cellar in 2006. When they did the inventory in '07, they counted it as full because it was in the rack. There was a rack above -- this is a magnum rack, which is above the regular bottle racks. I put it back in there because Mr. Koch didn't typically consume magnums. Very infrequently I would say.

We put it back up there because at that point there were questions about the authenticity of the bottle, I believe, so we put it back there because it was a safekeeping place. The staff on inventoried it didn't realize it was empty. They just scanned it, scanned it back into inventory.

It didn't go missing. It went out I believe to be tested. That was the time when we didn't have anything in there that said to France or to be tested. So they put it under that category. My staff could attest to that.

Q. So you did actually have a category about out to be tested?

A. I don't believe we did. We have added categories. As this case has come to light, we have added categories. We added to New York, to New York court, or something to that effect.

Q. When did you add a category for out to be tested?

A. I didn't say I did. I said we could have. We added categories as we needed them. I have forgotten when we started to add categories. We realized that things weren't what they seemed because we didn't have enough categories of status.

MR. CIALONE: Your Honor, I want to raise something about this exhibit. 509, given the way we did the numbers, was

actually an exhibit that Mr. Koch's side designated. So I'm a little surprised, again, to hear about the authenticity complaint about it. Of course, that would explain why we didn't follow up. It was in their designations.

MR. WESSEL: Your Honor, it was indicated as one that the parties had not stipulated to authenticity and admissibility. That was the point I was making. It's not a huge point, but I think Mr. Cialone knows that.

THE COURT: OK.

A. I because I haven't seen this formally before, I would have to look at the inventory live to see if this is all correct. But it looks to be somewhat what that bottle says.

Q. Let's take a look at this bottle, 60055. When did this go to France?

A. I don't know without my records in front of me. I don't know if it did go to France, actually. I don't even know if it went to France, to tell you the truth.

Q. None of the reports that you have seen shows that it went to France, right, none of the reports you have seen today?

A. None of these pieces of paper, no.

Q. Do you know of any other reports from Mr. Koch's inventory that have been produced in this litigation?

A. There are lots of other reports. Can you be specific?

Q. Sure. Any other reports generated from the inventory system that show the movement of bottles other than these

documents you have seen today?

MR. WESSEL: Objection. Lack of foundation. We produced the documents that were requested. We made things available. Mr. Curley is not an expert on what was produced.

MR. CIALONE: I asked a very specific question.

THE COURT: If you know, you can answer.

A. I don't know.

Q. Looking at what you have seen today, you have no idea if this bottle went to France, right?

A. Looking at what I have seen today, I have no idea if that particular bottle went to France.

Q. More accurately, looking at what you have seen, nothing shows that it actually did, correct?

A. You haven't shown me anything --

Q. -- that says this bottle went to France, right?

A. Correct.

Q. I haven't shown you anything that says this bottle went to Cape Cod to be examined by other people?

A. Correct.

Q. Haven't shown you anything that shows it moved back and forth to the Florida cellar?

A. No. But as I said, I could show you all that. It's live on our database. I could show you to Cape Cod from Florida, back from Cape Cod to Florida. It's been kind of a whirlwind for this wine. I wish I traveled as much as it did.

Q. Sir, who took the bottle to France?
A. What bottle?
Q. This bottle 60055.
A. I just told you I don't think it went to France.
Q. Who took any of the bottles that went to France for testing and examination?
A. I believe Mr. Elroy took all of them, I think.
Q. So Mr. Elroy, who is not allowed in the cellar on his own, is allowed to take bottles to France and keep them there for months, correct?
MR. WESSEL: Objection. Compound.
MR. CIALONE: I'll break it up.
Q. Mr. Elroy is not allowed in the cellar on his own, correct?
A. Correct. He is escorted.
Q. Was he escorted when he took all the bottles to France?
A. From time to time someone would go with him, but not a staff. It wasn't an escorted trip, no.
Q. How long did he have the bottles while he was there?
A. It varied.
Q. Varied from how long to how long?
A. Again, if I had all my paperwork, I think from a month to several months.
Q. He removed bottles for several months sometimes, correct? Sometimes for several months?
A. He wouldn't remove them. Staff would box them up, have

paperwork that was assigned to them with the bar codes, and he would be allowed to take those to France, yes.

Q. Other than the bar code and that it has a 1950 Lafleur label, you have no other way to identify this bottle or differentiate it from any of the other 1950 Lafleur magnums in Mr. Koch's collection, correct?

A. Quite the other side. At that point when he started taking things, we had pictures of everything.

Q. You took pictures of the cork?

A. I don't know. I just know that we had pictures of the bottle. I don't know beyond that.

Q. Just pictures of the front label?

A. I don't know how many pictures, but there were pictures taken.

MR. WESSEL: Objection. Lack of foundation. Mr. Curley doesn't know all the pictures, but Mr. Cialone does because they have been made available for the expert.

MR. CIALONE: If Mr. Wessel wants to call me to testify and ask me about that, he can. But if he just wants to make an objection -- the witness said he has pictures. I think I'm entitled to ask what pictures he has.

THE COURT: You may.

Q. You would expect, though, that nothing would change in the cork of a bottle just because it was being moved around, right?

A. I would have no idea. It might shrink, it might grow, I

don't know. Pressures do different things. But that's about all I know.

Q. You wouldn't expect the label to change, right?

A. Personally, I wouldn't expect the label to change, no.

Q. Are you supposed to be informed if the label is nicked or cut or anything?

A. To my knowledge, we didn't have a thorough nick and cut policy.

Q. So the bottles moved quite a bit, right?

A. These bottles?

Q. Yes.

A. They have moved quite a bit. I just said that, yes.

Q. From Florida to New York, to Cape Cod, to France, maybe more than once, right?

MR. WESSEL: Objection. Vague, your Honor. Not all the bottles moved.

A. Yes, and I'm not sure which bottles. In this case I didn't do a comparison if these 24 were even on that list of shipping. I'd have to have all the paperwork in front of me, shipping lists and things like that.

Q. Let's turn to a different subject. Who is Brian Orcutt? You know who Brian Orcutt is, correct?

A. I know Brian.

Q. Mr. Koch paid Mr. Orcutt money to put bids in for him, right?

A. Yes, he did.
Q. He paid him 5 percent, correct?
A. I think it was 5, yes.
Q. The higher Mr. Orcutt bid, the more he got paid, correct?
A. That would make sense, yes.
MR. CIALONE: Exhibit 1024 has been admitted. Would you put that up, please.
THE COURT: Go back for a second to 509. Did you move its admission?
MR. CIALONE: I would actually like to move 509 into evidence, your Honor. You said you were going to reserve because you wanted to work out the authenticity issue.
MR. WESSEL: Your Honor, I have no problem with admitting it for the purpose that the witness identified the particular entries for the particular bottle that he explained to us what happened. I have no objection to admitting it for that purpose.
THE COURT: OK.
MR. CIALONE: I'm moving it into evidence for all purposes, your Honor.
THE COURT: 509 is received in evidence.
I'll note for the jury that 509, insofar as you decide to look at that when you are deliberating, remember that it's connected to testimony about the format being the particular thing, that he didn't recall the format but that the witness

did recognize some of the information. That's just a note for the jury. But it is received.

(Trial Exhibit 509 received in evidence))

Q. Exhibit 1024 is an invoice to Mr. Koch, correct?

A. Yes.

Q. You saw that when it came in, correct?

A. I did.

Q. Do you recall raising a concern about it?

A. Yes.

MR. CIALONE: If I may approach the witness and give him Exhibit 455, your Honor?

THE COURT: Yes.

Q. Mr. Curley, is Exhibit 455 an email that you sent to Mr. Koch on January 10, 2006?

A. Yes, it is.

MR. CIALONE: Your Honor, I move Exhibit 455 into evidence, please.

MR. WESSEL: No objection.

THE COURT: 455 received.

(Trial Exhibit 455 received in evidence)

MR. CIALONE: Can you put that up, please.

Q. You thought Mr. Orcutt's fees were outrageous, right?

A. They were high. They were extremely high for what I thought he was doing or for what he was doing.

Q. You said his fees are outrageous, right?

A. I haven't gotten to that part yet. Maybe I missed it.
Q. Second paragraph. That's what you believed, because you wanted to protect Mr. Koch, right?
A. Correct.
Q. You worked for him for a long time and you didn't want to see him get ripped off, right?
A. That's correct.
Q. You say that at the bottom, "I do not want to see you get ripped off," right?
A. I'm sorry. I'm scanning around here.
Q. Sure. Are you aware that as part of his claim in this case, Mr. Koch wants Mr. Greenberg to pay him these outrageous and rip-off fees that he had to pay Mr. Orcutt for wanting plaintiff's counterfeit?
MR. WESSEL: Objection. Argumentative and untrue.
MR. CIALONE: It's in their pretrial statement.
THE COURT: Sustained. It's just a characterization.
MR. WESSEL: You granted a motion on that.
MR. CIALONE: The motion you granted was --
MR. WESSEL: Mr. Cialone, Mr. Curley testified the number today included not Mr. Orcutt's fee, it included what was on the invoice plus the buyer's commission on the invoice. This was litigated pretrial and it was resolved pretrial. And I'll sit down.
MR. CIALONE: That was just wrong, your Honor. What

was litigated pretrial was that they couldn't seek their investigative fees, which we won and you granted. Mr. Orcutt's fees were not the subject of any motion. I defy counsel to identify a single motion in which those words were used. I do understand Mr. Curley testified only to what Mr. Koch paid Zachys, but that doesn't preclude them from putting up other evidence about what they paid Mr. Orcutt.

They are acknowledging that those fees, which were in their pretrial statement which they said they were going to recover, have now been withdrawn. It's news to me, I'm glad to hear it, and I'll move on. But they should commit to that. I don't want to hear a different story later. Have they been withdrawn?

MR. WESSEL: Your Honor, we are not seeking Mr. Orcutt's fees. That was clear at the pretrial conference. I think it is clear from the evidence we have put on today. We are not seeking Mr. Orcutt's fees.

MR. CIALONE: Then I have no further questions.

THE COURT: Thank you. Is there any redirect?

REDIRECT EXAMINATION

BY MR. WESSEL:

Q. Mr. Curley, you talked a little bit about Exhibit 509, that you didn't recognize the formatting, correct?

A. Correct, yes.

Q. But you do remember the issues relating to the empty

bottle?

A. I do.

Q. Can you explain to us what happened with the empty bottle and why someone put it back in the system because they thought it was a full bottle and then it was corrected?

A. Yes. I kind of explained that earlier. The magnum racks, this was in the Florida cellar at the time, the magnum racks are all up high, high where Mr. Koch or I could reach them or someone over 6 feet could reach them. Because there are so many, they are kind of stacked pyramidwise. They are a reach for me, and I'm 6-5. The regular bottles are all below that in bins normally stacked.

This particular bottle had been consumed. It was marked consumed when Mr. Koch, I assume, or someone that was working for Mr. Koch that day that it shows consumed in our computer, scanned it out of the cellar, took it up. I think it was a special occasion that that bottle was drunk when Mr. Koch's brother was there. They drank the bottle.

We keep all the old bottles. Mr. Koch makes walls out of the bottles and lights it from behind, and it's kind of neat. And he keeps the labels. He takes them off and makes wallpaper out of it. The bathroom down by the wine cellar has wallpaper made out of all the old labels. He even keeps the corks. We keep all the corks from the wine he has drunk, and he makes other things out of those. Actually, one of the

ceilings of the small bathroom is made out of corks. So over the years of collecting, he has drank some wine.

That particular bottle was empty. And over that period of time -- I can't speak specifically to the time frame, because I wouldn't involved in any of the investigating and looking into things or finding on you things were found out. But over a period of time we grabbed that bottle, I particularly did, and put it back into the cellar as the safest place to keep it.

They couldn't reconsume it, I wouldn't get thrown out, it wouldn't get thrown in the crash trash, and it wouldn't get the label stripped off, and it wouldn't be made into a wall. So I put the empty bottle back in the rack of magnum bottles with the other wines of that age and type, Petrus.

When the staff went through -- I don't live in Florida but I go down from time to time to help manage the property. I go down from time to time to help with an inventory of wine, but I don't always do the inventory. The staff went through and scanned the bottles when they were doing inventory, and they just scanned the empty bottle, probably on a step ladder. I wasn't there, I don't believe, so I can't speak specifically. But they scanned it. It got scanned back in his inventory. The scanner is not smart. It doesn't know the bottle is empty.

That was the course of that consumed, back into inventory, consumed, and then I think the last two entries on

that email were maybe consumed again and then missing. "Missing" is a term that someone put in because we only had a very limited status. We hadn't thought of a status for investigation or shipping to France or those things yet. Like I said earlier, we added status descriptions as we had new statuses.

Q. The bottom line is your belief is that the bottle was consumed in 2004?

A. Yes. I've done the research. My total belief, all my records show that it was consumed in June of 2004.

Q. Mr. Greenberg's lawyers subpoenaed Mr. Koch to bring that bottle here today. Is that the bottle they asked for?

A. Yes. I brought it with me.

Q. Then you, at their request, brought the bottle to this courthouse in New York?

A. That's correct.

Q. The empty bottle?

A. Yes.

Q. They also asked you to bring another bottle that wasn't one of the 24?

A. That's correct.

Q. You brought that bottle because they asked you to?

A. That's correct.

Q. Yesterday they asked you to bring five other bottles to the courthouse today, and you did that, too?

A. That's correct.

Q. Can you recall any situation at any time in this case where they asked you to bring bottles anywhere that you didn't do it?

MR. CIALONE: Your Honor, I want to object to the suggestion that I am actually communicating with Mr. Curley directly or that anyone in my law firm is. Any requests, the timing of the requests, and the content was dictated by Mr. Koch's counsel.

THE COURT: That's fine.

MR. WESSEL: I will stipulate to that.

Q. Mr. Curley, did we ever convey to you a request from Mr. Greenberg to ask you to move a bottle from one place to another that you didn't act on?

A. Not to my knowledge. I remember bringing them to New York when Mr. Greenberg was first looking at them for a day.

Q. You brought some to the courthouse, some extra ones, and you brought some to the courthouse today at their request?

A. I did.

Q. You were asked about Exhibit 102. Why don't we pull that up. In terms of knowing the records of the Koch wine cellars about things like invoices and appraisals, are you the person that probably knows the most?

A. I think I am.

Q. You're sometimes asked to look for stuff?

A. Correct.

Q. You were asked here to look for information on 1895 Latour and a 1921 Petrus?
A. That's correct.
Q. You were asked to do that and you did it?
A. That's correct.
Q. Other than fulfilling that request, you weren't involved personally --
MR. CIALONE: Objection, leading.
Q. -- personally, to your memory?
THE COURT: Sustained. Please rephrase.
Q. Do you remember whether you had any involvement at this time in this matter other than sending this email?
A. I don't recall any other.
Q. Let's look at Exhibit 1081A.
A. One thing about that email is I think I remember Mr. Koch drank a bottle of the 1865 Latour, told me how much he liked it. That was the only thing that struck me from that. Sorry.
Q. On lot 6 there is a reference there "bottle is leaking and there is a puddle in the box." Do you see that?
A. Yes.
Q. Is that an example of a problem that you might discover when looking at the boxes?
A. That's one example, yes.
Q. This process of looking at the bottles when they come in to the cellar, do you have people helping you with that?

A. I'm sorry. Can you repeat that first part?
Q. The process of looking at the bottles and checking them against the invoice, do you have people who help you with that?
A. Yes. The looking at the bottles is very cursory. It's for the information on the label. If I saw that puddle, that would be when I might look at a cork. Sometimes the corks are dried out and shrunk and cracked. That would be why I look at a cork, to see what's causing the puddle. It could be a crack in the glass or something else.
Q. In 2006, when you had indicated that it might take 60 days to check everything in, you had thousands of bottles coming?
A. Yes, thousands of bottles. I was giving our estimate, Daniel I think it was, an estimate of to get back to you it might take up to two months.
Q. So you had people helping you going through the process you testified about earlier, checking?
A. Yes.
Q. During that process you are not authenticating wine?
A. No, not at all.
Q. You're checking it against the invoices and making sure it's not leaking, and things like that?
A. That's it.
MR. CIALONE: Objection, leading.
A. I'll tell you exactly. Checking to see if it's full, if it has a low shoulder, very low shoulder, obviously if it had

signs of leakage or the cork might have dried out, evaporated, is the bottle cracked, is the foil gone, whatever the physical attributes of the bottle are. Even to this day I have no way to tell the bottles. I just don't.

(Continued on next page)

BY MR. WESSEL:

Q. I'd like to hand you the 60055, the bottle you looked at before. Mr. Cialone asked you the question of whether, when the bottle came in, you could look at the cork. Do you remember he asked about that?

A. He did.

Q. Now looking at that bottle, can you tell anything about the cork?

A. No.

Q. If it were leaking, you could tell that.

A. Correct. Lots of times if it's leaking, it's -- it's just -- not so much it's pouring out but it's like -- there's like a little scum from years of leaking or, you know, like a gelatinized, hardened stuff.

Q. In the course of this case you've had to double-check bar codes against invoices and against the database. Has everything checked out when you did that?

MR. CIALONE: Objection. Vague.

THE COURT: Please clarify.

Q. Was the information -- when you had the bottle in front of you and you looked at the bar code, and then you checked the database to see if it reflected that -- the bar code for the wine you were looking at, did it always check out?

A. Everything jibed so far, yeah. You'd need a flashlight to see anything through that dark glass.

Q. And just to go back to explain the process, in February, March, April, that time frame, May of 2006, when you were checking in these bottles, you indicated that after the first check of the box and the second check to put the bar code on, then you put the bottle back in the styrofoam container in the box?

A. Yeah. The magnums would always go in those.

MR. CIALONE: Your Honor, the question is leading.

A. Well, it's an easy answer. The process was --

THE COURT: Hold on a second.

MR. CIALONE: "You indicated this."

THE COURT: Yes, please ask it in a nonleading way.

Q. The question is: Did you tell us --

MR. SHARTSIS: Well, can we have the judge actually rule?

THE COURT: Sustained. Please rephrase in a nonleading way.

BY MR. WESSEL:

Q. Mr. Curley, I don't want to go through all the steps that you talked about this morning. Now I want to talk about the step that happens after the bar code is affixed on the bottle.

A. Yes.

Q. What happens next?

A. The bottle -- basically how we were set up and how we always set up is we set up temporary tables in the space just

outside the crate cellars, crate cellar, and we would have the invoice there, we'd have the bar codes, and we'd do lot by lot. We would take a lot out and a lot, you know -- a lot -- these come in one-bottle lots, or these did because they all came in those single boxes with a lot number on the end. Sometimes a lot is three bottles, six bottles, twelve bottles, sometimes even more. But we take out one lot at a time. We'd be very specific. Take the bar codes that were assigned to that lot, they're all sequential from 60 -- or 599 something up through 60,000 for this. We would go sequentially down and be very pragmatic about putting bar code on the lot and then the bar code on the outside of the box, put the bottle back into the box and put the box back into the crate cellar and take the next box out. That's the simple process.

Did I answer your question?

Q. Yes.

A. Okay.

Q. And then the bar codes remain on the bottle and you checked the information about the bottles, the 24 bottles, and that's what appeared on Exhibit 1090A from the database.

A. Yes.

Q. That was the exhibit with the 24 bottles.

A. Yes, that's how I knew these bottles and that's how I've known to track these bottles from the day we put the bar code on the first time.

MR. WESSEL: No further questions.

THE COURT: Okay. Thank you.

MR. CIALONE: Nothing further, your Honor.

THE COURT: Okay. Thank you. You may step down.

(Witness excused)

THE COURT: Okay. Who is plaintiff's next witness?

MR. KABA: Plaintiff calls Michael Egan, your Honor.

THE COURT: Okay. Give him a minute to clear the witness stand.

Okay. If you'd please come up to the witness stands and Mr. Skolnik will swear you in.

THE CLERK: Just watch your step, please.

Raise your right hand.

(Witness sworn)

THE CLERK: Please have a seat. I'm going to ask that you state your name completely and spell your first and last name for the record, please.

THE WITNESS: Michael Egan. M-I-C-H-A-E-L, E-G-A-N. Thank you.

MICHAEL EGAN,

called as a witness by the Plaintiff,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KABA:

Q. First things first, Mr. Egan. Let's figure out that

accent. Where did you grow up?
A. I grew up in London, England.
Q. And where do you live now?
A. I live in Bordeaux, France.
Q. And what is it that you do for a living?
A. I'm a wine authenticator.
Q. What does that mean?
A. I look at people's collections of wine, both professional people and private, and evaluate the wines that they have, essentially confirming whether their collections are authentic or do they have -- or do the wines in their collections have problems with authenticity.
Q. And we'll talk about that a little bit further. But let's talk a bit about your general education. Did you go to university?
A. I did.
Q. Where?
A. In Manchester, England.
Q. When did you graduate?
A. 1979.
Q. And after graduating from Manchester University, have you received any other formal education in wine?
A. Yes.
Q. What was that?
A. After I left Manchester University in 1979, I went to

Bordeaux and did a course for a year studying French but also learning about wine tasting and basic wine making. There was a course there at Bordeaux University.

Q. And when did you study at Bordeaux University?

A. From November 1979 through to June 1980.

Q. And have you received any other certificates or diplomas in connection with wine?

A. Yes.

Q. What is that?

A. I received the Wine & Spirit Education Trust diploma in 1983.

Q. And what does that mean, the Wine & Spirit Education Trust diploma?

A. Well, the Wine & Spirit Education Trust is an English institution run full of people in the wine business, in the wine trade in England, and they evaluate your capabilities by certain written exams, and the diploma being one of them.

Q. So you had to take a written exam in order to get that diploma.

A. That's right.

Q. And you understand that you've been called here today as an expert witness?

A. I do.

Q. And who retained you?

A. Mr. William Koch.

Q. What's the subject matter on which you have expertise?
A. Fine and rare wines, particularly the wines from Europe and more particularly the regions of Bordeaux and Burgundy.
Q. And how long have you specialized in this field of fine and rare wine?
A. 30 years.
Q. Have you ever testified in court before?
A. No.
Q. Okay. How much of your professional career have you spent in the wine world?
A. All of it.
Q. So about 30 years.
A. 30 years.
Q. How did you get into wine in the first place?
A. Well, my father was born in France, near Bordeaux, and his -- he was born in this house, this little French manor house, and we went there every summer for our holidays, and I have cousins in the wine business in Bordeaux, so I developed a passion as I grew up because my father loved wines and he taught me a lot about how to enjoy wine, and I decided after university to have a career in the wine trade.
Q. What was your first wine-related job?
A. I was working in retail in London as a shop assistant.
Q. And how long were you working as a shop assistant?
A. Just over a year.

Q. What did you do after that?
A. I joined Sotheby's wine department.
Q. And we've heard Sotheby's referred to in this case earlier. Just remind the jury, what is Sotheby's?
A. Sotheby's is one of the world's leading fine auction houses.
Q. And what position did you have when you first joined Sotheby's?
A. I was the logistics person. That meant dealing with the wines which were being consigned to sale, making sure everything was ready for each auction, and also releasing the wines to the buyers after the sale.
Q. Was it difficult to get that job at Sotheby's?
A. Well, apparently there were a hundred applicants for this post so I was very lucky.
Q. And how long did you work for Sotheby's?
A. Just under 24 years.
Q. Were those -- all 24 of those years were spent in Sotheby's wine department?
A. They were indeed.
Q. Were you involved at auction -- at wine auctions while you were at Sotheby's?
A. Yes, I was.
Q. Can you give us a sense for roughly how many auctions you were personally involved in.

A. Well, the wine department was a full on department and it had organized between 10 and 12 auctions a year, so I suppose I was involved with about 250 auctions, approximately.

Q. Over the course of your 24 years there.

A. That's right.

Q. And where were you located while you were working in the wine department?

A. I was located in London but I had a spell over in Brussels, Belgium for a year.

Q. What was the highest position you obtained at Sotheby's?

A. A director of the wine department.

Q. When was that?

A. 1999 through to 2005.

Q. What were your core or chief responsibilities as director of the wine department at Sotheby's?

A. To ensure the turnover was as much as possible, making sure the junior staff were -- were working well on the catalogs. I was by that time promoting our auctions to the buyers, negotiating with the very important collectors to sell the wine through Sotheby's, and I was obviously inspecting the wine for sale.

Q. And so what does it mean that you were negotiating with collectors and inspecting the wine?

A. It meant collectors would contact Sotheby's or we would know who they were and we would negotiate with them, try and

persuade them to sell through Sotheby's. We weren't, obviously, forcing them to sell through Sotheby's, but if they were expressing an interest in the value of their collections, it was to a mind in selling part of their collections, so I was negotiating, as well as my colleagues, with these potential consignors, many of whom were very knowledgeable, to sell the wine through Sotheby's.

Q. And in the course of your work at Sotheby's as the director and otherwise, were you authenticating wine?

A. Yes.

Q. Did you ever receive training on authenticating wine?

A. Yes.

Q. What kind of training was that?

A. The training was in the form of my superiors when I was a junior, telling me what to look for in wine, showing me how to inspect wine properly, avoiding wine in deteriorated condition, wines that had problem with authenticity.

Q. And you've now discussed that you authenticated wine while at Sotheby's. Can you give us an estimate for roughly how many wines you've authenticated while you were at Sotheby's for 24 years.

A. Well, over that period of time, tens of thousands of bottles.

Q. And during that time did you have any contact with wine producers?

A. Yes.
Q. What -- which wine producers would you speak to?
A. Well, for example, Chateau Cheval Blanc, Chateau Lafite Rothschild, Chateau Latour, Chateau Petrus.
Q. Did you ever visit the chateaux?
A. Yes.
Q. How many times?
A. Well, in my career there, I'd say four or five times per chateau.
Q. And have you ever lectured on fine wine authentication?
A. I have indeed.
Q. Tell us a little bit -- help us to understand a bit about the process of authenticating fine wine that you employed while you were at Sotheby's.
A. Well, you'd go to someone's cellar, you'd look at the bottles, take them out and make sure that they were what they purported to be, and you did a visual inspection. You looked at the bottles, condition of the labels, the level of the wine, the capsule, and the cork. The capsule was very important because that is the actual seal of the bottle, so if that had been tampered with, that would be something which we were all told to pay special attention to. And we also looked to make sure the wine inside the bottle appeared to be all right.
Q. When did you leave Sotheby's?
A. In March 2005.

Q. Why?
A. Well, my father sadly passed away in 2003 and I inherited his share of this house, so I decided to move myself and my family down there. I had spent 24 years at Sotheby's, and this was a good time to embark on a new career.
Q. And it's at this time that you moved to Bordeaux, is that right?
A. That's correct.
Q. And what have you done for employment since 2005?
A. Wine authentication services.
Q. Has that been your full-time profession, being a wine authenticator?
A. It has.
Q. And has your process for inspecting wine since you left Sotheby's been the same as the process you used when you were at Sotheby's?
A. Yes.
Q. Have you worked for any private companies since 2005?
A. I have. I worked for a Bordeaux wine merchant called Bordeaux Winebank.
Q. And how long were you with them?
A. I was there for two years.
Q. What was your title?
A. I was director of authenticity and auctions.
Q. And what -- during which two years were you the director of

authenticity at Bordeaux Winebank?
A. 2010 through to 2012.
Q. We've mentioned Bordeaux a fair amount already. We've talked about it in this trial. Can you just explain for the jury, what is Bordeaux?
A. Bordeaux is a geographic region, southwest of France. The town of Bordeaux is virtually in the center of this region and it produces a lot of wine, fine wine.
Q. And do you have an understanding of whether the 24 bottles at issue in this case are all from the Bordeaux region?
A. Yes.
Q. Or at least purported to be?
A. They are, or purported to be from Bordeaux.
Q. We've also heard this term used, and help us understand: What is a chateau?
A. Well, a chateau is a brand. There are about 3 to 4,000 of these brands selling -- sorry -- producing Bordeaux. A chateau is essentially a farm, agricultural property. Not every single property has this fantastic big castle situated in the middle of it, but it's really -- there are a lot of labels which say chateau, and it's the brand. You have to -- you have to remember it's the brand rather than this magnificent palace.
Q. So with that understood, so, for example, Chateau Cheval Blanc is a brand of wine?
A. That is correct.

Q. Like a Gucci bag.
A. Exactly. That would be a very good analogy.
Q. Okay. And how about Chateau Petrus?
A. Probably a Prada.
Q. Okay. And we have a few other different types of wines at issue in this case. Some purport to be a Chateau Lafleur. Is that a desirable brand?
A. It is. So that would be like an Hermes bag. It's of the top 10 out of these 3, 4,000 brands.
Q. We're going to run out of bag references.
A. We are.
Q. But Chateau Lafite, is that also a desirable brand?
A. It is indeed. Again, one of the top 10 of all these brands.
Q. And finally, how about Chateau Latour?
A. Yes, exact -- the same, within that top 10 category.
Q. And during your career have you inspected wines from each of these different chateaux?
A. Yes.
Q. And roughly how many bottles in total would you say that you've inspected for authenticity?
A. Well, again, it goes back to, you know, the tens of thousands. Sotheby's specialized in selling the very best Bordeaux and wines from other regions, so we spent a lot of -- we saw a lot of bottles from these properties, these -- these

chateaux.

Q. And have you, in the course of your 30-year professional career, determined wines that purport to come from these chateaux to be counterfeit?

A. I have.

Q. And have you determined some of these wines not at issue in this case but just in your career to be authentic?

A. Yes.

MR. KABA: Your Honor, at this time plaintiff would tender Michael Egan as a qualified expert witness in the field of rare and fine wine authentication, pursuant to Rule 702.

MR. CIALONE: No objection.

THE COURT: Okay. He's qualified.

Q. Okay. Let's talk just a little bit about how wine is made and bottled. Can you describe that process for the jury briefly.

A. Yes, sure. You have to remember, the harvest only takes place once a year in Bordeaux, so this is -- happens in the autumn, in September, October time. The grapes are picked, maybe stomped on back in the 1920s, but now they are pressed, mechanically, and this juice is put into big fermentation vats, and the fermentation takes about three weeks.

After that the red wine undergoes a second fermentation, which is called a malolactic fermentation, which modifies the acidity. The grapes have kind of a high natural

acidity, and you want that to be transformed into a softer acidity so that generally takes the winter to complete.

After that, for these sort of wines, they want to put them into oak barrels in order to give a certain other dimension to impart some -- not oak flavors but more complex flavors to the wine, so these 225-liter barrels are filled with the harvest, and this is -- these barrels are kept to the chateau for a maximum of two years, and then the entire harvest is bottled. They're taken out of the barrels, blended together, and then bottled.

Q. So you mentioned something about the wine being in oak barrels. How long did it stay in that oak barrel?

A. A maximum of two years.

Q. Why not longer?

A. Oak. These tannins would be too much. They would start dominating the wine. So two years is the maximum.

Q. So let's take an example of a 1921 Cheval Blanc. That's what the bottle purports to be. What does a 1921 represent?

A. Well, that is the year that the grapes were picked. That is the year of the harvest.

Q. And by when would that bottle have, you know -- the juice been put in the bottle, the label put on, the cork put in, the capsule put on?

A. Two years later, so 1923 it would be bottled.

Q. Now was all wine bottled at the chateau?

A. No.
Q. Where else could wine have been bottled?
A. Well, the chateau had a choice. For economic reasons -- I'm talking about the 1920s, 1930s, '40s, '50s -- it was not surprising to see a proportion of this harvest in sort of the chateau bottling that -- the chateau would actually sell the wine in barrels to the merchants and then so the merchants in Bordeaux or even elsewhere would be looking after the wine in barrels and they would do the bottling themselves, but they would follow the two-year rule, so to speak, so that they would be bottling at about the same time as already said.
Q. So even if -- in your opinion, even if it was merchants bottling the wine, that too would be done within two years of the harvest.
A. That's right.
Q. So if a merchant was bottling Cheval Blanc, 1921 Cheval Blanc, by when would they have finished the bottling and the labeling and the capsuling?
A. That would be, again, 1923.
Q. Is there an easy way to tell whether a Bordeaux wine has been bottled at the chateau or bottled outside?
A. Very simple. Every single wine which is bottled at the chateau always states as such on the label.
Q. What does it state on the label precisely?
A. Well, in French it says "Mis en Bouteille au Chateau,"

which literally means put in the bottle at the chateau.
Q. Why did the chateau indicate on the bottle that it was bottled at the chateau?
A. Because the chateaux are very proud of their product, and it's also a guarantee for them to different -- differentiate what they bottled perhaps and what the merchant bottled. They like to make a distinction. It actually commanded a premium to actually buy wines which were chateau bottled than bottled by merchants.
Q. Let's talk about a term that you've used already here. It's counterfeit wine. What is counterfeit? What does the term counterfeit wine mean to you?
A. Well, a counterfeit wine means the bottle is not what it purports to be. The wine, the whole entity is not what it purports to be.
Q. And is that concept of counterfeit wine related to the marketability of that wine?
A. Yes.
Q. How?
A. Well, the wine -- well, the bottle cannot be offered for sale as a genuine article.
Q. And is this definition of counterfeit wine consistent with how you have used it in the past?
A. It has -- it is indeed.
Q. Is it consistent, this idea that wine that is not what it

purports to be consistent with how your colleagues used it at Sotheby's?

A. That's correct.

MR. SHARTSIS: Objection, your Honor. He didn't say the wine was not what it purported to be; he said the bottle was not what it purported to be. It's a misstatement of his testimony.

Q. Is the definition that you have used and articulated to the jury here today of counterfeit wine consistent with the definition that had been used by your colleagues at Sotheby's?

A. Yes.

Q. Now why isn't counterfeit wine just an opinion on the juice inside the bottle?

A. Well, we're looking at these old wines, which are artifacts now. They're survivors. Wine is a living thing and it's -- for collectors, it's very special to have this living thing in its original enclosure. It's a find. It's an archeological find. You have the bottle, you have the label, the capsule, everything is of the period. Nothing has been changed. It is a guarantee that it's a gen -- the genuine article. And this is why fine wines, because they are getting drunk regularly year by year, they're becoming rarer and rarer, and this is what makes wines from the 1920s, 1930s, '40s, '50s in particular so fascinating because they've withstood the test of time. Wines from the 1920s have, you know, withstood the

second World War, for example. A lot -- a lot went missing in that period. So through the generations, again, consuming this wine, you're seeing a diminishing, I suppose, a diminishing breed.

Q. Now, Mr. Egan, the collectors that you work with, do they sometimes buy some of this old fine and rare wine not to drink it?

A. Yes. They like to have it in their cellars as conversation pieces or they may be looking for that particular bottle to complete a collection. It's not expressly in a -- for drinking. People celebrate their birthdays, and that's another analogy to this concept of something living. You like to have something as old as you are which, you know, is biological rather than completely inanimate.

Q. Now you've testified that you visually inspect wines to authenticate it, and we've heard a fair amount of talk here about tasting the wine. Is -- do you believe tasting is an effective way to authenticate wine?

A. No.

Q. Why not?

A. Because tasting is a subjective experience. People -- people's opinions vary widely. People cannot arrive very often on a consensus of, you know, the quality of the wine. Also, as wine gets older, it loses its individuality, so the further back you go, you may not even be able to determine whether it

is a Bordeaux, for example, from a Burgundy or from an Italian wine.

Q. And once you've visually inspected a wine and determined that it's counterfeit, would you want to taste that wine?

A. Not really, no.

Q. Why not?

A. Well, you wouldn't know what was inside it, you know, what was the concoction.

Q. Now in your 24 years at Sotheby's did you ever authenticate wine without tasting it?

A. Yes.

Q. Was it of more or less frequency?

A. The authentication was -- without tasting was almost all that we did, by visual inspection.

Q. Now do you think it's necessary to obtain an opinion from a chateau prior to determining whether a wine is counterfeit or real, or authentic?

A. No.

Q. Why not?

A. I think I'm -- I can rest on my own experience and what I've seen to determine if a bottle of wine is counterfeit or not.

Q. And again, while you were at Sotheby's working on these 200 plus auctions, did you frequently go to the chateau to get their opinion on bottles that you deemed counterfeit?

A. Not frequently, but they could assist us, you know, to have supplemental information on wines that we were having questions about.

Q. And do the -- do the chateaux have personnel changes over the course of the time that the wine was bottled to the time -- to today?

A. Sure. I mean, you wouldn't expect people to still be around who worked there in the 1920s, '30s, '40s, so there are personnel changes, yes.

Q. We've also heard this term "provenance" used. What is provenance?

A. Well, provenance is the history of an item, so wine is -- does have a provenance. It's bottled at the chateau, then it goes to the merchant, then it goes to the importer and then to the retailer and then to the consumer, so good provenance would be -- would stop at the first consumer, but obviously people sell their wines on a regular basis so the provenance chain may be lost in time.

Q. We've also heard reference to some kind of chemical testing of wine. Are you familiar with chemical testing of wine to determine its authenticity?

A. No.

Q. Have you ever used chemical testing to determine the authenticity of a wine?

A. No.

Q. Do you know any of your colleagues at Sotheby's or in the wine authentication world that use chemical testing to determine the authenticity of wine?
A. No.
Q. We heard during opening statement a reference that until 1973 there was no standardized label for bottles from any major chateau at Bordeaux. Do you agree with that?
A. No, I don't.
Q. Why not?
A. Well, it goes back to the concept of a chateau as a brand and I -- how you distinguish one brand from another. Well, it's the -- what it looks like, the logo, so a chateau label is its brand and this will remain unchanged year -- year on -- year on year because that is the way they market themselves.
Q. Now you worked on a lot of auctions at Sotheby's, and did -- the auction house has a role -- does the auction house have a role in inspecting the wine?
A. It does, yes.
Q. What, if any, role does the actual consignor of the wine play?
A. Well, the auctioneer acts as the agent for the consignor, the seller; doesn't act as the agent for the buyer. So the auctioneer forms a partnership, if you like, with the consignor and so the consignor should assist the auctioneer in the task of evaluating and authenticating the wine.

MR. SHARTSIS: Your Honor, we object to broad testimony. This exceeds the report, and I'd asked Mr. Egan at his deposition if he had told me everything he had to say in his deposition, after I asked him all the questions I asked, whether we covered all the subject matter, and discussion of partnerships at auctions was not included either in his report or in all of the questions I asked him at his deposition. I asked him if he had given me his full report. And I would object on that ground.

THE COURT: On everything related to auctions or --

MR. SHARTSIS: No. We covered matters relating to auctions and I asked him about those things. This is a subject matter he didn't identify. I'm entitled to ask him things I asked him at deposition. That's why I asked him the traditional question, have you told me everything in your report, everything you have to talk about, and we didn't hear this, your Honor.

THE COURT: Mr. Kaba?

MR. KABA: Your Honor, there -- Mr. Egan has participated in over 200 auctions. There's been a lot of testimony about what an auction house's role is and why a consignor can just say nothing to an auction house and it's all up to the auction house. I think it would be helpful to the jury certainly for a percipient witness who has participated in over 200 auctions to briefly explain what role the consignor

plays in the auction process. It's -- the standard I think is really what would be helpful to the jury.

MR. SHARTSIS: He can go ahead and testify about this, but he ought to give us a foundation that he has worked at other auction houses and that he knows what those auction houses do, rather than give some generalized testimony. If he wants to talk about Sotheby's, that's fine. If he's worked at Zachys or he's worked at Christie's, he should give us that foundation and then we'll have the questions.

MR. KABA: I think we have a foundation. He's established that he's worked at over 200 auctions. I'm asking him -- to be very clear, I'm asking Mr. Egan about his experience.

MR. SHARTSIS: 200 auctions for Sotheby's, your Honor.

MR. KABA: Stipulated.

THE COURT: Okay. You can continue. You can continue.

MR. KABA: Thank you.

BY MR. KABA:

Q. Mr. Egan, in your experience, so we're clear --

A. Yeah.

Q. -- in your over 200 auctions in which you participated, what did you expect the consignor to tell you about doubts they may have as to the authenticity of their wine?

A. Well, it would be very useful, if not essential, if there

were doubts about authenticity, for us to be informed about any doubts that a consignor may have.

Q. And in your experience, again, if a consignor withholds information that they have about the authenticity of their wine, would that hamper your ability to vet the wine?

MR. SHARTSIS: Oh, no, your Honor. This really is far afield. There's been no testimony elicited and nothing in the report along these lines whatsoever. This is not what this gentleman gave -- look at his report. His report is a report on 36 bottles of wine.

MR. KABA: Your Honor --

MR. SHARTSIS: That's it.

MR. KABA: -- I'm just surprised -- first, I'd appreciate if the objections were the objection, not long speaking objections, but I'm really surprised that a witness who has all of this experience authenticating wine, dealing with consignors, expecting them to be forthcoming, is not allowed to tell the jury about that experience.

MR. SHARTSIS: Well, your Honor --

MR. KABA: I have a few more questions on this line.

THE COURT: I'll allow it.

MR. SHARTSIS: There are rules about what experts do.

THE COURT: Right, but I don't think they have to have disclosed every single sentence in detail.

MR. SHARTSIS: This is a different subject. This,

your Honor, is.

THE COURT: He testified about auctions.

MR. SHARTSIS: This is the relationship between the consignor and the auction house, your Honor, and there was I don't believe testimony about that relationship where I had a chance to examine him, as I'm entitled to do at his deposition, based on the report on this particular subject.

MR. KABA: Mr. Shartsis was not foreclosed from asking him any questions he would like, and I have just a few more questions, and I'd like to proceed.

THE COURT: Overruled. Continue.

MR. KABA: Thank you.

BY MR. KABA:

Q. In your experience working on over 200 auctions at Sotheby's, would you -- if a seller -- strike that.

In your experience, if another auction house had already rejected a seller's wine on the basis of authenticity, what, if anything, would you have expected to know from the seller?

A. Well, we would have liked to have known which bottles were at issue which had been rejected.

Q. And in your experience did you understand sellers to be consigning wines that they believed to be genuine?

A. That's right.

Q. I want to talk briefly also about inspections before

auction. There's been a lot of testimony. In your experience working on auctions at Sotheby's, was it common for prospective buyers to come and inspect wine prior to auction?

A. No.

Q. And on those rare occasions -- well, did sellers ever come and inspect prior to auction?

A. Rarely. Very rarely.

Q. And do you ever recall an instance where a prospective buyer inspected hundreds of bottles before auction?

A. No, I can't recall that.

Q. Do you ever recall a situation where a buyer even inspected 50 bottles before auction?

A. No.

Q. In your time as a consultant on authentication, have you personally ever inspected wine before an auction on -- before an auction on behalf of a buyer?

A. I have not.

Q. There was an objection before I believe I got the answer to one of your last questions. If a seller withholds information, in your experience, from the auction house, does that affect the auction house's ability to inspect and vet the wine?

A. Yes, it does.

Q. How long does it take you to inspect a bottle of wine, generally speaking?

A. About 25 minutes.

Q. So how long do you think it would take you to inspect 2600 bottles of wine?
A. Well, I'd suppose about 1,100 hours, about.
Q. A long time.
A. Yes.
Q. And in doing so, do you need -- what kind of access do you need to the wine?
A. Well, you need -- for that amount of bottles, you'd need assistance, you'd need people to bring you the bottles, you would need, I suppose, to have complete access to these -- to these bottles.
Q. And I'm going to ask you to maybe either pull the mic a little bit closer to you or lean in a bit.
A. Sure.
Q. I'm having a little bit of a hard time hearing you.

And do you need any tools in order to be able to inspect the wine?
A. Yes.
Q. What kind of tools do you need?
A. A magnifying glass, a jeweler's loupe, a flashlight, measuring tape. That's about it, really.
Q. And in this case we've heard that Mr. Koch received the auction catalog ten days to two weeks before the auction. Would you have been able to inspect 2600 bottles of wine within that time period?

A. No.
Q. Is it true that you can sometimes identify suspicious features of wine fairly quickly?
A. Yes.
Q. And so if you -- if you have that kind of clue that there may be a suspicious feature, does that stop your authentication process?
A. It's a clue, but you need to look at the whole bottle and you want to be satisfied because wine authent -- to declare something inauthentic is very serious, so you have to take it very seriously and therefore inspect very carefully the bottles. That's why I say 25 minutes per bottle.
Q. Have you ever authenticated a wine looking just at catalogs?
A. No, I have not.
Q. Why not?
A. As I said just previously, you need to look at the item in the flesh, not just from an image.
Q. Have you had an opportunity to inspect all 24 bottles of wine at issue in this case?
A. Yes.
Q. When did you inspect them?
A. In November 2010.
Q. Where?
A. Cape Cod, Osterville.

Q. How many wines in total did you inspect?
A. 36.
Q. And let's talk first about the full universe of 36 bottles that you inspected. How many of those did you conclude were counterfeit?
A. 35.
Q. And how about the one that you didn't conclude was counterfeit?
A. Well, I thought it was -- had issues with it, but I didn't conclude that that particular bottle was counterfeit.
Q. And then let me draw your attention to the 24 bottles that are sitting here at counsel's table. How many of these 24 bottles did you conclude were counterfeit?
A. All 24 of them.
Q. And again, what do you mean when you use the term "counterfeit"?
A. These bottles are not what they purport to be.
Q. Did you conclude that any of these 24 bottles should have been sold?
A. No.
Q. Did you reach a conclusion about whether or not these bottles should have been sold?
A. Yes, I did.
Q. What is your conclusion?
A. They should not have been offered for sale as genuine

bottles of wine.

Q. Did you taste any of these wines?

A. No.

Q. Did you feel you needed to?

A. No.

Q. Let me ask you a bit about your visual, your -- the process that you go by in order to inspect wines for authenticity. What -- what features did you look at?

A. We're looking at the bottle, the label, which is again this trademark, the brand of the chateau would be one of the main things we look at first, and then the capsule, again, which is the seal of the bottle, very important to check that, and the bottle, the shape of the bottle, is the bottle of the period, the cork, is it at the right cork, again, the right cork of the period, has it been manipulated in any way.

Q. What other features?

A. And then the fill level, very important, 'cause that -- that can provide clues.

Q. And do you look at any other labels on the bottle?

A. Well, there might be other indicia on the labels. For example, stamps on the labels or back labels.

Q. And did you look at all six of these features in determining whether or not the 24 bottles at issue here are counterfeit?

A. More or less, yes.

MR. KABA: Okay. Your Honor, I'm about to get into a bottle-by-bottle discussion. If you'd like to take a break now --

THE COURT: Yeah, why don't we take our afternoon break.

Ladies and gentlemen, we'll take ten minutes. Please leave your pads on your chairs. We'll see you in ten minutes.

(Jury excused)

THE COURT: Okay, folks. We'll see you in ten minutes.

(Recess)

(Continued on next page)

(Jury not present)

MR. SHARTSIS: Your Honor, may I raise one housekeeping matter?

THE COURT: Yes.

MR. SHARTSIS: Your Honor, we have asked the plaintiff if we can get hardcopies of the exhibits they used at the opening. They have said they will not give it to us. It seems to me that it is appropriate that we are able to see what the jury was shown so we can respond to it at closing.

MR. HUESTON: Your Honor, first of all, they are not exhibits. They have asked me for the demonstratives, and we had an agreement before trial that the parties were not going to exchange demonstratives. There was no checking and exchanging. We proceeded. Demonstratives went up, went up without any objection. They were not admitted into evidence.

I think it is highly inappropriate that they would ask and have them and then I don't know what they are going to try to do in closing about a demonstrative from opening which is supposed to be what the evidence will likely show. I have been in cases where we have actually exchanged demonstratives, and the courts normally say you're not going to use the other side's work product and slice them up or do things with them at closing, it is just inappropriate, especially under the circumstances of this case.

MR. SHARTSIS: Your Honor. What we did at first, we

asked to exchange them before. We received a letter saying we trust you will be very professional and not do anything inappropriate in the opening, which we followed.

I think it is unfair to be able to put something in front of the jury and not allow the other side to comment on it. We are happy to give them our demonstratives. We think it is only fair to do that. When you give an opening statement, your Honor, you make a promise to the jury what you are going to prove, and we are entitled to try to hold the plaintiff to their promise. I don't see what harm is done by us getting something that has been shown in the courtroom.

MR. HUESTON: First of all, that mischaracterizes. There was an agreement not to exchange, number one. Number two, they have my opening statement. It's called a transcript. If they think it is appropriate closing to harken back to what was said in opening, have at it. But to actually take demonstratives to which they didn't object and which there was an agreement not to exchange and attempt some sort of circus in closing with my work product --

THE COURT: I'm not going to make you exchange them. Whatever the parties agree to.

MR. HUESTON: Thank you.

MR. SHARTSIS: Your Honor, we agreed before the opening. I didn't object. I didn't think they were objectionable. I certainly didn't agree that we would be

deprived of being able to use things that were shown to the jury. Is there something wrong with me being able to show the jury something where said they said they would show you this but they failed to? Can't I do that?

THE COURT: You saw the exhibits.

MR. SHARTSIS: Wouldn't it be more efficient for the jury, to assist the jury, that rather than me getting up and saying, well, let me take a minute to describe what they said, to just put it up? Why can't I do that, your Honor?

THE COURT: I'm not going to make them give you their product.

MR. SHARTSIS: You're the judge. You're supposed to order things.

THE COURT: I know, but I'm not going to do it. I'm not going to make them. The parties can agree or agree not to exchange. You saw the exhibits. You can talk about them. You can comment on them.

MR. SHARTSIS: Your Honor, if the parties don't agree, the Court will not make decisions on what should happen?

THE COURT: That's not what I said.

MR. SHARTSIS: That's what I'm concerned about. Why can't I just use what was in the courtroom? If they had put up a board here, I could take the board and I could point to it and describe it. If they put something up in front of the jury, your Honor, to make an argument, could I please just use

the things that the jury got to see?

THE COURT: You can talk about it. I'm not going to make them give you their work product that was used only as a demonstrative.

MR. HUESTON: Thank you, your Honor.

THE COURT: Can we get the jury.

(Continued on next page)

(Jury present)

THE COURT: Welcome back, folks.

Mr. Kaba.

BY MR. KABA:

Q. Mr. Egan, let me go back briefly to your time at Sotheby's. Were you ever involved in working on the catalog that Sotheby's would prepare for auction?

A. Sure.

Q. How many catalogs were you involved with?

A. 250.

Q. In the course of working on those catalogs, had you seen things similar to what has been shown here, which are notes, not tasting notes, but notes about the actual lots that are being sold?

A. Yes, I have seen those actual notes.

Q. What are those notes meant to reflect?

A. These are called condition notes. A modern wine, say from the 1990s or from the 2000s, if you have a bottle and it's been kept properly, there will be no issues with the label or the capsule. You will just say one bottle of Chateau Latour 2005. However, if that label was damaged, in the catalog we would mention that so as to portray it accurately. Or in some instances Sotheby's -- the label would be missing and the consignor would put a tag label on it. We would have verified that by cutting the capsule and looking at what actually was on

the cork just to make sure it was a bottle of Chateau Latour 2005.

Q. If the catalog note doesn't speak to an attribute of the bottle, say the cork, let's say there is no mention of the cork on a catalog note, what does that signify?

A. It would mean there is nothing wrong with the bottle, there is no dust on it, there is nothing untoward about this bottle.

Q. During your time working on catalogs at Sotheby's, if a consignor ever told you, hey, I know this is a photocopied label or I believe this is a photocopied label, would you decline the consignor's request to put that in the catalog?

A. If there were no other grounds for authenticity apart from the fact that a photocopied label had been put on the bottle, then we would go ahead and catalog it as such, with the designation "Chateau Latour 2005 photocopied label."

Q. Again, just in your time working on over 200 auctions at Sotheby's and on the various catalogs for those auctions, do you recall ever denying a consignor's request to make a disclosure in the catalog?

A. No, we have not.

Q. Let's proceed to the analysis of these 24 bottles at issue.

MR. KABA: Your Honor, with the Court's permission, not for every bottle, but I think it may be helpful to the jury if Mr. Egan is allowed to point out, close to the jury but off of the witness stand, some of the specific attributes he

studied on the bottle.

THE COURT: That's fine.

Q. Mr. Egan, let's start with Exhibit 223. If you come off the witness stand, I'll hand this to you. Wait until I ask a question?

THE COURT: Make sure that you speak so that the court reporter can hear you and the jury can hear you and counsel can all hear you, to the extent you can.

Q. Mr. Egan, what does this purport to be?

A. This purports to be a magnum of Chateau Cheval Blanc 1921.

Q. Have you seen this magnum before?

A. I have.

Q. When did you see it?

A. I saw this in November 2010.

Q. Is 1921 a good vintage?

A. It's one of the great vintages of the 20th century, of the handful of truly great ones.

Q. I'm also going to hand you what's previously been marked as Trial Exhibit 105, which I will hand to you so you can identify it. Mr. Egan, what is Trial Exhibit 105?

A. This is my report which I wrote concerning the bottles I inspected in Osterville in November 2010.

Q. I've given you that so that if it would aid in recalling some of the observations you made about these bottles, you can refer to that document. Let's start with the label, Mr. Egan.

Did you notice any authenticity issues with respect to the label on this magnum of purported 1921 chateau Cheval Blanc?

A. Yes, I did. The label is large. This is a magnum bottle. The label is usually slightly smaller in dimension to this. This is larger than it should be.

Q. How about the quality of the label?

A. The quality of the label, you can probably see, the printing is not firmly impressed on the paper. It is faded. I think it's been rubbed. But it is not a fair depiction of a Chateau Cheval Blanc label. This is purportedly a very old label, and they took great care when producing the labels. The paper is not the right quality. The paper is rougher. The chateau uses very fine paper so it can wrap around the bottle. This shows signs of coarseness, especially where it's torn here. You can see it's rather rough here. The original labels wouldn't have that sort of roughness.

Q. What does that suggest to you, the coarseness of the paper, the poor printing quality?

A. This is a copy of a Chateau Cheval Blanc label. It is not an actual label as fitted to this magnum by the chateau.

Q. Would you expect the chateau to use a copy of a label?

A. No. They would use only ones which were printed for them by the printing press.

Q. I have seen this magnum before. It looks to be old. It looks like it has stains on it. Did you make any observations

about that?
A. Yes. Particularly around the middle and to the right side there is what looks to be some sort of dark liquid or -- not liquid, a substance applied to it. A label which is now 90 years will have undergone some sort of --
Q. Speak up a little bit.
A. The bottle is always laid down in the cellar like this, and you have some natural staining from damage or dust coming down.
Q. Does that look to be natural staining to you?
A. It does not.
Q. What does it look like?
A. It looks like it's been treated to look old.
Q. Have you ever heard a term called "reconditioning," Mr. Egan?
A. Yes, I have.
Q. What is reconditioning?
A. Reconditioning is a process where the cork is replaced. Essentially, that is the main component of reconditioning. Corks are from tree bark, and they will not last forever. Corks are a fantastic material because they are elastic, but as the wine is in contact with them such a long while, the wine gradually saturates the cork and the cork will let in more of the wine to it, actually pour through the capsule and evaporate.
What you will have then is that the level of the wine

will go down. This makes the wine susceptible to being attacked by oxygen. Oxygen is the wine's worst enemy. That's why it's enclosed in this space. If any oxygen comes into the wine, it could be rendered undrinkable.

What people can do is to actually have their bottles serviced, for want of a better word. The chateaus did this service. You would take your magnum to the chateau, but you would have to take another magnum of the same year and cannibalize that.

You would have this one, which is going to say be recorked, but you would have to fill up the liquid again, so you would have to bring on the magnum or other bottle that would be used when the cork is taken out by the chateau. The wine from the other bottle is put in, and then a new cork is put in and a new capsule is applied. As a service as well, the chateaus would put on a new label.

Q. Has this bottle been reconditioned?

A. This has not been reconditioned at the chateau. The chateau would never recondition a bottle and put such a copy label on it.

Q. Would the chateau recondition a bottle and put a label with artificial coloring on it?

A. No. There would be no treatment like that.

Q. Did you notice, make any observations, about the capsule on this bottle?

A. Yes. Look carefully. Obviously, it has been cut away. But the lip of the 1921 vintage would feature embossed letters which say it was chateau, "mis en bouteille au chateau." Here there is nothing around this lid, so this is not a capsule from 1923, when it would have been applied. This is a later capsule.

I do not think that it is an actual Chateau Cheval Blanc capsule because the actual treatment, I don't know if you can see it, but there is a little chateau actually on the capsule. It's not as clearly done as would have been done at the chateau.

Q. How do you know that or why do you believe this bottle purports to be bottled at the chateau?

A. This is what I was saying earlier. This is the important wording on the label, "mis en bouteille au chateau." That would tell you that this purports to be bottled at the chateau. This is what the chateaus would put on all their labels of all the wines which they bottled.

Q. How about the cork? Did you make any observations about the cork on this bottle?

A. You can't see it. The cork is probably the worst thing to be able to show you. The normal length of a cork is 5.2 centimeters, which is roughly an inch and a half -- sorry, about two inches and a bit. This cork is 5.7 centimeters, so it's longer than a regular chateau cork.

Q. Why are corks of this era normally 5.2 centimeters?
A. This is the industry standard. As the cork manufacturers would have done and the federation of cork makers in France stipulate, the fine wine closure like this, it should be 5.2 centimeters.
Q. Only in France would they have a federation of cork makers, I suppose?
A. That's right. It's a syndicate, Federation du Bouchoniers.
Q. Let me ask you, there appears to be a diagonal label on the back of that bottle.
A. Yes.
Q. What does that label say, first of all?
A. This is an instruction to the consumer to decant this wine and let it breathe for five hours before consuming. That means you pour out the win into a decanter and this lets it breathe. I told you before oxygen is an enemy of wine during storage, but it helps when you open it because it brings out the aromas. So it is very important for these sort of fine wines to decant them.
Q. What does the presence of this label on this bottle suggest to you about the authenticity of this magnum?
A. This particular strip label is peculiar to the French retailer called Nicolas. They put these on their fine wine bottles. The Nicolas were very proud of having such fine wines to sell and they wanted everyone to know forever that they were

the purveyors of these fine wines, so there would be a little round stamp over the vintage or along this plane here which would say "Etablissements Nicolas." That is why this is another anomaly that you have this back label but you do not have the commensurate round Nicolas stamp at the front.

Q. Finally, did you notice anything about the fill level of this bottle?

A. Yes. The fill is very high. This again is talking about recorking, how wine gradually diminishes in the bottle because it goes through the cork. The fill level is at the bottom of the neck. This is extraordinarily high for wine now more than 90 years old. I would normally fill down to the top shoulder, high shoulder. That's why wines of a certain age, it is not a bad idea to recondition the wines in the chateau.

Q. Here you noted that the fill level is very high for a bottle that purports to be 90 years old. Why do not believe this bottle has been reconditioned?

A. Again, as I said before, it would have had a proper capsule applied, a new cork, and a new label. This has a long cork, which doesn't look to me that it's a modern Chateau Cheval Blanc cork. So this wine has not been reconditioned at the chateau.

Q. Considering all of these factors -- the label, the capsule, the cork, the back stamping, and the fill level -- have you reached a conclusion as to the authenticity of this wine?

A. Yes.
Q. What is your conclusion?
A. It's a counterfeit.
Q. Do you have any opinion as to whether or not this wine should have been offered for sale?
A. Yes.
Q. What is your conclusion?
A. It should not have been offered for sale as a genuine magnum of Chateau Cheval Blanc 1921.
Q. Let's put that down. You can take your seat again. We might ask you to do another demonstration for the jury.
A. I'm sorry I don't have any new ones.
Q. Let me hand to you another purported magnum of 1921 Chateau Cheval Blanc, which is Exhibit 224. Have you seen this before?
A. I have.
Q. When have you seen it?
A. I saw it in November 2010.
Q. What does this purport to be?
A. It purports to be a magnum of Chateau Cheval Blanc 1921.
Q. Similar to Exhibit 223 which you just walked the jury through?
A. That's right, similar.
Q. Did you observe any issues with the label on this magnum?
A. Yes.
Q. What are those?

A. Again, we have a size issue. The size of the label is too large for an actual magnum of Chateau Cheval Blanc 1921. It is slightly too large both longitudinally and latitudinally.

Q. How about the staining that appears on this magnum?

A. The staining, as shown before, has been artificially applied. It's not the natural patina or natural form of dust or damp which has affected this label.

Q. Maybe you can turn the label to the jury.

A. Yes.

Q. There looks to be something that might resemble mold on it. What do you believe that is?

A. I don't think it is mold. I think it is some other substance. It's not natural. It's not something you would naturally see in a cellar. It's something which is applied to simulate mold or dirt for an old label.

Q. Has this bottle, in your opinion, been reconditioned at the chateau?

A. No, it has not.

Q. Why?

A. The chateau would not have reconditioned this and put a label like this on this magnum. Again, the label -- sorry -- the capsule, go to the capsule. We have the same issue as the preceding capsule, where the "mis en bouteille au chateau" has not been impressed, or embossed, sorry, on the lip here. So it is not a chateau of the period.

Q. On this bottle we see another back label.
A. Yes.
Q. Have you made any conclusions about the authenticity of this wine based on that back label?
A. I don't think this is applied in the right place. This should be at the front. This is an importer's label, in this instance a company called R.B. Beaumaine, who are based in Brussels. They supplied a lot of fine wine to wealthy Belgian clients. They would have put their label on the front of the bottle, not at a diagonal at the back, where it could not be seen. This should be at the front because they would want to have their name associated with, again, the brand, the logo of the chateau.
Q. Mr. Egan, how do you know that sometimes they might put the label on the front, sometimes they might put it on the back, sometimes diagonal, sometimes horizontal; why do you believe that is an indication that this bottle is inauthentic?
A. Because I've seen so many bottles with these sort of labels, and they've always been affixed to the front of the bottle rather than diagonally at the back.
Q. Have you reached any conclusions as to the authenticity of this magnum?
A. Yes.
Q. What have you concluded?
A. This is a counterfeit bottle.

Q. Have you reached any conclusion as to whether or not this magnum should have been offered for sale?
A. Yes.
Q. What have you concluded?
A. It should not have been offered for sale as a genuine magnum of Chateau Cheval Blanc 1921.
Q. I didn't ask you about the fill level, and I recall you testified as to the fill level of the other 1921 Cheval Blanc. What are your observations about the fill level of this purported 90-year-old wine?
A. This is pretty high as well. It's slightly lower than the preceding magnum, but again high for a magnum of 90 years or more. Again, in all probability, or reality, sorry, it should be much lower down in the bottle, into the shoulder.
Q. I'm handing you Exhibit 222. Mr. Egan, what does this purport to be?
A. This purports to be a magnum of Chateau Lafite Rothschild 1945.
Q. Was 1945 a good vintage?
A. It was. Like the 1921, it is a cherished vintage for collectors.
Q. How about Chateau Lafite Rothschild?
A. Chateau Lafite Rothschild is one of the premier wines, Bordeaux. Again, we are talking about the top ten of all these thousands of chateaus. It is sought after throughout the world

now. It has a long history going back to the 18th century.

Q. Did you make any observations about the label on this bottle?

A. Yes. You see this label is quite yellow. Genuine Lafite labels are cream or white, but they are not this deep hew yellow.

Q. Does this bottle purport to have been bottled at the chateau?

A. Yes, it does.

Q. Would the chateau have put a label like this on?

A. No, they would not.

Q. Have you noticed anything else about the bottle itself?

A. French law concerning the contents, the Code du Vin, established in 1930, stipulated that the contents had to be shown on a receptacle, like a magnum, and it would have to show what this magnum contained. This would have been 150 centiliters.

French wine law, failing that, the contents would have to actually be on the label. But the bottle manufacturers took this on board and they said, well, we have to comply with this, so from 1930 they incorporated into their molds the contents of the bottle. So 150 centiliters for a magnum, 75 centiliters -- this would be embossed in raised letters on the lower side of the magnum.

Q. Do you see any embossing on this bottle?

A. There is none on this, which is an anomaly.
Q. For purposes of comparison, let me show you Exhibit 208, which is what purports to be a magnum of 1949 Chateau Lafleur. Do you see embossing on that magnum?
A. Yes. It's at the back here. I don't know if you want to show the jury that. That's what a bottle of that era, 1949, should have.
MR. KABA: With the Court's permission?
THE COURT: Yes.
Q. We'll discuss this one a bit further later. Now, was it required for all magnums bottled at the chateau to have embossing?
A. Anything bottled in France, including the chateau.
Q. Does this purport to be bottled at the chateau?
A. It does.
Q. Considering the label and the lack of embossing, have you reached a conclusion as to the authenticity of this magnum of wine?
A. Yes.
Q. What is your conclusion?
A. It is a counterfeit.
Q. Do you have an opinion as to whether or not this magnum should have been offered for sale?
A. Yes.
Q. What is your conclusion?

A. It should not have been offered for sale as a genuine magnum of Chateau Cheval Blanc -- sorry -- Chateau Lafite 1945.

Q. Let me put before you both Exhibits 205 and 206. Can you tell the jury what these magnums purport to be.

MR. SHARTSIS: Counsel, if you could give us the numbers at the top of the bottles so we could follow in our own notes. There are numbers on top of the bottle.

MR. KABA: The bar code numbers? Sure. They are on the screen up there, 60047, 60048, which are Mr. Koch's inventory numbers that connect the bottles to the auctions.

MR. SHARTSIS: Thank you. Can you give me the exhibit number for 47?

THE WITNESS: The exhibit is Exhibit 205.

MR. SHARTSIS: And 48 is 206?

THE WITNESS: That's right.

MR. SHARTSIS: Thank you.

MR. KABA: I'll try to do that on each one.

MR. SHARTSIS: Thank you. I just want to be able to follow.

Q. Mr. Egan, I have forgotten if I asked you the question, What do these magnums purport to be?

A. These purport to be two magnums of Chateau Lafleur 1921.

Q. Once again we see 1921 was a famous vintage?

A. That's right. Like Cheval Blanc has already been described, it is one of the great vintages of the 20th century.

Q. Tell us a little bit about Chateau Lafleur.
A. Chateau Lafleur is a small property. It actually only produces about 17, 18,000 bottles a year, so it is very small. Chateau Lafite produces about 280,000 bottles. This is a very rare wine, and it is from an area in Bordeaux which is called Pomerol, where the average holdings are probably about 15 acres or less. That is the average. So the production is very small. Chateau Lafleur was not very well known internationally until after the Second World War, but it had a very loyal following in the north of France and Belgium. This is where it's main market was.
Q. Tell us about the labels on these bottles. Did you observe anything about the labels that caused you to doubt the authenticity of these magnums?
A. Yes. You can see there is the size, the labels are very big. They cover a large portion of the front of these magnums. Chateau Lafleur, with its small production, would have had economic issues. One of these would be label runs. They would have only produced bottle-size labels, which are about this size. If any magnums would have been produced, they would affix the bottle-size label to the magnum. They wouldn't have undertaken the expense of commissioning the printer to run a few labels just for the few magnums which might have been produced in this year.
Q. We also see with these magnums, and we can see it's a bit

larger on the screen here, there appears to be dark stains on these labels. To what do you attribute those stains?

A. These are very strange. To me it looks like they have been applied deliberately with a sponge using a circular motion. This is not the natural staining or soiling that I would expect, having seen so many bottles in my 30 years.

Q. Do you notice any issues with the bottle itself?

A. Yes. We're talking about 1923, when these would purportedly have been bottled. Both of them rock a bit. These are hand-blown. They are not machine-made. By the end of the First World War in France, mechanization had arrived in the bottle industry and bottles of magnums were no longer blown using the traditional method of a person blowing into each bottle.

Q. Let me pause there for a moment. Give us a little bit of a history lesson. You said by the end of the First World War. I did well in politics, not so much in history. When was that?

A. 1918.

Q. By 1918 what would have happened?

A. 1918, the glass, the bottle industry had evolved. For years, for decades, even hundreds of years it relied on these people, these poor people, blowing into each and every bottle. By this time manufacturing had been superseded by the use of machines.

You see on every bottle, you can tell a machined

bottle because the mold, the glass, the seam goes all the way up the glass through to the bottom, where there is another part, another join. It is in fact made in three parts, two at the top and then at the bottom with the base.

This has been hand-blown into I think just a circular mold, like a waste paper basket, and turned. So these bottles are not period-consistent.

Q. If I may, Exhibit 207, which purports to be a 1945 Chateau Lafleur, does this have the kind of machined bottles that you would expect?

A. It does. You can see on this side, you can see the line going all the way down. Also, the bottle doesn't rock.

Q. You're talking about the two lines on either side of this bottle?

A. That's right.

Q. That indicates it's machine-blown?

A. Exactly.

Q. I'm sorry. Machine-made?

A. Machine-made, yes.

Q. Yet this 1921 Chateau Lafleur, what purports to be a Chateau Lafleur magnum, has no seams, is that right?

A. That's right. Also, I think the lip of one, you can see the irregularity of the lip which has been hand-applied by an artisan rather than a regular circle around the top here.

Q. How about the capsules? Did you make any observations

about the capsules?
A. Yes. The capsules are not age-appropriate. Again, they are not of the period. They are not from the 1920s. They are a far later period. They are Chateau Lafleur capsules. Also, you will see on the sides of both, I think, particularly the second one, where you have actually got part of the lower part of the capsule, they look to have been rubbed. To me that's not a sign of natural cellaring or aging in a cellar.
Q. To what do you attribute the rubbing of the capsule?
A. I don't know, but it appears to me it's been done on purpose to simulate age.
Q. To make this look like it's older, to make something newer look like it may be from the 1920s?
A. That's right.
Q. There's been a lot of talk in this trial about the corks on these magnums of Chateau Lafleur. Have you considered that conversation about the branding on these corks?
A. I know it's become an issue in this trial. I wasn't focusing on the corks so much when I was doing my report. I have had a chance to look at all the bottles again and studied the corks carefully. I have done more research on this.
The corks, the branding of the corks, runs down vertically, so the lettering runs from top to bottom, which is a feature of Lafleur corks of a much later period, really post-1966. The corks on both of these, they run vertically

rather than horizontally. As in very many chateaus of the period, where you would see the name of the chateau, you could read it with the bottle standing up rather than having to lay the bottle down.

Q. Mr. Egan, do you believe that the vertical, i.e., up-and-down, branding on the cork of these 1921 Chateau Lafleur magnums is an indicator that it is inauthentic?

A. It is another indicator on both these magnums of inauthenticity.

Q. You didn't mention the vertical branding in your expert report, did you?

A. No, I don't think I did.

Q. You didn't mention it at your deposition, did you?

A. No.

MR. SHARTSIS: I'm sorry. I didn't hear that question.

MR. KABA: It should come up on the transcript.

Q. Yet you now believe that that is not another indicator?

A. Yes.

Q. Why is that?

A. Because having looked at other photographs of real Chateau Lafleur bottles prior to 1966, you have this horizontal branding.

Q. When you prepared your expert report, had you relied on other attributes of the bottles to conclude they were

inauthentic?

A. Yes. There were quite a few, as I have mentioned.

Q. Considering all of the factors you have now named -- the label, the capsule, the bottle, the cork -- let me ask you about the fill level. Do you have any observation about the fill levels of these bottles?

A. The fill level is high, both at the top shoulder. Again, they are unusual to have such high fills for a 1921, for this vintage, for a wine which is purportedly 90 years old.

Q. Normally, when you have what purports to be a 90-year-old wine with a high fill level, under normal circumstances, to what would you attribute that?

A. I would have thought that this has been recorked at the chateau.

Q. Do you believe these have been reconditioned at the chateau?

A. No, I don't think they have.

Q. Why not?

A. Because the chateau wouldn't have put these sort of labels, which are copies and which have been treated to look old, on these bottles, and they probably would have questioned the fact that the bottles are so old.

Q. Considering all of these various factors to which you have testified, have you reached a conclusion as to the authenticity of these two purported magnums of 1921 Lafleur?

A. Yes.
Q. What have you concluded?
A. They are both counterfeit.
Q. Have you reached any conclusion as to whether or not these magnums should have been offered for sale?
A. Yes.
Q. What have you concluded?
A. They should not have been offered for sale as genuine magnums of Chateau Lafleur 1921.
Q. Mr. Egan, why don't you join us here again. We can go through this. We will now discuss for the record Exhibits 207, 229, and 230, which correspond to Mr. Koch's inventory numbers 60049, 60050, and 60051. I will hand you first Exhibit 207. Mr. Egan, tell us what this magnum purports to be.
A. It purports to be a magnum of Chateau Lafleur 1945.
Q. Do the other two exhibits 229 and 230 also purport to be 1945 Chateau Lafleur?
A. That is correct. So we have three magnums of purported Chateau Lafleur 1945.
Q. Let's talk first about Exhibit 207. Were there any observations you made about the label on these magnums?
A. Yes.
Q. What was it?
A. Again, the scarcity of the bottles produced in 1945 would make it highly unlikely that a label this size would have been

produced by the chateau. They would have produced a label smaller for their bottles.

Q. How about the quality of the paper?

A. The paper is, again, far too thick, far too coarse for the paper that would have been used by the chateau in applying labels to their bottles. This says "mis en bouteille au chateau," so it purports to have been bottled at the chateau.

May I say that the print also is not very well -- it is too light in texture. It should be a darker print and more definite than you see here.

MR. SHARTSIS: You are looking at 207 now?

MR. KABA: We are looking at Exhibit 207, correct, 60049 of Mr. Koch's inventory.

Q. How about the capsule?

A. Again, this is the capsule, which is more modern than the vintage. It is not a capsule from Chateau Lafleur of 1945.

Q. With respect to the 1945 Lafite, you had discussed embossing. Do you see embossing on this bottle?

A. No, I do not.

Q. Would you have expected it?

A. I would. There is no issue with the molding, because this is a machine-molded bottle. There is no embossed "150 centiliters" anywhere to be seen. So this would be the bottle prior to I think 190.

Q. How about the cork on this magnum?

A. Again, you cannot see it here, but again we have an issue with the branding where it runs vertically rather than horizontally across.

Q. Mr. Egan, I direct you to the photo that's been put up. Is that what you are talking about, the problem with the cork branding?

A. That's right. There is an E-R-O-L, Pomerol. It should be E-R-O-L this way rather than pointing down.

(Continued on next page)

BY MR. KABA:

Q. So horizontal, you mean left to right like one would read?

A. That's right.

Q. Okay. And does that vertical up and down branding on this cork -- is that another indicator that it had been authentic?

MR. SHARTSIS: Your Honor, they didn't have testimony that his report says that and that is changing his report now. I'm entitled to have had a report that was changed, and he's now testifying contrary to his report, so perhaps we can make that clear.

THE COURT: Well, you'll be able to cross-examine on it.

MR. SHARTSIS: There's no amended report, your Honor. I'm entitled to an amended report.

MR. KABA: I think -- counsel can cross-examine the witness. We'll continue with our examination.

THE COURT: You'll be able to cross-examine.

BY MR. KABA:

Q. Have you noticed anything about the fill level on this bottle, purported 1945 Chateau Lafleur?

A. Yes, you can see it's actually in the neck, very high fill, and even though it's younger than the 1921, it's still exceptional amount of any 1945 to be this high. Again, you'd expect it to be around the shoulder, not up here.

Q. Mr. Egan, we talked about how sometimes the fill level can

be higher because of reconditioning. Is it possible this bottle was reconditioned?

A. No.

Q. Why do you believe that?

A. It's not been reconditioned at the chateau because the chateau would not have applied or allowed to have this sort of label, which is a copy, put on one of their bottles.

Q. Okay. Let's put that bottle away.

And while the wine tasting class is very interesting, we have two more bottles, Exhibit 229 and Exhibit 230, which are Koch inventory numbers 60050 and 60051, and I'll ask you really just briefly to tell me if you observed the same issues as the ones that we just talked about for the jury's knowledge.

Let's take Exhibit 229 first. Did you also observe similar label issues on this bottle?

A. Yes I did.

Q. Did you observe similar capsule issues on this bottle?

A. Yes. In fact you can see clearly the capsule shows signs of rubbing, which is not consistent with capsules of any acceptable means of storage.

Q. And did you notice similar cork vertical branding on the cork issues with this magnum?

A. I did, yes. It's the same. It runs down rather than across. The lettering runs down rather than across.

Q. Did you notice a similar fill level issue?

A. Yes. You see the fill level again in the neck rather than you would expect down here for a wine -- for a bottle of this age.

Q. Now this magnum has again what we saw in an earlier magnum, which is the diagonal strip label. Tell us about that.

A. Well, again, it's a strip label as used by the French retailer Nicolas and it has -- and it is an instruction to decant this wine two hours in advance before consumption, and it's there at the back, but there's no Nicolas stamp, which would have been on the main label at the front.

Q. Let's put that bottle away.

And Exhibit 230, again, we'll do briefly. Did you notice the same label issues?

A. That's right.

Q. Did you notice the same capsule issues?

A. Yes, the capsule again, similar to a capsule that's rubbed, in my opinion, so that it's aged.

Q. And once again the same bottle and cork and fill level issues.

A. That's right. The fill level here is very high again, into the neck.

Q. And again we see -- we see the label diagonally on the back of this Exhibit 230, but is there a Nicolas stamp on the front of this magnum?

A. No, it's the same diagonal label as the last magnum, no

Nicolas stamp on the front.

Q. So considering all of these factors from the three purported Chateau Lafleur magnums that we've gone through here, have you -- again, label, capsule, bottle, cork, stamp, fill level, etc. -- you may be seated, Mr. Egan -- have you reached a conclusion as to the authenticity of these three magnums?

A. Yes.

Q. What is your conclusion?

A. They're all counterfeit.

Q. Have you reached a conclusion as to whether or not these magnums should have been put up for sale?

A. Yes.

Q. What is your conclusion?

A. They should not have been offered for sale as genuine magnums of Chateau Lafleur 1945.

Q. Okay. Let's take a look at Exhibits 208 and 209, which are inventory numbers 60052 and 60053. Mr. Egan, what do these magnums purport to be?

A. They purport to be two magnums of Chateau Lafleur 1949.

Q. And let's take a look here -- let's start with Exhibit 208. Did you notice any -- did you make any observations about the label on this magnum that suggests it's inauthentic?

A. Yes. We have the same size issue as previously discussed, where the very small -- magnums which may have been produced would have had the normal bottle size labels on them but these

two have very large labels as you can see, and the chateau would have not commissioned a run of magnum-sized labels for such a small quantity which may have been produced. Again, we have -- we have problems with the printing and the paper. The paper is very rough, there's not fine paper, and the printing is not consistent. Parts of the letters are fading out, and also the impression of the actual printing of the lettering is not as one would expect -- I would expect.

Q. Now both of these magnums -- and again, would you focus briefly first on Exhibit 208. They have this dark stain. What is that?

A. Well, again, it's this substance which has been applied, rubbed into the labels to simulate age. It's a bit like, you know, when you're a child, creating treasure maps and rubbing -- putting them in -- putting some tea on them or something to make them look antiquated, but it's -- I think it's the same method used in making these look older than they actually are.

Q. I suspect putting tea on a map might be a British thing.

A. Yes.

Q. Do these magnums purport to be bottled at the chateau?

A. Yes, they both have the statement that they are.

Q. And in your view would the chateau have used these kinds of labels?

A. No, they would not.

Q. How about the capsules?
A. The capsules again are more recent than the 19 -- well, 1951, and this was -- these were bottled and capsuled -- the one on the right is very poorly rendered, but the top, I think that is an absolute counterfeit. I don't think it's a Lafleur capsule at all, while the one -- while this one is a more recent Lafleur capsule, but again, you can see this rubbing. There's hardly any red paint left on the capsule, and this is not normal for capsules to be treated in this manner, in this way. You know, it's a wine capsule rather than a doorknob.
Q. Now -- and do both of these magnums have that same suspicious vertical branding on the cork?
A. I've seen that recently that they do have this -- the lettering which runs down the cork rather than running across the cork.
Q. Focusing your attention on Exhibit 209 for a moment.
A. Yes.
Q. Have you made any other observations about this cork, about the size of the cork?
A. Size of the cork. Yeah, shorter than usual. So it's shorter than the requisite 5.2 centimeters.
Q. And going back to Exhibit 208, did you make any observations about the fill level on that magnum?
A. Yeah. This is very high for a 1949. Again, it's top shoulder and it would be more likely to be in the region of the

magnum on your left, Exhibit 209.

Q. So in your view there is a difference between the fill level on Exhibit 208 and the fill level on Exhibit 209, although both purport to be from 1949?

A. That's right.

MR. KABA: So let's have the jury see it.

Q. And let me ask you finally about Exhibit 208. There's a back label on this magnum. Do you see that?

A. Yes.

Q. And did the positioning or the placement of that back label raise any concern?

A. Yes. Again, this is the label which would have been on the front of the bottle rather than at the back and it would have been affixed horizontally rather than as a diagonal. Also, the label has been treated in very much the same way as the front label with this staining you see on it, which is not natural.

Q. Okay. So considering everything you've considered about Exhibit 208 and 209, you've made references to the label, the capsule, the corks, in some instances, at least for Exhibit 208, fill level and the stamp or other label. Have you reached a conclusion about whether or not these bottles are authentic?

A. Yes.

Q. What have you concluded?

A. They're both counterfeit.

Q. Have you reached any conclusions as to whether or not these magnums should have been sold?

A. Yes.

Q. What is your conclusion?

A. They should not have been offered for sale as genuine magnums of Chateau Lafleur 1949.

MR. KABA: Okay. Your Honor, I see it's about 4:45. I'd like, if possible, if -- with the court's indulgence and the jury's, of course, to get through the rest of these. I think we might be able to do it a bit quicker now that we all have the same vocabulary, but I'd defer to the court.

THE COURT: Are you guys doing okay? Can you do another 15 minutes? Okay.

MR. KABA: Thank you. Thank you.

Q. Let's take a look at these magnums of 1950 Chateau Lafleur. I will announce them for the record but I won't hand all of them to you at this time. They are Exhibits 210, which is Koch inventory number 60054; Exhibit 212, which is Koch inventory number 60056; Exhibit 213, which is Koch inventory number 60057; Exhibit 214, which is Koch inventory number 60058; and Exhibit 211, which is Koch inventory number 60055. What do these magnums purport to be?

A. These purport to be five magnums of Chateau Lafleur 1950.

Q. And have you observed -- well, we can see that there are large labels again. What else have you observed about the

labels here?
A. The actual finish, the sizing of the labels as discussed before is far too large for Chateau Lafleur. Again, with a small production they would have just used ordinary-sized bottle labels for any magnums that they might have produced in this vintage. The edges of the labels have been poorly finished. It looks like they've been homemade, even cut out with a guillotine rather than the usual industry standard for producing labels.
Q. So let's see if we might show that. You're talking about these -- for example, this edge on the top?
A. That's right.
Q. Right corner of Exhibit 210.
A. That's right. That's an example even --
Q. Or the left corner of Exhibit 210.
A. Left corner, for example.
Q. Okay. And did you notice similar -- did you have similar concerns about the labels on all five of these purported 1950 Chateau Lafleur?
A. I did. Really it's the standard of printing. They are copies of an actual Chateau Lafleur label, but they're very large and very poor print quality and hasn't been -- hasn't been impressed into the paper. And also that the label's been very poorly applied to each of these magnums. There are bubbles under the label, which is something my daughters might

have done when they were in primary school, because in France they did a lot of cutting and sticking.

Q. Now do these magnums purport to be bottled at the chateau?

A. They do indeed.

Q. How do you -- how can you tell that?

A. Because it says so on each label.

Q. And would you expect the chateau to have applied labels such as this in the fashion that they were applied?

A. No.

Q. How about the capsules on these five magnums?

A. Again, the same issue as the previous Chateau Lafleur is that these capsules are far too modern for the period. They are more recent and --

Q. How do you know that they're too modern?

A. Because the ones of the period would have a deeper brick red. They'd also be slightly affected by corrosion. You'd have signs of -- signs of soiling. Even if these were being kept in a very good, very clean environment, they would show more signs of age than these ones.

Q. And just briefly, tell the jury, what's the significance of a capsule on a bottle of fine and rare wine?

A. Well, the capsule is the seal. It's -- if that is broached, then there are serious issues because it would mean that the cork could have been extracted, the wine taken out, and another wine put in or another substance put in and the

cork put back, so the capsule is really the guarantee that what is in the bottle is what it is because the capsule is the guardian, so to speak, of the bottle.

Q. And how about the corks on these five magnums? Did you -- have you -- do you now believe they have -- they also indicate the inauthenticity of these magnums?

A. That's right.

Q. Why?

A. They're clearly branded, and again, the lettering runs vertically down the cork rather than horizontally across.

Q. And just to remind the court, you didn't mention this in your report, did you?

A. I did not.

Q. And you didn't mention this at your deposition.

A. I don't think I did, no.

MR. SHARTSIS: Object to the question being vague. He mentioned the cork in his report so I object on the grounds of the question is vague.

THE WITNESS: Sorry.

MR. KABA: Your Honor, I'll clarify that. That's fine. I think everybody understood precisely what I was asking.

Q. You didn't mention that the vertical branding of the cork raised an issue as to the authenticity of these wines, is that right?

A. No. No.
Q. And yet you still do believe that the vertical branding does raise an issue as to authenticity.
A. Yes, it does.
Q. And what happened from your deposition to today?
A. Well, I've had cause -- I hadn't really focused on this issue when I was doing the report but I've had since performed further research from my own photos and getting other information, and branding of Lafleur of this period definitely runs horizontally rather than vertically.
Q. And were you able to conclude that these bottles were counterfeit even without your observation on -- as to the cork branding?
A. I did.
Q. But taking all of your observations together, the label, the capsule, the cork, have you reached a conclusion as to the authenticity of these wines?
A. Yes, I have.
Q. What is your opinion?
A. All five of these magnums of Chateau Lafleur are counterfeit.
Q. And have you reached a conclusion as to whether or not these magnums should have been offered for sale?
A. Yes.
Q. What's your conclusion?

A. All five of these magnums should not have been offered for sale as genuine Lafleur, Chateau Lafleur 1950.

Q. Thank you. I'm going to hand you next our first bottle rather than magnum. It's Exhibit 201 and it's Koch inventory number 59958. What does this purport to be?

A. It purports to be a bottle of Chateau Latour 1864.

Q. Have you made any observations about the label on this bottle?

A. Yes. This is not a real label from the 19th Century. It is a copy. The paper for a 19th Century bottle would be very fragile, and as you can see, I can run my hand all around this label without any fear of damaging it. The print is a gray quality, there's not dark black as you'd expect. And again, it has had some substance rubbed on it to simulate aging.

Q. How about the capsule?

A. Well, the capsule is a modern capsule from Chateau Latour. I cannot tell exactly the period because the sides have been cut away and this, unfortunately, eliminates some clues as to its exact period because you could have three little tower emblems on the capsule side or just one, but I know from the top that it's -- probably the time span for this capsule is from the 1960s through to the 1970s.

Q. So from the 1960s rather than the 1860s.

A. That's right.

Q. Okay. And how about the cork? Did you make any

observation about the cork on this bottle of purported 1864?
A. Well, it's branded with the Latour emblem, but it's patchy. I'd have to go back to my notes because it's --
Q. Sure. For your reference, it's page 31 of your report.
A. It's very hard to see the branding because of these old bottles. I may hasten to add, the bottle is actually of the period that it purports to be, but the cork is damaged where the vintage may have been branded so it's got a modern -- it's got a modern capsule, so that means that it must -- that it looks as if it's been reconditioned by the chateau but the chateau wouldn't have reconditioned this bottle because they would have applied a new label, they wouldn't have had a label like this. So even if, let's say for argument, the old label was here, they would have taken that off and applied a new label and a new capsule, so this has not been reconditioned at the chateau.
Q. So, Mr. Egan, have you reached a conclusion as to whether or not this bottle that purports to be from 1864 is authentic?
A. Yes.
Q. What is your conclusion?
A. It's a counterfeit.
Q. And have you reached a conclusion as to whether or not this bottle should have been offered for sale?
A. Yes.
Q. What is your conclusion?

A. It should not have been offered for sale as a genuine bottle of Chateau Latour 1864.

Q. Okay. I'm going to hand you next Exhibits 200 and 227. Exhibit 200 bears Koch inventory number 59967 and Exhibit 227 bears Koch inventory number 59966. These are also bottles. Would you let the jury know what these bottles purport to be.

A. Yeah, they both purport to be two bottles of Chateau Latour 1928.

Q. Let's start with the label. What have you observed about the label on -- let's take Exhibit 200 to start.

A. Well, these are very -- Chateau Latour has very nice labels, very elegant labels, and what you cannot see here is that the print is in a lovely copper, shiny copper print, like copper paint, very fine indeed, and neither of these has a trace of this anymore, and even if they'd been stored under damp conditions or dusty conditions, you'd find remnants of this finish, and these are in fact photocopies of actual Latour labels and they're photocopies of more recent -- more recent version which Chateau Latour would have used when re -- reconditioning because at the bottom you actually have the address, the basic address of the chateau, which they did not have on the original 1928 when they applied the labels in 1930.

Q. Let's talk about the capsule that I see. Exhibit 200 doesn't have a capsule so we can't really discuss that, but Exhibit 227 does have a capsule.

A. It does.
Q. And did that raise any concern?
A. Yes, 'cause it's a modern capsule. It's not a capsule from 1928. The Chateau Latour prided itself for a while in actually having a vintage embossed on the top of the capsule so you'd see 1, 9, 2, 8, on the top here, and this does not have it, and again, like the Chateau Latour 1864, I cannot tell the exact era because the sides have been cut away, but it's certainly more recent than 1928.
Q. And how about the cork? Did you make any observations about the cork?
A. Yes. This one, strangely enough --
Q. When you say "this one," refer to the number.
A. Sorry. The exhibit number is 227. -- is illegible. The cork is completely stained. I couldn't see anything on this cork, which I found strange for a cork, even -- even for one from 1928, let alone a more recent cork.

And on Exhibit 200, we have a very basic authenticity issue because the capsule is missing, and as I said before, the capsule is the seal of the bottle, the guardian of the wine therein and it is missing, so even though the cork is in -- is correctly branded, I have strong reservations about the fact that it could have been taken out and replaced.
Q. Okay. So considering the various things you've discussed, the label, the capsule, and the cork on these two bottles that

purport to be from 1928, have you reached a conclusion as to their authenticity?

A. Yes.

Q. What have you concluded?

A. They're both counterfeit.

Q. And have you reached any conclusion as to whether or not these two bottles should have been put up for sale?

A. Yes.

Q. What have you concluded?

A. They should not have been offered for sale as genuine bottles of Chateau Latour 1928.

Q. Okay. I'm going to hand you next Exhibit 225, which is Koch inventory number 60025. What does this purport to be?

A. Well, it purports to be a magnum of Chateau Petrus 1921.

Q. Let's start with the label here. Did you have any concerns with regard to the authenticity of this bottle of wine based on your observation of the label?

A. Yes.

Q. What are those?

A. Well, Chateau Petrus gained international acclaim after the second World War with its 1947 vintage -- well, in 1947, let me say, because the 1945 vintage was excellent and 19 -- and here we have 1921, which was an excellent vintage, as already discussed, but Chateau Petrus at that time, even though the top wine was Pomerol, because it was situated in Pomerol and rather

on the other side where Chateau Lafite and Chateau Latour are situated in Bordeaux, other side of the river, they enjoyed decades, if not centuries of publicity and acclaim, whereas Chateau Petrus was appreciated in France and in Belgium chiefly and nowhere else, so it is questionable whether Chateau Petrus would have produced magnums in this period because it was owned at the time by about 27 different people and they would not have arrived at a consensus. They wanted economics rather than anything else to govern their -- govern the production of this wine, so producing a few very large labels like you see here and even producing magnums would be very questionable, so they would have -- I've seen original labels of Chateau Petrus of this era, and this I believe is an enlargement of one of those labels.

Q. So do you believe this to be an authentic label that Chateau Petrus would have used in 1921?

A. No, I do not.

Q. Okay. And how about the cap -- how about the treatment of this label? This also looks a bit aged.

A. Yes, again, it's got this aging, this rubbing of a substance on the label, and I may -- the print quality is not good, it's not defined enough for me to believe that it is print -- had been printed at the time.

Q. And how about the capsule?

A. The capsule is not of the period. It is far more recent.

It's -- it has the chateau on the lip of the cap, around the lip of the bottle, but I've compared this with many Petrus Chateaux and it looks -- Chateau capsules and it looks like it's from the 1960s, so it's a 1960s capsule on a bottle purporting to be from 1921.

Q. And can you see the vintage on this cork?

A. I could not read the vintage on the cork. The branding is horizontal rather than vertical, which I think is age appropriate, but I cannot see the vintage on this.

Q. Is that a concern for you that you can't read the year of the wine on this cork?

A. Yes, it is.

Q. How about the bottle? Any concern about the bottle itself?

A. Again, it's a hand-blown bottle. It's -- there's no seam on it, it is -- as discussed before, this bottle is much earlier than the purported vintage. They would have used bottles, magnum bottles incorporating seams because they would have been made by mechanized process by then.

Q. And I think the jury can see, and I certainly can, that we again see this diagonal strip label on the back of this bottle.

A. That's right.

Q. But do you see a Nicolas stamp on the front?

A. I do not see the corresponding Nicolas stamp on the front.

Q. Is that a concern for you?

A. It is indeed.

Q. So considering all of these factors here, the label, the capsule, the bottle, the cork, the absence of a Nicolas stamp, have you reached a conclusion as to whether this bottle was authentic?

A. Yes.

Q. When is your conclusion?

A. It is a counterfeit.

Q. Do you have any opinion as to whether or not this magnum should have been offered for sale?

A. Yes.

Q. What is your opinion?

A. It should not have been offered for sale as a genuine magnum of Chateau Petrus 1921.

MR. KABA: Okay. Your Honor, I may have been a bit optimistic. We have, I see here, about five magnums left to go and a few final questions. I don't think it will take me much longer in the morning, but --

THE COURT: How much longer do you anticipate?

MR. KABA: Possibly another 15 to 20 minutes.

THE COURT: Okay. Well, maybe we should go ahead and break for the evening. Is that okay with you all?

Okay. I'm going to let you go for the evening. We'll start back at 9:30. Please don't talk about the case. Please don't do any research on the case. Have a good evening, and I'll see you tomorrow morning at 9:30.

(Jury excused)

THE COURT: Okay. Anything we need to address?

MR. HUESTON: No, your Honor.

THE COURT: Okay. See you tomorrow. Have a good night.

(Adjourned to April 5, 2013, at 9:30 a.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

WILLIAM I. KOCH,

Plaintiff,

v. 07 Civ. 9600 JPO

ERIC GREENBERG, et al.,

Defendants.

----------x

New York, N.Y.

April 5, 2013
9:45 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge
and a jury

APPEARANCES

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

(Trial resumed)

(In open court; jury not present)

THE COURT: Good morning, everybody.

ALL COUNSEL: Good morning, your Honor.

THE COURT: Are you ready for the jury?

MR. KABA: Your Honor, just one preliminary matter. There is a trial exhibit, it's Trial Exhibit 476, which I'll pass up. This is a document that was from Mr. Greenberg to Mr. Brierley and others at Christie's. On the pretrial order this document was identified as a plaintiff's exhibit. It was introduced at Mr. Brierley's deposition. Defendants and plaintiffs did not object to the authenticity or admissibility of this document; that is, we stipulated to it. We didn't -- we'd just like to move it into evidence. We're not going to have discussion over it, but we'd like it to be in the record, given that there was no objection to the admissibility of it.

MR. CIALONE: We don't have an objection, your Honor. And one other housekeeping matter. I had put in Exhibit 1073 last week, I believe it was with Mr. Ritchie, and on the transcript it came off as 1070. I know I didn't talk loud enough that day. I'm sorry. So 1073 is not indicated as having been admitted into evidence and I would just like to move it in with another witness later.

THE COURT: Any objection?

MR. KABA: I don't -- 1073 appears to be an essay from Parker's Wine Buyers Guide.

THE COURT: It appears to be what?

MR. KABA: On my exhibit list it says 1073 is an essay from Parker's Wine Buyers Guide.

MR. CIALONE: Hold on.

(Pause)

MR. CIALONE: I'm sorry, Judge. 1070 is the one that we wanted admitted, which is the draft proposal from Sotheby's.

THE COURT: I have 1070 as admitted.

MR. CIALONE: Oh, okay.

MR. KABA: That's what we had.

THE COURT: We'll double-check that, but I think we have it as admitted.

And then when the jury comes in, you can more for Exhibit 476's admission.

Anything else?

MR. KABA: No, that's it.

THE COURT: Okay.

(Continued on next page)

(Jury present)

THE COURT: Good morning, folks.

THE JURORS: Good morning.

THE COURT: Hope you had a good night. Happy Friday to you.

We're continuing with the testimony from plaintiff's expert Mr. Egan. Is Mr. Egan here? You may come up to the witness stand, please.

Okay. You were previously sworn in, Mr. Egan, and Mr. Kaba, you may proceed.

MR. KABA: Your Honor, before we do that, plaintiff would just request that Trial Exhibit 476 be moved into evidence.

THE COURT: Okay. And I believe there's no objection, is that right? 476?

MR. SHARTSIS: No objection.

THE COURT: 476 is received.

(Trial Exhibit 476 received in evidence)

MICHAEL EGAN, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. KABA:

Q. Good morning, Mr. Egan.

A. Good morning.

Q. Let's continue where we left off yesterday. And I'm going to hand you Exhibit 215, which is Koch inventory number 60026.

A. Thank you.

Q. Let's also hand you Exhibit 216, which is Koch inventory number 60027.

Mr. Egan, what do these two magnums purport to be?

A. They both purport to be two magnums of Chateau Petrus 1928.

Q. And have you identified any concerns as to the authenticity of these bottles based on their labels?

A. Yes, I have.

Q. What have you concluded?

A. I've concluded that the labels, as previously discussed, are the wrong size for any magnums which might have been produced for this particular vintage for Chateau Petrus. Again, the reasoning being that at the time, the small production and lack of international fame, they would have just used, for economic reasons, the label size bottle -- sorry, the bottle size labels, the 75-centimeter size labels rather than these large items here.

Q. What about the print quality of these labels, does that look suspicious to you?

A. Yes, the print quality is not as dark or as well defined as you would find on an actual label of Chateau Petrus from this era. The paper quality is very thick. Again, as previously mentioned to you, the paper would have been much thinner, much finer, and also, the type of paper stock which Chateau Petrus used at this time, and still do, for more recent vintages now

is ridged stock. That means there are very small ridges which cross the label. And I find that there are depictions of these ridges on these two magnum bottles but they are in fact images rather than the -- than actual three-dimensional items.

Q. So --

MR. KABA: If I may approach, your Honor?

THE COURT: Sure.

Q. You're referring to ridges that are images. Could you point out where it looks like they're not ridges but rather a copy of ridges.

A. Well, just below the medals here -- sorry. If I go a bit further up. I suppose where the dirt has been rubbed in, you can see where it has been applied.

Q. And --

A. That provides the best contrast.

Q. And so you -- do you believe those to be real ridges on these labels?

A. I do not believe they are.

Q. And how about the dirt that you were referring to?

A. Again, as I previously -- previously said, dirt tends to gather naturally in a cellar, and it is dust. It normally falls all over the label. You can actually rub it off. However, if there's dampness in the cellar as well, then this dirt will turn -- turn -- will not be so easily rubbed off but it will look natural. It won't -- it wouldn't have been

applied as in this fashion, where it has been applied as if with a sponge. And if, for example, the bottles have been cleaned, say there was dirt all around the bottles, there would actually be smearing on the -- on the edges of the label as well as someone had attempted to, you know, wash the bottles, and this is not evident in either of these, so the dirt has been -- well, whatever it is has been artificially added to make the -- these labels look aged.

Q. And at least Exhibit 215 has a cork. Have you made any observations about the -- I'm sorry. The capsule.

A. Yes.

Q. 215 has a capsule. Have you made any observations about the capsule?

A. Yes. Again, it's not a capsule of the era, it is a capsule -- having made reference to images that I've taken of Chateau Petrus bottles, it is of the 1960s. So this is a -- I think a 1960s capsule on a magnum from the 1920s.

Q. Is that suspicious to you?

A. It is. It is highly unusual and is in fact suspicious.

Q. How about the corks, the branding of the corks on these two magnums of 1920 -- purported 1928 Petrus?

A. Well, as the branding runs vertically down rather than horizontally across on both of these two magnums, which was not the practice for actual corks being produced for -- at the time.

Q. So is this similar to what you were discussing with respect to Chateau Lafleur with the -- the vertically branded corks?
A. That's correct.
Q. And so as with Chateau Lafleur, Chateau Petrus, what would the branding have been on Chateau Petrus corks in this era?
A. Well, the lettering would have said Chateau Petrus Pomerol with the vintage but running across the cork as you look at the bottle as it's standing up, rather than in these two instances, where it runs along the cork so you can only easily read it with the magnum lying on its side.
Q. So considering the label, the capsule, the branding on the cork, have you reached a conclusion as to the authenticity of these two magnums of purported 1928 Petrus?
A. Yes, I have.
Q. What have you concluded, sir?
A. They are both counterfeit.
Q. And have you reached a conclusion as to whether or not these magnums should have been offered for sale?
A. Yes.
Q. What have you concluded?
A. They should not have been offered for sale as genuine bottles of Chateau Petrus 1928.
Q. Before we move on to the next three magnums, let me ask you just generally, do you have a view regarding the authenticity of Petrus magnums from the 1920s as we see three magnums at

issue in this case, the '21 Petrus and the two '28 Petruses?
A. Well, out of the hundreds or thousands of bottles of Chateau Petrus which I have seen, probably running into the hundreds from the 1920s, I've never actually seen a magnum of Chateau Petrus which I find singular because normally, looking at these old European cellars, which did have Petrus from this era, looking at the other bottles in the cellar, there would have been magnums sometimes of other illustrious chateaux from that era but none of Chateau Petrus, so I take the view that it is highly improbable that Chateau Petrus had produced any magnums in this era, and this extends I think to even Chateau Petrus which was bottled by merchants.
Q. So you mentioned that you've seen bottles of Chateau Petrus from this era, from the 1920s, is that right?
A. That is correct.
Q. And just remind us again, what's the difference between a bottle and a magnum?
A. Well, a magnum is the equivalent of two bottles so it's double the quantity.
Q. And so magnums are -- bottles are small, magnums are big.
A. That's right.
Q. And the three Petruses that we see from the 1920s in this case, those are magnums, correct?
A. They are indeed.
Q. And why is it that you believe that there are no authentic

magnums of Petrus from the 1920s?
A. Well, I've had discussions with senior staff at Chateau Petrus, I've spoken to Jean-Claude Berrouet, who is -- was the oenologist for a long time there and his son Olivier Berrouet has taken up his position, so to speak, and so he's been there for a long time, and he said to me that there were no magnums produced of Chateau Petrus in the 1920s to his knowledge.
Q. And have you ever seen an authentic magnum of Petrus from the 1920s?
A. I have not.
Q. Let's go next to Exhibit 228, which, for the record, is Koch inventory number 60029. Mr. Egan, what does this magnum purport to be?
A. This magnum purports to be a magnum of Chateau Petrus 1950.
Q. And have you made any observations about the label on this magnum?
A. Yes. Now this is the type of label which Petrus used from 1940s. They changed the design. And as you can see, it's a very intricate -- it's one of the most intricate chateau labels that have been produced. It is what you'd expect on a dollar bill, the same sort of draftsmanship. This, unfortunately, has some issues. It is slightly too big for an actual 1950 Petrus magnum label. Chateau Petrus did produce magnums and they bottled them themselves. This is a copy of an actual Petrus label. There are some clues as to that. The draftsmanship is

so fine that the eyes of the priest -- normally, you can see the whites around the eyes. This example does not have this. And likewise, there are three lines under the main Chateau Petrus, the Petrus name in red, and these copies, these tend to blend together, while originals, they're definitely apart, and the paper is not the actual stock that the printers would have used. It's too thick. And the -- the print definition is not as dark as you would -- as you would see on an actual 1950 Chateau Petrus label.

Q. Let's talk about the capsule on this magnum. Any suspicions based on the capsule?

A. Yes.

Q. What are those?

A. The capsule used at Chateau Petrus at this time, the "Mis en Bouteille au Chateau" which is on the side of the lip of the bottle, would have been in raised -- would have been in relief, and this particular example is flush with the capsule, so looking at the font style again, it is of a later period, and referencing what I've seen, it's from the 1960s.

Q. So let's -- just to make sure the jury's clear on this, you're referring here to what appears to be white text on a capsule that says "Mis en Bouteille au Chateau"?

A. That's right.

Q. And what about this is suspicious to you?

A. It is not from the era. It's not raised. The 1950s --

1950 capsule had raised lettering.

Q. And you're saying this is flat to the capsule.

A. That's right.

Q. And how about the cork on this magnum?

A. That I recall, the run of the lettering is again vertical rather than horizontal as would have been the case of an actual 1950 Chateau Petrus cork, so that gives me additional concerns.

Q. And this is -- this is in addition to the concerns you have about the label and the capsule, is that right?

A. That's right.

Q. Let's look at the next magnum, Exhibit 217, Koch inventory number 60030. What does this purport to be, Mr. Egan?

A. It purports to be a magnum of Chateau Petrus 1950.

Q. And have you observed anything suspicious about the label on this magnum?

A. I have.

Q. What is that?

A. Well, again, it shares the same issues as the preceding magnum with the definition, the print definition, the clarity of the image, the lines under the E in particular of the main lettering of Petrus, the thickness of the paper, and the size of it. It's too large for an actual 1950 magnum.

Q. How about the capsule?

A. Again, it's more damaged and it's been fixed with clear tape, but looking at the capsule, it shares the same print

definition as the preceding capsule. It is -- it is not -- the lettering is not raised. It is flush with the -- with the capsule. Again, it's the capsule from the 1960s rather than from the 1950s.

Q. Does this capsule also purport to be from -- purport to indicate that it was bottled at the chateau?

A. Yes, it says "Mis en Bouteille au Chateau."

Q. And as with the previous one, would the chateau have used a label such as this or a capsule such as this?

A. They would not have done.

Q. And how about the -- there's a back label on this magnum.

A. Yes.

Q. Have you studied that?

A. I did. Now this is another label as used by the French retail company called Nicolas, and again, it's an instruction to the consumer to decant the wine before consuming it so as to get the best possible flavor, and normally you would have a Nicolas stamp on the actual label as well, towards the middle, and this is missing on this particular example.

Q. And finally, let me ask you about the cork. You've mentioned the vertical branding on the cork of the two 1928 Petrus magnums and the earlier 1950 Petrus magnums.

A. Yes.

Q. What did you observe about the branding on this magnum?

A. Again, it runs vertically rather than horizontally, as

would be the case of an actual 1950 Chateau Petrus bottle or magnum produced and bottled at the chateau.

Q. Okay. Finally, let me hand you Exhibit 218, which is Koch inventory number 60031. Mr. Egan, what does this magnum purport to be?

A. It purports to be a magnum of Chateau Petrus 1950.

Q. And any observations about the label?

A. Again, the same observations as the preceding two labels now. We have issues with the size. It is too large. The print definition is not clear enough, and the darkness of the print is not as you'd find on an actual genuine label of Chateau Petrus. And if I've not mentioned it before, the label is too thick.

Q. Here we also see the back label that you were referring to with respect to the earlier magnum. You indicated that that would be a label put on by the retailer Nicolas.

A. That is correct.

Q. Now on the front of this magnum, though, it does appear to have a stamp from Nicolas.

A. Yes, it does.

Q. So why is that suspicious to you?

A. If you look at it on the screen, it's not -- it's not in the right position. It should be to the center of the label. It should occupy the center plane of this period and it would actually have put the -- put it over the vintage, at least, but

certainly down the center of the label, and again, the definition, you have -- they were very proud of their printing because this had to be -- this had to represent their -- their -- the shop or the store, and there is an actual -- on the left-hand side there's lack of definition to the stamp. It would have been stamped or applied with absolute clarity.

Q. So it may be a bit hard to see, but are you referring here to the left-hand side of the stamp where it seems that ink is missing?

A. That's right.

Q. And you believe that that's not how Nicolas would have stamped these magnums?

A. That is right.

Q. How about the cork on this magnum?

A. The cork, again, runs vertically rather than horizontally, as would have been the case for corks produced at Chateau Petrus at this time.

Q. And did you observe that?

A. I did observe that.

Q. How did you observe it?

A. I observed it by looking at it through using a flashlight.

Q. So with respect to these three magnums of purported 1950 Petrus, you've made comments about the label, the capsule, the cork, and other stamps and back labels. Have you reached a conclusion as to the authenticity of these magnums?

A. Yes, I have.
Q. What have you concluded?
A. All three of them are counterfeit.
Q. And have you reached any conclusions as to whether or not these magnums should have been offered for sale?
A. Yes.
Q. And what have you concluded?
A. They should not have been offered for sale as genuine magnums of Chateau Petrus 1950.
Q. Let me take this magnum down.

Mr. Egan, just so we're perfectly clear, have you concluded that any of these 24 magnums or bottles of wine that are at issue in this case is authentic?

A. No, I have not.
Q. Have you concluded that any should have been offered for sale?
A. I have concluded.
Q. And what have you concluded about all of these 24 magnums?
A. None of these 24 items should have been offered for sale.

MR. KABA: No further questions at this time, your Honor.

THE COURT: Okay. Thank you.

Cross-examination?

CROSS-EXAMINATION

BY MR. SHARTSIS:

Q. Good morning, Mr. Egan.

A. Good morning, Mr. Shartsis.

Q. Haven't seen you since Cape Cod.

Mr. Egan, before we go to the bottles and practices of authenticating, I want to follow up on some things you talked about about Christie's and the auction practices there. You say you were involved in about 250 auctions at Christie's?

A. I think you may mean Sotheby's.

Q. I think I should start again.

A. Yeah.

Q. Mr. Egan, you were at Sotheby's, right?

A. That's correct, I was at Sotheby's.

Q. And you didn't talk about Christie's practices, you talked about Sotheby's practices yesterday.

A. I did, yeah.

Q. Thank you. Feel free to correct me again. I'm sure I'm going to make that same mistake.

Sotheby's had "as is" contracts, didn't they?

A. I don't recall.

Q. Would it help to see a Sotheby's contract for you?

A. Absolutely.

MR. SHARTSIS: All right. May I approach the witness, your Honor?

THE COURT: Yes.

A. Thank you.

Q. Have you had a chance to look at that?
A. I have, yes. Are we talking about contracts, when I was employed at Sotheby's in London or --
Q. I'm going to ask you that too.
A. Fine. Because I'm not a legal person, I'm a wine expert.
Q. I understand that. Well, you understood, looking at this contract --
MR. KABA: Your Honor, may I just make an objection as to this document.
THE COURT: Sure.
MR. KABA: It just has a handwritten Sotheby's up top. There's no identification for when it's from, where it's from, what it's attached to, with four pages, a bunch of legal terms.
MR. SHARTSIS: Your Honor, I'm trying to refresh the witness' recollection here.
THE COURT: Okay. You may.
BY MR. SHARTSIS:
Q. Do you see, Mr. Egan, Aulden Cellars on top?
A. The first paragraph.
Q. And do you see Sotheby's?
A. Yes, I see Sotheby's.
Q. Do you recall that Aulden Cellars was Sotheby's correspondent in the United States?
A. I recall that, yes.
Q. And you yourself looked at contracts during your many, many

years at Sotheby's?
A. I looked at sales contracts between the consignor and Sotheby's.
Q. Did you ever look at a contract between Sotheby's and a -- and a auction bidder?
A. In the catalog -- I did see them in the back of the catalog, yes.
Q. And looking at this, does it remind you that Sotheby's always used an "as is" contract in its wine auctions?
A. No, it doesn't.
Q. Do you remember that it ever used an "as is" contract?
MR. KABA: Your Honor, I object to continuous references to an "as is" contract, as a contract. I don't think it's been established, certainly not through this witness.
A. I was involved in the European auctions at Sotheby's.
Q. Right. Do you remember whether, at Sotheby's, an "as is" form was used?
A. I don't.
Q. Not at all.
A. Not at all. If you -- if you --
Q. Do you remember --
A. Sorry. If you brought up a European catalog with the conditions and business, I -- I would be most -- I'd be grateful to read that, but this is, I suppose, a New York

catalog, and I was responsible for European auctions and I was not so much involved in United States.

Q. Mr. Egan, I would love to bring one up except I learned about this at your testimony last night for the first time so this was the best we could do overnight, and perhaps you'll wait around and we'll recall you later. Would you be willing to do that, if I have a chance to find a contract from Europe?

A. Fine. Yes.

Q. Let me ask you another question. Was it your understanding that when Sotheby's auctioned wine, they guaranteed the authenticity of the bottle to the bidder?

A. I don't recall that.

Q. You never remember them guaranteeing the authenticity of a bottle to a bidder, do you?

A. I can't recall that.

Q. Right. And in fact, do you -- you testified that you didn't have -- you testified about your recollection about whether people came to Sotheby's to inspect wine. Isn't it true that Sotheby's did not offer to bidders the opportunity to inspect the wine before the auction?

A. I'd have to read through all the fine print at the back of the catalog to see if that provision was made to the buyer.

Q. Well, let me ask you this question: Sitting here today, after all the years, the 250 auctions you worked at at Sotheby's, can you ever remember that Sotheby's offered the

opportunity to a bidder to come in and inspect wine before an auction?

A. I can't recall.

Q. So you know of no circumstance, sitting here today, after 250 auctions with Sotheby's, no circumstance where Sotheby's offered to the bidders a right to come in and inspect the wines before the auction, correct?

A. I'm sorry, but I'd have to read through the fine print of all the catalogs throughout the 24 years I was there just to see the evolution.

Q. So having been there 24 years -- my question is really direct here. Having been there 24 years, having worked at 250 auctions, you cannot recall a single instance in which Sotheby's offered to the bidders an opportunity to come in and inspect the wine?

MR. KABA: Your Honor, objection. Asked and answered three times now.

MR. SHARTSIS: Your Honor, if he may answer, I can move on.

THE COURT: Fine. You can go ahead.

Q. Is that correct?

A. I can't recall.

Q. You talked -- I think you used the word "partnership" between the auction house and the consignor yesterday, is that right?

A. Yes, yes, I did.
Q. What it actually is is, there's a contract with the consignor, correct?
A. Sotheby's entered into a contract with a consignor and Sotheby's was acting as agent for the consignor, not as the buyer. I do know that.
Q. Well, it just -- the question again is simple. The relationship, as far as you understood, was between the consignor and the auction house and it was defined by a -- a contract.
A. Yes.
Q. And that established whatever the relationship was, correct?
A. That's right, between Sotheby's and the consignor.
Q. And that contract did not require the consignor to write the descriptions of the wine in the catalog, did it?
A. I'd have to look at a contract from Sotheby's to see if that was actually included. I can't tell you today whether -- whether the catalog writing was -- was -- if there was any onus on the consignor to assist in writing the catalog.
Q. But you don't remember any, right, after 250 auctions?
A. I can't recall that, no.
Q. Okay. But what you can recall is that you yourself wrote the descriptions in many, many catalogs, correct?
A. I wrote the descriptions and on very many occasions I had

to have the input from the consignor, the collector.

Q. But you wrote the descriptions, correct?

A. I or my staff or my colleagues wrote the descriptions.

Q. Right. And that's because your profession was what was known as a cataloger, correct?

A. That's correct.

Q. And as a cataloger, writing down the fill level, the condition of the cork, the condition of the label, the condition of the bottle, that was your job, correct?

A. That was right, to accurately describe the actual bottle.

Q. And that's what the consignor hired Sotheby's to do, correct?

A. The consignor hired Sotheby's to do that, but Sotheby's also obtained information from the consignor as to provenance, for example, as to how many years the wine had actually been in the cellar, so that if the -- if Sotheby's was satisfied with a consignor's declaration of that, for example, looking at the original invoices for the wines we would, you know, be happy to put that in the catalog because that would aid the sell -- salability, so if you have a wine, wines which remained in a cellar for 40, 50 years, that would be something of great importance. Likewise, the cellar conditions. If it had been a natural European cellar, where the conditions were perfect, we would mention that in the catalog as well, having witnessed it ourselves.

Q. And if the consignor told Sotheby's that the consignor couldn't give any information on provenance, Sotheby's would decide whether they wanted to go forward to sell the bottle or not, correct?

A. Sotheby's would do, again, a visual inspection of the items.

Q. Right. And it's the visual inspection I want to focus on. What we've done here is the visual inspection, correct?

A. That's correct.

Q. So what your job was was you would -- let me take one of these bottles.

You would inspect the bottle and you would look and say something about the label, you'd write it down in the catalog if you thought it was worthwhile to write down, correct?

A. That's right.

Q. The consignor didn't look at the label and write something in the catalog, correct?

A. We were making notes about the label.

Q. Right. And then you'd look at the cork, you'd observe it, you'd take out a bright light and look through the glass?

A. If it was necessary to look at the cork, yes, but if we were satisfied with the overall condition of the bottle, i.e., the label was completely legible and the capsule was appropriate and had not had signs of being tampered with and

the bottle looked okay, then there was no reason to look at the cork.

Q. Did you ever peel back a capsule to look at corks?

A. Yes, we did that when the labels were illegible.

Q. All right. And so if you saw something on the cork that you thought was noteworthy, you as the cataloger would write it down in the catalog, correct?

A. We would normally say label illegible or missing, capsule cut for inspection, cork branded, vintage legible or if there was -- if there was -- the sides of the cork had crumbled, something like that, we would add that as well. And that was normally for the older wines, where it would actually note the conditions of the cork.

Q. And that was your job as a cataloger to write that in the catalog, correct?

A. That's right.

Q. And if there were other things that you physically observed about the bottle that you thought were noteworthy for a bidder, you as a cataloger would write that down in the catalog, correct?

A. That's correct.

Q. The consignor wouldn't do that; the consignor wouldn't get out and draft the description of what you saw of the bottle, would the consignor?

A. No, but the consignor could provide us with other

information. I mean, I recall one occasion where the labels were skewed on the bottles and they were very valuable wines and he explained -- and he actually showed me this -- that the cellar had flooded at one point, because it was next to a river, and that is what caused the wine -- the labels weren't completely fixed, and he showed me the insurance declaration. And there was also quite a lot of mud as well on these bottles. That's just an example where I needed information from the consignor about why the labels were not as standard, why they -- why they had moved around, and that, of course, required looking at the -- the corks as well. And there was a consignment of Burgundy, and that's where there was nothing on the corks which had the year, so we had to go back to the records, we had the original bill, and we got information that way.

Q. Okay. So that was one circumstance in which you looked at the bottle, you saw something that you thought was irregular, and then you sought more information from the consignor, correct?

A. That is correct.

Q. And after that you as the cataloger made the decision of what to write down in the catalog about the bottle, correct?

A. That is correct.

Q. And that's the role of the cataloger.

A. Yes.

Q. It's not the role of the consignor, correct?
A. No, because the descriptions are always written by the staff at Sotheby's. But getting additional information from the vendor concerning history, provenance, or any other salient details.
Q. Let me just ask you -- let me go back to the contract a bit. Do you ever remember at Sotheby's, with regards with what was in the contracts, anybody at Sotheby's believing that some portion of your own contract was BS or boilerplate?
A. I don't recall that, sir.
Q. Was it the belief at Sotheby's that the bidders were bound by the terms of the catalog?
MR. KABA: Objection, your Honor. These are legal conclusions. This is an expert on the authenticity of these wines, not on Sotheby's, as counsel is describing it, contract terms or whether they're legally bound by it.
THE COURT: He can testify to his understanding, just for what that's worth.
A. Well, we had -- we had a legal department who went through all these contracts and adjusted them as necessary, but asking experts, we relied on the legal department and --
Q. I'm just asking you whether you were aware at Sotheby's that there was a belief that the bidders were bound to the terms of the auction catalog.
A. Yes.

Q. Thank you. Was there a belief at Sotheby's that the auction contract was unfair in any way?
A. I don't recall us ever discussing that.
Q. Was there a belief at Sotheby's that the auction catalog was a license to steal?
A. I don't think so. I don't know, but --
Q. Let's go back a little bit to the beginning and go through what it took to enable you to do that impressive job you did yesterday and this morning.

With specific regard to the bottles in this case, you have considerable experience in cataloging wines specifically like Cheval Blanc, Petrus, and Lafleur, correct?
A. Yes.
Q. You have the special experience of being stationed in Brussels, isn't that right?
A. It facilitated work at the time when there were a great many vendors -- sorry -- sellers out there, so it was -- the view was taken I should be stationed there full time for a while.
Q. And the reason it was special was there was a particular taste in Belgium for the three wines I just mentioned.
A. That is correct.
Q. So you had, could we call, an immersion experience in those three kinds of wines?
A. That's right. I saw them in situ.

Q. And when you say in situ, I remember from my education, it means in place.
A. In place for -- for a long period, maybe even for generations. It remained in the same cellar for generations.
Q. And so you were able to go into, I think you told me, over a hundred cellars to look at what wine bottles looked like when they were in cellars, correct?
A. Yes.
Q. And from going into those cellars, you could have the firsthand experience of comparing what a label looked like if it were dirty or damp or dusty or mothy or anything, correct?
A. That's right, because you could actually tie in the conditions of the label with the conditions of the cellar.
Q. Right. And so you had the visual experience of looking at and developing a sort of a mental database of thousands of these kinds of bottles of Cheval Blanc, Petrus, and Lafleur and how their labels would deteriorate or change color or age, correct?
A. Yes, and also the actual look of the genuine labels and how they would deteriorate, the actual paper.
Q. And that experience of being in over a hundred cellars, looking at thousands of Cheval Blancs, Petruses, and Lafleur, enables you to look at markings on a label and to at least have a strong belief that the markings are inconsistent with the thousands of bottles that you've seen.

A. Yes, it would give me the conviction that labels would be copies.

Q. Now let's talk about what enabled you over time to do that.

You didn't just figure this out on your own, right, working by yourself?

A. No.

Q. Right. You started at Sotheby's in basically a beginning position, correct?

A. That's correct.

Q. And then over the years, Sotheby's brought you along with mentorship to enable you to understand what was authentic about each element of a bottle, correct?

A. That is correct.

(Continued on next page)

BY MR. SHARTSIS:

Q. And you worked with such people as David Molyneaux-Berry, correct?

A. Yes.

Q. And you think Mr. Molyneaux-Berry was qualified to determine whether a bottle might be authentic or not?

A. Yes. He gave me a lot of insights into how to determine whether a bottle was authentic or not.

Q. And you did this training and work on a full-time basis, correct?

A. I did.

Q. It's the only thing you did five days a weak, seven or eight hours a day?

A. That's right.

Q. And so you had people beyond David Molyneaux-Berry who were training you in how to look at a bottle like this and figure out whether there might be some questionable aspect, correct?

A. Yes, at Sotheby's, and also because we were dealing with collectors of wine with selling through us, they were very knowledgeable, as well, and they could actually point out things to me, especially when I was younger, which I learned.

So it's not just the staff at Sotheby's, but also people who were impassioned about wine who built up these collections and they could give me information as well.

Q. And you would say that you could have never become as

proficient in identifying authenticity issues if you had not had the mentorship of other experts at Sotheby's; is that correct?

A. That's right, that's what I said.

Q. In developing this expertise, you looked at thousands of capsules, correct?

A. Yes.

Q. And you looked at hundreds, if not thousands, of capsules for the three wines we've been talking about, correct?

A. Yes.

Q. And that enabled you to understand the possible age of the capsule?

A. That's right. The condition I would expect a capsule to be, the older wine in the back.

Q. And what color the capsules should be?

A. That's right.

Q. And what the likely wear would be on a capsule of a likely age?

A. That's right, or the lack of wear.

Q. And then the markings would enable you to know that a capsule ought to be embossed instead of stamped, right?

A. That's right.

Q. And it would enable you to know what would be stamped on it, if it should be stamped, correct?

A. That's right.

Q. And it would enable you to know where on the capsule something should be stamped, correct?
A. That's right.
Q. And you learned all that from looking at thousands and thousands of capsules, correct?
A. That is right.
Q. And that was over a period of more than a decade looking at thousands and thousands of capsules, correct?
A. That's it.
Q. And also being able to look at those capsules in situ, as you say, in hundreds of cellars?
A. Yes.
Q. You have, on thousands of occasions, looked through the glass of a bottle to try to see the cork, correct?
A. I think so, yes, thousands of times.
Q. And you have looked at thousands and thousands of labels; is that right?
A. Yes.
Q. You've looked at them outside of cellars?
A. Yes.
Q. You've looked at them inside of cellars?
A. Yes.
Q. You've looked at them in over a hundred cellars?
A. Yes.
Q. You've looked at them in Bordeaux?

A. Yes.
Q. You work in Bordeaux?
A. I do.
Q. And so you're there where these wines all come from, correct?
A. I know where the wines come from. I think, with the consideration of looking at capsules and labels, collectors, again, as they have seen a lot of wine, have a lot of wine in their cellars, they would have a nice reference as well of genuine bottles.
Q. And so you've been able to be in these cellars and see bottles that you believe were genuine and had the opportunity to compare other bottles to them that might raise questions of authenticity, correct?
A. That's right.
Q. Thousands of times, correct?
A. Exactly.
Q. You've seen thousands of magnums of the types that are in this case, correct?
A. I've probably seen more bottles than magnums, because generally speaking more bottles are produced per vintage than magnums. Magnums are more for special occasions and as such. The logic is to produce more bottles than magnums. So I wouldn't say maybe in the thousands of magnums but hundreds, at least.

Q. Okay. And I'm sorry, because in your deposition you said you had probably observed thousands of magnums?
A. In total, probably thousands.
Q. Okay. And you have looked at tens of thousands of Bordeaux corks, correct?
A. I don't know about tens of thousands of Bordeaux corks because as we evolved at Sotheby's looking at wines, as I said before -- well, as I'd like to say now, is that we looked at bottles in situ. We were happy with the authenticity of the capsules, the labels, without having to damage the capsules and squint at the corks; so....
Q. I'm not sure I followed the answer.
A. Sure.
Q. Let me just ask the question again, and we'll see if we can move this along for the jury.
A. Yes.
Q. You have to have looked at tens of thousands of Bordeaux corks in your experience?
A. I don't think tens of thousands. I wouldn't have peeled back every single capsule of every bottle I saw.
Q. Okay. And one thing you have developed is a concept that a cork from Bordeaux should be 5.2 millimeters? Do I have my meters right?
A. Centimeters.
Q. Centimeters, thank you.

A. There's 52 millimeters.
Q. Correct?
A. That's correct.
Q. There's no published standard?
A. There is, in fact.
Q. And what is the published standard for corks?
A. Published standard for corks is from the -- now, let me get this right because it's a very long -- the French like very long terms. It's Federacion Francaise Des Syndicats De Liege.
THE COURT: Can you give the translation?
MR. SHARTSIS: Did you get all that? I'll explain it to you later.
A. So, confusingly, a long French cork is called a bouchon, bouchon cork, and liegois or liegois is a picture of this type of cork, a long cylindrical cork, which is used for fine wines. I don't know where it comes from because Liege is in Belgium rather than France, but anyway, I digress.
But they say that it should be 52 centimeters for corks used for fine wine, i.e. wine which has to be aged for a long time in bottle so it can withstand the contact with wine for decades. Whereas, I think it's 38 centimeters for wine which is for almost immediate consumption because, you know, the corks do not have to be in contact with the wines so long.
Q. And is this a law or is it something that's suggested?
A. It's a standard. It's an industry standard.

Q. And that industry standard it's published in French?
A. Yes, it is.
Q. And when was it published?
A. I don't know exactly.
Q. So if you don't know exactly when it was published -- You've made comments about the length of corks in these bottles. Do you know that the industry standards that called for 5.2 centimeters were published before any of these bottles were bottled?
A. I don't know, but I may add, having spoken to the people at Chateau, they understand that the standard cork length was 5.2 centimeters; so it's from other sources not just printed sources.
Q. So for you to know that this standard, you either had to read it in a French standard guide for corks or talked to people at Chateaux, correct?
A. Yes.
Q. Now --
A. And also from looking at lots of corks to see that that standard was actually in place.
Q. In fact, I thought you had told me that as to Chateau Lafite, when I asked you how many corks you had reviewed, you said in the thousands or even tens of thousands for Chateau Lafite alone?
A. Right.

Q. Is that correct?
A. Whatever I said at the deposition, I said it at the deposition.
Q. You may have thought of it since and think different. I'm just trying to find out whether that is --
A. Well --
Q. Because I'm asking you these questions just based on what you told me before.
A. Well, sure. Reviewing the logic, as I've explained, looking at the bottles, not every bottle had a label issue concerning legibility so there would have been no need to look at the corks. Yes, I'm sure I've seen thousands of corks.
Q. And thousands of Chateau Lafite labels?
A. Yes.
Q. Thousands of 19th century labels?
A. I don't think 19th century would run in the thousands because these are such a rare breed now that it would be in the hundreds.
Q. So, again, for not belaboring it, do you recall the deposition, you've told me that is based on many years of looking at thousands of labels from the 19th century?
A. Did I say that?
Q. I don't want to put words in your mouth, and I don't want to bore the jury. Yet, I'm just asking you the same questions I asked you before.

A. Okay.
Q. So do you remember?
A. I don't remember what I said at the deposition, then.
Q. All right. Do you remember that you have observed thousands of Cheval Blanc labels before you looked at these bottles?
A. Yes.
Q. Mr. Egan, you would agree with me that even if you worked on a full-time basis trying to learn what you do to authenticate a bottle of wine, you could not do it if you worked full time for three years?
A. I think it would take a bit longer than that to have the experience of seeing.
Q. And your view really is that it takes about ten years to really be able to do the kind of thing that you did here for the jury yesterday and today?
A. That's what I said.
Q. Mr. Egan, and I'm going to change a little bit. I've talked enough about your extensive and impressive experience. I believe that -- Do you agree that by the year 2000, at least at Sotheby's, there were authentication issues arising in the collections that you were looking at?
A. Yes.
Q. And if Sotheby's saw a collection in which it found bottles where it questioned the authenticity, it would not walk away

from that collection for the purpose of an auction, would it?
A. It depends on a case-by-case basis. We would identify the items and speak to the vendor about it.
Q. But you wouldn't walk away from auctioning the good bottles in the collection; that's really my question?
A. Not necessarily.
Q. Right. What you do is, Sotheby's knowing that -- and, in fact, when you would vet collections, and vetting, of course, is looking at them to see how good the bottles are and quality. There would be collections where you'd be working and you'd see a few bottles or a lot of bottles, whatever, a bottle that raised question of authenticity to you, and then you would continue to look at other bottles and select among those bottles for auction, correct?
A. Yes, but we wouldn't just be packing the wines, whatever. We'd be, obviously, putting those bottles apart so not --
Q. I'm not suggesting you're packing the bottles that you thought were improper.
A. Just inspecting.
Q. So let me ask the question again. So the process was this. The consignor would propose bottles for Sotheby's to examine, correct?
A. Yes.
Q. Right. Then Sotheby's would examine the bottles itself, correct?

A. Yes.
Q. You wouldn't take the consignor's word that all the bottles were authentic, correct?
A. No, we wouldn't. We'd have to look at these wines.
Q. Right. You'd look at them yourself?
A. However, if the consignor had already knew that there were issues with some of the bottles, that would be a great opportunity for us to learn from the consignor that there were already known issues.
Q. All right.
A. That would have helped us considerably.
Q. Well, you wouldn't look at the bottles that you were looking at any differently. You'd still look at the label. You'd look at the glass. You'd look at the fill. You'd look at the capsule, and if need be, you'd look at the cork, correct?
A. That's right.
Q. You'd always do that?
A. That's right, as a matter of course.
Q. Right. So after you finished looking at all the things that you told the jury about these bottles yesterday and today, you might find a bottle that you thought was questionable or inauthentic or unlikeable for some reason, correct?
A. That's right.
Q. You'd give that back to the consignor?

A. That's right.
Q. It might even be that you thought the bottle was inauthentic, correct?
A. Sorry, could you say that again?
Q. It might even be that you thought the bottle was inauthentic?
A. Yes.
Q. Right. And then you'd still go ahead, you'd still look through the rest of the bottles. You'd pick the ones that you didn't have authenticity concerns about, and put them up for auction?
A. That's right, but we would actually, you know, say to the consignor, look, while we were inspecting, we have issues with these bottles because it may be an insensitive issue for the consignor. And the consignor would say, well, I want to put these bottles into sale, and I was really wanting to put these, which you have said are -- there are issues, and at that particular moment, if we said we cannot possibly put these items into auction, the consignor said, well, I don't want you to proceed any further. If you cannot put these wines into auction, then goodbye; so....
Q. Right. Or the more common case would be, you'd say you've asked us to put up a hundred bottles, let's just use an example. You find a couple that you don't want to put up for auction. You tell the consignor that, and then the consignor

says, fine, you may put the rest of them up, and that would happen, wouldn't it?

A. Yes, it would.

Q. And you would determine whether there was a problem with the bottles, bottle by bottle, looking at each bottle?

A. Yes.

Q. Using all the skills that you had developed over more than a decade at Sotheby's, correct?

A. Yes.

Q. And even after doing all the work that Sotheby's did, examining the bottle with all the experts that Sotheby's had, as far as you can recall, Sotheby's would never guarantee in the catalog that this bottle was what it purported to be, correct?

A. I'd have to look at the print in the catalog to answer that question.

Q. But you can't ever remember a guarantee?

A. I can't remember the guarantee.

Q. Okay.

A. Or lack of the guarantee.

Q. And, Mr. Egan, in those circumstances where Sotheby's had removed bottles of a consignor because they thought they were inauthentic, giving them back to the consignor but then gone ahead and sold the other bottles that Sotheby's had examined and didn't have problems with, Sotheby's never ever, in a

catalog, informed bidders that the collection had bottles known to Sotheby's to be inauthentic?

A. No, I don't think that was mentioned.

Q. It was never mentioned? I want to be really clear about this. As far as you know, it was never mentioned?

A. As far as I know.

Q. And not just Sotheby's catalogs, in your really substantial experience in the wine auction world, you have never seen a catalog which said, we're offering these wines, but we know that we have removed a few wines from this collection that we think are fake, or anything like that?

A. Well, I professed to have not read every single wine auction catalog from every wine auctioneer; so I can't --

Q. I'm not asking you about every one ever written in the world. I'm just asking your experience as a really substantial expert, having worked for 23 years at Sotheby's and now advising people on wine and auctions, whether you have ever seen a catalog which says we're auctioning wines, but we know that this collection has or may have inauthentic wine?

A. No.

Q. Now, I believe Trial Exhibit 293 is admitted.

MR. SHARTSIS: Could you show 293, Page 6, please.

Q. Mr. Egan, just for time frame, you left Sotheby's in 2005?

A. March 2005.

Q. I'm just going to let you know this has been put into

evidence, I think, by the plaintiff about the draft contract between Sotheby's and Mr. Greenberg that they could not come to terms on.

MR. SHARTSIS: And I'm going to ask Miss Seabrook to blow up that paragraph above paragraph 13. And we don't need the handwriting. I just want the actual text.

Q. And, Mr. Egan, could you take a look at that, please?

A. Yes.

Q. And just read it to yourself?

A. All right.

Q. Do you remember in -- I think you said earlier what you did have experience was in the contracts between the consignor and the auction house, right?

A. Yes.

Q. And do you remember that your contracts had a term like this?

A. I don't believe the European contracts.

Q. Pardon me?

A. I don't recall the European contracts which I was involved with.

Q. So having worked in the relationship between the auction house and the consignor, you don't remember the terms of any of those contracts?

A. No.

Q. Okay. And looking at this where it says, "Neither Aulden

Cellars nor Sotheby's will be liable for any errors or omissions in catalog or other descriptions of the property," you don't remember you had some protection for yourself like that when you worked for Sotheby's?

A. I'm sorry, I can't remember. I'd have to look at an actual contract.

Q. Do you have any in your possession?

A. I don't.

Q. All right. It would have been easier. I'm sorry.

A. No, I don't have any material pertaining to that since I left Sotheby's.

MR. SHARTSIS: Your Honor, may I approach the witness?

THE COURT: Yes.

Q. Mr. Egan, I'm going to give you an e-mail that you sent, but we're going to put it up on the screen to make it easier to read. And I'm just going to focus on the second page for you.

MR. SHARTSIS: Could we have Page 2 put up, please, 02. Actually, I'm sorry, let's stay with Page 1.

Q. Before I get to ask you questions, you have to identify it for me. And do you see this, looking at this document, it's Michael Egan to Martha@outlaw.net?

A. That's right.

Q. Do you remember sending Miss Martha this e-mail?

A. Yes, I do.

MR. SHARTSIS: Your Honor, I move it into evidence.

THE COURT: Any objection?

MR. KABA: No objection.

THE COURT: Okay. 1042 is received.

(Trial Exhibit 1042 received in evidence)

Q. So in May 4, 2009 -- if we can just get the date of this all the way across -- you were working for Mr. Koch, correct?

A. I was.

Q. And this is before Mr. Koch asked you to give an opinion on the bottles of wine, correct?

A. Yes.

Q. He didn't ask you to give an opinion on the bottles of wine until sometime in 2010?

A. That is correct.

Q. Okay. And you had visited Chateau Lafite on behalf of Mr. Koch, correct?

A. I don't know if it involved Mr. Koch. I don't know if it was on behalf of Mr. Koch on this particular -- Are you talking about this particular occasion.

Q. Sure.

A. As alluded to in this e-mail?

Q. Sure.

A. I don't know if it was on behalf of Mr. Koch.

Q. Mr. Elroy was the one who directed you, correct?

A. I don't believe it was Mr. Elroy.

Q. Who was it who directed you?

A. I think it was from Mr. Edgerton.
Q. Mr. Edgerton?
A. Right.
Q. And then on Page 2, if we turn to the fourth paragraph down, "I hope"?
A. Yes.
Q. First, you have to tell me how that -- Chevalier, I think I can pronounce. Mr. Conge?
A. That's perfect, yes.
Q. So what this says is, "I hope that the information that I gleaned from Mr. Chevalier and Mr. Conge is useful." And those are the people at Chateau Lafite, correct?
A. That's correct.
Q. "As Mr. Chevalier explained to me at the meeting, there were no hard and fast rules as to how precise the labels, bottles and capsules should appear at that time. Therefore, there could be slightly different versions of labels in existence," correct?
A. Correct.
Q. And that was about a 1945 Chateau Lafite, correct?
A. Yes, it was to do with a 1945 vintage.
Q. And here they were simply telling you the difficulty in knowing?
A. Yes. I mean, what's -- they explained -- they explained to me that there were no hard and fast rules, as it says. So

there could be slightly different versions, but they say could be. And I would like to mention at this time that the Chateau Lafite team, Mr. Chevalier was the head of Chateau Lafite, were only installed in 1997. So they were not the personnel who bottled or put the labels on. So they weren't expressing an opinion. They're saying could. Though, they believed there were no hard and fast rules.

Q. That's one of the things, Mr. Egan, that makes it even more difficult to figure out labels and bottles and stickers and capsules, is that for most of these bottles, the people who made them aren't around anymore?

A. That's right.

Q. So you can't go back to them and say, is this real or is this not real because most of them are dead?

A. Exactly. But the great thing is there are enough genuine bottles remaining that we have -- we know what the labels, what the capsules look like of genuine items which have been -- remained untouched.

Q. Now --

A. And Mr. Conge and Mr. Chevalier are extremely good wine makers and their energies are spent in producing one of the best wines in the world, and it was gracious of them, even for me, to give me the time to let me have their opinion.

Q. And do you think that your description of them means that it was not correct, that there are no hard and fast rules as to

how precise the labels, bottles and capsules should appear at that time?

A. Yes, because as I explained yesterday, when going back to the brand of which actually appeared as a label on the Chateau and the fact that they would have done only one label run, that was the logical thing to do. They wanted to sell the wine, deliver it to the merchants, especially in the Chateau bottle, and therefore, they would have done one label run and that would have been it.

Q. Now, you were asked yesterday about something I said in the opening statement, and I had said that standardization with the exception of one of the wines, started in 1973. Do you remember that question to you? Do you remember the question yesterday? I want to be very precise about this.

A. The 19 --

Q. 1973?

A. Who posed the questions?

Q. Your lawyer.

A. Sorry. Yes.

Q. Do you remember that question?

A. About the 1973 standardization of labels?

Q. Right. And you said that my statement was wrong about that. That, in fact, there they were standardized long before 1973?

A. There was a European standardization in 1973, where you had

the identify the country of origin on the label, the contents. It had to also display the contents on the bottle, I think the alcohol content and the basic address of the Chateau or winery or domain.

Q. So in 1973, it became law that all the top wineries in Bordeaux had to have the bottles, Chateau bottle. So, broadly speaking, that would be the time when all the labels would be similar, correct?

A. Well, Chateau bottling is one thing.

Q. Was may statement correct?

A. Yes, sure.

Q. You understand, I'm reading you what you said to me.

A. Sure. Sure that --

MR. KABA: Your Honor, could we get references to the depositions if counsel is going to read the deposition?

MR. SHARTSIS: Page 161.

MR. KABA: I'm sorry, what page?

MR. SHARTSIS: Page 161.

Q. Even from the 1970s, even after this law, Chateau bottling law was enshrined in French wine law, there were some variations, such as with Chateau Palmer, who had a special label for Berry Brothers, where they still had their own label even though the line was bottled in the Chateau; is that true?

A. That is an exception.

Q. Right. And so the statement, quoting you, so

standardization, with a few exceptions, was in 1973; is that correct?

A. I think I was alluding to the standardization concerning the necessary requirements concerning the alcohol content, the country of origin. Those had to appear on the labels.

Q. And then is it also true that prior to 1973, you had the wine which could still be bottled elsewhere than the Chateau, and I suppose with bearing different types of labels?

A. Yes.

Q. Thank you. Now, I think you touched on this in your testimony yesterday. Wine could be bottled outside of the Chateaux, not by the Chateaux?

A. That's correct.

Q. There were middlemen called Negociants, correct?

A. Yes.

Q. And they buy the wine in barrels?

A. That's right.

Q. And a lot of them are in Belgium, where you've had your experience?

A. Yes. Some of them were in Belgium, that's correct. They're actually sent up.

Q. And the Negociants then would pick their own bottles and put their own labels on the wine they bought from some of these very famous Chateaux, correct?

A. Yes.

Q. And the Negociants, for example, could decide that they want that they wanted to create magnums. They could do magnums, correct?
A. Yes.
Q. And so Negociants could get magnum bottles, create those. Chateau would not know whether those were made, correct?
A. That's correct.
Q. Chateau Petrus wouldn't know whether someone was creating a magnum?
A. That's right.
Q. And, in fact, it's true, isn't it, that even after sometimes wine is bottle, people will create magnums by opening two smaller bottles and pouring them into a bigger bottle?
A. That's an exceptional case.
Q. But it happens?
A. I would have thought highly unlikely myself.
Q. But it happens, correct?
A. It would render the magnum, in my opinion --
Q. And when I asked you isn't it true that even Chateaus themselves might have more than one form of label for the same year, you said that could be, correct?
A. It could be.
MR. SHARTSIS: Your Honor, it's 11:00. Should we take our break now?
THE COURT: Sure. We can take a brief break. Ladies

and gentlemen, let's take ten minutes. Please put your pads down, and we'll see you back here in ten minutes.

(Jury exits)

(Recess)

THE COURT: Please be seated. Okay. Bring back the jury.

(Jury enters)

THE COURT: Please be seated. Mr. Shartsis.

MR. SHARTSIS: Your Honor, with the Court's permission, I'd like to use one of the demonstrative exhibits I used in the opening statements. It might help us. It's just a drawing of the bottle.

THE COURT: Okay.

Q. Mr. Egan, you have that from front of you. I just want to ask you a few questions before we start going through the elements. One, you were retained by Mr. Koch as his expert here; is that right?

A. Yes.

Q. And compensated by him for your time and effort?

A. Yes.

Q. I want to finish up on 1973 and ask you one more question, see if you agree with this proposition. It is true that there was never a time before 1973 when an expert could say that for any vintage or Chateau, except Mouton Rothschild, there was only one kind of label?

A. That's right.

Q. Now, I put up for the jury's convenience an indication of the items on a bottle that you look at, and let's just go through and make sure that's correct.

I've listed on here cork, capsule, character labeling, the fill level, the color of the wine, the glass, the Chateau label, other labels, punt and sediment.

Is it true that those are all of the things that you look at when you examine a bottle to see if it might or might not be authentic?

A. Yes.

Q. Have I left anything out on my chart?

A. Where -- I don't think so.

Q. All right. So we can use this comfortably as a guide for what you look at. I want to talk about aging of labels. One of the things that enables you to understand aging of labels, of course, is having seen thousands of labels; is that correct?

A. Yes.

Q. And in some cases, thousands of labels of the same type of wine?

A. Yes.

Q. And thousands of labels which have been in a variety of cellar conditions?

A. Yes, atmospheric and --

Q. All right. Temperature?

A. Temperature, et cetera.

(Continued on next page)

BY MR. SHARTSIS:

Q. You've also been able to see how labels are damaged by being placed in cellars, is that right?

A. Yes.

Q. And one of the reasons that you need that experience is that the bins in cellars come in all kinds of shapes, don't they?

A. Well, you have two main ways of cellaring wine. You have the bin, which is basically like a oblong, or even a square, and the bottles are put in, so they're jammed in, and then another way -- you put a strip of wood and put the next layer of the bottles in, and you can have just one layer of bottles or two or even -- layers of two or even three or four bottles deep and they're -- and then the next layer is put on.

The other way is you have a rack which are basically like pigeon holes and you just slide the bottles in.

Q. The bottles may be organized vertically. You can have them run in a rack straight up and down.

A. Up and down, exactly, but always -- but always lying down, of course.

Q. Right. Always cork first.

A. Cork first or punt first. It depends on how the -- how you want to put them in.

Q. And you have horizontal racks where they're laying that way?

A. That's right.
Q. Sometimes racks are made out of wood?
A. Yes.
Q. Sometimes out of metal?
A. Yes.
Q. You might even have very old cellars, might be stone in some cases?
A. That's right. Sometimes the racking would even be made out of a light stone.
Q. And you --
A. Or cement.
Q. And you've become familiar with what happens to bottles if they slide in over metal or wood or stone.
A. Yes.
Q. And you do that by seeing all these bottles and all these cellars?
A. Yes.
Q. And so when you look at a damage on a label, it helps you to try to figure out is the damage artificial or real.
A. Yes. I want to know if the damage was caused by sliding or other things which had happened to the bottle.
Q. And your ability to try to make a judgment about the nicks and scrapes on bottles is your experience seeing these various types of racks in various types of materials, correct?
A. I suppose so, yes.

Q. You've seen lots of bottles with mold on them, correct?
A. Yes.
Q. And so seeing mold enables you to know whether the kind of markings on these bottles may or not -- may or may not be real --
A. Yes.
Q. -- correct? And of course you've seen bottles with wine stains.
A. Natural, normal wine stains from a bottle that may have broken above and stained the other labels.
Q. You've examined bottles where mice have eaten away little bits of the labels?
A. That's right.
Q. And where spiders have nests in the labels?
A. That's right. Even slugs on the bottles sometimes, which is not such a great experience when you're delving into a deep --
Q. When you're reaching in there, right?
A. That's right.
Q. You've seen dust on bottles, correct?
A. Yes.
Q. And you've seen dust on bottles in damp cellars?
A. Yes, I have.
Q. Cellars with high humidity?
A. Yes.

Q. Cellars with low humidity?
A. Yes.
Q. Cellars at various temperatures?
A. Yes. If, you know, the temperature is too high, you normally don't have any dampness, of course, and in fact, wine which is spoiled because wine has to be at a certain low temperature. Otherwise, the cork actually shrinks and the wine comes out or the wine essentially gets cooked.
Q. And that experience enables you to evaluate a label that looks less than pristine, correct?
A. Yes.
Q. You can also look at the discoloration of the surface based on the experiences you've had seeing thousands of bottles in hundreds of cellars, correct?
A. I suppose so, yes.
Q. And make a judgment about whether the type of discoloration looks right, given your experience.
A. Yes.
Q. And there's a thing called -- I'll give you both the US and English pronunciations -- the patina or patina of a label?
A. Yeah, yes.
Q. That's the sheen on a label, is that right?
A. It's the -- what would happen to a label as the years go by.
Q. Right. And you can form judgments about what the patina or

patina of a label should be based upon having seen thousands of bottles in hundreds of cellars.

A. Yes.

Q. And your experience of seeing thousands of bottles in hundreds of cellars makes you determine whether somebody has artificially damaged the label or it has happened in what you would expect to be the ordinary course of an old wine bottle.

A. Yes, but also you can see for yourself. You don't have to be an expert in that people can see that something has been applied to the label which looks odd.

Q. Now, Mr. Egan, there have been questions about photocopied labels here, and you've been sitting in court, you've heard them?

A. I have heard mention to that -- of that.

Q. And in fact you have seen bottles which you believed to be authentic where the owner of the bottle had placed a photocopied label on that bottle, isn't that true?

A. That's true, but the photocopy would be something very basic. It would be -- might have taken a label and just put it on the photocopying machine and it would just be a black and white and patently obvious that it's a copy of a label. I think anyone would be able to see that. I think in --

Q. And --

A. But you wouldn't see labels which had been treated as the 24 examples here.

Q. Well, there is one label that's yellow. You know that one.
A. Yes.
Q. I mean, do you think somebody put a yellow label on that Chateau Lafite intending to pass it off as a real Chateau Lafite label?
A. It's quite a sophisticated copy of a Chateau Lafite label. You know, the printing is very fine, it's -- the fact that it is yellow is the only determining factor while -- on first looking at it.
Q. Well, would you consider a sophisticated fake a yellow label, where Chateau Lafite is basically an off-white label? You think it looks sophisticated at yellow?
A. It looks like a very, very clear depiction of a Chateau Lafite label. It doesn't look like a photocopy as would have been done in just putting it on a machine.
Q. If we put a hundred wine authenticators in a room and held this bottle up, how many do you think would say, "I'm sure that that's a real Chateau Lafite label"?
A. Probably none of them, but they would probably have commented on the sophistication of the label.
Q. Not a person in the room would be fooled, correct?
A. I don't know if -- that's just a hypothetical.
Q. Yes. But you're the expert. I'm asking you, a hundred experts on Chateau Lafite labels or just a hundred experts from top auction houses look at this bottle, hypothetically, out of

that hundred, how many would say, "Oh, I think that's a real Chateau Lafite label"?

MR. KABA: Objection. Speculation and asked and answered.

THE COURT: You can answer.

A. I don't know if a hundred experts would answer yes, but the probability would be that that would be picked out.

Q. Thank you.

I want to ask you about reconditioning. And you said yesterday your example of reconditioning is where somebody brings their own other bottle to the chateau and you basically cannibalize one bottle to put wine in another bottle, is that your description?

A. That's my description, yes.

Q. But the wine put in a reconditioned bottle may not in fact be the identical year and date, isn't that correct?

A. The chateaux have told me that that is the practice, these leading chateaux. They say if a bottle is reconditioned, it has to be filled up with the very same wine, very same vintage.

Q. Have you ever been to a chateau when they reconditioned a bottle?

A. No, I have not, but this is what they have told me.

Q. Can you tell how much wine has been added to a reconditioned bottle?

A. If you saw the before -- the bottle before and the bottle

after, you might be able to make an Archimedes-based guess on the volume.

Q. But I'm asking you a hypothetical. If this bottle had a reconditioning sticker on it, we agree it was reconditioned, without seeing what was done at the chateau, you couldn't know how much wine had been added?

A. No.

Q. How long -- is there an average length to the life of a cork?

A. It depends. It can be as low as 25 years you'll start seeing cork failure. If the cellar is remarkable and you have a fantastic correct humidity, which would maintain the top of the cork humidity, you might see corks lasting 50, 60 years, but generally speaking, 25 years is probably the lowest. The average would be about 35, 40 years.

Q. You had mentioned Nicolas, the famous negociant in Paris?

A. Yes.

Q. Didn't they have a practice of automatically reconditioning their wine every 25 to 30 years?

A. I'm not aware of that.

Q. All right. So when you say average of 30 long or 50, when we look at a bottle of 1864, could we safely assume that that bottle has been recorked at least twice because corks don't last 150 years?

A. You may see that you could say that, but sometimes, as I

said, under good conditions of storage, the -- the cork might have lasted the time. It all depends on the cork.

Q. Do you think in your experience, having been in all these cellars, there's much likelihood that a cork would last from 1864 to 2013 without being changed and without showing leakage or other problems?

MR. KABA: Your Honor, I object to the extent it assumes that that is in fact a bottle from 1864.

MR. SHARTSIS: Any bottle from 1864.

A. It would be quite a long shot for the cork to have remained intact all that time.

Q. Quite a long shot?

A. Yes, but I have actually seen bottles from the 19th Century, Mouton Rothschilds 1893, which was actually buried in the ground. The deeper you bury something in the ground, the less frost is going to affect it, and that was done during the First World War in Belgium, where these bottles were buried at a deep enough level to have maintained the humidity, and the corks were in extremely good condition, and they were only discovered when they were doing building work and these bottles were brought to light again. That -- that is real archeology.

Q. All right. Thank you. One of the things you look at -- and I've got it up there -- is the color of the wine?

A. Yes.

Q. All right. And that's because some wine gets very old, the

color falls out, is that right? It becomes less -- less of a rich purple?

A. That's right, if you can see it through the glass.

Q. And if you had seen a bottle here where the color of the wine was inconsistent with what you would expect, you would have mentioned it in your report, is that right?

A. I was -- I would have mentioned the color showed the wine was out of condition.

Q. And one of the things you'd look at is sediment, is that right?

A. I do sometimes.

Q. Right. And sediment is after the clear fluid of the wine is in that bottle a long time, it begins to form granules or material, something that's not liquid that settles at the bottom of the bottle, correct?

A. That's right.

Q. You look at sediment to see if the sediment -- if the bottle is consistent with a bottle of that age, correct?

A. Sometimes. Sediment is also indication of the storage condition of the wine, and I said before, if there's a very heavy sediment, it needs to be mentioned because that would be an indication that the wine has undergone irregular storage where it's been too hot and that would cause the color to drop out of the wine.

Q. Well, part of -- part of what catalogers do, the work you

did looking at bottles and writing down what's in the catalog, is they actually do look at the sediment before the wine goes to auction, correct?

A. Not necessarily.

Q. I'm sorry.

A. They look at -- they may have a look at the clarity of the wine to make sure it's not troubled, because again, if you see a wine which is totally cloudy, the odds are that there's a bacterial infection in the wine and you would not want to sell it. You'd have to reject it for sale. But generally speaking, you're looking at just the brightness of the color and just to see if it's -- it looks healthy enough for sale.

Q. You look at the fill level, correct?

A. Yes.

Q. And in fact, you looked at the fill level of these bottles, correct?

A. Yes.

Q. And when you look at the fill level, it's only the beginning of the analysis as to why the fill level is important, isn't that right?

A. Sorry. Can you say that again?

Q. Well, when you look at the fill level, you then begin to -- that -- based on your knowledge of what the fill level should be for a bottle of a certain age, that then causes you to go and look at other parts of the bottle to see if it's all

consistent, based on your experience.
A. Well, there might be other parts of the bottle which I haven't really noticed before I see the fill level.
Q. Right. But one of the indicators is understanding fill level about the age of the wine, the likelihood that it's been reconditioned, the quality of the cork, the quality of the capsule, and the fill level is one of the clues to try to understand that relationship, correct?
A. The fill level is an indication as to how well the wine has been stored. We've seen cellars where fill level generally is higher than average, which is good, because you can -- we've seen for ourselves at Sotheby's the cellar had the right conditions of -- for a long-term storage of wine. Other times we've seen fill levels which run feasibly high for a very old wine.
Q. You see an older wine and you see a very high fill level, that raises a question for you, correct?
A. It does.
Q. Right. Because you think an older wine, given the cork, that the cork should have deteriorated to some extent and wine should have either leaked out or evaporated out, thereby causing the fill level to go down.
A. Yes.
Q. Right. And so you then make an inquiry because you have knowledge of what the fill level ought to be for a bottle of a

certain age.
A. It's actually a generally recognized facet among collectors concerning fill levels. They know generally that the fill level should be of a certain height for certain wine and so they wouldn't take exceptional bidding at auction if a fill level was like high to mid shoulder, for a very old wine, with an original capsule and cork.
Q. There are really two different issues of fill level here. One is that when a buyer is buying it, they don't want to buy a bottle of wine where the fill level is down here (indicating), right?
A. They don't.
Q. Not a very attractive purchase.
A. No.
Q. But the other issue is that as an authenticator, you're not just looking at whether this is an attractive bottle for sale; you're also looking at whether or not something about the fill level, based on your experience, suggests you might examine other parts of the bottle, isn't that correct?
A. I suppose so, yes.
Q. Now on sediment -- sorry to jump back and forth a little bit. I'm not good enough yet in my wine authentication.
On sediment, there are in fact -- you have such expertise that if I were to ask you what a 1945 Mouton Rothschild sediment should look like, you would describe it as

a thick granular sediment, correct?
A. That's what I said, yes.
Q. Right. And that would look different than the sediment in some other chateau bottles, correct?
A. I think so, yeah. I just pointed out Mouton Rothschild because I'm well aware of that sediment.
Q. So the extent of your expertise extends even to understanding what different kind of sediment might be involved, depending on which chateau supposedly made the wine, is that correct?
A. For certain chateaux, certain years. I don't have an encyclopedic memory bank of every form of sediment for every single wine.
Q. But you know a lot of famous chateaux. If we had a little quiz and I asked you what the sediment for Mouton Rothschild or someone else, you could say yes, you'd expect to see this or you'd expect to see that, correct?
A. If it's been cellared correctly.
Q. Right. Now in order to do your work, you need to have an understanding of the practices of the negociants who have been bottling these chateau wines before the '70s, correct?
A. Yes, the --
Q. And there were a lot of negociants, right?
A. There were, and there are -- collectors who are passionate about this subject do know the existence of negociant or

merchant-bottled wines compared to chateau-bottled wines because they're a common enough feature in auction catalogs and with fine wine merchants who sell old wines.

Q. And as part of your work as an authenticator, you have to know all about the many negociants who handled wine for the many famous chateaux, correct?

A. You have to have a certain knowledge, yes.

Q. Right. And it's true, isn't it, that chateaux would sell their wine to more than one negociant?

A. I believe so, yes.

Q. And then those negociants would get that wine in barrels, correct?

A. That's correct.

Q. And then the negociants, each of those separate negociants eventually would select which bottle they were going to use and label that bottle, correct?

A. Yes. In the two-year period.

Q. In the two-year period after the --

A. Yes.

Q. Right. The barrel comes, it's aged in the barrel for up to 24 months, and then they bottle it.

A. That's correct.

Q. Now you mentioned on one of these bottles -- I don't know if I can find it -- a Beaumaine label. Do you remember which bottle the -- on the back, do you remember talking about that?

A. I believe so, yes.
Q. Can you remember which bottle it was?
A. I think it's one of the --
(Pause)
Q. Sorry for the delay. Maybe, Mr. Egan, if you wouldn't mind coming down --
A. Sure.
Q. -- and finding that Beaumaine label for me, please.
A. And I think it was one of these --
Q. This is it. Sorry to get you up.
A. Yeah.
Q. So here on a Chateau Cheval Blanc there is a establishment, R.B. Beaumaine Brussels.
A. Yes.
Q. And what I heard you say yesterday was that with your expertise, you look at this label, and upon looking at the label, you knew it was wrong.
A. Yes.
Q. You know enough to know that Beaumaine didn't put their labels on diagonally but put their labels on horizontally, correct?
A. That was the established procedure.
Q. And you know that because you spent a lot of time in Brussels, right?
A. I've seen a lot of wines from Belgium, from Belgian

cellars.

Q. And you'd agree with me that Beaumaine is actually a pretty obscure, not a widely known negociant.

A. It wouldn't be known to everyone, I don't believe, no, but perhaps to the Bel -- except for the Belgians. The Belgian collectors would probably know the name.

Q. Right. The Belgian collectors might know of Beaumaine. And in determining that this bottle was not authentic, one of the things you needed to know was that Beaumaine didn't put their labels on diagonally, correct?

A. Yes.

Q. And also I guess that Beaumaine actually put the labels on on the front of the bottle.

A. On the front.

Q. Right. And that was very specialized knowledge you had to make this determination.

A. I think it was my experience that, as I say, other collectors, particularly in Belgium, would have known that, perhaps other European countries, even in the United States.

Q. And so we have a Joseph de Pontaud. Is my French getting any better?

A. That's right, de Pontaud, yeah.

Q. I now regret that I took Italian in college.

And also you looked at -- and who is this? Who is Pontaud?

A. That's one of the negociants in Bordeaux, not one of the great negociants who I -- in my opinion, would have handled this sort of wine. It would have been negociants like Ginestet or Dulong.

Q. So this is a pretty obscure negociant in Bordeaux?

A. That's right.

Q. Okay. So in order for you to -- one of the things you looked at to determine that this bottle might not be authentic was you looked at the Pontaud and you said to yourself, I'm not sure that makes sense to me because they're one of the minor negociants and it's unlikely that Pontaud would have been distributing Lafleur, is that right?

A. That's right, and the fact that the label is on the back of the --

Q. Right. And you had to know that Pontaud put its labels on the front, this obscure negociant.

A. That's right, as all the other negociants would have done, because they wanted their name obviously to be connected with the chateau name.

MR. SHARTSIS: Now can we put up 101, 65, please.

Q. And can you see that picture clearly enough?

A. It's mighty fuzzy. If you want to -- still a bit fuzzy, but --

Q. Do you recognize the Chateau Lafleur bottles?

A. Yes.

Q. And can you tell the size of the labels?
A. Yes, I can.
Q. And looking at those labels for those years, you believe those are not authentic labels, correct?
A. I'd have -- I would have my suspicions on those labels.
Q. Right. And here's where your suspicion would come from. You know that in 1921 Chateau Lafleur had only 4 acres under cultivation, correct, 4 hectares?
A. That's right, yes.
Q. And knowing that Chateau Lafleur in 1921 had 4 hectares under cultivation, you have a general idea of how many bottles they were producing, correct?
A. Yes.
Q. And having a general idea of the bottles they were producing and the prices of wine and the costs of production, you've made a conclusion about the economics of Chateau Lafleur 1921, correct?
A. Yes.
Q. And based on the number of hectares, the number of bottles, the price of the bottles, and the cost of production, you've concluded that Chateau Lafleur probably wouldn't have produced two sizes of label because it would be too expensive, given all those factors.
A. That's what I said.
Q. Right. And based on that, when you looked at the Chateau

Lafleur bottle here and saw the large label, almost immediately, you said to yourself, you know, that's not right.

A. It was an issue with this particular magnum, which would have required me to look at this magnum more closely in the flesh.

Q. Well, looking at it more closely, if you looked at it more closely, what would have changed your mind that Chateau Lafleur had only 4 hectares, limited wine production, certain costs and certain profits so they couldn't afford the label, what would have changed your mind if you had seen it?

A. If I looked at the actual label in the flesh, so I -- it might have been an actual label as used by Lafleur, properly -- properly printed on the correct paper and also having the right patina of its age, I could be stand -- I could stand corrected.

Q. But --

A. So I would have to look at the actual item itself.

Q. But once you saw this label depicted here, you would never have offered, according to you, based on 4 hectares of production, you never would have offered that bottle for sale without much further work, correct?

A. Exactly.

Q. Right. The presumption wouldn't be you'd sell it; the presumption would be you wouldn't sell it.

A. The presumption would be I would have to look at the whole bottle to see if everything -- if there are other clues which

prove that it was authentic.
Q. And you have that knowledge of Chateau Lafleur's size in hectares and bottle output and costs of bottles and prices of bottles from your experience and training, correct?
A. Well, not just my experience but it was a well-known fact that Chateau Lafleur produced only about on average 1,700 bottles, 1,800 bottles a year, which is tiny in terms of Bordeaux production, so it was a well-known fact that Lafleur is rare, has always been rare.
Q. All right. And all the information about costs of bottles and profits for wineries in 1921, based on your deep experience, correct?
A. Yes.
MR. SHARTSIS: Could we put up 101, 60, please.
Actually, I'm sorry. Could you go back to the Lafleur for a minute. Let's see those.
Q. I've used a phrase that even I don't know what it means. What's a hectare?
A. A hectare is just over 2 acres.
Q. Right. It's some ancient size measurement, isn't it?
A. I don't know. It's -- probably goes back to the Romans. Everything goes back to the Romans in Europe, so --
Q. Now based on the size of these labels alone, every one of these bottles in your mind is questionable, correct?
A. Looking at these, yes.

MR. SHARTSIS: All right. And now if we could go to the next slide, please.

Q. Now we're looking at Chateau Petrus. Do you see that?

A. Yes.

Q. And seeing the size of those labels, do you agree with me on those magnums these are not standard 750 centiliter labels?

A. That's right, and they would require visual inspection of the actual label to see if they were by chance labels as produced then for the chateau.

Q. And the reason you thought, when you looked at these labels, that there was a problem was that back in the '20s Chateau Lafleur was only 6½ hectares --

A. Chateau Petrus.

Q. Pardon me?

A. Chateau Petrus.

Q. Let me start again. Thank you.

A. Yeah.

Q. The reason you thought these Petrus labels were not right because they were so big was because you knew that in the '20s Chateau Petrus farmed for grapes only 6½ hectares, correct?

A. It was a small production.

Q. Right. And in fact you know that today they farm 11½ hectares, correct?

A. That's correct.

Q. And you know that from your experience in the wine

industry, correct?

A. Yes, and many other people as well.

Q. And then you went through the same logic when you looked at it which was, well, if Petrus in the '20s only farmed 6½ hectares, then they could have produced only so many bottles, and the revenues from those bottles would be one thing, the cost of production would be another thing, and taking all that into account, it was very unlikely that Petrus would spend the money to print two different size of labels, correct?

A. Yeah, that's the logic, yes.

Q. Now up on the screen we have bottles, and actually, if we could go back to my -- my homemade bottle, which is the -- this rare "Chateau Name" bottle. One of the things you look at is glass, correct?

A. Yes.

Q. And not just glass but the shape of the bottle, correct?

A. Yes.

Q. Over the centuries the shape of the bottle has changed, correct?

A. For Bordeaux.

Q. For Bordeaux.

A. Yes.

Q. And over the centuries the quality of the glass has changed, isn't that right?

A. Yes, as -- as in keeping with developments in the glass industry, yes.

Q. Old glass used to have striations or lines in it?

A. Yes, with the glass-blowing techniques, bubbles, all sorts of things would be in the glass.

Q. And people got better at making bottles over time.

A. Yes. I mean, they were pretty skilled glass makers to make the bottles in the first instance and using pretty good techniques.

Q. So bottles went from being blown -- where they put them on a long pipe and blow the bottle, right?

A. Yes.

Q. Which I guess you could see at some amusement parks, they do that and blow glass, right?

A. That's right.

Q. And then it went to being molded, correct?

A. They were put into molds.

Q. When they're put into molds, they have seams on them.

A. That's right.

Q. You've had at one point a three-part mold, is that right?

A. That's right.

Q. And at another time a two-part mold?

A. Well, everything is three-part molded because you have the top and the bottom -- the sides of the mold, and the bottom is another component.

Q. So three part is not around, three part is up and down?
A. Well, the only three-part molded bottles had joints from the neck down to the shoulder and then the bottom would be one piece.
Q. And whether or not a bottle is two-part molded or three-part molded or hand blown, it changes over time, correct?
A. Yes.
Q. And you need to be a student of bottles to understand when those changes were likely to have occurred, is that right?
A. You should have, yes.
Q. And on the underside of the bottle is a punt.
A. Yes.
Q. And the punts are of all kinds of different shapes, isn't that right? 'Cause there's a little dome inside the punt?
A. Yes, they vary, quite a lot.
Q. And over the two centuries or so that wine has been made, the design of this punt has changed a number of times, correct?
A. That's correct.
Q. And so this is one of the clues to the age of the bottle, correct?
A. Yes.
Q. And --
A. Particularly the -- particularly the 19th Century.
Q. And to understand those clues you have to have looked at a lot of bottles and a lot of punts to understand why it is that

with a certain kind of dome or certain depth or certain height, it might not be of the year of the bottle, as the label shows.

A. Yes.

Q. And that's expertise you've developed by looking at thousands of punts, is that right?

A. Yes.

Q. Now when you do your work, you don't necessarily look at all these elements which are up on the screen in isolation, you look at them in combination, sometimes, correct?

A. Yes, it's a combination of facets of the bottle which would -- which would indicate whether there were problems or not.

Q. And one of the things that is helpful, which I think you told us is, if you have a high fill, which suggests a bottle might be reconditioned, you then examine other aspects of the bottle to see if there's a likelihood that it was reconditioned.

A. That's right.

Q. Right. And you need to have knowledge about each of those facets as well as the fill level in order to make a -- an experienced decision about whether the bottle might not be authentic, correct?

A. I and others, collectors would have a pretty good idea as well because if a bottle is reconditioned, the chateau would have a modern label, a modern capsule, and it would actually

state many occasions the date of it being reconditioned, at least the year, so that would be a clue for everyone to see. It would be an explanation put on the bottle by the chateau, which would answer the question why this very old bottle has a new label and a new capsule.

Q. Right. And you raised that some collectors might know that, but the fact is that you believe that a purchaser of fine wine, a person buying wine at auction, is entitled to rely upon the auction house to have examined a collection to be sure that the bottles are reliable, isn't that true?

A. That's right. So the auction house should put the necessary information. Now, for example, if it's an 1893 Chateau Lafite, they would say new capsule, new label, reconditioned at the chateau in 1986, and the auction house might want corroboration from the vendor, from the seller as to did he or she have that particular bottle reconditioned at the chateau, because unfortunately there are counterfeit wines which purport to be reconditioned at the chateau so they have purported new capsules, new labels, but they are actually not real.

Q. You've gone on there a bit, and my question was: You believe in your experience that the consignor of fine wine -- I'm sorry, I don't want to confuse you -- that you believe that a purchaser of fine wine is entitled to rely upon a major auction house to have examined a collection, correct?

A. Yes.
Q. Okay. And in addition to that, you believe that the consignor, the person in the position of Mr. Greenberg, is entitled to rely upon an accredited fine wine auction house to examine the wine and remove questionable bottles, isn't that correct?
A. Yes, but the consignor needs to provide the auction house with any information he or she may have about authenticity issues.
Q. Well, how much information, Mr. Egan, were you provided to determine this bottle, in your view, is not authentic?
A. I was provided no information.
Q. Right. You were provided no information. You needed nothing more than looking at this bottle and examining it as you did as a cataloger at Sotheby's to make your determinations, correct?
A. That is correct in this instance.
Q. And to -- for this instance. How much information did you need, other than what's on this bottle, to determine that it was not authentic?
A. I just -- I got my information from the visual inspection that I did of these bottles -- this bottle. Sorry.
Q. You didn't even know who owned the bottle, correct, other than Mr. Koch?
A. I don't think so.

Q. How much information did you need to determine that this bottle was not authentic?
A. Well, it was a visual, a very careful visual inspection done by myself.
Q. And how much information did you ask for, in addition to what you were looking at, to determine that this bottle was not authentic?
A. My brief when inspecting these bottles was not to ask for any further information.
Q. So you didn't ask for any other information to help you determine whether this bottle was authentic.
A. That's right. My own -- my own understanding of the task in hand was just to do the report based on my own findings.
Q. And can you tell me, what information could you have possibly heard that would cause the capsule to look different than it looks?
A. Recorking done by the chateau, but in my mind that would have been impossible because the label is inauthentic, and the fact that it has an inauthentic label means that no way would the chateau have reconditioned this item.
Q. How much information could you have learned that would have caused you to believe, in your view, that that label is authentic?
A. Just by visual inspection.
Q. Right. No matter how much information you got, no matter

how many stories you had received from the consignor or anyone else, you would still believe that this is not authentic, correct?

A. That's right.

Q. And that's true for all these bottles.

A. I believe so, because I inspected those in a vacuum, so to speak, where I had no -- I had no outside information to base my findings.

Q. And there's no amount of information that anybody could have ever given you that would cause you to believe this bottle is authentic based on what you see when you look at the bottle, correct?

A. That's right, looking at the fact that there's a label which is inappropriate, a capsule which is inappropriate, etc.

Q. And so if all kinds of information you think is relevant was withheld from you, would you have come up with any other conclusion about this bottle?

A. I don't think so, but it would have helped at the beginning if the consignor had told me that these items are believed inauthentic.

Q. All right. But no matter what information is withheld for you, assuming the absolute worst information humanly possible, every one of these 24 bottles would still have been viewed by you as inauthentic, correct?

A. Yes, because I am an authenticator so I have to confirm

people's doubts or not that these items are inauthentic.
Q. Right. And that's your job.
A. That's my job.
Q. And that was your job at Sotheby's.
A. That was my job at Sotheby's.
Q. That's the job of experts at accredited auction houses, correct?
A. I believe so, yes.
Q. And you've told me at the deposition, you listed the auction houses you thought were the top accredited auction houses. One was Sotheby's.
A. Yes.
Q. One was Christie's?
A. Yes.
Q. And the third one was Zachys, correct?
A. I believe I mentioned Zachys.
Q. Right. And you mentioned Zachys, Christie's, and Sotheby's all in the same group, correct?
A. As accredited auction houses, yes.
Q. Now, Mr. Egan, you were asked some questions about how long it would take to examine wine based on 17,000 bottles. Do you remember that?
A. I do.
Q. Now do you spend a lot of time examining cases of 2000, the year 2000 bottles of wine?

A. I'd have to take every single bottle out and make sure that the bottles were right, the labels were right, the capsules were all right, as would be standard, so that would mean very gently opening the case, whether by me or by warehousemen, so as not to damage the slats of wood, take the bottles out of the tissue, which they're normally found -- they're wrapped in this very fine tissue, and do that carefully so I don't damage the tissue, look at each bottle, put it back in the tissue, put it back in the wooden case.

Q. Now if I were to hire you and say I was going to buy $3.7 million of wine and I wanted you just to spot check the collection, would you look at the boxes of 2000 or 2001 wine or would you look at the old and rare bottles that cost 20 or $30,000?

A. It depends on the brief. If it was a range of wines, then I would probably start with the rarest, the trophy wines. It all depends on, you know, their -- the physical whereabouts of these bottles and how they were brought to me at the warehouse.

Q. And if you started with a Chateau Lafleur at the auction house, one of the old, rare bottles, you looked at that label, it would take you, what, a few minutes to conclude that there was a serious question with this bottle?

A. Well, I would have to look at it, you know, with a magnifying glass, as I did with all these items, to look at the, you know, actual way the paper is, how the print is

defined, if it's -- if it's a photocopy using a modern process or is it a more sophisticated process, but I have to, as I did with these, look at the print carefully.

Q. Would it be fair to say that within a matter of moments you would be highly suspicious about this bottle causing you to want to do more work?

A. I would be suspicious, but I would want to be a hundred percent sure of my findings.

Q. I understand the hundred percent sure concept, but you'd be highly suspicious, correct?

A. I'd be suspicious.

Q. You wouldn't be highly suspicious looking at something where you believed the label was a fake just on sight?

MR. KABA: Objection. Argumentative, your Honor.

THE COURT: Overruled.

A. I would like to see -- view the label more closely. I'd be suspicious. I wouldn't say highly suspicious.

Q. And you'd be suspicious within a minute or two, correct?

A. Yes, yes.

Q. Chateau Petrus, large label, 1920s, you would be suspicious within a minute or two.

A. 1950.

Q. I'm sorry. I picked the wrong one. I don't know my Petruses that well.

A. Are we talking about the 1950 or --

Q. No, I'm sorry. As I said, I'm not -- I don't have a lot of these in my cellar. 1928 Petrus, highly suspicious within a matter of minutes, correct?

A. I would like -- no. I would view the label carefully. I would have thought it was unusual and I've never seen a magnum of Chateau Petrus 1928 so it would be a singularity for me. I would be intrigued by it.

Q. Wouldn't be a singularity, it would be hectares. You said just a few minutes ago that knowing the output of Chateau Petrus back in 1920s, labels like this would not have been made, isn't that right?

A. In my opinion, but I would like to study the label.

Q. Right. But you would be suspicious within a matter of minutes because you know how many bottles of wine they produced in the '20s, isn't that true?

A. Yes, you could say that.

Q. Okay. If you had been retained to examine these bottles by somebody other than Mr. Koch, you'd have come to the same conclusion about the bottles, correct?

A. Yes.

Q. And if you'd examined them as a cataloger, you'd have come to the same conclusion, correct?

A. Yes.

Q. And if you'd seen those photographs I showed you, showing the size of these labels in connection with the bottles, it

would have raised doubts in your mind, correct?
A. I think so, yes.
Q. You're paid I think you said a hundred euros an hour?
A. That's right.
Q. That's around $150, roughly? I don't know my conversion.
A. Roughly, yes.
Q. I can't remember how many euros I paid for my last Petrus. No. It's about $150, right?
A. Let's say that.
Q. Now, Mr. Egan, you said that you had never tasted a bottle of wine to authenticate it, correct?
A. I said that.
Q. But the job of a -- you'd never also been asked to give evidence in a fraud case, correct?
A. That's right.
Q. When you do your work, you've got a bottle given to you by the consignor and you're going to examine it, either it's going to go for sale or it's going to go back to the consignor, correct?
A. That's correct.
Q. And the decision about market -- and the decision is marketability, isn't that right?
A. That was -- it's -- well, it's more than that. It's a decision of authenticity, very important.
Q. Well, let's talk about your definition. You told me that

you cannot tell if the wine is not what it says it is because the bottle has not been opened, correct?

A. I said that.

Q. Well, you said that, right?

A. Right.

Q. And you believe that. You can't tell me what the wine is in the bottle because the bottle has not been opened.

A. That's correct, because there are so many other indicias of inauthenticity concerning certainly these 24 bottles, and we have to take these items as an entirety that regardless of what we talk about being in the bottle, it is -- it is an artifact, and it is an inauthentic artifact, so the question of the wine becomes irrelevant, given that there are so many other indicias concerning the label, capsule, sometimes the bottle itself.

Q. Your conclusion is that based on what you've seen, the bottles are not marketable.

A. I'd say that my -- all those bottles are counterfeit, and we did say, we did say, and therefore, they could not be presented as authentic bottles of wine.

Q. Didn't you use the precise phrase "they're not marketable"?

A. I think I may have said that.

Q. So your conclusion is they're not marketable based on what you see.

MR. KABA: Objection. Misstates the testimony.

THE COURT: I think it's okay. I mean, it's a

question of exclusivity, I guess, but you can answer the question.

A. Could you say the question again. Sorry.

Q. I'm sorry to do this, but perhaps madam reporter could read the question back.

(Record read)

A. They're not marketable. They're not salable.

MR. SHARTSIS: Your Honor, I realize I'm about to start searching for some deposition testimony and I would like not to impose upon the jury or the court. Perhaps we could break now and I'll be a little more efficient with that.

THE COURT: Are you all ready for lunch? Yeah?

How long do you think? I was thinking of going till 12:45 or so, but --

MR. SHARTSIS: The only trouble is, I'm just going to take people's time doing this.

THE COURT: Okay. Well, we can take lunch.

It's 12:22. We'll start up at about 1:20, folks? So let's please leave your pads and we'll start at 1:20. Have a good lunch.

(Jury excused)

(Continued on next page)

(In open court; jury not present)

THE COURT: You may be seated.

Mr. Shartsis, how much longer do you think you have?

MR. SHARTSIS: We were just estimating, your Honor. We're all talking a little slower than I normally talk. But I would say not more than an hour, I hope.

THE COURT: Okay.

MR. SHARTSIS: Somewhere in that range.

THE COURT: Okay. We'll see you all in an hour.

(Luncheon recess)

(Continued on next page)

A F T E R N O O N S E S S I O N

1:36 P.M.

THE COURT: Please be seated. Are we ready for the jury?

MR. SHARTSIS: Yes, your Honor.

THE COURT: Okay.

(Jury enters)

THE COURT: Please be seated. Welcome back, folks. Mr. Shartsis, you may continue.

MR. SHARTSIS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. SHARTSIS:

Q. Mr. Egan, I'm going to talk just a little bit more about the Chateau Lafite Rothschild 1949 with the yellow label, Exhibit 222. When after you looked at this label, you never actually concluded that the label was counterfeit, correct?

A. I said the label was unusual and that it had this strange yellow; so, to me, that would indicate a copy of a label.

Q. You never concluded, in fact, that the label is not genuine; isn't that true?

A. I think I concluded that the label -- I'd have to refer to my report.

Q. Well, let me read to you from your deposition. I'm going to read from, I believe, 367, Line 17, through 367, Line 25.

MR. SHARTSIS: And, unfortunately, your Honor, we

don't have this on tape; so I'm just going to read.

MR. KABA: I'd like to review it. And do you have a copy for the witness?

MR. SHARTSIS: I don't, and I don't know that it's necessary.

Your Honor, is it necessary to give the witness a copy to read these ten lines?

THE COURT: No.

Q. Let me just read it to you, Mr. Egan. Actually, let me just -- I'm not sure we made this clear to the jury. I took your deposition a couple of years ago, I guess now, up in Cape Cod; is that right?

A. Yes.

Q. And I had explained to you before the deposition that the process was that we had a court reporter there, just like our court reporter here; do you remember?

A. Yes.

Q. And you had a lawyer there to represent you, and I think one of the lawyers here, or more than one, was with you; do you remember that?

A. Yes.

Q. And then I would ask you questions and you would answer; do you recall?

A. Yes.

Q. And do you remember in the beginning I told you the thing

that was most important was that if a question I asked you was unclear, that you stop me and say I need to understand the question? Do you remember that process?

A. Yes.

Q. And you had an opportunity to see the transcript when we were done and then correct it. Do you remember that?

A. I do.

Q. So now, let me read to you what the court reporter recorded when I asked you this question from Line 17, Page 367, and I'm asking about this bottle:

"Q. Have you concluded that this label, in fact, is not genuine?

"A. I said the label is suspicious.

"Q. And what does suspicious mean in your array of conclusions?

"A. Leading towards this not being genuine.

"Q. But not conclusive?

"A. Not conclusive. Otherwise, I would have said counterfeit."

Do you remember that testimony?

A. I don't recall.

Q. Any reason to believe that's wrong?

A. If it's what I said at a deposition --

Q. Thank you.

A. -- that's what it says.

Q. Now, one of the reasons that you felt that this was an inauthentic bottle was because it lacks embossing, correct?
A. That is correct.
Q. And by embossing, you mean raised letters that say 150, which would be the size of a magnum?
A. That is correct.
Q. And they don't appear on this bottle?
A. They don't appear on this bottle.
Q. Isn't it true that marking the contents, embossing the contents on bottles only became required in the 1970s in France?
A. Not at all.
Q. Okay.

MR. SHARTSIS: And could we play -- Could we show Exhibit 1042, Page 1? And can you show -- again, this we saw before from Mr. Egan on May 4th, 2009. Just blow that up.

Q. Mr. Egan, remember I asked you about this this morning?
A. Yes.

MR. SHARTSIS: And then if we can show the first paragraph about "further to my meeting."

Q. And this was your meeting again with the two gentlemen at Chateau Lafite, correct?
A. That's correct.

MR. SHARTSIS: And then can we go to -- Can you put that back, if that's the right phrase. And that one single

line.

Q. "I have inserted the answers in italics at the end of each question"?

A. Yes.

Q. And that's what you did. You had gone there with questions to pose, and then you inserted the answers in italics when you got them after meeting with Mr. Conge and Mr. Chevalier, correct?

A. That's right.

Q. So let's blow up No. 1. The question that was posed to them is, "Can they confirm when the bottles were embossed with the year? Were ALL -- and that's all caps -- genuine 45's embossed? Other years?"

That's a question that's posed, correct?

A. Yes.

Q. And then, "The people from Chateau Lafite said they could not give me a reply concerning other years. Concerning 1945, Mr. Chevalier is almost sure that all the bottles that were Chateau -- all the bottles that were Chateau bottled were embossed"?

A. Yes. Now, I think --

Q. Well, that's what it says, right?

A. Yes.

Q. And it doesn't say magnums. There's a different between a magnum and a bottle, correct?

A. Yes, but we have to study this very carefully because, see, the question is, can they confirm when bottles were embossed with the year? And 1945 Chateau Lafite, for all that Chateau bottled stock, they had an oval 1945 on the shoulder of the bottles of the 75 centimeter bottles. This is what the question about the embossing was about.

Q. All right. And then the next sentence reads, "Lafite were still selling some wine in barrels to the negociant at the time."

So there were Negociant bottled examples of Lafite 1945 that were not embossed bottles; is that right?

A. That's right.

Q. And then let's look at the next paragraph.

A. So, may I?

Q. Sure, please.

A. So we're still focusing on this 1945 embossed on the shoulder of the bottles. That is what the question is, and so the Negociant-merchant-bottled wines wouldn't have had a 1945 embossed in the oval on the shoulder of the bottle.

Q. So then let's look at paragraph No. 2. So then a second question is asked, and that question is, "Can they confirm when bottles were embossed with the size?" That was the question you supposed to them, right?

A. Yes.

Q. And the answer they gave you was, "No, the contents in

centiliters embossed on the bottles only became obligatory in the 1970s," and that was part of the answer they gave you, correct?

A. Yes, that's the part of the answer that Mr. Chevalier and Mr. Conge gave me.

Q. And then the second sentence says, "Therefore, it could be that some bottles of Lafite 1945 were not embossed with the size." Do you see that?

A. Yes.

Q. And so you are familiar with this e-mail because you're the one that sent it, correct?

A. That's right. Now --

Q. And notwithstanding what they said in the e-mail, it was your conclusion that the 1945 Chateau Lafite Rothschild, because it was not embossed with the size, was inauthentic, correct?

A. That is correct, and as I previously stated, Mr. Conge and Mr. Chevalier only joined Chateau Lafite in 1997, and would not have had the knowledge of the people who actually were working with Chateau at the time of the 1940s.

Q. And you didn't talk to somebody who was working at the Chateau in the 1940s?

A. Exactly. This is their opinion. This is what they say, and they are -- I'm not denying what they said, but I'm just saying that they are not the ultimate experts on this.

Q. All right. So you simply disagreed with the people at Chateau Lafite about what would be found on a Chateau Lafite bottle; is that right?

A. That is correct.

Q. One thing that is found on this bottle --

MR. SHARTSIS: And, your Honor, if I may approach the jury?

THE COURT: Yes.

Q. And I know you're familiar with it, it's a Bordeaux wine locator strip?

A. Right.

Q. So one thing that appears on Exhibit 222 is a Bordeaux line locator strip. Nowhere in your report do you identify a Bordeaux wine locator strip as something that indicates inauthenticity; is that correct?

A. That is correct.

Q. You don't believe that the fact that it has a Bordeaux wine locator strip means that it's a counterfeit?

A. I was looking at the actual label, the bottle and the capsule and the cork, in some instances. That wasn't part of the inspection for me.

Q. Well, but you saw it, right?

A. I don't recall -- I didn't pay any attention to it. I was paying more attention to the way these bottles had been concocted.

Q. Well, you looked at the labels on the back, right, on the back of the bottle?
A. Yes.
Q. Right. And this label was some fraction of a millimeter away from the main label, correct?
A. Yes.
Q. You didn't remember noticing that there was an imported by Bordeaux wine locators here?
A. No, I didn't.
Q. You didn't. Do you remember that there was one on this 1950 Chateau Lafleur?
A. No.
Q. Did you remember that there was one on this 1950 Lafleur?
A. No.
Q. Did you remember there was one on this 1950 Lafleur?
A. No. For me, these are modern labels and had the same relevance as the unique numbers and bar codes which have been applied to the back of the bottles by Mr. Koch's staff.
Q. And based upon all of your years of expertise, studying tens of thousands of bottles in various places, the Bordeaux wine locators stamp doesn't give rise to you being concerned that the bottle is inauthentic, correct?
A. No. The actual bottle, no.
Q. Okay. Mr. Egan, you're trained in tasting wine; isn't that correct?

A. To a certain point.
Q. In fact, you're trained in tasting rare wines from the 20th century, correct?
A. I have tasted them.
Q. Right. And one of the services you have is to taste wines for customers from the 1920s, 1930s, 1940s and 1950s to be sure that the wines are of the quality that they want, correct?
A. On all, it's a case-by-case basis. On these magnificent trading wines, which are worth millions and millions, it would be rare for me to actually taste one of these wines. I have tasted wines in situ in cellars.

Normally mine are wines which don't have the same illustrious reputation as the ones before you, just to see if by any chance they've survived over the decades and to see if they could be put into auction with a little tasting note indicating that they are fit for -- they're still enjoyable.
Q. Well, you would say that the very great vintages like the 21 here, hang onto their youth, whereas the lesser-quality vintages dilute to some extent; isn't that correct?
A. I have said that.
Q. Right. There's a real fingerprint for an extraordinary wine, correct?
A. It's got certain aspects which would make it a survivor.
Q. More than a survivor, it has a hallmark which never blemishes; isn't that true?

A. That's right. There are indications for certain vintages.
Q. So people who are knowledgeable can taste and see if that hallmark that never blemishes is present in the wine; isn't that true?
A. I would say taste is a very subjective process. You have a group of people who might concur or differ widely on their appreciation or evaluation of the same wine.
Q. So you would say a great vintage should have enough indicia so when you taste it, you can detect that it is such a great vintage; isn't that true?
A. Yes. You can detect that it is a wine which has a fantastic amount of ripeness, sweetness, support -- perhaps a supporting acidity, soft tannins or enough tannins, which would make it last longer than maybe the vintage before or after it.
Q. Well, more specifically, you would agree that if we took a 1921 Petrus to the skilled people at Sotheby's, that there would be a general consensus among them, whether it was a 1921 Petrus or something else; isn't that true?
A. There would probably -- If the wine had been correctly stored, they would probably have said, yes, this is a fantastic wine, a very good vintage. Whether they would actually pinpoint, in certainly a blind tasting, whether that was a 1921 Petrus or, indeed, a, I don't know, 1945 Petrus would be harder to say.
Q. Don't you believe that there would be a general consensus,

one way or the other, as to whether this was a good example of a 1921 Petrus or a bad example, i.e. a wine which had been properly kept and has undergone no problems concerning oxidation, oxygen gets into the wine and flattens the taste; would that be true?

A. Yes.

Q. Thank you. These are going to be just a few random questions, and then I'm going to talk about the bottles again and then we'll be done.

I believe that the plaintiff is going to present an expert witness named James Martin today or Monday. Have you ever heard of James Martin?

A. I don't think I have.

Q. Have you, in your work, ever known anyone to retain a forensic expert or scientist who used laboratory tools to analyze the paper, glue or ink on a wine bottle?

A. No, I haven't heard anyone who has done that.

Q. Do you know anybody in the wine industry who deals in any way with whether or not bottles are authentic by using a laboratory to analyze paper, ink or glue on a wine label?

A. I do not.

Q. You had carried -- You had taken some bottles to Chateaux in France?

A. I've taken bottles to the Chateaux in France, yes.

Q. On behalf of Mr. Koch, to your understanding?

A. Yes.
Q. How did you get the bottles?
A. How did I get the bottles? They were sent over from the United States to Bordeaux.
Q. And then you would pick them up?
A. I would pick them up from the airport and take them to the warehouse in Bordeaux, a wine warehouse.
Q. Okay. Thank you. And in doing your work in the case, you can tell just by looking at the table, there are a number of exposed corks, correct?
A. Exposed cork?
Q. That is the capsules have been stripped away?
A. That's right.
Q. And that's a very unusual thing to see in bottles that are being auctioned, correct?
A. Not so unusual these days. If you're going back a couple of decades, you wouldn't see such treatment of capsules, but certainly in the last few years, yes.
Q. But in 2005, it was not common, correct?
A. 2005, no, we saw quite a few where the capsules had been cut.
Q. So you're telling me that it was common, in consigned collections in 2005, for there to be a significant number of wine bottles with capsules partially removed to expose the corks? Is that what you're saying?

A. No. What I'm saying is that we saw more and more incidents of where the capsules had been cut prior to us inspecting these fine wines.

Q. In 2005 it was an unusual occurrence, correct?

A. It was getting more, more of an occurrence.

Q. You wouldn't have characterized it as unusual?

MR. KABA: Your Honor, objection. Asked and answered.

THE COURT: Overruled.

Q. You wouldn't have characterized it as unusual; is that right?

A. I would characterize it as I said before, as becoming more and more of an occurrence.

Q. Well, let's read from deposition Page 133, Line 25, to 134, Line 5.

MR. KABA: If you're going to read it, I think you should read it from 133, Line 4.

MR. SHARTSIS: That's fine.

"Q. Mr. Egan, when you were working at Sotheby's up to 2005, did you ever have a consignor for an auction trim back the capsules to expose the corks for examination?

"A. The consignor?

"Q. Right.

"A. I don't know if the consignor had done it, but sometimes there were capsules that had already been cut or even removed.

"Q. Removed in their entirety?

"A. Up until the very tops, so the plateau remains but not the side.

"Q. By the plateau, you mean the portion around the lip, if you can call it that?

"A. Just say the top was remaining, but yes, in my experience some capsules had already been cut.

"Q. Did that happen very frequently?

"A. I don't know. I mean, there were instances. I can't remember the frequency.

"Q. Was it common in a consigned collection of wine bottles to have a significant number of them with the capsules partially removed to expose the cork?

"A. No. Not as the usual occurrence, no."

Is that correct?

A. That's what I said at the deposition.

Q. Okay. Thank you.

MR. SHARTSIS: Counsel, I'm going to ask to be displayed 1044. Could you show 1044 to the witness, please?

Q. Mr. Egan, you're looking at what's called Exhibit 1044 on the screen in front of you. Can you see these are meeting notes that show you being present?

A. Yes.

Q. Do you remember these notes?

A. I remember writing them, yes.

MR. SHARTSIS: Your Honor, I move 1044 into evidence.

THE COURT: Any objection?

MR. KABA: I'll just object to the extent that these are hearsay, but other than that, I don't have any objection.

THE COURT: Okay. They're received, 1044 received.

(Trial Exhibit 1044 received in evidence)

MR. SHARTSIS: Can we display Page No. 1, please.

Q. Mr. Egan, this shows a meeting in France in July of 2009. At the bottom of the list of people present you show yourself; is that right?

A. Yes.

Q. And at the top, you show the president of Chateau Latour and the director of Chateau Latour; is that right?

A. Yes.

Q. And below that the Cellar Master at Chateau Latour?

A. Yes.

Q. And you had gone there to ask them to look at some bottles that you brought and give you an opinion about the bottles; is that correct?

A. That's correct.

MR. SHARTSIS: And can we turn to the last page, please. On the last page -- Can we turn to 4, Page 4, please, and if you could highlight the second bottle.

Q. This is a bottle with the reference 599665. Is that the bottle that is on the counter in front of you?

A. Yes, it is.

Q. Is that the bottle that you brought to Chateau Latour to ask their opinion?

A. Yes.

Q. And here it says in the first paragraph, "Chateau Latour, the Chateau Latour team told Mr. Egan that the label and the capsule appear modern. The capsule had already been cut prior to arrival in Bordeaux, and all of the sides of the capsule was missing." Do you remember writing that?

A. Yes.

Q. Then it says, "Mr. Chabot," who I will look back and tell you was the Cellar Master --

A. Yes.

Q. -- "said that he was slightly unhappy about the appearance of the cork, which is scratched in places, leading to the possibility that this cork has been withdrawn and replaced. The cork appears to be modern and one used by the Chateau when recorking;" is that correct?

A. Yes.

Q. Have you concluded that this was recorked?

A. No, I have not.

Q. Have you concluded that it was not recorked?

A. I've concluded that the bottle is counterfeit.

Q. But no conclusion about whether it was recorked or not?

A. No. All I have said is that it is a counterfeit.

Q. And then Chateau Latour, the Chateau from which the bottle

comes, with the president and the cellar master present, said the Chateau Latour team maintained an open verdict on the authenticity of this bottle; is that correct?

A. Yes.

Q. And they did this after you presented the bottle to them asking them whether it was authentic; is that right?

A. Yes.

Q. Thank you.

MR. SHARTSIS: Could we pull up 101, Page 53, please?

Q. Mr. Egan, I'm showing you the other Chateau Latour '28 bottle in the case, and that's got no capsule; is that right?

A. That's right.

Q. And then yesterday you gave your testimony about what it meant to have no capsule, that you thought that raised issues of authenticity; is that correct?

A. Exactly.

Q. And so if we could look at lot 409.

MR. SHARTSIS: And blow that up for us, please.

Q. Now, this shows a Chateau Latour 1928?

A. Yes.

Q. And in the description of -- and this is down where the No. 409 is, it shows it's three bottles in the lot, correct?

A. Three bottles.

Q. In the lot?

A. In the lot, yes.

Q. And what that means is that, per lot, for $5,500 and $9,000 estimated, you can bid on buying all three bottles of wine; is that right?

A. That's correct.

Q. And that's how a lot works?

A. That's how it works.

Q. And here, we can see up in the description of the bottles, sort of a collective description starting, two into neck, one very top shoulder, right? And that means that if we looked at the three bottles in this lot two would be, wherever the neck is on one of these, and the other one would be top shoulder, right?

A. Yes, the levels.

Q. And then the next one says "one missing capsule"?

A. Yes.

Q. So do you think that that is appropriate for the auction house to indicate that there might be a bottle in the lot that's missing a capsule?

A. It's surprising for me to see an auction house would include a bottle where the capsule was missing because that would already give rise to authenticity issues.

Q. But you don't disagree with me that the auction house described a missing capsule on a label -- excuse me, on a bottle?

A. No, I do not.

Q. Let me turn finally to corks. Mr. Egan, when I took your deposition, I had asked you specifically, "As of today, are you completely finished with doing all of the work that you believe is necessary to render the opinions that are rendered in these reports?" Do you remember that?

A. I remember.

Q. And you said, "I believe so." And then just to clarify, it says, "So to state it" --

MR. KABA: Can you just let me know where you're reading?

MR. SHARTSIS: Sure, Page 15.

Q. "So to state it back to you, to make sure we're saying the same thing, as far as you're concerned, there is no more work or activity of any kind required to support or confirm your opinions?" And you said, "That's correct."

A. That's what I said.

Q. Right. And was that true?

A. At the time, I believed it was true.

Q. And at the time of your report, you had been authenticating bottles of Chateau Lafleur for, what, 20 years?

A. More than 20 years.

Q. And you were familiar with what a Chateau Lafleur cork looked like?

A. Yes.

Q. And for -- And, in fact, you had reviewed and looked for,

in your report, 15 Chateau Lafleur magnums, correct?
A. Yes.
Q. And each time you looked at one of those magnums, you took out a high-powered light and you examined the cork, correct?
A. That's correct.
Q. And after each time you looked at it and examined the cork, under no circumstance did you determine that the cork was the basis for concluding that any of those magnums was inauthentic; isn't that correct?
A. I wasn't focusing on the corks at the time because --
Q. You weren't focusing on the corks? Let's look at your report.
A. I was looking at other items or components of the bottles which indicated to me that they were inauthentic. So I think the vast majority of labels gave rise to inauthenticity. I had issues with the capsules. We had issues with the back labels and the stems. We had issues with some of the bottles. Concerning the corks, the Lafleur corks, I didn't focus on them.
Q. Well, we'll look at what you focused on so we're just going to go through the report.
A. Sure.
Q. Can we just look at Page 9 of the report first. So I'm actually showing you Chateau Lafite 1805 that you looked at?
A. Yes.

Q. And let's just blow up the summary down at the bottom.
A. Yes.
Q. And right at the middle of that last full line, where it says the "bottle shape is wrong" --
A. Yes.
Q. -- can we highlight that to the end, please. "The bottle shape is wrong for the era. The label is not genuine, and neither is the cork." So you're focusing on the cork when you looked at that bottle, right?
A. In some instances, I was.
Q. All right. And let's look at the next page, and look at the last line of the summary, please, and highlight that last short sentence. This is a summary. It says, "The branding on the cork is also questionable." So you're focusing on the cork on that one, correct?
A. On the Lafite, yes.
Q. And I believe you told me what really mattered in your report was what was in the summary, right?
A. Did I say that?
Q. Well, did you?
A. I can't remember.
Q. All right.
A. The summary is good. It's an aid. It gives all the features of all the indicia of authenticity. It's just like a little index to all the things that I found wrong with the

bottle, which I chose to include in the report.

Q. Okay. So let's look at the first of the Chateau Lafleurs in your report at Page 14. Show what bottle we're looking at the top, and then just pull up the two lines above the summary. "The glass is so dark that the branding on the cork cannot be seen. The cork is the regular 5.2 centimeters in length for top Bordeaux wine." So you looked at the cork, correct?

A. Yes, I looked at the cork, and at the time, I couldn't see the branding.

Q. And you tried to see the branding, correct?

A. That's right.

Q. And you got out your tape measure and you examined the length of the cork, correct?

A. Sure, but the question --

Q. And --

A. Sorry, may I? The question of branding is a tricky one because not every occasion you can actually view the branding, particularly when the glass is dark. Some days you can see better than others.

As I said before, corks, whether young or old, can have a film of wine actually creep up between the cork and the glass, making it even harder to see. So some days, especially if the bottle has been moved around, you'll still get that residue of wine, which will hinder the viewing of the cork, and other times you can see it much clearer. And I actually took

the opportunity to view this cork this time, and I can actually see the branding on this particular magnum.

Q. And you took and you made the effort, Mr. Egan, to measure the length of this cork?

A. Yes, I did.

Q. And you did those two things because it's part of the authentication process, to determine whether the cork is consistent with the rest of the bottle; isn't that true?

A. That's right, if I choose to include it as a component.

Q. So are you telling us that, as a conscientious authenticator, a person who as done this for 20 years, you consciously chose to ignore the data that was on the cork; is that what you did?

A. Well, at the time of the report, which you have in your hand, I could not see the branding and that's what I stated.

Q. But if you could see the branding and the branding looked wrong to you, you would put that in the conclusion, correct?

A. I probably would, yes.

Q. Okay. Let's look at Page 15. This is Chateau Lafleur 1921, and then let's look at the two sentences above the summary. "The glass is so dark that the branding on the cork cannot be seen. It is the regular 5.2 centimeters in length. It is crumbled and slightly damaged." So you could see that, correct?

A. I could see that it's crumbled and slightly damaged, but I

could not see at that time the branding on the vintage.

MR. SHARTSIS: Let's turn the page to 16. Can you show us which one we're looking at? All right. And then could you illuminate the cork paragraph.

Q. "The cork is the usual length of 5.2 centimeters for top Bordeaux wine. Most of the branding can be seen on the cork, including the last three digits of the vintage." Do you see that?

A. Yes.

Q. You could see the branding on this cork, correct?

A. Yes.

Q. And you looked at it close enough to figure out that one of the digits on the vintage was missing, correct?

A. Yes.

Q. And you could see it was a vertical cork, correct?

A. Yes, I could.

Q. And when you saw it was a vertical cork, based upon the 20-plus years you have of looking at Chateau corks, particularly including Chateau Lafleur, it looked just fine to you; isn't that true?

A. As I said before, I wasn't focusing on Lafleur corks. On these particular corks and seeing that it was becoming an issue in the case, I did do subsequent research including reference to photographs of old Chateau Lafleur corks, and I can see that the branding was -- should be horizontal for this period rather

than vertical.
Q. And when did you decide to do the subsequent work after you told me you had finished your work?
A. Within the last few weeks.
Q. The last few weeks. And what is it -- what is it, Mr. Egan, that all of a sudden that got into your head about this particular cork, which you had found to be just fine in the last few weeks? How did that happen?
MR. KABA: Objection. It misstates what Mr. Egan found in his report.
THE COURT: He can answer if he understands.
Q. How did it happen that in just the last few weeks, all of a sudden, you decided, oh, my goodness, I think I made a mistake on 15 different corks? What caused that?
A. I suppose issues being raised at this trial, but I'm an expert and I'm entitled to do further research, if necessary, and I did that further research.
Q. And how did you learn about issues being raised?
A. Pardon?
Q. How did you learn about issues being raised?
A. Well, just by attending this court.
Q. Fine. You've attended this court for two weeks, but you did the research before you attended the court, didn't you?
A. I've done the research during the two weeks.
Q. So you've just been doing it during these few weeks?

A. That's correct.
Q. All right. And after 20 years, after 20 years, when you saw this cork, you thought it was fine; isn't that true?
A. I wasn't focusing on the Chateau Lafleur corks.
Q. Well, you saw the cork?
A. Yes.
Q. You've seen hundreds, if not thousands, of these corks, correct?
A. I have, but --
Q. That's correct, right?
A. That's right.
Q. And so you've seen hundreds, if not thousands, of these corks. You pull up a cork, and does this cork look completely different than every other Chateau Lafleur cork you've ever seen?
A. It's a more modern cork.
Q. Well, does it look completely different than every other Chateau Lafleur cork you've ever seen?
A. No, it looks more like it. I'm referring to research that I've done. I conclude that it is a more modern branding.
Q. Right. So the fact is this actually is a Chateau Lafleur cork, correct?
A. It purports to be a Chateau Lafleur cork.
Q. But it is a Chateau Lafleur cork. It's just not a Chateau Lafleur cork that would have been put in the bottle before

1996, correct?
A. Well, it's a cork branded Chateau Lafleur.
Q. And the branding is just fine, correct?
A. Well, the branding is in the style of Chateau Lafleur, yes.
Q. Well, when you looked at all 15 of these a few years ago, the branding looked completely unexceptional --
A. Yes.
Q. -- in terms of how Chateau Lafleur brands its corks, right?
A. In the style of Chateau Lafleur.
Q. Right. But with all of your massive experience at looking at corks, when you, Mr. Egan, looked at the cork, it looked just fine; isn't that true?
A. I was concentrating, as you can see, on each of the components which brought me to my conclusions in determining these wines were counterfeit.
Q. So are you --
A. Let me finish, please.
Q. Oh, please. Go ahead.
A. There are other facets of the bottles which led me to be convinced that they were counterfeit.
Q. So is this what we would call slipshod work in authentication, that you ignored the cork on the bottle?
MR. KABA: Objection, your Honor. Argumentative.
THE COURT: Sustained.
Q. Would you consider this your standard of examination, that

you simply look at a cork which doesn't look right to you at all, and you ignore it? Is that your standard?
A. I think I probably wouldn't -- I probably overlooked it.
Q. I'm sorry, what's your answer?
A. I probably overlooked it.
Q. And you probably overlooked it 15 times?
A. I think so because I was --
Q. Do you remember Mr. --
A. I was concentrating on other aspects of these bottles.
Q. Do you remember, Mr. Egan, at your deposition as to every bottle you looked at, I asked you pointblank whether the cork was fine? Do you remember that? Every bottle I asked you that question.
A. Yes.
Q. I asked you that question 15 times about Chateau Lafleur; do you remember that?
A. I think you did 15 times.
Q. Right? Every time?
A. Yes.
Q. We'd do an examination, I'd ask all the same questions, and then I'd say, let's talk about the cork. Does this cork -- does this cork on this bottle indicate inauthenticity, and 15 times you told me no; isn't that true?
A. At the time, yes.
Q. And would you say in the deposition we were concentrating

on the cork when I asked you that question 15 times?
A. I would have believed so, yes.
Q. Now, you also have come up with something about the direction of the Chateau Petrus corks now?
A. Yes.
Q. And you didn't concentrate on those either, I guess?
A. No, because there were sufficient other indications on the Petrus magnums which made me convinced that they were counterfeit -- they are counterfeit.
Q. Let's look at Page 40, please. Chateau Petrus 1950, do you see that?
A. Yes.
Q. That's one of these bottles that you now have discovered that is wrong because it has a vertical cork?
A. Yes.
Q. And let's look at the cork paragraph which always appears in the same place. "The cork is 5.2 centimeters long. It is fully branded. However, the last digit of the vintage is damaged and cannot be read. The lettering is very large." Do you agree with me you took a good look at that cork?
A. Yes.
Q. And when you took a good look at that cork, it did not strike you that there was anything wrong with the direction of the printing, did it?
A. I did not mention it.

Q. But let's get beyond that. Nothing struck you about the direction of the printing when you looked at this cork; isn't that true? Isn't that true?

A. I just made a note of the size of the printing and the vintage.

Q. Right. My question is, nothing struck you as being wrong about the direction of the printing at the time; isn't that true?

A. Not that I can recall, no.

Q. Thank you. And then let's look at the summary. And so what this summary shows is that the cork mattered when you reached your conclusion. The capsule is more recent and the last digit of the vintage on the cork is damaged, and it's in the summary, correct?

A. That is right.

Q. Nothing about it's wrong because it's vertical, correct?

A. No, but --

Q. Correct?

A. Correct, but the last vintage was not visible, which always raises suspicions.

Q. But the rest of it was visible because it was fully branded, correct?

A. I believe so.

Q. And in the summary describing what was wrong with this bottle, you did not put that the cork was vertical because, at

the time, at the time you did not believe that a vertical cork indicated inauthenticity; isn't that true?

A. I did not mention it.

Q. And that's because you didn't believe that?

A. I wouldn't say so.

MR. SHARTSIS: Thank you. Your Honor, I have no further questions.

THE COURT: Okay. Thank you. Is there redirect?

MR. KABA: Yes, your Honor.

THE COURT: Mr. Kaba?

REDIRECT EXAMINATION

BY MR. KABA:

Q. Mr. Egan, let's start off where Mr. Shartsis ended and talk about the corks some more, okay?

A. Right.

Q. Let's first establish for the jury and for the record with every single magnum Mr. Shartsis talked about, every magnum of the Lafleur, every magnum of the Petrus, in your report, did you conclude they were counterfeit?

A. Yes, I did.

Q. At your deposition, did you make clear that you had concluded every single one of those magnums was counterfeit?

A. I believe so.

Q. Did you say anything about the vertical branding being okay?

A. No, I did not.
Q. You, as you've explained, you weren't focused on the branding?
A. I wasn't focused on the branding.
Q. Now, you have done some work, haven't you, to confirm your belief that the vertical branding on these magnums of Lafleur and Petrus are incorrect?
A. I have, indeed.
Q. And you sat through the deposition of Mr. Greenberg's expert, correct?
A. I do.
Q. What was Mr. Greenberg's expert's name, or what is his name?
A. Mr. Gil Lempert-Schwarz.
Q. Do you see him here in the courtroom today?
A. I do.
Q. Where is he?
A. He's behind you on the left -- right, sorry.
Q. He's saluting?
A. He's saluting.
Q. Yes. And Mr. Lempert-Schwarz produced photographs in this case; is that right?
A. He did.
Q. Did you look at his photographs?
A. I did, indeed.

Q. In examining his photographs, did you notice anything about the Lafleur cork branding?
A. I did.
Q. What did you notice?
A. Well, the Lafleur 1921, which I could not see when I inspected them in 2010, thanks to Mr. Lempert-Schwarz's fantastic photography, I could see clearly the branding, and in some instances, the vintage, and I suppose the direction of the branding.
Q. And did Mr. Lempert-Schwarz produce photographs that he claimed were authentic Lafleur corks?
A. He produced photographs of other bottles of -- and I think magnums of Chateau Lafleur.
Q. And did you examine those photographs?
A. Yes, I did.
Q. And I'm just going to mark here three, a set of three photographs that were produced in part of Mr. Lempert-Schwarz's report that I note were produced, what Mr. Lempert-Schwarz identified as authentic, confirmed genuine Lafleur corks.
A. Thank you.
Q. Mr. Egan, can you identify these three photos for the record, please?
A. Well, they're closeups of the capsules and corks of Chateau Lafleur bottles.
MR. KABA: Okay. I move these three photos into

evidence.

THE COURT: Do they have numbers?

MR. KABA: We can call them Exhibit 106A, B and C.

THE COURT: Okay. Any objection?

MR. SHARTSIS: No, your Honor.

THE COURT: 106A, B and C received.

(Trial Exhibits 106A, B and C received in evidence)

Q. So you can also see them on your screen here?

A. Yes.

Q. Now, what is -- how does the branding appear on these corks?

A. Well, all three of them, the branding runs horizontally.

Q. And how does the branding appear -- strike that.

And you, what do you understand Mr. Lempert-Schwarz to have explained about these three Lafleur corks?

A. That they're all genuine.

Q. Okay. So three photos of three corks of Lafleur, horizontal branding. Are these all from before -- 1966 or before?

A. Well, they're all before 1966.

Q. Okay. Three corks, three Lafleurs, three horizontal branding, all three from before 1966. How about the 12 corks in this case?

A. They are all horizontally -- Sorry, all vertically branded.

Q. Is that vertical branding consistent with what

Mr. Greenberg's expert showed you on his photos?

A. No, they are not.

MR. KABA: Let's put up Exhibit 390. It's already been admitted into evidence. There's a -- let's blow up the paragraph below in the original e-mail discussing the Lafleur corks.

Q. Mr. Egan, you see there is a paragraph here that says, "then there are the Lafleurs"?

MR. SHARTSIS: Your Honor, this is redirect. I don't believe this document was used in my examination.

MR. KABA: There was extensive questioning about the corks that we spent. I think that Mr. Egan is permitted to say that he agrees with the conclusion reached in this e-mail.

MR. SHARTSIS: Well, I don't believe that is the actual, correct --

THE COURT: Is the objection scope?

MR. SHARTSIS: The objection is no foundation he saw it when he gave his opinion.

MR. KABA: That's not what I'm eliciting.

MR. SHARTSIS: What they're trying to do is import a closing argument to a jury. This isn't a question that relates to what he was testifying about. He wasn't testifying about this e-mail.

THE COURT: Overruled. You can answer.

Q. Mr. Egan, do you see in this e-mail there is a reference to

the Lafleurs?
A. Yes.
Q. Do you see there's a reference to the cork branding?
A. In this paragraph? Yes.
Q. "There is one fundamental problem, the corks all have the vertically ovally Chateau Lafleur brand on the cork;" do you see that?
A. I see that.
Q. And what does it say about when the Lafleur would have used that vertical branding?
A. Post-1966.
Q. And do you agree with that?
A. Having done further research, I would agree with that, yes.
Q. And this e-mail is dated November 2004, and you did not see this e-mail before you began your inspection here, did you?
A. No, I did not.
Q. But had you seen this e-mail, would that have been something that drew your attention to the cork branding?
A. Yes, it would have then because it is a statement. I'm always interested when other people in the wine industry bring up issues such as this.
Q. And let's go to the top of this e-mail. You also mentioned during your testimony here today that you noticed a problem with the cork branding on the Petrus magnums from before 1966 --

A. Yes.

Q. -- is that right?

A. Yes.

Q. And what is the problem with the Petrus cork branding?

A. The Petrus cork branding is too recent for the purported vintage. It is vertical rather than horizontal.

(Continued on next page)

BY MR. KABA:

Q. And you see here this e-mail from Mr. Greenberg, "Petrus changed cork in '66." Do you agree with that?

A. I see that, yes, I --

Q. And if a consignor knew of this issue of cork branding, is that something that you would have factored in when you were doing your examination of these bottles?

A. I would, yes.

Q. You also were asked about Bordeaux Wine Locators labels on various of these magnums. Do you recall that?

A. Yes.

Q. Now if you knew that a seller had concluded that Bordeaux Wine Locators was the worst counterfeiting operation in the world, would that have been relevant to your analysis?

A. Yes, because it would have been a source that were a suspected supply of counterfeit wines into the market so you would be worried about seeing bottles from such a source.

Q. Now when you find out that a consignor believes he has wines from suspect sources, whether it's Bordeaux Wine Locators or we've heard Royal Wine here, how does that factor into the work that someone who is inspecting the wine has to undertake?

A. Well, if you're aware that the source is suspect, you have to look at these bottles very carefully because these may be counterfeit bottles as well, so if the source is suspect, you obviously have to arrive at your own conclusions once you've

looked at the bottles because it may be that the bottles are perfectly okay, but you just have to -- it is an alarm bell which sounds, but when I authenticate bottles, I look at them carefully and --

Q. When you are authenticating, do you expect to hear from a consignor of their own doubts or doubts they've heard from others about the authenticity of the wine that you are examining?

A. Absolutely. If they have already got doubts, then they should obviously tell it to me.

Q. Let me ask you -- we talked a bit about this magnum of 1945 Chateau Lafite. Now you noticed something about the label on this magnum, is that right?

A. I did, yes.

Q. What did you notice about that?

A. I noticed that the color was a strange yellow, not of the norm -- not the normal cream or white background.

Q. You were asked whether you could have quickly determined that or if other experts could quickly determine that there was something off about this label. Do you recall that?

A. I do.

Q. Now a seller who has multiple examples of a 1945 Lafite, could they have also compared this label to the other labels and noticed something was off about it?

A. They could -- they could -- they could do if all the other

magnums are genuine or at least there was a part which were genuine, yes.

Q. And this magnum, we talked about the embossing. Does this magnum have the 150 centiliters embossed?

A. It does not.

Q. And your understanding is that it should.

A. That's right. After 1930, the -- as said before, all bottles and magnums should either have the contents on the labels or on the bottles or magnums.

Q. Does this bottle -- I'm sorry. Does this magnum of 1945 Lafite that we've discussed at some length, does this magnum purport to be bottled at the chateau?

A. It purports to be bottled at the chateau. It says "Mis en Bouteille au Chateau" on the label.

Q. And for a chateau-bottled magnum, you believe that the code is deemed required, is that right?

A. That's right.

Q. Would a chateau ever put such a label on a bottle?

A. No.

Q. We talked a bit about negociant bottling. I may not be pronouncing that right.

A. That's fine.

Q. So wine could be bottled outside of the chateau, is that right?

A. Yes.

Q. But a number of bottles in this case say "Mis en Bouteille au Chateau"?
A. They do.
Q. What does that mean again?
A. Chateau bottled.
Q. For example, we looked at the two 1928 Petrus magnums that Mr. Shartsis asked you about, and how about those two? Do those two purport to be bottled at the chateau?
A. I think so. You have to show them to me again just to be absolutely sure, or you can even --
Q. Here's one of them. Do you see on the capsule --
A. Yes.
Q. -- capsules indicate bottled at the chateau?
A. Yes.
Q. Now --
A. But not on the labels.
Q. Not on the labels.
A. No.
Q. Now would Petrus, if they were bottling these at the chateau, have used labels such as that?
A. They would have -- as I said before, they would have used smaller labels and if chateau bottled, they would have actually mentioned "Mis en Bouteille au Chateau" on the label.
Q. And just looking at all of these labels -- we talked about 1973, was that significant or not. Let's say any time before

1973, in your opinion would any chateau have used the kinds of labels you've seen on any of these bottles?

A. No, they would not.

Q. You were asked a bit about your catalog experience and how at Sotheby's you were cataloging entries of the wines that were being sold, is that right?

A. That's correct.

Q. Now there are introductory letters in catalogs, is that right?

A. Introductory letters, what -- describing collections.

Q. And are those letters written exclusively by the auction house?

A. The auction house would get information from the vendor as to salient points. You know, for example, if the vendor would say these wines had been cellared all their life in the same location, that would be something that Sotheby's would put in the catalog because it would make the wines much more desirable. It would be -- there would be much more competition to buy wines of assured provenance. Or the consign -- the consignor could -- there might be a history to the wines. They might have belonged to, I don't know, a great aristocratic family or something, which always helps the sale of the wine.

MR. SHARTSIS: I'm trying not to interrupt here. Beyond the scope. I don't remember asking any questions about this at all. I don't think that was a subject I touched upon.

MR. KABA: There was extensive questioning on who writes the catalog and why it's only the experts at the auction house that write the catalog. I have very few questions on it.

MR. SHARTSIS: I think it was limited to descriptions of wine, your Honor, and I move to strike this as beyond the scope. I'm happy to do this again, but I don't think the jury wants to hear us going into yet another area that wasn't raised, wasn't raised on direct, wasn't raised on cross, and now we're about to have -- I've got to get up and start examining him on this. I don't think that's appropriate for the jury to have to go through that.

THE COURT: I think it probably wasn't covered in cross, the actual description.

MR. SHARTSIS: I never talked about that.

MR. KABA: I'm happy to move on to the actual description.

MR. SHARTSIS: Then I've got to cross-examine him on it. I don't want to take the jury's time.

THE COURT: Okay.

MR. SHARTSIS: Is that okay, it's stricken? I've got to examine him. I don't want to spend the time on it.

THE COURT: Well, it was just one answer. It was --

MR. SHARTSIS: Well, but your Honor, one answer is an answer. I have to examine him. I mean, either I'm going to examine him now on the introductions to catalogs, which I never

raised and he never raised on direct, or I'm not. I mean, I can't just say it's one answer, that's great with me.

MR. KABA: I think parsing through the catalog to say I've only talked about these pages and not these pages, it doesn't merit striking. I'm happy to move on to ask about the description.

THE COURT: I'm going to strike it and ask the jury to disregard the discussion of the catalog notes as opposed to the specific descriptions of the bottles.

BY MR. KABA:

Q. So let's talk about the description of the bottles, which were raised by Mr. Shartsis.

Now you testified that you were writing descriptions for the bottles that appear in catalogs at Sotheby's, is that right?

A. That's right.

Q. If a consignor told you that they had identified issues with the bottle, would that be something you would want to know as you're writing the description?

A. Absolutely.

Q. Would you ever turn a consignor away and say, "No, don't tell me about those things"?

A. No. I would have liked to have heard what the consignor had to say.

Q. And if a consignor had told you, "Hey, Mr. Egan, another

auction house has told me these are photocopied labels," is that something you would have wanted to know?

A. I would, yes.

Q. Is that something that you would want to put in the catalog?

A. Yes.

Q. Would you have turned the consignor away there and said, "Don't tell me what other auction houses have told you, I'm the expert"?

A. No. I would have wanted to listen to what the consignor said which would make me draw attention to any points such as that, such as labels.

Q. Now you were asked about whether a consignor is entitled to rely on an auction house, in terms of authenticating wine, is that right?

A. Yes.

Q. Do you also believe that a buyer like Mr. Koch here is entitled to rely on the seller of wine, that they are not selling inauthentic wine?

MR. SHARTSIS: Your Honor, outside the scope. We're asking for a legal conclusion here. We're about to just --

THE COURT: Overruled. I let him testify to his understanding; he testify to this understanding as well.

Q. Let me just be clear and ask the question again.

A. Yes.

Q. Do you also believe that a buyer like Mr. Koch here is entitled to rely on the seller of wine, that they are not selling inauthentic or questionable wine?
A. Yes, because the auctioneer, as I already said, is the agent. The actual transaction is taking place between the seller and the buyer.
Q. You were asked about the fact that you have -- you really have a lot of experience authenticating wine, is that right?
A. I have.
Q. And there was a reference to you saying that one might need how many years to become a true expert in authentication?
A. Was it -- was it ten?
Q. Do you think that ten years of training is required just to be able to identify suspicious features on wine?
A. Ten years training but, you know, if you are a collector, you're a passionate collector of wine and buying and selling wine on a very regular basis and have access to lots of different bottles of wine and it's all -- lots of different -- sorry -- let me say, lots of different bottles of the same vintage, then you have a pretty good idea of how a particular wine from that vintage should look like.
Q. And in your experience even those that don't have ten years of training in authentication, can they too give you information about authenticity of wines?
A. Yes, and they have done that on many occasions.

Q. And how long would it take for someone to look at a cork once they've been informed that the branding is wrong?
A. I suppose if they had it -- if they had it reg -- registered in their thoughts, then that would be it, then that would be the benchmark.
Q. And how long would it take a consignor to look at a fill level and say, fill level looks awfully high for a 90-year-old bottle of wine?
A. Well, just a few moments.
Q. And despite your training and your experience, do you expect a consignor to reveal doubts they have about authenticity of wine to you?
MR. SHARTSIS: Object. That's been asked and answered.
THE COURT: Overruled. You can answer.
A. Yes.
Q. And do those doubts help you identify and focus your inspection?
MR. SHARTSIS: Objection, your Honor.
A. Yes.
Q. And we talked about --
THE COURT: Overruled.
Q. -- inspection here. In this case how many bottles were you asked to inspect?
A. 36.

Q. Now in a sale of 17,000 bottles, could you possibly give bottles the requisite amount of scrutiny in two weeks?

A. No, I could not.

Q. And what kind of information would be helpful to you from a consignor in terms of being able to inspect 17,000 bottles of wine?

MR. SHARTSIS: Your Honor, I would object. He just said he wouldn't do it, he couldn't do it, and now he's going to tell us what information would help him do something he says he can't do.

THE COURT: Overruled.

A. What information. If there are any issues with any of these 17,000 bottles concerning authenticity or their condition, or provenance.

Q. And in your experience have auction houses ever made mistakes?

A. Yes, Sotheby's included.

Q. And what kind of mistakes can be made?

A. Well, you can -- you can get the vintage wrong, it can be a typographical error, you can get the levels wrong, you can say something was top shoulder when in fact it was down to mid shoulder. I don't know. You could say -- you can make all sorts of mistakes, the label is in good condition when in fact you missed out saying that it has been soiled or torn, things like that.

Q. Now continuing on this topic of your experience, you were asked about this a bit on cross, though I noticed you weren't able to get your answer out entirely.

MR. SHARTSIS: Objection, your Honor.

THE COURT: Sustained.

Q. Speaking about your experience, even with all of your experience, are there times that you rely on the consignor?

A. Yes, I do.

Q. Do you come across consignors that are more knowledgeable than you are?

A. That are more knowledgeable in certain fields, yes.

Q. And have you ever come across a consignor or do you know of any consignor that has sold 44,000 bottles of wine, as Mr. Greenberg had, in just three auctions?

A. I haven't personally, no.

Q. Now you were asked about "as is" clauses. Do you recall that testimony?

A. Yes.

Q. You were asked what your understanding is of an "as is" clause, right?

A. Yes.

Q. Do you understand an "as is" clause in a catalog to permit a consignor to withhold information they have about doubts or the authenticity of wine they're consigning?

MR. SHARTSIS: Your Honor, I object. We're now into

legal conclusions. He says he doesn't know, he hasn't seen them, he has to read them, and now he's being asked to opine on what they are.

MR. KABA: Your Honor, there were a series of questions about "as is" clauses, do they guarantee marketability, do they guarantee authenticity at Sotheby's. I'm asking him what he recalls about "as is" clauses.

MR. SHARTSIS: I don't believe I asked those questions, your Honor.

MR. KABA: It's well within the scope of the cross.

THE COURT: Well, there weren't questions. He testified what he testified to about his knowledge of them. I'll allow the question, which was: Do they guarantee marketability, do they guarantee authenticity at Sotheby's --

MR. KABA: No, that was the question that was asked on cross. My question, your Honor --

THE COURT: Oh, I'm sorry.

MR. KABA: My question, your Honor, is: Does Mr. Egan understand that "as is" clauses permit consignors to withhold information about authenticity of the wine they're buying.

THE COURT: Right. You can answer.

A. If there is an "as is" clause, I suppose it would permit the consignor to withhold information.

Q. You're saying if there is an "as is" clause, it would not permit a consignor to withhold information?

MR. SHARTSIS: No. Your Honor, the answer is --

THE COURT: Yes, he did.

MR. KABA: I --

MR. SHARTSIS: Excuse me. He's answered the question. Now counsel is trying to get him to change his answer.

THE COURT: Sustained.

MR. KABA: I'm trying to understand the answer, frankly.

MR. SHARTSIS: He's trying to get him to change his answer, your Honor. He has answered that question.

BY MR. KABA:

Q. In your experience at Sotheby's has it ever been permissible for a consignor to withhold information about the authenticity of the wines they are consigning?

A. It hasn't been permissible, no.

Q. In your experience at Sotheby's, has it ever been permissible for a consignor to not tell Sotheby's or you about doubts they have about the authenticity of wine they're consigning?

MR. SHARTSIS: Your Honor, this must be the 15th time this question has been asked, and I object. Asked and answered. It's over and over again.

THE COURT: Slightly different question. I'll allow you to answer it.

A. It would not be morally permissible for a consignor to do

that.

Q. Now you were asked about inspection at Sotheby's. And you testified -- you were asked about whether Sotheby's permitted inspections of wine that they were consigning for auction. Do you recall one way or another if Sotheby's permitted that?

A. Yes, they did. If a buyer wanted to inspect wine, they could come and view the bottle, but it was very rarely done because of the logistics involved for any large amount of bottles to be inspected, so it was only done on a handful of times and a handful of bottles.

Q. Now you get hired by collectors to examine their wine, is that right?

A. Yes.

Q. Was there anything preventing Mr. Greenberg from hiring you once he learned of doubts about his collection?

A. No.

Q. And you could have went to his cellar and you could have inspected these wines for him, isn't that right?

A. Yes.

Q. And you could have reached conclusions here and told him those conclusions, isn't that right?

A. Yes.

Q. Now we talked a bit about tasting. In this case you did not taste wines before authenticating them, correct?

A. No, I did not.

Q. And in your experience authenticating wine in the last eight or so years that you've been authenticating, have you been doing that on visual inspection alone?
A. I have.
Q. Is that your understanding of what various other experts do who authenticate wine?
A. That's right, other experts do -- perform the same role, just looking at wines in people's collections and from the outward appearance of the wine can say whether these wines are -- these bottles are authentic or not.
Q. And you explained that you know that Mr. Greenberg has an expert in this case. Do you know if -- how Mr. Greenberg's expert examined these wines?
A. Yes, I think he did the same way as I did.
Q. And do you know whether Mr. Greenberg's expert has concluded whether any one of these bottles, a single one of them, is authentic?
MR. SHARTSIS: Your Honor, how many times do we have to hear the same question? I mean, this is --
MR. KABA: I've never asked this expert this question.
THE COURT: Overruled.
A. Please, say the question again.
Q. Sure. I know it's getting a bit late in the day for you.
Do you know if Mr. Greenberg's expert has concluded that any wine, a single one of these 24 bottles, is authentic?

A. I don't think he has concluded that any of them is authentic.

Q. And do you know if Mr. Greenberg's expert has concluded that any single one of these bottles should have been put up for sale?

A. I think he's concluded they should not have been put up for sale.

Q. And on this point you and Mr. Greenberg's expert actually agree, don't you?

MR. SHARTSIS: Objection, your Honor. I mean, how much are we going to flog this particular horse?

THE COURT: Overruled.

MR. SHARTSIS: Apparently more, I guess.

A. Say the question again. Sorry.

Q. And on this point, that these bottles should not have been put up for sale, you and Mr. Greenberg's expert agree, isn't that right?

A. Yes, we do.

Q. How confident are you that these 24 bottles are counterfeit?

A. Very confident.

Q. Anything that's happened today change your conclusions as to these 24 bottles?

A. No.

MR. KABA: No further questions, your Honor.

THE COURT: Thank you. Recross?

MR. SHARTSIS: I do, your Honor.

RECROSS EXAMINATION

BY MR. SHARTSIS:

Q. Mr. Egan, you were asked about whether you're familiar with anyone who has sold 44,000 bottles of wine. Have you ever known anybody who had a collection of 70 to 80,000 bottles of wine that Serena Sutcliffe said was one of the great collections of the world?

A. Remind me. I can't remember.

Q. Well, I'm asking you.

A. No.

Q. You've never -- you have never yourself known anyone who had a 70 or 80,000 bottle collection that Serena Sutcliffe said was one of the great collections of the world, isn't that true?

A. No, I can't remember.

Q. You know who Serena Sutcliffe is.

A. Yes.

Q. Serena Sutcliffe is one of the really famous people in the fine wine world, isn't she?

A. Yes.

Q. She really knows what she's doing when she looks at a collection, doesn't she?

A. Yes.

Q. She's widely regarded as one of the top experts in the

world on the quality of wine collections, isn't that true?
A. Yes.
Q. And if Serena Sutcliffe said this was one of the great wine collections of the world, you would believe that is true, wouldn't you?
A. Yes, I would believe her opinion.
Q. Now you were asked about Mr. Koch, and I'm not quite sure I remember the question, about what he was entitled to expect. Based on your experience in the auction business, do you believe that a buyer like Mr. Koch is entitled to ignore provisions of a contract?
A. It depends, not only on the contract but on, you know -- if there's anything involved in the contract, i.e., sale of inauthentic wines.
Q. So for example, do you believe that Mr. Koch could take an "as is" contract and decide on his own that what "as is" meant was that the specific bottles of wine were each guaranteed? Do you believe he can do that properly?
MR. KABA: Objection, your Honor. If we are going to have this witness start testifying about the law, then we should both be able to ask him.
THE COURT: Well, I've allowed both sides to do a little bit on his understanding of what buyers at auctions can and can't do. I'm going to caution the jury that the legal conclusion is not what this expert is here to testify about and

I'll explain the law to you, but he can testify to his understanding of how these worked.

Q. Your understanding of the "as is" contract, do you believe that the buyer can say, I'm not going to treat this as is, I'm going to treat this as if you, Sotheby's, specifically guaranteed that each bottle was genuine? Do you think that's appropriate in your experience in the auction business?

A. Not knowing so much about the legal part of the auction business, but again, the auction house is the agent between the buyer and the seller so it is the buyer, again, buying from the seller, so the buyer is entitled to be getting the correct goods from the seller.

Q. Do you believe -- listen to my question, please. Sotheby's offers an "as is" contract to the buyer, to Mr. Koch. As a person who worked in the auction business, do you believe Mr. Koch can say, I know it says "as is," I know it disclaims all warranties, but I'm going to hold you, Sotheby's, to guaranteeing that each bottle is authentic? Is that your understanding as somebody in the auction business?

MR. KABA: Your Honor, I'm going to object. The question -- this question was just asked, the witness gave his answer. I understand counsel doesn't like it, but he can't keep asking the same question different ways to hope to elicit a different answer.

MR. SHARTSIS: I don't think that's been a problem

here, your Honor.

THE COURT: Well --

MR. SHARTSIS: He answered a completely different question, your Honor. Can I just get this answer, we'll move on.

THE COURT: Yes.

Q. Can you answer my question, please.

MR. SHARTSIS: Let's have it read to the witness so there's no confusion.

(Record read)

A. So Sotheby's -- so if a buyer is holding Sotheby's to guarantee all the wines are authentic in the catalog.

Q. So you're not confused --

A. No, that's the way I understand it.

Q. No, let me be clear. Sotheby's has a contract, it says "as is." It disclaims every warranty about the wine. It does not say: We guarantee each bottle. That's the contract. It's a hypothetical. You're an expert, and I can ask you that question. Do you believe it's appropriate for a bidder who has bid on a bottle to come in and say: I don't care about all of that, you guaranteed the wine? Do you think that's appropriate?

MR. KABA: Your Honor, objection again. He's answered now the question a second time. You can ask hypotheticals to an expert about the area in which they have expertise, not

about the law.

MR. SHARTSIS: Your Honor, may I have his last answer and we'll finish.

THE COURT: You may.

Q. Can you answer that, please?

A. I believe that there's a moral responsibility to the auction house, if there is a real problem concerning authenticity, that this should be addressed between the buyer and the seller.

Q. So the answer to my question is that it's okay for the buyer to say: I disregard the contract completely, I treat it the way I want?

MR. KABA: Objection again, your Honor. This is a third time we're asking the question and the answer keeps coming back the same and counsel isn't happy with it.

MR. SHARTSIS: It comes back different each time.

THE COURT: Overruled.

A. If the -- if the circumstances are there is -- there are grounds for inauthenticity, then I think the buyer has the right to gain redress against the auction house and the consignor, because the auction house, don't forget, is the representative of the consignor.

Q. So it's your view --

THE COURT: Okay. Next question.

MR. SHARTSIS: Thank you, your Honor.

Q. -- that the buyer can rewrite the contract.

MR. KABA: Your Honor, objection.

THE COURT: Next question. Sustained.

Q. Let me ask you about the corks. Ask you about the corks. Maybe we can cut through this. You just changed your mind two weeks ago about whether or not the corks in the Lafleurs were authentic. Is that a fair statement?

A. It is a fair statement.

Q. Okay. And you just changed your mind ago -- your mind two weeks ago about whether the Petrus corks were authentic because of the direction of the corks, correct?

A. That's right.

Q. And at the time you gave your testimony you believed the contrary, you believed that what you saw in the corks in terms of the direction of the corks was proper for those bottles, is that correct?

A. I didn't make mention of any issue with the corks.

Q. But you believed it. I'm not -- well, you made a lot of mention of corks. I don't want to go through all that again.

A. Yeah.

Q. Well, let's go through it. When I asked you point blank about the Lafleur corks and I said, there's nothing here that indicated inauthenticity and you agreed with me, did you say that -- you remember doing that, correct?

A. Yes.

MR. KABA: Excuse me. Objection. What Lafleur cork are you talking about?

Q. You remember me doing that about some Lafleur corks, correct?

A. Yes.

Q. When you said that, were you answering me without regard to what was on the cork?

A. I was -- I wasn't focusing really on the corks. If I said that, I said that, but --

Q. Well --

A. Let me go back to the inauthenticity issues on all of these 24 items --

Q. Well, no, no, no. We're not talking --

A. -- not just the corks.

Q. I just -- I just want to finish this just about corks, so we can move on, the jury can hear another witness.

A. Sure.

Q. Okay. So after I showed you -- I didn't do all 15, all 15 pages, where you identified the cork. It's your testimony that you weren't focusing on the corks, is that correct?

A. Yes.

Q. And when I asked you point blank, cork by cork, whether, after looking at the cork, there was a problem with inauthenticity, you're telling me that you gave me an answer without knowing what you had looked at?

A. I said what I said in the deposition.
Q. Well, I'm just trying to figure it out. But now you're saying that you actually didn't look at the cork, so the answer then --
A. No.
Q. -- didn't respond to my question at the deposition.
MR. KABA: Objection, your Honor. It's mischaracterizing the testimony. This is actually just the cross again, it's not limited to what I asked on redirect, and the witness has explained himself and explained what happened at the deposition.
MR. SHARTSIS: Well, I believe he asked a lot of questions about corks just ten minutes ago.
THE COURT: I'll allow a little further.
Q. So are you telling me that, sitting there under oath, sitting there under oath, there in Cape Cod, when I asked you specifically whether a cork indicated that a bottle was authentic and you said yes, you were actually answering me without knowing what was on the cork?
A. I said yes at the time under oath, but I --
Q. You said yes because you believed it, correct?
A. I think so, but now --
Q. And you said yes because you believed --
MR. KABA: Objection. Let the witness finish his answer. They're argumentative questions, the witness should be

allowed to answer.

THE COURT: Sustained.

A. As I said, I have made further research, and now I am satisfied that my answer was wrong at the time of the deposition.

Q. And it was wrong based upon a judgment that you made because you had examined the corks at the time of the deposition, correct?

A. That's correct.

MR. SHARTSIS: Thank you. Your Honor, I have no further questions.

THE COURT: Okay. Thank you.

MR. KABA: No questions.

THE COURT: Okay. Thank you, sir. You may step down.

(Witness excused)

THE COURT: Would this be a good time for a short break?

MR. KABA: That's fine with us, your Honor.

THE COURT: Okay. We'll take a ten-minute break, folks. Please leave your pads. We'll see you in ten minutes.

(Jury excused)

(Continued on next page)

(In open court; jury not present)

THE COURT: Who do we have next?

MR. KABA: Your Honor, plaintiff has Mr. Jamie Martin next, who will be plaintiff's last witness.

THE COURT: Okay. Great.

(Recess)

(In open court; jury not present)

THE COURT: Okay. Can we get the jury?

MR. KABA: Yes, we're ready, your Honor.

(Continued on next page)

(Jury present)

THE COURT: Please be seated.

Okay, ladies and gentlemen, one last session for the day.

Mr. Kaba?

MR. KABA: Your Honor, before we call the next witness, I don't believe we've actually moved all of the bottles into evidence yet, and with -- if there's no objection, I'd like to move them all. I can identify them by exhibit number if that would be helpful.

THE COURT: Okay. That would be great.

MR. SHARTSIS: Your Honor, no objection. I suggest perhaps we identify them by exhibit number without taking the jury's time.

MR. KABA: Fine. I can just read off the exhibit numbers.

THE COURT: Okay. They'll all be received.

(Trial Exhibits 200, 201, 205-218, 222-225, 227-230 received in evidence)

MR. KABA: Okay. Plaintiff calls Mr. James Martin.

THE COURT: Okay. Is Mr. Martin here? Please come to the witness stand, Mr. Skolnik will swear you in.

THE CLERK: Please watch your step, remain standing at the top stair here. Please raise your right hand.

(Witness sworn)

THE CLERK: Thank you. Please have a seat.

Please state your name, and I'm going to ask that you spell your first and last name for the record, please.

THE WITNESS: James Martin, J-A-M-E-S, Martin, M-A-R-T-I-N.

THE CLERK: Thank you.

JAMES MARTIN,

called as a witness by the Plaintiff,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KABA:

Q. Good afternoon, Mr. Martin. Tell us, where are you from?

A. Originally Baltimore, Maryland; now Williamstown, Massachusetts.

Q. Is that where you currently live?

A. Yes.

Q. What do you do for a living?

A. I'm a materials analyst and consultant.

Q. What does it mean to be a materials analyst?

A. I get to do what happens behind the closed doors of museums, so a lot of what I do is analyze the materials that are used to make and preserve works of art, collectibles, things that go into museums.

Q. And when you say you analyze these works, what do you mean by you analyze the works?

A. I use photography, I use microscopes, and I use spectroscopy to study the structure and the chemical composition of the materials.

Q. And how long have you been practicing in this field?

A. I've been practicing in the field for 28 years and I've been specializing in authenticity studies for 19 years.

Q. And we'll talk a bit more about the authenticity studies and the work you did in this case, but let's get some more background information. Where did you go to college?

A. I went to Towson University, which is just north of Baltimore.

Q. What did you study?

A. Studied studio art, chemistry, and art history.

Q. And did you pursue graduate studies?

A. I did. I pursued a master's of science in art conservation at the University of Delaware.

Q. And what did you learn at the University of Delaware?

A. Delaware was a three-year program and I learned about the chemistry, the history, the construction, the degradation, how things fall apart, materials used to make fine art and collectibles, essentially things that go in museums, and I learned how to conserve those, so I worked after that time as both a conservator and a scientist.

Q. And have you received any fellowships that are related to work that you've done in this case?

A. I did. I received what's called a Samuel H. Kress fellowship, which allowed me to go to the University of Cambridge in England to study.

Q. Now while you were at the University of Delaware, did you learn about any specific methods to examining materials?

A. We did. For a wide array of materials, everything from paper and archival materials to paintings, glass and ceramics, furniture and photographs, we learned methods that are used to analyze them, so using microscopes to make them bigger so we can see what they're made of, and microscopes and spectrometers to identify their components, their building blocks.

Q. Have you heard of a tool called FTIR?

A. I have.

Q. What is FTIR?

A. FTIR is fourier transform infrared microspectroscopy, which is why most people call it FTIR.

Q. And how about Raman?

A. Raman is the confocal dispersive Raman microspectroscopy, so it's Raman with two As, not an E.

Q. And we'll talk a bit more about those two tools briefly, but are both FTIR and Raman generally accepted in the scientific community?

A. Oh, yes, they're widely used in the museum field, forensic field, and industrial analysis field.

Q. And what can one learn from using tools like FTIR and

Raman?

A. We can identify the composition of materials, everything from the composition of a paper to an ink, the colorants in ink called pigments, plastics. Basically I could use those tools to analyze most of the materials that construct the room, in fact what you're wearing.

Q. Let's continue discussing your background a bit more.

What positions have you held since you finished your formal studies?

A. At the Clark Art Institute in Williamstown, I was a paintings conservator and a conservation scientist for about 11 years.

Q. And what do you -- what company do you currently work for?

A. I work for a company called Orion, like the constellation, Orion Analytical.

Q. How long have you worked there?

A. I started the company in 2000.

Q. And how many projects have you done since you've been working at Orion?

A. Out of 1700 career projects, I've completed about 1100 since 2000.

Q. And what kinds of projects do you do?

A. This would be everything from studying the materials used to make ancient Egyptian artifacts to baseball memorabilia to modern art to contaminants on gyroscopes that go into guided

missile systems.

Q. And what kind of clients do you have at Orion?

A. Clients range from the Federal Bureau of Investigation, Department of Justice, Christie's and Sotheby's, I do work for art insurance companies, I've done work for Colgate-Palmolive, who makes fabric softener, I do work for collectors, and at times law firms, in cases like this.

Q. And you mentioned that you've done some work with sports memorabilia. Give the jury an example so they can get a sense of the kind of work you do.

A. Sure. So Danny Mantle, Mickey Mantle's son, called me once and asked me if I could differentiate whether the ball he had was his father's 511th home run ball or if the one that was being sold in Las Vegas the next weekend was the real ball, and I was able to tell him the one that he had was genuine.

Q. And in the course of doing that did you have to analyze any of the materials?

A. I did. I had to analyze the inks, so I called people I know at Secret Service who are experienced with inks and I reviewed the -- I had him review the game footage of that home run, which showed that the ball had been hit foul before home run. His ball had dirt and grass stains on it. The one in Las Vegas was clean right out of the box. So it was a simple, simple find.

Q. So you helped Danny Mantle out, huh?

A. Yeah, that was kind of cool.
Q. Are you a member of any professional organizations?
A. I am.
Q. Name a couple of those.
A. American Association of -- American Academy of Forensic Sciences, the American Society for Trace Evidence Examiners, and the American Institute for Conservation, American Chemical Society, etc.
Q. Do you do any teaching?
A. I do.
Q. Do you do any teaching on material analysis?
A. I do. Between '88 and '90, I taught at the Getty Museum; '91 to 2001 I taught at the Smithsonian. Between 2000 and 2008, I taught at the FBI Academy's Counterterrorism Forensic Science Research Unit. My job there was teaching paint analysis and also teaching FTIR, interestingly, using the identical equipment that I have in my laboratory that I used for this case.
Q. And have you taught at NYU?
A. Oh, yes. I've been with NYU as adjunct faculty since 2010, and I've been a research scientist in chemistry at Williams College since 1998.
Q. Have you published in your field?
A. I have.
Q. And have you published on examination and analysis of

historical objects?

A. I have. Recently I've published on the importance of modern industrial pigments and authenticity studies, a group of paintings misattributed to Pollock, techniques and approaches to authenticity studies, identification of arsenic insecticides on Native American artifacts, for example.

MR. KABA: And at this time, your Honor, pursuant to Rule 702, plaintiff tenders Mr. James Martin as a qualified expert in the field of materials analysis.

THE COURT: Okay. Is there any objection or voir dire?

MR. CIALONE: No, your Honor.

THE COURT: Okay. He's qualified.

(Continued on next page)

BY MR. KABA:

Q. Mr. Martin, who were you retained by?

A. Bill Koch.

Q. And are you being paid for your time?

A. Yes.

Q. And does that fact prevent you from providing truthful and honest testimony here today?

A. No.

Q. Have you discussed your work on this case with any other expert?

A. No.

Q. What were you retained to do in this case?

A. I was retained to make an independent and objective examination of labels on the bottles, the same sort of work I'm retained to do on a frequent basis when looking at museum objects and other collectibles.

Q. And did you have an opportunity to examine each of the bottles at issue in this case?

A. I did.

Q. When did you conduct your examination?

A. Over two days in November 2010, and two days in April 2011.

Q. Where was that?

A. Osterville, Massachusetts, on Cape Cod.

Q. And did you understand that your part of the authentication work was necessary?

A. I understood that it was a part of the process as it ordinarily would be because I was just dealing with the labels.
Q. Did you understand why Mr. Koch wanted to retain you to do this label analysis?
A. I had a general understanding that Mr. Koch disputed the authenticity of the bottles and wanted me to use my tools, as a scientist, to see what I could learn about the papers and inks.
Q. What tools did you use during your examination of these bottles of fine wine?
A. In Osterville I used what's called a blacklight. When I was younger, these were the things on the ceiling of my room with posters, right, back in the '70s. They can be used to look at the fluorescence of materials.

I used what's called a stereomicroscope, which is a microscope you look through and you get a magnified image of what you're studying at magnifications up to about a hundred times, and I also used a couple of cameras to document what I was seeing.
Q. And specifically, what were you examining on these bottles?
A. I was specifically examining the paper labels on the front. I was examining the paper itself to see if the paper was coated, to see if the paper was altered, if there was any indication if there was an artificial alteration.

I was studying the material that was used to print the ink, including the colorant or pigments used to color the ink.

And I also studied the material that was smeared onto the surface to make it look old. And I also studied the glue that was used to stick it onto the bottles.

Q. And was part of your examination visual at Mr. Koch's cellar; is that right?

A. Yes. So everything I did at Mr. Koch's cellar was visual. I examined, and in the course of that, I took samples, and I took the samples back to my laboratory for analysis.

Q. So we'll talk about what you did in the laboratory in a moment, but let's talk about the visual examination. What could you discern about these labels based on your visual examination?

A. I could see that some of the labels had been coated with a material. Some paper manufacturers will coat a paper to change its property, and I could see that. I could see the material had been smeared on the surface, which caused it to look old or caused it to look like mold.

I could see what I thought were tears, in many cases were cuts. The damage appeared artificial, and that led me to take a number of samples. I was also able to see the glue and where the glue ended and what the glue covered.

Q. And we'll talk about each of these analyses in a few minutes as we go through some of these bottles, but you mentioned you also took samples and you analyzed them in your lab?

A. I did.
Q. Tell us a little bit about the process for getting a sample and what you took a sample of?
A. So in the last slide, if you can go back, the slide in the middle is a stereomicroscope. This is what I use to examine the samples and examine the works of art. And back in the lab, I reexamined the samples with the microscope; so I kept a visual chain of custody from the bottle to my sample container, back to my lab.

And I think there's a next slide that shows the relative sample size. I then took a portion of -- the samples I took, the samples were very small, less than the width of a human hair. So if you picture a millimeter in your mind, and you divide it a thousand times, these samples would be 41,000ths of a millimeter in size. So really small.
Q. And then you used FTIR as a tool that we talked about earlier, right?
A. I did.
Q. Tell us a little bit about what FTIR is?
A. FTIR and RAMAN, R-a-m-a-n, not like the noodle. FTIR and RAMAN, is called vibrational spectroscopy. So when a molecule absorbs energy, like in the case of infrared, it's heat like in the heat from the sun or in the case of RAMAN it's in fact a red laser like this, it causes the molecule to vibrate.

The FTIR measures and records the vibration. So with

an FTIR spectrum, I'm able to identify the materials that are in the sample. When I teach at NYU, I encourage the students to think about the outline of buildings and monuments in New York. So the outline of the Empire State Building or the outline of the Statue of Liberty. In the same way that those are outlines because of their structures, materials have specific outlines because of their chemical structure.

So looking at these different FTIR spectra, I can determine the composition of the materials of the samples I took.

Q. And so is that -- Let me see if I'm following it. Does that mean sort of like every sample will have its own kind of skyline?

A. Yeah, that's a good analogy. It's a bit of a chemical fingerprint, yeah.

Q. Now, tell us about what you did in the laboratory and what you were able to observe, generally?

A. So back in the laboratory, I reviewed the photographs I'd taken on site, and I took a lot of photographs through the stereomicroscope so I could see the surface. I could see the locations where I sampled, what I sampled, where I sampled, and in the laboratory, over the course it was in excess of a hundred hours, I analyzed each of the samples that I brought back to the lab.

So the sample would go in the microscope or on the

RAMAN microscope and using a computer, I would collect the spectrum, what we saw on the last slide. I'd go through the process of interpreting the spectrum, identifying the components.

Q. Mr. Martin, do you have any special training or experience authenticating wine?

A. No.

Q. Now, do you think that kind of experience was necessary for you to do the work you did in this case?

A. No, because I was retained to study works of art on paper, the labels, and I've been doing that for 28 years.

Q. Now, do you examine labels on other historical objects?

A. I do. Many of the objects that I examine, whether it's a trophy baseball that sells at auction for half million dollars or a famous painting, there's often a label that's integral to the work. It's what identifies the work. It's what establishes what that work is. So examining those labels and very often analyzing those labels is part of what I do on a regular basis.

Q. And here, you understand that there are bottles of wine that purport to be 60 to over 100 years old; is that right?

A. Yes.

Q. And so do you consider these historical or at least purported historical objects?

A. Well, to me, I consider these collectible objects, and in

that case, they would fall under what I would call an historical object. They're quite old. They're quite rare in many cases, I understand now, having sat through the morning of testimony; so, yes.

Q. And your work in this case was limited to examination of the labels?

A. Yes.

Q. And what can attributes of a label tell you about the object itself?

A. Well, the attributes of the label, for me, they purport to represent the maker. They also purport to represent the year the grapes were grown, as I understand it. They can also tell me a lot about when the label was made, when it could have first been made, whether it was altered intentionally, and when it was altered intentionally, before or after it was glued to the bottle.

So all of that I found very, very interesting and potentially helpful in the case.

Q. And you understood your work in this case was merely confirmatory of what Mr. Koch's other experts may have concluded about the wine?

MR. CIALONE: Objection. There's no foundation. There's no foundation that he has read what any other expert has said.

THE COURT: Sustained.

A. My --

MR. CIALONE: Objection, your Honor. He's answering the question.

Q. I'll ask another question, Mr. Martin.

A. Okay.

Q. Did you understand that your work was necessary for Mr. Koch to reach a determination about the authenticity of these wines?

MR. CIALONE: Objection, asked and answered. Well, certainly asked and answered. No foundation, unless this person is a wine authenticator and there's no --

THE COURT: Sustained.

A. I would --

Q. That's fine. Let's move on.

A. Okay.

Q. Did you prepare a report in this case?

A. I did.

Q. And let me hand you what is marked for identification Exhibit 511. What is this, Mr. Martin?

A. This appears to be a print of the expert report that I issued in April 2011.

MR. KABA: Your Honor, I'd move this into evidence.

THE COURT: 511 received.

MR. CIALONE: Your Honor, I would object to the moving his expert report into evidence. He's here to testify about

his opinions, not to put his report in.

MR. KABA: Your Honor, every single expert report has been moved into evidence.

MR. CIALONE: Only as by the opposing party. We put in Mr. Egan's report to show things that Mr. Egan said. They put in Mr. Schwarz's to show the things that he said because those are admissions of a party opponent under the law, but you don't get to put in your own expert report because it's hearsay. That's why you call the expert to testify.

MR. KABA: Your Honor, we can use it as a demonstrative. We can use it to --

THE COURT: Well, okay. I mean --

MR. CIALONE: I have no objection to him using it as a demonstrative. I have no objection for him using it to refresh his recollection. It's very complicated.

THE COURT: Okay.

MR. CIALONE: But we object to it being admitted.

THE COURT: I'm going to reserve on admission at this point.

MR. KABA: That's perfectly fine.

Q. Mr. Martin, did you reach any conclusions about the labels you examined?

A. Yes.

Q. And describe for us your overall conclusions about the 24 bottles at issue and the labels on these bottles?

A. My overall conclusions to the bottles were that I found evidence of physical alteration, in many cases deliberate. In many cases made before the bottle -- before the labels were glued to the actual bottle itself. These physical alterations consisted of things like artificial wear, nicks, cuts, holes in the labels, not tears.

I saw evidence of artificial discoloration. So what to the naked eye might appear to be mold, but to my trained eye under the microscope clearly was not mold. I also found evidence of suspect materials, what scientists commonly call anachronisms, and there would be anachronisms also in the paper itself and in the glue used to stick the labels to the bottles.

Q. In your experience, what explains artificial wear and artificial discoloration?

A. In my experience, having dealt with authenticity studies for 19 years, when I see this occur in a group of questioned objects, it's because there's a deliberate intention to cause something new to appear old.

Q. And you talk about suspect paper and suspect glue and describe it as an anachronism?

A. Yes.

Q. It's a $5 word; so you'll have to tell us what an anachronism is?

A. An example of an anachronism would be a photograph of John F. Kennedy holding an iPhone. So if I saw a photograph of

John F. Kennedy and he was holding an iPhone, I would know that the photograph could not be genuine because the iPhone didn't exist at that time, just put in a very simple way.

Q. Okay. So it's -- And you found such an anachronism or historical errors on labels at issue in this case?

A. Yes, I did.

Q. We'll explore that in a bit. Now, when you're making reference to an historical era, you have to be making reference to a certain point in tame; is that right?

A. Yes.

Q. So what are you assuming about these bottles? What's the relevant point in time to analyze these materials?

A. Well, because my focus was what was the front label, that large label, the thing I would look at if I went to purchase a bottle of wine, I restricted my information to the date on that label; so 1864 and 1921, '28, '45, et cetera.

Q. So when there's a bottle that says it's 1921 Cheval Blanc, for example, what did you assume about, around about when the label would have been created?

A. It's my general understanding that wines are usually bottled with a couple of years the harvest of the grape. The grape has to have time to do its thing, to make itself into wine; so ...

Q. So let's start going through some of these bottles. I'll invite you off the stand and we can start with --

MR. CIALONE: Your Honor, the answer to that question is nonresponsive, and I move to strike. He was asked, you have a bottle that says 1921 Cheval Blanc. What do you assume about around when the label would have been created, and he testified to when the wine would have been put in the bottle, which is a very different answer.

MR. KABA: I think the testimony is quite clear. The jury would understand it.

MR. CIALONE: It's clear, but it's nonresponsive because he's answering a different question.

THE COURT: You can ask him on cross-examination.

MR. KABA: Why don't you come off the stand, Mr. Martin.

Q. I'm going to hand you -- the mic is right here they can hear you. I'm going to hand you what's been previously marked as Exhibit 224, which is what purports to be a magnum of 1921 Cheval Blanc?

A. Yes.

Q. Describe this label for the jury.

A. So this label appears -- it purports to represent a 1921 Chateau -- my French isn't that good -- Chateau Cheval Blanc wine. It appears old, it appears worn, and it appears moldy.

Q. So let's do some further explanation. Did you observe any normal wear and tear on this label?

A. I did. What I would see as normal wear and tear, what some

people refer to as an accordion tear, I see it on cans of soup in my cupboard at home. I'll point it out to you. The tear here, where it's torn and the paper pulls up on itself, it's an accordion tear.

Q. Okay. So you've now described an accordion tear, which you said is normal wear and tear. Did you find any other tears on this label that were suspicious?

A. I did. I found a number of tears around the perimeter, which, under magnification, when I looked at it, I expected to see torn paper, but what I saw was cut paper, and I couldn't explain how that would occur naturally.

Q. And did you observe anything else about where these cuts were?

A. I did, under the microscope. So under high magnification, I could see that the glue that was used to stick the label to the bottle covered the edge of the cut.

Q. What does that mean, Mr. Martin?

A. Well, it means that the cuts existed before the label was glued to the bottle.

Q. And what does that tell you?

A. It told me that these cuts were made on the label before someone glued it to the bottle; so the cuts did not occur after they were glued to the bottle. They were made before.

Q. And how can you tell that this is a cut rather than normal wear and tear?

A. Under magnification, you can see that the edges are very sharp and very angular. If you tear paper, you'll tend to find a torn edge. If you sort of picture tearing a paper towel apart, you'll get a frayed edge. Under the microscope, that's not what I saw with these labels.

Q. In your understanding, how are labels typically affixed to objects?

A. My general understanding is that an adhesive is applied to the back of the label and the label is pressed on the bottle and smoothed down.

Q. And is an adhesive like glue?

A. Glue, yes.

Q. And did you make any observations about the adhesives used on this magnum of purported 1921 Cheval Blanc?

A. I did. I identified the adhesive as a material -- I won't use too much chemistry, but it as a material called polyvinylacetate, otherwise known as white glue. And when I was young, it was Elmer's glue. So an arts and crafts type glue.

Q. When was polyvinylacetate or white glue first used as a consumer glue?

A. Well, that would have been in the late 1940s, around 1946, '47.

Q. So is this an example of John F. Kennedy holding an iPhone?

A. It would be because that kind of glue was not available in

1921. It wasn't available until the late 1940s.
Q. Okay. So did you make any findings about the discoloration of this label?
A. I did. So the gray material that you can see that resembles mold, it's a material called shellac.
Q. And what did you observe about the shellac?
A. Well, shellac is a natural insect resin. I'd be surprised if a lot of the furniture in the room wasn't coated with shellac, and it was applied in such a way that caused the bottle to appear moldy. To a normal inspection, without magnification, this sort of resembles mold.
Q. And so what have you concluded about the application of shellac to this bottle?
A. I concluded it was a deliberate attempt to create the appearance of mold and discoloration.
Q. Now, let's talk a bit about the actual paper used on this label.
A. Sure.
Q. Did you make any observations about the paper, the composition of the paper?
A. I did. The paper is very white, and when I analyzed samples of the paper, I found a material called styrene. Polystyrene is the material used in foam paper, foam coffee cups. After the war, they began -- the second World War, so about 1946, they began to use styrene coatings on paper. So

that would be the earliest that styrene could be on this paper. Styrene is still used on paper today.

Q. So the earliest that styrene would have been on this paper would have been in the mid-1940s, but from what -- what does the label say about this vintage?

A. 1921. So the paper couldn't have been produced until the late 1940s, at the earliest, or anytime after the late 1940s.

Q. Okay. Let's put that bottle down. Well, actually, before you do that, let me ask you one more question about it. Did you make any finding about the inks used on this label?

A. I did. I've analyzed the ink; so actually I took the tip of the U in that letter, right there, and analyzed it, and I found a pigment, a coloring called pigment orange 34.

Q. And when was pigment orange 34 first available?

A. It was first patented in 1936. What has happened with a lot of material, it doesn't become commercially available or important until later. So the earliest pigment orange could have been used in anything would have been 1936, about 15 years after 1921, but more likely, after the 19 -- in or after the 1950s when it was being produced on a large scale.

Q. Now, I see some what appears to be some rubbing of the paper. What have -- Did you study that?

A. I did, and it was my impression that in this label and others, some of the ink was rubbed to make it look worn, which would make sense if somebody was using a new ink to print a new

label but wanted it to look old. And they, evidently, did because they applied shellac to make it look moldy. They cut the edges to make it look worn; so abrading the ink would be something that you would expect to see as well.

Q. Given everything that you've just testified to, Mr. Martin, do you believe that it is an authentic 1921 label?

A. I don't believe that that's a label that would have been originally applied to the bottle, no.

Q. Okay. Why don't you go ahead and take a seat. Let's look next at Exhibit 229, which is what purports to be a magnum of 1945 Chateau Lafleur, and for your reference, Mr. Martin, you discuss that at Exhibit 38 of your report. Did you make any findings about the edges of this label?

A. I did, as well.

Q. And what did you find?

A. I found the same suspicious nicks, cuts in the edges like this which you can see illustrated there. It sort of looks like Batman ears, very sharp, very angular, not consistent with torn paper.

Q. And do you believe that that was a deliberate alteration?

A. I do.

Q. And did you make any findings about whether or not this cut or the cuts on this label were coated with adhesive?

A. I did. I examined and found that they also were coated with label adhesive as well.

Q. And just remind us again, what does that suggest to you, that the cut was coated in adhesive?
A. Well, that means that the cut had to exist before the adhesive was applied; so the label was cut before it was glued to the bottle.
Q. And what's your understanding of why somebody would have done that to this bottle?
A. In my experience in dealing with collections of questioned objects, it's not uncommon for someone to create the indicia or appearance of age deliberately so that something is more convincing. So it would certainly make a 1945 bottle look older if it was cut and discolored.
Q. How about how the label which was affixed to this bottle, any observations about the glue used?
A. Yes. In this case, polyvinylacetate, again, white glue like Elmer's glue.
Q. Now, you mentioned that polyvinylacetate was used by the late 1940s. Could this just be an early use?
A. Yes, I think it would be an extremely early use. It's also possible that polyvinylacetate was used at any time after that date, as well, because white glues, like polyvinylacetate, are probably still the most common arts and crafts glue around.
Q. Now, did you make any findings about this, the discoloration on this label?
A. I did. Examination of this showed, as well, the appearance

of shellac. So as the bottle before, shellac was applied in order to cause it to appear discolored, potentially to cause it to appear moldy or mildew.

Q. Could the shellac have been used in the cellar and sort of naturally fallen in this pattern?

A. When I was in graduate school at Winterthur, we actually had to use shellac to try to coat objects. It's an incredibly difficult material to work with. It's very sticky and dries very quickly. And if shellac were used, if shellac fell on this inadvertently, I would expect to see large spots and drips, not a very diffuse, clever-looking stain on the paper label.

Q. Now, there's a back label on this bottle --

A. Yes.

Q. -- is that right? Did you study the back label?

A. I did.

Q. And what did you find about the back label?

A. Well, I found abrasions to the label. So the abrasions were up and down, in this fashion, which could be consistent with a bottle being slid in and out of a wine rack or something, but what I found curious was that both ends had been abraded away and that the ink -- or, I'm sorry, the glue used to stick the label on the bottle, it covered the abraded ends.

So this label wasn't abraded while it was on the

bottle. It was abraded before it was stuck to the bottle, and it was stuck to the bottle with white glue, polyvinylacetate.

Q. Just so we're clear, what do you mean by abraded?

A. Oh, rubbed. One example of an abrasive would be sandpaper. If you have scratches in your DVD, you can put toothpaste on it. That's an abrasive also; so....

Q. Okay. That's a new tip.

Let me hand you next Exhibit 201 that purports to be a bottle of 1864 Chateau Latour. Now, I'll ask you to come down here for this because we see a new feature on this bottle, and for your reference, that's Exhibit 20 in your report.

A. Okay.

Q. Did you notice anything about the holes or cuts in this label?

A. I did. This is the first bottle we've looked at that has a pair of vertical holes, one hole in this direction, another hole on top of it. Quite a few of the bottles among this group have these pairs of holes, which sort of suggests that something happened when the bottle was moved in or out of the wine rack.

Q. So you said it suggests that something happened when the bottles were moved in or out of the wine rack. Do you believe that's how these holes were created?

A. What I looked for was evidence of a gouge or an indentation or an abrasion on either side of the holes. I would sort of

picture a plow going through a field, cutting a furrow. This was more like a shovel that was just plunged in the dirt and created a hole. So I didn't see any evidence of anything being dragged back and forth.

Q. And did you notice whether the holes on this paper were coated in adhesive?

A. Yes. The holes, the edges of the holes were coated with adhesive, and if you look closely, you can see an area of discoloration around the holes where the glue spilled out and over the holes and stained the front of the paper.

Q. So what kind of glue was this that was used?

A. I just want to be sure. Polyvinylacetate. Sorry. It was a lot of data to keep track of.

Q. And that's the glue that you mentioned wasn't used by consumers until the 1940s?

A. Yes. So this would be an anachronism.

Q. So this would be like Abraham Lincoln holding an iPhone?

A. Yeah.

Q. Did you make any other findings about how the paper, the label was affixed to this bottle?

A. The paper also was affixed to the bottle with polyvinylacetate also; so white glue.

Q. And the edges of the label, is that similar to what you've seen before?

A. Similar, but more severe. Many more of these angular cuts,

these cuts that really don't look like tears, but look like nicks or clips from, in fact, all four edges.

Q. And is it your view that these cuts were also deliberately made to the paper?

A. It is.

Q. And why would they have been deliberately made?

A. If a person wanted to make an 1864 label that wasn't made in 1864 look like it was made in 1864.

Q. And did you examine the paper itself?

A. I did.

Q. And what did you find in this paper material?

A. So in the paper surface I found a material called calcite. We all know calcite from grade school as chalk. That's what you write on the school board with. And chalk has been applied to paper as coatings to make them smoother and less absorbent, but calcite chalk wasn't used as a coating for paper until the late 1920s. So that would be anachronistic to a paper purportedly made in 1864.

Q. Okay. Let's put this one away. You can go back and be seated. And to help speed this process along -- it's a fair amount of science. So I won't bring you up all the bottles, but I'll bring you up and down as necessary to help the jury understand your analysis.

Let's go next to the other magnum of purported Cheval Blanc. It's Exhibit 223 in evidence and Exhibit 25 in your

report. And we'll have some demonstrative graphics to assist you and the jury.

A. Right.

Q. Did you make any findings or observations about the edges on these labels?

A. I did. I found those suspicious nicks along the edges of this label, in addition, areas where the paper was thinned from the back. So the paper was just as thin, something had happened to the back of the paper. And as before, I found the glue that was used to affix the label to the bottle, it covered the cuts and nicks.

Q. And how about the discoloration on this label?

A. It was a dark material, and I don't believe that I identified it specifically in this case.

Q. But were you able to tell whether or not this was the kind of mold one would see on a bottle that purports to be from 1921?

A. Well, what I could tell, based on my training in graduate school, we had a class called integrated pest management, where we learned to identify beetles and mold and things like that. Mold has almost an appearance of something like a dandelion. It has a center stalk that goes up, spores are broadcast, and it has a root system. You don't see that in any of these labels at all. What you see is a discolored coating that looks like mold, and that's simply all it is.

Q. Did you examine the paper?
A. I did. I found styrene, as before. So again, this would be an anachronistic material to a paper purported to be 1921.
Q. And when was styrene first appearing in paper?
A. Styrene first appeared in paper shortly after the second World war; so the mid-1940s.
Q. And how about the inks, did you make any findings about the inks on this label?
A. I did. Again, I found pigment orange 34.
Q. And that, remind us once more, when was that patented?
A. Sure. 1936 was the patent date. Commercially important in or after the 1950s.
Q. And how about the fading on this label?
A. Again, the red appears worn, which might be a bit odd with this. This particular pigment is known to be fast to alcohol. Alcohol won't dissolve it. So this suggests that someone really rubbed this ink in order to make it appear worn like this.
Q. Is that -- that's similar to what we saw with the other 1921 Cheval Blanc, right?
A. Yes.
Q. Okay. Let's take a look next at Exhibit 205, which is Exhibit 27 in your report, and it is a magnum of purported 1921 Lafleur. Do you see any holes in this label?
A. Yes. As before, I saw a combination of holes within the

label itself, and along the edge I saw these nicks, these cuts, small cuts on the edge. As before, the glue that was used to stick the label to the bottle, it covered the edges of the holes and the nicks.

Q. And so while this magnum purports to be from the 1920s, when was the glue first available?

A. This again was white glue, polyvinylacetate, mid, late 1940s.

Q. And so was the -- were these cuts and the coating suspicious to you?

A. Yes, suspicious because they existed before the labels were glued to the bottles.

Q. Did you make any findings about the discoloration of this label?

A. Yes. There's a discoloration that's wiped over the surface. You can see a wiping motion hereon. Without magnification, it sort of resembles mold. Under magnification, it's clearly not mold.

Q. Okay. Let's talk about the next 1921 or at least magnum that purports to be 1921 Lafleur, Exhibit 206, and Exhibit 28 in your report. Same observations about the holes in this label?

A. Yes, holes within. An ordinary cut here or an ordinary tear, but as before, suspicious nicks and cuts to the edges. And as before, the adhesive, the glue that was used to stick it

to the bottle covered the top of the clipped edge of the paper, as you can see here in the photograph through the microscope.

Q. Was this that same glue that wasn't even around until the 1940s?

A. Polyvinylacetate.

Q. Is that right?

A. Yes.

Q. And did you have the same finding here, that the glue -- that the cuts appeared in the label before it was glued onto the magnum?

A. Yes.

Q. How about the discoloration of this label?

A. Discoloration of this label is similar to what we saw before, material wiped on. It has the appearance of mold and mildew, but under magnification, you don't see any evidence, no features that consist or suggest mold at all.

Q. Okay. Let's take a look at Exhibit 225, which is a 1921 or purported 1921 Petrus. It's Exhibit 29 in your report, Mr. Martin. And, again, we see holes in the middle of the label?

A. Yes, here.

Q. What does that tell you?

A. Here and here, and as before, we see that the glue covers the edge of the holes; so the holes existed before the label was glued to the bottle.

Q. Now, earlier you showed the jury a 1921 Cheval Blanc with an accordion tear. Are these holes accordion tears?
A. No, these aren't accordion tears. These are very sharp, angular, clipped tears and holes.
Q. What does that tell you?
A. It tells me that they were deliberately made.
Q. And what kind of glue was used?
A. Polyvinylacetate, as before.
Q. The jury is going to get very familiar with polyvinylacetate.
A. I apologize for that.
Q. I'll ask you one more time. That glue wasn't commercially available until the 1940s; is that right?
A. That's right.
Q. And how about the discoloration on this label?
A. The discoloration on this label, shellac, as we found before.
Q. Okay. And how about the ink used in this label?
A. In this, I actually found two pigments, one of which is shown here, the pigment orange 34. Remember, the patent date was '36, but it didn't become commercially important until the '50s. I also found pigment blue 15, which was first used in or around 1935; so there wasn't just one anachronistic pigment, there were two in this case.
Q. Okay. Let's look at Exhibit 227, which is a bottle that

purports to be a 1928 Latour. It's Exhibit 30 in your report.
A. Okay.
Q. Let's first talk about the discoloration on this bottle. Did you notice anything about the discoloration?
A. I did. So from a distance, the label appears discolored and actually appears moldy. When mold attacks paper and while it's living, it's often a black color or white color. When it dies, it releases chemicals into the paper to cause discoloration. The paper can become a blue, it can become purple, it becomes a range of different colors.

This is more of what we think we're seeing here. However, when you look at the label through a microscope, you see that that's not mold, but those are actual individual dots of ink. Has anybody looked at an inkjet print with a magnifying glass? And you can see the individual dots of ink. That's the sort of thing that you're seeing through the microscope.

Q. And what kind of ink is this?
A. Well --
Q. What did you notice about the ink here?
A. When I sampled the ink, I found two materials. I found epoxy and I found a material polyethylene terephthalate. It's called PET, commonly known as the polymer that Coke bottles are made out of. And this material did not become widely used or used for this purpose until the 1950s.

Q. This jury is familiar with Coke bottles. They've heard about in this case but that's an inside joke. You wouldn't get it?

A. That was C-o-k-e, not K-o-c-h.

Q. So the ink here, the PET ink, that would be an anachronistic use?

A. It would.

Q. And how about the inks themselves, the coloring of the inks?

A. Well, one of the inks, the yellow -- for example, the yellow dot right there is a pigment called pigment yellow 17. It was first marketed in 1935, about seven years after the date, but it didn't become commercially important until after the 1940s.

Q. So in your view, what's the earliest this label could have possibly -- this label that purports to be a 1928 Latour, could possibly have been printed?

A. In the 1940s or later, just based solely on the ink.

Q. Okay. Now, let me -- Let's do a little show and tell. If you could come down, and let's take a look at the label itself?

A. Right.

Q. You studied the paper on this label; isn't that right?

A. I did.

Q. And what did you find in the paper?

A. Well, I used a blacklight. Hold that. And when I examined

it through the blacklight, I found that the paper lit up blue, fluoresced brightly. It fluoresces like the white of my shirt. It's because laundry detergent has optical brightening agents, and if you look at a piece of paper without optical brightening agents, it's a dull purple versus a bright blue. This bottle is fluorescing a bright blue. It tells me optical brightening agents were used to make this paper.

Q. Let's, while I have you here, why don't you take a look at -- there's another bottle of 1928 Latour in this case, Exhibit 200. Is there optical brightening agent on that bottle, on that label, I should say?

A. So there's optical brightening agent in here, and if you look closely, it's a very bright blue, as opposed to a dull purple. So we have optical brightening agent in the label, as well.

Q. So for both of these bottles, you've seen the optical brightening agent; so what does it say about these bottles of purported 1928 Latour?

A. Optical brightening weren't used until about 1950s; so the earliest the paper could have been made would have been about 1950 or later.

Q. Ah-hah. How about how the paper was glued onto the bottle?

A. In this case, the adhesive was different than what we talked about before. This is an adhesive called Polyvinylpyrrolidone. Let's call it PVP. PVP was patented in

1939, but its use as a glue began around 1960 as glue sticks. These are the sticks that my kids use to glue paper to paper and arts and crafts projects.

Q. Okay. So this would be yet another unexplained anachronistic use on the bottle of '28 Latour?

A. Yes.

Q. And we started talking about the other bottle of purported '28 Latour, where you mentioned there was optical brightening agent, on Exhibit 200. What else did you find about the discoloration on this label?

A. Right. As before, the discoloration on this label also consisted of the printed ink. So what appears to be stains is actually dots of ink.

Q. Did you also find the same epoxy and PET?

A. I did. Yeah, I did.

Q. And we already talked about the optical brightening agent on this paper. And how about how this label was affixed to the bottle?

A. PVP, as well. So something like the glue stick.

Q. Let's talk next about Exhibit 215, which is a 1928 -- purports to be a 1928 Petrus. It's Exhibit 32 in your report, Mr. Martin.

A. Yes.

Q. Let's start with the edges of this label. What did you note about the nicks and cuts on the edges of this label?

A. As with some of -- many of the other labels that we've seen so far, except for the last two, we have these angular, sharp cuts in the edge, here and here. And in this case, this is a good photograph. This not only shows the glue that was used to stick it on, which covers the cut, but it shows some of the black material that was wiped across the label.

So the black material that was applied to the label to make it look like mold, when it was wiped across, it caught the edge of the paper there, and there's a slight buildup of that material. That's what looks dark and black there and what's accumulated here.

Q. Now, did you consider that this label could have naturally been cut in this way?

A. No.

Q. Why not?

A. Well, for one, the angularity of the cut and sharpness of the cut. No. 2, that the glue coats the edges; so this label was altered before it was glued to the bottle.

Q. And you started talking about the discoloration. Do you think that's naturally occurring discoloration on this label?

A. I don't. In large part because it's wiped across the surface, and what I'm talking about, that discoloration, I'm referring to the black discoloration here, not the color discoloration that could have been caused by wine.

Q. And how about the inks used on this label, what did you

find?

A. The red ink used in this one was a combination of pigments that we found before, which included pigment orange 34, patented in '36, commercially important in 1950 or later, but 1928 vintage.

Q. Let's talk about the next 1928 Petrus. Here, we see holes in the middle of the label. Any findings with respect to those holes?

A. Yes. These holes, as well, were coated with the adhesive used in this case, polyvinylacetate again.

Q. And, again, that is anachronistic?

A. Yes.

Q. And let's talk about the edges, same findings here on the edges?

A. Yes. As before, you can see the sharp nicks. Also, again, coated with the glue. So they existed before the bottle was applied to the label or before the label was applied to the bottle.

Q. How about the discoloration?

A. Discoloration again was, in this case, the '27 Petrus, this was identified specifically as shellac. And, again, you can see where it's built up on the edge here, where it was wiped across the bottle.

Q. Okay. Let's move on to the 1945 Lafite. This label appears quite yellow. Is that natural?

A. No, and there's a good explanation. Under the microscope you can see that the yellowness is actually ink that's printed right on the label. If you look closely at the numbers, there's a white halo around them, and the discoloration almost goes up to the numbers but doesn't cover the numbers. So the discoloration is ink; it's not yellow paper.

Q. This is Exhibit 222. Let me ask you about the edges of this label. There are no cuts on the edges, but did you find anything else suspicious?

A. I did. Do we have a graphic?

Q. Sure. It's up.

A. Thank you. So under the microscope you can see that the yellow, as before, it didn't extend all the way up to the date. The yellow doesn't extend to the edge of the paper; so it suggests to me that this was a scanned copy or a photocopy that was printed on a larger piece of paper and then cut by hand, applied to the bottle.

Q. And how about the pigment used in this paper?

A. The pigment used in this paper was pigment yellow 180. The earliest mention I can find of pigment yellow 180 in the literature is that it started in the 1980s. So this would be an anachronism to 1945, and the yellow pigment I'm speaking of would be these yellow dots here.

Q. So just tell us in layperson's terms what is your conclusion, what is this label?

A. I believe this is a modern photocopy of probably another label that then was attached to this bottle.

Q. Let's talk about Exhibit 207 next. It's a magnum of purported 1945 Lafleur, and it's Exhibit 37 in your report. Did you make any findings about the cuts on the edges of these labels -- or, I'm sorry, of this label?

A. I did. This cut was actually quite severe, and it was actually quite a long cut in the label, inconsistent with a tear. The adhesive, again, coats the edges; so we have that existed before it was applied to the bottle.

Q. So in your experience what, how does one make a cut like that?

A. Well, in this case, I would imagine that somebody used either an X-ACTO knife or a pair of nail clippers or tweezers or something like that to clip the edge of the paper off.

Q. What type of glue did you find?

A. Polyvinylacetate.

Q. That's that same famous polyvinylacetate. How about the discoloration in the label?

A. The discoloration in this case was an acrylic polymer. This was something I hadn't identified on other bottles before, but acrylic polymers didn't become used as coatings until the late 1940s or 1950s.

Q. There's another purported 1945 Lafleur magnum in this case, it's Exhibit 130, which is Exhibit 38 in your report, and I

think we're getting used to your findings; so we can go a little bit faster here. Similar findings about deliberate cuts made to the edges of this label?

A. Yes, sir.

Q. Similar findings about adhesive coated --

A. Yes.

Q. -- on top of the edges?

A. Yes.

Q. And did you also find the same polyvinylacetate glue used for this label?

A. I did. I found that, and I found shellac as the dark material spread on the surface.

Q. And, again, the shellac you believe was spread deliberately to give the appearance of age?

A. Yes.

Q. Exhibit 208 is a purported 1949 Lefleur magnum. It's Exhibit 42 in your report. Do you see the same suspicious cuts made to the edges of the label?

A. I do, the suspicious angular sharp cuts, and here again you can see.

Q. And same kind of discoloration on this label?

A. Similar discoloration that, from a distance, looks like mold but is not mold.

Q. Okay. Let's go to the next purported 1948 Lafleur magnum. It's Exhibit 43 in your report. Exhibit 209 in this case.

Here we start seeing those holes in the middle of the label?
A. Right.
Q. And what does that tell you?
A. Glue coated the edge of the hole. The hole existed in the label before it was glued to the bottle.
Q. And how about the cuts on the edges?
A. The same thing, these sharp nicks, sharp edges of the cuts coated with glue used to affix the label to the bottle. These nicks existed before the label was glued to the bottle.
Q. And how about the discoloration of this label?
A. Discoloration of this label appeared suspicious to me, as well. This has that general appearance of mold but clearly, under magnification, it's not mold.
Q. Okay. Let's look at the magnum of 1950 Lafleur, which is Exhibit 213 in the case, and Exhibit 47 in your report. Here we see some more severe cuts to the edges of the label. Did you make any findings about those cuts?
A. I did. You can actually see that almost the entire edge of the label has been cut off. Under magnification, you can see that the cut is tapered. The cut was made on an edge as it went down. Let me just check.

If I recall correctly, this is one of the few bottles where the glue does not coat the edge of the cut, an indication that this label was attached before it was cut, and a probable reason for that is the thickness of this paper. It's a coated

paper. It's a very stiff paper. It would be much easier to cut like this in a very severe way if it was mounted to something hard.

Q. How about the discoloration on this label?

A. The discoloration is shellac, as we've seen before.

Q. Okay. The next magnum is another purported 1950 Lafleur. Any findings about the edges of this label? It's Exhibit 44 in your report.

A. Thank you. These edges are cut like the last set of labels on the last bottle.

Q. And did you also find the same suspicious discoloration of this label?

A. I did, and I identified that as shellac again.

Q. The next magnum, once again, we see another purported 1950 Lafleur, Exhibit 45 in your report and Exhibit 211 in this case. Same suspicious edges?

A. Same suspicious edge, except that the glue coated the edge of this label. This label was not cut as severely as the other four 1950 Lafleurs; so this was nicked, but it had shellac spread on the surface to resemble the mold.

Q. Okay. So you also found suspicious discoloration here?

A. I did.

Q. And when -- we've been using the term suspicious, but do you believe it to have been intentional discoloration?

A. I do believe it to be intentional, yes.

Q. Okay. Let's take a look at another purported 1950 Lafleur. It's Exhibit 212 in the case and Exhibit 46 in your report. Do you find again the same suspicious cuts to the edges?

A. I do. As with a couple of the other, as with three of the preceding bottles, cut with a sharp edge, probably a razor blade or an X-ACTO knife after it was glued to the bottle.

Q. And how about the coloring on this label?

A. Shellacked again. This is what cleverly looks like mold.

Q. And the next exhibit, 214, another purported 1950 Lafleur magnum, Exhibit 48 in your report. Here, do you also find the same suspicious cuts to the edges?

A. I did. The same tapered cuts, again, made after it was glued to the bottle.

Q. And the same discoloration?

A. Yes, there's shellac again.

Q. Okay. Let's look at Exhibit 228, which is yet another bottle at issue in this case. It's another purported 1950 Petrus. It's Exhibit 50 in your report. Do you, again, find the same deliberate cuts to the edges of this label?

A. Yes. This goes back to the earlier bottles, before we looked at the '50 Lafleurs, which were cut with a sharp blade. These angular nicks cut from the edges, glue coating the edge, nick made before the label was attached to the bottle.

Q. And how about the discoloration on this label?

A. Again, it's a dark material that resembles mold but is not

mold.

Q. Let's go to the next purported 1950 Petrus magnum. It's Exhibit 217; Exhibit 51 in your report. Same findings, deliberate cuts made to the edges, Mr. Martin?

A. Yes.

Q. Same finding about adhesives on top of the cut?

A. Yes, glue coating the edges; therefore, the cut existed before the label was applied, and again, shellac being used to resemble mold.

Q. Let's go to the last bottle at issue here. It's Exhibit 218. The final purported 1950 Petrus magnum, Exhibit 52 in your report. And once again, do you see the same suspicious cuts to the edges of this label?

A. I do. Coated with adhesive again.

Q. Okay. So, Mr. Martin, we've gone through these bottles one by one and the characteristics you found. There's a summary up there for the jury. Did you make any conclusions generally with respect to the set of these 24 bottles?

A. I did. I found that the deliberate cuts, the deliberate physical alteration in many times -- in many cases before the label was applied to the bottle, combined with the artificial discoloration, in many cases shellac intended to resemble mold, combined with the anachronistic materials that clearly demonstrated that the labels couldn't have been printed within even a couple of years of the vintages, it suggested to me, it

indicates to me, points me to one conclusion, that the bottles -- that the labels attached to the bottles aren't what they purport to be, that they're not original labels applied to those bottles. In essence, they're forfeit.

Q. Have you concluded that these labels are counterfeit?

A. I have, yes.

Q. And what does that conclusion that the labels are counterfeit lead you to believe about these 24 bottles; that is, the objects to which these counterfeit labels are attached?

A. So when I started my testimony, we talked about these bottles being historic objects, being objects -- sure, they had wine in them, but they're historic bottles, capsules, labels, they're, in some cases, 1864 purportedly.

The label is an integral part of that. It's an important part of that, and to find a label like this, in each case suspicious cuts, alterations, discoloration, to me, it raises serious doubts about the authenticity of the entire historic objects, all 24.

(Continued on next page)

BY MR. KABA:

Q. So in your experience, given what you have concluded about these counterfeit labels, could these 24 objects be represented as genuine?

A. I don't believe so.

Q. Why is that?

A. To be represented as genuine objects, to be represented as a collection --

MR. CIALONE: Your Honor, I object to this. There is no evidence that this witness ever worked for a wine auction house, ever been involved in the sale of wine, or any basis to opine on whether a particular bottle of wine can be represented as genuine. He's never been involved in anything having to do with wine.

MR. KABA: The witness here has extensive experience authenticating or determining whether objects are genuine or not, and that's what he's testifying to. The object --

MR. CIALONE: He has no experience in whether wines are genuine.

THE COURT: You can address it on cross-examination. I'll let him respond, and the jury is the one that will decide what to credit.

BY MR. KABA:

Q. So why do you believe that these objects -- in light of the counterfeit labels, why do you believe these objects should not

be represented as genuine?

A. In this case we're talking about a set of objects that represent five different wine makers, I believe at least eight or nine or ten different vintages, spanning years from 1864 to 1951, and they share so many of the same features in terms of deliberate cuts to the edge, deliberate alteration to make them appear old, evidently anachronistic material, in my experience, and I don't have experience authenticating wine, but I've got a lot of experience studying the authenticity of art objects and collectible objects. This raises questions to me about the authenticity of these works, and I would not represent them as being genuine with these labels attached to them as they are.

MR. KABA: No further questions at this time, your Honor.

THE COURT: Okay. Thank you. Do you want to start cross or shall we --

MR. CIALONE: I'm not going to finish today for sure, your Honor. It's Friday. Your call, but I think the jury might appreciate the break from chemistry. But I'm happy to do -- it's completely up to you or if you want to ask the jury.

THE COURT: Are you all ready to start the weekend?

Okay. All right. I think I'll let you go. It's Friday, after all. You've been very patient this week, which I appreciate.

Ladies and gentlemen, I'm going to let you go for the

weekend. We will start back on Monday morning. And I just want to remind you to keep an open mind about the case. We're still in plaintiff's part of the case, which is plaintiff's evidence. There's obviously been a lot of examination by both sides, but when plaintiffs complete their case on Monday, then defendants will have a chance to call additional witnesses and present more evidence if they choose to do so.

So please keep an open mind and please don't talk about the case with anyone over the weekend. Think about other things. And please also don't do any research on the case. Don't look online about anything. And as I said, no Facebook, no Twitter, nothing like that talking about the case.

So once again, thanks for your patience. Have a good weekend, and I'll see you all on Monday morning at 9:30.

(Jury excused)

(Continued on next page)

(In open court; jury not present)

THE COURT: Please be seated.

Okay. Mr. Kaba, this is plaintiff's final witness, you said, right?

MR. KABA: Yes.

THE COURT: Okay. All right.

MR. KABA: Final witness in our case in chief, of course.

THE COURT: Right. So I assume at some point on Monday we'll begin --

MR. SHARTSIS: Yes, your Honor.

THE COURT: -- defendant's witnesses.

MR. SHARTSIS: Yes. Your Honor, I wonder if you have our hour count?

THE COURT: Yes. Looks like what I have is, for plaintiffs, it looks like about 18½ hours have been used. For defendant I have just about 16 hours used.

MR. SHARTSIS: By my calculation, your Honor, that means we would have about 16 hours left in the case before closing, except for reserving time for the second phase.

MR. KABA: I believe we have about 15½ hours.

THE COURT: Oh, together. Yeah, that sounds right.

MR. SHARTSIS: And the reason I raise it, your Honor, I think I mentioned I have a hearing in Orange County a week from Tuesday which it would be impossible for me not to be at,

and I just -- I don't mind if the jury's deliberating while I'm gone, but I'd like to be here for closing.

And just a second request in terms of timing. I hadn't advised the court, your Honor, I coach the University of California at Berkeley undergraduate mock trial system, and they're going to be competing in the national championships this coming Friday night in Washington, DC, and if it's at all possible, I'd like to be with my team at that tournament, and I assume we're sort of headed towards a closing on Thursday at this rate if there are 15 hours left for -- not counting holding time for a rebuttal case. It would be five hours a day, we would be done by Wednesday, we'd be giving closings on Thursday, and I just wanted to raise that with the court in case we need to manage our time. If the court can't do it, you know, I'll miss the first portion of the tournament, which I'd prefer not to. It starts in the evening on Friday in Washington, DC, and continues Saturday and Sunday, and it's a little bit of a squeeze for me with all of these things.

THE COURT: Well, I guess, yeah, we'll do our best and we'll hopefully get to closings Thursday, if we can.

MR. SHARTSIS: Seems like we're headed about there.

THE COURT: Yeah, I mean, I think that's the hope. So, you know, we'll move it along and do what we can.

MR. SHARTSIS: I appreciate that, your Honor.

THE COURT: And I'm thinking in terms of a charge

conference, I'm hoping to be able to give you all a proposed jury charge which I guess really -- well, yeah, it will be a proposed jury charge I'm hoping on Monday, and then perhaps Tuesday after court we could talk about it.

MR. SHARTSIS: That would be appreciated.

MR. KABA: Sounds great.

THE COURT: Okay. Great. Anything else?

MR. KABA: No.

MR. SHARTSIS: No, your Honor.

THE COURT: Okay. Have a great weekend, everybody.

ALL COUNSEL: Thank you.

(Adjourned to April 8, 2013, at 9:30 a.m.)

TRIAL EXHIBITS RECEIVED

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1042 1404

1044 1467

106A, B and C 1486

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

WILLIAM I. KOCH,

Plaintiff,

v. 07 Civ. 9600 JPO

ERIC GREENBERG, et al.,

Defendants.

----------x

New York, N.Y.

April 8, 2013
9:50 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge
and a jury

APPEARANCES

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FRANK ALBERT CIALONE, Esq.
Of counsel

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

(Trial continued)

THE COURT: Please be seated. Good morning, everyone. Let's see. I've received a number of letters. Can we address these at the break or do we need to address them now.

MR. SHARTSIS: The break is fine.

THE COURT: Okay. So we can bring in the jury? Okay.

(Jury enters)

THE COURT: Please be seated. Good morning, ladies and gentlemen. Welcome back. I hope you had a good weekend. We're starting the cross-examination of Mr. Martin. Mr. Martin, if you'd please come back to the witness stand.

(Witness resumes stand)

Okay. Mr. Martin, you are still under oath. You were sworn last week. Mr. Cialone.

MR. CIALONE: Thank you, your Honor.

JAMES MARTIN,

called as a witness by the Plaintiff,

having been duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. CIALONE:

Q. Good morning, Mr. Martin.

A. Good morning.

Q. You examined the bottles that you discussed last week in November 2010 and in April 2011, correct?

A. Yes.

Q. And after -- and shortly after that, you examined some samples in your laboratory?
A. After each visit, yes.
Q. And after doing that analysis, you prepared a report, correct?
A. I did, yes.
Q. And since preparing the report, have you done any further analysis on the labels of the 24 bottles at issue?
A. I haven't done any further chemical analysis on the labels, no.
Q. Have you done any other sort of analysis?
A. Well, in the roughly two years since I issued the report, I've thought a lot about the case and the examination and what I did, yes.
Q. Other than think about the examination, have you done any work?
A. I'm not clear what other work that would be.
Q. So you don't know of any?
A. I've thought about the case, but I haven't done any additional analysis.
Q. Have you done any research?
A. Not that I'm aware of, no.
Q. Okay. And since preparing your report and doing the thinking that you've done, have any of your opinions changed?
A. I don't believe any of my opinions have changed.

Q. Thank you. And at the time you prepared your report, your company, Orion, had done more than 1,500 investigations, correct?

A. Yes.

Q. How many of those involved the analysis of labels on wine bottles?

A. None.

Q. You testified last week that the 24 bottles at issue in this case cannot be sold as genuine, correct?

A. I don't know if that's exactly what I said.

Q. How many times has an auction house retained you or your company to determine if a bottle of wine can be sold as genuine or authentic?

A. No times.

Q. Sotheby's is a client of Orion, correct?

A. Yes.

Q. And Christie's is a client of Orion?

A. Yes.

Q. Have they ever retained Orion the determine if a bottle of wine can be sold as authentic?

A. No.

Q. So they're clients of your's through their other departments; their art department, for example?

A. Correct.

Q. But not wine, right?

A. Correct.
Q. Prior to preparing your report for Mr. Koch, had you ever examined labels on bottles of wine other than just visually, just looking at them?
A. No.
Q. Had you ever used a microscope, prior to doing the examination for Mr. Koch, to examine samples of labels from wine bottles?
A. No.
Q. Ever used a blacklight?
A. To examine labels from wine bottles?
Q. Yes. Thank you.
A. No.
Q. Not to see the stars in your room at night.
Had you ever used -- I'm going the use the abbreviation -- FTIR on labels on wine bottles prior to doing this case?
A. No.
Q. Had you ever used RAMAN on labels on wine bottles prior to this case?
A. No.
Q. Had you ever heard of anyone who used any of those techniques on labels on wine bottles prior to this case?
A. No, but I suppose it's important to point out that I've used blacklight, stereomicroscope and FTIR and RAMAN to examine

ink on labels on objects for about the last 20 years.

Q. Oh, I'm not questioning your expertise. I'm questioning whether the techniques you used are ever used in the analysis of labels on wine bottles outside of this lawsuit. Correct, they're not?

A. I don't know what's used to analyze wine bottles.

Q. All right. Now, before you prepared your report, did you do anything to educate yourself about the labeling practices of the Chateaux that are identified as the producers of the wines at issue?

A. No.

Q. You understood, I believe you testified to this on Friday, that wine is bottled a couple of years after the vintage date, correct?

A. I believe that's so.

Q. Did you do anything to determine when the bottles are actually labeled?

A. No.

Q. Did you do anything to determine how long a Chateau might keep a bottle of wine in the Chateau's wine cellar before putting a label on?

A. No.

Q. It could be decades, as far as you know, right?

A. I wouldn't know.

Q. You also didn't determine if labels on wine bottles are

typically affixed by Chateaux or by Negociants or by other middlemen, correct?

A. No.

Q. Not correct or you did not do that?

A. I didn't do that.

Q. My fault for asking the question that way.

You did not determine how close in time relative to the vintage, the label is printed for a bottle of wine?

A. In terms of a general practice?

Q. Yes.

A. No.

Q. The general practice of the Chateaux at issue for the vintages ranges from 1864 to 1950?

A. No.

Q. You don't know if Chateaux will have labels printed in a single run and then put the dates on them afterwards, right?

A. I wouldn't know that, no.

Q. Now, you understand that Mr. Koch has had wine authentication experts examine 20 percent of his collection; have you heard that testimony?

A. No, I haven't heard that.

Q. Mr. Koch so testified. Before you prepared your report, did you examine the labels on any of the bottles of wine that wine authentication experts have determined to be genuine?

A. I don't know if wine experts determined any bottles to be

genuine; so no.

Q. You have no idea if any of the 40,000 bottles in Mr. Koch's collection, an authentication expert has looked at it and determined them to be genuine?

A. I'm a scientist. I wouldn't know that, no.

Q. And Mr. Koch's counsel didn't ask you to examine bottles other than the ones Mr. Koch claims were counterfeit, correct?

A. Correct.

Q. So you don't know if bottles that a wine authentication expert, like Mr. Egan, would say is genuine would have what you would consider anachronistic features, correct?

A. I wouldn't know that.

Q. Do you understand what reconditioning of wine bottles is?

A. I don't have any experience, just a general understanding that something is done to the wine after a period of time.

Q. Done the wine or done the bottle?

A. Done to the wine bottle, done to -- yeah, I don't have any specific knowledge.

Q. Okay. And it can include replacing the label? Do you have any understanding of that?

A. I wouldn't know that.

Q. And in your report, you ignored evidence that wine bottles had been reconditioned, correct?

A. No, I didn't ignore evidence of that, sir.

Q. You disregarded it in determining whether bottles were

anachronistic, correct?

A. No. I didn't focus on it in my analysis.

Q. Well, you didn't focus on it, or you made your determination that there were anachronisms without regard to alleged reconditioning?

A. I believe what you're referring to is a footnote in my report, where I indicated that in determining whether something was anachronistic, I focused on the date on the label without dates on any other labels on the bottle, because my focus was the front label.

Q. And is there a difference between not focusing on reconditioning and disregarding reconditioning?

A. I don't understand -- I think that's called a difference without a distinction, I mean, to me.

Q. A distinction without a difference?

A. Yes.

Q. There's no difference. In your report you said you relied on the vintage date as indicated on the Chateau label without regard to any alleged reconditioning, correct?

A. That's correct. I based may anachronism on the date on the label, on the front label.

Q. So if a bottle said it was reconditioned in 1980, you didn't test the labels to see if they could have been printed in 1980, you looked at the vintage date?

A. Correct. I had no information whether the bottles were

reconditioned or not.
Q. Well, if there was a label on the bottle saying it was reconditioned, would that be such information?
A. Potentially, but I deal with a lot of art objects, a lot of collectibles that have false labels applied for the intention of misleading.
Q. Did you ask Mr. Egan if he thought that the reconditioning labels were real?
A. I've never spoken with Mr. Egan.
Q. You've had art objects that have had false reconditioning dates put on them, right?
MR. KABA: Objection, misstates testimony.
Q. You just testified?
A. False reconditioning dates?
Q. Yes. I think that's what you just indicated.
A. I think I've stated that I've had other art objects where there have labels and other pieces of paper attached, where the label has been evidently fraudulent.
Q. But if you have label on a wine bottle that says the bottle has been reconditioned in 1980 and the technology used to print the labels is consistent with 1980, that was something you disregarded, right? You only looked at the vintage date?
MR. KABA: Objection, your Honor. Incomplete hypothetical.
A. As I --

THE COURT: Overruled.

A. -- mentioned before, I only focused on the date on the front label, not the myriad of other labels on the bottles.

Q. Now, we have this 1864 Latour here that you spoke about. This is Exhibit 201. And Mr. Koch alleges that this bottle was sold to him as lot 401 in the Zachys October 2005 auction, and the description in the catalog of that lot said, in part, "believed recorked in 1980, as 1980 is visible on the cork." Did you know that? Were you aware of that?

A. No.

Q. Did you check the see if the cork said 1980?

A. I didn't focus on the corks at all, no.

Q. Would you agree with me that a cork that says 1980 on a bottle that's labeled 1864 is anachronous?

A. Could you say that again, please?

Q. Sure. A cork that says 1980, it has the date 1980 on a bottle with an 1864 label is anachronous?

A. As anachronistic as the label on the bottle, yes.

Q. And Mr. Koch was aware of that anachronism, assuming this is actually the bottle he bought as lot 401?

MR. KABA: Objection.

THE COURT: Sustained.

A. I'm afraid I don't know what Mr. Koch --

THE COURT: When I sustain the objection, you don't -- you don't need to answer.

THE WITNESS: I'm sorry. This is my first time testifying.

Q. This is not your the first time being an expert witness, though, right?

A. No.

Q. You've been an expert witness many times?

A. Yes.

Q. Approximately how many?

A. Dozens.

Q. You've been retained in dozens of different lawsuits and paid to provide expert testimony, correct?

A. I've been paid for my time and expenses to conduct objective, independent studies, yes.

Q. And you've also testified at depositions an expert witness, correct?

A. Yes, I have.

Q. So this is just the first time that it's actually gone all the way the court, correct?

A. That's correct.

Q. Thank you. Now, you found polyvinylacetate in the adhesive on this label, correct?

A. So I haven't memorized all the materials I found on the 24 labels.

Q. Okay.

A. But if I testified Friday I found polyvinylacetate, then I

would have, yes.

Q. Would that adhesive on this label be consistent with a 1980 reconditioning date?

A. I wouldn't know because polyvinylacetate, while it was introduced as an adhesive in the late '40s, it's continued to be introduced as an adhesive in every year since. So there are formulations of polyvinylacetate that have only been introduced in recent years.

Q. Is that something you could have determined, whether the formulation of polyvinylacetate on this label was developed before or after 1980?

A. It's possible.

Q. Did you do that?

A. I didn't do that.

Q. Because you disregarded the fact that the cork said 1980 and the catalog said it was believed to be reconditioned in 1980?

A. I didn't disregard the fact that the cork said something. My focus was not the corks. I didn't look at any corks.

Q. Let me correct that. You didn't disregard it. Nobody told you that that was stated in the catalog that Mr. Koch claims he relied on in buying that bottle, correct?

A. I believe so, yes.

Q. Now, we have this 1945 Lafite with a yellow label, and I believe you said this could be a photocopy label?

A. It looks like a modern photographic copy, yes.
Q. Could it be a label printed from a laser printer?
A. I suppose so. I don't have expertise in exact printing processes.
Q. How would somebody go about photocopying Chateau label? You'd have to get one off the label, right?
A. I've never done it before; so I wouldn't know.
Q. Do you know how one would go about printing a Chateau Lafite label from the Internet?
A. I would have to speculate that somebody would download an image and print it.
Q. Have you tried that? Have you done a Google image for Chateau Lafite labels?
A. I don't believe so.
Q. So it could well be simply a label that somebody printed from the Internet and cut the paper and glued it on, correct?
A. I suppose so.
Q. Nothing that you found is inconsistent with that, correct?
A. I don't recall examining with a purpose of trying to determine whether that was the case or not; so ...
Q. Well, when you said it appears it could be a modern photocopy label, did you intend the exclude that somebody could just have printed that label from the Internet on a laser printer?
A. In looking at the large collection of objects I looked at,

and finding so many incidents of anachronistic materials which pointed the labels that weren't original and intentional alteration, I assumed that someone at sometime was doing something that didn't seem proper or perhaps wasn't the way things ordinarily would be done; so ...

Q. But this was the only one that was cut from the larger piece of paper?

A. That is the only one that I found evidence that it was cut from a larger piece of paper.

Q. Okay. Now, you don't have any opinion as to what is inside any of these bottles that you examined, correct?

A. I suppose there is liquid and whatever other contents there are, yeah.

Q. Okay. Other than that, no opinion?

A. No.

Q. Now, in your report, you haven't stated any opinion as to who altered the labels, correct?

A. I don't believe so.

Q. You've not stated any opinion as to whether that was done by one person or many different?

A. I don't believe so, no.

Q. You've not stated an opinion as to when the label on any individual bottle was altered?

A. I don't believe so.

Q. You've not stated an opinion as to who put the labels on

the bottles?
A. No.
Q. You have not stated an opinion as to when the labels were affixed to the bottles?
A. No.
Q. You've not stated an opinion as to whether the same person put the labels on each of these 24 bottles?
A. No.
Q. You've not stated an opinion as to when the labels were made, correct?
A. In certain cases I think I've stated an opinion as to when the earliest the labels could have been made, based on the material anachronism.
Q. For example, if a label has red dye No. 2, when is the earliest date it could have been made?
A. I didn't identify red dye No. 2.
Q. Sorry. If a label has a particular pigment in it, I believe you testified to a dye that was patented in 1936, correct?
A. Pigment orange 34.
Q. Thank you. Pigment orange 34. Red dye No. 2 is the M&M color probably.
A. Could be.
Q. I remember that from you.
So if a label had pigment orange 34, the earliest it

could have been produced is when?
A. Well, the patent date would have been around 1936. It became commercially available in the 1950s.
Q. Okay. And other than being able the affix that earlier date on it, either the 1936 or the '50s, you can't say when the label was printed, correct?
A. No. It would require a lot more work to go beyond a class identification to a specific product identification; so for example, to identify when a particular pigment product was first used.
Q. You can only say the label was created sometime between the earliest commercial use of that dye and the day you examined the labels, correct?
A. Sure, yes.

MR. CIALONE: Thank you. No further questions.

THE COURT: Is there any redirect?

MR. KABA: Yes, briefly, your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. KABA:

Q. Mr. Martin, let's just start off with this same way that your cross-examination started off. You were asked about whether you examined labels on wine before; is that right?
A. Yes.
Q. Now, you were beginning the tell the jury how, although you

haven't examined labels on wine, you have examined many other labels; isn't that right?

A. Yes, that's correct.

Q. And on what types of objects have you examined labels?

A. Everything ranging from fine arts to things like paintings to baseball memorabilia, trophy balls from 1864, that kind of thing.

Q. What does examining a label tell you?

A. Well, there's one case that I recall specifically, out of the many cases I've worked on, where there was a painting, two paintings, and the analysis of the materials of the painting itself I didn't find an anachronism in the paint used to create the objects.

But integral to the objects, integral to the paintings, glued to the back of the paintings were labels, which gave the name of the artist and the date. And the date was about 1836, about 1844. And my analysis with FTIR showed that the ink contained a chemical that wasn't used in inks until after 1960.

So that proved that the labels were absolutely not genuine because they were affixed to the object and were part of the integral object that called into question the entire object, as well. And the opinion was that the works were not authentic.

Q. So in examining the labels on the bottles at issue in this

case, did you think prior wine authentication experience was necessary?

A. It would have only been necessary if I was asked to authenticate the wine, and if I was asked the do that, I would have declined because I don't have any expertise on authenticating wine.

Q. What do you have expertise authenticating?

A. Authentication is an interesting word. So the authentication process, I liken to a three-legged stool. The first leg of that stool is consortia or expertise, it's the expert's opinion.

The second leg of the stool is provenance. It's the documented history of the work. Where has it been? Who's it been sold by? Is it featured in a catalog?

And the third leg is what I do. I examine the physical substance of the work to see if it's consistent with what the experts say and what the provenance says. So my expertise is working in authenticity studies to see if the object is consistent with its claimed attributes.

In this case, I'm looking at labels; so I was asked to determine if the labels are consistent with the date on the label and that's what I did.

Q. And before you began examination of these labels, were you told whether or not the bottles were suspected to be counterfeit?

A. No.
Q. So your examination was independent of anything else?
A. Yes. I had a general suspicion that there were questions about the bottles, that they were -- you know, questions had been raised, or that there was a suspicion that they might not be genuine, but I didn't have any specific information about particular bottles, no.
Q. Let's talk briefly about this Exhibit 201, which you were cross-examined on. It purports to be an 1864 Chateau Latour. You were asked a series of questions, Mr. Martin, about whether or not this bottle had been reconditioned. Do you recall that?
A. This morning?
Q. Yes, just now.
A. Yes.
Q. And you were asked if you knew the bottle had been reconditioned in, for example, 1980; do you recall that?
A. Yes.
Q. New, let's pursue that hypothetical just a bit further. Even assumption the bottle was reconditioned in 1980, even assuming the label was put on in 1980, do you still find suspicious features of this label?
A. Well, the label, as I testified last week, is evidently a false label. The coating that was applied to the label wasn't produced until about 60 years after the date on the label. The adhesive used to attach it wasn't first used as a glue until

the late 1940s.

So assuming a hypothetical that the bottle was reconditioned in 1980 and, I guess, assuming that, at some point, something might have been done to the label, to me, in my expertise, looking at questioned objects, that still doesn't explain why somebody would intentionally alter the label to make it old.

Q. And explain for the jury what you mean by intentionally altering the label to make it look old?

A. As we discussed, and actually looked at together with the slides last week, we looked at the nicks that were cut into the edges of the label, and these holes, and that this damage occurred before the label was glued to the bottle. And the only conclusion that I could reach is that that was intentionally done.

I can't see why somebody would take what would be understandably a very valuable collectible item -- I'm just assuming that a bottle from 1864 must be pretty rare, and if they've got something genuine like that, why would they alter a label to make it look old. Why not just put on a new label and say it's been reconditioned and we've attached a new label to this old bottle of wine, but I'm not an expert that way.

Q. Now, did you focus on just anachronisms in your analysis of these 24 bottles?

A. No. I focused on the physical condition of the label and

on the way the label was adhered; so anachronisms were just a part of that process.

Q. But you observed that some deliberate nicks and cuts to the label?

A. Yes.

Q. And you observed deliberate discoloration of the label?

A. Yes.

Q. And you combine -- Did you consider all of knows factors in reaching your conclusions about the 24 bottles at issue?

A. I did because what's really striking to me, and I've worked on a number of cases where there have been a relatively large collection of suspect objects. In some cases, these objects come to the market from different places. They might be sold through one gallery in California, another in New York.

And initially, at least, people will examine the work, the bottle, the work of art, and think the work of art looks okay. But collectively, when they come together and you start to see patterns in this case of anachronistic materials, patterns in the case of the same type of nicks, pulls, the same type of adhesive being used on, I think it was, 21 to 24 bottles, it starts to point to deliberate act.

And in my case, in my experience, whenever I've looked at a large group of collectible objects like that, the conclusion has always been that the collection has been faked.

Q. And you've reached conclusions in this case?

A. I have.
Q. And you've testified to that?
A. I did.
Q. And how confident are you that these -- in your conclusions that these labels are counterfeit?
A. Highly confident, without reservation.
MR. KABA: Okay. No further questions, your Honor.
THE COURT: Okay. Thank you.
MR. CIALONE: I have a few, your Honor.
THE COURT: Recross?
RECROSS EXAMINATION
BY MR. CIALONE:
Q. Mr. Martin, what glue is used to adhere the label on a genuine bottle of 1864 Latour?
A. I wouldn't know that.
Q. What ink is used to print the label on a genuine bottle of 1864 Latour?
A. I wouldn't know that either.
Q. What materials are in the paper on a genuine bottle of 1864 Latour?
A. I imagine cellulose.
Q. No calcite? Could it be?
A. I don't know.
Q. If a Negociant reconditions an old bottle of wine, is it possible the Negociant would age the label to make it look

older?
A. In my field, in dealing with fine art and collectible objects, when someone does that, that's considered fraud, it's deceptive.
Q. But you don't know what Negociants' practices have been in the 150 years since 1864 Latour was --
A. I'm not an expert on Negociants.
Q. What -- Do genuine labels -- Do labels on genuine bottles of 1864 Latours have nicks in them?
A. I don't believe I've ever examined a genuine bottle of 1864 Lafleur; so I don't know.
Q. In fact, you haven't examined a genuine -- a bottle that Mr. Koch wine authentication experts have believed to be genuine of any kind of wine, correct?
A. I don't believe so.
MR. CIALONE: No further questions.
THE COURT: Okay. Okay. Mr. Martin, you my step down. Thank you.
(Witness excused)
THE COURT: Okay.
MR. KABA: Plaintiff has no further witnesses at this time in its case in chief.
THE COURT: Okay.
MR. CIALONE: We are going to do the video testimony of Thierry Lovato. We had intended to do Mr. Elroy and

Mr. Jaeger, as well.

THE COURT: How long is Lovato, first?

MR. CIALONE: About 15 minutes.

THE COURT: Shall we go ahead and do Lovato?

MR. CIALONE: Sure. And then we have a witness coming that should be here by 11:00.

THE COURT: Okay. Ladies and gentlemen of the jury, we're now starting defendant's case. It doesn't really matter to you really whose witnesses are called in which case because you'll be evaluating all the evidence together, but we're now starting with the witnesses who are called by the defendant, Mr. Greenberg. Some of those will be by deposition, as was the case with the plaintiff's witnesses.

(Video being played)

MR. CIALONE: That concludes Mr. Lovato's testimony.

MR. KABA: Plaintiff has its counter clips of Mr. Lovato.

THE COURT: All right.

(Video being played)

THE COURT: Does that conclude the testimony?

MR. KABA: Yes, your Honor.

THE COURT: Okay. Would this be a good time for a break?

MR. KABA: Certainly, your Honor.

THE COURT: Okay. Ladies and gentlemen, let's take a

ten-minute break. Please leave your pads, and take ten minutes.

(Jury exits)

(Continued on next page)

(In open court; jury not present)

THE COURT: Okay. Folks, I'm going to take five minutes.

(Recess)

(In open court; jury not present)

THE COURT: Please be seated.

Okay.

MR. CIALONE: Your Honor, Mr. Zacharia is here so we can proceed with live testimony if you'd prefer. We can argue the motions with the video testimony later. Whichever you prefer. I just wanted to let you know.

THE COURT: Let's see. I guess we could go ahead with the testimony. There's no reason to resolve the --

MR. CIALONE: He just stepped out for a minute, actually.

THE COURT: Okay. How long do you think his testimony will be?

MR. CIALONE: I think it will take us through the midafternoon, including his cross.

THE COURT: Okay. So we can talk about it at lunch; we can talk about the other issues.

MR. CIALONE: Yeah.

THE COURT: Okay.

(Pause)

THE COURT: Okay. Please bring in the jury.

(Jury present)

THE COURT: Defendant may call its next witness.

MR. CIALONE: Your Honor, defendant calls Jeff Zacharia.

THE COURT: Mr. Zacharia, if you'd please come straight up and then come around the front of this table, and don't trip on the various cords. And come around to the witness box and Mr. Skolnik will swear you in.

THE CLERK: Remain standing here at the top stair. Please raise your right hand.

(Witness sworn)

THE CLERK: Thank you. Please have a seat.

I'm going to ask that you state your full name and spell your first and last name for the record, please.

THE WITNESS: Full name is Jeff Zacharia, Jeffrey Zacharia, J-E-F-F-R-E-Y, Z-A-C-H-A-R-I-A.

THE CLERK: Thank you.

JEFFREY ZACHARIA,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CIALONE:

Q. Good morning, Mr. Zacharia.

A. Good morning.

Q. Mr. Zacharia, where do you work?

A. I work at Zachys.
Q. And is Zachys multiple companies? What is that?
A. It's -- it's two companies. It's a retail wine store that's been around since my grandfather started it in 1944, and we now have a wine auction company as well that was started I think in 1995.
Q. And who was that started by?
A. My father.
Q. Where is Zachys based?
A. In Scarsdale, New York.
Q. And how long have you worked there?
A. Since '83, I believe.
Q. What is your current position at Zachys?
A. At both companies -- because they are two separate companies -- I'm president.
Q. Is Zachys still a family-owned business?
A. It is.
Q. Before I go any further, you spoke with me and Mr. Coles last week, correct?
A. That is correct.
Q. And did you also meet with counsel for Mr. Koch last week?
A. That is correct.
Q. And did you answer all their questions?
A. As far as I remember.
Q. Now at one point Zachys was a party to this case, correct?

A. That is correct.
Q. And Mr. Koch had sued Zachys, correct?
A. That is correct.
Q. Did Zachys reach a settlement with Mr. Koch?
A. Yes, we did.
Q. And that's why Zachys is no longer a party to the case?
A. Yes.
Q. And we've had testimony that Zachys conducted auctions for Christie's. When did that begin?
A. Can you repeat that question.
Q. Sure. When did Zachys begin conducting auctions for Christie's?
A. It wasn't for Christie's. It was with Christie's.
Q. Okay. Thank you.
A. And that was in 1995.
Q. It began in 1995?
A. Correct.
Q. Okay.
A. '90 -- I believe it was either '94 or '95. I'm pretty sure '95.
Q. And did Zachys conduct, with Christie's, all of Christie's wine auctions in New York?
A. Yes, and in LA.
Q. And how long did that last?
A. The partnership lasted until 2001.

Q. Was there a reason why Christie's couldn't conduct auctions on its own in New York and LA?

A. Not in LA, but in New York the law states that to get a wine auction license you need to be in the wine retail business for a minimum of ten years.

Q. During the period when you did auctions with Christie's in a partnership, did Zachys share responsibility for inspecting wines that were submitted for auction?

A. We were involved in that process with them, yes.

MR. CIALONE: Let's put up Exhibit 1081. I believe it's been admitted, yes? No? Okay. Could you show the witness 1081, please.

One second.

Q. Mr. Zacharia, the top e-mail, there's an e-mail on Exhibit 1081 on the first page from you to Bill Koch dated March 13, 2007. Do you see that?

A. I do.

Q. And then below that there's an e-mail exchange from May of 2006, correct?

A. May of -- yes, I see that as well.

MR. CIALONE: Your Honor, I'd like to move Exhibit 1081 into evidence, please.

THE COURT: Is there any objection?

MR. CAMP: No objection.

THE COURT: 1081 is received.

(Trial Exhibit 1081 received in evidence)

MR. CIALONE: Put that up, please. And if you could blow up the top part, please, the e-mail from Mr. Zacharia. Thank you.

Q. Looking at your e-mail to Mr. Koch from March of 2007, you say, in the first paragraph, "We have always put a lot of effort into verifying the wines that we are offering out." By "verifying the wines," what do you mean?

A. By verifying that we're as comfortable as we can be that they are what they purport to be. I should -- let me -- by verifying in this instance, probably I was talking as well about conditioning --

Q. Okay.

A. -- about reporting what the conditioning is.

Q. And does that process of being as comfortable as you can be with the wines include both looking at condition and looking at authenticity?

A. Correct.

Q. Does it include reaching a judgment that the wines are suitable for sale?

A. Yes.

Q. And that's something that your company has been working to do since the 1990s, correct?

A. That is correct.

Q. Since you started in the wine auction business?

A. That is correct, although we were involved in that even earlier from the retail business.

Q. And had you been aware of the fact that there might be counterfeit wines on the marketplace as early as 1995?

A. Yes.

Q. Now when did Zachys begin conducting wine auctions on its own, independently versus --

A. In 2002.

Q. Did Zachys adopt a different style of conducting wine auctions?

A. In terms -- if you're talking about the auction itself, the auction day itself, yes, we did.

Q. Yeah. That's what I am talking about.

A. Yes.

Q. Can you tell me what was different about it.

A. Yeah. When we were with Christie's and all other auction houses used to do them in an auditorium style, we say, where you just -- people are sitting row by row behind each other, and it can get -- it's not -- it can get boring. You're sitting there all day listening, 'cause the auction goes on all day long, and it just -- it gets boring after a while. We wanted to change it up, make it more exciting, and what we did, we did it restaurant style, where people can sit around tables, they can bring a bottle of wine if they'd like, and enjoy themselves. They can bring their computer, they can, you know,

do work in the meantime. So it became a much more pleasurable thing. We'd do them at nice restaurants in New York City, so people could have a nice lunch at the same time, and it just -- our goal was to bring them into the room.

Q. Have other auction houses followed suit in terms of doing auctions the way you were doing them?

A. Yes.

Q. When Zachys started conducting wine auctions independently, did you have people at the company with experience in verifying wines?

A. Yes, we did.

Q. More than one person?

A. Yes.

Q. Can you tell me some of the people who were involved in that.

A. Fritz Hatton, Ursula Hermacinski -- don't ask me to spell her name.

Q. It's in some of the exhibits.

A. Okay, good. Kevin Swersey was with us at that time. We had Maureen, who was with us in the beginning, Maureen Downey, who's here in the room today. Myself. Those are the people that come to mind.

Q. And who is Fritz Hatton? What was his background?

A. Fritz Hatton had worked with Christie's for many years as he ran their wine auction department I believe first in

Chicago, then for a while in New York, and after he stopped running the wine department, continued along with them.

Q. Now I want to talk to you about some of the work that Zachys actually did in inspecting wines that were submitted for auction, and I want to focus you on the period between 2003 and 2005. When a consignor submitted wines for inclusion in the auction, did Zachys conduct its own inspection of those wines?

A. If they were -- if we reached a deal. We wouldn't do the inspection until after we reached a deal.

Q. Sure.

A. But if we reached a deal, then yes, we would.

Q. So did you ever -- was it ever enough for you to have a consignor just tell you what wine was authentic and in good condition?

A. No.

Q. Let me ask you what the auction -- what the inspection process would involve. Did it involve looking at corks?

A. Yes, it did.

Q. And why would you look at corks?

A. Cork is one part of the process to make sure we're comfortable that the wine is what it purports to be, but also, if we're just talking about that piece of it, to make sure the cork is still solid, because cork is a living thing and just -- just to make sure that was still a solid cork and it wasn't going to fail, to make sure it's still acceptable to put up for

auction.

Q. In terms of looking -- in terms of reaching a conclusion or a judgment that the wine was what it purports to be, what would you look for on a cork?

A. We would look -- there's a number of things you could look for. You certainly look to see that the markings on the cork, that it -- and it depends on the winery. 'Cause different wineries put different things on corks. Some put more detail, some put very little details. So if we knew what the winery put on the cork, what we expected to see on the cork, we'd look for that. We'd look to make sure that we -- it didn't appear that the cork had been removed already and put back on, or that the vintage wasn't -- didn't -- was consistent to what we saw in the rest of the cork. Those were some of the things that we would look for.

Q. How could you tell if a cork had been removed? Is there actually damage to the cork?

A. There can be. One type of corkscrew, it's called an OXO corkscrew, which, a typical corkscrew, you put the cork -- the worm right into the center, but an OXO reaches along the sides and pulls it up that way, and you can actually see markings on the side if they do it that way.

Q. And so if you saw that, that's something that would make you suspicious about the cork?

A. Correct.

Q. Did the process of inspecting the wines for auction include looking at the labels?
A. Yes, it did.
Q. For what purpose?
A. For the same types of purposes -- to make sure we were comfortable that the label was an original label from the chateau. Again, we're just talking about authen -- feeling comfortable with it, not for conditioning.
Q. Yeah, focusing on the authentication process.
A. Yeah.
Q. Okay. Did it also include looking at the bottle and the glass?
A. Yes, it did.
Q. Why would you do that?
A. To make sure the glass was appropriate, of the appropriate age that it should be for -- for what the wine is purported to be.
Q. Do old wines -- do old bottles of wine have particular characteristics that you would look for?
A. Yes, old wines would be hand blown, so you would look to make sure that it was a, you know, a hand-blown -- a hand-blown glass, because if it wasn't hand blown, if it was a very old wine, there would be concern. It would raise some concern.
Q. Did the process also involve looking at the capsule?
A. Yes, it did.

Q. For what purpose?
A. The same purposes we've described, I've already discussed.
Q. And let me ask you about the capsule. Would you cut the capsules sometimes?
A. Yes, we would.
Q. And why do you do that?
A. Because you have -- you have bottles here of wine. It's easier to explain with that. But because the capsule often goes down lower to cover the bottom of the cork, so you can't see the details on the cork unless you cut back on the capsule.
Q. And did the process of verifying, authenticating the wines also include sometimes just looking at the wine itself?
A. Yes, it would.
Q. And why would you do that?
A. You'd look at the sediment of the wine. You expect to see sediment in older wines. In terms of authentication, that would be the main reason.
Q. And just -- can you just briefly tell me, what is sediment in the wine?
A. Sediment is the -- is just little pieces of the wine that gets -- wine is made from grapes, and it's just little pieces of it gets separated from the wine over time.
Q. Would you sometimes contact importers to ask questions as part of this authentication process?
A. Yes, we would.

Q. Now all of the steps that we've discussed, is that -- are these things that Zachys did in connection with the October 2005 auction of Mr. Greenberg's wine?

A. I believe it was. I believe we did.

Q. Did you expect the Zachys specialists to be diligent in examining wines that were consigned for auction?

A. Yes, I did.

Q. And did you expect them to be particularly diligent with wines that were rare and expensive?

A. Yes, I did.

Q. Did you discuss Zachys' efforts to authenticate wines with consignors?

A. Yes.

Q. Okay. I want to turn you -- turn your attention to the February 2003 auction. We've had testimony here that this was the first auction that Mr. Greenberg consigned wines to; first Zachys auction. Prior to the February --

MR. CIALONE: Can we put up Exhibit 325, page 85.

Could you just blow up the left-hand side, please.

Q. This is a -- can you see that okay?

A. Yes, I can. Thank you.

Q. This is an introductory paragraph or column relating to the Greenberg collection. One of the things it says is that you and Mr. Hatton went to visit Mr. Greenberg in November 2002. Do you see that?

A. I do not. I'm sure it's here, but I'm not seeing it.
Q. In the second paragraph.
MR. CIALONE: Could you blow that one up.
A. Yeah, I see it now. Second half of the second paragraph.
Q. Correct. Did you in fact go to Mr. Greenberg's home?
A. I believe we did.
Q. While you were there at Mr. Greenberg's home in November 2002, did he give you a tour of his wine cellar?
A. Yes, he did.
Q. During the course of that visit did Mr. Greenberg tell you anything about Royal Wines?
A. He -- I -- I won't -- he -- I had many conversations with Eric. I believe -- I won't always remember exactly where he told me things. I believe it was in this visit. I'm sure it was in the first time -- in the first visit. That would make sense. But this is going back now --
Q. Sure.
A. -- nine years, so I won't know for sure that's when it was, but yes, Eric did talk to me about some dealings he'd had with Royal.
Q. Okay. And do you recall anything he told you about Royal, generally?
A. I don't remember anything he told me about Royal in general. It was more about the dealings.
Q. And what did he tell you about the dealings with Royal?

A. That there was some wines that he'd bought from Royal that were fake and he was suing them.

Q. Did Mr. Greenberg show you that he had boxes of wines that he believed were counterfeit that were set aside?

A. That is my memory, yes.

Q. And do you recall about how -- the volume of that?

A. I don't remember the specific volume. I don't. But it wasn't one or two boxes. It was certainly more than that.

Q. Okay. Mr. Greenberg in fact consigned wines to this auction, the February '03 auction, correct?

A. Yes, I'm assuming this was the February '03.

Q. Yeah.

A. Okay.

Q. And did Zachys inspect those wines?

A. Yes, we did.

Q. All right. Do you know if Zachys rejected any wines that Mr. Greenberg consigned to the February 2003 auction?

A. I do not.

Q. Do you know if there were any -- have you heard about Jayer wines being rejected from that auction?

A. I know at some point we did reject some Jayer wines. It certainly could have been from this auction. I don't remember the details.

MR. CIALONE: Your Honor, if I can approach and give the witness an exhibit?

THE COURT: Sure.

MR. CIALONE: Number 72.

THE WITNESS: Thank you.

Q. Mr. Zacharia, have you seen this document previously, Exhibit 72?

A. Yes, I have.

Q. And do you see that on the first page? Well, actually, can you tell me what it is.

A. This is what we used at the time to assess wines.

MR. CIALONE: I'm not sure if this has been admitted, your Honor, but if not, I'd move for admission of Exhibit 72 and ask that it be shown on the screen.

MR. CAMP: I would object without further foundation to the handwriting, whose notes they are and what they reflect.

Q. There's been testimony about the handwriting previously but Ms. Downey, but Mr. Zacharia, if you can tell me, there are two --

MR. CAMP: Objection. The document is not in evidence. There hasn't been testimony about the handwriting.

Q. Mr. Zacharia, you see there are two lines that are not redacted on the first page. Can you tell me what those lines are.

A. I do. Can you tell me what -- I see them, but what was your question?

Q. Sure. Can you tell me what those lines indicate.

A. Yeah, there's -- so there's two wines here that -- there are two wines here that are -- come from Eric's consignment and there's some notes on them. What other information do you want to know?

Q. And what do those notes indicate about those wines?

A. Well, it's -- I can read the words "6 not valid" very clearly, which indicates to me that there was more than 6 in here. I believe it's 12. In the first one. That's the 1990. So 6 of the 12 we felt were incorrect.

Q. Now do you know whose handwriting it is?

A. I do not.

Q. Okay. Do you know what's been redacted from this document?

A. I believe the rest of the consignment.

Q. Okay. Other than the 12 bottles of Jayer wines that are identified on this page, do you know if any wines were rejected from this consignment on authenticity grounds?

A. I don't believe there were any others.

Q. Okay. Do you recall why it was that Jayer wines were rejected on authenticity grounds from that auction?

A. Again, I believe it was this time. I know there was a period -- and I discussed this in my deposition -- where we contacted the supplier of these wines, the person who brings them into the country, because we were -- there was -- we just needed -- we wanted further confirmation, as we discussed earlier. I believe it was for this, but I won't -- can't swear

to it.

Q. Sure.

A. And then as I remember, she then -- Martine Saunier then contacted the producer to get more information of these wines to find out what he had actually done.

Q. I'm just going to ask you to go a little bit slower.

A. Sorry. I apologize. Do I need to repeat that?

THE REPORTER: No, that's fine.

Q. Now if you take a look back at Exhibit 325, page 85.

MR. CIALONE: Can you blow up that first paragraph, please, Liz.

325, page 85. Thank you.

Q. You see in the first paragraph, you describe the cellar of one of America's most passionate wine collectors. Do you see that?

A. Yes, I do.

Q. Little further down it says he's amassed one of the most impressive private collections in the world?

A. I do.

Q. Were those your opinions about Mr. Greenberg's collection?

A. Those were.

Q. And you reached those opinions even knowing Mr. Greenberg had bought wine from Royal, correct?

A. That is correct.

Q. And you reached those opinions even though you knew he

bought counterfeit wines from Royal, correct?
A. I didn't know he had, that's what he said he had, but yes, I reached those opinions.
Q. And you reached those opinions even though Zachys had rejected some wines from that auction at the time, correct?
A. That is correct.
Q. Now have you ever stated in a catalog, in this catalog or any other, that the consignor had counterfeit wines in his collection that were rejected from the consignment?
A. No, not that I can recall.
Q. After the February 2003 auction did Mr. Greenberg consign wines to a number of other auctions prior to October '05?
A. I believe he did, yes.
Q. And in all of those auctions did Zachys carefully inspect the wines that he submitted?
MR. CAMP: Object to the leading question.
THE COURT: Please rephrase.
Q. Did Zachys inspect wines that Mr. Greenberg consigned?
A. Yes, we did.
Q. And did you expect people to continue to apply -- to go through all the steps that you discussed earlier?
MR. CAMP: Same objection.
THE COURT: You can answer.
A. Yes, I expected them to follow the same procedures.
Q. Did Zachys reject wines from any of those auctions in 2003

and 2004 based on concerns about authenticity?

A. I don't recall.

MR. CIALONE: Exhibit 529. Could we put up, display Exhibit 529, your Honor. Blow up the top e-mail.

Q. This is an e-mail from Eric Greenberg to you and B. Nelson. Is that Ben Nelson?

A. Yes, that would be.

Q. Dated October 28, 2004. Is that in connection with the December 2004 auction; do you know?

A. I'd have to look. I don't know.

Q. Okay. Do you see Mr. Greenberg says here, "You have wines in here -- wine in here that is not mine and you're missing much. Very professional." And then he goes on some more?

A. Yes.

Q. Do you recall Mr. Greenberg complaining about that in connection with that auction?

A. Yes, I do.

Q. Okay. Do you remember what the nature of the issue was that he was complaining about?

A. I don't remember the details, but I believe there was some mix-up that we had in a spreadsheet that we sent to him showing some wines that were not his, listing them as his.

Q. Okay. And was it a clerical kind of error or what?

A. It was a clerical error, yes. We had it all correctly segregated. It was just clerical.

Q. Does this e-mail have anything to do with the verification, authentication process?
A. No.
Q. And Mr. Nelson, did he have any role in the October 2005 auction?
A. I don't believe so. I don't think he was with us at that point.
Q. Okay. All right. I am going to turn your attention now to the October 2005 auction and to the events that led up to it.
MR. CIALONE: Can you put Exhibit 96 up, please. Just blow up the top, please.
Q. In connection with the October 2005 auction did Zachys enter into a consignment agreement with Mr. Greenberg?
A. We did.
Q. And do you know if that -- if this document is that consignment agreement?
A. It appears to be, yes.
MR. CIALONE: Could we go to paragraph 3, please.
Q. Under this provision did Zachys -- was Zachys responsible for all packing and transporting and delivering of the wines?
A. It appears that way, from reading the beginning.
Q. Did you actually go to Mr. Greenberg's home to inspect wines?
A. I did, yes.
Q. Did other people from Zachys do that?

A. Along on my trip was Fritz Hatton. He came with me.
Q. And then did other people go on a separate trip?
A. I believe there was a separate trip to his house where other people went, but I'm not sure.
MR. CIALONE: Okay. If we could go to page 2, please.
Q. Take a look at paragraph 8(b). In that paragraph that's titled Withdrawal by Zachys -- by ZA, does Zachys have the power to withdraw wines from the sale?
A. Yes, we did.
Q. And under what circumstances?
A. As it says here, if there was any doubt to the attribution, the authenticity, the quality, the potability of the product, any doubt of the seller's representations of the products, if he's breached -- if he's breached or about to breach any provisions, if there's doubt to the seller's title, or other just cause.
Q. And it says here, looking at the introductory language, Zachys reserves the right to withdraw any product at any time before actual sale. Correct?
A. Correct.
Q. If, in Zachys' sole judgment, there is doubt about attribution, authenticity, quality, and so forth, correct?
A. Correct.
Q. So did Zachys need Mr. Greenberg's consent to withdraw a bottle from sale if you believed it wasn't what it purported to

be?

A. No, we did not.

Q. And if we go down to paragraph 12, please. This is titled Rescission of Sale. It starts, "Zachys is authorized to accept the returns and rescind the sale of any product at any time if Zachys determines that there is a genuine issue as to quality, authenticity, or title of the product," and it goes on. Was that a standard provision in Zachys' consignment agreements in 2005?

A. I'm pretty sure it was.

Q. Okay. And what does it mean to rescind the sale?

A. To cancel the sale.

Q. So that --

A. So we give the buyer the money back, we return the wine to the consignor, and ask for the money back from the consignor.

Q. And that's -- so that's the power that Mr. Greenberg gave to Zachys in connection with this auction, correct?

A. Yes.

MR. CIALONE: If we could go back to Exhibit 1081, to the bottom half of the first page, please.

Q. Do you recall -- we looked at a portion of this e-mail exchange earlier, Mr. Zacharia, but in May of 2006, in that exchange, you see it discusses certain wines that are being returned?

A. Yes. Oh, I'm sorry. Yes.

Q. And being returned by -- by Mr. Koch or by his agent --
A. Yes.
Q. -- Mark Curley? And if you look at -- and these were returns from -- what auction is this from?
A. I can see -- let's see. Number 1 just has an invoice number but I don't know that from the invoice number I can see here on the screen what auction it's from.

The next one, it says the 0509 sale, which was 9/15/05, which is the sale we're talking about here, the main sale we're talking about here. Then there's some other ones down below. Yeah, those are from an LA sale.

Q. And you see -- you look at the bottom line item, Mr. Curley or Mr. Koch wanted to return a case of 1975 Petrus because two bottles had bad corks, right?
A. Correct.
Q. To your knowledge did Zachys accept the return of all of the items identified in this e-mail?
A. I'm pretty sure we did.
Q. So that was an instance of rescinding the sale, correct?
A. That is an instance of rescinding the sale. I don't know -- we don't always go back to the consignor and ask for money back. It depends on the situation. But yes, we rescinded the sale and would have paid the buyer back -- refunded the buyer back his money.
Q. Okay. Now prior to the October 2005 auction do you have

any sense of how many wines, how many bottles of wine Mr. Greenberg had consigned to Zachys for sale?

A. No.

Q. Thousands?

A. Probably, but I don't know.

Q. And as -- through your dealings with Mr. Greenberg were you aware that he had bought wine from many different sources?

MR. CAMP: Object to form. Foundation.

THE COURT: You can answer if you know.

A. So could you repeat the question.

Q. Sure. Well, let me ask you this: Did you discuss with Mr. Greenberg generally his sources for wine over the years?

A. It -- it had been discussed, yes.

Q. Was Royal his only source of wine?

A. No, Royal was not his only source of wine.

Q. Did you ever discuss with Mr. Greenberg whether he could track individual bottles to a specific source?

A. Yes, we had discussed that.

Q. And what had he told you in the context of those discussions?

A. That he was not able to tie it -- tie bottles back to their sources.

Q. Was that a -- was he the only wine collector you'd ever encountered who couldn't tie an individual bottle to a particular source?

A. No, he was not.
Q. Have you seen a lot of -- I assume you've seen a lot of different wine collections in the time you've been in this business, right?
A. Yes, I have.
Q. And in the course of looking at a lot of different wine collections, have you become familiar with how collectors maintain their records?
A. To an extent, yes.
Q. Have you seen other collectors who can't tie specific bottles to a specific source?
MR. CAMP: Object to the leading testimony. Direct examination.
THE COURT: Overruled. You can answer.
A. So I can answer that?
Q. You can answer.
A. Yes, I've seen others.
Q. And have you seen collectors who can tie every bottle of wine in their collection to the source?
A. One or two.
Q. So which is more common, in your experience?
A. Between tying every bottle back and none back?
Q. Yeah. Yeah.
A. Every single bottle and not a single bottle? Probably -- the most is in between.

Q. Okay.
A. Some, you know, some were in the spectrum.
Q. Right. Now the October 2005 auction, this was a single-consignor auction, correct?
A. Yes.
Q. And I just want to focus you on the trip that you made with Mr. Hatton. When did that occur; do you recall?
A. I don't recall, but I believe it was in the summer of '05.
Q. Okay. And what wines did you and Mr. Hatton plan to inspect while you were there?
A. We wanted to look at the real high-valued wines, the wines that needed the most amount of due diligence.
Q. Were you going to be the only people inspecting those high-value wines, you and Mr. Hatton?
A. No. There was scheduled another inspection back in New York of them as well.
MR. CIALONE: If I may approach, your Honor, I'd like to give the witness Exhibit 95.
THE COURT: Yes.
THE WITNESS: Thank you.
Q. Mr. Zacharia, do you recognize Exhibit 95?
A. Only from deposition.
Q. Is it an e-mail from Fritz Hatton to you?
A. Yes, it is.
Q. And also to Michael Jessen, right?

A. Yes, it is.
Q. Who is Michael Jessen?
A. He is currently the managing director of New York, of the auction division.
Q. And is this an e-mail that Mr. Hatton sent you in connection with your trip to Mr. Greenberg's home?
A. Yes, it was.
MR. CIALONE: I would move for admission of Exhibit 95, your Honor.
THE COURT: Any objection?
MR. CAMP: No objection, your Honor.
THE COURT: Okay. 95 received.
(Trial Exhibit 95 received in evidence)
MR. CIALONE: Can we display it, please.
Q. Just -- and the date on the e-mail is July 23, 2005, correct?
A. Yes, it is.
Q. And was your trip to Mr. Greenberg's home before or after that?
A. It would have been after that.
Q. Now Mr. Hatton starts with the statement, "As I will not be able to go to the cellar in person over the next couple of weeks." In fact he was able to go in person, correct?
A. That's correct.
Q. Mr. Hatton further states that he did not believe -- in the

second paragraph. Sorry. "I do not believe we should accept expensive bottles (and especially magnums and oversize bottles) with facsimile labels, even if they have stamped corks, without adequate provenance." When you went to Mr. Greenberg's cellar and inspected the valuable wines, the particularly valuable wines, was one of the things that you were looking for facsimile labels?

A. Yes, it was.

Q. And then if you look a little further down --

MR. CIALONE: Could you blow up the last line before the list, Liz, and a little bit of the list. Thank you. Actually, just do it from that line and the list. Thank you. Great.

Q. Mr. Hatton then says, "Here are wines to be reviewed for appearance and provenance prior to shipment." Generally, are the wines listed here the kinds of wines that you intended to go look at?

A. Yes.

Q. If you see at the bottom --

MR. CIALONE: Can you blow up the bottom paragraph, please.

Q. Mr. Hatton says, "Most concerned with 19th --" I assume he means 19th Century?

A. Yes.

Q. "-- 19th Century wines, 1870 and back, and Right Bank

mags 1960 to 1961."

A. I'm sorry. 1900.

Q. 1900 to 1961. Thank you. And then some other things. Was that consistent with your view of the kinds of things that you should be looking for that Mr. Hatton identified?

MR. CAMP: Objection, leading.

THE COURT: Overruled. You can answer.

A. Yes.

Q. Let me ask you, did you disagree with Mr. Hatton about what kinds of wines you should be looking at?

A. At this time?

Q. Yes.

A. I don't remember.

Q. Okay. Let me ask about some of the wines in this case. Is Cheval Blanc a Right Bank wine?

A. Yes, it is.

Q. Lafleur?

A. Yes.

Q. Petrus?

A. Yes.

Q. Now when you and Mr. Hatton were in Mr. Greenberg's home, did you get another tour through the cellar?

A. I don't think so, but I don't remember.

Q. Do you remember Mr. Greenberg opening a bottle of wine?

A. Yes.

Q. Do you remember what it was?
A. 1947 Lafleur.
Q. Was it a bottle or magnum?
A. Excuse me. Thank you. It was a magnum.
Q. Did you taste the wine?
A. I did.
Q. Did Mr. Hatton?
A. He did.
Q. Did you take a look at the bottle?
A. We did.
Q. Did you look at the cork?
A. We did.
Q. Did you and Mr. Hatton then begin inspecting wines or some of the wines that Mr. Greenberg had proposed to consign?
A. Yes, but now we tasted it I think much later in the day, so --
Q. Okay. It was later in the day.
A. Later in the day we tasted it, yes.
Q. Thank you. Where did you actually do the inspection?
A. As far as I can recall, there was a room right outside of the wine cellar. Might have been even part of the wine cellar but it wasn't where the wines were stored. I don't remember exactly. But it was right outside of the wine cellar.
Q. Who brought the bottles to you?
A. Most of them, as I recall, were brought by Thierry, who was

the wine manager, the person who managed the cellar for him.
Q. Thierry Lovato?
A. Correct.
Q. And how did Mr. Lovato know what kinds of bottles to bring you?
A. I don't know. I mean, we had a -- we had a list that we were -- that, you know -- that he knew the wines we wanted to look at, but how we chose specifically beyond that, I don't know.
Q. Sure. I didn't mean how he chose the specific bottles. I actually meant: Did you give him a list of what kinds of wines you wanted to see?
A. I presume we did. I don't remember specifically, but that would be the normal course of action.
Q. After you inspected a bottle, what would you do with it?
A. We would -- I don't remember.
Q. Was it packed for shipment or --
A. I assume that's what we did, but to be honest, I just don't remember.
Q. Okay. And then once you and Mr. Hatton were done with your inspection at Mr. Greenberg's house, what happened to the bottles that you thought were okay?
A. They were shipped back to New York.
Q. And then what happened to them there?
A. There was a second inspection that was done back in New

York.

Q. When you and Mr. Hatton were there, did you take notes as you were inspecting?

A. Yes, we did.

MR. CIALONE: Your Honor, if I can approach and give the witness Exhibit 99.

THE COURT: You may.

THE WITNESS: Thank you.

Q. Mr. Zacharia, do you recognize this document, Exhibit 99?

A. I do.

Q. And what is it?

A. It is the document -- well, this is -- this went through a couple iterations, but in this version is the document that was used for the New York part of the inspection.

Q. Okay. And are any of the notes that you and Mr. Hatton made in California reflected in this document?

A. Yes, that's in the second column entitled JZ/FH Notes.

MR. CIALONE: Your Honor, I'd move for --

A. Excuse me. Just to be clear, it's the ones that we -- that are typed in. The handwritten notes are not ours.

MR. CIALONE: Okay. And your Honor, I'd like to move Exhibit 99 into evidence.

MR. CAMP: May I voir dire?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. CAMP:

Q. Mr. Zacharia, do you know whose handwriting is all over this document?

A. All the pages?

Q. Yes, sir.

A. I do not.

MR. CAMP: Then I would object to admitting the document that the witness cannot authenticate.

BY MR. CIALONE:

Q. Mr. Zacharia, is the handwriting that of any person other than Zachys employees?

A. I don't know. I wouldn't -- I would not expect it to be anybody but a Zachys employee's handwriting, but I do not recognize the handwriting.

Q. And if you would take a look at page 8, do you recognize any of the handwriting on that page?

A. I do not.

Q. Are your own notes reflected on this document, your own observations of the wine?

A. They are.

Q. Is this a document that was a Zachys business record?

A. Yes, it was.

Q. Was this made -- were these notes made in the course of these wine inspections that you've testified to?

A. Yes, they were, for the '05 auction.

MR. CIALONE: And your Honor, again, I would move for admission of Exhibit 99.

MR. CAMP: Again, I'm -- if he's testifying about the typewritten notes that he just said are his, which are fairly small in number, we'd have no objection to that document being admitted. I do object to the document consisting almost entirely of handwriting that he doesn't recognize and can't say who made it or what it means.

THE COURT: Do you know which notes are yours? You know your handwriting.

THE WITNESS: Yeah, mine -- this document was a document created -- should I just explain what the document was?

THE COURT: Sure.

THE WITNESS: -- that we brought with us in an earlier version to California. I had handwritten notes on it that I then put into the Excel and so my notes then got converted to typed notes, which is the JZ/FH notes, which is -- and those are the typed ones you see in there.

THE COURT: And this is the kind of document that Zachys keeps in its files?

THE WITNESS: Yes.

THE COURT: And are you confident that the notes, the handwritten notes on top of yours were written by a Zachys

employee?

THE WITNESS: Yes. I mean, this is -- this is -- for this -- for this trial, we -- this is part of the documents that were requested. It got pulled out of our files.

THE COURT: But this wasn't made for the trial.

THE WITNESS: Correct. This was a work document.

THE COURT: Okay. It's received. 99.

(Trial Exhibit 99 received in evidence)

MR. CIALONE: Thank you, your Honor.

If you could put up page 1 of the document up, please, and just blow up the top half, so we can see the header, so we know what we've been talking about.

BY MR. CIALONE:

Q. So this is titled number 1066, Pull Inventory for Authentication. What does 1066 refer to?

A. I'm assuming that was the consignment number we were using for Eric, for that consign -- for that sale.

Q. Okay. And then on the left-hand column, Quantity, correct?

A. Yes.

Q. And then there's Wine Description, correct?

A. Correct.

Q. And then what is JZ/FH Notes?

A. Those -- as I described already, those are the notes -- there were originally handwritten notes that were taken in California that I then put into the Excel document when I was

back in New York.

Q. Okay. And then on the right-hand column there's Assessment Notes?

A. Yes.

Q. And what is that?

A. That was intended for the column where the further notes would be taken back in New York.

Q. And then if you would take a look at the second page, please.

A. Yes.

MR. CIALONE: Liz, could you put that up, please. And just blow up the first few lines. That's fine.

Q. And then are these additional notes that were taken as part of the assessment?

A. Yes. The space where it says Assessment Notes simply wasn't big enough so they wrote on -- I believe on the back of each page, if I remember correctly.

Q. Okay. And looking at those top few lines, those refer to '21 Cheval 1.5. What does that refer to?

A. 1921 Cheval Blanc 1.5 liters.

Q. So a magnum?

A. A magnum, yes.

Q. And on that first magnum, what does it say about the cork on the bottle?

A. On the cork on the bottle, "capsule cut to reveal fully

branded cork."

Q. And then just so we understand the abbreviations, let's look at the next one, the '21 Cheval Blanc magnum. What is TS?

A. Top shoulder. That's the fill level. That's the fill level, how -- wine will eventually -- certain amount of wine will evaporate from the bottle. That's a normal process. And so this is showing what the fill level was of that bottle.

Q. Okay. And then it says -- what is that after that, scuffed?

A. "Scuffed and nicked label."

Q. And then it says what after that?

A. "Capsule cut to reveal fully branded cork."

Q. And then the next one, the next '21 Cheval Blanc, what does that say?

A. 1.5 liter. I'm not sure what that next thing, +1, is. I don't know what that is. "Upper shoulder and BS and nicked label." Bin soiled and nicked label. Same thing, "capsule cut to reveal fully branded cork."

Q. Okay. What does a fully branded cork mean in this context?

A. It means it has everything on the cork that we would expect it to have.

MR. CIALONE: Turn to page 5, please. And Liz, if you would just blow up some of the lines in the middle.

Q. See in that third line there, it says two Lafite 1945 mags?

A. I do.

Q. And what do your notes about that bottle say, about those bottles say?
A. "Fully stamped cork, new chateau label, period capsule cut to reveal full stamping."
Q. What does "period capsule cut to reveal full stamping" mean?
A. That the -- I'm assuming what I wrote here is that the capsule was from the original period or was from 1945.
Q. And then if you see underneath that, what are those marks?
A. I'm not sure what you're referring to.
Q. Just underneath where it says "reveal full stamping"?
A. Underneath that? There's an arrow.
Q. And what's the mark, the handwritten marks in that box?
A. Oh, the box to the right?
Q. Yeah. No.
A. Okay.
Q. Just in the box where it says, "fully stamped cork, new chateau label, period capsule," etc., what are the marks underneath that?
A. Oh, those little marks underneath it?
Q. Yeah.
A. I don't know. Looks like quotation marks, but I don't know.
Q. Was what you wrote here based on your own observation of the bottles?

A. Yes, it was. Well, mine and Fritz's.
Q. When you and Fritz were doing this, did you each look at the bottles together?
A. We each looked at the bottles, yes.
Q. Did you have flashlights?
A. Yes, we did.
Q. Did you cut capsules?
A. Yes, we did.
Q. Were some capsules already cut; do you know?
A. Yes, there were.
Q. When you had a capsule that was already cut, what did that indicate?
A. That someone had cut the capsule.
Q. And why would someone -- is there any reason to cut a capsule other than to try and look at the cork?
A. None that I'm aware of.
Q. Did you ever ask Mr. Greenberg, when you saw that capsules had been cut, what somebody had told him about the bottles?
A. Did I ever ask him what someone had told him -- I'm not sure I'm understanding the question.
Q. Sure. If you saw a bottle that had a capsule cut, did you ask Mr. Greenberg if somebody had inspected it previously?
A. Eric -- I don't know that I asked him. Eric told us that he had done a number of inspections ahead of time, before, you know -- in his cellar already before we got there.

Q. Okay. And let me ask you, was Mr. Greenberg with you the whole time you were looking at these bottles, you and Mr. Hatton?

A. He was in the house, but no, he was not with us. As far as I know, he was in the house.

MR. CIALONE: Could we look at the bottom portion of that page, please.

Q. And do you see there's a 1921 Lafleur magnum?

A. I do.

Q. And what do the numbers underneath that, 4391 and 4392, mean?

A. Those would have been the boxes that we -- the box numbers that we used when we put them into the warehouse in New York.

Q. Okay. And then next to that, what was your note?

A. "One capsule cut by ZWL to see fully stamped cork."

Q. ZWO or ZWA?

A. It looks like an L but maybe it's A.

Q. What is ZWL?

A. It is an A. I apologize. Just from the screen, it's hard to see.

Q. Yeah. And the Assessment Notes, it says, "See back," correct?

A. Yes.

Q. And if we could just take -- actually, we'll just go through the rest of this page and then we'll look at the next

page for the see backs.

The next one is the 1945 Lafleur magnum. You see that?

A. Uh-huh.

Q. And what's going on in that box next to it?

A. Someone has crossed out what I typed in.

Q. Mm-hmm. Do you know why?

A. I do not.

Q. And then below that, there's another few 1945 Lafleur magnums, correct?

A. Yes.

Q. And what did you write about those?

A. Fully -- I just lost it there. Fully -- "vintage fully stamped."

Q. Is that different than "fully branded cork"?

A. That would mean that we saw the vintage but perhaps couldn't see the name of the chateau on the cork.

MR. CIALONE: If we could go to page 6, please.

And if you would please blow up the lines 4391 through 4394.

Q. And you see there's two '21 Lafleurs there, right?

A. I see that.

Q. What's the first one say about -- well, are there two different -- the descriptions there?

A. There are some differences in the descriptions, in what's

handwritten here, yes.

Q. And what's the differences with respect to the cork?

A. Well, one says, "capsule cut to reveal fully branded cork," and the other has no -- no note, no note at all.

Q. Looking at this, does that -- what does that indicate to you with respect to that bottle?

A. Looking at it, and tying it into my notes on the page before?

Q. Mm-hmm.

A. When I tie it into the notes on the page before, it tells me that we just cut one and then based on that, we were comfortable, which was a practice in those days not to necessarily cut every capsule of wine.

Q. And then you see on the 1945 Lafleur mags just below that --

A. I do.

Q. -- "fully branded cork," correct?

A. Yes.

MR. CIALONE: And then, Liz, if you could go down to line 4412, please.

Q. And that's also a 1945 Lafleur magnum, right?

A. I see, yes.

Q. And what does -- what does JBTS mean?

A. Just below top shoulder.

Q. Oh.

A. That's a lot of work to write that out every time.
Q. Okay. And then it says what about the cork?
A. "Capsule cut to reveal partial -- partially" something "branded cork." I don't know what that one word is. To reveal partially -- I don't know what that one word is.
MR. CIALONE: Okay. If we can go to page 7, please. Just blow up the top two lines.
Q. Can you see -- and you see there's the 1949 Lafleur magnums at the top?
A. Yes.
Q. Can you read what it says in your notes.
A. "One red dot fully stamped legible vintage, other one stamping partially legible."
Q. What does that mean?
A. I'm assuming what this means is when we -- it's very important that each lot -- and each bottle in this instance was going to be a lot, we were going to sell each bottle separately -- that we catalog it correctly, so if there's -- and normally we use the -- well, in New York we were using the box numbers. We were separating them into separate boxes. In California we were putting them all into one box. So I needed a way to uniquely identify which bottle was which in this instance.
Q. So does that -- is that what the red dot refers to?
A. That's what the red dot refers to.

Q. Okay. So that way, what would having the red dot help you determine when you pulled the two bottles out?
A. What I had seen in each bottle. I could uniquely identify which bottle was which.
Q. Okay. And then the next line down is the 1950 Lafleur magnums, correct?
A. Yes.
Q. That indicates that you didn't look at those, right?
A. Yes, that would indicate that.
MR. CIALONE: Okay. And then if you could go a few lines further down, please, Liz.
A. Or we didn't take any notes. Or I missed the notes. I don't know what it indicates, but --
Q. Okay. And do you see there's a line that has the numbers 4470 to 4471, the 1864 Latour?
A. I see that.
Q. What do your notes indicate about those two bottles?
A. My notes indicate, "Believed rebouche," which means recorked, that's the French word, "in 1980, as 1980 is visible on the cork." Then it says, "cork stamped with chateau emblem and vintage date, modern chateau foil. Cut."
Q. And is that based on your observations of the cork and that bottle?
A. Yes, mine and Fritz's.
Q. Okay. If we could go a little further down, you see how

there's a number --

MR. CIALONE: Just right there is fine. Just blow up the left-hand column, the big one.

Q. Do you see here there's a Latour 1865, 1870s, etc.? You see all those?

A. Yes.

Q. The 1928 Latours are not listed here.

A. I see that.

Q. Are those bottles that you inspected at Mr. Greenberg's home, the 1928 Latours?

A. I don't believe so, no.

Q. Relative to some of the other wines that we've been looking at, the 1864 or the 1945 magnum, and so forth, were the 1928 Latour bottles very high value?

A. They would have been on the lower end of the scale, of these expense -- of the higher-valued wines.

Q. Now were wines of lower value inspected by anyone at Zachys prior to the auction?

A. Yes.

Q. By who?

A. By the auction team back in New York.

MR. CIALONE: And could you go to the next page, please, Liz. Just blow up the middle chunk there from 4410 through 4471. Thank you.

Q. You see there there's some notes about the '49 Lafleur

magnum, right?

A. Yes.

Q. And then there's also some notes about the 1950 Lafleur Magnum, correct?

A. Yes.

Q. And the 1950 Lafleur magnum, what's it say?

A. It says, "just below top shoulder, capsule cut to reveal fully branded cork."

(Continued on next page)

BY MR. CIALONE:

Q. And then after that, what's it say about the rest of them?

A. Same as 4413.

MR. CIALONE: And if we could go to Page 11, please, and just pull up the top six or seven lines through the 1950 Petrus.

Q. Now, Mr. Zacharia, do you see on the third line there's a 1921 Petrus magnum?

A. I do.

Q. And what is that? What does it say about those two bottles?

A. Can you blow that up a little bit?

Q. Sure.

MR. CIALONE: Can you blow up the middle a little bit?

A. One magnum -- Oh, that's --

MR. CIALONE: Can you just blow up that rectangle? Thank you. That's good.

A. One magnum, parts of vintage date only legible. One mag, the 19 is legible. What vintage is this? '21. So the 19 is visible on cork. Petrus on both cork. Some shrinkage on bottle of corks.

Q. Okay. And again is that based on yours and Mr. Hatton's observations?

A. That's correct.

Q. And then if you could go back and do the rest of the lines

for the wines. Okay. Do you see there's the 1928 Petrus, right, magnums?

A. Yes.

Q. And it says "fully stamped cork"?

A. Yes.

Q. And then the 1950, there's a total of five 1950 magnums, right? Do you see that?

A. Yes.

Q. And then -- and your notes say "fully stamped corks" but then only three numbers are written down there, correct?

A. Well, let's see. If you look to the left, I think all five numbers are there, 80 to 84, under the word 1950 Petrus.

Q. Do you know why just three numbers are written next to "fully stamped corks"?

A. I don't think -- I don't know why.

Q. Do you recall if you saw fully stamped corks on all five of those 1950 Petrus magnums?

A. That would be my assumption at this point. I don't recall.

MR. CIALONE: Okay. And then if we can just go to the next page, Page 12. Can you blow that up?

Q. And then there's additional inspection notes about these bottles that we just looked at, correct?

A. I didn't hear the question, I apologize.

Q. Sure. Just these are additional notes regarding -- inspection notes regarding the bottles we just looked at?

A. Yes.
Q. I'm going to talk to you about the auction catalog in some detail, but before I do that, while you and Mr. Hatton were inspecting these wines in Mr. Greenberg's home, did you put Zachys stickers on them?
A. In his home? No, I did not.
Q. Were Zachys stickers at some point put on bottles?
A. They should have been, yes.
Q. Why?
A. Two reasons. The main reason, it's the law in New York State to do that, and secondly, we like doing that. It's good promotional for us. I'm very happy when I'm at someone's house and they're opening, they're putting out a bottle and it has our name on it.
Q. What was the practice at Zachys in 2005 about when you would actually put the stickers on?
A. It changed at some point. So I don't know exactly when it changed. So should I just talk about the change and the general practices?
Q. Sure.
A. Initially, it was done when we were cataloging the wines back in New York. So it would have been done during that second inspection, and at some point we changed it in the '04, '05 period when we were shipping the wines out.
Q. And you're not sure which of those policies was applicable

at that point?
A. No, I'm not.
Q. Is it possible that someone could have missed a bottle here or there?
A. It's certainly possible.
Q. Do you have any reason to believe that somebody would have missed virtually every bottle?
A. I would not be happy if that was the case, but I don't know. I mean, possibly.
Q. Now, I want to talk to you about the auction catalog.
MR. CIALONE: If you could go to Exhibit 101 at Page 44, please, Liz. And if you would just blow up the part about the Cheval Blanc magnums.
A. I'm not seeing anything on my screen.
Q. No? Has the screen gone dead?
A. My screen has gone dead. Now, there it is. Now it's raised from the dead.
Q. Do you see here that there's a description of these 1921 Cheval Blanc magnums?
A. I do. Are you talking about at the top, not the description of the wine tasting?
Q. Yes, not the tasting, no.
A. My screen went blank again, sorry.
Q. That's okay. Do we have a hard copy?
A. For this, I can look up on the big screen. It came back.

THE DEPUTY CLERK: You've got to put another quarter in.

THE WITNESS: I guess so.

Q. Maybe I'm stepping on some wire or kicking the cord. Thank you.

So it says, "top shoulder nicked and scuffed label, capsule cut to reveal fully branded cork;" do you see that?

A. I do.

Q. Who was responsible for putting that sort of information about specific bottles into the catalog?

A. Responsible, you mean after these sheets?

Q. Yes. Yes, or actually --

A. Moving it from these sheets into the catalog?

Q. Yes.

A. It would be part of the team, the auction specialist team.

Q. Was that something that Mr. Greenberg had any role in?

A. No.

Q. Is this -- You referred to cataloging. What does cataloging mean?

A. Cataloging would be capturing all of this information, top shoulder, nicked label, those are the types of things I'm talking about cataloging.

Q. Okay. And we've had some reference in this matter to lotting. What is lotting?

A. So each wine -- all the wines are sold in lots, and we have

to decide what we think is the best lots to put them into, and that's the lotting process.

Q. Okay. Did Mr. Greenberg have involvement in the lotting process?

A. I don't recall.

Q. Okay. Looking at this description of the 1921 Cheval Blancs, it says "fully branded cork," correct?

A. Yes.

Q. And that was -- Was that based on Zachys' inspection of the bottle?

A. Yes, that would be based on our inspection.

Q. Did Zachys reach a judgment that these wines were suitable for sale?

A. Yes, we did.

Q. Was part of that judgment that you believed that these wines were in fact magnums of 1921 Cheval Blanc?

A. That's correct.

Q. Take a look at Page 51, please.

MR. CIALONE: And blow up the lot 401, please, Liz. Not that one. Just that one.

Q. This is an 1864 Latour bottle, correct?

A. Yes.

Q. And you see it says, "cork fully stamped with modern Chateau foil, foil cut, believed recorked in 1980 as 1980 is visible on the cork." First, what does "foil cut" mean?

A. Capsule cut. It's the same as the capsule.
Q. And then why does it say "believed recorked in 1980, as 1980 is visible on cork"?
A. The Chateau's practice -- in those days the Chateau would recondition, recork wines. Usually when they did that, they would put on the new cork the vintage that they had recorked it.
Q. What do you mean by the vintage that they had recorked it?
A. The year, the year they recorked.
Q. Okay. And so is that why you put this information in the catalog?
A. Yes.
Q. Did you reach a professional judgment that this wine was suitable for sale?
A. Yes, we did.
Q. Let's take a look at Page 53, please. And I just want to show you the bottle that's not been discussed in this case previously, No. 407.
MR. CIALONE: Pull up 407.
Q. That's a 1900 Latour. Do you see it says "facsimile label"?
A. I do.
Q. Was it the practice to put that in the catalog if you'd seen that there was a facsimile label?
A. I don't remember specifically that, but it's the -- Ask the

question again.

Q. Sure, sure. Why would you put facsimile label in the catalog about the wine?

A. Because that would be a piece of information that we felt is important to let the buyers know about.

Q. Okay. And was that Zachys' decision about putting the information in?

A. Yes.

Q. And that was based on your evaluation of the wine?

A. Correct.

Q. And let's look at the 1928 Latour, lot 409, please. Do you see it says, among other things, "one missing capsule"?

A. Yes.

Q. Why is that something you would put in there?

A. Buyers like to know that. I think buyers want to make as informed a decision as possible, and we felt that was information the buyer would like to know.

Q. Okay. And did you reach a professional judgment that these bottles of 1928 Latour were suitable for sale?

A. Yes, we did.

Q. Did that include a judgment that they were, in fact, what they purported to be?

A. Yes. Excuse me, that they were purported.

Q. That they were, in fact, what they purported to be?

A. Yes, yes.

Q. Thank you.

MR. CIALONE: Go to Page 59, please, Liz. And just blow up the right-hand column, just the text. Thank you.

Q. Do you see on the top, No. 443, there's a Chateau Petrus 1921 magnum?

A. I do.

Q. And it says "part of vintage visible on cork"?

A. Yes.

Q. Is that consistent with what we saw in the inspection notes earlier?

A. I'd have to go back. I don't remember specifically.

Q. Do you recall there was the one that had the 19 and the one that had the '28 in Exhibit 99?

A. I remember looking at a number of these lines with you. I don't remember the specifics of what was on each line.

Q. Sure.

MR. CIALONE: If I may approach, your Honor? I'll just give him another copy.

THE COURT: Sure.

A. No, I have it. I'm looking right at it.

Q. Take a look at Page 11.

A. Yes.

Q. And do you see under 1921 Petrus mag?

A. Yes. "One mag, part of vintage date only legible; one mag, 19 is visible on cork." So yes, it seems consistent.

Q. Okay. Now, is part of vintage date visible on cork, how does that compare to fully branded cork?

A. It just means sometimes it's hard to see. The glass can be dark. There can be wine stains on the cork. So it's hard to see the full cork, and we were letting the buyers know what we were able to see.

Q. And why were you letting the buyers know that?

A. So that the buyers can make as informed a decision as possible.

Q. And let's look at lots 445 and 446. Do you see they each say "vintage visible on cork"?

A. I see 445. Yes.

Q. And these are the 1928 Petrus magnums. How is vintage visible on cork different than fully branded cork?

A. We couldn't see the word Petrus, the name of the Chateau, on the cork.

MR. CIALONE: And if you go to the next page, please. Page 60, sorry, and just pull up the text for the whole thing.

Q. Do you see there you have three magnums of 1950 Petrus?

A. Yes.

Q. Do you recall earlier when we were looking at the inspection notes, there were actually five magnums of 1950 Petrus?

A. I believe that's correct.

Q. Did Zachys reject the other two, do you know?

A. I don't know.
Q. But there was a decision somewhere along the line not to sell them?
A. I would assume so, yes.
Q. Okay. Now, there's no information at all about the cork brands on those bottles, correct?
A. That is correct.
Q. And under what circumstances would you not put information about the cork brand?
A. Well, usually our policy was, on these older wines, to let people know what we'd seen, and we would want to look at that. Why it's not there, did we have it in any earlier notes? I don't remember.
Q. Sure. It's on Page 11 of the notes.
A. It says, "see back." So it's Page 12, right? 1950 magnums, '80, '81, '82. Yeah, it says it. It says it there, but I don't know why we didn't put it.
Q. Okay. So you had actually seen fully branded cork on this, correct?
A. Yes.
Q. But you didn't put that in the catalog, right?
A. Right.
Q. Is a fully branded cork typically a positive thing?
A. It's -- It's letting the buyers know the full information that we've seen.

Q. Okay. Can we go to Page --

A. The information that we've seen.

MR. CIALONE: Can we go to Page 64, please. And just blow up the two lots, 479 and 480.

Q. And these are the 1921 Lafleur magnums?

A. Yes.

Q. Do you recall we looked at notes on those earlier?

A. Mmm, hmm.

Q. The first one says "fully branded cork," right?

A. Right.

Q. And the second one says nothing about the cork, right?

A. Correct.

Q. Why the difference?

A. Again, I don't know specifically, except I can see from my earlier notes I didn't cut one of them, and the other one hadn't been cut.

Q. When it says fully branded cork, does that indicate that Zachys has actually verified that?

A. Yes.

Q. And if it doesn't say fully branded cork, what's that mean?

A. It means the information isn't there. It means if a buyer wants to know, they should contact us.

Q. Okay. And do you believe your buyers know that they can do that?

A. Certainly buyers have contacted us.

Q. Okay. Do you consider buyers of wines at prices like this to be sophisticated buyers?
A. Most of them, yes.
Q. Do you consider Mr. Koch to be a sophisticated buyer of wine?
A. I don't -- I know Mr. Koch. I don't know if he's -- I don't know how to answer that.
Q. Did Mr. Koch attend the auction himself, do you know, the October?
A. He did not attend the auction.
Q. Who attended for him?
A. An agent of his.
Q. Was that Brian Orcutt?
A. Yes, it was.
Q. And who is Mr. Orcutt?
A. Mr. Orcutt is someone who used to work with Christie's, when -- partnered with them, and then went out on his own to work for individuals.
Q. To work for individuals doing what?
A. Work for individuals in helping them manage their wine collections.
Q. Okay. If you look a little further down on this page, please, the next two lots. Again, we have the 1945 Lafleur magnums, right?
A. Yes.

Q. And the cataloging information on those, is that based on Zachys' observations?

A. Yes.

Q. And then if we go to Page 65, please. And let me just ask, the ones we looked at, the 1921 Lafleur magnums and the 1945 Lafleur magnums, did Zachys reach a professional judgment that those were suitable for sale?

A. Yes, we did.

Q. And that was based on what?

A. Based on our judgment of the inspection of the wines.

MR. CIALONE: Liz, can you blow up the 1949, please, lot 488 and 489.

Q. Can you see on 488, again, it says "capsule cut to reveal fully branded cork"?

A. Yes.

Q. And the next one just says "capsule cut to verify vintage"?

A. Right.

Q. What's the difference?

A. That we probably couldn't see Lafleur. We couldn't see the Chateau on there, but we could see the vintage.

Q. And then going to Page 66, do you see on the left-hand column --

MR. CIALONE: Just blow up the first portion of the left-hand column, just the 1950s. Thank you. Sorry. My mistake. Blow up lots 492, 3 and 4. I got my bottles and

magnums mixed up.

Q. Do you see they have a 1950 Lafleur magnum, right?

A. Yes.

Q. There's a total of five of them?

A. Yes.

Q. And as to the first two, it says "fully branded cork," correct?

A. Yes.

Q. Does that refer to both of those magnums?

A. Yes, it should.

Q. Okay. And then as to the next one, it's a lot of three, right?

A. Correct.

Q. And it just says "capsule cut to verify vintage," correct?

A. Yes.

Q. And what's the difference between those two?

A. That is the same answer as before.

Q. Okay. And all of this information in the catalog is based on what?

A. On our inspection of the wines.

Q. And did Zachys reach a professional judgment that all of these wines were suitable for sale?

A. Yes, we did.

Q. Can we turn to Page 6 of Exhibit 101, please.

A. Page 6 of -- Oh, okay. I'm sorry.

Q. This is an introduction or cover letter from the catalog?
A. Yes.
Q. Did you draft this?
A. I did.
Q. Did Eric Greenberg provide comments to you?
A. He did.
Q. Just take a look at the first paragraph, please. Do you see in that paragraph you refer to paintings by Degas, right?
A. Mmm, hmm.
Q. William Randolph Hearst?
A. Yes.
Q. Alexander the Great of the collecting world; do you see that?
A. I do.
Q. Did any of those statements, in your view, were you representing facts about Mr. Greenberg's collection?
A. No.
Q. Were these your opinions about the collection?
A. This was part of our marketing piece in trying to give people an idea of what the collection was like, a comparative.
Q. And in making these statements in this first paragraph here, were you making any representation about where Mr. Greenberg had bought his wines?
A. In this first paragraph?
Q. Yes.

A. I don't think so. No, I don't think so.
Q. Were you make -- I'm sorry, did you finish your answer?
A. I did.
Q. Okay. Thank you. Were you making any representation about the way in which the wine collection was stored?
A. Not that I see, no.
Q. Were you representing that the consignor had not bought wine from resellers?
A. Not that I see, no.
Q. Were you making any representation about how the consignor tracked his inventory?
A. No.
Q. Let's take a look at the second paragraph. Do you see there you describe it as a "best of the best collection"?
A. Yes.
Q. "Rarely have I seen the breadth and depth of this cellar;" were these your opinions?
A. They were.
Q. And what were they based on?
A. My visiting of the cellar and knowledge -- just knowledge of his collection.
Q. Now, you stated these opinions even though Zachys had actually rejected wines from that cellar as potentially inauthentic, correct?
A. That's correct.

Q. Did you have any difficulty making that statement, knowing that you'd rejected wines as counterfeit?
A. No, I did not.
Q. Now, do you see here, a little further down, you say, "This offering represents less than a third of his current inventory"? Do you see that?
A. Yes.
Q. And "He now believes about 30,000 bottles of the world's greatest wines should provide adequate supply and variety;" do you see that?
A. Yes.
Q. What was the purpose of saying those things?
A. It was part of our marketing. It was part of how we were trying to give buyers, you know, some idea of what the collector was all about.
Q. You also say that "several smaller sales have taken place," in the last sentence?
A. Yes.
Q. Let's take a look at the next paragraph, please. Do you see here you state that, "the collection was relatively recently formed with most purchases occurring between 1995 and 2004"?
A. I do.
Q. Was that accurate, as far as you know?
A. Yes.

Q. For a collection of the size that's discussed here, is that a pretty quick time period in which to amass it?
A. Yes.
Q. And why did you put that in the catalog?
A. I don't remember.
Q. Okay. Fair enough. Is it clear from this -- Let me ask. The auction was in 2005, right?
A. Correct.
Q. And you're showing that the collector had bought most of the wines between '95 and 2004, right?
A. Yes.
Q. So is it clear from this that the collector might be selling wines that were recently acquired?
A. Yes.
Q. And you also identified that there have been several smaller sales in the past, correct?
A. Yes.
Q. In fact, do you recall that the -- this auction, the 17,000-bottle auction actually included a number of wines from fairly recent vintages; do you know?
A. I don't know.
Q. Do you know if it included wines from the 2002 vintage?
A. I don't remember.
Q. Okay. When would wines from the 2002 vintages have actually been available for purchase?

A. Usually one to three years after the vintage.

MR. CIALONE: Okay. Can you just put up Page 261 of this exhibit, and it should say 2002 on the bottom there. Do you see it? Blow up the bottom half. There you go.

Q. Do you see there there's a number of 2002 Burgundies?

A. I do.

Q. And do you recall also that there was in this sale a super lot of 2,000 Bordeaux?

A. I don't.

Q. Okay. Would the fact that there are wines from 2001, 2002 indicate that there were wines that the collector had recently bought and were being resold?

A. Yes.

Q. Let's go back to the introduction, please, Page 6. And if we look at the third paragraph, the bottom half, it says, "On occasion, Burgundian and Rhone rarities were purchased directly from domains, as well as from other collectors who are personal friends of some of the world's greatest winemakers." What does that sentence mean?

A. That some of the wines that Eric bought were bought directly from the domains, as well as from other collectors who were personal friends, and some he bought then from other collectors, who were friends with the owners of the domains.

Q. Were you making a representation about all of the 17,000 bottles in the auction with this sentence?

A. No, I was not.
Q. Were you making a representation about any of the Bordeaux wines in this sentence?
A. I talk about burgundy and Rhones; so no, not Bordeaux.
Q. And were you trying to imply that most of the wines had come from -- directly from domains and collectors in this sentence?
A. No.
Q. Mr. Zacharia, does this introduction set forth your honest opinions and impressions of Mr. Greenberg's cellar?
A. Yes, it does.
MR. CIALONE: Your Honor, it's 12:30. I'm about to turn to another portion. I'm not going to finish before the lunch break; so this might be a good time.
THE COURT: I'm going to actually have a -- I have a meeting I need to attend from 1:00 to close to 2:00; so why don't you go a little bit more.
MR. CIALONE: Sure, no problem.
THE WITNESS: I'm happy to.
THE COURT: Is that fine?
THE WITNESS: I can keep going.
THE COURT: Is the jury okay? We'll go a little bit longer.
Q. Now, Mr. Zacharia, we've talked about your efforts to verify wines and inspect wines. Did Zachys guarantee

authenticity?

A. No, we did not.

Q. Did Zachys include an as-is provision in the catalog?

A. Yes, we did.

Q. Did Zachys do that throughout the 2003 to 2005 period?

A. Did you say '3 to '5?

Q. Yes.

A. Yes.

Q. And why?

A. We were doing our best to only present wines that we believed they were what they were, but we couldn't guarantee that.

Q. Did you allow prospective bidders to inspect wines before the auction?

A. Yes, we did.

Q. Is it something that bidders sometimes did?

A. Yes, they did.

Q. Did you ever prevent a bidder who asked to inspect from doing so?

A. Not to my knowledge.

Q. Would you take a look at Page 247 of Exhibit 101, please.

MR. CIALONE: Just blow up the top third, above the signature line.

Q. This is titled Bidder Pre-registration Form. Is this -- What was the purpose of this form?

A. This is a form for bidders who wanted to register for the sale, what they have to fill out.

Q. And do you see at the right it says "paddle number"?

A. Yes.

Q. What does that mean?

A. When the bidders are in the room, they actually have a paddle that they will raise, and that's what will -- that's how we tie all together to who they are.

Q. Does it really look like a paddle?

A. It does.

Q. And so each person has a number?

A. Correct.

Q. If you had somebody who was a buying agent, say like Mr. Orcutt, hypothetically, who was buying for more than one person, would they have multiple paddles?

A. They could, yes.

Q. Was filling out this form a requirement to get a paddle?

A. This, or the actual form in the room, which I think was slightly different, but yes.

Q. Okay. And then looking at the bottom lines here, it says, "I agree that I will bid subject to, and hereby agree to be bound by, the conditions of sale printed in the catalog for this sale." correct?

A. Yes.

Q. If we go to another exhibit.

MR. CIALONE: Can you put 1019 on the screen, please. Not on the big one. Do you have it up on his?

Q. Mr. Zacharia, do you see Exhibit 1019 on your screen?

A. I do.

Q. Can you tell me what it is?

A. It's similar to the other form.

Q. And who signed it?

A. Brian Orcutt, I believe.

Q. And on whose behalf did he sign it, can you tell?

A. William I. Koch.

MR. CIALONE: Your Honor, I'd like to move Exhibit 1019 into evidence.

MR. CAMP: No objection.

THE COURT: 1019 received.

(Trial Exhibit 1019 received in evidence)

MR. CIALONE: Can we put that on the screen, please.

Q. Now, was it enough -- It says Invoice Information, William Koch. Was that enough information for Zachys to know who was buying this wine?

A. In this instance, yes.

Q. Okay. And it says -- just above that, it says, 0410LA. What does that refer to?

A. That is the sale number and the location of the sale. So 04 is the year, 10 is the month, and LA is LA.

Q. And that occurred in October of 2004, correct?

A. Yes.
Q. What does the number 530V?
A. That would have been the paddle that we'd given Brian for Bill Koch.
MR. CIALONE: Can you put up Exhibit 1021 on his screen, please.
Q. And, Mr. Zacharia, do you have Exhibit 1021 in front of you?
A. I do. What Exhibit? 1021, yes.
Q. Can you tell me what it is?
A. It's similar to the last form for a different sale, I'm assuming.
Q. Okay.
MR. CIALONE: Your Honor, I'd like to move Exhibit 1021 into evidence.
MR. CAMP: No objection.
THE COURT: 1021 received.
(Trial Exhibit 1021 received in evidence)
MR. CIALONE: Put the top portion on the screen, please. Thank you.
Q. And is this, again, signed by Mr. Orcutt?
A. It is.
Q. On Mr. Koch's behalf?
A. It is.
Q. And then which auction was this for?

A. This is for the December 2004, New York auction.
Q. Okay. And then the number 493, what is that?
A. Again, the paddle number that he used, that we gave Brian for that sale.
Q. And then like the others, it says, "I agree I will bid subject to, and hereby agree to be bound by, the conditions of sale," correct?
A. Yup.
Q. Now, have you looked for a similar form signed by Mr. Orcutt for the October 2005 auction?
A. I have.
Q. Have you found one?
A. I have not.
Q. Do you know why?
A. We had a flood in our warehouse where we stored these records, I don't remember when, but at some point after the sale.
Q. Could Mr. Orcutt have gotten a paddle for Mr. Koch at the October 2005 auction without signing that form?
A. That was our procedure, that no one gets a paddle without signing the form.
Q. And without a paddle, can you place bids at the auction?
A. No, you cannot.
MR. CIALONE: Can you put Exhibit 97 up, please, Liz.
Q. Now, Mr. Zacharia, I'm going to show you an e-mail exchange

from August of 2005 that's been previously admitted.

MR. CIALONE: Would you go to the second page, please. Just blow up the top e-mail.

Q. Do you see here you e-mailed Thierry Lovato, re: line, Eric estimates?

A. I do.

Q. And what does "estimates" refer to?

A. Those are the estimates where we -- the range where we think the wines will sell at auction.

Q. And do you see in the marked paragraph in the middle, the largest paragraph, it says "on another matter, one of the issues we've been dealing with is people are more and more cautious when buying these older bottles. What will help us help get Eric top dollar for his old wines is getting the provenance." Do you see that?

A. I do.

Q. And a little further down it says, "Wines from the 19th century will not fetch top dollar. In fact, they will be much harder to sell without the provenance. The further back it can be ascertained, the more valuable the wine is."

First, What do you mean by provenance in this context?

A. Provenance is the history of the wine. If this is a bottle of wine that was in Eric's possession but where he bought it from, and how it was stored in Eric's possession, and how it was stored in the person possession before his, and going back

in time, all the way to the release from the Chateau.

Q. And does the provenance refer to the history of a specific bottle of wine?

A. Yes, we look at the provenance per bottle of wine, yes.

Q. Were you -- What was the purpose of asking for provenance in August of 2005?

A. I think it states here. So, again, I don't remember, but from what I see here, is we were trying to obtain top dollar.

Q. At this point in time, do you know, had you already -- had the wines already been shipped from Mr. Greenberg's home to Zachys in New York?

A. I don't know.

MR. CIALONE: Can you show him Exhibit 1094.

Q. Let's see if I can refresh your recollection.

MR. CIALONE: Has that been admitted? Okay.

Q. Mr. Zacharia, do you see Exhibit 1094?

A. I do.

Q. And do you see on the lower half there's an e-mail from Michael Jessen to Mr. Greenberg and you and others, dated August 26th, 2005?

A. Yup.

Q. And it says in the second paragraph -- Can you just read the second paragraph, the one that starts "As an update"?

A. "As an update we safely" --

Q. Just read it to yourself.

A. I'm sorry.
Q. That's okay. And just let me know if this helps refresh your recollection whether the bottles had been shipped from California by August 24th?
A. In this second paragraph?
Q. Yes.
A. So certainly some of the wines. It says, "dedicated western truck." It would have been a big portion, if not all of the wines, arrived in our warehouse today, August 26th.
Q. So would they have been shipped by the time you e-mailed the e-mail regarding Eric estimates on August 24, do you believe?
A. When did I -- I'd have to go back.
Q. Sure.
MR. CIALONE: If we can give him back Exhibit 96, Liz, second page. Just put it on the screen too.
A. So there were -- Yes, they would have been shipped.
Q. Okay. I'm looking at Page 1 of Exhibit 97. You forwarded Mr. Lovato's response with your e-mail to Mr. Greenberg, correct?
A. I forwarded it to Eric?
Q. Yup.
A. Oh, yes, I see that.
Q. And then Mr. Greenberg's response on the top?
A. Yes.

Q. It said, "I cannot provide this. I had many sources and cannot tie them to bottles, sorry"?

A. Yes.

Q. Was that consistent with what Mr. Greenberg had previously told you?

MR. CAMP: Objection, leading.

THE COURT: Overruled. You can answer.

Q. Is that consistent with what Mr. Greenberg had previously told you about how he maintained records on his collection?

A. Yes.

Q. Okay. Let's take a look at Exhibit 98, please. And you see a few minutes later --

MR. CIALONE: Just blow up the top half, the top e-mail.

Q. -- Mr. Greenberg said, "The only thing I can tell you about the older Bordeaux is that they were purchased from Eddie Gelsman at Wine Library or Dave Sokolin at D. Sokolin in South Hampten;" do you see that?

A. I do.

Q. From this e-mail, did you know what specific wines Mr. Greenberg was referring to?

A. No.

Q. Did you -- Did this give you the information you were looking for to be able to get higher prices?

A. No, it did not.

Q. And why not?
A. I would have needed to have been able to tie specific purchases to specific wines.
Q. And did you ever follow up with Mr. Greenberg and ask if he could do that with any of the specific wines?
A. I don't recall.
Q. Now, if Mr. Greenberg had told you that he got 19th century Bordeaux from these two sources, one Library and D. Sokolin and also Royal, Atherton Wine Imports, Sotheby's and Christie's, would that have made any difference in how you handled the auction?
MR. CAMP: Objection, compound.
THE COURT: You can answer.
A. It would not have made a difference unless I could tie specific bottles to specific purchases.
Q. Now, by the time you got this e-mail, you had been -- had you been aware for a while that Mr. Greenberg had bought wines from Royal?
A. Yes, I had.
Q. And was it a cause of concern for you that Mr. Greenberg had bought wines from Royal?
A. Not that I recall.
Q. Did he ever tell you that none of the wines he consigned to the October '05 auction had come from Royal?
A. I don't remember.

Q. Now, at the time of this e-mail, August 25, 2005, was Royal the only vendor or only entity that had been tied to counterfeits?

A. I don't know that Royal had been tied to counterfeits.

Q. Were there other people that had been or were rumored to be?

A. There were rumors, yes.

Q. And then --

MR. CIALONE: You can take that off.

Q. -- and let's just focus on 19th century wines. Is knowing that -- Would knowing that Mr. Greenberg bought a 19th century wine from, say, Wine Library, would that be sufficient provenance for the purpose you had put in that e-mail?

A. No.

Q. Why not?

A. Because it doesn't give us enough history to be meaningful. Wine Library, most likely, had just purchased it and was reselling it.

Q. Would knowing that Mr. Greenberg had bought a wine at an auction be sufficient provenance?

A. Perhaps.

Q. And under what circumstances would it be?

A. If he bought wine from a -- If he bought wine, as Eric did, from the Doris Duke collection, that would have had significance because that was a known collector who had bought

the wines 50 years earlier and had stated herself, and that would increase the value of the wine.

Q. What if he had bought wine from an anonymous consignment?

A. It would be of much -- We would note it, but it would be of much less significance.

Q. Okay. At any point did Mr. Greenberg tell you that he had gone through some of his wines that he thought came from Royal?

A. Yes.

Q. And what did he tell you about that, that you recall? I realize it was a long time ago.

A. Yeah, I'm trying. That he had gone through his wines to cull out the ones that were fake.

Q. Did he tell you that he had taken notes regarding that?

A. Not that I remember.

MR. CIALONE: I'm going to put up Exhibit 107, Page 1, please. 107. If you could just blow up items 1 through 5, please.

Q. Had you ever seen this document before, Mr. Zacharia?

A. I might have seen it at a deposition.

Q. Okay. But other than in the context of this litigation?

A. No, I have not.

Q. Okay. Would you look at -- these are -- these have been identified as notes that Mr. Greenberg made when he looked at wines in his cellar. Do you see No. 1 it says, among other things, "no visible date on cork or domain markings"?

A. I do.
Q. And the next one says "no visible date on cork or domain markings"?
A. I do.
Q. The third one says the same?
A. Yup.
Q. If you had seen that Mr. Greenberg was noting things like that when he went through wines in his cellar, would that have mattered to you in connection with the October 2005 auction?
A. Mattered to me in what way?
Q. Would you be concerned that these wines would be submitted to you and you would -- you would include them in the auction?
A. We did our own inspection of these wines. So am I answering the question? You have to ask me again, I'm sorry.
Q. No, that's fine.

Do you think you can -- in your inspection, you would see if a cork had no visible date or domain markings?
A. In my inspection, we could see if there was no -- Yes, we would see that.

MR. CIALONE: You can take that off.

Q. I'm going to ask you about a different subject. Do you know who JJ or Jaime Cortes is?
A. Only from depositions.
Q. Okay. Did you ever deal with Mr. Cortes in connection with any of Mr. Greenberg's consignments?

A. Not that I recall.
Q. Okay. If you had known that prior to November 2004, when Mr. Cortes stopped working for Mr. Greenberg, that he had been instructed once or twice to send the worst-looking bottles to an auction, would that have made a difference in how you conducted your inspection?
A. No.
MR. CAMP: Objection, lacks foundation.
THE COURT: It's fine. You can answer.
Q. Let's take a look -- Let me ask, did the October 2005 auction include bottles -- some bottles that had torn labels or tattered labels?
A. Yes.
Q. Is that information that would be set forth in the catalog?
A. Yes, it would.
Q. Can you go to Exhibit 101, please?
THE COURT: Which one?
THE WITNESS: 101.
MR. CIALONE: Sorry? 101. Page 189.
A. Those are torn.
Q. Those are torn, right?
A. Yes.
Q. And that's something you had in the catalog, right?
A. Correct.
Q. And can you tell what lot numbers those are?

MR. CIALONE: If you blow at the top a little bit?
A. Yes, you can, 1865, 1867 and 1869.
Q. Okay. So the one on the right would be lot 1869, am I correct?
A. No, not necessarily. You'd have to tie it in by the actual vintage.
Q. Okay. Can you tell which is which looking at those wines?
A. Only by you have to look -- If you could blow up the wines, the one on the right says Musiny '47 vintage, then we'd have to go to the catalog to find Musiny '47, but I'd have to confirm that the other two aren't Musiny '47. So you have '45 and '29; so you have to find the Musiny '47 in the catalog and see which lot that was. But it would have been one of those three lots.
Q. Okay.
MR. CIALONE: If I can approach to give the witness a copy of an exhibit that's been previously admitted. It's Exhibit 100. I just want to show him Page 13.
A. Thank you.
Q. And Exhibit 100 is an invoice that was sent to Mr. Koch of the wines he bought in the October '05 auction. Looking at that exhibit and this picture, can you tell if Mr. Koch bought any of these wines?
A. Sorry. 1869 he bought, which is that '47 Musiny.
Q. That's the one on the right?
A. That is correct, but let's -- Yeah. Yes.

Q. And then if you look to the previous page, there may be some others. I don't know.

A. Do you want me to look?

Q. Yes.

A. 65 and 67. 67, which is the '45 Musiny; that's the one in the middle.

MR. CIALONE: Okay. Can you just go back to the full picture, please.

Q. So Mr. Koch bought the one in the middle and the one on the right, correct?

A. Correct.

MR. CIALONE: Can you put up -- I'm going to turn to another area now. Can you put Exhibit 412 please, Liz.

Q. Mr. Zacharia, do you know what Chicago Wine Company is?

A. To an extent.

Q. Were you ever aware that Mr. Greenberg sometimes sold wine through Chicago Wine Company?

MR. CAMP: Objection, lacks foundation.

THE COURT: Sustained.

MR. CIALONE: I didn't hear you.

THE COURT: Sustained.

MR. CIALONE: Okay.

Q. Let's take a look at Exhibit 412, please.

MR. CIALONE: It's not admitted? 413. Thank you. Do you have 413? Can you blow up the bottom e-mail, please.

Q. Do you see here there's an e-mail from Simon Lambert of Chicago Wine to Eric Greenberg from February 2005?
A. I do.
Q. And it's regarding some -- it says, "the customer to whom we sold all of the 1921 and 1929 Petrus magnums, having now received delivery from us, has today sent me the following. See below." Do you see that?
A. Yes.
Q. And then let's look at the customer's e-mail. It starts at the very bottom of the page. It says, "Dear Simon"?
A. I see that.
MR. CAMP: Objection. A lack of foundation, given the witness' testimony. He's not on the e-mail. He doesn't know if Mr. Greenberg purchased --
THE COURT: Do you know who Simon Lambert is?
THE WITNESS: I do.
MR. CIALONE: He can read, and this e-mail has been admitted into evidence, and I'm just going to show him.
THE COURT: That's fine.
Q. Do you see it says, "Dear Simon"?
A. Yes.
MR. CIALONE: And then just go to the next page, please. Blow that up.
Q. Do you see there it has some comments about some of these wines and ends with "best regards" and no signature?

A. Mmm, hmm.
Q. Do you see that?
A. I do.
Q. The first one, it says that "121 has no date on the cork and cork is shrunken at the base"?
A. Yes.
Q. Would knowing that -- Let's assume for a moment that -- strike that.

Would knowing that an unidentified customer of Chicago Wine had said that about a bottle of wine that he bought from Mr. Greenberg, would that have affected your inspection in any way?

MR. CAMP: Objection, lacks foundation.

THE COURT: You can answer if you can answer.

A. Sure. Repeat the question, please.
Q. Sure. Would knowing about this e-mail, from whoever this is, would that have affected your inspection in any way in connection with the October 2005 auction?
A. I would have wanted to verify that I could see the vintage.
Q. Okay. And did you do that with respect to the 1921 Petrus magnums?
A. I did.

MR. CIALONE: Your Honor, it's five to 1:00.

THE COURT: Yes, why don't we break for lunch. Can you come back after lunch, Mr. Zacharia?

THE WITNESS: I'm sorry?

THE COURT: Can you come back after lunch?

THE WITNESS: Sure, seeing you asked so nicely.

THE COURT: I'm going to let the jury go for lunch. We'll have a little more than an hour. We'll start back around 2:00. It's a beautiful day. Hopefully, you'll have a chance to go out and enjoy the beautiful weather. We'll start at 2:00. Please leave your pads. Please don't talk about the case. We'll see you at 2:00.

(Jury exits)

THE COURT: Okay. Folks, why don't we break for lunch. I'll try to come back a little before 2:00 to address the issues. Let's say I'll try to make it back at 1:45 or 1:50.

MR. SHARTSIS: Thank you, your Honor.

THE COURT: Okay.

(Luncheon recess)

(Continued on next page)

AFTERNOON SESSION

2:11 p.m.

(In open court; jury not present)

THE COURT: Unfortunately my meeting went longer than I expected. So Mr. Skolnik is handing out three copies per side of the draft jury instructions that we put together and then we'll hopefully have a chance tomorrow at the end of the trial day to discuss them.

How much more time for direct, Mr. Cialone?

MR. CIALONE: 20 or 30 minutes.

THE COURT: Okay. Can we proceed and then talk about the evidentiary issues on the break?

MR. CIALONE: Yeah, yeah.

THE COURT: Okay. Let's go ahead and bring in the jury.

Mr. Zacharia, you may approach and come back to the witness stand.

(Continued on next page)

(Jury present)

THE COURT: Welcome back, folks. We'll continue with the testimony of Mr. Zacharia.

Mr. Cialone.

MR. CIALONE: Thank you, your Honor.

BY MR. CIALONE:

Q. Mr. Zacharia, have you heard of a Bordeaux Wine Locators?

A. Yes.

Q. What is Bordeaux Wine Locators?

A. They're an importer of wine.

Q. What does it mean to be an importer of wine?

A. They buy wines, mainly from Europe, and bring them -- well, in this instance they buy wines mainly from Europe and bring them into the United States and sell them.

Q. Are they a large operation?

A. I believe they are.

Q. Do you see -- do you frequently see bottles -- well, how do you know a bottle has been imported by Bordeaux Wine Locators?

A. It would have a strip label on it on the bottom saying "Imported by Bordeaux Wine Locators."

Q. Do you see those frequently?

A. Yes, we see them.

MR. CIALONE: Can we put up Exhibit 388, please.

Blow up the top e-mail, Liz.

Q. This is an e-mail Mr. Greenberg sent on November 24, 2004

to David Smydo at Sokolin. Do you know who that is?
A. Yes.
Q. Who is he?
A. He's someone who works at Sokolin.
Q. What is Sokolin?
A. It's a retailer in New York, of fine wine, of wine.
Q. And Mr. Greenberg here refers to a "'49 Latour you just shipped is fake and I'm sending it back for refund. The cork is not properly marked." And he goes on to describe issues with it, cellophane tape, etc. He says, "I will expect a refund on that as well. Bordeaux Wine Locators is the worst counterfeiting operation in the world. Have a great Thanksgiving." If you'd seen this e-mail prior to the October 2005 auction, would that have affected the work you did in any way?
A. No.
Q. Prior to the October 2005 auction did you know whether or not Mr. Greenberg had ever bought wine from Rudy Kurniawan?
A. No, I did not.
MR. CIALONE: Could we put up Exhibit 78, please.
Go to the second page. And blow up the first paragraph of Mr. Greenberg's e-mail.
Q. This is an e-mail Mr. Greenberg sent on December 28, 2003, discussing wines he bought that had been consigned by Rudy Kurniawan, and he says they're counterfeit. Do you see that?

A. I'm sorry. These are wines that Eric bought -- that he bought from Rudy.

Q. That Rudy -- Mr. Kurniawan consigned?

A. That he consigned. Okay. Oh, I see. Yeah.

MR. CIALONE: Could we go to the first page of the document, please. Could we blow up the top e-mail.

Q. And this is an e-mail dated December 30, and Mr. Greenberg says, "I just had a lengthy conversation with Rudy Kurniawan. He and I have known each other, done tastings together, and I am convinced that he did not know what he was selling was not right."

If Mr. Greenberg had told you he had bought wines from Mr. Kurniawan that he thought were counterfeit and that he returned them for a refund and did not think that Mr. Kurniawan knew that the wines he'd been selling were not right, if he had told you that before the October 2005 auction, would that have affected your work at all?

A. No, it would not.

Q. Do you know who John Kapon is?

A. I do.

Q. Who is John Kapon?

A. He's the -- I don't know his exact title, but he runs Acker Merrall.

Q. And that's another wine auction house?

A. Correct.

Q. Newer wine auction house than Zachys, or an older one?
A. I don't know when they started doing wine auctions. I don't know. No, I -- well, I don't know.
Q. Did you know before the October 2005 auction that Mr. Greenberg had sold wine through Acker Merrall?
A. Before -- now you're going way back in time. I don't think so, but I'm not sure.
Q. Okay. Do you ask consignors about their contacts with other auction houses?
A. Sometimes.
Q. Was that your practice with Mr. Greenberg?
A. I don't think I did with Eric, but I don't remember.
MR. CIALONE: Okay. Let's take a look at Exhibit 389, please. And if you would just blow up the bottom.
Q. This is an e-mail from Mr. Kapon to Mr. Greenberg, November 28, 2004, regarding Mr. Kapon's inspection of some wines.
First, you see the discussion of the 1921 Cheval and the 1945 Lafite?
A. Yes.
Q. Do you see where Mr. Acker -- Mr. Kapon says, "How do we catalog the wines?"
A. I do.
Q. Did you look to other auction houses to tell you how to catalog wines that Zachys was putting up for auction?

A. No, I did not.

Q. Looking at this e-mail -- well, strike that.

If you examined the wine and you thought it was counterfeit, would you include it in an auction?

A. No, I would not.

Q. Would you do that with any -- would there be any catalog description you could use of the wine that would make you comfortable putting a counterfeit wine in an auction?

A. No.

Q. Look at the larger paragraph that starts, "Then there are the Lafleurs."

A. Yes.

Q. Can you see it talks about, "The corks are branded vertically, which they only started using post '66." Do you see that?

A. I do.

Q. Was that your opinion in advance of the October 2005 auction, that Lafleurs from prior to 1966 had to have horizontal cork brands?

A. No.

Q. Did you actually inspect corks on Lafleurs consigned by Mr. Greenberg for the October 2005 auction?

A. I did.

Q. Including pre1966?

A. Yes, I did.

Q. And did you see brands on them?
A. I believe that's what I did, yes.
Q. Were some of those brands vertical; do you know?
A. I don't know.
Q. If -- and you also said you tasted a Lafleur. We talked about that this morning. Do you recall that?
A. Yes, I do.
Q. And you looked at the cork on that one?
A. I did.
Q. And that was 1947, right?
A. Correct.
Q. Did -- the cork on that one was the same as the ones you expected; do you know?
A. I don't remember.
Q. Would you expect that it would?
A. They changed their branding on their corks at times, so I don't know what I would expect.
Q. And what was your view as to whether a vertical -- vertically oriented cork brand was appropriate on a Lafleur from that era?
A. In 2005?
Q. Yeah. What was your view at that time?
A. I didn't -- I was not aware of -- of a difference there.
Q. Would Mr. Kapon's opinion have changed your mind about that, affected your work?

A. It would have made me confirm, try to ascertain whether that was accurate or not.

Q. Okay. What would you have done to do that?

A. I would have contacted the winery.

Q. In 2002 when you met with Mr. Greenberg, did you know that he'd spoken with Christie's?

A. No.

Q. Would that have made a difference to you if Mr. Greenberg had told you he'd spoken with Christie's?

A. In terms of what?

Q. That he'd been speaking with them about potentially consigning these wines.

A. In terms of what?

Q. In how you conducted yourself in your dealings with him.

A. It would have made a difference perhaps in how I would have structured my terms with him, the terms of the agreement, if I felt it was competitive.

Q. Would it have made a difference to you in terms of how you inspected his wines?

A. No.

Q. Would it have made a difference if he told you that Christie's raised concerns with some of his wines?

A. No.

Q. Did you know that Mr. Greenberg had spoken with Sotheby's when you met with him in 2002?

A. Yes, I did.
Q. And how did you know that?
A. He told me.
Q. And what did he tell you about that?
A. He told me that Serena had been in his cellar, Serena Sutcliffe from Sotheby's, and she had looked at a couple of his bottles. I don't remember exactly. Again, this is a long time ago. And Eric had said, you know, had said that she -- Serena had said that he had some fake bottles, and he pulled a bottle around and says, "Is this fake?" And she said yes. And he turned it around and it had the Sotheby's sticker on it.
Q. Mm-hmm. And did he tell you about that she had -- that was the only one she said was fake or others as well?
A. That's the only one that Eric mentioned to me.
Q. Okay. Take a look at Exhibit 1008, please.
MR. CIALONE: If we could blow out the second paragraph.
Q. This is a letter from Ms. Sutcliffe to Mr. Greenberg dated April 30, 2002, where she says, "Jamie and I were deeply impressed with your cellar." Do you know who Jamie Ritchie is?
A. I do.
Q. Did he work for Sotheby's?
A. He does.
Q. Ms. Sutcliffe goes on to say, "I can honestly say that it's one of the greatest collections I've ever seen," and then, "the

collection is breathtaking." If Mr. Greenberg had told you that Ms. Sutcliffe raised concerns about some wines in his cellar and then sent that letter, would you have been concerned about the integrity of the wine collection?

A. No.

Q. Let's take a look at Exhibit 1070, please.

Did Mr. Greenberg ever show you this proposal that he got from Sotheby's?

A. No, he did not.

Q. Did he tell you that they had actually proposed to auction his wines?

A. No, he did not.

Q. Can you take a look at page 3, please. Have you ever seen this document, Appreciation of the Eric Greenberg Collection?

A. I don't believe so.

Q. Take a look at the second paragraph, please.

Do you see Ms. Sutcliffe -- this document says, "The range in quality of the wines is breathtaking, reflecting the owner's search for the best." It goes on to say, "truly starry array of wines," some other comments like that.

A. I do.

Q. If you had seen this description from Ms. Sutcliffe and from Sotheby's, would you have any reason to be concerned about auctioning Mr. Greenberg's wines?

A. No.

Q. Would that have changed how you conducted yourself in connection with the auction?

A. No.

Q. Pretty consistent with your description of, this is the best of the best collection?

MR. CAMP: Objection. Leading.

A. Can you ask that question again, I'm sorry.

THE COURT: You can answer.

Q. Not until the judge --

THE COURT: You can answer.

A. Oh.

Q. Is this pretty consistent with your description of this as the best of the best collection?

A. So is this similar to how I described it?

Q. Yes.

A. Yeah, I think it's basically similar.

MR. CIALONE: No further questions. Thank you.

THE COURT: Okay. Cross-examination?

MR. CAMP: Yes.

THE COURT: Mr. Camp?

MR. CAMP: We have a couple of bottles to set up on the table. It will take us just a moment.

THE COURT: Sure.

(Pause)

CROSS-EXAMINATION

BY MR. CAMP:

Q. Good afternoon, sir.

A. Good afternoon to you.

Q. Mr. Zacharia, you understand that in the course of this trial, this jury has heard a lot of evidence and testimony about the 24 bottles that are at issue. You're aware of that, right?

A. Yes.

Q. And you understand they've heard actually a couple days of expert testimony relating to whether or not those bottles are counterfeit, that is, what -- whether they are what their label says they are.

A. I understand there's been testimony about that.

Q. And you understand that if this jury agrees that Mr. Koch bought those bottles from your auction house and that they're counterfeit, the implication would be that your auction house made available for public sale counterfeit bottles sold for more than $300,000.

A. Okay.

Q. You understand that.

A. I understand that.

Q. I would like to ask you some questions, if I could, about how that might have happened.

I want to start with the relationship between the

auction house and the consignor in this case, obviously Mr. Greenberg.

MR. CAMP: Is that me?

THE CLERK: It is. The short is underneath your foot.

(Discussion off the record)

Q. I was going to ask you about the relationship between consignor and auction house. The way Zachys in the auctions makes its money is as a percentage of the price that's paid for items that are sold at auction, right?

A. That's correct.

Q. And so for instance, if you have a thousand dollars, an item goes for a thousand dollars, there's then something on top of that called a buyer's premium, right?

A. Yes.

Q. And the bulk of that is what's paid to Zachys, if not all of it, for Zachys' service as the auction house.

A. Yes.

Q. So using an example, as a buyer, you've got a winning bid for a thousand dollars, on top of that you've got to pay some percentage, let's say if it were 20 percent, $200, to Zachys as the auction house, right?

A. Correct.

Q. So it's clear, this isn't like a real estate transaction where the seller might have to pay a percentage of the proceeds, here the buyer actually pays the auction house,

right?
A. Mm-hmm. Yes.
Q. Now the consignor actually enters into a contract called a consignment agreement with the auction house, right? That's your experience?
A. Yes.
Q. And the consignment agreement provides that the auction house, Zachys, will actually be the agent for the consignor, the seller, right?
A. That's --
Q. The sales agent?
A. That's correct.
Q. Zachys is not the auction -- the agent for the buyer, right?
A. Correct.
Q. So is it fair to say that the more bottles Zachys sells or sold at a Zachys auction, the more money Zachys makes?
A. Yes.
Q. And the higher the prices for those bottles, the more money Zachys makes, right?
A. Yes.
Q. I want to ask you, just as an example, to take a look at Trial Exhibit 100 in evidence, which may be up in front of you, but if not, we'll just put up on the screen.
This is the invoice to Mr. Koch, and I'll just briefly

ask you, if you look at the first line, which is lot 7 --
A. Yes.
Q. -- do you see that the invoice lists the lot, the description, hammer, premium, and total? And just so the jury's clear, hammer is the price that the item went for, right?
A. Yes.
Q. And premium is the -- the amount on top of that that the buyer has to pay, in this case Mr. Koch had to pay Zachys, right?
A. That's correct.
Q. So in connection with the October 2005 auction, how much did Zachys earn in buyer premiums, approximately?
A. I don't remember what the premium was at that time, nor do I remember what the hammer price was, but it was the percentage of the hammer price.
Q. If I represent about $9 million in hammer prices and then buyer's premium of 18 percent, does that sound about right?
A. That doesn't sound unreasonable.
Q. So in this single auction, Zachys made somewhere between 1 and $2 million, right?
A. We grossed, yes. That's before our expenses.
Q. Understood. Mr. Greenberg's auction in October of 2005 was not the first one he had done with Zachys. You testified about that on direct, right?

A. Correct.
Q. In fact, he had done five other auctions before the one in October 2005, if you recall.
A. I don't remember the exact number, but that's not far off.
Q. Okay. Is it fair to say that by October 2005 Mr. Greenberg was a pretty big consignor in terms of wines being sold through an Zachys auction?
A. Before the 2005 auction?
Q. Well, before and including the October 2005 auction.
A. If we're including the 2005 -- the October 2005 auction, then yes.
Q. In fact, the October 2005 auction was the biggest auction in terms of dollars that Zachys had done in its independent existence since splitting from Christie's, right?
A. I believe that's correct.
Q. And since then, Zachys hasn't done a larger auction in terms of old and rare wine, has it?
A. I don't know. I'd have to look.
Q. Well, do you recall testifying that at least by 2010, 2011, Zachys had not done a bigger rare and fine wine auction than the one in October of 2005?
A. I don't recall that. I might have said it, but I don't recall it.
Q. By October of 2005 Mr. Greenberg had also bought wines as a buyer, the bidder, through Zachys auctions, right?

A. Correct.
Q. So he was both a significant consignor by October of 2005 and a significant buyer through your auctions?
A. I wouldn't -- did I say he was a significant buyer?
Q. I'm just asking.
A. Oh, I'm sorry. I don't know that he was a significant buyer. He was a significant consignor.
Q. He was a buyer and a very significant consignor by October of 2005?
A. He was a significant consignor, yes.
Q. Now you were asked briefly on direct about this case, and in fact when the lawsuit was originally filed, your company, Zachys, was a defendant, right?
A. That's correct.
Q. A co-defendant with Mr. Greenberg. That's how the suit was filed.
A. If that's the legal terms, yes.
Q. And Zachys subsequently reached a settlement with Mr. Koch.
A. That's correct.
Q. Now I want to ask you about the process you described on direct of -- you used the term "verifying wines" for your auctions. Do I have that terminology right?
A. Sure.
Q. It begins with the consignor creating a list of wines that they might be interested in selling, right?

A. That's usually how it begins.
Q. And so a consignor like Mr. Greenberg puts together a list, sends it to Zachys, right?
A. Correct.
Q. And one of the first steps is for Zachys to go through that list and price out, that is, estimate what each item might fetch at auction.
A. Correct.
Q. And that's not with respect to condition or authenticity; at that point you're just asking, assuming this is genuine, good condition, what would it go for, roughly?
A. Correct.
Q. So that list, in connection with the October 2005 auction, that was prepared by Mr. Greenberg, initially, right?
A. Yes.
Q. He sent it to you and then you all priced out the list.
A. Correct.
Q. And that's what ultimately then became the 17,000 bottles in the auction.
A. Probably not that exact list, but yes, that was the -- that's what -- the genesis of it.
Q. Okay. So it's fair to say that pretty early on in this process, putting together the auction, the consignor, here Mr. Greenberg, knows roughly what he could stand to earn if all of his items go -- are sold within the range that Zachys has

estimated it at?

A. Yes, if he did the work, yes, if he did the math.

Q. And Mr. Greenberg knew fairly early on, this auction could total in the millions for him in proceeds, right?

A. Mm-hmm, yes.

Q. And Zachys knew fairly early on that the fee, the buyer's premium you could stand to earn through this auction was quite substantial.

A. Correct.

Q. In connection -- well, let me move a little further forward in the process, this process of verification.

The review you've described in your direct testimony at some length, reviewing the bottles for condition, for authenticity issues, it's not your view that what you were doing there is putting a stamp of authenticity on them, right?

A. That's correct.

Q. And you never told Mr. Greenberg, "We're going to certify your bottles to be authentic."

A. No.

Q. In fact, your goal was to get comfortable with them that you could offer them for sale.

A. Get comfortable that we believed that they were what they purported to be, yes.

Q. Right. And in fact, you didn't have to believe something was fake to pull it out, you just had to have concerns over its

authenticity; is that your testimony?

A. Correct.

Q. Now you've never received any formal training in authenticating wines, have you?

A. Formal training, no.

Q. And you're not even aware of there being formal training for wine authentication.

A. Correct.

Q. With respect particularly to the sorts of rare in this case, pre-'60s Bordeaux, like the ones at issue in this case, you're not aware of any single person who has all the knowledge there is to have about these wines, right?

A. I am not aware of a single person, correct.

Q. You do, however, expect that if a consignor knows an issue with respect to a specific bottle or specific type of wine that they're offering or seeking to offer for consignment through your company, that they're going to tell you about it. That's your expectation.

A. That's my hope, yes.

Q. And you expected that of Mr. Greenberg, right?

A. Same answer.

Q. Sorry?

A. Same answer.

Q. That being yes.

A. Meaning that would be my hope.

Q. Now sometimes in your experience consignors have in fact learned information about their wines that you as the auction house simply don't have, correct?
A. Correct.
Q. You do not recall Mr. Greenberg ever telling you, in connection with the October 2005 auction, of any problem he suspected with respect to any bottle he was seeking to offer for sale, right?
A. Correct. Seeking to offer for sale with us.
Q. Correct.
A. Yes.
Q. He did not, for instance, tell you that before the 2005 auction he hired an expert named Bill Edgerton to inspect his cellar, right?
A. He did not tell me that.
Q. He didn't tell you that Mr. Edgerton looked at a hundred eight bottles and determined as many as 69 of them were probably or definitely counterfeit. He didn't tell you that.
A. He did not tell me that.
Q. He did not tell you that Mr. Edgerton had in fact put special stickers and signed the stickers on bottles so that he could correspond his conclusions back to the bottles he had examined; did Mr. Greenberg tell you that?
A. He did not.
Q. And did Mr. Greenberg ever show you a written report or any

written report prepared by Mr. Edgerton?

A. He did not.

Q. I'm going to hand you one of the bottles --

MR. CAMP: If I may approach, your Honor.

THE COURT: Yes.

Q. -- at issue in this case. This is, for the record, Trial Exhibit 200 and purports to be a 1928 Lafleur. I'll set that down in front of you, sir, and you can look at the front, if you like.

Now do you see a circular sticker at the top of that bottle with the number 41 on it?

A. In the front here, yes, I do.

Q. And do you see handwritten initials on that sticker?

A. I do.

Q. Mr. Greenberg never told you that those were Mr. Edgerton's initials, did he?

A. No, he did not.

Q. And he didn't give you a copy of Mr. Edgerton's report so that you or someone else at Zachys could independently figure out what the number 41 meant, right?

A. Correct.

Q. And he didn't tell you that number 41 corresponded with a conclusion by Mr. Edgerton that this bottle was "definitely counterfeit." Mr. Greenberg didn't tell you that.

A. Mr. Greenberg -- Eric did not tell me that.

Q. And if Mr. Greenberg had told you that that sticker means an expert has already determined that in his view the bottle is "definitely counterfeit," that's information you would have wanted to have before accepting the bottle for consignment, right?

A. Yes.

Q. Now I want to talk about some of the other bottles -- and mercifully, I only have three more of them here -- that Mr. Koch has alleged in this case he bought from your auction and are counterfeit.

You were asked a few moments ago about Mr. Kapon, the head of the Acker Merrall auction house. Do you recall that -- those questions?

A. Yes, mm-hmm.

Q. You were shown a document in which Mr. Kapon had indicated to Mr. Greenberg that certain bottles of wine Mr. Greenberg was seeking to consign, certain Lafleurs, had vertically branded corks. Do you remember being shown that e-mail?

A. I do.

Q. And that Mr. Kapon was rejecting them because he believed that vertically branded corks did not begin for Lafleur until 1966.

A. Was he rejecting them? I don't remember the details of the document. Or was he just saying how he had to -- how he'd have to put them into the sale if he used them?

MR. CAMP: Let's put the exhibit up. It's Trial Exhibit 389.

Q. And if you'd look, sir, to the second paragraph at the bottom of the page, this is the e-mail from Mr. Kapon to Mr. Greenberg, November 28, 2004. Do you see the paragraph beginning, "Then there are the Lafleurs"?

A. Yes.

Q. And Mr. Kapon writes, "Without getting into the exact details of each of them, there is one fundamental problem. The corks all have the vertically, ovally Chateau Lafleur brand on the cork, which they only start using post '66. The magnum of '47 that I had at the top 100 was the same and unfortunately fake as well. So I cannot offer those Lafleurs in good conscience."

Do you see that's what --

A. I do, yeah.

Q. -- what Mr. Kapon wrote? Prior to the 2 -- October 2005 auction, Mr. Greenberg never said to you, "I've been told by John Kapon that vertical cork branding is in fact inappropriate for pre1966 Lafleurs," right?

A. Correct.

Q. Mr. Greenberg never told you that a Lafleur -- and I'll show you wine from this case, Trial Exhibit 208. Mr. Greenberg never told you that a pre1966 Lafleur magnum with a vertically branded cork had been rejected by John Kapon, right?

A. He had not.
Q. Now you did testify on direct about a bottle of 1947 Lafleur that you drank at Mr. Greenberg's house, right?
A. Correct.
Q. That's a different vintage than the one in front of you, but fairly close, right, two years?
A. Three years, right?
Q. Three.
A. No, two years. Sorry.
Q. When you drank the '47 Lafleur in Mr. Greenberg's house, your reaction was, it tastes 40 to 60 years old, right?
A. Yes.
Q. You had never drunk a 1947 or what purported to be a 1947 Lafleur before then, true?
A. I don't believe so, no.
Q. And it's fair to say that you weren't suggesting that when you tasted it, you knew, that's an authentic 1947 Lafleur, right?
A. Correct.
Q. You could taste within a broad range the age of the wine, right?
A. Correct.
Q. So 40 to 60 years, it could have been anywhere -- a wine from anywhere from the '40s to the '60s?
A. Yeah, something -- roughly that. That's fine.

Q. Now as you sit here today, are you aware that vertical cork branding for Lafleurs in fact began in 1966?
A. I am not.
Q. Okay. If you had received credible information from Mr. Greenberg prior to the October 2005 auction suggesting that vertical cork branding on Lafleurs didn't start until 1966, that's something you would have wanted to know, right?
A. Yes.
Q. And as you testified on direct, you would have followed it up -- it would have caused you to follow it up and try to figure out the right answer, right?
A. That's correct.
Q. Now on direct examination I believe you testified that certain information is included in cataloging notes because -- and I want to get your words right -- buyers want to make as informed a decision as possible. True?
A. That's correct.
Q. And if you have credible information that a particular bottle may be counterfeit, that's something you believe buyers should know too.
A. Can you repeat the question?
Q. Well, let me back up. If you have credible information that a bottle is counterfeit, you're not going to offer it for auction, right?
A. Correct.

Q. And if you had some indication that a bottle is counterfeit but for whatever reason, you think it gets across the threshold and it's something we can offer, you'd want the buyer to know what you know about that bottle, true?

A. I'm not sure I'm answering your question correctly. I'd want the buyer to know what I -- what I saw on the bottle, that is correct.

Q. Well, and if you'd received information about what you saw on the bottle meant, like the way cork branding should be at a certain time period and it was inconsistent, that's something you would disclose to the buyer, if you offered it for sale at all.

A. If I offered -- this is speculation now, it sounds like, at this point.

Q. Right. It sounds like if you've got a serious question, then you're not going to intentionally then offer the bottle for sale.

A. Right.

Q. Now we've talked about the pre1966 Lafleur magnums in this case, and there's 12 of them. I want to ask you also about the three Petrus magnums from before 1966.

I'm going to show you -- I don't think you looked at it on direct -- Trial Exhibit 390 in evidence. It's on the screen as well.

A. I see it on the screen.

Q. And if you look -- right. I'm sorry. I think I said three magnums of Petrus and I meant three vintages of Petrus magnums that are at issue, and I'm showing you one of them.

If you look at Trial Exhibit 390, at the bottom you see that same e-mail from Mr. Kapon to Mr. Greenberg that we looked at a moment ago that mentions the Lafleur --

A. Yes.

Q. -- Lafleur cork branding. And then if you look at the top, do you see a response from Mr. Greenberg reading, "Petrus changed cork in '66; you are saying that Lafleur did as well?" You see that?

A. I do.

Q. Now I don't know if -- I'll show you one of the Petrus magnums, which is 218, Trial Exhibit. And I suspect in the lighting in the courtroom that maybe -- can you tell which direction the cork branding is just sitting there with the naked eye?

A. I cannot.

Q. I'll represent to you the corks in these Petrus magnums are likewise branded vertically. Did Mr. Greenberg tell you before the October 2005 auction that he thought Petrus moved to vertical branding in 1966 as well?

A. No, he did not.

Q. And again, if you had credible information from Mr. Greenberg or anyone else that vertical branding in Petrus

magnums from before 1966 was not appropriate to the time, that's information you would have wanted to have before offering the bottle for auction, right?

A. Correct.

Q. Now the e-mail exchange with Mr. Kapon and Mr. Greenberg -- which is still in part on the screen so you can look at it if need be -- also refers to a 1945 Lafite with what's described as a photocopied label, and I think you were asked actually about that specific description on direct. I do want to show you a 1945 Lafite at issue in this case, Trial Exhibit 222.

And, sir, if you look at Trial Exhibit 222, do you see that it has what appears to be a fairly yellow label?

A. I guess.

Q. Now there's been a suggestion that that color is sort of an obvious sign that the label is not a genuine original, that it's a facsimile of some sort. As you sit here today, does that look to you like an obvious facsimile or copied or printed label?

A. I would be hard in this light without my tools to start making those kinds of judgments.

Q. And if Mr. Greenberg thought that that color meant obvious, blatant facsimile, something you'd expect him to tell you, right?

A. I hope he would.

Q. Now I want to turn your attention a bit more generally to

this process of verification that you've described and in particular that -- the process used for the October 2005 auction. As of that time, Zachys did have a practice of asking consignors where they purchased old and rare wine, right?

A. Correct.

Q. And as part of the process of verifying Mr. Greenberg's old and rare wine, you looked at any provenance history you could get.

A. Mm-hmm, yes.

Q. And to try to get that provenance history, what you did is you asked Mr. Greenberg.

A. Correct.

Q. In fact, you told Mr. Greenberg in an e-mail that I believe we looked at before the auction that people were becoming more and more cautious when buying these old expensive wines, right?

A. Correct.

Q. And by the way, when you used the term or when you adopt my use of the term "old wines," you have in mind things older than 1982, is that right?

A. That sounds about right.

Q. Now Mr. Greenberg initially responded to your inquiry by saying, in substance: I can't -- I have many sources and cannot tie them to bottles. Is that his response?

A. That's his, yes.

Q. But he then sends you another response to that same

message, and I want to ask you to take a look at Trial Exhibit 98.

A. Thank you.

Q. Sure. And in Trial Exhibit 98 Mr. Greenberg writes, "I cannot provide this --" I'm sorry. I'm looking at 97.

He writes, "The only thing I can tell you about the older Bordeaux is that they were purchased from Eddie Gelsman of Wine Library or Dave Sokolin at D Sokolin in Southampton." Is that Mr. Greenberg's response?

A. That is Mr. Greenberg's response.

Q. Sorry. You may need to speak up a little bit.

A. Sorry. That is Mr. Greenberg's response.

Q. Now just to be clear, just in case it's not, all of the wines at issue in this case -- Cheval Blanc, Lafite Rothschild, Lafleur, Latour, and Petrus -- qualify as Bordeaux, right?

A. Yes, that's correct.

Q. And older Bordeaux in your -- to your understanding are those older than 1980s, approximately, early '80s?

A. Sure.

Q. So if I represent to you the latest vintage in this case is 1950, you'd agree that every bottle in this case is an older Bordeaux, right?

A. Yes.

Q. Now looking back --

MR. CIALONE: Objection, your Honor. "Older Bordeaux"

is a phrase Mr. Greenberg used, not in Mr. Zacharia's e-mail, and he's asking Mr. Zacharia to speculate what Mr. Greenberg meant in that e-mail. Move to strike the answer.

MR. CAMP: Move to strike the speaking objection.

THE COURT: Wait. Let me look at the question. What is the question?

MR. CAMP: Are you asking me, your Honor?

THE COURT: No, no. I'm reading.

MR. CIALONE: Referring to this document, the question was: "So if I represent to you the latest vintage in this case is 1950, you'd agree that every bottle in this case is an older Bordeaux, right?"

THE COURT: Well, you can answer if you have an understanding as to that. Do you know?

THE WITNESS: Do I know what? I'm sorry.

THE COURT: Whether every bottle in this case is an older Bordeaux.

THE WITNESS: So --

MR. CIALONE: Your Honor, again, calls for speculation. "Older Bordeaux" as used by Mr. Greenberg in this e-mail or as used by someone else?

MR. CAMP: Asking for the witness' understanding.

THE COURT: Whatever your understanding is.

THE WITNESS: My understanding of what?

BY MR. CAMP:

Q. Well, let's back up.
A. Sorry.
Q. All of the wines I've described to you as being the producers at issue in this case, those are Bordeaux, right?
A. Yes.
Q. And to your understanding an older wine is one that's certainly pre1980, is that right?
A. I would -- to my understanding, I would call older Bordeaux, you know -- it depends. I don't know. I'm not -- how do I call older Bordeaux? I think it depends on the context of the situation.
Q. Right. Obviously there are Bordeaux that are older than other Bordeaux, but a 1950 Bordeaux would generally, to your understanding as a wine auction -- a president of a wine auction company, qualify as an older Bordeaux?
MR. CIALONE: Your Honor, calls for speculation. Is asking he for what was in Mr. Greenberg's mind.
Q. Sir --
MR. CAMP: I'll try to rephrase, your Honor.
Q. You received this e-mail, 98, right, Exhibit 98?
A. In '05, right?
Q. Right.
A. Yes, I received this e-mail in '05.
Q. Did you write back, "Eric, what on earth are you talking about? Older Bordeaux has no meaning to me. Please rephrase"?

Was that your response?
A. I have no idea what I responded, if anything.
Q. Do you think that was your response?
A. I do not think that was my response.
Q. Right. Because you know what older Bordeaux is in your understanding, right?
A. Yes, I know what -- I think I know. Older depends on the context, but yeah, I think I know what old -- generally I have an opinion what older Bordeaux is.
Q. Okay. And this answer, referring to Eddie Gelsman and D Sokolin, those were not names that in your mind raised any red flags as sources of counterfeits, did they?
A. No, they did not.
Q. Mr. Greenberg did not say, in response to your e-mail, that any older Bordeaux came from Royal Wine Merchants; did he say that?
A. He did not say that.
Q. Now by 2005 you did have concerns with Royal Wine Merchants as a vendor of old and rare wine, true?
A. Yes, I did.
Q. And by 2005 you were aware of industry chatter about a lot of fakes coming through Royal Wine Merchants, true?
A. I don't know about a lot, but yes, there was industry chatter about Royal.
Q. And if Mr. Greenberg had said to you Royal was a source of

any of the wine being auctioned through Zachys in October of 2005, that would have been a concern to you.

A. I guess, but, you know, we did -- we did our work and I -- and I've, you know -- most important thing that we did was we did our -- our work when we're investigating the wines, when we're looking at the wines. That was what was the highest concern to me.

Q. Sir, do you recall giving deposition testimony in this case?

A. Yes.

Q. You've reviewed your deposition?

A. Yeah, I've reviewed it.

Q. You were under oath when you gave it?

A. Yes.

Q. You've answered the questions that were asked to the best of your ability?

A. To the best of my ability.

Q. I'm going to ask you to look at your deposition.

MR. CAMP: Well, I guess the protocol has been asking to play the clip, so I'm going to ask to play page 196, 7 through 14.

(Video played)

MR. CIALONE: I think I get a chance to object before they start playing?

THE COURT: Yes. Hold on a second.

(Pause)

MR. CIALONE: It's fine. Thank you. Sorry.

THE COURT: Okay.

(Video played)

BY MR. CAMP:

Q. Now Mr. Greenberg told you that he had gone through his cellar and segregated out the wines from Royal he believed to be fake. Is that your testimony?

A. Yes.

Q. And in fact, during that visit, Mr. Greenberg, your memory is, pointed to a bunch of bottles, or at least boxes, and said, "These are going back to Royal." That's what you recall.

A. That is what I recall.

Q. He did not say to you that wines he consigned for auction with Zachys in October 2005 came from Royal. Did he say that?

A. No, he did not.

Q. He did not tell you before the October 2005 auction that in fact he had made an insurance claim in connection with wines he bought from Royal that he believed to be fake.

A. No, he did not.

Q. Did he tell you that?

A. No, he didn't.

Q. He did not tell you that he provided Royal with a list of wines that he believed to be counterfeit.

A. No, he did not.

Q. He didn't give you a copy of something called his Royal Fake Wine Summary Notes that you were shown on direct, right?

A. No, he did not.

(Continued on next page)

BY MR. CAMP:

Q. He did not tell you that the wines that were, in fact, shipped back to Royal, were only a fraction, less than half, of the wines he had identified as counterfeit wines from Royal; did he say that to you?

A. No.

Q. And if Mr. Greenberg consigned wines for sale by Zachys that he had previously claimed in an insurance claim or in a demand, a lawsuit demand previously claimed to be counterfeit, that's information you would have wanted and expected to receive?

A. If Eric had given me wines to sell that he had previously claimed were counterfeit? Can you just repeat the question so I understand.

Q. I think you've got it. If Mr. Greenberg had consigned with you wines that he had previously claimed either in a insurance claim or in a lawsuit demand to be counterfeit, that is information you would have wanted and expected to receive?

A. Yes, I would have liked that information.

Q. Now, we looked at a document in which, at some point in this verification process, Mr. Greenberg told you that he could not tie particular bottles to particular sources, and I've already asked you about that e-mail once; do you recall that?

A. I do.

Q. He did not tell you, however, that many of the older

Bordeaux wines he sold in the October 2005 through Zachys included among the sources Royal wines; he didn't say that to you?

A. He did not say that to me.

Q. Now, I'd like to show you a demonstrative exhibit created by defense counsel. It's trial Exhibit 1102, marked for identification.

A. Do you want to take this bottle back?

Q. I do. And do you see a document in front of you titled Sources of Wines at Issue?

A. I do.

MR. CAMP: Your Honor, at this point, we'd offer Trial Exhibit 1102 for demonstrative purposes only.

MR. CIALONE: Your Honor, we would move it into evidence as a summary exhibit. It summarizes approximately 50 or so designated trial exhibits that are invoices, and it seems that this is a lot better to give to the jury than 50 invoices.

THE COURT: Any objection, Mr. Camp?

MR. CAMP: I don't know if it is what it is, but assuming that's correct, I don't think we have any objection.

THE COURT: Okay. I'll receive it.

(Trial Exhibit 1102 received in evidence)

MR. CAMP: And can we put 1102 up on the screen.

Q. And, Mr. Zacharia, if you look at it, the defense exhibit here has a column the wine, the type of wine, then the size,

the number at issue. I'll wait for the document to catch up with my question.

MR. CAMP: Okay. So if we could just zoom in on what this is.

Q. It's a table that includes the type of wine, size, the number at issue in the case, source or sources, the number purchased from each source. So do you see all that information?

A. I do.

Q. And I want to ask you about a few of the wines at issue in this case. So the first one, top row, is the 1921 Chateau Cheval Blanc magnum, and you see there are two at issue in this case?

A. I do.

Q. And then if you look to the right, do you see that Royal Wine Merchants is listed as the source of one, then three of these magnums and then Atherton Wine Imports the source of two?

A. I do.

Q. So did Mr. Greenberg ever tell you that with respect to the 1921 Chateau Cheval Blanc magnums, four of the six bottles in his cellar were from Royal?

A. He did not.

Q. If you look down to the fourth row, do you see the 1945 Chateau Lafleur magnum, three in issue?

A. I do.

Q. And I will represent to you that on the right there, there are a total of 16 bottles described, of which 12 are from Royal. Did Mr. Greenberg tell you that 12 of his 16, 1945 Chateau Lafleur magnums were from Royal Wine Merchants?

A. He did not.

Q. If you look to the bottom row, do you see 1950 Chateau Lafleur magnum, five in issue?

A. I do.

Q. Did Mr. Greenberg ever tell you that seven of the 24 in his cellar were from Royal Wine Merchants?

A. He did not.

Q. If you look at the next page, top row, 1864 Chateau Latour bottle, one in issue?

A. Yes.

Q. Did Mr. Greenberg ever tell you that three of the four such bottles in his cellar were from Royal Wine Merchants?

A. No, he did not.

Q. Next row, 1928 Chateau Latour bottle, two in issue. Did Mr. Greenberg tell you that three of 14 were from Royal?

A. No.

Q. We're getting close to the end. 1921 Chateau Petrus magnum, one in issue?

A. I'm sorry. So for the '28 Latour, is it three, because it lists two at number of issue. Did I mishear you? I just want to make sure.

Q. Sorry. I'm asking -- If you looked two columns over, do you see Royal Wine Merchants, second from the bottom, three?

A. Okay. I misheard you, but no, he didn't tell me.

Q. Next row, 1921 Chateau Petrus magnum, one at issue. Did Mr. Greenberg ever tell you before October of 2005 that five of the 11 in his cellar were from Royal Wine?

A. No.

Q. Next line, 1928 Chateau Petrus magnum, two in issue. Did Mr. Greenberg ever tell you that two of the seven in his cellar were from Royal?

A. He did not.

Q. And, finally, the third page, 1950 Chateau Petrus magnum, three in issue. Did Mr. Greenberg ever tell you that five of the 11 in his cellar were from Royal Wine Merchant?

A. No.

Q. And I'm told that in the last line, the Royal Wine Merchant with the asterisk means these were returned immediately for some reason. Did Mr. Greenberg ever tell you that five of the -- I'm sorry, that two of the eight remaining were from Royal Wine?

A. No.

Q. Now, you did testify about a cellar inspection that you and Mr. Hatton conducted in Mr. Greenberg's cellar. I want to ask you a couple of questions about that. You were not allowed to just go through the cellar and pick out bottles that you wanted

to inspect, right?

A. In which time period are you talking about here?

Q. Well, how many times did you go to the cellar to actually inspect Mr. Greenberg's wine?

A. I believe I was in his cellar twice.

Q. Right.

A. Right? And I went the first time to look at the cellar and to meet with Eric, and the second time was for just before the 2005 sale.

Q. Right. And so that's the one I'm focusing on.

A. Okay.

Q. The second visit.

A. That's what I need to understand.

Q. During that visit, were you and Mr. Hatton allowed to just walk the aisles of the cellar and decide which bottles to pull off the shelf for inspection?

A. It wasn't a question of allowed. This is the way we're set up, is that Thierry, as I mentioned earlier, was going to be bringing us the wines.

Q. Right. So you two were out front, and Thierry, you're referring to one of Mr. Greenberg's employees?

A. Correct.

Q. And Thierry, you'd describe, for instance, a vintage 1945 Chateau Lafleur magnum on the list, and he would go get a bottle and bring it out for you to look at, right?

A. I don't think that's how it actually happened. I think he had a copy of the list and was bringing wines to us.

Q. Okay. So he was going down the list and then going to the bin or wherever it was and pulling out one of the bottles and bringing them to you?

A. That's correct.

Q. So for instance, again using my example, the '45 Lafleur, where Mr. Greenberg indicates he bought 12 of his 16 magnums from Royal Wine Merchants, do you know how Thierry went about deciding which magnum I'm going to pull out and bring to Zacharia and Hatton to look at?

A. No, I do not.

Q. Now, you testified about Thierry's role in the process, but in fact, Mr. Greenberg was down in the cellar for part of this time, right?

A. He was down there at some points, yes.

Q. And at no time did Thierry say to you, I'm pulling a bottle that's not from Royal Wine or is from Royal Wine Merchants, right?

A. Correct.

Q. Now, I want to ask you specifically about the 1921 Petrus magnums offered for sale through the October 2005 auction. You're aware that Mr. Koch bought one of those magnums, right?

A. I believe that's correct. I don't remember, but --

Q. And you recall that at some point after the auction,

Mr. Koch representative started asking some questions about --
A. Yes.
Q. -- that particular bottle?
A. Yes, I remember.
Q. And you passed those questions along to Mr. Greenberg, right?
A. Yes.
Q. And I want you to look, if you would, at Trial Exhibit 1093 marked for identification. And do you see here an e-mail chain from February 15th, 2006, between you and Mr. Greenberg, re: 1921 Petrus?
A. I do.
MR. CAMP: Your Honor, we'd offer 1093.
THE COURT: Any objection?
MR. CIALONE: No objection, your Honor. I thought it was in already, but that's why no objection.
MR. CAMP: It may be in under another number.
THE COURT: If it's not, then it's received.
(Trial Exhibit 1093 received in evidence)
Q. Mr. Zacharia, looking at 1093, do you see the e-mail at the very bottom?
MR. CAMP: And if we can, hopefully, bring it up.
Q. Okay. Which one is that? All right. It looks like we had a little exhibit renumbering. So let's use trial Exhibit 461, which is the same exchange, or I'm sorry, the beginning of that

exchange.

Do you see the e-mail to you, "We would like to know the source of the magnum of 1921 Petrus that was purchased from Zachys on 10-28-05"?

A. Yes.

Q. And then if we move up to the top of that document, do you see that you responded, "Here is the response from the consignor. He bought the wines from two different sources. The wine either came from a top collector in Toronto or out of Europe from English royalty." Do you see that response?

A. I do.

Q. Now, when you referred there to the consignor, you're talking about Mr. Greenberg, right?

A. Correct.

Q. And that's information you got from Mr. Greenberg, true?

A. Yes.

Q. I don't know if we have it on the screen, but you're holding Trial Exhibit 1093, and that's actually -- 1093 is the response from Mr. Greenberg that came just before this, before you sent this, and I'm going to read his response and tell me if I get it right.

"I am not sure which mag this is. A lot came, C-a-m, from a collector in Toronto and many came out of Europe, in many cases from English royalty." Okay. It's up on the screen now. Do you see that?

A. I do.
Q. Is that the response Mr. Greenberg gave you when you asked about this '21 Petrus?
A. It is.
Q. In the course of all of these discussions you've been testifying about regarding efforts to get provenance from Mr. Greenberg, did he ever say to you, any wine in particular or at all, came from a top collector in Toronto?
A. Before this?
Q. Before the auction?
A. No, I don't recall.
Q. Did he ever say to you in all of your discussions about provenance, any wine came from English royalty?
A. Not that I recall.
Q. This e-mail was the first time you'd ever gotten that story, right?
A. That's -- Yes. As far as my recollection, yes.
Q. And if you still have this demonstrative Exhibit 1102 in front of you, and you turn to the second page, second line from the bottom, do you see the line that corresponds to what we're talking about, 1921 Chateau Petrus magnum?
A. I do.
Q. When Mr. Greenberg responded, came from a top collector in Toronto or an English Royal, did he mention that five of the 11 Petrus magnums he had in his cellar he purchased from Royal

Wine Merchants?

A. I already answered that. No, he didn't.

MR. CIALONE: I actually object -- Never mind.

Q. Now, I want to turn your attention to the catalog from the October 2005 auction, which you were asked about, and in particular, I want to start with the introduction, which is trial Exhibit 101, Pages 6 to 7, which I think we have in front of you. In this introduction, sir, is it your desire to mislead buyers?

A. No.

Q. Trying to get the information you had in there correct?

A. Yes.

Q. Now, information regarding provenance is in this introduction; there are some statements regarding provenance, right?

A. I believe there are, yes.

Q. And if I ask you to look at the second page, second paragraph, do you see the paragraph beginning "the offering of Bordeaux two is wide ranging" and it goes on?

A. Not yet. It needs to be blown up. It's too small.

Q. Second paragraph, second page.

A. Okay.

Q. And let me ask you, in particular, to look at the second sentence. Do you see "most unusual, however, is the selection of 19th century Bordeaux and right-bank wines from the 1921

through 1961 vintages." Do you see that?

A. I do.

Q. And that encompasses some of the wines we've been talking about, right?

A. Yes.

Q. It goes on, "bottles" and it lists a bunch of 19th century vintages of Lafite and Latour, and it continues at the end, "are of similar provenance to those tasted by Michael Broadbent." Do you see that sentence?

A. I do.

Q. And that's a statement by provenance, right?

A. Yes.

Q. And to move this along, if you look at the last sentence, do you see "the cork, while quite old and crumbly, was fully stamped, as with the corks of all these right-bank magnums sourced on the continent?" Do you see that?

A. Yes.

Q. That's a statement relating to provenance?

A. Okay.

Q. Well, "sourced on the continent" means from Europe, right?

A. Yes.

Q. You weren't referring to a different continent?

A. No, I was not referring to a different continent.

Q. You did not say in here, and Mr. Greenberg did not suggest that you say in here, sourced from Royal Wine Merchants in

lower Manhattan; did it say that?

A. No.

Q. Now --

A. But I didn't -- I mean, I didn't know they came from Royal. We still don't know they came from Royal.

Q. I understand that. That's my point.

Sir, if you look now to -- I'm going to show you Trial Exhibit -- Well, let me back up. The statements about provenance in this introduction, those came from Mr. Greenberg, not some other source, right?

A. I presume so, yes.

Q. Because you didn't make them up, and you didn't have anyone else telling you about the provenance of Mr. Greenberg's wines, did you?

A. Not that I recall, no.

Q. You were asked briefly about whether Mr. Greenberg made some comments. I want to show you specifically what those were very briefly. I'm going to show you Trial Exhibit 435 in evidence.

A. Thank you.

Q. Now, this document reflects comments that Mr. Greenberg made to your original draft or initial draft of the introduction to the catalog, right?

A. Correct.

Q. And his comments are all this text in caps?

A. That sounds correct.
Q. And he begins, "good start, please see comments within and below text. I want to review the next draft as well." That's what he writes?
A. Yes.
Q. Mr. Greenberg, it was your memory, was keenly interested in how this introduction was going to read, right?
A. Do I say that? Did I say that at some point? I'm just confused. Did I say he was --
Q. I'm just asking.
A. Oh, it sounded like you were saying. I'm sorry. Can you repeat the question?
Q. Mr. Greenberg was keenly interested in how this introduction was going to read, that's your recollection?
A. You're asking me that? I'm sorry. It sounds like a statement. He was interested. Keenly is not the word I would choose. He clearly was interested. He read this.
Q. Well, he wanted to see the next draft, right?
A. Right.
Q. And if you look a couple lines down, do you see in all caps, "This collection is all about the best producers, vineyards and vintages. It is a best-of-the-best collection." Do you see that?
A. I do.
Q. Those are Mr. Greenberg's words, right, best of the best?

A. Yes.
Q. And if you look, just moving along to the last sentence of that paragraph, do you see in all caps, "It was also assembled by me with painstaking effort, no consultants, et cetera"?
A. Yes.
Q. That's a point that Mr. Greenberg, not you, was trying to make?
A. A point Mr. Greenberg was trying to make to whom?
Q. To you, sir. It's an e-mail to you.
A. I understand that. No, this is his suggestions on some things that I thought would add -- that he would add to the introduction.
Q. Right. And the "best of the best" language, it made it into the catalog, right?
A. Mmm, hmm.
Q. Sorry. You have to say "yes" or "no."
A. Yes, I'm sorry.
Q. And just a couple more questions about this document. If you look to the second page, do you see the third paragraph down toward the bottom, there's some more all caps?
A. Yes.
Q. And Mr. Greenberg writes, "This next sentence is questionable. Why beg the question of doubters? Say upon inspecting the old and crumbly cork, it was fully stamped as..." Do you see that?

A. I do.
Q. And the sentence to which he's referring to is, "Doubters may be reassured the cork, while quite old and crumbly, was fully stamped, as with the corks of all these right-bank magnums sourced on the continent;" do you see that?
A. I do.
Q. You, at Mr. Greenberg's suggestion, took out the phrase "doubters may be reassured," right?
A. Correct.
Q. You heeded his suggestion to not beg the question of doubters?
A. Correct.
Q. And Mr. Greenberg endorsed the language of the rest of the sentence standing by itself?
A. Correct.
Q. Now, did you send Mr. Greenberg the next version of this introduction?
A. I don't remember.
Q. Okay. I'm going to show you Trial Exhibit 527 for identification.
A. Thank you.
Q. And do you recognize this as an e-mail chain from September 30, 2005, regarding the updated intro?
A. I see that, yes.
Q. And at the top, an e-mail from yourself to Mr. Jessen?

A. Yes.
Q. Your colleague?
A. Mmm, hmm.
MR. CAMP: Your Honor, we'd offer 527.
THE COURT: Any objection?
MR. KABA: No objection to 527 itself, your Honor, but there's no attachment.
MR. CAMP: Right.
THE COURT: Okay. 527 is received.
(Trial Exhibit 527 received in evidence)
Q. Now, Mr. Zacharia, if you look at 527, what counsel is referring to is the bottom e-mail from you to Mr. Greenberg says, "updated intro" and then "please give me your thoughts"; do you see that?
A. I do.
Q. This is a reference to the updated intro to the catalog, that's your memory?
A. I don't know my memory. I would assume that's what it is.
Q. Right. And Mr --
A. I don't remember.
Q. Sorry.
A. Sorry.
Q. Mr. Greenberg, if you look up, then responds "okay"?
A. Yes, I see that.
Q. And then, finally, you forward that response to your --

Mr. Jessen's your colleague at Zachys, or was your colleague at Zachys Wine?

A. Correct. Is.

Q. You forward to Mr. Jessen, "please print and put in the file," is what you tell him to do, right?

A. Correct.

Q. And that was because you were looking to memorialize that Mr. Greenberg had signed off on the final intro, right?

A. I assume that's what this is, right.

MR. CAMP: If I may have just one moment, your Honor.

THE COURT: Sure.

MR. CAMP: Nothing further.

THE COURT: Okay. Is there any redirect?

MR. CIALONE: Yes, there is, your Honor.

REDIRECT EXAMINATION

BY MR. CIALONE:

Q. Mr. Zacharia, Mr. Camp started by asking you about the commissions that Zachys earned through this auction. Do you recall, what was the commission?

A. The dollar, the percentage?

Q. Yeah. What was the percentage?

A. I don't recall. I think it was around 18 percent, I would guess, but I don't recall.

MR. CIALONE: Let's put Exhibit 100 up, please. And if you can go to the page that has lot 404 on it, please, Liz.

I think it's four pages in. And zoom in on lot 404.

Q. I picked it because it's a nice round number $10,000 lot and $1,800 commission; so 18 percent, right?

A. Yup, you got it.

Q. So Mr. Camp referred to $300,000 of wine at issue; so that would be about a $56,000 commission to Zachys?

A. Okay.

Q. Out of, what was it, approximately a million dollars of commissions on the overall auction?

A. I think so, yes.

Q. Is selling counterfeit wine good for an auction house's reputation?

A. No.

Q. Is it important to avoid selling counterfeit wine to preserve your reputation?

A. Yes, it is.

Q. Did this lawsuit itself get a lot of publicity?

A. It's got publicity, yes.

Q. It was in the Wine Spectator, right?

A. It was in the Wine Spectator.

Q. Was it in other publications as well?

A. I believe --

MR. CAMP: Objection, relevance.

THE COURT: Overruled.

A. I believe it was.

Q. Now, you testified earlier about wines that were rejected from Mr. Greenberg's very first consignment in February 2003. Do you recall that?

A. I do.

Q. Did Mr. Greenberg say, oh, I'm not consigning wines to Zachys anymore?

A. No, he did not.

Q. Did he say, you better not reject any of my wines anymore?

A. No, he did not.

Q. Let's take a look at the catalog introduction.

MR. CIALONE: You don't need to put it up.

Q. As counsel pointed out, Mr. Greenberg suggested this is a best-of-the-best collection, right?

A. Correct.

Q. Did you think that was a fair characterization?

A. Yes, I did.

Q. Would you have put it in an introduction in a Zachys catalog if it weren't?

A. No, I would not.

Q. Now, do you actually remember that the statement "sourced on the continent" came from Mr. Greenberg?

A. I do not.

Q. And I will --

MR. CIALONE: Give me his deposition, please.

Q. Do you actually have any idea where the phrase "sourced on

the continent" came from?

A. I do not.

Q. Do you even know what it means?

A. No.

Q. Now, did Mr. -- the other aspect of provenance that counsel pointed to was the comment about the Jaeger tasting, the provenance of the 19th century wines. Do you remember that?

A. Right, yes.

Q. Who told you that?

A. Fritz Hatton did.

Q. So not Mr. Greenberg?

A. So let's make sure I'm answering this correctly. Can you repeat the question?

Q. Sure.

MR. CIALONE: Why don't you put the Exhibit 101, please, up. Can you go to the next page, please, and blow up the second paragraph.

Q. And do you see there it says, "bottles of the 1811, 1832," et cetera?

A. Yes.

Q. "Are of similar provenance to those tasted by Michael Broadbent at the Jaeger tasting in 2001"?

A. Yes.

Q. Where did that information -- how did you get that information, from whom?

A. That was information I got from Fritz.
Q. So Mr. Greenberg didn't tell you that, correct?
A. No.
Q. Do you know if Mr. Hatton actually attended that tasting in 2001?
A. Okay. Let me just -- I believe that's where I got the information from. You know, it's a long time ago, as I've stated many times, and I believe Fritz was at that Jaeger tasting.
Q. And just so the jury understands, what is the -- what does the Jaeger tasting referring to?
A. It was a tasting that Wilf Jaeger put together, where they tasted a lot of these older wines, and Fritz recognized bottles to be similar to those -- recognized bottles from the wine that we're looking at that were similar to the tasting bottles.
Q. Okay. Now, counsel showed you a bottle of 1928 Latour with the numbered sticker from Mr. Edgerton on it. When did you first see that bottle?
A. Possibly today.
Q. Prior to the auction, did you know that there were any bottles with that sticker on it?
A. I did not, no.
Q. So counsel asked, did Mr. Greenberg tell you that those are Mr. Edgerton's initials? You never actually discussed that bottle with Mr. Greenberg before the auction, correct?

A. I don't think so.
Q. Now, let's turn to what you expect your consignors to tell you. Do you expect a consignor to tell you information that he believes is wrong?
A. I'm interested in any information that a consignor has about his wines. If he thought it was wrong, I would hope he would tell me that and tell me it's wrong. That would then be the consignor's judgment on what to do.
Q. And you have a contract with your consignors, right?
A. Yes.
Q. We looked at your contract with Mr. Greenberg earlier, right?
A. Yes.
Q. And that contract doesn't say you need to disclose to us any information you have about your wines, correct?
A. I believe not.
Q. And it doesn't say, you even have to tell us stuff you think is wrong, right?
A. Correct.
Q. It doesn't say if you look at a bottle and you see a vintage on the bottle, you got to tell us that some other person didn't see that vintage, right?
A. It does not.
Q. Now, we've spoken about the Lafleur magnums and the Petrus magnums. The October 2005 auction was not the first time that

Zachys had sold bottles like that for Mr. Greenberg, right?
A. I believe that's correct.
Q. For example, if we put up Exhibit 325 and start on Page 85, do you see there's Petruses from 1921, '28 and '29?
A. Yes, I see that.
Q. And then if we go to the next page, there's more Petrus there. Go to the next page, Cheval Blancs, and there's also some -- we've seen them previously in this trial -- there's a number of Lafleurs from pre-1966. And do you know if Mr. Greenberg consigned such wines to some of the other auctions prior to October 2005?
A. I do not.
Q. Do you think Mr. Greenberg was allowed to believe that Zachys was right when it looked at those wines and said they were suitable for auction?
MR. CAMP: Object to the form.
THE COURT: Sustained.
Q. Well, let me put it this way. Zachys inspected those wines, correct?
A. The wines we were just talking about from '03?
Q. Yes, all the wines in the February 2003 auction, right?
A. Yes.
Q. Zachys inspected the wines Mr. Greenberg consigned to the next auction after that?
A. For Zachys, yes.

Q. And to all of -- Thank you. And to all of the Zachys auctions, correct?
A. Yes.
Q. And in connection with any of those auctions, did you ever say to Mr. Greenberg, we're really not sure if we know how to authenticate a Lafleur; so if you get any different information we might be wrong, let us know? Did you do anything like that?
A. No.
Q. Did you give him any reason to believe that your professional judgment about those wines in all those auctions might not be correct?
A. Not that I recall, no.
Q. Now, did you give any reason -- counsel described the 1945 Lafleur as an obvious, blatant facsimile. Did you give Mr. Greenberg any reason to believe --
MR. CAMP: Objection. I was describing their characterization.
THE COURT: Sustained.
Q. Well, let's say that is a correct characterization. Did you give Mr. Greenberg any reason to believe that you could not spot an obvious, blatant facsimile?
A. Did I give Mr. Eric any reason --
Q. Yeah.
A. No, I did not.
Q. And you did the catalog, correct?

A. Correct.
Q. We discussed that. Did you expect Mr. Greenberg to leaf through the catalog and make sure the catalog entries were correct?
A. Could you speak up?
Q. Sure. Did you expect Mr. Greenberg to leaf through the catalog and make sure the cataloging entries were correct?
A. Did I expect Eric to do that?
Q. Yeah.
A. No.
Q. Let's take a look at Exhibit 98.
MR. CIALONE: Liz, if you could put that on the screen, please, and blow up the bottom half.
Q. Now, this talks about old wines. Do you see that? "Eric will help us, help Eric get top dollar for his old wines;" do you see that?
A. Yes.
Q. Also, says "older bottles," right?
A. Yes.
Q. Would you agree with me that nowhere does this say, I'm talking about all bottles from 1982 and earlier?
A. It doesn't specifically say that, no.
Q. In fact, the only specific time period it mentions is wines from the 19th century, right?
A. Yes.

Q. In fact, it doesn't even mention Bordeaux specifically, does it?
A. I don't think so.
Q. But the only 19th century wines in this auction were Bordeaux?
A. Correct.
Q. Right?
A. I believe that's correct.
Q. And when Mr. Greenberg responded, he said older Bordeaux, right?
A. Yes.
Q. Do you think he was talking about 19th century wines, since that's the only thing you refer to here?
A. I don't know.
Q. Okay. And you didn't ask, right?
A. I did not, no.
Q. And you don't know that Mr. Greenberg was saying all Bordeaux from 1982 and earlier, do you?
A. I do not.
Q. Now, you talked with counsel about where you saw boxes of wine in Mr. Greenberg's home that he said he was sending back wines from Royal that he thought were counterfeit, right?
A. Yes.
Q. And that was at the 2002 trip?
A. That's my assumption. I remember. That would make sense.

Q. Do you recall in your deposition that you had forgotten that you had been to Mr. Greenberg's home, correct?
A. In 2002, yes.
Q. And you knew as early as November 2002, or thereabouts, that Mr. Greenberg had actually bought wine from Royal, correct?
A. Correct.
Q. Does the consignment agreement say you need to tell us if you bought any wines of a particular type from Royal?
A. No, it does not.
Q. Did you ask Mr. Greenberg -- for example, you looked at that summary document, the summary of invoices. Did you ask Mr. Greenberg for his invoices from Royal?
A. I did not.
Q. Did you ask Mr. Greenberg for his invoices for any particular kind of wine?
A. I did not.
Q. Did you tell Mr. Greenberg, if you got a particular kind of wine from Royal, we're going to check it more carefully than you check other wines?
A. I did not.
Q. Did you check wines as carefully as you could?
A. We checked wines very thorough.
MR. CIALONE: One moment, please. Nothing further. Thank you.

THE COURT: Okay. Thank you. Anything further?

MR. CAMP: No, your Honor.

THE COURT: Okay. Mr. Zacharia, you may step down. Thank you.

THE WITNESS: Thank you. Can I take my water?

THE COURT: You can have the water.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: All right. Shall we take a break?

MR. CIALONE: Yes, your Honor.

THE COURT: Okay. Ladies and gentlemen, we'll take our afternoon break for about ten minutes. Please leave your pads. We'll see you in ten minutes.

(Jury exits)

THE COURT: Who's next on tap?

MR. CIALONE: Well, your Honor, we were going to have Dr. Wilf Jaeger and Mr. Elroy by video, but it sounds like we may need to argue about that first.

THE COURT: Right.

MR. CIALONE: Unless you've reached a decision on this.

THE COURT: Well, let's -- Yes. I guess let's address those two. They're both by video; is that right?

MR. CIALONE: Correct.

THE COURT: Okay. I have a couple of letters on, is

it Jaeger, J-a-e-g-e-r, and apparently there was deposition testimony designated by defendant for Mr. Jaeger, and the second issue is the deposition testimony of Mr. Elroy E-l-r-o-y. Is there any change in what the defendant proposes to use as to Jaeger?

MR. RAHMIL: No, your Honor.

THE COURT: So plaintiff argues that the Jaeger testimony, other than the couple of sections you've agreed to, goes into issues involving other wines? And I mean, I certainly agree on the expert issue. The testimony cannot come in as expert testimony and I don't believe you purport to use it as expert testimony.

MR. RAHMIL: We don't, your Honor. We use it to rebut testimony from other witnesses about their experience with wine and with maintaining cellars and tasting wines for authenticity.

THE COURT: Does it all go to conversations with or e-mails with Mr. Greenberg?

MR. RAHMIL: Many of it does. Much of it does, your Honor.

THE COURT: Mr. Kaba?

MR. KABA: Your Honor, I think your inclination or, by the question at least, seems to be what our trouble with this was is, we're going to open the door up to anyone who has talked to anyone about wine or about their experience with

wine. It's nothing to do with bottles in this suit, nothing to do with Mr. Greenberg's intent or knowledge of wines in this suit or selling other counterfeit wines.

Mr. Jaeger, maybe he's a super taster and there's testimony about that. He's received some awards. He's talked to people at Royals about wines that Mr. Greenberg returned to Royal that clearly have nothing do with this suit that's part of our claim. He's talked about burgundy and wines. He's talked to Mr. Greenberg about some of these the wines. Again, nothing to do with any of the bottles or the vintages or the producers in this case.

THE COURT: No, I understand. The issue, though, insofar as it could be relevant to Mr. Greenberg's intent, I've given a fair amount of leeway in general with testimony, for example with Mr. Ritchie and his doubting about bottles that aren't at issue, like the Jayer wines because on the theory that that could go to his intent in general about authenticity issues and that's relevant.

MR. KABA: Well, about selling other wines that had been identified as fake or that had been rejected from sale. Nothing in what Mr. Jaeger is saying bears upon whether or not Mr. Greenberg sold other fake wines or even sold wines that he thought were authentic because none of the wines he's discussing are authentic -- I'm sorry, none of the wines he's discussing are at issue, even the type of wines are not at

issue.

It seems what they're trying to do is stick in sort of ideas about tasting wine and what that may mean, and hearsay conversations Mr. Jaeger may have had with Mr. Greenberg, hearsay conversations he may have had with Royal Wine Merchants. It certainly -- the designations, as they currently stand, are way overbroad and is just going to muddle the issue based on a lot of hearsay on bottles that have nothing to do with this case, that don't bear upon Mr. Greenberg's knowledge or recklessness of consigning these wines.

THE COURT: What is the relevance of these passages?

MR. RAHMIL: Well, I think I can break it down by passage and explain it that way. Preliminarily, I note that most of the doors Mr. Kaba complained about were opened wide during plaintiff's case when they called, for example, Ms. Downey, who's certainly knowledgeable about wines, to give her views on whether tasting was a reliable method of authentication; Mr. Koch, who was also not supposed to be an expert, gave testimony to that effect as well.

So we want to put in testimony in from another very well-credentialed individual in the wine community to give his views on tasting. So I think breaking down the relevance of Mr. Jaeger's testimony by segments, the first segment, as we stated our letter, talks about Greenberg's actions after Serena Sutcliffe visited his cellar. That's certainly been put at

issue.

The second segment refers to Greenberg's ability to authenticate wine on his own, and his own ability to identify wine and whether he had that ability or not.

Second --

THE COURT: So you're on 79 to 88?

MR. RAHMIL: Yes, your Honor.

THE COURT: The second one? So that's --

MR. RAHMIL: And it goes directly to Mr. Greenberg's state of mind about the authenticity of wines he returned to Royal, and the authenticity of wines he retained from Royal. Dr. Jaeger communicated his belief about the authenticity of those wines to Mr. Greenberg and Mr. Greenberg's state of mind about that.

THE COURT: I think that can come in. What's the third one?

MR. KABA: Well, your Honor, I think they were describing the first segment 61, 11 to 63, 2. There's a reference to Miss Sutcliffe. I don't see how that designation has anything to do with Miss Sutcliffe. It talks about some Ramonet and Coche-Dury, I'm not pronouncing it right, and that Jaeger believed them to be great and very much authentic.

Well, so what? They don't have anything to do with this case, and his conversations with Mr. Greenberg are, obviously, hearsay. They can't be offered by a party about his

own statements. And Mr. Jaeger is not on the stand talking generally about tasting wine and why that's important. He's talking about specifically -- tasting specific bottles and having conversations or e-mails with the defendant about those bottles, or with Royal Wine Merchants about those bottles.

MR. RAHMIL: Your Honor, Mr. Kaba is certainly correct that a coached jury is not at issue, but neither was a '99 Romanee-Conti, a '90 La Tache, a '78 Dujac Echezeaux -- I apologize for that -- that they questioned Mr. Greenberg at length on his direct examination.

THE COURT: No, I mean, I understand how it could be relevant, insofar as it goes to his intent? How does that first passage go to his intent? I don't care about Jaeger's intent, unless it was communicated to Mr. Greenberg.

MR. RAHMIL: It was communicated to Mr. Greenberg and that goes to Mr. Greenberg's state of mind about authenticity of bottles that he returned to and retained from Royal.

THE COURT: So it's a conversation between Jaeger and Mr. Greenberg?

MR. RAHMIL: I'm sorry?

THE COURT: It was a conversation between Jaeger and Mr. Greenberg?

MR. RAHMIL: Yes, sir.

MR. KABA: Your Honor, this is inadmissible hearsay being offered for the truth of the matter, that these wines

were somehow authentic and Mr. Greenberg believed them to be authentic as a result. Mr. Greenberg was on the stand for over two days --

THE COURT: The authenticity of these other wines is not -- no one cares about the truth of that. All it goes to is absence of mistake and intent.

MR. KABA: But mr. Greenberg was on the stand for two and a half days and never said, by the way, I thought that the other Royal wine was real because Wilf Jaeger, my friend, told me he tasted some --

THE COURT: Well, he doesn't have to have done that to make this non-hearsay.

MR. RAHMIL: Certainly not, your Honor. And the testimony is not being offered for the truth of the matter. It's being offered for the effect on Mr. Greenberg when he heard the statements and --

THE COURT: Yes, I'm not bothered by it. I think it's admissible. I mean, I can give a limiting instruction that it's not expert testimony or something.

MR. RAHMIL: We would be fine with that, your Honor.

THE COURT: What's the fourth one?

MR. KABA: How about the third one, your Honor? 91, 25 to 92, 12 where he is talking about tasting fake wine that Royal claimed, and Jaeger is just testifying as to his own belief that Greenberg was wrong in his belief?

THE COURT: And this is a conversation with Greenberg?

MR. KABA: I'm not sure that that third segment refers to conversations he had with Mr. Greenberg.

MR. RAHMIL: That excerpt doesn't, your Honor, but there's an e-mail that is part of Dr. Jaeger's testimony that was communicated, that was sent to Mr. Greenberg containing Mr. Jaeger's conclusions.

THE COURT: Okay. I mean, the issue of the Royal wine and Mr. Greenberg's intent with respect to the sort of category of Royal wine, I think, is sufficiently in issue. We may need to make it clear that the bottles in these excerpts are not the bottles at issue here, but I think this can be -- I don't see how it's particularly prejudicial, and I think it could be relevant to his intent.

MR. KABA: Well, if he didn't communicate, if the testimony at 91 to 92 was not communicated to Mr. Greenberg, and that's not what the testimony is about. It's not about his communicating something to Mr. Greenberg, I don't even see how it gets in on state of mind.

MR. RAHMIL: Your Honor, the wines that Dr. Jaeger tasted that evening at Restaurant Danielle were the wines he wrote about in an e-mail to Mr. Greenberg. Those beliefs were communicated.

MR. KABA: That's not what this deposition segment is about. This deposition segment does not anywhere say that and

I told Eric Greenberg that he's wrong about his belief that the wines were counterfeit, or that Eric Greenberg told me that, hey, I must have messed up.

MR. RAHMIL: And the jury will have the e-mail in front of them. They'll be able to connect those dots.

THE COURT: Is it in evidence already?

MR. RAHMIL: No, your Honor. We would admit it through --

THE COURT: Yes, I'll allow his testimony.

Let's turn to the issue of Mr. Elroy. There's already been testimony from at least one witness about -- I mean, this idea of the two versions of the memo has already come in. I'm going to allow defendant to introduce -- How long is the testimony that you intend to use, the deposition testimony? Do you know?

MR. CIALONE: 23 minutes.

THE COURT: Do you have counter-designated testimony?

MR. KABA: If we have, it's de minimus. Our position has long been that this testimony -- it's becoming -- the defendants are trying to make it a central character in this case. They've questioned Mr. Koch on it. We believe it's just -- it is exactly what the Court said it was going to be aware of, which is, is the integrity of the investigation correctly at play.

And so playing 23 minutes of Mr. Elroy's testimony

seems, to us, just to be completely confusing and excludable under 403, or at the very least, meriting -- giving us some opportunity to respond, to affirm the integrity of Mr. Koch's investigation. If they're going to play 20 minutes of this sideshow, we should be able to say something in response.

THE COURT: What do you want to say? I mean, Mr. Koch has already refuted it in his testimony. He's already explained that there were no magna from whatever -- I don't know if that's the correct plural.

MR. KABA: If it's coming from the bench, we'll go with it.

MR. CIALONE: The magnums of Petrus.

THE COURT: I think this has already essentially been previewed, and I don't really think -- I still don't believe the testimony from Ms. McCormick goes to the issue of the integrity of the investigation, but rather, goes to a slightly different issue, which is whether the underlying facts of the longer version of the e-mail happen to be true, which is just a different issue.

Maybe you can argue that that makes it less culpable or something, but the specific issue that Judge Freeman contemplated this to come in on, I think, still remains, and I do believe that the issue of the investigation and the issues of Mr. Elroy's role are sufficiently in play that I'm going to allow them. I'm going to allow the testimony.

MR. CIALONE: Thank you, your Honor.

MR. KABA: Your Honor, if I may just briefly.

THE COURT: Sure.

MR. KABA: They're going to play 23 minutes of deposition testimony designed to lead the jury to believe that Mr. Elroy just made something up. He put in the sentence. It's made up, experts relied on it, whomever relied on it to reach their conclusions, and those are just false.

I understand the Court's concern about, well, it's really -- it's not necessarily truth of that sentence, but just whether it was added at some point, but at the very least, we should be able to put on a witness briefly, again, no more than 20 minutes, no more than ten minutes that will say, you know, the statements are true. Those statements are confirmed. The statements were detailed by Miss McCormick.

And if your Honor is not inclined to let Miss McCormick come up and testify, then at least the e-mail that she prepared goes into excruciating detail about the conversation with the very same Chateau owner should get to come in so we can say that the substance of those documents were completely true and correct, and have been confirmed and are not connected, are not connected at all to the conclusions that were reached by the experts in order to --

THE COURT: I think that's already -- that testimony has already come in.

MR. KABA: We'd like to be able to offer the actual exhibit in evidence.

MR. CIALONE: The actual exhibit they want to offer is an e-mail written a year and a half later, which, of course, if Mr. Berrouet had said those things to Mr. Elroy and confirmed them in a document, why would they have to ask him again? They seem to want everyone to testify about Mr. Elroy's conduct except for Mr. Elroy.

Mr. Koch said, well, you know, after my deposition, I talked to Mr. Elroy and he told me here's what really happened. That's not what Mr. Elroy says in his deposition. They want Ms. McCormick to come and say, well, I'm the lawyer for Mr. Koch. And let me remind the Court, if she comes in to testify, we have a subpoena out for extensive information that is essential to go to bias.

She wants to come in and say, well, I had a conversation with Mr. Berrouet a year later that I recorded in an e-mail. Well, you know, that's a year later, but that doesn't change the fact that Mr. Elroy fabricated a document. Miss McCormick, I assume, never saw the original communication between Mr. Elroy and Mr. Berrouet, a written communication. The reason I assume that, and we sure hope it's true, because her firm never produced it. So if she had seen it, we should have gotten it by now.

MR. KABA: Your Honor, the point is --

MR. CIALONE: How is her testimony relevant to the question of -- not to the question of, is there some guy at Petrus who says these magnums never existed, but to the question of did Mr. Elroy falsify a document in order to make that?

THE COURT: Can you make it shorter than 23 minutes?

MR. CIALONE: Not right now.

THE COURT: I'm going to allow the Elroy testimony. I'm not going to allow the McCormick Testimony.

MR. KABA: Your Honor, may we at least get the e-mail admitted in evidence, without Ms. McCormick's testimony, just the e-mail, which just says, well, here's what happened with Chateau Petrus --

MR. CIALONE: That's worse, your Honor.

MR. KABA: -- in 2007.

MR. CIALONE: That's worse than the testimony.

THE COURT: Well, the e-mail was created --

MR. KABA: The e-mail was not created for purposes of addressing the Elroy memo. The e-mail was created as a record of a conversation at Chateau Petrus, where they said we are not aware of magnums from this era.

MR. CIALONE: We don't know. We don't know that because she's not here to testify about it. It was created a year later.

MR. KABA: That's because defendant doesn't want her

to testify.

MR. CIALONE: No, we don't because I think the notion of calling somebody that had a conversation a year later and say, well, he could have said that so the memo is not really fabricated, that's exactly what Judge Freeman talked about in her order.

MR. KABA: It's the integrity of the investigation, your Honor. That's what they are trying to impugn, and they don't want us to be able to respond and say, actually, this investigation did confirm precisely what they are claiming Mr. Elroy fabricated. The investigation confirmed from the exact same source, that Chateau Petrus is not aware of magnums of this -- from this era being created by the Chateaux.

MR. CIALONE: Letting in the e-mail is -- I don't think Ms. McCormick should testify, but letting in the e-mail is worse because then we have a hearsay statement from her, with no opportunity to cross-examine and no opportunity to discuss bias.

THE COURT: So you'd rather have her testify, if there was a choice?

MR. CIALONE: I'd rather have her testify and get all the evidence that we requested for a subpoena. I don't think it's appropriate, and the first question I'm going to ask her, or whoever pulls that straw, is going to ask her is, were you part of this communication with Mr. Elroy and Mr. Berrouet?

Boy, I sure hope she says no, because the next question is, well, where is it? What did you do with it?

THE COURT: Where is what?

MR. CIALONE: Where is that communication between Mr. Elroy and Mr. Berrouet? Where is the original e-mail? What did you do with it? If she can't answer that first question and say, yes, she was part of it, then why is she here to refute what we have to say about Mr. Elroy.

The person they should call is Mr. Elroy, and it's pretty obvious why they don't want to. Your Honor, I think your rulings have been correct on this so far, and I think you should stick with them.

THE COURT: I'm going to allow the Mr. Elroy testimony. I'm inclined not to allow any further, but I'll reserve on whether I allow anything further after I hear the deposition. I'm going to take a five-minute break.

MR. CIALONE: Thank you.

(Recess)

(Continued on next page)

(In open court; jury not present)

THE COURT: Please be seated.

Are we ready for the jury?

MR. CIALONE: Yes, your Honor.

MR. KABA: Yes.

(Jury present)

THE COURT: How's my jury holding up? Okay? All right. Just one more session and then we'll be done for the day.

Defendant may call its next witness.

MR. CIALONE: We have Wilfred Jaeger by videotape.

THE COURT: Okay. Roll tape.

(Video played)

MR. CIALONE: Your Honor, that concludes Mr. Jaeger's testimony. I'd like to move Exhibit 82 into evidence.

THE COURT: 82? Do you have a copy?

MR. CIALONE: Yes, your Honor.

THE COURT: Any objection?

MR. KABA: The objection we noted that it's hearsay, but other than that, no objection.

THE COURT: Okay. I'm going to allow it. Exhibit 82 is admitted into evidence.

(Trial Exhibit 82 received in evidence)

THE COURT: Is there a counterdesignation?

MR. KABA: We have about 90 seconds, your Honor.

THE COURT: Okay.

(Video played)

THE COURT: That concludes the testimony?

MR. KABA: That concludes the testimony.

THE COURT: Okay. Just to clarify one thing, ladies and gentlemen of the jury, we've had testimony from a couple of experts in this case who were actually certified as experts, and there will be I believe another expert who will testify in the case. Only people who are certified as expert witnesses may testify about their expert opinions, and the testimony you just heard from Dr. Jaeger, he's not an expert in the case. However, I did allow testimony, insofar as it's relevant, to the extent you find it relevant, even though some of his testimony was about bottles of wine other than those in this case. But insofar as you find it relevant to Mr. Greenberg's knowledge and intent, you may consider that testimony to the extent you find it helpful, okay?

Who's the next witness?

MR. CIALONE: James Elroy.

THE COURT: How long is that?

MR. CIALONE: 23 minutes.

THE COURT: Do you want to hear one more or do you want to go home? One more? Okay. Let's do it.

MR. CIALONE: I'm not sure what the nods meant. I'm not asking. I might object to that as compound, but --

(Video played)

MR. CIALONE: Your Honor, that concludes the testimony of Mr. Elroy. I have two exhibits. They are Exhibit 1026, which was what we discussed as Exhibit 1 in the deposition, and 1025, which is what's discussed as Exhibit 2 in the deposition. And I'd like to move those into evidence.

THE COURT: Okay.

MR. KABA: Your Honor, I believe these were the exhibits that were discussed with Mr. Koch and we had discussed that we were -- we didn't have objection, provided there was foundation.

THE COURT: Right. Okay. They're received.

(Trial Exhibits 1025 and 1026 received in evidence)

THE COURT: Do you have any --

MR. KABA: No, plaintiff has no counterdesignations.

THE COURT: Okay. Anything further?

MR. CIALONE: Nothing further today, your Honor. Thank you.

THE COURT: All right. Folks, I'm going to let you go for the day. I appreciate your patience. We're getting close to the end. We're not there yet, but -- so I'm going to need you to come back tomorrow morning at 9:30.

And once again, I know this has gone on a couple weeks, and I appreciate your attention and patience.

Please leave your notepads on your chairs. Please

don't talk about the case with anyone, including each other, until you're deliberating. Please don't do any research on the case, and please keep an open mind about the evidence. You haven't heard all the evidence yet, and you will have a chance to deliberate once you've heard all the evidence.

So we'll see you at 9:30. Have a good evening.

(Jury excused)

(Continued on next page)

(In open court; jury not present)

THE COURT: Okay. You may be seated.

Just in terms of time, I have down actually just a little under 20 hours for each side. I have 19:48 for plaintiff having been used and about 19:40 for defendant.

I want to look more closely at the letters I've received. Is there anything we need to address tonight?

MR. SHARTSIS: No, your Honor.

MR. KABA: No, your Honor.

THE COURT: All right. Great. Have a good evening, and we'll see you tomorrow morning at 9:30.

MR. KABA: Your Honor, may I just clarify, is your intention still to have the charge conference tomorrow after court?

THE COURT: Yes, after court tomorrow.

(Adjourned to April 9, 2013, at 9:30 a.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

WILLIAM I. KOCH,

Plaintiff,

v. 07 Civ. 9600 JPO

ERIC GREENBERG, et al.,

Defendants.

----------x

New York, N.Y.
April 9, 2013
9:45 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge
and a jury

APPEARANCES

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TRACY SALISBURY, Esq.
FRANK ALBERT CIALONE, Esq.
Of counsel

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

(Trial resumed; jury not present)

THE COURT: Good morning. I didn't get any letters this morning. Did I miss something?

MR. KABA: It's early yet.

THE COURT: I have dealt with the letters on Mr. Elroy and Dr. Jaeger. There is also a letter on Edgerton. Is Edgerton the next witness?

MR. SHARTSIS: Yes, your Honor.

THE COURT: Is he here in the courtroom?

MR. SHARTSIS: Your Honor, he is.

THE COURT: Do you want to respond to the letter on Edgerton?

MR. SHARTSIS: Sure.

THE COURT: Shall we have him leave the courtroom?

MR. SHARTSIS: I think that's correct, he should not be in court when we do that.

THE COURT: OK.

MR. SHARTSIS: Mr. Edgerton, would you mind stepping outside for a minute, please.

THE COURT: Plaintiff argues for various limitations in advance in the testimony. He first argues that he should not be assumed to be a hostile witness and therefore there should be no leading questions in defendant's examination, and various other limitations. Let me ask you before you get into any response to those specific things, obviously he is not here

as an expert, so he is not going to be testifying as an expert.

MR. SHARTSIS: Correct.

THE COURT: He is testifying as to personal knowledge. What are the categories of testimony that you seek to adduce?

MR. SHARTSIS: Your Honor, first I have to explain his background and why he is here. I'll address in a minute how that relates to whether or not he is a hostile witness. I want to discuss the relationship of Mr. Elroy, which is the investigation. I want to discuss his selection of bottles for the lawsuit. I want to discuss the material that he looked at to decide that these bottles should be in the lawsuit, which is contemporaneous.

Of course, discuss the receipt of Mr. Elroy's memo and how that was used in the decisions to bring the lawsuit. I want to raise some questions about what he physically saw on bottles that were in front of him as we raise questions about those issues.

I want to discuss sources of information that he had available, because the question is did Mr. Greenberg have some kind of peculiar knowledge about sources of information that weren't available to him. Identify Mr. Molyneaux-Berry, who was a contemporaneous expert for Mr. Koch, and the fact that there were contradictory opinions about whether the bottles at the time that they looked were considered to be authentic or inauthentic.

I want to discuss his opinions that he formed at the time about Mr. Greenberg and research he did about whether Mr. Greenberg had peculiar knowledge of other things or had done other things that were wrongful.

THE COURT: Do you agree that he should not be assumed to be a hostile witness for purposes of --

MR. SHARTSIS: I can ask him those questions, but I don't think that is appropriate, for two reasons. One, that will make this much longer for the jury. But that is not the main reason. The Federal Rules of Evidence say a witness identified with an adverse party. Your Honor, this is the man who helped draft the complaint.

I think it is hard to be much more hostile than that to Mr. Greenberg. He is not just some neutral individual. He reviewed the draft complaint. He marked it up for Mr. Koch. He provided to Mr. Koch the bottles on which Mr. Greenberg should be sued. It's really hard to be a lot more hostile than that.

The Federal Rules of Evidence indicate a witness identified with an adverse party. The fact that he once worked for Mr. Greenberg under any circumstance doesn't mean that he is not identified with Mr. Koch. What he is identified as is helping Mr. Koch sue Mr. Greenberg. That cannot be more hostile. I think that is clearly established. I can spend time proving that in front of him and then we can ask

questions, but I don't think that is reasonably disputed in the case.

THE COURT: Are you going to accuse him of fabricating anything?

MR. SHARTSIS: It depends on the answer. Other than Mr. Koch and his lawyers, the next person is Mr. Edgerton who is hostile to Mr. Greenberg.

THE COURT: Do counsel for plaintiff want to respond?

MR. WESSEL: Your Honor, Mr. Edgerton did not draft the complaint, I did. Mr. Shartsis makes up a story about the fact that Mr. Elroy sent a draft of the complaint to Mr. Edgerton, who is a 78-year-old man who made some comments on it, and all of a sudden it becomes Mr. Edgerton picked the bottles, Mr. Edgerton wrote the complaint. That is not what happened. It is not really fair to him. It's an overstatement that I think is inappropriate.

On the issue of what Mr. Shartsis said about asking Mr. Edgerton his opinions of Mr. Greenberg, I don't understand how that is relevant, Mr. Edgerton, I believe, met Mr. Greenberg once in 2003, so whatever he observed of Mr. Greenberg in 2003 isn't particularly relevant to this proceeding.

The jury can decide what information Mr. Greenberg had or didn't have from all the other witnesses that they have heard from. To ask Mr. Edgerton what his opinion is of Mr.

Greenberg I think is an odd direction to go that is not particularly relevant.

MR. SHARTSIS: Your Honor, I'll restrain myself about the comment about how accurate I am. Question of Mr. Edgerton: "And you also for Irell & Manella reviewed the draft complaint against Mr. Greenberg, correct?

"A. Yes."

He is assisting the lawyers.

THE COURT: He reviewed it. He reviewed the draft complaint.

MR. SHARTSIS: Correct.

MR. WESSEL: He didn't pick the bottles. He didn't decide to sue Mr. Greenberg. There is a lawyer, a client, and they make the decisions.

THE COURT: This is a strange situation. I'm not going to issue any blanket ruling. I am inclined to agree that he is associated with the plaintiff and that he is for purposes of the rule probably a hostile witness. It is a strange situation because he is an expert in some sense for both sides and he is testifying as a fact witness. I'm going to be carefully watching for expert opinion testimony and precluding that and whatever else is inappropriate. Beyond that, I'm going to see how the testimony goes.

Can we bring out the jury?

MR. COLES: Your Honor, there is another letter, the

refund offer, particularly under the GBL. If your Honor wants to hear that, I would present on it.

THE COURT: I have reviewed the letter. I'm actually prepared to rule on it. Is there anything you need to add to the letter?

MR. COLES: I want to point out to your Honor that the First Department has squarely held that the issue of a refund offer is relevant to determining liability under the GBL. That's been followed in trial courts.

THE COURT: You're talking about the Faden case?

MR. COLES: Yes. It's been followed in New York trial courts and also in the Second Circuit generally in the Kentucky Fried Chicken case. These cases basically say a refund is relevant, whether it's offered is relevant and whether it is not offered is relevant.

Your Honor's determination on the refund, although it may be relevant to the fraud claim, similarly, New York law, the First Department has determined that the offer of a refund is relevant to determining the deceptiveness of a transaction under the GBL. There is no basis, no legal basis, I would submit to your Honor, on the GBL claim for keeping out the offer of a refund.

It is also consistent with the business practices that we have heard so far in this case. Mr. Greenberg returned wine to Chicago Wine when they asked for that. Mr. Curley, Mr.

Koch's guy, returned wine to Zachys. And Mr. Greenberg also returned wine to D. Sokolin in connection with the Bordeaux Wine Locators.

The distinction that the other side makes that somehow this is a prelitigation offer simply isn't true, and it isn't true for two reasons. First, the first offer of a refund, the 1928 Latour, was made before any litigation started. So the statement that these are post-litigation refunds is simply an incorrect statement.

Second, the other refunds were made as soon as Mr. Greenberg was notified that Mr. Koch had problems with the bottles. The way that Mr. Greenberg was notified was by virtue of the litigation. As soon as the litigation came in, he said you've got a problem with the bottles, you can have your money back. Under New York law, that transaction, including the refund, is relevant to determining liability under the GBL. It's part of the evaluation of the nature of the transaction.

I think the law in New York is clear on this. Although there is no Court of Appeals decision, there is a First Department decision. So I think this Court is largely bound by what the First Department has said. And there is no basis, when you look at the Second Circuit decisions and the trial court decisions, for saying that the Court of Appeals would do anything differently.

THE COURT: The state court decisions were not

applying Rule 403. They were, obviously, interpreting the GBL statute.

MR. COLES: Yes. But Rule 403 is just a rule of evidence. As a matter of state law in New York, an offer of refund or failure to offer refund is relevant; therefore, it can't possibly as a matter of state law, which is applicable here, be excluded under 403.

There is a different argument with regard to fraud. With regard to the fraud claim, that legal argument doesn't necessarily apply. But, as we put in our letter, we believe the door has been opened many times by the plaintiff. So actually the issue of refund should come in on all the claims.

Mr. Koch has said this is a license to steal. It is clearly not a license to steal if in fact he was offered a refund. Mr. Koch has said that he wants people to stand behind the wine and that means he can send it back if he needs to, he can get a refund. That's exactly what Mr. Greenberg said he would do.

THE COURT: Thank you, Mr. Coles.

Does plaintiff want to respond?

MR. KABA: Your Honor, I'll be brief. We have actually addressed these issues multiple times: Before trial, the first day of trial, during trial. The latest theory on the GBL claim, citing cases that are a decade old or more, which could have been cited the very first time or the second time or

the third time your Honor looked at this issue, actually doesn't hold water.

These are not cases that talk about settlement offers, nor are these cases where the deceptive conduct at issue was the sale of something inauthentic, and, once discovered that they had sold something inauthentic, then they rush in and say, hey, here's a refund, drop the suit, here's a refund, give me the wine back.

In the Faden case the deceptive practice was the failure to disclose a feature missing in an automobile. The court said, well, actually, in view of the documentary evidence establishing defendant's voluntary disclosure of that information and the fact that they didn't charge the guy for the missing item in the car, in this case it was automatic ride control, we think that there hasn't been a deceptive act or practice. It would have to be directed to the deceptive practice.

Our complaint makes clear here -- Judge Jones has also ruled this way and your Honor has ruled this way multiple times in this proceeding already -- that the acts complained of in this case, both on the fraud and on the New York GBL claims, were the sale of inauthentic wine. It's not a contract case.

The New York State court case Guydon makes it clear that GBL claims are not contract claims, they are deceptive acts or practices claim. In the other New York trial court

decisions citing Baker v. Burlington and BNY Mellon v. Monsanto, the refund was directly implicated.

One of the reasons that it was a deceptive act or practice was because of the way the refund act or offer was implemented there. We just don't have that here. We have a settlement offer, a series of settlement offers, that defendant has been for two weeks been trying to interject in this trial and now on the final breaths of this trial, saying let it in now.

On the opening door, your Honor, I think we have dealt with this multiple times at side bar, and I have nothing further, unless your Honor has questions.

THE COURT: No, that's fine. I'm going to rule on this probably at the next break.

Would someone please retrieve Mr. Edgerton.

MR. SHARTSIS: Your Honor, while Mr. Edgerton is being retrieved, I do not want to mislead the Court. I did not give you an exhaustive list of the things I'm going to raise. I don't want to ask a question and have somebody jump up and say, wait a minute, you didn't tell the judge.

THE COURT: I do want to remind everybody of the time. You each have a little over five hours.

MR. SHARTSIS: I just wanted the Court to feel that I omitted something.

THE COURT: OK.

(Continued on next page)

(Jury present)

THE COURT: Good morning. We will proceed with the testimony.

MR. SHARTSIS: Your Honor, Mr. Greenberg calls William Edgerton.

WILLIAM EDGERTON,

called as a witness by the defendant,

having been duly sworn, testified as follows:

THE CLERK: Will you please state your full name. And I'm going to ask that you spell your first and last name for the record, please.

THE WITNESS: William Edgerton. W-I-L-L-I-A-M, E-D-G-E-R-T-O-N.

THE CLERK: Thank you.

MR. SHARTSIS: Your Honor, may I commence?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. SHARTSIS:

Q. Mr. Edgerton, you have been subpoenaed by Mr. Greenberg to appear here, is that correct?

A. Yes.

Q. That means, as far as you know, you're not appearing here voluntarily, right?

A. That's right.

Q. Mr. Koch has not asked you to testify here, is that right?

A. No.

Q. Mr. Edgerton, other than being at your deposition with me, you and I haven't talked at all, have we?

A. No.

Q. We didn't meet in anticipation of this testimony?

A. No.

Q. Did you have a chance to talk with Mr. Koch's lawyers before the testimony?

A. Yes.

Q. How much time did you spend with them?

A. I don't know. 15 minutes maybe.

Q. Thank you. You performed services for Mr. Greenberg in 2002 or 2003, is that right?

A. Yes.

Q. Who hired you to do that?

A. Mr. Coles.

Q. Mr. Coles was Mr. Greenberg's attorney then, is that right?

A. Yes.

Q. What did Mr. Coles hire you to do?

A. He hired me to visit California to look at potentially counterfeit wines.

Q. A word on your background, Mr. Edgerton. You are principally a wine appraiser, is that right?

A. Yes.

Q. By appraiser, that means that you give values about wine

bottles, is that right?

A. Yes.

Q. You have done that for most of your career, as I recall?

A. 27 years.

Q. You have done some wine authentication, is that correct?

A. Yes.

Q. Some of that you did for Mr. Greenberg?

A. Yes.

Q. Then some you did for Mr. Koch?

A. Yes.

Q. You went to Mr. Greenberg's house, correct?

A. Yes.

Q. How many times did you go?

A. Once. Actually, two days, so twice.

Q. You spent time working there with Mr. Greenberg?

A. Yes.

Q. You reviewed 108 bottles, that is right?

A. I don't remember.

Q. Around a hundred, does that sound right?

A. I thought it would be more, but I don't remember.

Q. The way you reviewed those was Mr. Greenberg would go into the cellar and he would bring out bottles for you to look at, is that right?

A. Yes.

Q. He would bring out bottles, and you would compare bottles

that you believed were authentic with some of the bottles he brought out, and make a determination of whether you thought one or the other of those bottles might be inauthentic, is that right?

A. Yes.

Q. Then you prepared a report?

A. Yes.

Q. Of the however many bottles you looked at, a hundred or more, not all of those, in your view, were inauthentic, right?

A. Yes.

Q. Roughly half, would that be about right?

A. I don't remember.

Q. Do you remember it was close to half?

A. No.

Q. It certainly wasn't all?

A. No.

Q. You agree with me it certainly wasn't all?

A. Yes.

Q. You put stickers on those bottles, correct?

A. Yes.

Q. You prepared a report?

A. Yes.

Q. And you kept a copy of your report?

A. Yes.

Q. That report had photographs in it, right?

A. Yes.

Q. So you had photographs of the bottles you looked at in your possession after you left Mr. Greenberg, correct?

A. Yes.

Q. Later, when you were working for Mr. Koch, you were taking direction from Mr. Elroy, correct?

A. Yes.

Q. You were working for him starting at the end of 2006?

A. I don't remember the precise date.

Q. 2006-2007, does that sound about right?

A. Yes.

Q. One of the things Mr. Elroy asked you to do was to look at a large auction of Mr. Greenberg's wine that was going on at Acker Merrall, do you remember that?

A. Vaguely.

Q. He asked you to look at the auction from Acker Merrall to see if there were any Greenberg bottles that you had looked at in that auction, correct?

A. I really don't remember.

Q. We'll get back to that and we'll take out some of your earlier testimony and look at it. Let's stay now with what happened with Mr. Koch as a way of background. Mr. Koch ultimately paid you somewhere between 100 and $200,000 to examine bottles in his cellar, correct?

A. And to write a report, yes.

Q. And to write a report. When you worked in his cellar, he has cellars in two different locations, correct?

A. Yes.

Q. Palm Beach one location?

A. Yes.

Q. Cape Cod the other?

A. Yes.

Q. You were in those cellars four or five times each, correct?

A. Yes.

Q. You were working with a gentleman named Molyneaux-Berry, David Molyneaux-Berry, right?

A. In the beginning, yes.

Q. You and Mr. Molyneaux-Berry would look at the bottles together, right?

A. Yes.

Q. You would look at the bottle and form an opinion whether the bottle was counterfeit, not counterfeit, possible, etc., is that correct?

A. Yes.

Q. You understood that Mr. Molyneaux-Berry was an expert in authenticating wine, is that right?

A. Yes.

Q. He had been the head of Sotheby's worldwide wine department, correct?

A. Yes.

Q. You talked over with Mr. Molyneaux-Berry what you saw some on some of those bottles, correct?

A. Yes.

Q. You reported to Mr. Elroy, correct?

A. Yes.

Q. You understood Mr. Elroy worked for Mr. Koch?

A. Yes.

Q. You understood that Mr. Elroy worked for Mr. Koch full time?

A. I didn't know.

Q. You understood Mr. Elroy was running Mr. Koch's investigation of counterfeit wine?

A. Yes.

Q. Mr. Elroy would give you your instructions on what to do, correct?

A. Yes.

Q. There were times when you thought that wine bottles that you were looking at should go back to Europe so the chateau would review them, is that correct?

A. Yes.

Q. You did not have the authority to send a wine bottle to the chateau, correct?

A. Yes.

Q. You had to ask Mr. Elroy if he would agree that that bottle should go to the chateau?

A. It was more complicated, but basically yes.

Q. Then Mr. Elroy would decide whether a bottle would go to a chateau?

A. I guess so.

Q. Mr. Elroy would take some of those bottles to the chateaus himself?

A. I don't know.

Q. Do you not know that Mr. Elroy actually went to the chateaus?

A. I don't know who took them.

Q. Mr. Elroy then at some point would give you a report that was supposed to have been from a chateau about the bottle, correct?

A. Yes.

Q. It would be Mr. Elroy who would give that to you, is that right?

A. Yes.

Q. You would consider that report in reaching your conclusion about whether a bottle of wine was counterfeit, correct?

A. Not entirely.

Q. Not entirely, but it would be part of what you considered?

A. Yes.

Q. And you would put it in your report in some cases that it had been taken to the chateau and the chateau said certain things, correct?

A. Yes.

Q. The way you knew that the chateau said certain things was that Mr. Elroy told you what the chateau say, correct?

A. Or I saw the correspondence, yes.

Q. Frequently when Mr. Elroy would report to you, he said the chateau said, correct?

A. Yes.

Q. Then you would use Mr. Elroy's account of what he said the chateau said to put in your report, correct?

A. To reconsider the bottle.

Q. Right, in considering the bottle.

A. To reconsider the bottle.

Q. Right. You would reach an opinion, and then you'd say, I'd like this to go to the chateau?

A. Yes.

Q. You would tell Mr. Elroy, and he would do something; you wouldn't know what happened?

A. That's right.

Q. Then Elroy would come back and say, here is what the chateau said, right?

A. Yes.

Q. Then you would add that to your report if you thought it was necessary?

A. Yes.

Q. And you had no idea whether that was truthful?

A. I don't ever think that came into anybody's mind. Much of what Elroy did was to show us, show me, what the written document was that he got. There was no time that I recall where he just told me that the chateau said such and such.

Q. Are you saying that Mr. Elroy brought back to you in each case a written statement from the chateau?

A. There were written statements from the chateau and from other people in France.

Q. Who wrote the statements?

A. Many of them were written by Mr. Egan.

Q. You were told they were written by Mr. Egan, right?

A. I didn't hear the question.

Q. You were told they were written by Mr. Egan?

A. They were signed by him, yes.

Q. Others were not written by Mr. Egan, correct?

A. That's right.

Q. Some of them Mr. Elroy would give you written statements, correct?

A. Yes.

Q. You wouldn't know who actually wrote those statements, correct?

A. Unless they were signed.

Q. Right, unless they were signed. If they weren't signed, you wouldn't know, correct?

A. Yes.

Q. It was Mr. Elroy ultimately who would decide whether a bottle would go to the chateau or not?

A. I don't know who made the decision.

Q. There were other tests conducted on the bottles in Europe, isn't that true?

A. Yes.

Q. One of those tests was a radioactivity test of the glass, isn't that right?

A. Sometimes.

Q. Sometimes they would test radioactivity, and that would be because you could test the glass for radioactivity to see the age of the bottle, correct?

A. That's right.

Q. Mr. Elroy in fact refused to give you some of those tests, isn't that true?

A. I don't know.

Q. You reviewed the complaint against Mr. Greenberg?

A. Yes.

Q. You said that Irell & Manella the lawyers asked you to review it?

A. A long time ago, yes.

Q. The bottles that were included in the complaint, Mr. Elroy had not provided you any radioactivity test for any of those bottles, had he?

A. I don't remember.

Q. If he did, it would have shown up in your report, correct?

A. Yes.

Q. Do you remember if for the bottles that were included in the complaint in your report you ever showed the results of a radioactivity test?

A. Please ask the question again.

Q. Sure. For the bottles in your report that appeared in the complaint, do you remember in fact that any of those reports included radioactivity tests?

MR. KABA: Objection, your Honor. It isn't even clear the witness remembers what bottles were in the complaint.

MR. SHARTSIS: It's a straight question, your Honor.

THE COURT: If you under, you can answer.

MR. SHARTSIS: I think he did answer.

A. I don't remember.

Q. There was another test that was conducted in Europe by a gentleman named Professor Hubert, do you remember that?

A. Yes.

Q. That test was a gamma ray test, correct?

A. Yes.

Q. That test is done in order to see -- let me step back. The way the test is conducted is they measure radiation or gamma rays coming out of the wine through the glass bottle, correct?

MR. KABA: Objection, your Honor. This is expert testimony on gamma ray testing.

MR. SHARTSIS: This is his understanding at the time. He is not testifying as an expert on this. Your Honor, I'll make an offer of proof. This gentleman asked for things to be tested for gamma rays. I'm just trying to get to that issue.

THE COURT: He is a percipient witness. He is not testifying as an expert.

MR. SHARTSIS: No, no. It is just his understanding of what the test was. I don't purport that he is an expert on it.

THE COURT: OK, you can ask.

Q. You are not an expert on gamma ray testing?

A. No.

Q. But you understood that gamma ray testing could be done on bottles?

A. Yes.

Q. You yourself asked for gamma ray attesting?

A. Yes.

Q. The reason you asked was because a gamma ray test could prove some evidence about whether a bottle had contents that included wine that was made after 1950, is that right?

MR. KABA: Objection, your Honor. Again we are getting into what gamma ray testing may or may not show, and the witness is not an expert.

THE COURT: Sustained.

MR. SHARTSIS: Your Honor, just his understanding. He

asked for these tests. I want to show whether he understood what he was looking for. I'm not asking him to testify that that is the truth or that is the test. It's what he understood. It goes only to his understanding. I have just elicited a statement that he is not an expert in gamma ray testing.

THE COURT: You asked because a gamma ray test could prove some evidence about whether a bottle -- I don't think that has any probative value other than an expert opinion.

MR. SHARTSIS: I am going to show later that he would ask for gamma ray tests and wouldn't get them, they would not do the ones that he requested, in terms of trying to determine whether a bottle was fake or not.

THE COURT: You can ask him why he ordered, why he asked for it.

MR. SHARTSIS: That's fine, your Honor.

Q. Mr. Edgerton, why did you ask for gamma ray tests?

A. I thought it would be helpful to get the answers.

Q. Those answers would help you determine whether the bottles were authentic or inauthentic, correct?

A. It would confirm a prior opinion.

Q. Or it might not confirm a prior opinion?

A. Yes.

Q. Thank you. Mr. Edgerton, when you initially examined the bottles for Mr. Koch, in terms of looking at them to determine

inauthenticity, you had no interest in where the bottles came from, correct?

A. No.

Q. You did have an interest?

A. Yes.

MR. SHARTSIS: Counsel, I'm going to ask to play from volume 2 of Mr. Edgerton's deposition, page 16/line 23 through page 17/line 2.

MR. KABA: It should be page to page 17/line 7.

MR. SHARTSIS: That's fine, through page 17/line 7.

(Edgerton video deposition shown)

Q. That was your testimony, Mr. Edgerton?

A. Yes. Would you restate the question?

Q. My only question is, was that your testimony?

A. Yes.

Q. Part of your work was looking at the cork, correct?

A. If possible.

Q. Right. In fact, on many of these bottles the capsule had been stripped off, correct?

A. No.

Q. The bottles you looked at, the capsules had not been stripped off?

A. You said many. There were some, not many.

Q. I'm sorry. Thank you for the correction. On some of these bottles, the capsules were stripped off, right?

MR. KABA: Objection, vague, as to these bottles. Is counsel referring to the bottles in the case?

THE COURT: Can you clarify?

MR. SHARTSIS: Your Honor, maybe we should just bring those bottles into the courtroom, then and we will look at all the stripped capsules. I think this is a pretty easy question.

THE COURT: Are we talking about the bottles at issue in the case or a different set?

MR. SHARTSIS: The bottles in the case. This gentleman looked at them. May we take a short break and bring in a dozen of those bottles that have the capsules stripped so we can refresh his recollection? I'm surprised by the response. I thought it was pretty obvious. Maybe we can do that.

THE COURT: We can do that on a break.

MR. SHARTSIS: He is not going to go that long that it's going to matter. I can come back and do it.

THE COURT: You can make a representation.

MR. KABA: Your Honor, I'm fine with that. The witness hasn't yet testified that he knows what bottles are at issue in this case. Counsel is referring to "these bottles." I think it would be helpful for the witness and for the Court to know what the reference is to.

MR. SHARTSIS: Your Honor, I don't want to burden the jury. This gentleman has a report. His report includes all 36

of those bottles. Virtually every one of those bottles is missing a capsule. I think it would be better if we had him look at it. Maybe it would refresh his recollection that he looked at bottles like this. I didn't expect this answer. I thought it was so clear.

THE COURT: He said some of them.

MR. SHARTSIS: I really would like to. If we can just do that. I had not anticipated it. We have them conveniently located. Why don't we bring in a dozen of those bottles that don't have capsules, have Mr. Edgerton look at them, and then we will see if it refreshes his recollection. It's evidence in the case. It's very important.

MR. KABA: Your Honor, now we are getting into him examining bottles. He is not an expert. The Court has heard from two experts. Defendant is going to bring his own expert in. I'm willing to agree that there are 12 bottles in this case without capsules, with the capsules stripped off. If that is the only point, I'm willing to agree to that. I think the witness was just saying, of the bottles I examined, some had capsules, some didn't.

THE COURT: Yes.

MR. SHARTSIS: Your Honor, it is important to deal with the witness just in terms of the fact that he was a gentleman who identified the bottles that are in the complaint and that the bottles in the complaint have stripped capsules.

It is very important. I think I'm entitled to show him the evidence. It's evidence. I don't think I can be denied the right to show evidence to a witness. I would like to do that.

MR. KABA: I have no objection to that, your Honor.

MR. SHARTSIS: Then if we can bring the bottles in the courtroom, please. I don't have control of them, the plaintiff does.

THE COURT: How long will it take?

MR. KABA: We have to go back. I assume defendant will volunteer some of their attorneys so we can go back and grab 12 bottles.

THE COURT: They are here, right?

MR. KABA: Yes. They are in the attorneys' rooms.

THE COURT: OK.

MR. SHARTSIS: If we may take a five-minute break to do that?

THE COURT: Sure.

(Pause)

MR. WESSEL: Your Honor, if the witness needs to go to the bathroom or something?

THE COURT: Sure. Does the jury want to take a bathroom break or do you want to wait here?

MR. SHARTSIS: Why don't we do that, your Honor.

THE JUROR: We're fine.

THE COURT: Let me know if you want to take a break.

You're also welcome to stand and stretch to stay awake.

Are we bringing in 12 bottles are all 24?

MR. SHARTSIS: All 24.

MR. KABA: We'll see whatever they come back with.

MR. SHARTSIS: You should bring in all 24. I'd like to have the evidence.

THE COURT: The bottles are already in evidence, right?

MR. KABA: They are.

MR. SHARTSIS: Yes.

THE COURT: Bring in the bottles. The jury is again instructed not to drink the wine.

(Continued on next page)

THE COURT: Okay. Is it here? Is it all here?

MR. KABA: We're waiting for a few more.

MR. SHARTSIS: Probably good enough to start out.

THE COURT: Okay.

BY MR. SHARTSIS:

Q. Mr. Edgerton, I know you have a screen in front of you.

A. I can see it.

Q. Are you able to see those bottles?

A. Yes.

Q. And looking at that -- those bottles, does that remind you that when you examined bottles in Mr. Koch's cellar, that's how they appeared?

A. No.

Q. You believe they all had complete capsules?

A. No. But some had -- they've been in many places and touched by many people since then.

Q. All right. So you don't remember that bottles like this appeared in Mr. Koch's cellar?

A. Some did.

Q. All right. Some did. And you can't remember which ones.

A. That's right.

Q. Okay. Do you think if we looked at photographs in the catalog, for example, and it shows that bottles were stripped, that you'd be comfortable that they had come to you in a stripped fashion?

MR. KABA: Your Honor, I'm going to object here because the witness hasn't testified he doesn't remember that they were stripped or not stripped. He testified some of them were -- didn't have capsules, some of them did.

THE COURT: Please rephrase.

MR. SHARTSIS: Sure.

Q. Would you agree with me that if the Zachys catalog showed that the bottle had a stripped capsule, that when you received it or looked at it in Mr. Koch's cellar, it was likely to have arrived that way?

A. Yes.

Q. And you would agree with me that you would not expect someone who was trying to sell counterfeit wine to strip capsules, is that right?

MR. KABA: Objection. Speculation.

THE COURT: You can answer if you know.

A. Not necessarily.

Q. Do you agree with me it would be contrary to someone who is trying to purvey counterfeit wine to strip capsules, correct?

A. No.

MR. SHARTSIS: Well, let's read -- and I'm sorry I do not have a film of our first day of deposition. I'm going to read, counsel, page 72, line 21 through line 73/3, from volume 1.

Q. "Q. Would you expect someone who was trying to purvey

counterfeit wine to cut the capsule to expose an entire cork?" And there's an objection to form.

"A purveyor who counterfeits to cut the capsule?" That's you, a question. I say, "Right." You say, "No, I would not expect that."

"Q. Would it be --" let me be clear. I'm not sure I read that well. Let me do the question again so it's not confusing.

I asked you a question: "Would you expect someone who was trying to purvey counterfeit wine to cut the capsule to expose an entire cork?"

Your lawyer has an objection. Then you ask a question:

"A purveyor of counterfeits to cut the capsule?"

I say, "Right."

And you say, "No, I would not expect that."

And then I say -- I ask you, "Would it be contrary to someone who was trying to purvey counterfeit wine?"

Your answer: "Exactly."

Do you remember that question and answer?

A. Yes.

Q. Thank you.

MR. SHARTSIS: Could we put up the first Elroy memo regarding Chateau Petrus '21.

And can you show us the next page, please.

Show me the -- let's put up the second one.

I'm sorry. Could we put up the other of these two memos. Not this one, the other one. And can we go to the second page, please.

Q. Mr. Edgerton, do you remember Mr. Elroy giving you a memorandum that he purportedly had sent to Chateau Petrus?

A. Yes.

MR. SHARTSIS: And if we could highlight the one on the right.

MR. KABA: Do you have copies of -- the hard copies of both of these for the witness?

MR. SHARTSIS: Well, he can read it on the screen.

Can you highlight the one on the right, please.

MR. KABA: I'd like him to be able to look at the whole memo, the whole document. That's what they're entitled to see, the whole document.

MR. SHARTSIS: Do we have a copy, Liz?

May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. SHARTSIS:

Q. Mr. Edgerton, counsel for Mr. Koch has asked that I provide you with these two copies. If you need to look at those, help yourself.

A. Thank you.

Q. And the one on the right in paragraph number 6 has

language, "The cork is too long and in fact you advised, 'I have never seen a cork that long in any Petrus bottle.' Until now you have never observed a '21 Petrus magnum and never heard of such a bottle. All of the above causes you to believe the bottle is a forgery."

And you received that memo from Mr. Elroy, is that correct?

A. I don't know if it was this one or the other one or we -- if we got both of them.

Q. Well, do you remember at your deposition we showed you this one memorandum with this language and you were surprised to see it in there?

A. I was surprised to see that there were two that had this different sentence, yes.

Q. Right. And you'll note on the bottom of this, this was produced as an EDGE number? Do you see? You have the original copy yourself. You'll see one has an EDGE number?

A. Yes.

Q. And that was out of your files, correct?

A. Yes.

Q. You didn't have two memos in your file, did you?

A. No.

Q. Right. You only had this in your file, correct?

A. Yes.

Q. And so you couldn't be confused by having two different

memos in your file with two different language 'cause you only had one, right?

A. I -- I probably thought I had a duplicate and threw it away, back when it came.

Q. Mr. Edgerton, I asked you these questions in your deposition and you didn't say a thing about probably having a duplicate, did you?

A. I've thought about it for the last three years.

Q. Right. After working for Mr. Koch you've thought about it?

MR. KABA: Objection. Argumentative, your Honor.

A. No, after the deposition.

THE COURT: Overruled.

Q. Right. And -- but are you going to testify under oath here in court that you know you had two copies and you threw one away?

A. No.

Q. Okay. And when you saw this in your deposition, you were surprised that this was different than the other memo, correct?

A. Yes.

Q. Thank you.

And you relied upon Mr. Elroy to provide you truthful information from what he learned in Europe, correct?

A. Yes.

Q. You would send -- you would have some bottles sent to Europe and they'd leave in one condition and they'd come back

in a different condition, correct?

A. Did I say that?

Q. I'm just asking you if you remember that.

A. I don't remember that.

Q. Do you remember that some bottles would leave with the capsules intact and that they would come back with the capsules torn up poorly and then Scotch-taped back onto the bottles?

A. Yes, that I remember.

Q. All right. So the bottle that you saw when it left was different than the bottle that you saw when it came back, correct?

A. Yes.

Q. And one of the reasons you wanted the chateau to look at these was that you felt that in certain cases the chateau would have superior knowledge about the authenticity of the bottle, correct?

A. Yes.

Q. Do you remember that Mr. Molyneaux-Berry wrote down his own notes in his work with you in the cellar for Mr. Koch?

A. Yes.

Q. And let me -- I'm going to show you --

MR. SHARTSIS: If we could display to the witness, please, Trial Exhibit 1066, page 42.

Q. Do you recognize those notes?

A. Generally but not specifically.

Q. These are the form of notes that Mr. Molyneaux-Berry had when he worked with you, correct?

A. Yes.

Q. And you have in front of you 1042. Would you look at the second of those notes, the Chateau Latour 1928.

A. Yes.

Q. And that has a -- that's one of Mr. Koch's cellar numbers, 00599672?

A. Yes.

Q. And that's a 1928 Chateau Latour, correct?

A. Yes.

Q. Let me show you what's been marked as Exhibit 200. It's a Chateau Latour 1928, 00599672. Do you see that?

A. Yes.

Q. And that's a bottle that has your sticker on it?

A. Yes.

Q. And that's your handwriting on the sticker?

A. Yes.

Q. Mr. Molyneaux-Berry looked at that bottle and he concluded it was --

MR. KABA: Your Honor, objection. This document is not in evidence, Mr. Molyneaux-Berry is not here to testify, and testimony regarding what his document says and what his conclusions are is expert testimony and not even of this -- the witness on the stand.

MR. SHARTSIS: Your Honor, it's an admission. It's an admission by a party opponent.

MR. KABA: There's been no foundation laid that Mr. Molyneaux-Berry was an agent of the party, and again, these are hearsay documents that go to expert issues.

MR. SHARTSIS: It's an admission, your Honor. We've established Mr. Molyneaux-Berry worked for Mr. Koch, doing work in his cellar, identifying inauthentic bottles side by side with this witness. Not calling on him as an expert. I'm just showing it as an admission.

THE COURT: Overruled. You can answer.

Q. Mr. Molyneaux-Berry looked at the same bottle you looked at and he determined it was probably genuine, correct?

A. Yes.

Q. And he looked at it knowing that you had inspected it and you were of the opinion that the wine could be fraudulent.

MR. KABA: Objection. Speculation.

THE COURT: If you know, you can answer.

A. Say it again, please?

Q. He looked at the bottle after you looked at it, right?

A. Who? Who's "he"?

Q. Mr. Molyneaux-Berry.

A. I inspected this bottle after he did.

Q. Right. And if you -- would you look at that note and see if it refreshes your recollection that you had already

inspected the bottle before he reached that opinion.

A. Yes. But I looked at all the bottles three or four times.

Q. All right. But you had already looked at the bottle at least one of your three or four times and you were of the opinion that the wine could be fraudulent, correct?

A. Yes.

Q. And after you looked at the bottle and told Mr. Molyneaux-Berry you thought the wine could be fraudulent, he said, "I think it's probably genuine." Correct?

A. It's not clear to me. I don't remember.

Q. And looking at this doesn't refresh your recollection?

A. This came well before the report, so I don't know. What does the report say about this?

Q. So would you just read this note and see if it refreshes your recollection that Bill Edgerton inspected and was of the opinion that the wine could be fraudulent before he said it was genuine?

MR. KABA: Your Honor, the question is misstated. He's not referring to Bill Edgerton having inspected the wine and was of the opinion. I think he's referring to Mr. Molyneaux-Berry.

MR. SHARTSIS: Let me try the question again.

THE COURT: Okay.

Q. Does this document that you're looking at refresh your recollection that before Mr. Molyneaux-Berry said the wine is

probably genuine, Bill Edgerton, you, had inspected and you were of the opinion that the wine could be fraudulent?

A. Yes.

Q. Now you disagreed on another bottle, which was a 1945 Chateau Lafite, isn't that correct?

A. I don't remember.

MR. SHARTSIS: Could we show Exhibit 1066, page 24, to the witness, please.

Q. I've just shown you the Chateau Lafite 1945, 00599504. Do you recognize that --

A. Yes.

Q. -- number? Do you remember that -- and if you'll take a look, please, at Trial Exhibit 1066 at page 24, third one down, that should be on your screen.

A. Yes.

Q. Do you remember that both you and Mr. Molyneaux-Berry looked at this bottle with its yellow label?

A. Yes.

Q. And do you remember observing the yellow label when you saw it?

A. Yes.

Q. And the yellow label, in your view, obviously was very inconsistent with what a Chateau Lafite color is for a label?

A. That's correct.

Q. And Mr. Molyneaux-Berry also observed that this was a

yellow color and strange coloration for the label, is that right?

A. Yes.

Q. And after he did that, he concluded that this bottle was probably genuine, is that true?

A. Yes.

Q. Thank you. Now you worked with Mr. Greenberg in his cellar, is that correct?

A. Yes.

Q. And at the time you met him you didn't consider him to be an expert in identifying counterfeit wine, did you?

A. No.

Q. When you met with Mr. Greenberg, you didn't suggest to him that any of his bottles be sent to chateaux for authentication, did you?

A. No.

Q. You didn't suggest that any of his bottles be sent to the university of Bordeaux for gamma testing, did you?

A. No, because it wasn't available then.

Q. You didn't suggest to him that glass radiation testing be done to determine the age of the bottles, did you?

A. No.

Q. You didn't suggest that he, for example, send the bottles to the printers in Europe who printed labels, did you?

A. No.

Q. Mr. Edgerton, as someone in the wine industry, you were aware, at the time you were doing the work, that Mr. Greenberg did not try to conceal the fact that he had problems with Royal Wine, isn't that true?

A. Yes.

Q. It wasn't a secret to people in the wine industry that he had a dispute with Royal Wine, correct?

A. Yes.

Q. And you had many contacts with many people in the industry telling you that they had heard about that dispute, correct?

A. Yes.

Q. Mr. Edgerton, other than that one bottle that has your sticker, when you reviewed all the other bottles that you reviewed for Mr. Koch -- let me change my question.

I think I'd asked you at your deposition how much you worked and you said thousands of manhours, is that right?

A. Yes.

Q. And that was reviewing bottles for Mr. Koch in his cellar?

A. Or at -- preparing the report, analyzing, researching, yes.

Q. And in those thousands of manhours, preparing the report, analyzing, and working in his cellar, you did not see any other bottle that you thought was counterfeit or possibly counterfeit for Mr. Koch that you had also advised Mr. Greenberg was counterfeit or possibly counterfeit other than that one single bottle, correct?

A. Yes.

Q. Now I'd asked you a question --

MR. SHARTSIS: And I'm going to, counsel, provide Mr. Edgerton with his deposition testimony for the purpose of refreshing his recollection, your Honor. I'd asked him about looking at an Acker Merrall auction. So let me provide him with that testimony.

(Discussion off the record)

MR. SHARTSIS: May I approach the witness, your Honor?

THE COURT: Yes.

Q. Mr. Edgerton, I'm just going to ask you to read to yourself page 237 and 238 and then if that doesn't refresh your recollection, we'll have you read some more.

Have you had a chance to read that?

A. Yes.

Q. Does that refresh your recollection about looking at the Acker auction?

A. Yes.

Q. So do you remember Mr. -- there was an Acker auction of somewhere between 8 and 15,000 bottles of Mr. Greenberg's wine?

A. Yes.

Q. That was in 2007; do you remember?

A. I don't remember specifically when it was, but I remember there was a sale.

Q. And it was before the complaint was filed, correct, as far

as you know?

A. Yes.

Q. That was yes, right?

A. Yes.

Q. Thank you. And Mr. Elroy had said to you: Mr. Edgerton, would you please look at this Acker auction and see if there are any bottles by Greenberg that shouldn't be in there, is that right?

A. I don't know if he phrased it that way.

Q. Well, the basic concept was to make sure that there was nothing in that auction that you thought Mr. Greenberg was doing that was wrong, right?

A. That I knew about.

Q. That you knew about. Nothing more than you knew about, right?

A. Yes.

Q. So Mr. Elroy says: Look, would you check out the Acker auction, see if Greenberg's doing anything wrong there, correct?

A. I doubt that it was phrased that way, but I think I understand what you're saying.

Q. But that was the spirit of it, correct?

A. I was asked to see if there were any bottles that looked familiar.

Q. Right. And by familiar, what you understood that meant

was, bottles that you had looked at in Mr. Greenberg's cellar that you thought were inauthentic.

A. Yes.

Q. And you examined the Acker auction to the best of your ability --

A. The catalog.

Q. -- right? And after looking at this catalog involving a sale of 8 to 15,000 bottles before the lawsuit was filed, you couldn't find a single bottle that you thought was problematic, correct?

A. Yes.

Q. Mr. Edgerton, you have arranged for Robert Parker to taste old and rare bottles of wine to determine if they are authentic or inauthentic, correct?

A. Yes.

Q. In fact, there was a very highly publicized tasting by Robert Parker of a number of bottles you brought to him to have him determine whether they were counterfeit or not, correct?

A. Yes.

Q. And you had I think an event or a lunch; was it in Baltimore, Maryland?

A. Yes.

Q. And Mr. Parker came there, correct?

A. Yes.

Q. Mr. Parker, of course, is considered one of the outstanding

wine experts in the world?

A. Yes.

Q. And you believed Mr. Parker was capable of tasting wine in order to determine whether or not it was authentic, correct?

A. Yes.

Q. And you asked him to do so?

A. Yes.

Q. He tasted a number of wines that came from someone other than Mr. Koch?

A. Yes.

Q. And he reached opinions that the wines were inauthentic simply by tasting them, correct?

A. Yes.

Q. About how many wines were involved?

A. 12.

Q. Mr. Edgerton, I'm going to hand you a few pages of your report for Mr. Koch, have them in front of you, and then ask you some questions about them. We don't necessarily have to have them in front of the jury. And if we could display -- and actually, let me give you a set of them. We'll put them on the screen in front of you.

Mr. Edgerton?

A. I'll give you this back.

Q. I'll trade you. Thank you. You can give me that one back as well, if you'd like. Thank you.

Mr. Edgerton, I'm first going to show you a page that on the computer is marked 84, Exhibit 1045, 84. And here you're looking at a 1945 -- oh, I'm sorry. It should be right on the page in front of you as well, but --

A. I have the title page in front of me.

Q. It should be right in the same order that I'm doing, just if you turn to the first --

A. I have an 83.

Q. Right. Next one is 84. Let me see what you've got.

A. Next one is 86.

Q. It's your page 83. There's an exhibit number that may not appear on there. Your page is marked 83.

A. Yes.

Q. Okay. So we're on the same one, 1945 Chateau Lafleur magnum?

A. Yes.

Q. When you looked at the 1945 Chateau Lafleur Magnum, which was Koch bottle number 600507, you observed that the -- certain aspects of the cork branding, correct?

A. Yes.

Q. You didn't observe that the cork was branded either vertically or horizontally, did you?

A. Not here, no.

Q. Right. And the fact that it -- however it was branded in terms of direction was not of concern to you, correct?

A. I don't know if it was or not.

Q. Generally you wrote down your concerns, correct?

A. Most of the time.

Q. Right. If you saw something that you thought was a basis for concluding a bottle was counterfeit, you would identify that, correct?

A. Yes.

Q. And you don't identify the fact that the direction of the branding on the cork is a -- of the Lafleur cork -- cork is a basis for saying that it's not authentic, correct?

A. The response was questionable, not inauthentic.

Q. Right. But it doesn't relate to the cork, correct?

A. That's right.

MR. KABA: Your Honor, I'm going to object to the extent that we're now going to get into lines of questioning about whether or not Mr. Edgerton concluded a bottle was authentic or inauthentic. He's not being offered as an expert, and certainly, if this line of questioning is going to proceed, I should be entitled to then take him bottle by bottle and have him say he concluded these bottles were counterfeit or questionable.

MR. SHARTSIS: Your Honor, these are admissions by a party opponent. They have not called Mr. Edgerton as an expert, nor am I asking him his expert opinions. I'm asking him factual issues of what he saw at the time.

MR. KABA: And how they pertain to conclusions reached about wine. Mr. Edgerton is being offered as an expert --

MR. SHARTSIS: No.

MR. KABA: -- and they presented him small segments of a larger report that they're not even seeking to move into evidence.

MR. SHARTSIS: Your Honor, I can only say that if the plaintiff at one point said something was real and now says it's fake, that's a pretty important piece of evidence.

THE COURT: I'm going to allow it. Go ahead.

BY MR. SHARTSIS:

Q. And so Mr. Edgerton, just back to this, you did not identify, for example, that the direction of the printing on the cork of the Chateau Lafleur magnum was a specific problem, correct?

A. Not here, no.

Q. And you also did not indicate that the size of the label was a problem, correct?

A. Correct.

Q. Right. You didn't say, this label is too big to be on a bottle like this and it should be smaller, correct?

A. Correct.

Q. And at the time you did this, I presume you were not familiar with how many hectares of land Chateau Lafleur had under cultivation in 1945?

A. That's correct.

Q. And you didn't use that as a basis to reach some conclusion about the size of the label?

A. That's correct.

Q. With regard to this bottle, you wanted to send it back to the chateau, correct?

A. I suggested that more information would be acquired that way.

Q. Right. Do you know if it ever was?

A. I have no idea.

Q. And with regard to this bottle, you thought that -- not that it was counterfeit but it was just questionable.

A. Yes.

Q. Let's look at your page marked 86. We'll put it on the screen just in front of you. Trial Exhibit 87.

This is another 1945 Chateau Lafleur magnum, Koch bottle number 60051-6. Do you remember here you said the label appears appropriate?

A. Yes.

Q. So you weren't concerned about the fact the label might be too big, correct?

A. No.

Q. This is another one that you wanted to send back to the chateau, correct?

A. I suggested that that -- it would be helpful to get

information that the chateau had.

Q. And you saw branded cork.

A. Yes.

Q. And you didn't raise the question about whether the direction of the brand might indicate it was not authentic, correct?

A. That's -- yes.

Q. And again, you didn't conclude the bottle was counterfeit, you raised -- you said the bottle remains "questionable," correct?

A. Yes.

Q. And let's turn to 89, please.

And here I want to just talk more broadly about the kind of knowledge that you had to do this. One of the -- one of the -- one of the things you knew in determining whether there might be Chateau Lafleur magnums in the postwar period was a story that had been told to you by Mr. Molyneaux-Berry, is that correct?

A. Yes.

Q. And what Mr. Molyneaux-Berry told you was that he had talked with another wine expert named Michel Bettane in Moscow in 2007, correct?

MR. KABA: Objection. Calls for hearsay. The question itself calls for hearsay, and again, I'll just reiterate, this is not an expert in this case and --

MR. SHARTSIS: Your Honor.

MR. KABA: -- he's eliciting expert testimony.

MR. SHARTSIS: This does not go to the truth of the matter stated; it goes to the kind of information that Mr. Edgerton used to make his determinations. And this is what he did at the time. They're arguing that Mr. Greenberg should know these things. We'll find out.

THE COURT: You can ask him.

BY MR. SHARTSIS:

Q. So one of the pieces of information you had was an account that Mr. Molyneaux-Berry gave to you no earlier than 2007, correct?

A. Yes.

Q. And the auction that you were looking at for Mr. Greenberg was 2005, correct?

A. Which auction?

Q. Well, the auction in which the stickered bottle period was in 2005, correct?

A. I don't know.

Q. All right. So in any event, you're receiving this information in 2007, from Mr. Molyneaux-Berry.

A. No.

Q. Well, it had to be --

A. I beg your pardon. Yes.

Q. Yes. It has to be.

A. Yes.

Q. And he told you an account of something that happened in Moscow in 2007, right?

A. Yes.

Q. And the account Mr. Molyneaux-Berry told you was he talked to a wine specialist named Michel Bettane, B-E-T-T-A-N-E, in Moscow at an event called Vinnaya, V-I-N-N-A-Y-A, Karta, in 2007, correct?

A. Yes.

MR. KABA: Your Honor, I'm just -- now we're just reading this report into the record. I'm going to ask that it be moved into evidence.

MR. SHARTSIS: I have no obligation to do that, your Honor. I'm not offering it into evidence. I'm using it to refresh this man's recollection.

THE COURT: That's fine.

Q. And what Mr. Bettane told Mr. Molyneaux-Berry, who told you, was that there was a woman named Madame Robin who had been related to the family that made Chateau Lafleur, correct?

A. Yes.

Q. And she had been a young girl at the time of the war, correct?

A. I don't know how old she was.

Q. Or at least she'd been a lot younger in 1945 than she was in 2007 --

A. That's correct.

Q. -- right? And he had spoken with her and she remembered that magnum-sized bottles had been very difficult to find after World War Two, correct?

A. Yes.

Q. And that was the kind of detailed information that you were finding that assisted you in reaching some of your conclusions, correct?

A. Sometimes, yes.

Q. Let's turn to page 103 of your report.

And this is a 1950 Chateau Lafleur, Koch bottle number 600547, is that right?

A. Yes.

Q. And here, and I think on others -- I don't want to misspeak -- you identify a Bordeaux Wine Locators importer strip. Do you see that?

A. Yes.

Q. And that was not, for you, a particular reason to think, if it has a Bordeaux Wine Locators strip, it must be counterfeit, correct?

A. No. That was part of the appearance.

Q. Right. But not a reason for thinking it was fake.

A. No.

Q. And of course in this one the cork was fully branded, is that right?

A. Yes.

Q. And again no mention of the fact that there was something wrong with the direction of the printing on the cork, correct?

A. Yes.

Q. And no mention of the size problem, if any, with the label.

A. Yes.

Q. Let's turn to Trial Exhibit 122, which would be page 121 for you.

A. Yes.

Q. And this is the 1928 Chateau Latour bottle. It's Koch bottle number 00599665. Do you see that?

A. Yes.

Q. And this is a bottle which you thought was probably counterfeit, correct?

A. Yes.

Q. But it went to the chateau. Right?

A. Yes.

Q. And the chateau did not make any final determination of the authenticity of the bottle, did it?

A. I don't know.

Q. Do you remember that? Can you read this to see if --

A. Oh, I'm sorry. Yes.

Q. And what you had seen on this bottle was a cork that was dirty with no brand being able to be seen. That was the bottle that you had looked at.

A. Yes.

Q. And then this shows that the bottle that the chateau looked at, the cork appeared modern, like one used in the chateau when recorking, correct?

A. Yes.

Q. This is one of the bottles that had been sent for caesium testing to see if the contents were before or after 1952, correct?

A. Yes.

Q. And the conclusion that you were informed of was that the wine in the bottle was earlier than 1952, correct?

A. Yes.

Q. Can you turn, please, to -- I think it's your page 164. I'm sorry. It may not be, and I've written right over it. We're going to show it on the screen to you. It's around 160. It's Trial --

A. Yes.

Q. 162? Thank you. And this was a report on a 1921 Chateau Petrus magnum, is that right?

A. Yes.

Q. And in this report you actually were including the information that you had received from Mr. Elroy at the memo that we looked at earlier, correct?

A. Yes.

Q. And it's part of your report.

A. Yes.

Q. And you relied on that information as part of your report, correct?

A. Yes.

Q. When you looked at the bottle, you could see no legible marking on the cork, correct?

A. Yes.

Q. And we're going to turn off that screen in front of you and put up Exhibit 105, page 59.

MR. SHARTSIS: Am I wrong? Excuse me, your Honor.

(Pause)

MR. SHARTSIS: I think we can find the right one. I'm not the most organized person there is.

And can we blow up the corresponding lot number, lot 443.

Now this should be a Chateau '21 Petrus, and I don't think that's right.

Q. This is the catalog description by Zachys. Do you see that in front of you?

A. Yes.

Q. When you looked at the bottle, you could see no marking on the cork that was legible, correct?

A. Yes.

Q. And you would not have described that as part of vintage visible on the cork, would you?

A. No.

Q. Thank you.

Let's turn to --

MR. SHARTSIS: We could close that, please. And let's turn on Mr. Edgerton's screen to what is his page 189 and the Trial Exhibit page 190.

Q. And Mr. Edgerton, this shows a 1990 Chateau Petrus magnum, is that correct?

A. Yes.

Q. And Koch bottle 600293, is that right?

A. Yes.

Q. This was a bottle which you recommended should be gamma tested to see if the wine was before or after a certain period, correct?

A. Yes.

Q. And do you know if it was?

A. I have no way of knowing.

Q. And you'd made that recommendation to Mr. Elroy, right?

A. Yes.

Q. Here, you could see the Petrus Pomerol 1950 brand on the cork, correct?

A. Yes.

Q. And you make no mention about whether the cork is vertical or horizontal or anything else, correct?

A. Yes.

Q. And that was not of concern to you based on what you saw, correct?

A. At the time, no.

Q. Right. And this is a bottle which you concluded was probably counterfeit, correct?

A. Yes.

MR. SHARTSIS: Can we turn to Trial Exhibit 1045, 0178.

Q. This is -- and do you have that in front of you, sir?

A. Yes.

Q. This is a 1950 Chateau Petrus magnum, bottle number 600312.

A. Yes.

Q. On this bottle, the gamma report was that the contents were younger than 1952, correct?

A. Yes.

Q. And this was a 1950 bottle, right?

A. Yes.

Q. And on this bottle you observed that no lettering could be seen on the cork, is that right?

A. Yes.

Q. And then the bottle that was taken to the chateau, the chateau's observation was, the cork had the wrong type of branding, correct?

A. They cut the capsule.

Q. Do you know that for a fact, sir?

A. No, but I know that in all cases the bottles that went to the chateaux had capsules cut.

Q. Right. And many of the bottles that you looked at already had the capsules cut when you examined them, correct?

A. I didn't say many. I said some.

Q. Some of the bottles. So you don't know if this is one of the bottles that you examined that already had the capsule cut, correct?

A. No, but if you're saying that my determination was one thing, it's possible that it was because the capsule was still on the bottle.

Q. Well, wouldn't it have been appropriate in a thorough report to say "could not see the cork at all" instead of saying "no lettering could be seen on the cork"?

A. Hindsight is 20/20.

Q. Hindsight is 20/20, but you agree with me if you were trying to convey that there was no lettering on the cork, for example, you wouldn't say the lights were out in the room and there was no lettering on the cork? You wouldn't do that, right?

MR. KABA: Your Honor, objection.

A. No.

Q. So what you would do, if the cork was obscured or you couldn't see the cork, you would not make a representation that no lettering could be seen on the cork, would you?

A. I think it depends on the circumstances.

Q. All right. And in these circumstances you didn't say capsule blocked cork lettering or anything like that, correct?

A. Correct.

Q. Now let's look at one final one.

MR. SHARTSIS: Let's look at Trial Exhibit 1045, page 1073. And can we close the screen and put up on the screen, because it's been admitted, Trial Exhibit 92, 165. And can we show lot 1454, please.

Q. Mr. Edgerton, when you looked at this bottle, you said no lettering could be seen on the cork, correct?

A. Yes.

Q. And you would not have described the bottle you saw as it was described in the Zachys catalog as a fully stamped cork, would you?

A. No.

MR. SHARTSIS: Thank you. Your Honor, I have no further questions.

THE COURT: Okay. Thank you, Mr. Shartsis. Examination by the plaintiff?

MR. KABA: Sure, your Honor.

THE COURT: Let me ask the jury, do you want a break now? Anybody want? Okay. It's almost 11:20. Why don't we do a five- or ten-minute break. Folks, we'll see you in ten minutes.

(Jury excused)

THE COURT: You may be seated.

If you want to take a break, you may.

THE WITNESS: Thank you.

(Recess)

(In open court; jury not present)

THE COURT: Please be seated. Mr. Edgerton, you can come back to the witness stand.

(Jury present)

THE COURT: Please be seated. Okay. Mr. Kaba?

CROSS-EXAMINATION

BY MR. KABA:

Q. Good morning, Mr. Edgerton.

A. Good morning.

Q. The jury has already heard from plenty of witnesses and experts. I'll try to keep this as short as possible.

You were just asked about cork branding, the cork branding you observed on -- in your report versus the cork branding that apparently was observed and reflected in the Zachys auction catalog. Do you recall that?

A. Yes.

Q. Now is it possible that one can see a cork text legible on a cork one day and not see it the next time one reviews that cork?

A. Depends what happens in the meantime. That between the

time of the auction, the bottles were handled, packed, shipped, unpacked, brought to us two or three times in the cellar, so anything could happen.

Q. And is it possible that sometimes wine actually covers the cork so that you can no longer see text that may have been legible?

A. The bottles were standing up on their base in the Koch cellar, but presumably were not anywhere else, so that can completely change the characteristics of the cork.

Q. Okay. Now you were also asked about tasting wine. Do you think tasting is necessary to authenticate wine?

A. Unlike other products, tasting destroys the bottle, so it might be valuable if you had two cases of a suspect wine so when you taste one, you still have 23 bottles left, but in many of the cases that I've been involved in, the tasting confirms the original determination so I'm not sure it's -- it's wise even.

Q. And you've identified that -- a problem where tastings actually destroy the wine, right?

A. It destroys the wine.

MR. SHARTSIS: Objection. Leading the witness.

A. It destroys the value of the bottle, yes.

MR. SHARTSIS: Objection. Leading, your Honor.

MR. KABA: This is cross-examination.

MR. SHARTSIS: Your Honor, this is not a

cross-examination. I did the cross-examination because this is a hostile witness.

THE COURT: Please rephrase.

MR. KABA: Your Honor, if I may just -- when Mr. Ritchie was here as a witness, a third-party witness, defendants used plenty of leading questions to cross-examine Mr. Ritchie. Under the rules, the witness was called by defendant. I'm allowed to also facilitate his testimony.

MR. SHARTSIS: Your Honor, this isn't Mr. Ritchie. It's Mr. Edgerton. He works for Mr. Koch.

MR. KABA: And worked for Mr. Greenberg.

MR. SHARTSIS: As it was, your Honor, for Mr. Greenberg, where he was called, he was cross-examined, and we did a direct examination when Mr. Greenberg was put up by Mr. Cialone, this is exactly the same situation.

MR. KABA: Under the federal rules -- we won't take much time on it -- Rule 611, leading questions should not be used on direct examination except as necessary to develop the witness' testimony. Ordinarily the court should allow leading questions on cross-examination.

MR. SHARTSIS: It's not cross-examination.

THE COURT: Okay.

MR. KABA: May I proceed, your Honor?

THE COURT: Yes.

Q. And you've identified that as wine purports to be older,

tasting is even more difficult.

A. Yes.

Q. Because you believe wines mature in different ways and at different rates, correct?

A. And in different storage conditions, so there's no way to tell where a 50-year-old bottle has been.

Q. Okay. And you were asked a bit about a tasting you did with Mr. Robert Parker. Do you recall that?

A. Yes.

Q. Now that tasting with Mr. Parker occurred after you had determined those wines were counterfeit, correct?

A. Yes. Yes.

Q. And in fact, Mr. Parker applauded you for your obvious ability to detect fraud just by visual inspection, isn't that right?

A. Yes.

MR. SHARTSIS: Your Honor, I object. That is beyond the scope of the question of Mr. Parker tasting his wines to determine whether or not they were authentic. The fact that these happened to be inauthentic doesn't mean -- if they're always inauthentic, they wouldn't be asking Mr. Parker to do it.

THE COURT: Overruled.

Q. Let's just make sure the record is clear on this. In fact, the very tasting that Mr. Shartsis was asking you about was the

tasting where Mr. Parker applauded you for your ability to identify fake wine based purely on visual inspection, isn't that right?

A. Yes. Yes.

Q. This tasting just confirmed what you had determined on visual inspection.

A. Yes.

Q. Now let's talk a bit about your engagement in this -- in this matter. You began working for Mr. Greenberg, isn't that right?

A. Yes.

Q. You were retained by him sometime in 2002?

A. Yes.

MR. KABA: Exhibit 70 marked for identification, your Honor.

Q. Mr. Edgerton, what is -- what does this document appear to be?

A. This was the engagement agreement that I had before I went to work for Mr. Greenberg.

MR. KABA: Your Honor, I'd move this into evidence.

THE COURT: Any objection?

MR. SHARTSIS: No objection, your Honor.

THE COURT: 70 received.

(Trial Exhibit 70 received in evidence)

Q. Mr. Edgerton, you see this is dated November 4th, 2002?

A. Yes.

Q. And you see here the first paragraph confirms your engagement as a consultant to Mr. Coles' firm?

A. Yes.

Q. And you were to assist Mr. Coles in his representation of Eric Greenberg in proceedings relating to his claims against Royal Wine Merchants, arising from his purchase of possibly fake and/or counterfeit wine from Royal. Do you see that?

A. Yes.

Q. And that's what you understood your engagement to be for Mr. Greenberg, correct?

A. Yes.

Q. You were going to help him identify fake and counterfeit wine.

A. Yes.

Q. And you did in fact authenticate wine for Mr. Greenberg, isn't that right?

A. Yes.

Q. You traveled to his home --

A. Yes.

Q. -- in 2002?

A. Yes.

Q. You went to his cellar?

A. Yes.

Q. You spent two days there, is that right?

A. Yes.

Q. And during that time you visually inspected the wine that you were being presented, is that right?

A. Yes. Yes.

Q. And you prepared a report for Mr. Greenberg, isn't that right?

A. Yes.

Q. I've handed you Exhibit 73. It's already been admitted into evidence. What is this document?

A. This was my report following the -- the cellar visit with Mr. Greenberg.

Q. Okay. And does this report memorialize your finding during that cellar visit?

A. Yes.

Q. Okay. Now in performing your inspection -- let's take a look at page 3 of this report, the second full paragraph.

A. Yes.

Q. You see here that your assignment was to inspect, photograph, and assess a group of unopened wine bottles?

A. Yes.

Q. You see that you were going to be determining whether or not they were genuine, suspect, or counterfeit?

A. Yes.

Q. And you see how it says, "The authentication assignment specifically excluded at this time a valuation, tasting the

wine, any consideration of the source," etc.?

A. Yes.

Q. So you were specifically excluded from tasting the wine when you were authenticating Mr. Greenberg's wine, isn't that right?

A. Yes.

Q. Okay. And in the course of your examination you looked at corks, is that right?

A. Yes.

Q. You looked at capsules for Mr. Greenberg?

A. Yes.

Q. You looked at labels?

A. Yes.

Q. You looked at the bottle itself?

A. Yes.

Q. This is consistent with how you would normally authenticate a wine, is that right?

A. Yes.

Q. And as a general rule, when you're authenticating wine, you prefer to have as much information as possible, right?

A. Absolutely.

Q. And if you can find out information on the source, that's something you want to know.

A. Yes.

Q. And just so we're perfectly clear, you didn't taste any of

the wines that Mr. Greenberg had asked you to authenticate, right?

A. No.

Q. And during your two-day inspection of wine in Mr. Greenberg's cellar, was Mr. Greenberg present with you?

A. Yes.

Q. Did you discuss authentication of wine with Mr. Greenberg while he was there?

A. Yes.

Q. And did you get the sense that after that discussion he knew more about authenticating wine?

A. Yes.

Q. Did he know more about authenticating wine than other collectors you've encountered?

A. I don't really recall, but probably.

Q. Now you examined -- you can take a look at the report but -- roughly a hundred six bottles in Mr. Greenberg's cellar, correct?

A. Yes.

Q. Now you didn't select those bottles for inspection, did you?

A. No.

Q. Mr. Greenberg chose the bottles.

A. Yes.

Q. And he decided that he was going to bring a hundred six

bottles, correct?

A. I don't know. I just looked at the ones that were brought.

Q. And the one bringing the bottles to you?

A. Pardon me? Again? Question again?

Q. I said you looked at the bottles that were brought to you by whom?

A. Mr. Greenberg.

Q. And then you applied stickers to some of the bottles you inspected, right?

A. Yes.

Q. Actually applied stickers to all the bottles you inspected.

A. Yes.

Q. And those stickers correspond with entries on your report, Exhibit 73, right?

A. Yes.

Q. You delivered a copy of this report to Mr. Greenberg, right?

A. Yes.

Q. Let's just take a look at a now famous bottle in the case. Let's take a look at this bottle. It's purported 1928 Chateau Latour, Exhibit 200 in the case. Could you identify -- do you see that sticker on the top of that bottle?

A. Yes.

Q. There's -- there are some initials on there. Are those your initials?

A. Yes, they are.

Q. Take a look at page 32 of your report, Exhibit 73.

A. Okay.

Q. Does that sticker correspond with paragraph 41 in your report?

A. Yes.

Q. And if you'd turn to the next -- and you see you've identified a 1928 Chateau Latour, which is what Exhibit 200 is, right?

A. Yes.

Q. Turn to the next page, the Conclusion. What did you conclude about this bottle?

A. Definitely counterfeit.

Q. You communicated your conclusion that this bottle was definitely counterfeit in this report to Mr. Greenberg, correct?

A. Yes.

Q. Now you found a number of the 106 wines you inspected in Mr. Greenberg's cellar were counterfeit, or possibly counterfeit, correct?

A. Yes.

Q. In fact, I'll tell you, having looked at the report -- and we can count it up, but we have a summary exhibit here that we'll use as a demonstrative -- you found 60 of the 106 bottles that you inspected from Mr. Greenberg were definitely

counterfeit.

A. Yes.

Q. You found 5 that had a very strong likelihood of being counterfeit.

A. Yes.

Q. You found 1 that was probably counterfeit.

A. Yes.

Q. You found 3 that were possibly counterfeit.

A. Yes.

Q. You found 2 that were probably genuine.

A. Yes.

Q. And so on and so forth, right?

A. Yes.

Q. So if I add up the definitely counterfeit, very strong likelihood of being counterfeit, probably counterfeit, and possibly counterfeit, that's 69 out of 106 bottles.

A. Yes.

Q. And do you know -- again, having looked at your report, do you know that all 69 of these bottles were identified as coming from Royal Wine Merchants in this report?

A. I don't know.

Q. Would that surprise you?

A. No.

Q. Now who identified -- who told you that the bottles that you identified as counterfeit came from Royal Wine Merchants?

A. Mr. Greenberg.

Q. You didn't know that on your own, correct?

A. No.

Q. Mr. Greenberg told you: Hey, these wines are from Royal Wine Merchants that are counterfeit.

A. Yes.

Q. And that's what you recorded in your report, what Mr. Greenberg told you about the source of his wine.

A. Yes.

Q. Did Mr. Greenberg say: Hey, I'm just joking, they're not really from Royal?

A. No.

Q. Did Mr. Greenberg tell you: Hey, this is just a crazy assumption that they're from Royal?

A. No.

MR. SHARTSIS: Oh, your Honor, I object to that question.

THE COURT: Sustained.

Q. When Mr. Greenberg told you, all of these 69 bottles, a hundred percent of them that you identified as counterfeit, came from Royal, did you believe him?

A. Yes.

Q. That's why you included it in your report, correct?

A. Yes.

Q. Were you aware that Mr. Greenberg was also contemplating a

lawsuit against Royal?

A. I didn't know but I assumed that might be a product of my -- the work I did.

Q. So did you ever see a copy of the draft complaint Mr. Greenberg wrote in order to pursue his claims against Royal?

A. I don't think so.

Q. Did you ever come to understand that Mr. Greenberg had purchased over $2 million worth of wine from Royal?

A. I'm not sure of the exact figure, but I knew it was substantial.

Q. Let me see if I can remind you here.

Mr. Edgerton, I've handed you Exhibit 314 marked for identification. What is this document?

A. Looks like a chart of wines.

Q. And do you see on the first page it's being sent to you by express mail?

A. Yes.

Q. Do you have any reason to doubt that you received this document?

A. No.

MR. KABA: Okay. Your Honor, I'd move this into evidence.

MR. SHARTSIS: No objection.

THE COURT: 314 received.

(Trial Exhibit 314 received in evidence)

Q. Okay. Mr. Edgerton, you see on the first page, this is a letter from Mr. Coles, Mr. Greenberg's lawyer, to you in September 2002?

A. Yes.

Q. You see it says, "As discussed, here is a summary of the wine in issue prepared by Mr. Greenberg." Do you see that?

A. Yes.

Q. You see how he says, "It is a work in process"? Do you see that?

A. Yes.

Q. Now let's turn -- let's turn to the second page of the document. And it proceeds, and it identifies page after page after page of wines. Do you see that?

A. Yes.

Q. Do you see that on the top of that page it says, the second column -- I'm sorry -- the third column in from the right, Fake Wine (So Far)?

A. Yes.

Q. You see that?

A. Yes.

Q. Now let's turn to the last page. You see the invoice total is two point roughly two million dollars?

A. Yes.

Q. And then in the Fake Wine (So Far) column, the total is

over $900,000, right?

A. Yes.

Q. And this was a work in process, as Mr. Coles identified, right?

MR. SHARTSIS: Your Honor -- your Honor, I would object to this. I don't believe we spent time on this. We're just having a regurgitation of something that has been in front of the jury many, many times. All we're doing is having counsel go through this report, say the report shows this, the report shows that. Maybe we could have testimony that the witness either independently remembered it or this is refreshing his recollection about the details rather than just using him as a cipher to read things to the jury, and I object on that grounds.

MR. KABA: The witness received the document. There was a lot of testimony elicited about what the witness did, what he thought Mr. Greenberg knew, and I'm going to ask him about whether he actually looked at these wines.

MR. SHARTSIS: That's not my objection. My objection is, there's no basis that this witness can testify to this other than the lawyer reading it to him here. He reads a line and says: It says that, doesn't it?

THE COURT: But he said he received it.

MR. SHARTSIS: He received it, your Honor. It's in. It's been in 20 times. That's not my --

MR. KABA: I'm allowed to go over the evidence, your Honor, with the witness.

MR. SHARTSIS: The objection is to the form of the question. If he's trying to refresh his recollection, as I did, he should put it in front of him and say: Do you remember that, but not just say, line 1 says this, line 2 says that. I think the jury has seen line 1 and 2 many, many times, and we don't need to waste more of their time on that.

THE COURT: Do you have any more on this?

MR. KABA: I have a couple more questions, your Honor. We could probably go quicker with nonspeaking objections, but --

BY MR. KABA:

Q. Mr. Edgerton, when you were in Mr. Greenberg's cellar, he only gave you a hundred six bottles to look at, correct?

A. Yes.

Q. He never gave you all of the wines listed on these -- on this chart to look at, did he?

A. No.

Q. He didn't give you $2 million worth of Royal Wine to look at, did he?

A. No.

Q. He didn't give you even $900,000 worth of Royal Wine that he had identified as fake to look at, did he?

MR. SHARTSIS: Your Honor, we're going to stipulate

that he only gave him these 108 bottles. I don't -- he didn't give him $5 million either. He didn't give him his whole cellar. He gave him a hundred eight bottles, for goodness sake.

MR. KABA: Your Honor, this is improper. I'm trying to get through my examination.

THE COURT: Go ahead.

Q. So the record is clear, Mr. Greenberg did not give you even the $900,000 worth of fake wine he had identified by September 2002 to look at, did he?

A. No.

Q. Did you ever tell Mr. Greenberg: I'm only going to look at 106 bottles and nothing more?

A. No.

Q. Did you ever tell him: I'm not going to come back another day and help you authenticate more wine?

A. No.

Q. Did he ever ask you to come back and help him authenticate more wine?

A. No.

Q. Did you have any contact with Mr. Greenberg after you told him 69 of these 106 bottles are counterfeit?

A. I don't remember any.

Q. Do you know where any of the bottles you had identified as counterfeit are today?

A. Well, there's one right here.

Q. Now you -- at some time later you were retained by Mr. Koch, is that right?

A. Yes.

Q. And he also hired you to authenticate wines, isn't that right?

A. Yes.

Q. But Mr. Koch didn't just bring you a certain number of bottles and say, hey, just look at these, did he?

A. No.

Q. In fact, Mr. Koch told you, go in and find the fakes, is that right?

A. Yes.

Q. And you went in to Mr. Koch's cellar on more than one occasion.

A. Yes.

Q. You went to his cellar in Palm Beach and you went to his cellar at Cape Cod.

A. Yes.

Q. Mr. Koch never restricted you on what wines you could look at, did he?

A. No.

Q. And you believed Mr. Koch was serious about identifying fake and counterfeit wine in his collection, didn't you?

A. Yes.

Q. Now when you were retained by Mr. Koch, did he tell you the sources of the wines that he had, the sources of the wines that he had acquired?

A. Was I told?

Q. At the time that you were retained, were you told by Mr. Koch?

A. No.

Q. No. But at some point you did find at least one bottle that Mr. Greenberg had sold to Mr. Koch, right?

A. Yes.

Q. And upon finding that bottle, you went and looked at your notes?

A. Yes.

Q. You determined, hey, this is the bottle that I'd already told Mr. Greenberg was counterfeit, is that right?

A. Yes.

Q. You identified your sticker with your initials on this bottle.

A. Yes.

Q. And you -- then you later came to identify additional counterfeit and suspect wines in Mr. Koch's cellar, is that right?

A. Yes.

Q. And you came to learn that even more bottles that Mr. Greenberg had sold through Zachys that Mr. Koch purchased

were fake and counterfeit.

A. Yes.

Q. And you prepared a report, didn't you?

A. Yes.

Q. And you saw a few pages of the report that counsel for Mr. Greenberg showed you. I'm just going to hand you the whole report. We don't have to mark it.

Let me hand you your full report and ask you some questions about it.

Now you reached conclusions in this report after looking at the bottles, some of them up to four times, right?

MR. SHARTSIS: Your Honor, I object to this report as hearsay. They're out-of-court statements being offered for the truth of what happened. I was entitled to question Mr. Edgerton because he is a representative or affiliated with a party opponent, and under the law of hearsay, those are admissions by a party opponent. Party opponent, however, may not seek on his own initiative to place hearsay before a jury, and I object on that grounds. This is entirely hearsay and this is not -- this is not an admission of a party opponent, and this is a party opponent asking the question. The law is clear.

THE COURT: Mr. Kaba?

(Continued on next page)

MR. KABA: Your Honor, I haven't moved this document into evidence. I'm going to ask the witness about the work he did for Mr. Koch. If he needs to rely on the document to refresh his recollection, that's no different.

THE COURT: I think this is hearsay. It could be used for refreshing recollection, but that would be all.

MR. KABA: Thank you.

MR. SHARTSIS: Your Honor, also, to the extent that there is a question about some material which I did not raise, it is hearsay. Other than the limited pages and the limited questions, I don't think that he can now go through an entire report which is hearsay, import it into the court by asking the witness. This is something that was done outside of this courtroom, and it was hearsay when it was done. It is not admissible in this case.

MR. KABA: Your Honor, I understand that Mr. Shartsis only wants me to pick certain little pieces of Mr. Edgerton's lengthy report where he examined these bottles and reached conclusions about these bottles. He asked him about the work he did for Mr. Koch. I'm entitled to finish asking him those questions.

THE COURT: You may. Overruled.

MR. KABA: Thank you.

BY MR. KABA:

Q. When you inspected bottles for authenticity for Mr. Koch,

you also did a visual inspection, isn't that right?

A. Yes.

Q. You looked at some of these bottles multiple times, isn't that right?

A. Yes.

Q. You were shown some notes from Mr. Molyneaux-Berry, do you recall that?

A. Yes.

Q. You inspected the wines after those notes, correct?

A. Yes.

Q. You reached conclusions about the wines that you were inspecting, correct?

A. Yes.

Q. You stand behind those conclusions, correct?

A. Yes.

Q. Those were your independent conclusions, weren't they?

A. Yes.

Q. Again, when you inspected these wines for Mr. Koch, you looked at the cork and the capsule and the label and the bottle, didn't you?

A. Everything I could, yes.

Q. For Mr. Koch you also reached your conclusions without ever popping one of these open and tasting it, isn't that right?

A. Yes.

Q. I want to talk to you about some of your conclusions, Mr.

Edgerton. You were shown some pages of certain of these conclusions, but let me ask you about the others that you weren't shown. You can refer to the report to refresh your recollection to the extent you need to. Let's start turning to page 21 of your report. I'm going to try to go through this pretty quickly.

MR. SHARTSIS: Your Honor, I'm going to interpose an objection. This is going to obligate him to go page by page through the report, the very thing I tried to avoid. I think it is improper examination. We are now about to go through --

Let me put it this way, your Honor. Mr. Koch was entitled to call Mr. Edgerton as an expert, and he chose not to. That was his decision. He could have presented Mr. Edgerton and stood behind Mr. Edgerton's report and put this entire thing in front of the jury the way Mr. Egan's report is in front of the jury and the way Mr. Schwartz's report is in front of the jury. He chose not to stand behind Mr. Edgerton to do that. Now he is trying to come in and present the report page by page. I object.

THE COURT: I'm not going to allow testimony that is to the substance of the report.

MR. KABA: Your Honor, the point I'm trying to make here is that Mr. Shartsis showed Mr. Edgerton certain pages of the report to try to suggest there was something wrong with the analysis or there were inconsistencies in his conclusions. I

think the jury is entitled to hear that Mr. Edgerton looked at these bottles and did not conclude a single one of these was genuine. If I can ask him that question and he can make reference to it, I don't have to go through all the bottles.

THE COURT: You can ask that question.

Q. Mr. Edgerton, if you need to look at the report, you can, but do you recall concluding that any single one of these 24 bottles is genuine?

A. I don't believe so.

Q. You were asked a bit about Bordeaux Wine Locators. Do you recall that?

A. Yes.

Q. At some point did you come to suspect that Bordeaux Wine Locators was involved in selling suspicious or counterfeit wine?

A. There seemed to be a lot of counterfeits THAT had their label, but that's the only thing that we saw.

Q. In fact, you saw a number of counterfeit wines in Mr. Koch's cellar that had the Bordeaux Wine Locators label, correct?

A. Yes.

Q. Mr. Greenberg never told you that he had concluded Bordeaux Wine Locators was the worst counterfeiting operation in the world, did he?

A. I don't remember it if he did.

Q. I want to ask you specifically about a couple of the bottles that Mr. Shartsis did ask you about. Do you recall being asked about the 1921 Petrus?

A. Yes.

Q. If you would like, you can make reference to page 155 of your report, which is Bates stamped 156 on the bottom.

MR. SHARTSIS: If you could tell me the bottle.

MR. KABA: It's a 1921 Petrus magnum. It's actually page 162 of your report.

MR. SHARTSIS: Right. This is the report at 147?

MR. KABA: Yes.

Q. Page 162 of your report, Mr. Edgerton, can you turn to that.

A. OK.

Q. You recall Mr. Shartsis asked you about this 1921 Petrus magnum?

A. Yes.

Q. You recall he asked you about Mr. Elroy and whether or not you had received two memos from him?

A. Yes.

Q. Taking a look at this report, you had reached your own conclusion that the magnum of 1921 Petrus at issue was counterfeit, correct?

A. Yes.

Q. You reached that conclusion before you got any memo from

Mr. Elroy, correct?

A. Yes.

Q. You reached the conclusion independent of any memo from Mr. Elroy, correct?

A. Yes.

Q. Do you stand behind that conclusion?

A. Absolutely.

Q. Even if there may be another version of the memo, do you stand behind the conclusion?

A. Yes.

Q. You were also asked about cork branding. Do you recall that?

A. Yes.

Q. You were shown a number of pages, and Mr. Shartsis asked you, hey, you didn't mention anything about the cork branding here. Do you recall that?

A. Yes.

Q. I want to show you another page. It's page 100 of your report.

MR. KABA: It's report number 67, Mr. Shartsis.

Q. Are you there?

A. Yes.

Q. You see here this is a 1949 Chateau Lafleur magnum?

A. Yes.

Q. It's Koch bottle number 60053, correct?

A. Yes.

Q. I will represent to you that's Exhibit 209 in this case. Do you see here where you note the cork brand is rather indistinct but branded vertically? Do you see that?

A. Yes.

Q. You noted that because that was a concern for you, isn't that right?

A. Yes.

Q. It was important that the cork was branded vertically?

MR. SHARTSIS: I object to the question as vague. Was a concern to him that it was indistinct or was it a concern to him that it was branded vertically?

MR. KABA: That is actually, in fact, just the question I asked: It was important to you that the cork was branded vertically.

A. Yes.

Q. Now let me ask you a few more questions about some of the topics you were asked. Did you spend thousands of man hours in Mr. Koch's cellars?

A. No.

Q. How much time did you actually spend in Mr. Koch's cellar looking at the hundreds of bottles of wine that you inspected?

A. Actual time in the cellars, two cellars, was probably somewhere between 120 and 150 hours.

Q. You also were asked whether Mr. Greenberg's dispute with

Royal was well known at the time of his dispute, do you recall that?

A. Yes.

Q. You had heard that Mr. Greenberg had a dispute with Royal, hadn't you?

A. Yes.

Q. But had you heard that Mr. Greenberg was consigning wines he acquired from Royal for sale at the Zachys '05 auction?

MR. SHARTSIS: Your Honor, I object. This is just giving a speech to the jury by asking questions that counsel knows have nothing to do with what Mr. Edgerton was hired to do.

MR. KABA: Mr. Edgerton was asked about the dispute with Royal, and I'm entitled --

MR. SHARTSIS: He can ask him every question about what he doesn't know and he'll say he doesn't know. We can go through for the 20th time the same litany of matters. That's all that is going on here. This is not a proof from this witness, this is a closing argument. I will be happy to engage this issue at closing argument.

MR. KABA: The witness was asked, were you aware of Mr. Greenberg's dispute with Royal. I'm entitled to ask the witness, but were you aware that Mr. Greenberg then consigned wines for sale that he had acquired from Royal. I'm not saying he doesn't know. I'm asking him did he know that.

THE COURT: I'm going to sustain the objection.

BY MR. KABA:

Q. Mr. Edgerton, were you aware that Mr. Greenberg had entered into a settlement agreement with Royal?

A. No.

MR. SHARTSIS: Your Honor, I object to that. He wasn't even aware that he had sued them. There is no lawsuit yet, and now he is asking him is he aware that he settled the lawsuit.

THE COURT: He said no.

MR. KABA: Thank you.

Q. At some point you stopped working for Mr. Koch, right?

A. Yes.

Q. You stopped working for Mr. Koch after you had been sued by Mr. Greenberg, correct?

A. Yes.

Q. Mr. Greenberg sued you in Connecticut, right?

A. Yes.

Q. Do you recall that Mr. Greenberg sued you because he alleged that you breached your confidentiality obligations to him?

A. Yes.

Q. Among the confidential information that Mr. Greenberg claimed you improperly disclosed to Mr. Koch was the fact that you had identified this Exhibit 200 as counterfeit to Mr.

Greenberg, correct?

A. Yes.

Q. That lawsuit was troubling for you, wasn't it?

A. It was what?

Q. That lawsuit was troubling for you, wasn't it?

A. Yes, very.

Q. You didn't think you had done something wrong, did you?

A. Absolutely not.

Q. In fact, you would normally treat a client's confidential information as confidential, right?

A. Yes.

Q. You thought you had a professional obligation to disclose that there were counterfeit wines out there that you had previously identified, isn't that right?

A. Yes.

Q. Do you understand that Mr. Greenberg has testified in this case that the lawsuit against you was just a part of his litigation strategy against Mr. Koch?

A. I didn't know that.

Q. But Mr. Greenberg then did drop the lawsuit against you, isn't that right?

A. Yes, on my wife's birthday.

Q. That's a nice birthday present. And you stopped working for Mr. Koch?

A. Yes.

MR. KABA: No further questions at this time, your Honor.

THE COURT: Thank you.

Is there redirect?

MR. SHARTSIS: I do, your Honor.

REDIRECT EXAMINATION

BY MR. SHARTSIS:

Q. Mr. Edgerton, Mr. Greenberg in fact did sue you because you had disclosed information you promised not to disclose to anyone else, correct?

A. No.

Q. You signed a confidentiality agreement, right?

A. No, I didn't.

Q. You didn't. As a professional you believed you had an obligation to maintain the confidentiality of a client's material, correct?

A. Yes.

Q. You did not do that, correct?

A. In this case no.

Q. Right. Mr. Greenberg sued you, is that right?

A. Yes.

Q. Then, a few months later, he just voluntarily dropped the lawsuit, correct?

A. Yes.

Q. You didn't sit in a courtroom, like this, correct?

A. No.

Q. You didn't go through discovery about that case, correct?

A. No.

Q. You didn't have your deposition taken about that, correct?

A. No.

Q. You didn't have extended litigation about that, correct?

A. No.

Q. A few months later Mr. Greenberg just said, I'm not going forward with this, he dropped it, and you didn't even ask him to drop it, correct?

A. I was represented by counsel, but I didn't make that request.

Q. You were asked questions about vertical cork. If you would turn to page 100 of your report.

MR. SHARTSIS: And if you could show Mr. Edgerton Trial Exhibit page 101, 1045-101.

Q. With me?

A. Yes.

Q. You had a phrase that said the cork brand is rather indistinct but branded vertically, correct?

A. Yes.

Q. Nowhere in your report, if we were to do the whole thing Mr. Kaba wanted you to do, do you ever say a vertical cork means this, right?

A. That's correct.

Q. In this case what bothered you wasn't that it was vertical, it was that it was upside down, right?

A. No.

Q. Didn't you say that the cork is inserted upside down?

A. OK. When I first looked at this, I thought it was from the chateau. But that's correct, we determined that later on.

Q. Right. What bothered you was that the cork was upside down, right?

MR. KABA: Objection. Asked and answered.

MR. SHARTSIS: I'd like a clear answer here.

THE COURT: You can answer.

Q. Correct?

A. Yes.

Q. Upside down means it wasn't that way, it was this way, right?

A. Yes.

Q. If it was vertical that way, it was vertical that way, right?

A. Yes.

Q. You didn't write here the problem is that it is vertical; you wrote the problem is upside down, right?

A. Yes.

Q. Then you were asked about another bottle, which was the '21 Petrus, and that you had reached your conclusion without knowing what the winery thought, correct?

A. Yes.

Q. If we read the conclusion, it says, "Inspection notes and analysis," and we get down to "Original conclusion." Do you see that?

A. Tell me which one you're on.

Q. I'm sorry. Let me go slower. We are going to go to what must be 162, your page 162.

MR. SHARTSIS: Liz, will you show him 1045, page 163, please.

A. 163.

Q. It's your 162, Mr. Edgerton.

A. OK, I'm there.

Q. Are you with me?

A. Yes.

Q. The way this is structured is you put in your conclusion first and then you give an original conclusion, and it says counterfeit, right?

A. Yes.

Q. Below it it says, "For further verification, the bottle was taken to the chateau," correct?

A. Yes.

Q. Above the line, for your initial conclusion, you write, "The winery advises that no magnums were made prior to 1945," correct?

A. Yes.

Q. So you had chateau information already, correct?

A. In this case yes.

Q. For the chateau information, you didn't go to the chateaus, right?

A. No.

Q. You didn't ask to go to the chateaus?

A. No.

Q. You didn't ask to go firsthand and hear what a chateau had to say about a bottle, correct?

A. No, I didn't.

Q. You had Mr. Elroy tell you what the chateau said, right?

A. Yes.

Q. In this case in fact Mr. Elroy had told you the winery advises that no magnums were made prior to 1945 before you reached your first conclusion, correct?

MR. KABA: Objection. Foundation. Assumes that Mr. Elroy --

MR. SHARTSIS: I just asked a question.

THE COURT: You can answer it if you know.

Q. Is that correct?

A. Say it again.

Q. In this case you had already been advised that the winery said that no magnums were made prior to 1945, before you reached your original conclusion?

A. Yes. But that didn't come from the visit of this bottle to

the chateau. We had that before the bottle went.

Q. But you didn't make the visit?

A. No.

Q. You had no idea exactly what the chateau had said, because you weren't there to hear it, correct?

A. It was from other sources, I believe.

Q. You weren't there to hear it?

A. No, I was not there.

Q. You were asked questions about Robert Parker and the tasting, correct?

A. Yes.

Q. Mr. Parker in fact had tasted some of the same wines before, correct?

A. Yes.

Q. He told you that?

A. Yes.

Q. He tasted 12 wines and he found those 12 wines counterfeit, correct?

A. Yes.

Q. He told you, I've tasted these wines before, same wine, same label, same size bottle?

A. Yes.

Q. And the ones I tasted before I could tell were authentic, correct?

A. Yes.

Q. So Mr. Parker was able to taste a wine, the same label, the same date, the same domain, the same chateau, and tell whether the wine in his view was authentic or not authentic, correct?

A. Yes.

MR. KABA: Objection. That is a question for Mr. Parker, not Mr. Edgerton.

THE COURT: Sustained.

MR. SHARTSIS: I think he just answered it, your Honor.

MR. KABA: Move to strike the answer, your Honor. That was an objectionable question and you sustained the objection.

THE COURT: The answer to the previous question is stricken. You can rephrase the question.

Q. Your understanding when you retained Mr. Parker was that Mr. Parker was capable of determining from a bottle which had the same date and the same chateau and the same type and style of wine, whether that bottle was authentic or inauthentic by tasting it, correct?

A. I didn't retain him and I didn't have that understanding.

Q. After the tasting, didn't he publish an article in which he said, I've tasted these same bottles, same year, same type, same chateau, and the ones I tasted were just fine?

MR. KABA: Objection. Hearsay, asked and answered. If he doesn't like the answer, I'm sorry. The witness has

answered his question.

THE COURT: It's a different question about the article. You can answer if you know.

A. Before the tasting, I didn't know he had tasted those wines.

Q. After the tasting, you knew he did?

A. Yes.

Q. After the tasting, he told you, I've tasted these before, and when I tasted the same type, the same year, the same chateau, the same size, those were genuine, correct?

MR. KABA: Objection. Hearsay.

THE COURT: Overruled.

Q. Correct?

A. Yes.

Q. Thank you. Now, just for the sake of accuracy, do you still have in front of you Trial Exhibit 145, which is your report?

THE COURT: Is it 1045?

MR. SHARTSIS: I'm sorry. It is 1045, your Honor.

A. Which report?

Q. I'm sorry. That is not the one I want.

MR. SHARTSIS: Is 73 now in evidence? Can we have 73 pulled up.

Q. You were asked about 106 bottles of wine, is that right? Maybe we could turn to page 73, page 68, just so we have some

accuracy here.

A. Which page?

Q. Page 68. We will show it on the screen. Do you have that in front of you?

A. Yes.

Q. We are not talking about 106 bottles, we're talking about 108 bottles?

A. Yes.

Q. We are interest in accuracy, right?

A. Yes.

Q. The number is 108. On the next page, if we could show the next page, which is 73, page 69. Mr. Edgerton, let's talk a little bit more about your background. You were principally a wine authenticator by the time you met Mr. Greenberg, correct?

A. No.

Q. Thank you. You were not principally a wine authenticator, right? Do you want me to start again?

A. Yes.

Q. I agree. I confused that badly. By the time you met Mr. Greenberg, you were basically a person who appraised wine, correct?

A. Yes.

Q. You didn't hold yourself out as an expert in authentication, correct?

MR. KABA: Your Honor, scope. This is supposed to be

redirect. I didn't talk about any of this stuff on cross.

MR. SHARTSIS: You asked him whether he trained Mr. Greenberg in authentication. I want to show --

THE COURT: I'll allow it. Go ahead.

Q. You didn't hold yourself out as a wine authenticator, correct?

A. To a certain extent, yes.

Q. You weren't hired on a regular basis to do significant wine authentication, right?

A. That's correct.

Q. Thank you. Now, we have up on the screen the back of your report. Let's look at paragraph 1.

MR. SHARTSIS: Highlight that, please.

Q. These are the conditions and assumptions that you put in your report, correct?

A. Yes.

MR. KABA: Your Honor, objection. Scope. This should have been done on the direct exam if they want to go through the report.

MR. SHARTSIS: This is the same question, your Honor. This goes to the appraiser.

THE COURT: OK.

Q. Here you describe yourself as an appraiser/consultant, is that right?

A. Yes.

Q. Down in paragraph 6, and this of course is the report that Mr. Kaba has just put into evidence, you say, "The authentication process is not a finding of fact." That is true, isn't it?

A. Yes.

Q. It's just a finding of an opinion, correct?

A. Yes.

Q. You say, "It is supported by the research, analysis, and informed and unbiased opinion of the appraiser/consultant retained by the client," correct?

A. Yes.

Q. Then it says, you make it very clear, "The undersigned," which is you, "does not guarantee acceptance by others of the conclusion herein," correct?

A. Yes.

Q. That's true, you wouldn't guarantee your results would be accepted by anyone, correct?

A. Yes.

MR. SHARTSIS: Your Honor, I have no further questions.

THE COURT: Is there any recross?

MR. KABA: Yes, briefly.

RECROSS-EXAMINATION

BY MR. KABA:

Q. We need to make sure the report is perfectly clear. Mr.

Shartsis said it wasn't 106 bottles, it was 108 bottles. Do you remember that?

A. Yes.

Q. Let's go back to your report, Trial Exhibit 73.

A. Yes.

Q. You see that you do have 108 numbers here, correct?

A. Yes.

Q. That's what Mr. Shartsis was saying to you, hey, there's 108 bottles, right?

A. Yes.

Q. Look at number 74 on your entry. What does that say?

A. "Unassigned bottle number."

Q. That means you didn't actually look at a bottle, correct?

A. That's right.

Q. Look at number 68, what does that say?

A. Same thing.

Q. If you subtract 2 from 108, what do you get?

A. 106.

Q. So you looked at 106 bottles, correct?

A. That's right.

MR. KABA: I have to defend my integrity there.

Q. Let me ask you one final question or one final little area. Do you feel bad that you told Mr. Koch that you had purchased counterfeit wine from Mr. Greenberg?

A. No.

Q. Would you do it again?

A. Yes.

MR. KABA: No further questions, your Honor.

THE COURT: Thank you. Are we finished with the witness? Thank you, sir. You may step down.

(Witness excused)

THE COURT: Why don't we take our lunch break. I have to handle another matter at 12:30, not in this courtroom but in my courtroom, so I'm going to let you all go for lunch. We will start back at 1:30. Please don't talk about the case. Please keep an open mind. Have a good lunch.

(Luncheon recess)

AFTERNOON SESSION

1:42 p.m.

(In open court; jury not present)

THE COURT: I want to address the refund issue. Counsel for Mr. Greenberg has submitted a letter regarding the issue of Mr. Greenberg's offers of refund to Mr. Koch following the auction at issue in this case. Counsel for Mr. Koch has submitted a response. Both letters are being placed on the docket so the parties' arguments will be preserved for the record.

Defendant argues that the refund offers are relevant to the GBL claims asserted in this case and he cites cases applying New York GBL law, General Business Law, relating to refunds. Having reviewed the cases, I conclude that they are distinguishable, particularly given that several of them involve issues of refund as a part of the GBL claims themselves, something that is not the case here.

I find the Second Circuit in the *Faden* -- F-A-D-E-N -- case also distinguishable on this issue. I believe the facts are distinguishable. Each case involves a different type of claim and it depends on how the claim is pled and presented, whether the particular practice that is challenged is within the scope of a GBL claim. I find that the claim here does not make the issue of the refunds more than marginally relevant, and in any event, my analysis under Rule 403 continues to

apply, so I reiterate my original ruling that for purposes of the liability phase, there's minimal probative value in the evidence of the refund offers and it is substantially outweighed by the prejudice to plaintiff and the danger of confusion of the issues.

Second, defendant argues that plaintiff has opened the door to the refund offers in certain questioning of witnesses and in counsel's opening statement. As to the testimony of defendant himself or adduced by his counsel, this does not open the door as a matter of law because it was not plaintiff, it's not attributable to the plaintiff in terms of opening the door, making something at issue.

As to the other instances of testimony cited by the defendant, when reviewed in context, I've concluded that none of them resulted in opening the door by placing in issue the matter of the refund offers as opposed to referencing and responding to other matters that are at issue. Therefore, my ruling on the issue stands.

Who is defendant's next witness?

MR. SHARTSIS: Your Honor, before we call the defendant's next witness, I wanted to talk about scheduling a little bit before the jury is here so decisions can be made. It's unclear to me whether or not we're going to quite finish today. It's going to depend on both the length and cross-examination of the expert witness. We don't have

witnesses beyond that. I wanted to propose a schedule to the court and raise an issue which I wasn't considering until lunch, when I broke my tooth during lunch.

THE COURT: Ouch. Are you okay?

MR. SHARTSIS: I would like to get to a dentist, and would suggest, consistent with this, that perhaps tomorrow morning there be a settling of the jury instructions.

THE COURT: I thought you said settlement.

MR. SHARTSIS: No, settling. I don't believe settlement is in the works here. And closing arguments be given on Thursday. I need to actually get to a little medical treatment here.

THE COURT: So you're proposing to finish the expert today?

MR. SHARTSIS: Even if it goes over till tomorrow, your Honor, then the case will be concluded at that point, jury instructions can be finalized with the court and argued, and then we'll be ready to go on Thursday. So anyway, I suggest, in part because I really actually have got to do something about this one-hour-old problem --

THE COURT: So you're suggesting we not do the jury charge tonight.

MR. SHARTSIS: Correct. That we try to finish tonight if we can, not call the jury back in tomorrow, resolve the jury matters, and then have the full day of closings and charge to

the jury on Thursday so we don't break up closing over two days. It would be appropriate to do closing -- I assume it's going to be about four hours total between the parties -- and then charge the jury all in one day. But in any event, I have a sort of a medical problem --

THE COURT: Right. Let me hear from Mr. Hueston.

MR. HUESTON: Well, we want to accommodate Mr. Shartsis' medical issues.

With respect to -- excuse me. I sincerely doubt, by the way, we're going to finish Mr. Lempert-Schwarz today unless he's going to hop on the chair and hop off, and we anticipate a fairly substantial cross. So that would continue into tomorrow anyway.

With respect to the closings, I would like some guidance about time limits. I assume, your Honor -- you had mentioned at the beginning of the case you were going to set some time limits. I think that's appropriate. I was going to suggest 90 minutes each side. And frankly, if we're going to start Thursday morning, what I would like to do is to say, let's get the jury here at 9 a.m., let's have them go for an hour and a half, 15-minute break, I go for an hour and a half, jury's off to lunch and deliberating.

MR. SHARTSIS: Your Honor, I'm going more than 90 minutes, and I understood you to say that time does not come out of our time. The best way I can describe this case, your

Honor, it started with a claim that Serena Sutcliffe told Mr. Greenberg that those wines were fake. This case is so far from what this was, we now have an entire case that has never been pleaded before the court. It wasn't argued even in summary judgment most recently. I need to deal with more things that have come up at random in this case than I ever expected and that have ever been identified. Just picture the defendant's position. A pleading of fraud requires specificity. Almost nothing that has come up here has been ever pleaded against Mr. Greenberg, and I need time to deal with that, and that I believe is exactly why the plaintiff wants to cut my time short. I've got to --

THE COURT: Would two hours be enough? What are you thinking?

MR. SHARTSIS: Your Honor, I'm going to try to do it in two hours. I will tell you, as I'm sure you're aware, I've done this before, and I understand that taking too much time is a bad thing with a jury. I have never ever set out to take more time than I needed, because I think that's stupid for a trial lawyer to do that. So I'm not --

THE COURT: Yes. I'm thinking maximum of around two hours.

MR. HUESTON: Your Honor, that's fine, but I want a cutoff.

THE COURT: You want what? I'm sorry?

MR. HUESTON: I want a firm two-hour -- whatever the limit is, each side is firmly held to that. I'm, frankly, tired of Mr. Shartsis going on much longer than I do on everything. Arguments, the opening. Time for closings, in my experience it's always fairly -- each side gets exactly the same time. They're held to it. So if we're going to go for two hours, which I think is, frankly, too long, but if that's what the court is inclined to do, then fine, but that is a firm cutoff. That's all.

MR. SHARTSIS: Your Honor, I think we have adhered your time limits. If counsel for the plaintiff doesn't think we have adhered to our time limits, he can say so. I'm entitled to use my time.

THE COURT: But I think the closings are separate from the --

MR. SHARTSIS: I understand that. But, you know, your Honor, if we're going to have fixed time limits and I have two hours, then may I reserve time for rebuttal out of the two hours?

MR. HUESTON: Absolutely not. It's the plaintiff's case. That's why we go second. And if it were in another district where we had divisions, it would be the plaintiff's entitlement to rebuttal.

THE COURT: Right. We'd go defendant/plaintiff. So, you know, I think two hours is reasonable. I'm going to impose

a two-hour limit.

MR. HUESTON: Good.

MR. SHARTSIS: And your Honor, then one other issue. Might we have an exchange of exhibits or demonstrative exhibits to be used so I won't get sandbagged with yet another theory in this case that we have never seen?

MR. HUESTON: No.

THE COURT: Well, I mean, for openings you all reached some sort of understanding.

MR. HUESTON: We reached an understanding that we need not exchange the demonstratives, and in fact each side went up with demonstratives without objection from the other. And -- I'm going to finish, Mr. Shartsis.

And the second thing is, your Honor, I absolutely am not going to show Mr. Shartsis my demonstratives before he starts his closing because I get to answer what he says. And that's just an unfair advantage for him, so I don't want that. We didn't have it in the beginning, and I don't have any basis -- there's no reason for me to be showing it to him during closing. If he finds something in there that's inappropriate -- and I'll stake my reputation on it that there won't be -- then he can stand up and object and you can rule that it must be taken down.

THE COURT: I'm not going to require. I mean, the practice has been --

MR. SHARTSIS: I normally prefer not to object during people's closings, but if that's the standard, I'll do that.

THE COURT: Okay.

MR. HUESTON: Great.

MR. KABA: So your Honor, just so we're clear, are we having the charging conference today or are we going to have it tomorrow?

MR. HUESTON: I'd prefer we do it today so we can clarify it. It's helpful for me in framing the closing, if we could.

THE COURT: Well, Mr. Shartsis, do you need to be here for the charging conference?

MR. SHARTSIS: No, your Honor, I do not need to be here for the charging conference. That's why I'm posing that it just be done at the end of the case in the morning. You can do it this evening, your Honor. My main concern is I need to get to a dentist.

THE COURT: No, I don't want to hold you up from the dentist, but if others are able to focus on the charge conference, I'd just as soon do it earlier.

MR. SHARTSIS: That's fine. I was not intending to drive the charging conference, in any event.

And I assume we'll start on Thursday, your Honor?

THE COURT: Well, that's a good question. I mean, I'm just thinking. Like let's say we finish witnesses. There's no

additional witnesses after this witness, I assume.

MR. HUESTON: Correct. At this time we don't anticipate a rebuttal case.

THE COURT: Okay. So, I mean, let's say we finish at 11 tomorrow morning. Shouldn't we go right to closings or --

MR. HUESTON: I don't think there will be enough time to get it in, and frankly, I've got to tell you, the worst lot is the rump of the day, like to get up there at 3:30.

THE COURT: Yes. I don't want to break up the closings in between, and ideally it would be the morning, so why don't we just plan on closings Thursday morning. And if you want, we could start at 9 a.m.

MR. SHARTSIS: I'd be happy to start whenever the court wants.

THE COURT: Yeah, we could do 9 and try to get it done by 1. We will get it done by 1.

MR. HUESTON: Yes.

THE COURT: And then they can --

MR. HUESTON: Give them a bathroom break so they're not looking at me.

THE COURT: Right. Okay.

MR. HUESTON: All right.

THE COURT: Great. Can we bring in the jury?

(Continued on next page)

(Jury present)

THE COURT: Okay. Please be seated. Welcome back, folks.

Mr. Shartsis?

MR. SHARTSIS: Your Honor, thank you. We call Brian Orcutt.

THE COURT: Okay. Mr. Orcutt, if you'd please approach and come around the front of that table to the witness stand.

THE CLERK: Watch your step. Remain standing at the top stair here. Raise your right hand.

(Witness sworn)

THE CLERK: Thank you. Please have a seat.

Can you please state your first and last name and spell your first and last name for the record, please.

THE WITNESS: First name is Brian, last name is Orcutt. My first name is spelled B-R-I-A-N, my last name is spelled O-R-C-U-T-T.

BRIAN ORCUTT,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHARTSIS:

Q. Mr. Orcutt, did you bid for Mr. Koch at the Zachys auction in October of 2005?

A. Yes.

Q. Is that your profession in part to represent people at auctions?

A. That's correct.

Q. And you had bid -- have you bid for Mr. Koch at auctions before that?

A. Yes.

Q. Had you worked for Mr. Koch before bidding for him at auction?

A. Not directly.

Q. Had you worked helping to arrange or organize or manage his cellar in any way?

A. I worked for a company that provided services for him that dealt with his cellar.

Q. And so you had worked in his cellar prior to working for him representing him bidding.

A. That's correct.

Q. Just ask a little bit about your background. Did you work at Christie's?

A. Yes.

Q. And when did you work at Christie's, please?

A. Roughly 1996 to 2000.

Q. Did you know Mr. Fritz Hatton when you were at Christie's?

A. Yes.

Q. And what was his position and what was your position?

A. I believe his title was head of the wine department for Christie's, I think in the United States or in North America, something along those lines.

Q. And did you learn anything about the wine business from Mr. Hatton?

A. I'm sorry. Could you repeat that.

Q. Sure. Did you learn anything about the wine business from Mr. Hatton?

A. Yes.

Q. And what did you learn from him?

A. He asked me to join Christie's and showed me how Christie's processed consignments, dealt with consignors, dealt with buyers, so there would be a variety of things that he would have explained to me how we did things in the New York office.

Q. Did you work on arranging for sales of consignments at auction?

A. Yes.

Q. And when you did that, did you yourself make efforts, to the best of your ability, to be sure that there was not wine that you believed was counterfeit in those auctions?

A. In dealing with consignors who had, you know, wine for sale, it was certainly my policy and the people that we worked with that we wouldn't knowingly sell something that we thought was fraudulent.

Q. Did you make an effort to look at the wine to satisfy

yourself?

A. We did catalog the wines for consignments.

Q. And by cataloging, does that mean you inspected the bottles?

A. Yes.

Q. You also represent people who buy at auctions, correct?

A. Yes.

Q. And have you given advice to the people you represent to buy at auctions what to do if they find a problem with a bottle?

A. When I've been asked that from clients, I've normally told them to return the wine.

Q. Would you consider yourself an expert in French Bordeaux wines?

A. I have a fair bit of knowledge about Bordeaux. On whether or not one could term me an expert, I don't know about that, but I -- I know more than -- more than many and less than some.

Q. And you've represented -- have you represented Mr. Koch at wine auctions at Christie's?

A. I believe so.

Q. Zachys, of course.

A. Yes.

Q. Sotheby's?

A. Yes.

Q. Acker Merrall?

A. I think so too.

Q. In representing Mr. Koch, has he ever given you a dollar limit for the purchase of a particular bottle?

A. I don't recall whether we, you know, had a specific number for a specific wine. I don't recall whether we had that agreement -- or arrangement with that.

Q. Has he ever given you a total purchase limit for any auction at which you have represented him in the bidding?

A. I just don't recall if we had that arrangement.

Q. Mr. Orcutt, at the 2005 Zachys auction were you aware that the bidders could inspect the wine before auction?

A. Yes.

Q. As a person in the wine business in 2005, did you have any concern about Zachys' integrity at that time?

A. I had no knowledge that they were anything other than a reputable wine auction house.

THE COURT: If you would speak into the microphone a little closer, that would be great.

THE WITNESS: I'm sorry.

THE COURT: Thanks.

MR. SHARTSIS: Could we put up Exhibit 444, please.

Q. There's an exhibit on the screen in front of you, Mr. Orcutt. Could you just take a moment to take a look at that e-mail that's addressed to Mr. Koch and tell me whether you remember ever seeing it.

MR. HUESTON: Your Honor, I'd ask that he be shown the entire page and exhibit and not just this portion.

MR. SHARTSIS: That's fine. This was just to help him read it. If you can just move that out.

Q. Can you see that all right, Mr. Orcutt, or should we give you a copy?

A. Yes, I'm just looking at it.

THE COURT: Yes, you can see it or yes you've seen it before?

THE WITNESS: Yes, I can read this.

A. I don't know whether I've seen this before. I don't think it's addressed to me.

Q. No, no, it's not. I'm just asking if you'd seen it.

A. I don't recall seeing this.

MR. SHARTSIS: All right. So let's take that down then.

Q. Mr. Orcutt, do you remember that the night before the October 2005 auction at Zachys, there was a wine tasting?

A. Yes, there was a dinner.

Q. Right. And you attended that, correct?

A. Correct.

Q. And you attended that with Mr. Koch, correct?

A. That's correct.

Q. And you were sitting at a table of about eight people, is that right?

A. That's my general recollection. It was a large round table with approximately eight people, I would imagine.

Q. And was Mr. Koch sitting across from you?

A. Yes, he was sitting the opposite side of the table from myself.

Q. Right. And was -- do you remember that the Chateau Lafleur 1947 was served to everybody at the table?

A. I know it was served to me, but I -- I can't say with absolute certainty that everybody got it.

Q. It was your belief, though, that everybody was served, correct?

A. That's certainly -- it's possible.

Q. Did you have any impression that some wines were served to some people and others were served to others?

A. I wasn't looking for that sort of thing so I wouldn't have noticed.

Q. Right. So you didn't have that impression about that?

MR. HUESTON: Objection. Asked and answered.

THE COURT: Sustained.

Q. Did anybody, to your knowledge, at the table indicate that they thought any of the wines was wrong in any way?

A. I don't recall there being much in the way of discussion about the wine at the table. It was more social commentary than it was wine. That's at least my recollection.

Q. Right. But your recollection is that no one said, "I think

something's wrong with this wine or that wine."

A. I can't remember whether -- one way or the other on that.

Q. The next day or the next two days -- the auction was two days, correct?

A. I believe so.

Q. And you bid for Mr. Koch on the 1947 Chateau Lafleur, correct?

A. That would be correct.

Q. The -- and you didn't get it; at least you didn't get two of the bottles, correct?

A. I would have to see the invoice, but I believe that's correct.

Q. Right. You remember you were the underbidder for the Chateau Lafleur '47 twice. Do you remember that?

A. Yeah, that could be.

Q. Right. And the underbidder is the runner up, correct?

A. That's correct.

Q. And when you were the runner up for the Chateau Lafleur 1947, the winner paid $45,000 for the bottle, correct?

A. I would have to see the invoice, but -- okay.

Q. Do you recall that?

A. It's possible.

Q. Would it help if I just showed you your deposition to see what you said a number of years ago?

A. Oh, sure.

Q. Okay. So let's just show it to you.

MR. SHARTSIS: And if I could --

MR. HUESTON: Page reference?

BY MR. SHARTSIS:

Q. Mr. Orcutt, I'm going to hand you your deposition, and if you look, I'd asked you the question: "Did you bid on a '47 magnum for Mr. Koch?" Starting at line 8 and just read whatever you want, just see if that refreshes your recollection about what you told us at the deposition.

A. Thank you.

Yes, I -- deposition is, I was asked about whether I bid on the magnum, 1947 Lafleur, and I asked if I could consult the catalog. This deposition I think was in 2010 --

Q. Right.

A. -- and the sale was in 2005, and so I was asking to actually see documentation. I didn't want to just say something off the top of my head if that wasn't correct. So I believe that I was shown the catalog and that's where I could confirm that -- that I was the underbidder for that lot.

Q. Right. And what you had at the deposition was you had the actual catalog you used, right?

A. That is correct.

Q. And you made careful notes about what bottles went for, the amounts they were sold for?

A. I do my best. The catalog is a tool that I use in the sale

room to sort of execute the plan of what to do in that auction, so it's not uncommon for me to write down the price that was paid, but since you're bidding on many lots and the next lot could be another one that you're bidding on, I might write down the number, but truthfully, I'm more concerned about concentrating on the next lot than I am about making sure that what I wrote down was a hundred percent accurate. The invoice is for that.

Q. Okay. And you remember -- at least at your deposition you remembered that the winner on the Lafleur '47 had paid $45,000 for it, correct?

A. Correct.

Q. And then Mr. Koch was the runner up on the Chateau Lafleur '47 magnum, right below $45,000.

A. Correct.

Q. And then there was a second bottle that he was also the underbidder on. Do you recall that?

A. Correct.

Q. Do you remember how much that was?

A. I don't exactly. Not without the invoice. But I wouldn't be surprised if it was a very similar price.

MR. SHARTSIS: Okay. Thank you.

Your Honor, I have no further questions.

THE COURT: Okay. Cross-examination?

MR. HUESTON: Yes, your Honor.

CROSS-EXAMINATION

BY MR. HUESTON:

Q. Good afternoon, Mr. Orcutt.

A. Good afternoon.

Q. Mr. Orcutt, you are not currently employed by Mr. Koch?

A. No.

Q. And you haven't been for several years?

A. That's correct.

Q. All right. Now were -- Mr. Koch is not the only person who has hired you to advise him on auctions and bid on his behalf, right?

A. That's correct.

Q. You have other clients for whom you've bid on and purchased wine?

A. Yes.

Q. And in fact, at that October 2005 auction you were bidding on behalf of four or five clients?

A. I believe so, yes.

Q. And just to set the scene, you mentioned you were at a table of eight. Do you -- at the October 2005 auction, there were other bidders who attended, right?

A. Yes.

Q. Can you remember roughly, was there a packed room? Roughly how many people might have been there bidding in the auction?

A. Oh, for the dinner or for the auction?

Q. For the auction.

A. For the auction, it was a full room. There must have been 60 or 80 people. As many people as you can fit in that large dining room at Daniel.

Q. Okay. Now you were asked about your services in connection here with the auction. Is part of your business to assist collectors by consulting with them and going to auctions and bidding on their behalf, right?

A. Yes.

Q. It's consulting and bidding, right?

A. Yes.

Q. Okay. But you don't provide authentication services, correct?

A. That is correct.

Q. And in fact, you do not advise your clients as to what to do with regard to determining whether the wine is authentic, right?

A. That is correct.

Q. And that's in part because you are not trained as an expert authenticator.

A. It's simply not a service that I provide.

Q. And it's not your practice to inspect wines before purchasing, is that right?

A. That is correct.

Q. In fact, you've never recommended that a prospective buyer

retain someone else to examine wine for authenticity before purchasing it, right?

A. That is correct.

Q. And, sir, is it your understanding -- well, let me just ask you this: Is it the custom and practice in the wine auction industry to inspect before purchase?

A. It would be very uncommon.

Q. Okay. How about in 2005?

A. It would have been very uncommon.

Q. Okay. And back in 2005, sir, you did not believe that counterfeiting was a serious problem, correct?

A. With hindsight it appears it was a much bigger problem than what we thought it was at the time.

Q. Right. At the time you didn't think it was a big problem, right?

A. It was nowhere near the problem that it's turned out to be.

Q. So in 2005 you never went into an auction thinking the wine you were purchasing was anything other than authentic, right?

A. No. We wouldn't have tried to purchase something we thought had a problem.

Q. Okay. Okay. Let me ask you about conversations you had with Mr. Koch. You consulted with Mr. Koch before purchasing the wine, right?

A. That's correct.

Q. And you did not talk to Mr. Koch about wine authentication,

to your recollection, right?

A. No. That's a service I don't provide. I wouldn't have talked to him about that.

Q. And to your recollection Mr. Koch never expressed any concern to you about inauthentic wine, correct?

A. That's correct.

Q. Now you were asked about Mr. Koch and whether you remember some kind of firm ceiling on prices, correct?

A. I was asked by the --

Q. By defense counsel.

A. Yes, Mr. Shartsis. Shartsis.

Q. Sir, you were entrusted to use your judgment whether or not the wine merited the price being paid, is that fair?

A. Yes.

Q. And in exercising your judgment as to whether a particular bottle merited the price at auction, you considered the catalog description for that bottle or lot, correct?

A. That's correct.

Q. And in your experience as someone who has attended -- how many auctions, over a hundred?

A. Yes.

Q. -- a bottle that is represented in the catalog in pristine condition will typically get a higher price than a bottle of the same wine or vintage that had disclosed defects or issues, correct?

A. Yes.

Q. So for instance, in your experience and judgment, with everything else being equal, a bottle that was represented in a catalog as having a photocopied label would generally merit a lower price than one with an original, right?

A. That's information that's relevant to what you would bid for, absolutely.

Q. Okay. And is it your expectation that an auction catalog would disclose a bottle having a photocopied label?

A. I would expect so, yes.

Q. Okay. And in your experience if the seller was told about that issue by one auction house, that seller should disclose the same issue to the next auction house through which he tried to sell the bottle?

MR. SHARTSIS: Objection. We're not calling him as an expert.

MR. HUESTON: He's been asked about his experience at Christie's, asked about authentication, and I'm asking him his experience as a buyer's representative and what services he brought.

THE COURT: Sustained only insofar as the question is phrased as "sellers should disclose." You can phrase it as a practice in the industry.

Q. Okay. Mr. Orcutt, was it your understanding that it was a practice in the industry that sellers would disclose an issue

that they heard about with their wine from one auction house if they took it to another auction house?

MR. SHARTSIS: Your Honor, again, I object. This is clearly asking for expert testimony. All I asked Mr. Orcutt about is actually what he did that night. I have not gone beyond that to ask him about his own personal opinions about how people behaved. Mine was limited to the facts of what he did.

MR. HUESTON: Your Honor, he brought him here to present the person and the services that were brought to bear, experience and wisdom brought to bear, expectations brought there as a consultant to Mr. Koch, elicited questions, and I think it's proper to have a full and fair record of what was brought to bear by Mr. Koch for the services paid, which they've elicited repeatedly at trial, and what his expectations were.

MR. SHARTSIS: Your Honor, the next question can be about the Russian Mafia. I mean, this is just --

MR. HUESTON: I can assure you we won't go there.

THE COURT: I'm going to sustain the objection. The direct was more limited to his experiences.

BY MR. HUESTON:

Q. Well, let me ask this: In your -- in your consulting services that you brought to buyers such as Mr. Koch, would you bring your experience as to seller's practices of what they

would disclose and not disclose to the auction houses?

MR. SHARTSIS: Same objection, your Honor. This is a fact witness.

MR. HUESTON: That's a general background question, your Honor, that I think the jury is entitled to hear the answer.

MR. SHARTSIS: Your Honor, he also brought his high school education to bear, but those weren't facts that have been elicited here.

THE COURT: Sustained.

Q. Mr. Orcutt, when you were reviewing the catalog and deciding the pricing for the purchases that were being made, did you have expectations of what sellers should be disclosing and how that might appear in the catalog?

MR. SHARTSIS: Your Honor, same objection.

MR. HUESTON: I think this is part of what he brings, your Honor. I can put him in a rebuttal case if we need to that we can put on later today, if that's going to be the insistence, but this is relevant to the issues he's raised.

MR. SHARTSIS: You can't call this man because he's not identified as an expert testifying --

THE COURT: He can't testify to expert testimony. The question is: When you were reviewing the catalog and deciding the pricing for the purchases that were made, would you have expectations of what sellers should be disclosing? I'm going

to allow that. And how that might appear in the catalog.

BY MR. HUESTON:

Q. You may answer.

A. Could you ask me the question again? Sorry.

MR. SHARTSIS: Your Honor, in this case, actually, I would object to --

MR. HUESTON: Actually, you've allowed me to go ahead, your Honor. May I go ahead with the question?

THE COURT: Yes.

MR. SHARTSIS: Let me state my objection. I would object to leading the witness through this kind of examination because this witness is not adverse or hostile to either party and all we're doing is going into a whole new area and now counsel is trying to put words in the witness' mouth and he's suggesting answers to him. I didn't ask these questions. This is beyond the scope of what I asked, and then to come in and try to put words in the witness' mouth I think is improper under the circumstances and it exceeds the scope of my examination.

MR. HUESTON: No. It's directly relevant to the experience that he has been touching upon. This is a witness that he called. The presumption is, as Mr. Kaba laid out, that we get to cross-examine, and that's what I'm doing, your Honor.

THE COURT: I think it's proper cross.

The question is, Mr. Orcutt: When you were reviewing

the catalog and deciding the pricing for the purchases that were being made, did you have expectations of what sellers should be disclosing and how that might appear in the catalog?

BY MR. HUESTON:

Q. You may answer.

A. I would expect that the catalog accurately relayed all the information that the consignor gave the auction house. I expected that what was in the catalog was true and accurate.

Q. And what would be that relevant -- what would be relevant information that you would anticipate the seller would be giving?

A. Anything that could affect the value of the wine -- condition, provenance, anything that could affect the value of the wine.

Q. Thank you. Let's go to the October 2005 Zachys auction. Did you read the introduction cover letter to the catalog?

A. The -- in the beginning of the catalog? Yes.

Q. Yes. And I'm going to put that exhibit in front of you. It's Exhibit 101.

A. Thank you.

Q. And I think this is at page 6.

A. Yes.

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

A. I read the cover letter in every auction, and this one

would have been no different. I absolutely read this, and it had a lot of interesting information in it.

Q. Okay. And what was of interest or significance in reading this letter?

A. Anything that makes reference to provenance. That's a -- something that's -- that you would bring to bear in terms of whether or not you would want to bid and how much you would want to bid, so if you make reference to things coming directly from a domain or, you know, things being sourced from, you know, ideal places, those are things that would make you think, you know, this is a special or unique kind of treasure trove, you know, did this come from, I don't know, an old family castle in Europe. I mean, those things would influence how you would want to bid on the wines.

Q. And do you recall whether this cover letter, with this descriptions, influenced your willingness to go forward and the prices you were prepared to bid for on Mr. Koch's behalf?

A. I believe so.

Q. For the reasons you just outlined?

A. Exactly.

Q. Sir, there's been some testimony in this case about a preregistration form for the October 2005 auction. Do you recall signing one?

A. I can't remember exactly. I don't have a specific memory of signing a registration form. It's possible, but I just

don't remember -- remember.

Q. Okay. Did you ever tell Mr. Koch, "If I don't sign the form, I can't bid on your behalf"?

A. No. We never had that conversation.

Q. Did you think that there was anything in that catalog, including conditions of sale in the back of the catalog, that you thought would be a problem for Mr. Koch if he detected problems and issues with bottles that he purchased?

A. No. It just seems like standard boilerplate. I suppose it's like if you're buying a song on iTunes, there's a huge disclaimer you have to click on, but if you don't get the song that you paid for, I expect that you would have some legal remedies available to you.

MR. HUESTON: Great. No more questions.

THE COURT: Okay. Mr. Shartsis?

REDIRECT EXAMINATION

BY MR. SHARTSIS:

Q. Mr. Orcutt, you knew that this auction was "as is," is that right?

A. I'm sorry?

Q. You understood the auction was "as is"?

A. "As is"?

Q. Yes.

A. Is that part of the boilerplate in the back of the catalog? Is that what you're referring to?

Q. I'm asking this question. When you participated in this auction, on behalf of Mr. Koch, did you understand that the auction was being conducted on an "as is" basis?

A. My understanding is that you should expect to get what you paid for, where you can say it's "as is," but I don't believe that gives you the right to give somebody something that they didn't pay for, or not give them what they actually paid for.

Q. Let's focus on my question. Did you know the auction was conducted "as is"?

MR. HUESTON: Objection. Asked and answered.

Q. Did you know the auction was conducted "as is"?

MR. HUESTON: Same objection.

THE COURT: Sustained.

MR. SHARTSIS: Could we have the catalog. Conditions of Sale and Limited Warranty. If you'd highlight Conditions of Sale.

Q. Mr. Orcutt, you said you read the catalog. Did you read this provision under Conditions of Sale which says, "The authenticity of property listed in the catalog is guaranteed only as stated herein and otherwise all property is sold as is, without any representations or warranties by Zachys Auctions or the consignor"? Did you read that?

A. It's certainly possible, yeah. I wouldn't doubt that I've read this.

Q. Right. And do you believe that this was part of the

contract that bound you in your bidding?

MR. HUESTON: Objection. There's no foundation for a contract.

THE COURT: Sustained.

Q. Did you believe that you were bound by these terms?

MR. HUESTON: Objection. Calls for a legal conclusion.

THE COURT: Overruled.

A. I'm not a lawyer, but I can't imagine you could enter into any contract where you don't get what you pay for or at least have the ability to have the courts decide whether or not this contract is valid.

Q. Mr. Orcutt, have you talked to Mr. Koch's lawyers in recent weeks or months?

A. I've talked to them twice. Once several years ago before my deposition, and it was simply because I've never done this before.

Q. Right.

A. And I asked them, you know, what -- what is -- what can I expect. And then I spoke with them in the last few days, along the same lines, 'cause again, I've never testified in court before.

Q. Right.

A. And so I was asking them what can I expect.

Q. And you talked to them about what you could expect, is that

right?

A. That's correct.

MR. SHARTSIS: All right. And can we show page 233 of the catalog, please -- 233 of the catalog, not of the exhibit. Sorry.

All right. Conditions of Sale & Limited Warranty. Can you highlight that paragraph, please.

Q. And Mr. Orcutt, this says Conditions of Sale & Limited Warranty. "Prior to bid, all participants must read the Conditions of Sale & Limited Warranty contained in this catalog that state the terms governing the purchase of wine sold at auction. By participating in an auction, an auction participant agrees to be bound by the Conditions of Sale and Limited Warranty, printed in this catalog." Do you see that?

A. Yes.

Q. Do you remember reading that?

A. I'm sure I have.

Q. Did you discuss that with anybody at Zachys asking what it meant?

A. No.

Q. Did you indicate to anybody at Zachys that by participating in the auction, you did not agree to be bound by the conditions of sale and the limited warranty?

MR. HUESTON: Objection. Mischaracterizes his testimony.

MR. SHARTSIS: It's a question.

THE COURT: You can answer. You can answer.

A. Oh. I didn't have any conversation like that.

Q. All right. And then let's go back to the "as is" provision.

Now, Mr. Orcutt, did you talk to anybody at Zachys saying that you felt that this provision did not apply to you?

A. I never had that conversation.

Q. Did you talk to Mr. Koch about this provision?

A. No.

Q. Did you suggest to Mr. Koch that any part of the auction catalog would not apply to him?

A. We never had a conversation like that.

Q. And Mr. Orcutt, did anybody force you to appear at this auction?

A. No.

Q. You chose to go to the auction to buy wine, correct?

A. That's correct.

Q. And you submitted yourself to the rules of the auction house as they were stated in the auction catalog, correct?

MR. HUESTON: Objection. Asked and answered. Calls for a legal conclusion.

THE COURT: You can answer.

A. That's correct.

Q. Right. You understood that the auction house had certain

rules, and by you voluntarily picking up that paddle at that auction and bidding, that you would be bound by the auction house's rules, didn't you? You understood that.

A. I'm not a lawyer, but --

Q. You understood --

A. -- whenever those situations come up where there's a big, you know, sort of agreement or terms like this, I still believe that the auction house doesn't ultimately determine whether or not you're bound by it. Courts like this do.

Q. Okay. So it was your understanding that there would be rules in the auction catalog that you would not be bound by, is that what you're telling us?

MR. HUESTON: Objection. Asked and answered and argumentative.

THE COURT: Sustained.

Q. Was it your -- was it your understanding that you were not bound by the terms in the auction catalog?

MR. HUESTON: Asked and answered.

THE COURT: You can answer. Overruled.

THE WITNESS: I can answer?

THE COURT: Yes.

A. Okay. My understanding is that everybody has the right to go to court if they have an issue with these contracts.

Q. So when you went to Zachys, you believed, I hear you saying -- you tell me if I'm wrong -- you believed you were not

bound to participate in accordance with the rules set by the auction house, is that correct?

MR. HUESTON: Asked and answered. This is the fourth or fifth time.

THE COURT: Sustained.

Q. Did you tell Zachys that you had any reason to believe that these terms were unfair?

A. Never had a conversation like that.

Q. Did you tell Zachys that you thought that really what this provision meant was you could all go to court and argue over it?

A. Never had a conversation like that.

Q. What you believed in fact was that you were going to an auction that would be conducted the way Zachys would conduct auctions, correct?

A. I believed we were going to an auction that we would get what was paid for.

Q. Do you agree that Zachys has a right -- did you believe that Zachys did not have a right to establish rules for its own auctions?

A. I'm sure they consulted lawyers to come up with these terms of sale.

Q. Right. And they had a right to do that, correct?

MR. HUESTON: Objection. There's really no foundation to this.

THE COURT: Sustained.

Q. Do you specifically remember reading this phrase before the auction?

A. I don't remember whether I read this particular paragraph for this particular sale.

Q. Right. Do you ever remember reading a phrase like this in a Zachys auction?

A. You know, in the back of the catalog? It's in the back of every catalog.

Q. Do you remember reading it in the back of the catalog?

A. Yeah, I'm sure I've glanced through these. You know, they're in the back of every catalog.

Q. Okay. And so by the time you went to Zachys in October 2005, we can safely assume you were aware of the specific "as is" terms, correct?

A. I'm aware of it, yes.

Q. And you were in October of 2005.

A. Yes.

Q. Okay. You were asked some questions about when you were first aware there might be inauthentic wine in the marketplace. When you worked at Christie's in 1996 to 2000, part of your job was to make sure, as best you could, that inauthentic wine would not be in an auction, correct?

A. Yes. We were looking to eliminate potential problems.

Q. Right. And --

A. It's different than authenticating. We were trying to eliminate potential problems.

Q. Well, authenticating was part of it. If something looked inauthentic to you, you'd take it out, correct?

MR. HUESTON: Objection. That was a statement followed by a question.

THE COURT: Yes. The question is: If something looked inauthentic, you'd take it out, correct?

MR. HUESTON: I'm going to object to foundation. He said he wasn't authenticating.

Q. If something looked inauthentic to you when you were working at Christie's between 1996 and 2000, if something looked inauthentic to you, you would remove it from the auction, correct?

A. We had a number of things that would cause us to, what we called RTO, or a return to owner. It could be because the condition was particularly poor or the wine wasn't particularly valuable enough to auction, or it was something that just seemed anomalous. It didn't really have to do with whether or not we were absolutely certain it was real or not. We were in the enviable position at the time of being the number one auction house in the world. We simply didn't have to take everything that was offered, so the easiest course was if something seemed unusual, it was safer just to send it back.

Q. So if something raised a question of possible

inauthenticity, you would remove it from the auction, correct?

A. That's what I would do.

Q. Right. And that's what you did in fact, right?

A. Yes.

Q. That's what Christie's did if they saw something that had a concern about possible inauthenticity, the auction house, during its inspection process, would remove that from the auction, correct?

A. I can't speak for all of Christie's. I can only speak for the work that I did and the people that I did it with in New York.

Q. Right. And that's what you expected other auction houses to do when you were appearing at those auctions and bidding; you were expecting the auction houses, if they had a concern about authenticity, to remove the bottle from the auction, correct?

A. I don't know the practices of every auction house, but I imagine that they do look at the bottles of wine that they get.

Q. And that's what you expected as a bidder, that the auction house, if it saw something that appeared inauthentic, would remove it from the auction, correct?

A. I --

MR. HUESTON: Your Honor, I'm fine with this, but he's opened the door to my questions about what he expected then as part of that same chain from the cellar, so Mr. Shartsis, those

questions are --

THE COURT: We'll deal with that later.

MR. SHARTSIS: Your Honor, these are exact questions that were asked about what he expected the auction house would do and I'm staying narrowly within that range.

Q. So that's my question. You testified about what you thought they would do.

MR. SHARTSIS: And if I could have my question read to the witness.

(Record read)

A. That's correct.

MR. SHARTSIS: Thank you. Your Honor, I have no further questions.

THE COURT: Okay. Thank you. Mr. Hueston?

MR. HUESTON: Yes, just a few questions.

RECROSS EXAMINATION

BY MR. HUESTON:

Q. Let's focus on your time at Christie's. That was about 1996 to 2000?

A. I believe that's correct.

Q. All right. Now you acted as a wine specialist working with consignors and buyers, correct?

A. I did a variety of jobs starting with hauling boxes in the warehouses to, you know, to working with consignors.

Q. Okay. And in looking at wine prior to auction, you were

not authenticating wine, correct?

A. That's correct.

Q. Rather, you were just conducting a general inspection, right?

A. Yes.

Q. Okay. And in fact, your understanding was that Christie's was not authenticating wine or certifying wine as authentic, right?

A. I wasn't and I don't believe that the people that I was working with in the New York office was doing that either.

Q. Right. And what you were looking for were noticeable problems, in your words from your deposition, correct?

A. Looking to eliminate problems.

Q. Right. Things that you happened to notice.

A. Yes.

Q. Okay. And it's certainly -- mistakes are made in that process, right, sir?

A. That's correct.

Q. And as part of that process, you expected the consignor in the auctions to be forthcoming and honest with you so you could spot potential problems, right?

MR. SHARTSIS: Your Honor, this is the same objection. I didn't ask him about consignors. We're beyond the scope --

MR. HUESTON: He opened the door.

MR. SHARTSIS: And we're flogging this horse again.

MR. HUESTON: This is my last question.

THE COURT: Overruled.

BY MR. HUESTON:

Q. You may answer.

A. We would expect our consignors to be forthright and honest.

Q. About any potential problems they had with what was coming up on offer, right?

A. Yes.

MR. HUESTON: Thank you.

MR. SHARTSIS: Your Honor, I do have a question.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. SHARTSIS:

Q. Mr. Orcutt, when you were at Christie's, you were not guaranteeing the authenticity of the wine to the buyer, were you?

A. Not me personally.

Q. And Christie's wasn't giving a guarantee of authenticity to the buyer, was it?

A. You would have to talk to Christie's legal department about that.

Q. As far as you know, you never saw a statement by Christie's that said: We guarantee that this wine is authentic, correct?

A. I don't recall seeing anything like that.

Q. And you -- after doing the inspection that you did, looking

for possible authenticity problems or questions, you were not making a guarantee to any bidder who was bidding at a Christie's auction, were you?

A. I wasn't, no.

MR. SHARTSIS: Thank you.

MR. HUESTON: No more questions, your Honor.

THE COURT: Okay. Thank you, sir. You may step down.

(Witness excused)

THE COURT: Defendant, you may call your next witness.

MS. SALISBURY: Thank you, your Honor. We call Mr. Gil Lempert-Schwarz, please.

MR. CAMP: Sorry, your Honor. We do have one outstanding *Daubert* issue on this witness. I'm not sure if your Honor would like to take it up now or --

THE COURT: Was this the subject of a motion *in limine*?

MR. CAMP: Right, and there was an issue about the state of the record pretrial.

THE COURT: Okay. I'm not recalling. Can we do it at sidebar?

MR. CAMP: Sure.

THE COURT: Okay.

(Continued on next page)

(At the side bar)

THE COURT: Mr. Camp.

MR. CAMP: Your Honor, the issue that was raised pretrial related to Mr. Lempert-Schwarz's expertise or, in our view, lack thereof with respect to chemical testing. There were certain representations that he was going to testify to about that. I don't know if that is part of the exam.

MS. SALISBURY: I think I can say I don't plan to ask him about chemical testing.

MR. CAMP: That is anywhere with reference to it?

MS. SALISBURY: I don't plan to ask him a single question about it.

MR. CAMP: All right.

THE COURT: Thank you.

(Continued on next page)

(In open court)

GIL LEMPERT-SCHWARZ,

called as a witness by the defendant,

having been duly sworn, testified as follows:

THE CLERK: Will you please tell state your full name and spell your first.

THE WITNESS: My name is Gil Lempert-Schwarz. First name G-I-L, last name L-E-M-P-E-R-T hyphen S-C-H-W-A-R-Z.

THE COURT: Ms. Salisbury.

MS. SALISBURY: Thank you.

DIRECT EXAMINATION

BY MS. SALISBURY:

Q. Good afternoon, Mr. Lempert-Schwarz.

A. Good afternoon.

Q. I understand sometimes it is OK if people call you Mr. Schwarz instead of Mr. Lempert-Schwarz?

A. Yes, I will allow you to call me Mr. Schwarz.

Q. Thank you. I will do that. Have you been retained as an expert by Mr. Greenberg?

A. I have.

Q. What is your area of expertise, please?

A. My area of expertise is wine inspection and authentication.

Q. Do you have any particular expertise in wines from the Bordeaux region of France?

A. Very much so, yes.

Q. As a retained expert, have you been paid for your time?

A. I have.

Q. Is this the first time you have ever testified at a trial?

A. It is.

Q. Let me start with some background and qualifications.

A. Sure.

Q. First of all, where were you born?

A. I was born in Denmark, more specifically Copenhagen. I was born in Copenhagen but raised in a small town just north of Copenhagen called Hellerup.

Q. How do you spell that?

A. H-E-L-L-E-R-U-P.

Q. I am going to be asking you a spell a few things.

A. Sure.

Q. Where do you live now?

A. I live in Las Vegas, Nevada.

Q. How long have you lived in Las Vegas?

A. Just over 14 years.

Q. What do you do there?

A. I'm a wine consultant.

Q. As a wine consultant, do you inspect and authenticate fine and rare wines?

A. I do.

Q. How long have you been a professional wine authenticator?

A. A little over 13 years professionally.

Q. Are you also a wine collector?

A. I am.

Q. Have you bought and sold wine through auction houses?

A. I have.

Q. Can you tell us your education after how school or what the equivalent of that is in Denmark.

A. Sure. I went to a college called Oregaard, which is spelled O-R-E-G-A-A-R-D. That's a royal college. I earned a Bachelor's degree in political science. Following moving to Hong Kong in 1989, I earned an MBA in international marketing.

Q. Did you receive any formal education in the authentication of old and rare wines?

A. I did not, because it doesn't exist.

Q. Did you receive any informal training, apprenticeship, hands-on training in the authentication of old and rare wines?

A. Very much so.

Q. When did that kind of informal training or apprenticeship, as it were, begin?

A. It goes back to when I was about 18 years old and I had the opportunity to go to Bordeaux and spend more than two months there at the invitation of the owner of one of the most prominent chateaus in Bordeaux. I stayed there and started learning everything about the business of wine -- the chateau's production, the vineyards -- and also at the time forming an impression of how you start looking at old bottles versus

younger bottles. Kind of that is the practice at the chateaus. They handle a lot of bottles.

Q. What chateau did you apprentice at?

A. This is a chateau called Pichon-Longueville Comtesse de Lalande. I know it's a very tough one. Let's do P-I-C-H-O-N, L-A-L-A-N-D-E.

Q. Was this the only chateau you visited in Bordeaux over your years here?

A. No, not at all. If I go back to when I was 18 years old, on a continuous basis I would go back to Bordeaux, quite frankly, as much as possible, because it was something that really interested me. Having met a lot of incredible people there, it was part of me, immersing myself in this particular business and in this particular world. It was very fascinating to me. So I visited Bordeaux multiple times every year since then.

Q. Ever since you were 18, you have been traveling to Bordeaux?

A. Absolutely, yes.

Q. You know that there are five chateaus whose wines are at issue in this case?

A. Yes, I'm aware of that.

Q. Have you visited, traveled to, all of those five chateaus?

A. Dozens of times, in fact.

Q. These chateaus, I was about to list them to make sure we

are talking about the same ones. Why don't you tell us a little bit about these chateaus. I think we ought to hear the right pronunciation at least once in this trial. It's not going to be from me.

A. Sure. There are three chateaus in the so-called right bank of Bordeaux. That would be Chateau Petrus, Chateau Lafleur, and Chateau Cheval Blanc. Those are on the right bank. We heard that earlier in this trial. Then, on the left bank, on what is called the left bank of Bordeaux, we have Chateau Lafite Rothschild and Chateau Latour.

Q. I asked you if you visited these chateaus, which sounds like visiting like a tourist, like I might if I were so lucky to do that. Is that how you have visited these chateaus, or have you had more inside access to their operations?

A. Very much so. Actually, going back to when I was 18, as I said, the introduction to many of the owners of these chateaus as well as the people that worked in these chateaus came through another chateau owner, which is really a dream sort of come true. You kind of get walked in the back door of the property, so to speak, and have an opportunity to speak with these people and meet them, and then start a relationship that way.

So, given the best possible introduction like that, I maintain my relationships with these at every level, basically, the owners as well as the technical managers, the vineyard

managers, the cellar masters. So today I'm very intimately familiar with all of these five properties to the point where I could conduct a cellar tour for you.

Q. That would be great. Have you spent any particular amount of time at Chateau Lafite, for example?

A. Chateau Lafite I have probably spent more time than in any of the other properties in question here. Again, Chateau Lafite is a very famous, very great property. I have great relations with them, so I have had a lot of time at Chateau Lafite both at lunches, dinners, visits, going through their cellars, etc. It's been great.

Q. Have you become thoroughly familiar with the operations of these vineyards, both historically and currently, in the productions of their wines?

A. Very much so.

Q. What was your first formal job in the wine business?

A. My first formal job in the wine business goes back to when I moved to Hong Kong in 1989. I joined a small company that grew quite dramatically during my time there. It was a specialist in importing California wines, specifically from Napa and Sonoma counties.

Q. How long did you do that?

A. I did that with them for about three years.

Q. What was your next formal job in the wine business?

A. The next formal job in the wine business was when I moved

into Las Vegas in 1999, where I set up my company, the Wine Institute of Las Vegas.

Q. I have to say that when I think of Las Vegas, I do not think about fine and rare wine. Is there a lot of fine and rare wine bought, sold, drunk in Las Vegas?

A. Yes. Las Vegas has been for the past decade or longer, actually since I moved there in '99, the world's largest market for fine and rare wine. I mean in terms of opening and drinking these wines, not just for buying and selling. Las Vegas has a tremendous number of great restaurants and hotels where these bottles constantly are opened and drunk. That's why I can say that Las Vegas is by far the largest market of such kind in the world, specifically for fine and rare.

Q. Does that include fine and rare Bordeaux?

A. Absolutely. It's very much the focus point of the fine and rare business or sales in Las Vegas. Again, it relates to the high rollers that come there, and they love to drink wines that specifically are Bordeaux wines, but also from other regions. Bordeaux is the majority of them, yes.

Q. What did you do through the Wine Institute of Las Vegas? What were your kind of operations, activities?

A. When I first arrived in Las Vegas in '99, I set up the Wine Institute of Las Vegas as a consulting firm. Basically, we started doing educational stuff. This included educating professionals in the industry, sommeliers, butlers at the

hotels, as well as private individuals, retailers of wine. The focus was very much on Bordeaux at the time. Later on the business expanded. Not that much later on, but the business expanded into including general consulting services.

Q. Did you also teach at a college or a formal school?

A. Sure. One of the parts of doing education in the wine business or wine industry and to the public was I became an adjunct professor at a college in Las Vegas, where I taught a graduate wine course for several semesters.

Q. You mentioned consulting.

A. Yes.

Q. Did you consult for a company called Southern Wine and Spirits?

A. I did.

Q. Who is Southern Wine and Spirits?

A. Southern Wine and Spirits is the largest distributor of wine in America as well as the world. I started consulting for them in 2000.

Q. What specifically did you do for them with regard to the authentication and inspection of wine?

A. Based on my previous knowledge of the wines of Bordeaux specifically, but also other regions, when I started with them in 2000, we set up an entire system for inspecting and authenticating wines, which I basically was in charge of.

With the enormous volumes of wines that come into Las

Vegas every year, most of them through Southern Wines and Spirits, it became pertinent for them to have somebody not working for their company to look at all these many great rare bottles that were coming into the market and before they got delivered to the restaurants and the hotels. Remember, these are being drunk within a fortnight of delivery, so it was very important that they were in good condition and in good shape and that no bottles that were not deemed right were put into the market.

Q. How many years did you do that?

A. I did it for nearly nine years with Southern Wine and Spirits.

Q. Do you currently consult for Acker Merrall & Condit?

A. I do.

Q. Who or what is Acker Merrall & Condit?

A. Acker Merrall Condit is the world's largest wine auction house today. I've been doing that for the past five years, a little over five years.

Q. What do you do for them?

A. I do several different things for them. The main thing that I do for Acker Merrall Condit is I'm in charge of authenticating wines before they get put into an auction. In other words, at the stage even before cataloging, these wines are all inspected before they get put into an auction.

Q. How many auctions have you done inspections and

authentications for Acker Merrall?

A. I would say over 30 at this point.

Q. Do you also do inspection and authentication work for private collectors?

A. I do, and I have been doing all along. I travel the world almost on a constant basis visiting clients and collectors specifically in Europe, the United States, and Asia, where I go through their cellars and collections and render opinions on authenticity.

Q. Do you also do authentication and inspect work for hotels, resorts, restaurants?

A. Yes. Over my years in Las Vegas, I have personally inspected and authenticated most of the great wine cellars in Las Vegas hotels and resorts and restaurants, including that of Mr. Steve Wynn, who is the owner of the Wynn properties. But I've been doing that for the entirety of the time I've been there.

Q. What is your estimate of how many wines you inspect and authenticate in a year?

A. In a year?

Q. In a year.

A. Tens of thousands of bottles.

Q. Have you received any honors by virtue of your work in wine?

A. Yes. When I was young and I arrived in Hong Kong, I

basically, as I said, was immersed in anything that had to do with wine. I was completely like taking everything in that I could about it, as well as traveling into the wine regions. I had the great fortune to being inducted into several various prestigious wine societies, or brotherhoods, if you will. Very hard to get into. Most of the people involved in those were very much more senior than I was. I believe I was the youngest person ever inducted into several of those.

Further to that, after years of working with this particular -- these particular societies, I became a conseiller du vin du Bordeaux, which is a title of great honor, which allows me to basically be part of a policy making council, if you will, which is consisted of Bordeaux chateau owners, negociants, and other people that are of quite good importance over there.

After that, I was greatly honored by the French government, and they honored me with so-called Chevalier de L'ordre Merit du Agricole, which is the order of merit in agriculture. In this specific instance it's wine. It is a very high honor that was bestowed to me directly by the French government.

Since I received that honor, I have been ungraded to an officer. This is the little pin that I'm wearing here in my lapel. I wear that with great pride, because it is a very great honor. I can in fact only think of a couple of people

who achieved that level here, living here in the United States.

Q. Who are they?

A. Robert Mondavi and Robert Parker.

Q. Do you also write about wine?

A. Yes, in fact, I do. I have been an accredited member of the International Wine Press for the past 15 years. When I arrived in Las Vegas in '99, I started writing a column on wine, a weekly column on wine, for the Las Vegas Review Journal, the largest newspaper in Nevada. Today I have written more than 700 columns on wine for that newspaper.

In addition to that, I write for or have written and write for a number of international wine publications, I think the most important of which is probably The World of Fine Wine, which is the reference, really the reference in wine writing in our industry. So I have written quite a lot of articles.

Actually, I have written articles in other languages than English as well, since I speak about eight languages. It is something that I have no trouble doing.

Q. I'll only speak to you in English. Do you only write about rare and expensive wines?

A. No, actually not. What is so interesting is I'm in both ends of the spectrum, so to speak. My weekly column on wine is a column which I go out and pick 20 or 30 wines, let's say. I line them up. I taste the wines, and I determine which wine I like the best blind, that is to say, not showing what bottles

they are. I pick this bottle out, I write a nice article about it, and it comes in the newspaper. It may be a 5 or $10 wine. People go out and buy this wine, and everybody is generally quite happy about that.

Q. Have you inspected and authenticated wines from the five chateaus that are at issue in our case?

A. I have.

Q. Have you ever determined that wine supposedly from these five chateaus are counterfeit?

A. I have as well, yes.

MS. SALISBURY: At this point, your Honor, I would like to move to qualify Mr. Lempert-Schwarz as an expert.

THE COURT: Is there any voir dire or inspection?

MR. CAMP: No, your Honor.

THE COURT: He is qualified as an expert.

Q. Let me start out, Mr. Schwarz, with what were you asked to do in this case?

A. I was asked to inspect 36 bottles of wine, including magnums, mostly magnums, render an expert opinion on them, write a report as well as rebut several expert reports.

Q. Did you inspect 24 bottles that are here, at least to the best of your recollection?

A. To the best of my recollection, as long as nobody has switched any bottles, yes, those look like the 24 bottles I inspected.

Q. How many times did you inspect them?

A. Twice.

Q. Were you able to conclude that any of the 24 -- we are only going to talk about 24. I know you did 36. We are only going to talk about 24.

A. Sure.

Q. Were you able to conclude that any of the 24 bottles and magnums that you inspected were authentic?

A. No, I was not able to conclude that any of these bottles were authentic, nor inauthentic for that matter.

Q. Were you able to conclude that any of them were counterfeit?

A. I was unable to conclude that any of them were counterfeit or not counterfeit.

Q. Why were you not able to reach a conclusion on that?

A. Because the only way you can reach a conclusion on whether these bottles are counterfeit is by opening and tasting them.

Q. Were you able to reach a conclusion on whether you would have recommended these wines for sale at an auction?

A. I would not have recommended any of these wines for auction.

Q. Did you reach that conclusion based on what you were able to see on the bottles that we see sitting on the table?

A. Yes, that's right. I inspected the external indicia on the bottles to come to that conclusion.

Q. When you say counterfeit, what do you mean by "counterfeit"?

A. Counterfeit is quite simple, really. It is when the content of the bottle does not match what it is purporting to be on the exterior of the bottle. The only way to really know if it is counterfeit is really to open it and get into tasting the wine. That's the definition of counterfeit.

Q. Is that definition the definition commonly used in your business?

A. Yes, absolutely.

Q. Do you agree with some testimony you may have heard in this courtroom that tasting is an unreliable or unnecessary way to find out if an old and rare wine that is claimed to be counterfeit really is counterfeit?

A. That sounds like complete nonsense to me.

Q. Why is that?

A. The whole wine business, everything we do in our industry, is based on tasting, all tasting notes and tasting this and tasting that. We go to wine tastings and we hold dinners where we taste the wines. Tasting is the core of the wine industry and the wine business. I've never heard of any other definition of that. Tasting is really the center of what it is that we do in our business. Just like law is to your profession, very similar.

Q. I'm going to ask you, for those of us, and I would venture

to guess it's almost everyone in this room, who do not taste old and rare wines with any regularity, is it really the case that if someone like you tastes a 1945 Lafite or a 1921 Cheval Blanc and then you taste it again two or three or four or five years later, after all the other wines you have tasted in between, can you really recognize that you are tasting again a 1945 Chateau Lafite or a 1921 Cheval Blanc?

A. Yes. These are really benchmark wines. These are legends, if you will. 1945 in particular, legendary vintage. Lafite, of course, one of the great chateaus in Bordeaux. I have had the great pleasure of tasting a 1945 Lafite on several occasions, including at the chateau, in fact in the presence of the owner of chateau, the cellar master. Obviously, you have built up a reference point in your mind as to what that wine really is. But it is a very profound wine.

You have to understand that 1945 Lafite, because of what it is -- this was the end of World War II. This was at a time when Europe lay in ruins. Then, miraculously, they were able to produce such a legendary wine. It was almost as if the hand of God was in this vintage, as they say in Bordeaux. So it is a very profound experience.

The entire experience of tasting this wine is something in my profession, when we taste a lot of wines, when something really stands out and is very extraordinary, you remember this. It's like you store that in the hard disk in

your head to basically have that memory, that olfactory memory, which is the memory of the taste and smell of this wine, which is profound.

I believe that once you have done that and you remember that, when you come to such a wine again and you are asked do you believe this to be a 1945 Lafite, yes, I totally believe you can to that.

Q. I think we have an 1864 Latour on the table, which I will confess I added up separately, it's 149 years. I did the subtraction previously. How can anyone know what that should taste like?

A. I have actually had 1864 Latour before I had it at the chateau in a landmark vertical tasting that was done there some years ago. It's an old wine. It's a wine where there are maybe a handful of people who could say it's from the 1860s to 1870. Because it's prephylloxera. It is very significant in our business because -- phylloxera is P-H-Y-L-L-E-X-A-I. Basically, you could take the people that have tasted prephylloxera wines, there are a handful of them, as I said, and basically you are looking for that prephylloxera quality in an 1864.

So, if it is a true 1864, then it has to have the characteristics of prephylloxera wine, which only hit Bordeaux in 1871, I believe. Therefore, there are some characteristics that cannot be produced today. So those must be in there to

begin with, yes.

Q. Have you tasted all 24 of the wines represented on our table here, the vintages and producers?

A. Yes, I have actually tasted all of them, with the exception of the '21 Lafleur, some of them actually multiple times.

Q. Do you know people who have tasted the '21 Lafleur?

A. Yes, I do.

Q. So there are people that you know, including yourself, that have tasted these wines, all of these wines, and could taste them again?

A. Yes, absolutely.

Q. I think you have been here for the trial. You may have heard some testimony that tasting wines can be subjective.

A. Yes.

Q. Is that correct? And if so, how is that taken into account when you taste wines that are alleged to be counterfeit for authenticity?

A. When you taste the wine to determine whether it's counterfeit for authenticity, if you allow that there is some subjectivity in tasting wines, I believe that a person who has tasted wine enough times or has a great memory of what that wine is like will be able to basically say within a very short range of certainty whether he thinks or she thinks or believes that that is the real wine that they are tasting there.

But when it comes to determining wines in terms of

counterfeit, the proof will be in the bottle. A few experts assembled together could absolutely do the job, because now you have a group of people who could basically go in one direction or another and agree, yes, it's absolutely what it purports to be, or no, it does not. So yes, that's very much possible.

Q. You reach a consensus from the group, basically?

A. Yes. You would have to have a group consensus on the tasting of the wine. But that's very often reached when you have these tastings, since I do so many of them.

Q. You have mentioned that you do tasting. Do you attend and put together tastings where wine experts and collectors and other interested, informed people show up for the purpose of tasting wines that have been questioned or alleged to be counterfeit?

A. Yes. First of all, I've organized more than 250 tastings and dinners in my time in the wine industry, if you will, some of them absolutely landmark legendary tastings and dinners. In addition to that, I think you can basically say this. If you have a group of people who get together, and that has happened on many occasions, you get a group of people together, collectors -- typically, you have some producers there, some journalists who like to write about this, I myself have been one of them as well -- and you open these bottles that bear indicia of inauthenticity, if you will, I use that term, then, when the wine is opened, all is revealed, so to speak, and we

have determined, oh, my God, this is actually what it purports to be, despite there may have been some crazy things going on with the bottle. But opening and tasting that wine settles all accounts, so to speak.

Q. The wines that you have tasted at some of these tastings, do they have comparable indicia of inauthenticity, as you called it, to the wines that we have here on our table?

A. Absolutely, and actually way worse than this. There have been tastings where we have had bottles where there was no vintage on the labels, perfectly original labels with no vintage, vintage typed in a typewriter onto the label, and the label then affixed to the bottle, obviously after it was typed on there, missing capsules, corks that couldn't be read, or vintage missing on the label but then you can see it on the cork.

There has been a whole host of things that could be going on, which is extremely common in our industry, especially with old fine and rare Bordeaux wines. We have opened these bottles to determine that, hey, they were actually perfectly OK. In some cases there have been some that, sorry, were not right. And that's what happens.

Q. But when you get together at these dinners because of these questioned bottles, I take it you don't all sit around and debate the indicia, take a vote, and go home?

A. No, that is absolutely not what we do. We open the bottles

and taste them, and then we start talking about the indicia afterwards.

Q. You don't even discuss the indicia first, you just go right for the bottles?

A. In many cases, many people that are there don't have an opportunity to sit and look at the indicia in detail. The bottles are put out, they are opened in the presence of great tasters, renowned chateau owners, etc., the wines are opened, the wine speaks for itself. As we say, the proof is in the pudding.

Q. I think there was a suggestion during trial that there might be some reluctance of people in your business to want to take a chance on tasting counterfeit wines. Is that your experience with wines of indicia comparable to these?

A. No. Actually, I don't understand that particular notion at all. How could you begin to know what is inside the bottle if you don't open and taste it?

Q. Would you, for example, have been willing to taste all of these wines?

A. Absolutely.

Q. You would not have worried about what was in there?

A. No, no. I would taste them just like I would any other group of bottles that would be put in front of me to taste and render some opinion on.

Q. Based on your experience, do you believe there are other

people, experts like yourself, who you could have gotten together to be willing to taste these wines?

A. Oh, yes, very much so.

Q. Finally, in your opinion, what is the majority view in your field on the best way to find out if a wine that is claimed to be counterfeit really is counterfeit?

A. The best way to do that is to open and taste the wine. At least then you know a hell of a lot more than you know from before it was opened.

Q. Is that the majority view in your field?

A. That would be the majority view, yes.

Q. Who are some other experts in your field who have publicly expressed this view, that if you have a wine that is alleged to be counterfeit, a counterfeit wine, the best way to find that out is to open and taste?

A. We could start with Serena Sutcliffe, whom we heard from earlier in this trial. She is the head of Sotheby's International, the wine department. Her main view is that you have to open and taste to determine if a wine is finally counterfeit. She's done that all her career with peer groups and with chateau owners whom she knows very well. Further than that, you could say Robert Parker, the world's most influential wine critic, a legendary taster of Bordeaux wines of all ages, the man whose foundations a lot of this business is actually based on. He's been doing this for 35 years.

Going over to France, we have a guy name Michel Bettane, who Mr. Shartsis mentioned before. He also happens to be the lead French wine writer in existence. The guy has unbelievable experience in the vineyards of Bordeaux and Burgundy. He knows everything about everything, has an incredible olfactory memory for wines, and nails them blind time after time in blind tasting where he doesn't even know what the wine is.

Michel Roland, the greatest oenologist and responsible for many great wines in the world, a man behind the scenes, if you will, a man who is a master at blending vintages before they are bottled, he does it to this day for a hundred different properties. He lives in Pomerol, where Chateau Lafleur and Chateau Petrus is located. He runs a laboratory there that does testing on wines. He basically has all this stuff in his mind, how he has tasted these wines for decades, and can completely nail these wines when put in front of him.

Q. Do you recall any particular publication by Mr. Parker that addressed the issue of counterfeit wines and tasting of counterfeit wines?

A. Mr. Parker has published a lot of things. One publication I remember, I should say an article, was published I believe in 2002. It was an article that was called In Vino Veritas, which, apart from the fact that the term was coined by Pliny the Elder in the first century in Rome, also is very

significant. It's the model of my own company, In Vino Veritas means in wine there is truth. In wine there is truth. You can't learn the truth if you don't get in the wine, in other words.

This article dealt with counterfeiting and fraudulent practices in the wine industry. It caused quite a ripple in our industry. It caused a lot of discussion because it was Mr. Parker who for the first time really laid it out there, what these practices were, what he believed. He looked at bottles. He tasted bottles with people. So this was a very seminal article, yes.

Q. I'm sorry. What year did you say that was published?

A. I think it was first published in 2002, if I remember correctly. It was in one of his books, probably Parker's Wine Buyer's Guide or The Bordeaux Book. But definitely, yes, around 2002.

Q. Are those books by Mr. Parker commonly on the shelf of every major wine collector?

A. Yes, very much so.

Q. Let's look at a couple of bottles?

MS. SALISBURY: May I?

THE COURT: Sure.

Q. If you were to taste this wine to see what's actually inside it -- I'm sorry -- open the bottle to taste what is inside it, would you be able to go about opening that bottle to

get to the wine inside without destroying everything we are looking at there?

A. Very much so. That's common practice. You're not opening a bottle of wine to destroy it. You open it so that you can taste the wine and drink the wine. But yes, we would of course carefully take off the capsule using an X-Acto knife to cut down the side of it and then peel it off so that the cork will be exposed.

I would take an ah so, called ah so, A-H S-O, which has been mentioned before in this trial, which is kind of a pincher that goes down the side of the cork into the glass, a very, very thin metal pincher. Then you very slowly turn it and draw the cork out. Then you have the full cork. It is actually more reliable with old wines than a corkscrew. A corkscrew could damage the cork if you don't know what you are doing. An ah so withdraws the cork completely intact.

Then we can look at the cork without having to look at it through the glass. Furthermore, we have the capsule just like it is here except it is cut, and here I'll put it next to me on the table. I have the cork now that I can fully look at to look at all the branding and see what's been going on with this cork.

Then I have the glass bottle, of course, which contains the wine. The label remains where it is. I am not touching the label to open the wine. Now I have the wine.

That's the most important thing. We have the wine, we can taste the wine, make a determination.

Q. I assume you could go through the same process with all of these bottles here?

A. Yes, without damaging any of them.

Q. In your view, is it fair to say you wouldn't be destroying evidence, you would actually be retrieving the evidence that is hidden inside that bottle right now?

A. Actually, yes. As I said before, the proof is in the pudding. Now we can really get to the pudding. That makes a big difference.

Q. I'm going to move to a slightly different topic now, which is talking a little bit about indicia of authenticity, words we have been using.

A. OK.

Q. Which I take it means the things on the outside of the bottle that you and Mr. Egan, for example, looked at when you inspected these bottles.

A. Yes. Anything that is inspected on the external parts of the bottle, but not limited to shining a light through the bottom of the bottle to look at sedimentation, etc., but all the indicia that we can look at, yes, without opening it.

Q. What does the label say on that wine that you are looking at?

A. The label states "Chateau Lafite Rothschild 1945 Pauillac.

Q. You remember inspecting this bottle?

A. I do.

Q. Do you recall, what did you find particularly interesting about it?

A. This bottle was one of the bottles -- I'm sorry. I'm laughing a little bit because this bottle really stood out. Having looked at thousands of bottles of Chateau Lafite, this is the kind of bottle you don't forget. This screaming yellow label is really very outstanding. I think I called it a blatant reproduction in my report, as a matter of fact. But yes.

Q. What did you find about the other indicia of that bottle?

A. What's interesting about the other indicia of this bottle is that when you look at this bottle -- the punt, the glass, the entire bottle of this wine, the capsule and the cork -- everything looks exactly like it would look on 1945 Lafite magnum, of which I have inspected many. So all items on this bottle really match up, with the exception of this crazy label. That's pretty much, you know, what my finding was on this bottle.

Q. From that do you assume or do you infer from your inspection of this bottle, one of the many that you have seen, that whoever put that label on was trying to defraud somebody?

A. No. That would have been the worst counterfeiting or faking job in the whole world. That's not put on there to

defraud. Anyone who has ever seen a bottle of Lafite would have looked at that and said, nah.

Q. I'm going to talk about different parts of the bottle now. If at any point you want, for whatever reason, to pull another one out, let me know, and I'll get it for you.

A. Sure.

Q. Let's start with inspecting the cork.

A. OK.

Q. Start at the top. I realize the capsule is at the top, but I'm not going to start there. Let me back up for a minute. If you were to open this bottle and pour some wine out, to state the obvious, how could you preserve the evidence of the fill, how far up it went?

A. We would have taken pictures of that. You put it against a white background or light background, you can see the fill level. Pictures are quite good at that. You memorialize that by writing down, this one has VTS, very top shoulder, that type of thing. So fill level is really secondary to the other indicia in this case.

Q. Other than the capsule. I'll start with the corks.

A. Yes.

Q. Did you inspect all the corks on all the bottles you looked at very carefully?

A. Very much so, yes.

Q. We heard some testimony that there is a fixed standard for

cork size in France that all of these chateaus have followed, I think, since 1930 or so. Do you agree with that?

A. That was complete nonsense, actually.

Q. Really?

A. Yes.

Q. Why do you say that?

A. Because even to this day, within about two miles of Petrus and Lafleur, there are wine producers producing bottles with four different lengths of cork. If there was a standard that was introduced in 1930, then why would anybody bother using different lengths of corks. Plus, all the bottles that I have inspected over the years, and I have inspected tens of thousands of bottles of these kinds of wines, there are different lengths of corks.

There were no standards. You have to remember that corks could have been put in by any number of different entities. All the corks weren't put in by the chateau always. There are negociants and merchants, as we have heard many times, who all could have used different corks. Since all corks come from Spain and Portugal, the suppliers of these corks were supplying corks into the market, into different markets.

If the bottler who put the cork in was in Belgium, he would have used one kind of cork. If the bottler was the chateau itself, they had another kind of cork. Then in one

vintage you actually have different cork suppliers. Even up to modern times, you have corks delivered. Even if they are in the same length, they might have different markings. Same chateau, same vintage, different cork suppliers with different standards.

There are no standards. You cannot make a statement saying that in 1930 somebody came up with a standard for corks. It doesn't work.

Q. I may have gotten the year wrong. I think your point is there was never a standard for corks?

A. Never a standard, to my knowledge. I have never heard it in all my years in Bordeaux.

Q. You haven't seen standardized corks, either, I take it?

A. I don't know what standard size corks would mean, actually. Since I have just said there were no standards, you cannot have standardized corks. No, standardized corks would have been made from cork coming from the oak tree that bears the cork bark, where all corks are derived from.

Q. I want to make sure of some of these terms. We have heard them, but I want to make sure that we understand them. When you say one of these chateaus in the same vintage might have different lengths of corks, does that mean a chateau in one year, like 1945 or 1927?

A. Yes.

Q. All of the wines bottled that year would have different

size corks? Not every bottle, but they would have a variety sizes of corks even for that one year?

A. Absolutely. Again, it depends on who inserted the cork and when. You can have first, beginning from the beginning, 1945, something. Then in 1945, or let's say 1921 Chateau Petrus, for example, 90 percent of the production of this wine or more was sold in barrels, left the chateau.

The owners of the chateau lost all contact with their own wine following that particular point in time. Then one barrel went to Denmark, two barrels went to Holland, three went to England, four went to Belgium, three went to Germany, two to Switzerland. You know what I'm saying? Therefore, you have now that many different people in possession of these barrels of wine.

What they would do is when they determined that it was time to bottle these wines, they themselves would choose a cork for their own bottles. They might be branded one way or they might be branded in another way. It's a fact. It happened over centuries like this. Even up to modern times, in fact, there are different markings or standards for corks. So yes.

Q. Let me ask a specific question about the corks. We have heard testimony -- you inspected some of these Lafleurs that have vertical brands on the corks?

A. That's correct.

Q. They are from before 1966?

A. Why is that important?

Q. That's my question. Is it important? Is there anything questionable in your mind about a cork in a pre-1966 Lafleur or Petrus? Is there anything that is questionable about there being a vertical brand on corks for that period?

A. Not in my mind at all.

Q. Why not?

A. Because I have seen examples of pre-1966 corks with vertical marks on them on multiple different occasions, most famously in the cellar of the owner of Chateau Petrus, who also was in charge of distributing Chateau Lafleur for the better part of a half century.

Q. You were at the home of the owner of Chateau Petrus?

A. That's right.

Q. In his cellar he has what?

A. He has one of the greatest cellars in Bordeaux, apart from the fact that he is an incredible collector of impressionist art. But he has a huge collection of bottles and magnums of Petrus and Lafleur going back to 1900. Some have vertical corks, some have horizontal corks.

There are all kinds of different examples. No standards. Nobody could tell me that there is one standard that was introduced in '66. If I talked to somebody at Chateau Lafleur or to that man himself, that could not be corroborated. There's no such standard that came in place.

Q. Have you seen vertical corks on pre-1966 Petrus and Lafleurs other than in the cellar of Mr. --

A. Yes, I have. I have seen them. They have come up in tastings. We did a very great tasting with a collector in Hong Kong, one of the greatest collectors in the world. He is actually the largest collector of Chateau Petrus on the planet. He put on a tasting.

There were bottles that were sourced from Belgium negociants and some from UK sources, English sources. Some of these labels were actually very similar to the ones that we have on the '21s and the '28s, which are not chateau bottled, by the way, and they were, for example, '24 and '28 Petrus magnums. The corks were pulled out, and the cork marks were vertical without there being any assertion that the wine wasn't what it purported to be.

Q. I'm switching now from specifically the cork to the bottles. We have also heard speculation, I guess, that it's doubtful that there were magnums of Petrus produced in the 1920s. Is that correct?

A. No, that is not correct.

Q. How do you know that?

A. Again, there have been numerous examples of magnums of Chateau Petrus that were not chateau bottled, just like these ones, out and about in the market. I have found some in old cellars on the continent and Europe and Belgium where the

market for Petrus was particularly strong. And I've seen such magnums myself.

So, the existence of these, a guy who had this laying in his cellar for 60 years, same family, same home or manor house, makes it completely natural for me to believe that of course there were magnums of 1921 Petrus, and older as a matter of fact, back to 1900.

Q. Have you specifically seen magnums of 1924 and 1926 Petrus at public tastings?

A. Sure, I have. I just actually mentioned that. I was saying that we did this tasting where we did a vertical of Petrus, many of them in magnums, and they went back all the way to the 20's, and it was really remarkable.

Q. Does that bottle have the liquid quantity 150 CL embossed on the glass?

A. No, it does not. That was, again, something which I heard which was just utter nonsense. You have here a bottle which is 1945, so this is the end of World War II. This is at a time when all glass factories were either bombed to smithereens or the little production that they had they were producing medicinal glass for medicine to be used for wounded people or whatever was going on.

It was a terrible time in Europe and glass with a very scarce, very hard to come by. In fact, I have had long discussions about Chateau Lafite specifically with the 1945.

Like I said, it was a bit of a miracle, this vintage.

The regular size bottles of Chateau Lafite 1945, the regular size bottles, they all have this glass embossing in the neck of the wine right here, where it says 1945. For some crazy reason they were able to find someone and pay a very high price to order the entire run of their chateau bottle, regular size bottles, with the 1945.

But the magnums, there weren't any magnum bottles that you could just order. You can't just call somebody up and go, hey, let me have 3,000 magnums. It didn't work like that. So everybody it was scrambling. Their suppliers scrambled to find magnum size glass bottles.

And guess what. These magnum size glass bottles that were around in the 1940s, they recycled. A lot of them came from the 1910s, the 1920s. So even if there had been some sort of a crazy standard, which there wasn't, there was no embossing of those bottles, because the standard that is fictitious would not have been in place.

MS. SALISBURY: Your Honor, do you want me to keep going?

THE COURT: This might be a good time for a break. Why don't we take a 10-men break. Ladies and gentlemen, take ten minutes.

(Recess)

(Continued on next page)

(In open court; jury not present)

THE COURT: Please be seated.

MR. KABA: Your Honor, if I may, I don't know how late you're planning on going today, but Mr. Koch has to deal with the family matter that we discussed earlier and he has to be out of here no later than 4:55 or so.

THE COURT: Okay. I have a 4:45 matter anyway, so we'll be finishing up before 4:45.

MR. KABA: Thank you.

MR. KOCH: Thank you, sir.

THE COURT: Okay. Can we bring in the jury.

(Continued on next page)

(Jury present)

THE COURT: You may be seated.

Ms. Salisbury, you may proceed.

MS. SALISBURY: Thank you, your Honor.

BY MS. SALISBURY:

Q. Mr. Schwarz, I'm going to now --

A. Yes.

Q. We've been over some different pieces of this bottle. We're going to talk about the label, our last topic on the indicia, top ten list.

As a general matter, did these five chateaux, in your opinion, use standardized labels before 1973 or so?

A. No. As I pointed out earlier, there were no standards. And so therefore, again, going back to what I was saying, many different bottlers, many different labels, many different standards. Not one standard, not one label. Never.

Q. Were there variations -- for example, did Chateau Petrus -- would original Chateau Petruses from a certain era -- I'm sorry. I should have said original. Would genuine Chateau Petruses from say 1921 or 1928, could you -- if you lined up the bottles of genuine Chateau Petrus from 1928, could there be different sizes of labels, different --

A. Sure.

Q. -- label designs?

A. Absolutely. Again, depending on who put these in -- who

put the wine from the barrel into the bottle. You had a variety of different bottlers, including the chateau itself, and so if you imagine, you had the chateau going to their printer, in this case with Chateau Petrus it was Vit et Vin (ph), which is a very famous printer in Bordeaux, and they had this beautiful engraved label from Daniel Curmaison (ph), who was the artist of the label, and then they would have one run of labels for one vintage or for multiple vintages. This also happened.

Then you had all the others in Belgium, Holland, Denmark, Sweden, Norway, wherever it may have been. There were so many different ones, each one using another label, some even receiving labels from the chateau to apply to bottles that they bottled outside the chateau, some even saying "Mis en Bouteille au Chateau," bottled at the chateau, but that bottling in fact happened outside the chateau.

So there were no standards at all in those days. And so what happened is, depending on who it was, different brands, different marks.

The one thing that happened is that they had to represent where their wine came from, so it would say Chateau Lafleur, for example. Now some spelled it "Lafleur," in one word, some spelled it "La Fleur." In fact, there are some very famous examples of this.

So again, it depended who applied the labels and how

and when, that you had this.

Then on top of all that, you have what's called reconditioning labels, so let's say some collector like Mr. Koch or Mr. Greenberg had a good connection with a chateau. In 1965 they would have brought those bottles back to the chateau, said, "I'd like to have you recondition these bottles." The chateau might have reconditioned any part or all of the external indicia on the bottle, including cork, capsule, and label, or they could have left the label alone while just doing the cork and the capsule. And then another time somebody came in 1980. Every single time somebody had a bottle reconditioned or a bottle was reconditioned, a label, a contemporary label was affixed to the bottle.

So you have no standards in labels whatsoever, if you go back a century or so, and certainly not for size or markings or anything of the sort, especially when they're not chateau bottled, as these bottles are not chateau bottled. Then how could you know?

Q. So when you say not chateau bottled, you mean bottled by some of these negociants who bought barrels from the chateau and took them off to Belgium and all those places and bottled them themselves?

A. Yes, I'm specifically talking about the '28 and the '21 Petrus in this case. Now we've heard many times during testimony in this trial how it says "Mis en Bouteille au

Chateau," which means bottled at the chateau. Well, these ones don't say that. So nobody is saying that they were bottled at the chateau, so they must therefore be negociant bottles.

They're on the right, by the way. Right there.

Q. Are they? Oh, there they are. Thank you.

A. Yeah. You can just bring one up, I'll indicate to you what I'm talking about.

Q. Okay. All right.

A. So here, for example, you see on this Lafite it says the words "Mis en Bouteille au Chateau" in red. On this one, it doesn't say anything of the sort. So therefore, I can only assume by looking at this label that it wasn't actually bottled at the chateau. So while it is Chateau Petrus, notice how the E has a -- an accent above it, whereas on the more modern bottles, that a different label, also a Petrus, has no accent. That's just another example of how many different things could be going on with these labels.

So you have here a beautiful original label of Chateau Petrus, 1928 Pomerol, not from the chateau. Certainly we don't know where it was bottled but it wasn't at the chateau, 'cause it doesn't claim to be from the chateau. So we don't even have to take that into consideration.

Q. Now are there examples -- do the chateaux sometimes bottle wine -- say bottle wine in 1945, actually keep it in their chateau, produce it for years, and then don't release it out

into the public for say 20 years?

A. Oh, yeah. I think this is a very, very important point that I actually haven't heard anybody -- anyone talk about here, and I think this bears saying, once and for all. When bottles are in the chateau, they're laying down in racks, old, dirty, grimy, moldy, cobwebbed racks in their cellars. These cellars are very cold. They're approximately 45 degrees Fahrenheit up to about 50 degrees Fahrenheit. It's natural, sort of cavelike temperatures. But the humidity is very high in these cellars. So when the chateau bottles a run of bottles, any vintage, they get put down -- like the ones they don't release, they get put down in their cellars, no labels, no capsules. Capsules tend to corrode in humidity, and they run 90 to 92 percent humidity, for example, in the cellars of Chateau Lafite, and they have 300,000 bottles laying in these cellars, bottles, magnums, and larger bottles, none of them have labels on them. And why is that? Because if they had labels on them, by the time somebody came down to pick out a bottle for dinner, oh, look, the label is completely ruined, from the humidity. Paper turns to like pulp in high humidity. So all the bottles lay there, no labels on them, and when they are then taken out, let's say the owner of Chateau Lafite, he would like to take ten cases and sell them to one of his good friends. They take them out -- say they take out 1945 bottles, and then they label them right there on the spot in 2013, so

you're going to get a 2013-made label that says 1945 Lafite because it comes from the chateau. And this could have happened any number of times during the last century. So again, you have labels, original great labels from the chateau, released at multiple different stages. Only the label was affixed when the bottle was drawn out of the cellar, cleaned off, and released into the marketplace. So there are many variables here.

Q. Well, let me ask specifically -- you can pick up that Lafite again.

A. All right.

Q. Show it to the jury.

A. I like holding it. It feels really good.

Q. You don't have a corkscrew on you, do you? I want to make sure that you're not going to lose control here.

A. I was trying to hide it but then the court confiscated it. Otherwise...

Q. All right. I see a Bordeaux Wine Locators -- well, I don't see it, but I know it's there. A Bordeaux Wine Locators label, the white label there at the bottom --

A. Sure.

Q. -- is that an alarm bell at all for you on authentication?

A. No. I must say, I found it hard not to laugh when I heard testimony to that earlier at this trial. Bordeaux Wine Locators is a federally licensed import company, one of the

largest in the United States. That means every single year for the past 30 odd years they've imported hundreds of thousands of bottles of Bordeaux wines, magnums, larger, whatever it may be. Bordeaux Wine Locators is just an importer. They don't even put these labels on. These labels are put on from the guy who sends it to them from France. So they have no control over who puts their labels on except they are the importer of record, you know. And then they bring them into the United States. They go out in the trade, and every cellar, including Mr. Koch's and Mr. Greenberg's and my own cellar, including everybody in the business, in restaurants, you find Bordeaux Wine Locators labels. They're one of the biggest importers of Bordeaux wines in the country. Nothing more than that.

So no, that doesn't set off any alarm bells whatsoever, just to answer your question. Sorry.

Q. Okay. Thank you. Now we talked earlier about that yellow label, which obviously, I mean, I think you said in your report -- what was the term you used?

A. Blatant reproduction.

Q. And yet you don't think that that indicates fraud in any way or intent to deceive anyone who might come into possession of that bottle.

A. On this particular bottle, you know, when I inspected this bottle, as I pointed out earlier, all the indicia on this bottle, except for the label, look absolutely exactly like

magnums of 1945 Lafite I inspected on multiple occasions. Now what's so crazy about this label is the color. And so I was thinking to myself, who would have put on this crazy colored label? Certainly a counterfeiter or somebody with intent to defraud would not put such a label on because that's like having a red $20 bill. That like stands out. So no, I didn't think that.

Q. Can you think of an honest reason that a -- somebody would have put that label on that bottle?

A. Sure. Many times I come into collector's cellars -- again, many of these cellars run at a fairly high humidity, 70 percent, sometimes something happens with the equipment, it goes a little higher. I mean, these are large cellars in many cases. And so let's say this bottle was sitting in the cellar in the rack, and then this nice gentleman who owns a cellar comes down one day to inspect his pride and joy, the '45 Lafite, and then he pulls it out of the rack and he goes, oh, and the label is gone, but where is the label? And he looks into the rack and, look, there's the label, all tattered, having come off the bottle, you know, it was put on with a fairly rudimentary type of glue in those days, and so it comes off and there you are. He now has a completely crumpled or tattered label. He has his Lafite '45 magnum which he knows is real. And then he goes, what do I do now? So he finds an image of a Chateau Lafite label, produces it to the best of his

ability to memorialize to himself that that's a bottle of Lafite '45, sticks the label on there, probably with some Elmer glue stick, you know, back on the bottle, and then into the rack it goes. Nothing wrong with that, right? He owns the bottle. He has the right to tell himself: This is my bottle of 1945 Lafite. He put that label on there. There's nothing wrong with that.

Q. Have you actually seen collectors do something like that with bottles in their collection?

A. Tons of times. We've had great laughs at that in cellars. Some examples are obviously better than others, you know, some people just put a sticker with a handwritten like name and vintage on there. That I've seen too. Again, nothing untoward there. So yeah, seen it lots and lots of times.

Q. Have you seen copied or facsimile labels on bottles you know to be genuine?

A. That would be a yes.

Q. And have you ever seen labels that are something like that color?

A. Yeah. This is actually quite interesting. I think I might have made a mention of this somewhere. The fact that this has this yellow color -- there used to be this company in London called Whitwham's -- or not London, in Altrincham or something like that. It was in England somewhere. Very famous wine company. Existed for a long time; doesn't exist anymore.

Whitwham's is spelled "Whit wham's." Very famous company. They dealt in a lot of old bottles of Bordeaux, and they were known for reconditioning and recorking bottles. And they always -- when they didn't have an original label, they used this crazy yellow facsimile copy label. So you see that on some bottles that are still around to this day, going way back. Pardon me.

Q. Okay. Thank you. I'm actually going to change topics now.

A. Sure.

Q. I'm going to ask you a question -- I'm going to have to look at it very closely so I get this right. You were here when Mr. Martin testified the other day. Do you remember that?

A. I was, yes.

Q. And he was hired by Mr. Koch. And he talked about using a research stereo microscope, fourier transform infrared microspectrometry, and confocal Raman microscopy to do analysis of wine labels. Do you remember that?

A. I do. There was a lot of words and quite a mouthful.

Q. To your knowledge in 2005 was any collector, any consignor, any auction house, or any chateau using any of those methods to analyze wine labels as part of wine authentication?

A. Absolutely not.

Q. And other than Mr. Koch, are you aware today of any collector, consignor, auction house, or chateau using that method or any of those methods to analyze wine labels as part

of wine authentication?

A. I am not. I have never heard of this method until it was presented in this case.

Q. Change of topic again. How many wine auction catalogs do you think you've read in your career?

A. I'd say north of 1500.

Q. Do you collect them?

A. I do, actually. I have a very nice collection in my library, that numbers over 1500, as it were.

Q. Have you ever seen a wine auction catalog include a notification to potential bidders that some wines owned by the consignor, but that are not in the sale because they've been rejected for authenticity reasons, that those -- let me back up.

Have you ever seen a notification to the potential bidders that the consignor -- that some wines owned by the consignor had been rejected from a sale for authenticity reasons?

A. No. That doesn't exist. I mean, these are catalogs for bottles that are being sold. Why would they put in the catalog the bottles that aren't being sold?

Q. How many of the US catalogs you've read for the past 20 years, to your knowledge, to your recollection, have specified the wines being auctioned are being sold as is?

A. Every one of them.

Q. Now have you ever been hired to inspect wines for a buyer before an auction?

A. I have.

Q. How many times?

A. Four times.

Q. Okay. Now have you also been a buyer at auctions?

A. Yes, I have, multiple times.

Q. And have you inspected wines that you intended to bid on before an auction?

A. I have, yes.

Q. Actually, have you ever done an inspection for wines that were being offered by Zachys at auction?

A. I have.

Q. On behalf of yourself or on behalf of another buyer or both?

A. Both, actually, yes.

Q. Was that difficult?

A. No, not at all. There's a number provided in the catalog. You call them up, you say, hello, I'd like to come inspect the following lots, you give them the lot numbers, either over the phone or by e-mail, you go into the warehouse -- I think in this case it was White Plains where Zachys warehouse was located. I went in, they had all the lots lined up on a table that I wanted to inspect, I took my time, looking through the bottles that we were potentially wanting to bid on and buy, and

I looked at them. Nobody was breathing down my neck or anything like that. I took my time, read, looked at all the bottles, and then I left. Thank you very much.

Q. Now for those auctions where you were either hired to do this or did it on your own behalf, did you inspect all the wines that were listed in the catalog?

A. No. Why would I have to do that? You wouldn't inspect all the wines that are in the catalog. You're not going to buy all the wines in the catalog.

Q. Okay. Well, did you inspect all the wines that you or the buyer intended to bid on?

A. No. Again, that would be a ridiculous proposition. All the ones that you're potentially going to bid on prior to an auction -- you have let's say a list of wines that you're interested in, and then out of that list of wines there would be some very fine, rare, expensive bottles, the specific bottles that would stand out from, you know, some of the other bottles that you would bid on, and then you would go in and you would inspect those bottles. And that's exactly what happened.

Q. Are you familiar with the 2005 Zachys auction catalog for the auction at issue in this case?

A. I'm very familiar with that catalog, yes.

MS. SALISBURY: And then I'd actually like to call up onto the screen Exhibit 100, your Honor, which is already admitted in evidence.

May I --

THE COURT: Yes.

Q. Mr. Lempert-Schwarz --

A. Thank you.

Q. -- here you go. Mr. Lempert-Schwarz, were you here in the trial when this document was discussed? It's the invoice from Zachys to Mr. Koch after the 2005 auction.

A. Yes, I was.

Q. And did I give you this list to look through so you could answer some questions for me?

A. Yes, you did.

Q. And have you looked through this list?

A. I have.

Q. Now if Mr. Koch had hired you in 2005 to inspect wines for him before the Zachys auction, how many wines on this list would you have recommended that he inspect?

A. Well, this list --

MR. CAMP: Objection. Calls for hypothetical. Calls for a nonexpert hypothetical.

THE COURT: You can answer.

A. Okay.

THE COURT: Let me be clear, though, before you do. Remind the jury, this is a list of the wines he purchased or what?

MS. SALISBURY: This is a list of the wines he

purchased.

THE COURT: Okay.

MS. SALISBURY: Let me back up, actually. That's a good point.

BY MS. SALISBURY:

Q. If Mr. Koch had hired you to inspect wines for him before the Zachys auction in 19 -- in 2005, would you have recommended that he inspect all the wines in the Zachys catalog?

A. Of course not.

Q. Would you have recommended that he inspect all the wines that he was interested in bidding on?

A. No.

Q. Which wines would you have recommended he inspect?

A. Well, looking at this list, which I guess is the list of the wines he ended up buying through Mr. Orcutt, I would say that -- what is your -- 2669 bottles I believe was bought. I would probably go ahead and inspect about a hundred fifty of these.

Q. And about how long would it have taken you to do that?

A. Inspecting for bidding at an auction, potentially buying? About a day, a full day's work, yeah.

Q. And what would you have charged Mr. Koch in 2005 for that?

A. In 2005, I would have probably charged something like $150 an hour plus expenses.

Q. So all in, a couple thousand bucks?

A. Sure.

Q. Now if you were hired tomorrow, well, whenever this trial is over, by someone who said: I'm going to bid -- I want to bid in a 17,000 bottle auction, two to three weeks from now --

A. Sure.

Q. -- would you be able to do that for them?

A. Why not? Again, we're not looking at all 17,000 bottles, we're just looking at a small part or a part of these bottles, and then, further, a smaller part of the bottles that you intend to bid on, and all I'm looking at them for is whether we should put a bid in or not.

Q. Did you ever inspect Mr. Greenberg's wine cellar?

A. I did.

Q. When?

A. I believe I inspected Mr. Greenberg's wine cellar in February of 2010.

Q. And what did you inspect that for?

A. We were doing a very large auction of Mr. Greenberg's wines in Hong Kong in May of 2010 and so there was approximately 19,300 bottles of wine that went into that auction, and I was in charge of the inspection of all these bottles.

Q. When you were doing your inspection, did you see bottles there that had been segregated in the cellar from other bottles?

A. In fact, I did.

Q. Do you recall about how many?

A. Well, there was quite a few boxes. I would say hundreds. There must have been hundreds of bottles.

Q. And did you ask Mr. Greenberg what they were?

A. I did. It said "Don't Touch" on the boxes and, you know, I'm a curious mind so I went over and asked him if I could have a look at them.

Q. And did you look at them?

A. I did indeed.

Q. And what did you find? What did you find in there?

A. Well, I found in these boxes there were many different kinds of bottles of wine, like really many different kinds of bottles of wines. Magnums and bottles. I looked through almost all of them 'cause I found it fascinating, and I -- I found -- so I couldn't really figure out what was going on 'cause I saw certainly some bottles with indicia of inauthenticity, if you will, that just by inspecting the bottles by a quick visual inspection, and then there were others where I was like, what's up with these? And then there were -- they seemed perfectly genuine to me, and so --

Q. Well, did you ask Mr. Greenberg what these bottles were?

A. Yeah, I did.

Q. And what did he tell you?

A. Well, he said he couldn't see the cork markings on them so they had gone with the rest of the bottles over in this area,

and I found that amusing because they were obviously quite good.

Q. Did he tell you why he had segregated these bottles?

A. Yes, he did.

Q. What did he tell you?

A. Well, he told me he believed that these bottles were inauthentic and he had put them away, not to be touched.

Q. Now from your discussions with Mr. Greenberg and from the testimony that you've heard in the case, what is your assessment of Mr. Greenberg's level of knowledge and skill in being able to identify potentially counterfeit wine?

MR. CAMP: Objection. The witness hasn't been offered or approved as a psychoanalyst. He's here as a wine authentication expert, not a mind reader.

MS. SALISBURY: Your Honor, he's an expert with knowledge in what it takes to have certain skills in this field and he can certainly express his opinion based on his experience and knowledge. And we've certainly had lots of unidentified experts talk here and we've had experts talk about things that we never heard before. This is well within his knowledge.

THE COURT: I'll allow him to answer.

Q. Do you have the question in mind?

A. Please ask the question again, yes.

Q. From your discussions with Mr. Greenberg when you inspected

his cellar and the testimony that you heard in this case, what's your assessment of Mr. Greenberg's level of knowledge and skill in being able to identify potentially counterfeit wine?

A. Without insulting Mr. Greenberg, I think he's lacking skills in that department.

MS. SALISBURY: Thank you. I have no further questions, your Honor.

THE COURT: Thank you.

Cross-examination? Mr. Camp?

MR. CAMP: Yes, your Honor.

CROSS-EXAMINATION

BY MR. CAMP:

Q. Good afternoon, Mr. Schwarz.

A. Good afternoon.

Q. Sir, you testified on direct examination -- I want to get the quote right -- the only way you can reach a conclusion on whether these bottles are counterfeit is by opening and tasting them. Did I have that right?

A. Sounds about right to me.

Q. You were asked about other testimony in this trial suggesting that taste testing is an unreliable way to find out if a bottle is counterfeit, and you called that complete nonsense. Do I have that right?

A. Yes.

Q. You testified on direct I believe that opening and tasting settles all accounts and the proof is in the pudding. Am I right about that?

A. Yes.

Q. You also testified that in your view those opinions are shared by most of the leading experts in the field, and then you proceeded to name a number of them. Do you remember that?

A. Yes.

Q. Sir, before Mr. Greenberg hired you for this case, you had a different opinion about taste testing, isn't that right?

A. I -- if you talk about determining conclusively whether a bottle is counterfeit, I think I've always been of the belief that you could only conclusively determine that by opening and tasting the wine.

Q. In fact, sir, before Mr. Greenberg hired you in this case, you said you believed there were no experts who could taste a wine and determine on the spot that it was a fake. Do you remember saying that?

A. No.

Q. Before you were hired, you said you believed that a particular bottle of wine could have been through heat or been compromised, thereby rendering the taste not like the original so that taste is not a reliable indicator of whether something is fake. Do you remember that?

A. I may have said something to that effect, but again, that's

probably taken out of context, because there are a number of things that can happen to bottles in their lifetime, as we've heard many times before, so if you taste the bottle of wine and you open it and it's corked, it's just corked. There's just nothing you can do about that. It's just how it happened.

Q. Sir, let me see if I can refresh you about the context.

A. Sure.

MR. CAMP: Could we have Tab 8.

May I approach, your Honor?

THE COURT: Yes.

Q. Showing you what's been -- what we'll mark for identification as Trial Exhibit 536. And before I get into this, sir, you're familiar with a website called robertparker.com?

A. Erobertparker.com would be the correct name, yes.

Q. Got it. So you're familiar with it and in fact you have a link to that website on your own website, right?

A. Oh, yeah.

Q. And you've participated from time to time in a message board on erobertparker.com that is used frequented by a lot of wine aficionados and experts, is that right?

A. Yes, Mark Squires' wine bulletin board, which is run on erobertparker.com, correct?

Q. Now I'm going to ask you to turn -- and if we can, I don't know if it will help, because the pages are numbered in the

lower left, if you go to 47 -- well, let's start at the beginning. If you read the first post at the top, on the first page, it will give you some context, and then if you turn to the last post on page 47.

A. You mean where it says the Jefferson bottles in New York?

Q. That's right.

A. Okay.

Q. And if you look to the last full sentence on the page and read it to yourself.

Does that refresh your recollection, sir, that in August of 2007 you said, "There are no such experts who can taste a wine and determine right away on the spot whether it is fake or not"? Does that refresh your memory?

A. This is in relation to a bottle of '82 Petrus, I believe, right?

Q. Just asking if it refreshes your memory about your statement.

A. It refreshes my memory about the statement made in connection with a bottle of 1982 Petrus, yes.

Q. Right. And does it refresh your memory that what you also said about the '82 Petrus is the wine could have been through heat or otherwise been compromised, thereby rendering the taste not like the original and that does not denote a fake? Do you remember saying that?

A. I said that right here.

Q. Right. Because there are a lot of things that can affect the way a wine tastes over time, true?

A. True.

Q. The way it's stored, for instance, right?

A. Absolutely.

Q. And with a 1982 Petrus -- so at this point we're talking about a 25-year-old wine?

A. Mm-hmm.

Q. -- your opinion was, even in 25 years, depending on storage, the taste could have changed, it's not a reliable way to simply taste it and figure out if it's a fake.

A. Well, again, you're taking this out of context. This is page 47 of 48, and this discussion was specifically about Petrus '82, which you can actually determine if it is Petrus '82 without tasting it. You can open it and have it tested to see exactly whether it's Petrus '82.

MR. CAMP: I'm going to object and move to strike.

A. Well, that's a fact.

MR. CAMP: I'm going to object and move to strike.

A. Why?

MR. CAMP: Everything after, "Well, again."

MS. SALISBURY: Your Honor, it answered the question. He's trying to impeach him with his statement and not letting him discuss the context.

THE COURT: I'm not going to strike it, but --

Q. Sir, just to be clear, it's a 47-page post.

A. Yes.

Q. The part I'm asking you about is your contribution to that discussion, right?

A. Yeah, but you take one sentence out of context and want to somehow apply that. This is about '82 Petrus in this case. There's a whole discussion about what happens and so on with these, and I, of course, being in Las Vegas, sent bottles of Petrus '82 back to be tested.

MR. CAMP: Objection.

A. You know, so that's what it's all about.

MR. CAMP: Objection. Move to strike again.

A. Well --

Q. Sir, is it your testimony that the '82 Petrus is the only wine that can't be taste tested?

A. Can you come again? I was looking at the text here 'cause there's a lot more in here I think you should maybe read. It's -- that shows the context that I'm talking about.

Q. Sir, I'm asking about your statements about taste testing and whether or not in 2007 you stated, "There are no such experts who can taste a wine and determine right away on the spot whether it is fake or not." That was your statement, was it not?

A. I wrote that.

MS. SALISBURY: Objection. Objection, your Honor.

Asked and answered.

Q. And sir --

MR. CAMP: I'm sorry.

THE COURT: Overruled. You can go ahead.

Q. And sir, '82 Petrus is a lot younger than 1921 Petrus, right?

A. Sure it is.

Q. And depending on the way a 1921 Petrus is stored over the 80 or at this point 90 years since it was vinted, heat and conditions can change the way it tastes, right?

A. They can, yes.

Q. Right. And in your view, because something tastes different than an authentic, that does not necessarily denote a fake? That was your view in 2007, wasn't it?

A. Yeah, but it's not that kind of different taste that I was talking about here. I'm talking about faults or flaws in the wine. If a wine has been stored incorrectly over the period of time you're discussing here, let's say it got heat damaged, it got cooked, you can taste that right away when you open it. You can't then say, well, this is or is not a '21 Chateau Petrus but it has heat damage on it so that the wine is compromised during its lifetime. If it's corked, if it's maturized, if it's turned into vinegar, as we heard. These are all things that could happen to the wine. But if you want to determine that, you still have to open and find out first

before you get to that determination.

Q. And the statement, nobody can just figure a fake from simply tasting it without supporting evidence, is that something you agree with or not?

A. Where do you see that?

Q. I'm just asking you.

A. Come again?

Q. Nobody can just figure a fake from simply tasting it without supporting evidence.

A. Again, that depends on the context. It's not that simple in this case.

Q. All right.

A. It's not that simple.

Q. Sir, you've also testified on direct examination that no one can reach a definitive conclusion about authenticity without tasting the wine. Is that your view?

A. When did I say this?

Q. I'm asking you if on direct examination it was your testimony that nobody can reach a definitive conclusion about the authenticity of a wine without tasting it.

A. That sounds -- can you simplify that question a little bit?

Q. Well, sir, you're saying you can't figure out if a wine is fake without tasting it, because you've got to taste it.

A. Correct.

Q. Can you authenticate a wine without tasting it?

A. Of course.

Q. Well, other than seeing it vinted, can you authenticate a wine without tasting it?

A. No, but looking at a wine for indicia of authenticity versus rendering a final conclusion of whether it's counterfeit, two different things.

Q. Sir, I'm asking about final conclusion that wine is not counterfeit, that it's authentic. Can you do that without tasting it, say: I have reached a final conclusion, this is authentic, I don't need to taste it?

A. Again, you could do that with a whole number of different wines today.

Q. Okay. In fact, you've reached conclusions about something being completely authentic just by looking at pictures of a bottle on eBay, right?

A. Hmm. I've looked at pictures of a bottle on eBay and said whether it's authentic or not?

Q. That's my question.

A. I could have. Or indicias of inauthenticity by looking at a picture on eBay, yeah, sure.

MR. CAMP: Could we have Tab 12.

A. Like if you had a picture of this '45 Lafite on eBay, I would have said it has indicia of inauthenticity.

Q. I'm going to show you what we'll mark for identification as Trial Exhibit 537.

A. Mm-hmm.

MR. CAMP: Sorry. For the court as well.

Q. And if you look to the first page, you see a post about a 1875 Lafite eBay auction with a bidding price of 223 euros?

A. Yes, I do.

Q. And if you turn to page 5 of 8, look at the second post at the bottom. Do you see your name?

A. That is my name.

Q. Does this refresh your recollection that by looking simply at a photo on eBay, you reached a conclusion that, "This bottle is completely authentic and a very rare original cork and label, nothing looks wrong about this and the only question that remains is how it was stored for the last 135 years"?

A. Oh, sure. That was in -- oh, yeah. I remember this. I actually knew the guy who was selling it. That's why I was able to make such a statement, because I had previously inspected this bottle of wine.

Q. Did you say that, "I know the guy that's selling it"?

A. No. There was no question about whether I had to say that or not. It was just a statement I made. I said, it's completely authentic.

Q. And have you looked at other bottles online and reached a conclusion that that's authentic, not a fake?

A. If there are bottles that I've seen previously or that are in known collectors' cellars that I've inspected, I might have

said such things. I make conclusions all the time, online and offline.

Q. In fact, sir, you describe yourself as a professional wine authenticator.

A. That's correct.

Q. And a large part of your business, more than 50 percent, consists of authenticating wine, right?

A. Yes.

Q. You've testified on direct examination about working as a consultant for Acker Merrall, right?

A. That is correct.

Q. Acker Merrall is one of the biggest wine auction houses in the world.

A. No, the biggest wine auction house in the world.

Q. The biggest?

A. Mm-hmm.

Q. And your work for them includes authenticating wines for auction, right?

A. That is correct.

Q. That's involved preparing a report for the president, Mr. Kapon, that reflects your conclusions about whether bottles are authentic.

A. There's not always a report included in my findings.

Q. Well, in writing or orally, you convey your findings.

A. I convey my findings only in such cases when my findings

show that there might have been some bottles that were rejected.

Q. Well, you render an opinion in one way or another regarding the authenticity of the wines to be offered for sale, right?

A. I would say that's a fair statement.

Q. And that includes an auction in 2010 of more than 19,000 bottles from Mr. Greenberg's cellar, right?

A. That's correct.

Q. That was millions of dollars' worth of wine that was sold from Mr. Greenberg's cellar. You were the one who made the final decision on whether or not it was authentic for purposes of that auction.

A. That is correct.

Q. Now for the bottles you've approved, that you've put through to auction, you were, in your view, representing: I believe these to be authentic. Right?

A. That is correct.

Q. And as to the bottles you testified about on direct authenticating at the Wynn Hotel, for Venetian, private sellers, Acker Merrall, you believe all of those wines that you've put through that you've vetted, that made it past you, to be authentic?

A. Well, again, depends on how they were inspected, right? I mean, some are inspected for authenticity, some are inspected for whether or not they're sellable in an auction. There's a

number of different factors at play here. But yes, I stand by my findings.

Q. Right. And you made those determinations of authenticity based on the physical appearance of the bottle and whatever provenance you had.

A. Of course I did. If I was rendering bottles for sale in an auction, I'm looking at the bottle. If it looks like this, it's not going in the auction. If it looks perfectly fine, and I need to examine it, it goes in the auction or it's sold in the marketplace. But that's -- those are bottles just to be determined to be sold or not. I'm not inspecting them where a lawsuit and serious fraud allegations are involved. That's a whole different story.

Q. Sorry. I'm simply asking whether you reached conclusions that those bottles were authentic. That is the conclusion you reached?

A. The ones that have been passed for sale, yes.

Q. Right. And there was -- in this case you were retained by Mr. Greenberg to, in your words, render an opinion on whether or not the bottles at issue are authentic. That's why you were hired.

A. Yes.

Q. There was nothing else you were hired to render an opinion on, right?

A. Well, authentic was one of the words used here, but, I

mean, you know, I was dealing with bottles that were the subject of this particular lawsuit, so I'm sitting there and I'm inspecting these bottles very carefully to write a report on them. That report is based on authenticity, or indicia of inauthenticity.

Q. Sir, you recall being deposed in this case?

A. Yes, I do.

Q. You were under oath during that deposition?

A. I was.

Q. You answered questions to the best of your ability and truthfully?

A. Sure.

Q. Since we don't have your video, I'm going to approach with a copy of the transcript.

A. Thank you.

Q. Ask you to turn, if you would --

MR. SHARTSIS: One moment while we --

MR. CAMP: I'll just tell you the page. Page 11, line 12 to 18.

A. Mm-hmm. Page 11. Now this is page 11 of the deposition or the page, physical page 11?

Q. I'm sorry. Yeah, it's a minuscript so it's the little numbers in the upper right corner, so it's actually page 4 of the document.

A. Right in the beginning there. Okay.

Q. Sir, were you asked the following questions and did you give the following answers:

"Q. Were you retained to render an opinion on whether or not the bottles, as you observed them, were authentic?"

"A. That would be a yes."

Were you asked that question and did you give that answer?

A. Yeah, I gave that answer.

Q. And were you then asked:

"Was there anything else you were asked to render an opinion on?"

"A. Above and beyond that, no."

Was that your testimony then?

A. That was my testimony.

Q. Was that testimony truthful?

A. Yes, it was.

Q. Now as to all of the 15 -- I'm sorry -- 30 auctions for Acker Merrall where you've authenticated the wine, you rendered opinions regarding the wines offered -- authenticity opinion regarding the wines offered for sale, right?

A. Yes.

Q. Now you've had an opportunity to examine carefully the 24 bottles in this case, true?

A. That is correct.

Q. You spent two days in Mr. Koch's cellar looking at bottles

at issue in this litigation?

A. It actually wasn't Mr. Koch's cellar. It was in his boathouse, I believe, in Osterville, marina in Cape Cod.

Q. Right. And you had two days in there to examine the bottles?

A. Yes, I did.

Q. And after all that, given your background, how many of these bottles here have you concluded are authentic?

A. None of them.

Q. And how many, based on your experience, have you concluded could be properly offered for sale at an auction?

A. None of them.

Q. Your conclusions that none of these could be offered for sale was based on a physical examination of these bottles, right?

A. That is correct.

Q. Not taste testing them.

A. Of course not.

Q. You were retained as an expert in this case how long ago?

A. I believe in April of 2010, first, when I was asked to come to New York.

Q. So we're now up to almost three years. During that time you've never once made a request to taste test any of these bottles, have you?

A. I disagree with you.

Q. Who did you ask?

A. I believe when we were in Osterville, I asked Mr. -- what's his name -- Adam, one of your colleagues, and first I think I joked about it, then I was like: Give me a corkscrew, let's go, are we allowed to?

Q. You were just going to start pulling corks out and swigging the wine in the boathouse?

A. Just taste testing the wines.

Q. Seems like a good idea.

Sir, you also prepared an expert -- I'm sorry.

Other than in the boathouse talking to an associate from one of the law firms, did you ever make a request that a panel of experts be assembled to taste test these wines formally?

A. No, but if asked about it, I would have rendered that opinion.

Q. Yeah. Mr. Greenberg's counsel never asked you for that opinion.

A. Well, she did just now.

Q. Right. Just now.

A. Right.

Q. Sir, you also prepared an expert report, a written report in this case, right?

A. I did.

Q. How long did you spend preparing that report?

A. It took awhile. It was a pretty comprehensive report. Just off the top of my head I worked on it for some days, carefully typing out all the notes I've taken on the bottles and I think total was like almost 90 pages, so it must have taken a few days to do that, or a couple of days, I guess.

Q. Okay. So let me ask you a couple of questions.

(Continued on next page)

Q. Let me ask you a couple of questions about your notes.

MR. CAMP: If I could approach to see if it is up here.

A. Hang on. Are you asking me about my report?

Q. I will in just a moment.

A. Do you have a copy?

Q. Yes. I am going to hand it to you first. I am going to ask you about a particular bottle. I want you to look at Trial Exhibit 215, the 1928 Chateau Petrus, which is still up here.

A. Yes, I'm looking at it.

Q. Just to refresh, this was the one that you said doesn't indicate that it was bottled at the chateau. Do I have that right?

A. You have that right.

Q. I'm going to show you, if I could, a copy of your expert report, Trial Exhibit 106.

A. I would need my report before answering questions about my report.

Q. Yes.

MR. CAMP: Do we have it on the digital? It's Exhibit 106. If we could bring up page 75. I'm sorry. It's Bates page 76.

Q. Here is a copy. I hand you up a paper copy.

A. It's hard to believe it's so fuzzy in this day and age.

Q. The Bates numbers are the ones at the bottom. If you turn

to Bates page 76. Are you there?

A. 76, OK. Petrus 1928, yes.

Q. Does that inventory number match Trial Exhibit 215 in front of you?

A. Yes, it does.

Q. If you look down to your description of the capsule.

A. Yes.

Q. Do you see that it says in the middle there, "But appearing pink on the red metallic background, 'mis en bouteille au chateau,' which is obviously inconsistent with the bottle"?

A. Yes.

Q. That means, by the way, bottled at the chateau, bottled at the producer, right?

A. That's right.

Q. So, this bottle actually does represent that it was bottled at the chateau, at least on the capsule, true?

A. Just one second. I'm just reviewing something here. OK. Ask the question again, please.

Q. The bottle does indicate on the capsule that it was -- rather, the capsule indicates that it was bottled at the chateau?

A. Yes. But I was talking about the label before.

Q. Right. In fact, that issue, that the capsule says "mis en bouteille au chateau" and the label doesn't, was one that you flagged?

A. Absolutely.

Q. Do you still have your report in front of you.

A. Yes, I'm looking at it.

Q. Is the '49 Lafleur still up there?

A. There is no '49 Lafleur. A '45 Lafite and a '21 Petrus.

Q. Rather than moving the bottles, do you recall testifying on direct examination about bottles that were bottled in the 1945 vintage, which you described as being sort of a miracle year because it was at the end of World War II?

A. Absolutely.

Q. Your conclusion was it's not unusual that the bottle is the wrong year because glass was sort of hard to come by at the days at the end of World War II, right?

A. That's factual.

Q. Right. Would you turn to Bates page 45 of your report.

A. This is about a bottle that we don't have here in front of us.

Q. Yes. It's over here. I can bring it to you. I'm just going to ask you about one of your conclusions in here. Do you see that it's a Chateau Lafleur 1949 magnum?

A. Yes.

Q. The one I'm asking you about?

A. Yes.

Q. If you look at the bottom of the first paragraph about the bottle, do you see, "This my opinion, the bottle is older than

the vintage states, but this would be commonplace, that in 1945, right after World War II, when glass was very scarce, to have used or even reused bottles from, say, the 1930s." Do you see that?

A. Yes, that's consistent with what I said earlier.

Q. A 1945 magnum would have been bottled when, sir, 1951?

A. That's right.

Q. This Chateau Lafleur magnum was bottled purportedly six years after the end of World War II, right?

A. OK.

Q. It's your conclusion that glass was still scarce, bottles being pulled out of the basement six years later?

A. Oh, yes, absolutely. In 1949 or in 1951, after World War II, magnum bottles were not hanging on trees.

Q. I'm going to show you the corresponding bottle that is 208. Do you have room for one more?

A. Sure.

Q. Would you check the inventory number for me real quick.

A. What's the Bates number on this report?

Q. It's the one we were just looking at, Bates page 45.

A. Sure. Yes?

Q. If you look to the lower half of your description of the front label, about five lines from the bottom, do you see, "Underneath the main label is a shipper's label from Bordeaux wherein framed black on white it states Audinet & and Buhan.

That's the back label. Hang on a second. This is not the right bottle.

MS. SALISBURY: What page are you on.

A. I'm confused here. If I have an ordinary blank underneath that this one doesn't have that.

Q. You are description for this inventory number is not correct then?

A. It appears it's a description of a different bottle.

Q. In fact, it also says, "Back label is nonexistent and only bar code sticker with a numerical reference to the Koch inventory number is present." If you look at the back, is there a visible back label?

A. Yes, that's right, inconsistent with this bottle's look at this point.

Q. Let me ask you a few other questions about your report, sir.

A. Yes.

Q. You say in it that you were retained by the defense as an expert in Koch v. Acker Merrall & Condit, right? Bates page 6.

A. OK, yes.

Q. You go on and say, "In that case I inspected a series of wines and gave expert opinions and deposition testimony." Do you see that?

A. Yes.

Q. That's not true, is it?

A. That is not true. But I did make that mention to Mr. Greenberg's lawyers following this report having been produced.

Q. You never testified as an expert in that case, right?

A. I did not.

Q. If you look at the next entry, do you see, "I was retained by the plaintiff as an expert in Southern Wine and Spirits Co. of Nevada," and it goes on?

A. Yes.

Q. Then you say, "I gave expert deposition testimony relating to my expert opinions in that case"?

A. That's correct.

Q. In fact, sir, you were subpoenaed as a third party in that case and you moved to quash the subpoena in that case, right?

A. No, I did not move to quash the entire subpoena. The subpoena that got quashed before the discovery commissioner by my attorneys was the one that sought to produce a whole number of private information that wasn't going to be given in this case.

Q. You were subpoenaed for testimony because you had been involved with the transactions at issue, right?

A. Well, I was a consultant to Southern Wine and Spirits, so essentially a third party in that case. Since many of the transactions that took place with these Bordeaux chateaus -- these are, of course, modern wines. That was what that whole matter was all about.

Q. In fact, you never prepared an expert report or gave expert testimony in that case?

A. Well, I gave deposition testimony regarding my expertise in that case.

Q. Right. But you did not provide an expert report that was certified?

A. No, I did not. But it never went to trial.

Q. You also represent in your report that you taught for five semesters at the University of Nevada Las Vegas as an adjunct professor, is that right?

A. Where do you see that?

Q. First of all, do you recall saying that?

A. Yes, I think so. But we're talking about Community College of Nevada, southern Nevada.

Q. I'm sorry. It's the second page of your report.

A. OK.

Q. Last full paragraph, last sentence, "I also taught the full-credit graduate wine course at the Community College of Las Vegas as well as at the University of Nevada Las Vegas as an adjunct professor for five semesters." Do you see that?

A. I just have to figure out where we are.

Q. Bates page 2.

A. Bates page 2.

Q. Also on your screen.

A. Right, exactly.

Q. In fact, you were never an adjunct professor at the University of Nevada Las Vegas, right?

A. I was teaching the wine course at the Community College of Las Vegas, and I simultaneously taught classes at UNLV.

Q. If the UNLV human resources department indicated that you had never worked there as an adjunct professor, that you had only worked at this other college, that would be untrue?

A. The adjunct professor actually relates to the community college. The UNLV was classes in wine that I taught there.

Q. It was two semesters, not five, that you were at community college?

A. At community college I was for five semesters, and UNLV I was for two semesters.

Q. I see.

MR. CAMP: Your Honor, I'm about to move to another line.

THE COURT: I have another matter at 4:45. Why don't we break for the day. Ladies and gentlemen, we are going to break today. I think we are going to finish all the evidence in this case tomorrow. You have been very patient, and I'm grateful. I'm going to tell you once again please don't discuss the case. Please don't do any research on the case or any blogging or social networking on the case. Please keep an open mind. You have one more day during which you will hear evidence in the case. Have a good evening. We will see you at

9:30 tomorrow morning.

(Jury not present)

THE COURT: You may step down, sir.

(Witness not present)

THE COURT: I have to handle this other matter, which should only take about ten minutes. Do the parties still want to do charge conference, at least start on it this evening?

MR. KABA: It's up to you, your Honor. We're fine starting on it tonight.

THE COURT: Why don't we start on it. I'll be back in about 15, 20 minutes.

(Recess)

THE COURT: You all received the draft jury instructions, and I have a couple of letters from defendant. One of them requests a charge on recklessness and one of them requests a charge on puffery.

MR. CIALONE: Your Honor, with regard to the letter on recklessness, you're not going to sympathize with us, but I'm losing track of all the letters. I actually defined it the way recklessness has been defined in the charge. We could dispense with that. We would like the puffery instruction.

THE COURT: I was thinking of adding something on recklessness. What page is that on, do you know?

MR. CIALONE: I believe it is on page 7.

MR. KABA: 7 to 8.

THE COURT: 17?

MR. CIALONE: 7 letter c, or is there a different one? Knowledge and recklessness, element 3.

MR. KABA: Your Honor, from our perspective, we are also fine with the instruction on that element.

THE COURT: I forgot what I put in. You're OK with the charge as it is?

MR. CIALONE: Yes. I'm fine with it. Your Honor, if it's OK with counsel and the Court, I propose we go through it page by page.

THE COURT: Sure.

MR. KABA: That's perfectly fine with us.

THE COURT: Let's start with page 1. Are you OK with the contents?

MR. CIALONE: We're good.

THE COURT: Page 1. Do you have anything on the general instructions, burden of proof, etc.?

MR. CIALONE: I have nothing until we get to page 5, your Honor.

MR. KABA: I have something on page 4.

THE COURT: Actually, I have something on page 3, so I beat you both. I put in "matters already decided" which I have used in the past, but I'm not sure that I have really decided anything other than admissibility issues and a few clarifying limiting instructions.

MR. CIALONE: We believe that the nature of the as-is clause and the binding nature is something that has been decided by the Court as early as however many years ago when Judge Jones decided it. It's a written contract, unambiguous. We do have some suggestions and some requests when we get to that specific instruction. I think that is the only thing that is decided other than, obviously, instructions during the trial.

THE COURT: It doesn't really hurt to have it.

MR. KABA: We believe your Honor also decided something else that we will get to when we talk about the GBL. We think your Honor has decided the entire case already.

THE COURT: OK, page 4.

MR. KABA: Your Honor, in the summary, that paragraph, the last paragraph on the page, "Mr. Koch claims that Mr. Greenberg made misrepresentations relating to the authenticity of the 24 bottles of wine at issue in this case and that he knew those representations were false," we would add "or he made those representations recklessly," since that is part of our case. Or "with reckless disregard as to its truth," something along those lines.

THE COURT: Or "made them" --

MR. KABA: "With reckless disregard as to their truth." It's just consistent with the scienter articulation that you have later.

MR. CIALONE: It is really not, your Honor. Reckless-ness is knowledge and recklessness. Intent is a separate element. It's intent to induce. Different elements. They are set forth differently, one on page 7 and one on page 8.

MR. KABA: To be clear to the Court, I'm talking about the summary element, your Honor. The way you currently articulated it is "and that he knew those representations were false." All I'm proposing is that the fraud claim is either that he knew the representations were false, as your Honor articulates it in element by element, or he made the representation with reckless disregard as to its truth.

MR. CIALONE: I'm sorry. "Knew those representations were false"?

THE COURT: "Or made them with reckless" --

MR. CIALONE: "Or made them recklessly."

MR. KABA: "Or made the representation with reckless disregard as to its truth."

MR. CIALONE: Your Honor, I do have one thing I wanted to add in the paragraph above that, when you are ready.

THE COURT: Yes.

MR. CIALONE: Number 1 should say "made a material misrepresentation of fact."

MR. KABA: I don't have an objection to it. I think it probably fits in number 2, though, because that is how you have laid it out in the instructions. It would be "made a

representation of fact that the representation was false and material."

MR. CIALONE: That's right. "The representation was false and material." We are agreeing.

THE COURT: Is that all on page 4?

MR. CIALONE: Yes, your Honor, all from us.

MR. KABA: That's all we have, your Honor, on page 4.

THE COURT: Page 5.

MR. CIALONE: On page 5, your Honor, where you go through the first, second, third, fourth, etc., you refer to the 24 bottles of wine in the fourth and fifth. We would ask that that be on the first as well. "First, that Mr. Greenberg made a representation of fact to Mr. Koch about the 24 bottles of wine."

MR. KABA: Your Honor, that's fine. We would add to that, "First, that Mr. Greenberg made a representation of fact to Mr. Koch, directly or indirectly," to be consistent with the rest of the instructions where your Honor does talk about it could be direct or indirect.

THE COURT: Mr. Cialone you added "regarding the 24"?

MR. CIALONE: Yes, "to Mr. Koch about the 24 bottles of wine."

THE COURT: OK. You said, "made a representation of fact, directly or indirectly"?

MR. KABA: Correct.

MR. CIALONE: That's fine.

THE COURT: That's another question I had. I don't know that we need it, but I thought about the issue of agency. Maybe "directly or indirectly" is all you need. We don't have an instruction about an agent is responsible for whatever, the standard instruction acts of the principal.

MR. CIALONE: I don't think agency was proposed by either side, and I think because of the "directly or indirectly," it covers it.

THE COURT: OK.

MR. CIALONE: Then, your Honor, on the next line, where it says, "Second, that the representation was false," we would ask that you add "and that it was material."

THE COURT: Is that OK?

MR. KABA: I missed that. Going back briefly to that first one, we would say "to some or all of the 24 bottles at issue." "First, that Mr. Greenberg made a representation of fact to Mr. Koch, directly or indirectly, as to some or all of the 24 bottles at issue."

As to the second point, "false and that it was material" is fine. My "some or all" comment would be consistent for these summaries.

THE COURT: That sort of goes to a broader question I'm going to raise about the verdict form, I know defendant's position is as to each bottle. One of the things I've been

toying with throughout this trial is how do you --

One way to look at it is take, for example, fraud. The jury will find fraud or not in general, and then the issue of 1 versus 10 versus 24 bottles is an issue that goes to damages. Another way to look at it is essentially these were different bottles, there was testimony about the different bottles and there are different conclusions you could draw about the level of knowledge as to this one and that one, the cork, I care about the vertical cork or I don't, etc.

I have come closer to the view that maybe the verdict form should put out the 24 bottles for each count so they can check which ones. I actually don't know who that helps. I know defendants have asked for it.

MR. CIALONE: We agree that it is the only thing that makes sense, your Honor. I'll give you an example. One of the things we heard today was the yellow label on the Chateau Lafite should have said "photocopied label" or "facsimile label" in the catalog.

Let's assume that's true and let's assume that that is something that Mr. Greenberg can be blamed for and not Zachys. What would Mr. Koch have done? We already know what he would have done, because there was another bottle in the catalog that said "facsimile label." He didn't walk away from the auction, he just didn't buy that bottle. He bought 2600 others.

THE COURT: It depends in terms of the statements they

might or might not focus on. There are some that are kind of catch-all statements, one of which is the subject of the puffery instruction you want, but other things in the introduction to the catalog, and then there are other things that are more specific descriptions -- this is a 1921 Petrus -- that are more bottle by bottle. So there's both. It's a hybrid.

MR. KABA: Your Honor, we have a fraud charge, we have a 349 claim, we have a 350 claim. Those are our claims. If the jurors decide that for 20 of the 24 they think we are there, then they will give us damages on the 20 of the 24.

We are really concerned about sending the jury back with a verdict form where page after page after page for every single bottle they have to go through the same multipart analysis. I think of it as a stock fraud case. It is not per share when it was bought, when it was sold, every single time was there material misrepresentation, was there reliance, etc. That's the claim.

The damages might depend, based on what objects the jury considers are the elements have been made up and how Mr. Koch has been damaged by the fraud. But our claims are actually the three claims. That's how it has been laid out in the complaint. They are general, not specific for every single bottle we claim fraud 24 times.

MR. CIALONE: That is a great analogy for us, the

stock purchase case. When you buy stock, you don't say I'll take one share of AT&T, I'll take one more share of AT&T. You don't do that a thousand times. You buy a thousand shares. UCC section 332(a) says that in an auction each lot is a different sale. Of course, it is. Mr. Orcutt bid one at a time. He didn't bid on 2700 bottles. He bid one at a time.

My concern is the jury is going to be led into believing, you know, Mr. Greenberg really should have told them about that yellow label, but that whole Lafleur cork thing, he clearly believed that Zachys was right and Kapon was wrong, so he didn't have to tell them that. But you know he did something wrong by not telling them about the yellow bottle, therefore Koch gets damages for all of it.

It needs to be act by act, just as in the stock case. If the broker told me something about AT&T that wasn't true, I don't get to sue him because my IBM stock went down in value.

MR. KABA: There are a couple of things wrong with that. First of all, we are not under the UCC, we are not suing for rescission of the sale. Second of all, every bottle was not sold in individual lots, so even if it did apply, it wouldn't apply to every single bottle.

MR. CIALONE: Every bottle was an individual lot. There are some instances where there are 3-bottle lots. But there is only one bottle. Again, it is lot by lot, so they can say every lot if they want.

MR. KABA: If you would let me finish. Moreover, we aren't saying that we bought from the Zachys auction, we bought from the Acker auctions, we bought from another Zachys auction, now we are going to throw them all in the mix and you guys go figure it out with one generalized verdict form.

Sending them back for every single bottle -- false statement, material omission, reliance, intent to induce -- a lot of this stuff is talking about the collection. It's talking about the catalog, it's talking about this one transaction that Mr. Greenberg sold all of these wines through. The representations are the same. The intent to induce will be the same. The reliance will be the same.

I do agree perhaps when we get to damages, there will be a question on the bottles.

THE COURT: Right. When you get to damages, they are going to have to do something bottle by bottle at that point anyway.

MR. KABA: Right. But having them go back with a book of forms where it's not appropriate or necessary, these are representations and the fraud here was a general fraud. The representations about the authenticity of the wines were representations about the authenticity of all the wines being sold.

MR. CIALONE: They made representations about each of the wines being sold.

THE COURT: There are both. There are some general representations and then there are some -- the jury could go either way in terms of finding a specific statement or focusing on the general statement. I'm trying to think of whether there is some neutral way to cover both options without making it confusing.

MR. KABA: I think on damages your Honor can certainly list all 24 bottles. If they believe an element hasn't been satisfied, they can put zero in that category.

MR. CIALONE: Your Honor, for example -- and I'm hoping I'm only arguing against one lawyer at a time here, otherwise it's going to be a complete mess. For example, they can argue the statement in the catalog about Alexander the Great, which they are saying is not puffery.

Let's assume they can prove that, the statement about Alexander the Great. That went to the entire collection. That went to each and every bottle. So, you should find that the misrepresentation about each and every bottle, that element has been satisfied because Alexander the Great. They can make that argument. They can make that argument even if you give them a bottle-by-bottle verdict form.

But what you are going to do is deprive us of the ability to make a contrary argument if you give just this general was-there-a-misrepresentation/what-are-the-damages kind of verdict form they are asking for. We ought to be able to go

through bottle by bottle ourselves. That's my real concern here. The representation was a bottle-by-bottle representation.

And it is not just about authenticity. They have made that very clear in their presentation. It's not Mr. Greenberg should have told Zachys that John Kapon said the yellow label bottle was not authentic. Mr. Kapon didn't say any such thing. He just said, I would catalog this as having a photocopied label. But all 17,000 bottles had photocopied labels? Of course not.

So it really needs to be a bottle-by-bottle analysis, particularly in a peculiar knowledge case, particularly in a peculiar knowledge case. If there was a photograph of a bottle in the catalog that Mr. Koch looked at and knew that the bottle was counterfeit by looking at it, just as he did with the Christy's auction where he went and bought that bottle, how could that be justifiable reliance for purposes of buying that bottle? It has to be because it's a peculiar knowledge case in particular. Your leaning is right, we need a bottle-by-bottle.

THE COURT: Mr. Wessel, did you want to add something?

MR. WESSEL: We kind of got stalled on page 5, and we may be able to go through the instructions. Maybe we could reserve the verdict form until tomorrow.

THE COURT: That's a fair point.

MR. CIALONE: I take back what I said about Wessel

standing up. I think that is an excellent suggestion.

Your Honor, I do have a couple of further requests on page 5.

MR. KABA: As do I. Please go first.

MR. CIALONE: The last full paragraph that starts with "The first question," on the fourth line it says, "You must next decide whether a representation was true or false." We would add "and whether it was material." Then again two lines down, "If the representation was false," we would add "and material."

MR. KABA: Your Honor, earlier in that discussion, again back to the elements 1 through 6, you have "Fourth, that Mr. Greenberg made the representation to induce Mr. Koch as a buyer." We would add "as a buyer" and we would add "in whole or in part," "made the representation in whole or in part," "made the representation to Mr. Koch to purchase some or all of the 24 bottles."

MR. CIALONE: I would say I'm not sure what "as a buyer" adds to "purchase," but I guess I don't really care. I don't understand "in whole or in part." He has to have intent, period.

MR. KABA: It's not the intent. It's the inducement element of it that "in whole or in part" covers. The "as a buyer" element actually comes out of the New York pattern jury instructions, where it says "induce plaintiff or a class of

persons." That includes plaintiff.

MR. CIALONE: I don't have a problem with that. I think the "in whole or in part" is improper here. I think "in whole or in part" goes to justifiable reliance. Whether something is a substantial factor doesn't go to intent.

MR. KABA: The clarification, your Honor, is that the sole object of the representations didn't need to be to induce plaintiff. It's he made the representations in whole or in part to induce plaintiff. He may have made the representations for multiple reasons, one of which is to induce plaintiff.

MR. CIALONE: He made it with the intent to induce plaintiff. It doesn't mean it was the only intent he had that day.

MR. KABA: That is what I am seeking to clarify.

THE COURT: Does the pattern instruction --

MR. CIALONE: I don't think the pattern instructions say "in whole or in part."

MR. KABA: Your Honor, the pattern instruction actually gives even more language on intent, which we will talk about when we get there.

MR. CIALONE: The summary pattern instruction GI 320 is exactly this, made the representation to induce AB to do whatever. It doesn't say "in whole or in part."

THE COURT: I'll take that under advisement.

MR. KABA: Thank you, your Honor.

THE COURT: Anything else on 5?

MR. KABA: Not from us, your Honor.

MR. CIALONE: No, your Honor.

THE COURT: 6?

MR. KABA: Your Honor, the second full paragraph on the page, "Whether the person to whom a representation is made is justified in relying upon it," and then there is a discussion about investigation, justifiable reliance, we think this is getting outsized play in your summary of the fraud elements. You do go on in some detail to explain justifiable reliance as you get to the element.

We would suggest shortening this paragraph, including deleting this "Whether a person is justified in relying on a representation also depends on whether a reasonable person would buy rare wine without independent investigation." It is something, as I mentioned, you do describe at length, and you don't get into this kind of discussion with any of the other elements up front in just your summary of the elements.

MR. CIALONE: Justifiable reliance and lack of independent investigation is a pretty critical part of our defense here, your Honor. On a claim that brings with it the possibility of punitive damages, it is very important.

THE COURT: We could move some of that down to the specific element 5 discussion.

MR. KABA: That's fine, your Honor. It just seems

like that much conversation of it up front where nothing else is getting treated that way, it seems out of place.

MR. CIALONE: The first sentence, treating it that way, "is one that a reasonable person would believe and consider important in deciding whether to purchase rare wine," here we have the overarching fact of a binding contract with an as-is provision and express disclaimer which has already been ruled on by the Court. We are adding one sentence that foreshadows that issue and addresses that issue.

Justifiable reliance is not simply a matter that Mr. Koch would believe, that a buyer would believe and consider important. It is also a matter of what a reasonable buyer would use for investigation. They are both part of the concept. If you take one out, it really gives unfair weight to the other.

MR. KABA: Your Honor, I'm not suggesting that you remove it from the instructions. I'm suggesting that when you do the summary, you treat this element like you have treated all the other elements and note that it is in summary form and you will discuss it further later. We keep talking about the binding contract, the binding contract. I think we can put that aside at least for purposes of our discussion right now.

MR. CIALONE: Your Honor, if you are going to shorten that instruction, which I think you should not, then I would ask that you take out the first two sentences of that

paragraph, "Whether the person to whom a representation is made is justified in relying upon it generally depends," etc., that sentence. Take them both out or don't take either out. If the concern is shortening it, that will shorten it. If the concern is making it unfair, then what I am suggesting will not handle that.

THE COURT: What if we took the first two sentences and moved them down to the more detailed justifiable reliance section, just before the as-is part?

(Continued on next page)

MR. KABA: That's fine, your Honor, and we'll have some comments on changing those sentences to make them clearer as well, but it's fine if you want to move those.

THE COURT: I'd be disappointed if you didn't have comments on those sentences.

MR. KABA: We never would want to disappoint.

THE COURT: Okay. Anything else on 6?

MR. CIALONE: Yeah, I've got a typo, your Honor. Sorry. Under "a," the second line, "make" should be "made."

MR. KABA: We object, your Honor.

THE COURT: I don't know if it's "made." Isn't that the subjunctive?

MR. CIALONE: You know, your Honor, I'm a lousy proofreader. I'm going to have to defer to the people who actually caught that one.

THE COURT: "The first requirement is that the defendant make." Well, maybe that doesn't make sense. I think you're right.

MR. CIALONE: I don't care.

THE COURT: No, I think you're probably right. It's "made." We'll make it "made." Okay.

All right. Anything else on 6, 7?

MR. CIALONE: We would like to see more detail about puffery, at the end of the paragraph.

MR. KABA: On what page?

MR. CIALONE: On page 7. There's a one-and-a-half-line paragraph. That's what we would like to be something about puffery. What we'd propose is, "You are instructed that the general assertions or expressions of a seller in commendation of the property being offered for sale, commonly called 'dealer's talk,' 'trade talk,' or 'puffing,' do not constitute any grounds for an action of deceit or fraud. Puffing are generalized or exaggerated statements that a reasonable consumer would not interpret as a factual claim upon which he or she could rely."

(Reporter indicated she could not hear)

THE COURT: Do people in the real world know what the word "puffery" is?

MR. CIALONE: I doubt it, your Honor.

THE COURT: I think it's a lawyer thing, right?

MR. CIALONE: It really is a lawyer thing, and I don't care if you change that word to something else.

THE COURT: I mean, that is the word.

MR. KABA: I can respond as well.

MR. CIALONE: Trade talk, sales talk, dealer talk.

THE COURT: Well, there's one we found that is in -- it's not the New York Pattern but it's another form instruction. It said, "You are instructed that general assertions or expressions of a seller in commendation of the property, or commending the property being offered for sale,

commonly called dealer's talk, trade talk, or puffing, do not constitute grounds for an action of deceit or fraud. Such statements are generally regarded in law as mere expressions of opinion on which purchasers cannot safely rely." Is that different from yours?

MR. CIALONE: Not in substance, no. It's fine.

MR. KABA: Your Honor --

THE COURT: Do you want to address that?

MR. KABA: -- can I respond to that? First of all, the instruction has already said, needs to be a representation of fact, not -- not a mere opinion or prediction of something that will happen in the future. To -- to add a lengthy discussion of puffery, I think we'd have to look at what the law in New York is, and we submitted this to the court. There is -- there is law in New York that a misrepresentation, even those concerning things that are -- that something is in good repair and operating condition, are considered descriptions and affirmations and they are actionable under New York law for fraud. The case is *Black v. Chittenden*. It's a New York Court of Appeals case. There are many other cases that talk about even expressions of opinion, where not sincerely held, are actionable.

THE COURT: Well, that's an exception to the general rule about opinions, I think.

MR. KABA: Yes. But then, your Honor, if there's

going to be a discussion about how certain opinions are not actionable, cannot form a basis for a fraud and deceit claim, then we think we should be able to also say, well, if it's an expression of opinion that's not sincerely held, that can be actionable. I don't think the jury -- the jury should fairly get "opinions are not actionable but I'm not going to tell you what the exceptions are to that." And the cases we've cited, your Honor, are listed in our -- in our letter to you.

THE COURT: Yeah. We'll take a closer look at that. Did you want to add anything?

MR. CIALONE: Yeah, I would just say, there's a world of difference between, "this is in good repair and operating condition" and "Alexander the Great."

THE COURT: Yeah, I have to say, I'm a little *dubitante* about "Alexander the Great," and even "Best of the Best." I mean, I don't know. It's pretty established, I think, in the law that saying "this is the greatest cereal" is not actionable. It's solid puffery.

MR. KABA: But if you have reason to believe that it's actually a horrible cereal, then --

THE COURT: If you have reason to believe what?

MR. KABA: If you have reason to believe that it's actually a horrible cereal and you're making a statement pretending to be a sincerely held belief, that is actionable under New York law. So is -- when you make statements that

falsely represent someone -- what someone believes about something, those are actionable. So when you say, in this case, as we have, "Best of the Best," "Best of the Best," and then you told your staff to send the crappiest wine, or you've told someone else, "I've sold all my garbage," there is a real question about whether "Best of the Best" was a sincerely held belief.

THE COURT: Although the other point about -- now we're getting far afield, but the other point about that "Best of the Best" is a reference to the 17,000 bottles at auction. It's not --

MR. CIALONE: Yes, and it's an opinion stated by Mr. Zacharia. It's his opinion.

THE COURT: That's another issue.

MR. KABA: Well, that's the argument and the --

THE COURT: Yeah, this is all fair argument, and I shouldn't have said the thing I said about "Best of the Best." But I guess my point is, I do think there's a basis for me saying something about puffery in the evidence. And your argument is, if you say that, you should put in the thing about opinions not genuinely --

MR. KABA: Sincerely held.

THE COURT: Sincerely held. So we'll take a look at that.

Anything else on 7?

MR. CIALONE: Not for me.

MR. KABA: No, your Honor.

MR. CIALONE: I do have something on 8. In the Justifiable Reliance element, you say, on the second line, in the second paragraph, "contained certain disclaimers." And we would just request that we change it to "contained disclaimers of authenticity, provenance, and merchantability." Those are the ones that are relevant here and not --

THE COURT: But they don't agree that authenticity is disclaimed, right?

MR. KABA: That's correct, and your Honor, the discussion, so far as the case has been presented to the jury -- and we can change it elsewhere, but all we're referring to is made misrepresentations as to authenticity. The evidence is actually he made misrepresentations as to authenticity, merchantability, and provenance. And so right now you've just sort of done the general authenticity issue, not suitability for sale, for example, which there's evidence of, and not -- and not provenance. So I don't think the court should now be directing the jury about disclaimed authenticity and merchantability and provenance. I'm okay if they want to say merchantability and provenance in this part of the discussion.

THE COURT: Are you okay with what Mr. Cialone read?

MR. KABA: Not all of it, but if he wants to add the merchantability and provenance, I'm okay with that, but then I

think we need to add that to the other discussion about the misrepresentation. Then it should say made misrepresentations about authenticity, merchantability, and provenance. Or provenance, I should say.

MR. CIALONE: Your Honor, we covered this I don't know how long ago it was, three weeks ago, in a pretrial conference, where you said that, "Judge Jones' original instruction expressed disclaimer that covers the representations at issue in the case. I'm inclined to agree with that decision as a reasonable reading of the 'as is' disclaimer herein and that goes to conditions of sale and the entire catalog, authenticity," and the first clause of that provision covered the catalogs generally. We've covered this already. It's been covered. And now we're going back to it. And, you know, because of that, you know, it says, "The authenticity of the property listed in the catalog is guaranteed only as stated herein," and "herein" means only in the conditions of sale by multiple orders of the court, and otherwise all property is sold as is, without any representations or warranties as to merchantability, fitness, description, size, quality, condition, provenance, it goes on and on, but authenticity, provenance, and merchantability are all in there. The court has repeatedly found them to be binding here, and they just want to muddy it up.

MR. KABA: Your Honor, look, we can go back to the

catalog. We don't even have evidence before this jury that Mr. Koch or any agent of Mr. Koch signed off on the conditions of sale. They brought --

MR. CIALONE: They didn't need to. They bought from the auction.

MR. KABA: We can be much more specific here.

MR. CIALONE: I apologize.

MR. KABA: They -- they --

MR. CIALONE: I apologize, sorry.

MR. KABA: They introduced other contracts, other -- other -- from other auctions, the LA auction. They didn't even put anything in front of this jury about the October 2005 auction.

THE COURT: About the what?

MR. KABA: About the October 2005 auction at issue. There is not a single shred of paper showing Mr. Orcutt's signature, as they have for other auctions, that he agrees to the conditions of sale bidding on behalf of Mr. Koch. We -- the language -- Mr. Koch has testified, the language in that condition of sale, as he understood it, is that the authenticity of the property is guaranteed. The "as is" disclaimer, there are other auction catalogs, your Honor, including the Acker Merrall auction catalog, that specifically disclaim authenticity after the "as is" disclaimer. This one makes no reference to authenticity. Says merchantability, says

provenance, says rarity. It says things like that.

THE COURT: It says description.

MR. CIALONE: It says authenticity.

MR. KABA: Not in the "as is" disclaimer.

THE COURT: Believe me, I've actually stared at this language and thought about it, and I think Judge Jones did decide it as Mr. Cialone says, and I thought about it in my -- I ultimately said, I think -- I don't know why I had to decide this, but -- was it a motion *in limine* or something? I don't know. But whatever. I said Judge Jones decided it as you've said, but in any event, even if she hadn't, I think the specific governs the general, and even if the first clause meant to guarantee authenticity, it's basically undermined by all of the things as to which there's a disclaimer, including description as well as -- but description, you know, you describe something as a 1921 Chateau Lafite, how is that not a description as collapses to authenticity.

MR. KABA: Well, your Honor, it's a -- I think the reference that's being sought is a specific disclaimer as to authenticity, and there isn't one. That's our -- our position is there isn't one. Even in light of what you've said, to tell the jury there was a specific disclaimer as to authenticity as it goes to what the disclaimer actually said.

THE COURT: Well, I'm inclined to just refer to disclaimers, as set forth in the catalog. They'll have it.

MR. CIALONE: Well, no, the problem is, your Honor, they'll have it and they'll make their own interpretation, and it's a written contract that the court could interpret and already has.

Let me add -- let me respond to this no evidence point. Mr. Zacharia clearly testified that you need to acknowledge the conditions of sale to get an auction catalog, but beyond that, it doesn't matter. It's binding on anyone who bids at the auction. When they brought their lawsuit, Zachys moved to dismiss and we moved to dismiss. There was no piece of paper with Mr. Orcutt's signature attached to the complaint. It just referenced a catalog. And the court found that the auction catalog contains the auction contract.

THE COURT: Right. Clearly the only way out of the "as is" world is the peculiar knowledge exception.

MR. CIALONE: Sure, but what we don't want is, for example, Mr. Hueston raised an objection to a question today saying, it assumes that there's an "as is" contract. Wait a minute. That's been decided.

THE COURT: Well, that was just on the word "contract."

MR. CIALONE: But there is a contract. That's my point, your Honor. And these are very intelligent lawyers and very convincing lawyers, and they're trying to tell you there's no contract and no disclaimer of authenticity, and they've been

arguing this point for six years. What do you think they're going to do to that jury if the court doesn't confirm what the contract and the disclaimer really are?

THE COURT: So tell me again what you want it to say.

MR. CIALONE: I want it to say -- I'll read you the rest of it. Instead of the word "certain," "disclaimers of authenticity, provenance, and merchantability," and I also want it to say that "as is" provision was part of the auction contract that is binding on the parties.

THE COURT: Hold on a second. Of authenticity. What was second?

MR. CIALONE: Provenance and merchantability. That "as is" provision was part of the auction contract that is binding on the parties.

And then the next sentence talks about how there's an exception, so we're fine, but there is an exception. We acknowledge that. And it's covered. But what I don't want is this notion that, well, you have a guarantee. You got a guarantee. That's -- there's no guarantee. There is no guarantee.

MR. KABA: Well, your Honor, again, the language you have right now, there is disclaimers. The jury can go back and read the disclaimers. And I'm sure defense counsel is going to tell them, go back, read the disclaimers, in fact, I'll read them to you. So that's the addition to the first sentence.

The second sentence is, there's a -- a contract that is binding on the parties. That gives exactly the wrong impression. We're not telling your Honor, don't put the "as is" disclaimer language in here. The point is, you can put the disclaimer language in here, but then you, as you do in your instruction, your Honor, then you say, and here's why, when it doesn't apply under New York law. This has never been a breach of contract action. Judge Jones has held that repeatedly. So to then tell the jury a binding -- a contract which is binding on the parties, the jury's going to think, oh --

THE COURT: But if the disclaimer has any effect, what is it if not contractual effect? I mean, it's a contract.

MR. KABA: But if your Honor's instructing them that there is a disclaimer in this case and ordinarily -- that's what your Honor says, ordinarily the disclaimer will preclude a finding of justifiable reliance, but then to add in where there's no contract cause of action, this is a contract binding on the parties, serves no purpose other than to get the jury to start thinking, is there a contract, is it binding, and ignoring what the instruction actually is, which is, you can get to justify -- you can get to justifiable reliance even with an "as is" disclaimer where there's peculiar knowledge, and obviously we bear the burden of that, of proving that peculiar knowledge.

MR. CIALONE: Your Honor, we had a GBL claim, a GBL

claim, and you're not going to tell the jury there's a contract that is part of the transaction? We have a GBL claim. And there --

MR. KABA: But that's not --

MR. CIALONE: It's all part of it, and the contract, the fact that there is a contract with the disclaimer, that's binding. They can argue anything. That affects what they have to prove on the fraud.

MR. KABA: Your Honor --

MR. CIALONE: Not a contract cause of action, but the fact that it's there affects it, and it's just -- the court needs to be definitive about it because they've been arguing on this for six years, despite losing it in the motion to dismiss and having it be stated what the disclaimer means and what the scope of "except as provided herein" means. They've been trying to -- they tried in front of Judge Jones, that didn't work, they tried it with you, you said, no, Judge Jones got it right, and now they're going to try to convince the jury to read the contract in their way, and that's not what -- you're not supposed to do with a written contract.

THE COURT: Okay.

MR. KABA: Your Honor, we are not saying you should not have a peculiar knowledge instruction. It's there. We accept it. We're not saying that you shouldn't even tell the jury there was a disclaimer. It is this idea that -- I'll just

note, we've prevailed on all of the motions to dismiss and the motions for summary judgment the defendant has brought, making these arguments about the contract, and Judge Jones has held this is not a contract case. The GBL claim under New York law is not a contract claim. But then to instruct the jury a binding contract, that shifts the focus away from the reliance and the peculiar knowledge just to -- oh, there's some binding contract, oh, our job is just to enforce the contract, and that's not -- this is a fraud case.

THE COURT: Okay. I'll take a look at that.

MR. KABA: And then, your Honor, if I may, if you're going to move the reliance, the justifiable reliance element down from page 6, you have here whether a person is justified in relying on a representation also depends on whether a reasonable person would buy rare wine without independent investigation. Do you see where I am?

THE COURT: Yes.

MR. KABA: Okay. We would propose -- we think there needs to be some explanation for it, for what the idea of the reasonable person is, which would be -- we would propose "in light of the circumstances presented" or "a reasonable person similarly situated" or --

THE COURT: How about "a reasonable person under the circumstances"?

MR. KABA: That's fine, your Honor. And then "would

buy rare wine," we think this idea of independent investigation is actually independent, should actually be independent verification of the representations.

MR. CIALONE: I disagree. I disagree. It's independent investigation. It's what we've asked for.

MR. KABA: It's not just investigation. It's actually could they verify independently the misrepresentation. That's the issue. It's not just the idea that Mr. Koch -- that no -- any kind of investigation would qualify. The investigation has to go to the misrepresentation, not just a general investigation.

MR. CIALONE: Actually, it doesn't, your Honor, it doesn't, because if Mr. Koch knew that all these wines were counterfeit, then would not knowing that Mr. Greenberg was not really the Alexander the Great of the collecting world have made any difference? It's -- the issue is investigation, because the investigation would lead him to discover that the wines were counterfeit, not verifications or representations, not -- Mr. Koch knew these 24 bottles were counterfeit, would it really matter to him whether or not Mr. Greenberg had bought some Burgundies from the domain? Of course not.

THE COURT: So, I'm sorry. So you're saying instead of --

MR. CIALONE: The language that you have, and then in addition, if you're going to talk about "reasonable person

under the circumstances" should also refer to the plaintiff's sophistication.

MR. KABA: The court was asking me what I was proposing.

MR. CIALONE: I'm sorry.

MR. KABA: That's okay. Our suggestion would be whether a reasonable person under the circumstances would buy wine without independently verifying the representations.

THE COURT: Is that okay with you, Mr. Cialone? You would take out --

MR. CIALONE: It really depends. It depends again on whether it's going to be specific to bottles or it's going to be, well, they never discovered them, was that he had said on two occasions, "Send the shitty bottles," it couldn't possibly be "Best of the Best." It really all comes back to that.

MR. KABA: I don't follow that.

THE COURT: But you would take out "rare"?

MR. KABA: Yes. This idea that it's independent -- if Mr. Cialone would feel better about some other word, we can talk about it, but it's the idea of independently confirming, verifying, the representations as to authenticity or something along those lines.

MR. CIALONE: That would be fine. Thank you.

And I'm sorry, your Honor. You did say you were going to add "reasonable person under the circumstances"? If so, I

would say that it should also talk about sophistication.

MR. KABA: The element goes on to discuss where sophistication matters under Justifiable Reliance, and these sentences are going to be a part of that section, so it doesn't make sense to keep talking about sophistication.

MR. CIALONE: Where? I'm not seeing.

MR. KABA: This is just --

THE COURT: This is the two sentences that we're moving down from page 6?

MR. KABA: I'm talking about moving them down.

MR. CIALONE: Okay. That's fine. Thank you.

THE COURT: And then moving on.

MR. KABA: On page 9, your Honor, sometimes you -- well, I won't talk about that point, but you have a paragraph here, "In other words, if and only if you conclude Mr. Greenberg knew material facts relating to the authenticity of the bottles of wine at issue," this is where, if you're going to provide more explanation about the disclaimer, we would also add authenticity, merchantability, rarity, or provenance of the wines, of the bottles of wine at issue. Mr. Cialone just started off today saying the case is not about authenticity. I wrote it right down because I knew it was going to come up again. So if we're going to start talking about disclaimer, the merchantability idea, the suitability for sale idea, that's also a misrepresentation made by

Mr. Greenberg.

MR. CIALONE: There's actually no representation. There's a difference between a representation that's disclaimed, the 1921 Petrus, and a representation that's just not made at all, which is, and here's the provenance of that bottle. There's no representation about provenance.

MR. KABA: I don't see why you would change the disclaimer language to say all of these things were specifically disclaimed but then not also give up the opportunity and let the jury hear the material facts about more than just the authenticity. We think they go hand in hand, your Honor. So I know you're reserving judgment on the elements of the disclaimer you're going to articulate, and so we think that if you're going to expand that to include other things, then you should expand the discussion later in that very same section to include the other characteristics as well.

MR. CIALONE: Your Honor, I can't believe we're expanding provenance now too. I have a complaint here that talks about authenticity. Counterfeit. And then I have a few years later counterfeit became not merchantable. And now in this case as well there's also provenance, which is not represented by any --

THE COURT: The way the evidence has come in, it's really been authenticity.

MR. CIALONE: That's true.

MR. KABA: Your Honor, there's a suitability for sale argument either. My point is simply -- your Honor, my point is, if you're -- it's really surprising. They want -- they want specific reference that the disclaimer disclaims merchantability, i.e., suitability for sale. The experts have testified -- testified to suitability for sale. And they want a specific reference that the disclaimer disclaims provenance, yet they don't want to have it elsewhere in that same paragraph where all your Honor talks about is authenticity, if Mr. Greenberg knew material facts about things like the suitability for sale, like John Kapon saying these shouldn't be put up for sale?

THE COURT: The reason it doesn't necessarily have to be parallel is the -- maybe it does. I don't know. I mean, the disclaimer is one thing, but the peculiar knowledge exception, which takes you out of the disclaimer, has to do with the peculiar knowledge relating to the alleged misrepresentations, so the knowledge is about those.

MR. KABA: And to the matters disclaimed. That's --

MR. CIALONE: No. Has to be a representation.

MR. KABA: Disclaimer. Let me finish, Mr. Cialone. The disclaimer applies as to the matters disclaimed, and when you're talking about peculiar knowledge, you're talking about representation as to the matters disclaimed. Otherwise, you would have -- you wouldn't even be in peculiar knowledge land

because we're claiming something disclaimed was now misrepresented. That's how that analysis works. And when you have e-mails and evidence that say somebody from Chicago Wine Company returned bottles because they wouldn't have sold them, John Kapon is saying he wouldn't sell these things, certainly the idea of merchantability of these wines is at issue in this case.

MR. CIALONE: Certainly provenance is not even close, and this is them bending authenticity to include --

MR. KABA: There's issues of provenance where you have representations in the catalog claiming things are sourced from the Continent.

THE COURT: Well, okay. I'll take that under advisement too, when I consider the other issue.

MR. CIALONE: Your Honor, we would also just add on that page on 9, in paragraph 2 --

MR. KABA: Of what?

MR. CIALONE: In the second paragraph on the page. Sorry. Not paragraph 2. Where it says, "would face high costs," that you put in the word "unreasonably high costs." And that would be for a $3.7 million purchase, it's certainly not --

MR. KABA: Your Honor, the caselaw does not say "unreasonably high costs." The caselaw says "high costs or great difficulty to determine the truth or falsity of the

representation."

MR. CIALONE: Your Honor, if I'm buying the Empire State Building, a structural inspection is going to cost me some money. If I'm buying the corner hot dog stand, the structural inspection is going to cost me some money. What is high in that circumstance? It's what's reasonable.

MR. KABA: Well, that's just -- that's not what the cases say. I'll pull up, your Honor, in --

THE COURT: No, I remember the case. It's a Second Circuit case that is explaining the rationale for the peculiar knowledge exception.

MR. KABA: And it says "high cost or great difficulty." And we think you should also add "or great difficulty."

MR. CIALONE: Your Honor, the case says only with extraordinary effort. That's the case. As peculiar knowledge reasonableness.

Your Honor, I'm reading from the *Dimon* case, D-I-M-O-N. *Dimon*. "The New York cases recognize that the peculiar knowledge exception applies not only where the facts allegedly misrepresented literally were within the exclusive knowledge of the defendant but also where the truth theoretically might have been discovered, only with extraordinary effort or great difficulty. As the peculiar knowledge inquiry addresses the reasonableness of the

plaintiff's claimed reliance, this makes a good deal of sense. The effort necessary to discover the truth bears on the reasonableness of a plaintiff's reliance on the defendant's statement." Then it goes on to discuss levels of sophistication. Reasonableness is inherent in making the inquiry.

THE COURT: So, okay. So you want "unreasonably high cost," and Mr. Kaba, you are suggested adding what language?

MR. KABA: Not the "unreasonably" but "or great difficulty." And there's the *Bankara* (ph) case, your Honor, there's the *Dimon Realty Corp.*, your Honor, that addressed these issues.

THE COURT: Yeah, actually, would you give us those cites, just so we can check those.

MR. KABA: Absolutely, your Honor. I can hand you my page from our jury instructions. It's got cites on the bottom. It includes the cite Mr. Cialone provided as well.

THE COURT: Just give me -- *Dimon* was one. Yeah, you can just give them to Christine. And the one you read from is *Dimon*, right?

MR. CIALONE: Yes, your Honor.

MR. KABA: It's cited as well in that.

THE COURT: Okay. Anything else in that section?

MR. CIALONE: Not in that section but a little further down on that page in the next section.

THE COURT: Okay.

MR. CIALONE: In the second paragraph where it says, "If you find that Mr. Koch did not sustain any damage," we would change "any" to "monetary." I don't think there's any other damage alleged.

MR. KABA: That's fine, your Honor.

MR. CIALONE: And similarly in the next, where it says "any loss," it should say "monetary damage."

MR. KABA: "Monetary loss" again.

MR. CIALONE: Fine.

THE COURT: Sorry. Where was that second one?

MR. CIALONE: Just where it says "any loss," just "any monetary loss."

THE COURT: Yeah. Okay.

MR. CIALONE: On page 10, we would ask that this again be tied to bottles of wine at issue. "Also alleges fraud based on the concealment of a material fact or facts," "about the 24 bottles of wine." And then in the next paragraph, "alleges that Mr. Greenberg concealed material facts," "about the 24 bottles of wine."

MR. KABA: Well, your Honor, this -- you know, this is sort of the thing that you're struggling with here. There are concealments generally and then there are concealments specifically. The jury instruction should not all be read to talk only about the specific concealments. There were, when he

spoke about his collection, when he spoke about its rarity, its provenance.

THE COURT: Well, when I say, "about the 24 bottles of wine," I meant that to be kind of all-inclusive, to cover the general statements and the specific.

MR. KABA: That's right, but -- and I'm okay with that. It's the addition, insertion of every -- at every single point of, "about the 24 bottles," "about the 24 bottles," "about the 24 bottles." There are also -- on the duty to disclose particularly and on the concealment, there were generalized statements that applied to the whole sale, and certainly it applied to the -- to Mr. Koch's transaction with Mr. Greenberg. And so it's fine to have it as you have it here, we believe, but we don't think at every stage you have to insert this "about the 24 bottles," because we don't think that's what the duty to disclose language requires.

MR. CIALONE: If the concealment is about the whole sale, it's going to be about the 24 bottles. It shouldn't be about something else.

MR. KABA: Well, your Honor has it right up there, right as he starts off. "Mr. Greenberg contends he did not know at the time he consigned them and therefore did not conceal information relating to the authenticity of any of the 24 bottles of wine at issue in this case." That's their position and that's fine. That's how you've articulated it.

THE COURT: But I don't think it hurts to add it in the sentence before, does it?

MR. KABA: Well, your Honor --

THE COURT: You just think it's saying it too much.

MR. KABA: It's -- we've said it now several times earlier, we're saying it again here. That's their position. You've already -- you've already provided that in the very next sentence to the jury.

THE COURT: Okay. I'll think about that one.

MR. KABA: Because the first sentence is just our position.

THE COURT: Right. Okay. Anything else in that section?

MR. CIALONE: No, your Honor. Not for me.

THE COURT: Duty to disclose?

MR. KABA: On page 11, your Honor, just as a -- this is just a matter of clarification we think. At the very top, "Thus, where one party possesses superior knowledge not readily available to the other and knows that the other's acting on the basis of mistaken knowledge, the party with superior knowledge has a duty to disclose that information." We just think that would make it clearer as it goes opposed to just "there is."

MR. CIALONE: Fine.

MR. KABA: And then where you have the Special Facts doctrine, which reminds me of law school, under (1) and (2),

instead of referring to "one party," "other party," we would just propose "defendant" and "plaintiff" to make it clear what we're talking about, because by this point we'll be well into the jury instructions.

MR. CIALONE: That's fine. I think that's it.

THE COURT: So one peculiar within the knowledge of defendant?

MR. KABA: Yes, and then sub (2), exercise of ordinary intelligence by the plaintiff.

THE COURT: Okay. Okay.

MR. CIALONE: I think we have the same change on page 12.

MR. KABA: Yeah.

THE COURT: Page 12?

MR. CIALONE: Yeah, the third paragraph, second line, "Mr. Greenberg must prove by clear and convincing evidence," should be "Mr. Koch must prove."

THE COURT: I'm sorry.

MR. CIALONE: Third paragraph, second line. "In order to establish that Mr. Greenberg intended to defraud Mr. Koch by concealing material information, Mr. --" it says Greenberg. It should be Koch.

THE COURT: No, I meant it to be Mr. Greenberg. No, okay.

MR. KABA: We're okay with that.

THE COURT: Okay. Anything else on 12?

MR. CIALONE: Not from us, your Honor.

MR. KABA: No.

THE COURT: 13?

MR. CIALONE: Your Honor, in 13, we would request that you add a general mitigation instruction. We had previously submitted one tied to the refund request, but we would just request a general one of --

THE COURT: That would go in injury?

MR. CIALONE: Yes. Yeah, it probably goes after injury, honestly. "If you award Mr. Koch damages, the award must be reduced if Mr. Greenberg proves Mr. Koch failed to take reasonable steps to mitigate the damages."

THE COURT: Yes. See, putting aside the refund issue, and I know you feel very strongly about that, I don't think there's any other evidence. I mean, it's defendant's burden, and I don't think there's any other evidence of mitigation.

MR. CIALONE: Well, there is a refund that Mr. Greenberg offered after the lawsuit was filed, and we'll put that aside, but there's very powerful evidence that -- Mr. Orcutt himself said it today on their examination. Well, when people have a problem, call the auction house, get your money back. Zachys had the right to rescind the sale, and we've seen that that's what Mr. Koch did. You know, the "as is" disclaimer goes to the condition of bottles as well as to

authenticity and anything else. When Mr. Koch got bottles that were in bad condition, he didn't say: Oh, bummer, there's an "as is" clause, I can't get my money back. And he didn't say: The "as is" clause is a license to steal, I'm going to sue them for fraud. He said: Hi, Zachys, I want to return these bottles. And that's what he did, and he took two months and -- two and a half months after getting the bottles to do that, and we should be able to argue that that was reasonable in this context as well.

MR. KABA: Your Honor, it's not relevant to the fraud claim. It's -- the fraud claim is, did you buy goods that defendant had knowledge, knew that were defective in the ways we allege, so just to throw in a mitigation instruction so they can argue, hey, he could have always -- he could have -- he could have just returned this stuff when he discovered it was counterfeit, has nothing to do with our fraud claim. It's just going to be used to get the jury to think, yeah, yeah, he could have returned that stuff, why didn't he return that stuff, oh, wait, no damages for him, notwithstanding Mr. Greenberg's fraud.

MR. CIALONE: We should be able to -- mitigation is always a duty. There have been situations where people have to have surgery to mitigate their damages.

THE COURT: That's the thing. In tort cases mitigation is, you know, also known as the -- what's the

phrase -- avoidance of consequence, avoidance of loss doctrine, because the classic case of tort mitigation is, you have an injury and then you don't get it treated, so it gets worse.

MR. KABA: Aggravates it, right.

THE COURT: And it's the delta, you know, it's how much worse it gets. That's the failure to mitigate, and in this case that doesn't really apply.

MR. CIALONE: Your Honor --

MR. KABA: We aren't seeking, for example, the appreciation in value of these bottles were genuine. I mean, we literally are just saying, he sold us this wine, this is how much we paid for it, this was the buyer's premium, this was the hammer price, that's what we're entitled to. I don't see how we can mitigate those damages under any circumstance without just saying, well, there's no fraud claim, period.

MR. CIALONE: Just like they mitigated their damages by returning bottles that had shrunken corks that wasn't disclosed in the catalog that they had shrunken corks.

THE COURT: I'm sorry. By returning?

MR. CIALONE: By returning bottles that had shrunken corks.

MR. KABA: They're not in the case.

MR. CIALONE: They're not at issue. Those damages were mitigated to zero. Your Honor, all harmed plaintiffs have to mitigate damages. A suggestion that that doesn't apply in

fraud cases is wrong. I'll refer you to *Katara*, K-A-T-A-R-A, 835 F.2d 966, which is a common law fraud claim case. All plaintiffs have to mitigate their damages and the jury ought to be able to consider what would have happened if he'd looked at these bottles, would it have been reasonable to look at these bottles when he got them and called Zachys, there's a problem, and what would Zachys have done. We ought to have them consider that.

MR. WESSEL: I don't think there's any evidence of that, and obviously if they sent a box of donuts instead of a box of wine and they said, "We got donuts and not wine," and they said, "Sorry," that -- Frank is saying, well, the "as is" disclaimer is saying, well, you got to keep the donuts but they would waive it. I don't think there's any evidence of it, and I think it's just a back door way to get the refund in.

MR. KABA: I just want to mention briefly, the *Katara*, I'm looking at it right now, where a customer's position is involuntarily liquidated because of his failure to meet a margin call, application of the general duty to mitigate -- the additional amount required to repurchase the same contract. It's the exact same thing your Honor was talking about with respect to, you don't get to sit around and let your injury be aggravated. Then you do get a mitigation kind of instruction. Here, the injury was the fraud and that's all we're seeking redress for.

THE COURT: If that were the kind of mitigation, you could never have a fraud claim.

MR. CIALONE: Sure, you could.

THE COURT: You could always be mitigated by, oh, you could have returned it.

MR. CIALONE: Sure, you could. Sure, you could. First of all, you could always -- you could always say, they wouldn't have accepted the return, or I needed to prove it conclusively, or they demanded too much out of me, or it was unreasonable to expect me to do it that quickly, in fact, it took me three years, look at all the experts I had to do it. They can do all of those, but to say that because there's a fraud claim, their duty to mitigate is now disappeared, that's contrary to the law.

THE COURT: Well, I'll take a look at it, but my sense is that the duty to mitigate really does have to do with the sort of consequence where it's gotten worse, where the damage has gotten worse because you've failed to limit your losses to the actual losses, and this case, we're talking really about the actual losses. But I'll take a look at *Katara* and anything else I can find. Anything else my law clerk can find.

MR. KABA: The silent soldier.

THE COURT: Yes. Anything else on 13? Or 14?

MR. CIALONE: On 14, your Honor, just on the damages, again, I think it's clear, I think it's even been stipulated

that the only damages that they're seeking are the purchase price, the out-of-pocket loss. So I would suggest that in the second paragraph, strike the second sentence, the, "Generally, this is the difference," and that in the third paragraph you say, "Mr. Koch's actual monetary loss is the difference between the money he paid for the wines and the value of what he received," and that there's a bracketed passage there that I just don't think is necessarily supported by any evidence at this point.

THE COURT: Yeah, I was going to check with the parties, or with plaintiff on that.

MR. KABA: Your Honor, I wouldn't recommend any changes to this section except striking this bracketed language. I think the rest of it is fine, and I think that's how damages instructions are typically given.

THE COURT: Am I correct that it's really just the price that's sought at this point?

MR. KABA: That's correct.

MR. CIALONE: I don't feel strongly. I just think it would make -- since we know what it does include, it would be more clear, but I don't feel very strongly about it.

MR. KABA: I just think the jury should -- they go back and they figure it out.

THE COURT: So you would just take out, Mr. Cialone, you would take out, "this is the difference."

MR. CIALONE: I would change "may include" to "is" and I would take out the "Generally" sentence, but I guess that doesn't really matter since we're going out -- next you're saying specifically what it is here.

THE COURT: I'm sorry. Where was the "may include"?

MR. CIALONE: The third paragraph.

THE COURT: Okay. Okay. Anything else on 14?

MR. KABA: Not from us, your Honor.

MR. CIALONE: No, not from us.

THE COURT: 15?

MR. KABA: Your Honor, you provided two instructions on consumer-oriented conduct, on page 15 under the 349 claim and again, we see it on page 17, and we discussed this at the motion *in limine*, at the pretrial hearing where there was talk -- we wanted to elicit evidence and testimony that other consumers from the same auction had returned the wine. Your Honor said -- I have the transcript. It's page 87. "I think I can obviate the need for that, insofar as that's necessary, because I think the requirement for potential fraudulent or related conduct with respect to consumers is established by simply the nature of the auction." And we weren't allowed to ask Mr. Zacharia about other consumers returning wine at this auction so we could say, hey, this is the kind of consumer-oriented conduct. We discussed it at length. We talked about the direction to the jury that this is an auction,

therefore it's consumer oriented. We think that your Honor should -- should give us that sort of instruction because we were hands off in getting the evidence from the witness.

MR. CIALONE: Your Honor, we moved to exclude that because it was hearsay. It was unidentified people saying this wine is questionable, without any explanation of what that meant.

MR. KABA: But it wasn't offered for hearsay, it was offered just to show that other consumers had returned wine. They were the acts, not necessarily the conduct, and that's why, your Honor, when we addressed it at the pretrial conference, you said: I can obviate the need for you to do that because the nature of the auction being consumer-oriented conduct is established.

MR. CIALONE: No, your Honor, it wasn't introduced just to show that other people had returned wine because the evidence was completely irrelevant if they weren't returning wine on the grounds that it was actually questionable. So it certainly was to prove the truth. For example, they did not put in return -- evidence of returns that does exist where people said, hey, you just sent me the wrong bottle, or hey, this bottle is, you know, has a -- is leaking, like Mr. Koch did. And they certainly never suggested, your Honor, that one way to cure the hearsay problem would have been to redact the line that said questionable and just note the fact that a

bottle was returned because that wasn't what they were looking for. So that was hearsay. That's why it was kept out.

THE COURT: Although Mr. Kaba is right that I did say that. I mean, that was my view at the time.

MR. KABA: Your Honor, if you keep going, that was what we were discussing. Mr. Hueston said, "Look, if your Honor can give us the instruction," then, you know, that's what the -- your Honor was inclined to do, that's what we were talking about in connection with this other conduct. Otherwise we would have shown Mr. Zacharia the document, refreshed his recollection so he could testify that other consumers had returned wine at these auctions.

MR. CIALONE: Unless the reason for the return was there, how would that be relevant to deceptive consumer-oriented conduct alleged? It sounds like they're moving for a directed verdict on this, your Honor.

THE COURT: Well, yeah. I mean, I meant to say -- I do think I might put in something about an auction because I think as a matter of law, the auction here is the type of thing, but I don't want to direct a verdict on this one element.

MR. KABA: Well, I think, your Honor, if you do something along the lines of -- if you do something along the lines of -- of, you know, you need to decide whether it's consumer-oriented conduct, you may consider the fact that this

was an auction directed at consumers at large. In doing so, I do think we need something, your Honor, because we were unable to elicit the evidence we would need to show this was deceptive towards all consumers, and to that end -- and, you know, your Honor specifically noted in the transcript, you're going to deal with this at the charge conference, on page 95 of the transcript.

THE COURT: I hate it when I say that.

MR. KABA: Don't you hate when you're quoted back to yourself?

THE COURT: Yeah.

MR. KABA: But to that end, your Honor, I think that the second paragraph of what's consumer-oriented conduct, certainly if you just have that and you don't give us the other stuff, this idea of because Section 349 was enacted to protect consumers, private disputes unique to the parties, for example, would not fall within the ambit of the statute because such single-shot transactions are not typical consumer transactions, that's giving the exact opposite impression of what your Honor was inclined to tell us -- to tell the jury in the beginning.

MR. CIALONE: I'm actually okay taking that sentence out, your Honor, but it is an element of the claim, and the fact that they were precluded from putting up hearsay documents on this doesn't mean that they were handcuffed or hamstringed. They could have found other people, they could have looked for

other people, they could have served discovery on Zacharia saying who are those people.

MR. KABA: Actually, we did, your Honor, and defendant objected and defendant said that the bottles have to be limited to the bottles at issue in this case, and that's why we got documents that were redacted, your Honor. And so the idea that we could have done this and we could have done that, when defendant objected to it when we tried to do it during discovery, that's the point we made at the pretrial conference, and that's why your Honor was saying that: I can obviate the need for you guys to get into all of this because I can tell the jury that auctions by their nature are directed at consumers.

MR. CIALONE: Mr. Kaba is confusing his defendant. I said they could have sought discovery from Zachys. I'm fairly certain any objections I made to discovery on Zachys really weren't binding on Zachys. They could have --

MR. KABA: We did.

MR. CIALONE: Let me finish. Both of you, please. They could have moved -- they could have moved to compel Zachys -- and objection is not determinative. Or, when they reached a settlement with Zachys, they could have demanded that Zachys provide them that information. What they were limited on was relying on hearsay, and obviously, and I think it's pretty clear from this trial, your Honor, they got a lot more

information than about 24 bottles. So an element of the claim, I'm fine with striking the second sentence, but unless you're going to give a directed verdict, they should have to make the argument.

MR. WESSEL: Your Honor, I would just say you should look at what was said at the pretrial, and obviously Zachys was a defendant in this case at the beginning and we did ask for information from Zachys, and Zachys was zealously represented by counsel and there were limitations put on the discovery of other people.

THE COURT: On this ground.

MR. WESSEL: Yeah, on the ground of confidentiality, on the ground of limiting it. Judge Freeman was very clear early on about trying to put some limits to discovery.

THE COURT: Well, Judge Jones did hold this was not a single-shot --

MR. KABA: Exactly right.

THE COURT: -- deal, and then I agreed, you know, I reaffirmed that. So I think I can put in some language about conduct that is targeted to consumers at large or a group of buyers may include an auction, as in this case.

MR. KABA: And your Honor, I mean, to the extent -- you know, we've gone back on the disclaimers about what Judge Jones held and what you've -- you have indicated you're inclined to hold, the argument that these are not consumer

transactions, that they were private party, single-shot transactions has been raised over and over again. They've been rejected every single time. Because Judge Jones held, as you just noted, that auctions have the potential to impact other consumers and so obviously we would like the court to direct the jury that you find as a matter of law that the consumer-oriented nature of the conduct has been established and they have to deal with the other claims, but at the very least we think there should be a strong instruction on auctions being directed at consumers.

THE COURT: Okay. I'll work on that.

What else on 15?

MR. CIALONE: Nothing for me, your Honor.

THE COURT: 16?

MR. CIALONE: Your Honor, here -- and I have a -- this goes both to page 16, where you -- after the damages on the Section 349 claim, and then also on page 18, after the damages on the Section 350 claim. First, for the reasons we said before, we would request the mitigation instruction. Second, we've requested an apportionment of comparative fault instruction. This is a -- under General Obligation Law 15-108.

THE COURT: Yeah, I thought that under that statute what you might get is a posttrial allocation, you know, under the rules about what you do with the settling defendant when it covers some of the same loss as opposed to -- I mean, there

hasn't been evidence here about the degree of fault of Zachys, really.

MR. CIALONE: Well, there's been testimony from Zachys. There's been lots of evidence. There's been testimony that they inspected, that they made the decisions, that they had the right to reject any of the wines they wanted. There's been plenty of evidence. And what the statute says is that where there's been a release, the claim against the nonreleased party, Mr. Greenberg --

THE COURT: The non?

MR. CIALONE: I'm sorry?

THE COURT: Your claim against?

MR. CIALONE: The nonreleased party. The claim against -- first of all, let's start from the threshold. The same injury -- both parties were charged with the same injury, right? Both Zachys and Mr. Greenberg were accused of causing the same injury. And I can read you from the complaint where they make it very clear. Under 15-108, once Zachys settled, Mr. Greenberg is entitled to an offset that is the greater of either the consideration that Zachys paid for the release -- and there's a dispute about what that consideration was because the way they structured the settlement, and we don't need to argue that now and we may never need to argue it because we're entitled to the greater of that or to the portion of the damages that are allocable to Zachys as comparative fault. And

we're entitled to a jury finding on that under the evidence we've put in.

THE COURT: Wouldn't it be an odd rule if the party that's not represented and who, you know, doesn't have a lawyer here but everyone's pointing to as the blamable party or at least some people are pointing to could be found to be X percent liable and that that comes off a recovery?

MR. KABA: In any case, your Honor, then you -- then someone would argue, well, it's the guy that's not in the courtroom that's really to blame so the jury, you guys should -- you guys should go off and think about that too. Here we've got two parties. There hasn't been -- certainly Zachys hasn't been able to come in here -- and there's been one Zachys witness -- and say: We're not to blame at all in this case, don't you dare allocate loss to us. We have one suit. We're only able to get recovery from the defendant in this case. The offset issue is something we can deal with obviously after, if we get a verdict. But this is just further to the idea that the jury, don't blame Eric Greenberg, blame Zachys. They're going to make the argument, and they might be able to make it on all of the other elements of the fraud claim.

THE COURT: So did you want to -- Mr. Coles?

MR. COLES: I thought maybe you'd want to hear from a New York lawyer.

THE COURT: That would be great.

MR. KABA: I practice in New York as well. Not as long as Mr. Coles has, but I do.

THE COURT: I missed the New York accent.

MR. COLES: To answer your question, it is, your Honor, but it's the way the law works and the reason it works that way is 'cause the settling tortfeasor, in this case Zachys, gets insulated from lawsuits either by us or -- or by Mr. Koch, once he settles. He gets a free pass. And in order to balance the equities on that, the legislative side under 15-108, the remaining defendant can get the jury to determine, even though it's something of an empty chair argument, that that defendant gets the benefit of the reduction by the proportionate share attributable to the settling tortfeasor or the amount the settling tortfeasor paid, whichever is greater. And so --

THE COURT: What is known as proportionate share.

MR. COLES: Proportionate share of the injuries caused by the settling tortfeasor or the amount paid in settlement, whichever is greater. And the fact that it -- whichever is greater is significant because it's intended to benefit, in this limited circumstance, the remaining defendant and to avoid a situation where, say, a plaintiff would do some sort of collusive settlement, settles too low, and then try to get more damages from the remaining defendant. So it's actually the way it works in every single tort case in New York. It is a

well-established principle that applies in the GBL as well.

So it should -- so what should happen here, to sort of go through it technically, is the jury should be asked what -- if in fact it finds there were damages, if it gets to that level, it then should be asked, what share of Mr. Koch's damages were caused by Zachys. If it turns out that that proportionate share, whatever we allocated, was more than they paid in settlement, then Mr. Greenberg would be entitled to a reduction in that amount.

(Continued on next page)

THE COURT: You're asking for the GBL claims only, right?

MR. KABA: Yes, your Honor.

MR. CIALONE: That's the only where there is a common, where they were both sued. I would just note, yes, it's an empty chair, but they could have filled that chair. They subpoenaed two Zachys witnesses. They subpoenaed Mr. Zacharia and they subpoenaed Michael Jessen, and they chose not to --

MR. KABA: We are not the ones seeking apportionment. Let me finish now. Mr. Greenberg could have cross-claimed against Zachys. Mr. Greenberg could have brought Zachys in and said, hey, you can't hold me responsible, you've got to hold them responsible. Mr. Greenberg could go after Zachys still and say you guys were the ones that were negligent. He could have done it at any point in time.

For them to say, and now, jury, apportion liability between this guy that's not here, who is not represented by counsel, who hasn't been able to put on a case saying that he wasn't liable, all you have to go on is based on what I told you, it actually seems completely antithetical to what these cases and what these claims are about, which is resolving a dispute between these two parties.

MR. COLES: What Mr. Kaba just said is wrong. We are not, under 15-108, entitled now to bring a third-party claim against Zachys. The statement of the law he just made to you

is not New York law. And because we can't do that, 15-108 comes into play and gives us the benefit of the proportionate share reduction.

THE COURT: 15-108 I don't think mentions a jury.

MR. COLES: We addressed this in the motion in limine, and the issue of a proportionate share gets submitted to the jury. The actual allocation is something you do yourself.

MR. KABA: It was our release. I don't know what defendant Greenberg in Zachys did as to the liability that they may have had or their contractual relationship, whether Zachys is indemnified. I don't know any of that stuff.

The release was here, just our release of Zachys, and the evidence about this case has just been about Mr. Greenberg and about our claims against Mr. Greenberg. If your Honor would like more briefing, I unfortunately don't have 15-108 in front of me and I don't have the authority. I'm happy to look at it further. At the very least we think that if your Honor is inclined to do it, it's a court issue, not a jury issue.

MR. WESSEL: Your Honor, I make one point, which is that Mr. Greenberg's counsel should tell the lawyers at Dickstein Shapiro, who represent Zachys, who have been in the courtroom, that this is what they are asking for, that they are asking you to ask the jury to make a finding about Zachys. I don't think it is fair to Zachys that this happened without them being put on notice. They have been involved in this --

THE COURT: They are protected.

MR. COLES: They are protected.

MR. WESSEL: They are not protected if this jury comes back and makes a jury finding that Zachys is a hundred percent at fault for this and that's on the front page of the Wine Spectator and no one told them that this was going on in this courtroom. I just think that Mr. Greenberg needs to tell the auction house that he hired and the lawyers that we have all dealt with in this case that he is asking you to do something like this. They may have a view, and I think it is fair to them.

MR. COLES: I'm pretty sure they are familiar with 15-108. I'm pretty sure it applies as we have articulated.

MR. CIALONE: And they have gotten their motion, including our opposition to the motion in limine that specifically said --

MR. WESSEL: I'll let them know.

MR. CIALONE: Feel free. They are on the e-filing and they have been reading stuff.

MR. COLES: It's just if your Honor wants the number, it was motion in limine number 2.

MR. CIALONE: No. It was our opposition.

MR. COLES: Our opposition.

THE COURT: Your opposition to their motion in limine.

MR. CIALONE: Right. It discussed the law, and the

decision was we couldn't bring the settlement agreement in. But there was no decision that we weren't entitled to the benefits of New York statute 15-108. To suggest otherwise is simply incorrect.

MR. KABA: Your Honor said on that motion, as I recall -- and you have the transcript, we all do -- that if it is going to be an issue, it's a judge issue and can be resolved after the jury has reached its findings. Again, unfortunately, I'm at a bit of a disadvantage, I haven't looked at the authority, but we will be happy to send you something.

THE COURT: You don't have to. I'll take a look at it.

MR. KABA: Thank you.

THE COURT: Anything else on 16?

MR. KABA: Your Honor, on page 16 you have a sentence up here, "Moreover, the presence of a disclaimer does not necessarily bar a claim under the statute." We think the word "necessarily" is not necessary. The presence of a disclaimer does not bar a claim under the statute. It's established law under the Koch v. Acker case by the New York Court of Appeals.

MR. CIALONE: Your Honor, to say it does not bar it at all says the jury is not even allowed to consider the disclaimer. That is not what the Koch v. Acker case said. That was reversing a motion to dismiss. It was not sending a directed verdict that the jury could not consider the presence

of the disclaimer where there is a GBL claim.

MR. KABA: It says the disclaimer does not bar a claim.

MR. CIALONE: Does not bar it does not mean it compels it. I just means it doesn't bar it.

MR. KABA: That is squarely what the New York Court of Appeals held. If there is an authority that you would like to cite that says that juries should be told all about a disclaimer in the context of a GBL claim, in the context of a GBL 349 claim, I haven't seen it yet.

THE COURT: I'll take a look. It was a very short decision.

MR. KABA: It was powerfully brief.

MR. CIALONE: On a motion to dismiss, which is different from a trial.

THE COURT: They denied the motion to dismiss. Is that still going on?

MR. KABA: It is. It is down the street. We are waiting. Justice in the state supreme court turns a little slower.

THE COURT: Although it is not always so fast here. Anything else on 16?

MR. KABA: Not from us, your Honor.

MR. CIALONE: Not from us, your Honor.

THE COURT: 17?

MR. CIALONE: Not from us.

MR. KABA: Your Honor, you used the term "consumer" in here. We would say to the extent that you are going to give the instruction on 349 or modify it, do the same thing on 350.

THE COURT: Anything else on 17? 18?

MR. CIALONE: We would request the mitigation and 15-108 instruction here as well, on 350.

THE COURT: Is that for jury or after damages?

MR. CIALONE: I think it goes after damages that you look at mitigation and apportionment. They are affirmative defenses, essentially. Not essentially. They actually are affirmative defenses.

THE COURT: OK. Anything in the last section?

MR. CIALONE: Not from us.

MR. KABA: Nothing further from us, your Honor.

MR. CIALONE: Your Honor, if I may, the 15-108 instruction, just for the Court's reference, is part of the instructions. It's on page 56.

THE COURT: I remember. OK.

MR. WESSEL: I think it is clear, but you're saying that you want that instruction on the GBL claims only?

MR. CIALONE: Yes, the two GBL claims.

THE COURT: Got it. I have some work to do. We'll start back at 9:30. Is there any witness after this witness?

MR. CIALONE: Not from us, your Honor.

MR. KABA: We will have to see how it goes tomorrow.

THE COURT: All right.

MR. CIALONE: Are we going to discuss the verdict form tomorrow?

THE COURT: Yes. We'll talk about it tomorrow. Thanks a lot.

(Adjourned to 9:30 a.m., April 10, 2013)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

WILLIAM I. KOCH,

Plaintiff,

v. 07 Civ. 9600 JPO

ERIC GREENBERG, et al.,

Defendants.

----------x

New York, N.Y.

April 10, 2013
9:47 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge
and a jury

APPEARANCES

MORVILLO ABRAMOWITZ GRAND IASON ANELLO
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BY: EDWARD M. SPIRO,
- and -
IRELL & MANELLA, LLP
BY: JOHN CHARLES HUESTON, Esq
MOEZ KABA, Esq.
MARSHALL CAMP, Esq.
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TRACY SALISBURY, Esq.
FRANK ALBERT CIALONE, Esq.
Of counsel

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

(Trial resumed)

(In open court; jury not present)

THE COURT: Good morning, everyone.

ALL COUNSEL: Good morning.

THE COURT: So let me just mention something about the jury charge, the proposed jury instructions before I bring the jury back. We've made some changes, and we'll send around to the parties a revised version of the jury instructions based on the charge conference.

We looked into a couple of issues. The one issue that I'm still unsure about is the New York General Obligations Law 15-108 issue. You know, the cases that apply that, you know, the apportionment of fault, you know, are personal injury tort cases whereas this is a -- one question I have is whether this is a tort case, tort claim, the GBL claim. It's a statutory cause of action. It's probably most akin to a tort claim, but is this the kind of claim, you know, that is contemplated by General Obligations Law. If the parties have any authority on that, you know, I'd be happy to see it. I didn't find any. It certainly applies in negligence cases, and that's obviously where it would apply. I mean, I'll tell you what I'm inclined to do at this point is add something to the verdict form which would be, you know, after the jury makes its decision on the GBL 349 claim, just put in a question there which would be -- it's sort of odd because Zachys has not been in this court, but

the question would be along the lines of, you know, if you have found liability on the GBL 349 claim, something about, you know, and there is also fault with Zachys, how do you apportion fault between Zachys and defendant, and then you'd use that as a basis for determining whether the reduction, which I would do later, would be some portion of the settlement amount or an apportioned amount based on the jury's percentage.

MR. KABA: Your Honor, just briefly on the first point, we actually had a letter, but you were clear you didn't want anymore letters on this topic.

THE COURT: Oh.

MR. KABA: The point we make in our letter is actually the one you started off with, which is 15-108 deals with tort claims, it's for joint tortfeasors, where the harm arises out of the same injury. *Halpern v. Rosenbloom*, which is a Southern District of New York case, 459 F.Supp. 1346, says, in interpreting 15-108, there is "not even the slightest hint that the legislature contemplated that 15-108 would apply to any but personal injury, injury to property, or wrongful death actions. When the legislature used tortfeasor in 15-108, their intention was to restrict the applications of 15-108 to tortfeasors in the traditional sense of the word," and that's been applied in other cases in this circuit.

THE COURT: Do you know what that case was about, what kind of claim?

MR. KABA: I believe that was a coinsurer case, but I don't have it in front of me right now. But --

THE COURT: Can you give me that cite again.

MR. KABA: Sure. It's 459 F.Supp. 1346. I'll cite to you what I know was a coinsurer case from New York, which is called *Scotts Co., LLC v. Pacific Employers Ins. Co.*, which is 61 AD3d 464, 465, which just says Section 15-108 applies only to joint tortfeasors, not coinsurers.

Now the New York General Business Law, as you identified, Section 349(h), establishes just a private right of action for individuals. It doesn't say it's a tort. It doesn't say it's a traditional tort.

THE COURT: Well, it's a fraudlike statutory cause of action.

MR. KABA: Right, but the reason we get to bring it is because it actually establishes a prive right of action. Just note that *Halpern* is about a contractual --

THE COURT: Right. Do you have a letter that you want to submit?

MR. KABA: I'm happy to hand it to you, your Honor.

MR. COLES: Your Honor, we can get you precedent indicating that this has been applied to statutory causes of action. If we could do that later on today.

THE COURT: Okay. That would be great. Even if it's just a list of cites, that would be fine, and we'll check into

it.

Okay. Anything else we need to address or can we bring the jury in?

MS. SALISBURY: You know, your Honor, I'm afraid there is something we need to address. It's rather serious, in my view, and it relates to information we obtained last night when Mr. Schwarz left the stand. He got very disturbing reports from his home and from business associates that someone purporting to be investigating counterfeiting of wine labels had visited his wife's office building and spoken to her landlord, had visited a graphic designer who worked with him and his wife, had visited a licensed importer that he and his wife worked with in their business, and, most disturbingly, had gone to his home and talked to his housekeeper who was taking care of his two young daughters while he was here in New York testifying.

Now there is, of course, no good faith basis for believing in any way that Mr. Schwarz and his wife or their graphic designer are engaged in counterfeiting. What they are engaged in is a publication of a children's book called Bubble Tubbie. That is what his wife does. She's an artist and a graphic designer. The graphic designer they visited works for them. The importer that they used, it's a wine services importer, is friends of Mr. Schwarz who of course, in all public records, imports Bubble Tubbie books and Bubble Tubbie

bath books and other baby-related products from China and Hong Kong.

Now this all started -- and by the way, we know that this relates to the defense here -- I mean, the plaintiffs here because on Monday they served Mr. Schwarz with a subpoena purporting to ask him to report -- to produce documents relating to counterfeiting of wine labels. We objected to that and thought that that was hopefully where the matter was going to end, but then we find out that it just so happens, on the day he's set to testify, or the day before he's set to testify, they're sending some ex-FBI guy out to the house where his young daughters are staying.

Now we happen to know who this guy is because he left a card with one of -- I think with the importer who sent him on his way, and I have copies of the card that he left. You can Google him. It's quite interesting reading. He had to resign from the FBI because he had committed a misdemeanor, to which he ended up pleading guilty, I believe, for harassing someone who owed a friend of his money. So he is now going around everywhere he turns, at his wife's landlord's office, for example, saying, "We're here investigating counterfeiting. Do you know where Mr. Schwarz is?" Or going to the graphic designer and talking to the graphic designer's landlord and saying, "Have you ever seen evidence of counterfeit wine labels up in this guy's office and do you know where I can find him?"

And then leaving him a phone message that he considered intimidating enough that he hasn't been to work for two days. Going to the importer and saying, "By the way, have you ever imported counterfeit wine labels with Mr. Schwarz?" They're slandering him everywhere he goes.

THE COURT: Going to the importer? What do you mean the importer?

MS. SALISBURY: I'm sorry? Oh, they import wines -- Mr. Schwarz imports these Bubble Tubbie books and related products through an importer in Los Angeles, a federally licensed importer. They visited the importer's office, said, "Do you know Mr. Schwarz is importing counterfeit wine labels?" This is all happening -- of course Mr. Schwarz was deposed three years ago. It's no coincidence, in our view, that this is happening as Mr. Schwarz is on the stand, and it is particularly egregious they visited his home. If they had legitimate questions for Mr. Schwarz, they knew right where he was, and they've known where he was for three years. You don't send somebody to the guy's house where his 9- and 10-year-old daughters are staying while he's here testifying in this trial.

We also know it's related to this trial because the importer, Mr. Reinhart I believe his name is, asked this guy, "Does this relate to that trial in New York?" And he said, "Yes, it does."

Now in light of this -- and the reason I'm bringing it

up with your Honor, because I didn't want it to just come out on the stand as they are questioning Mr. Schwarz -- it seems to me that there are a couple of things that we're entitled to have happen here. And one of them is, obviously they intend to cross-examine Mr. Schwarz today. There is no good faith basis for asking him any questions about whether he's engaged in the counterfeiting of wine labels. We think that would be incredibly prejudicial and they shouldn't be allowed to do it.

Secondly, whatever happens on the stand today, I believe I am entitled to ask Mr. Schwarz about the duress and stress he has been placed under as a result of the reports he's received from his home and his business associates about this purported investigation into nonexistent counterfeiting. Clearly this is very upsetting to him. He's away from home, his daughters are there, he's getting calls from his housekeeper about this man at the door. I think he is entitled, whatever happens on the stand today, to explain the impact on him and his state of mind from this outrageous conduct.

THE COURT: Mr. Camp?

MR. CAMP: I'm not planning to ask any questions about the subject matter that she's describing so I don't see how it's relevant, and I certainly can't imagine a scenario in which it would be appropriate not to ask questions but then to elicit speculation. And I'm not altogether sure how counsel

knows about this since she's obviously not supposed to have spoken to the witness while he's on cross. But in any event, it obviously wouldn't be proper to say nothing about this on cross and then on redirect start eliciting speculation about what he thinks is going on.

THE COURT: What about this investigation? Can you tell me anything about whether they crossed a line.

MR. CAMP: I absolutely do not think any lines have been crossed. It is routine. It should come as a shock to no one that when witnesses are on the stand, their backgrounds are investigated. I've already impeached Mr. Schwarz with respect to certain things that we investigated in his background. That happens. It happened with my witnesses, it happens to witnesses. They get investigated. Our witness -- our party was extensively investigated by the other side. Things came out during his cross. None of this is shocking. Nothing that she's described -- and I don't know all of these facts that she's representing and whether or not they're accurate, but nothing she's described is improper. Investigators talk to people. That's what happens. That's where information comes from.

THE COURT: But going to the wife's publisher, is that --

MR. CAMP: Wife's importer? I mean, I don't want to get into this because I don't think it's relevant, but the

importer is a group called the Wine Care Group, which is importing these books. I don't know the exact trajectory of that investigation, but I think the questions that were being asked were absolutely fair. Obviously if something relevant were to come out, I would ask him about it on the stand, but the fact that we're investigating is neither unusual nor improper.

THE COURT: And you're not planning to ask any questions about --

MR. CAMP: That's right.

THE COURT: -- this investigation. Or what's come out of this investigation.

MR. CAMP: That's correct.

MS. SALISBURY: Your Honor, there's nothing usual or proper about sending an ex-FBI guy to his wife's -- to his personal residence, when they know he's here, to question his housekeeper about -- that he's there to investigate counterfeiting. That's not usual or proper. You can investigate expert witnesses, of course. They've had three years to do it. The timing of this is not a coincidence. That's what makes it especially egregious and especially improper. We can put aside whether they've slandered him in any actual way. That's not the point. The point is that they had conducted an investigation for which they have no good faith basis, at a time that is specifically intended to subject

him to harassment and stress when he is testifying. And it has had that effect. He's gotten these calls from home. And by the way, he's perfectly entitled to talk to me, whether he's on cross or not, about these reports from home that don't have anything to do with the substance of his testimony but have to do with the fact that he has intentionally been placed under duress and stress by virtue of their conduct, which the timing of this is inexcusable. There is no legitimate explanation for it.

Whether they decide to ask him questions or not about this issue, they're going to ask him a lot of other questions about things, they're going to try to impeach him, they're going to try to upset him. Until I see him, I don't know how it's going to affect his demeanor or his ability to concentrate and not worry about what's going on back at home with this intimidating investigation, but I certainly think I'm entitled to bring that out. They brought it on themselves by doing this investigation while he's on the stand, and if they don't want it to come out, don't ask him any more questions. They're not entitled to get the benefit of this harassment and attempt to subject him to undue duress while he's on the stand and claim, well, I just won't ask him any questions about Bubble Tubbie.

MR. CAMP: I'm sorry. This is not harassment. Good faith leads are followed up. I don't know about a visit to his home and --

THE COURT: Why did they visit his home on the day that he's testifying here?

MR. CAMP: I don't even know that he did that, but if he did, it certainly wasn't at our direction. We asked questions about importation, about through a wine group, about what was being imported, about contacts with an illustrator, with a background in detailed wine label design. These were all incredibly reasonable lines to follow up. If she's going to try to elicit on redirect some circumstantial, you know, completely irrelevant circumstantial atmospherics about investigation, then on recross, which I'm obviously not planning to do, I suppose I'm going to have to inquire about the basis for those inquiries, and there is a good faith basis, and I don't think we want to wind up with a mini trial over what it was that was being investigated. I mean, that to me seems completely absurd.

MS. SALISBURY: Well, you know, your Honor, that's really convenient, because now they get the benefit of a witness who has been subjected to this and, you know, if you want to get Mr. Lempert-Schwarz in here to talk about the call he got from his housekeeper describing the man at the door asking about wine, he can do that. We should have him on video. They have a security system there. So we believe we have him on video, we have his card, and we have a voice mail message transcript that he left with the graphic designer,

who's trying to figure out why people are going out to his landlord saying, "Do you know if this guy has fake wine labels sitting around in his studio?" So I now have a witness on the stand who has been subjected to this sort of duress, and believe me, the timing of something can make it duress. If you are entitled to conduct an investigation, you're entitled to conduct an investigation. But these people have controlled the timing of this. Mr. Schwarz has been an expert witness in this case for three years. The timing of this is not an accident, and if he has been subjected to that sort of duress before he gets on the stand, I'm entitled to bring it up. And you know what, if it's a circus, it's a circus they created.

THE COURT: Well, I'm not in a position to know enough about what happened and the timing to know whether there was harassment or something, but what I want to do is finish this witness' testimony and keep it limited to the issues that are in this trial.

MR. CAMP: And to be clear, the remaining cross I have is directly related to just expert issues, his view on an expert issue and what our expert testified to.

THE COURT: Okay. Do you know how much longer you have?

MR. CAMP: Probably 15 minutes, 10 minutes.

THE COURT: Okay. Well, whether there's something to be done about this, you know, is something that I don't think

we are going to decide right now, that I'm going to decide right now, whether there was some improper thing that was done. But what I think we need to do is finish the testimony.

MS. SALISBURY: I'd like to finish it too, your Honor, but if he's shaken on the stand, I think I'm going to have to talk to you again about whether I can bring this out, because I think it's extremely unfair for them to do, to have their investigators going out to his house and all these places, which obviously the reports are going to get back to him and then: Oh, well, we just won't ask him that. I think that's very unfair. But we'll see how it goes.

THE COURT: Okay.

MR. CAMP: Well --

THE COURT: Mr. Camp?

MR. CAMP: Just to be clear, I'm not sure I understand what counsel's talking about, shaken witness. Is the suggestion that if I don't ask anything further, they're not going to redirect? Because if so, I mean, I can talk to our client, but perhaps we'd consider that.

MS. SALISBURY: Consider what?

MR. CAMP: Not doing any further cross of him.

MS. SALISBURY: That's fine.

MR. CAMP: No, at all.

MS. SALISBURY: You don't want to do further cross, I think that's one of the remedies I requested for this behavior.

MR. CAMP: No, I'm asking if you're going to do redirect.

MS. SALISBURY: Well, yes, I'm going to do redirect. Not on -- well, yeah. I'm not going to do it on this without talking to the judge.

THE COURT: But you have redirect about yesterday's testimony.

MS. SALISBURY: I'm assuming I'll have redirect, but, you know, probably five minutes. I don't know.

THE COURT: Do you want to continue to examine?

MR. CAMP: Well, I thought if the issue is how he's going to be affected on the stand, I was saying, if she's not going to do any redirect, then I'd consider not doing any cross and we're just done with the witness.

MS. SALISBURY: Okay. Wait. I'm sorry. I don't mean to interrupt, but I misunderstood you, so I want to -- okay. So what you're saying, if I don't want to do any redirect on what was said yesterday, you would not do cross now, and that would solve the problem; is that what you're saying?

MR. CAMP: No. I thought the issue -- I'm sorry it's confusing. I thought the issue was, you're concerned about his demeanor on the stand in general and whether or not he can testify fully today and correctly as a witness. I'm saying, if you're willing not to do any redirect at all, then I will agree to do no further cross.

THE COURT: And we'd be done.

MR. CAMP: After I talk to my client. And we'd be done with the witness.

MS. SALISBURY: Well, I'd like to discuss it with my team too. If we could?

THE COURT: Okay.

MS. SALISBURY: Could we discuss it?

(Pause)

MS. SALISBURY: You know, I have some very limited redirect from yesterday that I don't think I should be deprived of the opportunity to do. It's fairly limited.

MR. CAMP: I have very limited cross as well.

THE COURT: Okay. So we'll do the limited cross and then the limited redirect.

MR. CAMP: Thank you.

THE COURT: Is Mr. Schwarz here?

MS. SALISBURY: Mr. Schwarz is here. I asked him to step outside for this discussion, although if he wants to know the facts about all that happened, he's certainly entitled to.

THE COURT: Oh, right. Get the jury. Sorry. I forgot about the jury.

MS. SALISBURY: You know, your Honor, of course Mr. Schwarz hasn't heard this session so I know that he may -- I can't -- I don't know what he's going to say in response to certain questions from these gentlemen that he knows are

responsible for these events. I don't know what should be done about that, but I just wanted to let you know.

THE COURT: Well, Mr. Camp?

MR. CAMP: Obviously I'm going to object to nonresponsive, irrelevant testimony and ask that it be stricken but -- if that's the plan. I hope it's not.

THE COURT: Yes. Mr. Schwarz, there's going to be limited, very short period of time of cross-examination and redirect and then we'll be done, okay? So it will be focused on the experts issues in the case.

THE WITNESS: Okay.

(Continued on next page)

(Jury present)

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

THE JURORS: Good morning.

THE COURT: Welcome back.

We'll be continuing with examination of Mr. Lempert-Schwarz.

Mr. Camp?

GIL LEMPERT-SCHWARZ, resumed.

CROSS-EXAMINATION CONTINUED

BY MR. CAMP:

Q. Good morning, sir.

A. Good morning. By the way, I forgot to get an introduction from you yesterday, so I'm not actually sure what your name is.

Q. Oh. My name is Marshall Camp.

A. Thank you.

Q. Just a few final questions --

A. Sure.

Q. -- this morning, sir. You were here for the testimony of Jamie Martin? The labeling glue, ink?

A. Oh, yes, yes, yes. James Martin, yes.

Q. I'm sorry. James. And you were here when Mr. Martin testified that for many of the bottles in this case, the inks and the glues used on the labels on the bottles are years and decades younger than -- or newer than the vintages on the corresponding bottles? You were here for that?

A. Yes, naturally.
Q. And you testified yesterday that in your view there could be innocent explanations for a label being newer than the vintage of the bottle it represents, right?
A. Yes.
Q. You gave the example of chateaux that keep bottles in their cellars with no labels on them for many years and then maybe do some sort of re-release decades later and print up brand new labels with the old vintage on it.
A. Correct.
Q. You also said that you believed that sometimes collectors may have a label fall off and, on their own, assuming they have access to some sort of sophisticated color copying, might generate a photocopy and put it on the label.
A. I don't think I said sophisticated color copying. I mean, I've seen all kinds of examples. But generally, yes, they could put on any sort of label they wish to on their own bottles.
Q. Okay. So I want to be clear about this point. You were also here when Mr. Martin testified that almost every label in this case, 21 of 24, have some sort of indication that the label was made to actually look older than it is, right?
A. Yes, it's possible.
Q. You heard him testify that many of the labels on the bottles in this case have cuts or nicks on the edges or on the

middle that were made with a sharp implement like tweezers or nail clippers. Did you hear that testimony?

A. I heard him mention something about X-ACTO knives and -- but in general, yes, I heard that testimony.

Q. Okay. I want to show you just a couple of examples. I'm going to hand you Trial Exhibit 225, 1921 Petrus magnum, or purports to be, and Trial Exhibit 224, which purports to be a 1921 Cheval Blanc.

A. Okay.

Q. And if you look at those two labels, do you see nicks and cuts on the edges and in some cases in the middle of the label?

A. Yes, I do.

Q. Now you're not an expert in paper or the way cuts are made to paper, right?

A. Not at all.

Q. You have no basis, expert basis to disagree with Mr. Martin's conclusion that the cuts on these labels were made deliberately with some kind of implement, right?

A. I don't disagree with that, no.

Q. And you heard that also studying these and other labels in the case under a microscope, Mr. Martin was able to determine that based on the way the glue had dried, the labels had actually been affixed to the bottles after these cuts and nicks had been made to the labels? You heard that testimony?

A. Sure.

Q. And you have -- you're not an expert in glues either, right?
A. No, I'm not.
Q. And you have no basis to dispute Mr. Martin's testimony that as to many of the labels in this case, the cuts and nicks on them were made before they were applied to the bottles, right?
A. If that's what he found in his forensic expert report, then I so -- I heard it, I saw it, and yes.
Q. You were also here when Mr. Martin testified that a number of the bottles in this case, including the two in front of you, have what appears to be mold from age on the labels but in fact under close examination is a shellac that's been smeared on them to create the appearance of mold.
A. Yeah, that was actually particularly interesting because just by pure logic, I was thinking about shellac, which is varnish that's used on furniture and wood, and since many people have their bottles in wood racks, you know, we didn't hear about whether shellac seeps into the paper when it sits in wood racks for a number of years, etc. So, you know, it's possible that there's shellac on these labels for sure.
Q. And you heard actually Mr. Martin's testimony is that it's been deliberately smeared into the label to spread it out so it looks like mold. Do you remember that testimony?
A. This doesn't actually look like mold at all. But anyway --

Q. Just asking if you were here for Mr. Martin's testimony.
A. I was here for Mr. Martin's testimony. I heard everything he said, yes.
Q. And you're not an expert in shellac, right?
A. No.
Q. You're not an expert in mold.
A. No, I'm not.
Q. Now you were also here when Mr. Martin testified about a label where the ink was much younger than the vintage but it had been rubbed to make the ink look older. Did you hear that testimony?
A. Yes, I did.
Q. And again, you're not an expert in ink, right?
A. I am not an expert in ink, no.
Q. And you have no basis to disagree with Mr. Martin's expert conclusions about the shellac and the ink?
A. Not really. I mean, he talked about the ink as a substance in and of itself, not related to the printing process at all, since he said he wasn't a printing expert, and the shellac, yes, I heard all of his testimony about this.
Q. Well, and to be clear, sir, you testified about a lot of trips to chateaux. You never, on any of these trips to chateaux, saw a wine maker making cuts to labels to make them look old, gluing them to the bottle? Did you ever see that happen?

A. I've seen a lot of things going on in these chateaux by different people but I can't say that I've ever observed somebody working at the chateau rubbing wine labels and cutting them with a knife and then gluing them on in front of me, no, I have not seen that.

Q. And in all your trips to the chateaux, you've never seen somebody at the wine producer rubbing shellac onto a label to give it the appearance of mold.

A. I have not seen that either, no.

Q. And you haven't seen that -- I asked you about chateaux. You haven't seen either of those things happening anywhere else, have you?

A. Truthfully, I've seen a lot of different things over my time in the chateaux and in Bordeaux. I've also heard stories. There are lots and lots of things that were done to labels and bottles in the past in Bordeaux, but specific to shellac or X-ACTO knives, no, I haven't heard anything of the sort.

Q. And during your deposition do you remember being asked whether if an expert concluded that cuts on the labels had been deliberately inflicted before they were applied to the bottles, whether -- the labels were applied, whether that would have any relevance to your conclusions in this case? Do you remember being asked that?

A. Yeah.

Q. And do you remember saying it wouldn't, you'd need to know

the circumstances because, for instance, a bike messenger could have stumbled with a load of labels, causing the labels to get cut and then maybe the chateau just put them on anyway with the cuts in the labels? Do you remember giving that example?

A. Yeah, I give a lot of examples. You know, short of having sort of a microvideo camera attached to these bottles during the life of these bottles, we don't really know what happened, when, where, how, who did what or whatever. That's why --

Q. So just -- sorry.

A. -- what's inside is very important in relation to what's going on on the outside --

Q. So I just --

A. -- specifically.

Q. -- want to be clear, you understood there are five different chateaux at issue in this case, right?

A. Yes.

Q. And that the age range of the vintages is 86 years.

A. That is correct.

Q. Now you're not suggesting that you're aware of an epidemic of bike messenger tumblings having happened over in the early century, long period, inflicting the French countryside, right?

A. No.

Q. You're not aware of anything that would have caused all these different labels, from all these different chateaux, after all these different years, to have all been cut, glued to

the bottle after being cut?
A. Were they all cut and glued?
Q. The ones -- I'm asking about the ones that Mr. Martin testified were cut and then glued to the bottle.
A. Yeah, but I saw a chart where you had, you know, some had glue problems, some had, you know -- there was all kinds of things going on, but not all of them had all the things going on with them, as far as I remember from -- from that nice chart you put up on the screen, and so again, all of them, no, there was no such thing with regards to all of them. I mean --
Q. All right. Are you --
A. -- do you want do specify maybe?
Q. Are you aware of a bike messenger epidemic that affected the ones that have cuts on them glued to the bottle?
MS. SALISBURY: Objection. Asked and answered. Argumentative.
MR. CAMP: I think he asked me to narrow the category down so I'm asking just about the bottles where Mr. Martin testified --
THE COURT: Overruled.
MR. CAMP: -- the cuts were made before the labels were glued to the bottles.
THE WITNESS: Right.
Q. Are you aware of any bike messenger accidents or other things that would have caused all those labels over all those

years from all those producers to have all had cuts in them before they were glued on the bottle?

MS. SALISBURY: I also object, it misstates the witness' testimony.

THE COURT: Yeah, when you say all those labels, are you referring to --

MR. CAMP: We can put the chart up. It's --

THE WITNESS: Yeah, by all means.

THE COURT: -- the ones --

THE WITNESS: Here we go.

Q. Right. And if you highlight the line that says -- I think it's the first one, right, Artificial Wear?

A. Yeah, so all but three had artificial wear.

Q. Right. So when I say all those bottles, I'm referring to all those bottles except the '28 -- the two '28 Latours and the 45 Lafite. Okay?

A. Okay. So that's --

MS. SALISBURY: Objection. Misstates the evidence.

A. So that's 21 out of 24 bottles, basically.

THE COURT: Overruled.

Q. That's right.

A. I see 21 out of 24 bottles, according to Mr. Martin's report, had signs of artificial wear.

Q. Right. And are you aware of any bike messenger accidents or other things that would have caused artificial wear to all

of those labels that have Xs under them?
A. Bike messengers, as I mentioned in my deposition -- is that where that comes from, the bike messenger reference?
Q. Yes.
A. No, there was no bike messenger epidemic that I have heard of. There was world wars and other things, but no bike messenger problems.
Q. And in all of your trips to the chateaux I asked you, have you seen shellac being applied and rubbed on the labels --
MS. SALISBURY: Objection. He has asked that. It's asked and answered.
MR. CAMP: Right. I'm leading to the next --
THE COURT: Sustained.
MR. CAMP: I was going to ask --
THE COURT: Okay.
Q. Are you aware of any legitimate reason that a chateau would put shellac on a label and rub it in to create the appearance of mold?
A. That's a tough question, quite frankly, 'cause I don't know what all the chateaux did at all the times during all these different years with different owners, but logically I can't think of any reason why anybody would rub shellac into a paper label before it gets applied to a wine bottle to make it appear as if there's mold on it, even when it doesn't actually look like mold.

Q. And are you aware of any legitimate reason to apply nicks and cuts to a label before it's glued onto the bottle?
A. Well, that's the one thing, you know, if you have stacks of labels the way they store stacks of labels, they were on old shelves and racks, they were handled by a bunch of people. There could be many different reasons why you have nicks and scratches. But if Mr. Martin says that somebody deliberately sat and applied them with an X-ACTO knife, then that's a pretty extreme example, so again, logic would dictate that maybe I haven't heard of such a thing.
Q. Right. The only reason somebody would do that, sir, is to attempt to deceive, right?
A. I don't know if I dis -- if I agree with that particular way to describe it. Again, these are just the labels we're talking about here, not the whole package, so to speak, so again, I can't begin to divine what has happened to all these labels over all these years. You know, like I said, one of them was clearly a blatant reproduction label, two others were copied labels. I mean, lots of things could have happened, but I can't attest to what has happened to all these labels over all these years.
Q. Right. And based on your examination, you wouldn't recommend that any bottle in this case be purchased by one of your customers.
A. No, I said I would not recommend any of these bottles be

sold.

MR. CAMP: Thank you.

Nothing further, your Honor.

THE COURT: Okay. Ms. Salisbury?

MS. SALISBURY: Yes, thank you.

REDIRECT EXAMINATION

BY MS. SALISBURY:

Q. Mr. Schwarz, you said something interesting there about wine labels sitting around in stacks in chateaux.

A. Yes.

Q. That's how chateaux keep their labels, they sit around in stacks on a shelf?

A. Well, in the old days, basically what happened is, like I said, they had gone ahead and ordered a series of labels to be printed. This is only the chateaux now we're dealing with here, at the chateaux themselves. Stacks of labels were coming in from the printers. They had those -- like I said, many times they actually had labels that had no vintage on them because when they didn't have much money, they'd go ahead and order, say, you know, 50,000 labels and then they had enough labels for several different vintages, and then vintages were sometimes applied on the need basis at the chateau using another type of printing method or sent back to the printer for adding just the, you know, the vintage on there.

And then independently of that, you had negociants,

who also had their own labels or sometimes were supplied labels from the chateau.

So you had this whole universe of different possibilities with these labels and so, you know, anything really was possible in that sense.

Q. And what are some of the different reasons or ways that you've seen labels degrade?

A. Oh, if I may give you a recent example, I was just asked to come and inspect a very large and famous collection of a chateau called Yquem. There's no bottles here from Chateau Yquem, but what was interesting is this is a very famous collection, it was sold to the Rio Hotel in Las Vegas, where it's been the pride and joy of their wine collection for the past 15 years. I've inspected it once before. Of course I document these inspections with lots of photographs and looking very carefully at the bottles. This is one collection that is entirely authentic. It has been authenticated by the former owner of the chateau, reauthenticated, etc., so there's no dispute about authenticity here. But what's interesting about this is all these bottles have been sitting in these wine cabinets at the same temperature, with the same humidity. I mean, that's what their readings on their machines -- and they're pretty sophisticated. And so for the -- since I'd inspected it last time, it's been about eight years. So I was there last month to reinspect it because now they're interested

in selling this collection, which is worth upwards of a million dollars. Or maybe half a million dollars. But at the end of the day, all these hundred and thirty different vintages of Chateau Yquem are sitting in the same location, without ever moving, and then I come in and take these bottles out of the racks -- this is 1855 to 1990 -- and out of these different bottles, these are all reconditioned labels. That means these labels were not applied originally but during reconditioning that was done at the chateau between 1990 and 1996, so these are fairly recent labels on old bottles. Another example of such an occurrence. And then I come in and I take out all the bottles from these wine cabinets where they sit in perfect condition, and lo and behold, some of the labels have come off, some of the labels have this green substance on them, some labels have what appear to be like mold, some have different markings on them, very similar to some of the ones that we've seen on these bottles, and these are like fairly recent labels. So I was trying to look for an explanation as to how could these labels, all sitting in the same conditions, on a hundred thirty-five different vintages of the same wine, from a hundred fifty years, how could these labels all have differences with them? And so this was documented during my inspection and my report, and I found it very interesting, but, I mean, some labels just came off, and these were applied by the chateau in the 1990s, surely when they had, you know, pretty good glues,

etc., and then some labels were just wrinkled, some labels were kind of like falling apart, where the paper wasn't, you know, holding together and was -- there was like a whole universe of stuff going on. And this is just last month, when I'm looking at this. I mean, so yes, lots of things can happen to labels, even when they are not touched by human hands.

Q. I'm going to talk -- ask you a couple questions about some of your testimony and some of the cross-examination from yesterday.

A. Yes.

Q. In your business, is how you authenticate a wine like this for an auction --

A. Yes.

Q. -- different than how you decide that a wine is counterfeit?

A. Very much so.

Q. And what is that difference?

A. Well, when I sit in somebody's cellar, let's say in Europe -- I'm in many different countries all the time and I look at these incredible cellars. So I sit in the cellar. The reason I go to the cellar specifically for auction -- other times I may go for other reasons, but if I've specifically been asked by my client, Acker Merrall Condit, the world's largest wine auction house, to go and inspect the cellar to look at what bottles can be included in an auction, I'm merely looking

at these bottles for whether or not they should be included in an auction, in a sale, and so if I see indicia of inauthenticity on the bottles or things that I don't like, the way the bottles look, they simply remove them for sale. They don't ever go to an auction and is -- they are never sold.

Now if I'm looking at bottles to determine whether they are counterfeit or not, that involves looking at the exterior of the bottle, and then in order to finally conclude whether it is counterfeit or not, I would have to open that wine, I'd have to draw the cork out, using any method, and test the wine or taste the wine, if you will, just to at least see if there's some cohesion here, and that has been, again, done on a number of different occasions.

Let's assume I've been in somebody's cellar and -- another recent example, I was in a very famous Swiss collector's cellar, just last year, and I go through this cellar. This gentleman is interested in consigning a large number of bottles for auction, so I go through methodically all of the bottles, as I do, inspecting, photographing, etc., and then a couple of bottles that didn't seem -- there were some indications in my mind just by looking at them that there was some -- something not normal with these bottles. Okay. So I set them aside. And when I finished the entire inspection, the collector came and saw me and he said to me, "Why are those two bottles not included?" I said, "Well, there are some issues

with these bottles in my mind so I don't want to include them in the sale." Of course I never use the word "counterfeit" or anything of the sort with anybody that -- whose cellars I'm inspecting. It's not appropriate. Counterfeiting is a very serious criminal matter and that should never be mentioned in front of these collectors. And so therefore, I sit with these bottles -- and he said to me, "You know what, why don't we just go ahead and open them and then we'll know." And I said, "Absolutely." So we sat down at his dinner table -- one was actually a '28 Chateau Latour and the other one was a 1945 Mouton. I know these wines like, you know, back of my hand and I had them dozens of times. And I -- and I said to him, "Fine." And we opened the bottles. I drew out the corks. I was able to really look at the corks. They looked -- one was reconditioned, the Mouton was reconditioned, and the Latour was actually from an original collection. It had the "28" on the capsule as the original Latours done -- had, but not reconditioned bottles. And then once we opened these bottles and tasted them, we both looked at each other, said these are perfectly authentic examples of these two wines, and we had, of course, a great time drinking them. So yes.

Q. And they were authentic even though they had indicia of inauthenticity; the wine in the bottle was the wine that was on the label.

A. Absolutely. Absolutely.

MS. SALISBURY: Thank you. I have no further questions.

THE COURT: Okay. Thank you.

Anything further?

MR. CAMP: No, your Honor.

THE COURT: Okay. Thank you, sir. You may step down.

THE WITNESS: Thank you.

(Witness excused)

(Continued on next page)

THE COURT: Are there any further witnesses for defendant?

MS. SALISBURY: We are good, your Honor.

THE COURT: Thank you. Anything from plaintiff?

MR. KABA: Plaintiff has no rebuttal witnesses, your Honor.

THE COURT: So we have completed the evidence in the case.

MR. KABA: We would like to reserve the right to introduce any summary exhibits. We will disclose them to the other side. They may be helpful to the jury as we prepare for closing arguments.

THE COURT: OK.

MS. SALISBURY: Your Honor, we would like to move for judgment as a matter of law pursuant to Rule 50. What we would like is to have the motion deemed made now with briefing to be filed in due course.

THE COURT: That's fine. I'll reserve on that, subject to any briefing.

MS. SALISBURY: Thank you.

THE COURT: Thank you. Nothing further in terms of evidence that we need to deal with right now with the jury?

MR. KABA: Nothing further from plaintiff, your Honor.

MS. SALISBURY: Nor from defendant, your Honor.

THE COURT: OK, folks. We have completed the evidence

in the case. However, based on scheduling needs of everyone involved, we have decided to do closing arguments tomorrow morning. You are going to have a free day or most of a free day. At least as of now it's a beautiful day. I hope you will have a chance to enjoy it.

What I would like to do is let you go for today. If possible, I'd like you to come in early tomorrow, 9 o'clock. Would you all be able to come in at 9 o'clock?

Also, importantly, the court reporters, would one of you be able to come in at 9 o'clock? You're pointing to each other.

Closing arguments, as I mentioned, are not evidence, but they are a very important thing in the case. They are each side's chance to have the lawyers summarize evidence for you and explain their argument about why you should find for them. But at the end of the day it's your recollection of the evidence and your view of the evidence, which you will be able to see in the jury room when you deliberate starting tomorrow, that is going to determine how you decide the case.

The closing arguments, I'm giving them basically the rest of today to finalize those. We will do the closing arguments tomorrow morning between 9:00 and lunchtime. Then in the afternoon I'll give you my final instructions. We'll get lunch for you tomorrow and you will have a chance to start your deliberations. We will start promptly at 9 o'clock tomorrow

morning.

One last time I will say to you please don't discuss case, because starting tomorrow you will get to discuss the case, but only with each other. As I will explain more tomorrow, you should not discuss the case at all right now, but starting tomorrow you will get to discuss the case, but only when the entire jury is there. When all of you are not there, you're just a group of nice people. When you are all there, you're a jury. That's when you get to discuss the case.

One final time. Please don't do any research on the case. You're welcome to think about it, but continue to keep an open mind. I'm going to ask you when you deliberate to discuss with each other the evidence that you think is important in the case, the witnesses, who you believe, who was credible, who was not, and make your finding based on that. So, no research, no blogging, no talking to anyone else about the case. We'll see you tomorrow morning at 9 o'clock. Have a good day.

(Jury not present)

THE COURT: You may be seated. We had a very helpful charge conference yesterday. As I mentioned this morning, we will be sending out, maybe we have sent out, we have sent out, what I think is a close to final version of the jury instructions that I intend to use tomorrow.

We have up to 2-hour closing summations tomorrow

starting at 9:00. I'm hopeful that we will be finished with closings by 1 o'clock. Depending on how the jury is doing, I will then go right to my instructions or we'll let them have lunch and then I'll instruct them right after lunch, depending on how hungry they are.

The other thing we need to discuss is the verdict form. I'm still working on that. What I would like to do is take a little time myself, maybe an hour or so, and we could come back and start talking about the verdict form and any other final issues relating to open issues about the instructions. Is that OK?

MR. KABA: That's fine with us, your Honor. If I may make just one request?

THE COURT: Sure.

MR. KABA: We will have defendant's closing argument from about 9:00 to 11:00, assuming we start at 9:00, and then we will go right into or maybe there will be a brief break and then go into plaintiff's closing argument. We are just concerned that by the time we get close to 1:00 or 1:15 the jury is going to be very upset with us that their bellies are empty. If it is OK with the Court, we can anonymously bring some snacks or something to the jury so they can get some nourishment so they are in it.

THE COURT: As long as it's not wine. I think we could have snacks.

MR. KABA: No wine. But we can just bring it in anonymously and the jury never needs to know about it.

THE COURT: Do defendants have any issue with that?

MS. SALISBURY: I have never in my life been against snacks.

MR. KABA: We will even bring some for you.

MS. SALISBURY: No thanks.

THE COURT: Provide them to Mr. Skolnik in the morning. He is the keeper of the jury. That's fine. We will give them some sustenance perhaps on the break between summations. Anything else we need to address now before I take a little time and think about the verdict form?

MS. SALISBURY: No, your Honor.

MR. KABA: No, your Honor.

THE COURT: We will be back in about an hour.

(Recess)

THE COURT: The verdict form, we don't have a draft yet, but I wanted to talk to you about my general ideas. First, with respect to the jury instructions, I don't know if you have had a chance to look at them, but I added back in treble damages on the GBL claim.

Originally, I had taken it out on the theory that that is really more like punitive damages. But in thinking about it, as it seemed kind of its own distinct thing, it seemed more efficient to do the treble damages with the GBL claim, since it

is just kind of an additional element. So I added that as part of the first phase in the instructions.

With respect to the verdict form, what I am inclined to do is in some ways make it more like a general verdict form. Essentially, there are two alternative forms of finding fraud, one being misrepresentation and the second being fraudulent concealment. Then there are, obviously, two GBL claims.

What I am inclined to do is have essentially a general, rather than going through question by question by question, just have a general form that says something like -- I'd remind them of the elements.

For example, we would have fraud. Part 1, fraud misrepresentation or affirmative misrepresentation. As stated in the instructions, the elements are 1, 2, 3, 4, 5. Do you find that Mr. Koch established by clear and convincing evidence or do you find by clear and convincing evidence with respect to one or more of the 24 bottles of wine at issue that the elements of fraud have been met? Yes or no.

Again I would remind them of the elements right before that or, alternatively, refer them to the section of the jury instructions. I'm going to give them a copy of the jury instructions. And have it yes or no.

Then I was going to say, if yes, which of the bottles of wine at issue in this case, with respect to which bottles of wine do you find fraud, and then actually have the table of the

bottles of wine that is set forth in defendant's verdict form. Then, the instructions hopefully correctly state the elements and they won't find unless they find all the elements.

Then, if they decide that there are statements that go to all of them, they can check all of them yes or no. If they find that it is fewer than all of them but some of them, they can check which specific box. Then I do the same thing for 1(b), which is fraudulent concealment, again state the elements and say do you find fraudulent concealment by clear and convincing evidence.

Then there would be a (c) for damages. If you have found by clear and convincing evidence or if you answered yes to either 1(a) or 1(b), you must determine how much to award Mr. Koch in compensatory damages. There I was going to ask you about the issue of pricing.

The chart identifies, which is helpful, both the trial exhibit number for each bottle and the Koch ID number, which I think is a good thing. I was wondering if there might be a stipulated chart that we could say when we got to damages, for your reference attached is a chart showing the amount paid that is attributable to each bottle.

MR. KABA: We were actually discussing it. I don't think we are going to have a dispute over the amount paid. We could probably even just add a column here. This was 1090A, and send it to defendants with that addition, a column with the

amounts listed. That would be the easiest thing, rather than having to flip back and forth between invoices and the chart.

THE COURT: Then there would be a table like defendant's proposal.

MR. CIALONE: I wouldn't want to use this one, because we are asking the jury to make a finding that it came from this auction, and so forth. List the bottles, lot number, ID number, price.

MR. KABA: We can do that. I think we can do a summary chart, whether it is this one or less than this.

THE COURT: Right. So there is an agreed-upon amount for each bottle which reflects if it is 1 in a lot of 3, it has already been divided by 3.

MR. KABA: That's right.

MR. CIALONE: There is no dispute as to the price on the individual lots.

THE COURT: I think it would be helpful to have as an addendum to the verdict form that they could refer to if they want to pick and choose among bottles.

MR. CIALONE: I think that is fine, your Honor, and the form sounds fine. As long as it is clear from it, it sounds like it will be, that to award damages on a bottle, the jury needs to find that all of the elements are satisfied for that bottle. That may be because they find an element is satisfied for all 24 bottles but they do need to find,

essentially, for each.

THE COURT: Yes. I think that will be clear.

MR. KABA: Your Honor, I think what you have proposed is a good compromise between our two positions. We would ask that the verdict form list all the bottles but also have kind of an all, so if they find it for all of them, then they can check the all box. We think that is a fair, easy way for them to do it. They don't have to, obviously. You can have an all or none even and do it that way.

THE COURT: We can have an option for none and an option for all. Does that make sense?

MR. CIALONE: I think that is OK. It is reminding me when I used to live in Rhode Island, it is the one state where you could vote for the entire democratic slate or the entire Republican slate. Really easy.

THE COURT: It's a simple way of voting. Yes, I think we can craft something like that.

MR. KABA: If your Honor is willing to hear us, we do have a couple of comments on the requests to charge.

MR. CIALONE: I was going to say we argued for more than two hours last night. It's been under submission for a while. I think the parties should submit, with the exception of two things. One is there is one typo and the other is on the 15-108 instruction which Mr. Coles is prepared to deal with. The typo is on page 9. It says "without independently

investigation or verification." It should be "without independent."

THE COURT: OK.

MR. CIALONE: We had extensive argument on this one, your Honor. Really, what more do you need to hear from us?

THE COURT: If you have additional ones, I want you to be able to preserve.

MR. KABA: It will take me about 60 seconds. First, on page 7 you have added language on puffery and you have also added, "However, given a statement of opinion, given a law or fact." I am not proposing to change language, but to change the order. The "however" should follow the puffery instruction. That's the way you have it in sort of the other paragraphs, it is sort of rule, however, rule, however.

THE COURT: This is the "however" to the general rule about opinion not being actionable.

MR. CIALONE: That's right. If something is puffing, your Honor, it doesn't matter whether it is sincere or not; it can't be sincere, because it is puffing. You have it in the right order. It's a general assertion or expression. "This is the champagne of beers." It's not really champagne. I can't be liable for that. It's puffery. You have it correct.

MR. KABA: The last sentence -- now I'm going to go over 60 seconds -- "Such statements are generally regarded in the law as mere expressions of opinion." Then the "however"

says, "However, even a statement of opinion, whether of law or fact, that was not sincerely held or made is actionable."

The point is simply you're saying puffery, that is generally a statement of opinion. And the exception to the rule, as the case law articulates, is even if you find it's a statement of opinion, like puffery may be, if it is not sincerely held, it is actionable. It's just a structural thing, your Honor.

MR. CIALONE: It's wrong, your Honor, and the reason it is wrong is because counsel is not reading to the end of the sentence. Puffery is merely an expression of opinion on which a purchaser cannot safely rely. That's the entire sentence. If you do it the way he wants, but sometimes you can rely. No, no, you can't rely on it, because it is mere trade talk, Alexander the Great. It's just trade talk.

THE COURT: I'll take another look at it.

MR. KABA: Thank you, your Honor.

THE COURT: And check a couple of the cases on that.

MR. KABA: That's all we were requesting.

The other point is on page 9 you added, "In other words" -- you didn't add this. The language is, "In other words, if and only if you conclude that Mr. Greenberg knew material facts relating to the authenticity, provenance, and merchantability of those bottles." It actually should be "or merchantability," since the point we are making is if he knew

about one or more of those things, it can be actionable and we can't have relied on it.

THE COURT: Could you read the whole sentence again?

MR. KABA: Sure. This is in the justifiable reliance discussion. You have the carryover paragraph from page 9 to 10 on the red-lined. "In other words, if and only if you conclude that Mr. Greenberg knew material facts relating to the authenticity, provenance," right now you have "and merchantability of the bottles of wine at issue in this case that were not readily available to Mr. Koch, then a specific disclaimer, like the as-is clause, is not a bar if you find justifiable reliance."

The point I am make here is it could be any one of those things. We don't need to prove he had any information about every single one of those things or other elements of the disclaimer.

THE COURT: OK. I assume that is --

MR. CIALONE: I think that is OK, yes. It's a little hard to read on these things, but I think, given the context, it is clear that those have to be facts about which an actual representation was made.

THE COURT: OK. Anything else?

MR. COLES: Your Honor, just before the break you had asked for some citations as to whether or not GOL 15-108 applies to the General Business Law. I actually just sent you

an email that must have just gone out as you were walking in, giving you three citations, a 2009 Eastern District case, Mathis v. United Homes, 607 F.Supp. 411. The issue is addressed at pages 429 through 433. There is also a more general Southern District case that deals with the issue.

MR. KABA: May I ask counsel, was Mathis applying 15-108 specifically to the 349 and 350 claim?

MR. COLES: Yes. Minpeci v. ContiCommodity Services, 677 F.Supp. 151, that's Judge Lasker from 1988. The Minpeco cites other cases, which you will see when you look at it.

THE COURT: Great. We'll look at those.

MR. COLES: Thank you, your Honor.

MR. KABA: Your Honor, if we may make another suggestion. We have to take a look at these cases. We haven't looked at them yet. If we have anything further we will send you a note on it. There may be a way for us to resolve this so that it is clear that it is only as to GBL claims. We still have our other objection that it has to be as to the same injury.

THE COURT: As to the same?

MR. KABA: The 15-108, even if it does apply to the GBL claims, has to be for the same injury for which the other party was released. Our settlement agreement, this is what we talked about the motions in limine, the 10 bottles not at issue in this case, not from Mr. Greenberg's auction. That was the

release.

THE COURT: Right. That is something we will deal with after the trial, I assume.

MR. KABA: Right.

THE COURT: If I do add something based on 15-108, I think I'm not going to have them do a calculation or anything. It will just be a question about the percentage of fault attributable. It is essentially an advisory question for the jury in case I need to use it in applying 15-108 after the trial.

MR. COLES: Thank you, your Honor. If I could reserve one point? I don't think you have to address it now.

THE COURT: Sure.

MR. COLES: I think there is an inconsistency to having both a treble damage claim, even one that is capped like the GBL, and a punitive damage claim. I think you could have one or the other in the case. I don't want to address that now, but I wanted to raise it.

THE COURT: You mean even as to different claims?

MR. COLES: Even as to different claims. It's something we want to look into further, but I wanted to make sure I put it on the record.

THE COURT: OK.

MR. CIALONE: Can you give us one moment, your Honor, to discuss the GBL claim?

THE COURT: Sure.

MR. CIALONE: We're fine, your Honor.

THE COURT: Anything else?

MR. WESSEL: You will send the form to us so we can see it?

THE COURT: Yes. We'll work on it for the next couple of hours and send it to you this afternoon. Is it working; when we email you, you get it?

MR. KABA: Yes.

MR. CIALONE: Yes.

THE COURT: We'll do that. I don't know what is easier for you. Maybe we could talk at 4:00 or something. We could even do it by phone if that's easier. I don't know what is easier for you.

MR. CIALONE: That would be fine, your Honor, if we could do it by phone and get back working on tomorrow.

MR. KABA: That's fine with us. We may have no comments to make on it.

THE COURT: Why don't we assume just as a placeholder that 4 o'clock you will call my chambers.

MR. CIALONE: What is the number, your Honor?

THE COURT: 212-805-0266. We don't have fancy conferencing capabilities, of course, because we are the federal government. You should either have a call-in number or get each other on the phone if there is a way.

MR. KABA: If it's fine with you, I'll circulate a call-in number and maybe we can send it to Christine and you can call us.

THE COURT: Sure.

MR. CIALONE: Your Honor, one question that doesn't need to be on the record. I just want to know what your practice is when we are waiting for a verdict to come back. When would where would you like us to be? We don't have cell phones in here, unless you are a member of the New York bar.

MR. KABA: And more.

MR. CIALONE: And more.

THE COURT: Two of you have cell phones, right? Mr. Skolnik is not here. The main thing is we usually have people on the floor. If you need to run to the cafeteria, that's fine. But generally, as long as he has a way to reach you, that's what we have done in the past. If you have other thoughts, I'm open.

MR. KABA: A bat signal perhaps.

THE COURT: A bat signal, whatever.

MR. KABA: We'll leave phone numbers.

THE COURT: You don't have to be in the courtroom the whole time, but generally someone in the courthouse who can get back in a short time.

Thank you. (Recess)

(Continued on next page)

(In chambers, 4:48 p.m.)

(Attorneys present via telephone)

(Case called)

THE CLERK: Can I have counsel, first starting with plaintiff's counsel, just state their appearance for the record, please.

MR. KABA: Moez Kaba and Bruce Wessel.

THE CLERK: Great. And for defendants, please?

MS. DRAPER: Felicia Draper, Frank Cialone, and Anthony Coles.

THE COURT: Hi, everybody.

ALL COUNSEL: Hi, your Honor.

THE COURT: Did you all get the copy of the verdict, the verdict form?

ALL COUNSEL: Yes, we did.

THE COURT: So, any comments?

MS. DRAPER: This is Felicia Draper. Yeah, we have a few, your Honor.

MR. KABA: As do we.

THE COURT: All right. Plaintiff, you want to go first?

MR. KABA: Sure, your Honor. It's Moez Kaba speaking. Our overall comment is just a point of clarification. We're fine either way you choose to do this, your Honor, but I see here that after each claim the jurors can select yes or no and

if they select no, then they're told to proceed directly to the next question, and if they select yes, they're given three options -- all of the bottles, none of the bottles, some but not all of the bottles, and so -- but if they select yes, then they would never select none of the bottles, and so we thought you may be able to get rid of the "none of the bottles" because the options are only if they select yes. That way we can avoid any possible inconsistency. But we're fine either way with that, with the way you have it or with striking the "none of the bottles," and then moving that description up that you currently have in the "If you chose none of the bottles" section, moving that up to the "If no" option.

The other comment, again global, would be to indicate page numbers, so where you have, "proceed directly to 1.B," you might also include a page number, because some of the outline forms might be a little bit confusing.

Then on the fraudulent concealment instruction -- I'm sorry, charge -- verdict form on page 4, it says, "If yes," in the middle of that page, "If yes, please indicate whether Mr. Greenberg made a fraudulent representation," and we would -- we think it should be made "fraudulent concealment."

THE COURT: Yes.

MR. KABA: Instead of "representation."

THE COURT: Right.

MR. KABA: And then moving on further, I don't know if

your Honor has -- on the last page, page 13, where you have the offset instructions, I don't know if your Honor decided to include it at this point or not. You know, we won't argue that further. We've argued it plenty. But if you are going to include it, we would suggest calling it apportionment rather than offset, or something along those lines. And where you say "this violation," we would suggest that you actually indicate the GBL Section 349 and 350 rather than "this violation."

THE COURT: Right. Okay.

MS. DRAPER: Your Honor, this is -- I'm sorry, your Honor. This is Felicia Draper, counsel for Mr. Greenberg. We have a few responses to that. I'm not sure how you would like to proceed here, but --

THE COURT: Did you have anything else, Mr. Kaba?

MR. KABA: That's all we have, your Honor.

THE COURT: Okay. Ms. Draper?

MS. DRAPER: Good morning. This is -- or afternoon. I can't even tell anymore.

We'll start with the Fraudulent Misrepresentation. We have just a few things. First is that I think the word "representation" ought to be corrected to "misrepresentation." Just a clerical thing in a few places. For instance, in number 4, in part A, it would say that "Mr. Greenberg made the misrepresentation." And then again in the last paragraph on that page.

THE COURT: Well, the thing is, I mean, when you say the elements, the first one is a representation, the second one is that it was false, which turns it into a misrepresentation, and then knowing that, you know, it's just kind of repeating an element in other elements.

MS. DRAPER: It's fine either way. It's just by the time it gets to -- that he's established it's false, it just turns into a misrepresentation. Either way it's fine.

THE COURT: Okay. I understand the point.

MS. DRAPER: It's not a big deal.

THE COURT: Okay.

MS. DRAPER: But the larger issue with this one is in paragraph 2. We need, we think, to make it clearer that each of those elements listed above needs to be proved as to each bottle, so we would propose that it read, "Do you find that Mr. Koch established each of the elements listed above by clear and convincing evidence?"

MR. KABA: Your Honor, if I may, you actually do have that paragraph immediately preceding where you're laying out the elements. It says, "each of the following elements must be proven by clear and convincing evidence." And so I understand defendant's desire to emphasize, but it seems like it's already there quite clearly that those are the elements that need to be satisfied and the next question sort of tries to get to the heart of the matter.

MS. DRAPER: This is Felicia Draper again. I just think that it's not clear that each of the elements has to be proved as to one bottle, or one or more of the bottles. I think it is clear in the instruction above that each of the elements has to be established in order to prove fraudulent misrepresentations, but it's still not clear that it has to be as to each of the bottles that they want to award damages for.

THE COURT: So you would make it what exactly?

MS. DRAPER: It would read, "Do you find that Mr. Koch established each of the elements listed above by clear and convincing evidence with respect to one or more of the 24 bottles of wine at issue," etc.

MR. KABA: Well, when you say in that -- at the end of that sentence -- I'm sorry. For the court reporter, this is Moez Kaba. When you say at the end of that sentence that Mr. Greenberg engaged in fraudulent misrepresentation, that necessarily is talking about the preceding paragraph, where you say each of the elements need to be satisfied to engage in the fraudulent misrepresentation, but if there's some other language, we'll be fine with it, your Honor. I just think we can't have both of those ideas in that same one sentence.

THE COURT: Well, I mean, that's why I put in the elements, so I wouldn't have to do it twice.

MR. KABA: Right.

THE COURT: Maybe the problem is that I --

MS. DRAPER: I'm sorry. This is Felicia again. It's a little bit difficult to tell who's talking. But I guess I'm just not sure how it's incorrect to say that each of the elements listed above needs to be proved with respect to each of the bottles. It just seems to be unclear, again, that these have to be proved as to each bottle that we're talking about and not just one or more of the bottles, or to any of the bottles.

MR. KABA: Your Honor, it's Moez Kaba. We defer to you. I don't think it's a point worth arguing. However you decide it, we think it's fine the way you've done it here with where you've laid out the elements, that each needs to be satisfied and then ask the question, saying -- if you'd like to do it -- if you're going to do it the other way, that's fine as well, as long as the sentence still continues to make sense --

THE COURT: Right. Okay.

MR. KABA: -- in context with the rest of the page.

THE COURT: Okay. We'll look at that.

MS. DRAPER: Okay. This is Felicia Draper again. I have a couple more comments on -- as the page goes down. In the line that starts, "If you chose all of the bottles, proceed directly to 1.B," I think that's incorrect. If they've chosen all of the bottles for fraudulent misrepresentation, they don't then get to establish whether or not they have proved fraudulent concealment as to any of the bottles. So it's not

necessary to go through that exercise if all of the bottles have been proven as fraudulent misrepresentations. So they just proceed to the GBL.

THE COURT: Well, so proceeding to 1.B would be, you know, do they also find fraudulent concealment, which is an alternative theory of fraud. Why wouldn't you want them to go ahead and decide that as well? I mean, I agree with you that in some sense it's duplicative because it's another legal way to prove a fraud claim, but, you know, if one theory was overturned on appeal, then, you know, there would be a verdict as to the other theory.

MS. DRAPER: This is Felicia Draper again. That's fine, your Honor. They had pled fraudulent misrepresentation, fraudulent concealment as to one claim, but that's fine. We can leave it as is.

THE COURT: Mr. Kaba, do you have any view on that?

MR. KABA: Your Honor, I have no view on it except the one you've already articulated.

MS. DRAPER: And this is Felicia Draper again. Just one more thing. At the bottom, "If you chose some but not all of the bottles," it doesn't actually tell them that they should proceed to 1.B. It may just be clearer if you tell them there what to do, since you described what to do if they choose all of the bottles or none of the bottles, although I guess that's coming out.

THE COURT: Oh, you mean after I say, "If you chose some but not all, please indicate on the table below and then proceed to --"

MR. KABA: 1.B.

THE COURT: "-- 1.B"?

MS. DRAPER: That's correct.

MR. KABA: We -- it's Moez Kaba. We agree with that, your Honor, and actually, Ms. Draper pointing me to that paragraph reminded me of just some language here. It says, "Please indicate which bottles about which you find that Mr. Greenberg." Maybe it should say, "Please indicate the bottles about which you find that Mr. Greenberg made a fraudulent representation."

THE COURT: Yeah, that's better.

MR. KABA: And I think that that will be consistent throughout the instruction.

THE COURT: Yeah. So Ms. Draper, do you have a view on taking out "none of the bottles," the first point that Mr. Kaba made?

MS. DRAPER: I think that's fine. This is Felicia Draper -- sorry -- again. We think that's fine.

THE COURT: Okay.

MR. KABA: I think, your Honor -- this is Moez Kaba. I think we should stipulate that Ms. Draper, because she's the only woman on the call, doesn't have to announce herself.

THE COURT: Okay. That's okay.

MS. DRAPER: I would appreciate that.

THE COURT: All right. Anything else? Ms. Draper?

MS. DRAPER: We would just, under Part B, Fraudulent Concealment, we have the same thing to say about, that each of the elements listed above be asserted for that same paragraph?

THE COURT: Right. Got you. So there you would say, "Do you find that Mr. Koch established each of the above elements by clear and convincing evidence with respect to one or more of the 24 bottles?"

MS. DRAPER: I'm sorry. I couldn't quite hear you. It would read, "Do you find that Mr. Koch established each of the elements listed above by clear and convincing evidence?" That's what it would be.

THE COURT: Yeah. And then maybe "and therefore that Mr. Greenberg engaged in fraudulent concealment"?

MS. DRAPER: Yes.

THE COURT: Okay. Okay.

MS. DRAPER: Okay. In Part B, this is where we're starting to talk about this appendix, which we have some comments on, and we can talk about that separately, I guess, but at the very end of that top paragraph where it says, "and the prices paid for them," we would just request that that be changed to the "claimed price paid" or something to that effect. It's still -- Koch needs to establish that these are

the bottles that Mr. Greenberg consigned. We're not disputing the actual price that was paid for the loss but whether or not those prices were paid for those particular bottles is the dispute.

THE COURT: How about "and the corresponding prices"? That doesn't save it, or does it?

MS. DRAPER: I don't think that quite gets to the problem.

THE COURT: Okay.

MS. DRAPER: It doesn't quite get to the fact that the price isn't necessarily attached to the bottle, so I think "claimed price" works. I'm open to suggestions, but that's what I came up with.

MR. KABA: Well, your Honor, by the time they get to damages, they're going to have already reached those conclusions. Your instruction already says that it would have to be about the bottles that we purchased from Mr. Greenberg. So I'm not quite sure, if they're allocating damages, we would still be arguing about prices paid. They agree that these are the bottles that we've purchased from Mr. Greenberg if they're already at 1.C.

MS. DRAPER: Okay. I would actually agree with that. So the change then would come to the appendix, which we can talk about in a moment, but yeah, that makes sense, actually.

THE COURT: Okay. Anything else?

MS. DRAPER: Yes. There is, as to the apportionment at the end with the offset, whatever we're calling it now -- changing the title of it is fine. I don't have a problem with that.

THE COURT: Okay.

MS. DRAPER: But I do have a concern about changing the language from "this violation," as Mr. Kaba suggested earlier. It's our position that it doesn't just apply to the GBL claims, that it applies to the fraud claims, since this is all the same injury and 15-108 applies to any tort injury, so I don't think that that's appropriate.

THE COURT: Oh, no. I thought --

MR. KABA: Your Honor, it's Moez Kaba. It was pretty clear on the record when this discussion was had, Mr. Coles was asked quite clearly by Mr. Wessel, "You're referring only to the GBL claims," and the answer was yes. The fraud claim is different. The fraud claim was dismissed as against the Zachys defendants prior to the settlement. So it cannot cover -- possibly cover the fraud claim. It's not the same injury claimed against them.

MR. COLES: The only thing to keep in mind, your Honor -- this is Mr. Coles talking -- is that we obviously can't have a double recovery, so the amount paid for the fraud damages can't be in excess of -- you know, can't be in excess of this recovery. And looking at 15-108 a little more closely,

it talks about the injuries to Mr. Koch rather than the particular cause of action and so it should apply both to the GBL and the fraud claim.

MR. KABA: Your Honor, we disagree completely. It's about a joint tortfeasor on the tort at issue. It cannot be about the fraud claim against Zachys. Was -- the fraud claim could not be sustained against the Zachys defendants. And as to the double recovery issue, that's obviously something the court can address if we get a recovery at all.

MR. COLES: I think that's fair, so long as we keep that issue open, so the amount paid to Zachys can be credited against the fraud claim. Then I think we can proceed this way.

MR. KABA: Well, we obviously disagree with that, and we'll reach out to the court if it's necessary. If we -- if Mr. Greenberg -- I'm sorry -- if Mr. Koch prevails on the fraud claim and we get the full amount of damages, the fact that they may apportion some liability on the GBL claim is not an offset against the full amount of damages Mr. Koch recovers on the fraud claim. If Mr. Koch doesn't recover on the fraud claim, he only recovers on the GBL claim, then possibly there is some discussion to be had about an offset, which we'll present to your Honor at the appropriate time.

MR. COLES: Well, I think -- and this is Mr. Coles talking. I think the basic point is he couldn't recover more than he paid for the bottles. So you can't have a double

recovery on these. I think the offset probably makes sense. And that's why 15-108 talks in terms of the injury.

MR. KABA: This is Mr. Kaba again. This is why we had a briefing on that motion *in limine* regarding the payment Mr. Koch received for the bottles not at issue from Zachys, and we'll explain to the court on the damages issue that Mr. Greenberg gets credit for that sum because it doesn't concern bottles that were purchased from Mr. Greenberg. It's a separate injury.

MR. COLES: It really can't be a separate issue because you got a release that covers the bottles in dispute in this case, and the relief -- and the amended complaint in this case, they clearly plead that plaintiff's injury is caused jointly by Greenberg and Zachys and there was a release for that. So it simply has to be a apportionment for the bottles at issue in this case.

THE COURT: But the claims that were released as to Zachys were only GBL claims, right?

MR. KABA: Yes, your Honor. The fraud claim was dismissed by Judge Jones.

THE COURT: And you don't get double recovery even as between the fraud claim and the GBL claim, I assume. So let's say if there's a recovery on the fraud claim and a finding of liability on the GBL claim, then this apportionment issue goes away, right? Because there's no apportionment that would apply

to the fraud claim so they'd end up getting a hundred percent as to that anyway so the GBL is just doing double duty, right?

MR. COLES: In that case, at the very least, I would think that you would deduct -- and, you know, whether it's the full amount, which I think it is, or what Mr. Kaba just said -- and this is Mr. Coles talking -- whether you would deduct the amount that Zachys paid from the amount of the fraud claim to prevent a double recovery.

MR. WESSEL: Your Honor, this is Mr. Wessel. I think you can work this out after the jury's done. I don't think that it makes sense to make the changes they're requesting. It seems to me it's particularly absurd for a court to ask a jury to apportion fraud fault to Zachys when there was no fraud claim against Zachys, so it would be kind of a horrific result for a jury to come back and find Zachys liable for fraud in which no fraud claim is stated against them. That makes zero sense.

THE COURT: Right. In any event --

MR. COLES: But the point --

THE COURT: I'm sorry. Go ahead.

MR. COLES: I'm sorry. This is Mr. Coles. The point I want to be clear, that Mr. Koch has received $250,000 from Zachys, and we want to make clear that to the extent there's a damage award on the fraud claim, we can apply that subject to whatever argument Mr. Koch will make against what is paid by

them -- that's awarded by the jury.

MR. WESSEL: It's Mr. Wessel. They've stipulated they can make their arguments and we can make ours, and we disagree on that, and the judge will decide.

THE COURT: Right. These arguments will all be made, you know, after the trial, but just to -- hold on one second. We're doing a switchover in court reporters, so I want to give us a second here.

(Continued on next page)

THE COURT: Keep saying your names. We now have our other great court reporter.

To go back to the language, for purposes of what we need to do, and frankly I think these are tricky issues, we'll deal with it if and when we have to. In terms of the jury on this apportionment question, I'm inclined to put it in there even if it turns out to be an advisory thing. I'm inclined to agree that apportionment is a better name for that part 3 question.

Other than what you all pointed out about violation, the word violation, is there anything else? The other thought is I don't know if we should separate out 349 from 350. Maybe they have a 50 percent theory on one and a 40 percent theory on something because they make a distinction between deceptive business practices and advertising, something. Does that make sense?

MR. KABA: Your Honor, we are fine if you would like to separate it out. It probably does make sense to separate it out between the two different violations and make clear which one they are entering as to which violation, that is, as to the 349 or the 350.

MR. COLES: I would defer to your Honor's view on that. Whether you do it the way you did now with a separate the section 3 or insert it after 349 and then again after 350, I'm not sure there is much of a difference.

THE COURT: OK. We will do one final turn of the verdict form. Is there anything else?

MS. DRAPER: Yes. We just have a couple of comments on the appendix 1 that has been circulated. It circles back to something I talked about earlier.

THE COURT: Actually, I don't think we circulated anything on that.

MR. KABA: Your Honor, we circulated it just to opposing counsel. We haven't sent anything to the Court yet. I'm wondering, Ms. Draper, it might make more sense for us to talk without disturbing the Court on it, to come to some resolution on the language and then we could submit something to The court jointly.

MS. DRAPER: Yes. My apologies. Someone just brought me a copy of this. I thought it had been circulated to the Court. My apologies. I will talked Mr. Kaba about this.

THE COURT: Great.

MR. WESSEL: Your Honor, what we have, and we will discuss with Mr. Greenberg's counsel, is essentially a list of the wines and the prices so that they will have the numbers as stipulated by the parties.

THE COURT: Great. I assume you are going to see if you can reach agreement on the headings or whatever format to put it in.

MR. WESSEL: That's right.

MS. DRAPER: Yes, we will.

THE COURT: All right. I think we are good to go. Anything else?

MR. WESSEL: Not from us, your Honor.

MS. DRAPER: Not from us.

THE COURT: Thanks everybody.

(Adjourned to 9:00 a.m., April 11, 2013)

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GIL LEMPERT-SCHWARZ

Cross By Mr. Camp 2091

Redirect By Ms. Salisbury 2102

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.

----------x

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

Before:

HON. J. PAUL OETKEN,

District Judge,
and a jury

APPEARANCES

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

(Trial resumed; jury not present)

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

MR. HUESTON: No, your Honor.

MR. SHARTSIS: No, your Honor.

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

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

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

THE COURT: OK.

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

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

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

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

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

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

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

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

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

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

MS. SKAKEL: Thank you, your Honor.

THE COURT: Does anybody want to comment?

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

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

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

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

MR. SHARTSIS: Thank you.

THE COURT: Anything else?

MR. HUESTON: No, your Honor.

THE COURT: Please bring in the jury.

(Jury present)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Six, that Mr. Koch suffered damages.

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

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

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

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

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

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

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

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

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

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

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

That's not a fraud by Mr. Greenberg.

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

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

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

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

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

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

"A. The introduction?

"Q. The introduction.

"A. The what?

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

"A. Yes.

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

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

"Q. In extreme detail?

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

"Q. Line by line?

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

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

"A. Well, that could be true."

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

it.

Let's see a little testimony.

(Koch video deposition shown)

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

(Koch video deposition shown)

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

Let's look at another quote.

(Koch video deposition shown)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Greenberg.

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

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

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

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

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

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

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

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

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

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

"A. I don't believe I did.

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

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

What did he answer? "No, I didn't understand that." "No, I didn't understand that," in front of you. "Most of them did as far as I knew."

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

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

their expert is.

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

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

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

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

"A. Yes.

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

"A. That's right.

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

"A. That's right.

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

"A. Correct, that's correct.

"Q. You could have inspected?

"A. The catalog said I could inspect.

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

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

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

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

"A. That I had a right to inspect?

"Q. To inspect, yes.

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

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

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

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

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

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

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

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

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

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

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

17,000 bottles, oh, my goodness.

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

have to decide that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

They have never proved that Mr. Greenberg knowingly

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

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

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

(Continued on next page)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, move on.

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

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

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

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

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

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

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

anybody. Chicago Wine. Give me a break.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

take that chance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now Mr. Koch signed under oath these statements.

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

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

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

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

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

we are all in really big trouble in front of the law. Recklessness? One. One.

Cut the capsules. Right? Segregated wine. Reckless? Is that what somebody who's reckless does? Relied on Zachys, as Egan tells him he can? Again, you know, if there's a mistake here, if Zachys made a mistake, we're all human. Zachys made a mistake. It's not recklessness by Greenberg.

They're going to suggest Greenberg was an expert. You heard the experts here. You have to know how many hectares of land there are somewhere, you have to know Madame Robin talked to somebody in Moscow in 2007, you have to know the names of obscure negociants, you have to know whether the labels go on this angle or this angle. Greenberg was supposed to know that? We're not suggesting Greenberg was an expert. You've heard the evidence. I trust you completely on that.

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

Concealment. We concealed information. Fraudulent concealment. Just take a look. Who did Greenberg tell about Royal? The big fact in this case is Royal, right? The big fact. Told Sotheby's, Christie's, Zachys, told Robert Parker, Bipin Desai, most famous collector in the world, Larry Stone, the most famous sommelier in the world, Wil Jaeger, collector of the year, told Elroy, told Koch, and both Edgerton and Brierley said, he told all kinds of people, right? That's a big fraud. It's the way you defraud somebody, you tell

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued on next page)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

real.

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

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

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

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

So you check that box "no."

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

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

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

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

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

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

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

THE COURT: Thank you, Mr. Shartsis.

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

(Recess)

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

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

Mr. Hueston.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

it was counterfeit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"A. No."

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

"What was Mr. Greenberg's reaction?

"He didn't want to proceed."

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

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

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

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

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

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

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

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

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

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

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

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

"A. That's possible."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Think about it. Use the Mickey Mantle baseball. If

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Greenberg video deposition shown)

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

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

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

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

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

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

He doesn't go with them.

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

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

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

So, Mr. Greenberg goes to Zachys.

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

(Zacharia video deposition shown)

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

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

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

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

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

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

The Zachys contract did not require that. This is

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

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

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

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

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

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

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

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

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

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

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

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

made a mistake. Far from it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued on next page)

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

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

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

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

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

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

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

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

And the other part of it is, "many came out of Europe, in many cases from English royalty." That's just a flat out whopper, ladies and gentlemen. That's just totally false. Why was he saying this and passing this back on to Mr. Zacharia, knowing it's getting back to Bill Koch? Because he was trying to throw him off his trail. We know, and he's admitted in cross-examination, he had five sources for 1921 Petrus magnum, sold to Bill Koch. Royal Wine Merchants, Wine Club, Wine Library, D Sokolin and Company, and something called Pritam Banerji. He said for the top collector, or collector out of Toronto, "As far as I know, it could have been made up." Folks, why does someone say something like that? Mr. Koch told you, "When I heard that, it reminded me about what I had been reading in the cover letter." On the Continent, top collector, sourced -- sourced from the Continent, meaning Europe. Mr. Greenberg gave information to try to lull the buyer into thinking: Don't worry, all is well. Sounds just like that cover letter. Don't you worry. Why would he tell him that? It is just a lie to try to throw the buyer off his trail so he

could get away with it.

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

(Video played)

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

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

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

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

MR. SHARTSIS: Your Honor, misstatement of the

document, and I object to it.

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

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

MR. HUESTON: Let's count them.

Not at all.

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

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

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

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

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

Kurniawan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Video played)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And Mr. Shartsis tried to play a lawyer's trick. Oh, yes, you heard Mr. Koch, first he said he read this letter and didn't want to look. Well, that's right. He said: When I read this letter, I didn't think I needed to inspect. Who would have thought there was a need to inspect? And then he was asked later: Well, Mr. Koch, let's just say you did find a reason to inspect. Do you think you could have at that time in 2005? Mr. Koch told you: It's like I didn't -- I didn't think counterfeiting was a widespread problem at the time. Mr. Orcutt, his buyer's representative, said the same thing. This wasn't a widespread problem known at the time. Mr. Orcutt, his representative, didn't recommend inspection. Mr. Koch said: I'm buying 2600 bottles of wine. What do I

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

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

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

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

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

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

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

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

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

Let's just quickly run through these.

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

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

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

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

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

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

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

He talked about Bordeaux Wine Locators. That's

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

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

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

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

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

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

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

at the evidence.

MR. HUESTON: "Photocopied labels."

1928 Latour. "Label, photo laser copy."

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

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

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

Another one, "No visible date, date scraped off." Mr. Lempert-Schwarz: "Yes, vintage, can't see the date."

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

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

A deceptive or misleading act. Well, ladies and

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

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

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

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

paid for the bottles. That's it.

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

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

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

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

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

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

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

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

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

That's it for fraudulent misrepresentation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

JUROR: I want to go through.

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

MR. HUESTON: Yes, please.

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

THE COURT: You want --

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

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

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

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

JUROR: Half hour?

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

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

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

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

THE COURT: Okay.

(Jury excused)

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

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

MR. SHARTSIS: Thank you.

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

(Luncheon recess)

(Continued on next page)

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

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

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

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

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

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

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

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

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

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

probable that what he claims is what actually happened.

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

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

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

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

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

you on Mr. Koch's claim for fraud.

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

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

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

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

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

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

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

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

Second, that the representation was false and material;

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

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

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

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

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

The first question you will be asked to decide is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If you find that Mr. Greenberg made a

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

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

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

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

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

If you find that Mr. Greenberg did make the

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

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

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

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

In determining whether facts are peculiar within an

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

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

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

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

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

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

then decide the actual monetary loss Mr. Koch sustained. However, we will save our discussion of damages until after I have discussed Mr. Koch's claim for fraud based on concealment.

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

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

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

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

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

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

3. That Mr. Greenberg's concealment of material

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

4. That Mr. Koch suffered damages.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I will now turn to Mr. Koch's General Business Law claims, or GBL.

Mr. Koch also alleges that Mr. Greenberg violated sections 349 and 350 of the New York General Business Law, GBL. I will address each GBL section and claim separately.

Remember, the burden of proof for these claims is preponderance of the evidence, a lesser burden, lower standard,

than the clear and convincing evidence required for the fraud claim.

Turning first to Mr. Koch's claim under section 349. This section of the General Business Law provides consumers protection by declaring as unlawful deceptive acts and practices in the conduct of any business, trade, or in the furnishing of any service in the State of New York.

To establish a claim under section 349, the plaintiff must prove by a preponderance of the evidence (1) that the defendant engaged in an act or practice that is deceptive or misleading in a material way, (2) that the defendant suffered injury as a result, and (3) that the alleged deceptive business practices were aimed at the consumer.

A section 349 claim must be predicated on a deceptive act or practice that is consumer-oriented. In contrast with a private contractual dispute, consumer-oriented conduct is that what is targeted at consumers at large or a group of buyers. And while the conduct may not be repetitive or recurring in order to be consumer-oriented, a defendant's acts or practices must have impact or potential impact on consumers at large or a group of potential buyers to qualify under this law.

In determining the nature of the conduct in this case, you may consider the fact that the Zachys auction was directed at a group of potential buyers of wine. If you determine that the conduct at issue in this case was not consumer-oriented,

you need proceed no further on the claim under GBL section 349.

If you determine that Mr. Greenberg's conduct was consumer-oriented, you must next decide whether it was materially misleading.

A deceptive act or practice is a representation or omission that is likely to mislead a reasonable consumer acting reasonably under the circumstances. The statute does not require the plaintiff to prove intent to defraud or mislead on the part of the defendant. Moreover, the presence of a disclaimer does not prevent a plaintiff from asserting a claim under the statute.

If you determine that Mr. Greenberg's consumer-oriented conduct was not materially misleading, you need not proceed any further on the section 349 claim.

If you determine that Mr. Greenberg's consumer-oriented conduct was material and misleading, you must next determine whether Mr. Koch was injured as a result of that conduct.

If you find that Mr. Koch suffered actual injury as a result of Mr. Greenberg's conduct, then this element is satisfied and you must then decide how much money, if any, to award to Mr. Koch in damages.

The law governing damages for a violation of GBL section 349 permits you to award Mr. Koch compensatory damages equal to the amount of damages he suffered as a result of Mr.

Greenberg's actions with respect to the 24 bottles of wine at issue in this case. Mr. Koch must prove the amount of his damages by a preponderance of the evidence.

In addition, if you find that Mr. Greenberg acted willfully or knowingly in his deceptive act or practice, you may award what are called treble damages. An award of treble damages can be an amount up to $1,000 for each violation.

I will now instruct you on Mr. Koch's claim pursuant to General Business Law section 350.

Section 350 of the GBL prohibits false advertising. In order to establish his claim for false advertising, Mr. Koch must prove by a preponderance of the evidence that an advertisement by Mr. Greenberg (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury to the plaintiff.

Although the definitions I have provided to you for the elements of the 349 claim are applicable for this claim as well, I will discuss each briefly in turn in order to be clear.

An advertisement that is consumer-oriented must be directed at consumers at large or a group of buyers rather than at a single individual. As I mentioned earlier, in determining the nature of the conduct in this case you may consider the fact that the Zachys auction was directed at a group of potential buyers of wine.

If the advertisement was not consumer-oriented, you

need not go any further in your analysis of the 350 claim, as Mr. Greenberg did not violate the provision.

If you determine that an advertisement by Mr. Greenberg was consumer-oriented, you must next decide whether it was materially misleading.

In order to prove a false advertising claim, the plaintiff must prove that the advertisement was likely to mislead a reasonable consumer acting reasonably under the circumstances. If you find that Mr. Koch did not prove that an advertisement by Mr. Greenberg relating to the bottles of wine was deceptive or misleading in a material way, then you must find in favor of Mr. Greenberg on this claim.

If you determine that an advertisement by Mr. Greenberg was consumer-oriented and misleading, then you must next decide whether Mr. Koch suffered injury as a result of the advertisement.

If you find that Mr. Koch suffered injury as a result of Mr. Greenberg's conduct, then this element is satisfied, you must next decide how much to award Mr. Koch in damages.

The law governing compensatory damages for a violation of New York General Business Law 350 permits you to award Mr. Koch compensatory damages for the amount he was injured as a result of Mr. Greenberg's false advertisement relating to the bottles of wine at issue. Mr. Koch must prove the amount of any damages by a preponderance of the evidence.

That concludes the substantive instructions regarding the specific claims at issue in this case. I will now instruct you on various matters relating to evidence and the weighing of evidence generally.

What is and is not evidence? You are to consider only the evidence in the case. The evidence in this case is the sworn testimony of the witnesses, the exhibits received in evidence, and any stipulations to which the parties have agreed.

A stipulation is an agreement by the parties that a certain fact is true. You must regard such agreed-upon fact as true.

It is for you alone to decide the weight, if any, to give to the testimony you have heard and the exhibits you have seen. Testimony that I have excluded or stricken or told you to disregard is not evidence in this case and may not be considered by you in rendering your verdict.

You are not to consider as evidence the questions asked by the parties' lawyers. It is the witnesses' answers that are evidence, not the questions.

Arguments by the attorneys are not evidence, because the attorneys are not witnesses. I need to stress again that what they have said to you in their opening statements and their summations is intended to help you understand the evidence that actually was admitted to help you reach your

verdict. If, however, your recollection of the evidence differs from the statements made by the attorneys in their opening statements or summations, it is your recollection that controls.

Finally, any statements or rulings that I may have made do not constitute evidence. Because you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to what the facts are or what the verdict should be. The rulings I have made during the trial are not any indication of my views.

Also, you should not draw any inference from the fact that I may on occasion have asked certain questions of witnesses. Those questions were only intended to clarify or expedite and are not an indication of my view of the evidence. In short, if anything I have said or done seemed to you to indicate an opinion relating to any matter you need to consider, you must disregard that.

There are two types of evidence that you may properly use in reaching your verdict. One type is direct evidence. Direct evidence is the witnesses' testimony about something he or she knows by virtue of his or her own senses, something the witness has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit.

The other type of evidence is circumstantial evidence. Circumstantial evidence is evidence that tends to prove one

fact by proof of other facts. Here is a simple example of circumstantial evidence.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds -- we don't have blinds, but if we had blinds, assume they were drawn and you couldn't look outside. As you are sitting here, someone walks in with an umbrella that is dripping wet. Somebody else walks in with a raincoat that's dripping wet.

You can't look outside the courtroom and you cannot see whether it is actually raining, so you have no direct evidence of the fact that it's raining. But on the combination of the facts I have asked you to assume, it would be reasonable and logical for you to conclude that between the time you arrived at the courthouse and the time these people walked in, it had started to rain.

That is all there is to circumstantial evidence. You infer on the basis of reason, experience, and common sense from an established fact the existence or nonexistence of some other fact.

Many facts, such as a person's state of mind, can only rarely be proven by direct evidence. Circumstantial evidence is of no less value than direct evidence. The law makes no distinction between the two but simply requires that you, the jury, decide the facts in accordance with all the evidence,

both direct and circumstantial.

Inferences. I have used the term "infer" and the lawyers in their arguments have asked you to draw certain inferences. When you draw an inference, you conclude from one or more established facts that another fact exists, and you do so on the basis of your reason, experience, and common sense.

The process of drawing inferences from facts in evidence is not a matter of guesswork, suspicion, or speculation. An inference is a reasoned, logical deduction or conclusion that you, the jury, may draw but are not required to draw from the facts which have been established by either direct or circumstantial evidence. In considering inferences, you should use your common sense and draw from the facts that you find to be proven whatever reasonable inferences you find to be justified in light of your experience.

Now for the important subject of evaluating testimony. How do you evaluate the credibility or believability of witnesses? The answer is that you use your plain common sense. There is no magic formula by which you evaluate testimony. You should use the same tests for truthfulness that you use in determining matters of importance in your everyday lives.

You should ask yourselves, did the witness impress you as honest, open, and candid, or was the witness evasive and edgy, as if hiding something? How did he or she appear, that is, his or her bearing, behavior, manner, and appearance, while

testifying? How responsive was the witness to the questions asked on direct examination and on cross-examination?

You should consider the opportunity the witness had to see, hear, and know about the things about which he or she testified, the accuracy of his or her memory, his or her candor or lack of candor, his or her intelligence, the reasonableness and probability of his or her testimony, its consistency or lack of consistency, and its corroboration or lack of corroboration by other credible evidence.

In short, in deciding credibility, you should size up the witness in light of his or her demeanor, the explanations given, and all of the other evidence in the case. Always remember to use your common sense, good judgment, and life experience.

Few people recall every detail of every event precisely the same way. A witness may be inaccurate, contradictory, or even untruthful in some respects and yet entirely believable and truthful in others. It is for you to determine whether such inconsistencies are significant or inconsequential

If you find that a witness intentionally testified falsely, that is always a matter of importance that you should weigh carefully. If you find that any witness has willfully testified falsely as to any material fact, that is, as to an important matter, the law permits you to disregard completely

the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unbelievable. You may accept so much of his or her testimony as you deem true and disregard what you feel is false.

By the processes which I have just described to you, you, as the sole judges of the facts, decide which of the witnesses you will believe, what portion of their testimony you will accept, and what weight you will give to it.

You have heard evidence that at some earlier time a witness may have said or done something which counsel suggested or which you saw was inconsistent with the witness's trial testimony. If that prior inconsistent statement was sworn testimony, it can be considered as evidence. Likewise, if the prior inconsistent statement was that of a party, it can be considered as evidence against that party.

Otherwise, evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence in determining liability. Evidence of a prior inconsistent statement was placed before you for the more limited purpose of helping you decide the trial testimony of the witness who contradicted himself or herself.

If you find that a witness made an earlier statement that conflicts with his or her trial testimony, you may

consider that fact in deciding how much of his or her trial testimony, if any, to believe. In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake, whether the inconsistency concerns an important fact or whether it had to do with a small detail, whether the witness had an explanation for the inconsistency and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent and, if so, how much, if any, weight to give to the inconsistent statement in determining whether to believe all or part of the witness's testimony.

In deciding whether to believe a witness, you should specifically note any evidence of bias, hostility, or affection that the witness may have toward any of the parties. Likewise, you should consider evidence of any other interest or motive that the witness may have in cooperating or not cooperating with a particular party. If you find any such bias, hostility, affection, interest, or motive, you must then consider whether or not it affected or colored the witness's testimony.

You should also take into account any evidence that the witness may benefit or suffer in some way from the outcome of the case. Such interest in the outcome may create a motive to testify falsely and may sway the witness to testify in a way

that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

Keep in mind, though, that it does not automatically follow that testimony given by an interested witness is to be disbelieved. There are many people who, no matter what their interest in the outcome of the case may be, would not testify falsely. It is for you to decide, based on your own perception and common sense, to what extent, if at all, the witness's bias or interest has affected his or her testimony.

You are not required to disbelieve an interested witness. You may accept as much of his or her testimony as you teem reliable and reject as much of it as you deem unworthy of acceptance.

It is the duty of the attorneys for each side of the case to object when the other side offers testimony or evidence which the attorney believes is not admissible. Counsel also have the right and duty to ask the Court to make rulings of law. All those questions of law must be decided by me. You should not show any prejudice against an attorney or his or her client because the attorney may have objected to the admissibility of evidence or asked for a conference outside the hearing of the jury or asked the Court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence. If, however, I sustained an objection to the evidence or if I ordered evidence to be stricken or disregarded, that evidence must be entirely ignored.

During the trial, certain testimony has been presented by way of deposition. The deposition consisted of sworn recorded answers to questions asked of the witness in advance of the trial by attorneys for the parties in the case.

The testimony of a witness who for some reason is not present to testify from the witness stand may be presented in writing, under oath, or on video. We have seen some both in writing and on videotape. Such testimony is entitled to the same consideration and is to be judged as to the credibility and weight and otherwise considered by you insofar as possible in the same way as if the witness had been present and testified from the witness stand.

Finally, this is part 4, I will instruct you on your conduct during deliberations. This is a process by which you will determine a verdict.

The most important part of this case, members of the jury, is the part that you as jurors are about to play as you deliberate on the issues of fact. It is for you, and you

alone, to decide whether Mr. Koch has proven the elements of his fraud claim by clear and convincing evidence and his New York GBL claims by a preponderance of the evidence.

I know you will try the issues that have been presented to you according to the oath that you have taken as jurors. In that oath you promised that you would well and truly try the issues in this case and render a true verdict. Your function is to weigh the evidence in the case and reach your decision based solely on the evidence. Your duty is to decide the issues before you fairly and impartially and to see that justice is done.

It is your duty as jurors to consult with each other and to deliberate with a view to reaching an agreement. Each of you must decide the case for yourself, but you should do so only after consideration of the case with your fellow jurors.

Your verdict and the answers to each question on the verdict form that you will receive shortly must be unanimous. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without prejudice or favor toward either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

As you deliberate, please listen to the opinions of your fellow jurors and ask for an opportunity to express your own views. Every juror should be heard. No one juror should hold center stage in the jury room and no one juror should

control or monopolize the deliberations. You should all listen to one another with courtesy and respect.

If, after stating your own view, and if, after listening to your fellow jurors, you become convinced that your view is wrong, do not hesitate because of stubborness or pride to change your view. On the other hand, do not surrender your honest convictions and beliefs concerning the weight or the effect of the evidence solely because of the opinions of your fellow jurors or because you are outnumbered or for the mere purpose of returning a verdict. Your final vote must reflect your conscientious belief as to how the issues should be decided. Your verdict must be unanimous.

You are not to discuss this case until all the jurors are present. As I said before, when there are seven of you or six of you, you're just a group of nice people. It's only when all eight of you are together that you constitute a jury.

Upon retiring to the jury room in a minute, the first thing you should do is select one of you to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court. The foreperson does not have any more power or authority than any other juror, and his or her vote or opinion does not count for any more than any other juror's vote or opinion.

The foreperson is merely your spokesperson to the Court. He or she will send out any notes to the Court, and

when the jury has reached a verdict, he or she will notify the marshal or Mr. Skolnik and fill out the signed verdict form and give the verdict in open court.

(Continued on next page)

THE COURT: The exhibits will be sent to you in the jury room. If you want any of the testimony read back to you, that can be arranged. Bear in mind that it is not always easy for the court reporter to locate the testimony that you might want so be as specific as possible as to what witness and what portion of that witness' testimony you'd like to hear and we'll give you a copy of the actual testimony if you'd like to see it.

Any communication with the court should be made in writing, signed by your foreperson, and given to the marshal or Mr. Skolnik, who will be here in the courtroom while you deliberate. I will respond to any question or request you have as promptly as possible, either in writing or by having you return to the courtroom so I can speak with you in person.

If at any time you are not in agreement, you are not to reveal the standing of the jurors, that is, the split of the vote. Don't say in any note that the vote is breaking down a certain way to anyone, including me, during your deliberations. So do not ever indicate, in a note or otherwise, what the preliminary vote is or which way the majority is leaning or anything like that. Nobody outside the jury should know how the jury stands on any issue until a unanimous verdict is reached and you've filled out the verdict form.

If you took notes during portions of the trial, you should not show your notes to or discuss your notes with any

other juror during your deliberations. That's because any notes you have taken are to be used solely to assist yourself. The fact that a particular juror has taken notes entitles that juror's views to no greater weight than those of any other juror. Finally, your notes are not to substitute for your own recollection of the evidence in the case. If you have any doubt as to any testimony, you may request the testimony be read back to you, as I mentioned earlier.

Under your oath as jurors, you are not to be swayed by sympathy. You are to be completely fair and impartial. You are to be guided solely by the evidence, or the lack of evidence, in the case, without regard to the consequences of your decision. The crucial question you must ask yourselves, as you sift through the evidence, is: Has Mr. Koch proven the elements of his fraud claim by clear and convincing evidence and his New York GBL claims by a preponderance of the evidence?

It would be improper for you to consider, in deciding the facts of this case, any personal feelings you have about the race, religion, national origin, sex, sexual orientation, disability, or age of any party or any witness or any such other irrelevant factor. It would also be improper for you to consider any sympathy you might feel for an individual in a lawsuit.

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal

worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.

Publicity. Your verdict must be based solely on the evidence presented in this courtroom in accordance with my instructions. You must completely disregard any report that you may have read in the press, on the internet, on television, or on the radio. Indeed, it would be unfair to consider such reports, since they are not in evidence and the parties have had no opportunity of contradicting their accuracy or otherwise explaining them away. In short, it would be a violation of your oath as jurors to allow yourself to be influenced in any manner by any such publicity.

Finally, the verdict form is simply the written notice of the decision that you reach in the case. You will take this form to the jury room. It has a number of questions on it, and when you have unanimously agreed on your verdict, your foreperson will fill in the form, sign and date it, and there's a place for each juror to sign. So I'll ask each of the eight jurors to sign the verdict form. And then you will advise the marshal or bailiff that you are ready to return to the courtroom.

In closing, I want to emphasize that all litigants stand equal in this courtroom. All litigants stand equal before the bar of justice. All litigants stand equal before

you. Your duty is to decide between these parties fairly and impartially, to see that justice is done, all in accordance with your oath as jurors.

I want to thank you for your time and attentiveness. You may now begin your deliberations.

We'll swear the marshal.

(Marshal sworn)

THE CLERK: Thank you.

THE COURT: Now you can bring your pads.

THE CLERK: Ladies and gentlemen of the jury, please follow the marshal into your jury room to begin your deliberations. Thank you.

(Jury excused for deliberations)

THE COURT: Okay. Folks, I think Mr. Skolnik has your cellphones. He'll be able to reach you. So don't stray too far. If there's a note or anything, we'll contact you.

ALL COUNSEL: Thank you, your Honor.

THE COURT: Thank you.

MR. CIALONE: Your Honor, will you let us know when the jury is dismissed for the day or should we just anticipate a specific time?

THE COURT: We will let you know before. We'll let you know before we do that. I'm going to try to get a read from them on, you know, if they want to stay till 6, I would let them, or even later, so -- but we'll let you know before we

let them go.

MR. CIALONE: Thank you, your Honor.

(Recess pending verdict)

(In open court; jury not present)

THE COURT: We do not have a verdict, but we do have a note. It's just a note indicating the foreperson. It's been marked as Court Exhibit 1. They passed it out at 5:20, and it just says, "I, Darrell Paul, assigned by the jurors the foreperson." Which is, I believe, juror number 3.

So -- but I wanted to ask counsel just a question about punitive damages. I mean, just in terms of timing. I mean, I don't know if they'll reach a verdict, but let's say if they reach a verdict, obviously if it's a defendant's verdict on all counts, then we're done. If it's a plaintiff's verdict in part, we have to determine whether there's a punitive damages phase. So my understanding has been that the punitive damages claim is only as to the fraud claim. The punitive damages demand is only for the fraud claim. But maybe that's not right. I don't know if --

MR. KABA: Your Honor, I believe -- I have to go back and look at the law again, but I believe there's also a punitive damages claim available under 349, at least under Section 349, which is separate and apart from the trebling of damages. There's a punitive damages -- punitive damages may be available under the GBL as well.

MR. CIALONE: I think that's incorrect, your Honor. I think -- we can brief it, and I think it's capped by the trebling at a thousand dollars per incident, which is already in the form.

THE COURT: Yeah. I know it says treble damages up to a thousand dollars per violation under 349. This isn't briefed anywhere, is it?

MR. CIALONE: No. We can file something.

MR. KABA: Yeah, we can pull cases probably pretty quickly. We looked at the issue and we believe that there are punitive -- there are cases that permit punitive damages that are separate and apart from the trebling cap up to a thousand dollars. I just don't have the cases accessible right now.

THE COURT: Well, and this is just 349, not 350.

MR. KABA: Yeah. The cases we've seen at least have been in 349 context. We haven't seen them in 350 context, but we haven't seen anything that disallows it under 350 either.

MR. CIALONE: Again, your Honor, we don't think that's correct, and we'd be happy to submit something on it, something that's correct. Mr. Koch is asking for trebling, then punitive, then they're going to ask for fees, and I don't think those are provided for under the statute and that's incorrect. But we're happy to brief it.

MR. KABA: Your Honor, if I may, we submitted a set of jury instructions. Plaintiff's proposed set had a discussion

of punitive damages both to the fraud claim and the GBL claim.

THE COURT: Yes.

MR. KABA: I believe we cited at least one case, if not more, in that set of jury instructions that deals with the punitive damages issue. I don't have to --

MR. CIALONE: Rather than go back and forth saying, "I have cases," "I have cases," why don't we just submit something tomorrow, your Honor, if that's okay, with a short letter.

THE COURT: That's fine. The reason I'm raising this is because, I mean, the jury obviously doesn't know that there's a second phase so I think they think that if they're reaching a verdict, they're done, so there might be some surprise that they have to come back. And what I was wondering, I'm trying to think of all the scenarios, and I was wondering, if there was a defendant's verdict on fraud and a plaintiff's verdict on the GBL claims, do they have to come back is what I was wondering, and you're saying you believe they do.

MR. KABA: Yeah, I believe there is authority for it. Once we -- once we're done now, I can actually just go back and take a look.

THE COURT: Well, the complaint doesn't appear to -- it asks for treble damages but doesn't say punitives as to 349.

MR. KABA: In the total prayer for relief I believe we had asked for exemplary damages as to -- at the end of the

complaint.

MR. CIALONE: Your Honor, the pretrial order says, "Greenberg's violation of GBL Sections 349 and 350 --" this is plaintiff's statement, plaintiff's statement "-- further entitles Koch to (a) treble damages pursuant to GBL Section 349(h) of $1,000 for each violation; (b) treble damages pursuant to GBL Section 350(e)(3) of $10,000; and (c) attorney's fees pursuant to GBL Sections 349(h) and 350(e), in a sum to be determined in posttrial briefing." Their own statement in the pretrial order makes no reference to punitive damages under 349 or 350. That's their statement.

THE COURT: Well, I mean, maybe we should just see what the jury says and we'll fall off the bridge if we have to fall off the bridge.

MR. KABA: It's been a long two and a half weeks and I'm happy to not argue any more on the topic. If we believe it's available, we can see if the jury does, and we can certainly get you the authority that supports our position, as to whether or not it's available. Shortly, it's mentioned in our complaint and in the list of relief that we seek. And it's -- we also have, "and such other legal and equitable relief as may be just and proper" in our pretrial order that Mr. Cialone is quoting from.

MR. CIALONE: I'll be happy to show it to them. It's not in there. We're entitled to --

MR. KABA: It says, "Finally, Koch requests injunctive relief to prevent further wrongdoing by Greenberg, and such other legal and equitable relief as may be just and proper."

MR. CIALONE: Your Honor, punitive damages is never captured in "such other legal relief." If they're going to ask for punitive damages, we had a right to know about it before the trial started on this claim. We're happy to brief it, but --

THE COURT: The jury, their proposed instructions did say punitive, did seek punitive damages instruction on all claims, pretty clearly.

MR. CIALONE: The pretrial statement didn't.

MR. KABA: The complaint does, Mr. Cialone.

MR. CIALONE: I'd like to see a copy of it, but I haven't seen it. I don't think it did ask for it.

THE COURT: In any event, I just wanted to clarify the parties' positions on this, and you all can provide any authorities you'd like to provide.

I will say, just looking at 349, I mean, I looked very quickly at like two cases, and the language of the statute does have a very specific provision about the compensatory damages you get and then the treble damages you can get, and I think a better reading of the statute would be that it does not separately provide for punitives on top of the treble damages that are specifically provided for, but having said that, you

know, I'm open to looking at whatever cases have decided something different.

MR. KABA: Thank you, your Honor.

THE COURT: Okay? And we'll let you know where things stand with the jury.

MR. KABA: Okay.

MR. HUESTON: Okay. Thank you.

MS. SALISBURY: Thank you.

MR. CIALONE: Your Honor, if I may, I'm sorry, but I'm looking at their complaint. At their complaint, their amended complaint, under the 349 claim, "Plaintiff is entitled to damages, including treble damages, injunctive relief, and attorney's fees, pursuant to New York GBL Section 349."

THE COURT: No, that's what I looked at.

MR. CIALONE: No punitives. Same thing under 350. If they were entitled to it, they waived it. They didn't plead it.

MR. KABA: Your Honor, I've mentioned, I really would prefer not to argue further on it, but the end of the complaint, we say, "Wherefore, plaintiff prays for judgment in its favor as follows." We list out all of the relief we seek, including under C, exemplary damages in an amount to be determined at trial. We will submit authority if your Honor is going to hear us on that.

THE COURT: Okay. We'll see, you know, hopefully

shortly, if we need it.

MR. KABA: Thank you.

THE COURT: Thanks.

MS. SALISBURY: Your Honor, the jury's still here tonight?

THE COURT: Yes, they're still here. I think they've indicated to the marshal or Mr. Skolnik that they're going to be just a few minutes longer. Is that right? Yes. So I think we may hear either that they have a note or something. They didn't want dinner so -- we offered them dinner and they didn't want it.

MR. CIALONE: What time should we be here tomorrow, assuming we need to be here tomorrow?

THE COURT: 9:30.

MR. CIALONE: 9:30?

THE COURT: Yes. But I think we may hear something from them pretty soon.

MS. SALISBURY: All right.

MR. HUESTON: Thank you, your Honor.

THE COURT: By the way, I'm going to bring them out anyway, just to let them go for the night and remind them the usual reminders, so I will have one official session with them in any event.

MS. SALISBURY: Okay. Thank you.

(Recess)

(In open court; jury not present)

THE COURT: We received a note from the jury at 5:55 p.m. It's been marked Court Exhibit Number 2. "We, the jury, have a verdict." Unless there's any objection, we'll bring out the jury.

ALL COUNSEL: No objection.

(Jury present)

THE COURT: Has the jury reached a verdict?

THE FOREPERSON: Yes.

THE COURT: Mr. Foreperson, if you'd please hand the verdict form to Mr. Skolnik.

(Pause)

THE COURT: Ladies and gentlemen of the jury, I want to thank you for your verdict form. Unfortunately, there is a little bit more work you need to do, which is, you didn't fill out page 6 and page 12, where you have to specify an amount of compensatory damages if you answered yes to the questions above it, which you did. So I'm going to need you to complete pages 6 and 12 of the verdict form, okay?

And I realize it's 6:15. Can you stay a little longer? Yes? Okay. So I'm going to give it back to you. I appreciate your long hours.

(Jury excused)

(Recess pending verdict)

(In open court; jury not present)

THE COURT: After the jury went back, I realized that what I'd said to them was incomplete, because I had indicated to them here in the courtroom that they hadn't completed pages 6 and 12 but they also had not completed page 9. So I actually just sent in a note which Mr. Skolnik read to them that just says -- this has been marked as Court Exhibit 3 from 6:25 p.m. To clarify my -- "Dear Jury, To clarify my comments in court, you must complete pages 6, 9, and 12 of the verdict form." Signed me, Judge Oetken.

We have since gotten another note, Court Exhibit 4, which says, "Do we need a grand total?" And I guess I propose maybe my sending a note back that says, "No, you don't need a grand total. Just complete the entries on the verdict form."

MR. HUESTON: That's fine, your Honor.

MS. SALISBURY: Yes.

THE COURT: Is that okay?

MS. SALISBURY: Yes.

THE COURT: Okay. I'll just that back and have Mr. Skolnik read that note to them and then we'll go from there. Okay.

(Recess pending verdict)

(In open court; jury not present)

THE COURT: I mentioned Court Exhibit 4, which is the question from the jury, "Do we need a grand total?" We've marked Court Exhibit 5, which is my note to the jury, which

Mr. Skolnik has read, Court Exhibit 5. It says, "Dear Jury, No, you do not need a grand total. Simply fill in the verdict form tables at pages 6, 9, and 12."

They now have indicated they have a verdict. So I propose to bring them out.

Before I do, based on the verdict that I expect you're about to hear, we'll need to talk about the next phase, and the jury, I think, will be surprised to hear that they have to come back tomorrow. So I don't know if there's any -- I don't know how much you all have thought about it, of a time frame. I mean, I don't know if I can tell them one to two days or -- I don't know. If there's any information you want to give me now, you're welcome to.

MR. HUESTON: Sure. For us, I think we have 30 minutes of maybe testimony and then there will be some argument from us. We don't anticipate something lengthy at all.

THE COURT: Okay. And defendant?

MS. SALISBURY: About the same, your Honor. Maybe a little more. But we certainly assume this will be done in half a day.

THE COURT: Okay. So this will be tomorrow.

MR. HUESTON: Yeah.

MS. SALISBURY: Yes.

THE COURT: Okay. Great. That's helpful, I think. Great. Please bring out the jury.

(Jury present)

THE COURT: Mr. Foreperson, has the jury reached a verdict?

THE FOREPERSON: Yes, we have.

THE COURT: Okay. Could you please hand the verdict form to Mr. Skolnik.

(Pause)

THE COURT: Okay. Mr. Skolnik? Mr. Skolnik will confirm the verdict.

THE CLERK: I'm going to ask the foreperson to please rise.

In the matter of William I. Koch v. Eric Greenberg:

I. Fraud.

A. Fraudulent Misrepresentation.

As you have been instructed, in order to establish fraud based on an affirmative misrepresentation, each of the following elements must be proven by clear and convincing evidence: (1) that Mr. Greenberg made a representation of fact; (2) that the representation was false and material; (3) that Mr. Greenberg knew the representation was false or made it with reckless disregard for its truth or falsity; (4) that Mr. Greenberg made the representation to induce Mr. Koch to rely upon it; and (5) that Mr. Koch did justifiably rely upon it and sustained damages.

Do you find that Mr. Koch established each of the

above elements by clear and convincing evidence with respect to one or more of the 24 bottles of wine at issue and, therefore, that Mr. Greenberg engaged in fraudulent misrepresentation? Yes or no.

THE FOREPERSON: Yes.

THE CLERK: If yes, please indicate whether Mr. Greenberg made the fraudulent misrepresentation with respect to:

All of the bottles, or some (but not all) of the bottles.

THE FOREPERSON: All of the bottles.

THE CLERK: B. Fraudulent Concealment.

As you have been instructed, in order to establish fraud based on fraudulent concealment, each of the following elements must be proven by clear and convincing evidence: (1) that Mr. Greenberg failed to discharge a duty to disclose; (2) that Mr. Greenberg intended to defraud Mr. Koch, or a class of persons that included Mr. Koch; (3) that Mr. Greenberg's concealment of material information was a substantial factor in Mr. Koch's decision to purchase the bottles of wine at issue in this case, meaning Mr. Koch relied on Mr. Greenberg's concealment in purchasing the bottles of wine; and (4) that Mr. Koch suffered damages.

Do you find that Mr. Koch established each of the above elements by clear and convincing evidence with respect to

one or more of the 24 bottles of wine at issue and, therefore, Mr. Greenberg engaged in fraudulent concealment?

Yes or no.

THE FOREPERSON: Yes.

THE CLERK: If yes, please indicate whether Mr. Greenberg made the fraudulent concealment with respect to:

All of the bottles, or some (but not all) of the bottles.

THE FOREPERSON: All of the bottles.

THE CLERK: C. Damages. If you find, by clear and convincing evidence, that Mr. Greenberg engaged in fraud by answering yes to either 1.A or 1.B above, you must determine how much to award Mr. Koch in monetary damages. (For your reference, attached as Appendix I is a list of wines at issue, and the prices paid for them.)

As an amount of compensatory damages for the 1921 Chateau Cheval Blanc magnum, how much do you find in compensatory damages?

THE FOREPERSON: 15,340.

THE CLERK: As to the 1921 Chateau Cheval Blanc magnum, how much compensatory damages do you find?

THE FOREPERSON: 15,340.

THE CLERK: As to the 1945 Chateau Lafite Rothschild magnum, how much do you find?

THE FOREPERSON: 4,956.

THE CLERK: As to the 1921 Chateau Lafleur magnum, how much do you find?

THE FOREPERSON: 16,000.

THE CLERK: As to the next, 1921 --

THE FOREPERSON: Hold on one second. I can't quite read my handwriting. I think it's 16,000, either 520 or 620. Depends --

THE COURT: Was it the same amount on the appendix?

THE FOREPERSON: Yes.

THE COURT: The record will reflect -- do you have the appendix there? The record will reflect the amount in the appendix is 16,520.

THE CLERK: As to the next, 1921 Chateau Lafleur Magnum -- this is Trial Exhibit 206 -- how much do you find?

THE FOREPERSON: 17,700.

THE CLERK: As to the 1945 Chateau Lafleur magnum, Trial Exhibit 207, how much do you find?

THE FOREPERSON: 17,700.

THE CLERK: As to the 1945 Chateau Lafleur magnum, Trial Exhibit 229, how much do you find?

THE FOREPERSON: 16,520.

THE COURT: You can just do the exhibit number.

THE CLERK: Okay. As to Exhibit Number 230, how much do you find?

THE FOREPERSON: 17,700.

THE CLERK: As to Exhibit Number 208, how much do you find?

THE FOREPERSON: 14,160.

THE CLERK: As to Exhibit Number 209, how much do you find?

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit Number 210, how much do you find?

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit 211, how much do you find?

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit 212, how much do you find?

THE FOREPERSON: 12,587.

THE CLERK: As to Exhibit 213?

THE FOREPERSON: 12,587.

THE CLERK: As to Exhibit 214?

THE FOREPERSON: 12,587.

THE CLERK: As to Exhibit 201?

THE FOREPERSON: 14,160.

THE CLERK: As to Exhibit 227?

THE FOREPERSON: $3,737.

THE CLERK: As to Exhibit 200?

THE FOREPERSON: $2,557.

THE CLERK: As to Exhibit 225?

THE FOREPERSON: 29,500.

THE CLERK: As to Exhibit 215?

THE FOREPERSON: 12,980.

THE CLERK: As to Exhibit 216?

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit 228?

THE FOREPERSON: 17,700.

THE CLERK: As to Exhibit 217?

THE FOREPERSON: 20,060.

THE CLERK: As to Exhibit 218?

THE FOREPERSON: 20,060.

THE CLERK: II. New York General Business Law.

A. New York General Business Law Section 349.

As you have been instructed, in order to establish a violation of NYGBL Section 249, each of the following elements must be established by a preponderance of evidence: (1) that Mr. Greenberg engaged in an act or practice that is deceptive or misleading in a material way; (2) that Mr. Koch suffered injury as a result; and (3) that the alleged deceptive business practices were aimed at the consumer.

Do you find that Mr. Koch established each of the above elements by a preponderance of the evidence with respect to one or more of the 24 bottles of wine at issue and, therefore, that Mr. Greenberg engaged in materially deceptive business practices?

Yes or no.

THE FOREPERSON: Yes.

THE CLERK: If yes, please indicate whether Mr. Greenberg engaged in material deceptive business practices with respect to:

All of the bottles, or some (but not all) of the bottles.

THE FOREPERSON: All of the bottles.

THE CLERK: 1. Compensatory damages under Section 349.

If you have found by preponderance of the evidence that Mr. Greenberg violated Section 349 by answering yes to II.A above, you must determine how much to award Mr. Koch in monetary damages. Please indicate the amount for each bottle of wine on the table. (For your reference, attached as Appendix 1 is a list of the wines at issue, and the prices paid for them.)

As to Exhibit 223?

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit 224.

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit 222.

THE FOREPERSON: 4,956.

(Continued on next page)

THE CLERK: As to Exhibit 205?

THE FOREPERSON: 16,520.

THE CLERK: As to Exhibit 206?

THE FOREPERSON: 17,700.

THE CLERK: As to Exhibit 207?

THE FOREPERSON: 17,700.

THE CLERK: As to Exhibit 229?

THE FOREPERSON: 16,520.

THE CLERK: As to Exhibit 230?

THE FOREPERSON: 17,700.

THE CLERK: Exhibit 208?

THE FOREPERSON: 14,160.

THE CLERK: As to Exhibit 209?

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit 210?

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit 211?

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit 212?

THE FOREPERSON: 12,587.

THE CLERK: As to Exhibit 213?

THE FOREPERSON: 12,587.

THE CLERK: As to Exhibit 214?

THE FOREPERSON: 12,587.

THE CLERK: As to Exhibit 201?

THE FOREPERSON: 14,160.

THE CLERK: As to Exhibit 227?

THE FOREPERSON: 3,737.

THE CLERK: As to Exhibit 200?

THE FOREPERSON: 2,557.

THE CLERK: As to Exhibit 225?

THE FOREPERSON: 29,500.

THE CLERK: As to Exhibit 215?

THE FOREPERSON: 12,980.

THE CLERK: 120 Exhibit 216?

THE FOREPERSON: 15,340.

THE CLERK: As to Exhibit 228?

THE FOREPERSON: 17,700.

THE CLERK: As to Exhibit 217?

THE FOREPERSON: 20,060.

THE CLERK: As to Exhibit 218?

THE FOREPERSON: 20,060.

THE CLERK: Number 2. Treble damages under section 349. As you were instructed, if you find by a preponderance of the evidence that Mr. Greenberg willfully or knowingly violated section 349, you may also choose to award treble damages, which may constitute up to $1,000 per violation. If you choose to award treble damages, you must indicate the amount up to $1,000 per violation on the table below.

As to the treble damages on Exhibit 223?

THE FOREPERSON: 1,000.

THE CLERK: 224?

THE FOREPERSON: 1,000.

THE CLERK: 222?

THE FOREPERSON: 1,000.

THE CLERK: 205?

THE FOREPERSON: 1,000?

THE CLERK: 206?

THE FOREPERSON: 1,000.

THE CLERK: 207?

THE FOREPERSON: 1,000.

THE CLERK: 229?

THE FOREPERSON: 1,000.

THE CLERK: 230?

THE FOREPERSON: 1,000.

THE CLERK: 208?

THE FOREPERSON: 1,000.

THE CLERK: 209?

THE FOREPERSON: 1,000.

THE CLERK: 210?

THE FOREPERSON: 1,000.

THE CLERK: 211?

THE FOREPERSON: 1,000.

THE CLERK: 212?

THE FOREPERSON: 1,000.

THE CLERK: 213?

THE FOREPERSON: 1,000.

THE CLERK: 214?

THE FOREPERSON: 1,000.

THE CLERK: 201?

THE FOREPERSON: 1,000.

THE CLERK: 227?

THE FOREPERSON: 1,000.

THE CLERK: 200?

THE FOREPERSON: 1,000.

THE CLERK: 225?

THE FOREPERSON: 1,000.

THE CLERK: 215?

THE FOREPERSON: 1,000.

THE CLERK: 216?

THE FOREPERSON: 1,000.

THE CLERK: 228?

THE FOREPERSON: 1,000.

THE CLERK: 218?

THE FOREPERSON: 1,000.

THE CLERK: B. New York General Business Law section 350. As you have been instructed, in order to establish a violation of NYGBL section 350, each of the following elements must be established by a preponderance of the evidence:

1. That an advertisement by Mr. Greenberg had an

impact on consumers at large;

2, Was deceptive or misleading in a material way; and

3. Resulted in injury to Mr. Koch.

Do you find that Mr. Koch established each of the above elements by a preponderance of the evidence with respect to one or more of the 24 bottles of wine at issue and therefore Mr. Greenberg engaged in false advertising? Yes or no.

THE FOREPERSON: Yes.

THE CLERK: If yes, please indicate whether Mr. Greenberg engaged in false advertising with respect to all of the bottles or some but not all of the bottles.

THE FOREPERSON: All of the bottles.

THE CLERK: 1. Compensatory damages under section 350. If you have found by a preponderance of the evidence that Mr. Greenberg violated section 350 by answering yes to IIB above, you must determine how much to award Mr. Koch in monetary damages. Please indicate the amount of each bottle of wine on the table below. For your reference, attached as appendix 1 is a list of the wines at issue and the prices paid for them.

As to Trial Exhibit 223, what amount of compensatory damages?

THE FOREPERSON: 15,340.

THE CLERK: As to Trial Exhibit 224?

THE FOREPERSON: 15,340.

THE CLERK: Exhibit 222?

THE FOREPERSON: 4,956.

THE CLERK: Exhibit 205?

THE FOREPERSON: 16,520.

THE CLERK: Exhibit 206?

THE FOREPERSON: 17,700.

THE CLERK: Exhibit 207?

THE FOREPERSON: 17,700.

THE CLERK: Exhibit 229?

THE FOREPERSON: 16,520.

THE CLERK: Exhibit 230?

THE FOREPERSON: 17,700.

THE CLERK: Exhibit 208?

THE FOREPERSON: 14,160.

THE CLERK: Exhibit 209?

THE FOREPERSON: 15,340.

THE CLERK: Exhibit 210?

THE FOREPERSON: 15,340.

THE CLERK: Exhibit 211?

THE FOREPERSON: 15,340.

THE CLERK: Exhibit 212?

THE FOREPERSON: 12,587.

THE CLERK: Exhibit 213?

THE FOREPERSON: 12,587.

THE CLERK: Exhibit 214?

THE FOREPERSON: 12,587.

THE CLERK: Exhibit 201?

THE FOREPERSON: 14,160.

THE CLERK: Exhibit 227?

THE FOREPERSON: 3,737.

THE CLERK: Exhibit 200?

THE FOREPERSON: 2,557.

THE CLERK: Exhibit 225?

THE FOREPERSON: 21,500.

THE CLERK: Exhibit 215?

THE FOREPERSON: 12,980.

THE CLERK: Exhibit 216?

THE FOREPERSON: 15,340.

THE CLERK: Exhibit 228?

THE FOREPERSON: 17,700.

THE CLERK: Exhibit 2717?

THE FOREPERSON: 20,060.

THE CLERK: Exhibit 218?

THE FOREPERSON: 20,060.

THE CLERK: III. Apportionment of fault as to NY GBL claims. During this case you heard evidence about a 2005 auction conducted by Zachys in which Mr. Greenberg was the consignor. Zachys was once a defendant in this case but is no longer a part of this case. Nevertheless, you must still consider whether Zachys was responsible for some portion, if

any, of the damages you have awarded in section II, the NYGBL claims.

If you find that Zachys as well as Mr. Greenberg was responsible for Mr. Koch's monetary damages, then you must decide the percentage of total fault that each bears a violation of NY GBL section 349 and/or section 350. In doing so, you should weigh the conduct of Mr. Greenberg and Zachys and consider all the circumstances based on the evidence at trial.

A. NYGBL section 349. If you found in IIA that Mr. Greenberg engaged in materially deceptive business practices, indicate below the percentage of total fault that Mr. Greenberg and Zachys bears for the violation. As to Mr. Greenberg's percentage fault, what percent do you find from the jury?

THE FOREPERSON: 100 percent.

THE CLERK: As to Zachys' percentage fault?

THE FOREPERSON: Zero percent.

THE CLERK: B. NYGBL section 350. If you found in IIB that Mr. Greenberg engaged in false advertising, indicate below the percentage of total fault that each of Mr. Greenberg and Zachys bears for the violation. As for Mr. Greenberg's percentage fault, what percentage?

THE FOREPERSON: 75 percent.

THE CLERK: And Zachys' percentage fault?

THE FOREPERSON: 25 percent.

THE COURT: Does that complete the verdict form?

THE CLERK: Yes, your Honor.

THE COURT: You may be seated, Mr. Foreperson. Thank you.

Please poll the jury.

(Jury polled, all answered in the affirmative)

THE CLERK: Your Honor, the jury has been polled and the verdict is unanimous.

THE COURT: Thank you, folks. First of all, I want to thank you for your patience and hard work and especially for saying to 7 o'clock.

We didn't know whether there would be a need for any additional matters relating to this case. But based on your verdict, there is one more portion that needs to be addressed, so I am going to have to ask you to come back one more day. I hope you are able to do that. I believe it will be likely just tomorrow.

Based on the findings of liability, there is what is called a punitive damages portion of the case, which I will explain to you tomorrow. There will be some additional phase of evidence in the case which will be relatively brief. Then I will instruct you, again briefly, on this specific piece of the case relating to punitive damages. I believe when that's done tomorrow afternoon, you will be able to deliberate on that portion of the case.

Is that OK with everyone, to come back once more at 9:30 tomorrow? Great.

Thank you very much for all your time and efforts. We will see you tomorrow morning at 9:30. Have a good evening. Once again, don't talk about the case with anyone else. As you know, as you did today, you will have a chance at the end of the additional piece of evidence tomorrow to deliberate on this final phase of the case.

For the record, the verdict form has been marked as Court Exhibit 6, the completed verdict form.

Folks, once again, please don't talk or write or read anything about the case tonight. We'll see you tomorrow morning at 9:30. Please leave your pads here.

(Jury not present)

THE COURT: We haven't addressed in detail the punitive damages phase of the case, although I understand from what we just addressed that it will be a fairly brief presentation of evidence in the morning. We will be finalizing the instructions which we can send out to you. Actually, why don't the lawyers come in at 9 o'clock tomorrow morning, and we will talk about any legal issues with respect to the instructions and verdict form in the punitive damages phase.

I assume we will have brief openings, plaintiff-defendant, then presentation of plaintiff's evidence, defendant's evidence, and then closings, defendant-plaintiff.

Does anybody have any objection to that?

MS. SALISBURY: No, your Honor.

MR. HUESTON: No, your Honor.

THE COURT: Anything else we need to address now?

MR. CIALONE: Your Honor, I can give you some of the authorities on the GBL claim if you want to hear them now. It's Post v. General Motors Corp., 2002 U.S. Dist. Lexis 9968 from the Southern District June 3, 2002. "GBL section 349 limits punitive damages to an amount no greater than $1,000."

THE COURT: You said Post?

MR. CIALONE: Post, yes. Another one, Nwagboli v. Teamwork Transportation Corp., 2009 U.S. Dist. Lexis 121893, Southern District of New York, December 7, 2009. "Plaintiff cannot recover punitive damages in addition to treble damages," which we think presents a broader issue.

Those cases are both under 349. We haven't seen any case under 350 going one way or another, but the rationale is the same, which is that is the remedy in the statute.

Beyond that, your Honor, I would say that this really does present a due process issue. The complaint, while it is in the prayer that they want punitive damages, it's because it's in the first cause of action for fraud that they say they are entitled to them. In the complaint it does not say they are entitled to punitive damages under the GBL claim. Had they said that, we would have brought a motion to resolve that much

earlier.

We do think that, particularly the punitive damages, does present a fundamental due process issue, to just say we put it in our proposed jury instructions and we pled for further relief in the pretrial order. The complaint makes it very clear that they weren't entitled to punitive damages on those two causes of action, and they never alleged it.

Thank you.

THE COURT: Mr. Kaba.

MR. KABA: Thank you, your Honor. I'll deal with the due process issue first.

We have findings on fraud anyway, so the punitive damages case they are going to have to prepare for, which they had notice is going to come in, whether it is coming in under the fraud claim or the New York GBL claim. It was quite clear on the complaint from our proposed jury instructions, from our draft verdict form. All of those referred to exemplary damages under New York law.

THE COURT: Does it matter anymore whether there is going to be a punitive damages determination as to fraud?

MR. KABA: There may be a slightly different instruction under the GBL. We laid it out in our proposed jury instructions. I think it doesn't matter in the due process sense because the case is going to come forward and the jury is going to have to make a decision.

I do want to give you some authority on the availability of punitive damages under New York law for the GBL. It is a more recent case than that cited, and it is actually a New York State case. It is called Wilner v. Allstate Insurance Company.

THE COURT: I have that. I have read that.

MR. KABA: So I shall sit down.

MR. CIALONE: Can we have a cite for that, please?

THE COURT: Wilner is 71 A.D.3d 155, 165-167. We'll be looking at this issue.

Anything else we need to address now?

MR. HUESTON: Not for plaintiff, your Honor.

MR. CIALONE: Not for us, your Honor.

THE COURT: Thank you. Have a good night.

(Adjourned to 9:00 a.m., April 12, 2013)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

WILLIAM I. KOCH,

Plaintiff,

v. 07 Civ. 9600 JPO

ERIC GREENBERG, et al.,

Defendants.

----------x

New York, N.Y.

April 12, 2013
9:16 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge
and a jury

APPEARANCES

MORVILLO ABRAMOWITZ GRAND IASON ANELLO
Attorneys for plaintiff
BY: EDWARD M. SPIRO,
- and -
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BY: ANTHONY PAUL COLES, Esq.
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TRACY SALISBURY, Esq.
FRANK ALBERT CIALONE, Esq.
Of counsel

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

(Trial resumed)

(In open court; jury not present)

THE COURT: Good morning, everybody.

ALL COUNSEL: Good morning, your Honor.

THE COURT: I believe we sent out last night the preliminary instructions, postevidence instructions, and verdict form for this phase of the case. So I wanted to use this time to address that and any other preliminary issues that the parties had.

MR. COLES: If no one is setting up, may I set up, your Honor, and address the issue of punitive damages?

THE COURT: Sure.

MR. COLES: Maybe I'll just come around.

Your Honor, I want to raise an issue that we reserved when we were talking about the jury charges and make sure that we have it clear on the record. The issue I'd like to raise is that we don't believe that Mr. Koch is entitled to both treble damages under the GBL and punitive damages under the fraud claim, because both arise out of the same conduct. Because he was awarded treble damages on the GBL, he should not be able to obtain a second additional exemplary award of punitive damages. The rationale is because both types of damages are punitive in nature and are not intended to compensate Mr. Koch for his injury. He can't recover both of those damages for the same injury because essentially that would violate the principle

against double recovery or maybe in this case even triple recovery.

THE COURT: Why shouldn't he get a greater one if there's a punitive amount that's greater than the $1,000 times 24?

MR. COLES: Because he's already submitted the GBL claim to the jury. He made his election.

And just as background, the issue of applying two types of exemplary damages, there is no controlling precedent, but at least one case here in the Southern District has raised an issue as to whether or not it would pass constitutional muster. The cite of that case is Lukaszuk, L-U-K-A-S-Z-U-K, v. Sudeen, S-U-D-E-E-N, and I have a Westlaw cite, which is 207 WL 4699018. That case involved a RICO treble damage claim and a -- and a claim for punitive damages, and the court determined, because the RICO claim was trebled, the plaintiff was not entitled to punitive damages in that case.

THE COURT: And there was a punitive damages claim on a separate claim or on the RICO claim?

MR. COLES: I believe there were a number of claims and I believe it was on the separate claim.

THE COURT: Okay.

MR. COLES: Okay? But I will double-check that. However, I think the principle applies actually in either case. And I think even more significantly, I want to bring to the

court's attention a case under the Anti-Terrorism Act, *Smith v. The Islamic Emirate of Afghanistan*. It's a case by Judge Baer, 262 F.Supp.2d 217. In that case Judge Baer found that, "To the extent that the ATA," the Anti-Terrorism Act, "treble damages provision already provides a penalty, this court is foreclosed from assessing additional punitive damages." Now this was a case involving victims of terrorism in the September 11 attack, right? A situation of far more gravity than we have here. And Justice Baer in that case found that the double exemplary damages was inappropriate. It is not a huge step to say that if you can't get them in the September 11 terrorism case, Mr. Koch should not be able to get double exemplary damages in a case like this. First, he's a highly sophisticated consumer, he has substantial collections in 10 or 11 different areas, there was an available contract right to inspect, he chose not to do it. He explained the reasons for that, but it's undisputed that he had a right to inspect. Zachys was given by Mr. Greenberg the sole discretion to return bottles to Mr. Koch if Mr. Koch wanted. Mr. Koch never asked for a refund. There is no persuasive proof that anybody else at this auction other than Mr. Koch believes that they were sold counterfeit bottles of wine.

The amount in dispute is something in the range of 10 or 15 times that Mr. Greenberg has paid in legal fees. The legal fees, rather, are 10 to 15 times the amount in dispute.

I have never had a case where the disproportion imposed on somebody is this high, where he's paid something like 5 million in legal fees for a judgment that is a tenth of that, if that. All of those legal fees were incurred after, as you know, Mr. Greenberg made a refund offer and offered to taste the wine publicly.

And finally, the sale was conducted by an expert auction house that acted as a auctioneer pursuant to a contract.

So it seems to me, in light of all the circumstances, in light of the *Smith* case and the constitutional concerns about double exemplary damages, there's no basis to proceed with the punitive damages phase of the trial. They had their election, they submitted the treble damages on the GBL, and that is the exemplary damages that have met whatever requirements or standards are needed in order to show exemplary conduct. So we would move at this point to dismiss this part of the claim and not move ahead with the trial on punitive damages.

THE COURT: I think there are some cases, including the *Wilner* case that the plaintiffs cite, there are some cases that talk about the availability of treble and punitive damages, and I think I'm going to rule shortly that, I think -- unless Mr. Kaba persuades me otherwise -- that you can't get punitives beyond the treble damages under 349, and those cases

seem to indicate that, where they talk about both punitives and treble, that you can have an alternative theory of treble and punitive, and in that situation, I don't know why you wouldn't get to elect the higher one.

MR. COLES: Well, I guess the answer would be twofold is, they didn't seek punitive damages on the GBL claim. It's not in their pretrial order, it's not in their amended complaint. If they wanted their election, the burden was on them to make that election at the time the pretrial order was submitted.

The Second Circuit, your Honor, has been very clear. *Perma Research & Development v. Singer*, 542 F.2d 111, a pretrial order becomes the governing pattern of the lawsuit. They didn't seek punitive damages under the GBL.

THE COURT: That's your argument that they waived it as to GBL, but they clearly preserved it for fraud.

MR. COLES: No, but my point is, under the *Smith* case and the *Lukaszuk* case and the constitutional issues we've talked about, having -- maybe they couldn't have gotten it under the GBL because the GBL limits everything. Having chosen -- having elected not to proceed under the GBL, they don't have a right now to get a second type of exemplary damages under the fraud claim. They're getting treble damages under the GBL. Those are their exemplary damages, and basically they can't now double dip under the fraud claim and

say that they're entitled to punitive damages.

THE COURT: The reason they've submitted exemplary damages is because of the happenstance that I put the exemplary damages in the first phase for efficiency reasons, and it's not as though they elected to do that first in lieu of their punitive damages, unless I'm missing something.

MR. COLES: No. My point is, having chosen not to plead the punitive, seek punitives on the GBL claim and having gotten the treble damages, that they're now foreclosed from proceeding on the fraud claim, regardless of what the particular chronology of the trial is. That was the election they made.

THE COURT: I see. Okay. Thank you. I'll hear from Mr. Kaba.

MR. COLES: Thank you.

MR. KABA: I don't know when we made an election that we could either get a thousand dollars per bottle under the GBL or we could get exemplary damages under the fraud cause of action. Our complaint clearly -- I'm not going to argue, your Honor, that we can get punitives or treble just under the GBL, even though I think *Wilner* actually supports that proposition quite clearly, but I'm fine that the court has decided that it's not going to permit GBL recovery for punitive damages, but our prayer for exemplary and punitive damages under the fraud claim has been clear from the outset, and in fact, it was in

the complaint. They never moved to dismiss that. They never had made this argument before. Even when they were arguing that the refund offer should come in to address the punitive damages and the fraud claim, they didn't say, by the way, plaintiff only gets the thousand dollars per bottle or punitive damages under the fraud claim.

I think it's very clear we've reserved the right. If the court, after we get a verdict from the jury, says to us, you either have to decide whether you're going to get the statutory treble damages or the exemplary damages, then, you know, we'll discuss it here and we'll make that election. I don't think that election would be appropriate in any event, because I think there are two separate causes of action, separate recoveries sought, there are separate stands that govern treble damages under the GBL and exemplary damages under the fraud cause of action.

I'll just note briefly that your Honor's already said, we didn't -- we didn't elect to put the trebling -- the willful and knowing violation of 349 in the up-to-Thursday case and then move the rest of it to the Friday case, so it would seem a very strange result if now we're -- because the court has bifurcated, in part because defendant asked for it, that we are now just foreclosed from making our punitive arguments to the jury.

I'll just note briefly, because I have it up -- I just

pulled it out -- the *Smith v. Islamic*, etc. case, at 262 F.Supp.2d 217, actually doesn't deal with this sort of issue at all. It says, "The plaintiff's claim against the Al Qaeda defendants are brought under Section 2333 of the ATA, which provides for treble damages and attorney's fees but does not provide for punitive damages. To the extent that Section 2333's treble damages provision already provides a penalty, this court is foreclosed from assessing additional punitive damages against the Al Qaeda defendants." There you're dealing with a statute that provides very clearly just for trebling but not for punitives, and the court's saying, if you're only moving under that one statute, you've gotten treble under that one. I'm not going to read into it some additional punitive damage right. I think the case -- the case here is clearly different.

THE COURT: Okay. Did you want to add anything, Mr. Coles?

MR. COLES: I just want to close the circle on that. As you may recall, your Honor, this point about making an election, that's not true at all. It they actually made an election, they sought bifurcation of the case, when we wanted to go ahead as one case, but they were concerned about the refund offer.

I do think these cases are fairly relevant, that you can't take exemplary damages of one type and stack on top of

that exemplary damages of another type. And here they have exemplary damages that -- they have a case where, it's a very unusual type of case to begin with when you have people of this level of sophistication and this type of matter in dispute, and I think to add punitive damages on top of that is not appropriate, and we would move to dismiss this aspect of the trial.

THE COURT: Okay. I'm going to reserve on the question but go forward with the second phase, subject to further argument or briefing on that point.

I am going to go ahead and rule on the 349 punitive damages point that we were discussing yesterday, and I'm going to base it on the law.

I know the parties have argued the issue of waiver. I'm not going to base my decision on that but rather on Section 349, the question being: Are punitive damages, in addition to the "treble" damages, up to $1,000, available under GBL 349. I conclude that they are not. First, the language, the plain language of GBL Section 349 provides -- well, I'll read it. 349(h) provides, "In addition to the right of action granted to the Attorney General, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or $50, whichever is greater, or both such actions. The court may, in its

discretion, increase the award of damages to an amount not to exceed three times the actual damages, up to $1,000, if the court finds the defendant wilfully or knowingly violated this section." My reading of that statute is that it really is a cap of all damages, including exemplary or punitive damages, of a thousand dollars per violation.

In addition, I would cite a New York Court of Appeals decision, which I think is unanimous, in which Chief Judge Kaye discussed the relevant amendment of Section 349. This is Karlin, K-A-R-L-I-N, v. IVF, IVF America, as in in vitro fertilization, 93 NY2d 282. And Chief Judge Kaye writes -- she's discussing the 1980 amendment, which created Section 349(h), and says, "Among the remedies available to private plaintiffs are: compensatory damages, limited punitive damages, and attorney's fees."

And finally, I would rely on the case cited by Mr. Coles, the *Post v. General Motors Corporation* case, 2002 U.S. Dist. LEXIS 9968, in which Judge Griesa of this court held, "As to punitive damages, New York GBL Section 349 relied upon by plaintiff in one of his two causes of actions limits punitive damages to an amount 'not to exceed three times the actual damages, up to $1,000.'"

Based on that, I can conclude that punitive damages beyond the thousand dollars per violation are not available under 349.

However, separate from the point that's just been argued this morning, I think punitive damages are potentially available under the fraud claim, given the jury's findings, so I'm going to go forward with that, and I'll reserve on the argument that's been made this morning.

Mr. Cialone?

MR. CIALONE: Yes, your Honor, a different issue. I'm sure you noticed last night there was a lot of press attention. A person working with us saw Jurors Number 1 and 8 approached by a reporter for the Wine Spectator. Juror Number 8 seemed to walk away without talking to him. Juror Number 1 did not, continued talking to the reporter, presumably about the case. We're very concerned about that. A clear instruction from the court obviously was no talking about the case. We don't know if others were interviewed or why the press was trying to do that, but we're very concerned about that.

THE COURT: What do you propose?

MR. CIALONE: What I would propose is that the court ask Juror Number 1 if in fact he did speak with the press or ask the jurors generally if anyone actually did, and if they did, that juror be removed.

THE COURT: Any objection?

MR. KABA: No objection.

THE COURT: So it was Juror Number 1?

MR. CIALONE: Juror Number 1 who our colleague saw

speaking, and we don't know if others did. Juror Number 8 was approached, but she did the right thing and kept walking.

THE COURT: Okay.

MR. SHARTSIS: And your Honor?

THE COURT: Yes.

MR. SHARTSIS: I only say this out of an overabundance of caution. Of course we don't want anything to reflect on either of the parties having raised this observation so we don't wind up getting some prejudicial reaction from any of the jurors.

THE COURT: Yes. Right. I'm not going to specify.

MR. SHARTSIS: I'm sure you'll do that. I just want to state it because --

THE COURT: Yes. Fair point.

Okay. Are there any comments or objections to the court's proposed instructions or verdict form?

MR. KABA: Not from plaintiffs, your Honor.

MR. SHARTSIS: Not from us, your Honor.

THE COURT: Any other preliminary matters?

MR. SHARTSIS: Your Honor, just trying to think through the juror issue, it seems to me that the question could be asked two ways of the jury. One is whether they talked to anyone who approached them at all, regardless of whether they knew they were from the press, although my experience is that people from the press generally identify themselves as such,

but an even more global question might be helpful since the instruction is not to talk to anybody about the case.

THE COURT: That seems reasonable. Hold on one second.

(Pause)

(Juror Number 1 present)

THE COURT: You may be seated.

Juror Number 1, Mr. -- is it Sarmiento?

JUROR: Yes.

THE COURT: I wanted to follow up on something yesterday after we finished. There were a lot of people around and there were people -- I don't know if there were reporters or other people coming up to people, and I wanted to check with you, based on just observations, as to whether you spoke to anyone about the case, if anyone came up to you, so if there's anything about that you could tell me.

JUROR: No, no one really came up to me. They just said, "You looked really attentive in there."

THE COURT: They said what?

JUROR: He said I looked really attentive up there. It was a gentleman. I don't know if he's in here right now.

THE COURT: Did he say who he was or --

JUROR: No, no.

THE COURT: Okay. Did he ask you anything about your deliberations or anything?

JUROR: No.

THE COURT: Okay. And then did you say anything to him or --

JUROR: No. That's basically what I said. He just asked about -- we took really quick time doing it, and that's basically it. Small talk.

THE COURT: Small talk?

JUROR: Yeah.

THE COURT: Okay. You said you didn't talk about the jury's deliberations?

JUROR: No, not at all.

THE COURT: Did you talk about your view of the case or anything?

JUROR: No, not at all.

THE COURT: Okay. And in general have you followed the instruction not to talk about the case outside of the jury deliberations?

JUROR: Yeah, yes.

THE COURT: Okay. All right. Thanks very much. You can go back to the jury room.

(Juror excused)

MR. KABA: Your Honor, may I just inquire, are we going to ask every single juror the same question?

THE COURT: I don't think so.

MR. KABA: Okay. Good, 'cause I don't think that will

be appropriate.

THE COURT: Yeah. I mean, based on what the juror said, I assume there's no motion, or do you want to address anything?

MR. CIALONE: Without further information, your Honor, and the person who informed us isn't here -- without that, no, not at this time.

THE COURT: Okay. All right. I think we talked about how to proceed with this phase. I'll give my preliminary instructions and then we'll have brief openings from plaintiff, brief opening from plaintiff and defendant, and then I understand there's one witness per side, is that right?

MR. SHARTSIS: Yes, your Honor.

MR. HUESTON: Yes, your Honor. I just want to raise something, just so we don't get objection to it. We will have questions of Mr. Greenberg. It could be that that goes outside the scope of their direct. I don't think in this process, one witness each side, we need to do the formality of officially calling Mr. Greenberg to elicit our questions. I'm hopeful that's not going to be a problem. We're not going to have a broad cross. It's going to be narrow. But I'm hoping I'm not going to hear objections that, well, our opportunity is lost so we have to go through the formality of calling him and then they call him back.

MR. SHARTSIS: Your Honor, they can't call him. They

did not designate him as a witness in time, and that's the situation. Last night we fully expected them to designate him. They designated Mr. Koch. We then designated -- and then they said, "That's our witness. Who are you calling?" We said we are calling Mr. Greenberg. I think there's rules here, and the rule is, if you don't designate a witness, you can't call him. So the suggestion that they can now open up a case in cross-examination when they waived their right to call a witness, your Honor, just violates the rules. We have -- we're living by these rules, and we're trying to, and the suggestion now that we're just going to bend that rule I think is inappropriate. They did not designate this witness in their case, period, and I do not believe that their cross-examination, under rules of evidence, can exceed the scope of the direct. They're just changing the rules on us, your Honor. We didn't prepare Mr. Greenberg last night broadly, we didn't anticipate that there would be questions outside of the questions we're asking, and now I'm being told that we're going to be ambushed with questions that we were unable to even anticipate that would be asked outside the scope, and I object strenuously.

THE COURT: Mr. Hueston?

MR. HUESTON: Yes. First of all, we think our questioning will very likely be directly responsive to what we anticipate the direct examination will be. This is not some

planned ambush. This is going to be a short -- we anticipate, both sides, this will be short. What I'm trying to avoid is, you know, technical arguments of what may -- Mr. Shartsis may start arguing as going beyond, you know, some line of cross. I don't think it will. If it does, we'll just call a rebuttal then. There's no designation responsibility the night before on a rebuttal issue. So if he's going to force us to do that, then we'll take that step. I just think it's totally unnecessary.

MR. SHARTSIS: Your Honor, let me say that if you intend to elicit testimony from a witness and you know the identity of that witness and as Mr. Hueston has now said he intended to make it part of his case, that is not rebuttal and it cannot be used in rebuttal. That's an improper purpose. You can't ambush people. You got to tell them you're calling witnesses. And we know to a certainty -- we know to a certainty that Mr. Hueston intended to ask questions of Mr. Greenberg in the manner of presenting Mr. Greenberg in his own case. He cannot now say, oh, okay, I'm just going to call him in rebuttal. That's prohibited, your Honor. Prohibited. Because he doesn't even know what Mr. Greenberg is going to say, and he's already ready to call him in rebuttal on questions he has presently prepared that he intended to put in in his case in chief as he described. It's an improper use of rebuttal. We're trying to get this thing over with. We're

entitled, your Honor, entitled, to know that we should be preparing Mr. Greenberg more broadly than we did. We prepared him on the questions we intended.

THE COURT: Well, but I mean, designation for this phase was pretty informal, right?

MR. HUESTON: Absolutely.

MR. SHARTSIS: Your Honor --

MR. HUESTON: It's time for me to talk, Mr. Shartsis. Absolutely, your Honor, there was no court-ordered rule.

And let's talk about what happened last night. These folks didn't e-mail us at all. It was late at night and we finally said, "Well, we're going to call Mr. Koch. What are you going to do?" They e-mailed back, "We're going to call Mr. Greenberg." That was at 10:00 at night. So this whole thing about, "oh, we were really worried about preparing Mr. Greenberg" is nonsense.

So we intend to keep this narrow. This is going to be a fair cross, and it's going to be Mr. Camp this time who's going to do that cross. I suppose we can take objections as they go, but if there are going to be objections, obviously we don't know exactly what Mr. Shartsis is going to do so we can prepare as best we can. We obviously didn't want to share and wouldn't want to share where he's going to go with us, so if necessary, we'll proceed on rebuttal if we can't be allowed to cross based on what we hear.

MR. SHARTSIS: Your Honor, if I may now be heard. There was a -- and you're the one who said if parties have agreements, we live by them. There has been an agreement throughout the trial that witnesses are designated the night before.

MR. KABA: 24 hours before, Mr. Shartsis, not the night before.

MR. SHARTSIS: Well, then they can't call Mr. Koch, either, your Honor, because they can't call Mr. Koch until 7 at night tonight.

MR. HUESTON: Then you can't call Mr. Greenberg.

MR. SHARTSIS: I'm sorry. Let me finish, please.

MR. HUESTON: Oh, okay.

MR. SHARTSIS: The parties have been doing that designation, your Honor. And now to suggest that all of a sudden the way the parties conduct themselves and designate witness is no rules, when we've conducted a full trial this way, I would like to ask the court -- I know, Judge, your Honor, you're hesitant to enforce things. We tried to invoke those matters before. We tried to do it with getting the court's direction on the use of demonstratives or what the parties do. There was no designation last night of Mr. Greenberg under any circumstance. And I believe we're entitled to live by the rules.

MR. HUESTON: Great. Okay. You know, we're going to

live by the rules. No witnesses then. Let's go right to argument. No witnesses, only argument. You didn't designate Mr. Greenberg. Live by your rule.

THE COURT: Obviously there was an informal rule to designate, to change the 24-hour understanding between the parties and designate witnesses last night. You know, I'm going to see how the evidence goes. I mean, I think I'm going to generally limit the testimony to the scope of Mr. Greenberg's direct. So we'll see how it goes.

Are we ready for the jury?

MR. HUESTON: Yes, your Honor.

THE COURT: Okay. Are they all here?

Okay. Mr. Skolnik will check and see if they're all here. If not, we'll take a break.

(Pause)

THE COURT: Okay. They're almost ready. We'll just take about two or three minutes.

(Recess)

(In open court; jury present)

THE COURT: Please be seated.

Ladies and gentlemen of the jury, good morning.

THE JURORS: Good morning.

THE COURT: We're about to begin phase two of this trial, which will be a much shorter phase. Before this phase begins, I will give you a few instructions just to help you

understand what is going to be presented to you today.

All of the instructions I gave you before about how you should conduct yourself during the trial, trial procedure, and how the evidence will be presented, apply to this phase as well. I will not repeat those, but you should continue to keep them in mind.

This part of the trial is on something called punitive damages. Although you've already awarded compensatory damages in this case for Mr. Koch's fraud and New York GBL claims, in certain circumstances, in New York, a plaintiff may be entitled to what are called punitive damages. I will instruct you on the specific standard and the law at the close of the evidence, but for now, consider generally that punitive damages are separate from compensatory damages, like those that you considered in the first phase of the trial, and are a type of punishment.

After all of the evidence on punitive damages has been heard and the arguments and instructions are finished, you will meet to make your decision about the amount of punitive damages, if any, to award. You will determine the facts from the testimony and other evidence that's presented. Again, you are the sole and exclusive judges of the facts. I must stress that you must accept the rules of law that I give you, whether or not you agree with them.

As a reminder, please do not make up your mind about

what the verdict should be until after I have instructed you on the law at the end of this phase of the trial and you've gone to the jury room and you and your fellow jurors have discussed the evidence. Keep an open mind until then. Both parties deserve, and the law requires, that you give them an opportunity to be fully heard on this issue.

We will turn now to brief opening statements of counsel for each of the parties.

Mr. Hueston.

MR. HUESTON: Thank you, your Honor.

Ladies and gentlemen, you have already found that Mr. Greenberg has committed fraud by clear and convincing evidence. And that he wilfully and knowingly committed fraud. That evidence is fresh in your mind so I'm not going to repeat it here, and that's why this phase is going to be very short. You know the evidence.

Today we are asking you to complete your work. Punitive damages are for the kind of conduct that we proved up to you and you found here. It's for fraudulent misrepresentations and concealment that are wanton and reckless, just as Mr. Greenberg did. It's for fraud that's gross fraud, that involved high moral culpability, just as involved in this case, or wanton dishonesty.

All the lies he told in this case, that meets the standard for punitive damages. It's exactly what we've already

been proving to you in this court, and now, ladies and gentlemen, it's time for you to send a message to Mr. Greenberg with a judgment that will ensure that he never does this again to anyone else.

I'm going to ask you to consider, when I come back in a brief closing statement, for you to think about a couple of things.

First, Mr. Koch will take the stand and tell you these weren't all the fakes he got. He got other fakes from Mr. Greenberg. And it came out of another auction.

Secondly, I'm going to remind you of the evidence that we showed you and proved to you that he didn't do this once; he was trying to push his fake bottles time and time again.

We've already established, ladies and gentlemen, that when Mr. Koch first came knocking at Mr. Greenberg's door, Mr. Greenberg lied and tried to throw him off the trail with a huge whopper about English royalty and a collector from Toronto, and later, in a discussion with Mr. Koch, he lied again, made up another whopper about the Russian mob coming after Royal. Don't go there.

Now we anticipate Mr. Greenberg's going to take the stand again and he's going to say: Well, wait a minute. Later, when I was confronted with a 1928 Latour, the Edgerton bottle, number 41, I offered to give Mr. Koch his money back, and so therefore you should consider me to be working under a

contract and doing nothing wrong here. Just let me go. Well, ladies and gentlemen, this is what you're going to hear about that, that that was a limited -- he thought of that as a limited, one-time offer, and even for the smoking gun bottle, number 41, which he knew through his own Edgerton report was definitely counterfeit, he still didn't accept responsibility, still didn't admit it was a counterfeit. And Mr. Koch will tell you that he suspected then what you have discovered yourself in this case, that this was part of Mr. Greenberg's con. When he pushed bottles out to a victim, to the buyer, if that buyer spotted him, he'd say: Okay, give me that -- give me those bottles back. He silenced those who were about to blow the whistle by taking the bottles back. Then what would he do next? He would push those bottles -- we've seen it -- to other buyers and auction houses and not tell them the bad information he learned from the last victim who spoke up. He would take those bottles, dump them on somebody else, and keep doing it, hoping they would fail to find what the last person had done. That's what he was after. And Mr. Koch said, no, not going to allow you to do that.

You're going to hear, in six years of litigation here, folks, leading up to this trial, Mr. Greenberg has never, never accepted responsibility for his actions. It took a jury trial with all of you, after two weeks, for you to force him to accept responsibility, to acknowledge what he has done. You

heard him on the stand. You can consider this. When he was on the stand and talking to you, he was still unrepentant. He took the stand, raised his hand to tell you the truth, he looked you in the eyes, and he lied to you, over and over again, about documents that clearly show what he was doing. He lied to you about what those were. He gave you laugh out loud lies, hoping to distract you. He lied about his role in the auction in Zachys in 2005. He lied about the false statements and the things that he knew he was keeping back. He lied to try to pull it over on you.

After our short presentation, ladies and gentlemen, I'm going to come back and I'm going to ask you to think about what is the amount of money that it's going to take to make sure this man isn't tempted to do this again. The award that you came up with yesterday is the amount of money for the bottles. You may have thought you awarded it three times. It's 3 -- it was just $355,000. It's for the bottles. Ladies and gentlemen, that's just the cost of doing business for Mr. Greenberg. If that's all he has to pay, that's not going to stop him. Ask yourselves, what will stop him? I have a suggestion for you. That's going to be your decision to make. Remember the Greenberg then versus Greenberg now? Hold him to the standard that he tried to hold Royal to. He got stuck with counterfeits from Royal. He had drafted up a complaint with his attorneys and he demanded $10 million in punitive damages.

That's what he thought it was going to take to send a message to Royal. I submit to you, ladies and gentlemen, you send him that same message, to make sure he never does it again.

THE COURT: Mr. Shartsis?

MR. SHARTSIS: Thank you, your Honor.

Good morning.

THE JURORS: Good morning.

(Continued on next page)

MR. SHARTSIS: Good morning. We are here talking about punitive damages. Punitive damages are not something that's required. If not, that would have been automatic in connection with the fraud claim. It's a separate decision that the jury makes.

The standard for the jury actually is higher in punitive damages. While it was clear and convincing before, it now must be unequivocal. So we're up to a little higher standard for you to consider and to judge the things that are being done.

First I want to tell you that Mr. Greenberg will tell you that he respects your decision as a jury. He is sorry that Mr. Koch was sold those questionable bottles. He will also tell you, which he believed, that he thought the bottles were authentic. But he is sorry that this has happened and he is sorry that Mr. Koch was inconvenienced.

In the arguments yesterday a statement was made that we were unable to respond to. If you will excuse me, I have to get some papers. The statement was made to you in closing that at the end of the day, by doing that, Mr. Greenberg got top dollar for all this, and Mr. Koch is here stuck with these worthless bottles.

I agree with you, if that were true, that would be a bad thing, if Mr. Koch had been stuck with the worthless bottles. You were told, think about what Mr. Greenberg is

asking you to do. He's sitting here, and Mr. Koch, with these bogus bottles.

Now, there was an evidentiary ruling by the judge before the case that kept us from presenting certain evidence to you that the judge has said we can present to you because it's relevant, it's relevant to a punitive damage claim.

Let me show you a couple of documents. If we could look at Trial Exhibit 1036, please. And if we can blow up first the letterhead and who it is addressed to. This is a letter from Mr. Greenberg to Mr. Koch. The date of the letter is just a few weeks after the lawsuit was filed. Mr. Koch had filed a lawsuit originally about 11 bottles. Let's see what the first paragraph says.

At this point Mr. Greenberg offers Mr. Koch all of his money back and more, as you will see. You heard Mr. Greenberg testify it was his practice always to stand behind the wine and to offer refunds to anyone who complained. In fact, he does that in this letter. Mr. Koch didn't make a demand for payment. There was no demand for payment before the lawsuit was filed.

Mr. Greenberg had learned about the Latour bottle. On his own, when he learned that the Latour bottle was in the auction, no lawsuit filed about it, you can see here, "Earlier this year you contacted me about a counterfeit bottle of Chateau Latour 1928 that you bought at Zachys auction which was

accidentally included in my single-seller consignment of over 17,000 bottles."

You know that Mr. Greenberg testified, and I think we tried to make that point as clearly as we could. He says, "While there's no certainty that the bottle is counterfeit, I immediately authorized Zachys to refund the purchase price of $2873. Your entire auction purchase was 3.7 million. You turned down that offer. Then, without even requesting that I refund any purchases, you sued me, claiming 6 other bottles were counterfeit and four more are possibly counterfeit," that was the claim, "all without providing a single fact why any of these bottles is inauthentic."

Let's go to the second paragraph. You will see here Mr. Greenberg makes some comments about the complaint that was filed because he felt that it was inaccurate. He says, "Unfortunately your lawsuit is filled with factual errors, including Sotheby's refusal to auction my wine," which is what Koch had alleged, that Sotheby's wouldn't do an auction for him.

Mr. Greenberg couldn't understand why, because he said they made every effort to get the auction, which we know they did. They spent three years doing that. Mr. Koch had alleged in a public complaint that Sotheby's had walked away from Mr. Greenberg, and we all know that is not accurate.

"And my alleged wine-buying trips with Royal, which

never happened." There was also another allegation that Mr. Greenberg went on wine-buying trips with Royal in Europe, but you didn't hear any evidence here about that, because that wasn't true. But that had been alleged in the complaint against Mr. Greenberg. He was upset that things were being said that weren't true, in the complaint.

Nevertheless, we go to paragraph 3. "I have never knowingly sold counterfeit wine. Similar wines from my collection have tasted genuine to me." You heard that testimony. "I don't know why you claim each bottle is counterfeit." That was true. There was no detail at all in the complaint about any of the bottles. It was just possibly counterfeit or counterfeit.

Then he points out something which we have done a lot. "Unlike most sellers, I exposed the corks so people could look at them." Then he goes on to say, "I don't know if you exercised your right to inspect the bottles before purchasing them. Zachys, which was then the world's number one wine auctioneer, inspected the bottles a number of times." And you have heard that. That was true. "We both obviously relied on Zachys' impeccable reputation." And that was true for Mr. Greenberg.

He then goes on and he offers him his money back. Here it is. He says, "I'm perfectly happy to repay your money and take all the bottles back." You remember yesterday you

were told, and we couldn't respond, Mr. Koch here is stuck with these worthless bottles. So he wasn't stuck with the worthless bottles. He didn't have all those bogus bottles he couldn't do anything with. Take all the bottles back.

"Your lawsuit requests rescission and I agree." Of course, we didn't have a rescission claim here in this case. "Accordingly, I enclose a check for $272,555.72, which covers the amount you paid for the eleven bottles."

Then he also gives him interest on his money for the time from when Mr. Koch bought the bottles until this point, and costs. There were some costs in filing the case. Mr. Greenberg says, look, I'll give it all back to you, and then I'll bear the cost of returning the bottles.

Then Mr. Greenberg does this. Mr. Greenberg, unlike what you have heard from Mr. Koch, did not want to put the bottles into circulation or resell them. We're talking about punitive damages here. Punitive damages are to deter somebody from doing something, to deter them.

If Mr. Greenberg had proposed to take the bottles back and then resell them privately or something, that might be a different situation. But here, just as soon as the lawsuit is filed, Mr. Greenberg says, "I have never been and have no interest in spending my productive time dealing with this matter. In fact, it is my plan to use these bottles in a charity wine auction for a worthwhile children's cause in New

York City. In this way deserving people will benefit and the public will have the opportunity to taste the wines."

This lawsuit was very highly publicized. There was a lot of interest in whether these wines were real or not real. Mr. Greenberg said let's open them in public, let's find out, it will be a highly attractive event, very controversial, and we can use that to benefit other people. We can open these, we'll all find out at the same time what's in the bottle, and we'll help a charity. That's what he proposed.

The suggestion is that Mr. Greenberg, after being notified that there might be problems with these bottles, wanted to take the bottles and put them back in circulation. It is something that is not fair and it is not true.

Then he goes on to try to have a cordial ending to this. He says, "This is the gentlemanly way to bring this matter to a conclusion. I look forward to receiving the bottles so I can proceed with the charity auction."

Mr. Greenberg didn't ask Mr. Koch -- can we see the next page, please. There is the check. The check is attached to the letter. He sends the check to Mr. Koch.

Some of have us have had small claims or other claims with insurance companies that says on the back of the check you sign this and you release your claims. There was nothing like that. Mr. Greenberg did not ask for a claim to be released. He didn't propose to settle any claim Mr. Koch had. If Mr.

Koch had further problems, Mr. Koch was free to bring that up.

This complaint had an allegation for an injunction where the court ordered Mr. Greenberg to do things. There was no request that that be stopped. The injunction could continue to go forward. This was a refund done in good faith.

Mr. Hueston suggests this is the most diabolical plot in the world, honoring your commitment, honoring the contract, and honoring the promise. It's a total catch-22 the way Mr. Koch presents it. If Mr. Greenberg didn't honor his promise, didn't act honorably. What we would hear is Mr. Koch here is stuck with these worthless bottles. But when Mr. Greenberg does the honorable thing . . .

Remember, this is punitive damages for reprehensible behavior. That is the equivalent to criminal behavior. And this is about as clear evidence as you can get of honorable conduct. The first time somebody learns that there is a customer who has a problem, they step up, they stand behind the product.

Picture this. This is an as-is contract, which is a buyer-beware contract. In an as-is contract Mr. Greenberg does more. He steps up and honors his own commitment to give a refund. The result is now he is being sued for punitive damages for reprehensible behavior.

If we are trying to encourage people in society to behave a certain way by the functions of the jury and your

decisions, I think this is what we want people to do. So just remember, it's catch-22. If he doesn't give that, Mr. Koch's lawyer rails that Mr. Koch is stuck with these worthless bottles. If he gives it, Mr. Koch's lawyer rails this proves it's a cover-up. It's just not very fair and it's not the stuff that punitive damages is made of.

So Mr. Koch expanded his claim. He expanded the claim years later to 36 bottles. Let's look at Trial Exhibit 1052. This is my law firm. I'm going to blow up my letterhead for the publicity here. We are in San Francisco. It's a letter from me. You will see it's addressed to Ed Spiro, who is here in New York. Mr. Spiro is a very fine lawyer with one of the really premier law firms in New York. Good guy, good lawyer, got long well professionally.

I send this letter to Mr. Spiro, authorized by Mr. Greenberg. Let's see what we say in the first paragraph. "Mr. Greenberg has twice previously offered -- in accordance with the terms of the catalog -- to reimburse Mr. Koch for all the disputed wine he purchased from Mr. Greenberg. Although Mr. Koch agreed in writing to this remedy in registering to bid, he has to date disregarded his promise and refused Mr. Greenberg's previous offers."

That was correct. Those are just the facts.

"While Mr. Greenberg disputes Mr. Koch's claims, he nonetheless makes the present offer." He steps up and he's

honorable. "This offer encompasses each of the bottles identified in Mr. Koch's amended complaint filed November 10, 2010." You can see this letter is 19 days later, on the 29th of November. You don't get the complaint the day it's filed. It takes time for it to come in.

Then let's see what Mr. Greenberg offers Mr. Koch. Remember, you have a $350,000 more or less judgment in the case. "In exchange for return of the bottles identified in the amended complaint as having come from Mr. Greenberg's cellar, Mr. Greenberg will pay Mr. Koch $688,238.47," the value of the 36 bottles. He says this is what it represents.

"Which figure includes: $272,555.72 reflecting Mr. Greenberg's original offer." We have seen that. "Which included the purchase price of the original eleven bottles, interest, and filing fees; $395,589 reflecting the purchase price of the twenty five newly claim bottles, and $20,093.75 reflecting interest at 9 percent." At 9 percent. Wouldn't be bad to get 9 percent. "On the twenty five newly claimed bottles from May 2010 to November 2010." That was the period that had elapsed with the filing of the complaint. Before that, Mr. Greenberg had no idea about these.

"Mr. Greenberg will pay the cost of shipping the returns. We hope that your client will accept this offer." Then a copy is shown to Mr. Greenberg. Let's leave that up here just for another second.

Mr. Hueston is going to argue this was the most devious act imaginable, that Mr. Greenberg was honorable, that he stepped up to meet this.

Most importantly, this offer was almost twice as much money as Mr. Koch sought in this case. There were no conditions in this letter. He had offered to him $688,000, and he turned it down in order to seek from you $350,000. He was offered $688,000, but he elected, which is his right as a citizen to come into court and have an extended trial, in order to collect half the amount that he was offered. I want to hark back again to the statement, think about what Greenberg is saying to you. He's sitting here, and Mr. Koch, with all these bogus bottles. That was never necessary.

You can imagine Mr. Greenberg's frustration at one point in the testimony. He had been instructed by the judge that he couldn't mention what he had done, couldn't mention that he had acted honorably. There is a point in his testimony where he says to Mr. Hueston, you know there's something I can't talk about. He is being questioned about his conduct and whether he treated Mr. Koch fairly.

You can imagine our frustration to sit there yesterday, to sit there yesterday and hear "and Mr. Koch here is stuck with these worthless bottles." It's really hard to sit there and then have somebody get up and rail that this was so offensive it's the equivalent of criminal behavior and it is

worthy of punitive damages to make an example of something somebody. The example here is somebody who was honorable and did what he was supposed to do.

Mr. Greenberg has been punished badly. Obviously, he has now got a fraud judgment against him, a terrible punishment. But after Mr. Greenberg offered all the money back allowing Mr. Koch to proceed with his injunction, to proceed with anything he wanted to proceed with, not requesting a settlement, not requesting a release, not requesting anything, here is your check, after Mr. Greenberg could have taken the bottles, gotten Mr. Koch the $688,000. You know how many lawyers we have in this room.

Mr. Greenberg then had to spend $5 million in his defense. If we are talking about punitive damages, $5 million is a lot of harm. It's pretty significant when you offer somebody all their money back, they don't do it, and they continue suing you for the same thing you just offered over and over again. All those experts, all those depositions, all those lawyers. You got to put up a defense. You spend $5 million, and somebody comes in and says, you know, we really have to punish this guy. $5 million.

Let me tell you what else we are going to talk about. One thing we became concerned about respecting your decision, one thing is we don't get to know your thinking process. Maybe you think that Mr. Greenberg didn't segregate the bottles.

Maybe you think he was lying. Counsel said so many times he was lying about it.

Then counsel said something yesterday, he said, you know, Mr. Greenberg didn't even bring in a single bottle to show he segregated bottles. So, today we brought in five bottles. These bottles are the bottles that Maureen Downey said were on the cover of the Acker catalog. We said they weren't. We pointed out that on the cover of the Acker catalog there were 1990 magnums and not bottles. That's when she said that was authorship.

These are the bottles. How do we know? Because they have the Eric Greenberg Collection sticker on the back. She said there were six of these bottles that Mr. Greenberg injected into the auction. Mr. Greenberg said no, I segregated those bottles. Mr. Lovato said those bottles are back in the cellar. Well, today they are here in the courtroom.

We are going to show you all five of the bottles. Mr. Greenberg drank the sixth bottle. These are the bottles. And the plaintiff had seen these before this trial. These are the bottles that they called a witness to say were on the cover of Acker Merrall's catalog.

What we want to do is let you know that what we said about the segregation of bottles was right. And since you are going to be asked was Mr. Greenberg's conduct reprehensible when he said he segregated the bottles, here they are. Here

they are. You will see all five of them. He drank the sixth one, which he testified to.

There are six others, but they are a different date. That date doesn't appear in the Acker catalog. Five of them, because he drank one, went back to Royal. They are on the list of the returns to Royal. They went back to Royal.

So reprehensible conduct? Did he segregate bottles? We brought them.

Let me talk finally about as you think about the evidence, the instructions -- and we get them in advance from the judge, that's how we know this -- you're not required to find punitive damages. This is not a situation where you must find punitive damages and you're just trying to decide what the number is. You have to decide first under these circumstances are punitive damages appropriate.

I told you that now we move to clear, convincing, and unequivocal. What you are deciding, as the judge will say, is was this so wantonly dishonest, so wantonly dishonest to imply a criminal indifference to civil obligations? This is a really, really high standard. And you will have to decide that.

It's not to compensate Mr. Koch. The law is clear he's compensated through the judgment you just had, compensatory damages. This is to deter people from further conduct. I'm going to talk about that in closing a little

more. It is to deter them from further conduct. That lawsuit is way behind us, as is the $5 million that Mr. Greenberg paid after he tried to give Mr. Koch his money back.

So that's what we're doing. The judge will tell you you may not impose an additional penalty on Mr. Greenberg for injury Mr. Greenberg's conduct may have had on anyone else other than Mr. Koch. It's not some general doing that for other people.

Finally, there is this mention that Mr. Koch is going to get up and say, oh, we had these other bottles that were fake. As I said before, and I mentioned it in closing, there are 12 other bottles sitting out there. I really don't want to go through a long -- it's like a whole new piece of litigation.

Mr. Koch came into this court. Those bottles were in this case until two weeks ago. Five weeks ago, I guess. It's a little longer. He took them out. He was entitled to bring a lawsuit to prove the bottles were fake in the case, to give us a right to confront the witnesses, a right of cross-examination, a right to point things out to you. This is, I will tell you, a little bit of a back door, that you take them out -- we are talking about being candid -- you take them out of the case the week before the trial.

You have a trial on these other things. Then you come back in after the trial and you say, hey, how about these. You do that for the purpose of trying to get punitive damages. I

just want you to ask if you're in that position, would you think it is fair not to have a chance to look at that and discuss it?

There were all kinds of serious issues and problems with those bottles that we were not allowed to present evidence on, because they weren't in the case. Don't you want to know what all the evidence is about before you use that, use that basis to impose a criminal standard on someone who was not given a right to defend himself on those matters?

That's punitive damages. I'll be back to talk to you at closing. You will hear from Mr. Greenberg. He will tell you about the refunds backing his wine and doing what he told you he would do. He's going to describe these bottles. We are going to talk about a couple of other things. Then we are going to ask you to close this case.

He's really been punished, folks, determined to be a fraud, paid $5 million after offering to take care of any problems that Mr. Koch had.

Thank you for your patience. Hopefully this will be short. We'll be done in a couple of hours.

THE COURT: Thank you.

We will now proceed to the evidence in this case. Plaintiff may call a witness.

MR. HUESTON: Thank you, your Honor. We call Mr. Bill Koch.

WILLIAM KOCH,

called as a witness on his own behalf,

having been duly sworn, testified as follows:

THE CLERK: You are still under oath.

THE WITNESS: Thank you. I was hoping I would get out of this chair. Here we are again.

DIRECT EXAMINATION

BY MR. HUESTON:

Q. Mr. Koch, we are not here, I'm not here, to ask you about the stuff that is already in evidence. I'm going to ask you about a few specific items that are relevant to this phase.

You just heard Mr. Shartsis say that this case has been about 24 fake bottles from Mr. Greenberg. Are those all the fakes that you received from Mr. Greenberg?

MR. CIALONE: Objection, your Honor. Lacks foundation. Mr. Koch has already testified he has no idea how to authenticate a bottle of wine. He has no basis to testify that there are any other bottles that are counterfeit. This is completely improper. Objection. I'm going to ask that the answer which he shot out while I was objecting be stricken.

MR. HUESTON: Your Honor, the expert report of Michael Egan is in, Trial Exhibit 105. They talked about these other bottles the whole time. They are right in there marked as fakes from the 2004 auction. That's his basis and that's what I'm going to ask him about.

MR. CIALONE: The evidence is in. He just said his basis is some document that is in evidence. I think that is called hearsay.

THE COURT: Sustained.

BY MR. HUESTON:

Q. Mr. Koch, do you believe that you were sold additional fake bottles by Mr. Greenberg?

MR. CIALONE: Same objection, your Honor. You just sustained it.

MR. HUESTON: That's a different question. I'm asking for his belief.

MR. CIALONE: Objection.

MR. HUESTON: Why can't I ask him his belief whether he has been sold, your Honor?

MR. CIALONE: His belief is irrelevant, your Honor. It's speculation. He has no foundation. He has testified at length he does not know how to authenticate a bottle of wine, he doesn't have a clue.

THE COURT: Sustained.

BY MR. HUESTON:

Q. Mr. Koch, in your testimony earlier in the trial you have already talked to the jury about how you felt you were lied to not once but twice by Mr. Greenberg when you first contacted him.

MR. CIALONE: Objection, your Honor. Leading. It

seems like a leading question. Maybe it is just a speech. I apologize. There is no question.

MR. HUESTON: I'm happy to run through that again. I'm trying to provide context so we can move on.

Q. You remember that testimony, right, sir?

A. Yes, I do.

Q. I want to move beyond that now. At a later point in time did you make an inquiry of Mr. Greenberg about a 1928 Latour bottle, the so-called Edgerton bottle number 41?

A. I remember making inquiry with him about a 1921 Petrus. I don't remember about the Latour bottle.

Q. Mr. Koch, I'm going to put in front of you an email to see if it refreshes your recollection about what your attorney may have alerted Mr. Greenberg to, whether you remember that.

A. I'd like to see it, please.

MR. SHARTSIS: Your Honor, I'm not sure he has established he doesn't have a recollection on that yet.

Could I have a copy of this, please?

MR. HUESTON: Sure.

Q. Mr. Koch, let me know when you have finished reading this document.

A. Yes, I have finished it.

Q. Does this refresh your recollection as to whether you had an attorney make an inquiry of Mr. Greenberg about a 1928 Chateau Latour in about September of 2007?

A. Yes.

Q. Go ahead and put that down. I'm going to ask you some questions about that. Sir, the 1928 Chateau Latour, when your attorney had a question posed to Mr. Greenberg, what do you remember the response being?

A. I remember it being --

MR. CIALONE: Objection, your Honor, foundation. It's a completely improper question. It's hearsay.

MR. HUESTON: I have asked him if he remembers through his attorney communication to Mr. Greenberg, and he said it refreshed his recollection.

MR. CIALONE: Your Honor, there is no foundation that he has personal knowledge rather than just what his unidentified attorney told him. It's hearsay.

THE COURT: Overruled.

Q. You can answer.

A. I can answer?

Q. Yes.

A. I remember that the attorney asked I guess his attorney about the bottle.

MR. CIALONE: Your Honor, this is hearsay. This is not his testimony. He did not witness this. He is reporting what an attorney told him. It's hearsay. It is being offered for the truth of the fact at issue.

MR. HUESTON: Actually, it's not. It shows the

progress of the discussions and why Mr. Koch did not accept the so-called refund offer later.

MR. CIALONE: It is for the truth because it is offered to show that that is what was actually discussed, and Mr. Koch wasn't involved in that discussion. He just said it. He is just reporting what someone else told him someone else said. That's hearsay.

THE COURT: Overruled.

Q. You may answer.

A. I remember the attorney asked for it or raised questions with their attorney about it, that we thought was fake. Then I remember . . .

Q. Let me ask you this, Mr. Koch. Do you remember if Mr. Greenberg accepted responsibility and said, yeah, I have a counterfeit, you got a counterfeit, send it back?

A. No.

MR. CIALONE: Objection, your Honor. Lacks foundation. One attorney talking to another attorney. We have double hearsay now, may believe triple.

Q. Did you hear through your agent attorney that Mr. Greenberg or his agent attorney suggested that Mr. Greenberg had accepted responsibility it was a counterfeit?

MR. CIALONE: Objection, your Honor. Asking did your agent tell you this, this is hearsay.

THE COURT: Overruled.

Q. You may answer.
A. In all the correspondence that I had with Eric about the fake bottles, he never once said that they were fake and never once accepted responsibility for selling me fake wines.
Q. Let's get to the letter that counsel has shown you which came later in time, November 27, 2007. That's Trial Exhibit 1036. I don't think this is admitted into evidence, so we will move it into evidence at this time. I'll give you a copy of it.
MR. CIALONE: What is it?
MR. HUESTON: That's the one Mr. Shartsis just put up. 1036. Let's put it up, please.
Q. Mr. Koch, do you remember receiving this letter on November 27th?
MR. CIALONE: Your Honor, before it is put on the screen, obviously we have no objection, but it should be moved into evidence.
THE COURT: It has not been admitted yet.
MR. HUESTON: We will move it into evidence.
A. Yes, I remember seeing this.
THE COURT: 1036 is received.
(Trial Exhibit 1036 received in evidence)
Q. Right on the first line it says, "Dear Mr. Koch, earlier this year you contacted me about a," quote-unquote, "counterfeit bottle of Chateau Latour 1928." That's the

Edgerton bottle number 41, right?

A. Yes, it is.

Q. He is putting quote-unquote counterfeit on there, right?

A. Yes.

Q. Is he admitting that it's a counterfeit?

A. No.

Q. He had the Edgerton report that said counterfeit, right?

A. That's right.

Q. Let's go to the next line, next sentence. "While there is no certainty that the bottle is counterfeit, I immediately authorized Zachys to refund the purchase price of $2,873." Do you see that?

A. Yes.

Q. Then it says you turned down that offer. Is that true?

A. Yes, it is.

Q. Why did you turn down the offer?

A. There's a whole lot of reasons. You want them all?

Q. Yes.

A. The first is that one of the ways fakers get rid of the wines or collectors who have fake wines get rid of them is to dump them into auctions. I was afraid if I accepted this, he would turn around and dump them at another auction if I would have to return the bottle to him.

Q. Let me make sure the record is clear on that. Was it clear to you that in order to take money back, Mr. Greenberg required

the bottle to come back to him?

A. Yes. He even says it, I believe, in this letter, or in another letter he said it. There is another reason --

Q. Go ahead.

A. -- that I wanted the bottle out of circulation. I wanted to destroy or keep these bottles from being dumped around. I have analyzed 421 bottles. I haven't. We have identified 421 bottles in my collection. I'll tell you how I got them. I got a whole bunch from auctions. Someone gave me a fake bottle. That was a good way to get rid of it. The other way was I bought a fake bottle at a Texas auction for charity.

So the way these guys get rid of their fakes is to put them in auction, donate them to charity, or give them away as gifts. My goal is to stop all that and shine a huge spotlight on fake wine. Everybody thinks, because wine is high priced, it's fine, it's a small market. It isn't. It's a big market. We have Royal Wines receiving --

MR. CIALONE: Objection, your Honor. This is going way beyond the scope of the questions. This is just a speech.

MR. HUESTON: I asked him his reasons. I think he was finishing them.

MR. CIALONE: He had never heard of Royal Wine.

THE COURT: Overruled. You can continue to answer.

A. Royal Wines had a shipment from Hardy Rodenstock.

MR. CIALONE: Objection, your Honor.

A. The number one --

MR. CIALONE: Excuse me, Mr. Koch.

THE WITNESS: Excuse me.

MR. CIALONE: Objection, your Honor. This is not responsive. This is hearsay. He doesn't have personal knowledge. The question was why did you turn this down. It's a letter from November 2007. Mr. Koch is now talking about what his team of FBI investigators, former FBI agent investigators have unearthed for him in the years since that. That's not why he turned this down. He is just making a speech. Could we please at least lay a foundation based on personal knowledge, not on hearsay?

THE COURT: He can answer it, and you will have a chance to cross-examine.

Q. By the way, let me help Mr. Cialone here. This wasn't the first time Mr. Greenberg tried to send you a check and get the bottles back, right, sir?

A. No. He sent me a check back two or three times.

Q. Did you ever accept the check?

A. No, absolutely not.

Q. Why not?

A. I didn't accept it, because I was terrified that he would redump the bottles back into an auction market and stick someone else with them. That's what I was worried about. And that's standard practice.

Q. There has been evidence at trial about that in the earlier case. I'm not going to review that with you. But in this letter, in November 2007, and Mr. Shartsis highlighted this in his opening statement, if you look at the second-to-last paragraph -- let's pull it out -- he says, "In fact, it is my plan to use these bottles in a charity wine tasting for a worthwhile children's cause in New York City. In this way deserving people will benefit and the public will have the opportunity to taste these wines."

Did you believe that when he wrote that?

A. I believed that's what he would try, but I think that would be the worst thing to do because you don't know what is in those wines. They could have put arsenic in them. I know of some cases where guys literally, and I have some of the bottles, put in antifreeze, glycol. Imagine drinking that. In prohibition they made bathtub gin, and a lot of people got blinded and killed by these homemade concoctions.

So I concluded in these bottles were homemade concoctions and you had no idea of what was in them. I wasn't about for charity to go out and expose people to something that could be poisonous.

Q. Mr. Koch, Mr. Shartsis talked about how this case has been litigated for some time. It's been six years of litigation for you, sir, in this case?

A. Yes.

Q. Did this come at expense to you personally?
A. A huge expense.
Q. Did you devote personal time to this?
A. Yes.
Q. Did you take time away from your business responsibilities at Oxbow?
A. Yes.
MR. CIALONE: Objection, your Honor. This seems to be looking for additional compensatory damages for Mr. Koch's time. Other than that, there is no relevance whatsoever to it. This is supposed to be punitive damages about the defendant, not what the plaintiffs litigation costs were. I would like a ruling on the objection.
THE COURT: Sustained.
MR. CIALONE: Thank you.
A. Let me say --
MR. CIALONE: Your Honor, the objection has been sustained.
THE COURT: Please wait for the next question.
Q. I'll give you another question, Mr. Koch.
A. I wanted to answer the previous question.
MR. CIALONE: Your Honor, objection. If the witness would listen to the Court.
THE COURT: What are you asking about, Mr. Koch?
MR. HUESTON: The previous question.

A. A previous question, yes, that you had asked me.

MR. CIALONE: Which the Court sustained an objection to.

MR. HUESTON: He's wanting to --

Q. Let me give you a different question, Mr. Koch.

A. OK.

Q. In that six years that you have been litigating the case, has Mr. Greenberg ever taken responsibility for his actions?

A. Absolutely not.

Q. Let me put another exhibit in front of you. It's another one that Mr. Shartsis showed the jury. It's Trial Exhibit 1052.

MR. HUESTON: I'll move that into evidence.

THE COURT: I am going to receive 1052 into evidence.

(Trial Exhibit 1052 received in evidence)

Q. Take a moment to review this and then I'll ask you about it.

A. Yes, I've seen it.

Q. You've seen it?

A. Yes.

Q. Do you remember that later on in time, this is November 2010, Mr. Greenberg is again offering to give money in exchange for getting the bottles back, right?

A. Yes.

Q. There is no mention here about doing a tasting here, is

there?

A. No, there isn't.

Q. Did you agree to do this?

A. To what? To give the money --

Q. Right, to give him his bottles back.

A. No, I did not.

Q. Why not?

A. I answered part of that before. The other part is that if he paid me the money and I gave him the bottles back, he would not -- he would cover up his con. That's what con artists do. If they get caught, they say I'll pay you your money back and then we forget about it, so they could con somebody else. I wanted to stop this conning.

Q. You continued to invest your time and money until we brought this case to trial here, is that right?

MR. CIALONE: Objection, your Honor. Same objection as before.

THE COURT: Overruled.

MR. CIALONE: I move the answer be stricken.

THE COURT: Overruled.

Q. Mr. Koch, have you considered what amount the jury should consider to send a message to Mr. Greenberg --

MR. CIALONE: Objection, your Honor. This is a completely improper question. His just asking his opinion on a legal question.

MR. HUESTON: Directly relevant.

MR. CIALONE: There is a time for --

THE COURT: He can ask what amount. Overruled.

A. If you want to deter bad behavior, you have to have significant consequences. I saw what Mr. Greenberg wanted to try and do to Royal, who is a big seller of fake wines, 10 million bucks would defer that behavior in other people as well as in Mr. Greenberg.

MR. HUESTON: Thank you. No more questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. CIALONE:

Q. Good morning, Mr. Koch. What were the two or three other occasions where Mr. Greenberg sent you checks before November 27, 2007?

A. I remember the first check that was offered, I don't remember exactly, about 272,000. Then --

Q. Mr. Greenberg sent you a check for 2,072,000?

A. No, 200, I'm sorry.

Q. You testified that on two or three occasions before that he sent you checks. What were they?

A. Actually, I don't remember those. All I do remember is he sent one check and we sent it back. But I misspoke. It was two offers or three offers he made.

Q. You were concerned that Mr. Greenberg might just sell the

wine to someone else?
A. Of course.
Q. Or give it away?
A. Or give it away, yes.
Q. Or there might be poison in it?
A. That's right, or something dangerous in it. I didn't say poison. Something dangerous in it.
Q. You never wrote back and said, I'll accept a refund but I want to destroy the bottles, correct?
A. No, because I wanted to stop this behavior.
Q. If your concern was he's going to sell the bottles to someone else or poison somebody, you could have addressed that by saying, yes, we'll take the refund but we need to destroy the bottles, correct?
A. I could have, but I sensed in his letters that he didn't accept any of the claims that we were claiming or any responsibility for selling fake wines.
Q. You felt that he didn't confess to you?
A. He didn't admit it.
Q. You recall you have done interrogatory responses in this case, right?
A. Yes.
Q. And that as late as 2009 you provided interrogatory responses that said the only bottle that Mr. Greenberg consigned having any information it was not genuine was that

one '28 Latour, right?

A. I'd have to look at them.

Q. Sure. No problem. One moment.

MR. CIALONE: May I approach, your Honor?

THE COURT: Yes.

Q. I give the witness Exhibit 1046A.

A. Thank you.

Q. Mr. Koch, if you would turn in Exhibit 1046A to page 11. Do you see interrogatory number 11 there?

A. Yes.

Q. "Identify each bottle of wine that Greenberg allegedly consigned to Zachys knowing such bottle of wine was other than genuine as alleged in paragraph 80 of the complaint." Do you see that?

A. Yes, I do.

MR. CIALONE: Your Honor, I'd like to move Exhibit 1046A into evidence, please.

MR. HUESTON: No objection.

MR. CIALONE: Actually, strike that. I'm sorry. I would just like to display this one portion to the jury rather than the entire response.

MR. HUESTON: No objection.

MR. CIALONE: I just want to display it so the jury can see what I am reading.

Q. The answer is "Koch incorporates herein by reference the

preliminary statement and general objections set forth above. Furthermore, Koch objects to this interrogatory on the following grounds," etc. Then the last statement is, "Subject to and without waiving these objections, Koch states that the bottles of wine responsive to this interrogatory include the bottle of 1928 Chateau Latour bearing sticker with the number 41 and Edgerton's initials identified in paragraph 44 of the complaint."

Do you recall that?

A. I see it here.

Q. You signed this?

A. Yes, I did.

Q. You never supplemented to say that you knew that Mr. Greenberg knew that other bottles were not genuine, right?

MR. CIALONE: You can take that down.

A. This was signed in 2009. Since 2009 we had a lot of additional discovery.

Q. Sure.

A. That caused us to determine he had a lot more information than this.

Q. Right. But in 2007, when he offered you the refund, a year and a half earlier, that was the only one that you thought he actually knew was genuine, correct?

A. In 2007?

Q. Yes.

MR. HUESTON: I object. I think the question was in 2007 what did you think was in Greenberg's head at that time. That calls for speculation.

MR. CIALONE: I'm asking what was in Mr. Koch's head, what did he think in 2007.

Q. That was the only one you had any information on that Mr. Greenberg believed was other than genuine, correct?

A. In 2007 that bottle was the only one that we had absolute proof on. We had a lot of other bottles that we were extremely suspicious of and we were doing a whole lot of analysis on, but we hadn't taken all the discovery that allowed us to determine that he had knowledge on a whole bunch of other bottles.

Q. Your decision in 2007 not to accept the refund was based on what you knew in 2007, correct?

A. It was based upon that and other information that we had.

Q. Was based on information you learned after?

A. Excuse me?

Q. You made the decision based on information you learned later?

MR. HUESTON: Objection. Argumentative. And it is mischaracterizing his testimony.

Q. I said your decision in 2007 not to accept the refund was based on what you knew in 2007, and you said it was based upon that and other information that we had.

A. Sir, you're a good enough lawyer to know that you could

file a complaint based upon information and belief.
Q. Right.
A. We had belief that he knew a lot more about these wines than he was letting on, tremendous more. We had that belief, absolutely.
Q. And you left that out of the interrogatory responses, right?
MR. HUESTON: Objection. That misstates and it's argumentative.
THE COURT: Sustained.
A. There's a whole --
THE COURT: Sustained.
THE WITNESS: Sorry.
Q. Mr. Koch, you have had a team of investigators working for you on this matter, correct?
A. Yes.
Q. Around the world?
A. I wouldn't say around the world. We had a whole lot of them.
Q. California, East Coast, Hong Kong, right? Europe?
A. We hired some local ones. I don't remember when we hired people in Hong Kong. But the world is a pretty big place. We concentrated on --
MR. HUESTON: Your Honor, I'm going to object to scope. They made a big stink about that before the jury came

in. If Mr. Cialone wants to go off this way, what is good for the goose is good for the gander with Mr. Greenberg.

MR. CIALONE: That is foundational. I'm going to be asking him questions about Mr. Greenberg's other auctions in 2007 and 2010.

MR. HUESTON: Absolutely not. We asked him about the so-called refund offer. We didn't get into investigations and other issues.

MR. CIALONE: This goes directly to what counsel was talking about in his opening.

THE COURT: Overruled. You can answer.

A. The question is?

Q. You had a team of investigators in various places around the world, correct?

A. Yes, we did.

Q. You had Mr. Edgerton review the catalog from Mr. Greenberg's auction at Acker Merrall in 2007, correct?

A. In 2007?

(Continued on next page)

BY MR. CIALONE:

Q. Yes.

A. I believe I did.

Q. And you had a --

A. I'm not sure, but I believe I did.

Q. And did you send investigators to Mr. Greenberg's auction in Hong Kong in 2010?

A. Boy, I don't know. I don't think so.

Q. There's been extensive publicity about this case; would you agree?

A. I'd say modest publicity about it. I don't -- I don't keep track of it.

Q. How many articles came out last night, about the verdict?

A. I -- I'm only -- I only saw -- I didn't look at it last night. I was --

MR. HUESTON: Objection. Relevance.

A. I don't --

THE COURT: Sustained.

MR. CIALONE: Your Honor, this is going to the level of punishment, and the public -- the publicity about this case and the publicity about Mr. Greenberg having been found liable for fraud --

MR. HUESTON: No, please. This is so beyond direct. He can elicit that from his own client if he thinks it's relevant.

THE COURT: Sustained.

MR. CIALONE: In that case, there's nothing further, your Honor. Thank you.

THE COURT: Thank you.

Is there any redirect?

MR. HUESTON: Yes, short redirect.

REDIRECT EXAMINATION

BY MR. HUESTON:

Q. Mr. Koch, you said you were continuing in your discovery, you didn't have all the information about Mr. Greenberg and his fraud, right?

MR. CIALONE: Objection, your Honor. I'd asked him about an interrogatory response he gave in 2009, showing what he knew in 2009. And also leading, obviously.

MR. HUESTON: Well, let me -- I can strike that.

THE COURT: Please rephrase.

MR. HUESTON: Sure.

Q. You were asked about needing or sending out a team of investigators, right?

A. Yes.

Q. Would it have helped if you'd had, from the beginning, from Mr. Greenberg, his Royal Wine Fake Summary Notes?

A. Absolutely.

Q. He didn't give you that, did he?

A. No, he sure didn't.

Q. How about the Royal Wine fake spreadsheet, did he give you that?

A. No, and that would have been incredibly helpful.

MR. CIALONE: Objection, your Honor. This is beyond the scope. I was asking about his knowledge of two auctions.

THE COURT: Overruled.

MR. HUESTON: Absolutely not. This is his investment of time.

THE COURT: Overruled.

Q. You may answer. Would that have helped?

A. It would have helped greatly, yes.

Q. Would that have cut time, costs?

MR. CIALONE: Objection, your Honor. This is not seeking attorney's fees from the jury. This is really improper.

THE COURT: Overruled.

Q. You may answer.

A. Yeah, we probably wouldn't be sitting here now.

Q. Did he tell you that?

A. It would save a lot of time, a lot of costs, tremendous expense.

Q. Did he tell you about the Chicago Wine Company returns?

A. No.

Q. Did he tell you about Kapon's observations about the bogus corks?

A. No.
Q. Did he tell you about his own observations of the bogus Petrus corks, which would have immediately identified a number of these as fakes?
A. No, he did not.
MR. HUESTON: No more questions.
THE COURT: Is there any recross?
MR. CIALONE: Sure.
RECROSS EXAMINATION
BY MR. CIALONE:
Q. How did you find out about all these documents?
A. How did I find out about all the evidence?
Q. Yeah, yeah. No, all those documents Mr. Hueston just went through. How did you find out about all of them?
A. Excuse me. We got a lot of them in discovery.
Q. Right. In discovery in this lawsuit, right?
A. Yes.
Q. Not by sending people to Hong Kong, right?
A. Most of those documents that were mentioned, we got from discovery, yes.
Q. Most of them from Mr. Greenberg, right, through the discovery process?
A. From -- from the subpoenas we got those documents and --
Q. From subpoenas or from just documents? Where did you get the Royal Wine --

A. It's document requests. That's a subpoena.
Q. Sure. Through the normal legal process, right?
A. That's correct. That's true.
Q. Mr. Greenberg hadn't destroyed them.
A. No. I'm not -- well, obviously, he didn't. I --
Q. Okay.
A. He may have destroyed other things, but I don't know.
Q. And -- right. That would be pure speculation on your part, right?
A. I said -- I just said I don't know.
Q. Okay.
A. So --
Q. And again, that didn't require you sending investigators out around the world, that requires your lawyers sending written discovery requests to give us these documents, right?
A. That -- that was the process.
MR. CIALONE: Thank you. No further questions.
THE COURT: Thank you.
REDIRECT EXAMINATION
BY MR. HUESTON:
Q. The process that cost you millions of dollars in time, right, sir?
MR. CIALONE: Objection, your Honor. Sending discovery requests didn't cost millions of dollars in time.
THE COURT: He can answer.

Q. It was more than discovery requests, right, Mr. Koch?
A. Sometimes. In this case getting discovery was like pulling teeth because they refused, then you have to go to court, etc., etc.
MR. CIALONE: Objection, your Honor. This is pure speculation. I'm going to ask him that, motions to compel, did he ever bring in Mr. Greenberg. There were none and he knows it.
THE COURT: Sustained.
Q. And you had to go to Mr. Greenberg's insurance company to get those insurance documents, right?
MR. CIALONE: Your Honor, come on. Come on. This is ridiculous.
MR. HUESTON: That's a direct response --
A. The insurance company --
MR. CIALONE: Your Honor, there's not even a question pending. There's just an argument from counsel that Mr. Koch wants to testify to.
THE COURT: There was a question. Overruled.
A. We did not get any insurance documents from Greenberg. We got them from the insurance companies. And we had to fight to get them.
MR. HUESTON: Thank you. No more questions.
THE COURT: Thank you.
MR. CIALONE: One other question.

RECROSS EXAMINATION

BY MR. CIALONE:

Q. What fight did you have with the insurance company?

A. Excuse me?

Q. What fight did you have to get those documents from the insurance company?

MR. HUESTON: He didn't say fight with the insurance company. He said a fight, Mr. Cialone.

Q. What fight did you have to get those documents?

A. We had to fight with you.

Q. Did we move to quash the subpoena on the insurance carrier?

A. As I recall --

Q. Actually, Mr. Koch, the fight you're referring to is when your agent, Brad Goldstein, in violation of a court order, circulated those documents, right? Right?

A. That was another fight.

Q. Right. And your lawyers gave the documents to Mr. Goldstein, in violation of a court order, right? That was the fight you're referring to, correct?

MR. HUESTON: Objection, and that is not it.

MR. CIALONE: It's true.

A. That's not it.

Q. What fight was it? Was there a motion to quash?

A. As I said, as I recall, and my memory could be faulty on this point, but my recall, I -- as I recall, you all greatly

resisted our getting those insurance documents.

Q. But you can't remember a motion to quash, right? You can't remember any motion?

A. I let the lawyers handle that stuff, so, you should --

MR. CIALONE: Then I'd move to strike, because he just said he let the lawyers handle it. He's just speculating.

THE COURT: Well, this is getting far afield, so --

MR. CIALONE: No further questions, your Honor.

MR. HUESTON: I do have one question.

REDIRECT EXAMINATION

BY MR. HUESTON:

Q. Mr. Goldstein sent the documents to the FBI, didn't he?

A. Yes, he did.

MR. CIALONE: All right. Then he opened the door, your Honor.

RECROSS EXAMINATION

BY MR. CIALONE:

Q. Mr. Goldstein sent violate -- documents to the FBI in gross violation of a court order, right? You were sanctioned $180,000 for that, right?

A. Yes, we were sanctioned.

Q. You had to pay Mr. Greenberg $180,000 because your lawyers and your agent, Mr. Goldstein, violated a court order by sending documents to the FBI, right?

A. Yes, we did.

Q. And that was how many years ago?

A. I've forgotten.

MR. CIALONE: No further questions.

MR. HUESTON: Well, I have one.

REDIRECT EXAMINATION

BY MR. HUESTON:

Q. And why did you do that, sir?

MR. CIALONE: Objection. Objection, your Honor.

MR. HUESTON: Your Honor --

MR. CIALONE: This is clearly --

THE COURT: Holds on, hold on, hold on. Please stop. What's the question?

Q. And, sir, why did you go ahead and have Goldstein send them to the FBI?

MR. CIALONE: Oh, oh, oh, your Honor, objection to that, because Mr. Koch has never confessed to being the one who instructed Mr. Goldstein to violate the order.

THE COURT: I'm going to stop the questioning at this point. This has gotten far afield.

MR. HUESTON: Okay. No further questions.

THE COURT: Okay. Mr. Koch, you may step down.

THE WITNESS: Thank you, sir.

(Witness excused)

THE COURT: Does plaintiff have any further witnesses? Counsel?

MR. CAMP: Sorry?

MR. HUESTON: Sorry. No further witnesses for us, your Honor. Sorry.

THE COURT: Okay. Why don't we take our morning break.

We'll take a ten-minute break, folks. Please leave your pads on your chairs. We'll see you in ten minutes.

(Jury excused)

(Recess)

(In open court; jury present)

THE COURT: You may be seated.

We're continuing with the evidence on phase two of the trial.

Mr. Shartsis.

MR. SHARTSIS: Your Honor, we call Eric Greenberg.

THE COURT: Mr. Greenberg, please come to the witness stand.

THE CLERK: Mr. Greenberg, I remind you you're still under oath.

THE WITNESS: Yes.

MR. SHARTSIS: May I proceed, your Honor?

THE COURT: Yes.

ERIC GREENBERG,

recalled as a witness by the Defendant,

having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHARTSIS:

Q. Mr. Greenberg, what's your reaction to yesterday's verdict?

A. I'm disappointed.

Q. Do you have any further reaction?

A. Yeah, I'm sorry that wines that I sold to Bill Koch were counterfeit but I thought they were real, and Zachys looked at them and, based on that inspection, I thought they were real.

Q. Thank you.

I'd like to turn to Trial Exhibit 1036.

MR. SHARTSIS: And if we could put that up, please.

Q. Mr. Greenberg, I don't -- this has been talked about quite a bit. Can you see that all right?

A. Actually, it's not online.

MR. SHARTSIS: If we can get some assistance for Mr. Greenberg. If I touch that, I'll break it.

THE WITNESS: I'll probably break it too.

(Pause)

Q. Can you see it there?

A. Yes.

Q. Do you recognize Exhibit 1036?

A. Yes.

Q. Is that your signature?

A. Yes.

Q. Did you send that to Mr. Koch?

A. Yes, I did.
Q. Mr. Koch rejected that, right? Rejected that refund offer?
A. Yes.
Q. After you sent this to Mr. Koch did Mr. Koch contact you to suggest that if the bottles were taken completely out of circulation, he would accept the refund?
A. No.
Q. Did he contact you to suggest that if you would be willing to destroy the bottles, he would accept the refund?
A. No.
Q. Did he contact you to express a concern that the bottles might be put into circulation?
A. No.
Q. Did you intend to resell these bottles?
A. Never.
Q. What did you intend to do?
A. I wanted to have a wine tasting for charity and open up the wines and see if they were real or not.
Q. Were you prepared to receive any public judgment as to whether the wines were real or not?
A. Yes. I had nothing to hide.
Q. Let me ask you to look at Exhibit 1052, please.
A. But there is one other thing on your first question. To let you know, I really respect the jury and the work they put in here.

Q. All right. Thank you.

Mr. Greenberg, could you look at 1052, please.

A. Yes.

Q. Did you authorize me to send this to Mr. Koch's counsel?

A. Yes, I did.

Q. Did Mr. Koch accept your refund offer of $688,238.47?

A. No, he didn't.

Q. Did Mr. Koch ever contact you after this saying that his -- he would accept this if you would agree to destroy the bottles?

A. No.

Q. Or agree to leave them in Mr. Koch's possession?

A. No.

Q. Or agree not to circulate them in commerce?

A. No.

Q. Did he contact you at all?

A. No.

Q. Mr. Greenberg, after you sent the first of these offers for the first 11 bottles, I've made a representation to the jury of an estimate of your attorney's fees. Can you give us an estimate of your attorney's fees that you have had to pay since you made your first offer of a refund.

A. At least $5 million.

Q. Thank you.

A. It's --

Q. No, Mr. Greenberg.

A. My --

Q. During Mr. Hueston's closing arguments, he had indicated that we didn't bring any bottles that you had sequestered into court. Have you brought some into court today?

A. Yes.

MR. SHARTSIS: May I approach the witness, your Honor?

THE COURT: Yes.

Q. Mr. Greenberg, could you identify for the jury what those bottles are, please.

A. Yes. When I was alerted by Zachys in February of 2003 that there were some wines that Martine Saunier inspected and determined to have improper corks, village wine corks, and Maureen delivered one of these to me to taste, and I tasted it and, sure enough, it wasn't Cros Parantoux that you see on this label here -- and that was a sale where we had designated Eric Greenberg Sale, which you could see on these stickers, actually were tied to my name, and so when Zachys sent back the wines six months later, as Mr. Curley testified -- usually it took about six months to get wine from Zachys, they weren't so efficient in that -- I segregated these wines and they've been in my cellar since, these five bottles, 'cause the other wine I tasted at Daniel, and these wines have been segregated ever since in my cellar, along with all my other wines that I think are problematic, because I can't put this stuff in the stream of commerce. That's not who I am. I'm just not that person.

MR. SHARTSIS: Could we please put up the cover of the Acker auction.

Q. Mr. Greenberg, I'm showing you the cover of the Acker auction. Are those 1990 bottles?

A. They're magnums, actually, which are twice the size of bottles this big. They're the kind of big things you saw on the table yesterday. And so the authorship or poetic liberty or whatever it was called, these aren't the same bottles; nowhere near.

Q. And in fact, are the bottles shown on that cover that Ms. Downey wrote she had rejected the same bottles that she rejected?

A. These are the exact bottles she rejected, and they're borne out by the Zachys stickers with my name on it that only got put on in that February 2003 auction.

Q. In -- were there other bottles of Cros Parantoux that had been rejected?

A. Yes, there are six others. I tasted one, which was a 1995, and those are part of the Royal Wine returns, and it's on -- in evidence on the Royal Wine return sheet.

Q. So what happened to the -- you tasted one of the six. What happened to the other five?

A. They were returned to Royal in the 1995s.

Q. And does that appear on evidence that the jury will have?

A. Yes, it's on the Royal return sheet, all those wines I

returned to Royal.

Q. And finally, let me ask you a question about Mr. Koch's purchase of wines in 2005. There's been questions throughout the trial about the "Best of the Best," what the wines were like. Have you looked through the list of his purchase?

A. Oh, yes, extensively.

Q. And have you determined about how many of those wines were Parker 100 rated?

A. Well, out of the 2600 something wines, approximately 22 to 25 percent received perfect 100-point ratings by Robert Parker. A lot of --

Q. Let me ask you another question.

A. Yeah.

Q. Excluding the wines that are disputed in the case -- let me ask something else.

Are you currently familiar with fine wine?

A. Very familiar.

Q. And have you looked at Mr. Koch's total purchases from the 2005 auction with regard to the value of those wines?

A. Yes.

Q. And excluding the wines that are in dispute in this case, for the wines that Mr. Koch purchased in 2005, what would you estimate their present value to be?

A. Probably about 9 to $11 million.

MR. SHARTSIS: Thank you. Your Honor, I have no other

questions.

THE COURT: Okay. Mr. Camp?

CROSS-EXAMINATION

BY MR. CAMP:

Q. Mr. Greenberg, good morning, sir.

A. Good morning.

Q. I want to start by asking you about the five bottles you have there next to you. I think you just testified that you know those are the five that were returned to you because they have the Eric Greenberg Collection sticker on them?

A. Yeah. Most of them do. One they put a Zachys sticker on, one or two, but Zachys -- you know, as you see here, I have stickers in all my bottles and Zachys always put a sticker on the bottles I bought from them.

Q. So two of the five actually don't say the Eric Greenberg Collection on them.

A. They have Zachys stickers.

Q. Right. And you testified during the trial that you segregated all of the bottles in your cellar that you identified as counterfeit or potentially counterfeit, right?

A. Any where I think there's a problem. Especially after this lawsuit, yes.

Q. And that includes all of the counterfeit wine you identified from Royal that you didn't send back to Royal, right?

A. I'm not sure I understand that question.
Q. You at one point had identified as much as $900,000 in wine from Royal as likely or potentially or definitely counterfeit?
A. Yes.
Q. And you sent back about $300,000, about a third of that to Royal, correct?
A. I think it was about half of the bottles, but something like that. I'm not going to argue that.
Q. So still hundreds of thousands of dollars in Royal bottles segregated in your cellar?
A. I probably have $3 million worth of wine in my cellar.
Q. Segregated.
A. Yes.
Q. And that includes the 69 bottles, minus one, at least, that Mr. Edgerton identified in your cellar as likely or definitely counterfeit.
A. You know, it has a lot of Edgerton stickers on. I can say that.
Q. Okay. Sir, did you bring in any photos for this jury of that huge collection of segregated wine you say you have in your cellar?
A. No.
Q. Did you bring in any bottles other than these five that you say Ms. Downey identified to show this jury, here are all of my segregated wines that I told you about? Did you bring those

in?

A. No.

Q. Did you bring in any of the Edgerton bottles with the little stickers he put on them, the numbered, signed stickers, to say, here are the other counterfeits Mr. Edgerton identified that I told you I segregated, here they are? Did you do that?

A. No.

Q. Sorry. Couldn't hear your answer.

A. No.

Q. Now I'd like to ask you about the refund offer you just described.

MR. CAMP: Could we have Trial Exhibit 1036 back up.

Q. Mr. Shartsis just asked you about this. I want to ask you just about a few of the statements in here.

If you direct your attention, sir, to the first sentence, do you see, "Earlier this year you contacted me about a 'counterfeit' bottle of Chateau Latour 1928 that you bought at a Zachys auction." Do you see where I'm reading?

A. Yes.

Q. And you continue, "which was accidentally included in my single seller consignment of over 17,000 bottles." Do you see that?

A. Yes.

Q. Now just to be clear, the Chateau Latour 1928, that's the one we've been talking about that had Mr. Edgerton's sticker

number 41 right in the middle of it, right?
A. Yeah. 41 was inauthentic. It was accidentally put into the racks, as we have testified. Number 42 was authentic, and number 43 is in my cellar. It's segregated.
Q. And right. And number 41 was inauthentic, right?
A. Yes, and it was accidentally put in the auction, as we have stated numerous times. It was an accident. That one bottle was an accident. It wasn't a smoking gun.
Q. Got you. Look at the next sentence, sir. Do you see you wrote, "While there is no certainty that the bottle is counterfeit"? Do you see that?
A. Yes.
Q. In fact, sir, there was certainty. Mr. Edgerton had told you it was "definitely counterfeit," hadn't he?
A. He told me that bottle was certainly counterfeit and I had to look at his report, which, actually, I didn't have a copy when I received, you know, this initial thing. I actually had to get a copy from Tony Coles. And I didn't know which bottle it was and so I was just going to stand behind my wine. I didn't care if it was counterfeit or not. You know, if he had a problem with it, I wanted to give him a refund.
Q. Okay. This is not a true statement, as of November 27, 2007. There was in your mind no certainty that the bottle is counterfeit. That's untrue.
A. There was the opinion of Bill Edgerton that bottle 41 was

counterfeit. That was a certainty. I really did not know all the facts, and that's what this is getting at.

Q. I see. If you look down, sir, to the fourth paragraph, do you see the sentence, I think you may have been asked about, "I am perfectly happy to repay your money and take all the bottles back"? Do you see that?

A. Yes.

Q. Every offer you made to Mr. Koch involves him returning bottles to you, right?

A. Yes, and he could have also said, "I'd like to keep the bottles," or even put a scarlet letter on them, so if you put an X or a scarlet letter so they can never enter the stream of commerce again, I would be fine with that.

Q. I'll get to that in just a moment.

Sir, I'm sorry. I actually skipped over one sentence I wanted to ask you about, the previous one. Do you see, "We obviously -- we both obviously relied on Zachys' impeccable reputation"?

A. Yes.

Q. Sir, you were not relying on Zachys' impeccable reputation when you withheld information from Zachys about the provenance of your older Bordeaux, were you?

A. Are you talking about 19th Century Bordeaux?

Q. Let me ask the question again. You were not relying on Zachys' reputation when you withheld information from them

about your older Bordeaux, were you?
A. I believe I was forthright with them. I answered the questions they asked, and if they had follow-up questions, they could have answered those, and if they had any doubts in their mind, they should not have put them in the sale.
Q. And you were not, sir, relying on Zachys' impeccable reputation when you misrepresented information to them about the 1921 Petrus, were you?
A. I don't understand that question.
Q. When you told Mr. Zacharia that you got certain 1921 Petrus magnums from either a top collector in Canada or English royalty, you were not relying on Zachys' impeccable reputation.
MR. SHARTSIS: Your Honor, we're about to go through the whole case again at this rate. I think this exceeds the direct.
MR. CAMP: Credibility impeachment.
THE COURT: Overruled.
A. As you saw and as the jury saw, Jeff Zacharia wrote something completely different from what I sent him. There were two bottles of Petrus in that auction. My first sentence was, "I don't know which bottle this is," first sentence. And the second sentence is, "Eddie Gelsman at Wine Library told me that some of my bottles came from Glamis Castle, which was a European seller of royalty, or a collector in Toronto. Wine dealers don't typically tell you where wines come from. And so

I didn't say definitively what Jeff wrote as a response to Mr. Koch, and I would have never wrote that response to Mr. Koch, ever.

Q. And, sir, at the bottom of the letter you mentioned you have a plan to use these bottles in a charity wine tasting for a worthwhile children's cause, right?

A. Yes.

Q. Were you planning to put up a big banner that says, "Come taste my bogus wine"?

A. I don't understand that question.

Q. Were you going to tell people at a charity auction, "All of this wine is fake, step on up and take a sip"?

A. I thought the wine was real and I was willing to have the public be the judge and let them be the judge and have the light of clear day make that determination.

Q. Sir, the wine that you just said you thought was real included a bottle of 1928 Chateau Latour that Mr. Edgerton had told you was definitely counterfeit. Right?

A. That bottle would not have been included.

Q. Oh, I see.

A. Why would I put up a bottle to auction or into a charity tasting that I knowingly thought was fake? Would never do it. It's not me.

Q. And, sir, the last -- next to last sentence in your letter, "This is the 'gentlemanly' way to bring this matter to a

conclusion." "Gentlemanly," sir, means returning the bottles to you and keeping this quiet, doesn't it?

A. No. Actually, not. "Gentlemanly" to me is avoiding spending $17 million on litigation, and millions of dollars of taxpayer resources, wasting the time burdening the courts, when we're going through military furloughs, layoffs in social services. And I do a lot of philanthropy. This money could have fed a lot of hungry people. This is an absolute waste of money, it's a waste of resources, and these people have had to give up three weeks of their lives. And I didn't want to hide anything.

Q. But let me ask you about that, sir. You testified just a moment ago that Mr. Koch never -- I'm not sure exactly how this was phrased, it's quite delicate -- never contacted you to offer to accept the refund if you destroyed the bottles. Did I get the question right? Do you remember being asked those questions?

A. Can you repeat those one at a time?

Q. Well, let me just ask you. Mr. Koch did in fact make settlement offers to you, didn't he?

MR. SHARTSIS: Your Honor, I object. This is absolutely -- before we have a gesture by counsel, he knows that this is completely improper conduct.

MR. CAMP: The door was wide open.

MR. SHARTSIS: Your Honor, may we argue this out of

the hearing of the jury? This is absolutely improper at every possible level, to be raising settlement discussions. These were not settlement discussions. These were refund offers. The court has determined that. And we're about to have a lawyer start talking about settlement offers.

MR. CAMP: He just asked him: Did Mr. Koch ever contact you and offer to accept the refund if you destroyed the bottles? I think the door is now wide open to what Mr. Koch's in fact contact was about.

MR. SHARTSIS: Your Honor, we're going to have a mistrial.

THE COURT: Let's have a sidebar.

(At the sidebar)

MR. SHARTSIS: Your Honor, counsel is asking about other settlement offers in the case. My question was very limited. Mr. Koch got up and said, "I didn't accept this refund because of X." And my question was, "In connection with this refund, did he inform you why he wasn't accepting that refund?" It was completely limited.

THE COURT: I think you asked another question, which was, did he ever contact you and offer to destroy the wine as part of a settlement, as part of your --

MR. SHARTSIS: No, your Honor, not settlement. I asked my questions in sequence about the two refund offers. That's all. That's why I phrased it that way. I didn't ask

him about general settlement offers.

If we do this, your Honor, we're going to wind up going through every settlement discussion these parties had and every settlement offer, and I will tell you, I'm not prepared to do that. I don't have the settlement transcripts. The law is quite clear that settlement cannot come in to the prejudice of the defendant. And, your Honor, you are the one who said that we could bring this up in this case and we have done it.

MR. CAMP: Can I be heard at all?

MR. SHARTSIS: I didn't use the settlement word. I have been clear in the questions that no, there was no settlement in connection with these.

THE COURT: Okay. Mr. Camp?

MR. CAMP: First of all, that's not what the rule is. Settlement offers may not be offered to prove liability on the matter in compromise. That's certainly not why it's being offered.

Second, the questions Mr. Shartsis posed I'm sure were designed to be misleading. They were, did he accept this offer. They were then, did he ever contact you and something like offer to accept the refund if you destroyed the bottles. There was then another, did he ever contact you to offer to accept the refund if he kept the bottles. Well, that's horribly misleading. This is -- of course Mr. Koch did offer to settle this matter with terms that included return of the --

I mean keeping the bottles himself, having Mr. Greenberg's cellar inspected before he sold any other wines. This is a deliberate effort to create an impression on the part of the jury that Mr. Koch just wants to barrel towards litigation without any willingness to compromise. It's just false.

MR. SHARTSIS: Your Honor, this is about as prejudicial -- and we're going to have to -- and I don't have -- I'm not even prepared to go through that, your Honor. Every demand Mr. Koch made was a -- I'm sorry.

MR. CAMP: I will say this, your Honor. I think if your Honor will move to strike Mr. Greenberg's testimony regarding those questions, instruct the jury to disregard those answers, then the door's closed.

THE COURT: I'm going to cut off this line of questioning because I don't think we can get into settlement offers. That's my ruling.

(In open court)

THE WITNESS: Excuse me. May I talk to my counsel?

THE COURT: There's no question.

THE WITNESS: I know, but I want to talk to my counsel.

THE COURT: He wants to talk to his counsel.

THE WITNESS: It's extreme gravity.

THE COURT: The problem is, you're testifying, so you're not actually supposed to. Is it about your testimony?

THE WITNESS: No, it's about something I just saw. It's serious.

MR. SHARTSIS: Well, why don't we complete the testimony and then we'll talk.

THE COURT: Let's complete the testimony and then we'll give you a chance.

BY MR. CAMP:

Q. Mr. Greenberg, do you still have Trial Exhibit 1036 in front of you?

MR. CAMP: And if we could put it up.

A. Which one's that, Mr. Camp?

Q. Excuse me. The November 27, 2007 letter we were just looking at.

A. Yes, sir.

Q. Now did you hear Mr. Shartsis tell the jury that Mr. Koch could have accepted this offer, this refund offer and gone forward with the lawsuit?

A. That was his option. I had no release of claims.

Q. Do you recall, sir, that less than a month after you sent this letter you moved to dismiss Mr. Koch's lawsuit, citing this offer as having mooted the claims?

A. Yes, that was part of our legal strategy after we made the offer.

Q. Now before you sent that letter we just looked at, you actually told Mr. Zacharia that any refund for that 1928 Latour

would be a one-time courtesy and not precedent for anything else, right?

A. I did, because Mr. Koch is very litigious and I was very worried about that, and, you know, anybody that sues their family for 20 years, depositions of his mother at 95 years old, you have to, you know -- I mean, you see what I'm going through, so I mean, I can't -- what I've gone through is just unconscionable. It's unconscionable. It's inhuman.

Q. Sir, do you think what Mr. Koch has gone through is unconscionable, as you sit here today?

A. I'm very sorry that he had counterfeit wine and I'm very sorry I had counterfeit wine. I'm extremely sorry. It's a horrible thing that both of us have lost millions of dollars, and it's ruined a hobby for both of us.

Q. Are you sorry that you made false representations in connection with the October 2005 Zachys auction?

A. I respect the jury immensely for the work they put into this case, and I did believe the wine was real.

Q. Are you sorry that you concealed material information that buyers would have wanted to know in connection with the October 2005 auction?

A. I respect the work of the jury, and I believed the wine to be real.

Q. Sir, just focusing on the three biggest auctions you did, October 2005, October 2007, and May 2010, you sold between

35,000 and 47,000 bottles of wine, right?

MR. SHARTSIS: Beyond the scope.

THE COURT: Overruled. You can go ahead.

A. Can you please rephrase the question.

Q. Three biggest auctions you conducted -- October 2005, the one in this case; October 2007; and May 2010 -- you sold between 35,000 and 47,000 bottles of wine, right?

A. Something like that.

Q. And you received approximately $40 million selling those bottles.

A. Yes, and all those wines were fully inspected by experts.

Q. You sold -- well, including the 24 in this case.

A. They were inspected.

Q. Right. And you received all of that money and sold all of that wine after Serena Sutcliffe visited your cellar in 2002, right?

A. Yes.

Q. After Mr. Edgerton prepared a report, right?

MR. SHARTSIS: Your Honor, without trying to bore the jury, I think these dates are pretty well established. Are we now going to have a recitation of the dates in the case? We'll stipulate --

MR. CAMP: No, just those two.

MR. SHARTSIS: -- that they specified -- thank you.

Q. You sold all that wine, you received all that money, after

Mr. -- Ms. Sutcliffe visited your cellar and Mr. Edgerton prepared this report, right?

A. Mr. Edgerton prepared a report of bottles I pulled for potential complaint and we knew they were fake. We knew it. So that's -- when you put up that fancy slide with 69 percent, of course we knew that.

And for Serena Sutcliffe to come to my cellar and tell me: It was one of the greatest collections she'd ever seen and fake wine's not a problem, it's maybe 1 percent of it, and we'll make sure that we vet that out for you so you don't have to worry about it, yes, I did sell wine, because you know what, one bottle does not taint the entire collection.

Q. And, sir, when you discovered the fake wine in your cellar from Royal, you approved your lawyer sending a draft complaint that demanded $10 million in punitive damages from Royal, right?

A. We never filed a complaint, we never intended to file a complaint, and if you recall your facts, sir, we sent a spreadsheet that showed that we only believed approximately 912,000 was fake.

Q. Let me try my question again. After you discovered fakes from Royal in your cellar, you approved your lawyer sending a draft complaint to Royal that demanded $10 million in punitive damages, right?

A. I don't know if it said punitive damages. You'll have to

show me the document, but my lawyer sent them a letter.

Q. Sure. It's Trial Exhibit 332. We'll just put it up.

MR. CAMP: If you could turn to Exhibit page 7, paragraph 24.

Q. And that reads, "By reason of the willful and intentional conduct of defendants, and by reason of the pattern of misconduct engaged in by defendants, which represents a wanton dishonesty and a criminal indifference to civil obligations, defendants further are liable to plaintiff for punitive damages in an amount of at least $10 million."

MR. SHARTSIS: Your Honor, object to the question. Beyond the scope. I don't believe that we were talking on direct about this particular complaint. Evidence was not adduced.

MR. CAMP: I think it's appropriate cross for the purposes of this proceeding, and the cross on Mr. Koch was quite broad.

MR. SHARTSIS: It is beyond the scope, your Honor.

THE COURT: Overruled.

Q. Did I read that correctly, sir?

A. You read it correctly. I don't recall the sentence.

Q. And if you turn to the next page, paragraph 32, does that remind you that the total amount you had spent on all of the wine you bought from Royal between January 2000 and March 2002 was $2 million?

A. Yes.

Q. You were seeking five times the total amount you had paid for wine from Royal in this draft complaint, right?

A. We never filed a complaint, and it was a draft complaint. We sought no money like that, so I can't say yes.

Q. And Mr. Koch has spent at least $3.7 million on wine from you in the October 2005 auction alone, right?

A. If he wants to give it all back to me, I'll take every single bottle back and give him the $3.7 million today. I'll take every single bottle back, because it's worth three times as much.

Q. Was that a yes, that Mr. Koch spent $3.7 million that went in your pocket for wines from you in connection with the October 2005 auction?

A. Of course. I'm not denying that. They're great wines, with the exception of some that neither one of us knew were counterfeit.

(Continued on next page)

MR. CAMP: Nothing further, your Honor.

THE COURT: Thank you. Is there redirect?

MR. SHARTSIS: Yes, your Honor, briefly.

REDIRECT EXAMINATION

BY MR. SHARTSIS:

Q. Mr. Greenberg, excluding the wines that are in dispute for the $3.7 million Mr. Koch paid, what is the value of what he bought today?

A. At least $10 million.

Q. Finally, did you ever in fact sue Royal for a penny of punitive damages?

A. Never.

Q. Was a complaint filed against Royal for even a penny of punitive damages?

A. No.

MR. SHARTSIS: Thank you. No further questions, your Honor.

MR. CAMP: Nothing further.

THE COURT: You may step down.

(Witness excused)

THE COURT: Does defendant have any further witnesses?

MR. SHARTSIS: No, your Honor.

THE COURT: Do you want to take a break before closing statements?

MR. SHARTSIS: Yes, your Honor, a little break would

be useful.

MR. HUESTON: A very brief break.

THE COURT: Why don't we do a five-minute break, folks. I'll send you back for five minutes and then we will come back for summations.

(Jury not present)

THE COURT: How long do you expect for summations?

MR. CAMP: Well under 30 minutes.

THE COURT: We'll do this before lunch.

MR. SHARTSIS: Your Honor, let me call to something the Court's attention and the Court can determine what is proper. The thing that got Mr. Greenberg upset was that, sitting where he was, he was observing jurors passing notes back and forth during his testimony. I don't know whether that falls within some prohibition. It seems to me irregular.

THE COURT: I did instruct them if they take notes, they are for their own use and they shouldn't be sharing them.

MR. SHARTSIS: It is very concerning, your Honor, in terms of the integrity of the process. He said he watched them do it while he was sitting on the stand and that's why he got so upset.

MR. GREENBERG: It was when you were at side bar. I can tell you exactly who it was.

THE COURT: We can either ask him a question or have Mr. Skolnik ask him about the nature of the notes and then

report back.

MR. CIALONE: We need a moment, your Honor.

THE COURT: Sure. We'll come back for this. I'll take five minutes.

MR. SHARTSIS: Your Honor, as you do that, I want to make an observation as to how this is dealt with. If these jurors get questioned about this, there will be no doubt that they know that it was Mr. Greenberg who saw them. We are really in an impossible position, because he said it's something I just saw. Now, if questions go to these jurors, they are clearly going to hold that against Mr. Greenberg for calling them out or embarrassing them over this issue.

THE COURT: I don't want to do anything to prejudice.

MR. SHARTSIS: I have never seen this happen before.

THE COURT: It could be a note about I need to go to the bathroom or something.

MR. SHARTSIS: It could be, your Honor. I think the only thing we can do is go through with the process and then, when we are done, afterwards determine what the conduct was. If not, this will be taken out on my client unfairly.

MR. CAMP: If I could be heard. I also think the process has the protections that are meant for this. The jury is told you can speak to each other but not about the case. You said many times you're seven nice people and then when all eight of you get together you are a jury. There is a

presumption they follow those instructions.

I have seen many times jurors whisper to each other during side bars. I have never seen them get hauled in and interrogated about what were you discussing, was it about the case. I don't think there is any reason here to presume some nefarious intent. I think there is a presumption that they were following instructions. It's not as if they were passing a note to someone in the gallery where there is a red flag of improper conduct.

MR. SHARTSIS: I don't know. I think inquiry post-result would be appropriate.

THE COURT: We will defer it for now.

(Recess)

THE COURT: With respect to the indication that you had that a juror was passing a note to another juror during Mr. Greenberg's testimony, if the parties think that that could create an issue, I think we probably would call out the juror who there was an indication passed the note and simply ask, was it about the trial. I would do it without indicating how it was noted but just say apparently you were passing a note and was it about the trial, then find out if there is anything further to inquire. Do one or both parties think that we should to that?

MR. SHARTSIS: Your Honor, I don't think we should do it now. I think it would prejudice my client because of the

sequence of events. When the jury does whatever it does and reaches whatever conclusion it reaches, I think we should determine whether we could have a problem.

We are in the totally impossible position. The minute you ask the juror a question about having done something, they are going to take it out on Mr. Greenberg. If you're giving me the Hobson's choice, we should not do it now. I propose that we not do it now.

THE COURT: If we are going to do it, we have to do it now.

MR. SHARTSIS: Why?

THE COURT: If there is some issue with jurors passing notes, they could be second it around now and we need to do it to make sure it doesn't happen again.

MR. SHARTSIS: I guess I'm willing to take my chance on that. If at the end of the trial we learned about misconduct during the trial --

THE COURT: We have learned about it now.

MR. SHARTSIS: Yes.

THE COURT: We don't have any reason to believe it was misconduct unless we hear that it was a note about the testimony in the trial of the case, in which case there would be further inquiry about whether the juror could still keep an open mind, etc.

MR. SHARTSIS: Your Honor, given the choice between

asking a juror now or not, if that is my only choice, we don't want to do it. I propose, because I think it is fair, that we make the inquiry after the conclusion of the jury's deliberations to see if there was something wrongful during the deliberation. Otherwise, Mr. Greenberg is just going to be on the short end.

MR. CAMP: We did not see anything that would suggest anything improper had happened. Even if a note had been passed, I don't think there is any reason to presume something nefarious. Jurors talk in the box, they talk at lunch. They are given instructions about how to comport themselves.

I think it would not be proper to start interrogating them. I certainly think if there is going to be any inquiry, it would absolutely have to be now, because you can't find out what they are going to do and then decide if you are going to say something inappropriate may have happened beforehand.

We do know about it now. I think they do have to make the choice, either inquire or don't. We think there is no need to inquire.

THE COURT: Your position is there is no need to inquire?

MR. CAMP: That's right, your Honor.

THE COURT: I do think that's right. If there is going to be an inquiry of the juror about this, it would have to be now. I think I could do it in a way that would not

indicate who saw it.

MR. SHARTSIS: Your Honor, that is a risk we don't want to take. If you believe it must be now, I have stated how I think it ought to properly be done. But I think we will be even more prejudiced by raising it now, and it shouldn't be done now under any circumstance. I can raise my objection that I thought it should be done at the end of the trial, which I will state at this time, your Honor can overrule that, and we will have that preserved.

THE COURT: We could even say my law clerk or Mr. Skolnik saw it. It wouldn't be true, but there are a number of people who could have seen it.

MR. SHARTSIS: That wouldn't be a fair statement to the jury.

THE COURT: I wouldn't say they saw it, but I would say someone saw it.

MR. SHARTSIS: I wouldn't want to do that. The situation is I'm going to state my objection. We absolutely object to doing it now because it would prejudice Mr. Greenberg without question. If the Court elects at the end of the proceeding not to make the inquiry, then that's where we are, we have expressed our view.

THE COURT: OK?

MR. CAMP: Nothing further.

MR. COLES: Your Honor, on the Rule 50 and subject to

further briefing, we would like to move for judgment as a matter of law on the punitive damages claims for the legal reasons that we articulated this morning and on the ground that based on the evidence, no reasonable jury would have a legally sufficient basis to find for Mr. Koch on punitive damages.

THE COURT: Your motion is noted, and I'll reserve on that.

MR. KABA: Your Honor, to make it clear, plaintiff obviously reserves all objections procedurally and substantively to that objection.

THE COURT: Yes. Are we ready for closings?

MR. SHARTSIS: Same rules, defendant first?

THE COURT: Yes. Let's bring out the jury.

(Jury present)

THE COURT: Members of the jury, we have completed the evidence on phase 2 of this trial. We will now have summations. Summations, or closing arguments, are the opportunity for each side to discuss the evidence presented to the jury. They are not evidence, but the lawyers are entitled to discuss the evidence in the case. Your recollection of the evidence and your own views of the evidence will be what control your decision.

This is now the closing argument, or summation, on behalf of defendant, Mr. Greenberg.

Mr. Shartsis.

MR. SHARTSIS: Thank you, your Honor.

Could I have Trial Exhibit 1036, please.

While that exhibit is going up, let me go back and reiterate something that I said originally. This is a phase where you make two decisions; one, whether under these circumstances there ought to be punitive damages; second, if you think so, what the amount should be. I am going to spend most of the time talking about whether they are really appropriate in this case, and I'm going to talk a little bit about the amount and the analogy that's been used with regard to Royal.

I want to emphasize that because this session of the trial is held does not mean you are required to apply a punitive damage standing.

I was able to show you for the first time the exhibit which you see there. We are not going to blow it up. That was on November 27 of 2002. Mr. Koch turned that down. It's his right to turn down a refund. You can do that. But the fact that he elected that right to turn down the refund doesn't diminish the fact that Mr. Greenberg by now had twice offered to refund Mr. Koch's money in its entirety. He had not demanded any terms in response.

When you hear the judge talk about the kind of behavior, basically criminal behavior, that justifies punitive damages, I'd like you to keep that in mind, that if we are

talking about how people conduct themselves in a commercial setting, whether we want to acknowledge people who stood up to their commercial responsibilities and stepped forward.

Mr. Koch suggested that in November of 2007 there were great suspicions about Mr. Greenberg and that was one of the reasons that he turned this down. But two years later we were trying to figure out what the case was about because, as Mr. Greenberg has said here, and he doesn't back away from it, Mr. Greenberg, aside from that one 1928 Latour, had no reason to believe that any of these bottles were fake.

He has apologized to the jury, apologized to Mr. Koch. He's recognized and respected the jury's position. But what he believes is what he believes, and that can't be changed by the jury's verdict. As I said, I don't know what it was that caused you to reach that decision.

Two years after this letter, trying to find out what the case was about, we sent to the other side an interrogatory. An interrogatory is a written question so that you are able to sort of sweep through the entire case and ask the other side, OK, so what is it that you know? Then, on the other side of the case, the party signs under oath what they know. We were trying to figure out what was known about these 11 bottles where the case started.

We asked, "Identify each bottle of wine that Greenberg allegedly consigned to Zachys knowing," knowing, "such bottle

was other than genuine as alleged in the complaint." What we said was, look, would you please tell us what bottles you believe Greenberg knew were fake when you consigned them. That was the purpose of the question.

As the case was going on, we were trying to figure out what is the case. Greenberg is telling us he didn't know, they are alleging he knew, so why don't we just ask them. Name the bottles that Mr. Greenberg knew were fake.

Mr. Koch signed the answer, I presume truthfully. The answer was, "Koch states that the bottles of wine," bottles of wine, "responsive to this interrogatory include the bottle of 1928 Chateau Latour bearing the sticker with the number 41 and Edgerton's initials identified in paragraph 44 of the complaint," period.

Consistent with what Mr. Greenberg had told you, that he didn't knowingly consign the wine, two years after the lawsuit had started we asked that question, and the answer was it was one bottle. It was in the context of the one bottle that Mr. Koch turned down the refund. He says he turned it down because he didn't want the bottles in circulation. I understand that concept and that position.

We asked questions of Mr. Greenberg and I think Mr. Koch, if I can still remember correctly -- maybe not, but certainly Mr. Greenberg -- about whether Mr. Koch followed up the letter, saying my real concern is these bottles will be in

circulation, otherwise give me my money back. Fine.

That, of course, didn't happen. It didn't happen with the next letter, either. It wasn't as if Mr. Greenberg on sending these letters, suggesting, offering, sending checks of full refunds, had called Mr. Koch back and say close but not close enough, let's retire the bottles, destroy them. That didn't happen, we know that.

Mr. Greenberg in the 2007 letter proposed that they be tasted in public. The suggestion somehow that he was going to be fob off these now very notorious bottles in public without people knowing this was a taste test to determine whether they were real or fake I think isn't a weighty argument, because obviously these are very public.

Mr. Koch was all over this. It would be hard for Mr. Greenberg to say I'm going to hold a charity auction in New York and I'm going to try to pass these off as real, knowing that Mr. Koch would be involved and knowing where the bottles would go.

Mr. Greenberg simply was willing to have a public tasting, thought it would be notorious, it would attract attention, it would benefit somebody else. He would lose all of the money that he had gotten for those bottles, give Mr. Koch back his money, he would have no money for the bottles, he would put them up at an auction for a public tasting to see whether they were real or not. That's what was done.

I would suggest pretty strong I don't think that is the stuff of punitive damages, punishing people for trying to do what the contract says, give the money back, expose publicly what happened. Mr. Greenberg obviously could have been greatly embarrassed in public, could have had Robert Parker or others coming forward and saying look at this, Greenberg has fake wine.

But there was no effort here to hide from the public, to hide from the public something that would be harmful to him, what the verdict would be on the wine. So, when we heard in closing Mr. Koch was stuck with the bottles, this suggests something else.

We brought in some bottles for you to see. I thought I was responding to the plaintiff. We had this speech that Mr. Greenberg didn't bring a single bottle, not a single bottle that he sequestered. So we brought five. We heard today he didn't bring another bottle, he didn't bring another bottle. Maybe we should have brought the whole cellar.

The fact is that he was charged by a witness over those five bottles. Plaintiff came in and said he resold those bottles, brought in a witness to say he resold those bottles, he sold them again through another auction house, we spotted them in the catalog. You were here to hear it. That was an allegation against Mr. Greenberg, a pretty damning allegation.

He said not true. You have now seen the bottles. We

know that he didn't resell those bottles. This claim that he was out there knowingly reselling wasn't true. You saw it. It is about as hard evidence as you can propose.

Royal. To hear the plaintiff, it's as if Mr. Greenberg kept Royal a secret, a complete secret, nobody could possibly know that Mr. Greenberg had bottles from Royal. Maybe it sounds different to you. It's not very nuanced. That's how it sounds to me.

Mr. Greenberg told Zachys, Christy's, Sotheby's, Robert Parker, Bipin Desai, Larry Stone. He told so many people that when Mr. Brierley was asked was it widely known in the industry that Greenberg bought bottles from Royal, the answer was yes.

That email about whispers in the dark, Mr. Greenberg himself was going around saying, hey, I bought wine from Royal. He was telling people in the industry. He was telling the auction houses. It would be impossible to think that we want to punish him for hiding the fact that he did business with Royal when everybody who walked into this courtroom said, he told me he did business with Royal. That can't be the stuff that punitive damages is made of. He can't be blamed for something that didn't happen. He talks a lot. He told everybody.

When Mr. Koch called him directly, he volunteered about wines from Royal. He told him more. He says, I have

wines from Royal that are fake. Now, in punitive damages we are trying to assess how awful and miserable and dishonest his conduct was.

He gets called by Mr. Koch with an investigator. Mr. Koch asks him the sources of his wine. Not only does he say Royal, he says, I'm in a dispute with them, they sold me fake wine, I have other wine from Royal that's fake. That is not exactly the stuff of punitive damages.

If we heard one word in this case more than any other, it was the word "Royal." The main word in the case was "Royal." Mr. Koch told so many people. I mentioned Mr. Brierley all by himself, Mr. Edgerton all by himself said he talked to all kinds of people who knew Greenberg bought wine from Royal.

So punishing him separately with the idea that his conduct was so awful that he concealed the biggest fact in the case, there is no basis to do that. He told everybody, for goodness' sake. Now we have the plaintiff screaming that he concealed information, knowingly concealed.

For Mr. Greenberg, the worst thing that there could be in the marketplace, think about this, in the whole marketplace, was knowledge that Greenberg's cellar contained fakes from Royal. Just think about it. If he had concealed that from the marketplace, if we had evidence that they could show that Mr. Greenberg had never told anybody about Royal, kept it a deep

dark secret, people were all unknowing about this, well, maybe punitive damages.

But he sort of calls on the dogs on himself. He tells the whole marketplace that he has fake wine in his cellar from Royal. That cannot be a basis for punitive damages. What are you punishing him for? Because he told everybody, caused there to be whispers in the marketplace? Nobody asked him to tell everybody. He just sort of went out and told people. That cannot be.

When Mr. Koch called him, you heard Mr. Koch say, Mr. Greenberg answered every question I asked. Is that the stuff of punitive damages? Is that somebody who is just the world's most miserable fraudster, who you call and say tell me this and he tells you?

Their argument is he describes that he had believed that there was a Russian mafia connection. He believed it. We don't know if it is true. And Mr. Koch's response is, oh, the whole phonecall was to get me to step back because of the Russian mafia. That's an interesting concept.

why would Mr. Greenberg tell him about Royal? Wouldn't there be no phonecall? Wouldn't there be no answer? Wouldn't Mr. Greenberg be able to say it's anonymous, don't tell them who I am? Then we are talking punitive damages; he hides, he conceals the information.

But here he says here I am, give him my name, I'll

talk to him, and then he gives him every answer. Mr. Greenberg now is criticized because in that conversation he didn't answer questions he wasn't asked. I don't think that is the stuff of punitive damages. I think that is unfair.

I want to go to punitive damages itself. Mr. Greenberg has been subject to a bad thing. In your wisdom you have concluded that he is now marked as somebody who committed a fraud, sort of worse money can do to you. It's your reputation. His reputation now has that mark on it. The level of that punishment should not be underestimated.

No one can suggest that this case was about money. From what we have heard a hundred times, the amount in dispute has gone down the drain in lawyer's fees. This was not about money. This is about something else, people making a point, showing a principle. It couldn't be about money, because all the money, in fact twice as much money as is in dispute, got offered in the refund and got turned down. It's not about money.

The thing it's about is reputation. That's done, ladies and gentlemen. I don't think anybody here would want to be in Mr. Greenberg's position in terms of what is now being said about his reputation that all these members of the press are going to go out and print. Everybody in the United States and, over the Internet, the world will hear that. When you go in and deliberate, think about what kind of punishment is real

punishment. That's real punishment. It's punishment. It's awful.

The judge is going to read to you the instructions which say you're not required to find punitive damages but that you may. He is also going to say by clear, unequivocal, and convincing evidence, this higher standard. And that you have got to decide that Mr. Greenberg's fraud rose to such a level of wanton dishonesty to as to imply a criminal indifference to a civil obligation.

When you do that, I'd like you to think about the refunds, think about his candor, about the main fact in the case, which was Royal. Think about the fact that he did segregate his wine. It doesn't sound like wanton dishonesty. We know he segregated his wine. We have had the bottles. We have had lots of people testify about seeing the segregated wine.

Let me say this. We know one mistake was made. It was a very, very, very large cellar, in the beginning 70,000 bottles. If you remember, Mr. Koch bought 2600 bottles. That was too many, too many to inspect. It was a factor in why he didn't inspect. And he said that, I had too many to inspect. Well, if 2600 bottles was too many, 70,000 is quite a few.

If mistakes were made, they were made. Mr. Greenberg made mistakes, Mr. Lovato, who worked for him putting the wine away, made mistakes. Negligence is not a basis for punitive

damages. You won't hear that here, if you made mistakes, to give punitive damages. You have to really, really intend it.

Would somebody who was acting wantonly, wanton dishonesty as to imply criminal disinterest take the goods and give it to the senior inspectors of one of the top auction houses of the world? Is that somebody who ought to be slammed with punitive damages? No.

Somebody who is trying to move bad wine wouldn't go through one of the top three auction houses in the world. They would go through somebody else. They would go through fly-by-night auctions. They would make separate deals. They would sell it separately. Remember, we're talking punitive damages and whether this was wanton dishonesty.

If you can just imagine, you go to the best experts to examine something. The experts decide what's in and what's out. Later you get sued. Punitive damages for that? Is that punitive damages? You give to the experts the complete authority, unfettered authority, to put a bottle in or take a bottle out. Is that the stuff of punitive damages? When a problem comes up, you offer people their money back. Is that criminal indifference? That's what we are talking about when we talk about punitive damages.

Finally, as we said, Mr. Greenberg also doesn't now have just the problem of being branded a fraud at a public trial, but after he tried to avoid the costs for everybody,

avoid Mr. Koch's cost in the litigation and avoid his own costs, made this good-faith offer, after that the litigation raged on.

Even two years into the litigation Mr. Koch, as he signed under oath, could not say that Mr. Greenberg knew that a single bottle was fake other than the 1928 Latour. After that, money just flooded out in litigation, paying me and my firm, paying Mr. Coles, paying Mr. Koch's very capable firms. He has three law firms in the case. A lot of money went. None of it had to. But it cost Mr. Greenberg $5 million to be here in court to have a judgment for half of the amount that he offered five or six years ago.

Let's talk about numbers. As I'm sure you know, this is just not a punitive damages case, in my view. It's not a criminal, wanton action. Mr. Greenberg has been punished enough: $5 million in costs, branded a fraud.

The other side comes in and says $10 million in punitive damages because Mr. Greenberg had a draft complaint against Royal for $10 million in punitive damages. Let's examine that and see what it means.

Royal sold him $2 million of wine. You have the list where he thought $900,000, almost half of it, almost half of it, was questionable or fraudulent. We know that. That's the number, half of $2 million.

In this case Mr. Greenberg in this auction sold 17,000

bottles of wine and 24 of them have been determined to be questionable. I did a little calculation. Because we can't bring our phones into court, I had to try to do it by hand. I think that's about 2/10 of 1 percent of the wine that was sold in the auction.

So, what we have them saying is in a situation where half of the wine, 900,000 out of 2 million, where half of the wine was believed to be fake, that should be $10 million in punitive damages. And we have another situation where we have 24 bottles out of 17,000, 2/10 of 1 percent, and Mr. Koch is saying that should be $10 million. But they both stand in the same place.

We have heard over and over again that Mr. Greenberg sold a total of 44,000 bottles between 2005 and today. And of the 44,000 bottles, we know of 24 fake bottles, the bottles in this case. The percentage now is down to some miniscule fraction of a fraction of a fraction of a percent of the 44,000 bottles compared to Royal at 900,000 out of 2 million.

Mr. Koch wants $10 million. He wants Mr. Koch to pay $5 million in attorney's fees, he wants him branded by the fraud verdict, and then he wants $10 million because of his sale of wine. We heard that 44,000 many, many, many times in this courtroom. We never heard another bottle.

That brings me to the final issue. You will see deterrence, that's one of the reasons you give punitive

damages, is to keep people from doing the thing again. You want to stop them. You want to say, boy, you do that again, punitive damages.

We have to have evidence in the case. We have to have evidence. There is no evidence beyond the 24 bottles that between 2005 and 2013 Mr. Greenberg did something again or at all. If you're going to deter somebody from doing it, there's got to be a reason. There is zero evidence, other than these 24 bottles, that claims were made out of those other auctions or any other sales that somebody came forward with a false bottles.

We know this is a very high profile case. There has been publicity. Mr. Koch said there's a firestorm. Nobody has shown up, folks. So if we are talking about deterring conduct, there is no evidence of that conduct to be deterred. It just didn't happen.

That's where we are. I said before, I trust the jury system. I still trust the jury system. I know you're going to be fair. This is not an issue, as the judge will tell you, that should be driven by emotion. It is not an issue that is driven by Mr. Koch's losses, because he has now been compensated for those. It's not trying to get him more money to reimburse him attorney's fees. It's a broader question.

The kinds of things we are talking about -- criminal, segregating wine, disclosing experts, telling everybody about

Royal, doing things like that, offering all the money back based on a contract that requires refund -- I've got to say if that has become the standard of being a criminal in our society, we are all in trouble.

Thank you.

THE COURT: Thank you, Mr. Shartsis.

We will now have the summation on behalf of plaintiff.

MR. HUESTON: Thank you, your Honor.

Ladies and gentlemen, today was a remarkable day because Mr. Greenberg and his attorneys basically showed you that he still doesn't get it. He has not accepted responsibility here. He has not admitted fault. It was another remarkable document versus Greenberg moment.

He tried to say in this so-called refund offer that it was quote-unquote counterfeit, not admitting what the Edgerton report definitely was telling him. Later, when the tasting part came up and Mr. Camp kind of caught him there, oh, you're going to pour out the definitely counterfeit? he said, oh, I didn't mean to put that, that wasn't going go in the tasting charity event. But that wasn't written in the letter. Lied to you again.

He and his counsel showed you, ladies and gentlemen, that your verdict, the hard work you did for two weeks, is not enough. It's not enough because it's not going to deter him, because he is unrepentant. This is exactly what punitive

damages are made for.

Let's talk about the so-called refund. You saw it before in the evidence in this case. This is not news for you folks. Remember, he tried to bully Mr. Kapon. I won't put the emails back up there. Take the wine, take the wine. When Kapon doesn't, he goes, OK, I'll take it back, and here we go, it's off to Zachys.

(Continued on next page)

MR. HUESTON: How about Chicago Wine Company? They spot the bad wine, they're like: We can't sell this. He's like: Great, okay, um, here's your money back. What did he do with it? Trotted it along, sent it off to Zachys. Didn't tell them any of the information that he had learned from Chicago Wine Company, any of the bad information he had.

This is his MO, ladies and gentlemen. He tries to push his goods on one auction house after another, and if they -- someone says, whoops, no, he gives them the money, they don't blow the whistle, he then takes those bad goods and sends them off to somebody else, making sure he doesn't pass on the bad information that's only in his head. Finally, it gets to an unsuspecting buyer. That's part of his fraud. That's not in mitigation. And he took the stand today and wants you to believe that this is something that should help him? It's something that hurts him.

You know what happened here, and you know why you're here? Because, unluckily for him, he ran into Mr. Koch, who did something he figured no one would do. Mr. Koch actually spent a lot of money, through six years of litigation, through six years of this man never accepting responsibility -- and by the way, six years and a trial that you had to sit through where he never accepted responsibility, until you just handed it to him yesterday, and he's still up there -- we'll talk about it -- not accepting responsibility.

One other thing about this so-called refund offer. He actually admitted that he used it as a litigation strategy. He used this so-called refund offer to dismiss -- to try to dismiss this lawsuit. A litigation strategy. That's not acceptance of responsibility. That's a guy trying to evade responsibility. And you need to send a message to him that he can't do that anymore.

Ladies and gentlemen, Mr. Shartsis seemed to be arguing in his closing statement again -- you found differently -- he said something about how, well, he told the world about Royal. Here's just a very quick reminder. You saw Mr. Zacharia say, and he wrote him, "What's the source of your older Bordeaux?" He gave him two other sources and didn't tell him Royal. And Zacharia said over and over again on the stand: Yes, I would have wanted to know Royal was the source, yes, I would have wanted to know, it would help me inspect, it would have helped me catch. There was plenty of evidence in the case, folks. You saw it, and that's why you came back with your verdict yesterday.

And more than that, ladies and gentlemen, you saw evidence in this case that he didn't do it just once. This isn't just about 24 bottles. How many witnesses need to come forward, swear to tell the truth, and tell you he's doing it over and over and over again? And still, sitting here today, unrepentant.

Let's review it briefly. Click to the next slide.

Mr. Ritchie. He caught Greenberg selling inauthentic wines through Zachys in 2003. He went into his cellar, he saw problem bottles, and then he said: My goodness, look what I'm seeing. It's Mr. Greenberg putting those wine bottles up for sale. He told that to you under oath. That's another separate incident of him doing it.

Next. Maureen Downey. You've heard a lot of testimony about this. She spots Mr. Greenberg's rejected wines being sold through Acker in 2003, just a few weeks later. That's not all.

Next. You had Mr. Kapon. We've gone through this over and over again. What was he trying to do with Mr. Kapon? He was pushing wine that Kapon's telling him is bad. Again, what does he do? Oops, sorry? No, he tries to bully him into taking the wine and putting it onto the market. That is someone unrepentant, that is someone who is intent on committing fraud, and that is exactly what punitive damages is meant to stop. "Send them back tomorrow," says Mr. Greenberg, after he fails to bully him into submission. And what does he do with them? Trots them over to Zachys and sends them off to Zachys and doesn't tell them one thing. Mr. Kapon, his -- one of his favorite experts, told him about that wine, the bad corks, the other photocopied labels. Keeps all that in his head, shoves it on to Zachys, crosses his fingers, and he

appeared to do it. He won. The stuff went through and no one at first caught him.

Now defense counsel made the remarkable statement: Aha, Mr. Koch, look at this. Two years in and you'd only caught Mr. Greenberg with one fake. How about that? I think that's something you should consider that tells you more of a message needs to be sent. This man has had to engage in a clawing act for years to get the information from Mr. Greenberg in order to bring it to you to show the fraud was much more than that one bottle. He's fought it every step of the way. That's unrepentant Mr. Greenberg, that's unrepentant Mr. Greenberg, who needs to be sent a message.

Chicago Wine Company. Another instance. Chicago Wine Company says, hey, you've got bottles, we can't sell them. What does he do? Refund. Here's the money. And he just trots them over to Zachys, sends them off and doesn't tell Zachys what Mr. Zacharia told you he wanted to know, that it had been bounced from another auction house.

This is his fraud MO, ladies and gentlemen. It is not something in mitigation. It is aggravating, it is wanton, malicious misconduct. Time to send a message.

Next. And of course Mr. Koch, the bottles he bought, and that he has worked hard to bring this to you so you could see and have this fraud exposed in the bright light of this courtroom, and through your hard work.

Let's talk for a moment -- one more. Mr. Brierley. Here's somebody, they can't -- they don't touch him because he's somebody they can't impeach. Mr. Brierley from Christie's. Sees problematic bottles offered at the 2005 auction at Zachys, bottles he spotted in the cellar of Mr. Greenberg --

MR. SHARTSIS: Your Honor --

MR. HUESTON: Folks saw it over and over again.

MR. SHARTSIS: -- just because I cannot rebut this, I'm going to object to this as misstatement of Mr. Brierley's testimony.

MR. HUESTON: No.

THE COURT: As I've said before, the jury will recall, has the evidence and will base its determination on its own evaluation of the evidence, not demonstrative exhibits.

MR. HUESTON: And ladies and gentlemen, that's not all. You've just uncovered the tip of the iceberg. You heard Mr. Greenberg. He admitted it. It's like, yup, no picture of any segregated wines, nope, didn't bring any of these bottles, these Edgerton bottles. How hard would it be to bring in the other labeled bottles, the other so-called segregated bottles, or a picture? You know why he didn't do it? 'Cause he doesn't have them anymore. He sold them. They're gone. You've uncovered the tip of an iceberg. Out the door they went. Mr. Lovato told you that. Stuff was going back in the cellar,

turned around, as Lovato said, I don't have to tell anybody anything. Out they go. It was intentional conduct. He sent them all. We're lucky Mr. Koch found the 24 and had the staying power to bring this to you.

You think Mr. Greenberg was just trying to do the right thing somewhere along the line? Remember Mr. Edgerton, don't forget, the other person, other than Mr. Koch, who tried to blow the whistle on Mr. Greenberg. Edgerton did not -- he didn't feel comfortable. He wanted to make sure Mr. Koch knew that Mr. Koch got bogus bottles. You know what Mr. Greenberg did? He sued him to keep his mouth shut. That's the way Mr. Greenberg operates. And Mr. Edgerton could no longer be Mr. Koch's expert because he'd been sued by Mr. Greenberg. Mr. Greenberg was not accepting responsibility. Mr. Greenberg was trying to shut people up.

And ladies and gentlemen, he's still unrepentant today. He made a remarkable statement. I'm sure he regrets it. He told you today, this has been a waste of time, a waste of a couple of weeks. You think he was sorry when he said that to you? He's telling you that your time that you have committed, you've taken two weeks out of your life, you've come back and you've said, I found willful and knowing fraud, and he said it's a waste of time. Is that taking responsibility? Do you feel comfortable that if you don't send him a message, he's going to change his ways? Of course not. He is telling you

that what you've done to date doesn't mean a darn thing to him.

Mr. Camp asked him on the stand, and when he talked about it, he didn't admit to a single thing. He said: I'm sorry Mr. Koch has bottles that Mr. Koch determined were counterfeit. That's not -- that's not a sorry. He's saying: I'm sorry for something that nobody could dispute. Here's what he didn't say he was sorry for. He didn't say: I'm sorry for fraud. He didn't say: I'm sorry about not telling about the Kapon corks that were bogus, the Petrus corks, the Bordeaux Wine Locators, all the other information that was in his head that no one could get back. He held that back. He didn't tell anybody. And on the stand here today he says the same thing: I still feel the same way about my conduct. Your verdict has not done anything to ensure this man changes his ways.

Ladies and gentlemen, there is a separate basis for you -- apart from what I've just described, this wanton fraud, a separate basis for you to bring home punitive damages here. It's wanton dishonesty. Mr. Greenberg came to this trial, picked his hand up, swore to tell the truth, and he looked at you and he lied to you over and over and over again. Why did he do that? We talked about the documents he ran away from and lied about. We talked about what he clearly did in this case, and he still denied. The Greenberg then and now, all lies. Why was he doing that? Why was he lying to you? He's trying to run away from responsibility. He was trying to trick you.

He's trying to turn you away. And today, oh, the wine tasting should have been in my letter in the charity event. Another attempted lie to you. To evade responsibilities. How many lies have you counted up from Mr. Greenberg in this case? How many does it take? That's wanton dishonesty. Do you know anybody who's more dishonest than Mr. Greenberg? Go back to the jury room and think about that. How many times does someone get to just lie before it's time for them to be told it's -- you must accept responsibility? He's still sitting here talking about Zacharia inspected and this and that. He still feels he's not 1 percent responsible. Even after your verdict. It's not enough, ladies and gentlemen.

Let's talk about why punitive damages -- what amount is right here, what's going to send the message. Obviously what you've sent already is not enough. You need to speak the language of Mr. Greenberg. Money. You need to send a money damage that's going to make him pay attention and think, I'd better not do this again. I am not doing this again. We've got testimony here that just in the last few years he sold off $40 million worth of wine from an infested cellar, a cellar infested with fraudulent wine, that he tried to hide from the world till Mr. Koch finally brought him to justice.

Edgerton bottles. Royal fakes. The other fakes that people have found. All of it, sold, gone, money in his pocket. And you know what, ladies and gentlemen, hold him to the same

standard that he tried to hold others to before he was caught. Exhibit 78, when he caught Rudy Kurniawan in the act, before he had his deal with him to move suspect Bordeaux. Here's what he said. "The wines were consigned by Rudy Kurniawan of Arcadia, California. I know this for a fact. He also consigned some suspect bad mags to Acker Merrall that I bought. Bad news. Now I can proceed with a lawsuit without messing around. There I will get punitive damages against one or both of you. My goal is to bury the consignor's reputation in the wine world. We have too much faking going on. And I want your firm to notify everyone who has bought wine consigned from him that it may be suspect."

Ladies and gentlemen, take those words back with you in the jury room and make Mr. Greenberg responsible. Have the world know what he has done so that no other unsuspecting buyer can be suckered in again.

And he runs away from his Royal complaint that he was ready to file. He named his price. $10 million he thought was enough to stop Royal. Ladies and gentlemen, you may decide $10 million is not enough to stop Mr. Greenberg. This is a very reasonable construct, a very reasonable basis for you to send home a message to this man. He's not going to be bankrupted by this. There's no testimony about that today. He's a very wealthy man. He can afford it. My concern is that this is not enough.

I submit to you, ladies and gentlemen, you have one last thing to do to finish your mission here. You will have a verdict form and you will have an up or down decision. Send the message that this man needs to be deterred, that what he has done today is unrepentant conduct, is unacceptable to you.

Thank you for your patience in this case.

THE COURT: Thank you.

Ladies and gentlemen, you've now heard the final phase of evidence in the case. You've heard the final closing arguments of both sides.

We've now reached the point where you are about to begin your final function as jurors, which is deliberating on the punitive damages phase of the trial.

First of all, I'm going to talk about the issue of entitlement to punitive damages under the law. In addition to awarding damages to compensate Mr. Koch for his injuries associated with the fraud claim, you may, but are not required to, award Mr. Koch punitive damages if you find that the acts of Mr. Greenberg that caused the injury complained of -- here the fraudulent misrepresentation and fraudulent concealment -- were wanton and reckless or malicious.

Punitive damages may not be awarded in an ordinary fraud case or if Mr. Greenberg's fraud constituted only a private wrong.

Punitive damages may only be awarded if you find that

Mr. Koch proved, by clear, unequivocal, and convincing evidence, that Mr. Greenberg's fraud was gross, involved high moral culpability, and was aimed at the general public. Alternatively, punitive damages may be awarded if you find that Mr. Koch proved, by clear, unequivocal, and convincing evidence, that Mr. Greenberg's fraud rose to such a level of wanton dishonesty as to imply a criminal indifference to his civil obligations. If you find that Mr. Greenberg's conduct did not rise to any such level, then you may not award punitive damages.

Whether or not to make any award of punitive damages in addition to compensatory damages is a matter exclusively within the province of the jury.

Importantly, the purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for wanton and reckless or malicious acts and thereby to discourage the defendant and other people from acting in a similar way in the future.

An act is malicious when it is done deliberately, with knowledge of the plaintiff's rights, and with the intent to interfere with those rights. An act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the rights of others. If you find that Mr. Greenberg's acts were not wanton and reckless or malicious, you should not award punitive damages.

On the other hand, if you find that Mr. Greenberg's acts were wanton and reckless or malicious, you may, but are not required to, award Mr. Koch punitive damages.

Again, punitive damages are not awarded to compensate the plaintiff for any actual injuries caused by the defendant. In the eyes of the law, an award of compensatory damages fully compensates a plaintiff for any injuries. Rather than being compensation, punitive damages are an extraordinary penalty similar to criminal fines.

You should keep in mind that compensatory damages, although awarded to compensate plaintiffs for their injuries, also have the effect of punishing and deterring misconduct. Only if you find that the compensatory award is insufficient to punish or deter may you consider imposing an additional award in the form of punitive damages. If you decide to award any punitive damages in this case, you may award only an amount necessary to accomplish the punitive and deterrence purposes of punitive damages.

You should also keep in mind not only the conditions under which and the purposes for which the law permits an award of punitive damages to be made but also the requirement of the law that the amount of any punitive damages, when awarded, must be fixed with calm discretion and sound reason and must never be awarded or fixed in amount because of any sympathy or bias or prejudice with respect to any party in the case.

Burden of proof. Mr. Koch must establish his punitive damages claim by clear, unequivocal, and convincing evidence. As I explained to you in the first phase of the trial, when a party has the burden to prove any matter by clear, unequivocal, and convincing evidence, it means that the evidence has produced in your mind a firm belief or conviction as to the matter at issue. Clear, unequivocal, and convincing evidence involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

This standard requires you to find that there is a high degree of probability that Mr. Greenberg's conduct was not merely intentional but rather evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a criminal indifference to civil obligations.

To award Mr. Koch punitive damages, it is not enough to find that the preponderance of the evidence is in Mr. Koch's favor. A party who must prove his case by a preponderance of the evidence only need satisfy you that the evidence supporting his case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish his case by clear, unequivocal, and convincing evidence must satisfy you that the evidence makes it highly probable that what he claims is what actually happened.

If, upon all the evidence, you are satisfied that there is a high probability that Mr. Greenberg's conduct warrants punitive damages, based on the factors I will define for you, then you must decide for Mr. Koch. If you are not satisfied that there is such a high probability, you must decide for Mr. Greenberg.

As discussed, the purpose of punitive damages is to punish the defendant for wanton and reckless or malicious acts and thereby to discourage the defendant and other people from acting in a similar way in the future. There is no exact rule by which to decide the amount of punitive damages. You may award punitive damages in such amount as in your sound judgment and discretion you find will punish Mr. Greenberg for what you conclude he did and will deter him and others from acting in a similar way in the future.

In deciding the amount of punitive damages to award Mr. Koch, if any, you should consider the following factors:

1. The nature and reprehensibility of what Mr. Greenberg did. This would include the character of the wrongdoing and Mr. Greenberg's awareness of what harm the conduct caused or was likely to cause. In considering the amount of punitive damages to award, you should weigh this factor heavily. You may not impose an additional penalty on Mr. Greenberg for injury Mr. Greenberg's conduct may have had on anyone other than Mr. Koch.

The actual harm created by Mr. Greenberg's conduct. This is 2. The actual harm created by Mr. Greenberg's conduct. The amount of punitive damages that you award must be both reasonable and proportionate to the actual harm suffered by Mr. Koch, and to the compensatory damages you awarded Mr. Koch. The reprehensibility of Mr. Greenberg's conduct is an important factor in deciding the amount of punitive damages that would be reasonable and proportionate in view of the harm suffered by Mr. Koch and the compensatory damages you have awarded Mr. Koch. The United States Constitution prohibits the imposition of grossly excessive or arbitrary punishments on a party.

The third factor. Mr. Greenberg's financial condition and the impact your punitive damages award will have on him. However, Mr. Greenberg's wealth alone cannot justify an excessive punitive damages award.

Now as to your deliberations, you must follow the same rules as you did before while deliberating and returning your verdict as to the amount of punitive damages.

First, the same foreperson you elected in phase one of this trial will preside over your discussions and will speak for you here in court with regard to phase two of the trial.

Second, it is your duty as jurors to discuss the amount of punitive damages to award with one another in the jury and try to reach agreement.

Each of you must make your own conscientious decision but only after you've considered all the evidence, discussed it fully with the other jurors, and listened to the views of the other jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not make a decision about the amount of punitive damages to award simply because the other jurors think it's right or simply to reach a decision.

Third, if you need to communicate with me during the deliberations, you may send a note to me through the marshal, signed by your foreperson. I will respond as soon as possible, either in writing or orally in open court. Remember you should not tell anyone -- including me -- how your vote stands until you've reached a verdict and I ask you to announce it in court.

Fourth, your award must be based solely on the evidence and the law I have given to you in these instructions and the instructions I gave you in phase one. The decision on the amount of punitive damages to award must be unanimous. Nothing I have said or done is intended to suggest what your decision should be. That is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed, your foreperson will fill in the form, sign and date it, and

each of you will sign the form, and then your foreperson will advise the marshal that you are ready to return to the courtroom.

In reporting your verdict, you will state the amount awarded by you as punitive damages if you find that punitive damages are to be awarded.

In closing, I want to emphasize that all litigants stand equal in this courtroom. All litigants stand equal before the bar of justice. All litigants stand equal before you. Your duty is to decide between these parties fairly and impartially, to see that justice is done, all in accordance with your oath as jurors.

I want to thank you for your time and consideration and attentiveness. You may now retire to deliberate.

We'll be giving you a copy of the verdict form and also the instructions that I've just read.

THE CLERK: May I ask the marshal to come forward and remind the marshal that they're still under oath, and will you please escort the jury back into the jury room to start their deliberations.

And please, you may take your pads now back with you.

(Jury excused for deliberations)

THE COURT: Anything to address?

MR. SHARTSIS: No, your Honor.

MR. HUESTON: No, your Honor.

THE COURT: Okay. We'll let you know if we need you.

(Recess pending verdict)

(In open court; jury not present)

THE COURT: The jury charge phase two, the written copy of it, went into the jury room. It's been marked as Court Exhibit 8.

We've also received a note from the jury, which has been marked as Court Exhibit 9, dated today, 2:25 p.m. It says, "We, the jury, have come to a verdict." Signed by the foreperson.

Are we prepared to bring them out for verdict?

MR. HUESTON: Yes, your Honor.

MR. CIALONE: Yes, your Honor.

(Jury present)

THE COURT: Please be seated.

Mr. Foreperson, has the jury reached a verdict?

THE FOREPERSON: Yes, we have.

THE COURT: Okay. Please hand the verdict form to Mr. Skolnik.

(Pause)

THE COURT: And Mr. Skolnik will take the verdict.

THE CLERK: Mr. Foreperson, please stand.

In the matter of William I. Koch v. Eric Greenberg. Verdict Form. Phase two. Punitive Damages.

Based on standards stated in my instructions, do you

award punitive damages for Mr. Koch's fraud claim? Yes or no.

THE FOREPERSON: Yes.

THE CLERK: If you answered yes above, please specify the amount of punitive damages that you award.

THE FOREPERSON: 12 million. 12 million.

THE COURT: Please poll the jury.

THE CLERK: Juror number 1, is that your verdict?

JUROR: Yes.

THE CLERK: Juror number 2, is that your verdict?

JUROR: Yes.

THE CLERK: Juror number 3, is that your verdict?

JUROR: Yes.

THE CLERK: Juror number 4, is that your verdict?

JUROR: Yes.

THE CLERK: Juror number 5, is that your verdict?

JUROR: Yes.

THE CLERK: Juror number 6, is that your verdict?

JUROR: Yes.

THE CLERK: Juror number 7, is that your verdict?

JUROR: Yes.

THE CLERK: Juror number 8, is that your verdict?

JUROR: Yes.

THE CLERK: Your Honor, the jury has been polled and the verdict is unanimous.

THE COURT: Thank you. The jury has reached its

verdict as to phase two, the punitive damages phase.

Are there any matters I need to deal with in terms of finalizing court exhibits in evidence or -- while the jury is still here? I want to make sure the record is clear as to all the court exhibits.

(Pause)

THE COURT: I just want to be clear for the record about the court exhibits that have been received.

Court Exhibit Number 1 is the first jury note from yesterday from the foreperson.

Court Exhibit Number 2 is the jury note indicating verdict.

Court Exhibit Number 3 is my note to the jury regarding the verdict form.

Court Exhibit Number 4 is the jury note with a question about grand total.

Court Exhibit Number 5 is my note to the jury regarding the answer to that question.

Court Exhibit Number 6 is the verdict form as to the first phase of the trial.

Court Exhibit Number 7 is the jury charge for phase one that I sent in to the jury.

Court Exhibit Number 8 is the jury charge for phase two. That is the instructions provided to the jury today for phase two.

Court Exhibit Number 9 is the jury note that I just read a little while ago.

And Court Exhibit Number 10 will be the verdict form for phase two of the trial.

So those are all the court exhibits that have been received.

Is there anything the parties need to address before I release the jury?

MR. HUESTON: Not for plaintiffs, your Honor. Thank you.

MR. CIALONE: Not before you release the jury, your Honor, no.

THE COURT: Okay. All right. Ladies and gentlemen of the jury, we've finally reached that time where I'm going to let you go. I want to thank you for your patience, for sitting through this trial. It was a fairly long trial, basically three weeks. And you've been attentive and you've listened to the evidence and you've done your job as jurors, and I want to thank you for that. As I mentioned a couple of times, there's no greater duty for a citizen than to serve as a juror. In some ways it's an unusual system. A lot of different countries have systems of justice where a bureaucrat decides cases like this or, you know, someone appointed by a dictator decides cases like this. In our system, when you're called for jury duty, you become part of our justice system, and essentially a

group of eight people, in this case, are selected from the community, essentially at random, eight citizens from the community to decide a case like this. And it's a remarkable system, and you have been a part of that system, and I want to thank you for performing your role in this case.

One thing I want to mention to you. I've said several times over the course of these three weeks that you shouldn't talk about the case. You now can talk about the case. There's nothing restraining you. I can't prevent you from talking about the case, now that you're going to be released. The only caveat to that is, I'd ask that you not discuss your deliberations, and the reason for that is really respect for each other. None of you has to talk about the case. There may be people who ask you questions about the case. If you choose to talk to them, that's fine. But some of your fellow jurors might want to maintain the privacy or confidentiality of the proceedings, so you really shouldn't talk about the substance of the deliberations out of respect for your fellow jurors. If you do want to talk to anyone who asks you about the case, you may do so, but as I said, the one thing I'd ask is that you don't talk about the deliberations because some of your fellow jurors might not want to talk about the case, and you should protect what was said in that jury room. It should be protected as confidential out of respect for your fellow jurors.

That's really all I have to say. I'm going to let you go back to the jury room. I will come back in a few minutes and talk to you briefly, not about the substance of the case or anything but just to answer any questions and thank you for your service. Okay? Thanks again.

(Jury discharged)

THE COURT: Okay. You may be seated.

Anything the parties would like to address?

MR. CIALONE: Yes, your Honor. We'll be bringing a Rule 50 motion to vacate or to modify and reduce the punitive damages award, on the grounds it exceeds constitutional limits, and we'll be filing that in the appropriate time frame.

We would also like to request, so that the record of posttrial motions and for appeal can be preserved, a court order on graphic demonstratives filed with the court. We would object to certain ones and in some of our other objections we're going to be arguing that evidentiary rulings were not harmless because they were -- then evidence was displayed to the jury that really should have been excluded, and so we would request that. I assume that plaintiff is going to not agree to that, so I would ask that at least you order that they be preserved so we can brief that motion.

THE COURT: Do plaintiffs have a position on demonstratives, for the record?

MR. HUESTON: Yeah, they're not exhibits. We agreed

they weren't exhibits. There were a couple of objections which your Honor ruled on in the course of closings, but they should not be lodged. But having said all that, we will preserve so that if they want to file a motion, we're happy to respond to it.

THE COURT: Okay. I'm going to direct the parties to preserve any demonstrative exhibits that were used and I'll address any issues about the filing of those at the appropriate time.

Anything else?

MR. HUESTON: No, your Honor. Thank you. Thank you for your time and your accommodation.

MR. CIALONE: Likewise, your Honor. Nothing further. Thank you.

THE COURT: Okay. I just want to thank the lawyers in this case. It's been a very interesting case, and there aren't many cases that have displayed such an array of talent on both sides in the lawyering, and I'm talking about from the senior lawyers to the most junior associates. It's really a lot of talent in this courtroom over the last three weeks. So I want to commend all the lawyers on both sides for that. Thanks very much.

ALL COUNSEL: Thank you, your Honor.

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