

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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IN RE: ) GJ 18-41  
Grand Jury Subpoena 7049 )  
)  
Interested Parties, ) March 27, 2019  
CORPORATION, ) 11:28 a.m.  
GOVERNMENT, ) Washington, D.C.  
MOVANT, )

\* \* \* \* \*

**TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE BERYL A. HOWELL,  
UNITED STATES DISTRICT COURT CHIEF JUDGE**

**APPEARANCES:**

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**P R O C E E D I N G S**

1  
2 THE DEPUTY: Matter before the Court, grand jury  
3 matter 18-41 in regards to grand jury subpoena No. 7049,  
4 Counsel for the interested party, corporation; Government;  
5 movant, Reporters Committee For Freedom of the Press.

6 Please come forward and identify yourselves for  
7 the record.

8 MR. BOUTROUS: Good morning, Your Honor.  
9 Theodore Boutrous for the Reporters Committee For Freedom of  
10 the Press. I am joined by my colleagues Lee Crain and Katie  
11 Townsend from the Reporters Committee.

12 We are pleased to be here. Thank you, Your Honor.

13 THE COURT: Yes. Good morning.

14 The Government -- well, Mr. Boone.

15 MR. BOONE: Brian Boone from Alston & Bird for the  
16 corporation. With me today are Karl Geercken, Ted Kang, and  
17 Lee Deneen, also from Alston & Bird.

18 THE COURT: Yes. Thank you.

19 MR. GOODHAND: Good morning, Your Honor.  
20 David Goodhand for the United States. With me at counsel's  
21 table is Zia Faruqui and Peter Lallas.

22 THE COURT: All right. Well, welcome, everybody.

23 Let me just begin by reviewing where we are in the  
24 case because the Reporters Committee has before me a motion  
25 to unseal redacted versions, by my count, of the briefs, the

1 record, transcripts and orders in this action, as well as  
2 the identity of the corporation, that is, the contemnor.

3 And let me just start by making clear or  
4 summarizing what's already been made public in this case at  
5 multiple levels of the federal judiciary.

6 In the District Court, I have already released a  
7 redacted copy of the docket sheet as of January 31, 2019;  
8 redacted copies of six memoranda, including the contempt  
9 order in this case, which is docketed at ECF 30. The D.C.  
10 Circuit has made the docket public, as well as redacted  
11 forms of its opinion, the parties' briefs regarding  
12 unsealing.

13 And my understanding is that the parties before  
14 the D.C. Circuit are in the midst right now of an ongoing  
15 effort to redact the parties' substantive briefs so that  
16 redacted versions of those briefs can be made public.

17 The Supreme Court has made the docket itself  
18 public, as well as redacted versions of the parties' briefs  
19 regarding the stay of the contempt order in this case;  
20 redacted versions of the parties' briefs regarding the  
21 petition for certiorari; and unredacted versions of the  
22 parties' briefing regarding the Reporters Committee's motion  
23 to unseal before the Supreme Court. Neither the D.C.  
24 Circuit nor the Supreme Court has revealed the identity of  
25 the contemnor.

1           So part -- from where I sit, part of the Reporters  
2 Committee motion seeking redacted versions of the briefing  
3 is, in some ways, just to have this Court catch up with the  
4 redacted versions of briefing that is already available on  
5 the Supreme Court docket, and I think is going to be made  
6 available on the D.C. Circuit's docket.

7           Mr. Goodhand, is that a fairly accurate summary?

8           MR. GOODHAND: Yes, that's my understanding, Your  
9 Honor.

10          THE COURT: Okay. Do you know when, before the  
11 D.C. Circuit, all of those redacted versions of briefs will  
12 be made available?

13          MR. GOODHAND: Your Honor, actually -- I'm sorry.

14          I communicated this morning with the assistant to  
15 handle this matter in the D.C. Circuit. And I actually  
16 asked if the redactions had been completed of both briefs,  
17 and the transcripts of the oral argument. He emailed those  
18 to me. And I actually didn't follow up -- I didn't have  
19 time, actually, to follow up and see whether they had been  
20 filed. That suggests to me, however, if they haven't  
21 already been filed, it is very soon.

22          THE COURT: All right. Well, I think, from my  
23 review of the docket there, the corporation doesn't have to  
24 respond until March 27th. So I don't think that any of them  
25 have been actually filed yet. You are just still in the

1 process of going back with redactions.

2 Is that correct, Mr. Boone?

3 MR. BOONE: That's correct, Your Honor.

4 THE COURT: All right. Okay.

5 So I am going to -- just so everybody understands  
6 the structure of how I'm going to conduct the hearing this  
7 morning, I am going to start with some clarifying questions  
8 to Mr. Boone on behalf of the corporation, and then I will  
9 turn to the Reporters Committee.

10 So just to begin, Mr. Boone, on behalf of the  
11 corporation, the corporation is aware that it had the right  
12 to request that the contempt proceedings in this matter be  
13 open to the public; is that correct?

14 MR. BOONE: That is correct, Your Honor.

15 THE COURT: And just to confirm, no such request  
16 was ever made; is that correct?

17 MR. BOONE: That's right.

18 THE COURT: The Reporters Committee highlights the  
19 fact that the corporation has taken no position on its  
20 unsealing request, suggesting that the corporation has no  
21 interest in preserving secrecy here. Is it correct that the  
22 corporation has no interest in preserving secrecy here?

23 MR. BOONE: That's not correct.

24 My client would prefer not to have its identity  
25 disclosed to the public.

1 THE COURT: Do you want to articulate any reasons  
2 in a public hearing for why that is?

3 MR. BOONE: I'd prefer not to at a public hearing.

4 THE COURT: All right. Is the corporation willing  
5 to participate in the task, should I order it, of -- that is  
6 already being undertaken before the Circuit of redacting the  
7 briefs, transcripts, and other orders for public versions to  
8 be made available to the public?

9 MR. BOONE: We're happy to participate in that  
10 process.

11 THE COURT: All right. Thank you. You may be  
12 seated.

13 MR. BOONE: Thank you, Your Honor.

14 THE COURT: All right. Mr. Boutrous.

15 MR. BOUTROUS: Thank you very much, Your Honor.

16 Thank you, again, for hearing us today, because I  
17 think these are very important issues. I know the Court has  
18 been focused on transparency. We really appreciate the  
19 Court issuing the redacted orders --

20 THE COURT: Just so the record is clear: The  
21 corporation is excused.

22 MR. BOONE: Thank you, Your Honor.

23 (Whereupon, counsel for the corporation exit the  
24 courtroom.)

25 MR. BOUTROUS: We hate to see them go. You are

1 welcome to stay, though.

2 We spent on the briefing -- I think you captured  
3 it exactly right. Our first line request to the Court is  
4 to, basically, catch up. A lot has been disclosed, and the  
5 Court summarized it, I think, perfectly.

6 We have briefed First Amendment issues and  
7 common-law issues. But I don't think the Court really needs  
8 to reach those because Rule 6.1 of this court and  
9 Rule 6(e)(6) regarding the unsealing of documents in the  
10 D.C. Circuit's decision in *Dow Jones* and *In Re Sealed Case*,  
11 this Court's decision in the *CNN* case regarding the *Starr*  
12 investigation all demonstrate that just -- basically, the  
13 test is whether sealing is necessary to protect --

14 THE COURT: Mr. Boutrous, are you telling me that  
15 you spent so much of your brief talking about the First  
16 Amendment right of access and the common-law right of  
17 access; but you are telling me now that I really don't have  
18 to worry my mind with those more interesting constitutional  
19 issues?

20 MR. BOUTROUS: Only if you don't go with me on the  
21 first part. Because I think that they do provide -- since  
22 it is a contempt proceeding, the contempt proceedings which  
23 are called out by both rules as potentially being open, and  
24 Rule 65 says that it's subject -- closure subject to any  
25 right to open this; it doesn't limit it to the witness's

1 rights. I think that adds a First Amendment dimension.

2 Again, there is a long history of contempt  
3 proceedings being open, both to --

4 THE COURT: Let me just -- let me start with one  
5 of the more troublesome aspects of your request and see if  
6 we can just get that resolved right now.

7 One of the things that you requested is that the  
8 contemnor be identified, which is why I felt it important  
9 for the corporation to make clear it does not want to be  
10 identified.

11 So from my reading of *Dow Jones*, the  
12 D.C. Circuit's decision in 1998, it says in no uncertain  
13 terms that the First Amendment does not provide a right of  
14 access to the identities of witnesses or jurors in grand  
15 jury proceedings. So doesn't that opinion foreclose  
16 disclosure of the corporation's identity here?

17 MR. BOUTROUS: I don't think so, Your Honor,  
18 because it is a contempt proceeding. I think the public has  
19 a particular interest in scrutinizing a contempt proceeding.  
20 And this Court's decision on the *Lewinsky, Starr* matter held  
21 that there is an inherent power of the Court to release  
22 grand jury information beyond the exceptions to the rule --  
23 that are contained in Rule 6(e). Here we really have --

24 THE COURT: That is a matter that's not pending in  
25 front of the D.C. Circuit. It's not my case, but in another



1 case -- whether I have that inherent authority.

2 MR. BOUTROUS: Correct. But I think the Court's  
3 decision is absolutely correct. The Court relied on the  
4 decisions from other circuits that are correct.

5 I think the key here is the unique circumstances  
6 that we are in, that this is not an ordinary witness. This,  
7 according to the contemnor's counsel, is a country, a  
8 nation. We have foreign policy issues here where this  
9 country has been taking the position in this court, to the  
10 Supreme Court and back, that they're not even subject to the  
11 grand jury --

12 THE COURT: No. Let me make sure you are  
13 understanding correctly. The contemnor in this case is a  
14 corporation that is owned by a foreign sovereign. It is not  
15 the foreign sovereign itself.

16 MR. BOUTROUS: All right. That was what I  
17 understood, Your Honor. But then I noticed that the briefs  
18 that the contemnor filed in the Supreme Court referred to  
19 itself as "Country A" as opposed to the company. I'm, of  
20 course, working at a disadvantage; I'm reading between the  
21 lines.

22 What I inferred from that is that they were  
23 seeking to persuade this Court and other courts that they  
24 really were one and the same as the country. And one of the  
25 core issues for the public to be able to understand what

1 this case is all about is to know what the facts are and who  
2 the company is.

3 It seems to me that here where Special Counsel  
4 Mueller has submitted his report to the Attorney General,  
5 the Attorney General has submitted a four-page summary -- we  
6 don't really know what the conclusions really are; that this  
7 is a time for this Court, consistent with the rules, its  
8 inherent authority --

9 THE COURT: And that is -- just so you know, that  
10 is one of the questions I will ask the Government to  
11 explain, why are we still here, in terms of the fact that  
12 the special counsel's report has been delivered and whether  
13 this contempt proceeding continues or not.

14 MR. BOUTROUS: I was wondering what that -- what  
15 was the status of that myself because it certainly seemed  
16 the report is in. In reading all of the public materials,  
17 including this Court's order --

18 THE COURT: And the reason that that question is  
19 important, I think, is to clarify whether there is a closed  
20 grand jury investigation now or whether this is a grand jury  
21 investigation that is continuing. Because I think you would  
22 concede, wouldn't you, Mr. Boutrous, that if it is an  
23 ongoing grand jury investigation that the redactions and the  
24 amount of information that can be publicly disclosed has to  
25 be measured against the needs of an ongoing grand jury

1 investigation, correct?

2 MR. BOUTROUS: Yes, Your Honor. I agree with  
3 that. It was interesting. On Friday we filed our reply  
4 brief. And then, suddenly, your decision in the *CNN*,  
5 Independent Counsel Starr decision became much more  
6 relevant, because we were -- at least, from a public  
7 perspective, it seems that the grand jury investigation that  
8 was working with Special Counsel Mueller is done. At least  
9 that's what it looks like.

10 If there are strands -- and I guess this contempt  
11 proceeding would be one of them -- that needs to be wrapped  
12 up, but I think that the arguments for coercing -- I don't  
13 mean to make their argument for them -- but coercing the  
14 witness now changes, that is something I think the public  
15 should be able to scrutinize in how this all plays out with  
16 Special Counsel Mueller having wrapped things up and made  
17 the report.

18 So I do think that the arguments for disclosure  
19 are even stronger -- much stronger for greater disclosure  
20 if, in fact, the grand jury investigating the Russia matters  
21 and related matters has completed.

22 THE COURT: But if, in fact -- and we'll hear from  
23 the Government -- the grand jury matter is continuing  
24 robustly, then that is a significant consideration in terms  
25 of the response that may be available to your motion,

1 correct?

2 MR. BOUTROUS: I agree with that, Your Honor.

3 I think it would -- nonetheless, disclosure -- at  
4 least to the extent that has already occurred in the Supreme  
5 Court, the D.C. Circuit, this Court's prior orders -- would  
6 still then be appropriate because the local rule and  
7 Rule 6(e)(6) contemplate disclosure during ongoing grand  
8 jury investigations, but the considerations -- the balance  
9 would be different; I agree with that, Your Honor.

10 THE COURT: All right. So is there anything else  
11 that you would like to add to your papers?

12 MR. BOUTROUS: If I could, Your Honor, on the  
13 witness issue. I do want to -- I think it really is a  
14 special situation because we have the public scrutiny and  
15 the public attention to this matter which the Court noted in  
16 one of its orders.

17 We have the fact that we have a company owned by a  
18 foreign nation litigating in our courts all the way to the  
19 Supreme Court, briefing things fully. And the core issue --  
20 in order for the public to understand this Court's ruling,  
21 that's the one thing we don't know. We don't know what the  
22 facts are regarding this company, who is this company.

23 We know so much about the Mueller investigation.  
24 Even without seeing the report, we know a lot. We know what  
25 the focus was. We know many, many things about it.

1           So it seems that if ever there were a strong  
2 public interest for exercising the Court's discretion for  
3 considering First Amendment considerations about disclosing  
4 the witness's identity -- and I know Mr. Boone said that  
5 they would rather their identity remain secret, but it  
6 wasn't like they were fighting tooth and nail. They asked  
7 in the D.C. Circuit for permission to file their response to  
8 our motion on the record, and then their response was: We  
9 take no position, which I took to mean they weren't exactly  
10 viewing this as a crucial thing to keep secret. They didn't  
11 argue there was a reason --

12           THE COURT: And that's why I had the corporation  
13 clarify --

14           MR. BOUTROUS: Yes.

15           THE COURT: -- what you thought was being  
16 suggested by their notice of no position I thought was not  
17 an unreasonable perception of that position; but I knew it  
18 was incorrect, which is why the corporation clarified and  
19 corrected the impression that you thought had been suggested  
20 by their no position on your motion.

21           MR. BOUTROUS: And I appreciate that, Your Honor.

22           But I would say that even now that I understand  
23 their position, it's a farer cry from any sort of compelling  
24 reason, any sort of, you know, need to keep it secret.

25           Now, the United States, in their briefs, they --

1 this is the other point I wanted to make, Your Honor.

2 In the D.C. Circuit and the Supreme Court, I  
3 argue, yes, we agree; redacted materials can be released in  
4 a way that protects grand jury secrecy. We really  
5 appreciate that the transcripts and the briefs in the D.C.  
6 Circuit, as you know, are on the verge of coming out.

7 And they told the D.C. Circuit that as to this  
8 Court's records, this Court's past position -- now, in their  
9 briefs, they seem to be taking the position nothing else  
10 should come out because all of this other information has  
11 come out; that's, of course, not the standard. The more  
12 that's made public, the less reason there is for secrecy.

13 So we would ask the Court to release as much as  
14 possible the entire record in this case. We know it's all a  
15 big task for everyone, but the D.C. Circuit has said that as  
16 important as that is --

17 THE COURT: And you appreciate, as the D.C.  
18 Circuit certainly does, and has talked about in *Dow Jones*  
19 and in the sequel to *Dow Jones*, proceedings before the  
20 Circuit can be far more controlled and measured and  
21 certainly take more time than proceedings in front of the  
22 District Court in grand jury proceedings. And,  
23 consequently, redactions of transcripts, let's say, or  
24 briefing submitted in the course of ancillary grand jury  
25 proceedings like contempt proceedings, which are fast

1 moving, have to get a lot of detailed facts in front of the  
2 Court and the witness, and vice versa to the Government, on  
3 a prompt basis and fulsome basis in order for the Court to  
4 make a fair evaluation of the parties' arguments. But  
5 because of all of those circumstances, which are  
6 characteristic of the nature of grand jury proceedings,  
7 including ancillary proceedings like contempt proceedings  
8 before the District Court, makes redactions a lot more  
9 complicated to make.

10 Do you understand that?

11 MR. BOUTROUS: I do understand that. I know the  
12 D.C. Circuit noted that it is a different inquiry, so we  
13 appreciate that.

14 The Court, in its orders -- I think it was very  
15 helpful for us to see the Court's analysis. But we  
16 respectfully request -- and notwithstanding the differences  
17 in the inquiry -- that the Court release as much as possible  
18 in redacted form because we do know a lot about the case;  
19 and it would be interesting to see how it played out with  
20 Your Honor and what led the Court -- I mean, contempt is a  
21 serious thing. We know the Court is careful in holding  
22 someone in contempt, so we'd like to see what their  
23 arguments were before this Court.

24 They seemed -- again, I'm sort of in the peanut  
25 gallery here, but I'm fascinated to read how it played out.

1           It seemed like their arguments were shifting; they  
2           were coming up with new arguments before the Court. Some of  
3           them seemed -- for a company owned by a foreign nation --  
4           kind of out there on the edge, and they're saying we don't  
5           have to listen to the U.S. courts. That's something the  
6           public should be able to see in an investigation like this,  
7           and how it unfolded within this Court, the judge who had to  
8           hold them in contempt -- I think it's even more important to  
9           see what was being argued to you by both sides and what led  
10          the Court to its decisions so we can understand what really  
11          the Court was basing its decision on.

12           We really appreciate the Court hearing us. And we  
13          hope the Court would release as much as possible, including  
14          the identity of the witness. I mean, a foreign country  
15          comes here, goes into contempt, goes to our Supreme Court,  
16          cert is denied, the investigation is over -- we should know  
17          who that country is and the company and what it's all about  
18          so we can scrutinize their behavior and how our judicial  
19          system and the justice department handled it.

20           THE COURT: And I appreciate the fact that the  
21          Reporters Committee has taken the time and engaged quality  
22          counsel to come forward and bring these issues teed up for  
23          the Court's consideration. Transparency, particularly when  
24          it comes to judicial proceedings, is very important. There  
25          should be no secret law.



1 MR. BOUTROUS: Thank you, Your Honor.

2 THE COURT: So I appreciate your efforts here.

3 MR. BOUTROUS: Thank you very much.

4 THE COURT: Thank you.

5 Mr. Faruqui. Mr. Goodhand.

6 So let's start with the first question. Is the  
7 grand jury investigation over?

8 MR. GOODHAND: No, it is continuing. I can -- in  
9 the Court's words, I can say it's continuing robustly.

10 THE COURT: All right. So this is a situation  
11 where the Court must evaluate the Reporters Committee  
12 request for unsealing in the context of a robust and ongoing  
13 grand jury investigation; is that correct?

14 MR. GOODHAND: Exactly.

15 THE COURT: All right.

16 Notwithstanding the fact there is an ongoing grand  
17 jury investigation, given the fact that there are redacted  
18 versions of briefs in front of the Supreme Court, redacted  
19 versions of the briefs that are in the process of being done  
20 for posting on the D.C. Circuit's docket -- although there  
21 are a lot more briefs in front of the District Court, and  
22 that makes the administrative work that much more in front  
23 of the District Court, why is it that the Government is  
24 taking the position of "no" as opposed to allowing for  
25 redacted versions of at least the briefing and, if not, some

1 of the transcripts in this matter to be made public?

2 MR. GOODHAND: Sure.

3 We thought we saw a little bit of schizophrenia in  
4 the Reporters Committee's motion, and that's why we did  
5 launch an opposition. When I say that, what I mean is  
6 this -- and, in particular, I'm directing the Court's  
7 attention to page 13 where the Reporters Committee says:  
8 The public has the right of access to contempt proceedings.  
9 There can be no doubt that the public has a right of access  
10 to the orders, briefs, transcripts, and underlying record in  
11 the proceedings before this Court.

12 We were a little concerned that that was a  
13 suggestion that -- this is a contempt proceeding, number  
14 one, and that means everything gets opened; that was our  
15 concern.

16 We certainly understand the mandate of Rule 6.1.  
17 We understand the mandate of *Dow Jones*. And we are  
18 perfectly willing to work within the confines of both those  
19 constructs to get to roughly the same place that the D.C.  
20 Circuit and the Supreme Court has reached with this massive  
21 caveat. There's been a lot of discussion about the identity  
22 of the witness. You know, number one, we have heard from  
23 the corporation about that.

24 Number two, I think, in contrast to the Reporters  
25 Committee's arguments, Rule 6.1 itself recognizes,

1 consistent with *Dow Jones*, that: All hearings on matters  
2 affecting grand jury shall be closed except for contempt  
3 proceedings in which the alleged contemnor requests a public  
4 hearing.

5 To my mind, I understand Rule 6.1 to be this:  
6 It's an embodiment of the rule -- Rule 6(e), 6(e)(5) and  
7 6(e)(6) that the advisory committee has said is consistent  
8 with the First Amendment.

9 So Rule 6.1 is sort of a perfect distillation of  
10 the balance, on the one hand, of grand jury matters and, on  
11 the other hand, the First Amendment. So we are willing to  
12 work within the confines of Rule 6.1, and we will. It will  
13 be a burden. We will endeavor to do that, just as things  
14 have already done -- others have done that at other levels.

15 But we were concerned about, sort of, the blanket  
16 suggestion that the First Amendment puts this category of  
17 proceeding in a different posture than a typical ancillary  
18 grand jury matter. This is an ancillary grand jury matter.  
19 It is not a contempt proceeding and, thus, all bets are off.  
20 I think that answers the question that has been raised with  
21 respect to the identity of the contemnor.

22 So, with that said, of course -- with those  
23 caveats -- again, that was the basis, essentially, for our  
24 opposition here. We're willing to work with the Court and  
25 the Reporters Committee.

1           THE COURT: All right. And how much time do you  
2 think that the Government would need, beginning with -- I  
3 think what would be easiest is the redaction of briefing in  
4 the matter, in cooperation with the corporation's counsel,  
5 before turning to looking at whether any transcripts can be  
6 redacted in a way that leaves anything intelligible left to  
7 be read.

8           MR. GOODHAND: Sure. Sure.

9           THE COURT: How much time would you need?

10          MR. GOODHAND: I would like -- I think I  
11 understand the Court's general timetable to be a month. I  
12 would appreciate that for a couple of reasons.

13                 As the Court and indexed newspapers outlined, when  
14 you have voluminous materials, there are risks attendant,  
15 sort of, inadvertent disclosures; we don't want to go down  
16 that road. There are great consequences attendant to  
17 inadvertent disclosures. So if the Court was willing to  
18 grant us the luxury of that time, we would greatly  
19 appreciate it because of the volume.

20          THE COURT: All right. I am going to be issuing a  
21 memorandum, an order on this matter and this particular  
22 motion, to make clear what is being done and what my order  
23 is; and I will take the month-long request into  
24 consideration.

25                 I think you are also going to have to be

1 consulting with the corporation's counsel.

2 MR. GOODHAND: Yes.

3 THE COURT: So I think a month may be even, you  
4 know, too tight a time frame; but I will let you work that  
5 out with the corporation. Thank you.

6 MR. GOODHAND: Okay. Thank you, Your Honor.

7 THE COURT: Mr. Boutrous.

8 MR. BOUTROUS: Yes, Your Honor.

9 THE COURT: You have won a huge chunk of your  
10 motion --

11 MR. BOUTROUS: Yes, so I am going to say very  
12 little.

13 THE COURT: -- with the Government; and I will  
14 take under consideration your request for the additional  
15 disclosure of the contemnor corporation's identity.

16 Is there anything you would like to respond to?

17 MR. BOUTROUS: Really just --

18 THE COURT: You won. You might just want to sit  
19 down.

20 MR. BOUTROUS: With that, Your Honor, I would like  
21 to wrap up. Thank you, Your Honor.

22 THE COURT: Thank you. You are all excused.

23 THE DEPUTY: All rise.

24 (Whereupon, the proceeding concludes.)

25 \* \* \* \* \*

**CERTIFICATE**

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 27th day of March, 2019.

/s/ Elizabeth Saint-Loth, RPR, FCRR  
Official Court Reporter