broader issue if you allow any  
 12 of these investors to come in and say, well, I've got some  
 13 policies and, you know, Lincoln has filed some lawsuits so  
 14 I want to have these hundred policies declared valid, well,  
 15 Penn Mutual filed some lawsuits, I want to have these 50  
 16 policies declared valid when there has been no express  
 17 repudiation as to any of those particular contracts.  
 18 All of the impaired marketability cases that  
 19 were cited, all of those involve an action taken by some  
 20 party towards the other. They involve an action taken by  
 21 an environmental regulatory group saying this property is  
 22 a dump, and you are saying, well, you have impaired my  
 23 marketability with respect to this action with respect to  
 24 me. The allegations here are that we impaired the  
 25 marketability by filing lawsuits against unrelated parties.

1 Even the lawsuits we filed against ESF, against  
 2 this trust, they're alleged to not have been involved in  
 3 either the initial purchase of the policies from Phoenix  
 4 or the initial resale of those purchases or the beneficial  
 5 interest in the trust that own these policies onto the  
 6 secondary market. They bought the policies years later and  
 7 they have, the policies have varied background. So, unlike  
 8 with the Lockwood case, the CSSEL Bare case, all of those  
 9 policies came through one program and were all involved in  
 10 one very narrow, very specific issue.

11 These policies are varied. They're from  
 12 different producers. There is some overlap in trustees,  
 13 there is some overlap in producers, but there is nothing  
 14 that says that all of these policies that they own that they  
 15 bought at different times from different areas are all part  
 16 of something that Phoenix is definitely going to challenge.

17 As far as the equity waiver issues, I'm not  
 18 saying that my client wouldn't be subject to some type of  
 19 liability if they had done something wrong. All I'm saying  
 20 is that on the very narrow issue of whether the relief is  
 21 that despite the fact this is an illegal contract, this  
 22 Court is going to enforce it, that's not permitted. If my  
 23 client has done something wrong, they would certainly be  
 24 subject to some type of claim if they have actually done all  
 25 these bad things. I don't know what exactly what the form

1 insurable interest. Letting time go past is not helpful to  
 2 me. It's much easier if I have a live insured I can go  
 3 talk to than if I am trying to circumstantially prove the  
 4 circumstances related to a transaction where the insured is  
 5 dead. The passage of time makes it much harder for me to  
 6 get rid of a policy than it does for them to keep one on  
 7 the books.

8 THE COURT: Thank you very much.

9 MR. GANER: Thank you, Your Honor.

10 THE COURT: I appreciate the argument. We'll  
 11 take it under advisement. We will be in recess.

12 (Oral argument hearing ends at 3:22 p.m.)  
 13

14 I hereby certify the foregoing is a true and accurate  
 15 transcript from my stenographic notes in the proceeding.

16 /s/ Brian P. Gaffigan  
 17 Official Court Reporter  
 18 U.S. District Court  
 19  
 20  
 21  
 22  
 23  
 24  
 25

1 of that is, but it might be that it would be a claim for  
 2 damages, that you have caused damages. You have done  
 3 something to me that caused damages. That would be the  
 4 remedy. It wouldn't be the Court enforcing an illegal  
 5 contract. That is a much narrower issue.

6 I am not saying they wouldn't be without redress  
 7 in this hypothetical situation that ten years down the line,  
 8 my client sues to rescind one of these policies, these 14  
 9 unrelated policies, that they wouldn't be subject to some  
 10 type of claim for damages. But that is, again, a hypothetical  
 11 situation. If my client ever actually denied a claim, that  
 12 would be a different story, but that is not the factual  
 13 situation we have.

14 THE COURT: Do you agree that the contestability  
 15 period is over on all of these policies?

16 MR. GANER: Yes, all of the policies are past  
 17 the contestability period. In the Griggs and Szalay cases,  
 18 my client has not moved to void the policies due to  
 19 misrepresentations. We have moved to have the policies  
 20 declared void due to lack of insurable interest. I think  
 21 that misrepresentation with fraud that happened in the  
 22 applications certainly can be relevant. And,

23 With respect to the sort of passage of time  
 24 argument, my client has the burden of proof to declare all  
 25 of these policies are invalid and that they lacked an

<b>\$</b>	<p><b>acknowledge</b> [3] - 4:25, 13:5, 15:15</p> <p><b>acquired</b> [1] - 28:12</p> <p><b>Act</b> [1] - 17:10</p> <p><b>ACTION</b> [2] - 1:3, 1:9</p> <p><b>action</b> [15] - 4:7, 4:8, 4:16, 4:23, 8:21, 11:6, 11:18, 14:6, 22:14, 24:2, 24:6, 24:11, 33:19, 33:20, 33:23</p> <p><b>actions</b> [3] - 4:6, 8:2, 11:16</p> <p><b>actual</b> [3] - 10:19, 31:22, 31:24</p> <p><b>additional</b> [1] - 4:9</p> <p><b>address</b> [3] - 7:17, 9:19, 26:15</p> <p><b>addressed</b> [1] - 10:1</p> <p><b>adequate</b> [3] - 13:22, 14:13, 15:1</p> <p><b>adequately</b> [4] - 13:6, 13:18, 14:8, 27:20</p> <p><b>adjudicate</b> [1] - 23:20</p> <p><b>adjudicated</b> [1] - 18:15</p> <p><b>adjudication</b> [7] - 6:23, 18:17, 23:18, 23:19, 25:16, 25:22, 26:7</p> <p><b>administration</b> [2] - 24:15, 24:18</p> <p><b>administrators</b> [1] - 24:17</p> <p><b>admit</b> [1] - 29:24</p> <p><b>adversity</b> [14] - 7:21, 7:22, 7:25, 8:4, 8:17, 8:24, 10:17, 20:4, 20:5, 20:14, 21:4, 21:10, 21:21</p> <p><b>advisement</b> [1] - 36:11</p> <p><b>advisory</b> [2] - 4:21, 7:11</p> <p><b>advocacy</b> [1] - 25:2</p> <p><b>affect</b> [1] - 24:5</p> <p><b>affects</b> [1] - 24:11</p> <p><b>affirmation</b> [1] - 7:6</p> <p><b>affirmatively</b> [7] - 5:20, 19:4, 31:3, 31:18, 31:19, 31:21, 32:13</p> <p><b>afternoon</b> [8] - 2:18, 2:19, 2:23, 3:7, 3:10, 3:14, 16:10, 16:11</p> <p><b>agents</b> [1] - 28:13</p> <p><b>ago</b> [2] - 23:16, 28:12</p> <p><b>agree</b> [3] - 26:10, 32:3, 35:14</p> <p><b>agreement</b> [1] - 23:10</p> <p><b>ahead</b> [3] - 17:6,</p>	<p>17:22, 31:23</p> <p><b>ahold</b> [1] - 9:3</p> <p><b>Alexander</b> [1] - 24:12</p> <p><b>allegation</b> [5] - 12:25, 15:18, 28:2, 30:24, 32:24</p> <p><b>allegations</b> [7] - 7:8, 12:23, 14:4, 14:5, 22:9, 33:24</p> <p><b>allege</b> [3] - 14:1, 14:2, 27:8</p> <p><b>alleged</b> [16] - 11:2, 11:5, 12:3, 12:6, 12:7, 13:6, 14:8, 15:11, 18:20, 19:1, 25:23, 28:8, 28:13, 29:19, 31:15, 34:2</p> <p><b>alleges</b> [1] - 28:10</p> <p><b>alleging</b> [2] - 13:10, 14:10</p> <p><b>allow</b> [4] - 13:11, 14:7, 14:9, 33:11</p> <p><b>allowed</b> [1] - 9:14</p> <p><b>alone</b> [2] - 13:22, 15:5</p> <p><b>alternative</b> [1] - 17:11</p> <p><b>amend</b> [4] - 16:1, 16:5, 17:10, 17:12</p> <p><b>amount</b> [1] - 25:7</p> <p><b>analysis</b> [3] - 11:23, 18:7, 26:3</p> <p><b>AND</b> [1] - 1:2</p> <p><b>Angeles</b> [2] - 2:6, 3:9</p> <p><b>answer</b> [3] - 30:17, 31:17, 32:9</p> <p><b>anyway</b> [1] - 26:16</p> <p><b>apologize</b> [1] - 16:20</p> <p><b>APPEARANCES</b> [2] - 1:19, 2:1</p> <p><b>appearances</b> [1] - 2:21</p> <p><b>application</b> [1] - 30:13</p> <p><b>applications</b> [2] - 29:25, 35:22</p> <p><b>applies</b> [2] - 21:16, 25:17</p> <p><b>appreciate</b> [1] - 36:10</p> <p><b>approach</b> [1] - 16:15</p> <p><b>area</b> [1] - 6:19</p> <p><b>areas</b> [2] - 9:25, 34:15</p> <p><b>argued</b> [1] - 31:7</p> <p><b>arguing</b> [2] - 15:18, 21:12</p> <p><b>Argument</b> [1] - 1:15</p> <p><b>argument</b> [12] - 2:16, 3:11, 18:24, 18:25, 21:12, 23:11, 25:6, 27:3, 28:4, 35:24, 36:10, 36:12</p> <p><b>arguments</b> [2] - 14:3, 27:1</p> <p><b>article</b> [1] - 9:11</p>	<p><b>asset</b> [1] - 11:5</p> <p><b>assets</b> [4] - 11:18, 24:20, 26:12, 27:4</p> <p><b>assurance</b> [1] - 22:6</p> <p><b>assure</b> [1] - 11:15</p> <p><b>asymmetrical</b> [1] - 18:14</p> <p><b>Attorney</b> [1] - 21:24</p> <p><b>attorneys</b> [1] - 2:19</p> <p><b>aware</b> [1] - 33:8</p>	<p>10:24, 33:11</p> <p><b>broker</b> [5] - 19:7, 23:6, 26:21, 30:15</p> <p><b>brought</b> [5] - 4:5, 10:16, 20:19, 20:25, 26:9</p> <p><b>bunch</b> [1] - 14:3</p> <p><b>burden</b> [1] - 35:24</p> <p><b>business</b> [2] - 8:3, 18:20</p> <p><b>buy</b> [3] - 24:8, 24:10, 27:10</p> <p><b>BY</b> [4] - 1:21, 1:23, 2:3, 2:5</p>
<b>/</b>				
<b>/s</b> [1] - 36:16				
<b>1</b>				
<p><b>12</b> [1] - 31:9</p> <p><b>12-317-LPS</b> [1] - 1:7</p> <p><b>12-319-LPS</b> [1] - 1:12</p> <p><b>13</b> [1] - 31:9</p> <p><b>14</b> [7] - 4:9, 4:11, 4:17, 6:23, 8:16, 10:9, 35:8</p> <p><b>15</b> [1] - 30:6</p> <p><b>1926</b> [1] - 26:14</p> <p><b>1958</b> [1] - 20:2</p>				
<b>2</b>				
<p><b>2012</b> [1] - 1:15</p> <p><b>25</b> [2] - 18:1, 20:15</p> <p><b>2:36</b> [1] - 2:17</p>				
<b>3</b>				
<p><b>3:22</b> [1] - 36:12</p>				
<b>5</b>				
<p><b>50</b> [1] - 33:15</p>				
<b>8</b>				
<p><b>8</b> [2] - 1:15, 27:18</p>				
<b>A</b>				
<p><b>ability</b> [5] - 6:10, 9:22, 10:3, 23:20, 25:12</p> <p><b>able</b> [2] - 20:23, 23:23</p> <p><b>absolutely</b> [1] - 14:19</p> <p><b>accept</b> [2] - 13:20, 13:22</p> <p><b>Accessories</b> [1] - 20:1</p> <p><b>accomplices</b> [1] - 29:14</p> <p><b>account</b> [2] - 14:23, 14:24</p> <p><b>accumulate</b> [1] - 5:23</p> <p><b>accumulation</b> [1] - 6:1</p> <p><b>accurate</b> [1] - 36:14</p>				<p><b>B</b></p> <p><b>Babbitt</b> [1] - 21:23</p> <p><b>background</b> [1] - 34:7</p> <p><b>bad</b> [1] - 34:25</p> <p><b>BANK</b> [2] - 1:6, 1:11</p> <p><b>bar</b> [2] - 30:10, 30:12</p> <p><b>Bare</b> [3] - 18:16, 23:8, 34:8</p> <p><b>based</b> [10] - 5:23, 6:17, 10:8, 14:13, 20:6, 22:9, 23:11, 23:12, 26:3, 29:6</p> <p><b>became</b> [1] - 6:1</p> <p><b>become</b> [1] - 9:14</p> <p><b>BEFORE</b> [1] - 1:17</p> <p><b>beginning</b> [1] - 2:17</p> <p><b>behalf</b> [1] - 3:8</p> <p><b>beneficial</b> [1] - 34:4</p> <p><b>benefit</b> [4] - 5:3, 5:25, 32:21, 32:22</p> <p><b>benefits</b> [1] - 32:20</p> <p><b>Berck</b> [5] - 19:7, 26:22, 32:25, 33:2, 33:5</p> <p><b>between</b> [4] - 8:5, 8:24, 10:19, 20:14</p> <p><b>big</b> [1] - 17:3</p> <p><b>binding</b> [1] - 18:6</p> <p><b>bit</b> [1] - 15:3</p> <p><b>books</b> [1] - 36:7</p> <p><b>bottom</b> [1] - 9:13</p> <p><b>bought</b> [4] - 25:2, 29:3, 34:6, 34:15</p> <p><b>BOVE</b> [1] - 1:20</p> <p><b>Bove</b> [1] - 2:24</p> <p><b>box</b> [1] - 23:14</p> <p><b>BRIAN</b> [1] - 2:3</p> <p><b>Brian</b> [3] - 2:9, 3:7, 36:16</p> <p><b>brief</b> [6] - 7:17, 7:18, 18:8, 30:22, 31:8</p> <p><b>briefing</b> [3] - 7:4, 7:15, 17:16</p> <p><b>briefly</b> [1] - 30:23</p> <p><b>briefs</b> [1] - 26:15</p> <p><b>bring</b> [1] - 22:7</p> <p><b>brings</b> [1] - 18:7</p> <p><b>broader</b> [3] - 10:5,</p>
				<p><b>C</b></p> <p><b>California</b> [4] - 2:6, 3:9, 7:3, 29:2</p> <p><b>cancelled</b> [1] - 14:18</p> <p><b>cannot</b> [1] - 6:15</p> <p><b>carrier</b> [1] - 28:8</p> <p><b>carriers</b> [2] - 33:2, 33:10</p> <p><b>case</b> [42] - 3:17, 4:24, 6:6, 6:9, 7:5, 11:4, 18:8, 18:12, 20:2, 20:9, 20:10, 20:18, 20:19, 21:22, 21:23, 22:8, 22:15, 22:16, 22:18, 22:24, 23:9, 23:13, 24:3, 24:7, 24:13, 25:9, 25:19, 25:24, 26:19, 26:23, 26:24, 27:2, 29:1, 29:3, 31:22, 32:4, 32:19, 34:8</p> <p><b>cases</b> [12] - 3:11, 6:18, 7:19, 12:5, 15:1, 15:8, 25:20, 28:16, 28:23, 33:9, 33:18, 35:17</p> <p><b>Casualty</b> [1] - 18:7</p> <p><b>causation</b> [2] - 11:2, 18:25</p> <p><b>caused</b> [3] - 25:23, 35:2, 35:3</p> <p><b>causes</b> [1] - 18:16</p> <p><b>causing</b> [1] - 11:8</p> <p><b>Central</b> [1] - 7:3</p> <p><b>certain</b> [1] - 25:3</p> <p><b>certainly</b> [11] - 9:21, 12:16, 16:13, 19:3, 26:17, 27:2, 27:12, 27:15, 31:7, 34:23, 35:22</p> <p><b>certify</b> [1] - 36:14</p> <p><b>CESSSEL</b> [1] - 23:8</p> <p><b>CHAD</b> [1] - 1:21</p> <p><b>Chad</b> [1] - 2:23</p> <p><b>chain</b> [1] - 11:11</p>

<p><b>challenge</b> [5] - 4:14, 6:10, 6:15, 30:11, 34:16</p> <p><b>challenges</b> [1] - 10:11</p> <p><b>challenging</b> [1] - 7:9</p> <p><b>change</b> [1] - 5:13</p> <p><b>characteristics</b> [1] - 23:8</p> <p><b>check</b> [3] - 14:18, 14:22, 14:24</p> <p><b>Circuit</b> [6] - 20:2, 20:10, 20:17, 21:4, 24:1, 24:13</p> <p><b>circumstances</b> [2] - 9:13, 36:4</p> <p><b>circumstantial</b> [1] - 22:9</p> <p><b>circumstantially</b> [1] - 36:3</p> <p><b>cite</b> [8] - 18:8, 22:15, 24:7, 25:9, 25:10, 25:25, 28:16, 28:23</p> <p><b>cited</b> [3] - 20:9, 33:3, 33:19</p> <p><b>CIVIL</b> [2] - 1:3, 1:9</p> <p><b>civil</b> [1] - 19:8</p> <p><b>claim</b> [27] - 4:15, 4:20, 4:24, 5:7, 17:10, 17:11, 17:12, 17:18, 18:8, 20:20, 20:25, 21:15, 21:19, 22:7, 23:22, 25:22, 26:7, 27:19, 28:9, 29:21, 29:22, 30:17, 32:19, 34:24, 35:1, 35:10, 35:11</p> <p><b>claimed</b> [1] - 29:20</p> <p><b>claims</b> [15] - 4:12, 7:9, 9:14, 10:24, 11:1, 17:14, 17:19, 17:24, 18:2, 18:3, 19:19, 21:5, 22:12, 26:11, 30:12</p> <p><b>clear</b> [2] - 29:7, 30:6</p> <p><b>client</b> [32] - 5:1, 5:4, 5:6, 5:12, 8:8, 8:10, 8:11, 8:14, 8:16, 8:20, 9:5, 9:14, 9:17, 11:13, 15:9, 15:20, 20:8, 25:2, 25:3, 30:14, 30:15, 30:25, 31:2, 31:8, 31:11, 31:12, 34:18, 34:23, 35:8, 35:11, 35:18, 35:24</p> <p><b>client's</b> [1] - 15:7</p> <p><b>Cliff</b> [2] - 22:24, 26:25</p> <p><b>clogging</b> [2] - 26:17, 27:2</p> <p><b>close</b> [1] - 26:2</p> <p><b>coin</b> [1] - 32:5</p>	<p><b>collect</b> [1] - 4:14</p> <p><b>collected</b> [1] - 22:20</p> <p><b>coming</b> [3] - 6:22, 10:7, 28:4</p> <p><b>communicate</b> [1] - 8:19</p> <p><b>communicated</b> [2] - 8:10, 8:12</p> <p><b>communicates</b> [1] - 8:21</p> <p><b>communication</b> [2] - 8:23, 9:1</p> <p><b>Company</b> [4] - 3:25, 4:10, 29:2, 33:6</p> <p><b>company</b> [4] - 5:22, 5:24, 5:25, 6:14</p> <p><b>COMPANY</b> [4] - 1:3, 1:6, 1:8, 1:11</p> <p><b>complaint</b> [6] - 12:23, 18:20, 19:3, 27:7, 31:4, 31:17</p> <p><b>completely</b> [1] - 8:12</p> <p><b>compliance</b> [2] - 3:22, 4:19</p> <p><b>complicated</b> [2] - 4:23, 24:14</p> <p><b>comply</b> [1] - 6:24</p> <p><b>component</b> [1] - 6:2</p> <p><b>concede</b> [2] - 19:21, 19:24</p> <p><b>conceptually</b> [1] - 28:3</p> <p><b>concession</b> [1] - 17:8</p> <p><b>conclusion</b> [2] - 23:3, 30:19</p> <p><b>conclusive</b> [2] - 9:23, 10:3</p> <p><b>conclusiveness</b> [4] - 9:21, 22:3, 23:11, 26:9</p> <p><b>conduct</b> [1] - 25:23</p> <p><b>Connolly</b> [1] - 2:24</p> <p><b>CONNOLLY</b> [1] - 1:20</p> <p><b>Consumer</b> [1] - 17:9</p> <p><b>contaminants</b> [1] - 26:4</p> <p><b>contend</b> [1] - 27:4</p> <p><b>contest</b> [1] - 3:18</p> <p><b>contestability</b> [7] - 3:20, 6:11, 6:13, 6:20, 30:9, 35:14, 35:17</p> <p><b>context</b> [2] - 10:5, 10:25</p> <p><b>Continued</b> [1] - 2:1</p> <p><b>contract</b> [25] - 3:23, 5:19, 8:20, 8:22, 10:14, 15:19, 15:22, 18:15, 21:19, 28:10, 29:5, 29:9, 29:13, 31:25, 32:1, 32:2,</p>	<p>32:3, 32:11, 32:13, 32:14, 32:15, 32:16, 34:21, 35:5</p> <p><b>contracts</b> [1] - 33:17</p> <p><b>contractual</b> [1] - 10:12</p> <p><b>contractually</b> [1] - 5:8</p> <p><b>contrary</b> [2] - 7:1, 7:12</p> <p><b>controversy</b> [3] - 10:18, 31:22, 32:4</p> <p><b>conventional</b> [1] - 18:11</p> <p><b>copy</b> [1] - 16:16</p> <p><b>core</b> [1] - 17:23</p> <p><b>correct</b> [9] - 3:3, 3:4, 12:1, 12:5, 12:9, 13:6, 13:7, 15:13, 17:20</p> <p><b>correctly</b> [1] - 7:10</p> <p><b>Counsel</b> [4] - 1:25, 2:7, 20:19, 20:25</p> <p><b>counsel</b> [6] - 17:1, 21:12, 22:16, 22:17, 26:8</p> <p><b>counterclaim</b> [4] - 4:8, 22:24, 23:1, 31:1</p> <p><b>counterclaims</b> [4] - 3:12, 12:3, 16:1, 17:24</p> <p><b>country</b> [1] - 18:2</p> <p><b>course</b> [4] - 7:2, 8:14, 9:22, 11:25</p> <p><b>court</b> [12] - 2:17, 6:7, 14:16, 15:16, 15:18, 20:23, 20:24, 22:7, 26:17, 27:1, 28:5, 28:24</p> <p><b>Court</b> [45] - 3:17, 6:6, 6:12, 6:14, 7:10, 9:22, 10:2, 10:10, 10:14, 10:15, 10:20, 11:24, 12:18, 13:12, 14:7, 15:7, 15:15, 17:13, 18:6, 18:9, 20:16, 21:1, 21:19, 21:23, 23:2, 23:9, 24:5, 24:10, 24:14, 24:16, 25:9, 25:14, 26:6, 26:10, 27:24, 28:6, 28:21, 28:23, 28:24, 29:11, 29:23, 34:22, 35:4, 36:16, 36:17</p> <p><b>COURT</b> [51] - 1:1, 2:18, 2:21, 3:2, 3:5, 3:10, 4:25, 5:10, 6:5, 7:14, 8:7, 8:14, 9:1, 9:19, 11:21, 11:23, 12:3, 12:8, 12:11, 13:5, 13:8, 13:15, 14:12, 15:6, 15:11, 15:23, 16:6, 16:9, 16:13, 16:16, 16:19,</p>	<p>16:22, 16:24, 17:3, 17:6, 17:15, 17:22, 19:21, 22:4, 25:1, 26:8, 27:3, 29:24, 30:3, 30:9, 30:20, 31:7, 32:6, 35:14, 36:8, 36:10</p> <p><b>court-clogging</b> [1] - 26:17</p> <p><b>courts</b> [2] - 14:17, 26:15</p> <p><b>coverage</b> [1] - 24:24</p> <p><b>coy</b> [2] - 30:24, 31:17</p> <p><b>create</b> [1] - 8:24</p> <p><b>crime</b> [1] - 29:15</p> <p><b>criminal</b> [2] - 15:16, 21:25</p> <p><b>CSSEL</b> [2] - 18:16, 34:8</p> <p><b>culpable</b> [1] - 28:14</p>	<p>4:3, 10:6, 15:11, 15:23, 16:9, 26:24, 29:4, 29:8</p> <p><b>Defendant</b> [2] - 1:7, 1:13</p> <p><b>defendant's</b> [1] - 15:6</p> <p><b>Defendants</b> [1] - 2:7</p> <p><b>defense</b> [1] - 29:21</p> <p><b>defenses</b> [4] - 28:7, 28:9, 28:22, 29:20</p> <p><b>deficiencies</b> [2] - 10:2, 15:24</p> <p><b>defines</b> [1] - 24:1</p> <p><b>definitely</b> [2] - 32:20, 34:16</p> <p><b>DELAWARE</b> [1] - 1:2</p> <p><b>Delaware</b> [10] - 1:14, 3:17, 3:18, 4:1, 4:19, 6:24, 11:23, 17:9, 18:1, 22:21</p> <p><b>Delaware's</b> [1] - 3:22</p> <p><b>delay</b> [1] - 21:13</p> <p><b>delicto</b> [2] - 29:14, 29:17</p> <p><b>denial</b> [1] - 9:10</p> <p><b>denied</b> [3] - 30:3, 30:18, 35:11</p> <p><b>deny</b> [2] - 5:7, 31:16</p> <p><b>denying</b> [1] - 7:9</p> <p><b>deposit</b> [1] - 14:23</p> <p><b>depressed</b> [1] - 19:2</p> <p><b>described</b> [1] - 9:18</p> <p><b>despite</b> [2] - 4:18, 34:21</p> <p><b>destroyed</b> [3] - 27:7, 27:8, 27:12</p> <p><b>determine</b> [1] - 3:21</p> <p><b>DEUTSCHE</b> [2] - 1:6, 1:11</p> <p><b>devaluing</b> [1] - 8:1</p> <p><b>develop</b> [1] - 23:17</p> <p><b>developed</b> [2] - 25:12, 25:13</p> <p><b>dies</b> [1] - 23:21</p> <p><b>different</b> [17] - 3:11, 6:8, 6:22, 9:7, 9:15, 11:17, 12:5, 17:25, 20:20, 32:4, 32:12, 32:15, 32:17, 34:12, 34:15, 35:12</p> <p><b>digressing</b> [1] - 15:3</p> <p><b>diminished</b> [1] - 26:6</p> <p><b>diminution</b> [1] - 11:5</p> <p><b>directly</b> [3] - 7:5, 9:2, 24:9</p> <p><b>disagree</b> [1] - 27:19</p> <p><b>disavow</b> [6] - 21:2, 21:24, 22:2, 30:24, 30:25, 31:19</p> <p><b>disavowed</b> [1] - 31:21</p> <p><b>disavowing</b> [1] -</p>
---	--	---	--	---

## D

<p>31:18  <b>disbarred</b> [2] - 20:21, 20:24  <b>Disciplinary</b> [2] - 20:19, 20:25  <b>disclosed</b> [2] - 9:5, 9:18  <b>disclosure</b> [1] - 22:16  <b>discrete</b> [1] - 6:9  <b>dismiss</b> [6] - 3:12, 13:9, 17:9, 17:17, 31:4, 32:9  <b>disparage</b> [1] - 16:4  <b>dispositive</b> [2] - 13:2, 15:5  <b>dispute</b> [4] - 10:19, 31:22, 31:24, 32:20  <b>DISTRICT</b> [2] - 1:1, 1:2  <b>District</b> [4] - 7:3, 25:25, 33:9, 36:17  <b>doctrines</b> [1] - 15:13  <b>document</b> [2] - 8:15, 9:11  <b>Documents</b> [1] - 16:21  <b>documents</b> [1] - 27:10  <b>dollars</b> [1] - 19:12  <b>done</b> [5] - 30:12, 34:19, 34:23, 34:24, 35:2  <b>down</b> [1] - 35:7  <b>dozen</b> [1] - 33:9  <b>drawn</b> [1] - 22:14  <b>due</b> [6] - 5:20, 5:21, 6:1, 6:10, 35:18, 35:20  <b>dump</b> [3] - 26:3, 26:5, 33:22  <b>duty</b> [3] - 11:2, 11:14, 14:4</p> <p style="text-align: center;"><b>E</b></p>	<p><b>enforcing</b> [1] - 35:4  <b>engaged</b> [1] - 19:11  <b>ensure</b> [1] - 11:14  <b>entertaining</b> [1] - 10:10  <b>entire</b> [2] - 14:17, 14:20  <b>entity</b> [1] - 8:15  <b>environmental</b> [2] - 26:3, 33:21  <b>EPA</b> [1] - 26:1  <b>equitable</b> [2] - 15:12, 28:7  <b>equitably</b> [1] - 15:20  <b>equity</b> [3] - 28:5, 28:7, 34:17  <b>ESF</b> [5] - 1:6, 1:11, 3:8, 4:3, 34:1  <b>ESQ</b> [5] - 1:21, 1:23, 1:24, 2:3, 2:5  <b>essentially</b> [4] - 9:14, 11:4, 19:10, 26:2  <b>establish</b> [3] - 19:1, 19:19, 20:4  <b>established</b> [1] - 27:16  <b>esteemed</b> [1] - 22:17  <b>estopped</b> [1] - 15:21  <b>estoppel</b> [4] - 15:13, 28:22, 29:20, 29:21  <b>estoppel-type</b> [1] - 28:22  <b>Euclid</b> [2] - 25:10, 26:13  <b>EUNICE</b> [1] - 1:24  <b>Eunice</b> [1] - 2:25  <b>evidence</b> [3] - 12:19, 22:10, 27:23  <b>exact</b> [1] - 32:18  <b>exactly</b> [1] - 34:25  <b>example</b> [4] - 20:1, 22:13, 24:3, 25:8  <b>exclusive</b> [1] - 12:16  <b>exist</b> [3] - 23:14, 29:22, 32:14  <b>existed</b> [1] - 13:12  <b>expand</b> [2] - 4:8, 4:22  <b>expert</b> [1] - 27:14  <b>expiration</b> [1] - 3:20  <b>expired</b> [2] - 6:11, 6:13  <b>explained</b> [2] - 18:16, 22:24  <b>express</b> [2] - 22:6, 33:16  <b>eye</b> [1] - 10:23</p>	<p><b>fact</b> [20] - 3:22, 4:18, 6:10, 6:18, 8:8, 8:11, 10:25, 13:1, 13:21, 13:22, 17:4, 19:2, 20:17, 21:14, 21:16, 22:2, 28:1, 28:15, 31:15, 34:21  <b>factor</b> [12] - 10:4, 12:12, 13:6, 15:5, 19:19, 20:6, 20:13, 22:2, 22:3, 23:11, 23:12, 23:25  <b>factor-based</b> [2] - 20:6, 23:12  <b>factors</b> [20] - 3:21, 7:21, 9:19, 9:23, 12:2, 12:15, 12:16, 12:17, 13:13, 14:6, 14:8, 14:10, 14:11, 15:4, 20:5, 20:8, 21:2, 21:9, 21:20, 26:19  <b>facts</b> [3] - 23:14, 23:17, 23:19  <b>factual</b> [2] - 14:5, 35:12  <b>fade</b> [1] - 23:21  <b>failed</b> [2] - 5:7, 13:17  <b>fall</b> [1] - 11:1  <b>familiar</b> [1] - 3:6  <b>far</b> [3] - 11:11, 27:18, 34:17  <b>Farm</b> [1] - 21:23  <b>FARNAN</b> [4] - 2:2, 2:3, 3:7, 17:2  <b>Farnan</b> [2] - 3:6, 3:8  <b>favor</b> [1] - 20:6  <b>Federal</b> [1] - 20:10  <b>federal</b> [3] - 20:23, 22:7, 29:5  <b>file</b> [2] - 31:20, 32:23  <b>filed</b> [5] - 3:25, 15:9, 33:13, 33:15, 34:1  <b>filing</b> [2] - 4:8, 33:25  <b>filings</b> [1] - 15:8  <b>Fink</b> [2] - 26:22, 33:1  <b>first</b> [6] - 3:13, 7:21, 12:4, 13:21, 14:14, 27:24  <b>five</b> [2] - 17:25, 23:15  <b>flags</b> [1] - 23:6  <b>flaw</b> [1] - 11:1  <b>flip</b> [1] - 32:18  <b>flooded</b> [2] - 26:11, 26:16  <b>Florida</b> [2] - 22:15, 22:18  <b>focus</b> [1] - 17:13  <b>followed</b> [1] - 5:5  <b>following</b> [4] - 2:16, 3:16, 3:24, 8:16</p>	<p><b>follows</b> [1] - 22:4  <b>FOR</b> [1] - 1:2  <b>foregoing</b> [1] - 36:14  <b>form</b> [1] - 34:25  <b>formed</b> [2] - 5:4, 9:17  <b>fortunately</b> [1] - 22:8  <b>forward</b> [2] - 16:21, 24:22  <b>four</b> [4] - 9:12, 20:5, 21:9, 22:25  <b>fours</b> [1] - 23:8  <b>Fraud</b> [1] - 17:10  <b>fraud</b> [3] - 14:2, 30:8, 35:21  <b>free</b> [1] - 25:3  <b>freely</b> [1] - 16:4  <b>frequently</b> [1] - 18:9  <b>frozen</b> [1] - 23:14  <b>Fuld</b> [4] - 22:14, 22:19, 22:23, 26:23  <b>full</b> [1] - 30:13  <b>functionally</b> [1] - 27:12  <b>fundamental</b> [1] - 11:1  <b>future</b> [2] - 4:21, 25:22</p> <p style="text-align: center;"><b>G</b></p>	<p><b>great</b> [1] - 14:3  <b>Griggs</b> [5] - 4:7, 17:21, 23:22, 32:19, 35:17  <b>group</b> [1] - 33:21  <b>guess</b> [1] - 27:7  <b>guys</b> [1] - 19:9</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>Hammond</b> [1] - 29:2  <b>handle</b> [1] - 24:20  <b>harder</b> [2] - 23:20, 36:5  <b>harm</b> [2] - 18:16, 25:23  <b>hazardous</b> [1] - 26:3  <b>hear</b> [3] - 3:11, 3:13, 16:9  <b>Hearing</b> [1] - 1:15  <b>hearing</b> [2] - 2:17, 36:12  <b>held</b> [5] - 2:17, 7:10, 24:16, 25:14, 30:11  <b>help</b> [3] - 16:22, 20:4, 23:18  <b>helpful</b> [2] - 20:17, 36:1  <b>hereby</b> [1] - 36:14  <b>Hetherington</b> [2] - 3:1, 3:15  <b>HETHERINGTON</b> [1] - 1:23  <b>highlight</b> [1] - 23:12  <b>holding</b> [3] - 14:12, 15:15, 18:20  <b>holds</b> [2] - 5:3, 8:11  <b>Honor</b> [12] - 2:20, 2:23, 3:7, 3:14, 12:10, 16:3, 16:15, 17:2, 17:7, 30:22, 33:7, 36:9  <b>HONORABLE</b> [1] - 1:17  <b>Houston</b> [2] - 1:24, 3:1  <b>hundred</b> [1] - 33:14  <b>hundreds</b> [2] - 10:15, 19:11  <b>Hurley</b> [1] - 24:7  <b>HUTZ</b> [1] - 1:20  <b>Hutz</b> [1] - 2:24  <b>hypothetical</b> [3] - 5:12, 35:7, 35:10</p>
<p><b>earner</b> [1] - 3:23  <b>easier</b> [1] - 36:2  <b>Edison</b> [2] - 2:25, 3:15  <b>EDISON</b> [1] - 1:23  <b>Edward</b> [1] - 22:19  <b>effectively</b> [1] - 27:7  <b>either</b> [5] - 8:18, 11:2, 18:12, 30:18, 34:3  <b>emphatic</b> [1] - 12:18  <b>empirically</b> [1] - 26:16  <b>encouraged</b> [1] - 28:13  <b>ends</b> [1] - 36:12  <b>enforce</b> [5] - 15:16, 15:19, 21:5, 21:19, 34:22  <b>enforced</b> [1] - 28:20</p>	<p style="text-align: center;"><b>F</b></p> <p><b>face</b> [1] - 10:9</p>	<p><b>Gaffigan</b> [2] - 2:9, 36:16  <b>game</b> [1] - 19:14  <b>GANER</b> [28] - 1:23, 3:14, 5:4, 5:18, 6:7, 7:16, 8:10, 8:18, 9:5, 9:21, 11:22, 12:2, 12:7, 12:10, 12:15, 13:7, 13:10, 13:20, 14:16, 15:9, 15:14, 16:3, 16:8, 30:22, 31:10, 32:8, 35:16, 36:9  <b>Ganer</b> [2] - 2:25, 3:15  <b>General</b> [1] - 21:24  <b>general</b> [2] - 10:24, 11:5  <b>generally</b> [1] - 8:3  <b>gentlemen's</b> [1] - 22:21  <b>given</b> [2] - 12:11, 15:25  <b>GODFREY</b> [1] - 2:5  <b>Godfrey</b> [1] - 3:9  <b>governed</b> [1] - 4:1  <b>government</b> [1] - 29:7  <b>grand</b> [1] - 10:22  <b>grant</b> [2] - 12:13, 13:23  <b>granted</b> [2] - 16:4, 17:11  <b>granting</b> [1] - 15:24</p>	<p style="text-align: center;"><b>I</b></p> <p><b>idea</b> [2] - 11:10, 31:17  <b>identifies</b> [1] - 9:12  <b>illegal</b> [9] - 3:23,</p>	

<p>15:16, 15:19, 15:21, 28:10, 29:5, 29:9, 34:21, 35:4</p> <p><b>immaterial</b> [1] - 18:9</p> <p><b>imminent</b> [1] - 20:13</p> <p><b>immune</b> [1] - 28:9</p> <p><b>immunity</b> [2] - 15:12, 15:14</p> <p><b>impact</b> [3] - 24:2, 24:17, 24:18</p> <p><b>impacted</b> [2] - 24:10, 24:15</p> <p><b>impaired</b> [12] - 18:19, 18:24, 25:10, 25:15, 25:18, 26:11, 26:14, 27:4, 27:13, 33:18, 33:22, 33:24</p> <p><b>impairment</b> [1] - 27:13</p> <p><b>implicit</b> [3] - 19:17, 19:22, 20:3</p> <p><b>important</b> [2] - 10:4, 12:12</p> <p><b>IN</b> [2] - 1:1, 1:2</p> <p><b>inappropriate</b> [1] - 31:2</p> <p><b>INC</b> [2] - 1:7, 1:12</p> <p><b>include</b> [1] - 4:9</p> <p><b>included</b> [1] - 13:14</p> <p><b>incontestable</b> [1] - 30:6</p> <p><b>Indiana</b> [2] - 25:25, 26:1</p> <p><b>indicated</b> [1] - 7:12</p> <p><b>individuals</b> [1] - 12:4</p> <p><b>industrial</b> [1] - 25:13</p> <p><b>inference</b> [2] - 22:13, 23:2</p> <p><b>information</b> [1] - 30:19</p> <p><b>ing</b> [1] - 32:16</p> <p><b>initial</b> [7] - 7:17, 7:18, 7:19, 12:1, 13:11, 34:3, 34:4</p> <p><b>injury</b> [2] - 18:18, 20:13</p> <p><b>innocent</b> [4] - 28:11, 29:13, 29:18, 29:19</p> <p><b>inquiry</b> [1] - 18:11</p> <p><b>instead</b> [1] - 15:25</p> <p><b>insufficient</b> [1] - 14:11</p> <p><b>insurable</b> [20] - 3:22, 4:2, 4:20, 6:15, 6:24, 13:3, 13:12, 13:16, 13:18, 13:25, 14:10, 14:13, 14:19, 21:15, 21:18, 23:15, 27:21, 30:11, 35:20, 36:1</p> <p><b>INSURANCE</b> [2] - 1:3, 1:8</p> <p><b>insurance</b> [14] - 3:19, 4:1, 5:2, 5:11, 5:16,</p>	<p>5:23, 6:14, 12:20, 12:22, 12:24, 13:14, 22:19, 30:1, 33:10</p> <p><b>Insurance</b> [3] - 3:24, 4:10, 33:6</p> <p><b>insured</b> [9] - 13:11, 14:21, 15:2, 23:21, 27:24, 30:14, 36:2, 36:4</p> <p><b>insurer</b> [1] - 3:18</p> <p><b>insurer's</b> [1] - 5:21</p> <p><b>intend</b> [2] - 8:8, 9:3</p> <p><b>intended</b> [1] - 12:19</p> <p><b>intends</b> [3] - 4:13, 4:14, 31:9</p> <p><b>intent</b> [22] - 5:5, 5:6, 5:25, 8:11, 9:17, 10:8, 21:2, 21:24, 22:2, 22:5, 22:10, 22:11, 23:23, 24:10, 30:25, 31:1, 31:11, 31:12, 31:16</p> <p><b>intention</b> [4] - 5:1, 5:13, 5:14, 5:16</p> <p><b>intentions</b> [4] - 8:21, 15:17, 31:3, 31:5</p> <p><b>interest</b> [25] - 3:22, 4:2, 4:20, 6:16, 6:25, 7:21, 7:22, 8:5, 10:17, 13:4, 13:12, 13:16, 13:18, 13:25, 14:10, 14:13, 14:19, 21:16, 21:18, 23:15, 27:21, 30:11, 34:5, 35:20, 36:1</p> <p><b>internal</b> [4] - 8:15, 9:11, 9:17, 23:5</p> <p><b>internally</b> [3] - 22:10, 22:11, 23:4</p> <p><b>interpret</b> [1] - 11:8</p> <p><b>interpretation</b> [1] - 11:9</p> <p><b>invalid</b> [1] - 35:25</p> <p><b>invalidate</b> [1] - 4:11</p> <p><b>investigation</b> [1] - 30:13</p> <p><b>investor</b> [1] - 22:25</p> <p><b>investors</b> [5] - 18:21, 22:23, 24:21, 24:25, 33:12</p> <p><b>involve</b> [2] - 33:19, 33:20</p> <p><b>involved</b> [10] - 4:3, 10:13, 23:6, 23:7, 26:23, 32:25, 33:2, 33:5, 34:2, 34:9</p> <p><b>involving</b> [4] - 4:23, 20:11, 26:21, 27:18</p> <p><b>irrelevant</b> [1] - 8:13</p> <p><b>issuance</b> [1] - 23:15</p> <p><b>issue</b> [20] - 6:8, 6:9,</p>	<p>7:24, 18:2, 22:25, 23:15, 24:16, 27:17, 27:18, 28:3, 28:20, 28:22, 30:5, 31:15, 33:7, 33:11, 34:10, 34:20, 35:5</p> <p><b>issued</b> [7] - 3:22, 4:9, 4:19, 13:3, 13:25, 14:9, 24:11</p> <p><b>issues</b> [3] - 11:25, 30:7, 34:17</p> <p><b>item</b> [1] - 7:21</p>	<p>27:23</p> <p><b>Latin</b> [1] - 29:15</p> <p><b>law</b> [9] - 3:18, 3:23, 4:1, 4:20, 6:20, 6:25, 18:6, 29:5, 29:10</p> <p><b>lawsuit</b> [3] - 31:2, 32:9, 32:23</p> <p><b>lawsuits</b> [8] - 17:25, 18:1, 20:8, 20:16, 33:13, 33:15, 33:25, 34:1</p> <p><b>lawyer</b> [3] - 20:20, 21:1, 24:3</p> <p><b>leap</b> [1] - 21:7</p> <p><b>learn</b> [2] - 9:3, 9:4</p> <p><b>least</b> [3] - 19:22, 26:16, 30:7</p> <p><b>leave</b> [4] - 15:25, 16:3, 16:5, 17:10</p> <p><b>legal</b> [1] - 21:19</p> <p><b>legally</b> [2] - 6:21, 11:12</p> <p><b>legitimate</b> [4] - 12:20, 12:22, 12:24, 13:14</p> <p><b>LEONARD</b> [1] - 1:17</p> <p><b>letters</b> [1] - 4:5</p> <p><b>letting</b> [1] - 36:1</p> <p><b>level</b> [1] - 27:13</p> <p><b>Lewis</b> [1] - 24:12</p> <p><b>liability</b> [1] - 34:19</p> <p><b>life</b> [3] - 3:19, 22:19, 22:21</p> <p><b>likely</b> [1] - 20:13</p> <p><b>limited</b> [1] - 25:12</p> <p><b>Lincoln</b> [3] - 33:5, 33:8, 33:13</p> <p><b>line</b> [1] - 35:7</p> <p><b>linguistic</b> [1] - 19:14</p> <p><b>link</b> [1] - 19:1</p> <p><b>listing</b> [1] - 12:17</p> <p><b>litigated</b> [1] - 10:16</p> <p><b>litigation</b> [13] - 8:4, 9:9, 10:13, 11:7, 11:16, 20:11, 20:21, 31:19, 31:20, 32:25, 33:3, 33:5, 33:8</p> <p><b>live</b> [1] - 36:2</p> <p><b>LLP</b> [4] - 1:20, 1:23, 2:2, 2:5</p> <p><b>Lockwood</b> [6] - 19:6, 19:8, 26:21, 26:22, 33:1, 34:8</p> <p><b>Lodge</b> [1] - 2:24</p> <p><b>LODGE</b> [1] - 1:20</p> <p><b>logic</b> [1] - 25:17</p> <p><b>logically</b> [1] - 21:16</p> <p><b>look</b> [12] - 5:18, 7:20, 12:17, 14:7, 14:17, 14:20, 20:7, 21:1, 23:13, 29:9, 29:12</p> <p><b>looking</b> [2] - 7:10,</p>	<p>11:6</p> <p><b>looks</b> [2] - 3:6, 17:4</p> <p><b>Los</b> [2] - 2:6, 3:9</p> <p><b>lose</b> [1] - 17:5</p> <p><b>lower</b> [2] - 6:7, 28:24</p>
		<b>J</b>		<b>M</b>
	<p><b>Jarrett</b> [2] - 2:25, 3:14</p> <p><b>JARRETT</b> [1] - 1:23</p> <p><b>John</b> [2] - 19:7, 26:22</p> <p><b>joints</b> [1] - 20:7</p> <p><b>judgment</b> [9] - 10:7, 17:17, 18:10, 27:19, 27:23, 28:5, 28:15, 29:22, 32:2</p> <p><b>judicial</b> [4] - 15:7, 15:12, 15:14, 20:16</p> <p><b>June</b> [1] - 24:13</p> <p><b>jurisprudence</b> [1] - 25:7</p> <p><b>jury</b> [2] - 17:5, 27:25</p>	<b>K</b>		<p><b>mail</b> [1] - 24:9</p> <p><b>maneuver</b> [1] - 20:7</p> <p><b>market</b> [11] - 8:1, 11:8, 11:9, 11:15, 11:17, 18:22, 18:23, 25:3, 34:6</p> <p><b>marketability</b> [11] - 18:19, 18:25, 25:11, 25:18, 26:12, 26:14, 27:4, 27:8, 33:18, 33:23, 33:25</p> <p><b>marketable</b> [1] - 27:5</p> <p><b>Maryland</b> [1] - 18:6</p> <p><b>match</b> [1] - 23:7</p> <p><b>matter</b> [6] - 8:5, 9:8, 15:10, 21:13, 22:5</p> <p><b>maturity</b> [1] - 18:21</p> <p><b>McDowell</b> [3] - 1:23, 3:1, 3:15</p> <p><b>mean</b> [2] - 24:1, 25:21</p> <p><b>mechanisms</b> [1] - 23:5</p> <p><b>Medicaid</b> [1] - 24:15</p> <p><b>memories</b> [1] - 23:20</p> <p><b>Merit</b> [1] - 2:9</p> <p><b>might</b> [2] - 11:17, 35:1</p> <p><b>million</b> [3] - 4:24, 10:9, 23:22</p> <p><b>millions</b> [1] - 19:11</p> <p><b>mind</b> [2] - 5:13, 22:4</p> <p><b>Minor</b> [1] - 24:7</p> <p><b>misconduct</b> [4] - 19:1, 19:2, 28:8, 28:11</p> <p><b>misrepresentation</b> [3] - 30:7, 30:12, 35:21</p> <p><b>misrepresentations</b> [2] - 29:25, 35:19</p> <p><b>moment</b> [2] - 5:12, 16:11</p> <p><b>money</b> [1] - 29:7</p> <p><b>months</b> [1] - 27:23</p> <p><b>most</b> [1] - 33:3</p> <p><b>motion</b> [5] - 3:12, 13:9, 13:15, 15:25, 27:22</p> <p><b>motions</b> [1] - 12:13</p> <p><b>move</b> [1] - 32:9</p> <p><b>moved</b> [2] - 35:18, 35:19</p> <p><b>moving</b> [1] - 31:3</p> <p><b>MR</b> [48] - 2:23, 3:4, 3:7, 3:14, 5:4, 5:18,</p>
		<b>L</b>		
	<p><b>L.L.P</b> [1] - 2:5</p> <p><b>label</b> [1] - 26:6</p> <p><b>labeled</b> [2] - 26:2, 26:4</p> <p><b>lack</b> [8] - 4:2, 6:15, 11:2, 18:25, 21:15, 21:17, 35:20</p> <p><b>lacked</b> [1] - 35:25</p> <p><b>land</b> [3] - 24:23, 25:12, 29:4</p> <p><b>language</b> [5] - 19:10, 20:3, 21:3, 28:18, 29:15</p> <p><b>larger</b> [1] - 4:24</p> <p><b>last</b> [3] - 3:16, 23:25,</p>			

<p>6:7, 7:16, 8:10, 8:18, 9:5, 9:21, 11:22, 12:2, 12:7, 12:10, 12:15, 13:7, 13:10, 13:20, 14:16, 15:9, 15:14, 16:3, 16:8, 16:11, 16:15, 16:18, 16:20, 16:23, 17:2, 17:5, 17:7, 17:20, 17:23, 19:24, 22:8, 25:5, 26:13, 27:6, 30:2, 30:4, 30:10, 30:22, 31:10, 32:8, 35:16, 36:9</p> <p><b>must</b> [1] - 4:21</p> <p><b>Mutual</b> [2] - 33:6, 33:15</p>	<p><b>obligated</b> [1] - 5:8</p> <p><b>obligation</b> [1] - 11:14</p> <p><b>obviously</b> [2] - 10:2, 20:6</p> <p><b>occurring</b> [1] - 6:2</p> <p><b>OF</b> [1] - 1:2</p> <p><b>Office</b> [2] - 20:19, 20:24</p> <p><b>office</b> [2] - 20:22, 24:4</p> <p><b>Official</b> [1] - 36:16</p> <p><b>once</b> [1] - 31:14</p> <p><b>one</b> [27] - 8:12, 8:20, 10:6, 10:19, 11:25, 12:2, 12:16, 14:10, 14:18, 15:5, 16:11, 17:5, 17:18, 17:19, 18:18, 20:13, 22:23, 28:23, 28:24, 30:5, 31:10, 32:12, 34:9, 34:10, 35:8, 36:6</p> <p><b>ones</b> [2] - 32:10, 32:11</p> <p><b>oOo</b> [1] - 2:14</p> <p><b>open</b> [3] - 2:17, 20:22, 24:4</p> <p><b>opening</b> [1] - 10:15</p> <p><b>opinion</b> [9] - 3:16, 4:21, 6:14, 7:3, 7:11, 7:24, 9:24, 10:3, 12:18</p> <p><b>opposing</b> [2] - 21:12, 22:17</p> <p><b>opposition</b> [1] - 33:4</p> <p><b>Oral</b> [1] - 1:15</p> <p><b>oral</b> [3] - 2:16, 23:11, 36:12</p> <p><b>order</b> [1] - 19:23</p> <p><b>ordinance</b> [1] - 25:11</p> <p><b>Oregon</b> [3] - 28:25, 29:1, 29:2</p> <p><b>otherwise</b> [1] - 4:23</p> <p><b>out-of-state</b> [1] - 24:8</p> <p><b>outside</b> [2] - 10:25, 31:19</p> <p><b>overlap</b> [2] - 34:12, 34:13</p> <p><b>overturn</b> [1] - 25:6</p> <p><b>own</b> [2] - 34:5, 34:14</p> <p><b>owned</b> [2] - 4:3, 4:10</p>	<p>19:18, 26:20</p> <p><b>participating</b> [1] - 15:21</p> <p><b>particular</b> [4] - 6:19, 6:20, 17:12, 33:17</p> <p><b>parties</b> [14] - 8:5, 8:25, 10:19, 15:17, 18:10, 20:12, 20:14, 21:8, 23:10, 24:2, 24:11, 25:10, 29:14, 33:25</p> <p><b>party</b> [13] - 8:19, 10:19, 19:4, 26:24, 29:13, 29:18, 29:19, 31:25, 32:11, 32:12, 32:13, 33:8, 33:20</p> <p><b>passage</b> [2] - 35:23, 36:5</p> <p><b>passed</b> [2] - 16:21, 25:12</p> <p><b>past</b> [2] - 35:16, 36:1</p> <p><b>patent</b> [1] - 20:10</p> <p><b>pattern</b> [1] - 7:8</p> <p><b>pause</b> [1] - 16:14</p> <p><b>pay</b> [13] - 4:15, 5:17, 5:25, 7:7, 7:13, 8:8, 9:13, 9:25, 22:11, 29:7, 29:11, 32:21, 32:22</p> <p><b>paying</b> [7] - 5:1, 5:13, 5:14, 14:21, 14:25, 15:2, 24:22</p> <p><b>payment</b> [2] - 5:20, 15:21</p> <p><b>payments</b> [2] - 12:4, 32:10</p> <p><b>Penn</b> [2] - 33:5, 33:15</p> <p><b>Pennsylvania</b> [3] - 20:22, 24:4, 28:23</p> <p><b>Pension</b> [2] - 19:8, 26:22</p> <p><b>perciplus</b> [2] - 29:16, 29:17</p> <p><b>performance</b> [1] - 5:24</p> <p><b>period</b> [6] - 3:20, 6:11, 6:13, 30:9, 35:15, 35:17</p> <p><b>permitted</b> [1] - 34:22</p> <p><b>person</b> [2] - 12:19, 14:3</p> <p><b>persuaded</b> [1] - 13:17</p> <p><b>Pharmaceuticals</b> [1] - 20:9</p> <p><b>PHL</b> [5] - 1:3, 1:8, 3:24, 4:9, 4:16</p> <p><b>Phoenix</b> [28] - 4:11, 4:13, 6:8, 6:9, 6:17, 6:25, 7:6, 7:7, 7:8, 7:11, 17:24, 18:13, 19:12, 22:17, 23:3, 26:24, 28:4, 28:14,</p>	<p>28:19, 31:25, 32:21, 32:24, 33:7, 33:9, 34:3, 34:16</p> <p><b>Phoenix's</b> [4] - 18:24, 28:11, 31:24, 33:4</p> <p><b>phonetic</b> [1] - 29:16</p> <p><b>phrase</b> [1] - 29:16</p> <p><b>piece</b> [2] - 26:2, 31:20</p> <p><b>plainly</b> [1] - 19:19</p> <p><b>plaintiff</b> [7] - 2:24, 3:2, 3:4, 3:13, 6:12, 29:3, 29:7</p> <p><b>Plaintiff</b> [3] - 1:4, 1:9, 1:25</p> <p><b>plaintiff's</b> [1] - 3:12</p> <p><b>plaintiffs</b> [1] - 26:9</p> <p><b>plan</b> [1] - 24:5</p> <p><b>plans</b> [2] - 24:2, 24:11</p> <p><b>playing</b> [2] - 30:24, 31:17</p> <p><b>plays</b> [1] - 21:11</p> <p><b>plead</b> [1] - 13:18</p> <p><b>pleading</b> [2] - 10:1</p> <p><b>pleadings</b> [4] - 19:9, 27:15, 28:1, 28:16</p> <p><b>plus</b> [2] - 18:1, 20:15</p> <p><b>point</b> [13] - 5:15, 6:6, 7:5, 9:6, 12:9, 17:13, 18:25, 21:10, 21:11, 21:20, 25:24, 27:21, 30:3</p> <p><b>points</b> [1] - 20:13</p> <p><b>policies</b> [69] - 4:1, 4:2, 4:9, 4:12, 4:14, 4:15, 4:17, 4:19, 5:1, 5:23, 6:23, 6:24, 7:1, 7:9, 7:23, 8:1, 8:3, 8:9, 8:16, 9:12, 10:9, 10:15, 11:7, 11:14, 11:17, 11:25, 12:24, 17:18, 18:1, 18:5, 18:19, 18:21, 19:7, 19:12, 19:13, 19:18, 21:15, 22:25, 23:4, 23:7, 25:3, 25:4, 28:6, 28:12, 28:13, 28:19, 30:1, 30:5, 30:6, 31:6, 31:9, 31:12, 33:13, 33:14, 33:16, 34:3, 34:5, 34:6, 34:7, 34:9, 34:11, 34:14, 35:8, 35:9, 35:15, 35:16, 35:18, 35:19, 35:25</p> <p><b>Policy</b> [1] - 22:19</p> <p><b>policy</b> [30] - 3:19, 3:21, 5:3, 5:12, 6:2, 6:10, 6:12, 6:15, 7:7, 10:21, 11:10, 12:20, 12:21, 13:3, 13:24, 13:25, 14:7, 14:9,</p>	<p>17:21, 18:4, 19:6, 19:15, 19:17, 22:16, 22:20, 23:24, 27:1, 27:20, 36:6</p> <p><b>policy's</b> [1] - 3:20</p> <p><b>position</b> [7] - 6:25, 7:12, 22:1, 25:21, 28:8, 32:7</p> <p><b>positions</b> [1] - 18:10</p> <p><b>potentially</b> [1] - 26:11</p> <p><b>practical</b> [1] - 26:10</p> <p><b>practice</b> [2] - 7:9, 20:23</p> <p><b>practices</b> [2] - 8:3, 8:4</p> <p><b>prediction</b> [1] - 26:18</p> <p><b>prejudice</b> [1] - 17:9</p> <p><b>preminus</b> [2] - 29:16, 29:17</p> <p><b>premium</b> [9] - 12:1, 12:4, 13:11, 13:21, 14:14, 14:21, 15:3, 27:24, 32:10</p> <p><b>premiums</b> [6] - 9:25, 12:25, 13:1, 14:25, 22:20, 24:22</p> <p><b>prepared</b> [1] - 31:8</p> <p><b>present</b> [2] - 18:18, 31:11</p> <p><b>press</b> [1] - 9:15</p> <p><b>pretty</b> [2] - 28:4, 29:1</p> <p><b>Price</b> [1] - 3:17</p> <p><b>price</b> [1] - 29:6</p> <p><b>private</b> [1] - 18:15</p> <p><b>privately</b> [1] - 8:11</p> <p><b>probable</b> [1] - 11:12</p> <p><b>proceeding</b> [1] - 36:14</p> <p><b>procure</b> [1] - 12:20</p> <p><b>procured</b> [3] - 12:21, 12:24, 23:24</p> <p><b>producers</b> [2] - 34:12, 34:13</p> <p><b>product</b> [1] - 5:15</p> <p><b>program</b> [1] - 34:9</p> <p><b>prohibited</b> [3] - 3:23, 24:24, 29:6</p> <p><b>prong</b> [2] - 20:4, 21:4</p> <p><b>proof</b> [1] - 35:24</p> <p><b>property</b> [5] - 25:15, 26:2, 26:5, 26:7, 33:21</p> <p><b>proposition</b> [2] - 20:11, 28:17</p> <p><b>prosecute</b> [1] - 21:25</p> <p><b>prove</b> [1] - 36:3</p> <p><b>provide</b> [6] - 5:8, 5:9, 9:23, 10:3, 12:19, 24:24</p> <p><b>provided</b> [1] - 6:4</p> <p><b>providing</b> [6] - 5:2, 5:11, 5:15, 5:16, 5:22</p>
<b>N</b>				
<p><b>narrow</b> [2] - 34:10, 34:20</p> <p><b>narrower</b> [1] - 35:5</p> <p><b>nebulous</b> [1] - 11:11</p> <p><b>necessary</b> [3] - 19:22, 19:25, 27:15</p> <p><b>need</b> [5] - 12:8, 13:13, 14:1, 16:22, 21:7</p> <p><b>needs</b> [2] - 12:21, 30:5</p> <p><b>negligible</b> [1] - 10:22</p> <p><b>never</b> [14] - 14:13, 14:14, 15:16, 19:12, 20:25, 21:15, 21:17, 21:18, 24:23, 28:20, 30:25, 31:4, 31:18, 31:21</p> <p><b>never-land</b> [1] - 24:23</p> <p><b>New</b> [4] - 6:5, 6:13, 6:19, 23:9</p> <p><b>newspaper</b> [3] - 9:2, 9:6, 9:11</p> <p><b>newspapers</b> [1] - 9:9</p> <p><b>NO</b> [2] - 1:7, 1:12</p> <p><b>nonparty</b> [1] - 20:20</p> <p><b>Northern</b> [1] - 25:25</p> <p><b>NOTE</b> [1] - 2:16</p> <p><b>notes</b> [1] - 36:14</p> <p><b>nothing</b> [3] - 5:19, 9:10, 34:13</p> <p><b>notice</b> [3] - 8:24, 15:7, 20:16</p> <p><b>Novartis</b> [1] - 20:9</p> <p><b>November</b> [1] - 1:15</p> <p><b>number</b> [1] - 19:16</p> <p><b>numerous</b> [2] - 15:8, 33:2</p>	<p><b>ones</b> [2] - 32:10, 32:11</p> <p><b>oOo</b> [1] - 2:14</p> <p><b>open</b> [3] - 2:17, 20:22, 24:4</p> <p><b>opening</b> [1] - 10:15</p> <p><b>opinion</b> [9] - 3:16, 4:21, 6:14, 7:3, 7:11, 7:24, 9:24, 10:3, 12:18</p> <p><b>opposing</b> [2] - 21:12, 22:17</p> <p><b>opposition</b> [1] - 33:4</p> <p><b>Oral</b> [1] - 1:15</p> <p><b>oral</b> [3] - 2:16, 23:11, 36:12</p> <p><b>order</b> [1] - 19:23</p> <p><b>ordinance</b> [1] - 25:11</p> <p><b>Oregon</b> [3] - 28:25, 29:1, 29:2</p> <p><b>otherwise</b> [1] - 4:23</p> <p><b>out-of-state</b> [1] - 24:8</p> <p><b>outside</b> [2] - 10:25, 31:19</p> <p><b>overlap</b> [2] - 34:12, 34:13</p> <p><b>overturn</b> [1] - 25:6</p> <p><b>own</b> [2] - 34:5, 34:14</p> <p><b>owned</b> [2] - 4:3, 4:10</p>	<p><b>participating</b> [1] - 15:21</p> <p><b>particular</b> [4] - 6:19, 6:20, 17:12, 33:17</p> <p><b>parties</b> [14] - 8:5, 8:25, 10:19, 15:17, 18:10, 20:12, 20:14, 21:8, 23:10, 24:2, 24:11, 25:10, 29:14, 33:25</p> <p><b>party</b> [13] - 8:19, 10:19, 19:4, 26:24, 29:13, 29:18, 29:19, 31:25, 32:11, 32:12, 32:13, 33:8, 33:20</p> <p><b>passage</b> [2] - 35:23, 36:5</p> <p><b>passed</b> [2] - 16:21, 25:12</p> <p><b>past</b> [2] - 35:16, 36:1</p> <p><b>patent</b> [1] - 20:10</p> <p><b>pattern</b> [1] - 7:8</p> <p><b>pause</b> [1] - 16:14</p> <p><b>pay</b> [13] - 4:15, 5:17, 5:25, 7:7, 7:13, 8:8, 9:13, 9:25, 22:11, 29:7, 29:11, 32:21, 32:22</p> <p><b>paying</b> [7] - 5:1, 5:13, 5:14, 14:21, 14:25, 15:2, 24:22</p> <p><b>payment</b> [2] - 5:20, 15:21</p> <p><b>payments</b> [2] - 12:4, 32:10</p> <p><b>Penn</b> [2] - 33:5, 33:15</p> <p><b>Pennsylvania</b> [3] - 20:22, 24:4, 28:23</p> <p><b>Pension</b> [2] - 19:8, 26:22</p> <p><b>perciplus</b> [2] - 29:16, 29:17</p> <p><b>performance</b> [1] - 5:24</p> <p><b>period</b> [6] - 3:20, 6:11, 6:13, 30:9, 35:15, 35:17</p> <p><b>permitted</b> [1] - 34:22</p> <p><b>person</b> [2] - 12:19, 14:3</p> <p><b>persuaded</b> [1] - 13:17</p> <p><b>Pharmaceuticals</b> [1] - 20:9</p> <p><b>PHL</b> [5] - 1:3, 1:8, 3:24, 4:9, 4:16</p> <p><b>Phoenix</b> [28] - 4:11, 4:13, 6:8, 6:9, 6:17, 6:25, 7:6, 7:7, 7:8, 7:11, 17:24, 18:13, 19:12, 22:17, 23:3, 26:24, 28:4, 28:14,</p>	<p>28:19, 31:25, 32:21, 32:24, 33:7, 33:9, 34:3, 34:16</p> <p><b>Phoenix's</b> [4] - 18:24, 28:11, 31:24, 33:4</p> <p><b>phonetic</b> [1] - 29:16</p> <p><b>phrase</b> [1] - 29:16</p> <p><b>piece</b> [2] - 26:2, 31:20</p> <p><b>plainly</b> [1] - 19:19</p> <p><b>plaintiff</b> [7] - 2:24, 3:2, 3:4, 3:13, 6:12, 29:3, 29:7</p> <p><b>Plaintiff</b> [3] - 1:4, 1:9, 1:25</p> <p><b>plaintiff's</b> [1] - 3:12</p> <p><b>plaintiffs</b> [1] - 26:9</p> <p><b>plan</b> [1] - 24:5</p> <p><b>plans</b> [2] - 24:2, 24:11</p> <p><b>playing</b> [2] - 30:24, 31:17</p> <p><b>plays</b> [1] - 21:11</p> <p><b>plead</b> [1] - 13:18</p> <p><b>pleading</b> [2] - 10:1</p> <p><b>pleadings</b> [4] - 19:9, 27:15, 28:1, 28:16</p> <p><b>plus</b> [2] - 18:1, 20:15</p> <p><b>point</b> [13] - 5:15, 6:6, 7:5, 9:6, 12:9, 17:13, 18:25, 21:10, 21:11, 21:20, 25:24, 27:21, 30:3</p> <p><b>points</b> [1] - 20:13</p> <p><b>policies</b> [69] - 4:1, 4:2, 4:9, 4:12, 4:14, 4:15, 4:17, 4:19, 5:1, 5:23, 6:23, 6:24, 7:1, 7:9, 7:23, 8:1, 8:3, 8:9, 8:16, 9:12, 10:9, 10:15, 11:7, 11:14, 11:17, 11:25, 12:24, 17:18, 18:1, 18:5, 18:19, 18:21, 19:7, 19:12, 19:13, 19:18, 21:15, 22:25, 23:4, 23:7, 25:3, 25:4, 28:6, 28:12, 28:13, 28:19, 30:1, 30:5, 30:6, 31:6, 31:9, 31:12, 33:13, 33:14, 33:16, 34:3, 34:5, 34:6, 34:7, 34:9, 34:11, 34:14, 35:8, 35:9, 35:15, 35:16, 35:18, 35:19, 35:25</p> <p><b>Policy</b> [1] - 22:19</p> <p><b>policy</b> [30] - 3:19, 3:21, 5:3, 5:12, 6:2, 6:10, 6:12, 6:15, 7:7, 10:21, 11:10, 12:20, 12:21, 13:3, 13:24, 13:25, 14:7, 14:9,</p>	<p>17:21, 18:4, 19:6, 19:15, 19:17, 22:16, 22:20, 23:24, 27:1, 27:20, 36:6</p> <p><b>policy's</b> [1] - 3:20</p> <p><b>position</b> [7] - 6:25, 7:12, 22:1, 25:21, 28:8, 32:7</p> <p><b>positions</b> [1] - 18:10</p> <p><b>potentially</b> [1] - 26:11</p> <p><b>practical</b> [1] - 26:10</p> <p><b>practice</b> [2] - 7:9, 20:23</p> <p><b>practices</b> [2] - 8:3, 8:4</p> <p><b>prediction</b> [1] - 26:18</p> <p><b>prejudice</b> [1] - 17:9</p> <p><b>preminus</b> [2] - 29:16, 29:17</p> <p><b>premium</b> [9] - 12:1, 12:4, 13:11, 13:21, 14:14, 14:21, 15:3, 27:24, 32:10</p> <p><b>premiums</b> [6] - 9:25, 12:25, 13:1, 14:25, 22:20, 24:22</p> <p><b>prepared</b> [1] - 31:8</p> <p><b>present</b> [2] - 18:18, 31:11</p> <p><b>press</b> [1] - 9:15</p> <p><b>pretty</b> [2] - 28:4, 29:1</p> <p><b>Price</b> [1] - 3:17</p> <p><b>price</b> [1] - 29:6</p> <p><b>private</b> [1] - 18:15</p> <p><b>privately</b> [1] - 8:11</p> <p><b>probable</b> [1] - 11:12</p> <p><b>proceeding</b> [1] - 36:14</p> <p><b>procure</b> [1] - 12:20</p> <p><b>procured</b> [3] - 12:21, 12:24, 23:24</p> <p><b>producers</b> [2] - 34:12, 34:13</p> <p><b>product</b> [1] - 5:15</p> <p><b>program</b> [1] - 34:9</p> <p><b>prohibited</b> [3] - 3:23, 24:24, 29:6</p> <p><b>prong</b> [2] - 20:4, 21:4</p> <p><b>proof</b> [1] - 35:24</p> <p><b>property</b> [5] - 25:15, 26:2, 26:5, 26:7, 33:21</p> <p><b>proposition</b> [2] - 20:11, 28:17</p> <p><b>prosecute</b> [1] - 21:25</p> <p><b>prove</b> [1] - 36:3</p> <p><b>provide</b> [6] - 5:8, 5:9, 9:23, 10:3, 12:19, 24:24</p> <p><b>provided</b> [1] - 6:4</p> <p><b>providing</b> [6] - 5:2, 5:11, 5:15, 5:16, 5:22</p>
<b>O</b>				
<p><b>object</b> [1] - 15:6</p>	<p><b>p.m</b> [2] - 2:17, 36:12</p> <p><b>paid</b> [9] - 4:21, 8:17, 11:25, 13:1, 13:11, 13:21, 14:14, 27:24, 32:23</p> <p><b>pari</b> [2] - 29:14, 29:17</p> <p><b>part</b> [3] - 21:4, 29:21, 34:15</p> <p><b>participants</b> [3] - 19:6,</p>	<p>19:18, 26:20</p> <p><b>participating</b> [1] - 15:21</p> <p><b>particular</b> [4] - 6:19, 6:20, 17:12, 33:17</p> <p><b>parties</b> [14] - 8:5, 8:25, 10:19, 15:17, 18:10, 20:12, 20:14, 21:8, 23:10, 24:2, 24:11, 25:10, 29:14, 33:25</p> <p><b>party</b> [13] - 8:19, 10:19, 19:4, 26:24, 29:13, 29:18, 29:19, 31:25, 32:11, 32:12, 32:13, 33:8, 33:20</p> <p><b>passage</b> [2] - 35:23, 36:5</p> <p><b>passed</b> [2] - 16:21, 25:12</p> <p><b>past</b> [2] - 35:16, 36:1</p> <p><b>patent</b> [1] - 20:10</p> <p><b>pattern</b> [1] - 7:8</p> <p><b>pause</b> [1] - 16:14</p> <p><b>pay</b> [13] - 4:15, 5:17, 5:25, 7:7, 7:13, 8:8, 9:13, 9:25, 22:11, 29:7, 29:11, 32:21, 32:22</p> <p><b>paying</b> [7] - 5:1, 5:13, 5:14, 14:21, 14:25, 15:2, 24:22</p> <p><b>payment</b> [2] - 5:20, 15:21</p> <p><b>payments</b> [2] - 12:4, 32:10</p> <p><b>Penn</b> [2] - 33:5, 33:15</p> <p><b>Pennsylvania</b> [3] - 20:22, 24:4, 28:23</p> <p><b>Pension</b> [2] - 19:8, 26:22</p> <p><b>perciplus</b> [2] - 29:16, 29:17</p> <p><b>performance</b> [1] - 5:24</p> <p><b>period</b> [6] - 3:20, 6:11, 6:13, 30:9, 35:15, 35:17</p> <p><b>permitted</b> [1] - 34:22</p> <p><b>person</b> [2] - 12:19, 14:3</p> <p><b>persuaded</b> [1] - 13:17</p> <p><b>Pharmaceuticals</b> [1] - 20:9</p> <p><b>PHL</b> [5] - 1:3, 1:8, 3:24, 4:9, 4:16</p> <p><b>Phoenix</b> [28] - 4:11, 4:13, 6:8, 6:9, 6:17, 6:25, 7:6, 7:7, 7:8, 7:11, 17:24, 18:13, 19:12, 22:17, 23:3, 26:24, 28:4, 28:14,</p>	<p>28:19, 31:25, 32:21, 32:24, 33:7, 33:9, 34:3, 34:16</p> <p><b>Phoenix's</b> [4] - 18:24, 28:11, 31:24, 33:4</p> <p><b>phonetic</b> [1] - 29:16</p> <p><b>phrase</b> [1] - 29:16</p> <p><b>piece</b> [2] - 26:2, 31:20</p> <p><b>plainly</b> [1] - 19:19</p> <p><b>plaintiff</b> [7] - 2:24, 3:2, 3:4, 3:13, 6:12, 29:3, 29:7</p> <p><b>Plaintiff</b> [3] - 1:4, 1:9, 1:25</p> <p><b>plaintiff's</b> [1] - 3:12</p> <p><b>plaintiffs</b> [1] - 26:9</p> <p><b>plan</b> [1] - 24:5</p> <p><b>plans</b> [2] - 24:2, 24:11</p> <p><b>playing</b> [2] - 30:24, 31:17</p> <p><b>plays</b> [1] - 21:11</p> <p><b>plead</b> [1] - 13:18</p> <p><b>pleading</b> [2] - 10:1</p> <p><b>pleadings</b> [4] - 19:9, 27:15, 28:1, 28:16</p> <p><b>plus</b> [2] - 18:1, 20:15</p> <p><b>point</b> [13] - 5:15, 6:6, 7:5, 9:6, 12:9, 17:13, 18:25, 21:10, 21:11, 21:20, 25:24, 27:21, 30:3</p> <p><b>points</b> [1] - 20:13</p> <p><b>policies</b> [69] - 4:1, 4:2, 4:9, 4:12, 4:14, 4:15, 4:17, 4:19, 5:1, 5:23, 6:23, 6:24, 7:1, 7:9, 7:23, 8:1, 8:3, 8:9, 8:16, 9:12, 10:9, 10:15, 11:7, 11:14, 11:17, 11:25, 12:24, 17:18, 18:1, 18:5, 18:19, 18:21, 19:7, 19:12, 19:13, 19:18, 21:1</p>	

<p><b>proximate</b> [2] - 11:11, 11:12</p> <p><b>Pruco</b> [1] - 33:6</p> <p><b>public</b> [2] - 15:10, 27:1</p> <p><b>publicly</b> [1] - 9:5</p> <p><b>purchase</b> [1] - 34:3</p> <p><b>purchaser</b> [1] - 28:11</p> <p><b>purchases</b> [1] - 34:4</p> <p><b>pure</b> [1] - 4:21</p> <p><b>purportedly</b> [1] - 4:10</p> <p><b>purpose</b> [1] - 13:14</p> <p><b>purposes</b> [7] - 12:12, 12:20, 12:22, 12:24, 13:15, 22:14</p> <p><b>pushed</b> [1] - 27:9</p> <p><b>put</b> [3] - 2:21, 8:23, 19:22</p>	<p><b>redressable</b> [1] - 19:23</p> <p><b>redundant</b> [1] - 17:18</p> <p><b>refer</b> [1] - 4:4</p> <p><b>refuse</b> [2] - 32:6, 32:8</p> <p><b>refused</b> [1] - 32:23</p> <p><b>regard</b> [1] - 15:25</p> <p><b>regardless</b> [2] - 15:17, 18:7</p> <p><b>Registered</b> [1] - 2:9</p> <p><b>regulations</b> [1] - 24:15</p> <p><b>regulatory</b> [1] - 33:21</p> <p><b>related</b> [5] - 12:25, 14:4, 19:17, 32:17, 36:4</p> <p><b>relating</b> [1] - 14:10</p> <p><b>relationship</b> [1] - 10:12</p> <p><b>release</b> [1] - 9:15</p> <p><b>relevant</b> [2] - 30:7, 35:22</p> <p><b>relief</b> [5] - 12:13, 13:23, 22:22, 29:18, 34:20</p> <p><b>relies</b> [1] - 7:18</p> <p><b>remedy</b> [1] - 35:4</p> <p><b>remember</b> [1] - 29:15</p> <p><b>reply</b> [1] - 7:18</p> <p><b>Reporter</b> [2] - 2:9, 36:16</p>	<p><b>reversed</b> [1] - 18:11</p> <p><b>RICO</b> [3] - 19:8, 26:20, 30:16</p> <p><b>rid</b> [1] - 36:6</p> <p><b>rights</b> [1] - 18:15</p> <p><b>ripe</b> [10] - 10:25, 18:3, 18:17, 19:20, 21:1, 25:15, 25:22, 26:7</p> <p><b>ripeness</b> [6] - 17:13, 17:23, 18:11, 25:7, 25:19, 27:17</p> <p><b>risk</b> [4] - 25:6, 25:17, 26:4, 26:10</p> <p><b>risks</b> [2] - 25:4, 25:21</p> <p><b>Robert</b> [1] - 26:22</p> <p><b>Roberta</b> [1] - 23:22</p> <p><b>Ron</b> [1] - 16:24</p> <p><b>room</b> [1] - 20:7</p> <p><b>Rule</b> [1] - 27:18</p> <p><b>ruling</b> [2] - 24:5, 24:11</p> <p><b>run</b> [1] - 30:9</p> <p><b>Rutgers</b> [1] - 27:22</p>	<p><b>setting</b> [1] - 3:20</p> <p><b>short</b> [1] - 22:6</p> <p><b>show</b> [1] - 26:17</p> <p><b>showed</b> [1] - 21:5</p> <p><b>showing</b> [2] - 11:1, 11:13</p> <p><b>shown</b> [1] - 7:22</p> <p><b>side</b> [5] - 8:19, 8:20, 8:22, 31:24, 32:18</p> <p><b>sides</b> [1] - 32:5</p> <p><b>signed</b> [2] - 30:14, 30:15</p> <p><b>significant</b> [1] - 21:3</p> <p><b>similar</b> [5] - 7:2, 20:11, 20:12, 20:15</p> <p><b>Simmonds</b> [1] - 20:1</p> <p><b>simple</b> [2] - 4:22, 28:4</p> <p><b>simply</b> [4] - 4:16, 4:22, 13:10, 31:4</p> <p><b>sit</b> [1] - 31:13</p> <p><b>situation</b> [6] - 6:3, 26:18, 29:12, 35:7, 35:11, 35:13</p> <p><b>six</b> [2] - 3:25, 23:16</p>	<p><b>statements</b> [1] - 19:9</p> <p><b>STATES</b> [1] - 1:1</p> <p><b>stating</b> [1] - 32:14</p> <p><b>statute</b> [2] - 6:20, 21:25</p> <p><b>stenographic</b> [1] - 36:14</p> <p><b>Step</b> [6] - 7:14, 7:17, 7:19, 7:20, 9:20, 19:19</p> <p><b>Step-Saver</b> [6] - 7:14, 7:17, 7:19, 7:20, 9:20, 19:19</p> <p><b>STEVEN</b> [1] - 2:5</p> <p><b>Steven</b> [3] - 3:8, 19:6, 26:21</p> <p><b>still</b> [3] - 6:1, 6:3, 20:23</p> <p><b>stipulate</b> [1] - 5:11</p> <p><b>STOLI</b> [5] - 19:10, 20:8, 20:15, 26:21, 28:13</p> <p><b>stood</b> [1] - 21:17</p> <p><b>story</b> [5] - 9:7, 9:15, 32:5, 32:12, 35:12</p> <p><b>STOVER</b> [3] - 1:21, 2:23, 3:4</p>
<b>Q</b>	<p><b>QIF</b> [4] - 1:6, 1:11, 3:8, 4:3</p> <p><b>questions</b> [2] - 11:21, 29:23</p> <p><b>quite</b> [3] - 4:5, 4:16, 5:10</p> <p><b>quotes</b> [1] - 28:19</p>	<b>S</b>	<p><b>SKLAVER</b> [18] - 2:5, 16:11, 16:15, 16:18, 16:20, 16:23, 17:5, 17:7, 17:20, 17:23, 19:24, 22:8, 25:5, 26:13, 27:6, 30:2, 30:4, 30:10</p> <p><b>Sklaver</b> [1] - 3:8</p> <p><b>slips</b> [1] - 9:2</p> <p><b>sole</b> [1] - 12:25</p> <p><b>solely</b> [1] - 14:13</p> <p><b>someone</b> [8] - 10:12, 11:4, 13:1, 21:6, 21:25, 24:8, 27:10, 32:15</p> <p><b>sorry</b> [1] - 33:4</p> <p><b>sort</b> [5] - 7:18, 9:2, 21:11, 26:14, 35:23</p> <p><b>sought</b> [1] - 4:11</p> <p><b>specific</b> [3] - 9:10, 33:7, 34:10</p> <p><b>specifically</b> [1] - 17:21</p> <p><b>speculation</b> [1] - 9:16</p> <p><b>squarely</b> [2] - 28:20, 28:22</p> <p><b>stand</b> [2] - 19:13, 32:15</p> <p><b>standing</b> [1] - 31:25</p> <p><b>stands</b> [2] - 20:10, 32:12</p> <p><b>STARK</b> [1] - 1:17</p> <p><b>start</b> [2] - 10:11, 17:8</p> <p><b>started</b> [1] - 28:11</p> <p><b>starts</b> [1] - 10:10</p> <p><b>state</b> [6] - 19:3, 20:22, 20:24, 24:8, 27:6, 31:3</p>	<p><b>stood</b> [1] - 21:17</p> <p><b>story</b> [5] - 9:7, 9:15, 32:5, 32:12, 35:12</p> <p><b>STOVER</b> [3] - 1:21, 2:23, 3:4</p> <p><b>Stover</b> [1] - 2:24</p> <p><b>straight</b> [1] - 4:5</p> <p><b>strategy</b> [1] - 11:8</p> <p><b>strong</b> [6] - 12:19, 13:6, 22:2, 22:9, 23:2, 29:1</p> <p><b>strongly</b> [2] - 21:9, 21:20</p> <p><b>stuck</b> [2] - 24:23, 25:1</p> <p><b>subject</b> [8] - 8:5, 25:18, 27:14, 28:7, 28:21, 34:18, 34:24, 35:9</p> <p><b>submitted</b> [5] - 4:12, 4:16, 4:20, 7:4, 32:20</p> <p><b>substantial</b> [1] - 25:7</p> <p><b>substantially</b> [1] - 27:13</p> <p><b>sue</b> [7] - 8:6, 21:2, 21:17, 30:25, 31:1, 31:9, 31:11</p> <p><b>sued</b> [14] - 11:7, 19:5, 19:8, 21:8, 21:9, 22:15, 22:18, 22:21, 26:20, 26:23, 29:8, 30:16</p> <p><b>sues</b> [1] - 35:8</p> <p><b>sufficient</b> [4] - 11:12, 19:24, 20:4, 28:2</p> <p><b>sufficiently</b> [1] - 27:16</p> <p><b>suggest</b> [1] - 12:23</p> <p><b>suing</b> [1] - 21:5</p> <p><b>suit</b> [2] - 18:10, 18:11</p>
<b>R</b>	<p><b>REPORTER'S</b> [1] - 2:16</p> <p><b>represent</b> [1] - 31:8</p> <p><b>representation</b> [1] - 4:13</p> <p><b>repudiation</b> [1] - 33:17</p> <p><b>request</b> [4] - 15:7, 15:12, 15:14, 15:15</p> <p><b>requested</b> [1] - 13:23</p> <p><b>requires</b> [1] - 14:16</p> <p><b>resale</b> [1] - 34:4</p> <p><b>rescind</b> [5] - 21:14, 22:15, 22:18, 23:4, 35:8</p> <p><b>resell</b> [1] - 24:21</p> <p><b>reselling</b> [1] - 24:25</p> <p><b>reserve</b> [2] - 11:19, 16:6</p> <p><b>residential</b> [1] - 25:14</p> <p><b>respect</b> [10] - 4:17, 7:1, 11:16, 17:20, 31:5, 31:13, 32:24, 33:23, 35:23</p> <p><b>respectfully</b> [1] - 27:19</p> <p><b>respond</b> [2] - 2:19, 30:23</p> <p><b>responded</b> [1] - 4:7</p> <p><b>rest</b> [2] - 11:19, 16:7</p> <p><b>result</b> [1] - 8:2</p>	<p><b>S.C</b> [1] - 1:21</p> <p><b>satisfies</b> [1] - 24:6</p> <p><b>satisfy</b> [2] - 13:13, 14:6</p> <p><b>Saver</b> [6] - 7:14, 7:17, 7:19, 7:20, 9:20, 19:19</p> <p><b>savings</b> [1] - 6:2</p> <p><b>saw</b> [1] - 17:16</p> <p><b>SCA</b> [1] - 25:24</p> <p><b>scheme</b> [1] - 10:22</p> <p><b>score</b> [2] - 26:1</p> <p><b>screen</b> [3] - 16:25, 17:1, 17:3</p> <p><b>scrutinize</b> [1] - 14:17</p> <p><b>scrutiny</b> [1] - 15:4</p> <p><b>secondary</b> [3] - 11:15, 18:22, 34:6</p> <p><b>see</b> [1] - 17:1</p> <p><b>seek</b> [4] - 3:25, 17:10, 17:12, 18:3</p> <p><b>seeking</b> [4] - 4:8, 22:21, 28:5, 32:1</p> <p><b>seeks</b> [1] - 4:18</p> <p><b>sell</b> [2] - 18:21, 24:20</p> <p><b>sending</b> [1] - 32:10</p> <p><b>sense</b> [1] - 19:4</p> <p><b>sentence</b> [1] - 19:16</p> <p><b>separate</b> [2] - 4:6, 18:17</p> <p><b>served</b> [1] - 31:1</p> <p><b>service</b> [2] - 5:15, 6:4</p> <p><b>Services</b> [3] - 19:8, 25:24, 26:22</p> <p><b>set</b> [1] - 16:12</p>	<p><b>Sklaver</b> [1] - 3:8</p> <p><b>slips</b> [1] - 9:2</p> <p><b>sole</b> [1] - 12:25</p> <p><b>solely</b> [1] - 14:13</p> <p><b>someone</b> [8] - 10:12, 11:4, 13:1, 21:6, 21:25, 24:8, 27:10, 32:15</p> <p><b>sorry</b> [1] - 33:4</p> <p><b>sort</b> [5] - 7:18, 9:2, 21:11, 26:14, 35:23</p> <p><b>sought</b> [1] - 4:11</p> <p><b>specific</b> [3] - 9:10, 33:7, 34:10</p> <p><b>specifically</b> [1] - 17:21</p> <p><b>speculation</b> [1] - 9:16</p> <p><b>squarely</b> [2] - 28:20, 28:22</p> <p><b>stand</b> [2] - 19:13, 32:15</p> <p><b>standing</b> [1] - 31:25</p> <p><b>stands</b> [2] - 20:10, 32:12</p> <p><b>STARK</b> [1] - 1:17</p> <p><b>start</b> [2] - 10:11, 17:8</p> <p><b>started</b> [1] - 28:11</p> <p><b>starts</b> [1] - 10:10</p> <p><b>state</b> [6] - 19:3, 20:22, 20:24, 24:8, 27:6, 31:3</p>	<p><b>stuck</b> [2] - 24:23, 25:1</p> <p><b>subject</b> [8] - 8:5, 25:18, 27:14, 28:7, 28:21, 34:18, 34:24, 35:9</p> <p><b>submitted</b> [5] - 4:12, 4:16, 4:20, 7:4, 32:20</p> <p><b>substantial</b> [1] - 25:7</p> <p><b>substantially</b> [1] - 27:13</p> <p><b>sue</b> [7] - 8:6, 21:2, 21:17, 30:25, 31:1, 31:9, 31:11</p> <p><b>sued</b> [14] - 11:7, 19:5, 19:8, 21:8, 21:9, 22:15, 22:18, 22:21, 26:20, 26:23, 29:8, 30:16</p> <p><b>sues</b> [1] - 35:8</p> <p><b>sufficient</b> [4] - 11:12, 19:24, 20:4, 28:2</p> <p><b>sufficiently</b> [1] - 27:16</p> <p><b>suggest</b> [1] - 12:23</p> <p><b>suing</b> [1] - 21:5</p> <p><b>suit</b> [2] - 18:10, 18:11</p>

<p><b>suits</b> <sup>[1]</sup> - 3:25  <b>summary</b> <sup>[2]</sup> - 27:22, 28:15  <b>Superior</b> <sup>[1]</sup> - 6:14  <b>supplemental</b> <sup>[1]</sup> - 7:4  <b>supported</b> <sup>[1]</sup> - 27:20  <b>Supreme</b> <sup>[8]</sup> - 3:17, 6:5, 11:24, 18:6, 21:23, 23:9, 25:9, 28:24  <b>Surrick</b> <sup>[3]</sup> - 20:18, 21:22, 24:3  <b>SUSMAN</b> <sup>[1]</sup> - 2:5  <b>Susman</b> <sup>[1]</sup> - 3:9  <b>Szalay</b> <sup>[2]</sup> - 17:21, 35:17</p>	<p>21:4, 24:1, 24:13  <b>threats</b> <sup>[3]</sup> - 19:17, 19:22, 20:3  <b>three</b> <sup>[1]</sup> - 27:23  <b>Thursday</b> <sup>[1]</sup> - 1:15  <b>title</b> <sup>[1]</sup> - 29:8  <b>today</b> <sup>[7]</sup> - 2:25, 4:4, 5:13, 5:14, 5:16, 8:8, 31:13  <b>tomorrow</b> <sup>[1]</sup> - 5:14  <b>tort</b> <sup>[2]</sup> - 10:25, 17:13  <b>towards</b> <sup>[2]</sup> - 8:23, 33:20  <b>tracking</b> <sup>[1]</sup> - 23:5  <b>transaction</b> <sup>[3]</sup> - 14:17, 14:20, 36:4  <b>transcript</b> <sup>[1]</sup> - 36:14  <b>transfer</b> <sup>[1]</sup> - 29:6  <b>transmitted</b> <sup>[1]</sup> - 6:4  <b>trial</b> <sup>[1]</sup> - 28:16  <b>true</b> <sup>[12]</sup> - 5:10, 12:8, 12:12, 13:2, 13:22, 14:5, 19:15, 25:5, 25:19, 25:20, 28:18, 36:14  <b>Trust</b> <sup>[2]</sup> - 4:3, 18:16  <b>TRUST</b> <sup>[4]</sup> - 1:6, 1:6, 1:11, 1:11  <b>trust</b> <sup>[16]</sup> - 4:4, 4:7, 4:10, 4:18, 17:8, 17:24, 17:25, 21:9, 21:17, 24:17, 24:18, 28:10, 28:14, 34:2, 34:5  <b>trust's</b> <sup>[1]</sup> - 33:4  <b>trustee</b> <sup>[4]</sup> - 1:6, 1:11, 19:7, 23:7  <b>trustees</b> <sup>[1]</sup> - 34:12  <b>trusts</b> <sup>[1]</sup> - 24:16  <b>try</b> <sup>[2]</sup> - 4:22, 30:22  <b>trying</b> <sup>[3]</sup> - 7:6, 8:6, 36:3  <b>turned</b> <sup>[1]</sup> - 29:4  <b>twice</b> <sup>[1]</sup> - 19:5  <b>two</b> <sup>[14]</sup> - 3:11, 4:2, 4:5, 8:5, 8:25, 12:5, 16:19, 17:25, 18:17, 20:8, 22:19, 28:23, 32:5, 32:17  <b>type</b> <sup>[8]</sup> - 10:10, 21:5, 22:22, 28:22, 30:8, 34:18, 34:24, 35:10</p>	<p><b>underlie</b> <sup>[1]</sup> - 7:19  <b>undisclosed</b> <sup>[1]</sup> - 10:8  <b>unique</b> <sup>[4]</sup> - 23:13, 23:18, 26:19, 27:2  <b>UNITED</b> <sup>[1]</sup> - 1:1  <b>universal</b> <sup>[1]</sup> - 5:22  <b>unless</b> <sup>[3]</sup> - 29:14, 29:16, 29:23  <b>unlike</b> <sup>[1]</sup> - 34:7  <b>unrelated</b> <sup>[3]</sup> - 11:16, 33:25, 35:9  <b>up</b> <sup>[8]</sup> - 10:15, 16:12, 21:17, 26:9, 29:7, 31:25, 32:12, 32:16  <b>uses</b> <sup>[1]</sup> - 20:3  <b>utility</b> <sup>[4]</sup> - 10:4, 10:21, 23:25, 24:1  <b>uttered</b> <sup>[1]</sup> - 19:15</p>	<p><b>waited</b> <sup>[1]</sup> - 22:19  <b>waive</b> <sup>[2]</sup> - 21:15, 21:19  <b>waived</b> <sup>[1]</sup> - 15:20  <b>waiver</b> <sup>[7]</sup> - 15:13, 21:11, 28:3, 28:21, 29:20, 29:21, 34:17  <b>weigh</b> <sup>[1]</sup> - 10:14  <b>White</b> <sup>[2]</sup> - 22:24, 26:25  <b>wholesalers</b> <sup>[1]</sup> - 24:9  <b>willing</b> <sup>[2]</sup> - 17:17, 27:10  <b>Wilmington</b> <sup>[1]</sup> - 1:14  <b>wine</b> <sup>[2]</sup> - 24:8, 24:10  <b>winery</b> <sup>[1]</sup> - 24:9  <b>withdraw</b> <sup>[2]</sup> - 17:9, 17:17  <b>words</b> <sup>[1]</sup> - 6:11  <b>Workers</b> <sup>[1]</sup> - 21:23  <b>worse</b> <sup>[1]</sup> - 23:19  <b>write</b> <sup>[3]</sup> - 14:22, 14:24, 28:13</p>
<b>T</b>		<b>V</b>	
<p><b>table</b> <sup>[1]</sup> - 17:1  <b>talks</b> <sup>[1]</sup> - 25:10  <b>technicalities</b> <sup>[1]</sup> - 9:24  <b>technique</b> <sup>[1]</sup> - 21:20  <b>technology</b> <sup>[1]</sup> - 20:12  <b>ten</b> <sup>[1]</sup> - 35:7  <b>tend</b> <sup>[1]</sup> - 26:16  <b>tendency</b> <sup>[1]</sup> - 21:5  <b>tertiary</b> <sup>[2]</sup> - 18:22, 18:23  <b>test</b> <sup>[3]</sup> - 20:6, 23:13, 24:6  <b>testify</b> <sup>[1]</sup> - 23:23  <b>testimony</b> <sup>[2]</sup> - 27:14  <b>Teva</b> <sup>[1]</sup> - 20:9  <b>Texas</b> <sup>[2]</sup> - 1:24, 3:1  <b>THE</b> <sup>[52]</sup> - 1:1, 1:2, 2:18, 2:21, 3:2, 3:5, 3:10, 4:25, 5:10, 6:5, 7:14, 8:7, 8:14, 9:1, 9:19, 11:21, 11:23, 12:3, 12:8, 12:11, 13:5, 13:8, 13:15, 14:12, 15:6, 15:11, 15:23, 16:6, 16:9, 16:13, 16:16, 16:19, 16:22, 16:24, 17:3, 17:6, 17:15, 17:22, 19:21, 22:4, 25:1, 26:8, 27:3, 29:24, 30:3, 30:9, 30:20, 31:7, 32:6, 35:14, 36:8, 36:10  <b>themselves</b> <sup>[1]</sup> - 15:3  <b>therefore</b> <sup>[4]</sup> - 25:18, 29:10, 29:20, 31:21  <b>they've</b> <sup>[4]</sup> - 10:13, 15:18, 19:5  <b>thinking</b> <sup>[1]</sup> - 15:24  <b>third</b> <sup>[2]</sup> - 21:8, 26:24  <b>Third</b> <sup>[5]</sup> - 20:2, 20:17,</p>	<p><b>valid</b> <sup>[11]</sup> - 7:23, 13:25, 18:5, 25:4, 26:18, 32:1, 32:2, 32:4, 32:17, 33:14, 33:16  <b>validity</b> <sup>[4]</sup> - 3:19, 10:14, 11:24, 17:18  <b>valuable</b> <sup>[2]</sup> - 11:10, 11:15  <b>value</b> <sup>[8]</sup> - 5:23, 6:1, 6:3, 10:9, 11:5, 19:2, 25:15, 26:6  <b>VARIABLE</b> <sup>[2]</sup> - 1:3, 1:8  <b>Variable</b> <sup>[3]</sup> - 3:24, 4:9, 4:16  <b>varied</b> <sup>[2]</sup> - 34:7, 34:11  <b>various</b> <sup>[2]</sup> - 3:21, 26:12  <b>via</b> <sup>[1]</sup> - 24:9  <b>view</b> <sup>[3]</sup> - 11:18, 13:9, 13:10  <b>Village</b> <sup>[2]</sup> - 25:10, 26:13  <b>violation</b> <sup>[2]</sup> - 29:9, 30:16  <b>violations</b> <sup>[2]</sup> - 19:9, 26:21  <b>void</b> <sup>[10]</sup> - 4:1, 18:4, 19:16, 28:6, 28:19, 29:10, 29:13, 32:15, 35:18, 35:20</p>	<b>Y</b>	<p><b>year</b> <sup>[1]</sup> - 3:16  <b>year's</b> <sup>[1]</sup> - 3:16  <b>years</b> <sup>[5]</sup> - 22:20, 23:16, 28:11, 34:6, 35:7  <b>York</b> <sup>[4]</sup> - 6:5, 6:13, 6:20, 23:9</p>
<b>U</b>		<b>Z</b>	
<p><b>U.S</b> <sup>[2]</sup> - 18:6, 36:17  <b>U.S.D.C.J</b> <sup>[1]</sup> - 1:17  <b>under</b> <sup>[11]</sup> - 3:18, 4:11, 6:19, 6:20, 9:13, 10:21, 14:8, 15:1, 18:6, 20:5, 36:11</p>	<p><b>underlie</b> <sup>[1]</sup> - 7:19  <b>undisclosed</b> <sup>[1]</sup> - 10:8  <b>unique</b> <sup>[4]</sup> - 23:13, 23:18, 26:19, 27:2  <b>UNITED</b> <sup>[1]</sup> - 1:1  <b>universal</b> <sup>[1]</sup> - 5:22  <b>unless</b> <sup>[3]</sup> - 29:14, 29:16, 29:23  <b>unlike</b> <sup>[1]</sup> - 34:7  <b>unrelated</b> <sup>[3]</sup> - 11:16, 33:25, 35:9  <b>up</b> <sup>[8]</sup> - 10:15, 16:12, 21:17, 26:9, 29:7, 31:25, 32:12, 32:16  <b>uses</b> <sup>[1]</sup> - 20:3  <b>utility</b> <sup>[4]</sup> - 10:4, 10:21, 23:25, 24:1  <b>uttered</b> <sup>[1]</sup> - 19:15</p>	<b>W</b>	<p><b>wage</b> <sup>[1]</sup> - 3:23  <b>wagering</b> <sup>[2]</sup> - 12:21, 19:11  <b>wait</b> <sup>[1]</sup> - 21:13</p>