

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<b>FEDERAL TRADE COMMISSION,</b>	)	
	)	
<b>et al.,</b>	)	Civil Action
	)	No. 15-256
<b>Plaintiffs,</b>	)	
	)	Tuesday, May 5, 2015
<b>v.</b>	)	9:30 a.m.
	)	
<b>SYSCO CORPORATION,</b>	)	Washington, D.C.
	)	
<b>et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**DAY 1 - MORNING SESSION  
TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS  
BEFORE THE HONORABLE AMIT P. MEHTA,  
UNITED STATES DISTRICT COURT JUDGE**

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MORNING SESSION, MAY 5, 2015

(9:28 a.m.)

THE COURT: Good morning, everybody. Please be seated.

THE COURTROOM CLERK: Civil Action 15-256, *Federal Trade Commission, et al. versus Sysco Corporation, et al.* For the plaintiffs, Stephen Weissman, Alexis Gilman, Mark Seidman, Gary Honick, Melissa Davenport. For the defense, Richard Parker, Ian Simmons, Edward Hassi, Katy Robson, Joseph Tringali, Peter Herrick and Philip Mirrer-Singer.

THE COURT: All right. Good morning, everyone, and welcome back. We're here to start the preliminary injunction hearing this morning, but before we begin I just have one issue I want to raise with the parties, and that has to do with the motions that were filed yesterday by a number of third parties seeking confidential treatment, in-camera treatment of confidential material. Let me just state for the record who those parties are, those third parties are. They're Culver's Franchising Systems; Jacmar Food Distribution; Shamrock Foods, although they may have withdrawn their motion; Nicholas and Company; Maines Paper & Food Services; Labatt Food Services; Clayton, Dubilier & Rice; Performance Food Group; Reinhart Foodservice; Interstate Hotels & Resorts; Foodbuy, LLC; and Compass Group USA; XYZ, Incorporated; and Food Services of America; as well as Centralized Supply Chain Services.

I'm not going to rule on those motions but will treat all

1 of those materials that were submitted yesterday in-camera, and  
2 I'd ask the parties to treat those materials in the manner that  
3 we discussed on Friday; assume all of you will do.

4 It also sort of dawned on me that while the Court and the  
5 parties understand why some of the proceedings have been under  
6 seal and that why there's a need from time to time to clear the  
7 courtroom, I may not have clearly articulated why that needs to  
8 be the case on the record.

9 There is, of course, a presumption that court proceedings  
10 are open to the public, and that the public shall have access to  
11 filings, as well as live proceedings, but in some instances the  
12 general rule must give way to other interests, and in this case  
13 that interest is a production of confidential business  
14 information, both to the parties and the third parties.  
15 Ultimately it'll be up to me to decide what can be aired publicly  
16 and what must remain under seal, but for now, so that we don't  
17 slow down the proceedings, we'll presume that all of the material  
18 that's been designated confidential to date will remain under  
19 seal, and that the parties will treat it as such.

20 We will, as a result of this, have to, from time to time,  
21 clear the courtroom so that the parties can examine the witnesses  
22 and introduce evidence that is confidential. It'll require us to  
23 close the courtroom to the public, but unfortunately it's just  
24 part of the balancing of both the public interest hearing and the  
25 interest of the parties in maintaining the confidentiality of

1 their business records.

2 All right. With that, are there any preliminary matters  
3 from either side?

4 MR. TRINGALI: Your Honor, I just wanted to give you a  
5 further clarification on the motions. To cut down on the number  
6 of motions you received, the parties have agreed with a number of  
7 the people, who otherwise would have made motions, to treat some  
8 or all of their documents as confidential, and they, therefore,  
9 do not have to make a motion for Your Honor. So we will  
10 obviously abide by those agreements, but I just wanted to let you  
11 know that there are agreements for documents to be kept  
12 in-camera, other documents to be allowed, to be treated publicly,  
13 that we're just done by the parties without having to burden the  
14 Court, just so you know that that took place as well.

15 THE COURT: Okay. Well, I appreciate that. Thank you.

16 All right. Let me ask counsel for the FTC: Have you  
17 disclosed your witnesses for the next two ways?

18 MR. WEISSMAN: We have, Your Honor.

19 THE COURT: All right. And if you would just do me the  
20 favor of stating who they'll be.

21 MR. WEISSMAN: Sure, Your Honor. The first witness for  
22 the plaintiffs will be Christine Szrom from the Veterans  
23 Administration Hospital. The second witness likely to be Mr. Jim  
24 Thompson from Interstate Hotels & Resorts. The third witness  
25 will be Mr. Hoffman, from a street customer in Omaha. There is a

1 chance, because Mr. Hoffman's from Omaha and he needs to catch a  
2 flight, that we may need to flip Mr. Thompson and Mr. Hoffman,  
3 and I've alerted the defense counsel to that first thing this  
4 morning.

5 And then today, if there's more time, we are prepared to,  
6 if we need to fill that time, prepared to read in deposition  
7 testimony from Mr. Mark Allen from the International Food  
8 Distributors Association, and then we'll start with new witnesses  
9 tomorrow.

10 THE COURT: Okay. Great. Okay. Just the schedule for  
11 the morning will be as follows: The FTC's opening will be an  
12 hour long. We'll take a five-minute break at that point so that  
13 the defendants can prepare their openings. The defendants will  
14 open for an hour. We'll take a ten-minute break thereafter, and  
15 that should put us around 11:50 or so, and we'll probably try and  
16 get in about 40 minutes' worth of evidence before our lunch break  
17 at 12:30. Okay?

18 All right, Mr. Weissman.

19 MR. WEISSMAN: Thank you, Your Honor. I have some slides  
20 here. May I approach both the Court and Your Honor's clerk to  
21 hand up copies?

22 THE COURT: Certainly. You may begin, Mr. Weissman.

23 **OPENING STATEMENT ON BEHALF OF THE PLAINTIFF**

24 MR. WEISSMAN: Thank you, Your Honor. Steve Weissman, may  
25 it please the Court.

1           Just to alert Your Honor, there may be some slides that  
2 I'm going to ask Ms. White not to show on the big screens out  
3 there, just to preserve the confidentiality along the lines of  
4 what you raised this morning.

5           THE COURT: Very good. And do you need to do any portion  
6 of your opening at sidebar or do you expect to do it all in open  
7 court?

8           MR. WEISSMAN: I'm trying to do it without a sidebar.

9           THE COURT: All right.

10          MR. WEISSMAN: Good morning. Before the Court is the FTC  
11 and the state's motion for preliminary injunction under Section  
12 13(b) of the FTC Act. The standards under Section 13(b) in this  
13 circuit are well-settled. The issue is whether a preliminary  
14 injunction would be in the public's interest when you weigh the  
15 equities and consider the commission's and the state's likelihood  
16 of success on the merits in the upcoming merits trial, which is  
17 scheduled to begin July 21st, 2015.

18          The equity's prong of Section 13(b) standard decidedly  
19 favors the plaintiffs in this case. The two principle equities  
20 recognized by the Court are public equities: The first is  
21 effective enforcement of the antitrust laws; the second -- and  
22 it's intertwined with the first strong public equity -- is the  
23 need to preserve effective relief for the commission if it  
24 ultimately succeeds in the administrative merits trial.

25          There is a well-known problem scrambling the eggs problem,



1 that if the parties close the transaction, that undermines the  
2 ability to obtain effective relief. Both those public equities  
3 weigh strongly in favor of a preliminary injunction in this case,  
4 Your Honor.

5 I'm going to focus, though, this morning, on the  
6 likelihood of success prong because that prong is fundamental to  
7 both sides' case.

8 A merger between US Foods and Sysco would combine, by far,  
9 the two largest broadline foodservice distributors in the United  
10 States. It would create an industry behemoth that is many, many  
11 times the size of the next largest broadline distributor, and  
12 that's even accounting for the proposed divestiture of 11  
13 distribution centers to Performance Food Group.

14 It would also eliminate, importantly, the intense  
15 head-to-head competition between these two very close competitors  
16 that has yielded lower prices, better services and more choice  
17 for both national customers and local customers. And I'm going  
18 to get into that.

19 I want to focus this morning on six points, and I want to  
20 emphasize what the evidence is going to show. I'm going to show  
21 you some evidence that is already in the record, and to the  
22 extent it's not, it will be in the record.

23 The first is that broadline foodservice distribution is a  
24 distinct antitrust market.

25 The second: The merger would harm two types of broadline

1 customers: National customers -- and what we mean by that -- and  
2 I want to be very clear, upfront about this. We're not saying a  
3 national customer necessarily is someone who has locations or  
4 foodservice outlets in every single state. It -- these are  
5 customers that are referred to by the parties and others in the  
6 industry as geographically disbursed across regions, so they may  
7 be national, but they also may be disbursed across multiple  
8 regions. So the merger would harm both national customers and  
9 local customers, and by local customers I mean customers that are  
10 concentrated in a specific region of the United States, typically  
11 independent restaurants, maybe mom-and-pop restaurants, single or  
12 very small chains that are concentrated in single metropolitan  
13 areas. The merger will harm competition in many markets for  
14 those local customers.

15 The relevant third point: Relevant geographic market for  
16 national customers is nationwide.

17 Fourth point: The merger is unlawful under Section 7 of  
18 the Clayton Act. We're certainly not just relying on the  
19 presumption, based on market shares and concentration levels that  
20 this Court and this circuit applies. We're also going to show  
21 that the merger would eliminate substantial head-to-head  
22 competition between closest rivals and result in unilateral  
23 anticompetitive effects.

24 Fifth point: The proposed divestiture to PFG is  
25 inadequate. We're not saying PFG isn't a good company. We're

1 not here to disparage PFG. They're a good company. CEO will  
2 testify. He's a likeable guy. All we're saying is that the  
3 divestiture, and combined with PFG's existing assets, is not  
4 sufficient to replace the loss competition that would result from  
5 allowing these two companies to merge.

6 Sixth point is that the alleged deficiencies cannot save  
7 this anticompetitive deal.

8 This case is about broadline foodservice distribution.  
9 The best way to describe broadline foodservice distribution is  
10 the way the parties describe it. I'm showing Your Honor on the  
11 screen a document from one of USF's private equity owners, KKR.  
12 And this document -- this part of the document is not  
13 confidential. And the way USF's owners describe broadline  
14 distribution is as a distinct business segment. "Broadline  
15 offers a broad line of products and value-added distribution  
16 services focused on meeting the unique needs of street and  
17 national account customers." That's what broadline foodservice  
18 distribution is, and that's who the customers are to whom they  
19 sell.

20 THE COURT: I'm sorry, what's the source of that document?

21 MR. WEISSMAN: KKR is one of two private equity owners for  
22 US Foods. And this is PX 3007.

23 THE COURT: And this is an investment summary of some  
24 kind --

25 MR. WEISSMAN: It is a --

1 THE COURT: -- Prepared by KKR?

2 MR. WEISSMAN: Exactly.

3 About the two companies, Sysco and US Foods dwarf every  
4 other broadline distributor on every metric that affects  
5 competitiveness in this industry, even after you factor in the  
6 PFG divestiture, which I've just done.

7 So we've redacted, or we put in names to protect the  
8 confidentiality of the revenues of these other smaller regional  
9 players. And if you look at this, you're talking about an  
10 industry player that has close to \$50 billion in annual revenues  
11 of broadline sales. The nearest, after the divestiture, will be  
12 PFG approximately \$10 billion.

13 THE COURT: And just so I'm clear, Mr. Weissman, the  
14 revenue here is the broadline industry as it's defined in your  
15 papers and as the FTC's defined it. It doesn't include some of  
16 the alternate food distribution methods like cash-and-carry and  
17 systems distribution and the like; is that correct?

18 MR. WEISSMAN: Correct.

19 THE COURT: Okay.

20 MR. WEISSMAN: This is broadline distribution.

21 THE COURT: It's just broadline distribution.

22 MR. WEISSMAN: And there's a similar picture, if you look  
23 at the number of distribution centers for Sysco, USF, compared to  
24 other broadliners. Again, this includes the proposed divestiture  
25 to PFG.

1           And it would be a very, very similar picture with these  
2 bar graphs, whether you look at number of truck fleet, number of  
3 products or products available, number of private label  
4 products -- private label, you'll be hearing a lot about private  
5 label; very important value products for these broadline  
6 customers -- or whether you're looking at the number of sales  
7 representatives.

8           It's not just the number of distribution centers, it's  
9 where they're located, as well. This chart shows in red where  
10 the US Foods' distribution centers are located throughout the  
11 United States and where Sysco's are in red -- I'm sorry, in blue.

12           Importantly, Sysco and US Foods are the two broadliners,  
13 with the broadest networks of distribution centers, and they have  
14 facilities that are geographically disbursed throughout the  
15 United States.

16           Their unmatched disbursed footprints are among the  
17 multiple factors that make them closest competitors for national  
18 customers. And the proximity and size of their distribution  
19 centers across the United States -- you can see all the overlaps  
20 throughout the United States -- are what, in many localities, are  
21 what helped to drive their positions as the closest competitors  
22 in a number of local markets.

23           So point one: Broadline distribution is a distinct  
24 antitrust market. No other form of distribution for foodservice  
25 provides a combination of a one-stop-shop for customers --

1 there's thousands of SKUs, literally a broad line of products  
2 that these broadliners carry that no one else does. They offer  
3 flexible next-day delivery; value-added services, things like  
4 menu planning, cost control, that help, for example, a nursing  
5 home that doesn't have the internal expertise to prepare a menu,  
6 make sure the nutrition is right for its patients. That's what  
7 broadliners do. They offer these services, and other forms of  
8 distribution do not.

9 And I mentioned private-label products. Other  
10 distribution channels do not offer the array of private-label  
11 distribution products that broadliners do. So this is a distinct  
12 service.

13 I should mention that the Supreme Court in *Brown Shoe* set  
14 forth the reasonable interchangeability test that guides market  
15 definition in antitrust cases. And the courts in this circuit  
16 have consistently and religiously applied those factors in  
17 deciding merger cases, including under Section 13(b). Here,  
18 those factors weigh strongly in favor of a broadline distribution  
19 product market.

20 I mentioned one of the factors, and --

21 THE COURT: I'm sorry to interrupt you, Mr. Weissman, but  
22 let me make sure I'm clear on what the FTC intends to prove with  
23 respect to the product market.

24 You have posited that there is a broad line market. Do  
25 you also posit that there is a national product -- a national

1 product within the broadline market? Help me sort of understand  
2 those. The defendants have -- in their papers, have raised  
3 issues about precisely what it is you intend to prove with  
4 respect to the product market, and I want to be very clear on  
5 what that is.

6 MR. WEISSMAN: Okay. Let me be clear. There is a product  
7 market defined as broadline distribution. Within that broader  
8 product market there is a separate market that you need to look  
9 at for national customers. Broadline distribution services sold  
10 to national customers. I'm going to touch upon that in my  
11 opening.

12 You also need to look at the transaction for the effects  
13 on broadline distribution to local customers in numerous local  
14 markets. So I'm hoping that clarifies things for you.

15 THE COURT: Okay. So your contention is that there is,  
16 essentially, a submarket. There's a product market generally for  
17 broadline distribution, but there is a submarket for both  
18 national customers and local customers?

19 MR. WEISSMAN: Yes.

20 THE COURT: Okay.

21 MR. WEISSMAN: And so we go back to the *Brown Shoe*  
22 factors. First, it's distinct service that I touched upon.

23 The second factor distinct pricing. Broadline prices, the  
24 evidence will show, is driven by competition from other broadline  
25 producers. It's not driven by the other forms of distribution.

1 I'm going to show you a couple of examples of that. Distinct  
2 operations and sales forces, broadline competitors have distinct  
3 sales forces from systems competitors, for example. A really  
4 good example of that is Sysco. Sysco has a broadline company  
5 that it treats separately from what -- its systems company, which  
6 is called a SYGMA, S-Y-G-M-A, which is a systems distributor. If  
7 you look at the 10-K that Sysco puts out, it reports those  
8 businesses separately. It has different sales forces, different  
9 operations, different facilities.

10 PFG's another good example of that. PFG has a broadline  
11 division, and it also has a separate division for both its  
12 specialty, which is called Vistar, and its systems distribution,  
13 which is called PFG Customized. So that's another *Brown Shoe*  
14 factor that favors a broadline distribution market here. The  
15 sales forces are different as well.

16 Distinct facilities, typically broadliners have to serve  
17 customers out of different facilities than specialty or systems  
18 distributors. Again, SYGMA and PFG are great examples of that.

19 SYGMA will serve systems customers of Sysco, the broad  
20 umbrella company, out of SYGMA facilities. PFG serves systems  
21 customers out of PFG Customized facilities and broadline  
22 customers out of PFS or PFG broadline facilities.

23 Let me just make sure I'm back where I need to be, Your  
24 Honor.

25 And the other *Brown Shoe* factor I wanted to highlight for



1 Your Honor this morning is industry recognition of broadline as a  
2 distinct market. Industry recognition of broadline, it comes  
3 across loudly, not just in the business documents of the parties  
4 and third parties, but in customer testimony, including the  
5 declarations and the live testimony you'll hear, as well as the  
6 distributor testimony, including the declarations, the scores of  
7 declarations, that are ready before your Court.

8 And these *Brown Shoe* factors, that's not just what we're  
9 relying on. We're going to put on our expert, Dr. Israel, who's  
10 going to confirm that under a merger guidelines, Hypothetical  
11 Monopolist Test that the courts also look to, that broadline  
12 distribution is a distinct product market.

13 THE COURT: And under that test, the alternatives would be  
14 systems cash-and-carry and specialty distribution?

15 MR. WEISSMAN: The defendants are arguing that the market  
16 is broad enough to encompass those. What I'm saying is, both  
17 *Brown Shoe* and the Hypothetical Monopolist Test that Dr. Israel  
18 applies show it's a broadline distribution market.

19 THE COURT: Okay.

20 MR. WEISSMAN: Let me talk a little bit about systems.  
21 You're going to be hearing a lot from the defendants about  
22 systems distribution. Systems distribution is used principally  
23 by fast food restaurants and quick service national food chains  
24 who buy all of their products directly from manufactures,  
25 proprietary products like Burger King. The label's already on

1 the box, and the distributor, the systems distributor, basically  
2 performs a drayage function. It basically just moves the boxes.  
3 Broadliners frequently provide much greater service than that, as  
4 the evidence will show.

5 And the fact that certain fast food restaurants and quick  
6 service restaurants that may be included in national customers,  
7 that they can and sometimes do use systems distribution, tells us  
8 very little to nothing about all the other broadline distributor  
9 customers we have, hospitals, GPOs, hospitality customers, local  
10 independent restaurants.

11 Here's what -- and I'm not going to show this on the  
12 screen, so I'm going to ask Ms. White to redact the next slide,  
13 if you can, put on the -- okay. Make sure that's good.

14 I want to show Your Honor -- and Mr. Parker said I could  
15 read this. Here's what defendants' expert economist said,  
16 Dr. Hausman, in his deposition:

17 "Can you name for me a single GPO that purchases system  
18 distribution services?

19 "The answer: No.

20 "Can you name for me a single hospitality chain that  
21 purchases system distribution?

22 "Answer: No.

23 "Can you name for me a single independent restaurant that  
24 uses systems distribution?

25 "Answer: No. That's what I'm saying. For them I don't

1 see systems working."

2 And on the top there -- this is confidential -- here's  
3 what one of -- another player in the industry testified to. He  
4 said, "It would be next to impossible for a systems distributor  
5 to service a broadline customer."

6 The next line should remain under seal here.

7 "You're also going to be hearing a lot about -- from the  
8 defendants about specialty distribution and cash-and-carry  
9 stores. Sure, some customers use these to a limited extent  
10 today, but that's hardly the question from an antitrust  
11 perspective. The specific question on market definition is  
12 whether customers would, in enough volume, credibly switch a  
13 substantial portion of their business -- of their spend, to  
14 specialty or cash-and-carry to discipline a price increase by all  
15 the broadliners, in other words, a hypothetical broadline  
16 monopolist."

17 The evidence already in front of Your Honor demonstrates  
18 that they could not and would not do so. Here's an example on  
19 this screen from one of the defense witnesses in this case --  
20 again, I won't identify. This is a customer, and he's talking  
21 about why specialty distribution is not a substitute.

22 "He says: It's not efficient.

23 "The question: And when you say not efficient, there'd be  
24 additional costs in managing multiple relationships, right?

25 "Answer: Multiple relationships, multiple invoices,

1 multiple orders, multiple you name it, yes."

2 Quick word about cash-and-carry. Again, a slide -- and  
3 I'm just going to assume they're all until I talk to you,  
4 Ms. White; is that fair?

5 THE COURTROOM CLERK: Yes.

6 MR. WEISSMAN: Okay. Thank you.

7 Here's what Mr. Schreiberman, the head of US Foods'  
8 strategic development and head of their cash-and-carry business,  
9 testified at deposition in this case. We talk about whether  
10 cash-and-carry is a constraint, a price constraint, on  
11 broadliners. Here's what he said -- and I'm not going to read it  
12 because I've identified the witness.

13 THE COURT: Okay.

14 MR. WEISSMAN: And here's a document as well from the  
15 files, again, authored by Mr. Schreiberman who's most  
16 knowledgeable, according to the defendants, about the  
17 cash-and-carry business for US Foods.

18 Just to give you some context about this document, a few  
19 years ago US Foods opened its own cash-and-carry stores.

20 THE COURT: What's the name of this? Chef's --

21 MR. WEISSMAN: Chef's? Huh?

22 THE COURT: Chef's Restaurant, is that what it's called?

23 MR. WEISSMAN: Chef Store.

24 THE COURT: Chef Store, okay.

25 MR. WEISSMAN: And it opened a couple, I think three, to

1 the best of my knowledge, and there was some inquiries about how  
2 they were going to price their products in those stores and  
3 compare it to how they were going to price their broadline  
4 distribution centers for deliveries they were going to make to  
5 customers. And here's what Mr. Schreiber said about how they  
6 would go about pricing. And we put a callout box on this  
7 (indicating).

8 THE COURT: Okay.

9 MR. WEISSMAN: You can -- you can turn it back on.

10 Second point. This goes to Your Honor's question from  
11 before. The merger would harm two types of broadline customers.  
12 This merger would inflict harm on national customers and local  
13 customers in numerous markets.

14 Now, the parties have argued that the distinction between  
15 these two types of customers is fictional, mythology, I think is  
16 sometimes the word they've used. And -- but no one needs to look  
17 any farther than the parties' own business documents to see that  
18 there are two distinct types of customers in the broadline  
19 market.

20 I'm going to ask Ms. White, please activate again.

21 Here's a document prepared by McKinsey, which as Your  
22 Honor may know, was the integration consultant hired very early  
23 on by US Foods and Sysco to analyze the parties' businesses.  
24 Done a lot of work, a lot of work with the parties, analyzing how  
25 these parties go to market.

1           And from July 2014, here's how McKinsey described the two  
2 sets of customers. And I think I can -- without disclosing  
3 confidentiality -- say that they separated them exactly the way  
4 the plaintiffs are separating them in this case.

5           THE COURT: Do you know what the source of their  
6 distinction is?

7           MR. WEISSMAN: Sysco and US Foods. They -- in fact,  
8 you'll see when we put in the full document, all of this was back  
9 and forth with Sysco and US Foods. They did a lot of working  
10 with the companies to understand how they run their business.  
11 They had to, because how could you do analysis without doing  
12 that?

13           So this is the same document, page -- it's page 3 of the  
14 same document. And here's what it says for each: It breaks  
15 apart national customers from field customers, and it describes  
16 the distinct customer requirements applicable to each. And we've  
17 highlighted next to the national, under the national column row,  
18 the types of things we're talking about that define national  
19 customers in our case; specifically, the part about dispersion  
20 across regions and markets.

21           THE COURT: What does set margin schedule contract mean?

22           MR. WEISSMAN: That is a contract where you have a set  
23 margin that applies regardless of where the location is. So you  
24 have customer A, which is a national customer. Customer A will  
25 negotiate with Sysco or US Foods for a markup, and that markup

1 will apply whether the customer is in San Francisco or its  
2 location's in New York. It's the same pricing, usually,  
3 regardless of where the customer's located.

4 THE COURT: So markup applies across regions --

5 MR. WEISSMAN: Yes.

6 THE COURT: -- irrespective of geographic location?

7 MR. WEISSMAN: For national customers, that's true.

8 THE COURT: Okay.

9 MR. WEISSMAN: And we will have loads of evidence on that  
10 point, Your Honor.

11 And again, at the bottom there, you see another point  
12 that, both, we and the evidence, as well as our expert, emphasize  
13 as a hallmark of national customers that we're talking about,  
14 across multiple markets here and the consistency.

15 And if you look on the left, there are the field  
16 customers -- field customers are local customers, same  
17 nomenclature, really -- and they're very distinct. If you look  
18 at the bottom there, with regard to how much coordination is  
19 required across markets, you'll see what it says there on the  
20 bottom left.

21 The conclusion in this document aligns squarely with our  
22 case. And that's not all either. There are other documents.  
23 We're not just relying on this document. There's customer  
24 testimony, distributor testimony, testimony from the parties, the  
25 way the parties set up their sales forces. They each have

1 national accounts groups to tailor specifically to serve these  
2 national customers, as opposed to local sales forces to deal with  
3 local customers.

4 And here is a US Foods' document. It's quite clear how  
5 US Foods looks at its customers. And you see exactly how they  
6 segregate their customers here.

7 So it's not something we're making up. This is not  
8 fiction made up by the FTC or the plaintiffs for the purposes of  
9 trial. This is business reality as the companies perceive it.

10 THE COURT: How does the Hypothetical Monopolist Test  
11 apply with respect to your distinction between national and local  
12 customers?

13 MR. WEISSMAN: You would look at national customers and  
14 whether they're targeted. Whether they're tar- -- there's a  
15 specific part of the merger's guideline that talk about whether  
16 customers can be specifically targeted. And if there is a  
17 targeted set of customers under that test, then you define --  
18 then you define the relevant market around those customers. And  
19 what we're saying here is there's a targeted group of customers,  
20 the national customers, under the merger guidelines test, and  
21 Dr. Israel's going to lay that all out for you.

22 THE COURT: And you would then supply a SSNIP to the  
23 national customer group --

24 MR. WEISSMAN: Exactly.

25 THE COURT: -- to determine the breadth of it or the scope



1 of the national --

2 MR. WEISSMAN: You could do it that way. That's certainly  
3 one way you could do it.

4 THE COURT: Okay.

5 MR. WEISSMAN: You could apply the *Brown Shoe* factor. You  
6 could do a lot of different things to define the monopolist test  
7 for national customers.

8 Third point is that -- and you can go back, Ms. White, on  
9 this.

10 The third point is there's a geographic market for  
11 national customers that's nationwide. Again, the -- and for  
12 national customers, we're talking about. The defendants claim  
13 that there's no national market. Again, that's fiction created  
14 by the FTC.

15 THE COURT: I'm sorry. The national market for national  
16 customers, but not a national market for broadline distribution?

17 MR. WEISSMAN: No. There's a national market for  
18 broadline distribution to national customers.

19 THE COURT: Right, but only to national customers?

20 MR. WEISSMAN: Correct.

21 THE COURT: Okay.

22 MR. WEISSMAN: It's local for local customers.

23 THE COURT: Understood.

24 MR. WEISSMAN: Not only has defendants' economic expert  
25 conceded as much -- and we cited the testimony in our reply

1 brief, that there is a national market for these geographically  
2 disbursed customers -- but that's what the Supreme Court law  
3 tells us.

4 Here's a chart that compares the factors that led the  
5 Supreme Court in *U.S. v. Grinnell* to find a national market,  
6 compared to the factors and what the evidence will show in this  
7 case.

8 You've got two companies that are engaged in national  
9 planning. They have sales forces that are separated to be  
10 national. They have nationwide contracts with multistate  
11 businesses. They contract -- their contracts cover activities  
12 across a number of states. These are words right out of the  
13 opinion. Their contract schedules apply to locations across  
14 regions, as do other terms, and the national market reflects the  
15 reality of how defendants built and conduct their businesses.

16 And it's not just the defendants either. You'll hear  
17 about a company called DMA, Direct Marketing Advantage, and that  
18 is a company that's a consortium of regional distributors. The  
19 whole purpose for forming that consortium is because it allowed  
20 them to try to compete against Sysco and US Foods for these  
21 geographically disbursed companies. So the law is decidedly in  
22 favor of a national market here for national customers. And it's  
23 not just *Grinnell*. The Court's decision -- this Court's decision  
24 in *Cardinal Health* also founded a national market under even  
25 weaker facts, Your Honor.

1 And can you turn off the next -- please?

2 THE COURTROOM CLERK: Yes.

3 MR. WEISSMAN: Thank you.

4 And again, US Foods' owners recognized the existence of a  
5 national market here. This document is confidential, but this is  
6 the other private equity owner, Clayton, Dubilier & Rice. They  
7 did file a motion, as Your Honor pointed out at the beginning.  
8 And here -- here's how they -- in their private company valuation  
9 analysis in 2013, they talked about US Foods. So the company's  
10 owners recognize a national market here.

11 You can turn it back on. Thank you.

12 Point four: The merger is unlawful under Section 7 of the  
13 Clayton Act. This circuit applies a burden shifting analysis to  
14 determine the legality of mergers under Section 7. The first  
15 step is to calculate market shares and concentration levels.  
16 Here, the market shares and concentration levels that would  
17 result from the merger are exceedingly high, creating a strong  
18 presumption in both the national market and in numerous local  
19 markets.

20 Here's what the market shares look like under one of  
21 Dr. Israel's methodologies for national customers (indicating).

22 Very highly concentrated, exceedingly high percentage. I  
23 would say the merger guidelines treat, as presumptively  
24 anticompetitive, those mergers resulting in HHI's -- and I assume  
25 Your Honor knows what HHIs are. I can explain that, if you'd

1 like.

2 THE COURT: I do now.

3 MR. WEISSMAN: Okay. It's -- I hate to say it. It's  
4 something that antitrust geeks know by heart, but many people  
5 don't know, so thank you for getting up to speed.

6 So HHIs above 2,500 where the increase in the HHI is above  
7 200, are presumptively anticompetitive under the merger  
8 guidelines, which are viewed by -- as instructive by this Court,  
9 as recognized by Judge Howell in H&R Block. The levels we're  
10 talking about here far surpass the levels to create a presumption  
11 of anticompetitive effects.

12 And it doesn't matter what methodology you use.  
13 Dr. Israel looked at market shares to national customers using at  
14 least seven different methodologies, and here's the range they  
15 yielded. They all yielded a range on the very low end, very  
16 conservative end of 65 percent, but again, the concentration  
17 levels were quite high, up to 78 percent, and 75 percent is what  
18 we showed on the chart.

19 THE COURT: Let me ask two questions and then one that's  
20 specific to this chart. One, when I am to be assessing the  
21 pre-merger versus the post-merger concentrations, the post-merger  
22 concentrations should take into account the proposed divestiture?

23 MR. WEISSMAN: Yes.

24 THE COURT: All right. And then does this slide take the  
25 proposed divestiture into account?

1 MR. WEISSMAN: It does not, but it -- you'll -- Dr. Israel  
2 will show you. It really doesn't change. You still have really  
3 strong presumptions, and that's already in evidence from  
4 Dr. Israel's report. But to answer your question, these do not  
5 but they're not going to change much.

6 THE COURT: Okay.

7 MR. WEISSMAN: And the market shares we're talking  
8 about -- again, regardless of methodology, regardless of whether  
9 the divestiture is factored in -- all exceed the combined shares  
10 and HHI levels that we're talking about in a slew of cases where  
11 the courts have enjoined mergers.

12 This chart, Your Honor, I think we included in our opening  
13 brief, and we just wanted to highlight that, that the courts are  
14 quite clear as to the presumption here and how much weight you  
15 give the presumption.

16 And if we drill down even more -- we're taking a national  
17 customer, but if you even look at specific segments within the  
18 national customers, further submarkets, like the Court did in  
19 *Cardinal Health*, and you look at healthcare customers --

20 Can you please deactivate the next slide.

21 -- it's even higher. Here's a Sysco document that talks  
22 about their share of broadline sales to major healthcare GPOs.  
23 It's quite explicit. And if you look at the first and third  
24 customers there where Sysco says it doesn't have any sales,  
25 US Foods has nearly 100 percent of the sales of those customers.

1           So if you look at healthcare customers, and even  
2           hospitality customers in particular, and you look at those  
3           separately, as the Court did in *Cardinal Health*, the shares and  
4           the sales and the concentration levels are even further off the  
5           charts.

6           THE COURT: Will you be asking me to make a determination  
7           as to those submarkets?

8           MR. WEISSMAN: Yes.

9           THE COURT: Okay.

10          MR. WEISSMAN: Let me turn to local markets as well. It's  
11          really the same story in many local markets for local customers.  
12          Dr. Israel will testify that the post-merger market shares and  
13          concentration levels in a number of local markets will be equally  
14          daunting. And he'll provide you with the shares.

15          In a number of local markets we allege in the complaint,  
16          US Foods' own documents recognize the parties' combined market  
17          strength in those markets with substantial distance between them  
18          and other players. Here's just an example of a document from  
19          USF. And I will move quickly past this slide, but this is a USF  
20          investor presentation where it's touting its market position in  
21          two-thirds of local markets.

22          THE COURT: Okay.

23          MR. WEISSMAN: Second subpoint as to why this merger  
24          violates Section 7 of the Clayton Act, we are certainly not  
25          relying on the market share presumptions here. That is not what

1 this case is about. Our -- equally important to our case is that  
2 even though there's a presumption of anticompetitive harm that  
3 stems from the shares and concentration levels, there's  
4 substantial evidence that the merger would eliminate head-to-head  
5 competition between closest rivals, resulting in unilateral  
6 anticompetitive effects.

7 It's the same type of theory that led this Court to block  
8 mergers in H&R Block, Swedish Match, and Staples, among other  
9 cases. And we're going to be citing those cases to Your Honor,  
10 as we have already, in our conclusions of law.

11 You can turn this on.

12 I'm going to show you, Your Honor, some examples of the  
13 evidence that's already before the Court on this very issue. One  
14 of defendants' own witnesses, Mark Allen, the president of the  
15 trade association for the industry of which Sysco and US Foods  
16 and PFG are the largest members --

17 THE COURT: What's the name of the trade association?

18 MR. WEISSMAN: International Food Distributors  
19 Association.

20 Here's what Mr. Allen testified at deposition in this  
21 case. Again, this is a witness they identified.

22 "And in your experience, who, to your knowledge, do larger  
23 GPOs use to keep US Foods honest for distribution services?

24 "It would be -- they would be Sysco.

25 "Same question for large hospital chains. In your

1 experience, who do they use to keep Sysco honest for  
2 distribution?

3 "US Foods.

4 "And in your experience, who do large hospitality chains  
5 use to keep US Foods honest?

6 "Sysco.

7 "And for foodservice management companies, who, in your  
8 experience, do foodservice management companies use to keep Sysco  
9 honest?

10 "Answer: US Foods."

11 Can you please turn that off.

12 Even more instructive than Mr. Allen's testimony is what  
13 we see in the party's business documents. Here's how US Foods  
14 sized up its only, quote, true competition, for two of the  
15 largest national customers (indicating).

16 "Sysco will come hard after customer A and customer B.  
17 Only true options for customer A and customer B is either Sysco  
18 or USF. The regional players will bid but not be seriously  
19 considered."

20 I'll give you an example from a hospitality customer.  
21 This is from the declaration of a large national hospitality  
22 chain. Let's call it customer X. And customer X testified  
23 through declaration about RFP that it was considering going out  
24 for in 2013. What it did instead in going out for an RFP, it  
25 went and threatened US Foods with an RFP against Sysco. And



1 there were resulting price concessions amounting to X million  
2 dollars in annual cost savings for that customer. Now, this is a  
3 national customer, just like 18 or 19 others that we had  
4 declarations for that the defendants did not go out and even try  
5 to depose in this case.

6 Those 19 or so national customer declarations are in  
7 evidence and uncontradicted at this point.

8 Another document. This one's from Sysco's files about the  
9 head-to-head competition between US Foods and Sysco. You  
10 couldn't be more explicit in this Sysco slide at the top about  
11 who they believe their strongest competitor is for healthcare GPO  
12 dollars and how close the third company is.

13 THE COURT: Let me ask you: Do you expect to present  
14 evidence concerning pricing of national customer accounts in a  
15 post-merger realm? In other words, will I hear modeling by your  
16 experts about what we can expect prices to look like in the  
17 aftermath of a merger if it were to go forward?

18 MR. WEISSMAN: You could hear -- you will hear from our  
19 expert about the harm that will occur. I don't think he's going  
20 to be prepared to present the pricing will be X, Y, Z. That's  
21 not the type for which the data was available. But you certainly  
22 will hear from Dr. Israel about all the harm and the price  
23 effects that this merger would have on a large subset of --

24 THE COURT: And so if not increased prices, what will he  
25 testify is the harm, and how is the harm quantified in his mind?

1 MR. WEISSMAN: It will be increased prices, for sure, but  
2 in terms of actually quantifying it, he does have a model that  
3 does that. And I don't want to say the number out loud, but he  
4 will testify about the harm and how it dwarfs the alleged merger  
5 specific efficiencies in this case.

6 THE COURT: Okay.

7 MR. WEISSMAN: So another example, and this is, I believe,  
8 a natural experiment that shows the exact competition that takes  
9 place in this market between US Foods and Sysco that would be  
10 eliminated as a result of this merger. Here Sysco controlled 70  
11 percent of customer-wide purchases.

12 "After submission of RFP responses, customer Y asked for  
13 further enhancement of Sysco's offer in order to keep USF out of  
14 the mix."

15 At the bottom, Sysco -- this is from a Sysco document  
16 summarizing what happened with this RFP. This is a national  
17 customer, one of Sysco's largest national customers, customer Y.

18 "Sysco agreed to what we projected to be an X percent  
19 decrease in margins and incentives in exchange for a new year, a  
20 new five-year agreement, and no USF."

21 We deposed customer Y, and here's what we asked customer Y  
22 about this very issue:

23 "Other than US Foods, is there another distributor that  
24 customer Y could use as that kind of leverage to improve their  
25 terms with Sysco?"

1 "And his answer was: No."

2 Just a couple more examples, and I'm going to move on.  
3 I'm maybe getting close to my time here.

4 THE COURT: You have about a little under 20 minutes, I  
5 think, about 35.

6 MR. WEISSMAN: Thank you, Your Honor.

7 This is another large national customer. And this is  
8 right before getting ready for an RFP. And here's what USF says  
9 internally. Mr. Swanson was the CFO of the company at that time,  
10 and Mr. Lynch, the head of national accounts for US Foods,  
11 including today. And here's what he says. And I'm not going to  
12 identify the customer.

13 He says, "Tom, if we have to go backward to keep this  
14 business, then I am fine. My guess is that Sysco will be  
15 aggressive, as your team notes."

16 And there are scores of examples. We're going to have all  
17 of that. We've presented it already, and it's already in  
18 evidence, but these are just some of the highlights. I want to  
19 step back at a high level, too, and show you what one of USF's  
20 top executives, the COO, Stuart Schuette, said shortly after this  
21 merger was announced. In an e-mail, he talked about -- and I'm  
22 not going to read this out loud in the public record because Your  
23 Honor can see it, but he talked about the simple story behind the  
24 merger.

25 We're not just relying on customer testimony and the

1 parties' documents here. Our expert did an empirical analysis,  
2 too, that aligns exactly what we're talking about with the  
3 head-to-head competition that will be lost as a result of the  
4 transaction.

5 Dr. Israel performed a empirical analysis of RFPs that  
6 have been conducted. He took the most robust set of RFPs that  
7 was available from the evidence. And it wasn't easy. The  
8 evidence wasn't great, but he, as experts do in these cases, you  
9 take the best available evidence and you analyze what you can,  
10 and you see whether it's instructive or not. And he did that.  
11 And here's what he found, and he will explain to you why it's  
12 instructive. What he found in Sysco's database, that when Sysco  
13 lost RFPs, they lost most frequently to US Foods. And I won't  
14 tell you by how much because that's, again, confidential for  
15 purposes of this proceeding. And then it shows you who else it  
16 lost to and with what level of frequency. And as you can see  
17 here, the losses to USF greatly exceed the combined -- certainly  
18 individually who it lost to, with regard to RFPs to other  
19 cust- -- to others.

20 THE COURT: These are actual numbers, not percentages?

21 MR. WEISSMAN: Exactly.

22 THE COURT: Okay.

23 MR. WEISSMAN: Actual numbers of where they competed.

24 And the same's true. He did the same thing for US Foods'  
25 database of RFPs, and it yielded very much a similar story. In

1 fact, even more pronounced toward losses to Sysco than anyone  
2 else. And you'll hear that empirical evidence from Dr. Israel.  
3 It's in his report as well.

4 Next point is that the proposed divestiture to PFG is  
5 inadequate. There are a number of reasons why the proposed  
6 divestiture to PFG is inadequate.

7 Compared to US -- the current US Foods, which is really  
8 what you really need to compare it to. We've been taken out of  
9 the market, and whether they will replace PFG with the divested  
10 assets, will replace the competition that US Foods presents  
11 today, PFG would have inferior geographic coverage, fewer SKUs,  
12 stock keeping units for products, including private label SKUs.

13 I'm not going to read the next one because that's  
14 sensitive.

15 Longer delivery distances. A lack of track record in  
16 healthcare and hospitality.

17 US Foods for years has developed its healthcare and  
18 hospitality expertise, and the resources that PFG today has don't  
19 even come close. They don't even play in that space in any  
20 material respect today, and they'll acknowledge that.

21 And they are getting some people, but the people they're  
22 getting is a small percentage of what US Foods has today to go  
23 out and compete with Sysco.

24 The next bullet point I'm not going to read because that,  
25 too, may be sensitive.

1 THE COURT: I don't know what that stands for.

2 MR. WEISSMAN: Um...

3 THE COURT: That's okay.

4 MR. WEISSMAN: Okay.

5 THE COURT: We can handle that a different way.

6 MR. WEISSMAN: Did you want me to approach?

7 THE COURT: No. You can continue.

8 MR. WEISSMAN: Okay. There will be execution and  
9 immigration risks associated with the divestiture. PFG's, again,  
10 a good company. The largest acquisition they've ever made is of  
11 two distribution centers at one time. Two. We're talking about  
12 11 here and magnitudes greater, in terms of customers, than what  
13 they've ever done before.

14 And, of course, there are going to be customer concerns  
15 over splitting contracts. Let me explain a little bit what I  
16 mean by splitting contracts. So the way this divestiture is  
17 being proposed to work, is that there are national customers who  
18 buy, not just in the 11 distribution centers, but they could buy  
19 throughout 40 of US Foods' distribution centers today. And, but  
20 11 -- they purchased in 11 of them that US Foods would be giving  
21 to PFG, so those customers who may have bargained for an  
22 agreement with US Foods to serve them out of, let's say, 40  
23 distribution centers, will now be forced to deal with PFG in 11  
24 of those and have a separate point of contact. Now, those  
25 distribution centers will be the same, and the people in those

1 distribution centers will be the same, but one of the things  
2 you'll hear about -- and PFG will acknowledge this -- that why  
3 some customers purchase principally from US Foods or Sysco, they  
4 cherish the single point of contact. Here, that gets lost right  
5 away when you split these contracts. They have to deal with two  
6 separate companies.

7 THE COURT: Well, where -- where will your -- where do you  
8 contend that geographic coverage will lack if -- with the -- even  
9 assuming the divestiture were to go through?

10 MR. WEISSMAN: And I can get specific, if you'd like?

11 THE COURT: Okay.

12 MR. WEISSMAN: In Albuquerque, both US Foods and Sysco  
13 both have distribution centers today for broadline in  
14 Albuquerque. PFG won't be getting one, and they don't have one  
15 anywhere close.

16 West Texas, same thing, both companies have distribution  
17 centers there today. They won't -- and PFG does not have one and  
18 they won't be getting one of those.

19 Making my way further east here, Oklahoma City. Oklahoma  
20 City -- and you'll hear testimony that PFG actually wanted the  
21 Oklahoma facility but didn't get it. That's another one where  
22 both Sysco and US Foods have distribution centers today, and PFG  
23 won't have a distribution center anywhere close.

24 Omaha, Nebraska, another area where both have distribution  
25 centers today in the Lincoln, Omaha area, where PFG will not have

1 a distribution center.

2 In the Dakotas, US Foods and Sysco both have distribution  
3 centers there today. PFG's closest distribution center will be,  
4 I believe, in the Chicago area. I may be wrong about that, but  
5 we can check, but I think it's going to be in the Chicago -- oh,  
6 I'm sorry, Minneapolis. It'll be in the Minneapolis area. I  
7 apologize. Yeah. But again, both companies have a distribution  
8 center today in Minneapolis, Sysco and US Foods, and they also  
9 have distribution centers in the Dakotas as well, but PFG will  
10 only have a distribution center in Minneapolis.

11 Then Cincinnati, Ohio. You'll hear a lot of testimony  
12 about Cincinnati, Ohio. You'll see a lot of documents about  
13 Cincinnati. Both US Foods and Sysco today have distribution  
14 centers in Cincinnati, Ohio. PFG will not get a distribution  
15 center in Cincinnati, Ohio. It will be getting a distribution in  
16 Cleveland, Ohio, where both companies both have distribution  
17 centers today, which is over 200 miles, 242 miles, I think, to be  
18 precise, from Cincinnati, Ohio. So that's another gap.

19 Indianapolis, another area where Sysco and US Foods both  
20 have distribution centers almost right on top of each other  
21 today. PFG's not getting a distribution center in Indianapolis.

22 Western Pennsylvania, another gap. US Foods and Sysco  
23 both have distribution centers there. In fact, US Foods has  
24 multiple distribution centers in Western Pennsylvania. PFG's not  
25 getting one and won't have one. Again, their nearest one will be



1 Cleveland, Ohio.

2 Upstate New York, another area, Sysco and US Foods both  
3 have distribution centers in those areas. PFG, closest thing  
4 they're going to have is Cleveland, Ohio. Again, hundreds of  
5 miles away.

6 THE COURT: I'm taking you off course. You've got about  
7 ten minutes, so I don't want to spend the rest of your time  
8 listing those locations.

9 MR. WEISSMAN: Okay. So here's what -- just graphically,  
10 what the distribution center numbers will look like. Today  
11 US Foods has over 60 distribution centers. Today PFG has 24. It  
12 will get 11. It will be dwarfed by the post-merger entity in  
13 terms of distribution centers, and it will be dwarfed by what  
14 US Foods has today. It's important. Having geographic coverage,  
15 you'll hear that that's very important to these customers.

16 And what's equally probative, too, is the analysis that  
17 PFG did after the merger was announced to figure out how many  
18 additional distribution centers it required to become a national  
19 broadline distributor. This is PFG's internal analysis.

20 I'm not going to read the number, but it's not 11.

21 THE COURT: Was this in addition to the 11 or --

22 MR. WEISSMAN: No, this is total.

23 THE COURT: Total, okay.

24 MR. WEISSMAN: And certainly their numbers changed over  
25 time, particularly when Sysco came to them and said you're in a

1 competition with other bidders here, you better get your number  
2 down, we're not selling you more than X.

3 That's why it came down, and that's what the testimony is  
4 going to show. But this speaks volumes. This is unambiguous  
5 what this document says.

6 Last point is that alleged deficiencies cannot save this  
7 merger. Case law makes clear that defendants bear a heavy burden  
8 in attempting to save this transaction through a deficiencies  
9 defense, Heinz and other cases make that clear.

10 To start, defendants bear the burden of showing that their  
11 claimed deficiencies are merger-specific, which means they  
12 couldn't be achieved without combining the two companies. They  
13 couldn't be achieved as stand-alones, merger specificity concept  
14 in the guidelines.

15 And they also need to show that their alleged savings are  
16 verifiable by an independent party. Defendants have failed to do  
17 that here in material part. We're not saying there aren't  
18 efficiencies. Every transaction has efficiencies, but it's not  
19 nearly the magnitude that they say they are. And the defendants'  
20 own expert even says that.

21 "Defendants' own expert has concluded" -- and I'm not  
22 going to give numbers. "The defendants' own expert has concluded  
23 that only a relatively small percentage of the defendants'  
24 claimed efficiencies are merger-specific."

25 Furthermore, even if the defendants could show that the

1 merger-specific efficiencies and that they were verifiable, you  
2 still need to consider how much of that would be passed through  
3 the consumers here. There's a big question about pass-through.

4 I'm going to show you a document that I'm quite sure the  
5 defendants would not want in the public view. This is a McKinsey  
6 document that describes potential strategies that could be  
7 available to Sysco in order to, quote, prevent value leakage to  
8 customers and the team that's been tasked with fixing the  
9 problem.

10 So, Your Honor, I think I just hit an hour or close to it,  
11 and I want to give Mr. Parker and his colleagues some time. So  
12 just to sum up, based upon what the record will show, plaintiffs  
13 respectfully ask the Court to grant the preliminary injunction  
14 pending the administrative trial. Thank you.

15 THE COURT: Thank you, Mr. Weissman.

16 All right. Why don't we take a five-minute break here,  
17 and we'll reconvene in five minutes and continue.

18 (Thereupon, a break was had from 10:31 a.m. until  
19 10:39 a.m.)

20 THE COURT: Please be seated, everybody. Thank you. If  
21 everyone could find a seat. If no seats are available, we're  
22 piping audio into courtroom 4. I have to confess, I didn't  
23 expect this many people to be here. Sorry we didn't have that up  
24 earlier, but it should be up now. So if you can't find a seat  
25 here, the security officer won't let you stand. You'll have to

1 go to courtroom 4.

2 All right, Mr. Parker.

3 MR. PARKER: Your Honor, you know you're in Washington  
4 when an antitrust case draws a big crowd.

5 THE COURT: We sure could.

6 MR. PARKER: Unlike Minneapolis, I don't think anybody  
7 would care.

8 THE COURT: We should have charged admission for this.  
9 All right.

10 **OPENING STATEMENT ON BEHALF OF DEFENDANT SYSCO**

11 MR. PARKER: Your Honor, I have some slides I'm going to  
12 pass out to the other side here.

13 And I will do my best also on the confidentiality. I have  
14 to say that there's going to be a lot of confidential things  
15 here, and I'm also using this clicker that's -- I'm an old guy,  
16 and this could be interesting.

17 All right. Your Honor, if it please the Court.

18 Your Honor, the food distribution -- the foodservice  
19 distribution business industry in the United States is a large  
20 sprawling industry comprised of more than 15,000 people  
21 delivering food from point A to point B, to hundreds, literally  
22 hundreds of thousands of customers. My client alone has about  
23 400,000 customers, and a lot of these other companies have the  
24 same thing.

25 The firms participating in this market have different

1 business models, diverse ways of approaching the market, but  
2 they're all doing the same thing: Delivering food from point A  
3 to point B, and they're doing it well. This is a market that's  
4 working. You don't hear anything at this table that this is a  
5 sleeping market and people aren't competing. People are  
6 competing fiercely, fiercely. And we respectfully suggest that  
7 the combination of Sysco and US Foods and the accompanying  
8 divestiture of significant assets to PFG will enhance, it will be  
9 good for competition, good for customers, good for commerce in  
10 the United States. Your Honor, this transaction or these  
11 transactions should not be enjoined.

12 Your Honor, I propose to spend my time today as follows,  
13 if it please the Court: One, let's look at this market today and  
14 the competitiveness of this market; two, I want to present four  
15 themes -- he had six, I got four -- four themes around which our  
16 response to their case will be organized; and finally,  
17 recognizing that Section 7 is an odd duck in the law in that  
18 you're predicting the future. Not an easy thing to do, but it  
19 requires you to predict the future, so I want to end by going to  
20 10,000 feet and looking down, and showing you why competition  
21 will be enhanced. The statute says they oppose and they preclude  
22 things that are substantially lessening. We're going to have a  
23 substantially enhancing of competition. That's what we're going  
24 to show you, and that's what the evidence is going to show.

25 Let's start with the industry today. Your Honor, the

1 assets underlying this industry are not complicated. Trucks,  
2 warehouses, people, good people, very good people. You don't  
3 need patents. You don't need a R&D team with graduate degrees in  
4 electrical engineering from Stanford. Trucks, warehouses,  
5 people. And that's why I would suggest respectfully there's  
6 exactly two companies making microprocessors -- that's something  
7 you can monopolize and dominate -- and 15,000 in this industry.

8 Now let me show you how men and women who actually work in  
9 this industry look at it.

10 Is that -- why is this is not coming up? Pardon me, Your  
11 Honor. It just worked about one minute ago.

12 THE COURT: There you go.

13 MR. PARKER: Oh, there we go. All right. I apologize,  
14 Your Honor. It's probably my fault. I'm more old economy than  
15 new economy myself.

16 Right here, when my client, a successful company in this  
17 industry, looks at the business, this is what they look like.  
18 They don't look at some market share prepared by -- you know,  
19 every market share chart they used to get their presumption said  
20 "Compass Lexecon." Compass Lexecon's an economic consulting  
21 group working for the FTC. Right here, this is the way men and  
22 women in this industry look at the industry. And you'll see here  
23 overall market \$225 billion. Here they've got some 16,500  
24 competitors. I was being conservative. And here you've got  
25 market shares. Sysco, they've got at 17 percent; US

1 at 8 percent, that adds up to 25. You take PFG off, and we're  
2 probably at 23 to 24. I am not here to tell you that we're a  
3 mom-and-pop operation. We're a big company, a successful  
4 company, because we're good. We're good. But I am here to tell  
5 you that in market context, the pre- and post-merger shares are  
6 quite modest, they're moderate, and they do not an antitrust  
7 make.

8 One other point I want to point out, they talk about  
9 regionals and everything else. You'll see on the right a  
10 breakout of revenues of these regionals. These are not puppies.  
11 These are not babies. 8 billion, 5 billion, 3 billion,  
12 3 billion, 2 billion, these are big serious companies. That's  
13 why this industry is so competitive.

14 Now, you don't have to take our word for it, about the --  
15 what this industry looks like. Okay? I'm going to show you.  
16 And I got permission from Restaurant Depo, which is a company  
17 we're going to be hearing about.

18 Please show this document.

19 THE COURT: Mr. Parker, I apologize for interrupting, but  
20 let me make sure I understand your position, the defendants'  
21 position.

22 MR. PARKER: Yes.

23 THE COURT: And that is, you do not concede that there is  
24 a broadline foodservice product market?

25 MR. PARKER: No, sir.

1 THE COURT: Your definition, to the extent that -- I  
2 understand it's not your burden, but your definition of the  
3 product market is foodservice distribution, period, not modified  
4 by broadline?

5 MR. PARKER: Yes, sir, everything competes.

6 THE COURT: Okay.

7 MR. PARKER: And when our expert, Dr. Hausman, said it was  
8 national, that was after 3-1/2 half hours of saying how wrong  
9 Dr. Israel was, and trust me, he was not referring to  
10 Dr. Israel's market. There is no concession here. He just  
11 believes all these companies. He believes 16,500 companies are  
12 chasing 225- or \$240 billion worth of business. That's what the  
13 testimony's going to be.

14 But let me keep going. Restaurant Depo, okay, they're not  
15 in the market. They're not supposed to be a competitor here.  
16 Well, surprise, surprise. Who did they list as competitors?  
17 That would be us. And how do they look at the market? Well, it  
18 looks an awful lot like the same way we do. This is a company  
19 that makes somewhere between 6- and \$8 billion. It's a  
20 cash-and-carry operation selling to restaurants. I'm going to  
21 bring in our CEO. He's going to tell you how much he'd love to  
22 have a nice piece of that 6- or \$8 billion, but they're taking it  
23 away from us. This is the way -- this is the way people in the  
24 industry -- you will not find their 78 percent or whatever it was  
25 market share anywhere except in their complaint and in the



1 offices of their economic consultants. When people look at the  
2 market, this is what they look like. And I think *Brown Shoe* had  
3 something to say about that.

4 This is a little confidential here. Okay. Here's another  
5 one. This is a -- I'll just say it's a GPO, a large GPO, who  
6 actually will be testifying here. Internally, how do they look  
7 at the market? Dominated by us? No, not at all. Not at all.  
8 This is their document.

9 Next document, Your Honor, also confidential, is an  
10 industry expert, securities analyst, securities analyst. It  
11 says -- I won't mention the name -- "So we think the actual share  
12 held by a combined Sysco/US Foods could be less than 25 percent  
13 when considering the number of alternative outlets," et cetera.

14 That's what we're saying. In market context, we're a big  
15 company, but we're not that big. We're not something that  
16 antitrust law to be concerned about. In fact, antitrust law is  
17 about promoting competition, and that's what we're doing here.  
18 That's what we're doing here, and the evidence will show that.

19 Another -- yes, sir, another analyst, again, concludes  
20 that we're to be in about the 25 percent range. That's also  
21 confidential.

22 And so you look on the left, and there you will see the  
23 way men and women who actually live and breathe and make their  
24 living in this industry look at it, and here is the way the FTC's  
25 economic consultants look at it and it is very, very different.

1           Now, Your Honor, I'm going to bring in the CEO of this  
2 company, Mr. Bill DeLaney. He's going to be sitting right there,  
3 and he's going to take you through some of the history of this  
4 industry. Very interesting. It grew up after World War II, as  
5 incomes rose, as two income families emerged, and the restaurant  
6 business grew. And this business grew along with it, very  
7 nicely, for the last half of the 20th century and the first few  
8 years of this century. Competitive, but it was growing.

9           2008, Your Honor, changed everything. Lehman Brothers. A  
10 lot of sectors came back; restaurants never really did it, still  
11 in trouble. Compound annual growth rate of this industry,  
12 1 to 2 percent. So what's that mean? That means competition is  
13 all about squeezing prices out to get the price down.

14           Now, this is definitely confidential.

15           Here you go. Your Honor, that, sir, is competition. That  
16 is trying to provide great -- Sysco provides great service.  
17 There's no dispute about that. But here we're trying to do it at  
18 a great competitive price, and who are we competing with? We're  
19 competing with everybody, and I want to talk about that.

20           Straight south, this industry works. It works. And you  
21 will hear from Mr. DeLaney, and you'll hear from me later today,  
22 sir, the role that cost reductions play in this -- Your Honor,  
23 you -- this case, you need to look at our executives, who are  
24 going to be running this operation, and try to figure out whether  
25 they're trying to be more competitive, which I suggest they are,

1 or they're trying to take a waltz through monopoly profit land.  
2 And you're going to see the former. You're going to see people  
3 trying to save money to be more competitive in an industry for 50  
4 years has been intensely competitive.

5 Now let's just talk about the industry. There you are.  
6 That's pretty good. I can press this button and get an arrow  
7 right there. All right. Hey, I'm working this, you guys. I  
8 can't believe they're letting me do this. This is really good.  
9 All right. Might as well laugh, Your Honor.

10 And here's some testimony from somebody I will not  
11 mention. He's a competitor. But I'm going read it since I  
12 haven't identified, but it just makes the point. Okay? And  
13 there's more where this came from.

14 "But the competition is so fierce. We gain and lose  
15 business on a penny. On a \$60 case, if we're at 59.99 and  
16 someone else is at 59.98, we wouldn't get the business that week.  
17 That's how competitive the business is."

18 That's what we're talking about, and you're going to hear  
19 a lot about that in the next ten days.

20 All right. Let's talk about the industry. All these  
21 things coming up on your screen -- and we can go back on the  
22 public record -- are different kinds of customers. I said we  
23 have 400,000 customers. All these people have tens of hundreds  
24 of thousands, and there's a lot of different kinds, and they have  
25 different needs. Hospitals, coffee shops, elementary school

1 cafeteria, they all need different food. They need frozen food.  
2 They need poultry. They need -- they need vegetables. They need  
3 different things at different temperatures, and they need it at  
4 the right time. That's a tough job. 240 billion -- 225- to  
5 \$240 billion of food delivered at the right place at the right  
6 time; not easy.

7 Now, I used to study history. That's something that  
8 Soviet Russia and their economy never figured out how to do.  
9 Let's look at how American capitalism figured it out. Right  
10 here. I'm going to have a flag waving in a minute, Your Honor.

11 But this is the response of the free market, over 50 years  
12 right here. All right? And let me just describe this. What you  
13 have is -- okay. Here's a problem. How are we going to get this  
14 food at the right time? People say, well, I'm going to do it  
15 this way and I'm going to do it that way, I'm going to give  
16 customers choices.

17 Let's go to the top.

18 Sam's, Restaurant Depot, Costco. You know about Sam's and  
19 Costco, Restaurant Depot. Someone who owns a restaurant in Los  
20 Angeles or somewhere can get in a truck on a Monday morning and  
21 drive to Restaurant Depot and get food 15 to 17 percent less,  
22 unfortunately, than they can get it from us. That's a big number  
23 in a competitive restaurant market, and it happens all the time.  
24 And if you don't think you're not going to hear from an executive  
25 that we don't want that business, we want that business. But

1 that's just one business model. Okay?

2 Move down, and you'll see we've got a little truck here  
3 with a fish on it. Okay? That's a specialty producer. We're  
4 forcing it to live in the Chesapeake Bay. I spend a lot of time  
5 trying to catch rockfish, but guys like this, this specialty guy,  
6 say, from the eastern shore, can come in with crab, oysters,  
7 rockfish, et cetera, and you see him on the street. You see  
8 him double- -- hopefully not double-parked, but you see him in  
9 the morning bringing this stuff in. And they can say, you know  
10 something, I'm in Crisfield, Maryland, and I've been here for 35  
11 years, and I know where the best fish and the best oysters, and I  
12 can land those rocks and those blues, and I can bring that in.  
13 You know what, that brings business away from Sysco.

14 THE COURT: Let me ask you, Mr. Parker: The FTC's case is  
15 built in large part on dividing up the food distribution  
16 industry, and there's --

17 MR. PARKER: Yes, sir.

18 THE COURT: -- a described characteristic to each mode or  
19 particular modes of distribution. What's your response to that  
20 contention that there is actual value in the different  
21 characteristics?

22 MR. PARKER: Yes.

23 THE COURT: For example, your client delivers --

24 MR. PARKER: Yes, absolutely.

25 THE COURT: -- the cash-and-carry folks don't. As the

1 trier of fact, how am I supposed to analyze that those  
2 arguments -- because, really, that seems to me where the rubber's  
3 going to meet the road here.

4 MR. PARKER: Yeah. This is extremely important, and I was  
5 just about to get to it, so this is perfect. Okay? Perfect.

6 What -- what -- in the -- this is an old economy -- this  
7 is an old -- closer to the older economy than the new economy,  
8 but one thing we know from the 21st century is you don't have to  
9 look like somebody else to offer competition. You don't. You  
10 can compete when you don't look like somebody else.

11 So I'm a -- I'm a broadline customer. I'm going to come  
12 back. Let's assume that I own some coffee shops in my hometown  
13 of Minneapolis, and my broadliner gets fat and sassy and it's  
14 starting to -- I don't like the service, I don't like  
15 the whatever, I don't like the price. Okay. I will go buy -- in  
16 Minnesota you've got to have walleye. I'll go buy my walleyes  
17 from somebody else. You're not going sell me fish anymore. I  
18 will good buy my steaks from somebody else. Okay. Mister, if  
19 you want to charge me a higher price, you go ahead, but I'll tell  
20 you something, you are no longer delivering fish, poultry, corn  
21 on the cob or steaks. And I suggest to you, and you're going to  
22 hear it right here, that that -- I'm going to have Scott  
23 Sonnemaker, who runs our national accounts, but he was also in  
24 Portland, and he's going to tell you when he was running in  
25 Portland what it was like when one of the salmon specialty trucks

1 took away the center of the place where the money is, took it  
2 away. That will sober you up. You don't want to lose that  
3 business.

4 All right, all right, I'll back off. I'll back off.

5 There's an economic interaction. There's a market that's  
6 built up in which all these different things interact  
7 economically.

8 Let's keep going. We've got broad -- broadline is an  
9 important factor, and it does all the things that Steve says, and  
10 it's important. It's important. I'm not saying it's not an  
11 important product. I'm just saying it's not a product market.  
12 I'm just saying that around -- that you can -- you can lose  
13 enough business to the walleye guy in Minnesota or the rockfish  
14 guy in Crisfield to feel the pain. And a company like mine can't  
15 have -- be driving around with trucks that are half full because  
16 they lost all the poultry and the fish to these local people, and  
17 you see these people all over Washington every morning.

18 Now let's talk about systems. Steve is absolutely right  
19 that systems generally deal with chain restaurants, but -- and  
20 that's true. And systems is not for -- you know, for everybody,  
21 it's not. But is it in -- of course it's in the market because  
22 for some people it's an option. And I'm going to show you later  
23 about people who do systems and broadline, and they move --  
24 people who you'd expect to be broadline -- or systems are doing  
25 broadline. There's more economic interaction there than what the

1 FTC is telling you.

2 Another factor here that really complicates -- yes, sir?

3 THE COURT: Can I ask you a question. What's your  
4 sense -- or what do you think the evidence will show about the  
5 ability of a -- of a particular mode to convert to another mode?  
6 And here's what I'm talking about specifically. You're a  
7 cash-and-carry store like Restaurant --

8 MR. PARKER: Depot.

9 THE COURT: -- Depot --

10 MR. PARKER: Yes, sir.

11 THE COURT: -- and I gather they right now don't deliver,  
12 or maybe not everywhere. What's your sense of the convertibility  
13 of those modes to look something more like a broadliner, which  
14 does deliver and perhaps provides a broader line of services like  
15 Mr. Weissman said?

16 MR. PARKER: There will be testimony that Restaurant Depot  
17 is in the business of providing customers refrigerated trucks.  
18 That you can say, look, I'll rent you a truck for X, and then you  
19 come and buy from me, and with the value of the truck, but with a  
20 15 or 20 or 17 percent discount, you're still going to make out  
21 fine. So the answer to the question is: Markets -- markets --  
22 you know, they try to put brick walls up between all these  
23 different modes, and markets are messier than that. That's what  
24 I'm -- I'm trying to -- I'm trying to -- you know, I want the  
25 Court to focus on reality. And markets are not as neat as



1 they're pretending they are. They're not. They're messy. They  
2 bleed together.

3 Restaurant Depo is an extremely and astonishingly  
4 competitive company, and it wouldn't surprise me to see a lot  
5 more delivery from them, and you can't ignore that.

6 Here's a factor here that's also important, and that is,  
7 we love to sell our clients Kellogg's Corn Flakes and Rice  
8 Krispies and the like. And when we do, we get a price on the  
9 Corn Flakes, plus an upcharge for the delivery person service.  
10 That's good business. We get both. But customers who don't like  
11 our price can go up to Michigan and cut their own deal on  
12 Kellogg's Corn Flakes, and all of a sudden we're cut out and we  
13 become simply the delivery boy or the delivery person, and that's  
14 it. That's what they do.

15 So there's all -- you know, product consistency, you hear,  
16 only broadline can have product. Well, that's baloney. They can  
17 go to -- they can get product consistency by going right to the  
18 manufacturer, and in particular, the large ones, the people who  
19 they say are going to be hurt here -- and the evidence will show  
20 that just doesn't stand up -- are the ones who are best able to  
21 take a trip to Michigan and cut their own deal on a food and cut  
22 us out. Big factor here. So you have a functioning market to  
23 get this food going, where customers have great choices of  
24 different business models and they can just cut us out and go  
25 right to the -- right to the source.

1           Now, here's an important point here. I want to talk about  
2 GPOs, and this is not -- this is not confidential, but -- so  
3 let's go back to my hypothetical, the Rich Parker coffee shop in  
4 Minneapolis. They got five locations, and I don't feel I'm  
5 getting a good price on Corn Flakes from Sysco. I join a GPO,  
6 and I combine my demand with the GPO, and all of a sudden I'm  
7 cutting Sysco out and I'm getting product from GPO at a pretty  
8 good price, that reflects the fact that they're buying from me  
9 and 200 and whatever companies that look like me. That's another  
10 option. That's another option.

11           And so we're going to see GPOs come in here, by the way,  
12 Your Honor, and I'm not saying they're not an important function.  
13 They can be good for customers. But when they stand up and say,  
14 oh, we're going to be really hurt, we're going to be really hurt  
15 by this transaction, please, hear me, I want you to keep this in  
16 mind that they're not buying anything. They're an agent, and  
17 they skim off of -- they -- I'm sorry, they take a margin off the  
18 top. They're a middleman, classic, okay? But you know what?  
19 They compete with us. We want to sell the Corn Flakes that  
20 they're selling, and one of the efficiencies of this merger is  
21 we're going to buy Corn Flakes at a lower price. And when you  
22 see a GPO up here saying, oh, this merger's awful, I want you to  
23 keep in mind, is it because they're really worried about the  
24 delivery boy raising the price, or are they really worried about  
25 losing sales, Corn Flakes? That's their only function, and we're

1 going at it. You bet we're going at it. That's competition.  
2 That's what the antitrust laws favor, and I want to you listen  
3 for that during this trial.

4 THE COURT: Let's make sure I understand. The GPO is --  
5 the GPO does the direct purchasing from the product manufacturer,  
6 and then Sysco and US Foods or another broadline will essentially  
7 serve with driver and delivery functions; is that right?

8 MR. PARKER: Yes. Yes, we do.

9 THE COURT: Okay.

10 MR. PARKER: Yes, we do. All right. Move on.

11 And in the next slide indicates a theme that I've been  
12 talking about for the next -- for the last half hour, and that is  
13 customers have, and exercise, many, many choices.

14 Your Honor, what the FTC is saying here -- and however you  
15 describe the burden, what you see and what I portrayed to you is  
16 a competitive market developed over 50 years that's working, and  
17 they're saying this will transform, this will change everything,  
18 this will change everything, from an industry in which customers  
19 get the best deal possible, the one in which my client can sit in  
20 the office and point to customers and say, you, you, you, you and  
21 you, are totally dependent on USF and Sysco, guess what buddy,  
22 you get a price increase. That's what they have to show. They  
23 have to identify who those customers are. And you have to  
24 think -- excuse me, you have to decide whether that's what our  
25 customers -- I mean, our executives intend to do, but more

1 importantly, can they? Can they? And I suggest that however you  
2 describe the burden, the FTC can't come close to making that  
3 showing, not close, no way, no how.

4 All right. Let's move to the fames of our defense. Oh,  
5 you've heard some of them already. First of all, national  
6 market, there you go, that's a brick wall.

7 Does anyone contend that's confidential? Just a little  
8 joke, Your Honor.

9 THE COURT: That depends on the wall.

10 MR. PARKER: Well, this one is not. All right.

11 So let's turn -- let's turn to what the FTC's trying to do  
12 here in order to get a 70-something percent market share  
13 (indicating).

14 Go ahead, Katy, let's do the whole thing. Thank you.

15 So what you have is -- what we have here is \$231 billion.  
16 Cash-and-carry, systems, specialty, broadline, and then down to  
17 the -- the one on the bottom is the one they say that we're going  
18 to really hurt people on, plus some -- some local markets. Okay?  
19 So they cut off an awful lot of this industry, and they're trying  
20 to put up brick walls between them saying, oh, there's no  
21 economic interaction here. This -- take that out, gone. Next  
22 one, gone. Gone, gone. Let's get -- and then they make the big  
23 distinction -- which I'll get to -- between local and national.  
24 And that knocks off 90 billion.

25 But let me just review some of the evidence, and I've

1 already done some of this, and this is confidential.

2 On the fact that all of these -- all of these different  
3 forms that have built up over 50 years actually do compete and  
4 provide good choices for customers.

5 Go ahead, Katy, why don't you just go through these.  
6 Apparently they yanked me out, and they put in a pitcher on  
7 the -- on the slides.

8 Slow down just a little bit.

9 Here's a customer saying, "Do you believe the distinction  
10 between a broadliner and a specialty distributor can be unclear?"

11 "It's often to me, yes."

12 Next one.

13 Here's a quote from another customer, "Does IPC have a  
14 preference for broadline or systems"?

15 "Well, we don't have a strong preference. We'll take the  
16 best deal we can get."

17 Economic interaction, that's what I'm saying.

18 "Did you send the RFI to both places and other very  
19 famous" -- great burger, great famous burger place.

20 "Did you send the IFR [sic] to both broadline and systems  
21 distributors?"

22 "Yes, we did."

23 If -- this is from a competitor:

24 "Sir, if you were to raise your prices, would you expect  
25 customers to switch to other distributors?"

1 "Yes.

2 "Including broadliners?

3 "Yes.

4 "Specialty?

5 "Yes, absolutely, that's what we're saying."

6 And you're going to hear this time and again.

7 And here's another quote there. Why don't we get through

8 these, but you can understand where I'm going. Okay. This one

9 is from an independent broadliner. Go back to that one.

10 Independent broad liner in San Diego, California, and this is

11 what they're saying:

12 "I could lose some or all of my customers' business to the  
13 cash-and-carry store."

14 And you're going to hear the president of Sysco, the  
15 biggest company in the industry, say the same thing. And you're  
16 going to hear people from USF say the same thing, yeah,  
17 absolutely, these guys are good.

18 Let's go.

19 Kansas City, the company there with the gentleman's name  
20 is a competitor. Here we go. "Here's who I compete with in  
21 Kansas City: PFG, US, Sysco, Reinhart, Gordon's, specialty  
22 cash-and-carry.

23 That's what I'm saying. That's what I'm saying, these  
24 people are saying, please, don't put the brick walls up there  
25 because it's not reality.

1 Let's move on.

2 Same thing (indicating). Look at that, "cash-and-carry  
3 specialty." These are our competitor -- who do you compete with?

4 Same thing here. I'm not mentioning any of these names.  
5 We can go on and on. I could do this all afternoon, but let's  
6 get through this, Katy, and move on. Your Honor's going to see a  
7 lot of this, and you'll see this in our proposed findings and  
8 facts elsewhere.

9 All right. Now, here's a quote in the -- the government's  
10 brief: "It would be next to impossible for a system's  
11 distributor to service a broadline customer."

12 Well, Your Honor, you will see before you the impossible  
13 happen. You'll see it right here. Here it is (indicating).  
14 These companies split their bid. The impossible will happen in  
15 that shift right there, right there. Three companies, they split  
16 it. I'm not suggesting -- Steve's right, I mean, when your  
17 economic expert says, yeah, GPOs don't use systems. Yeah, that's  
18 true, okay, but some of these other people do, and so you can't  
19 just throw them out, because there is some economic interaction  
20 there.

21 Let's move on.

22 All right. So -- all right. Let's go to the next one.  
23 What I'd like to do now is get to the big issue where they take  
24 out \$90 billion worth of business on the premise that there's  
25 something unique about national. And remember, remember, what

1 they're saying here is these national customers, they're hanging  
2 out there and they're dependent on USF and Sysco. And a Monday  
3 morning staff meeting -- you got to think about this, Your Honor.  
4 This is not just economic -- this is people making decisions. If  
5 somebody really on Monday morning saying, you know what, we don't  
6 compete with USF anymore, I'm going to raise the price on all  
7 these national customers right now, because they don't have any  
8 choices other than -- that's what they're trying to prove. It's  
9 not factual. It's not close. So let's just talk about this.

10 THE COURT: Let me interrupt you for a moment, Mr. Parker.

11 What's interesting and unique about this industry, unlike  
12 some of the other --

13 MR. PARKER: Your Honor, I'm moving closer. I'm a little  
14 hard of --

15 THE COURT: I'm sorry. What's unique and interesting  
16 about this case and what makes it different from a number of the  
17 other cases that this Court has seen, is that there's not a  
18 single product, all right, there's not tax preparation services,  
19 there's not a single unique good that is sold across a number of  
20 different types of customers. And so what I'm trying to -- what  
21 I've struggled with as I've read your papers and tried to  
22 understand, is when you talk about -- and one of the few things  
23 I've got to figure out is what impact is this merger potentially  
24 going to have on pricing and prices, and how will it harm or  
25 benefit the customer at the end of the day? How am I supposed to



1 assess that question on the pricing? I mean, there's obviously  
2 been a lot of very compelling -- and you-all have unquestionably  
3 found a lot of compelling testimony from individuals, but the  
4 objective question of pricing and how a basket of foods, a basket  
5 of services, will either go up in price or go down in price, what  
6 do you think the evidence will show that? And how do I analyze  
7 what that basket consists of? Because, again, it's not just tax  
8 preparation services or backup services, as it was in Judge  
9 Collyer's case. It's a whole host of different services and  
10 products.

11 MR. PARKER: And in this case, I will agree with Your  
12 Honor that this case is conceptually difficult. I agree with  
13 you. And it's largely because of that fact that it's not clear  
14 what their -- you know, where the product is ever changing from  
15 food to distribution to all kinds of different things, and people  
16 are buying different things from different places. It's very  
17 hard to do.

18 I do know that their economic expert has not any work with  
19 actual prices. And what we're going to ask you to do is to look  
20 at a competitive industry today in which you saw what mergers  
21 were doing, and you're going to have to make a judgment as to  
22 whether this deal actually changes -- changes anything. Does it  
23 change the fundamentals of this industry that has kept it  
24 competitive? Does it really allow us to pick out customers and  
25 say, you're dependent on USF, I own USF, pay up? That's what it

1 comes down to: Can we really do that? And the answer to the  
2 question is, no.

3 Now, all right, if you were going to prove a market of  
4 national customers who were vulnerable, the first thing you'd do  
5 is figure out what you'd do. And there's -- right there, there's  
6 no perfect definition of a national customer. I totally agree --  
7 by the way, Dr. Israel, somebody who's known, he's a good  
8 economist, known to many of us, I think he was given an  
9 impossible task to defend this complaint. So I'm going to be  
10 talking about him, but it's certainly nothing personal. This is  
11 a very professional individual. I'm not disparaging him.

12 But he's -- reading this, and he says, "Where possible, I  
13 rely on the distributor's own definitions of national customers."

14 All right. So that's what they do. Let's go to the next  
15 one.

16 Your Honor, what they are relying on -- okay, go to the  
17 next one, Katy.

18 All right. All right. What they're relying on is our  
19 list of national customers. And the evidence is going to show  
20 that like in, you know, any organization, a law firm, I was in  
21 the Army, I'm sure in the courthouse, there are terms that have  
22 meaning within that -- within the firm that are different from  
23 what they are outside. And so, indeed, you will see in our  
24 documents references to, quote-unquote, national customers. What  
25 they were are is corporate multiunit customers. And there are

1 people who are managed from Houston, which is headquarters, as  
2 opposed to people who are managed at the -- at the OpCo. Well, I  
3 mean, OpCo's just a --

4 THE COURT: Just an example, yes.

5 MR. PARKER: So let's go back to the Rich Parker coffee  
6 shop, which I think will be helpful -- I hope will be hopeful  
7 here. So I have five locations in Minnesota, and I'm doing well,  
8 and I'm dealing with a man and a woman in Minnesota at the  
9 outpost, everything's fine. But then I decide to open in  
10 Milwaukee, and I open in another adjoining state, so somewhere in  
11 Iowa. I'm now using three different DCs. At that point I'm  
12 given the option -- Mr. Sonnemaker's says, you know, do you want  
13 to be managed -- continue to be managed by the person in  
14 Minnesota and have him line up these other DCs, or I've got a guy  
15 on my staff who can do it centrally. What do you want?

16 And I can take my pick. Maybe I'll say, you know, I'm  
17 getting along with the fellow in Minnesota. He's good. I'll  
18 stick with him, or maybe I'll go to Houston. But the point here  
19 is, is that when they take our list and staple it together and  
20 say that these are national customers who are vulnerable, it --  
21 that's not what they have. That's not what the list is at all.  
22 These are not a group of customers who have to have USF -- I  
23 mean, their theory is USF is really big, and Sysco's really big,  
24 coast to coast, sea to shining sea, and these customers are going  
25 to lose that competition and therefore their account.

1 THE COURT: I understand your point that the definition of  
2 national may be overinclusive.

3 MR. PARKER: It is.

4 THE COURT: Let me ask the following: Is there evidence  
5 that there is, in fact, some number of customers who do have --  
6 and forget about your example, the coffee shop, which I hope does  
7 well -- but, in which there are customers who do require truly  
8 national distribution?

9 MR. PARKER: And I'm about -- if you can wait for just a  
10 couple of minutes, I'm going to get to that.

11 THE COURT: Okay.

12 MR. PARKER: That's a critical point. Let's go.

13 Now, what I'm talking to you about is the arbitrary nature  
14 of these two -- of these cust- -- of what I'll call the CMUs, and  
15 the testimony will be from Mr. Tringali's client that the same  
16 applies.

17 So here you go. The left company has 16 OpCos; the right  
18 has 12; assets about the same. Which one is which?

19 Excuse me, Your Honor.

20 All right. Which one is national and which one's not? Go  
21 ahead. There you go. Local/national. All right. Same thing  
22 here. Let's see which one is which (indicating). Next one  
23 (indicating). The whole thing is arbitrary, Your Honor. It's  
24 got to do with personal preference, not with vulnerability.

25 Keep moving. All right.

1           Now, I told you I could move from Minnesota to Houston, if  
2 I wanted to, and back. A lot of people move from national to  
3 local and local to national. This whole list is comprised with  
4 people who moved from one to the other and back again.

5           Your Honor, here is -- and the other client. And what I'm  
6 trying to say, these people are targeted because they require  
7 a -- national coverage, they require it. Well, the answer to the  
8 question is, is many of these companies operate in a single  
9 region; and second, many of them actually do regionalizing  
10 themselves.

11           Let's move on.

12           THE COURT: Let me just ask a fact question.

13           MR. PARKER: Yes, sir.

14           THE COURT: What's your -- what do you attribute to the  
15 decision-making to -- a customer who was making a decision  
16 between your corporate office and doing it regionally, what are  
17 some of the factors that you think the evidence will show that  
18 will make a difference in that?

19           MR. PARKER: The interesting point here is, is that I am  
20 going to have Mr. Sonnemaker on the line. And the real -- the  
21 real point for me in Minnesota would be: Can the fellow in  
22 Minneapolis, does he really have the ability to coordinate the  
23 people in Michigan or the people in Milwaukee or the people in  
24 Iowa so that I get the same SKUs in every place? Or do I want  
25 somebody down in Houston who steps back and looks at my account

1 from a corporate point of view? And that's the choice. It's  
2 almost personal. You know, can the woman in Minnesota do it or  
3 do I really need more clout here?

4 Let's move on. All right.

5 Now, these are supposed to be customers who need national  
6 coverage. This is in the national market right here, and there's  
7 the name of the company, and I had to put a arrow there in order  
8 to show where it is.

9 The next one, another company. This is in Chicago. I had  
10 to put an arrow there to show where it is.

11 Now, do you think this fellow in Chicago cares whether USF  
12 and Sysco have -- do work in California or in Oregon? No, they  
13 don't. They can use USF and Sysco if they're good, but they sure  
14 don't need them. They sure don't need them. I went to Safeway  
15 last night. Do you think I care whether or not they have 225  
16 stores in California? No, they don't. It doesn't matter. And  
17 it doesn't matter to the guy in Chicago.

18 Let's move on. All right.

19 Now, here's your question. There are companies who  
20 absolutely operate across the country. They absolutely do. And  
21 so Sysco and USF would love to have that business. Do they have  
22 choices? This is a large company, well-known, a good sandwich.

23 Move on. Next one.

24 Here's what they do (indicating). This is what that  
25 company does. The yellow is regionals -- excuse me, is work that

1 Sysco and USF do not get. Do you think -- wait, I don't ask you  
2 questions. Rhetorically, do you think that -- totally  
3 rhetorically --

4 THE COURT: That's good, because I wouldn't be able to  
5 answer.

6 MR. PARKER: Exactly. Does anybody think that our client  
7 can sit here and say, well, let's target these guys for a price  
8 increase because they're totally dependent on us? And the answer  
9 to that question is obviously, no.

10 Let's move on. And this is an internal document. Every  
11 one of those docs, bids themselves out separately. And if want  
12 to get all that business, we've got to win all those different  
13 docs, and we don't always do it, as you can see.

14 Let's move on.

15 Here is a government agency, 42 regions, 42. They can  
16 regionalize this.

17 Let's move on. All right.

18 And here is a large company that runs cafe -- if you had a  
19 company cafeteria, you might hire these guys to run it for you.  
20 And they -- you know, Sysco gets a lot of that business because  
21 we're good, but we've got to win it in 70 regions. They're not  
22 dependent on us.

23 Let's move on. All right.

24 Your Honor, I want to pause here for a minute. Okay?

25 There may be people who come in here and say, in words or

1 substance, I have got to have somebody national. That's what I  
2 have to have. But, Your Honor -- and Mr. Tringali's going to go  
3 into this. If it's a preference, it doesn't count. I love  
4 Dunkin' Donuts, and to go get some other coffee, I got to go out  
5 of my way a couple of blocks. And if they raise their price, to  
6 me, I'll pay it. But you can't run the economy that way. The  
7 question under the law is: What could they do? And I suggest  
8 because the companies you just saw can do it, there is no reason  
9 why the companies the FTC is going to parade in here and say they  
10 can't do it, they're simply wrong. They can. They could, in the  
11 event we had the -- to merit a plan of a price increase. That's  
12 what I'm saying.

13 All right. Let's move. I want to skip the expert  
14 section. I was going to show you that, but I'm running out of  
15 time here. Let's just move.

16 Finally, Your Honor, what they're saying is, is that right  
17 now there is, in essence, a duopoly right now, today, between us  
18 and between us and between US Foods for these big customers.  
19 Now, I showed you these maps which shows that isn't true. It's  
20 not true at all. But, if it was a duopoly, you would expect  
21 higher prices, and the evidence from Dr. Hausman is going to show  
22 that the largest customers aren't paying any more than the -- the  
23 margins on the big customers that supposedly are so vulnerable  
24 aren't any different from the ones -- and I'm going to ask you to  
25 look at slide -- I'm getting off this thing -- 45 in the book



1 that I have. Slide 46 is something our experts put together as  
2 to when we lose business, to whom we're losing it. You'll see in  
3 San Diego, for example, we lose -- we lose it to -- well, you'll  
4 see it's loss to competitors is 84.3 percent, not USF. We're not  
5 just competing with USF here. All right.

6 THE COURT: Mr. Parker, I didn't mark the exact time you  
7 started, but it's almost 11:30 now. I'll give you another ten  
8 minutes.

9 MR. PARKER: I've got another ten -- but I'm going to give  
10 Joey -- I'll wrap this up quickly.

11 THE COURT: Mr. Tringali, were you intending on --

12 MR. TRINGALI: For ten minutes, Your Honor.

13 THE COURT: -- opening for ten minutes?

14 Okay. All right. Well, why don't you -- if you'd wrap up  
15 and then we'll hear from Mr. Tringali.

16 MR. PARKER: All right. Thank you. I will wrap up.

17 Your Honor, the evidence will show that their local  
18 markets are absolutely defined in a way that makes no sense, and  
19 you're going to hear expert testimony on that.

20 And I'm showing you on slide 47 they say that PFG  
21 doesn't -- their work doesn't apply in Washington, and you will  
22 see parked in front of Union Station a PFG truck about two months  
23 ago.

24 THE COURT: Let me ask you the following, and maybe you  
25 don't intend to take a position on this: You-all have hotly

1 contested how a local market is defined --

2 MR. PARKER: Yes.

3 THE COURT: -- and your experts are hotly in dispute about  
4 that.

5 MR. PARKER: Yes.

6 THE COURT: Do you take a position as to how one defines a  
7 geographic local market?

8 MR. PARKER: We -- our experts will take you through that.

9 THE COURT: Okay.

10 MR. PARKER: And it's a lot less complicated than what  
11 they're doing.

12 THE COURT: Okay.

13 MR. PARKER: FTC claims 100 percent share in San Diego as  
14 a result of their analysis, and you will see that it's just not  
15 true. That if Sysco and US Foods slipped into the sea, there  
16 would not be restaurant starvation in San Diego.

17 Carolinas, Your Honor, I'll leave that for you. You'll  
18 see all this evidence. There are plenty of affidavits and  
19 testimony about competition in the Carolinas. You're going to  
20 hear from Mr. Holm of PFG that they're -- their facility in that  
21 area has grown at 40 percent a year, and you're going to hear on  
22 all of these markets.

23 Let me just go to my next point, which is really PFG, and  
24 I'll summarize it quickly, very quickly. PFG is an astonishingly  
25 competitive company. In an industry that's grown 1 to 2 percent

1 a year, their compound growth rate is 40 percent. They are  
2 backed by Blackstone -- and that's not just anybody, as we all  
3 know. Blackstone is putting almost \$1 billion in to buying these  
4 DCs, and they've gone beyond that and they're going to build  
5 seven more, expand seven more, so we're going to 18 more.

6 You've got the -- Mr. Schwarzman, the head of Blackstone,  
7 is personally involved in this. You're going to see an executive  
8 who's been in this business for 35 years and who knows how to  
9 compete, knows how to compete. This is a serious company. This  
10 is a very serious company, and they will take you through how  
11 they're going to compete in Albuquerque and Omaha, and the rest  
12 of the list. They can do it. You don't have to have a DC there.  
13 In fact, our biggest salesman are -- PFG's biggest salesman out  
14 of the Denver office is actually located in Albuquerque making  
15 sales.

16 So if you would turn to slide 59 and 60, you'll see PFG  
17 today, PFG with the added 11, and PFG in the future with all the  
18 others. And I suggest, Your Honor, that we are divesting to a  
19 very good company.

20 Finally, Your Honor, I'm not going to go through it, but  
21 you'll see the cost savings. That is a real cost savings case.  
22 This was done by a third party to figure out what their -- our  
23 executives are not trying to take a walk through monopoly profits  
24 land. They're trying to save money and be more competitive, and  
25 the evidence on the cost savings will show exactly that.

1           You know, there's cases -- I've been at this table before  
2 where people do a deal, and then they do the efficiency study,  
3 oh, you know, we're going to present that as evidence. No. This  
4 is what the board looked at when they made it.

5           So, Your Honor, at the end of the day, from 10,000 feet,  
6 the new market, still 15,000 people chasing this business, PFG, a  
7 powerhouse, Sysco at an all-time low cost point, more  
8 competitive, more lean, more mean. That's competition. That's  
9 good for business, and I respectfully request that the injunction  
10 ought to be denied. Thank you.

11           THE COURT: Thank you, Mr. Parker.

12           Mr. Tringali.

13           OPENING STATEMENT ON BEHALF OF DEFENDANT U.S. FOODS

14           MR. TRINGALI: Your Honor, let me first address why  
15 US Foods is here today.

16           THE COURT: I'm sorry. Do you -- are you working off the  
17 same slide deck or --

18           MR. TRINGALI: Yes, it starts right now.

19           THE COURT: All right.

20           MR. TRINGALI: US Foods is here today, Your Honor, because  
21 it was US Foods, not Sysco, who initiated this transaction. So  
22 we're here today to defend a transaction that we initiated and  
23 for the reason that we initiated it, which is all the right  
24 reasons: To lower costs when margins are declining.

25           The evidence will be clear that this transaction did not

1 come about from Sysco trying to take out a competitor. It was  
2 US Foods looking at the industry conditions, considering for  
3 itself what is the -- what are the best options, and looking at a  
4 transaction on its own, a transaction with Sysco and seeing that  
5 that would achieve the greatest cost synergies, which would then  
6 make them more competitive and allow them, the post-merger Sysco,  
7 to pass those costs -- those cost benefits to the consumer.

8 So if you'll turn to the first slide, Your Honor, you'll  
9 see that in 2013 it was USF, not Sysco, who approaches Sysco to  
10 discuss the merger. It tells Sysco that the believe significant  
11 synergies appear to exist, and USF does a back of the napkin  
12 estimate with synergies raising from 535- to close to  
13 \$900 million. That's the relevant background for you, Your  
14 Honor, not some anticompetitive intent on the part of Sysco, or  
15 for that matter, US Foods.

16 Secondly, Mr. Parker mentioned to you about the issue of  
17 customer preferences, and this gets to the issue Your Honor has  
18 raised a few times about harm: How are people harmed? The legal  
19 test is not what a customer prefers, but in the words of the  
20 Court in *United States v. Oracle Corp.*, not what solutions the  
21 customers would like or prefer, the issue is what they could do  
22 in the event of an anticompetitive price increase. And similar  
23 language in another case, which I'm not going to go through with  
24 you.

25 And the reason for that is simply, Your Honor, someone is

1 not going to be harmed, is not going to have the price increase  
2 that Your Honor is talking about if they have options, and that's  
3 what they have here. And it's not -- typically, in a merger  
4 case, Your Honor, what you're going to hear -- what you typically  
5 hear a lot of argument about is what options would a customer  
6 have in a hypothetical world. You don't need to get there,  
7 because what you're going to have in the testimony in front of  
8 you, including from the FTC witnesses, is what they are doing  
9 today. They are today using system distributors. They are today  
10 using regional broadline distributors. They are today using  
11 specialty. They're today using cash-and-carry. So it's not an  
12 issue of what will they do if Sysco raises prices, it's what do  
13 they do today? And ignoring what the case law is in terms of  
14 preference -- you see the FTC declarations and how many of them  
15 speak about preference. A hospitality chain prefers, a national  
16 hotel chain would prefer, that's not the test. The test is what  
17 do you do, or what could you credibly do?

18       The other thing that's very important for Your Honor is to  
19 understand the definition that the plaintiffs have given to a  
20 national broadline customer. And this is in their response to  
21 our first set of interrogatories. And the reason why this is  
22 important, Your Honor, is you're going to find that for numerous  
23 customers -- they're classified as national by either us or by  
24 Sysco -- the customer does not match any, any of the five  
25 characteristics. And I ask Your Honor: How can you have a

1 market where the market -- where the customers don't even fit the  
2 definition of the market? So the FTC says you need a single  
3 broadliner -- typically you have a single broadliner contract  
4 across all your locations. You typically have single pricing,  
5 single point of contact, product consistency, meaning private  
6 label -- and this comes up because each distributor has their own  
7 private label line -- or a single technology platform, because  
8 you report information to your customer. The fact is their  
9 expert, when he calculates the shares, the 75 percent shares, he  
10 will be the first to admit that he has no idea whether any of the  
11 customers that he's included in that share for us have any one of  
12 these characteristics. He has merely looked at how we classify a  
13 customer, whether it's national for our purposes; CMU for their  
14 purposes. And the fact is that for multiunit customers can and  
15 do use multiple options today, and that's true of every customer  
16 category.

17 Let me turn to the next slide, Your Honor. And I think  
18 this is seriously the elephant in the room throughout this trial,  
19 which is that many of plaintiffs' national broadline customers do  
20 not have any of the characteristics, any of the characteristics  
21 that they say are all the characteristics of a national broadline  
22 customer.

23 I go through five categories for Your Honor: National  
24 chain restaurants, using the example of Applebee's and IHOP;  
25 Avendra, which is a hospitality GPO, our largest hospitality GPO

1 customer for USF; MedAssets, a healthcare GPO; the Defense  
2 Logistics Agency, which is a government organization that  
3 essentially operates our military bases; and Sodexo, which is a  
4 contract feeder. And you will find in the case of Applebee's,  
5 when you look at whether it has a single broadline and IHOP,  
6 whether it has a single broadliner contract, the answer's no;  
7 Avendra, no; MedAssets, no; DLA, no; Sodexo, no. Same thing with  
8 broadliner price in terms, not a single one of them. Broadline a  
9 point of contact, not a single one of them. Product consistency  
10 in terms of private label, none of them. Single broadliner  
11 technology platform, again, none of them.

12 The other thing I want to point out to Your Honor, we  
13 talked about DMA, Distribution Market Advantage, and how that was  
14 created by all these regionals, companies like Reinhart, Gordon,  
15 Shamrock, all of whom compete against us. What's very  
16 interesting, Your Honor, is some of these customers are served by  
17 DMA, like Avendra, and MedAssets, but some of these other  
18 national customers are served by members of DMA in their  
19 individual capacity, not through DMA, and that would be DLA and  
20 Sodexo.

21 Another point that I think should be of interest to Your  
22 Honor in terms of PFG, there was talk about how PFG could not  
23 serve national customers. These are national customers according  
24 to the plaintiffs. PFG today serves Applebee's and IHOP. PFG  
25 today serves DMA, and PFG today serves Sodexo, and that, Your



1 Honor, is because you don't need a national footprint. You don't  
2 need to be Sysco and USF to service these customers, and they're  
3 being serviced today by regional distributors outside of DMA who  
4 are DMA members; they are being serviced sometimes by DMA when  
5 the customer has a preference for that; and they're being  
6 serviced by PFG, even though they're supposed -- even though PFG  
7 does not have a national footprint.

8 This, Your Honor, to me, should be the essential issue for  
9 you in terms of harm, because how can you have harm to a customer  
10 if in every customer category customers today are exercising an  
11 option outside of Sysco and USF providing a single source  
12 solution? You cannot have a market where customers are harmed  
13 where the market participants, the customers, many of them, don't  
14 even fit any of the characteristics of the alleged national  
15 broadliner market. Thank you.

16 THE COURT: Thank you. Okay. It is now almost 20 of.  
17 Why don't we take ten minutes, and then, Mr. Weissman's prepared  
18 to -- oh, we're doing this by video, right?

19 MR. WEISSMAN: We are, and we will endeavor to do our best  
20 to make sure we're ready in ten minutes.

21 THE COURT: Okay. All right. Well, take the time you  
22 need. If it takes a few extra minutes, that's fine, but I'd like  
23 to try and get in a little bit of testimony before the lunch  
24 break.

25 MR. WEISSMAN: Understood.

1 THE COURT: All right.

2 (Thereupon, a break was had from 11:42 a.m. until  
3 11:54 a.m.)

4 THE COURT: All right. Please be seated, everyone. Thank  
5 you. Mr. Weissman, proceed with your first witness.

6 MR. WEISSMAN: All right. Your Honor, we are pleased to  
7 do so. I want to introduce to the Court my colleague, Alexis  
8 Gilman, from the FTC who's going to handle the next witness.

9 THE COURT: All right. Mr. Weissman, do you want, as a  
10 formal matter, to move your exhibits into evidence now at the  
11 start of your case?

12 MR. WEISSMAN: We'd like to do that. There are -- the  
13 vast majority of the exhibits have not been -- we've resolved  
14 them through meet and confers, so they are not objected to.

15 If you want me to go ahead and list them, that's going to  
16 take some time, so --

17 THE COURT: No, no, no, that's fine. I can either -- we  
18 can either sort of dispense with that formality, recognizing  
19 we're all on the same page and that everything will get admitted  
20 by the end of the day, or if there's some use here in actually  
21 doing that at the start of your case so that the evidence is in  
22 for all purposes, then we can do that. But given that this is  
23 not a jury trial and we're dispensing with the rules of evidence,  
24 that may not be necessary.

25 MR. WEISSMAN: If I can go ahead now and move into

1 evidence all of the PX's that have no objection, I'd like to do  
2 that.

3 THE COURT: Okay.

4 MR. HASSI: No objection.

5 THE COURT: All right. Well, we'll do that. We'll move  
6 all the unobjected-to exhibits into evidence, and so they'll be  
7 available for all purposes for your examination and for  
8 cross-examination.

9 MR. HASSI: And, Your Honor, may we do the same with the  
10 defendants' exhibits?

11 THE COURT: Yes.

12 MR. HASSI: Okay.

13 THE COURT: Yes. All right.

14 MR. WEISSMAN: That's fine with us.

15 THE COURT: Okay. So all the defendants' unobjected-to  
16 exhibits will be admitted as well, and we'll sort out at the end,  
17 Ms. White, exactly which exhibits those are, but we'll get to  
18 that. But for present purposes, any exhibit that's been admitted  
19 can be used by either side for either direct or  
20 cross-examination.

21 (Plaintiffs' Exhibits admitted into the record.)

22 (Defendants' Exhibits admitted into the record.)

23 MR. GILMAN: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. GILMAN: Alexis Gilman for the Federal Trade

1 Commission. We have our next or first witness, Ms. Szrom,  
2 appearing by video telephone conference. I'm not sure exactly.  
3 I guess we still swear in the witness?

4 THE COURT: Yes.

5 (CHRISTINE SZROM, PLAINTIFF'S WITNESS, SWORN.)

6 DIRECT EXAMINATION OF CHRISTINE SZROM

7 BY MR. GILMAN:

8 THE COURT: Ms. Szrom, good morning. I understand you've  
9 had some surgery recently. If for any reason you need a break,  
10 either this morning -- we'll be breaking, by the way, just within  
11 a half hour for a lunch break, or after your testimony continues  
12 after the lunch break, just hold your hand up and let us know and  
13 we'll break to accommodate whatever time you need.

14 THE WITNESS: Thank you.

15 BY MR. GILMAN:

16 Q. Good morning. Would you please state and spell your name  
17 for the record.

18 A. My first name is Christine, C-H-R-I-S-T-I-N-E; last name  
19 is Szrom, S, as in Sam, Z as in zebra, R-O-M, as in Mary.

20 Q. And Ms. Szrom, who is your current employer?

21 A. Department of Veterans Affairs.

22 Q. And is it okay if I refer to that as the VA today?

23 A. Yes.

24 Q. When did you join the VA?

25 A. January of 2006.

1 Q. What was your position when you joined the VA?

2 A. Contract specialist.

3 Q. What were your responsibilities as a contract specialist  
4 at the VA?

5 A. To complete market research, review, clarify, negotiate,  
6 and award contracts for pharmaceuticals and medical, surgical  
7 type items.

8 Q. And how long were you the contract specialist in that  
9 position?

10 A. Until June of 2010.

11 Q. What job did you hold after that?

12 A. Senior contract specialist under the pharmaceutical  
13 branch responsible for dietary supplements and Subsistence Prime  
14 Vendor Program.

15 Q. Do you refer to the subsistence program as the SPV  
16 program?

17 A. That's correct.

18 Q. We're going to talk more about the SPV program in detail  
19 but just very briefly for now, what is the SPV program?

20 A. It's subsistence programs, so it's -- so that our  
21 customers can procure or purchase food and foodservice-related  
22 items.

23 Q. Does that include distribution of food and food-related  
24 items?

25 A. That is correct.

1 Q. How long were you the senior contract specialist for the  
2 SPV program?

3 A. From June 2010 until November of 2013.

4 Q. So almost three and a half years; is that right?

5 A. That's correct.

6 Q. What were your responsibilities as a senior contract  
7 specialist?

8 A. Administering SPV-3, and then doing everything from the  
9 market, research, acquisition plan, source selection plan,  
10 developing the IPT or integrated product team, creating the  
11 request for proposals, request for information -- I'm sorry --  
12 request for information, and then soliciting for a distributor  
13 for that program; evaluating, negotiating and awarding that  
14 program as well.

15 Q. Okay. And that began when you became the senior contract  
16 specialist in or around June 2010?

17 A. That is correct.

18 Q. Do you do -- did your responsibilities include any work  
19 with food manufacturers as suppliers?

20 A. At that time, yes.

21 Q. What was the nature of that work?

22 A. Market research.

23 Q. How much of your time as a senior contract specialist was  
24 spent on the SPV program?

25 A. 90 percent.

1 Q. I think you just mentioned, but let me ask it to be  
2 clear. When you became the senior contract specialist around  
3 June 2010, was there an SPV contract in place at the time?

4 A. That's correct.

5 Q. And what was the name of that again?

6 A. That was the SPV-3 program, and that was with U.S.  
7 Foodservice at the time, before they changed their names to U.S.  
8 Foods.

9 Q. And sorry, just to clarify, what role did U.S. Foods play  
10 with respect to SPV-3?

11 A. They were our awarded contractor for distribution of all  
12 food and foodservice items to our customer base.

13 Q. Were the -- were they the only awarded contractor for the  
14 SPV program?

15 A. That is correct.

16 Q. I want to go back a little bit and talk about the various  
17 things that you mentioned were your responsibilities as the  
18 senior contract specialist/market research. Can you explain in  
19 a little bit more detail what you did with respect to market  
20 research?

21 A. Sure. So several things. First, we had deviated pricing  
22 agreements in place. So, I did business reviews with multiple  
23 suppliers that we had on deviated pricing agreements, which we  
24 consider our preferred vendors. Also went to both Sysco and  
25 U.S. Foods to the distribution centers, met with their head of

1 sales, with many of their top executives to learn about the  
2 commercial -- the commerciality of their business to ensure that  
3 when we wrote the RFP, that we were following suit with  
4 commercial terms.

5 **Q.** Did you do any other research?

6 **A.** We did a lot of Internet research on other various  
7 companies based on a listing that we had that showed the top, I  
8 think, 50 or 100, to see what type of products they offered  
9 based on, again, what they had on their Websites. So, looked at  
10 that, looked at the localities that they could service. We also  
11 went out with requests for information. The requests for  
12 information had about 19 questions that asked anybody who would  
13 be interested if they could meet certain elements, as well as  
14 different definitions and how they would define those.

15 **Q.** You mentioned, I believe, an integrated product team.  
16 Can you explain what that is.

17 **A.** Sure. So, an integrated product team is a team of  
18 experts who work with food and foodservice-related items on a  
19 daily basis, and the folks who are on that team are chosen  
20 nationwide so that we have a perspective from the different  
21 customer regions as to what types of foods, foodservice items  
22 that they all utilize, what do they have in common, and to again  
23 ensure that I understood what the current requirements were and  
24 what the potential requirements would be, whether --

25 **Q.** You mentioned customers.



1 THE COURT REPORTER: I'm sorry, I didn't hear the end of  
2 your answer.

3 THE COURT: Ms. Szrom, could you repeat the end of your  
4 answer.

5 THE WITNESS: About the IPT?

6 BY MR. GILMAN:

7 Q. Correct.

8 A. So the IPT is a group of experts, typically dietitians,  
9 throughout the nation located at our various VA medical centers  
10 who participate in a program to kind of explain to me what the  
11 current requirements of the current contract, which was SPV-3 at  
12 the time, was and what possible new requirements would be  
13 required for the SPV-4 program.

14 Q. At one point during your answer you mentioned customers.  
15 Who do you characterize as the VA's customers?

16 A. Well, we define customers in two different ways. So, the  
17 way that our RFP is written up is that we guaranty our  
18 requirements based on the VA medical centers only; however, we  
19 also have participating customers which are all of the veteran  
20 canteen services, all of the Army medical centers nationwide,  
21 the largest Naval hospitals nationwide. We have Indian Health  
22 Service, we have the Job Corp. force service, and many state  
23 veteran homes.

24 Q. I believe, when you were describing your responsibilities  
25 as the senior contract specialist, you mentioned an acquisition

1 plan. Can you explain what an acquisition plan is?

2 **A.** The acquisition plan basically states what our statement  
3 of need is. It speaks to cost elements and several other  
4 factors, such as providing milestones for the upcoming request  
5 for proposal for that acquisition in itself, any barriers, what  
6 type of competition we have found, any type of market research,  
7 things of that nature.

8 **Q.** And what was your role with respect to the acquisition  
9 plan?

10 **A.** It was written in conjunction with the IPT since they're  
11 responsible mainly for working on the Statement of Work.

12 **Q.** And do you work with the IPT or did you as the senior  
13 contract specialist work with the IPT?

14 **A.** Yes. We met in face for the first meeting, and then we  
15 had weekly calls thereafter, up until, I want to say, the  
16 technical evaluation portion, which then again they turned into  
17 our source selection team, and so we held conference calls up to  
18 that point until there was a break during negotiations and  
19 ultimate award.

20 **Q.** Can you explain what the source selection team is?

21 **A.** The source selection team is a group of people. One is  
22 basically a chairperson that does oversight. The rest of the  
23 members who are responsible for evaluating those technical  
24 evaluation factors that are part of the request for proposals.  
25 They are technical experts, so they are best suited to evaluate

1 those technical factors.

2 Q. I believe you mentioned that you were involved as a  
3 senior contract specialist with a request for proposal. What  
4 was your role specifically with the RFP?

5 A. It's my responsibility to write the RFP and to ensure  
6 that the language isn't too constrictive where we don't have  
7 competition but restrictive enough that it meets the customers'  
8 requirements.

9 Q. I believe you mentioned you also negotiated SPV  
10 contracts. Can you explain your role in that regard?

11 A. Sure. Once the proposals came in, the source selection  
12 team was provided with a technical portion to evaluate. At the  
13 same time it was my responsibility to evaluate the rest of the  
14 proposal to ensure that there was no exceptions to the terms and  
15 conditions. At that point, we found that there was exceptions  
16 to the terms and conditions, so no further negotiations happened  
17 at that time except for the removal of those exceptions or to  
18 revise some of the terminology in which there was the exception  
19 to see if we could come to a common ground.

20 Q. Okay. And we'll talk a little bit about specifics of a  
21 particular SPV, but for now I just wanted to get the general  
22 scope of your responsibilities. And I believe you mentioned you  
23 evaluated pricing proposals. Can you explain what you mean by  
24 that?

25 A. Sure. So when the technical evaluation portion was

1 completed, we evaluated price. Due to Sysco no longer being  
2 within the competitive range at that time, we still utilized  
3 their prices to compare to U.S. Foods' proposed prices to ensure  
4 fair and reasonable pricing could be established.

5 Q. Okay. And we'll probably come back to that as well. I  
6 think one of the last things you mentioned was your involvement  
7 as a senior contract specialist with awarding the SPV contract;  
8 is that right?

9 A. That is correct.

10 Q. And what was involved in that?

11 A. Um, basically it's award documentation and then a  
12 post-award conference with the awardee, and a possible  
13 debriefing with the vendor or vendors who did not receive an  
14 award, if requested by them.

15 Q. Did you have any role after an award was made to an SPV  
16 awardee?

17 A. Again, the role was the post-award conference, so it's  
18 basically going out to meet with the awardee to go over what the  
19 expectations are, again go through what the requirements of the  
20 contract are, any type of reporting, special reporting, so that  
21 everybody understands what the expectations of both sides are.

22 Q. After the --

23 THE COURT: I'm sorry to interrupt, but Ms. Szrom, what  
24 year again was this when you were undertaking this evaluation and  
25 the RFP?

1 THE WITNESS: I'm sorry, could you repeat that question?

2 THE COURT: What year was it that the RFP was issued and  
3 you were evaluating the competing responses of U.S. Foods and  
4 Sysco?

5 THE WITNESS: The RFP was issued in 2011. We did eight  
6 months of negotiations, and the award happened in -- I believe,  
7 May 1st of 2012 --

8 THE COURT: All right. Thank you.

9 THE WITNESS: -- was the effective date.

10 BY MR. GILMAN:

11 Q. We're going to come back to this, but with respect to the  
12 SPV you were referring to that you evaluated between U.S. Foods  
13 and Sysco, was that SPV-3 or a subsequent SPV-3?

14 A. That was SPV-4.

15 Q. Okay. Thank you. And I believe you also mentioned  
16 something about deviated pricing agreements. Can you explain  
17 what a deviated pricing agreement is?

18 A. Sure. So it's basically taking economies of scale to  
19 standardized products across the nation. So what we do is we  
20 identify our top volume, most highly critical items required  
21 throughout all hospitals that need to be standardized, we take  
22 the -- our -- we call it a sub, it's a standardization user  
23 group. We meet once a year and we pull in different  
24 manufacturers that are available through the distributor to  
25 compete their products, and they're evaluated based on taste,

1 appearance, nutritional values, and then ultimately on price.

2 At that point in time, we make a determination whether  
3 winner-take-all or that we provide a PPL -- or basically an  
4 agreement with more than one supplier, depending on maybe a  
5 higher product quality in some areas versus some other areas to  
6 ensure that they get the products that they need.

7 **Q.** And what effect, if any, does a deviated pricing  
8 agreement have on the VA customers' prices for those products  
9 subject to a deviated pricing agreement?

10 **A.** Well, basically, those are the products our customers are  
11 supposed to purchase first, so we push compliance on those  
12 products because of the standard need for them throughout the  
13 nation and throughout the hospitals themselves. We realize a  
14 considerable amount of savings, but without the documentation in  
15 front of me to look at the numbers, it's in the tens of millions  
16 of dollars over the life of the contract.

17 **Q.** Okay. So, compared to products that are not on deviated  
18 pricing agreements, how do the prices of products subject to a  
19 deviated pricing agreement compare? Are they higher,  
20 discounted, or some other --

21 **A.** So, if we purchase products that are not a deviated  
22 pricing agreement, those are the line of products priced to the  
23 distributor, so it's whatever the price is paid by the  
24 distributor and if there's any costs on top of that. Deviated  
25 pricing agreement prices are fixed prices, so they're negotiated

1 prices at a lower cost or with an allowance that we receive over  
2 a specific period of time.

3 Q. And we'll probably come back to this, but let me wrap up  
4 a little bit of your professional experience. What is your  
5 current position?

6 A. I'm currently a chief contract officer for a program  
7 management and resource support team for the Federal Supply  
8 Schedule Service.

9 Q. Was that a lateral move within the VA, a promotion,  
10 something else?

11 A. It was a promotion.

12 Q. And how long have you been the division chief?

13 A. Since November of 2014.

14 Q. Do you hold any other professional degrees or  
15 certifications?

16 A. Yes, I do. I hold a college degree and also a federal  
17 acquisition certification, Level 3, and an unlimited warrant.

18 Q. Can you explain briefly what a federal acquisition  
19 certification Level 3 is.

20 A. Sure, it's about a four-year program. There's a level 1,  
21 level 2, level 3; level 3 meaning basically that you're an  
22 expert in the acquisition field.

23 Q. Okay. Thank you. So I want to turn briefly to the SPV  
24 program generally, and I think you've started to explain that,  
25 but can you provide a little more detail about what the SPV

1 program is?

2 **A.** Okay. So, again, it's -- it's our prime vendor program.  
3 When you're talking about normal contracts in the VA, we have  
4 requirement-type contracts where we take volume products and we  
5 compete them, and so one offer would be that our customers are  
6 required to utilize those contracts. SPV is similar in nature  
7 in that it's a requirement-type contract -- it's not IDIQ, but  
8 it's required by all VA facilities to utilize as a mandatory  
9 source, so all of their food and foodservice supplies.

10 **Q.** You used the term "IDIQ." Can you explain what that is.

11 **A.** Indefinite delivery, indefinite quantity-type contract.

12 **Q.** And under the SPV program, who was the VA contracting  
13 with?

14 **A.** We currently are contracting with U.S. Foods.

15 **Q.** So a foodservice distributor? I'm sorry, I didn't catch  
16 your answer.

17 **A.** I'm sorry?

18 **Q.** Does the VA contract under the SPV program with  
19 foodservice distributors?

20 **A.** Yes. So we contract with broadline distributor U.S.  
21 Foods.

22 **Q.** Okay. And does the VA contract with food manufacturers  
23 and suppliers?

24 **A.** Not directly, we do not. We do it in an indirect way.

25 **Q.** So who was contracting with the food suppliers that



1 provide the food to VA customers?

2 **A.** The distributor is responsible to get -- to go into an  
3 agreement with those food manufacturers/suppliers on behalf of  
4 the VA. However, they're not allowed to do so without the VA  
5 reviewing prices and, again, like I said, evaluating for taste,  
6 nutritional value, things of that nature, but they do it on our  
7 behalf due to our administrative restraints.

8 **Q.** What types or categories of products are VA customers  
9 purchasing under the SPV program?

10 **A.** We purchase mainly hospital food, a lot of specialty food  
11 for people with diabetes, for people with dysphasia, so like  
12 pureed food, a lot of dietary supplement-type items, a lot of  
13 portion controlled items, low sodium items, so a lot of items  
14 that are more of restrictive than the typical public-type food.

15 **Q.** Do the VA facilities purchasing under the SPV program  
16 purchase branded products, private label products, something  
17 else, all of the above? Can you explain what products, types of  
18 products?

19 **A.** So, the way that the contract is awarded is that it's the  
20 entire catalog of the distributor is awarded for use. So  
21 customers have the broad catalog to purchase from. However,  
22 since our deviated pricing agreement is what we aim to utilize,  
23 those products are again based on competition, so it could be a  
24 brand name product, it could be a private label. It depends  
25 again on those criteria that we mentioned. And again, do we

1 need a name brand because it sits in the face of the vendor or  
2 can we go with a private label because the vendor never sees  
3 any -- Not the vendor, I'm sorry, the veteran member who sees  
4 the actual manufacturer's name on it. So --

5 Q. And in what circumstances would a customer or the VA  
6 purchase a private label product, or why would you do that?

7 THE COURT: I'm sorry, could you clarify what you mean by  
8 "private label product"?

9 MR. GILMAN: Sure.

10 BY MR. GILMAN:

11 Q. Ms. Szrom, can you explain what a private label product  
12 is or, if you know of an exclusive brand product, what that is?

13 A. Sure. So, it's kind of like going to a grocery store.  
14 And I don't know what grocery store you have over there, but you  
15 like have a General Mills and then you have grocery store's own  
16 named product. In essence, that's what a private label or  
17 exclusive brand product would be. So that's, in essence, U.S.  
18 Foods' own private label named product, so it's like a generic  
19 brand.

20 MR. GILMAN: Thank you.

21 THE COURT: Thank you.

22 BY MR. GILMAN:

23 Q. And so in what type of a situation would a customer, a VA  
24 customer purchase a private label product instead of a branded  
25 product, or why would they do that?

1     **A.**     Again, it varies. Everything is based on nutritional  
2 values because of the dietary restrictions that we have, and we  
3 have the National Dietary Guidelines that our dieticians have to  
4 follow, so if those private label products are of less expense  
5 and again are utilized in a fashion where it's not put on a  
6 plate to the veteran where a brand name would be necessary, in  
7 many cases those items would be used. But again, it's assuming  
8 that they meet the qualifications of taste, smell, appearance,  
9 and the nutritional values.

10    **Q.**     And I think you mentioned earlier some of the customers  
11 that purchase products under the SPV program. Can you tell me  
12 roughly how many VA medical centers' customers are under the SPV  
13 program?

14    **A.**     We have approximately 156 medical facilities, and then  
15 all together with our other government customers, including  
16 veterans' canteens, we're right around 450 customers total.

17    **Q.**     And how many states in the U.S. do the VA facilities  
18 receive distribution under the SPV program?

19    **A.**     49 states and then also Puerto Rico.

20    **Q.**     Do you know what percent of VA customers' purchases are  
21 purchased under the SPV program?

22    **A.**     Well over 90 percent.

23    **Q.**     I was going to ask you about the structure of a typical  
24 SPV program, and I think you mentioned it was IDIQ?

25            THE COURT: I'm sorry to interrupt. You said over

1 90 percent. What would be the reason that it's less than a  
2 hundred percent?

3 THE WITNESS: We have three areas that are potential  
4 set-asides for small, viable businesses such as farmers or small  
5 disabled veteran owned businesses, and that's for fresh produce,  
6 fresh bakery that no distributor carries because they don't  
7 produce fresh breads in the morning, and milk. So we try to  
8 reach out to our local farmers and small businesses.

9 THE COURT: Thank you.

10 BY MR. GILMAN:

11 Q. With respect to the SPV contracts, what's the typical  
12 term of -- let's talk specifically about SPV-4. What's the term  
13 of SPV-4 in terms of a length of a contract?

14 A. It's a one-year base with four "one option" years for a  
15 total of five years.

16 Q. You may have mentioned this, but when you became the  
17 senior contract specialist, SPV-3 was in effect at the time?

18 A. That's correct.

19 Q. And who was the SPV distributor to the VA under SPV-3?

20 A. It was U.S. Foods Service at the time.

21 MR. GILMAN: Your Honor, I'm about to begin a new section.  
22 I could start.

23 THE COURT: Well, if you're at a natural breaking point,  
24 why don't we break. So, it's 12:25 now. Why don't we break for  
25 lunch and we'll reconvene at 1:25.

1 (Thereupon, a luncheon recess was had beginning at  
2 12:25 p.m.)

3 C E R T I F I C A T E

4  
5 I, Scott L. Wallace, RDR-CRR, certify that  
6 the foregoing is a correct transcript from the record of  
7 proceedings in the above-entitled matter.

8 /s/ Scott L. Wallace

5/5/15

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9 **Scott L. Wallace, RDR, CRR**  
10 **Official Court Reporter**

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I N D E XEXAMINATIONSPage

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF	7
OPENING STATEMENT ON BEHALF OF DEFENDANT SYSCO	44
OPENING STATEMENT ON BEHALF OF THE DEFENDANT U.S. FOODS	76
DIRECT EXAMINATION OF CHRISTINE SZROM BY MR. GILMAN	84

EXHIBITSDESCRIPTION

Plaintiffs' Exhibits admitted	83
Defendants' Exhibits admitted	83

<b>\$</b>	<b>20006</b> [4] - 2:12, 16, 19, 23 <b>2006</b> [1] - 84:25 <b>2008</b> [1] - 50:9 <b>2010</b> [4] - 85:10; 86:3, 16; 87:3 <b>2011</b> [1] - 93:5 <b>2012</b> [1] - 93:7 <b>2013</b> [4] - 27:9; 32:24; 77:9; 86:3 <b>2014</b> [2] - 22:1; 95:13 <b>2015</b> [3] - 1:5; 4:1; 8:17 <b>202</b> [15] - 1:16, 20, 24; 2:4, 12-13, 16, 20, 24; 3:8, 11 <b>202.354.3196</b> [1] - 3:15 <b>20580</b> [4] - 1:15, 19, 23; 2:4 <b>20th</b> [1] - 50:7 <b>212</b> [2] - 3:4 <b>21202</b> [1] - 2:8 <b>21st</b> [2] - 8:17; 54:8 <b>220-5052</b> [1] - 2:24 <b>225</b> [3] - 48:12; 52:4; 70:15 <b>23</b> [1] - 47:2 <b>24</b> [2] - 41:11; 47:2 <b>240</b> [1] - 52:4 <b>242</b> [1] - 40:17 <b>25</b> [3] - 47:1; 49:12, 20	<b>5</b>
<b>\$10</b> [1] - 12:12 <b>\$225</b> [1] - 46:23 <b>\$231</b> [1] - 60:15 <b>\$240</b> [2] - 48:12; 52:5 <b>\$50</b> [1] - 12:10 <b>\$60</b> [1] - 51:15 <b>\$90</b> [1] - 63:24 <b>\$900</b> [1] - 77:13	<b>202.354.3196</b> [1] - 3:15 <b>20580</b> [4] - 1:15, 19, 23; 2:4 <b>20th</b> [1] - 50:7 <b>212</b> [2] - 3:4 <b>21202</b> [1] - 2:8 <b>21st</b> [2] - 8:17; 54:8 <b>220-5052</b> [1] - 2:24 <b>225</b> [3] - 48:12; 52:4; 70:15 <b>23</b> [1] - 47:2 <b>24</b> [2] - 41:11; 47:2 <b>240</b> [1] - 52:4 <b>242</b> [1] - 40:17 <b>25</b> [3] - 47:1; 49:12, 20	<b>5</b> [3] - 1:5; 4:1; 47:11 <b>5/5/15</b> [1] - 101:7 <b>50</b> [5] - 51:3; 52:11; 59:16; 61:3; 88:8 <b>535</b> [1] - 77:12 <b>576-6470</b> [1] - 2:9 <b>59</b> [1] - 75:16 <b>59.98</b> [1] - 51:16 <b>59.99</b> [1] - 51:15
<b>/</b>	<b>3</b>	<b>6</b>
<b>/s</b> [1] - 101:7	<b>3</b> [7] - 22:13; 47:11; 95:17, 19, 21 <b>3-1/2</b> [1] - 48:8 <b>3007</b> [1] - 11:22 <b>326-2030</b> [1] - 1:16 <b>326-2579</b> [1] - 1:20 <b>326-2673</b> [1] - 2:4 <b>326-3296</b> [1] - 1:24 <b>35</b> [3] - 35:5; 53:10; 75:8 <b>383-5300</b> [1] - 2:16 <b>383-5336</b> [1] - 2:20 <b>383-5380</b> [1] - 2:12 <b>383-5414</b> [3] - 2:13, 20, 24	<b>6</b> [2] - 48:19, 22 <b>60</b> [2] - 41:11; 75:16 <b>600</b> [4] - 1:15, 19, 23; 2:3 <b>636-5500</b> [1] - 3:8 <b>636-5502</b> [2] - 3:8, 12 <b>636-5527</b> [1] - 3:11 <b>65</b> [1] - 28:16 <b>6503</b> [1] - 3:14
<b>1</b>	<b>4</b>	<b>7</b>
<b>1</b> [5] - 1:10; 50:12; 74:25; 75:3; 95:20 <b>10,000</b> [2] - 45:20; 76:5 <b>10-K</b> [1] - 16:7 <b>100</b> [3] - 29:25; 74:13; 88:8 <b>10017</b> [1] - 3:3 <b>10:31</b> [1] - 43:18 <b>10:39</b> [1] - 43:19 <b>11</b> [10] - 9:12; 38:12, 18, 20, 23; 41:12, 20-21; 75:17 <b>1155</b> [2] - 3:7, 10 <b>11:30</b> [1] - 73:7 <b>11:42</b> [1] - 82:2 <b>11:50</b> [1] - 7:15 <b>11:54</b> [1] - 82:3 <b>12</b> [1] - 68:18 <b>12:25</b> [2] - 100:24; 101:2 <b>12:30</b> [1] - 7:17 <b>13(b)</b> [3] - 8:12, 18 <b>13(b)</b> [1] - 14:17 <b>15</b> [2] - 52:21; 56:20 <b>15,000</b> [3] - 44:20; 46:7; 76:6 <b>15-256</b> [2] - 1:4; 4:4 <b>156</b> [1] - 99:14 <b>16</b> [1] - 68:17 <b>16,500</b> [2] - 46:23; 48:11 <b>1625</b> [4] - 2:11, 15, 19, 23 <b>17</b> [3] - 46:25; 52:21; 56:20 <b>18</b> [2] - 33:3; 75:5 <b>19</b> [3] - 33:3, 6; 88:12 <b>1:25</b> [1] - 100:25 <b>1st</b> [1] - 93:7	<b>4</b> [2] - 43:22; 44:1 <b>40</b> [5] - 7:16; 38:19, 22; 74:21; 75:1 <b>400,000</b> [2] - 44:23; 51:23 <b>410</b> [1] - 2:9 <b>42</b> [2] - 71:15 <b>425</b> [1] - 3:3 <b>44</b> [1] - 102:5 <b>45</b> [1] - 72:25 <b>450</b> [1] - 99:16 <b>455-2502</b> [1] - 3:4 <b>455-3840</b> [1] - 3:4 <b>46</b> [1] - 73:1 <b>47</b> [1] - 73:20 <b>49</b> [1] - 99:19	<b>7</b> [6] - 10:17; 27:12, 14; 30:24; 45:17; 102:4 <b>70</b> [2] - 34:10; 71:21 <b>70-something</b> [1] - 60:12 <b>75</b> [2] - 28:17; 79:9 <b>76</b> [1] - 102:6 <b>78</b> [2] - 28:17; 48:24
<b>2</b>	<b>A</b>	<b>8</b>
<b>2</b> [4] - 47:12; 50:12; 74:25; 95:21 <b>2,500</b> [1] - 28:6 <b>20</b> [3] - 35:4; 56:20; 81:16 <b>200</b> [4] - 2:8; 28:7; 40:17; 58:9 <b>20001</b> [1] - 3:15 <b>20004</b> [2] - 3:7, 11	<b>4</b> [2] - 43:22; 44:1 <b>40</b> [5] - 7:16; 38:19, 22; 74:21; 75:1 <b>400,000</b> [2] - 44:23; 51:23 <b>410</b> [1] - 2:9 <b>42</b> [2] - 71:15 <b>425</b> [1] - 3:3 <b>44</b> [1] - 102:5 <b>45</b> [1] - 72:25 <b>450</b> [1] - 99:16 <b>455-2502</b> [1] - 3:4 <b>455-3840</b> [1] - 3:4 <b>46</b> [1] - 73:1 <b>47</b> [1] - 73:20 <b>49</b> [1] - 99:19	<b>8</b> [4] - 47:1, 11; 48:19, 22 <b>83</b> [2] - 102:13 <b>84</b> [1] - 102:8 <b>84.3</b> [1] - 73:4
<b>2</b>	<b>9</b>	<b>9</b>
<b>2</b> [4] - 47:12; 50:12; 74:25; 95:21 <b>2,500</b> [1] - 28:6 <b>20</b> [3] - 35:4; 56:20; 81:16 <b>200</b> [4] - 2:8; 28:7; 40:17; 58:9 <b>20001</b> [1] - 3:15 <b>20004</b> [2] - 3:7, 11	<b>4</b> [2] - 43:22; 44:1 <b>40</b> [5] - 7:16; 38:19, 22; 74:21; 75:1 <b>400,000</b> [2] - 44:23; 51:23 <b>410</b> [1] - 2:9 <b>42</b> [2] - 71:15 <b>425</b> [1] - 3:3 <b>44</b> [1] - 102:5 <b>45</b> [1] - 72:25 <b>450</b> [1] - 99:16 <b>455-2502</b> [1] - 3:4 <b>455-3840</b> [1] - 3:4 <b>46</b> [1] - 73:1 <b>47</b> [1] - 73:20 <b>49</b> [1] - 99:19	<b>90</b> [4] - 60:24; 86:25; 99:22; 100:1 <b>9:28</b> [1] - 4:2 <b>9:30</b> [1] - 1:6
<b>2</b>	<b>A</b>	<b>A</b>
<b>2</b> [4] - 47:12; 50:12; 74:25; 95:21 <b>2,500</b> [1] - 28:6 <b>20</b> [3] - 35:4; 56:20; 81:16 <b>200</b> [4] - 2:8; 28:7; 40:17; 58:9 <b>20001</b> [1] - 3:15 <b>20004</b> [2] - 3:7, 11	<b>4</b> [2] - 43:22; 44:1 <b>40</b> [5] - 7:16; 38:19, 22; 74:21; 75:1 <b>400,000</b> [2] - 44:23; 51:23 <b>410</b> [1] - 2:9 <b>42</b> [2] - 71:15 <b>425</b> [1] - 3:3 <b>44</b> [1] - 102:5 <b>45</b> [1] - 72:25 <b>450</b> [1] - 99:16 <b>455-2502</b> [1] - 3:4 <b>455-3840</b> [1] - 3:4 <b>46</b> [1] - 73:1 <b>47</b> [1] - 73:20 <b>49</b> [1] - 99:19	<b>a.m</b> [6] - 1:6; 4:2; 43:18; 82:2 <b>abide</b> [1] - 6:10 <b>ability</b> [3] - 9:2; 56:5; 69:22 <b>able</b> [2] - 57:20; 71:4 <b>above-entitled</b> [1] - 101:6 <b>absolutely</b> [7] - 53:24; 55:18; 62:5, 17; 70:20; 73:18 <b>access</b> [1] - 5:10

<p><b>accommodate</b> [1] - 84:13  <b>accompanying</b> [1] - 45:7  <b>according</b> [2] - 20:16; 80:23  <b>account</b> [5] - 11:17; 28:22, 25; 67:25; 69:25  <b>accounting</b> [1] - 9:12  <b>accounts</b> [4] - 24:1; 33:14; 35:10; 54:23  <b>achieve</b> [1] - 77:5  <b>achieved</b> [2] - 42:12  <b>acknowledge</b> [2] - 37:20; 39:2  <b>acquisition</b> [10] - 38:10; 86:9; 89:25; 90:1, 5, 8; 95:17, 22  <b>Act</b> [4] - 8:12; 10:18; 27:13; 30:24  <b>Action</b> [2] - 1:4; 4:4  <b>activate</b> [1] - 21:20  <b>activities</b> [1] - 26:11  <b>actual</b> [6] - 36:20, 23; 49:11; 53:20; 65:19; 98:4  <b>added</b> [3] - 11:15; 14:3; 75:17  <b>addition</b> [1] - 41:21  <b>additional</b> [2] - 19:24; 41:18  <b>address</b> [1] - 76:14  <b>adds</b> [1] - 47:1  <b>adjoining</b> [1] - 67:10  <b>administering</b> [1] - 86:8  <b>Administration</b> [1] - 6:23  <b>administrative</b> [3] - 8:24; 43:14; 97:7  <b>admission</b> [1] - 44:8  <b>admit</b> [1] - 79:10  <b>admitted</b> [7] - 82:19; 83:16, 18, 21-22; 102:13  <b>Advantage</b> [2] - 26:17; 80:13  <b>Affairs</b> [1] - 84:21  <b>affects</b> [1] - 12:4  <b>affidavits</b> [1] - 74:18  <b>aftermath</b> [1] - 33:17  <b>afternoon</b> [1] - 63:5  <b>agency</b> [1] - 71:15  <b>Agency</b> [1] - 80:2  <b>agent</b> [1] - 58:16  <b>aggressive</b> [1] - 35:15  <b>agilman@ftc.gov</b> [1] - 1:20  <b>ago</b> [3] - 20:19; 46:11; 73:23  <b>agree</b> [3] - 65:11; 66:6  <b>agreed</b> [2] - 6:6; 34:18  <b>agreement</b> [11] - 34:20; 38:22; 93:17; 94:4, 8-9, 19, 22, 25; 97:3, 22  <b>agreements</b> [6] - 6:10; 87:22; 93:16; 94:18  <b>ahead</b> [6] - 54:19; 60:14; 61:5; 68:21; 82:15, 25  <b>aided</b> [1] - 3:17  <b>aim</b> [1] - 97:22  <b>aired</b> [1] - 5:15  <b>al</b> [4] - 1:4, 8, 4:5  <b>Albuquerque</b> [4] - 39:12, 14; 75:11, 14  <b>alert</b> [1] - 8:1  <b>alerted</b> [1] - 7:3</p>	<p><b>Alexis</b> [3] - 1:17; 4:6; 82:7  <b>alexis</b> [1] - 83:25  <b>aligns</b> [2] - 23:21; 36:2  <b>all-time</b> [1] - 76:7  <b>allege</b> [1] - 30:15  <b>alleged</b> [5] - 11:6; 34:4; 42:6, 15; 81:14  <b>Allen</b> [3] - 7:7; 31:14, 20  <b>Allen's</b> [1] - 32:12  <b>allow</b> [2] - 65:24; 77:6  <b>allowance</b> [1] - 95:1  <b>allowed</b> [3] - 6:12; 26:19; 97:4  <b>allowing</b> [1] - 11:5  <b>almost</b> [6] - 40:20; 70:2; 73:7; 75:3; 81:16; 86:4  <b>alone</b> [1] - 44:22  <b>alones</b> [1] - 42:13  <b>alternate</b> [1] - 12:16  <b>alternative</b> [1] - 49:13  <b>alternatives</b> [1] - 17:13  <b>America</b> [1] - 4:24  <b>American</b> [1] - 52:9  <b>AMIT</b> [1] - 1:11  <b>amount</b> [1] - 94:14  <b>amounting</b> [1] - 33:1  <b>analysis</b> [8] - 22:11; 27:9, 13; 36:1, 5; 41:16, 19; 74:14  <b>analyst</b> [3] - 49:10, 19  <b>analyze</b> [4] - 21:23; 36:9; 54:1; 65:6  <b>analyzing</b> [1] - 21:24  <b>Angeles</b> [1] - 52:20  <b>announced</b> [2] - 35:21; 41:17  <b>annual</b> [3] - 12:10; 33:2; 50:11  <b>answer</b> [15] - 18:19, 22, 25; 29:4; 32:10; 35:1; 56:21; 66:1; 69:7; 71:5, 8; 89:2, 4, 14; 96:16  <b>Answer</b> [1] - 19:25  <b>answer's</b> [1] - 80:6  <b>anticompetitive</b> [9] - 10:23; 11:7; 27:24; 28:7, 11; 31:2, 6; 77:14, 22  <b>antitrust</b> [11] - 8:21; 9:24; 13:24; 14:15; 19:10; 28:4; 44:4; 47:6; 49:16; 59:2  <b>apart</b> [1] - 22:15  <b>apologize</b> [3] - 40:7; 46:13; 47:19  <b>appear</b> [1] - 77:11  <b>appearance</b> [2] - 94:1; 99:8  <b>APPEARANCES</b> [2] - 1:13; 2:1  <b>Appearances</b> [1] - 3:1  <b>appearing</b> [1] - 84:2  <b>Applebee's</b> [3] - 79:24; 80:4, 24  <b>applicable</b> [1] - 22:16  <b>applied</b> [1] - 14:16  <b>applies</b> [6] - 10:20; 17:18; 22:23; 23:4; 27:13; 68:16  <b>apply</b> [5] - 23:1; 24:11; 25:5; 26:13; 73:21  <b>appreciate</b> [1] - 6:15  <b>approach</b> [2] - 7:20; 38:6  <b>approaches</b> [1] - 77:9</p>	<p><b>approaching</b> [1] - 45:1  <b>arbitrary</b> [2] - 68:13, 23  <b>area</b> [7] - 39:24; 40:4, 6, 19; 41:2; 74:21  <b>areas</b> [5] - 10:13; 41:3; 94:5; 100:3  <b>argued</b> [1] - 21:14  <b>arguing</b> [1] - 17:15  <b>argument</b> [1] - 78:5  <b>arguments</b> [1] - 54:2  <b>Army</b> [2] - 66:21; 89:20  <b>array</b> [1] - 14:10  <b>arrow</b> [3] - 51:6; 70:7, 10  <b>articulated</b> [1] - 5:7  <b>asides</b> [1] - 100:4  <b>assess</b> [1] - 65:1  <b>assessing</b> [1] - 28:20  <b>assets</b> [5] - 11:3; 37:10; 45:8; 46:1; 68:18  <b>Assistant</b> [1] - 2:6  <b>associated</b> [1] - 38:9  <b>Association</b> [2] - 7:8; 31:19  <b>association</b> [2] - 31:15, 17  <b>assume</b> [4] - 5:3; 20:3; 27:24; 54:12  <b>assuming</b> [2] - 39:9; 99:7  <b>astonishingly</b> [2] - 57:3; 74:24  <b>attempting</b> [1] - 42:8  <b>Attorney</b> [5] - 1:14, 17, 21; 2:2, 6  <b>ATTORNEY</b> [1] - 2:7  <b>attribute</b> [1] - 69:14  <b>audio</b> [1] - 43:22  <b>authored</b> [1] - 20:15  <b>available</b> [8] - 13:3; 33:21; 36:7, 9; 43:7, 21; 83:7; 93:24  <b>Avendra</b> [3] - 79:25; 80:7, 17  <b>Avenue</b> [5] - 1:15, 19, 23; 2:3; 3:3  <b>award</b> [8] - 85:6; 90:19; 92:11, 14-15, 17; 93:6  <b>awarded</b> [4] - 87:11, 13; 97:19  <b>awardee</b> [3] - 92:12, 16, 18  <b>awarding</b> [2] - 86:13; 92:7  <b>awful</b> [3] - 48:18; 58:22; 60:19</p> <p style="text-align: center;"><b>B</b></p> <p><b>babies</b> [1] - 47:11  <b>backed</b> [1] - 75:2  <b>background</b> [1] - 77:13  <b>backup</b> [1] - 65:8  <b>backward</b> [1] - 35:13  <b>bakery</b> [1] - 100:6  <b>balancing</b> [1] - 5:24  <b>baloney</b> [1] - 57:16  <b>Baltimore</b> [1] - 2:8  <b>bar</b> [1] - 13:2  <b>bargained</b> [1] - 38:21  <b>barriers</b> [1] - 90:5  <b>BARTLETT</b> [3] - 3:2, 6, 10  <b>base</b> [2] - 87:12; 100:14</p>
--	---	---



<p><b>based</b> [8] - 10:19; 43:12; 88:7, 9; 89:18; 93:25; 97:23; 99:1</p> <p><b>bases</b> [1] - 80:3</p> <p><b>basis</b> [1] - 88:19</p> <p><b>basket</b> [3] - 65:4, 7</p> <p><b>Bay</b> [1] - 53:4</p> <p><b>bear</b> [2] - 42:7, 10</p> <p><b>became</b> [3] - 86:15; 87:2; 100:16</p> <p><b>become</b> [2] - 41:18; 57:13</p> <p><b>BEFORE</b> [1] - 1:11</p> <p><b>began</b> [1] - 86:15</p> <p><b>begin</b> [4] - 4:12; 7:22; 8:17; 100:21</p> <p><b>beginning</b> [2] - 27:7; 101:1</p> <p><b>behalf</b> [2] - 97:3, 7</p> <p><b>BEHALF</b> [6] - 7:23; 44:10; 76:13; 102:4</p> <p><b>behemoth</b> [1] - 9:10</p> <p><b>behind</b> [1] - 35:23</p> <p><b>believes</b> [2] - 48:11</p> <p><b>benefit</b> [1] - 64:25</p> <p><b>benefits</b> [1] - 77:7</p> <p><b>best</b> [12] - 11:9; 21:1; 36:9; 44:13; 53:11; 57:20; 59:19; 61:16; 77:3; 81:19; 90:25</p> <p><b>bet</b> [1] - 59:1</p> <p><b>better</b> [2] - 9:16; 42:1</p> <p><b>between</b> [19] - 9:8, 15; 10:22; 21:14; 24:11; 30:17; 31:5; 33:9; 34:9; 48:19; 56:22; 60:20, 23; 61:10; 69:16; 72:17; 93:12</p> <p><b>beyond</b> [1] - 75:4</p> <p><b>bid</b> [2] - 32:18; 63:14</p> <p><b>bidders</b> [1] - 42:1</p> <p><b>bids</b> [1] - 71:11</p> <p><b>big</b> [15] - 8:2; 43:3; 44:4; 47:3, 12; 49:14; 52:22; 57:22; 60:22; 63:23; 67:23; 72:18, 23</p> <p><b>biggest</b> [3] - 62:15; 75:13</p> <p><b>Bill</b> [1] - 50:2</p> <p><b>billion</b> [17] - 12:10, 12; 46:23; 47:11; 48:12, 19, 22; 52:4; 60:15, 24; 63:24; 75:3</p> <p><b>bit</b> [8] - 17:20; 38:15; 61:8; 81:23; 87:16, 19; 91:20; 95:4</p> <p><b>Blackstone</b> [3] - 75:2, 6</p> <p><b>bleed</b> [1] - 57:2</p> <p><b>Block</b> [2] - 28:9; 31:8</p> <p><b>block</b> [1] - 31:7</p> <p><b>blocks</b> [1] - 72:5</p> <p><b>blue</b> [1] - 13:11</p> <p><b>blues</b> [1] - 53:12</p> <p><b>board</b> [1] - 76:4</p> <p><b>book</b> [1] - 72:25</p> <p><b>bottom</b> [5] - 23:11, 18, 20; 34:15; 60:17</p> <p><b>box</b> [2] - 18:1; 21:6</p> <p><b>boxes</b> [1] - 18:2</p> <p><b>boy</b> [2] - 57:13; 58:24</p> <p><b>branch</b> [1] - 85:13</p>	<p><b>brand</b> [6] - 97:24; 98:1, 12, 17, 19; 99:6</p> <p><b>branded</b> [2] - 97:16; 98:24</p> <p><b>bread</b> [1] - 100:7</p> <p><b>breadth</b> [1] - 24:25</p> <p><b>break</b> [14] - 7:12, 14, 16; 43:16, 18; 81:24; 82:2; 84:9, 11-13; 90:18; 100:24</p> <p><b>breaking</b> [2] - 84:10; 100:23</p> <p><b>breakout</b> [1] - 47:10</p> <p><b>breaks</b> [1] - 22:14</p> <p><b>breathe</b> [1] - 49:23</p> <p><b>brick</b> [4] - 56:22; 60:6, 20; 62:24</p> <p><b>brief</b> [3] - 26:1; 29:13; 63:10</p> <p><b>briefly</b> [3] - 85:19; 95:18, 23</p> <p><b>bring</b> [3] - 48:21; 50:1; 53:12</p> <p><b>bringing</b> [1] - 53:9</p> <p><b>brings</b> [1] - 53:13</p> <p><b>broad</b> [8] - 11:15; 14:1, 24; 16:19; 17:16; 55:8; 62:10; 97:21</p> <p><b>broader</b> [2] - 15:7; 56:14</p> <p><b>broadest</b> [1] - 13:13</p> <p><b>broadline</b> [65] - 9:9, 11, 23, 25; 11:8, 13-14, 17; 12:4, 11, 14, 20-21; 13:5, 23; 14:18; 15:1, 7, 9, 13, 17, 23-24; 16:2, 4, 10, 14, 21-22; 17:1, 11, 18; 18:8; 19:5, 15; 21:3, 11, 18; 25:16, 18; 29:22; 39:13; 41:19; 47:24; 48:4; 54:11; 55:8, 23-25; 57:16; 59:6; 60:16; 61:14, 20; 63:11; 78:10, 20; 79:19, 21; 80:5, 8; 96:20</p> <p><b>broadliner</b> [10] - 54:13; 56:13; 61:10; 62:9; 79:3; 80:6, 8, 10; 81:15</p> <p><b>broadliners</b> [10] - 12:24; 13:12; 14:2, 7, 11; 16:16; 18:3; 19:15; 20:11; 62:2</p> <p><b>Brothers</b> [1] - 50:9</p> <p><b>Brown</b> [8] - 14:13; 15:21; 16:13, 25; 17:8, 17; 25:5; 49:2</p> <p><b>buddy</b> [1] - 59:21</p> <p><b>build</b> [1] - 75:4</p> <p><b>built</b> [4] - 26:15; 53:15; 55:6; 61:3</p> <p><b>bullet</b> [1] - 37:24</p> <p><b>burden</b> [7] - 6:13; 27:13; 42:7, 10; 48:2; 59:15; 60:2</p> <p><b>Bureau</b> [3] - 1:18, 22; 2:3</p> <p><b>burger</b> [2] - 61:19</p> <p><b>Burger</b> [1] - 17:25</p> <p><b>business</b> [41] - 5:13; 6:1; 11:14; 17:3; 19:13; 20:8, 17; 21:17; 22:10; 24:9; 32:13; 35:14; 44:19; 45:1; 46:17; 48:12; 50:6; 51:15-17; 52:25; 53:1, 13; 55:3, 13; 56:17; 57:10, 24; 62:12; 63:24; 70:21; 71:12, 20; 73:2; 75:8; 76:6, 9; 87:22; 88:2</p> <p><b>businesses</b> [7] - 16:8; 21:23; 26:11, 15; 100:4, 8</p> <p><b>button</b> [1] - 51:6</p> <p><b>buy</b> [7] - 17:24; 38:18; 54:15, 18; 56:19; 58:21</p> <p><b>buying</b> [4] - 58:8, 16; 65:16; 75:3</p> <p><b>BY</b> [8] - 84:7, 15; 89:6; 93:10; 98:10,</p>	<p>22; 100:10; 102:9</p> <p style="text-align: center;"><b>C</b></p> <p><b>cafe</b> [1] - 71:18</p> <p><b>cafeteria</b> [2] - 52:1; 71:19</p> <p><b>calculate</b> [1] - 27:15</p> <p><b>calculates</b> [1] - 79:9</p> <p><b>California</b> [3] - 62:10; 70:12, 16</p> <p><b>callout</b> [1] - 21:6</p> <p><b>camera</b> [3] - 4:15; 5:1; 6:12</p> <p><b>cannot</b> [3] - 11:6; 42:6; 81:12</p> <p><b>canteen</b> [1] - 89:20</p> <p><b>canteens</b> [1] - 99:16</p> <p><b>capacity</b> [1] - 80:19</p> <p><b>capitalism</b> [1] - 52:9</p> <p><b>Cardinal</b> [3] - 26:24; 29:19; 30:3</p> <p><b>care</b> [2] - 44:7; 70:15</p> <p><b>cares</b> [1] - 70:11</p> <p><b>Carolinas</b> [2] - 74:17, 19</p> <p><b>carries</b> [1] - 100:6</p> <p><b>carry</b> [18] - 12:16; 14:2; 17:14; 19:8, 14; 20:2, 8, 10, 17, 19; 48:20; 53:25; 56:7; 60:16; 62:13, 22; 63:2; 78:11</p> <p><b>case</b> [34] - 5:8, 12; 8:19; 9:3, 7; 11:8; 19:19; 20:9; 22:4, 19; 23:22; 26:7; 31:1, 21; 33:5; 34:5; 42:7; 44:4; 45:16; 50:23; 51:15; 53:14; 64:16; 65:9, 11-12; 75:21; 77:23; 78:4, 13; 80:4; 82:11, 21</p> <p><b>cases</b> [10] - 14:15, 17; 29:10; 31:9; 36:8; 42:9; 64:17; 76:1; 99:7</p> <p><b>cash</b> [17] - 12:16; 17:14; 19:8, 14; 20:2, 8, 10, 17, 19; 48:20; 53:25; 56:7; 60:16; 62:13, 22; 63:2; 78:11</p> <p><b>cash-and-carry</b> [17] - 12:16; 17:14; 19:8, 14; 20:2, 8, 10, 17, 19; 48:20; 53:25; 56:7; 60:16; 62:13, 22; 63:2; 78:11</p> <p><b>catalog</b> [2] - 97:20</p> <p><b>catch</b> [3] - 7:1; 53:5; 96:15</p> <p><b>categories</b> [2] - 79:23; 97:8</p> <p><b>category</b> [2] - 79:16; 81:10</p> <p><b>center</b> [9] - 39:23; 40:1, 3, 8, 10, 15, 21; 41:10; 55:1</p> <p><b>centers</b> [32] - 9:13; 12:23; 13:8, 10, 13, 19; 21:4; 38:11, 18-19, 23, 25; 39:1, 13, 17, 22, 25; 40:3, 9, 14, 17, 20, 23-24; 41:3, 11, 13, 18; 87:25; 89:9, 18, 20</p> <p><b>centers'</b> [1] - 99:12</p> <p><b>Centralized</b> [1] - 4:24</p> <p><b>centrally</b> [1] - 67:15</p> <p><b>century</b> [3] - 50:7; 54:8</p> <p><b>CEO</b> [3] - 11:1; 48:21; 50:1</p> <p><b>certain</b> [2] - 18:5; 88:13</p> <p><b>certainly</b> [8] - 7:22; 10:18; 25:2; 30:24; 33:21; 36:17; 41:24; 66:10</p> <p><b>certification</b> [2] - 95:17, 19</p> <p><b>certifications</b> [1] - 95:15</p> <p><b>certify</b> [1] - 101:5</p>
--	---	--

<p><b>cetera</b> [2] - 49:13; 53:7  <b>CFO</b> [1] - 35:9  <b>chain</b> [6] - 18:20; 32:22; 55:19; 78:15; 79:24  <b>Chain</b> [1] - 4:24  <b>chains</b> [4] - 10:12; 17:23; 31:25; 32:4  <b>chairperson</b> [1] - 90:22  <b>chance</b> [1] - 7:1  <b>change</b> [5] - 29:2, 5; 59:17; 65:23  <b>changed</b> [3] - 41:24; 50:9; 87:7  <b>changes</b> [2] - 65:22  <b>changing</b> [1] - 65:14  <b>channels</b> [1] - 14:10  <b>characteristic</b> [1] - 53:18  <b>characteristics</b> [7] - 53:21; 78:25; 79:12, 20-21; 81:14  <b>characterize</b> [1] - 89:15  <b>charge</b> [1] - 54:19  <b>charged</b> [1] - 44:8  <b>chart</b> [6] - 13:9; 26:4; 28:18, 20; 29:12; 46:19  <b>charts</b> [1] - 30:5  <b>chasing</b> [2] - 48:12; 76:6  <b>check</b> [1] - 40:5  <b>Chef</b> [2] - 20:23  <b>chefs</b> [3] - 20:20  <b>cherish</b> [1] - 39:4  <b>Chesapeake</b> [1] - 53:4  <b>Chicago</b> [5] - 40:4; 70:9, 11, 17  <b>chief</b> [2] - 95:6, 12  <b>choice</b> [2] - 9:16; 70:1  <b>choices</b> [6] - 52:16; 57:23; 59:13; 61:4; 64:8; 70:22  <b>chosen</b> [1] - 88:19  <b>CHRISTINE</b> [4] - 84:5, 18; 102:8  <b>Christine</b> [2] - 6:22; 84:18  <b>Cincinnati</b> [6] - 40:11-15, 18  <b>circuit</b> [4] - 8:13; 10:20; 14:15; 27:13  <b>circumstances</b> [1] - 98:5  <b>cited</b> [1] - 25:25  <b>citing</b> [1] - 31:9  <b>City</b> [4] - 39:19; 62:19, 21  <b>Civil</b> [2] - 1:4; 4:4  <b>claim</b> [1] - 25:12  <b>claimed</b> [2] - 42:11, 24  <b>claims</b> [1] - 74:13  <b>clarification</b> [1] - 6:5  <b>clarifies</b> [1] - 15:14  <b>clarify</b> [3] - 85:5; 87:9; 98:7  <b>classic</b> [1] - 58:18  <b>classified</b> [1] - 78:23  <b>classify</b> [1] - 79:12  <b>Clayton</b> [5] - 4:21; 10:18; 27:6, 13; 30:24  <b>clear</b> [14] - 5:6, 21; 10:2; 12:13; 14:22; 15:4, 6; 24:4; 29:14; 42:7, 9; 65:13; 76:25; 87:2  <b>clearly</b> [1] - 5:7  <b>CLERK</b> [3] - 4:4; 20:5; 27:2</p>	<p><b>clerk</b> [1] - 7:20  <b>Cleveland</b> [3] - 40:16; 41:1, 4  <b>clicker</b> [1] - 44:15  <b>client</b> [7] - 44:22; 46:16; 53:23; 59:19; 68:15; 69:5; 71:6  <b>clients</b> [1] - 57:7  <b>close</b> [14] - 5:23; 9:1, 15; 12:10; 33:12; 35:3; 37:19; 39:15, 23; 43:10; 60:2; 64:9; 77:12  <b>closer</b> [2] - 54:7; 64:13  <b>closest</b> [6] - 10:22; 13:17, 21; 31:5; 40:3; 41:3  <b>clout</b> [1] - 70:3  <b>CMU</b> [1] - 79:13  <b>CMUs</b> [1] - 68:14  <b>coast</b> [2] - 67:24  <b>cob</b> [1] - 54:21  <b>coffee</b> [6] - 51:25; 54:12; 58:3; 67:5; 68:6; 72:4  <b>colleague</b> [1] - 82:7  <b>colleagues</b> [1] - 43:11  <b>college</b> [1] - 95:16  <b>Collyer's</b> [1] - 65:9  <b>COLUMBIA</b> [1] - 1:1  <b>column</b> [1] - 22:17  <b>combination</b> [2] - 13:25; 45:7  <b>combine</b> [2] - 9:8; 58:6  <b>combined</b> [5] - 11:3; 29:9; 30:16; 36:17; 49:12  <b>combining</b> [1] - 42:12  <b>coming</b> [2] - 46:10; 51:21  <b>commerce</b> [1] - 45:9  <b>commercial</b> [2] - 88:2, 4  <b>commerciality</b> [1] - 88:2  <b>Commission</b> [2] - 4:5; 84:1  <b>commission</b> [1] - 8:23  <b>COMMISSION</b> [5] - 1:3, 14, 18, 22; 2:2  <b>COMMISSION's</b> [1] - 8:15  <b>common</b> [2] - 88:22; 91:19  <b>companies</b> [27] - 11:5; 12:3; 22:10; 24:9; 26:8, 21; 32:7; 39:6, 16; 40:7, 16; 42:12; 44:23; 46:6; 47:12; 48:11; 58:9; 63:14; 69:8; 70:19; 72:8; 80:14; 88:7  <b>Company</b> [1] - 4:20  <b>company</b> [33] - 10:25; 11:1; 16:4, 20; 26:17; 27:8; 33:12; 35:9; 38:10; 46:16; 47:3, 16; 48:18; 49:15; 50:2; 55:14; 57:4; 62:15, 19; 68:17; 70:7, 9, 22, 25; 71:18; 74:25; 75:9, 19  <b>company's</b> [1] - 27:9  <b>compare</b> [4] - 21:3; 37:8; 92:3; 94:19  <b>compared</b> [4] - 12:23; 26:6; 37:7; 94:17  <b>compares</b> [1] - 26:4  <b>Compass</b> [3] - 4:23; 46:20  <b>compelling</b> [2] - 65:2  <b>compete</b> [14] - 26:20; 37:23; 54:10; 58:19; 61:3; 62:20; 63:3; 64:6; 75:9, 11; 80:15; 93:25; 96:5</p>	<p><b>competed</b> [1] - 36:23  <b>competes</b> [1] - 48:5  <b>competing</b> [6] - 45:5; 50:18; 73:5; 93:3  <b>competition</b> [27] - 9:15; 10:13, 22; 11:4; 15:24; 31:5; 32:14; 33:9; 34:8; 36:3; 37:10; 42:1; 45:9, 20, 23; 49:17; 50:12, 15; 51:14; 54:9; 59:1; 67:25; 74:19; 76:8; 90:6; 91:7; 97:23  <b>Competition</b> [3] - 1:18, 22; 2:3  <b>competitive</b> [17] - 47:13; 50:8, 18, 25; 51:3, 17; 52:23; 57:4; 59:16; 65:20, 24; 74:25; 75:24; 76:8; 77:6; 92:2  <b>competitiveness</b> [2] - 12:5; 45:14  <b>competitor</b> [7] - 33:11; 48:15; 51:11; 61:23; 62:20; 63:3; 77:1  <b>competitors</b> [8] - 9:15; 13:17, 21; 16:2; 46:24; 48:16; 73:4  <b>complaint</b> [3] - 30:15; 48:25; 66:9  <b>complete</b> [1] - 85:5  <b>completed</b> [1] - 92:1  <b>compliance</b> [1] - 94:11  <b>complicated</b> [2] - 46:1; 74:10  <b>complicates</b> [1] - 56:2  <b>compound</b> [2] - 50:11; 75:1  <b>comprised</b> [2] - 44:20; 69:3  <b>computer</b> [1] - 3:17  <b>computer-aided</b> [1] - 3:17  <b>concede</b> [1] - 47:23  <b>conceded</b> [1] - 25:25  <b>concentrated</b> [3] - 10:10, 12; 27:22  <b>concentration</b> [7] - 10:19; 27:15; 28:16; 30:4, 13; 31:3  <b>concentrations</b> [2] - 28:21  <b>concept</b> [1] - 42:13  <b>conceptually</b> [1] - 65:12  <b>concerned</b> [1] - 49:16  <b>concerning</b> [1] - 33:14  <b>concerns</b> [1] - 38:14  <b>concession</b> [1] - 48:10  <b>concessions</b> [1] - 33:1  <b>concluded</b> [2] - 42:21  <b>concludes</b> [1] - 49:19  <b>conclusion</b> [1] - 23:21  <b>conclusions</b> [1] - 31:10  <b>conditions</b> [3] - 77:2; 91:15  <b>conduct</b> [1] - 26:15  <b>conducted</b> [1] - 36:6  <b>CONFERENCE</b> [1] - 1:10  <b>conference</b> [4] - 84:2; 90:17; 92:12, 17  <b>confers</b> [1] - 82:14  <b>confess</b> [1] - 43:22  <b>confidential</b> [18] - 4:15; 5:13, 18, 22; 6:8; 11:13; 19:2; 27:5; 36:14; 44:14; 49:4, 9, 21; 50:14; 58:2; 60:7; 61:1  <b>confidentiality</b> [5] - 5:25; 8:3; 12:8; 22:3; 44:13  <b>confirm</b> [1] - 17:10  <b>conjunction</b> [1] - 90:10  <b>conservative</b> [2] - 28:16; 46:24</p>
---	---	--

<p><b>consider</b> [3] - 8:15; 43:2; 87:24  <b>considerable</b> [1] - 94:14  <b>considered</b> [1] - 32:19  <b>considering</b> [3] - 32:23; 49:13; 77:2  <b>consistency</b> [5] - 23:14; 57:15, 17; 79:5; 80:9  <b>consistently</b> [1] - 14:16  <b>consists</b> [1] - 65:7  <b>consortium</b> [2] - 26:18  <b>constraint</b> [2] - 20:10  <b>constrictive</b> [1] - 91:6  <b>consultant</b> [1] - 21:22  <b>consultants</b> [2] - 49:1, 25  <b>consulting</b> [1] - 46:20  <b>consumer</b> [1] - 77:7  <b>consumers</b> [1] - 43:3  <b>Cont</b> [2] - 2:1; 3:1  <b>contact</b> [4] - 38:24; 39:4; 79:5; 80:9  <b>contacts</b> [1] - 96:3  <b>contend</b> [2] - 39:8; 60:7  <b>contention</b> [2] - 15:15; 53:20  <b>contested</b> [1] - 74:1  <b>context</b> [3] - 20:18; 47:5; 49:14  <b>continue</b> [3] - 38:7; 43:17; 67:13  <b>continues</b> [1] - 84:11  <b>contract</b> [35] - 22:21; 26:11, 13; 79:3; 80:4, 6; 85:2, 8, 12; 86:1, 6, 15, 23; 87:2, 18; 89:11, 25; 90:13; 91:3; 92:7, 20; 94:16; 95:6; 96:7, 11, 18, 20, 22; 97:19; 100:13, 17  <b>contracting</b> [3] - 96:12, 14, 25  <b>contractor</b> [2] - 87:11, 13  <b>contracts</b> [10] - 26:10; 38:15; 39:5; 85:6; 91:10; 96:4, 6; 100:11  <b>control</b> [1] - 14:4  <b>controlled</b> [2] - 34:10; 97:13  <b>convert</b> [1] - 56:5  <b>convertibility</b> [1] - 56:12  <b>COO</b> [1] - 35:20  <b>coordinate</b> [1] - 69:22  <b>coordination</b> [1] - 23:18  <b>copies</b> [1] - 7:21  <b>Corn</b> [7] - 57:7, 9, 12; 58:5, 19, 21, 25  <b>corn</b> [1] - 54:20  <b>Corp</b> [2] - 77:20; 89:22  <b>corporate</b> [3] - 66:25; 69:16; 70:1  <b>Corporation</b> [2] - 2:11; 4:5  <b>CORPORATION</b> [1] - 1:7  <b>correct</b> [13] - 12:17; 25:20; 85:17, 25; 86:5, 17; 87:4, 15; 89:7; 92:9; 100:18; 101:5  <b>cost</b> [11] - 14:4; 33:2; 50:22; 75:21, 25; 76:7; 77:5, 7; 90:3; 95:1  <b>Costco</b> [2] - 52:18  <b>costs</b> [4] - 19:24; 76:24; 77:7; 94:24  <b>counsel</b> [2] - 6:16; 7:3  <b>count</b> [1] - 72:3  <b>country</b> [1] - 70:20  <b>couple</b> [5] - 16:1; 20:25; 35:2; 68:10;</p>	<p>72:5  <b>course</b> [4] - 5:9; 38:14; 41:6; 55:21  <b>Court</b> [26] - 3:13; 5:4; 6:14; 7:20, 25; 8:10, 20; 10:20; 14:13; 17:7; 26:2, 5; 28:8; 29:18; 30:3; 31:7, 13; 43:13; 44:17; 45:13; 56:25; 64:17; 77:20; 82:7; 101:9  <b>court</b> [2] - 5:9; 8:7  <b>Court's</b> [2] - 26:23  <b>courthouse</b> [1] - 66:21  <b>Courthouse</b> [1] - 3:14  <b>courtroom</b> [5] - 5:7, 21, 23; 43:22; 44:1  <b>COURTROOM</b> [3] - 4:4; 20:5; 27:2  <b>courts</b> [4] - 14:15; 17:11; 29:11, 13  <b>cover</b> [1] - 26:11  <b>coverage</b> [5] - 37:11; 39:8; 41:14; 69:7; 70:6  <b>crab</b> [1] - 53:6  <b>create</b> [2] - 9:10; 28:10  <b>created</b> [2] - 25:13; 80:14  <b>creating</b> [2] - 27:17; 86:10  <b>credibly</b> [2] - 19:12; 78:17  <b>Crisfield</b> [2] - 53:10; 55:14  <b>criteria</b> [1] - 97:25  <b>critical</b> [2] - 68:12; 93:20  <b>cross</b> [2] - 83:8, 20  <b>cross-examination</b> [2] - 83:8, 20  <b>crowd</b> [1] - 44:4  <b>CRR</b> [3] - 3:13; 101:5, 8  <b>Culver's</b> [1] - 4:17  <b>current</b> [6] - 37:7; 84:20; 88:23; 89:11; 95:5  <b>cust</b> [2] - 36:19; 68:14  <b>customer</b> [60] - 6:25; 10:3; 17:4; 19:5, 20; 22:16, 24; 23:1, 23; 24:23; 29:17; 32:16, 20, 22; 33:2, 6, 14; 34:11, 17, 21, 24; 35:7, 12, 25; 38:14; 54:11; 61:9, 13; 63:11; 64:25; 66:6; 69:15; 77:17, 19; 78:5, 20, 24; 79:8, 13, 15, 22; 80:1; 81:5, 9-10; 87:12; 88:21; 98:5, 23  <b>customer's</b> [1] - 23:3  <b>customer-wide</b> [1] - 34:11  <b>customers</b> [146] - 9:17; 10:1, 5, 8-9, 14, 16; 11:17; 13:6, 18, 25; 15:9, 13, 18; 16:17, 19, 21-22; 18:6, 9; 19:9, 12; 21:5, 11-13, 15, 18; 22:2, 15, 19; 23:7, 13, 16; 24:2, 5-6, 12-13, 16-20; 25:7, 11-12, 16, 18-19, 22; 26:2, 22; 27:21; 28:13; 29:18, 24-25; 30:1, 11; 32:15; 34:17; 38:12, 17, 21; 39:3; 41:15; 43:8; 44:22; 45:9; 51:22; 52:16; 56:17; 57:10, 23; 58:13; 59:13, 18, 20, 23, 25; 61:4, 25; 64:1, 7, 20; 65:24; 66:4, 13, 19, 24-25; 67:20, 22, 24; 68:5, 7; 70:5; 72:18, 22-23; 77:21; 78:23; 79:1, 11, 14, 19; 80:16, 18, 23; 81:2, 10, 12-13; 85:21; 88:25; 89:14-16, 19; 94:10; 96:5; 97:1, 8, 21; 99:10, 12, 15  <b>customers'</b> [4] - 62:12; 91:7; 94:8;</p>	<p>99:20  <b>Customized</b> [2] - 16:13, 21  <b>cut</b> [7] - 6:5; 57:11, 21, 24; 60:19  <b>cutting</b> [1] - 58:7</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> [2] - 1:7; 3:15  <b>daily</b> [1] - 88:19  <b>Dakotas</b> [2] - 40:2, 9  <b>data</b> [1] - 33:21  <b>database</b> [2] - 36:12, 25  <b>date</b> [2] - 5:18; 93:9  <b>Date</b> [1] - 101:8  <b>daunting</b> [1] - 30:14  <b>Davenport</b> [2] - 2:2; 4:7  <b>dawned</b> [1] - 5:4  <b>DAY</b> [1] - 1:10  <b>days</b> [1] - 51:19  <b>DC</b> [11] - 1:15, 19, 23; 2:4, 12, 16, 19, 23; 3:7, 11; 75:12  <b>DCs</b> [3] - 67:11, 14; 75:4  <b>deactivate</b> [1] - 29:20  <b>deal</b> [11] - 11:7; 24:2; 38:23; 39:5; 55:19; 57:11, 21; 59:19; 61:16; 65:22; 76:2  <b>dealing</b> [1] - 67:8  <b>debriefing</b> [1] - 92:13  <b>decide</b> [3] - 5:15; 59:24; 67:9  <b>decidedly</b> [2] - 8:18; 26:21  <b>deciding</b> [1] - 14:17  <b>decision</b> [4] - 26:23; 69:15  <b>decision-making</b> [1] - 69:15  <b>decisions</b> [1] - 64:4  <b>deck</b> [1] - 76:17  <b>declaration</b> [2] - 32:21, 23  <b>declarations</b> [6] - 17:5-7; 33:4, 6; 78:14  <b>declining</b> [1] - 76:24  <b>decrease</b> [1] - 34:19  <b>defend</b> [2] - 66:9; 76:22  <b>DEFENDANT</b> [4] - 44:10; 76:13; 102:5  <b>defendants</b> [16] - 7:13; 15:2; 17:15, 21; 19:8; 20:16; 25:12; 26:15; 33:4; 42:7, 10, 16, 25; 43:5  <b>Defendants</b> [3] - 1:9; 2:10; 3:2  <b>Defendants'</b> [2] - 83:22; 102:13  <b>defendants'</b> [10] - 18:15; 25:24; 31:14; 42:19, 21-23; 47:20; 83:10, 15  <b>defense</b> [5] - 4:7; 7:3; 19:19; 42:9; 60:4  <b>Defense</b> [1] - 80:1  <b>deficiencies</b> [4] - 11:6; 42:6, 8, 11  <b>define</b> [6] - 22:18; 24:17; 25:6; 88:14; 89:16  <b>defined</b> [5] - 12:14; 15:7; 73:18; 74:1  <b>defines</b> [1] - 74:6  <b>definitely</b> [1] - 50:14  <b>definition</b> [8] - 14:15; 19:11; 48:1;</p>
--	---	--

<p>66:6; 68:1; 78:19; 79:2  <b>definitions</b> [2] - 66:13; 88:14  <b>degree</b> [1] - 95:16  <b>degrees</b> [2] - 46:3; 95:14  <b>DeLaney</b> [2] - 50:2, 21  <b>deliver</b> [2] - 56:11, 14  <b>delivered</b> [1] - 52:5  <b>deliveries</b> [1] - 21:4  <b>delivering</b> [3] - 44:21; 45:2; 54:20  <b>delivers</b> [1] - 53:23  <b>delivery</b> [9] - 14:3; 37:15; 57:5, 9, 13; 58:24; 59:7; 96:11  <b>demand</b> [1] - 58:6  <b>demonstrates</b> [1] - 19:17  <b>denied</b> [1] - 76:10  <b>Denver</b> [1] - 75:14  <b>Department</b> [1] - 84:21  <b>dependent</b> [5] - 59:21; 64:2; 65:25; 71:8, 22  <b>Depo</b> [3] - 47:16; 48:14; 57:3  <b>depose</b> [1] - 33:5  <b>deposed</b> [1] - 34:21  <b>deposition</b> [4] - 7:6; 18:16; 20:9; 31:20  <b>Depot</b> [6] - 52:18, 21; 56:8, 16  <b>describe</b> [6] - 11:9, 13; 52:12; 59:15; 60:2  <b>described</b> [2] - 22:1; 53:18  <b>describes</b> [2] - 22:15; 43:6  <b>describing</b> [1] - 89:24  <b>DESCRIPTION</b> [1] - 102:12  <b>designated</b> [1] - 5:18  <b>detail</b> [3] - 85:18; 87:19; 95:25  <b>determination</b> [2] - 30:6; 94:2  <b>determine</b> [2] - 24:25; 27:14  <b>developed</b> [2] - 37:17; 59:16  <b>developing</b> [1] - 86:10  <b>development</b> [1] - 20:8  <b>deviated</b> [11] - 87:21, 23; 93:16; 94:7, 9, 17, 19, 21, 24; 97:22  <b>diabetes</b> [1] - 97:11  <b>Diego</b> [4] - 62:10; 73:3; 74:13, 16  <b>dietary</b> [3] - 85:13; 97:12; 99:2  <b>Dietary</b> [1] - 99:3  <b>dieticians</b> [1] - 99:3  <b>dietitians</b> [1] - 89:8  <b>difference</b> [1] - 69:18  <b>different</b> [35] - 16:8, 15, 17; 25:6; 28:14; 38:5; 44:25; 49:25; 51:22, 24-25; 52:1, 3; 53:20; 55:6; 56:23; 57:24; 61:2; 64:16, 20; 65:9, 15-16; 66:22; 67:11; 71:12; 72:24; 88:14, 20; 89:16; 93:23  <b>difficult</b> [1] - 65:12  <b>Direct</b> [1] - 26:17  <b>DIRECT</b> [2] - 84:6; 102:8  <b>direct</b> [2] - 59:5; 83:19  <b>directly</b> [2] - 17:24; 96:24  <b>disabled</b> [1] - 100:5  <b>disbursed</b> [6] - 10:6; 13:14, 16; 26:2, 21</p>	<p><b>discipline</b> [1] - 19:14  <b>disclosed</b> [1] - 6:17  <b>disclosing</b> [1] - 22:2  <b>discount</b> [1] - 56:20  <b>discounted</b> [1] - 94:20  <b>discuss</b> [1] - 77:10  <b>discussed</b> [1] - 5:3  <b>disparage</b> [1] - 11:1  <b>disparaging</b> [1] - 66:11  <b>dispense</b> [1] - 82:18  <b>dispensing</b> [1] - 82:23  <b>dispersion</b> [1] - 22:19  <b>dispute</b> [2] - 50:17; 74:3  <b>distance</b> [1] - 30:17  <b>distances</b> [1] - 37:15  <b>distinct</b> [14] - 9:24; 11:14; 13:23; 14:11; 15:22; 16:1, 16; 17:2, 12; 21:18; 22:16; 23:17  <b>distinction</b> [5] - 21:14; 22:6; 24:11; 60:23; 61:9  <b>Distribution</b> [2] - 4:18; 80:13  <b>distribution</b> [86] - 9:13, 23; 11:8, 14-15, 18; 12:16, 20-21, 23; 13:8, 10, 13, 18, 23-24; 14:8, 10-11, 18; 15:7, 9, 13, 17, 25; 16:12, 14; 17:12, 14, 18, 22; 18:7, 18, 21, 24; 19:8, 21; 21:4; 25:16, 18; 31:23; 32:2; 38:11, 18-19, 23, 25; 39:1, 13, 16, 22-24; 40:1-3, 7, 9-10, 13-16, 20-21, 23-24; 41:3, 10-11, 13, 18; 44:18; 48:3; 53:15, 19; 65:15; 68:8; 85:23; 87:11, 25; 99:18  <b>distributor</b> [24] - 9:11; 12:4; 16:6; 17:6; 18:1, 8; 19:4; 23:24; 34:23; 41:19; 61:10; 63:11; 79:6; 86:12; 93:24; 94:23; 96:15, 20; 97:2, 20; 100:6, 19  <b>distributor's</b> [1] - 66:13  <b>Distributors</b> [2] - 7:8; 31:18  <b>distributors</b> [9] - 9:9; 16:18; 26:18; 61:21, 25; 78:9; 81:3; 96:19  <b>DISTRICT</b> [3] - 1:1, 11  <b>diverse</b> [1] - 45:1  <b>divested</b> [1] - 37:9  <b>divesting</b> [1] - 75:18  <b>divestiture</b> [15] - 9:12; 10:24; 11:3; 12:6, 11, 24; 28:22, 25; 29:9; 37:4, 6; 38:9, 16; 39:9; 45:8  <b>dividing</b> [1] - 53:15  <b>division</b> [3] - 16:11; 95:12  <b>DLA</b> [2] - 80:7, 19  <b>DMA</b> [9] - 26:17; 80:13, 17-19, 25; 81:3  <b>docs</b> [2] - 71:11, 13  <b>document</b> [25] - 11:11, 20; 20:14, 18; 21:21; 22:8, 13-14; 23:21, 23; 24:4; 27:5; 29:21; 30:18; 33:8; 34:15; 42:5; 43:4, 6; 47:18; 49:8; 71:10  <b>documentation</b> [2] - 92:11; 94:14  <b>documents</b> [11] - 6:8, 11-12; 17:3; 21:17; 23:22; 30:16; 32:13; 36:1; 40:12; 66:24  <b>dollars</b> [3] - 33:2, 12; 94:16</p>	<p><b>dominate</b> [1] - 46:7  <b>dominated</b> [1] - 49:7  <b>done</b> [6] - 6:13; 12:6; 21:24; 38:13; 61:1; 75:22  <b>Donuts</b> [1] - 72:4  <b>double</b> [2] - 53:8  <b>double-parked</b> [1] - 53:8  <b>down</b> [13] - 5:17; 6:5; 29:16; 42:2; 45:20; 50:13; 53:2; 60:16; 61:8; 65:5; 66:1; 69:25  <b>Dr</b> [17] - 17:9, 17; 18:16; 24:21; 27:21; 28:13; 29:1, 4; 30:12; 33:22; 36:5; 37:2; 48:7, 9-10; 66:7; 72:21  <b>draws</b> [1] - 44:4  <b>drayage</b> [1] - 18:2  <b>drill</b> [1] - 29:16  <b>drive</b> [2] - 13:21; 52:21  <b>driven</b> [2] - 15:24  <b>driver</b> [1] - 59:7  <b>driving</b> [1] - 55:15  <b>Dubilier</b> [2] - 4:21; 27:6  <b>duck</b> [1] - 45:17  <b>due</b> [2] - 92:1; 97:7  <b>Dunkin'</b> [1] - 72:4  <b>duopoly</b> [2] - 72:17, 20  <b>during</b> [3] - 59:3; 89:14; 90:18  <b>dwarf</b> [1] - 12:3  <b>dwarfed</b> [2] - 41:12  <b>dwarfs</b> [1] - 34:4  <b>dysphasia</b> [1] - 97:11</p> <p style="text-align: center;"><b>E</b></p> <p><b>e-mail</b> [1] - 35:21  <b>early</b> [1] - 21:22  <b>east</b> [1] - 39:19  <b>eastern</b> [1] - 53:6  <b>easy</b> [3] - 36:7; 45:18; 52:6  <b>economic</b> [12] - 25:24; 46:20; 49:1, 25; 55:5, 25; 60:21; 61:17; 63:17, 19; 64:4; 65:18  <b>economically</b> [1] - 55:7  <b>economies</b> [1] - 93:18  <b>economist</b> [2] - 18:15; 66:8  <b>economy</b> [7] - 46:14; 52:8; 54:6; 72:6  <b>Edward</b> [2] - 2:18; 4:8  <b>effect</b> [2] - 94:7; 100:17  <b>effective</b> [4] - 8:21, 23; 9:2; 93:9  <b>effects</b> [5] - 10:23; 15:12; 28:11; 31:6; 33:23  <b>efficiencies</b> [6] - 34:5; 42:18, 24; 43:1; 58:20  <b>efficiency</b> [1] - 76:2  <b>efficient</b> [2] - 19:22  <b>eggs</b> [1] - 8:25  <b>ehassi@omm.com</b> [1] - 2:21  <b>eight</b> [1] - 93:5  <b>either</b> [11] - 6:3; 23:22; 26:16; 32:17; 65:5; 78:23; 82:17; 83:19; 84:10</p>
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<p><b>electrical</b> [1] - 46:4  <b>elementary</b> [1] - 51:25  <b>elements</b> [2] - 88:13; 90:3  <b>elephant</b> [1] - 79:18  <b>eliminate</b> [3] - 9:14; 10:21; 31:4  <b>eliminated</b> [1] - 34:10  <b>elsewhere</b> [1] - 63:8  <b>Email</b> [11] - 1:16, 20, 24; 2:5, 9, 13, 17, 21, 25; 3:5, 12  <b>emerged</b> [1] - 50:5  <b>emphasize</b> [2] - 9:20; 23:12  <b>empirical</b> [3] - 36:1, 5; 37:2  <b>employer</b> [1] - 84:20  <b>encompass</b> [1] - 17:16  <b>end</b> [9] - 28:15; 45:19; 64:25; 76:5; 82:20; 83:16; 89:1, 3  <b>endeavor</b> [1] - 81:19  <b>enforcement</b> [1] - 8:21  <b>engaged</b> [1] - 26:8  <b>engineering</b> [1] - 46:4  <b>enhance</b> [1] - 45:8  <b>enhanced</b> [1] - 45:21  <b>enhancement</b> [1] - 34:13  <b>enhancing</b> [1] - 45:23  <b>enjoined</b> [2] - 29:11; 45:11  <b>ensure</b> [6] - 88:2, 23; 91:5, 14; 92:3; 94:6  <b>entire</b> [1] - 97:20  <b>entitled</b> [1] - 101:6  <b>entity</b> [1] - 41:12  <b>equally</b> [3] - 30:13; 31:1; 41:16  <b>equities</b> [4] - 8:15, 19-20; 9:2  <b>equity</b> [4] - 8:22; 11:11, 21; 27:6  <b>equity's</b> [1] - 8:18  <b>Esq</b> [7] - 2:10, 14, 18, 22; 3:2, 6, 9  <b>essence</b> [3] - 72:17; 98:16  <b>essential</b> [1] - 81:8  <b>essentially</b> [3] - 15:16; 59:6; 80:3  <b>established</b> [1] - 92:4  <b>estimate</b> [1] - 77:12  <b>et</b> [6] - 1:4, 8; 4:5; 49:13; 53:7  <b>evaluate</b> [3] - 90:25; 91:12  <b>evaluated</b> [4] - 91:23; 92:1; 93:12, 25  <b>evaluating</b> [4] - 86:13; 90:23; 93:3; 97:5  <b>evaluation</b> [4] - 90:16, 24; 91:25; 92:24  <b>event</b> [2] - 72:11; 77:22  <b>everywhere</b> [1] - 56:12  <b>evidence</b> [40] - 5:22; 7:16; 9:20; 15:24; 18:4; 19:17; 23:9, 12; 26:6; 29:3; 31:4, 13; 33:7, 14; 35:18; 36:7-9; 37:2; 45:24; 49:18; 56:4; 57:19; 60:25; 65:6; 66:19; 68:4; 69:17; 72:21; 73:17; 74:18; 75:25; 76:3, 25; 82:10, 21, 23; 83:1, 6  <b>exact</b> [2] - 34:8; 73:6  <b>exactly</b> [11] - 12:2; 22:3; 24:5, 24; 36:2, 21; 46:6; 71:6; 75:25; 83:17; 84:2  <b>examination</b> [3] - 83:7, 20</p>	<p><b>EXAMINATION</b> [2] - 84:6; 102:8  <b>EXAMINATIONS</b> [1] - 102:3  <b>examine</b> [1] - 5:21  <b>example</b> [13] - 14:4; 16:3, 10; 19:18; 30:18; 32:20; 34:7; 53:23; 67:4; 68:6; 73:3; 79:24  <b>examples</b> [5] - 16:1, 18; 31:12; 35:2, 16  <b>exceed</b> [2] - 29:9; 36:17  <b>exceedingly</b> [2] - 27:17, 22  <b>except</b> [2] - 48:25; 91:17  <b>exception</b> [1] - 91:18  <b>exceptions</b> [3] - 91:14, 17  <b>exchange</b> [1] - 34:19  <b>exclusive</b> [2] - 98:12, 17  <b>excuse</b> [3] - 59:24; 68:19; 70:25  <b>execution</b> [1] - 38:8  <b>executive</b> [2] - 52:24; 75:7  <b>executives</b> [5] - 35:20; 50:23; 59:25; 75:23; 88:1  <b>exercise</b> [1] - 59:13  <b>exercising</b> [1] - 81:10  <b>exhibit</b> [1] - 83:18  <b>EXHIBITS</b> [1] - 102:11  <b>exhibits</b> [6] - 82:10, 13; 83:6, 10, 16  <b>Exhibits</b> [4] - 83:21; 102:13  <b>exist</b> [1] - 77:11  <b>existence</b> [1] - 27:4  <b>existing</b> [1] - 11:3  <b>expand</b> [1] - 75:5  <b>expect</b> [7] - 8:6; 33:13, 16; 43:23; 55:24; 61:24; 72:20  <b>expectations</b> [2] - 92:19, 21  <b>expense</b> [1] - 99:4  <b>experience</b> [5] - 31:22; 32:1, 4, 8; 95:4  <b>experiment</b> [1] - 34:8  <b>expert</b> [17] - 17:9; 18:15; 23:12; 25:24; 33:19; 36:1; 42:20-22; 48:7; 49:10; 63:17; 65:18; 72:13; 73:19; 79:9; 95:22  <b>expertise</b> [2] - 14:5; 37:18  <b>experts</b> [8] - 33:16; 36:8; 73:1; 74:3, 8; 88:18; 89:8; 90:25  <b>explain</b> [16] - 27:25; 36:11; 38:15; 87:18; 88:16; 89:10; 90:1, 20; 91:10, 23; 93:16; 95:18, 24; 96:10; 97:17; 98:11  <b>explicit</b> [2] - 29:23; 33:10  <b>extent</b> [3] - 9:22; 19:9; 48:1  <b>extra</b> [1] - 81:22  <b>extremely</b> [2] - 54:4; 57:3  <b>Eye</b> [2] - 2:11, 15</p>	<p>49:16; 54:1; 58:8; 61:2; 65:13; 68:5; 69:12; 75:13; 79:8, 14  <b>factor</b> [9] - 12:5; 15:23; 16:14, 25; 25:5; 55:9; 56:2; 57:6, 22  <b>factored</b> [1] - 29:9  <b>factors</b> [12] - 13:17; 14:16, 18, 20; 15:22; 17:8; 26:4, 6; 69:17; 90:4, 24; 91:1  <b>facts</b> [2] - 26:25; 63:8  <b>factual</b> [1] - 64:9  <b>failed</b> [1] - 42:16  <b>fair</b> [2] - 20:4; 92:4  <b>fames</b> [1] - 60:4  <b>families</b> [1] - 50:5  <b>famous</b> [2] - 61:19  <b>far</b> [2] - 9:8; 28:10  <b>farmers</b> [2] - 100:4, 8  <b>fashion</b> [1] - 99:5  <b>fast</b> [2] - 17:23; 18:5  <b>fat</b> [1] - 54:13  <b>fault</b> [1] - 46:14  <b>favor</b> [5] - 6:20; 9:3; 14:18; 26:22; 59:2  <b>favours</b> [2] - 8:19; 16:14  <b>Fax</b> [6] - 2:13, 20, 24; 3:4, 8, 12  <b>Federal</b> [3] - 4:4; 83:25; 95:7  <b>federal</b> [2] - 95:16, 18  <b>FEDERAL</b> [5] - 1:3, 14, 18, 22; 2:2  <b>feeder</b> [1] - 80:4  <b>feet</b> [2] - 45:20; 76:5  <b>fellow</b> [3] - 67:17; 69:21; 70:11  <b>few</b> [5] - 20:18; 50:7; 64:22; 77:18; 81:22  <b>fewer</b> [1] - 37:11  <b>fiction</b> [2] - 24:8; 25:13  <b>fictional</b> [1] - 21:15  <b>field</b> [4] - 22:15; 23:15; 95:22  <b>fierce</b> [1] - 51:14  <b>fiercely</b> [2] - 45:6  <b>fifth</b> [1] - 10:24  <b>figure</b> [5] - 41:17; 50:24; 64:23; 66:5; 75:22  <b>figured</b> [2] - 52:8  <b>file</b> [1] - 27:7  <b>filed</b> [1] - 4:14  <b>files</b> [2] - 20:15; 33:8  <b>filings</b> [1] - 5:11  <b>fill</b> [1] - 7:6  <b>finally</b> [3] - 45:16; 72:16; 75:20  <b>findings</b> [1] - 63:7  <b>fine</b> [6] - 35:14; 56:21; 67:9; 81:22; 82:17; 83:14  <b>firm</b> [2] - 66:20, 22  <b>firms</b> [1] - 44:25  <b>first</b> [21] - 6:21; 7:3; 8:20, 22; 9:23; 15:22; 27:14; 29:23; 50:7; 60:5; 66:4; 76:14; 77:8; 78:21; 79:10; 82:5; 84:1, 18; 87:21; 90:14; 94:11  <b>fish</b> [5] - 53:3, 11; 54:17, 20; 55:16  <b>fit</b> [2] - 79:1; 81:14</p>
<b>F</b>		
	<p><b>face</b> [2] - 90:14; 98:1  <b>facilities</b> [11] - 13:14; 16:9, 16-17, 20-22; 96:8; 97:15; 99:14, 17  <b>facility</b> [2] - 39:21; 74:20  <b>fact</b> [14] - 18:5; 22:7; 37:1; 40:23;</p>	

<p><b>five</b> [9] - 7:12; 34:20; 43:16; 58:4; 67:7; 78:24; 79:23; 100:15</p> <p><b>five-minute</b> [2] - 7:12; 43:16</p> <p><b>five-year</b> [1] - 34:20</p> <p><b>fixed</b> [1] - 94:25</p> <p><b>fixing</b> [1] - 43:8</p> <p><b>flag</b> [1] - 52:10</p> <p><b>Flakes</b> [7] - 57:7, 9, 12; 58:5, 19, 21, 25</p> <p><b>fleet</b> [1] - 13:2</p> <p><b>flexible</b> [1] - 14:3</p> <p><b>flight</b> [1] - 7:2</p> <p><b>flip</b> [1] - 7:2</p> <p><b>focus</b> [3] - 9:5, 19; 56:25</p> <p><b>focused</b> [1] - 11:16</p> <p><b>folks</b> [2] - 53:25; 88:19</p> <p><b>follow</b> [1] - 99:4</p> <p><b>following</b> [3] - 68:4; 73:24; 88:3</p> <p><b>follows</b> [2] - 7:11; 45:12</p> <p><b>Food</b> [8] - 4:18, 20-21, 23; 7:7; 9:13; 31:18</p> <p><b>food</b> [31] - 12:16; 17:23; 18:5; 44:18, 21; 45:2; 52:1, 5, 14, 21; 53:15; 57:21, 23; 65:15; 85:21, 23; 86:19; 87:12; 88:18; 96:9, 22, 25; 97:1, 3, 10, 12, 14</p> <p><b>food-related</b> [1] - 85:23</p> <p><b>Foodbuy</b> [1] - 4:22</p> <p><b>foods</b> [2] - 65:4; 88:21</p> <p><b>FOODS</b> [2] - 76:13; 102:7</p> <p><b>Foods</b> [64] - 3:2; 4:18; 9:8; 11:22; 12:3; 13:12; 20:17, 19; 21:23; 22:7, 9, 25; 24:5; 26:20; 27:9; 29:25; 31:15, 23; 32:3, 5, 10, 13, 25; 33:9; 34:9, 23; 35:10; 36:13; 37:7, 10, 17, 22; 38:20, 22; 39:3, 12, 22; 40:2, 8, 13, 19, 22-23; 41:2, 11, 14; 45:7; 49:12; 59:6; 72:18; 74:15; 76:15, 20-21; 77:2, 15; 87:8, 25; 93:3, 12; 96:14, 21; 100:20</p> <p><b>Foods'</b> [9] - 13:10; 20:7; 24:4; 27:4; 30:16; 36:24; 38:19; 92:3; 98:18</p> <p><b>Foodservice</b> [2] - 4:22; 87:7</p> <p><b>foodservice</b> [19] - 9:9, 23; 10:4; 11:8, 17; 13:24; 32:7; 44:18; 47:24; 48:3; 85:21; 87:12; 88:18, 21; 96:9, 15, 19</p> <p><b>foodservice-related</b> [2] - 85:21; 88:18</p> <p><b>footprint</b> [2] - 81:1, 7</p> <p><b>footprints</b> [1] - 13:16</p> <p><b>FOR</b> [1] - 1:1</p> <p><b>force</b> [1] - 89:22</p> <p><b>forced</b> [1] - 38:23</p> <p><b>forces</b> [7] - 16:2, 8, 15; 23:25; 24:2; 26:9</p> <p><b>forcing</b> [1] - 53:4</p> <p><b>foregoing</b> [1] - 101:5</p> <p><b>forget</b> [1] - 68:6</p> <p><b>form</b> [1] - 13:24</p> <p><b>formal</b> [1] - 82:10</p> <p><b>formality</b> [1] - 82:18</p> <p><b>former</b> [1] - 51:2</p>	<p><b>forming</b> [1] - 26:19</p> <p><b>forms</b> [3] - 14:7; 15:25; 61:3</p> <p><b>forth</b> [2] - 14:14; 22:9</p> <p><b>forward</b> [1] - 33:17</p> <p><b>founded</b> [1] - 26:24</p> <p><b>four</b> [6] - 27:12; 45:14; 95:20; 100:14</p> <p><b>four-year</b> [1] - 95:20</p> <p><b>fourth</b> [1] - 10:17</p> <p><b>Franchising</b> [1] - 4:18</p> <p><b>Francisco</b> [1] - 23:1</p> <p><b>free</b> [1] - 52:11</p> <p><b>frequency</b> [1] - 36:16</p> <p><b>frequently</b> [2] - 18:3; 36:13</p> <p><b>fresh</b> [3] - 100:5</p> <p><b>Friday</b> [1] - 5:3</p> <p><b>front</b> [4] - 19:17; 73:22; 78:7; 94:15</p> <p><b>frozen</b> [1] - 52:1</p> <p><b>FTC</b> [16] - 6:16; 8:10, 12; 14:22; 24:8; 25:14; 46:21; 56:1; 59:14; 60:2; 72:9; 74:13; 78:8, 14; 79:2; 82:8</p> <p><b>FTC's</b> [5] - 7:11; 12:15; 49:24; 53:14; 60:11</p> <p><b>full</b> [2] - 22:8; 55:15</p> <p><b>function</b> [3] - 18:2; 58:12, 25</p> <p><b>functioning</b> [1] - 57:22</p> <p><b>functions</b> [1] - 59:7</p> <p><b>fundamental</b> [1] - 9:6</p> <p><b>fundamentals</b> [1] - 65:23</p> <p><b>furthermore</b> [1] - 42:25</p> <p><b>future</b> [3] - 45:18; 75:17</p>	<p>22; 59:4; 79:25; 80:1</p> <p><b>GPOs</b> [6] - 18:9; 29:22; 31:23; 58:2, 11; 63:17</p> <p><b>graduate</b> [1] - 46:3</p> <p><b>grant</b> [1] - 43:13</p> <p><b>graphically</b> [1] - 41:9</p> <p><b>graphs</b> [1] - 13:2</p> <p><b>great</b> [9] - 7:10; 16:18; 36:8; 50:16, 18; 57:23; 61:19</p> <p><b>greater</b> [2] - 18:3; 38:12</p> <p><b>greatest</b> [1] - 77:5</p> <p><b>greatly</b> [1] - 36:17</p> <p><b>grew</b> [3] - 50:4, 6</p> <p><b>Grinnell</b> [2] - 26:5, 23</p> <p><b>grocery</b> [3] - 98:13</p> <p><b>ground</b> [1] - 91:19</p> <p><b>group</b> [7] - 24:19, 23; 46:21; 67:22; 89:8; 90:21; 93:23</p> <p><b>Group</b> [3] - 4:21, 23; 9:13</p> <p><b>groups</b> [1] - 24:1</p> <p><b>growing</b> [1] - 50:8</p> <p><b>grown</b> [2] - 74:21, 25</p> <p><b>growth</b> [2] - 50:11; 75:1</p> <p><b>guaranty</b> [1] - 89:17</p> <p><b>guess</b> [3] - 35:14; 59:21; 84:3</p> <p><b>guideline</b> [1] - 24:15</p> <p><b>Guidelines</b> [1] - 99:3</p> <p><b>guidelines</b> [5] - 17:10; 24:20; 27:23; 28:8; 42:14</p> <p><b>guides</b> [1] - 14:14</p> <p><b>guy</b> [7] - 11:2; 44:15; 53:5; 55:13; 67:14; 70:17</p> <p><b>guys</b> [5] - 51:7; 53:5; 62:17; 71:7, 19</p>
	<b>G</b>	
	<p><b>gain</b> [1] - 51:14</p> <p><b>gap</b> [2] - 40:18, 22</p> <p><b>Gary</b> [2] - 2:6; 4:6</p> <p><b>gather</b> [1] - 56:11</p> <p><b>geeks</b> [1] - 28:4</p> <p><b>general</b> [2] - 5:12; 91:21</p> <p><b>General</b> [2] - 2:6; 98:15</p> <p><b>GENERAL</b> [1] - 2:7</p> <p><b>generally</b> [3] - 15:16; 55:19; 95:24</p> <p><b>generic</b> [1] - 98:18</p> <p><b>gentleman's</b> [1] - 62:19</p> <p><b>geographic</b> [7] - 10:15; 23:6; 25:10; 37:11; 39:8; 41:14; 74:7</p> <p><b>geographically</b> [4] - 10:6; 13:14; 26:1, 21</p> <p><b>ghonick@oag.state.md.us</b> [1] - 2:9</p> <p><b>GILMAN</b> [13] - 83:23, 25; 84:7, 15; 89:6; 93:10; 98:9, 20, 22; 100:10, 21; 102:9</p> <p><b>Gilman</b> [4] - 1:17; 4:6; 82:8; 83:25</p> <p><b>given</b> [4] - 66:8; 67:12; 78:19; 82:22</p> <p><b>Gordon</b> [1] - 80:14</p> <p><b>Gordon's</b> [1] - 62:21</p> <p><b>government</b> [3] - 71:15; 80:2; 99:15</p> <p><b>government's</b> [1] - 63:9</p> <p><b>GPO</b> [13] - 18:17; 33:11; 49:5; 58:5-7,</p>	<b>H</b>
		<p><b>H&amp;R</b> [2] - 28:9; 31:8</p> <p><b>half</b> [6] - 48:8; 50:7; 55:15; 59:12; 84:11; 86:4</p> <p><b>hallmark</b> [1] - 23:13</p> <p><b>hand</b> [2] - 7:21; 84:12</p> <p><b>handle</b> [2] - 38:5; 82:8</p> <p><b>hanging</b> [1] - 64:1</p> <p><b>hard</b> [3] - 32:16; 64:14; 65:17</p> <p><b>hardly</b> [1] - 19:10</p> <p><b>harm</b> [15] - 9:25; 10:8, 13; 21:11; 31:2; 33:19, 22, 25; 34:4; 64:24; 77:18; 81:9</p> <p><b>harmed</b> [3] - 77:18; 78:1; 81:12</p> <p><b>Hassi</b> [2] - 2:18; 4:8</p> <p><b>HASSI</b> [3] - 83:4, 9, 12</p> <p><b>hate</b> [1] - 28:3</p> <p><b>Hausman</b> [3] - 18:16; 48:7; 72:21</p> <p><b>head</b> [15] - 9:15; 10:21; 20:7; 31:4; 33:9; 35:10; 36:3; 75:6; 87:25</p> <p><b>head-to-head</b> [5] - 9:15; 10:21; 31:4; 33:9; 36:3</p> <p><b>headquarters</b> [1] - 67:1</p> <p><b>Health</b> [4] - 26:24; 29:19; 30:3; 89:21</p> <p><b>healthcare</b> [7] - 29:19, 22; 30:1; 33:11;</p>

<p>37:16; 80:1  <b>hear</b> [29] - 17:5; 26:16; 33:15, 18, 22; 37:2; 39:2, 20; 40:11; 41:15; 45:4; 50:21; 51:18; 52:24; 54:22; 57:15; 58:15; 62:6, 14, 16; 73:15, 19; 74:20; 78:4; 89:1  <b>heard</b> [1] - 60:5  <b>HEARING</b> [1] - 1:10  <b>hearing</b> [6] - 4:12; 5:24; 13:4; 17:21; 19:7; 47:17  <b>heart</b> [1] - 28:4  <b>heavy</b> [1] - 42:7  <b>Heinz</b> [1] - 42:9  <b>held</b> [2] - 49:12; 90:17  <b>help</b> [2] - 14:4; 15:1  <b>helped</b> [1] - 13:21  <b>helpful</b> [1] - 67:6  <b>Herrick</b> [2] - 3:6; 4:9  <b>HHI</b> [2] - 28:6; 29:10  <b>HHI's</b> [1] - 27:24  <b>HHIs</b> [2] - 27:25; 28:6  <b>high</b> [4] - 27:17, 22; 28:17; 35:19  <b>higher</b> [5] - 29:21; 54:19; 72:21; 94:5, 19  <b>highlight</b> [2] - 16:25; 29:13  <b>highlighted</b> [1] - 22:17  <b>highlights</b> [1] - 35:18  <b>highly</b> [2] - 27:22; 93:20  <b>hire</b> [1] - 71:19  <b>hired</b> [1] - 21:22  <b>history</b> [2] - 50:3; 52:7  <b>hit</b> [1] - 43:10  <b>Hoffman</b> [2] - 6:25; 7:2  <b>Hoffman's</b> [1] - 7:1  <b>hold</b> [4] - 84:12; 85:11; 95:14, 16  <b>Holm</b> [1] - 74:20  <b>home</b> [1] - 14:5  <b>homes</b> [1] - 89:23  <b>hometown</b> [1] - 54:12  <b>honest</b> [4] - 31:23; 32:1, 5, 9  <b>Honick</b> [2] - 2:6; 4:7  <b>Honor</b> [82] - 6:4, 9, 18, 21; 7:19, 24; 8:1; 9:4; 11:10; 16:24; 17:1; 18:14; 19:17; 21:22; 23:10; 26:25; 27:7, 25; 29:12; 31:9, 12; 35:6, 23; 43:10; 44:3, 11, 17-18; 45:10, 12, 25; 46:11, 14; 49:9; 50:1, 9, 15, 22; 51:9; 52:10; 58:12; 59:14; 60:8; 63:12; 64:3, 13; 65:12; 66:16; 68:19, 23; 69:5; 71:24; 72:2, 16; 73:12, 17; 74:17; 75:18, 20; 76:5, 14, 20; 77:8, 14, 17, 25; 78:2, 4, 18, 22, 25; 79:17, 23; 80:12, 16, 22; 81:1, 8; 82:6; 83:9, 23; 100:21  <b>Honor's</b> [3] - 7:20; 21:10; 63:6  <b>HONORABLE</b> [1] - 1:11  <b>hope</b> [2] - 67:6; 68:6  <b>hopeful</b> [1] - 67:6  <b>hopefully</b> [1] - 53:8  <b>hoping</b> [1] - 15:14</p>	<p><b>Hospital</b> [1] - 6:23  <b>hospital</b> [2] - 31:25; 97:10  <b>hospitality</b> [11] - 18:9, 20; 30:2; 32:4, 20-21; 37:16, 18; 78:15; 79:25  <b>hospitals</b> [5] - 18:9; 51:25; 89:21; 93:21; 94:13  <b>host</b> [1] - 65:9  <b>hotel</b> [1] - 78:16  <b>Hotels</b> [2] - 4:22; 6:24  <b>hotly</b> [2] - 73:25; 74:3  <b>hour</b> [5] - 7:12, 14; 43:10; 59:12; 84:11  <b>hours</b> [1] - 48:8  <b>Houston</b> [4] - 67:1, 18; 69:1, 25  <b>Howell</b> [1] - 28:9  <b>hundred</b> [1] - 100:2  <b>hundreds</b> [4] - 41:4; 44:21; 51:23  <b>hurt</b> [4] - 57:19; 58:14; 60:18  <b>Hypothetical</b> [3] - 17:10, 17; 24:10  <b>hypothetical</b> [3] - 19:15; 58:3; 78:6</p> <p style="text-align: center;"><b>I</b></p> <p><b>Ian</b> [2] - 2:14; 4:7  <b>idea</b> [1] - 79:10  <b>identified</b> [3] - 20:12; 31:21; 51:12  <b>identify</b> [4] - 19:20; 35:12; 59:23; 93:20  <b>IDIQ</b> [3] - 96:7, 10; 99:24  <b>IFR</b> [1] - 61:20  <b>ignore</b> [1] - 57:5  <b>ignoring</b> [1] - 78:13  <b>IHOP</b> [3] - 79:24; 80:5, 24  <b>II</b> [1] - 50:4  <b>immigration</b> [1] - 38:9  <b>impact</b> [1] - 64:23  <b>important</b> [14] - 13:5; 31:1; 41:14; 54:4; 55:9-11; 57:6; 58:1, 12; 78:18, 22  <b>importantly</b> [3] - 9:14; 13:12; 60:1  <b>impossible</b> [5] - 19:4; 63:10, 12, 14; 66:9  <b>improve</b> [1] - 34:24  <b>in-camera</b> [3] - 4:15; 5:1; 6:12  <b>inadequate</b> [3] - 10:25; 37:5  <b>incentives</b> [1] - 34:19  <b>include</b> [3] - 12:15; 85:23; 86:18  <b>included</b> [3] - 18:6; 29:12; 79:11  <b>includes</b> [1] - 12:24  <b>including</b> [8] - 14:17; 17:4, 6; 35:11; 37:12; 62:2; 78:8; 99:15  <b>income</b> [1] - 50:5  <b>incomes</b> [1] - 50:5  <b>Incorporated</b> [1] - 4:23  <b>increase</b> [7] - 19:14; 28:6; 59:22; 71:8; 72:11; 77:22; 78:1  <b>increased</b> [2] - 33:24; 34:1  <b>indeed</b> [1] - 66:23  <b>indefinite</b> [2] - 96:11  <b>independent</b> [6] - 10:11; 18:10, 23; 42:16; 62:9</p>	<p><b>Indian</b> [1] - 89:21  <b>Indianapolis</b> [2] - 40:19, 21  <b>indicates</b> [1] - 59:11  <b>indicating</b> [9] - 21:7; 27:21; 32:15; 60:13; 63:2, 13; 68:22; 70:24  <b>indirect</b> [1] - 96:24  <b>individual</b> [2] - 66:11; 80:19  <b>individually</b> [1] - 36:18  <b>individuals</b> [1] - 65:3  <b>industry</b> [38] - 9:10; 10:6; 12:5, 10, 14; 17:1; 19:3; 31:15; 44:19; 45:25; 46:1, 7, 9, 17, 22; 47:13, 15; 48:24; 49:10, 24; 50:4, 11, 20; 51:3, 5, 20; 53:16; 59:18; 60:19; 62:15; 64:11; 65:20, 23; 74:25; 77:2  <b>inferior</b> [1] - 37:11  <b>inflict</b> [1] - 21:12  <b>information</b> [6] - 5:14; 79:8; 86:11; 88:11  <b>initiated</b> [3] - 76:21  <b>injunction</b> [6] - 4:11; 8:11, 14; 9:3; 43:13; 76:9  <b>inquiries</b> [1] - 21:1  <b>instances</b> [1] - 5:11  <b>instead</b> [2] - 32:24; 98:24  <b>instructive</b> [4] - 28:8; 32:12; 36:10, 12  <b>integrated</b> [3] - 86:10; 88:15, 17  <b>integration</b> [1] - 21:22  <b>intend</b> [3] - 15:3; 59:25; 73:25  <b>intending</b> [1] - 73:11  <b>intends</b> [1] - 14:22  <b>intense</b> [1] - 9:14  <b>intensely</b> [1] - 51:4  <b>intent</b> [1] - 77:14  <b>interact</b> [1] - 55:6  <b>interaction</b> [5] - 55:5, 25; 60:21; 61:17; 63:19  <b>interchangeability</b> [1] - 14:14  <b>interest</b> [5] - 5:13, 24-25; 8:14; 80:21  <b>interested</b> [1] - 88:13  <b>interesting</b> [6] - 44:16; 50:4; 64:11, 15; 69:19; 80:16  <b>interests</b> [1] - 5:12  <b>internal</b> [3] - 14:5; 41:19; 71:10  <b>internally</b> [2] - 35:9; 49:6  <b>International</b> [2] - 7:7; 31:18  <b>Internet</b> [1] - 88:6  <b>interrogatories</b> [1] - 78:21  <b>interrupt</b> [4] - 14:21; 64:10; 92:23; 99:25  <b>interrupting</b> [1] - 47:19  <b>Interstate</b> [2] - 4:22; 6:24  <b>intertwined</b> [1] - 8:22  <b>introduce</b> [2] - 5:22; 82:7  <b>investment</b> [1] - 11:23  <b>investor</b> [1] - 30:20  <b>invoices</b> [1] - 19:25  <b>involved</b> [3] - 75:7; 91:2; 92:10  <b>involvement</b> [1] - 92:6</p>
---	--	---

<p><b>Iowa</b> [2] - 67:11; 69:24  <b>IPC</b> [1] - 61:13  <b>IPT</b> [6] - 86:10; 89:5, 8; 90:10, 12  <b>irrespective</b> [1] - 23:6  <b>isimmons@omm.com</b> [1] - 2:17  <b>Israel</b> [8] - 17:9; 28:13; 29:1; 30:12; 33:22; 36:5; 37:2; 66:7  <b>israel</b> [2] - 17:17; 48:9  <b>israel's</b> [1] - 48:10  <b>Israel's</b> [3] - 24:21; 27:21; 29:4  <b>issue</b> [10] - 4:12; 8:13; 31:13; 34:22; 63:23; 77:16, 21; 78:12; 81:8  <b>issued</b> [2] - 93:2, 5  <b>issues</b> [1] - 15:3  <b>It'll</b> [1] - 40:6  <b>it'll</b> [2] - 5:15, 22  <b>items</b> [12] - 85:7, 22, 24; 87:12; 88:18, 21; 93:20; 97:12; 99:7  <b>itself</b> [2] - 77:3; 90:5</p>	<p><b>knows</b> [3] - 27:25; 75:8  <b>Krispies</b> [1] - 57:8  <b>krobson@omm.com</b> [1] - 2:25</p>	<p>67:14; 69:20; 79:7; 94:22  <b>liner</b> [1] - 62:10  <b>lines</b> [1] - 8:3  <b>list</b> [7] - 48:16; 66:19; 67:19, 21; 69:3; 75:12; 82:15  <b>listen</b> [1] - 59:2  <b>listing</b> [2] - 41:8; 88:7  <b>literally</b> [2] - 14:1; 44:21  <b>live</b> [4] - 5:11; 17:5; 49:23; 53:4  <b>living</b> [1] - 49:24  <b>LLC</b> [1] - 4:22  <b>LLP</b> [7] - 2:11, 15, 18, 22; 3:2, 6, 10  <b>loads</b> [1] - 23:9  <b>local</b> [32] - 9:17; 10:9, 14; 13:22; 15:13, 18; 18:9; 21:12; 23:16; 24:2, 11; 25:22; 27:18; 30:10, 13, 15, 21; 55:16; 60:18, 23; 69:3; 73:17; 74:1, 7; 100:8  <b>local/national</b> [1] - 68:21  <b>localities</b> [2] - 13:20; 88:10  <b>located</b> [5] - 13:9; 23:3; 75:14; 89:9  <b>location</b> [2] - 22:23; 23:6  <b>location's</b> [1] - 23:2  <b>locations</b> [6] - 10:3; 26:13; 41:8; 58:4; 67:7; 79:4  <b>Logistics</b> [1] - 80:2  <b>look</b> [43] - 12:9, 22; 13:2; 15:8, 12; 16:7; 17:11; 21:16; 23:15, 17; 24:13; 27:20; 29:17, 19, 23; 30:1; 33:16; 41:10; 45:13; 46:9, 17-18, 22; 48:17; 49:1, 6, 22, 24-25; 50:23; 52:9; 54:9; 56:13, 18; 58:9; 63:2; 65:19; 72:25; 80:5; 94:15  <b>looked</b> [5] - 28:13; 76:4; 79:12; 88:9  <b>looking</b> [4] - 13:6; 45:20; 77:2  <b>looks</b> [5] - 24:5; 46:17; 47:15; 48:18; 69:25  <b>Los</b> [1] - 52:19  <b>lose</b> [8] - 51:14; 55:2, 12; 62:12; 67:25; 73:2  <b>losing</b> [2] - 58:25; 73:2  <b>loss</b> [2] - 11:4; 73:4  <b>losses</b> [2] - 36:17; 37:1  <b>lost</b> [7] - 36:3, 13, 16, 18; 39:4; 55:16  <b>loud</b> [2] - 34:3; 35:22  <b>loudly</b> [1] - 17:3  <b>love</b> [4] - 48:21; 57:7; 70:21; 72:3  <b>low</b> [3] - 28:15; 76:7; 97:13  <b>lower</b> [4] - 9:16; 58:21; 76:24; 95:1  <b>lunch</b> [5] - 7:16; 81:23; 84:11; 100:25  <b>luncheon</b> [1] - 101:1  <b>lynch</b> [1] - 35:10</p>
<b>J</b>	<b>L</b>	
<p><b>Jacmar</b> [1] - 4:18  <b>January</b> [1] - 84:25  <b>Jim</b> [1] - 6:23  <b>Job</b> [1] - 89:22  <b>job</b> [2] - 52:4; 85:11  <b>Joey</b> [1] - 73:10  <b>join</b> [2] - 58:5; 84:24  <b>joined</b> [1] - 85:1  <b>joke</b> [1] - 60:8  <b>Joseph</b> [2] - 3:2; 4:8  <b>jtringali@stblaw.com</b> [1] - 3:5  <b>Judge</b> [2] - 28:9; 65:8  <b>JUDGE</b> [1] - 1:11  <b>judgment</b> [1] - 65:21  <b>July</b> [2] - 8:17; 22:1  <b>June</b> [4] - 85:10; 86:3, 16; 87:3  <b>jury</b> [1] - 82:23</p>	<p><b>Labatt</b> [1] - 4:20  <b>label</b> [19] - 13:3-5; 14:9; 37:12; 79:6; 80:10; 97:16, 24; 98:2, 6, 8, 11, 16, 18, 24; 99:4  <b>label's</b> [1] - 17:25  <b>lack</b> [2] - 37:15; 39:8  <b>land</b> [3] - 51:1; 53:12; 75:24  <b>language</b> [2] - 77:23; 91:6  <b>large</b> [11] - 31:25; 32:4, 21; 33:23; 35:7; 44:19; 49:5; 53:15; 57:18; 70:22; 71:18  <b>largely</b> [1] - 65:13  <b>larger</b> [1] - 31:22  <b>largest</b> [9] - 9:9, 11; 31:16; 32:15; 34:17; 38:10; 72:22; 79:25; 89:21  <b>last</b> [6] - 42:6; 50:7; 59:12; 70:15; 84:18; 92:6  <b>lateral</b> [1] - 95:9  <b>laugh</b> [1] - 51:9  <b>law</b> [10] - 26:2, 21; 31:10; 42:7; 45:17; 49:16; 66:20; 72:7; 78:13  <b>laws</b> [2] - 8:21; 59:2  <b>lay</b> [1] - 24:21  <b>leakage</b> [1] - 43:7  <b>lean</b> [1] - 76:8  <b>learn</b> [1] - 88:1  <b>least</b> [1] - 28:14  <b>leave</b> [1] - 74:17  <b>led</b> [2] - 26:4; 31:7  <b>left</b> [4] - 23:15, 20; 49:22; 68:17  <b>legal</b> [1] - 77:18  <b>legality</b> [1] - 27:14  <b>Lehman</b> [1] - 50:9  <b>length</b> [1] - 100:13  <b>less</b> [5] - 49:12; 52:21; 74:10; 99:4; 100:1  <b>lessening</b> [1] - 45:22  <b>letting</b> [1] - 51:8  <b>Level</b> [2] - 95:17, 19  <b>level</b> [6] - 35:19; 36:16; 95:20  <b>levels</b> [10] - 10:19; 27:15; 28:9, 17; 29:10; 30:4, 13; 31:3  <b>leverage</b> [1] - 34:24  <b>Lexecon</b> [1] - 46:20  <b>Lexecon's</b> [1] - 46:20  <b>Lexington</b> [1] - 3:3  <b>life</b> [1] - 94:16  <b>likeable</b> [1] - 11:2  <b>likelihood</b> [2] - 8:15; 9:6  <b>likely</b> [1] - 6:23  <b>limited</b> [1] - 19:9  <b>Lincoln</b> [1] - 39:25  <b>line</b> [9] - 11:15; 14:1, 24; 19:6; 56:14;</p>	
<b>K</b>		
<p><b>Kansas</b> [2] - 62:19, 21  <b>Katrina</b> [1] - 2:22  <b>Katy</b> [5] - 4:8; 60:14; 61:5; 63:6; 66:17  <b>keep</b> [11] - 31:23; 32:1, 5, 8; 34:13; 35:13; 48:14; 55:8; 58:15, 23; 68:25  <b>keeping</b> [1] - 37:12  <b>Kellogg's</b> [2] - 57:7, 12  <b>kept</b> [2] - 6:11; 65:23  <b>kind</b> [4] - 11:24; 34:24; 89:10; 98:13  <b>kinds</b> [3] - 51:22, 24; 65:15  <b>King</b> [1] - 17:25  <b>KKR</b> [3] - 11:11, 21; 12:1  <b>knocks</b> [1] - 60:24  <b>knowledge</b> [2] - 21:1; 31:22  <b>knowledgeable</b> [1] - 20:16  <b>known</b> [4] - 8:25; 66:7; 70:22</p>		<b>M</b>
		<p><b>machine</b> [1] - 3:17  <b>magnitude</b> [1] - 42:19  <b>magnitudes</b> [1] - 38:12  <b>mail</b> [1] - 35:21  <b>Maines</b> [1] - 4:20</p>



<p><b>maintaining</b> [1] - 5:25  <b>major</b> [1] - 29:22  <b>majority</b> [1] - 82:13  <b>man</b> [1] - 67:8  <b>managed</b> [4] - 67:1, 13  <b>management</b> [3] - 32:7; 95:7  <b>managing</b> [1] - 19:24  <b>mandatory</b> [1] - 96:8  <b>manner</b> [1] - 5:2  <b>manufacturer</b> [2] - 57:18; 59:5  <b>manufacturer's</b> [1] - 98:4  <b>manufacturers</b> [3] - 86:19; 93:24; 96:22  <b>manufacturers/suppliers</b> [1] - 97:3  <b>manufactures</b> [1] - 17:24  <b>maps</b> [1] - 72:19  <b>margin</b> [3] - 22:21, 23; 58:17  <b>margins</b> [3] - 34:19; 72:23; 76:24  <b>mark</b> [2] - 7:7; 73:6  <b>Mark</b> [3] - 1:21; 4:6; 31:14  <b>market</b> [92] - 9:24; 10:15, 19; 13:24; 14:14, 19, 23-24; 15:1, 4, 7-8, 16; 16:14; 17:2, 12, 15, 18; 19:11; 21:19, 25; 24:18; 25:10, 13, 15-17; 26:1, 5, 14, 22, 24; 27:5, 10, 15-16, 18, 20; 28:13; 29:7; 30:12, 16, 20, 25; 34:9; 37:9; 44:25; 45:1, 3, 5, 13-14; 46:18, 23, 25; 47:5, 24; 48:3, 10, 15, 17, 25; 49:2, 7, 14; 52:11, 23; 55:5, 11, 21; 57:22; 59:16; 60:6, 12; 66:3; 70:6; 74:1, 7; 76:6; 79:1; 81:12, 15; 85:5; 86:9, 22; 87:19; 90:6  <b>Market</b> [1] - 80:13  <b>Marketing</b> [1] - 26:17  <b>markets</b> [21] - 10:13; 13:22; 15:14; 21:13; 22:20; 23:14, 19; 27:19; 30:10, 13, 15, 17, 21; 56:21, 23, 25; 60:18; 73:18; 74:22  <b>markup</b> [3] - 22:25; 23:4  <b>Mary</b> [1] - 84:19  <b>Maryland</b> [1] - 53:10  <b>MARYLAND</b> [1] - 2:7  <b>match</b> [1] - 78:24  <b>Match</b> [1] - 31:8  <b>material</b> [4] - 4:16; 5:17; 37:20; 42:17  <b>materials</b> [2] - 5:1  <b>matter</b> [6] - 28:12; 70:16; 77:15; 82:10; 101:6  <b>matters</b> [1] - 6:2  <b>MAY</b> [1] - 4:1  <b>McKinsey</b> [3] - 21:21; 22:1; 43:5  <b>MD</b> [1] - 2:8  <b>mdavenport@ftc.gov</b> [1] - 2:5  <b>mean</b> [13] - 10:1, 9; 22:21; 38:16; 50:12; 59:25; 63:16; 65:1; 67:3, 23; 76:8; 91:23; 98:7  <b>meaning</b> [3] - 66:22; 79:5; 95:21  <b>means</b> [2] - 42:11; 50:12  <b>MedAssets</b> [3] - 80:1, 7, 17</p>	<p><b>medical</b> [6] - 85:6; 89:9, 18, 20; 99:12, 14  <b>meet</b> [6] - 54:3; 82:14; 88:13; 92:18; 93:23; 99:8  <b>meeting</b> [3] - 11:16; 64:3; 90:14  <b>meets</b> [1] - 91:7  <b>MEHTA</b> [1] - 1:11  <b>Melissa</b> [2] - 2:2; 4:7  <b>member</b> [1] - 98:3  <b>members</b> [4] - 31:16; 80:18; 81:4; 90:23  <b>men</b> [3] - 46:8, 21; 49:23  <b>mention</b> [3] - 14:13; 49:11; 51:11  <b>mentioned</b> [18] - 14:9, 20; 77:16; 87:1, 17; 88:15, 25; 89:14, 25; 91:2, 9, 22; 92:6; 93:15; 97:25; 99:10, 24; 100:16  <b>mentioning</b> [1] - 63:4  <b>menu</b> [2] - 14:4  <b>merely</b> [1] - 79:12  <b>merge</b> [1] - 11:5  <b>merger</b> [41] - 9:8, 25; 10:8, 13, 17, 21; 14:17; 17:10; 21:11; 24:20; 27:12, 17, 23; 28:7, 21; 30:12, 23; 31:4; 33:15, 17, 23; 34:4, 10; 35:21, 24; 41:12, 17; 42:7, 11, 13, 24; 43:1; 47:5; 58:20; 64:23; 77:6, 10; 78:3  <b>merger's</b> [2] - 24:15; 58:22  <b>merger-specific</b> [3] - 42:11, 24; 43:1  <b>mergers</b> [5] - 27:14, 24; 29:11; 31:8; 65:20  <b>merit</b> [1] - 72:11  <b>merits</b> [3] - 8:16, 24  <b>messier</b> [1] - 56:23  <b>messy</b> [1] - 57:1  <b>met</b> [2] - 87:25; 90:14  <b>methodologies</b> [2] - 27:21; 28:14  <b>methodology</b> [2] - 28:12; 29:8  <b>methods</b> [1] - 12:16  <b>metric</b> [1] - 12:4  <b>metropolitan</b> [1] - 10:12  <b>Michigan</b> [3] - 57:11, 21; 69:23  <b>microprocessors</b> [1] - 46:6  <b>middleman</b> [1] - 58:18  <b>might</b> [2] - 51:9; 71:19  <b>miles</b> [3] - 40:17; 41:5  <b>milestones</b> [1] - 90:4  <b>military</b> [1] - 80:3  <b>milk</b> [1] - 100:7  <b>million</b> [2] - 33:1; 77:13  <b>millions</b> [1] - 94:15  <b>Mills</b> [1] - 98:15  <b>Milwaukee</b> [2] - 67:10; 69:23  <b>mind</b> [3] - 33:25; 58:16, 23  <b>mine</b> [1] - 55:14  <b>Minneapolis</b> [8] - 40:6, 8, 10; 44:6; 54:13; 58:4; 69:22  <b>Minnesota</b> [9] - 54:16; 55:13; 67:7, 14, 17; 69:1, 21; 70:2  <b>minute</b> [6] - 7:12, 14; 43:16; 46:11;</p>	<p>52:10; 71:24  <b>minutes</b> [10] - 35:4; 41:7; 43:17; 68:10; 73:8, 12-13; 81:17, 20, 22  <b>minutes'</b> [1] - 7:16  <b>Mirrer</b> [2] - 3:9; 4:9  <b>Mirrer-Singer</b> [2] - 3:9; 4:9  <b>Mister</b> [1] - 54:18  <b>mix</b> [1] - 34:14  <b>mode</b> [3] - 53:18; 56:5  <b>model</b> [2] - 34:2; 53:1  <b>modeling</b> [1] - 33:15  <b>models</b> [2] - 45:1; 57:24  <b>moderate</b> [1] - 47:6  <b>modes</b> [3] - 53:19; 56:13, 23  <b>modest</b> [1] - 47:6  <b>modified</b> [1] - 48:3  <b>mom</b> [2] - 10:11; 47:3  <b>mom-and-pop</b> [2] - 10:11; 47:3  <b>moment</b> [1] - 64:10  <b>Monday</b> [3] - 52:20; 64:2, 5  <b>money</b> [3] - 51:3; 55:1; 75:24  <b>monopolist</b> [2] - 19:16; 25:6  <b>Monopolist</b> [3] - 17:11, 17; 24:10  <b>monopolize</b> [1] - 46:7  <b>monopoly</b> [2] - 51:1; 75:23  <b>months</b> [2] - 73:22; 93:6  <b>MORNING</b> [2] - 1:10; 4:1  <b>morning</b> [21] - 4:3, 10, 12; 7:4, 11; 8:4, 10; 9:5, 19; 17:1; 52:20; 53:9; 55:17; 64:3, 5; 83:23; 84:8, 10, 16; 100:7  <b>most</b> [4] - 20:15; 36:6, 13; 93:20  <b>motion</b> [4] - 4:19; 6:9; 8:11; 27:7  <b>motions</b> [5] - 4:14, 25; 6:5  <b>move</b> [25] - 30:19; 35:2; 53:2; 55:23; 59:10; 60:4; 63:1, 6, 21; 69:1, 11; 70:4, 18, 23; 71:10, 14, 17, 23; 72:13, 15; 82:10, 25; 83:5; 95:9  <b>moved</b> [1] - 69:4  <b>moves</b> [1] - 18:2  <b>moving</b> [2] - 64:13; 68:25  <b>MR</b> [121] - 6:4, 18, 21; 7:19, 24; 8:8, 10; 11:21, 25; 12:2, 18, 20, 22; 15:6, 19, 21; 17:15, 20; 20:6, 14, 21, 23, 25; 21:9; 22:7, 22; 23:5, 7, 9; 24:13, 24; 25:2, 5, 17, 20, 22, 24; 27:3; 28:3, 23; 29:1, 7; 30:8, 10, 23; 31:18; 33:18; 34:1, 7; 35:6; 36:21, 23; 38:2, 4, 6, 8; 39:10, 12; 41:9, 22, 24; 44:3, 6, 11; 46:13; 47:22, 25; 48:5, 7; 53:17, 22, 24; 54:4; 56:8, 10, 16; 59:8, 10; 60:10; 64:13; 65:11; 67:5; 68:3, 9, 12; 69:13, 19; 71:6; 73:9, 12, 16; 74:2, 5, 8, 10, 13; 76:14, 18, 20; 81:19, 25; 82:6, 12, 25; 83:4, 9, 12, 14, 23, 25; 84:7, 15; 89:6; 93:10; 98:9, 20, 22; 100:10, 21; 102:9  <b>mseidman@ftc.gov</b> [1] - 1:24  <b>multiple</b> [10] - 10:7; 13:17; 19:24; 20:1; 23:14; 40:24; 79:15; 87:22  <b>Multiple</b> [1] - 19:25</p>
--	--	--

<p><b>multistate</b> [1] - 26:10  <b>multiunit</b> [2] - 66:25; 79:14  <b>must</b> [2] - 5:12, 16  <b>MYERS</b> [4] - 2:11, 15, 18, 22  <b>mythology</b> [1] - 21:15</p>	<p>74:23; 79:17; 82:8; 84:1  <b>next-day</b> [1] - 14:3  <b>nice</b> [1] - 48:22  <b>nicely</b> [1] - 50:7  <b>Nicholas</b> [1] - 4:19  <b>night</b> [1] - 70:15  <b>nomenclature</b> [1] - 23:17  <b>none</b> [2] - 80:10  <b>normal</b> [1] - 96:3  <b>notes</b> [1] - 35:15  <b>nothing</b> [2] - 18:8; 66:10  <b>November</b> [2] - 86:3; 95:13  <b>number</b> [22] - 4:14; 6:5; 12:23; 13:2, 6, 8, 22; 26:12; 30:13, 15; 34:3; 37:5; 41:20; 42:1; 49:13; 52:22; 64:16, 19; 68:5  <b>numbers</b> [6] - 36:20, 23; 41:10, 24; 42:22; 94:15  <b>numerous</b> [4] - 15:13; 21:13; 27:18; 78:22  <b>nursing</b> [1] - 14:4  <b>nutrition</b> [1] - 14:6  <b>nutritional</b> [4] - 94:1; 97:6; 99:1, 9  <b>NW</b> [10] - 1:15, 19, 23; 2:3, 11, 15, 19, 23; 3:7, 10  <b>NY</b> [1] - 3:3</p>	<p>45:13; 46:11; 47:8; 49:5; 53:1; 54:8, 25; 58:20; 59:19; 60:10, 17, 22; 61:12; 62:8; 63:22; 64:22; 66:15, 17; 68:18, 20, 22; 69:4; 70:9, 23; 71:11; 74:6; 79:11; 80:8; 89:14; 90:21; 92:6; 94:4; 96:5; 100:14</p>
<b>N</b>		
<p><b>name</b> [17] - 18:17, 20, 23; 20:1, 20; 31:17; 49:11; 62:19; 70:7; 84:16, 18; 87:5; 97:24; 98:1, 4; 99:6  <b>named</b> [2] - 98:16, 18  <b>names</b> [3] - 12:7; 63:4; 87:7  <b>napkin</b> [1] - 77:11  <b>nation</b> [3] - 89:9; 93:19; 94:13  <b>national</b> [101] - 9:17; 10:1, 3, 7-8, 16; 11:17; 13:17; 14:25; 15:9, 18; 17:23; 18:6; 21:12; 22:15, 17-18, 24; 23:7, 13; 24:1, 11, 13, 20, 23; 25:1, 7, 11-13, 15-19; 26:1, 5, 8, 10, 14, 22, 24; 27:5, 10, 18, 21; 28:13; 29:16, 18; 32:15, 21; 33:3, 6, 14; 34:16; 35:7, 10; 38:17; 41:18; 48:8; 54:23; 60:5, 23; 63:25; 64:1, 7; 66:4, 6, 13, 19, 24; 67:20; 68:2, 8, 20; 69:2, 7; 70:5; 72:1; 78:15, 20, 23; 79:13, 19, 21, 23; 80:18, 23; 81:1, 7, 14  <b>National</b> [1] - 99:3  <b>nationwide</b> [6] - 10:16; 25:11; 26:10; 88:20; 89:20  <b>natural</b> [2] - 34:8; 100:23  <b>nature</b> [5] - 68:13; 86:21; 90:7; 96:6; 97:6  <b>Naval</b> [1] - 89:21  <b>nearest</b> [2] - 12:11; 40:25  <b>nearly</b> [2] - 29:25; 42:19  <b>neat</b> [1] - 56:25  <b>Nebraska</b> [1] - 39:24  <b>necessarily</b> [1] - 10:3  <b>necessary</b> [2] - 82:24; 99:6  <b>need</b> [37] - 5:6; 7:2, 6; 8:5, 23; 15:8, 12; 16:23; 37:8; 42:15; 43:2; 46:3; 50:23; 52:1-3; 70:3, 5, 14; 78:6; 79:2; 81:1, 22; 84:9, 13; 90:3; 93:21; 94:6, 12; 98:1  <b>needs</b> [5] - 5:7; 7:1; 11:16; 21:16; 51:25  <b>negotiate</b> [2] - 22:25; 85:5  <b>negotiated</b> [2] - 91:9; 94:25  <b>negotiating</b> [1] - 86:13  <b>negotiations</b> [3] - 90:18; 91:16; 93:6  <b>networks</b> [1] - 13:13  <b>never</b> [3] - 50:10; 52:8; 98:2  <b>New</b> [3] - 3:3; 23:2; 41:2  <b>new</b> [8] - 7:8; 34:19; 46:15; 54:7; 76:6; 89:12; 100:21  <b>next</b> [29] - 6:17; 9:11; 14:3; 18:12; 19:4, 6; 22:17; 27:1; 29:20; 37:4, 13, 24; 49:9; 51:19; 59:11; 60:21; 61:12; 63:10, 22; 66:14, 17; 68:22; 70:9, 23;</p>	<p><b>one's</b> [2] - 33:8; 68:20  <b>one-stop-shop</b> [1] - 13:25  <b>one-year</b> [1] - 100:14  <b>ones</b> [3] - 57:18, 20; 72:24  <b>OpCo</b> [1] - 67:2  <b>OpCo's</b> [1] - 67:3  <b>OpCos</b> [1] - 68:17  <b>open</b> [5] - 5:10; 7:14; 8:6; 67:9  <b>opened</b> [2] - 20:19, 25  <b>opening</b> [5] - 7:11; 8:6; 15:11; 29:12; 73:13  <b>OPENING</b> [6] - 7:23; 44:10; 76:13; 102:4  <b>openings</b> [1] - 7:13  <b>operate</b> [2] - 69:8; 70:20  <b>operates</b> [1] - 80:3  <b>operation</b> [3] - 47:3; 48:20; 50:24  <b>operations</b> [2] - 16:2, 9  <b>opinion</b> [1] - 26:13  <b>oppose</b> [1] - 45:21  <b>opposed</b> [2] - 24:2; 67:2  <b>option</b> [6] - 55:22; 58:10; 67:12; 81:11; 100:14  <b>options</b> [5] - 32:17; 77:3; 78:2, 5; 79:15  <b>Oracle</b> [1] - 77:20  <b>order</b> [4] - 34:13; 43:7; 60:12; 70:7  <b>orders</b> [1] - 20:1  <b>Oregon</b> [1] - 70:12  <b>organization</b> [2] - 66:20; 80:2  <b>organized</b> [1] - 45:16  <b>otherwise</b> [1] - 6:7  <b>ought</b> [1] - 76:10  <b>outlets</b> [2] - 10:4; 49:13  <b>outpost</b> [1] - 67:9  <b>outside</b> [3] - 66:23; 81:3, 11  <b>overall</b> [1] - 46:23  <b>overinclusive</b> [1] - 68:2  <b>overlaps</b> [1] - 13:19  <b>oversight</b> [1] - 90:22  <b>own</b> [16] - 20:19; 21:17; 30:16; 31:14; 42:20-22; 54:12; 57:11, 21; 65:25; 66:13; 77:4; 79:6; 98:15, 18  <b>owned</b> [1] - 100:5  <b>owner</b> [1] - 27:6  <b>owners</b> [5] - 11:11, 13, 21; 27:4, 10  <b>owns</b> [1] - 52:19  <b>oysters</b> [2] - 53:6, 11</p>	<p><b>one's</b> [2] - 33:8; 68:20  <b>one-stop-shop</b> [1] - 13:25  <b>one-year</b> [1] - 100:14  <b>ones</b> [3] - 57:18, 20; 72:24  <b>OpCo</b> [1] - 67:2  <b>OpCo's</b> [1] - 67:3  <b>OpCos</b> [1] - 68:17  <b>open</b> [5] - 5:10; 7:14; 8:6; 67:9  <b>opened</b> [2] - 20:19, 25  <b>opening</b> [5] - 7:11; 8:6; 15:11; 29:12; 73:13  <b>OPENING</b> [6] - 7:23; 44:10; 76:13; 102:4  <b>openings</b> [1] - 7:13  <b>operate</b> [2] - 69:8; 70:20  <b>operates</b> [1] - 80:3  <b>operation</b> [3] - 47:3; 48:20; 50:24  <b>operations</b> [2] - 16:2, 9  <b>opinion</b> [1] - 26:13  <b>oppose</b> [1] - 45:21  <b>opposed</b> [2] - 24:2; 67:2  <b>option</b> [6] - 55:22; 58:10; 67:12; 81:11; 100:14  <b>options</b> [5] - 32:17; 77:3; 78:2, 5; 79:15  <b>Oracle</b> [1] - 77:20  <b>order</b> [4] - 34:13; 43:7; 60:12; 70:7  <b>orders</b> [1] - 20:1  <b>Oregon</b> [1] - 70:12  <b>organization</b> [2] - 66:20; 80:2  <b>organized</b> [1] - 45:16  <b>otherwise</b> [1] - 6:7  <b>ought</b> [1] - 76:10  <b>outlets</b> [2] - 10:4; 49:13  <b>outpost</b> [1] - 67:9  <b>outside</b> [3] - 66:23; 81:3, 11  <b>overall</b> [1] - 46:23  <b>overinclusive</b> [1] - 68:2  <b>overlaps</b> [1] - 13:19  <b>oversight</b> [1] - 90:22  <b>own</b> [16] - 20:19; 21:17; 30:16; 31:14; 42:20-22; 54:12; 57:11, 21; 65:25; 66:13; 77:4; 79:6; 98:15, 18  <b>owned</b> [1] - 100:5  <b>owner</b> [1] - 27:6  <b>owners</b> [5] - 11:11, 13, 21; 27:4, 10  <b>owns</b> [1] - 52:19  <b>oysters</b> [2] - 53:6, 11</p>
<b>O</b>		
<p><b>O'MELVENY</b> [4] - 2:11, 15, 18, 22  <b>objected</b> [1] - 82:14  <b>objection</b> [2] - 83:1, 4  <b>objective</b> [1] - 65:4  <b>obtain</b> [1] - 9:2  <b>obviously</b> [3] - 6:10; 65:1; 71:9  <b>occur</b> [1] - 33:19  <b>odd</b> [1] - 45:17  <b>OF</b> [11] - 1:1, 10; 2:7; 7:23; 44:10; 76:13; 84:6; 102:4-6, 8  <b>offer</b> [6] - 14:2, 7, 10; 34:13; 54:9; 96:5  <b>offered</b> [1] - 88:8  <b>offers</b> [1] - 11:15  <b>office</b> [3] - 59:20; 69:16; 75:14  <b>OFFICE</b> [1] - 2:7  <b>officer</b> [2] - 43:25; 95:6  <b>offices</b> [1] - 49:1  <b>Official</b> [2] - 3:14; 101:9  <b>often</b> [1] - 61:11  <b>Ohio</b> [8] - 40:11, 14-16, 18; 41:1, 4  <b>Oklahoma</b> [3] - 39:19, 21  <b>old</b> [4] - 44:15; 46:14; 54:6  <b>older</b> [1] - 54:7  <b>Omaha</b> [5] - 6:25; 7:1; 39:24; 75:11  <b>ON</b> [6] - 7:23; 44:10; 76:13; 102:4  <b>once</b> [2] - 91:11; 93:23  <b>one</b> [67] - 4:12; 11:11, 21; 13:23, 25; 14:2, 20; 19:3, 19; 21:16; 25:3; 27:20; 28:19; 31:13; 34:17; 35:19; 37:13; 38:11; 39:1, 14, 17-18, 21; 40:25;</p>	<p><b>O'MELVENY</b> [4] - 2:11, 15, 18, 22  <b>objected</b> [1] - 82:14  <b>objection</b> [2] - 83:1, 4  <b>objective</b> [1] - 65:4  <b>obtain</b> [1] - 9:2  <b>obviously</b> [3] - 6:10; 65:1; 71:9  <b>occur</b> [1] - 33:19  <b>odd</b> [1] - 45:17  <b>OF</b> [11] - 1:1, 10; 2:7; 7:23; 44:10; 76:13; 84:6; 102:4-6, 8  <b>offer</b> [6] - 14:2, 7, 10; 34:13; 54:9; 96:5  <b>offered</b> [1] - 88:8  <b>offers</b> [1] - 11:15  <b>office</b> [3] - 59:20; 69:16; 75:14  <b>OFFICE</b> [1] - 2:7  <b>officer</b> [2] - 43:25; 95:6  <b>offices</b> [1] - 49:1  <b>Official</b> [2] - 3:14; 101:9  <b>often</b> [1] - 61:11  <b>Ohio</b> [8] - 40:11, 14-16, 18; 41:1, 4  <b>Oklahoma</b> [3] - 39:19, 21  <b>old</b> [4] - 44:15; 46:14; 54:6  <b>older</b> [1] - 54:7  <b>Omaha</b> [5] - 6:25; 7:1; 39:24; 75:11  <b>ON</b> [6] - 7:23; 44:10; 76:13; 102:4  <b>once</b> [2] - 91:11; 93:23  <b>one</b> [67] - 4:12; 11:11, 21; 13:23, 25; 14:2, 20; 19:3, 19; 21:16; 25:3; 27:20; 28:19; 31:13; 34:17; 35:19; 37:13; 38:11; 39:1, 14, 17-18, 21; 40:25;</p>	<p><b>options</b> [5] - 32:17; 77:3; 78:2, 5; 79:15  <b>Oracle</b> [1] - 77:20  <b>order</b> [4] - 34:13; 43:7; 60:12; 70:7  <b>orders</b> [1] - 20:1  <b>Oregon</b> [1] - 70:12  <b>organization</b> [2] - 66:20; 80:2  <b>organized</b> [1] - 45:16  <b>otherwise</b> [1] - 6:7  <b>ought</b> [1] - 76:10  <b>outlets</b> [2] - 10:4; 49:13  <b>outpost</b> [1] - 67:9  <b>outside</b> [3] - 66:23; 81:3, 11  <b>overall</b> [1] - 46:23  <b>overinclusive</b> [1] - 68:2  <b>overlaps</b> [1] - 13:19  <b>oversight</b> [1] - 90:22  <b>own</b> [16] - 20:19; 21:17; 30:16; 31:14; 42:20-22; 54:12; 57:11, 21; 65:25; 66:13; 77:4; 79:6; 98:15, 18  <b>owned</b> [1] - 100:5  <b>owner</b> [1] - 27:6  <b>owners</b> [5] - 11:11, 13, 21; 27:4, 10  <b>owns</b> [1] - 52:19  <b>oysters</b> [2] - 53:6, 11</p>
<b>P</b>		
<p><b>p.m</b> [1] - 101:2  <b>page</b> [3] - 22:13; 82:19</p>		<p><b>p.m</b> [1] - 101:2  <b>page</b> [3] - 22:13; 82:19</p>

<p><b>Page</b> [1] - 102:3  <b>paid</b> [1] - 94:23  <b>pain</b> [1] - 55:14  <b>Paper</b> [1] - 4:20  <b>papers</b> [3] - 12:15; 15:2; 64:21  <b>parade</b> [1] - 72:9  <b>pardon</b> [1] - 46:10  <b>parked</b> [2] - 53:8; 73:22  <b>PARKER</b> [33] - 44:3, 11; 46:13; 47:22, 25; 48:5, 7; 53:17, 22, 24; 54:4; 56:8, 10, 16; 59:8, 10; 60:10; 64:13; 65:11; 67:5; 68:3, 9, 12; 69:13, 19; 71:6; 73:9, 16; 74:2, 5, 8, 10, 13  <b>Parker</b> [11] - 2:10; 4:7; 18:14; 43:11; 44:2; 47:19; 53:14; 58:3; 67:5; 76:11; 77:16  <b>parker</b> [3] - 44:6; 64:10; 73:6  <b>part</b> [8] - 5:24; 11:12; 22:19; 24:15; 42:17; 53:15; 77:14; 90:24  <b>participants</b> [1] - 81:13  <b>participate</b> [1] - 89:10  <b>participating</b> [2] - 44:25; 89:19  <b>particular</b> [5] - 30:2; 53:19; 56:5; 57:18; 91:21  <b>particularly</b> [1] - 41:25  <b>parties</b> [23] - 4:13, 17; 5:2, 5, 14, 19, 21, 25; 6:6, 13; 9:1; 10:5; 11:10; 17:3; 21:14, 24-25; 23:24  <b>parties'</b> [4] - 21:17, 23; 30:16; 36:1  <b>party</b> [2] - 42:16; 75:22  <b>party's</b> [1] - 32:13  <b>pass</b> [3] - 43:3; 44:12; 77:7  <b>pass-through</b> [1] - 43:3  <b>passed</b> [1] - 43:2  <b>past</b> [1] - 30:19  <b>patents</b> [1] - 46:3  <b>patients</b> [1] - 14:6  <b>Paul</b> [1] - 2:8  <b>pause</b> [1] - 71:24  <b>pay</b> [2] - 65:25; 72:6  <b>paying</b> [1] - 72:22  <b>pending</b> [1] - 43:14  <b>Pennsylvania</b> [6] - 1:15, 19, 23; 2:3; 40:22, 24  <b>penny</b> [1] - 51:15  <b>people</b> [45] - 6:7; 28:4; 37:21; 38:25; 43:23; 44:20; 45:5; 46:2, 5; 48:23; 49:1; 51:2, 23; 52:14; 55:16, 22-24; 57:18; 60:18; 62:16, 24; 63:18; 64:4; 65:15; 67:1; 69:2, 4, 6, 23; 71:25; 76:2, 6; 77:18; 90:21; 97:11  <b>perceive</b> [1] - 24:9  <b>percent</b> [26] - 28:16; 29:25; 34:11, 18; 46:25; 47:1; 48:24; 49:12, 20; 50:12; 52:21; 56:20; 60:12; 73:4; 74:13, 21, 25; 75:1; 79:9; 86:25; 99:20, 22; 100:1  <b>percentage</b> [3] - 27:22; 37:22; 42:23  <b>percentages</b> [1] - 36:20  <b>perfect</b> [3] - 54:5; 66:6</p>	<p><b>Performance</b> [2] - 4:21; 9:13  <b>performed</b> [1] - 36:5  <b>performs</b> [1] - 18:2  <b>perhaps</b> [1] - 56:14  <b>period</b> [2] - 48:3; 95:2  <b>permission</b> [1] - 47:16  <b>person</b> [3] - 57:9, 13; 67:13  <b>personal</b> [3] - 66:10; 68:24; 70:2  <b>personally</b> [1] - 75:7  <b>perspective</b> [2] - 19:11; 88:20  <b>Peter</b> [2] - 3:6; 4:8  <b>PFG</b> [50] - 10:24; 11:1; 12:6, 12, 25; 16:10, 13, 18, 20-22; 31:16; 37:4, 6, 9, 11, 18; 38:21, 23; 39:2, 14, 17, 20, 22, 25; 40:9, 14; 41:3, 11, 17; 45:8; 47:1; 62:21; 73:20, 22; 74:20, 23-24; 75:16; 76:6; 80:22, 24-25; 81:6  <b>PFG's</b> [8] - 11:3; 16:10; 38:9; 40:3, 21, 24; 41:19; 75:13  <b>PFS</b> [1] - 16:22  <b>pharmaceutical</b> [1] - 85:12  <b>pharmaceuticals</b> [1] - 85:6  <b>Philip</b> [2] - 3:9; 4:9  <b>pick</b> [2] - 65:24; 67:16  <b>picture</b> [2] - 12:22; 13:1  <b>piece</b> [1] - 48:22  <b>piping</b> [1] - 43:22  <b>pitcher</b> [1] - 61:6  <b>Place</b> [1] - 2:8  <b>place</b> [8] - 6:14; 34:9; 52:5; 55:1; 61:19; 69:24; 87:3, 22  <b>places</b> [2] - 61:18; 65:16  <b>PLAINTIFF</b> [2] - 7:23; 102:4  <b>PLAINTIFF'S</b> [1] - 84:5  <b>plaintiffs</b> [8] - 4:6; 6:22; 8:19; 22:4; 24:8; 43:12; 78:19; 80:24  <b>Plaintiffs</b> [3] - 1:5, 14; 2:2  <b>Plaintiffs'</b> [2] - 83:21; 102:13  <b>plaintiffs'</b> [1] - 79:19  <b>plan</b> [7] - 72:11; 86:9; 90:1, 9  <b>planning</b> [2] - 14:4; 26:9  <b>plate</b> [1] - 99:6  <b>platform</b> [2] - 79:7; 80:11  <b>play</b> [3] - 37:19; 50:22; 87:9  <b>player</b> [2] - 12:10; 19:3  <b>players</b> [3] - 12:9; 30:18; 32:18  <b>pleased</b> [1] - 82:6  <b>plenty</b> [1] - 74:18  <b>plus</b> [2] - 57:9; 60:18  <b>pmirror</b> [1] - 3:12  <b>pmirror-singer@stblaw.com</b> [1] - 3:12  <b>point</b> [45] - 7:12; 10:15, 17, 24; 11:6; 13:23; 21:10; 23:10; 25:8, 10; 27:12; 33:7; 37:4, 24; 38:24; 39:4; 42:6; 44:21; 45:2; 47:8; 51:12; 58:1; 59:20; 67:11, 18; 68:1, 12; 69:19, 21; 70:1; 74:23; 76:7; 79:5; 80:9, 12, 21; 89:14; 90:18; 91:15; 94:2; 100:23</p>	<p><b>pointed</b> [1] - 27:7  <b>points</b> [1] - 9:19  <b>pop</b> [2] - 10:11; 47:3  <b>portion</b> [6] - 8:5; 19:13; 90:16; 91:12, 25; 97:13  <b>Portland</b> [2] - 54:24  <b>portrayed</b> [1] - 59:15  <b>posit</b> [1] - 14:25  <b>posited</b> [1] - 14:24  <b>position</b> [8] - 30:20; 47:20; 73:25; 74:6; 85:1, 9; 95:5  <b>positions</b> [1] - 13:21  <b>possible</b> [4] - 59:19; 66:12; 89:12; 92:12  <b>post</b> [9] - 28:21; 30:12; 33:15; 41:12; 47:5; 77:6; 92:12, 17  <b>post-award</b> [2] - 92:12, 17  <b>post-merger</b> [7] - 28:21; 30:12; 33:15; 41:12; 47:5; 77:6  <b>potential</b> [3] - 43:6; 88:24; 100:3  <b>potentially</b> [1] - 64:23  <b>poultry</b> [3] - 52:2; 54:20; 55:16  <b>powerhouse</b> [1] - 76:7  <b>PPL</b> [1] - 94:3  <b>PRE</b> [1] - 1:10  <b>pre</b> [2] - 28:21; 47:5  <b>PRE-HEARING</b> [1] - 1:10  <b>pre-merger</b> [1] - 28:21  <b>precise</b> [1] - 40:18  <b>precisely</b> [1] - 15:3  <b>preclude</b> [1] - 45:21  <b>predict</b> [1] - 45:19  <b>predicting</b> [1] - 45:18  <b>prefer</b> [2] - 77:21; 78:16  <b>preference</b> [7] - 61:14; 68:24; 72:3; 78:14; 81:5  <b>preferences</b> [1] - 77:17  <b>preferred</b> [1] - 87:24  <b>prefers</b> [2] - 77:19; 78:15  <b>preliminary</b> [6] - 4:11; 6:2; 8:11, 13; 9:3; 43:13  <b>premise</b> [1] - 63:24  <b>preparation</b> [2] - 64:18; 65:8  <b>prepare</b> [2] - 7:13; 14:5  <b>prepared</b> [7] - 7:5; 12:1; 21:21; 33:20; 46:18; 81:17  <b>present</b> [5] - 33:13, 20; 45:14; 76:3; 83:18  <b>presentation</b> [1] - 30:20  <b>presented</b> [1] - 35:17  <b>presents</b> [1] - 37:10  <b>preserve</b> [2] - 8:3, 23  <b>president</b> [2] - 31:14; 62:14  <b>press</b> [1] - 51:6  <b>presume</b> [1] - 5:17  <b>presumption</b> [8] - 5:9; 10:19; 27:18; 28:10; 29:14; 31:2; 46:19  <b>presumptions</b> [2] - 29:3; 30:25  <b>presumptively</b> [2] - 27:23; 28:7</p>
--	---	---

<p><b>pretending</b> [1] - 57:1  <b>pretty</b> [2] - 51:6; 58:7  <b>prevent</b> [1] - 43:7  <b>price</b> [29] - 19:14; 20:10; 21:2; 33:1, 22; 50:13, 18; 54:15, 19; 57:8, 11; 58:5, 8, 21, 24; 59:22; 64:6; 65:5; 71:7; 72:5, 11; 77:22; 78:1; 80:8; 92:1; 94:1, 23  <b>priced</b> [1] - 94:22  <b>prices</b> [19] - 9:16; 15:23; 33:16, 24; 34:1; 50:13; 61:24; 64:24; 65:19; 72:21; 78:12; 92:3; 94:8, 18, 25; 95:1; 97:5  <b>pricing</b> [22] - 15:23; 21:6; 23:2; 33:14, 20; 64:24; 65:1, 4; 79:4; 87:21, 23; 91:23; 92:4; 93:16; 94:7, 9, 18-19, 22, 25; 97:22  <b>Prime</b> [1] - 85:13  <b>prime</b> [1] - 96:2  <b>principally</b> [2] - 17:22; 39:3  <b>principle</b> [1] - 8:19  <b>private</b> [23] - 11:11, 21; 13:3; 14:9; 27:6, 8; 37:12; 79:5, 7; 80:10; 97:16, 24; 98:2, 6, 8, 11, 16, 18, 24; 99:4  <b>private-label</b> [2] - 14:9  <b>probative</b> [1] - 41:16  <b>problem</b> [4] - 8:25; 43:9; 52:13  <b>proceed</b> [1] - 82:5  <b>proceeding</b> [1] - 36:15  <b>PROCEEDINGS</b> [1] - 1:10  <b>Proceedings</b> [1] - 3:17  <b>proceedings</b> [5] - 5:5, 9, 11, 17; 101:6  <b>procure</b> [1] - 85:21  <b>produce</b> [2] - 100:5, 7  <b>produced</b> [1] - 3:17  <b>producer</b> [1] - 53:3  <b>producers</b> [1] - 15:25  <b>product</b> [36] - 14:19, 23, 25; 15:1, 4, 6, 8, 16; 17:12; 47:24; 48:3; 55:11; 57:15-17; 58:7; 59:5; 64:18; 65:14; 79:5; 80:9; 86:10; 88:15, 17; 94:5; 97:24; 98:6, 8, 11-12, 16-18, 24  <b>production</b> [1] - 5:13  <b>products</b> [33] - 11:15; 13:3-5; 14:1, 9, 11; 17:24; 21:2; 37:12; 65:10; 88:8; 93:19, 25; 94:6, 8, 10, 12, 17-18, 21-22; 96:4; 97:8, 16-18, 23; 99:4, 11  <b>professional</b> [3] - 66:11; 95:4, 14  <b>profit</b> [1] - 51:1  <b>profits</b> [1] - 75:23  <b>Program</b> [1] - 85:14  <b>program</b> [26] - 85:15, 18-19; 86:2, 13-14, 24; 87:6, 14; 89:10, 13; 95:6, 20, 24; 96:1, 12, 18; 97:9, 15; 99:11, 13, 18, 21, 24  <b>programs</b> [1] - 85:20  <b>projected</b> [1] - 34:18  <b>promoting</b> [1] - 49:17  <b>promotion</b> [2] - 95:9, 11  <b>prong</b> [3] - 8:18; 9:6  <b>pronounced</b> [1] - 37:1  <b>proposal</b> [3] - 90:5; 91:3, 14</p>	<p><b>proposals</b> [4] - 86:11; 90:24; 91:11, 23  <b>propose</b> [1] - 45:12  <b>proposed</b> [10] - 9:12; 10:24; 12:24; 28:22, 25; 37:4; 38:17; 63:7; 92:3  <b>proprietary</b> [1] - 17:25  <b>protect</b> [1] - 12:7  <b>prove</b> [4] - 14:22; 15:3; 64:8; 66:3  <b>provide</b> [7] - 18:3; 30:14; 50:16; 61:4; 94:3; 95:25; 97:1  <b>provided</b> [1] - 91:12  <b>provides</b> [3] - 13:25; 50:16; 56:14  <b>providing</b> [3] - 56:17; 81:11; 90:4  <b>proximity</b> [1] - 13:18  <b>public</b> [11] - 5:10, 23-24; 8:20, 22; 9:2; 35:22; 43:5; 51:22; 97:14  <b>public's</b> [1] - 8:14  <b>public-type</b> [1] - 97:14  <b>publicly</b> [2] - 5:15; 6:12  <b>Puerto</b> [1] - 99:19  <b>pull</b> [1] - 93:23  <b>puppies</b> [1] - 47:10  <b>purchase</b> [10] - 39:3; 85:21; 94:11, 21; 97:10, 16, 21; 98:6, 24; 99:11  <b>purchased</b> [2] - 38:20; 99:21  <b>purchases</b> [4] - 18:17, 21; 34:11; 99:20  <b>purchasing</b> [3] - 59:5; 97:9, 15  <b>pureed</b> [1] - 97:12  <b>purpose</b> [1] - 26:19  <b>purposes</b> [7] - 24:8; 36:15; 79:13; 82:22; 83:7, 18  <b>push</b> [1] - 94:11  <b>put</b> [14] - 7:15; 12:7; 17:9; 18:13; 21:6; 22:8; 56:22; 60:20; 61:6; 62:24; 70:7, 10; 73:1; 99:5  <b>puts</b> [1] - 16:7  <b>putting</b> [1] - 75:3  <b>PX</b> [1] - 11:22  <b>PX's</b> [1] - 83:1</p>	<p style="text-align: center;"><b>R</b></p> <p><b>R&amp;D</b> [1] - 46:3  <b>raise</b> [4] - 4:13; 61:24; 64:6; 72:5  <b>raised</b> [3] - 8:4; 15:2; 77:18  <b>raises</b> [1] - 78:12  <b>raising</b> [2] - 58:24; 77:12  <b>range</b> [4] - 28:14; 49:20; 92:2  <b>rate</b> [2] - 50:11; 75:1  <b>RDR</b> [3] - 3:13; 101:5, 8  <b>RDR-CRR</b> [1] - 101:5  <b>reach</b> [1] - 100:8  <b>read</b> [9] - 7:6; 18:15; 20:11; 35:22; 37:13, 24; 41:20; 51:11; 64:21  <b>reading</b> [1] - 66:12  <b>ready</b> [3] - 17:7; 35:8; 81:20  <b>real</b> [3] - 69:20; 75:21  <b>reality</b> [4] - 24:9; 26:15; 56:25; 62:25  <b>realize</b> [1] - 94:13  <b>really</b> [24] - 16:3; 23:17; 29:2; 30:11; 37:7; 50:10; 51:8; 54:2; 56:2; 58:14, 23-24; 60:18; 64:5; 65:24; 66:1; 67:23; 69:22; 70:3; 74:23  <b>realm</b> [1] - 33:15  <b>reason</b> [6] - 72:8; 76:23; 77:25; 78:21; 84:9; 100:1  <b>reasonable</b> [2] - 14:14; 92:4  <b>reasons</b> [2] - 37:5; 76:24  <b>receive</b> [3] - 92:13; 95:1; 99:18  <b>received</b> [1] - 6:6  <b>recently</b> [1] - 84:9  <b>recess</b> [1] - 101:1  <b>recognition</b> [2] - 17:1  <b>recognize</b> [2] - 27:10; 30:16  <b>recognized</b> [3] - 8:20; 27:4; 28:9  <b>recognizing</b> [2] - 45:17; 82:18  <b>reconvene</b> [2] - 43:17; 100:25  <b>record</b> [12] - 4:16; 5:8; 9:21; 35:22; 37:15; 43:12; 51:22; 83:21; 84:17; 101:5  <b>records</b> [1] - 6:1  <b>red</b> [2] - 13:9, 11  <b>redact</b> [1] - 18:12  <b>redacted</b> [1] - 12:7  <b>reductions</b> [1] - 50:22  <b>refer</b> [2] - 84:22; 85:15  <b>references</b> [1] - 66:24  <b>referred</b> [1] - 10:5  <b>referring</b> [2] - 48:9; 93:12  <b>reflects</b> [2] - 26:14; 58:8  <b>refrigerated</b> [1] - 56:17  <b>regard</b> [3] - 23:18; 36:18; 91:10  <b>regardless</b> [4] - 22:23; 23:3; 29:8  <b>region</b> [2] - 10:10; 69:9  <b>regional</b> [5] - 12:8; 26:18; 32:18; 78:10; 81:3  <b>regionalize</b> [1] - 71:16  <b>regionalizing</b> [1] - 69:9</p>
	<p style="text-align: center;"><b>Q</b></p> <p><b>qualifications</b> [1] - 99:8  <b>quality</b> [1] - 94:5  <b>quantified</b> [1] - 33:25  <b>quantifying</b> [1] - 34:2  <b>quantity</b> [1] - 96:11  <b>quantity-type</b> [1] - 96:11  <b>questions</b> [3] - 28:19; 71:2; 88:12  <b>quick</b> [3] - 17:23; 18:5; 20:2  <b>quickly</b> [4] - 30:19; 73:10; 74:24  <b>quite</b> [6] - 24:4; 28:17; 29:14, 23; 43:4; 47:6  <b>quote</b> [6] - 32:14; 43:7; 61:13; 62:7; 63:9; 66:24  <b>quote-unquote</b> [1] - 66:24</p>	

<p><b>regionally</b> [1] - 69:16  <b>regionals</b> [4] - 47:9; 70:25; 80:14  <b>regions</b> [8] - 10:6, 8; 22:20; 23:4; 26:14; 71:15, 21; 88:21  <b>Reinhart</b> [3] - 4:21; 62:21; 80:14  <b>related</b> [3] - 85:21, 23; 88:18  <b>relationships</b> [2] - 19:24  <b>relatively</b> [1] - 42:23  <b>relevant</b> [4] - 10:15; 24:18; 77:13  <b>relief</b> [2] - 8:23; 9:2  <b>religiously</b> [1] - 14:16  <b>rely</b> [1] - 66:13  <b>relying</b> [7] - 10:18; 17:9; 23:23; 30:25; 35:25; 66:16, 18  <b>remain</b> [3] - 5:16, 18; 19:6  <b>remember</b> [2] - 63:25  <b>removal</b> [1] - 91:17  <b>rent</b> [1] - 56:18  <b>repeat</b> [2] - 89:3; 93:1  <b>replace</b> [3] - 11:4; 37:9  <b>reply</b> [1] - 25:25  <b>report</b> [3] - 29:4; 37:3; 79:8  <b>reported</b> [1] - 3:17  <b>REPORTER</b> [1] - 89:1  <b>Reporter</b> [3] - 3:13; 101:9  <b>reporting</b> [2] - 92:20  <b>reports</b> [1] - 16:7  <b>representatives</b> [1] - 13:7  <b>request</b> [7] - 76:9; 86:11; 90:4, 24; 91:3  <b>requested</b> [1] - 92:14  <b>requests</b> [2] - 88:11  <b>require</b> [4] - 5:22; 68:7; 69:6  <b>required</b> [6] - 23:19; 41:18; 89:13; 93:20; 96:6, 8  <b>requirement</b> [2] - 96:4, 7  <b>requirement-type</b> [2] - 96:4, 7  <b>requirements</b> [8] - 22:16; 88:23; 89:11, 18; 91:8; 92:19  <b>requires</b> [1] - 45:19  <b>research</b> [8] - 85:5; 86:9, 22; 87:18, 20; 88:5; 90:6  <b>resolved</b> [1] - 82:13  <b>Resorts</b> [2] - 4:22; 6:24  <b>resource</b> [1] - 95:7  <b>resources</b> [1] - 37:18  <b>respect</b> [9] - 14:23; 15:4; 24:11; 37:20; 87:10, 19; 90:8; 93:11; 100:11  <b>respectfully</b> [4] - 43:13; 45:6; 46:5; 76:9  <b>response</b> [4] - 45:16; 52:11; 53:19; 78:20  <b>responses</b> [2] - 34:12; 93:3  <b>responsibilities</b> [6] - 85:3; 86:6, 18; 87:17; 89:24; 91:22  <b>responsibility</b> [2] - 91:5, 13  <b>responsible</b> [4] - 85:13; 90:11, 23; 97:2  <b>rest</b> [4] - 41:7; 75:11; 90:22; 91:13</p>	<p><b>restaurant</b> [5] - 18:23; 50:5; 52:19, 23; 74:16  <b>Restaurant</b> [9] - 20:22; 47:16; 48:14; 52:18, 21; 56:7, 16; 57:3  <b>restaurants</b> [10] - 10:11; 17:23; 18:5, 10; 48:20; 50:10; 55:19; 79:24  <b>restraints</b> [1] - 97:7  <b>restrictions</b> [1] - 99:2  <b>restrictive</b> [2] - 91:7; 97:14  <b>result</b> [7] - 5:20; 10:22; 11:4; 27:17; 34:10; 36:3; 74:14  <b>resulting</b> [3] - 27:24; 31:5; 33:1  <b>revenue</b> [1] - 12:14  <b>revenues</b> [3] - 12:8, 10; 47:10  <b>review</b> [2] - 60:25; 85:5  <b>reviewing</b> [1] - 97:5  <b>reviews</b> [1] - 87:22  <b>revise</b> [1] - 91:18  <b>RFI</b> [1] - 61:18  <b>RFP</b> [13] - 32:23-25; 34:12, 16; 35:8; 88:3; 89:17; 91:4; 92:25; 93:2, 5  <b>RFPs</b> [5] - 36:5, 13, 18, 25  <b>rhetorically</b> [2] - 71:2  <b>Rice</b> [3] - 4:21; 27:6; 57:7  <b>Rich</b> [2] - 58:3; 67:5  <b>Richard</b> [2] - 2:10; 4:7  <b>Rico</b> [1] - 99:19  <b>risks</b> [1] - 38:9  <b>rivals</b> [2] - 10:22; 31:5  <b>road</b> [1] - 54:3  <b>Robson</b> [2] - 2:22; 4:8  <b>robust</b> [1] - 36:6  <b>rockfish</b> [3] - 53:5, 7; 55:13  <b>rocks</b> [1] - 53:12  <b>role</b> [7] - 50:22; 87:9; 90:8; 91:4, 10; 92:15, 17  <b>ROM</b> [1] - 84:19  <b>room</b> [1] - 79:18  <b>Room</b> [1] - 3:14  <b>rose</b> [1] - 50:5  <b>roughly</b> [1] - 99:12  <b>row</b> [1] - 22:17  <b>rparker@omm.com</b> [1] - 2:13  <b>rubber's</b> [1] - 54:2  <b>rule</b> [2] - 4:25; 5:12  <b>rules</b> [1] - 82:23  <b>run</b> [3] - 22:10; 71:19; 72:6  <b>running</b> [3] - 50:24; 54:24; 72:14  <b>runs</b> [2] - 54:23; 71:18  <b>Russia</b> [1] - 52:8</p>	<p><b>Sam</b> [1] - 84:19  <b>Sam's</b> [2] - 52:18  <b>same's</b> [1] - 36:24  <b>San</b> [5] - 23:1; 62:10; 73:3; 74:13, 16  <b>sandwich</b> [1] - 70:22  <b>sassy</b> [1] - 54:13  <b>save</b> [5] - 11:6; 42:6, 8; 51:3; 75:24  <b>savings</b> [6] - 33:2; 42:15; 75:21, 25; 94:14  <b>saw</b> [2] - 65:20; 72:8  <b>scale</b> [1] - 93:18  <b>schedule</b> [2] - 7:10; 22:21  <b>Schedule</b> [1] - 95:8  <b>scheduled</b> [1] - 8:17  <b>schedules</b> [1] - 26:13  <b>school</b> [1] - 51:25  <b>Schreibman</b> [3] - 20:7, 15; 21:5  <b>Schuette</b> [1] - 35:20  <b>Schwarzman</b> [1] - 75:6  <b>scope</b> [2] - 24:25; 91:22  <b>scores</b> [2] - 17:6; 35:16  <b>Scott</b> [5] - 3:13; 54:22; 101:5, 7  <b>scottlyn01@aol.com</b> [1] - 3:16  <b>scrambling</b> [1] - 8:25  <b>screen</b> [4] - 11:11; 18:12; 19:19; 51:21  <b>screens</b> [1] - 8:2  <b>sea</b> [3] - 67:24; 74:15  <b>seal</b> [4] - 5:6, 16, 19; 19:6  <b>seat</b> [2] - 43:21, 24  <b>seated</b> [3] - 4:3; 43:20; 82:4  <b>seats</b> [1] - 43:21  <b>second</b> [7] - 6:23; 8:21; 9:25; 15:23; 21:10; 30:23; 69:9  <b>secondly</b> [1] - 77:16  <b>Section</b> [9] - 8:11, 18; 10:17; 14:17; 27:12, 14; 30:24; 45:17  <b>section</b> [2] - 72:14; 100:21  <b>sectors</b> [1] - 50:10  <b>securities</b> [2] - 49:10  <b>security</b> [1] - 43:25  <b>see</b> [45] - 13:19; 19:1; 21:17; 22:8; 23:11, 19; 24:5; 32:13; 35:23; 36:10, 16; 40:12; 46:22; 47:9; 49:22; 51:2; 53:2, 7-8; 55:17; 57:4; 58:11, 22; 59:15; 63:6, 12-13; 66:23; 68:22; 71:13; 73:2, 4, 22; 74:14, 18; 75:7, 16, 21; 77:9; 78:14; 88:8; 91:19  <b>seeing</b> [1] - 77:4  <b>seeking</b> [1] - 4:15  <b>sees</b> [2] - 98:2  <b>segment</b> [1] - 11:14  <b>segments</b> [1] - 29:17  <b>segregate</b> [1] - 24:6  <b>Seidman</b> [2] - 1:21; 4:6  <b>selection</b> [5] - 86:9; 90:17, 20-21; 91:11  <b>sell</b> [4] - 11:19; 54:17; 57:7; 58:19  <b>selling</b> [3] - 42:2; 48:20; 58:20  <b>send</b> [2] - 61:18, 20</p>
<b>S</b>		
	<p><b>Safeway</b> [1] - 70:14  <b>sales</b> [16] - 12:11; 13:6; 16:2, 8, 15; 23:25; 24:2; 26:9; 29:22, 24-25; 30:4; 58:25; 75:15; 88:1  <b>salesman</b> [2] - 75:13  <b>salmon</b> [1] - 54:25</p>	

<p><b>senior</b> [12] - 85:12; 86:1, 6, 15, 23; 87:2, 18; 89:25; 90:12; 91:3; 92:7; 100:17</p> <p><b>sense</b> [3] - 56:4, 12; 73:18</p> <p><b>sensitive</b> [2] - 37:14, 25</p> <p><b>separate</b> [4] - 15:8; 16:11; 38:24; 39:6</p> <p><b>separated</b> [2] - 22:3; 26:9</p> <p><b>separately</b> [4] - 16:5, 8; 30:3; 71:11</p> <p><b>separating</b> [1] - 22:4</p> <p><b>serious</b> [3] - 47:12; 75:9</p> <p><b>seriously</b> [2] - 32:18; 79:18</p> <p><b>serve</b> [6] - 16:16, 19; 24:1; 38:22; 59:7; 80:23</p> <p><b>served</b> [2] - 80:16, 18</p> <p><b>serves</b> [4] - 16:20; 80:24</p> <p><b>Service</b> [3] - 89:22; 95:8; 100:20</p> <p><b>service</b> [13] - 14:12; 15:22; 17:23; 18:3, 6; 19:5; 50:16; 54:14; 57:9; 63:11; 81:2; 88:10; 89:22</p> <p><b>serviced</b> [3] - 81:3, 6</p> <p><b>Services</b> [4] - 4:20, 23</p> <p><b>services</b> [14] - 9:16; 11:16; 14:3, 7; 15:9; 18:18; 31:23; 56:14; 64:18; 65:5, 8-9; 89:20</p> <p><b>SESSION</b> [2] - 1:10; 4:1</p> <p><b>set</b> [8] - 14:13; 22:21; 23:25; 24:17; 36:6; 78:21; 100:4</p> <p><b>set-asides</b> [1] - 100:4</p> <p><b>sets</b> [1] - 22:2</p> <p><b>settled</b> [1] - 8:13</p> <p><b>seven</b> [3] - 28:14; 75:5</p> <p><b>several</b> [2] - 87:21; 90:3</p> <p><b>shall</b> [1] - 5:10</p> <p><b>Shamrock</b> [2] - 4:18; 80:15</p> <p><b>share</b> [9] - 29:22; 30:25; 46:18; 48:25; 49:11; 60:12; 74:13; 79:11</p> <p><b>shares</b> [15] - 10:19; 27:15, 20; 28:13; 29:7, 9; 30:3, 12, 14; 31:3; 46:25; 47:5; 79:9</p> <p><b>shift</b> [1] - 63:15</p> <p><b>shifting</b> [1] - 27:13</p> <p><b>shining</b> [1] - 67:24</p> <p><b>Shoe</b> [8] - 14:13; 15:21; 16:13, 25; 17:8, 17; 25:5; 49:2</p> <p><b>shop</b> [4] - 13:25; 58:3; 67:6; 68:6</p> <p><b>shops</b> [2] - 51:25; 54:12</p> <p><b>shore</b> [1] - 53:6</p> <p><b>shorthand</b> [1] - 3:17</p> <p><b>shortly</b> [1] - 35:20</p> <p><b>show</b> [38] - 8:2; 9:20; 10:20; 15:24; 16:1; 17:18; 18:4, 11, 14; 26:6; 29:2; 31:12; 35:19; 42:4, 15, 25; 43:4, 12; 45:24; 46:8; 47:15, 18; 49:18; 55:22; 56:4; 57:19; 59:22; 65:6; 66:19; 69:17; 70:8, 10; 72:14, 21; 73:17; 75:25</p> <p><b>showed</b> [3] - 28:18; 72:19; 88:7</p> <p><b>showing</b> [5] - 11:10; 42:10; 45:20; 60:3; 73:20</p> <p><b>shows</b> [4] - 13:9; 34:8; 36:15; 72:19</p>	<p><b>sic</b> [1] - 61:20</p> <p><b>side</b> [3] - 6:3; 44:12; 83:19</p> <p><b>sidebar</b> [2] - 8:6, 8</p> <p><b>sides</b> [1] - 92:21</p> <p><b>sides'</b> [1] - 9:7</p> <p><b>significant</b> [2] - 45:8; 77:10</p> <p><b>similar</b> [5] - 12:22; 13:1; 36:25; 77:22; 96:6</p> <p><b>Simmons</b> [2] - 2:14; 4:8</p> <p><b>simple</b> [1] - 35:23</p> <p><b>simply</b> [3] - 57:13; 72:10; 77:25</p> <p><b>SIMPSON</b> [3] - 3:2, 6, 10</p> <p><b>Singer</b> [2] - 3:9; 4:9</p> <p><b>singer@stblaw.com</b> [1] - 3:12</p> <p><b>single</b> [21] - 10:4, 11-12; 18:17, 20, 23; 39:4; 64:18; 69:8; 79:2-5, 7; 80:5, 8-10; 81:11</p> <p><b>sit</b> [2] - 59:19; 71:7</p> <p><b>sits</b> [1] - 98:1</p> <p><b>sitting</b> [1] - 50:2</p> <p><b>situation</b> [1] - 98:23</p> <p><b>six</b> [2] - 9:19; 45:15</p> <p><b>sixth</b> [1] - 11:6</p> <p><b>size</b> [2] - 9:11; 13:18</p> <p><b>sized</b> [1] - 32:14</p> <p><b>skim</b> [1] - 58:17</p> <p><b>skip</b> [1] - 72:13</p> <p><b>SKUs</b> [4] - 14:1; 37:11; 69:24</p> <p><b>sleeping</b> [1] - 45:5</p> <p><b>slew</b> [1] - 29:10</p> <p><b>slide</b> [14] - 18:12; 20:2; 28:24; 29:20; 30:19; 33:10; 59:11; 72:25; 73:1, 20; 75:16; 76:17; 77:8; 79:17</p> <p><b>slides</b> [4] - 7:19; 8:1; 44:11; 61:7</p> <p><b>slipped</b> [1] - 74:15</p> <p><b>slow</b> [2] - 5:17; 61:8</p> <p><b>small</b> [6] - 10:12; 37:22; 42:23; 100:4, 8</p> <p><b>smaller</b> [1] - 12:8</p> <p><b>smell</b> [1] - 99:8</p> <p><b>sober</b> [1] - 55:2</p> <p><b>Sodexo</b> [4] - 80:3, 7, 20, 25</p> <p><b>sodium</b> [1] - 97:13</p> <p><b>sold</b> [2] - 15:9; 64:19</p> <p><b>soliciting</b> [1] - 86:12</p> <p><b>solution</b> [1] - 81:12</p> <p><b>solutions</b> [1] - 77:20</p> <p><b>someone</b> [4] - 10:3; 51:16; 52:19; 77:25</p> <p><b>sometimes</b> [3] - 18:7; 21:16; 81:4</p> <p><b>somewhere</b> [3] - 48:19; 52:20; 67:10</p> <p><b>Sonnemaker</b> [2] - 54:23; 69:20</p> <p><b>Sonnemaker's</b> [1] - 67:12</p> <p><b>sorry</b> [19] - 11:20; 13:11; 14:21; 25:15; 40:6; 43:23; 58:17; 64:15; 76:16; 86:11; 87:9; 89:1; 92:23; 93:1; 96:15, 17; 98:3, 7; 99:25</p> <p><b>sort</b> [4] - 5:4; 15:1; 82:18; 83:16</p> <p><b>source</b> [10] - 11:20; 22:5; 57:25; 81:11;</p>	<p>86:9; 90:17, 20-21; 91:11; 96:9</p> <p><b>south</b> [1] - 50:20</p> <p><b>Soviet</b> [1] - 52:8</p> <p><b>space</b> [1] - 37:19</p> <p><b>speaks</b> [2] - 42:4; 90:3</p> <p><b>special</b> [1] - 92:20</p> <p><b>specialist</b> [14] - 85:2, 8, 12; 86:1, 7, 16, 23; 87:2; 89:25; 90:13; 91:3; 92:7; 100:17</p> <p><b>specialist/market</b> [1] - 87:18</p> <p><b>specialty</b> [16] - 16:12, 17; 17:14; 19:8, 14, 21; 53:3, 5; 54:25; 60:16; 61:10; 62:4, 21; 63:3; 78:11; 97:10</p> <p><b>specific</b> [11] - 10:10; 19:11; 24:15; 28:20; 29:17; 34:5; 39:10; 42:11, 24; 43:1; 95:2</p> <p><b>specifically</b> [6] - 22:19; 24:1, 16; 56:6; 91:4; 100:12</p> <p><b>specificity</b> [1] - 42:13</p> <p><b>specifics</b> [1] - 91:20</p> <p><b>speed</b> [1] - 28:5</p> <p><b>spell</b> [1] - 84:16</p> <p><b>spend</b> [4] - 19:13; 41:7; 45:12; 53:4</p> <p><b>spent</b> [1] - 86:24</p> <p><b>split</b> [3] - 39:5; 63:14</p> <p><b>splitting</b> [2] - 38:15</p> <p><b>sprawling</b> [1] - 44:20</p> <p><b>SPV</b> [26] - 85:15, 18-19; 86:2, 24; 87:3, 14; 91:9, 21; 92:7, 15; 93:12; 95:23, 25; 96:6, 12, 18; 97:9, 15; 99:11, 18, 21, 24; 100:11, 19</p> <p><b>SPV-3</b> [8] - 86:8; 87:6, 10; 89:11; 93:13; 100:17, 19</p> <p><b>SPV-4</b> [4] - 89:13; 93:14; 100:12</p> <p><b>squarely</b> [1] - 23:21</p> <p><b>squeezing</b> [1] - 50:13</p> <p><b>SSNIP</b> [1] - 24:22</p> <p><b>St</b> [1] - 2:8</p> <p><b>staff</b> [2] - 64:3; 67:15</p> <p><b>stand</b> [4] - 42:13; 43:25; 57:20; 58:13</p> <p><b>stand-alones</b> [1] - 42:13</p> <p><b>standard</b> [2] - 8:18; 94:12</p> <p><b>standardization</b> [1] - 93:22</p> <p><b>standardized</b> [2] - 93:19, 21</p> <p><b>standards</b> [1] - 8:12</p> <p><b>stands</b> [1] - 38:1</p> <p><b>Stanford</b> [1] - 46:4</p> <p><b>staple</b> [1] - 67:19</p> <p><b>Staples</b> [1] - 31:8</p> <p><b>start</b> [7] - 4:11; 7:8; 42:10; 45:25; 82:11, 21; 100:22</p> <p><b>started</b> [2] - 73:7; 95:24</p> <p><b>starting</b> [1] - 54:14</p> <p><b>starts</b> [1] - 76:18</p> <p><b>starvation</b> [1] - 74:16</p> <p><b>state</b> [5] - 4:16; 10:4; 67:10; 84:16; 89:22</p> <p><b>state's</b> [2] - 8:11, 15</p> <p><b>statement</b> [1] - 90:2</p>
--	--	--

<p><b>STATEMENT</b> [6] - 7:23; 44:10; 76:13; 102:4</p> <p><b>Statement</b> [1] - 90:11</p> <p><b>STATES</b> [2] - 1:1, 11</p> <p><b>States</b> [9] - 9:10; 10:10; 13:11, 15, 19-20; 44:19; 45:10; 77:20</p> <p><b>states</b> [4] - 26:12; 90:2; 99:17, 19</p> <p><b>stating</b> [1] - 6:20</p> <p><b>Station</b> [1] - 73:22</p> <p><b>statute</b> [1] - 45:21</p> <p><b>steaks</b> [2] - 54:18, 21</p> <p><b>stems</b> [1] - 31:3</p> <p><b>step</b> [2] - 27:15; 35:19</p> <p><b>Stephen</b> [2] - 1:14; 4:6</p> <p><b>steps</b> [1] - 69:25</p> <p><b>Steve</b> [3] - 7:24; 55:9, 18</p> <p><b>Steve's</b> [1] - 63:16</p> <p><b>stick</b> [1] - 67:18</p> <p><b>still</b> [7] - 29:2; 43:2; 50:10; 56:20; 76:6; 84:3; 92:2</p> <p><b>stock</b> [1] - 37:12</p> <p><b>stop</b> [1] - 13:25</p> <p><b>store</b> [4] - 56:7; 62:13; 98:13</p> <p><b>Store</b> [2] - 20:23</p> <p><b>store's</b> [1] - 98:15</p> <p><b>stores</b> [4] - 19:9; 20:19; 21:2; 70:16</p> <p><b>story</b> [3] - 30:11; 35:23; 36:25</p> <p><b>straight</b> [1] - 50:20</p> <p><b>strategic</b> [1] - 20:8</p> <p><b>strategies</b> [1] - 43:6</p> <p><b>Street</b> [6] - 2:11, 15, 19, 23; 3:7, 10</p> <p><b>street</b> [3] - 6:25; 11:16; 53:7</p> <p><b>strength</b> [1] - 30:17</p> <p><b>strong</b> [4] - 8:22; 27:17; 29:3; 61:15</p> <p><b>strongest</b> [1] - 33:11</p> <p><b>strongly</b> [2] - 9:3; 14:18</p> <p><b>structure</b> [1] - 99:23</p> <p><b>struggled</b> [1] - 64:21</p> <p><b>Stuart</b> [1] - 35:20</p> <p><b>study</b> [2] - 52:7; 76:2</p> <p><b>stuff</b> [1] - 53:9</p> <p><b>sub</b> [1] - 93:22</p> <p><b>subject</b> [2] - 94:9, 18</p> <p><b>submarket</b> [2] - 15:16</p> <p><b>submarkets</b> [2] - 29:18; 30:7</p> <p><b>submission</b> [1] - 34:12</p> <p><b>submitted</b> [1] - 5:1</p> <p><b>subpoint</b> [1] - 30:23</p> <p><b>subsequent</b> [1] - 93:13</p> <p><b>subset</b> [1] - 33:23</p> <p><b>Subsistence</b> [1] - 85:13</p> <p><b>subsistence</b> [2] - 85:15, 20</p> <p><b>substance</b> [1] - 72:1</p> <p><b>substantial</b> [4] - 10:21; 19:13; 30:17; 31:4</p> <p><b>substantially</b> [2] - 45:22</p> <p><b>substitute</b> [1] - 19:21</p> <p><b>succeeds</b> [1] - 8:24</p> <p><b>success</b> [2] - 8:16; 9:6</p>	<p><b>successful</b> [2] - 46:16; 47:3</p> <p><b>sudden</b> [2] - 57:12; 58:6</p> <p><b>sufficient</b> [1] - 11:4</p> <p><b>suggest</b> [7] - 45:6; 46:5; 50:25; 54:21; 60:1; 72:7; 75:18</p> <p><b>suggesting</b> [1] - 63:16</p> <p><b>suit</b> [1] - 88:3</p> <p><b>suited</b> [1] - 90:25</p> <p><b>sum</b> [1] - 43:12</p> <p><b>summarize</b> [1] - 74:24</p> <p><b>summarizing</b> [1] - 34:16</p> <p><b>summary</b> [1] - 11:23</p> <p><b>supplement</b> [1] - 97:12</p> <p><b>supplement-type</b> [1] - 97:12</p> <p><b>supplements</b> [1] - 85:13</p> <p><b>supplier</b> [1] - 94:4</p> <p><b>suppliers</b> [4] - 86:19; 87:23; 96:23, 25</p> <p><b>supplies</b> [1] - 96:9</p> <p><b>supply</b> [1] - 24:22</p> <p><b>Supply</b> [2] - 4:24; 95:7</p> <p><b>support</b> [1] - 95:7</p> <p><b>supposed</b> [6] - 48:15; 54:1; 64:25; 70:5; 81:6; 94:11</p> <p><b>supposedly</b> [1] - 72:23</p> <p><b>Supreme</b> [3] - 14:13; 26:2, 5</p> <p><b>surgery</b> [1] - 84:9</p> <p><b>surgical</b> [1] - 85:6</p> <p><b>surpass</b> [1] - 28:10</p> <p><b>surprise</b> [3] - 48:16; 57:4</p> <p><b>Swanson</b> [1] - 35:9</p> <p><b>swear</b> [1] - 84:3</p> <p><b>Swedish</b> [1] - 31:8</p> <p><b>sweissman@ftc.gov</b> [1] - 1:16</p> <p><b>switch</b> [2] - 19:12; 61:25</p> <p><b>SWORN</b> [1] - 84:5</p> <p><b>SYGMA</b> [5] - 16:6, 18</p> <p><b>synergies</b> [3] - 77:5, 11</p> <p><b>SYSKO</b> [3] - 1:7; 44:10; 102:5</p> <p><b>Sysco</b> [82] - 2:11; 4:5; 9:8; 12:3, 23; 13:12; 16:4, 7, 19; 21:23; 22:7, 9, 25; 26:20; 29:21, 24; 31:15, 24; 32:1, 6, 8, 16-17, 25; 33:9; 34:9, 15, 18, 25; 35:14; 36:12; 37:1, 23; 39:3, 12, 22; 40:2, 8, 13, 19, 22; 41:2, 25; 43:7; 45:7; 46:25; 50:16; 53:13; 58:5, 7; 59:6, 21; 62:14, 21; 64:2; 70:12, 21; 71:1, 20; 74:15; 76:7, 21; 77:1, 4, 6, 9-10, 14; 78:12, 24; 81:2, 11; 87:24; 92:1; 93:4, 13</p> <p><b>Sysco's</b> [6] - 13:11; 33:8; 34:13, 17; 36:12; 67:23</p> <p><b>Sysco/US</b> [1] - 49:12</p> <p><b>system</b> [3] - 18:17, 21; 78:9</p> <p><b>system's</b> [1] - 63:10</p> <p><b>Systems</b> [1] - 4:18</p> <p><b>systems</b> [26] - 12:17; 16:3, 5-6, 12, 17, 19-20; 17:14, 20, 22; 18:1, 7, 24; 19:1, 4; 55:18-20, 23-24; 60:16; 61:14, 20; 63:17</p> <p><b>SZROM</b> [3] - 84:5; 102:8</p>	<p><b>Szrom</b> [8] - 6:22; 84:1, 8, 19-20; 89:3; 92:23; 98:11</p> <p style="text-align: center;"><b>T</b></p> <p><b>table</b> [2] - 45:4; 76:1</p> <p><b>tailor</b> [1] - 24:1</p> <p><b>talks</b> [1] - 29:21</p> <p><b>tar</b> [1] - 24:14</p> <p><b>target</b> [1] - 71:7</p> <p><b>targeted</b> [5] - 24:14, 16-17, 19; 69:6</p> <p><b>task</b> [1] - 66:9</p> <p><b>tasked</b> [1] - 43:8</p> <p><b>taste</b> [3] - 93:25; 97:5; 99:8</p> <p><b>tax</b> [2] - 64:18; 65:7</p> <p><b>team</b> [13] - 35:15; 43:8; 46:3; 86:10; 88:15, 17, 19; 90:17, 20-21; 91:12; 95:7</p> <p><b>technical</b> [6] - 90:16, 23, 25; 91:1, 12, 25</p> <p><b>technology</b> [2] - 79:7; 80:11</p> <p><b>telephone</b> [1] - 84:2</p> <p><b>temperatures</b> [1] - 52:3</p> <p><b>ten</b> [9] - 7:14; 41:7; 51:19; 73:7, 9, 12-13; 81:17, 20</p> <p><b>ten-minute</b> [1] - 7:14</p> <p><b>tens</b> [2] - 51:23; 94:15</p> <p><b>term</b> [3] - 96:10; 100:12</p> <p><b>terminology</b> [1] - 91:18</p> <p><b>terms</b> [15] - 26:14; 34:2, 25; 38:12; 41:13; 66:21; 78:13; 80:8, 10, 22; 81:9; 88:4; 91:14, 16; 100:13</p> <p><b>test</b> [8] - 14:14; 17:13; 24:17, 20; 25:6; 77:19; 78:16</p> <p><b>Test</b> [3] - 17:11, 17; 24:10</p> <p><b>testified</b> [4] - 19:3; 20:9; 31:20; 32:22</p> <p><b>testify</b> [4] - 11:2; 30:12; 33:25; 34:4</p> <p><b>testifying</b> [1] - 49:6</p> <p><b>testimony</b> [22] - 7:7; 17:4-6; 23:24; 25:25; 32:12; 35:25; 39:20; 40:11; 42:3; 51:10; 56:16; 65:3; 68:15; 73:19; 74:19; 78:7; 81:23; 84:11</p> <p><b>testimony's</b> [1] - 48:13</p> <p><b>Texas</b> [1] - 39:16</p> <p><b>THACHER</b> [3] - 3:2, 6, 10</p> <p><b>theme</b> [1] - 59:11</p> <p><b>themes</b> [2] - 45:15</p> <p><b>themselves</b> [3] - 69:10; 71:11; 94:13</p> <p><b>theory</b> [2] - 31:7; 67:23</p> <p><b>there'd</b> [1] - 19:23</p> <p><b>thereafter</b> [2] - 7:14; 90:15</p> <p><b>therefore</b> [2] - 6:8; 67:25</p> <p><b>Thereupon</b> [3] - 43:18; 82:2; 101:1</p> <p><b>they've</b> [6] - 21:16; 38:10, 13; 46:23, 25; 75:4</p> <p><b>third</b> [11] - 4:14, 17; 5:14; 6:24; 10:15; 17:4; 25:8, 10; 29:23; 33:12; 75:22</p> <p><b>thirds</b> [1] - 30:21</p> <p><b>Thompson</b> [2] - 6:24; 7:2</p> <p><b>thousands</b> [3] - 14:1; 44:22; 51:24</p>
---	---	---

<p><b>threatened</b> [1] - 32:25  <b>three</b> [5] - 20:25; 63:15; 67:11; 86:4; 100:3  <b>throughout</b> [9] - 13:10, 14, 20; 38:19; 79:18; 89:9; 93:21; 94:12  <b>throw</b> [1] - 63:19  <b>today</b> [43] - 7:5; 19:10; 35:11; 37:11, 18, 20, 22; 38:19; 39:13, 17, 22, 25; 40:3, 8, 13, 17, 21; 41:10, 14; 45:12, 25; 50:21; 65:20; 72:17; 75:17; 76:15, 20, 22; 78:9-11, 13; 79:15; 80:24; 81:3, 10; 84:22  <b>together</b> [4] - 57:2; 67:19; 73:1; 99:15  <b>Tom</b> [1] - 35:13  <b>tomorrow</b> [1] - 7:9  <b>took</b> [4] - 6:14; 36:6; 55:1  <b>top</b> [10] - 19:2; 33:10; 35:20; 40:20; 52:17; 58:18; 88:1, 7; 93:20; 94:24  <b>total</b> [4] - 41:22; 99:16; 100:15  <b>totally</b> [4] - 59:21; 66:6; 71:2, 8  <b>touch</b> [1] - 15:10  <b>touched</b> [1] - 15:22  <b>tough</b> [1] - 52:4  <b>touting</b> [1] - 30:20  <b>toward</b> [1] - 37:1  <b>track</b> [1] - 37:15  <b>trade</b> [2] - 31:15, 17  <b>Trade</b> [2] - 4:4; 83:25  <b>TRADE</b> [5] - 1:3, 14, 18, 22; 2:2  <b>transaction</b> [12] - 9:1; 15:12; 36:4; 42:8, 18; 45:10; 58:15; 76:21, 25; 77:4  <b>transactions</b> [1] - 45:11  <b>transcript</b> [2] - 3:17; 101:5  <b>TRANSCRIPT</b> [1] - 1:10  <b>transcription</b> [1] - 3:17  <b>transform</b> [1] - 59:17  <b>treat</b> [5] - 4:25; 5:2, 19; 6:7; 27:23  <b>treated</b> [1] - 6:12  <b>treatment</b> [2] - 4:15  <b>treats</b> [1] - 16:5  <b>trial</b> [7] - 8:16, 24; 24:9; 43:14; 59:3; 79:18; 82:23  <b>Trial</b> [4] - 1:14, 17, 21; 2:2  <b>tried</b> [1] - 64:21  <b>trier</b> [1] - 54:1  <b>Tringali</b> [5] - 3:2; 4:8; 73:11, 15; 76:12  <b>TRINGALI</b> [5] - 6:4; 73:12; 76:14, 18, 20  <b>Tringali's</b> [2] - 68:15; 72:2  <b>trip</b> [1] - 57:21  <b>trouble</b> [1] - 50:11  <b>truck</b> [6] - 13:2; 52:20; 53:2; 56:18; 73:22  <b>trucks</b> [5] - 46:1, 4; 54:25; 55:15; 56:17  <b>true</b> [10] - 23:7; 32:14, 17; 36:24; 55:20; 63:18; 72:19; 74:15; 79:15  <b>truly</b> [1] - 68:7  <b>trust</b> [1] - 48:9</p>	<p><b>try</b> [7] - 7:15; 26:20; 33:4; 50:24; 56:22; 81:23; 100:7  <b>trying</b> [17] - 8:8; 50:16, 25; 51:1, 3; 53:5; 56:24; 60:11, 19; 64:8, 20; 69:6; 75:23; 77:1  <b>Tuesday</b> [1] - 1:5  <b>turn</b> [12] - 21:9; 27:1, 11; 30:10; 31:11; 32:11; 60:11; 75:16; 77:8; 79:17; 95:23  <b>turned</b> [1] - 90:16  <b>two</b> [27] - 6:17; 8:19; 9:9, 15, 25; 11:5, 21; 12:3; 13:12; 21:11, 15, 18; 22:1; 26:8; 28:19; 30:21; 32:14; 38:11; 39:5; 42:12; 45:14; 46:6; 50:5; 68:14; 73:22; 89:16  <b>two-thirds</b> [1] - 30:21  <b>type</b> [13] - 31:7; 33:21; 85:7; 88:8; 90:6; 92:20; 96:4, 7, 11; 97:12, 14; 98:23  <b>types</b> [9] - 9:25; 21:11, 15, 18; 22:18; 64:20; 88:21; 97:8, 17  <b>typical</b> [3] - 97:14; 99:23; 100:11  <b>typically</b> [7] - 10:10; 16:16; 78:3; 79:3; 89:8</p> <p style="text-align: center;"><b>U</b></p> <p><b>U.S</b> [17] - 3:2, 14; 26:5; 76:13; 87:6, 9, 25; 92:3; 93:3, 12; 96:14, 20; 98:17; 99:17; 100:20; 102:6  <b>ultimate</b> [1] - 90:19  <b>ultimately</b> [3] - 5:15; 8:24; 94:1  <b>um..</b> [1] - 38:2  <b>umbrella</b> [1] - 16:20  <b>unambiguous</b> [1] - 42:4  <b>unclear</b> [1] - 61:10  <b>uncontradicted</b> [1] - 33:7  <b>under</b> [30] - 5:5, 16, 18; 8:11; 10:17; 14:17; 17:10, 13; 19:6; 22:17; 24:17, 20; 26:24; 27:12, 14, 20; 28:7; 35:4; 72:7; 85:12; 96:12, 18; 97:9, 15; 99:11, 18, 21; 100:19  <b>underlying</b> [1] - 46:1  <b>undermines</b> [1] - 9:1  <b>understood</b> [3] - 25:23; 81:25; 88:23  <b>undertaking</b> [1] - 92:24  <b>unfortunately</b> [2] - 5:23; 52:22  <b>unilateral</b> [2] - 10:22; 31:5  <b>Union</b> [1] - 73:22  <b>unique</b> [5] - 11:16; 63:25; 64:11, 15, 19  <b>UNITED</b> [2] - 1:1, 11  <b>United</b> [9] - 9:9; 10:10; 13:11, 15, 19-20; 44:19; 45:10; 77:20  <b>units</b> [1] - 37:12  <b>unlawful</b> [2] - 10:17; 27:12  <b>unlike</b> [2] - 44:6; 64:11  <b>unlimited</b> [1] - 95:17  <b>unmatched</b> [1] - 13:16  <b>unobjected</b> [2] - 83:6, 15</p>	<p><b>unobjected-to</b> [2] - 83:6, 15  <b>unquestionably</b> [1] - 65:2  <b>unquote</b> [1] - 66:24  <b>up</b> [38] - 5:15; 7:21; 23:25; 24:7; 28:5, 17; 32:14; 43:12, 23-24; 46:10; 47:1; 50:4; 51:21; 53:15; 55:2, 6; 56:22; 57:11, 20; 58:13, 22; 60:20; 61:3; 62:24; 65:5, 25; 67:14; 73:10, 14, 16; 79:6; 84:12; 89:17; 90:15, 17; 95:3  <b>upcharge</b> [1] - 57:9  <b>upcoming</b> [2] - 8:16; 90:4  <b>upfront</b> [1] - 10:2  <b>upstate</b> [1] - 41:2  <b>US</b> [63] - 9:8; 11:22; 12:3; 13:10, 12; 20:7, 17, 19; 21:23; 22:7, 9, 25; 24:4; 26:20; 27:4, 9; 29:25; 30:16; 31:15, 23; 32:3, 5, 10, 13, 25; 33:9; 34:9, 23; 35:10; 36:13, 24; 37:7, 10, 17, 22; 38:19, 22; 39:3, 12, 22; 40:2, 8, 13, 19, 22-23; 41:2, 11, 14; 45:7; 46:25; 59:6; 62:21; 72:18; 74:15; 76:15, 20-21; 77:2, 15  <b>USA</b> [1] - 4:23  <b>user</b> [1] - 93:22  <b>uses</b> [1] - 18:24  <b>USF</b> [27] - 12:23; 30:19; 32:18; 34:13, 20; 35:8; 36:17; 59:21; 62:16; 64:2, 6; 65:25; 67:22; 70:11, 13, 21; 71:1; 73:4; 77:9, 11; 80:1; 81:2, 11  <b>USF's</b> [3] - 11:11, 13; 35:19  <b>utilize</b> [4] - 88:22; 96:6, 8; 97:22  <b>utilized</b> [2] - 92:2; 99:5</p> <p style="text-align: center;"><b>V</b></p> <p><b>VA</b> [24] - 84:22, 24; 85:1, 4; 89:9, 18; 94:8; 95:9; 96:3, 8, 12, 18, 22; 97:1, 4, 8, 15; 98:5, 23; 99:12, 17, 20; 100:19  <b>VA's</b> [1] - 89:15  <b>valuation</b> [1] - 27:8  <b>value</b> [7] - 11:15; 13:5; 14:3; 43:7; 53:20; 56:19; 97:6  <b>value-added</b> [2] - 11:15; 14:3  <b>values</b> [3] - 94:1; 99:2, 9  <b>varies</b> [1] - 99:1  <b>various</b> [3] - 87:16; 88:6; 89:9  <b>vast</b> [1] - 82:13  <b>vegetables</b> [1] - 52:2  <b>Vendor</b> [1] - 85:14  <b>vendor</b> [5] - 92:13; 96:2; 98:1  <b>vendors</b> [2] - 87:24; 92:13  <b>verifiable</b> [2] - 42:16; 43:1  <b>versus</b> [3] - 4:5; 28:21; 94:5  <b>veteran</b> [5] - 89:19, 23; 98:3; 99:6; 100:5  <b>Veterans</b> [2] - 6:22; 84:21  <b>veterans'</b> [1] - 99:16  <b>viable</b> [1] - 100:4  <b>video</b> [2] - 81:18; 84:2</p>
--	---	---



<p><b>view</b> [2] - 43:5; 70:1  <b>viewed</b> [1] - 28:8  <b>violates</b> [1] - 30:24  <b>Vistar</b> [1] - 16:12  <b>volume</b> [3] - 19:12; 93:20; 96:4  <b>volumes</b> [1] - 42:4  <b>vulnerability</b> [1] - 68:24  <b>vulnerable</b> [3] - 66:4; 67:20; 72:23</p>	<p><b>withdrawn</b> [1] - 4:19  <b>witness</b> [9] - 6:21, 23-24; 20:12; 31:21; 82:5, 8; 84:1, 3  <b>WITNESS</b> [7] - 84:5, 14; 89:5; 93:1, 5, 9; 100:3  <b>witnesses</b> [6] - 5:21; 6:17; 7:8; 19:19; 31:14; 78:8  <b>woman</b> [2] - 67:8; 70:2  <b>women</b> [3] - 46:8, 22; 49:23  <b>word</b> [3] - 20:2; 21:16; 47:14  <b>words</b> [5] - 19:15; 26:12; 33:15; 71:25; 77:19  <b>works</b> [2] - 50:20  <b>world</b> [1] - 78:6  <b>World</b> [1] - 50:4  <b>worried</b> [2] - 58:23  <b>worth</b> [3] - 7:16; 48:12; 63:24  <b>wrap</b> [4] - 73:10, 14, 16; 95:3  <b>write</b> [1] - 91:5  <b>written</b> [2] - 89:17; 90:10  <b>wrote</b> [1] - 88:3</p>
<b>W</b>	
<p><b>wait</b> [2] - 68:9; 71:1  <b>walk</b> [1] - 75:23  <b>wall</b> [2] - 60:6, 9  <b>Wallace</b> [4] - 3:13; 101:5, 7  <b>walleye</b> [2] - 54:16; 55:13  <b>walleys</b> [1] - 54:16  <b>walls</b> [3] - 56:22; 60:20; 62:24  <b>waltz</b> [1] - 51:1  <b>War</b> [1] - 50:4  <b>warehouses</b> [2] - 46:2, 4  <b>warrant</b> [1] - 95:17  <b>Washington</b> [15] - 1:7, 15, 19, 23; 2:4, 12, 16, 19, 23; 3:7, 11, 15; 44:3; 55:17; 73:21  <b>waving</b> [1] - 52:10  <b>ways</b> [3] - 6:17; 45:1; 89:16  <b>weaker</b> [1] - 26:25  <b>Websites</b> [1] - 88:9  <b>week</b> [1] - 51:16  <b>weekly</b> [1] - 90:15  <b>weigh</b> [3] - 8:14; 9:3; 14:18  <b>weight</b> [1] - 29:14  <b>Weissman</b> [11] - 1:14; 4:6; 7:18, 22, 24; 12:13; 14:21; 43:15; 56:15; 82:5, 9  <b>WEISSMAN</b> [66] - 6:18, 21; 7:19, 24; 8:8, 10; 11:21, 25; 12:2, 18, 20, 22; 15:6, 19, 21; 17:15, 20; 20:6, 14, 21, 23, 25; 21:9; 22:7, 22; 23:5, 7, 9; 24:13, 24; 25:2, 5, 17, 20, 22, 24; 27:3; 28:3, 23; 29:1, 7; 30:8, 10, 23; 31:18; 33:18; 34:1, 7; 35:6; 36:21, 23; 38:2, 4, 6, 8; 39:10, 12; 41:9, 22, 24; 81:19, 25; 82:6, 12, 25; 83:14  <b>Weissman's</b> [1] - 81:17  <b>welcome</b> [1] - 4:11  <b>well-known</b> [2] - 8:25; 70:22  <b>well-settled</b> [1] - 8:13  <b>West</b> [1] - 39:16  <b>western</b> [1] - 40:22  <b>Western</b> [1] - 40:24  <b>white</b> [6] - 8:2; 18:12; 20:4; 21:20; 25:8; 83:17  <b>whole</b> [5] - 26:19; 60:14; 65:9; 68:23; 69:3  <b>wide</b> [1] - 34:11  <b>win</b> [2] - 71:12, 21  <b>winner</b> [1] - 94:3  <b>winner-take-all</b> [1] - 94:3</p>	<b>X</b>
	<p><b>XYZ</b> [1] - 4:23</p>
<b>Y</b>	
	<p><b>yanked</b> [1] - 61:6  <b>year</b> [9] - 34:19; 74:21; 75:1; 92:24; 93:2, 23; 95:20; 100:14  <b>years</b> [12] - 20:19; 37:17; 50:8; 51:4; 52:11; 53:11; 59:16; 61:3; 75:8; 86:4; 100:14  <b>yellow</b> [1] - 70:25  <b>yesterday</b> [2] - 4:14; 5:1  <b>yielded</b> [4] - 9:16; 28:15; 36:25  <b>York</b> [3] - 3:3; 23:2; 41:2  <b>you-all</b> [2] - 65:2; 73:25</p>
<b>Z</b>	
	<p><b>zebra</b> [1] - 84:19</p>