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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM : PART 42

-----X

OVERSEAS SHIPHOLDING GROUP, INC.,

Mot Seq. 001

Plaintiff,

-against-

Index No.  
650765/2014

PROSKAUER ROSE, LLP, ALAN P. PARNES,  
RICHARD H. ROWE, PETER G. SAMUELS, AND  
STEVEN O. WEISE,

Defendants.

-----X

Transcript of Motion Proceedings

New York Supreme Court  
60 Centre Street  
New York, New York 10007  
September 10, 2014

B E F O R E:

HON. JEFFREY OING, Justice of the Supreme Court

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(Continued on the next page.)

LAURA L. LUDOVICO  
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2 A P P E A R A N C E S: (continued)

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## Proceedings

1. THE COURT: Okay. The Court has before it the  
2. matter of Overseas Shipholding Group versus Proskauer Rose,  
3. et al.; Index No. 650765 of 2014. This is Motion Sequence  
4. No. 1, which is a motion by Defendants collectively to  
5. dismiss the complaint based on documentary evidence,  
6. statute of limitations and failure to state a cause of  
7. action.  
8.

9. Having said that, parties enter their  
10. appearances.

11. Parties for the Plaintiff.

12. MR. HOARD: Steve Hoard, Your Honor. And with me  
13. is my partner John Brown and our co-counsel Michael Allen.

14. THE COURT: Thank you.

15. Defendants.

16. MR. SPAGNOLETTI: Paul Spagnoletti from Davis  
17. Polk & Wardwell. And I have with me my colleagues Heather  
18. Ward and Andrew Gehring.

19. THE COURT: Thank you.

20. All right. Just so we have it for the record, in  
21. this 43-page complaint there are two causes of action. Not  
22. bad. The First Cause of Action is for legal malpractice  
23. and the Second Cause of Action is for malpractice and/or  
24. breach of fiduciary duty.

25. All right. Having said that, I read the  
26. complaint here. This all stems from a relationship that

## Proceedings

1  
2 goes back approximately 30 years. This all arises out of a  
3 situation where the Plaintiff, Overseas, has two foreign  
4 subsidiaries, and this also arises out of these tax issues  
5 in which the US -- the Plaintiff, being the US company, is  
6 trying to avoid having to pay taxes on its foreign  
7 subsidiary's income. And what we had here is there are  
8 several credit agreements that went into place where the US  
9 company, the Plaintiff, was taking out loans, and  
10 originally Proskauer, the Defendants here, created these  
11 credit agreements that allowed the US company to take these  
12 loans and that the two foreign subsidiaries were also  
13 taking out loans, but they were severally liable. In other  
14 words, each entity was liable for their own debts. The  
15 other ones, there was no joint liability there.

16 And then sometime in 2000 or 2001, for some  
17 reason, the credit agreements got changed and they started  
18 listing these obligations as joint and several, and that's  
19 where the problems started coming in, at least Plaintiff is  
20 alleging. And what impacted -- why that's a problem is  
21 that there's a section 956 in the tax code that regards any  
22 sort of, I guess, distribution or dividend distributions as  
23 taxable that the US company gets as a result of its foreign  
24 company.

25 And one of them is broadly looked at, and its  
26 right out of the complaint. I'll take it right here from

## Proceedings

1  
2 paragraph 34. It says: "Under section 956, a CFC  
3 earning" -- and CFC is defined as --

4 MR. HOARD: If I may, Your Honor, it's controlled  
5 foreign company.

6 THE COURT: Yes, CFC, controlled foreign company.  
7 Thank you.

8 -- "CFC earnings will be deemed to have been  
9 distributed to its US parent under certain circumstances  
10 considered functionally equivalent to a dividend  
11 distribution. The Internal Revenue Code and Regulations  
12 thereunder specifically define such circumstances in broad  
13 terms, expressly including loans, guarantees, asset pledges  
14 and other direct or indirect arrangements where the assets  
15 of the foreign subsidiary are used to support the  
16 obligations of the US parent."

17 So that it could be viewed or interpreted that  
18 956 will cover situations where the foreign subsidiaries  
19 are jointly and severally liable for the US parent's debts.  
20 And that is something that Congress wanted to avoid in  
21 terms of someone on the US company avoiding having to pay  
22 taxes by way of getting around it instead of getting a  
23 direct distribution, but getting a benefit by way of a  
24 joint and several liability on a loan guarantee. And that  
25 was enacted in 1962.

26 So section 956, when I read the complaint, had

## Proceedings

1  
2 all these changes in the tax laws going back and forth,  
3 back and forth, but at bottom, this section 956 was always  
4 around. It was not new. It was back in 1962 that it was  
5 on the books. They never changed. So that was always  
6 there.

7 So then as we go along through the whole process,  
8 it turns out that the credit agreements continued to have  
9 the joint and several liability, and ultimately, if you  
10 fast forward it, we have a situation where they took out  
11 additional loans -- the US parent took out additional  
12 loans, and at the end of the day they were facing large  
13 liabilities as a result of this potential section 956  
14 problem with this joint and several liability clause in the  
15 loan agreements.

16 And ultimately, what happens, and I was reading  
17 this and finding this really came to a head when, I guess  
18 in 2012 the forward start facility lenders, FSF lenders,  
19 were making an issue of this because they were looking  
20 through all of the documents and realized this joint and  
21 several liability. And it's always interesting, the  
22 lenders are the ones -- the banks who loaned out the money,  
23 they're the ones who are going to be really concerned about  
24 it, because ultimately, their concern is that it would  
25 impact their ability on getting paid back.

26 So, of course, the joint and several liability

## Proceedings

1  
2 becomes a big issue for the lender, less so much for the  
3 borrower, but more for the lender. And that's where that  
4 issue started to reemerged itself in real strong fashion,  
5 because it had come up earlier, but somehow the allegations  
6 said that the issue was sort of able to be laid to rest  
7 temporarily, but the lenders brought it back up again, and  
8 the Plaintiffs still took the position that everything was  
9 good, as a result, allegedly, of Proskauer's  
10 recommendation, and went ahead with their borrowings and  
11 everything. And then ultimately, we had a situation that  
12 everything just came to a head sometime in late 2012.

13 In paragraph 91: "OSG filed for relief under  
14 Chapter 11 of the US Bankruptcy Code on November 14, 2012."

15 And this is where I was looking. Where were the  
16 damages? What happened as a result of this section 956  
17 problem? And in paragraph 92 it finally says: "After the  
18 Chapter 11 filing, OSG self-reported to the Internal  
19 Revenue Service" --

20 And that I thought was interesting, they  
21 self-reported to the Internal Revenue Service.

22 -- "that certain of OSG's tax returns were  
23 incorrect due to the joint and several section 956 issue.  
24 As a result, OSG expects to pay hundreds of millions of  
25 dollars in US income taxes, which it would not otherwise  
26 have to pay had Proskauer provided OSG with sound advice

## Proceedings

1  
2 under the joint and several/section 956 issue.

3 "In addition, as a direct result of Proskauer's  
4 negligent advice, OSG has incurred millions of dollars in  
5 connection with the restatement of its prior financial  
6 statements, collateral litigation in its bankruptcy  
7 proceeding, the recovery of which is sought herein.

8 On February 11, 2013 the Internal Revenue Service  
9 filed an amended complaint in the OSG bankruptcy proceeding  
10 containing an income tax deficiency against OSG in the  
11 amount of" -- over \$400 million -- it's 463,000 --  
12 4,663,13 -- forget it. The number is over \$400 million --  
13 "largely based on the joint and several/section 956 issue."

14 Pretty much that's where the flavor of this goes.  
15 When I read this complaint it says as if it was a ticking  
16 time bomb ready to go off at some point, and it finally  
17 went off.

18 First of all, the statute of limitations -- let's  
19 address the statute of limitations issue. Why do you think  
20 this is a statute of limitations problem here?

21 MR. SPAGNOLETTI: Good morning, Your Honor. I  
22 have a couple of handouts. Would I be able to refer to the  
23 Court and give to the Court because it will be relevant to  
24 answering those questions?

25 THE COURT: When I saw the board I got a little  
26 nervous. Do you have any problem with that, Counsel? Do



## Proceedings

1  
2 you have the handouts yourself?

3 MR. SPAGNOLETTI: Yes.

4 MR. HOARD: Just a few minutes ago. They were  
5 almost identical to my own handouts.

6 THE COURT: You got handouts, too?

7 MR. HOARD: No, not like them.

8 MR. SPAGNOLETTI: Your Honor, to answer your  
9 question, there are two acts of malpractice that are  
10 alleged in the complaint. One act of malpractice relates  
11 to advice that Proskauer provided to OSG in 2011 in the  
12 form of this memorandum that was dated June 1, 2011  
13 regarding the joint and several issue.

14 There is another act of malpractice that is  
15 alleged in the complaint, which is relevant to the statute  
16 of limitations argument, and that relates to the so-called  
17 check the box claim.

18 THE COURT: Right.

19 MR. SPAGNOLETTI: Okay. The check the box claim  
20 is a claim relating to a transaction, a tax transaction.

21 THE COURT: Right. That treated all the entities  
22 as a single entity.

23 MR. SPAGNOLETTI: Not all the entities, all of  
24 the OIN subsidiaries. So just to be clear, we have a  
25 parent company, which is the US corporation, which is the  
26 Plaintiff OSG, the subsidiary for these purposes of the

## Proceedings

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Court is OIN.

THE COURT: Right.

MR. SPAGNOLETTI: Then OIN's subsidiaries.

THE COURT: OBS.

MR. SPAGNOLETTI: Not, OBS. OBS is a US sub,  
it's separate.

THE COURT: Ok. That's separate. It's OIN who's  
having the problem?

MR. SPAGNOLETTI: OIN and OIN's subsidiaries are  
the parties that took part in the check the box election.

THE COURT: Right.

MR. SPAGNOLETTI: And what that effectively did  
was to take all the tax attributes of the OIN subsidiaries  
and push them up to the OIN level.

THE COURT: Right. So far so good.

MR. SPAGNOLETTI: So far so good.

Your Honor, that transaction occurred in 2005, it  
ended in 2005.

THE COURT: Right.

MR. SPAGNOLETTI: And the only way that there  
could be a claim relating to advice given by Proskauer to  
OSG in connection with that transaction is if OSG brought  
the claim with respect to that advice by 2008. There's a  
three-year statute of limitations for malpractice claims in  
New York, and unless they can show that there's tolling

## Proceedings

1  
2 because of continuous representation, then that claim is  
3 subject to that three-year statute of limitations and must  
4 be dismissed.

5 Now, they have not made such a showing. It's  
6 their burden to show tolling. And what they have done is  
7 plainly insufficient under the relevant case law to support  
8 the conclusion of tolling.

9 THE COURT: But that's just with one particular  
10 transaction. Let's say I agree with you with that on that  
11 check the box scenario, that in 2005, that was it, I mean,  
12 you know, because what happens is if OIN gets all of its  
13 subsidiary's money elevated to its level, and then what  
14 happens, with the check the box situation, because all of  
15 that money coming up to OIN, and you have this joint and  
16 several liability issue there, then OSG gets now maybe  
17 exposed to that kind of tax liability, because OIN because  
18 of checking the box has now added money or added monies to  
19 its inventory that it would have not had so as to reduce  
20 the tax liability to OSG.

21 But you follow?

22 MR. SPAGNOLETTI: I do follow, but I --

23 THE COURT: It all flows from the joint and  
24 several liability problem.

25 MR. SPAGNOLETTI: It doesn't flow from it, and I  
26 think the Court's use of the word potential is important to

## Proceedings

1  
2 when I was describing this issue.

3           What the check the box election did was simply to  
4 push up its tax attributes to OIN, and if nothing else  
5 happened --

6           THE COURT: But their allegation is that  
7 Proskauer, or the attorneys at Proskauer, did not  
8 understand -- either did not understand or overlooked the  
9 joint and several liability aspect of those credit  
10 agreements, so that if they had done that, they may not  
11 have told -- they may have not advised to do the check the  
12 box situation.

13           But we're getting ahead of ourselves, because  
14 ultimately, it's 2005, 3 years later is 2008. Where is  
15 the -- you're out of time.

16           MR. SPAGNOLETTI: That's exactly right, Your  
17 Honor.

18           And by the way, Your Honor, during this period,  
19 from 2001 until 2011, Proskauer has no role at all in  
20 advising the company of its credit agreements. The 2006  
21 credit agreement, from which all of OSG's damages flow, was  
22 a credit agreement put in place, documented and negotiated  
23 by Clifford Chance. So what their theory essentially is  
24 with respect to this check the box election issue is that  
25 Proskauer in 2005 gives advice in connection with the check  
26 the box election, and then has to imagine or foresee

## Proceedings

1  
2 somehow that in a year the company would enter into a new  
3 credit agreement, would have different counsel, Clifford  
4 Chance, which documents and negotiates that credit  
5 agreement, that that new counsel would not spot this joint  
6 and several issue, and that that credit agreement would  
7 create liability down the road. That's just not a  
8 plausible --

9 THE COURT: But you're asking me to also ignore  
10 the other allegations in the complaint that perhaps, yes,  
11 Clifford Chance did that credit agreement in 2006, but then  
12 they went back to you and asked you, well, what's up with  
13 this joint and several liability issue? And then they made  
14 these allegations pretty forcefully saying that you had --  
15 the partners amongst Proskauer say, well, there's no tax  
16 solution, but instead, we're going to create a contractual  
17 problem or we're going to create a contractual  
18 interpretation of what we intended when we entered into  
19 these agreements.

20 MR. SPAGNOLETTI: Yes. Well, there are two  
21 issues, Your Honor, clearly. There's the check the box  
22 issue and then there's the advice in 2011 that applies back  
23 to the 2006 agreement.

24 If I can describe the reasoning that we believe  
25 we're entitled to a dismissal on this claim.

26 THE COURT: I mean, ultimately, what you're

## Proceedings

1  
2 saying is, you know, we can stand here all day and we can  
3 carve out little portions of whatever. I mean, the bottom  
4 line is, is there a legal malpractice claim or not?

5 You guys have here a breach of duty of loyalty  
6 and a breach for the Second Cause of Action, and the First  
7 Cause of Action is a breach of duty to care.

8 MR. SPAGNOLETTI: There's not a malpractice claim  
9 here because they have not adequately pled causation. And  
10 they haven't adequately pled causation because they were  
11 aware at the time that they purportedly relied on the  
12 advice of Proskauer contained in the 2011 memo, that the  
13 representation in the memo that Proskauer set forth in the  
14 memo that was based upon representations OSG made, was  
15 demonstrably and patently false. There's no way that OSG  
16 could reasonably have relied on Proskauer's advice, because  
17 Proskauer's advice was substantially premised, and I can  
18 show the Court the reference, on representations that were  
19 false that OSG knew were false.

20 If I could show the Court No. 1. This is Slide  
21 No. 1 in your package, Your Honor. So this is the  
22 June 2011 memo that Proskauer prepared. So this is the  
23 part of the memo talking about after they've analyzed the  
24 question of whether the credit agreements were susceptible  
25 to multiple interpretations, the question they're analyzing  
26 now is what was the intent of the parties? And this is.

## Proceedings

1  
2 what it says in the memo.

3 THE COURT: But wait a minute. No, no, no. This  
4 first slide that I'm looking at right here: "Senior  
5 management at OSG, whom we had advised over the years that  
6 OIN cannot guarantee borrowings by OSG or any other  
7 domestic borrower, strongly state that they never intended  
8 that OIN would be responsible for the obligations of OSG or  
9 OSG Bulk under the recent credit agreements."

10 That memo was in response to inquiries that OSG  
11 has made so that you had to -- according to them, these are  
12 all allegations.

13 MR. SPAGNOLETTI: I'm sorry, I didn't hear you.

14 THE COURT: That memo didn't come out of nowhere.  
15 That memo was in response to inquiries that were being made  
16 by OSG, and that memo, according to the allegations, is so  
17 sort of a backdoor way of trying to explain why the joint  
18 and several liability issue came to be in the credit  
19 agreement, and the fact that it's there now, we're going to  
20 explain to -- we're using this memo, and this memo did not  
21 become a tax advice memo, okay? So what happens is you're  
22 now trying to explain to a third party, the IRS or whoever,  
23 so that when they see the joint and several liability,  
24 you're going to stay, oh, no, wait a minute.

25 At bottom, all of the pro evidence is going to  
26 prove that the US company never intended or never wanted --

## Proceedings

1  
2 not never intended, but never wanted OIN to be a joint and  
3 several -- to be jointly liable for its obligations. That  
4 is what that says, but that doesn't do -- where's the -- I  
5 don't understand what you're saying.

6 MR. SPAGNOLETTI: Let me show you. This is the  
7 first step.

8 THE COURT: Do you follow what I'm saying?

9 MR. SPAGNOLETTI: I follow. I don't quite agree,  
10 Your Honor.

11 THE COURT: Okay.

12 MR. SPAGNOLETTI: Let me try to clarify.

13 THE COURT: It's always the case, but  
14 unfortunately, for you, it's what I say that controls.

15 MR. SPAGNOLETTI: I understand. Maybe you'll say  
16 something different.

17 THE COURT: Well, actually not, it's the  
18 Appellate Division that would.

19 MR. SPAGNOLETTI: Your Honor, the memo itself  
20 reflects what Proskauer was told by its client in  
21 connection with its drafting of the memo. What it says is  
22 that: "Senior management of OSG strongly state that they  
23 never intended" -- they didn't say why, they say they never  
24 intended that OIN would be responsible for the obligations  
25 of OSG. Okay. So that's an expression of what the  
26 company's view is about its historical intent.



## Proceedings

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2 And that's not the only time it appears in the  
3 memo. It's important enough that it appears a second time.  
4 And if I could just, with the Court's indulgence, read this  
5 provision. This is also in the memo. This is the  
6 reasoning of Proskauer's memo, the memo they're claiming is  
7 what they relied on.

8 THE COURT: All right.

9 MR. SPAGNOLETTI: "The following circumstances of  
10 the transactions indicate that the parties to the recent  
11 credit agreements could not have intended that OSG and OIN  
12 would engage in the same performance so that they would be  
13 considered co-obligors under the recent credit agreements."

14 And then what does it reference? "The statements  
15 of senior management of OSG, that OSG would not have  
16 entered into the recent credit agreements and would not  
17 enter into the 2011 credit agreement had senior management  
18 believed that OIN was responsible for the obligations of  
19 OSG."

20 THE COURT: But that just states the obvious. I  
21 mean, I'm looking at that and I'm listening to your  
22 arguments, but you're stating the obvious at this point,  
23 because what US company would want to face section 956 tax  
24 liabilities? Of course, that's going to be --

25 MR. SPAGNOLETTI: Your Honor, that's not what  
26 that representation says. It doesn't say that OSG told us

## Proceedings

1  
2 that they didn't want to incur tax liability under 956.  
3 Its specific, and it's important that its specific, and it  
4 says, OSG told us that they didn't intend for OIN to be  
5 responsible for OIN obligations.

6 THE COURT: Which then, if you read it carefully,  
7 would trigger 956 liability.

8 MR. SPAGNOLETTI: However, if Proskauer had known  
9 at the time it drafted this memo, that this statement of  
10 intention was not true, it wouldn't have drafted the memo.  
11 Moreover --

12 THE COURT: Hold on a second. Back up. You just  
13 said -- what did you say again? If Proskauer knew --

14 MR. SPAGNOLETTI: That the statement of intent  
15 that was provided to it by management at the time that it  
16 drafted the memo was not true, Proskauer would have never  
17 drafted the memo and the company could not have relied on  
18 it.

19 THE COURT: But that statement is true. Why are  
20 you saying that it's not true?

21 MR. SPAGNOLETTI: Let me show you why.

22 THE COURT: Why?

23 MR. SPAGNOLETTI: Because this is the point. We  
24 have documentary evidence that we've provided to the Court  
25 in connection with our motion to dismiss that conclusively  
26 establishes that this representation of intent by OSG was

## Proceedings

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just false.

THE COURT: Okay. Go right to it.

MR. SPAGNOLETTI: There are several of them in our papers, Your Honor. Its Exhibits H, I, J and K. This is one of them.

So Your Honor, just to explain what this is. This document was not provided to Proskauer when it drafted the memo, it was discovered mysteriously by the general counsel at OSG a year and a half later, only after things started going badly, after he had already told Proskauer, by the way, that he didn't have any documents relevant to the question of intent. And what this is is significant. This is the term sheet for the 2006 credit agreement.

THE COURT: Right.

MR. SPAGNOLETTI: This is the credit agreement at issue. It's the term sheet being marked up by Clifford Chance.

THE COURT: Right.

MR. SPAGNOLETTI: Okay. And what the term sheet says is quite significant. What it does is it has a -- this is a black line, okay, and it has a section that says, "Subsidiary Guarantors." And this is what the bank wants. It says -- what the bank wants is "any direct or indirect subsidiary of the parent that is liable for the indebtedness in existence at or coming into existence after

## Proceedings

1  
2 the closing."

3           What that's referring to -- this is, by the way,  
4 Exhibit H to the Samuels declaration. So what this says is  
5 the banks want guarantees, not from OIN, but from OIN  
6 subsidiaries. Okay. This is the second level of  
7 subsidiaries.

8           THE COURT: Right.

9           MR. SPAGNOLETTI: Okay. That provision is  
10 stricken out, as is the footnote that goes along with it.  
11 The footnote says, "discuss tax implications of guarantees  
12 from non-US subsidiaries."

13           THE COURT: Right. Because if you strike out  
14 that, you won't have a 956 problem.

15           MR. SPAGNOLETTI: No, Your Honor, that's not  
16 right. Your Honor, this provision is talking about  
17 guarantees by subsidiaries of OIN, and not talking about a  
18 guarantee from OIN itself.

19           THE COURT: Subsidiary is OIN, okay.

20           MR. SPAGNOLETTI: Right. This footnote says,  
21 "discuss the tax implications of that."

22           What does Clifford Chance do in response to that  
23 language in the draft term sheet? This is what it does; it  
24 strikes out the subsidiary guarantee section and it puts a  
25 footnote in place, and it says, quote, no subsidiary  
26 guarantees should be required. OSG Bulk and OSG

## Proceedings

1  
2 International -- by the way, OSG International is OIN --  
3 are the holding companies of all the group ship owning  
4 companies and will be joint and several borrowers under the  
5 credit facility.

6 So what does that mean? That can only be read  
7 one way, and the only way it can be read is to say that  
8 Clifford Chance, when looking at this, said, hey, banks,  
9 you don't need guarantees from OIN, all the subsidiaries of  
10 OIN, because OIN is jointly and severally liable, which  
11 means that Clifford Chance understood in the context of the  
12 2006 credit agreement that Proskauer had no role, that  
13 joint and several meant guarantee, which is diametrically  
14 opposed to what the representations were that OSG  
15 management made to Proskauer five years later when they  
16 asked Proskauer to do the memorandum.

17 Remember, this is what the representation was.  
18 "Statements of senior management that OSG would not have  
19 entered into the credit agreements and would not have  
20 entered into the 2011 credit agreement had senior  
21 management believed OIN was responsible for the obligations  
22 of OSG."

23 That representation cannot be true if in the  
24 company's own files, not far from Mr. Edelson's office, by  
25 the way, there's a document like this. And Your Honor, I  
26 mean, quite frankly, there have been a number of e-mails

## Proceedings

1  
2 that have been produced.

3 THE COURT: That document you're pointing to  
4 right now essentially says that OIN -- that Clifford Chance  
5 in its representation of the Plaintiff here told the banks,  
6 you don't need to have this kind of language in there  
7 because there's joint and several liability attached, so  
8 you, the banks, are in the clear.

9 MR. SPAGNOLETTI: Right, you're in the clear  
10 because we think -- we, OSG, believe that joint and several  
11 means guarantee. That's what that means. And that's the  
12 only way to read it.

13 And by the way, if I could show the Court an  
14 e-mail that we found in discovery.

15 THE COURT: Okay. When you say joint and several  
16 means guarantee --

17 MR. SPAGNOLETTI: Right.

18 THE COURT: -- that still doesn't talk about the  
19 956 issue, that talks about the lender, whether or not the  
20 lender is going to be able to get repaid. Look, the banks  
21 aren't in the business of giving money out for nothing.

22 MR. SPAGNOLETTI: That's right.

23 THE COURT: They want their money back. So they  
24 don't care how you word the language in terms of how they  
25 get their money back, so that you're saying that that just  
26 talks about the guarantee of the money to the bank or the

## Proceedings

1  
2 lender, hey, don't worry about it, you're going to get your  
3 money back because there's a joint and several  
4 liability issue -- there's a joint -- forget the several --  
5 there's a joint component here in terms of OIN being  
6 jointly liable for OSG's debts, so you're covered, don't  
7 worry about it. But you're taking from that now, you're  
8 asking me to make a leap of faith in saying that that also  
9 means there is no 956 problem.

10 MR. SPAGNOLETTI: No, Your Honor, that's not what  
11 I'm asking you.

12 Just go back to the representation that OSG made  
13 to Proskauer. OSG is telling Proskauer, this joint and  
14 several language that's in these credit agreements, we did  
15 not intend for that language to mean that OIN was  
16 responsible for the obligations of OSG. That's what the  
17 representation was, and that was the basis of --

18 THE COURT: Can you put that back up, that last  
19 line?

20 MR. SPAGNOLETTI: Sure.

21 THE COURT: Hang on a second.

22 See, the thing is that we have -- although we're  
23 talking about perhaps the same type of -- well, there are  
24 two things that are going on here in these blowups that  
25 you're showing me. One is with the Clifford Chance  
26 document, that's talking about a workout of a loan, a

## Proceedings

1  
2 financing agreement, a credit agreement.

3 MR. SPAGNOLETTI: Yes.

4 THE COURT: All right. And what was the  
5 interplay there in terms of what was being discussed.  
6 That's one aspect.

7 This aspect flows from the fact that now, based  
8 on the joint and several liability issue here, that that  
9 may now trigger a 956 problem. I'm not sure from the  
10 Clifford Chance point of view in that transaction that we  
11 saw just a minute ago, whether or not 956 ever even came  
12 up. Do we know that?

13 MR. SPAGNOLETTI: Well, we do know it. I can  
14 show Your Honor an e-mail, which makes it clear that it  
15 came up.

16 THE COURT: Well, you know, the thing is, when  
17 you talk about e-mails and everything, you get further away  
18 from the pleadings and more into a factual dispute.

19 MR. SPAGNOLETTI: I understand. Let me focus on  
20 this first, and then if the Court would like to see one  
21 e-mail, I'll show it, which I think makes unmistakably  
22 clear that my interpretation of the Clifford Chance markup  
23 is exactly what Mr. Edelson and Mr. Itkin also believed.

24 THE COURT: You know, your interpretation of the  
25 Clifford Chance markup is your interpretation. Clifford  
26 Chance would strongly probably disagree and say, let me see



## Proceedings

1  
2 for myself and I don't need counsel to speak for me.

3 MR. SPAGNOLETTI: Let me do this in stages.  
4 Proskauer's memo --

5 THE COURT: Do you see where my problem is  
6 though?

7 MR. SPAGNOLETTI: I believe I do, but I think I  
8 can answer it.

9 THE COURT: Okay.

10 MR. SPAGNOLETTI: Proskauer's memo has two parts  
11 with respect to the commercial log analysis. It starts  
12 with an analysis of the joint and several language and the  
13 language in the credit agreements generally.

14 THE COURT: All right.

15 MR. SPAGNOLETTI: And it concludes that that  
16 language is susceptible to multiple interpretations.

17 Step two in the analysis then is, okay, if the  
18 Court is going to get to parole evidence, the only way to  
19 analyze whether OSG would likely win in a litigation  
20 against the IRS over this issue, is to understand what the  
21 parole evidence is. Proskauer was not involved in the 2006  
22 credit agreement. It has no idea what the parties to the  
23 credit agreement intended. It has to ask OSG, what did the  
24 parties intend? OSG's response is this -- OSG's  
25 response --

26 THE COURT: To Clifford Chance?

## Proceedings

1  
2 MR. SPAGNOLETTI: No, no, this is the  
3 Proskauer -- this is the Proskauer memo.

4 THE COURT: I know, but that would be also, if  
5 Clifford -- looking at the Clifford Chance involvement in  
6 this, let's just -- you know, we're just thinking out loud  
7 here, at least thinking theoretically, Clifford Chance,  
8 when they saw the joint and several liability issue, you  
9 know, in the prior credit agreements, should have or may  
10 have asked OSG, well, what did you mean by this? And OSG  
11 should have said that, right?

12 MR.. SPAGNOLETTI: Quite frankly, I think that's  
13 irrelevant to my point.

14 All we need to know for purposes of analyzing  
15 whether this representation is true, is when you look at  
16 the Clifford Chance markup, you can look at it without  
17 regard to 956 liability.

18 THE COURT: Okay.

19 MR. SPAGNOLETTI: What did the parties to the  
20 2006 credit agreement intend as a commercial matter, as a  
21 commercial matter, without regard to whether there is 956  
22 liability? This document shows unmistakably that it was a  
23 commercial matter. They believed that joint and several  
24 meant that OIN was responsible for the obligations of OSG.

25 THE COURT: I don't think that anyone is arguing  
26 that that's in question. Joint and several is clear what

## Proceedings

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MR. HOARD: Yes, Your Honor.

First of all, unlike the -- if the Court has the complaint in front of it with the June 1 Proskauer memo attached, I just want to make sure the Court is focused on this.

THE COURT: Yes.

MR. HOARD: The purpose of the memo is to analyze from a contractual construction perspective whether or not the joint and several language in the credit agreement means joint and several. This memo begs the very question. Your Honor, just basically said joint and several means what it means. Well, not according to this memo it doesn't mean what it means, according to the memo.

But the point I want to make to the Court initially is the memo is not addressed solely at the 2006 credit agreement drafted by Clifford Chance. As you can see on the very first page of the memo, Exhibit A, it's addressed at the 2000 credit agreement, the 2001 credit agreement, both of which were drafted by Proskauer, and the 2000 credit agreement, being the one where Proskauer advised the company to allow the joint and several language to be added in the first place, and then Proskauer did the 2001 credit agreement, carrying the joint and several language over. The 2005 credit agreement is covered. That was done in-house at OSG. The 2006 agreement is covered.

## Proceedings

1  
2 joint and several means. It is what it is. The only  
3 question is what impact that has on section 956.

4 MR. SPAGNOLETTI: Your Honor, what we're talking  
5 about here is not what joint and several means, we're  
6 talking about what the intent was of the parties. We're  
7 talking about the part of the memo that analyzes the intent  
8 of the parties after there's already a conclusion that  
9 joint and several is susceptible to multiple  
10 interpretations.

11 So there's two parts to the analysis. The second  
12 part of the analysis is critically hinging on the  
13 representations by OSG management. Those representations  
14 by OSG management simply could not be made, and the reason  
15 they could not be made is that that's not what they  
16 believed. They believe that OIN was responsible for the  
17 obligations of OSG. And if that's what they believe, if  
18 that's true, and it has to be true, then this  
19 representation that they made to Proskauer is false.

20 If that representation is false, it all falls  
21 down. You can't rely on a memo that's false, and you know  
22 it's false. And they did know it was false because the  
23 documents that showed they knew it was false were in their  
24 own files.

25 THE COURT: Your response to this with the  
26 Clifford Chance markup?

## Proceedings

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2 It was done by Clifford Chance.

3 And then it also includes, Your Honor, the 2011  
4 forward start facility that was started up at the end of  
5 May that was drafted by Proskauer and also includes the  
6 joint and several language. And as the memorandum itself  
7 states very clearly, the joint and several language in all  
8 five of those credit agreements is essentially the same  
9 language. And in footnote 52, I believe, Your Honor,  
10 footnote 52 to the memorandum, Proskauer acknowledges in  
11 the little four parens there that the drafting of each of  
12 the successive recent credit agreements were based on an  
13 earlier version of the recent credit agreements. That is  
14 to say, they admit that the one agreement that was done by  
15 Clifford Chance in 2006 was actually based on their own  
16 agreement, and so when they go to OSG, Your Honor, and they  
17 ask OSG, what was your intent when you made this change in  
18 2000, there was no one better situated to know what the  
19 intent was than Proskauer themselves.

20 And so it's kind of just almost ridiculous that  
21 they're going to the client who, by the way, they're really  
22 going principally to a group of four people, only one of  
23 whom had anything to do with the 2000 credit agreement and  
24 who had no recollection of this change in the 2000 credit  
25 agreement.

26 THE COURT: These problems all arose when you

Laura L. Ludovico, SCR

## Proceedings

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2 started doing the forward start facility. That's when  
3 everything started to come to a head because that's when  
4 the lenders themselves, the guys who are giving you the  
5 money, of course, they're going to read over every single  
6 word in the agreement, because they want to make sure that  
7 they're going to get paid and not somebody else getting  
8 paid ahead of them. And that's where the joint and several  
9 issued popped up. All right. Everything was fine until  
10 2010 when you started working on this forward start  
11 facility agreement. That's where it all came to a head.

12 MR. HOARD: At the end of 2010 Proskauer was  
13 retained to draft the forward start facility. The forward  
14 start facility from day one contained joint and several  
15 language. The commercial finance lawyer at Proskauer, who  
16 is a very skillful lawyer, I'm sure very capable, never  
17 said a word about joint and several being a problem. He  
18 never said a word about it. About four months later, as  
19 the drafting process was drawing to a close, essentially at  
20 the 11th hour before it was finalized, the commercial  
21 finance lawyer at Proskauer asked his tax lawyer, Alan  
22 Parnes, who was the principal outside tax adviser for the  
23 company, please take a look at this, not to look at it for  
24 a 956, but just either there might have been some other  
25 specific issue or just generally from a tax lawyer's  
26 perspective.

## Proceedings

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2 Alan Parnes looked at it, took one look at it and  
3 instantaneously saw there was a problem from a tax  
4 perspective. He alerted the company. The company says,  
5 this could be a big problem. They said, don't do anything  
6 yet. Parnes says, don't do anything, let me talk to my  
7 people at Proskauer. Within two or three days Proskauer's  
8 Peter Samuels, who was the engagement partner at Proskauer  
9 for OSG, reported to the CFO of OSG, Myles Itkin, they  
10 reported there is no problem, basically it was a big  
11 nevermind.

12 OSG asked Proskauer to memorialize that advice in  
13 a written memorandum setting forth their rationale for  
14 getting to that conclusion, and that is Exhibit A to the  
15 complaint. So what you have -- and so now the basis for  
16 dismissing -- the basis for the motion to dismiss the claim  
17 based on the 2011 memo is essentially that it was based on  
18 misrepresentations made by the company to OSG --

19 THE COURT: My question --

20 MR. HOARD: -- I mean to Proskauer.

21 THE COURT: The question I have to you is, when I  
22 read your complaint and we had the 2010, 2011, all of these  
23 problems all of a sudden popping up because the lenders for  
24 the forward start facility agreements raised this issue,  
25 but ultimately, at the end of the day, the drawdown wasn't  
26 from the forward start facilities, it was from the 2006

## Proceedings

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2 credit agreement. That's where the drawdown came in, so  
3 that all this other stuff that happened with the forward  
4 start facility, you know, it's a good storytelling, it's a  
5 good story line, but ultimately, your liabilities flow from  
6 the fact that you did the drawdown or you took money out as  
7 a result of the 2006 credit agreement, and that's where the  
8 problems all came up, and that's where you have the  
9 situation, and that's one where he's arguing, well, wait a  
10 minute, if you look at the 2006 credit agreement, they  
11 talked about what they struck out, so that really, it has  
12 less to do with Proskauer and more to do with what you  
13 guys, the Plaintiff, did with Clifford Chance.

14 MR. HOARD: Actually, I don't think that's the  
15 case at all, Your Honor. Remember what we're talking about  
16 here.

17 THE COURT: See, I did get what you're saying.

18 MR. HOARD: We have a 2006 credit agreement,  
19 which is in effect, and it's running to the end of 2013.

20 THE COURT: Yes.

21 MR. HOARD: Okay. We have that in place. It's a  
22 \$1.5 billion unsecured line of credit.

23 THE COURT: No dispute.

24 MR. HOARD: And it's in place. And then the  
25 forward start facility is simply being negotiated and  
26 signed up in anticipation of the 2006 credit agreement



## Proceedings

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2 coming to its conclusion at the end of 2013. So they're  
3 just getting ahead of the curve.

4 THE COURT: Yes, they're getting ahead of the  
5 curve, but you never had to draw any -- there were no  
6 monies that flowed to the Plaintiff as a result of the  
7 forward start facility agreement.

8 MR. HOARD: None.

9 THE COURT: And now, that memo that you got in  
10 2011, June 2011, arose out of this forward start facility  
11 dispute or contention and had less to do with the 2006  
12 problem because at that point, you know, you didn't think  
13 to connect the dots perhaps.

14 MR. HOARD: That is not the case, Your Honor, and  
15 you've got a misunderstanding of the facts there, I think,  
16 if I may.

17 THE COURT: Okay.

18 MR. HOARD: Here is the situation. The forward  
19 start facility was the impetus for the recognition of the  
20 joint and several language.

21 THE COURT: Right.

22 MR. HOARD: No question about that. Alan Parnes  
23 saw it and said, we've got a problem, we got at least a  
24 potential problem.

25 THE COURT: Right.

26 MR. HOARD: But the problem is not with the

## Proceedings

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2 forward start facilities per sé, because even though it was  
3 signed up, it never even went into effect. So the problem  
4 is that the joint and several language exists in the  
5 current credit agreement, as well as the predecessor credit  
6 agreements going back to 2000.

7 So what Proskauer does with the memo is they are  
8 advising the company that under the existing credit  
9 agreement that contains the joint and several enclosure;  
10 you do not have a problem.

11 THE COURT: Including the 2006.

12 MR. HOARD: And if you just flip to the last page  
13 of the memo, not -- excluding the appendix. It's page 13  
14 of the memo.

15 THE COURT: Right.

16 MR. HOARD: If you go to that last page of the  
17 memo, you can see what the final opinion is of Proskauer.  
18 And remember, the recent credit agreements is defined as  
19 the 2006 agreement and the 2005 and the 2001 and the 2000.  
20 It's not -- the forward start facility is not included in  
21 the definition of the recent credit agreements. It is  
22 included in the definition of credit agreements, which is  
23 complicated, but they're talking -- they're not even  
24 talking about the forward start. The memo is not directed  
25 at the forward start facility, it's directed really at the  
26 2006 and the predecessors. And that's the deal.

## Proceedings

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2           So they get this memo from Proskauer. Remember,  
3 Alan Parnes says, I think you might have a problem under  
4 the 2006 credit agreement. And we say, we'll get to the  
5 bottom of it. Tell us, do we or do we not? And they  
6 report back, nevermind, you don't have a problem, you can  
7 continue to draw down under the 2006 credit agreement.  
8 That's the advice that the company is given. The advice  
9 that Proskauer gives to OSG is you do not have a problem  
10 under your existing credit agreement and you can continue  
11 to draw down on it in reliance on our opinion.

12           THE COURT: The problem with the arguments that  
13 you're raising right now is the fact that when you're  
14 dealing with a legal malpractice issue, I'm usually dealing  
15 typically, with one law firm, one law firm from beginning  
16 to end that did the work. What's unique about this is that  
17 you have another major player in this event here. In 2006  
18 you went out and got Clifford Chance to negotiate the  
19 credit agreement for you for the 2006 credit agreement,  
20 which is also now the basis of this section 956 problem, so  
21 that perhaps you may be right saying that that June 2011  
22 memo that Proskauer wrote up was wrong, in your own words,  
23 dead wrong, but at bottom, when you're talking about legal  
24 malpractice now, the question is, is that, well, was it  
25 more to them or was it more to Clifford Chance, because I  
26 don't know exactly what Clifford Chance's relationship with

## Proceedings

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2 you guys was at the time when you were negotiating this  
3 type of document or negotiating this type of financing,  
4 because I have this markup here that throws into question a  
5 lot -- it raises a lot of questions about, well, what  
6 exactly happened with you -- I mean, you guys are  
7 sophisticated business guys. I mean, you know from the  
8 complaint throughout the entire history of the existence of  
9 this company was to always maintain independence of your  
10 foreign subsidiaries so that you wouldn't have to incur tax  
11 consequences as a result of section 956, which has been on  
12 the books since 1962.

13 So that was always in your mind, so that now you  
14 hired Clifford Chance, another player in this history here.  
15 I don't know what happened, so that you're trying -- you're  
16 alleging these incredible facts against Proskauer. Fine.  
17 But there's a little bit of a wrinkle there because usually  
18 typically, when I get a legal malpractice claim, I don't  
19 get anybody interfering with the relationship, but in this  
20 case I've got a major player that negotiated the agreement  
21 that caused you these problems.

22 The facility stuff that happened in 2000 and  
23 2011, that just brought to bear or brought up the issue of  
24 this joint and several liability so that everybody can then  
25 at that point say, oh, no, we got a problem. But the  
26 bottom line is that, okay, assume there's a problem, assume

## Proceedings

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2 that they messed up, but the problem is there's a line here  
3 and there may be a cut in the line there in terms of the  
4 liability, perhaps. I'm not saying there is, but there may  
5 be a cut there. In this complaint here, I don't hear  
6 anything about Clifford Chance's involvement in the 2006  
7 agreement.

8 MR. HOARD: I think the complaint doesn't name  
9 Clifford Chance, I don't believe. They indicate that  
10 Proskauer did not do the 2006.

11 THE COURT: Yeah, but I don't know, but that  
12 didn't really -- I mean, that's something I kind of was  
13 questioning about because you also said at some point that  
14 you also internally created, or at least used as templates  
15 the prior credit agreements to continue the 2001 and 2005  
16 credit agreement, I believe. You used those templates.

17 MR. HOARD: I think I can address your concerns,  
18 Your Honor.

19 THE COURT: You see where my problem is a little  
20 bit?

21 MR. HOARD: I do.

22 THE COURT: It's a little bit of a problem.

23 MR. HOARD: The problem you're describing, you  
24 know, before I got a little better versed in New York law  
25 in particular, the problem you're describing is one of  
26 comparative fault. I mean, how do you allocate

## Proceedings

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2 responsibility here to Clifford Chance for not catching it  
3 in 2006? How do you allocate the responsibility to  
4 Proskauer for affirmatively advising you that it was not a  
5 problem in 2011, which is the focus of our claim?

6 THE COURT: But they're advising you it's not a  
7 problem in 2011 without the benefit of knowing what  
8 Clifford Chance did for you, so that their advice is  
9 suspect. Well, it's only suspect because they're  
10 contending, we didn't know about this, we didn't know about  
11 this until the eleventh hour what Clifford Chance did,  
12 because had we had known that this was the markup, we  
13 wouldn't have issued that 2011 memo, because there's no way  
14 on God's earth that we would be that stupid.

15 MR. HOARD: Let me just tell you that I think you  
16 are reading a little too much into the --

17 THE COURT: I'm not reading anything, I'm just  
18 reading what I have in front of me.

19 MR. HOARD: All you have in front of you is the  
20 2006 term sheet -- the 2006 term sheet, the first page of  
21 that, that was the 2006 credit agreement in which the  
22 company was represented by Clifford Chance. This document,  
23 you know, we're not doubting the authenticity of it, Your  
24 Honor, but we don't know whose handwriting it is, we don't  
25 really know much about that document or the exact timing of  
26 it. We don't know -- we're not -- you know, it came from

## Proceedings

1  
2 our files.

3           What I would point out to Your Honor is that the  
4 argument that Mr. Spagnoletti was making is that this  
5 document utterly refutes the allegation in the complaint as  
6 to what the company represented regarding OSG's intent in  
7 2000 when the change was made.

8           THE COURT: There's no doubt that your  
9 allegations are here that based on this 2011 memo that  
10 Proskauer issued, that you went ahead and did the drawdown  
11 on the 2006. No question. The only question I have and  
12 the dilemma that I'm facing now is that 2011 memo, is it  
13 accurate, because Proskauer's intention is that there is  
14 something now on the record, documentary evidence that  
15 shows the 2006 markup, the 2006 credit agreement here  
16 that's been marked up, we didn't know about that? Their  
17 position is, unless -- and it's not alleged here that they  
18 knew about this.

19           You just simply said that Proskauer didn't do the  
20 2006 credit agreement, but you didn't say in the complaint  
21 that another major law firm did the 2006 credit agreement,  
22 this is what happened, and that Proskauer, when they issued  
23 the 2011 memo, based on the green light go ahead and  
24 drawdown on the 2006, knew of this. They're saying we  
25 didn't know about this.

26           MR. HOARD: Now, when you say this, I'm a little.

## Proceedings

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unclear.

THE COURT: This meaning, Clifford Chance's --

MR. HOARD: That particular document?

THE COURT: That particular document.

Let's look at it broader. They didn't know the details of that transaction surrounding the 2006 credit agreement, so that that 2011 memorandum that they issued, even though it talks about all of the other credit agreements, so forth and so forth, the damages flow from the 2006 credit agreement drawdown, not from all of the other -- all the other credit agreements and all the other, you know, red -- let's just say all of the other credit agreements, that's good storytelling. That's nice to tell me what happened. That gives me the flavor, but the bottom line is the damages that flowed from what's happening here now, unless I'm mistaken, is from your drawdown of the 2006 agreement. And that 2006 drawdown, you're telling me -- you're alleging was based on the 2011 memo that Proskauer gave you and said, go ahead, we're giving you the green light. And you're saying that that was dead wrong. Well, they're saying, yeah, it's dead wrong because you didn't tell us everything that you needed to tell us for us to write that memo.

MR. HOARD: And that's what they're saying, Your Honor, and that certainly raises a fact issue, and that's



## Proceedings

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2 going to be their defense when we go to trial.

3 THE COURT: That's not a fact issue, that's a  
4 pleading issue. You got to plead that. You got to plead  
5 that somehow that they didn't need to know that, they  
6 didn't need to know about the 2006 transaction to issue the  
7 2011 memo, because we know as lawyers in the legal setting  
8 that you have to -- you give opinion based on what you know  
9 or what your client tells you, and that if your client  
10 doesn't tell you something and you issue an opinion based  
11 on what you know and it turns out to be inaccurate, how can  
12 you hold the law firm or lawyer liable for that when it  
13 wasn't disclosed to them, all of the facts?

14 MR. HOARD: Your question answers itself. If the  
15 representation -- if the documents contradict what was  
16 said, then you have something to talk about. I'll go  
17 through these documents with you and show they don't  
18 contradict. They do not contradict --

19 THE COURT: Okay.

20 MR. HOARD: -- what the company told.

21 First of all, Your Honor, you have to, of course,  
22 focus on the allegation in the complaint. The allegation  
23 in the complaint is that the only representation made --  
24 two representations made to the company. One was, we  
25 looked through the files and we couldn't find it. Not that  
26 there are none, but we looked and we didn't find them.

## Proceedings

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2 These things happen.

3           The second one is that the OSG intended -- back  
4 in 2000 when the change was made originally, that OSG did  
5 not intend to trigger 956. That's a big no, right? I  
6 mean, even Proskauer acknowledges that. That's our only  
7 allegation, and the complaint says that's the only  
8 representation that was made. And that's what the OSG  
9 witnesses are telling us. But Proskauer didn't point to  
10 their memo and say to the blowup of what their  
11 representation was, which says, after we advised you over  
12 the years that you can't guarantee -- you know, foreign  
13 subsidiaries can't guarantee the US parent's debt, after  
14 we've told you that for many years, you told us that you  
15 didn't intend for OIN to be a guarantor.

16           THE COURT: Right.

17           MR. HOARD: All right. And that's it. That's  
18 what their spin on the representation is. We say that  
19 wasn't actually said. We don't say it's not true, but they  
20 didn't say it.

21           But now, let's look at that in the context of the  
22 four documents. I think this hand-up that Mr. Spagnoletti  
23 gave you in his blowups only addresses three of them, I  
24 think, Your Honor, but if you flip over to -- I'm going to  
25 take you in chronological order, if I could. I tell you  
26 what, I might hand you up -- Your Honor, I might hand you

## Proceedings

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up my copy.

THE COURT: Okay.

MR. HOARD: May I approach?

THE COURT: Yes.

(Document was handed to the Court.)

MR. HOARD: Let's go and let's -- Exhibit H is on the top, Your Honor, but let's put it on the bottom because it comes last chronologically.

THE COURT: Right.

MR. HOARD: Exhibit I, as you can see, is a March 29, 2000 draft of the 2000 credit agreement, the one drafted by Proskauer.

THE COURT: Right.

MR. HOARD: And what you see here -- this is -- remember, the Defendants have only put forward four documents that they contend utterly refute under the relevant statute our allegations in the complaint, and thus, defeat causation. And if you look at this first one, Exhibit I, I'll go down to the one in the body of it first, but it -- basically, the words jointly and severally are struck out and the word no is written to the right. What does that tell us? That tells us that someone at OSG initially at least, resisted the change. Remember, as it's pled in the complaint, and it's not denied by Proskauer, that the preexisting credit agreements were several only

## Proceedings

1  
2 with an OSG guarantee? That was the preexisting structure.

3 And so you got to keep in mind the OSG guarantee,  
4 because when that word shows up, it's in the context of  
5 OSG. But all that shows you -- all this document shows,  
6 Your Honor, is that OSG initially resisted the change.  
7 That's understandable to some extent. The notation up in  
8 the right-hand corner that's X'd out, and I think the X-out  
9 is significant, it raises a question, and it says -- as I  
10 read it, Your Honor, it says: "Different accounting/tax  
11 treatment, joint and several/OSG guarantee."

12 So it's just asking the question; all right, so  
13 the lenders want us to make a change from several to joint  
14 and several. And then the person at OSG is saying, does  
15 this have any different accounting -- will that result in  
16 any difference of counting for tax treatment? We know,  
17 Your Honor, that what that -- what does that tell us? That  
18 tells us that the smart guy at OSG asked a question.

19 We also know from the memorandum, Your Honor,  
20 itself, Exhibit A to the complaint, this footnote 57,  
21 Proskauer acknowledges that its partner -- he's not named  
22 here, but it's a gentleman by the name of Jim Waddington.  
23 Mr. Waddington is no longer with the firm. He was  
24 representing OSG in connection with the 2000 credit  
25 agreement. And what this footnote purports to tell us is,  
26 is that Proskauer's time records, Mr. Waddington's time

## Proceedings

1  
2 records, reflect that he considered the tax implications at  
3 the time.

4 THE COURT: I don't think there's a dispute with  
5 respect to -- first of all, I don't think there's a dispute  
6 about the ramification of joint and several as it's applied  
7 to section 956. However you want to word it, it looks like  
8 there is tax liability if use the terms joint and several,  
9 okay?

10 With respect to the 2000 and 2001 drafts, you,  
11 yourself, said you're not looking at pursuing any claims  
12 flowing from the 2000 and 2001 credit agreements, which is  
13 where the change all of a sudden out of nowhere came with  
14 the joint and several. The issue then becomes afterwards.  
15 As you're going along doing your business now with the  
16 joint and several liability clause since 2000, since 2000,  
17 it's in there now, so that everything is happening, and so  
18 far there are no tax liability or tax issues so far. We  
19 had that pre 1987 \$400,000,000. That's not on the table,  
20 right? You're not looking to pursue damages for that,  
21 right?

22 MR. HOARD: Well, to the extent that it's been  
23 brought up, but you've got to remember, Your Honor, the IRS  
24 only goes back so far.

25 THE COURT: Thank goodness for everybody for  
26 that. Ten years, as they say.

## Proceedings

1  
2           So, okay. So then we're looking now at as we're  
3 moving along in our relationship, then we hit 2006 where  
4 you have to redraft because prior to 2006 you, yourself,  
5 say that we did self -- internally we did -- in 2003 and  
6 2006 we -- hang on a second.

7           In paragraph 41: "OSG subsequently entered into  
8 several additional unsecured credit facilities between 2003  
9 and 2006. OSG negotiated and documented the 2003 through  
10 2005 credit agreement as being in-house. Although  
11 Proskauer did not represent OSG in connection with the  
12 negotiation and documentation of these credit agreements,  
13 Alan Parnes at Proskauer continued throughout this time to  
14 be OSG's principal tax adviser, including with respect to  
15 ongoing issues related to foreign shipping income taxation  
16 under sub part F and section 956. Moreover, OSG used the  
17 joint and several structure of the 2000 and 2001 credit  
18 agreements drafted by Proskauer as templates for the 2003  
19 to 2006 credit agreements, all of which followed the joint  
20 and several structure of the 2000 agreement originally  
21 negotiated and drafted by Proskauer."

22           Okay. Still moving along.

23           In paragraph 42: "In early 2006, OSG, OBS and  
24 OIN entered into a \$1.8 billion unsecured credit facility."

25           And that's where you use Clifford Chance.

26           MR. HOARD: Yes.

Laura L. Ludovico, SCR

## Proceedings

1  
2 THE COURT: In paragraph you don't tell me in  
3 paragraph 42, because when you said you did mention it, it  
4 doesn't tell me who did that.

5 MR. HOARD: Pardon?

6 THE COURT: It doesn't tell me who did that.  
7 Who, helped you do that? It doesn't say it. There's no  
8 allegation there.

9 So we're moving along now still, so that we get  
10 now fast forwarded. The 2006 credit agreement is in play.  
11 We fast forwarded to 2010 where you do now the FSF  
12 agreements, and the lenders are all going bananas saying,  
13 there's no way we're going to lend you money if you got a  
14 joint and several liability clause in that 2006 credit  
15 agreement or in all these credit agreements.

16 MR. HOARD: That's not correct, Your Honor.

17 THE COURT: Okay.

18 MR. HOARD: The forward start facility actually  
19 gets signed up. There is no pushback on the joint and  
20 several language during the negotiation of the forward  
21 start facility itself. It gets signed up in the end of  
22 May. The first draft comes May 9. There's internal  
23 discussion about whether we should go ahead and make a  
24 change because Proskauer is telling the company it's not a  
25 problem. They decided to just go with it. Again, the same  
26 language as in the 2006.

## Proceedings

1  
2 Now, fast forward to the following year. The  
3 shipping industry is in a downturn. That's when the  
4 lenders raise it.

5 THE COURT: No, but wait a minute. I thought in  
6 your complaint you said that the lenders -- that the FSF  
7 lenders raised the issue prior to you executing this, and  
8 that's where the problem came in, and that's at  
9 paragraph -- unless I read it wrong, I saw it in paragraph  
10 52 and 54. That's when the problem came up.

11 MR. HOARD: No, Your Honor, it came up the  
12 following -- I think the first time that any lender raises  
13 the question is in June of 2012, and it's --

14 THE COURT: That was Parnes. He looked at it and  
15 he reviewed it and he recognized that there was a problem.

16 MR. HOARD: Exactly. And he's the only one that  
17 recognized the problem. He alerted the company and then  
18 that led to the memo where Proskauer told us, nevermind,  
19 you don't have a problem and you can continue. They  
20 specifically affirmatively told the company, you can  
21 continue to draw down. That's the negligence that gives  
22 rise to the claim for damages arising out of the 2011 memo.  
23 It's the advice that you're still -- OSG, you don't have a  
24 problem under this. Even though Clifford Chance drafted  
25 it, we don't care who drafted it, you don't have a problem,  
26 it doesn't create a problem for you and you can continue to



## Proceedings

1  
2 rely on it.

3 The only defense to that claim --

4 THE COURT: Because that memo is not only talking  
5 about 2006, but it talks about every year.

6 MR. HOARD: It is. But the only defense that  
7 Proskauer has asserted here, and Your Honor is helping them  
8 out a little bit perhaps, but that's fine, they're smart  
9 guys and they'll come on all of these arguments themselves  
10 eventually, but the only defense that -- the only basis for  
11 the motion to dismiss that part of our claim is that we  
12 couldn't rely on the memo because we made false  
13 representations to them, and we didn't make false  
14 representations to them.

15 What we allege in the complaint is, in fact, the  
16 truth. They say these documents refute some other version  
17 of the representation. They simply do not refute the  
18 allegation in the complaint. They do not refute even the  
19 allegation as Proskauer cast it, which is -- the allegation  
20 that Proskauer cast it, it said that there was no intent  
21 for OIN to be a guarantor. And if you look at these  
22 documents, even the 2006 term sheet, Your Honor, which is  
23 the Exhibit H, the one that you were focused on, the  
24 Clifford Chance one, if you look at that document fairly,  
25 you'll see there's no way to construe that document as  
26 being inconsistent with the negotiation that OIN didn't

## Proceedings

1  
2 intend to be a guarantor.

3           If anything, the exact opposite is true, because  
4 what's happening here is a lender is asking for guarantees,  
5 albeit guarantees from the OIN subsidiaries and not from  
6 OIN. And the answer is, no. So how can that possibly be  
7 inconsistent with the representation as Proskauer spins it  
8 that there was no intent for OIN to be a guarantor? There  
9 was no intent for OIN to be a guarantor.

10           The problem here, Your Honor, is that nobody  
11 connected the dots, not Proskauer, not OSG, until  
12 Proskauer's tax expert looked at it. The dots being that  
13 joint and several language would be treated like a  
14 guarantee, which would trigger 956, and that's the  
15 situation.

16           THE COURT: All right. I got it. Okay.

17           What's your response?

18           MR. SPAGNOLETTI: Your Honor, thank you. Just a  
19 couple of points.

20           First, Mr. Hoard repeats again and again that  
21 their allegation in the complaint is different than what  
22 we're claiming the representation was that OSG made. The  
23 problem is that --

24           THE COURT: What I've stated on the record, is it  
25 clear to you that I understand what you're arguing to me?

26           MR. SPAGNOLETTI: I believe so, Your Honor. If I

## Proceedings

1  
2 could -- maybe I can move on and just make one corollary  
3 point.

4 THE COURT: Yes.

5 MR. SPAGNOLETTI: Just to go back to where we  
6 started and I think I'll sit down. Your Honor, they've  
7 alleged two acts of malpractice again. We spent most of  
8 the day talking about this memorandum that was prepared in  
9 2011 that contained the representations. These  
10 representations are in the memorandum that's attached to  
11 their complaint. So it's incorporated by reference to  
12 their complaint. They can't allege a representation  
13 different from what the memorandum itself says that they  
14 represented. Either they actually did make that  
15 representation and its wrong or they didn't make that  
16 representation and relied on a memo that they knew did not  
17 accurately reflect what they told Proskauer. So either  
18 way, they have a problem.

19 But going back to the initial point, Your Honor.  
20 There's also an allegation about the 2005 check the box  
21 advice. That's a completely separate allegation about  
22 completely separate conduct, and there is no, I think,  
23 viable theory on which they have continuous representation.  
24 So for independent reasons, that claim should be dismissed  
25 as well.

26 THE COURT: I have a question to ask you. Let me

## Proceedings

1  
2 ask you as well.

3 MR. SPAGNOLETTI: Sure.

4 THE COURT: I'm looking at this memo, this June  
5 2011 memo that we're sort of like hopping on. You got an  
6 exculpatory clause in here somewhere saying that it's based  
7 on the information that we know that you told me and you  
8 promised, or at least you represented to us that what you  
9 told us was accurate? You got anything in this memo to  
10 sort of give you an out?

11 MR. SPAGNOLETTI: Your Honor, this is not a  
12 formal opinion, it's a memo to the client, which is why it  
13 doesn't have that type of language. However, if you read  
14 the whole thing, you can make no mistake that the reasoning  
15 in the memo is based upon -- substantially based upon the  
16 representations the client made. If the client couldn't  
17 make those representations, the memo could not be drafted.

18 THE COURT: But to his point, the Plaintiff's  
19 counsel's point, this is just not the 2006 credit agreement  
20 we're looking at, we're looking at going back to the old  
21 credit agreements up to the present credit agreements, and  
22 we want generally an assurance from Proskauer that this  
23 joint and several liability issue is not going to be a  
24 problem. We didn't go to Clifford Chance because they're  
25 not our tax experts. We went to Proskauer because you were  
26 our tax experts for 30 years, you know exactly what we're

## Proceedings

1  
2           trying to do, you know exactly what we're trying to avoid;  
3           we're trying to avoid paying the tax man for a foreign  
4           subsidiary's income. That's what it is.

5                        It's not asking you to say, tell me about my 2006  
6           credit agreement because then I would agree with you at  
7           that point, well, how can I give you an opinion about a  
8           2006 credit agreement if I had nothing to do with it? But  
9           they want, in a general sense -- not just about the 2006,  
10          but they want in a general sense, tell me what your opinion  
11          is about joint and several and the impact that it would  
12          have on section 956? And your opinion is contractually  
13          saying, don't worry about it, we're okay, because if you  
14          look at the parole evidence, your intent was always never  
15          to have to have 956 liability, so we're covered.

16                       So the bottom line is, is that that kind of  
17          opinion to me, you know, that's well and fine, but at the  
18          end of the day, guess who gets to decide whether or not 956  
19          applies? The IRS.

20                       MR. SPAGNOLETTI: Your Honor --

21                       THE COURT: Right?

22                       MR. SPAGNOLETTI: That's right.

23                       Your Honor, just a couple of points in response  
24          to those questions.

25                       THE COURT: Let me finish.

26                       The last point is so that when we get this memo,

## Proceedings

1  
2 it finally said we get some assurances they feel okay about  
3 it, and they say, let's do the drawdown on the 2006 credit  
4 agreement. We get the money. Boom! The next thing you  
5 know, all hell breaks loose.

6 MR. SPAGNOLETTI: Right. So, Your Honor, just a  
7 couple of points.

8 First of all, the memo doesn't say, quote, don't  
9 worry about it, you're not going to incur liability. It  
10 says you should prevail if this were litigated against the  
11 IRS. That's different from --

12 THE COURT: It's a matter of semantics in a  
13 sense.

14 MR. SPAGNOLETTI: It's important.

15 But Your Honor, I go back to the point that the  
16 Court was picking up on earlier. What they're doing here  
17 is attempting to bootstrap advice from 2011 onto a problem  
18 that began in 2006 that had no role for Proskauer  
19 whatsoever. And if their allegations in the complaint and  
20 all their damages in the complaint all flow from the 2006  
21 credit agreement, and if the drawdowns that they made were  
22 from the 2006 credit agreement, it's then their burden to  
23 properly plead that they relied on Proskauer's advice in  
24 2011 with respect to drawdowns under the 2006 credit  
25 agreement that was negotiated and documented by a different  
26 law firm, Clifford Chance.

## Proceedings

1  
2 Now, this memo --

3 THE COURT: They did say that.

4 MR. HOARD: We did.

5 THE COURT: Wait a second. I highlighted that.  
6 Hold on a second. Now you're going to make me find my  
7 notes. Hold on a second. There it goes right here. No,  
8 that's the wrong one. Hold on a second. Starting from  
9 paragraph 69 going forward; 69, 70, 71 and 72. And  
10 specifically in paragraph 72: "Had Proskauer properly  
11 advised OSG of the tax consequences of the joint and  
12 several structure of the credit facilities in 2011 and in  
13 2012, OSG could have and would have completely avoided the  
14 section 956 inclusion tax resulting from its post-May 2011  
15 drawdowns on its existing credit facility."

16 And that would be the 2006 credit facility.

17 "In addition, Proskauer's improper advice to OSG  
18 management that it was not necessary for OSG's management  
19 to disclose the potential tax issue to the OSG board or the  
20 committee, independent auditors or the regulators deprived  
21 the board of the opportunity to assess the issue itself  
22 until the board was first advised of the issue on  
23 September 20, 2012. Proskauer's advice to OSG in 2011 and  
24 2012 concerning the interpretation of the credit agreements  
25 and their resulting adverse tax effects to OSG was a direct  
26 and proximate cause of at least \$120 million of damages OSG

## Proceedings

1  
2 seeks to recover herein."

3 So they make -- whether or not they can prove it  
4 is another story, but --

5 MR. SPAGNOLETTI: I was just saying that's just a  
6 foundation for my next point, Your Honor. I'm sorry, I  
7 wasn't disputing that. I'm simply saying, if that's their  
8 allegation that all of the damages flow from the 2006  
9 credit agreement, then what they have to do is connect the  
10 dots, and they don't know, because this is the memorandum  
11 that Proskauer gave. It's attached and it's incorporated  
12 by reference.

13 THE COURT: Got it.

14 MR. SPAGNOLETTI: Your Honor, this memorandum is  
15 not merely about the 2000 agreement, the 2001 agreement,  
16 the 2011 agreement, it's about the 2006 agreement as well.  
17 In connection with the 2006 agreement, there were documents  
18 that were not provided to Proskauer that directly  
19 contradict this representation, and that is the term sheet  
20 that I showed the Court before.

21 THE COURT: Well, then, you know what, isn't that  
22 more subject to discovery and some sort of behind the  
23 pleadings, rather than for me at this stage in the game  
24 saying, you didn't, you didn't, you know, it's not there,  
25 good-bye? Because at this point it's going to require a  
26 lot of factual analysis here as to what did they know --



## Proceedings

1  
2 what did OSG know, what did they tell your guys, and how  
3 did your guys decipher or digest the information? You know  
4 what, when it comes to taxes -- and let me tell you, I  
5 avoided taxes in law school -- those are very complicated  
6 and very discreet issues, so that you have to be very clear  
7 as to what was going on and what was said in all of those  
8 meetings, and I can't help but -- I can't ignore the fact  
9 that there was a 30-year tax relationship between Proskauer  
10 and the Plaintiff, so that you don't need to ask your  
11 client the same thing three, four, five times if you had a  
12 30-year relationship, because at that point the client is  
13 going to say, what's the matter with you, why do you keep  
14 asking me if I like my eggs over easy or scrambled? For 30  
15 years I've had them scrambled all the time. I mean, there  
16 are certain things that are just known or understood, so  
17 that when you point to this now or you're relying on  
18 this -- and I'm not saying it's not good stuff, but it  
19 requires a lot of -- a little bit more digging into at this  
20 point.

21 MR. SPAGNOLETTI: Well, I disagree, and the  
22 reason I disagree is that it's actually much more simple  
23 than that.

24 THE COURT: If I have a dollar for every time a  
25 lawyer told me it was simple, I wouldn't be sitting here.

26 MR. SPAGNOLETTI: Maybe it's simple to me.

## Proceedings

1  
2 THE COURT: Of course, it's always simple to the  
3 person making the argument.

4 MR. SPAGNOLETTI: Proskauer included the client's  
5 representations in its memo. It didn't do this by  
6 accident. It didn't do it for no purpose. It did it  
7 because it was part of the analysis.

8 THE COURT: It's called CYA also.

9 MR. SPAGNOLETTI: Well, it's called, I think,  
10 analyzing the issue and identifying the factual  
11 representations that were made.

12 THE COURT: Like I said, at the end of the day,  
13 when you take the sum and substance of all of these  
14 allegations and what the -- there was one point here and I  
15 circled it, where on paragraph 56 it was saying here:  
16 "Shortly after speaking to Artzin, Itkin spoke to Samuels,  
17 who are two Proskauer attorneys, and conveyed that OSG  
18 needed to fully understand from Proskauer whether OSG had a  
19 section 956 tax problem, and if so, the magnitude of the  
20 problem. That is Proskauer needed to get to the bottom of  
21 this issue. By this time, Proskauer and Parnes had already  
22 researched the tax issue, and unknown to OSG, and informed  
23 Samuels that there was no tax solution."

24 And my notes here say, we have a problem. So  
25 that at that point there was a lot of factual stuff going  
26 on here now, in that when that issue came up and that when

## Proceedings

1  
2 this memo had to be written, there were already problems  
3 that you knew. So regardless of what was being represented  
4 to you, there may have been a tax problem and there was no  
5 tax solution no matter what you wrote in your memo.

6 MR. SPAGNOLETTI: Your Honor, the memo is the  
7 advice about the potential tax problem. The memo concludes  
8 that you should prevail against the IRS.

9 THE COURT: But this goes contrary to paragraph  
10 56 where they're alleging that you guys, Proskauer, said  
11 there was no tax solution, so whatever memo you wrote,  
12 there was no tax solution.

13 MR. SPAGNOLETTI: No, Your Honor. There is no  
14 tax solution means that under the tax code alone you can't  
15 get to the right result, but the only way to get to the  
16 right result is by looking at the commercial law. And  
17 that's what the documents show, Your Honor, that this was a  
18 commercial law analysis, not the tax analysis. The tax  
19 conclusion was driven by the commercial law conclusion.

20 THE COURT: The problem, if you had just taken  
21 your memo here, this lengthy memo, and you just told the  
22 client, there's no tax solution, the client at that point,  
23 I don't know, conceivably would have said, you know what,  
24 then we're not doing the drawdown in 2006. That's the end  
25 of it. And you would have avoided all these problems at  
26 this point --

## Proceedings

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MR. SPAGNOLETTI: Your Honor, that's --

THE COURT: -- because it's a simple -- I don't know how you want to interpret no tax solution, but to me it's very simple --

MR. SPAGNOLETTI: Your Honor .

THE COURT: -- no solution. You can't get around it. So when you write all of this up in your 2011 memo saying, you may prevail if you do this, this, this and this, but then they have an allegation saying that you guys know that there was no solution no matter what you said.

MR. SPAGNOLETTI: Your Honor, if I could explain.

THE COURT: Yes.

MR. SPAGNOLETTI: Okay.

THE COURT: Well, now that you're explaining, get beyond the pleadings.

MR. SPAGNOLETTI: No, I don't think so. Look, I think this is consistent with what the pleadings say. Mr. Parnes, who is a tax lawyer, reviews the credit agreement. He's the one who spots this, and we talked about no good deed goes unpunished.

THE COURT: You ain't kidding.

MR. SPAGNOLETTI: He spots the issue, okay?

THE COURT: Also, the self-reporting to the IRS, no good deed goes unpunished there either.

MR. SPAGNOLETTI: What he does is analyzes the

## Proceedings

1  
2 issue from a tax perspective. Remember, 956 does not use  
3 the phrase joint and several. 956 says guarantee.

4 THE COURT: Right.

5 MR. SPAGNOLETTI: So there's a question about,  
6 putting aside what was meant, putting aside what the words  
7 mean from a commercial law perspective, does the fact that  
8 there's a difference between what the tax code says and  
9 what the language in the credit agreement says give you the  
10 possibility of making your argument?

11 The analysis that Mr. Parnes engages in is set  
12 forth in the first half of the memorandum, but that's not  
13 ultimately persuasive to Proskauer, because the purpose and  
14 intent of section 956 is to look beyond form to substance.  
15 So the only way to analyze the issue is to look from a  
16 commercial law perspective, which is what the rest of the  
17 memo addresses.

18 THE COURT: I'm going to break it down really  
19 simple, and maybe this is too simple in terms of what I see  
20 of the facts here alleged in this complaint.

21 After all of these allegations in this complaint,  
22 and there's a lot, in terms of the relationship and the  
23 history here, at bottom it centers around the 2006 credit  
24 agreement. They want to know whether or not there's a  
25 problem with the joint and several language in there, so  
26 they ask you. You say in your memo, based on what they

## Proceedings

1  
2 told you, all right, that we, they being the Plaintiff,  
3 that we never intended to have our foreign subsidiary to  
4 guarantee our loan.

5           You write this memo saying, go ahead, you're  
6 going to prevail ultimately because -- you may or you  
7 should prevail -- you should prevail on the IRS should  
8 there be a section 956 problem. So based on that 2011,  
9 they draw down, they do the drawdown. And then after they  
10 do the drawdown, they have later on all these issues pop up  
11 that, in fact, there is a problem and the fact they did a  
12 self-reporting --

13           MR. SPAGNOLETTI: Your Honor, there's no --  
14 that's not factually accurate and the allegations don't say  
15 that.

16           They're claiming that this statement by Mr.  
17 Parnes is somehow relevant. That statement by Mr. Parnes  
18 was from an e-mail that was sent at the time that they were  
19 drafting the 2011 memo. He was working through the issues.  
20 He didn't tell the client a year later, our memo is  
21 unreliable, don't rely on it. He didn't do that at all.  
22 In fact, Proskauer was working on converting the memorandum  
23 to an opinion, a formal opinion in 2012 when it found these  
24 documents, when the company says, we have these documents.  
25 And that's where even Proskauer doesn't go forward. It's  
26 not that it doesn't believe its opinion. To this day it

## Proceedings

1  
2 stands behind this analysis. The problem is the entire  
3 analysis is premised upon this false representation. And  
4 the Court can reach this issue on a motion to dismiss.

5 Your Honor, if you look at the actual language of  
6 the term sheet, the term sheet was negotiated by Clifford  
7 Chance in 2006 that Proskauer did not have access to,  
8 despite the fact it asked for documents from OSG. If you  
9 look at that term sheet, there's only one way to interpret  
10 that term sheet, and the only way to interpret it is that  
11 Clifford Chance and OSG believed that joint and several  
12 connect, that OIN was guaranteeing the obligations of OSG.

13 THE COURT: That may be true, but I think that's  
14 more subject to a summary judgment motion and less  
15 applicable to a motion to dismiss on a pleadings stage. I  
16 just can't help but think that what you've just told me is  
17 exactly what the discovery is supposed to do.

18 MR. SPAGNOLETTI: Your Honor, if I might indulge  
19 the Court then, could I show the Court just one e-mail that  
20 makes it unmistakably clear?

21 THE COURT: Okay, but be careful what you wish  
22 for.

23 MR. SPAGNOLETTI: Your Honor, I think it removes  
24 any doubt about the interpretation of the term sheets.  
25 This is attached to our complaint against Edelson and Mr.  
26 Itkin in the related case. Okay. So this is an e-mail

## Proceedings

1  
2 dated February 5, 2006, from Mr. Edelson, the general  
3 counsel at OSG. He's sending it to Myles Itkin, who is CFO  
4 of OSG. They are the two Defendants in the related case,  
5 also copied to Clifford Chance.

6 THE COURT: You have sued OSG in a related case?

7 MR. SPAGNOLETTI: We've sued Mr. Edelson and Mr.  
8 Itkin for fraud.

9 THE COURT: Okay.

10 MR. SPAGNOLETTI: Your Honor --

11 THE COURT: Where is that lawsuit right now?

12 MR. SPAGNOLETTI: It's here. It's consolidated  
13 for discovery.

14 THE COURT: It's mine, too?

15 MR. SPAGNOLETTI: Yes.

16 THE COURT: Okay.

17 MR. SPAGNOLETTI: We have a status conference  
18 later.

19 Your Honor, this is an e-mail regarding the 2006  
20 credit agreement, and this is what Mr. Edelson says: "As a  
21 practical matter, OSG will always be the borrower, but once  
22 the funds are borrowed, OSG Bulk and OIN are joint and  
23 severally liable." He says: "Again, this issue arises  
24 because each borrower is responsible for the entire debt,  
25 but all the tests are on a consolidated basis.

26 So what is he saying? He's saying that his



## Proceedings

1  
2 understanding of the 2006 credit agreement is that each  
3 borrower is responsible for the entire debt. In other  
4 words, OIN is responsible for the obligation of OSG, which  
5 is exactly the opposite of what he represented to Proskauer  
6 that's reflected in the memo. There's no room for  
7 interpretation there.

8 THE COURT: Wait a minute. What prompted that  
9 e-mail?

10 MR. SPAGNOLETTI: This is an e-mail about the  
11 draft 2006 credit agreement.

12 THE COURT: I tried cases on e-mails and it's  
13 just not -- it just doesn't lend itself. As much as you  
14 are trying to argue this documentary evidence, it's not  
15 really sufficient, I think in my mind for me to say, okay,  
16 it's a slam dunk, you're right. E-mails are e-mails. They  
17 respond to certain e-mails. They're in relation to --  
18 those kind of e-mails may engender another response from  
19 somebody else. I don't know from that e-mail chain because  
20 it's just not going from one person to another, but there's  
21 a series of people on those e-mails that saw that and they  
22 could in a sense interpose vigorous disputes as to his  
23 interpretation of what's --

24 MR. SPAGNOLETTI: Maybe so, Your Honor, but the  
25 point for this issue -- maybe so, and I don't think that's  
26 true, but maybe so.

## Proceedings

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THE COURT: Maybe so?

MR. SPAGNOLETTI: Your Honor, what we're talking about is whether or not OSG could rely on the memo, and whether OSG could rely on the memo that contained an expression of intent that was reported to Proskauer by OSG. If this e-mail were shared with Proskauer, there's no way they would write that memo, and there's no way that representation could have been given.

So even if, let's assume for the purposes of this argument, ten people respond and say, no, you're wrong, that's not what we're thinking. This is enough because one person at OSG had this belief, and that's diametrically inconsistent with the memo.

THE COURT: What if the transaction with Clifford Chance, and I'm just speculating, if this came up, this joint and several issue came up, and Clifford Chance said, you know what, we don't know about this joint and several stuff, we don't want to issue an opinion on this because this is already from back from before we were even involved in this stuff, when this issue comes up, you go ask your tax guy, you go ask Proskauer what to do with this because we take a no opinion approach to this at that point? That could have been said, who knows. Depending upon the engagement letter and what the responsibilities are, Clifford Chance could have punted the ball and said, you

## Proceedings

1.  
2. guys go when the times comes, or when you believe it's  
3. necessary, you go ask Proskauer.

4. MR. SPAGNOLETTI: That could be, but that doesn't  
5. affect the conclusion here, which is that Mr. Edelson,  
6. through this e-mail, intended for there to be a guarantee.

7. THE COURT: Your response briefly.

8. MR. HOARD: Very briefly, Your Honor.

9. Obviously, this isn't before the Court, but it is  
10. exactly the sort of document -- it doesn't meet the  
11. documentary evidence standard. I won't belabor the 2011  
12. memo. It seems the Court has understood the issues with  
13. regard to that.

14. But the other part of the motion to dismiss, this  
15. hasn't been addressed too much, I haven't addressed it, and  
16. I will be very brief. The cause of action going back to  
17. advice in 2005 is unrelated to the memo, going back to  
18. 2005.

19. THE COURT: Which is the check box?

20. MR. HOARD: Yes, we people refer to it as a check  
21. the box deal, but the malpractice claim does not arise out  
22. of the check the box election per sé, as Proskauer  
23. acknowledges in their motion to dismiss. That's a very  
24. simple process. It's a three-page form. You literally  
25. check a box.

26. The malpractice claim arises out of the tax

## Proceedings

1  
2 advice or the failure to give us the tax advice, and we've  
3 alleged it, we've given examples, certainly not an  
4 exhaustive list, but 30 examples, over the years of how  
5 Proskauer was continuously representing the company on  
6 protecting the foreign subsidiary from US taxation. That's  
7 all I have to say about that issue, Your Honor.

8 THE COURT: I got to tell you one thing is that  
9 you have two causes of action. One is breach of --

10 MR. HOARD: One is breach of the duty of standard  
11 care and one is the breach of the duty of loyalty.

12 THE COURT: Yes, the breach of the duty of  
13 loyalty, that's duplicative in the first part of the  
14 action. It's the same thing. I mean, I looked at it and  
15 it's essentially, you're saying the same thing, but you're  
16 just labeling it different, loyalty and duty of care.

17 Now, legal malpractice is legal malpractice.  
18 That encompasses fiduciary duty and loyalty.

19 MR. HOARD: It does, and we really don't have any  
20 objection to combining them together. We broke them out  
21 for pleading purposes because the second one focuses on  
22 some of Proskauer's actions once they found a problem.

23 THE COURT: I think what I would do is that --  
24 all right. This is my decision and order. This is my  
25 decision and order with respect to Defendant's motion to  
26 dismiss the complaint.

## Proceedings

1  
2 With regard to the Second Cause of Action, which  
3 is breach of duty of loyalty, that sum and substance is  
4 virtually identical to the First Cause of Action, which is  
5 seeking a legal malpractice for breach of duty of care. I  
6 think any time you talk about legal malpractice, it talks  
7 about duty of care, there's fiduciary duties, there's duty  
8 of loyalty. That's all wrapped up. So in a sense the  
9 allegations set forth in the Second Cause of Action, 99  
10 through 103, those are subsumed within the First Cause of  
11 Action.

12 So what I'm going to do is grant that branch of  
13 the motion. I'm going to dismiss the Second Cause of  
14 Action because, as I said, those allegations are  
15 essentially all subsumed within the First Cause of Action.  
16 So there is no waiver of any of those claims, it's now we  
17 just have one singular legal malpractice claim asserted  
18 against the Defendant.

19 Having said that, the question now is whether or  
20 not I'm going to dismiss that claim for legal malpractice.  
21 My decision and order again is that that branch of the  
22 motion to dismiss the complaint for legal malpractice is  
23 denied. I believe that the allegations here are  
24 sufficiently set forth, the legal malpractice claim,  
25 against Proskauer. I think everything flows from the 2006  
26 drawdown. The problem is that the drawdown occurred as a

## Proceedings

1  
2 result of the 2011 memorandum that was issued to the  
3 Plaintiff. There is a sharp dispute as to whether or not  
4 that 2011 was based on accurate information provided to  
5 Proskauer by the client and whether or not that information  
6 was such that the opinion that was offered in 2011 is  
7 suspect and not because of Proskauer, but according to  
8 Proskauer's argument, it was because the client failed to  
9 advise Proskauer of certain circumstances that surrounded  
10 the 2006 credit agreement, namely their engagement of  
11 Clifford Chance in terms of structuring that deal. At  
12 bottom, that's more factual issues in terms of finding out  
13 exactly in discovery what went down, who said what to whom  
14 in 2006.

15 The other question is, is that at the end of the  
16 day, that opinion letter, however suspect it may be or  
17 however inaccurate it is, based on alleged faulty  
18 representations from the client, the bottom line is, is  
19 that that opinion letter talks about joint and several  
20 liability and its impact upon section 956. It was that  
21 letter itself that provided the impetus for the Plaintiff  
22 to go ahead and do the drawdown, and that's where the  
23 damages flow from.

24 With respect to the statute of limitations,  
25 there's a continuing duty throughout this situation here of  
26 continuing representation. I find that there is no statute

## Proceedings

1  
2 of limitations issue. With regard to certain damages, that  
3 maybe subject to the statute of limitations, but we'll see  
4 where that goes in terms of the discovery, so that once I  
5 get the terms of discovery, where the damages are going  
6 from in the time period, I will be able to determine  
7 whether or not those damages are recoverable or not.

8 But the legal malpractice claim is there. I find  
9 that this complaint sufficiently states the allegations to  
10 support the legal malpractice claim. Here, all the  
11 arguments that defense counsel raised, I can't help but  
12 think that the substance of those arguments lend more to a  
13 summary judgment motion and less to a motion to dismiss on  
14 the pleading at the pleading stage.

15 Of course, you know, at this point the Plaintiff  
16 has survived the motion to dismiss. They may not survive  
17 the summary judgment motion, depending upon how it plays  
18 out during discovery. So accordingly, that branch of the  
19 motion to dismiss the complaint is denied.

20 We're going to go forward with the legal  
21 malpractice claim. Today is September 10. File your  
22 answer on or before October 10, 2014. If you want, since  
23 you're all here -- actually, you know what, let the dust  
24 settle and we'll give you a date to come back to talk about  
25 discovery, because you may want to pursue other remedies.

26 So that's my decision and order. We have the

Laura L. Ludovico, SCR

Proceedings

singular legal malpractice claim going forward. And please order the transcript. I'll so order it for your records.

Thanks so much.

MR. SPAGNOLETTI: Thank you, Your Honor.

MR. HOARD: Thank you, Your Honor.

THE COURT: You're welcome.

\* \* \* \* \*

Certified to be a true and accurate record of the within proceedings.

*Laura L. Ludovico*

Laura L. Ludovico  
Senior Court Reporter

9/24/14

Index No. ~~650765/14~~

650765/14

(mtn  
seq. no. 001)

So ordered

**JEFFREY K. OING**  
J.S.C.





\$	5	
\$1.5 [1] 32/22	500 [1] 1/18	advice [25] 7/26 8/4 9/11 10/22 10/24 12/25 13/22 14/12 14/16 14/17 15/21 31/12 35/8 35/8 38/8 48/23 51/21 54/17 54/23 55/17 55/23 59/7 67/17 68/2 68/2
\$1.5 billion [1] 32/22	52 [3] 29/9 29/10 48/10	advise [1] 70/9
\$1.8 [1] 46/24	54 [1] 48/10	advised [6] 12/11 15/5 28/22 42/11 55/11 55/22
\$1.8 billion [1] 46/24	56 [2] 58/15 59/10	adviser [2] 30/22 46/14
\$120 [1] 55/26	57 [1] 44/20	advising [4] 12/20 34/8 38/4 38/6
\$120 million [1] 55/26	6	affect [1] 67/5
\$400 [2] 8/11 8/12	60 [2] 1/10 1/26	affirmatively [2] 38/4 48/20
\$400 million [2] 8/11 8/12	650765 [1] 3/4	after [11] 7/17 14/23 19/10 19/11 19/26 27/8 42/11 42/13 58/16 61/21 62/9
\$400,000,000 [1] 45/19	650765/2014 [1] 1/5	afterwards [1] 45/14
-	69 [2] 55/9 55/9	again [8] 7/7 18/13 47/25 50/20 50/20 51/7 64/23 69/21
-	7	against [9] 1/5 8/10 25/20 36/16 54/10 59/8 63/25 69/18 69/25
-X [2] 1/3 1/9	70 [1] 55/9	ago [2] 9/4 24/11
-against [1] 1/5	71 [1] 55/9	agree [3] 11/10 16/9 53/6
0	72 [2] 55/9 55/10	agreement [82]
001 [1] 1/4	79101 [1] 1/18	agreements [39] 4/8 4/11 4/17 6/8 6/15 12/10 12/20 13/19 14/24 15/9 17/11 17/13 17/16 21/19 23/14 25/13 26/9 29/8 29/12 29/13 31/24 34/6 34/18 34/21 34/22 37/15 40/10 40/12 40/14 43/26 45/12 46/12 46/18 46/19 47/12 47/15 52/21 52/21 55/24
1	8	ahead [11] 7/10 12/13 30/8 33/3 33/4 39/10 39/23 40/20 47/23 62/5 70/22
10 [3] 1/11 71/21 71/22	800 [1] 1/17	ain't [1] 60/22
10007 [2] 1/11 1/26	9	al [1] 3/4
10017 [1] 2/5	900 [1] 1/22	ALAN [6] 1/6 30/21 31/2 33/22 35/3 46/13
10022 [1] 1/22	91 [1] 7/13	albeit [1] 50/5
103 [1] 69/10	92 [1] 7/17	alerted [2] 31/4 48/17
11 [3] 7/14 7/18 8/8	956 [38] 4/21 5/2 5/18 5/26 6/3 6/13 7/16 7/23 8/2 8/13 17/23 18/2 18/7 20/14 22/19 23/9 24/9 24/11 26/17 26/21 27/3 30/24 35/20 36/11 42/5 45/7 46/16 50/14 53/12 53/15 53/18 55/14 58/19 61/2 61/3 61/14 62/8 70/20 99 [1] 69/9	all [76]
11th [1] 30/20	A	allegation [14] 12/6 39/5 41/22 41/22 42/7 47/8 49/18 49/19 49/19 50/21 51/20 51/21 56/8 60/10
13 [1] 34/13	ability [1] 6/25	allegations [15] 7/5 13/10 13/14 15/12 15/16 39/9 43/18 54/19 58/14 61/21 62/14 69/9 69/14 69/23 71/9
14 [1] 7/14	able [4] 7/6 8/22 22/20 71/6	allege [2] 49/15 51/12
17th [1] 1/22	about [65] 6/23 14/23 16/26 20/16 20/17 22/18 22/19 22/26 23/2 23/7 23/23 23/26 24/17 27/5 27/6 27/7 30/17 30/18 30/18 32/11 32/15 33/22 34/24 35/16 35/23 36/5 37/6 37/13 38/10 38/10 38/25 39/16 39/18 39/25 40/9 41/6 41/16 45/6 47/23 49/5 49/5 51/8 51/20 51/21 53/5 53/7 53/9 53/11 53/13 54/2 54/9 56/15 56/16 59/7 60/21 61/5 63/24 65/10 66/4 66/18 68/7 69/6 69/7 70/19 71/24	alleged [7] 9/10 9/15 39/17 51/7 61/20 68/3 70/17
1962 [3] 5/25 6/4 36/12	access [1] 63/7	allegedly [1] 7/9
1987 [1] 45/19	accident [1] 58/6	alleging [4] 4/20 36/16 40/19 59/10
2	according [5] 15/11 15/16 28/13 28/14 70/7	ALLEN [3] 1/21 1/23 3/13
20 [1] 55/23	accordingly [1] 71/18	allocate [2] 37/26 38/3
2000 [21] 4/16 28/19 28/21 29/18 29/23 29/24 34/6 34/19 36/22 39/7 42/4 43/12 43/12 44/24 45/10 45/12 45/16 45/16 46/17 46/20 56/15	accounting [2] 44/10 44/15	allow [1] 28/22
2001 [10] 4/16 12/19 28/19 28/24 34/19 37/15 45/10 45/12 46/17 56/15	accounting/tax [1] 44/10	allowed [1] 4/11
2003 [4] 46/5 46/8 46/9 46/18	accurate [5] 39/13 52/9 62/14 70/4 72/9	almost [2] 9/5 29/20
2005 [12] 10/18 10/19 11/11 12/14 12/25 28/25 34/19 37/15 46/10 51/20 67/17 67/18 2006 [74]	accurately [1] 51/17	alone [1] 59/14
2008 [2] 10/24 12/14	acknowledges [4] 29/10 42/6 44/21 67/23	along [6] 6/7 20/10 45/15 46/3 46/22 47/9
2010 [4] 30/10 30/12 31/22 47/11	act [2] 9/10 9/14	already [5] 19/11 27/8 58/21 59/2 66/20 29/3 29/5 35/20 37/13 37/14 44/19 51/20 58/8 60/24 64/5
2011 [40] 9/11 9/12 12/19 13/22 14/12 14/22 17/17 21/20 29/3 31/17 31/22 33/10 33/10 35/21 36/23 38/5 38/7 38/13 39/9 39/12 39/23 40/8 40/19 41/7 48/22 51/9 52/5 54/17 54/24 55/12 55/14 55/23 56/16 60/8 62/8 62/19 67/11 70/2 70/4 70/6	action [15] 3/8 3/21 3/22 3/23 14/6 14/7 67/16 68/9 68/14 69/2 69/4 69/9 69/11 69/14 69/15	although [2] 23/22 46/10
2012 [8] 6/18 7/12 7/14 48/13 55/13 55/23 55/24 62/23	actions [1] 68/22	always [9] 6/3 6/5 6/21 16/13 36/9 36/13 53/14 58/2 64/21
2013 [3] 8/8 32/19 33/2	acts [2] 9/9 51/7	Amurillo [2] 1/17 1/18
2014 [4] 1/5 1/11 3/4 71/22	actual [1] 63/5	amended [1] 8/9
29 [1] 43/12	actually [8] 16/17 29/15 32/14 42/19 47/18 51/14 57/22 71/23	amongst [1] 13/15
3	added [3] 11/18 11/18 28/23	amount [1] 8/11
30 [4] 4/2 52/26 57/14 68/4	addition [2] 8/3 55/17	analysis [12] 25/11 25/12 25/17 27/11 27/12 56/26 58/7 59/18 59/18 61/11 63/2 63/3
30-year [2] 57/9 57/12	additional [3] 6/11 6/11 46/8	analyze [3] 25/19 28/8 61/15
34 [1] 5/2	address [2] 8/19 37/17	analyzed [1] 14/23
4	addressed [4] 28/16 28/19 67/15 67/15	analyzes [2] 27/7 60/26
4,663,13 [1] 8/12	addresses [2] 42/23 61/17	analyzing [3] 14/25 26/14 58/10
41 [1] 46/7	adequately [2] 14/9 14/10	and/or [1] 3/23
42 [3] 1/2 46/23 47/3	admit [1] 29/14	ANDREW [2] 2/7 3/18
420 [1] 1/26	adverse [1] 55/25	another [7] 9/14 35/17 36/14 39/21 56/4
43-page [1] 3/21		
450 [1] 2/5		
463,000 [1] 8/11		

**A**

another... [2] 65/18 65/20  
 answer [4] 9/8 25/8 50/6 71/22  
 answering [1] 8/24  
 answers [1] 41/14  
 anticipation [1] 32/26  
 any [14] 4/21 8/26 15/6 19/12 19/24 33/5  
 44/15 44/16 45/11 48/12 63/24 68/19 69/6  
 69/16  
 anybody [1] 36/19  
 anyone [1] 26/25  
 anything [7] 29/23 31/5 31/6 37/6 38/17  
 50/3 52/9  
 appearances [1] 3/10  
 appears [2] 17/2 17/3  
 Appellate [1] 16/18  
 appendix [1] 34/13  
 applicable [1] 63/15  
 applied [1] 45/6  
 applies [2] 13/22 53/19  
 approach [2] 43/4 66/23  
 approximately [1] 4/2  
 are [44] 3/21 4/7 5/15 5/19 6/22 6/23 9/9 9/9  
 10/10 13/20 15/11 18/19 19/4 21/3 22/8  
 23/23 23/24 30/4 34/7 36/6 38/16 39/9 41/26  
 42/9 43/21 45/18 47/12 51/10 57/5 57/16  
 57/16 58/17 64/4 64/22 64/22 64/25 65/14  
 65/16 66/25 69/10 69/14 69/23 71/5 71/7  
 aren't [1] 22/21  
 argue [1] 65/14  
 arguing [3] 26/25 32/9 50/25  
 argument [6] 9/16 39/4 58/3 61/10 66/11  
 70/8  
 arguments [5] 17/22 35/12 49/9 71/11 71/12  
 arise [1] 67/21  
 arises [4] 4/2 4/4 64/23 67/26  
 arising [1] 48/22  
 arose [2] 29/26 33/10  
 around [4] 5/22 6/4 60/7 61/23  
 arrangements [1] 5/14  
 Artzin [1] 58/16  
 as [55] 4/18 4/22 4/23 5/3 6/7 6/13 7/9 7/16  
 7/24 8/3 8/15 9/22 11/19 20/10 26/20 26/20  
 28/17 29/6 30/18 32/6 33/6 34/5 34/5 34/18  
 36/11 37/14 39/5 41/7 43/11 43/24 44/9 45/6  
 45/15 45/26 46/2 46/10 46/18 47/26 49/19  
 49/25 50/7 51/25 52/2 56/16 56/26 57/7  
 64/20 65/13 65/13 65/22 67/20 67/22 69/14  
 69/26 70/3  
 aside [2] 61/6 61/6  
 ask [9] 25/23 29/17 51/26 52/2 57/10 61/26  
 66/21 66/22 67/3  
 asked [7] 13/12 21/16 26/10 30/21 31/12  
 44/18 63/8  
 asking [7] 13/9 23/8 23/11 44/12 50/4 53/5  
 57/14  
 aspect [3] 12/9 24/6 24/7  
 asserted [2] 49/7 69/17  
 assess [1] 55/21  
 asset [1] 5/13  
 assets [1] 5/14  
 assume [3] 36/26 36/26 66/10  
 assurance [1] 52/22  
 assurances [1] 54/2  
 attached [5] 22/7 28/5 51/10 56/11 63/25  
 attempting [1] 54/17  
 attorneys [5] 1/17 1/21 2/4 12/7 58/17  
 attributes [2] 10/14 12/4  
 auditors [1] 55/20  
 authenticity [1] 38/23  
 Avenue [2] 1/22 2/5  
 avoid [4] 4/6 5/20 53/2 53/3

avoided [3] 55/13 57/5 59/25  
 avoiding [1] 5/21  
 aware [1] 14/11  
 away [1] 24/17

**B**

back [26] 4/2 6/2 6/3 6/4 6/25 7/7 13/12  
 13/22 18/12 22/23 22/25 23/3 23/12 23/18  
 34/6 35/6 42/3 45/24 51/5 51/19 52/20 54/15  
 66/20 67/16 67/17 71/24  
 backdoor [1] 15/17  
 bad [1] 3/22  
 badly [1] 19/11  
 ball [1] 66/26  
 bananas [1] 47/12  
 bank [3] 19/23 19/24 22/26  
 bankruptcy [3] 7/14 8/6 8/9  
 banks [6] 6/22 20/5 21/8 22/5 22/8 22/20  
 based [20] 3/6 8/13 14/14 24/7 29/12 29/15  
 31/17 31/17 39/9 39/23 40/19 41/8 41/10  
 52/6 52/15 52/15 61/26 62/8 70/4 70/17  
 basically [3] 28/12 31/10 43/21  
 basis [6] 23/17 31/15 31/16 35/20 49/10  
 64/25  
 be [60] 5/8 5/17 6/23 7/6 8/22 8/23 9/24  
 10/22 11/4 15/8 15/18 16/2 16/3 16/24 17/12  
 17/24 18/4 20/26 21/4 21/6 21/7 21/23 22/20  
 26/4 27/14 27/15 27/18 28/23 31/5 35/21  
 37/3 37/5 38/14 41/2 41/11 42/15 46/14  
 49/21 50/2 50/6 50/8 50/9 50/13 51/24 52/17  
 52/23 55/16 57/6 57/25 59/2 62/8 63/13  
 63/21 64/21 67/4 67/6 67/16 70/16 71/6 72/9  
 bear [1] 36/23  
 because [65] 6/19 6/24 7/5 8/23 11/2 11/12  
 11/14 11/17 11/17 12/13 14/9 14/10 14/16  
 17/23 18/23 20/13 21/10 22/7 22/10 23/3  
 27/22 30/3 30/6 31/23 33/12 34/2 35/25 36/4  
 36/17 37/13 38/9 38/12 38/13 39/13 40/22  
 41/7 43/8 44/4 46/4 47/3 47/24 49/4 49/12  
 50/3 52/24 52/25 53/6 53/13 56/10 56/25  
 57/12 58/7 60/3 61/13 62/6 64/24 65/19  
 66/12 66/19 66/22 68/21 69/14 70/7 70/8  
 71/25  
 become [1] 15/21  
 becomes [2] 7/2 45/14  
 been [11] 5/8 21/26 22/2 30/24 36/11 39/16  
 45/22 59/4 66/9 66/24 67/15  
 before [7] 3/2 30/20 37/24 56/20 66/20 67/9  
 71/22  
 began [1] 54/18  
 beginning [1] 35/15  
 begs [1] 28/11  
 behind [2] 56/22 63/2  
 being [13] 4/5 15/15 19/17 23/5 24/5 28/21  
 30/17 32/25 46/10 49/26 50/12 59/3 62/2  
 belabor [1] 67/11  
 belief [1] 66/13  
 believe [12] 13/24 22/10 25/7 27/16 27/17  
 29/9 37/9 37/16 50/26 62/26 67/2 69/23  
 believed [6] 17/18 21/21 24/23 26/23 27/16  
 63/11  
 benefit [2] 5/23 38/7  
 better [2] 29/18 37/24  
 between [3] 46/8 57/9 61/8  
 beyond [2] 60/16 61/14  
 big [4] 7/2 31/5 31/10 42/5  
 billion [2] 32/22 46/24  
 bit [5] 36/17 37/20 37/22 49/8 57/19  
 black [1] 19/22  
 blowup [1] 42/10  
 blowups [2] 23/24 42/23  
 board [4] 8/25 55/19 55/21 55/22  
 body [1] 43/20

bomb [1] 8/16  
 books [2] 6/5 36/12  
 Boom [1] 54/4  
 bootstrap [1] 54/17  
 borrowed [1] 64/22  
 borrower [5] 7/3 15/7 64/21 64/24 65/3  
 borrowers [1] 21/4  
 borrowings [2] 7/10 15/6  
 both [1] 28/20  
 bottom [13] 6/3 14/3 15/25 35/5 35/23 36/26  
 40/15 43/8 53/16 58/20 61/23 70/12 70/18  
 box [16] 9/17 9/19 10/11 11/11 11/14 11/18  
 12/3 12/12 12/24 12/26 13/21 51/20 67/19  
 67/21 67/22 67/25  
 branch [3] 69/12 69/21 71/18  
 breach [10] 3/24 14/5 14/6 14/7 68/9 68/10  
 68/11 68/12 69/3 69/5  
 break [1] 61/18  
 breaks [1] 54/5  
 brief [1] 67/16  
 briefly [2] 67/7 67/8  
 broad [1] 5/12  
 broader [1] 40/6  
 broadly [1] 4/25  
 broke [1] 68/20  
 brought [5] 7/7 10/23 36/23 36/23 45/23  
 BROWN [3] 1/16 1/19 3/13  
 Bulk [3] 15/9 20/26 64/22  
 burden [2] 11/6 54/22  
 business [3] 22/21 36/7 45/15  
 bye [1] 56/25

**C**

called [3] 9/16 58/8 58/9  
 came [16] 6/17 7/12 15/18 24/11 24/15 30/11  
 32/2 32/8 38/26 45/13 48/8 48/10 48/11  
 58/26 66/16 66/17  
 can [28] 10/26 13/24 14/2 14/2 14/17 21/6  
 21/7 23/18 24/13 25/8 26/16 28/17 34/17  
 35/6 35/10 36/24 37/17 41/11 43/11 48/19  
 48/20 48/26 50/6 51/2 52/14 53/7 56/3 63/4  
 can't [10] 27/21 42/12 42/13 51/12 57/8 57/8  
 59/14 60/7 63/16 71/11  
 cannot [2] 15/6 21/23  
 capable [1] 30/16  
 care [7] 14/7 22/24 48/25 68/11 68/16 69/5  
 69/7  
 careful [1] 63/21  
 carefully [1] 18/6  
 carrying [1] 28/24  
 carve [1] 14/3  
 case [8] 11/7 16/13 32/15 33/14 36/20 63/26  
 64/4 64/6  
 cases [1] 65/12  
 cast [2] 49/19 49/20  
 catching [1] 38/2  
 causation [3] 14/9 14/10 43/19  
 cause [13] 3/7 3/22 3/23 14/6 14/7 55/26  
 67/16 69/2 69/4 69/9 69/10 69/13 69/15  
 caused [1] 36/21  
 causes [2] 3/21 68/9  
 centers [1] 61/23  
 Centre [2] 1/10 1/26  
 certain [6] 5/9 7/22 57/16 65/17 70/9 71/2  
 certainly [2] 40/26 68/3  
 Certified [1] 72/9  
 CFC [4] 5/2 5/3 5/6 5/8  
 CFO [2] 31/9 64/3  
 chain [1] 65/19  
 Chance [42] 12/23 13/4 13/11 19/18 20/22  
 21/8 21/11 22/4 23/25 24/10 24/22 24/25  
 24/26 25/26 26/5 26/7 26/16 27/26 28/17  
 29/2 29/15 32/13 35/18 35/25 36/14 37/9

<p><b>C</b></p> <p>Chance... [16] 38/2 38/8 38/11 38/22 46/25 48/24 49/24 52/24 54/26 63/7 63/11 64/5 66/16 66/17 66/26 70/11 Chance's [3] 35/26 37/6 40/3 change [9] 29/17 29/24 39/7 42/4 43/24 44/6 44/13 45/13 47/24 changed [2] 4/17 6/5 changes [1] 6/2 Chapter [2] 7/14 7/18 check [15] 9/17 9/19 10/11 11/11 11/14 12/3 12/11 12/24 12/25 13/21 51/20 67/19 67/20 67/22 67/25 checking [1] 11/18 chronological [1] 42/25 chronologically [1] 43/9 circled [1] 58/15 circumstances [4] 5/9 5/12 17/9 70/9 CIVIL [1] 1/2 claim [25] 9/17 9/19 9/20 10/22 10/24 11/2 13/25 14/4 14/8 31/16 36/18 38/5 48/22 49/3 49/11 51/24 67/21 67/26 69/17 69/20 69/24 71/8 71/10 71/21 72/2 claiming [3] 17/6 50/22 62/16 claims [3] 10/25 45/11 69/16 clarify [1] 16/12 clause [4] 6/14 45/16 47/14 52/6 clear [9] 9/24 22/8 22/9 24/14 24/22 26/26 50/25 57/6 63/20 clearly [2] 13/21 29/7 client [15] 16/20 29/21 41/9 41/9 52/12 52/16 52/16 57/11 57/12 59/22 59/22 62/20 70/5 70/8 70/18 client's [1] 58/4 Clifford [46] 12/23 13/3 13/11 19/17 20/22 21/8 21/11 22/4 23/25 24/10 24/22 24/25 24/25 25/26 26/5 26/5 26/7 26/16 27/26 28/17 29/2 29/15 32/13 35/18 35/25 35/26 36/14 37/6 37/9 38/2 38/8 38/11 38/22 40/3 46/25 48/24 49/24 52/24 54/26 63/6 63/11 64/5 66/15 66/17 66/26 70/11 close [1] 30/19 closing [1] 20/2 co [2] 3/13 17/13 co-counsel [1] 3/13 co-obligors [1] 17/13 code [5] 4/21 5/11 7/14 59/14 61/8 collateral [1] 8/6 colleagues [1] 3/17 collectively [1] 3/5 combining [1] 68/20 come [5] 7/5 15/14 30/3 49/9 71/24 comes [5] 43/9 47/22 57/4 66/21 67/2 coming [4] 4/19 11/15 19/26 33/2 commercial [11] 25/11 26/20 26/21 26/23 30/15 30/20 59/16 59/18 59/19 61/7 61/16 committee [1] 55/20 companies [2] 21/3 21/4 company [31] 4/5 4/9 4/11 4/23 4/24 5/5 5/6 5/21 9/25 12/20 13/2 15/26 17/23 18/17 28/22 30/23 31/4 31/4 31/18 34/8 35/8 36/9 38/22 39/6 41/20 41/24 47/24 48/17 48/20 62/24 68/5 company's [2] 16/26 21/24 comparative [1] 37/26 complaint [39] 3/6 3/21 3/26 4/26 5/26 8/9 8/15 9/10 9/15 13/10 28/4 31/15 31/22 36/8 37/5 37/8 39/5 39/20 41/22 41/23 42/7 43/18 43/25 44/20 48/6 49/15 49/18 50/21 51/11 51/12 54/19 54/20 61/20 61/21 63/25 68/26 69/22 71/9 71/19 completely [3] 51/21 51/22 55/13</p>	<p>complicated [2] 34/23 57/5 component [1] 23/5 conceivably [1] 59/23 concern [1] 6/24 concerned [1] 6/23 concerning [1] 55/24 concerns [1] 37/17 concludes [2] 25/15 59/7 conclusion [7] 11/8 27/8 31/14 33/2 59/19 59/19 67/5 conclusively [1] 18/25 conduct [1] 51/22 conference [1] 64/17 Congress [1] 5/20 connect [3] 33/13 56/9 63/12 connected [1] 50/11 connection [8] 8/5 10/23 12/25 16/21 18/25 44/24 46/11 56/17 consequences [2] 36/11 55/11 considered [3] 5/10 17/13 45/2 consistent [1] 60/18 consolidated [2] 64/12 64/25 construction [1] 28/9 construe [1] 49/25 contained [4] 14/12 30/14 51/9 66/5 containing [1] 8/10 contains [1] 34/9 contend [1] 43/17 contending [1] 38/10 contention [1] 33/11 context [3] 21/11 42/21 44/4 continue [6] 35/7 35/10 37/15 48/19 48/21 48/26 continued [4] 1/23 2/2 6/8 46/13 continuing [2] 70/25 70/26 continuous [2] 11/2 51/23 continuously [1] 68/5 contractual [3] 13/16 13/17 28/9 contractually [1] 53/12 contradict [4] 41/15 41/18 41/18 56/19 contrary [1] 59/9 controlled [2] 5/4 5/6 controls [1] 16/14 converting [1] 62/22 conveyed [1] 58/17 copied [1] 64/5 copy [1] 43/2 corner [1] 44/8 corollary [1] 51/2 corporation [1] 9/25 correct [1] 47/16 could [24] 5/17 10/22 14/16 14/20 17/4 17/11 18/17 22/13 27/14 27/15 31/5 42/25 51/2 52/17 55/13 60/12 63/19 65/22 66/4 66/5 66/9 66/24 66/26 67/4 couldn't [3] 41/25 49/12 52/16 counsel [8] 3/13 8/26 13/3 13/5 19/10 25/2 64/3 71/11 counsel's [1] 52/19 counting [1] 44/16 COUNTY [1] 1/2 couple [4] 8/22 50/19 53/23 54/7 course [6] 6/26 17/24 30/5 41/21 58/2 71/15 COURT [26] 1/2 1/10 1/14 1/25 3/2 8/23 8/23 10/2 14/18 14/20 18/24 22/13 24/20 25/18 28/3 28/5 28/15 43/6 54/16 56/20 63/4 63/19 63/19 67/9 67/12 72/12 Court's [2] 11/26 17/4 cover [1] 5/18 covered [4] 23/6 28/25 28/26 53/15 create [4] 13/7 13/16 13/17 48/26 created [2] 4/10 37/14 credit [106]</p>	<p>critically [1] 27/12 current [1] 34/5 curve [2] 33/3 33/5 cut [2] 37/3 37/5 CYA [1] 58/8</p> <p><b>D</b></p> <p>damages [13] 7/16 12/21 40/10 40/16 45/20 48/22 54/20 55/26 56/8 70/23 71/2 71/5 71/7 date [1] 71/24 dated [2] 9/12 64/2 DAVIS [2] 2/4 3/16 day [9] 6/12 14/2 30/14 31/25 51/8 53/18 58/12 62/26 70/16 days [1] 31/7 dead [3] 35/23 40/21 40/22 deal [3] 34/26 67/21 70/11 dealing [2] 35/14 35/14 debt [3] 42/13 64/24 65/3 debts [3] 4/14 5/19 23/6 decide [1] 53/18 decided [1] 47/25 decipher [1] 57/3 decision [4] 68/24 68/25 69/21 71/26 declaration [1] 20/4 deed [2] 60/21 60/25 deemed [1] 5/8 defeat [1] 43/19 Defendant [2] 2/4 69/18 Defendant's [1] 68/25 Defendants [6] 1/8 3/5 3/15 4/10 43/16 64/4 defense [5] 41/2 49/3 49/6 49/10 71/11 deficiency [1] 8/10 define [1] 5/12 defined [2] 5/3 34/18 definition [2] 34/21 34/22 demonstrably [1] 14/15 denied [3] 43/25 69/23 71/19 depending [2] 66/24 71/17 deprived [1] 55/20 describe [1] 13/24 describing [3] 12/2 37/23 37/25 despite [1] 63/8 details [1] 40/7 determine [1] 71/6 diametrically [2] 21/13 66/13 did [40] 10/13 12/3 12/7 12/8 13/11 15/20 18/13 23/14 25/23 26/10 26/19 27/22 28/23 32/6 32/13 32/17 35/16 37/10 38/8 38/11 39/10 39/21 42/4 46/5 46/5 46/11 47/3 47/4 47/6 51/14 51/16 55/3 55/4 56/26 57/2 57/2 57/3 58/6 62/11 63/7 didn't [32] 15/13 15/14 16/23 18/2 18/4 19/12 33/12 37/12 38/10 38/10 39/16 39/19 39/20 39/25 40/6 40/22 41/5 41/6 41/26 42/9 42/15 42/20 49/13 49/26 51/15 52/24 56/24 56/24 58/5 58/6 62/20 62/21 difference [2] 44/16 61/8 different [9] 13/3 16/16 44/10 44/15 50/21 51/13 54/11 54/25 68/16 digest [1] 57/3 digging [1] 57/19 dilemma [1] 39/12 direct [5] 5/14 5/23 8/3 19/24 55/25 directed [2] 34/24 34/25 directly [1] 56/18 disagree [3] 24/26 57/21 57/22 disclose [1] 55/19 disclosed [1] 41/13 discovered [1] 19/9 discovery [9] 22/14 56/22 63/17 64/13 70/13 71/4 71/5 71/18 71/25 discreet [1] 57/6</p>
---	--	--

**D**  
discuss [2] 20/11 20/21  
discussed [1] 24/5  
discussion [1] 47/23  
dismiss [15] 3/6 18/25 31/16 49/11 63/4  
63/15 67/14 67/23 68/26 69/13 69/20 69/22  
71/13 71/16 71/19  
dismissal [1] 13/25  
dismissed [2] 11/4 51/24  
dismissing [1] 31/16  
dispute [6] 24/18 32/23 33/11 45/4 45/5 70/3  
disputes [1] 65/22  
disputing [1] 56/7  
distributed [1] 5/9  
distribution [3] 4/22 5/11 5/23  
distributions [1] 4/22  
dividend [2] 4/22 5/10  
Division [1] 16/18  
do [50] 8/19 8/26 8/26 11/22 12/11 16/4 16/8  
20/22 21/16 24/12 24/13 25/3 25/5 25/7  
29/23 31/5 31/6 32/12 32/12 33/11 34/10  
35/5 35/5 35/9 37/10 37/21 37/26 38/3 39/19  
41/18 47/7 47/11 49/17 49/18 53/2 53/8 54/3  
56/9 57/13 58/5 58/6 60/9 62/9 62/10 62/21  
63/17 66/22 68/23 69/12 70/22  
document [16] 1/9 21/25 22/3 23/26 26/22  
36/3 38/22 38/25 39/5 40/4 40/5 43/6 44/5  
49/24 49/25 67/10  
documentary [5] 3/6 18/24 39/14 65/14  
67/11  
documentation [1] 46/12  
documented [3] 12/22 46/9 54/25  
documents [15] 6/20 13/4 19/12 27/23 41/15  
41/17 42/22 43/17 49/16 49/22 56/17 59/17  
62/24 62/24 63/8  
does [14] 17/14 19/21 20/22 20/23 21/6 34/7  
43/23 44/14 44/17 60/26 61/2 61/7 67/21  
68/19  
doesn't [18] 11/25 16/4 17/26 22/18 28/13  
37/8 41/10 47/4 47/6 47/7 48/26 52/13 54/8  
62/25 62/26 65/13 67/4 67/10  
doing [4] 30/2 45/15 54/16 59/24  
dollar [1] 57/24  
dollars [2] 7/25 8/4  
domestic [1] 15/7  
don't [45] 16/5 16/9 21/9 22/6 22/24 23/2  
23/6 25/2 26/25 31/5 31/6 32/14 35/6 35/26  
36/15 36/18 37/5 37/9 37/11 38/24 38/24  
38/26 41/17 42/19 45/4 45/5 47/2 48/19  
48/23 48/25 48/25 53/13 54/8 56/10 57/10  
59/23 60/3 60/17 62/14 62/21 65/19 65/25  
66/18 66/19 68/19  
don't know [1] 38/26  
done [5] 11/6 12/10 28/26 29/2 29/14  
dots [4] 33/13 50/11 50/12 56/10  
doubt [2] 39/8 63/24  
doubting [1] 38/23  
down [10] 13/7 27/21 35/7 35/11 43/20  
48/21 51/6 61/18 62/9 70/13  
downturn [1] 48/3  
draft [5] 20/23 30/13 43/12 47/22 65/11  
drafted [14] 18/9 18/10 18/16 18/17 19/8  
28/17 28/20 29/5 43/13 46/18 46/21 48/24  
48/25 52/17  
drafting [4] 16/21 29/11 30/19 62/19  
drafts [1] 45/10  
draw [5] 33/5 35/7 35/11 48/21 62/9  
drawdown [15] 31/25 32/2 32/6 39/10 39/24  
40/11 40/17 40/18 54/3 59/24 62/9 62/10  
69/26 69/26 70/22  
drawdowns [3] 54/21 54/24 55/15  
drawing [1] 30/19

driven [1] 59/19  
due [1] 7/23  
dunk [1] 65/16  
duplicative [1] 68/13  
during [3] 12/18 47/20 71/18  
dust [1] 71/23  
duties [1] 69/7  
duty [13] 3/24 14/5 14/7 68/10 68/11 68/12  
68/16 68/18 69/3 69/5 69/7 69/7 70/25

**E**  
e-mail [12] 22/14 24/14 24/21 62/18 63/19  
63/26 64/19 65/9 65/10 65/19 66/7 67/6  
e-mails [8] 21/26 24/17 65/12 65/16 65/16  
65/17 65/18 65/21  
each [4] 4/14 29/11 64/24 65/2  
earlier [3] 7/5 29/13 54/16  
early [1] 46/23  
earning [1] 5/3  
earnings [1] 5/8  
earth [1] 38/14  
easy [1] 57/14  
Edelson [6] 24/23 63/25 64/2 64/7 64/20  
67/5  
Edelson's [1] 21/24  
effect [2] 32/19 34/3  
effectively [1] 10/13  
effects [1] 55/25  
eggs [1] 57/14  
either [5] 12/8 30/24 51/14 51/17 60/25  
election [5] 10/11 12/3 12/24 12/26 67/22  
elevated [1] 11/13  
eleventh [1] 38/11  
else [3] 12/4 30/7 65/19  
enacted [1] 5/25  
enclosure [1] 34/9  
encompasses [1] 68/18  
end [12] 6/12 29/4 30/12 31/25 32/19 33/2  
35/16 47/21 53/18 58/12 59/24 70/15  
ended [1] 10/19  
engage [1] 17/12  
engagement [3] 31/8 66/25 70/10  
engages [1] 61/11  
engender [1] 65/18  
enough [2] 17/3 66/12  
enter [3] 3/9 13/2 17/17  
entered [6] 13/18 17/16 21/19 21/20 46/7  
46/24  
entire [4] 36/8 63/2 64/24 65/3  
entities [2] 9/21 9/23  
entitled [1] 13/25  
entity [2] 4/14 9/22  
equivalent [1] 5/10  
ESQ [6] 1/19 1/19 1/23 2/6 2/6 2/7  
essentially [7] 12/23 22/4 29/8 30/19 31/17  
68/15 69/15  
establishes [1] 18/26  
et [1] 3/4  
even [12] 24/11 34/2 34/3 34/23 40/9 42/6  
48/24 49/18 49/22 62/25 66/10 66/20  
event [1] 35/17  
eventually [1] 49/10  
ever [1] 24/11  
every [3] 30/5 49/5 57/24  
everybody [2] 36/24 45/25  
everything [9] 7/8 7/11 7/12 24/17 30/3 30/9  
40/23 45/17 69/25  
evidence [9] 3/6 15/25 18/24 25/18 25/21  
39/14 53/14 65/14 67/11  
exact [2] 38/25 50/3  
exactly [11] 12/16 24/23 35/26 36/6 48/16  
52/26 53/2 63/17 65/5 67/10 70/13  
examples [2] 68/3 68/4

excluding [1] 34/13  
exculpatory [1] 52/6  
executing [1] 48/7  
exhaustive [1] 68/4  
Exhibit [8] 20/4 28/18 31/14 43/7 43/11  
43/20 44/20 49/23  
Exhibits [1] 19/5  
existence [3] 19/26 19/26 36/8  
existing [3] 34/8 35/10 55/15  
exists [1] 34/4  
expects [1] 7/24  
expert [1] 50/12  
experts [2] 52/25 52/26  
explain [5] 15/17 15/20 15/22 19/7 60/12  
explaining [1] 60/15  
exposed [1] 11/17  
expression [2] 16/25 66/6  
expressly [1] 5/13  
extent [2] 44/7 45/22

**F**  
face [1] 17/23  
facilities [4] 31/26 34/2 46/8 55/12  
facility [21] 6/18 21/5 29/4 30/2 30/11 30/13  
30/14 31/24 32/4 32/25 33/7 33/10 33/19  
34/20 34/25 36/22 46/24 47/18 47/21 55/15  
55/16  
facing [2] 6/12 39/12  
fact [13] 15/19 24/7 32/6 35/13 40/26 41/3  
49/15 57/8 61/7 62/11 62/11 62/22 63/8  
facts [4] 33/15 36/16 41/13 61/20  
factual [5] 24/18 56/26 58/10 58/25 70/12  
factually [1] 62/14  
failed [1] 70/8  
failure [2] 3/7 68/2  
fairly [1] 49/24  
faith [1] 23/8  
falls [1] 27/20  
false [13] 14/15 14/19 14/19 19/2 27/19  
27/20 27/21 27/22 27/22 27/23 49/12 49/13  
63/3  
far [6] 10/16 10/17 21/24 45/18 45/18 45/24  
fashion [1] 7/4  
fast [4] 6/10 47/10 47/11 48/2  
fault [1] 37/26  
faulty [1] 70/17  
February [2] 8/8 64/2  
February 11 [1] 8/8  
February 5 [1] 64/2  
feel [1] 54/2  
few [1] 9/4  
fiduciary [3] 3/24 68/18 69/7  
File [1] 71/21  
filed [2] 7/13 8/9  
files [4] 21/24 27/24 39/2 41/25  
filing [1] 7/18  
final [1] 34/17  
finalized [1] 30/20  
finally [3] 7/17 8/16 54/2  
finance [2] 30/15 30/21  
financial [1] 8/5  
financing [2] 24/2 36/3  
find [5] 41/25 41/26 55/6 70/26 71/8  
finding [2] 6/17 70/12  
fine [4] 30/9 36/16 49/8 53/17  
finish [1] 53/25  
firm [6] 35/15 35/15 39/21 41/12 44/23  
54/26  
first [24] 3/22 8/18 14/6 15/4 16/7 24/20  
28/3 28/18 28/23 38/20 41/21 43/19 43/20  
45/5 47/22 48/12 50/20 54/8 55/22 61/12  
68/13 69/4 69/10 69/15  
five [3] 21/15 29/8 57/11

**F**  
 flavor [2] 8/14 40/15  
 flip [2] 34/12 42/24  
 floor [1] 1/22  
 flow [7] 11/25 12/21 32/5 40/10 54/20 56/8 70/23  
 flowed [2] 33/6 40/16  
 flowing [1] 45/12  
 flows [3] 11/23 24/7 69/25  
 focus [3] 24/19 38/5 41/22  
 focused [2] 28/5 49/23  
 focuses [1] 68/21  
 follow [4] 11/21 11/22 16/8 16/9  
 followed [1] 46/19  
 following [3] 17/9 48/2 48/12  
 footnote [8] 20/10 20/11 20/20 20/25 29/9 29/10 44/20 44/25  
 forcefully [1] 13/14  
 foreign [14] 4/3 4/6 4/12 4/23 5/5 5/6 5/15 5/18 36/10 42/12 46/15 53/3 62/3 68/6  
 foresee [1] 12/26  
 forget [2] 8/12 23/4  
 form [3] 9/12 61/14 67/24  
 formal [2] 52/12 62/23  
 forth [9] 6/2 6/3 14/13 31/13 40/10 40/10 61/12 69/9 69/24  
 forward [26] 6/10 6/18 29/4 30/2 30/10 30/13 30/13 31/24 31/26 32/3 32/25 33/7 33/10 33/18 34/2 34/20 34/24 34/25 43/16 47/18 47/20 48/2 55/9 62/25 71/20 72/2  
 forwarded [2] 47/10 47/11  
 found [3] 22/14 62/23 68/22  
 foundation [1] 56/6  
 four [6] 29/11 29/22 30/18 42/22 43/16 57/11  
 frankly [2] 21/26 26/12  
 fraud [1] 64/8  
 front [3] 28/4 38/18 38/19  
 FSF [3] 6/18 47/11 48/6  
 fully [1] 58/18  
 functionally [1] 5/10  
 funds [1] 64/22  
 further [1] 24/17

**G**  
 game [1] 56/23  
 gave [3] 40/20 42/23 56/11  
 GEHRING [2] 2/7 3/18  
 general [4] 19/9 53/9 53/10 64/2  
 generally [3] 25/13 30/25 52/22  
 gentleman [1] 44/22  
 get [21] 22/20 22/25 23/2 24/17 25/18 30/7 32/17 35/2 35/4 36/18 36/19 47/9 53/26 54/2 54/4 58/20 59/15 59/15 60/7 60/15 71/5  
 gets [6] 4/23 11/12 11/16 47/19 47/21 53/18  
 getting [9] 5/22 5/22 5/23 6/25 12/13 30/7 31/14 33/3 33/4  
 give [7] 8/23 41/8 52/10 53/7 61/9 68/2 71/24  
 given [4] 10/22 35/8 66/9 68/3  
 gives [4] 12/25 35/9 40/15 48/21  
 giving [3] 22/21 30/4 40/20  
 go [25] 6/7 8/16 19/3 23/12 29/16 34/16 39/23 40/20 41/2 41/16 43/7 43/20 47/23 47/25 51/5 52/24 54/15 62/5 62/25 66/21 66/22 67/2 67/3 70/22 71/20  
 God's [1] 38/14  
 goes [9] 4/2 8/14 20/10 45/24 55/7 59/9 60/21 60/25 71/4  
 going [44] 6/2 6/23 13/16 13/17 15/19 15/24 15/25 17/24 19/11 22/20 23/2 23/24 25/18 29/21 29/22 30/5 30/7 34/6 41/2 42/24 45/15

47/12 47/13 51/19 52/20 52/23 54/9 55/6 55/9 56/25 57/7 57/13 58/23 61/18 62/6 65/20 67/16 67/17 69/12 69/13 69/20 71/5 71/20 72/2  
 good [11] 7/9 8/21 10/16 10/17 32/4 32/5 40/14 56/25 57/18 60/21 60/25  
 good-bye [1] 56/25  
 goodness [1] 45/25  
 got [21] 4/17 8/25 9/6 33/9 33/15 33/23 33/23 35/18 36/20 36/25 37/24 41/4 41/4 44/3 45/23 47/13 50/16 52/5 52/9 56/13 68/8  
 grant [1] 69/12  
 green [2] 39/23 40/20  
 group [4] 1/3 3/3 21/3 29/22  
 guarantee [17] 5/24 15/6 20/18 20/24 21/13 22/11 22/16 22/26 42/12 42/13 44/2 44/3 44/11 50/14 61/3 62/4 67/6  
 guaranteeing [1] 63/12  
 guarantees [8] 5/13 20/5 20/11 20/17 20/26 21/9 50/4 50/5  
 guarantor [5] 42/15 49/21 50/2 50/8 50/9  
 Guarantors [1] 19/23  
 guess [3] 4/22 6/17 53/18  
 guy [2] 44/18 66/22  
 guys [12] 14/5 30/4 32/13 36/2 36/6 36/7 49/9 57/2 57/3 59/10 60/10 67/2

**H**  
 had [33] 4/7 5/26 7/5 7/11 7/26 11/19 12/10 13/14 15/5 15/11 17/17 18/8 19/11 21/12 21/20 29/23 29/24 31/22 33/5 33/11 38/12 38/12 45/19 53/8 54/18 55/10 57/11 57/15 58/18 58/21 59/2 59/20 66/13  
 half [2] 19/10 61/12  
 hand [4] 42/22 42/26 42/26 44/8  
 hand-up [1] 42/22  
 handed [1] 43/6  
 handouts [4] 8/22 9/2 9/5 9/6  
 handwriting [1] 38/24  
 hang [2] 23/21 46/6  
 happen [1] 42/2  
 happened [8] 7/16 12/5 32/3 36/6 36/15 36/22 39/22 40/15  
 happening [3] 40/16 45/17 50/4  
 happens [4] 6/16 11/12 11/14 15/21  
 has [20] 3/2 4/3 8/4 11/18 12/19 12/26 15/11 19/21 19/22 25/10 25/22 25/23 27/3 27/18 28/3 32/11 36/11 49/7 67/12 71/16  
 hasn't [1] 67/15  
 have [94]  
 haven't [2] 14/10 67/15  
 having [6] 3/9 3/25 4/6 5/21 10/9 69/19  
 he [18] 19/11 19/12 30/17 31/4 44/23 45/2 48/14 48/15 48/15 48/17 60/23 60/26 62/19 62/20 62/21 64/23 64/26 65/5  
 he's [6] 32/9 44/21 48/16 60/20 64/3 64/26  
 head [4] 6/17 7/12 30/3 30/11  
 hear [2] 15/13 37/5  
 HEATHER [2] 2/6 3/17  
 hell [1] 54/5  
 help [3] 57/8 63/16 71/11  
 helped [1] 47/7  
 helping [1] 49/7  
 here [50] 3/26 4/7 4/10 4/26 8/20 14/2 14/5 14/9 15/4 22/5 23/5 23/24 24/8 26/7 27/5 32/16 33/18 35/17 36/4 36/14 37/2 37/5 38/2 39/9 39/15 39/17 40/16 43/15 44/22 49/7 50/4 50/10 52/6 54/16 55/7 56/26 57/25 58/14 58/15 58/24 58/26 59/21 61/20 61/23 64/12 67/5 69/23 70/25 71/10 71/23  
 herein [2] 8/7 56/2  
 hey [2] 21/8 23/2  
 highlighted [1] 55/5

hinging [1] 27/12  
 hired [1] 36/14  
 his [5] 30/21 42/23 52/18 64/26 65/22  
 historical [1] 16/26  
 history [3] 36/8 36/14 61/23  
 hit [1] 46/3  
 HOARD [4] 1/16 1/19 3/12 50/20  
 hold [5] 18/12 41/12 55/6 55/7 55/8  
 holding [1] 21/3  
 HON [1] 1/14  
 Honor [74]  
 hopping [1] 52/5  
 hour [2] 30/20 38/11  
 house [2] 28/26 46/10  
 how [11] 22/24 22/24 37/26 38/3 41/11 50/6 53/7 57/2 60/4 68/4 71/17  
 however [5] 18/8 45/7 52/13 70/16 70/17  
 hundreds [1] 72/4

**I**  
 I'll [6] 4/26 24/21 41/16 43/20 51/6 72/3  
 I'm [25] 15/4 15/13 16/8 17/21 17/21 23/11 24/9 30/16 35/14 37/4 38/17 38/17 39/12 39/26 40/17 42/24 52/4 56/6 56/7 57/18 61/18 66/16 69/12 69/13 69/20  
 I've [3] 36/20 50/24 57/15  
 idea [1] 25/22  
 identical [2] 9/5 69/4  
 identifying [1] 58/10  
 ignore [2] 13/9 57/8  
 imagine [1] 12/26  
 impact [4] 6/25 27/3 53/11 70/20  
 impacted [1] 4/20  
 impetus [2] 33/19 70/21  
 implications [3] 20/11 20/21 45/2  
 important [4] 11/26 17/3 18/3 54/14  
 improper [1] 55/17  
 in-house [2] 28/26 46/10  
 inaccurate [2] 41/11 70/17  
 INC [1] 1/3  
 included [3] 34/20 34/22 58/4  
 includes [2] 29/3 29/5  
 including [3] 5/13 34/11 46/14  
 inclusion [1] 55/14  
 income [5] 4/7 7/25 8/10 46/15 53/4  
 inconsistent [3] 49/26 50/7 66/14  
 incorporated [2] 51/11 56/11  
 incorrect [1] 7/23  
 incredible [1] 36/16  
 incur [3] 18/2 36/10 54/9  
 incurred [1] 8/4  
 indebtedness [1] 19/26  
 independence [1] 36/9  
 independent [2] 51/24 55/20  
 index [2] 1/5 3/4  
 indicate [2] 17/10 37/9  
 indirect [2] 5/14 19/24  
 indulge [1] 63/18  
 indulgence [1] 17/4  
 industry [1] 48/3  
 information [4] 52/7 57/3 70/4 70/5  
 informed [1] 58/22  
 initial [1] 51/19  
 initially [3] 28/16 43/24 44/6  
 inquires [1] 15/15  
 inquiries [1] 15/10  
 instantaneously [1] 31/3  
 instead [2] 5/22 13/16  
 insufficient [1] 11/7  
 intend [7] 18/4 23/15 25/24 26/20 42/5 42/15 50/2  
 intended [11] 13/18 15/7 15/26 16/2 16/23 16/24 17/11 25/23 42/3 62/3 67/6

<p><b>I</b></p> <p>intent [16] 14/26 16/26 18/14 18/26 19/13 27/6 27/7 29/17 29/19 39/6 49/20 50/8 50/9 53/14 61/14 66/6</p> <p>intention [2] 18/10 39/13</p> <p>interesting [2] 6/21 7/20</p> <p>interfering [1] 36/19</p> <p>internal [5] 5/11 7/18 7/21 8/8 47/22</p> <p>internally [2] 37/14 46/5</p> <p>internally we [1] 46/5</p> <p>International [2] 21/2 21/2</p> <p>interplay [1] 24/5</p> <p>interpose [1] 65/22</p> <p>interpret [3] 60/4 63/9 63/10</p> <p>interpretation [8] 13/18 24/22 24/24 24/25 55/24 63/24 65/7 65/23</p> <p>interpretations [3] 14/25 25/16 27/10</p> <p>interpreted [1] 5/17</p> <p>inventory [1] 11/19</p> <p>involved [2] 25/21 66/20</p> <p>involvement [2] 26/5 37/6</p> <p>irrelevant [1] 26/13</p> <p>IRS [8] 15/22 25/20 45/23 53/19 54/11 59/8 60/24 62/7</p> <p>is [289]</p> <p>is that [1] 50/23</p> <p>isn't [2] 56/21 67/9</p> <p>issue [52] 6/19 7/2 7/4 7/6 7/23 8/2 8/13 8/19 9/13 11/16 12/2 12/24 13/6 13/13 13/22 15/18 19/17 22/19 23/4 24/8 25/20 26/8 30/25 31/24 35/14 36/23 40/26 41/3 41/4 41/6 41/10 45/14 48/7 52/23 55/19 55/21 55/22 58/10 58/21 58/22 58/26 60/23 61/2 61/15 63/4 64/23 65/25 66/17 66/19 66/21 68/7 71/2</p> <p>issued [6] 30/9 38/13 39/10 39/22 40/8 70/2</p> <p>issues [9] 4/4 13/21 45/18 46/15 57/6 62/10 62/19 67/12 70/12</p> <p>it [202]</p> <p>it's [75]</p> <p>itkin [6] 24/23 31/9 58/16 63/26 64/3 64/8</p> <p>its [27] 4/6 4/23 4/25 5/9 8/5 8/6 11/12 11/13 11/19 12/4 12/20 16/3 16/20 16/21 16/26 18/3 18/3 19/5 22/5 33/2 44/21 51/15 55/14 55/15 58/5 62/26 70/20</p> <p>itself [11] 7/4 16/19 20/18 29/6 41/14 44/20 47/21 51/13 55/21 65/13 70/21</p>	<p>47/25 50/18 51/2 51/5 52/19 53/9 53/23 54/6 56/5 56/5 57/16 59/20 59/21 63/16 63/16 63/19 65/13 65/13 65/20 66/16 68/16 69/17</p> <p>Justice [1] 1/14</p> <p><b>K</b></p> <p>keep [2] 44/3 57/13</p> <p>kidding [1] 60/22</p> <p>kind [6] 11/17 22/6 29/20 37/12 53/16 65/18</p> <p>knew [7] 14/19 18/13 27/23 39/18 39/24 51/16 59/3</p> <p>know [60] 11/12 14/2 24/12 24/13 24/16 24/24 26/4 26/6 26/9 26/14 27/21 27/22 29/18 32/4 33/12 35/26 36/7 36/15 37/11 37/24 38/10 38/10 38/23 38/24 38/25 38/26 38/26 39/16 39/25 40/6 40/13 41/5 41/6 41/7 41/8 41/11 42/12 44/16 44/19 52/7 52/26 53/2 53/17 54/5 56/10 56/21 56/24 56/26 57/2 57/3 59/23 59/23 60/4 60/11 61/24 65/19 66/18 66/18 71/15 71/23</p> <p>knowing [1] 38/7</p> <p>known [3] 18/8 38/12 57/16</p> <p>knows [1] 66/24</p> <p><b>L</b></p> <p>labeling [1] 68/16</p> <p>laid [1] 7/6</p> <p>language [24] 20/23 22/6 22/24 23/14 23/15 25/12 25/13 25/16 28/10 28/22 28/25 29/6 29/7 29/9 30/15 33/20 34/4 47/20 47/26 50/13 52/13 61/9 61/25 63/5</p> <p>large [1] 6/12</p> <p>largely [1] 8/13</p> <p>last [5] 23/18 34/12 34/16 43/9 53/26</p> <p>late [1] 7/12</p> <p>later [7] 12/14 19/10 21/15 30/18 62/10 62/20 64/18</p> <p>LAURA [2] 1/25 72/12</p> <p>law [13] 11/7 35/15 35/15 37/24 39/21 41/12 54/26 57/5 59/16 59/18 59/19 61/7 61/16</p> <p>laws [1] 6/2</p> <p>lawsuit [1] 64/11</p> <p>lawyer [7] 30/15 30/16 30/21 30/21 41/12 57/25 60/19</p> <p>lawyer's [1] 30/25</p> <p>lawyers [1] 41/7</p> <p>leap [1] 23/8</p> <p>least [7] 4/19 26/7 33/23 37/14 43/24 52/8 55/26</p> <p>led [1] 48/18</p> <p>legal [18] 3/22 14/4 35/14 35/23 36/18 41/7 68/17 68/17 69/5 69/6 69/17 69/20 69/22 69/24 71/8 71/10 71/20 72/2</p> <p>lend [3] 47/13 65/13 71/12</p> <p>lender [7] 7/2 7/3 22/19 22/20 23/2 48/12 50/4</p> <p>lenders [11] 6/18 6/18 6/22 7/7 30/4 31/23 44/13 47/12 48/4 48/6 48/7</p> <p>lengthy [1] 59/21</p> <p>less [5] 7/2 32/12 33/11 63/14 71/13</p> <p>let [12] 16/6 16/12 18/21 24/19 24/26 25/3 31/6 38/15 51/26 53/25 57/4 71/23</p> <p>let's [11] 8/18 11/10 26/6 40/6 40/13 42/21 43/7 43/7 43/8 54/3 66/10</p> <p>letter [4] 66/25 70/16 70/19 70/21</p> <p>level [3] 10/15 11/13 20/6</p> <p>Lexington [1] 2/5</p> <p>liabilities [3] 6/13 17/24 32/5</p> <p>liability [33] 4/15 5/24 6/9 6/14 6/21 6/26 11/16 11/17 11/20 11/24 12/9 13/7 13/13 15/18 15/23 18/2 18/7 22/7 23/4 24/8 26/8 26/17 26/22 36/24 37/4 45/8 45/16 45/18 47/14 52/23 53/15 54/9 70/20</p>	<p>liability issue [1] 23/4</p> <p>liable [9] 4/13 4/14 5/19 16/3 19/25 21/10 23/6 41/12 64/23</p> <p>light [2] 39/23 40/21</p> <p>like [8] 9/7 21/25 24/20 45/7 50/13 52/5 57/14 58/12</p> <p>likely [1] 25/19</p> <p>limitations [10] 3/7 8/18 8/19 8/20 9/16 10/25 11/3 70/24 71/2 71/3</p> <p>line [11] 14/4 19/22 23/19 32/5 32/22 36/26 37/2 37/3 40/16 53/16 70/18</p> <p>list [1] 68/4</p> <p>listening [1] 17/21</p> <p>listing [1] 4/18</p> <p>literally [1] 67/24</p> <p>litigated [1] 54/10</p> <p>litigation [2] 8/6 25/19</p> <p>little [11] 8/25 14/3 29/11 36/17 37/19 37/22 37/24 38/16 39/26 49/8 57/19</p> <p>LLP [3] 1/6 1/16 1/21</p> <p>loan [4] 5/24 6/15 23/26 62/4</p> <p>loaned [1] 6/22</p> <p>loans [6] 4/9 4/12 4/13 5/13 6/11 6/12</p> <p>log [1] 25/11</p> <p>longer [1] 44/23</p> <p>look [18] 22/20 26/15 26/16 30/23 30/23 31/2 32/10 40/6 42/21 43/19 49/21 49/24 53/14 60/17 61/14 61/15 63/5 63/9</p> <p>looked [7] 4/25 31/2 41/25 41/26 48/14 50/12 68/14</p> <p>looking [13] 6/19 7/15 15/4 17/21 21/8 26/5 45/11 45/20 46/2 52/4 52/20 52/20 59/16</p> <p>looks [1] 45/7</p> <p>loose [1] 54/5</p> <p>lot [6] 36/5 36/5 56/26 57/19 58/25 61/22</p> <p>loud [1] 26/6</p> <p>loyalty [7] 14/5 68/11 68/13 68/16 68/18 69/3 69/8</p> <p>LUDOVICO [2] 1/25 72/12</p>
<p><b>J</b></p> <p>JEFFREY [1] 1/14</p> <p>Jim [1] 44/22</p> <p>JOHN [2] 1/19 3/13</p> <p>joint [71] 4/15 4/18 5/24 6/9 6/14 6/20 6/26 7/23 8/2 8/13 9/13 11/15 11/23 12/9 13/5 13/13 15/17 15/23 16/2 21/4 21/13 22/7 22/10 22/15 23/3 23/4 23/5 23/13 24/8 25/12 26/8 26/23 26/26 27/2 27/5 27/9 28/10 28/11 28/12 28/22 28/24 29/6 29/7 30/8 30/14 30/17 33/20 34/4 34/9 36/24 44/11 44/13 45/6 45/8 45/14 45/16 46/17 46/19 47/14 47/19 50/13 52/23 53/11 55/11 61/3 61/25 63/11 64/22 66/17 66/18 70/19</p> <p>jointly [5] 5/19 16/3 21/10 23/6 43/21</p> <p>judgment [3] 63/14 71/13 71/17</p> <p>June [7] 9/12 14/22 28/4 33/10 35/21 48/13 52/4</p> <p>June 1 [2] 9/12 28/4</p> <p>June 2011 [3] 14/22 33/10 35/21</p> <p>just [51] 3/20 7/12 9/4 9/24 11/9 13/7 17/4 17/20 18/12 19/2 19/7 22/25 23/12 24/11 26/6 26/6 28/5 28/12 29/20 30/24 30/25 33/3 34/12 36/23 38/15 38/17 39/19 40/13 44/12</p>	<p>led [1] 48/18</p> <p>legal [18] 3/22 14/4 35/14 35/23 36/18 41/7 68/17 68/17 69/5 69/6 69/17 69/20 69/22 69/24 71/8 71/10 71/20 72/2</p> <p>lend [3] 47/13 65/13 71/12</p> <p>lender [7] 7/2 7/3 22/19 22/20 23/2 48/12 50/4</p> <p>lenders [11] 6/18 6/18 6/22 7/7 30/4 31/23 44/13 47/12 48/4 48/6 48/7</p> <p>lengthy [1] 59/21</p> <p>less [5] 7/2 32/12 33/11 63/14 71/13</p> <p>let [12] 16/6 16/12 18/21 24/19 24/26 25/3 31/6 38/15 51/26 53/25 57/4 71/23</p> <p>let's [11] 8/18 11/10 26/6 40/6 40/13 42/21 43/7 43/7 43/8 54/3 66/10</p> <p>letter [4] 66/25 70/16 70/19 70/21</p> <p>level [3] 10/15 11/13 20/6</p> <p>Lexington [1] 2/5</p> <p>liabilities [3] 6/13 17/24 32/5</p> <p>liability [33] 4/15 5/24 6/9 6/14 6/21 6/26 11/16 11/17 11/20 11/24 12/9 13/7 13/13 15/18 15/23 18/2 18/7 22/7 23/4 24/8 26/8 26/17 26/22 36/24 37/4 45/8 45/16 45/18 47/14 52/23 53/15 54/9 70/20</p>	<p><b>M</b></p> <p>made [22] 11/5 13/13 14/14 15/11 15/15 21/15 23/12 27/14 27/15 27/19 29/17 31/18 39/7 41/23 41/24 42/4 42/8 49/12 50/22 52/16 54/21 58/11</p> <p>magnitude [1] 58/19</p> <p>mail [12] 22/14 24/14 24/21 62/18 63/19 63/26 64/19 65/9 65/10 65/19 66/7 67/6</p> <p>mails [8] 21/26 24/17 65/12 65/16 65/16 65/17 65/18 65/21</p> <p>maintain [1] 36/9</p> <p>major [3] 35/17 36/20 39/21</p> <p>make [14] 23/8 28/5 28/15 30/6 44/13 47/23 49/13 51/2 51/14 51/15 52/14 52/17 55/6 56/3</p> <p>makes [3] 24/14 24/21 63/20</p> <p>making [4] 6/19 39/4 58/3 61/10</p> <p>malpractice [26] 3/22 3/23 9/9 9/10 9/14 10/25 14/4 14/8 35/14 35/24 36/18 51/7 67/21 67/26 68/17 68/17 69/5 69/6 69/17 69/20 69/22 69/24 71/8 71/10 71/21 72/2</p> <p>man [1] 53/3</p> <p>management [12] 15/5 16/22 17/15 17/17 18/15 21/15 21/18 21/21 27/13 27/14 55/18 55/18</p> <p>many [1] 42/14</p> <p>March [1] 43/12</p> <p>March 29 [1] 43/12</p> <p>marked [2] 19/17 39/16</p> <p>markup [7] 24/22 24/25 26/16 27/26 36/4 38/12 39/15</p> <p>matter [9] 3/3 26/20 26/21 26/23 54/12 57/13 59/5 60/11 64/21</p>

**M**

may [22] 5/4 12/10 12/11 24/9 26/9 29/5  
33/16 35/21 37/3 37/4 43/4 47/22 47/22  
55/14 59/4 60/9 62/6 63/13 65/18 70/16  
71/16 71/25

maybe [10] 11/16 16/15 51/2 57/26 61/19  
65/24 65/25 65/26 66/2 71/3

me [37] 3/12 3/17 13/9 16/6 16/12 18/21  
23/8 23/25 24/19 24/26 25/2 25/3 31/6 38/15  
38/18 40/15 40/15 40/18 47/2 47/4 47/6  
50/25 51/26 52/7 53/5 53/10 53/17 53/25  
55/6 56/23 57/4 57/14 57/25 57/26 60/4  
63/16 65/15

mean [18] 11/11 13/26 14/3 17/21 21/6  
21/26 23/15 26/10 28/14 31/20 36/6 36/7  
37/12 37/26 42/6 57/15 61/7 68/14

meaning [1] 40/3

means [12] 21/11 22/11 22/11 22/16 23/9  
27/2 27/5 28/11 28/12 28/13 28/14 59/14

meant [3] 21/13 26/24 61/6

meet [1] 67/10

meetings [1] 57/8

memo [88]

memorandum [15] 9/12 21/16 29/6 29/10  
31/13 40/8 44/19 51/8 51/10 51/13 56/10  
56/14 61/12 62/22 70/2

memorialize [1] 31/12

mention [1] 47/3

merely [1] 56/15

messed [1] 37/2

MICHAEL [2] 1/23 3/13

might [5] 30/24 35/3 42/26 42/26 63/18

MILLER [1] 1/21

million [3] 8/11 8/12 55/26

millions [2] 7/24 8/4

mind [3] 36/13 44/3 65/15

mine [1] 64/14

minute [6] 15/3 15/24 24/11 32/10 48/5 65/8

minutes [1] 9/4

misrepresentations [1] 31/18

mistake [1] 52/14

mistaken [1] 40/17

misunderstanding [1] 33/15

money [13] 6/22 11/13 11/15 11/18 22/21  
22/23 22/25 22/26 23/3 30/5 32/6 47/13 54/4

monies [2] 11/18 33/6

months [1] 30/18

more [11] 7/3 24/18 32/12 35/25 35/25 56/22  
57/19 57/22 63/14 70/12 71/12

Moreover [2] 18/11 46/16

morning [1] 8/21

most [1] 51/7

Mot [1] 1/4

motion [19] 1/9 3/4 3/5 18/25 31/16 49/11  
63/4 63/14 63/15 67/14 67/23 68/25 69/13  
69/22 71/13 71/13 71/16 71/17 71/19

move [1] 51/2

moving [3] 46/3 46/22 47/9

Mr [6] 24/23 24/23 44/23 62/16 63/25 64/7

Mr. [12] 21/24 39/4 42/22 44/26 50/20 60/19  
61/11 62/17 64/2 64/7 64/20 67/5

Mr. Edelson [4] 64/2 64/7 64/20 67/5

Mr. Edelson's [1] 21/24

Mr. Hoard [1] 50/20

Mr. Parnes [3] 60/19 61/11 62/17

Mr. Spagnoletti [2] 39/4 42/22

Mr. Waddington's [1] 44/26

much [8] 7/2 8/14 38/16 38/25 57/22 65/13  
67/15 72/4

MULLIN [1] 1/16

multiple [3] 14/25 25/16 27/9

must [1] 11/3

my [20] 3/13 3/17 9/5 24/22 25/5 26/13 31/6  
31/19 37/19 43/2 53/5 55/6 56/6 57/14 58/24  
65/15 68/24 68/24 69/21 71/26

Myles [2] 31/9 64/3

myself [1] 25/2

mysteriously [1] 19/9

**N**

name [2] 37/8 44/22

named [1] 44/21

namely [1] 70/10

National [1] 1/17

necessary [2] 55/18 67/3

need [7] 21/9 22/6 25/2 26/14 41/5 41/6  
57/10

needed [3] 40/23 58/18 58/20

negligence [1] 48/21

negligent [1] 8/4

negotiate [1] 35/18

negotiated [7] 12/22 32/25 36/20 46/9 46/21  
54/25 63/6

negotiates [1] 13/4

negotiating [2] 36/2 36/3

negotiation [3] 46/12 47/20 49/26

nervous [1] 8/26

never [15] 6/5 15/7 15/26 15/26 16/2 16/2  
16/23 16/23 18/16 30/16 30/18 33/5 34/3  
53/14 62/3

nevermind [3] 31/11 35/6 48/18

new [16] 1/2 1/2 1/10 1/11 1/11 1/22 1/22  
1/26 1/26 2/5 2/5 6/4 10/26 13/2 13/5 37/24

next [3] 1/23 54/4 56/6

nice [1] 40/14

no [70] 1/5 4/15 9/7 12/19 13/15 14/15 15/3  
15/3 15/3 15/24 20/15 20/25 21/12 23/9  
23/10 25/22 26/2 26/2 29/18 29/24 31/10  
32/23 33/5 33/22 36/25 38/13 39/8 39/11  
42/5 43/22 44/23 45/18 47/7 47/13 47/19  
48/5 48/11 49/20 49/25 50/6 50/8 50/9 51/22  
52/14 54/18 55/7 58/6 58/23 59/4 59/5 59/11  
59/12 59/13 59/13 59/22 60/4 60/7 60/11  
60/11 60/17 60/21 60/25 62/13 65/6 66/7  
66/8 66/11 66/23 69/16 70/26

No. [4] 3/4 3/5 14/20 14/21

No. 1 [3] 3/5 14/20 14/21

No. 650765 [1] 3/4

nobody [1] 50/10

non [1] 20/12

non-US [1] 20/12

none [2] 33/8 41/26

not [129]

notation [1] 44/7

notes [2] 55/7 58/24

nothing [3] 12/4 22/21 53/8

November [1] 7/14

November 14 [1] 7/14

now [37] 11/5 11/16 11/18 14/26 15/19  
15/22 22/4 23/7 24/7 24/9 31/15 33/9 35/13  
35/20 35/24 36/13 39/12 39/14 39/26 40/17  
42/21 45/15 45/17 46/2 47/9 47/10 47/11  
48/2 55/2 55/6 57/17 58/26 60/15 64/11  
68/17 69/16 69/19

nowhere [2] 15/14 45/13

number [2] 8/12 21/26

**O**

objection [1] 68/20

obligation [1] 65/4

obligations [12] 4/18 5/16 15/8 16/3 16/24  
17/18 18/5 21/21 23/16 26/24 27/17 63/12

obligors [1] 17/13

OBS [4] 10/5 10/6 10/6 46/23

obvious [2] 17/20 17/22

Obviously [1] 67/9

occurred [2] 10/18 69/26

October [1] 71/22

October 10 [1] 71/22

off [2] 8/16 8/17

offered [1] 70/6

office [1] 21/24

oh [2] 15/24 36/25

OIN [44] 9/24 10/2 10/8 10/10 10/14 10/15  
11/12 11/15 11/17 12/4 15/6 15/8 16/2 16/24  
17/11 17/18 18/4 18/5 20/5 20/5 20/17 20/18  
20/19 21/2 21/9 21/10 21/10 21/21 22/4 23/5  
23/15 26/24 27/16 42/15 46/24 49/21 49/26  
50/5 50/6 50/8 50/9 63/12 64/22 65/4

OIN's [2] 10/4 10/10

OING [1] 1/14

Ok [1] 10/8

okay [34] 3/2 9/19 15/21 16/11 16/25 19/3  
19/20 19/22 20/6 20/9 20/19 22/15 25/9  
25/17 26/18 32/21 33/17 36/26 41/19 43/3  
45/9 46/2 46/22 47/17 50/16 53/13 54/2  
60/14 60/23 63/21 63/26 64/9 64/16 65/15  
old [1] 52/20

once [3] 64/21 68/22 71/4

one [40] 4/25 9/10 11/9 19/6 21/7 23/25 24/6  
24/20 28/21 29/14 29/18 29/22 30/14 31/2  
32/9 35/15 35/15 37/25 41/24 42/3 43/12  
43/19 43/20 48/16 49/23 49/24 51/2 55/8  
58/14 60/20 63/9 63/19 65/20 66/12 68/8  
68/9 68/10 68/11 68/21 69/17

ones [3] 4/15 6/22 6/23

ongoing [1] 46/15

only [28] 10/21 17/2 19/10 21/6 21/7 22/12  
25/18 27/2 29/22 38/9 39/11 41/23 42/6 42/7  
42/23 43/16 43/26 45/24 48/16 49/3 49/4  
49/6 49/10 49/10 59/15 61/15 63/9 63/10

opinion [17] 34/17 35/11 41/8 41/10 52/12  
53/7 53/10 53/12 53/17 62/23 62/23 62/26  
66/19 66/23 70/6 70/16 70/19

opportunity [1] 55/21

opposed [1] 21/14

opposite [2] 50/3 65/5

order [7] 42/25 68/24 68/25 69/21 71/26  
72/3 72/3

originally [3] 4/10 42/4 46/20

OSG [102]

OSG's [8] 7/22 12/21 23/6 25/24 25/24 39/6  
46/14 55/18

other [17] 4/13 4/15 5/14 13/10 15/6 30/24  
32/3 40/9 40/12 40/12 40/12 40/13 49/16  
65/3 67/14 70/15 71/25

otherwise [1] 7/25

our [16] 3/13 18/25 19/5 35/11 38/5 39/2  
42/6 43/18 46/3 49/11 52/25 52/26 62/3 62/4  
62/20 63/25

ourselves [1] 12/13

out [35] 4/2 4/4 4/9 4/13 4/26 6/8 6/10 6/11  
6/22 12/15 14/3 15/14 20/10 20/13 20/24  
22/21 26/6 32/6 32/11 33/10 35/18 39/3  
41/11 43/22 44/8 44/8 45/13 48/22 49/8  
52/10 67/21 67/26 68/20 70/12 71/18

outside [1] 30/22

over [10] 8/11 8/12 15/5 25/20 28/25 30/5  
42/11 42/24 57/14 68/4

overlooked [1] 12/8

OVERSEAS [3] 1/3 3/3 4/3

own [6] 4/14 9/5 21/24 27/24 29/15 35/22

owning [1] 21/3

**P**

package [1] 14/21

page [8] 1/23 3/21 28/18 34/12 34/13 34/16  
38/20 67/24



**P**

paid [3] 6/25 30/7 30/8  
papers [1] 19/5  
paragraph [13] 5/2 7/13 7/17 46/7 46/23  
47/2 47/3 48/9 48/9 55/9 55/10 58/15 59/9  
Pardon [1] 47/5  
parens [1] 29/11  
parent [5] 5/9 5/16 6/11 9/25 19/25  
parent's [2] 5/19 42/13  
PARNES [13] 1/6 30/22 31/2 31/6 33/22  
35/3 46/13 48/14 58/21 60/19 61/11 62/17  
62/17  
parole [3] 25/18 25/21 53/14  
part [10] 1/2 10/11 14/23 27/7 27/12 46/16  
49/11 58/7 67/14 68/13  
particular [4] 11/9 37/25 40/4 40/5  
parties [10] 3/9 3/11 10/11 14/26 17/10  
25/22 25/24 26/19 27/6 27/8  
partner [3] 3/13 31/8 44/21  
partners [1] 13/15  
parts [2] 25/10 27/11  
party [1] 15/22  
patently [1] 14/15  
PAUL [2] 2/6 3/16  
pay [4] 4/6 5/21 7/24 7/26  
paying [1] 53/3  
people [5] 29/22 31/7 65/21 66/11 67/20  
per [2] 34/2 67/22  
performance [1] 17/12  
perhaps [6] 13/10 23/23 33/13 35/21 37/4  
49/8  
period [2] 12/18 71/6  
person [4] 44/14 58/3 65/20 66/13  
perspective [6] 28/9 30/26 31/4 61/2 61/7  
61/16  
persuasive [1] 61/13  
PETER [2] 1/7 31/8  
phrase [1] 61/3  
picking [1] 54/16  
place [6] 4/8 12/22 20/25 28/23 32/21 32/24  
plainly [1] 11/7  
Plaintiff [17] 1/4 1/17 1/21 3/11 4/3 4/5 4/9  
4/19 9/26 22/5 32/13 33/6 57/10 62/2 70/3  
70/21 71/15  
Plaintiff's [1] 52/18  
Plaintiffs [1] 7/8  
plausible [1] 13/8  
play [1] 47/10  
player [3] 35/17 36/14 36/20  
plays [1] 71/17  
Plaza [1] 1/17  
plead [3] 41/4 41/4 54/23  
pleading [4] 41/4 68/21 71/14 71/14  
pleadings [5] 24/18 56/23 60/16 60/18 63/15  
please [2] 30/23 72/2  
pled [3] 14/9 14/10 43/25  
pledges [1] 5/13  
point [30] 8/16 17/22 18/23 24/10 26/13  
28/15 33/12 36/25 37/13 39/3 42/9 51/3  
51/19 52/18 52/19 53/7 53/26 54/15 56/6  
56/25 57/12 57/17 57/20 58/14 58/25 59/22  
59/26 65/25 66/23 71/15  
pointing [1] 22/3  
points [3] 50/19 53/23 54/7  
POLK [2] 2/4 3/17  
pop [1] 62/10  
popped [1] 30/9  
popping [1] 31/23  
portions [1] 14/3  
position [2] 7/8 39/17  
possibility [1] 61/10  
possibly [1] 50/6

post [1] 55/14  
post-May [1] 55/14  
potential [5] 6/13 11/26 33/24 55/19 59/7  
practical [1] 64/21  
pre [1] 45/19  
predecessor [1] 34/5  
predecessors [1] 34/26  
preexisting [2] 43/26 44/2  
premised [2] 14/17 63/3  
prepared [2] 14/22 51/8  
present [1] 52/21  
pretty [2] 8/14 13/14  
prevail [6] 54/10 59/8 60/9 62/6 62/7 62/7  
principal [2] 30/22 46/14  
principally [1] 29/22  
prior [5] 8/5 26/9 37/15 46/4 48/7  
pro [1] 15/25  
probably [1] 24/26  
problem [62] 4/20 6/14 7/17 8/20 8/26 10/9  
11/24 13/17 20/14 23/9 24/9 25/5 30/17 31/3  
31/5 31/10 33/12 33/23 33/24 33/26 34/3  
34/10 35/3 35/6 35/9 35/12 35/20 36/25  
36/26 37/2 37/19 37/22 37/23 37/25 38/5  
38/7 47/25 48/8 48/10 48/15 48/17 48/19  
48/24 48/25 48/26 50/10 50/23 51/18 52/24  
54/17 58/19 58/20 58/24 59/4 59/7 59/20  
61/25 62/8 62/11 63/2 68/22 69/26  
problems [7] 4/19 29/26 31/23 32/8 36/21  
59/2 59/25  
proceeding [2] 8/7 8/9  
proceedings [2] 1/9 72/10  
process [3] 6/7 30/19 67/24  
produced [1] 22/2  
promised [1] 52/8  
prompted [1] 65/8  
properly [2] 54/23 55/10  
PROSKAUER [101]  
Proskauer's [16] 7/9 8/3 14/16 14/17 17/6  
25/4 25/10 31/7 39/13 44/26 50/12 54/23  
55/17 55/23 68/22 70/8  
protecting [1] 68/6  
prove [2] 15/26 56/3  
provided [8] 7/26 9/11 18/15 18/24 19/8  
56/18 70/4 70/21  
provision [3] 17/5 20/9 20/16  
proximate [1] 55/26  
punted [1] 66/26  
purportedly [1] 14/11  
purports [1] 44/25  
purpose [3] 28/8 58/6 61/13  
purposes [4] 9/26 26/14 66/10 68/21  
pursue [2] 45/20 71/25  
pursuing [1] 45/11  
push [2] 10/15 12/4  
pushback [1] 47/19  
put [4] 12/22 23/18 43/8 43/16  
puts [1] 20/24  
putting [2] 61/6 61/6

**Q**

question [23] 9/9 14/24 14/25 19/13 26/26  
27/3 28/11 31/19 31/21 33/22 35/24 36/4  
39/11 39/11 41/14 44/9 44/12 44/18 48/13  
51/26 61/5 69/19 70/15  
questioning [1] 37/13  
questions [3] 8/24 36/5 53/24  
quite [4] 16/9 19/21 21/26 26/12  
quote [2] 20/25 54/8

**R**

raise [1] 48/4  
raised [3] 31/24 48/7 71/11  
raises [4] 36/5 40/26 44/9 48/12

raising [1] 35/13  
ramification [1] 45/6  
rather [1] 56/23  
rationale [1] 31/13  
reach [1] 63/4  
read [13] 3/25 5/26 8/15 17/4 18/6 21/6 21/7  
22/12 30/5 31/22 44/10 48/9 52/13  
reading [4] 6/16 38/16 38/17 38/18  
ready [1] 8/16  
real [1] 7/4  
realized [1] 6/20  
really [10] 6/17 6/23 29/21 32/11 34/25  
37/12 38/25 61/18 65/15 68/19  
reason [3] 4/17 27/14 57/22  
reasonably [1] 14/16  
reasoning [3] 13/24 17/6 52/14  
reasons [1] 51/24  
recent [8] 15/9 17/10 17/13 17/16 29/12  
29/13 34/18 34/21  
recognition [1] 33/19  
recognized [2] 48/15 48/17  
recollection [1] 29/24  
recommendation [1] 7/10  
record [4] 3/20 39/14 50/24 72/9  
records [3] 44/26 45/2 72/3  
recover [1] 56/2  
recoverable [1] 71/7  
recovery [1] 8/7  
red [1] 40/13  
redraft [1] 46/4  
reduce [1] 11/19  
reemerged [1] 7/4  
refer [2] 8/22 67/20  
reference [4] 14/18 17/14 51/11 56/12  
referring [1] 20/3  
reflect [2] 45/2 51/17  
reflected [1] 65/6  
reflects [1] 16/20  
refute [4] 43/17 49/16 49/17 49/18  
refutes [1] 39/5  
regard [5] 26/17 26/21 67/13 69/2 71/2  
regarding [3] 9/13 39/6 64/19  
regardless [1] 59/3  
regards [1] 4/21  
Regulations [1] 5/11  
regulators [1] 55/20  
related [4] 46/15 63/26 64/4 64/6  
relates [2] 9/10 9/16  
relating [2] 9/20 10/22  
relation [1] 65/17  
relationship [7] 3/26 35/26 36/19 46/3 57/9  
57/12 61/22  
relevant [6] 8/23 9/15 11/7 19/12 43/18  
62/17  
reliance [1] 35/11  
relied [6] 14/11 14/16 17/7 18/17 51/16  
54/23  
relief [1] 7/13  
rely [6] 27/21 49/2 49/12 62/21 66/4 66/5  
relying [1] 57/17  
remedies [1] 71/25  
remember [8] 21/17 32/15 34/18 35/2 43/16  
43/24 45/23 61/2  
removes [1] 63/23  
repaid [1] 22/20  
repeats [1] 50/20  
report [1] 35/6  
reported [5] 7/18 7/21 31/9 31/10 66/6  
Reporter [2] 1/25 72/12  
reporting [2] 60/24 62/12  
represent [1] 46/11  
representation [28] 11/2 14/13 17/26 18/26  
21/17 21/23 22/5 23/12 23/17 26/15 27/19

<p><b>R</b></p> <p>representation... [17] 27/20 41/15 41/23 42/8 42/11 42/18 49/17 50/7 50/22 51/12 51/15 51/16 51/23 56/19 63/3 66/9 70/26 representations [15] 14/14 14/18 21/14 27/13 27/13 41/24 49/13 49/14 51/9 51/10 52/16 52/17 58/5 58/11 70/18 represented [6] 38/22 39/6 51/14 52/8 59/3 65/5 representing [2] 44/24 68/5 require [1] 56/25 required [1] 20/26 requires [1] 57/19 researched [1] 58/22 resisted [2] 43/24 44/6 respect [9] 10/24 12/24 25/11 45/5 45/10 46/14 54/24 68/25 70/24 respond [2] 65/17 66/11 response [10] 15/10 15/15 20/22 25/24 25/25 27/25 50/17 53/23 65/18 67/7 responsibilities [1] 66/25 responsibility [2] 38/2 38/3 responsible [11] 15/8 16/24 17/18 18/5 21/21 23/16 26/24 27/16 64/24 65/3 65/4 rest [2] 7/6 61/16 restatement [1] 8/5 result [13] 4/23 6/13 7/9 7/16 7/24 8/3 32/7 33/6 36/11 44/15 59/15 59/16 70/2 resulting [2] 55/14 55/25 retained [1] 30/13 returns [1] 7/22 Revenue [4] 5/11 7/19 7/21 8/8 reviewed [1] 48/15 reviews [1] 60/19 RICHARD [1] 1/7 ridiculous [1] 29/20 right [55] 3/20 3/25 4/26 4/26 9/18 9/21 10/3 10/12 10/16 10/20 12/16 15/4 17/8 19/3 19/15 19/19 20/8 20/13 20/16 20/20 22/4 22/9 22/17 22/22 24/4 25/14 26/11 30/9 33/21 33/25 34/15 35/13 35/21 42/5 42/16 42/17 43/10 43/14 43/22 44/8 44/12 45/20 45/21 50/16 53/21 53/22 54/6 55/7 59/15 59/16 61/4 62/2 64/11 65/16 68/24 right-hand [1] 44/8 rise [1] 48/22 road [1] 13/7 role [3] 12/19 21/12 54/18 room [2] 1/26 65/6 ROSE [2] 1/6 3/3 ROWE [1] 1/7 running [1] 32/19</p>	<p>40/22 40/25 44/14 47/12 52/6 53/13 56/5 56/7 56/24 57/18 58/15 60/9 60/10 62/5 64/26 64/26 68/15 says [31] 5/2 7/17 8/15 15/2 16/4 16/21 17/26 18/4 19/21 19/22 19/24 20/4 20/11 20/20 20/25 22/4 31/4 31/6 35/3 42/7 42/11 44/9 44/10 51/13 54/10 61/3 61/8 61/9 62/24 64/20 64/23 scenario [1] 11/11 school [1] 57/5 scrambled [2] 57/14 57/15 second [17] 3/23 14/6 17/3 18/12 20/6 23/21 27/11 42/3 46/6 55/5 55/6 55/7 55/8 68/21 69/2 69/9 69/13 section [23] 4/21 5/2 5/26 6/3 6/13 7/16 7/23 8/2 8/13 17/23 19/22 20/24 27/3 35/20 36/11 45/7 46/16 53/12 55/14 58/19 61/14 62/8 70/20 see [14] 15/23 23/22 24/20 24/26 25/5 28/18 32/17 34/17 37/19 43/11 43/15 49/25 61/19 71/3 seeking [1] 69/5 seeks [1] 56/2 seems [1] 67/12 self [5] 7/18 7/21 46/5 60/24 62/12 self-reported [2] 7/18 7/21 self-reporting [2] 60/24 62/12 semantics [1] 54/12 sending [1] 64/3 senior [8] 1/25 15/4 16/22 17/15 17/17 21/18 21/20 72/12 sense [5] 53/9 53/10 54/13 65/22 69/8 sent [1] 62/18 separate [4] 10/7 10/8 51/21 51/22 September [3] 1/11 55/23 71/21 September 10 [1] 71/21 September 20 [1] 55/23 Seq [1] 1/4 Sequence [1] 3/4 series [1] 65/21 Service [3] 7/19 7/21 8/8 set [4] 14/13 61/11 69/9 69/24 setting [2] 31/13 41/7 settle [1] 71/24 several [73] several language [1] 33/20 several/OSG [1] 44/11 several/section [2] 8/2 8/13 severally [5] 4/13 5/19 21/10 43/21 64/23 shared [1] 66/7 sharp [1] 70/3 sheet [12] 19/14 19/17 19/20 20/23 38/20 38/20 49/22 56/19 63/6 63/6 63/9 63/10 sheets [1] 63/24 ship [1] 21/3 SHIPHOLDING [2] 1/3 3/3 shipping [2] 46/15 48/3 Shortly [1] 58/16 should [10] 20/26 26/9 26/11 47/23 51/24 54/10 59/8 62/7 62/7 62/7 show [12] 10/26 11/6 14/18 14/20 16/6 18/21 22/13 24/14 24/21 41/17 59/17 63/19 showed [2] 27/23 56/20 showing [2] 11/5 23/25 shows [5] 26/22 39/15 44/4 44/5 44/5 signed [4] 32/26 34/3 47/19 47/21 significant [3] 19/13 19/21 44/9 simple [9] 57/22 57/25 57/26 58/2 60/3 60/5 61/19 61/19 67/24 simple process [1] 67/24 simply [6] 12/3 27/14 32/25 39/19 49/17 56/7 since [4] 36/12 45/16 45/16 71/22</p>	<p>single [2] 9/22 30/5 singular [2] 69/17 72/2 sit [1] 51/6 sitting [1] 57/25 situated [1] 29/18 situation [9] 4/3 6/10 7/11 11/14 12/12 32/9 33/18 50/15 70/25 situations [1] 5/18 skillful [1] 30/16 slam [1] 65/16 slide [2] 14/20 15/4 smart [2] 44/18 49/8 so [101] so-called [1] 9/16 solely [1] 28/16 solution [10] 13/16 58/23 59/5 59/11 59/12 59/14 59/22 60/4 60/7 60/11 some [9] 4/16 8/16 30/24 37/13 44/7 49/16 54/2 56/22 68/22 somebody [2] 30/7 65/19 somehow [4] 7/5 13/2 41/5 62/17 someone [2] 5/21 43/23 something [6] 5/20 16/16 37/12 39/14 41/10 41/16 sometime [2] 4/16 7/12 somewhere [1] 52/6 sophisticated [1] 36/7 sorry [2] 15/13 56/6 sort [7] 4/22 7/6 15/17 52/5 52/10 56/22 67/10 sought [1] 8/7 sound [1] 7/26 South [1] 1/18 SPAGNOLETTI [4] 2/6 3/16 39/4 42/22 speak [1] 25/2 speaking [1] 58/16 specific [3] 18/3 18/3 30/25 specifically [3] 5/12 48/20 55/10 speculating [1] 66/16 spent [1] 51/7 spin [1] 42/18 spins [1] 50/7 spoke [1] 58/16 spot [1] 13/5 spots [2] 60/20 60/23 stage [3] 56/23 63/15 71/14 stages [1] 25/3 stand [1] 14/2 standard [2] 67/11 68/10 stands [1] 63/2 start [19] 6/18 29/4 30/2 30/10 30/13 30/14 31/24 31/26 32/4 32/25 33/7 33/10 33/19 34/2 34/20 34/24 34/25 47/18 47/21 started [9] 4/17 4/19 7/4 19/11 29/4 30/2 30/3 30/10 51/6 Starting [1] 55/8 starts [1] 25/11 state [4] 1/2 3/7 15/7 16/22 stated [1] 50/24 statement [5] 18/9 18/14 18/19 62/16 62/17 statements [3] 8/6 17/14 21/18 states [3] 17/20 29/7 71/9 stating [1] 17/22 status [1] 64/17 statute [11] 3/7 8/18 8/19 8/20 9/15 10/25 11/3 43/18 70/24 70/26 71/3 stay [1] 15/24 stems [1] 3/26 step [2] 16/7 25/17 Steve [1] 3/12 STEVEN [2] 1/7 1/19 still [5] 7/8 22/18 46/22 47/9 48/23 story [2] 32/5 56/4</p>
<p><b>S</b></p> <p>said [32] 3/9 3/25 7/6 18/13 21/8 26/11 28/12 30/17 30/18 31/5 33/23 37/13 39/19 40/20 41/16 42/19 45/11 47/3 48/6 49/20 54/2 57/7 58/12 59/10 59/23 60/11 66/17 66/24 66/26 69/14 69/19 70/13 same [7] 17/12 23/23 29/8 47/25 57/11 68/14 68/15 SAMUELS [5] 1/7 20/4 31/8 58/16 58/23 saw [7] 8/25 24/11 26/8 31/3 33/23 48/9 65/21 say [37] 11/10 13/15 16/14 16/15 16/23 16/23 17/26 18/13 21/7 22/15 24/26 29/14 35/4 36/25 39/20 39/26 40/13 42/10 42/18 42/19 42/20 45/26 46/5 47/7 49/16 53/5 54/3 54/8 55/3 57/13 58/24 60/18 61/26 62/14 65/15 66/11 68/7 saying [29] 13/14 14/2 16/5 16/8 18/20 22/25 23/8 32/17 35/21 37/4 39/24 40/21</p>		

<p><b>S</b></p> <p>storytelling [2] 32/4 40/14  Street [2] 1/10 1/26  stricken [1] 20/10  strike [1] 20/13  strikes [1] 20/24  strong [1] 7/4  strongly [3] 15/7 16/22 24/26  struck [2] 32/11 43/22  structure [4] 44/2 46/17 46/20 55/12  structuring [1] 70/11  stuff [6] 32/3 36/22 57/18 58/25 66/19 66/21  stupid [1] 38/14  sub [2] 10/6 46/16  subject [4] 11/3 56/22 63/14 71/3  subsequently [1] 46/7  subsidiaries [15] 4/4 4/12 5/18 9/24 10/4 10/10 10/14 20/6 20/7 20/12 20/17 21/9 36/10 42/13 50/5  subsidiary [9] 5/15 9/26 19/23 19/25 20/19 20/24 20/25 62/3 68/6  subsidiary's [3] 4/7 11/13 53/4  substance [4] 58/13 61/14 69/3 71/12  substantially [2] 14/17 52/15  subsumed [2] 69/10 69/15  successive [1] 29/12  such [3] 5/12 11/5 70/6  sudden [2] 31/23 45/13  sued [2] 64/6 64/7  sufficient [1] 65/15  sufficiently [2] 69/24 71/9  sum [2] 58/13 69/3  summary [3] 63/14 71/13 71/17  support [3] 5/15 11/7 71/10  supposed [1] 63/17  SUPREME [3] 1/2 1/10 1/14  sure [6] 23/20 24/9 28/5 30/6 30/16 52/3  surrounded [1] 70/9  surrounding [1] 40/7  survive [1] 71/16  survived [1] 71/16  susceptible [3] 14/24 25/16 27/9  suspect [4] 38/9 38/9 70/7 70/16  sé [2] 34/2 67/22</p>	<p>telling [4] 23/13 40/18 42/9 47/24  tells [3] 41/9 43/23 44/18  templates [3] 37/14 37/16 46/18  temporarily [1] 7/7  ten [2] 45/26 66/11  term [14] 1/2 19/14 19/17 19/20 20/23 38/20 38/20 49/22 56/19 63/6 63/6 63/9 63/10 63/24  terms [13] 5/13 5/21 22/24 23/5 24/5 37/3 45/8 61/19 61/22 70/11 70/12 71/4 71/5  tests [1] 64/25  Texas [1] 1/18  than [4] 29/19 50/21 56/23 57/23  thank [7] 3/14 3/19 5/7 45/25 50/18 72/5 72/6  Thanks [1] 72/4  that [489]  that's [92]  their [29] 3/9 4/14 6/24 6/25 7/10 11/6 12/6 12/23 22/23 22/25 27/23 29/15 31/13 38/8 39/16 41/2 42/10 42/10 42/18 50/21 51/11 51/12 54/19 54/20 54/22 55/25 56/7 67/23 70/10  them [17] 4/25 9/7 10/15 15/11 19/4 19/6 30/8 35/25 41/13 41/26 42/23 49/7 49/13 49/14 57/15 68/20 68/20  themselves [3] 29/19 30/4 49/9  then [34] 4/16 6/7 7/11 10/4 11/2 11/13 11/16 12/26 13/11 13/13 13/22 17/14 18/6 24/20 25/17 27/18 28/23 29/3 32/24 36/24 41/16 44/14 45/14 46/2 46/3 48/17 53/6 54/22 56/9 56/21 59/24 60/10 62/9 63/19  theoretically [1] 26/7  theory [2] 12/23 51/23  there [69] 3/21 4/7 4/15 4/15 6/6 9/9 9/14 10/21 11/16 13/20 14/4 15/19 19/4 21/26 22/6 23/9 23/23 24/5 26/21 29/11 29/18 30/24 31/3 31/10 33/5 33/15 36/17 37/3 37/3 37/4 37/4 37/5 39/13 41/26 45/8 45/17 45/18 47/8 47/19 48/15 49/20 50/8 50/8 51/22 55/7 56/17 56/24 57/9 57/15 58/14 58/23 58/25 59/2 59/4 59/4 59/11 59/12 59/13 60/11 60/25 61/25 62/8 62/11 65/7 67/6 69/16 70/3 70/26 71/8  there's [41] 4/21 10/24 10/26 13/15 13/21 13/22 14/8 14/15 21/25 22/7 23/3 23/4 23/5 27/8 27/11 36/17 36/26 37/2 38/13 39/8 45/4 45/5 47/7 47/13 47/22 49/25 51/20 59/22 61/5 61/8 61/22 61/24 62/13 63/9 65/6 65/20 66/7 66/8 69/7 69/7 70/25  thereunder [1] 5/12  these [29] 4/4 4/10 4/11 4/18 6/2 9/26 13/14 13/19 15/11 23/14 23/24 29/26 31/22 36/16 36/21 41/17 42/2 46/12 47/15 49/9 49/16 49/21 51/9 58/13 59/25 61/21 62/10 62/23 62/24  they [110]  they'll [1] 49/9  they're [22] 6/23 14/25 17/6 29/21 29/21 30/5 30/7 33/2 33/4 34/23 34/23 38/6 38/9 39/24 40/22 40/25 49/8 52/24 54/16 59/10 62/16 65/17  they've [2] 14/23 51/6  thing [8] 23/22 24/16 52/14 54/4 57/11 68/8 68/14 68/15  things [4] 19/10 23/24 42/2 57/16  think [34] 8/19 11/26 22/10 24/21 25/7 26/12 26/25 32/14 33/12 33/15 35/3 37/8 37/17 38/15 42/22 42/24 44/8 45/4 45/5 48/12 51/6 51/22 58/9 60/17 60/18 63/13 63/16 63/23 65/15 65/25 68/23 69/6 69/25 71/12  thinking [3] 26/6 26/7 66/12</p>	<p>third [2] 1/22 15/22  this [189]  those [16] 8/24 12/9 27/13 29/8 37/16 52/17 53/24 57/5 57/7 65/18 65/21 69/10 69/14 69/16 71/7 71/12  though [4] 25/6 34/2 40/9 48/24  thought [2] 7/20 48/5  three [6] 10/25 11/3 31/7 42/23 57/11 67/24  three-page [1] 67/24  three-year [2] 10/25 11/3  through [8] 6/7 6/20 41/17 41/25 46/9 62/19 67/6 69/10  throughout [3] 36/8 46/13 70/25  throws [1] 36/4  thus [1] 43/19  ticking [1] 8/15  time [19] 8/16 12/15 14/11 17/2 17/3 18/9 18/15 36/2 44/26 44/26 45/3 46/13 48/12 57/15 57/24 58/21 62/18 69/6 71/6  times [2] 57/11 67/2  timing [1] 38/25  Today [1] 71/21  together [1] 68/20  told [18] 12/11 16/20 17/26 18/4 19/11 22/5 41/20 42/14 42/14 48/18 48/20 51/17 52/7 52/9 57/25 59/21 62/2 63/16  tolling [3] 10/26 11/6 11/8  too [5] 9/6 38/16 61/19 64/14 67/15  took [6] 6/10 6/11 7/8 10/11 31/2 32/6  top [1] 43/8  transaction [9] 9/20 9/20 10/18 10/23 11/10 24/10 40/7 41/6 66/15  transactions [1] 17/10  transcript [2] 1/9 72/3  treated [2] 9/21 50/13  treatment [2] 44/11 44/16  trial [1] 41/2  tried [1] 65/12  trigger [4] 18/7 24/9 42/5 50/14  true [13] 18/10 18/16 18/19 18/20 21/23 26/15 27/18 27/18 42/19 50/3 63/13 65/26 72/9  truth [1] 49/16  try [1] 16/12  trying [7] 4/6 15/17 15/22 36/15 53/2 53/3 65/14  turns [2] 6/8 41/11  two [16] 1/17 3/21 4/3 4/12 9/9 13/20 23/24 25/10 25/17 27/11 31/7 41/24 51/7 58/17 64/4 68/9  typing [1] 53/2  type [4] 23/23 36/3 36/3 52/13  typically [2] 35/15 36/18</p> <p><b>U</b></p> <p>ultimately [10] 6/9 6/16 6/24 7/11 12/14 13/26 31/25 32/5 61/13 62/6  unclear [1] 40/2  under [18] 5/2 5/9 7/13 8/2 11/7 15/9 17/13 18/2 21/4 34/8 35/3 35/7 35/10 43/17 46/16 48/24 54/24 59/14  understand [8] 12/8 12/8 16/5 16/15 24/19 25/20 50/25 58/18  understandable [1] 44/7  understanding [1] 65/2  understood [3] 21/11 57/16 67/12  unfortunately [1] 16/14  unique [1] 35/16  unknown [1] 58/22  unless [4] 10/26 39/17 40/17 48/9  unlike [1] 28/3  unmistakably [3] 24/21 26/22 63/20  unpunished [2] 60/21 60/25</p>
--	--	--

**U**  
 unrelated [1] 67/17  
 unreliable [1] 62/21  
 unsecured [3] 32/22 46/8 46/24  
 until [5] 12/19 30/9 38/11 50/11 55/22  
 up [40] 7/5 7/7 10/15 11/15 12/4 13/12 18/12  
 19/17 23/18 24/12 24/15 29/4 30/9 31/23  
 32/8 32/26 34/3 35/22 36/23 37/2 39/16  
 42/22 42/26 43/2 44/4 44/7 45/23 47/19  
 47/21 48/10 48/11 52/21 54/16 58/26 60/8  
 62/10 66/16 66/17 66/21 69/8  
 upon [7] 14/14 52/15 52/15 63/3 66/24 70/20  
 71/17  
 us [37] 4/5 4/5 4/8 4/11 4/23 5/9 5/16 5/19  
 5/21 6/11 7/14 7/25 9/25 10/6 15/26 17/23  
 17/26 18/4 20/12 35/5 40/23 40/23 40/23  
 42/9 42/13 42/14 43/23 43/23 44/13 44/17  
 44/18 44/25 48/18 52/8 52/9 68/2 68/6  
 use [4] 11/26 45/8 46/25 61/2  
 used [4] 5/15 37/14 37/16 46/16  
 using [1] 15/20  
 usually [2] 35/14 36/17  
 utterly [2] 39/5 43/17

**V**  
 versed [1] 37/24  
 version [2] 29/13 49/16  
 versus [1] 3/3  
 very [12] 28/11 28/18 29/7 30/16 30/16 57/5  
 57/6 57/6 60/5 67/8 67/16 67/23  
 viable [1] 51/23  
 view [2] 16/26 24/10  
 viewed [1] 5/17  
 vigorous [1] 65/22  
 virtually [1] 69/4

**W**  
 Waddington [2] 44/22 44/23  
 Waddington's [1] 44/26  
 wait [6] 15/3 15/24 32/9 48/5 55/5 65/8  
 waiver [1] 69/16  
 want [17] 17/23 18/2 20/5 22/23 28/5 28/15  
 30/6 44/13 45/7 52/22 53/9 53/10 60/4 61/24  
 66/19 71/22 71/25  
 wanted [3] 5/20 15/26 16/2  
 wants [2] 19/23 19/24  
 WARD [2] 2/6 3/18  
 WARDWELL [2] 2/4 3/17  
 was [139]  
 wasn't [4] 31/25 41/13 42/19 56/7  
 way [26] 5/22 5/23 10/21 12/18 14/15 15/17  
 19/12 20/3 21/2 21/7 21/7 21/25 22/12 22/13  
 25/18 29/21 38/13 47/13 49/25 51/18 59/15  
 61/15 63/9 63/10 66/7 66/8  
 we [89]  
 we'll [3] 35/4 71/3 71/24  
 we're [32] 12/13 13/16 13/17 13/25 15/19  
 15/20 23/22 26/6 27/4 27/5 27/6 32/15 38/23  
 38/26 40/20 46/2 46/2 47/9 47/13 50/22 52/5  
 52/20 52/20 52/26 53/2 53/3 53/13 53/15  
 59/24 66/3 66/12 71/20  
 we've [6] 18/24 33/23 42/14 64/7 68/2 68/3  
 WEISE [1] 1/7  
 welcome [1] 72/7  
 well [24] 13/12 13/15 13/20 16/17 23/23  
 24/13 24/16 26/10 28/13 32/9 34/5 35/24  
 36/5 40/21 45/22 51/25 52/2 53/7 53/17  
 56/16 56/21 57/21 58/9 60/15  
 Well, it's [1] 38/9  
 went [9] 4/8 7/10 8/17 13/12 34/3 35/18  
 39/10 52/25 70/13  
 were [31] 4/12 4/13 6/12 6/19 6/19 7/15 7/22  
 9/4 14/10 14/18 14/19 14/24 15/15 21/14

27/23 28/20 29/12 33/5 36/2 43/26 49/23  
 52/25 54/10 54/21 56/17 56/18 58/11 59/2  
 62/18 66/7 66/20  
 what [148]  
 what's [7] 13/12 35/16 40/16 50/4 50/17  
 57/13 65/23  
 whatever [2] 14/3 59/11  
 whatsoever [1] 54/19  
 when [47] 5/26 6/17 8/15 8/25 12/2 13/18  
 15/23 19/8 21/8 21/15 22/15 24/16 26/8  
 26/15 29/16 29/17 29/26 30/2 30/3 30/10  
 31/21 35/13 35/23 36/2 36/18 39/7 39/22  
 39/26 41/2 41/12 42/4 44/4 47/3 48/3 48/10  
 53/26 57/4 57/17 58/13 58/26 58/26 60/8  
 62/23 62/24 66/21 67/2 67/2  
 where [34] 4/3 4/8 4/19 5/14 5/18 6/10 7/3  
 7/15 7/15 8/14 12/14 25/5 28/21 30/8 30/11  
 32/2 32/7 32/8 32/9 37/19 45/13 46/3 46/25  
 47/11 48/8 48/18 51/5 58/15 59/10 62/25  
 64/11 70/22 71/4 71/5  
 where's [1] 16/4  
 whether [18] 14/24 22/19 24/11 25/19 26/15  
 26/21 28/9 47/23 53/18 56/3 58/18 61/24  
 66/4 66/5 69/19 70/3 70/5 71/7  
 which [35] 3/5 4/5 7/25 8/7 9/15 9/25 9/25  
 12/21 13/4 18/6 21/10 21/13 24/14 24/21  
 28/20 32/19 34/22 35/20 36/11 38/5 38/21  
 42/11 45/12 46/19 49/19 49/22 50/14 51/23  
 52/12 61/16 65/4 67/5 67/19 69/2 69/4  
 who [19] 6/22 6/23 29/21 29/24 30/4 30/15  
 30/22 31/8 47/4 47/6 47/7 48/25 53/18 58/17  
 60/19 60/20 64/3 66/24 70/13  
 who's [1] 10/8  
 whoever [1] 15/22  
 whole [2] 6/7 52/14  
 whom [3] 15/5 29/23 70/13  
 whose [1] 38/24  
 why [9] 4/20 8/19 15/17 16/23 18/19 18/21  
 18/22 52/12 57/13  
 will [8] 5/8 5/18 8/23 21/4 44/15 64/21 67/16  
 71/6  
 win [1] 25/19  
 wish [1] 63/21  
 within [4] 31/7 69/10 69/15 72/10  
 without [3] 26/16 26/21 38/7  
 witnesses [1] 42/9  
 won't [2] 20/14 67/11  
 word [8] 11/26 22/24 30/6 30/17 30/18  
 43/22 44/4 45/7  
 words [5] 4/14 35/22 43/21 61/6 65/4  
 work [1] 35/16  
 working [3] 30/10 62/19 62/22  
 workout [1] 23/26  
 worry [4] 23/2 23/7 53/13 54/9  
 would [36] 6/24 7/25 8/22 11/19 13/2 13/3  
 13/5 13/6 15/8 16/18 16/24 17/12 17/12  
 17/15 17/16 17/23 18/7 18/16 21/18 21/19  
 24/20 24/26 25/19 26/4 38/14 39/3 50/13  
 50/14 53/6 53/11 55/13 55/16 59/23 59/25  
 66/8 68/23  
 wouldn't [4] 18/10 36/10 38/13 57/25  
 wrapped [1] 69/8  
 wrinkle [1] 36/17  
 write [4] 40/24 60/8 62/5 66/8  
 written [3] 31/13 43/22 59/2  
 wrong [8] 35/22 35/23 40/21 40/22 48/9  
 51/15 55/8 66/11  
 wrote [3] 35/22 59/5 59/11

**X**  
 X'd [1] 44/8  
 X-out [1] 44/8

**Y**  
 yeah [2] 37/11 40/22  
 year [9] 10/25 11/3 13/2 19/10 48/2 49/5  
 57/9 57/12 62/20  
 years [10] 4/2 12/14 15/5 21/15 42/12 42/14  
 45/26 52/26 57/15 68/4  
 yes [16] 5/6 9/3 13/10 13/20 24/3 28/2 28/7  
 32/20 33/4 43/5 46/26 51/4 60/13 64/15  
 67/20 68/12  
 yet [1] 31/6  
 YORK [13] 1/2 1/2 1/10 1/11 1/11 1/22 1/22  
 1/26 1/26 2/5 2/5 10/26 37/24  
 you [250]  
 you'll [2] 16/15 49/25  
 you're [42] 12/15 13/9 13/26 15/21 15/24  
 16/5 17/22 22/3 22/9 22/25 23/2 23/6 23/7  
 23/7 23/25 32/17 35/13 35/13 35/23 36/15  
 36/15 37/23 37/25 40/18 40/19 40/21 45/11  
 45/15 45/20 48/23 50/25 54/9 55/6 57/17  
 60/15 62/5 65/16 66/11 68/15 68/15 71/23  
 72/7  
 you've [3] 33/15 45/23 63/16  
 your [112]  
 yourself [3] 9/2 45/11 46/4