

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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: 05-MD-1720(JG)
:
: United States Courthouse
: Brooklyn, New York
:
: Thursday, April 11, 2013
: 2:30 p.m.
:
: X

IN RE: PAYMENT CARD
INTERCHANGE FEE AND MERCHANT
DISCOUNT ANTITRUST
LITIGATION

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

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1 (In open court.)

2 COURTRROOM DEPUTY: All rise. The United States
3 District Court for the Eastern District of New York is now in
4 session. The Honorable John Gleeson is now presiding.

5 (Honorable John Gleeson takes the bench.)

6 COURTRROOM DEPUTY: Calling civil cause for oral
7 argument in Docket No. 05-MD-1720, *In Re: Payment Card*
8 *Interchange Fee and Merchant Discount Antitrust Litigation*.

9 THE COURT: Good afternoon. Have a seat, please.

10 We're here on class plaintiffs' motion and I
11 have no intention, I don't know how long you plan to be here,
12 there are so many of you. I don't have any intention to roll
13 up my sleeves and get down in the weeds about these websites.
14 I think they're misleading and need to be corrected.

15 Just to give one example of my take on it.
16 There's different degrees of "misleadingness," and my concern
17 right now is not with the disputes among you about the
18 relative merits of the settlement, we'll deal with that in
19 due course.

20 My concern is with these members o the absent
21 members of the class and whether they're making decisions
22 based on bad information based on misleading information.
23 And it looks to me like they're being manipulated. And these
24 are your own, for the most part, not always, these are your
25 own members. I don't know why this would happen.

1 I will give one example. It's asserted
2 here that -- this is on the Merchants Object! site -- is
3 misleading. I'm referring to Paragraph 7 of the declaration
4 of Ms. Sweeney. It's misleading with regard to what the
5 merchants' options are and the screen shot that's appears in
6 Paragraph 7 it says, "Your options, what that means," and
7 there's two options there -- opt-out and object
8 electronically, opt-out and object via standard mail. And
9 that's it.

10 And I'm told in the opposing papers that some
11 merchant is supposed to extrapolate from a sentence above
12 where the options are that there's an option to do nothing.

13 It's not right, it's not fair, you have to be
14 fair to these people, so I'm not going through all this
15 stuff.

16 I think it's completely misleading and my fear
17 is there's merchants who, if they were better educated about
18 their options, might object but not opt-out because they
19 don't understand that they're not going to be able, if I
20 overrule the objections and approve what is now a proposed
21 settlement, they're not going to be able to share in the
22 damages.

23 So I'll hear you, but as I say, I'm not going
24 to take the time and get down in the weeds here. I want to
25 talk about relief in addition to the relief that's requested

1 by the class plaintiffs, unless you talk me out of it, I have
2 every intention of ordering every one of these sites to
3 include a banner prominently displayed, the first thing they
4 see when they go on the site that Judge Gleeson, who was
5 presiding over the case, has determined that the information
6 previously contained on this site and others like it was
7 misleading, specifically, he's concerned that some merchants
8 may not have fully understood their rights with regard to the
9 proposed settlement before acting.

10 I don't mean that to be the -- either the
11 precise iteration or the only thing expressed, but that's
12 what I have in mind together with a prominent link to the
13 Court-approved site. It's a Court-approved site so they can
14 see that information which is much more objective.

15 I don't want to confuse them any more and I
16 don't know where else we go from here. I don't know if a
17 corrective missive is going to be more confusing or less
18 confusing. I don't know if people who have opted out on bad
19 information should get a chance to opt back in if the
20 settlement is approved.

21 I have every intention, if they come back and
22 seek real relief against these sites for misleading them I
23 have every intention of asserting ancillary jurisdiction over
24 any such claims.

25 So that's where I stand. Anybody want to be

1 heard from class plaintiffs?

2 MR. WILDFANG: Your Honor, Craig Wildfang.
3 Mr. Stewart is going to present our argument today to the
4 extent you want to hear from us first he's the guy.

5 THE COURT: Okay.

6 MR. STEWART: I think Court expressed our views on
7 the matter. I don't think I have anything else to add. Just
8 in the example that you gave, I would just add that,
9 unfortunately, that page that you made reference to in the
10 "What that means" nowhere says that what that means if you
11 opt-out is you've given up your claim for damages to share in
12 the --

13 THE COURT: I understand.

14 MR. STEWART: -- resolution of the case.

15 THE COURT: You can rebut anything that's said by
16 the Objectors.

17 Anybody want to be? Mr. Shinder?

18 MR. SHINDER: Yes. Okay if I come up?

19 THE COURT: Yes.

20 MR. SHINDER: I will dispense with the portion of
21 my argument that's going to address the fact that these sites
22 are not misleading.

23 THE COURT: I didn't hear what you just said.

24 MR. SHINDER: I'm going to dispense with the
25 portion of my argument of he misleading nature of the sites

1 given your views.

2 THE COURT: All right.

3 MR. SHINDER: I will say this, your Honor.

4 Certainly, there was no intention whatsoever to deceive. In
5 fact, all of the sites including the Merchants Object! site
6 have detailed references what it means to object, what it
7 means to opt-out, the benefits, the costs of exercising any
8 of those options including that if someone opts out they will
9 be relinquishing their right to participate in any money
10 damages that are awarded in the settlement. That's in all of
11 the sites including the Merchants Object! site.

12 THE COURT: I read your papers. I'm not persuaded
13 that they're not misleading.

14 MR. SHINDER: Okay.

15 If the Court is inclined as it seems to be to
16 order prominent banners to the Court-approved website we
17 would respectfully request that the Court-approved website
18 include, consistent with the Court's order, on preliminary
19 approval.

20 This court ordered the Notice Plan that was
21 set forth in Appendix E to the settlement agreement which
22 authorized the creation of the website, neutral website, that
23 would include all filings that were made in conjunction with
24 the preliminary approval motion.

25 If one goes to the Court-approved website, one

1 finds only the filing made by class counsel in the motion for
2 preliminary approval. One does not find any of the
3 objections. One cannot find the brief filed by the objecting
4 plaintiffs, the NRF brief, Home Depot's pre.

5 THE COURT: I'm not going to direct that these
6 other sites that you're defending should be shut down.
7 They'll be there. By definition, someone will have gone on
8 to that site. And after this banner that says the site was
9 previously misleading and the link to the Court-approved site
10 you'll say what you say. They'll see the contrary views.
11 You can't just mislead them.

12 MR. SHINDER: We are not misleading them.

13 THE COURT: Yes, you are.

14 MR. SHINDER: That --

15 THE COURT: You have to be a lawyer. You have to
16 be a lawyer to actually believe that, for example, this
17 bolded "If you do nothing, the Court will assume you approve
18 of the settlement."

19 You'll have to be lost in our world of
20 lawyering to believe that undoes the damage that's done by
21 this "Take Action Now" and by burying the link to the site in
22 frequently asked questions. I'm not going to belabor this
23 with you. I'm just talking basic fairness.

24 MR. SHINDER: I'm not contesting that. I'm
25 requesting that the Court-approved website that is now going

1 to be prominently displayed include all the papers that were
2 filed on the motion for preliminary approval. That's what
3 was in the notice plan.

4 THE COURT: Denied.

5 MR. SHINDER: Okay.

6 THE COURT: I want you to sit down with your
7 adversaries the --

8 What else do you have to say, by the way?

9 MR. SHINDER: The other issue, if we're going to
10 get into corrections and --

11 THE COURT: We're going to get into corrections.

12 In the first instance, I'm going to direct
13 that you sit down with class counsel guided by my comments
14 here today and the ones I'll make by the time we're done and
15 try to comply. I got 500 other cases, I don't feel like
16 sitting down and figuring out myself what the remedy is. I'm
17 going to direct you to take a crack at it with class counsel.

18 MR. SHINDER: Okay.

19 THE COURT: What else do you have.

20 MR. SHINDER: If we're going go get into the realm
21 of corrections, we've highlighted in our papers blatant
22 misstatements that are on unauthorized websites that class
23 counsel has put up that claim as a benefit of the settlement
24 that the system gives merchants the ability to discount,
25 that's just not true.

1 Merchants can have the ability to discount
2 from the DOJ consent decree that preceded this settlement.
3 This settlement will reject it today. The merchants would
4 still have the ability --

5 THE COURT: Do you want to address the motion
6 that's before me by the plaintiffs for corrective action on
7 your part?

8 Is there a motion before me now on your part
9 for corrections to the proposed settlement papers?

10 MR. SHINDER: No.

11 THE COURT: Then let's address the motion that's
12 before me, please.

13 MR. SHINDER: Okay. I have nothing further, your
14 Honor.

15 THE COURT: All right. Anything further from the
16 class plaintiffs?

17 MR. STEWART: No, Your Honor.

18 THE COURT: I want you to sit with the objectors
19 and try to work this out. I'm granting the relief that's
20 requested.

21 In principle, I'm granting the relief stated
22 on the proposed order granting relief that was submitted in
23 connection with the initial motion papers and for the actual
24 implementation of that. I'm going to give the parties a week
25 to try to propose to me jointly a fix.

1 What you can agree on, I want submitted to me
2 to the extent that you're still in disagreement and I need to
3 rule on it. You can submit along with the joint submission
4 your separate suggestions to me.

5 Anything else?

6 Have a good day.

7 (WHEREUPON, this matter was adjourned.)

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CERTIFICATE OF REPORTER

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13

I certify that the foregoing is a correct transcript of the
record of proceedings in the above-entitled matter.

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Anthony D. Frisolone, FAPR, RDR, CRR, CRI
Official Court Reporter

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0	87102 [1] - 1:24	based [2] - 5:22 basic [1] - 10:23 BEFORE [1] - 1:12 belabor [1] - 10:22 BELKNAP [1] - 3:16 bench [1] - 5:5 benefit [1] - 11:23 benefits [1] - 9:7 BERGER [1] - 1:18 better [1] - 6:17 blatant [1] - 11:21 bolded [1] - 10:17 Box [1] - 1:23 BOYD [1] - 1:21 Bridgeport [1] - 3:14 brief [2] - 10:3, 10:4 Broad [1] - 2:20 Brooklyn [1] - 1:5 burying [1] - 10:21 BY [12] - 1:17, 1:20, 1:24, 2:6, 2:10, 2:14, 2:17, 3:4, 3:8, 3:15, 3:18, 4:5
05-MD-1720 [1] - 5:7 05-MD-1720(JG) [1] - 1:3 06604 [1] - 3:14	9	
1	90 [1] - 3:3 92101 [1] - 2:5 94105 [1] - 3:4 9th [1] - 2:9	
10004 [1] - 2:21 10007 [1] - 4:4 10017 [1] - 2:9 10019 [1] - 2:13 10022 [1] - 2:17 10036 [2] - 3:11, 3:18 10104 [1] - 3:7 11 [1] - 1:7 1133 [1] - 3:17 125 [1] - 2:20 1290 [1] - 3:7 1600 [1] - 2:5 1622 [1] - 1:19 19103 [1] - 1:19	A	
2	ability [3] - 11:24, 12:1, 12:4 able [2] - 6:19, 6:21 above-entitled [1] - 13:13 absent [1] - 5:20 acting [1] - 7:9 Action [1] - 10:21 action [1] - 12:6 actual [1] - 12:23 ADAM [2] - 2:10, 3:15 add [2] - 8:7, 8:8 addition [1] - 6:25 address [3] - 8:21, 12:5, 12:11 adjoined [1] - 13:7 adversaries [1] - 11:7 afternoon [1] - 5:9 agree [1] - 13:1 agreement [1] - 9:21 aided [1] - 4:9 Albuquerque [1] - 1:24 Americas [2] - 3:7, 3:17 ancillary [1] - 7:23 AND [1] - 1:5 Anthony [2] - 4:6, 13:17 ANTITRUST [1] - 1:6 Antitrust [1] - 5:8 Appendix [1] - 9:21 approval [4] - 9:19, 9:24, 10:2, 11:2 approve [2] - 6:20, 10:17 approved [8] - 7:13, 7:20, 9:16, 9:17, 9:25, 10:9, 10:25 April [1] - 1:7 argument [4] - 5:7, 8:3, 8:21, 8:25 ARGUMENT [1] - 1:11 ARNOLD [2] - 2:15, 3:2 ARPS [1] - 3:9 asserted [1] - 6:1 asserting [1] - 7:23 assume [1] - 10:17 attorney [1] - 2:4 Attorneys [10] - 1:15, 1:18, 2:8, 2:12, 2:16, 3:6, 3:10, 3:13, 3:17, 4:3 attorneys [3] - 1:22, 2:19, 3:2 AUSTIN [1] - 2:12 authorized [1] - 9:22 Avenue [4] - 1:16, 2:8, 3:7, 3:17 awarded [1] - 9:10	
3		C
335 [1] - 2:8 399 [1] - 2:16 39th [1] - 2:20		California [2] - 2:5, 3:4 CANNON [1] - 2:7 cannot [1] - 10:3 CARD [1] - 1:5 Card [1] - 5:7 case [2] - 7:5, 8:14 cases [1] - 11:15 CAUSE [1] - 1:11 certainly [1] - 9:4 CERTIFICATE [1] - 13:11 certify [1] - 13:12 chance [1] - 7:19 CIRESI [1] - 1:14 civil [1] - 5:6 CIVIL [1] - 1:11 claim [2] - 8:11, 11:23 claims [1] - 7:24 class [9] - 5:10, 5:21, 7:1, 8:1, 10:1, 11:13, 11:17, 11:22, 12:16 CLINE [1] - 1:22 COMLEY [1] - 3:13 comments [1] - 11:13 completely [1] - 6:16 comply [1] - 11:15 Computer [1] - 4:9 Computer-aided [1] - 4:9 computerized [1] - 4:9 concern [2] - 5:16, 5:20 concerned [1] - 7:7 confuse [1] - 7:15 confusing [2] - 7:17, 7:18 conjunction [1] - 9:23 Connecticut [1] - 3:14 connection [1] - 12:23 consent decree [1] - 12:2 consistent [1] - 9:18 CONSTANTINE [1] - 2:7 contained [1] - 7:6 contesting [1] - 10:24 Continued [3] - 2:1, 3:1, 4:1
5		
500 [1] - 11:15 550 [1] - 2:4 55402 [1] - 1:16		
6		
600 [1] - 3:3 613-2487 [1] - 4:7 613-2694 [1] - 4:7		
7		
7 [3] - 4:4, 6:3, 6:6 700 [1] - 1:23 718 [2] - 4:7, 4:7 767 [1] - 2:13		
8	B	
800 [1] - 1:16 850 [1] - 3:14	bad [2] - 5:22, 7:18 banner [2] - 7:3, 10:8 banners [1] - 9:16	

<p>contrary [1] - 10:10 correct [1] - 13:12 corrected [1] - 5:14 corrections [4] - 11:10, 11:11, 11:21, 12:9 corrective [2] - 7:17, 12:6 costs [1] - 9:7 counsel [4] - 10:1, 11:13, 11:17, 11:23 course [1] - 5:19 court [2] - 5:1, 9:20 Court [14] - 4:6, 4:6, 5:3, 7:13, 8:6, 9:15, 9:16, 9:17, 9:25, 10:9, 10:17, 10:25, 13:18 Court's [1] - 9:18 Court-approved [7] - 7:13, 9:16, 9:17, 9:25, 10:9, 10:25 Courthouse [1] - 1:5 COURTROOM [2] - 5:2, 5:6 crack [1] - 11:17 Craig [1] - 8:2 CRAIG [1] - 1:17 creation [1] - 9:22 CRI [2] - 4:6, 13:17 CRR [2] - 4:6, 13:17 CUTLER [1] - 4:3</p>	<p>down [6] - 5:13, 6:24, 10:6, 11:6, 11:13, 11:16 due [1] - 5:19</p>	<p>guy [1] - 8:4</p>
<p style="text-align: center;">D</p>	<p style="text-align: center;">E</p>	<p style="text-align: center;">H</p>
<p>damage [1] - 10:20 damages [3] - 6:22, 8:11, 9:10 DANIELS [1] - 1:21 DAVID [1] - 4:5 DAVIDOFF [1] - 1:20 deal [1] - 5:18 deceive [1] - 9:4 decisions [1] - 5:21 declaration [1] - 6:3 Defendants [11] - 2:7, 2:8, 2:12, 2:16, 2:19, 3:2, 3:6, 3:10, 3:13, 3:17, 4:3 defending [1] - 10:6 definition [1] - 10:7 degrees [1] - 5:16 denied [1] - 11:4 DENNIS [1] - 2:6 Depot's [1] - 10:4 DEPUTY [2] - 5:2, 5:6 detailed [1] - 9:6 determined [1] - 7:5 Diego [1] - 2:5 different [1] - 5:16 direct [3] - 10:5, 11:12, 11:17 disagreement [1] - 13:2 DISCOUNT [1] - 1:6 discount [2] - 11:24, 12:1 Discount [1] - 5:8 dispense [2] - 8:20, 8:24 displayed [2] - 7:3, 11:1 disputes [1] - 5:17 DISTRICT [3] - 1:1, 1:1, 1:12 District [2] - 5:3 Docket [1] - 5:7 DOJ [1] - 12:2 done [2] - 10:20, 11:14 DORR [1] - 4:3</p>	<p>E-mail [1] - 4:8 EAMON [1] - 2:14 EASTERN [1] - 1:1 Eastern [1] - 5:3 educated [1] - 6:17 either [1] - 7:10 electronically [1] - 6:8 entitled [1] - 13:13 ESQ [14] - 1:17, 1:20, 1:24, 2:6, 2:10, 2:10, 2:14, 2:17, 2:21, 3:4, 3:8, 3:11, 3:15, 4:5 example [4] - 5:15, 6:1, 8:8, 10:16 exercising [1] - 9:7 expressed [2] - 7:11, 8:6 extent [2] - 8:4, 13:2 extrapolate [1] - 6:11</p>	<p>HALE [1] - 4:3 HARPER [1] - 2:3 hear [3] - 6:23, 8:4, 8:23 heard [1] - 8:1 highlighted [1] - 11:21 HOLLANDER [1] - 1:21 HOLWELL [1] - 2:19 Home [1] - 10:4 Honor [4] - 8:2, 9:3, 12:14, 12:17 HONORABLE [1] - 1:12 Honorable [2] - 5:4, 5:5 HULETT [1] - 2:3</p>
<p style="text-align: center;">D</p>	<p style="text-align: center;">F</p>	<p style="text-align: center;">I</p>
<p>Facsimile [1] - 4:7 fact [2] - 8:21, 9:5 fair [2] - 6:13, 6:14 fairness [1] - 10:23 FAPR [2] - 4:6, 13:17 fear [1] - 6:16 Fee [1] - 5:8 FEE [1] - 1:5 figuring [1] - 11:16 filed [2] - 10:3, 11:2 filing [1] - 10:1 filings [1] - 9:23 First [1] - 1:23 first [3] - 7:3, 8:4, 11:12 fix [1] - 12:25 FLOM [1] - 3:9 Floor [2] - 2:9, 2:20 FOERSTER [1] - 3:6 FOR [1] - 1:11 foregoing [1] - 13:12 forth [1] - 9:21 Four [1] - 3:10 Francisco [1] - 3:4 FREEDMAN [1] - 1:21 frequently [1] - 10:22 Frisolone [2] - 4:6, 13:17 fully [1] - 7:8</p>	<p style="text-align: center;">G</p>	<p>implementation [1] - 12:24 IN [1] - 1:5 inclined [1] - 9:15 include [4] - 7:3, 9:18, 9:23, 11:1 including [3] - 9:5, 9:8, 9:11 information [5] - 5:22, 7:5, 7:14, 7:19 initial [1] - 12:23 instance [1] - 11:12 intention [6] - 5:11, 5:12, 7:2, 7:21, 7:23, 9:4 INTERCHANGE [1] - 1:5 Interchange [1] - 5:8 issue [1] - 11:9 iteration [1] - 7:11 it's [6] - 6:1, 6:4, 6:13, 6:16, 7:13 I'll [2] - 6:23, 11:14</p>
<p style="text-align: center;">D</p>	<p style="text-align: center;">G</p>	<p style="text-align: center;">J</p>
	<p>given [2] - 8:11, 9:1 GLEESON [1] - 1:12 Gleeson [3] - 5:4, 5:5, 7:4 GLIST [1] - 2:10 GOLDBERG [3] - 1:22, 1:24, 2:19 granting [3] - 12:19, 12:21, 12:22 GREENE [1] - 3:11 guided [1] - 11:13</p>	<p>JEFFREY [1] - 2:10 JOHN [1] - 1:12 John [2] - 5:4, 5:5 joint [1] - 13:3 jointly [1] - 12:25 JOSEPH [1] - 1:24 JOYCE [1] - 2:14 Judge [1] - 7:4 JUDGE [1] - 1:12 jurisdiction [1] - 7:23</p>
	<p style="text-align: center;">G</p>	<p style="text-align: center;">K</p>
	<p style="text-align: center;">G</p>	<p>KAPLAN [1] - 1:14</p>
	<p style="text-align: center;">G</p>	<p style="text-align: center;">L</p>
	<p>LaSalle [2] - 1:15, 1:16 lawyer [2] - 10:15, 10:16 lawyering [1] - 10:20 less [1] - 7:17 LESSER [1] - 4:5 let's [1] - 12:11 link [3] - 7:12, 10:9, 10:21</p>	<p>LaSalle [2] - 1:15, 1:16 lawyer [2] - 10:15, 10:16 lawyering [1] - 10:20 less [1] - 7:17 LESSER [1] - 4:5 let's [1] - 12:11 link [3] - 7:12, 10:9, 10:21</p>

<p>Litigation [1] - 5:8 LITIGATION [1] - 1:6 LLC [1] - 3:13 LLP [1] - 1:14, 1:18, 2:3, 2:12, 2:15, 2:19, 3:2, 3:6, 3:9, 3:16, 4:3 Locust [1] - 1:19 looks [1] - 5:23 lost [1] - 10:19</p>	<p>nothing [3] - 6:12, 10:17, 12:13 notice [1] - 11:3 Notice [1] - 9:20 nowhere [1] - 8:10 NRF [1] - 10:4</p>	<p>12:16 plaintiffs' [1] - 5:10 Plan [1] - 9:20 plan [2] - 5:11, 11:3 Plaza [2] - 1:15, 1:23 PORTER [2] - 2:15, 3:2 portion [2] - 8:20, 8:25 pre [1] - 10:4 preceded [1] - 12:2 precise [1] - 7:11 preliminary [4] - 9:18, 9:24, 10:2, 11:2 present [1] - 8:3 presiding [2] - 5:4, 7:5 previously [2] - 7:6, 10:9 principle [1] - 12:21 Proceedings [1] - 4:9 proceedings [1] - 13:13 produced [1] - 4:9 prominent [2] - 7:12, 9:16 prominently [2] - 7:3, 11:1 propose [1] - 12:25 proposed [4] - 6:20, 7:9, 12:9, 12:22 PULLMAN [1] - 3:13 put [1] - 11:23</p>
M	O	
<p>Madison [1] - 2:8 mail [2] - 4:8, 6:8 Main Street [1] - 3:14 manipulated [1] - 5:23 MASON [1] - 2:17 matter [3] - 8:7, 13:7, 13:13 MEAGHER [1] - 3:9 mean [1] - 7:10 means [5] - 6:6, 8:10, 9:6, 9:7 members [3] - 5:20, 5:21, 5:25 MERCHANT [1] - 1:5 Merchant [1] - 5:8 merchant [1] - 6:11 Merchants [3] - 6:2, 9:5, 9:11 merchants [5] - 6:17, 7:7, 11:24, 12:1, 12:3 merchants' [1] - 6:5 merits [1] - 5:18 MERRILL [1] - 1:20 Mexico [1] - 1:24 MICHAEL [2] - 2:21, 3:8 might [1] - 6:18 MILLER [2] - 1:14, 3:8 MILLS [1] - 3:18 mind [1] - 7:12 Minneapolis [1] - 1:16 Minnesota [1] - 1:16 mislead [1] - 10:11 misleading [12] - 5:14, 5:22, 6:3, 6:4, 6:16, 7:7, 7:22, 8:22, 8:25, 9:13, 10:9, 10:12 misleadingness [1] - 5:16 missive [1] - 7:17 misstatements [1] - 11:22 MOCCIOLO [1] - 3:15 money [1] - 9:9 MONTAGUE [1] - 1:18 Montgomery [1] - 3:3 MORRISON [1] - 3:6 most [1] - 5:24 motion [8] - 5:10, 9:24, 10:1, 11:2, 12:5, 12:8, 12:11, 12:23 Ms. Sweeney [1] - 6:4</p>	<p>Object [3] - 6:2, 9:5, 9:11 object [4] - 6:7, 6:8, 6:18, 9:6 objecting [1] - 10:3 objections [2] - 6:20, 10:3 objective [1] - 7:14 objectors [1] - 12:18 Objectors [1] - 8:16 OF [3] - 1:1, 1:11, 13:11 Official [2] - 4:6, 13:18 one [7] - 5:15, 6:1, 7:2, 9:25, 10:2, 10:3 ones [1] - 11:14 open [1] - 5:1 opposing [1] - 6:10 opt [6] - 6:7, 6:8, 6:18, 7:19, 8:11, 9:7 opt-out [5] - 6:7, 6:8, 6:18, 8:11, 9:7 opted [1] - 7:18 option [1] - 6:12 options [6] - 6:5, 6:6, 6:7, 6:12, 6:18, 9:8 opts [1] - 9:8 ORAL [1] - 1:11 oral [1] - 5:6 order [3] - 9:16, 9:18, 12:22 ordered [1] - 9:20 ordering [1] - 7:2 overrule [1] - 6:20 OWEN [1] - 2:10 own [2] - 5:24, 5:25</p>	
N	P	Q
<p>nature [1] - 8:25 need [2] - 5:14, 13:2 neutral [1] - 9:22 NEW [1] - 1:1 New [20] - 1:5, 1:24, 2:9, 2:13, 2:17, 2:21, 3:3, 3:7, 3:11, 3:18, 4:4, 5:3</p>	<p>P.A [1] - 1:22 p.m [1] - 1:8 P.O [1] - 1:23 page [1] - 8:9 papers [6] - 6:10, 9:12, 11:1, 11:21, 12:9, 12:23 Paragraph [2] - 6:3, 6:6 Park Avenue [1] - 2:16 part [3] - 5:24, 12:7, 12:8 participate [1] - 9:9 parties [1] - 12:24 PATTERSON [1] - 3:16 Payment [1] - 5:7 PAYMENT [1] - 1:5 Pennsylvania [1] - 1:19 people [2] - 6:14, 7:18 persuaded [1] - 9:12 PETER [1] - 3:11 Philadelphia [1] - 1:19 PICKERING [1] - 4:3 Plaintiffs [6] - 1:14, 1:15, 1:18, 1:22, 2:3, 2:4 plaintiffs [5] - 7:1, 8:1, 10:4, 12:6,</p>	questions [1] - 10:22
N		R
		<p>RDR [2] - 4:6, 13:17 Re [1] - 5:7 RE [1] - 1:5 read [1] - 9:12 real [1] - 7:22 realm [1] - 11:20 rebut [1] - 8:15 record [1] - 13:13 recorded [1] - 4:9 reference [1] - 8:9 references [1] - 9:6 referring [1] - 6:3 regard [2] - 6:4, 7:8 reject [1] - 12:3 relative [1] - 5:18 relief [6] - 6:25, 7:22, 12:19, 12:21, 12:22 relinquishing [1] - 9:9 remedy [1] - 11:16 REPORTER [1] - 13:11 Reporter [3] - 4:6, 4:6, 13:18 request [1] - 9:17 requested [2] - 6:25, 12:20 requesting [1] - 10:25 resolution [1] - 8:14 respectfully [1] - 9:17 rights [1] - 7:8 rise [1] - 5:2 ROBERT [2] - 2:17, 3:4 ROBINS [1] - 1:14 roll [1] - 5:12 rule [1] - 13:3</p>

RUTH [1] - 3:18	TRANSCRIPT [1] - 1:11 Transcript [1] - 4:9 Transcription [1] - 4:9 true [1] - 11:25 try [3] - 11:15, 12:19, 12:25 two [1] - 6:7 TYLER [1] - 3:16
S	U
San [2] - 2:5, 3:4 SAPIR [1] - 4:5 screen [1] - 6:5 seat [1] - 5:9 see [3] - 7:4, 7:14, 10:10 seek [1] - 7:22 sentence [1] - 6:11 separate [1] - 13:4 session [1] - 5:4 set [1] - 9:21 settlement [11] - 5:18, 6:21, 7:9, 7:20, 9:10, 9:21, 10:18, 11:23, 12:2, 12:3, 12:9 share [2] - 6:21, 8:11 SHINDER [15] - 2:10, 8:18, 8:20, 8:24, 9:3, 9:14, 10:12, 10:14, 10:24, 11:5, 11:9, 11:18, 11:20, 12:10, 12:13 Shinder [1] - 8:17 shot [1] - 6:5 SHUSTER [2] - 2:19, 2:21 shut [1] - 10:6 SIDLEY [1] - 2:12 sit [3] - 11:6, 11:13, 12:18 site [11] - 6:2, 7:4, 7:6, 7:13, 9:5, 9:11, 10:8, 10:9, 10:21 sites [7] - 7:2, 7:22, 8:21, 8:25, 9:5, 9:11, 10:6 sitting [1] - 11:16 SKADDEN [1] - 3:9 SLATE [1] - 3:9 sleeves [1] - 5:13 someone [2] - 9:8, 10:7 specifically [1] - 7:7 Square [1] - 3:10 stand [1] - 7:25 standard [1] - 6:8 stenography [1] - 4:9 STEWART [5] - 2:3, 2:6, 8:6, 8:14, 12:17 Stewart [1] - 8:3 still [2] - 12:4, 13:2 STORM,ESQ [1] - 3:18 Street [4] - 1:19, 2:4, 2:20, 3:3 stuff [1] - 6:15 submission [1] - 13:3 submit [1] - 13:3 submitted [2] - 12:22, 13:1 suggestions [1] - 13:4 Suite [3] - 1:23, 2:5, 3:3 supposed [1] - 6:11 system [1] - 11:24	unauthorized [1] - 11:22 understood [1] - 7:8 undoes [1] - 10:20 unfortunately [1] - 8:9 United States [4] - 1:1, 1:5, 1:12, 5:2 unless [1] - 7:1 up [4] - 5:13, 8:11, 8:18, 11:23
	V
	via [1] - 6:8 views [3] - 8:6, 9:1, 10:10 VIVIAN [1] - 3:18 VIZAS [1] - 3:4
	W
	WEBB [1] - 3:16 website [6] - 9:16, 9:17, 9:22, 9:25, 10:25 websites [2] - 5:13, 11:22 weeds [2] - 5:13, 6:24 week [1] - 12:24 West [1] - 2:4 we'll [1] - 5:18 whatsoever [1] - 9:4 WHEREUPON [1] - 13:7 Wildfang [1] - 8:2 WILDFANG [2] - 1:17, 8:2 WILMER [1] - 4:3 world [1] - 10:19 World Trade Center [1] - 4:4
	Y
	YORK [1] - 1:1 York [18] - 1:5, 2:9, 2:13, 2:17, 2:21, 3:7, 3:11, 3:18, 4:4, 5:3 you're [1] - 13:2
T	
Telephone [1] - 4:7 Third Avenue [1] - 2:13 Thursday [1] - 1:7 today [3] - 8:3, 11:14, 12:3 together [1] - 7:12 transcript [1] - 13:12	