



Transcript of Proceedings:

Geraci

v.

Cotton

November 03, 2017

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY SAN DIEGO

DEPARTMENT 73 HON. JOEL R. WOHLFEIL, JUDGE

) Case No.
) 37-2017-00010073-CU-BC-CTL

LARRY GERACI, AN)
INDIVIDUAL,)
)
Plaintiff ,)

vs.)

DARRYL COTTON, AN)
INDIVIDUAL; AND DOES 1)
THROUGH 10, INCLUSIVE,)
Defendants.)

_____)
DARRYL COTTON, AN INDIVIDUAL,)
Cross-complainant,)

vs.)

LARRY GERACI, AN INDIVIDUAL,)
REBECCA BERRY, AN INDIVIDUAL,)
and DOES 1 THROUGH 10,)
INCLUSIVE,)
Cross-Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SAN DIEGO, CALIFORNIA

NOVEMBER 3, 2017

REPORTED BY: JULIE A. MCKAY, CSR 9059
OFFICIAL REPORTER PRO TEMPORE

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APPEARANCES:

FOR THE PLAINTIFFS:

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1 FRIDAY, NOVEMBER 3, 2017, 9:13 A.M.

2 SAN DIEGO, CALIFORNIA

3 DEPARTMENT 73 HON. JOEL R. WOHLFEIL, JUDGE

4

5 THE COURT: Item 7. Case number ending 10073.

6 Counsel, good to see both of you. You were
7 temporarily confused, Counsel.

8 MR. WEINSTEIN: Because we have two actions
9 between us; and in one, with real parties in interest.

10 THE COURT: Can I have your appearance?

11 MR. WEINSTEIN: Michael Weinstein with Ferris &
12 Britton for plaintiff Larry Geraci, also a
13 cross-defendant, and cross-defendant, Rebecca Berry.

14 MR. DEMIAN: Good morning, Your Honor. David
15 Demian appearing on behalf of Darryl Cotton.

16 THE COURT: Okay. Just give me one moment to
17 remind myself of what the Court is inclined to do. This
18 is your demurrer?

19 MR. WEINSTEIN: Yes.

20 THE COURT: That's what I thought. That's why
21 when you were heading over there and ended up there --
22 okay. This is on a cross-complaint?

23 MR. WEINSTEIN: It is.

24 THE COURT: Interesting case. Are you
25 submitting?

26 MR. DEMIAN: On the tentative, yes, Your Honor.

27 THE COURT: Right.

28 Counsel?

1 MR. WEINSTEIN: Yes. What I would like to do
2 is address only the breach of contract claim. That's
3 the one that we take issue with the tentative on.

4 So with respect to the breach of contract, your
5 tentative ruling rejects the argument that Mr. Cotton's
6 alleged oral agreement is inconsistent with the --
7 contradicts the signed written agreement, which you've
8 referred to in your tentative ruling as the written
9 memorandum and, therefore, you reject the argument that
10 it's violative of the statute of frauds.

11 What you say in support of that is the argument
12 lacks merit because the written memorandum attached to
13 the second amended cross-complaint is unclear. The
14 acknowledgment as to payment of \$10,000 does not
15 necessarily mean that the total deposit was not, in
16 fact, \$50,000, and \$40,000 was remained to be paid.

17 You also say it's not clear whether the statute
18 of fraud applies to an agreement to negotiate. I'm
19 going to address that second point last.

20 As to the issue of whether the alleged oral
21 agreement is inconsistent with the written memorandum, I
22 think you're reading the controlling decision in
23 California, the Supreme Court cases in Sterling versus
24 Taylor and Beazell versus Shrader. And these are cited
25 in the brief. I think you're reading them too narrowly.
26 Those decisions hold --

27 THE COURT: Counsel, the case, again? I'm
28 sorry. I just want to be --

1 MR. WEINSTEIN: Two California Supreme Court
2 cases are Sterling versus Taylor and Beazell,
3 B-e-a-z-e-l-l.

4 THE COURT: Gotcha.

5 MR. WEINSTEIN: So those decisions clearly hold
6 that under the statute of frauds, extrinsic evidence
7 can't be employed to prove an agreement at odds with the
8 terms of the memorandum. Put another way, the parol
9 agreement, in this case, alleged oral agreement that
10 Mr. Cotton is alleging of which the written agreement is
11 a memorandum, must be one whose terms are consistent
12 with the terms of the memorandum.

13 So determining whether extrinsic evidence
14 provides the certainty required by the statutes, Court
15 has to recognize that extrinsic evidence cannot
16 contradict the terms of the writing.

17 Here your tentative focuses on the \$10,000
18 deposit in the written agreement versus the \$50,000
19 that's alleged in the oral agreement. But there's more
20 than that. Mr. Cotton clearly alleges an \$800,000 price
21 for the purchase of real property. That's in the
22 written agreement.

23 But he also alleges that the parties orally
24 agreed to provide him that he would receive a 10 percent
25 equity stake in the dispensary that was going to operate
26 on the property and, also, 10 percent of the profits.
27 There's nothing in the written agreement about that.

28 And the purpose of the parol evidence rule is

1 it's only there to -- and these cases hold that -- it's
2 only there to explain ambiguities in the written
3 memorandum. There's nothing in the written agreement
4 that's ambiguous about the total consideration that's
5 being paid for the property.

6 You've got the oral agreement that's being
7 alleged lead to substantially additional consideration
8 in the form of an equity stake and 10 percent of
9 profits. So those additional terms and conditions are
10 automatically inconsistent with the terms of the written
11 agreement.

12 In addition, if we look at the 10,000 versus
13 \$50,000 deposit, which I think is a lesser
14 contradiction, you've said that that particular
15 provision in the written agreement, the \$10,000 earnest
16 money, is ambiguous and could be explained by the
17 extrinsic evidence that he provided of an agreement that
18 there be a \$50,000 deposit.

19 I also think that's flawed, because if you read
20 the allegations of the complaint, Mr. Cotton alleges
21 that Geraci agreed to pay -- this is in paragraph 14A of
22 the second amended cross-complaint. Geraci agreed to
23 pay the total sum of \$800,000 consideration for the
24 purchase of the property, with a \$50,000 nonrefundable
25 deposit payable to Cotton upon the parties' execution of
26 final integrated written agreements and the remaining
27 \$750,000 payable to Cotton upon the City's approval of
28 his CUP application for the property.

1 In the written agreement, what it says, it
2 talks about he agrees to pay 800,000 for the property.
3 And then it says \$10,000 has been given in good faith
4 earnest money to be applied to the sales price and to
5 remain in effect until the license is granted.

6 So the written agreement says, I've given
7 \$10,000. The remaining balance of \$790,000 is not due
8 until the license or the CUP application is approved.
9 That's inconsistent with what's alleged in the oral
10 agreement that says, I was supposed to get 50,000 and
11 pay the balance of 750- at the end. So that provision
12 is inconsistent with the -- contradicts the terms of the
13 written agreement.

14 And as I said before, the two provisions for
15 10 percent equity stake and 10 percent of the profits
16 clearly add to the written memorandum and don't clear up
17 any ambiguity in the written memorandum. It doesn't
18 speak to those issues at all.

19 So you have agreement for the purchase of real
20 property that is subject to the statute of frauds. All
21 the material terms and conditions have to be stated in
22 writing. And an oral agreement that alleges additional
23 material terms and conditions that -- and that evidence
24 doesn't explain any ambiguity in the written agreement.
25 It adds to the terms. And that's violative of the
26 statute of frauds.

27 So that takes us to the other argument, which
28 is, Okay. You said it's not clear that the statute of

1 frauds applies to an agreement to negotiate in good
2 faith. And you cite the Copeland case, Copeland versus
3 Baskin-Robbins, which counsel cited in their papers.

4 And I submit that that case doesn't apply at
5 all. Copeland was a written agreement between
6 Mr. Copeland and Baskin-Robbins where Copeland bought
7 Baskin-Robbins' ice cream manufacturing plant and in the
8 written agreement agreed that they would negotiate on
9 the terms of a co-packing agreement. In other words, on
10 an agreement whereby once he started operating the
11 plant, he would sell the ice cream to Baskin-Robbins.
12 Previously Baskin-Robbins owned both the plant and sold
13 itself ice cream from the plant.

14 These -- this is not a case in which there's an
15 agreement to negotiate a future or another agreement.
16 I've looked at all the citations to Copeland. There's
17 about 109 of them, about 90-plus of which are
18 unpublished, but they come up, also, in the context of a
19 letter of intent or, like, in a lease where it has a
20 provision that says, You have an -- You have an
21 obligation to negotiate in good faith with respect to a
22 lease extension.

23 The -- when I say sine qua non, I'm not sure
24 that's the correct Latin phrase, but the whole point of
25 this type of claim that's recognized in California for
26 breach of an agreement to negotiate is when there is no
27 agreement already. It's a situation in which the
28 parties agree to negotiate to try and reach an agreement

1 in the future. And, in fact, there's no obligation on
2 the part of the parties to reach an agreement about
3 anything.

4 So what the case law says -- and Copeland says
5 this directly in its quote -- is you can violate an
6 agreement to negotiate without actually reaching an
7 agreement. You don't have to reach an agreement. And
8 that's why under this particular type of claim, you're
9 only entitled to reliance damages, not expectancy
10 damages, because you don't get what you say the contract
11 should have been. You get what you expended in reliance
12 on the promise to negotiate.

13 So the way these cases are litigated is the
14 people decide whether it was negotiated in good faith,
15 because there was an obligation to do so, and then you
16 did or didn't.

17 In this case, it's very clear from the second
18 amended cross-complaint. If you look at paragraphs 13,
19 14, 15, Mr. Cotton has alleged that on November 2nd,
20 2016, the parties reached an agreement about the
21 material terms and conditions for the purchase of the
22 property: \$800,000. He sets \$50,000 deposit,
23 10 percent equity stake, 10 percent profit. And that
24 was all agreed to on November 2nd, 2016. And my client,
25 Mr. Geraci promises to reduce it to a writing.

26 There was nothing to negotiate. There was no
27 negotiation that was going to happen on the deposit.
28 There was no agreement to negotiate on the equity stake

1 or on the 10 percent of the property profits. He claims
2 that was already agreed to.

3 So this is a case in which it's an agreement
4 that has, according to Mr. Cotton, all of these material
5 terms and concerns. Not reflected in the written
6 memorandum, but there's nothing to agree to negotiate,
7 to reach.

8 The issue -- what's really happening in this
9 complaint and what's really alleged, if you look at the
10 factual allegations, is my client failed to reduce to
11 writing the agreement -- the oral agreement that
12 Mr. Cotton says was reached between them.

13 You can't get around the statute of frauds that
14 easily. You can't have an agreement that requires
15 compliance with the statute of frauds and say, But I
16 don't have to comply with it because I had an oral
17 agreement to put it in writing; and they failed to put
18 it in writing, so, therefore, the statute of frauds
19 isn't violated. That's not the law. So that's my
20 position on breach of contract claim.

21 THE COURT: All right. And, Counsel, I'm going
22 to take the matter under submission. I'm going to look
23 at the authorities and reflect.

24 Did you want me to make note of anything that
25 you would like to respond to?

26 MR. DEMIAN: Yes. I would like the opportunity
27 to respond briefly. And I will be brief. If Your Honor
28 has decided to take it under submission, then I think

1 the papers speak clearly to the strength of our
2 position.

3 However, several of the statements of
4 Mr. Weinstein are interesting to me and they point up
5 that our case and our causes of action for breach of
6 contract have merit. The position of Mr. Weinstein is
7 that if there is no conflict between the November 2
8 document, which he calls an agreement -- I prefer to
9 call it a document simply to distinguish between the
10 idea that they're asserting that this is a fully
11 integrated, signed real estate purchase agreement, which
12 we do not believe it is.

13 That November 2nd document leads with this
14 language: "Darryl Cotton has agreed to sell the
15 property located at," et cetera. Darryl Cotton has
16 agreed. Darryl Cotton does not hereby agree pursuant to
17 the terms of this agreement.

18 If you look at real estate purchase agreements,
19 CAR forms, commercially drafted, they will all say, The
20 seller of the property hereby agrees to sell the
21 property.

22 Our case is based on the idea that this is a
23 receipt. This is more a receipt than an agreement.
24 This document was signed because Mr. Geraci said, I'm
25 going to give you \$10,000. We need to at least put down
26 that we have this agreement to agree and have an
27 exchange of this cash in a writing that documents it.

28 And that's what it does. So is there a

1 conflict between or an ambiguity in this agreement and
2 the other allegations in our complaint? Well, no,
3 there's not. Because what I just said is completely
4 consistent with all the allegations of the complaint.

5 Similarly, I know that we have an ambiguity and
6 a conflict because in the moving parties for the
7 demurrer -- and I apologize if I misremember, but we can
8 go back, if Your Honor does take this under submission,
9 and look at the documents. Frequently, the \$10,000 is
10 referred to as a deposit.

11 However, in the November 2nd writing, the
12 document states \$10,000 cash has been given in good
13 faith earnest money. Wait a second. Is good faith
14 earnest money the exact same thing as a deposit? And
15 more importantly, is it a final statement as to all the
16 money that must be tendered prior to the sale of the
17 property?

18 And consistent with all our allegations in our
19 cause of action, we assert that there was an agreement
20 to reach the final terms of an agreement. I know I
21 firmly believe this complaint states a cause of action
22 that survives the statute of frauds and the standard for
23 general demurrer, which is the standard here. All
24 allegations must be assumed in the light most favorable
25 to our paper.

26 And then I'll just say briefly on the Beazell
27 case -- and Your Honor, if you review this, you will
28 see. The Beazell case cited by Mr. Weinstein involved a

1 writing that provided for a total 1.25 percent
2 commission, which conflicted with a writing that then
3 called for a 5 percent commission, which is different
4 and can plainly distinguishable from a \$10,000 earnest
5 money statement versus a \$50,000 deposit. So that case
6 is not on point.

7 And then I guess my -- on the agreement to
8 agree on Baskin-Robbins, I have read Baskin-Robbins,
9 although maybe not the 109-plus citations, as
10 Mr. Weinstein seems to have reviewed. Baskin-Robbins
11 does stand. Where there is a written agreement to
12 agree, the cause of action can stand.

13 And I think that's what the Court found in its
14 demurrer, and I encourage the Court to not deflect from
15 that path because that is a fact. When you have that
16 agreement to agree, it's not necessarily an unhinged
17 agreement to agree. You may have agreement. Regularly
18 we do write letters of intent that have agreements as to
19 the material terms that set the baseline for the
20 discussion that frame what is the good faith negotiation
21 that then follows.

22 So for all of those reasons and the reasons
23 stated in our papers, we request the Court to rule as it
24 did in its tentative ruling.

25 THE COURT: All right. Thank you very much.

26 MR. WEINSTEIN: May I have 15 seconds,
27 Your Honor? You've been patient. I appreciate it.

28 THE COURT: Sure.

1 MR. WEINSTEIN: Counsel is now saying they had
2 an agreement to agree. If that's the case, then this
3 case gets -- the cause of action gets knocked out
4 automatically. There's no such thing as agreement to
5 agree.

6 It's even in your quotation in the tentative
7 ruling. You were distinguishing in there between
8 agreement to agree and actual agreement to negotiate in
9 good faith towards something. Those are different
10 things. So I need to make that point.

11 The other thing is, again, we're comparing the
12 alleged oral agreement to the written memorandum. And
13 that's the important thing to focus on in looking at the
14 parol evidence rule.

15 Thank you.

16 THE COURT: Thank you both. I'll take it under
17 submission. I'll get a minute order out as soon as
18 possible. I'll be looking at everything and reflect it
19 in my arguments.

20 MR. DEMIAN: Thank you.

21 MR. WEINSTEIN: Thank you. Your Honor, may I
22 approach the court reporter?

23 THE COURT: Sure.

24 (The proceedings were adjourned at 9:31 a.m.)

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CERTIFICATE OF REPORTER

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

I, JULIE A. MCKAY, CSR NO. 9059, AN OFFICIAL
REPORTER PRO TEM IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, HEREBY
CERTIFY THAT I REPORTED IN SHORTHAND THE RECORD OF THE
PROCEEDINGS HAD IN THE WITHIN CASE AND LATER TRANSCRIBED
SAID RECORD AND THAT THE FOREGOING TRANSCRIPT IS A FULL,
TRUE, AND CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN
THIS CASE.

DATED THIS 14th DAY OF NOVEMBER, 2017.

JULIE A. MCKAY,
CSR NO. 9059
OFFICIAL REPORTER PRO TEMPORE

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27
28

\$	1450 2:4	2:10	additional 6:7,9 7:22	5:10
\$10,000 4:14 5:17 6:15 7:3,7 11:25 12:9,12 13:4	14A 6:21	73 1:4 3:3	address 4:2,19	ambiguities 6:2
\$40,000 4:16	15 9:19 13:26	750- 7:11	adds 7:25	ambiguity 7:17,24 12:1,5
\$50,000 4:16 5:18 6:13, 18,24 9:22 13:5	2 2 11:7	8 800,000 7:2	adjourned 14:24	ambiguous 6:4,16
\$750,000 6:27	2016 9:20,24	858 737-3100 2:11	agree 8:28 10:6 11:16, 26 13:8,12,16, 17 14:2,5,8	amended 4:13 6:22 9:18
\$790,000 7:7	2017 1:24 3:1	9 90-plus 8:17	agreed 5:24 6:21,22 8:8 9:24 10:2 11:14, 16	apologize 12:7
\$800,000 5:20 6:23 9:22	2nd 9:19,24 11:13 12:11	9059 1:27	agreement 4:6,7,18,21 5:7, 9,10,18,19,22, 27 6:3,6,11,15, 17 7:1,6,10,13, 19,22,24 8:1,5, 8,9,10,15,26,27, 28 9:2,6,7,20,28 10:3,11,14,17 11:8,11,17,23, 26 12:1,19,20 13:7,11,16,17 14:2,4,8,12	appearance 3:10
-	3 3 1:24 3:1	92101 2:5	agrees 7:2 11:20	APPEARANCES 2:1
-ooo- 14:25	37-2017-00010073- CU-BC-CTL 1:5	92121 2:10	allegations 6:20 10:10 12:2, 4,18,24	appearing 3:15
1	4 4747 2:10	9:13 3:1	alleged 4:6,20 5:9,19 6:7 7:9 9:19 10:9 14:12	application 6:28 7:8
1.25 13:1	5 13:3	9:31 14:24	alleges 5:20,23 6:20 7:22	applied 7:4
10 1:10,17 5:24,26 6:8 7:15 9:23 10:1	5 50,000 7:10	A a.m. 3:1 14:24	alleging 12:24	applies 4:18 8:1
10,000 6:12	6 619 233-3131 2:5	acknowledgment 4:14		apply 8:4
10073 3:5	7 3:5	action 11:5 12:19,21 13:12 14:3		approach 14:22
109 8:17	7 700	actions 3:8		approval 6:27
109-plus 13:9		actual 14:8		approved 7:8
13 9:18		add 7:16		argument 4:5,9,11 7:27
14 9:19		addition 6:12		arguments 14:19

attached 4:12	2:4	clear 4:17 7:16,28 9:17	contradict 5:16	1:27
authorities 10:23	C	client 9:24 10:10	contradiction 6:14	CUP 6:28 7:8
automatically 6:10 14:4	California 1:1,23 2:5,10 3:2 4:23 5:1 8:25	co-packing 8:9	contradicts 4:7 7:12	D
B	call 11:9	commercially 11:19	controlling 4:22	damages 9:9,10
B-E-A-Z-E-L-L 5:3	called 13:3	commission 13:2,3	Copeland 8:2,5,6,16 9:4	Darryl 1:9,13 3:15 11:14,15,16
back 12:8	calls 11:8	comparing 14:11	correct 8:24	David 2:9 3:14
BAIRD 2:9	CAR 11:19	complaint 6:20 10:9 12:2, 4,21	Cotton 1:9,13 3:15 5:10,20 6:20,25, 27 9:19 10:4,12 11:14,15,16	ddemian@ftblaw.com 2:11
balance 7:7,11	case 1:5 3:5,24 4:27 5:9 8:2,4,14 9:4, 17 10:3 11:5,22	completely 12:3	Cotton's 4:5	decide 9:14
based 11:22	cases 4:23 5:2 6:1 9:13	compliance 10:15	counsel 3:6,7,28 4:27 8:3 10:21 14:1	decided 10:28
baseline 13:19	cash 11:27 12:12	comply 10:16	COUNTY 1:2	decision 4:22
Baskin-robbins 8:3,6,11,12 13:8,10	certainty 5:14	concerns 10:5	court 1:1 3:5,10,16, 17,20,24,27 4:23,27 5:1,4,14 10:21 13:13,14, 23,25,28 14:16, 22,23	decisions 4:26 5:5
Baskin-robbins' 8:7	cetera 11:15	conditions 6:9 7:21,23 9:21	cream 8:7,11,13	Defendants 1:11 2:8
Beazell 4:24 5:2 12:26, 28	citations 8:16 13:9	conflict 11:7 12:1,6	Cross-complainant 1:14	deflect 13:14
behalf 3:15	cite 8:2	conflicted 13:2	cross-complaint 3:22 4:13 6:22 9:18	Demian 2:9 3:14,15,26 10:26 14:20
Berry 1:16 3:13	cited 4:24 8:3 12:28	confused 3:7	cross-defendant 3:13	demurrer 3:18 12:7,23 13:14
bought 8:6	City's 6:27	consideration 6:4,7,23	Cross-defendants 1:18	DEPARTMENT 1:4 3:3
breach 4:2,4 8:26 10:20 11:5	claim 4:2 8:25 9:8 10:20	consistent 5:11 12:4,18	CSR	deposit 4:15 5:18 6:13, 18,25 9:22,27 12:10,14 13:5
briefly 10:27 12:26	claims 10:1	context 8:18		determining 5:13
Britton 2:3 3:12		contract 4:2,4 9:10 10:20 11:6		Diego
Broadway				

1:2,23 2:5,10 3:2 directly 9:5 discussion 13:20 dispensary 5:25 distinguish 11:9 distinguishable 13:4 distinguishing 14:7 document 11:8,9,13,24 12:12 documents 11:27 12:9 drafted 11:19 Drive 2:10 due 7:7	ending 3:5 entitled 9:9 equity 5:25 6:8 7:15 9:23,28 ESQ 2:4,9 estate 11:11,18 evidence 5:6,13,15,28 6:17 7:23 14:14 exact 12:14 exchange 11:27 execution 6:25 Executive 2:10 expectancy 9:9 expended 9:11 explain 6:2 7:24 explained 6:16 extension 8:22 extrinsic 5:6,13,15 6:17	faith 7:3 8:2,21 9:14 12:13 13:20 14:9 favorable 12:24 Ferris 2:3 3:11 final 6:26 12:15,20 FINCH 2:9 firmly 12:21 flawed 6:19 focus 14:13 focuses 5:17 form 6:8 forms 11:19 found 13:13 frame 13:20 fraud 4:18 frauds 4:10 5:6 7:20,26 8:1 10:13,15,18 12:22 Frequently 12:9 FRIDAY 3:1 fully 11:10 future 8:15 9:1	<hr/> G general 12:23 Geraci 1:6,16 3:12 6:21,22 9:25 11:24 give 3:16 11:25 good 3:6,14 7:3 8:1, 21 9:14 12:12, 13 13:20 14:9 Gotcha 5:4 granted 7:5 guess 13:7	<hr/> H happen 9:27 happening 10:8 heading 3:21 hold 4:26 5:5 6:1 HON 1:4 3:3 Honor 3:14,26 10:27 12:8,27 13:27 14:21	14:13 importantly 12:15 inclined 3:17 INCLUSIVE 1:10,17 inconsistent 4:6,21 6:10 7:9, 12 INDIVIDUAL 1:6,10,13,16 integrated 6:26 11:11 intent 8:19 13:18 interest 3:9 interesting 3:24 11:4 involved 12:28 issue 4:3,20 10:8 issues 7:18 Item 3:5
<hr/> E earnest 6:15 7:4 12:13, 14 13:4 easily 10:14 effect 7:5 employed 5:7 encourage 13:14 end 7:11 ended 3:21	<hr/> F fact 4:16 9:1 13:15 factual 10:10 failed 10:10,17	<hr/> I ice 8:7,11,13 idea 11:10,22 important	<hr/> J JOEL 1:4 3:3 JUDGE 1:4 3:3 JULIE 1:27		
			<hr/> K knocked 14:3		

<p style="text-align: center;">L</p> <p>lacks 4:12</p> <p>language 11:14</p> <p>Larry 1:6,16 3:12</p> <p>Latin 8:24</p> <p>law 9:4 10:19</p> <p>lead 6:7</p> <p>leads 11:13</p> <p>lease 8:19,22</p> <p>lesser 6:13</p> <p>letter 8:19</p> <p>letters 13:18</p> <p>license 7:5,8</p> <p>light 12:24</p> <p>litigated 9:13</p> <p>located 11:15</p> <p>looked 8:16</p> <hr/> <p style="text-align: center;">M</p> <p>make 10:24 14:10</p> <p>manufacturing 8:7</p> <p>material 7:21,23 9:21</p>	<p>10:4 13:19</p> <p>matter 10:22</p> <p>Mckay 1:27</p> <p>memorandum 4:9,12,21 5:8, 11,12 6:3 7:16, 17 10:6 14:12</p> <p>merit 4:12 11:6</p> <p>Michael 2:4 3:11</p> <p>minute 14:17</p> <p>misremember 12:7</p> <p>moment 3:16</p> <p>money 6:16 7:4 12:13, 14,16 13:5</p> <p>morning 3:14</p> <p>moving 12:6</p> <p>mweinstein@ ferrisbritton.com 2:6</p> <hr/> <p style="text-align: center;">N</p> <p>narrowly 4:25</p> <p>necessarily 4:15 13:16</p> <p>negotiate 4:18 8:1,8,15, 21,26,28 9:6,12, 26,28 10:6 14:8</p> <p>negotiated 9:14</p> <p>negotiation</p>	<p>9:27 13:20</p> <p>nonrefundable 6:24</p> <p>note 10:24</p> <p>November 1:24 3:1 9:19,24 11:7,13 12:11</p> <p>number 3:5</p> <hr/> <p style="text-align: center;">O</p> <p>obligation 8:21 9:1,15</p> <p>odds 5:7</p> <p>OFFICIAL 1:27</p> <p>operate 5:25</p> <p>operating 8:10</p> <p>opportunity 10:26</p> <p>oral 4:6,20 5:9,19 6:6 7:9,22 10:11,16 14:12</p> <p>orally 5:23</p> <p>order 14:17</p> <p>owned 8:12</p> <hr/> <p style="text-align: center;">P</p> <p>paid 4:16 6:5</p> <p>paper 12:25</p> <p>papers 8:3 11:1 13:23</p>	<p>paragraph 6:21</p> <p>paragraphs 9:18</p> <p>parol 5:8,28 14:14</p> <p>part 9:2</p> <p>parties 3:9 5:23 8:28 9:2,20 12:6</p> <p>parties' 6:25</p> <p>path 13:15</p> <p>patient 13:27</p> <p>pay 6:21,23 7:2,11</p> <p>payable 6:25,27</p> <p>payment 4:14</p> <p>people 9:14</p> <p>percent 5:24,26 6:8 7:15 9:23 10:1 13:1,3</p> <p>phrase 8:24</p> <p>plainly 13:4</p> <p>plaintiff 1:7 3:12</p> <p>PLAINTIFFS 2:2</p> <p>plant 8:7,11,12,13</p> <p>point 4:19 8:24 11:4 13:6 14:10</p>	<p>position 10:20 11:2,6</p> <p>prefer 11:8</p> <p>Previously 8:12</p> <p>price 5:20 7:4</p> <p>prior 12:16</p> <p>PRO 1:27</p> <p>proceedings 1:22 14:24</p> <p>profit 9:23</p> <p>profits 5:26 6:9 7:15 10:1</p> <p>promise 9:12</p> <p>promises 9:25</p> <p>property 5:21,26 6:5,24, 28 7:2,20 9:22 10:1 11:15,20, 21 12:17</p> <p>prove 5:7</p> <p>provide 5:24</p> <p>provided 6:17 13:1</p> <p>provision 6:15 7:11 8:20</p> <p>provisions 7:14</p> <p>purchase 5:21 6:24 7:19 9:21 11:11,18</p> <p>purpose</p>
--	--	---	--	--

5:28	9:25 10:10	reviewed 13:10	speak 7:18 11:1	6:7
pursuant 11:16	referred 4:8 12:10	role 5:28	stake 5:25 6:8 7:15 9:23,28	Suite 2:4,10
put 5:8 10:17 11:25	reflect 10:23 14:18	rule 13:23 14:14	stand 13:11,12	sum 6:23
<hr/> Q	reflected 10:5	ruling 4:5,8 13:24 14:7	standard 12:22,23	SUPERIOR 1:1
qua 8:23	Regularly 13:17	<hr/> S	started 8:10	support 4:11
quotation 14:6	reject 4:9	sale 12:16	STATE 1:1	supposed 7:10
quote 9:5	rejects 4:5	sales 7:4	stated 7:21 13:23	Supreme 4:23 5:1
<hr/> R	reliance 9:9,11	San 1:2,23 2:5,10 3:2	statement 12:15 13:5	survives 12:22
reach 8:28 9:2,7 10:7 12:20	remain 7:5	seconds 13:26	statements 11:3	<hr/> T
reached 9:20 10:12	remained 4:16	sell 8:11 11:14,20	states 12:12,21	takes 7:27
reaching 9:6	remaining 6:26 7:7	seller 11:20	statute 4:10,17 5:6 7:20,26,28 10:13,15,18 12:22	talks 7:2
read 6:19 13:8	remind 3:17	set 13:19	statutes 5:14	Taylor 4:24 5:2
reading 4:22,25	REPORTED 1:27	sets 9:22	Sterling 4:23 5:2	temporarily 3:7
real 3:9 5:21 7:19 11:11,18	reporter 1:27 14:22	Shrader 4:24	strength 11:1	TEMPORE 1:27
reasons 13:22	REPORTER'S 1:22	signed 4:7 11:11,24	subject 7:20	tendered 12:16
Rebecca 1:16 3:13	request 13:23	Similarly 12:5	submission 10:22,28 12:8 14:17	tentative 3:26 4:3,5,8 5:17 13:24 14:6
receipt 11:23	required 5:14	simply 11:9	submit 8:4	terms 5:8,11,12,16 6:9,10 7:12,21, 23,25 8:9 9:21 10:5 11:17 12:20 13:19
receive 5:24	requires 10:14	sine 8:23	submitting 3:25	thing 12:14 14:4,11, 13
recognize 5:15	respect 4:4 8:21	situation 8:27	substantially	things
recognized 8:25	respond 10:25,27	sold 8:12		
reduce	review 12:27			

14:10	1:4 3:3	
THORNTON	words	
2:9	8:9	
thought	write	
3:20	13:18	
total	writing	
4:15 6:4,23 13:1	5:16 7:22 9:25	
TRANSCRIPT	10:11,17,18	
1:22	11:27 12:11	
type	13:1,2	
8:25 9:8	written	
	4:7,8,12,21	
<hr/>	5:10,18,22,27	
U	6:2,3,10,15,26	
unclear	7:1,6,13,16,17,	
4:13	24 8:5,8 10:5	
unhinged	13:11 14:12	
13:16		
unpublished		
8:18		
<hr/>		
V		
versus		
4:23,24 5:2,18		
6:12 8:2 13:5		
violate		
9:5		
violated		
10:19		
violative		
4:10 7:25		
<hr/>		
W		
Wait		
12:13		
Weinstein		
2:4 3:8,11,19,23		
4:1 5:1,5 11:4,6		
12:28 13:10,26		
14:1,21		
West		
2:4		
WOHLFEIL		