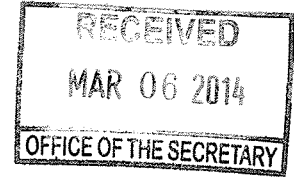


**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**



In the Matter of

**HARDING ADVISORY LLC and
WING F. CHAU,**

Respondents.

File No. 3-15574

**EMERGENCY EXPEDITED
CONSIDERATION REQUESTED**

**RESPONDENTS' REPLY IN FURTHER SUPPORT OF
PETITION FOR INTERLOCUTORY REVIEW AND
EMERGENCY MOTION TO STAY THE HEARING AND PREHEARING DEADLINES**

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and Wing F. Chau
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SECURITIES AND EXCHANGE COMMISSION

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Respondents, Harding Advisory LLC (“Harding”) and Wing F. Chau, by and through their counsel, Nixon Peabody LLP, respectfully submit this Reply in further support of their Petition for Interlocutory Review and motion to issue a stay of the March 31, 2014 hearing and all prehearing deadlines (the “Petition”), and in reply to the March 4, 2014 opposition (“Opposition”) submitted by the Division of Enforcement (“Division”).

* * * *

In the Petition, we expressed “grave doubts that the Commission itself was aware of the Division’s conduct or intent before it authorized the Division to bring this case administratively.” The Opposition reinforces those doubts. It is conspicuously and completely silent on the core question of whether or not the determination to bring this case in an administrative forum was a rational one based on complete information from the Division. The Division lamely asserts that “the Commission presumably considered the complexity of this case when it set a 300-day

deadline for issuance of the initial decision.” (Opposition at 5.) This is an odd formulation to say the least because (1) the Division was present at the closed Commission meeting at which the decision to bring charges in this matter was made, including the selection of the forum in which to bring them, and (2) the Commission acted on the Division’s recommendation. The use of the word “presumably” to describe the basis for the Commission’s decision, therefore, implies that the Division did *not* inform the Commission that (i) it intended to prevent Respondents from preparing a defense by burying them in documents; (ii) the Staff’s investigation was tainted by a conflict of interest; (iii) the Division sought to prevail in an administrative proceeding by flatly contradicting positions that the Commission had taken in *SEC v. Tourre*; or (iv) that bringing this case administratively would subject the Respondents to unequal treatment.

The Division then seeks to blame Respondents for its apparent lack of transparency. With respect to Mr. Nigro’s conflict of interest, the Division argues, “Had Respondents thought the matter worth bringing to the Commission’s attention, they could have done so in their June 2013 Wells submission (or in white papers that preceded it earlier in 2013).” (Opposition at 6.) But Respondents did raise the issue during that period—in a letter to the Division. (Petition Ex. P.) If the Division failed to inform the Commission of the issues raised in Respondents’ letter, Respondents should not be blamed for assuming the integrity of the Division, even if that assumption was misplaced, as it appears to have been. In any event, the Division’s lame excuse is the functional equivalent of claiming that the dog ate its homework.

Without discovery, Respondents cannot know the degree of prejudice resulting from the Division’s failure to address the conflict of interest issue with the Commission. But Respondents are keenly aware of the severe prejudice that has resulted from the apparent failure to consider the size and nature of the investigative file when choosing a forum. On this issue, the Division again attempts misdirection, citing to the timeliness of the document dump under Rule 230.

(Opposition at 1-2.) The Division ignores the core point, which is that the document dump, no matter that it might have been produced in a timely manner under Rule 230, is so massive that Respondents would be required to go to trial before being able to unearth exculpatory evidence, thus losing the ability to use that evidence at the hearing.

Although Respondents have had the ability to pull and review less than 1% of the investigative file, they have found new evidence that flatly contradicts the Division's case. The quality of the *Brady* material that was buried within the investigative file has become increasingly apparent in recent weeks, and highly exculpatory documents were located outside of what the Division calls the "relatively tiny universe" (Opposition at 2) relevant to the allegations in the OIP. It is certain, therefore, that, absent the relief sought in the Petition, exculpatory evidence will remain buried in the mountains of data produced until after the time for the trial has come and gone. Indeed, it appears that approximately one third of the Division's exhibit list has been culled from outside of the "relatively tiny universe" to which the Division would have the Respondents limit themselves.

The Division has demonstrated that it is of the view that it is perfectly acceptable for the Respondents to be hurtling toward a March 31 trial date notwithstanding that exculpatory evidence will remain buried until well after trial. We are at a loss as to how this position could be reconciled with the government's lawyers' ethical obligations to do the right thing, every time; the goal is not, we hope, to win at all costs, the only goal should be to do justice. This goal obtains regardless of whether the Division is convinced that it is right on the merits, which in this case is simply not so.

It is also clear that the ALJ does not share the Division's cavalier view, notwithstanding his rulings. The context of those rulings is very important, but the Division once again misleads by conveniently ignoring it. In denying Respondents' motions, the ALJ referenced his lack of

authority to rule otherwise, notwithstanding the facts and circumstances specific to Respondents' case. In the Jan. 24 Order, the ALJ referenced three factors that favored an adjournment under Rule 161(b)(1), but held that it was "dispositive that a six-month adjournment will make it impossible for me to complete the proceeding within the time specified by the Commission" and cited a recent Commission decision, *John Thomas Capital Mgmt. Grp. LLC*. (Petition Ex. A at 1-2.)

Previously, during a prehearing conference, when addressing the difficulties that Respondents would have in preparing for a trial commencing in March, the ALJ stated:

You are absolutely right, you have a perfectly valid point that preparing for the hearing is going to be really hard because of the size of the investigative file, and this is a problem that recurs in a lot of cases that I have seen recently. ... This is going to be a continuing problem, I think, particularly if we -- if the Division continues to generate gigantic investigative files. That's not criticism. The file is what it is. But unfortunately, I am not in a position to do anything about that. ... So I have to assume in every one of my cases that I've got 300 days to do it, and unfortunately, that may work in a lot of cases to the respondent's disadvantage, but I don't feel like I can do anything to provide you any sort of relief, at least not at this point.

(Transcript, 11/18/13 Telephonic Prehearing Conference, attached hereto as Ex. 1, at 25-26.)

The ALJ then invited the Respondents to take this issue up with the Commission, referencing the then-pending *John Thomas* case and noting that the respondents in that case had filed "an emergency motion to stay the case with the Commission, and the Commission stayed it, and one of the grounds was that they just haven't had enough time to prepare because the file was so big." (Ex. 1 at 25.)¹ Indeed, the following colloquy illustrates exactly why the ALJ felt constrained:

¹ The investigative file in *John Thomas* (700 GB of electronic data) was a fraction of the size of the file in this case.

MR. LIPMAN: Your Honor, I have to say that I have to object because I don't know how we can do this by April 1st. If we could start, if we could start at least at the end of April, that's just -- it's a brutal schedule during which there are holidays, and I'm -- frankly, your Honor, I'm staring at the abyss because I don't know what it is that I don't know, and that really concerns me. I understand what your Honor has said, which is that this is not -- the court is under its own various strict deadlines and the Commission chooses to bring a case in an administrative proceeding that historically would be brought in a Federal District Court, where the schedule is very different and where there is time to learn the record and narrow the issues before you get to trial. It really disadvantages a respondent in this way. Even a criminal case like this, with this kind of complexity, would take a very long time to get ready, even despite the speedy trial rule.

JUDGE ELLIOT: You know what, I agree with you. You can waive the speedy trial rule in District Court. I can't and you can't and the Division can't waive the 300-day rule. The only entity that could waive that is the Commission. So I have to apply -- I am not allowed to apply to the Commission. I don't have the authority to ask them to extend it. I have to go through the chief ALJ to do that and she won't do it -- she won't file a motion with them until we get to within about 30 days of the due date of the initial decision. So I hear what you're saying, Mr. Lipman. I am sympathetic. I know nothing about this case, I have no idea what the outcome is going to be. If you are ever in a position to appeal, I encourage you to raise this with the Commission. This is a recurring problem. Unfortunately, except for what you mentioned a moment ago about witness lists and Brady and so forth, there is nothing I could do about it. So I will overrule your objection and will start March 31st in Washington, DC....

(Ex. 1 at 30-31.)

Of course this colloquy occurred before anyone was aware of the full scope of the problems with the Division's document production. Nevertheless, once the Commission ruled in the *John Thomas* case, the ALJ felt bound by that precedent to deny the relief requested by the Respondents, as the quote from his January 24 Order set forth above make plain.

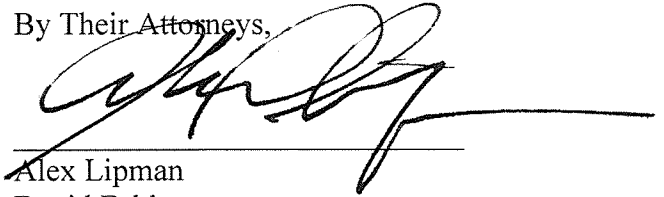
The Commission may now address this issue in light of the facts and circumstances specific to this case, as set forth in the Petition.

Dated: New York, New York
March 5, 2014

Respectfully Submitted,

HARDING ADVISORY LLC and
WING F. CHAU

By Their Attorneys,

A handwritten signature in black ink, appearing to be 'Alex Lipman', written over a horizontal line.

Alex Lipman
David Feldman
Sean Haran
Ashley Baynham
Nixon Peabody LLP
437 Madison Avenue
New York, NY 10022
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EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
Administrative Proceeding
File No. 3-15574

In the Matter of:

HARDING ADVISORY, LLC and
WING F. CHAU

Telephonic Prehearing Conference held at
the United States Securities and Exchange Commission,
3 World Financial Center, New York, New York, on
Monday, November 18, 2013, commencing at 9:33 a.m.

BEFORE: CAMERON ELLIOT, Administrative Law Judge
(via telephone)

<p style="text-align: right;">Page 1</p> <p style="text-align: center;">UNITED STATES OF AMERICA BEFORE THE SECURITIES AND EXCHANGE COMMISSION Administrative Proceeding File No. 3-15574</p> <p>In the Matter of:</p> <p>HARDING ADVISORY, LLC and WING F. CHAU</p> <p style="text-align: center;">Telephonic Prehearing Conference held at the United States Securities and Exchange Commission, 3 World Financial Center, New York, New York, on Monday, November 18, 2013, commencing at 9:33 a.m.</p> <p>BEFORE: CAMERON ELLIOT, Administrative Law Judge (via telephone)</p>	<p style="text-align: right;">Page 3</p> <p>1 PROCEEDINGS 2 JUDGE ELLIOT: We are here in the matter 3 of Harding Advisory LLC and Wing F. Chau, Securities 4 and Exchange Commission, Administrative Proceeding 5 File Number 3-15574. 6 My name is Cameron Elliot, presiding 7 Administrative Law Judge. 8 May I have appearances from counsel, 9 please? 10 MR. FISCHER: For the Division of 11 Enforcement, Howard Fischer, and I am here with my 12 colleagues Dan Walfish, Elisabeth Goot and Brenda 13 Chang. 14 MR. LIPMAN: For both of the 15 respondents, Alex Lipman of Nixon Peabody, and with 16 me are my colleagues, Ashley Baynham and Sean Haran. 17 Good morning, your Honor. 18 JUDGE ELLIOT: Good morning. 19 This is our first prehearing conference, 20 and we have a few things to talk about. The main 21 issue is to resolve the prehearing schedule. 22 Let me first ask, I think as I may have 23 noted in my order from last week, it's not clear when 24 the dates of service of the OIP was. 25 Let me ask the Division, do you have any</p>
<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES: 2 3 On behalf of the Securities and Exchange Commission: 4 5 HOWARD A. FISCHER, ESQ. 6 DANIEL R. WALFISH, ESQ. 7 ELISABETH GOOT, ESQ. 8 BRENDA CHANG, ESQ. 9 3 World Financial Center 10 New York, New York 10281 11 12 13 On behalf of the Respondents: 14 15 ALEX LIPMAN, ESQ. 16 ASHLEY BAYNHAM, ESQ. 17 SEAN HARAN, ESQ. 18 NIXON PEABODY, LLP 19 437 Madison Avenue 20 New York, New York 10022-7039 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 position on that? 2 MR. FISCHER: Yes, your Honor, but I 3 think -- let me just give sort of a brief outline of 4 what happened and then I think we have resolved this 5 issue. 6 The case was filed on the 18th. Service 7 went out to the respondents at their address, and to 8 their then counsel, Mr. Steven Molo of the law firm 9 MoloLamken. 10 JUDGE ELLIOT: I did get a green card 11 for Mr. Molo. 12 MR. FISCHER: Mr. Molo received the 13 copies of the OIP on the 28th of October. However, 14 when we had talked to Mr. Molo on October 25th, which 15 was the Friday before, he had said that there was a 16 strong likelihood that his services would be 17 terminated and then another firm would take over for 18 the defense of the action. 19 He never -- although he received it, he 20 never formally said: I accept service on behalf of 21 my client. Counsel for -- new counsel for 22 respondents, who are sitting across the table from 23 me, came into the case and we had a phone call on the 24 28th, I believe, I believe that the statement to me 25 was, and to my colleagues, was that: We are being</p>

Page 5

1 retained. It's not formally official yet, but it
 2 probably will happen shortly.
 3 So there is a little question as to
 4 whether or not service was effective since
 5 Mr. Chau -- service was not made on Mr. Chau. Either
 6 he didn't sign for it or he turned it back, for
 7 whatever reason.
 8 And there is the issue with Mr. Molo
 9 maybe -- being counsel of record at the time but not
 10 having put in his notice of appearance.
 11 Prior to the beginning of this
 12 conference, we met briefly with counsel for
 13 respondents, handed them copies of the OIP and they
 14 formally accepted service at that point.
 15 JUDGE ELLIOT: You mean like this
 16 morning?
 17 MR. FISCHER: This morning.
 18 JUDGE ELLIOT: Oh, okay. Does anyone
 19 have an objection then if we say that the service
 20 date was today, November 18th?
 21 MR. LIPMAN: No, your Honor.
 22 MR. FISCHER: This is Howard Fischer.
 23 That was Mr. Lipman. If the service date is today,
 24 then the 300-day date would be September 14, 2014.
 25 JUDGE ELLIOT: All right, very good.

Page 6

1 Okay, so I'll just deem service to have taken place
 2 today, the 18th.
 3 Now, on that understanding, Mr. Lipman,
 4 when can you file an answer?
 5 MR. LIPMAN: Well, your Honor, we are
 6 new to this and we are just trying to come up to
 7 speed, so ideally, if we could, we'd like to take,
 8 given that there is Thanksgiving in the middle, maybe
 9 by the first of January.
 10 JUDGE ELLIOT: Well, let's say the 2nd,
 11 because the 1st would be a holiday.
 12 Mr. Fischer, any objection to an answer
 13 on January 2nd?
 14 MR. FISCHER: None, your Honor.
 15 JUDGE ELLIOT: Good. So the
 16 respondents' answers will be due January 2nd.
 17 MR. FISCHER: I presume it will be one
 18 document, but I guess that's up to Mr. Lipman.
 19 MR. LIPMAN: Yes, I assume that will be
 20 one document.
 21 JUDGE ELLIOT: Well, I will leave that
 22 up to you.
 23 Next issue: This is a cease and desist
 24 case, which means the respondents have the right to
 25 demand a hearing within -- between 30 and 60 days

Page 7

1 after service, or you can waive that.
 2 Mr. Lipman, how do you want to proceed?
 3 MR. LIPMAN: Let me ask you this way:
 4 We will be ready for trial whenever that is, but we
 5 waive the 60-day requirement.
 6 JUDGE ELLIOT: Very good.
 7 And Mr. Fischer, have you made the
 8 investigative file available?
 9 MR. FISCHER: We have, your Honor. Let
 10 me give a brief outline of what has been provided to
 11 the respondents.
 12 We have given them -- we have as of
 13 today provided them with everything before it was
 14 due. On the 25th of October, we sent, I think, four
 15 hard drives to prior counsel, which amounted to about
 16 2.8 terabytes of data.
 17 This past week we served an additional
 18 box of materials, which were several hard drives and
 19 disks. This includes all of the investigative
 20 testimony in the case, all of the investigative file
 21 in this action, and also includes parts of the
 22 investigative files from other cases.
 23 And the reasons why those were provided
 24 is those were consulted by the Division in its
 25 investigation, so we thought that we should just

Page 8

1 provide them everything that had been done just to
 2 make sure that we were completely inclusive of what
 3 we gave them.
 4 I think the rough equivalent is about
 5 9.6 terabytes of data. Some portion of that is
 6 obviously the various exhibits and the testimony in
 7 this action, so there is still a slight amount to be
 8 done, but I would say about 98 to 99 percent of the
 9 file has already been provided.
 10 JUDGE ELLIOT: Very well. Well, that's
 11 a pretty big file.
 12 So, Mr. Lipman, if you have any problems
 13 accessing it or otherwise getting the rest of
 14 whatever there is to turn over, you may file a motion
 15 with me.
 16 MR. LIPMAN: I appreciate that, your
 17 Honor.
 18 We also would like to make an
 19 application to have the Division provide to us as
 20 soon as possible a list of all the documents that
 21 have been withheld. We would like it detailed.
 22 The reason we would like it detailed as
 23 opposed to a general list is because we have 9 point
 24 something terabytes of data, and it's not all.
 25 It would also be very helpful for us to

Page 9

1 have notes of the interviews. We assumed, in
 2 addition to the various transcripts that we have
 3 received, the notes of interviews, we would like to
 4 get those as well.
 5 We would -- besides that, to the extent
 6 that there is Brady material, we would like a
 7 disclosure of that as soon as possible and Jencks
 8 material as soon as possible. The Commission has
 9 been doing this investigation for some six years or
 10 so.
 11 MR. FISCHER: Three years.
 12 MR. LIPMAN: I will take three years.
 13 But in any event, my sense is they have
 14 a pretty good idea of who their witnesses are going
 15 to be at this point. I am not saying they can't
 16 amend their list or supplement their list at some
 17 point, but we would like to have that as early as
 18 possible so we could focus our efforts.
 19 MR. FISCHER: If I may respond, your
 20 Honor.
 21 JUDGE ELLIOT: Yes.
 22 MR. FISCHER: In the first instance,
 23 while counsel for the defense has just come on board,
 24 it was Mr. Chau's decision to hire new counsel. The
 25 prior counsel had been involved during the entirety

Page 10

1 of the investigation.
 2 Moreover, Mr. Lipman has the advantage
 3 of actually having complete and internal access to
 4 his client, who is the most familiar with the files
 5 and what would be the most relevant.
 6 With respect to the particular aspects
 7 of Mr. Lipman's request, to the extent that he asks
 8 for a list of documents withheld, I presume what you
 9 mean, Mr. Lipman, is a list of documents on the
 10 grounds of privilege?
 11 MR. LIPMAN: Withheld for any reason,
 12 privilege, I don't know what you have, but I assume
 13 that you have notes.
 14 As I understand it, you haven't produced
 15 them to us, although we haven't seen everything
 16 that's in those documents. But if there are
 17 privileged documents, we would like to know, if there
 18 is any documents that have been deliberately
 19 withheld -- but to the extent that these documents
 20 relate to other investigations, in other words, you
 21 have given us portions of other investigative
 22 records, to the extent that there are documents that
 23 relate to nothing else other than other
 24 investigations, I have no problem with you giving us
 25 a more summary, sort of disclosure that these are the

Page 11

1 categories of documents we have withheld because they
 2 relate to these other investigations.
 3 JUDGE ELLIOT: Let me jump in here. Let
 4 me ask this, Mr. Fischer: I think if I remember your
 5 numbers correctly, you had four or so terabytes of an
 6 investigative file, plus another maybe four or five
 7 terabytes from third parties. Am I misunderstanding
 8 you?
 9 MR. FISCHER: I will have my colleague,
 10 Mr. Walfish, respond to that because he was more
 11 directly involved with that provision.
 12 Dan?
 13 MR. WALFISH: The hugest amount of
 14 terabytes comes from other case files. But in terms
 15 of what's going to be most helpful, the respondents
 16 have now, within their possession, not only all of
 17 the testimony and all of the exhibits, they also have
 18 essentially all of the outgoing requests and all of
 19 the incoming production letters.
 20 And as far as notes of witness
 21 interviews, my understanding is that, in general, we
 22 don't produce that because that's work product,
 23 except to the extent of some sort of summary Brady
 24 disclosure, which we can certainly provide to the
 25 extent that we determine that there is so-called

Page 12

1 Brady materials in the files.
 2 MR. FISCHER: I think what would make
 3 sense then, your Honor, is we would be happy to
 4 provide whatever Brady or Jencks material there is,
 5 and I don't know whether -- how much, if any, there
 6 would be.
 7 We would provide that, let's say a week
 8 after we provide the list of witnesses, which is
 9 typically when they're done. Typically, actually,
 10 it's been the practice of the Division to provide
 11 that material, you know, some time, a short time
 12 before the actual hearing. We would be happy to give
 13 it to the defense counsel before that, let's say a
 14 week after we provide a copy of a list of our
 15 witnesses.
 16 MR. LIPMAN: Well, your Honor, if I
 17 may --
 18 JUDGE ELLIOT: Hold on, hold on.
 19 Okay, all right, go ahead, Mr. Lipman.
 20 MR. LIPMAN: Your Honor, first with
 21 respect to new counsel, old counsel --
 22 JUDGE ELLIOT: You know, I don't need to
 23 hear about that. I understand the issue there. I
 24 also understand that there is an issue here that
 25 although there are a lot of files which presumably

Page 13

1 were obtained from the respondents, so the
 2 respondents, at least, in theory, should be able to
 3 go through the investigative file and identify what
 4 is theirs and have no problem figuring that out, it
 5 sounds like there are multiple terabytes data from
 6 third parties that you would not have necessarily
 7 seen before. So I understand those two things.
 8 Go ahead, Mr. Lipman.
 9 MR. LIPMAN: We don't have in one place
 10 all of the requests for information and all of the
 11 subpoenas. So they are in there somewhere, but we
 12 don't know where they are.
 13 MR. WALFISH: That's not really a fair
 14 statement.
 15 MR. LIPMAN: Okay, well, where are they?
 16 MR. WALFISH: They are in the little
 17 thumb drive that we presented with a cover letter
 18 indicating that that's exactly where they were last
 19 week.
 20 MR. LIPMAN: You mean on Friday?
 21 MR. WALFISH: Yes.
 22 MR. LIPMAN: I stand corrected. We will
 23 check on that, your Honor.
 24 On Friday afternoon, we received another
 25 production with apparently a thumb drive, which I

Page 14

1 have to say we haven't had a chance to look at,
 2 because my recollection is by the time that we
 3 received it, it was late afternoon.
 4 But, your Honor, the bigger issue here
 5 is that it's their case and it's their burden. And
 6 the allegations in this complaint frankly confuse us.
 7 So the sooner we have the list of
 8 witnesses and the sooner we have a sense of what
 9 their proof is, the sooner we can, we can focus our
 10 efforts, and that's what we are looking for, because
 11 300 days is a very short period of time for a case of
 12 this complexity.
 13 MR. FISCHER: Your Honor.
 14 JUDGE ELLIOT: Yes, go ahead.
 15 MR. FISCHER: The Division has had
 16 several cases with Mr. Lipman. He has a reputation
 17 as a somewhat reasonable man. So we are happy, to
 18 the extent possible, as they come in -- we gave the
 19 bulk of the material to them on Friday.
 20 In all fairness, they haven't had a
 21 chance to look at the material yet or to figure out
 22 what's there. We are happy to work with Mr. Lipman
 23 and his co-counsel on an ongoing basis identifying
 24 things as it goes on. I am sure your experience with
 25 the Division before, whatever issues you have, we

Page 15

1 could respond to on an ongoing basis as the case
 2 develops.
 3 JUDGE ELLIOT: Let me say a couple of
 4 things here:
 5 First of all, I, of course, encourage
 6 the parties to be cooperative with one another. This
 7 doesn't mean that you have to agree with each other
 8 about everything, but do try to be civil to one
 9 another and professional, and the more issues that
 10 you can resolve yourselves, the easier my job is.
 11 So I like to hear when the parties are
 12 able to talk to each other and work out issues, and
 13 if you can't work them out, then, of course, you can
 14 make a motion and I will resolve it. But please do
 15 talk to each other about these sorts of things.
 16 The second, I will order a withheld
 17 documents list. I will make, at least initially, I
 18 will not require the Division to describe the
 19 documents on the withheld documents list other than
 20 through, I think the language and the rule is
 21 "groups," so you could group documents together that
 22 are of similar nature.
 23 If I feel like a particular category
 24 that you have listed on your withheld documents list
 25 needs more specificity, then I will order it, but I

Page 16

1 want to look at it first.
 2 I think also, Mr. Lipman, and this is a
 3 third point, I am not going to grant your application
 4 for the turnover of Jencks material or Brady material
 5 yet. So I am going to deny your application without
 6 prejudice. I think it would be helpful to wait and
 7 see what's on the withheld document list before we
 8 actually get to the question of Brady and Jencks.
 9 So if you would like to file some sort
 10 of motion requesting Brady material, written motion,
 11 requesting Brady material or Jencks material after
 12 you see the withheld document list, you may do so.
 13 But I am going to deny it, at least for now, without
 14 prejudice.
 15 Now, having said all those things, Mr.
 16 Fischer, when can you get me a withheld documents
 17 list?
 18 MR. FISCHER: I am just thinking about
 19 what the time frame is and thinking about
 20 Thanksgiving.
 21 JUDGE ELLIOT: We will make it the same
 22 day as respondent's answer, January 2nd.
 23 MR. FISCHER: That's fine, your Honor.
 24 Frankly, your Honor, if we can provide it earlier, we
 25 will.

Page 17

1 JUDGE ELLIOT: Okay. Again, I encourage
 2 the parties to talk to one another about these
 3 things, and I have found, and I'm sure that the
 4 parties have found this as well, that if there is any
 5 possibility of settlement, the more that you disclose
 6 to each other along the lines of "here is my case,"
 7 sometimes at least the more likely it is that you are
 8 going to end up with a settlement.
 9 Of course I encourage the Division to be
 10 forthcoming about these things and, you know, if Mr.
 11 Lipman is having trouble, for example, finding the
 12 various documents on the thumb drive or what have
 13 you, then please just tell him where they are.
 14 MR. WALFISH: We can tell him where the
 15 documents are on the thumb drive.
 16 MR. FISCHER: We are happy to work with
 17 him and we are happy to make it as easy for him and
 18 his co-counsel as well.
 19 JUDGE ELLIOT: Very well.
 20 One other thing about the withheld
 21 documents list, the withheld documents that are
 22 withheld for any reason, and of course, the usual
 23 reason is going to be privilege, it may be something
 24 else, but it could be privilege or work product or
 25 something like that, but for whatever reason it may

Page 18

1 be, it doesn't have to be privilege, okay.
 2 MR. FISCHER: Frankly, in this case,
 3 your Honor, very few documents have been withheld. I
 4 think we should be able to do that by January 2nd
 5 without a problem.
 6 JUDGE ELLIOT: Mr. Lipman, any objection
 7 to a withheld documents list by January 2nd?
 8 MR. LIPMAN: No, your Honor. I think
 9 that that would work for us. Thank you.
 10 JUDGE ELLIOT: Very well.
 11 Okay, let's talk about -- before we get
 12 to a prehearing schedule, let's talk about the
 13 location and the date.
 14 Let me first ask Mr. Fischer, how long
 15 do you anticipate your case in chief will last?
 16 MR. FISCHER: Your Honor, two responses
 17 to that:
 18 One, before this call, we talked briefly
 19 with defense counsel, and while obviously their lack
 20 of familiarity currently with the case hinders their
 21 ability to predict with 100 percent exactitude, we
 22 both have a fuzzy idea that the trial will probably
 23 take three weeks.
 24 I think that -- I have a history and
 25 tendency to always underestimate how long witnesses

Page 19

1 take, but I think that that's a reasonable time for
 2 the hearing.
 3 And I think we could also expedite
 4 things, I understand it's your practice if there is
 5 an expert, the expert's report constitutes their
 6 direct testimony and you don't need to put them on
 7 for direct. If we do things like that, I think we
 8 will be able to shorten the hearing so that three
 9 weeks is a reasonable period of time. It may take
 10 slightly longer than that, but I think that that's
 11 reasonable.
 12 JUDGE ELLIOT: Very well. Okay. Well,
 13 that's longer than I would have hoped. Of course, I
 14 don't know anything about this case, but I'll accept
 15 your representation.
 16 Unfortunately, on the basis of that
 17 representation, we need to hold it in DC. I have a
 18 six-week hearing with one of the other trial counsel
 19 in the New York Regional Office starting
 20 January 27th. So I really can't be away from the
 21 office for three weeks in New York for this case
 22 because I have just got too much other stuff going
 23 on, including writing the decision in that other
 24 case.
 25 MR. FISCHER: If it makes it easier,

Page 20

1 your Honor, in calculating the September 14th as the
 2 300-day period, if we could have the trial in May,
 3 and I think that would give us, and you, more than
 4 enough time to write the opinion, if that helps.
 5 The other thing is if we have the
 6 hearing and we have it here in the New York Regional
 7 Office, which Mr. Lipman has consented to, we made
 8 available to Mr. Lipman a break-out room for him to
 9 keep documents in, meet witnesses, whatever, which
 10 will hopefully expedite the hearing if we can do it
 11 here.
 12 If we do it in DC, I would endeavor to
 13 make the same facilities available to Mr. Lipman, but
 14 I have frankly very little pull with the DC office
 15 room assignment process. So I don't know -- I will
 16 try to do that, but I don't know if I can make good
 17 on that promise.
 18 JUDGE ELLIOT: Well, thank you for your
 19 offer.
 20 But there are two issues: One is the
 21 chief judge, the chief ALJ will not, except in
 22 emergencies, will not authorize the hearing in the
 23 New York Regional Office. She doesn't like that. So
 24 that's not going to happen.
 25 If we were to do it in New York, there

Page 21	Page 23
<p>1 are other places to do it, the most commonplace 2 historically has been at 26 Federal Plaza, but as I 3 have been informed recently, the facilities there are 4 just way too out of date. There is no WiFi. There 5 is no telephone, frankly. 6 MR. FISCHER: It's horrific. 7 JUDGE ELLIOT: We can't hold it in the 8 New York Regional Office. 9 The other issue -- and I will get to the 10 question of facilities availability for like a 11 break-out room in a second. 12 But the other issue is I really -- if 13 the parties have some schedule planned, did you talk 14 about this beforehand and agree on May? 15 MR. FISCHER: We didn't agree -- we had 16 a discussion. We were slightly off on our 17 discussions. We had actually proposed April. They 18 had proposed May. But that was before we hit upon 19 accepting service as of to date. 20 I think the May date would work, or 21 dates in May. But again, it depends on your 22 availability and whatever -- obviously whatever the 23 court orders, we will do it. I just don't know 24 whether or not I could make any break-out facilities 25 available to respondents in DC.</p>	<p>1 communicate with my other people in my office, like 2 my law clerks, who can help me with the other cases 3 that I've got going on at the same time. 4 So -- 5 MR. LIPMAN: Your Honor? 6 JUDGE ELLIOT: Yes, go ahead. 7 MR. LIPMAN: May I be heard in this? We 8 are new to the case, and although we have some 9 experience with similar cases, we do have 9 terabytes 10 of data, and it's -- I'm not sure how the public 11 interest is served entirely unless we have adequate 12 time to review documents and prepare adequately. 13 And I worry about the beginning of April 14 with how much time or how little time that gives us 15 to wrap our heads around this case, and also prepare 16 for trial. 17 Now, again, if the Commission were 18 really forthcoming with its witness lists and Jencks 19 and Brady and all of the other things, that obviously 20 would help us a lot, but I really worry about the 21 amount of data that we have and the -- all the things 22 that we have to do in order to come up to speed to 23 start the -- to start the trial in April. 24 The other thing that I wanted to mention 25 to your Honor is that it is obviously an enormous</p>
Page 22	Page 24
<p>1 MR. LIPMAN: Your Honor? 2 JUDGE ELLIOT: Yes. 3 MR. LIPMAN: We could do May. 4 JUDGE ELLIOT: Let me jump in here then. 5 I don't think I can do May. It's not because I don't 6 have the availability. I should be available in May. 7 The problem is I think that's too late. 8 It is a good thing, at least in terms of my schedule, 9 that the service date is today, because that gives me 10 the maximum amount of time within which to get my 11 initial decision out. 12 But according to the usual schedule, and 13 especially if the hearing is going to last three 14 weeks, I really need to get this case started no 15 later than maybe April 1st. And I really need to 16 start it before then. 17 I can't start it before mid March, 18 because I might bump up against this other trial that 19 I've got. But I think May is too late. And I think 20 in view of the fact that May is too late, I have to 21 start it in April, I have all these other things I 22 have to do, I think that -- this is in the rule -- I 23 think the public interest calls for me to get this 24 trial started as soon as I reasonably can, and to do 25 it in a location where I will be available to</p>	<p>1 expense for the client to be in DC for three weeks 2 for a trial. 3 Now, Mr. Fischer has said three weeks. 4 We have no view at the moment because we just don't 5 understand enough about the case to know what it is. 6 But if the trial were shorter, if we 7 could find a way to streamline it, could we do it 8 later? Could we do it in May and then we could think 9 about what we can do? 10 Is there some possibility here that we 11 could revisit this issue after we've had a chance to 12 focus, after we have had a chance to look at what 13 they have and consult with them about when we might 14 be able to go and how long it might take? 15 JUDGE ELLIOT: Well, let me address the 16 second issue first. 17 Yes, I will entertain a motion. If the 18 parties can talk to each other and come up with a way 19 of shortening the case, for example, by stipulations, 20 or perhaps one way that I have done this in recent 21 hearing, is the admission -- and I would not order 22 this unless both parties consented to it, but the 23 admission of investigative testimony with the witness 24 subject to cross-examination. That has shortened 25 hearings, one hearing in particular that I had</p>

6 (Pages 21 to 24)

Page 25

1 recently.
 2 But yes, of course. If the parties
 3 could come up with a way of streamlining the hearing,
 4 then absolutely tell me and I will entertain a motion
 5 to that effect.
 6 However, until you do that, I'm going to
 7 have to assume that it's going to take three weeks.
 8 On that basis, I really need to start the hearing in
 9 early April.
 10 Now, as to the first point you were
 11 making, Mr. Lipman, I will tell you what. You are
 12 absolutely right, you have a perfectly valid point
 13 that preparing for hearing is going to be really hard
 14 because of the size of the investigative file, and
 15 this is a problem that recurs in a lot of cases that
 16 I have seen recently.
 17 There is one case going on that's being
 18 handled by my colleague, Judge Foelak right now, she
 19 was supposed to have a hearing in New York in a case,
 20 and the respondents filed essentially an emergency
 21 motion to stay the case with the Commission, and the
 22 Commission stayed it, and one of the grounds was that
 23 they just haven't had enough time to prepare because
 24 the file was so big.
 25 This is going to be a continuing

Page 26

1 problem, I think, particularly if we -- if the
 2 Division continues to generate gigantic investigative
 3 files. That's not criticism. The file is what it
 4 is.
 5 But unfortunately, I am not in a
 6 position to do anything about that. So I have 300
 7 days to get my decision out and I'm not even really,
 8 according to our usual practice, I am not even able
 9 to move for an extension until I get very close to
 10 the deadline.
 11 So I have to assume in every one of my
 12 cases that I've got 300 days to do it, and
 13 unfortunately, that may work in a lot of cases to the
 14 respondent's disadvantage, but I don't feel like I
 15 can do anything to provide you any sort of relief, at
 16 least not at this point.
 17 MR. FISCHER: And, your Honor, we are
 18 happy to explore other alternative methods, such as
 19 introducing witness' testimony through stipulations,
 20 affidavits, put that that in as direct and having
 21 cross on that. We are open to whatever methods there
 22 are for streamlining the case.
 23 JUDGE ELLIOT: Very well. I am not
 24 inclined to do something that the parties are not
 25 both willing to or all willing to agree to.

Page 27

1 Okay. So if you want to streamline the
 2 case, you are going to have to agree to it. If you
 3 don't, then I am not going to go along with whatever
 4 one party's proposal is. Of course, I encourage you
 5 with coming up on ways to doing that and agree to.
 6 MR. LIPMAN: Your Honor, I'm sorry to be
 7 sounding a little bit like a broken record, but one
 8 thing that you could do is make it clear to the
 9 Commission that they need to provide their witness
 10 list and they need to provide their Brady and Jencks
 11 and all that as soon as possible. Because that's the
 12 one thing that we need in order to wade through all
 13 of that 9 terabytes of data.
 14 I'm not sure that even if they did that,
 15 that we would have adequate time to prepare. But at
 16 least we would have a fighting chance.
 17 JUDGE ELLIOT: Okay, all right. We will
 18 talk about that in just a moment.
 19 Let me mention -- I have two other
 20 things.
 21 First of all, if I neglected to mention
 22 the break-out rooms, our usual practice in the DC
 23 hearing room is there is a room, a conference room
 24 that's a pretty good size that is almost adjacent to
 25 the hearing room that we usually just turn over to

Page 28

1 the respondents, and then for the Division, if the
 2 Division is traveling from one of the regional
 3 offices, we usually give them an investigative
 4 testimony room, which is on the floor, essentially
 5 below the hearing room.
 6 It's easy to get to the hearing room
 7 from where the Division is residing, but it's
 8 slightly more convenient for the respondents. I
 9 don't think the break-out room is going to be an
 10 issue.
 11 The other issue that we need to resolve
 12 before we get to the timing of various productions is
 13 the date. Let's try to settle the date, the start
 14 date of the hearing.
 15 So March 31st is a Monday. I am going
 16 to be out for spring break, which I believe for me is
 17 the 14th through the 18th of April. So we will have
 18 to take a break partway through the hearing.
 19 MR. FISCHER: Your Honor, that's also --
 20 the 14th is the first night of Passover, so that
 21 works perfectly, since I'm observant and we need to
 22 be off for that as well.
 23 JUDGE ELLIOT: I am going to have to
 24 double-check. If it's not the 14th to the 18th, then
 25 I will notify the parties, because I will issue an

Page 29

1 order after this telephone conference is over.
 2 But for now, I'm pretty sure that I will
 3 not be available the 14th through the 18th.
 4 So what we would do is start March 31st,
 5 we would continue for two weeks until April 11th,
 6 Friday, April 11th. And then we would start up again
 7 on Monday, April 21st.
 8 So I heard the parties on this already,
 9 but let me pin this down: Any objection to that
 10 schedule for the start of the hearing, Mr. Fischer?
 11 MR. FISCHER: Your Honor, that's fine
 12 with us. The only thing I would note that is, if
 13 your break is on a slightly different date, given
 14 that the week of the 14th is Passover, I could -- if
 15 that's not and we have to have the trial during that
 16 week, I would just ask that it not be the 14th
 17 through the 16th.
 18 JUDGE ELLIOT: All right, very well. So
 19 you're not available the 14th through the 16th?
 20 MR. FISCHER: More or less, your Honor.
 21 JUDGE ELLIOT: But you could start up
 22 again on the 17th?
 23 MR. FISCHER: I might get into some
 24 trouble with my wife, but I am sure I could do that.
 25 JUDGE ELLIOT: Let me hear from Mr.

Page 30

1 Lipman then.
 2 Any objection?
 3 MR. LIPMAN: Your Honor, I have to say
 4 that I have to object because I don't know how we can
 5 do this by April 1st. If we could start, if we could
 6 start at least at the end of April, that's just --
 7 it's a brutal schedule during which there are
 8 holidays, and I'm -- frankly, your Honor, I'm staring
 9 at the abyss because I don't know what it is that I
 10 don't know, and that really concerns me.
 11 I understand what your Honor has said,
 12 which is that this is not -- the court is under its
 13 own various strict deadlines and the Commission
 14 chooses to bring a case in an administrative
 15 proceeding that historically would be brought in a
 16 Federal District Court, where the schedule is very
 17 different and where there is time to learn the record
 18 and narrow the issues before you get to trial.
 19 It really disadvantages a respondent in
 20 this way. Even a criminal case like this, with this
 21 kind of complexity, would take a very long time to
 22 get ready, even despite the speedy trial rule.
 23 JUDGE ELLIOT: You know what, I agree
 24 with you. You can waive the speedy trial rule in
 25 District Court. I can't and you can't and the

Page 31

1 Division can't waive the 300-day rule. The only
 2 entity that could waive that is the Commission.
 3 So I have to apply -- I am not allowed
 4 to apply to the Commission. I don't have the
 5 authority to ask them to extend it. I have to go
 6 through the chief ALJ to do that and she won't do
 7 it -- she won't file a motion with them until we get
 8 to within about 30 days of the due date of the
 9 initial decision.
 10 So I hear what you're saying, Mr.
 11 Lipman. I am sympathetic. I know nothing about this
 12 case, I have no idea what the outcome is going to be.
 13 If you are ever in a position to appeal,
 14 I encourage you to raise this with the Commission.
 15 This is a recurring problem. Unfortunately, except
 16 for what you mentioned a moment ago about witness
 17 lists and Brady and so forth, there is nothing I
 18 could do about it. So I will overrule your objection
 19 and will start March 31st in Washington, DC and I
 20 will -- we will definitely not be meeting or
 21 convening between the 14th and the 16th of April
 22 regardless, and I will double-check on my spring
 23 break.
 24 So --
 25 MR. FISCHER: Your Honor, could I

Page 32

1 suggest that before we do the prehearing -- the
 2 pretrial schedule, we do the post-hearing brief
 3 schedule, do that first and then work backwards?
 4 JUDGE ELLIOT: Well, I don't -- that's
 5 not my usual practice. If you have a suggestion, I
 6 will listen to you, but usually I don't set that
 7 until after we have actually -- until essentially
 8 after all of the testimony is in.
 9 MR. FISCHER: Okay, your Honor.
 10 Whatever your Honor's preference is.
 11 I was going to propose that given that
 12 the 300-day date is September 14th, and assuming we
 13 conclude the hearing by April 25th, I would just
 14 presume that we work on a 4, 4, 2 schedule, which is
 15 the Division's post-hearing brief be due four weeks
 16 after the hearing ends, the response will be due four
 17 weeks after that, and the reply will be due two weeks
 18 after that.
 19 JUDGE ELLIOT: I think it's more
 20 manageable if we do it that way, if nothing else,
 21 because who knows if it will finish on April 25th.
 22 Let's start out, let me see, let me look
 23 at my calendar. Usually I will order witness lists
 24 to be turned over by both sides about four weeks
 25 before the start of the hearing.

Page 33

1 Now, Mr. Lipman, I assume that you want
 2 them turned over before that time?
 3 MR. LIPMAN: Yes, your Honor.
 4 JUDGE ELLIOT: Mr. Fischer, do you want
 5 to be heard on that?
 6 MR. FISCHER: Frankly, I would prefer to
 7 keep the normal schedule, but frankly, I also am in
 8 the unusual situation of sympathizing slightly, and I
 9 emphasize the slightly, with Mr. Lipman, rather than
 10 four weeks, we do it five or six weeks before.
 11 MR. LIPMAN: Your Honor?
 12 JUDGE ELLIOT: Yes, go ahead.
 13 MR. LIPMAN: Five or six weeks, four
 14 weeks, I will take what I can get.
 15 But again, I have to object for the same
 16 reasons. They could start producing to us, giving us
 17 witnesses lists. They already know today what most
 18 of their witnesses -- who most of their witnesses are
 19 going to be. Why do we have to wait?
 20 This is not -- what is the public
 21 interest in having the Commission take that long to
 22 give us a witness list for a case they have been
 23 investigating for three years? I don't understand,
 24 especially given the schedule, especially given the
 25 complexity and the amount of data that we have

Page 34

1 received.
 2 JUDGE ELLIOT: Okay, I hear what you're
 3 saying, Mr. Lipman.
 4 I think, though, at least in my
 5 experience, a lot of the potential witnesses, and
 6 this may not be the kind of case where this is true,
 7 but a lot of potential witnesses may not have been
 8 the subject of any formal investigative testimony.
 9 And in my experience, it's quite common
 10 that a witness has not really been talked to in any
 11 depth until the hearing preparation trial prep. So
 12 I'm not sure that what you're saying is really
 13 entirely accurate.
 14 Certainly there are some witnesses that
 15 the Division is going to be required to put on. An
 16 example would be Mr. Chau. But at least as to
 17 Mr. Chau, I don't know what your concerns are really
 18 all that acute.
 19 In any event, what I am going to do is I
 20 am going to deviate from my usual practice and I'm
 21 going to order witness lists exchanged six weeks
 22 before the start of the hearing. So this will be
 23 February 17th, that's Monday, February 17th. So I
 24 will exchange witness lists Monday, February 17th.
 25 Two weeks after that, on Monday,

Page 35

1 March 3rd, the parties will exchange exhibit lists
 2 and expert disclosures, and so far everything I've
 3 mentioned, I am talking about witness lists, exhibit
 4 lists and expert disclosures, you should file those
 5 with the secretary's office and send me copies.
 6 In addition, on February 3rd -- not
 7 February 3rd. March 3rd, Monday, March 3rd, you
 8 should also exchange premarked exhibits. You do not
 9 need to file those. In fact, please do not file them
 10 and they should premarked in the sense that even if
 11 you know that the other side has a copy of them, just
 12 mark them however you want to mark them in the manner
 13 that you would use them when you offer them in
 14 evidence.
 15 MR. FISCHER: Your Honor, if I may
 16 comment to that.
 17 JUDGE ELLIOT: Yes, yes.
 18 MR. FISCHER: In the trial division, we
 19 are experimenting with ways of doing much of the
 20 exhibits electronically. And to the extent possible,
 21 perhaps Mr. Lipman and I could agree that we would
 22 come up with an electronic database.
 23 If we do this in the DC office, I
 24 believe they probably have -- since we have them here
 25 in New York, I am assuming that they have it in DC,

Page 36

1 equipment that will enable us to load many of the
 2 exhibits electronically to save a couple of forests.
 3 I am saying we will explore that with
 4 Mr. Lipman as we get closer to the date to see if we
 5 can expedite and limit the actual amount of paper
 6 discovery, if your Honor has no problem with that.
 7 JUDGE ELLIOT: No, I encourage the
 8 parties to serve each other and exchange documents
 9 with each other, including exhibits, electronically.
 10 As of right now, the secretary's office
 11 requires paper copies of anything you file. We are
 12 working here at headquarters on an electronic filing
 13 system, like what they have in the District courts.
 14 But as of right now, everything still has to be on
 15 paper.
 16 When you send me copies, you may send
 17 them electronically. In fact, one of the things, we
 18 will talk about this in a moment, one of the things I
 19 like is I don't need your exhibits until the start of
 20 the hearing.
 21 So the very first thing that I intend
 22 to, at the start of the hearing, is I admit or
 23 exclude as many documents as I can. I resolve
 24 whatever objections to evidence I can. And I don't
 25 need your exhibits until then. But when we do show

Page 37

1 up at the hearing, just give me a disk, for example.
 2 with all your exhibits on it.
 3 MR. FISCHER: Okay, we will do that,
 4 your Honor. And if we could come up with some
 5 mechanism for making everything as electronic as
 6 possible, I will explore that internally here and
 7 work with Mr. Lipman to see if we could limit the
 8 destruction of our nation's forests.
 9 JUDGE ELLIOT: Very well.
 10 MR. FISCHER: Just so your Honor is
 11 aware, we have agreed amongst ourselves that we could
 12 serve each other electronically.
 13 JUDGE ELLIOT: Very good. Okay.
 14 The next event will be two weeks before
 15 the start of the hearing, this is Monday, March 17th,
 16 I think this case is complex enough that I would like
 17 to see prehearing briefs.
 18 Sometimes I do not order them, but I
 19 think in this case, there is enough -- a sufficient
 20 amount of detail on the OIP that I think that I would
 21 need to have a prehearing brief, and that would help
 22 me in understanding all of the various issues.
 23 So I will order on Monday, March 17th,
 24 prehearing briefs.
 25 I also would like from the parties any

Page 38

1 objections to evidence, that is to exhibits,
 2 witnesses or expert disclosures, and I'd also like
 3 any motions in limine. So March 17th will be
 4 prehearing briefs, objections and motions in limine.
 5 MR. FISCHER: I think I know what I am
 6 doing that weekend beforehand.
 7 JUDGE ELLIOT: Sorry.
 8 And in addition, because we are doing
 9 prehearing briefs, I don't need opening statements,
 10 no opening statements. Then one week before the
 11 start of the hearing, this is Monday, March 24th, I
 12 want a final prehearing conference which -- can we
 13 agree on 9/30?
 14 Any objection to 9/30, Mr. Lipman?
 15 MR. LIPMAN: No, your Honor.
 16 JUDGE ELLIOT: Mr. Fischer?
 17 MR. FISCHER: Fine here, your Honor.
 18 JUDGE ELLIOT: All right.
 19 MR. FISCHER: Is that telephonic or in
 20 person?
 21 JUDGE ELLIOT: That's telephonic.
 22 MR. FISCHER: Okay.
 23 JUDGE ELLIOT: Okay, 9/30.
 24 Also, on that day, if you have any
 25 stipulations along the lines of what we have talked

Page 39

1 about in terms of streamlining the case, then you
 2 could submit them to me at any time, but -- including
 3 in the middle of the hearing if you want, but if you
 4 have any written stipulations, generally, I like them
 5 no later than one week before the hearing.
 6 So I'll make on March 24th, stipulations
 7 will be due also. So March 24th is prehearing
 8 conference and stipulations. Then the hearing will
 9 start -- we will talk about some of the details of
 10 the daily schedule at the prehearing conference on
 11 March 24th.
 12 But usually the first day of hearing, I
 13 start at 9:30.
 14 Okay, now, a couple of other things: I
 15 will issue what I call a general prehearing order,
 16 which lays out how I like the case to proceed in the
 17 middle of the hearing and some other details. I will
 18 mention in there what we have already alluded to, is
 19 that the expert witness reports should be detailed,
 20 very detailed, as detailed as what you would see in
 21 District Court under Federal Rule Civil Procedure
 22 Rule 26, so that the report can substitute for the
 23 witness' direct testimony.
 24 Also, let me just say now if the parties
 25 have any subpoenas, my usual practice is when I get a

Page 40

1 subpoena request, I will look it over. If it seems
 2 to be in order and nothing about it that strikes me
 3 as potentially a problem, then I will wait a few
 4 days, and if any party objects to the subpoena, then
 5 I'll set a briefing schedule and then we can brief a
 6 motion to quash or what have you. If I do not
 7 receive any notice of objections within about two or
 8 three days after I have received the request for the
 9 subpoena, then I will just sign it and send it right
 10 back to the requesting party.
 11 MR. FISCHER: Your Honor, one additional
 12 question on experts: I presume, since it's been your
 13 practice in prior cases, that in terms of
 14 disclosures, one of the things that can be withheld
 15 is communications with the expert prior to the
 16 submission of the expert report?
 17 JUDGE ELLIOT: Well, you know, it's
 18 interesting, I have actually never ruled on that.
 19 This is something that, of course, I'm sure as the
 20 parties are much more familiar with than I am, this
 21 was something that was changed in the Federal Rules
 22 several years ago.
 23 MR. FISCHER: Right.
 24 JUDGE ELLIOT: And I had never actually
 25 resolved whether or not to apply that rule change to

Page 41

1 my usual practice. It just has not -- it hasn't been
 2 squarely presented to me.
 3 So let me say this: I will not require
 4 any expert disclosures that you turn over, you know,
 5 whatever it may be, communications, drafts of expert
 6 reports, things like that, just provide the final
 7 expert report, and if a party wants me to order
 8 production of things which used to be considered not
 9 privileged under Federal Civil Procedure 26, I guess
 10 it is, then file a motion.
 11 MR. FISCHER: Thank you, your Honor.
 12 JUDGE ELLIOT: Okay. I think that's
 13 about all I have.
 14 Mr. Fischer, is there anything else we
 15 need to discuss?
 16 MR. FISCHER: I believe that's it, your
 17 Honor.
 18 JUDGE ELLIOT: Mr. Lipman, let me just
 19 ask you this: I understand that you have objected to
 20 the hearing date and I have overruled your objection.
 21 Subject to that objection, do you have
 22 any objections with the overall prehearing schedule?
 23 MR. LIPMAN: I do, your Honor.
 24 For the record, only because all of
 25 these exchanges at the same time are putting us at a

Page 42

1 severe disadvantage. I think they are in a much
 2 better place than we are having done this
 3 investigation.
 4 There is no reason why they couldn't
 5 stagger their production, give it to us early. So I
 6 appreciate the fact that your Honor has pulled some
 7 of these dates back somewhat, but that said,
 8 conceptually, there is no reason why they can't go
 9 first and can't go first right away. So for the
 10 record, we have to object.
 11 JUDGE ELLIOT: Very well. Let me throw
 12 one thing out there, and I'm -- I don't want to
 13 encourage you necessarily to do this, but I will
 14 point out that if you believe that you have grounds
 15 for a meritorious motion for more definite statement,
 16 you may find that if I were to grant a request for a
 17 more definite statement, you may find that that might
 18 be helpful.
 19 Again, I am not encouraging you to do
 20 that and you don't know if you have any such grounds.
 21 But that's something that is available under the
 22 rules that -- in at least one case that I can think
 23 of, led to a fairly quick settlement after the
 24 Division produced their more definite statement. So
 25 that's one possibility.

Page 43

1 MR. FISCHER: And, your Honor, this is
 2 Mr. Fisher, we recognize that as the government, we
 3 have certain obligations. We brought the case
 4 because we think it has merits and the facts support
 5 it.
 6 We are happy to work with defense
 7 counsel to expedite things in any way possible, and
 8 to the extent that they have any issues or questions
 9 about the discovery that's already been provided, we
 10 are happy to work with them and answer questions, and
 11 to the extent that they have concerns about the
 12 schedule, we are happy to work with them on a
 13 consensual basis to address those concerns.
 14 JUDGE ELLIOT: Very well.
 15 Mr. Lipman, anything else that we need
 16 to discuss here today?
 17 MR. LIPMAN: No, I don't think so, your
 18 Honor, thank you.
 19 JUDGE ELLIOT: Let me raise one final
 20 issue.
 21 Let me direct this to Mr. Haran.
 22 Mr. Haran, did you used to be an
 23 Assistant U.S. Attorney in the Eastern District of
 24 New York?
 25 MR. HARAN: Yes, your Honor.

Page 44

1 JUDGE ELLIOT: Let me just say -- I
 2 don't think this would affect my impartiality, but
 3 Mr. Haran and I were Assistant U.S. attorneys at the
 4 same time in the Eastern District of New York. I was
 5 there in 2005 and 2006 and we didn't work on anything
 6 together, at least not that I recall.
 7 MR. HARAN: Me neither, your Honor, me
 8 neither.
 9 JUDGE ELLIOT: I don't think that would
 10 affect my impartiality, but in case anyone was not
 11 aware of that, I just thought I would raise that.
 12 MR. FISCHER: Your Honor, for the
 13 Division, we have no reasons to question your
 14 impartiality, so to the extent that there is any
 15 grounds, based on what you have told us and what Mr.
 16 Haran has said, we would waive any objection on that
 17 basis.
 18 JUDGE ELLIOT: Very well. All right,
 19 counsel, thank you very much. This matter is
 20 adjourned for now.
 21 MR. FISCHER: Thank you very much, your
 22 Honor.
 23 MR. LIPMAN: Thank you, your Honor.
 24 (Time noted: 10:28 a.m.)
 25

Page 45

1
2 SCOPIST'S CERTIFICATE
3
4 I, Dolores Cavanagh, hereby certify that
5 the foregoing transcript consisting of 47 pages is a
6 complete, true and accurate transcript of the
7 investigative hearing, held on November 18, 2013, at
8 3 World Financial Center, New York, New York, in the
9 Matter of Harding Advisory, LLC and Wing F. Chau.
10 I further certify that this proceeding
11 was reported by Deborah Moschitto and that the
12 foregoing transcript has been scoped by me.
13
14
15
16 _____
17 Dolores Cavanagh DATE
18
19
20
21
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24
25

Page 47

1
2 PROOFREADER'S CERTIFICATE
3
4 In the Matter of Harding Advisory, LLC and Wing F.
5 Chau
6 File Number: 3-15574
7 Date: November 18, 2013
8 Location: 3 World Financial Center, New York, New
9 York
10
11
12 This is to certify that I, Deborah
13 Moschitto, the undersigned, do hereby swear and
14 affirm that the attached proceedings before the
15 United States Securities and Exchange Commission were
16 held according to the record and that this is the
17 original, complete, true and accurate transcript that
18 has been compared to the reporting or recording
19 accomplished at the hearing.
20
21
22 _____
23 DEBORAH MOSCHITTO DATE
24
25

Page 46

1
2 UNITED STATES
3 SECURITIES AND EXCHANGE COMMISSION
4 REPORTER'S CERTIFICATE
5
6
7 I, Deborah Moschitto, reporter, hereby
8 certify that the foregoing transcript of 47 pages is
9 a complete, true and accurate transcript of the
10 testimony indicated, held on November 18, 2013, at 3
11 World Financial Center, New York, New York, in the
12 Matter of Harding Advisory, LLC and Wing F. Chau.
13 I further certify that this proceeding
14 was reported by me and that the foregoing transcript
15 was prepared under my direction.
16
17
18
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21 _____
22 Deborah Moschitto DATE
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11
12
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15
16
17
18
19
20
21
22
23
24
25

A	Advisory 1:5 3:3 45:9 46:12 47:4	application 8:19 16:3,5	42:7	brutal 30:7
ability 18:21	affect 44:2,10	apply 31:3,4 40:25	backwards 32:3	bulk 14:19
able 13:2 15:12 18:4 19:8 24:14 26:8	affidavits 26:20	appreciate 8:16 42:6	based 44:15	bump 22:18
absolutely 25:4 25:12	affirm 47:14	April 21:17 22:15,21 23:13,23 25:9 28:17 29:5,6,7 30:5,6 31:21 32:13,21	basis 14:23 15:1 19:16 25:8 43:13 44:17	burden 14:5
abyss 30:9	afternoon 13:24 14:3	Ashley 2:16 3:16	Baynham 2:16 3:16	C
accept 4:20 19:14	ago 31:16 40:22	asks 10:7	beginning 5:11 23:13	C 3:1
accepted 5:14	agree 15:7 21:14,15 26:25 27:2,5 30:23 35:21 38:13	assignment 20:15	behalf 2:3,13 4:20	calculating 20:1
accepting 21:19	agreed 37:11	Assistant 43:23 44:3	believe 4:24,24 28:16 35:24 41:16 42:14	calendar 32:23
access 10:3	ahead 12:19 13:8 14:14 23:6 33:12	assume 6:19 10:12 25:7 26:11 33:1	board 9:23	call 4:23 18:18 39:15
accessing 8:13	Alex 2:15 3:15	assumed 9:1	box 7:18	calls 22:23
accomplished 47:19	ALJ 20:21 31:6	assuming 32:12 35:25	Brady 9:6 11:23 12:1,4 16:4,8 16:10,11 23:19 27:10 31:17	Cameron 1:11 3:6
accurate 34:13 45:6 46:9 47:17	allegations 14:6	attached 47:14	break 28:16,18 29:13 31:23	card 4:10
action 4:18 7:21 8:7	allowed 31:3	Attorney 43:23	break-out 20:8 21:11,24 27:22 28:9	case 4:6,23 6:24 7:20 11:14 14:5,11 15:1 17:6 18:2,15 18:20 19:14 19:21,24 22:14 23:8,15 24:5,19 25:17 25:19,21 26:22 27:2 30:14,20 31:12 33:22 34:6 37:16,19 39:1,16 42:22 43:3 44:10
actual 12:12 36:5	alluded 39:18	attorneys 44:3	Brenda 2:8 3:12	cases 7:22 14:16 23:2,9 25:15 26:12,13 40:13
acute 34:18	alternative 26:18	authority 31:5	brief 4:3 7:10 32:2,15 37:21 40:5	categories 11:1
addition 9:2 35:6 38:8	amend 9:16	authorize 20:22	briefing 40:5	category 15:23
additional 7:17 40:11	AMERICA 1:1	availability 21:10,22 22:6	briefly 5:12 18:18	Cavanagh 45:4 45:17
address 4:7 24:15 43:13	amount 8:7 11:13 22:10 23:21 33:25 36:5 37:20	available 7:8 20:8,13 21:25 22:6,25 29:3 29:19 42:21	bring 30:14	cease 6:23
adequate 23:11 27:15	amounted 7:15	Avenue 2:19	broken 27:7	Center 1:8 2:9 45:8 46:11 47:8
adequately 23:12	answered 6:4,12 16:22 43:10	aware 37:11 44:11	brought 30:15 43:3	certain 43:3
adjacent 27:24	answers 6:16	a.m 1:9 44:24		certainly 11:24
adjourned 44:20	anticipate 18:15	B		
administrative 1:2,11 3:4,7 30:14	apparently 13:25	back 5:6 40:10		
admission 24:21,23	appeal 31:13			
admit 36:22	appearance 5:10			
advantage 10:2	appearances 2:1 3:8			

34:14	25:21,22 27:9	continuing	DANIEL 2:6	depends 21:21
CERTIFICA...	30:13 31:2,4	25:25	data 7:16 8:5,24	depth 34:11
45:2 46:4 47:2	31:14 33:21	convenient 28:8	13:5 23:10,21	describe 15:18
certify 45:4,10	46:3 47:15	convening	27:13 33:25	desist 6:23
46:8,13 47:12	common 34:9	31:21	database 35:22	despite 30:22
chance 14:1,21	commonplace	cooperative	date 5:20,23,24	destruction
24:11,12	21:1	15:6	18:13 21:4,19	37:8
27:16	communicate	copies 4:13 5:13	21:20 22:9	detail 37:20
Chang 2:8 3:13	23:1	35:5 36:11,16	28:13,13,14	detailed 8:21,22
change 40:25	communicati...	copy 12:14	29:13 31:8	39:19,20,20
changed 40:21	40:15 41:5	35:11	32:12 36:4	details 39:9,17
Chau 1:5 3:3	compared	corrected 13:22	41:20 45:17	determine
5:5,5 34:16,17	47:18	correctly 11:5	46:21 47:7,23	11:25
45:9 46:12	complaint 14:6	counsel 3:8 4:8	dates 3:24	develops 15:2
47:5	complete 10:3	4:21,21 5:9,12	21:21 42:7	deviate 34:20
Chau's 9:24	45:6 46:9	7:15 9:23,24	day 16:22 38:24	different 29:13
check 13:23	47:17	9:25 12:13,21	39:12	30:17
chief 18:15	completely 8:2	12:21 18:19	days 6:25 14:11	direct 19:6,7
20:21,21 31:6	complex 37:16	19:18 43:7	26:7,12 31:8	26:20 39:23
chooses 30:14	complexity	44:19	40:4,8	43:21
civil 15:8 39:21	14:12 30:21	couple 15:3	DC 19:17 20:12	direction 46:15
41:9	33:25	36:2 39:14	20:14 21:25	directly 11:11
clear 3:23 27:8	conceptually	course 15:5,13	24:1 27:22	disadvantage
clerks 23:2	42:8	17:9,22 19:13	31:19 35:23	26:14 42:1
client 4:21 10:4	concerns 30:10	25:2 27:4	35:25	disadvantages
24:1	34:17 43:11	40:19	deadline 26:10	30:19
close 26:9	43:13	court 21:23	deadlines 30:13	disclose 17:5
closer 36:4	conclude 32:13	30:12,16,25	Deborah 45:11	disclosure 9:7
colleague 11:9	conference 1:7	39:21	46:7,21 47:12	10:25 11:24
25:18	3:19 5:12	courts 36:13	47:23	disclosures 35:2
colleagues 3:12	27:23 29:1	cover 13:17	decision 9:24	35:4 38:2
3:16 4:25	38:12 39:8,10	co-counsel	19:23 22:11	40:14 41:4
come 6:6 9:23	confuse 14:6	14:23 17:18	26:7 31:9	discovery 36:6
14:18 23:22	consensual	criminal 30:20	deem 6:1	43:9
24:18 25:3	43:13	criticism 26:3	defense 4:18	discuss 41:15
35:22 37:4	consented 20:7	cross 26:21	9:23 12:13	43:16
comes 11:14	24:22	cross-examin...	18:19 43:6	discussion
coming 27:5	considered 41:8	24:24	definite 42:15	21:16
commencing	consisting 45:5	currently 18:20	42:17,24	discussions
1:9	constitutes 19:5		definitely 31:20	21:17
comment 35:16	consult 24:13	D	deliberately	disk 37:1
Commission	consulted 7:24	D 3:1	10:18	disks 7:19
1:2,8 2:3 3:4	continue 29:5	daily 39:10	demand 6:25	District 30:16
9:8 23:17	continues 26:2	Dan 3:12 11:12	deny 16:5,13	30:25 36:13

39:21 43:23 44:4 division 3:10,25 7:24 8:19 12:10 14:15 14:25 15:18 17:9 26:2 28:1 28:2,7 31:1 34:15 35:18 42:24 44:13 Division's 32:15 document 6:18 6:20 16:7,12 documents 8:20 10:8,9,16,17 10:18,19,22 11:1 15:17,19 15:19,21,24 16:16 17:12 17:15,21,21 18:3,7 20:9 23:12 36:8,23 doing 9:9 27:5 35:19 38:6,8 Dolores 45:4,17 double-check 28:24 31:22 drafts 41:5 drive 13:17,25 17:12,15 drives 7:15,18 due 6:16 7:14 31:8 32:15,16 32:17 39:7	easy 17:17 28:6 effect 25:5 effective 5:4 efforts 9:18 14:10 Either 5:5 electronic 35:22 36:12 37:5 electronically 35:20 36:2,9 36:17 37:12 Elisabeth 2:7 3:12 Elliot 1:11 3:2,6 3:18 4:10 5:15 5:18,25 6:10 6:15,21 7:6 8:10 9:21 11:3 12:18,22 14:14 15:3 16:21 17:1,19 18:6,10 19:12 20:18 21:7 22:2,4 23:6 24:15 26:23 27:17 28:23 29:18,21,25 30:23 32:4,19 33:4,12 34:2 35:17 36:7 37:9,13 38:7 38:16,18,21 38:23 40:17 40:24 41:12 41:18 42:11 43:14,19 44:1 44:9,18 emergencies 20:22 emergency 25:20 emphasize 33:9 enable 36:1 encourage 15:5	17:1,9 27:4 31:14 36:7 42:13 encouraging 42:19 endeavor 20:12 ends 32:16 Enforcement 3:11 enormous 23:25 entertain 24:17 25:4 entirely 23:11 34:13 entirety 9:25 entity 31:2 equipment 36:1 equivalent 8:4 especially 22:13 33:24,24 ESQ 2:5,6,7,8 2:15,16,17 essentially 11:18 25:20 28:4 32:7 event 9:13 34:19 37:14 evidence 35:14 36:24 38:1 exactitude 18:21 exactly 13:18 example 17:11 24:19 34:16 37:1 exchange 1:2,8 2:3 3:4 34:24 35:1,8 36:8 46:3 47:15 exchanged 34:21 exchanges 41:25	exclude 36:23 exhibit 35:1,3 exhibits 8:6 11:17 35:8,20 36:2,9,19,25 37:2 38:1 expedite 19:3 20:10 36:5 43:7 expense 24:1 experience 14:24 23:9 34:5,9 experimenting 35:19 expert 19:5 35:2,4 38:2 39:19 40:15 40:16 41:4,5,7 experts 40:12 expert's 19:5 explore 26:18 36:3 37:6 extend 31:5 extension 26:9 extent 9:5 10:7 10:19,22 11:23,25 14:18 35:20 43:8,11 44:14	familiarity 18:20 far 11:20 35:2 February 34:23 34:23,24 35:6 35:7 Federal 21:2 30:16 39:21 40:21 41:9 feel 15:23 26:14 fighting 27:16 figure 14:21 figuring 13:4 file 1:3 3:5 6:4 7:8,20 8:9,11 8:14 11:6 13:3 16:9 25:14,24 26:3 31:7 35:4 35:9,9 36:11 41:10 47:6 filed 4:6 25:20 files 7:22 10:4 11:14 12:1,25 26:3 filing 36:12 final 38:12 41:6 43:19 Financial 1:8 2:9 45:8 46:11 47:8 find 24:7 42:16 42:17 finding 17:11 fine 16:23 29:11 38:17 finish 32:21 firm 4:8,17 first 3:19,22 6:9 9:22 12:20 15:5 16:1 18:14 24:16 25:10 27:21 28:20 32:3 36:21 39:12
E			F	
E 3:1,1 earlier 16:24 early 9:17 25:9 42:5 easier 15:10 19:25 Eastern 43:23 44:4			F 1:5 3:3 45:9 46:12 47:4 facilities 20:13 21:3,10,24 fact 22:20 35:9 36:17 42:6 facts 43:4 fair 13:13 fairly 42:23 fairness 14:20 familiar 10:4 40:20	

42:9,9 Fischer 2:5 3:10 3:11 4:2,12 5:17,22,22 6:12,14,17 7:7 7:9 9:11,19,22 11:4,9 12:2 14:13,15 16:16,18,23 17:16 18:2,14 18:16 19:25 21:6,15 24:3 26:17 28:19 29:10,11,20 29:23 31:25 32:9 33:4,6 35:15,18 37:3 37:10 38:5,16 38:17,19,22 40:11,23 41:11,14,16 43:1 44:12,21 Fisher 43:2 five 11:6 33:10 33:13 floor 28:4 focus 9:18 14:9 24:12 Foelak 25:18 foregoing 45:5 45:12 46:8,14 forests 36:2 37:8 formal 34:8 formally 4:20 5:1,14 forth 31:17 forthcoming 17:10 23:18 found 17:3,4 four 7:14 11:5,6 32:15,16,24 33:10,13 frame 16:19	frankly 14:6 16:24 18:2 20:14 21:5 30:8 33:6,7 Friday 4:15 13:20,24 14:19 29:6 further 45:10 46:13 fuzzy 18:22 <hr/> G <hr/> G 3:1 general 8:23 11:21 39:15 generally 39:4 generate 26:2 getting 8:13 gigantic 26:2 give 4:3 7:10 12:12 20:3 28:3 33:22 37:1 42:5 given 6:8 7:12 10:21 29:13 32:11 33:24 33:24 gives 22:9 23:14 giving 10:24 33:16 go 12:19 13:3,8 14:14 23:6 24:14 27:3 31:5 33:12 42:8,9 goes 14:24 going 9:14 11:15 16:3,5 16:13 17:8,23 19:22 20:24 22:13 23:3 25:6,7,13,17 25:25 27:2,3 28:9,15,23	31:12 32:11 33:19 34:15 34:19,20,21 good 3:17,18 5:25 6:15 7:6 9:14 20:16 22:8 27:24 37:13 Goot 2:7 3:12 government 43:2 grant 16:3 42:16 green 4:10 grounds 10:10 25:22 42:14 42:20 44:15 group 15:21 groups 15:21 guess 6:18 41:9 <hr/> H <hr/> handed 5:13 handled 25:18 happen 5:2 20:24 happened 4:4 happy 12:3,12 14:17,22 17:16,17 26:18 43:6,10 43:12 Haran 2:17 3:16 43:21,22 43:25 44:3,7 44:16 hard 7:15,18 25:13 Harding 1:5 3:3 45:9 46:12 47:4 headquarters 36:12 heads 23:15	hear 12:23 15:11 29:25 31:10 34:2 heard 23:7 29:8 33:5 hearing 6:25 12:12 19:2,8 19:18 20:6,10 20:22 22:13 24:21,25 25:3 25:8,13,19 27:23,25 28:5 28:6,14,18 29:10 32:13 32:16,25 34:11,22 36:20,22 37:1 37:15 38:11 39:3,5,8,12,17 41:20 45:7 47:19 hearings 24:25 held 1:7 45:7 46:10 47:16 help 23:2,20 37:21 helpful 8:25 11:15 16:6 42:18 helps 20:4 hinders 18:20 hire 9:24 historically 21:2 30:15 history 18:24 hit 21:18 hold 12:18,18 19:17 21:7 holiday 6:11 holidays 30:8 Honor 3:17 4:2 5:21 6:5,14 7:9 8:17 9:20 12:3,16,20	13:23 14:4,13 16:23,24 18:3 18:8,16 20:1 22:1 23:5,25 26:17 27:6 28:19 29:11 29:20 30:3,8 30:11 31:25 32:9 33:3,11 35:15 36:6 37:4,10 38:15 38:17 40:11 41:11,17,23 42:6 43:1,18 43:25 44:7,12 44:22,23 Honor's 32:10 hoped 19:13 hopefully 20:10 horrific 21:6 Howard 2:5 3:11 5:22 hugest 11:13 <hr/> I <hr/> idea 9:14 18:22 31:12 ideally 6:7 identify 13:3 identifying 14:23 impartiality 44:2,10,14 inclined 26:24 includes 7:19 7:21 including 19:23 36:9 39:2 inclusive 8:2 incoming 11:19 indicated 46:10 indicating 13:18 information
--	---	---	---	---

13:10 informed 21:3 initial 22:11 31:9 initially 15:17 instance 9:22 intend 36:21 interest 22:23 23:11 33:21 interesting 40:18 internal 10:3 internally 37:6 interviews 9:1,3 11:21 introducing 26:19 investigating 33:23 investigation 7:25 9:9 10:1 42:3 investigations 10:20,24 11:2 investigative 7:8,19,20,22 10:21 11:6 13:3 24:23 25:14 26:2 28:3 34:8 45:7 involved 9:25 11:11 issue 3:21 4:5 5:8 6:23 12:23 12:24 14:4 21:9,12 24:11 24:16 28:10 28:11,25 39:15 43:20 issues 14:25 15:9,12 20:20 30:18 37:22 43:8	J	30:23 31:11 33:17 34:17 35:11 38:5 40:17 41:4 42:20 knows 32:21	34:3 35:21 36:4 37:7 38:14,15 41:18,23 43:15,17 44:23 Lipman's 10:7 list 8:20,23 9:16 9:16 10:8,9 12:8,14 14:7 15:17,19,24 16:7,12,17 17:21 18:7 27:10 33:22 listed 15:24 listen 32:6 lists 23:18 31:17 32:23 33:17 34:21,24 35:1 35:3,4 little 5:3 13:16 20:14 23:14 27:7 LLC 1:5 3:3 45:9 46:12 47:4 LLP 2:18 load 36:1 location 18:13 22:25 47:8 long 18:14,25 24:14 30:21 33:21 longer 19:10,13 look 14:1,21 16:1 24:12 32:22 40:1 looking 14:10 lot 12:25 23:20 25:15 26:13 34:5,7	main 3:20 making 25:11 37:5 man 14:17 manageable 32:20 manner 35:12 March 22:17 28:15 29:4 31:19 35:1,7,7 37:15,23 38:3 38:11 39:6,7 39:11 mark 35:12,12 material 9:6,8 12:4,11 14:19 14:21 16:4,4 16:10,11,11 materials 7:18 12:1 matter 1:4 3:2 44:19 45:9 46:12 47:4 maximum 22:10 mean 5:15 10:9 13:20 15:7 means 6:24 mechanism 37:5 meet 20:9 meeting 31:20 mention 23:24 27:19,21 39:18 mentioned 31:16 35:3 meritorious 42:15 merits 43:4 met 5:12 methods 26:18 26:21 mid 22:17
	K	lack 18:19 language 15:20 late 14:3 22:7 22:19,20 law 1:11 3:7 4:8 23:2 lays 39:16 learn 30:17 leave 6:21 led 42:23 letter 13:17 letters 11:19 let's 6:10 12:7 12:13 18:11 18:12 28:13 32:22 likelihood 4:16 limine 38:3,4 limit 36:5 37:7 lines 17:6 38:25 Lipman 2:15 3:14,15 5:21 5:23 6:3,5,18 6:19 7:2,3 8:12,16 9:12 10:2,9,11 12:16,19,20 13:8,9,15,20 13:22 14:16 14:22 16:2 17:11 18:6,8 20:7,8,13 22:1 22:3 23:5,7 25:11 27:6 30:1,3 31:11 33:1,3,9,11,13	L	
			M	

<p>middle 6:8 39:3 39:17 misunderstan... 11:7 Molo 4:8,11,12 4:14 5:8 MoloLamken 4:9 moment 24:4 27:18 31:16 36:18 Monday 1:9 28:15 29:7 34:23,24,25 35:7 37:15,23 38:11 morning 3:17 3:18 5:16,17 Moschitto 45:11 46:7,21 47:13,23 motion 8:14 15:14 16:10 16:10 24:17 25:4,21 31:7 40:6 41:10 42:15 motions 38:3,4 move 26:9 multiple 13:5</p> <hr/> <p style="text-align: center;">N</p> <p>N 3:1 name 3:6 narrow 30:18 nation's 37:8 nature 15:22 necessarily 13:6 42:13 need 12:22 19:6 19:17 22:14 22:15 25:8 27:9,10,12 28:11,21 35:9</p>	<p>36:19,25 37:21 38:9 41:15 43:15 needs 15:25 neglected 27:21 neither 44:7,8 never 4:19,20 40:18,24 new 1:8,8 2:10 2:10,20,20 4:21 6:6 9:24 12:21 19:19 19:21 20:6,23 20:25 21:8 23:8 25:19 35:25 43:24 44:4 45:8,8 46:11,11 47:8 night 28:20 Nixon 2:18 3:15 normal 33:7 note 29:12 noted 3:23 44:24 notes 9:1,3 10:13 11:20 notice 5:10 40:7 notify 28:25 November 1:9 5:20 45:7 46:10 47:7 Number 3:5 47:6 numbers 11:5</p> <hr/> <p style="text-align: center;">O</p> <p>O 3:1 object 30:4 33:15 42:10 objected 41:19 objection 5:19 6:12 18:6 29:9 30:2 31:18</p>	<p>38:14 41:20 41:21 44:16 objections 36:24 38:1,4 40:7 41:22 objects 40:4 obligations 43:3 observant 28:21 obtained 13:1 obviously 8:6 18:19 21:22 23:19,25 October 4:13 4:14 7:14 offer 20:19 35:13 office 19:19,21 20:7,14,23 21:8 23:1 35:5 35:23 36:10 offices 28:3 official 5:1 Oh 5:18 OIP 3:24 4:13 5:13 37:20 okay 5:18 6:1 12:19 13:15 17:1 18:1,11 19:12 27:1,17 32:9 34:2 37:3 37:13 38:22 38:23 39:14 41:12 old 12:21 ongoing 14:23 15:1 open 26:21 opening 38:9,10 opinion 20:4 opposed 8:23 order 3:23 15:16,25 23:22 24:21</p>	<p>27:12 29:1 32:23 34:21 37:18,23 39:15 40:2 41:7 orders 21:23 original 47:17 outcome 31:12 outgoing 11:18 outline 4:3 7:10 overall 41:22 overrule 31:18 overruled 41:20</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 pages 45:5 46:8 paper 36:5,11 36:15 particular 10:6 15:23 24:25 particularly 26:1 parties 11:7 13:6 15:6,11 17:2,4 21:13 24:18,22 25:2 26:24 28:25 29:8 35:1 36:8 37:25 39:24 40:20 parts 7:21 partway 28:18 party 40:4,10 41:7 party's 27:4 Passover 28:20 29:14 Peabody 2:18 3:15 people 23:1 percent 8:8 18:21 perfectly 25:12</p>	<p>28:21 period 14:11 19:9 20:2 person 38:20 phone 4:23 pin 29:9 place 6:1 13:9 42:2 places 21:1 planned 21:13 Plaza 21:2 please 3:9 15:14 17:13 35:9 plus 11:6 point 5:14 8:23 9:15,17 16:3 25:10,12 26:16 42:14 portion 8:5 portions 10:21 position 4:1 26:6 31:13 possession 11:16 possibility 17:5 24:10 42:25 possible 8:20 9:7,8,18 14:18 27:11 35:20 37:6 43:7 post-hearing 32:2,15 potential 34:5,7 potentially 40:3 practice 12:10 19:4 26:8 27:22 32:5 34:20 39:25 40:13 41:1 predict 18:21 prefer 33:6 preference 32:10 prehearing 1:7</p>
--	--	---	---	--

3:19,21 18:12 32:1 37:17,21 37:24 38:4,9 38:12 39:7,10 39:15 41:22 prejudice 16:6 16:14 premarked 35:8,10 prep 34:11 preparation 34:11 prepare 23:12 23:15 25:23 27:15 prepared 46:15 preparing 25:13 presented 13:17 41:2 presiding 3:6 presumably 12:25 presume 6:17 10:8 32:14 40:12 pretrial 32:2 pretty 8:11 9:14 27:24 29:2 prior 5:11 7:15 9:25 40:13,15 privilege 10:10 10:12 17:23 17:24 18:1 privileged 10:17 41:9 probably 5:2 18:22 35:24 problem 10:24 13:4 18:5 22:7 25:15 26:1 31:15 36:6 40:3 problems 8:12	Procedure 39:21 41:9 proceed 7:2 39:16 proceeding 1:2 3:4 30:15 45:10 46:13 proceedings 47:14 process 20:15 produce 11:22 produced 10:14 42:24 producing 33:16 product 11:22 17:24 production 11:19 13:25 41:8 42:5 productions 28:12 professional 15:9 promise 20:17 proof 14:9 PROOFREA... 47:2 proposal 27:4 propose 32:11 proposed 21:17 21:18 provide 8:1,19 11:24 12:4,7,8 12:10,14 16:24 26:15 27:9,10 41:6 provided 7:10 7:13,23 8:9 43:9 provision 11:11 public 22:23 23:10 33:20 pull 20:14	pulled 42:6 put 5:10 19:6 26:20 34:15 putting 41:25 <hr/> Q <hr/> quash 40:6 question 5:3 16:8 21:10 40:12 44:13 questions 43:8 43:10 quick 42:23 quite 34:9 <hr/> R <hr/> R 2:6 3:1 raise 31:14 43:19 44:11 ready 7:4 30:22 really 13:13 19:20 21:12 22:14,15 23:18,20 25:8 25:13 26:7 30:10,19 34:10,12,17 reason 5:7 8:22 10:11 17:22 17:23,25 42:4 42:8 reasonable 14:17 19:1,9 19:11 reasonably 22:24 reasons 7:23 33:16 44:13 recall 44:6 receive 40:7 received 4:12 4:19 9:3 13:24 14:3 34:1 40:8 recognize 43:2	recollection 14:2 record 5:9 27:7 30:17 41:24 42:10 47:16 recording 47:18 records 10:22 recurring 31:15 recurs 25:15 regardless 31:22 regional 19:19 20:6,23 21:8 28:2 relate 10:20,23 11:2 relevant 10:5 relief 26:15 remember 11:4 reply 32:17 report 19:5 39:22 40:16 41:7 reported 45:11 46:14 reporter 46:7 REPORTER'S 46:4 reporting 47:18 reports 39:19 41:6 representation 19:15,17 reputation 14:16 request 10:7 40:1,8 42:16 requesting 16:10,11 40:10 requests 11:18 13:10 require 15:18 41:3	required 34:15 requirement 7:5 requires 36:11 residing 28:7 resolve 3:21 15:10,14 28:11 36:23 resolved 4:4 40:25 respect 10:6 12:21 respond 9:19 11:10 15:1 respondent 30:19 respondents 2:13 3:15 4:7 4:22 5:13 6:16 6:24 7:11 11:15 13:1,2 21:25 25:20 28:1,8 respondent's 16:22 26:14 response 32:16 responses 18:16 rest 8:13 retained 5:1 review 23:12 revisit 24:11 right 5:25 6:24 12:19 25:12 25:18 27:17 29:18 36:10 36:14 38:18 40:9,23 42:9 44:18 room 20:8,15 21:11 27:23 27:23,23,25 28:4,5,6,9 rooms 27:22 rough 8:4
---	---	--	--	--

rule 15:20 22:22 30:22 30:24 31:1 39:21,22 40:25	20:1 32:12 serve 36:8 37:12 served 7:17 23:11	sooner 14:7,8,9 sorry 27:6 38:7 sort 4:3 10:25 11:23 16:9 26:15	24:19 26:19 38:25 39:4,6,8 streamline 24:7 27:1	9:12 18:23 19:1,9 24:14 25:7 28:18 30:21 33:14 33:21
ruled 40:18 rules 40:21 42:22	service 3:24 4:6 4:20 5:4,5,14 5:19,23 6:1 7:1 21:19 22:9	sorts 15:15 sounding 27:7 sounds 13:5 so-called 11:25	streamlining 25:3 26:22 39:1 strict 30:13 strikes 40:2 strong 4:16 stuff 19:22 subject 24:24 34:8 41:21	taken 6:1 talk 3:20 15:12 15:15 17:2 18:11,12 21:13 24:18 27:18 36:18 39:9
S	services 4:16 set 32:6 40:5 settle 28:13 settlement 17:5 17:8 42:23	specificity 15:25 speed 6:7 23:22 speedy 30:22,24 spring 28:16 31:22	submission 40:16 submit 39:2 subpoena 40:1 40:4,9 subpoenas 13:11 39:25 substitute 39:22 sufficient 37:19 suggest 32:1 suggestion 32:5 summary 10:25 11:23	talked 4:14 18:18 34:10 38:25 talking 35:3 telephone 1:12 21:5 29:1 telephonic 1:7 38:19,21 tell 17:13,14 25:4,11
S 3:1 save 36:2 saying 9:15 31:10 34:3,12 36:3	severe 42:1 short 12:11 14:11 shorten 19:8 shortened 24:24 shortening 24:19 shorter 24:6 shortly 5:2 show 36:25	squarely 41:2 stagger 42:5 stand 13:22 staring 30:8 start 22:16,17 22:21 23:23 23:23 25:8 28:13 29:4,6 29:10,21 30:5 30:6 31:19 32:22,25 33:16 34:22 36:19,22 37:15 38:11 39:9,13	submit 39:2 subpoena 40:1 40:4,9 subpoenas 13:11 39:25 substitute 39:22 sufficient 37:19 suggest 32:1 suggestion 32:5 summary 10:25 11:23 supplement 9:16 support 43:4 supposed 25:19 sure 8:2 14:24 17:3 23:10 27:14 29:2,24 34:12 40:19 swear 47:13 sympathetic 31:11 sympathizing 33:8 system 36:13	tendency 18:25 terabytes 7:16 8:5,24 11:5,7 11:14 13:5 23:9 27:13 terminated 4:17 terms 11:14 22:8 39:1 40:13 testimony 7:20 8:6 11:17 19:6 24:23 26:19 28:4 32:8 34:8 39:23 46:10 thank 18:9 20:18 41:11 43:18 44:19 44:21,23 Thanksgiving 6:8 16:20 theirs 13:4 theory 13:2
scoped 45:12 SCOPIST'S 45:2 Sean 2:17 3:16 second 15:16 21:11 24:16 secretary's 35:5 36:10 Securities 1:2,8 2:3 3:3 46:3 47:15 see 16:7,12 32:22 36:4 37:7,17 39:20 seen 10:15 13:7 25:16 send 35:5 36:16 36:16 40:9 sense 9:13 12:3 14:8 35:10 sent 7:14 September 5:24	show 36:25 side 35:11 sides 32:24 sign 5:6 40:9 similar 15:22 23:9 sitting 4:22 situation 33:8 six 9:9 33:10,13 34:21 six-week 19:18 size 25:14 27:24 slight 8:7 slightly 19:10 21:16 28:8 29:13 33:8,9 somewhat 14:17 42:7 soon 8:20 9:7,8 22:24 27:11	started 22:14 22:24 starting 19:19 statement 4:24 13:14 42:15 42:17,24 statements 38:9 38:10 States 1:1,8 46:2 47:15 stay 25:21 stayed 25:22 Steven 4:8 stipulations	table 4:22 take 4:17 6:7	
			T	

thing 17:20 20:5 22:8 23:24 27:8,12 29:12 36:21 42:12	12:11 14:2,11 16:19 19:1,9 20:4 22:10 23:3,12,14,14 25:23 27:15 30:17,21 33:2 39:2 41:25 44:4,24	U	44:16	17:21,22 18:3 18:7 40:14
things 3:20 13:7 14:24 15:4,15 16:15 17:3,10 19:4,7 22:21 23:19,21 27:20 36:17 36:18 39:14 40:14 41:6,8 43:7	timing 28:12 today 5:20,23 6:2 7:13 22:9 33:17 43:16 told 44:15 transcript 45:5 45:6,12 46:8,9 46:14 47:17	underestimate 18:25 undersigned 47:13 understand 10:14 12:23 12:24 13:7 19:4 24:5 30:11 33:23 41:19 understanding 6:3 11:21 37:22 unfortunately 19:16 26:5,13 31:15 United 1:1,8 46:2 47:15 unusual 33:8 use 35:13 usual 17:22 22:12 26:8 27:22 32:5 34:20 39:25 41:1 usually 27:25 28:3 32:6,23 39:12 U.S 43:23 44:3	Walfish 2:6 3:12 11:10,13 13:13,16,21 17:14 want 7:2 16:1 27:1 33:1,4 35:12 38:12 39:3 42:12 wanted 23:24 wants 41:7 Washington 31:19 way 7:3 21:4 24:7,18,20 25:3 30:20 32:20 43:7 ways 27:5 35:19 week 3:23 7:17 12:7,14 13:19 29:14,16 38:10 39:5 weekend 38:6 weeks 18:23 19:9,21 22:14 24:1,3 25:7 29:5 32:15,17 32:17,24 33:10,10,13 33:14 34:21 34:25 37:14 went 4:7 we've 24:11 wife 29:24 WiFi 21:4 willing 26:25,25 Wing 1:5 3:3 45:9 46:12 47:4 withheld 8:21 10:8,11,19 11:1 15:16,19 15:24 16:7,12 16:16 17:20	witness 11:20 23:18 24:23 26:19 27:9 31:16 32:23 33:22 34:10 34:21,24 35:3 39:19,23 witnesses 9:14 12:8,15 14:8 18:25 20:9 33:17,18,18 34:5,7,14 38:2 words 10:20 work 11:22 14:22 15:12 15:13 17:16 17:24 18:9 21:20 26:13 32:3,14 37:7 43:6,10,12 44:5 working 36:12 works 28:21 World 1:8 2:9 45:8 46:11 47:8 worry 23:13,20 wrap 23:15 write 20:4 writing 19:23 written 16:10 39:4
think 3:22 4:3,4 7:14 8:4 11:4 12:2 15:20 16:2,6 18:4,8 18:24 19:1,3,7 19:10 20:3 21:20 22:5,7 22:19,19,22 22:23 24:8 26:1 28:9 32:19 34:4 37:16,19,20 38:5 41:12 42:1,22 43:4 43:17 44:2,9	transcripts 9:2 traveling 28:2 trial 7:4 18:22 19:18 20:2 22:18,24 23:16,23 24:2 24:6 29:15 30:18,22,24 34:11 35:18 trouble 17:11 29:24 true 34:6 45:6 46:9 47:17 try 15:8 20:16 28:13 trying 6:6 turn 8:14 27:25 41:4 turned 5:6 32:24 33:2 turnover 16:4 two 13:7 18:16 20:20 27:19 29:5 32:17 34:25 37:14 40:7 typically 12:9,9	V		
thinking 16:18 16:19		valid 25:12 various 8:6 9:2 17:12 28:12 30:13 37:22 view 22:20 24:4		
third 11:7 13:6 16:3		W		
thought 7:25 44:11		wade 27:12 wait 16:6 33:19 40:3 waive 7:1,5 30:24 31:1,2		
three 9:11,12 18:23 19:8,21 22:13 24:1,3 25:7 33:23 40:8				Y
throw 42:11				years 9:9,11,12 33:23 40:22 York 1:8,8 2:10 2:10,20,20 19:19,21 20:6 20:23,25 21:8 25:19 35:25 43:24 44:4
thumb 13:17,25 17:12,15				
time 5:9 12:11				

45:8,8 46:11 46:11 47:8,9	41:9 27th 19:20 28th 4:13,24			
1				
1st 6:11 22:15 30:5 10:28 44:24 100 18:21 10022-7039 2:20 10281 2:10 11th 29:5,6 14 5:24 14th 20:1 28:17 28:20,24 29:3 29:14,16,19 31:21 32:12 16th 29:17,19 31:21 17th 29:22 34:23,23,24 37:15,23 38:3 18 1:9 45:7 46:10 47:7 18th 4:6 5:20 6:2 28:17,24 29:3	3			
	3 1:8 2:9 45:8 46:10 47:8 3rd 35:1,6,7,7,7 3-15574 1:3 3:5 47:6 30 6:25 31:8 300 14:11 26:6 26:12 300-day 5:24 20:2 31:1 32:12 31st 28:15 29:4 31:19			
	4			
	4 32:14,14 437 2:19 47 45:5 46:8			
	6			
	60 6:25 60-day 7:5			
	9			
2	9 8:23 23:9 27:13 9.6 8:5 9/30 38:13,14 38:23 9:30 39:13 9:33 1:9 98 8:8 99 8:8			
2 32:14 2nd 6:10,13,16 16:22 18:4,7 2.8 7:16 2005 44:5 2006 44:5 2013 1:9 45:7 46:10 47:7 2014 5:24 21st 29:7 24th 38:11 39:6 39:7,11 25th 4:14 7:14 32:13,21 26 21:2 39:22				