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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM I. KOCH,

 Plaintiff,

v.

07 Civ. 9600 JPO

ERIC GREENBERG, et al.,

 Defendants.

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New York, N.Y.
April 11, 2013
9:30 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge,
and a jury

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Also Present:
JASON WIETHOLTER, Trial Tehnician
ELIZABETH S. SEABROOK, Paralegal

1 (Trial resumed; jury not present)

2 THE COURT: Good morning everyone. All the jurors
3 have now arrived any preliminary matters?

4 MR. HUESTON: No, your Honor.

5 MR. SHARTSIS: No, your Honor.

6 MS. SKAKEL: Your Honor, may I be heard? My name is
7 Deborah Skakel. I represent Zachys.

8 THE COURT: Sure. Please come forward. Deborah
9 Skakel, S-K-A-K-E-L?

10 MS. SKAKEL: That's correct, your Honor.

11 THE COURT: OK.

12 MS. SKAKEL: Your Honor, as you may recall, Mr.
13 Zacharia testified earlier in the week as a third-party
14 witness. I received late last night a copy of the jury verdict
15 form. As your Honor knows, it contains an apportionment
16 provision in there with respect to the GBL claims.

17 Additionally, as your Honor noted in the transcript
18 yesterday, also which I received a copy of late last night, it
19 is in fact, to use your Honor's words, a bit odd that the
20 apportionment charge is in there notwithstanding Zachys
21 settlement from the case and not been in this courtroom
22 participating in this proceeding. As your Honor further noted,
23 these are tricky issues.

24 In light of the way that this case has transpired. I
25 would respectfully request that that apportionment charge be

1 reconsidered. To the extent that, again, Zachys has not
2 participated in this trial, they have not been protected.

3 I allowed Mr. Zacharia to appear as a third-party
4 witness. I did not represent him, as your Honor may recall,
5 because I did not see a need to. Under these circumstances it
6 seems to me unduly prejudicial and unfair to have, as your
7 Honor referred to it, an advisory type jury charge here with
8 respect to a party who is no longer part of the case,
9 particularly when 15-108 is at best possibly applicable here to
10 the underlying claims at issue.

11 Again, Zachys was not part of the fraud claim, because
12 that was dismissed by Judge Jones early in this matter. So we
13 are only talking about the GBL claims.

14 Your Honor, I apologize for not bringing this to your
15 attention earlier, but the very fact of the matter is that
16 Zachys has not been part of this case. Mr. Wessel was kind
17 enough to provide me with the jury verdict form last night,
18 which I saw after I got home from a long day at the office.

19 THE COURT: Thank you, Ms. Skakel. Your objection is
20 noted. I'll consider it in the next few hours.

21 MS. SKAKEL: Your Honor, may I have permission to
22 submit something in writing to follow up my perhaps not totally
23 articulate oral objection?

24 THE COURT: I thought you were perfectly articulate.
25 But you're welcome to, yes, submit anything in writing.

1 MS. SKAKEL: Thank you, your Honor.

2 THE COURT: Does anybody want to comment?

3 MR. SHARTSIS: Your Honor, I don't want to address the
4 issue. I just want to say that to the extent that I am going
5 to be giving a closing statement, I am going to address the
6 Court's instructions. If I address them, I don't know when I
7 will be talking about something that the Court has changed its
8 mind on.

9 THE COURT: This won't affect anything in the
10 instructions. This is just something on the last page of the
11 verdict form.

12 MR. SHARTSIS: I am going to discuss the verdict form,
13 your Honor, which I am entitled to do.

14 THE COURT: At this point I'm going to keep in the
15 question. You should assume I'm going to keep it in as an
16 advisory question for the jury.

17 MR. SHARTSIS: Thank you.

18 THE COURT: Anything else?

19 MR. HUESTON: No, your Honor.

20 THE COURT: Please bring in the jury.

21 (Jury present)

22 THE COURT: Good morning, ladies and gentlemen.
23 Welcome back. We have reached the point in the case where we
24 have summations from each side. That is, a lawyer from each
25 side gets a chance to sum up and present each side's view of

1 the evidence in the case and argue to you about why in their
2 view you should render a verdict in that party's favor.

3 As I said previously, what the lawyers say is not
4 evidence, but they to have a chance to organize the evidence
5 and talk about the evidence. Your recollection of the evidence
6 and your own view of the evidence is what controls your
7 decision.

8 The way it works in this court is the defendant goes
9 first and then the plaintiff goes second, because the plaintiff
10 has the burden of proof in every civil case.

11 We will now hear the closing argument, or summation,
12 on behalf of defendant. Mr. Shartsis.

13 MR. SHARTSIS: Your Honor, thank you very much.

14 I want to start first by thanking each of you for
15 being so attentive. I think I said at the end of the opening
16 that I believe in the jury system. I have been doing this, I'm
17 sure you can guess, for a long time. I believe in juries and I
18 believe in people's common sense in what they do.

19 In this case it has struck me that you have been
20 remarkably attentive to the case, considering that this is a
21 case where you have devoted three weeks of your life to a
22 dispute of a few hundred thousands dollars. It takes a lot of
23 dedication to pay that kind of attention to this kind of
24 dispute. Mr. Greenberg appreciates the clear care and
25 attention you have given, and I do as well.

1 If you remember, opening statements are when lawyers
2 make promises to the jury. They promise what they are going to
3 show. Then you get to hold us to those promises. When we said
4 what evidence we were going to present, did we present it or
5 did something else happen?

6 If you recall, the plaintiff promised a simple case.
7 Of course, this case has been anything but simple. This case
8 has spent time on bottles that have never been in this court,
9 events that have never been in this court, evidence that has
10 never been presented in this court about things that happened
11 outside this Court. But that is not what the case is about.
12 The case is about 24 bottles of wine. They are right here.

13 The plaintiff made the statement and described what
14 happened in a case where the claim is that Mr. Greenberg wasn't
15 forthcoming. The plaintiff left out some facts which really
16 have dominated this case, didn't tell you about those proofs.
17 I'm going to remind you of them.

18 If you remember that statement, I'm sure you were
19 surprised to learn that Mr. Greenberg had actually done six
20 auctions with Zachys before the auction in question; surprised
21 to learn that Mr. Greenberg went to one of the top auction
22 houses in the world, an accredited auction house; surprised to
23 learn, as I told you in the opening, that Mr. Greenberg was
24 entitled to do that, and he was entitled to rely on the world's
25 best experts at one of the world's best auction houses.

1 You weren't told by the plaintiff, but you were told
2 by me and you saw the evidence, that every bottle in this case
3 was inspected by some of the top experts in the world before
4 they were sold. You weren't told by the plaintiff, but you
5 were told by me and I think we have proven it, that the experts
6 looked at these bottles and knew what they were going to look
7 at.

8 They inspected them. What they inspected was the
9 outside of each bottle, the same as the experts who came in to
10 testify inspected the outside of the bottle, because that is
11 how that business is done for the purpose of putting things up
12 for auction.

13 You weren't told by the plaintiff, but you were told
14 by us, that those experts, Zachys, the people who took the
15 stand, not one of them needed to know the source or the
16 background or the history of the bottle or where it came from
17 or even who owned it in order to do the kind of work that Mr.
18 Greenberg was entitled to rely on.

19 Plaintiff didn't tell you a very important fact -- I
20 did, and we have proven it -- that it was Zachys who selected
21 the bottles that were put up at the auction. Mr. Greenberg
22 proposed the bottles, but Zachys did its careful, professional,
23 expert review of the exterior of the bottle, and it selected
24 the bottles to put up at the auction.

25 The buyer had a right to inspect. I'm going to talk

1 about that later. I would suggest to you that because you
2 decide to buy some excessive or enormous number of things, that
3 you can't do that and embrace the fact that you have bought so
4 much that you can't exercise a right that's given to you, which
5 is what happened in this case.

6 The descriptions in the catalog about each bottle, not
7 written by Mr. Greenberg, written by Mr. Zacharia and his
8 staff.

9 This is a bottle-by-bottle case. This is not some
10 global case about general conduct of people. You're going to
11 hear instructions, I'm going to read to you one in a minute,
12 that it's about 24 cases. I'm going to ask you as I give this
13 statement to think about what misrepresentation -- because a
14 fraud is a misrepresentation -- what misrepresentation was made
15 about each bottle, what was said about a bottle that was false.

16 Mr. Koch's view is to ignore the contract language.
17 Mr. Koch got up and testified that what he really thought was
18 each bottle was guaranteed. You can read the whole catalog,
19 and it won't say anywhere that each bottle was guaranteed,
20 because it wasn't.

21 Remember we asked Mr. Orcutt, who was the buyer for
22 Mr. Koch, who had done this kind of work cataloging, did you
23 guarantee the bottles? He sort of jumped back. He said, no,
24 we just looked at them and put them up for sale.

25 That wasn't unique for Mr. Orcutt. That was true for

1 all of these auction houses. Every one of them sold them
2 exactly the same. All sold as-is. Mr. Schwarz, an obvious
3 expert in wine, with his huge collection of catalogs, said
4 every auction house sells as-is, no auction house guarantees a
5 bottle.

6 Mr. Koch understood that no one said to him or implied
7 or represented that the bottles were guaranteed to be what they
8 were. That's not a representation you heard made in this case.
9 It can't be a basis for fraud.

10 Mr. Koch viewed the auction catalog as a license to
11 lie and steal. Knowing that, he went to the auctions. Knowing
12 that, he submitted himself to the terms of the auction house.
13 He didn't like the terms, but he went ahead anyway, and on his
14 own he determined that the terms did not apply to him. It
15 would be nice if one could do that, I'd love to do that -- I
16 don't like the terms, they don't apply to me -- instead of
17 telling the auction house, I don't like the terms, would we
18 change them.

19 You will see that with Mr. Greenberg and Sotheby's,
20 Mr. Greenberg and Christy's, where they have that kind of
21 conversation and can't come to an agreement. Mr. Koch's view
22 is, I don't like the terms, I won't tell anybody, but I'm not
23 going to live by them. Later he testified recently he now
24 calls an auction house, says I don't like your terms, and they
25 can decide whether they do business.

1 But business is a two-way concept. People each have
2 the right to decide whether they want to do business with each
3 other, and they each have the right to know what terms they do
4 business with each other, and they each have the right to know
5 that one of them is thinking, yes, I agreed by this but I'm not
6 going to live by it.

7 That's where this guarantee issue comes up. If Mr.
8 Koch has a fight with the auction houses, he should have a
9 fight with the auction houses. If every auction of wine ever
10 in the United States is as-is, Mr. Greenberg, like anyone else,
11 has only one choice to auction his wine, and that's as-is.
12 That's the system and that's what he comes to. But he is not
13 the one who creates that system.

14 Some of the mystery is about to be lifted. Here is
15 where the mystery starts to lift. There is a thing called the
16 burden of proof in the case. One of these two parties has got
17 to prove the case. That party is the plaintiff, not the
18 defendant. I could leave the stand, go over there, sit down,
19 and do nothing. We could have sat there and not presented any
20 witnesses, any experts, any anything, any evidence. Mr. Koch
21 would still have the burden of proving his case by clear and
22 convincing evidence. That is the standard of the case.

23 The judge is going to read a statement to you at the
24 end. I will read you parts of it. It is so long. It would
25 take up my whole time. I don't purport to read everything.

1 You will hear more from other counsel, and the judge will read
2 the whole thing. I'm going to highlight issues.

3 The judge says, "When a party has the burden to prove
4 any matter by clear and convincing evidence, it means the
5 evidence has produced in your mind a firm belief or conviction
6 as to the matter at issue." In this case that means that the
7 evidence makes it highly probable that what Mr. Koch claims
8 actually happened. And if you're not satisfied, as the judge
9 will read to you, I'm going to quote it, "If you're not
10 satisfied that there is such a high probability, you must
11 decide to Mr. Greenberg."

12 When I say "evidence," I mean evidence, I don't mean
13 arguments. Mr. Koch's counsel will get up here and argue about
14 a bunch of things. That's no more evidence than what I am
15 telling you. If there is a point that Mr. Koch wanted to make
16 in the case, he had to put up a document or put up a witness
17 and they had to tell you. Lawyers make up all kinds of things,
18 because we are advocates. We are doing our job. We are not
19 witnesses and we are not documents.

20 Now, there is a second burden. I don't want to be
21 incomplete here. There are two claims. The fraud claim, which
22 is really what this case is about. Then there is a General
23 Business Law claim about consumer things. That will be a
24 different standard. That is a lower standard. That's a
25 standard where it is more likely than not, preponderance of the

1 evidence, can you tilt the scales. But this standard is very
2 high, very high. The judge will describe the standard in
3 detail.

4 So, what are we here for? I'm going to paraphrase a
5 little bit, don't want to take too much time. The judge will
6 read, "To summarize, Mr. Koch has the burden of proving by
7 clear and convincing evidence each of the following
8 elements:" -- here is your job -- "First, that Mr. Greenberg
9 made a representation of fact," a representation of fact,
10 "directly or indirectly to Mr. Koch relating to the 24 bottles;
11 second, that the representation was false; third, that Mr.
12 Greenberg knew it was false," knew it was false, "or was
13 reckless," reckless with regard to whether it was true or
14 false. That's what they have got to prove.

15 They have got to prove that he made the representation
16 to induce Mr. Koch to buy the 24 bottles, that whatever the
17 representation was, Mr. Koch justifiably relied on it. Very
18 important. There are a lot of things people say that you
19 cannot justify or rely on. As I will show you, when you have
20 in the introduction a statement about Alexander the Great, you
21 can't exactly justifiably rely on that in the catalog.

22 Six, that Mr. Koch suffered damages.

23 If you find, and the judge will read this exact
24 statement to you, if you find that Mr. Koch did not prove by
25 clear and convincing evidence that Mr. Greenberg made a

1 representation of fact to Mr. Koch about any of the bottles,
2 any of the bottles of wine at issue in this case, then you must
3 find in favor of Mr. Greenberg on a claim for fraud based on an
4 intentional misrepresentation.

5 That's what we are doing here. That's what this case
6 is about. It's about 24 bottles.

7 Let me point out some things about the 24 bottles.
8 The judge will read to you under intentional misrepresentation
9 Mr. Koch claims that Mr. Greenberg made misrepresentations
10 relating to the authenticity of 24 bottles of wine in this
11 case. I want you to think about, right now, what were those
12 misrepresentations about each of those bottles? Mr. Koch
13 basically, as you will recall, doesn't exactly remember what
14 bottles are in the case. We asked him about those, and he
15 said, not sure.

16 No time in this case under that burden of proof did
17 Mr. Koch get handed a bottle, because it's about the 24
18 bottles, and asked what misrepresentation was made about this
19 bottle, what did you rely on about this bottle? So, if it's a
20 misrepresentation about the fact about the bottles, there is no
21 evidence.

22 Counsel may argue, well, he thought it was genuine.
23 No one made that representation. He thought it was what was
24 described in the little description of the bottle. Well, read
25 the description of the bottle and see if it matches the bottle.

1 No misrepresentation. Zachys was pretty good about telling
2 what was in the bottle. No misrepresentation.

3 So, when you go back in the jury room, the first
4 question you ought to ask is, well, as to this Lafleur 1950
5 Pomerol, what did Mr. Koch say was misrepresented by Mr.
6 Greenberg about that bottle? That's what we are here for, 24
7 bottles and misrepresentation.

8 We know that Zachys was not misled in terms of what
9 they looked at. This is what Mr. Greenberg was entitled to
10 rely on, according to Mr. Egan. Nobody is misled here. Zachys
11 goes to California with Fritz Hatton, well regarded, well
12 regarded by everybody who has been in this case. Nobody has
13 had any bad word to say about Mr. Hatton or about Mr. Zacharia.
14 Ethical, well regarded, the top people in the business.

15 They go to California. They know what to look for.
16 They look at these bottles. Of course, I'm going to have to
17 talk about the 1928 Chateau Latour, the one bottle out of
18 70,000 that gets misfiled or put in the wrong bin. They look
19 at exactly what Mr. Egan looked at and what Mr. Schwarz looked
20 at.

21 If it turns out that Zachys made a mistake, and I
22 don't know that they did, that wasn't a mistake that Mr.
23 Greenberg made. That was a mistake that Zachys made, because
24 they came and studied each of the bottles. That's not a fraud.
25 That's somebody making a mistake about looking at a bottle.

1 That's not a fraud by Mr. Greenberg.

2 If you conclude, although a number of people have
3 differed, that all those bottles, depending on your definition,
4 are inauthentic or somehow counterfeit without know what's in
5 the bottle, even if you conclude that, if that's true, that's
6 not something Mr. Greenberg did. The evidence is clear Mr.
7 Greenberg did not believe that those bottles were fake.

8 Fraud is going to require intent. You can't have much
9 intent if you don't believe something is wrong. How does he
10 give the bottles without believing they are fake and then get
11 sued, get sued on the basis that he intended to give fake
12 bottles, when he didn't know it? So, Zachys did their job.
13 Nobody misled Zachys.

14 Let's talk about the introduction. When Mr. Koch was
15 put on the stand by his lawyer, you remember the lawyer took
16 him through the introduction. He would read him a sentence and
17 say, how about that sentence? Mr. Koch would say, oh, yeah,
18 that sentence, I remember that sentence as if it were
19 yesterday, that meant this, that meant that. He didn't say,
20 Mr. Koch, what do you remember? He took him sentence by
21 sentence, prompting Mr. Koch, getting an answer, prompting Mr.
22 Koch, getting an answer. But Mr. Koch never read that, and we
23 know it.

24 Let's read and see a little bit of testimony about
25 what Mr. Koch actually did, because that just wasn't true.

1 Here was the question at the trial. I'm sorry I can't play it
2 for you.

3 "Q. Mr. Koch, this morning your lawyer asked you a number of
4 questions about the details of the introduction of the catalog.

5 "A. The introduction?

6 "Q. The introduction.

7 "A. The what?

8 "Q. I'm sorry. Asked you a number of questions about
9 introduction written by Mr. Zacharia in the 2005 catalog. Do
10 you remember that?

11 "A. Yes.

12 "Q. You testified that you have read that in excruciatingly
13 careful detail, correct?

14 "A. I didn't use those words, but I have read it.

15 "Q. In extreme detail?

16 "A. I don't know what you mean by extreme detail, but I read
17 it.

18 "Q. Line by line?

19 "A. Yes, I read it line by line."

20 Then I asked Mr. Koch, "Isn't it true, Mr. Koch, that
21 I had asked you if you had looked at the catalog in 2010, you
22 told me you didn't recall you had looked at it?"

23 "A. Well, that could be true."

24 So he sat in this court and said, I read it line by
25 line. Years earlier, when asked, he didn't remember looking at

1 it.

2 Let's see a little testimony.

3 (Koch video deposition shown)

4 That's somebody who came up and told you he read it
5 line by line. What else?

6 (Koch video deposition shown)

7 There is a third thing he said. We have him twice
8 saying he didn't read it. Did anybody hear read introduction
9 line by line? This was he looked at it with Brian Orcutt, some
10 of the wines, which is probably what he did. That's what he
11 told you when he took the stand and told you not only did he
12 read it line by line, but he told you that Alexander the Great
13 had a great wine selection, or whatever he said.

14 Let's look at another quote.

15 (Koch video deposition shown)

16 Mr. Koch doesn't remember seeing the capsules peeled
17 back to the top, and he also testified he had never remembered
18 ever seeing that anywhere.

19 Let's take a look at these bottles. We have an
20 argument by his counsel that what really matters with these
21 bottles is how they look. Mr. Koch is a collector. He goes
22 down in the cellar, he looks at the bottle. It's a beautiful
23 thing. He is a collector of things. He really, really loves
24 them. So this is a beautiful thing.

25 I bought this by my hotel for \$12. What it's got is a

1 full capsule. It's a nice feature. It's a nice feature.

2 The bottles Mr. Koch bought are mutilated. I use the
3 word "mutilated" for a reason. Somebody took a razor blade,
4 took a razor blade to those bottles and destroyed their looks.
5 If you're into buying a bottle because you really, really like
6 the way it looks, you don't buy those bottles. They are
7 mutilated.

8 And you can't miss it. You can't miss it. If you're
9 somebody who really looks for things that are beautiful, you
10 might notice in the catalog the pictures. Take a look. Let's
11 look at them. There is one picture, so you could miss that.
12 There is another picture of the bottles he bought. You could
13 miss that. There is another picture, another bottle he bought.
14 There are some more bottles he bought. Mutilated. Every one
15 of these mutilated.

16 Mr. Koch claims he looked carefully through the
17 catalog, looked carefully through the catalog, read it line by
18 line -- mutilated, mutilated, mutilated, mutilated, mutilated,
19 look at this -- but doesn't remember seeing something that for
20 anybody buying wine, a collector who cares about how things
21 look had to have noticed, if he read it. Look at that. Look
22 at that. Look at that. Not very easy to miss.

23 And if not that, he said, well, what I really read was
24 I read the descriptions of the wines. Mutilated, every bottle
25 he bought, right there. Capsule cut, capsule cut, capsule cut.

1 Look at this. Look at this. Each of these is a separate wine.
2 Every one of them, capsule cut. Now, could you perhaps have
3 overlooked it once or twice, three times, ten times, 20 times,
4 50 times, a hundred times? Mr. Koch did not read this catalog.

5 Then Hardy Rodenstock comes up. Remember who Hardy
6 Rodenstock is? Mr. Koch, during the preceding same year in
7 2005, realized he was swindled by Hardy Rodenstock. He was
8 embarrassed. He went to display his Jefferson bottles at the
9 Museum of Fine Arts in Boston, proud to do it with his great
10 collections. He sat on the board of the museum. And when they
11 said could we check out these bottles and do something really
12 extreme like call Monticello, where Mr. Jefferson's records
13 are, he discovered he had been swindled, and he had been
14 swindled by Hardy Rodenstock, a name that is not easy to
15 forget, a crazy name.

16 As he looked through the catalog carefully, here we
17 are: Hardy Rodenstock, Hardy Rodenstock, Hardy Rodenstock,
18 Hardy Rodenstock, Hardy Rodenstock, Hardy Rodenstock, Hardy
19 Rodenstock, Hardy Rodenstock, Hardy Rodenstock. Mr. Koch
20 didn't read this catalog. And if he didn't read the catalog,
21 he could not rely on the catalog.

22 If you believe he read this catalog in detail, then we
23 have to talk about what's in the catalog. I'm sorry, because I
24 don't have a document that I need. You do this late at night
25 and you miss things. I have it here and I'm going to share it

1 with you. I'm sorry I can't put it up on the board. It would
2 be hard to describe how many all-nighters you put in in the
3 middle of a trial.

4 Here is our document, with some notes on it. This is
5 the introduction to the catalog. This was written by Mr.
6 Zacharia. Mr. Zacharia on the stand said, it's mine, I wrote
7 it, it's my honest opinion. That's what he said. It calls
8 this one of the greatest collections of the world. He believed
9 it, Sotheby's believed it, Christy's believed it, everybody
10 believed it.

11 Then Mr. Koch reaches some conclusions from greatest
12 collection in the world. One is if it's the greatest
13 collection in the world, then I don't have to inspect it. If
14 it's the greatest collection in the world, it must be like
15 mine, it must have bar coding. If it's the greatest collection
16 in the world, this person clearly doesn't resell wine. He
17 reaches those conclusions. I want to suggest to you what
18 that's like, just a little story here.

19 Imagine you have done pretty well in life and you have
20 a house, a nice house you want to sell. You put an ad in the
21 paper or on the Internet that says terrific house, spacious
22 living room, wonderful yard, great location, as-is, no
23 warranties or representations, call to arrange inspection.

24 Somebody like Mr. Koch buys it sight unseen. He says,
25 well, I didn't have to inspect it, it was a terrific house with

1 a wonderful yard and a spacious living room, so I didn't have
2 to do that, didn't inspect it. Then you get sued for fraud.
3 Fraud? How can you get sued for fraud?

4 He says, look, the ad said terrific house, this house
5 is only 2100 square feet. You know, a terrific house is 21,000
6 square feet. That's a terrific house. I was misled. And it
7 says spacious living room. This living room is only 20 feet by
8 20 feet. What are you talking about? A spacious living room
9 is a hundred feet long and 50 feet wide. That's a spacious
10 living room. You defrauded me.

11 And wonderful yard, I got there, I walked out in the
12 yard. No fountains. Where were the tennis courts, the Olympic
13 size swimming pool? There was not even a swimming pool. Not
14 even room to play polo or a putting green. That was a
15 wonderful yard. You said wonderful yard. That was a fraud.
16 My interpretation of wonderful yard is what I just described to
17 you. And great location, this is just in New Rochelle. I
18 thought it was Beverly Hills or Sutton place.

19 You don't get to do that, and there is a reason you
20 don't get to do that. The judge will give you an instruction
21 explaining why you can't do that. He is going to read to you
22 general assertions or expressions of a seller in praising the
23 product being offered for sale, commonly called dealer's talk,
24 trade talk, or puffery, do not constitute a basis for a fraud
25 claim. Examples of such statements are vague claims of

1 superiority over comparable products or exaggerated and
2 boasting statements upon which no reasonable buyer would be
3 justified in relying.

4 How much testimony did we hear from Mr. Koch about
5 having read Alexander the Great, the Alexander the Greats of
6 the collecting world? After reading that, he then read all
7 kinds of things. These wines had to be genuine because
8 Alexander the Great only collected genuine wine. They had to
9 be stored a certain way because Alexander the Great had a great
10 wine fridge.

11 All of that is not a representation, and all of the
12 things that Mr. Koch said he thought it meant is not
13 actionable, as we call it in law. You can't sue somebody over
14 it, because it's dealer's talk or trade talk or puffery.
15 "Puffery" is a funny word. But it is sort of puffing. Great
16 house, great lawn. People do that.

17 Mr. Koch read that it couldn't be the reseller.
18 Except it says here several smaller sales have taken place. He
19 read on occasion, on occasion, hear the words, on occasion
20 Burgundian and Rhone rarities were purchased directly from the
21 domains, and from that he concluded every wine in the auction
22 was directly from the domain, except the wines he bought were
23 not Burgundian or Rhone wines. But he made that leap, and he
24 was not entitled to do so.

25 If you go back and read this, you will see most

1 unusual, however, is the selection of 19th century Bordeaux and
2 Right Bank wines from '21 through '61 vintages. Then they list
3 bottles, bottles like 1811, 1832, 1864, 1865 Lafite. You've
4 got his receipts. He bought every one of those bottles, and
5 they were just fine, rare bottles, just fine. He bought them,
6 as well as an 1864 and 1865 Latour.

7 The 1864 Latour is here in the case. What did the
8 catalog say? What representation was made? The catalog said
9 believed to have been corked in 1980. You will see the word
10 "believed" in there, believed to have been reconditioned in
11 1980. Not a misrepresentation. It was clear that Zachys
12 didn't know, and that's why they put the word "believed." So
13 the one 19th century bottle he buys is believed to be. You
14 will see that in the catalog. No guarantee.

15 There is a discussion of Chateau Lafleur. We are
16 going to talk about that. It had been tasted by Zacharia and
17 Hatton. There is a statement by Fritz Hatton, not by Eric
18 Greenberg, about the provenance being similar provenance to
19 other wines, if somebody knows what that means.

20 Mr. Zacharia was asked directly where did that come
21 from? He said, not from Eric Greenberg, from Fritz Hatton.
22 Another statement sourced on the continent. Mr. Hatton said,
23 I'm not quite sure what that means, but it did not come from
24 Eric Greenberg. So that was not Eric Greenberg making a
25 statement or representation. It was written by Zacharia, not

1 Greenberg.

2 Of course, if Mr. Koch was worried about Hardy
3 Rodenstock, Hardy Rodenstock came, came, from the continent.
4 So if it was a problem, you can see it.

5 One of the things Mr. Koch said was -- I'm going to
6 get to it. I like to be more organized, but this is just a
7 hard business. He didn't inspect because of the Alexander the
8 Great language, that this was one of the best of the best, so
9 it wasn't necessary to inspect. You won't see anywhere in the
10 catalog that said you won't have to inspect if by reading the
11 catalog you think this is a really, really good collection.

12 Mr. Orcutt, the man who would not guarantee wine, had
13 read this puffery. Mr. Koch never testified that Mr. Orcutt
14 thought it was. What Mr. Orcutt read in the catalog
15 introduction was critical to his buying. That evidence is
16 missing from this case. Nobody has gotten up and said that.
17 If the lawyer argues that, it's argued.

18 Mr. Koch knew this was an as-is, or maybe he didn't.
19 Let me read to you what was said, because some things were said
20 that just weren't truthful. I can't say it any other way. He
21 testifies at trial, testifies at trial, "You knew that all
22 auction houses sold as-is, correct?"

23 "A. Sitting right there, most of them did as far as I knew."

24 A few years earlier I asked him that question. He was
25 trying to run away from the as-is clause as hard as humanly

1 possible until he decided he would change his testimony. Here
2 is what he said. Question by me.

3 "Q. Did you understand before the Zachys auction that the wine
4 was offered as is?

5 "A. I don't believe I did." That's about as clear as you can
6 be. Here he says, "Most of them did, yes, as far as I knew.

7 "Q. Did you before the Zachys auction understand that wine was
8 offered as is?

9 "A. I don't believe I did.

10 "Q. Did you ever understand that as to the auction of any good
11 that you bought, that the good is offered as is?" Then there
12 is an objection, and I clarify it.

13 "Q. Any good in any auction that you've ever been to up through
14 the end of 2005."

15 What did he answer? "No, I didn't understand that."

16 "No, I didn't understand that," in front of you. "Most of them
17 did as far as I knew."

18 It's just not true. Truth matters. You don't have to
19 lie. You shouldn't have to lie to prove a case for fraud. You
20 shouldn't have to lie to prove a case for fraud.

21 Now, either he read this or he didn't, either he knew
22 better or he didn't. You're the jury. You get to decide what
23 the truth is. But this is quite clear what it means. Nothing
24 is guaranteed, no promises are made, not guaranteeing that it
25 is marketable or merchantable, which is what the opinion of

1 their expert is.

2 I'm going to talk later about a thing called peculiar
3 knowledge. Peculiar knowledge can cause there to be an
4 exception to this in a certain way, and I'm going to discuss
5 it. But I point it out to you because whether or not there is
6 peculiar knowledge, what Mr. Koch knows is there are no
7 representations being made. There are no guarantees being
8 offered. There are no promises being made about the wine. It
9 says that, and it also says, and we're not guaranteeing,
10 warranting. But there is nowhere you can read this catalog
11 and imply, other than through Alexander the Great, that there
12 is some kind of promise.

13 Inspection. Couldn't inspect. First, the reason was,
14 well, I just decided I wouldn't inspect because of Alexander
15 the Great. If his wines were that good, I didn't have to
16 inspect. Later in the trial it was, oh, no, actually the
17 reason I didn't inspect was I would have to inspect all 17,000
18 bottles and that would be really hard, it would be very
19 expensive.

20 Let's read what was said at two different times at
21 trial.

22 "Q. Mr. Koch, you testified this morning that you had
23 affirmatively concluded not to inspect?

24 "A. Yes.

25 "Q. You said, what's the need to, that's your phrase, right?

1 "A. That's right.

2 "Q. What's the need to, because the catalog was so glowing in
3 the beginning?

4 "A. That's right.

5 "Q. Mr. Koch, you elected not to inspect, correct?

6 "A. Correct, that's correct.

7 "Q. You could have inspected?

8 "A. The catalog said I could inspect.

9 "Q. And you believed you could have inspected, did you believe
10 it?

11 "A. I believe I could have asked for it."

12 Now, when he was running as far away as is humanly
13 possible from the obligation to inspect, from the as-is clause,
14 from everything about the contract, and not remembering a thing
15 about the catalog itself or is the introduction, I asked him
16 about the inspection, sitting in a room with a court reporter,
17 under oath.

18 "Q. Mr. Koch, did you have an understanding at either of the
19 two Zachys auctions which are the subject of the complaint that
20 you had a right to inspect any of the wine before you attempted
21 to buy it at auction?

22 "A. That I had a right to inspect?

23 "Q. To inspect, yes.

24 "A. I don't know. I don't know." He says it twice. "All
25 right."

1 "Q. So both as to the 2004 Zachys auction and the 2005 Zachys
2 auction, at the time you participated in those auctions you
3 were unaware that you had a right to inspect the wine before
4 bidding?

5 "A. I don't know. I don't believe I did. I don't believe I
6 knew that."

7 Which one is the truth? When he wanted one story,
8 which is he didn't read it, didn't have to, didn't matter, that
9 was one. But later he had to come to grips with inspection.

10 Now, we had a witness Jaime Ritchie, even I don't
11 remember him, way in the beginning, from Sotheby's. He said he
12 could remember at least ten times when people came in and
13 inspected at least 30 or 40 bottles. Mr. Zacharia said that
14 people inspect at Zachys. Mr. Schwarz said he has inspected
15 for buyers.

16 And as to this concept that you've got to go inspect
17 all 17,000 bottles, Mr. Koch wasn't buying the new Zinfandels
18 or the new Chablis. Mr. Koch was buying the most expensive
19 bottles in the auction. You can look at it when you look at
20 his receipts, which we've got.

21 Mr. Koch is a smart man, runs a company worth
22 \$4 billion, knows how to conduct business. You look at the
23 most expensive wines. What else would you do? The most
24 expensive wines are 50 wines, 100 wines. That's what you
25 inspect. And you get somebody like Mr. Schwarz or Mr.

1 Edgerton. Edgerton looked at 106 wines at Greenberg's in a
2 day. Schwarz said he could have done the same, cost a couple
3 of thousand dollars.

4 The excuse can't be, I bought so much, I bought so
5 much that I just couldn't do it. I bought 2600 bottles, give
6 me a break, why should I, who buys 2600 bottles, actually have
7 to inspect the expensive ones? It's just so hard to do that,
8 it's so much.

9 I don't see that in the catalog. There is not a thing
10 in the catalog that says special exemption: If you buy more
11 than a thousand bottles, you don't have to inspect. That
12 doesn't exist here. I bought so much, I couldn't do it, it
13 would take me seven years to look at all 17,000 bottles.
14 That's an insult to all of our intelligence, I have to look at
15 17,000 bottles.

16 He wasn't interested in those bottles. He wasn't
17 interested in the little bottles, the bottles that weren't
18 important, the bottles that weren't famous, the bottles that
19 weren't great, the bottles that weren't the terrific vintages.
20 He is a collector. He knows what he is doing. By now he had
21 collected wine for 30 years.

22 17,000 bottles, oh, my goodness.

23 No one forced him to buy 2600 bottles, not one person
24 forced him to buy 26 or 1. He went there. There were rules.
25 He chose not to examine, or maybe he didn't know. You will

1 have to decide that.

2 Now let me go back a bit to the opening statement. In
3 the opening statement I said Mr. Greenberg didn't know that 23
4 of these 24 bottles had authentication problems, and the 24th,
5 this bottle, had gotten into the auction by mistake. Mr.
6 Greenberg had 70,000 bottles. Mr. Lovato was responsible for
7 putting them back in the racks or putting them backwards in the
8 racks or segregating them in different places. A lot of people
9 have testified about that.

10 So somebody made a mistake. This bottle wound up in
11 the wrong spot. That was compounded by a second mistake, which
12 is this bottle didn't get looked at when Zacharia and Hatton
13 were in California. You heard a all kinds of testimony about
14 that.

15 Folks, not a fraud. Just imagine you have 70,000 of
16 something and you make one mistake. \$2800 bottle, less than 1
17 percent of the claim in this case, \$2800 bottle, and you get
18 sued for fraud because somebody puts a bottle in a wrong place.

19 There is some explanation. People have testified that
20 this bottle has a fully marked cork. Could Thierry Lovato have
21 said fully marked corks, since that's what they looked at, must
22 be good, put it back? That's possible.

23 Molyneaux-Berry, former head of wine at Sotheby's,
24 working for Mr. Christie, looked at this bottle. It has the
25 sticker on it. He says, Mr. Edgerton, what about it? Edgerton

1 says, I think it's fake. Molyneaux-Berry says, I don't think
2 so, I don't think so, I think it's real. Fraud, ladies and
3 gentlemen, a \$2800 bottle out of a 70,000-bottle collection.

4 Mr. Edgerton was here pretty recently, so maybe we can
5 remember him. I said, so, Mr. Edgerton, there were how many
6 bottles? 60 or 70 bottles he spotted in Greenberg's cellar.
7 How did he spot the bottles? Did he go through the cellar and
8 pick them? No. Greenberg brought them to him. Greenberg knew
9 that he was concerned about these bottles, and he wanted
10 somebody to certify he was right so he could go and talk to his
11 insurance company and talk to Royal. Greenberg knew about
12 these.

13 So what happened? If Greenberg knew about these, what
14 about the other 60-odd bottles? Had they been injected into
15 auctions around the world? Did Mr. Greenberg go, according to
16 the way Mr. Koch thinks, and defraud somebody else by saying,
17 ah, I got 60 more bottles, I'll slip those into some more
18 auctions? Zero evidence of that, zero evidence.

19 In fact, Mr. Edgerton, who has his list of the 60
20 bottles, takes the list, he looks at an auction of 8 to 15,000
21 bottles at Acker Merrall. Before Mr. Greenberg is sued, before
22 anybody thinks he has ever defrauded anyone, Edgerton looks
23 through every bottle in the catalog. Does he find one of those
24 60-odd bottles? No, because Mr. Greenberg either segregated
25 them or gave them back to Royal.

1 We have heard over and over again Mr. Greenberg is not
2 selling wine. He sold 44,000 bottles of wine. Is there a
3 shred of evidence under the burden of proof that even one other
4 bottle, one other bottle that Mr. Edgerton looked at was among
5 the 44,000 bottles? No, because it wasn't. It was segregated
6 or given back to Royal.

7 Then we get the question by counsel to Mr. Zacharia,
8 did Greenberg give you Edgerton's list? Zacharia says no.
9 Would you have wanted to have it? Zacharia says, yeah, sure.
10 Why would Greenberg have an obligation to give somebody a list
11 of bottles that he wasn't selling? You've got to think about
12 that each time you hear did Greenberg give him that, did
13 Greenberg give him that.

14 The question is, was Greenberg selling those bottles?
15 Greenberg could have given him his junior high school grades
16 for all that. Maybe that mattered. But the question was, was
17 Greenberg selling the bottle? And if he wasn't selling the
18 bottle and wasn't selling the 60-odd bottles, why would he have
19 to give him a list of the 60 bottles he was not selling? Wait
20 for that question. Didn't show him. Oh, my.

21 I want to talk a little bit about the way the
22 examinations were conducted. If you remember, there were some
23 pretty minor questions: Mr. Greenberg, you said this, but it's
24 true, isn't it, you said it in the second paragraph of your
25 email? A compelling question to prove fraud. Mr. Greenberg,

1 you listed on line 35, first it says label, then it says cork,
2 you did that on purpose, it means the label was more important,
3 doesn't it?

4 Then, on various emails, the question is, well, it's
5 not in the email. Greenberg says, I told him myself. Well,
6 it's not in the email. Finally, Mr. Greenberg, frustrated --
7 and I'll tell you Mr. Greenberg got pretty frustrated and a
8 little rough around the edges, nobody can dispute that -- he
9 said, I didn't get married by email.

10 The fact that you didn't put something in an email --
11 fortunately, Twitter wasn't invented during this case, because
12 somebody would have said, well, you have 14 words there, where
13 is it, and anyway, why is it the 13th word, why isn't it the
14 12th word? Those kinds of questions prove absolutely nothing.

15 I think given the gravity, the gravity, the gravity of
16 a claim of fraud, the idea that they would be reduced to
17 saying, well, it's in the second but not the first paragraph --
18 they are claiming fraud, ladies and gentlemen. They should be
19 here to slay dragons, not to swat flies. This is a fraud
20 claim. They shouldn't be lying to prove a fraud claim.

21 Now let's talk about the 24 bottles. I put something
22 up as a challenge in the opening. Here was the challenge. I
23 went through Mr. Greenberg's notes. This is the same thing I
24 showed you before. He goes through all the bottles he thinks
25 are from Royal, he finds the ones he thinks are bad, he

1 identifies them, and he writes down what they look like.

2 Then I went through four categories that were on this
3 list. This is another list, by the way, that you are going to
4 hear. You know, Greenberg didn't give him the spreadsheet. He
5 didn't give him the spreadsheet, because he wasn't selling the
6 bottles on the spreadsheet that he thought were fake. Good
7 reason not to give him the spreadsheet. Why give it to him?
8 Because he's not selling them.

9 We know from the spreadsheet that there are four
10 categories: The ones he didn't suspect; the ones he saw and
11 marked, which I just showed you; the ones he guessed at,
12 thought might be bad because of the type; and others he guessed
13 at, sort of a lower grade guess.

14 I went through these. I said, look, 14 of those
15 bottles are on the notes. But we know what the corks look
16 like. Mr. Greenberg took the stand, he went through every
17 cork. So 14 of those labels are not bottles that he thought
18 were bad. If the label is the same, he had no reason to
19 believe that the bottle over here was fake. No intent, no
20 knowledge, no nothing.

21 Next, 5 of the bottles never came from Royal at all.
22 Telling somebody about Royal wouldn't much matter. He had no
23 suspicion about those bottles at all. They didn't even come
24 from Royal. Five of these bottles did not come from Royal at
25 all.

1 The last 5 are on the big spreadsheet, but they are in
2 the blank columns, meaning Greenberg thought they were fine.
3 So, as to all of these, thought they were all fine. Thought
4 they were all fine.

5 I put that up and Mr. Greenberg testified to it. You
6 did not hear the very skilled lawyer for Mr. Koch get up and
7 confront Mr. Greenberg about this. He didn't say, well, let's
8 go back, let's look at bottle number 1, your cork says this,
9 that cork says this, those are the same bottle. Did he do
10 that? No. He didn't do that for any of these. He didn't do
11 it for any of these.

12 You know, you have a right to be confronted by your
13 accuser. Basic decency requires that you ask somebody, did you
14 do it, did you do this, did you do that? If you remember, a
15 little testy, Mr. Greenberg any number of times said, what is
16 all this, would you just ask me about the bottles. Do you
17 remember him doing that? He blurted out. He was just as
18 frustrated as can be. Ask me about the bottle, ask me if I
19 knew that bottle was fake. He challenged the lawyer a number
20 of times to do that. And that never happened.

21 Burden of proof clear and convincing. Being accused
22 of something, but the lawyer says, no, no, let's just talk
23 about why this word is in the second paragraph. That's the
24 question you got.

25 Then there was one point, one of my favorites, where

1 Mr. Koch's lawyer during cross-examination actually goes back,
2 pulls up this list, says, you looked at a cork here, didn't
3 you. Then he gets up Gil Schwarz's report or Egan's report,
4 and then he says Mr. Egan looked at a cork for the same type of
5 bottle, didn't he. Greenberg looked at him and said, what? He
6 says, just answer my question.

7 Mr. Greenberg looked at the same type of cork.
8 Greenberg says, the cork he looked at was fully branded, the
9 cork I looked at was blank. They are not the same. The lawyer
10 says, that's not my question. My question is, you both looked
11 at corks.

12 Then he did another one. Greenberg said, would you
13 just look at it? Mine was completely stained, that one was
14 new. Greenberg is trying to tell the story about the fact, but
15 the lawyer is trying to suggest to you, the jurors, that
16 because there was a bottle of the same brand there and there is
17 a bottle of the same brand here, that they necessarily have to
18 be the same bottle.

19 But this is a bottle-by-bottle proof. The mere fact
20 that somebody looked at a cork in that bottle and Greenberg
21 looked at a cork in that bottle doesn't mean they are the same
22 bottle, because they are not. Greenberg did his best to try to
23 say that. But the question kept being, I'm not interested in
24 that. Cork, cork, right? OK, thank you.

25 They have never proved that Mr. Greenberg knowingly

1 sold fake wine, never, nor have they confronted him, which
2 would be the decent thing to do, with a direct question on that
3 issue. Never.

4 Now, Mr. Greenberg segregated the wine. Hard to
5 dispute this one. Certainly under a burden of proof they would
6 have to prove by clear and convincing evidence that he didn't
7 segregate the wine. How do we know he segregated it? Because
8 all those people said so and nobody said differently.

9 Mr. Cortes, who clearly doesn't like Mr. Greenberg,
10 not much question about that, described it. Brierley,
11 completely independent, from Christie's, described being in the
12 cellar at different times over the years and seeing the wines
13 segregated

14 (Continued on next page)

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1 MR. SHARTSIS: Thierry Lovato explained in detail,
2 he's the one who did it. He's the guy who put them away.
3 Greenberg didn't segregate them. Lovato segregated them. And
4 apparently, he didn't get fired. You know, made a mistake, put
5 one bottle in the wrong place. Lovato described it in detail.

6 Jeff Zacharia was in the cellar. He saw it
7 segregated. Gil Lempert was in the cellar five years later.
8 He saw it segregated. And of course Mr. Greenberg explained
9 that he segregated it because he didn't want it to get in
10 circulation.

11 And on that note -- and I'm going to talk about
12 Mr. Cortes later. Mr. Cortes asked Mr. Greenberg if he could
13 have some of the fake bottles that Greenberg thought were fake,
14 and Greenberg said no. Greenberg didn't want to have these
15 bottles in circulation. Remember he said, you know, JJ
16 occasionally likes to make a buck? It would not be a surprise.
17 He didn't want to put these bottles in the hands of somebody
18 who might go out and sell them, or put them in circulation. He
19 didn't want to take that chance. And Cortes uses that to base
20 his testimony on, and we'll get back to his testimony.

21 Segregated. We're going to later be talking about
22 recklessness. I want you to remember, how reckless can you be
23 when you segregate the wine?

24 Now I'm going to go through specific things that had
25 been raised in this case -- things that Greenberg should have

1 told about. Here we have an e-mail from Acker Merrall. This
2 is from John Kapon, who they relied on to be a real expert,
3 except you heard Mr. Koch say, Kapon's not an expert. So
4 apparently when I deposed him, it suited his needs that Kapon
5 wasn't an expert, but now that we're at trial, Kapon's an
6 expert. Let's accept him as an expert.

7 The highlighted portion is this question, all the
8 corks -- that the Lafleurs are branded vertically, on the
9 corks, that the cork runs up and down instead of printed side
10 to side, and that therefore Kapon won't take them. Greenberg
11 nevertheless, nevertheless, sends those bottles over to Zachys
12 to sell. The question is: Oh, my god, you didn't go and tell
13 Zachys about Kapon? If you'd only told Zachys about Kapon, all
14 of this would be different, right?

15 So we know what Greenberg is thinking about this.
16 Remember, it's got to be reasonable. What's reasonable?
17 What's his intent? Is he intending to defraud somebody?
18 What's reasonable? So what Greenberg is thinking is this:
19 Let's see now. Edgerton looked at these bottles when he was in
20 my cellar, didn't say anything about vertical corks. I sold
21 these at Zachys in February 2003 with a vertical cork. And
22 Maureen Downey looked at them, and she was really pretty
23 thorough. You know, she spent nine hours looking at one bottle
24 of Chateau Petrus. Called the winery. She's pretty thorough.
25 They were fine with her. Zachys sold them again, May 2003.

1 She examined them again. They're fine with her. Zachys sold
2 them again, in 2004. Somebody else examined them and thought
3 they were fine.

4 By now, is Greenberg very concerned about this? He is
5 at a tasting with Robert Parker, the man everybody on the stand
6 has said is the god of fine wine, the leading expert in the
7 world, a specialty in Bordeaux, and as we know from his
8 writings, tastes wine to see if it's bogus. Robert -- imagine
9 you're sitting next to the god of wine. You open the bottle
10 with a vertical cork. Parker says, oh, my god, that's
11 fantastic. Your first thought is, boy, that must be fake,
12 right? That must be fake.

13 He tastes it with Zacharia and Hatton in his house,
14 they pop a cork, as Gil Schwarz would say, they taste it.
15 Nobody said, oh, my god what's wrong here? It goes to the
16 auction. It's tasted at the auction by Koch and Orcutt. Now
17 they -- Mr. Koch says: You know, I didn't want to get drunk,
18 you know, so I don't drink that much. You remember the e-mail.
19 The thing that was most featured was the 1947 Lafleur. That
20 was the star of the show. The star of the show. "Oh, you
21 know, I didn't find it very interesting. There were wines that
22 were more interesting." And then Orcutt the next day bids more
23 for that bottle than any other bottle Mr. Koch bought at the
24 auction. Mr. Koch was the underbidder. There are a bunch of
25 them for sale and the first one goes for \$45,000. And when you

1 see those receipts, you will not see a bottle going for over
2 40. But Koch is the next bid below \$45,000. And he does it
3 again for another. Now if this is a bottle that's not very
4 interesting, imagine how much you'd spend for bottles that are
5 interesting. Indifferent to the bottle for which he reaches
6 for two bids in the range of \$45,000. He came here, ladies and
7 gentlemen, he said, "Bottle? What bottle? Who cared about
8 that bottle?" Well, \$45,000, at least where I come from, is a
9 lot of care.

10 Mr. Edgerton writes a report to Koch. No problem with
11 the vertical cork mentioned. Mr. Egan's expert report, which
12 I'm going to talk about in a minute, the report, no problem
13 with the vertical cork. Zacharia, confronted seven years
14 later, eight years later, says, hey, I heard that. No problem
15 with the vertical cork. And Mr. Schwarz says, you know, I've
16 seen genuine bottles with the vertical cork. That is the heart
17 of their case. You're going to hear a lot about it. Should
18 have told somebody that Kapon said something that Greenberg --
19 that contradicted everything that Greenberg knew and it
20 contradicts every finding, and except for Mr. Egan, who changed
21 his mind during trial -- we're going to talk about that -- no
22 one has said there was anything wrong with that cork. You will
23 hear it. The heart of the case.

24 Now, Mr. Egan. I will tell you, I took his deposition
25 in New England. Thought he was a pretty straightforward guy.

1 I thought that until he gave this testimony. I thought he was
2 a decent, straightforward man, a competent but not brilliant
3 expert. Real worklike guy. Not a Gil Schwarz, not in that
4 class, but all right. And so what happens? Egan says: Oh,
5 the trial started, I changed my opinion. Vertical corks are
6 all wrong. I said: Well, gosh, you know, we're back there in
7 Cape Cod, you said they were all correct. He didn't say -- and
8 this is really important. He didn't say: I was mistaken.
9 'Cause if he'd been mistaken, he could have said that. It was
10 embarrassing. He said, "You know, I didn't focus on the cork."
11 Remember that? "I didn't focus on the cork." And I really
12 went after him. "I didn't focus on the cork."

13 So let's just look at what the truth is. Remember,
14 you don't have to lie to prove a fraud case. If you're lying
15 to prove a fraud case, not a very good case; no case at all.

16 So what was it? So here were five of the reports that
17 he made. Every one of them, he went to the point of measuring
18 the cork, and then he tried to say, oh, the cork wasn't very
19 clear. But you can see. "Branding can be seen on the cork,"
20 "branding is clear," "branding is clear." This is the cork,
21 right, the cork that he didn't focus on. First five reports.

22 What about these? Five more. Five more times,
23 measured the cork, looked at the cork. Nowhere does it say:
24 Oh, by the way, branding is wrong. Did Mr. Egan focus on the
25 cork, do we think? Was Mr. Egan telling us the truth when he

1 sat here and told you, the members of the jury, he didn't focus
2 on the cork in order to prove Mr. Koch's case that something's
3 wrong with the vertical cork? What happened? Five more times.
4 "Branding can be easily read," "branding can be easily read,"
5 "branding can be easily read," "branding can be easily read."
6 Didn't focus on the cork. Just not the truth.

7 And then you heard the testimony -- I don't have it.
8 When I took the deposition, at the end of every examination
9 about a bottle, as he admitted, I would say, "Now let's look at
10 the cork. Is there any problem with the cork?" I asked him
11 that question 15 times, as he said here on the stand, and 15
12 times he said, "No, no problem with the cork." He is the only
13 person who's come into this case and said there's a problem
14 with the Lafleur cork, and that's going to be the heart of what
15 they argue.

16 Then he tossed in, for good measure, vertical Petrus
17 corks, something wrong with them. Well, take a look. First,
18 actually, let's go here. There it is. Seven times. And seven
19 times I asked him, "Is there anything wrong with the cork?" He
20 said no.

21 And so what's the story on the cork? Mr. Edgerton saw
22 the corks; they were fine. Mr. Egan saw the corks; before he
23 changed his testimony in the last two weeks, they were fine.
24 Mr. Schwarz saw the corks. He saw them in the cellars of great
25 collectors. Zachys saw the corks; they were fine. And

1 Mr. Schwarz even testified that he had been into the cellar at
2 Chateau Petrus. Mr. Schwarz, the man who, you know, he wears
3 that thing. He mentioned two people in America who have it.
4 One's Robert Parker, the other's Robert Mondavi, who you may
5 have heard of. This is me testifying so I just want to warn
6 you that it's testimony and not evidence. Mondavi is the most
7 famous wine maker in American history. Died recently. Most
8 famous wine maker. So three people have this order of whatever
9 it is that Gil Schwarz has, right? It gets him a lot of
10 places. One of them is Chateau Petrus in the basement, in the
11 cellar, where he sees these corks.

12 I mean, really. "I didn't focus on the corks."

13 You probably heard him say, boy, Greenberg should have
14 told him about the problems with that Petrus cork. Hmm, yeah.
15 Acker -- Acker did something else. This was a question of,
16 well, Greenberg should have told Zacharia, should have told
17 Zacharia how to catalog. Well, catalog was entirely
18 Zacharia's -- Zacharia was asked that. He said I don't care
19 what other people say, I do my own cataloging. But what I want
20 you to focus on here is, many of those bottles are here. And
21 Acker Merrall thought they were real. He's not saying these
22 bottles aren't real. Says: If I put them in the catalog, I
23 would catalog them this way. He doesn't say these are fake.
24 He disputes the Lafleurs, there's no question about that, but
25 all the others are real.

1 So let's get back to fraud and recklessness and intent
2 and misrepresentation. Mr. Greenberg had all the more reason
3 to believe that these bottles were authentic because he had
4 another auction house tell him that. Right? They're going to
5 say, the real problem here is that Acker had a different way of
6 cataloging and Greenberg was a fraud. He was a fraud because
7 he didn't tell Jeff Zacharia how to catalog. He was a fraud.
8 And that's what you're going to hear. Just remember, every
9 time it's, "He didn't tell them," that statement means, "He was
10 a fraud."

11 Now, move on.

12 One of my favorite lines of questions: Mr. Greenberg
13 didn't do business with Sotheby's and he didn't do business
14 with Christie's. Mr. Greenberg was entitled not to do business
15 with people he didn't want to do business with, as is Mr. Koch.
16 He negotiates with Sotheby's and they don't come to terms, and
17 here was one of those lines of questions when Greenberg is
18 saying, "Could I please explain this," and Mr. Koch's lawyer
19 saying, "Well, you know, your lawyer will get his chance." And
20 what happened in this one -- and it's going to be tough for me
21 to do it. In the end of the third line it says, "enforces
22 warranties on me I will not assume." And he was asked about
23 that or one other phrase repeatedly, on and on. Yeah, yeah,
24 yeah, you weren't interested. Here he says, "Can I explain
25 it?" No, no, no. So the fact is that the Sotheby's

1 negotiation brought -- broke down for like a dozen reasons.
2 It's right here: "They don't include all the items in the
3 proposal." "A substantial portion of the language is not
4 acceptable." "Some of the current agreement language I
5 can't -- I cannot consign wines for sale." "It gives too much
6 sole discretion to them." "It enforces warranties on me which
7 I will never assume." And some of those warranties were, he
8 had to warrant that import tariffs had been paid by whoever
9 sold it to him, taxes had been paid when they were brought from
10 Europe. He wasn't going to do that. He couldn't do that. "It
11 does not contain all the agreements we made." "It gives Aulden
12 Cellars broad rights over my property." "Assumes no collection
13 liability on your part from your clients." So if a great
14 Sotheby's client had bid but didn't want to pay, Sotheby's
15 said: Oh, don't pay, don't worry. "Does not adequately cover
16 costs or lack thereof." "Does not cover labor and timing."
17 "Does not go into detail on the catalog auction process."
18 That's why he didn't agree, folks. What they want to say is:
19 Oh, he wouldn't give this warranty, wouldn't give this
20 warranty, right? But the fact is, he would. When he was
21 asked -- it's right in the middle -- that, "You have no reason
22 to believe that any lot of property is not authentic or
23 counterfeit," he would do that, but he said "no reasonable
24 reason." Let me tell you why "reasonable reason" was put in
25 there, so he wouldn't be in this position, where somebody would

1 say, well, you know, vertical corks, that's a reason. Well,
2 you know, the Edgerton report, that's a reason. That's not
3 reasonable. And that's why he put that in. But that wasn't
4 why it broke down. It broke down because they couldn't agree.

5 And let me point this out. This just drives me nuts
6 in this case. They're attacking Mr. Greenberg for looking at a
7 catalog or -- excuse me -- a contract with Sotheby's and a
8 contract with Christie's. It's outrageous that he didn't do
9 business with them. It was some surreptitious intent to
10 defraud. Well, what happened? Greenberg looked at the term
11 and said: I don't want to do this. I don't agree with your
12 terms. And so he exercised the free right to either enter into
13 a contract or not.

14 On the other side of the case, Mr. Koch takes the
15 contract, doesn't tell anybody, and says: I don't care what it
16 says, we're going to do what I want.

17 Greenberg is being criticized for being
18 straightforward in the contractual process, based on a claim by
19 somebody who wants to impose his interpretation on a contract,
20 so when they start talking about Greenberg and Sotheby's, just
21 remember, you have a right to be candid. You should be candid.
22 You should say, I don't agree to that term. And if you can't
23 agree, you don't do the deal. That's what happened here.

24 Take another one. Chicago Wine. Wines rejected by
25 someone 'cause they're counterfeit, and you didn't tell

1 anybody. Chicago Wine. Give me a break.

2 Oh, I don't -- let me put another point in. They're
3 talking about how miserable Zachys was. You know, you went to
4 Zachys, god forbid. Zachys had the best consumer provision of
5 all of them. And we didn't focus much on this. Zachys
6 answered this question. It went by really fast. This is
7 really important. And we're going to stop and see. It's
8 really important. So in the Zachys contract, Greenberg gives
9 to Zachys -- Zachys has complete responsibility and complete
10 authority. Zachys is authorized to accept the return and
11 rescind the sale of any product at any time if Zachys
12 determines there is a genuine issue as to quality,
13 authenticity, or title of the property. Not so bad for
14 consumers. We're going to get to the consumer claim.
15 Greenberg says: Look, Zachys, if there is a -- you figure it
16 out. If there's a problem with something, you're the ones who
17 looked at the wine. If somebody comes back and there's an
18 authenticity problem, on your own. On your own. You can give
19 them the money back and I'll stand for it. I stand behind my
20 wine. Greenberg agrees to that. And you heard him on the
21 stand. He says: I stand behind my wines. I give people their
22 money back if they're unhappy. He gives Zachys the exclusive
23 and unfettered authority to say, if a mistake was made or
24 there's a dispute about a bottle of wine or somebody thinks
25 it's inauthentic, what do you do? You give them their money

1 back, like normal people do things. Right? That's what he
2 agreed to. That's the contract that Mr. Greenberg foisted on
3 the public -- a right to return and the complete power of
4 Zachys to make that determination.

5 Now this is the Chicago Wine story. Simon Lambert
6 from Chicago Wine, a company that Mr. Koch used to own half of
7 but didn't pay much attention to, apparently, and he sends back
8 some bottles of Petrus. And what do they say? "Obviously the
9 unmarked corks are a different matter, as are the shrunken
10 corks." So Greenberg is told they're sending back bottles of
11 Petrus with unmarked corks, right? The 1921, it turns out,
12 with an unmarked cork. Greenberg has no idea who the buyer was
13 because it's coming through a middleman. He has no idea
14 whether the buyer is blind, knows how to use a flashlight, or
15 anything else. And I say that somewhat facetiously, but he
16 doesn't know the other person's experience even at looking at
17 corks.

18 Greenberg gets the bottles and he says, I can see -- I
19 can see writing on this bottle. I don't know what they're
20 talking about. I don't know what they're talking about. And
21 he gives it to Zachys. Zachys inspects it and Zachys sees,
22 "Part of vintage visible on the cork." That's different than
23 what Simon Lambert said, the unmarked corks.

24 So what do we have here? It was a fraud, it was a
25 fraud, because Greenberg didn't tell Zachys that somebody said

1 that there was no marking on the cork when Greenberg saw the
2 marking on the cork himself. So what their standard of fraud
3 is is that Greenberg has to say, you know, somebody I don't
4 know sent back a bottle that said there's nothing on the cork,
5 I looked on the cork and I saw something, and you looked on the
6 cork and you saw something, but you should know, somebody out
7 there somewhere didn't see something.

8 Ladies and gentlemen, I want you to think real hard.
9 Is that a fraud? Does somebody who sees something with his own
10 two eyes have to talk about people who didn't see it, who he
11 doesn't know? And that's a fraud because he doesn't disclose
12 that someone he doesn't know didn't see something that is
13 actually there? Is that a fraud? Listen for Chicago Wine
14 Company. Boy, that was really terrible. Really terrible.

15 English royalty. Another one of my favorites.
16 English royalty. So below Mr. Koch gets this e-mail from
17 Zacharia. "Here's the response from the consignor." It's
18 Greenberg. "He bought the wines from two different sources.
19 The wine either came from a top collector in Toronto or out of
20 Europe from English royalty." That got put in front of
21 Greenberg. Greenberg said -- I don't know if you remember --
22 wait a minute, wait a minute, I didn't write that, somebody
23 else wrote it, Zacharia wrote it. Lawyers ran right over it.
24 And you'll remember this because he ends the questioning with
25 Greenberg, saying: Well, in the usual way, order things are

1 done, the last two words say English royalty. They don't say
2 Royal. Greenberg said yeah. But that wasn't what Greenberg
3 had said. That wasn't what Greenberg had said. Greenberg said
4 the thing on the top. He said, "I'm not sure which mag this
5 is." Pretty certain, huh? And he sends this to Zacharia. And
6 then he says, "A lot came from a collector in Toronto and many
7 came out of Europe, in many cases from English royalty." A lot
8 of "manys" and "a lots" in there. Zacharia interprets it to be
9 a top -- a top collector in Toronto. We don't see "top" in the
10 upper one, do we? And we don't see "every one comes from
11 English royalty." "Some came," "some came," "some came."
12 Greenberg gets beat up over this by Mr. Koch's lawyer. "You
13 concealed Royal. You concealed Royal."

14 But what we learn -- and this is after the auction,
15 right? This is after the auction. Remember Greenberg kept
16 saying, you know, I don't do everything in e-mail? What we
17 learned was that after this, Mr. Koch calls Zacharia and he
18 says: Who's the consignor? And Zacharia says: Oh, it's Eric
19 Greenberg. I'll ask Greenberg. He says: Okay, I'll tell you.
20 He says: Can I talk to the consignor? Greenberg says: Sure,
21 I'll talk to anybody. Koch talks to Greenberg twice. You
22 know, if this guy's a fraud, this is pretty stupid, because
23 he's talking to the guy he sold the wine to. He agrees to.
24 Koch says: I got an investigator on the line with me.
25 Greenberg says: So what? Put him on. Greenberg proceeds to

1 tell him about Royal, tell him he's got fake bottles from
2 Royal, tell him about Hardy Rodenstock, tell him about the
3 Royal dispute, tell him he can't match his sources to his
4 wines. Greenberg talks a lot, folks. And he just tells him
5 everything. And this is a fraud case. This is a case that
6 Greenberg concealed information, concealed information. He's
7 got a complete stranger who has just bought a bunch of bottles
8 from him on the phone, a guy he's supposed to have defrauded,
9 and he tells him everything. Tells him everything. Is that
10 evidence of an intent to defraud? Is that evidence of an
11 intent to mislead? And Greenberg knows this guy can return all
12 the wine because Zachys accepts the returns. And Greenberg
13 himself accepts returns. He knows he can do that. And he just
14 tells him everything. Ladies and gentlemen, if that's fraud,
15 we all have a real problem here in life.

16 Serena Sutcliffe. Real quick. Serena Sutcliffe. A
17 lot of people spot fake wines in Greenberg's cellar, and the
18 real answer to that is, so what? Because -- getting ahead of
19 myself here. Actually, I'm lost. I am lost. So let me --
20 okay. I'm going to have to describe something to you. I'm
21 sorry. I can't find it in here. It will probably pop up
22 later, so I apologize for the confusion.

23 Auction houses never disclose that there are
24 counterfeit bottles back in the collection that aren't being
25 sold. Serena Sutcliffe said that. Jamie Ritchie said that.

1 Brierley of Christie's said that. Michael Egan of Sotheby's
2 said that. Maureen Downey of Zachys said that. Zacharia said
3 that. Gil Lempert-Schwarz said that. Even Mr. Koch said that.
4 He's done enough auctions to know. So the idea that there is a
5 failure to disclose that there are wines back in the collection
6 that aren't being sold cannot be a claim.

7 After knowing that there were wines back in the
8 auction, Sutcliffe writes -- and you saw it -- "The greatest
9 collection in the world."

10 Mr. Jamie Ritchie testified. He's the one who said:
11 Greenberg took me aside and told me, "I'm going to sell it
12 through Acker Merrall." Of course he was Acker Merrall's
13 biggest competitor in 2010 when he said that, but in 2002 he
14 didn't tell anybody. Imagine, customer says, "I'm going to
15 sell fake wine," and he doesn't mention it to anybody. They
16 spent three months trying to sell Greenberg's wine, three
17 months trying to sell it, and his claim is, "Well, he told me
18 he'd sell fake wine." If Greenberg was going to go to Acker to
19 sell fake wines, why did Greenberg keep buying from Acker? He
20 kept buying more wine from Acker. Is he an idiot? An idiot?
21 He thinks Acker sells fake wine, "I think I'll go buy some
22 more"? An idiot? Absolutely not. Mr. Ritchie, in a highly
23 competitive field, took a shot at another competitor in 2010.
24 Never ever, ever raised that. In fact, he even said, when
25 confronted: Wow, Mr. Ritchie, if you knew, if you knew that

1 the guy selling you wine was trying to sell fake wine, would
2 you put that in a catalog? He said: Oh, no, no, no.
3 Sotheby's doesn't do that. I mean, what -- you know, if you
4 don't put that in the catalog, what would you ever put in the
5 catalog, right? They don't put in the catalog that wines not
6 involved aren't being sold.

7 Rudy Kurniawan. Not a single Kurniawan bottle is in
8 this case. Burden of proof, clear and convincing evidence. So
9 Kurniawan -- Greenberg gets some wine, he's suspicious about
10 Kurniawan, and he clears it up. And here's the e-mail that
11 says it. "I'm convinced he did not know he was selling what
12 was not right." In 2007, Mr. Greenberg concluded he was a bad
13 guy, and Greenberg returned all the Kurniawan bottles. In
14 fact, he was so sold on Kurniawan, they were the only bottles
15 he put a little sticker on to identify, 'cause Kurniawan
16 claimed to have a special source from Nicolas. You've heard
17 that, the great negociant in Paris. And he had all these fancy
18 Nicolas bottles with Kurniawan stickers on them, and later,
19 when he learns Acker has rejected Kurniawan's wine, Greenberg
20 takes all of it, sends it back, gets them out of his cellar.
21 Goes back to Acker, Greenberg gets his money back. Acker
22 honors -- honors the return. That's Kurniawan.

23 Then we get this, you know, "help you with the
24 suspects Bordeaux." When you look at this carefully, what
25 you'll see is that the answer is not to the question that

1 Mr. Koch's counsel suggested it was. Mr. Greenberg carefully
2 explained, when he said, "I'm putting it on auction," which was
3 the Georges Churchy 1989 Petrus, he was answering that
4 question. And above it, Kurniawan says, "actually try to move
5 some --" excuse me. "Try to move those suspects Bordeaux for
6 you." Greenberg says, "I'm putting it on auction." Well, one
7 is plural, one is singular. It clearly is responding to, "PS -
8 I tried the George Churchy Petrus. Same as your mag. I am
9 putting it on auction." And Greenberg explained that at
10 length. This is just a sham.

11 Next, Zachys asks for provenance. So Zachys sends an
12 e-mail around saying, "Eric, we want to get top dollar for your
13 wine." They're not asking Greenberg to give provenance for
14 authentication. Authentication is done. They're now about to
15 finish printing the catalog. Greenberg, as he said, had come
16 back from somewhere, had hundreds of e-mails, he's clicking
17 through them, and at first he says, "I cannot provide this. I
18 had many sources and can't tie them to the bottles." He's said
19 that all along. There's no change here. Then quickly, ten
20 minutes later, he sends another one. He says, "The only thing
21 I can tell you about the older Bordeaux is that they were
22 purchased from Eddie Gelsman at Wine Library and Dave Sokolin
23 at D Sokolin and Company. And so Mr. Greenberg is just
24 excoriated for this by Mr. Koch because he leaves out Royal.
25 But what he did was, he responded to wines which he did know

1 the provenance of, 'cause there were a few of them that were
2 one of a kind. And here was his testimony. Just go to the
3 answer:

4 "In fact, what I remember is, I can trace the 19 --
5 1893 Margaux in the sale to D Sokolin Company and the 1805 and
6 1835 Lafite Rothschild to Eddie Gelsman. I couldn't tie the
7 rest to any other vendors, so that's what I meant.

8 "Q. So you knew that a source of your older Bordeaux
9 was Royal Wine, didn't you?"

10 They already knew that. They knew that from 2002.
11 That was not a secret. He was answering a specific question,
12 can I give the specific provenance of the bottle of wine, and
13 Greenberg said actually, "Yes, I can tell you where those two
14 bottles came from." That's what that answer is. Nothing more.

15 Another one of my favorites. I frankly will tell you,
16 I would be embarrassed to do this. This is great. This is --
17 Bordeaux Wine Locators, right? He gets a bottle. The bottle
18 is just completely abused. "The bottle itself is suspect. The
19 label is taped on with cellophane tape, making it obvious, and
20 the condition alone being doubly unacceptable, I expect a
21 refund on that as well." 'Cause that's what people do; they
22 refund when questions come up. And then he says, "Bordeaux
23 Locators is the worst counterfeiting operation in the world.
24 Have a great Thanksgiving." Right? We have heard this more
25 times, that Greenberg had concluded -- had this deep, dark

1 secret, Bordeaux Wine Locators, the worst counterfeiter in the
2 world, and he kept that secret to himself. So he kept buying
3 wine for years from Bordeaux Wine Locators. Give me a break.
4 I mean, I wouldn't -- as a lawyer, I would have never done
5 this. I just want to let you know. I would have never taken a
6 cheap shot like this, because that's all it is. It's quite
7 obvious, given the context, that it's sarcasm, that he is
8 joking. And I asked every expert in the case, every expert in
9 the case: Well, Bordeaux Wine Locators. Boy, you see those
10 bottles and you just run the other direction? Edgerton, no.
11 Egan, no. Zacharia, no. Schwarz, no. Where is the clear and
12 convincing evidence that supports any concept for Mr. Koch's
13 lawyers to get up in court and malign -- malign Bordeaux Wine
14 Locators? Because now in the press somewhere it's going to be,
15 "Bordeaux Wine Locators is the worst counterfeiter in the
16 world." That's going to appear somewhere, because of this.
17 And not one expert says it's true. This is dangerous stuff,
18 making claims like this, without any consideration for the
19 people involved, and that is exactly what has happened here.
20 Exactly what's happened here.

21 Maureen Downey. One of my favorites. Says she
22 rejected bottles, rejected the Henry Mayer Cros Parantoux.
23 Next thing she knew, it was on the cover of the Acker catalog.
24 And she published that. Well, there was just one little
25 problem -- that the bottle on the Acker catalog was this big,

1 the bottle that she rejected was this big (indicating). But
2 she published in a blog -- this is a dangerous business --
3 published in a blog that Greenberg had put his bottles at Acker
4 and that they were on the cover. On the cover. A total
5 falsehood. And when she was confronted with it, did she say:
6 Oh, my goodness, it was a mistake? She said: No, that was
7 authorship. That was authorship. What I call it is, that was
8 dishonest. Authorship. Mr. Koch was fine with it. He called
9 it poetic license. I have to say, I have different standards
10 than those people, and I hope you do too. It's just not true.
11 And yet it did great damage to Mr. Greenberg. She published
12 one of those on the eve of a huge auction he did in Hong Kong,
13 clearly intending to damage him. It wasn't true. And in fact,
14 Greenberg had tasted the wine -- we'll talk about taste -- and
15 in tasting it, he knew it was fake. When Wil Jaeger went over
16 to taste the bottles that Greenberg had sent back, including
17 these, he tasted the same bottle, said: That one's fake. All
18 the other ones are real, but that's one's fake. Tasted it, it
19 was fake. Greenberg testified: Those bottles, those bottles,
20 the real bottles, the Jayers, segregated in my cellar. Thierry
21 Lovato testified: The Jayers, segregated in the cellar. I did
22 it personally. Uncontradicted. Clear and convincing.
23 Uncontradicted. The bottles are sitting in the cellar.

24 Just want to mention one more thing quickly, which
25 is -- and it's really interesting -- that Wil Jaeger, clearly

1 an expert, collector of the year, part of the Judgment of
2 Paris, the most famous wine tasting in history, with the French
3 and California wines, and he was invited to do it. He goes and
4 he tastes the wines that Greenberg sent back to Royal. We saw
5 that e-mail. Pretty embarrassing for Greenberg. Says: The
6 Cros Parantoux, you're right, it's all fake. All the other
7 ones, Eric, those are all real.

8 That's how good Greenberg was at identifying wine.
9 How did he know they were all real? Because he tasted them,
10 the way experts do. He tasted them. He knew they were real
11 because he tasted them. None of these have been tasted. Not
12 one. Just pop a cork and taste it. Preserve all the evidence.

13 The Edgerton report. I talked about that before. One
14 bottle from the Edgerton report wound up in this sale. One out
15 of 70,000 bottles in his cellar, one out of 17,000 bottles in
16 this particular auction. Edgerton had been given the bottles
17 by Greenberg to certify as fake, and that's all that happened
18 here, and of the 44,000 bottles Mr. Greenberg has sold that
19 they -- the plaintiff was so happy to talk about, not another
20 bottle to Mr. Edgerton appears.

21 JJ Cortes. I have to -- I have to apologize to you
22 for using this language. It's not what I normally do. Cortes
23 comes into court and he says, "I am so thankful for Eric
24 Greenberg." It was unbelievable. "I'm so thankful for Eric
25 Greenberg." And also, "I signed that confidentiality

1 agreement." Remember that? Sort of weird. Why is he talking
2 about signing a confidentiality agreement? The reason he's
3 talking about signing the confidentiality agreement is when
4 he's deposed, he denies it's his signature. It's a little hard
5 on his credibility. "I'm so thankful for Eric Greenberg." And
6 so what does the e-mail he sends to Mr. Koch's people say? I
7 apologize. "I want to bring this asshole down." Really hard
8 to be so thankful for Mr. Greenberg and then he wants to "bring
9 this asshole down." Which one of those is true? Why do you
10 have to lie? Why do you have to lie to prove a fraud case?

11 He also said that Serena Sutcliffe walked into the
12 cellar and started pulling capsules. Sutcliffe said no,
13 period, she didn't even remember this guy. And in his own
14 testimony, within 30 minutes, he had said two things about --
15 about the capsules. First he said, "She asked -- she asked me
16 if it was okay. I said yes, it's fine." 27 pages later, he
17 says, "She didn't ask. She said that's the proper protocol in
18 what they do." 27 pages to go from "she didn't ask me" to "she
19 asked me." True? Is this the truth? He says: I told
20 Greenberg to hire Edgerton. And -- I'm sorry. I listened to
21 Sutcliffe tell Greenberg to hire Edgerton. Except Sutcliffe
22 had never heard of Edgerton. I mean, really.

23 But what Cortes did say was this: He said the bottles
24 were segregated. He said he was never asked to put a
25 segregated bottle at auction. He said he worked on four

1 auctions for Eric Greenberg and never saw a fake bottle put in
2 one of those auctions. Greenberg did not let fake bottles out
3 except by accident. And everything Cortes says that's
4 objective supports Greenberg's position. And Cortes is a guy
5 who was packing the boxes for the auction, right? And what
6 does Cortes say? Oh, Greenberg said, "What they did to me,
7 I'll do to them." Right. Never packed a fake bottle.

8 Not having an inventory system. Oh, my god, there's
9 no inventory system. Where in the catalog does it say there's
10 an inventory? Zachys knew there wasn't an inventory system,
11 Sotheby's knew there wasn't, Christie's. They all wanted to
12 auction his wine. Mr. Koch didn't say: Hey, by the way,
13 inventory, I just don't buy from people who don't have
14 inventory systems like mine. Did that happen? No. Is that a
15 point in this case? God knows why. It's not an issue, and yet
16 we've heard about it over and over again. Whoa, Greenberg
17 didn't have an inventory system. Oh, when I read Alexander the
18 Great, I knew Alexander the Great had an inventory system, so
19 Greenberg must have had an inventory system. I mean, really.
20 If that was a reason not to sell that collection through
21 Zachys, wouldn't have sold it.

22 Another phrase I hate to use. This is not a word I
23 use ever. Cortes, asked to pull the shittiest bottles. I
24 apologize. The lawyer says, "Mr. Cortes, you think it was
25 moral for Mr. Greenberg to sell the shittiest bottles?" I

1 remember the question well. I didn't think this was what the
2 case was about, pulling the shittiest bottles. What
3 Mr. Greenberg was doing was he was culling the collection. And
4 Mr. Lovato described it forthrightly. Bottles that didn't look
5 as good, bottles with low fill, bottles that were no longer
6 well conceived. Serena Sutcliffe had told Greenberg, "You
7 know, your tastes are going to change," and that's what
8 happened. Pulling the shittiest bottles? And then we're going
9 to hear Greenberg say: Well, the garbage is out of the
10 collection, meaning, according to Mr. Koch, I have carefully
11 picked all of the fake bottles and gotten out of it. Well,
12 first, it couldn't be true because the garbage was actually
13 segregated in the back of the cellar, so garbage wasn't out of
14 the collection, so that's not true. It's just another pure
15 cheap shot. Because there is no evidence, clear and
16 convincing, that that meant that he'd gotten rid of all the
17 fakes. There's no evidence in the 44,000 bottles there's a
18 claim for fake for anything other than these.

19 Definition of counterfeit. An important issue.
20 Definition of counterfeit. Mr. Egan says not marketable,
21 that's what counterfeit means. It's not marketable. But
22 that's not what the other expert says.

23 Mr. Ritchie, called here by Mr. Koch, questioned by
24 Mr. Koch's lawyers, is asked -- I'm going to read it. And
25 listen real carefully. "You referred to this term counterfeit

1 wine a few times. How are you using that term? Counterfeit
2 wine."

3 "A. Wine that is not what it is supposed to be,
4 whether the contents of the bottle doesn't match the label."
5 The bottle, the cork, the capsule. Contents of the bottle.
6 That's, of course, what Gil Schwarz said. This is a fraud
7 case. This is not picking wine to put at auction. This is
8 where there has to be clear and convincing evidence that the
9 wine is counterfeit, and they've picked a very easy definition,
10 which is not wine not in the bottle. It's that you wouldn't
11 sell it. Not marketable.

12 But that's exactly what Zachys said in the catalog.
13 "All property sold as is, without any representations or
14 warranties by Zachys Wine Auctions or consignor as to the
15 merchantability." Well, that's right in there, folks. That
16 was a warning given to Mr. Koch, and now his expert comes in
17 and says, unmerchantable, not merchantable. So what's that
18 news? What do you do? You go back to Zachys and say, "Ah, I
19 don't like the bottle." Zachys says, "Fine. Our discretion,
20 here's your money back." Is that worth sitting three weeks in
21 court for, when that's what should have been done?

22 Now can you taste the wine? Big dispute. Can you
23 taste the wine, in order to find out whether it's counterfeit?
24 The proof is in the bottle. Mr. Egan actually said you would
25 have a consensus at Sotheby's if you took a fine wine --

1 remember he said something about the grapes, vintages? They
2 all have a signature. They all have a signature. Mr. Jaeger
3 did that -- does that. Robert Parker does it, and did it for
4 Mr. Edgerton. Gil Schwarz. Mr. Koch tasted a wine, a '21
5 Petrus, and it tasted too young. Pretty clear it was not a '21
6 Petrus. That's all he needed to do. Mr. Greenberg, every wine
7 that he thought was fake, he tasted. The Cros Parantoux,
8 other -- and the wine he opened with Sotheby's in the cellar,
9 he tasted them, and that's how he would determine they were no
10 good. And Mr. Edgerton was the one who set up the Robert
11 Parker tasting.

12 And I want to make this point, really important. And
13 I want you to listen to me. A lot of things go wrong with
14 wine. We've heard it. They get corked, as they said, the cork
15 gets rotten. They're stored badly so they're heated, it
16 changes the taste. All those things would cause a wine not to
17 taste like what it's supposed to taste like. Think about this.
18 That would favor Mr. Koch. You open the bottle, say, it
19 doesn't taste right. Favors Mr. Koch, right? It's corked, I
20 can't tell. Favors Mr. Koch. Badly stored. Favors Mr. Koch.
21 One thing might happen. One thing might happen. You taste it,
22 you say: My god, what a fantastic '21 Petrus. I've tasted it
23 before, it's unbelievable. It's the minority choice, because a
24 lot of things can go wrong. Mr. Koch would not even take that
25 chance, the long-shot chance that he would be wrong. Wouldn't

1 take that chance.

2 And they keep saying: Well, did you, the defendant --
3 you know, we don't have to prove anything, folks. Burden of
4 proof is at that table. Clear and convincing evidence. If he
5 wants to prove to you, we have 24 bottles. A lot of them are
6 multiples. Four Petruses, same year. Right? Find one of
7 these others. Lafleurs. Same. Open one. Put your money
8 where your mouth is. Don't go claiming fraud when you can't
9 prove by clear and convincing evidence that what's in the
10 bottle isn't what it says on the outside of the bottle. Is
11 that fair? It's certainly not over money. Let's be real. The
12 fact that you might open a bottle that you claim is worthless,
13 worthless, what are you going to lose? Nothing. What's it
14 worth here? The cost of one of those bottles.

15 All right. Burden of proof. A lot of things we have
16 not seen. Clear and convincing evidence. There were gamma
17 tests. The only thing was tested was what's inside the bottle
18 because it emanates rays, and if it's got radiation after 1952,
19 because that's when they did atomic testing, you can tell
20 whether the bottle has wine before or after. The only gamma
21 test we have showed the wine was correct. What was in the
22 bottle was correct. And we read some of those with
23 Mr. Edgerton. Where are the rest of the tests? Where are the
24 rest of the tests? Why haven't they been brought into court
25 for clear and convincing evidence? Where are they?

1 Radioactive -- and Edgerton asked that some be done. Never got
2 them done. Radioactivity in the glass tells you what year the
3 glass was made. Edgerton asked for those results, which they
4 had done. Elroy wouldn't give them to him. Elroy wouldn't
5 give them to him. The guy who wrote that e-mail. Elroy
6 wouldn't give them to him.

7 Chateau report. Took these to the chateau. We've
8 only shown a couple chateau reports, and those were all
9 favorable to Mr. Greenberg. Chateau had no opinion. Chateau
10 had no opinion. Didn't say it was fake. The only chateau
11 report we saw where the chateau had an opinion was the one
12 where Elroy wrote the opinion for the chateau and changed the
13 memo, falsified evidence. Took these to printers in Europe.
14 Pretty clever idea. Show the printers. Did you print this
15 label? Well, they took them there, but where are the results?
16 Where are the results?

17 Why did we have to call Mr. Edgerton? He'd done
18 \$200,000 of work for Mr. Koch, examining the bottles. Did
19 Mr. Koch call him to testify about what he'd seen in the
20 cellar? No. We had to call him. We had to call him. Clear
21 and convincing evidence? We are calling his guy in the cellar?
22 That's convincing.

23 They used Mr. Martin. Very interesting. You've heard
24 about, nobody's used Mr. Martin. Never worked in the wine
25 industry. No winery, no chateau, no expert, no auction house,

1 no nobody has ever used this man, and he is the basis of their
2 scientific proof, when they have other scientific proof which
3 people use, the radiation, the gamma tests. Where is he?

4 Where is Mr. Elroy? Mr. Koch was happy to get up and
5 tell us about this great investigation, third hand. All the
6 things he's found out, all the things that are true, all the
7 things that are true for Mr. Elroy. Where's Elroy? Just go in
8 that jury room and say, well, where was Elroy? Works full time
9 for Mr. Koch. That's all he does. Completely beholden to him,
10 his entire paycheck. They could bring JJ Cortes from Texas to
11 tell us what he told him? Where's Elroy? Why isn't he here to
12 tell us about all those results? Why isn't he here in court?

13 You know, make no secret about it, we got up and we
14 said, Elroy falsified evidence. He shouldn't have to lie to
15 prove a fraud. Shouldn't have to lie to prove a fraud. That's
16 pretty serious. I got a lot of people out here. Elroy
17 falsified evidence. Would you think that they would bring
18 Mr. Elroy to answer the charge? Would you think that? Would
19 you think they'd bring Mr. Elroy to explain what he did? Would
20 you think they would expose him to maybe being questioned about
21 all the things they found about the bottles in their obligation
22 to prove by clear and convincing evidence? Didn't. No.

23 Just going to raise one thing with you, which is a
24 little crazy. When you see the Egan report and the Gil Schwarz
25 report, you're going to see 36 bottles in there. Burden of

1 proof, Mr. Koch. There's been no explanation to you why 36
2 bottles are in those reports. None. Not our burden. You're
3 going to look at them. A lot of them say, these bottles are
4 fake. They say, they're just like these bottles, they're all
5 the same. So I want you to go in there and say, has Mr. Koch
6 explained to me the different representations that were made
7 about those 12 bottles and these 24 bottles? Why are these 12
8 bottles okay but these aren't? Clear, clear and convincing.
9 Two standards. Is that clear? When you look at that, you try
10 to figure it out. And Mr. Koch's lawyer's going to get up and
11 he's going to try to explain to you why that is, but remember,
12 he's not a witness. He's going to say, oh, you know, we just
13 wanted to simplify the case for Mr. Greenberg. I could ask you
14 straight up, do we think Mr. Koch is here to do favors for
15 Mr. Greenberg? Simplify the case. They want to shorten the
16 case so it wasn't so long? We were here for three weeks, for
17 2, \$300,000. Nobody's shortening anything. Whatever the
18 lawyer says is lawyer talk, folks. There's not a shred of
19 explanation or evidence of that, and I'll tell you, not clear
20 to me.

21 Now we've seen fake evidence in the case. Why do you
22 have to lie to bring a fraud? We know this one. That's fake.
23 Mr. Koch tried to explain to us that this actually was okay
24 because it was the truth because it was told by somebody else,
25 but that somebody else wasn't in this courtroom. Where was

1 Elroy? If you -- and here the judge will read this to you, and
2 this applies to Mr. Elroy, it applies to Mr. Greenberg, it
3 applies to Mr. Koch, it applies to every witness who testifies.
4 "If you find a witness intentionally falsified, that is always
5 a matter of importance you should weigh carefully. If you find
6 that any witness was -- has wilfully testified falsely as to
7 any material fact, that is, to an important matter, the law
8 permits you to disregard completely the entire testimony of
9 that witness upon the principle that one who testifies falsely
10 about one material fact is likely to testify falsely about
11 everything."

12 And I want you to think about what Mr. Koch said about
13 reading the catalog. If he's willing to testify falsely about
14 reading the catalog, how about what he's testifying about what
15 he relied on? Which he actually didn't tell us.

16 Now Mr. Koch signed under oath these statements.

17 I'm running out of time so I'm going to go quickly.

18 Remember Mr. Brierley told Sutcliffe had inspected and
19 walked away because a large number of them were counterfeits,
20 Brierley said, "I never said that." Koch put that under oath.
21 There we go. Brierley explained, out of 40 or 50,000 bottles,
22 10 to 15 percent appeared counterfeit. And the potential sale
23 fell through when Brierley refused to take certain vintages.
24 Brierley said: Totally false. Mr. Koch signed that under
25 oath. And what was his answer? Oh, you know, I was doing the

1 best I could, you know, I just wrote it down. I knew the other
2 side might catch me. They could go figure out whether it was
3 true, you know, but, you know, it was the best I could do was
4 to put down things that were totally false. Maybe he hoped we
5 wouldn't catch him. You know, we almost didn't catch the Elroy
6 e-mail. We were one click away from catching that thing. All
7 the notes gone, all the e-mails gone, all the corroborating
8 stuff gone. One click away.

9 So this is the standard, folks. If we want to know,
10 did he say things that are false, you're looking at it right
11 there. Right there. Don't have to lie to prove fraud.

12 Now let's go into the standards of the case. One is
13 recklessness. One is recklessness. You can have a reckless
14 disregard for the truth. Be responsible for it. But if you
15 have a reasonable belief for the truth of the statement, there
16 is no intent to deceive. Mr. Greenberg believed the bottles
17 were real. He had a reasonable belief. And under the reckless
18 standard, how can you ever take the objects, give them to an
19 expert, give them to an expert, an expert, and not have a
20 reasonable belief that they're real? How can you be reckless
21 when you go to the top people in the world to examine the
22 goods, and to either reject them or accept them and then get
23 charged with recklessness? Just listen for recklessness as we
24 go on here. Remember, how reckless is it? One mistake out of
25 70,000 bottles. Boy, if that is the standard for recklessness,

1 we are all in really big trouble in front of the law.

2 Recklessness? One. One.

3 Cut the capsules. Right? Segregated wine. Reckless?

4 Is that what somebody who's reckless does? Relied on Zachys,

5 as Egan tells him he can? Again, you know, if there's a

6 mistake here, if Zachys made a mistake, we're all human.

7 Zachys made a mistake. It's not recklessness by Greenberg.

8 They're going to suggest Greenberg was an expert. You

9 heard the experts here. You have to know how many hectares of

10 land there are somewhere, you have to know Madame Robin talked

11 to somebody in Moscow in 2007, you have to know the names of

12 obscure negociants, you have to know whether the labels go on

13 this angle or this angle. Greenberg was supposed to know that?

14 We're not suggesting Greenberg was an expert. You've heard the

15 evidence. I trust you completely on that.

16 So -- what have I done? Here we go.

17 Concealment. We concealed information. Fraudulent

18 concealment. Just take a look. Who did Greenberg tell about

19 Royal? The big fact in this case is Royal, right? The big

20 fact. Told Sotheby's, Christie's, Zachys, told Robert Parker,

21 Bipin Desai, most famous collector in the world, Larry Stone,

22 the most famous sommelier in the world, Wil Jaeger, collector

23 of the year, told Elroy, told Koch, and both Edgerton and

24 Brierley said, he told all kinds of people, right? That's a

25 big fraud. It's the way you defraud somebody, you tell

1 everybody you know. Was his conduct consistent with fraud,
2 folks? He hired Zachys seven times. He knew they rejected his
3 bottles. He gave anybody -- anybody -- buyer a right to
4 inspect. He openly disclosed Royal. We just saw it. He
5 segregated his wines. Told Downey to look at the Jayer labels.
6 He explained how to examine labels. Now this is the stupidest
7 fraud in America. "Have a happy Thanksgiving." You know? He
8 tells her, on the phone, you know, you got to look at the label
9 a certain way to make sure it's a facsimile. Who in the world
10 conducts a fraud by telling people what to do to catch them?
11 Really. Cuts the capsule so people can see it. He discloses
12 the identity to Koch. He talks with Koch and the
13 investigators. He answers every question Koch asks and then
14 some, 'cause Greenberg talks a lot. He volunteers additional
15 information. Tells him about Royal, tells he has fakes in his
16 cellar, says he bought other fakes from Royal. Boy, that is
17 really -- the biggest fraud in the world? Biggest fraud in the
18 world. Hard to get there. Concealment. Actually, let me go
19 back.

20 In order to establish -- the judge will read to you,
21 "In order to establish that Greenberg intended to defraud
22 Mr. Koch by concealing material information, Mr. Koch must
23 prove by clear and convincing evidence that Mr. Greenberg
24 intentionally concealed the material information for the
25 purpose of inducing buyers to rely on the concealment." And

1 then this is really important. "Conduct is intentional if it's
2 purposeful, that is, the product of the defendant's conscious
3 objective rather than the product of mistake, accident, or
4 negligence." Just remember that. You've got to really set out
5 to conceal it, to do it on purpose. If it's just a mistake, if
6 it's negligence -- negligence is sort of a lower level of
7 mistake, well below. It's -- intentional and negligent are
8 different. If he just didn't do it because he didn't think
9 about it, didn't think he'd have to do it, that is not
10 concealment. The judge will read to you this instruction about
11 what concealment is. Mr. Koch must reasonably rely, must
12 reasonably rely. The judge: "Whether Mr. Koch was justified
13 in relying upon Mr. Greenberg's concealment of a material
14 information depends on whether the concealment is something
15 that a reasonable person of Mr. Koch's knowledge and experience
16 would believe and consider important in deciding whether to
17 purchase the bottles of the wine." Read that and then figure
18 out whether anything in this case, anything does that.

19 Now I want to tell you about reasonable reliance.
20 Again. I know I've said a lot, but this is really important.
21 I gave Mr. Koch an opportunity to tell us what he would have
22 done if he knew the bottles were fake. I hope you remember
23 that. I said -- here it is. "Mr. Koch, if you had
24 inspected -- had suspected that even one bottle in the 2005
25 auction from Zachys was counterfeit, would you have walked away

1 from the whole auction?" Remember, here's the man who said:
2 Oh, my god, Alexander the Great cellar. If I'd only known
3 there was a problem, I never would have done that. Right? So
4 I asked him: Well, if you knew that one of the bottles was
5 fake, wouldn't you just walk away? He says, "At that time, I
6 don't know. I really do not know whether I would have or not.
7 When was that? How many years ago? A number of years. 2005?
8 It's over -- close to ten years? I don't -- I don't remember
9 what I would have done because I was not aware of counterfeit
10 wine."

11 "Q. If you had suspected that two bottles in the
12 auction were counterfeit, would you have walked away from the
13 auction?"

14 "A. I don't know. If I suspected 50, I would have
15 walked away."

16 Well, there's our standard, out of Mr. Koch's mouth.
17 But the whole preposterous concept, if I'd only known, right?
18 Reliance. If I'd only known. And here I ask him point blank:
19 Well, if you knew there were fake bottles, not back in the
20 cellar, but in the auction, would you have walked away? The
21 answer is: I don't know. Just think about that when you get
22 to reliance. Reasonable reliance.

23 Important. Peculiar knowledge. There is an exception
24 to these "as is" provisions called peculiar knowledge. That
25 is, if the seller knows something the buyer can't know. And

1 it's not just random stuff. In this case it's, does
2 Mr. Greenberg know these are fake when he sells them. I will
3 tell you, if you conclude that Mr. Greenberg knew these bottles
4 were fake when he sold them, you should find for Mr. Koch.
5 You're obligated to find for Mr. Koch. The law requires you to
6 find for Mr. Koch. But the peculiar knowledge is, did
7 Greenberg know something about the bottles that Koch didn't.
8 What did he know about them that Koch didn't that was material?
9 Well, what he'd have to know is, they're fake. Not that Rudy
10 Kurniawan did something, or that Chicago Wine couldn't see
11 something on a label, or that Maureen Downey couldn't tell the
12 difference between a bottle and a magnum. It's about those
13 bottles, those 24 bottles. In other words, "If and only if you
14 conclude Mr. Greenberg knew material facts relating to the
15 authenticity, the provenance, or the merchantability of the
16 bottles at issue in this case that were not readily available
17 to Mr. Koch, then a specific disclaimer like an 'as is' clause
18 is not a bar to finding justifiable reliance." Not a bar. But
19 it's -- it's still important because it shows what the
20 representations were. Mr. Greenberg had no special or peculiar
21 knowledge that the bottles were fake. And no reason to suspect
22 it.

23 I've got about ten minutes here so I'm going to rush a
24 little bit. I'm sorry to do this.

25 You're going to have a question on duty to disclose,

1 right? Did Mr. Greenberg have a duty to disclose. And the
2 judge is going to tell you, that duty to disclose does not
3 arise simply because two parties are on the opposite side of
4 the transaction. It's not something that's automatic. And
5 when you look at the Zachys catalog, there's no requirement
6 that Mr. Greenberg disclose anything in the catalog. I'm
7 sorry. The contract between Zachys and Greenberg says what the
8 parties do. Zachys said: I hope you would tell me. But
9 Zachys didn't say: He had to tell me. And the reason was that
10 the contract doesn't create an affirmative duty by
11 Mr. Greenberg to tell you everything. Read the contract
12 between Zachys and Greenberg. No obligation in there for
13 Greenberg to say things.

14 One of the lawyers for Mr. Koch asked Mr. Egan that
15 question directly. This is their witness. Their expert.

16 "Q. Does Mr. Egan understand that 'as is' clauses
17 permit consignors to withhold information about authenticity of
18 the wine they're buying?" Pretty powerful question. "Does the
19 'as is' clause let you withhold information about
20 authenticity?" Question to Mr. Egan, Mr. Koch's paid expert.

21 "A. If there is an 'as is' clause, I suppose it would
22 permit the consignor to withhold information." "If there's an
23 'as is' clause, I suppose it would permit the consignor to
24 withhold information." Mr. Koch's witness on duty to disclose.

25 You're going to be asked about the GBL, the New York

1 claim. This is where the standard of proof is lower. And
2 here's what we have on how Mr. Greenberg treated consumers.
3 Segregated the wine. Exposed the corks for the buyer's review.
4 Used one of the best auction houses in the world so consumers
5 would be protected by the auction houses doing it. Gave the
6 bottles to others to inspect; didn't do it himself. They
7 inspected the bottles before sale. Protecting consumers.
8 Mr. Egan said that that is what the consumer is entitled to
9 rely on, and Mr. Greenberg did it.

10 The catalog is quite clear of the terms that are
11 offered. Nothing is hidden in terms of terms. The bidders
12 have a right to inspect, so the consumer can go look before
13 buying. Mr. Greenberg gave Zachys that sole discretion to
14 accept terms. A brilliant -- imagine, an "as is" sale where
15 you get to return stuff. It's like a dream. You can look at
16 it afterwards, you can look at it before, you can return it
17 after you look at it after you buy it.

18 (Continued on next page)

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1 Greenberg agreed to that. And of course Mr. Greenberg
2 believed the wine was authentic that was being auctioned
3 because Zachys had examined it carefully.

4 When you go into the jury room there is going to be an
5 allocation form at the end of this. Sounds a little crazy.
6 For the GBL claim there is going to be a form where, if you
7 actually come to the conclusion that Mr. Greenberg, the things
8 we have just talked about, that Mr. Greenberg really mistreated
9 consumers -- we have exactly one consumer who has ever made a
10 claim -- but mistreated consumers in your conclusion, you are
11 going to be asked to allocate the responsibility, to allocate
12 the responsibility.

13 If it turns out that you think that Mr. Greenberg
14 conducted a hardcore fraud, knew the bottles were fake, somehow
15 managed to get them by Zachys, got them into the stream of
16 commerce, I'm going to tell you, don't allocate anything. If
17 you believe that, there is no allocation here, the
18 responsibility is Mr. Greenberg's.

19 But if you decided that -- and I don't know how you
20 will do this, but I trust juries -- you decide that's silly,
21 but this General Business Law thing is a little crazy, if
22 something goes wrong you can hold the seller responsible, if
23 you decide that, separate from the fraud, Mr. Greenberg was
24 entitled to rely on Zachys and did rely on Zachys, and if these
25 are somehow unmarketable, if you conclude unmarketable is a

1 standard instead of counterfeit, then I want you to ask
2 yourself as between Greenberg and Zachys, Zachys who prepared
3 the contract, did the cork descriptions, examined the wine,
4 pulled bottles out, put bottles in, as between Zachys and
5 Greenberg, who really has the responsibility in that
6 circumstance?

7 I don't think you're going to get there. I don't
8 think you're going to get close. But if somehow you get down
9 there, I think that is a fair way to look at it. Unless, if
10 you think Greenberg manipulated the system so much that he
11 caused Zachys to go blind when they looked at the bottles, then
12 it is Greenberg's fault.

13 But if Greenberg simply followed the system, put
14 bottles in, let Zachys look, Zachys made a mistake, then you
15 should be fair about that, and I know you will be.

16 Now, I have about five minutes left. Folks, this is a
17 fraud case. It's a fraud case. Mr. Greenberg, he described
18 who he is. I have been a lawyer for some time. He is very
19 rough around the edges. I think Wilfred Jaeger said that,
20 other people. He is a guy who came up from nothing, came up
21 from nothing, made a fortune. Not one of the yacht club group,
22 not that smooth, a little rough, a little frustrated when he
23 got asked the questions that I have described.

24 He's being charged with intentional fraud, something
25 that affects a person's life and has affected him now for seven

1 years while this claim has been here, while all this publicity
2 has gone on, Greenberg charged with fraud, Greenberg charged
3 with fraud, without a right to get front of people like you to
4 have a jury listen to the evidence and make a decision.

5 That's a real tough thing. That's why this standard
6 exists. That's why it's got to be clear and convincing.
7 That's why it's got to be both clear and you've got to be
8 convinced. That's a fraud standard, and it is there for a
9 reason, because you don't do these things lightly.

10 I will tell you, as I said, a lot of things that were
11 done in this case I'd never do. Have a happy Thanksgiving.
12 I'd never do that cheap shot junk. I would never in a fraud
13 case say, well, it's in the first paragraph, not the second
14 paragraph. That's not where fraud is.

15 Fraud is where somebody knows something, knows it's
16 fake, the thing you thought when the case started. They must
17 be talking about fake bottles, must be talking about Greenberg
18 knowing they are fake. They have never talked about that.
19 Don't be confused when somebody gets up and says a lot of these
20 came from Royal or same vintages came from Royal, same kind of
21 bottles came from Royal.

22 What we know is that bottles like this in this auction
23 came from a couple of sources. Mr. Greenberg took out the
24 bottles he thought were fake. He removed those bottles.
25 Nobody disputes that. He left in bottles he believed were

1 real.

2 He has never had the decency to be confronted directly
3 on the stand by somebody pulling up a bottle and saying you
4 knew this was fake. Decency required that, given what a fraud
5 claim is, how serious it is, how high the burden is, how
6 serious your work is, and how many resources have gone into
7 this absurd situation of a trial over 24 bottles for three
8 weeks when Zachys said just send them back, we'll give you your
9 money back. Think about that. I know you're going to take
10 this really seriously.

11 I want to show you two things, two verdict forms. Can
12 we get those up? My time may run out, so let me describe them
13 to you. You're going to get these verdict forms. Here we go.
14 Here is one. Can we get it any bigger, Liz? Just the top half
15 for me.

16 You're going to get asked a question on fraudulent
17 misrepresentation. This is the fraud claim. It will be on the
18 first page. You will have a chance to read it. It's what I
19 told you. It's those five elements of fraud. If you go in
20 that jury room and sit down and say, I don't think this is a
21 fraud, then take this box and check "no," there's no fraud. If
22 you check no fraud, you are done with the fraud case. You
23 don't have to spend any more time, any more than the three
24 weeks you've spent on this crazy case. You're done with the
25 fraud case.

1 If not, you've got to then go through bottle by
2 bottle. Remember, this case is misrepresentation,
3 misrepresentation, misrepresentation. If you think that there
4 are further questions, later in this you will see that you have
5 to go through every bottle and say what is it that Koch said he
6 relied on and what he didn't.

7 So you check that box "no."

8 Then it moves you to the General Business Law claim.
9 Let's move to that, please. That's on page 4. You go to the
10 General Business Law claim. This is the same. If you think
11 that Mr. Greenberg was abusive to consumers, that he was such
12 an outlier the way he did things, he deceived them, he cheated
13 them, he lied, he did all that, check "yes."

14 But if you think this was exactly what people normally
15 do, that there is anything to suggest that this auction was any
16 different from any auction that is normally conducted, then
17 check "no," you're done, you may go home, and this case is
18 over. I tell you, you ought to do that. You ought to end this
19 for Mr. Greenberg. This is profoundly unfair.

20 So, you can get out of the case by doing this. If
21 not, then you are going to go, and you should, it's your job,
22 go through these things bottle by bottle.

23 I have gone on a long time, longer than I normally do.
24 But so much mud has been thrown here, you just have to do
25 something to clean it.

1 Folks, why do you have to lie to prove a fraud claim,
2 and why don't you ask the guy whom you claimed did something
3 wrong about the very bottles? Why didn't they do that? Where
4 was Elroy? Where were all those experts, all those witnesses?
5 What are those is the bottles doing in this case? What's going
6 on here?

7 Just remember, Mr. Koch's lawyer promised you a simple
8 case when this started, a simple case. But the simple case is
9 that Mr. Greenberg did what he was entitled to. He hired a top
10 quality auction house to examine his wine, which they did, and
11 they put it out for sale. That is really all the case is
12 about.

13 Thank you very, very much. You have been really
14 patient. Again, I believe in the jury system and I trust in
15 the decision you're going to make. Thank you.

16 THE COURT: Thank you, Mr. Shartsis.

17 Ladies and gentlemen, I'm going to give you a brief
18 break. We'll take a 10-minute break. Then we will have the
19 summation on behalf of Mr. Koch. We will probably break for a
20 late lunch today. We have some snacks for you. You might want
21 to get some sustenance so we can get both of the closings done
22 before we break for lunch. See you back here in ten minutes.
23 Leave your pads there.

24 (Recess)

25 THE COURT: Ladies and gentlemen of the jury, we will

1 now hear the closing argument on behalf of plaintiff, Mr. Koch.

2 Mr. Hueston.

3 MR. HUESTON: Thank you, your Honor. Good morning,
4 ladies and gentlemen. Thank you for your patience. Thanks for
5 hanging in here. It's a late morning. I hope you got a snack.
6 I know I needed a snack.

7 One thing that I will agree with Mr. Shartsis about is
8 that this is a simple case. I said it in the beginning and I'm
9 going to say it now. Let's talk about a few things right off
10 the bat that are very simple.

11 Number one, there is no serious dispute in this case
12 that you are looking at 24 counterfeit bottles here. Number
13 two, there is no serious dispute in this case that these were
14 sold by Mr. Greenberg, these counterfeit bottles, to Mr. Koch.
15 And there is no serious dispute in this case that each of those
16 were represented as the real thing in the catalog.

17 Mr. Shartsis talked to you a lot about the law. He
18 didn't get it all right. The judge is going to be the one who
19 will do it. Here is the key thing. You're not allowed to hold
20 back information that a buyer would like to know before
21 deciding to make a purchase. That's called material
22 information. That's what the case is about.

23 Ladies and gentlemen, there is no serious dispute in
24 this case that Mr. Greenberg held back just the kind of
25 information that any buyer would want to know before spending

1 thousands of dollars on collectibles. Let's review. We will
2 start with a quick review. Mr. Kaba will help me here.

3 The 1928 Latour, bottle number 41. I'm going to put a
4 label around it. This is the one with Mr. Edgerton's sticker,
5 number 41. It is a smoking gun. It has a fingerprint on it.
6 What do we know about it? Mr. Edgerton says definitely
7 counterfeit with his sticker. Mr. Greenberg knew it, he didn't
8 tell the Zachys auction house about it or any other buyer, and
9 he sold it. That's it.

10 What about the other bottles? Another 1928 Latour,
11 just like that one, with the same photocopied label that Mr.
12 Edgerton told Mr. Greenberg about. It was a suspect bottle.
13 Mr. Greenberg knew it. He didn't tell Zachys auction house or
14 any buyer about it, and it was sold to Mr. Koch.

15 What else do we have? 17 bottles with vertical corks
16 that Mr. Greenberg -- we are going to get to the Greenberg
17 before he was caught and what he said and the Greenberg at
18 trial once he was caught and what he said.

19 Before he was caught, what he said, as his expert John
20 Kapon from Acker said is, whoa, I'm not even going to sell
21 these bottles, forget about disclosures, take these vertical
22 cork bottles back, no way, I'm not going to sell them. Mr.
23 Greenberg said, just like the Petrus cork, too, he knew that
24 Petrus corks before 1966 shouldn't be vertical. He knew that
25 these Lafleur corks before 1966 shouldn't be vertical. You

1 know what he did? He shipped out 17 bottles with the mark of a
2 fake right to Zachys.

3 Mr. Zacharia told you, yeah, I would have liked to
4 have known that information. He knew that information. He
5 didn't tell Zachys or any buyers, and he sold them.

6 The 1921 Petrus returned from another company, the
7 Chicago Wine Company. They said, hey, we got it back from a
8 seller, we're looking at this, we can't put it up for sale. He
9 said OK. He took that and he tried to get it through, and he
10 did, Zachys. He succeeded. The bogus wine got through. That
11 is just undisputed. He knew an auction house said no to it, he
12 didn't tell Zachys or any buyers, and he sold it.

13 Mr. Zacharia told you, hey, I want to know, even if
14 Mr. Greenberg has a different opinion, I want to know if
15 another auction house or company says this is bogus or I won't
16 sell it. It helps them focus their attention in their
17 inspection.

18 There is another thing that is not disputed here. Mr.
19 Zacharia and Zachys obviously didn't catch these bottles, did
20 they. 24 bogus bottles came through. We will get to this
21 later. Mr. Greenberg, who I think is one of the most expert
22 people in the room, though he tried to run away from it at
23 trial, saw things like a photocopied label that he said was
24 really obvious. Remember when it was put before Mr. Zacharia,
25 and he said, uh, I need some tools?

1 It is important for buyers to give information they
2 know about the bottles to auction houses because they know the
3 auction houses aren't perfect. Mr. Greenberg chose to keep
4 that information to himself so he could get top dollar hoping
5 these would get passed through.

6 What else? The 1945 Lafite with the photocopied
7 label, the one I just talked about, here it is. What did he
8 know about that? He was told by Mr. Kapon, hey, it's got a
9 photocopied label, I would have to disclose it with a
10 photocopied label. He said, let me have that back. He sent
11 that on to Zachys, didn't tell them about the photocopied
12 label, didn't share any information with them or any buyers,
13 and it was sold as the genuine article.

14 That covers 23 out of 24 bottles already, but there is
15 even more. Eight of these bottles were labeled by Bordeaux
16 Wine Locators, which he said was the worst counterfeiting
17 operation in the world. Mr. Shartsis doesn't like that. That
18 seems really damning. So he made some fun of it. He says Mr.
19 Greenberg was just sort of laughing about it.

20 One thing he forgot to tell you about when he was
21 summarizing things. Remember when Mr. Greenberg was talking to
22 Mr. Koch later and Mr. Koch asked him about a bottle that
23 didn't have Bordeaux Wine Locators on it and Mr. Greenberg was
24 trying to look like a victim, told him the Russian mob was
25 after him? One of the things Mr. Greenberg told him, and he

1 didn't laugh about it, was, hey, Bordeaux Wine Locators, a bad
2 counterfeiting operation.

3 Let's step back a little bit. Remember the Mickey
4 Mantle baseball? Remember Jamie Martin came up and told you
5 about what he did with a Mickey Mantle baseball? I don't know
6 if you are Yankees fans or Mets fans. I know you're not Boston
7 fines.

8 Say you wanted to save up your money and buy a real
9 Mickey Mantle baseball and you looked at one for sale. It
10 looks like Mickey Mantle and it has a sticker saying "Old
11 Baseball Locator Company" on it, right? You're like, OK, I'm
12 looking at that, they want, I don't know, \$800 for it. Then
13 you're looking at another Mickey Mantle baseball and it doesn't
14 have "Old Baseball Locator" on it.

15 Let's say the seller, he knows that the Old Baseball
16 Locator Company is the worst counterfeiting operation in the
17 world, but he sticks it up there. Is that information you
18 would want to know before you decided if you're going to buy
19 that Mickey Mantle baseball or maybe try to get another one?

20 Of course you'd want to know that. Of course you
21 would want to know that. Just like Mr. Koch would have to hear
22 that the seller had found that the Bordeaux Wine Locators
23 Company was the worst counterfeiting operation in the world.
24 It's something a wine collector would want to know before being
25 ready paying top dollar for a collectible.

1 What else do we have? You can see we are going to
2 start layering things over and over because there is more than
3 one thing Mr. Greenberg knew about these bottles. There are
4 multiple things.

5 Thirteen of these bottles, and one more right there,
6 had the same suspicious features, same rare vintage, same rare
7 wineries from those old years that they had found out from
8 Royal. Same bottles, same exact kind.

9 What did he have? He had in his hands roadmaps to
10 what those bottles were and why they were fake. He had at
11 least three. He had the Edgerton report. Had that in his
12 possession. He had the Royal Wine fake summary notes, a whole
13 listing of things he found fake and why he found it fake. And
14 he had that spreadsheet, looking to get money back, \$900,000
15 worth of Royal fakes.

16 Of all that information, he shared not any of that
17 with Zachys, those keys, those roadmaps which would have
18 directed Zacharia's attention, wait a minute, what have I got
19 here, making it much more likely that Zacharia would have said,
20 I'm not selling that same bottle or I'm going to make doubly
21 sure that I don't make a mistake here and held it back from the
22 auction.

23 He held all that information back, information any
24 buyer would want to know, and sold off all those bottles and
25 got top dollar. Ladies and gentlemen, right there, that's

1 enough for you to find liability. You can go in here and check
2 all the bottles, and then you get to go home. That's all you
3 need.

4 But there is more in the case than that. There's much
5 more. Mr. Greenberg knew, because he couldn't trace things to
6 his sources, he didn't have one of the most important things
7 that a seller of old collectibles needs to know: Where did it
8 come from? The history, the fancy word used in this case is
9 "provenance." Where did it come from? He knows he didn't have
10 that. What you see is over and over again he tried to get away
11 from telling people that.

12 Here is the mark of somebody who knew he was doing
13 something wrong. He's a smart man, but he slipped a few times.
14 We have caught him here, and you have seen it. When Mr.
15 Zacharia said, hey, how about those older Bordeaux, got some
16 information on that, he said, yeah, here are two sources. He
17 left out the one, Royal, which had rung alarm bells with the
18 other auction houses, left that out, knew that that would send
19 alarm bells for Mr. Zacharia. I'll play you a clip later when
20 Zacharia says he would have wanted to know about Royal.

21 But that's not all. When Mr. Koch calls in, when he
22 had his employee Mark Curley make an inquiry through Zacharia,
23 he didn't know it was Mr. Greenberg. He asked the auction
24 house, got ahold of Mr. Greenberg. Hey, Mr. Koch has some
25 questions about this 1921 Petrus. At that time he didn't know

1 it was counterfeit.

2 What did he come back and say? One of the biggest
3 whoppers in this case, ladies and gentlemen: English royalty
4 from Europe. Did you laugh out loud when you heard that? And
5 collector from Toronto. I'll show you later that matches
6 pretty closely what he wrote in his cover letter to try to give
7 the impression that this was a special collection coming from
8 very special places, when he didn't know where it came from.
9 And when he did look, it came from Royal, which he knew was bad
10 news.

11 He made a choice, ladies and gentlemen, when he said
12 that to Zacharia and he said that to Mr. Koch. He made a
13 choice to lie. That's how you know intent. Any one of these
14 bad facts, we only have to show that he recklessly put his head
15 in the sand and just sent them out the door. We have shown
16 that over and over again.

17 But this case got more interesting. I'm going to
18 bring you through chapters. It won't be the longest story, but
19 I'm going to show you that Mr. Greenberg did more than just put
20 his head in the sand. The evidence shows that he was not going
21 to be stopped in pushing his bogus wines on unsuspecting
22 consumers.

23 He bullied auctioneers to take the wine that he was
24 telling them was bad. He withheld information. Then, once
25 Bill Koch started asking questions, he lied to them. That's

1 somebody who is intentionally trying to cover his tracks for
2 something he did wrong. That's not an innocent seller just
3 trying to make an honest wage. At the end of the day, by doing
4 that, he got top dollars for all this, and Mr. Koch here is
5 stuck with these worthless bottles.

6 Think about what Mr. Greenberg is asking you to do.
7 He's sitting here, Mr. Koch with all these bogus bottles, and
8 he's saying blame Mr. Koch or blame Mr. Zacharia, but me, don't
9 blame me at all.

10 Let's go through what we showed you at trial. You
11 will see, of course, he is to blame and it is time for him to
12 take some responsibility.

13 Let's start quickly with what I call chapter 1. I'm
14 going to skip a couple of these. Chapter 1. I call this the
15 wine business CEO vs. The Collector. You heard Mr. Koch take
16 the stand. He told you what he is. He is a true collector.
17 He collects historical objects and he really treasures these
18 bottles for the valuable collectibles they are. He feels a
19 link to history over time to them.

20 He doesn't sell bottles. Once he sold, and it was 13
21 years ago, and that was it. He cares about a collection. Mr.
22 Curley took the stand and told you about how he even takes the
23 corks and uses them in his ceiling, that he takes the labels
24 and makes wallpaper out of them. He is a true collector.

25 What do you have with Mr. Greenberg? You'd never know

1 it from the cover letter, but Mr. Greenberg, for him wines are
2 an asset class, like any other investment. He sells wine when
3 the market conditions are right: Buy low, sell high. One of
4 the largest or the largest wine seller in the world. He said
5 it.

6 What happens in this case? That kind of sets the
7 stage quickly. Chapter 2, crisis. Sotheby's, one of the two
8 biggest, most well known auction houses in the world, they
9 visit his cellar. They specifically identify bogus,
10 counterfeit, and problematic wines. Then Christy's comes
11 separately. That's Mr. Brierley. You will hear about him
12 later. He visits and he spots problems and problematic bottles
13 in Mr. Greenberg's cellar.

14 Mr. Greenberg at this time knows he has an
15 infestation. You're going to see a jury instruction that says
16 if you have like a house with termites and you know you've got
17 termites, you've got to tell the buyer. You can't say I hope
18 the buyer will inspect and find them. His house, his cellar,
19 had termites. They were counterfeits, they were fakes.

20 Remember this thing from Mr. Kapon from Acker in April
21 2003 putting out a draft advertisement to sell Mr. Greenberg's
22 wine? He said, he wrote, Coupled by a general desire, Mr.
23 Greenberg's desire is to put a lot of his assets into green
24 right now. Mr. Greenberg was trying to sell off his wine to
25 raise money. That's what he was doing.

1 What did he do? He confirmed he had fakes in the
2 cellar. It wasn't just I wonder if Sotheby's is right. He
3 brought Mr. Edgerton in, only for a limited basis. We'll get
4 to this. Edgerton identified fakes. He made his Royal fake
5 summary notes and he made a spreadsheet. He confirmed they
6 were fakes. That's what we have. That's Exhibit 107. Royal
7 Wine fake summary notice, the fake wine spreadsheet, and the
8 Edgerton report, proof that he had an infestation.

9 He had some choices to make when he found that out,
10 ladies and gentlemen. Let's think about what choices he could
11 make. At this point he could make choices like a reasonable
12 seller or a reckless seller. Ladies and gentlemen, you will
13 see every time he had a choice, he chose to go the reckless
14 route and worse. Let's go through them.

15 One thing that you can do when you have an infestation
16 in your cellar, you can stop selling. Mr. Koch told you once
17 he found counterfeits, no way he's selling anything. He hasn't
18 sold anything in years. He's not going to go ahead and have
19 bottles sent out of his cellar and, oops, wonder if an auction
20 house will find out. That's a reasonable thing you can do.
21 Mr. Greenberg said no.

22 How about inspecting all your bottles? Mr. Koch has
23 been doing that. He's working through and inspecting all his
24 bottles to find out what's there. Mr. Greenberg said no. What
25 did he do? Mr. Greenberg took a sample from his cellar. This

1 is pretty amazing. He picked out 106 bottles. Look at the hit
2 rate for fakes. 65 percent definitely counterfeit or strong
3 likelihood of being counterfeit. He had Mr. Edgerton there for
4 one day. Mr. Edgerton told you, he didn't ask me to come back.
5 "Did he ever ask you to come back and help him authenticate
6 more wine?"

7 "A. No."

8 You heard Mr. Cortes. "What did you suggest to Mr.
9 Greenberg?" He said, "We should retain Mr. Edgerton so we
10 could go through the entire cellar."

11 "What was Mr. Greenberg's reaction?"

12 "He didn't want to proceed."

13 You know why he didn't want to proceed. He wanted to
14 stick his head in the sand. He didn't want to know what his
15 sample, a whole lot of fakes out of a hundred, was telling him.
16 He didn't want that.

17 How about one other choice? He could say, forget
18 about not selling any of the wines. How about not selling all
19 his large old bottles of Bordeaux? He could have made that
20 decision. He was finding a lot of fakes there. No, he
21 decides, I'm going to go sell those anyway.

22 Before I get into this document, what about a tracing
23 system, a tracking system, a bar code system? Mr. Lovato and
24 Mr. Cortes both raised with him, hey, why don't you have a bar
25 code or a tracing system? He says no, he's not looking to

1 trace the bottles, he doesn't want to know. Sticking his head
2 in the sand, even after he found a 60 percent hit rate on
3 counterfeits.

4 This inability to trace wines, remember Maureen Downey
5 told you, is unheard of with big collectors. You go to the
6 grocery store and buy a piece of fruit. It's got a bar code on
7 it. I had a bag of M&Ms the other day. It's got a bar code on
8 it. Mr. Koch has his bar code on his because when you have
9 collections like that, you track them. Mr. Greenberg didn't
10 want to track and didn't want to know.

11 But he had a double standard, and we will see this
12 theme come up over and over again. When he wants to get
13 somebody for selling him something, what does he say? I demand
14 you give me the information from your sources, and he expects
15 them to have it.

16 You saw that he had his attorneys write in to Royal,
17 "Mr. Greenberg demands the provenance of all bottles of wine he
18 purchased from Royal." He didn't track it himself. Why did he
19 think they had it? He knew they had it because everybody
20 tracks it. He decided not to so he could say, I don't know
21 where things are from.

22 This wasn't the only time he said it. When he was mad
23 at WineBid about getting fake wine, "Not good enough. I want
24 definitive provenance." You tell me where it is from. That is
25 a standard he didn't abide by, but he tried to hold other

1 people to it. Another one. "I want authentication from the
2 domain," where it was actually made. "I do not want to wait,"
3 he said. That's what he expects of others. He didn't hold
4 himself to that same standard.

5 Approximately \$912,300 of wine he received as fake,
6 and his review is continuing. Why do we care about that?
7 Ladies and gentlemen, what did he do in this case? Remember
8 fakes so far? He documented almost a million dollars worth of
9 fakes in his cellar. One of the most amazing admissions in
10 this case is he sent back 300,000 of it and kept the rest, kept
11 it all in the cellar. Some of it is right here in the table.

12 He then removed the stickers. He said at trial he
13 removed the stickers Edgerton used to identify the bottles as
14 counterfeit. He took those off, stuck them back in the cellar.
15 That is another remarkable admission. He had, what, 50, 60,000
16 bottles in his cellar. Maybe you wouldn't sell those that
17 Edgerton had stickered, hold those off to the last. No, he is
18 removing them and putting them back into general circulation.

19 We talked about that. That's the fakes that were
20 returned. I asked him, "Is it possible, sir, you sold bottles
21 afterward that said Mr. Edgerton concluded were counterfeit or
22 suspect, right, sir?"

23 "A. That's possible."

24 So much for the segregation thing. Yeah, I took them,
25 put them back, sold them.

1 How about Mr. Lovato? They showed him by video. They
2 didn't fly him to answer questions, and I'll get to that in a
3 moment. This is another remarkable admission. He had been
4 talking about how, hey, we would find questionable bottles and
5 turn them around. Then he was asked, "Sir, I assume you told
6 the auction houses that you had questions about the particular
7 wines that you had found problems with so that they would
8 examine them more closely.

9 "I didn't have to tell them anything."

10 That's an admission right there. Those bottles,
11 so-called segregated bottles, here you go. You could tell by
12 that question we thought, oh, I'm sure you to do them about it.
13 No, didn't tell them anything. This is Mr. Greenberg's
14 employee. He is responsible for him. He knew what he was
15 doing.

16 Then we get to this. Where are Mr. Greenberg's other
17 fake bottles? We have heard a lot about his segregation. He
18 has a table full of lawyers here and he's got lots of
19 resources. Have you seen one photograph from a seller where
20 these so-called segregated bottles are?

21 He came in, took the stand, and told you about one
22 bottle of wine that he drank for his birthday. How about
23 bringing in the other Edgerton bottles? You figure if he had
24 them, he'd bring them in and say, see, I never sold them.

25 They are gone. They are sold. Then he slipped and

1 said, yeah, it's possible I sold those. He did. They are not
2 there. There is no segregation. Mr. Lovato told you:
3 Questionable bottles? Eh. There it goes.

4 At the very least, ladies and gentlemen, that's
5 recklessness. You put your head in the sand, see if somebody
6 else finds it. That's not good enough under the law. You find
7 someone liable for that when they do that head-in-the-sand type
8 of behavior.

9 Then we get to this. Mr. Greenberg had a big decision
10 to make once he found his infestation of fakes. He had a
11 choice the make: Keep all the information to himself or
12 disclose it, just tell people about it. Why not just tell
13 them?

14 Ladies and gentlemen, he is the one who had the
15 knowledge. He's armed with superior knowledge. He has all the
16 information I started talking about earlier about these things.
17 The auction house doesn't have that information. Mr. Koch and
18 the other buyers don't have that information.

19 So, what's his decision? Keep it to himself and see
20 if he can get top dollar for those bottles and/or just tell
21 them and see what the buyers will do once they have the truth.
22 It is undisputed in this case he didn't tell anyone any of it.
23 And, boy, wasn't that convenient for him.

24 There is a reason why the auction houses want that
25 information, ladies and gentlemen. Authentication, figuring

1 out if this stuff is real or not, it's pretty tough. Mr.
2 Zacharia, remember when he was handed the yellow bottle? To me
3 that was an aha! moment. After all the, oh, my goodness, it's
4 so fake anybody could have seen it, they made an error.

5 The lawyer just handed this up to him, oh, come on,
6 Mr. Zacharia, that is fake, right? He's like, uh -- do you
7 remember what he said? He was like, uh, I need my tools. This
8 is the second chance he had to detect the fake. He didn't do
9 it.

10 This is why every auction house representative told
11 you, from Christy's, from Sotheby's, we want to know everything
12 the seller knows. They want to make sure they don't make a
13 mistake. And Greenberg knows that. He held back the
14 information. He lowered and lowered the chances that the
15 auction house would be able to do its job right. He made his
16 choice.

17 Let's see some of the things that he did not tell
18 Zachys. He didn't tell them about the Chicago Wine Company
19 return. Mr. Zacharia told you, and it came from his counsel.
20 They were not happy to get the response. They said, well, even
21 if Mr. Greenberg thinks it's wrong, you don't expect to hear
22 that, Mr. Zacharia. He's like, yeah, I do. Why is that? Mr.
23 Greenberg might have it wrong. He wants information so he
24 doesn't make a mistake. Mr. Greenberg doesn't tell him.

25 Think about it. Use the Mickey Mantle baseball. If

1 you were thinking of paying top dollar for a Mickey Mantle
2 baseball, wouldn't you want to know that some other auction
3 house bounced it as a fake? Of course you would want to know
4 that. That's something you would want to know, something you
5 might go, at least I'm going to take a further look at this. I
6 think I'd want to buy a baseball that hasn't been bounced out
7 of another auction house before I lay down big money for that.
8 Of course you want to know that.

9 Bordeaux Wine Locators, worst counterfeiting operation
10 in the world. We have covered that. If your baseball
11 collectible came through one of the worst counterfeiting
12 operations in the world, you don't think you would want to know
13 that before you're paying money for that or buying another
14 baseball? Of course you would.

15 How about Mr. Edgerton's counterfeit conclusions? He
16 had the key right there to bottle number 41. It's right there.
17 Find it on the list, definitely counterfeit. Just pass it
18 over. He kept it to himself. That's why that thing got out
19 the door.

20 Sotheby's and Christy's identify counterfeit and
21 questionable wines. He didn't tell them any of that. Of
22 course Mr. Zacharia would want to know. We'll get to Mr.
23 Zacharia in a moment. This was like a family operation, this
24 collection that he was offering, 17,000, biggest ever. Do you
25 think he wouldn't want to know if the two most reputable big-

1 name auction houses in the world went, oh, my, we see fakes in
2 here? Of course he would.

3 Royal Wine fake summary notes, another roadmap to the
4 fakes you see here. Of course, Mr. Zacharia would have liked
5 that roadmap, and he would have spotted a 1928 Latour. There
6 aren't a whole left of those in the world. Here it is, fake,
7 fake, fake, fake, out of here. Mr. Greenberg knew, and he
8 didn't give over that roadmap.

9 How about the fake wine spreadsheet when he was
10 looking to get money from Fireman's Fund, AIG, and Royal. He
11 could spot them out there when he wanted to. Here you go, here
12 is the paper, the roadmap. But when it is time for Mr.
13 Zacharia to figure out if there are fakes here, yeah, I think
14 I'll keep that for myself. Those General Business Law claims,
15 deceptive practices, this is the kind of thing that New York
16 law says shouldn't happen, and he did it.

17 Greenberg's knowledge of fake Petrus corks. We'll get
18 to one of the laugh-out-loud moments for me in the trial when
19 he looks at the email that says, oh, just like the Petrus
20 corks? Uh, I actually meant the opposite. Of course he said
21 that. If he admitted it, he's admitting he knew that a number
22 of the bottles here were totally bogus. He ran away from it.
23 He doesn't share that, of course, with Mr. Zacharia.

24 Or Mr. Kapon's doubts about Mr. Greenberg's magnums.
25 Remember all the disclosures he wanted? He didn't share any of

1 that with Mr. Zacharia that would have put him on to these
2 bottles.

3 Mr. Kapon's rejection of all the Lafleurs: Get these
4 things out of here, I can't even put them in my auction with a
5 disclosure. There are no. OK, let's see, try another auction
6 house. Whoosh, it worked, got them through.

7 Auction houses want to know all of this because it
8 helps make the auction world better. It helps limit mistakes.
9 It keeps people like Mr. Koch and other buyers from picking up
10 bogus bottles after they pay top dollar for what has been
11 represented in these catalogs as the real thing.

12 Mr. Shartsis said, well, Mr. Greenberg didn't write
13 this. You will see in the jury instructions that a
14 misrepresentation can be direct or indirect. If you say
15 something to Mr. Zacharia knowing it's going to show up in the
16 catalog, that's an indirect representation. He's on the hook
17 for that. You don't just shovel these out the door saying as
18 far as I know, these are all good, knowing it's going to show
19 up here as the real thing and say, well, I didn't know.

20 When you go to a car lot and you're buying a car,
21 let's say you go into a Ford dealership and you want to buy a
22 2013 F100 truck. The dealer says here's a 2013 F100 truck.
23 You believe him. You don't think that it might be a 2008
24 Toyota Camry. It's being presented for what it is. It's
25 exactly the same with these bottles of wine. When they say

1 1921 Petrus, people go, yeah, I'm buying a 1921 Petrus, just
2 like when you walk in an auto lot and they say 2013 F100, OK,
3 I'm buying a 2013 F100.

4 Let's go through the testimony of what these folks
5 said about why no information. Mr. Ritchie, he was from
6 Sotheby's. He was that first witness. It was kind of hard to
7 hear what he said sometimes. I have some quotes here for you.
8 He had that British accent and he was sitting a little far away
9 from the microphone. He expected to know if another auction
10 house had rejected the wine. "We rely on them giving us all
11 the information they have."

12 Mr. Egan. Absolutely expect to hear from a consignor
13 of their own doubts or doubts they have heard from others about
14 the authenticity of wine.

15 Maureen Downey. It was the expectation at Zachys that
16 collectors would tell if they had particular information about
17 wines in the consignment potentially being counterfeit.

18 Mr. Zacharia. He got up there. He's the guy who got
19 stuck with this stuff from the seller. I'm interested in any
20 information a consignor has about his wines. If he thought it
21 was wrong, I would hope he would tell me that and tell me it's
22 wrong.

23 That was one of the worst pieces of testimony for the
24 defense that came out in the case. They were trying to give
25 him a softball. Well, if Mr. Greenberg thought it was wrong,

1 he wouldn't care about that. Of course he cared to hear about
2 a clue, a suspicion, a mark of counterfeit that another expert
3 had found. Of course he did. It makes him do his job better.
4 It helps him spot the fakes. It would have stopped these 24
5 bottles from coming through.

6 If the bottle had been identified by someone else as
7 definitely counterfeit, that's information I would have wanted
8 to know before accepting the bottle for consignment. Nobody at
9 trial said otherwise. Everybody said this.

10 If I had known about Kapon's opinion on the Lafleur
11 vertical corks, it would have been made me confirm, try to
12 figure out whether that was accurate or not. By the way,
13 that's what Mr. Egan did. He took the stand. He's the real
14 expert. We'll get to Mr. Lempert-Schwarz later. Remember he
15 said, oh, when I heard about that vertical cork thing, I did
16 more research, I called back to the domains, I looked at
17 pictures.

18 And you know what? Mr. Kapon was right. Those
19 vertical corks, they are wrong. It's another mark of the
20 counterfeit. I already had figured out these bottles were
21 counterfeit six, seven other ways to Sunday, but this is
22 another mark of the counterfeit that I determined, and thank
23 you very much for letting me know. That's exactly what sellers
24 are supposed to do. That's exactly what the auction houses
25 expect.

1 Mr. Zacharia would have wanted to know if Mr.
2 Greenberg had credible information that the vertical cork
3 branding in Lafleurs didn't start until 1966 or that the
4 vertical branding in Petrus magnums before 1966 was not
5 appropriate. He wanted that. Mr. Greenberg didn't give it to
6 him.

7 Mr. Orcutt, that was a witness they called in the
8 defense. What did he say? We would expect our consignors to
9 be forthright and honest, would expect to know about any
10 potential problems they had with what was coming up on offer.
11 Anything that could affect the value of the wine -- condition,
12 provenance -- would be relevant.

13 What I have already gone through shows that Mr.
14 Greenberg at the very least was absolutely reckless. He put
15 his head in the sand. He knew information that an auction
16 house wanted to know, and he pushed them off, hoping they will
17 go through. That's recklessness. You can find liability.
18 Check "yes" for all those bottles, and go home.

19 But you know what, this story got interesting for me.
20 I'm going share some more. We have proved here at trial more
21 than we were required to prove. I found it fascinating to see
22 how this unfolded. Mr. Greenberg's intent was to push off fake
23 and questionable wine. It was no mistake. He did more than
24 stick his head in the sand. He picked it up and helped push it
25 out the door.

1 How do I know that? How do you know that? Mr.
2 Ritchie, he is from Christy's, the first guy who was up there.
3 He said to him -- words he remembers years later, because who
4 says stuff like this? -- if he had counterfeit wine, Mr.
5 Greenberg said, he said he could always sell it through Acker
6 Merrall because John Kapon would take anything.

7 They hate that. They go, well, he doesn't like John
8 Kapon and that's just something to smear John Kapon's name.
9 Really? How come he sat on that information for all this time?
10 If he was out there trying to smear John Kapon, he would have
11 blogged about it, wrote about it, he would gone to the
12 newspapers about it, if he just want to tear down the other
13 auction house.

14 Do you know why he said that? It's because he got a
15 subpoena to come here to this tile. He said, I got a subpoena,
16 I'm testifying, and under the oath he had to tell you the
17 truth. Then he had to say it, and he told it to you. Do you
18 think it is easy in an industry to have to say something like
19 that? He had to say it. Those words damned Mr. Greenberg. It
20 shows that he intended to do it.

21 We will see more corroborating evidence. You saw he
22 tried to do it. He was outraged when Kapon actually said no to
23 him. We'll get to that in a moment.

24 What else was there? Mr. Greenberg said to Cortes,
25 what they did to me I'm going to do to somebody else. Think

1 about this. What did you just see? Mr. Ritchie said, hey,
2 this is what Greenberg said: If he had counterfeit wine, he
3 could sell it through somebody else. Mr. Cortes: What they
4 did to me, I'm going to do to somebody else.

5 These two gentlemen are saying basically the same
6 thing about Mr. Greenberg's intent. They don't know each
7 other. Mr. Cortes is a chef and a property manager in Houston,
8 Texas. Mr. Shartsis was lawyering him this way and that way
9 and the man was trying to give his answers.

10 Well, what explains Mr. Ritchie having the very same
11 sort of conversation with Mr. Greenberg? He is saying the same
12 thing: If I have it, I can get it through somebody else. Two
13 people, two different ends of the earth, never met each other,
14 no connection, they are both saying it because it's the truth.

15 What else? There's more than that, ladies and
16 gentlemen. Boy, they hate this email. I can move, actually
17 try to move some of those suspects Bordeaux for you.

18 Remember Mr. Greenberg, very smart man, said, gosh, I
19 don't know what "suspects Bordeaux" means. You guys know what
20 it means. Suspects Bordeaux. And his answer: I'm putting it
21 on auction. I'm putting it on auction. Same thing he
22 basically said to Ritchie and Cortes. Oh, yeah? I'm going to
23 move them out.

24 By the way, he got caught among a lot of lies, Mr.
25 Greenberg. Then he was like, yeah, he's a bad man, I realize

1 he's a bad man. Oh. But didn't you do business with him
2 afterwards, sir? He had to admit yes, because we had documents
3 showing he did business. Why is he doing business with Mr.
4 Kurniawan, a bad man, who he caught twice doing counterfeit
5 work with? Why? Because he's helping him move his bad bottles
6 of wine, that's why.

7 Then there is this. After the auction, after the
8 October 2005 auction, he writes to Mr. Brierley at Christy's,
9 comes on back to him, he says, "What is important is that I am
10 not going to be cherry-picked. They are buying a collection.
11 The good news is that there is no garbage. That has been
12 sold." They don't like that, either. You don't call the best
13 of the best your garbage, folks.

14 But it's even worse for him. Look at this.

15 Actually, let me go back and set this up. What does
16 "garbage" really mean? Mr. Greenberg, remember when he was
17 asked about tasting those Jayer or "Ja-yea" wines from Ms.
18 Downey? She was like, hey, these are not good, and they
19 brought them to him. Later he said he drank them. He
20 described what they were. These were bogus bottles. He
21 described what they were. Watch the word he uses when he
22 tastes bogus wine.

23 (Greenberg video deposition shown)

24 Exactly. "They are what I call garbage, fakes,
25 disgusting." Fakes are garbage.

1 The good news is that there is no garbage. Here is
2 where the garbage is. He's ready to sell better stuff to Mr.
3 Brierley. Remember, Brierley saw problem bottles in his
4 cellar. Hey, Mr. Brierley, it's all gone.

5 It keeps going. If you have any thought, well, I'm
6 not sure yet about Mr. Greenberg's intent, this takes it over
7 the line. Email from Mr. Kapon to Greenberg. "I don't want to
8 sell wines I have doubts over." He says, "You were the one
9 insistent on the mags, and that if I was confident about them
10 after inspecting them, there would not be this big deal."

11 Why is he pushing Mr. Kapon to take those dubious
12 wines? Because he's trying to push them out the door. He
13 didn't say, oh, my goodness, sorry, a mistake, I didn't know,
14 or let me help you out there. He tells him -- you will see
15 more from that email later -- you take those things, you take
16 those old Bordeaux, those things you don't like, or I'm going
17 to take all my wines back from your auction house. You do it.

18 That's not a man who made a mistake. That's a man
19 putting the pressure on Mr. Kapon. And that fits perfectly
20 with what Mr. Ritchie remembered. Hey, if I have counterfeit
21 wine, I can always get it through John Kapon. He tried it
22 there, got push-back, and he went berserk: I'm fucking pissed.

23 Chapter 4. He pushes his bottles onto the market.
24 Let's go through this. Sotheby's spots fakes. They want all
25 information on questionable and counterfeit bottles. No go.

1 He doesn't go with them.

2 Christy's spots the fakes, wants all information on
3 questionable and counterfeit bottles. Huh-uh. They already
4 are on to him. He know he's got stuff in the cellar. They are
5 going to require him to say anything he knows about the
6 counterfeit. He doesn't want to make that representation.

7 Acker spots the fakes, refuses to sell. He says in
8 the email to Acker, hey, Zachys has already taken them, why
9 aren't you taking them? Acker doesn't take them.

10 He's got one more place to go. He's going to go to
11 Zachys with it. Let's set this up. Mr. Kapon knows there are
12 issues with Mr. Greenberg. Word is getting out about Mr.
13 Greenberg. You did OK, he said, after a 2003 auction, but a
14 lot of stuff didn't sell from '95, '97, other vintages. "I
15 believe that your collection needs to stay more low-key due to
16 too many whispers in the dark." What kind of collection gets
17 whispers in the dark?

18 So, Mr. Greenberg goes to Zachys.

19 I'm sorry. That is bit of a jump. I had this pulled
20 and played for you because Mr. Shartsis said that Mr. Zacharia
21 didn't care to hear about Royal. He did care. Let's play it.

22 (Zacharia video deposition shown)

23 Of course he wants to know that information, like all
24 the others, to focus his examination. It wasn't as Mr.
25 Shartsis represented.

1 Let's go to the Zachys auction. This was the biggest
2 auction in Zachys history. Mr. Zacharia said it.

3 What else? Did Mr. Greenberg really think that
4 Zacharia was going to be the best inspector he had possible?
5 His own words before he was here in this lawsuit: Get him
6 again. He writes to Mr. Zacharia before this auction. "I have
7 little faith that these inspections that have been done and
8 estimates were conducted well based on what I see here."

9 He even says, "You are missing about \$300,000 worth of
10 his wine. How careful are these guys if they can't even keep
11 track of the wine?" He doesn't have faith in their
12 inspections. But that's OK to him because he's ready to pass
13 off a bunch of wine without selling Zacharia anything.

14 Here is the Sotheby's contract. They said, provide us
15 with any information you have concerning the provenance of the
16 property and tell us you have no reason to believe that any
17 lot, meaning any piece of your property, is not authentic or
18 counterfeit. They need that. They want all the information to
19 figure out if they want to go forward. He says there were
20 other reasons, but this contract had this and he didn't want
21 it.

22 Christy's, same thing. Their contract, "Seller has no
23 reason to believe that any lot of property is not authentic or
24 is counterfeit." That's what they required.

25 The Zachys contract did not require that. This is

1 Trial Exhibit 96. You can go to paragraph 18. It's a lot of
2 small print there. Read it and reread it. There is no
3 required representation from Zachys to say here is what I know
4 about counterfeit or inauthentic property. This is the place
5 he goes, the lowest bar.

6 Now Mr. Greenberg thinks he is in the clear, right?
7 Oh, my contract doesn't make me say what I know about my
8 counterfeits. But he's not in the clear. Mr. Zacharia writes
9 to him before the auction, in August of 2005, and he asks about
10 his older Bordeaux. That's all this. It's all older Bordeaux.
11 He says, "The only thing I can tell you about the older
12 Bordeaux is that they were purchased from Eddie Gelsman at Wine
13 Library or Dave Sokolin at D. Sokolin in Southampton." Of
14 course, that's not true.

15 What is the one source that he leaves out? Royal.
16 Why does he leave it out? It rang alarm bells with Christy's,
17 it rang alarm bells with Sotheby's. He leaves that information
18 out because it would have rung alarm bells. You just heard
19 from Mr. Zacharia, with him, leaves it out.

20 You remember Mr. Zacharia being asked, wouldn't you
21 have liked to know about the real sources? We showed Mr.
22 Zacharia one of defendant's exhibits where they went through
23 invoices. It showed just what we are saying. Royal is all
24 over the place, a source over and over again with the wines at
25 issue in this case.

1 Mr. Zacharia, remember when he had it? He was like,
2 yeah, I would have liked to have known this. Yeah, I would
3 like to have known this. He was told two sources weren't
4 suspicious, not told about the suspicious source. Royal Wine
5 Merchants is all over this case as a source. He would have
6 wanted to know all that. Mr. Greenberg had all this
7 information, he knew it, and he decided intentionally not to
8 tell Zacharia because Zacharia would have been on to him.

9 But that's not all, ladies and gentlemen. The next
10 chapter, silencing the doubters. Remember this? Little slips,
11 little moments tell you what really is happening, the truth.
12 Maureen Downey told you that she had questions and issues with
13 these Jayer, "Ja-yea," wines. She's thorough. She went all
14 the way back to the winemaker, the guy, the old man who
15 actually founded the winery and was there, Henri Jayer, asked
16 him, hey, are these bottles right? And he said that they
17 weren't.

18 Downey came back with that information to Mr.
19 Greenberg. What did he say? Hey, thanks for telling me that,
20 boy, I'm sure glad I know? No. He said, that old bat --
21 remember those words? He called him an old bat -- he doesn't
22 know what he's talking about.

23 Why would Mr. Greenberg, who tells you today in court
24 when he doesn't want to have liability, oh, I only have a
25 middle school education in detecting counterfeits, why would he

1 tell her forget the winemaker who makes the wine, that old bat,
2 he doesn't know anything? He was trying to tell her ignore the
3 warning signs, sell the wine. Silence the doubters. That
4 shows intent.

5 What about Mr. Kapon when he tells him he has worries
6 and he's putting him on notice? What does Mr. Greenberg do? I
7 will tell you about some of this later. I'm showing you the
8 words. He erupts. "The entire consignment is pulled. I want
9 it back this week. I am fucking pissed," he says. He's mad
10 that Mr. Kapon is not doing what he thought he would, taking
11 the bogus wines. He doesn't say, sure, send them back. He
12 says, give me everything back unless you take these wines.

13 Kapon tells you what's going on behind the scenes.
14 You read this email. I don't want to sell wine I have doubts
15 over, so please do not bully me into offering these wines. Why
16 is he saying that? Because Greenberg is a bully. You have
17 seen it over and over in this court and from other witnesses.
18 I don't want to get yelled at on the phone or get into a
19 further argument. What does that tell you? There have been
20 arguments, he has been getting yelled at, stop.

21 What is Mr. Greenberg yelling at him doing here? He
22 is trying to push him, take these wines and sell them. That is
23 a person engaged in deceptive practices, ladies and gentlemen,
24 one of the charges in front of you. He's trying to push his
25 bad wines. This is not somebody who is an innocent seller who

1 made a mistake. Far from it.

2 Let's talk about the description of the collection,
3 purposeful deception. This is the cover letter in the catalog.
4 They don't like this document. First of all, Mr. Shartsis was
5 very clever. He asked Mr. Koch in the deposition -- remember
6 we played you those clips?

7 Here is one question you didn't hear. Mr. Koch, did
8 you read the cover letter? He never asked Mr. Koch that. Then
9 he waved his arms around and jumped up and down and told you
10 that Mr. Koch is lying. What did he say in his deposition?
11 "Yeah, I read it carefully." There were no other questions in
12 the deposition about it. Then Mr. Koch was asked, Did you read
13 this? What was it that was important to you?

14 You will be able to go back and look at this. The
15 cover letter, this is the whole description, two pages, not a
16 lot of writing, right up in front about what this whole
17 collection is about.

18 Mr. Shartsis is right, lawyers do say stuff, so I'm
19 going to read it. Mr. Shartsis said Mr. Orcutt didn't review
20 the cover letter. Oh, yeah, he did. I had somebody write down
21 what's in the transcript. I'm going to read it to you. Mr.
22 Orcutt was Mr. Koch's buyer, right? They liked to make fun of
23 Mr. Orcutt. Well, you know, he was the representative. That's
24 right, Mr. Orcutt read this cover letter, too, and he was
25 affected by it.

1 "Q. Was the cover letter, this introduction, of significance to
2 you?

3 "A. I read the cover letter in every auction, and this one
4 would have been no different. I absolutely read this. And it
5 has a lot of interesting information in it.

6 "Q. OK. And what was of interest or significance in reading
7 this letter?

8 "A. Well, anything that makes reference to provenance or
9 history."

10 You're going to see it in here: Sourced on the
11 continent and a whole bunch of lies that don't apply at all to
12 Mr. Greenberg's collection, which he says today he doesn't know
13 where he got it from.

14 "That's something that you would bring to bear," said
15 Mr. Orcutt, "in terms of whether or not you want to bid and how
16 much you want to bid. So if you make reference to things
17 coming directly from a domain," those words are in the letter,
18 "or, you know, things being sourced from, you know, ideal
19 places, those are things that make you think, you know, this is
20 a special or unique treasure trove. You know, did this come
21 from, I don't know, an old family castle in Europe? I mean,
22 these things influence how you want to bid on the wines."

23 Of course it does. He read it, Mr. Koch read it,
24 you'd read it. Let's look at it. They want you to run away
25 from it because it's another basis for liability. These

1 representations cover all these bottles. One wrong
2 representation, you check "yes" for all the bottles and you're
3 out of here. And there are plenty of them.

4 Let's start with Mr. Greenberg running away from this.
5 I caught him on it as it went: Hey, this isn't important, this
6 is not a description of what was being offered for sale.
7 That's just wrong.

8 Here is Mr. Greenberg to Mr. Zacharia. We showed you
9 this at trial. I won't spend a whole lot of time on it. He is
10 writing in all caps, "Please see comments. I want to review
11 the next draft as well. Great Wine: The Quest." He is giving
12 Mr. Zacharia the language he wants in this. "Best of the best
13 collection, that should be talked about."

14 Now, Mr. Shartsis said, well, people talk about
15 puffing kind of language. I'm not asking you to find liability
16 just on best of the best. But it's particularly awful when a
17 man who is telling his employees pick the shittiest bottles
18 actually writes in this thing it's the best of the best. He
19 knew something uniquely about what was going to be coming out
20 of that cellar. This is very misleading. But that's not it.

21 "I don't think you should state the original size, as
22 it shows heavy selling, and I don't want my targeted cellar
23 listed, as it makes future selling have to be justified." Why
24 is he writing this? He doesn't want Mr. Koch and other real
25 collectors to know that he is a humongous wine seller, wine in,

1 wine out, wine in, wine out. That would make any buyer
2 nervous. Oh, my gosh, what kind of quality control is going on
3 there?

4 There was no quality control going on there. He
5 didn't even trace his bottles or bar code. He wasn't a true
6 collector, a treasure trove. Mr. Shartsis made some fun of
7 Alexander the Great. This is way, way far from Alexander the
8 Great.

9 He was trying to hide that he was a major seller
10 because it would have made people like Mr. Koch and others a
11 lot more worried a lot more cautious. Mr. Koch told you, if I
12 had known he was the biggest wine seller in the world or just a
13 big seller, I would not have been interested in this, I would
14 not have bought 2600 bottles from this man.

15 What else? Mr. Greenberg tried to tell you, I didn't
16 write this or edit it. He wrote the whole last paragraph.
17 When you go back there and look at this, this is his language,
18 "one of the greatest consignments ever auctioned," "some of the
19 greatest wine of all time." He knew some of this greatest wine
20 of all time had bogus bottles and were the crappiest bottles.

21 I love this one. He is rewriting the sentence that
22 ends up with "sourced on the continent," one of the biggest
23 lies in the case.

24 This next sentence is questionable, "Why beg the
25 question of doubters?" Mr. Greenberg doesn't like anybody

1 doubting or becoming suspicious. He doesn't want people
2 finding out about the nature of his wine. He doesn't want
3 people to have their radar up so they can find and detect it
4 and keep it from an auction. He wants every suspicion, every
5 concern to be wiped out from that introduction so that nobody
6 thinks, boy, I better inspect or that no one thinks, I should
7 just walk away.

8 He says, "Let's say this. Upon inspecting the old and
9 crumbly cork, it was fully stamped as," and you finish the
10 sentence, "as with all corks of all these Right Bank magnums,"
11 All these are right bank, that means Bordeaux. "All these
12 Right Bank magnums sourced on the continent." Lie. None of
13 these are sourced or traced back to the continent. That one
14 lie itself covers every bottle here. That is enough as an
15 intentional misrepresentation for you to find liability.

16 Mr. Greenberg still tried to back away from this.
17 "Actually, I gave him suggestions and I never saw another copy.
18 I never received another draft." Three times he told you, "He
19 never sent another draft to me." Wrong.

20 Updated intro. Here you go. He had asked for Mr.
21 Greenberg's OK, and Mr. Greenberg got it. Mr. Greenberg then
22 tried to say, oh, that doesn't mean I was signing off. What
23 did Mr. Zacharia say? He said to you, I put this in my file.
24 This was the approval. That's why I kept it in my file.
25 Zacharia outed him when he took the stand.

1 "I was not involved. No, I did not edit the
2 document." How many times did he say things that just weren't
3 true? We are going to see lots of this. "Zacharia was in
4 complete and full control. They didn't want me to tell them
5 anything." That's totally wrong. You're going to see in it a
6 moment. "Mr. Zacharia is in fact the author of this document
7 that you are trying to ascribe to me. It's not my document.
8 It's Mr. Zacharia's document."

9 Ladies and gentlemen, Zacharia and Greenberg are
10 putting on the Greenberg Collection and he's editing and
11 rewriting this thing. He's making direct representations and
12 what we call indirect representations. He's blessing this
13 thing. He's rewriting it. These are his statements. Hold him
14 liable for them.

15 Here is some of the evidence, of course, that Mr.
16 Zacharia kept checking in with Mr. Greenberg. You know Mr.
17 Greenberg by now. He wouldn't have it another way. "Please
18 look this over and give me your thoughts or an OK, Mr.
19 Greenberg." Please give me your thoughts. Then you saw this.
20 It came back. "I want to review the next draft as well."

21 Then there is more. I showed this email to him on my
22 cross-examination. He is writing to Zachys. It's Mr.
23 Greenberg large and in charge. "We need to resolve all this
24 before we go to press," before we go to press, "with the
25 catalog." Remember when I asked him about that? He was like,

1 well, "we" doesn't mean me. It's the words he wrote before he
2 was caught, folks. Hold him to it. It's a partnership.

3 What else is he doing? It's not the only thing he
4 said. "I am OK with the overall category flow, with a few
5 exceptions. As an overall note, we still," we, "have much to
6 do we. I don't like the flow of the other wines in this
7 catalog. No way, absolutely not going to go by vintage.

8 "When do you want to go through the lots?" The lots
9 are what is being offered here. He is telling them how to
10 write and put on the auction. Greenberg is the guy behind the
11 scenes. Like the puppet, he is in charge here.

12 This is what I call consciousness of guilt. How do
13 you know he knows he done it? I don't even need to prove this
14 to you. We got recklessness. But there is plenty of this.

15 They don't like this one at all. I put both up here,
16 the response from the consignor and Mr. Greenberg's email to
17 Zacharia. Now let's set the stage for this.

18 Mr. Greenberg has already by this point lied to Mr.
19 Zacharia, telling him here are two sources but leaving out
20 Royal. That's called a material omission. That means you kept
21 information that you know would be important to somebody and
22 you didn't let it go. That's the other charge in this case.
23 Mr. Shartsis didn't talk about it.

24 (Continued on next page)

25

1 MR. HUESTON: Fraud by omission. That means leaving
2 out stuff you know people would want to know to know the whole
3 truth. That was the first lie, and the older Bordeaux, he kept
4 the information about Royal away from him.

5 What happens here though? What happens here? The
6 e-mail, it's clear, is coming from a buyer, and at this time
7 Mr. Koch doesn't know that the bottle of 1921 Petrus is bogus.
8 He's asking questions.

9 MR. SHARTSIS: Your Honor, may I object to putting
10 this up and not putting the complete statement Mr. Greenberg
11 made? He omitted the first line where Mr. Greenberg said, "I
12 don't know which mag you're talking about."

13 MR. HUESTON: He's had it up, and I can show whatever
14 I want from this.

15 MR. SHARTSIS: I object. You know, I don't have a
16 rebuttal, but I'm going to object to the use of this a
17 suggestion about Mr. Greenberg's response, because it omits the
18 sentence that precedes this. In fairness --

19 MR. HUESTON: It's argument, your Honor.

20 THE COURT: Well, I'm going to clarify to the jury
21 that I've given the lawyers a chance to put up sections of this
22 that are in evidence. However, what would control is the
23 examination by the jury of the entire thing. So these are
24 demonstrative exhibits. You'll have a chance to see all these
25 documents in their complete form.

1 MR. HUESTON: When Mr. Koch asked, what about the
2 history or provenance of this 1921 Petrus, Mr. Greenberg makes
3 it up. He said, "A lot," means a group of it, "came from a
4 collector in Toronto." You'll remember at trial, I said,
5 "Isn't it true, Mr. Greenberg, you said in your deposition that
6 could have been made up?" He said yes.

7 And the other part of it is, "many came out of Europe,
8 in many cases from English royalty." That's just a flat out
9 whopper, ladies and gentlemen. That's just totally false. Why
10 was he saying this and passing this back on to Mr. Zacharia,
11 knowing it's getting back to Bill Koch? Because he was trying
12 to throw him off his trail. We know, and he's admitted in
13 cross-examination, he had five sources for 1921 Petrus magnum,
14 sold to Bill Koch. Royal Wine Merchants, Wine Club, Wine
15 Library, D Sokolin and Company, and something called Pritam
16 Banerji. He said for the top collector, or collector out of
17 Toronto, "As far as I know, it could have been made up."

18 Folks, why does someone say something like that? Mr. Koch told
19 you, "When I heard that, it reminded me about what I had been
20 reading in the cover letter." On the Continent, top collector,
21 sourced -- sourced from the Continent, meaning Europe.

22 Mr. Greenberg gave information to try to lull the buyer into
23 thinking: Don't worry, all is well. Sounds just like that
24 cover letter. Don't you worry. Why would he tell him that?
25 It is just a lie to try to throw the buyer off his trail so he

1 could get away with it.

2 Luckily Mr. Koch didn't give up, and we'll get back to
3 that. His second contact. Right here. Mr. Shartsis forgot to
4 tell you about the rest of the conversation that Mr. Koch had
5 and he testified to with Mr. Greenberg. Remember, later on,
6 months after the auction, after he got saddled with the
7 bottles, he found one that he finally figured out, okay, this
8 one is a dud. It's a fake. He calls Mr. Zacharia, he gets the
9 information finally to get to the consignor, and he gets
10 Mr. Greenberg on the phone. And what does Mr. Greenberg do?
11 He describes himself as a victim. Oh, my goodness, these guys
12 from Royal, they're like the mob. They are threatening my
13 life, he says. And Mr. Koch said -- remember I said, "Well,
14 how did you interpret that?" He said, "He was trying to tell
15 me to stay away from this; otherwise I'd get involved with
16 organized crime." That was what he -- Mr. Greenberg was saying
17 then. Now that Mr. Koch has spotted the fake, he can no longer
18 say, well, it's not a fake. He goes: Oh, well, you know,
19 there's this Royal Wine, and, boy, they're with the mob. Then
20 he throws out the other statement he tries to claim he's just
21 laughing about. Mr. Koch remembered it. And he said Bordeaux
22 Wine Locators is one of the worst counterfeiting shops. But
23 that wasn't a concession, because the bottles that Mr. Koch was
24 talking about didn't have Bordeaux Wine Locators on them. How
25 do we know this was a lie? Because you heard from this man.

1 (Video played)

2 MR. HUESTON: Mr. Greenberg was threatening his life.
3 And you've seen Mr. Greenberg, and you've heard other people.
4 You heard Mr. Cortes, when they really wanted to push him to,
5 "Why did you call Mr. Greenberg an asshole?" Remember he gave
6 you an example. He beat up a delivery boy. Mr. Greenberg's a
7 tough guy. He was threatening this guy's life. But when
8 Mr. Koch is calling saying, "Hey, I got this bogus bottle,"
9 "Oh, yeah, there's this Royal Wine and they're threatening my
10 life." A whopper, designed to push off Mr. Koch and not
11 inquire further. Another sign of the fraudster.

12 What did he do here at trial? He denied things that
13 were obvious, that he wrote before he was caught. And he spun
14 as much as he could to avoid responsibility. Let's go through
15 a few examples. I'm sure you'll have many.

16 We already talked about this. "Bordeaux Wine Locators
17 is the worst counterfeiting operation in the world." That's
18 what he said then. He said: That's just what people say when
19 we're friendly to each other. But Mr. Koch said: No, that's
20 not what happened. When he told me, he was bloody serious
21 about it.

22 And then there's this one. "I can try to move the
23 suspects Bordeaux for you. I am putting it on auction."
24 That's what he says. How many stories --

25 MR. SHARTSIS: Your Honor, misstatement of the

1 document, and I object to it.

2 MR. HUESTON: How many stories is Mr. Greenberg going
3 to be telling about this moment in time?

4 MR. SHARTSIS: It's just a misstatement of the
5 evidence, your Honor.

6 MR. HUESTON: Let's count them.

7 Not at all.

8 MR. SHARTSIS: Because the statement does not match
9 what is being shown up here on the screen. It matched to a
10 sale of Bordeaux.

11 MR. HUESTON: I'm going to move to strike that as
12 improper argument.

13 THE COURT: Once again, I'll instruct the jury you'll
14 all have a chance to look at the evidence and be able to look
15 at each document in context.

16 MR. HUESTON: You remember the one goofy thing he
17 said? "Well, I don't put quotations around the word 'suspects'
18 so I don't know what 'suspects Bordeaux' means." You know
19 that's false.

20 But there is more. He says, "Rudy is coming into town
21 next week and I asked him to take a look with me so that we can
22 really take a long hard look." Look. He was running away from
23 Rudy Kurniawan at this trial, as far as he could. Remember
24 what he said? "I don't even know what 'with' means," when I
25 showed him this document. He didn't want to be attached to

1 Kurniawan.

2 How about this one? The November 23rd, 2004 e-mail
3 from Mr. Greenberg to John Kapon, the part where he says, "I am
4 fucking pissed"? Clearly showing he's mad that he's not
5 pushing and taking his bad wines? Know what he said? "And you
6 were very mad at Mr. Kapon, weren't you?" "No, no." Don't --
7 don't look at my words and believe them.

8 He then told you that when he writes with all caps --
9 remember when he said this: I don't think. I just write. I
10 don't think about the words. Ladies and gentlemen, look at his
11 all caps. He's thinking as he's writing. He just doesn't want
12 you to believe what he wrote before he was caught. "I'm
13 putting it on auction. They are fake in my mind. Why beg the
14 questions of doubters?" He says: When I'm doing all caps
15 stuff, I don't even think, I just type in. That's another
16 whopper.

17 This is one that I thought was amusing. Remember when
18 he went through the Royal Wine Fake Summary Notes, he tried to
19 tell you that all he cared about were the corks? Well, that's
20 kinds of funny because often he didn't mention the corks or he
21 put the labels up top. And he goes: Oh, actually, the lower
22 ones on the list were more important. "You put the most
23 important things lower on the list?" "Mm-hmm, lot of times."
24 You believe that, ladies and gentlemen?

25 And we looked at a piece of this earlier. "Sir, you

1 took the time to edit Mr. Zacharia's letter before it went into
2 the auction catalog, didn't you?" "No, I didn't. I just added
3 a few comments." "You did not edit?" "No, I did not edit. I
4 wasn't involved in writing the letter." And then we saw the
5 proof that in fact of course he was.

6 Here's something that he really tried to run away
7 from. He's trying to keep his hands off the bottles. I showed
8 him an e-mail. It's Exhibit 528. He said, "By the way, I
9 consigned more than 14 bottles of special 1961 Latour. I
10 believe we sent 18. Where are they? I personally pulled
11 them." What did he say? Oh, I just meant I looked at them.
12 Uh, the other guy pulled them, I didn't do the labor. You
13 believe that, ladies and gentlemen?

14 And this is one of the best. Here's what his document
15 said. Exhibit 390. "Petrus changed the cork in 1966." You
16 know what he said at trial? "I didn't believe Petrus changed
17 the cork in 1966." Which Mr. Greenberg do you believe? The
18 one that wrote that e-mail before he was caught or the one at
19 trial who said ignore what I wrote because it shows that I had
20 specific knowledge about those Petrus bogus corks? It's the
21 one on the left.

22 Here's the other thing you're going to have to
23 believe. To believe Mr. Greenberg, you're not only going to
24 have to ignore all his documents, which clearly show he knew
25 what he was doing, he was trying to push these wines, you also

1 have to believe that almost all the other witnesses in this
2 case are all in a conspiracy to lie about him. You'd have to
3 believe that Mr. Brierley, who testified by videotape, was
4 lying when he said under oath that he gave Greenberg bad news
5 about his wine collection. Mr. Greenberg said, oh, he lied
6 about that. That the man I just showed you there, he was lying
7 when he testified under oath that Greenberg threatened his
8 life. Mr. Cortes was lying when he testified under oath that
9 Greenberg told him, "What they did to me, I'm going to do to
10 someone else." That Ms. Downey was lying when she testified
11 that she saw wines she had personally rejected from
12 Mr. Greenberg while working on Zachys. He even said that his
13 lawyer, Tony Coles, who's sitting there at the table, that he
14 made a false statement when he wrote in Mr. Greenberg's draft
15 complaint against Royal that one international auction house
16 inspected parts of this wine collection. At trial here he's
17 run away from anything close to the auction house inspected and
18 found fakes. When his lawyer wrote it, he says: Now I want
19 you to believe that was a false statement. He wants you to
20 believe that Mr. Ritchie was lying when he testified under oath
21 that Mr. Greenberg told him he could always sell his fakes
22 through John Kapon at Acker Merrall. He even said that part of
23 the insurance company's report, done under the supervision of
24 Gail Clark, are outright not true, so the insurer -- insurance
25 company people who are writing down what he's saying, they're

1 lying because he doesn't like what they say. Folks, you got to
2 be thinking, are all those people lying and Mr. Greenberg
3 telling the truth? Which one is it?

4 Let's go to what I call smoking guns. Most of the
5 time, ladies and gentlemen, you have one smoking gun in the
6 case, the one "aha" moment where you go, okay, we know he was
7 trying to lie. There are actually many smoking guns in this
8 case, some of which you've already seen.

9 Here it is, the English royalty statement. Came from
10 a collector in Toronto. Came out of Europe and many cases from
11 English royalty. That's just a flat out lie. He's just caught
12 there and there was no way to explain it. He gave this
13 information to Zacharia. He had never said previously to
14 Zacharia that his wine came from English royalty. We know
15 that's just false. He admits at trial that this could have
16 been made up, and of course Mr. Koch relied on it. Mr. Koch
17 was trying to get the information. This was what came back to
18 Mr. Koch.

19 How about this? We've gone through some of this.
20 Mr. Kapon tells Mr. Greenberg about problems with the Lafleurs,
21 the very same problems as the bottles here. He wants specific
22 information in his head. He's got it here with 17 total
23 bottles. "There's one fundamental problem. The corks all have
24 vertically, ovally Chateau Lafleur brand on the cork, which
25 they only used after 1966. I can't offer these in good

1 conscience." Why is this an important document? Because
2 Mr. Greenberg admitted that he regarded Mr. Kapon as his own
3 expert. He told you that he hired Mr. Kapon since then to
4 review and authenticate his wines. He viewed him as an expert.
5 So when Kapon told him it was wrong, he knew he had information
6 that was important. And he decided to keep that back. When he
7 decides to keep that kind of information back, that is a
8 material omission. That's enough to find all those affected
9 bottles as wrong, as part of a fraud. And you saw the vertical
10 corks. These are the photos of the bottles in this case.

11 And then his own words, another smoking gun. His own
12 words in his own e-mail get him on the Petrus bottles. He
13 says, "Petrus changed the cork in '66; are you saying that
14 Lafleur did as well?" Yeah. The Petrus changed the cork. He
15 didn't want that. He tried to say, "I didn't mean it when I
16 said it," because he knows that three bottles have the wrong
17 corks here on Petrus. All three are vertical, all three are
18 wrong. He had that information, he didn't pass it along to
19 Zacharia or any -- any buyer, 'cause if he had known it, he
20 said another expert -- Acker Merrall, who he pumped up and said
21 was the biggest auction house in the world, the CEO of the
22 biggest auction house in the world said, "I won't take these
23 bottles," that's information any buyer would want to know.
24 Bounced from the biggest auction house in the world. Of course
25 you would want to know it. Of course another auction house

1 would want the heads up so that they wouldn't slip by.

2 We've gone through this. The worst counterfeiting
3 operation in the world. We've talked about the bottles
4 affected by that. And then the bullying of John Kapon. I just
5 bring it up again because, again, is this guy just making a
6 mistake, is he innocent, why is he bullying John Kapon to pass
7 off the bogus wine? Because he wants to push it off; that's
8 why. Common sense, ladies and gentlemen. That's what you're
9 here for. That's why we don't try the judge to -- I'm sorry --
10 try the case to just a judge. We try it to people who bring
11 common sense. What is your common sense telling you here about
12 what he's trying to do?

13 Two stories, ten minutes apart. The first answer he
14 gives, when Mr. Zacharia is asking him about information from
15 the older Bordeaux, first he says, "I can't provide this. I
16 have many sources and can't tie them to the bottles." He
17 should have stopped right there. He thinks about it for ten
18 minutes, and then he gives the information that he knows will
19 give more information about the sources to get a more -- get
20 him more money. "Well, the only thing I can tell you is that
21 it came from two sources." The only thing. Well, the other
22 only thing is that he left out Royal. He intentionally did it
23 here, folks. He started with the right answer, said, I'm going
24 to tell them about the other two but not Royal. That will help
25 boost up my price.

1 And Mr. Zacharia, what did he say? The two sources
2 Greenberg provided, he says at the trial, were sources that did
3 not raise any red flags as sources of counterfeit wine, and he
4 would have had concerns about Royal. Mr. Greenberg knew it
5 because Christie's and Sotheby's had already said, whoa, Royal
6 is bad news, and it made them look around and spot bad bottles.

7 We've covered this. He actually said what he intended
8 to do to two other people, and then he was caught doing what he
9 said he'd do. I haven't focused on this. Mr. Ritchie said he
10 caught Mr. Greenberg selling wines he believed to be
11 inauthentic at Zachys. Mr. Brierley said there were
12 problematic bottles that he spotted offered at auction at
13 Zachys -- bottles that had come from Mr. Greenberg's
14 collection. Ritchie at Sotheby's sees him do what he says.
15 Problematic bottles, and he sees that they've been passed on by
16 Mr. Greenberg at an auction. Brierley, same thing. Spots
17 problematic bottles, my goodness, I saw it for sale. Caught
18 him. And three, Downey, she spots Greenberg's rejected wines
19 on the cover of the Acker catalog, only weeks after she
20 rejected them. They like to make fun of Maureen Downey. She's
21 the third person who spotted him doing the same thing. Three
22 times, before Mr. Koch brought this case here to stop him the
23 fourth time.

24 Let's talk about the "suspects Bordeaux" e-mail and
25 let's talk about what he said at trial. There were so many

1 stories, you just figure out which one you want to get. At
2 trial, he says: Hey, "I'm putting it on auction" refers to the
3 Georges Churchy 1899 Petrus. The rest of that quote says a bad
4 bottle. Well, that's fine. If you want to push the bad bottle
5 of Churches Petrus -- or Georges Churchy, that's not making it
6 look too good. Same with "suspects Bordeaux." Both those
7 answers make him look like he's pushing bad bottles. But what
8 does he say in deposition? Remember I said, "Well, sir, that's
9 not what you said in deposition." And he said, "I was confused
10 at my deposition." Let's play that clip, and ask yourself,
11 does this look like a man when he's telling another whopper,
12 whether he was confused? Let's see.

13 (Video played)

14 MR. HUESTON: Did he look confused? He's just telling
15 another whopper. Keeping you away from the words. What do the
16 words tell you? He was intentionally moving this stuff.

17 And then there's this. I call it the fingerprint. We
18 started with this. This is the smoking gun. He can't run away
19 from this. Oops, forgot to peel the sticker off this one. But
20 you know what, he was still good, he thought. He was still
21 okay with that because the bottle goes to Zacharia, and I guess
22 he doesn't figure out that 41 means anything. These bottles
23 have lots of stickers on them, right? So 41 doesn't mean
24 anything to Mr. Zacharia. Well, number 41 would have meant
25 something to Mr. Zacharia if he had been told about Edgerton

1 putting numbers on the bad bottles. And Mr. Greenberg kept
2 that out from him. What does he have the nerve to do at trial
3 here? I -- he actually has the nerve to blame his employee.
4 "Not me." This is a man who will take no responsibility. "Not
5 me. Mr. Lovato, he must have gotten it."

6 What did Mr. Cortes tell you? He said, you know what,
7 those Edgerton bottles were in another whole part -- they were
8 in some other part of the cellar, not other bottles other than
9 Edgerton, but the Edgerton bottles were there. Remember I
10 asked him: Is there a way you can kind of make a mistake and
11 get into that box with those Edgerton bottles? He goes: No.
12 Did you ever see one kind of magically float out, come out?
13 No. No way you can make a mistake on number 41. Someone went
14 in there and took that bottle and sold it. And someone made a
15 lot of money off that bottle. And that wasn't his employee,
16 Mr. Lovato. You think he really did that, walked in there and
17 grabbed the bottle with the "I'm a fraud" tag on it?
18 Mr. Greenberg, the man who personally pulled bottles and then
19 tried to run away from the e-mail that showed he put his hands
20 on them? He did that. Told you he peeled some of those
21 stickers off. I guess the mistake he made here is he forgot to
22 peel that sticker off. Well, it's there. It's a smoking gun.
23 And it's another basis for liability.

24 Then he plays the blame game here at trial. Let's
25 talk about this. I call this blame the bike messenger. I'm

1 not sure what Mr. Shartsis was doing. He seemed like he was
2 starting to suggest these aren't bogus bottles of wine. I
3 think it's beyond -- if this was a criminal case, we'd have
4 beyond a reasonable doubt. There's not a question this stuff's
5 bogus. Mr. Jamie Martin, he took the stand. He told you how
6 he saw such clever counterfeiting, looked like it came from one
7 operation. Mr. Lempert-Schwarz took the stand. I'll talk to
8 you about him later. Remember the guy who like fibbed about
9 his background and everything else? He tried to come up with a
10 whopper to explain away what Mr. Martin told you about these
11 really well-designed labels. He said: I know, hey, a bike
12 messenger could have had it and fallen down and cut himself on
13 these things with these labels, trying to bring them to the
14 chateau, and then they pasted them on, and maybe they looked
15 bad that way. But that didn't work, right, because, wait a
16 minute, these are bottles of wine from all these years,
17 decades. So Mr. Camp asked him: Oh, okay, so bike messengers,
18 were they falling down every year, every year you've got bike
19 messengers falling down and putting cuts in these things, is
20 that the answer? He's like: Yeah, yeah, maybe. You believe
21 that, ladies and gentlemen?

22 Blame Mr. Elroy. They spent a lot of time at trial on
23 this. You know what, ladies and gentlemen, when you don't have
24 a defense, you start distracting. We just finished March
25 Madness. I don't know if anybody was rooting for a team, but,

1 you know, you're looking for the foul shot, and the fans in the
2 back are trying to distract you, they're moving the balloons
3 around, arms around, hoping you miss the shot. That's what
4 they're having you do here: Hey, what about Mr. Elroy? What
5 about him? Mr. Elroy's not part of this case.

6 You've got the evidence in this case. You have the
7 experts who have told you beyond any doubt this stuff's bogus.
8 All they come up with is, we found a memo that has an extra
9 line in it on a conversation with a guy who never appeared at
10 trial, Mr. Berrouet. And that extra line says that
11 Mr. Berrouet said that Petrus didn't even make the kind of
12 bottles back then, and Mr. Elroy, a former FBI agent, said:
13 Yeah, okay, but both these things I wrote back into the memo,
14 added it back in, it's true. What I wrote there in the extra
15 line is true, and what I wrote in my earlier interview is true.
16 Mr. Koch got up there and he told you: I went to that chateau
17 and I asked the question and I verified, this is true. So
18 where are we going with this? I'm unclear where this is going.

19 And Mr. Egan, in case anybody has a doubt -- he's the
20 expert that testified here -- he checked up on that. He said
21 he contacted and made a check on that and that information was
22 true.

23 It's called the distraction technique, folks.
24 Mr. Elroy doesn't go anywhere here in terms of this case, but
25 they want to somehow make an issue about Mr. Elroy and distract

1 your attention from the actions of Mr. Greenberg, which are the
2 actions of somebody intending to push bad bottles out the door.

3 Oh, and I wasn't going to mention it, but the lawyer
4 just mentioned it. They were making some accusations here,
5 saying the lawyers lied to you. You know, the only time
6 somebody said that lawyers lied during the trial was when
7 Mr. Greenberg blurted that out when I was questioning him.
8 "Your lawyers have lied." Your Honor told you the next morning
9 that thing that Mr. Greenberg said is wrong, is false. It's a
10 false statement. Another thing Mr. Greenberg was doing to
11 distract your attention and the court told you it's wrong, you
12 can ignore all that. His lawyers are doing it too. You can
13 conclude what you may about that.

14 Mr. Lovato, I already went through. He tried to blame
15 his poor employee. He's a guy who put the fingerprint bottle
16 out. You can discard that one without any more comment.

17 Zachys. Let's blame Zachys. Folks, why is it
18 improper to blame Zachys? Because Mr. Greenberg sought Zachys
19 out. He got the contract he wanted that he didn't have to make
20 those representations. He knew they weren't as good at
21 inspecting. He wrote them that e-mail. Caught red-handed,
22 like, you guys aren't good at inspection, just what he wanted,
23 and then he shows up here at trial and says: Huh, Zachys is at
24 fault. Go back there, ladies and gentlemen, and you'll see a
25 percentage. "Blame Zachys for it all. Not me." Don't buy

1 that for a moment. He's trying to tell you he shouldn't be
2 responsible for this. Of course he is. Blaming Zacharia after
3 he hides all the facts that he knew would have put Zacharia
4 onto it is wrong. You don't do business that way. You don't
5 conduct yourself as human beings that way. That's why this is
6 a fraud case. That's why this is a General Business Law case.

7 And then the capper to me is: Oh, I can do this and
8 then hide behind the boilerplate at the back of the catalog,
9 the "as is" provision. Please. The judge is going to tell
10 you -- I'll spend two minutes on the "as is" thing. He's going
11 to tell you, Mr. Koch was right. It's BS when people commit
12 fraud. It doesn't protect you. When the seller has
13 information that no one else has, the kind of information you
14 want to know, you've got to tell them. You can't hide behind
15 the "as is" clause. So much for the "as is" clause.

16 Mr. Edgerton. What was that about? They called him
17 up at trial. You know what he said: Yes, here are the 24
18 bottles. Um, I don't find any of them authentic. That was
19 another distraction technique. What was that? Oh, let's blame
20 the victim, Bill Koch. You knew that was coming. He jumped up
21 and down about how the capsules were cut. Mr. Koch didn't
22 remember that. It's not a sign of fraud. Capsules are cut so
23 that they're visible. It's not something that Mr. Koch
24 remembered in his deposition. Who cares? Capsules were cut.
25 They're mutilated. That's what these things -- that's what

1 some of those old bottles -- so if you can possibly see through
2 this dark glass that's there.

3 How about inspection? What I love here is
4 Mr. Greenberg is once again trying to hold Mr. Koch to a
5 standard that he doesn't hold himself to. He doesn't inspect.
6 And you heard person after person saying, you hardly ever get
7 any inspection. And when you do, it's a few bottles. It's not
8 the industry practice and standard. And guess what? When you
9 read this cover letter, you start getting suspicious? The
10 cover letter in this catalog was designed to make you feel
11 really good about the bottles. Not a hint that it's going to
12 make you worry to inspect.

13 And Mr. Shartsis tried to play a lawyer's trick. Oh,
14 yes, you heard Mr. Koch, first he said he read this letter and
15 didn't want to look. Well, that's right. He said: When I
16 read this letter, I didn't think I needed to inspect. Who
17 would have thought there was a need to inspect? And then he
18 was asked later: Well, Mr. Koch, let's just say you did find a
19 reason to inspect. Do you think you could have at that time in
20 2005? Mr. Koch told you: It's like I didn't -- I didn't think
21 counterfeiting was a widespread problem at the time.

22 Mr. Orcutt, his buyer's representative, said the same thing.
23 This wasn't a widespread problem known at the time.

24 Mr. Orcutt, his representative, didn't recommend inspection.

25 Mr. Koch said: I'm buying 2600 bottles of wine. What do I

1 start inspecting? Where do I start? Mr. Shartsis says: Oh,
2 well, this isn't that many bottles. I'm sorry. What do you
3 have, some sort of bottle radar? You go into the warehouse and
4 you just magically come to these 24 bottles and then you look
5 at them? There were thousands of expensive bottles. Take a
6 look at Exhibit 100. It's the invoice. Mr. Koch buys
7 expensive bottles of wine. They're all expensive. Where do
8 you start? There are hundreds of bottles in there that are
9 over a thousand, over \$2,000, over \$3,000. Mr. Egan told you,
10 it would have taken him 25 minutes a bottle to do the work to
11 review.

12 We've covered the cover letter. Let's continue.

13 Oh, the reasons -- of course, Mr. Greenberg wrote to
14 make sure buyers like Mr. Koch had no reason to be concerned.
15 25 minutes to inspect a bottle. It would take 1,100 hours to
16 inspect 2600. That's about half a year of work weeks. You
17 can't do that within two weeks, folks. You get this catalog
18 less than two weeks to go. What is Mr. Koch supposed to do,
19 helicopter a group in to pile through the offsite auction house
20 when he doesn't have the single suggestion in here there's
21 something to be worried about? It's absurd. 27 weeks of time.

22 Mr. Egan said: I can't even remember where a buyer
23 even inspected 50 bottles. Mr. Ritchie: Inspection is rare,
24 because buyers trust the information in the catalog. Well, no
25 kidding. Why would you think about piling in and doing an

1 inspection and spending loads of money on that when you're
2 given not a hint of it? Mr. Orcutt: Very uncommon. Doesn't
3 inspect. And of course, Mr. Greenberg. He doesn't inspect,
4 but he's asking you to say Mr. Koch -- think about it. I'm
5 going to step back for a second. You know what he's asking you
6 to do? He's saying: Find no liability here. Blame Mr. Koch
7 for not finding my fraud. I don't inspect, but he should have
8 inspected to find out what I've done. Folks, reject that.

9 All right. Let me quickly go through this. Folks,
10 again, remember this big chart? This was Mr. Egan. If you had
11 any thoughts about, is this stuff bogus, Mr. Egan found reason
12 after reason after reason why these were bogus, and yes, later
13 when he learned about Mr. Kapon's issue, he looked, he did
14 research and said, here's another reason why the Lafleurs and
15 Petruses are bogus, but he already found lots of reasons.
16 They're counterfeit six different ways to Sunday. No question
17 about it.

18 But just in case you had any concern, we had
19 Mr. Martin get up there. Here's his summary chart. You
20 remember seeing it. He told you how every one of these bottles
21 had a very carefully created bogus label, sophisticated, cuts
22 and nicks to make it look really old. That's not what innocent
23 people do in their cellar if a label flops off. They make a
24 photocopy and slap it on and they don't try to make it look old
25 with glue to make it look like it's an old-time thing. They

1 just put the label back on. He said these were cleverly made
2 counterfeits. And they all came from a single source. They're
3 all bogus.

4 What happened? \$355,000 for 24 worthless bottles,
5 folks.

6 Let's just quickly run through these.

7 This is the 1928 Latour, Exhibit 200, identified to
8 Mr. Greenberg by Edgerton as definitely counterfeit.

9 Same problem with the copied label identified by
10 Mr. Edgerton on the other 1928 Latour.

11 Two 1921 Cheval Blancs. Mr. Kapon warned
12 Mr. Greenberg about the photocopied label you see on both of
13 these. And Mr. Greenberg passed them off.

14 1945 Lafite. The one with the yellow label that got
15 past Mr. Zacharia. Mr. Kapon warned him, and Mr. Greenberg
16 moved it on out again.

17 Chicago Wine Company, they bounced it. They said they
18 would not have offered this magnum for sale if they had known
19 of cork issues. He passes it on.

20 12 Lafleur magnums. We've talked about that. That's
21 with the long cork.

22 And then the wrong Petrus bottles. And
23 Mr. Greenberg's nose was wrong. That's five more of them.
24 Exhibits 215 to 218 and 228.

25 He talked about Bordeaux Wine Locators. That's

1 another eight bottles. Now you got double Xs on some of these.

2 And then the ones that came from Royal Wine are or
3 look very, very similar. Now you got double and triple Xs.

4 Let's just -- there's been a suggestion that maybe
5 these are different. There's every -- there's every suggestion
6 in here that these are the same. There's been: Oh, hey, the
7 corks look different sometimes when you look at them. Maybe
8 they're different bottles. You heard from expert after expert,
9 lean one of these bottles on the side, some of the wine comes
10 up, you can't really see the cork. You put it back up again,
11 the cork shrinks and looks different. The fact that the cork
12 looks a little different from one expert to another doesn't
13 mean it's a different bottle. It's just what happens to corks.

14 But what do you have here? The 1921 Petrus from the
15 Royal Wine Fake Summary Notes, the Gil Lempert-Schwarz report,
16 they're saying the same thing. "Badly obscured cork, no
17 visible date on cork." Lempert-Schwarz: "Cork, parts of the
18 name are visible, badly obscured, cork, vintage of 1928 is
19 legible but it's partially obscured."

20 MR. SHARTSIS: Your Honor, I object to this. This is
21 also a misstatement of what appears in this document. Taking a
22 single line in the whole description --

23 MR. HUESTON: This is just another argument, your
24 Honor, counsel is making.

25 THE COURT: Again, the jury will have a chance to look

1 at the evidence.

2 MR. HUESTON: "Photocopied labels."

3 1928 Latour. "Label, photo laser copy."

4 1928 Latour. "Cork, mostly visible, branding or
5 printing is not legible, no cork identification or date, no
6 cork marking."

7 1864 Latour bottle. "Not consistent with what you
8 should see, capsules are off, capsule appears different in many
9 hundreds inspected and photographed before."

10 I guess this is just amazing coincidences from the
11 other side, how there's another 1950 Lafleur label, "Seems to
12 be photocopied, questionable label." And Mr. Lempert-Schwarz,
13 "It's unlike any other magnums, the label."

14 Another one, "No visible date, date scraped off."

15 Mr. Lempert-Schwarz: "Yes, vintage, can't see the date."

16 Another 1950 Petrus magnum. "Questionable label,
17 Nicolas stamp." Mr. Lempert-Schwarz: "Completely lacks
18 detailing." The fact that the label is not an original,
19 Nicolas stamp. Also observes that. "Would not have been
20 applied by the top retailers, Nicolas."

21 Folks, let me talk briefly about the elements here.
22 Section 359 [sic] protects consumers from deceptive acts and
23 practices. Only three elements here. This is a really easy
24 one.

25 A deceptive or misleading act. Well, ladies and

1 gentlemen, you got it here. He withheld information that
2 buyers would want to know and put these out and sent them out
3 knowing that they would be presented as the real article.
4 That's deceptive and misleading. It applies to all the
5 bottles.

6 Number 2. Was it targeted at a group of buyers?
7 Absolutely. Mr. Orcutt told you he represented several buyers
8 and there was a roomful of buyers. There's no doubt about it,
9 this was not a private transaction. It was out for the buyers.

10 Number 3. Are there damages? Of course there are.
11 Mr. Koch is out of \$355,000. That's it for claim 3. Check
12 that, you're done.

13 Then there's prohibited false advertising,
14 Section 350. The advertising had an impact on a group of
15 buyers. This is advertising. This is going out to everybody.
16 Remember I brought Mr. Greenberg to the contract that he
17 negotiated that said this thing was going to be advertised in
18 the New York Times, fancy catalogs, sent to lots of collectors.
19 This is what he entered into deliberately to put this thing,
20 misleading as it was, out there so that buyers like Mr. Koch
21 would buy. It had an impact. That's an ad. Is it deceptive
22 or likely to mislead? Absolutely. There are statements in
23 there about stuff coming from the Continent, from Europe and
24 elsewhere. It's not. Are there damages? Of course there are.
25 It's the same amount of money. It's just the money Mr. Koch

1 paid for the bottles. That's it.

2 And by the way, that's just by preponderance of the
3 evidence, not clear and convincing. It's just a little more
4 than not. Although there's been proof aplenty that's been
5 atower'd here.

6 Then you have what's called fraudulent
7 misrepresentations. First we have representation. Were there
8 statements of fact made? Yeah, there were plenty.
9 Authenticity is one. Remember I gave you the analogy? Hey,
10 this is a Ford F-100, 2013. If the dealer tells you that, do
11 you expect you're really getting a Ford 2013 F-100? When they
12 show up in the bottle here as a 1921 Cheval Blanc, Mr. Koch
13 told you, and any other buyer tells you, that's what I
14 expected. I expected to really get a 1921 and I really
15 expected to get a Cheval Blanc, not a counterfeit. Not
16 something that, even recklessly, Mr. Greenberg knew was likely
17 not true.

18 Merchantability. Suitable for sale. His own expert
19 has said that he wouldn't have allowed any of the stuff to go
20 on for sale as is.

21 Provenance. There were misrepresentations with where
22 this stuff is from. Sourced on the Continent, older Bordeaux.
23 Any one of these reasons applies to all these bottles, any one.
24 You can check the verdict form yes for all bottles. But you
25 have more and more and more reasons than that. You have four

1 or five, six, seven. You'll have your own reasons. You check
2 yes on all bottles and you have that.

3 Identity. How about the fact that Mr. Greenberg was
4 trying real hard to look like a collector like Mr. Koch when he
5 was a massive seller? That's something he misled Mr. Koch.
6 Yet another misrepresentation.

7 The misrepresentation was false, and a typical buyer
8 would want to know all this information. I think that's
9 obvious to you. Did Mr. Greenberg have knowledge or did he
10 recklessly disregard as to whether these things were accurate?
11 Of course. This stuff about sourced on the Continent, these
12 other representations, he knew that those were not correct, and
13 at the very least, he was putting his head in the sand and
14 shoving out those bad bottles, hoping that they would just land
15 in the catalog. That's enough to find him liable as well.

16 Made to induce buyers. That's number 4. Yeah, the
17 whole purpose was to get people to buy. That's an easy one.

18 Reliance. Didn't know what Mr. Greenberg knew.
19 There's no question about it. The information that
20 Mr. Greenberg knew that would lead people to have feelings that
21 these bottles were bogus, he didn't tell Mr. Koch, he didn't
22 tell Zacharia. These folks relied on him to tell the truth and
23 he didn't do it.

24 That's it for fraudulent misrepresentation.

25 There's also fraudulent concealment. I've told you

1 over and over again what -- all the stuff that he should have
2 told that buyers would want to know. That's what fraudulent
3 concealment is.

4 Does he have a duty to disclose? That sounds like --
5 what does that mean, duty to disclose? You'll see in the
6 instructions, you have a duty to disclose if you know more than
7 somebody else, if you have superior information. Absolutely.
8 Mr. Greenberg had superior information. He knew what was up
9 with these bottles. And he knew Zacharia didn't and he knew
10 Mr. Koch didn't. So he had a duty to disclose that
11 information.

12 Material information. Kind of a mouthful. That just
13 means the type of information that any buyer would want to know
14 before paying some major money for it. All that information.
15 You have probably 16 examples of stuff he should have
16 disclosed, any one of which is enough reliability here for all
17 the bottles.

18 And I won't even go through the examples because I've
19 gone through them several times. Was it a substantial factor
20 in getting Mr. Koch to buy and other buyers to buy? Of course.
21 Had he disclosed this information, people would not have paid
22 top dollar for these collectibles.

23 Damages, same thing. \$355,000. Just the money for
24 the bottles that were paid.

25 I'm going to finish with this, what I call then and

1 now. Mr. Shartsis spent a lot of time on, you know, hey, we
2 never tasted these things so maybe they're not bogus, and I
3 think you all know, of course they're bogus. How many ways do
4 we have to prove this? Now Mr. Greenberg says, the only way to
5 know a counterfeit bottle is to take what's inside the bottle
6 and taste it. That's a new standard for Mr. Greenberg when he
7 is in court, and it's time for him to accept responsibility.
8 That's what he says is the new standard. What did he say
9 before he was caught? He identified fakes over and over again
10 without testing. He knows that's the way you can do it, just
11 like the experts here do. You don't open up the bottle that
12 you're buying, it ruins it. People don't open them up to
13 figure out they're fakes. They do it this way, and no one has
14 given you evidence these are not fakes.

15 He said: I looked at corks. I had a middle school
16 level on wine counterfeits. This is what he said, though, in
17 his e-mails. He told a wine retailer that he bought suspect
18 bad mags, meaning magnums, from Kurniawan. These are so fake,
19 you have no idea. He didn't open those up and taste them. He
20 was -- flat on knew they were so fake, he couldn't believe it.
21 To the Wine Club. If the bottle came from Hardy Rodenstock, no
22 matter what, it's counterfeit. By the way, Mr. Shartsis made
23 another little: Hey, what about Mr. Rodenstock in his tasting
24 notes. He was clear in trial, ladies and gentlemen. The
25 tasting notes are about other bottles out there, not the

1 bottles and the description in the catalog. That's not
2 something that folks were paying attention to like Mr. Koch.

3 Fake. Fake. Fraudulent. Counterfeit. Suspect or
4 counterfeit. Look at all these exhibits if you want. 107,
5 331, 310, 73, 332, 354, 78, 388. He's calling things fake,
6 suspect, counterfeit, never tasted at all. The Greenberg
7 before trial, he found counterfeits without tasting. He knows
8 that's the way to do it. Believe what he says before he was
9 caught.

10 And I didn't even get to the Royal Wine Fake Summary
11 Notes. How many things is he saying here showing he could
12 spot -- corks, labels, paper, punt is modern, bottle. Is this
13 a middle school education? Labels, corks, capsules. Bottle
14 shape. All these you'll find in the Royal Wine Fake Summary
15 Notes.

16 Another e-mail to Wine Bid. "Different bottle and
17 punt. Label is printed by a fake mechanism. Dating on the
18 cork is inconsistent and darkness in print of rest of cork
19 looks amateur." This sound like a guy with a middle school
20 education? "Date of the label and paper on the main label do
21 not match in their composition. There are issues with the date
22 and label. Petrus changed cork in '66." He knew that.

23 Maureen Downey told you that she was schooled by
24 Mr. Greenberg. She said specifically, he stated he had become
25 an expert by himself because he had so many bad bottles of

1 Chateau Lafleur -- he got a lot of Chateau Lafleur, ladies and
2 gentlemen -- that he had had -- he had learned how to look for
3 photocopies. Remember when she sat there and told you about
4 how she was looking at the labels and he was telling her about
5 fuzziness in the photocopy? She learned from him. "I was on
6 the telephone with him and he was teaching me what to look at
7 to notice that something was photocopied or not on these
8 particular Lafleur labels." This is a man who knew what he was
9 doing, knew how to spot stuff. Stuff went out the door anyway.
10 "Did he tell you what in particular to look for, when examining
11 a Lafleur label, to determine whether it was a photocopy?"
12 "Yes." "What did he say?" "You look for the fuzzy -- the
13 paper becomes fuzzy and the ink becomes fuzzy and under
14 magnification, the lines are not fine lines of an ink press,
15 they are fuzzier, but they are not necessarily pixelated like
16 you get off an ink jet." Does that sound like somebody who's
17 at amateur hour? He knew what he was doing, he knew how to
18 spot these fakes, and he did it without tasting.

19 He was better than Mr. Zacharia. There's no doubt
20 Mr. Zacharia missed what Mr. Greenberg called the biggest
21 obvious fake in the collection. Missed it. It's bogus. No
22 one's contesting it. And again, I think it's like the CSI
23 moment. "Mr. Zacharia, what do you think of this?" "I don't
24 know. I need my tools"? He knew where he was sending these
25 bottles and what kind of a deal he was going to get.

1 Mr. Lempert-Schwarz. They tried to put him up here to
2 say: Aha, you need to taste. That lasted for about ten
3 minutes on cross-examination until he was shown first that he
4 was not an adjunct professor at UNLV, that it was not true that
5 he actually gave a deposition testimony in a case that he said
6 he did, and he had to admit that he did not testify as an
7 expert, even though he claimed to in his report. Ladies and
8 gentlemen, Mr. Greenberg has a table full of lawyers. He
9 circled the globe for an expert, and he presented a man with
10 these credentials. What does that tell you about what he's
11 trying to put across to you here today? Mr. Lempert-Schwarz
12 said: You need to taste what's in there to figure it out.
13 Uh-oh. He forgot what he wrote several years ago when he said,
14 tasting is not reliable. He was totally impeached on that. He
15 blew up on the stand. Other people at trial: Tasting wine is
16 not necessary to authenticate the wine. It destroys the
17 bottle. Mr. Egan. Tasting is not an effective way to
18 authenticate wine. Downey. Tasting is not a valid measure of
19 authenticity.

20 There are a few more "then and nows." Now,
21 Mr. Greenberg said: We never asked for money from the
22 insurance company. I just wanted to have somebody assist me in
23 the investigation. Ladies and gentlemen, you bring common
24 sense to this jury. Have you ever heard of somebody submitting
25 a claim to an insurance company who's not interested in getting

1 the money? That doesn't happen. And you know it didn't happen
2 here, because he filed multiple insurance claims seeking money.
3 Remember the conversation notes that he says were a lie? They
4 wrote down that he said this is a theft loss. He gave a figure
5 of \$1.6 million of his wine may be fraudulent. Said more than
6 once he considers this a theft loss. That's somebody seeking
7 money. That's why he's submitting that. He likened it to
8 buying a fake Picasso painting. He bought a fake and he's
9 trying to get money back from his insurance company. He wants
10 us to participate in litigation costs. He tried to tell you:
11 I wasn't really interested in suing Royal. Yeah, he was, and
12 he wanted them -- to get them to contribute money to the
13 lawsuit. And he's caught. They write it down as he says it.

14 Then he says -- he says now: Well, I didn't want
15 punitive damages. I didn't really want to sue these people who
16 gave me -- gave me bad stuff. He's saying that now 'cause he
17 wants you to think, as Mr. Shartsis was saying, oh, this is BS
18 that I'm here in a lawsuit. Well, when he was at a loss, he
19 wanted to sue these people and take them as far as he could.
20 Back then he said: I will get punitive damages against Wine
21 Bid and Rudy Kurniawan. And he filed -- sent this draft Royal
22 complaint demanding punitive damages. He went the full
23 9 yards.

24 Ladies and gentlemen, it's time for you to make a
25 choice. Do you believe Mr. Greenberg then or do you believe

1 Mr. Greenberg now? If you believe that Mr. Greenberg has told
2 the truth at this trial, if you believe he really didn't say
3 the things he put in his e-mail, which outlines liability over
4 and over again, if you believe when he was writing that whopper
5 about English royalty from Europe that he wasn't trying to
6 throw Mr. Koch off his trail, if you believe that everyone else
7 who came to this trial was lying, including three people from
8 auction houses who saw him do the same thing, spot problematic
9 wines, hey, he's doing it, and they saw those wines at auctions
10 later, were they all lying? Have they all been in a secret
11 room somewhere trying to figure all this out? No. They saw a
12 man who had an intent to do just what he did here, and you know
13 what, 'cause he did it again and again and again, and different
14 witnesses caught him doing it every step of the way. If you
15 instead believe that Mr. Greenberg just made a mistake and all
16 this is a misunderstanding, then you should not find him liable
17 and you should award Mr. Koch nothing for the worthless bottles
18 for which he paid over \$300,000.

19 Ladies and gentlemen, it is time for you to do justice
20 in this case. A man who was pushing and pressuring people to
21 put bad bottles on the market, here you are with a chance to
22 return a verdict that says, this is not the way you do business
23 in New York. One of the biggest wine sellers in the world
24 can't do business this way. It's not fair. He's got to give
25 the kind of information that any of you and any buyer would

1 want to know before laying down major money for what should be
2 a treasured collectible. That's the way you do business here.
3 It is not acceptable to put your head in the sand, go from one
4 auction house, boing, no, to another, until you finally get rid
5 of the bottles. That's not how you do business. You do what
6 these auction houses and the practice in the industry say. You
7 be honest. You tell people what you know. And you know what,
8 then they can do their job and spot counterfeits and no one is
9 stuck like this.

10 Thank you for your patience. Thank you for your time.

11 THE COURT: Thank you.

12 Ladies and gentlemen of the jury, it's a little before
13 2:00. I'm guessing you're hungry, and we have lunch for you in
14 the jury room.

15 The final thing that I need to do before you
16 deliberate is read through the instructions, the jury
17 instructions, which explain the law to you and will guide your
18 deliberations in this case. Because it's going to take a
19 little bit of time because I'm going to go through in detail
20 all of the aspects of law that you need to understand before
21 you deliberate, I think maybe we'll break and let you have
22 lunch for a half hour, unless you want to go ahead and -- you
23 want lunch, right? Oh, you don't? You want to go ahead?

24 JUROR: I want to go through.

25 THE COURT: Well, do the lawyers want to go through?

1 MR. HUESTON: Yes, please.

2 MR. SHARTSIS: Your Honor, I would ask if I could take
3 a break.

4 THE COURT: You want --

5 MR. SHARTSIS: I don't want to be --

6 THE COURT: -- a short break or a lunch break?

7 MR. SHARTSIS: I'd actually like to eat. We've been
8 at this since 8 in the morning and it's now 2 in the afternoon.
9 I don't want to inconvenience the jury, but it's been a long
10 time.

11 THE COURT: Yes, I think I'm going to give you a short
12 break.

13 JUROR: Half hour?

14 THE COURT: Yeah, why don't we do a short break. If
15 you want to eat lunch, you can, or start on your lunch, and
16 we'll come back in a half hour. Is half hour enough? Okay.
17 We'll do a half-hour break and then we'll come back and I'll
18 explain the instructions for you.

19 Please, what I want to make clear is you're not to
20 deliberate yet, and the reason is, before you start
21 deliberating, you'll hear instructions on the law, so please
22 don't start talking about the case. This is the final time
23 I'll say that to you.

24 Have a good lunch. Leave your pads. Come back in a
25 half hour.

1 MR. SHARTSIS: Your Honor, I just wanted to raise
2 something after the jury leaves.

3 THE COURT: Okay.

4 (Jury excused)

5 MR. SHARTSIS: Your Honor, I know the court's position
6 on the orders in which closing is done, and I understand that
7 I'm not allowed to have a rebuttal. I want to object to that
8 on the grounds that there have been such substantial
9 misstatements of evidence in the plaintiff's case that I
10 believe rebuttal is appropriate under the circumstances. I
11 know the court's ruling, but I want to make that absolutely
12 clear on the record.

13 THE COURT: Okay. You know, I gave each side a chance
14 to present portions of demonstratives, exhibits being
15 demonstratives. You know, I've instructed the jury that what
16 controls is the evidence, that they'll have a chance to review.
17 Your objection is noted, but I'm going to proceed with the
18 instructions.

19 MR. SHARTSIS: Thank you.

20 THE COURT: Thank you. We'll see you in a half hour.

21 (Luncheon recess)

22 (Continued on next page)

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AFTERNOON SESSION

(Jury present)

THE COURT: Members of the jury, we have now reached that point when you are about to begin your final function as jurors, which, as you all appreciate, is one of the most important duties of citizenship in this country.

My instructions to you will come in four parts. First, I will start with some general introductory instructions about the role of the court and the jury and the burden of proof. Second, I will describe the law to be applied to the facts as you find them to be established by the proof. Third, I will give you instructions concerning the evaluation of evidence. The fourth and final section of these instructions will relate to your deliberations.

Role of the court and the jury. Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it. You must apply the law to the facts as you find them from the evidence in this case. Do not single out one instruction as stating the law but consider all the instructions as a whole. Do not be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

The lawyers have referred to some of the governing rules of law in their arguments. If there is any difference

1 between the law as stated by the lawyers and these instructions
2 that I am giving you, you must follow my instructions.

3 Nothing I say in these instructions indicates that I
4 have any opinion about the facts. You, not I, have the duty to
5 determine the facts.

6 You must perform your duties as jurors without bias or
7 prejudice as to any party. The law does not permit you to be
8 controlled by sympathy, prejudice, or public opinion. All
9 parties expect that you will carefully and impartially consider
10 all the evidence, follow the law as it is now being given to
11 you, and reach a just verdict regardless of the consequences.

12 Burden of proof. This, as you know, is a civil case.
13 As such, the plaintiff, Mr. Koch, has the burden of proving his
14 claim. In this case you will have to apply two separate
15 burdens of proof. Mr. Koch must prove his claims under the New
16 York General Business Law, or GBL, by a preponderance of the
17 evidence, and Mr. Koch must prove his fraud claim by clear and
18 convincing evidence.

19 What do these phrases mean? As I explained, Mr. Koch
20 must prove the New York GBL claims by a preponderance of the
21 evidence. To establish a fact by a preponderance of the
22 evidence means to prove that the fact is more likely than not.
23 A preponderance of the evidence means the greater weight of the
24 evidence. It refers to quality and persuasiveness of the
25 evidence, not the number of witnesses or exhibits.

1 In determining whether a claim has been proven by a
2 preponderance of the evidence, you may consider relevant
3 testimony of all witnesses, regardless of who may have called
4 them, and all the relevant exhibits received in evidence,
5 regardless of who may have introduced them.

6 When a party has the burden to prove any matter by
7 clear and convincing evidence, it means that the evidence has
8 produced in your mind a firm belief or conviction as to the
9 matter at issue. Clear and convincing evidence involves a
10 greater degree of persuasion than is necessary to meet the
11 preponderance of the evidence standard. This standard does not
12 require proof to an absolute certainty, since proof to an
13 absolute certainty is seldom impossible in any case.

14 As I stated, the burden is on Mr. Koch to prove fraud
15 by clear and convincing evidence. This means evidence that
16 satisfies you that there is a high degree of probability that
17 there was fraud, as I will define it for you shortly.

18 To decide for Mr. Koch on the fraud claim, it is not
19 enough to find that the preponderance of the evidence is in Mr.
20 Koch's favor. A party who must prove his case by a
21 preponderance of the evidence only need satisfy you that the
22 evidence supporting his case more nearly represents what
23 actually happened than the evidence which is opposed to it.
24 But a party who must establish his case by clear and convincing
25 evidence must satisfy you that the evidence makes it highly

1 probable that what he claims is what actually happened.

2 If, upon all the evidence, you are satisfied that
3 there is a high probability that there was fraud as I will
4 define it for you, then you must decide for Mr. Koch. If you
5 are not satisfied that there is such a high probability, then
6 you must decide for Mr. Greenberg.

7 You may have heard of proof beyond a reasonable doubt,
8 which is the proper standard of proof only in a criminal trial.
9 That requirement does not apply to a civil case such as this,
10 and you should put it out of your mind.

11 I should have mentioned also, by the way, that I will
12 give you a copy of these instructions. You will have a copy of
13 these instructions so that you can refer to them if you would
14 like.

15 Matters already decided. The Court already has
16 decided certain matters in this case. In some cases I will
17 tell you what the Court has decided. In other cases I simply
18 will not discuss a matter that otherwise has already been
19 resolved. You are not to speculate on why the Court decided
20 some matters and not others. Instead, you are to decide the
21 issues presented to you in these instructions and in the
22 verdict form that you will be given based on the evidence that
23 you have heard and the instructions that you have received.

24 With those general instructions in mind, I will now
25 instruct you as to the applicable law. First, I will instruct

1 you on Mr. Koch's claim for fraud.

2 Mr. Koch alleges that Mr. Greenberg has engaged in
3 fraud in violation of New York common law. As relevant here,
4 under New York law a claim for fraud may be based upon either
5 (1) an affirmative misrepresentation or (2) the concealment of
6 a material fact or facts. I will describe both of these
7 possible grounds for finding fraud in this case.

8 I will first instruct you on Mr. Koch's claim against
9 Mr. Greenberg for fraud based on intentional misrepresentation.

10 The plaintiff, Mr. Koch, seeks to recover damages that
11 he claims were caused by a fraud committed by the defendant,
12 Mr. Greenberg. In order to recover for fraud, Mr. Koch must
13 prove by clear and convincing evidence that Mr. Greenberg (1)
14 made a representation of fact, (2) that the representation was
15 false and material, (3) that Mr. Greenberg knew it was false or
16 made the representation recklessly without regard to whether it
17 was true or false, (4) that Mr. Greenberg made the
18 representation to induce Mr. Koch to rely upon it, and (5) that
19 Mr. Koch did justifiably rely upon and sustain damages.

20 Mr. Koch claims that Mr. Greenberg made
21 misrepresentations relating to the authenticity of the 24
22 bottles of wine at issue in this case and that he knew those
23 representations were false or made them with reckless disregard
24 as to their truth.

25 Mr. Greenberg claims that he did not know at the time

1 of the consignment and did not intentionally misrepresent that
2 any of the 24 bottles of wine were counterfeit. Mr. Greenberg
3 further claims that there is no proof that all 24 bottles of
4 wine in the trial are bottles of wine that he sold to Mr. Koch
5 or that the wine in the bottles is counterfeit.

6 To summarize, Mr. Koch has the burden of proving by
7 clear and convincing evidence each of the following elements:

8 First, that Mr. Greenberg made a representation of
9 fact directly or indirectly to Mr. Koch relating to the 24
10 bottles of wine;

11 Second, that the representation was false and
12 material;

13 Third, that Mr. Greenberg knew the representation was
14 false or made the representation recklessly without regard to
15 whether it was true or false;

16 Fourth, that Mr. Greenberg made the representation to
17 induce Mr. Koch as a buyer to purchase the 24 bottles of wine;

18 Fifth, that Mr. Koch justifiably relied upon Mr.
19 Greenberg's representation in deciding to purchase the 24
20 bottles of wine; and

21 Sixth, as a result, Mr. Koch suffered damages.

22 I will first generally outline this type of fraud
23 claim, and then I'll address each of those elements
24 specifically in turn.

25 The first question you will be asked to decide is

1 whether Mr. Greenberg made the representation. If you find
2 that Mr. Greenberg did not make the representation, you need
3 proceed no further on the claim of fraud. If you find that Mr.
4 Greenberg did make the representation, you must next decide
5 whether the representation was true or false and whether it was
6 material.

7 If the representation was true, you need proceed no
8 further on the claimed fraud. If the representation was false
9 and material, you must next decide whether Mr. Greenberg knew
10 it was false or made it recklessly without regard to whether it
11 was true or false.

12 If you find that Mr. Greenberg did not know that it
13 was false and that Mr. Greenberg did not make it recklessly,
14 then you need proceed no further on the claim of fraud. If you
15 find that Mr. Greenberg did know that the representation was
16 false or acted recklessly, you must next decide whether the
17 representation was made to induce Mr. Koch to purchase the 24
18 bottles of wine.

19 If you find that Mr. Greenberg did not make the
20 statement to induce Mr. Koch to purchase the wine, you need
21 proceed no further on the claim of fraud. If you find that Mr.
22 Greenberg did make the representation to induce Mr. Koch to
23 purchase the wine, you must next decide whether Mr. Koch was
24 justified in relying on the representation.

25 If you find that Mr. Koch was not justified in relying

1 on the representation, you need proceed no further on the claim
2 of fraud. If you find that Mr. Koch was justified in relying
3 on the representation, you must next decide whether Mr. Koch
4 was damaged as a result of the fraud.

5 Finally, if you find that Mr. Koch did not sustain any
6 damages as a result of the fraud, you will find for Mr.
7 Greenberg on the claim of fraud. If you find that Mr. Koch did
8 sustain damages as a result of the fraud, you must then decide
9 the actual monetary loss sustained.

10 As I noted, the first requirement of a claim for fraud
11 based on affirmative misrepresentation is that the defendant
12 made a representation of fact. I am going to explain a little
13 more about that.

14 A representation is made when, by words or acts, an
15 impression is communicated to the mind of another person. It
16 is not necessary that the fraudulent representation be set
17 forth in writing. As a general rule, only factual
18 representations are actionable, and a representation of opinion
19 or a prediction of something which is hoped or expected to
20 occur in the future will not sustain an action for fraud.
21 However, even a statement of opinion, whether of law or fact,
22 if misrepresented as a sincere opinion that is not sincerely
23 held when made, is actionable.

24 General assertions are expressions of the seller in
25 praising the product being offered for sale, commonly called

1 dealer's talk, trade talk, or puffery, do not constitute a
2 basis for a fraud claim. Examples of such statements are vague
3 claims of superiority over comparable products or exaggerated
4 and boasting statements upon which no reasonable buyer would be
5 justified in relying.

6 Generally, a plaintiff cannot be claim reliance on
7 misrepresentations that a defendant made to third parties.
8 However, the representation need not have been made directly to
9 plaintiff if plaintiff is a person who was intended to act upon
10 it.

11 If you find that Mr. Koch did not prove by clear and
12 convincing evidence that Mr. Greenberg made a representation of
13 fact to Mr. Koch about any of the bottles of wine at issue in
14 this case, then you must find in favor of Mr. Greenberg on the
15 claim for fraud based on intentional misrepresentation.

16 If you find that Mr. Greenberg did make a
17 representation of fact relating to some or all of the bottles
18 of wine at issue in this case, then you must next decide
19 whether the evidence shows that the representation was false at
20 the time Mr. Greenberg made it and that it was material.

21 If a representation is false, it is called a
22 misrepresentation. A misrepresentation is material if it would
23 be deemed significant to a reasonable person considering
24 whether to enter into a transaction.

25 If you find that Mr. Greenberg made a

1 misrepresentation of material fact about a bottle of wine, you
2 must next decide whether Mr. Greenberg knew that the
3 representation was false or made the representation with
4 reckless disregard as to its truth.

5 Reckless disregard refers to representations made
6 without knowledge of or a genuine belief in their accuracy. It
7 is necessary to distinguish a representation recklessly made
8 with pretense of knowledge from a statement made with honest
9 and reasonable belief in its truth. There cannot be honest
10 belief in a statement purportedly made from knowledge when the
11 maker knows he or she has no basis for the pretense. But, by
12 contrast, when the maker has a reasonable basis for belief in
13 the truth of his statement, there is no intent to deceive.

14 If you find that Mr. Greenberg did not know that the
15 statement was false and that Mr. Greenberg did not make it
16 recklessly, then you need proceed no further on the fraud
17 claim.

18 If you find that Mr. Greenberg did know that the
19 representation was false or acted recklessly, you must next
20 decide whether the representation was made to induce Mr. Koch
21 to purchase the specific bottles of wine at issue.

22 If you find that Mr. Greenberg did not make the
23 statement to induce Mr. Koch to purchase the wine, you need
24 proceed no further on the fraud claim.

25 If you find that Mr. Greenberg did make the

1 misrepresentation to induce Mr. Koch to purchase the wine at
2 issue, you must next decide whether Mr. Koch was justified in
3 relying on the representation.

4 Whether the person to whom a representation is made is
5 justified in relying upon it generally depends on whether the
6 fact represented is one that a reasonable person would believe
7 and consider important in deciding whether to purchase wine.
8 Whether a person is justified in relying on a representation
9 also depends on whether a reasonable person under the
10 circumstances would buy these kinds of wines without
11 independent investigation or verification.

12 There has been evidence about the as-is clause in the
13 auction catalog in this case which contained disclaimers
14 regarding the authenticity, provenance, and merchantability of
15 the wine. Ordinarily, such a disclaimer will preclude a
16 finding of justifiable reliance on a misrepresentation.
17 However, there is an exception in situations where the
18 defendant had peculiar knowledge of the facts relating to the
19 alleged misrepresentation.

20 If you find that the representation concerned matters
21 that were peculiar within Mr. Greenberg's knowledge, then you
22 may find that Mr. Koch was justified in relying on the
23 representation without further investigation notwithstanding a
24 specific disclaimer.

25 In determining whether facts are peculiar within an

1 individual's knowledge, you must consider both (1) the
2 sophistication of the buyer, Mr. Koch, and (2) the
3 accessibility of the underlying information. This peculiar
4 knowledge exception is designed to address circumstances where
5 a party would face unreasonably high costs or great difficulty
6 or is otherwise not in a position to determine the truth or
7 falsity of a representation, making reliance upon the
8 representation reasonable.

9 In other words, if and only if you conclude that Mr.
10 Greenberg knew material facts relating to the authenticity,
11 provenance, or merchantability of the bottles of wine at issue
12 in this case that were not readily available to Mr. Koch, then
13 a specific disclaimer, like the as-is clause, is not a bar to
14 finding justifiable reliance.

15 If you find that Mr. Koch was not justified in relying
16 on the representation, you need proceed no further on the fraud
17 claim.

18 If you find that Mr. Koch was justified in relying on
19 the misrepresentation, you must next decide whether he was
20 damaged as a result of the fraud.

21 If you find that Mr. Koch did not sustain any monetary
22 damages as a result of the fraud, you will find for Mr.
23 Greenberg on the claim for fraud.

24 If you find that Mr. Koch did sustain any monetary
25 loss as a result of a fraudulent misrepresentation, you must

1 then decide the actual monetary loss Mr. Koch sustained.

2 However, we will save our discussion of damages until after I
3 have discussed Mr. Koch's claim for fraud based on concealment.

4 I will now instruct you on that claim, Mr. Koch's
5 claim against Mr. Greenberg for fraudulent concealment, which
6 is part of the fraud claim but another way of proving fraud.

7 Mr. Koch also alleges fraud based on the concealment
8 of a material fact or facts. Mr. Greenberg contends that he
9 did not know at the time he consigned them, and therefore did
10 not conceal, information relating to the authenticity of any of
11 the 24 bottles of wine at issue in this case.

12 The elements of this claim are similar to those for
13 fraud based on affirmative misrepresentation, except that
14 instead of alleging an affirmative misrepresentation, Mr. Koch
15 alleges that Mr. Greenberg concealed material facts that he had
16 a duty to disclose. This is another way of proving fraud, as I
17 mentioned.

18 To prevail in his claim for fraud based on
19 concealment, Mr. Koch must prove by clear and convincing
20 evidence the following four elements:

21 1. That Mr. Greenberg failed to discharge a duty to
22 disclose;

23 2. That Mr. Greenberg intended to defraud Mr. Koch or
24 a class of persons that included Mr. Koch;

25 3. That Mr. Greenberg's concealment of material

1 information was a substantial factor in Mr. Koch's decision to
2 purchase the bottles of wine at issue in this case, meaning
3 that Mr. Koch relied on Mr. Greenberg's concealment in
4 purchasing the bottles of wine; and

5 4. That Mr. Koch suffered damages.

6 A claim for fraudulent concealment requires the
7 plaintiff to prove that the defendant had a duty to disclose
8 material information. A duty to disclose information does not
9 arise simply because two parties are on the opposite sides of a
10 transaction. A duty to disclose may arise where one party's
11 superior knowledge of essentially facts renders a transaction
12 without disclosure inherently unfair.

13 This rule has come to be called the special facts
14 doctrine. Thus, where one party possesses superior knowledge
15 not readily available to the other and knows that the other is
16 acting on the basis of mistaken knowledge, the party with
17 superior knowledge has a duty to disclose that information.

18 The special facts doctrine applies where (1) the
19 material facts are peculiarly within the knowledge of the
20 defendant and (2) the facts could not have been discovered
21 through the exercise of ordinary intelligence by the plaintiff.
22 Accordingly, the jury should not find that the defendant
23 possessed superior knowledge when the information was either a
24 matter of public record, was actually disclosed, or was readily
25 available.

1 In general, where a buyer has an opportunity equal to
2 that of the seller to obtain information, such information is
3 readily available and the buyer is expected to protect himself
4 in a business transaction. However, the buyer is not required
5 to conduct investigations to unearth facts and defects that are
6 present but not obvious. For example, a buyer is not expected
7 to discover that a house is infested with termites.

8 A duty to disclose may also arise when a party to a
9 business transaction has made a partial or ambiguous statement
10 on the theory that once a party has undertaken to mention a
11 relevant fact to the other party, it cannot give only half of
12 the truth.

13 If you find that Mr. Greenberg made a partial or
14 ambiguous statement relating to the bottles of wine at issue in
15 this case, you may find that he had a duty to disclose
16 additional information to make his statement complete. If you
17 find that Mr. Greenberg did not have superior knowledge and did
18 not make a partial or ambiguous statement relating to the
19 authenticity of the bottles of wine, you need proceed no
20 further on the claim for fraudulent concealment.

21 If you find that Mr. Greenberg had a duty to disclose
22 information, meaning he either had superior knowledge or made a
23 partial or ambiguous statement concerning the bottles of wine,
24 you must next decide whether Mr. Greenberg concealed
25 information intending to defraud Mr. Koch. Put another way,

1 you must determine whether Mr. Greenberg, by failing to
2 disclose material information, intended to deceive buyers in
3 doing so.

4 In order to establish that Mr. Greenberg intended to
5 defraud Mr. Koch by concealing material information, Mr. Koch
6 must prove by clear and convincing evidence that Mr. Greenberg
7 intentionally concealed the material information for the
8 purpose of inducing buyers to rely upon the concealment.

9 Conduct is intentional if it is purposeful, that is,
10 the product of the defendant's conscious objective rather than
11 the product of mistake, accident, or negligence. If you find
12 that Mr. Greenberg did not conceal information with an intent
13 to defraud, the existence of facts he was duty-bound in honesty
14 to disclose, you need proceed no further on the fraudulent
15 concealment claim.

16 If you find that Mr. Greenberg intentionally breached
17 a duty to disclose a material fact, you must next determine
18 whether Mr. Koch justifiably relied on Mr. Greenberg's
19 concealment in deciding to purchase the bottles of wine at
20 issue in this case.

21 Mr. Koch relied on Mr. Greenberg's concealment if the
22 concealment of material information was a substantial factor in
23 Mr. Koch's decision to purchase the bottles of wine. It is not
24 necessary for Mr. Greenberg's concealment to have been the
25 exclusive cause of Mr. Koch's decision to purchase the wine.

1 It is sufficient that Mr. Greenberg's concealment was a
2 substantial factor in Mr. Koch's decision to purchase the
3 wines, that is, a factor that is not slight or trivial even if
4 there were other factors.

5 If you find that Mr. Koch actually relied on Mr.
6 Greenberg's concealment of material information, you must also
7 decide whether that reliance was reasonable or justified.
8 Whether Mr. Koch was justified in relying upon Mr. Greenberg's
9 concealment of material information depends on whether the
10 concealment is something that a reasonable person of Mr. Koch's
11 knowledge and experience would believe and consider important
12 in deciding whether to purchase the bottles of wine.

13 If you find that Mr. Koch did not justifiably rely on
14 Mr. Greenberg's concealment, you need proceed no further on Mr.
15 Koch's fraudulent concealment claim.

16 If you determine that Mr. Koch justifiably relied on
17 Mr. Greenberg's concealment, then you must determine whether
18 Mr. Koch was injured by that concealment.

19 Injury is an essential element of the claim of fraud.
20 If you find that Mr. Koch was not injured by his reasonable
21 reliance on Mr. Greenberg's concealment, you may proceed no
22 further on the fraudulent concealment claim. If you find that
23 Mr. Koch did sustain any loss as a result of the fraudulent
24 concealment, you must then decide the actual monetary loss Mr.
25 Koch sustained.

1 I will now turn to the specific calculation of damages
2 for the fraud claim.

3 If you decide that Mr. Koch did sustain damages as a
4 result of either Mr. Greenberg's fraudulent misrepresentation
5 or fraudulent concealment, you must next determine the actual
6 monetary loss he sustained. This is called compensatory
7 damages.

8 The measure of damages in an action for fraud is the
9 actual monetary loss sustained as a direct result of the wrong
10 or the out-of-pocket loss. This is the difference between the
11 value of what the plaintiff parted with and the value of what
12 the plaintiff received.

13 This means that if you find fraud by clear and
14 convincing evidence, the law permits you to award Mr. Koch the
15 actual monetary loss he sustained as a direct result of Mr.
16 Greenberg's wrong. Mr. Koch's actual monetary loss is the
17 difference between the money he paid for the wines and the
18 value of what he received.

19 I will now turn to Mr. Koch's General Business Law
20 claims, or GBL.

21 Mr. Koch also alleges that Mr. Greenberg violated
22 sections 349 and 350 of the New York General Business Law, GBL.
23 I will address each GBL section and claim separately.

24 Remember, the burden of proof for these claims is
25 preponderance of the evidence, a lesser burden, lower standard,

1 than the clear and convincing evidence required for the fraud
2 claim.

3 Turning first to Mr. Koch's claim under section 349.
4 This section of the General Business Law provides consumers
5 protection by declaring as unlawful deceptive acts and
6 practices in the conduct of any business, trade, or in the
7 furnishing of any service in the State of New York.

8 To establish a claim under section 349, the plaintiff
9 must prove by a preponderance of the evidence (1) that the
10 defendant engaged in an act or practice that is deceptive or
11 misleading in a material way, (2) that the defendant suffered
12 injury as a result, and (3) that the alleged deceptive business
13 practices were aimed at the consumer.

14 A section 349 claim must be predicated on a deceptive
15 act or practice that is consumer-oriented. In contrast with a
16 private contractual dispute, consumer-oriented conduct is that
17 what is targeted at consumers at large or a group of buyers.
18 And while the conduct may not be repetitive or recurring in
19 order to be consumer-oriented, a defendant's acts or practices
20 must have impact or potential impact on consumers at large or a
21 group of potential buyers to qualify under this law.

22 In determining the nature of the conduct in this case,
23 you may consider the fact that the Zachys auction was directed
24 at a group of potential buyers of wine. If you determine that
25 the conduct at issue in this case was not consumer-oriented,

1 you need proceed no further on the claim under GBL section 349.

2 If you determine that Mr. Greenberg's conduct was
3 consumer-oriented, you must next decide whether it was
4 materially misleading.

5 A deceptive act or practice is a representation or
6 omission that is likely to mislead a reasonable consumer acting
7 reasonably under the circumstances. The statute does not
8 require the plaintiff to prove intent to defraud or mislead on
9 the part of the defendant. Moreover, the presence of a
10 disclaimer does not prevent a plaintiff from asserting a claim
11 under the statute.

12 If you determine that Mr. Greenberg's consumer-
13 oriented conduct was not materially misleading, you need not
14 proceed any further on the section 349 claim.

15 If you determine that Mr. Greenberg's consumer-
16 oriented conduct was material and misleading, you must next
17 determine whether Mr. Koch was injured as a result of that
18 conduct.

19 If you find that Mr. Koch suffered actual injury as a
20 result of Mr. Greenberg's conduct, then this element is
21 satisfied and you must then decide how much money, if any, to
22 award to Mr. Koch in damages.

23 The law governing damages for a violation of GBL
24 section 349 permits you to award Mr. Koch compensatory damages
25 equal to the amount of damages he suffered as a result of Mr.

1 Greenberg's actions with respect to the 24 bottles of wine at
2 issue in this case. Mr. Koch must prove the amount of his
3 damages by a preponderance of the evidence.

4 In addition, if you find that Mr. Greenberg acted
5 willfully or knowingly in his deceptive act or practice, you
6 may award what are called treble damages. An award of treble
7 damages can be an amount up to \$1,000 for each violation.

8 I will now instruct you on Mr. Koch's claim pursuant
9 to General Business Law section 350.

10 Section 350 of the GBL prohibits false advertising.
11 In order to establish his claim for false advertising, Mr. Koch
12 must prove by a preponderance of the evidence that an
13 advertisement by Mr. Greenberg (1) had an impact on consumers
14 at large, (2) was deceptive or misleading in a material way,
15 and (3) resulted in injury to the plaintiff.

16 Although the definitions I have provided to you for
17 the elements of the 349 claim are applicable for this claim as
18 well, I will discuss each briefly in turn in order to be clear.

19 An advertisement that is consumer-oriented must be
20 directed at consumers at large or a group of buyers rather than
21 at a single individual. As I mentioned earlier, in determining
22 the nature of the conduct in this case you may consider the
23 fact that the Zachys auction was directed at a group of
24 potential buyers of wine.

25 If the advertisement was not consumer-oriented, you

1 need not go any further in your analysis of the 350 claim, as
2 Mr. Greenberg did not violate the provision.

3 If you determine that an advertisement by Mr.
4 Greenberg was consumer-oriented, you must next decide whether
5 it was materially misleading.

6 In order to prove a false advertising claim, the
7 plaintiff must prove that the advertisement was likely to
8 mislead a reasonable consumer acting reasonably under the
9 circumstances. If you find that Mr. Koch did not prove that an
10 advertisement by Mr. Greenberg relating to the bottles of wine
11 was deceptive or misleading in a material way, then you must
12 find in favor of Mr. Greenberg on this claim.

13 If you determine that an advertisement by Mr.
14 Greenberg was consumer-oriented and misleading, then you must
15 next decide whether Mr. Koch suffered injury as a result of the
16 advertisement.

17 If you find that Mr. Koch suffered injury as a result
18 of Mr. Greenberg's conduct, then this element is satisfied, you
19 must next decide how much to award Mr. Koch in damages.

20 The law governing compensatory damages for a violation
21 of New York General Business Law 350 permits you to award Mr.
22 Koch compensatory damages for the amount he was injured as a
23 result of Mr. Greenberg's false advertisement relating to the
24 bottles of wine at issue. Mr. Koch must prove the amount of
25 any damages by a preponderance of the evidence.

1 That concludes the substantive instructions regarding
2 the specific claims at issue in this case. I will now instruct
3 you on various matters relating to evidence and the weighing of
4 evidence generally.

5 What is and is not evidence? You are to consider only
6 the evidence in the case. The evidence in this case is the
7 sworn testimony of the witnesses, the exhibits received in
8 evidence, and any stipulations to which the parties have
9 agreed.

10 A stipulation is an agreement by the parties that a
11 certain fact is true. You must regard such agreed-upon fact as
12 true.

13 It is for you alone to decide the weight, if any, to
14 give to the testimony you have heard and the exhibits you have
15 seen. Testimony that I have excluded or stricken or told you
16 to disregard is not evidence in this case and may not be
17 considered by you in rendering your verdict.

18 You are not to consider as evidence the questions
19 asked by the parties' lawyers. It is the witnesses' answers
20 that are evidence, not the questions.

21 Arguments by the attorneys are not evidence, because
22 the attorneys are not witnesses. I need to stress again that
23 what they have said to you in their opening statements and
24 their summations is intended to help you understand the
25 evidence that actually was admitted to help you reach your

1 verdict. If, however, your recollection of the evidence
2 differs from the statements made by the attorneys in their
3 opening statements or summations, it is your recollection that
4 controls.

5 Finally, any statements or rulings that I may have
6 made do not constitute evidence. Because you are the sole and
7 exclusive judges of the facts, I do not mean to indicate any
8 opinion as to what the facts are or what the verdict should be.
9 The rulings I have made during the trial are not any indication
10 of my views.

11 Also, you should not draw any inference from the fact
12 that I may on occasion have asked certain questions of
13 witnesses. Those questions were only intended to clarify or
14 expedite and are not an indication of my view of the evidence.
15 In short, if anything I have said or done seemed to you to
16 indicate an opinion relating to any matter you need to
17 consider, you must disregard that.

18 There are two types of evidence that you may properly
19 use in reaching your verdict. One type is direct evidence.
20 Direct evidence is the witnesses' testimony about something he
21 or she knows by virtue of his or her own senses, something the
22 witness has seen, felt, touched, or heard. Direct evidence may
23 also be in the form of an exhibit.

24 The other type of evidence is circumstantial evidence.
25 Circumstantial evidence is evidence that tends to prove one

1 fact by proof of other facts. Here is a simple example of
2 circumstantial evidence.

3 Assume that when you came into the courthouse this
4 morning the sun was shining and it was a nice day. Assume that
5 the courtroom blinds -- we don't have blinds, but if we had
6 blinds, assume they were drawn and you couldn't look outside.
7 As you are sitting here, someone walks in with an umbrella that
8 is dripping wet. Somebody else walks in with a raincoat that's
9 dripping wet.

10 You can't look outside the courtroom and you cannot
11 see whether it is actually raining, so you have no direct
12 evidence of the fact that it's raining. But on the combination
13 of the facts I have asked you to assume, it would be reasonable
14 and logical for you to conclude that between the time you
15 arrived at the courthouse and the time these people walked in,
16 it had started to rain.

17 That is all there is to circumstantial evidence. You
18 infer on the basis of reason, experience, and common sense from
19 an established fact the existence or nonexistence of some other
20 fact.

21 Many facts, such as a person's state of mind, can only
22 rarely be proven by direct evidence. Circumstantial evidence
23 is of no less value than direct evidence. The law makes no
24 distinction between the two but simply requires that you, the
25 jury, decide the facts in accordance with all the evidence,

1 both direct and circumstantial.

2 Inferences. I have used the term "infer" and the
3 lawyers in their arguments have asked you to draw certain
4 inferences. When you draw an inference, you conclude from one
5 or more established facts that another fact exists, and you do
6 so on the basis of your reason, experience, and common sense.

7 The process of drawing inferences from facts in
8 evidence is not a matter of guesswork, suspicion, or
9 speculation. An inference is a reasoned, logical deduction or
10 conclusion that you, the jury, may draw but are not required to
11 draw from the facts which have been established by either
12 direct or circumstantial evidence. In considering inferences,
13 you should use your common sense and draw from the facts that
14 you find to be proven whatever reasonable inferences you find
15 to be justified in light of your experience.

16 Now for the important subject of evaluating testimony.
17 How do you evaluate the credibility or believability of
18 witnesses? The answer is that you use your plain common sense.
19 There is no magic formula by which you evaluate testimony. You
20 should use the same tests for truthfulness that you use in
21 determining matters of importance in your everyday lives.

22 You should ask yourselves, did the witness impress you
23 as honest, open, and candid, or was the witness evasive and
24 edgy, as if hiding something? How did he or she appear, that
25 is, his or her bearing, behavior, manner, and appearance, while

1 testifying? How responsive was the witness to the questions
2 asked on direct examination and on cross-examination?

3 You should consider the opportunity the witness had to
4 see, hear, and know about the things about which he or she
5 testified, the accuracy of his or her memory, his or her candor
6 or lack of candor, his or her intelligence, the reasonableness
7 and probability of his or her testimony, its consistency or
8 lack of consistency, and its corroboration or lack of
9 corroboration by other credible evidence.

10 In short, in deciding credibility, you should size up
11 the witness in light of his or her demeanor, the explanations
12 given, and all of the other evidence in the case. Always
13 remember to use your common sense, good judgment, and life
14 experience.

15 Few people recall every detail of every event
16 precisely the same way. A witness may be inaccurate,
17 contradictory, or even untruthful in some respects and yet
18 entirely believable and truthful in others. It is for you to
19 determine whether such inconsistencies are significant or
20 inconsequential

21 If you find that a witness intentionally testified
22 falsely, that is always a matter of importance that you should
23 weigh carefully. If you find that any witness has willfully
24 testified falsely as to any material fact, that is, as to an
25 important matter, the law permits you to disregard completely

1 the entire testimony of that witness upon the principle that
2 one who testifies falsely about one material fact is likely to
3 testify falsely about everything. You are not required,
4 however, to consider such a witness as totally unbelievable.
5 You may accept so much of his or her testimony as you deem true
6 and disregard what you feel is false.

7 By the processes which I have just described to you,
8 you, as the sole judges of the facts, decide which of the
9 witnesses you will believe, what portion of their testimony you
10 will accept, and what weight you will give to it.

11 You have heard evidence that at some earlier time a
12 witness may have said or done something which counsel suggested
13 or which you saw was inconsistent with the witness's trial
14 testimony. If that prior inconsistent statement was sworn
15 testimony, it can be considered as evidence. Likewise, if the
16 prior inconsistent statement was that of a party, it can be
17 considered as evidence against that party.

18 Otherwise, evidence of a prior inconsistent statement
19 is not to be considered by you as affirmative evidence in
20 determining liability. Evidence of a prior inconsistent
21 statement was placed before you for the more limited purpose of
22 helping you decide the trial testimony of the witness who
23 contradicted himself or herself.

24 If you find that a witness made an earlier statement
25 that conflicts with his or her trial testimony, you may

1 consider that fact in deciding how much of his or her trial
2 testimony, if any, to believe. In making this determination,
3 you may consider whether the witness purposely made a false
4 statement or whether it was an innocent mistake, whether the
5 inconsistency concerns an important fact or whether it had to
6 do with a small detail, whether the witness had an explanation
7 for the inconsistency and whether that explanation appealed to
8 your common sense.

9 It is exclusively your duty, based upon all the
10 evidence and your own good judgment, to determine whether the
11 prior statement was inconsistent and, if so, how much, if any,
12 weight to give to the inconsistent statement in determining
13 whether to believe all or part of the witness's testimony.

14 In deciding whether to believe a witness, you should
15 specifically note any evidence of bias, hostility, or affection
16 that the witness may have toward any of the parties. Likewise,
17 you should consider evidence of any other interest or motive
18 that the witness may have in cooperating or not cooperating
19 with a particular party. If you find any such bias, hostility,
20 affection, interest, or motive, you must then consider whether
21 or not it affected or colored the witness's testimony.

22 You should also take into account any evidence that
23 the witness may benefit or suffer in some way from the outcome
24 of the case. Such interest in the outcome may create a motive
25 to testify falsely and may sway the witness to testify in a way

1 that advances his or her own interests. Therefore, if you find
2 that any witness whose testimony you are considering may have
3 an interest in the outcome of this trial, then you should bear
4 that factor in mind when evaluating the credibility of his or
5 her testimony and accept it with great care.

6 Keep in mind, though, that it does not automatically
7 follow that testimony given by an interested witness is to be
8 disbelieved. There are many people who, no matter what their
9 interest in the outcome of the case may be, would not testify
10 falsely. It is for you to decide, based on your own perception
11 and common sense, to what extent, if at all, the witness's bias
12 or interest has affected his or her testimony.

13 You are not required to disbelieve an interested
14 witness. You may accept as much of his or her testimony as you
15 deem reliable and reject as much of it as you deem unworthy of
16 acceptance.

17 It is the duty of the attorneys for each side of the
18 case to object when the other side offers testimony or evidence
19 which the attorney believes is not admissible. Counsel also
20 have the right and duty to ask the Court to make rulings of
21 law. All those questions of law must be decided by me. You
22 should not show any prejudice against an attorney or his or her
23 client because the attorney may have objected to the
24 admissibility of evidence or asked for a conference outside the
25 hearing of the jury or asked the Court for a ruling on the law.

1 As I already indicated, my rulings on the
2 admissibility of evidence do not indicate any opinion about the
3 weight or effect of such evidence. You are the sole judges of
4 the credibility of all witnesses and the weight and effect of
5 all evidence. If, however, I sustained an objection to the
6 evidence or if I ordered evidence to be stricken or
7 disregarded, that evidence must be entirely ignored.

8 During the trial, certain testimony has been presented
9 by way of deposition. The deposition consisted of sworn
10 recorded answers to questions asked of the witness in advance
11 of the trial by attorneys for the parties in the case.

12 The testimony of a witness who for some reason is not
13 present to testify from the witness stand may be presented in
14 writing, under oath, or on video. We have seen some both in
15 writing and on videotape. Such testimony is entitled to the
16 same consideration and is to be judged as to the credibility
17 and weight and otherwise considered by you insofar as possible
18 in the same way as if the witness had been present and
19 testified from the witness stand.

20 Finally, this is part 4, I will instruct you on your
21 conduct during deliberations. This is a process by which you
22 will determine a verdict.

23 The most important part of this case, members of the
24 jury, is the part that you as jurors are about to play as you
25 deliberate on the issues of fact. It is for you, and you

1 alone, to decide whether Mr. Koch has proven the elements of
2 his fraud claim by clear and convincing evidence and his New
3 York GBL claims by a preponderance of the evidence.

4 I know you will try the issues that have been
5 presented to you according to the oath that you have taken as
6 jurors. In that oath you promised that you would well and
7 truly try the issues in this case and render a true verdict.
8 Your function is to weigh the evidence in the case and reach
9 your decision based solely on the evidence. Your duty is to
10 decide the issues before you fairly and impartially and to see
11 that justice is done.

12 It is your duty as jurors to consult with each other
13 and to deliberate with a view to reaching an agreement. Each
14 of you must decide the case for yourself, but you should do so
15 only after consideration of the case with your fellow jurors.

16 Your verdict and the answers to each question on the
17 verdict form that you will receive shortly must be unanimous.
18 Discuss and weigh your respective opinions dispassionately,
19 without regard to sympathy, without prejudice or favor toward
20 either party, and adopt that conclusion which in your good
21 conscience appears to be in accordance with the truth.

22 As you deliberate, please listen to the opinions of
23 your fellow jurors and ask for an opportunity to express your
24 own views. Every juror should be heard. No one juror should
25 hold center stage in the jury room and no one juror should

1 control or monopolize the deliberations. You should all listen
2 to one another with courtesy and respect.

3 If, after stating your own view, and if, after
4 listening to your fellow jurors, you become convinced that your
5 view is wrong, do not hesitate because of stubbornness or pride
6 to change your view. On the other hand, do not surrender your
7 honest convictions and beliefs concerning the weight or the
8 effect of the evidence solely because of the opinions of your
9 fellow jurors or because you are outnumbered or for the mere
10 purpose of returning a verdict. Your final vote must reflect
11 your conscientious belief as to how the issues should be
12 decided. Your verdict must be unanimous.

13 You are not to discuss this case until all the jurors
14 are present. As I said before, when there are seven of you or
15 six of you, you're just a group of nice people. It's only when
16 all eight of you are together that you constitute a jury.

17 Upon retiring to the jury room in a minute, the first
18 thing you should do is select one of you to act as your
19 foreperson. The foreperson will preside over your
20 deliberations and will be your spokesperson here in court. The
21 foreperson does not have any more power or authority than any
22 other juror, and his or her vote or opinion does not count for
23 any more than any other juror's vote or opinion.

24 The foreperson is merely your spokesperson to the
25 Court. He or she will send out any notes to the Court, and

1 when the jury has reached a verdict, he or she will notify the
2 marshal or Mr. Skolnik and fill out the signed verdict form and
3 give the verdict in open court.

4 (Continued on next page)

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1 THE COURT: The exhibits will be sent to you in the
2 jury room. If you want any of the testimony read back to you,
3 that can be arranged. Bear in mind that it is not always easy
4 for the court reporter to locate the testimony that you might
5 want so be as specific as possible as to what witness and what
6 portion of that witness' testimony you'd like to hear and we'll
7 give you a copy of the actual testimony if you'd like to see
8 it.

9 Any communication with the court should be made in
10 writing, signed by your foreperson, and given to the marshal or
11 Mr. Skolnik, who will be here in the courtroom while you
12 deliberate. I will respond to any question or request you have
13 as promptly as possible, either in writing or by having you
14 return to the courtroom so I can speak with you in person.

15 If at any time you are not in agreement, you are not
16 to reveal the standing of the jurors, that is, the split of the
17 vote. Don't say in any note that the vote is breaking down a
18 certain way to anyone, including me, during your deliberations.
19 So do not ever indicate, in a note or otherwise, what the
20 preliminary vote is or which way the majority is leaning or
21 anything like that. Nobody outside the jury should know how
22 the jury stands on any issue until a unanimous verdict is
23 reached and you've filled out the verdict form.

24 If you took notes during portions of the trial, you
25 should not show your notes to or discuss your notes with any

1 other juror during your deliberations. That's because any
2 notes you have taken are to be used solely to assist yourself.
3 The fact that a particular juror has taken notes entitles that
4 juror's views to no greater weight than those of any other
5 juror. Finally, your notes are not to substitute for your own
6 recollection of the evidence in the case. If you have any
7 doubt as to any testimony, you may request the testimony be
8 read back to you, as I mentioned earlier.

9 Under your oath as jurors, you are not to be swayed by
10 sympathy. You are to be completely fair and impartial. You
11 are to be guided solely by the evidence, or the lack of
12 evidence, in the case, without regard to the consequences of
13 your decision. The crucial question you must ask yourselves,
14 as you sift through the evidence, is: Has Mr. Koch proven the
15 elements of his fraud claim by clear and convincing evidence
16 and his New York GBL claims by a preponderance of the evidence?

17 It would be improper for you to consider, in deciding
18 the facts of this case, any personal feelings you have about
19 the race, religion, national origin, sex, sexual orientation,
20 disability, or age of any party or any witness or any such
21 other irrelevant factor. It would also be improper for you to
22 consider any sympathy you might feel for an individual in a
23 lawsuit.

24 You should consider and decide this case as a dispute
25 between persons of equal standing in the community, of equal

1 worth, and holding the same or similar stations in life. All
2 persons stand equal before the law and are to be treated as
3 equals.

4 Publicity. Your verdict must be based solely on the
5 evidence presented in this courtroom in accordance with my
6 instructions. You must completely disregard any report that
7 you may have read in the press, on the internet, on television,
8 or on the radio. Indeed, it would be unfair to consider such
9 reports, since they are not in evidence and the parties have
10 had no opportunity of contradicting their accuracy or otherwise
11 explaining them away. In short, it would be a violation of
12 your oath as jurors to allow yourself to be influenced in any
13 manner by any such publicity.

14 Finally, the verdict form is simply the written notice
15 of the decision that you reach in the case. You will take this
16 form to the jury room. It has a number of questions on it, and
17 when you have unanimously agreed on your verdict, your
18 foreperson will fill in the form, sign and date it, and there's
19 a place for each juror to sign. So I'll ask each of the eight
20 jurors to sign the verdict form. And then you will advise the
21 marshal or bailiff that you are ready to return to the
22 courtroom.

23 In closing, I want to emphasize that all litigants
24 stand equal in this courtroom. All litigants stand equal
25 before the bar of justice. All litigants stand equal before

1 you. Your duty is to decide between these parties fairly and
2 impartially, to see that justice is done, all in accordance
3 with your oath as jurors.

4 I want to thank you for your time and attentiveness.
5 You may now begin your deliberations.

6 We'll swear the marshal.

7 (Marshal sworn)

8 THE CLERK: Thank you.

9 THE COURT: Now you can bring your pads.

10 THE CLERK: Ladies and gentlemen of the jury, please
11 follow the marshal into your jury room to begin your
12 deliberations. Thank you.

13 (Jury excused for deliberations)

14 THE COURT: Okay. Folks, I think Mr. Skolnik has your
15 cellphones. He'll be able to reach you. So don't stray too
16 far. If there's a note or anything, we'll contact you.

17 ALL COUNSEL: Thank you, your Honor.

18 THE COURT: Thank you.

19 MR. CIALONE: Your Honor, will you let us know when
20 the jury is dismissed for the day or should we just anticipate
21 a specific time?

22 THE COURT: We will let you know before. We'll let
23 you know before we do that. I'm going to try to get a read
24 from them on, you know, if they want to stay till 6, I would
25 let them, or even later, so -- but we'll let you know before we

1 let them go.

2 MR. CIALONE: Thank you, your Honor.

3 (Recess pending verdict)

4 (In open court; jury not present)

5 THE COURT: We do not have a verdict, but we do have a
6 note. It's just a note indicating the foreperson. It's been
7 marked as Court Exhibit 1. They passed it out at 5:20, and it
8 just says, "I, Darrell Paul, assigned by the jurors the
9 foreperson." Which is, I believe, juror number 3.

10 So -- but I wanted to ask counsel just a question
11 about punitive damages. I mean, just in terms of timing. I
12 mean, I don't know if they'll reach a verdict, but let's say if
13 they reach a verdict, obviously if it's a defendant's verdict
14 on all counts, then we're done. If it's a plaintiff's verdict
15 in part, we have to determine whether there's a punitive
16 damages phase. So my understanding has been that the punitive
17 damages claim is only as to the fraud claim. The punitive
18 damages demand is only for the fraud claim. But maybe that's
19 not right. I don't know if --

20 MR. KABA: Your Honor, I believe -- I have to go back
21 and look at the law again, but I believe there's also a
22 punitive damages claim available under 349, at least under
23 Section 349, which is separate and apart from the trebling of
24 damages. There's a punitive damages -- punitive damages may be
25 available under the GBL as well.

1 MR. CIALONE: I think that's incorrect, your Honor. I
2 think -- we can brief it, and I think it's capped by the
3 trebling at a thousand dollars per incident, which is already
4 in the form.

5 THE COURT: Yeah. I know it says treble damages up to
6 a thousand dollars per violation under 349. This isn't briefed
7 anywhere, is it?

8 MR. CIALONE: No. We can file something.

9 MR. KABA: Yeah, we can pull cases probably pretty
10 quickly. We looked at the issue and we believe that there are
11 punitive -- there are cases that permit punitive damages that
12 are separate and apart from the trebling cap up to a thousand
13 dollars. I just don't have the cases accessible right now.

14 THE COURT: Well, and this is just 349, not 350.

15 MR. KABA: Yeah. The cases we've seen at least have
16 been in 349 context. We haven't seen them in 350 context, but
17 we haven't seen anything that disallows it under 350 either.

18 MR. CIALONE: Again, your Honor, we don't think that's
19 correct, and we'd be happy to submit something on it, something
20 that's correct. Mr. Koch is asking for trebling, then
21 punitive, then they're going to ask for fees, and I don't think
22 those are provided for under the statute and that's incorrect.
23 But we're happy to brief it.

24 MR. KABA: Your Honor, if I may, we submitted a set of
25 jury instructions. Plaintiff's proposed set had a discussion

1 of punitive damages both to the fraud claim and the GBL claim.

2 THE COURT: Yes.

3 MR. KABA: I believe we cited at least one case, if
4 not more, in that set of jury instructions that deals with the
5 punitive damages issue. I don't have to --

6 MR. CIALONE: Rather than go back and forth saying, "I
7 have cases," "I have cases," why don't we just submit something
8 tomorrow, your Honor, if that's okay, with a short letter.

9 THE COURT: That's fine. The reason I'm raising this
10 is because, I mean, the jury obviously doesn't know that
11 there's a second phase so I think they think that if they're
12 reaching a verdict, they're done, so there might be some
13 surprise that they have to come back. And what I was
14 wondering, I'm trying to think of all the scenarios, and I was
15 wondering, if there was a defendant's verdict on fraud and a
16 plaintiff's verdict on the GBL claims, do they have to come
17 back is what I was wondering, and you're saying you believe
18 they do.

19 MR. KABA: Yeah, I believe there is authority for it.
20 Once we -- once we're done now, I can actually just go back and
21 take a look.

22 THE COURT: Well, the complaint doesn't appear to --
23 it asks for treble damages but doesn't say punitives as to 349.

24 MR. KABA: In the total prayer for relief I believe we
25 had asked for exemplary damages as to -- at the end of the

1 complaint.

2 MR. CIALONE: Your Honor, the pretrial order says,
3 "Greenberg's violation of GBL Sections 349 and 350 --" this is
4 plaintiff's statement, plaintiff's statement "-- further
5 entitles Koch to (a) treble damages pursuant to GBL
6 Section 349(h) of \$1,000 for each violation; (b) treble damages
7 pursuant to GBL Section 350(e)(3) of \$10,000; and (c)
8 attorney's fees pursuant to GBL Sections 349(h) and 350(e), in
9 a sum to be determined in posttrial briefing." Their own
10 statement in the pretrial order makes no reference to punitive
11 damages under 349 or 350. That's their statement.

12 THE COURT: Well, I mean, maybe we should just see
13 what the jury says and we'll fall off the bridge if we have to
14 fall off the bridge.

15 MR. KABA: It's been a long two and a half weeks and
16 I'm happy to not argue any more on the topic. If we believe
17 it's available, we can see if the jury does, and we can
18 certainly get you the authority that supports our position, as
19 to whether or not it's available. Shortly, it's mentioned in
20 our complaint and in the list of relief that we seek. And
21 it's -- we also have, "and such other legal and equitable
22 relief as may be just and proper" in our pretrial order that
23 Mr. Cialone is quoting from.

24 MR. CIALONE: I'll be happy to show it to them. It's
25 not in there. We're entitled to --

1 MR. KABA: It says, "Finally, Koch requests injunctive
2 relief to prevent further wrongdoing by Greenberg, and such
3 other legal and equitable relief as may be just and proper."

4 MR. CIALONE: Your Honor, punitive damages is never
5 captured in "such other legal relief." If they're going to ask
6 for punitive damages, we had a right to know about it before
7 the trial started on this claim. We're happy to brief it,
8 but --

9 THE COURT: The jury, their proposed instructions did
10 say punitive, did seek punitive damages instruction on all
11 claims, pretty clearly.

12 MR. CIALONE: The pretrial statement didn't.

13 MR. KABA: The complaint does, Mr. Cialone.

14 MR. CIALONE: I'd like to see a copy of it, but I
15 haven't seen it. I don't think it did ask for it.

16 THE COURT: In any event, I just wanted to clarify the
17 parties' positions on this, and you all can provide any
18 authorities you'd like to provide.

19 I will say, just looking at 349, I mean, I looked very
20 quickly at like two cases, and the language of the statute does
21 have a very specific provision about the compensatory damages
22 you get and then the treble damages you can get, and I think a
23 better reading of the statute would be that it does not
24 separately provide for punitives on top of the treble damages
25 that are specifically provided for, but having said that, you

1 know, I'm open to looking at whatever cases have decided
2 something different.

3 MR. KABA: Thank you, your Honor.

4 THE COURT: Okay? And we'll let you know where things
5 stand with the jury.

6 MR. KABA: Okay.

7 MR. HUESTON: Okay. Thank you.

8 MS. SALISBURY: Thank you.

9 MR. CIALONE: Your Honor, if I may, I'm sorry, but I'm
10 looking at their complaint. At their complaint, their amended
11 complaint, under the 349 claim, "Plaintiff is entitled to
12 damages, including treble damages, injunctive relief, and
13 attorney's fees, pursuant to New York GBL Section 349."

14 THE COURT: No, that's what I looked at.

15 MR. CIALONE: No punitives. Same thing under 350. If
16 they were entitled to it, they waived it. They didn't plead
17 it.

18 MR. KABA: Your Honor, I've mentioned, I really would
19 prefer not to argue further on it, but the end of the
20 complaint, we say, "Wherefore, plaintiff prays for judgment in
21 its favor as follows." We list out all of the relief we seek,
22 including under C, exemplary damages in an amount to be
23 determined at trial. We will submit authority if your Honor is
24 going to hear us on that.

25 THE COURT: Okay. We'll see, you know, hopefully

1 shortly, if we need it.

2 MR. KABA: Thank you.

3 THE COURT: Thanks.

4 MS. SALISBURY: Your Honor, the jury's still here
5 tonight?

6 THE COURT: Yes, they're still here. I think they've
7 indicated to the marshal or Mr. Skolnik that they're going to
8 be just a few minutes longer. Is that right? Yes. So I think
9 we may hear either that they have a note or something. They
10 didn't want dinner so -- we offered them dinner and they didn't
11 want it.

12 MR. CIALONE: What time should we be here tomorrow,
13 assuming we need to be here tomorrow?

14 THE COURT: 9:30.

15 MR. CIALONE: 9:30?

16 THE COURT: Yes. But I think we may hear something
17 from them pretty soon.

18 MS. SALISBURY: All right.

19 MR. HUESTON: Thank you, your Honor.

20 THE COURT: By the way, I'm going to bring them out
21 anyway, just to let them go for the night and remind them the
22 usual reminders, so I will have one official session with them
23 in any event.

24 MS. SALISBURY: Okay. Thank you.

25 (Recess)

1 (In open court; jury not present)

2 THE COURT: We received a note from the jury at
3 5:55 p.m. It's been marked Court Exhibit Number 2. "We, the
4 jury, have a verdict." Unless there's any objection, we'll
5 bring out the jury.

6 ALL COUNSEL: No objection.

7 (Jury present)

8 THE COURT: Has the jury reached a verdict?

9 THE FOREPERSON: Yes.

10 THE COURT: Mr. Foreperson, if you'd please hand the
11 verdict form to Mr. Skolnik.

12 (Pause)

13 THE COURT: Ladies and gentlemen of the jury, I want
14 to thank you for your verdict form. Unfortunately, there is a
15 little bit more work you need to do, which is, you didn't fill
16 out page 6 and page 12, where you have to specify an amount of
17 compensatory damages if you answered yes to the questions above
18 it, which you did. So I'm going to need you to complete
19 pages 6 and 12 of the verdict form, okay?

20 And I realize it's 6:15. Can you stay a little
21 longer? Yes? Okay. So I'm going to give it back to you. I
22 appreciate your long hours.

23 (Jury excused)

24 (Recess pending verdict)

25 (In open court; jury not present)

1 THE COURT: After the jury went back, I realized that
2 what I'd said to them was incomplete, because I had indicated
3 to them here in the courtroom that they hadn't completed pages
4 6 and 12 but they also had not completed page 9. So I actually
5 just sent in a note which Mr. Skolnik read to them that just
6 says -- this has been marked as Court Exhibit 3 from 6:25 p.m.
7 To clarify my -- "Dear Jury, To clarify my comments in court,
8 you must complete pages 6, 9, and 12 of the verdict form."
9 Signed me, Judge Oetken.

10 We have since gotten another note, Court Exhibit 4,
11 which says, "Do we need a grand total?" And I guess I propose
12 maybe my sending a note back that says, "No, you don't need a
13 grand total. Just complete the entries on the verdict form."

14 MR. HUESTON: That's fine, your Honor.

15 MS. SALISBURY: Yes.

16 THE COURT: Is that okay?

17 MS. SALISBURY: Yes.

18 THE COURT: Okay. I'll just that back and have
19 Mr. Skolnik read that note to them and then we'll go from
20 there. Okay.

21 (Recess pending verdict)

22 (In open court; jury not present)

23 THE COURT: I mentioned Court Exhibit 4, which is the
24 question from the jury, "Do we need a grand total?" We've
25 marked Court Exhibit 5, which is my note to the jury, which

1 Mr. Skolnik has read, Court Exhibit 5. It says, "Dear Jury,
2 No, you do not need a grand total. Simply fill in the verdict
3 form tables at pages 6, 9, and 12."

4 They now have indicated they have a verdict. So I
5 propose to bring them out.

6 Before I do, based on the verdict that I expect you're
7 about to hear, we'll need to talk about the next phase, and the
8 jury, I think, will be surprised to hear that they have to come
9 back tomorrow. So I don't know if there's any -- I don't know
10 how much you all have thought about it, of a time frame. I
11 mean, I don't know if I can tell them one to two days or -- I
12 don't know. If there's any information you want to give me
13 now, you're welcome to.

14 MR. HUESTON: Sure. For us, I think we have 30
15 minutes of maybe testimony and then there will be some argument
16 from us. We don't anticipate something lengthy at all.

17 THE COURT: Okay. And defendant?

18 MS. SALISBURY: About the same, your Honor. Maybe a
19 little more. But we certainly assume this will be done in half
20 a day.

21 THE COURT: Okay. So this will be tomorrow.

22 MR. HUESTON: Yeah.

23 MS. SALISBURY: Yes.

24 THE COURT: Okay. Great. That's helpful, I think.

25 Great. Please bring out the jury.

1 (Jury present)

2 THE COURT: Mr. Foreperson, has the jury reached a
3 verdict?

4 THE FOREPERSON: Yes, we have.

5 THE COURT: Okay. Could you please hand the verdict
6 form to Mr. Skolnik.

7 (Pause)

8 THE COURT: Okay. Mr. Skolnik? Mr. Skolnik will
9 confirm the verdict.

10 THE CLERK: I'm going to ask the foreperson to please
11 rise.

12 In the matter of William I. Koch v. Eric Greenberg:
13 I. Fraud.

14 A. Fraudulent Misrepresentation.

15 As you have been instructed, in order to establish
16 fraud based on an affirmative misrepresentation, each of the
17 following elements must be proven by clear and convincing
18 evidence: (1) that Mr. Greenberg made a representation of
19 fact; (2) that the representation was false and material; (3)
20 that Mr. Greenberg knew the representation was false or made it
21 with reckless disregard for its truth or falsity; (4) that
22 Mr. Greenberg made the representation to induce Mr. Koch to
23 rely upon it; and (5) that Mr. Koch did justifiably rely upon
24 it and sustained damages.

25 Do you find that Mr. Koch established each of the

1 above elements by clear and convincing evidence with respect to
2 one or more of the 24 bottles of wine at issue and, therefore,
3 that Mr. Greenberg engaged in fraudulent misrepresentation?

4 Yes or no.

5 THE FOREPERSON: Yes.

6 THE CLERK: If yes, please indicate whether
7 Mr. Greenberg made the fraudulent misrepresentation with
8 respect to:

9 All of the bottles, or some (but not all) of the
10 bottles.

11 THE FOREPERSON: All of the bottles.

12 THE CLERK: B. Fraudulent Concealment.

13 As you have been instructed, in order to establish
14 fraud based on fraudulent concealment, each of the following
15 elements must be proven by clear and convincing evidence: (1)
16 that Mr. Greenberg failed to discharge a duty to disclose; (2)
17 that Mr. Greenberg intended to defraud Mr. Koch, or a class of
18 persons that included Mr. Koch; (3) that Mr. Greenberg's
19 concealment of material information was a substantial factor in
20 Mr. Koch's decision to purchase the bottles of wine at issue in
21 this case, meaning Mr. Koch relied on Mr. Greenberg's
22 concealment in purchasing the bottles of wine; and (4) that
23 Mr. Koch suffered damages.

24 Do you find that Mr. Koch established each of the
25 above elements by clear and convincing evidence with respect to

1 one or more of the 24 bottles of wine at issue and, therefore,
2 Mr. Greenberg engaged in fraudulent concealment?

3 Yes or no.

4 THE FOREPERSON: Yes.

5 THE CLERK: If yes, please indicate whether
6 Mr. Greenberg made the fraudulent concealment with respect to:

7 All of the bottles, or some (but not all) of the
8 bottles.

9 THE FOREPERSON: All of the bottles.

10 THE CLERK: C. Damages. If you find, by clear and
11 convincing evidence, that Mr. Greenberg engaged in fraud by
12 answering yes to either 1.A or 1.B above, you must determine
13 how much to award Mr. Koch in monetary damages. (For your
14 reference, attached as Appendix I is a list of wines at issue,
15 and the prices paid for them.)

16 As an amount of compensatory damages for the 1921
17 Chateau Cheval Blanc magnum, how much do you find in
18 compensatory damages?

19 THE FOREPERSON: 15,340.

20 THE CLERK: As to the 1921 Chateau Cheval Blanc
21 magnum, how much compensatory damages do you find?

22 THE FOREPERSON: 15,340.

23 THE CLERK: As to the 1945 Chateau Lafite Rothschild
24 magnum, how much do you find?

25 THE FOREPERSON: 4,956.

1 THE CLERK: As to the 1921 Chateau Lafleur magnum, how
2 much do you find?

3 THE FOREPERSON: 16,000.

4 THE CLERK: As to the next, 1921 --

5 THE FOREPERSON: Hold on one second. I can't quite
6 read my handwriting. I think it's 16,000, either 520 or 620.
7 Depends --

8 THE COURT: Was it the same amount on the appendix?

9 THE FOREPERSON: Yes.

10 THE COURT: The record will reflect -- do you have the
11 appendix there? The record will reflect the amount in the
12 appendix is 16,520.

13 THE CLERK: As to the next, 1921 Chateau Lafleur
14 Magnum -- this is Trial Exhibit 206 -- how much do you find?

15 THE FOREPERSON: 17,700.

16 THE CLERK: As to the 1945 Chateau Lafleur magnum,
17 Trial Exhibit 207, how much do you find?

18 THE FOREPERSON: 17,700.

19 THE CLERK: As to the 1945 Chateau Lafleur magnum,
20 Trial Exhibit 229, how much do you find?

21 THE FOREPERSON: 16,520.

22 THE COURT: You can just do the exhibit number.

23 THE CLERK: Okay. As to Exhibit Number 230, how much
24 do you find?

25 THE FOREPERSON: 17,700.

1 THE CLERK: As to Exhibit Number 208, how much do you
2 find?

3 THE FOREPERSON: 14,160.

4 THE CLERK: As to Exhibit Number 209, how much do you
5 find?

6 THE FOREPERSON: 15,340.

7 THE CLERK: As to Exhibit Number 210, how much do you
8 find?

9 THE FOREPERSON: 15,340.

10 THE CLERK: As to Exhibit 211, how much do you find?

11 THE FOREPERSON: 15,340.

12 THE CLERK: As to Exhibit 212, how much do you find?

13 THE FOREPERSON: 12,587.

14 THE CLERK: As to Exhibit 213?

15 THE FOREPERSON: 12,587.

16 THE CLERK: As to Exhibit 214?

17 THE FOREPERSON: 12,587.

18 THE CLERK: As to Exhibit 201?

19 THE FOREPERSON: 14,160.

20 THE CLERK: As to Exhibit 227?

21 THE FOREPERSON: \$3,737.

22 THE CLERK: As to Exhibit 200?

23 THE FOREPERSON: \$2,557.

24 THE CLERK: As to Exhibit 225?

25 THE FOREPERSON: 29,500.

1 THE CLERK: As to Exhibit 215?

2 THE FOREPERSON: 12,980.

3 THE CLERK: As to Exhibit 216?

4 THE FOREPERSON: 15,340.

5 THE CLERK: As to Exhibit 228?

6 THE FOREPERSON: 17,700.

7 THE CLERK: As to Exhibit 217?

8 THE FOREPERSON: 20,060.

9 THE CLERK: As to Exhibit 218?

10 THE FOREPERSON: 20,060.

11 THE CLERK: II. New York General Business Law.

12 A. New York General Business Law Section 349.

13 As you have been instructed, in order to establish a
14 violation of NYGBL Section 249, each of the following elements
15 must be established by a preponderance of evidence: (1) that
16 Mr. Greenberg engaged in an act or practice that is deceptive
17 or misleading in a material way; (2) that Mr. Koch suffered
18 injury as a result; and (3) that the alleged deceptive business
19 practices were aimed at the consumer.

20 Do you find that Mr. Koch established each of the
21 above elements by a preponderance of the evidence with respect
22 to one or more of the 24 bottles of wine at issue and,
23 therefore, that Mr. Greenberg engaged in materially deceptive
24 business practices?

25 Yes or no.

1 THE FOREPERSON: Yes.

2 THE CLERK: If yes, please indicate whether
3 Mr. Greenberg engaged in material deceptive business practices
4 with respect to:

5 All of the bottles, or some (but not all) of the
6 bottles.

7 THE FOREPERSON: All of the bottles.

8 THE CLERK: 1. Compensatory damages under
9 Section 349.

10 If you have found by preponderance of the evidence
11 that Mr. Greenberg violated Section 349 by answering yes to
12 II.A above, you must determine how much to award Mr. Koch in
13 monetary damages. Please indicate the amount for each bottle
14 of wine on the table. (For your reference, attached as
15 Appendix 1 is a list of the wines at issue, and the prices paid
16 for them.)

17 As to Exhibit 223?

18 THE FOREPERSON: 15,340.

19 THE CLERK: As to Exhibit 224.

20 THE FOREPERSON: 15,340.

21 THE CLERK: As to Exhibit 222.

22 THE FOREPERSON: 4,956.

23 (Continued on next page)

24

25

1 THE CLERK: As to Exhibit 205?
2 THE FOREPERSON: 16,520.
3 THE CLERK: As to Exhibit 206?
4 THE FOREPERSON: 17,700.
5 THE CLERK: As to Exhibit 207?
6 THE FOREPERSON: 17,700.
7 THE CLERK: As to Exhibit 229?
8 THE FOREPERSON: 16,520.
9 THE CLERK: As to Exhibit 230?
10 THE FOREPERSON: 17,700.
11 THE CLERK: Exhibit 208?
12 THE FOREPERSON: 14,160.
13 THE CLERK: As to Exhibit 209?
14 THE FOREPERSON: 15,340.
15 THE CLERK: As to Exhibit 210?
16 THE FOREPERSON: 15,340.
17 THE CLERK: As to Exhibit 211?
18 THE FOREPERSON: 15,340.
19 THE CLERK: As to Exhibit 212?
20 THE FOREPERSON: 12,587.
21 THE CLERK: As to Exhibit 213?
22 THE FOREPERSON: 12,587.
23 THE CLERK: As to Exhibit 214?
24 THE FOREPERSON: 12,587.
25 THE CLERK: As to Exhibit 201?

1 THE FOREPERSON: 14,160.

2 THE CLERK: As to Exhibit 227?

3 THE FOREPERSON: 3,737.

4 THE CLERK: As to Exhibit 200?

5 THE FOREPERSON: 2,557.

6 THE CLERK: As to Exhibit 225?

7 THE FOREPERSON: 29,500.

8 THE CLERK: As to Exhibit 215?

9 THE FOREPERSON: 12,980.

10 THE CLERK: 120 Exhibit 216?

11 THE FOREPERSON: 15,340.

12 THE CLERK: As to Exhibit 228?

13 THE FOREPERSON: 17,700.

14 THE CLERK: As to Exhibit 217?

15 THE FOREPERSON: 20,060.

16 THE CLERK: As to Exhibit 218?

17 THE FOREPERSON: 20,060.

18 THE CLERK: Number 2. Treble damages under section
19 349. As you were instructed, if you find by a preponderance of
20 the evidence that Mr. Greenberg willfully or knowingly violated
21 section 349, you may also choose to award treble damages, which
22 may constitute up to \$1,000 per violation. If you choose to
23 award treble damages, you must indicate the amount up to \$1,000
24 per violation on the table below.

25 As to the treble damages on Exhibit 223?

1 THE FOREPERSON: 1,000.
2 THE CLERK: 224?
3 THE FOREPERSON: 1,000.
4 THE CLERK: 222?
5 THE FOREPERSON: 1,000.
6 THE CLERK: 205?
7 THE FOREPERSON: 1,000?
8 THE CLERK: 206?
9 THE FOREPERSON: 1,000.
10 THE CLERK: 207?
11 THE FOREPERSON: 1,000.
12 THE CLERK: 229?
13 THE FOREPERSON: 1,000.
14 THE CLERK: 230?
15 THE FOREPERSON: 1,000.
16 THE CLERK: 208?
17 THE FOREPERSON: 1,000.
18 THE CLERK: 209?
19 THE FOREPERSON: 1,000.
20 THE CLERK: 210?
21 THE FOREPERSON: 1,000.
22 THE CLERK: 211?
23 THE FOREPERSON: 1,000.
24 THE CLERK: 212?
25 THE FOREPERSON: 1,000.

1 THE CLERK: 213?

2 THE FOREPERSON: 1,000.

3 THE CLERK: 214?

4 THE FOREPERSON: 1,000.

5 THE CLERK: 201?

6 THE FOREPERSON: 1,000.

7 THE CLERK: 227?

8 THE FOREPERSON: 1,000.

9 THE CLERK: 200?

10 THE FOREPERSON: 1,000.

11 THE CLERK: 225?

12 THE FOREPERSON: 1,000.

13 THE CLERK: 215?

14 THE FOREPERSON: 1,000.

15 THE CLERK: 216?

16 THE FOREPERSON: 1,000.

17 THE CLERK: 228?

18 THE FOREPERSON: 1,000.

19 THE CLERK: 218?

20 THE FOREPERSON: 1,000.

21 THE CLERK: B. New York General Business Law section

22 350. As you have been instructed, in order to establish a

23 violation of NYGBL section 350, each of the following elements

24 must be established by a preponderance of the evidence:

25 1. That an advertisement by Mr. Greenberg had an

1 impact on consumers at large;

2 2, Was deceptive or misleading in a material way; and

3 3. Resulted in injury to Mr. Koch.

4 Do you find that Mr. Koch established each of the
5 above elements by a preponderance of the evidence with respect
6 to one or more of the 24 bottles of wine at issue and therefore
7 Mr. Greenberg engaged in false advertising? Yes or no.

8 THE FOREPERSON: Yes.

9 THE CLERK: If yes, please indicate whether Mr.
10 Greenberg engaged in false advertising with respect to all of
11 the bottles or some but not all of the bottles.

12 THE FOREPERSON: All of the bottles.

13 THE CLERK: 1. Compensatory damages under section
14 350. If you have found by a preponderance of the evidence that
15 Mr. Greenberg violated section 350 by answering yes to IIB
16 above, you must determine how much to award Mr. Koch in
17 monetary damages. Please indicate the amount of each bottle of
18 wine on the table below. For your reference, attached as
19 appendix 1 is a list of the wines at issue and the prices paid
20 for them.

21 As to Trial Exhibit 223, what amount of compensatory
22 damages?

23 THE FOREPERSON: 15,340.

24 THE CLERK: As to Trial Exhibit 224?

25 THE FOREPERSON: 15,340.

1 THE CLERK: Exhibit 222?
2 THE FOREPERSON: 4,956.
3 THE CLERK: Exhibit 205?
4 THE FOREPERSON: 16,520.
5 THE CLERK: Exhibit 206?
6 THE FOREPERSON: 17,700.
7 THE CLERK: Exhibit 207?
8 THE FOREPERSON: 17,700.
9 THE CLERK: Exhibit 229?
10 THE FOREPERSON: 16,520.
11 THE CLERK: Exhibit 230?
12 THE FOREPERSON: 17,700.
13 THE CLERK: Exhibit 208?
14 THE FOREPERSON: 14,160.
15 THE CLERK: Exhibit 209?
16 THE FOREPERSON: 15,340.
17 THE CLERK: Exhibit 210?
18 THE FOREPERSON: 15,340.
19 THE CLERK: Exhibit 211?
20 THE FOREPERSON: 15,340.
21 THE CLERK: Exhibit 212?
22 THE FOREPERSON: 12,587.
23 THE CLERK: Exhibit 213?
24 THE FOREPERSON: 12,587.
25 THE CLERK: Exhibit 214?

1 THE FOREPERSON: 12,587.
2 THE CLERK: Exhibit 201?
3 THE FOREPERSON: 14,160.
4 THE CLERK: Exhibit 227?
5 THE FOREPERSON: 3,737.
6 THE CLERK: Exhibit 200?
7 THE FOREPERSON: 2,557.
8 THE CLERK: Exhibit 225?
9 THE FOREPERSON: 21,500.
10 THE CLERK: Exhibit 215?
11 THE FOREPERSON: 12,980.
12 THE CLERK: Exhibit 216?
13 THE FOREPERSON: 15,340.
14 THE CLERK: Exhibit 228?
15 THE FOREPERSON: 17,700.
16 THE CLERK: Exhibit 2717?
17 THE FOREPERSON: 20,060.
18 THE CLERK: Exhibit 218?
19 THE FOREPERSON: 20,060.
20 THE CLERK: III. Apportionment of fault as to NY GBL
21 claims. During this case you heard evidence about a 2005
22 auction conducted by Zachys in which Mr. Greenberg was the
23 consignor. Zachys was once a defendant in this case but is no
24 longer a part of this case. Nevertheless, you must still
25 consider whether Zachys was responsible for some portion, if

1 any, of the damages you have awarded in section II, the NYGBL
2 claims.

3 If you find that Zachys as well as Mr. Greenberg was
4 responsible for Mr. Koch's monetary damages, then you must
5 decide the percentage of total fault that each bears a
6 violation of NY GBL section 349 and/or section 350. In doing
7 so, you should weigh the conduct of Mr. Greenberg and Zachys
8 and consider all the circumstances based on the evidence at
9 trial.

10 A. NYGBL section 349. If you found in IIA that Mr.
11 Greenberg engaged in materially deceptive business practices,
12 indicate below the percentage of total fault that Mr. Greenberg
13 and Zachys bears for the violation. As to Mr. Greenberg's
14 percentage fault, what percent do you find from the jury?

15 THE FOREPERSON: 100 percent.

16 THE CLERK: As to Zachys' percentage fault?

17 THE FOREPERSON: Zero percent.

18 THE CLERK: B. NYGBL section 350. If you found in
19 IIB that Mr. Greenberg engaged in false advertising, indicate
20 below the percentage of total fault that each of Mr. Greenberg
21 and Zachys bears for the violation. As for Mr. Greenberg's
22 percentage fault, what percentage?

23 THE FOREPERSON: 75 percent.

24 THE CLERK: And Zachys' percentage fault?

25 THE FOREPERSON: 25 percent.

1 THE COURT: Does that complete the verdict form?

2 THE CLERK: Yes, your Honor.

3 THE COURT: You may be seated, Mr. Foreperson. Thank
4 you.

5 Please poll the jury.

6 (Jury polled, all answered in the affirmative)

7 THE CLERK: Your Honor, the jury has been polled and
8 the verdict is unanimous.

9 THE COURT: Thank you, folks. First of all, I want to
10 thank you for your patience and hard work and especially for
11 saying to 7 o'clock.

12 We didn't know whether there would be a need for any
13 additional matters relating to this case. But based on your
14 verdict, there is one more portion that needs to be addressed,
15 so I am going to have to ask you to come back one more day. I
16 hope you are able to do that. I believe it will be likely just
17 tomorrow.

18 Based on the findings of liability, there is what is
19 called a punitive damages portion of the case, which I will
20 explain to you tomorrow. There will be some additional phase
21 of evidence in the case which will be relatively brief. Then I
22 will instruct you, again briefly, on this specific piece of the
23 case relating to punitive damages. I believe when that's done
24 tomorrow afternoon, you will be able to deliberate on that
25 portion of the case.

1 Is that OK with everyone, to come back once more at
2 9:30 tomorrow? Great.

3 Thank you very much for all your time and efforts. We
4 will see you tomorrow morning at 9:30. Have a good evening.
5 Once again, don't talk about the case with anyone else. As you
6 know, as you did today, you will have a chance at the end of
7 the additional piece of evidence tomorrow to deliberate on this
8 final phase of the case.

9 For the record, the verdict form has been marked as
10 Court Exhibit 6, the completed verdict form.

11 Folks, once again, please don't talk or write or read
12 anything about the case tonight. We'll see you tomorrow
13 morning at 9:30. Please leave your pads here.

14 (Jury not present)

15 THE COURT: We haven't addressed in detail the
16 punitive damages phase of the case, although I understand from
17 what we just addressed that it will be a fairly brief
18 presentation of evidence in the morning. We will be finalizing
19 the instructions which we can send out to you. Actually, why
20 don't the lawyers come in at 9 o'clock tomorrow morning, and we
21 will talk about any legal issues with respect to the
22 instructions and verdict form in the punitive damages phase.

23 I assume we will have brief openings, plaintiff-
24 defendant, then presentation of plaintiff's evidence,
25 defendant's evidence, and then closings, defendant-plaintiff.

1 Does anybody have any objection to that?

2 MS. SALISBURY: No, your Honor.

3 MR. HUESTON: No, your Honor.

4 THE COURT: Anything else we need to address now?

5 MR. CIALONE: Your Honor, I can give you some of the
6 authorities on the GBL claim if you want to hear them now.

7 It's *Post v. General Motors Corp.*, 2002 U.S. Dist. Lexis 9968
8 from the Southern District June 3, 2002. "GBL section 349
9 limits punitive damages to an amount no greater than \$1,000."

10 THE COURT: You said *Post*?

11 MR. CIALONE: *Post*, yes. Another one, *Nwagboli v.*
12 *Teamwork Transportation Corp.*, 2009 U.S. Dist. Lexis 121893,
13 Southern District of New York, December 7, 2009. "Plaintiff
14 cannot recover punitive damages in addition to treble damages,"
15 which we think presents a broader issue.

16 Those cases are both under 349. We haven't seen any
17 case under 350 going one way or another, but the rationale is
18 the same, which is that is the remedy in the statute.

19 Beyond that, your Honor, I would say that this really
20 does present a due process issue. The complaint, while it is
21 in the prayer that they want punitive damages, it's because
22 it's in the first cause of action for fraud that they say they
23 are entitled to them. In the complaint it does not say they
24 are entitled to punitive damages under the GBL claim. Had they
25 said that, we would have brought a motion to resolve that much

1 earlier.

2 We do think that, particularly the punitive damages,
3 does present a fundamental due process issue, to just say we
4 put it in our proposed jury instructions and we pled for
5 further relief in the pretrial order. The complaint makes it
6 very clear that they weren't entitled to punitive damages on
7 those two causes of action, and they never alleged it.

8 Thank you.

9 THE COURT: Mr. Kaba.

10 MR. KABA: Thank you, your Honor. I'll deal with the
11 due process issue first.

12 We have findings on fraud anyway, so the punitive
13 damages case they are going to have to prepare for, which they
14 had notice is going to come in, whether it is coming in under
15 the fraud claim or the New York GBL claim. It was quite clear
16 on the complaint from our proposed jury instructions, from our
17 draft verdict form. All of those referred to exemplary damages
18 under New York law.

19 THE COURT: Does it matter anymore whether there is
20 going to be a punitive damages determination as to fraud?

21 MR. KABA: There may be a slightly different
22 instruction under the GBL. We laid it out in our proposed jury
23 instructions. I think it doesn't matter in the due process
24 sense because the case is going to come forward and the jury is
25 going to have to make a decision.

1 I do want to give you some authority on the
2 availability of punitive damages under New York law for the
3 GBL. It is a more recent case than that cited, and it is
4 actually a New York State case. It is called Wilner v.
5 Allstate Insurance Company.

6 THE COURT: I have that. I have read that.

7 MR. KABA: So I shall sit down.

8 MR. CIALONE: Can we have a cite for that, please?

9 THE COURT: Wilner is 71 A.D.3d 155, 165-167. We'll
10 be looking at this issue.

11 Anything else we need to address now?

12 MR. HUESTON: Not for plaintiff, your Honor.

13 MR. CIALONE: Not for us, your Honor.

14 THE COURT: Thank you. Have a good night.

15 (Adjourned to 9:00 a.m., April 12, 2013)

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