IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 1:24-cv-22142-DPG

FANNY B. MILLSTEIN and
MARTIN KLEINBART,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.
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PLAINTIFFS' RESPONSE TO WELLS FARGO'S AMENDED PARTIAL OBJECTIONS TO THE POST-DISCOVERY HEARING ORDER OF THE MAGISTRATE JUDGE AND INCORPORATED MEMORANDUM OF LAW

Judge Goodman's Order requiring Wells Fargo to produce redacted versions of litigation holds relevant to its trust and securities intermediary business should be affirmed. The record establishes Wells Fargo knowingly failed to preserve key documents relating to those aspects of its business – both central to its knowledge of the Ponzi scheme it aided and abetted – despite knowing those documents were relevant to ongoing regulatory investigations and litigation. That raises serious concerns about whether Wells Fargo complied with its preservation obligations, entitling Plaintiffs to the basic facts surrounding the litigation holds under Rule 26. Separately, the record establishes a preliminary showing of spoliation, which overcomes Wells Fargo's belated objections based on the work-product doctrine and attorney-client privilege.

Judge Goodman's Order is neither clearly erroneous nor contrary to law. It is, in fact, correct. The basic facts surrounding litigation holds are not privileged or work product and are discoverable when preservation failures are at issue. Here, Wells Fargo admitted that it sold its trust business in late 2021, transferred key documents and data repositories to Computershare, and did not keep copies of those documents. Wells Fargo did so despite receiving subpoenas from the Florida Office of Financial Regulation and from the receiver appointed for the entities used in the scheme – and despite knowing about a prior class action filed by the Class members here alleging a Ponzi scheme.

As a result, Wells Fargo failed to produce the life insurance policies and related documents at the heart of the scheme, despite having received and maintained them in its roles as Trustee and Securities Intermediary. Wells Fargo is now attempting to benefit from that spoliation by, among other things, arguing that it lacked knowledge of the scheme, which it is able to do because it disposed of the documents that show otherwise. It continues to resist production of the litigation holds on the ground that the current record does not support Plaintiffs' allegations – a position that only underscores the need for discovery into what documents were destroyed. Simply put, Wells

Fargo cannot use the absence of evidence it caused as a defense. Plaintiffs must be permitted to investigate the missing documents and proceed accordingly.

FACTS

The Scheme: The Scheme was perpetrated by Marshal Seeman, Eric Holtz, and Brian Schwartz (the "Scheme Operators") through numerous entities controlled by them, including the Para Longevity Companies ("PLCs"), and the Centurion Companies. FAC ¶¶1 & n.1, 3, 44, 50, 54-56. It involved the sale of promissory notes ("Notes"), offered by the PLCs purportedly secured by collateral in the form of life insurance policies. *Id.* ¶4. The Class members were told they were investing in funds that purchased life insurance policies (which, unbeknownst to them, were often unlawful stranger originated life insurance policies, or "STOLIs") and that the death benefits from those policies would be used to fund interest payments due to them and eventually return their principal. *Id.* ¶¶4, 60. Instead, the Scheme Operators used new Class member money to pay earlier investors and pilfered the funds. *Id.* ¶4.

Wells Fargo's Knowledge and Substantial Assistance of the Scheme: As trustee ("Trustee") for certain irrevocable life insurance trusts ("ILITs") that were part of the Scheme, Wells Fargo knowingly assisted the Centurion Companies to actively conceal from the insurance companies: (1) the source of funds used to purchase the STOLIs; (2) that the Scheme Operators' entities were the actual STOLI beneficiaries; and (3) that the insureds were paid to purchase the STOLIs. *Id.* ¶¶51-54, 57.

In its role as Trustee, Wells Fargo received the life settlement applications and policies and knew the Centurion Companies were violating insurer prohibitions on STOLIs. *Id.* ¶¶55-59. And from account-opening materials and checks received from Class members, it also knew that the Centurion Companies operated as a "fund that buys life policies," the STOLIs were purchased for the benefit of the Class, and the Centurion Companies were supposed to use the Class members'

funds, among other things, to purchase and pay the premiums on the STOLIs. *Id.*

As Trustee, Wells Fargo also knew the Scheme was in financial trouble. In April 2012, the Scheme Operators told Wells Fargo it had to resign as Trustee and assign the STOLIs to new lenders because the underlying "loans [were] in default" and facing "formal foreclosure." *Id.* ¶¶62, 64. Despite knowing the STOLIs collateralized the Notes, Wells Fargo misrepresented to the new lenders that the STOLIs were unencumbered, proceeded without the usual resignation process, and backdated the forms. *Id.* ¶¶61, 65, 67, 71-72. And when the insurance companies initially rejected the assignments due to potential STOLI violations, Wells Fargo intervened to push through approvals necessary to secure the new loans that perpetuated the Scheme. *Id.* ¶¶61-62, 68-69.

After resigning as Trustee, Wells Fargo transitioned to the role of Securities Intermediary. *Id.* ¶61. As Securities Intermediary, the bank was instrumental in the transfer of the STOLIs to the new lenders. *Id.* ¶¶61, 70-73. It misrepresented to them that there were no "liens" on the STOLIs, that they had a "first priority lien on and security interests in" STOLIs, and that it had "no actual knowledge of any claim to, or security interest in the" STOLIs, despite knowing the Class had security interests in STOLIs that collateralized the Notes. *Id.* ¶¶60-61, 71-72. This allowed the Scheme Operators to secure new loans that prevented the Scheme from collapsing. *Id.* ¶¶61-62.

Wells Fargo also knew the Scheme was in financial trouble based on its receipt of grace notices during its tenure as Securities Intermediary. *Id.* ¶75. And it knew the "consistent grace notices" resulting from the Scheme Operators' failure to pay the premiums on the STOLIs was "not normal for accounts [it] administer[ed]" and reflected their mismanagement and pilfering of the funds. *Id.*

This Court's Denial of Wells Fargo's Motion to Dismiss: Wells Fargo's motion to dismiss argued the allegations set forth above do not plausibly allege actual knowledge and substantial assistance of the Scheme on the part of Wells Fargo, as necessary to establish aider and

abettor liability. D.E. 25, pp. 7-15, D.E. 41, pp. 3-9. But as Judge Goodman correctly concluded, Plaintiffs adequately allege Wells Fargo possessed actual knowledge of, and substantially assisted, the Scheme through its roles as Trustee and Securities Intermediary. D.E. 53, pp. 55-62, adopted D.E. 91.[1] Specifically, Judge Goodman concluded Plaintiffs plausibly alleged the requisite knowledge by Wells Fargo in that: i) as Trustee, Wells Fargo agreed to an atypical trust structure that allowed the Scheme Operators to circumvent industry prohibitions on STOLIs and secure the policies central to the Scheme, resigned as trustee to enable the Scheme operators to obtain loans that perpetuated the Scheme and backdated the resignation forms, and intervened to push through approvals from the insurers necessary to secure those loans; and, ii) as Securities Intermediary for the policies at issue, Wells Fargo affirmatively misrepresented to the new lenders that there were no liens or security interests in the policies and routinely received grace notices indicating non-payment of the policy premiums, demonstrating misuse of funds by the Scheme Operators. *Id.*[2] Wells Fargo objected to Judge Goodman's Report and Recommendations on the basis that, among other things, "the ILITs allegations do not show actual knowledge," "the Ponzi scheme occurred after the ILIT services," "the purported STOLI violations are…irrelevant," "the 'unusual' ILIT allegations do not show knowledge," and "the Securities Intermediary allegations do not show actual knowledge." D.E. 81, pp. 14-20 (cleaned up). This Court then "conducted a *de novo* review of the [m]otion and the record and agree[d] with Judge Goodman's well-reasoned findings that Plaintiffs have adequately alleged" actual knowledge based on, as Judge Goodman found, their allegations regarding Wells Fargo's role as Trustee and Securities Intermediary. D.E. 91 at 2. The

[1] Wells Fargo also had knowledge of and substantially assisted the Scheme through its role as Depository Bank. DE. 3, ¶¶77-135, 137-38, 140¬42, 144-151, 153-155, 156-162.

[2] Judge Goodman also concluded that, as Depository Bank for the entities involved in the Scheme, Wells Fargo enabled the Scheme by knowingly violating its own anti-money laundering policies in acknowledged infractions of its compliance procedures, and by knowingly creating inaccurate client profiles for those entities. D.E. 53, pp.58-62.

Court thus denied Wells Fargo's motion to dismiss. *Id.*

***Wells Fargo Knew of the Scheme-Related Litigation and the Risk of Claims Against it*:** In 2016, the Florida Office of Financial Regulations ("OFR") opened an investigation into the Scheme and served Wells Fargo with a subpoena requesting documents related to the accounts involved. D.E. 111, p.1; D.E. 115, p.1; Transcript of Discovery Hearing ("Hearing Tr."), Ex. 1, 36:10-11. OFR continued interfacing with Wells Fargo to collect documents in connection with that investigation through 2021, when OFR filed its enforcement action against the Scheme Operators and Seeman Holtz. In June 2021, Plaintiff Millstein filed a putative class action against Seeman, Holtz, and various Scheme entities, alleging the Note program was a Ponzi scheme. D.E. 111, p.1; D.E. 115, p.2; Hearing Tr., Ex. 1, 36:12-13. Wells Fargo's internal documents show it chose to exit its relationship with the Scheme Operators in early 2021 because of Plaintiff Millstein's lawsuit. D.E. 111, p.1; D.E. 115, p.1; Hearing Tr., Ex. 1, 36:12-13. Also in 2021, a receiver was appointed in the OFR action to unwind the Scheme, and he served his own subpoena on Wells Fargo. D.E. 116, p.1; Hearing Tr., Ex. 1, 35:18-19, 36:13-15.

Wells Fargo Failed to Preserve Key Evidence of Its Role in the Scheme: Despite being served with subpoenas from the OFR and receiver – each targeting the Scheme Operators and their accounts – and despite being on notice that Plaintiff Millstein's lawsuit alleged a Ponzi scheme, Wells Fargo failed to preserve key evidence relating to its trust business, including materials related to its roles as Trustee and Securities Intermediary for Seeman Holtz. D.E. 111, p.1; D.E. 116, p.1; Hearing Tr., Ex. 1, 7:14-19. In late 2021, Wells Fargo sold its trust business to Computershare and transferred key documents and data repositories relating to its roles as Trustee and Securities Intermediary, and failed to retain copies of this evidence. D.E. 111, p.1; D.E. 116, p.1; Hearing Tr., Ex. 1, 7:14-19, 35:16-19. Prior to the transfer, Wells Fargo maintained this evidence in a variety of repositories, including "FileNet," "CCT Gateway," and "CTS Link

Library." Hearing Tr., Ex. 1, 21:15-17, 30:25-31:1, 34:20-22. Of these, Wells Fargo retained only FileNet. Hearing Tr., Ex. 1, 23:5-6, 29:4-7. But FileNet, which is organized by "Deal Key," does not contain complete policy files – omitting essential documents like applications and inception materials, and perhaps more. Hearing Tr., Ex. 1, 21:17-22:10, 23:5-15, 25:23-26:13. The result is that, despite repeated assurances the policy files would be produced, Wells Fargo has yet to produce a single, complete policy file with all of its attendant documents, because it no longer possesses files for any of the more than 114 policies at issue. D.E. 111, p.1; D.E. 116, p.1; Hearing Tr., Ex. 1, 6:25-7:2, 11:5-21, 14:15-23, 15:11-13, 17:16-18, 19:3-12, 34:25-35:13, 36:22-24.

The prejudice to Plaintiffs is severe. Computershare, represented by Wells Fargo's own counsel and the entity to whom Wells Fargo claims it produced the complete policy files – has not produced a single complete digital file for any of the 114 policies. Computershare located incomplete paper files for 14 policies and confirmed that 10 more policies files were "released" – a euphemism for destroyed. Hearing Tr., Ex. 1, 19:3-6; *see also id.* at 20:17-18 (THE COURT: "…We have ten policies that were released, but we are still missing a bunch."). As a result, none of the complete policy files have been produced. Plaintiffs have been deprived of critical documents at the heart of this case.

Plaintiffs Move to Compel Wells Fargo's Document Retention Policies and Litigation Holds: Given Wells Fargo's failure to produce a complete file for any of the more than 114 policies at issue, Plaintiffs noticed a hearing to address Wells Fargo's objections to Request No. 230 from Plaintiffs' First Request for Production. D.E. 107. That request sought documents "sufficient to show Wells Fargo's policy or practice related to the retention, destruction, disposal, and preservation of documents, including electronic data and records." *Id.* Instead of trying to show that it complied with its document retention obligations, Wells Fargo objected, claiming the request sought "impermissible discovery on discovery" and was "overly broad, unduly

burdensome, vague, ambiguous, and disproportionate to the needs of the case." *Id.*

The parties submitted discovery memoranda in advance of the hearing. D.E. 110. Plaintiffs' explained they sought to compel discovery regarding Wells Fargo's document retention policies and preservation efforts in this case – including specifically, when litigation holds were issued – to assess the completeness of Wells Fargo's production and the cause of the missing documents. D.E. 111, p.2. This followed extensive party conferrals regarding Wells Fargo's inability to produce the missing policy files and related documents. Hearing Tr., Ex. 1, 7:3-7, 17:13-16, 18:12-16.[3]

In response, Wells Fargo argued only that Plaintiffs' spoliation concerns were "premature" and "misguided," and that the request amounted to "discovery on discovery." D.E. 115, pp.1-3. It also pointed to the volume of its ongoing production and made unsupported assertions that Plaintiffs' allegations regarding the policy applications and loan disclosures were "at odds with the evidence" and that the trust documents "narrow Wells Fargo's role" and "undermine" Plaintiffs' claims. *Id.* at 2. Wells Fargo never claimed it was unprepared to address what it later characterized as Plaintiffs' attempt to expand "the scope of the hearing beyond" Request 230. It did not request additional pages or time or raise any objection to Plaintiffs' request for the litigation holds based on attorney-client privilege or work-product doctrine.

Judge Goodman Grants Plaintiffs' Motion to Compel the Litigation Holds: At the

[3] At the hearing, both parties referenced voluminous emails memorializing their conferrals regarding discovery issues in this case. Hearing Tr., Ex. 1, 7:3-7, 17:13-16, 18:12-16. And while Judge Goodman did not request the parties enter the emails into the record, Plaintiff does not expect Wells Fargo will dispute that: i) on May 9, Plaintiffs advised Wells Fargo of their concerns that it had failed to properly preserve the documents at issue; ii) on May 15, Wells Fargo took the position that Plaintiffs' "effort to argue spoliation is [purportedly] misplaced"; iii) on May 16, Plaintiffs asked Wells Fargo if it would produce documents responsive to Request 230 in light of the fact that "the current record raises serious questions regarding the spoliation of key materials"; and, iv) on May 20, in connection with discussions regarding Plaintiffs' "spoliation accusations," Wells Fargo advised it would stand by its objections to Request 230.

hearing, the parties and the Court addressed at length Wells Fargo's failure to produce a single complete file for any of the more than114 life insurance policies at issue. Wells Fargo admitted it no longer possesses the complete electronic files for any of these policies or their related documents. The few hard copy files it once maintained were transferred to Computershare in late 2021—***after*** Wells Fargo had been served with subpoenas from both the OFR and the receiver, and ***after*** it knew Plaintiff Millstein's prior class action alleged a Ponzi scheme. Hearing Tr., Ex. 1, 4–31, *passim*.

Judge Goodman recognized that the critical issue was not merely the content of the missing files, but what Wells Fargo had in its possession—because possession bears directly on its knowledge of the Scheme. Hearing Tr., Ex. 1, 15:18–21 (MR. BUCKNER: "[I]t's not just what the document[s] show. It's what they showed to Wells Fargo. So, possession is important here. Right?" THE COURT: "Right."). Judge Goodman further acknowledged that the issue was not the overall volume of Wells Fargo's production, but the absence of documents relating specifically to the life insurance policies: "Wells Fargo hasn't produced any documents relating to the insurance policies. I understand the production has been fulsome…" Hearing Tr., Ex. 1, 24:19–21. Judge Goodman then asked Wells Fargo:

> [L]et's assume for the sake of discussion that as phrased that particular request [230] encompasses litigation holds…it seems to me those…are not subject to the attorney-client privilege, subject to the work-product doctrine, and,…you have not inserted an unduly burdensome argument. Any problem with those statements?

Hearing Tr., Ex. 1, 31:19-32:3. In response, Wells Fargo first indicated its main concern was overbreadth. Hearing Tr., Ex. 1, 32:4-19. The parties then agreed to limit production of the retention policies to those pertaining to Wells Fargo's trust and securities intermediary businesses.

Hearing Tr., Ex. 1, 32:22-33:22.[4] Wells Fargo next addressed the request as it pertained to litigation holds, stating only that it had "never…read this discovery request to go as far as a legal hold." Hearing Tr., Ex. 1, 33:25-34:1. It did not claim it was unprepared to proceed, nor did it raise any objection based on attorney-client privilege or work-product. Hearing Tr., Ex. 1, 33:25-34:1. Plaintiffs explained the litigation holds were directly relevant to whether the OFR's and the receiver's subpoenas, and Plaintiff Millstein's earlier class action, "imposed an obligation on them to maintain copies of everything they offloaded to Computershare." Hearing Tr., Ex. 1, 34:14-36:25. In response, Wells Fargo argued only that the issue of "when a litigation hold should have been in place" was not before the Court, and again did not assert it was unprepared or raise any privilege objection. Hearing Tr., Ex. 1, 37:4-38:8. Judge Goodman then ordered Wells Fargo to produce litigation holds related to its trust and securities intermediary activities dating back to 2009. Hearing Tr., Ex. 1, 38:11-39:5; *see also* D.E. 119. When Wells Fargo asked "is the Court overruling…the work product and attorney-client privilege objections as to the litigation hold?" Hearing Tr., Ex. 1, 39:6-9. Judge Goodman responded "Yes." Hearing Tr., Ex. 1, 39:10. Judge Goodman later amended his order to permit redactions of attorney-client and work-product materials, and limited production to documents showing when litigation holds were imposed and what they covered. D.E. 126. As the Court explained, "based on the allegations, facts and procedural history, it is the dates of the litigation holds and what they cover which is discoverable under [Rule] 26." D.E. 126.

STANDARD OF REVIEW

A magistrate judge's order on a non-dispositive issue may be set aside only if it is "clearly

[4] Plaintiffs acknowledge Wells Fargo agreed to the limitation only insofar as Judge Goodman was overruling its objection based on purported "discovery on discovery." Hearing Tr., Ex. 1, 32:22-33:22. But Wells Fargo is not appealing that portion of the Order.

erroneous or contrary to law." 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(a). This is "a very difficult one to meet," *NAACP v. Fla. Dep't of Corr.*, 122 F. Supp. 2d 1335, 1337 (M.D. Fla. 2000), because it is "extremely deferential." *Sec. & Exch. Comm'n v. Charnas*, 717 F. Supp. 3d 1233, 1238 (S.D. Fla. 2024). A finding is clear error only when the district court "is left with the definite and firm conviction that a mistake has been made." *Id*. It is not enough that the reviewing court might have "decided the issue differently…." *Bluegreen Vacations Unlimited, Inc. v. Timeshare Termination Team, LLC*, 2022 WL 9762385, at *2 (S.D. Fla. Oct. 17, 2022). An "order is contrary to law" only if it fails to apply or misapplies controlling statutes, precedent, or procedural rules. *Charnas*, 717 F. Supp. 3d at 1238. Magistrate judges are "afforded broad discretion as to discovery matters, and reversal of a magistrate's discovery-related order is appropriate only where that discretion is abused." *Bluegreen Vacations Unlimited, Inc.*, 2022 WL 9762385, at *2. A magistrate judge's ruling "must [also] be affirmed if it is correct for any reason that is supported by the record." *McBride v. Carnival Corp.*, 2019 WL 5684262, at *2 n.5 (S.D. Fla. Nov. 1, 2019); *see also Combs v. Town of Davie*, 2007 WL 676102, at *2 (S.D. Fla. Feb. 28, 2007) (review of a magistrate judge's non-dispositive order "closely resembles an appellate function"); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001) (appellate court may affirm on "on any ground that finds support in the record"). Finally, "a District Court should not consider arguments…that were not presented to the Magistrate Judge." *Combs*, 2007 WL 676102, at *2.

ARGUMENT

Judge Goodman's order compelling production of the litigation holds should be affirmed. First, the record shows Wells Fargo failed to preserve key documents from its trust business – documents central to its knowledge of the Ponzi scheme – even though it knew those records were relevant to ongoing regulatory investigations and litigation. That failure directly implicates its preservation obligations and entitles Plaintiffs to the basic facts surrounding the litigation holds

under Rule 26. Even assuming the ordered material implicates work-product or attorney-client protections, the record supports a preliminary showing of spoliation, which is all that is required to overcome those belated objections. Second, Wells Fargo was on notice that Plaintiffs were moving to compel production of the litigation holds based on its failure to retain key evidence. Yet it raised no privilege or work-product objections, did not request additional time to brief the issue, and never claimed it was unprepared. Instead, it addressed the merits in both its written submissions and at the hearing. Third, Wells Fargo never sought *in camera* review of the documents. In any event, whether to conduct an *in camera* review lies squarely within the magistrate judge's discretion.

A. The Scope of the Litigation Holds is Discoverable Because Wells Fargo's Compliance With its Preservation Obligations is at Issue.

"The basic details surrounding the litigation hold are not protected by the attorney-client privilege and the work product doctrine." *Doe LS 340 v. Uber Techs., Inc.*, 710 F. Supp. 3d 794, 802 (N.D. Cal. 2024) (collecting cases). Rather, they are discoverable under Rule 26. *Colonial BancGroup Inc. v. PriceWaterhouseCoopers LLP*, 2016 WL 9687001, at *4 (M.D. Ala. Jan. 22, 2016) (concluding persons notified of litigation holds and dates of notifications are "in no way subject to an assertion of…work product or…attorney-client privilege," and types of documents included are "non-privileged categorical information which may lead to the discovery of admissible evidence"). Indeed, "courts are clear that…a party is entitled to know when a litigation hold was implemented, who received the litigation hold, *what categories of [documents] the recipients were instructed to preserve*…and what specific actions the recipients were instructed to take." *LifeScan, Inc. v. Smith*, 2024 WL 3823488, at *5 (D.N.J. July 11, 2024) (emphasis added); *see also In re eBay Seller Antitrust Litig.*, 2007 WL 2852364, at *2 (N.D. Cal. Oct. 2, 2007) ("To the extent…eBay…seek[s] to foreclose any inquiry into the contents of those notices…such a

position is not tenable…*plaintiffs are entitled to know what kinds and categories of ESI…employees were instructed to preserve*…and what specific actions they were instructed to undertake") (emphasis added). The Rule 26 analysis in this context simply considers whether the holds are relevant to whether a party has met its preservation obligations. *See Doe LS 340*, 710 F. Supp. 3d at 802 ("Plaintiffs…are entitled to information to evaluate whether [defendant] has met its preservation obligations."); *Colonial BancGroup Inc.*, 2016 WL 9687001, at *4 ("in this extremely document intensive case, such a system of double checking production practices…appears reasonable…the litigation hold information…is relevant"). Here, Wells Fargo's conduct puts its compliance with its preservation obligations squarely at issue.

After being served with subpoenas from the OFR and receiver – and after deciding to exit its relationship with the Scheme Operators due to the Ponzi scheme allegations in Plaintiff Millstein's prior class action – Wells Fargo sold its trust business to Computershare. In doing so, it transferred the key documents and data relating to its roles as Trustee and Securities Intermediary, and failed to retain copies of this evidence. D.E. 111, p.1; D.E. 116, p.1; Hearing Tr., Ex. 1, 7:14-19, 35:16-19. Before the transfer, Wells Fargo maintained this evidence across multiple repositories. Hearing Tr., Ex. 1, 21:15-17, 30:25-31:1, 34:20-22. Of those, the only repository Wells Fargo retained does not contain complete policy files. Hearing Tr., Ex. 1, 21:17-22:10, 23:5-15, 25:23-26:13, 29:4-7. As a result, Wells Fargo no longer possesses any copy, whether electronic, digital or hard copy, of the more than 114 policies at issue (nor apparently can Computershare produce a complete file for any of the policies). D.E. 111, p.1; D.E. 116, p.1; Hearing Tr., Ex. 1, 6:25-7:2, 11:5-21, 14:15-23, 15:11-13, 17:16-18, 19:3-12, 34:25-35:13, 36:22-24. And even setting aside Wells Fargo's unsupported suggestion that not all these policies are at issue, it admitted it failed to retain at least 10 of them (although the number is actually much larger). Hearing Tr., Ex. 1, 19:3-6; *see also id.* at 20:17-18. This easily meets the Rule 26 standard

for discovery of the basic facts surrounding the litigation holds. *Doe LS 340*, 710 F. Supp. 3d at 802 (compelling production of information regarding litigation holds because a prior "case or complaint has the potential to put [a party] on notice of its duty to preserve potentially relevant evidence"); *Colonial BancGroup Inc*., 2016 WL 9687001, at *4 (permitting discovery of information regarding litigation holds because it "may assist…in determining if any potentially discoverable [evidence should] remain"); *In re eBay*, 2007 WL 2852364, at *2 ("it is appropriate to permit plaintiffs to discover what those employees are supposed to be doing").[5]

These policy files are central to Plaintiffs' claims. Plaintiffs allege the Scheme Operators could not have acquired STOILIs, the foundation of the Scheme, without Wells Fargo's help, because among other things the unusual ILIT structure concealed the STOLI violations from the insurers. D.E. 3, ¶¶51-59, 60. As Trustee, Wells Fargo received policy documents revealing the Scheme Operators were violating the insurers' STOLI prohibitions and that the STOLIs were purchased for the benefit of the Class. *Id.* ¶¶55-59. Yet despite knowing this and that the Scheme was on the verge of financial collapse, Wells Fargo both helped the Scheme Operators assign the STOLIs to new lenders to secure fresh financing and intervened when insurers initially rejected the assignments in order to push through the financing. *Id.* ¶¶61-62, 65-69. As Securities Intermediary, Wells Fargo further enabled the Scheme by facilitating the assignment of the

[5] Wells Fargo's cases merely confirm that litigation holds are generally protected. Most make no distinction between privileged and work-product content (which Judge Goodman permitted Wells Fargo to redact) and content reflecting only the scope, and those that do support discovery of the latter. *See Gibson v. Ford Motor Co*., 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007) (no distinction or suggestion that defendant's preservation duties were at issue); *Muro v. Target Corp*., 250 F.R.D. 350, 360 (N.D. Ill. 2007) (same); *In re 3M Combat Arms Earplug Products Liab. Litig*., 2020 WL 1321522, at *8 (N.D. Fla. Mar. 20, 2020) (same); *Marquez-Marin v. Lynch*, 2018 WL 1358214, at *12 (D.P.R. Mar. 15, 2018) (same); *cf. Roytlender v. D. Malek Realty, LLC*, 2022 WL 5245584, at *4 (E.D.N.Y. Oct. 6, 2022) (overruling objections to questions regarding whether witness was instructed to preserve documents); *Mcdevitt v. Verizon Services Corp*., 2016 WL 1072903, at *2 (E.D. Pa. Feb. 22, 2016) (compelling production of date party retained counsel and/or received litigation hold notice).

STOLIs to new lenders by, *inter alia*, misrepresenting to those lenders that the STOLIs were unencumbered. And based on its regular receipt of grace notices, Wells Fargo also knew the Scheme Operators were misappropriating the funds. *Id*. ¶¶60-62, 70-73, 75.

The missing policies and related documents are critical for Plaintiffs' prosecution of this case. Wells Fargo objected to Judge Goodman's Report recommending denial of its motion to dismiss, arguing that Plaintiffs' ILIT and Securities Intermediary allegations do not show actual knowledge. D.E. 81, pp. 14-20. It then resisted discovery of its document retention policies and litigation holds by asserting the documents produced are "at odds with the evidence," and that "the trust documents…specifically narrow Wells Fargo's role and…undermine the allegations regarding Wells Fargo's purported knowledge and role." D.E. 115 at 2. Wells Fargo has telegraphed its strategy: argue the produced documents disprove knowledge, while failing to preserve the ones that do. Even in this appeal, Wells Fargo claims "there is no evidence that Wells Fargo had any involvement or knowledge of the note program," that "its role [as Trustee] was administrative…and [it] had no knowledge the policies in the ILITs had been pledged as collateral for the notes." D.E. 132, 4-5. It also asserts its role as Securities Intermediary was "purely custodial, and it was acting strictly in accordance with limited contractual obligations…[, and that t]hese contracts make clear Wells Fargo had no duty to research or determine whether the assets for which it served as securities intermediary had been pledged to support any other obligation." D.E. 132, p.5. Yet the contract between DZ Bank, Centurion Companies, and Wells Fargo actually ***required*** Wells Fargo to maintain and store complete policy files. Wells Fargo's suggestion that Plaintiffs should not get discovery because they have not yet proven their allegations literally puts the cart before the horse and rewards the bank for destroying the proof of its own misconduct. *Gordon v. Nexstar Broad., Inc*., 2018 WL 5920781, at *5 (E.D. Cal. Nov. 13, 2018) (a "challenge to the merits of the…theory of the case is not…a proper basis for resisting discovery"); *Caterpillar,*

Inc. v. Deere & Co., Inc., 1997 WL 399627, *2 (N.D. Ill., July 11, 1997) ("an attack on the merits will not preclude discovery").

Wells Fargo's related (and legally unsupported) suggestion that Judge Goodman's order is flawed because it continues to make rolling productions, D.E. 132, pp. 2, 5-6, should be rejected. Ongoing production is irrelevant. As Judge Goodman recognized, "possession [of the policy files] is important here," and "Wells Fargo hasn't produced any documents relating to the insurance policies." Hearing Tr., Ex. 1, 15:18-21, 24:19-21. Because the missing policy files bear directly on Wells Fargo's knowledge and substantial assistance of the Scheme, the issue is not what the documents reveal about the Scheme, but rather whether Wells Fargo had them and therefore knew what they revealed. *See NITV Fed. Services, LLC v. Dektor Corp*., 2019 WL 7899730, at *8 (S.D. Fla. Sept. 20, 2019) ("While [plaintiff] could conceivably attempt to piece together the larger puzzle of what might have [existed] through other sources, [plaintiff] can never know for sure…"). Wells Fargo has had plenty of time to produce these files. It cannot continue to stall.

B. Plaintiffs' Preliminary Showing of Spoliation Overcomes Any Privilege or Work-Product Objections.

Even if the scope of the litigation holds were protected by the work-product doctrine or attorney-client privilege, a preliminary showing of spoliation overcomes those protections. As courts across the country have recognized, "most applicable authority…provides that litigation hold letters should be produced if there has been a preliminary showing of spoliation." *Major Tours, Inc. v. Colorel*, 2009 WL 2413631, at *2, *5 (D.N.J. Aug. 4, 2009); *see also In re 3M Combat Arms Earplug Products Liab. Litig*., 2020 WL 1321522, at *8 (N.D. Fla. Mar. 20, 2020) (noting the "prevailing view" that litigation holds are discoverable upon "a preliminary showing of spoliation."); *Harris v. City of New York*, 2025 WL 1420424, at *1 (S.D.N.Y. Apr. 22, 2025) ("litigation hold letters may indeed be discoverable where there has been a preliminary showing

of spoliation"); *Whitesell Corp. v. Electrolux Home Products, Inc.*, 2021 WL 9316345, at *1 (S.D. Ga. Sept. 30, 2021) (noting Court ordered production of litigation holds based on a preliminary showing of spoliation). And "[t]he inquiry [regarding whether a party has made such a preliminary showing] is fact-intensive." *Safelite Group, Inc. v. Lockridge*, 2022 WL 17842945, at *4 (S.D. Ohio Dec. 22, 2022); *see also see also Roytlender v. D. Malek Realty, LLC*, 2022 WL 5245584, at *4 (E.D.N.Y. Oct. 6, 2022) ("A 'preliminary showing of spoliation' is a necessarily a fact-based inquiry.") (collecting cases).

As detailed above, the record before Judge Goodman established Wells Fargo failed to preserve critical evidence relating to its roles as Trustee and Securities Intermediary when it sold its trust business to Computershare in late 2021. It did so after being served with subpoenas from both the OFR and receiver, and after deciding to sever ties with the Scheme Operators in light of the Ponzi Scheme allegations in Plaintiff Millstein's previous class action. That is more than sufficient to establish a preliminary showing of spoliation and to overcome any privilege or work-product objections to producing the litigation holds. *See Oil Equip. Co. Inc. v. Modern Welding Co. Inc.*, 661 Fed. Appx. 646, 652 (11th Cir. 2016) ("Spoliation refers to the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.")

That Judge Goodman did not make a formal spoliation finding does not alter the outcome. Contrary to Wells Fargo's repeated suggestion, no "finding that spoliation occurred," D.E. 132, pp. 1, 3, 7, 12, is necessary to overcome its objections. "Ordering disclosure of a litigation hold letter differs from the imposition of a sanction for spoliation." *Tate & Lyle Americas, LLC v. Glatt Air Techniques, Inc.*, 2014 WL 10209161, at *2 (C.D. Ill. Aug. 4, 2014); *see also Harris*, 2025 WL 1420424, at *1 ("To be clear…the Court has not concluded at this stage that Plaintiff has made a showing of spoilation or that sanctions are warranted."); *Major Tours, Inc.*, 2009 WL 2413631,

at *5 n.4 ("The court is not ruling at this time whether spoliation sanctions should be imposed…The only issue…is whether…litigation hold letters should be produced."). The question is simply whether "it is reasonable to infer that [a party] destroyed relevant evidence, inadvertently or otherwise." *Tate & Lyle Americas, LLC*, 2014 WL 10209161, at *2. And that "inquiry is fact-intensive." *Safelite Group*, 2022 WL 17842945, at *4; *see also Roytlender*, 2022 WL 5245584, at *4 ("A 'preliminary showing of spoliation' is a necessarily a fact-based inquiry.") (collecting cases). Here, the record supports a reasonable inference that Wells Fargo failed to preserve key evidence. Plaintiffs have made the necessary preliminary showing to overcome any work-product or privilege objections. Judge Goodman's order should be affirmed. *McBride*, 2019 WL 5684262, at *2 n.5 (magistrate judge's decision must be affirmed if correct for any reason supported by the record).[6]

C. Wells Fargo Knew Request 230 Encompassed Litigation Holds and Chose to Be Heard.

Wells Fargo cites no authority to support its claim that Judge Goodman's order should be

[6] Wells Fargo belatedly asserts it was "contrary to precedent" not to conduct an *in camera* review. D.E. 132, p.9, 12 n.3. But it never requested *in camera* review below and cannot raise its absence as error now. *Combs*, 2007 WL 676102, at *2 (district court should not consider new arguments not presented to magistrate); *see also Batchelor v. Geico Cas. Co*., 2014 WL 3697682, at *6 (M.D. Fla. June 4, 2014) ("It is the movant's burden to justify an *in camera* review."). In any event, "the decision whether to engage in in camera review rests in the sound discretion of the [magistrate judge]." *United States v. Zolin*, 491 U.S. 554, 572 (1989). No such review is required where a party's entitlement to discovery can be resolved by other means.. *See United States v. HCA Holdings Inc*., 2015 WL 11198933, at *5 (S.D. Fla. July 21, 2015) (declining to conduct unnecessary *in camera* review). Wells Fargo's assertion that *in camera* review would have revealed "portions [of the litigation holds] addressing the scope of document retention…contain material prepared by counsel," D.E. 12, p.12 n.3, misses the point: the scope of a hold is discoverable, regardless of who determined it. *LifeScan*, 2024 WL 3823488, at *5 ("courts are clear that…a party is entitled to know when…[and] what categories of [documents] the recipients were instructed to preserve…"); *see also In re Blue Cross Blue Shield Antitrust Litig*., 2015 WL 13540728, at *3 (N.D. Ala. Sept. 2, 2015) ("Even if counsel were involved in the preparation and drafting of the litigation holds, their circulation to corporate employees was nothing more than giving managerial instructions, which are not privileged.").

set aside based on purported lack of notice that litigation holds were at issue – because none exist.[7] At best, its argument sounds in procedural due process. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (purpose of notice is to "permit adequate preparation for, an impending hearing"). But Wells Fargo identifies no liberty or property interest it was allegedly deprived of. *See Schultz v. Alabama*, 42 F.4th 1298, 1332 (11th Cir. 2022). In any event, "the adequacy of the notice and the nature of the hearing required depend on the facts of the case and the practical requirements of the circumstances." *Doe v. Valencia Coll.*, 903 F.3d 1220, 1234 (11th Cir. 2018) (cleaned up). And "[t]o prevail on a procedural due process challenge, the petitioner must show that he was substantially prejudiced by the violation." *Frech v. U.S. Atty. Gen.*, 491 F.3d 1277, 1281 (11th Cir. 2007). A party "has the right to waive a due process hearing," and may also agree "to a particular kind of hearing." *Burnley v. Thompson*, 524 F.2d 1233, 1242 (5th Cir. 1975). Similarly, "[i]t is well established that an issue arguably not raised…may be tried by implied consent when the party…had previously acquiesced by failing to object…" *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1115 (S.D. Fla. 1988).

Even assuming Request 230 did not itself place Wells Fargo on notice that Plaintiffs sought litigation holds (though it did), Plaintiffs' discovery memorandum made it explicit: "discovery regarding…when it put in place litigation holds…will assist Plaintiffs in evaluating the completeness of the production and identifying missing documents." D.E. 111, p.2. Wells Fargo had the opportunity to respond and did so on the merits, dismissing Plaintiffs' spoliation concerns as allegedly "premature" and "misguided." D.E. 115, p. 1. It neither asserted it was unprepared to address the request nor asked for more time for supplemental briefing. When Judge Goodman asked whether Wells Fargo had "any problem" with the conclusion that Request 230 "encompasses

[7] Wells Fargo cites only one case to argue that different standards govern the production of retention policies and litigation holds. D.E. 132, pp. 13-14.

litigation holds," Wells Fargo merely replied it "never read [it] to go as far as a legal hold." Hearing Tr., Ex. 1, 31:19-32:3, 33:25-34:1. It maintained its argument as to the scope of Request 230, but never indicated it was unprepared or needed more time to address the holds. Wells Fargo now asserts it was prejudiced because Plaintiffs allegedly "wait[ed] until the discovery hearing…to request production of a litigation hold," D.E 132, p.11, but that is demonstrably false. D.E. 111, p.2. It also claims prejudice on the basis that it was allegedly "not prepared to argue against (or brief) the compelled production of its litigation holds," D.E. 132, p.11, but fails to explain how that would have changed the result, given that Plaintiffs have established Wells Fargo knowingly failed to retain key documents, which both entitles Plaintiffs to the basic facts surrounding the litigation holds under Rule 26 and constitutes a preliminary showing of spoliation that overcomes Wells Fargo's belated objections based on work product and privilege. Wells Fargo's claims of ambush and surprise should be summarily rejected. *Doe*, 903 F.3d at 1234 (adequacy of notice and nature of the hearing required depend on "the facts of the case and the practical requirements of the circumstances"); *Burnley*, 524 F.2d at 1242 (parties may waive or limit due process hearing); *Frech*, 491 F.3d at 1281 (due process claim requires showing of prejudice); *Thomas v. Comm'r of Soc. Sec.*, 2020 WL 7753659, at *2 (M.D. Fla. Feb. 25, 2020) (rejecting conclusory claims of prejudice where petitioner failed to explain how or why result would have been different), *aff'd*, 841 Fed. Appx. 128 (11th Cir. 2020).

D. Wells Fargo Waived Any Work Product or Privilege Objections

"[W]hen a party fails to timely object to ... production requests ... the objections are deemed waived." *Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681, 685 (S.D. Fla. 2012); *U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp.*, 630 F. Supp. 2d 1332, 1340 (M.D. Fla. 2007) ("failure to make a timely and specific objection…waives any objection based on privilege"). Furthermore, "[g]eneralized objections asserting…attorney-client privilege or work product

doctrine…do not comply with local rules." *Guzman v. Irmadan, Inc*., 249 F.R.D. 399, 401 (S.D. Fla. 2008); *see also* D.E. 38, Magistrate Judge Goodman's Discovery Procedures Order (same).

Here, even assuming Wells Fargo did not read Request 230 to encompass litigation holds, Plaintiffs' discovery memorandum made clear it did, D.E. 111, p.2, and Wells Fargo still failed to raise any work-product or privilege objections. D.E. 115, *passim.* Judge Goodman also specifically asked Wells Fargo if it had "any problem" with the statement that the litigation holds were "not subject to the attorney-client privilege, subject to the work-product doctrine," and still no objection. Hearing Tr., Ex. 1, 31:21-32:3-19. Only after Judge Goodman ruled did Wells Fargo belatedly asked if he was "overruling" those purported objections it had never raised. Hearing Tr., Ex. 1, 39:6-9. Despite this, Judge Goodman modified his order to permit Wells Fargo to redact work product and privileged content. And now Wells Fargo effectively seeks an improper, full-blown do-over before this Court. *See E.E.O.C. v. Jack Marshall Foods*, Inc., 2010 WL 55635, at *3 (S.D. Ala. Jan. 4, 2010) ("new authority previously available cannot properly be submitted on appeal of a Magistrate Judge's ruling"); *Combs*, 2007 WL 676102, at *2 (district court should not consider new arguments on appeal of magistrate judge's order). That attempt should be rejected.

CONCLUSION

Accordingly, the Court should overrule Wells Fargo's objections and affirm the Order.

Dated: July 18, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on July 18, 2025, on all counsel or parties of record on the Service List below.

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EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 24-CV-22142-DPG

FANNY B. MILLSTEIN and MARTIN KLEINBART,

Plaintiffs,

vs.

WELLS FARGO BANK, N.A.,

Defendant.
_____/

Miami, Florida

June 6, 2025

Pages 1 to 48

DISCOVERY HEARING
BEFORE THE HONORABLE JONATHAN GOODMAN
UNITED STATES MAGISTRATE JUDGE
(TRANSCRIPT OF DIGITAL AUDIO RECORDING)

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(PROCEEDINGS TRANSCRIBED FROM DIGITAL AUDIO RECORDING)

THE COURT: Good afternoon, folks. It's Jonathan Goodman. We're here for a 3:30 discovery hearing.

Trina, call the case, please.

COURTROOM DEPUTY: The United State District Court is now in session. The Honorable Chief Magistrate Judge Jonathan Goodman presiding.

Calling case Millstein versus Wells Fargo Bank, NA, case number 24-22142-CV-Gayles.

Counsel, please state your appearance for the record, starting with the plaintiff.

MR. BUCKNER: Good afternoon, Judge, David Buckner, Josh Katz, Scott Silver and Peter Spett for the plaintiffs.

THE COURT: All right.

MR. SHAW: Good afternoon, Your Honor. Jarrod Shaw and Emily Rottmann for the defendant.

THE COURT: Good afternoon to you-all.

Just to refresh everyone's recollection about Zoom hearings, nobody is allowed to record or rebroadcast the hearing. If you need a transcript, please put out a request to the clerk's office.

Number two, please state your name before speaking. That way if anyone orders the transcript, the court reporter will know who is speaking.

Number three, please hesitate for about half a second

before speaking to minimize the chance that you inadvertently interrupt the person speaking before you.

Finally, since we have four, count them, four lawyers all on behalf of the plaintiff, you will understand my need to remind you about the one person per side rule.

So, whoever is going to be the oral advocate for the plaintiff on a particular point, that's the person who will be speaking.

Now, if we later talk about a completely different issue or sub issue and a different lawyer wants to be the mouthpiece, that's fine, but on an issue-by-issue basis, it's one lawyer per side.

So, for all practical purposes, what we have here is a de facto motion to compel filed by the plaintiff, requiring the defendant to produce its document retention policies. So, I note we have had some memoranda filed on the issue, three, to be exact, but I'm happy to hear from you lawyers and let's start off with the plaintiff first.

MR. BUCKNER: Thank you, Judge. I'll be brief because I think this is -- we briefed the issue, and I think this is pretty straightforward.

There is -- interestingly, you know, we have had a number of issues on this case. By the way, this is David Buckner, just for the record, I don't want to violate the rule right at the outset.

We've had a number of issues in this case where the case law is somewhat all over the place. I was surprised, frankly, in our back and forth briefing between us and Ms. Rottmann and Mr. Shaw to see how much case law there is sort of spanning this issue from you can't get discovery on discovery to you can or under what circumstances you can get it.

I think it's an interesting sort of legal point but for our practical purposes here, I don't think there is a whole lot of dispute, at least in my mind, as to what the outcome here should be and that is that we should get this discovery that we sought in our request 230.

I think the better-reasoned case law starts with Takata, written by Mr. Stumphauzer, who I know the Court knows. He did, I thought, a pretty thorough survey of the case law in this area, but I thought the most compelling point he made for the discoverability of this kind of information was harkening back to Rule 26 itself, and specifically his note that if you look at the 2015 commentary, it talks about the prior version of the rule that it was replacing and notes that, "permissible discovery," this is quoting from the rule, "includes the existence, description, nature, custody, condition and location of any documents or other tangible things."

And I went and looked at the advisory committee note, and it goes on to say, that the reason that language was taken

out was not because it was no longer going to be discoverable. In fact, what it says is it was really just taken out to make the rule more streamlined, but it says, and I'm quoting again the discovery commentary, "Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples."

And I want to say this, as I said last time at our hearing, because I think it's important, we have had a -- an excellent relationship with Mr. Shaw, Ms. Rottmann and the other lawyers working with Wells Fargo. And by that I mean not just that we are friendly with each other, which of course is always nice, but I think we've had a lot of very candid discussions. And they've been doing excellent work and I think that we have just agreed to disagree on certain issues.

So, I don't want anything I say to be seen as casting aspersions at them because I have nothing bad to say about them. What I will say though, however, and the reason why I think that there is no legal dispute here from a legal perspective is, if you follow Takata, we should get this discovery, because it's discoverable.

If you don't follow Takata, and you follow the case law that Wells Fargo's lawyers cited, which requires some evidence of missing documents, we have that too.

What we found -- and, again, this may be more for another day, I don't want to get too deeply into it now, but

Wells Fargo was either trustee or securities intermediary, or both, for 114 policies related to Seemen Holtz.

Counsel has informed us, and we have -- and I can share with the Court if you want, I can put it in the chat. We have documented a back and forth amongst us, all of our meet and confer sessions, and it is voluminous because we had a lot of them and we've had a lot of discussions. But what we found is only in the last month have we learned that in 2021 Wells Fargo sold its trust business, which was the business that dealt with Seaman Holtz, to a company called Computershare, and we talked about this very briefly in the papers.

Counsel for Wells Fargo happens to also represent Computershare in this matter, and what we learned in the last month is that those documents that were originally in Wells Fargo's possession related to all these policies, some number of them, we don't know what or specifically, you know, which documents, but whatever Wells Fargo apparently had, at some point in 2021 or maybe a little thereafter, was all transferred to Computershare.

Now, we can dispute, and there may be, and there may not be, there may not be an argument about spoliation later. There may be. I don't want to say that there will be. It's going to depend on what the facts are but there may or may not.

I know we believe there was an obligation to maintain those documents. Mr. Shaw and Ms. Rottmann may believe

otherwise.

That's, of course, their prerogative, but before we can even get into the question of whether there was an obligation to maintain these documents, we need to know what Wells Fargo had and what it no longer has, and the starting point for that is our request 230, which is the one at issue before the Court.

Ultimately we are going to need a 30(b)(6) deposition on this, and we can talk about that at a hearing or at a subsequent hearing if the Court wants to and counsel wants to as well, but the starting point is that. So, whether you follow their body of case law or our case law, it's discoverable. We made the requisite showing.

I can put evidence on the record, if Your Honor wants me to do that, but there are clearly documents that Wells Fargo no longer has that are critical to this case, and we need to get to the bottom of when they had them and when they lost possession of them.

THE COURT: Mr. Buckner, how would having the document retention policies tell you which documents Wells Fargo had, when they had them, whether they transferred them to Computershare, and if so, which documents were transferred? The policies themselves wouldn't give you any indication of those issues. Right?

MR. BUCKNER: Well, first of all, I think -- I disagree, but second of all --

THE COURT: Well, tell me how. Tell me how and why you disagree with that.

MR. BUCKNER: I will answer your question, but I think our request is broader than that. But I disagree because if Wells Fargo had an obligation to maintain certain documents, then that gives us an idea of what documents it might have had, it should have had, presumably, at various points in time. Right now -- and, again, this is not meant to cast aspersions at Mr. Shaw or Ms. Robin, but they haven't really been able to answer for us what Wells Fargo -- other than in very -- in small part, but of those 114 policies, the vast majority of them, they've not been able to answer for us where they are, what happened to them, and when.

If Wells Fargo had a policy -- and we know from their documents what documents they were supposed to be maintaining. We have, for example, Wells Fargo's agreement with DZ Bank, one of the buyers of these policies, which has a list of the documents Wells Fargo was supposed to maintain in these files.

If Wells Fargo hypothetically had a document retention policy that said we will keep all custodian documents or trustee documents or securities intermediary documents for a period of five years, again, hypothetically, after our relationship with this particular entity ends, then we know what should be there, because ultimately that's -- that may be where we end up. If they can't find these documents, if

Computershare no longer has them or never did, we're going to be left coming to this court to say this is what should be there, this is what their documents say were supposed to be there and be maintained, and yet, they are not.

Again, that -- that's probably jumping the gun to the spoliation argument to some degree, but we only get to spoliation if we find out what exactly was lost. But to take the next step, to answer your question, our request is not limited just to their document retention policies, although it is, obviously, encompasses those. It also encompasses the steps they took, to the extent it's documented, including litigation holds, for example, to preserve documents specific to this matter because, again -- and, again, I'm dealing in hypotheticals because I don't know, and I want to be clear with the Court, there's a lot I don't know because counsel hasn't told me and I think it's because they don't know.

But, again, hypothetically, if Wells Fargo transferred, you know, to Computershare, you know, 16 policies, plus all the of the attendant documents that go with them, you know, the applications, the grace notices, the -- you know, you name it. There's a bunch of policy documents and things related to them that we believe Wells Fargo had in their possession. If we find that they had a litigation hold in place and they transferred that to Computershare and then Computershare no longer maintained it, at least we know what happened. Wells

Fargo can make whatever arguments it wants to make about whether it acted appropriately, but at least we know what happened, versus they didn't maintain anything, Wells Fargo, and it never got to Computershare.

But what I can tell you is, these 114 policies and the documents related to them are absolutely central to this case and we know that, at most, as of right now, Wells Fargo's counsel has told us that of that number, they're going to -- they think they have documents, hard copy documents as to 13 of them. Ten they already know they don't have, and one of those ten policies was -- I don't want to say destroyed because I don't know what the right euphemism is, but dispensed with by Wells Fargo in 2023, well into the period where this litigation, you know, the prior class action and the receivership was already underway.

So, there is something that Wells Fargo did here. It only has -- we haven't seen them yet, but it only has, perhaps, 13 files, maybe, maybe just the hard copy files of 114 policies. We need to get to the bottom of what happened and then we can decide whether -- you know, what other motions may be appropriate.

THE COURT: So, I'm looking at request number 230.

MR. BUCKNER: Yes, sir.

THE COURT: I don't see a litigation hold specifically mentioned here.

MR. BUCKNER: Because it says, "documents sufficient to show Wells Fargo's policy or practice related to the retention, destruction, disposal, and preservation of documents, including electronic data and records."

Again, if Your Honor thinks that doesn't include litigation holds, I appreciate that may be your thought, but the way it was written and the way we wrote it and the intent was to cover all of their document retention policies relevant to this case. Obviously, I don't want their document retention policies related to trading in pork bellies in Taiwan, but all the document retention policies relevant to this case. And, again, sufficient to show, not every single copy.

And let me make a last point. If the argument -- well, the argument is not burden. They have not made a burden argument, so what is the prudential argument for not giving us these documents, right?

If it's not burden, because there just can't be that many of them, what's the problem?

What is the issue that we're trying?

You know, discovery is supposed to be broad and open, and as Ronald Regan said, "trust but verify." If they're producing everything to us, if we're getting all the documents, they shouldn't have any problems with us having their document retention policies. If they're not, then their document retention policies become pivotal in whatever comes next.

THE COURT: Now, I imagine that you have served the subpoena on Computershare, yes.

MR. BUCKNER: In September of last year, Your Honor.

THE COURT: And?

MR. BUCKNER: They have produced 100 and, roughly, 40 documents from Computershare, give or take. I think that's about the number.

THE COURT: When you say, "they," who are you referring to by "they?"

MR. BUCKNER: Counsel for Wells Fargo. They also represent Computershare.

THE COURT: Okay. So, you serve a subpoena on Computershare, and regardless of which law firm is representing Computershare, Computershare's response to that subpoena was to produce -- what number did you say?

MR. BUCKNER: About -- and correct me -- it's about 143 documents, I believe is the total number.

THE COURT: Do any of those 143 documents include the 114 policies relating to Seeman Holtz?

MR. BUCKNER: They do not.

And, again, to give the Court a little more background because since we're getting into it, let me give you a little more background. And I know Mr. Shaw or Ms. Rottmann will correct me if I'm wrong about any of this, but I think I'm right.

Some months ago -- we've been asking, on the plaintiffs' side, for these policies and the related documents from the beginning, for obvious reasons. I mean, the Court heard the motions to dismiss. You know what documents are going to matter in this case in terms of establishing Wells Fargo's knowledge. Right?

So, these are critical documents to us. I've had this discussion with Ms. Rottmann and Mr. Shaw. They know it, we know it. We've talked about it. It's not like -- there is no mystery.

Over time we've heard from them, as their knowledge of what their clients have has developed, that the documents, the policy documents, the related -- the policies and the related documents to them, they were coming.

Most recent, what we were told was, oh, they're going to be in the FileNet documents, which apparently are some deal related documents that are maintained electronically by Wells Fargo. We were told, they're going to be in there, you're going to get them. We waited for them. We got the FileNet documents. These are Wells Fargo's documents, not Computershare, no policies, no related documents, just some correspondence among counsel related to a deal to purchase some of these policies at some point in time.

So, I appreciate that counsel for the defendant and for Computershare have been playing catchup here trying to figure

out where all of this stuff is, but we still have no production of policies and the related documents from them, and we're ten months into discovery.

You know, the clock is kind of running out here. We can't take any depositions yet because we don't even have the key documents in the case. So, we need to find -- that's why -- I don't do this lightly -- I don't -- when I work with opposing counsel, especially professional counsel like these two fine lawyers who are, you know, not only good lawyers but are dealing with us honestly, I don't try and get behind their production, unless there is a good reason. But there is a good reason here, and the good reason is 114 policies that are related documents are nowhere to be found.

So, we need to start -- we can't just sit back and wait to see if somebody can recreate what happened in the past. We need to find out what happened, and we need to decide, you know, what steps are, you know, appropriate after that. Because, again, it's not just what the documentation show. It's what they showed to Wells Fargo.

So, possession is important here. Right?

THE COURT: Right.

MR. BUCKNER: Did Wells Fargo have these documents?

Possession is critical. It's not just what they say somebody would have learned from the documents, and I would expect Mr. Shaw and Ms. Rottmann when we're at trial to say,

they haven't proven that we knew. That's going to be part of the defense. They haven't proven that we knew what was going on here because these documents weren't in our possession.

So, you can't use it both as a sword and shield. If they dispensed with these documents, which seems to have been the case, you know, this is going to be, potentially, the key issue in the case, unfortunately.

But --

THE COURT: So, you served this -- maybe this is a question better framed to Wells Fargo, but I will hear from them in just a minute. But last September you served a subpoena on Computershare --

MR. BUCKNER: Yes, sir.

THE COURT: -- seeking, among other things, 114 policies.

MR. BUCKNER: I don't know that we specifically said 114, but the policies.

THE COURT: Right. So, you're asking for the policies. They were encompassed by the schedule attached to the subpoena.

MR. BUCKNER: Right.

THE COURT: You haven't received them.

MR. BUCKNER: Correct.

THE COURT: Surely, you mentioned to Mr. Shaw and Ms. Rottmann, where are they, where are the policies, and they said first, well, they are going to be in the FileNet

documents.

MR. BUCKNER: That wasn't first. That actually was down the road.

THE COURT: All right. But at some point they said the FileNet documents but that turned out to be an incorrect prediction.

MR. BUCKNER: Correct.

THE COURT: What's the latest explanation about where the documents are?

MR. BUCKNER: Well, and, again, this probably is a better question for Mr. Shaw and Ms. Rottmann, but I will say that from my understanding, this is my understanding of what they said. And, again, if the Court wants me to put into the record, the back and forth, the e-mails we have back and forth documenting our meet and confer, I'm happy to do that. It's voluminous because we conferred a lot, but my understanding is that the latest is for 13 policies there may be paper files at Computershare that have, perhaps, some, perhaps all of the documents related to those policies. We haven't seen them yet, but we understand they are gathering those.

For ten policies they -- with regard to those ten, I want -- they are -- they were -- this is using the term that, again, maybe a euphemism, I'll let Mr. Shaw explain it, but for ten of those policies of the 114, they were released in dates in the past ranging from 2012 through 2023. Released I guess

means they don't have them anymore.

Then for 91 policies, I don't know what the answer is because I think, with all due respect to Mr. Shaw and Ms. Rottmann, I don't think they know. But maybe they do and I will let them answer.

THE COURT: Let's find out. So, Mr. Shaw, or Ms. Rottmann, whoever is going to be doing the advocacy this afternoon, I'm happy to hear from you.

MR. SHAW: Thank you, Judge Goodman, and we appreciate the opportunity to be before you.

If I may, I will start at the end because counsel is right. We have spent a lot of time meeting and conferring. I think we printed out the e-mails that Mr. Buckner was speaking about. I think they go about 60 pages of explanations back and forth as to what we have, what we are looking for and where we are.

So, let me start with the policies. Computershare has, quite literally, like a vault where they can --

(Cross-talk.)

MR. SHAW: You can think of it like an iron mountain. It is a literal paper repository.

There are times, not for every policy, but for some policies, where Wells Fargo and the Computershare was requested to hold the hard copy documents. Whatever was provided to Computershare or Wells Fargo is what went into that repository.

So, if somebody sent a policy for them to hold as a custodian, they would put it in the repository.

We have explained to counsel that in total there were 23 policies that met that criteria, ten of which were released. We provided them with the insured's names and we provided them with the date that they were released.

THE COURT: What does that term mean, "they were released?" What does that term mean?

MR. SHAW: It means that -- so, it could mean any number of things, but it effectively means that for a variety of reasons Computershare took the hard copy and sent it out to another party. So, there could have been a new custodian.

Bank of Utah, for example, could have taken that role, so they sent the hard copy on to them.

THE COURT: And did not keep a version for itself?

MR. SHAW: Not at that time that we have been able to locate. That does not mean that we don't have a version of it in another system, which I will get to in a minute. And we provided counsel not only with the policies that were released but the dates on which they were released.

For the other 13, they're in the process of being scanned by a vendor and being produced.

THE COURT: Getting scanned and produced.

How voluminous are these policies?

MR. SHAW: It's about a box. It will be about a box.

THE COURT: One banker's box of documents?

MR. SHAW: Yes.

THE COURT: It shouldn't take that long to scan that in and produce them. How long has this process been underway of scanning?

MR. SHAW: The longer process was getting them out of the storage facility, but they're at the vendor right now. I think, if I may ask Emily, because she has been sort of hand in hand on this, when do we expect the production to finally be made?

MS. ROTTMANN: I'm hoping we can make it next week.

As Mr. Shaw indicated, they're with the vendor now and, as he indicated, the longer process was locating the vault and where the paper documents had moved in between and confirming which ones have been released, as Mr. Shaw indicated.

THE COURT: All right. So, we have 13 being scanned. We have ten policies that were released, but we are still missing a bunch.

MR. SHAW: Well, I wouldn't say missing a bunch. Those were the ones that, as far as we have been able to locate and identify through our conversations, were the ones that they received over the duration, from '09 to 2021, 2022.

THE COURT: I'm sorry. I'm sorry, maybe I'm confused, entirely possible. I thought we were talking about 114 policies which were transferred by Wells Fargo to

Computershare. Is that not factually accurate?

MR. SHAW: I would say, Your Honor, that a lot of what Mr. Buckner said, I don't know what bears it out. It may be confusion, but it is inaccurate that Wells Fargo transferred all of its documents to Computershare. For example --

THE COURT: Well, how many --

MR. SHAW: Still, for example --

THE COURT: Only one of us can talk at a time, and that person is going to be me right now.

So, how many of the 114 policies were transferred by Wells Fargo to Computershare?

MR. SHAW: If I may, Your Honor, I think I need to back up and sort of explain here because the way that question is asked, that's not what happened.

So, Wells Fargo, up until it sold its business to Computershare, kept documents in different systems, the biggest of which was called FileNet. FileNet was a repository for documents, and it was organized by something called Deal Key. So, what's important to know about these life insurance policies is a life insurance policy could have been created on, you know, person X's life.

Seeman Holtz may have had absolutely no involvement, the defendant -- the fraudsters here with that policy. That policy could have been accepted and in existence for three, four, five years. That could be in a totally different deal or

might be wholly unrelated to Wells Fargo.

Then, Seeman Holtz may have acquired that policy because these policies, as Your Honor knows, are sold as life settlement on the secondary market. At that time it would have come into a Deal Key corresponding with Seeman Holtz.

Whatever documents, whatever they might be, could have been an assignment document, a collateral assignment document, whatever was given to Wells Fargo at that time would end up in a Deal Key documents in FileNet. It may have been a policy, but it also may not have been the policy itself.

So, when counsel is saying Wells Fargo should have 114 policies, that's actually inconsistent with the way in which these work, and it's something counsel has acknowledged. They say, "We agree that plaintiffs are not seeking information about life settlement policies when those policies were not held for the benefit of Seeman Holtz. For instance, if a policy was held in a Deal Key unrelated to Seeman Holtz in 2010, but later appeared in Seeman Holtz related Deal Key in 2014, we would only want the 2014 material, and that is what we are producing.

So, if it went into a Seeman Holtz Deal Key in 2014, we have produced that. There are three different specific DL Keys which relate to Seeman Holtz, which we have produced. We did a review of the documents, and within the production from Wells Fargo, there is over 7,000 documents that touch on every one of

the 114 policies that they identify. So, it is inaccurate to say that Wells Fargo hasn't produced documents related to these policies.

Wells Fargo has worked incredibly diligent to produce the documents. It still has the documents in a system called FileNet, and it is producing those documents. Now, we understand that they may not be in the order or organization that plaintiffs want to see them. We are producing them in the way which they were kept, as we are required to do. That's just the way we have them.

So, when he says that it was transferred to Computershare, our response to that is, but Wells Fargo maintained Biomed, which keeps the Deal Key documents and the relevant documents here that we have been producing, across the entirety of their production. So, that's our production.

As Your Honor knows, there has been a massive production from the receiver. There has been third-party productions. There is over 70,000 documents so far that hit on these policies. So, to say that they don't have documents or information related to these policies we think is inaccurate. There is lots of information that's been produced.

Moreover, we have explained to them that Wells Fargo is making additional production. So, there is specific e-mail addresses for which policies or information, whatever Seeman Holtz is sending us -- I'm using Seeman Holtz in its broadest

sense, Centurion or otherwise -- could reside within that e-mail inbox.

Now, it took the parties a long time to negotiate search terms. There are over 300 search terms in this case. Probably the most search terms that, frankly, I have ever dealt with in a piece of litigation. It took a long time, but because we were able to work amicably, we came to an agreement.

There are 34 custodians for whom we have produced documents. We have produced several of those and continue to, and we continue to review all and talk with Wells and produce from the different systems that would have information related to these policies.

So, to say that we haven't produced documents or we aren't locating documents related to these 114 policies, that is not consistent with the documents that have been produced in this case thus far, as well as information that we have provided to them.

THE COURT: I haven't interpreted Mr. Buckner's comments or the plaintiff's comments to mean that Wells Fargo hasn't produced any documents relating to the insurance policies. I understand that the production has been fulsome and there has been a significant amount of cooperation.

I knew of this based on what I have been told because we are talking about the policies themselves. Right?

MR. BUCKNER: Yes, policies and all the documents that

would be related to them, and we know from Wells Fargo's documents -- remember, Wells Fargo wasn't just an -- you know, they were the securities intermediary and/or trustee.

THE COURT: First of all, Mr. Buckner, my question was actually designed for an answer from Mr. Shaw.

MR. BUCKNER: Oh, I'm sorry, I thought.

THE COURT: Thank you for jumping in.

MR. BUCKNER: I'm sorry.

THE COURT: Number two is, as long as you are now speaking, just try to answer this very specific question.

MR. BUCKNER: Yes, sir.

THE COURT: It's a magic kind of a question --

MR. BUCKNER: Okay.

THE COURT: -- that should be able to be answered yes or no, and that question is as follows:

Is -- let me start again. Are the plaintiffs taking the position that Wells Fargo has not produced any documents relating to the insurance policies?

MR. BUCKNER: No, sir.

THE COURT: All right. Please continue, Mr. Shaw.

MR. SHAW: Okay. Thank you, Your Honor.

So, what I think -- to get to the point that you were just making about the policies, because a policy could have been incepted or purchased or whatever term you want to use, outside of the relationship with Seeman Holtz, it will sit in a

different Deal Key. So, we have explained this to plaintiff.

So, there is not going to be 114 policies that were incepted from Seeman Holtz. It's going to be a much smaller subset. To the extent that they were incepted by Seeman Holtz and we would have had it, our understanding would be that they would have been within those Deal Key documents.

If they were not incepted and we have the policy documents, it would be in a different Deal Key not involving Seeman Holtz. We are actually in the process of pulling two Deal Key, one that would be earlier and one that would be later. So, one would be policies that were incepted before Seeman Holtz had actually become Seeman Holtz, and one that had policies that left Seeman Holtz.

Just to show them (deleted testimony) additional examples of what this looks like, the issues that we have had and we continue to negotiate and confer with plaintiff on this is, the volume of data associated with those DL Keys exceeds well over 60, 70 gigs, and the costs associated with simply processing that data is significant. And the problem, as we see it, is they include a lot of policies that are well above and beyond the 114 we are talking about here. They can involve policies for insureds that actually have no bearing.

So, that is an issue that we're trying to navigate. We are trying to prove out that with the additional DL Keys that we are getting.

THE COURT: Do you anticipate that if permitted to proceed with the ongoing rolling production that Wells Fargo will, in fact, at some point, be able to produce additional policies above and beyond the 23 that you have already mentioned to me?

MR. SHAW: I want to make sure we are not mixing up the hard copies versus the electronic documents that we have.

THE COURT: You know, for some reason your audio is problematic. Maybe like every fourth or fifth word is cutting out.

MS. ROTTMANN: Your Honor, maybe I can jump in for a second, if that would be acceptable, because I'm hoping mine will come through a little clearer.

THE COURT: Sure.

MS. ROTTMANN: Your Honor, what I think Mr. Shaw was trying to indicate is that the 23 we have been talking about when we have been talking about 23 specifically, those are just the hard copy files where Wells Fargo was asked to serve as custodian for the documents.

The example I've been using when I have been talking about it is if an attorney writes up a will for you, you ask him to hold the hard copy document, that lives in his vault room for sometimes decades.

I know we have some of these in our office where someone still knows where they are. I'm not that person,

blessedly.

However, Wells Fargo wasn't asked to serve as custodian for some of those, you know. For example, some people sign a will and take it home with them and say they want to keep it or give it to their kid to keep track of or what have you.

In contrast, what I think what Mr. Shaw was talking about is the FileNet documents that we've got. Those are electronic documents. They are copies of those. They do include, in certain instances, copies of policies outside of those 23. And what Mr. Shaw was indicating is that because a policy can run through, I've seen sometimes five, six, different deals, a copy of the policy may not get saved in every single deal, but, you know, we have identified everybody, that's 35 other DL Keys that the policy is identified traveled through. Some have 30 gigs of data in them, much of which is going to be totally unrelated to these policies.

So, we are dealing with plaintiffs on that exactly as you would expect.

We have proposed and are collecting and are in the process of processing a sampling of a couple of additional DL Keys. Some were five or six policies that related to Seeman Holtz travelled before the Seeman Holtz issues, and another one where five or six policies identified related to Seeman Holtz traveled after the Seeman Holtz issues.

So, we can see if, in fact, policy copies are in there

and that this is a worthwhile endeavor to keep on discussing collecting these Deal Key documents given their size and scope.

But that's an ongoing process we have been working through, and, you know, as the Court would expect, Wells Fargo has a copy of the FileNet system as it existed at the time Wells Fargo shuttered that part of its business. It also transferred a copy to Computershare. We have not collected from both because that would be duplicative, but those are -- and as we have indicated with counsel, we are not going to go through that exercise necessarily.

But we do have policy copies of some of the policies located and found electronically and we would expect additional copies to be with those DL Keys as we have identified and are working through.

THE COURT: So when do you anticipate you will be able to complete this portion of the ongoing rolling production where you can then say to the plaintiffs, listen, we've produced X additional policies to you from whatever sources and we just don't think there is anything else there for us to produce and, therefore, our policy production is now at an end?

When is that -- when is that going to happen?

MS. ROTTMANN: Understood, Your Honor, as I said, we are pulling two additional DL Keys; one before Seeman Holtz, one after. I assume we will be able to process those within the next week -- couple of weeks. I'm always optimistic on how

fast our discovery vendor can process things, but I'm very hopeful. And then I think we can have an intelligent discussion with opposing counsel about what, if any, additional DL Keys should be pulled.

THE COURT: What's the status of the subpoena response from Computershare?

MS. ROTTMANN: Absolutely, Your Honor.

So, we have produced some documents from Computershare. Because we represent both entities, we have been working with plaintiffs' counsel. As I think Mr. Shaw mentioned, I've got 61 pages of meet and confer in a single e-mail string just since March. So, we have been pretty open with them throughout this process.

We have not been duplicating -- providing a duplicate production from both Computershare and Wells Fargo where both maintain the same data. So, the FileNet documents would also exist at Computershare. We have not double-collected those documents.

We are actively working with Computershare on what additional documents can be gathered. One of those systems we told plaintiffs' counsel about, those documents will come Monday, if they have not already gone, is from Pegasus. That's the billing system used.

We have also gathered, and I believe can get out next week additional documents from a system we have been talking to

them about called CTS Gateway, now renamed CCT Gateway on the Computershare side.

Computershare has those documents. Wells Fargo has also -- maintains (deleted those) of those documents an archival sequel database. It's just harder to navigate through that because it's archived in only the background sequel tables. So, we are getting those from Computershare because they will be a more functional version of those.

But those are discussions we've been having with counsel, as we try to navigate who has the best copy of anything without engaging in a double burden on this issue.

Then, obviously, Your Honor, this is all complicated because Wells Fargo did sell the business four years ago and identifying the folks at Wells Fargo who know where that archive lives has been a, perhaps unsurprisingly, a very difficult task given the number of system Wells Fargo has maintained over the course of, you know, its decades of business.

THE COURT: The actual documents at issue here today for this discovery hearing is basically the document retention policies, and let's assume for the sake of discussion that as phrased that particular request encompasses litigation holds.

So, unless you can convince me to the contrary, it seems to me those document retention policies, number one, are not subject to the attorney-client privilege, subject to the

work-product doctrine, and, number three, you have not inserted an unduly burdensome argument.

Any problem with those three statements?

MS. ROTTMANN: Your Honor, as to the retention policy specifically and setting aside whether we think it goes as far as a legal hold, because I do want to address that separately, but as to the retention policies, our concern is primarily overbreadth of these and whether they're appropriate on discovery or discovery as written. And I think counsel effectively limited it on the record today, and maybe that's a discussion we can have, but as limited. It asked for documents as far back to 2009 that would show retention of any documents by Wells -- retention policies for all Wells Fargo documents.

We have produced out of more than 20 Wells Fargo systems in this case alone, and I think if we were to limit it to perhaps the documents specifically related to the trust and securities intermediary business, the overbreadth argument might go away, but it's primarily an overbreadth argument here, Your Honor.

THE COURT: That you want to limit it to which categories, trust and security intermediary?

MS. ROTTMANN: To the extent the Court is not willing to agree that it's not discoverable because it's discovery on discovery, I think that would be a more appropriate limitation.

THE COURT: And dating back to when?

MS. ROTTMANN: They've acknowledged in the most recent e-mail correspondence that 2014, I believe, is the start of the Centurion relationship. So, I think that would be most appropriate, but I expect given everyone a meeting -- given everyone a meeting, I expect they would disagree with me on that point.

THE COURT: Mr. Buckner.

MR. BUCKNER: I disagree with her on that point. It goes back to 2009. We have never agreed that this started in 2014, but I will agree with her to the limitation that she wants to impose that -- with regard to the retention policies relating to that specific line of business, that's fine.

As I said, I think at the outset, we don't need to see every document retention policy in Wells Fargo, just the one that's related to this business.

THE COURT: The trust business and the security intermediary.

MR. BUCKNER: Correct. We can live with that.

MS. ROTTMANN: And, Your Honor, we'd argue that the case law suggests we don't need to produce retention policies at all, including significant case law that -- if the Court is inclined to grant it, that would be my proposed limitation.

THE COURT: Anything further from either side?

MS. ROTTMANN: Your Honor, the only thing I would say is that we have never, as I think the Court indicated early on,

read this discovery request to go as far as a legal hold. That's how we responded to it accordingly, and we advised counsel of that when we received some information about them about the briefing and they served interrogatories that night specifically requesting information on the legal hold.

So, I think they may have shared a similar concern once we raised the issue.

THE COURT: Now, when you are using the term legal hold, is that substantively different than what many people call a litigation hold?

MS. ROTTMANN: They mean the same thing. I think we're saying the same thing.

THE COURT: All right.

MR. BUCKNER: Your Honor, we do, obviously, want those, because, again, specific to this -- and I don't want to reargue everything that's just been argued. I fundamentally disagree with Ms. Rottmann and Mr. Shaw about the scope of this.

They talked a lot about Deal Key. I don't want to rehash it because I think this is going to be a much bigger hearing at a later date but they -- they, meaning Wells Fargo, had a number of systems, CTS Link Library, CCT. You've heard some of these names today. They only want to talk about Deal Key because that's the one they still have. They offloaded the rest of them to Computershare.

So, they keep telling us the policies and all the

related documents with the policies are coming. They never arrive, and I want to be clear -- there is so much I can clear up, but I don't want to clear up all of it because I think Your Honor is prepared to rule.

Just to be clear, though, of the 23 policies that they will acknowledge having perhaps the policies and related documents, and these were kept in -- and we have evidence to show these were kept in files, the policies and all the documents related to them kept electronically in files, and they signed agreements requiring them to do this. That's Wells Fargo.

Ten are already gone. They've acknowledged that. They only have, perhaps 13, and the other 90 are lost.

We would like the retention policies, but we would also like the litigation holds they placed in this case because, again, that sale of that business was in November of 2021. We filed the lawsuit, the original class action lawsuit in this case earlier in 2021, and the receiver was appointed earlier in '21 and sent a subpoena to Wells Fargo earlier in 2021.

We can argue later about whether that imposed an obligation on them to maintain copies of everything they offloaded to Computershare, but we will get to that at the appropriate time.

We need to know what they held and what they had.

THE COURT: That lawsuit, however, was not against

Wells Fargo. Correct?

MR. BUCKNER: No, it was not. And, you know, this is -- again, I don't want to get into a much bigger argument because I've obviously read Your Honor's juris prudence on this. There are some things that, obviously, I would take up with you about what, when the obligation arises to maintain documents. We're not there. It's not briefed, and I know Mr. Shaw and Ms. Rottmann have a very different view on that than we do.

What we know is in 2016 there was a subpoena to Wells Fargo from the State of Florida investigating this scheme, and what we know is that in early 2021 we filed our first class action lawsuit that alleged this scheme, and Wells Fargo received a subpoena from the receiver who was appointed to unwind this scheme.

Again, we can debate whether that put them in a position where they were obligated to maintain, but before we get there, we got to know what they did to maintain and what they don't still have because, again, still haven't produced any policies to us and the related documents in the files in which they would have sat.

So, you know, we have been hearing this for ten months. They're coming. They are now in Deal Key. We have to go search through Deal Key because they offloaded everything else. That's why they are in the pickle they are in.

MS. ROTTMANN: Your Honor, may I briefly respond to that?

THE COURT: Yes.

MS. ROTTMANN: First, I don't think it's before this Court when a litigation hold should have been in place today but as we --

THE COURT: No, I'm not -- that's not on me.

MS. ROTTMANN: Okay. I didn't want to address it so...

THE COURT: No. No. No.

MS. ROTTMANN: There are, in fact, policy documents produced in the FileNet documents. We have cited examples to counsel in our meet and confer correspondence.

For example, there is a couple of the Joann and Bernard Kahan policy dating back to 1994 in the FileNet documents produced. So, I think it's inaccurate to say there are no policies in there.

Further, Wells Fargo has a copy of the FileNet documents. He mentioned CCT Gateway. As I mentioned, Wells Fargo has an archival sequel database of that information. It's probably not the best way to get it out, but if they insist that we archive it and produce it there, versus Computershare's property, we can talk about that exercise.

I hate navigating sequel databases, but I do have an engineering background. We will work through that if we need to, but, you know, that's something we can do.

Further, these documents that talk about transferring to Computershare are the hard copy files just if we were asked to maintain them. It would be like you getting a new lawyer and asking your new lawyer to hold on to your original will rather than the older one. That's what that is.

So, at this point, Your Honor, we think that retention policies are appropriate generally but, certainly, not all of Wells Fargo's retention policies.

THE COURT: I understand.

All right, folks, thank you so much.

So, the ruling for today is going to be limited and it's going to be focused on Request for Production Number 230. Within two weeks, I'm going to have Wells Fargo produce to plaintiffs the document retention policies of Wells Fargo dating back to 2014 concerning the trust and security intermediary activities of Wells Fargo dating back to 2009, but I want to make sure that the ruling is clear as to what I'm not doing.

I'm not today entering any ruling as to spoliation, as to when or if Wells Fargo was under any document retention duty to the plaintiffs, whether that duty was complied with, whether that duty was breached.

The document retention policies will include litigation holds. Not in general, but only litigation holds relating to the issues relevant to this lawsuit, namely the trust and

security intermediary business, and perhaps at some later date the parties may want to seek a court ruling on all the issues that I'm not ruling on today. So, either later on this afternoon or on Monday I will be issuing a post-hearing administrative order summarizing this ruling.

MS. ROTTMANN: Your Honor, just for clarity of the record, is the Court overruling the attorney-client -- the work product and attorney-client privilege objections as to the litigation hold?

THE COURT: Yes.

MS. ROTTMANN: Okay.

THE COURT: All right, folks.

We will be wrapping up this hearing. Good to see all of you. Have a good weekend. Be well.

Take care, by now.

MS. ROTTMANN: Thank you, Your Honor.

MR. BUCKNER: Thank you, Judge.

(Proceedings were concluded.)

C E R T I F I C A T E

I, Patricia Diaz, Registered Professional Reporter, in and for the United States District Court for the Southern District of Florida, do hereby certify that I transcribed from digital audio recording the proceedings had the 10th day of June, 2025, in the above-mentioned court; and that the foregoing transcript is a correct and complete transcript of said digital audio recording.

June 12, 2025
DATE

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'09 [1] - 20:22
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/s/Patricia [1] - 40:13

1

1 [1] - 1:7
100 [1] - 13:5
10th [1] - 40:7
114 [16] - 7:2, 9:11, 11:5, 11:18, 13:19, 15:12, 16:14, 16:17, 17:24, 20:24, 21:10, 22:11, 23:1, 24:14, 26:2, 26:21
11780 [1] - 1:23
11th [2] - 2:11, 40:15
12 [1] - 40:13
13 [6] - 11:9, 11:18, 17:17, 19:21, 20:16, 35:13
143 [2] - 13:16, 13:18
15222 [1] - 2:4
16 [1] - 10:18
1800 [1] - 2:3
1994 [1] - 37:14

2

20 [1] - 32:14
2009 [3] - 32:12, 33:9, 38:16
2010 [1] - 22:18
2012 [1] - 17:25
2014 [6] - 22:19, 22:21, 33:2, 33:10, 38:15
2015 [1] - 5:19
2016 [1] - 36:10
2020 [1] - 1:17
2021 [7] - 7:8, 7:18, 20:22, 35:16, 35:18, 35:19, 36:12
2022 [1] - 20:22
2023 [2] - 11:13, 17:25
2025 [3] - 1:5, 40:8, 40:13
210 [1] - 1:20
23 [6] - 19:4, 27:4, 27:16, 27:17, 28:10, 35:5
230 [4] - 5:12, 8:6, 11:22, 38:12
24-22142-CV-Gayles [1] - 3:9
24-CV-80722-DPG [1] - 1:2
26 [2] - 5:18, 6:6
260 [1] - 2:3

3

30 [1] - 28:15
30(b)(6 [1] - 8:7
300 [1] - 24:4
3010 [1] - 1:20
302 [1] - 1:17
305 [2] - 2:12, 40:16
32202 [1] - 2:6
3300 [1] - 2:6
33065 [1] - 1:24
33128 [2] - 2:12, 40:15
33133 [1] - 1:18
33431 [1] - 1:21
34 [1] - 24:8
35 [1] - 28:14
3:30 [1] - 3:3

4

40 [1] - 13:5
400 [2] - 2:11, 40:15

5

50 [1] - 2:5
523-5178 [2] - 2:12, 40:16

6

6 [1] - 1:5
60 [2] - 18:14, 26:18
61 [1] - 30:11

7

7,000 [1] - 22:25
70 [1] - 26:18
70,000 [1] - 23:18

9

90 [1] - 35:13
91 [1] - 18:2

A

able [9] - 9:9, 9:12, 19:16, 20:20, 24:7, 25:14, 27:3, 29:15, 29:24
above-mentioned [1] - 40:8
absolutely [3] - 11:6, 21:22, 30:7
acceptable [1] - 27:12
accepted [1] - 21:24
accordingly [1] - 34:2
accurate [1] - 21:1
acknowledge [1] - 35:6
acknowledged [3] - 22:13, 33:1, 35:12
acquired [1] - 22:2
acted [1] - 11:2
action [3] - 11:14, 35:17, 36:13
actively [1] - 30:19
activities [1] - 38:16
actual [1] - 31:19
additional [11] - 23:23, 26:14, 26:24, 27:3, 28:20, 29:12, 29:18, 29:23, 30:3, 30:20, 30:25
address [2] - 32:6, 37:8
addresses [1] - 23:24
administrative [1] - 39:5
advised [1] - 34:2
advisory [1] - 5:24
advocacy [1] - 18:7
advocate [1] - 4:6
afternoon [6] - 3:2, 3:12, 3:15, 3:17, 18:8, 39:4
ago [2] - 14:1, 31:13
agree [3] - 22:14, 32:23, 33:10
agreed [2] - 6:14, 33:9
agreement [2] - 9:16, 24:7
agreements [1] - 35:10
alleged [1] - 36:13
allowed [1] - 3:19
alone [1] - 32:15
amicably [1] - 24:7
amount [1] - 24:22
AND [2] - 1:15, 1:16
answer [8] - 9:3, 9:10, 9:12, 10:8, 18:2, 18:5, 25:5, 25:10
answered [1] - 25:14
anticipate [2] - 27:1, 29:15
appearance [1] - 3:10
APPEARANCES [1] - 1:13
appeared [1] - 22:18
applications [1] - 10:20
appointed [2] - 35:18, 36:14
appreciate [3] - 12:6, 14:24, 18:9
appropriate [7] - 11:21, 15:17, 32:8, 32:24, 33:4, 35:23, 38:7
appropriately [1] - 11:2
archival [2] - 31:5, 37:19
archive [2] - 31:15, 37:21
archived [1] - 31:6
area [1] - 5:16
argue [2] - 33:19, 35:20
argued [1] - 34:16
argument [10] - 7:21, 10:6, 12:13, 12:14, 12:15, 32:2, 32:17, 32:18, 36:3
arguments [1] - 11:1
arises [1] - 36:6
arrive [1] - 35:2
aside [1] - 32:5
aspersions [2] - 6:16, 9:8
assignment [2] - 22:7
associated [2] - 26:17, 26:18
assume [2] - 29:24, 31:21
ASTARITA [1] - 1:19
attached [1] - 16:19
attendant [1] - 10:19
attorney [4] - 27:21, 31:25, 39:7, 39:8
attorney-client [3] - 31:25, 39:7, 39:8
AUDIO [2] - 1:12, 3:1
audio [3] - 27:8, 40:7, 40:10
Avenue [3] - 2:3, 2:11, 40:15

B

background [4] - 13:21, 13:23, 31:6, 37:24
bad [1] - 6:16
Bank [2] - 3:8, 9:16
BANK [1] - 1:7
bank [1] - 19:13
banker's [1] - 20:1
based [1] - 24:23
basis [1] - 4:11
bearing [1] - 26:22
bears [1] - 21:3
become [2] - 12:25, 26:12
BEFORE [1] - 1:11
beginning [1] - 14:3
behalf [1] - 4:4
behind [1] - 15:10
bellies [1] - 12:10
benefit [1] - 22:16
Bernard [1] - 37:13
best [2] - 31:10, 37:20
better [3] - 5:13, 16:10, 17:11
better-reasoned [1] - 5:13
between [2] - 5:3, 20:14
beyond [2] - 26:21, 27:4
bigger [2] - 34:19, 36:3
biggest [1] - 21:16
billing [1] - 30:23
Biomed [1] - 23:13
blessedly [1] - 28:1
Boca [1] - 1:21
body [1] - 8:11
bottom [2] - 8:16, 11:19
box [3] - 19:25, 20:1
breached [1] - 38:22
brief [1] - 4:19
briefed [2] - 4:20, 36:7
briefing [2] - 5:3, 34:4
briefly [2] - 7:11, 37:1
broad [1] - 12:20
broader [1] - 9:4
broadest [1] - 23:25
Buckner [7] - 3:12, 4:24, 8:18, 18:13, 21:3, 25:4, 33:7
BUCKNER [32] - 1:16, 1:16, 3:12, 4:19, 8:24, 9:3, 11:23, 12:1, 13:3, 13:5, 13:10, 13:16, 13:20, 15:22, 16:13, 16:16, 16:20, 16:22, 17:2, 17:7, 17:10, 24:25, 25:6,

25:8, 25:11, 25:13, 25:19, 33:8, 33:18, 34:14, 36:2, 39:17
Buckner's [1] - 24:18
bunch [3] - 10:21, 20:18, 20:19
burden [4] - 12:14, 12:17, 31:11
burdensome [1] - 32:2
business [12] - 7:9, 21:15, 29:6, 31:13, 31:18, 32:17, 33:12, 33:15, 33:16, 35:16, 39:1
buyers [1] - 9:17
BY [1] - 2:8

C

candid [1] - 6:12
care [1] - 39:15
CASE [1] - 1:2
case [27] - 3:4, 3:8, 3:9, 4:23, 5:1, 5:2, 5:4, 5:13, 5:15, 6:21, 8:11, 8:15, 11:6, 12:9, 12:11, 14:5, 15:6, 16:6, 16:7, 24:4, 24:16, 32:15, 33:20, 33:21, 35:15, 35:18
cast [1] - 9:8
casting [1] - 6:15
catchup [1] - 14:25
categories [1] - 32:21
CCT [3] - 31:1, 34:21, 37:18
central [1] - 11:6
Centurion [2] - 24:1, 33:3
certain [3] - 6:14, 9:5, 28:9
certainly [1] - 38:7
certify [1] - 40:6
chance [1] - 4:1
chat [1] - 7:4
Chief [1] - 3:6
circumstances [1] - 5:6
cited [2] - 6:22, 37:11
clarity [1] - 39:6
class [3] - 11:14, 35:17, 36:12
clear [6] - 10:14, 35:2, 35:3, 35:5, 38:17
clearer [1] - 27:13
clearly [1] - 8:14
clerk's [1] - 3:21
client [3] - 31:25, 39:7, 39:8
clients [1] - 14:12
clock [1] - 15:4
clutter [1] - 6:6
collateral [1] - 22:7
collected [2] - 29:7, 30:17
collecting [2] - 28:19, 29:2
coming [4] - 10:2, 14:14, 35:1, 36:23
commentary [2] - 5:19, 6:4
comments [2] - 24:19
committee [1] - 5:24
company [1] - 7:10
compel [1] - 4:14
compelling [1] - 5:16
complete [2] - 29:16, 40:9
completely [1] - 4:9
complicated [1] - 31:12
complied [1] - 38:21
Computershare [39] - 7:10, 7:13, 7:19, 8:21, 10:1, 10:18, 10:24, 11:4, 13:2, 13:6, 13:11, 13:13, 13:14, 14:21, 14:25, 16:12, 17:18, 18:17, 18:23, 18:25, 19:11, 21:1, 21:5, 21:11, 21:16, 23:12, 29:7, 30:6, 30:8, 30:15, 30:17, 30:19, 31:2, 31:3, 31:7, 34:24, 35:22, 38:2
Computershare's [2] - 13:14, 37:22
concern [2] - 32:7, 34:6
concerning [1] - 38:15
concluded [1] - 39:18
condition [1] - 5:22
confer [5] - 7:6, 17:15, 26:16, 30:11, 37:12
conferred [1] - 17:16
conferring [1] - 18:12
confirming [1] - 20:14
confused [1] - 20:23
confusion [1] - 21:4
consistent [1] - 24:15
continue [4] - 24:9, 24:10, 25:20, 26:16
contrary [1] - 31:23
contrast [1] - 28:6
conversations [1] - 20:21
convince [1] - 31:23
cooperation [1] - 24:22
copies [7] - 27:7, 28:8, 28:9, 28:25, 29:11, 29:13, 35:21
copy [14] - 11:9, 11:18, 12:12, 18:24, 19:11, 19:14, 27:18, 27:22, 28:12, 29:5, 29:7, 31:10, 37:17, 38:2
Coral [1] - 1:24
correct [7] - 13:16, 13:24, 16:22, 17:7, 33:18, 36:1, 40:9
correspondence [3] - 14:22, 33:2, 37:12
corresponding [1] - 22:5
costs [1] - 26:18
counsel [24] - 3:10, 7:3, 7:12, 8:9, 10:15, 11:8, 13:10, 14:22, 14:24, 15:8, 18:11, 19:3, 19:19, 22:11, 22:13, 29:9, 30:3, 30:10, 30:21, 31:10, 32:9, 34:3, 37:12
count [1] - 4:3
couple [3] - 28:20, 29:25, 37:13
course [3] - 6:11, 8:2, 31:17
Court [20] - 2:10, 2:10, 3:5, 5:14, 7:4, 8:6, 8:9, 10:15, 13:21, 14:3, 17:13, 29:4, 32:22, 33:21, 33:25, 37:5, 39:7, 40:5, 40:14, 40:14
COURT [58] - 1:1, 3:2, 3:14, 3:17, 8:18, 9:1, 11:22, 11:24, 13:1, 13:4, 13:8, 13:12, 13:18, 15:21, 16:9, 16:14, 16:18, 16:21, 16:23, 17:4, 17:8, 18:6, 19:7, 19:15, 19:23, 20:1, 20:3, 20:16, 20:23, 21:6, 21:8, 24:18, 25:4, 25:7, 25:9, 25:12, 25:14, 25:20, 27:1, 27:8, 27:14, 29:15, 30:5, 31:19, 32:20, 32:25, 33:7, 33:16, 33:23, 34:8, 34:13, 35:25, 37:3, 37:7, 37:9, 38:9, 39:10, 39:12
court [4] - 3:23, 10:2, 39:2, 40:8
COURTROOM [1] - 3:5
cover [1] - 12:8
COX [1] - 1:19
created [1] - 21:20
criteria [1] - 19:4
critical [3] - 8:15, 14:7, 15:23
cross [1] - 18:19
cross-talk [1] - 18:19
CTS [2] - 31:1, 34:21
custodian [5] - 9:20, 19:1, 19:12, 27:19, 28:2
custodians [1] - 24:8
custody [1] - 5:22
cutting [1] - 27:9

D

data [5] - 12:4, 26:17, 26:19, 28:15, 30:16
database [2] - 31:5, 37:19
databases [1] - 37:23
date [3] - 19:6, 34:20, 39:1
DATE [1] - 40:13
dates [2] - 17:24, 19:20
dating [4] - 32:25, 37:14, 38:15, 38:16
David [2] - 3:12, 4:23
DAVID [1] - 1:16
de [1] - 4:14
Deal [16] - 21:18, 22:5, 22:9, 22:17, 22:18, 22:21, 23:13, 26:1, 26:6, 26:8, 26:10, 29:2, 34:18, 34:22, 36:23, 36:24
deal [4] - 14:16, 14:22, 21:25, 28:13
dealing [3] - 10:13, 15:10, 28:17
deals [1] - 28:12
dealt [2] - 7:9, 24:5
debate [1] - 36:16
decades [2] - 27:23, 31:17
decide [2] - 11:20, 15:16
deeply [2] - 6:5, 6:25
DEFENDANT [1] - 2:1
Defendant [1] - 1:8
defendant [4] - 3:16, 4:15, 14:24, 21:23
defense [1] - 16:2
degree [1] - 10:6
deleted [2] - 26:14, 31:4
deposition [1] - 8:7
depositions [1] - 15:5
DEPUTY [1] - 3:5
description [1] - 5:22
designed [1] - 25:5
destroyed [1] - 11:11
destruction [1] - 12:3
developed [1] - 14:12
DIAZ [2] - 2:9, 40:13
Diaz [2] - 40:4, 40:13
different [11] - 4:9, 4:10, 21:16, 21:25, 22:22, 24:11, 26:1, 26:8, 28:12, 34:9, 36:8
difficult [1] - 31:16
DIGITAL [2] - 1:12, 3:1
digital [2] - 40:7, 40:10
diligent [1] - 23:4
disagree [7] - 6:14, 8:25, 9:2, 9:4, 33:5, 33:8, 34:16
discoverability [1] - 5:17
discoverable [4] - 6:1, 6:20, 8:12, 32:23
discovery [16] - 3:3, 5:5, 5:6, 5:11, 5:21, 6:4, 6:20, 12:20, 15:3, 30:1, 31:20, 32:9, 32:23, 32:24, 34:1
DISCOVERY [1] - 1:10
Discovery [1] - 6:4
discussing [1] - 29:1
discussion [4] - 14:8, 30:3, 31:21, 32:11
discussions [3] -

6:13, 7:7, 31:9
dismiss [1] - 14:4
dispensed [2] - 11:12, 16:5
disposal [1] - 12:3
dispute [3] - 5:10, 6:18, 7:20
District [5] - 2:10, 3:5, 40:5, 40:6, 40:14
DISTRICT [2] - 1:1, 1:1
DIVISION [1] - 1:2
DL [8] - 22:22, 26:17, 26:24, 28:14, 28:21, 29:13, 29:23, 30:4
doctrine [1] - 32:1
document [18] - 4:15, 8:18, 9:19, 10:9, 12:8, 12:9, 12:11, 12:23, 12:24, 22:7, 27:22, 31:20, 31:24, 33:14, 38:14, 38:20, 38:23
documentation [1] - 15:18
documented [2] - 7:5, 10:11
documenting [1] - 17:15
documents [110] - 5:23, 6:23, 7:14, 7:17, 7:25, 8:4, 8:14, 8:19, 8:21, 9:5, 9:6, 9:15, 9:18, 9:20, 9:21, 9:25, 10:3, 10:12, 10:19, 10:21, 11:6, 11:9, 12:1, 12:3, 12:16, 12:22, 13:6, 13:17, 13:18, 14:2, 14:4, 14:7, 14:12, 14:13, 14:14, 14:16, 14:17, 14:20, 14:21, 15:2, 15:6, 15:13, 15:22, 15:24, 16:3, 16:5, 17:1, 17:5, 17:9, 17:19, 18:24, 20:1, 20:14, 21:5, 21:16, 21:18, 22:6, 22:9, 22:24, 22:25, 23:2, 23:5, 23:6, 23:13, 23:14, 23:18, 23:19, 24:9, 24:13, 24:14, 24:15, 24:20, 24:25, 25:2, 25:17, 26:6, 26:8, 27:7, 27:19, 28:7, 28:8, 29:2, 30:8, 30:16, 30:18, 30:20, 30:21, 30:25, 31:3, 31:4, 31:19, 32:11, 32:12, 32:13, 32:16, 35:1, 35:7, 35:9, 36:7, 36:20, 37:10, 37:11, 37:14, 37:18, 38:1
double [2] - 30:17, 31:11
double-collected [1] - 30:17
down [1] - 17:3
due [1] - 18:3
duplicate [1] - 30:14
duplicating [1] - 30:14
duplicative [1] - 29:8
duration [1] - 20:22
duty [3] - 38:20, 38:21, 38:22
DZ [1] - 9:16

E

e-mail [4] - 23:23, 24:2, 30:11, 33:2
e-mails [2] - 17:14, 18:13
early [2] - 33:25, 36:12
effectively [2] - 19:10, 32:10
either [3] - 7:1, 33:23, 39:3
electronic [3] - 12:4, 27:7, 28:8
electronically [3] - 14:17, 29:12, 35:9
EMILY [1] - 2:5
Emily [2] - 3:16, 20:8
encompassed [1] - 16:19
encompasses [3] - 10:10, 31:22
end [4] - 9:25, 18:11, 22:8, 29:20
endeavor [1] - 29:1
ends [1] - 9:23
engaging [1] - 31:11
engineering [1] - 37:24
entering [1] - 38:19
entirely [1] - 20:24
entirety [1] - 23:15
entities [1] - 30:9
entity [1] - 9:23
entrenched [1] - 6:5
especially [1] - 15:8
ESQ [6] - 1:16, 1:19, 1:22, 1:22, 2:2, 2:5
establishing [1] - 14:5
euphemism [2] - 11:12, 17:23
evidence [3] - 6:22, 8:13, 35:7
exact [1] - 4:17
exactly [2] - 10:7, 28:17
example [8] - 9:16, 10:12, 19:13, 21:5, 21:7, 27:20, 28:3, 37:13
examples [3] - 6:6, 26:15, 37:11
exceeds [1] - 26:17
excellent [2] - 6:9, 6:13
exercise [2] - 29:10, 37:22
exist [1] - 30:17
existed [1] - 29:5
existence [2] - 5:22, 21:24
expect [7] - 15:25, 20:9, 28:18, 29:4, 29:12, 33:4, 33:5
explain [2] - 17:23, 21:13
explained [3] - 19:3, 23:22, 26:1
explanation [1] - 17:8
explanations [1] - 18:14
extent [3] - 10:11, 26:4, 32:22

F

facility [1] - 20:7
fact [4] - 6:2, 27:3, 28:25, 37:10
facto [1] - 4:14
facts [1] - 7:23
factually [1] - 21:1
FANNY [1] - 1:4
far [6] - 20:20, 23:18, 24:16, 32:5, 32:12, 34:1
Fargo [67] - 3:8, 6:10, 7:1, 7:8, 7:12, 7:17, 8:4, 8:14, 8:19, 9:5, 9:10, 9:14, 9:18, 9:19, 10:17, 10:22, 11:1, 11:3, 11:13, 11:16, 13:10, 14:18, 15:19, 15:22, 16:10, 18:23, 18:25, 20:25, 21:4, 21:11, 21:15, 22:1, 22:8, 22:11, 22:25, 23:2, 23:4, 23:12, 23:22, 24:19, 25:2, 25:17, 27:2, 27:18, 28:2, 29:4, 29:6, 30:15, 31:3, 31:13, 31:14, 31:16, 32:13, 32:14, 33:14, 34:20, 35:11, 35:19, 36:1, 36:11, 36:13, 37:17, 37:19, 38:13, 38:14, 38:16, 38:20
FARGO [2] - 1:7, 2:1
Fargo's [9] - 6:22, 7:15, 9:16, 11:7, 12:2, 14:6, 14:20, 25:1, 38:8
fast [1] - 30:1
FCRR [2] - 2:9, 40:13
fifth [1] - 27:9
figure [1] - 14:25
filed [4] - 4:14, 4:16, 35:17, 36:12
FileNet [14] - 14:16, 14:19, 16:25, 17:5, 21:17, 22:9, 23:6, 28:7, 29:5, 30:16, 37:11, 37:14, 37:17
files [9] - 9:18, 11:18, 17:17, 27:18, 35:8, 35:9, 36:20, 38:2
finally [2] - 4:3, 20:9
fine [3] - 4:11, 15:9, 33:12
firm [1] - 13:13
first [7] - 4:18, 8:24, 16:25, 17:2, 25:4, 36:12, 37:4
five [5] - 9:22, 21:25, 28:11, 28:21, 28:23
Floor [2] - 2:11, 40:15
FLORIDA [1] - 1:1
Florida [9] - 1:4, 1:18, 1:21, 1:24, 2:6, 2:12, 36:11, 40:6, 40:15
focused [1] - 38:12
folks [4] - 3:2, 31:14, 38:10, 39:12
follow [4] - 6:19, 6:21, 8:11
follows [1] - 25:15
FOR [2] - 1:15, 2:1
Forbes [1] - 2:3
foregoing [1] - 40:9
forth [5] - 5:3, 7:5, 17:14, 18:15
four [4] - 4:3, 21:25, 31:13
fourth [1] - 27:9
FPR [2] - 2:9, 40:13
framed [1] - 16:10
frankly [2] - 5:3, 24:5
fraudsters [1] - 21:23
friendly [1] - 6:11
FROM [1] - 3:1
fulsome [1] - 24:21
functional [1] - 31:8
fundamentally [1] - 34:16

G

Gateway [3] - 31:1, 37:18
gathered [2] - 30:20, 30:24
gathering [1] - 17:20
general [1] - 38:24
generally [1] - 38:7
gigs [2] - 26:18, 28:15
given [5] - 22:8, 29:2, 31:16, 33:4
GOODMAN [1] - 1:11
Goodman [3] - 3:3, 3:7, 18:9
grace [1] - 10:20
grant [1] - 33:22
GROUP [1] - 1:23
guess [1] - 17:25
gun [1] - 10:5

H

half [1] - 3:25
hand [2] - 20:8, 20:9
happy [3] - 4:17, 17:15, 18:8
hard [9] - 11:9, 11:18, 18:24, 19:11, 19:14, 27:7, 27:18, 27:22, 38:2
harder [1] - 31:5
harkening [1] - 5:17
hate [1] - 37:23
hear [3] - 4:17, 16:10, 18:8
heard [3] - 14:4, 14:11, 34:21
hearing [10] - 3:3, 3:20, 6:8, 8:8, 8:9, 31:20, 34:20, 36:22, 39:4, 39:13
HEARING [1] - 1:10
hearings [1] - 3:19
held [3] - 22:16, 22:17, 35:24
hereby [1] - 40:6
hesitate [1] - 3:25
hit [1] - 23:18
hold [13] - 10:23,

11:24, 18:24, 19:1, 27:22, 32:6, 34:1, 34:5, 34:9, 34:10, 37:5, 38:4, 39:9
holds [6] - 10:12, 12:6, 31:22, 35:15, 38:24
Holtz [25] - 7:2, 7:10, 13:19, 21:22, 22:2, 22:5, 22:16, 22:17, 22:18, 22:21, 22:23, 23:25, 25:25, 26:3, 26:4, 26:9, 26:12, 26:13, 28:22, 28:23, 28:24, 29:23
home [1] - 28:4
honestly [1] - 15:10
Honor [24] - 3:15, 8:13, 12:5, 13:3, 21:2, 21:12, 22:3, 23:16, 25:21, 27:11, 27:15, 29:22, 30:7, 31:12, 32:4, 32:19, 33:19, 33:24, 34:14, 35:4, 37:1, 38:6, 39:6, 39:16
Honor's [1] - 36:4
HONORABLE [1] - 1:11
Honorable [1] - 3:6
hopeful [1] - 30:2
hoping [2] - 20:11, 27:12
hypothetically [3] - 9:19, 9:22, 10:17
hypotheticals [1] - 10:14

I

idea [1] - 9:6
identified [4] - 28:13, 28:14, 28:23, 29:13
identify [2] - 20:21, 23:1
identifying [1] - 31:14
imagine [1] - 13:1
important [3] - 6:8, 15:20, 21:19
impose [1] - 33:11
imposed [1] - 35:20
inaccurate [4] - 21:4, 23:1, 23:20, 37:15
inadvertently [1] - 4:1
inbox [1] - 24:2
incepted [5] - 25:24, 26:3, 26:4, 26:7, 26:11
inclined [1] - 33:22
include [5] - 12:5, 13:18, 26:20, 28:9, 38:23
includes [1] - 5:21
including [3] - 10:11, 12:3, 33:21
inconsistent [1] - 22:12
incorrect [1] - 17:5
incredibly [1] - 23:4
indicate [1] - 27:16
indicated [5] - 20:12, 20:13, 20:15, 29:9, 33:25
indicating [1] - 28:10
indication [1] - 8:22
information [10] - 5:17, 22:14, 23:20, 23:21, 23:24, 24:11, 24:16, 34:3, 34:5, 37:19
informed [1] - 7:3
inserted [1] - 32:1
insist [1] - 37:21
instance [1] - 22:16
instances [1] - 28:9
insurance [4] - 21:19, 21:20, 24:20, 25:18
insured's [1] - 19:5
insureds [1] - 26:22
intelligent [1] - 30:2
intent [1] - 12:7
interesting [1] - 5:8
interestingly [1] - 4:22
intermediary [8] - 7:1, 9:21, 25:3, 32:17, 32:21, 33:17, 38:16, 39:1
interpreted [1] - 24:18
interrogatories [1] - 34:4
interrupt [1] - 4:2
investigating [1] - 36:11
involve [1] - 26:21
involvement [1] - 21:22
involving [1] - 26:8
iron [1] - 18:20
issue [14] - 4:10, 4:11, 4:16, 4:20, 5:5, 8:6, 12:19, 16:7, 26:23, 31:11, 31:19, 34:7
issue-by-issue [1] - 4:11
issues [9] - 4:23, 5:1, 6:14, 8:23, 26:15, 28:22, 28:24, 38:25, 39:2
issuing [1] - 39:4
itself [3] - 5:18, 19:15, 22:10

J

Jacksonville [1] - 2:6
Jarrod [1] - 3:15
JARROD [1] - 2:2
Joann [1] - 37:13
Jonathan [2] - 3:2, 3:6
JONATHAN [1] - 1:11
Josh [1] - 3:13
JOSHUA [1] - 1:19
Judge [5] - 3:6, 3:12, 4:19, 18:9, 39:17
JUDGE [1] - 1:11
jump [1] - 27:11
jumping [2] - 10:5, 25:7
June [3] - 1:5, 40:8, 40:13
juris [1] - 36:4

K

Kahan [1] - 37:14
KATZ [1] - 1:19
Katz [1] - 3:13
keep [6] - 9:20, 19:15, 28:4, 28:5, 29:1, 34:25
keeps [1] - 23:13
kept [5] - 21:16, 23:9, 35:7, 35:8, 35:9
key [2] - 15:6, 16:6
Key [16] - 21:18, 22:5, 22:9, 22:17, 22:18, 22:21, 23:13, 26:1, 26:6, 26:8, 26:10, 29:2, 34:18, 34:23, 36:23, 36:24
Keys [8] - 22:22, 26:17, 26:24, 28:14, 28:21, 29:13, 29:23, 30:4
kid [1] - 28:5
kind [3] - 5:17, 15:4, 25:12
KLEINBART [2] - 1:4, 1:15
knowledge [2] - 14:6, 14:11
knows [4] - 5:14, 22:3, 23:16, 27:25

L

language [1] - 5:25
last [6] - 6:7, 7:8, 7:13, 12:13, 13:3, 16:11
latest [2] - 17:8, 17:17
Laura [1] - 2:5
law [10] - 5:2, 5:4, 5:13, 5:15, 6:21, 8:11, 13:13, 33:20, 33:21
LAW [1] - 1:23
lawsuit [5] - 35:17, 35:25, 36:13, 38:25
lawyer [4] - 4:10, 4:12, 38:3, 38:4
lawyers [6] - 4:3, 4:17, 6:10, 6:22, 15:9
learned [3] - 7:8, 7:13, 15:24
least [3] - 5:10, 10:25, 11:2
left [2] - 10:2, 26:13
legal [7] - 5:8, 6:18, 32:6, 34:1, 34:5, 34:8
Library [1] - 34:21
life [5] - 21:19, 21:20, 21:21, 22:3, 22:15
lightly [1] - 15:7
limit [2] - 32:15, 32:20
limitation [3] - 32:24, 33:10, 33:22
limited [4] - 10:9, 32:10, 32:11, 38:11
line [1] - 33:12
Link [1] - 34:21
list [1] - 9:17
listen [1] - 29:17
literal [1] - 18:21
literally [1] - 18:18
litigation [13] - 10:12, 10:23, 11:14, 11:24, 12:6, 24:6, 31:22, 34:10, 35:15, 37:5, 38:23, 38:24, 39:9
live [1] - 33:18
lives [2] - 27:22, 31:15
LLC [1] - 1:19
LLP [1] - 2:2
locate [2] - 19:17, 20:20
located [1] - 29:12
locating [2] - 20:13, 24:14
location [1] - 5:22
look [1] - 5:19
looked [1] - 5:24
looking [2] - 11:22, 18:15
looks [1] - 26:15
lost [3] - 8:16, 10:7, 35:13

M

magic [1] - 25:12
MAGISTRATE [1] - 1:11
Magistrate [1] - 3:6
mail [4] - 23:23, 24:2, 30:11, 33:2
mails [2] - 17:14, 18:13
maintain [11] - 7:24, 8:4, 9:5, 9:18, 11:3, 30:16, 35:21, 36:6, 36:17, 36:18, 38:3
maintained [5] - 10:4, 10:25, 14:17, 23:13, 31:17
maintaining [1] - 9:15
maintains [1] - 31:4
majority [1] - 9:11
March [1] - 30:12
market [1] - 22:4
MARTIN [1] - 1:4
massive [1] - 23:16
material [1] - 22:19
matter [3] - 7:13, 10:13, 14:5
matters [1] - 6:4
McGUIRE [1] - 2:2
mean [8] - 6:10, 14:3, 19:7, 19:8, 19:9, 19:17, 24:19, 34:11
meaning [1] - 34:20
means [3] - 18:1, 19:9, 19:10
meant [1] - 9:8
meet [4] - 7:5, 17:15, 30:11, 37:12
meeting [3] - 18:12, 33:4, 33:5
memoranda [1] - 4:16
mentioned [7] - 11:25, 16:23, 27:5, 30:10, 37:18, 40:8
met [1] - 19:4
MIAMI [1] - 1:2
Miami [6] - 1:4, 1:18, 2:11, 2:12, 40:15,

40:15
might [4] - 9:6, 22:1, 22:6, 32:18
MILES [1] - 1:16
Military [1] - 1:20
Millstein [1] - 3:8
MILLSTEIN [2] - 1:4, 1:15
mind [1] - 5:10
mine [1] - 27:12
minimize [1] - 4:1
minute [2] - 16:11, 19:18
missing [3] - 6:23, 20:18, 20:19
mixing [1] - 27:6
Monday [2] - 30:22, 39:4
month [2] - 7:8, 7:14
months [3] - 14:1, 15:3, 36:22
moreover [1] - 23:22
most [6] - 5:16, 11:7, 14:15, 24:5, 33:1, 33:3
motion [1] - 4:14
motions [2] - 11:20, 14:4
mountain [1] - 18:20
mouthpiece [1] - 4:11
moved [1] - 20:14
MR [44] - 3:12, 3:15, 4:19, 8:24, 9:3, 11:23, 12:1, 13:3, 13:5, 13:10, 13:16, 13:20, 15:22, 16:13, 16:16, 16:20, 16:22, 17:2, 17:7, 17:10, 18:9, 18:20, 19:9, 19:16, 19:25, 20:2, 20:6, 20:19, 21:2, 21:7, 21:12, 24:25, 25:6, 25:8, 25:11, 25:13, 25:19, 25:21, 27:6, 33:8, 33:18, 34:14, 36:2, 39:17
MS [18] - 20:11, 27:11, 27:15, 29:22, 30:7, 32:4, 32:22, 33:1, 33:19, 33:24, 34:11, 37:1, 37:4, 37:8, 37:10, 39:6, 39:11, 39:16
mystery [1] - 14:10

N

N.A [1] - 1:7
NA [1] - 3:8
name [2] - 3:22, 10:20
namely [1] - 38:25
names [2] - 19:5, 34:22
nature [1] - 5:22
navigate [3] - 26:23, 31:5, 31:10
navigating [1] - 37:23
necessarily [1] - 29:10
necessary [1] - 6:5
need [15] - 3:20, 4:4, 8:4, 8:7, 8:15, 11:19, 15:6, 15:14, 15:16, 21:12, 33:13, 33:20, 35:24, 37:24
negotiate [2] - 24:3, 26:16
never [5] - 10:1, 11:4, 33:9, 33:25, 35:1
new [3] - 19:12, 38:3, 38:4
next [5] - 10:8, 12:25, 20:11, 29:25, 30:24
nice [1] - 6:12
night [1] - 34:4
NO [1] - 1:2
nobody [1] - 3:19
North [2] - 2:11, 40:15
note [3] - 4:16, 5:18, 5:24
notes [1] - 5:20
nothing [1] - 6:16
notices [1] - 10:20
November [1] - 35:16
nowhere [1] - 15:13
number [17] - 3:9, 3:22, 3:25, 4:23, 5:1, 7:15, 11:8, 11:22, 13:7, 13:15, 13:17, 19:10, 25:9, 31:16, 31:24, 32:1, 34:21
Number [1] - 38:12

O

objections [1] - 39:8
obligated [1] - 36:17
obligation [5] - 7:24, 8:3, 9:5, 35:21, 36:6
obvious [1] - 14:3
obviously [6] - 10:10, 12:9, 31:12, 34:14, 36:4, 36:5
OF [2] - 1:1, 1:12
office [2] - 3:21, 27:24
Official [1] - 40:14
official [1] - 2:10
offloaded [3] - 34:23, 35:22, 36:24
older [1] - 38:5
once [1] - 34:6
one [20] - 4:5, 4:12, 8:6, 9:16, 11:10, 20:1, 21:8, 22:25, 26:10, 26:11, 26:12, 28:22, 29:23, 29:24, 30:20, 31:24, 33:14, 34:23, 38:5
ones [3] - 20:15, 20:20, 20:21
ongoing [3] - 27:2, 29:3, 29:16
open [2] - 12:20, 30:12
opportunity [1] - 18:10
opposing [2] - 15:8, 30:3
optimistic [1] - 29:25
oral [1] - 4:6
order [2] - 23:7, 39:5
orders [1] - 3:23
organization [1] - 23:7
organized [1] - 21:18
original [2] - 35:17, 38:4
originally [1] - 7:14
otherwise [2] - 8:1, 24:1
outcome [1] - 5:10
outset [2] - 4:25, 33:13
outside [2] - 25:25, 28:9
overbreadth [3] - 32:8, 32:17, 32:18
overruling [1] - 39:7

P

P.A [1] - 1:16
pages [2] - 18:14, 30:11
Pages [1] - 1:7
paper [3] - 17:17, 18:21, 20:14
papers [1] - 7:11
part [3] - 9:11, 16:1, 29:6
particular [3] - 4:7, 9:23, 31:22
parties [2] - 24:3, 39:2
party [2] - 19:12, 23:17
past [2] - 15:15, 17:25
PATRICIA [2] - 2:9, 40:13
Patricia [1] - 40:4
Pegasus [1] - 30:22
Pennsylvania [1] - 2:4
people [2] - 28:3, 34:9
per [2] - 4:5, 4:12
perhaps [8] - 11:17, 17:18, 31:15, 32:16, 35:6, 35:13, 39:1
period [2] - 9:22, 11:13
permissible [1] - 5:20
permitted [1] - 27:1
person [6] - 4:2, 4:5, 4:7, 21:9, 21:21, 27:25
perspective [1] - 6:19
Peter [1] - 3:13
PETER [1] - 1:22
phrased [1] - 31:22
pickle [1] - 36:25
piece [1] - 24:6
Pittsburgh [1] - 2:4
pivotal [1] - 12:25
place [3] - 5:2, 10:23, 37:5
placed [1] - 35:15
plaintiff [7] - 3:11, 4:4, 4:7, 4:14, 4:18, 26:1, 26:16
plaintiff's [1] - 24:19
Plaintiffs [1] - 1:5
plaintiffs [8] - 3:13, 22:14, 23:8, 25:16, 28:17, 29:17, 38:14, 38:21
PLAINTIFFS [1] - 1:15
plaintiffs' [3] - 14:2, 30:10, 30:21
playing [1] - 14:25
plus [1] - 10:18
point [14] - 4:7, 5:8, 5:16, 7:18, 8:5, 8:10, 12:13, 14:23, 17:4, 25:22, 27:3, 33:6, 33:8, 38:6
points [1] - 9:7
policies [88] - 4:15, 7:2, 7:15, 8:19, 8:22, 9:11, 9:17, 10:9, 10:18, 11:5, 11:11, 11:19, 12:8, 12:10, 12:11, 12:24, 12:25, 13:19, 14:2, 14:13, 14:21, 14:23, 15:2, 15:12, 16:15, 16:17, 16:18, 16:24, 17:17, 17:19, 17:21, 17:24, 18:2, 18:17, 18:23, 19:4, 19:19, 19:24, 20:17, 20:25, 21:10, 21:20, 22:3, 22:12, 22:15, 23:1, 23:3, 23:19, 23:20, 23:24, 24:12, 24:14, 24:21, 24:24, 24:25, 25:18, 25:23, 26:2, 26:11, 26:13, 26:20, 26:22, 27:4, 28:9, 28:16, 28:21, 28:23, 29:11, 29:18, 31:21, 31:24, 32:7, 32:13, 33:11, 33:20, 34:25, 35:1, 35:5, 35:6, 35:8, 35:14, 36:20, 37:16, 38:7, 38:8, 38:14, 38:23
policy [26] - 9:14, 9:20, 10:21, 12:2, 14:13, 18:22, 19:1, 21:20, 21:23, 21:24, 22:2, 22:9, 22:10, 22:17, 25:23, 26:7, 28:11, 28:12, 28:14, 28:25, 29:11, 29:20, 32:4, 33:14, 37:10, 37:14
pork [1] - 12:10
portion [1] - 29:16
position [2] - 25:17, 36:17
possession [6] - 7:15, 8:17, 10:22, 15:20, 15:23, 16:3
possible [1] - 20:24
post [1] - 39:4
post-hearing [1] - 39:4
potentially [1] - 16:6
practical [2] - 4:13, 5:9
practice [2] - 6:5, 12:2
prediction [1] - 17:6
prepared [1] - 35:4
prerogative [1] - 8:2
preservation [1] - 12:3

preserve [1] - 10:12
presiding [1] - 3:7
presumably [1] - 9:7
pretty [3] - 4:21, 5:15, 30:12
primarily [2] - 32:7, 32:18
printed [1] - 18:13
privilege [2] - 31:25, 39:8
problem [3] - 12:18, 26:19, 32:3
problematic [1] - 27:9
problems [1] - 12:23
proceed [1] - 27:2
proceedings [2] - 39:18, 40:7
PROCEEDINGS [1] - 3:1
process [10] - 19:21, 20:4, 20:6, 20:13, 26:9, 28:20, 29:3, 29:24, 30:1, 30:13
processing [2] - 26:19, 28:20
produce [10] - 4:15, 13:15, 20:4, 23:4, 24:10, 27:3, 29:20, 33:20, 37:21, 38:13
produced [19] - 13:5, 19:22, 19:23, 22:22, 22:23, 23:2, 23:21, 24:8, 24:9, 24:13, 24:15, 24:20, 25:17, 29:18, 30:8, 32:14, 36:19, 37:11, 37:15
producing [5] - 12:22, 22:20, 23:6, 23:8, 23:14
product [2] - 32:1, 39:8
production [13] - 15:1, 15:11, 20:9, 22:24, 23:15, 23:17, 23:23, 24:21, 27:2, 29:16, 29:20, 30:15
Production [1] - 38:12
productions [1] - 23:18
Professional [1] - 40:4
professional [1] - 15:8
property [1] - 37:22
proposed [2] - 28:19, 33:22
prove [1] - 26:24
proven [2] - 16:1, 16:2
provided [5] - 18:24, 19:5, 19:19, 24:17
providing [1] - 30:14
prudence [1] - 36:4
prudential [1] - 12:15
pulled [1] - 30:4
pulling [2] - 26:9, 29:23
purchase [1] - 14:22
purchased [1] - 25:24
purposes [2] - 4:13, 5:9
put [6] - 3:20, 7:4, 8:13, 17:13, 19:2, 36:16

Q

quite [1] - 18:18
quoting [2] - 5:21, 6:3

R

raised [1] - 34:7
ranging [1] - 17:25
rather [1] - 38:5
Raton [1] - 1:21
read [2] - 34:1, 36:4
really [2] - 6:2, 9:9
reargue [1] - 34:15
reason [6] - 5:25, 6:17, 15:11, 15:12, 27:8
reasoned [1] - 5:13
reasons [2] - 14:3, 19:11
rebroadcast [1] - 3:19
received [4] - 16:21, 20:22, 34:3, 36:14
receiver [3] - 23:17, 35:18, 36:14
receivership [1] - 11:15
recent [2] - 14:15, 33:1
recollection [1] - 3:18
record [7] - 3:10, 3:19, 4:24, 8:13, 17:14, 32:10, 39:7
RECORDING [2] - 1:12, 3:1
recording [2] - 40:7, 40:10
records [1] - 12:4
recreate [1] - 15:15
referring [1] - 13:8
refresh [1] - 3:18
Regan [1] - 12:21
regard [2] - 17:21, 33:11
regardless [1] - 13:13
Registered [1] - 40:4
rehash [1] - 34:19
relate [1] - 22:23
related [29] - 7:2, 7:15, 10:21, 11:6, 12:2, 12:10, 14:2, 14:13, 14:17, 14:21, 14:22, 15:2, 15:13, 17:19, 22:18, 23:2, 23:20, 24:11, 24:14, 25:1, 28:21, 28:23, 32:16, 33:15, 35:1, 35:6, 35:9, 36:20
relating [5] - 13:19, 24:20, 25:18, 33:12, 38:24
relationship [4] - 6:9, 9:23, 25:25, 33:3
released [9] - 17:24, 17:25, 19:4, 19:6, 19:8, 19:19, 19:20, 20:15, 20:17
relevant [4] - 12:8, 12:11, 23:14, 38:25
remember [1] - 25:2
remind [1] - 4:5
renamed [1] - 31:1
replacing [1] - 5:20
Reporter [3] - 2:10, 40:4, 40:14
reporter [1] - 3:23
repository [4] - 18:21, 18:25, 19:2, 21:17
represent [3] - 7:12, 13:11, 30:9
representing [1] - 13:13
Request [1] - 38:12
request [8] - 3:20, 5:12, 8:6, 9:4, 10:8, 11:22, 31:22, 34:1
requested [1] - 18:23
requesting [1] - 34:5
required [1] - 23:9
requires [1] - 6:22
requiring [2] - 4:14, 35:10
requisite [1] - 8:12
reside [1] - 24:1
respect [1] - 18:3
respond [1] - 37:1
responded [1] - 34:2
response [3] - 13:14, 23:12, 30:5
rest [1] - 34:24
retention [25] - 4:15, 8:19, 9:19, 10:9, 12:2, 12:8, 12:9, 12:11, 12:24, 12:25, 31:20, 31:24, 32:4, 32:7, 32:12, 32:13, 33:11, 33:14, 33:20, 35:14, 38:6, 38:8, 38:14, 38:20, 38:23
review [2] - 22:24, 24:10
Road [1] - 1:23
road [1] - 17:3
Robin [1] - 9:9
role [1] - 19:13
rolling [2] - 27:2, 29:16
Ronald [1] - 12:21
room [1] - 27:23
Rottmann [13] - 3:16, 5:4, 6:9, 7:25, 13:23, 14:8, 15:25, 16:24, 17:11, 18:4, 18:7, 34:17, 36:8
ROTTMANN [19] - 2:5, 20:11, 27:11, 27:15, 29:22, 30:7, 32:4, 32:22, 33:1, 33:19, 33:24, 34:11, 37:1, 37:4, 37:8, 37:10, 39:6, 39:11, 39:16
roughly [1] - 13:5
RPR [2] - 2:9, 40:13
Rule [2] - 5:18, 6:6
rule [6] - 4:5, 4:24, 5:20, 5:21, 6:3, 35:4
ruling [6] - 38:11, 38:17, 38:19, 39:2, 39:3, 39:5
run [1] - 28:11
running [1] - 15:4

S

sake [1] - 31:21
sale [1] - 35:16
SALLAH [1] - 1:19
Salzedo [1] - 1:17
Sample [1] - 1:23
sampling [1] - 28:20
sat [1] - 36:21
saved [1] - 28:12
scan [1] - 20:3
scanned [3] - 19:22, 19:23, 20:16
scanning [1] - 20:5
schedule [1] - 16:19
scheme [3] - 36:11, 36:13, 36:15
scope [2] - 29:2, 34:17
SCOTT [1] - 1:22
Scott [1] - 3:13
Seaman [1] - 7:10
search [4] - 24:4, 24:5, 36:24
second [3] - 3:25, 8:25, 27:12
secondary [1] - 22:4
securities [4] - 7:1, 9:21, 25:3, 32:17
security [4] - 32:21, 33:16, 38:15, 39:1
see [8] - 5:4, 11:24, 15:15, 23:8, 26:20, 28:25, 33:13, 39:13
seek [1] - 39:2
seeking [2] - 16:14, 22:14
Seeman [23] - 13:19, 21:22, 22:2, 22:5, 22:16, 22:17, 22:18, 22:21, 22:23, 23:24, 23:25, 25:25, 26:3, 26:4, 26:9, 26:12, 26:13, 28:21, 28:22, 28:23, 28:24, 29:23
Seemen [1] - 7:2
sell [1] - 31:13
sending [1] - 23:25
sense [1] - 24:1
sent [4] - 19:1, 19:11, 19:14, 35:19
separately [1] - 32:6
September [2] - 13:3, 16:11
sequel [4] - 31:5, 31:6, 37:19, 37:23
serve [3] - 13:12, 27:18, 28:2
served [4] - 13:1, 16:9, 16:11, 34:4
session [1] - 3:6
sessions [1] - 7:6
setting [1] - 32:5
settlement [2] - 22:4, 22:15
several [1] - 24:9
share [1] - 7:3
shared [1] - 34:6
SHAW [15] - 2:2, 3:15, 18:9, 18:20, 19:9, 19:16, 19:25, 20:2, 20:6, 20:19, 21:2, 21:7, 21:12,

25:21, 27:6
Shaw [23] - 3:15, 5:4, 6:9, 7:25, 9:9, 13:23, 14:8, 15:25, 16:23, 17:11, 17:23, 18:3, 18:6, 20:12, 20:15, 25:5, 25:20, 27:15, 28:6, 28:10, 30:10, 34:17, 36:8
shield [1] - 16:4
show [6] - 12:2, 12:12, 15:18, 26:14, 32:12, 35:8
showed [1] - 15:19
showing [1] - 8:12
shuttered [1] - 29:6
side [5] - 4:5, 4:12, 14:2, 31:2, 33:23
sign [1] - 28:3
signed [1] - 35:10
significant [3] - 24:22, 26:19, 33:21
Silver [1] - 3:13
SILVER [2] - 1:22, 1:23
similar [1] - 34:6
simply [1] - 26:18
single [3] - 12:12, 28:13, 30:11
sit [2] - 15:14, 25:25
six [3] - 28:11, 28:21, 28:23
size [1] - 29:2
small [1] - 9:11
smaller [1] - 26:3
so.. [1] - 37:8
sold [3] - 7:9, 21:15, 22:3
someone [1] - 27:25
sometimes [2] - 27:23, 28:11
somewhat [1] - 5:2
sorry [4] - 20:23, 25:6, 25:8
sort [4] - 5:5, 5:8, 20:8, 21:13
sought [1] - 5:12
sources [1] - 29:18
SOUTHERN [1] - 1:1
Southern [1] - 40:5
spanning [1] - 5:5
speaking [7] - 3:22, 3:24, 4:1, 4:2, 4:8, 18:13, 25:10
specific [6] - 10:12, 22:22, 23:23, 25:10, 33:12, 34:15
specifically [8] - 5:18, 7:16, 11:24, 16:16, 27:17, 32:5, 32:16, 34:5
spent [1] - 18:12
Spett [1] - 3:13
SPETT [1] - 1:22
spoliation [4] - 7:21, 10:6, 10:7, 38:19
Springs [1] - 1:24
start [6] - 4:18, 15:14, 18:11, 18:17, 25:16, 33:2
started [1] - 33:9
starting [3] - 3:11, 8:5, 8:10
starts [1] - 5:13
State [2] - 3:5, 36:11
state [2] - 3:10, 3:22
statements [1] - 32:3
States [3] - 2:10, 40:5, 40:14
STATES [2] - 1:1, 1:11
status [1] - 30:5
step [1] - 10:8
steps [2] - 10:11, 15:17
still [8] - 15:1, 20:17, 21:7, 23:5, 27:25, 34:23, 36:19
storage [1] - 20:7
straightforward [1] - 4:21
streamlined [1] - 6:3
Street [2] - 1:17, 2:5
string [1] - 30:11
stuff [1] - 15:1
Stumphauzer [1] - 5:14
sub [1] - 4:10
subject [2] - 31:25
subpoena [9] - 13:2, 13:12, 13:14, 16:12, 16:19, 30:5, 35:19, 36:10, 36:14
subsequent [1] - 8:9
subset [1] - 26:4
substantively [1] - 34:9
sufficient [2] - 12:1, 12:12
suggests [1] - 33:20
Suite [4] - 1:17, 1:20, 2:3, 2:6
summarizing [1] - 39:5
supposed [4] - 9:15, 9:18, 10:3, 12:20
surely [1] - 16:23
surprised [1] - 5:2
survey [1] - 5:15
sword [1] - 16:4
system [6] - 19:18, 23:5, 29:5, 30:23, 30:25, 31:16
systems [5] - 21:16, 24:11, 30:20, 32:15, 34:21

T

tables [1] - 31:7
Taiwan [1] - 12:10
Takata [3] - 5:14, 6:19, 6:21
talks [1] - 5:19
tangible [1] - 5:23
task [1] - 31:16
ten [10] - 11:10, 11:11, 15:2, 17:21, 17:24, 19:4, 20:17, 35:12, 36:22
term [5] - 17:22, 19:7, 19:8, 25:24, 34:8
terms [4] - 14:5, 24:4, 24:5
testimony [1] - 26:14
text [1] - 6:6
THE [58] - 1:11, 3:2, 3:14, 3:17, 8:18, 9:1, 11:22, 11:24, 13:1, 13:4, 13:8, 13:12, 13:18, 15:21, 16:9, 16:14, 16:18, 16:21, 16:23, 17:4, 17:8, 18:6, 19:7, 19:15, 19:23, 20:1, 20:3, 20:16, 20:23, 21:6, 21:8, 24:18, 25:4, 25:7, 25:9, 25:12, 25:14, 25:20, 27:1, 27:8, 27:14, 29:15, 30:5, 31:19, 32:20, 32:25, 33:7, 33:16, 33:23, 34:8, 34:13, 35:25, 37:3, 37:7, 37:9, 38:9, 39:10, 39:12
themselves [2] - 8:22, 24:24
thereafter [1] - 7:18
therefore [1] - 29:20
they've [4] - 6:13, 9:12, 33:1, 35:12
thinks [1] - 12:5
third [1] - 23:17
third-party [1] - 23:17
thorough [1] - 5:15
three [6] - 3:25, 4:16, 21:24, 22:22, 32:1, 32:3
throughout [1] - 30:12
today [7] - 31:19, 32:10, 34:22, 37:5, 38:11, 38:19, 39:3
took [4] - 10:11, 19:11, 24:3, 24:6
total [2] - 13:17, 19:3
totally [2] - 21:25, 28:16
touch [1] - 22:25
track [1] - 28:5
trading [1] - 12:10
Trail [1] - 1:20
transcribed [1] - 40:6
TRANSCRIBED [2] - 2:8, 3:1
TRANSCRIPT [1] - 1:12
transcript [4] - 3:20, 3:23, 40:9
transferred [10] - 7:18, 8:20, 8:21, 10:17, 10:24, 20:25, 21:4, 21:10, 23:11, 29:7
transferring [1] - 38:1
traveled [2] - 28:14, 28:24
travelled [1] - 28:22
trial [1] - 15:25
Trina [1] - 3:4
trust [7] - 7:9, 12:21, 32:16, 32:21, 33:16, 38:15, 38:25
trustee [3] - 7:1, 9:21, 25:3
try [3] - 15:10, 25:10, 31:10
trying [5] - 12:19, 14:25, 26:23, 26:24, 27:16
turned [1] - 17:5
two [6] - 3:22, 15:9, 25:9, 26:9, 29:23, 38:13

U

ultimately [2] - 8:7, 9:24
under [2] - 5:6, 38:20
understood [1] - 29:22
underway [2] - 11:15, 20:4
unduly [1] - 32:2
unfortunately [1] - 16:7
United [3] - 3:5, 40:5, 40:14
UNITED [2] - 1:1, 1:11
united [1] - 2:10
unless [2] - 15:11, 31:23
unrelated [3] - 22:1, 22:17, 28:16
unsurprisingly [1] - 31:15
unwind [1] - 36:15
up [10] - 9:25, 21:13, 21:15, 22:8, 27:6, 27:21, 35:3, 36:5, 39:13
Utah [1] - 19:13

V

variety [1] - 19:10
various [1] - 9:7
vast [1] - 9:11
vault [3] - 18:18, 20:13, 27:22
vendor [4] - 19:22, 20:7, 20:12, 30:1
verify [1] - 12:21
version [4] - 5:19, 19:15, 19:17, 31:8
versus [4] - 3:8, 11:3, 27:7, 37:21
view [1] - 36:8
violate [1] - 4:24
volume [1] - 26:17
voluminous [3] - 7:6, 17:16, 19:24
vs [1] - 1:6

W

wait [1] - 15:14
waited [1] - 14:19
wants [7] - 4:10, 8:9, 8:13, 11:1, 17:13, 33:11
week [3] - 20:11, 29:25, 30:25
weekend [1] - 39:14
weeks [2] - 29:25, 38:13
Wells [78] - 3:8, 6:10, 6:22, 7:1, 7:8, 7:12, 7:14, 7:17, 8:4, 8:14, 8:19, 9:5, 9:10, 9:14, 9:16, 9:18, 9:19, 10:17, 10:22, 10:25, 11:3, 11:7, 11:13,

11:16, 12:2, 13:10, 14:5, 14:17, 14:20, 15:19, 15:22, 16:10, 18:23, 18:25, 20:25, 21:4, 21:11, 21:15, 22:1, 22:8, 22:11, 22:24, 23:2, 23:4, 23:12, 23:22, 24:10, 24:19, 25:1, 25:2, 25:17, 27:2, 27:18, 28:2, 29:4, 29:6, 30:15, 31:3, 31:13, 31:14, 31:16, 32:13, 32:14, 33:14, 34:20, 35:10, 35:19, 36:1, 36:10, 36:13, 37:17, 37:18, 38:8, 38:13, 38:14, 38:16, 38:20
WELLS [2] - 1:7, 2:1
whole [1] - 5:9
wholly [1] - 22:1
willing [1] - 32:22
WOODS [1] - 2:2
word [1] - 27:9
work-product [1] - 32:1
worthwhile [1] - 29:1
wrapping [1] - 39:13
writes [1] - 27:21
written [3] - 5:14, 12:7, 32:9
wrote [1] - 12:7

X

X's [1] - 21:21

Y

year [1] - 13:3
years [3] - 9:22, 21:25, 31:13
you-all [1] - 3:17

Z

Zoom [1] - 3:18