IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Federal Trade Commission, et al.,	)	Civil Action No. CA 15-2115
Plaintiffs,	)	PRELIMINARY INJUNCTION
vs.	)	Washington, DC March 31, 2016
Staples, Inc., et al.,	)	Time: 1:10 p.m.
Defendants.	)	

TRANSCRIPT OF PRELIMINARY INJUNCTION
AFTERNOON SESSION
HELD BEFORE
THE HONORABLE JUDGE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

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Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

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INDEX

Allen Wright.....1977

Carl Shapiro.....2075

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AFTERNOON SESSION

THE COURT: Proceed with cross-examination.

MR. PERRY: Good afternoon, Your Honor, Jeff Perry on behalf of Staples.

THE COURT: Counsel.

CROSS-EXAMINATION

BY MR. PERRY:

Q. Good afternoon, Mr. Wright. As you just heard, my name is Jeff Perry. We haven't met before. I'm counsel for Staples. I have a few questions for you, okay, sir?

A. Okay.

Q. A few may have been a little bit of an over-promise, but we'll get through it as quickly as we can.

A. Okay.

Q. I'm sure -- I should say, I know you've been here a few days already and I know everybody here appreciates your flexibility, as well.

Now, sir, I want to talk a little bit about HPG. And you mentioned on direct examination that HPG is essentially divided into two divisions; is that right, sir?

A. That's correct.

Q. The first division is simply called HealthTrust, correct?

A. Well, HealthTrust is the parent and then there is a division that's called Core Trust.

Q. And the HealthTrust side of the business, the members of the HealthTrust side of the business are health care companies, right, sir?
A. That's correct.
Q. Things like hospitals and hospital systems, right?
A. Yes.
Q. And, in fact, your parent organization, HCA is one of the members of HealthTrust, right?
A. That is correct.
Q. And HCA is a Fortune 100 company, correct, sir?
A. That is correct.
Q. A for-profit institution, correct?
A. Correct.
Q. They do about $39 billion in revenue, right, sir?
A. That is correct.
Q. Okay. So I know you mentioned the revenue constraints facing some of your hospital members, but HCA, with 39 billion in revenue, they're doing okay, sir?
A. They are -- you know, it goes back and forth, but they're financially stable.
Q. And, sir, do you know, 39 billion in revenue is about the size of Staples and Office Depot put together, sir?
A. That is correct.
Q. Okay. Did you talk with anyone at HCA, the parent entity, about your declaration, sir?

A. I did not. I spoke to the executives within HealthTrust.
Q. Okay. Did you talk to anyone at HCA about your testimony today?
A. I did not.
Q. Have you talked to anyone at HCA about the impact, positive or negative, about this merger -- from this merger?
A. I did not speak to HCA, just HealthTrust.
Q. Okay. So you're not here testifying on behalf of HCA, the parent entity, correct, sir?
A. No, just HealthTrust.
Q. Right. They didn't authorize your testimony in this case?
A. They did not.
Q. Okay. And you don't know whether HCA, the parent entity, is happy or excited about the merger or concerned about the merger or otherwise, you don't know?
A. Well, we have representatives on our advisory board that are HCA members. And so they're informed of where we are in terms of the nature of the merger and our market assessment. So there are representatives within HCA on the advisory board that are attuned to the matter at hand.
Q. Right. And they're attuned and they're informed about where you are, but you're not testifying on their behalf, fair, sir?
A. I'm testifying on behalf of myself.
Q. Right. And not on behalf of HCA?

A. Correct.
Q. And, sir, there are, I think you said, about 1400 members of HealthTrust, different health care entities; is that correct?
A. 1400 hospitals.
Q. 1400 hospitals. Thank you, sir. And have any of those 1400 hospitals authorized your testimony today here?
A. They have not, just the executives of HealthTrust themselves. As I mentioned before, we have shared our market assessment and our analysis with our advisory boards within HealthTrust.
Q. Right. But you've shared information with them, but none of your hospital members, these 1400 hospital members have authorized you to testify on their behalf today; is that fair?
A. They did not.
Q. Okay. And the other division, I think you called it -- is called Core Trust, right, sir?
A. That is correct.
Q. And Core Trust is comprised of non-health care companies, correct, sir?
A. That is correct.
Q. The members include organizations like Toys 'R' Us and Hilton, correct?
A. That's correct.

Q. Have you spoken with anyone at the Hilton about your testimony today?
A. I have not.
Q. Have you spoken with anyone at Hilton about this merger?
A. I have not.
Q. Have you spoken with anyone at Toys 'R' Us about the merger or your testimony, sir?
A. I have not.
Q. Have you spoken with any of the 1200 Core Trust members?
A. There are 1200 total Core Trust members today.
Q. And have you --
A. A little over 1200.
Q. Sorry, sir, I didn't mean to interrupt you.
Have you spoken with any of those 1200 or so Core Trust members about your testimony?
A. I have not spoken about the details of the testimony. Some of the companies that are Core Trust members or private equity -- they have private equity owners, and we have briefed our private -- the private equity owners of Core Trust about the matter at hand, but not specifically the testimony.
Q. Right. So, for example, Bain and KKR, are those corporate private equity owners of your organization?
A. KKR is.
Q. Okay. They're pretty financially stable, you would admit?

A. They are financially stable, yes.

THE COURT: You said you're testifying on behalf of yourself. You're here individually?

THE WITNESS: Yes.

THE COURT: You're testifying in your individual capacity?

THE WITNESS: In my individual capacity in my role at HealthTrust.

THE COURT: Okay.

MR. PERRY: Thank you, Your Honor.

BY MR. PERRY:

Q. And in terms of your Core Trust members, you're not here testifying on behalf of any of those individual Core Trust members, fair?

A. That's fair.

Q. And you mentioned that your advisory boards are paramount in the contracting process, as you deal with vendors, correct?

A. Yeah, the advisory boards vote and approve our contract award decisions.

Q. Okay. Was there an advisory board vote to approve your testimony in this case?

A. There was an advisory board briefing on the evaluation of the market and our plans relative to the evaluation of the market, but not on the actual testimony itself.

Q. Right. So you provided information to the advisory board; is that correct?
A. That is correct.
Q. And the advisory board would have to actually vote in order to approve a contract, say, with Staples, correct?
A. That is correct.
Q. And the advisory board -- no advisory board at HPG actually voted to approve or authorize your testimony; is that fair?
A. That is fair.
Q. Okay. And none of your hospital members, the 1400 hospital members that you referenced, have told you that the quality of care at their facilities will decrease if this merger goes through, correct?
A. We know through conversations with our advisory board that if there is a nonnational player, that it creates inefficiencies for our members.
Q. Right. But none of your advisory board members have said that if this merger goes through, don't come to, for example, an HCA hospital because the quality of care is going to go down. That conversation never happened, correct?
A. Would you repeat the question, please?
Q. Sure. None of your hospital members have actually said that the quality of care at their facilities would be diminished depending on whether or not this merger goes

through, correct?

A. What they have acknowledged and recognized is that there would be inefficiencies created in the hospital environment should the merger go through.

Q. Sure. And I appreciate that, sir, but the question I'm trying to ask is about the quality of care, so if I could just direct you there.

Have any of your hospital members indicated to you that the quality of care that they offer at their hospital facilities would be diminished depending on whether or not this merger goes through?

A. They have not.

Q. Okay. And none of your hospital members have said if this Staples/Office Depot merger goes through we're going to close our doors, right? That hasn't happened, sir?

A. No.

Q. And none of them said if, you know, this touch-and-go patient that's on the operating table, if our paperclip distributors merge, something bad is going happen to that patient; that's hasn't happened, right, sir?

A. We have not had that specific comment.

Q. Okay. Sir, I want to talk for a few more minutes about how HPG operates. And I think your -- I don't want to put words in your mouth, but your reason for being, essentially, is to use the volume of your members to negotiate favorable

pricing in terms on their behalf. Is that a fair way to put it?

A. That's fair.

Q. And the primary way you do that is by negotiating favorable contractual terms, right, sir?

A. That is correct.

Q. And in particular, that would include favorable pricing, right?

A. Yes.

Q. And also favorable service requirements, right?

A. That is correct.

Q. Okay. And HPG has a number of tools at its disposal that it uses to negotiate those pricing and service terms, correct, sir?

A. What do you mean by -- did you say pools or tools?

Q. I meant to say tools. I don't know what I actually said, sir.

A. Okay. So could you repeat the question?

Q. Sure.

THE COURT: The court reporter heard you say tools.

MR. PERRY: Thank you, court reporter. That's a very generous interpretation.

BY MR. PERRY:

Q. Sir, HPG has a number of tools, tools with a T --

A. Okay.

Q. -- that it uses to negotiate the best pricing and terms for its members; is that fair?
A. We have different processes depending on the situation at hand.
Q. And in addition to those processes, one of the tools you have, really, is your procurement department, correct, sir?
A. Our sourcing organization is the primary means by which we negotiate contracts on behalf of our members.
Q. Right. And you're the vice president of strategic sourcing for HPG, right?
A. That is correct.
Q. And you have a team that reports up to you, right?
A. That is correct.
Q. And I think you said on direct that you have about 55 FTEs, about 55 total people?
A. Yes.
Q. And that includes 33 strategic sourcing experts, right?
A. That is correct.
Q. And you described these strategic sourcing experts in your direct examination as trained negotiators, right, sir?
A. Yes.
Q. And all of these 33 trained negotiators and 55 total people, are they all dedicated to the nonclinical supplies that you oversee?
A. Yes, they are.

Q. Okay. And nonclinical, does that essentially mean that the products that you're overseeing don't directly relate to the care of the patients? Is that a fair way to put it?
A. They're not medical supplies and they're not implants.
Q. Understood. And office supplies fall into that nonclinical category, right, sir?
A. Office supplies fall into the nonclinical category. But let me add, if I may, that, you know, when patients register, when patients are discharged, physician and clinical orders, they're on paper. And so there is an office supply impact relative to patient care.
Q. Sure. The hospitals use office supplies, right, sir?
A. They do.
Q. Right. But the office supplies don't directly relate to the health outcomes of the patients, right, sir?
A. They can. So if a patient is discharged and there's discharge instructions on a piece of paper that's delivered by an office supply vendor, the patient's, you know, adherence to those instructions that are given to them at discharge is a part of patient care.
Q. Okay. And, sir, you're not testifying that whether or not this merger goes through will impact whether patients have discharge orders that they can follow, sir, right?
A. What I'm suggesting is that there are tremendous efficiencies and tremendous value associated with a national

office supply vendor. And so if we were to fragment or go in a different direction, relative to office supplies, there would be a tremendous amount of inefficiencies introduced to the hospital.

Q. And that's your view, testifying on behalf of yourself and HPG, right?

A. That is correct.

Q. You're not authorized to give that testimony on behalf of any of your HealthTrust members or Core Trust members, correct?

A. That's correct.

Q. And, sir, going back to your team, you have someone who's a vice president of strategic sourcing who's specifically assigned to nonclinical supplies; is that right?

A. I am the vice president for nonclinical.

Q. I guess you don't report to yourself then, sir?

A. Well, I'm just trying to clarify your question.

Q. No, I appreciate it. I think what I meant to ask you, is you have an assistant vice president who reports to you, right?

A. That's correct.

Q. And beneath the assistant vice president you have someone who is a contract manager who is specifically assigned to oversee the Staples contract, correct?

A. I have a contract director.

Q. Okay. Is that Mr. Don Colletta?
A. That is correct.
Q. Okay. And one of Mr. Colletta's jobs is to make sure that HPG members get the best prices and best service from Staples, right, sir?
A. That is true.
Q. And he's good at his job, isn't he, sir?
A. He's an experienced negotiator and contract manager.
Q. Right. And so are the 33 other trained negotiators you have at HPG, correct?
A. They're experienced professionals.
Q. Right. And in addition to the experience and the training of your team, you also, I think you said on direct examination, have significant leverage as a result of your volume, right, sir?
A. We have significant volume that we introduce to the market and the market -- the competitive nature of the market delivers value that an individual member can't secure on their own.
Q. Right. But what you said on direct examination, sir, is that vendors cherish the volume that you bring them, right, sir?
A. They do.
Q. Right. And the volume that you -- the volume of business that you bring to vendors that they cherish, that

gives you a certain amount of leverage when you're negotiating with those vendors, right, sir?

A. It gives us, you know, a large amount of business to bring to the vendors in exchange for more favorable pricing terms.

Q. Right. And you believe that that volume of business that you have, in addition to your trained negotiators and your expertise, is one of the things that ensures you get competitive pricing for your members, right, sir?

A. That's correct. And that's part of the value proposition that's introduced to the vendor community in a competitive environment.

Q. Right. And that's the primary value proposition that you bring to your members, fair?

A. And a compliant membership.

Q. Thank you, sir. And in addition to your team and your expertise and your volume, you also have an external procurement consultant, right, sir?

A. We do.

Q. And I think the name of the firm is EJ Advisory Services; is that right?

A. That is correct.

Q. And the individual at EJ Advisory Services who works with you is named Butch Johnson, right, sir?

A. That is his name.

Q. And Mr. Johnson's expertise is specifically in office supplies, correct?
A. That is correct.
Q. And you pay him a fee in exchange for his consulting services, right?
A. We pay him a flat annual fee.
Q. Right. And on occasion Mr. Johnson will even go out to manufacturers, like go out to a paper mill, for example, as part of his work for your members to get low prices, right?
A. Not in our role, no. He simply advises us relative to our sourcing process.
Q. So he doesn't go out to paper mills on your behalf, sir?
A. He does not.
Q. Okay. Are you aware whether or not Mr. Johnson does that to form his analysis?
A. He may do that as part of his consulting business, but he's not directed to do that as part of the HealthTrust activity.
Q. Understood. So it's not part of your direction, but whatever knowledge he would gain through that process he would bring to bear in helping HPG members, right?
A. He does have industry knowledge.
Q. Okay. Now, sir, you talked about RFPs for quite a bit. And I think you said that your advisory boards have a role in that process as well, right, sir?

A. Yes.
Q. And part of the benefit of an RFP, isn't it, sir, that you have the ability to thoroughly analyze the capabilities of vendors, right, sir?
A. That is correct.
Q. And you would, for example, put out a questionnaire and ask for very detailed, robust information from vendors to allow you to compare and analyze their capabilities, correct, sir?
A. Correct.
Q. And on top of getting that information, you would get a significant amount of information about vendor pricing, right, sir?
A. Correct.
Q. And I believe you testified that the way you do the pricing analysis is that you do a detailed spreadsheet analysis, right, sir?
A. Yes.
Q. And that looks at literally every SKU or every product your members purchase, right, sir?
A. Yes.
Q. And the volume they purchase of each item, right, sir?
A. Right.
Q. And the pricing that's offered by the vendor for each one of those SKUs, right, sir?

A. Right.
Q. And you gather that information from multiple vendors and that allows you to do an all-in, apples to apples analysis of vendor pricing, right?
A. That information is provided to us by the contracted vendor.
Q. Understood. But during an RFP process you would be able to gather that information from competing members, wouldn't you, sir?
A. That is true if the competing vendors are willing to provide that information.
Q. Sure. So, for example, if you were using Staples and you went out to RFP to another company, you could find out whether the 250 million that your members are spending through Staples could be had for 245 million from some other vendor, right, sir?
A. That's part of the RFP process.
Q. You could do that direct analysis to inform your price negotiations, right, sir?
A. Correct.
Q. And that's part of the reason -- the ability to do that kind of rigorous analysis, that's part of the reason you go through an RFP process, right, sir?
A. That is the process.
Q. And you said it's a process that may take six months or

more at times, right?
A. Yes.
Q. It's not cheap, right, sir?
A. What do you mean by cheap?
Q. I mean, it -- you have to expend some real resources to go through that RFP process, don't you?
A. Well, we have a director, he's supervised by an AVP; we have a finance organization, that's typically a single finance person; and we also have a consultant. So I don't know if that's cheap or not, but those are the resources that we bear.
Q. Well, I won't ask you their salaries, but it takes a significant amount of time, at least, to go through that process, right?
A. It does. It does, yes.
Q. And the reason it's worth it is because you get a lot of value through that process, right, sir?
A. That's correct.
Q. And you get a lot more information, for example, than you could gather, say, by going on websites or public SEC filings, right?
A. We have a finance organization that will look at financial statements that are publicly available, so that's part of the process, as well.
Q. Understood. But when you do an RFP analysis, you go a

lot deeper than that when you're looking at pricing, right, sir?

A. Correct.

Q. And you go a lot deeper than that when it comes to capabilities, right, sir?

A. We analyze them -- I have a team that analyzes the market.

Q. Right.

A. Yes.

Q. So if you put an RFP to an office supply vendor, you wouldn't just ask them to reply with information that's available in SEC filings or on their website, right, sir?

A. There's all types of questions that could be in an RFP.

Q. Right. But the questions would certainly go beyond what's publicly available, correct, sir?

A. Correct.

Q. And you might ask for references. Do you ever do that, sir?

A. We do.

Q. And a reference would allow you to call up a customer and say, Hey, I'm not so sure if this office supply vendor can meet our needs, what's your experience been, right? That would be the reason?

A. Yes.

Q. And have you done that in the past, sir?

A. We have. I mean, we've gotten feedback from our

advisory board members in terms of who they think is capable, who's not capable as part of the RFP process. Again, they're representatives across our membership.

Q. Right. And the reason you go through the full, rigorous, in-depth RFP process, sir, is that you might learn something you couldn't learn just on websites and 10-Ks, right, sir?

A. Well, we don't limit ourselves to any one single source. We try to analyze the market in a comprehensive nature.

Q. Right. And the reason you go out through a full, rigorous RFP process is because you can learn information that you couldn't learn through just the website and a 10-K, right, sir?

A. We go through the RFP process to request pricing, responses to contract terms, conditions, and to learn other aspects about the vendor community itself.

Q. Right. Not all that information is available on websites and 10-Ks, fair?

A. Well, certainly pricing and responses to contract terms are not, so that's fair.

Q. Okay. Thank you, sir.

Now, sir, you mentioned that the contract that's currently in force -- I'm not referring to the one you said to the Judge was doable soon, but the one that's still in force through September of this year. Are you with me?

A. Yes.
Q. And that contract originally dates back to an RFP process that happened around 2009, correct?
A. That's correct.
Q. And that contact was in force beginning August of 2010, right, sir?
A. It went into effect 2010, correct.
Q. And it ran through September of 2013, right, sir?
A. Yes.
Q. And in that 2013 process, you didn't do a full RFP, is that fair?
A. We did not.
Q. And that's because -- I'm sorry, sir?
A. No, we negotiated directly with Staples.
Q. That's because Staples came to you before the contract expired and offered to renegotiate and give you a lower deal, right, sir?
A. That's correct.
Q. And as part of that process, I think you said -- I hope I can say it publicly, I think it came out on direct -- that you saved a percentage. Can I say that?
MR. PACK: Percentage of?
MR. PERRY: That you saved in 2013 relative to 2010.
THE WITNESS: Yeah, I'm okay with that.

MR. PACK: I think it came out on direct.

Thank you, sir.

BY MR. PERRY:

Q. I think you said you saved about 6.2 percent, about $12 1/2 million, right, sir?

A. Yes.

Q. And you were able to save that without putting an RFP out to Office Depot, right, sir?

A. That is correct.

Q. And you were able to actually save that much money without putting an RFP out to any vendors, right, sir?

A. We negotiated directly with Staples. I will add that we did a competitive RFP the term prior to that. And so we had vetted the market three years prior to that.

Q. And the vetting of the market that you're referring to was in 2009, right?

A. Correct.

Q. So in 2013, you never did a thorough vetting of the market, correct, sir?

A. We negotiated straight with Staples.

Q. In 2013 you never did a thorough vetting of the market, sir, right?

A. Well, we didn't do a thorough RPF, if that's your question. We have consultants on contract and we do stay in tune with the industry.

Q. You stay in tune with the industry, but in 2013 you never got information from possible vendors that wasn't available publicly, did you, sir?
A. We did not issue an RFP.
Q. And, therefore, you didn't get information from vendors that wasn't available publicly, correct?
A. We didn't request information through the RFP.
Q. And, sir, I believe you said that you have a contract -- you have an RFP process ongoing right now, right, sir?
A. For what area?
Q. I'm sorry, for office supplies.
A. Yes.
Q. I thought that would be assumed.
A. We have proposals in-house.
Q. And I believe in response to the Court's question you said it was doable that you would sign a new contract with Staples or Office Depot, right, sir?
A. We said we were evaluating both proposals. When you say "doable," I think the judge had asked if it would be possible to do this before, I think, May, and I said that would be highly -- it would be -- it would be very hard to coordinate and to wrap that up through -- so we've received initial proposals, we've had the proposals for roughly two weeks. So we have to fully vet and evaluate, negotiate contract terms and conditions, share the results with our

advisory board. And, typically, that's a lengthy process.
Q. The Judge asked you, if I recall, that it would be substantially important for you to finalize this process, right, sir?
A. He had asked if there would be -- yes, he basically stated that it would be in our interest if we could wrap this up early.
Q. I apologize, Your Honor, I don't want to put words in the Court's mouth, so let me ask you directly.

It's pretty important, and as a result it's doable that you could wrap up this contract in process in the next month or two, right, sir?
A. Possibly.
Q. And the -- I'm not going to ask you the specific dollars, and actually prefer you not say them out loud, but there's substantial savings on the table right now, correct, sir?
A. There is. As a result of the competitive environment.
Q. Right. And I should say, the savings that are on the table right now relative to the contract you have in force today, right, sir?
A. I'm not sure that I understand your question -- yeah, relative to the cost baseline that we have today.
Q. In terms of the total spend, the prices that you've been able to negotiate or that are on the table right now, they

are actually better than the prices that are in force on your existing contract, right?
A. That is correct.
Q. And in the intervening time between your 2013 renegotiation with Staples and your current RFP process, you're aware that Office Depot and Office Max merged, right sir?
A. Yes.
Q. And actually, you talked at length in your direct examination about the merger of numerous office supply companies over the last eight or ten years, right, sir?
A. Um-hum.
Q. Right, sir?
A. Yes.
Q. And over the course of that same time period, HPG's office supply pricing has actually gone down in every single interaction with Staples, right, sir?
A. Well, our price -- our price negotiations have secured cost reductions with our membership. But there's also a price adjustment methodology in the contract. So the prices aren't fixed for the term of the contract, they're tied to certain parameters behind which they're adjusted upward and downward. But we have reduced our members' expense each time we've gone out to the market.
Q. Right. In 2013, when you renegotiated with Staples, you

were able to reduce your members' expense relative to the 2010 contract, right, sir?

A. That is correct.

Q. And the pricing that you have on the table today will reduce your members' expenses yet again relative to the 2013 deal you reached, right, sir?

A. That is correct, as a result of the competitive process.

Q. That's true, notwithstanding the fact that in between those two processes Office Depot and Office Max merged; you know that, right, sir?

A. Yes.

Q. And, sir, I want to talk, if we could, about the definition of consumable office supplies, if we could.

A. George, I think we have a demonstrative, if you could put it up, please. That's a good start.

Sir, you mentioned --

THE COURT: Let me ask a question. If the concern after a merger is set prices will go up, then I assume that what's on the table now must be a priority, number one, for your business, trying to renegotiate this contract?

THE WITNESS: It is a priority, yes. Again, it was a priority last year. We thought that we had value on the table, because we were anticipating a potential merger, so we felt like it was in our interest at that point in time. As we proceeded with the negotiations, the value that

was initially offered was removed. So as a result we had to go through the competitive process, go back out and re-secure the value as a result of the competitive process.

THE COURT: But there would be significant savings over and above what the current contract offers now?

THE WITNESS: Yes. It would be a reduction in the current cost baseline as a result of the competitive process.

THE COURT: Is there any real doubt that the contract won't be renegotiated within the next couple of weeks or so?

THE WITNESS: We have a lot of coordination that we have to do with our advisory boards. First of all, we haven't even, you know, really started the negotiation. So we're trying to, you know, assemble the full details of the proposal. We've done an initial financial analysis, but it's not completely vetted. And then typically we would negotiate. We would clarify certain aspects of the proposals, maybe identify deficiencies, seek to clarify, eliminate the deficiencies, and then also negotiate contract terms and conditions.

So it may sound like it's a relatively quick process, but that by itself is somewhat time consuming. And then once we complete all that negotiations, we have to go back out to our advisory boards and seek their recommendation or approval on the contract award.

THE COURT: But that same advisory board, I assume, would be pretty upset if it's not renegotiated?

THE WITNESS: Yes. Right.

THE COURT: So what's going to happen?

THE WITNESS: Well, we're going to do our best.

THE COURT: All right. Fair enough.

BY MR. PERRY:

Q. It sounds like you're pretty motivated to do that, sir?

A. We are.

Q. Sir, I want to talk about consumable office supplies for a minute. And I think you testified on direct exam -- and I thought the percentages might be helpful -- that consumable office supplies includes general office supplies first. Right, sir?

A. Correct.

Q. And general office supplies, in your definition, are things like pens, pencils, paperclips, Post-its, file folders, right, sir?

A. Correct.

Q. And consumable office supplies also includes ink and toner, right, sir?

A. It does.

Q. And consumable office supplies also includes copy paper, right, sir?

A. That is correct.

Q. And you mentioned on your direct examination that your contract doesn't include much technology, but it does include some consumer-based technology like flash drives, right, sir?
A. Yeah. I mean, we don't really consider that IT, we consider that consumable, kind of -- pardon the term -- but it's consumable, inexpensive IT accessories. We don't really consider that to be IT hardware.
Q. So your contract includes -- I'm not going to remember what you said -- consumable, inexpensive IT technology?
A. Yeah. I would call it disposable types of IT related products. We really view IT as, you know, hardware; so it's the laptops and the desktops and the servers that are standard configured and imaged and, you know, built specifically to a customer's orders and their specifications and then certified and then distributed through an IT reseller. And so, hopefully, that clarifies your question.
Q. It does. So the Staples contract doesn't include big IT hardware like computers and printers and things?
A. Well, it may include some printers, but it doesn't include laptops and desktops and servers and, you know, what are considered to be IT business-related machines.
Q. I see. So you would have some printers, you would have some flash drives and a few other pieces of technology; is that right, sir?

A. That is correct.
Q. So I put some technology products on here. I put the "some," which I thought you would like. Are you comfortable with that, that some technology products are on your Staples contract, sir?
A. So can you share with me, what do you mean by technology?
Q. Well, what I meant to mean is things like flash drives, and now you've told me printers, right?
A. Well, there's printers, yeah, that could come through the Staples channel.
Q. Here we go. Flash drives. I'll say some printers. You can't read it, but you'll remember it, right, sir?
A. I think I understood what you said. I'm not sure that I can read your writing.
MR. REILLY: I'll write for you.
MR. PERRY: Thank you. Could we get a guest writer?
BY MR. PERRY:
Q. In addition to whatever it says here, sir, you also have some furniture, you mentioned some chairs and things that are on part of your Staples contract, right, sir?
A. Yeah, there's generally -- as I had described before, there's generally what we consider to be low end, off-the-shelf furniture, you know. But the way that we view furniture within our membership is there's furniture, what you typically find in a professional office environment

where you have designers that are spec'ing the furniture, they're selecting the fabrics.

That's not what we consider to be furniture from a HealthTrust perspective. The furniture that we would see under a Staples relationship would just be typically inexpensive, off the shelf; maybe folding chairs, folding tables.

Q. All right, sir. You know, I'm not going to be able to write all that. But if I wrote some chairs, right? There's some chairs in there, sir?

A. I would say inexpensive chairs.

Q. I'm not going to write inexpensive chairs. The screen is only so big, sir. All right. So, how about we'll abbreviate, sir, inexpensive.

Your Honor, the guidance you gave about doing demonstratives as you go is really hitting home now.

And I think you said, Mr. Wright, on direct examination that your contract also includes some snacks and break room, right, sir?

A. I'm sure there are some snacks sold through the -- yeah.

Q. And all of those things are part of your same Staples contracts, right, sir?

A. I believe that -- yeah, they're under -- I'm sure they're sold by the Staples office supply agreement.

Q. They're all part of the same contract, right, sir?

A. Yes.
Q. So all of this is part of one contract, right, sir?
A. They're sold through the office supply contract. But as I mentioned earlier, we don't view chairs, snacks, as really major, material items under an office supply contract. They're viewed as kind of ancillary.
Q. They're not a big part of the contract, but they're part of the same contract, right, sir?
A. Correct.
Q. And when you did the RFP back in 2009 and when you're doing your current RFP, all of this is negotiated together, right?
A. That is correct.
Q. Sir, this is going to get really ugly now.

You've never had a contract that's just general office supplies and copy paper but not ink and toner or snacks or break room or -- what was that, flash drives and printer, or some chairs. You never had a contract that's just for that grouping of products, have you, sir?
A. No, we've always held general office supplies, ink and toner and copy paper under a single agreement.
Q. And that's true with respect to your current RFP, right, sir?
A. That's correct.
Q. It's not general office supplies plus paper, but not ink

and toner and not anything else?

A. It includes all three of the bullets.

Q. Thank you, sir.

George, can you take this down quickly? It's kind of embarrassing.

Actually, George, can you put it up.

My writing won't be on it, I promise, Your Honor.

Sir, if we just look at consumable office supplies for a minute, that 23 percent of ink and toner, that's about 50 or $60 million of your members' spend with Staples every year, right, sir?

A. Yes.

Q. And if Staples, after this merger, arbitrarily tried to raise your prices of paperclips, you could take your 50 or $60 million in ink and toner elsewhere, couldn't you, sir?

A. We wouldn't typically do that. We feel like the best value proposition is by bundling all three of the categories together. And I think the value proposition is recognized by the office supply community as well, because what they're trying to do, is increase their order size so that they have meaningful orders coming through the truck to the delivery location.

Q. But you do buy things that Staples sells from other people, right, sir?

A. For instance?

Q. There's other furniture-type products that you could buy through your Staples contract and combine all that volume, but you get them elsewhere, right, sir?
A. We really have separate contract awards for separate categories; as we had discussed this morning, print management services, that's a separate contract category. So we don't view that as office supplies.
Q. So your preference is to keep ink and toner bundled with general office supplies and copy paper; is that it?
A. We think that's the core offering that the office supply community provides to the market.
Q. But if Staples tried to raise your prices of paperclips, even if you didn't really want to switch your $50 million in ink and toner to HP or Lexmark or Canon, you have 33 skilled negotiators who could threaten to do that, right, sir, to keep your paperclip prices down?
A. I'm not sure under what circumstance they could do that. How would they do that?
Q. By "How would they do that," do you mean --
A. How would they introduce a paperclip price increase?
Q. Well, sir, the point you're making is that the prices are locked in during the term of the contract?
A. No, that's not the point I'm making. I'm asking you how would they do that? How would they introduce a price increase?

Q. Let's say that during your current negotiation, your RFP, Staples decided, you know what? We're going to rise our paperclip prices, HPG, because we think we got you right where we want you. Couldn't your skilled, 33 skilled negotiators look them in the eye and say, You better be careful, Staples, I got 50 or $60 million in ink and toner; you might have heard of Lexmark or Canon, and I can make this business go away. That would be a pretty credible threat; wouldn't it, sir?

A. I think the general approach is we're not looking at one individual specific group of categories, we're looking at office supplies spend in a comprehensive manner. So there may be adjustments in the market that require certain products to increase, or other products to decrease. So that's why we go out to the market to see where the market is. So the idea of a paper -- you know, a price increase on paperclips, probably wouldn't necessarily yield some kind of dynamic, you know, change in behavior.

Q. Well, sir, for whatever reason, if you weren't happy with Staples' service, one of the levers your negotiators have, whether you actually want to use it or not, you can take that business elsewhere, right, sir?

A. Which business are you referring to?

Q. The ink and toner.

A. We think that we would lose the overall value

proposition by segmenting these categories. We feel like we create better value by aggregating these categories.

Q. Your negotiators wouldn't even try to make that claim to Staples, they would just say, You got us?

A. We have never, ever separated ink and toner, except for reman'd for minority business. We have always bundled it together.

Q. Remanufactured toner, that can be separate, right, sir?

A. It has for minority business reasons.

Q. And MPS, when it's bundled with a service, that can be different, right, sir?

A. It's a service, not a supply expense.

Q. But it's a service that includes toner?

A. It does, right.

THE COURT: What would be -- can you give me an example of what might be the dramatic increase in prices that might prompt you to take a hard look at competitors to service ink and toner needs? I'm certain as prices go up -- what prices are we talking about?

THE WITNESS: Well, I'm not sure, you know, quite honestly. I'm a little confused with the questioning. Typically when we go out, we have price protection under the contract for the term.

THE COURT: Let's make it easy. I thought you said that one concern was the increase in prices if the

merger went up.

THE WITNESS: Right.

THE COURT: Prices in what categories?

THE WITNESS: In general office supplies.

THE COURT: Across the board, not just the paperclips?

THE WITNESS: Yeah. I think comprehensively we believe that the market will be diminished and that the -- there will be one dominant player.

THE COURT: Less competition. Suppose prices went up in all categories but ink and toner and you have a wild card of 50 to $60 million in ink and toner, the question, as I understood it, is, Would you try to shop that elsewhere?

THE WITNESS: It's an alternative, but we believe that we lose the valve of aggregation.

THE COURT: So in other words, you think you're stuck with them?

THE WITNESS: Well, you know, we think that we could be stuck. We think that there's value in aggregation, that's kind of our overall model.

THE COURT: Who would you look to to service ink and toner, though, assuming that was a viable option?

THE WITNESS: As you might imagine, you know, there's hundreds, if not thousands of potential, you know, printer machines and models and manufacturers. And so it

would be a very fragmented approach towards trying to contract for all of those typical -- all those machines' toners, you know, so...

THE COURT: Could Amazon service your needs in that regard?

THE WITNESS: Well, they haven't. As I've mentioned earlier, in the earlier testimony, they, for the reasons cited before, they don't seem to be interested in our business and don't seem to be positioned or have demonstrated any past performance in a business to business model.

THE COURT: Okay. Speaking strictly about ink and toner, though, there are other -- are there other competitors that could service your needs in the event you pull that 50 or 60 because of the increase in prices and other categories, other than ink and toner?

THE WITNESS: Not that I'm aware of.

THE COURT: Okay. All right.

BY MR. PERRY:

Q. And, sir, the contract that you said is doable to lock in soon, if that contract runs through 2019 and you find yourself again on the market, you would, at least on behalf of your members, revisit this situation, scenario, right, as to whether you might take your ink and toner business elsewhere?

A. Well, we would have to evaluate the market, probably in 2018, if not before, to determine how we need to respond to the market.
Q. Right. In 2018 or so you would look out at the market and you would see what the reality is then, right, sir?
A. That is correct.
Q. And you don't know, sitting here today, whether it would be viable or not in 2018 or '19 to carve that out, right, sir?
A. Well, you know, we could speculate, but my gut tells me that when I look at the top two, which control 80 percent of the market share, and the third is what? a fifth -- or, 5 percent or less of the top two's volume, that my -- my best guess is that in 2018 there will be no significant B2B competition.
Q. Right. Sir, you don't have any nonpublic information about what other competitors are planning for 2018, do you, sir?
A. No.
Q. Okay. Sir, I want to talk about the way your prices are locked in and the terms that you have in the contract. You have something in your current Staples agreement called a market competitiveness guarantee, right, sir?
A. That is correct.
Q. And that essentially says that Staples' contract prices must remain market competitive through the life of the

contract, correct?
A. That is correct.
Q. And if you find a lower price from any source, and it's apples to apples, Staples has to match it within 30 days, right, sir?
A. If we come across a total office supply cost solution Staples has to match that solution.
Q. Right. And they have to do it within 30 days, right, sir?
A. That is correct.
Q. And that's required under the terms of the contract, right?
A. That is correct.
Q. And that's a favorable term that your skill and expertise and volume allowed you to get from Staples, right, sir?
A. It's a provision within the contract.
Q. Right. And there are other provisions in the contract -- I believe you refer to them as price guardrails -- that constrains Staples' behavior, right, sir?
A. It allows for the adjustment of office supply pricing based on market conditions.
Q. And for the core products -- is that what you call the list of 4200 SKUs, sir?
A. Yes. Otherwise referred to as manufacture direct products.
Q. Okay. And those manufacture direct or core products,

that accounts for a significant majority of your member spend, right, sir?

A. It does.

Q. And those products, those 4200 products essentially are locked in, the pricing is locked in through the life of the contract, right, sir?

A. They are not.

Q. Well, sir, unless there is some manufacturer increase in price, they are locked in, aren't they, sir?

A. That's not correct.

Q. Okay. So your testimony is that under your Staples contract the core pricing can be increased?

A. The core pricing can be adjusted upward or downward.

Q. There is a guardrail specifically for the core products, right, sir?

A. There is price protection for core or for manufactured direct.

Q. Right. And that's price protection that you negotiated as part of your agreement, right, sir?

A. That's the terms that are in the agreement.

Q. Okay. Now, in terms of the termination, I think you said on direct examination that HPG has the right to terminate your Staples contract for any reason, without cause, right, sir?

A. There is a termination for convenience provision in the

contract.
Q. Right. And that termination for convenience provision, excuse me, only applies to HPG, right, sir?
A. That's correct.
Q. So that's a one-way right in favor of HPG, correct?
A. That is correct.
Q. Staples does not have the ability, under the contract, to terminate for convenience or terminate without cause, right, sir?
A. Well, what we learned after the Office Max situation is that under a sole source agreement we really -- we can't afford, ourselves, to allow the vendor to have a termination for convenience provision. It doesn't protect our members.
Q. Right, sir. And as a result of that, your contract with Staples doesn't allow Staples to terminate for convenience, right, sir?
A. No, it's only for our convenience.
Q. Right. And the contract that you believe is doable to finalize hopefully in the next few weeks or month or two, will that have a similar arrangement where only HPG can terminate the contract for convenience?
A. We believe that it will.
Q. Okay. And if that's the case, as you believe, then HPG's pricing methodology and guardrails would be locked in until September of 2019, right, sir?

A. For a three-year term, correct. Now, we're still negotiating, so it's uncertain in terms of what those terms, conditions will ultimately end up being. But, you know, that would be our expectation.
Q. Okay. Expectation would be that you would have that -- those protections through September of 2019, right?
A. Correct.
Q. Now, sir, you talked in your direct examination about how your HealthTrust members, as part of their participation agreement, commit their volume to the contracts, right, sir?
A. They commit to HealthTrust. So they commit to use the contracts that HealthTrust awards through the advisory board process.
Q. Understood. And even though that's the case, sir, it's a fact that about 5 percent of HealthTrust members actually don't purchase through the Staples contract, right, sir?
A. That's what we estimate.
Q. Right. So your estimate is that about 70 of your members buy zero office supplies through the Staples contract, right?
A. Roughly.
Q. Right. So 100 percent of those members' spend is off-contract, right, sir?
A. It could be.
Q. And with respect to your Core Trust members, it's not

part of the Core Trust membership agreement to commit your volume to the HPG contract; is that right?

A. The Core Trust members elect to commit to the agreement.

Q. Okay. Elect, meaning they have the choice?

A. They have the choice.

Q. It's not a condition of joining Core Trust that you commit your volume to the agreement; is that right?

A. That is correct.

Q. And what percentage of Core Trust members purchase through the Staples contract?

A. It's a very high percentage. We have over 600 members on Core Trust that have committed to the office supply agreement.

Q. Out of 1200, sir?

A. That's correct.

Q. So, almost half of your Core Trust members don't buy any office supplies through the Staples contract?

A. They don't. And a lot of times there's good reasons for that. So, they may have preexisting commitments. We don't necessarily prescribe to this process, but a lot of times there's signing bonuses that are offered to a member in exchange for a committed term. So there are, a lot of times, preexisting commitments that are in place that may prevent a Core Trust member from using the HealthTrust contract.

Q. All right. But those aren't one-offs, right? They're -- almost half of your Core Trust members aren't buying off the Staples contract, right, sir?
A. That is correct.
Q. So you got about 600 Core Trust members and about 70 HealthTrust members who don't buy any office supplies through your Staples contract, correct, sir?
A. Correct.
Q. So for those, about 670 of your members, 100 percent of their office supply spend is off-contract, right, sir?
A. That could be the case, yeah.
Q. And for the HealthTrust and Core Trust members who purchase some, at least some portion of their office supplies through the Staples contract, you know there are occasions where they don't buy everything through the Staples contract, right, sir?
A. My understanding is that may occur.
Q. Right. And when you say "it may occur," you mean it may occur that your members who purchase off the contract may also purchase office supplies from some other source, right, sir?
A. Well, what I'm suggesting is that, as you might imagine, there's a lot of administrative assistants, a lot of people that consume and buy office supplies, primarily administrative assistants and primarily purchasing agents.

And so there may be situations where other -- where there's an administrative assistant that doesn't know, or other situations that are in place that might negate their ability to order office supplies under the agreement.

Q. Right. But for whatever reason you've got about -- even your putting aside the 670 members who don't buy anything, any office supplies through the contract, even your members who do some portion of their office supply spend may be from other sources, right, sir?

A. Well, let me characterize it this way. The -- our largest members and our highest volume members are buying their office supplies through the Staples agreement.

The Core Trust members, they elect to commit. And what we find in many cases, those Core Trust members have preexisting commitments that prevent them from coming over. But there is a high penetration rate on the Core Trust membership side. And as you might imagine, with tens of thousands of physician offices and, you know, surgery centers, you know, absolute compliance doesn't exist.

But what we understand and what's reaffirmed to us through Staples is that we have a very compliant GPO and a compliant membership.

Q. Right, sir. But you do know that some of your members, even the ones who purchase from the Staples contract, may also purchase office supplies from other sources; that's

true, isn't it?
A. That may occur.
Q. Okay. And you have no means to know, for example, whether any HPG member is buying office supplies through Amazon, correct?
A. I do not have any means to know that.
Q. Right. And that's because you don't see your members' purchasing order systems, right, sir?
A. That's correct.
Q. So you don't promote it, but if one of your members sees a blue pen on Amazon, they're perfectly free to go issue a purchase order and buy that box of blue pens, right, sir?
A. We don't control the purchase, so the member could choose to order through Amazon.
Q. Right. And you would have no way to know about that, right, sir?
A. We wouldn't. But we know that our largest members and our most disciplined members, they're pushing compliance towards the contract, and so they don't want off-contract spend. They can't manage what they can't control, what they can't see.

And so, you know, as it relates to our largest members, they're promoting the sole source relationship with Staples. And what we can see by looking at our member reports is our largest members are buying through the

Staples office supply agreement.

Q. Now, sir, the information you have about your member spend, that comes from Staples, right?

A. That is correct.

Q. So you talked at length in your direct examination about these usage reports, right, sir?

A. Um-hum.

Q. Yes?

A. Yes.

Q. Or, utilization reports?

A. That is correct.

Q. And the utilization reports are given to you by Staples and they show you the spend that your members have with Staples, right, sir?

A. That is correct.

Q. Because Staples has no way of knowing what your members are spending with anyone else, correct, sir?

A. Well, they have account management resources in the field. And so if they know that there's members that are noncompliant, they're quick to work with our account management people to identify and to change that behavior. But, to your point, they don't see every office supply purchase transaction that comes through the system.

Q. Right.

A. But they know in general whether a member is using the

agreement or not.
Q. Okay. Sir, I take it you're not here to speak on behalf of Staples today?
A. Well, no, I'm not, but what I'm trying to suggest to you is that we receive feedback from several sources. Staples, as a contracted partner, is one of those mechanisms behind which we receive feedback relative to compliance.
Q. Right. But the usage reports that you receive, the utilization reports, they have no information about spend to anyone else other than Staples, right, sir?
A. That is correct.
Q. Okay. And, sir, if your members -- I know you don't promote it, but if your members were to purchase that box of blue pens from Amazon, not only would you not have a means to know about it, you wouldn't get paid for that, right, sir?
A. What do you mean by "paid"?
Q. Well, your fee, sir, is 3 percent of your member spend through the Staples contract, right, sir?
A. There is a 3 percent administrative fee that is paid by the -- that's embedded in the member's unit price and it's rebated from the member -- from Staples back to HealthTrust. And let me just add that that fee is transparent. It's communicated to the membership and they completely understand that the HealthTrust charge is for providing that service.

Q. Okay. And, sir, your fee, you said, is built into the price that your members ultimately pay for the products, right, sir?
A. That is correct.
Q. And your fee is 3 percent of your members' total spend on the Staples contract, right?
A. That is correct.
Q. And the total spend of $250 million, you would get administrative fees of $7 1/2 million, right, sir?
A. Yeah. Um-hmm.
Q. And so if your members were, instead of buying through the contract, were to go buy that box of blue pens from Amazon or buy from W.B. Mason or set up their own account with Amazon Business, not only do you not see their purchasing orders to see that happening, you lose your money, right, sir?
A. Well, many of our members, quite frankly, they don't condone that behavior. They have protocols in place to somewhat lock down the ordering mechanism. So -- but you're right, if there is an off-contract spend, we would not see the transaction related to that.
Q. Right. But not only would you not see it, sir, you wouldn't get your fee, right, sir?
A. That is true.
Q. Right. Now, sir, you're familiar with a company called

Georgia Pacific, right?

A. Yes.

Q. And, in fact, you have a contract with Georgia Pacific; is that right, sir?

A. Yes, we have a direct relationship with Georgia Pacific.

Q. Is that something different than having a contract?

A. Well, it's a manufacturer agreement, as opposed to distributor.

Q. Understood. Thank you, sir. And as part of that manufacturer agreement your members are getting paper towels and tissues and toilet paper, right, sir?

A. That is correct.

Q. And that product is delivered to HealthTrust members nationwide, right, sir?

A. It is.

Q. Okay. Could we put up the slide here?

Now, sir, I've put on the screen here Georgia Pacific's website. Do you see it on the screen?

A. I do.

Q. And Georgia Pacific is the company that makes Dixie and Brawny and Quilted Northern. Do you see that, sir?

A. I do.

Q. Sir, you would agree with me, I hope, that toilet paper is a bit more mission critical than paperclips, sir?

A. Yes.

Q. Okay. If you had to run out of paperclips or toilet paper, sir, which -- I won't ask you that.

I'll withdraw the question, Your Honor.

Now, sir, you trust -- your members trust Georgia Pacific to deliver paper towels and toilet paper nationwide, right, sir?

A. Well, we trust them to furnish the product to our distributors. They're not the delivery mechanism.

Q. Right. But you have a delivery mechanism in place to get Georgia Pacific products to your members nationwide, right, sir?

A. That is correct.

Q. And Staples has no role in that, do they?

A. Staples is a jan-san distributor.

Q. No, my question was: Is Staples doing the delivery of the Georgia Pacific products to your members?

A. They are.

Q. I'm sorry?

A. They are.

Q. They are. And is that the only way that Georgia Pacific is able to deliver their products, sir?

A. There are other jan-san distributions in place that the members can choose to use as well.

Q. Right. And so if a member, through your contract, wants to get Georgia Pacific products, they can get them delivered

nationwide through means other than Staples, right, sir?
A. That is correct.
Q. And, sir, you're aware that Georgia Pacific also makes copy paper, right, sir?
A. Yes, I am.
Q. Okay. And if Georgia Pacific is able to get paper towels and toilet paper and tissues to your members nationwide, they could also get paper to your members too, couldn't they, sir?
A. They could. I'll add that I think that Staples, as part of the value that they provide to us, they have a manufacturer or a paper relationship that's greater than ours. So, as you know, Staples has their own private label for paper.
Q. Right.
A. So, they're garnering a better price point on paper than we would be able to garner through a straight relationship with Georgia Pacific or any other mill, quite frankly, because they have the better buying power.
Q. Sir, you have done no analysis to compare the prices you pay at Staples for paper to the prices that you would pay Georgia Pacific for paper, correct?
A. We have not.
Q. Okay. So you don't know whether or how Georgia Pacific paper prices would compare to Staples, right, sir?

A. What we do know is that by aggregating the three categories of office supply spend, that that creates more volume to a single vendor than segmenting the category.
Q. Well, hold on, sir, because you also have an existing contract with Georgia Pacific, right, sir?
A. For paper towels and tissues and toilet paper.
Q. Right. And if you disaggregated volume on the Staples contract, you would be adding volume to another existing contract, right, sir?
A. I'm sorry, would you repeat the question, please?
Q. Sure. You said that if you took paper out of the Staples contract, you would lose, potentially, the benefits of some volume, right?
A. Copy paper.
Q. Copy paper. But if you took your copy paper to your Georgia Pacific contract, you may get volume benefits on the Georgia Pacific contract that offset whatever you lose on Staples, right, sir?
A. Possibly, but we believe that with 27 percent of the volume coming through Staples and with Staples' purchasing power, that they're going to garner a better price point.
Q. Well, you believe it, sir, but you haven't done any analysis; is that right, sir?
A. We have not. We have not.
Q. And if for some reason -- for whatever reason in 2018 or

2019 you're upset with Staples, I'll bet you and your negotiating experts would do that analysis, wouldn't you, sir?

A. We would possibly look at that, correct.

Q. Right. And you might find out something you don't know today, right?

A. Possibly.

Q. Okay. Now, sir, I want to talk a little bit about delivery. Now, you mentioned that one of the things you like about Staples is that Staples does its own desktop and last mile delivery, right, sir?

A. That's correct.

Q. And when I say "last mile delivery," I'm sure you know what I mean. But I intend that to mean the last piece of delivery that actually lands at the customer, right?

A. Yes.

Q. And you said in your direct testimony, and you actually said in your deposition that you estimate that Staples does probably 90 or 95 percent of that with Staples employees and Staples trucks, right, sir?

A. Correct.

Q. And would it surprise you, sir, to know that, in fact, 80 percent-plus of Staples last mile delivery, including desktop, is outsourced?

A. To HealthTrust members?

Q. Nationwide, sir.

A. But to HealthTrust members?
Q. HealthTrust members are no exception. Would that surprise you, sir?
A. But does that 80 percent apply to Health Trust, is the question?
Q. Sir, I can represent to you that the vast majority --
A. Well, let me suggest this: We have a 95 percent next day delivery requirement in the HealthTrust contract. So, how do you think that that's achieved by outsourcing to a third party for the delivery?
Q. I'll represent to you it's achieved every day by Staples and Office Depot.
A. I'm not sure that that's the case for HealthTrust.
Q. Sir, you don't have any basis to dispute that, do you?
A. I don't have any basis to agree with you or question you. I do know what's in the contract and I know what's required within the contract.
Q. And, sir, did you know that UPS offers desktop delivery now?
A. UPS is a small parcel delivery, correct.
Q. No, my question was: Did you know that UPS offers desktop delivery now?
A. I did not know that.
Q. You didn't know that. That's new information for you?
A. So desktop, meaning to the department?

Q. Meaning past the loading dock to the landing spot from Staples or Office Depot?
A. Yeah, I'm familiar with that, correct.
Q. So you knew that?
A. Yes.
Q. Okay. So you knew that Staples actually does desktop delivery with UPS today?
A. They deliver to the department, correct.
Q. Right. Okay. Now, sir, you're aware that Staples has said publicly this merger will generate a billion dollars a year or more in efficiencies; you know that, right, sir?
A. I've heard that.
Q. And have you also heard that Staples has said that those efficiencies will be invested in lowering prices, not just for HCA and the $39 billion hospital systems, but for small businesses and medium businesses and consumers online and in stores? Have you heard that, sir?
A. I've heard that before, as well.
Q. And, sir, that Staples members are spending -- you said $250 million on -- I'm sorry, HPG members are spending $250 million on the Staples contract today, sir?
A. That is correct.
Q. And if this merger goes through, just mathematically, if Staples cut your prices by $50 million, your members would save $50 million, but you would lose, HPG would lose

$1.5 million a year in fees, isn't that right, sir?
A. Well, the fees aren't really the concern. You know, we're aligned with our members, so, you know, we're motivated to reduce their prices. Fees are secondary.
Q. Sir, if Staples cuts prices by $50 million, you lose $1.3 million every year --
A. My --
Q. -- correct?
A. My take on this as it relates to the $1 billion reduction, I think that $1 billion reduction, that their incentives and their alignment and loyalties to their shareholders, that $1 billion will go to the shareholders.
In a competitive environment we'll fight for the $1 billion, or our portion the $1 billion, but I know that the loyalty and their allegiance is to pass income on to their shareholders, not to pass the savings on to us. We have to have the competitive environment in place that we can take advantage of any efficiencies that come through the system.
Q. Sir, if Staples cuts prices by $50 million to your members, you lose $1 1/2 million every year; isn't that correct, sir? Can you answer that question?
A. If our prices go down, and they have gone down -- every time we go back out to the market they go down, we lose admin fee.

Q. Sir, are you aware just in the last couple of days Senator Blumenthal has indicated that he would encourage the FTC to investigate whether health care GPO fees actually lead to higher health care costs? Did you know about that, sir?

A. I did not know about that.

Q. Did you know that the same calls for investigation have questioned whether health care GPOs can cause scarcity of medications?

A. I can share this: Members aren't required to join a GPO. They choose to join a GPO. And the reason they choose to join a GPO is because we can deliver value to them greater than they can on themselves.

So there's different points of view on a GPO, but it's a voluntary relationship. We don't force anybody to become a member of the GPO.

Q. Understood, sir. If the member gets a better price through W.B. Mason or Amazon Business or anyone else, they can leave, and they may be perfectly happy, but you'd lose your fees, right, sir?

A. When members come on board to HealthTrust they commit to use our agreements to the participation agreement -- to the participation agreement they have in place with HealthTrust.

Q. Sir, I want to ask you about a company called McKesson. I assume you are familiar with McKesson?

A. Yes.
Q. They rank number 11 on the Fortune 100, sir. Did you know that?
A. I understand what you're saying.
Q. You follow me?
A. Yes.
Q. Sir, did you know McKesson had $179 billion in revenue in 2015?
A. I understand what you're saying.
Q. You follow me?
A. Yes.
Q. You follow me, that's about seven times larger than Staples, sir?
A. I follow you.
Q. And, sir, have -- you're aware that McKesson delivers about one-third of all medications used in North America every day? Did you know that, sir?
A. I understand they're a pharmacy distributor. We do not have a relationship with McKesson.
Q. HPG doesn't have a relationship?
A. No.
Q. But you're aware, certainly, that they have nationwide delivery capability, right?
A. They have nationwide pharmaceutical delivery capabilities.
Q. Did you know, sir, that McKesson sells office supplies?

A. I did not.
Q. Can you put up the slides?
Sir, in the research you talked about before going to RFP this year, did you ever check McKesson's website?
A. We have not. I'm very skeptical that office supplies is a core competency for McKesson.
Q. Just immediately, knowing nothing, you are skeptical?
A. I'm skeptical because a lot of organizations may represent that they sell office supplies, but the comprehensive nature can be somewhat limited.
Q. Your view, sir, is that $180 billion company that delivers one-third of all pharmaceuticals in North America can't handle office supplies; is that it?
A. My gut tells me that McKesson, that a very, very small fragment of their sales is associated with office supplies. And so I would also add if McKesson was a serious provider of office supplies, I can assure you, for our book of business, they would be knocking on our door seeking a relationship.
Q. Certainly, sir. But on behalf of your members, $7 1/2 million a year, you don't just sit around and wait for somebody to come to you, right, sir?
A. Well, they do come to us.
Q. Right. But, sir, part of the reason is you've been pretty happy with Staples and Office Depot, right?

A. I don't view -- if the question is do I view McKesson as a viable, competent office supply vendor, I do not.
Q. Right. And you didn't know that -- you literally didn't know they sold office supplies two minutes ago and yet you've already determined, sir, that they're not competent?
A. I know what McKesson does, and office supplies is not a core competency.
Q. Sir, on behalf of your members, if you were upset, for whatever reason, with Staples in 2018 or 2019, you would look at McKesson, wouldn't you, sir?
A. We would consider them.
Q. You would consider them, right?
A. You know, but really, they're not a legitimate B2B office supply vendor. They're not even in our market share analysis. They didn't even hit the radar.
Q. Right, you haven't analyzed them at all. You didn't even know about them.
A. Well, they are probably in the other segmented spend category, you know, so a very small player, if any.
Q. So you've never been to their website here, where on the top, Product Categories, they say office supplies; you see that, sir?
A. I see the screen that you are showing me, yeah.
Q. That is the first time you've seen this, right, sir?
A. This is the first time I've seen this screen.

Q. So you've never clicked through office supplies or seen their product catalog online, have you?
A. I have not.
Q. So you didn't know, sir, if you went to -- it's a big catalog, 508 pages. If you went to page 130 you would see pages on office supplies; you didn't know that, sir, right?
A. I have not seen this page.
Q. Okay. First time. And it says, "Why go anywhere else for office supplies?" Do you see that?
A. Yes.
Q. It says they carry more than 30,000 business supply items. Do you see that?
A. I do.
Q. Do you see where it says folders and paper and toner and pens and even break room products, right, sir?
A. I do.
Q. Those are the products you buy from Staples, right?
A. Those are products we buy from Staples. But, again, I do not consider McKesson to be a legitimate, primary office supply vendor.
Q. Based on the last three minutes of your cross-examination, that's the extent of your knowledge?
A. Based on my 18 years of working in office supplies.
Q. At no point in 18 years did you even become aware that McKesson sold office supplies, right, sir?

A. My gut tells me that they do not have warehouses that are dedicated, an account management that's dedicated. Nor do they, you know, consider themselves as a core office supply vendor. I don't think they position themselves in the marketplace as a core office supply vendor.
Q. Based on no analysis, right, sir?
A. Well, based upon my years of experience in health care.
Q. Sir, do you see here where it says "We carry more than 30,000 business supply items"? Do you see that?
A. I do.
Q. And you see on the next page it says, "We serve more than 50 percent of American hospitals, 20 percent of U.S. physicians, and 96 percent of the top 25 health plans, and we deliver one-third of all medications used every day in North America." Do you see that, sir?
A. Yeah. So that's a fairly broad statement. So that is primarily, I think, associated with their core competencies, which is pharmacy distribution, and also their information, software services and consulting services they have in place in the health care community.
Q. Sir, I would understand if you said a paperclip distributor can't immediately flip a switch and become a pharmaceuticals distributor. Is your testimony, really, that a $179 billion pharmaceutical distribution firm can do everything, supplying critical health care products to

hospitals, but can't deliver paperclips?
A. What I'm suggesting is that I don't view this as a core competency for McKesson, and I view this as just an ancillary. And in the health care space they're not known as a legitimate office supply vendor.
Q. You don't know what McKesson's office supply distribution plans are for 2016, 2017, 2018, correct?
A. I do not.
Q. I assume, because you don't even know their existing operations, right, sir?
A. Well, I'm familiar with McKesson.
Q. You can take it down.
Sir, you're also familiar -- actually, leave it up, George.
You're also familiar with a company called Grainger, right, sir?
A. I am.
Q. Grainger is another company that HPG has a contract with, right, sir?
A. That is correct.
Q. And your members already spend about 50 or $60 million a year with Grainger; is that right?
A. That's correct.
Q. And have you ever been to Grainger's website?
A. Yes, I have.

Q. Have you ever looked at their office supply offering?
A. I have.
Q. Let's take a look, sir.
So you've seen this, right? You've clicked through on office supplies?
A. I've seen that they have, basically, 8,000 line items that are available for office supplies. That's not a comprehensive solution. And I'll also add, if you don't mind --
Q. Please.
A. -- that we've had a long-standing relationship with Grainger. They know our industry, they know our organization and they know our members. And they have never, ever suggested that they can compete in the office supply category.
Q. They haven't come to you. But you've never gone to Grainger and said -- let me finish, sir -- you've got 50 or $60 million of our business, how would you like $250 million in office supplies? Did you ever bring that to them?
A. No. Nor have they to us.
Q. They haven't approached you and you haven't approach them?
A. I should also add that we have looked at their website; very limited product offering.
Q. Sir, if you were unhappy, for any reason, with Staples

in a year, two years, three years, you would at least take a look, right, sir?

A. We would assess the market.

Q. Part of the assessment you would do is call Grainger and say, Hey, guys, do you have any interest in doing this, right?

A. Possibly, yes.

Q. You might find out that they are interested, right, sir?

A. Maybe.

Q. And so you've clicked through on office supplies very quickly, sir, and you see binder clips and clip boards and you click on that, sir. And if you look at three-ring binders, you click on that, sir, you see they have 630 three-ring binders, sir?

A. Could I ask a question? Could you flip to their home page, the front page of Grainger?

Q. If we had WiFi, I could.

A. If you flip to the home page you'll see they have a very limited office supply offering, 8000 line items. We've looked at it. They are not a serious core office supply vendor.

Q. Sir, the core item list that accounts for about 80 percent of your member spend, that's about 4200 products, right?

A. That's the manufacture direct products that Staples has

in place under our agreement.
Q. You never -- certainly not anytime recently -- have gone to Grainger and said, Here's what our members buy, would you be willing to sell it to us and at what price? You haven't had that conversation?
A. We have not, but we have studied the Grainger catalog.
Q. You do know that Grainger, for example, has a national account team, right, sir?
A. Yes.
Q. And a national account infrastructure?
A. Yes, they do.
Q. And you know they have warehouses, right, sir?
A. I do.
Q. And you know they have utilization reporting, right, sir?
A. Yes, they do.
Q. I should say, with warehouses, you know, they have more warehouses than Staples or Office Depot; did you know that, sir?
A. That would not surprise me.
Q. And you know they have online E-procurement system, right, sir?
A. They do.
Q. You know that because your members are using that today, right?
A. For industrial supplies.

Q. Right. For other products, right?
A. For industrial supplies.
Q. And you would agree that Grainger is adequately positioned to service your membership today?
A. For industrial supplies.
Q. Sir, I want to ask you a few questions about Amazon Business. And you mentioned during your direct examination that you had a meeting in 2015 with Amazon Business, right, sir?
A. My team had a meeting with Amazon. Not a meeting, I think it was a conference call.
Q. Thank you, sir. There was a call between HPG and Amazon sometime in 2015?
A. Yes.
Q. And you weren't on that call?
A. I was not.
Q. And that was in early 2015, before the launch of Amazon Business, right?
A. It was, I believe, February or March of 2015.
Q. Right. You said on your direct examination that the Amazon Business was in beta at the time that your people talked to them, right, sir?
A. What they had communicated is that they were beta, they were in a beta phase for MRO.
Q. And, sir, if I represent to you that Amazon Business was

launched in late April of 2015, that would tell you that this conversation happened before that launch, right, sir?

A. That would tell me, yes.

Q. Okay. And, sir --

A. But I will also suggest that my team has recently followed up with Amazon and they haven't received a response back.

Q. And you're referring to a 2015 communication?

A. A 2016.

Q. 2016. And, sir, sitting here -- we'll get to that in a minute -- but sitting here today, you don't personally know what Amazon Business's capabilities are in 2016, do you, sir.

A. We do not. They have not responded to our calls.

Q. You certainly don't know what Amazon will offer in 2017 or 2018, right, sir?

A. They have not shared that information with us.

Q. And, sir, as far as you know, has there been a meeting between Amazon Business and HPG in the last month or two?

A. I understood that there was a general meeting, not relative to office supplies or to B2B. But there's a general meeting at the HCA corporate office between Amazon. But my understanding is it was outside of any type of a supply discussion.

Q. And, sir, who's Ed Jones?

A. He is our CEO of Health Trust.

Q. Did you know, sir, that Ed Jones recently met with Amazon Business?
A. That's what I had heard.
Q. Did you know that the subject matter of that meeting was Ed Jones saying he was interested in Amazon Business replacing Staples as your office supply dealer?
A. I did not know that.
Q. That's news to you, sir?
A. Yes.
Q. You haven't talked to Ed Jones about that?
A. No.
Q. If we wanted to get HPG's official word on Amazon Business, should that come from you, sir, or from Ed Jones?
A. As it relates to B2B solutions and office supplies, it should come through me and my organization.
Q. You outrank Mr. Jones?
A. No. I'm just suggesting that my responsibility is office supplies B2B, so we are the individuals that manage that relationship. I wasn't at the meeting that Ed may have had. He's also the HCA supply team officer. So, I wasn't at that meeting. But, my understanding, that that meeting did occur, but I don't know what the topics of the details were associated with that meeting.
Q. How often does your CEO meet with vendors that are in your product categories?

A. We just had a Core Trust conference and we saw a lot of vendors at the Core Trust conference last week.
Q. So you're not surprised that your CEO is meeting with Amazon Business, sir?
A. I'm saying that in the nature of our business as a group purchasing organization, there are lots of opportunities for vendor and CEO meetings to occur.
Q. My question is: Were you surprised that your CEO met with Amazon Business recently?
A. I was not surprised to hear that, no.
Q. You don't know the status of those discussions one way or the other, right?
A. No, no. What I do know is that we have followed up with Amazon as recently as this year and we've had prior discussions with Amazon relative to their B2B capabilities. And as the record reports, they did not seem to be interested.
Q. Well, they were interested enough to come down and meet person with your CEO, right, sir?
A. A lot of times C-suite relationships or discussions aren't necessarily detailed business discussions.
Q. Sir, how many times did you talk to the FTC before signing your declaration? You said three or four times?
A. Maybe about four or five times.
Q. How many hours total, sir?
A. Maybe four to five hours, maybe about an hour each call.

Q. So in that four or five hours of discussion, I assume the subject of Amazon came up?
A. I don't recall that, no.
Q. You talked to the FTC for four or five hours and you don't remember if there was any discussion of Amazon?
A. No.
Q. So you don't know if the FTC asked you a single question about Amazon, do you?
A. No, I don't recall Amazon coming up.
Q. And who chose the topics and questions in that discussion, you or the FTC?
A. It was an interview process.
Q. When the FTC sent you your declaration, who chose the topics in that declaration, sir?
A. They were asserted by the FTC based on conversations, conference calls that we had between the two parties.
Q. And your declaration, which I think is about -- it's tab 1, I believe, sir. It's about six pages long, single spaced, 16 paragraphs. It literally makes no mention of Amazon, right, sir?
A. That's correct.
Q. And the word Amazon does not even appear in your declaration; is that right, sir?
A. That is correct.
Q. Now, sir, the current bid process that you're doing with

Staples and Office Depot, you didn't solicit the formal bid from McKesson, obviously, right, sir?

A. We did not.

Q. Or Amazon Business, right, sir?

A. We did not. We had follow-up conversation with Amazon but did not solicit a bid.

Q. You didn't send the RFP to Grainger, right, sir?

A. We did not.

Q. Or Georgia Pacific, right, sir?

A. No. We didn't consider any of them to be legitimate B2B office supply vendors.

Q. But if you had an issue in a year, two years, three years, isn't it possible that between Georgia Pacific and Grainger and Amazon Business and McKesson and my office products, and W.B. Mason, that someone would be able to meet your needs, sir?

A. No. We'll know that two to three years from now.

Q. You don't know that sitting here today, right, sir?

A. I don't know for certain where they'll be three years from now.

Q. Thank you.

MR. PERRY: Your Honor, I have nothing further at this time.

THE COURT: All right. I just -- I need some clarity. You asked a number of questions about fees and the

impact of reduction of $50 million on fees.

First of all, fees are paid to whom?

THE WITNESS: Yeah. So there's -- in the GPO industry, under federal regulations and anti-kickback regulations, it's called a GPO fee, group purchasing organization fee. And --

THE COURT: It's fixed by statute?

THE WITNESS: It's fixed, yeah. Well, there's a safe harbor of 3 percent, and that's what we adhere to.

THE COURT: So if there is a reduction of 50 million, then that would translate to a reduction of 1 1/2 million in fees, statutorily, I assume, right?

THE WITNESS: If there -- it would be roughly -- it would be 3 percent of the 227 million -- or $250 million. So, basically about 7 million. So, 7 million is the total. So you're right.

THE COURT: So if there's a reduction of 50 million, that's -- 3 percent of that is one-and-a-half?

THE WITNESS: You're correct.

THE COURT: What does MRO mean?

THE WITNESS: It's a term that's kind of a generic term, maintenance repair and operations. But as it relates to Grainger, it's industrial supplies, you know, drills, motors.

THE COURT: And not office supplies?

THE WITNESS: They have some office supplies listed on their website, but when we reviewed that, it appeared to be a very limited offering. So we didn't see them as really a legitimate B2B office supply vendor. We believe that their core competency is really industrial supplies, and that's how they position themselves in the market.

THE COURT: All right. Any questions?

MR. PERRY: No. Thank you, Your Honor.

THE COURT: Any redirect, Counsel?

MR. XENAKIS: Yes, a little bit, Your Honor.

REDIRECT EXAMINATION

BY MR. XENAKIS:

Q. Hello again, Mr. Wright.

A. Hello.

Q. Just a couple of questions to follow up on.

Mr. Perry asked you about any authorization from your advisory boards for your testimony here today. Did any of HPG's members protest about you appearing here today to express your opinions about this deal?

A. No, they did not.

Q. Mr. Perry asked you about a variety of tools that you have to control pricing. Is your RFP process one of those tools?

A. It is.

Q. And to what extent does the efficiency of the RFP process depend on competition?
A. It's somewhat simple. We aggregate our members' volume, we go the market. The general market understands that we have a compliant membership and a membership that orders and utilizes the contracts that we have in place. And so, as part of the RFP process, they really prize and cherish an award. And so what we're seeking in exchange for prices, exclusivity relative to a national supply vendor.
Q. I think Mr. Perry asked you about your -- the employees who work under you, the experienced negotiators; is that right?
A. That is correct.
Q. And those are one of the tools that you use to control prices; is that right?
A. That's correct. They're part of the team, yep.
Q. Does the merger -- can you think of any reasons why this merger would increase the effectiveness of any tools that you have to control pricing?
A. I think the merger would decrease the effectiveness because the mechanism behind which we seek price reductions in exchange for exclusive award, in exchange for our volume, is competition. And my belief is that when you have 80 percent of the market merging under a single corporate entity, that significantly diminishes the market.

Q. So Mr. Perry talked to you a little bit about the fact that you're here testifying on behalf of yourself and HPG; is that correct?
A. That's correct.
Q. And I understand that you're not here to testify on behalf of any HPG members; is that correct?
A. That's correct.
Q. Would you say one of your primary responsibilities is delivering value to HPG members?
A. That's one of our primary responsibilities.
Q. By "value" do you mean low prices?
A. Low prices and, you know, favorable contract terms.
Q. Would you say that your members rely on you to deliver that value to them?
A. They do.
THE COURT: Did you provide the members with copies of your declaration that you gave the government?
THE WITNESS: I did not.
THE COURT: Do you have any reason to know whether they ever received copies of your declaration from any other sources?
THE WITNESS: Not that I'm aware of.
BY MR. XENAKIS:
Q. Mr. Perry asked you about EJ Advisory Services. Do you recall that?

A. Yes.
Q. They're the consultant that you use for office supplies procurement?
A. Correct.
Q. And do you rely on them to help you evaluate the market and the options available to HPG?
A. We do.
Q. All right. Have they ever come to you and said that an office supplies vendor other than Staples or Office Depot would be a viable option for your members?
A. They have not.
Q. What -- Mr. Perry asked you about the amount of time involved in the RFP process, and I believe you testified it's a significant amount of time?
A. It takes a long time, yeah.
Q. What impact, if any, would adding a vendor to the RFP, among the vendors you're considering, increasing that number, would that have on the amount of time necessary for your RFP?
A. Well, it increases the financial analysis aspects.
Q. Did you invite W.B. Mason to your most recent RFP?
A. We did not.
Q. Why did you not?
A. We did not feel they had the resources that would support our membership.

Q. If you had invited W.B. Mason to your RFP, would that have increased the amount of time you needed to conduct that RFP?
A. It would.
Q. So, Mr. Perry, and I believe the Court as well, asked you some questions about the prospect of taking your ink and toner spend under the Staples contract and moving it elsewhere. Do you recall that?
A. Yes, I do.
Q. I think your response was that moving your ink and toner spend would effectively fragment your spend and that would impose some kind of cost on you and your members?
A. We feel that removing toner from the office supplies spend will de-aggregate our volume and reduce the value to our membership.
Q. Would there be some point, though, at which, if the prices of general office supplies went up enough, you would consider threatening to move your ink and toner spend?
A. You know, I think we look at it in a comprehensive nature. But over the last 18 years we have always bundled toner with general office supplies and paper together. We understand from the vendor community that they value large order sizes and large deliveries.
Q. Can you think of anything about this merger that would make it easier for you to threaten to move your ink and

toner spend to another vendor to discipline Staples' pricing?
A. I cannot.
Q. If your members were finding better pricing on office supplies on, say, Amazon frequently, is that something you would expect to hear about?
A. I would.
Q. Why is that?
A. Well, because, you know, what it would represent to me is that there's a change in the market. But generally we don't hear that type of behavior or that feedback.
Q. I think you mentioned under Mr. Perry's questioning your members put into place some type of controls to ensure that their spend is going through the Staples contract. Did I understand that correctly?
A. They do. I mean, as part of their supply chain organizations, they have systems in place and protocols in place to kind of reinforce the compliance that we've -- that we've established between ourselves and our members.
Q. Why do members put those controls in place?
A. Well, number one is they know that if the controls aren't in place, we collectively can't help manage their office supply spend.

Secondly, they understand that committed, aggregated volume creates value.

Q. And I think you said that -- switching gears now,

talking about the Georgia Pacific contract. I think you said that Staples distributes the toilet paper and other paper products you source from Georgia Pacific?

A. Yeah. They perform jan-san distribution services, correct.

Q. Why did you select Staples to deliver those products?

A. Because they have the trucks and the warehouses behind which -- and they were already, basically, providing the office supply deliveries to our members, so it was a natural complement to their services.

Q. I want to talk a little bit about how HPG's fees would be impacted if the price of office supplies went down.

A. Well, our fees would go down but, you know, again, we're okay with that. The value proposition that we have between ourselves and our members is to reduce our price and, you know, we kind of -- you know, we know that the stickiness and the value that we have to deliver to our members is based on reducing price. And if we don't achieve that mission day in and day out, we won't have members.

Q. Is your job performance evaluated in any way?

A. I'm annually evaluated based on supply expense reduction.

Q. What does supply expense reduction mean?

A. It means reducing expenses for supplies.

Q. If HPG's fees went down as a result of a price decrease on office supplies, how do you think that would impact your

job evaluation?
A. It has no impact at all.
Q. Would it impact your salary at all?
A. It would not.
Q. In fact, your prices have been going down on office supplies over the last several years; is that correct?
A. Yes.
Q. And in the most recent RFP, if I understand correctly, Staples initially offered you savings and then took those off the table; is that right?
A. In 2015, in anticipation of a possible merger, we sought direct negotiations with Staples. Staples is kind of a defensive mechanism. Initially there was value offered on the table. In August of 2015 that value was removed.
Q. And at that point you didn't decide to sign the Staples contract, did you?
A. We did not.
Q. You went to a competitive bid process?
A. We issued a competitive RFP in February.
Q. Why did you do that?
A. Because we felt that we had to take -- well, first of all, we weren't seeing value from Staples due to the volume growth. And secondly, we felt like we needed to enter the competitive marketplace to secure price protection and savings for our members after the contract expiration in

September of 2016.
Q. Mr. Perry asked you about conversations that Ed Jones had with Amazon Business. Do you recall that?
A. Yes, he did.
Q. Has Mr. Jones ever told you that Amazon Business looks like a viable option for your office supplies vendor?
A. He never has.
Q. Do you know whether the discussions with Amazon Business that Mr. Jones had were even initiated around the topic of office supplies procurement?
A. I'm not aware.
Q. Mr. Perry asked you some questions about what the impact of an office supplies price increase or, you know, shortage would be on your members; is that correct?
A. That's correct.
Q. Okay. I think you said your members wouldn't close their doors if office supplies went up?
A. They won't close their doors, correct.
Q. Has Staples or Office Depot ever described office supplies to you as noncritical items?
A. I'm sorry, would you repeat the question?
Q. Has Staples or Office Depot ever characterized office supplies to you as noncritical or unimportant items?
A. No, they haven't.
MR. XENAKIS: Thank you, Your Honor. No further

questions.

THE COURT: Sure. Let me ask you this. I just need some understanding about the RFP process. It sounds as if you've already -- and maybe this is consistent with sound business practice. There's some organizations you don't ask to submit proposals because, in your mind, your opinion, you don't believe they can service your members, right?

THE WITNESS: Yes, sir.

THE COURT: And W.B. Mason is one, I think there was some testimony about another. What's the downside in asking an organization to submit a proposal; is it investment of time and effort and resources and money?

THE WITNESS: It is an investment of time, quite frankly, on both sides' behalf. And if we don't feel that they have a realistic possibility of receiving award, based on what we know our members need, we really don't want to exercise them.

THE COURT: How do you form that opinion without asking what they can do?

THE WITNESS: Well, we have a consultant, and we did evaluate their resources, as I mentioned earlier. We know that their resources, in terms of their distribution and the warehousing, is limited to three territories; Illinois, Florida and the northeast. All other national coverage capabilities is a subcontracted relationship.

So that was the first concern that we had, is that account management, the administration of a price file, the second party distribution is a concern. Their ability, quite frankly, to absorb the volume business that we have is also a concern.

And so those were kind of the primary. And I will say that this was conversations that we've had with our advisory board as well. We went through our competitive analysis with the advisory board and they vetted and validated our market analysis, many of which are located in those same territories that W.B. Mason has a presence in.

THE COURT: All right. Any questions?

MR. XENAKIS: I actually have two questions, Your Honor. I apologize. They don't relate to what you were asking about. Just two follow-up questions.

BY MR. XENAKIS:

Q. Mr. Wright, I want to ask two follow-up questions about managed print services. We talked about that earlier, as you recall.

Does the bundle of services and products that you're familiar with as managed print services include paper?

A. It does not.

Q. And if your members -- if one of your members elects to use a manage print services arrangement, generally would you expect that to reduce the amount of ink and toner that

member would purchase through the Staples contract?

A. It would, yeah.

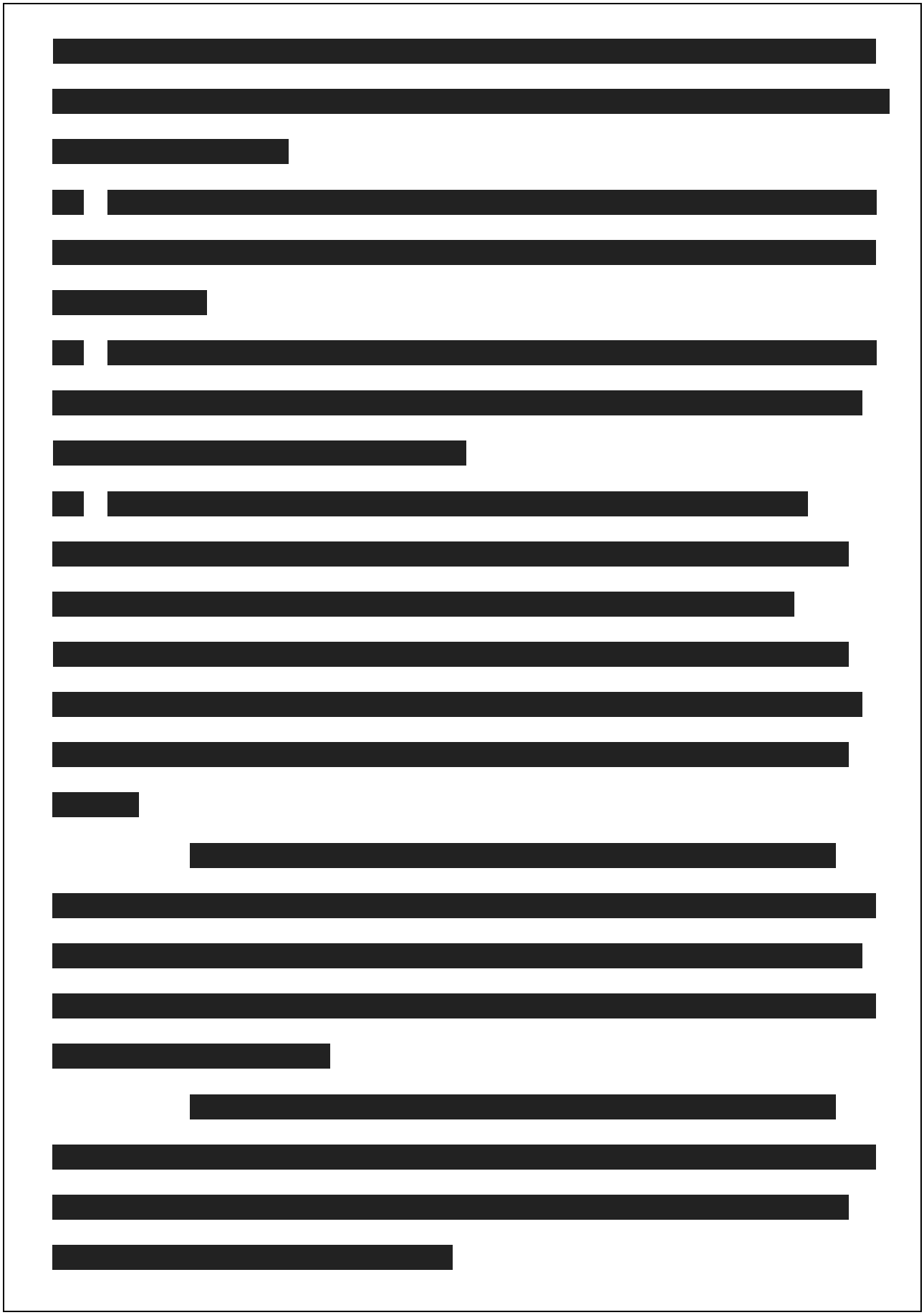
MR. XENAKIS: Thank you, Your Honor.

THE COURT: All right. Counsel, any appropriate recross?

MR. PERRY: Your Honor, just a couple of questions. Unfortunately, with the Court's indulgence, I think we need to do it at the bench with a husher.

SEALED SESSION

[redacted]





[redacted]

OPEN SESSION

THE COURT: All right. Let me thank the witness. All right. Travel safely. You may be excused.

Did you get everything?

THE WITNESS: I presume these are mine?

THE COURT: I think they belong to FTC.

All right. Who is your next witness? We'll take a short recess before the next witness. Who's your next witness?

MS. REINHART: Our next witness is Professor Carl

Shapiro.

THE COURT: Will that be your last witness?

MS. REINHART: The last of our affirmative case, yes, Your Honor.

THE COURT: Let's talk about timing. It's almost three. I'm very flexible. How late do you want to stay today? Ten, 11, whatever?

MS. REINHART: I think I'll defer to --

MS. SULLIVAN: It depends, Your Honor, on how long is the direct going to be, about?

MS. REINHART: Five, six.

THE COURT: About five hours? What's your pleasure? I mean, there is some flexibility.

MS. SULLIVAN: I'm happy to start the cross here tomorrow, Your Honor, if that works, instead of staying late.

THE COURT: All right. I'm not so sure we want to stay until eight. I was actually kidding about ten, eleven. How do you want to break it up? How do you want to break it up?

MS. REINHART: I think we'll probably get to a logical stopping place around five or a little after that.

THE COURT: Let's use 6:30 as a benchmark. Break at 6:30, see where we are at that point.

Let's take a 15-minute recess and then we'll start with the expert.

Will Mr. Jones testify? Is he a witness? He's not identified by the defendants, is he?

MR. PERRY: He's not, Your Honor. This is a late-produced document pursuant to the motion to compel that we weren't aware of until earlier -- until recently, Your Honor.

THE COURT: All right. Okay. All right. We'll take a 15-minute recess.

(Recess.)

THE COURT: Yes, counsel?

MS. SULLIVAN: Your Honor, may we approach briefly, to talk with Your Honor briefly, with the white noise?

THE COURT: Sure.

MS. SULLIVAN: Thank you, Your Honor. Actually, this doesn't need to be on the record.

(Off-the-record discussion at the bench.)

THE COURT: All right. Let me just ask -- and I'll seal that portion, counsel.

The last witness who testified, is the government offering that witness as a witness -- well, my understanding from his testimony is that he's here individually, he's testifying in his individual capacity; is that correct?

MS. REINHART: He's testifying in his role that he has to ensure that the costs of the individual members are kept low. That's his job, is to add value in that way, yes.

THE COURT: But he's not speaking on behalf of any

entity?

MS. REINHART: That was his testimony. That's correct.

THE COURT: The declaration seemed to be framed on behalf of an entity.

MS. REINHART: The testimony, Your Honor, we think is helpful, first of all, because these group purchasing organizations are -- they come into the case, you've heard about them somewhat, you're going to continue to hear about them. And we wanted Your Honor to understand what role they play in the market, how they function. They have members large and small. And they do aggregate their purchases so that they can take advantage of Staples --

THE COURT: Right. But if you look at the declaration, especially the latter numbered paragraphs, he's voicing an opinion on behalf of HPG, particularly from 12 on, which suggests something other than individual capacity.

He was clear today he's here individually. In fact, he said, in response to my question, the board didn't even know, has not seen his declaration.

MS. REINHART: And perhaps there's some confusion, because there are two different entities. There's HealthTrust and then there's HPG. And he was, as I understand it, offered to testify on behalf of HPG.

MR. PERRY: Your Honor, I don't think there's any

confusion. He testified very clearly he's testifying as an individual on his own behalf. He happens to work at HPG, but I thought the testimony was clear, Your Honor.

THE COURT: I thought it was, too. And I think I followed up and asked him because I needed to be clear on whether he was here individually, and he said individually.

MR. XENAKIS: And, Your Honor, I apologize. I respectfully disagree with Mr. Perry. I think he was clear -- and I'll have to go back and look at the transcript, I think he was clear that was here testifying individually and on behalf of HPG.

I think what was clear, and think what we can -- we and the defendants can agree on, is that he wasn't here testifying on behalf of any individual HPG member, but he was here representing the group purchasing organization.

THE COURT: We may have to get him back on the phone. I'm not going to make him fly back out. He's from Tennessee, right?

MR. XENAKIS: Yes, Nashville.

THE COURT: I thought I clarified, because I asked a follow-up question, too, because I wanted to be clear that he was here individually. And I thought that's what he said. I think the transcript will bear that out.

MR. PERRY: Sorry, Your Honor, that's how I heard him as well. I assume the transcript will make that clear.

THE COURT: Right. The other thing that the Court is interested in is Mr. Jones. I was wondering whether he was a designated witness for the defendants. He's not on the witness list. I assume there's no video that's going to come in with his testimony on it.

I think I'd like to hear from him, but -- is there a reason why he wasn't designated as a witness?

MR. PERRY: Well, Your Honor, as you recall, I'm sure, this was a document produced very late, after motions to compel and a significant amount of wrangling with Amazon. So, obviously, we have no --

THE COURT: This came in from Amazon?

MR. PERRY: This came in from Amazon very late in the game, Your Honor, after the time when witness lists were made and the ships were sailed, Your Honor.

THE COURT: Well, I don't -- I was wrestling whether there was any substantive evidence there. I don't think there is. I mean, I think probably -- if it's borderline impeachment, maybe, I don't know. But it's not substantive evidence, I don't think, that the Court can consider.

MR. PERRY: Your Honor, the exhibit is in evidence pursuant to the CMOs. We would submit that that document itself is in evidence and it speaks for the Court. And I think the witness made clear whether or not -- I won't say

anything specific, but whether or not he had a basis to dispute what was on the face of the document.

THE COURT: Right. But can the Court consider what's on the face of the document as being -- for the truth of the matter asserted?

MR. PERRY: Your Honor, I submit you can. I appreciate the weight -- obviously, you'll decide what weight you give that document. But it's in evidence, it was undisputed.

THE COURT: Yes.

MR. PERRY: And no objections from plaintiffs. I think you can consider it.

THE COURT: Right. Well, you know, this case is nonjury and I don't have to spend a lot of time deciding that now. But, I mean, at some point if I rely on it, there should be some hearsay exception rule that the Court can point to as relying upon it for the truth of the matter asserted. I'm not so sure I can.

I mean, this was a document produced by Amazon that reflects statements made to -- by someone else who is not before the Court to cross-examine. I have all sorts of concerns about that, but I don't have to spend a lot of time right now. I mean, provisionally it's in the record.

MR. PERRY: Understood, Your Honor. We're happy to follow-up. But initially it certainly appears to be an

ordinary course of business record of Amazon following up in an ordinary course meeting.

THE COURT: Business records from Amazon that reflect statements from someone else, I'm not so sure.

All right. Yes, counsel.

MR. XENAKIS: Yes, Your Honor. I would submit that while the document may be a business record, the portion in question is not the type of evidence designed to come in under the business record exception, because it is a summation of what someone else said. And if the Court intends to rely on it as an accurate representation of what that person said, I don't think it has reliability.

THE COURT: All right. The query whether -- rather than spending a lot of time on that issue, the query is whether it's just easier just to hear from him, to ask him to testify, because the question is whether or not there are any viable alternatives out here in the real world, who can compete, you know, query whether it's relevant to anyone's case, or not.

MR. PERRY: Understood, Your Honor. We're happy to look into it, of course. The more evidence the better. I suspect that the witness you've already heard from directly at Amazon can certainly speak and has spoken more directly to capabilities they have today, capabilities they will have going forward.

THE COURT: All right. All right. Well, give it some thought and it may well be I don't need to hear from him.

MR. PERRY: Thank you, Your Honor.

THE COURT: All right. You can call your next witness, Counsel.

MS. REINHART: Thank you, Your Honor. The plaintiffs call Professor Carl Shapiro.

CARL SHAPIRO,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

THE COURT: All right, good afternoon, sir.

THE WITNESS: Good afternoon.

THE COURT: How are you?

THE WITNESS: Very well, thank you.

THE COURT: Good.

MS. CERILLI: Good afternoon, Your Honor. I'm Krisha Cerilli from the Federal Trade Commission. I'll be conducting the exam.

THE COURT: All right. Good afternoon, Counselor.

MS. CERILLI: And we have a presentation that we're going to be using to guide the examination.

THE COURT: All right. Thank you.

MS. SULLIVAN: And, Your Honor, to the extent it will speed things along, we're willing to stipulate that

Dr. Shapiro is an expert in the field of economics.

THE COURT: I would like to hear his background; it's always helpful. I know you would, I know you would. I would like to hear it.

MS. CERILLI: Thank you. And, Your Honor, we expect to be able to conduct this entire exam in public forum. There will be just certain slides that are partially redacted from public view, but you will have the complete un-redacted version. And particularly towards the end there might be a handful of questions that it might make sense to just do in a brief sidebar and then continue on.

THE COURT: That's fine. All right. Thank you, Counsel.

MS. CERILLI: Great.

DIRECT EXAMINATION

BY MS. CERILLI:

Q. Professor Shapiro, can you please state your name for the record?

A. Carl Shapiro.

Q. And, Mr. Shapiro, what is your academic training?

A. I earned my Ph.D. in 1981 from MIT. I previously had degrees in economics and mathematics at the undergraduate and masters level in math.

Q. Okay. And after attaining your doctorate, where did you work?

A. I went to Princeton University. And I was there during the 1980s as an assistant professor and then a professor.
Q. Okay. Are where did you go after Princeton?
A. In 1990 I moved to Berkeley and joined the faculty there.
Q. And what is your field of academic research?
A. Industrial organization, which is really the economic field of which antitrust economics is one of the applied branches.
Q. Okay. And have you published in this field?
A. Yes. I have, yeah.
Q. And have you published articles regarding the economic analysis of mergers?
A. Yes, I have. I've been working on mergers in my research for about 25 years, back to about 1990, and other -- many other issues related to antitrust and IO -- or, the industrial organization field.
Q. Okay. And have you also been involved in publication of academic journals in this field?
A. Yes. I'm quite proud that I was the founding coeditor and then editor of the *Journal of Economic Perspectives*, which is one of the leading journals of the American Economic Association. And I was the associate editor at some other journals.
Q. And have you had jobs outside of academia related to antitrust economics?

A. Yes, I have.
Q. Okay. And what are those?
A. So, I guess I would start with, in 1995, I went to join the antitrust division in the Clinton administration as the chief economist there, formerly the deputy assistant attorney general, which is in charge of the economic shop in the antitrust division.
Q. And what are your responsibilities in that position?
A. Well, there are around 50 or 60 Ph.D. economists there who work with the attorneys in the DOJ to evaluate all -- basically, all the matters that the antitrust division is handling. So that would include mergers, certainly, civil non-merger work, as well as competition advocacy. And in a small -- and some role in criminal cases, as well.

So basically supervising that group and then working directly with the assistant attorney general who is in charge of antitrust.
Q. Okay. And how many merger cases were you involved in that you're talking about at the DOJ?
A. Well, I mean, the DOJ must handle, I guess, serious investigations of dozens a year. As the chief economist that would probably be a smaller number that I would really dig into. A lot of it would be done by people who are working under me. But I was there for a little over a year, or about a year. So, even that one year, it's a good number

of serious merger investigations. Probably a good dozen in that time.

Q. Okay. And what is the role of a chief economist in a merger investigation?

A. To listen carefully to the staff and learn from them. The -- well, the staff economists are doing the front-line work of working with the data, evaluating prices, market shares, all the things we're talking about here. And then as the chief economist my job is to, you know, supervise that, make sure it's high quality. And ultimately convey that and give my advice to my boss, who is the assistant attorney general who will primarily make the enforcement decision. Although, of course, necessarily in some cases, the bigger cases, consulting with the attorney general.

Q. And were you also involved in policy work at your time at the DOJ?

A. Yes. So, maybe I'll jump ahead. I am not sure you want to do this, but I actually then came back to the DOJ in 2009. At the beginning of the Obama administration I served in the same position for about two years. And so that's much fresher in my mind. And we did a lot of policy work, particularly since it was the early days in the administration.

For example, the -- there was a policy regarding broadband deployment and broadband build-out. And we had

views that we, being the antitrust division, on the advice to the Federal Communications Commission on competition in broadband, and so we would file -- we would call it competition advocacy. We would file -- I want to call them reports, there's probably another word, with the FCC in this case giving them advice on how to make sure the broadband was as competitive as possible.

We did other stuff involving transportation, airlines, for example. And then we did work on the merger guidelines during that period of time that you'll be hearing about, Your Honor, and I was involved in that effort.

Q. Okay. And what did that work entail?

A. The merger guidelines work?

Q. Yeah.

A. Well, we -- both agencies, that is, the FTC and the DOJ, the leaders there decided it was time -- a good time to update the merger guidelines, which had last been -- had a real overhaul in 1992. And so we had a process that took about more than a year of soliciting input. Just an extensive process, including public comments and so forth, that led to revised guidelines in August of 2010.

Q. Okay. And following that second stint at the antitrust division, did you return to Berkeley?

A. No, I stayed in Washington. And this would have been, now, February, March of 2011. I was very pleased to be

offered a position in the White House as a member of the President's Council of Economic Advisors.

Q. And what is the President's Counsel of Economic Advisors?

A. So, the CEA was set up in 1946 to give -- to have, basically, a professional economist, mostly academic economist as a group in the White House directly reporting to the President, to give the President, basically, objective, good economic advice.

Initially it was more for macro economics, it was really not to have another great depression. And by around the '70s into the '80s it became a broader portfolio. A lot of micro economics, so industry level work, regulatory work. So that's the job of the CEA; there's a chair and two members. And so in that position I was appointed by President Obama and confirmed by the Senate.

Q. And what were your responsibilities as a member of the council?

A. So we divided things up between the members. I had a kind of ridiculously large portfolio, because there's so many issues. So, basically, anything that was in a broad range of economic issues where there was a policy process or the President wanted advice or there were decisions to be made, we would participate. I mean, less than national security, for example. But everything from trade with

China -- housing finance I spent a lot of time on because they're still trying to dig out from the great recession and all the problems with Fannie and Freddie.

Energy, we had pipeline issues. Natural gas, the whole area of regulation was in my zone. My fellow member, who was handling the other half, Katharine Abraham, she's a labor economist. So I basically said I did the business, she did the labor side, okay, and training and education.

So very broad range of topics. It was quite demanding.

Q. And after your time on the council, what did you do?

A. I returned happily to my position at UC Berkeley.

Q. Okay. And aside from your work in academics and government, do you also serve as a consultant?

A. Yes, I do.

Q. And what role do you have in that?

A. So, what I'm doing now would be in that category. As a consultant in this case, the FTC being my client. Most of the work that I do is antitrust related, not all of it. Basically, whether it's for private parties or the government, I do economic analysis; take mergers, where I would be evaluating the likely effects of a merger and either advising private clients or advising the government as needed. And if my views are aligned well enough with my client, then I can testify. I do testify.

MS. CERILLI: Your Honor, at this point I would like to tender Professor Shapiro as an expert in economics.

THE COURT: All right. Any voir dire, counsel?

MS. SULLIVAN: No. No objection.

THE COURT: All right. I'll let the witness testify as an expert.

MS. CERILLI: Thank you.

BY MS. CERILLI:

Q. Professor Shapiro, I would like to turn to your analysis of the proposed merger. But before we talk about the specifics of this merger, I think it would be helpful if you could orient us to what an antitrust assessment of mergers is all about.

So just start -- what is the purpose of an antitrust assessment of a merger?

A. Well, as the economist, I'll talk about antitrust economists. And I've already said it's really the applied part of my field, industrial organization. And it's invariably working side by side with attorneys, since this is an area of the law.

So we're trying to bring economics to bear to answer the questions that government agencies or the Court ultimately is going to be interested in, which is to predict the likely effects of a merger. In particular, will a proposed merger significantly diminish competition?

Ultimately then that comes to a question: Will the customers, who are the customers of the merging firms, be harmed because they will have fewer choices, less competition?

THE COURT: Is that a relevant consideration, the customers of the merging firms, or not --

THE WITNESS: Absolutely. The customers -- well --

THE COURT: -- in a case like this?

THE WITNESS: So in a case like this, take -- Mr. O'Neill spoke of AEP, they're a customer of Office Depot, if I remember right. So absolutely, the focus is on the customers and their welfare, if you will. Now, I should say not just the customers of the merging firms, all the customers in the relevant market.

THE COURT: So individuals, John Q. Citizen?

THE WITNESS: Well, here we have a market where the customers are large businesses.

THE COURT: Right.

THE WITNESS: So, the direct -- let's call them the direct customers, AEP, Best Buy, some of the companies you've heard from.

THE COURT: Right. This is business, but I'm concerned about the individuals also. Is that part of what the Court has to determine, the impact on those individual purchases, who go in to -- well, who pick up the phone and ask for the delivery of pens and office supplies and things

like that?

THE WITNESS: Well -- so, if I, at home -- I have a home office and I order stuff from Amazon, for example. I am not a customer in this market because I'm not a big business. So, we're not directly looking at, you know, Shapiro Economics as a customer.

THE COURT: Won't you be impacted, though, by an increase in fees and prices?

THE WITNESS: No, I don't think so. No, because if --

THE COURT: I say "you," you the individual.

THE WITNESS: That's what I thought you meant. So, no. Let's take a small business customer or a retail customer or a consumer. If the merger has the effects that the FTC alleges here, and let's say AEP has to pay more for their office supplies, okay, 5 or 10 percent more, let's say, that's not going to affect what a small business is paying, it's not going to affect what I pay if I go to Amazon.com or to Staples online or retail. It's a different set of prices. We're already paying more -- now, me as a consumer, I'm paying a lot more than AEP is paying.

THE COURT: Because you don't get a discount?

THE WITNESS: I don't get those discounts. So, no, it's really -- the prices are detached, if you will. It's not the same prices.

THE COURT: What's the relevant timeframe for the

prediction, the impact on the B2B customer? It's not immediate, is it, the day after? Or is it?

THE WITNESS: Well -- so, first off -- in general in mergers -- it depends a lot on the case, okay. I mean, if the government is procuring jets, it might be they're not going to have another procurement for eight years and we got to look out eight years. But in this case, I guess, it's not like there's a certain timeframe, we close the window.

I think -- the way I would put it is when the deal closes, if the deal goes through, okay, the deal closes, some customers already have contracts, they're going to be protected for a while, maybe a year because they got fixed prices, okay? Other people, though, will be coming up every time -- every year -- every month there's some of these big customers who are going to be in RFP process who are going to be bidding. They're going to -- they could be hurt, and probably will be hurt right away. Okay?

So there's going to be immediate impact. Okay. And then if Staples is right, over time they'll gain some efficiencies and maybe some benefits will come to the customers. But I just view it as a motion picture, if you will, what's going to happen in the first month or year and then later.

I'm pretty confident that there will be some harm right away, Your Honor. And we're going to talk a lot about

entry; you know, will Amazon Business be coming in, can W.B. Mason expand? Those sort of questions, those are not going to happen overnight. So if those are going to be curative to this merger, it would take some time.

I tend to -- what I put in my report is I tend to look out one, two, three years. I don't think I can see out -- I can't claim to make much of a prediction beyond that. And so that's the timeframe I'll be talking about.

THE COURT: So reasonable foreseeable period of time would be that one- to three-year window?

THE WITNESS: Yeah. Yes. Right. And the fact is, if the other firms will come in and, you know, fix the problem within a year, there still might be some harm for awhile, but that's usually thought of as probably fast enough. But if it's going to take two, three years and it's iffy, then not so much. And we're going to come to that.

THE COURT: Sorry. Go ahead.

MS. CERILLI: No problem.

BY MS. CERILLI:

Q. Sir, there's been references to harm to competition and harm to consumers. Can you just summarize, virtually, what does it mean for a merger to harm competition?

A. It means that the customers have significantly fewer choices and, therefore, will end up paying a higher price, or perhaps ending up with a lower quality. But we'll just

talk about price for simplicity; end up paying a higher price because they have less leverage, fewer choices available to them due to two important suppliers merging.

Q. Okay. And how do you, as an economist, start evaluating the effects of a merger between competitors?

A. So what I always want to know first, whenever, you know, I get brought into one of these, is where are the companies competing? Are they competing at all? You know, in some cases it's not even -- they're not competitors, it's the conglomerate or something.

So are they competing for what products, for what customers. So that's the first -- and we'll call those -- we usually call those the overlaps. You know, where are they overlapping in terms of trying to serve the same customers for the same products. And that's the first question, because it's there where we're most likely to be worried, because it's those customers and those products where there will be -- customers will lose choice or leverage. So that's the first question.

Q. Okay. Then what else do you evaluate?

A. Well, then you're going to go from there and talk about what are the other choices that the customers have. Okay? Because there are, a lot of times, two firms, they compete, but they're two of many firms and it's not going to be a problem. So you really want to know where they overlap and

then who are the -- what are other competitors or choices the customers have.

So you do have to understand the customer's needs are first and foremost. There's a lot of the customer focus in this analysis.

Q. Is there a particular framework that economists use to evaluate these issues?

A. Yes. There's a well established, even called standard framework that's in the merger guidelines that, you know, that I and many other economists like me have used and follow. We're seeing it on the screen now here. So there's five steps and, yes, there's a standard framework.

Q. Can you explain the components of that framework?

A. Okay. Right. So, you see the five -- six, okay. We have the divestiture. I wasn't thinking about that one.

So, I should say, this framework is not something the economists just dreamed up, it's designed to help the lawyers and the courts. So we're not blind to the case law, okay? And the case law puts a lot of weight on relevant markets, so we start there.

THE COURT: That's key, because if the relevant market isn't defined correctly, everything else is skewed, isn't it, the analysis?

THE WITNESS: Yes and no. I think any lawyer would say yes, but an economist would push back a little

bit. The market shares are probably going to be skewed because we're defining the market -- a lot of what we're doing is to figure out market shares and seeing if they're high, which is the second step. So if you don't get the relevant marking right, the shares are not going to be -- they're going to be misinformed, they're going to be misleading, they're going to be screwed up.

Other parts of the analysis, when we talk about the bidding between these two firms, that's not so much driven by the relevant market, it's really more directly looking at how it's going on. But we are going to start with the relevant market.

So the answer is yes when it comes to market shares, not necessarily for other pieces of the analysis. Okay.

And the relevant market is, you know, kind of the more formal on the way the courts and the econ -- we have a formal way of doing this. We'll talk about this.

What are the products and customers where we have -- where the merger might alter competitive conditions, and the group of products and customers we need to look at where there might be a problem or there's alleged to be a problem. Then once you've defined that space, then we can measure market shares. We've got customers, we've got products, we can do our best with whatever the data is to

measure market shares.

And you're trying to figure out who is a big player, who is successful, who is not, which is a guide to what are the customer's options. And if the two firms sell the same thing but they're 5 percent and 7 percent, very unlikely to be a problem, because there are many other choices that are popular with customers. So the shares are very informative and, of course, this reflects what the case law is going to say, too.

Then competitive effects is where we look directly at, well, how do the firms compete and how might that change and how would customers get hurt here? Is the bidding going to be different? Are the prices going to be higher? Is there going to be less innovation? What's the actual real world implications of the merger, as best we can predict them? So that's what we mean by competitive effects.

And those first three pieces, then we're basically saying let's look at the customers and the firms that are in the market, that we can see them now, the way things are now. And then if we see a problem there, then we go to the next stage, which is, well, maybe there's a problem if we just took a snapshot. But it's not going to be a problem if we spin the clock ahead and we consider other firms will enter the market, small guys will grow. If the customers are unhappy, they'll fill the gap, they'll save the day, if

you will. So we look for entry and expansion, what other options emerge to save the day, in this case for large customers.

And then when we get through all that we have, I would say, the primary prediction about what we think the effects are going to be. But we have to consider efficiencies, because if a merger is -- looks like it's going to hurt customers -- if it's good it generates substantial cost savings, that makes it -- that makes the companies either lower cost or in some way better, they might pass some of that through to the customers. That could be an offsetting factor. So we need to consider that. But we have a screen on that, which is we're only really going to want to count cost savings if they're merger specific; that is, if the merger is allowing them to be achieved. Otherwise they don't get counted.

And here we have a possible six, basically. If when we get through step five we say it's a problem, then very often companies negotiate with the DOJ or the FTC to fix their problem by divesting a line of business, a factory, whatever, and we have a proposal here. So a small bit of my testimony at the end will talk about the proposed divestiture here.

BY MS. CERILLI:

Q. How do you go about investigating a merger using this

framework? What type of information and evidence are you looking to collect?

A. Well, I'm looking for a wide range of things. You start with customers, for example, and their choices, but it could be -- we could have data, documents, testimony, you know, it's the same range of things that the Court ultimately is to consider. Of course as an economist we will tend to gravitate towards the data because our comparative advantage, if you will, is to help everybody understand what the date are telling us.

Q. And how do you use this framework in past cases to evaluate mergers?

A. Yes, regularly. It's the one to use.

Q. In your past cases have you evaluated mergers that you concluded would not raise competitive concerns?

A. Sure. Of course. So, let's say at the Justice Department -- I mean, the vast majority of the mergers that are reported and reviewed by the Justice Department they wave through, it's not a problem.

And when I work for private companies, there's certainly, you know -- regularly I advise them that their deal looks good and I support it. This year -- last year, I guess it was last year now, I worked for Intel, they acquired Altera in a large merger in the semiconductor space. There were some overlaps. I thought the deal was

fine and the FTC cleared it pretty quickly. So did the European Commission, actually.

Q. In your past experiences, have you also evaluated mergers that you have concluded would raise competitive concerns?

A. Yes, certainly. I've testified over the years, I don't know, maybe a handful of times in merger cases before this and I think it's pretty much a split between the plaintiffs and defendants, in terms of sworn testimony.

In the -- as an example, I mean, the DOJ, when I was there, challenged the merger between H&R Block and TaxAct. I have a feeling you're going to run into this when you look at the cases, Your Honor. That case started when I was at DOJ and then a complaint was filed after I had already left and gone over to the White House. But that was one where there was a problem, and ultimately the Court agreed with the DOJ.

Q. Thank you for that background.

Now let's turn to your analysis of this merger. Professor Shapiro, what was your assignment with regard to evaluating this merger?

A. Well, FTC asked me to do just the sort of thing I've described, which is look at the merger and evaluate its likely competitive effects. The nature of that shifted over time as I learned more and as the FTC learned more, but it

was pretty broad at the beginning in that respect.

Q. And just to start us off, can you give us a very short summary of your opinion concerning the likely effects of this merger?

A. Well, I don't think you'll be shocked to hear, Your Honor, that I'm concerned about it. So I think that I see Staples and Office Depot as very much head-to-head, strong competitors. We're talking about the sale and distribution of consumable office supplies to large customers. And I think that the merger will harm competition in that space, and that's what I'm here to testify about.

Q. And did you use the framework that you just outlined to arrive at that conclusion?

A. I sure did, yes.

Q. Obviously, we're going to spend a lot of time walking through the formal steps that you did defining the market, calculating market shares. But before we do that, I think it would be helpful to understand your general thought process in analyzing this merger and why you conclude it's likely to result in harm, and why that matters to you as an antitrust economist.

So just to get us oriented, after you were retained by the FTC, what led you to focus on the sale and distribution of consumable office supplies to large customers?

A. So, of course I knew even right at the beginning that

Staples and Office Depot were large retailers. And I'd actually been aware of the merger challenge, whatever number of years ago it was. Was it '97? '98?

So naturally I thought there could be some issues in retail space. I hadn't really thought as much about their sales to large customers, but once we started to look into it, I learned that they have very substantial sales through the B2B channel, each of them. And then the focus shifted towards larger customers, once I learned more about how they procure office supplies and their choices. So it's a process of learning.

And I think -- but again, the question, as I said in general, is where did the companies compete, for what customers, and are there spaces there where they really dominate together and there are fewer choices? So that logical process led me eventually, working with the FTC and my own staff at Charles Rivers Associates, to these large customers as a group of concern.

Then once you get to that point, I'm like, okay, what do we know about the competition for the large customers? And some of the most striking data there involved the bidding between the two companies, or some of the data that came across that I saw and I found, you know, very much caught my attention.

Q. And you mentioned retail. Have you reached a conclusion

concerning the effects of the merger in retail?
A. No. I'm certainly aware that there's -- Amazon, for example, is a big competitor online, it competes against retail. And there's other retailers. So I didn't do the same in-depth investigation or analysis in retail because the analysis shifted towards large B2B customers, and that's the scope of the complaint that the FTC filed.
Q. And you mentioned noticing the presence of the parties in the business space. So what did you do to investigate the sales and distribution in the business channel?
A. Well, just so you understand the process, Your Honor. I work with several people. Charles Rivers Associates is the consulting firm I work with, and I have several people there, a number of people there who help me. And they work and I work with the FTC staff, the lawyers and the economists. So there's a month-long period of investigation.

And so during that, of course, I told my staff and the FTC, what -- if we're going to look at large -- sales to large customers, what data do we have about the bidding, and about Staples and Office Depot trying to win that business? This is a standard question I would ask in many cases for bidding data. And so fairly early on we got some very relevant data from Office Depot on that. And then somewhat later, data from Staples.
Q. We're obviously going to walk through some of that data

later on, but can you give us a preview of what you saw in the data?

A. Absolutely. We have a slide on that, don't we? So that's where we are going next. So we're going to have quite a few charts for the next number of hours, Your Honor. So here's the first one.

So first off, what are these data? This is Office Depot win/loss data. So Office Depot keeps track of, when they're bidding for large customers, who they're bidding against, who wins, whether they win. That's what we mean by win/loss data. In this case, we're talking about large customers. And they have a category of enterprise customers and major customers and those are included here. You can see the period is 2013 to 2015. So this is a couple years leading up to when they would have provided this data to the FTC, which was around last summer, I think.

And we have 1,253 total opportunities or bidding circumstances. And now you see, of course, we've highlighted Staples, so they're appearing -- this is just appearances, we haven't yet said who's winning, just who they're bidding against, as best they know. They don't always have perfect information.

So, they are -- Office Depot is reporting in their data that Staples is appearing 833 times, so that's around two-thirds of the time. And then W.B. Mason, of course

you've heard from them. It's not surprising, from what we know now, they're next, because they're sort of the largest regional distributor. So they're appearing, but substantially fewer appearances.

And then we've got -- let's call it a long tail of others who appear a smaller number of times. The third one here Veritiv, they're a paper merchant. So we got paper in here as part of the consumable office supplies grouping. This jumps out to me as, wow, okay, Staples is pretty dominant in terms of who Office Depot is seeing when they're bidding, in their bidding opportunities.

Q. Did you also have data on who won in these bidding opportunities?

A. Yes. So the same data said -- isn't that our next slide? Let's go to the next slide.

Same data, it's just we're reporting wins now instead of appearances. So before we had, you know, Staples 832 appearances, here they've got 240 wins. By the way, there's 1,200 here. Where are all the other wins? A lot of the wins are Office Depot winning. Okay. They're going to be reporting that. So, we're again seeing Staples really stands out as with far more wins than anybody else. The same pattern in the wins as in the appearances.

Q. And what is the significance of seeing such prominence for Staples in win/loss data like this?

A. Well, this is telling me that I'm getting an early sense, when I first see this at least, of okay, when Office Depot is out there bidding for large customers, by far and away their largest competitor, as measured by these -- by these metrics, is Staples. There are some other players, and we'll need to look at them more, but this tells me that if the two merge, that's going to be a pretty big event in the world of these customers who have been having Staples and Office Depot bid against each other so far.

Q. And did you also have bidding data from Staples' files?

A. Yes, we did. That came in a bit later, as I said. So here we are, yes. This is a smaller data set, Your Honor. There's 393 bids.

THE COURT: You know, it might be helpful for the record to refer to the page number of the slide that -- I can follow you, but the record is going to be silent.

A. Absolutely. So this is slide 6. So the exact same analysis, just a different data set. Staples compiled this in response to the FTC's request for information. We have the same pattern, it's very similar.

So again, here Office Depot appearing in somewhat more than half of the appearances, but far more than anybody else.

BY MS. CERELLI:

Q. And did you, likewise, have data on who won in some of

these opportunities?

A. Yeah, so that would be the next slide, slide 7, the same thing, we're looking at wins here. And again, I should say, this is large customers, this includes the Fortune 100 customers in this case and consumable office supplies. So we're in the same space that the FTC and I was interested in asking about, and this is what we got back from Staples and Office Depot, the exact same pattern we're seeing in really all four of these metrics.

Q. Again, what is the significance of seeing Office Depot have such prominence as a bidder and winner in Staples's bidding data?

A. Well, again, we're always thinking about this from the perspective of the customer. We can make it specific to AEP, you've heard about, or McDonald's, some of the witnesses from last week. From AEP's perspective, Mr. O'Neill, he's got -- he may very well be one of the data points here. I'm not actually sure. Okay? So let's turn it from data into business reality.

He wants to have a good deal and he wants to procure his office supplies. He sees Office Depot and Staples as the two leading choices for him. He benefits from having them bid against each other. And we'll talk about how, in various ways.

The fact that they're showing up so heavily here,

the two companies, means he's not alone in the line on the two of them. A lot of people, a lot of other big customers are going to be relying on competition between these two companies in order to get leverage as a buyer. They have leverage. They are big buyers, they're not babies, okay. But the way they get leverage is by threatening to go to the other guy. So this tells me that from the customers -- I get pretty worried, actually, this sort of data, that the customers will be harmed because of the dominance of the two firms in the bidding data.

Q. And can you give us an example of how a customer could be harmed?

A. Well, let's talk about AEP then. Okay. So -- I see -- so now -- okay. Without referring to the numbers just yet. So now we're on to slide 8.

So, Mr. O'Neill, I think, described how he received substantial discounts. We have some of the rows here showing the nature of the discounts he received. And why did Office Depot offer those, you know, substantial discounts to him? Well, the primary thing was they were under pressure from Staples. And he knows that he can't play that game anymore after the merger. So, that's a problem. And he said it's a problem. Okay.

Now, he's only one example, that's why I like to look at data. Okay. And there are other customers who will

say something different, it's not going to be unanimous.

So -- but this gives us -- I think illustrates in the real world what those bidding data translate to. So he is getting, you know, increased savings from a rebate. Okay. He's getting lower prices that are committed to him by Office Depot in this RFQ process, as described here. And there's some other savings. And those, you know, you can see at the lower right-hand corner of the numbers, Your Honor, it's a substantial overall, both in percentage and absolute dollar amounts for him.

So -- and the language here talks about -- that's not redacted. Okay. Basically, he's got counterproposals with Staples and Office Depot. It's the normal language we would see many times of when a customer is using their leverage of threatening to go to one guy or the other.

So that's a sort of thing that I'm worried that he won't be able to do that. And he and others like him, of which there could be many.

Q. And is Mr. O'Neill and AEP an unusual example?

A. Well, what I'm saying is we don't know until we look more systematically at the data, and we have different individual customers. The -- so, the data so far, and we're going to look at more, suggests he's not unusual. There are a lot of customers that are going to be similarly situated and potentially vulnerable to harm.

But then the question is, well, okay, what customer group really is vulnerable here? You know, we looked at these bids, but who -- who -- what are their attributes, what do they look like as a set of customers? And so we need to -- that's the next step then? Sort of what are the customer demand -- like I said, the customer needs. And you learn, and you already know this, Your Honor, that there are a lot of large customers who have a similar procurement process and structure, they have similar needs. And there are a number of different ways we start to learn that, through the company documents and through information we're getting from customers, as well.

Q. And so you mentioned some requirements of large customers. Is there evidence that suggests that large customers have distinct needs?

A. Yes. Absolutely. For one thing, the parties themselves recognize, basically, a hierarchy of customer types in their own documents. And that's a good sense of what these categories look like. And I think we have a slide on that. Yes. So this is now slide 9. And I don't know if you've seen this yet, Your Honor. I don't think so. But this is the private sector, so commercial customers. And if you go from -- on the left-hand side you could see the customer size going from pretty small, under 24,000, all the way up to more than a million. Okay. And they're talking about

their total purchases. So they're not talking specifically about consumable office supplies, we're going to narrow it down to there later.

And we've highlighted here for you the larger groups that is the focus -- that are included in the FTC complaint and that are the focus of my analysis.

So let's look at the 500,000, to a million purchases. So they call them a major customer. And then above a million we call them an enterprise customer.

So these are the things that are pretty common in those categories. And Office Depot recognizes that and so does Staples. Formal RFPs, centralized purchasing, approval processes, awareness and desire, up-front money, conversion incentives and rebates.

So that's some of the forms in which these customers basically are expecting and used to getting some very good deals, because they're big, even in that range 500,000 to a million.

Then we go above that, we add on sophisticated sourcing. Again, formal RFPs, sensitive to cost of change. That is, if there's some switching costs, they don't want to -- it's not so easy for them to switch suppliers. Expectation of conversation, incentives and rebates again.

So you don't see that in the smaller customer groups, they don't have the same sophisticated needs, they

don't tend to run RFPs. And we'll talk about other ways in which they're different. Okay. But this is one of the indications that large customers, you know, are a distinct group and have some needs.

We're going to say there's not going to be a sharp boundary between large and medium and small, it's the real world, things are smooth, but there are differences as you move up this hierarchy.

Q. Okay. And is there other documentary evidence you've seen that large customers have distinct needs?

A. Well, I like to look at -- not only look at the merging firms here the suppliers say, but what the customers themselves say. Okay. And so I asked pretty early on about that. We have -- that's the next slide.

So, we've -- so these RFPs is where the customer says it's a request for proposal. So the customers says here's all the stuff I want. What do you got? Well, that's, of course, the best place for the customer to describe what's valuable to them, what their requirements are. Okay. So here we've shown -- we've taken this -- I guess we've redacted the name of the customer for open court. But this is Staples' response to an RFP by a large customer, and you can see their name there, Your Honor.

And, you know, Staples is coming back with all the, you know, why they're qualified and all the good things

they can do. So we see here itemized prices on core products. So this is the set of products that the customer will negotiate that are high volume products typically, important to them, where they want really the most deeply discounted, best prices as a commitment from the vendor. And Staples is stepping up to do that. And then there's a volume rebate here.

So these are some of the price elements. That's the title of this slide. Okay. Slide 10. So that's one thing you see in this RFP and others.

Q. Okay. And are there attributes that stood out to you in these customer RFPs?

A. So, we have the next slide, 11. So, again the same RFP and response that we're looking at cost management. So I think you've heard about leakage, and we're going to talk about leakage and off-contract spend. So this is not at all uncommon for the large customer to say I want my folks to buy on the contract, you're going to give me a really good price. How are you going to help me get compliance with that? And so they're asking for, conduct a communications campaign and so forth, support compliance. So that's the first grouping here.

We have order size. It's clearly the case, and I'm sure you'll hear this from Staples and Office Depot, that, you know, it's more efficient if they can increase the

average order size, it's just more efficient to deliver rather than small little bits. So they want to work with the customer to do that. And that's more efficient, they're good at that. That's what the customer is asking for.

And then there's monitoring here. They talk about to make sure that the -- ensuring that the pricing and discount structures agreed to are met. They have a consultant here, Dryden. You know, frankly, when I do this I would never have thought -- maybe I should have, but I would never have thought there were specialized consultants who charge six figures to help companies procure their office supplies, but that's what we've got here. Okay.

So, you know, it's a testament to the efficiency in American business. This might seem simple, just get the pens, put them on the truck, but that's not the reality when we look into it.

Q. Okay. And do you have one more set of attributes you would like to talk about in relation to this RFP?

A. Yes. So this is service attributes and capabilities. So this customer is asking about distribution services, who is going to be servicing them. The response here is they're company owned. They are always concerned -- often concerned about accuracy and efficiency of the orders.

And this is something that's going to come up later, Your Honor, which is reliance on wholesaler products.

So, Staples is touting the fact that they have -- their product inventories represent more than 95 percent of the items sold. So they will talk about how they have lower costs because they purchase directly from manufacturers and not through wholesalers. So the wholesaler dependence is there.

E-procurement. You know, as you can imagine, as you probably already know, integrating with the procurement systems and the reporting, that's a requirement basically for large customers, not nearly the same for small customers. So that's here, too.

Q. Okay. And what is the significance of seeing large customers requesting information concerning all of these attributes?

A. So, the reason we're walking through all of this is I'm never going to be an expert on procurement, I don't want to be. But, I'm learning -- we're learning that the large customers have different needs and requirements. And this is -- it's going to line up with what we're going to hear later about -- such as Mr. O'Neill again, saying I really can't go to the smaller guys, they don't meet my needs, the smaller distributors. Okay. Yeah, they sell stuff, they're fine. And look, I'm not dissing them here, it's just these customers with these needs, we're going to see in the bidding data and other indications, that they're a

specialized group, and that in the end they're going to be a relevant market -- the customers in a relevant market. And this is part of the understanding how their needs are different, that is going to dovetail with, ultimately, the relevant market, when we get to that point, and the lack of choices some of these -- many of these customers will have after the merger.

Q. You noted the prominence that Staples and Office Depot have in the bid data for large customers. Why does that prominence raise a concern for you?

A. Well, we come back to loss of choice. You know -- we'll -- all this indicates that, you know, this customer, again, I won't say their name, they -- it sure doesn't look like a small distributor like Guernsey is going to be able to do it, okay, for all sorts of reasons; geographic distribution, these other -- geographic scope, I mean, and all these other elements. So, we're going to need to line up all these capabilities with who can meet these needs besides Staples and Office Depot.

And, again, it's customer choices and are they -- we know they're losing a choice if the merger goes through, the question is do they still have many? And this is pointing in the direction of a lot of these, not so much.

Q. What evidence have you seen in the record concerning the stature of the remaining firms?

A. Well, there's a lot of stuff, and we're going to go through it -- we're going to go through it soon enough. We have all sorts of evidence. Well, first off, we saw their general -- generally not appearing much in the bid data. We're going to look at market shares. We're going to look at testimony from the suppliers themselves, both what you've heard and then there's additional declarations, which I fear I'm getting ahead of myself a little bit, if we're going to go back to the whole framework.

But really, it's all pointing to the fact that there are many small distributors, local mostly, distributors of office supplies, but they're not in this game. Okay. Mr. Morrison, P.D. Morrison, he was very clear of the distinction between his traditional business, you know, in -- I think it was Houston and Austin on the one hand, and his Tier 1 business where he's got to partner with Office Depot to make that go.

So it's really the lack of choices for the large customers that this is all pointing to, and understanding why they have few choices and are losing a big one here if the merger goes through.

Q. Okay. And you've spoken a lot about the attributes of large customers. Have you reached a different conclusion about whether there will be harm to small- and medium-size businesses?

A. It's like retail, I haven't looked at that in nearly as much depth. I think, you know, very small customers -- small businesses, I don't think so, because they don't follow all these steps and all this process.

Medium-size businesses, you know, I'm not so sure. We took a cutoff, which we'll talk about, $500,000 in purchases, basically corresponding to these enterprise customers. And I'm quite confident of harm in that group. As you go down the hierarchy of the customer sizes they have more choices. And I'm not alleging harm. There's a range where I just don't know. And then below that I think not in terms of harm.

Q. Okay. So at the end of the day you're focusing on large customers. And some would say that they're quite powerful and successful companies. So even if they face a price increase, why does it matter, really? I mean, they're not going to be going out of business, right?

A. Well, that is true. And that's just not the right question from my point of view as an antitrust economist.

You know, there's a merger the DOJ is reviewing now, been reviewing for a whole year, but you may have -- probably read the newspapers about this, between Halliburton and Baker Hughes, two huge companies in oil services. Their customers are the large oil companies. Okay. I'm not involved in this merger in any way, but I'm pretty sure the

concern is the higher prices that maybe Chevron has to pay for oil drilling services. Okay. Chevron is not going to go out of business. Okay. But if they have to pay more, that's a loss of competition, that's a problem from antitrust.

One of the things I like about antitrust is it covers the whole economy, all the markets. So it's really -- whoever the customers are, merger analysis, we're seeing if they're going to be harmed, whether they're big or little, okay, whether it's upstream, you know, oil drilling services or whether it's, you know, cable television and it's a consumer.

So here -- look, I'm not saying -- office supplies in some sense it seems kind of mundane. Okay. I mean, I don't want to -- I'm not trying to take anything away from what Staples and Office Depot do, but on the other hand, you know, if you -- we've got that they're selling about -- the two companies are selling about $2 billion a year of consumable office supplies to large businesses. If they charge more to those businesses, 10 percent, that's a couple hundred million dollars a year. That's real money and that's a concern. No, I don't think Bank of America is going to go out of business if they pay more for their pens. That's not the right question.

Q. So if these large customers do face a price increase,

will it have any impact on regular consumers?

A. Well, not directly, but there's always going to be some trickle down or pass through. So -- look, take AEP again, Mr. O'Neill, he talked about -- his job is to control their costs. This is one of the things he does, office supplies along with other things they're procuring. If they have to pay more for office supplies, it goes into their overall costs. As an economist we normally -- I guess, I would say we assume there's some pass-through when a company incurs higher costs, to some extent they're going to pass it through to their customers. We don't -- without detailed analysis, we don't know much. Okay.

So in his case they've got ratepayers, maybe they're regulated, I'm not quite sure. The ratepayers, if their costs go up there will be some pass-through, I would expect, to the ratepayers, you know, who are going to be the final consumers.

MS. SULLIVAN: I'm going to object and move to strike. This is not in his report. He's acknowledged he hasn't done analysis. And Your Honor asked FTC counsel, point blank, in open air, are you alleging any pass-through to consumers and they said no. So I'll move to strike that.

THE COURT: Counsel, what about that?

MS. CERILLI: This is well within the scope of his report. I mean, I think he's just talking about general

economic principles.

THE COURT: That's not the government's theory, though, is it?

MS. CERILLI: I mean, we believe there's, obviously, harm to competition for large customers. I think it's acknowledged, even in the framework, the merger guidelines that there is generally assumed to be harm to any -- harm to direct customers.

THE COURT: What do you mean direct customers?

MS. CERILLI: The large customers.

THE COURT: Well, that's the government's theory, that it's business to business harm, but no other harm. The government was very clear that it was not making a consumer harm case here.

MS. CERILLI: Absolutely.

THE COURT: The average consumer, that's not the government's theory?

MS. CERILLI: No, and we're not seeking to supplement our complaint. What we're trying to explain is why harm to competition -- harm to competition for large customers, why it matters.

I mean, I think that there's been some question about, you know, if a large customer is harmed, why does that matter under the antitrust laws? And I think he's just seeking to explain that.

THE COURT: All right. And again, this is not a jury, so if I hear it and ultimately determine not to consider it because it's not relevant, then I'll say so.

MS. CERILLI: Okay.

THE WITNESS: Could I say a little more or --

THE COURT: Go ahead.

THE WITNESS: So, I'm not talking about whether Shapiro Economics would pay more for their office supplies, that sort of harm, which is outside the scope of what the customer --

THE COURT: Right.

THE WITNESS: But all I'm saying is when the large customers pay more, it raises their costs. We can't possibly track through is Bank of America going to charge more for their loans, because they pay $1 million for office supplies, or is AEP going to charge more for electricity. That's a fool's game to go after that.

But there's a general principle, which we would expect normally some of these costs to be passed through, it's hard to know what shares. All I'm saying, and I really don't want to go beyond this, is you shouldn't think about, oh, this is just a business between Bank of America and Staples, it has nothing to do with anybody else. All these customers, if their costs go up, we would expect their customers, whether it's people with loans or paying

electricity, to pay somewhat more. We're not going into that. I can't analyze that, it would be crazy to try. But, the effects are not cabined in.

THE COURT: You raise a good point, which is the point I raised early on. Well, what is the impact on Professor Shapiro or Sullivan who calls for pens, whatever? Someone is paying that freight. The corporations aren't eating it.

THE WITNESS: So, again, I don't -- I'm not talking about -- I'll have it be me. I don't know how you get your pens, I know how I get my pens. I'm not talking about me paying more for pens when I, let's say, go to Amazon.com. I'm talking about a ratepayer in Tennessee paying more for electricity because AEP has higher costs. It's a different story, but it's still a regular consumer.

But we can't penetrate down to that, that would be -- all these customers, you know, we got Best Buy in one area and Bank of America and another AEP. It would be crazy to try and look at that.

THE COURT: Suffice it to say if the prices go up, costs obviously go up. But you're not speculating on who those costs are passed on to?

THE WITNESS: Right. All I'm saying is we would expect some pass-through to the next level down.

THE COURT: What do you mean the next level down?

THE WITNESS: The ratepayers. Let's talk about AEP. AEP pays more for their office supplies.

THE COURT: Let's use this case. Staples merger goes through, prices go up.

THE WITNESS: To AEP. That's what I'm trying to do. So AEP is one of big customers; again, Mr. O'Neill. So AEP, suppose they pay an extra half a million dollars a year for office supplies. Look, it's a tiny share of their overall cost structure, and I believe counsel for Staples made that clear in cross-examining Mr. O'Neill. But it's still a half a million dollars.

So the question is, is that just, oh, the AEP shareholders, they're out a half million and Staples gets the money? You might think about it that way, it's just a deal between those two big entities. And I'm saying you shouldn't really think about it just that way. Okay. The way I would think about AEP is now we have a higher cost structure, okay, half a million dollars. Normally you would expect them to say, Well, we're going to have to raise our prices a little bit to our customers, which are electricity ratepayers.

Now, look, it's going to be so tiny when you measure it across all the electricity, I can't measure that. I'm not saying anything about it. I'm saying you should not think, Your Honor, that the harm just stops at the AEP

level. Some of it will trickle through, but we can't measure that.

THE COURT: And it's speculative.

THE WITNESS: It's spec --

THE COURT: It's there, but it's speculative as to who the harm is passed on to, isn't it?

THE WITNESS: I would say no. So, what we don't know -- and I know I'm not supposed to use the word "speculative," but I will. It's speculative how much will be passed through. Okay? But every customer -- but we can ask ourselves, if AEP's cost structure goes up, we know who their customers are, they're the ratepayers, I think, if I understand their business. He talked about the ratepayers. He's trying to keep his costs down so they can keep their rates down.

So, what he's telling us, and it makes good sense in economics, if costs go up, they might have to raise their rates a bit. We don't know how much. And again, it's going to be small in the overall scheme of things, it's a half million dollars, they're a big company. But it's still a half million dollars. And it is going to be maybe $100 million when we add up all the customers.

So I guess, just to be blunt, I can see that, you know, from the way the trial has played out, is that Staples would like to say these are big customers, if they pay a

little more money, who cares? And I don't think Bank of America is warm and fuzzy, okay, I don't. But it's not just Bank of America, it's their customers, too, the people who are taking out loans or bank accounts. It's AEP's customers, too. You have to think about them, too. And when you do antitrust, you don't just stop with the big customers, you have to think --

THE COURT: The defendants can speak for themselves. I don't think that's their theory. I think their theory is that the prices won't go up.

THE WITNESS: Sure, okay. That's their primary theory, of course. But they're also, and I don't want to put words in their mouth, I'd probably get myself in trouble, but I think they've also at least insinuated or hinted --

THE COURT: So what.

THE WITNESS: -- so what, who cares? These are big companies, they're already getting a good deal, all that stuff. And my view as an analyst economist is that's just incorrect. I don't look at it. I think -- fine, you will decide, the Court will decide, but my mode of analysis is I care about any customer, depending on the harm.

THE COURT: I'll float the question, I don't necessarily want an answer now, but at some point I would be interested in your answer to the question: Is there any

evidence, any competent evidence that the defendants can offer that addresses and ameliorates that harm that you perceive, the increase in price? Is there any evidence that they can offer in this trial that would persuade you that a harm is not as realistic as you've already articulated? But you don't have to answer that now. But I'm interested in what they can demonstrate, what they can offer in terms of competent evidence.

Yes?

MS. SULLIVAN: Again on the objection, Your Honor. This was never in their complaint. This was never part of the case. We would have had an economist address this issue in our case. This was taken off the table by the FTC and reaffirmed that it was off the table in this case when Your Honor asked counsel pointblank, Are you alleging trickle down effects to consumer? And they say, No, Your Honor, it's not. And now their expert's back-dooring that.

THE COURT: That's absolutely true. I'm going to sustain the objection. It's absolutely true.

MS. SULLIVAN: Thank you.

THE WITNESS: So I think the two main things that I've given a lot of thought to, and certainly they'll put on their case and make their argument, is, first, are there a lot of efficiencies here that are qualified, let's just say, that those would offset these concerns. Okay? And I

certainly accept in principle if they're large and meet the other requirements we'll talk about, that's -- okay, and particularly in this case, since they're claiming efficiencies that are across many other types of customers, not just large customers. So that is a totally -- that's an important question. Okay.

THE COURT: Okay.

THE WITNESS: The other thing really is entry, you know, whether there really is no harm because Amazon will come in or something. And that's more of a question --

THE COURT: You have an opinion about that, too?

THE WITNESS: I do. I do indeed.

THE COURT: We'll get to that.

Go ahead, Counsel.

BY MS. CERILLI:

Q. Just to close this out. And even just setting aside the issue of pass-through, you certainly recognize, as you mentioned, that office supplies are just a small fraction of the costs of what it takes to run a large business. So at the end of the day why does it matter, from a competition perspective, for a large customer to face a price increase on what is a small component of their costs?

A. Well, again, to me, I just look at the magnitude of what we're talking about. If we've got roughly $2 billion a year sales, and let's say 5 percent price increase, that's a

hundred million dollars a year. Okay? And whatever we make of trickle through, and I won't get into the whole pass-through stuff, but even if the first cut would be, that's a hundred million dollars that large customers will be paying, I'll say inflated, or elevated, to Staples after the merger because they don't have as much competition. Okay.

Now, okay, it is what it is. Okay. I'm not claiming -- I don't think anybody is claiming any of these customers are going to go out of business because of that, but they're going to be overcharged.

Q. Professor Shapiro, thank you for that introduction.

Now, let's discuss your analysis under the framework that you outlined at the beginning. I believe the first step in that framework was defining a relevant market. What is your opinion concerning the relevant market in this case?

A. It's my opinion, the relevant market is the sale and distribution of consumer office supplies to large customers in the United States.

Q. And what do you mean by consumable office supplies?

A. These would be what you might call general office supplies; core office supplies and paper, together.

Q. Can you give us some examples?

A. So pens, binders, Post-it notes. I think you're familiar with these now. The standard items that both

companies would count as general office supplies or consumable office supplies.

THE COURT: Ink and toner?

THE WITNESS: So, no, I'm not putting that in. We're going to talk about that; I could do it now. That is not included.

THE COURT: Can you tell me your opinion why it should not be included in that category?

THE WITNESS: I started with it in, and then as I learned that competitive conditions were significantly different for ink and toner --

THE COURT: Can I stop you? You kept it in at first because you made an assumption it was probably in there, right?

THE WITNESS: Assumption or -- again, it's a process. I went through a process. You're going to be following a process, Your Honor, which was, Look -- and defendants are going to love this -- the fact is most of the time when the companies talk about it, when they say consumable office supplies, they often mean really three categories; let's call it office supplies, paper, and ink and toner. And you see that in their materials, that's a pretty common usage.

THE COURT: It seems fairly logical to being a category.

THE WITNESS: Right. So that was the natural starting point. And a lot of the bids that are put out would include these items. And this is what these companies do, they're very good at it. It's also a big area of overlap, like I said. So that's a natural starting point. The reason -- why carve it out, right?

So, the -- what I learned was that, I think especially in the last three to five years, these managed print services have come in where ink and toner is often purchased by a large customer along -- from the same company that's providing the printer or the copier, that's servicing them, and maybe some other services. I'm not exactly sure of the scope. And so that is a different space. Okay?

And let me put it differently. The customers have additional choices for ink and toner that are important. And so, like I said, you look at the overlaps and then you look at the choices. So since there are significantly different choices, ultimately that did not warrant aggregation into the same cluster or group with core and paper. We're going to talk about this more, but that's the gist of it.

THE COURT: All right.

BY MS. CERILLI:

Q. So you defined consumable office supplies. What do you mean by large customer?

A. I'm defining large customer as a customer who purchases at least $500,000 of consumable office supplies in a given year from -- period. Yeah.

Q. What types of distribution services are included in the relevant market?

A. So, basically all modes of distribution. Okay. Staples and Office Depot have what we might call sophisticated high end distribution service with all these elements we talked about; next day delivery, desktop delivery, E-procurement, dah, dah, dah, dah, dah. But I've included in the market, basically, any way that these companies are getting their consumer office supplies. So it's quite a broad market in that sense. Any way that these large companies are getting consumable office supplies is included.

You could consider a narrower market that was just high-end sophisticated distribution, if you will, that wouldn't include some rogue spend from Amazon. I decided to go broader and just include all the modes by which large customers get their office supplies.

Q. And, obviously, we're going to walk through the details of how you define the market, but just generally, what method did you use to define the relevant market in this case?

A. Well, there's a particular method called the hypothetical monopolist test that economists use, and I applied that method. It's described in the merger

guidelines. It's a standard tool.

Q. I would like to, of course, understand how you arrived at the specific conclusion regarding the market in this case. But I would think this is another area where it would be helpful to first assess concept involving market definition.

So what is the purpose of market definition?

A. So, the goal is to -- and again, here is an area where antitrust economists, you know, we're dovetailing with the law here because we're trying to help. I don't mean just me, I mean the whole field.

So we're trying to identify a collection of products that's broad enough, really, so that if it were monopolized, controlled by one entity, that would be a serious problem. Okay.

If somebody just, you know, controls Corn Flakes alone, probably not going to be a problem. If they control all breakfast cereals, now we are worried about that. So ready-to-eat breakfast cereals has been a relevant market, I don't think Corn Flakes alone would be.

It's all from the customer's point of view. What are the choices the customers has? Reasonable substitutes would be the word that often gets used. Include reasonable substitutes for the products or services of the merchant firms.

Q. What are the components of market definition?

A. Well, there's a product, and then a geographic component.
Q. How do economists go about determining a relevant product market?
A. So we have this hypothetical monopolist test and we ask -- and the courts have adopted this, too, we're not off doing our own thing. Okay. Basically the way to think about it is you take what we often call a candidate market or collection of products and you ask, if one firm controlled those, could it significantly raise price? And that's a test. Would they have enough power that we would be worried about that. And if they can, then that qualifies as a market. So that's the hypothetical monopolist test.
Q. Do you have an example from a past case, just to put it in more concrete terms?
A. Good, good. So I mentioned the H&R Block/TaxAct case the DOJ brought, and I was involved in early stages of that. So you always do the same thing: What do the merchant firms sell? In that case, H&R Block and TaxAct each sold tax preparation software that people use to prepare their taxes. So the natural question would be, well, maybe that's a market, tax preparation software. Turns out there's one other major firm, actually the leading firm was Intuit, I think is the firm with the TurboTax program, that's very popular.

So the DOJ alleged that was the market, I think they called it digital do-it-yourself. Basically tax preparation software of that sort. The -- and the court ultimately agreed with that. Okay. But, the -- the emerging parties alleged a broader market, which would include pencil and paper. So another way to do it, to do your taxes or getting a professional to prepare your taxes. Okay.

So ultimately the court decided, the DOJ argued and the court agreed, that a single firm controlling all of the digital do-it-yourself software, tax prep software would raise prices, would have real power and, therefore, that group of products satisfied the hypothetical monopolist test. So that would be the candidate and that candidate passed the test, and so we -- the additional further out products, pencil and paper and professional help, were not included.

So that's an example where the relevant market is a collection of products. Again, I try to keep it simple because the test is a little bit technical. If one firm controlled all those products, would you be worried about it?

Q. And is the hypothetical monopolist test well established among antitrust economists?

A. Very well established. It really -- it was introduced in the 1982 merger guidelines and has been really a staple

of antitrust work. Not just mergers, actually, but other areas, too, for over 30 years.

Q. And what is really the conceptual question that the hypothetical monopolist test is asking?

A. Again, if a single firm controls a group of products, would that be a problem? If you wouldn't worry about that, then you have to broaden the set of products; the Corn Flakes example.

Take two gas stations that are across the street from each other. They're competitors. If they merge, would we worry about it? If there's another gas station five blocks away, probably not going to worry about it. They can't significantly raise price, people will go to the gas station five blacks away. If they're the only two gas stations in town, it's another story.

So you ask: Would one firm controlling both products raise price? In the case where it is an urban area, the answer is no. In the case of the only two in town, the answer is yes. You give the right answer.

Q. So the central question is what are all the alternatives that are outside the market, the candidate market?

A. Well, you first test the products in the candidate market and then -- I'm not sure I understood your question, actually.

Q. Sure. So is the question whether the candidate market

includes the alternatives that customers might turn to in the event of a price increase?

A. Yes, that's a key question. In the case of the two gas stations, there's a gas station five blocks away, that's a close alternative, you need to include it. And if you don't, you will find the test is not satisfied.

Q. And how does the fact that emerging firms are involved in sale and distribution impact product market analysis?

A. Well here, so the Staples and Office Depot, they are intermediators, they are not manufacturing the office supplies, they are at this intermediate level, sale and distribution. So that's why the question here, it's not really about which pens or clips to include, it's which forms of distribution we want to include in the market, because that's what they do.

So, here, and I think I touched on this earlier, we could imagine a narrower market, just with the very sophisticated high-end distribution that has all these extra features, and that might potentially satisfy the hypothetical monopolist test, I'm not really sure. Since I wasn't sure, I included a broader set of distribution. That would be all means by which these large customers can get these consumable office supplies.

Q. I'm sorry, can you explain that further, how it is that your market definition is broader or conservative in favor

of the defendants?

A. Well, let's use the Sysco/US Foods case as an example. So, they're food distributors. And the FTC alleged that the market was broadline food distribution, which, as I remember, includes a wide array of products and value-added services, and something else I can't remember. And that excluded certain types of distribution of food; specialty distributors, cash and carry, where you just go to the store and buy it. Okay. This is, you know, special. So there you had a distribution market that did not include all forms of distribution.

Here we've got really a broader market because it includes all forms of distribution of consumable office supplies. Whatever way the customer can get the pens and are doing to get the pens or other supplies, that's included. If we took a narrower market, Your Honor, and just looked at the high end distribution with all the features, Staples and Office Depot's share would be even higher than the ones I'm going to show you.

Q. And in general, are the products and services that are included in a relevant market all substitutes for each other?

A. Yes. Normally that would be the case, such as different types of tax preparation software. They're substitutes. And that's the normal situation for when we're defining

relevant markets.

Q. Are there instances in which economists use a different approach?

A. Well, here we've got what we call cluster markets, which creates an additional dimension of complication, if you will. So what we're doing is -- let me talk about it from the point of view, let's say AEP again.

They need pens delivered to their locations. They also need binder clips delivered and Post-it notes. Getting pens is not a substitute for binder clips, they need both. They don't substitute each other.

So, you might think we could ask about the distribution of pens, distribution of binder clips, distribution of Post-it notes. They need all these things. There are literally thousands of items. So what we do -- that's this notion of cluster market -- is we aggregate or add up a whole bunch of similar items that are -- where the competitive conditions are similar, and that's what we call a cluster. So pens are not substitutes for binder clips, but we're going to include them all in this relevant market.

So it can be a little confusing because this clustering is really a way to avoid having to do thousands and thousands of separate analyses.

Q. Can you give an example of a cluster market approach?

A. Well, an area where it's been -- well, an example I like

to give -- still, it may be slightly abstract. Like in clothing, so let's take shoes. A department store needs shoes. They need size 4 shoes, 5 shoes, whatever. Size 4 shoes are not substitutes for size 10 shoes. But we're not going to analyze a merger between shoe manufacturers by looking at the market for size 4 shoes, the market for size 10 shoes separately. We're going to look at the market for shoes, at least that are a similar type of shoes. So that's an example of a cluster, you know, shoes.

Q. Do you also have an example of a cluster market that's used in practice?

A. Sure. You didn't like the shoe example? Okay, we can do better.

THE COURT: Actually, I did. I like that.

THE WITNESS: Thank you, Your Honor.

THE COURT: I wrote it down, look, size 4 versus 10.

THE WITNESS: Okay, okay. I don't know if I got your size right. But okay. So an area where this has come up repeatedly, and FTC has been involved in this, is in hospital mergers, where there's different types of services and particular different types of surgery. Okay.

So let's suppose -- you might have a hospital that does cardiac surgery and they do bypass and they do valve replacement and some other stuff. Those are not substitutes, you got one or the other. It makes sense to

look at maybe cardiac surgery or some other types of surgery that the hospital does as a grouping, so long as that's not going to give misleading results.

And the basic principle here for the cluster market is if the different products are reasonably similar in terms of their competitive conditions, then we can group them together.

BY MS. CERILLI:

Q. So, from following, the items in a cluster market are often not substitutes for each other?

A. That's the whole idea, is we're adding up a bunch of things that are not substitutes; different types of heart surgery, in my example.

Q. So in theory you could define separate, relevant product markets for each of the different items in the cluster?

A. Yes, you could. And this is entirely a practical question. What data do you have? How can you measure things? How many do you have to do? Is it three? Is it a thousand? It's just practical. But so, yes, in principle you could divide all those things up and -- but you don't want to do that if they're pretty similar, ultimately, in terms of the market shares you're going to get, and the competitive conditions are similar.

Q. And so how do you decide what items to include in a cluster market?

A. Again, it's mostly a matter of what's practical. You want to follow groupings that, again, where the competitive conditions are similar.

So let's go back to the hospital example. Suppose these hospitals merge, there's two hospitals that merge, and they're the only ones that do this cardiac surgery in a given city. Okay. And it's going to be probably fine to aggregate those. Suppose they also do orthopedic surgery, okay; knee surgery, shoulder, whatever, would you include those too?

Question: Well, suppose I learn that actually there's a whole bunch of surgery centers in the same town who do a lot of orthopedic surgery. Okay. And the hospitals actually have a pretty small share of knee surgery, because there's all these other people, but these smaller facilities don't do cardiac. Then you shouldn't include the knee surgery, okay, because the competitive conditions are very different. And if you were to include the knee surgery you would get screwy results that would be misleading.

Suppose you added knees and hearts together and there was a lot of money in knee surgery, I've had it myself, if you add it all up you might say, oh, the share of these two hospitals in the overall surgery market doesn't look very big. But then if you came to your senses, you'd

say, wait, it's a merging monopoly in cardiac surgery, I've got to be worried about that.

So if you include some products that have very different shares or competitive circumstances, it's just going to lead you astray. So you have to avoid doing that. As long as you follow that principle -- I guess we have on the screen here now slide 14. If competitive conditions are similar, you can take the cluster market approach. And that's the guided principle.

And this is very much a cluster market case, Your Honor, because there are thousands and thousands of individual items in the cluster grouping of consumable office supplies. And, yes, we have to decide: Does paper fit in? Why doesn't ink and toner fit in? We have to work through that.

THE COURT: You have paper, you have pens, you have pencils, but not ink and toner?

THE WITNESS: Correct.

THE COURT: And the conclusion has to be not reasonably similar?

THE WITNESS: Correct.

THE COURT: And not reasonably similar because of?

THE WITNESS: The managed print services.

THE COURT: Right. Okay.

THE WITNESS: If managed print services were

small, I might just cluster it anyhow. But they're pretty big, okay? And Staples and Office Depot made that argument to the FTC, that they are facing a lot of companies who are carving out ink and toner as part of MPS. I looked at that and I said they have a good point, I'm less concerned about ink and toner. There might be still be some concerns, but I'm less concerned. So it's very practical.

BY MS. CERILLI:

Q. I really would like to explore that in more depth, why ink and toner weren't included and other items were. So how did you pick the cluster of items that you used to define the relevant market here?

A. Well, again, I think we started with what everybody in the industry normally talks about, which would be the -- call it core office supplies, paper, and ink and toner. And then we carve out ink and toner for the reasons I talked about with the judge. Then we have to check that the other remaining items are similar enough. Paper is not -- there is some differences between paper and the core items. Okay. So I think that's -- and Mr. Orszag came back in his report and criticized me for lumping it together with core. And I think he made some good points there, and I responded by showing what happens when we break it out, and we'll show you that.

So I'm not staking myself to -- that you have to

do paper and core together. What I'm going to say is it doesn't really matter whether you aggregate them or not. But the bigger thing that's come up a lot so far in this hearing is all the other stuff that Staples sells, beyond office supplies, you know, BOSS -- I believe Staples calls it that. And look, they make a lot of sales there.

So another big question is, well, should we include technology products? Should we include furniture? Should we include janitorial and sanitation, jan-san. So these are other big groupings, and I did not include those. And I think it's very clear that the competitive conditions and suppliers in those other categories are sharply different than consumable office supplies.

So it's very similar to the knee surgery example I gave. It would be -- give really misleading results to include them. Conditions are different. I did not.

Q. So why would it be a mistake to include these additional product categories in the cluster?

A. Well, okay. So take furniture for example. You always have to remember with market definition, one of the key things you're going to do is measure market shares. I gave the example with knee surgery, but let's talk about the furniture in this case.

Suppose we included furniture? I don't actually know off the top of my head how much the total volume of

furniture sales are to large customers, but furniture is pretty expensive, I imagine it's a lot. And I'm quite sure that Staples and Office Depot's market shares of that furniture sale are significantly smaller than they are. So if you included that and lumped it all together, it would pull down Staples and Office Depot's market shares for sure. Okay.

That's a correct answer. That's not a gerrymandering. That's the same as the heart surgeries. Okay. That tells us that that lower number would be -- would be, I'll say, misleading, in terms of the competitive effects and what's likely going on in the consumable office supplies space. The fact that there's all these competitors in furniture doesn't really solve the problem that Mr. O'Neill has when he wants to procure office supplies and his two main choices have merged. Yes, he has good choices for furniture, so what? He's still behind the eight ball on that.

So each of these BOSS categories, furniture technology, etcetera, is really very different. For technology we have Dell and CDW. For jan-san, Grainger and Fastenal. That's their home base. That's what they dominate. And Staples and Office Depot. Their home base is the consumable office supplies. So it would -- to me, this is an easy part of the case, frankly, Your Honor, that you

shouldn't be including those other categories. And I'm sure there will be more questions about that, but this is straightforward, as far as I'm concerned.

Q. But what about ink and toner? I mean, obviously you would agree in practical terms that ink and toner is an office product that is consumed, right?

A. Sure. And I even noted that it's often included in the normal uses of the -- the common, what many people would term consumable office supplies. And the plain language meaning, it is consumable, it is an office supply. So that's not my point.

Q. And so why did you not include ink and toner in the cluster here?

A. Well, I think we had -- we covered this with the Judge, the evidence -- I think it was pretty clear that these managed print services are significant. And they're often providing the ink and toner.

We have evidence from Lexmark, Xerox, another declarations that I've read to this effect, that they're supplying ink and toner through MPS.

I asked, actually, well, are they also supplying paper? Because if they're supplying paper in a significant way, then maybe paper is different, too. And the answer to that is no, it's not what they do. So paper did not warrant getting carved out for that reason.

THE COURT: Let me ask you this: Had you included ink and toner, would your ultimate opinion be different?

THE WITNESS: So, let me pause for a moment, Your Honor, just to make sure. It's a little bit of a tricky answer. If you include ink and toner in the cluster, then the next step would be you calculate -- we calculate market shares. They're going to be lower. Okay. Ink and toner is a significant volume of sales.

THE COURT: Right.

THE WITNESS: Okay. So, it's going to make a real difference, it's not just a small item. So if you include it, then you get -- now Staples and Office Depot, the shares I'm calculating, their combined shares are around 80 percent, which is very, very high. Okay.

I would think -- again, this is a little bit off the top of my head, but given how I know how important ink and toner is, if you included it, it would pull down that share. I'm not quite sure what their share is in ink and toner and how big it is, but it would pull it down -- let me just real quick, purely for illustrative purposes -- suppose it pulls it down to 60 percent, because that would be the logical where you would go with this. Okay.

Now -- so first off, I wouldn't get fooled by that, so it wouldn't change my opinion, because I would say, well, that's 60 percent, but that understates the problem in

consumable -- in core and paper, because that market share is this blend. And I don't get -- I'm not -- you know, I'm not going to be blindly following the market shares. I got to look at what's going on in the market, too.

So I wouldn't really go off in that stray direction. But even if you wanted to grab the 60 percent share instead of 80 percent share, that's still very high. Again, I don't think it's the right number to look at for the reason I just described. But the answer is no, okay, that the shares -- I don't know for sure, but I think they would still be quite high.

Look, if they were much lower, then it would just be like something's screwy here, right? There's so much ink and toner, so much Office Depot, it would just be a flag that that was a mistake, like the knee surgery.

So, no, my opinion is not based on how these boundaries are drawn and how this cluster is formed. That's just a way to -- we have to measure things, so we can measure shares and then ultimately what's going on in the market, how are the customers affected?

THE COURT: So the answer is no, it would not affect your opinion?

THE WITNESS: That's a much better answer. Yes, you got it. In the end it's no. I was giving a long explanation of why in the end it would not matter.

THE COURT: All right. Okay.

BY MS. CERILLI:

Q. Is ink and toner even a substitute for any of the products in the relevant market cluster here?

A. No, no. It's like a knee surgery again; it's not a substitute for heart surgery, it's a different product.

Q. Okay. And it seems like when you talk about focusing on consumable office supplies, it has the effect of focusing just on the product items that Staples and Office Depot have the most prominence in. So isn't that, in some sense, cherry-picking the items to focus on?

A. No.

Q. And why not?

A. This is what we do in merger analysis, we look at where the firms overlap and are significant and where there are fewer choices.

As I study this, you know, it shifted away from retail because there's more competition there. It shifted away from ink and toner or furniture. So it's honing in on where the problem is. And sure, that's going to go along with high shares. Okay. That's what we do all the time.

This notion that that's somehow gerrymandering or rigging it, I just -- that's why -- that's just nonsense to me, okay. That is not correct.

Q. You mentioned that you even think it's a mistake to

include these other items in. But what really is the harm of just, you know, putting ink and toner, putting furniture in the relevant market?

A. Again, because you're going to get -- the more of these other stuff you include, it will pull down the share of Staples and Office Depot, but in a misleading way. Okay. If our concern really is consumable office supplies, then the share -- their share in that line of business for those products is what we want to measure and look at. We don't want to blend in furniture sales. So it would give you a misleading set of shares.

Now, when I answered your question about ink and toner, you could recover from that mistake by saying, Wait, that number, not so good, got to look at the bidding. And I would recover, I would like to think. But that's why -- it takes you off track in a misleading direction to do that. It's a mistake.

THE COURT: I could see the -- the janitorial-sanitation, I can see that, and the pens and the paper, apples and oranges, right, cardiac surgery, knee surgery. Office furniture, you know --

THE WITNESS: Very different.

THE COURT: But toner, I'm still hung up on that toner and ink, you know, that's --

THE WITNESS: Well, don't be.

THE COURT: All right.

THE WITNESS: I don't really --

THE COURT: Trust you, right?

THE WITNESS: Well, I guess -- look, the -- it is -- look, it's -- it feels more like paper and those other stuff, okay, just in terms of how it's used.

THE COURT: You said it's reasonably similar and that's the test. Reasonably similar.

THE WITNESS: Well, no --

THE COURT: We're talking about paper and pens and binders and --

THE WITNESS: Okay. Wait. Hold on. If I said reasonably similar I need to correct --

THE COURT: That's what you said.

THE WITNESS: Well, so, it's not reasonably similar in the sense --

THE COURT: You told me earlier -- I think you told me earlier it's reasonably similar. I wrote it down. If I made a mistake -- you don't recall saying that?

THE WITNESS: I do not.

THE COURT: All right.

THE WITNESS: And it's not my view. Okay. So, let me slow down and make sure I get it right.

THE COURT: It's here. In this little box, it's here somewhere, but I'm not going to try to find it.

THE WITNESS: Is that the final record then, in the little yellow box?

THE COURT: It probably is pretty good, you know. But no, it's not final -- I thought you said -- I wrote it down, but I normally don't put any spin on what I write down.

THE WITNESS: Okay. So let me just -- I don't want a confused record here. So -- and if I said it, maybe I misspoke, I don't know. Okay. So --

THE COURT: Tell me if I'm wrong, is that the test, reasonably similar?

BY MS. CERILLI:

Q. Well, Professor, maybe you can recap the test for why you decided to include items in the market.

A. Okay.

THE COURT: So if it's not reasonably similar, then what is it?

THE WITNESS: I've been using the term reasonably similar for competitive conditions are reasonably similar, is the test for including different items in the cluster.

THE COURT: Right.

THE WITNESS: Okay. And I'm saying that's true for pens and binders and Post-it notes and so forth.

Now, I said it was not the case for ink and toner.

THE COURT: All right.

THE WITNESS: Okay. And our discussion about --

THE COURT: Not reasonably similar.

THE WITNESS: Because of Manage Print Services there's an important set of up suppliers who provide ink and toner, and it's logical because they're doing copiers and printers. It's a different business. It's very similar, actually, in my view, to the janitorial/sanitation, which a lot of customers get along with labor, basically, services. People come and clean. It's a whole different line of business.

Managed Print Service is like that. You are getting some labor and other things along with ink and toner. It's fitting into a natural bundle of product. So no, I'm saying ink and toner is not reasonably similar in terms of competitive conditions. And so that's why I carve it out.

To go back to -- while you're still hung up on it, because I don't want you to be hung up on it, it feels -- maybe this is where we had a miscommunication. It feels closer to office supplies because, you know, it's used in the office and it's ink, and it's kind of like a pen -- I mean, just intuitively. But that's not the test. It's not a functional substitute. So when we're clustering, we're clustering a lot of things that are not functional substitutes.

So then we're asking are competitive conditions reasonably similar? So even though it has some characteristics

that are similar to, let's say pens or other office supplies, the competitive conditions are different, and it's all about MPS. That's the only point here. And that's significant enough that it does not belong in the cluster.

THE COURT: But for MPS it would be in the cluster?

THE WITNESS: Yes.

THE COURT: All right.

BY MS. CERILLI:

Q. Just to make sure I understand it correctly. So when you're dealing with a cluster market, you're essentially aggregating items that are not necessarily substitutes for each other?

A. Yes.

Q. The criteria that you're using to decide whether to include an item or not is whether those items are subject to similar competitive conditions; is that right?

A. Yes.

Q. What does it mean for an item to be subject to similar competitive conditions?

A. And I've been using the term "reasonably similar competitive conditions," that's the language we've had here. It's really who are the suppliers, who are the main suppliers? Certainly looking at market shares is a big part of that. And that fits with the fact that we're ultimately going to measure market shares, and so it dovetails.

You could look at other things, such as entry conditions and so forth. But I think it's usually hard -- in practice, it's very hard to do that. So I would mostly focus on who are the main suppliers in the market shares for the purpose of clustering.

If there are other differences, we'll have to deal with that later in the analysis. We can't do everything here in this first stage with market definition.

Q. So how did you determine that the items that were included in your cluster are subject to similar conditions?

A. Well, there's a range of evidence from Staples and Office Depot, from the customers, that these products are typically -- the same firms, basically, are selling them and successful in them, like I said, with the market shares and, you know, often bought in a grouping together, which is going to dovetail with the market shares being similar.

So, this is how the companies think about the business, everything lines up in the direction that these are similar. Of course, I look to see whether there was something that was wildly different, and I'm not aware of that.

Q. And so by similar competitive conditions, you're looking at whether the set of competitors that sell those items is roughly similar?

A. Yes, and their shares, relative success. Again, because

we're going to use this to measure market shares, so we don't want to have very different market shares adding up. That's when you can get trouble.

Q. Why not examine each of the items separately? Why not examine sales of pens and sales of binders?

A. Because there are thousands of them. And that's our next chart exhibit here. I think we would all be exhausted. Certainly my staff would be. So there are thousands of items and it's not practical to do that. And again, like I said, there's a lot of commonality here, tens of thousands of things are sold and used, and the firms, you know. So here's the numbers, Your Honor, on consumable office supplies.

Again, this is average number purchased by a large customer. Okay. So it's in the 4- to 5,000 range. We have data from each of the three companies. Actually, we have data going back to before Office Depot and OfficeMax merged. It's similar, similar numbers.

Q. If customers buy a certain set of products together, like it's in their same contract, does that mean that all of those items belong in a cluster market?

A. No. We talked about ink and toner, which is the sticking point here of sorts. I'm happy -- I totally recognize that often these large companies will buy ink and toner from Staples or Office Depot with these other items, but often they don't. Okay. So the fact that they

sometimes do does not mean it belongs in the same cluster. We have to go back to are the competitive conditions similar? It's not what's the package of products that customers contract for.

Q. And just to sum up before we move on. Why is it, in your view, okay to include the items that you included in your cluster, but to not include ink and toner and the -- what they call beyond office supply products?

A. Because we're going to -- well, first off, we're going to satisfy the hypothetical monopolist test. We're going to check that box off. We are going to come to that. And we're going to get market shares here that are more reliable and that reflect the competitive situations and concerns in the area of the greatest overlap, which is the consumable office supplies, as we've defined it.

Q. And you mentioned the other component of market definition is the geographic component. Just generally, how do economists go about defining a geographic market?

A. It's the same thing as we do for product. We look at the geographic area where the firms compete and where, again, if a single firm were to control all the supply in that area, then this would be a problem.

Q. And what is the relevant geographic market in this matter?

A. Here we're looking at the entire United States, which

effectively means looking at large customers, wherever they may be in the United States. As far as I -- I'm pretty sure that Mr. Orszag, the party's expert, has agreed with me on that. We have one thing we agree about.

Q. And did you include all customers who purchase consumable office supplies in your market?

A. Well, just the large customers.

Q. And what is your definition, again, of large customers, just to reset?

A. So that's the $500,000 or more purchases on an annual basis of the relevant products.

Q. And why is it appropriate to include in the relevant market only certain customers?

A. Well, this flows back from our earlier discussion about the bidding and the RFPs. This is the customer group that appears vulnerable to anti-competitive effects resulting from the merger. I don't see the same concerns for consumers or very small businesses. I know that it takes a little bit of shaking one's head to understand how -- you know, these are really large, powerful customers, how they can be the ones who are vulnerable. But even if you're a powerful customer, large customer, you need choices in order to have bargaining leverage. And that's what's going to go away. And we talked about AEP. So these are the customers whose choices are being restricted in the way that's most

worrisome. That's the focus.

Q. Is this approach of focusing just on specific customers supported in economic -- the economic framework?

A. Yes. So we have a slide here, we're up to slide 17. This is a quote from the merger guidelines. And I know this approach was adopted in the Sysco/US foods case, as well, which I don't know whether I should read or not. But describing how there can be a group of customers, so-called targeted customers, who are harmed by the merger even if other customers are not. And it's always going to be the customers for whom the two merging firms are really important choices, but they don't have that many others. Okay. Again, we have -- it's a good example of that because the small businesses have more choices. Big businesses have some choices, but it's more restricted, given their needs.

Q. So did you evaluate in the record to determine whether the conditions for focusing on just a particular set of customers are satisfied here?

A. Yes. You could see, Your Honor, the title here is actually Targeted Customers and Price Discrimination. So price discrimination is the general concept of charging different people different prices, like a senior discount and a regular price at a movie theater.

Here we clearly have price discrimination. The large customers get a good deal, they get lower prices. So

we know that price discrimination is feasible here, it's going on. And if the merger does lead to higher prices for the large customers, that's -- well, we've got these conditions are met. In other words, the price to large customers can go up while the price to other customers is not because they're disconnect. And we see that, we see that in the market.

Q. And because you found that prices were individually negotiated, did you analyze the merger for each customer separately?

A. No, that wouldn't be an efficient or very informative way to go, customer by customer. We've grouped together large customers because they have commonality in terms of their needs, and that way we can measure market shares in an intelligent way and so forth.

Q. Why did you draw the line at $500,000 in consumable office supplies spend?

A. It's truly a practical issue. This trying to roughly correspond to what the parties -- they have a notion of enterprise customers, which is more like $1 million a year of spending, but that's all purchases. We're just focusing on purchases of consumable office supplies. There's a pretty good alignment between this size of customer and their enterprise customers. I think it's roughly -- it's in my report, Your Honor, but something like 90 percent of

these customers are enterprise or 90 percent of enterprise are these. They're closely aligned. And it goes along with that table we saw, which is these are the customers who have the formal RFP process or something. Not always, but they have these needs and demands and, for example, they are often geographically dispersed, so they have -- that affects who can do the business for them.

So the fact is, you have to draw the line somewhere. There's no magic place that's the right place. It's just a practical thing to do. I have some concerns about customers in the next grouping down, they're a little too small to be included here. But the clearest evidence I have in measurements and so forth are in this group, so that's what I presume.

Q. Would your opinions change if you used a somewhat different cutoff?

A. No, I don't think they would. I have got some data to show you, Your Honor, where we used the $250,000 cutoff, and I thought actually the shares would go down, and they didn't in that measure. If you go down far enough, if you go down in customer size far enough, I'm sure the shares would fall for Staples and Office Depot.

So, like I said, there may very well be some harm to customers in the next smaller grouping, but it wouldn't -- but moving the boundary around somewhat would

not change my opinion, and inevitably there's going to be customers who move from one to the other, from one year to the next, there's always some messiness like that. That's not going to matter, in my opinion.

Q. I believe you mentioned that the large customers in your market are commercial entities?

A. Yes.

Q. Why did you not include government entities?

A. Again, we could have included them, it would be harder to measure some of these things. Government entities are different in that they often have, say, local or small business preferences. And in other words, they're interested in things other than the more strict commercial concerns, and so they do have somewhat different demand. I just don't know whether they will be harmed, actually, so they're not in.

Q. And you mentioned earlier that hypothetical monopolist test is the standard economic tool for defining markets. Does the relevant market you defined here satisfy that test?

A. Yes. Absolutely.

Q. Can you briefly restate what the hypothetical monopolist test is?

THE COURT: I've got it. I've got it.

BY MS. CERELLI:

Q. Does finding that the hypothetical monopolist test is

satisfied mean that the merger is anti-competitive?
A. No, no, of course not. It's just a step to identify the grouping of products that we want to look at. You could define the market and find the merging firm shares are small and no problem. So it's simply a way of defining the sufficiently broad group of products so when we measure shares it's meaningful.
Q. In the market you defined in this case, what is it that the hypothetical monopolist controls?
A. All sale and distribution of consumable office supplies to large customers in the United States.
Q. And what evidence informed your conclusion that the hypothetical monopolist test is satisfied here?
A. Well, an easy way to see that it is is to note that Staples and Office Depot and other firms are just offering substantial discounts to win business from each other. So if we think about -- a hypothetical monopolist now gobbles them all up, it's the only choice, wouldn't offer those discounts. Why would they? The discounts are only offered because the firms are competing.

So the hypothetical monopolist would charge a significantly higher price, wouldn't face any competition. That's the whole concept. And so we know that would be significantly higher.

THE COURT: No doubt in your mind that would

happen, they would charge higher prices?

THE WITNESS: No doubt in my mind. Because we see -- all the discounting we see, the hypothetical monopolist, why should they? No reason to. It's not discounting --

THE COURT: Is that because of their obligation to their shareholders? Is that what it is?

THE WITNESS: The hypothetical monopolist?

THE COURT: Yeah.

THE WITNESS: That's not a question I've ever heard before. That's a good one. The reason I say that is it's construct. So let me just -- the assumption -- in this method, the assumption is that --

THE COURT: Well, I'm sorry to interrupt, but that would be consistent with making more money, though, the obligation to the shareholder. That's what I meant, to increase the shares of the stock.

THE WITNESS: Yes. Let me try to answer. And I'm not sure I'm with you, Your Honor, but I'm trying.

The assumption in this method is that this hypothetical monopolist, this single firm controlling all the consumable office supplies to all the large customers in the United States is out to make the most money. Okay. It's a profit maximizing --

THE COURT: For the shareholders, for the company,

right?

THE WITNESS: Yes, exactly.

THE COURT: You've never heard that before, making more money for the shareholders? That just seems to me to just logically flow. We're going to raise the prices because people buy stock in our company, we want to give them a good return on their investment.

THE WITNESS: I see. So this is going to something, I would say, a fundamental aspect of my field, industrial organization and antitrust economics. So our working assumption, we don't even talk about it much because it's implicit, is that the firms that we're looking at are out to make the most money.

THE COURT: Right.

THE WITNESS: And whatever -- and so this is really important and fundamental because when we're trying to figure out what's going to happen in the future, which this whole analysis is forward looking, we're assuming all the different players are out to make money; Amazon Business is out to make money, are they going to make these investments? W.B. Mason is out to make money, will they expand or not? That's a fundamental thing. Are you asking -- and that applies to hypothetical monopolist, as well as all the real world firms. So, that's fundamental to our craft.

Are you asking about questioning it or wondering -- I'm not quite sure what you want to know about it.

THE COURT: No, no, I was just -- no. I started off by asking you, there's no doubt in your mind that prices will go up, and I tied that to the obligation of a company to enhance the value of stockholders.

THE WITNESS: Okay. So, let me --

THE COURT: It seems to be natural.

THE WITNESS: It is. So, yes, I'm with you there. I was a little thrown off because you were asking about hypothetical monopolist, this special kind of construct we have. Let me talk about Staples.

So when I say I think there's a reason to believe Staples will raise the price after the merger, okay --

THE COURT: You say there's no doubt in your mind that is going to happen.

THE WITNESS: I'm not as confident about that. I think that's likely.

THE COURT: Okay. Just stick with the test. The test is a reasonable prediction, right?

THE WITNESS: For the merger itself. The hypothetical monopolist test, I'm very confident about that. The test is satisfied. But no, the overall predictions of the merger, I don't claim to be certain about these things. Okay. But I think it will help, what you're asking about,

why -- the fundamental basis for what I'm saying here is I think it will make -- Staples will make more money by raising the price than not. Okay.

Now, I'm sure you're going to be hearing from their CEO that that's not true. Okay. I understand that. He knows his business. I'm not trying to mix it up with him, as it were. But, the prediction is based on what I see as in the incentive, that Staples incentives will be, assuming that they're out to maximize their profits for their shareholders.

Okay. So that's, again, implicit, that's -- the whole analysis is based on that. And, look, if Staples would lose a lot of business by raising the price, then it wouldn't pay. And that's what I'm sure he's going to tell you, why they won't. Okay. And I'm arguing, well, a lot of the reasons they've offered discounts is to get business from Office Depot or to protect customers and not lose to Office Depot. He's not going to have to worry about that anymore. And that's why I think they'll be able to raise the price.

And I think Mr. O'Neill from AEP is worried about the same thing, and other customers are worried about the same thing. But it's because, again, Staples, assuming they're going to be kind of hard-nosed about it and make more money, if they can. And, in fact, their shareholders

would force that upon them in our system. Okay. So that's behind all of the analysis.

And I should say, though, it's not -- it's not a shortsighted profit maximization. Look, I wouldn't be -- I would expect them to say -- and maybe they've already said this, Look, we could raise the price, maybe we would get some more customers for a little while. But it would bring Amazon in, the customers would be mad, all these horrible things would happen, that won't pay. If that were true, I would say that won't raise the price. I would agree.

So it's a long run, thoughtful, sharehold -- maximizing profits for shareholders. Okay. And I'm going to tell you, I'm telling you that I think with that perspective there will be an incentive for them to do that for the foreseeable future.

THE COURT: All right. Thank you.

BY MS. CERILLI:

Q. When I read about the hypothetical monopolist test in H&R Block, I found it pretty intuitive in that context to understand what was being asked and answered. And correct me if I don't get it right, but what I understood in H&R Block was that there was a proposed market for digital tax preparation. And the Court was asking, and the economist in that case were asking if a single firm controlled tax preparation, would they be able to profitably raise prices

without customers switching to pencil and paper preparation.

Is that a fair characterization of the question at H&R Block?

A. Yes, that would be the implementation of the hypothetical monopolist in that test. Single firm controlling -- let's just think of it, all three versions of tax prep software, the H&R Block, the TaxAct and the TurboTax. Okay. Not just the merging parties, but everybody, would they raise price? And the answer is going to be, well, would it be profitable? Yes, unless a lot of people would switch to pencil and paper or maybe professional preparation of taxes.

So that's what you need to be thinking about, how many customers would you lose in this hypothetical monopolist if you tried to raise the price. And in that case I think the Court -- I know the Court agreed that there wouldn't be that much substitution to these other forms of tax prep, they just weren't that close a substitute. And so digital, do-it-yourself was a relevant market and satisfied the test.

Q. And so in that case the hypothetical monopolist test would have failed if the Court had found that people would have switched a lot from digital tax preparation to pencil and paper tax preparation, generally speaking?

A. Right. That's right. If there were a lot of people who

would shift to paper, then the relevant marker would have to be broader, it would have to include pencil and paper prep. And the implication would have been the merging firm's shares would be smaller. And you would include a number of people doing pencil and paper prep, but that wasn't the case. They kept with the DDIY, digital-do-it-yourself market.

Q. Okay. But in this case here, if I understand correctly, you're alleging a relevant market in which all sales of pens and paper and consumable office supplies to large business customers are included, correct?

A. Yes. It's really very broad in that sense, they're all methods of distribution. The market I'm putting forward is very broad. And that's why it's dead easy to satisfy the hypothetical monopolist test.

Q. Okay. And so, what is it in that type of market that would even discipline the hypothetical monopolist from raising prices, if you're positing a single firm that controls all sale and distribution of consumable office supplies to large customers?

A. Right. The only discipline would be if people said we're going to have to use fewer pens, we're going to conserve on Post-it notes, which, of course, they're already doing. You've heard from folks about they're trying to control their spend. So the only discipline, and I'm not

saying it's nonexistent, would be reduced usage of consumable office supplies if the price went up. So that's -- so that's a fair question. Would there be a lot of that? It's conceivable there would be, but the evidence shows that's not the case. That's why I say it's an easy call, actually, in the end, that this group -- that this satisfies the hypothetical monopolist test.

Q. I'm sorry, but why is it an easy call? I mean, what is it in the record that you're seeing that you think a hypothetical monopolist, if we eliminated Staples, Office Depot, W.B. Mason, all of that would find it profitable to raise prices on consumable office supplies sold to large customers?

A. Well, I think the first thing we see is all of the discounting that takes place, because the firms are competing against each other. They're not offering lower prices to get these customers to use more pens, they're offering lower prices so that they can sell the pens rather than somebody else. Okay. I mean, that's, overall, basically, all the evidence we've got, including, you know, the various up-front -- the various things we saw, such as an AEP slide that Staples and Office Depot are offering to large customers to win that business.

So we see that. That's pretty compelling right there. We also can formally do the test, which involves

margins and this recapture rate. And that confirms this result, if we want to do that for the Judge at such a late hour.

Q. Maybe very quickly, if you could just show that you -- I take it that you did do the test?

A. I -- look, I don't mean -- I like doing it, it's just not usually the most popular part of my testimony. So there's a standard formula here that I've used, it was also used -- in fact, in the -- used and accepted, I believe, by the Court in the --

THE COURT: In Texas Circuit Court, has accepted this test.

THE WITNESS: I believe so.

Okay. So it involves the profit margin, one thing which we've measured here. The other -- it's a bit harder to -- what takes a little more time is this recapture rate, which is if one firm raises the price, they lose some business, how much of that business goes to the other firms in the market, versus flowing out entirely.

And if the recapture rate is high, then that means there's a lot of competition between the firms in the market, and that's going to tend to cause the test to be satisfied.

So we've got some algebra here, it's redacted. The evidence indicates to me, given the profit margins we're

observing, that this test, that it's easily satisfied.

And so those are the two pieces why I think it's -- this is not a tough call, the direct competition and the Algebra here.

MS. CERILLI: Your Honor, this would be a natural breaking point, if you wanted to take --

THE COURT: You know, it's your call. I mean, if you want to go a little bit later, that's fine. If you would like to stop now, that's fine. What would the parties like to do? I mean, there's a time sensitive aspect to this case. Do you want to break now and we can start tomorrow at nine?

MS. REINHART: That would be great, Your Honor, if we could do that.

THE COURT: All right. You want to do that?

MS. SULLIVAN: That's fine.

THE COURT: All right. I'm mindful that -- I would like to be able to finish the examination of the expert tomorrow. Tomorrow is Friday, is that doable?

MS. SULLIVAN: It depends on how long they have.

THE COURT: How much longer do you need, Counsel?

MS. CERILLI: I would say about three hours.

THE COURT: Another three, really?

MS. CERILLI: Yeah.

THE COURT: Okay. Then I think you probably only

plan for one witness tomorrow.

MS. REINHART: This is it, Your Honor.

THE COURT: Right. Okay.

THE WITNESS: If I'm allowed to speak, I'm hoping to go back home to Berkeley after my testimony tomorrow, so...

THE COURT: You've already booked flights?

THE WITNESS: I have.

THE COURT: What time is your flight?

THE WITNESS: I have -- well, I was going to go back late in the afternoon and I moved it to Saturday morning. So I'm okay tomorrow.

THE COURT: Oh, okay.

THE WITNESS: No, I just want to be done -- from my point of view, I want to finish tomorrow, that's all I'm saying, Your Honor. Okay?

MS. SULLIVAN: Your Honor, if it helps, if I get him at the lunch break, I can finish tomorrow.

THE COURT: All right. That's fine. Let's do this: Let's start at -- traffic is pretty challenging out there this morning and tomorrow it will be because of something going on.

THE WITNESS: The Nuclear Summit.

THE COURT: It's very challenging.

THE WITNESS: The Nuclear Summit.

THE COURT: Is that what it is?

THE WITNESS: Yes.

THE COURT: Let's start tomorrow at 9:30. All right. Have a nice evening. Enjoy your evening.

* * *

CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenograph notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 31st day of March, 2016.

/s/_____

Janice E. Dickman, CRR, RMR
Official Court Reporter
Room 6523
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$100 [1] - 2118:21
$12 [1] - 1998:5
$179 [2] - 2036:7, 2040:24
$180 [1] - 2037:11
$250 [5] - 2026:8, 2033:20, 2033:21, 2042:18, 2051:14
$250,000 [1] - 2155:18
$39 [2] - 1978:14, 2033:15
$50 [6] - 2010:13, 2033:24, 2033:25, 2034:5, 2034:20, 2051:1
$500,000 [4] - 2111:6, 2125:2, 2152:10, 2154:16
$60 [6] - 2009:10, 2009:15, 2011:6, 2013:12, 2041:21, 2042:18

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'19 [1] - 2015:8
'70s [1] - 2080:12
'80s [1] - 2080:12
'97 [1] - 2095:3
'98 [1] - 2095:3
'R' [2] - 1980:23, 1981:6

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/s [1] - 2170:12

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08540 [1] - 1975:20

1

1 [11] - 2034:9, 2034:10, 2034:12, 2034:14, 2034:21, 2049:18, 2051:12, 2110:16, 2115:15, 2154:20
1,200 [1] - 2098:19
1,253 [1] - 2097:17
1.3 [1] - 2034:6
1.5 [1] - 2034:1
1/2 [5] - 1998:5, 2026:9, 2034:21, 2037:21, 2051:12
10 [6] - 2084:15, 2106:9, 2112:20, 2133:4, 2133:7, 2133:16
10-K [1] - 1996:12
10-Ks [2] - 1996:6, 1996:18
100 [5] - 1978:10, 2019:22, 2021:9, 2036:2, 2100:4
10153 [1] - 1975:22
11 [3] - 2036:2, 2067:7, 2106:13
12 [1] - 2069:16
1200 [5] - 1981:9, 1981:10, 1981:12, 1981:14, 2020:14
130 [1] - 2039:5
14 [1] - 2136:7
1400 [6] - 1980:2, 1980:5, 1980:6, 1980:7, 1980:13, 1983:11
14th [1] - 1976:5
15-2115 [1] - 1975:3
15-minute [2] - 2067:24, 2068:7
16 [1] - 2049:19
17 [1] - 2153:4
17120 [1] - 1976:5
18 [3] - 2039:23, 2039:24, 2056:20
1946 [1] - 2080:5
1980s [1] - 2076:2
1981 [1] - 2075:21
1982 [1] - 2128:25
1990 [2] - 2076:4, 2076:14
1992 [1] - 2079:18
1995 [1] - 2077:3
1:10 [1] - 1975:6

2

2 [2] - 2112:18, 2121:24
20 [1] - 2040:12
20001 [3] - 1976:1, 1976:10, 2170:15
20024 [1] - 1975:16
2009 [4] - 1997:3, 1998:16, 2008:10, 2078:19
2010 [5] - 1997:5, 1997:7, 1997:24, 2002:2, 2079:21
2011 [1] - 2079:25
2013 [10] - 1997:8, 1997:10, 1997:23, 1998:18, 1998:21, 1999:1, 2001:4, 2001:25, 2002:5, 2097:14
2015 [10] - 2036:8, 2045:8, 2045:13, 2045:17, 2045:19, 2046:1, 2046:8, 2059:11, 2059:14, 2097:14
2016 [7] - 1975:5, 2041:7, 2046:9, 2046:10, 2046:12, 2060:1, 2170:9
2017 [2] - 2041:7, 2046:14
2018 [9] - 2015:2, 2015:4, 2015:8, 2015:13, 2015:16, 2030:25, 2038:9, 2041:7, 2046:15
2019 [5] - 2014:21, 2018:25, 2019:6, 2031:1, 2038:9
202 [1] - 1975:17
202-354-3267 [1] - 1976:11
212)310-8538 [1] - 1975:23
227 [1] - 2051:14
23 [1] - 2009:9
24,000 [1] - 2103:24
240 [1] - 2098:18
245 [1] - 1993:15
25 [2] - 2040:13, 2076:14
250 [1] - 1993:14
27 [1] - 2030:19

3

3 [7] - 2025:17, 2025:19, 2026:5, 2051:9, 2051:14, 2051:18, 2064:19
30 [3] - 2016:4, 2016:8, 2129:2
30,000 [2] - 2039:11, 2040:9
301 [1] - 1975:19
303 [1] - 1975:19
31 [1] - 1975:5
326-2638 [1] - 1975:17
33 [5] - 1986:17, 1986:22, 1989:9, 2010:14, 2011:4
333 [2] - 1976:10, 2170:14
39 [2] - 1978:17, 1978:21
393 [1] - 2099:13

4

4 [5] - 2133:3, 2133:6, 2133:16, 2150:14
400 [1] - 1975:16
4200 [3] - 2016:23, 2017:4, 2043:23

5

5 [6] - 2015:11, 2019:15, 2084:15, 2090:5, 2121:25, 2133:3
5,000 [1] - 2150:14
50 [11] - 2009:10, 2009:14, 2011:6, 2013:12, 2014:15, 2040:12, 2041:21, 2042:17, 2051:11, 2051:17, 2077:9
500,000 [2] - 2104:7, 2104:18
508 [1] - 2039:5
55 [3] - 1986:14, 1986:15, 1986:22

6

6 [1] - 2099:17
6.2 [1] - 1998:4
60 [5] - 2014:15, 2077:9, 2141:21, 2141:25, 2142:6
600 [2] - 2020:11, 2021:5
609 [1] - 1975:20
630 [1] - 2043:13
6523 [2] - 1976:9, 2170:14
670 [2] - 2021:9, 2022:6
6:30 [2] - 2067:22, 2067:23

7

7 [6] - 2026:9, 2037:20,

2051:15, 2090:5, 2100:2
70 [2] - 2019:18, 2021:5
767 [1] - 1975:22

8

8 [1] - 2101:15
8,000 [1] - 2042:6
80 [7] - 2015:10, 2031:22, 2032:4, 2043:22, 2053:23, 2141:13, 2142:7
8000 [1] - 2043:19
832 [1] - 2098:18
833 [1] - 2097:24

9

9 [1] - 2103:20
90 [3] - 2031:18, 2154:25, 2155:1
900 [1] - 1975:25
95 [3] - 2031:18, 2032:7, 2108:2
96 [1] - 2040:13
986-1120 [1] - 1975:20
9:30 [1] - 2169:2
9th [1] - 1976:1

A

abbreviate [1] - 2007:14
ability [6] - 1992:3, 1993:21, 2018:7, 2022:3, 2062:3, 2170:8
able [16] - 1993:7, 1998:7, 1998:10, 2000:25, 2002:1, 2007:8, 2028:21, 2029:6, 2029:17, 2050:15, 2075:6, 2102:17, 2109:14, 2161:19, 2162:25, 2167:18
Abraham [1] - 2081:6
absolute [2] - 2022:19, 2102:10
absolutely [9] - 2083:6, 2083:10, 2097:3, 2099:17, 2103:16, 2114:15, 2120:18, 2120:19, 2156:20
absorb [1] - 2062:4
abstract [1] - 2133:1
academia [1] - 2076:24
academic [4] - 2075:20, 2076:5, 2076:18, 2080:6
academics [1] - 2081:13
accept [1] - 2121:1
accepted [2] - 2166:9, 2166:11
accessories [1] - 2005:7
account [7] - 2024:18, 2024:20, 2026:13, 2040:2, 2044:8, 2044:10, 2062:2
accounts [3] - 2017:1, 2043:22, 2119:4
accuracy [1] - 2107:23
accurate [2] - 2073:11, 2170:6
achieve [1] - 2058:18
achieved [3] - 2032:9, 2032:11, 2091:16
acknowledged [3] - 1984:2, 2113:19, 2114:6
acquired [1] - 2092:23
Action [1] - 1975:2
activity [1] - 1991:18
actual [2] - 1982:25, 2090:14
add [12] - 1987:8, 1998:12, 2025:22, 2029:10, 2037:16, 2042:8, 2042:23, 2068:24, 2104:19, 2118:22, 2132:17, 2135:23
added [2] - 2131:5, 2135:21
adding [4] - 2030:8, 2055:16, 2134:11, 2150:2
addition [5] - 1986:5, 1989:12, 1990:7, 1990:16, 2006:18
additional [5] - 2110:7, 2124:15, 2128:15, 2132:5, 2138:17
address [1] - 2120:12
addresses [1] - 2120:2
adequately [1] - 2045:3
adhere [1] - 2051:9
adherence [1] - 1987:19
adjusted [2] - 2001:22, 2017:13
adjustment [2] - 2001:20, 2016:20
adjustments [1] - 2011:13
admin [1] - 2034:25
administration [4] - 2062:2, 2077:4, 2078:19, 2078:23
administrative [5] - 2021:23, 2021:25, 2022:2, 2025:19, 2026:9
admit [1] - 1981:25
adopted [2] - 2127:6, 2153:6
advantage [3] - 2034:18, 2069:13, 2092:8
advice [5] - 2078:11, 2079:1, 2079:6, 2080:9, 2080:23
advise [1] - 2092:20
advises [1] - 1991:10
advising [2] - 2081:23
Advisors [2] - 2080:2, 2080:4
advisory [23] - 1979:16, 1979:19, 1980:10, 1982:16, 1982:19, 1982:21, 1982:23, 1983:1, 1983:4, 1983:7, 1983:15, 1983:18, 1991:24, 1996:1, 2000:1, 2003:12, 2003:24, 2004:1, 2019:12, 2052:18, 2062:8, 2062:9
Advisory [3] - 1990:20, 1990:23, 2054:24
advocacy [2] - 2077:13, 2079:4
AEP [23] - 2083:9, 2083:19, 2084:14, 2084:20, 2100:15, 2101:13, 2102:19, 2113:3, 2115:16, 2116:14, 2116:18, 2117:2, 2117:5, 2117:6, 2117:7, 2117:12, 2117:17, 2117:25, 2132:7, 2152:24, 2161:21, 2165:22
AEP's [3] - 2100:16, 2118:11, 2119:4
affect [3] - 2084:16, 2084:17, 2142:22
affected [1] - 2142:20
affects [1] - 2155:6
affirm [1] - 2066:8
afford [1] - 2018:12
AFTERNOON [2] - 1975:9, 1977:1
afternoon [7] - 1977:3, 1977:8, 2074:12, 2074:13, 2074:17, 2074:20, 2168:10
agencies [2] - 2079:15, 2082:22
agents [1] - 2021:25
aggregate [6] - 2053:3, 2056:14, 2069:12, 2132:16, 2135:8, 2138:2
aggregated [1] - 2057:24
aggregating [3] - 2012:2, 2030:1, 2148:11
aggregation [3] - 2013:15, 2013:19, 2124:19
ago [2] - 2038:4, 2095:3
agree [7] - 2027:23, 2032:15, 2045:3, 2070:13, 2140:5, 2152:4, 2162:10
agreed [6] - 2093:16, 2107:7, 2128:4, 2128:10, 2152:3, 2163:16
agreement [20] - 2007:24, 2008:21, 2015:21, 2017:19, 2017:20, 2018:11, 2019:10, 2020:1, 2020:3, 2020:7, 2020:13, 2022:4, 2022:12, 2024:1, 2025:1, 2027:7, 2027:10, 2035:22, 2035:23, 2044:1
agreements [1] - 2035:22
ahead [6] - 2078:17, 2086:17, 2090:23, 2110:8, 2115:6, 2121:14
aided [1] - 1976:7
air [1] - 2113:21
airlines [1] - 2079:9
al [2] - 1975:3, 1975:6
algebra [1] - 2166:24
Algebra [1] - 2167:4
aligned [3] - 2034:3, 2081:24, 2155:2
alignment [2] - 2034:11, 2154:23
all-in [1] - 1993:3
alleged [4] - 2089:22, 2128:1,

2128:5, 2131:3
alleges [1] - 2084:14
allegiance [1] - 2034:15
alleging [4] - 2111:10, 2113:21, 2120:15, 2164:9
allen [1] - 1976:13
allow [4] - 1992:8, 1995:19, 2018:12, 2018:15
allowed [2] - 2016:14, 2168:4
allowing [1] - 2091:15
allows [2] - 1993:3, 2016:20
almost [3] - 2020:16, 2021:2, 2067:5
alone [3] - 2101:1, 2126:17, 2126:20
alter [1] - 2089:20
Altera [1] - 2092:23
alternative [2] - 2013:14, 2130:5
alternatives [3] - 2073:17, 2129:20, 2130:1
Amazon [71] - 2014:4, 2023:5, 2023:11, 2023:14, 2025:14, 2026:13, 2026:14, 2035:18, 2045:6, 2045:8, 2045:10, 2045:12, 2045:17, 2045:21, 2045:25, 2046:6, 2046:12, 2046:14, 2046:18, 2046:21, 2047:2, 2047:5, 2047:12, 2048:4, 2048:9, 2048:14, 2048:15, 2049:2, 2049:5, 2049:8, 2049:9, 2049:20, 2049:22, 2050:4, 2050:5, 2050:14, 2057:4, 2060:3, 2060:5, 2060:8, 2063:13, 2063:18, 2063:23, 2063:25, 2064:1, 2064:4, 2064:11, 2064:13, 2064:24, 2065:5, 2065:6, 2065:9, 2065:13, 2065:15, 2065:18, 2065:21, 2066:2, 2071:10, 2071:12, 2071:13, 2072:19, 2073:1, 2073:3, 2073:23, 2084:3, 2086:1, 2096:2, 2121:9, 2125:17, 2159:19, 2162:8
Amazon.com [2] - 2084:18, 2116:13
ameliorates [1] - 2120:2
America [9] - 2036:16, 2037:12, 2040:15, 2112:22, 2115:14, 2115:22, 2116:18, 2119:2, 2119:3
American [3] - 2040:12, 2076:21, 2107:14
amount [11] - 1988:3, 1990:1, 1990:3, 1992:12, 1994:13, 2055:12, 2055:14, 2055:18, 2056:2, 2062:25, 2071:10
amounts [1] - 2102:10
analyses [1] - 2132:23
analysis [41] - 1980:10, 1991:15, 1992:16, 1992:17, 1993:4, 1993:18, 1993:22, 1994:25, 2003:15, 2029:20, 2030:23, 2031:2, 2038:15, 2040:6, 2055:20, 2062:9, 2062:10, 2064:8, 2076:12, 2081:21, 2082:9, 2088:5, 2088:23, 2089:8, 2089:14, 2093:18, 2096:5, 2096:6, 2099:18, 2104:6, 2112:8, 2113:12, 2113:20, 2119:21, 2122:12, 2130:8, 2143:14, 2149:7, 2159:18, 2161:12, 2162:2
analyst [1] - 2119:19
analyze [7] - 1992:3, 1992:8, 1995:6, 1996:9, 2116:2, 2133:5, 2154:9
analyzed [1] - 2038:16
analyzes [1] - 1995:6
analyzing [1] - 2094:18
ancillary [2] - 2008:6, 2041:4
AND [1] - 1976:2
Andrew [1] - 1975:24
annual [2] - 1991:6, 2152:10
annually [1] - 2058:21
answer [17] - 2034:22, 2082:22, 2089:13, 2119:24, 2119:25, 2120:6, 2129:18, 2129:19, 2139:8, 2140:23, 2141:5, 2142:9, 2142:21, 2142:23, 2158:18, 2163:9
answered [2] - 2144:12, 2162:20
anti [3] - 2051:4, 2152:16, 2157:1
anti-competitive [2] - 2152:16, 2157:1
anti-kickback [1] - 2051:4
anticipating [1] - 2002:23
anticipation [1] - 2059:11
Antitrust [1] - 1976:4
antitrust [23] - 2076:7, 2076:15, 2076:25, 2077:4, 2077:7, 2077:11, 2077:17, 2079:1, 2079:22, 2081:19, 2082:12, 2082:15, 2082:16, 2094:20, 2111:19, 2112:5, 2112:6, 2114:24, 2119:6, 2126:9, 2128:23, 2129:1, 2159:10
anyhow [1] - 2137:1
anytime [1] - 2044:2
apologize [3] - 2000:8, 2062:14, 2070:7
appear [2] - 2049:22, 2098:6
appearances [6] - 2097:20, 2098:4, 2098:17, 2098:18, 2098:23, 2099:22
appeared [1] - 2052:3
appearing [6] - 2052:19, 2097:19, 2097:24, 2098:3, 2099:21, 2110:4
apples [5] - 1993:3, 2016:4, 2144:20
applied [3] - 2076:7, 2082:17, 2125:25
applies [2] - 2018:3, 2159:23
apply [1] - 2032:4
appointed [1] - 2080:15
appreciate [3] - 1984:5, 1988:18, 2072:7
appreciates [1] - 1977:16
approach [9] - 2011:10, 2014:1, 2042:21, 2068:10, 2132:3, 2132:24, 2136:8, 2153:2, 2153:6
approached [1] - 2042:21
appropriate [2] - 2063:4, 2152:12
approval [2] - 2003:25, 2104:12
approve [4] - 1982:19, 1982:21, 1983:5, 1983:8
April [1] - 2046:1
arbitrarily [1] - 2009:13
area [13] - 1999:10, 2081:5, 2082:20, 2116:18, 2124:4, 2126:4, 2126:8, 2129:18, 2132:25, 2133:18, 2151:14, 2151:20, 2151:22
areas [1] - 2129:2
argued [1] - 2128:9
arguing [1] - 2161:15
argument [2] - 2120:23, 2137:2
arrangement [2] - 2018:20, 2062:24
array [1] - 2131:5
arrive [1] - 2094:12
arrived [1] - 2126:2
articles [1] - 2076:11
articulated [1] - 2120:5
aside [3] - 2022:6, 2081:13, 2121:16
aspect [2] - 2159:9, 2167:10
aspects [3] - 1996:16, 2003:17, 2055:20
assemble [1] - 2003:14
asserted [3] - 2049:15, 2072:5, 2072:18
assess [2] - 2043:3, 2126:5
assessment [8] - 1979:18, 1980:10, 2043:4, 2064:8, 2064:9, 2066:6, 2082:12, 2082:15
assigned [2] - 1988:14, 1988:24
assignment [1] - 2093:19
assistant [7] - 1988:19, 1988:22, 2022:2, 2076:2, 2077:5, 2077:16, 2078:11
assistants [2] - 2021:23,

2021:25
associate [1] - 2076:22
associated [4] - 1987:25, 2037:15, 2040:17, 2047:23
Associates [2] - 2095:17, 2096:12
Association [1] - 2076:22
assume [9] - 2002:18, 2004:2, 2035:25, 2041:9, 2049:1, 2051:12, 2070:25, 2071:4, 2113:9
assumed [2] - 1999:13, 2114:7
assuming [4] - 2013:22, 2159:18, 2161:9, 2161:23
assumption [6] - 2123:13, 2123:15, 2158:12, 2158:13, 2158:20, 2159:11
assure [1] - 2037:17
astray [1] - 2136:5
attaining [1] - 2075:24
attention [2] - 2064:10, 2095:24
attorney [4] - 2077:6, 2077:16, 2078:12, 2078:14
Attorney [1] - 1976:3
attorneys [2] - 2077:10, 2082:19
attributes [6] - 2103:4, 2106:11, 2107:17, 2107:19, 2108:14, 2110:22
attuned [2] - 1979:20, 1979:21
August [3] - 1997:5, 2059:14, 2079:21
Austin [1] - 2110:15
author [1] - 2065:4
authorization [1] - 2052:17
authorize [2] - 1979:11, 1983:8
authorized [3] - 1980:7, 1980:14, 1988:8
available [9] - 1994:23, 1995:11, 1995:14, 1996:17, 1999:3, 1999:6, 2042:7, 2055:6, 2087:3
Avenue [3] - 1975:22, 1976:10, 2170:14
average [3] - 2107:1, 2114:16, 2150:13
avoid [2] - 2132:22, 2136:5
AVP [1] - 1994:7
award [5] - 1982:20, 2003:25, 2053:8, 2053:22, 2061:15
awards [2] - 2010:4, 2019:12
aware [15] - 1991:14, 2001:6, 2014:17, 2029:3, 2033:9, 2035:1, 2036:15, 2036:22, 2039:24, 2054:22, 2060:11, 2068:5, 2095:2, 2096:2, 2149:20
awareness [1] - 2104:13
awhile [1] - 2086:14

B

B2B [11] - 2015:13, 2038:13, 2046:20, 2047:14, 2047:18, 2048:15, 2050:10, 2052:4, 2085:1, 2095:8, 2096:6
babies [1] - 2101:5
back-dooring [1] - 2120:17
background [2] - 2075:2, 2093:17
bad [1] - 1984:19
Bain [1] - 1981:22
Baker [1] - 2111:23
ball [1] - 2139:17
bank [1] - 2119:4
Bank [6] - 2112:22, 2115:14, 2115:22, 2116:18, 2119:1, 2119:3
bargaining [1] - 2152:23
BARTLETT [1] - 1975:25
base [2] - 2139:22, 2139:23
based [13] - 2005:3, 2016:21, 2039:21, 2039:23, 2040:6, 2040:7, 2049:15, 2058:18, 2058:21, 2061:15, 2142:16, 2161:7, 2161:12
baseline [2] - 2000:23, 2003:7
basic [1] - 2134:4
basis [7] - 2032:14, 2032:15, 2066:7, 2066:8, 2072:1, 2152:11, 2161:1
bear [4] - 1991:21, 1994:11, 2070:23, 2082:21
became [1] - 2080:12
become [3] - 2035:16, 2039:24, 2040:22
BEFORE [1] - 1975:9
beginning [5] - 1997:5, 2078:19, 2093:25, 2094:25, 2122:13
behalf [27] - 1977:4, 1979:8, 1979:22, 1979:24, 1979:25, 1980:14, 1982:2, 1982:13, 1985:1, 1986:8, 1988:5, 1988:8, 1991:12, 2014:22, 2025:2, 2037:20, 2038:8, 2054:2, 2054:6, 2061:14, 2068:25, 2069:5, 2069:16, 2069:24, 2070:2, 2070:11, 2070:14
behavior [5] - 2011:18, 2016:19, 2024:21, 2026:18, 2057:10
behind [6] - 2001:22, 2025:6, 2053:21, 2058:7, 2139:17, 2162:2
belief [1] - 2053:23
belong [3] - 2066:21, 2148:4, 2150:20
belongs [1] - 2151:1
below [1] - 2111:11
bench [2] - 2063:8, 2068:15
benchmark [1] - 2067:22
beneath [1] - 1988:22
benefit [1] - 1992:2
benefits [4] - 2030:12, 2030:16, 2085:20, 2100:22
Berkeley [4] - 2076:4, 2079:23, 2081:12, 2168:5
Best [2] - 2083:19, 2116:17
best [12] - 1986:1, 1989:4, 2004:5, 2009:16, 2015:12, 2089:25, 2090:15, 2097:21, 2105:18, 2106:5, 2170:8
bet [1] - 2031:1
beta [3] - 2045:21, 2045:23, 2045:24
better [12] - 2001:1, 2011:5, 2012:2, 2029:16, 2029:19, 2030:21, 2035:17, 2057:3, 2073:21, 2091:10, 2133:13, 2142:23
between [25] - 2001:4, 2002:8, 2045:12, 2046:18, 2046:21, 2049:16, 2050:13, 2057:18, 2058:14, 2080:19, 2087:5, 2089:9, 2093:7, 2093:10, 2095:22, 2101:3, 2105:6, 2110:14, 2111:22, 2115:22, 2117:15, 2133:5, 2137:19, 2154:23, 2166:21
beyond [5] - 1995:13, 2086:7, 2115:21, 2138:4, 2151:8
bid [8] - 2049:25, 2050:1, 2050:6, 2059:18, 2099:9, 2100:23, 2109:9, 2110:4
bidder [1] - 2100:11
bidding [21] - 2085:16, 2089:9, 2090:12, 2095:22, 2096:19, 2096:22, 2097:9, 2097:17, 2097:21, 2098:11, 2098:12, 2099:3, 2099:10, 2100:12, 2101:10, 2102:3, 2108:25, 2144:14, 2152:15
bids [3] - 2099:13, 2103:3, 2124:2
big [28] - 2005:18, 2007:13, 2008:7, 2039:4, 2084:4, 2085:14, 2090:2, 2096:3, 2099:7, 2101:2, 2101:5, 2104:17, 2110:20, 2112:9, 2117:6, 2117:15, 2118:20, 2118:25, 2119:6, 2119:18, 2124:4, 2135:25, 2137:2, 2138:7, 2138:10, 2141:19, 2148:23, 2153:14
bigger [2] - 2078:14, 2138:3
billion [15] - 1978:14, 1978:17, 1978:21, 2033:10, 2033:15, 2034:9, 2034:10, 2034:12, 2034:14, 2036:7, 2037:11,

2040:24, 2112:18, 2121:24
binder [5] - 2043:11, 2132:9, 2132:10, 2132:13, 2132:19
binders [6] - 2043:13, 2043:14, 2122:24, 2145:11, 2146:22, 2150:5
bit [20] - 1977:12, 1977:18, 1991:23, 2027:24, 2031:7, 2052:11, 2054:1, 2058:11, 2089:1, 2091:22, 2099:11, 2110:8, 2117:20, 2118:18, 2128:20, 2141:4, 2141:15, 2152:19, 2166:15, 2167:8
bits [1] - 2107:2
blacks [1] - 2129:14
blank [1] - 2113:21
blend [2] - 2142:2, 2144:10
blind [1] - 2088:18
blindly [1] - 2142:3
Block [6] - 2093:10, 2127:19, 2162:19, 2162:22, 2163:3, 2163:7
Block/TaxAct [1] - 2127:16
blocks [2] - 2129:12, 2130:4
blue [4] - 2023:11, 2023:12, 2025:14, 2026:12
Blumenthal [1] - 2035:2
blunt [1] - 2118:23
board [19] - 1979:16, 1979:20, 1982:21, 1982:23, 1983:2, 1983:4, 1983:7, 1983:15, 1983:18, 1996:1, 2000:1, 2004:1, 2013:5, 2019:12, 2035:21, 2062:8, 2062:9, 2069:19
boards [8] - 1980:10, 1982:16, 1982:19, 1991:24, 2003:12, 2003:24, 2043:11, 2052:18
bonuses [1] - 2020:21
book [1] - 2037:17
booked [1] - 2168:6
borderline [1] - 2071:19
boss [1] - 2078:11
BOSS [2] - 2138:5, 2139:19
bought [1] - 2149:15
boundaries [1] - 2142:17
boundary [2] - 2105:6, 2155:25
box [6] - 2023:12, 2025:13, 2026:12, 2145:24, 2146:2, 2151:11
branches [1] - 2076:8
Brawny [1] - 2027:21
break [9] - 2007:19, 2008:17, 2039:15, 2067:18, 2067:22, 2137:23, 2167:11, 2168:17
breakfast [2] - 2126:18, 2126:19
breaking [1] - 2167:6
brief [1] - 2075:11
briefed [1] - 1981:19
briefing [1] - 1982:23
briefly [3] - 2068:10, 2068:11, 2156:21
bring [8] - 1989:21, 1989:25, 1990:4, 1990:14, 1991:21, 2042:19, 2082:21, 2162:7
broad [9] - 2040:16, 2080:21, 2081:9, 2093:25, 2125:12, 2126:13, 2157:6, 2164:12, 2164:14
broadband [4] - 2078:25, 2079:3, 2079:6
broaden [1] - 2129:7
broader [7] - 2080:12, 2125:18, 2128:5, 2130:21, 2130:25, 2131:12, 2164:2
broadline [1] - 2131:4
brought [2] - 2087:7, 2127:17
build [1] - 2078:25
build-out [1] - 2078:25
built [2] - 2005:14, 2026:1
bullet [1] - 2064:22
bullets [1] - 2009:2
bunch [3] - 2132:17, 2134:11, 2135:12
bundle [2] - 2062:20, 2147:12
bundled [4] - 2010:8, 2012:6, 2012:10, 2056:20
bundling [1] - 2009:17
Bureau [1] - 1975:15
business [66] - 1978:1, 1978:2, 1989:25, 1990:3, 1990:6, 1991:16, 2002:20, 2005:22, 2011:8, 2011:22, 2011:23, 2012:6, 2012:9, 2014:9, 2014:10, 2014:24, 2037:18, 2039:11, 2040:9, 2042:18, 2048:5, 2048:20, 2061:5, 2062:4, 2065:22, 2073:1, 2073:3, 2073:7, 2073:9, 2081:7, 2083:21, 2084:5, 2084:12, 2084:16, 2091:20, 2096:9, 2096:10, 2096:20, 2100:19, 2107:14, 2110:14, 2110:16, 2111:17, 2112:3, 2112:23, 2114:12, 2115:22, 2118:13, 2121:19, 2122:9, 2144:8, 2147:5, 2147:9, 2149:18, 2155:7, 2156:12, 2157:16, 2161:6, 2161:13, 2161:16, 2164:10, 2165:23, 2166:18
Business [24] - 2026:14, 2035:18, 2045:7, 2045:8, 2045:18, 2045:21, 2045:25, 2046:18, 2047:2, 2047:5, 2047:13, 2048:4, 2048:9, 2050:4, 2050:14, 2060:3, 2060:5, 2060:8, 2063:13, 2063:18, 2063:23, 2065:13, 2086:1, 2159:19
Business's [1] - 2046:12
business-related [1] - 2005:22
businesses [11] - 2033:16, 2083:16, 2110:25, 2111:3, 2111:5, 2112:19, 2112:20, 2152:18, 2153:14
Butch [1] - 1990:24
Buy [2] - 2083:19, 2116:17
buy [19] - 2009:23, 2010:1, 2019:19, 2020:16, 2021:6, 2021:15, 2021:24, 2022:6, 2023:12, 2026:12, 2026:13, 2039:17, 2039:18, 2044:3, 2106:18, 2131:9, 2150:18, 2150:23, 2159:6
buyer [1] - 2101:4
buyers [1] - 2101:5
buying [6] - 2021:2, 2022:11, 2023:4, 2023:25, 2026:11, 2029:19
BY [24] - 1977:7, 1982:11, 1985:23, 1998:3, 2004:7, 2006:17, 2014:19, 2052:13, 2054:23, 2062:16, 2063:11, 2075:16, 2082:8, 2086:19, 2099:24, 2121:15, 2124:23, 2134:8, 2137:8, 2143:2, 2146:11, 2148:8, 2156:24, 2162:17
bypass [1] - 2133:23

C

C-suite [1] - 2048:19
CA [1] - 1975:3
cabined [1] - 2116:3
cable [1] - 2112:11
calculate [2] - 2141:6
calculating [2] - 2094:16, 2141:13
campaign [1] - 2106:21
candidate [6] - 2127:8, 2128:14, 2129:21, 2129:22, 2129:25
cannot [1] - 2057:2
Canon [2] - 2010:14, 2011:7
capabilities [11] - 1992:3, 1992:8, 1995:5, 2036:24, 2046:12, 2048:15, 2061:25, 2073:24, 2107:19, 2109:18
capability [1] - 2036:23
capable [2] - 1996:2
capacity [4] - 1982:6, 1982:7, 2068:21, 2069:17
card [1] - 2013:12
cardiac [6] - 2133:23, 2134:1, 2135:6, 2135:16, 2136:1, 2144:20
care [19] - 1978:2, 1980:3, 1980:20, 1983:13, 1983:20,

1983:24, 1984:6, 1984:9, 1987:3, 1987:11, 1987:20, 2035:3, 2035:4, 2035:8, 2040:7, 2040:20, 2040:25, 2041:4, 2119:22
careful [1] - 2011:6
carefully [1] - 2078:5
cares [2] - 2119:1, 2119:17
Carl [4] - 1976:14, 2066:25, 2074:8, 2075:19
CARL [1] - 2074:9
Carnegie [1] - 1975:19
carry [3] - 2039:11, 2040:8, 2131:8
carve [4] - 2015:8, 2124:6, 2137:16, 2147:14
carved [1] - 2140:25
carving [1] - 2137:4
case [56] - 1979:11, 1982:22, 2018:23, 2019:14, 2021:11, 2032:13, 2067:3, 2069:8, 2072:13, 2073:19, 2079:6, 2081:18, 2083:7, 2083:8, 2085:4, 2085:7, 2088:18, 2088:19, 2090:8, 2091:2, 2093:12, 2097:11, 2100:5, 2106:23, 2113:13, 2114:14, 2117:3, 2120:12, 2120:13, 2120:14, 2120:23, 2121:3, 2122:16, 2125:22, 2126:4, 2127:14, 2127:16, 2127:19, 2129:17, 2129:18, 2130:3, 2131:2, 2131:23, 2136:10, 2138:23, 2139:25, 2146:23, 2153:6, 2157:8, 2162:24, 2163:16, 2163:21, 2164:6, 2164:8, 2165:5, 2167:11
cases [11] - 2022:14, 2077:14, 2077:18, 2078:13, 2078:14, 2087:9, 2092:10, 2092:13, 2093:6, 2093:12, 2096:21
cash [1] - 2131:8
catalog [3] - 2039:2, 2039:5, 2044:6
categories [17] - 2009:17, 2010:5, 2011:11, 2012:1, 2012:2, 2013:3, 2013:11, 2014:16, 2030:2, 2047:25, 2103:19, 2104:11, 2123:21, 2138:12, 2138:18, 2139:19, 2140:1
Categories [1] - 2038:21
category [10] - 1987:6, 1987:7, 2010:6, 2030:3, 2038:19, 2042:15, 2081:17, 2097:12, 2123:8, 2123:25
caught [1] - 2095:24
CDW [1] - 2139:21
CEA [2] - 2080:5, 2080:14
Center [1] - 1975:19
centers [2] - 2022:19, 2135:12
central [1] - 2129:20
centralized [1] - 2104:12
CEO [11] - 2046:25, 2047:24, 2048:3, 2048:7, 2048:8, 2048:18, 2063:18, 2064:20, 2065:21, 2066:2, 2161:5
cereals [2] - 2126:18, 2126:19
CERELLI [2] - 2099:24, 2156:24
Cerilli [2] - 1975:13, 2074:18
CERILLI [27] - 2074:17, 2074:21, 2075:5, 2075:14, 2075:16, 2082:1, 2082:7, 2082:8, 2086:18, 2086:19, 2113:24, 2114:4, 2114:10, 2114:15, 2114:18, 2115:4, 2121:15, 2124:23, 2134:8, 2137:8, 2143:2, 2146:11, 2148:8, 2162:17, 2167:5, 2167:22, 2167:24
certain [12] - 1990:1, 2001:22, 2003:17, 2011:13, 2012:18, 2050:19, 2075:7, 2085:8, 2131:7, 2150:18, 2152:13, 2160:24
certainly [17] - 1995:13, 1996:19, 2036:22, 2037:20, 2044:2, 2046:14, 2072:25, 2073:23, 2077:12, 2092:20, 2093:5, 2096:2, 2120:22, 2121:1, 2121:17, 2148:23, 2150:8
CERTIFICATE [1] - 2170:2
certified [1] - 2005:16
certify [1] - 2170:5
chain [1] - 2057:15
chair [1] - 2080:14
chairs [8] - 2006:19, 2007:6, 2007:9, 2007:10, 2007:11, 2007:12, 2008:4, 2008:18
challenge [1] - 2095:2
challenged [1] - 2093:10
challenging [2] - 2168:19, 2168:23
chance [1] - 2065:2
change [8] - 2011:18, 2024:21, 2057:9, 2090:11, 2104:20, 2141:24, 2155:15, 2156:1
channel [3] - 2006:10, 2095:8, 2096:10
characteristics [1] - 2147:25
characterization [1] - 2163:2
characterize [1] - 2022:10
characterized [1] - 2060:22
charge [9] - 2025:24, 2077:6, 2077:17, 2107:11, 2112:20, 2115:14, 2115:16, 2157:21, 2158:1
charging [1] - 2153:21
Charles [3] - 1975:14, 2095:17, 2096:12
chart [1] - 2150:7
charts [1] - 2097:5
cheap [3] - 1994:3, 1994:4, 1994:10
check [3] - 2037:4, 2137:17, 2151:11
cherish [3] - 1989:21, 1989:25, 2053:7
cherry [1] - 2143:11
cherry-picking [1] - 2143:11
Chevron [2] - 2112:1, 2112:2
chief [4] - 2077:5, 2077:21, 2078:3, 2078:9
China [1] - 2081:1
choice [6] - 2020:4, 2020:5, 2087:18, 2109:11, 2109:21, 2157:18
choices [27] - 2083:3, 2086:24, 2087:2, 2087:22, 2088:1, 2090:7, 2092:3, 2095:10, 2095:15, 2100:22, 2109:6, 2109:20, 2110:18, 2110:20, 2111:10, 2124:15, 2124:17, 2124:18, 2126:22, 2139:16, 2143:16, 2152:22, 2152:25, 2153:12, 2153:14, 2153:15
choose [4] - 2023:14, 2028:23, 2035:11
chose [2] - 2049:10, 2049:13
Circuit [1] - 2166:11
circumstance [1] - 2010:17
circumstances [2] - 2097:18, 2136:4
cited [1] - 2014:8
Citizen [1] - 2083:14
city [1] - 2135:7
Civil [1] - 1975:2
civil [1] - 2077:12
claim [3] - 2012:3, 2086:7, 2160:24
claiming [3] - 2121:3, 2122:8
clarified [1] - 2070:20
clarifies [1] - 2005:17
clarify [3] - 1988:17, 2003:17, 2003:18
clarity [1] - 2050:25
clean [1] - 2147:8
clear [14] - 2069:18, 2070:3, 2070:5, 2070:9, 2070:10, 2070:12, 2070:21, 2070:25, 2071:25, 2110:13, 2114:13, 2117:10, 2138:11, 2140:15
cleared [1] - 2092:25
clearest [1] - 2155:12
clearly [3] - 2070:1, 2106:23, 2153:24
click [2] - 2043:12, 2043:13
clicked [3] - 2039:1, 2042:4, 2043:10

client [2] - 2081:18, 2081:25
clients [1] - 2081:23
clinical [1] - 1987:10
Clinton [1] - 2077:4
clip [1] - 2043:11
clips [6] - 2043:11, 2130:13, 2132:9, 2132:10, 2132:13, 2132:19
clock [1] - 2090:23
close [7] - 1984:15, 2060:16, 2060:18, 2085:8, 2121:16, 2130:5, 2163:18
closely [1] - 2155:2
closer [1] - 2147:19
closes [2] - 2085:10
clothing [1] - 2133:2
cluster [29] - 2124:19, 2132:4, 2132:16, 2132:19, 2132:24, 2133:9, 2133:10, 2134:4, 2134:9, 2134:15, 2134:25, 2136:8, 2136:10, 2136:12, 2137:1, 2137:11, 2138:18, 2140:13, 2141:5, 2142:17, 2143:4, 2146:19, 2148:4, 2148:5, 2148:10, 2149:10, 2150:20, 2151:1, 2151:7
clustering [4] - 2132:22, 2147:22, 2147:23, 2149:5
CMOs [1] - 2071:23
coeditor [1] - 2076:19
collect [1] - 2092:1
collection [3] - 2126:12, 2127:9, 2128:19
collectively [1] - 2057:21
Colletta [1] - 1989:1
Colletta's [1] - 1989:3
COLUMBIA [1] - 1975:1
Colwell [1] - 1975:14
combine [1] - 2010:2
combined [1] - 2141:13
comfortable [1] - 2006:3
coming [8] - 2009:21, 2022:15, 2030:20, 2049:9, 2064:5, 2085:13, 2086:1, 2105:24
comment [1] - 1984:21
comments [1] - 2079:20
commercial [3] - 2103:22, 2156:6, 2156:13
Commission [4] - 1975:2, 2074:18, 2079:2, 2093:1
COMMISSION [1] - 1975:15
commit [8] - 2019:10, 2019:11, 2020:1, 2020:3, 2020:7, 2022:13, 2035:21
commitment [1] - 2106:5
commitments [3] - 2020:19, 2020:23, 2022:15
committed [4] - 2020:12, 2020:22, 2057:23, 2102:5
common [3] - 2104:10, 2123:23, 2140:8
commonality [2] - 2150:10, 2154:13
Commonwealth [1] - 1976:3
communicated [2] - 2025:23, 2045:23
communication [1] - 2046:8
Communications [1] - 2079:2
communications [1] - 2106:20
community [6] - 1990:11, 1996:16, 2009:19, 2010:11, 2040:20, 2056:22
companies [28] - 1978:3, 1980:20, 1981:17, 2001:11, 2083:19, 2087:7, 2091:10, 2091:19, 2092:19, 2095:13, 2095:22, 2101:1, 2101:4, 2107:11, 2111:15, 2111:23, 2111:24, 2112:18, 2119:18, 2123:1, 2123:19, 2124:3, 2125:11, 2125:13, 2137:3, 2149:17, 2150:15, 2150:23
company [16] - 1978:10, 1993:13, 2026:25, 2027:20, 2035:24, 2037:11, 2041:15, 2041:18, 2103:11, 2107:22, 2113:9, 2118:20, 2124:10, 2158:25, 2159:6, 2160:5
comparative [1] - 2092:7
compare [3] - 1992:8, 2029:20, 2029:25
compel [2] - 2068:4, 2071:10
compelling [1] - 2165:24
compete [6] - 2042:14, 2073:18, 2087:23, 2090:11, 2095:13, 2151:20
competencies [1] - 2040:17
competency [4] - 2037:6, 2038:7, 2041:3, 2052:5
competent [4] - 2038:2, 2038:5, 2120:1, 2120:8
competes [1] - 2096:3
competing [7] - 1993:8, 1993:10, 2087:8, 2087:11, 2157:20, 2165:16
Competition [1] - 1975:15
competition [24] - 2013:10, 2015:14, 2053:2, 2053:23, 2077:13, 2079:2, 2079:4, 2082:25, 2083:3, 2086:20, 2086:22, 2094:9, 2095:20, 2101:3, 2112:4, 2114:5, 2114:20, 2121:20, 2122:6, 2143:18, 2157:22, 2166:21, 2167:3
competitive [45] - 1989:17, 1990:9, 1990:12, 1998:13, 2000:18, 2002:7, 2003:2, 2003:3, 2003:7, 2015:25, 2034:13, 2034:17, 2059:18, 2059:19, 2059:24, 2062:8, 2079:7, 2089:20, 2090:10, 2090:16, 2092:14, 2093:3, 2093:23, 2123:10, 2132:18, 2134:6, 2134:23, 2135:2, 2135:17, 2136:4, 2136:7, 2138:11, 2139:11, 2146:18, 2147:14, 2147:24, 2148:2, 2148:16, 2148:19, 2148:21, 2149:22, 2151:2, 2151:13, 2152:16, 2157:1
competitiveness [1] - 2015:22
competitor [2] - 2096:3, 2099:4
competitors [10] - 2012:17, 2014:14, 2015:16, 2087:5, 2087:9, 2088:1, 2094:7, 2129:10, 2139:13, 2149:23
compiled [1] - 2099:18
complaint [5] - 2093:13, 2096:7, 2104:6, 2114:19, 2120:11
complement [1] - 2058:10
complete [3] - 2003:23, 2075:8, 2170:7
completely [2] - 2003:16, 2025:23
compliance [6] - 2022:19, 2023:18, 2025:7, 2057:17, 2106:19, 2106:21
compliant [4] - 1990:15, 2022:21, 2022:22, 2053:5
complication [1] - 2132:5
component [4] - 2121:22, 2127:2, 2151:16, 2151:17
components [2] - 2088:13, 2126:25
comprehensive [5] - 1996:9, 2011:12, 2037:10, 2042:8, 2056:19
comprehensively [1] - 2013:7
comprised [1] - 1980:20
computer [1] - 1976:7
computer-aided [1] - 1976:7
computers [1] - 2005:19
conceivable [1] - 2165:4
concept [3] - 2126:5, 2153:21, 2157:23
conceptual [1] - 2129:3
concern [11] - 2002:17, 2012:25, 2034:2, 2062:1, 2062:3, 2062:5, 2095:18, 2109:10, 2112:1, 2112:22, 2144:7
concerned [9] - 1979:14, 2064:23, 2083:22, 2094:5, 2107:22, 2137:5, 2137:7, 2140:3
concerning [5] - 2094:2, 2096:1, 2108:13, 2109:24, 2122:15
concerns [9] - 2072:22,

2092:14, 2093:4, 2120:25, 2137:6, 2151:13, 2152:17, 2155:10, 2156:14
conclude [1] - 2094:18
concluded [2] - 2092:14, 2093:3
conclusion [6] - 2094:12, 2095:25, 2110:23, 2126:3, 2136:19, 2157:12
concrete [1] - 2127:15
condition [1] - 2020:6
conditions [28] - 1996:15, 1999:25, 2003:20, 2016:21, 2019:3, 2089:20, 2123:10, 2132:18, 2134:6, 2134:23, 2135:3, 2135:18, 2136:7, 2138:11, 2138:16, 2146:18, 2147:14, 2147:24, 2148:2, 2148:16, 2148:19, 2148:21, 2149:2, 2149:10, 2149:22, 2151:2, 2153:17, 2154:4
condone [1] - 2026:18
conduct [3] - 2056:2, 2075:6, 2106:20
conducting [1] - 2074:19
conference [4] - 2045:11, 2048:1, 2048:2, 2049:16
confers [1] - 2064:9
confident [4] - 2085:24, 2111:8, 2160:17, 2160:22
configured [1] - 2005:14
confirmed [1] - 2080:16
confirms [1] - 2166:1
confused [2] - 2012:21, 2146:7
confusing [1] - 2132:21
confusion [2] - 2069:21, 2070:1
conglomerate [1] - 2087:10
conservative [1] - 2130:25
conserve [1] - 2164:23
consider [20] - 2005:5, 2005:6, 2005:8, 2006:22, 2007:3, 2038:11, 2038:12, 2039:19, 2040:3, 2050:10, 2056:18, 2071:21, 2072:3, 2072:12, 2090:23, 2091:6, 2091:12, 2092:6, 2115:3, 2125:15
consideration [1] - 2083:4
considered [1] - 2005:22
considering [1] - 2055:17
consistent [2] - 2061:4, 2158:15
constitutes [1] - 2170:6
Constitution [2] - 1976:10, 2170:14
constrains [1] - 2016:19
constraints [1] - 1978:16
construct [2] - 2158:12, 2160:11
consultant [7] - 1990:18, 1994:9, 2055:2, 2061:20, 2081:14, 2081:18, 2107:8
consultants [2] - 1998:24, 2107:10
consulting [5] - 1991:4, 1991:16, 2040:19, 2078:14, 2096:13
consumable [43] - 2002:13, 2004:10, 2004:12, 2004:20, 2004:23, 2005:6, 2005:7, 2005:10, 2009:8, 2094:8, 2094:23, 2098:8, 2100:5, 2104:2, 2112:19, 2122:20, 2123:2, 2123:20, 2124:24, 2125:2, 2125:14, 2130:23, 2131:13, 2136:12, 2138:13, 2139:12, 2139:24, 2140:9, 2140:10, 2142:1, 2143:8, 2144:7, 2150:12, 2151:14, 2152:5, 2154:16, 2154:22, 2157:10, 2158:22, 2164:10, 2164:19, 2165:2, 2165:12
consume [1] - 2021:24
consumed [1] - 2140:6
consumer [10] - 2005:3, 2084:13, 2084:20, 2112:12, 2114:13, 2114:16, 2116:15, 2120:16, 2122:18, 2125:12
consumer-based [1] - 2005:3
consumers [6] - 2033:16, 2086:21, 2113:1, 2113:17, 2113:22, 2152:18
consuming [1] - 2003:22
contact [1] - 1997:5
context [1] - 2162:19
continue [2] - 2069:9, 2075:11
contract [108] - 1982:19, 1983:5, 1988:23, 1988:24, 1988:25, 1989:8, 1996:15, 1996:19, 1996:22, 1997:2, 1997:15, 1998:24, 1999:8, 1999:16, 1999:25, 2000:11, 2000:20, 2001:2, 2001:20, 2001:21, 2002:2, 2002:20, 2003:5, 2003:9, 2003:19, 2003:25, 2005:2, 2005:9, 2005:18, 2006:5, 2006:20, 2007:18, 2007:25, 2008:2, 2008:3, 2008:5, 2008:7, 2008:8, 2008:15, 2008:18, 2010:2, 2010:4, 2010:6, 2010:22, 2012:23, 2014:2, 2014:20, 2014:21, 2015:20, 2015:24, 2016:1, 2016:10, 2016:16, 2016:18, 2017:6, 2017:12, 2017:23, 2018:1, 2018:7, 2018:14, 2018:18, 2018:21, 2019:16, 2019:20, 2019:23, 2020:2, 2020:10, 2020:17, 2020:25, 2021:3, 2021:7, 2021:10, 2021:14, 2021:16, 2021:19, 2022:7, 2022:24, 2023:19, 2025:18, 2026:6, 2026:12, 2026:20, 2027:3, 2027:6, 2028:24, 2030:5, 2030:8, 2030:9, 2030:12, 2030:16, 2030:17, 2032:8, 2032:16, 2032:17, 2033:21, 2041:18, 2054:12, 2056:7, 2057:13, 2058:1, 2059:16, 2059:25, 2063:1, 2106:16, 2106:18, 2150:19, 2151:4
contracted [2] - 1993:5, 2025:6
contracting [1] - 1982:17
contracts [6] - 1986:8, 2007:22, 2019:10, 2019:12, 2053:6, 2085:11
contractual [1] - 1985:5
control [10] - 2015:10, 2023:13, 2023:20, 2052:23, 2053:14, 2053:19, 2113:4, 2126:17, 2151:21, 2164:25
controlled [4] - 2126:14, 2127:10, 2128:21, 2162:24
controlling [4] - 2128:10, 2129:16, 2158:21, 2163:6
controls [7] - 2057:12, 2057:19, 2057:20, 2126:16, 2129:5, 2157:9, 2164:19
convenience [7] - 2017:25, 2018:2, 2018:8, 2018:13, 2018:15, 2018:17, 2018:21
conversation [7] - 1983:21, 2044:5, 2046:2, 2050:5, 2064:1, 2066:4, 2104:23
conversations [4] - 1983:15, 2049:15, 2060:2, 2062:7
conversion [1] - 2104:13
convey [1] - 2078:10
coordinate [1] - 1999:22
coordination [1] - 2003:11
copier [1] - 2124:11
copiers [1] - 2147:4
copies [2] - 2054:17, 2054:20
copy [8] - 2004:23, 2008:16, 2008:21, 2010:9, 2029:4, 2030:14, 2030:15
Core [27] - 1977:25, 1980:18, 1980:20, 1981:9, 1981:10, 1981:14, 1981:17, 1981:19, 1982:12, 1982:13, 1988:9, 2019:25, 2020:1, 2020:3, 2020:6, 2020:9, 2020:12, 2020:16, 2020:24, 2021:2, 2021:5, 2021:12, 2022:13, 2022:14, 2022:16, 2048:1, 2048:2
core [24] - 2010:10, 2016:22, 2016:25, 2017:12, 2017:13, 2017:14, 2017:16, 2037:6, 2038:7, 2040:3, 2040:5,

2040:17, 2041:2, 2043:20, 2043:22, 2052:5, 2106:1, 2122:22, 2124:19, 2137:15, 2137:19, 2137:21, 2138:1, 2142:1
Corn [3] - 2126:16, 2126:20, 2129:7
corner [1] - 2102:8
corporate [3] - 1981:23, 2046:21, 2053:24
corporations [1] - 2116:7
correct [138] - 1977:21, 1977:23, 1978:4, 1978:9, 1978:10, 1978:11, 1978:12, 1978:13, 1978:15, 1978:23, 1979:9, 1980:1, 1980:4, 1980:19, 1980:21, 1980:22, 1980:24, 1980:25, 1982:18, 1983:2, 1983:3, 1983:5, 1983:6, 1983:14, 1983:21, 1984:1, 1985:6, 1985:11, 1985:14, 1986:6, 1986:11, 1986:13, 1986:18, 1988:7, 1988:10, 1988:11, 1988:21, 1988:24, 1989:2, 1989:10, 1990:10, 1990:22, 1991:2, 1991:3, 1992:5, 1992:9, 1992:10, 1992:14, 1993:20, 1994:18, 1995:3, 1995:14, 1995:15, 1997:3, 1997:4, 1997:7, 1997:18, 1998:9, 1998:17, 1998:19, 1999:6, 2000:16, 2001:3, 2002:3, 2002:7, 2004:15, 2004:19, 2004:25, 2006:1, 2008:9, 2008:13, 2008:24, 2015:6, 2015:23, 2016:1, 2016:2, 2016:9, 2016:12, 2017:10, 2018:4, 2018:5, 2018:6, 2019:1, 2019:7, 2020:8, 2020:15, 2021:4, 2021:7, 2021:8, 2023:5, 2023:9, 2024:4, 2024:11, 2024:15, 2024:17, 2025:11, 2026:4, 2026:7, 2027:12, 2028:12, 2029:2, 2029:22, 2031:3, 2031:11, 2031:20, 2032:20, 2033:3, 2033:8, 2033:22, 2034:8, 2034:22, 2041:7, 2041:20, 2041:23, 2049:21, 2049:24, 2051:19, 2053:13, 2053:16, 2054:3, 2054:4, 2054:6, 2054:7, 2055:4, 2058:5, 2059:6, 2060:14, 2060:15, 2060:18, 2068:21, 2069:3, 2136:18, 2136:21, 2139:8, 2143:24, 2145:13, 2162:20, 2164:11
Correct [1] - 2065:8
correctly [5] - 2057:14, 2059:8, 2088:22, 2148:9, 2164:8
correspond [1] - 2154:19
corresponding [1] - 2111:7
cost [13] - 2000:23, 2001:19, 2003:7, 2016:6, 2056:12, 2091:9, 2091:10, 2091:14, 2104:20, 2106:14, 2117:9, 2117:17, 2118:11
costs [18] - 2035:4, 2068:23, 2104:21, 2108:4, 2113:5, 2113:8, 2113:10, 2113:15, 2115:13, 2115:19, 2115:24, 2116:14, 2116:21, 2116:22, 2118:14, 2118:17, 2121:19, 2121:22
Council [1] - 2080:2
council [2] - 2080:18, 2081:11
Counsel [8] - 1977:5, 2052:10, 2063:4, 2074:6, 2075:13, 2080:3, 2121:14, 2167:21
counsel [9] - 1977:9, 2068:9, 2068:17, 2073:5, 2082:3, 2113:20, 2113:23, 2117:9, 2120:15
Counselor [1] - 2074:20
count [2] - 2091:14, 2123:1
counted [1] - 2091:16
counterproposals [1] - 2102:12
couple [6] - 2003:9, 2035:1, 2052:16, 2063:6, 2097:14, 2112:20
course [18] - 2001:15, 2073:1, 2073:2, 2073:21, 2078:13, 2090:8, 2092:6, 2092:15, 2094:25, 2096:17, 2097:18, 2097:25, 2105:18, 2119:12, 2126:2, 2149:19, 2157:2, 2164:23
Court [23] - 1976:8, 1976:9, 2056:5, 2064:12, 2071:1, 2071:20, 2071:24, 2072:3, 2072:16, 2072:21, 2073:10, 2082:22, 2083:23, 2092:5, 2093:15, 2119:21, 2162:23, 2163:16, 2163:22, 2166:10, 2166:11, 2170:13
court [6] - 1985:20, 1985:21, 2105:22, 2128:3, 2128:9, 2128:10
COURT [171] - 1975:1, 1977:2, 1977:5, 1982:2, 1982:5, 1982:9, 1985:20, 2002:17, 2003:4, 2003:8, 2004:1, 2004:4, 2004:6, 2012:15, 2012:24, 2013:3, 2013:5, 2013:10, 2013:16, 2013:21, 2014:4, 2014:12, 2014:18, 2050:24, 2051:7, 2051:10, 2051:17, 2051:20, 2051:25, 2052:8, 2052:10, 2054:16, 2054:19, 2061:2, 2061:9, 2061:18, 2062:12, 2063:4, 2066:15, 2066:17, 2066:21, 2067:2, 2067:5, 2067:12, 2067:16, 2067:22, 2068:6, 2068:9, 2068:12, 2068:16, 2068:25, 2069:4, 2069:14, 2070:4, 2070:16, 2070:20, 2071:1, 2071:12, 2071:16, 2072:3, 2072:10, 2072:13, 2073:3, 2073:13, 2074:1, 2074:5, 2074:12, 2074:14, 2074:16, 2074:20, 2074:23, 2075:2, 2075:12, 2082:3, 2082:5, 2083:4, 2083:7, 2083:14, 2083:17, 2083:21, 2084:7, 2084:10, 2084:21, 2084:25, 2086:9, 2086:17, 2088:21, 2099:14, 2113:23, 2114:2, 2114:9, 2114:11, 2114:16, 2115:1, 2115:6, 2115:11, 2116:4, 2116:20, 2116:25, 2117:3, 2118:3, 2118:5, 2119:8, 2119:16, 2119:23, 2120:18, 2121:7, 2121:11, 2121:13, 2123:3, 2123:7, 2123:12, 2123:24, 2124:22, 2133:14, 2133:16, 2136:16, 2136:19, 2136:22, 2136:24, 2141:1, 2141:9, 2142:21, 2143:1, 2144:18, 2144:23, 2145:1, 2145:3, 2145:7, 2145:10, 2145:14, 2145:17, 2145:21, 2145:24, 2146:3, 2146:9, 2146:15, 2146:20, 2146:24, 2147:1, 2148:5, 2148:7, 2156:23, 2157:25, 2158:6, 2158:9, 2158:14, 2158:25, 2159:3, 2159:14, 2160:3, 2160:8, 2160:15, 2160:19, 2162:16, 2166:11, 2167:7, 2167:15, 2167:17, 2167:21, 2167:23, 2167:25, 2168:3, 2168:6, 2168:8, 2168:12, 2168:18, 2168:23, 2168:25, 2169:2, 2170:2
Court's [3] - 1999:15, 2000:9, 2063:7
Courthouse [1] - 1976:9
courts [3] - 2088:18, 2089:17, 2127:6
coverage [1] - 2061:25
covered [1] - 2140:14
covers [1] - 2112:7
craft [1] - 2159:25
crazy [2] - 2116:2, 2116:18
create [1] - 2012:2
created [1] - 1984:3
creates [4] - 1983:16, 2030:2, 2057:24, 2132:5
credible [1] - 2011:8

criminal [1] - 2077:14
criteria [1] - 2148:14
critical [2] - 2027:24, 2040:25
criticized [1] - 2137:21
cross [5] - 1977:2, 2039:21, 2067:14, 2072:21, 2117:10
CROSS [1] - 1977:6
cross-examination [1] - 1977:2
CROSS-EXAMINATION [1] - 1977:6
cross-examine [1] - 2072:21
cross-examining [1] - 2117:10
CRR [2] - 1976:8, 2170:13
curative [1] - 2086:3
current [8] - 2001:5, 2003:5, 2003:7, 2008:11, 2008:22, 2011:1, 2015:21, 2049:25
customer [52] - 1995:19, 2031:14, 2083:9, 2084:4, 2084:6, 2084:12, 2084:13, 2085:1, 2088:4, 2100:14, 2101:11, 2102:14, 2103:2, 2103:6, 2103:17, 2103:23, 2104:8, 2104:9, 2104:24, 2105:15, 2105:18, 2105:21, 2105:23, 2106:2, 2106:12, 2106:17, 2107:3, 2107:4, 2107:20, 2109:12, 2109:20, 2111:9, 2114:23, 2115:10, 2118:10, 2119:22, 2121:21, 2124:10, 2124:25, 2125:1, 2131:14, 2150:14, 2152:15, 2152:22, 2154:9, 2154:12, 2154:23, 2155:21
customer's [4] - 2005:15, 2088:3, 2090:4, 2126:21
Customers [1] - 2153:20
customers [153] - 2083:2, 2083:5, 2083:6, 2083:11, 2083:12, 2083:13, 2083:16, 2083:19, 2085:11, 2085:15, 2085:21, 2086:23, 2087:12, 2087:15, 2087:17, 2087:18, 2087:22, 2088:2, 2089:19, 2089:21, 2089:24, 2090:7, 2090:12, 2090:18, 2090:24, 2091:3, 2091:8, 2091:11, 2092:3, 2094:8, 2094:24, 2095:6, 2095:9, 2095:14, 2095:18, 2095:21, 2096:6, 2096:19, 2097:9, 2097:12, 2097:13, 2099:3, 2099:8, 2100:4, 2100:5, 2101:2, 2101:7, 2101:9, 2101:25, 2102:22, 2102:24, 2103:4, 2103:8, 2103:12, 2103:14, 2103:15, 2103:22, 2104:16, 2105:3, 2105:10, 2105:12, 2105:16, 2108:10, 2108:11, 2108:13, 2108:18, 2108:24, 2109:2, 2109:6, 2109:9, 2110:19, 2110:23, 2111:2, 2111:8, 2111:14, 2111:24, 2112:8, 2112:25, 2113:11, 2114:5, 2114:8, 2114:9, 2114:10, 2114:21, 2115:13, 2115:24, 2115:25, 2116:17, 2117:6, 2117:20, 2118:12, 2118:22, 2118:25, 2119:3, 2119:5, 2119:7, 2121:4, 2121:5, 2122:4, 2122:9, 2122:18, 2124:14, 2125:19, 2126:22, 2130:1, 2130:22, 2139:1, 2142:20, 2147:7, 2149:12, 2150:18, 2151:4, 2152:1, 2152:5, 2152:7, 2152:8, 2152:13, 2152:20, 2152:24, 2153:2, 2153:8, 2153:9, 2153:10, 2153:11, 2153:18, 2153:25, 2154:3, 2154:5, 2154:13, 2154:20, 2154:24, 2155:1, 2155:3, 2155:11, 2155:24, 2156:2, 2156:5, 2157:11, 2158:22, 2161:17, 2161:22, 2162:7, 2162:8, 2163:1, 2163:14, 2164:11, 2164:20, 2165:13, 2165:17, 2165:23
cut [2] - 2033:24, 2122:3
cutoff [3] - 2111:6, 2155:16, 2155:18
cuts [2] - 2034:5, 2034:20

D

D.C [1] - 2170:15
dah [5] - 2125:10
data [41] - 2078:7, 2089:25, 2092:4, 2092:7, 2095:21, 2095:23, 2096:19, 2096:22, 2096:23, 2096:24, 2096:25, 2097:2, 2097:7, 2097:8, 2097:11, 2097:15, 2097:24, 2098:12, 2098:14, 2098:16, 2098:25, 2099:10, 2099:12, 2099:18, 2099:25, 2100:12, 2100:17, 2100:19, 2101:8, 2101:10, 2101:25, 2102:3, 2102:21, 2102:22, 2108:25, 2109:9, 2110:4, 2134:17, 2150:15, 2150:16, 2155:17
date [1] - 2092:9
Dated [1] - 2170:9
dates [1] - 1997:2
days [5] - 1977:16, 2016:4, 2016:8, 2035:1, 2078:22
DC [4] - 1975:5, 1975:16, 1976:1, 1976:10
DDIY [1] - 2164:6
de [1] - 2056:14
de-aggregate [1] - 2056:14
dead [1] - 2164:14
deal [14] - 1982:17, 1997:17, 2002:6, 2052:20, 2085:9, 2085:10, 2092:21, 2092:24, 2100:20, 2117:15, 2119:18, 2149:6, 2153:25
dealer [2] - 2047:6, 2064:5
dealing [1] - 2148:10
deals [1] - 2104:17
decide [7] - 2059:15, 2072:7, 2119:21, 2134:24, 2136:13, 2148:14
decided [5] - 2011:2, 2079:16, 2125:17, 2128:9, 2146:13
deciding [1] - 2072:14
decision [1] - 2078:13
decisions [2] - 1982:20, 2080:23
declaration [11] - 1978:25, 2048:22, 2049:13, 2049:14, 2049:17, 2049:23, 2054:17, 2054:20, 2069:4, 2069:15, 2069:20
declarations [2] - 2110:7, 2140:19
decrease [4] - 1983:13, 2011:14, 2053:20, 2058:24
dedicated [3] - 1986:23, 2040:2
deeper [2] - 1995:1, 1995:4
deeply [1] - 2106:4
defendants [8] - 2068:2, 2070:13, 2071:3, 2093:8, 2119:8, 2120:1, 2123:18, 2131:1
Defendants [2] - 1975:7, 1975:18
defensive [1] - 2059:13
defer [1] - 2067:8
deficiencies [2] - 2003:18, 2003:19
define [5] - 2125:21, 2125:22, 2134:14, 2137:11, 2157:4
defined [6] - 2088:22, 2089:23, 2124:24, 2151:15, 2156:19, 2157:8
defining [8] - 2089:2, 2094:15, 2122:14, 2125:1, 2131:25, 2151:18, 2156:18, 2157:5
definition [10] - 2002:13, 2004:16, 2126:6, 2126:7, 2126:25, 2130:25, 2138:20, 2149:8, 2151:17, 2152:8
degrees [1] - 2075:22
deliver [10] - 2028:5, 2028:21, 2033:8, 2035:12, 2040:14, 2041:1, 2054:13, 2058:6, 2058:17, 2107:1
delivered [5] - 1987:17, 2027:13, 2028:25, 2132:8, 2132:9
deliveries [2] - 2056:23, 2058:9

delivering [1] - 2054:9
delivers [3] - 1989:18, 2036:15, 2037:12
delivery [20] - 2009:21, 2028:8, 2028:9, 2028:15, 2031:8, 2031:10, 2031:12, 2031:14, 2031:22, 2032:8, 2032:10, 2032:18, 2032:20, 2032:22, 2033:7, 2036:23, 2036:24, 2083:25, 2125:9
Dell [1] - 2139:21
demand [2] - 2103:6, 2156:14
demanding [1] - 2081:10
demands [1] - 2155:5
demonstrate [1] - 2120:7
demonstrated [1] - 2014:10
demonstrative [1] - 2002:14
demonstratives [1] - 2007:16
Department [2] - 2092:16, 2092:17
department [4] - 1986:6, 2032:25, 2033:8, 2133:2
dependence [1] - 2108:5
deployment [1] - 2078:25
deposition [1] - 2031:17
Depot [57] - 1975:24, 1978:22, 1984:14, 1998:8, 1999:17, 2001:6, 2002:9, 2032:12, 2033:2, 2037:25, 2044:17, 2050:1, 2055:9, 2060:19, 2060:22, 2083:10, 2094:6, 2095:1, 2096:20, 2096:23, 2097:8, 2097:23, 2098:10, 2098:20, 2099:3, 2099:9, 2099:21, 2100:8, 2100:10, 2100:21, 2101:19, 2102:6, 2102:13, 2104:11, 2106:24, 2109:8, 2109:19, 2110:17, 2112:16, 2125:7, 2130:9, 2137:2, 2139:23, 2141:12, 2142:14, 2143:9, 2144:6, 2149:12, 2150:16, 2150:24, 2155:22, 2157:15, 2161:17, 2161:18, 2165:11, 2165:22
Depot's [3] - 2131:18, 2139:3, 2139:6
depression [1] - 2080:11
depth [4] - 1996:5, 2096:5, 2111:2, 2137:9
Deputy [1] - 1976:3
deputy [1] - 2077:5
describe [1] - 2105:19
described [8] - 1986:19, 2006:21, 2060:19, 2093:22, 2101:16, 2102:6, 2125:25, 2142:9
describing [2] - 2065:5, 2153:8
designated [2] - 2071:3, 2071:7
designed [2] - 2073:8, 2088:17
designers [1] - 2007:1
desire [1] - 2104:13
desk [1] - 2032:18
desktop [6] - 2031:9, 2031:23, 2032:22, 2032:25, 2033:6, 2125:9
desktops [2] - 2005:13, 2005:21
detached [1] - 2084:23
detailed [4] - 1992:7, 1992:16, 2048:20, 2113:11
details [4] - 1981:16, 2003:14, 2047:22, 2125:20
determine [6] - 2015:2, 2065:16, 2083:23, 2115:2, 2149:9, 2153:16
determined [1] - 2038:5
determining [1] - 2127:3
Diane [1] - 1975:18
Dickman [2] - 1976:8, 2170:13
DICKMAN [1] - 2170:5
difference [1] - 2141:11
differences [3] - 2105:7, 2137:19, 2149:6
different [49] - 1980:3, 1986:3, 1988:2, 2012:11, 2027:6, 2035:14, 2069:22, 2084:18, 2090:13, 2099:18, 2102:1, 2102:21, 2103:10, 2105:2, 2108:18, 2109:4, 2110:23, 2116:15, 2123:11, 2124:13, 2124:18, 2131:23, 2132:2, 2133:20, 2133:21, 2134:5, 2134:12, 2134:15, 2135:18, 2136:4, 2138:13, 2138:16, 2139:20, 2140:23, 2141:2, 2143:6, 2144:22, 2146:19, 2147:5, 2147:8, 2148:2, 2149:20, 2150:2, 2153:22, 2155:16, 2156:11, 2156:14, 2159:19
differently [1] - 2124:14
dig [2] - 2077:23, 2081:2
digital [6] - 2128:2, 2128:11, 2162:22, 2163:19, 2163:23, 2164:6
digital-do-it-yourself [1] - 2164:6
dimension [1] - 2132:5
diminish [1] - 2082:25
diminished [3] - 1983:25, 1984:10, 2013:8
diminishes [1] - 2053:25
dire [1] - 2082:3
DIRECT [1] - 2075:15
direct [34] - 1977:19, 1984:7, 1986:14, 1986:20, 1989:13, 1989:20, 1993:18, 1997:20, 1998:1, 2001:9, 2004:11, 2005:1, 2007:17, 2016:24, 2016:25, 2017:17, 2017:22, 2019:8, 2024:5, 2027:5, 2031:16, 2043:25, 2045:7, 2045:20, 2059:12, 2063:25, 2064:10, 2064:18, 2067:10, 2083:18, 2083:19, 2114:8, 2114:9, 2167:3
directed [1] - 1991:17
direction [6] - 1988:2, 1991:19, 2109:23, 2142:6, 2144:16, 2149:18
directly [14] - 1987:2, 1987:14, 1997:14, 1998:12, 2000:9, 2073:23, 2073:24, 2077:16, 2080:7, 2084:5, 2089:10, 2090:10, 2108:4, 2113:2
director [2] - 1988:25, 1994:7
disaggregated [1] - 2030:7
disagree [1] - 2070:8
discharge [3] - 1987:17, 1987:20, 1987:23
discharged [2] - 1987:9, 1987:16
discipline [4] - 2057:1, 2164:17, 2164:21, 2164:25
disciplined [1] - 2023:18
disconnect [1] - 2154:6
discount [3] - 2084:21, 2107:7, 2153:22
discounted [1] - 2106:5
discounting [3] - 2158:3, 2158:5, 2165:15
discounts [8] - 2084:22, 2101:17, 2101:18, 2101:20, 2157:16, 2157:19, 2161:16
Discrimination [1] - 2153:20
discrimination [3] - 2153:21, 2153:24, 2154:1
discuss [1] - 2122:12
discussed [1] - 2010:5
discussion [7] - 2046:23, 2049:1, 2049:5, 2049:11, 2068:15, 2146:25, 2152:14
discussions [5] - 2048:11, 2048:15, 2048:19, 2048:20, 2060:8
dispersed [1] - 2155:6
disposable [1] - 2005:11
disposal [1] - 1985:12
dispute [4] - 2032:14, 2066:7, 2066:8, 2072:2
dissing [1] - 2108:23
distinct [3] - 2103:15, 2105:3, 2105:10
distinction [1] - 2110:14
distributed [1] - 2005:16
distributes [1] - 2058:2
distribution [33] - 2040:18, 2040:24, 2041:7, 2058:4, 2061:22, 2062:3, 2094:7, 2094:23, 2096:10, 2107:20,

2109:16, 2122:18, 2125:4, 2125:6, 2125:8, 2125:16, 2130:8, 2130:12, 2130:14, 2130:18, 2130:21, 2131:4, 2131:7, 2131:10, 2131:11, 2131:13, 2131:17, 2132:13, 2132:14, 2157:10, 2164:13, 2164:19
distributions [1] - 2028:22
distributor [7] - 2027:8, 2028:14, 2036:18, 2040:22, 2040:23, 2098:3, 2109:14
distributors [7] - 1984:19, 2028:8, 2108:22, 2110:11, 2110:12, 2131:3, 2131:8
DISTRICT [3] - 1975:1, 1975:1, 1975:10
divesting [1] - 2091:20
divestiture [2] - 2088:15, 2091:23
divide [1] - 2134:20
divided [2] - 1977:20, 2080:19
division [8] - 1977:22, 1977:25, 1980:17, 2077:4, 2077:7, 2077:11, 2079:1, 2079:23
divisions [1] - 1977:20
Dixie [1] - 2027:20
do-it-yourself [3] - 2128:2, 2128:11, 2163:19
doable [7] - 1996:24, 1999:16, 1999:19, 2000:10, 2014:20, 2018:18, 2167:19
dock [1] - 2033:1
doctorate [1] - 2075:24
document [11] - 2064:11, 2064:19, 2065:5, 2068:4, 2071:9, 2071:23, 2072:2, 2072:4, 2072:8, 2072:19, 2073:7
documentary [1] - 2105:9
documents [3] - 2092:4, 2103:11, 2103:18
DOJ [14] - 2077:10, 2077:19, 2077:20, 2078:16, 2078:18, 2079:15, 2091:19, 2093:9, 2093:13, 2093:16, 2111:20, 2127:17, 2128:1, 2128:9
dollar [1] - 2102:10
dollars [10] - 2000:15, 2033:10, 2112:21, 2117:7, 2117:11, 2117:18, 2118:20, 2118:21, 2122:1, 2122:4
dominance [1] - 2101:9
dominant [2] - 2013:9, 2098:10
dominate [2] - 2095:15, 2139:23
Don [1] - 1989:1
done [7] - 1995:24, 2003:15, 2029:20, 2030:22, 2077:23, 2113:20, 2168:13
door [1] - 2037:18
dooring [1] - 2120:17
doors [3] - 1984:15, 2060:17, 2060:18
doubt [5] - 2003:8, 2157:25, 2158:2, 2160:4, 2160:15
dovetail [2] - 2109:4, 2149:16
dovetailing [1] - 2126:9
dovetails [1] - 2148:25
down [37] - 1983:21, 2001:16, 2009:4, 2010:16, 2026:19, 2034:23, 2034:24, 2041:12, 2048:17, 2058:12, 2058:13, 2058:24, 2059:5, 2104:3, 2111:9, 2113:3, 2116:16, 2116:24, 2116:25, 2118:14, 2118:15, 2120:16, 2133:16, 2139:6, 2141:17, 2141:19, 2141:21, 2144:5, 2145:18, 2145:23, 2146:5, 2155:11, 2155:19, 2155:20
downside [1] - 2061:10
downward [2] - 2001:23, 2017:13
dozen [1] - 2078:1
dozens [1] - 2077:21
Dr [1] - 2075:1
dramatic [1] - 2012:16
draw [2] - 2154:16, 2155:8
drawn [1] - 2142:17
dreamed [1] - 2088:17
drilling [2] - 2112:2, 2112:10
drills [1] - 2051:23
driven [1] - 2089:10
drives [5] - 2005:3, 2005:24, 2006:7, 2006:11, 2008:17
Dryden [1] - 2107:8
due [2] - 2059:22, 2087:3
duly [1] - 2074:10
during [7] - 1993:7, 2010:22, 2011:1, 2045:7, 2076:1, 2079:10, 2096:17
DX5167 [1] - 2064:11
dynamic [1] - 2011:18

E

e-mail [2] - 2065:4, 2066:5
E-procurement [3] - 2044:20, 2108:7, 2125:9
early [8] - 2000:7, 2045:17, 2078:22, 2096:22, 2099:1, 2105:13, 2116:5, 2127:17
earned [1] - 2075:21
easier [2] - 2056:25, 2073:15
easily [1] - 2167:1
easy [7] - 2012:24, 2104:22, 2139:25, 2157:14, 2164:14, 2165:5, 2165:8
eat [1] - 2126:19
eating [1] - 2116:8
econ [1] - 2089:17
economic [10] - 2076:6, 2076:11, 2077:6, 2080:9, 2080:22, 2081:21, 2114:1, 2153:3, 2156:18
Economic [4] - 2076:20, 2076:22, 2080:2, 2080:3
economics [10] - 2075:1, 2075:22, 2076:7, 2076:25, 2080:10, 2080:13, 2082:2, 2082:21, 2118:17, 2159:10
Economics [2] - 2084:6, 2115:8
economist [17] - 2077:5, 2077:21, 2078:3, 2078:9, 2080:6, 2080:7, 2081:7, 2082:16, 2087:4, 2088:25, 2092:6, 2094:20, 2111:19, 2113:8, 2119:19, 2120:12, 2162:23
economists [13] - 2077:9, 2078:6, 2082:17, 2088:6, 2088:10, 2088:17, 2096:16, 2125:24, 2126:9, 2127:3, 2128:23, 2132:2, 2151:18
economy [1] - 2112:7
Ed [9] - 2046:24, 2047:1, 2047:5, 2047:10, 2047:13, 2047:19, 2060:2, 2064:20, 2066:4
Ed's [1] - 2066:6
editor [2] - 2076:20, 2076:22
education [1] - 2081:8
effect [3] - 1997:7, 2140:19, 2143:8
effectively [2] - 2056:11, 2152:1
effectiveness [2] - 2053:18, 2053:20
effects [14] - 2081:22, 2082:24, 2084:13, 2087:5, 2090:10, 2090:16, 2091:6, 2093:23, 2094:2, 2096:1, 2116:3, 2120:16, 2139:12, 2152:16
efficiencies [8] - 1987:25, 2033:11, 2033:14, 2034:18, 2085:20, 2091:7, 2120:24, 2121:4
efficiency [3] - 2053:1, 2107:13, 2107:23
efficient [4] - 2106:25, 2107:1, 2107:3, 2154:11
effort [2] - 2061:12, 2079:11
eight [5] - 2001:11, 2067:17, 2085:6, 2085:7, 2139:17
either [2] - 2081:23, 2091:10
EJ [3] - 1990:20, 1990:23, 2054:24
elect [3] - 2020:3, 2020:4, 2022:13
electricity [5] - 2115:16, 2116:1, 2116:14, 2117:20,

2117:23
elects [1] - 2062:23
elements [3] - 2106:8, 2109:17, 2125:8
elevated [1] - 2122:5
eleven [1] - 2067:17
eliminate [1] - 2003:19
eliminated [1] - 2165:10
elsewhere [6] - 2009:15, 2010:3, 2011:22, 2013:13, 2014:25, 2056:8
embarrassing [1] - 2009:5
embedded [1] - 2025:20
emerge [1] - 2091:2
emerging [2] - 2128:5, 2130:7
EMMET [1] - 1975:10
employees [2] - 2031:18, 2053:10
encourage [1] - 2035:2
end [16] - 2006:22, 2019:3, 2075:9, 2086:24, 2087:1, 2091:22, 2109:1, 2111:13, 2121:20, 2125:8, 2125:16, 2130:18, 2131:17, 2142:24, 2142:25, 2165:6
ending [1] - 2086:25
energy [1] - 2081:4
enforcement [1] - 2078:12
enhance [1] - 2160:6
enjoy [1] - 2169:3
ensure [2] - 2057:12, 2068:23
ensures [1] - 1990:8
ensuring [1] - 2107:6
entail [1] - 2079:12
enter [2] - 2059:23, 2090:24
enterprise [7] - 2097:12, 2104:9, 2111:7, 2154:20, 2154:24, 2155:1
entire [2] - 2075:6, 2151:25
entirely [2] - 2134:16, 2166:19
entities [6] - 1980:3, 2069:22, 2117:15, 2156:6, 2156:8, 2156:10
entity [7] - 1978:25, 1979:9, 1979:14, 2053:24, 2069:1, 2069:5, 2126:14
entry [4] - 2086:1, 2091:1, 2121:8, 2149:1
environment [6] - 1984:3, 1990:12, 2000:18, 2006:25, 2034:13, 2034:17
equity [4] - 1981:18, 1981:19, 1981:23
especially [2] - 2069:15, 2124:8
essentially [6] - 1977:20, 1984:24, 1987:1, 2015:24, 2017:4, 2148:10
established [4] - 2057:18, 2088:8, 2128:22, 2128:24
estimate [3] - 2019:17, 2019:18, 2031:17
et [2] - 1975:2, 1975:6
etcetera [1] - 2139:20
European [1] - 2093:1
evaluate [10] - 1999:24, 2015:1, 2055:5, 2061:21, 2077:10, 2087:20, 2088:7, 2092:11, 2093:22, 2153:16
evaluated [4] - 2058:20, 2058:21, 2092:13, 2093:2
evaluating [5] - 1999:18, 2078:7, 2081:22, 2087:4, 2093:20
evaluation [3] - 1982:23, 1982:24, 2059:1
evening [2] - 2169:3
event [3] - 2014:14, 2099:7, 2130:2
eventually [1] - 2095:16
evidence [24] - 2071:17, 2071:20, 2071:22, 2071:24, 2072:8, 2073:8, 2073:21, 2091:25, 2103:14, 2105:9, 2109:24, 2110:3, 2120:1, 2120:3, 2120:8, 2140:15, 2140:18, 2149:11, 2155:12, 2157:12, 2165:4, 2165:20, 2166:25
exact [2] - 2099:17, 2100:8
exactly [2] - 2124:12, 2159:2
exam [3] - 2004:11, 2074:19, 2075:6
examination [16] - 1977:2, 1977:19, 1986:20, 1989:14, 1989:20, 2001:10, 2005:1, 2007:18, 2017:22, 2019:8, 2024:5, 2039:22, 2045:7, 2045:20, 2074:22, 2167:18
EXAMINATION [3] - 1977:6, 2052:12, 2075:15
EXAMINATON [1] - 2063:10
examine [3] - 2072:21, 2150:4, 2150:5
examined [1] - 2074:11
examining [1] - 2117:10
example [35] - 1981:22, 1983:20, 1991:8, 1992:6, 1993:12, 1994:19, 2012:16, 2023:3, 2044:7, 2078:24, 2079:9, 2080:25, 2084:3, 2092:3, 2093:9, 2096:3, 2101:11, 2101:24, 2102:19, 2127:14, 2128:18, 2129:8, 2131:2, 2132:24, 2132:25, 2133:9, 2133:10, 2133:12, 2134:13, 2135:4, 2138:14, 2138:19, 2138:22, 2153:13, 2155:5
examples [1] - 2122:23
except [2] - 2012:5, 2066:9
exception [3] - 2032:2, 2072:16, 2073:9
exchange [6] - 1990:4, 1991:4, 2020:22, 2053:8, 2053:22
excited [1] - 1979:14
excluded [1] - 2131:7
exclusive [1] - 2053:22
exclusivity [1] - 2053:9
excuse [1] - 2018:3
excused [1] - 2066:18
executives [2] - 1979:1, 1980:8
exercise [1] - 2061:17
exhausted [1] - 2150:7
exhibit [2] - 2071:22, 2150:7
exist [1] - 2022:19
existing [4] - 2001:2, 2030:4, 2030:8, 2041:9
expand [2] - 2086:2, 2159:22
expansion [1] - 2091:1
expect [9] - 2057:5, 2062:25, 2075:6, 2113:16, 2115:19, 2115:24, 2116:24, 2117:19, 2162:5
expectation [3] - 2019:4, 2019:5, 2104:23
expecting [1] - 2104:16
expend [1] - 1994:5
expense [5] - 2001:23, 2002:1, 2012:12, 2058:21, 2058:22
expenses [2] - 2002:5, 2058:23
expensive [1] - 2139:2
experience [3] - 1989:12, 1995:21, 2040:7
experienced [3] - 1989:8, 1989:11, 2053:11
experiences [1] - 2093:2
expert [7] - 2067:25, 2075:1, 2082:2, 2082:6, 2108:16, 2152:3, 2167:19
expert's [1] - 2120:17
expertise [4] - 1990:8, 1990:17, 1991:1, 2016:14
experts [3] - 1986:17, 1986:19, 2031:2
expiration [1] - 2059:25
expired [1] - 1997:16
explain [4] - 2088:13, 2114:19, 2114:25, 2130:24
explanation [1] - 2142:25
explore [1] - 2137:9
express [1] - 2052:20
extensive [1] - 2079:20
extent [4] - 2039:22, 2053:1, 2074:24, 2113:10
external [1] - 1990:17
extra [2] - 2117:7, 2130:18
eye [1] - 2011:5

F

fabrics [1] - 2007:2
face [6] - 2072:2, 2072:4, 2111:15, 2112:25, 2121:21, 2157:22
facilities [4] - 1983:13, 1983:24, 1984:10, 2135:16
facing [2] - 1978:17, 2137:3
fact [20] - 1978:7, 2002:8, 2019:15, 2027:3, 2031:21, 2054:1, 2059:5, 2069:19, 2086:11, 2100:25, 2108:1, 2110:10, 2123:18, 2130:7, 2139:13, 2148:24, 2150:25, 2155:8, 2161:25, 2166:9
factor [1] - 2091:12
factory [1] - 2091:21
faculty [1] - 2076:4
failed [1] - 2163:22
fair [20] - 1979:23, 1980:15, 1982:14, 1982:15, 1983:9, 1983:10, 1985:1, 1985:3, 1986:2, 1987:3, 1990:14, 1996:18, 1996:20, 1997:11, 2004:6, 2064:6, 2065:23, 2065:24, 2163:2, 2165:3
fairly [3] - 2040:16, 2096:22, 2123:24
fall [3] - 1987:5, 1987:7, 2155:21
familiar [8] - 2026:25, 2033:3, 2035:25, 2041:11, 2041:13, 2041:15, 2062:21, 2122:25
Fannie [1] - 2081:3
far [12] - 2046:17, 2066:1, 2098:22, 2099:3, 2099:9, 2099:22, 2102:22, 2138:3, 2140:3, 2152:2, 2155:20, 2155:21
fast [1] - 2086:14
Fastenal [1] - 2139:22
favor [2] - 2018:5, 2130:25
favorable [7] - 1984:25, 1985:5, 1985:7, 1985:10, 1990:4, 2016:13, 2054:12
FCC [1] - 2079:5
fear [1] - 2110:7
feasible [1] - 2154:1
features [2] - 2130:19, 2131:18
February [3] - 2045:19, 2059:19, 2079:25
Federal [3] - 1975:2, 2074:18, 2079:2
federal [1] - 2051:4
FEDERAL [1] - 1975:15
fee [11] - 1991:4, 1991:6, 2025:17, 2025:19, 2025:22, 2026:1, 2026:5, 2026:23, 2034:25, 2051:5, 2051:6
feedback [4] - 1995:25, 2025:5, 2025:7, 2057:10
fees [14] - 2026:9, 2034:1, 2034:2, 2034:4, 2035:3, 2035:20, 2050:25, 2051:1, 2051:2, 2051:12, 2058:11, 2058:13, 2058:24, 2084:8
fellow [1] - 2081:5
felt [3] - 2002:24, 2059:21, 2059:23
few [11] - 1977:10, 1977:12, 1977:15, 1984:22, 2005:24, 2018:19, 2045:6, 2064:14, 2065:15, 2097:5, 2110:20
fewer [7] - 2083:3, 2086:23, 2087:2, 2095:15, 2098:4, 2143:16, 2164:22
field [10] - 2024:19, 2075:1, 2076:5, 2076:7, 2076:9, 2076:16, 2076:18, 2082:18, 2126:11, 2159:9
fifth [1] - 2015:11
Fifth [1] - 1975:22
fight [1] - 2034:13
figure [3] - 2089:3, 2090:2, 2159:17
figures [1] - 2107:11
file [4] - 2004:17, 2062:2, 2079:3, 2079:4
filed [2] - 2093:13, 2096:7
files [1] - 2099:10
filings [2] - 1994:21, 1995:11
fill [1] - 2090:25
final [3] - 2113:17, 2146:1, 2146:4
finalize [2] - 2000:3, 2018:19
finance [4] - 1994:8, 1994:9, 1994:22, 2081:1
financial [3] - 1994:23, 2003:15, 2055:20
financially [3] - 1978:20, 1981:25, 1982:1
fine [9] - 2075:12, 2092:25, 2108:23, 2119:20, 2135:7, 2167:8, 2167:9, 2167:16, 2168:18
finish [4] - 2042:17, 2167:18, 2168:14, 2168:17
firm [18] - 1990:20, 2040:24, 2096:13, 2127:9, 2127:23, 2127:24, 2128:10, 2128:20, 2129:5, 2129:16, 2151:21, 2157:4, 2158:21, 2162:24, 2163:5, 2164:18, 2166:17
firm's [1] - 2164:3
firms [29] - 2083:2, 2083:5, 2083:12, 2086:12, 2087:23, 2087:24, 2089:9, 2090:4, 2090:11, 2090:18, 2090:23, 2101:10, 2105:12, 2109:25, 2126:24, 2127:18, 2130:7, 2143:15, 2149:13, 2150:11, 2151:20, 2153:11, 2157:15, 2157:20, 2159:12, 2159:24, 2165:15, 2166:18, 2166:21
first [34] - 1977:22, 2003:12, 2004:13, 2038:24, 2038:25, 2039:8, 2051:2, 2059:21, 2062:1, 2069:7, 2074:10, 2085:3, 2085:22, 2087:6, 2087:12, 2087:15, 2087:19, 2088:4, 2090:17, 2097:6, 2097:7, 2099:2, 2106:22, 2110:3, 2120:23, 2122:3, 2122:14, 2123:13, 2126:5, 2129:22, 2141:23, 2149:8, 2151:9, 2165:14
fit [2] - 2136:14
fits [1] - 2148:24
fitting [1] - 2147:12
five [14] - 2048:23, 2048:25, 2049:1, 2049:4, 2067:11, 2067:12, 2067:21, 2088:12, 2088:14, 2091:18, 2124:8, 2129:11, 2129:14, 2130:4
fix [2] - 2086:12, 2091:20
fixed [4] - 2001:21, 2051:7, 2051:8, 2085:12
flag [1] - 2142:14
Flakes [3] - 2126:16, 2126:20, 2129:7
flash [5] - 2005:3, 2005:24, 2006:7, 2006:11, 2008:17
flat [1] - 1991:6
flexibility [2] - 1977:17, 2067:13
flexible [1] - 2067:6
flight [1] - 2168:8
flights [1] - 2168:6
flip [3] - 2040:22, 2043:15, 2043:18
float [1] - 2119:23
Floor [2] - 1976:1, 1976:5
Florida [1] - 2061:24
flow [1] - 2159:5
flowing [1] - 2166:19
flows [1] - 2152:14
fly [1] - 2070:17
focus [9] - 2083:10, 2088:4, 2094:22, 2095:8, 2104:5, 2104:6, 2143:11, 2149:4, 2153:1
focusing [6] - 2111:13, 2143:7, 2143:8, 2153:2, 2153:17, 2154:21
folders [2] - 2004:18, 2039:14
folding [2] - 2007:6
folks [2] - 2106:17, 2164:24
follow [16] - 1987:23, 2036:5, 2036:10, 2036:12, 2036:14, 2050:5, 2052:16, 2062:15, 2062:17, 2070:21, 2072:25,

2088:11, 2099:16, 2111:4, 2135:2, 2136:6
follow-up [5] - 2050:5, 2062:15, 2062:17, 2070:21, 2072:25
followed [3] - 2046:6, 2048:13, 2070:5
following [5] - 2073:1, 2079:22, 2123:17, 2134:9, 2142:3
follows [1] - 2074:11
food [3] - 2131:3, 2131:4, 2131:7
foods [1] - 2153:6
Foods [1] - 2131:2
fool's [1] - 2115:17
fooled [1] - 2141:23
FOR [1] - 1975:1
for-profit [1] - 1978:12
force [7] - 1996:23, 1996:25, 1997:5, 2000:20, 2001:1, 2035:15, 2162:1
foregoing [1] - 2170:6
foremost [1] - 2088:4
foreseeable [2] - 2086:9, 2162:15
form [2] - 1991:15, 2061:18
formal [7] - 2050:1, 2089:17, 2089:18, 2094:15, 2104:12, 2104:20, 2155:4
formally [1] - 2165:25
formed [1] - 2142:17
formerly [1] - 2077:5
forms [5] - 2104:15, 2130:14, 2131:10, 2131:13, 2163:17
formula [1] - 2166:8
forth [7] - 1978:19, 2079:20, 2106:21, 2146:22, 2149:2, 2154:15, 2155:13
Fortune [3] - 1978:10, 2036:2, 2100:4
forum [1] - 2075:7
forward [3] - 2073:25, 2159:18, 2164:13
founding [1] - 2076:19
four [6] - 2048:22, 2048:23, 2048:25, 2049:1, 2049:4, 2100:9
fraction [1] - 2121:18
fragment [3] - 1988:1, 2037:15, 2056:11
fragmented [1] - 2014:1
framed [1] - 2069:4
framework [13] - 2088:6, 2088:9, 2088:12, 2088:13, 2088:16, 2091:25, 2092:10, 2094:11, 2110:9, 2114:6, 2122:13, 2122:14, 2153:3
frankly [6] - 2026:17, 2029:18, 2061:14, 2062:4, 2107:8, 2139:25
Freddie [1] - 2081:3
free [1] - 2023:11
freight [1] - 2116:7
frequently [1] - 2057:4
fresher [1] - 2078:21
Friday [1] - 2167:19
front [4] - 2043:16, 2078:6, 2104:13, 2165:21
front-line [1] - 2078:6
FTC [29] - 1975:13, 2035:3, 2048:21, 2049:4, 2049:7, 2049:11, 2049:13, 2049:15, 2066:21, 2079:15, 2081:18, 2084:14, 2091:19, 2092:25, 2093:21, 2093:24, 2094:22, 2095:16, 2096:7, 2096:15, 2096:18, 2097:16, 2100:6, 2104:5, 2113:20, 2120:13, 2131:3, 2133:19, 2137:3
FTC's [1] - 2099:19
FTEs [1] - 1986:15
full [5] - 1996:4, 1996:10, 1997:10, 2003:14, 2170:7
fully [1] - 1999:24
function [1] - 2069:11
functional [2] - 2147:22, 2147:23
fundamental [5] - 2159:9, 2159:16, 2159:22, 2159:24, 2161:1
furnish [1] - 2028:7
furniture [22] - 2006:19, 2006:23, 2006:24, 2007:1, 2007:3, 2007:4, 2010:1, 2138:8, 2138:19, 2138:23, 2138:24, 2139:1, 2139:4, 2139:14, 2139:17, 2139:19, 2143:19, 2144:2, 2144:10, 2144:21
furniture-type [1] - 2010:1
future [2] - 2159:17, 2162:15
fuzzy [1] - 2119:2

G

gain [2] - 1991:20, 2085:19
game [4] - 2071:14, 2101:22, 2110:13, 2115:17
gap [1] - 2090:25
garner [2] - 2029:17, 2030:21
garnering [1] - 2029:16
gas [7] - 2081:4, 2129:9, 2129:11, 2129:13, 2129:14, 2130:3, 2130:4
gather [3] - 1993:2, 1993:8, 1994:20
gears [1] - 2057:25
general [28] - 2004:13, 2004:16, 2008:15, 2008:20, 2008:25, 2010:9, 2011:10, 2013:4, 2024:25, 2046:19, 2046:21, 2053:4, 2056:17, 2056:21, 2077:6, 2077:16, 2078:12, 2078:14, 2085:3, 2094:17, 2095:13, 2110:4, 2113:25, 2115:18, 2122:21, 2123:1, 2131:20, 2153:21
General [1] - 1976:3
generally [9] - 2006:21, 2006:22, 2057:9, 2062:24, 2110:4, 2114:7, 2125:21, 2151:17, 2163:24
generate [1] - 2033:10
generates [1] - 2091:8
generic [1] - 2051:21
generous [1] - 1985:22
geographic [7] - 2109:15, 2109:16, 2127:1, 2151:17, 2151:18, 2151:20, 2151:23
geographically [1] - 2155:6
George [4] - 2002:14, 2009:4, 2009:6, 2041:14
Georgia [22] - 2027:1, 2027:3, 2027:5, 2027:17, 2027:20, 2028:4, 2028:10, 2028:16, 2028:20, 2028:25, 2029:3, 2029:6, 2029:18, 2029:22, 2029:24, 2030:5, 2030:16, 2030:17, 2050:9, 2050:13, 2058:1, 2058:3
gerrymandering [2] - 2139:9, 2143:22
gist [1] - 2124:21
given [8] - 1987:19, 2024:12, 2120:22, 2125:2, 2135:7, 2141:16, 2153:15, 2166:25
goal [1] - 2126:8
gobbles [1] - 2157:17
GOTSHAL [2] - 1975:18, 1975:21
government [10] - 2054:17, 2068:18, 2081:14, 2081:21, 2081:23, 2082:22, 2085:5, 2114:13, 2156:8, 2156:10
government's [3] - 2114:2, 2114:11, 2114:17
GPO [10] - 2022:21, 2035:3, 2035:11, 2035:12, 2035:14, 2035:16, 2051:3, 2051:5, 2064:20
GPOs [1] - 2035:8
grab [1] - 2142:6
Grainger [15] - 2041:16, 2041:18, 2041:22, 2042:12, 2042:17, 2043:4, 2043:16, 2044:3, 2044:6, 2044:7, 2045:3, 2050:7, 2050:14, 2051:23, 2139:21
Grainger's [1] - 2041:24
gravitate [1] - 2092:7
great [4] - 2075:14, 2080:11, 2081:2, 2167:13
greater [2] - 2029:12, 2035:13

greatest [1] - 2151:14
group [22] - 2011:11, 2048:5, 2051:5, 2069:7, 2070:15, 2077:15, 2080:7, 2089:21, 2095:18, 2103:2, 2105:4, 2109:1, 2111:8, 2124:19, 2128:13, 2129:5, 2134:6, 2152:15, 2153:8, 2155:13, 2157:6, 2165:6
grouped [1] - 2154:12
grouping [9] - 2008:19, 2098:8, 2106:22, 2134:2, 2136:12, 2149:15, 2155:11, 2155:24, 2157:3
groupings [2] - 2135:2, 2138:10
groups [2] - 2104:5, 2104:25
grow [1] - 2090:24
growth [1] - 2059:23
guarantee [1] - 2015:22
guardrail [1] - 2017:14
guardrails [2] - 2016:19, 2018:24
Guernsey [1] - 2109:14
guess [12] - 1988:16, 2015:13, 2064:23, 2077:3, 2077:20, 2085:7, 2092:22, 2105:21, 2113:8, 2118:23, 2136:6, 2145:4
guest [1] - 2006:16
guidance [1] - 2007:15
guide [2] - 2074:22, 2090:3
guided [1] - 2136:9
guidelines [9] - 2079:10, 2079:13, 2079:17, 2079:21, 2088:9, 2114:7, 2126:1, 2128:25, 2153:5
gut [3] - 2015:9, 2037:14, 2040:1
guy [2] - 2101:7, 2102:15
guys [3] - 2043:5, 2090:24, 2108:21

H

H&R [7] - 2093:10, 2127:16, 2127:19, 2162:19, 2162:21, 2163:3, 2163:7
half [11] - 2020:16, 2021:2, 2051:18, 2081:6, 2099:22, 2117:7, 2117:11, 2117:13, 2117:18, 2118:20, 2118:21
Halliburton [1] - 2111:22
hand [7] - 1979:20, 1981:20, 1986:4, 2102:8, 2103:23, 2110:16, 2112:16
handful [2] - 2075:10, 2093:6
handle [2] - 2037:13, 2077:20
handling [2] - 2077:12, 2081:6
happily [1] - 2081:12
happy [8] - 1979:14, 2011:19, 2035:19, 2037:25, 2067:14, 2072:24, 2073:20, 2150:22
harbor [1] - 2051:9
hard [6] - 1999:21, 2012:17, 2115:20, 2149:2, 2149:3, 2161:24
hard-nosed [1] - 2161:24
harder [2] - 2156:9, 2166:15
hardware [3] - 2005:8, 2005:12, 2005:19
harm [29] - 2085:24, 2086:13, 2086:20, 2086:21, 2086:22, 2094:9, 2094:19, 2102:25, 2110:24, 2111:8, 2111:10, 2111:12, 2114:5, 2114:7, 2114:8, 2114:12, 2114:14, 2114:20, 2115:9, 2117:25, 2118:6, 2119:22, 2120:2, 2120:5, 2121:9, 2144:1, 2155:23
harmed [7] - 2083:3, 2101:9, 2101:12, 2112:9, 2114:23, 2153:9, 2156:15
Harrisburg [1] - 1976:5
HCA [16] - 1978:7, 1978:10, 1978:17, 1978:24, 1979:2, 1979:5, 1979:7, 1979:8, 1979:13, 1979:17, 1979:19, 1979:25, 1983:20, 2033:15, 2046:21, 2047:20
head [5] - 2094:6, 2138:25, 2141:16, 2152:19
head-to-head [1] - 2094:6
heading [1] - 2064:20
Health [3] - 2032:4, 2046:25, 2065:18
health [12] - 1978:2, 1980:3, 1980:20, 1987:15, 2035:3, 2035:4, 2035:8, 2040:7, 2040:13, 2040:20, 2040:25, 2041:4
HealthTrust [35] - 1977:22, 1977:24, 1978:1, 1978:2, 1978:8, 1979:1, 1979:7, 1979:10, 1980:3, 1980:8, 1980:11, 1982:8, 1988:9, 1991:17, 2007:4, 2019:9, 2019:11, 2019:12, 2019:15, 2020:24, 2021:6, 2021:12, 2025:21, 2025:24, 2027:13, 2031:24, 2032:1, 2032:2, 2032:8, 2032:13, 2035:21, 2035:23, 2064:20, 2065:25, 2069:23
hear [13] - 2048:10, 2057:5, 2057:10, 2069:9, 2071:6, 2073:15, 2074:2, 2075:2, 2075:4, 2094:4, 2106:24, 2108:19, 2115:2
heard [22] - 1977:8, 1985:20, 2011:7, 2033:12, 2033:13, 2033:17, 2033:18, 2047:3, 2063:24, 2064:3, 2066:9, 2069:8, 2070:24, 2073:22, 2083:20, 2098:1, 2100:15, 2106:15, 2110:7, 2158:11, 2159:3, 2164:24
hearing [3] - 2079:10, 2138:4, 2161:4
hearsay [1] - 2072:16
heart [3] - 2134:12, 2139:9, 2143:6
hearts [1] - 2135:21
heavily [1] - 2100:25
held [1] - 2008:20
HELD [1] - 1975:9
hello [2] - 2052:14, 2052:15
help [10] - 2055:5, 2057:21, 2088:17, 2092:8, 2096:14, 2106:19, 2107:11, 2126:10, 2128:16, 2160:25
helpful [7] - 2004:12, 2069:7, 2075:3, 2082:11, 2094:17, 2099:14, 2126:5
helping [1] - 1991:21
helps [1] - 2168:16
hereby [1] - 2170:5
hierarchy [3] - 2103:17, 2105:8, 2111:9
high [14] - 2020:11, 2022:16, 2078:10, 2089:4, 2106:3, 2125:7, 2125:16, 2130:18, 2131:17, 2141:14, 2142:7, 2142:11, 2143:21, 2166:20
high-end [2] - 2125:16, 2130:18
higher [13] - 2035:4, 2086:24, 2087:1, 2090:13, 2112:1, 2113:10, 2116:14, 2117:17, 2131:19, 2154:2, 2157:22, 2157:24, 2158:1
highest [1] - 2022:11
highlighted [2] - 2097:19, 2104:4
highly [1] - 1999:21
Hilton [3] - 1980:24, 1981:1, 1981:4
hinted [1] - 2119:15
hit [1] - 2038:15
hitting [1] - 2007:16
hmm [1] - 2026:10
hold [2] - 2030:4, 2145:12
home [8] - 2007:16, 2043:15, 2043:18, 2084:2, 2084:3, 2139:22, 2139:23, 2168:5
honestly [1] - 2012:21
honing [1] - 2143:19
Honor [76] - 1977:3, 1982:10, 2000:8, 2007:15, 2009:7, 2028:3, 2050:22, 2052:9, 2052:11, 2060:25, 2062:14, 2063:3, 2063:6, 2066:12, 2066:14, 2067:4, 2067:9,

2067:15, 2068:3, 2068:5, 2068:10, 2068:11, 2068:13, 2069:6, 2069:10, 2069:25, 2070:3, 2070:7, 2070:24, 2071:8, 2071:14, 2071:15, 2071:22, 2072:6, 2072:24, 2073:6, 2073:20, 2074:4, 2074:7, 2074:17, 2074:24, 2075:5, 2079:11, 2082:1, 2085:25, 2093:12, 2094:5, 2096:11, 2097:6, 2099:12, 2102:9, 2103:8, 2103:21, 2105:23, 2107:25, 2113:20, 2117:25, 2120:10, 2120:15, 2120:16, 2123:17, 2131:16, 2133:15, 2136:11, 2139:25, 2141:4, 2150:12, 2153:19, 2154:25, 2155:18, 2158:19, 2167:5, 2167:13, 2168:2, 2168:15, 2168:16

HONORABLE [1] - 1975:10

honored [1] - 2064:13

hope [2] - 1997:19, 2027:23

hopefully [2] - 2005:17, 2018:19

hoping [1] - 2168:4

horrible [1] - 2162:8

hospital [18] - 1978:5, 1978:17, 1980:13, 1983:11, 1983:12, 1983:20, 1983:23, 1984:3, 1984:8, 1984:9, 1984:13, 1988:4, 2033:15, 2133:20, 2133:22, 2134:2, 2135:4

hospitals [11] - 1978:5, 1980:5, 1980:6, 1980:7, 1987:12, 2040:12, 2041:1, 2135:5, 2135:14, 2135:24

hour [2] - 2048:25, 2166:3

hours [7] - 2048:24, 2048:25, 2049:1, 2049:4, 2067:12, 2097:6, 2167:22

house [1] - 1999:14

House [3] - 2080:1, 2080:7, 2093:14

housing [1] - 2081:1

Houston [1] - 2110:15

HP [1] - 2010:14

HPG [37] - 1977:18, 1977:19, 1983:7, 1984:23, 1985:12, 1985:24, 1986:10, 1988:6, 1989:4, 1989:10, 1991:21, 2011:3, 2017:22, 2018:3, 2018:5, 2018:20, 2020:2, 2023:4, 2033:20, 2033:25, 2036:20, 2041:18, 2045:12, 2046:18, 2054:2, 2054:6, 2054:9, 2055:6, 2063:22, 2064:15, 2064:23, 2069:16, 2069:23, 2069:24, 2070:2, 2070:11, 2070:14

HPG's [6] - 2001:15, 2018:24, 2047:12, 2052:19, 2058:11, 2058:24

huge [1] - 2111:23

Hughes [1] - 2111:23

hum [2] - 2001:12, 2024:7

hundred [3] - 2112:21, 2122:1, 2122:4

hundreds [1] - 2013:24

hung [3] - 2144:23, 2147:16, 2147:17

hurt [4] - 2085:16, 2085:17, 2090:12, 2091:8

husher [1] - 2063:8

hypothetical [29] - 2125:24, 2127:5, 2127:13, 2128:13, 2128:22, 2129:4, 2130:20, 2151:10, 2156:17, 2156:21, 2156:25, 2157:9, 2157:13, 2157:17, 2157:21, 2158:3, 2158:8, 2158:21, 2159:23, 2160:11, 2160:22, 2162:18, 2163:5, 2163:14, 2163:21, 2164:15, 2164:17, 2165:7, 2165:10

I

idea [2] - 2011:16, 2134:11

identified [1] - 2068:2

identify [4] - 2003:18, 2024:21, 2126:12, 2157:2

iffy [1] - 2086:16

Illinois [1] - 2061:24

illustrates [1] - 2102:2

illustrative [1] - 2141:20

imaged [1] - 2005:14

imagine [6] - 2013:23, 2021:22, 2022:17, 2108:7, 2130:17, 2139:2

immediate [2] - 2085:2, 2085:18

immediately [2] - 2037:7, 2040:22

impact [15] - 1979:5, 1987:11, 1987:22, 2051:1, 2055:16, 2058:25, 2059:2, 2059:3, 2060:12, 2083:23, 2085:1, 2085:18, 2113:1, 2116:5, 2130:8

impacted [2] - 2058:12, 2084:7

impeachment [1] - 2071:19

implants [1] - 1987:4

implementation [1] - 2163:4

implication [1] - 2164:3

implications [1] - 2090:15

implicit [2] - 2159:12, 2161:11

important [10] - 2000:3, 2000:10, 2087:3, 2106:4, 2121:6, 2124:15, 2141:16, 2147:3, 2153:12, 2159:16

impose [1] - 2056:12

impressions [1] - 2064:4

IN [1] - 1975:1

in-depth [2] - 1996:5, 2096:5

in-house [1] - 1999:14

Inc [1] - 1975:6

incentive [2] - 2161:8, 2162:14

incentives [4] - 2034:11, 2104:14, 2104:23, 2161:8

include [44] - 1980:23, 1985:7, 2005:2, 2005:3, 2005:18, 2005:20, 2005:21, 2062:21, 2077:12, 2124:3, 2125:17, 2125:18, 2126:23, 2128:6, 2130:5, 2130:13, 2130:14, 2131:10, 2132:20, 2134:24, 2135:9, 2135:17, 2135:18, 2136:3, 2138:8, 2138:9, 2138:10, 2138:16, 2138:17, 2140:12, 2141:5, 2141:11, 2144:1, 2144:5, 2146:13, 2148:15, 2151:6, 2151:7, 2152:5, 2152:12, 2156:8, 2164:2, 2164:4

included [22] - 2097:13, 2104:5, 2123:6, 2123:8, 2125:4, 2125:10, 2125:14, 2128:17, 2130:21, 2131:16, 2131:21, 2137:10, 2138:24, 2139:5, 2140:7, 2141:1, 2141:17, 2149:10, 2151:6, 2155:12, 2156:9, 2164:11

includes [12] - 1986:17, 2004:13, 2004:20, 2004:23, 2005:9, 2007:18, 2009:2, 2012:13, 2100:4, 2130:1, 2131:5, 2131:13

including [5] - 2031:22, 2079:20, 2140:1, 2146:19, 2165:20

income [1] - 2034:15

incorrect [1] - 2119:20

increase [20] - 2009:20, 2010:20, 2010:25, 2011:14, 2011:16, 2012:16, 2012:25, 2014:15, 2017:8, 2053:18, 2060:13, 2084:8, 2106:25, 2111:16, 2112:25, 2120:3, 2121:21, 2121:25, 2130:2, 2158:17

increased [3] - 2017:12, 2056:2, 2102:4

increases [1] - 2055:20

increasing [1] - 2055:17

incurs [1] - 2113:9

indeed [1] - 2121:12

independently [1] - 2065:16

INDEX [1] - 1976:12

indicate [1] - 2065:22

indicated [2] - 1984:8, 2035:2

indicates [2] - 2109:12, 2166:25
indications [2] - 2105:3, 2108:25
individual [15] - 1982:5, 1982:7, 1982:13, 1989:18, 1990:23, 2011:11, 2068:21, 2068:23, 2069:17, 2070:2, 2070:14, 2083:23, 2084:10, 2102:22, 2136:12
individually [8] - 1982:3, 2068:20, 2069:18, 2070:6, 2070:11, 2070:22, 2154:8
individuals [3] - 2047:18, 2083:14, 2083:22
indulgence [1] - 2063:7
Industrial [1] - 2076:6
industrial [8] - 2044:25, 2045:2, 2045:5, 2051:23, 2052:5, 2076:16, 2082:18, 2159:10
industry [7] - 1991:22, 1998:25, 1999:1, 2042:12, 2051:4, 2080:13, 2137:14
inefficiencies [3] - 1983:17, 1984:3, 1988:3
inevitably [1] - 2156:1
inexpensive [6] - 2005:7, 2005:10, 2007:6, 2007:11, 2007:12, 2007:14
inflated [1] - 2122:5
inform [1] - 1993:18
information [28] - 1980:12, 1983:1, 1992:7, 1992:11, 1992:12, 1993:2, 1993:5, 1993:8, 1993:11, 1994:19, 1995:10, 1996:11, 1996:17, 1999:2, 1999:5, 1999:7, 2015:15, 2024:2, 2025:9, 2032:24, 2040:18, 2046:16, 2064:2, 2091:25, 2097:22, 2099:19, 2103:12, 2108:13
informative [2] - 2090:8, 2154:11
informed [3] - 1979:17, 1979:21, 2157:12
infrastructure [1] - 2044:10
initial [2] - 1999:23, 2003:15
initiated [1] - 2060:9
INJUNCTION [2] - 1975:4, 1975:8
ink [59] - 2004:20, 2008:16, 2008:20, 2008:25, 2009:9, 2009:15, 2010:8, 2010:14, 2011:6, 2011:24, 2012:5, 2012:18, 2013:11, 2013:12, 2013:21, 2014:12, 2014:16, 2014:24, 2056:6, 2056:10, 2056:18, 2056:25, 2062:25, 2123:3, 2123:11, 2123:21, 2124:9, 2124:15, 2136:14, 2136:17, 2137:4, 2137:6, 2137:10, 2137:15, 2137:16, 2140:4, 2140:5, 2140:12, 2140:17, 2140:20, 2141:2, 2141:5, 2141:7, 2141:16, 2141:18, 2142:13, 2143:3, 2143:19, 2144:2, 2144:12, 2144:24, 2146:23, 2147:3, 2147:11, 2147:13, 2147:20, 2150:21, 2150:23, 2151:7
innovation [1] - 2090:14
input [1] - 2079:19
insinuated [1] - 2119:14
instance [1] - 2009:25
instances [1] - 2132:2
instead [4] - 2026:11, 2067:15, 2098:17, 2142:7
institution [1] - 1978:12
instructions [2] - 1987:17, 1987:19
integrating [1] - 2108:8
Intel [1] - 2092:22
intelligent [1] - 2154:15
intend [1] - 2031:13
intends [1] - 2073:11
interaction [1] - 2001:17
interest [5] - 2000:6, 2002:24, 2043:5, 2065:16, 2065:22
interested [11] - 2014:8, 2043:8, 2047:5, 2048:16, 2048:17, 2071:2, 2082:23, 2100:6, 2119:25, 2120:6, 2156:13
intermediate [1] - 2130:11
intermediators [1] - 2130:10
interpretation [1] - 1985:22
interrupt [2] - 1981:13, 2158:14
intervening [1] - 2001:4
interview [1] - 2049:12
introduce [3] - 1989:16, 2010:20, 2010:24
introduced [3] - 1988:3, 1990:11, 2128:24
introduction [1] - 2122:11
Intuit [1] - 2127:23
intuitive [1] - 2162:19
intuitively [1] - 2147:21
invariably [1] - 2082:19
inventories [1] - 2108:2
invested [1] - 2033:14
investigate [2] - 2035:3, 2096:9
investigating [1] - 2091:24
investigation [4] - 2035:7, 2078:4, 2096:5, 2096:16
investigations [2] - 2077:21, 2078:1
investment [3] - 2061:12, 2061:13, 2159:7
investments [1] - 2159:21
invite [1] - 2055:21
invited [1] - 2056:1
involved [10] - 2055:13, 2076:17, 2077:18, 2078:15, 2079:11, 2095:22, 2111:25, 2127:17, 2130:7, 2133:19
involves [2] - 2165:25, 2166:14
involving [2] - 2079:8, 2126:5
IO [1] - 2076:15
issue [7] - 1999:4, 2023:11, 2050:12, 2073:14, 2120:12, 2121:17, 2154:18
issued [1] - 2059:19
issues [6] - 2076:15, 2080:21, 2080:22, 2081:4, 2088:7, 2095:4
IT [9] - 2005:5, 2005:7, 2005:8, 2005:10, 2005:11, 2005:12, 2005:16, 2005:18, 2005:22
item [5] - 1992:22, 2043:22, 2141:11, 2148:15, 2148:18
itemized [1] - 2106:1
items [34] - 2008:5, 2039:12, 2040:9, 2042:6, 2043:19, 2060:20, 2060:23, 2108:3, 2122:25, 2124:3, 2132:15, 2132:17, 2134:9, 2134:15, 2134:24, 2136:12, 2137:10, 2137:11, 2137:18, 2137:19, 2143:9, 2143:11, 2144:1, 2146:13, 2146:19, 2148:11, 2148:15, 2149:9, 2149:23, 2150:4, 2150:9, 2150:20, 2150:24, 2151:6
itself [5] - 1982:25, 1996:16, 2003:22, 2071:24, 2160:21

J

James [1] - 1975:24
jan [5] - 2028:14, 2028:22, 2058:4, 2138:9, 2139:21
jan-san [5] - 2028:14, 2028:22, 2058:4, 2138:9, 2139:21
JANICE [1] - 2170:5
Janice [2] - 1976:8, 2170:13
janitorial [2] - 2138:9, 2144:18
janitorial/sanitation [1] - 2147:6
Jeff [2] - 1977:3, 1977:9
Jeffrey [1] - 1975:21
jets [1] - 2085:5
job [7] - 1989:7, 2058:20, 2059:1, 2068:24, 2078:9, 2080:14, 2113:4
jobs [2] - 1989:3, 2076:24
John [1] - 2083:14
Johnson [3] - 1990:24, 1991:7, 1991:14
Johnson's [1] - 1991:1
join [4] - 2035:10, 2035:11, 2035:12, 2077:3

joined [1] - 2076:4
joining [1] - 2020:6
Jones [22] - 2046:24, 2047:1, 2047:5, 2047:10, 2047:13, 2047:16, 2060:2, 2060:5, 2060:9, 2063:13, 2063:18, 2063:22, 2064:1, 2064:7, 2064:20, 2065:3, 2065:9, 2065:12, 2065:17, 2065:18, 2068:1, 2071:2
Jones' [2] - 2063:24, 2064:4
Journal [1] - 2076:20
journals [3] - 2076:18, 2076:21, 2076:23
Judge [4] - 1996:24, 2000:2, 2140:14, 2166:2
judge [2] - 1999:19, 2137:17
JUDGE [2] - 1975:10, 1975:10
jump [1] - 2078:17
jumps [1] - 2098:9
jury [1] - 2115:2
Justice [2] - 2092:15, 2092:17

K

Katharine [1] - 2081:6
keep [5] - 2010:8, 2010:16, 2118:14, 2128:19
keeps [1] - 2097:8
kept [3] - 2068:24, 2123:12, 2164:6
key [3] - 2088:21, 2130:3, 2138:20
kickback [1] - 2051:4
kidding [1] - 2067:17
kind [18] - 1993:22, 2005:6, 2008:6, 2009:4, 2011:17, 2013:20, 2051:21, 2056:12, 2057:17, 2058:16, 2059:12, 2062:6, 2080:20, 2089:16, 2112:14, 2147:20, 2160:11, 2161:24
KKR [2] - 1981:22, 1981:24
knee [10] - 2135:9, 2135:14, 2135:17, 2135:19, 2135:22, 2138:14, 2138:22, 2142:15, 2143:5, 2144:20
knees [1] - 2135:21
knocking [1] - 2037:18
knowing [2] - 2024:16, 2037:7
knowledge [5] - 1991:20, 1991:22, 2039:22, 2065:8, 2066:9
known [1] - 2041:4
knows [2] - 2101:21, 2161:6
Krisha [2] - 1975:13, 2074:18

L

label [1] - 2029:13
labor [4] - 2081:7, 2081:8, 2147:7, 2147:11
lack [2] - 2109:5, 2110:18
Lacy [1] - 1975:24
landing [1] - 2033:1
lands [1] - 2031:14
language [4] - 2102:11, 2102:13, 2140:9, 2148:21
laptops [2] - 2005:13, 2005:21
large [75] - 1990:3, 2056:22, 2056:23, 2069:12, 2080:20, 2083:16, 2091:2, 2092:23, 2094:8, 2094:23, 2095:1, 2095:6, 2095:17, 2095:20, 2096:6, 2096:18, 2096:19, 2097:9, 2097:11, 2099:3, 2100:4, 2103:8, 2103:13, 2103:14, 2105:3, 2105:6, 2105:10, 2105:22, 2106:17, 2108:10, 2108:12, 2108:17, 2109:9, 2110:18, 2110:23, 2111:13, 2111:24, 2112:19, 2112:25, 2114:5, 2114:10, 2114:20, 2114:23, 2115:12, 2121:1, 2121:5, 2121:19, 2121:21, 2122:4, 2122:18, 2124:10, 2124:25, 2125:1, 2125:13, 2125:18, 2130:22, 2139:1, 2150:13, 2150:23, 2152:1, 2152:7, 2152:8, 2152:20, 2152:22, 2153:25, 2154:3, 2154:4, 2154:13, 2156:5, 2157:11, 2158:22, 2164:10, 2164:20, 2165:12, 2165:23
larger [3] - 2036:12, 2095:9, 2104:4
largest [6] - 2022:11, 2023:17, 2023:22, 2023:25, 2098:2, 2099:4
last [26] - 2001:11, 2002:22, 2031:10, 2031:12, 2031:13, 2031:22, 2035:1, 2039:21, 2046:18, 2048:2, 2056:20, 2059:6, 2063:22, 2064:22, 2065:12, 2065:15, 2066:1, 2067:2, 2067:3, 2068:18, 2079:17, 2092:21, 2092:22, 2097:16, 2100:16, 2124:8
late [8] - 2046:1, 2067:6, 2067:15, 2068:3, 2071:9, 2071:13, 2166:2, 2168:10
latter [1] - 2069:15
launch [2] - 2045:17, 2046:2
launched [1] - 2046:1
law [5] - 2082:20, 2088:18, 2088:19, 2090:9, 2126:10
laws [1] - 2114:24
lawyer [1] - 2088:24
lawyers [2] - 2088:18, 2096:15
lead [3] - 2035:4, 2136:5, 2154:2
leaders [1] - 2079:16
leading [4] - 2076:21, 2097:15, 2100:22, 2127:23
leakage [2] - 2106:15, 2106:16
learn [9] - 1996:5, 1996:6, 1996:11, 1996:12, 1996:15, 2078:5, 2103:7, 2103:11, 2135:11
learned [7] - 2018:10, 2093:24, 2095:7, 2095:9, 2123:10, 2124:7
learning [3] - 2095:11, 2108:17
least [8] - 1994:13, 2014:22, 2021:13, 2043:1, 2099:2, 2119:14, 2125:2, 2133:8
leave [2] - 2035:19, 2041:13
led [3] - 2079:21, 2094:22, 2095:16
left [2] - 2093:14, 2103:23
left-hand [1] - 2103:23
legitimate [5] - 2038:13, 2039:19, 2041:5, 2050:10, 2052:4
length [2] - 2001:9, 2024:5
lengthy [1] - 2000:1
less [8] - 2013:10, 2015:12, 2080:24, 2083:3, 2087:2, 2090:14, 2137:5, 2137:7
level [7] - 2065:22, 2075:23, 2080:13, 2116:24, 2116:25, 2118:1, 2130:11
leverage [9] - 1989:14, 1990:1, 2087:2, 2087:19, 2101:4, 2101:5, 2101:6, 2102:15, 2152:23
levers [1] - 2011:20
Lexmark [3] - 2010:14, 2011:7, 2140:18
life [2] - 2015:25, 2017:5
likely [8] - 2081:22, 2082:24, 2087:16, 2093:23, 2094:2, 2094:19, 2139:12, 2160:18
likewise [1] - 2099:25
limit [1] - 1996:8
limited [5] - 2037:10, 2042:24, 2043:19, 2052:3, 2061:23
line [11] - 2042:6, 2043:19, 2078:6, 2091:20, 2101:1, 2108:19, 2109:17, 2144:8, 2147:8, 2154:16, 2155:8
lines [1] - 2149:18
list [3] - 2016:23, 2043:22, 2071:4
listed [1] - 2052:2
listen [1] - 2078:5
lists [1] - 2071:14
literally [4] - 1992:19, 2038:3, 2049:19, 2132:15
LLP [3] - 1975:18, 1975:21,

1975:25
loading [1] - 2033:1
loans [3] - 2115:15, 2115:25, 2119:4
local [2] - 2110:11, 2156:11
located [1] - 2062:10
location [1] - 2009:22
locations [1] - 2132:8
lock [2] - 2014:20, 2026:19
locked [6] - 2010:22, 2015:20, 2017:5, 2017:9, 2018:24
logical [5] - 2067:21, 2095:16, 2123:24, 2141:22, 2147:4
logically [1] - 2159:5
long-standing [1] - 2042:11
look [70] - 1994:22, 2009:8, 2011:5, 2012:17, 2013:21, 2015:4, 2015:10, 2031:3, 2038:10, 2042:3, 2043:2, 2043:12, 2056:19, 2064:18, 2069:14, 2070:9, 2073:21, 2085:7, 2086:6, 2089:21, 2090:10, 2090:18, 2091:1, 2093:12, 2093:22, 2095:6, 2096:18, 2099:6, 2101:25, 2102:20, 2102:23, 2103:4, 2103:19, 2104:7, 2105:11, 2107:16, 2108:23, 2109:13, 2110:5, 2112:13, 2113:3, 2116:19, 2117:8, 2117:22, 2119:20, 2121:23, 2124:16, 2124:17, 2133:7, 2133:16, 2134:1, 2135:25, 2138:6, 2142:4, 2142:8, 2142:12, 2143:14, 2144:9, 2144:14, 2145:4, 2145:5, 2149:1, 2149:19, 2151:19, 2157:3, 2161:12, 2162:4, 2166:6
Look [2] - 2123:17, 2162:6
looked [7] - 2042:1, 2042:23, 2043:20, 2103:3, 2111:1, 2131:17, 2137:4
looking [17] - 1995:1, 2011:10, 2011:11, 2023:24, 2084:5, 2089:11, 2092:1, 2092:2, 2100:3, 2106:14, 2133:6, 2148:23, 2149:22, 2151:25, 2152:1, 2159:12, 2159:18
looks [4] - 1992:19, 2060:5, 2091:7, 2092:21
lose [16] - 2011:25, 2013:15, 2026:15, 2030:12, 2030:17, 2033:25, 2034:5, 2034:21, 2034:24, 2035:19, 2087:18, 2161:13, 2161:17, 2163:14, 2166:17
losing [2] - 2109:21, 2110:20
loss [2] - 2109:11, 2112:4
loud [1] - 2000:15
Loughlin [1] - 1975:14
love [1] - 2123:18
low [5] - 1991:9, 2006:22, 2054:11, 2054:12, 2068:24
lower [13] - 1997:16, 2016:3, 2086:25, 2091:10, 2102:5, 2102:8, 2108:3, 2139:10, 2141:7, 2142:12, 2153:25, 2165:16, 2165:18
lowering [1] - 2033:14
loyalties [1] - 2034:11
loyalty [1] - 2034:15
lumped [1] - 2139:5
lumping [1] - 2137:21
lunch [1] - 2168:17

M

machine [1] - 1976:6
machines [2] - 2005:22, 2013:25
machines' [1] - 2014:2
macro [1] - 2080:10
mad [1] - 2162:8
magic [1] - 2155:9
magnitude [1] - 2121:23
mail [2] - 2065:4, 2066:5
main [4] - 2120:21, 2139:16, 2148:22, 2149:4
maintenance [1] - 2051:22
major [4] - 2008:5, 2097:13, 2104:8, 2127:23
majority [3] - 2017:1, 2032:6, 2092:16
Manage [1] - 2147:2
manage [4] - 2023:20, 2047:18, 2057:21, 2062:24
managed [7] - 2062:18, 2062:21, 2124:8, 2136:23, 2136:25, 2140:16, 2147:10
management [6] - 2010:6, 2024:18, 2024:21, 2040:2, 2062:2, 2106:14
manager [2] - 1988:23, 1989:8
MANGES [2] - 1975:18, 1975:21
manner [1] - 2011:12
manufacture [3] - 2016:24, 2016:25, 2043:25
manufactured [1] - 2017:16
manufacturer [4] - 2017:8, 2027:7, 2027:10, 2029:12
manufacturers [4] - 1991:8, 2013:25, 2108:4, 2133:5
manufacturing [1] - 2130:10
March [3] - 1975:5, 2045:19, 2079:25
marden [1] - 1976:3
margin [1] - 2166:14
margins [2] - 2166:1, 2166:25
marker [1] - 2164:1
market [154] - 1979:18, 1980:10, 1982:24, 1982:25, 1989:17, 1989:18, 1995:6, 1996:9, 1998:14, 1998:15, 1998:19, 1998:21, 2001:24, 2010:11, 2011:13, 2011:15, 2013:8, 2014:22, 2015:1, 2015:3, 2015:4, 2015:11, 2015:22, 2015:25, 2016:21, 2034:24, 2038:14, 2043:3, 2052:7, 2053:4, 2053:24, 2053:25, 2055:5, 2057:9, 2062:10, 2064:8, 2069:11, 2078:7, 2083:13, 2083:15, 2084:4, 2088:22, 2089:1, 2089:2, 2089:3, 2089:10, 2089:12, 2089:13, 2089:16, 2089:24, 2090:1, 2090:19, 2090:24, 2094:15, 2094:16, 2109:2, 2109:5, 2110:5, 2122:14, 2122:15, 2122:17, 2125:5, 2125:10, 2125:12, 2125:15, 2125:21, 2125:22, 2126:3, 2126:5, 2126:7, 2126:19, 2126:25, 2127:4, 2127:8, 2127:13, 2127:22, 2128:1, 2128:5, 2128:18, 2129:21, 2129:23, 2129:25, 2130:8, 2130:14, 2130:17, 2130:25, 2131:4, 2131:10, 2131:12, 2131:16, 2131:21, 2132:16, 2132:20, 2132:24, 2133:6, 2133:7, 2133:10, 2134:5, 2134:9, 2134:22, 2134:25, 2135:24, 2136:8, 2136:10, 2137:12, 2138:20, 2138:21, 2139:3, 2139:6, 2141:6, 2142:1, 2142:3, 2142:4, 2142:20, 2143:4, 2144:3, 2146:13, 2148:10, 2148:23, 2148:25, 2149:4, 2149:8, 2149:14, 2149:16, 2150:1, 2150:2, 2150:20, 2151:12, 2151:16, 2151:18, 2151:23, 2152:6, 2152:13, 2154:7, 2154:14, 2156:6, 2156:19, 2157:4, 2157:8, 2162:22, 2163:19, 2164:7, 2164:9, 2164:13, 2164:16, 2166:19, 2166:22
marketplace [2] - 2040:5, 2059:24
markets [6] - 2088:20, 2112:7, 2132:1, 2132:4, 2134:15, 2156:18
marking [1] - 2089:5
Mason [11] - 2026:13, 2035:18, 2050:15, 2055:21, 2056:1, 2061:9, 2062:11, 2086:2, 2097:25, 2159:21, 2165:11

masters [1] - 2075:23
match [2] - 2016:4, 2016:7
material [1] - 2008:5
materials [1] - 2123:22
math [1] - 2075:23
mathematically [1] - 2033:23
mathematics [1] - 2075:22
matter [13] - 1979:20, 1981:20, 2047:4, 2072:5, 2072:17, 2111:16, 2114:24, 2121:20, 2135:1, 2138:2, 2142:25, 2151:24, 2156:4
matters [3] - 2077:11, 2094:19, 2114:21
Matthew [1] - 1975:24
Max [3] - 2001:6, 2002:9, 2018:10
maximization [1] - 2162:4
maximize [1] - 2161:9
maximizing [2] - 2158:24, 2162:12
McDonald's [1] - 2100:15
McHie [1] - 1975:24
McKesson [18] - 2035:24, 2035:25, 2036:7, 2036:15, 2036:19, 2036:25, 2037:6, 2037:14, 2037:16, 2038:1, 2038:6, 2038:10, 2039:19, 2039:25, 2041:3, 2041:11, 2050:2, 2050:14
McKesson's [2] - 2037:4, 2041:6
mean [55] - 1981:13, 1985:15, 1987:1, 1994:4, 1994:5, 1995:25, 2005:5, 2006:6, 2006:7, 2010:19, 2021:18, 2025:16, 2031:13, 2051:20, 2054:11, 2057:15, 2058:22, 2067:13, 2071:18, 2072:15, 2072:19, 2072:23, 2077:20, 2080:24, 2085:4, 2086:22, 2090:16, 2092:16, 2093:9, 2097:10, 2109:16, 2111:16, 2112:14, 2113:25, 2114:4, 2114:9, 2114:22, 2116:25, 2122:20, 2123:20, 2124:25, 2126:10, 2126:11, 2140:4, 2147:21, 2148:18, 2150:19, 2151:1, 2157:1, 2165:8, 2165:19, 2166:6, 2167:7, 2167:10
meaning [4] - 2020:4, 2032:25, 2033:1, 2140:10
meaningful [2] - 2009:21, 2157:7
means [11] - 1986:7, 2023:3, 2023:6, 2025:14, 2029:1, 2058:23, 2086:23, 2101:1, 2130:22, 2152:1, 2166:20
meant [5] - 1985:16, 1988:18, 2006:7, 2084:11, 2158:16
measure [16] - 2089:24, 2090:1, 2117:23, 2118:2, 2134:17, 2138:21, 2142:18, 2142:19, 2144:9, 2148:25, 2150:1, 2154:14, 2155:20, 2156:10, 2157:6
measured [2] - 2099:4, 2166:15
measurements [1] - 2155:13
mechanism [5] - 2026:19, 2028:8, 2028:9, 2053:21, 2059:13
mechanisms [1] - 2025:6
medical [1] - 1987:4
medications [3] - 2035:9, 2036:16, 2040:14
medium [4] - 2033:16, 2105:6, 2110:24, 2111:5
medium-size [2] - 2110:24, 2111:5
meet [8] - 1995:21, 2047:24, 2048:17, 2050:15, 2065:21, 2108:21, 2109:18, 2121:1
Meeting [2] - 2064:20, 2065:7
meeting [24] - 2045:8, 2045:10, 2046:17, 2046:19, 2046:21, 2047:4, 2047:19, 2047:21, 2047:23, 2048:3, 2063:24, 2064:1, 2064:5, 2064:15, 2065:2, 2065:5, 2065:14, 2066:2, 2066:6, 2066:9, 2066:10, 2073:2
meetings [1] - 2048:7
member [20] - 1989:18, 2017:1, 2020:21, 2020:24, 2023:4, 2023:13, 2023:24, 2024:2, 2024:25, 2025:17, 2025:21, 2028:24, 2035:16, 2035:17, 2043:23, 2063:1, 2070:14, 2080:1, 2080:17, 2081:5
member's [1] - 2025:20
members [121] - 1978:1, 1978:8, 1978:17, 1979:17, 1980:3, 1980:13, 1980:23, 1981:9, 1981:10, 1981:15, 1981:17, 1982:12, 1982:14, 1983:11, 1983:12, 1983:17, 1983:18, 1983:23, 1984:8, 1984:13, 1984:25, 1986:2, 1986:8, 1988:9, 1989:4, 1990:9, 1990:14, 1991:9, 1991:21, 1992:20, 1993:8, 1993:14, 1996:1, 2014:23, 2018:13, 2019:9, 2019:15, 2019:19, 2019:25, 2020:3, 2020:9, 2020:11, 2020:16, 2021:2, 2021:5, 2021:6, 2021:9, 2021:12, 2021:19, 2022:6, 2022:7, 2022:11, 2022:13, 2022:14, 2022:23, 2023:10, 2023:17, 2023:18, 2023:23, 2023:25, 2024:13, 2024:16, 2024:19, 2025:12, 2025:13, 2026:2, 2026:11, 2026:17, 2027:10, 2027:13, 2028:4, 2028:10, 2028:16, 2028:23, 2029:7, 2029:8, 2031:24, 2032:1, 2032:2, 2033:19, 2033:20, 2033:24, 2034:3, 2034:21, 2035:10, 2035:21, 2037:20, 2038:8, 2041:21, 2042:13, 2044:3, 2044:23, 2052:19, 2054:6, 2054:9, 2054:13, 2054:16, 2055:10, 2056:12, 2057:3, 2057:12, 2057:18, 2057:19, 2058:9, 2058:15, 2058:17, 2058:19, 2059:25, 2060:14, 2060:16, 2061:7, 2061:16, 2062:23, 2068:23, 2069:11, 2080:15, 2080:19
members' [8] - 2001:23, 2002:1, 2002:5, 2009:10, 2019:22, 2023:7, 2026:5, 2053:3
membership [13] - 1990:15, 1996:3, 2001:19, 2006:24, 2020:1, 2022:17, 2022:22, 2025:23, 2045:4, 2053:5, 2055:25, 2056:15
mention [1] - 2049:19
mentioned [23] - 1977:19, 1978:16, 1980:9, 1982:16, 1996:22, 2002:16, 2005:1, 2006:19, 2008:4, 2014:7, 2031:8, 2045:7, 2057:11, 2061:21, 2095:25, 2096:8, 2103:13, 2121:18, 2127:16, 2143:25, 2151:16, 2156:5, 2156:17
merchant [3] - 2098:7, 2126:24, 2127:18
merge [5] - 1984:19, 2099:7, 2129:10, 2135:5
merged [4] - 2001:6, 2002:9, 2139:16, 2150:16
merger [85] - 1979:6, 1979:14, 1979:15, 1979:18, 1981:4, 1981:7, 1983:14, 1983:19, 1983:25, 1984:4, 1984:11, 1984:14, 1987:22, 2001:10, 2002:18, 2002:23, 2009:13, 2013:1, 2033:10, 2033:23, 2053:17, 2053:18, 2053:20, 2056:24, 2059:11, 2064:23, 2077:13, 2077:18, 2078:1, 2078:4, 2079:9, 2079:13, 2079:17, 2081:22, 2082:10, 2082:11, 2082:15, 2082:24, 2082:25, 2084:13, 2086:4, 2086:22, 2087:5, 2088:9,

2089:20, 2090:15, 2091:7, 2091:14, 2091:15, 2091:24, 2092:23, 2093:6, 2093:10, 2093:18, 2093:20, 2093:22, 2094:3, 2094:9, 2094:18, 2095:2, 2096:1, 2101:22, 2109:7, 2109:21, 2110:21, 2111:20, 2111:25, 2112:8, 2114:6, 2117:3, 2122:5, 2125:25, 2128:25, 2133:5, 2143:14, 2152:17, 2153:5, 2153:9, 2154:2, 2154:9, 2157:1, 2160:14, 2160:21, 2160:24
mergers [12] - 2076:12, 2076:13, 2077:12, 2081:21, 2082:12, 2085:4, 2092:11, 2092:13, 2092:16, 2093:3, 2129:1, 2133:20
merging [11] - 2053:24, 2083:2, 2083:5, 2083:12, 2087:3, 2105:11, 2136:1, 2153:11, 2157:4, 2163:8, 2164:3
messiness [1] - 2156:3
met [8] - 1977:9, 2047:1, 2048:8, 2065:18, 2065:20, 2065:24, 2107:7, 2154:4
method [5] - 2125:22, 2125:23, 2125:25, 2158:13, 2158:20
methodology [2] - 2001:20, 2018:24
methods [1] - 2164:13
metrics [2] - 2099:5, 2100:9
micro [1] - 2080:13
might [34] - 1995:16, 1996:5, 2004:12, 2011:7, 2012:16, 2012:17, 2013:23, 2014:24, 2021:22, 2022:3, 2022:17, 2031:4, 2043:8, 2075:10, 2085:5, 2086:13, 2089:20, 2089:22, 2090:11, 2091:11, 2099:14, 2107:14, 2117:14, 2118:17, 2122:21, 2125:7, 2130:1, 2130:19, 2132:12, 2133:22, 2135:23, 2137:1, 2137:6
mile [3] - 2031:10, 2031:12, 2031:22
mill [2] - 1991:8, 2029:18
million [47] - 1993:14, 1993:15, 1998:5, 2009:10, 2009:15, 2010:13, 2011:6, 2013:12, 2026:8, 2026:9, 2033:20, 2033:21, 2033:24, 2033:25, 2034:1, 2034:5, 2034:6, 2034:20, 2034:21, 2037:21, 2041:21, 2042:18, 2051:1, 2051:11, 2051:12, 2051:14, 2051:15, 2051:17, 2103:25, 2104:7, 2104:9, 2104:18, 2112:21, 2115:15, 2117:7, 2117:11, 2117:13, 2117:18, 2118:20, 2118:21, 2118:22, 2122:1, 2122:4, 2154:20
mills [1] - 1991:12
mind [7] - 2042:9, 2061:6, 2078:21, 2157:25, 2158:2, 2160:4, 2160:15
mindful [1] - 2167:17
mine [1] - 2066:20
minority [2] - 2012:6, 2012:9
minute [3] - 2004:11, 2009:9, 2046:11
minutes [3] - 1984:22, 2038:4, 2039:21
miscommunication [1] - 2147:18
misinformed [1] - 2089:6
misleading [8] - 2089:7, 2134:3, 2135:20, 2138:15, 2139:11, 2144:6, 2144:11, 2144:16
mission [2] - 2027:24, 2058:19
misspoke [1] - 2146:8
mistake [6] - 2138:17, 2142:15, 2143:25, 2144:13, 2144:17, 2145:19
MIT [1] - 2075:21
mix [1] - 2161:6
mode [1] - 2119:21
model [2] - 2013:20, 2014:11
models [1] - 2013:25
modes [2] - 2125:6, 2125:18
moment [2] - 2064:19, 2141:3
money [17] - 1998:10, 2026:16, 2061:12, 2104:13, 2112:21, 2117:14, 2119:1, 2135:22, 2158:15, 2158:23, 2159:4, 2159:13, 2159:19, 2159:20, 2159:21, 2161:2, 2161:25
monitoring [1] - 2107:5
monopolist [29] - 2125:24, 2127:5, 2127:13, 2128:13, 2128:22, 2129:4, 2130:20, 2151:10, 2156:17, 2156:21, 2156:25, 2157:9, 2157:13, 2157:17, 2157:21, 2158:4, 2158:8, 2158:21, 2159:23, 2160:11, 2160:22, 2162:18, 2163:5, 2163:15, 2163:21, 2164:15, 2164:17, 2165:7, 2165:10
monopolized [1] - 2126:14
monopoly [1] - 2136:1
month [6] - 2000:12, 2018:19, 2046:18, 2085:14, 2085:22, 2096:16
month-long [1] - 2096:16
months [1] - 1993:25
morning [3] - 2010:5, 2168:11, 2168:20
Morrison [2] - 2110:13
most [13] - 2023:18, 2055:21, 2059:8, 2081:18, 2087:16, 2095:21, 2106:4, 2123:18, 2143:10, 2152:25, 2158:23, 2159:13, 2166:7
mostly [4] - 2080:6, 2110:11, 2135:1, 2149:3
motion [2] - 2068:4, 2085:21
motions [1] - 2071:9
motivated [2] - 2004:8, 2034:4
motors [1] - 2051:24
mouth [3] - 1984:24, 2000:9, 2119:13
move [7] - 2056:18, 2056:25, 2105:8, 2113:18, 2113:22, 2151:5, 2156:2
moved [2] - 2076:4, 2168:10
movie [1] - 2153:23
moving [3] - 2056:7, 2056:10, 2155:25
MPS [5] - 2012:10, 2137:4, 2140:20, 2148:3, 2148:5
MR [43] - 1977:3, 1977:7, 1982:10, 1982:11, 1985:21, 1985:23, 1997:22, 1997:23, 1998:1, 1998:3, 2004:7, 2006:15, 2006:16, 2006:17, 2014:19, 2050:22, 2052:9, 2052:11, 2052:13, 2054:23, 2060:25, 2062:13, 2062:16, 2063:3, 2063:6, 2063:11, 2066:11, 2066:13, 2066:14, 2068:3, 2069:25, 2070:7, 2070:19, 2070:24, 2071:8, 2071:13, 2071:22, 2072:6, 2072:11, 2072:24, 2073:6, 2073:20, 2074:4
MRO [2] - 2045:24, 2051:20
MS [53] - 2066:25, 2067:3, 2067:8, 2067:9, 2067:11, 2067:14, 2067:20, 2068:10, 2068:13, 2068:22, 2069:2, 2069:6, 2069:21, 2074:7, 2074:17, 2074:21, 2074:24, 2075:5, 2075:14, 2075:16, 2082:1, 2082:4, 2082:7, 2082:8, 2086:18, 2086:19, 2099:24, 2113:18, 2113:24, 2114:4, 2114:10, 2114:15, 2114:18, 2115:4, 2120:10, 2120:20, 2121:15, 2124:23, 2134:8, 2137:8, 2143:2, 2146:11, 2148:8, 2156:24, 2162:17, 2167:5, 2167:13, 2167:16, 2167:20, 2167:22, 2167:24, 2168:2, 2168:16
multiple [1] - 1993:2
mundane [1] - 2112:14
must [3] - 2002:19, 2015:25,

2077:20

N

name [7] - 1977:8, 1990:20, 1990:25, 2075:17, 2105:21, 2105:23, 2109:13
named [1] - 1990:24
narrow [1] - 2104:2
narrower [3] - 2125:15, 2130:17, 2131:16
Nashville [1] - 2070:19
national [6] - 1987:25, 2044:7, 2044:10, 2053:9, 2061:24, 2080:24
nationwide [8] - 2027:14, 2028:5, 2028:10, 2029:1, 2029:8, 2031:25, 2036:22, 2036:24
natural [8] - 2058:9, 2081:4, 2124:1, 2124:5, 2127:21, 2147:12, 2160:8, 2167:5
naturally [1] - 2095:4
nature [8] - 1979:18, 1989:17, 1996:9, 2037:10, 2048:5, 2056:20, 2093:23, 2101:18
nearly [2] - 2108:10, 2111:1
necessarily [7] - 2011:17, 2020:20, 2048:20, 2078:13, 2089:14, 2119:24, 2148:11
necessary [1] - 2055:18
need [22] - 2015:2, 2050:24, 2061:3, 2061:16, 2063:8, 2068:14, 2074:2, 2089:21, 2091:12, 2099:6, 2103:5, 2109:17, 2130:5, 2132:8, 2132:9, 2132:10, 2132:14, 2133:3, 2145:13, 2152:22, 2163:13, 2167:21
needed [4] - 2056:2, 2059:23, 2070:5, 2081:24
needs [21] - 1995:21, 2012:18, 2014:4, 2014:14, 2050:16, 2088:3, 2103:7, 2103:10, 2103:15, 2104:25, 2105:4, 2105:10, 2108:18, 2108:21, 2108:24, 2109:3, 2109:18, 2133:2, 2153:15, 2154:14, 2155:5
negate [1] - 2022:3
negative [1] - 1979:6
negotiate [10] - 1984:25, 1985:13, 1986:1, 1986:8, 1999:24, 2000:25, 2003:17, 2003:19, 2091:19, 2106:3
negotiated [6] - 1997:14, 1998:12, 1998:20, 2008:11, 2017:18, 2154:9
negotiating [4] - 1985:4, 1990:2, 2019:2, 2031:2
negotiation [2] - 2003:13, 2011:1
negotiations [5] - 1993:19, 2001:18, 2002:25, 2003:23, 2059:12
negotiator [1] - 1989:8
negotiators [9] - 1986:20, 1986:22, 1989:9, 1990:7, 2010:15, 2011:5, 2011:20, 2012:3, 2053:11
never [19] - 1983:21, 1998:18, 1998:21, 1999:2, 2008:15, 2008:18, 2012:5, 2038:20, 2039:1, 2042:14, 2042:16, 2044:2, 2060:7, 2107:9, 2107:10, 2108:16, 2120:11, 2159:3
New [1] - 1975:22
new [2] - 1999:16, 2032:24
news [1] - 2047:8
newspapers [1] - 2111:22
next [28] - 2000:11, 2003:9, 2018:19, 2032:7, 2040:11, 2066:22, 2066:23, 2066:25, 2074:5, 2090:21, 2097:4, 2097:6, 2098:2, 2098:14, 2098:15, 2100:2, 2103:5, 2105:14, 2106:13, 2116:24, 2116:25, 2125:9, 2141:6, 2150:7, 2155:11, 2155:24, 2156:3
nice [1] - 2169:3
nine [1] - 2167:12
NJ [1] - 1975:20
noise [1] - 2068:11
non [2] - 1980:20, 2077:13
non-health [1] - 1980:20
non-merger [1] - 2077:13
nonclinical [6] - 1986:23, 1987:1, 1987:6, 1987:7, 1988:14, 1988:15
noncompliant [1] - 2024:20
noncritical [2] - 2060:20, 2060:23
none [6] - 1980:13, 1983:11, 1983:18, 1983:23, 1984:13, 1984:17
nonexistent [1] - 2165:1
nonjury [1] - 2072:14
nonnational [1] - 1983:16
nonpublic [1] - 2015:15
nonsense [1] - 2143:23
normal [3] - 2102:13, 2131:25, 2140:8
normally [6] - 2113:8, 2115:19, 2117:18, 2131:23, 2137:14, 2146:5
Norman [1] - 1976:3
North [3] - 2036:16, 2037:12, 2040:15
northeast [1] - 2061:24
Northern [1] - 2027:21
nosed [1] - 2161:24
note [1] - 2157:14
noted [2] - 2109:8, 2140:7
notes [6] - 2122:24, 2132:9, 2132:14, 2146:22, 2164:23, 2170:7
nothing [5] - 2037:7, 2050:22, 2066:11, 2066:13, 2115:23
noticing [1] - 2096:8
notion [3] - 2132:16, 2143:22, 2154:19
notwithstanding [1] - 2002:8
Nuclear [2] - 2168:22, 2168:24
number [20] - 1985:12, 1985:24, 2002:19, 2036:2, 2050:25, 2055:18, 2057:20, 2077:22, 2077:25, 2095:2, 2096:14, 2097:6, 2098:6, 2099:15, 2103:10, 2139:10, 2142:8, 2144:14, 2150:13, 2164:4
numbered [1] - 2069:15
numbers [4] - 2101:14, 2102:8, 2150:12, 2150:17
numerous [1] - 2001:10
NW [4] - 1975:16, 1975:25, 1976:10, 2170:14
NY [1] - 1975:22

O

O'Neill [10] - 2083:9, 2100:17, 2101:16, 2102:19, 2108:20, 2113:4, 2117:6, 2117:10, 2139:15, 2161:21
Obama [2] - 2078:19, 2080:16
object [1] - 2113:18
objection [3] - 2082:4, 2120:10, 2120:19
objections [1] - 2072:11
objective [1] - 2080:9
obligation [3] - 2158:6, 2158:16, 2160:5
observing [1] - 2167:1
obviously [9] - 2050:2, 2071:11, 2072:7, 2094:14, 2096:25, 2114:5, 2116:21, 2125:20, 2140:4
occasion [1] - 1991:7
occasions [1] - 2021:15
occur [6] - 2021:17, 2021:18, 2021:19, 2023:2, 2047:22, 2048:7
occurred [1] - 2066:10
OF [3] - 1975:1, 1975:8, 2170:2
off-contract [4] - 2021:10, 2023:19, 2026:20, 2106:16
off-the-record [1] - 2068:15

off-the-shelf [1] - 2006:23
offer [7] - 1984:9, 2046:14, 2101:19, 2120:2, 2120:4, 2120:7, 2157:18
offered [10] - 1992:24, 1997:16, 2003:1, 2020:21, 2059:9, 2059:13, 2069:24, 2080:1, 2157:19, 2161:16
offering [10] - 2010:10, 2042:1, 2042:24, 2043:19, 2052:3, 2068:19, 2157:15, 2165:16, 2165:18, 2165:22
offers [3] - 2003:5, 2032:18, 2032:21
Office [62] - 1975:24, 1978:22, 1998:8, 1999:17, 2001:6, 2002:9, 2018:10, 2032:12, 2033:2, 2037:25, 2044:17, 2050:1, 2055:9, 2060:19, 2060:22, 2083:9, 2094:6, 2095:1, 2096:20, 2096:23, 2097:7, 2097:8, 2097:23, 2098:10, 2098:20, 2099:2, 2099:9, 2099:21, 2100:8, 2100:10, 2100:21, 2101:19, 2102:6, 2102:13, 2104:11, 2106:24, 2109:8, 2109:19, 2110:17, 2112:16, 2125:7, 2130:9, 2131:18, 2137:2, 2139:3, 2139:6, 2139:23, 2141:12, 2142:14, 2143:9, 2144:6, 2149:12, 2150:16, 2150:24, 2155:22, 2157:15, 2161:17, 2161:18, 2165:10, 2165:22
office [181] - 1987:5, 1987:7, 1987:11, 1987:12, 1987:14, 1987:18, 1988:1, 1988:2, 1991:1, 1995:9, 1995:20, 1999:11, 2001:10, 2001:16, 2002:13, 2004:10, 2004:13, 2004:16, 2004:20, 2004:23, 2006:25, 2007:24, 2008:3, 2008:5, 2008:16, 2008:20, 2008:25, 2009:8, 2009:19, 2010:7, 2010:9, 2010:10, 2011:12, 2013:4, 2016:6, 2016:20, 2019:19, 2020:12, 2020:17, 2021:6, 2021:10, 2021:13, 2021:20, 2021:24, 2022:4, 2022:7, 2022:8, 2022:12, 2022:25, 2023:4, 2024:1, 2024:22, 2030:2, 2036:25, 2037:5, 2037:9, 2037:13, 2037:15, 2037:17, 2038:2, 2038:4, 2038:6, 2038:14, 2038:21, 2039:1, 2039:6, 2039:9, 2039:19, 2039:23, 2039:25, 2040:3, 2040:5, 2041:5, 2041:6, 2042:1, 2042:5, 2042:7, 2042:14, 2042:19, 2043:10, 2043:19, 2043:20, 2046:20, 2046:21, 2047:6, 2047:14, 2047:18, 2050:11, 2050:14, 2051:25, 2052:1, 2052:4, 2055:2, 2055:9, 2056:13, 2056:17, 2056:21, 2057:3, 2057:22, 2058:9, 2058:12, 2058:25, 2059:5, 2060:6, 2060:10, 2060:13, 2060:17, 2060:19, 2060:22, 2063:14, 2063:19, 2064:5, 2064:24, 2065:10, 2066:3, 2083:25, 2084:3, 2084:15, 2094:8, 2094:23, 2095:10, 2098:8, 2100:5, 2100:21, 2104:2, 2107:12, 2110:12, 2112:13, 2112:19, 2113:5, 2113:7, 2115:8, 2115:15, 2117:2, 2117:8, 2121:18, 2122:18, 2122:20, 2122:21, 2122:22, 2123:1, 2123:2, 2123:20, 2123:21, 2124:24, 2125:2, 2125:12, 2125:14, 2125:19, 2130:10, 2130:23, 2131:13, 2136:13, 2137:15, 2138:5, 2138:13, 2139:12, 2139:15, 2139:24, 2140:6, 2140:9, 2140:10, 2143:8, 2144:7, 2144:21, 2147:19, 2147:20, 2148:1, 2150:12, 2151:8, 2151:15, 2152:6, 2154:17, 2154:22, 2157:10, 2158:22, 2164:10, 2164:19, 2165:2, 2165:12
OfficeMax [1] - 2150:16
officer [1] - 2047:20
offices [3] - 2022:18, 2065:19, 2065:25
Official [2] - 1976:9, 2170:13
OFFICIAL [1] - 2170:2
official [1] - 2047:12
offs [1] - 2021:1
offset [2] - 2030:17, 2120:25
offsetting [1] - 2091:12
often [15] - 2047:24, 2091:19, 2107:22, 2123:20, 2124:9, 2126:23, 2127:8, 2134:10, 2140:7, 2140:16, 2149:15, 2150:23, 2150:25, 2155:6, 2156:11
oil [4] - 2111:23, 2111:24, 2112:2, 2112:10
once [5] - 2003:23, 2089:23, 2095:6, 2095:9, 2095:19
one [69] - 1978:7, 1986:5, 1989:3, 1990:8, 1992:25, 1996:8, 1996:23, 1996:24, 2002:19, 2008:2, 2011:10, 2011:20, 2012:25, 2013:9, 2018:5, 2021:1, 2023:10, 2025:6, 2031:8, 2036:16, 2037:12, 2040:14, 2048:11, 2051:18, 2052:23, 2053:14, 2054:8, 2054:10, 2057:20, 2061:9, 2062:23, 2076:7, 2076:21, 2077:25, 2086:6, 2086:10, 2087:7, 2088:15, 2092:12, 2093:15, 2097:6, 2098:6, 2100:17, 2101:24, 2102:15, 2103:16, 2105:2, 2106:9, 2107:17, 2110:15, 2110:20, 2112:6, 2113:5, 2116:17, 2117:6, 2126:14, 2127:9, 2127:22, 2128:20, 2129:16, 2133:25, 2138:20, 2152:4, 2156:2, 2158:11, 2166:14, 2166:17, 2168:1
one's [1] - 2152:19
one-and-a-half [1] - 2051:18
one-offs [1] - 2021:1
one-third [3] - 2036:16, 2037:12, 2040:14
one-way [1] - 2018:5
ones [4] - 2022:24, 2131:19, 2135:6, 2152:21
ongoing [1] - 1999:9
online [5] - 2033:16, 2039:2, 2044:20, 2084:18, 2096:3
open [2] - 2105:21, 2113:21
OPEN [1] - 2066:16
operates [1] - 1984:23
operating [1] - 1984:18
operations [2] - 2041:10, 2051:22
opinion [14] - 2061:6, 2061:18, 2069:16, 2094:2, 2121:11, 2122:15, 2122:17, 2123:7, 2141:2, 2141:24, 2142:16, 2142:22, 2156:1, 2156:4
opinions [2] - 2052:20, 2155:15
opportunities [5] - 2048:6, 2097:17, 2098:11, 2098:13, 2100:1
opposed [1] - 2027:7
option [5] - 2013:22, 2055:10, 2060:6, 2063:14, 2063:19
options [3] - 2055:6, 2090:4, 2091:2
oranges [1] - 2144:20
order [12] - 1983:5, 2009:20, 2022:4, 2023:8, 2023:12, 2023:14, 2056:23, 2084:3, 2101:4, 2106:23, 2107:1, 2152:22
ordering [1] - 2026:19
orders [7] - 1987:10, 1987:23, 2005:15, 2009:21, 2026:15, 2053:5, 2107:23
ordinary [2] - 2073:1, 2073:2

organization [15] - 1978:7, 1981:23, 1986:7, 1994:8, 1994:22, 2042:13, 2047:15, 2048:6, 2051:6, 2061:11, 2070:15, 2076:6, 2076:16, 2082:18, 2159:10
organizations [5] - 1980:23, 2037:8, 2057:16, 2061:5, 2069:8
orient [1] - 2082:12
oriented [1] - 2094:21
originally [1] - 1997:2
Orszag [2] - 2137:20, 2152:3
orthopedic [2] - 2135:8, 2135:13
otherwise [3] - 1979:15, 2016:24, 2091:16
ourselves [5] - 1996:8, 2018:12, 2057:18, 2058:15, 2118:11
outcomes [1] - 1987:15
outlined [2] - 2094:11, 2122:13
outrank [1] - 2047:16
outside [4] - 2046:22, 2076:24, 2115:9, 2129:21
outsourced [1] - 2031:23
outsourcing [1] - 2032:9
over-promise [1] - 1977:12
overall [9] - 2011:25, 2013:20, 2102:9, 2113:7, 2117:9, 2118:19, 2135:24, 2160:23, 2165:19
overcharged [1] - 2122:10
overhaul [1] - 2079:18
overlap [4] - 2087:25, 2124:5, 2143:15, 2151:14
overlapping [1] - 2087:14
overlaps [3] - 2087:13, 2092:24, 2124:16
overnight [1] - 2086:3
oversee [2] - 1986:24, 1988:24
overseeing [1] - 1987:2
own [8] - 1989:19, 2026:13, 2029:13, 2031:9, 2070:2, 2095:17, 2103:18, 2127:7
owned [1] - 2107:22
owners [3] - 1981:18, 1981:19, 1981:23

P

P.D [1] - 2110:13
p.m [1] - 1975:6
PA [1] - 1976:5
Pacific [21] - 2027:1, 2027:3, 2027:5, 2027:20, 2028:5, 2028:10, 2028:16, 2028:20, 2028:25, 2029:3, 2029:6, 2029:18, 2029:22, 2029:24, 2030:5, 2030:16, 2030:17, 2050:9, 2050:13, 2058:1, 2058:3
Pacific's [1] - 2027:18
PACK [2] - 1997:22, 1998:1
package [1] - 2151:3
page [8] - 2039:5, 2039:7, 2040:11, 2043:16, 2043:18, 2064:18, 2099:15
pages [3] - 2039:5, 2039:6, 2049:18
paid [4] - 2025:15, 2025:16, 2025:19, 2051:2
paper [65] - 1987:10, 1987:17, 1991:8, 1991:12, 2004:23, 2008:16, 2008:21, 2008:25, 2010:9, 2011:16, 2027:10, 2027:11, 2027:23, 2028:2, 2028:5, 2029:4, 2029:6, 2029:7, 2029:8, 2029:12, 2029:14, 2029:16, 2029:21, 2029:22, 2029:25, 2030:6, 2030:11, 2030:14, 2030:15, 2039:14, 2056:21, 2058:2, 2058:3, 2062:21, 2098:7, 2122:22, 2123:21, 2124:20, 2128:6, 2128:16, 2136:13, 2136:16, 2137:15, 2137:18, 2137:19, 2138:1, 2140:22, 2140:23, 2140:24, 2142:1, 2144:19, 2145:5, 2145:10, 2163:1, 2163:11, 2163:24, 2164:1, 2164:2, 2164:5, 2164:10
paperclip [5] - 1984:18, 2010:16, 2010:20, 2011:3, 2040:21
paperclips [8] - 2004:17, 2009:14, 2010:12, 2011:17, 2013:6, 2027:24, 2028:1, 2041:1
paragraphs [2] - 2049:19, 2069:15
parameters [1] - 2001:22
paramount [1] - 1982:17
parcel [1] - 2032:20
pardon [1] - 2005:6
parent [5] - 1977:24, 1978:7, 1978:24, 1979:9, 1979:13
part [38] - 1987:20, 1990:10, 1991:9, 1991:16, 1991:17, 1991:19, 1992:2, 1993:17, 1993:21, 1993:22, 1994:24, 1996:2, 1997:19, 2006:20, 2007:21, 2007:25, 2008:2, 2008:7, 2017:19, 2019:9, 2020:1, 2027:9, 2029:10, 2037:24, 2043:4, 2053:7, 2053:16, 2057:15, 2082:18, 2083:22, 2098:8, 2109:3, 2120:11, 2137:4, 2139:25, 2148:23, 2166:7
partially [1] - 2075:7
participate [1] - 2080:24
participation [3] - 2019:9, 2035:22, 2035:23
particular [7] - 1985:7, 2064:15, 2082:24, 2088:6, 2125:23, 2133:21, 2153:17
particularly [4] - 2069:16, 2075:9, 2078:22, 2121:3
parties [8] - 2049:16, 2081:20, 2096:8, 2103:16, 2128:5, 2154:19, 2163:8, 2167:9
partner [2] - 2025:6, 2110:16
parts [1] - 2089:8
party [4] - 2032:10, 2062:3, 2063:25, 2066:10
party's [1] - 2152:3
pass [11] - 2034:15, 2034:16, 2091:11, 2113:3, 2113:9, 2113:10, 2113:15, 2113:21, 2116:24, 2121:17, 2122:2
pass-through [5] - 2113:9, 2113:15, 2113:21, 2116:24, 2121:17
passed [5] - 2115:19, 2116:22, 2118:6, 2118:10, 2128:15
past [7] - 1995:24, 2014:10, 2033:1, 2092:10, 2092:13, 2093:2, 2127:14
patient [5] - 1984:18, 1984:20, 1987:11, 1987:16, 1987:20
patient's [1] - 1987:18
patients [5] - 1987:3, 1987:8, 1987:9, 1987:15, 1987:22
pattern [3] - 2098:23, 2099:20, 2100:8
pause [1] - 2141:3
pay [19] - 1991:4, 1991:6, 2026:2, 2029:21, 2084:14, 2084:17, 2112:1, 2112:3, 2112:23, 2113:7, 2115:8, 2115:13, 2115:15, 2116:1, 2117:7, 2118:25, 2161:14, 2162:9
paying [11] - 2084:17, 2084:19, 2084:20, 2086:24, 2087:1, 2115:25, 2116:7, 2116:12, 2116:14, 2122:4
pays [1] - 2117:2
pen [2] - 2023:11, 2147:20
pencil [7] - 2128:6, 2128:16, 2163:1, 2163:11, 2163:23, 2164:2, 2164:5
pencils [2] - 2004:17, 2136:17
penetrate [1] - 2116:16
penetration [1] - 2022:16
Pennsylvania [1] - 1976:3
pens [30] - 2004:17, 2023:12, 2025:14, 2026:12, 2039:15, 2083:25, 2107:15, 2112:23, 2116:6, 2116:11, 2116:12, 2122:24, 2130:13, 2131:14, 2131:15, 2132:8, 2132:10,

2132:13, 2132:19, 2136:16, 2144:19, 2145:10, 2146:22, 2148:1, 2150:5, 2164:9, 2164:22, 2165:17, 2165:18
People [1] - 2147:8
people [25] - 1986:15, 1986:23, 2009:24, 2021:23, 2024:21, 2045:21, 2077:23, 2085:13, 2096:12, 2096:13, 2096:14, 2101:2, 2115:25, 2119:3, 2127:20, 2129:13, 2135:15, 2140:8, 2153:22, 2159:6, 2163:11, 2163:22, 2163:25, 2164:5, 2164:21
perceive [1] - 2120:3
percent [36] - 1998:4, 2009:9, 2015:10, 2015:12, 2019:15, 2019:22, 2021:9, 2025:17, 2025:19, 2026:5, 2030:19, 2031:18, 2031:22, 2032:4, 2032:7, 2040:12, 2040:13, 2043:23, 2051:9, 2051:14, 2051:18, 2053:23, 2084:15, 2090:5, 2108:2, 2112:20, 2121:25, 2141:13, 2141:21, 2141:25, 2142:6, 2142:7, 2154:25, 2155:1
percent-plus [1] - 2031:22
percentage [5] - 1997:21, 1997:22, 2020:9, 2020:11, 2102:9
percentages [1] - 2004:12
perfect [1] - 2097:22
perfectly [2] - 2023:11, 2035:19
perform [1] - 2058:4
performance [2] - 2014:10, 2058:20
perhaps [2] - 2069:21, 2086:25
period [6] - 2001:15, 2079:10, 2086:9, 2096:16, 2097:14, 2125:3
Perry [13] - 1975:21, 1977:3, 1977:9, 2052:17, 2052:22, 2053:10, 2054:1, 2054:24, 2055:12, 2056:5, 2060:2, 2060:12, 2070:8
PERRY [29] - 1977:3, 1977:7, 1982:10, 1982:11, 1985:21, 1985:23, 1997:23, 1998:3, 2004:7, 2006:16, 2006:17, 2014:19, 2050:22, 2052:9, 2063:6, 2063:11, 2066:11, 2066:14, 2068:3, 2069:25, 2070:24, 2071:8, 2071:13, 2071:22, 2072:6, 2072:11, 2072:24, 2073:20, 2074:4
Perry's [1] - 2057:11
person [6] - 1994:9, 2048:18, 2063:22, 2065:6, 2065:12, 2073:12
personally [1] - 2046:11
perspective [5] - 2007:4, 2100:14, 2100:16, 2121:21, 2162:14
Perspectives [1] - 2076:20
persuade [1] - 2120:4
Peter [1] - 1975:14
Ph.D [2] - 2075:21, 2077:9
pharmaceutical [2] - 2036:24, 2040:24
pharmaceuticals [2] - 2037:12, 2040:23
pharmacy [2] - 2036:18, 2040:18
phase [1] - 2045:24
phone [2] - 2070:17, 2083:24
physician [2] - 1987:9, 2022:18
physicians [1] - 2040:13
pick [2] - 2083:24, 2137:11
picking [1] - 2143:11
picture [1] - 2085:21
piece [2] - 1987:17, 2031:13
pieces [4] - 2005:24, 2089:14, 2090:17, 2167:2
pipeline [1] - 2081:4
place [20] - 2020:23, 2022:3, 2026:18, 2028:9, 2028:22, 2034:17, 2035:23, 2040:19, 2044:1, 2053:6, 2057:12, 2057:16, 2057:17, 2057:19, 2057:21, 2067:21, 2105:18, 2155:9, 2165:15
plain [1] - 2140:9
Plaintiffs [2] - 1975:4, 1975:13
plaintiffs [3] - 2072:11, 2074:8, 2093:7
plan [1] - 2168:1
planning [1] - 2015:16
plans [3] - 1982:24, 2040:13, 2041:7
play [2] - 2069:11, 2101:22
played [1] - 2118:24
player [4] - 1983:16, 2013:9, 2038:19, 2090:3
players [2] - 2099:5, 2159:19
pleased [1] - 2079:25
pleasure [1] - 2067:13
plus [2] - 2008:25, 2031:22
point [30] - 2002:24, 2010:21, 2010:23, 2024:22, 2029:16, 2030:21, 2039:24, 2056:16, 2059:15, 2067:23, 2072:15, 2072:17, 2082:1, 2095:19, 2109:5, 2111:19, 2113:21, 2116:4, 2116:5, 2119:24, 2124:2, 2124:5, 2126:21, 2132:7, 2137:5, 2140:11, 2148:3, 2150:22, 2167:6, 2168:14
pointblank [1] - 2120:15
pointing [3] - 2109:23, 2110:10, 2110:19
points [3] - 2035:14, 2100:18, 2137:22
policy [4] - 2078:15, 2078:21, 2078:24, 2080:22
pools [1] - 1985:15
popular [3] - 2090:7, 2127:25, 2166:7
portfolio [2] - 2080:12, 2080:20
portion [5] - 2021:13, 2022:8, 2034:14, 2068:17, 2073:8
portions [1] - 2064:14
positing [1] - 2164:18
position [7] - 2040:4, 2052:6, 2077:8, 2078:20, 2080:1, 2080:15, 2081:12
positioned [2] - 2014:9, 2045:4
positive [1] - 1979:6
possibility [1] - 2061:15
possible [6] - 1999:2, 1999:20, 2050:13, 2059:11, 2079:7, 2091:17
possibly [6] - 2000:13, 2030:19, 2031:3, 2031:6, 2043:7, 2115:14
Post [6] - 2004:17, 2122:24, 2132:9, 2132:14, 2146:22, 2164:23
Post-it [5] - 2122:24, 2132:9, 2132:14, 2146:22, 2164:23
Post-Its [1] - 2004:17
potential [2] - 2002:23, 2013:24
potentially [3] - 2030:12, 2102:25, 2130:19
power [4] - 2029:19, 2030:21, 2127:11, 2128:12
powerful [3] - 2111:14, 2152:20, 2152:22
practical [8] - 2134:16, 2134:19, 2135:1, 2137:7, 2140:5, 2150:9, 2154:18, 2155:10
practice [3] - 2061:5, 2133:11, 2149:3
predict [2] - 2082:23, 2090:15
prediction [5] - 2085:1, 2086:7, 2091:5, 2160:20, 2161:7
predictions [1] - 2160:23
preexisting [3] - 2020:19, 2020:23, 2022:15
prefer [1] - 2000:15
preference [1] - 2010:8
preferences [1] - 2156:12
PRELIMINARY [2] - 1975:4, 1975:8
prep [5] - 2128:11, 2163:7, 2163:18, 2164:2, 2164:5
preparation [10] - 2127:20, 2127:22, 2128:3, 2131:24, 2162:23, 2162:25, 2163:1,

2163:12, 2163:23, 2163:24
prepare [2] - 2127:20, 2128:7
prescribe [1] - 2020:20
presence [2] - 2062:11, 2096:8
present [1] - 2064:15
presentation [1] - 2074:21
President [4] - 2080:8, 2080:16, 2080:23
president [5] - 1986:9, 1988:13, 1988:15, 1988:19, 1988:22
President's [2] - 2080:2, 2080:3
pressure [1] - 2101:21
presume [2] - 2066:20, 2155:14
pretty [29] - 1981:25, 2000:10, 2004:2, 2004:8, 2011:8, 2037:25, 2085:24, 2092:25, 2093:7, 2093:25, 2098:9, 2099:7, 2101:8, 2103:24, 2104:10, 2105:13, 2111:25, 2123:23, 2134:21, 2135:14, 2137:1, 2139:2, 2140:15, 2146:3, 2152:2, 2154:23, 2162:19, 2165:24, 2168:19
prevent [2] - 2020:24, 2022:15
preview [1] - 2097:1
previously [1] - 2075:21
Price [1] - 2153:20
price [58] - 1993:18, 2001:18, 2001:20, 2010:20, 2010:24, 2011:16, 2012:22, 2016:3, 2016:18, 2017:9, 2017:16, 2017:18, 2025:20, 2026:2, 2029:16, 2030:21, 2035:17, 2044:4, 2053:21, 2058:12, 2058:15, 2058:18, 2058:24, 2059:24, 2060:13, 2062:2, 2086:24, 2087:1, 2087:2, 2106:8, 2106:19, 2111:15, 2112:25, 2120:3, 2121:21, 2121:25, 2127:10, 2129:13, 2129:17, 2130:2, 2153:21, 2153:23, 2153:24, 2154:1, 2154:4, 2154:5, 2157:22, 2160:14, 2161:3, 2161:13, 2161:20, 2162:6, 2162:10, 2163:9, 2163:15, 2165:2, 2166:17
prices [63] - 1989:4, 1991:9, 2000:24, 2001:1, 2001:20, 2002:18, 2009:14, 2010:12, 2010:16, 2010:21, 2011:3, 2012:16, 2012:18, 2012:19, 2012:25, 2013:3, 2013:10, 2014:15, 2015:19, 2015:24, 2029:20, 2029:21, 2029:25, 2033:14, 2033:24, 2034:4, 2034:5, 2034:20, 2034:23, 2053:8, 2053:15, 2054:11, 2054:12, 2056:17, 2059:5, 2078:7, 2084:8, 2084:19, 2084:23, 2084:24, 2085:13, 2090:13, 2102:5, 2106:1, 2106:5, 2112:1, 2116:20, 2117:4, 2117:20, 2119:10, 2128:12, 2153:22, 2153:25, 2154:2, 2154:8, 2158:1, 2159:5, 2160:4, 2162:25, 2164:18, 2165:12, 2165:17, 2165:18
pricing [25] - 1985:1, 1985:7, 1985:13, 1986:1, 1990:4, 1990:9, 1992:12, 1992:16, 1992:24, 1993:4, 1995:1, 1996:14, 1996:19, 2001:16, 2002:4, 2016:20, 2017:5, 2017:12, 2017:13, 2018:24, 2052:23, 2053:19, 2057:1, 2057:3, 2107:6
primarily [4] - 2021:24, 2021:25, 2040:17, 2078:12
primary [10] - 1985:4, 1986:7, 1990:13, 2039:19, 2054:8, 2054:10, 2062:6, 2091:5, 2101:20, 2119:11
Princeton [3] - 1975:20, 2076:1, 2076:3
principle [6] - 2115:18, 2121:1, 2134:4, 2134:19, 2136:6, 2136:9
principles [1] - 2114:1
Print [2] - 2147:2, 2147:10
print [8] - 2010:5, 2062:18, 2062:21, 2062:24, 2124:9, 2136:23, 2136:25, 2140:16
printer [3] - 2008:18, 2013:25, 2124:11
printers [7] - 2005:19, 2005:20, 2005:23, 2006:8, 2006:9, 2006:11, 2147:5
priority [3] - 2002:19, 2002:21, 2002:22
private [10] - 1981:17, 1981:18, 1981:19, 1981:23, 2029:13, 2081:20, 2081:23, 2092:19, 2103:22
privy [2] - 2064:8, 2065:14
prize [1] - 2053:7
problem [24] - 2086:13, 2086:18, 2087:25, 2089:22, 2089:23, 2090:6, 2090:20, 2090:21, 2090:22, 2091:18, 2091:20, 2092:18, 2093:15, 2101:23, 2112:4, 2126:15, 2126:17, 2129:6, 2139:14, 2141:25, 2143:20, 2151:22, 2157:5
problems [1] - 2081:3
proceed [1] - 1977:2
proceeded [1] - 2002:25
Proceedings [1] - 1976:6
proceedings [1] - 2170:8
process [55] - 1982:17, 1991:11, 1991:20, 1991:25, 1993:7, 1993:17, 1993:23, 1993:24, 1993:25, 1994:6, 1994:14, 1994:17, 1994:24, 1996:2, 1996:5, 1996:11, 1996:14, 1997:3, 1997:10, 1997:19, 1999:9, 2000:1, 2000:3, 2000:11, 2001:5, 2002:7, 2003:2, 2003:3, 2003:7, 2003:22, 2019:13, 2020:20, 2049:12, 2049:25, 2052:23, 2053:2, 2053:7, 2055:13, 2059:18, 2061:3, 2079:18, 2079:20, 2080:22, 2085:15, 2094:18, 2095:11, 2095:16, 2096:11, 2102:6, 2103:9, 2111:4, 2123:16, 2123:17, 2155:4
processes [4] - 1986:3, 1986:5, 2002:9, 2104:13
procure [4] - 2095:10, 2100:21, 2107:11, 2139:15
procurement [11] - 1986:6, 1990:18, 2044:20, 2055:3, 2060:10, 2085:6, 2103:9, 2108:7, 2108:8, 2108:16, 2125:9
procuring [2] - 2085:5, 2113:6
produced [5] - 1976:7, 2064:11, 2068:4, 2071:9, 2072:19
Product [1] - 2038:21
product [17] - 1992:19, 2027:13, 2028:7, 2039:2, 2042:24, 2047:25, 2108:2, 2127:1, 2127:4, 2130:8, 2134:14, 2138:18, 2140:6, 2143:6, 2143:9, 2147:12, 2151:19
products [65] - 1987:2, 2005:12, 2006:2, 2006:4, 2008:19, 2010:1, 2011:14, 2016:22, 2016:24, 2016:25, 2017:4, 2017:14, 2026:2, 2028:10, 2028:16, 2028:21, 2028:25, 2039:15, 2039:17, 2039:18, 2040:25, 2043:23, 2043:25, 2045:1, 2050:15, 2058:3, 2058:6, 2062:20, 2087:11, 2087:15, 2087:17, 2089:19, 2089:21, 2089:25, 2106:2, 2106:3, 2107:25, 2126:13, 2126:24, 2127:9, 2128:13, 2128:16, 2128:19, 2128:21, 2129:5, 2129:7, 2129:17, 2129:22, 2131:5, 2131:20, 2134:5, 2136:3, 2138:8, 2143:4, 2144:9, 2149:12, 2150:18, 2151:3, 2151:8, 2152:11, 2157:3, 2157:6
professional [5] - 2006:25, 2080:6, 2128:7, 2128:16,

2163:12
professionals [1] - 1989:11
Professor [6] - 2066:25, 2074:8, 2082:2, 2116:6, 2122:11, 2146:12
professor [5] - 2075:17, 2076:2, 2082:9, 2093:19
profit [5] - 1978:12, 2158:24, 2162:4, 2166:14, 2166:25
profitable [2] - 2163:10, 2165:11
profitably [1] - 2162:25
profits [2] - 2161:9, 2162:12
program [1] - 2127:24
prominence [5] - 2098:24, 2100:11, 2109:8, 2109:10, 2143:10
promise [2] - 1977:12, 2009:7
promote [2] - 2023:10, 2025:13
promoting [1] - 2023:23
prompt [1] - 2012:17
proposal [4] - 2003:15, 2061:11, 2091:21, 2105:16
proposals [6] - 1999:14, 1999:18, 1999:23, 2003:18, 2061:6
proposed [4] - 2082:10, 2082:25, 2091:22, 2162:22
proposition [6] - 1990:11, 1990:13, 2009:17, 2009:18, 2012:1, 2058:14
prospect [1] - 2056:6
protect [2] - 2018:13, 2161:17
protected [1] - 2085:12
protection [4] - 2012:22, 2017:16, 2017:18, 2059:24
protections [1] - 2019:6
protest [1] - 2052:19
protocols [2] - 2026:18, 2057:16
proud [1] - 2076:19
provide [4] - 1993:11, 2029:11, 2054:16, 2147:3
provided [3] - 1983:1, 1993:5, 2097:15
provider [1] - 2037:16
provides [1] - 2010:11
providing [4] - 2025:24, 2058:8, 2124:11, 2140:17
provision [4] - 2016:16, 2017:25, 2018:2, 2018:13
provisionally [1] - 2072:23
provisions [1] - 2016:17
public [4] - 1994:20, 2075:6, 2075:8, 2079:20
publication [1] - 2076:17
publicly [6] - 1994:23, 1995:14, 1997:20, 1999:3, 1999:6, 2033:10
published [2] - 2076:9, 2076:11
pull [5] - 2014:15, 2139:6, 2141:17, 2141:19, 2144:5
pulls [1] - 2141:21
purchase [16] - 1992:20, 1992:22, 2019:16, 2020:9, 2021:13, 2021:19, 2021:20, 2022:24, 2022:25, 2023:12, 2023:13, 2024:23, 2025:13, 2063:1, 2108:4, 2152:5
purchased [2] - 2124:10, 2150:13
purchases [9] - 2069:12, 2083:24, 2104:1, 2104:8, 2111:7, 2125:1, 2152:10, 2154:21, 2154:22
purchasing [9] - 2021:25, 2023:8, 2026:15, 2030:20, 2048:6, 2051:5, 2069:7, 2070:15, 2104:12
purely [1] - 2141:20
purpose [3] - 2082:14, 2126:7, 2149:5
purposes [1] - 2141:20
pursuant [2] - 2068:4, 2071:23
push [1] - 2088:25
pushing [1] - 2023:18
put [25] - 1978:22, 1984:23, 1985:1, 1987:3, 1992:6, 1995:9, 2000:8, 2002:15, 2006:2, 2009:6, 2027:16, 2027:17, 2037:2, 2057:12, 2057:19, 2085:9, 2086:5, 2107:15, 2119:13, 2120:22, 2124:2, 2124:14, 2127:14, 2146:5
puts [1] - 2088:19
putting [7] - 1998:7, 1998:11, 2022:6, 2123:4, 2144:2, 2164:13

Q

qualified [2] - 2105:25, 2120:24
qualifies [1] - 2127:12
quality [7] - 1983:13, 1983:20, 1983:24, 1984:6, 1984:9, 2078:10, 2086:25
query [3] - 2073:13, 2073:14, 2073:18
questioned [1] - 2035:8
questioning [3] - 2012:21, 2057:11, 2160:1
questionnaire [1] - 1992:6
questions [21] - 1977:10, 1995:12, 1995:13, 2045:6, 2049:10, 2050:25, 2052:8, 2052:16, 2056:6, 2060:12, 2061:1, 2062:12, 2062:13, 2062:15, 2062:17, 2063:7, 2063:12, 2075:10, 2082:22, 2086:2, 2140:2
quick [3] - 2003:21, 2024:20, 2141:20
quickly [5] - 1977:13, 2009:4, 2043:11, 2092:25, 2166:4
Quilted [1] - 2027:21
quite [17] - 1991:23, 2012:20, 2026:17, 2029:18, 2061:13, 2062:4, 2076:19, 2081:9, 2097:5, 2111:8, 2111:14, 2113:14, 2125:12, 2139:2, 2141:18, 2142:11, 2160:2
quote [1] - 2153:5

R

radar [1] - 2038:15
raise [21] - 2009:14, 2010:12, 2092:14, 2093:3, 2109:10, 2116:4, 2117:19, 2118:17, 2127:10, 2128:12, 2129:13, 2129:17, 2159:5, 2160:14, 2161:19, 2162:6, 2162:10, 2162:25, 2163:9, 2163:15, 2165:12
raised [1] - 2116:5
raises [2] - 2115:13, 2166:17
raising [3] - 2161:3, 2161:13, 2164:18
ran [1] - 1997:8
range [8] - 2080:22, 2081:9, 2092:2, 2092:5, 2104:17, 2111:10, 2149:11, 2150:14
rank [1] - 2036:2
rate [4] - 2022:16, 2166:1, 2166:16, 2166:20
ratepayer [1] - 2116:13
ratepayers [7] - 2113:13, 2113:14, 2113:16, 2117:1, 2117:21, 2118:12, 2118:13
rates [2] - 2118:15, 2118:18
rather [3] - 2073:14, 2107:2, 2165:18
re [1] - 2003:3
re-secure [1] - 2003:3
reached [4] - 2002:6, 2065:15, 2095:25, 2110:23
read [6] - 2006:12, 2006:14, 2111:22, 2140:19, 2153:7, 2162:18
ready [1] - 2126:19
ready-to-eat [1] - 2126:19
reaffirmed [2] - 2022:20, 2120:14
real [12] - 1994:5, 2003:8, 2073:17, 2079:18, 2090:14, 2102:3, 2105:6, 2112:21, 2128:12, 2141:10, 2141:20, 2159:24
realistic [2] - 2061:15, 2120:5
reality [3] - 2015:5, 2100:19, 2107:15

really [67] - 1986:6, 2003:13, 2005:5, 2005:8, 2005:12, 2007:16, 2008:4, 2008:14, 2010:4, 2010:13, 2018:11, 2034:2, 2038:13, 2040:23, 2052:4, 2052:5, 2053:7, 2061:16, 2064:2, 2076:6, 2077:22, 2080:11, 2082:17, 2084:23, 2087:25, 2089:10, 2091:13, 2095:5, 2095:14, 2098:21, 2100:8, 2103:2, 2106:4, 2106:18, 2108:20, 2110:10, 2110:18, 2111:16, 2112:7, 2115:20, 2117:16, 2121:8, 2121:9, 2123:20, 2126:13, 2128:24, 2128:25, 2129:3, 2130:13, 2130:20, 2131:12, 2132:22, 2137:9, 2138:2, 2138:15, 2139:14, 2139:20, 2142:5, 2144:1, 2144:7, 2145:2, 2148:22, 2152:20, 2153:11, 2159:16, 2164:12, 2167:23

reason [25] - 1984:24, 1993:21, 1993:22, 1994:16, 1995:22, 1996:4, 1996:10, 2011:19, 2017:23, 2022:5, 2030:25, 2035:11, 2037:24, 2038:9, 2042:25, 2054:19, 2071:7, 2108:15, 2124:6, 2140:25, 2142:9, 2158:4, 2158:11, 2160:13

reasonable [4] - 2086:9, 2126:22, 2126:23, 2160:20

reasonably [16] - 2134:5, 2136:20, 2136:22, 2145:7, 2145:8, 2145:13, 2145:15, 2145:18, 2146:10, 2146:15, 2146:17, 2146:18, 2147:1, 2147:13, 2147:25, 2148:20

reasons [7] - 2012:9, 2014:8, 2020:18, 2053:17, 2109:15, 2137:16, 2161:16

rebate [2] - 2102:4, 2106:7

rebated [1] - 2025:21

rebates [2] - 2104:14, 2104:23

recap [1] - 2146:12

recapture [3] - 2166:1, 2166:16, 2166:20

receive [3] - 2025:5, 2025:7, 2025:8

received [5] - 1999:22, 2046:6, 2054:20, 2101:17, 2101:18

receiving [1] - 2061:15

recent [2] - 2055:21, 2059:8

recently [7] - 2044:2, 2046:5, 2047:1, 2048:9, 2048:14, 2065:15, 2068:5

recess [4] - 2066:23, 2067:24, 2068:7, 2068:8

recession [1] - 2081:2

recognize [3] - 2103:17, 2121:17, 2150:23

recognized [2] - 1984:2, 2009:18

recognizes [1] - 2104:11

recommendation [1] - 2003:24

record [15] - 2048:16, 2068:14, 2068:15, 2072:23, 2073:1, 2073:7, 2073:9, 2075:18, 2099:15, 2099:16, 2109:24, 2146:1, 2146:7, 2153:16, 2165:9

records [1] - 2073:3

recover [2] - 2144:13, 2144:15

recross [1] - 2063:5

RECROSS [1] - 2063:10

RECROSS-EXAMINATON [1] - 2063:10

redacted [5] - 2075:8, 2075:9, 2102:12, 2105:21, 2166:24

redactions [1] - 2064:13

redirect [3] - 2052:10, 2063:12, 2063:17

REDIRECT [1] - 2052:12

reduce [6] - 2002:1, 2002:5, 2034:4, 2056:14, 2058:15, 2062:25

reduced [2] - 2001:23, 2165:1

reducing [2] - 2058:18, 2058:23

reduction [9] - 2003:6, 2034:10, 2051:1, 2051:10, 2051:11, 2051:17, 2058:21, 2058:22

reductions [2] - 2001:19, 2053:21

refer [2] - 2016:18, 2099:15

reference [1] - 1995:19

referenced [1] - 1983:12

references [2] - 1995:16, 2086:20

referred [1] - 2016:24

referring [5] - 1996:23, 1998:15, 2011:23, 2046:8, 2101:14

reflect [2] - 2073:4, 2151:13

reflects [2] - 2072:20, 2090:8

regard [2] - 2014:5, 2093:19

regarding [3] - 2076:11, 2078:24, 2126:3

regional [1] - 2098:3

register [1] - 1987:9

regular [3] - 2113:1, 2116:15, 2153:23

regularly [2] - 2092:12, 2092:20

regulated [1] - 2113:14

regulation [1] - 2081:5

regulations [2] - 2051:4, 2051:5

regulatory [1] - 2080:13

Reilly [1] - 1975:24

REILLY [1] - 2006:15

reinforce [1] - 2057:17

Reinhart [1] - 1975:13

REINHART [12] - 2066:25, 2067:3, 2067:8, 2067:11, 2067:20, 2068:22, 2069:2, 2069:6, 2069:21, 2074:7, 2167:13, 2168:2

relate [4] - 1987:2, 1987:14, 2062:14, 2064:14

related [6] - 2005:11, 2005:22, 2026:21, 2076:15, 2076:24, 2081:19

relates [4] - 2023:22, 2034:9, 2047:14, 2051:22

relation [1] - 2107:18

relationship [12] - 2007:5, 2023:23, 2027:5, 2029:12, 2029:17, 2035:15, 2036:19, 2036:20, 2037:19, 2042:11, 2047:19, 2061:25

relationships [1] - 2048:19

relative [14] - 1982:24, 1987:11, 1988:2, 1991:10, 1997:23, 2000:20, 2000:23, 2002:1, 2002:5, 2025:7, 2046:20, 2048:15, 2053:9, 2149:25

relatively [1] - 2003:21

relevant [37] - 2073:18, 2083:4, 2083:13, 2084:25, 2088:19, 2088:21, 2089:5, 2089:10, 2089:12, 2089:16, 2096:23, 2109:2, 2109:5, 2115:3, 2122:14, 2122:15, 2122:17, 2125:5, 2125:22, 2126:19, 2127:3, 2128:18, 2131:21, 2132:1, 2132:20, 2134:14, 2137:12, 2143:4, 2144:3, 2151:23, 2152:11, 2152:12, 2156:19, 2163:19, 2164:1, 2164:9

reliability [1] - 2073:12

reliable [1] - 2151:12

reliance [1] - 2107:25

rely [4] - 2054:13, 2055:5, 2072:15, 2073:11

relying [2] - 2072:17, 2101:3

remain [1] - 2015:25

remaining [2] - 2109:25, 2137:18

reman'd [1] - 2012:6

remanufactured [1] - 2012:8

remember [9] - 2005:9, 2006:12, 2049:5, 2063:14, 2063:19, 2083:10, 2131:5, 2131:6, 2138:20

removed [2] - 2003:1, 2059:14

removing [1] - 2056:13

renegotiate [2] - 1997:16, 2002:20

renegotiated [3] - 2001:25,

2003:9, 2004:2
renegotiation [1] - 2001:5
repair [1] - 2051:22
repeat [4] - 1983:22, 1985:18, 2030:10, 2060:21
repeatedly [1] - 2133:19
replacement [1] - 2133:24
replacing [1] - 2047:6
reply [1] - 1995:10
report [6] - 1988:16, 2086:5, 2113:19, 2113:25, 2137:20, 2154:25
reported [2] - 1976:6, 2092:17
REPORTER [1] - 2170:2
reporter [2] - 1985:20, 1985:21
Reporter [3] - 1976:8, 1976:9, 2170:13
reporting [6] - 2044:14, 2080:7, 2097:23, 2098:16, 2098:21, 2108:9
reports [10] - 1986:12, 1988:19, 2023:25, 2024:6, 2024:10, 2024:12, 2025:8, 2025:9, 2048:16, 2079:5
represent [7] - 2032:6, 2032:11, 2037:9, 2045:25, 2057:8, 2064:12, 2108:2
representation [1] - 2073:11
representatives [3] - 1979:16, 1979:19, 1996:3
representing [1] - 2070:15
represents [1] - 2066:6
request [4] - 1996:14, 1999:7, 2099:19, 2105:16
requesting [1] - 2108:13
require [1] - 2011:13
required [3] - 2016:10, 2032:17, 2035:10
requirement [2] - 2032:8, 2108:9
requirements [5] - 1985:10, 2103:13, 2105:19, 2108:18, 2121:2
research [3] - 2037:3, 2076:5, 2076:14
reseller [1] - 2005:17
reset [1] - 2152:9
resources [7] - 1994:5, 1994:10, 2024:18, 2055:24, 2061:12, 2061:21, 2061:22
respect [3] - 2008:22, 2019:25, 2093:25
respectfully [1] - 2070:8
respond [1] - 2015:2
responded [3] - 2046:13, 2065:17, 2137:22
response [8] - 1999:15, 2046:6, 2056:10, 2069:19, 2099:19, 2105:22, 2106:14, 2107:21
responses [2] - 1996:15, 1996:19
responsibilities [4] - 2054:8, 2054:10, 2077:8, 2080:17
responsibility [1] - 2047:17
restate [1] - 2156:21
restricted [2] - 2152:25, 2153:15
result [12] - 1989:14, 2000:10, 2000:18, 2002:7, 2003:1, 2003:3, 2003:7, 2018:14, 2058:24, 2065:6, 2094:19, 2166:2
resulting [1] - 2152:16
results [4] - 1999:25, 2134:3, 2135:19, 2138:15
retail [9] - 2084:12, 2084:18, 2095:5, 2095:25, 2096:1, 2096:4, 2096:5, 2111:1, 2143:18
retailers [2] - 2095:1, 2096:4
retained [1] - 2094:22
return [2] - 2079:23, 2159:7
returned [1] - 2081:12
revenue [5] - 1978:14, 1978:16, 1978:18, 1978:21, 2036:7
reviewed [2] - 2052:2, 2092:17
reviewing [2] - 2111:20, 2111:21
revised [1] - 2079:21
revisit [1] - 2014:23
RFP [46] - 1992:2, 1993:7, 1993:13, 1993:17, 1993:23, 1994:6, 1994:25, 1995:9, 1995:12, 1996:2, 1996:5, 1996:11, 1996:14, 1997:2, 1997:10, 1998:7, 1998:11, 1998:13, 1999:4, 1999:7, 1999:9, 2001:5, 2008:10, 2008:11, 2008:22, 2011:2, 2037:4, 2050:7, 2052:23, 2053:1, 2053:7, 2055:13, 2055:16, 2055:19, 2055:21, 2056:1, 2056:3, 2059:8, 2059:19, 2061:3, 2085:15, 2105:22, 2106:10, 2106:13, 2107:18, 2155:4
RFPs [7] - 1991:23, 2104:12, 2104:20, 2105:1, 2105:15, 2106:12, 2152:15
RFQ [1] - 2102:6
ridiculously [1] - 2080:20
rigging [1] - 2143:23
right-hand [1] - 2102:8
rigorous [3] - 1993:22, 1996:5, 1996:11
ring [2] - 2043:12, 2043:14
rise [1] - 2011:2
Rivers [2] - 2095:17, 2096:12
RMR [2] - 1976:8, 2170:13
robust [1] - 1992:7
rogue [1] - 2125:17
role [9] - 1982:7, 1991:10, 1991:24, 2028:13, 2068:22, 2069:10, 2077:14, 2078:3, 2081:16
room [3] - 2007:19, 2008:17, 2039:15
Room [2] - 1976:9, 2170:14
roughly [7] - 1999:23, 2019:21, 2051:13, 2121:24, 2149:24, 2154:18, 2154:24
rows [1] - 2101:17
RPF [1] - 1998:23
rule [1] - 2072:16
run [5] - 2028:1, 2093:11, 2105:1, 2121:19, 2162:11
runs [1] - 2014:21

S

safe [1] - 2051:9
safely [1] - 2066:18
sailed [1] - 2071:15
salaries [1] - 1994:12
salary [1] - 2059:3
sale [8] - 2094:7, 2094:22, 2122:17, 2130:8, 2130:11, 2139:4, 2157:10, 2164:19
sales [13] - 2037:15, 2095:6, 2095:7, 2096:10, 2096:18, 2121:25, 2138:6, 2139:1, 2141:8, 2144:10, 2150:5, 2164:9
san [5] - 2028:14, 2028:22, 2058:4, 2138:9, 2139:21
sanitation [2] - 2138:9, 2144:19
satisfied [9] - 2128:13, 2130:6, 2153:18, 2157:1, 2157:13, 2160:23, 2163:19, 2166:23, 2167:1
satisfies [1] - 2165:7
satisfy [4] - 2130:19, 2151:10, 2156:19, 2164:14
Saturday [1] - 2168:10
save [5] - 1998:7, 1998:10, 2033:25, 2090:25, 2091:2
saved [3] - 1997:21, 1997:23, 1998:4
savings [10] - 2000:16, 2000:19, 2003:4, 2034:16, 2059:9, 2059:25, 2091:9, 2091:14, 2102:4, 2102:7
saw [6] - 2048:1, 2095:23, 2097:1, 2110:3, 2155:3, 2165:21
scarcity [1] - 2035:8
scenario [1] - 2014:23
scheme [1] - 2118:19
scope [5] - 2096:7, 2109:16, 2113:24, 2115:9, 2124:13
screen [8] - 2007:12, 2027:17, 2027:18, 2038:23, 2038:25, 2088:11, 2091:13, 2136:7

screwed [1] - 2089:7
screwy [2] - 2135:19, 2142:13
seal [1] - 2068:17
SEALED [1] - 2063:9
SEC [2] - 1994:20, 1995:11
second [3] - 2062:3, 2079:22, 2089:4
secondary [1] - 2034:4
secondly [2] - 2057:23, 2059:23
Section [1] - 1976:4
sector [1] - 2103:22
secure [3] - 1989:18, 2003:3, 2059:24
secured [1] - 2001:18
security [1] - 2080:25
see [67] - 2005:23, 2007:4, 2011:15, 2015:5, 2023:7, 2023:21, 2023:24, 2024:22, 2026:14, 2026:15, 2026:20, 2026:22, 2027:18, 2027:21, 2038:21, 2038:23, 2039:5, 2039:9, 2039:12, 2039:14, 2040:8, 2040:9, 2040:11, 2040:15, 2043:11, 2043:13, 2043:18, 2052:3, 2064:19, 2064:21, 2064:22, 2064:25, 2065:9, 2067:23, 2086:6, 2088:14, 2090:19, 2090:20, 2094:5, 2097:14, 2097:18, 2099:2, 2101:13, 2102:8, 2102:14, 2103:23, 2104:24, 2105:23, 2106:1, 2106:10, 2108:24, 2118:23, 2123:22, 2144:18, 2144:19, 2149:19, 2152:17, 2153:19, 2154:6, 2157:14, 2158:3, 2159:8, 2161:7, 2165:14, 2165:24
seeing [11] - 2059:22, 2088:11, 2089:3, 2098:10, 2098:21, 2098:24, 2100:8, 2100:10, 2108:12, 2112:8, 2165:9
seek [3] - 2003:18, 2003:24, 2053:21
seeking [4] - 2037:18, 2053:8, 2114:18, 2114:25
seem [5] - 2014:8, 2014:9, 2048:16, 2065:22, 2107:14
Sees [1] - 2064:24
sees [6] - 2023:10, 2063:13, 2063:18, 2065:10, 2066:3, 2100:21
segmented [1] - 2038:18
segmenting [2] - 2012:1, 2030:3
select [1] - 2058:6
selecting [1] - 2007:2
sell [7] - 2037:9, 2044:4, 2090:4, 2108:22, 2127:19, 2149:23, 2165:18
selling [3] - 2112:17, 2112:18, 2149:13
sells [3] - 2009:23, 2036:25, 2138:4
semiconductor [1] - 2092:23
Senate [1] - 2080:16
Senator [1] - 2035:2
send [1] - 2050:7
senior [1] - 2153:22
Senior [1] - 1976:3
sense [10] - 2075:10, 2099:2, 2103:18, 2112:14, 2118:16, 2125:13, 2133:25, 2143:10, 2145:16, 2164:12
senses [1] - 2135:25
sensitive [2] - 2104:20, 2167:10
sent [1] - 2049:13
separate [6] - 2010:4, 2010:6, 2012:8, 2132:23, 2134:14
separated [1] - 2012:5
separately [3] - 2133:7, 2150:4, 2154:10
September [5] - 1996:25, 1997:8, 2018:25, 2019:6, 2060:1
serious [5] - 2037:16, 2043:20, 2077:20, 2078:1, 2126:15
serve [3] - 2040:11, 2081:14, 2087:14
served [1] - 2078:19
servers [2] - 2005:13, 2005:21
service [16] - 1985:10, 1985:13, 1989:4, 2011:20, 2012:10, 2012:12, 2012:13, 2012:18, 2013:21, 2014:4, 2014:14, 2025:25, 2045:4, 2061:7, 2107:19, 2125:8
Service [1] - 2147:10
Services [4] - 1990:21, 1990:23, 2054:24, 2147:2
services [25] - 1991:5, 2010:6, 2040:19, 2058:4, 2058:10, 2062:18, 2062:20, 2062:21, 2062:24, 2107:20, 2111:23, 2112:2, 2112:10, 2124:9, 2124:12, 2125:4, 2126:24, 2131:6, 2131:20, 2133:20, 2136:23, 2136:25, 2140:16, 2147:7
servicing [2] - 2107:21, 2124:11
SESSION [4] - 1975:9, 1977:1, 2063:9, 2066:16
set [16] - 2002:18, 2026:13, 2080:5, 2084:19, 2099:12, 2099:18, 2103:4, 2106:2, 2107:17, 2129:7, 2130:21, 2144:11, 2147:3, 2149:23, 2150:18, 2153:17
setting [1] - 2121:16
seven [1] - 2036:12
Seventh [1] - 1975:16
several [4] - 2025:5, 2059:6, 2096:12, 2096:13
shaking [1] - 2152:19
SHAPIRO [1] - 2074:9
Shapiro [13] - 2067:1, 2074:8, 2075:1, 2075:17, 2075:19, 2075:20, 2082:2, 2082:9, 2084:6, 2093:19, 2115:8, 2116:6, 2122:11
Shapiro..... [1] - 1976:14
share [18] - 1999:25, 2006:6, 2015:11, 2035:10, 2038:14, 2064:2, 2117:8, 2131:18, 2135:14, 2135:23, 2141:18, 2142:1, 2142:7, 2144:5, 2144:8
shared [3] - 1980:9, 1980:12, 2046:16
sharehold [1] - 2162:11
shareholder [1] - 2158:16
shareholders [10] - 2034:12, 2034:16, 2117:13, 2158:7, 2158:25, 2159:4, 2161:10, 2161:25, 2162:12
shares [40] - 2078:8, 2089:1, 2089:3, 2089:5, 2089:14, 2089:24, 2090:1, 2090:7, 2094:16, 2110:5, 2115:20, 2134:22, 2136:4, 2138:21, 2139:3, 2139:6, 2141:7, 2141:12, 2141:13, 2142:3, 2142:10, 2142:19, 2143:21, 2144:11, 2148:23, 2148:25, 2149:4, 2149:14, 2149:16, 2149:25, 2150:1, 2150:2, 2151:12, 2154:14, 2155:19, 2155:21, 2157:4, 2157:7, 2158:17, 2164:4
sharp [1] - 2105:5
sharply [1] - 2138:12
shelf [2] - 2006:23, 2007:6
shift [1] - 2164:1
shifted [5] - 2093:23, 2095:9, 2096:6, 2143:17, 2143:18
ships [1] - 2071:15
shocked [1] - 2094:4
shoe [2] - 2133:5, 2133:12
shoes [11] - 2133:2, 2133:3, 2133:4, 2133:6, 2133:7, 2133:8, 2133:9
shop [2] - 2013:13, 2077:6
short [2] - 2066:23, 2094:1
shortage [1] - 2060:13
shorthand [1] - 1976:6
shortsighted [1] - 2162:4
shoulder [1] - 2135:9
show [5] - 2024:13, 2131:19, 2137:23, 2155:18, 2166:4
showing [4] - 2038:23, 2100:25, 2101:18, 2137:23

shown [1] - 2105:20
shows [1] - 2165:5
side [7] - 1978:1, 1978:2, 2022:17, 2081:8, 2082:19, 2103:23
sidebar [1] - 2075:11
sides' [1] - 2061:14
sign [2] - 1999:16, 2059:15
significance [3] - 2098:24, 2100:10, 2108:12
significant [14] - 1989:14, 1989:16, 1992:12, 1994:13, 2003:4, 2015:13, 2017:1, 2055:14, 2071:10, 2140:16, 2140:22, 2141:8, 2143:15, 2148:4
significantly [10] - 2053:25, 2082:25, 2086:23, 2123:10, 2124:17, 2127:10, 2129:13, 2139:4, 2157:22, 2157:24
signing [2] - 2020:21, 2048:22
silent [1] - 2099:16
similar [41] - 2018:20, 2099:20, 2103:9, 2132:17, 2132:18, 2133:8, 2134:5, 2134:21, 2134:23, 2135:3, 2136:8, 2136:20, 2136:22, 2137:18, 2138:14, 2145:7, 2145:8, 2145:13, 2145:16, 2145:18, 2146:10, 2146:15, 2146:18, 2147:1, 2147:5, 2147:13, 2147:25, 2148:1, 2148:16, 2148:18, 2148:20, 2149:10, 2149:16, 2149:19, 2149:22, 2149:24, 2150:17, 2151:3
similarly [1] - 2102:24
simple [3] - 2053:3, 2107:14, 2128:19
simplicity [1] - 2087:1
simply [3] - 1977:22, 1991:10, 2157:5
SIMPSON [1] - 1975:25
single [15] - 1994:8, 1996:8, 2001:16, 2008:21, 2030:3, 2049:7, 2049:18, 2053:24, 2128:10, 2129:5, 2151:21, 2158:21, 2162:24, 2163:5, 2164:18
sit [1] - 2037:21
sitting [4] - 2015:7, 2046:10, 2046:11, 2050:18
situated [1] - 2102:24
situation [4] - 1986:3, 2014:23, 2018:10, 2131:25
situations [3] - 2022:1, 2022:3, 2151:13
six [6] - 1993:25, 2049:18, 2067:11, 2088:14, 2091:17, 2107:11
size [16] - 1978:22, 2009:20, 2103:24, 2106:23, 2107:1, 2110:24, 2111:5, 2133:3, 2133:4, 2133:6, 2133:16, 2133:18, 2154:23, 2155:21
sizes [2] - 2056:23, 2111:9
skeptical [3] - 2037:5, 2037:7, 2037:8
skewed [2] - 2088:22, 2089:1
skill [1] - 2016:13
skilled [3] - 2010:14, 2011:4
SKU [1] - 1992:19
SKUs [2] - 1992:25, 2016:23
slide [19] - 2027:16, 2097:3, 2098:15, 2099:15, 2099:17, 2100:2, 2101:15, 2103:19, 2103:20, 2105:14, 2106:9, 2106:13, 2136:7, 2153:4, 2165:22
slides [2] - 2037:2, 2075:7
slightly [1] - 2133:1
slow [1] - 2145:23
small [30] - 2032:20, 2033:15, 2037:14, 2038:19, 2069:12, 2077:14, 2084:12, 2084:16, 2090:24, 2091:21, 2103:24, 2105:6, 2107:2, 2108:10, 2109:14, 2110:11, 2110:24, 2111:2, 2111:3, 2118:19, 2121:18, 2121:22, 2135:14, 2137:1, 2141:11, 2152:18, 2153:14, 2155:12, 2156:11, 2157:4
smaller [10] - 2077:22, 2098:6, 2099:12, 2104:24, 2108:21, 2108:22, 2135:16, 2139:4, 2155:24, 2164:4
smooth [1] - 2105:7
snacks [4] - 2007:18, 2007:20, 2008:4, 2008:17
snapshot [1] - 2090:22
so-called [1] - 2153:8
so.. [2] - 2014:3, 2168:5
software [8] - 2040:19, 2127:20, 2127:22, 2128:3, 2128:11, 2131:24, 2163:7
sold [9] - 2007:20, 2007:24, 2008:3, 2038:4, 2039:25, 2108:3, 2127:19, 2150:11, 2165:12
sole [2] - 2018:11, 2023:23
solicit [2] - 2050:1, 2050:6
soliciting [1] - 2079:19
solution [6] - 2016:6, 2016:7, 2042:8, 2064:24, 2065:10, 2066:3
solutions [1] - 2047:14
solve [1] - 2139:14
someone [7] - 1988:12, 1988:23, 2050:15, 2072:20, 2073:4, 2073:10, 2116:7
something's [1] - 2142:13
sometime [1] - 2045:13
sometimes [1] - 2151:1
somewhat [11] - 2003:22, 2026:19, 2037:10, 2053:3, 2069:9, 2096:23, 2099:21, 2116:1, 2155:15, 2155:25, 2156:14
somewhere [2] - 2145:25, 2155:9
soon [3] - 1996:24, 2014:21, 2110:2
sophisticated [5] - 2104:19, 2104:25, 2125:7, 2125:16, 2130:18
sorry [13] - 1981:13, 1997:13, 1999:11, 2028:18, 2030:10, 2033:20, 2060:21, 2063:16, 2070:24, 2086:17, 2130:24, 2158:14, 2165:8
sort [8] - 2086:2, 2093:21, 2098:2, 2101:8, 2102:16, 2103:5, 2115:9, 2128:3
sorts [4] - 2072:21, 2109:15, 2110:3, 2150:22
sought [2] - 2059:11, 2064:13
sound [2] - 2003:21, 2061:4
sounds [2] - 2004:8, 2061:3
source [6] - 1996:8, 2016:3, 2018:11, 2021:20, 2023:23, 2058:3
sources [4] - 2022:9, 2022:25, 2025:5, 2054:21
sourcing [7] - 1986:7, 1986:10, 1986:17, 1986:19, 1988:13, 1991:11, 2104:20
space [9] - 2041:4, 2089:23, 2092:24, 2094:9, 2095:5, 2096:9, 2100:6, 2124:13, 2139:13
spaced [1] - 2049:19
spaces [1] - 2095:14
speaking [3] - 2014:12, 2068:25, 2163:24
speaks [1] - 2071:24
spec [1] - 2118:4
spec'ing [1] - 2007:1
special [2] - 2131:9, 2160:11
specialized [2] - 2107:10, 2109:1
specialty [1] - 2131:7
specific [8] - 1984:21, 2000:14, 2011:11, 2072:1, 2091:15, 2100:14, 2126:3, 2153:2
specifically [7] - 1981:20, 1988:14, 1988:23, 1991:1, 2005:15, 2017:14, 2104:1
specifications [1] - 2005:15
specifics [1] - 2082:11
speculate [1] - 2015:9

speculating [1] - 2116:21
speculative [4] - 2118:3, 2118:5, 2118:9
speed [1] - 2074:25
spend [34] - 2000:24, 2009:10, 2011:12, 2017:2, 2019:22, 2021:10, 2022:8, 2023:20, 2024:3, 2024:13, 2025:9, 2025:17, 2026:5, 2026:8, 2026:20, 2030:2, 2038:18, 2041:21, 2043:23, 2056:7, 2056:11, 2056:14, 2056:18, 2057:1, 2057:13, 2057:22, 2072:14, 2072:22, 2094:14, 2106:16, 2125:17, 2154:17, 2164:25
spending [6] - 1993:14, 2024:17, 2033:19, 2033:20, 2073:14, 2154:21
spent [1] - 2081:1
spin [2] - 2090:23, 2146:5
split [1] - 2093:7
spoken [8] - 1981:1, 1981:4, 1981:6, 1981:9, 1981:14, 1981:16, 2073:23, 2110:22
spot [1] - 2033:1
spreadsheet [1] - 1992:16
Square [1] - 1976:4
stable [3] - 1978:20, 1981:25, 1982:1
staff [6] - 2078:5, 2078:6, 2095:17, 2096:15, 2096:17, 2150:8
stage [2] - 2090:21, 2149:8
stages [1] - 2127:17
staking [1] - 2137:25
standard [8] - 2005:14, 2088:8, 2088:12, 2096:21, 2122:25, 2126:1, 2156:18, 2166:8
standing [1] - 2042:11
stands [1] - 2098:22
staple [1] - 2128:25
Staples [175] - 1975:6, 1975:18, 1977:4, 1977:10, 1978:22, 1983:5, 1988:24, 1989:5, 1993:12, 1993:15, 1997:14, 1997:15, 1998:12, 1998:20, 1999:17, 2001:5, 2001:17, 2001:25, 2005:18, 2006:4, 2006:10, 2006:20, 2007:5, 2007:21, 2007:24, 2009:10, 2009:13, 2009:23, 2010:2, 2010:12, 2011:2, 2011:6, 2012:4, 2015:21, 2016:4, 2016:7, 2016:14, 2017:11, 2017:23, 2018:7, 2018:15, 2019:16, 2019:19, 2020:10, 2020:17, 2021:3, 2021:7, 2021:14, 2021:16, 2022:12, 2022:21, 2022:24, 2023:24, 2024:1, 2024:3, 2024:12, 2024:14, 2024:16, 2025:3, 2025:5, 2025:10, 2025:18, 2025:21, 2026:6, 2028:13, 2028:14, 2028:15, 2029:1, 2029:10, 2029:13, 2029:21, 2029:25, 2030:7, 2030:12, 2030:18, 2030:20, 2031:1, 2031:9, 2031:17, 2031:18, 2031:19, 2031:22, 2032:11, 2033:2, 2033:6, 2033:9, 2033:13, 2033:19, 2033:21, 2033:24, 2034:5, 2034:20, 2036:13, 2037:25, 2038:9, 2039:17, 2039:18, 2042:25, 2043:25, 2044:17, 2047:6, 2050:1, 2055:9, 2056:7, 2057:13, 2058:2, 2058:6, 2059:9, 2059:12, 2059:15, 2059:22, 2060:19, 2060:22, 2063:1, 2069:13, 2084:18, 2085:19, 2094:6, 2095:1, 2096:20, 2096:24, 2097:19, 2097:24, 2098:9, 2098:17, 2098:21, 2098:25, 2099:5, 2099:8, 2099:18, 2100:7, 2100:22, 2101:21, 2102:13, 2104:12, 2105:24, 2106:6, 2106:24, 2108:1, 2109:8, 2109:19, 2112:16, 2115:23, 2117:3, 2117:9, 2117:13, 2118:24, 2122:5, 2125:6, 2130:9, 2131:18, 2137:2, 2138:4, 2138:5, 2139:3, 2139:6, 2139:23, 2141:12, 2143:9, 2144:6, 2149:11, 2150:24, 2155:22, 2157:15, 2160:12, 2160:14, 2161:2, 2161:8, 2161:12, 2161:23, 2165:10, 2165:22
Staples' [7] - 2011:20, 2015:24, 2016:19, 2030:20, 2057:1, 2099:10, 2105:22
Staples's [1] - 2100:11
Staples/Office [1] - 1984:14
Staples/OfficeMax [1] - 2064:23
start [14] - 2002:15, 2067:14, 2067:24, 2077:3, 2082:14, 2087:4, 2088:20, 2089:11, 2092:2, 2094:1, 2103:10, 2167:11, 2168:19, 2169:2
started [6] - 2003:13, 2093:12, 2095:6, 2123:9, 2137:13, 2160:3
starting [2] - 2124:2, 2124:5
state [1] - 2075:17
statement [1] - 2040:16
statements [3] - 1994:23, 2072:20, 2073:4
States [6] - 1976:9, 2122:19, 2151:25, 2152:2, 2157:11, 2158:23
STATES [2] - 1975:1, 1975:10
stating [1] - 2065:6
station [3] - 2129:11, 2129:14, 2130:4
stations [3] - 2129:9, 2129:15, 2130:4
stature [1] - 2109:25
status [1] - 2048:11
statute [1] - 2051:7
statutorily [1] - 2051:12
stay [4] - 1998:24, 1999:1, 2067:6, 2067:17
stayed [1] - 2079:24
staying [1] - 2067:15
stenograph [1] - 2170:7
step [6] - 2089:4, 2091:18, 2103:5, 2122:14, 2141:6, 2157:2
stepping [1] - 2106:6
steps [3] - 2088:12, 2094:15, 2111:4
stick [1] - 2160:19
stickiness [1] - 2058:16
sticking [1] - 2150:22
still [15] - 1996:24, 2019:1, 2081:2, 2086:13, 2109:22, 2116:15, 2117:11, 2118:20, 2133:1, 2137:6, 2139:17, 2142:7, 2142:11, 2144:23, 2147:16
stint [1] - 2079:22
stipulate [1] - 2074:25
stock [2] - 2158:17, 2159:6
stockholders [1] - 2160:6
stood [1] - 2106:11
stop [3] - 2119:6, 2123:12, 2167:9
stopping [1] - 2067:21
stops [1] - 2117:25
store [2] - 2131:8, 2133:2
stores [1] - 2033:17
story [2] - 2116:15, 2129:15
straight [2] - 1998:20, 2029:17
straightforward [1] - 2140:3
strategic [4] - 1986:9, 1986:17, 1986:19, 1988:13
Strawberry [1] - 1976:4
stray [1] - 2142:5
street [1] - 2129:9
Street [2] - 1975:16, 1975:25
strict [1] - 2156:13
strictly [1] - 2014:12
strike [2] - 2113:19, 2113:22
striking [1] - 2095:21
strong [1] - 2094:6
structure [4] - 2103:9, 2117:9, 2117:18, 2118:11
structures [1] - 2107:7

stuck [2] - 2013:17, 2013:19
studied [1] - 2044:6
study [1] - 2143:17
stuff [11] - 2079:8, 2084:3, 2105:17, 2108:22, 2110:1, 2119:19, 2122:3, 2133:24, 2138:4, 2144:5, 2145:6
subcontracted [1] - 2061:25
subject [5] - 2047:4, 2049:2, 2148:15, 2148:18, 2149:10
submit [5] - 2061:6, 2061:11, 2071:23, 2072:6, 2073:6
substantial [7] - 2000:16, 2091:9, 2095:7, 2101:17, 2101:19, 2102:9, 2157:16
substantially [2] - 2000:3, 2098:3
substantive [2] - 2071:17, 2071:20
substitute [6] - 2132:10, 2132:11, 2143:3, 2143:6, 2147:22, 2163:18
substitutes [11] - 2126:22, 2126:24, 2131:21, 2131:24, 2132:19, 2133:4, 2133:25, 2134:10, 2134:12, 2147:23, 2148:11
substitution [1] - 2163:17
success [1] - 2149:25
successful [3] - 2090:3, 2111:15, 2149:14
suffice [1] - 2116:20
sufficiently [1] - 2157:6
suggest [3] - 2025:4, 2032:7, 2046:5
suggested [1] - 2042:14
suggesting [4] - 1987:24, 2021:22, 2041:2, 2047:17
suggests [3] - 2069:17, 2102:23, 2103:14
suite [1] - 2048:19
Suite [1] - 1975:19
SULLIVAN [13] - 1975:10, 2067:9, 2067:14, 2068:10, 2068:13, 2074:24, 2082:4, 2113:18, 2120:10, 2120:20, 2167:16, 2167:20, 2168:16
Sullivan [2] - 1975:18, 2116:6
sum [1] - 2151:5
summarize [1] - 2086:21
summary [1] - 2094:2
summation [1] - 2073:10
summer [1] - 2097:16
Summit [2] - 2168:22, 2168:24
supervise [1] - 2078:9
supervised [1] - 1994:7
supervising [1] - 2077:15
supplement [1] - 2114:19
suppliers [9] - 2087:3, 2104:22, 2105:12, 2110:6, 2138:12, 2147:3, 2148:22, 2148:23, 2149:4
supplies [145] - 1986:23, 1987:4, 1987:5, 1987:7, 1987:12, 1987:14, 1988:2, 1988:14, 1991:2, 1999:11, 2002:13, 2004:10, 2004:13, 2004:16, 2004:20, 2004:23, 2008:16, 2008:20, 2008:25, 2009:8, 2010:7, 2010:9, 2011:12, 2013:4, 2019:19, 2020:17, 2021:6, 2021:14, 2021:20, 2021:24, 2022:4, 2022:7, 2022:12, 2022:25, 2023:4, 2036:25, 2037:5, 2037:9, 2037:13, 2037:15, 2037:17, 2038:4, 2038:6, 2038:21, 2039:1, 2039:6, 2039:9, 2039:23, 2039:25, 2042:5, 2042:7, 2042:19, 2043:10, 2044:25, 2045:2, 2045:5, 2046:20, 2047:14, 2047:18, 2051:23, 2051:25, 2052:1, 2052:6, 2055:2, 2055:9, 2056:13, 2056:17, 2056:21, 2057:4, 2058:12, 2058:23, 2058:25, 2059:6, 2060:6, 2060:10, 2060:13, 2060:17, 2060:20, 2060:23, 2063:14, 2063:19, 2064:25, 2065:10, 2066:3, 2083:25, 2084:15, 2094:8, 2094:23, 2095:10, 2098:8, 2100:5, 2100:21, 2104:2, 2107:12, 2110:12, 2112:13, 2112:19, 2113:5, 2113:7, 2115:8, 2115:16, 2117:2, 2117:8, 2121:18, 2122:18, 2122:20, 2122:22, 2123:1, 2123:2, 2123:20, 2123:21, 2124:24, 2125:2, 2125:12, 2125:14, 2125:19, 2130:11, 2130:23, 2131:14, 2131:15, 2136:13, 2137:15, 2138:5, 2138:13, 2139:13, 2139:15, 2139:24, 2140:9, 2143:8, 2144:7, 2147:19, 2148:2, 2150:12, 2151:15, 2152:6, 2154:17, 2154:22, 2157:10, 2158:22, 2164:10, 2164:20, 2165:2, 2165:12
supply [49] - 1987:11, 1987:18, 1988:1, 1995:9, 1995:20, 2001:10, 2001:16, 2007:24, 2008:3, 2008:5, 2009:19, 2010:10, 2012:12, 2016:6, 2016:20, 2020:12, 2021:10, 2022:8, 2024:1, 2024:22, 2030:2, 2038:2, 2038:14, 2039:11, 2039:20, 2040:4, 2040:5, 2040:9, 2041:5, 2041:6, 2042:1, 2042:15, 2043:19, 2043:20, 2046:23, 2047:6, 2047:20, 2050:11, 2052:4, 2053:9, 2057:15, 2057:22, 2058:9, 2058:21, 2058:22, 2064:5, 2140:10, 2151:8, 2151:21
supplying [4] - 2040:25, 2140:20, 2140:21, 2140:22
support [3] - 2055:25, 2092:21, 2106:21
supported [1] - 2153:3
suppose [9] - 2013:10, 2117:7, 2133:22, 2135:4, 2135:8, 2135:11, 2135:21, 2138:24, 2141:20
supposed [1] - 2118:8
surgeries [1] - 2139:9
surgery [24] - 2022:18, 2133:21, 2133:23, 2134:1, 2134:13, 2135:6, 2135:8, 2135:9, 2135:12, 2135:13, 2135:15, 2135:17, 2135:19, 2135:22, 2135:24, 2136:1, 2138:14, 2138:22, 2142:15, 2143:5, 2143:6, 2144:20
surprise [3] - 2031:21, 2032:3, 2044:19
surprised [3] - 2048:3, 2048:8, 2048:10
surprising [1] - 2098:1
suspect [1] - 2073:22
sustain [1] - 2120:19
switch [4] - 2010:13, 2040:22, 2104:22, 2163:11
switched [1] - 2163:23
switching [3] - 2057:25, 2104:21, 2163:1
sworn [2] - 2074:10, 2093:8
Sysco/US [2] - 2131:2, 2153:6
system [4] - 2024:23, 2034:19, 2044:20, 2162:1
systematically [1] - 2102:21
systems [5] - 1978:5, 2023:8, 2033:15, 2057:16, 2108:9

T

tab [1] - 2049:17
table [12] - 1984:18, 2000:16, 2000:20, 2000:25, 2002:4, 2002:19, 2002:23, 2059:10, 2059:14, 2120:13, 2120:14, 2155:3
tables [1] - 2007:7
tail [1] - 2098:5
talks [2] - 2102:11, 2137:14
Tara [1] - 1975:13
targeted [1] - 2153:9
Targeted [1] - 2153:20
tax [11] - 2127:19, 2127:22,

2128:2, 2128:11, 2131:24, 2162:22, 2162:24, 2163:7, 2163:18, 2163:23, 2163:24
TaxAct [3] - 2093:11, 2127:19, 2163:7
taxes [4] - 2127:20, 2128:7, 2163:12
team [10] - 1986:12, 1988:12, 1989:13, 1990:16, 1995:6, 2044:8, 2045:10, 2046:5, 2047:20, 2053:16
technical [1] - 2128:20
technology [10] - 2005:2, 2005:3, 2005:10, 2005:24, 2006:2, 2006:4, 2006:6, 2138:8, 2139:20, 2139:21
television [1] - 2112:11
ten [3] - 2001:11, 2067:7, 2067:17
tend [5] - 2086:5, 2092:6, 2105:1, 2166:22
tender [1] - 2082:2
Tennessee [2] - 2070:18, 2116:13
tens [2] - 2022:17, 2150:10
term [13] - 1998:13, 2001:21, 2005:6, 2010:22, 2012:23, 2016:13, 2019:1, 2020:22, 2051:21, 2051:22, 2140:9, 2146:17, 2148:20
terminate [5] - 2017:23, 2018:8, 2018:15, 2018:21
termination [4] - 2017:21, 2017:25, 2018:2, 2018:12
terms [34] - 1979:18, 1982:12, 1985:1, 1985:5, 1985:13, 1986:1, 1990:5, 1996:1, 1996:15, 1996:19, 1999:25, 2000:24, 2003:20, 2015:20, 2016:10, 2017:20, 2017:21, 2019:2, 2054:12, 2061:22, 2087:14, 2093:8, 2098:10, 2111:12, 2120:7, 2127:15, 2134:6, 2134:22, 2139:11, 2140:5, 2145:6, 2147:14, 2154:13
territories [2] - 2061:23, 2062:11
test [38] - 2125:24, 2127:5, 2127:11, 2127:13, 2128:14, 2128:15, 2128:20, 2128:22, 2129:4, 2129:22, 2130:6, 2130:20, 2145:8, 2146:10, 2146:12, 2146:19, 2147:21, 2151:10, 2156:18, 2156:19, 2156:22, 2156:25, 2157:13, 2160:19, 2160:20, 2160:22, 2160:23, 2162:18, 2163:5, 2163:20, 2163:21, 2164:15, 2165:7, 2165:25, 2166:5, 2166:12, 2166:22, 2167:1
testament [1] - 2107:13
testified [7] - 1992:15, 2004:11, 2055:13, 2068:18, 2070:1, 2074:11, 2093:5
testify [9] - 1980:14, 2054:5, 2068:1, 2069:24, 2073:16, 2081:25, 2082:6, 2094:10
testifying [14] - 1979:8, 1979:22, 1979:24, 1982:2, 1982:5, 1982:13, 1987:21, 1988:5, 2054:2, 2068:21, 2068:22, 2070:1, 2070:10, 2070:14
testimony [29] - 1979:3, 1979:11, 1980:7, 1981:2, 1981:7, 1981:15, 1981:16, 1981:21, 1982:22, 1982:25, 1983:8, 1988:8, 2014:7, 2017:11, 2031:16, 2040:23, 2052:18, 2061:10, 2068:20, 2069:2, 2069:6, 2070:3, 2071:5, 2091:22, 2092:4, 2093:8, 2110:6, 2166:7, 2168:5
Texas [1] - 2166:11
THACHER [1] - 1975:25
THE [275] - 1975:1, 1975:1, 1975:10, 1977:2, 1977:5, 1982:2, 1982:4, 1982:5, 1982:7, 1982:9, 1985:20, 1997:25, 2002:17, 2002:21, 2003:4, 2003:6, 2003:8, 2003:11, 2004:1, 2004:3, 2004:4, 2004:5, 2004:6, 2012:15, 2012:20, 2012:24, 2013:2, 2013:3, 2013:4, 2013:5, 2013:7, 2013:10, 2013:14, 2013:16, 2013:18, 2013:21, 2013:23, 2014:4, 2014:6, 2014:12, 2014:17, 2014:18, 2050:24, 2051:3, 2051:7, 2051:8, 2051:10, 2051:13, 2051:17, 2051:19, 2051:20, 2051:21, 2051:25, 2052:1, 2052:8, 2052:10, 2054:16, 2054:18, 2054:19, 2054:22, 2061:2, 2061:8, 2061:9, 2061:13, 2061:18, 2061:20, 2062:12, 2063:4, 2066:15, 2066:20, 2066:21, 2067:2, 2067:5, 2067:12, 2067:16, 2067:22, 2068:6, 2068:9, 2068:12, 2068:16, 2068:25, 2069:4, 2069:14, 2070:4, 2070:16, 2070:20, 2071:1, 2071:12, 2071:16, 2072:3, 2072:10, 2072:13, 2073:3, 2073:13, 2074:1, 2074:5, 2074:12, 2074:13, 2074:14, 2074:15, 2074:16, 2074:20, 2074:23, 2075:2, 2075:12, 2082:3, 2082:5, 2083:4, 2083:6, 2083:7, 2083:8, 2083:14, 2083:15, 2083:17, 2083:18, 2083:21, 2084:2, 2084:7, 2084:9, 2084:10, 2084:11, 2084:21, 2084:22, 2084:25, 2085:3, 2086:9, 2086:11, 2086:17, 2088:21, 2088:24, 2099:14, 2113:23, 2114:2, 2114:9, 2114:11, 2114:16, 2115:1, 2115:5, 2115:6, 2115:7, 2115:11, 2115:12, 2116:4, 2116:9, 2116:20, 2116:23, 2116:25, 2117:1, 2117:3, 2117:5, 2118:3, 2118:4, 2118:5, 2118:7, 2119:8, 2119:11, 2119:16, 2119:17, 2119:23, 2120:18, 2120:21, 2121:7, 2121:8, 2121:11, 2121:12, 2121:13, 2123:3, 2123:4, 2123:7, 2123:9, 2123:12, 2123:15, 2123:24, 2124:1, 2124:22, 2133:14, 2133:15, 2133:16, 2133:17, 2136:16, 2136:18, 2136:19, 2136:21, 2136:22, 2136:23, 2136:24, 2136:25, 2141:1, 2141:3, 2141:9, 2141:10, 2142:21, 2142:23, 2143:1, 2144:18, 2144:22, 2144:23, 2144:25, 2145:1, 2145:2, 2145:3, 2145:4, 2145:7, 2145:9, 2145:10, 2145:12, 2145:14, 2145:15, 2145:17, 2145:20, 2145:21, 2145:22, 2145:24, 2146:1, 2146:3, 2146:6, 2146:9, 2146:15, 2146:17, 2146:20, 2146:21, 2146:24, 2146:25, 2147:1, 2147:2, 2148:5, 2148:6, 2148:7, 2156:23, 2157:25, 2158:2, 2158:6, 2158:8, 2158:9, 2158:10, 2158:14, 2158:18, 2158:25, 2159:2, 2159:3, 2159:8, 2159:14, 2159:15, 2160:3, 2160:7, 2160:8, 2160:9, 2160:15, 2160:17, 2160:19, 2160:21, 2162:16, 2166:11, 2166:13, 2167:7, 2167:15, 2167:17, 2167:21, 2167:23, 2167:25, 2168:3, 2168:4, 2168:6, 2168:7, 2168:8, 2168:9, 2168:12, 2168:13, 2168:18, 2168:22, 2168:23, 2168:24, 2168:25, 2169:1, 2169:2
theater [1] - 2153:23
themselves [9] - 1980:9, 2035:13, 2040:3, 2040:4, 2052:6, 2103:16, 2105:13, 2110:6, 2119:9
theory [7] - 2114:2, 2114:11,

2114:17, 2119:9, 2119:10, 2119:12, 2134:14
therefore [3] - 1999:5, 2086:24, 2128:12
they've [5] - 2098:18, 2113:13, 2119:14, 2161:16, 2162:5
thinking [3] - 2088:15, 2100:13, 2163:13
third [8] - 2015:11, 2032:10, 2036:16, 2037:12, 2040:14, 2063:25, 2066:10, 2098:6
third-party [1] - 2066:10
thirds [1] - 2097:25
thorough [3] - 1998:18, 1998:21, 1998:23
thoroughly [1] - 1992:3
thoughtful [1] - 2162:11
thousand [1] - 2134:19
thousands [10] - 2013:24, 2022:18, 2132:15, 2132:22, 2132:23, 2136:11, 2150:6, 2150:8, 2150:10
threat [1] - 2011:9
threaten [2] - 2010:15, 2056:25
threatening [3] - 2056:18, 2101:6, 2102:15
three [26] - 1998:14, 2009:2, 2009:17, 2019:1, 2030:1, 2039:21, 2043:1, 2043:12, 2043:14, 2048:22, 2050:12, 2050:17, 2050:19, 2061:23, 2067:6, 2086:6, 2086:10, 2086:15, 2090:17, 2123:20, 2124:8, 2134:18, 2150:15, 2163:6, 2167:22, 2167:23
three-ring [2] - 2043:12, 2043:14
three-year [2] - 2019:1, 2086:10
thrown [1] - 2160:10
tied [2] - 2001:21, 2160:5
Tier [1] - 2110:16
timeframe [3] - 2084:25, 2085:8, 2086:8
timing [1] - 2067:5
tiny [2] - 2117:8, 2117:22
tissues [3] - 2027:11, 2029:7, 2030:6
title [2] - 2106:9, 2153:19
today [22] - 1979:3, 1980:7, 1980:14, 1981:2, 1981:10, 2000:21, 2000:23, 2002:4, 2015:7, 2025:3, 2031:5, 2033:7, 2033:21, 2044:23, 2045:4, 2046:11, 2050:18, 2052:18, 2052:19, 2067:7, 2069:18, 2073:24
together [15] - 1978:22, 2008:11, 2009:18, 2012:7, 2056:21, 2095:15, 2122:22, 2134:7, 2135:21, 2137:21, 2138:1, 2139:5, 2149:15, 2150:18, 2154:12
toilet [7] - 2027:11, 2027:23, 2028:1, 2028:5, 2029:7, 2030:6, 2058:2
tomorrow [11] - 2067:15, 2167:11, 2167:19, 2168:1, 2168:5, 2168:11, 2168:14, 2168:17, 2168:20, 2169:2
toner [64] - 2004:21, 2008:16, 2008:21, 2009:1, 2009:9, 2009:15, 2010:8, 2010:14, 2011:6, 2011:24, 2012:5, 2012:8, 2012:13, 2012:18, 2013:11, 2013:12, 2013:22, 2014:13, 2014:16, 2014:24, 2039:14, 2056:7, 2056:10, 2056:13, 2056:18, 2056:21, 2057:1, 2062:25, 2123:3, 2123:11, 2123:22, 2124:9, 2124:15, 2136:14, 2136:17, 2137:4, 2137:6, 2137:10, 2137:15, 2137:16, 2140:4, 2140:5, 2140:12, 2140:17, 2140:20, 2141:2, 2141:5, 2141:7, 2141:17, 2141:19, 2142:14, 2143:3, 2143:19, 2144:2, 2144:13, 2144:23, 2144:24, 2146:23, 2147:4, 2147:12, 2147:13, 2150:21, 2150:24, 2151:7
toners [1] - 2014:3
took [7] - 2030:11, 2030:15, 2059:9, 2079:18, 2090:22, 2111:6, 2131:16
tool [2] - 2126:1, 2156:18
tools [11] - 1985:12, 1985:15, 1985:16, 1985:20, 1985:24, 1986:5, 2052:22, 2052:24, 2053:14, 2053:18
top [8] - 1992:11, 2015:10, 2015:12, 2032:18, 2038:21, 2040:13, 2138:25, 2141:16
topic [1] - 2060:9
topics [4] - 2047:22, 2049:10, 2049:14, 2081:9
total [12] - 1981:10, 1986:15, 1986:22, 2000:24, 2016:6, 2026:5, 2026:8, 2048:24, 2051:15, 2097:17, 2104:1, 2138:25
totally [2] - 2121:5, 2150:22
touch [1] - 1984:17
touch-and-go [1] - 1984:17
touched [1] - 2130:16
tough [1] - 2167:3
touting [1] - 2108:1
towards [6] - 2014:1, 2023:19, 2075:9, 2092:7, 2095:9, 2096:6
towels [4] - 2027:10, 2028:5, 2029:7, 2030:6
town [3] - 2129:15, 2129:19, 2135:12
Toys [2] - 1980:23, 1981:6
track [3] - 2097:8, 2115:14, 2144:16
trade [1] - 2080:25
Trade [2] - 1975:2, 2074:18
TRADE [1] - 1975:15
traditional [1] - 2110:14
traffic [1] - 2168:19
trained [4] - 1986:20, 1986:22, 1989:9, 1990:7
training [3] - 1989:13, 2075:20, 2081:8
transaction [2] - 2024:23, 2026:21
transcript [6] - 1976:6, 2070:10, 2070:23, 2070:25, 2170:6, 2170:8
TRANSCRIPT [1] - 1975:8
transcription [1] - 1976:7
translate [2] - 2051:11, 2102:3
transparent [1] - 2025:22
transportation [1] - 2079:8
travel [1] - 2066:18
traveled [1] - 2065:21
tremendous [3] - 1987:24, 1987:25, 1988:3
trial [2] - 2118:24, 2120:4
trickle [4] - 2113:3, 2118:1, 2120:15, 2122:2
tricky [1] - 2141:4
tried [3] - 2009:13, 2010:12, 2163:15
trouble [2] - 2119:14, 2150:3
truck [2] - 2009:21, 2107:15
trucks [2] - 2031:19, 2058:7
true [14] - 1989:6, 1993:10, 2002:8, 2008:22, 2023:1, 2026:24, 2111:18, 2120:18, 2120:19, 2146:21, 2161:5, 2162:9, 2170:6, 2170:7
truly [1] - 2154:18
trust [4] - 2028:4, 2028:7, 2145:3
Trust [29] - 1977:25, 1980:18, 1980:20, 1981:9, 1981:10, 1981:15, 1981:17, 1981:20, 1982:12, 1982:13, 1988:9, 2019:25, 2020:1, 2020:3, 2020:6, 2020:9, 2020:12, 2020:16, 2020:24, 2021:2, 2021:5, 2021:12, 2022:13, 2022:14, 2022:16, 2032:4, 2046:25, 2048:1, 2048:2
Trust's [1] - 2065:18
truth [2] - 2072:4, 2072:17
try [8] - 1996:9, 2012:3, 2013:13, 2116:2, 2116:19,

2128:19, 2145:25, 2158:18
trying [23] - 1984:6, 1988:17, 2002:20, 2003:14, 2009:20, 2014:1, 2025:4, 2081:2, 2082:21, 2087:14, 2090:2, 2096:20, 2112:15, 2114:19, 2117:5, 2118:14, 2126:10, 2126:12, 2154:18, 2158:19, 2159:16, 2161:6, 2164:24
tune [2] - 1998:25, 1999:1
TurboTax [2] - 2127:24, 2163:8
turn [4] - 2082:9, 2093:18, 2100:18, 2130:1
turns [1] - 2127:22
two [46] - 1977:20, 1999:23, 2000:12, 2002:9, 2015:10, 2018:19, 2038:4, 2043:1, 2046:18, 2049:16, 2050:12, 2050:17, 2062:13, 2062:15, 2062:17, 2069:22, 2078:20, 2080:14, 2086:6, 2086:15, 2087:3, 2087:23, 2087:24, 2089:9, 2090:4, 2095:22, 2097:25, 2099:7, 2100:22, 2101:1, 2101:2, 2101:3, 2101:9, 2111:23, 2112:18, 2117:15, 2120:21, 2129:9, 2129:14, 2129:18, 2130:3, 2135:5, 2135:24, 2139:16, 2153:11, 2167:2
two's [1] - 2015:12
two-thirds [1] - 2097:25
type [8] - 2010:1, 2046:22, 2057:10, 2057:12, 2073:8, 2091:25, 2133:8, 2164:16
types [11] - 1995:12, 2005:11, 2103:17, 2121:4, 2125:4, 2131:7, 2131:24, 2133:20, 2133:21, 2134:1, 2134:12
typical [1] - 2014:2
typically [9] - 1994:8, 2000:1, 2003:16, 2006:25, 2007:5, 2009:16, 2012:22, 2106:3, 2149:13

U

U.S [1] - 2040:12
UC [1] - 2081:12
ugly [1] - 2008:14
ultimate [1] - 2141:2
ultimately [15] - 2019:3, 2026:2, 2078:10, 2082:23, 2083:1, 2092:5, 2093:15, 2109:4, 2115:2, 2124:18, 2128:4, 2128:9, 2134:21, 2142:19, 2148:24
um-hmm [1] - 2026:10
um-hum [2] - 2001:12, 2024:7
un-redacted [1] - 2075:9
unanimous [1] - 2102:1
uncertain [1] - 2019:2
uncommon [1] - 2106:17
under [23] - 2007:5, 2007:23, 2008:5, 2008:21, 2010:17, 2012:22, 2016:10, 2017:11, 2018:7, 2018:11, 2022:4, 2044:1, 2051:4, 2053:11, 2053:24, 2056:7, 2057:11, 2073:9, 2077:24, 2101:21, 2103:24, 2114:24, 2122:12
undergraduate [1] - 2075:22
understates [1] - 2141:25
understood [15] - 1987:5, 1991:19, 1993:7, 1994:25, 2006:13, 2013:13, 2019:14, 2027:9, 2035:17, 2046:19, 2066:1, 2072:24, 2073:20, 2129:23, 2162:21
undisputed [1] - 2072:9
unfortunately [1] - 2063:7
unhappy [2] - 2042:25, 2090:25
unimportant [1] - 2060:23
unit [1] - 2025:20
United [6] - 1976:9, 2122:19, 2151:25, 2152:2, 2157:11, 2158:23
UNITED [2] - 1975:1, 1975:10
University [1] - 2076:1
unless [2] - 2017:8, 2163:10
unlikely [1] - 2090:6
unredacted [1] - 2064:14
unusual [2] - 2102:19, 2102:23
up [79] - 1986:12, 1995:19, 1999:22, 2000:7, 2000:11, 2002:15, 2002:18, 2009:6, 2012:18, 2013:1, 2013:11, 2019:3, 2026:13, 2027:16, 2037:2, 2041:14, 2046:6, 2048:13, 2049:2, 2049:9, 2050:5, 2052:16, 2056:17, 2060:17, 2062:15, 2062:17, 2067:18, 2067:19, 2070:5, 2070:21, 2072:25, 2073:1, 2080:5, 2080:19, 2083:24, 2085:13, 2086:24, 2086:25, 2087:1, 2088:17, 2089:7, 2097:15, 2100:25, 2103:24, 2104:13, 2105:8, 2106:6, 2107:24, 2108:19, 2109:18, 2113:15, 2115:24, 2116:20, 2116:21, 2117:4, 2118:11, 2118:17, 2118:22, 2119:10, 2132:17, 2133:19, 2134:11, 2134:20, 2135:23, 2138:3, 2144:23, 2147:3, 2147:16, 2147:17, 2149:18, 2150:2, 2151:5, 2153:4, 2154:5, 2157:18, 2160:5, 2161:6, 2165:2, 2165:21
up-front [2] - 2104:13, 2165:21
update [1] - 2079:17
UPS [4] - 2032:18, 2032:20, 2032:21, 2033:7
upset [3] - 2004:2, 2031:1, 2038:8
upstream [1] - 2112:10
upward [2] - 2001:22, 2017:13
urban [1] - 2129:17
usage [4] - 2024:6, 2025:8, 2123:23, 2165:1
uses [3] - 1985:13, 1986:1, 2140:8
utilization [4] - 2024:10, 2024:12, 2025:9, 2044:14
utilizes [1] - 2053:6

V

validated [1] - 2062:10
valuable [1] - 2105:19
value [29] - 1987:25, 1989:18, 1990:10, 1990:13, 1994:17, 2002:22, 2002:25, 2003:3, 2009:17, 2009:18, 2011:25, 2012:2, 2013:19, 2029:11, 2035:12, 2054:9, 2054:11, 2054:14, 2056:14, 2056:22, 2057:24, 2058:14, 2058:17, 2059:13, 2059:14, 2059:22, 2068:24, 2131:5, 2160:6
value-added [1] - 2131:5
valve [2] - 2013:15, 2133:23
variety [1] - 2052:22
various [3] - 2100:24, 2165:21
vast [2] - 2032:6, 2092:16
vendor [29] - 1987:18, 1988:1, 1990:11, 1992:12, 1992:24, 1993:4, 1993:6, 1993:16, 1995:9, 1995:20, 1996:16, 2018:12, 2030:3, 2038:2, 2038:14, 2039:20, 2040:4, 2040:5, 2041:5, 2043:21, 2048:7, 2052:4, 2053:9, 2055:9, 2055:16, 2056:22, 2057:1, 2060:6, 2106:5
vendors [16] - 1982:18, 1989:21, 1989:25, 1990:2, 1990:4, 1992:4, 1992:7, 1993:2, 1993:10, 1998:11, 1999:2, 1999:5, 2047:24, 2048:2, 2050:11, 2055:17
Veritiv [1] - 2098:7
version [1] - 2075:9
versions [1] - 2163:6
versus [2] - 2133:16, 2166:19
vet [1] - 1999:24
vetted [3] - 1998:14, 2003:16, 2062:9
vetting [3] - 1998:15, 1998:18,

1998:21
viable [8] - 2013:22, 2015:8, 2038:2, 2055:10, 2060:6, 2063:14, 2063:19, 2073:17
vice [5] - 1986:9, 1988:13, 1988:15, 1988:19, 1988:22
video [1] - 2071:4
view [21] - 1988:5, 2005:12, 2006:23, 2008:4, 2010:7, 2035:14, 2037:11, 2038:1, 2041:2, 2041:3, 2075:8, 2085:21, 2111:19, 2119:19, 2126:21, 2132:7, 2145:22, 2147:6, 2151:6, 2168:14
viewed [1] - 2008:6
views [2] - 2079:1, 2081:24
virtually [1] - 2086:21
voicing [1] - 2069:16
voir [1] - 2082:3
volume [32] - 1984:25, 1989:15, 1989:16, 1989:21, 1989:24, 1990:6, 1990:17, 1992:22, 2010:2, 2015:12, 2016:14, 2019:10, 2020:2, 2020:7, 2022:11, 2030:3, 2030:7, 2030:8, 2030:13, 2030:16, 2030:20, 2053:3, 2053:22, 2056:14, 2057:24, 2059:22, 2062:4, 2106:3, 2106:7, 2138:25, 2141:8
voluntary [1] - 2035:15
vote [3] - 1982:19, 1982:21, 1983:4
voted [1] - 1983:8
vs [1] - 1975:5
vulnerable [4] - 2102:25, 2103:2, 2152:16, 2152:21

W

W.B [11] - 2026:13, 2035:18, 2050:15, 2055:21, 2056:1, 2061:9, 2062:11, 2086:1, 2097:25, 2159:21, 2165:11
Wait [1] - 2144:13
wait [3] - 2037:21, 2136:1, 2145:12
walk [2] - 2096:25, 2125:20
walking [2] - 2094:14, 2108:15
wants [4] - 2028:24, 2100:20, 2139:15
warehouses [5] - 2040:1, 2044:12, 2044:16, 2044:17, 2058:7
warehousing [1] - 2061:23
warm [1] - 2119:2
warrant [2] - 2124:18, 2140:24
Washington [6] - 1975:5, 1975:16, 1976:1, 1976:10, 2079:24, 2170:15
wave [1] - 2092:18
ways [3] - 2100:24, 2103:10, 2105:1
website [8] - 1995:11, 1996:12, 2027:18, 2037:4, 2038:20, 2041:24, 2042:23, 2052:2
websites [3] - 1994:20, 1996:6, 1996:18
week [2] - 2048:2, 2100:16
weeks [4] - 1999:24, 2003:10, 2018:19, 2065:16
weight [3] - 2072:7, 2072:8, 2088:19
WEIL [2] - 1975:18, 1975:21
welcome [1] - 2064:17
welfare [1] - 2083:11
White [3] - 2080:1, 2080:7, 2093:14
white [1] - 2068:11
whole [13] - 2081:5, 2110:9, 2111:21, 2112:7, 2122:2, 2126:11, 2132:17, 2134:11, 2135:12, 2147:8, 2157:23, 2159:18, 2161:12
wholesaler [2] - 2107:25, 2108:5
wholesalers [1] - 2108:5
wide [2] - 2092:2, 2131:5
WiFi [1] - 2043:17
wild [1] - 2013:11
wildly [1] - 2149:20
willing [3] - 1993:10, 2044:4, 2074:25
win [4] - 2096:20, 2097:10, 2157:16, 2165:23
win/loss [3] - 2097:8, 2097:11, 2098:25
window [2] - 2085:8, 2086:10
winner [1] - 2100:11
winning [2] - 2097:20, 2098:20
wins [8] - 2097:10, 2098:16, 2098:18, 2098:19, 2098:20, 2098:22, 2098:23, 2100:3
withdraw [1] - 2028:3
WITNESS [104] - 1982:4, 1982:7, 1997:25, 2002:21, 2003:6, 2003:11, 2004:3, 2004:5, 2012:20, 2013:2, 2013:4, 2013:7, 2013:14, 2013:18, 2013:23, 2014:6, 2014:17, 2051:3, 2051:8, 2051:13, 2051:19, 2051:21, 2052:1, 2054:18, 2054:22, 2061:8, 2061:13, 2061:20, 2066:20, 2074:13, 2074:15, 2083:6, 2083:8, 2083:15, 2083:18, 2084:2, 2084:9, 2084:11, 2084:22, 2085:3, 2086:11, 2088:24, 2115:5, 2115:7, 2115:12, 2116:9, 2116:23, 2117:1, 2117:5, 2118:4, 2118:7, 2119:11, 2119:17, 2120:21, 2121:8, 2121:12, 2123:4, 2123:9, 2123:15, 2124:1, 2133:15, 2133:17, 2136:18, 2136:21, 2136:23, 2136:25, 2141:3, 2141:10, 2142:23, 2144:22, 2144:25, 2145:2, 2145:4, 2145:9, 2145:12, 2145:15, 2145:20, 2145:22, 2146:1, 2146:6, 2146:17, 2146:21, 2146:25, 2147:2, 2148:6, 2158:2, 2158:8, 2158:10, 2158:18, 2159:2, 2159:8, 2159:15, 2160:7, 2160:9, 2160:17, 2160:21, 2166:13, 2168:4, 2168:7, 2168:9, 2168:13, 2168:22, 2168:24, 2169:1
witness [21] - 2064:15, 2066:17, 2066:22, 2066:23, 2066:24, 2066:25, 2067:2, 2068:1, 2068:18, 2068:19, 2071:3, 2071:4, 2071:7, 2071:14, 2071:25, 2073:22, 2074:6, 2074:10, 2082:5, 2168:1
witnesses [1] - 2100:16
won [2] - 2098:12, 2099:25
wondering [2] - 2071:2, 2160:2
word [6] - 2047:12, 2049:22, 2066:1, 2079:5, 2118:8, 2126:23
words [6] - 1984:24, 2000:8, 2013:16, 2119:13, 2154:4, 2156:12
works [2] - 1990:23, 2067:15
world [6] - 2073:17, 2090:15, 2099:8, 2102:3, 2105:7, 2159:24
worried [9] - 2087:17, 2101:8, 2102:16, 2126:18, 2127:12, 2128:21, 2136:2, 2161:21, 2161:22
worrisome [1] - 2153:1
worry [4] - 2129:6, 2129:11, 2129:12, 2161:18
worth [1] - 1994:16
wow [1] - 2098:9
wrangling [1] - 2071:10
wrap [3] - 1999:22, 2000:6, 2000:11
wrestling [1] - 2071:16
Wright [4] - 1977:8, 2007:17, 2052:14, 2062:17
Wright.....1977 [1] - 1976:13
write [4] - 2006:15, 2007:9, 2007:12, 2146:5
writer [1] - 2006:16
writing [2] - 2006:14, 2009:7
wrote [4] - 2007:9, 2133:16,

2145:18, 2146:4

X

Xenakis [2] - 2063:12, 2063:17
XENAKIS [11] - 2052:11, 2052:13, 2054:23, 2060:25, 2062:13, 2062:16, 2063:3, 2066:13, 2070:7, 2070:19, 2073:6
Xerox [1] - 2140:18

Y

year [36] - 1996:25, 2002:22, 2009:11, 2019:1, 2033:11, 2034:1, 2034:6, 2034:21, 2037:4, 2037:21, 2041:22, 2043:1, 2048:14, 2050:12, 2077:21, 2077:24, 2077:25, 2079:19, 2085:12, 2085:14, 2085:22, 2086:10, 2086:13, 2092:21, 2092:22, 2111:21, 2112:18, 2112:21, 2117:7, 2121:24, 2122:1, 2125:3, 2154:20, 2156:2
years [24] - 1998:14, 2001:11, 2039:23, 2039:24, 2040:7, 2043:1, 2050:12, 2050:13, 2050:17, 2050:19, 2056:20, 2059:6, 2076:14, 2078:20, 2085:6, 2085:7, 2086:6, 2086:15, 2093:5, 2095:3, 2097:14, 2124:8, 2129:2
yellow [1] - 2146:2
yield [1] - 2011:17
York [1] - 1975:22
yourself [9] - 1982:3, 1988:5, 1988:16, 2014:22, 2054:2, 2128:2, 2128:11, 2163:19, 2164:6

Z

zero [1] - 2019:19
zone [1] - 2081:5