

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

OMEGA LINER COMPANY, INC.

Petitioner

v.

BUERGOFOL GmbH

Patent Owner

IPR2023-01372

Patent 9,657,882 B2

TRANSCRIPT OF TELEPHONIC PROCEEDINGS

BEFORE GRACE KARAFFA OBERMANN

December 6, 2024

4:00 P.M. Eastern

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1 (Proceedings reported commencing at 4:09 p.m.)

2 MR. WALLACE: The proposed motion for
3 sanctions by petitioner is really based on
4 mischaracterizations of the specification of the
5 inventor's declaration and of these documents
6 that they have recently brought. Petitioner
7 just said that there were multiple falsehoods.
8 There are no falsehoods. I will start with
9 Stark. This relates to our motion that Stark is
10 in multiple litigations with the patent owner
11 and he actively wants to harm patent owner. He
12 signed a declaration saying that everything was,
13 you know, true and correct in the specification
14 for the 882 patent, and now he's saying that it
15 wasn't because the declarations from the
16 inventors are paraphrased from the
17 specification.

18 And he never said that because he was --
19 you know, pretty smart here -- because he could
20 be sued in Germany for perjury, but he never
21 said that anything in those declarations 2003,
22 2004 was false. He just said he could not
23 confirm them, and he underscored it. So we in
24 Germany can't sue him because the DA said that,
25 well, we don't have any specific statement that



1 he said that is incorrect.

2 But there has now come to light emails
3 between counsel for petitioner and Dr. Stark
4 offering to pay money for him to prepare these
5 declarations and to provide testimony, and the
6 declaration and the email show Mr. Stark saying
7 "I have precious information which will help you
8 against Buergofol. They have great fear of me.
9 This is something I am really proud of. I have
10 already talked to Mark Hallett." He's the
11 president of petitioner. "I am no friend of
12 Buergofol and Dr. Schleicher, so I can offer you
13 my help."

14 And then he wants to do it in exchange
15 for license fees of another patent of his. And
16 if he gets that, then he will help petitioner
17 to -- well, he -- to invalidate these patents.
18 So -- this is him, "So I know the 'secret
19 triggers' to press the -- and destroy the
20 patents and to help you out of this misery."

21 So this is a disgruntled former
22 employee, and petitioner is using that person to
23 provide this false testimony, and that is the
24 reason that patent owner in the district court
25 got a protective order to prevent petitioner



1 from getting protected information, work product
2 information from Mr. Stark. And the statements
3 that he was given three business days to sign is
4 totally false and that he was threatened, it was
5 not.

6 Stark signed an assignment when he
7 assigned the 882 patent to patent owner. And in
8 that assignment, which was recorded in the
9 patent office in 2014 or -- I think I got that
10 date right, but it says that the inventor will
11 do everything to help the patent owner, the
12 assignee, to enforce the patent, to protect the
13 patent rights. And so that is a breach of
14 contract for him not to cooperate with patent
15 owner by signing the draft declaration that I
16 sent. It's also a violation of the German
17 Employee Inventor Act because he also has a duty
18 of loyalty to patent owner, which is also --
19 well, there are -- there are also criminal case
20 penalties for breaching the secrecy laws.

21 So the German attorney who forwarded the
22 draft declaration to him was simply reminding
23 him of his duties, contractual and duties of
24 loyalty statutory, to cooperate. And there was
25 no mention that he had to sign anything in



1 three days, so it's a misrepresentation for
2 petitioner to say that Stark was forced to sign
3 something.

4 He was given my contact information, and
5 he was supposed to contact me and he never did.
6 Instead, he intentionally contacted the counsel
7 for petitioner and said "I know how we can hurt
8 Buergofol" instead of cooperating.

9 So the petitioner has no case in its
10 motion for sanctions, and it's based just on
11 misrepresentation of these documents. For
12 example, the customer complaints where they say
13 "massive problem," there were no massive
14 problems. There were --

15 THE COURT: Mr. Wallace?

16 MR. WALLACE: Yes?

17 THE COURT: I'm sorry to interrupt, but
18 you are definitely drifting into the merits
19 here. I think I understand --

20 MR. WALLACE: Okay.

21 THE COURT: -- your position, but the
22 arguments that you're making, I understand that
23 both sides are very charged about this, but
24 these are arguments that could be made in
25 response to a motion to sanction.

1 What I'm really looking for here is --
2 you know, these are serious allegations. We
3 have director decisions that talk about the
4 seriousness of allegations of misrepresentations
5 before the board. I'm not saying that there are
6 misrepresentations here. I'm just, you know,
7 looking at whether or not we should entertain
8 briefing on these very serious issues.

9 So I think that we've heard enough at
10 this point to rule on whether we should
11 authorize this motion. I'm going to hold it in
12 abeyance, and I'm going to issue an order on
13 this.

14 But first let me just check with my
15 panelists to see if any of my panelists have
16 questions for either patent owner or petitioner,
17 if you'd just hold for one second.

18 (Brief pause.)

19 THE COURT: Okay. It does not appear
20 that we have any questions. We will issue a
21 ruling, you know, in an order following this
22 conference in a timely fashion.

23 With that, I think we can turn to patent
24 owner's request for authorization to file its
25 sanctions motion.



1 Mr. Wallace, will you be presenting
2 argument on that?

3 MR. WALLACE: Yes, I will, Your Honor.

4 THE COURT: Okay. You have ten minutes.
5 When you're ready.

6 MR. WALLACE: Patent owner is proposing
7 a motion for sanctions because of the ethical
8 violations of petitioner's counsel who not only
9 violated the protective order by soliciting
10 confidential information, but violated ethics
11 rules by receiving the draft declaration from
12 Dr. Stark and then not informing a patent owner
13 and actually using it. And so this is -- there
14 are very -- it violates PTO rules and ethics
15 opinions in D.C. and Maryland, and it's an
16 ethics violation to receive a document that you
17 know or should know to be attorney work product
18 and then not to notify the owner of the
19 document.

20 I believe that petitioner will argue
21 that those rules only apply to inadvertent
22 disclosure and then will say that Starks
23 intentionally trying to harm patent owner and
24 giving that information to petitioner was not
25 inadvertent, but that mischaracterizes the



1 ethics rules. It's the intention of the owner
2 of the document that is important, and patent
3 owner definitely did not intend for the draft
4 declaration to be sent to opposing counsel.

5 Second, I believe that petitioner will
6 argue, well, there's no confidential information
7 in the draft declaration, but that is
8 immaterial. The point of attorney work product
9 is that it shows the attorney's mental
10 impression. So even if all the underlying facts
11 in the draft declaration would ultimately become
12 known, it's the attorney who collected those
13 facts and determined which facts are important
14 to present or support the patent owner's
15 arguments.

16 And this is not a signed declaration,
17 this is a draft declaration. So the point is
18 for the attorney to propose certain facts and
19 then discuss that with the inventor and to
20 determine the best course of action. And that
21 draft declaration with the topics that the
22 attorney has picked out was then disclosed to
23 opposing counsel. So the opposing counsel
24 should be disqualified because they cannot
25 unlearn what they saw in the draft declaration



1 which was definitely work product protected.

2 THE COURT: Can I ask a question?

3 MR. WALLACE: Sure.

4 THE COURT: I'm sorry that I didn't ask
5 this with respect to petition's motion either.
6 What is the relief that you're requesting? I
7 just heard you say that you wanted to disqualify
8 counsel.

9 MR. WALLACE: Correct, Your Honor. But
10 also the relief is that these -- all arguments
11 based on the draft declaration should be
12 stricken. And in petitioner's motion, they want
13 to use this draft declaration where the inventor
14 underlined certain things and said he could not
15 confirm them, and they construe that to be
16 stating that those paragraphs, which is about a
17 quarter of the many-page document, they're
18 saying that those are false statements because
19 the inventor underlined them and said he could
20 not confirm them. That should not be able to be
21 brought up in the -- in any substantive
22 arguments in this IPR because the petitioner
23 never should have gotten a document, and they're
24 just misconstruing what this disgruntled former
25 employee is stating for their arguments. So the

1 relief is that those documents will be expunged
2 and all arguments based on that.

3 THE COURT: Okay. So that would be the
4 relief that's in your motion.

5 MR. WALLACE: Correct, correct.

6 THE COURT: Okay. And it sounds to me
7 that the motion is based on the allegation that
8 Exhibits 1070 through 1072 reflect protected
9 work product.

10 MR. WALLACE: Yes, correct.

11 THE COURT: Okay. Thank you. We
12 understand the position that you're taking.
13 Thank you very much.

14 I'd like to turn back to petitioner.
15 And before we have you address or respond to
16 patent owner's request for authorization, I just
17 want to ask you in connection with your own
18 motion for sanctions, petitioner, what is the
19 relief that you will be requesting?

20 MR. McKEOWN: Yes. Thank you, Your
21 Honor. Originally when we sent the motion over
22 to patent owner, we were requesting adverse
23 judgment. Since that time, in our view, there's
24 been significant frivolous motion practice, so
25 we would be seeking adverse judgment or in the

1 alternative costs for those motions.

2 THE COURT: But not both.

3 MR. McKEOWN: Right.

4 THE COURT: Okay. Thank you.

5 With that, you have five minutes to
6 respond to patent owner's argument in connection
7 with their own proposed motion for sanctions.

8 MR. McKEOWN: Thank you. And just
9 briefly, on petitioner's motions, all of that
10 argument about hiring Stark and all these
11 things, none of that is in evidence. None of
12 that has ever been discussed anywhere prior to
13 this call. This is the first I've heard any of
14 it. The reason that we have a safe harbor is to
15 go through those issues, so I can only assume
16 that there's not much there. But, in any event,
17 patent owner, even though it decided to raise
18 these issues late, can argue that in its
19 sanctions. I would have liked to have heard all
20 about that sooner.

21 But getting to the patent owner's
22 motion, this is clearly retaliatory. You can
23 hear from the conversation we just had this is a
24 lot of cut and pasting from the previous
25 motions. They're asking for expungement.

1 They've already asked for all of that stuff.

2 You know, primarily their argument here
3 is that this is a violation of the protective
4 order or somehow it's a violation of the court
5 order. There's a motion pending before the
6 court on that. It would be very strange for the
7 agency in the first instance to be construing
8 the court's order and trying to determine, you
9 know, why it was written in the first place,
10 what's the scope of that order. That's all been
11 teed up for the district court, and it would
12 seem like the district court should be
13 interpreting its order in the first instance.

14 The rest of this stuff, they've not
15 identified any authority or PTO rules. They've
16 generally referenced, you know, District of
17 Columbia's ethics rules and things. But all of
18 this hinges on their work product theory. And
19 in the first part of this call, they make
20 Dr. Stark out to be this dastardly individual
21 who supposedly has all this confidential
22 information of theirs that they sent to them.
23 It just doesn't make any sense at all. Either
24 Dr. Stark can't be trusted or he's somehow an
25 agent of the patent owner. It can't be both.



1 So, you know, this idea that this was
2 work product and that the lead inventor of this
3 patent when he said he couldn't confirm
4 something is somehow -- you know, maybe saying
5 it's still true also, you know, doesn't make a
6 lot of sense.

7 So, you know, ultimately this is
8 retaliation. You know, this is all argument
9 that's been cut and pasted, like I said, from
10 the earlier exhibits, and there's no basis,
11 there's nothing that the board can do with this.
12 The board, at least in my view, shouldn't be at
13 least deciding the scope of court orders in the
14 first instance. Certainly the court understands
15 why it issued that order. Us arguing here about
16 what the real purpose was doesn't make a lot of
17 sense. It was for oral interviews. It has
18 nothing to do with what's been going on here.

19 So, you know, the exhibits that we've
20 submitted speak for themselves. There was a
21 threat of litigation and damages. It's right
22 there in the exhibits. And these exhibits are
23 not protected, has nothing to do with
24 inadvertent disclosure. This is third-party.
25 We went out and got this from other people,

1 including the Saertex emails going to Saertex
2 themselves. And setting all of that side,
3 there's a crime fraud exception here. We think
4 there's blatant misrepresentations in these
5 declarations. And even accepting that somehow
6 there was some work product, that does not trump
7 the duty of candor here, so we don't believe
8 that their sanction motion is anything but
9 frivolous, and we oppose it for that reason.

10 THE COURT: Thank you, Mr. McKeown.

11 I'm going to put the parties on mute
12 just for a moment while I find out if there are
13 any questions. Oh, there is a question. This
14 is for -- well, I guess it's for patent owner.

15 Is Dr. Stark a fact witness or an expert
16 witness? When you sent Dr. Stark that
17 declaration, the draft, was that in his capacity
18 as a fact witness?

19 MR. WALLACE: That was a fact witness
20 just like the other two inventors.

21 THE COURT: Thank you very much.

22 Let me see if there are any other
23 questions from my panelists.

24 (Brief pause.)

25 THE COURT: Okay. No other questions.



1 Thank you, counsel, very much. I think that we
2 have enough here that the board will be able to
3 issue an order in due course resolving both
4 requests for authorization to file a motion for
5 sanctions.

6 While you have the panel on the line, is
7 there anything else that you need to have
8 addressed.

9 Patent owner?

10 MR. WALLACE: Not that I can think of
11 now.

12 THE COURT: Thank you.
13 Petitioner?

14 MR. McKEOWN: None for petitioner, Your
15 Honor. Thank you.

16 THE COURT: Thank you, counsel. And
17 with that, we will adjourn the call.

18 (Proceedings concluded at 4:29 p.m.)
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CERTIFICATE

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

I, Gary Schneider, a shorthand reporter, do
hereby certify that the foregoing proceedings were
taken down and transcribed under my direction to
the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my
hand on December 7, 2024.

Gary Schneider
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My commission expires: 3/3/2026



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LEGAL SERVICES

OMEGA EX1085 Page 18 of 25

Omega Liner Company, Inc. v. Buergofol GmbH

A abeyance 7:12 ability 17:8 able 10:20 16:2 accepting 15:5 Act 5:17 action 9:20 actively 3:11 address 11:15 addressed 16:8 adjourn 16:17 adverse 11:22,25 agency 13:7 agent 13:25 allegation 11:7 allegations 7:2,4 alternative 12:1 APPEAL 1:4 appear 7:19 APPEARANCES 2:1 apply 8:21 argue 8:20 9:6 12:18 arguing 14:15	argument 8:2 12:6,10 13:2 14:8 arguments 6:22,24 9:15 10:10 10:22,25 11:2 asked 13:1 asking 12:25 assigned 5:7 assignee 5:12 assignment 5:6,8 assume 12:15 attorney 5:21 8:17 9:8,12,18 9:22 attorney's 9:9 authority 13:15 authorization 7:24 11:16 16:4 authorize 7:11 Avenue 2:4 B B2 1:14 back 11:14 based 3:3 6:10 10:11 11:2,7 basis 14:10 believe 8:20 9:5 15:7 best 9:20 17:8 blatant 15:4	board 1:4 7:5 14:11,12 16:2 Box 2:8 breach 5:13 breaching 5:20 Brief 7:18 15:24 briefing 7:8 briefly 12:9 brought 3:6 10:21 Buergofol 1:9 4:8,12 6:8 business 5:3 C CA 2:9 call 12:13 13:19 16:17 candor 15:7 capacity 15:17 case 5:19 6:9 certain 9:18 10:14 Certainly 14:14 CERTIFICATE 17:1 certify 17:6 charged 6:23 check 7:14 clearly 12:22	collected 9:12 Columbia's 13:17 come 4:2 commencing 3:1 commission 17:18 COMPANY 1:6 complaints 6:12 concluded 16:18 conference 7:22 confidential 8:10 9:6 13:21 confirm 3:23 10:15,20 14:3 connection 11:17 12:6 construe 10:15 construing 13:7 contact 6:4,5 contacted 6:6 contract 5:14 contractual 5:23 conversation 12:23 cooperate 5:14,24 cooperating 6:8 correct 3:13 10:9 11:5,5,10 costs 12:1
--	--	---	---

counsel 4:3 6:6 8:8 9:4,23,23 10:8 16:1,16 COUNTY 17:3 course 9:20 16:3 court 4:24 6:15,17,21 7:19 8:4 10:2,4 11:3,6,11 12:2,4 13:4,6,11,12 14:13,14 15:10,21 15:25 16:12,16 court's 13:8 crime 15:3 criminal 5:19 CRR 17:17 customer 6:12 cut 12:24 14:9	1:18 17:11 decided 12:17 deciding 14:13 decisions 7:3 declaration 3:5,12 4:6 5:15,22 8:11 9:4,7,11,16,17 9:21,25 10:11,13 15:17 declarations 3:15,21 4:5 15:5 definitely 6:18 9:3 10:1 destroy 4:19 determine 9:20 13:8 determined 9:13 direction 17:7 director 7:3 disclosed 9:22 disclosure 8:22 14:24 discuss 9:19 discussed 12:12 disgruntled 4:21 10:24 disqualified 9:24 disqualify 10:7 district 4:24 13:11,12,16 document 8:16,19 9:2 10:17,23 documents 3:5 6:11 11:1	Dr 4:3,12 8:12 13:20,24 15:15,16 draft 5:15,22 8:11 9:3,7,11 9:17,21,25 10:11,13 15:17 drifting 6:18 due 16:3 duties 5:23,23 duty 5:17 15:7	15:3 exchange 4:14 exhibits 11:8 14:10,19,22,22 expert 15:15 expires 17:18 expunged 11:1 expungement 12:25
D		E	F
D.C 2:4 8:15 DA 3:24 damages 14:21 DARIEN 2:7 Darien@Imperiu... 2:10 dastardly 13:20 date 5:10 DAVIDSON 17:3 days 5:3 6:1 December		earlier 14:10 Eastern 1:19 either 7:16 10:5 13:23 email 4:6 emails 4:2 15:1 employee 4:22 5:17 10:25 enforce 5:12 entertain 7:7 ESQ 2:3,7 ethical 8:7 ethics 8:10,14,16 9:1 13:17 event 12:16 evidence 12:11 example 6:12 exception	fact 15:15,18,19 facts 9:10,13,13,18 false 3:22 4:23 5:4 10:18 falsehoods 3:7,8 fashion 7:22 fear 4:8 fees 4:15 file 7:24 16:4 find 15:12 first 7:14 12:13 13:7,9,13 13:19 14:14 five 12:5 following 7:21 forced 6:2 foregoing 17:6 former 4:21 10:24

forwarded 5:21	17:11	4:7 5:1,2 6:4 8:10,24	3:13,19 4:18 6:7 7:2
fraud 15:3	harbor 12:14	9:6 13:22	7:6,21 8:17,17 13:2
friend 4:11	harm 3:11 8:23	informing 8:12	13:9,16 14:1,4,5,7,8
frivolous 11:24 15:9	hear 12:23	instance 13:7,13 14:14	14:19
	heard 7:9 10:7 12:13,19	intend 9:3	known 9:12
G	help 4:7,13,16,20 5:11	intention 9:1	L
Gary 17:5,17	hereunto 17:10	intentionally 6:6 8:23	late 12:18
generally 13:16	hinges 13:18	interpreting 13:13	laws 5:20
German 5:16,21	hiring 12:10	interrupt 6:17	LCR 17:17
Germany 3:20,24	hold 7:11,17	interviews 14:17	lead 14:2
getting 5:1 12:21	Honor 8:3 10:9 11:21 16:15	invalidate 4:17	license 4:15
given 5:3 6:4	hurt 6:7	inventor 5:10,17 9:19 10:13	light 4:2
giving 8:24		10:19 14:2	liked 12:19
GmbH 1:9	I	inventor's 3:5	line 16:6
go 12:15	idea 14:1	inventors 3:16 15:20	LINER 1:6
going 7:11,12 14:18 15:1	identified 13:15	IPR 10:22	litigation 14:21
15:11	immaterial 9:8	IPR2023-01372 1:13	litigations 3:10
gotten 10:23	Imperium 2:8	issue 7:12,20 16:3	looking 7:1,7
GRACE 1:17	important 9:2,13	issued 14:15	lot 12:24 14:6,16
great 4:8	impression 9:10	issues 7:8 12:15,18	loyalty 5:18,24
Greenfield 2:3	inadvertent 8:21,25 14:24		M
guess 15:14	including 15:1	J	making 6:22
	incorrect 4:1	judgment 11:23,25	many-page 10:17
H	individual 13:20	K	Mark 4:10
Hallett 4:10	information	KARAFFA 1:17	Maryland 8:15
hand		know	

Massachusetts 2:4 massive 6:13,13 McKEOWN 2:3 11:20 12:3,8 15:10 16:14 mental 9:9 mention 5:25 merits 6:18 minutes 8:4 12:5 mischaracterizations 3:4 mischaracterizes 8:25 misconstruing 10:24 misery 4:20 misrepresentation 6:1,11 misrepresentations 7:4,6 15:4 moment 15:12 money 4:4 motion 3:2,9 6:10,25 7:11,25 8:7 10:5,12 11:4,7 11:18,21,24 12:7,22 13:5 15:8 16:4 motions 12:1,9,25 multiple 3:7,10 mute 15:11	never 3:18,20 6:5 10:23 notify 8:18 NW 2:4	7:24 9:14 11:16 12:6 12:21	14:25 perjury 3:20 person 4:22 petition's 10:5 petitioner 1:7 2:2 3:3,6 4:3,11 4:16,22,25 6:2,7,9 7:16 8:20,24 9:5 10:22 11:14,18 16:13,14 petitioner's 8:8 10:12 12:9 picked 9:22 place 13:9 Pleasanton 2:9 point 7:10 9:8,17 position 6:21 11:12 practice 11:24 precious 4:7 prepare 4:4 present 9:14 presenting 8:1 president 4:11 press 4:19 pretty 3:19 prevent 4:25 previous 12:24 primarily
	O	P	
	OBERMANN 1:17 offer 4:12 offering 4:4 office 1:2 5:9 Oh 15:13 Okay 6:20 7:19 8:4 11:3,6 11:11 12:4 15:25 OMEGA 1:6 opinions 8:15 oppose 15:9 opposing 9:4,23,23 oral 14:17 order 4:25 7:12,21 8:9 13:4 13:5,8,10,13 14:15 16:3 orders 14:13 Originally 11:21 owner 1:10 2:6 3:10,11 4:24 5:7,11,15,18 7:16 8:6,12,18,23 9:1,3 11:22 12:17 13:25 15:14 16:9 owner's	P.C 2:3 p.m 1:19 3:1 16:18 P.O 2:8 panel 16:6 panelists 7:15,15 15:23 paragraphs 10:16 paraphrased 3:16 part 13:19 parties 15:11 pasted 14:9 pasting 12:24 patent 1:2,4,10,14 2:6,8 3:10,11,14 4:15,24 5:7,7,9,11,12,13,14 5:18 7:16,23 8:6,12 8:23 9:2,14 11:16 11:22 12:6,17,21 13:25 14:3 15:14 16:9 patents 4:17,20 pause 7:18 15:24 pay 4:4 penalties 5:20 pending 13:5 people	
	N		
need 16:7			

13:2 prior 12:12 problem 6:13 problems 6:14 proceedings 1:16 3:1 16:18 17:6 product 5:1 8:17 9:8 10:1 11:9 13:18 14:2 15:6 propose 9:18 proposed 3:2 12:7 proposing 8:6 protect 5:12 protected 5:1 10:1 11:8 14:23 protective 4:25 8:9 13:3 proud 4:9 provide 4:5,23 PTO 8:14 13:15 purpose 14:16 put 15:11	12:17 ready 8:5 real 14:16 really 3:3 4:9 7:1 reason 4:24 12:14 15:9 receive 8:16 receiving 8:11 recorded 5:8 referenced 13:16 reflect 11:8 relates 3:9 relief 10:6,10 11:1,4,19 reminding 5:22 reported 3:1 reporter 17:5 request 7:24 11:16 requesting 10:6 11:19,22 requests 16:4 resolving 16:3 respect 10:5 respond 11:15 12:6 response 6:25 rest 13:14 retaliation	14:8 retaliatory 12:22 right 5:10 12:3 14:21 rights 5:13 RMR 17:17 RPR 17:17 rule 7:10 rules 8:11,14,21 9:1 13:15 13:17 ruling 7:21 S Sacks 2:3 Saertex 15:1,1 safe 12:14 sanction 6:25 15:8 sanctions 3:3 6:10 7:25 8:7 11:18 12:7,19 16:5 saw 9:25 saying 3:12,14 4:6 7:5 10:18 14:4 says 5:10 Schleicher 4:12 Schneider 17:5,17 scope 13:10 14:13 SCOTT 2:3	Scott.McKeown@... 2:5 second 7:17 9:5 secrecy 5:20 secret 4:18 see 7:15 15:22 seeking 11:25 sense 13:23 14:6,17 sent 5:16 9:4 11:21 13:22 15:16 serious 7:2,8 seriousness 7:4 set 17:10 setting 15:2 shorthand 17:5 show 4:6 shows 9:9 side 15:2 sides 6:23 sign 5:3,25 6:2 signed 3:12 5:6 9:16 significant 11:24 signing 5:15 simply 5:22 smart
Q quarter 10:17 question 10:2 15:13 questions 7:16,20 15:13,23,25			
R raise			

3:19 soliciting 8:9 sooner 12:20 sorry 6:17 10:4 sounds 11:6 speak 14:20 specific 3:25 specification 3:4,13,17 Stark 3:9,9 4:3,6 5:2,6 6:2 8:12 12:10 13:20,24 15:15,16 Starks 8:22 start 3:8 STATE 17:3 statement 3:25 statements 5:2 10:18 STATES 1:2 stating 10:16,25 statutory 5:24 strange 13:6 stricken 10:12 stuff 13:1,14 submitted 14:20 substantive 10:21 sue	3:24 sued 3:20 support 9:14 supposed 6:5 supposedly 13:21 Sure 10:3 T taken 17:7 talk 7:3 talked 4:10 teed 13:11 TELEPHONIC 1:16 ten 8:4 TENNESSEE 17:3 testimony 4:5,23 Thank 11:11,13,20 12:4,8 15:10,21 16:1,12,15 16:16 theirs 13:22 theory 13:18 things 10:14 12:11 13:17 think 5:9 6:19 7:9,23 15:3 16:1,10 third-party 14:24 threat 14:21	threatened 5:4 three 5:3 6:1 time 11:23 timely 7:22 topics 9:21 totally 5:4 TRADEMARK 1:2 transcribed 17:7 TRANSCRIPT 1:16 TRIAL 1:4 triggers' 4:19 true 3:13 14:5 trump 15:6 trusted 13:24 trying 8:23 13:8 turn 7:23 11:14 two 15:20 U ultimately 9:11 14:7 underlined 10:14,19 underlying 9:10 underscored 3:23 understand 6:19,22 11:12	understands 14:14 UNITED 1:2 unlearn 9:25 use 10:13 V v 1:8 view 11:23 14:12 violated 8:9,10 violates 8:14 violation 5:16 8:16 13:3,4 violations 8:8 W Wallace 2:7 3:2 6:15,16,20 8:1,3,6 10:3,9 11:5 11:10 15:19 16:10 want 10:12 11:17 wanted 10:7 wants 3:11 4:14 Washington 2:4 wasn't 3:15 we've 7:9 14:19 went 14:25 WHEREOF 17:10 witness 15:15,16,18,19 17:10
--	---	--	--

Wolf	3:1		
2:3	4:29		
work	16:18		
5:1 8:17 9:8 10:1			
11:9 13:18 14:2	5		
15:6			
Works	6		
2:8	6		
written	1:18		
13:9	601		
	2:4		
X	607		
	2:8		
Y	676		
	17:17		
Z			
	7		
0	7		
	17:11		
1			
1070	8		
11:8	882		
1072	3:14 5:7		
11:8			
	9		
2	9,657,882		
20001	1:14		
2:4	925.331.8099		
2003	2:9		
3:21	94566		
2004	2:9		
3:22			
2014			
5:9			
202.389.6025			
2:5			
2024			
1:18 17:11			
3			
3/3/2026			
17:18			
4			
4:00			
1:19			
4:09			