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1
2 SUPREME COURT OF THE STATE OF NEW YORK
3 COUNTY OF NEW YORK - CIVIL TERM - PART 48

4 -----X

5 SPACE RACE, LLC,

6 Petitioner,

7 -against-

8 ALABAMA SPACE SCIENCE EXHIBIT COMMISSION d/b/a
9 U.S. SPACE & ROCKET CENTER,

10 Respondents.

11 -----X
12 Index # 655649/2018 Proceedings

13 60 Centre Street
14 New York, New York
15 February 15, 2019

16 B E F O R E:

17 HONORABLE ANDREA MASLEY,
18 Justice.

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

20 KENNEDY BERG LLP
21 405 Lexington Avenue
22 New York, New York 10174
23 BY: GABRIEL BERG, ESQ.
24 MEITAL WAIBSNALDER
25 Attorneys for Petitioners

26 MAYNARD COOPER & GALE, PC
551 Fifth Avenue - Suite 2000
New York, New York 10176
BY: WILLIAM R. LUNSFORD, ESQ.
JOHN M. HINTZ, ESQ.
Attorneys for Respondents

DEBORAH A. ROTHROCK, RPR
Official Court Reporter

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1 -Proceedings-

2 THE COURT: In the matter of Space Race against
3 Alabama Space Science Exhibit Commission.

4 Who is here for Petitioner.

5 MR. BERG: Your Honor, Gabriel Berg, Kennedy Berg;
6 with me is my colleague, Meital Waibsnalder, for Space Race.

7 Your Honor, in the front row are my clients who are
8 the principals of Space Race.

9 THE COURT: Wonderful. Thank you.

10 MR. BERG: Thank you.

11 THE COURT: For Respondent?

12 MR. HINTZ: Good morning. John Hintz from Maynard
13 Cooper & Gale. I am of counsel for Respondents. And with
14 me is William Lunsford who will be handling the matter today
15 before the Court.

16 THE COURT: Okay. Thank you. Please be seated.

17 As I said, I'm expecting the ex-parte clerk to come
18 in for a minute with emergency orders so I will have to take
19 a break but let's begin.

20 So I have Petitioner's motion.

21 MR. BERG: We have a TRO and a motion for
22 injunction to enjoin the Rocket Center from going forward in
23 Alabama.

24 Two days ago with this motion fully submitted they
25 filed a motion to vacate in the Court of Alabama now under
26 the first-filed doctrine and under inconsistent results-- I

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1 -Proceedings-

2 see you nodding, I got it, I will be quiet now.

3 THE COURT: Okay. Why don't we address this at the
4 end after I hear arguments on the substantive issue of
5 whether to grant your motion as to the arbitration and also
6 considering the defendant's motion to dismiss the petition
7 for lack of jurisdiction.

8 So if I understand correctly, the Respondent --
9 let's just say the Rocket Center -- if I understand you
10 correctly, you're saying I don't have jurisdiction. You are
11 not challenging for a second time the jurisdiction of the
12 arbitration of the arbitrators?

13 MR. LUNSFORD: Thank you. Again, your Honor, my
14 name is William Lunsford and I'm, obviously, appearing pro
15 hac vice. I appreciate the opportunity to appear in front
16 of you.

17 I want to make sure your Honor is aware that we are
18 a private law firm. Some people don't know this but we, in
19 Alabama, actually have law firms that are appointed by the
20 Attorney General to appear in cases like this. And so I'm
21 actually appearing as a Deputy Attorney General today, which
22 because the Attorney General of Alabama views this case as a
23 critical case in terms of the interpretation of Alabama Law.

24 Yes, your Honor, we are challenging the
25 jurisdiction of the arbitration panel to render the award
26 based on state sovereignty immunity.

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1 -Proceedings-

2 THE COURT: Okay.

3 MR. LUNSFORD: But your first statement was also
4 correct, your Honor, that we also are raising a motion to
5 dismiss on jurisdictional grounds --actually two different
6 jurisdiction grounds, which are personal jurisdiction, first
7 and for most, and, secondly, state sovereign immunity.

8 THE COURT: Getting back to your appearance as
9 Deputy Attorney General. I thought that the case that you
10 had submitted -- I think it was the Rocket Center case
11 against Odysseia, where they said that the Rocket Center
12 does not get representation from the Attorney General; is
13 that incorrect?

14 MR. LUNSFORD: At the time that was incorrect, yes
15 ma'am. Because I was also at the time of that, I was
16 appointed as Deputy Attorney General in another case, the
17 Ingalls case.

18 THE COURT: Maybe that is where I saw it.

19 MR. LUNSFORD: No, ma'am, you're exactly right.
20 There's a confusing procedural history. If I could, I would
21 be happy to walk through those cases.

22 There is actually three other cases that have been
23 cited involving; the Commission, your Honor, what we could
24 typically refer to as the Space Rocket Center is the place
25 that if you came to Huntsville, Alabama, you would see the
26 Saturn V standing on the horizon. It is actually not a

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-Proceedings-

thing, it is not a legal entity. The Alabama Space Science Commission is the name of the entity that was created by state statute.

THE COURT: Okay. We will call it the Commission.

If I understand correctly, did the Court also get it wrong when it said "it owned the property?"

MR. LUNSFORD: It --

THE COURT: Doesn't your client own the property?

MR. LUNSFORD: The Commission-- the property is titled actually in the name of the Commission, which is actually not unusual in terms of state agencies. I could give you a for instance, your Honor--

THE COURT: Well, I'm just saying that A, another Court found that it owns the property. So to say it is just a Commission and not anything other than a group of people, is that correct?

MR. LUNSFORD: Oh, I did not mean to suggest that. I was just simply saying the Commission is the name of the legal entity.

Now the Commission certainly does employ individuals and conduct business in its name and engage in business; it employs individuals. It is an operation like any other state agency in that respect. It has a board --

THE COURT: Speaking of which, what is the outcome of the Odysseia case which was by the employees against the

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-Proceedings-

Commission?

MR. LUNSFORD: Your Honor, that case was resolved.

THE COURT: How?

MR. LUNSFORD: Yes, I believe it was settled, your Honor.

Your Honor, that case, to me, has some important points that I know that the plaintiffs have highlighted that particular case here; but I think it is important that we understand Odysseia occurred at a time before the Alabama Supreme Court had spoken about what is the Space and Rocket Center, what is the Commission, is it a state agency?

THE COURT: You're talking about what you call the Ingalls case and what I would call the Barnhart case?

MR. LUNSFORD: Yes, your Honor.

THE COURT: And you're relying on Page 1, Paragraph 1; is that the citation that you made, Page 1, Paragraph 1?

MR. LUNSFORD: Yes.

THE COURT: The Commission was created as -- sorry. Paragraph 2. Section 1, Page 2: The Commission was created as a state agency in 1965 by the Alabama Legislature; that is what you're relying on?

MR. LUNSFORD: That is part of it. Also the state statute itself, your Honor.

THE COURT: Wasn't the Commission dismissed from

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-Proceedings-

the action?

MR. LUNSFORD: It was upon the basis of sovereign immunity.

THE COURT: Right. So how can you rely on a court's general statement in its first opening paragraph?

MR. LUNSFORD: It is a very fair question, your Honor.

THE COURT: Thank you.

MR. LUNSFORD: I understand the confusion there because the case --

THE COURT: No, no; no confusion.

MR. LUNSFORD: Well, I understand how there could be confusion on that, I guess is what I am saying.

If you look at the Ingalls case, what happened was, the case was filed originally -- it depends if we are talking about the state court case or the federal court case because there were two different cases.

THE COURT: I'm talking about the federal decision.

MR. LUNSFORD: Okay. So in the federal decision the case was filed in federal court against the Commission and then it was filed against several individuals who were officials with the Commission. And then we raised immunity, state immunity, on behalf of these particular individuals and 11th Amendment immunity, as well as on behalf of the individuals.

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1 -Proceedings-

2 Your Honor disclosed about the fact that if the
3 agency is not entitled to immunity, then certainly it is a
4 natural progression that the employees who are employed by
5 that particular agency would not be entitled to immunity.

6 So the 11th Circuit clearly held in the Ingalls
7 Federal Opinion that the officials, the Barnhart Opinion, if
8 you will, Dr. Barnhart and the other officials were entitled
9 to immunity as agents of the State of Alabama. And they
10 could only be entitled to that immunity if the agency itself
11 was immune.

12 THE COURT: Okay.

13 Thank you so much. Please have a seat.

14 MR. BERG: If I may address what you were just
15 speaking about.

16 THE COURT: Please.

17 MR. BERG: He's conflating sovereign immunity,
18 which does not exist to the Commission, with qualified
19 immunity, which was held to be found by the principals for
20 the principals in the Ingalls case. He's relying on that
21 one sentence, your Honor --

22 THE COURT: Page 2, Section 1.

23 MR. BERG: That is right.

24 That is all that he is relying on and what is cited
25 in his brief.

26 If I may just back up for a moment.

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-Proceedings-

They agreed that they were not pursuing sovereign immunity in this case in the arbitration. It lead to the-- your Honor, may I just stand at the podium?

THE COURT: Sure.

(Pausing.)

THE COURT: Okay.

MR. BERG: Thank you.

I was counsel during the arbitration. And what we said in opening statement was, we are going to need a finding on sovereign immunity. They were coy about it in their answer. We started adducing evidence, they objected, and the panel jumped all over them and said is sovereign immunity an issue in this case? And they tried to hem and haw and they got pinned down and they said, no, ultimately.

Rocket Center said no we are not asserting Sovereign immunity.

So what the panel did, they made a finding in their award. It is my affidavit, Berg Affidavit, it's Exhibit 8:

At the hearing USSRC --that is the Rocket Center -- counsel confirms to the arbitrator --

THE COURT: Hold on. If you are going to read you have to go real slowly.

MR. BERG: No problem, I usually do.

THE COURT: Sorry. Tell me where you are reading from?

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-Proceedings-

MR. BERG: It is the award.

THE COURT: Right. What page?

MR. BERG: Let me get the page.

(Pausing.)

MR. BERG: Page 15.

THE COURT: Okay. Continue.

MR. BERG: It says in its answer to statement of claim: USSRC asserted a defense of Sovereign immunity. Because USSRC is an agency of the State of Alabama, cite to the answer.

At the hearing USSRC's counsel confirmed to the arbitrators that USSRC was not and would not be asserting sovereign immunity as a defense in this action.

Now, that finding, your Honor, has a preclusive affect. It is the equivalent, under the law, of the nature of a court ordered decree.

THE COURT: They are saying that they actually disregard with what they said because they actually did not have authority to do it?

MR. BERG: They didn't have the authority to do it?

THE COURT: That is their argument.

MR. BERG: Your Honor, come on. They --

THE COURT: They say it can't be waived.

MR. BERG: I understand. I can address why it can be waived.

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

Number one, the --

THE COURT: Because there would be a fraud action against the people who signed the contract, but go ahead.

MR. BERG: There's that.

There may be an action against any lawyer who makes a statement like that as well under the Judiciary Law.

Here is the problem with their waiver argument. They also agreed that the Federal Arbitration Act applies to this case.

Now, under the Doctrine of Federal Preemption, a recent Supreme Court case called Kindred --

THE COURT: You're not talking about the one that got argued on January 9th, I think?

MR. BERG: No. No.

THE COURT: The California one, such an interesting case.

MR. BERG: No, no, that has nothing to do with this case.

Kindred Nursing Center Limited versus Clark, United States Supreme Court, 2017, the decision was 7 to 1. Here is what the Court held:

The FAA preempts any state rule discriminating on its face against arbitration. For example, a law prohibiting outright the arbitration of a particular type of claim.

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

What they are saying, your Honor, is that they rely exclusively on the Alabama Constitution against the FAA. That turns the Federal Preemption Doctrine and the Supremacy Clause on its head.

There's another reason they lose under the FAA, it is an important one. When you agree to an arbitration provision, as they did, in an agreement, it is an abrogation of Sovereign immunity. It is consent. We agree that if there is a dispute, you can sue us, you can sue us in the arbitration. Importantly, Ruth Bader Ginsburg said there are practical consequences when you agree to that regime.

What you are saying is, yes, we agree, we the Rocket Center agree. We'll go to arbitration if there's a dispute. That is exactly what happened.

So, again, the federal law preempts the state law and you cannot flip it on its head.

Now, I want to address the personal jurisdiction argument as well.

They also agreed to the jurisdiction of the AAA which, under the CPLR, means you have jurisdiction over them by definition --

THE COURT: You're relying on the Arbitration Agreement provision that says that the parties shall be entitled to bring an action in a court of competent jurisdiction for injunctive or other provisional relief in

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

aid of such arbitration?

MR. BERG: No, I am actually relying on CPLR 7502, which says: When you agree to have an arbitration in New York, this is where the arbitration took place, that a court of competent jurisdiction automatically has personal jurisdiction over the Rocket Center. It is not a close call on jurisdiction.

There are numerous cases that say your Honor doesn't even need to go through the CPLR 302 analysis. They participated in arbitration, they were here, and that conferrers jurisdiction, period, stop, in this courtroom and in front of your Honor.

Now, I want to, as two final points:

There are three cases that say the Rocket Center is not --does not have Sovereign immunity. Those cases went through a four-pronged analysis to determine whether or not there was true independence on the part of the Rocket Center from the State of Alabama. And they concluded all of them concluded that because they write their own checks, own properties, et cetera, et cetera they operate like a corporation.

THE COURT: Uh-huh.

MR. BERG: And those cases have never been overturned. He is really fishing and, frankly, this is all about the delay anyway. They are hoping they get some court

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

somewhere to say, yes, you have Sovereign immunity. It would not make a difference in this case.

Your Honor, this is an arbitration --a petition to confirm arbitration. We know that to vacate they have to move under the specifically enumerated statute. They have not even tried to do this here. They did tried two days ago in a different courtroom in Alabama, which is why we brought the emergency order to show cause. They are playing games. They are saying we agree to jurisdiction, we agreed never to raise Sovereign immunity unless we lose; and then in that instance, well, here we are, they are trying to do that again by filing in Alabama and having your Honor rule here. They were required to bring any vacatur motion here as part of their cross-motion. They knew how to plead in the alternative. They asked for a stay based on a case that the Supreme Court is going to decide nothing to do with arbitration, no preemption argument, it is not at all relevant to this case.

So let me conclude, if I might, your Honor, with the following:

Where we started with all of this was a grant from NASA to fund science education for preschools; that was the whole point of the grant. And here we are with the Rocket Center having been held to breach, owing at least \$1.4 million and they are running around saying we have

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

Sovereign immunity. It is important, in this case in particular, to stop this nonsense. No court has held that. And that should be the end of it, your Honor. We ask that you would confirm our petition.

Thank you.

THE COURT: Thank you.

MR. LUNSFORD: Your Honor, may I respond?

THE COURT: Yes.

MR. LUNSFORD: Thank you.

First of all, your Honor, let me say that the original agreement, the parties clearly agreed that Alabama law would govern any disputes between the parties; that is, in my view, the most critical part of this dispute.

THE COURT: That is selecting a law for the case. I apply the law of jurisdiction all over the world; that doesn't mean forum. You have to have a forum selection provision.

MR. LUNSFORD: You're right. In terms of the application of Sovereign immunity, it arises out of Alabama law. It is not according to the law that plaintiff's counsel just said, it is based on Alabama law.

THE COURT: Just the law you're referencing that your colleague is relying on is the FAA?

MR. LUNSFORD: Well, no, I'm referring to the other cases which are -- he kind of conflates Sovereign immunity

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

as a general concept and fails to distinguish between the two different types of Sovereign immunity.

In other words, if you look at plaintiff's filings with the Court, they would tell you Sovereign immunity is the same concept regardless of whether you are in federal court or state court, and nothing could be further from the truth. State Sovereign immunity existed --

THE COURT: Could I ask you, if you were successful on this case, right, what is the right place to go?

MR. LUNSFORD: The right place to go to Alabama Board of Adjustment. So that the State Legislature set up a Board of Adjustment in the State of Alabama for this exact scenario because our state sovereign immunity is an issue of constitutional law in Alabama that people who have grievances against the State -- anyone who has a grievance against the State of Alabama can file a Board of Adjustment claim, which is a quasi judicial entity set up by the legislature to receive those claims.

THE COURT: So why did you sign the Arbitration Agreement?

MR. LUNSFORD: Well, I was not present at the time but here is my interpretation of what happened:

State agencies have in the past agreed to arbitrations, frankly, for the benefit of who they are signing the agreement with. Because in this particular

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

instance what could happen is, if the Space and Rocket Center for the Commission had a claim, which it could pursue, that claim would go into arbitration. It would not go into the Alabama court system, which many people outside the State of Alabama view as unfair if you're an outside the State of Alabama entity doing business with a State of Alabama agency, you can agree to the forum in which if the agency has a claim that claim could be pursued.

Your Honor, one of the instances we have seen this is, for example, in a road contract, where there's road construction. Sometimes out-of-state contractors say we don't want to be in an Alabama Court fighting the State of Alabama over a claim that might have against us, it would be more fair if we did this, and if the agency was forced to pursue its claim in an arbitration.

THE COURT: So it's a one-sided arbitration agreement now?

MR. LUNSFORD: It is a one-sided arbitration agreement but --

THE COURT: Could you point me to the language please, where does it say that?

MR. LUNSFORD: Well, it doesn't come --directly come out. It says any disputes-- it doesn't say any disputes by the Commission.

THE COURT: So you want me to change the agreement?

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

1 -Proceedings-

2 MR. LUNSFORD: No, your Honor. All we are saying
3 is that the underlying law, Alabama law, and under that law
4 the Commission is immune. It cannot be sued. You cannot
5 bring a claim against the Commission because its immune
6 under the Alabama State Constitution.

7 THE COURT: Uh-huh.

8 MR. LUNSFORD: But the law that the plaintiffs
9 continue to rely on is different sovereign immunity law.
10 The Odysseia case and Parker case are not state sovereign
11 immunity cases. They are 11th Amendment sovereign immunity
12 case.

13 The 11th Amendment was passed long after state
14 sovereign immunity existed. In fact, state sovereignty was
15 the issue that hung under the passage of the United States
16 Constitution in the first place. The states were worried
17 about this very issue, about being hauled into the Court of
18 another state and its laws, essentially, being disregarded
19 for whatever reason.

20 So the reason that we have the choice of law
21 provision is because the state was still entitled to its
22 immunity.

23 I did want to respond to a couple of other points
24 that Mr. Berg raised.

25 First of all of, your Honor, this is a confirmation
26 proceedings. I do think it is important that we focus on

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

1 -Proceedings-

2 this being a confirmation proceeding and not a motion to
3 vacate proceeding, because the FAA is pretty clear --

4 THE COURT: You want me to dismiss it though?

5 MR. LUNSFORD: Yes, your Honor, that's correct.

6 But I'm saying procedurally, in terms of where we
7 are, this is not about necessarily vacating these
8 proceedings. This is about whether this Court has
9 jurisdiction. There's a process for this --

10 THE COURT: And whether the arbitrators had
11 jurisdiction, even though they made a finding. This was my
12 first question. You're attacking my jurisdiction and the
13 jurisdiction of the arbitrators, correct?

14 MR. LUNSFORD: Correct.

15 THE COURT: That is what you said?

16 MR. LUNSFORD: Yes. Yes.

17 THE COURT: Okay. And, so, if I that grant your
18 motion to dismiss, then the arbitrator's award would be
19 vacated because you would get what you want in terms of
20 their challenging jurisdiction, right? There would be no
21 arbitration award?

22 MR. LUNSFORD: Well, it depends on what your order
23 dismissing it says. It depends on if you just dismiss
24 saying you didn't have jurisdiction, if the arbitrator
25 didn't have jurisdiction, if you treated the order as null
26 and void as a legal matter, which we think it is, then that

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

would certainly settle the matter. Even that would not prevent the plaintiffs from going to the Board of Adjustment. They can certainly raise that claiming in the Board of Adjustment.

THE COURT: Uh-huh.

MR. LUNSFORD: On the FAA preemption issue. Your Honor, again, this is where the difference between the 11th Amendment immunity and state sovereign immunity is so important.

What Space Race is arguing is that Congress adopted the Federal Arbitration Act and by virtue of that, they preempted all of the states' immunity, all 50 states immunity; that is, essentially, what he's asking you to rule today.

What is unusual about that is, we've looked and we can't even find a case where any federal court has held that the FAA preempts 11th Amendment immunity.

So, in other words, what Space Race is saying is that Congress passed this law, that is not a substantive law, just procedural law, and they granted all 50 states immunity. But left their own immunity alone. And that on its face makes absolutely no sense; why would congress do that? And there's no law that the FAA actually preempts any immunity of any kind. They mix the issues and they talk about the FAA as if it provides substantive rights and it

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

doesn't.

Now there are two other opinions that they mention, the Ginsburg opinion in CNL Enterprise.

First of all, it did involve sovereign immunity. Again, we have this mixing and confusing of immunities in hopes of trying to find a theory that overcomes Alabama law. It involved tribal immunity, which is a wholly distinguishable immunity that originates from a wholly separate time and place.

THE COURT: Isn't the argument the same, you're saying it existed before the Constitution?

MR. LUNSFORD: The difference, tribal immunity could be waived. There are cases that even pre-date Ginsburg case which says tribal immunity can be waived, that is not the law of Alabama on state sovereign immunity.

The second case he brings up is the Kindred case, which is another Supreme Court case involving Kentucky law.

Again, I think if a reading of that opinion clearly shows Kindred stands for the proposition that you cannot attack arbitration limiting certain types of claims. So, for example, if there was a specific law in New York or Alabama that said you cannot take this particular claim and try it in an arbitration setting, that law, according to Kindred, is not allowed under the FAA. But Kindred also backs off that and says we are not saying that law that is

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

1
2 applied to any kind of disputes across the board in court
3 and in arbitration alike are preempted by the FAA.

4 In other words, if New York or Alabama adopted a
5 law that says with respect to this category of claims, you
6 must prove X, Y, Z, those apply regardless of the context;
7 regardless whether it's arbitration or in court because that
8 would not be preempted by the FAA. Well, the same is true
9 here.

10 Here we have a state, constitutional provision that
11 says the State of Alabama cannot be made a defendant and
12 that applies equally in court and in arbitration. And so it
13 can't be preempted by the FAA because it doesn't just attack
14 arbitration. It doesn't say the State of Alabama can never
15 be made a defendant or a respondent in an arbitration. And,
16 so, we don't believe Kindred really applies in any way.

17 But if we go back to this issue of state immunity.
18 Your Honor, I understand Space Race's frustration, I get it.
19 I can't stand here and explain to your Honor why my prior
20 counsel, for my client, said what was said in the
21 arbitration.

22 I will say, I don't -- it was not a surprise to the
23 claimant or the plaintiff in this case that sovereign
24 immunity was an issue because they were pushing it clearly
25 according to the transcript. All I can say, it didn't
26 matter what he said. Just like your Honor said earlier,

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-Proceedings-

under Alabama law sovereign immunity can't be waived, even by the governor.

THE COURT: Let's just be clear that this is an argument and I'm not saying anything yet.

MR. LUNSFORD: I understand.

THE COURT: You're going to get a decision.

So don't pin me down the way you did using the first sentence on Page 2 of the Ingalls case, it doesn't work here.

MR. LUNSFORD: Well, your Honor, to go back to that point, the whole Ingalls opinion -- as I said after that -- the whole Ingalls opinion outlines why the Commission is a state agency and how it operates and how the individuals who work there are entitled to immunity as well.

THE COURT: So the people who signed this Agreement in this case, are going to be immune for having signed an Agreement that under your view is not enforceable?

MR. LUNSFORD: The Agreement is enforceable in certain respects. A, if there's an alleged breach that can be taken to the Board of Adjustment -- Alabama Board of Adjustment, Number 1.

Number 2, certainly my client can enforce that.

Also there are exceptions --if there was a violation of Alabama State Law there are ways to enforce that under various other provisions. You can not bring suit

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

1 -Proceedings-

2 against the Commission to do that. That is what Alabama law
3 says.

4 THE COURT: Okay. Thank you. I hear you, I'm not
5 necessarily agreeing with you, just to be clear.

6 MR. BERG: I have nothing else unless your Honor
7 has any questions?

8 THE COURT: Hold on. I did have a lot of
9 questions. Let me make sure that we have covered all of
10 them.

11 (Pausing.)

12 THE COURT: Okay. So moving onto your new order to
13 show cause for a Preliminary Injunction.

14 MR. BERG: Yes, your Honor.

15 Two days ago the Rocket Center filed a motion to
16 vacate in Alabama, started a new action about three months
17 after this one, which makes them second filed under any
18 analysis and they are trying to get a different result,
19 Number 1.

20 Number 2, the risk of inconsistent results is
21 critical. As your Honor just pointed out, to my adversary,
22 if they win this motion to dismiss, there's no confirmation.
23 Where else are we supposed to go? We can only go here.
24 There's this board in Alabama that I have never heard of,
25 this is all new, not in the papers.

26 The point is, your Honor, we cannot risk an

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

1 -Proceedings-

2 inconsistent result, we were first filed. They were
3 obligated to move to vacate here because this Court has
4 jurisdiction over them and the arbitration was here, and
5 they consented to jurisdiction both subject and personal
6 jurisdiction.

7 THE COURT: Okay. And the consequence -- so to be
8 sure I understand, you're asking me to stay the Court of an
9 another state?

10 MR. BERG: No. No, your Honor, that certainly is
11 not. We have researched this very carefully.

12 What we are asking you even enjoin the Space Center
13 from participating in another action.

14 THE COURT: Got it.

15 MR. BERG: We would not want you to do that.

16 THE COURT: Yes. Okay. Thank you.

17 Yes, sir, why shouldn't I enjoin the proceeding?

18 MR. LUNSFORD: First of all, your Honor, we go back
19 --we start with personal jurisdictional issue. As your
20 Honor knew, we objected to that before we filed this other
21 action in Alabama --

22 THE COURT: And you lost the arbitration.

23 MR. LUNSFORD: We filed --no, we had filed it here
24 in this case. We had raised the personal jurisdiction issue
25 in this Court and the subject matter jurisdiction in this
26 Court before we filed there. And, certainly, I'm sure your

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-Proceedings-

Honor understands, we did not file that in Alabama out of any disrespect for the Court. We were simply filing because we cannot submit to your jurisdiction. By filing it here we would have voluntarily submitted to your jurisdiction which we had already objected to. We cannot create jurisdiction.

THE COURT: You can make a special appearance.

MR. LUNSFORD: Well, your Honor, I think there were some concerns on our part based on some law that we had seen that that might create a waiver situation and given what waiver arguments we have heard otherwise.

To go back to the personal jurisdiction issue briefly. Your Honor, this idea that we somehow agreed to arbitrate in New York; first of all, factually that is false, we did not agree to arbitration.

THE COURT: You agreed to arbitration. Now you are saying that your Agreement was false?

MR. LUNSFORD: Well, on the personal jurisdiction issue, what I am saying is, we did not agree to New York as the local or venue for the arbitration. We objected to that local.

We said that the arbitration should actually occur in either Huntsville, Alabama or Washington D.C. given the involvement of NASA in the case.

THE COURT: Where in the Agreement does it say that?

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

1 -Proceedings-

2 MR. LUNSFORD: It does not say that in the
3 Agreement.

4 THE COURT: You have been reading a lot of things
5 into this Agreement, you know.

6 MR. LUNSFORD: I understand, your Honor. But,
7 again, I just want to be clear, factually, we didn't
8 volunteer like be suggested here today, that we somehow
9 agreed to arbitrate in New York. That Agreement does not
10 consist. There's nothing in the record where the Commission
11 ever said that we agreed to arbitrate this case in New York
12 and be subject to --

13 THE COURT: The only thing you agreed to was that
14 Alabama law would apply and that the AAA Commercial Rules
15 would apply; that is what the Agreement says, right?

16 MR. LUNSFORD: Yes, ma'am.

17 THE COURT: Anything else?

18 MR. LUNSFORD: So, this other issue of personal
19 jurisdiction that we have been talking about, this idea that
20 somehow the fact that the arbitration occurred in New York
21 gives this Court jurisdiction. That is not true either.

22 Based on the law that the plaintiffs have cited --
23 all the cases they have cited actually set the local of the
24 arbitration in New York, which the logic necessarily falls
25 from that; you agree to arbitrate a case in New York, you're
26 agreeing that that will be the fundamental nexus of

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

1 -Proceedings-

2 everything that will happen for the dispute. We did not
3 agree to that. Those cases do not apply.

4 There is a case, the Morgan Keegan versus Rote. It
5 was a FINRA Arbitration where the parties had agreed--
6 actually they originally agreed to set the venue in
7 Tennessee. And then, just out of convince, the parties said
8 we have a lot more people in New York, it makes sense to
9 have arbitration in New York and that is what they did and
10 they had the arbitration here. It really had no other
11 connection to the underlying facts and there was a
12 confirmation proceeding brought in New York State Court and
13 the Court held that New York had nothing to do with the
14 previous proceeding. And the same is really --

15 THE COURT: What year was that case?

16 MR. LUNSFORD: I have the name. I can give you
17 that, I apologize, I have it right here.

18 (Pausing.)

19 It is a 2014 case, your Honor.

20 THE COURT: Okay.

21 MR. LUNSFORD: We have also --

22 THE COURT: Do you know what the amount in dispute
23 was? Was it over a million dollars?

24 MR. LUNSFORD: I do not know offhand, your Honor.

25 THE COURT: General Obligations Law kicks in if it
26 is over a million dollars and then the Court would have

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

jurisdiction. Okay.

MR. LUNSFORD: And the last point is that our filing, we believe our filing in Alabama was simply A, to preserve our rights to vacate --move to vacate the underlying proceedings on the grounds we have already outlined for your Honor. We had to do that within a specific timeframe and we felt that we needed to do that in a place who had jurisdiction. Your Honor --

THE COURT: Are you agreeing to stay that action pending decision in this action?

MR. LUNSFORD: Well, this is the problem with the order of things. We believe the FAA calls for a specific order of events. So this is one of those cases where the plaintiffs got an award and they ran to the courthouse to get confirmed. This is not the first time that this has happened. They actually filed --they instituted this action I believe on the very same day that the arbitration award was issued. And so...

THE COURT: What difference does it make when?

MR. LUNSFORD: Well, the reason it matters is because we have three months to move to vacate and there's at least three different reported opinions in New York that address the issue of whether confirmation is appropriate while a motion to vacate is pending.

Actually, it is our position, that it would be it

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

would be inappropriate to rule on a confirmation while a motion to vacate is pending. For example, your Honor, I have a copy of the case, if your Honor would like a copy.

It is a 2014 Opinion entitled Loda Okla, LLC versus Overall. It is a 2014 case that involves this very issue. And it said, it addressed two prior opinions from the Second Circuit --well, one from the Second Circuit and one from the Northern District of Oklahoma. For example, it cites a case entitled In Re: North of England Steamship Company Limited, which is 57 Fed. 2d 672.

THE COURT: You know what, I am going to stop you for a second. We are talking about a TRO right now until we can have argument on the motion for a stay of that action.

MR. BERG: Two quick points.

THE COURT: Sure.

MR. BERG: I want to read from-- this goes to jurisdiction --really quickly from the scheduling order from the arbitration.

The parties confirmed that the arbitrators have jurisdiction to determine the claims asserted in the pleadings filed in this arbitration.

THE COURT: That is why you keep raising the attorney's ethical obligation?

MR. BERG: That is correct, your Honor, Number 1.

The second point is, he said he didn't mean any

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

1 -Proceedings-

2 disrespect by filing in Alabama. What he asked for in
3 Alabama was for the Alabama Court to stay this action. That
4 is what he asked for in Alabama. He said, do not let the
5 New York judge rule. So I just wanted to correct that point
6 on the record.

7 THE COURT: Oh, you want that court to stay me?

8 MR. LUNSFORD: Well, to -- well, I'm --

9 MR. BERG: That is what it says.

10 MR. LUNSFORD: I'm disagreeing. We are saying stay
11 this proceeding in terms of the plaintiff's pursuit of
12 confirmation. We may not have said it that way; that is
13 certainly what we meant. We know that an Alabama Court
14 can't order this Court to do anything, we understand that.

15 We are here arguing sovereign immunity, that seems
16 to be a little inconsistent with our overall position.

17 MR. BERG: They have asked for exactly that, your
18 Honor.

19 THE COURT: Okay. Let's pick a day that will give
20 you some time to give me some case law and give them an
21 opportunity to --give plaintiff an opportunity to look at.
22 It is just not fair that they filed this today and you are
23 scrambling to get the cases together.

24 I'm looking at my calendar for you to pick a day to
25 argue the injunction.

26 Between now and then I'm going to grant the TRO so

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

1 -Proceedings-

2 that we all have time to examine the Court's jurisdiction;
3 meaning that the Respondent in this case is enjoined from
4 proceeding with that action.

5 How much time would you like?

6 MR. LUNSFORD: I'm checking my calendar. I
7 apologize, I had turned my phone off.

8 THE COURT: All right.

9 (Pausing.)

10 MR. LUNSFORD: Your Honor, would you like a
11 briefing deadline and a period for a hearing after that?

12 THE COURT: Right. I want you to tell me how much
13 time you need to write a brief in opposition to this motion
14 for an injunction.

15 MR. LUNSFORD: Your Honor, we would ask through --
16 if we could have ten calendar days from today? The only
17 reason I raise that, I have a couple of court appearances
18 next week that will make that complicated.

19 THE COURT: Okay. So you want until the 25th?

20 MR. LUNSFORD: Yes, ma'am.

21 THE COURT: How much time do you want to reply?

22 MR. BERG: Three days, your Honor, that Friday is
23 good.

24 THE COURT: March 1st.

25 MR. BERG: Thank you.

26 THE COURT: Okay.

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

1
2 So you can argue on Friday the 8th? You'll be
3 traveling I assume?

4 MR. LUNSFORD: Yes, ma'am.

5 THE COURT: Tell me what time is good for you?

6 MR. LUNSFORD: The earlier the better, your Honor.

7 THE COURT: Okay. You can have 10:00.

8 You are okay with 10:00 on the 8th?

9 MR. BERG: Yes, your Honor, we are.

10 THE COURT: This is all contingent unless the Court
11 issues a decision prior to that day.

12 MR. BERG: Okay. Thank you.

13 THE COURT: So I will sign the order to show cause
14 issuing the TRO until the 8th. And the motion and
15 cross-motion are submitted. Please get the transcript to
16 the Court and I will see you on the 8th.

17 Thank you very much. Excellent argument.

18 MR. BERG: Thank you.

19 MR. LUNSFORD: Thank you.

20 MR. HINTZ: Sorry. Just so that I am clear on the
21 date-- John Hintz --I have February 26th.

22 THE COURT: You're going to serve, file and e-mail
23 your papers by February 25th.

24 MR. HINTZ: Okay.

25 THE COURT: You have until 5:00 p.m. and on
26 March 1st by 5:00 p.m.

DEBORAH A. ROTHROCK - OFFICIAL COURT REPORTER

-Proceedings-

MR. HINTZ: Thank you.

THE COURT: Thank you.

(Whereupon, the proceedings concluded.)

* * *

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

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Official Court Reporter

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Alabama Space Science Exhibit

	8:9	3:14,21	19:12	26:13
\$	ago (3)	application (1)	Attorney (6)	bring (4)
	2:24;14:7;24:15	15:20	3:20,21,22;4:9,12,16	12:25;14:14;18:5;23:26
\$1.4 (1)	agree (12)	applied (1)	attorney's (1)	brings (1)
14:26	12:7,9,12,13,14;13:4;14:10;17:8;26:15,19;27:25;28:3	22:2	30:24	21:17
A	agreed (12)	applies (3)	authority (2)	brought (2)
	9:2;11:9;12:20;14:10;15:12;16:24;26:13,16;27:9,11,13;28:6	11:9;22:12,16	10:20,21	14:8;28:12
AAA (2)	agreed- (1)	apply (5)	automatically (1)	business (3)
12:20;27:14	28:5	15:16;22:6;27:14,15;28:3	13:6	5:22,23;17:7
abrogation (1)	agreeing (3)	appointed (2)	award (7)	
12:8	24:5;27:26;29:10	3:19;4:16	3:25;9:19;10:2;19:18,21;29:15,18	C
absolutely (1)	agreement (17)	appreciate (1)	aware (1)	
20:23	12:8,24;15:12;16:21,26;17:18,20,26;23:16,18,19;26:17,25;27:3,5,9,15	3:15	3:17	calendar (3)
according (3)	ahead (1)	appropriate (1)		31:24;32:6,16
15:21;21:24;22:25	11:4	29:24	B	California (1)
across (1)	aid (1)	arbitrate (4)		11:16
22:2	13:2	26:14;27:9,11,25	back (6)	call (4)
Act (2)	Alabama (53)	arbitration (48)	4:8;8:26;22:17;23:11;25:18;26:12	5:5;6:13,14;13:7
11:9;20:12	2:3,23,25;3:19,22;23:4;25;5:2;6:10,22;8:9;10:10;12:3;13:19;14:8,13;15:12,20,22;16:11,13,15,17;17:5,6,7,8,13,14;18:3,6;21:7,16,23;22:4,11,14;23:2,21,25;24:2,16,24;25:21;26:2,23;27:14;29:4;31:2,3,3,4,13	3:5,12,25;9:3,9;11:9,24,25;12:7,11,14,23;13:2,4,5,11;14:4,5,18;16:20;17:4,16,17,19;19:21;20:12;21:21,24;22:3,7,12,14,15,21;25:4,22;26:15,16,20,22;27:20,24;28:5,9,10;29:18;30:19,22	23:11;25:18;26:12	11:12
action (14)	alike (1)	arbitrations (1)	backs (1)	calls (1)
7:2;10:14;11:3,6;12:25;24:16;25:13,21;29:10,11,17;30:14;31:3;32:4	22:3	16:25	21:26	29:13
actually (16)	alleged (1)	arbitrator (2)	Bader (1)	came (1)
3:19,21;4:5,22,26;5:11,12;10:18,19;13:3;20:24;26:22;27:23;28:6;29:17,26	23:20	9:21;19:24	12:11	4:25
address (5)	allowed (1)	arbitrators (5)	Barnhart (3)	can (20)
3:3;8:14;10:25;12:18;29:24	21:25	3:12;10:13;19:10,13;30:20	6:14;8:7,8	7:5;10:25,25;12:10,10;16:17;17:8;20:4;21:15;22:14,25;23:20,23,26;24:23;26:7;28:16;30:14;33:2,7
addressed (1)	alone (1)	arbitrator's (1)	based (5)	33:2,7
30:7	20:22	19:18	3:26;14:16;15:22;26:9;27:22	carefully (1)
adducing (1)	alternative (1)	argue (2)	basis (1)	25:11
9:12	14:16	31:25;33:2	7:3	case (54)
Adjustment (7)	Amendment (5)	argued (1)	begin (1)	3:22,23;4:9,10,16,17;5:26;6:3,7,9,14,14;7:11,15,16,17,17,21;8:20;9:3,14;11:10,12,17,19;14:3,16,19;15:2,15;16:10;18:10,10,12;20:17;21:15,17,17,18;22:23;23:9,17;25:24;26:24;27:11,25;28:4,15,19;30:4,6,9;31:20;32:3
16:12,13,17;20:4,5;23:21,22	7:25;18:11,13;20:9,18	11:14	2:19	3:22,23;4:9,10,16,17;5:26;6:3,7,9,14,14;7:11,15,16,17,17,21;8:20;9:3,14;11:10,12,17,19;14:3,16,19;15:2,15;16:10;18:10,10,12;20:17;21:15,17,17,18;22:23;23:9,17;25:24;26:24;27:11,25;28:4,15,19;30:4,6,9;31:20;32:3
adopted (2)	amount (1)	arguing (2)	behalf (2)	cases (15)
20:11;22:4	28:22	20:11;31:15	7:24,25	3:20;4:21,22;7:18;13:9,15,16,24;15:26;18:11;21:14;27:23;28:3;29:14;31:23
adversary (1)	analysis (3)	argument (8)	benefit (1)	category (1)
24:21	13:10,17;24:18	10:22;11:8;12:19;14:18;21:11;23:5;30:14;33:17	16:25	22:5
affect (1)	apologize (2)	arguments (2)	Berg (38)	cause (3)
10:16	28:17;32:7	3:4;26:11	2:5,5,5,10,21;8:14,17,23;9:8,19,24;10:2,4,6,8,21,23,25;11:5,15,18;13:3,24;18:24;24:6,14;25:10,15;30:15,17,25;31:9,17;32:22,25;33:9,12,18	14:9;24:13;33:13
affidavit (2)	appear (2)	arises (1)	better (1)	Center (17)
9:19,19	3:15,20	15:20	33:6	2:22;3:9;4:10,11,24;6:12;9:16,20;11:20;12:14;13:7,15,18;14:25;17:3;24:15;25:12
Again (7)	appearance (2)	around (1)	board (10)	certain (2)
3:13;12:16;14:13;20:8;21:6,19;27:7	4:8;26:7	14:26	5:24;16:12,13,17;20:3,5;22:2;23:21,21;24:24	21:21;23:20
against (14)	appearances (1)	asserted (2)	both (1)	
2:2;4:11;5:26;7:21,22;11:4,6,24;12:3;16:16,17;17:14;18:5;24:2	32:17	10:9;30:21	25:5	
agencies (2)	appearing (2)	asserting (2)	breach (2)	
5:12;16:24		9:16;10:13	14:25;23:20	
agency (11)		assume (1)	break (1)	
5:24;6:12,22;8:3,5,10;10:10;17:8,9,15;23:14		33:3	2:19	
agents (1)		attack (2)	brief (2)	
		21:21;22:13	8:25;32:13	
		attacking (1)	briefing (1)	
			32:11	
			briefly (1)	

<p>certainly (7) 8:3;20:2,4;23:23; 25:10,26;31:13</p> <p>certainty (1) 5:21</p> <p>cetera (2) 13:21,21</p> <p>challenging (3) 3:11,24;19:20</p> <p>change (1) 17:26</p> <p>checking (1) 32:6</p> <p>checks (1) 13:20</p> <p>choice (1) 18:20</p> <p>Circuit (3) 8:6;30:8,8</p> <p>citation (1) 6:17</p> <p>cite (1) 10:10</p> <p>cited (4) 4:23;8:24;27:22,23</p> <p>cites (1) 30:9</p> <p>claim (11) 10:9;11:26;16:18; 17:3,4,9,9,14,16;18:5; 21:23</p> <p>claimant (1) 22:23</p> <p>claiming (1) 20:4</p> <p>claims (4) 16:19;21:21;22:5; 30:21</p> <p>Clark (1) 11:20</p> <p>Clause (1) 12:5</p> <p>clear (5) 19:3;23:4;24:5; 27:7;33:20</p> <p>clearly (4) 8:6;15:12;21:19; 22:24</p> <p>clerk (1) 2:17</p> <p>client (3) 5:9;22:20;23:23</p> <p>clients (1) 2:7</p> <p>close (1) 13:7</p> <p>CNL (1) 21:4</p> <p>colleague (2) 2:6;15:24</p> <p>Commercial (1) 27:14</p> <p>Commission (23) 2:3;4:23;5:3,5,11, 16,19,21;6:2,12,20, 21,26;7:21,23;8:18; 17:3,25;18:4,5;23:13; 24:2;27:10</p> <p>Commission- (1) 5:10</p> <p>Company (1) 30:10</p> <p>competent (2) 12:25;13:6</p> <p>complicated (1) 32:18</p> <p>concept (2) 16:2,6</p> <p>concerns (1) 26:9</p> <p>conclude (1) 14:20</p> <p>concluded (2) 13:19,20</p> <p>conduct (1) 5:22</p> <p>conferrers (1) 13:12</p> <p>confirm (2) 14:5;15:5</p> <p>confirmation (7) 18:25;19:2;24:22; 28:12;29:24;30:2; 31:12</p> <p>confirmed (3) 10:12;29:16;30:20</p> <p>confirms (1) 9:21</p> <p>conflates (1) 15:26</p> <p>conflating (1) 8:17</p> <p>confusing (2) 4:20;21:6</p> <p>confusion (3) 7:10,12,14</p> <p>Congress (3) 20:11,20,23</p> <p>connection (1) 28:11</p> <p>consent (1) 12:9</p> <p>consented (1) 25:5</p> <p>consequence (1) 25:7</p> <p>consequences (1) 12:12</p> <p>considering (1) 3:6</p> <p>consist (1) 27:10</p> <p>Constitution (4) 12:3;18:6,16;21:12</p> <p>constitutional (2) 16:15;22:10</p>	<p>construction (1) 17:12</p> <p>context (1) 22:6</p> <p>contingent (1) 33:10</p> <p>Continue (2) 10:7;18:9</p> <p>contract (2) 11:4;17:11</p> <p>contractors (1) 17:12</p> <p>convince (1) 28:7</p> <p>Cooper (1) 2:13</p> <p>copy (2) 30:4,4</p> <p>corporation (1) 13:22</p> <p>correctly (3) 3:8,10;5:6</p> <p>counsel (6) 2:13;9:9,21;10:12; 15:22;22:20</p> <p>couple (2) 18:23;32:17</p> <p>COURT (138) 2:2,9,11,15,16,25; 3:3,4;2,8,18;5:5,6,9, 14,15,25;6:4,11,13, 16,20,26;7:5,9,12,17, 17,19,21;8:12,16,22; 9:5,7,22,25;10:3,7,17, 18,22,24;11:3,12,13, 16,21,22;12:23,25; 13:5,23,26;14:17; 15:3,7,9,15,23;16:5,7, 7,9,20;17:5,13,17,21, 26;18:7,17;19:4,8,10, 15,17;20:6,17;21:11, 18;22:2,7,12;23:4,7, 16;24:4,8,12;25:3,7,8, 14,16,22,25,26;26:3, 7,16,25;27:4,13,17, 21;28:12,13,15,20,22, 25,26;29:10,20;30:12, 16,23;31:3,7,7,13,14, 19;32:8,12,17,19,21, 24,26;33:5,7,10,10, 13,16,22,25</p> <p>courthouse (1) 29:15</p> <p>courtroom (2) 13:12;14:8</p> <p>court's (2) 7:6;32:2</p> <p>covered (1) 24:9</p> <p>coy (1) 9:11</p> <p>CPLR (3) 12:21;13:3,10</p>	<p>create (2) 26:6,10</p> <p>created (3) 5:3;6:20,21</p> <p>critical (3) 3:23;15:14;24:21</p> <p>cross-motion (2) 14:15;33:15</p> <p>D</p> <p>date- (1) 33:21</p> <p>day (4) 29:18;31:19,24; 33:11</p> <p>days (5) 2:24;14:7;24:15; 32:16,22</p> <p>DC (1) 26:23</p> <p>deadline (1) 32:11</p> <p>decide (1) 14:17</p> <p>decision (6) 7:19,20;11:21;23:7; 29:11;33:11</p> <p>decree (1) 10:17</p> <p>defendant (2) 22:11,15</p> <p>defendant's (1) 3:6</p> <p>defense (2) 10:9,14</p> <p>definition (1) 12:22</p> <p>delay (1) 13:26</p> <p>depends (3) 7:16;19:22,23</p> <p>Deputy (3) 3:21;4:9,16</p> <p>determine (2) 13:17;30:21</p> <p>difference (4) 14:3;20:8;21:13; 29:20</p> <p>different (7) 4:5;7:18;14:8;16:3; 18:9;24:18;29:23</p> <p>directly (1) 17:23</p> <p>disagreeing (1) 31:10</p> <p>disclosed (1) 8:2</p> <p>discriminating (1) 11:23</p> <p>dismiss (6) 3:6;4:5;19:4,18,23; 24:22</p>	<p>dismissed (1) 6:26</p> <p>dismissing (1) 19:23</p> <p>dispute (5) 12:10,15;15:14; 28:2,22</p> <p>disputes (3) 15:13;17:25;22:2</p> <p>disputes- (1) 17:24</p> <p>disregard (1) 10:19</p> <p>disregarded (1) 18:18</p> <p>disrespect (2) 26:3;31:2</p> <p>distinguish (1) 16:2</p> <p>distinguishable (1) 21:9</p> <p>District (1) 30:9</p> <p>doctrine (3) 2:26;11:11;12:4</p> <p>dollars (2) 28:23,26</p> <p>down (2) 9:15;23:8</p> <p>Dr (1) 8:8</p> <p>during (1) 9:9</p> <p>E</p> <p>earlier (2) 22:26;33:6</p> <p>education (1) 14:23</p> <p>either (2) 26:23;27:21</p> <p>else (3) 24:6,23;27:17</p> <p>e-mail (1) 33:22</p> <p>emergency (2) 2:18;14:9</p> <p>employ (1) 5:21</p> <p>employed (1) 8:4</p> <p>employees (3) 5:23,26;8:4</p> <p>end (2) 3:4;15:4</p> <p>enforce (2) 23:23,25</p> <p>enforceable (2) 23:18,19</p> <p>engage (1) 5:22</p> <p>England (1)</p>
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30:10 enjoin (3) 2:22;25:12,17 enjoined (1) 32:3 Enterprise (1) 21:4 entitled (9) 8:3,5,8,10;12:25; 18:21;23:15;30:5,10 entity (5) 5:2,3,20;16:18;17:7 enumerated (1) 14:6 equally (1) 22:12 equivalent (1) 10:16 essentially (2) 18:18;20:14 et (2) 13:21,21 ethical (1) 30:24 even (8) 13:10;14:7;19:11; 20:2,17;21:14;23:2; 25:12 events (1) 29:14 evidence (1) 9:12 exact (1) 16:13 exactly (3) 4:19;12:15;31:17 examine (1) 32:2 example (5) 11:24;17:11;21:22; 30:3,9 Excellent (1) 33:17 exceptions (1) 23:24 exclusively (1) 12:3 Exhibit (2) 2:3;9:19 exist (1) 8:18 existed (3) 16:8;18:14;21:12 ex-parte (1) 2:17 expecting (1) 2:17 explain (1) 22:19	11:23;12:3,6;15:24; 19:3;20:7,18,24,26; 21:25;22:3,8,13; 29:13 face (2) 11:24;20:23 fact (3) 8:2;18:14;27:20 facts (1) 28:11 factually (2) 26:14;27:7 fails (1) 16:2 fair (3) 7:7;17:15;31:22 falls (1) 27:24 false (2) 26:15,17 February (2) 33:21,23 Fed (1) 30:11 federal (12) 7:17,19,20,21;8:7; 11:9,11;12:4,16;16:6; 20:12,17 felt (1) 29:8 fighting (1) 17:13 file (3) 16:17;26:2;33:22 filed (14) 2:25;7:16,21,22; 24:15,17;25:2,20,23, 23,26;29:17;30:22; 31:22 filing (6) 14:13;26:3,4;29:4, 4;31:2 filings (1) 16:4 final (1) 13:14 find (2) 20:17;21:7 finding (4) 9:11,18;10:15; 19:11 FINRA (1) 28:5 firm (1) 3:18 firms (1) 3:19 first (13) 4:3,6;7:6;15:11; 18:16,25;19:12;21:5; 23:9;25:2,18;26:14; 29:16 first-filed (1)	2:26 fishing (1) 13:25 flip (1) 12:17 focus (1) 18:26 following (1) 14:21 forced (1) 17:15 forum (3) 15:17,17;17:8 forward (1) 2:22 found (2) 5:15;8:19 four-pronged (1) 13:17 frankly (2) 13:25;16:25 fraud (1) 11:3 Friday (2) 32:22;33:2 from- (1) 30:17 front (3) 2:7;3:15;13:13 frustration (1) 22:18 fully (1) 2:24 fund (1) 14:23 fundamental (1) 27:26 further (1) 16:7	governor (1) 23:3 grant (5) 3:5;14:22,24;19:17; 31:26 granted (1) 20:21 grievance (1) 16:16 grievances (1) 16:16 grounds (3) 4:5,6;29:6 group (1) 5:16 guess (1) 7:14	17:10;18:2,25;19:5; 20:8;22:18,19,26; 23:11;24:6,14,21,26; 25:10,18,20;26:2,8, 13;27:6;28:19,24; 29:7,9;30:3,4,25; 31:18;32:10,15,22; 33:6,9 Honor- (1) 5:13 hopes (1) 21:7 hoping (1) 13:26 horizon (1) 4:26 hung (1) 18:15 Huntsville (2) 4:25;26:23
			H	I
			hac (1) 3:15 handling (1) 2:14 happen (2) 17:2;28:2 happened (4) 7:15;12:15;16:23; 29:17 happy (1) 4:21 hailed (1) 18:17 haw (1) 9:15 head (2) 12:5,17 hear (2) 3:4;24:4 heard (2) 24:24;26:11 hearing (3) 9:20;10:12;32:11 held (7) 8:6,19;11:22;14:25; 15:3;20:17;28:13 hem (1) 9:14 highlighted (1) 6:8 Hintz (5) 2:12,12;33:20,21, 24 history (1) 4:20 Hold (2) 9:22;24:8 Honor (60) 2:5,7;3:13,17,24; 4:4,23;6:3,6,7,15,25; 7:8;8:2,21;9:4;10:15, 23;12:2;13:9,13;14:4, 13,20;15:4,8,11;	idea (2) 26:13;27:19 immune (4) 8:11;18:4,5;23:17 immunities (1) 21:6 immunity (53) 3:26;4:7;7:4,23,24, 25;8:3,5,9,10,17,19; 9:3,11,14,17;10:9,14; 12:9;13:16;14:2,11; 15:2,20,26;16:3,5,8, 14;18:9,11,11,14,22; 20:9,9,13,14,18,22,22, 25;21:5,8,9,13,15,16; 22:17,24;23:2,15; 31:15 important (6) 6:7,9;12:7;15:2; 18:26;20:10 Importantly (1) 12:11 inappropriate (1) 30:2 inconsistent (4) 2:26;24:20;25:2; 31:16 incorrect (2) 4:13,14 independence (1) 13:18 individuals (6) 5:22,23;7:22,24,26; 23:14 Ingalls (8) 4:17;6:14;7:15;8:6, 20;23:9,12,13 injunction (4) 2:22;24:13;31:25; 32:14
F			G	
FAA (14)		Gabriel (1) 2:5 Gale (1) 2:13 games (1) 14:9 General (9) 3:20,21,22;4:9,12, 16;7:6;16:2;28:25 Ginsburg (3) 12:11;21:4,15 given (2) 26:10,23 gives (1) 27:21 goes (1) 30:17 Good (3) 2:12;32:23;33:5 govern (1) 15:13		

injunctive (1) 12:26 instance (3) 5:13;14:12;17:2 instances (1) 17:10 instituted (1) 29:17 interesting (1) 11:16 interpretation (2) 3:23;16:23 into (4) 17:4,5;18:17;27:5 involve (1) 21:5 involved (1) 21:8 involvement (1) 26:24 involves (1) 30:6 involving (2) 4:23;21:18 issue (15) 3:4;9:14;16:14; 18:15,17;20:7;22:17, 24:25;19,24;26:12, 19;27:18;29:24;30:6 issued (1) 29:19 issues (2) 20:25;33:11 issuing (1) 33:14	K Keegan (1) 28:4 keep (1) 30:23 Kennedy (1) 2:5 Kentucky (1) 21:18 kicks (1) 28:25 kind (3) 15:26;20:25;22:2 Kindred (7) 11:12,20;21:17,20, 25,25;22:16 knew (2) 14:15;25:20	L lack (1) 3:7 language (1) 17:21 last (1) 29:3 law (41) 3:18,19,23;10:16; 11:7,24;12:16,16; 15:13,15,16,21,21,22, 23;16:15;18:3,3,3,8,9, 20;20:20,21,21,24; 21:7,16,18,22,24,26; 22:5;23:2,25;24:2; 26:9;27:14,22;28:25; 31:20 laws (1) 18:18 lawyer (1) 11:6 lead (1) 9:3 least (2) 14:25;29:23 left (1) 20:22 legal (3) 5:2,20;19:26 Legislature (3) 6:22;16:12,19 Limited (2) 11:20;30:10 limiting (1) 21:21 little (1) 31:16 LLC (1) 30:5 local (3) 26:20,21;27:23	Loda (1) 30:5 logic (1) 27:24 long (1) 18:13 look (3) 7:15;16:4;31:21 looked (1) 20:16 looking (1) 31:24 lose (2) 12:6;14:11 lost (1) 25:22 lot (3) 24:8;27:4;28:8 Lunsford (61) 2:14;3:13,14;4:3, 14,19;5:8,10,18;6:3,5, 15,19,24;7:3,7,10,13, 20;15:8,10,19,25; 16:11,22;17:19,23; 18:2,8;19:5,14,16,22; 20:7;21:13;23:6,11, 19;25:18,23;26:8,18; 27:2,6,16,18;28:16, 21,24;29:3,12,21; 31:8,10;32:6,10,15, 20;33:4,6,19	31:13 Meital (1) 2:6 mention (1) 21:3 might (3) 14:20;17:14;26:10 million (3) 14:26;28:23,26 minute (1) 2:18 mix (1) 20:25 mixing (1) 21:6 moment (1) 8:26 months (2) 24:16;29:22 more (2) 17:15;28:8 Morgan (1) 28:4 morning (1) 2:12 most (2) 4:7;15:14 motion (17) 2:20,21,24,25;3:5, 6;4:4;14:14;19:2,18; 24:15,22;29:25;30:3, 14;32:13;33:14 move (4) 14:6;25:3;29:5,22 moving (1) 24:12 much (5) 8:13;32:5,12,21; 33:17 must (1) 22:6	28:8,9,12,13;29:23; 31:5 next (1) 32:18 nexus (1) 27:26 nodding (1) 3:2 nonsense (1) 15:3 North (1) 30:10 Northern (1) 30:9 null (1) 19:25 Number (6) 11:2;23:22,23; 24:19,20;30:25 numerous (1) 13:9 Nursing (1) 11:20
J January (1) 11:14 John (2) 2:12;33:21 judge (1) 31:5 judicial (1) 16:18 Judiciary (1) 11:7 jumped (1) 9:13 jurisdiction (40) 3:7,10,11,25;4:6,6; 12:18,20,21,26;13:6, 7,8,12;14:10;15:16; 19:9,11,12,13,20,24, 25;25:4,5,6,24,25; 26:4,5,6,12,18;27:19, 21;29:2,9;30:18,21; 32:2 jurisdictional (2) 4:5;25:19			M ma'am (5) 4:15,19;27:16; 32:20;33:4 makes (4) 11:6;20:23;24:17; 28:8 many (1) 17:5 March (2) 32:24;33:26 matter (6) 2:2,14;19:26;20:2; 22:26;25:25 matters (1) 29:21 may (6) 8:14,26;9:4;11:6; 15:8;31:12 Maybe (1) 4:18 Maynard (1) 2:12 mean (3) 5:18;15:17;30:26 meaning (1) 32:3 means (1) 12:21 meant (1)	N name (6) 3:14;5:3,11,19,22; 28:16 NASA (2) 14:23;26:24 natural (1) 8:4 nature (1) 10:16 necessarily (3) 19:7;24:5;27:24 need (3) 9:10;13:10;32:13 needed (1) 29:8 New (19) 13:4;21:22;22:4; 24:12,16,25;26:14,19; 27:9,11,20,24,25;	O objected (4) 9:12;25:20;26:6,20 obligated (1) 25:3 obligation (1) 30:24 Obligations (1) 28:25 obviously (1) 3:14 occur (1) 26:22 occurred (2) 6:10;27:20 Odysseia (4) 4:11;5:26;6:10; 18:10 off (2) 21:26;32:7 offhand (1) 28:24 officials (3) 7:23;8:7,8 Okla (1) 30:5 Oklahoma (1) 30:9 one (10) 8:21;11:2,13,16; 12:7;17:10;24:17; 29:14;30:8,8 one-sided (2) 17:17,19 only (4) 8:10;24:23;27:13; 32:16 onto (1)

24:12	owned (1)	23:8	previous (1)	
opening (2)	5:7	pinned (1)	28:14	Q
7:6;9:10	owns (1)	9:15	principals (3)	qualified (1)
operate (1)	5:15	place (7)	2:8;8:19,20	8:18
13:21		4:24;13:5;16:10,11;	prior (3)	quasi (1)
operates (1)	P	18:16;21:10;29:9	22:19;30:7;33:11	16:18
23:14		plaintiff (2)	private (1)	quick (1)
operation (1)	Page (8)	22:23;31:21	3:18	30:15
5:23	6:16,17,21;8:22;	plaintiffs (5)	pro (1)	quickly (1)
Opinion (7)	10:3,4,6;23:9	6:8;18:8;20:3;	3:14	30:18
8:7,7;21:4,19;	panel (3)	27:22;29:15	problem (3)	quiet (1)
23:12,13;30:5	3:25;9:13,18	plaintiff's (3)	9:24;11:8;29:12	3:2
opinions (3)	papers (2)	15:21;16:4;31:11	procedural (2)	
21:3;29:23;30:7	24:25;33:23	playing (1)	4:20;20:21	R
opportunity (3)	Paragraph (4)	14:9	procedurally (1)	
3:15;31:21,21	6:17,18,21;7:6	plead (1)	19:6	Race (5)
opposition (1)	Parker (1)	14:15	proceeding (7)	2:2,6,8;20:11,19
32:13	18:10	pleadings (1)	19:2,3;25:17;28:12,	Race's (1)
order (9)	part (5)	30:22	14:31;11;32:4	22:18
14:9;19:22,25;	6:24;13:18;14:14;	Please (5)	proceedings (3)	raise (3)
24:12;29:13,14;	15:14;26:9	2:16;8:13,16;17:22;	18:26;19:8;29:6	14:11;20:4;32:17
30:18;31:14;33:13	participated (1)	33:15	Proceedings- (32)	raised (3)
ordered (1)	13:11	pm (2)	2:1;3:1;4:1;5:1;6:1;	7:23;18:24;25:24
10:17	participating (1)	33:25,26	7:1;8:1;9:1;10:1;	raising (1)
orders (1)	25:13	podium (1)	11:1;12:1;13:1;14:1;	30:23
2:18	particular (7)	9:4	15:1;16:1;17:1;18:1;	ran (1)
original (1)	6:9;7:24;8:5;11:25;	point (7)	19:1;20:1;21:1;22:1;	29:15
15:12	15:3;16:26;21:23	14:24;17:21;23:12;	23:1;24:1;25:1;26:1;	rasing (1)
originally (2)	parties (6)	24:26;29:3;30:26;	27:1;28:1;29:1;30:1;	4:4
7:16;28:6	12:24;15:12,13;	31:5	31:1;32:1;33:1	Re (1)
originates (1)	28:5,7;30:20	pointed (1)	process (1)	30:10
21:9	passage (1)	24:21	19:9	read (2)
otherwise (1)	18:15	points (4)	progression (1)	9:22;30:17
26:11	passed (2)	6:8;13:14;18:23;	8:4	reading (3)
out (5)	18:13;20:20	30:15	prohibiting (1)	9:25;21:19;27:4
15:20;17:24;24:21;	past (1)	position (2)	11:25	real (1)
26:2;28:7	16:24	29:26;31:16	properties (1)	9:23
outcome (1)	Pausing (5)	practical (1)	13:21	really (5)
5:25	9:6;10:5;24:11;	12:12	property (4)	13:25;22:16;28:10,
outlined (1)	28:18;32:9	preclusive (1)	5:7,9,10,15	14:30:18
29:7	pending (3)	10:15	proposition (1)	reason (5)
outlines (1)	29:11,25;30:3	pre-date (1)	21:20	12:6;18:19,20;
23:13	people (7)	21:14	prove (1)	29:21;32:17
out-of-state (1)	3:18;5:16;11:4;	preempted (4)	22:6	receive (1)
17:12	16:15;17:5;23:16;	20:13;22:3,8,13	provides (1)	16:19
outright (1)	28:8	Preemption (4)	20:26	recent (1)
11:25	period (2)	11:11;12:4;14:18;	provision (5)	11:12
outside (2)	13:12;32:11	20:7	12:8,24;15:18;	record (2)
17:5,6	personal (9)	preempts (4)	18:21;22:10	27:10;31:6
over (8)	4:6;12:18;13:6;	11:23;12:16;20:18,	provisional (1)	refer (1)
9:13;12:21;13:7;	25:5,19,24;26:12,18;	24	12:26	4:24
15:16;17:14;25:4;	27:18	Preliminary (1)	provisions (1)	referencing (1)
28:23,26	petition (3)	24:13	23:26	15:23
Overall (2)	3:6;14:4;15:5	preschools (1)	pursue (2)	referring (1)
30:6;31:16	Petitioner (1)	14:23	17:4,16	15:25
overcomes (1)	2:4	present (1)	pursued (1)	regardless (3)
21:7	Petitioner's (1)	16:22	17:9	16:6;22:6,7
overturned (1)	2:20	preserve (1)	pursuing (1)	regime (1)
13:25	phone (1)	29:5	9:2	12:12
owing (1)	32:7	pretty (1)	pursuit (1)	relevant (1)
14:25	pick (2)	19:3	31:11	14:19
own (4)	31:19,24	prevent (1)	pushing (1)	relief (1)
5:9;13:20,20;20:22	pin (1)	20:3	22:24	

12:26 rely (3) 7:5;12:2;18:9 relying (7) 6:16;23;8:20,24; 12:23;13:3;15:24 render (1) 3:25 reply (1) 32:21 reported (1) 29:23 representation (1) 4:12 required (1) 14:14 researched (1) 25:11 resolved (1) 6:3 respect (2) 5:24;22:5 respects (1) 23:20 respond (2) 15:8;18:23 Respondent (4) 2:11;3:8;22:15; 32:3 Respondents (1) 2:13 result (2) 24:18;25:2 results (1) 24:20 results- (1) 2:26 right (14) 4:19;7:5;8:23;10:3; 15:19;16:10,10,11; 19:20;27:15;28:17; 30:13;32:8,12 rights (2) 20:26;29:5 risk (2) 24:20,26 road (2) 17:11,11 Rocket (15) 2:22;3:9;4:10,11, 24:6;11:9;16:20; 12:14;13:7,15,18; 14:24;17:2;24:15 Rote (1) 28:4 row (1) 2:7 rule (5) 11:23;14:13;20:14; 30:2;31:5 Rules (1) 27:14 running (1)	14:26 Ruth (1) 12:11 S same (5) 16:6;21:11;22:8; 28:14;29:18 Saturn (1) 4:26 saw (1) 4:18 saying (19) 3:10;5:14,19;7:14; 10:18;12:2,13;14:10, 26;18:2;19:6,24; 20:19;21:12,26;23:5; 26:17,19;31:10 scenario (1) 16:14 scheduling (1) 30:18 Science (3) 2:3;5:2;14:23 scrambling (1) 31:23 seat (1) 8:13 seated (1) 2:16 second (7) 3:11;21:17;24:17; 30:7,8,13,26 secondly (1) 4:7 Section (2) 6:21;8:22 seems (1) 31:15 selecting (1) 15:15 selection (1) 15:17 sense (2) 20:23;28:8 sentence (2) 8:21;23:9 separate (1) 21:10 serve (1) 33:22 set (4) 16:12,18;27:23; 28:6 setting (1) 21:24 settle (1) 20:2 settled (1) 6:5 several (1) 7:22	shall (1) 12:24 show (3) 14:9;24:13;33:13 shows (1) 21:20 sign (2) 16:20;33:13 signed (3) 11:4;23:16,17 signing (1) 16:26 simply (3) 5:19;26:3;29:4 situation (1) 26:10 slowly (1) 9:23 somehow (3) 26:13;27:8,20 Sometimes (1) 17:12 somewhere (1) 14:2 sorry (3) 6:20;9:25;33:20 sovereign (30) 4:7;7:3;8:17;9:2,11, 13,17;10:9,14;12:9; 13:16;14:2,11;15:2, 20,26;16:3,5,8,14; 18:9,10,11,14;20:9; 21:5,16;22:23;23:2; 31:15 sovereignty (2) 3:26;18:14 Space (12) 2:2,3,6,8;4:24;5:2; 6:11;17:2;20:11,19; 22:18;25:12 Speaking (2) 5:25;8:15 special (1) 26:7 specific (3) 21:22;29:8,13 specifically (1) 14:6 spoken (1) 6:11 stand (2) 9:4;22:19 standing (1) 4:26 stands (1) 21:20 start (1) 25:19 started (3) 9:12;14:22;24:16 state (43) 3:26;4:7;5:4,12,24; 6:12,22,24;7:17,24;	8:9;10:10;11:23; 12:16;13:19;16:7,8, 12,13,14,16,17,24; 17:6,7,7,13;18:6,10, 13,14,18,21;20:9; 21:16;22:10,11,14,17; 23:14,25;25:9;28:12 statement (5) 4:3;7:6;9:10;10:8; 11:7 States (5) 11:21;18:15,16; 20:13,21 states' (1) 20:13 statute (3) 5:4;6:25;14:6 stay (7) 14:16;25:8;29:10; 30:14;31:3,7,10 Steamship (1) 30:10 still (1) 18:21 stop (3) 13:12;15:3;30:12 subject (3) 25:5,25;27:12 submit (1) 26:4 submitted (4) 2:24;4:10;26:5; 33:15 substantive (3) 3:4;20:20,26 successful (1) 16:9 sue (2) 12:10,10 sued (1) 18:4 suggest (1) 5:18 suggested (1) 27:8 suit (1) 23:26 supposed (1) 24:23 Supremacy (1) 12:4 Supreme (5) 6:11;11:12,21; 14:17;21:18 sure (6) 3:17;9:5;24:9;25:8, 26;30:16 surprise (1) 22:22 system (1) 17:5	T talk (1) 20:25 talking (6) 6:13;7:17,19;11:13; 27:19;30:13 ten (1) 32:16 Tennessee (1) 28:7 terms (6) 3:23;5:12;15:19; 19:6,19;31:11 the- (1) 9:3 theory (1) 21:7 though (2) 19:4,11 thought (1) 4:9 three (6) 4:22;13:15;24:16; 29:22,23;32:22 timeframe (1) 29:8 titled (1) 5:11 today (6) 2:14;3:21;20:15; 27:8;31:22;32:16 together (1) 31:23 took (1) 13:5 transcript (2) 22:25;33:15 traveling (1) 33:3 treated (1) 19:25 tribal (3) 21:8,13,15 tried (3) 9:14;14:7,7 TRO (4) 2:21;30:13;31:26; 33:14 true (3) 13:18;22:8;27:21 truth (1) 16:8 try (1) 21:24 trying (3) 14:12;21:7;24:18 turned (1) 32:7 turns (1) 12:4 Two (10)
--	---	---	--	--

2:24;4:5;7:18; 13:14;14:7;16:3;21:3; 24:15;30:7,15 type (1) 11:25 types (2) 16:3;21:21 typically (1) 4:24	vice (1) 3:15 view (3) 15:14;17:6;23:18 views (1) 3:22 violation (1) 23:25 virtue (1) 20:12 void (1) 19:26 voluntarily (1) 26:5 volunteer (1) 27:8	year (1) 28:15 York (16) 13:5;21:22;22:4; 26:14,19;27:9,11,20, 24,25;28:8,9,12,13; 29:23;31:5	7 (1) 11:21 7502 (1) 13:3
U		1	8
ultimately (1) 9:15 under (16) 2:25,26;10:16;11:7, 11;12:6,21;14:6;18:3, 6,15;21:25;23:2,18, 26;24:17 underlying (3) 18:3;28:11;29:6 understands (1) 26:2 unfair (1) 17:6 United (2) 11:20;18:15 unless (3) 14:11;24:6;33:10 unusual (2) 5:12;20:16 up (4) 8:26;16:12,18; 21:17 upon (1) 7:3 using (1) 23:8 USSRC (4) 9:20;10:9,10,13 USSRC's (1) 10:12 usually (1) 9:24	W	1 (10) 6:16,17,17,18,21; 8:22;11:21;23:22; 24:19;30:25 10:00 (2) 33:7,8 11th (6) 7:25;8:6;18:11,13; 20:8,18 15 (1) 10:6 1965 (1) 6:22 1st (2) 32:24;33:26	8 (1) 9:19 8th (4) 33:2,8,14,16
	Waibsnalder (1) 2:6 waived (5) 10:24,26;21:14,15; 23:2 waiver (3) 11:8;26:10,11 walk (1) 4:21 Washington (1) 26:23 way (3) 22:16;23:8;31:12 ways (1) 23:25 week (1) 32:18 whole (3) 14:24;23:12,13 wholly (2) 21:8,9 William (2) 2:14;3:14 win (1) 24:22 within (1) 29:7 Wonderful (1) 2:9 words (3) 16:4;20:19;22:4 work (2) 23:10,15 world (1) 15:16 worried (1) 18:16 write (2) 13:20;32:13 wrong (1) 5:7	2	9
V	Y	2 (6) 6:21,21;8:22;23:9, 23;24:20 2014 (3) 28:19;30:5,6 2017 (1) 11:21 25th (2) 32:19;33:23 26th (1) 33:21 2d (1) 30:11	9th (1) 11:14
vacate (10) 2:25;14:5;19:3; 24:16;25:3;29:5,5,22, 25;30:3 vacated (1) 19:19 vacating (1) 19:7 vacatur (1) 14:14 various (1) 23:26 venue (2) 26:20;28:6 versus (3) 11:20;28:4;30:5		3	
		302 (1) 13:10	
		5	
		5:00 (2) 33:25,26 50 (2) 20:13,21 57 (1) 30:11	
		6	
		672 (1) 30:11	
		7	