

1
2 SUPREME COURT OF THE STATE OF NEW YORK
3 COUNTY OF NEW YORK : PART 3

4 -----X
5 ALM UNLIMITED, INC.,
6 Plaintiff,

Index No.
603491/08

7 - against -

8
9 DONALD J. TRUMP,
10 Defendant.

11 -----X

12
13 April 18, 2013
14 60 Centre Street
15 New York, New York

16 B E F O R E: HONORABLE EILEEN BRANSTEN, JSC

17
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26
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1 Hager - by Plaintiff - Cross

2 THE COURT: Please come back to the witness
3 stand.

4 THE COURT OFFICER: Mr. Hager, please step
5 up.

6 M A R K H A G E R, having first been
7 previously duly affirmed, took the witness stand and
8 testified further as follows:

9 THE COURT: Mr. Hager, you previously
10 affirmed to us you would tell the truth. You are still
11 under affirmation.

12 Please continue your cross.

13 Bring the jury down.

14 (Whereupon, the jurors entered the courtroom
15 and resumed their respective seats in the jury box.)

16 THE COURT: Good morning, jurors. Please be
17 seated.

18 Jurors, we had to stop yesterday. We're
19 going to continue the cross-examination of Mr. Hager.

20 Go ahead.

21 MR. GOLDMAN: Thank you, your Honor.

22 CROSS EXAMINATION

23 BY MR. GOLDMAN:

24 Q Mr. Hager, is it an accurate statement that prior
25 to entering into the September 2003 memo of understanding
26 you and ALM had no prior experience representing licensors?

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1 Hager - by Plaintiff - Cross

2 A Representing outside licensors, no. Representing
3 our own brand Pure Players, we had a lot of experience
4 licensing our own brand worldwide.

5 MR. GOLDMAN: I'll ask the Court to please
6 direct the witnesses to answer my question. I move to
7 strike his answer.

8 THE COURT: It was a yes or no answer.

9 Mr. Hager, you've been here the entire time.
10 You heard time after time after time your particular
11 counsel asking me to direct the witness to answer it
12 yes or no.

13 THE WITNESS: Okay.

14 THE COURT: It's the same way.

15 A The answer is no.

16 Q I'm sorry?

17 A The answer is I did not --

18 Q The answer is yes or no. What's the answer?

19 A No.

20 Q Thank you.

21 And Mr. Hager, would it be fair to say that
22 as it relates to the negotiation and the execution of the
23 PVH agreement, all you know is that Mr. Danzer had some
24 input on some of the terms but you do not know to what
25 extent or if it was accepted? Is that a fair statement?

26 A Yes.

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1 Hager - by Plaintiff - Cross

2 MR. GOLDMAN: No further questions.

3 THE COURT: All right, redirect.

4 REDIRECT EXAMINATION

5 BY MR. ITKOWITZ:

6 Q Mr. Hager, you were asked about your experience
7 with branding?

8 A Correct.

9 MR. GOLDMAN: Objection, that wasn't my
10 question.

11 THE COURT: No, it was licenser.

12 Q You were asked if you had experience in obtaining
13 licenses?

14 MR. GOLDMAN: No. Objection. That's not my
15 question.

16 THE COURT: Read back -- you know what the
17 easiest thing, read back the question that was posed,
18 Mr. Goldman posed.

19 (Record read.)

20 THE COURT: All right. Now that you've heard
21 the question now ask the question.

22 BY MR. ITKOWITZ:

23 Q Did you have experience representing any
24 licensers?

25 MR. GOLDMAN: Objection.

26 THE COURT: Rephrase it.

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1 Hager - by Plaintiff - Cross

2 BY MR. ITKOWITZ:

3 Q Did you have experience representing your own
4 brand?

5 A Yes.

6 Q What experience did you have doing that?

7 A One of our brands was called Pure Players. We
8 were one of the major, major, maybe number one or number two
9 in a certain area in clothing, that basically my company was
10 instrumental in starting this trend in the fashion business
11 called Urban Wear, which is associated with music video
12 rappers and so on and so forth, and because of the success
13 of this brand we were licensing our name in a few countries
14 in Germany -- I mean a few countries in Europe, Germany,
15 England, Italy, Canada. Then a licensing company approached
16 us because WalMart was interested in licensing our name and
17 they approached us to do a licensing deal where they would
18 represent us to do the brand with WalMart and Target.

19 That's more or less summarizing the crux --
20 the major part of our experience in licensing our own brand.

21 Q Thank you.

22 MR. ITKOWITZ: No further questions.

23 MR. GOLDMAN: Can I recross?

24 THE COURT: Yes. This is recross only on
25 what was brought up in redirect.

26 RE CROSS EXAMINATION

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1

Hager - Plaintiff - Recross

2

BY MR. GOLDMAN:

3

Q Mr. Hager, you remember the questions I asked you about appearing in my office for a deposition?

5

A Yes. If you refresh my question I basically remember.

7

Q I asked you then yesterday afternoon at approximately 3:30, 4:00, you don't remember any of the questions I asked you about you appearing in my office?

10

A Yes, of course.

11

Q Okay. And do you recall that you were shown your signature on a piece of paper of your deposition transcript?

13

A Correct.

14

Q And when you saw that piece of paper did it not say that you affirmed under penalties of perjury?

16

A Correct.

17

Q And did it not say that you read the deposition for accuracy?

19

A Correct.

20

Q Please tell me if you recall being asked the following questions and giving the following answers.

22

THE COURT: Page and line?

23

MR. GOLDMAN: Page 123, lines 2 through 12.

24

THE COURT: Wait one second.

25

MR. GOLDMAN: Actually 2 through -- 2 through

26

12.

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Hager - Plaintiff - Recross

2

THE COURT: 123.

3

MR. GOLDMAN: Of the deposition transcript.

4

THE COURT: That's what I've got. 123, are you sure? Two.

6

MR. GOLDMAN: It says page 123.

7

THE COURT: Come up. Let me coordinate it.

8

(Whereupon, there's a sidebar discussion off

9

the record, out of the hearing of the jury.)

10

BY MR. GOLDMAN:

11

"Q At the time you signed the memorandum of --"

12

MR. GOLDMAN: Withdrawn.

13

"Q Did you have anybody in September of 2003

14

with experience representing licensors? Yes or no?

15

"A No, except myself.

16

"Q And what experience did you have representing

17

Licensors?"

18

Your answer.

19

"A I just knew the field very well. Did I

20

represent licensors before? No."

21

You didn't answer that question about all

22

these other brands that you just told us today you just

23

simply said no, did you not?

24

A Yes, because I answered your question. You asked

25

me did I represent any licensors. I meant to understand

26

what you meant outside licensor and the answer is absolutely

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Hager - Plaintiff - Recross

2

not, but if you would have asked me, but you didn't ask me

3

did I represent my brand and license it to others, I would

4

have said absolutely, I would have told you. My lawyer told

5

me try to answer only the question that you are going to

6

ask.

7

Q And the question that I asked, which was did you

8

represent licensors, did the word outside licensors appear

9

in that question?

10

A No, but I --

11

Q Just answer.

12

A The answer is no.

13

Q Did inside licensors appear in that question?

14

A No.

15

Q It simply asked if you had any experience

16

representing licensors. Correct?

17

A Correct. And I --

18

Q And you answered no?

19

A Correct. And I'm still saying no.

20

Q And you're still saying no?

21

A Correct. I understood it to be outside licensors.

22

Q I didn't ask you what you understood it to be?

23

THE COURT: Okay. Anything else?

24

MR. ITKOWITZ: Not at this time, your Honor.

25

THE COURT: Mr. Hager, you may step down.

26

Mr. Itkowitz, call your next witness.

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2 MR. ITKOWITZ: I have deposition testimony I
3 would like to read in.

4 THE COURT: Read the deposition testimony.
5 And if I don't have the deposition make sure I get it.

6 MR. GOLDMAN: I'm objecting to the reading of
7 all the things he is proposing to read.

8 THE COURT: All right. We have to have a
9 consultation on that, so with that I'm going to ask
10 you, jurors, to go back to your room.

11 It's going to be a little disjointed today
12 but that's the way it goes a little towards the end.

13 Take your time, if you have a book, I'll give
14 you enough time to get a newspaper or whatever you need
15 to entertain yourself. Okay?

16 (Whereupon, the jury retired from the
17 courtroom.)

18 THE COURT: You have -- let me get this
19 straight. You've exchanged with counsel the -- what
20 you wish to read, am I correct?

21 MR. ITKOWITZ: Yes.

22 I just noticed I left out a page. There were
23 one or two mistakes which I can correct now but I've
24 given him everything, yes.

25 THE COURT: Let's start with the first one.
26 Who are you reading first?

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2 MR. ITKOWITZ: I'm going to read Mr. Trump
3 and then I'm going to read George Ross.

4 THE COURT: Well, here's the problem with
5 reading testimony.

6 MR. ITKOWITZ: Yes.

7 THE COURT: When they have been in this
8 courtroom to testify, it is not appropriate to indeed
9 read testimony from depositions when they were here,
10 you were questioning them, you could have -- if they
11 gave a different answer you could have gone to the
12 deposition, say well -- and you did, by the way, on a
13 number of occasions. Going to page 102, line 20, "Did
14 you have any conversations with anybody from ALM about
15 this?"

16 Answer, line 23: "I met with him six months
17 ago."

18 But other than that if that was -- if
19 Mr. Trump had testified differently from what was said
20 in the deposition then you could have impeached him
21 with his prior testimony. But now that Mr. Trump has
22 left you cannot now read deposition testimony to
23 bolster your case.

24 You had Mr. Trump here. He was sworn to tell
25 the truth the whole truth nothing but the truth. He
26 sat here for not one day but a day and a half, came

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1
2 back again. You had him a second day, just in case you
3 had the weekend to go through everything to make sure
4 you had everything you wanted from Mr. Trump. And if
5 there was anything that he said that was different or
6 in contradiction in the deposition you were free to
7 impeach him. You were cross examining him. He was a
8 hostile witness and you had that opportunity.

9 So anything to do with Trump is out.

10 MR. ITKOWITZ: Your Honor, may I be heard on
11 this?

12 THE COURT: No. That's the rule. That's the
13 law.

14 MR. ITKOWITZ: Your Honor, I've been
15 practicing law --

16 THE COURT: I don't care how long you've been
17 practicing law, you should read the CPLR.

18 MR. ITKOWITZ: Your Honor, I'm given to
19 understand there's no restriction on reading deposition
20 testimony from an adverse party in and that if you have
21 a deposition that you must cross-examine on that
22 deposition, and anything that you don't ask about you
23 can't read in. I've never heard that before in the
24 long time I've been practicing.

25 THE COURT: Well, that's it, that's going to
26 be this rule of this Court. That's what I understand

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2 the law is and the rules of evidence.

3 MR. ITKOWITZ: Your Honor, my
4 cross-examination might have been longer because there
5 are certain things --

6 THE COURT: But that's your problem, sir, you
7 made decisions in this case.

8 MR. ITKOWITZ: I made decisions based upon an
9 assumption -- excuse me.

10 THE COURT: Excuse me, sir, did you ever
11 bother to ask, Judge, I am reserving on this particular
12 thing because I plan to use his deposition testimony at
13 the end of the case, and then I would have said, well,
14 no, you're not going to do that, sir. Then you could
15 have asked him.

16 MR. ITKOWITZ: Your Honor, as I understand
17 the CPLR and the rules of evidence.

18 THE COURT: Then give me case law on it right
19 now, and the answer is you're not going to find it.

20 MR. GOLDMAN: And just for the record, your
21 Honor, let me just -- I looked through -- and that was
22 the one basis for my objection to all of the deposition
23 testimony he intended to offer, number one.

24 Number two, it's cumulative, because in fact
25 most of the things that he is asking for, as your Honor
26 correctly noted, he did read to each of the witnesses

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2 that he called to impeach them, and he said do you
3 remember the deposition and do you remember giving
4 these questions and answers. And in fact, we spent
5 almost 30 minutes on Mr. Trump saying whether or not he
6 liked Mr. Danzer or he believed there was a first
7 person there that he really liked, and then he examined
8 him and he read a portion of the deposition testimony.
9 And guess what? Mr. Hager comes on the stand and says
10 Cheryl Calegari was the first person there working on
11 it, and Mr. Trump really liked him, just like Mr. Trump
12 had said.

13 So why would counsel -- she. So why would
14 counsel spend 30 minutes on that when his own witness,
15 his own witness reaffirmed exactly what he wasted 30
16 minutes. For counselor to say that because he has been
17 doing this for 20 or 30 years, he's obviously been
18 doing it wrong, and I think this Court is aware from
19 the way Mr. Itkowitz has conducted himself during this
20 trial, for him to come in here and say he has
21 expeditiously pushed this case and knows what he's
22 doing with respect to the depositions and things like
23 that, the record that has gone on here -- and I'm going
24 to quote your Honor, that was on the record, what
25 Mr. Itkowitz was doing was, you said, outrageous, it
26 was an affront to you and it was an affront to the

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2 jury. And in fact, we had to have Mr. Trump come back
3 on a Monday because Mr. Itkowitz said for the sabbath
4 he could not be here on Friday.

5 You told a juror, because of that they made
6 an appointment. He then comes in and says, oh, I can
7 do an hour on Friday. Well, in between that was, one,
8 too late. Number two, in between that time he tweeted
9 to my client before Monday, and guess what, when I
10 checked sabbath is at sunset, Mr. Hager lives on the
11 upper west side, counsel lives in Brooklyn, we could
12 have worked till 4:30, we could have then gone our
13 separate ways, been home by 5:30, an hour and a half
14 before sabbath. This is a waste of time. We're going
15 to lose juror number one every day and every minute
16 that we wait.

17 MR. ITKOWITZ: Your Honor, I've never, ever,
18 been understood in any proceeding that I've ever
19 handled and I've had many jury trials --

20 THE COURT: We know you've done a lot.

21 MR. ITKOWITZ: -- where counsel has been
22 precluded from reading deposition testimony of an
23 adverse party. Now, if I asked a question -- if I read
24 a question from the deposition and counsel wants to
25 object that it's cumulative, obviously your Honor can
26 rule on that.

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2 THE COURT: No, sir. No, sir. No, sir.

3 The fact is you had Mr. Trump here. It was
4 up to you to conduct your inquiry. If you felt that
5 you didn't -- that you wanted to reach a different
6 topic and you decided not to do it you can't now do it.
7 It is CPLR 3117 --

8 MR. ITKOWITZ: I don't have it in front of
9 me. Can you read it, your Honor?

10 THE COURT: Use of depositions: Impeachment
11 of witnesses; parties; unavailable witnesses. At the
12 trial or upon the hearing of a motion for an
13 interlocutory proceeding, any part or all of the
14 deposition, so far as admissible under the rules of
15 evidence, may be used in accordance with any of the
16 following provisions:

17 1. any deposition may be used by any party
18 for the purpose of contradicting or impeaching the
19 testimony of the deponent as a witness;

20 2. the deposition testimony of a party or of
21 any person who was a party when the testimony was
22 given -- et cetera, et cetera -- testimony of an
23 officer -- et cetera, et cetera -- may be used for any
24 purpose by any party who was adversely interested when
25 the deposition testimony was given or who is adversely
26 interested when the deposition testimony is offered in

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2 evidence.

3 MR. ITKOWITZ: Your Honor, I would suggest
4 that the provision you just read directly applied.

5 THE COURT: Not if the person was in this
6 courtroom. It was up to you to ask him the questions
7 and if he gave you a different answer to use the
8 depositions. You used the depositions.

9 MR. ITKOWITZ: Your Honor, that's one method.
10 That's the impeachment route but --

11 THE COURT: No. No, sir. Because guess what
12 you're doing here? Guess what you are doing here? You
13 are saying now I'm going to read the deposition
14 testimony. And you know we don't have Mr. Trump any
15 longer, we don't have him so he can't contradict what
16 I'm saying.

17 MR. ITKOWITZ: Yes, he can. He can come back
18 on Mr.--

19 THE COURT: Sir --

20 MR. GOLDMAN: That's sandbagging.

21 THE COURT: Sir, you had your opportunity and
22 that is something you're not going to get again.

23 MR. ITKOWITZ: Under the CPLR provision that
24 you just read your Honor, I'm entitled to read.

25 THE COURT: Not if he is a witness.

26 MR. ITKOWITZ: I beg to differ. I'll point
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1
2 out one thing else. If after I read this deposition
3 testimony and I close my case, if Mr. Goldman wants to
4 bring back a witness to testify about anything I read
5 in he -- I guess he's entitled to do that, but that's
6 his case, so it's not like Mr. Trump, Miss Glosser or
7 Mr. Ross are foreclosed.

8 MR. GOLDMAN: That's sandbagging.

9 MR. ITKOWITZ: Truly, truly you are entitled
10 under the CPLR provision that you just read to read any
11 portion of a deposition that's not an objectionable
12 question to a jury from an adverse party at the time
13 that the deposition is taken. Clearly stated in the
14 CPLR section you just read.

15 MR. GOLDMAN: Just for the record, that's not
16 the case. And what he is proposing to do and what he
17 is doing and attempting to do is sandbag, after all the
18 witnesses of mine that he called and he cross-examined,
19 two times initially after my examination, and then a
20 redirect or -- I should call it a recross now, he says,
21 okay, once they are off the stand let me reread all the
22 questions and answers.

23 Don't interrupt me --

24 MR. ITKOWITZ: Your Honor.

25 THE COURT: One second. Quiet.

26 (Pause.)

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1
2 THE COURT: This section two that I read
3 before, this is --

4 MR. ITKOWITZ: I'm --

5 THE COURT: Excuse me.

6 Rule 3117: Use of deposition, subdivision
7 (a) has to do with, quote, unavailable witnesses.

8 That is what this rule says. And sir, if you
9 don't have your CPLR with you --

10 MR. ITKOWITZ: I'm getting it on line right
11 now.

12 THE COURT: Good. Excellent. So you'll be
13 able to read along with me.

14 (a) has to do with unavailable witnesses.

15 (b) is use of part of the deposition. If
16 only part of a deposition is read at trial by a party,
17 any other party may read the other part of the
18 deposition which ought in fairness to be considered in
19 connection with the part read.

20 (c) Substitution of parties; prior actions.

21 (d) Effect of using deposition.

22 But all of this has to do with, (a), the
23 impeachment of witness party's unavailable witnesses.

24 So therefore, subdivision 2 of (a) has to do
25 with unavailable witnesses.

26 MR. ITKOWITZ: May I have a minute, your
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1
2 Honor?

3 THE COURT: Of course. Read it.

4 MR. ITKOWITZ: All right.

5 (Pause.)

6 MR. GOLDMAN: Your Honor, I'm quoting from
7 St. John's law review article citing a Court of Appeals
8 decision. Recently however, if Feldsberg
9 F-E-L-D-S-B-E-R-G versus Nitschke, N-I-T-S-C-H-K-E the
10 Court of Appeals held that the refusal to allow a
11 deposition to be used for impeachment purposes after
12 the party deponent had been recalled for redirect
13 examination does not constitute an abuse of the trial
14 court's discretion.

15 Your Honor has ruled, I believe, the Court of
16 Appeals says it's not an abuse of the trial court's
17 discretion given what has gone on to date, and the use
18 of the examination extensively for all three witnesses
19 who were called by counsel for his case before he
20 called one of his own relevant witnesses, I think
21 that's what the Court of Appeals held in the Nitschke
22 case then your Honor should stand by your Honor's
23 ruling and we should move on to the next phase.

24 The Court of Appeals case was from 1978.

25 (Pause.)

26 MR. ITKOWITZ: Your Honor, may I be heard?

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2 THE COURT: No. I'm looking.

3 (Pause.)

4 THE COURT: All right, so how do you read
5 what the CPLR says?

6 MR. ITKOWITZ: Your Honor, there's no
7 restriction of the CPLR. If you look at --

8 THE COURT: Sir, use of deposition. This is
9 under section (a) which is entitled impeachment of
10 witnesses; parties; unavailable witnesses.

11 So the issue is unavailable witnesses here.
12 At the trial or upon the hearing of a motion or an
13 interlocutory proceeding, any part or all of a
14 deposition, so far as admissible under the rules of
15 evidence, may be used in accordance with any of the
16 following provisions:

17 1. any deposition may be used by any
18 party -- but it is about an unavailable witness. And
19 that is the issue here.

20 It goes on to say -- there's other sections.

21 (b) Use of part of the deposition. If only
22 part of a deposition is read at trial by a party, any
23 other party may read any other part of the deposition
24 which ought in fairness to be considered in connection
25 with the part read. Obviously.

26 Substitution of parties; prior actions. .

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2 Effect of using deposition. A party shall
3 not be deemed to make a person his own witness for the
4 purpose of taking his deposition. The introduction in
5 evidence of the deposition or any part thereof for any
6 purpose other than that of contradicting or impeaching
7 the deponent makes the deponent the witness of the
8 party introducing the deposition, but this shall not
9 apply for the use of a deposition as described in
10 paragraph two of subdivision (a). At trial, any party
11 may rebut any relevant evidence contained in a
12 deposition, whether introduced by him or other party.

13 MR. ITKOWITZ: May I be heard, your Honor?

14 You haven't really given me a chance to
15 speak.

16 THE COURT: Oh, come on, sir.

17 MR. ITKOWITZ: Not on this issue. Let me
18 point out one thing, by the way. When we spoke about
19 reading deposition testimony a day or two days ago, you
20 said make sure you tell the other side what you're
21 going to read in.

22 THE COURT: Absolutely.

23 MR. ITKOWITZ: At that point you didn't say,
24 by the way, there may be an issue as to whether you're
25 going to be permitted to read.

26 MR. GOLDMAN: How could she know.

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2 THE COURT: How could I possibly know what
3 you're intention was. There were depositions taken of
4 other witnesses that have not been called at this
5 trial.

6 MR. ITKOWITZ: No, there weren't.

7 MR. GOLDMAN: How could she know that?

8 THE COURT: That's an accusation totally
9 unfounded and not at all correct.

10 MR. ITKOWITZ: Under federal practice --

11 THE COURT: Look, sir, guess what, I haven't
12 been born yesterday. This must be close to my one
13 thousandth trial, I did it for 300 when I was in the
14 DA's office, that's what I did, trials. After that
15 I've been doing trials since I've been a Judge. That's
16 now going on 18 years.

17 MR. ITKOWITZ: May I see 3117 of the CPLR,
18 when we look at the title of 3117 it says use of
19 depositions, (a) says impeachment of witnesses
20 semicolon, parties, semicolon, unavailable witness.
21 That basically means --

22 THE COURT: Sir, I'll tell you what I have
23 ruled, I'm not going to allow you for do Trump's
24 deposition. When I'm wrong you'll take me up to the
25 Appellate Division they will reverse me.

26 MR. ITKOWITZ: Wasn't just Trump, I was going
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2 to read portions of Glosser.

3 THE COURT: She also was in this courtroom.

4 MR. ITKOWITZ: It's extremely prejudicial to
5 my case, your Honor.

6 THE COURT: I don't care, you had Glosser for
7 two days, too.

8 MR. ITKOWITZ: I understand I had her and I
9 also had the depositions. The depositions to the
10 extent they are not cumulative are under the plain, I
11 mean the plain language of CPLR 3117, section 2, it
12 says if a deposition -- if the deposition testimony of
13 a party or of any person who was a party when the
14 testimony was given, or of any person who at the time
15 the testimony was given was an officer, director,
16 member, employee or managing or authorized agent of a
17 party may be used for any purpose by any party.

18 THE COURT: Don't yell at me.

19 MR. ITKOWITZ: I'm not yelling.

20 THE COURT: Don't yell at me, is that clear?
21 Don't you ever raise your voice to me.

22 MR. ITKOWITZ: I'm not yelling.

23 THE COURT: Yes, you were. Don't yell at me.
24 That's the last time you do that, sir.

25 (Continued on next page.)

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2 MR. ITKOWITZ: Excuse me. It says may be used for
3 any purpose by any party who was adversely interested when
4 the deposition testimony was given or who was adversely
5 interested when the deposition testimony was offered in
6 evidence.

7 There's no restriction there, Your Honor, in the
8 plain language of the CPLR; and I would ask, by the way, if
9 you're going to adhere to this ruling that you give me 30
10 minutes to go get -- to go consult Professor Segal, who I'm
11 sure has lots of commentary on this particular section.

12 MR. GOLDMAN: Just for the record, to support Your
13 Honor's decision, not only did the Court of Appeals, and it
14 was 1980, rule that it's within your discretion, but in
15 *Novas, N-O-V-A-S v. Zuckerman*, Appellate Division First
16 Department, under CPLR (a)(2), use of deposition testimony
17 within the Court's discretion and not reviewable except
18 where it's a clear abuse of discretion. And it affirmed
19 Judge Schlesinger's refusal to allow the use of deposition
20 testimony.

21 So we have a Court of Appeals, we have the
22 Appellate Division First Department. He has made his
23 record. Let's move on.

24 MR. ITKOWITZ: I need an opportunity to look at
25 those cases, Your Honor, to argue this point, because this a
26 very important point.

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2 THE COURT: Sir, I am going to rule the way I
3 ruled. It is clear that I believe it is within my
4 prerogative to so move. You had Mr. Trump here.

5 MR. ITKOWITZ: I understand that.

6 THE COURT: You could have asked him anything you
7 wanted. No one said you can only ask this and this or I'll
8 leave it until later to deal with other issues.

9 MR. ITKOWITZ: Your Honor, I believe I'm entitled
10 to rely on the plain provision, the plain language of the
11 CPLR, which says that I can read --

12 THE COURT: Sir, you think what you can think and
13 see, that's it. We're going to go forward.

14 MR. ITKOWITZ: May I have five minutes to consult
15 Professor Segal and see if Professor Segal has some
16 information on this that may be of relevance to Your Honor?

17 THE COURT: You can do that, just so you can make
18 your record.

19 Do you have Segal on yours?

20 MR. GOLDMAN: I'm just looking at whatever Mr.
21 Segal may say. Quite frankly, I don't care, because when I
22 have a Court of Appeals case and an Appellate Division case
23 from this department that says it's within the discretion of
24 the Court, I really -- I don't think Mr. Segal is a higher
25 authority than the Court of Appeals or the Appellate
26 Division, so I haven't looked at Segal. I have looked at

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2 the Appellate Division, First Department Division and that
3 was March 27, 2012, a decision. So it's probably about a
4 year old. I think it's pretty well settled. It's within
5 your discretion, et cetera, and we can move on.

6 MR. ITKOWITZ: But in the exercise of your
7 discretion, it may be useful to Your Honor if I have an
8 opportunity to look at Segal and to quote Segal to Your
9 Honor.

10 THE COURT: Five minutes.

11 (Whereupon, a recess taken.)

12 THE COURT: Mr. Itkowitz.

13 MR. ITKOWITZ: May I be heard, Your Honor?

14 THE COURT: No, you don't need to be heard. I want
15 to know, take the deposition testimony of Trump, what you
16 want to offer?

17 MR. ITKOWITZ: Well --

18 THE COURT: I want the page and line number. Sir,
19 you're not going to read the deposition, okay; that you're
20 not doing.

21 MR. ITKOWITZ: Your Honor, pursuant to Your Honor's
22 instruction, if I may, I sent Counsel a letter and just list
23 all the lines, all the pages and lines.

24 THE COURT: What I asked you, sir, is to read from
25 your own thing and ask you, you want to read page 20, that's
26 what I want you to tell me.

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MR. ITKOWITZ: You want me to read it now?

THE COURT: No. Three -- this is page 20, line -- it starts at line 2. You have line 3, "which can be communicated electronically." Do you have the deposition here?

MR. ITKOWITZ: Yes, I do. Page 20 -- hold on a second. Page 20, line 3.

THE COURT: Okay. Three is communicates electronically, right; is that what the line says?

MR. ITKOWITZ: No. The line says, "what about your relationship with George Ross."

THE COURT: Wrong deposition. Page 20, line 3, "what about your relationship with George Ross; how long have you had that relationship with George Ross." You asked him those questions. You asked him those questions, and he gave you answers. And if they were wrong answers, sir, then indeed pursuant to all the case law you could have then impeached him with a wrong answer.

But if you read the Feldsberg case, if you read Feldsberg v. Nitschke, 49 NY2d 636 at 645, two things; that, first place, it's up to the Court, in the Court's discretion, whether or not I should permit something. There's other case law that supports that, too, but for me to find that, for example, that request to be read is something you already asked him, it could be cumulative and

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2 I am not going to permit that.

3 MR. ITKOWITZ: Your Honor, if I may be heard very
4 briefly. I think the Court of Appeals case that's cited,
5 I'm not saying it divests you of your discretion, what I'm
6 saying is that that Court of Appeals case, if you look at it
7 carefully, it says the trial court is permitted to
8 prevent -- is authorized to prevent undue repetition.

9 THE COURT: And I am moving that that question that
10 you want to ask has already been asked and answered by Mr.
11 Trump. So let's go on to the next one.

12 MR. GOLDMAN: Just for the record, Your Honor, we
13 are going to do this 47 times, and the mere fact that he has
14 the audacity to want to read that question in this case
15 shows he doesn't know the issues, he's ill prepared or he
16 doesn't remember his own questions and answers; and for us
17 to waste time, yet again, on these things is an unreasonable
18 waste of time.

19 This Court's discretion should not continue
20 another -- number one, you're going to find it's cumulative
21 or he asked again, and it will be noon and we have gone
22 nowhere.

23 MR. ITKOWITZ: Your Honor --

24 THE COURT: Do you really -- let me ask you this
25 question. Do you really want to sum up? Because once I
26 begin the process, you're not going home. I don't care if

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2 it's Sabbath or not, you're not going home until I get a
3 verdict from the jury. So if you want to spend the day
4 going through these things now, where you're asking on page
5 22 at line 25: "Question: Now what role, if any, did
6 George Ross have in terms of licensing deals, generally
7 speaking?" The Answer: "Generally speaking, he does real
8 estate deals."

9 Those exact words, sir, were actually pronounced in
10 this courtroom by Mr. Trump. And you could see it, if you
11 pick up the record, you'd see it in your own questioning.
12 He answered exactly that way. There's nothing, not a change
13 in it.

14 MR. ITKOWITZ: Your Honor, may I be heard on that?

15 THE COURT: No, no, I have had it. It is up to --
16 look, unless you point out to me right now, you point out
17 exactly that in Donald Trump's testimony, all right, and I'm
18 giving this as an example, at 101 -- page 101, line 1.5, I
19 don't know how -- twice how you get that, to page 102, 1.19,
20 unless you prove to me that that is a substantially
21 different, new material.

22 So far you've given me two examples of, indeed,
23 something that has already been asked of Mr. Trump. He was
24 here. If he gave you a wrong answer along those lines, then
25 it is something you should have -- you should have impeached
26 him with his deposition testimony at that time.

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2 Then beyond that it is, without a doubt, that while
3 317(a)(2) has been found to be a somewhat liberal
4 interpretation of allowing people to read deposition
5 testimony, despite the fact that the witness was brought to
6 the witness stand by you in this case, that does not
7 allow -- it does not forbid me, as the person in charge of
8 running this trial, it does not forbid me to have the
9 discretion that if this is repetitious, it's repetitious.

10 So I'm asking you, sir --

11 MR. ITKOWITZ: I agree with you.

12 THE COURT: I'm asking you, sir, to please give me,
13 not things that have already been brought up on your -- in
14 your questioning of Mr. Trump, as an example, but questions
15 that are completely new. Show it.

16 MR. ITKOWITZ: All right, Your Honor.

17 THE COURT: Give me the line number; the page, the
18 line.

19 MR. ITKOWITZ: Your Honor, just very briefly.

20 THE COURT: Sir, give me the pages.

21 MR. ITKOWITZ: I have to sit here and go through
22 every section, and I will do that.

23 THE COURT: Then forget about it, sir. You should
24 have been prepared.

25 MR. ITKOWITZ: Your Honor, you asked me two days
26 ago to notify Counsel of what sections I intended to read.

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2 I did that. I haven't heard anything from Mr. Goldman
3 saying I object to this section or that section. So that's
4 number one. Number two, I'm happy, if Your Honor prefers,
5 I'll go through every --

6 THE COURT: Sir, sir, look, we're closing this case
7 up, because we have --

8 MR. ITKOWITZ: I'd like to close the case up.

9 THE COURT: I have very important things to do,
10 which I don't think whether or not Mr. Ross was a real
11 estate agent is of any import whatsoever to this case.

12 MR. ITKOWITZ: I'm not arguing that point. I'm
13 really not.

14 THE COURT: Good. Then tell me what you do want.
15 If you haven't done it, maybe your assistant has done
16 something.

17 MR. ITKOWITZ: No, I did it. This is me. I went
18 through --

19 THE COURT: No. I want to know from you right now
20 what new material there is. Maybe your assistant knows;
21 maybe you don't know, but your assistant might know
22 something.

23 MR. ITKOWITZ: I'll go through it very quickly
24 right now, go through every section.

25 MR. GOLDMAN: Your Honor, this just shows how ill
26 prepared he was last night to come in and tell us what it

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is.

MR. ITKOWITZ: I object to that characterization.

THE COURT: No, I agree with that characterization.
It's been that way from the very beginning.

MR. ITKOWITZ: Just give me a second and I'll go
through this very quickly, and I'll tell you what is
different and why it should be read.

MR. GOLDMAN: May I make a suggestion? Because
there are probably 30 to 40 things that he has to go
through, and he has no idea what it is. Since we are going
to have to deal with directed verdict and jury charges, is
my guess, unless something amazing comes up that he can
figure out what's new or he didn't examine any of the three
witnesses, which based upon my review he will not find,
maybe we should let the jury go in the next five or ten
minutes so that we don't let them sit around all day,
because I don't think they are going to be needed during
jury --

THE COURT: I thought you wanted to sum up today.
That's what you suggested.

MR. ITKOWITZ: Your Honor, I will tell you quite
honestly, if I was able to read this stuff in and then we
had our jury charge, we had our conference --

THE COURT: No, sir.

MR. ITKOWITZ: -- I could sum up this afternoon.

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2 THE COURT: Of course you couldn't. Let me tell
3 you something, it's going to take hours to do the jury
4 conference today. You have a directed verdict issue, then
5 you have the jury questions, and then you have the charge
6 conference. No, sir, these things are not done
7 fly-by-night. Maybe it is in criminal trial or something,
8 but it isn't in this court.

9 MR. ITKOWITZ: Let me just quickly go through this,
10 Your Honor. I'll do this as quickly as I can. I would
11 suggest, if it please the Court, just give me five minutes
12 to go through this.

13 THE COURT: I gave you five minutes already.

14 MR. ITKOWITZ: You gave me five minutes then I was
15 researching the issue. Now you're asking me to go through
16 all of these sections, which I carefully went through and I
17 indicated which ones I wanted to read, and now you're
18 saying --

19 THE COURT: Let me ask you, Mr. Itkowitz. Last
20 night, before you wanted to read all this material -- wait
21 one second -- last night you wanted to read the deposition
22 testimony, surely you took a look at this and you went over
23 it and said, oh, yes, that's really good; oh, that's really
24 important. You must have. You must have prepared that way.

25 MR. ITKOWITZ: I did this on April 16th. I didn't
26 do it again. I did this on April 16th.

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2 THE COURT: Yes, that's exactly right. You have
3 now proven the point that Mr. Goldman just made.

4 MR. ITKOWITZ: What? What?

5 THE COURT: That you don't prepare for trial.

6 MR. ITKOWITZ: I am prepared. I did it two days
7 ago.

8 THE COURT: I'm asking you what is important in
9 your deposition testimony of Mr. Trump, and you are not
10 prepared to tell me.

11 MR. ITKOWITZ: I'm prepared to go through each
12 section.

13 THE COURT: But page 43, 2 to 22 is the key issue.

14 MR. ITKOWITZ: Page 23, okay.

15 THE COURT: Forty-three it was.

16 MR. ITKOWITZ: I'm at 22 we were talking about. We
17 didn't finish talking about page 22 through page 23. The
18 key section was he referred to Mr. Ross as the person who
19 was in charge and --

20 THE COURT: So you got that from his direct
21 testimony. On to the next issue.

22 MR. ITKOWITZ: Okay.

23 MR. GOLDMAN: He's just doing this on the fly. He
24 has no knowledge. This is on the fly. And, in fact --

25 MR. ITKOWITZ: I didn't do this on the fly. I
26 object to that.

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2 MR. GOLDMAN: Well, considering you did it two days
3 ago, your retention to be able to articulate what's
4 important is missing. So tell us what's important or new,
5 otherwise you're going to read every page and every line.

6 MR. ITKOWITZ: That's not true.

7 THE COURT: Look, take the next 15 minutes and come
8 back and tell me exactly, exactly what you want, what new
9 material you want to take to the jury. Now you have two
10 people here, all right. Now you can do some and he can do
11 some so that, indeed, at the end of 15 minutes you will tell
12 me what's important about Cathy Glosser that has not been
13 used already, what's important about Donald Trump and what's
14 important about Mr. Ross.

15 MR. ITKOWITZ: Okay.

16 (Whereupon, a recess was taken.)

17 THE COURT: Ready to proceed?

18 MR. GOLDMAN: Your Honor, before Mr. Itkowitz
19 proceeds, I just want to remind this Court that on April
20 11th, very early on at page 290 of the transcript, when Mr.
21 Itkowitz was doing the very same thing he did each of the
22 following days, but very early on, you said, "You're playing
23 with the Court."

24 THE COURT: No, no, I don't need to hear this.

25 MR. GOLDMAN: Judge, we've now wasted almost an
26 hour because he was not prepared to deal with this. It's

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2 just not fair to my client. As we now sit here and
3 hopefully go through something relevant, it's just not --

4 THE COURT: Sir, objection is noted. Are you ready
5 now?

6 MR. ITKOWITZ: Almost. Yes, I'm ready to address.

7 THE COURT: What in Trump are you going to be
8 reading; page, number and line?

9 MR. ITKOWITZ: With respect to Trump, I propose to
10 read -- I've produced --

11 THE COURT: What line are you reading, sir?

12 MR. ITKOWITZ: Starting at page 26, line 23 going
13 to page 28, line 22. Now I've made it bigger.

14 THE COURT: Wait one second. Let me read it.

15 MR. ITKOWITZ: Okay.

16 THE COURT: Line -- 26, line 20.

17 MR. ITKOWITZ: Page 26, line 23 through page 28,
18 line 22.

19 THE COURT: Mr. Goldman.

20 MR. GOLDMAN: Not only did he ask him those
21 questions, because frankly he pretty much had no prepared
22 notes for Mr. Trump or any witness, so what he did was he
23 just kind of went through the exhibits and deposition and
24 kind of followed the same kinds of questions.

25 Number two, it is so inconsequential that by
26 denying him the opportunity to read this in would not be an

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2 abuse of discretion. He's showing him the memorandum of
3 understanding that he signed. That's what we're going to
4 read to the jury .

5 MR. ITKOWITZ: May I be heard?

6 THE COURT: What?

7 MR. ITKOWITZ: The key portion of this starts from
8 line 17 on page 27 to line 22 on page 28. And what they
9 show, in complete contravention to Mr. Trump's recall when
10 he was on the stand about what this deal was, what he
11 expected, okay, this shows he had no memory.

12 THE COURT: So you asked those questions and he
13 said I don't recall, I don't know how many times? As many
14 times as Mr. Hager said?

15 MR. ITKOWITZ: No, but I think when he came back on
16 redirect, and I didn't recross him on this --

17 THE COURT: But, sir, you could have. You could
18 have.

19 MR. ITKOWITZ: There's no question I could have.

20 THE COURT: You could have.

21 MR. ITKOWITZ: I was laboring under --

22 THE COURT: No, that has been asked and answered.
23 Let's go on to the next one.

24 MR. ITKOWITZ: Okay. Then the next one is 33, line
25 seven through 34, line five.

26 THE COURT: That one I'll permit.

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MR. GOLDMAN: Can I address that?

THE COURT: Yes, you can, but I'm going to permit it.

MR. GOLDMAN: He asked him that exact series of questions on the stand, exact. And then if you recall at page 71 and 72 of the deposition, he went through it again and he left out the last couple of questions and answers. So it's not -- now you're going to have to reread everything else that he said on that.

THE COURT: I'll permit that and if you read it again, I will not permit it. So you have a choice. Don't do it twice. Next one. Let's go quickly. We've had a jury out now for two hours because of you.

MR. ITKOWITZ: Page 36, line --

THE COURT: Line 9, that's what you got down here.

MR. ITKOWITZ: No, no, no. Hold on. I'll skip that. I'll skip that.

THE COURT: Okay, you're skipping 36. Forty-three.

MR. ITKOWITZ: Forty-three -- cross that out. I'm crossing that out.

THE COURT: Forty-three is out. Next. Sixty-two.

MR. ITKOWITZ: Hold on, I'm getting to it, Your Honor. Sixty-two, line one. Okay. This I would like to read, Your Honor.

MR. GOLDMAN: Your Honor, in order to do this, I'm

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2 now going to have to go into the record and show where it is
3 he asked Mr. Trump all about this. If that's how we're
4 going to spend the next five hours, I would now like to
5 reread the examination of Mr. Trump and show where he did
6 that. He needs to make an affirmative statement that he did
7 not address that with Mr. Trump rather than me being on the
8 defensive and have to explain where it was that he did.

9 THE COURT: Did you ask these questions of Mr.
10 Trump? Did you; yes or no?

11 MR. ITKOWITZ: I don't believe he was asked these
12 things and, excuse me, I don't believe these answers are
13 different from, basically, what his testimony was. And the
14 whole point --

15 MR. GOLDMAN: If that's the case, he should have
16 used it.

17 MR. ITKOWITZ: Excuse me. The whole point is that
18 Mr. Trump --

19 THE COURT: Speak, I'm listening. Sir, I'm not
20 going to permit that one. Go on to the next one.

21 MR. ITKOWITZ: Okay. Page 70, we feel that's
22 important.

23 MR. GOLDMAN: Why, Counselor?

24 THE COURT: Well, never mind why. The whole issue
25 of the memorandum expiring, that you went into with Trump
26 really in detail. The whole issue of I like the man very

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2 much, that whole issue.

3 MR. ITKOWITZ: I don't care about that. The
4 important part here is if you look at line 18 of 70:

5 "Question: So in June of 2004 you knew you had a
6 memorandum of understanding with PVH?

7 "ANSWER: Correct.

8 "QUESTION: Were you aware that it was expiring?

9 "ANSWER: I wasn't aware, no. I mean, perhaps I
10 was aware. You're asking me was I aware eight years ago
11 about a memorandum of understanding?"

12 "As you sit here now, you don't have a
13 recollection?

14 "ANSWER: I don't remember."

15 He sat here on redirect and he pontificated about
16 all --

17 THE COURT: I'll give you 70, line 22 through 70,
18 line 7. That's it. Go on to the next one.

19 MR. GOLDMAN: For the record, Your Honor, if you
20 recall, he examined Mr. Trump as to why he knew, when he
21 testified, and Mr. Trump said he reviewed documents before,
22 and Mr. Itkowitz made a point of that. When Mr. Hager was
23 on the stand, Mr. Hager said my memory is better today than
24 it was before the deposition because I reviewed the
25 documents.

26 THE COURT: That's true.

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2 MR. GOLDMAN: So therefore, this is completely
3 irrelevant.

4 MR. ITKOWITZ: That's fodder for the jury.

5 MR. GOLDMAN: That's not fodder.

6 THE COURT: You know what, it doesn't matter. I'll
7 allow it. You got what you're getting, you're not getting
8 anything more. Okay.

9 MR. ITKOWITZ: Page 75.

10 THE COURT: Seventy-five what?

11 MR. ITKOWITZ: Page 75 at the top, line 2.

12 MR. GOLDMAN: He's doing it now. He can't even --

13 MR. ITKOWITZ: No, no, I'm not doing it now. I did
14 it three days ago, two days ago. I sent it to you, Mr.
15 Goldman, and I didn't get any objections from you in
16 writing.

17 MR. GOLDMAN: Address the Court. What do you want
18 to read, Counselor?

19 MR. ITKOWITZ: I want to read this entire section,
20 75, line 2 to 80, line whatever it is.

21 MR. GOLDMAN: Line whatever.

22 MR. ITKOWITZ: I have it marked here. Eighty, line
23 8.

24 MR. GOLDMAN: He wants to read five pages.

25 THE COURT: That's been asked and answered in
26 detail by Mr. Trump in his testimony. This is completely

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2 repetitious. It's exactly the same testimony. There's
3 nothing different about it.

4 MR. ITKOWITZ: Okay. Let's move on to 101. I
5 think 101 is significant.

6 MR. GOLDMAN: Why?

7 THE COURT: No, no. What do you want first?

8 MR. ITKOWITZ: 101, line 5 to 102, line 19.

9 MR. GOLDMAN: He was examined at length on this. I
10 then crossed and he redirect. We went through the whole
11 check process.

12 MR. ITKOWITZ: Your Honor, this is different from
13 the testimony of Cathy Glosser.

14 MR. GOLDMAN: You had an opportunity, he was called
15 after Ms. Glosser. Do you remember that?

16 THE COURT: Enough, enough.

17 MR. GOLDMAN: Come on.

18 MR. ITKOWITZ: There are different stories on how
19 this occurred.

20 THE COURT: So what? So what? You know what, I'm
21 going to give him that. Let him have it. Up to 102, line
22 19. Next one. What else?

23 MR. ITKOWITZ: The next one is 105.

24 THE COURT: 105.

25 MR. ITKOWITZ: Line -- let's see. 105, line 7
26 through 107, line 11.

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2 THE COURT: Everything that you say has been
3 testified to at length.

4 MR. ITKOWITZ: All right. I'm not arguing about
5 that.

6 MR. GOLDMAN: Judge, this is like a game. If the
7 judge throws me a bone, she throws me a bone, I won't argue
8 about it. He didn't know why it was important.

9 THE COURT: Enough, enough, Mr. Goldman.

10 MR. ITKOWITZ: Now, with Cathy Glosser we've
11 reduced the number of read-ins to --

12 MR. GOLDMAN: To which ones?

13 MR. ITKOWITZ: All right. We start with page 37.

14 THE COURT: Wait a second. You're not going to go
15 through every list. Who did Glosser?

16 MR. ITKOWITZ: Who did it? I worked it with my
17 associate, we cut it down. We're down to one, two, three
18 readings.

19 MR. GOLDMAN: Which ones?

20 THE COURT: Thirty-seven.

21 MR. ITKOWITZ: Thirty-seven, line 16.

22 THE COURT: To? To 38, line 24, right?

23 MR. ITKOWITZ: Yes.

24 MR. GOLDMAN: I would like to show the Court where
25 that was exactly asked of Ms. Glosser; and if it was, it's
26 not necessary and we should not waste everybody's time if he

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2 doesn't know whether he asked it or not. We just should --

3 THE COURT: All right. It has been asked. I
4 remember it and it's not necessary. Next.

5 MR. ITKOWITZ: The next is 59, line 25.

6 THE COURT: Taking out 40 and 45. 59, line 25.

7 MR. ITKOWITZ: Through 60, line 15.

8 MR. GOLDMAN: Through 60, line 15?

9 MR. ITKOWITZ: Yes.

10 MR. GOLDMAN: First of all, not only it was gone
11 over, but if you're going to read it, it should be read to
12 21; but there's no need to read it, because he did exactly
13 that, exactly crossing her on what she knew about the deal.
14 When she first started, was she at the meeting on August
15 3rd, which was her first day of work, what they talked
16 about.

17 MR. ITKOWITZ: I don't know that -- no, I think
18 this is a little bit more detailed than what was testified
19 to, and I'm asking to read it in.

20 THE COURT: You know what, you have Cathy Glosser's
21 trial testimony? Have you read it? Have any one of you
22 read it?

23 MR. ITKOWITZ: I've read all the trial testimony
24 except for the last two days.

25 THE COURT: Look at Cathy Glosser's, the index, and
26 look for the word August 3rd, all right. You can look at

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2 the three, you can look at the August, get the two of them
3 together and tell me that it was not exactly already asked.

4 We do have a glossary, right?

5 MR. ITKOWITZ: Yes. While we're doing that, just
6 to be efficient, I would go to 71.

7 MR. GOLDMAN: I'm sorry, what are we doing? Are
8 you checking the glossary?

9 THE COURT: He's checking, but going on 71.

10 MR. ITKOWITZ: Seventy-one, line 13 to 73, line 13.

11 THE COURT: It's been asked and answered, but guess
12 what? This particular case I'll allow it up to 72, line 8.
13 So you got 71, line 13 to 73 -- 72, line 8.

14 Next.

15 MR. GOLDMAN: Is there anything else on Glosser?

16 THE COURT: Is that it?

17 MR. ITKOWITZ: That's on Cathy Glosser.

18 THE COURT: Glosser, okay, great.

19 Next.

20 MR. ITKOWITZ: We're going to strike 59, Your
21 Honor.

22 THE COURT: What?

23 MR. ITKOWITZ: We're going to strike 59.

24 THE COURT: Okay, 59 is out, too. So you got two
25 things on Glosser.

26 MR. GOLDMAN: What's the other thing?

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2 THE COURT: You got one thing on Glosser. One
3 thing. 71, line 13 to 72, line 8. Right. Okay, that's
4 Glosser.

5 MR. ITKOWITZ: Let me make sure I got notes on the
6 Trump one.

7 THE COURT: Next.

8 MR. ITKOWITZ: Let's go back to George Ross.

9 THE COURT: What?

10 MR. ITKOWITZ: We didn't do George Ross.

11 THE COURT: We cut back that.

12 MR. ITKOWITZ: All right. So the next we've
13 eliminated some.

14 MR. GOLDMAN: Can you just for clarity, which are
15 the ones that remain in that list? Just say the page
16 numbers.

17 MR. ITKOWITZ: All right. The ones that I'm asking
18 for are 113, line 20.

19 MR. GOLDMAN: Just say the page number.

20 MR. ITKOWITZ: 113.

21 MR. GOLDMAN: Okay. What's the next page number?

22 MR. ITKOWITZ: 118.

23 (Continued on next page.)
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MR. GOLDMAN: Okay.

MR. ITKOWITZ: 121.

MR. GOLDMAN: Anything else?

MR. ITKOWITZ: 123. 131.

MR. GOLDMAN: 131 isn't even on this list.

THE COURT: No, it's not. You have 135.

MR. ITKOWITZ: We amended that.

THE COURT: You haven't because I don't have
it. Let's go.

MR. ITKOWITZ: All right, 131, line 8.

MR. GOLDMAN: No.

THE COURT: Thirty-one is out. Let's go.
It's not on the list.

MR. ITKOWITZ: 135.

MR. GOLDMAN: Okay.

MR. ITKOWITZ: 139.

MR. GOLDMAN: Yes.

MR. ITKOWITZ: 146. 159. 165.

THE COURT: Let's go. 113, line 20.

MR. GOLDMAN: If Mr. Ross wasn't examined on
that entire line of e-mails and negotiations, I don't
know what he was. That was the entire
cross-examination of Mr. Ross.

THE COURT: Not only was he asked these
questions, he gave the same answers.

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2 MR. ITKOWITZ: All right. We'll withdraw
3 that one.

4 118, line 9 through 120, line 22.

5 THE COURT: 118, line 9.

6 MR. GOLDMAN: I don't even have to read any
7 further, your Honor. He cross-examined him at length
8 on both cross-examination and recross-examination about
9 what he wrote, why he didn't write it, et cetera. Why
10 he allegedly called or didn't call. Mr. Itkowitz made
11 a big play for the jury how it wouldn't have been any
12 different if he wrote or called, he went through all of
13 that. I was at the same trial he was.

14 MR. ITKOWITZ: Your Honor, the key portion
15 here is, and I made it bigger so I wouldn't be accused
16 of segmenting out. If you look at line 119, line 25
17 where it says:

18 "Q On or about August 23 of 2004, when you got
19 this Plaintiff's Exhibit 6, did you advise Cathy
20 Glosser, did you have any discussion with Cathy Glosser
21 as to what the deal was --

22 THE COURT: Wait, 119 line what?

23 MR. ITKOWITZ: 119 --

24 THE COURT: I see it starts here.

25 MR. ITKOWITZ: Line 25.

26 THE COURT: I don't know what the deal --

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2 MR. ITKOWITZ: Says I don't recall what the
3 deal was with ALM.

4 MR. GOLDMAN: It references Exhibit 6, which
5 is an exhibit he was given which I believe was one of
6 the e-mails from Mr. Danzer.

7 THE COURT: It's been asked and answered.
8 No, I'm not going to give you that.

9 MR. ITKOWITZ: All right.

10 121.

11 THE COURT: You can't redo his testimony
12 through deposition testimony.

13 Sixteen to 23? That was asked and answered
14 more than once.

15 MR. ITKOWITZ: Okay. 123, line 9 through 25.

16 THE COURT: 123, line 9.

17 (Pause.)

18 THE COURT: I think he even answered you the
19 same way. Let's see the original agreement? What's
20 that got to do with anything. The question was I was
21 just asking what you recall. I recalled there was some
22 wild number but there was also a wild number that they
23 had to deliver an agreement which --

24 MR. ITKOWITZ: That's the key. He's saying
25 there -- that's an acknowledgment that the number was
26 an -- was a very high bar and they knew it was a high

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2 bar.

3 THE COURT: But, sir, sir, that you can sum
4 up on. And you have trial testimony that you can call
5 on and sum up on.

6 MR. ITKOWITZ: Okay, so -- all right, you're
7 not permitting it.

8 135. I mean he used the word wild. I think
9 that's why I was interested in it.

10 THE COURT: You could have cross-examined
11 him, did you use the word wild.

12 MR. GOLDMAN: He did cross-examine him.

13 THE COURT: You could have impeached him.

14 MR. GOLDMAN: He was trying to sand bag him.

15 THE COURT: Next, next.

16 MR. GOLDMAN: I can tell you, your Honor, the
17 mere fact that he's referencing the August 22, 2005
18 e-mail, that's exactly what he examined. All of the
19 material the August 23, the August 25, the August 30 he
20 did all that.

21 MR. ITKOWITZ: Here he's saying 135, he
22 doesn't recall any of this, which is different from
23 what I believe he testified to.

24 MR. GOLDMAN: Then you should have impeached
25 him with the deposition. That's exactly what it's not
26 supposed to do.

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I rest my case.

THE COURT: E-mail from Cathy Glosser. But you don't have an answer there. She writes Jeff --

MR. ITKOWITZ: That doesn't mean --

THE COURT: And his answer is aha.

Do you recall having a conversation at that time? I.

Don't recall.

No, sir. No. Again, you have that all in the record.

MR. ITKOWITZ: Okay.

THE COURT: And you really did develop this very well. Ad infinitum.

What do you want on 39?

MR. ITKOWITZ: Next I have listed 139, line 9 to 143 line 16.

MR. GOLDMAN: Again, it was the e-mail chains, it was exhibits, and it was the same exhibit that was shown to the witness at the deposition that was shown to him here, and I'm sure there are plenty of indications in the record when he said I show you Exhibit 15, oops, I made a mistake, it's a deposition exhibit. I show you exhibit -- what the right trial exhibit was. Every exhibit that is marked before Mr. Ross at the deposition was shown to Mr. Ross at the

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1 trial by the attorney who called Mr. Ross.

2 THE COURT: If you want anything, okay? I
3 see something that you may want. At line 140 you can
4 do question at 111 and you can end it --Page 140, line
5 11 to line 22.
6

7 MR. GOLDMAN: That was the exact answer he
8 gave at the trial.

9 THE COURT: I will allow it.

10 MR. ITKOWITZ: If you look at 141 also, your
11 Honor.

12 THE COURT: I'm not doing more than that, you
13 get that?

14 MR. ITKOWITZ: Just that one question and
15 answer, line 4 to 7, if I may be heard?

16 THE COURT: One second, I'm writing this
17 down.

18 (Pause.)

19 MR. GOLDMAN: What are we looking at now?
20 What are we revisiting now, page and line?

21 MR. ITKOWITZ: 141 line, 4 through 7.

22 MR. GOLDMAN: That's exactly what he
23 testified to at trial. This is not to get the last
24 word in before the jury, let me just reiterate some
25 things. It's cumulative and it's improper.

26 MR. ITKOWITZ: I don't think it's improper, I
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2 disagree with it.

3 MR. GOLDMAN: At least you don't disagree
4 it's cumulative.

5 MR. ITKOWITZ: I think it's permitted under
6 the CPLR.

7 And if you want to talk about improper.

8 MR. GOLDMAN: You should not, sir. Sir.

9 MR. ITKOWITZ: You --

10 THE COURT: Gentleman, this is my courtroom.
11 If you want to go have a brawl go outside and do it.

12 Don't do it out here because I have to get my
13 Court Officer involved.

14 I gave you the lines that you have, let's go
15 on.

16 146. What's that?

17 MR. ITKOWITZ: 146, line 14.

18 THE COURT: I do think it was done at the
19 trial. This is cumulative.

20 MR. GOLDMAN: Exactly.

21 MR. ITKOWITZ: This is just basically
22 utilized to getting to 147 where he states that
23 basically that Jeff misled Cathy Glosser, which is --

24 THE COURT: But sir, you asked him these
25 questions and he answered you. I really think that's
26 totally repetitious.

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MR. ITKOWITZ: Okay.

159.

MR. ITKOWITZ: 159, line 12.

THE COURT: I'm going to allow that.

MR. GOLDMAN: Judge, can I show you in the transcript where he did that?

THE COURT: I'm going to allow it.

MR. GOLDMAN: Am I going to be permitted to reread answers from the trial transcript.

THE COURT: Absolutely, from the trial transcript.

MR. GOLDMAN: This is kind of like okay let's --

THE COURT: No, we're not going to redo everything.

MR. GOLDMAN: Well --

THE COURT: Excuse me. You have to take it from the deposition transcript.

MR. ITKOWITZ: 165.

THE COURT: Wait one second, I'm going to tell you what you can do.

No, you're going to get it to line -- page 160, line 15.

MR. GOLDMAN: To page 160, line 15?

THE COURT: Right.

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2 The last 165.

3 (Pause.)

4 THE COURT: You're going to get 165 from 17
5 down to 25 and that's it. The rest of it's completely
6 repetitious.

7 Bring the jury down.

8 Which one are you going to do first,
9 Mr. Itkowitz?10 MR. ITKOWITZ: I will do Mr. Trump then
11 Mr. Ross then Ms. Glosser. But I just need a second to
12 collect my notes.13 THE COURT: I'm bringing down the jury. You
14 made notes.15 MR. GOLDMAN: Is he resting after that, your
16 Honor?

17 THE COURT: Are you resting after that?

18 MR. ITKOWITZ: I'm going to read, then I
19 propose to read the notices to admit the admissions to
20 the notices to admit.21 THE COURT: No, sir, that's absolutely not
22 permitted, and the reason why is that, indeed, the
23 notice to admit is to -- it's not --

24 MR. ITKOWITZ: They are admitted facts.

25 THE COURT: No. No, sir. Those are
26 questions you should have brought up during the course

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2 of interviewing your witnesses.

3 Don't look at me, sir, get ready to read.

4 MR. ITKOWITZ: Is it not a stipulated fact?

5 THE COURT: No, sir.

6 MR. ITKOWITZ: Notice to admit?

7 THE COURT: Notice to admit is if somebody
8 then says I didn't say, I didn't do, then you can use
9 the notice to admit to impeach. That's what a notice
10 to admit is supposed to be.

11 MR. ITKOWITZ: My understanding is a notice
12 to admit is it's a stipulated fact.

13 THE COURT: No, sir. If it was testified to
14 contrary then indeed you can use the notice to admit to
15 impeach that witness. But you can't do it just to read
16 notices to admit.

17 All right, let's go.

18 Bring in the jury.

19 (Whereupon, the jury entered the courtroom
20 and resumed their respective seats in the jury box.)

21 THE COURT: Jurors, I assure you we've been
22 working, don't think we've been playing around.

23 Please be seated.

24 Mr. Itkowitz is going to read you what --
25 certain lines of deposition testimony that we have been
26 discussing. And so please listen carefully. He's

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2 going to identify what he's reading once again by page
3 number and line number and he will read the portions
4 that we've gone over.

5 Go ahead.

6 MR. ITKOWITZ: I'm going to start with
7 reading from Mr. Trump's deposition, page 20 --

8 THE COURT: No, sir.

9 MR. ITKOWITZ: Sorry. Page 33.

10 THE COURT: Right.

11 MR. ITKOWITZ: Sorry.

12 Page 33, line 7 through 34, line 5. These
13 are questions to Mr. Trump.

14 "Q What efforts did you make, as you understand
15 it, as you sit here today, as you recollect, what
16 efforts did you make to get a deal signed with ALM?

17 "A Well, I was told by George Ross, because
18 we're now getting into much more modern times, not just
19 a long time ago, signed memorandum of understanding
20 that they were not doing a good job. I was told by
21 somebody, they had somebody, maybe his name was Jeff
22 whatever, who was very good and he left the company and
23 we were not happy about that. And I remember that from
24 a long time ago. But I was told by George that we were
25 unable to get a final contract signed with these
26 people -- with these people.

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"Q Did you ask him why?

"A I don't know why. He was in charge."

Now, the next segment I'm going to read is
page 70.

THE COURT: Line 22.

MR. ITKOWITZ: Page 70, line 22 through 71,
line 11.

THE COURT: Wait. No 71, line 7.

MR. ITKOWITZ: Seventy-one, line 7? Okay.

"Q So in June 2004 --"

THE COURT: Wait, wait one second. 170, line
22.

MR. ITKOWITZ: Seventy.

THE COURT: Seventy, line 22.

MR. ITKOWITZ: I apologize, your Honor.

"Q Were you aware that it was expiring?

"A I wasn't aware, no. I mean, perhaps I was
aware at the time. You're asking me was I aware eight
years ago about a memorandum of understanding?

"Q As you sit here now you don't have a
recollection?

"A I don't remember."

THE COURT: Okay.

MR. ITKOWITZ: Now I'm going to read a
segment from page 101.

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THE COURT: One second. Let me get there.

MR. ITKOWITZ: 101. I have it as line 5
through 102, line 19.

THE COURT: Correct. Go ahead.

MR. ITKOWITZ:

"Q Tell me about this. Tell me about what
precipitated your awareness that you were paying ALM
that; do you have a recollection?

"A That I was paying?

"Q You're sitting around, you're signing
thousands of invoices. How did it come about that a
light went on the last time you were asked for sign one
of the checks?

"A A check was presented to me, as these checks
were, but they got through. And I said, what is ALM?
What is it? I'm trying to --

"Q Was anybody in the room with you?

"A No. I just said it to myself. I then looked
and I actually opened the invoice which is behind this
large check, because it's a check but it's also the
document of the check so it covers the invoices. You
don't see the invoices unless you flip through them,
which is hard to do when you have thousands of pages in
front of you. So I said what is this? And I looked
and I saw it was licensing. And I had heard we were

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2 unable to make a deal on licensing. So I called, I
3 think it was George or Cathy or somebody. I said
4 what's going on? I said why are we paying these
5 people, we were unable to make a deal? They lost their
6 best guy. They didn't do the job, and I had just heard
7 we were unable to make a deal with them, so I said why
8 are we doing this? And I canceled the check and,
9 hence, we have this litigation."

10 So that was Mr. Trump.

11 Now I'm going to read from Mr. Ross. I'm
12 going to page 140, line 11 through 22, I believe.

13 Is that correct, your Honor?

14 THE COURT: Yes.

15 MR. ITKOWITZ: This is Mr. Ross.

16 "Q Now, I'm going to direct your attention to
17 the next e-mail, which is the one at the top of the
18 page, which says from Cathy Glosser to Jeff Danzer
19 dated September 7, 2005 from Cathy. It says: Jeff,
20 George is drafting something. I don't know what his
21 timing is but I will get something to you as soon as I
22 get it. Do you recall drafting?

23 "A I never drafted anything.

24 "Q An agreement?

25 "A No."

26 Now we go to 160, line 15.

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THE COURT: I think you start at 159, line --

MR. ITKOWITZ: Oh, excuse me, 159, line 12
through 160, line 15.

"Q Do you recall stating that at some point,
after 11 checks had been written, you didn't say 11
I'll tell you 11, after 11 checks had been written to
ALM, Donald Trump asked you to investigate or asked
somebody to investigate?

"A No. That's not quite the way it happened.
Fortuitously I was in Donald Trump's office at a
particular time when Cathy was there and the checks
were there and Donald was physically signing the
checks, and then when he looked at the check that was
made payable to ALM he said, how much have we paid
them? And at that point I think Cathy said something
like \$300,000. I don't remember. And he said what,
and we're still continuing to pay them? Why are we
paying them that much? Their involvement isn't worth
anywhere near that. And that's when I happened to be
there and he asked me to look into the situation and I
said I would. But it was totally fortuitous. If I
hadn't been there the checks would have gone out like
in the normal course."

Then 165, line 17 through 165, line 25.

"Q Have you told me all you can recollect about
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2 your discussions with Mr. Trump about how ALM was
3 getting 10 percent?

4 "A Donald never looked at 10 percent, when he
5 heard it was 300,000 he thought that was an excessive
6 amount for what was involved in connection with PVH."

7 Now, I have one section from Cathy Glosser,
8 which is page 71, line 13 through page 72, line 8.

9 This is Cathy Glosser.

10 "Q Now, with respect to this e-mail, this is a
11 confirmatory e-mail from Jeff Danzer as to an agreement
12 that Mr. Danzer states was reached with the Trump
13 Organization. Do you see that?

14 "A Yes.

15 "Q This is Plaintiff's Exhibit 6 for
16 identification?"

17 THE COURT: On this thing what is six equal
18 to in the trial testimony?

19 MR. WILTENBURG: Seventy-two.

20 THE COURT: All right, this is plaintiff's 72
21 that's been admitted into evidence.

22 Go ahead.

23 "Q This is Plaintiff's 6 for identification. At
24 any point did you have a discussion with Mr. Ross about
25 this particular e-mail?

26 "A I'm sure at some point we did, yes.

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2 "Q At any point did you attempt to confirm with
3 Mr. Ross whether Mr. Ross agreed with the contents of
4 this e-mail?

5 "A Yes.

6 "Q And what did Mr. Ross tell you?

7 "A He told me, after I probed many times to find
8 out if he had a signed deal with ALM to -- that ALM was
9 entitled to payment and to see to it that they got
10 paid.

11 THE COURT: All right, that concludes
12 deposition testimony.

13 Anything else? Are you resting or what?

14 MR. ITKOWITZ: I'm going to move to conform
15 the pleadings to the proof then I will rest.

16 THE COURT: The pleadings to the proof?

17 Any objections to that.

18 MR. GOLDMAN: I don't know what proof he
19 claims is not in his pleadings. And that would be more
20 of a legal issue.

21 THE COURT: That's a legal issue.

22 MR. GOLDMAN: Other than that is he resting?

23 MR. ITKOWITZ: Is that it?

24 Wait a second. May I -- no. I think I'm
25 okay.

26 MR. GOLDMAN: So you rest?

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THE COURT: Are you resting?

MR. ITKOWITZ: Yes.

THE COURT: Mr. Goldman, call your first witness.

MR. GOLDMAN: Your Honor, I'm comfortable with the testimony of the witnesses. I call no witnesses.

THE COURT: That concludes the testimony in this trial. And there are a number of things that now -- legal issues that once again we have to address before we can come to the jury with summations, and also my charge to you on the jury and verdict sheet. So there are a number of things that we have to do.

I realize this was a disruptive type of day, you're here, nothing much happened, you think. Well, a lot of things have happened. I assure you these things are not done in a vacuum, it takes time and effort and research to do the work that we have to do. So I'm going to ask you to be here at -- because we're going to have to do everything tomorrow. Well, let me just ask one question.

Come up.

(Whereupon, there's a sidebar discussion off the record, out of the hearing of the jury.)

THE COURT: I was just going over scheduling
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2 once again.

3 We have work to do that's going to take the
4 balance of the day. What I want to do is I want to
5 start the summations starting at 9:15 tomorrow morning.
6 That way we should get the summations, both summations
7 done, then followed by my charge to you on the law and
8 followed by the questions that also will be the verdict
9 sheet, and you'll be able to retire to actually
10 deliberate on this matter. So you'll be deliberating
11 tomorrow. Once it's in your hands how long you take is
12 up to you to take. The question is getting it into
13 your hands, and that's what we have to do today to make
14 sure that we can do it.

15 So please enjoy the rest of the day. I won't
16 tell anybody that you're not sitting with me the entire
17 day so if you want to go to a, movie whatever you want
18 to do nobody is going to know it, all right? Because
19 officially once you step foot in this courthouse you're
20 mine for the day. So you're free to do whatever you
21 wish to do. Of course if you want to go to work I'm
22 not saying you can't, but you can do whatever you want
23 to do. If anybody calls about you I will say you're my
24 jury, you're with me today. So that is the official
25 word.

26 Now, with that you'll be gone until tomorrow
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2 morning. You've heard all this testimony. You say to
3 yourself, oh, I probably can figure this out all by
4 myself, I don't have to wait for anything else.

5 The three most important things that happen
6 at this time, and that is the summations by the lawyers
7 as to what the evidence has shown gives you very good
8 direction as to how they hope you're going to see the
9 evidence. It gives you a way of being able to
10 deliberate on the evidence. Without that it's sort of
11 like not pulled together. Sort of like you have all
12 the ingredients but the cake hasn't been mixed and
13 hasn't gone into the oven to get cooked. What happens
14 next is, indeed the summations of the parties are going
15 to help you understand what they believe the evidence
16 has shown.

17 The second thing is that from the Court's
18 point of view, my charge to you on the law is of utmost
19 importance. That's what I do for a living. I want to
20 be heard, too. The framework that I'm going to give
21 you on the law will help you, again, put the evidence
22 to the law and come to a conclusion. Until those two
23 things happen you're not really -- you don't have the
24 tools necessary for you to deliberate. However, if you
25 begin talking about it you begin to form ideas, your
26 mind is going to be closed to whatever happens

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2 tomorrow.

3 So please, please, this is most important
4 now, keep an open mind, do not discuss this case with
5 anyone, including my parakeet. I don't have a parakeet
6 but if I did don't discuss it with it, and see
7 everybody back here. We're going to start early so
8 please be here at 9 o'clock, bring your coffee in, I'm
9 going to start hopefully at 9:15 on the dot. That is
10 my dream. Okay? So have a lovely day.

11 (Whereupon, the jury retired from the
12 courtroom.)

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2 THE COURT: Hopefully, Mr. Goldman, you will get
3 done with your portion before lunch, then I'll have my
4 ruling and go directly into the charge conference. All
5 right?

6 MR. GOLDMAN: I'll do my best. If not, I will be
7 shortly after lunch. Your Honor, on behalf of Defendant, we
8 move for a directed verdict pursuant to CPLR 4401.

9 The directed verdict, as McKinney opines, is based
10 upon the legal issue for Your Honor to decide and also based
11 upon admissions. And I understand that under the CPLR we're
12 going to look at the evidence in the light most favorable to
13 the Plaintiff. And I'm going to submit to Your Honor that
14 when you look at Mr. Danzer's words yesterday, you're going
15 to have to find in favor of the Defendant.

16 And let me just say for the easy ones there is a
17 fifth cause of action, which Plaintiff sought damages for,
18 and it involved the issue of a breach of the contract based
19 upon the failure to give information of prior licensees
20 prior to the January 13, 2004 extension. In the paragraph
21 five that was added, there were two components. Your Honor
22 dismissed one on summary judgment and left the issue of fact
23 with respect to the other component.

24 Not one question was asked of Mr. Hager or
25 Mr. Danzer whether or not they ever requested any
26 information of prior licensees, which is what the extension

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2 of the memorandum of understanding which is in evidence
3 specifically said, and I quote, "upon a reasonable request
4 of ALM, I should cite, in addition, Trump shall provide
5 ALM --

6 THE COURT: Excuse me, where are you reading from?

7 MR. GOLDMAN: I'm reading from Trial Exhibit 2,
8 paragraph 5. In the middle of paragraph five it says, "In
9 addition, Trump shall provide ALM with reasonable access to
10 copies" -- "to copies of all information in Trump's and/or
11 Trump's representatives or agents' possession relating to
12 any prior opportunities presented to Trump or investigated
13 by Trump to license the Trump brand and manufacture the high
14 quality apparel."

15 That was the one issue left in the cause of action.
16 And the one word relating to any prior opportunities would
17 have meant prior opportunities prior to the execution of the
18 extension. And, in fact, the record is devoid of any
19 testimony or any fact as to that issue. So as to the easy
20 one, there is not one scintilla of evidence on that issue
21 and, therefore, that issue has been -- there's no cause of
22 action stated for that issue. That's the easy one.

23 Let's back-track one now and let's talk about the
24 modification. Now, Your Honor ruled that to satisfy the
25 statute of frauds the August 23rd, August 25th and August
26 30th e-mails, and I'm just going to call them the August

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1
2 e-mails, that it was those August e-mails that they claim
3 was the agreement by which my client was obligated to pay
4 them 10 percent for every renewal on any deal. And, in
5 fact, in the papers that originally were presented, they
6 claimed it was PVH specific. And there was a lot of
7 discussion in Your Honor's ruling about PVH specific.

8 And, in fact, we now know it wasn't specific,
9 because Mr. Danzer made it very clear that the pure reading
10 of the August e-mails was not specific, and that is in their
11 complaint and in their papers. It's clear that that is when
12 it occurred, because Mr. Danzer told us two very important
13 things; he believed that there was a modification, although
14 he said modification, new agreement; there was a
15 modification on July 29th after he met with Mr. Trump, and
16 he then sent the August 3, 2004 e-mail.

17 He told you and the jury that Mr. Trump did not get
18 back to him, and we know he didn't sign it, did not get back
19 to him, and then he sought out Mr. Ross. In the middle of
20 August he telephoned Mr. Ross, the very next day he met with
21 Mr. Ross, they discussed the 10 percent. And according to
22 Mr. Danzer, he then sent what we call the August 23rd
23 e-mail.

24 Now, it's very important what Mr. Danzer said, at
25 least for purposes of this directed verdict, because
26 Mr. Danzer said significant things, and I'm going to read

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2 from his deposition testimony -- I'm sorry, from his trial
3 testimony regarding those August 23rd e-mails or the August
4 e-mails. And he first addresses -- he first addresses the
5 August 3rd letter, which admittedly Mr. Trump did not sign,
6 and on page 780 through 781, but we begin on line 14:

7 "QUESTION: And you thought it was necessary
8 because there was an existing contract and there were really
9 only two things in that contract being changed, wasn't it?

10 "ANSWER: More than two, but, yes.

11 "QUESTION: You only put two things down -- two
12 things down in your letter following your meeting with
13 Mr. Trump as to the only things being changed or modified;
14 isn't that true?

15 "ANSWER: No.

16 "QUESTION: There are more -- there are more things
17 being changed?

18 "ANSWER: Yes, there are three."

19 Mr. Danzer told you in his own voice that only
20 three things were changed in his conversations with Mr.
21 Trump.

22 And we go on.

23 "QUESTION: There are only three?

24 "ANSWER: There are only three.

25 "QUESTION: Okay. And those only -- and those only
26 three things have nothing to do with the tail period because

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2 you didn't use the word tail period, correct?

3 "ANSWER: Correct.

4 "QUESTION: It has nothing to do with the
5 significant negotiation requirement, correct, because you
6 didn't use the words there?

7 "ANSWER: Correct.

8 "QUESTION: It has nothing to do with the words
9 acceptable license, because you didn't say the agreement,
10 correct?

11 "ANSWER: Correct.

12 "QUESTION: What was changing --

13 "THE COURT: Wait, wait, wait.

14 "QUESTION:" This is line 8. "It has nothing to do
15 with the words acceptable license, because you didn't say
16 the agreement, correct?

17 "ANSWER: Correct."

18 Go ahead.

19 MR. GOLDMAN: I apologize.

20 "QUESTION: What was changing was the percentage?

21 "ANSWER: Correct.

22 "QUESTION: And the scope of the agreement, would
23 that be fair to say?"

24 "ANSWER: Define scope.

25 "QUESTION: Well, the agreement was related only to
26 apparel?

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2 "ANSWER: Correct. Correct. Yes."

3 And then if you go to page 782, lines 2 to five.

4 "QUESTION: So those other provisions based upon
5 your conversations with Mr. Trump and what you drafted all
6 were not modified because there were only three
7 modifications, correct?

8 "ANSWER: Correct."

9 So we know as of August 3rd Mr. Danzer told us in
10 his conversations with Mr. Trump the only modification to
11 the signed contract were those three items. And, in fact,
12 later on Mr. Danzer testified that what he put in his August
13 3rd letter, not the draft, but the August 3rd letter, was
14 100 percent reflective of what they spoke about.

15 And I then turn -- ask the Court to look at
16 Mr. Danzer's own sworn statements and admissions on page
17 769, beginning line 20 to the end and going to page 770,
18 line 2 to line 13. And again, these are admissions that I
19 am relying upon by Plaintiff for purposes of my directed
20 verdict.

21 "QUESTION: And it's your testimony under oath that
22 what you put into your August 3, 2004 letter accurately
23 reflects your discussions with Mr. Trump and ALM's position
24 as to those, correct?

25 "ANSWER: Correct.

26 "QUESTION: The August 3, 2004 letter that you

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2 drafted, looked at, reviewed encompasses all of the issues
3 that you spoke to Mr. Trump about; does it mention anywhere
4 in that document the memo of understanding?

5 "ANSWER: It does not.

6 "QUESTION: Does it mention anywhere in this
7 document the extension of the memorandum of understanding?

8 "ANSWER: It does not.

9 "QUESTION: This document that you prepared is not
10 limited to just apparel, it is for any licensing deal,
11 correct?

12 "ANSWER: Correct.

13 "QUESTION: The original contract was limited to
14 apparel, correct?

15 "ANSWER: Correct."

16 And I then go on to page 771 and ask him whether or
17 not, and I won't -- because of time, I'm not going to read
18 every question and answer, but it is very clear to every
19 question on page 771 that there was no mention with
20 Mr. Trump on August 3rd about waiving the acceptable license
21 requirement, eliminating or extending the tail period or
22 changing the words significant negotiations of material
23 terms. It was -- and these are not my positions on this,
24 Your Honor, these are their admissions. But there is more,
25 because now we know that although that was not signed by Mr.
26 Trump, there was an August 23rd e-mail, which is very clear

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2 was 100 percent of what they discussed, as was the August
3 25th e-mail.

4 And before I read Plaintiff's admissions to that,
5 under the statute of frauds and parole evidence rule
6 requirements when a writing is complete and has all of the
7 terms, there's no ambiguity because when you look, as Your
8 Honor said, to the four corners of the unsigned document,
9 the August 23rd or August 25th e-mail and the signed
10 document, which is the signed contracts, all of the material
11 terms are there.

12 There is nothing missing. And how do we know that?
13 Because Mr. Danzer told us in his words that those are all
14 the things that they discussed and agreed upon. And if
15 those are all the things that they've discussed and agreed
16 upon and contains all of the material terms, parole
17 evidence, what Mr. Danzer understood it to be, why he didn't
18 put this in, what he thought it should be is all precluded
19 as a matter of law.

20 So now let's talk about what Mr. Danzer said about
21 those e-mails. And in particular to my point, if the Court
22 goes to page 825, line 24 to 26 and 826, line 2, it's
23 effectively through 15, these were the admissions by
24 Plaintiff.

25 "QUESTION: And the August 25th e-mail asking Mr.
26 Ross to sign off is 100 percent of what was discussed?

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2 "Answer: Okay, it's what we discussed.

3 "QUESTION: It's 100 percent of what you discussed?

4 "ANSWER: If I sent it, it's 100 percent of what we
5 discussed.

6 "QUESTION: And it's fair then that nothing was
7 discussed that wasn't put in your letter, correct?"

8 And then the answer appears on line 15.

9 "ANSWER: Correct."

10 Your Honor, before yesterday I know this Court had
11 inclinations as to what it may or may not have done with
12 respect to a directed verdict, and I understand that, and I
13 understand that the Court kept an open mind because the
14 Court tells the jury to keep an open mind every time the
15 jury leaves because it hasn't heard everything. And before
16 yesterday, you didn't hear those admissions by Mr. Danzer.
17 It was what he said, what he said, did he call him back, did
18 he not call him back. But at the end of the day, if you
19 examine, putting all that aside, if you just look at what
20 they claim, what they admit to be the modification, it's the
21 August 23rd and August 25th e-mails. They say it is 100
22 percent reflective of what they discussed and 100 percent
23 incorporated with what they agreed; and if they didn't talk
24 about it, they didn't change it.

25 If that's the case, and it may be a harsh rule, but
26 it's a rule, and if the case is that that is all that they

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2 discussed and, therefore, all they modified, the acceptable
3 license requirement was not satisfied and it was not changed
4 and there is no issue, because Mr. Danzer told us that the
5 PVH agreement did not satisfy the acceptable license
6 requirement. That's not in dispute and he told us that.

7 Now, he may want to tell you why he didn't want to
8 put certain things in. Again, we have a whole document
9 signed and unsigned. In addition, there was no change to
10 the tail period. There wasn't even an expiration date in
11 his August 23rd, August 25th. So the tail period, as Mr.
12 Danzer told us, was not changed, modified or discussed. It
13 remained in effect, and we know because there is no fact in
14 dispute that the agreement was signed on November 29th, two
15 months after the tail period, another requirement of the
16 modified contract that was not satisfied.

17 Now, I want to go to beginning on page 806, and it
18 goes to 810, but I will be able to read it quickly and I
19 promise to do my best with question and answer.

20 "QUESTION: Was your August 23rd e-mail to Mr. Ross
21 100 percent reflective of what he agreed to just a few days
22 earlier?"

23 THE COURT: I'm sorry, forgive me, what was the
24 page number you had?

25 MR. GOLDMAN: Page 806, beginning line 23.

26 "Was your August 23 e-mail to Mr. Ross 100 percent

1 Proceedings

2 reflective of what he agreed to just a few days earlier?

3 "Answer: Yes, it was.

4 "QUESTION: You are 100 percent certain?

5 "Answer: I'm a hundred percent certain. I would
6 not have sent it if it is not a hundred percent reflective.
7 I never sent anything out that wasn't a hundred percent
8 reflective.

9 "QUESTION: And the August 23rd e-mail accurately
10 reflects your understanding of what arrangements you came up
11 with with Mr. Ross as a representative of Mr. Trump, right?

12 "ANSWER: Correct.

13 "QUESTION: So let's go now to the August 23rd
14 e-mail." And then there's some colloquy and there's a
15 question. "Since it may be a while since you last saw it,
16 why don't you take a look at it.

17 "ANSWER: I remember it very well. I remember that
18 whole conversation, that whole day very well.

19 "QUESTION: And that accurately reflects your whole
20 conversation, correct?

21 "ANSWER: It does."

22 Now going to page 808, beginning at line 17 to 21.

23 "QUESTION: Is there any mention in your August
24 23rd e-mail about the signed contracts, either the
25 memorandum of understanding or the extension; is there any
26 reference, whatsoever?

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2 "ANSWER: No.

3 "QUESTION: Is there any mention of the words PVH,
4 that misunderstanding was specific to the PVH transaction?

5 "ANSWER: No.

6 "QUESTION: In fact, your August 23rd e-mail is not
7 specific to PVH; isn't that correct?

8 "ANSWER: Correct.

9 "QUESTION: Is there any reference that your August
10 23, 2004 e-mail was specific to apparel?

11 "ANSWER: No.

12 "QUESTION: And, in fact, the signed contracts in
13 effect were specific to apparel, correct?

14 "ANSWER: Correct.

15 "QUESTION: And is there any mention in your August
16 23rd e-mail of a termination date?

17 "ANSWER: No.

18 "QUESTION: Is there any mention in your August
19 23rd e-mail of the tail period being extended?

20 "ANSWER: No.

21 "QUESTION: Is there any mention in your August
22 23rd e-mail which 100 percent accurately reflects what you
23 and Mr. Ross spoke about of an extension or elimination of a
24 tail period?25 "ANSWER: We didn't discuss that, so the answer is
26 no.

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2 "THE COURT: The answer is no.

3 "QUESTION: Then it's fair to say as well there is
4 no mention of the modifying or changing the acceptable
5 license requirement that was in existence under the signed
6 contract, correct?

7 "ANSWER: Correct.

8 "QUESTION: Because you didn't discuss that either,
9 did you?

10 "ANSWER: No.

11 "QUESTION: And you didn't discuss either changing
12 the significant negotiations of the material terms as well,
13 correct?

14 "ANSWER: Correct.

15 "QUESTION: Because that was already in the
16 existing contract, correct?

17 "ANSWER: Correct.

18 "QUESTION: You use a word, and I call it a defined
19 word because it's initial capped. It says on the second
20 paragraph, second sentence, it says, "evolves into an
21 initial cap licensing deal," correct?

22 "ANSWER: Correct.

23 "QUESTION: That term licensing deal, that doesn't
24 appear anywhere in the signed contract, does it?

25 "ANSWER: Not that I remember, no."

26 "Then when you couple that with page 18, lines 24

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2 to 26, the August 26th meeting was pursuant to the signed
3 contract, correct".

4 "ANSWER: Correct."

5 Going to page 819 to 820, line 25 to 26 and line 2
6 to six.

7 "QUESTION: Okay. So again, there had to be a
8 licensing deal entered into in order to trigger a fee by
9 September 30th, correct?

10 "ANSWER: Based upon -- based on the original
11 contract, yes.

12 "QUESTION: And the meeting on August 26th was
13 based upon the original contract, correct?

14 "ANSWER: Correct."

15 And if you go on the same page 820, lines 23 to 26,
16 and we could certainly --

17 "QUESTION: And we could certainly agree, can we
18 not, that the PVH license doesn't satisfy the acceptable
19 license requirement; can you and I agree to that?

20 "ANSWER: Under the signed agreement, yes."

21 Your Honor, whatever you may have had presented to
22 you before in motion practice and in all our motions in
23 limine regarding what we call the payment documents and what
24 we objected to, what we didn't have were these admissions by
25 Plaintiff. These are not insignificant or immaterial
26 admissions. These go to the heart of the statute of frauds.

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2 It goes to the heart as to what was modified. It goes to
3 the heart that it shows that the signed contract and the
4 August e-mails together had everything that a contract was
5 to have. It had a percentage, it had a requirement as to
6 how to satisfy for ALM to earn a fee, and it had an
7 expiration date. No other terms were discussed.

8 As a matter of law, parole evidence does not permit
9 any change to that. Those part performance documents, what
10 we've called the payment, the documents in which Your Honor
11 ruled, those documents do not go to the creation of the
12 August 2004 e-mails, because we have admissions that clearly
13 show in August of 2004 the contract was modified in a
14 certain way and only in a certain way.

15 What those documents, the payment documents, go to
16 is that we were performing, we were engaging in conduct that
17 performed under that modification. It doesn't change what
18 was modified. What they try to argue when they move for
19 summary judgment is that we waived or are estopped from
20 claiming that it didn't satisfy the acceptable license, that
21 it wasn't done within the tail period; and all those things
22 that we were waived or estopped from doing that because of
23 the payment documents, because of the checks, because of the
24 invoices, because of the royalty statements.

25 If in fact that is the case, Your Honor ruled on
26 summary judgment in response to the issue of waiver and

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2 estoppel, which are defenses. Your Honor ruled at best
3 those documents are part performance and we were not
4 estopped nor waived from challenging them. Those documents
5 served to only be prejudicial. And as we've argued before,
6 the jury doesn't need to see that or have heard it or to
7 digest it or analyze it, because what they're being asked to
8 do is to determine whether or not the August e-mails
9 modified the signed contract, because that's what you said
10 the issue of fact was did they do that. And we now know,
11 based upon Plaintiff's admissions, that they did in certain
12 ways and in certain ways they didn't.

13 They are bound by their admissions as it relates to
14 how that modification occurred and the terms. They are not
15 permitted to explain away what's not in there. They are not
16 permitted to explain away what's in there, not when Mr.
17 Danzer told everybody under oath it's 100 percent reflective
18 of what we discussed; if I didn't discuss it, it's not in
19 there; if I discussed it, it would have been in there, and
20 that the meeting that took place and what occurred on August
21 26th was all pursuant to the original contract with his
22 modification of August 23rd and 25th.

23 If that's the case, we don't need the jury to make
24 a determination of fact as to the existence, because it is
25 now a legal issue. It is not an issue of fact anymore
26 regarding those August 2004 e-mails, in spite of Mr.

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2 Danzer's admissions, because it's no longer -- it's really
3 irrelevant whether or not Mr. Ross called Mr. Danzer, didn't
4 call Mr. Danzer; spoke to him, didn't speak to him. All the
5 things that were part of the mix in these dualing affidavits
6 that Your Honor had when Your Honor was deciding summary
7 judgment, if we just go on their admissions and under
8 McKinney's for a directed verdict, it's not only law that
9 the Court is empowered to have a directed verdict on, it's
10 also based upon those admissions.

11 And I submit, while I could understand, and there
12 are cases that say even if the Court agrees with me 100
13 percent, that at times some judges do permit the matter to
14 go to a jury to see whether or not the jury agrees, because
15 the judge always has the opportunity to do an NOV anyway;
16 and therefore, we have a record; and therefore, if it goes
17 up on appeal at least we don't all have to come back. Well,
18 I appreciate that concern.

19 When it's their admission that created a full and
20 complete contract because, Your Honor, it is either a full
21 and complete contract based upon Mr. Danzer's admissions or
22 it's not, it's not for the jury to determine whether or not
23 it's a full and complete contract. That's a legal issue,
24 because otherwise you're going to have to have charges on
25 parole evidence and those are the things that that's not for
26 them to decide.

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2 For all the sections that I have read to you from
3 Mr. Danzer and Mr. Hager had no probative information on
4 that issue; and whatever Mr. Trump said or didn't say,
5 whatever Mr. Ross said or didn't say, I'm relying upon
6 Mr. Danzer's admissions. Ms. Glosser on July 29th, when Mr.
7 Danzer met with Mr. Trump, Ms. Glosser wasn't even at the
8 company. On August -- on July 29th Ms. Glosser was not even
9 with the company. And when the alleged conversation with
10 Mr. Ross occurred, which was a telephone call and meeting in
11 the middle of August, she was on vacation. Ms. Glosser is
12 relevant to the paper documents. She is not relevant to the
13 admissions by Mr. Danzer.

14 And I honestly, Your Honor, I do not see how in
15 light of those admissions there can be any issue of fact
16 regarding the August 2004 modification as being a complete
17 document. And even if the Court somehow sees some issue of
18 fact, and I would be interested to see based upon
19 Mr. Danzer's admissions what those are, we're going to ask
20 the Court to eliminate, as we objected throughout, the
21 payment documents, because it does not go to whether or not
22 the August 2004 e-mails modified the signed contract in
23 light of Mr. Danzer's admissions.

24 Thank you, Your Honor.

25 THE COURT: Go ahead. Thank you very much.

26 Perfectly timed. I appreciate it. All right, so we'll have

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1
2 Mr. Itkowitz, you'll do your response when we come back at
3 2:15.

4 MR. GOLDMAN: Thank you.

5 (Whereupon, a lunch recess was taken.)

6 (Continued on next page.)
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2 AFTERNOON SESSION

3 THE COURT: All right. Mr. Goldman, before
4 we continue, I have a question for you. We all agree
5 that the checks are not to be used for partial
6 performance. We agree with it, it was said many times,
7 I agree with you.

8 However, the writings on the check with the
9 invoices in the back, can they not be used to satisfy
10 the statute of frauds?

11 MR. GOLDMAN: Good question, and I'll answer
12 that.

13 THE COURT: Well, thank you.

14 MR. GOLDMAN: Because you've raised it.

15 I'll put that aside for a second. When you
16 say satisfy the statute of frauds, that means there's
17 something that doesn't satisfy the statute of frauds.
18 Because --

19 THE COURT: No, I --

20 MR. GOLDMAN: But no --

21 THE COURT: Let me put it another way,
22 because I don't want to put it in a negative way. What
23 I want to say, isn't it possible that the checks could
24 be used to satisfy the writings requirement of the
25 statute of frauds?

26 MR. GOLDMAN: Again, that question also

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2 presumes that the August 2004 e-mails do not satisfy
3 the statute of frauds. What I was trying to present to
4 the Court that based upon the admonitions of the
5 plaintiff at yesterday's hearing, his admissions make
6 the August 2004 e-mails complete, a whole writing. If
7 the August 2004 e-mails, together with the signed
8 document are a whole writing, there's no need to supply
9 any missing terms. And when plaintiff says the
10 agreement is --

11 Withdrawn.

12 When plaintiff says that the August 2004
13 e-mails are 100 percent reflective of what our
14 agreement is, it contains all the terms we discussed to
15 modify the signed contract and but for the three things
16 that I discussed, the signed contract remains in effect
17 then you don't need those. And the cases --

18 THE COURT: I understood your argument.
19 You're basically saying that because the -- the
20 so-called modifications contained everything, we go
21 back to the licensing agreement itself, the original
22 agreement on the material terms. Since they were not
23 met you don't have a contract at all and throw out the
24 entire case. That's your argument. And let's say that
25 I don't agree that those are admissions, can the checks
26 themselves be used as a portion of the writing

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2 necessary -- the checks themselves can be used as a
3 portion of the writings necessary to satisfy the
4 statute of frauds. That's my question.

5 MR. GOLDMAN: I'll answer it in two parts.
6 Number one, to say that I'm shocked that you don't
7 think Mr. Danzer's admissions yesterday make a whole
8 document would be an understatement.

9 THE COURT: I don't care if you're shocked or
10 not.

11 MR. GOLDMAN: With respect to -- no. Do I
12 think those documents can be used to show that there's
13 a material term missing from the August 2004 unsigned
14 e-mail and the signed contracts? No, I do not. If
15 that is the point of the question. Because those
16 occurred more than a year later --

17 THE COURT: Yes, but that's explainable
18 because -- it's easily explainable because when you
19 enter into a licensing agreement you then have to go to
20 someplace in the world, we assume it's probably China
21 or India, to produce these wonderful dress shirts and
22 ties to get them on the market in order for them to be
23 sold so that royalties can be collected and then
24 invoices made, transferred to the Trump Organization,
25 who then sends it off to ALM, through Jeff Danzer, and
26 then they come back and they say, yes, here's your

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2 10 percent check.

3 My question to you once again is, forget the
4 partial performance issue. I agree with you
5 100 percent. Can the checks, the writings on the
6 checks with the invoices in the back and the checks
7 themselves, can they be used to satisfy the statute of
8 frauds?

9 MR. GOLDMAN: Short answer, no. And an
10 extended answer is the very same checks and the same
11 invoice references, and all of that was presented to
12 your Honor on each and every motion your Honor decided.
13 And when they presented those checks on the argument,
14 that we waived our right to say that we don't have to
15 perform because there was performance or conduct or
16 acquiescence, when they argued to you --

17 THE COURT: Actually you're wrong on that,
18 because I did consider the checks, they were part and
19 parcel of my findings that a writing had sufficiently
20 occurred, that we had to go to the next stage in terms
21 of discovery.

22 MR. GOLDMAN: I don't recall where that was
23 in the decision, but anyway, getting to the portion
24 where those checks were in -- presented to you, and you
25 said at best they were part performance and we're not
26 estopped from arguing it because -- and clearly there

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2 will be a record and there will be an appellate review.

3 Those admissions, we can agree to disagree,
4 we never need to go any further than the admissions
5 that is a whole document. And if the question is, when
6 you have the whole document, as a matter of law, can
7 any other document be used, as a matter of law, to put
8 in terms or explain away terms? As a matter of law the
9 answer is no. And the cases are legion that a full
10 complete document cannot be examined. But if you don't
11 think the admissions of Mr. Danzer make a full and
12 complete document, then you'll decide what your
13 Honor --

14 THE COURT: I'm not so sure, sir it's not a
15 question for the jury to decide. That's really the
16 problem you're facing. Had you gone more on the
17 statute of frauds issue, I'm not so sure even that's a
18 legal issue, I will have to decide.

19 MR. GOLDMAN: Your Honor, before you ask me a
20 question, there was just two other things I wanted to
21 raise that I thought about and it will take a few
22 minutes. I'm sure Mr. Itkowitz won't mind if I take a
23 few minutes, given this morning.

24 As to the fourth cause of action, your Honor,
25 which is a declaratory judgment action, that's for your
26 Honor to decide, that's the one that says that they are

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2 entitled to it for years and years in futura. That's
3 not for the jury to decide, number one.

4 Number two, the second cause of action which
5 is quantum meruit, there has been not one piece of
6 evidence as to what is ordinary and customary in the
7 field, as to what would be reasonable compensation for
8 the performance rendered. There was no expert
9 testimony, there was no direct testimony. That also is
10 a determination that your Honor has to make, not the
11 jury.

12 Lastly, again, just as to that fifth cause of
13 action, anticipating. That fifth cause of action, the
14 one thread that was left was going to be granted, but a
15 sur-reply affidavit of Mr. Danzer was submitted on the
16 motion for summary judgment, which you considered over
17 my objection, which said I had numerous conversations
18 with Mr. Ross where I asked him for prior licenses, and
19 you said based upon that, that remaining thread of the
20 fifth cause of action would remain.

21 Again, there is not one piece of paper, nor
22 was there any testimony by Mr. Danzer on that issue.
23 And that is an easy one to dismiss.

24 Thank you.

25 THE COURT: All right.

26 Before you start.

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2 (Pause.)

3 MR. GOLDMAN: Your Honor, to answer that
4 question again before he begins, if you do consider
5 those checks and those invoices, somebody has to ask
6 themselves if that's what we're going to use to tie it
7 in, so to speak, to satisfy the statute. Do those
8 checks and invoices give you any insight as a matter of
9 law as to what the term of the arrangement is? It
10 gives you none. And the only term, even if you were to
11 consider it as a matter of law, the only term that
12 you're left with is the term that expired in September.

13 THE COURT: Okay, Mr. Itkowitz.

14 MR. ITKOWITZ: Your Honor, I'm going to keep
15 my remarks very brief. Primarily I recall your
16 statements on directed verdicts after the evidence and
17 the practice and the prudent practice, certainly
18 allowing a question to go to the jury. But we're not
19 relying just on that by any means. Your Honor asked
20 for a memorandum of law on directed verdict. We put it
21 in. We have two briefs on that.

22 THE COURT: It hasn't been asked, the issue
23 of directed verdict, but rather as a judgment, as a
24 matter of law.

25 Go ahead. Just go to your argument, please.

26 MR. ITKOWITZ: I found it interesting --

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2 look, let me just say this: I think the Trial Exhibit
3 25, the letter to George Ross by Jeff Danzer, basically
4 met all the material terms of the contract. If you
5 look at it, it modified, in the language that's in
6 there, modified the language of the memorandum of
7 understanding.

8 Now, we know --

9 THE COURT: Let me get it if you're going to
10 be talking about it.

11 (Pause.)

12 THE COURT: Since you bring that up, you tell
13 me, what are the material terms of a contract? What
14 are the material terms that must be in a contract? You
15 can go to the statute of frauds to find that out, too.

16 MR. ITKOWITZ: Generally speaking?

17 THE COURT: Yes.

18 MR. ITKOWITZ: Offer and acceptance.

19 THE COURT: No, sir. What are the material
20 terms of a written contract?

21 MR. ITKOWITZ: Of this material contract?

22 THE COURT: The other question is doesn't a
23 contract modification have to meet the same terms -- it
24 has to meet the terms of the statute of frauds.

25 MR. ITKOWITZ: I think the unsigned document
26 in and of itself does not have to meet the terms of the

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2 statute of frauds. I think you have to look. I think
3 the cases, as we've cited in our memorandum of law
4 indicate that you look at the totality of
5 circumstances. There are many documents that the Court
6 can refer, to and there can be internal documents, and
7 there are internal documents which validate this
8 unsigned agreement.

9 In addition to the checks there's the Cathy
10 Glosser e-mail to George Ross which, by the way,
11 basically affirms everything that's in here. What
12 that -- that particular e-mail from Cathy Glosser to
13 George Ross, that September 7, 2005 e-mail basically
14 says, George, when you write the letter, when you write
15 the letter, make sure you don't include sportswear
16 because sportswear, if ALM knew about sportswear they
17 might think they are entitled to sportswear.

18 That in and of itself is an admission. Talk
19 about admissions, that's an admission by Cathy Glosser
20 to George Ross that they've had conversations about it
21 and that -- they are obligated to pay for neckwear,
22 they are obligated to pay for shirts.

23 THE COURT: Sir, at page 3 and 4 you start
24 off --

25 MR. ITKOWITZ: Excuse me?

26 THE COURT: Page 3 and 4 of your memorandum
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2 of law you go into A, through on page five Q, all
3 right? Of all the different writings that together
4 constitute the elements, when considered together meet
5 the statute of frauds. By the statute of frauds under
6 general obligation law 5.701 provides, in pertinent
7 part, that every agreement, promise or undertaking
8 constituting a contract to pay compensation for service
9 rendered in negotiating a business opportunity, which
10 is this particular case, is void unless it or some note
11 or memoranda thereof be in writing and subscribed by
12 the party to be charged therewith or by his lawful
13 agent.

14 Now, we have -- then it goes on to say: An
15 oral modification of a written agreement must also
16 comply with the statute of frauds.

17 That's a case Intercontinental Planning LTD
18 versus Daystrom Incorporated, 24 N.Y. 2d 372 at 380, a
19 1969 case.

20 The point is, sir, that's the statute that we
21 have to meet.

22 MR. ITKOWITZ: I understand that.

23 THE COURT: And my statement -- my asking of
24 you is where is -- where is the memoranda that is in
25 writing and subscribed by the party against whom it's
26 going to be charged? Where is it?

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2 MR. ITKOWITZ: Well, an e-mail by Cathy
3 Glosser, who is an agent of Mr. Trump --

4 THE COURT: It's not -- no, wait a second.
5 You cannot -- there is really no way to say that an
6 e-mail is a writing. Okay? An e-mail is not a
7 writing. Certainly an e-mail from Cathy Glosser to
8 Ross saying, gee, be careful, you don't put in
9 sportswear is not a writing, that is subscribed by the
10 party against whom it must be -- against whom it must
11 be subscribed.

12 MR. ITKOWITZ: Your Honor, I would submit to
13 the Court most respectfully that there are many kinds
14 of writings that can satisfy the statute of frauds,
15 including checks, including invoices, including
16 e-mails.

17 THE COURT: Let's take the checks. We all
18 agree that the checks were produced or the invoice was
19 produced by Mr. Danzer. But in the invoice that's
20 produced by Mr. Danzer he takes what has been sent to
21 him and he puts down 10 percent ALM commission. And
22 then a check is made and Mr. Trump signs it. But the
23 problem I have with that is that it doesn't give me the
24 terms of the agreement. It doesn't anywhere say that
25 the agreement is going to last for two months, for ten
26 years, forevermore upon eternity and eternity. It

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2 didn't say anything like that.

3 MR. ITKOWITZ: You want me to --

4 THE COURT: Not that writing. That writing
5 does have no specifics like that. And there is nothing
6 else in the entire record that we have before us,
7 despite all the paper that we have, that has something
8 subscribed by the person against whom it's going to be
9 held. That is the statute of frauds.

10 Even in the e-mails --

11 MR. ITKOWITZ: By the way, parenthetically I
12 just noticed that one of the jurors left a notebook
13 here.

14 THE COURT: No, that's parenthetically he
15 left the notebook here but we haven't picked it up and
16 put it away. Don't worry that the jurors left them,
17 they are supposed to leave them. They are always
18 picked up and put in the safety deposit box.

19 That's an aside, it's a nice aside because
20 you tried to distract me.

21 Even if I consider that the writings were
22 something that could be considered in cobbling together
23 the writing, even if I consider that, which I don't
24 believe you can, because I don't think that an e-mail
25 is something that you can consider to be a writing --

26 MR. ITKOWITZ: Your Honor, on that point --

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2 THE COURT: -- because the writing is not
3 something that's signed.

4 MR. ITKOWITZ: Your Honor, just on that
5 point, if I may --

6 THE COURT: No.

7 (Pause.)

8 THE COURT: Nothing in any of the e-mails
9 that we're talking about that we read in detail from
10 Miss Glosser, every one of them seems to me that
11 nothing in those e-mails contain an agreement to modify
12 the terms, and the new terms that were being proposed.
13 They weren't there. They are just not in those
14 e-mails.

15 MR. ITKOWITZ: Let me just, if I may respond
16 to, your Honor?

17 First of all, e-mails sent by a party under
18 which the sending party's name is typed should be
19 considered signed writings. That's Newmark and Company
20 v --

21 THE COURT: You have a case? Give me the
22 case.

23 MR. ITKOWITZ: It's 2615 -- I'll give you the
24 cite: 80AD Third 476. That's the First Department.

25 THE COURT: Gary, could I have those cases,
26 please?

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2 (Pause.)

3 THE COURT: But the problem that you have is
4 not that you can't consider e-mails, the problem is you
5 don't have an e-mail that has all the terms and
6 material terms that have to be modified.

7 MR. ITKOWITZ: I think the case law is clear
8 that under -- you can satisfy the statute of frauds by
9 looking at various different writings to verify the
10 agreement. And so different pieces of writing might
11 verify different aspects --

12 THE COURT: Excuse me. Was this appealed?

13 MR. ITKOWITZ: This is First Department.
14 I -- I assume -- my associate just gave it to me, it's
15 cited in our memorandum. Our practice is that we
16 verify every cite that we give in our memorandum of law
17 as to being current law.

18 It's not in our memorandum, I'm just advised.

19 THE COURT: What?

20 MR. ITKOWITZ: I apologize.

21 MR. GOLDMAN: It's not in the memorandum.

22 THE COURT: Oh, okay.

23 MR. ITKOWITZ: This was a case that we
24 brought for the charging conference.

25 (Pause.)

26 (Continued on next page.)

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2 MR. ITKOWITZ: Your Honor, a couple of other things
3 I want to point out. Look, we can literally -- there are
4 many different writings that support this agreement. The
5 agreement which is at issue, Trial Exhibit 25, the
6 articulation by Mr. Danzer that Mr. Goldman was so excited
7 about is, I mean, in its express language modifies the
8 memorandum of understanding and the extension. It says, "As
9 we've agreed, ALM's fee for any introduction" --

10 THE COURT: Where are you reading from?

11 MR. ITKOWITZ: Trial Exhibit 25. If you want to,
12 we have another copy.

13 THE COURT: This is just answer to Mr. Ross.

14 MR. ITKOWITZ: Yes, this is an e-mail.

15 THE COURT: Where does it expressly modify the
16 actual term?

17 MR. ITKOWITZ: Excuse me?

18 THE COURT: Where in the language here?

19 MR. ITKOWITZ: Your Honor, if you permit me.

20 THE COURT: I can read it too. Just point to me
21 where it modifies the original agreement.

22 MR. ITKOWITZ: It modifies the original agreement
23 because it substitutes for any acceptable license to be
24 any -- for any introduction of a potential licensee brought
25 to Donald Trump which evolves into a licensing deal, okay,
26 and any subsequent renewal thereof shall be ten percent

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1 royalties.

2
3 THE COURT: Mr. Itkowitz, it is primary law, law
4 101, what we learn the first day that we arrive in law
5 school, that something that is offered by a proponent that
6 would benefit from the writing is certainly not a writing
7 signed by a person against whom you want to charge. So if
8 you had Mr. Ross saying, okay, I agree to that, then you
9 could take these terms; but nowhere does Mr. Ross ever, ever
10 respond to this memorandum. Right? Right?

11 MR. ITKOWITZ: He responded with acquiescence.

12 THE COURT: But where? It has to be in writing,
13 sir.

14 MR. ITKOWITZ: By directing Cathy Glosser to pay
15 ALM, and that was --

16 THE COURT: That, sir, is, first place -- one
17 thing, in one of the things, okay, by Cathy Glosser, but you
18 see that's not a modification of the agreement. The fact
19 that we have checks and have okay to pay is different from
20 modifying the terms of the memorandum of agreement or the
21 extension thereto. And there's nowhere in the entire case
22 that you have one writing that modifies the memorandum of
23 agreement or modifies the extension to the memorandum
24 agreement.

25 MR. ITKOWITZ: Well, we do have an admission from
26 Mr. Ross, for instance, on one of the points that Mr.

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2 Goldman was talking about so excitable today.

3 THE COURT: What did you just say? Don't make
4 comments like that, please. We're professional.

5 MR. ITKOWITZ: I'm sorry, I apologize.

6 Mr. Ross specifically in his testimony waived the
7 significant negotiation provision. He said --

8 THE COURT: Wait, wait, wait. What are you reading
9 from now; what page?

10 MR. ITKOWITZ: It's page 365 of the transcript.

11 THE COURT: So what date did he tell you that,
12 April 11th?

13 MR. GOLDMAN: Yes, Your Honor.

14 THE COURT: 365. Okay.

15 MR. ITKOWITZ: Line 16.

16 THE COURT: This is your question?

17 MR. ITKOWITZ: Yes.

18 THE COURT: "Question: And it was your
19 understanding that having brought PVH in six days before
20 that, had ALM ultimately satisfied the signed writings, the
21 requirements of the signed writings over -- and over the
22 next 30 days" -- I'm sorry, "over the next 90 days, through
23 September, had there been a deal signed by the end of
24 September they, ALM, would have gotten a fee."

25 And the answer is yes, but no one is arguing, sir.
26 You are not arguing that the agreement and the extension of

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2 the agreement are not valid contracts. No one is saying
3 that. We're saying that subsequent to that there came a
4 time that indeed the agreement ended and there was no
5 license in that time.

6 MR. ITKOWITZ: I'm not agreeing that the agreement
7 ended. You may hold that, but I don't think that that would
8 be correct.

9 THE COURT: You're saying it was modified?

10 MR. ITKOWITZ: Correct.

11 THE COURT: It was modified by Jeff Danzer setting
12 the contract terms. Was that one of the modifications?

13 MR. ITKOWITZ: Yes, it's a modification. Actually,
14 it's two things, if you really want to know. It's two
15 things. There's really three things going on, basically.
16 But the first two things are Jeff Danzer's August 25th
17 e-mail to Mr. Ross modifies the memorandum of understanding
18 and the extension, A. So we consider that a modification,
19 and we would certainly argue that it's a modification, and
20 we think the proof --

21 THE COURT: I say to you it can't be considered a
22 modification, because it's not signed by the party to be
23 charged.

24 MR. ITKOWITZ: Well, the other writings show that
25 it was.

26 THE COURT: Nowhere, sir. The only writing that

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2 you have, the only writing that you have are the checks, and
3 there -- and furthermore, does that e-mail modify the tail
4 period; is the language in here?

5 MR. ITKOWITZ: Yes, it does. It does.

6 THE COURT: Where? Where is that language which is
7 not signed by a party to be --

8 MR. ITKOWITZ: It says, "As agreed, ALM's fee for
9 any introduction of a potential licensee partner to Donald
10 Trump or any entity associated with Donald Trump which
11 evolves into a licensing deal." The evolving into a
12 licensing deal, that modifies the September 30th term of the
13 original memorandum of understanding and extension.

14 THE COURT: Sir, first place, I don't know if I
15 agree with that, but that's neither here nor there. This is
16 a document that Jeff Danzer and then your client, ALM, all
17 right, sent for -- sent. Not to be the fact that he sign
18 it, Jeff Danzer, does not mean that anyone in the opposite
19 camp, Mr. Ross, Cathy Glosser, Donald Trump signed it in
20 return.

21 If you had an e-mail from any one of them saying
22 Jeff, Dear Jeff, I agree to everything you say, signed -- if
23 it were true -- signed Donald Trump, then you have a
24 writing.

25 MR. ITKOWITZ: Let me cite a most eminent jurist,
26 who issued a decision on November 12, 2009 in connection

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2 with a motion to dismiss in this case. You went through --

3 THE COURT: No, no, no. Wait a second. Wait a
4 second. What I did in the motion to dismiss has an entirely
5 different standard; and indeed, I did say that you could
6 possibly, you know -- at that point, we had just the
7 beginning. I didn't dismiss your case outright, and I did
8 say that the checks could be used as a potential mechanism
9 of proving that it met the statute of frauds.

10 MR. ITKOWITZ: And nothing is changed.

11 THE COURT: But, sir, yes, it has. Yes, indeed it
12 has. Because if you're saying to this Court that the
13 invoice that was attached to the signed checks by Donald
14 Trump, because he discovers looking at the invoices, except
15 one, and that's the time that he stopped, but if indeed the
16 invoice was made part of that writing, that invoice had to
17 have all the material terms.

18 And the invoice, apart from saying 10 percent, does
19 not have the material terms. It doesn't have the length of
20 the contract, it does not have -- it doesn't have the rule
21 it should be charged against, it doesn't have anything. It
22 does not have the way in the statute of frauds you have to
23 have the very material terms; which, by the way, can be done
24 by a combination of signed and unsigned documents, but you
25 have to have something against whom it's being charged.

26 So the fact that you have not a single e-mail, not

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2 a single document, not a single letter, not a single sign of
3 anything makes it impossible that it meets the statute of
4 frauds.

5 MR. ITKOWITZ: I would disagree, Your Honor.

6 THE COURT: It says here --

7 MR. ITKOWITZ: Respectfully.

8 THE COURT: Let's take this. "If a writing fails
9 to satisfy the statute of frauds where it does not indicate
10 material terms, including inter alia the contract duration,
11 rate of compensation" -- that you got, the 10 percent -- "or
12 any of the Defendant's promises given in exchange for
13 Plaintiff's services." And that is the Signature of
14 Brokerage Incorporated versus Group Health Incorporated, 5AD
15 Third 96, page 197 First Department, 2004.

16 MR. ITKOWITZ: Your Honor, I would submit we have a
17 number of signed documents against the party to be charged.

18 THE COURT: Apart from the 11 checks?

19 MR. ITKOWITZ: Yes. We have the memo of
20 understanding. We have got the extension agreement.

21 THE COURT: But the extension agreement and the
22 memorandum of understanding is, of course, if you go with
23 what Mr. Goldman is arguing, is that since that was only an
24 agreement, that was the only agreement, all right, so then
25 since it wasn't fulfilled in a timely fashion, he says give
26 me a directed verdict on everything, because the contract

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1
2 was not fulfilled.

3 MR. ITKOWITZ: Mr. Goldman and I disagree, and I
4 guess that's certainly for Your Honor to decide. And if it
5 goes to a jury, it will be for the jury to decide fact
6 questions.

7 The bottom line here is, Your Honor, this is an
8 overwhelming case, you know. The case law states that the
9 statute of frauds is not supposed to be a sword. It's
10 supposed to be a shield, okay. And in terms of what we have
11 here, they're trying to use it as a sword. They're trying
12 to say no matter what ALM did, no matter how much ALM made
13 from Mr. Trump, they didn't have this one little signed
14 document, boom, stabbing, sword. Okay.

15 It's not supposed to be that. The statute of
16 frauds -- the purpose of the statute of frauds is to make
17 sure -- is to prevent fraud. That's why they call it the
18 statute of frauds. And in this situation where you have the
19 collection of written documents that are before this Court,
20 and that should go before this jury, when you have -- when
21 you look at each and every one of those documents, nobody
22 could say this could possibly be fraud.

23 THE COURT: Of course you can. I can get up in the
24 morning and sit down and begin writing at on my typewriter,
25 my computer, and send it to whoever I want to send. The
26 fact that everything that you have, every document is done

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2 by Jeff Danzer and sent to Cathy Glosser, Cathy Glosser
3 comes back and says, you know, give me a signed document.
4 That's what Cathy Glosser says.

5 MR. ITKOWITZ: Right.

6 THE COURT: George Ross says, and he says this in
7 his testimony, he doesn't write anything, by the way, he
8 says --

9 MR. ITKOWITZ: Of course.

10 THE COURT: -- okay, 10 percent, give him 10
11 percent, that will be a fair compensation. But he doesn't,
12 of course, he doesn't say how long either. So instead of
13 giving 10 percent of the first check, which is, I think, is
14 what Mr. Ross expected --

15 MR. ITKOWITZ: That's what he stated he expected,
16 if you believe that.

17 THE COURT: He got in the end 11 checks for a total
18 of \$328,000, which is considered, it was supposed to be a
19 finder's fee, it's a finder's fee.

20 MR. ITKOWITZ: Well, if the issue for the Court and
21 for the jury is the --

22 THE COURT: There's another thing. Where is your
23 evidence and reasonable value of services rendered? That's
24 on a quantum meruit theory. One of the elements of quantum
25 meruit is the value of the reasonable services of services
26 performed. Where is it?

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2 MR. ITKOWITZ: I would say that Mr. Danzer
3 satisfied that requirement.

4 THE COURT: Where?

5 MR. ITKOWITZ: He testified, he said that he was
6 experienced in licensing and that people in licensing, it's
7 a standard clause in licensing agreements that a finder or a
8 person who procures a license gets -- would get a commission
9 for the entire period of time that the license exists or/and
10 is renewed. So he testified to that as what's standard in
11 the industry, and I think that industry -- and I think that
12 satisfies that particular standard to keep that claim, that
13 cause of action.

14 THE COURT: If there's a writing and if it had been
15 subscribed against the person against whom it was made.

16 MR. ITKOWITZ: Well, in terms of the renewal, in
17 terms of the renewal fee of the agreement that's clear,
18 that's set forth in the memorandum of understanding. So if
19 the -- if, as I allege, Exhibit 55, the letter modifies
20 the -- 25 modifies the original agreement, the renewal
21 provision is in the memorandum of understanding.

22 So Mr. Trump, as they came up on the stand, Mr.
23 Trump and Mr. Ross, they both got up there and said we can't
24 go on forever, that's unthinkable. Yet it's in the
25 memorandum of understanding and --

26 THE COURT: If you met the terms. If you met the

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2 terms of the memorandum of understanding. If you met the
3 terms of the memorandum of understanding, you would have a
4 very good case coming here and say I'm entitled to 22.5
5 percent ad infinitum. All right?

6 MR. ITKOWITZ: But the testimony, if I may, the
7 testimony in the case is that both sides knew in June that
8 the memorandum of understanding requirements could not be
9 met. And both sides knew that there would have to be a
10 renegotiation or modification of the agreement between ALM
11 and Mr. Trump. They both knew.

12 THE COURT: All right. However, one side said that
13 the other side did not agree. All right. So I mean, now
14 you have I am proposing modifications, but the modifications
15 were made by one side to the other side and never, never
16 responded to. Never in the letters that you have Jeff
17 Danzer saying, you know, there's my signature. You don't
18 have either Ross's or Trump's signature on the other side.
19 So you don't have a meeting of the minds. You don't have an
20 agreement.

21 MR. ITKOWITZ: Well, I would disagree with Your
22 Honor, because if you look just at the Cathy Glosser e-mail
23 to Mr. Ross, that memorializes the fact that they -- that
24 they're not even disagreeing among themselves that my client
25 is entitled -- there not disagreeing among themselves.

26 THE COURT: Wait one second. That particular

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2 e-mail does memorialize that Cathy Glosser thought that ALM
3 expected to be paid the fee, not that Trump through Cathy
4 Glosser agreed that they should be paid a fee.

5 MR. ITKOWITZ: No, I disagree with Your Honor.

6 THE COURT: Well, show me the language.

7 MR. ITKOWITZ: Okay. Your Honor, do you have
8 Exhibit 122 in front of you?

9 THE COURT: I'll find it. Your additions didn't
10 include it. Cathy Glosser to Melissa Nicchitta, that's 122.

11 MR. ITKOWITZ: No, no. Look down, it's Cathy
12 Glosser, September 7th, right?

13 THE COURT: To George Ross, okay. That's September
14 7, 2005.

15 MR. ITKOWITZ: If I may, Your Honor, this
16 context -- it's just context. The context is an exchange of
17 e-mails between Jeff and Cathy Glosser leading up to this.
18 And the exchange is Cathy Glosser saying can you send me a
19 one pager, and Danzer saying can you do it. And she says --
20 then she writes back and says, yes, I'll have George do it.
21 Then she's directing George as to what needs to go in here.

22 Now, this is a seminal e-mail, because in terms of
23 an admission and an acknowledgment of the deal if -- let's
24 just be wild and crazy for a second, let's just assume that
25 for some reason this was all made up by Jeff Danzer, all
26 made up, okay, and he's writing an e-mail to Cathy Glosser,

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2 why is Cathy Glosser saying send me a one page letter, then
3 Jeff says you send me the one pager, and now Cathy Glosser
4 says George is going to write it up. And then she writes to
5 George, and what does she tell George? Does she tell
6 George, George, we never made a deal, send this guy packing,
7 what are we doing. She had no --

8 THE COURT: Wait a second, sir. You have once
9 again Cathy Glosser, through Ross, okay, George, I received
10 yet another e-mail from Jeff Danzer regarding outstanding
11 payment, and then I let him know that you are drafting a
12 letter and you -- and we will get it to him as soon as we
13 can. I know we briefly discussed this a while back, that
14 ALM may expect that they should benefit from the sportswear
15 deal.

16 Now look at that language, "may expect that they
17 should benefit from the sportswear deal." I don't know that
18 he even knows that we did a sportswear deal, but we should
19 probably specify in the letter that they get a percentage of
20 dress shirts and neckwear.

21 MR. ITKOWITZ: That's a key admission what she is
22 saying there.

23 THE COURT: But sir, but sir, but sir, all right.
24 Ross never sent out the letter. There's no --

25 MR. ITKOWITZ: What he did is better. He said get
26 them the check. That's what he said.

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2 THE COURT: He said, okay, pay him. Pay them is
3 not the same thing as a writing.

4 MR. ITKOWITZ: You've got to look at the context,
5 Judge. The context is referring back -- it all goes back to
6 the August 25th letter. It all goes back to the August 25th
7 letter. And they said, okay, let's have something signed,
8 okay, back and forth. And then she's not saying no deal.
9 She's saying we owe him for the neckwear and the dress ties.

10 THE COURT: Sir, even on that, on 122 that you want
11 me to consider so much, doesn't have the material terms of a
12 contract.

13 MR. ITKOWITZ: The material terms are in Trial
14 Exhibit 25, which is what this is referencing to. This is
15 ultimately referencing that.

16 THE COURT: I don't agree with that.

17 MR. ITKOWITZ: Well, you have to go back. Let's
18 look at the other e-mails.

19 THE COURT: That is totally wrong, because your
20 number 25 that you say is a contract, which it isn't,
21 because it's Jeff Danzer suggesting things, your 25 is done
22 on August 23, 2004 to George. Again, we don't know -- to
23 George, it's self serving, I'm happy for people to come to
24 terms and get the deal. That line is used all the time, as
25 we agreed. Production --

26 MR. ITKOWITZ: Hold on.

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2 MR. GOLDMAN: I believe on there, Your Honor, he
3 asks for him to sign and he doesn't sign.

4 THE COURT: He doesn't ask.

5 MR. GOLDMAN: On August 25th he does.

6 THE COURT: I don't think so.

7 MR. GOLDMAN: The August 25 asked him to sign.

8 THE COURT: I'm on 23.

9 MR. GOLDMAN: I'm sorry.

10 THE COURT: Twenty-five does ask him to sign.
11 Please sign it and fax it back to me before our meeting
12 tomorrow.

13 MR. ITKOWITZ: We're talking about '04.

14 THE COURT: I'm talking August 25.

15 MR. ITKOWITZ: But '04, not '05.

16 THE COURT: This is '06.

17 MR. GOLDMAN: No, it's '04. Everybody's talking
18 about the same thing. It's August 25, 2000 --

19 MR. ITKOWITZ: In August of '05, when the first
20 royalty check comes in, there's a series of correspondence
21 between Cathy Glosser and Jeff Danzer.

22 THE COURT: All right, go ahead. Continue on.
23 Just one second. I really have to end this no later than
24 20, 25 after 3:00.

25 MR. ITKOWITZ: Twenty-five after what?

26 THE COURT: Three. Whatever you want to say, go

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1
2 ahead and say.

3 MR. ITKOWITZ: Well, basically what I want to say,
4 I want to point out a couple of other things to Your Honor.
5 First of all, in your decision on the motion for summary
6 judgment you ruled -- you basically stated what the triable
7 issue was that was going to be decided in this case. And
8 frankly, I thought you very astutely --

9 THE COURT: Yes, but one of the problems that I
10 had, what really was a problem, is that Trump never moved.
11 And that summary judgment motion for a ruling on the statute
12 of frauds.

13 MR. ITKOWITZ: That's their problem.

14 THE COURT: That may be so, but that's the reason I
15 did not rule on it, because it was not asked for. So
16 therefore, I was put in the position of having not to rule
17 on the statute of frauds. Had it been presented to me at
18 that time, I may very well have found that there wasn't a
19 meeting on the statute of frauds, but it wasn't, so I did
20 not rule on it.

21 MR. ITKOWITZ: Maybe you would have found a triable
22 issue, which is what you ultimately said.

23 THE COURT: It was not on the statute of frauds
24 issue.

25 MR. ITKOWITZ: I understand that.

26 THE COURT: It was not on the statute of frauds

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2 issue. That's what I'm faced with now.

3 MR. ITKOWITZ: I understand that. Now, you ruled
4 that the material issues of fact that exist are whether
5 Trump accepted the modification, and I think that's clearly
6 been shown; and whether the modification agreement overrides
7 acceptable license and significant negotiation, that
8 certainly we have enough to go to the jury on that. Those
9 are two very triable issues and it really should be for the
10 jury to decide.

11 Now, let me very briefly state two other things.
12 Number one, even if this agreement -- even if this letter
13 from Mr. Danzer was not referencing, it was not a
14 modification, I'd still think, based upon the evidence of
15 this case and the Appellate Division, and the Appellate case
16 law that exists on statute of frauds, that could
17 independently exist as a new separate agreement.

18 That's my position. I just want to state it for
19 the record.

20 THE COURT: Where is the signature, sir?

21 MR. ITKOWITZ: The signature would be, again, the
22 checks and e-mails.

23 THE COURT: That we all agree is about, you know,
24 that was a proposal made. What you're talking about was in
25 2004?

26 MR. ITKOWITZ: Yes.

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2 THE COURT: And we're talking about the checks
3 coming in after the invoices are sent to him?

4 MR. ITKOWITZ: 2005.

5 THE COURT: 2005, right. And that's your
6 signature, your signature on the modification of the
7 contract, that's what you're telling me?

8 MR. ITKOWITZ: I'm telling you -- I'm telling you,
9 in my view, it's on the law. That's not as strong as you
10 being on the law, but it's on the law based on cases that
11 I've seen, okay. That says that an unsigned document like
12 this followed by the exchanges of e-mails where is the
13 check, oh, we got to have a writing, you're going to write
14 it, I'm going to write it. Cathy Glosser says we have the
15 handwritten notation. George says pay. Then we have a
16 series of 12 checks, 11 checks over three years. Yeah, I
17 think that satisfies it as a separate agreement.

18 But then we go beyond that, which is also which is
19 touched on in your -- you know what, I wasn't happy when I
20 got your decision saying you have to go to trial, I would
21 have much preferred summary judgment than to go through all
22 this work, but I respected your decision. I thought it was
23 very well reasoned. And one of the things that you pointed
24 out in your decision was the issue of acquiescence. And the
25 issue of acquiescence and admission of the deal in and of
26 itself, as we've cited in our memorandum of law, takes this

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2 case out of statute of frauds. Statute of frauds does not
3 exist when you have an admitted contract, when you have an
4 admitted agreement. And what we have here is an admitted
5 agreement, and we've cited cases that are in our memorandum
6 of law. That, Your Honor, I have to throw myself before
7 you, you tell us what we're doing. Are we picking a jury
8 tomorrow or are you dismissing the case? Because if we are
9 going before a jury tomorrow, we have a lot to do.

10 MR. GOLDMAN: I'll just be very brief, two minutes.
11 As to the testimony, Mr. Danzer, all Mr. Danzer testified to
12 on quantum meruit was that it's standard in the industry
13 that in a situation like that that you would have renewals
14 that would continue. He never was asked, nor did he ever
15 testify, that if there was no contract, which is what
16 quantum meruit requires, what is the reasonable and
17 customary practice for compensating somebody for basically
18 what Mr. Danzer said was nothing more than a finder's fee.

19 You asked counsel very early on what were the
20 material terms that you can find in the writing with the
21 August 23rd and August 25th e-mail. There was nothing in
22 either of those e-mails that indicates the term. The only
23 term is in the signed writing. You asked what about the
24 acceptable license. The only term that is in the signed
25 writing. In fact, as to significant negotiations, they have
26 pled that that is, in fact, a requirement. So they

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2 choose -- although the August 23rd and 25th e-mails don't
3 mention significant negotiations, they plead in their papers
4 that that is a requirement that needs to be satisfied under
5 the modification, yet it's the same silence that you see in
6 the August 23rd and 25th e-mails as to the acceptable
7 license.

8 Now, we all worked hard, but if it doesn't satisfy
9 the statute of frauds, the jury will be very happy to go
10 home, as I would be.

11 (Continued on next page.)

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2 THE COURT: All right, let's retire. I'll be
3 back shortly.

4 What about the fifth cause of action,
5 Mr. Itkowitz, are you dropping it?

6 MR. ITKOWITZ: The fifth cause of action I'm
7 dropping.

8 THE COURT: What about the fourth?
9 Mr. Itkowitz, are you requesting if I so find that the
10 quantum meruit issue go to the jury?

11 MR. ITKOWITZ: Your Honor, I think that's --
12 I've always been taught that equitable relief is for
13 the Court.

14 THE COURT: We have found in our research
15 actually there are two cases, I think one from the
16 First Department that says that quantum meruit can go
17 to the jury.

18 MR. GOLDMAN: Your Honor, it can, and I found
19 the same cases your Honor did, but if you look at --
20 and we put this in our filings with your Honor, if you
21 look at his note of issue, he did not ask for a jury
22 trial on that issue.

23 THE COURT: On the other hand, sir, I
24 certainly don't want to do a bench trial after so much
25 time --

26 MR. GOLDMAN: I don't think you need any more
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2 of a bench trial, you would decide quantum meruit much
3 better than the jury. They've heard nothing, you've
4 heard nothing, they would be spinning a wheel.

5 MR. ITKOWITZ: I think the jury can hear that
6 then, it's up to you.

7 THE COURT: And you think I can. Okay, good.
8 Let me think about this.

9 MR. GOLDMAN: Thank you, your Honor.

10 MR. ITKOWITZ: Your Honor, as they say in
11 fifth grade may I go outside?

12 THE COURT: We're going upstairs. Come back
13 in about ten, 15 minutes.

14 (Recess.)

15 THE COURT: Everybody come back, I have one
16 last question.

17 Mr. Goldman, I didn't mention in your request
18 you're requesting a counterclaim. The counterclaim
19 that you have put forth is on the modification and on
20 the ex agreement and the extension of the agreement.

21 Are you still continuing the counterclaim?

22 MR. GOLDMAN: I think I'd be comfortable in
23 saying that if there was no cause of action for damages
24 for breach of contract we would not be seeking our
25 counterclaim, is what I think we said very early on in
26 our motion in limine. We stand by that.

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2 THE COURT: Thank you.

3 MR. GOLDMAN: You're welcome.

4 (Recess.)

5 THE COURT: All right. I have a decision
6 that I've written. And the decision I think is going
7 to be my signed decision. It does include the
8 background of the case, which I'm not going to go into.
9 I'm going to get into the second part of it that starts
10 on page 4, it's called The Analysis. And this is what
11 I'm going to read into the record, because I think in
12 response to our oral arguments today it's appropriate
13 that the record should contain my decision. Later on I
14 will also sign it and will E file it so it's part of
15 the record.

16 Trump moves pursuant to CPLR 4401, for a
17 directed verdict on ALM's causes of action for: Breach
18 of contract and anticipatory breach of contract and for
19 a declaratory judgment on the ground that the
20 Modification does not meet the Statute of Frauds and
21 thus there is no enforceable contract between the
22 parties under which Trump is required to pay ALM.

23 Now, I know that your argument today was on a
24 slightly different basis, but your argument in terms of
25 the memoranda that you submitted were mostly based on
26 that, and I'm going to go on that because while your

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2 other argument is interesting I think that this is more
3 substantial.

4 All right?

5 MR. GOLDMAN: Okay.

6 THE COURT: One Standard of Law: CPLR 4401
7 provides that "any part may move for judgment with
8 respect to a cause of action or issue upon the ground
9 that the moving party is entitled to judgment as a
10 matter of law, after the close of the evidence
11 presented by an opposing party with respect to such
12 cause of action or issue."

13 Where there is no proof at trial sufficient
14 to meet the Statute of Frauds, when the contract at
15 issue is subject to the Statute of Frauds, a verdict is
16 properly directed for defendants. Citing to Lumen
17 Bearing Company versus Mosle, M-O-S-L-E, 221 A.D. 572
18 1st Dep't 1927." Two statute of frauds ALM's first and
19 fourth causes of action.

20 New York General Obligations Law 5-701
21 provides, in pertinent part, that "every agreement,
22 promise or undertaking," constituting "a contract to
23 pay compensation for services rendered in
24 negotiating...a business opportunity," is void "unless
25 it or some note or memoranda thereof be in writing and
26 subscribed by the party to be charged therewith, or by

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1 his lawful agent."

2
3 An oral modification of a written agreement
4 must also comply with the Statute of Frauds. Citing
5 Intercontinental Planning LTD versus Daystrom Inc., at
6 24 N.Y. 2d 372, 380 (1969) case.

7 "In a contract action, a memorandum
8 sufficient to meet the requirements of the Statute of
9 Frauds must contain expressly or by reasonable
10 implication all the material terms of the agreement,
11 including the rate of compensation if there has been
12 agreement on that matter."

13 Citing to "Morris Cohon and Company versus
14 Russell, 23 N.Y. 2d, 569, 575 (1969) (internal
15 citations omitted).

16 The terms of an agreement between the parties
17 may be established by a combination of signed and
18 unsigned documents, letters or other writings provided
19 that "at least one writing, the one establishing, the
20 contractual relationship between the parties, must
21 bear the signature of the party to be charged, while
22 the unsigned documents must on its face refer to the
23 same transaction as that set forth in the one that was
24 signed."

25 Citing again the Intercontinental Planning,
26 23 N.Y. 2d, this time at page 379. And that's also

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2 quoting Crabtree versus Elizabeth Arden Sales Corp. 305
3 N.Y. 48, 56, (1953) case.

4 Although the terms of an agreement may be
5 established by a combination of signed and unsigned
6 documents, "To permit an unsigned document prepared by
7 the plaintiff to serve as a portion of the requisite
8 memorandum would open the door to evils the Statute of
9 Frauds was designed to avoid." That cites to Solin
10 S-O-L-I-N, Lee Chu, C-H-U versus Ling Sun Chu, 9 AD 2d
11 888, 888-89 1st Dep't (1959) case.

12 A writing fails to satisfy the Statute of
13 Frauds where it does not indicate material terms,
14 including, inter alia, the contract duration, rate of
15 compensation or any of the defendant's promises given
16 in exchange for plaintiff's services. That's cited to
17 Signature Brokerage Incorporated versus Group Health
18 Incorporated, I previously cited it. 204 case. Maybe
19 I didn't. 5AD 3d 196, 197 1st Dep't (2004).

20 Checks and check stubs signed by the parties
21 to be charged with a contract do not fulfill the
22 Statute of Frauds writing requirement if they do not
23 indicate the material terms of the agreement. Walker
24 versus Knowles at 15 misc 3d 1124(A) Supreme Court New
25 York County (2007).

26 Although there was an established
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2 contractual relationship between the parties as
3 evidenced in the memoranda of understanding -- we put
4 it in as Mou, M-O-U. I think we'll do memorandum of
5 understanding. And the Extension, any modification of
6 those agreements must also meet the requirements of the
7 Statute of Frauds. Cited to Intercontinental Planning
8 at 24 N.Y. 2d at 280. Plaintiff's argument that an
9 oral modification of those agreements is valid because
10 neither agreement, required that any amendment thereto
11 be made in writing in thus without merit, because the
12 material terms of the contract modification are
13 required to be evidenced in writing pursuant to the
14 Statute of Frauds.

15 The Court finds that here, the material terms
16 are not evidenced in a sufficient writing.

17 Even if the Court were to permit the invoices
18 and e-mail draft agreements prepared by ALM to serve as
19 a portion of the requisite memoranda, as the First
20 Department cautions against in Solin Lee Chu, the Court
21 finds that the combined writings do not fulfill the
22 Statute of Frauds because they do not include all the
23 material terms of the parties' agreement. See
24 Signature Brokerage, 5 A.D.3d at 197. And that is a
25 finding that a writing fails to satisfy the Statute of
26 Frauds where it does not indicate, inter alia, the

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2 contract duration, rate of compensation or any
3 defendant's promises given in exchange for plaintiff's
4 services.

5 The e-mail draft agreements sent by Danzer to
6 various people at the Trump Organization, see
7 Plaintiff's Exhibits 25, 26 and 31, very generally
8 provide that ALM would receive 10 percent of the
9 royalties earned by Trump on any license and subsequent
10 renewal that ALM brings to Trump. Nowhere does this
11 draft agreement, nor any other document in evidence
12 including the checks signed by Trump, address any other
13 terms, let alone material terms, of the modification.

14 The Court finds that there is a general lack
15 of material terms present in the documents set forth by
16 ALM to satisfy the Statute of Frauds, but herein
17 focuses on two.

18 First, both the Memoranda of Understanding
19 and its Extension address the duration of each
20 respective agreement. The Exclusive Period under the
21 Memoranda of Understanding terminated on March 30th,
22 2004. Plaintiff's Exhibit 1, paragraph 1.

23 Under the Memoranda of Understanding provided
24 ALM introduced a potential licensee to Trump prior to
25 March 30th, 2004, ALM should have been -- should still
26 be entitled to its fee if Trump entered into an

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2 "Acceptable License" with that licensee -- with that
3 licensee within three months of the March 30th, 2004
4 the "Tail Period." This is the same citation at
5 paragraph 3. ALM's right to earn any fee under the
6 Memoranda of Understanding thus terminated on
7 June 30th, 2004. The Extension amended the Memoranda
8 of Understanding to provide that the exclusive agency
9 period expires on June 30th, 2004.

10 Accordingly, under the Memoranda of
11 Understanding as amended by the extension, ALM's right
12 to earn any fee terminated as of September 30, 2004.
13 The license agreement with PVH was not executed until
14 November 29, 2004, after the expiration date of the
15 Tail Period.

16 ALM claims that, as a part of the
17 Modification, Trump waived the end date of the Tail
18 Period. This requires an assumption that Trump agreed
19 to extend the Tail Period indefinitely, which is
20 nowhere evidenced in a writing. The writings provided
21 by ALM to take the alleged Modification out of the
22 Statute of Frauds, even those drafted by ALM, are
23 entirely silent as to the date of the Tail Period.
24 Therefore, particularly in light of the parties'
25 inclusion of a termination date in both the Memoranda
26 of Understanding and the Extension, contract duration

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2 is here a material term that is nowhere contained in
3 the writings provided by ALM. On this basis alone, the
4 alleged Modification has not met the Statute of Frauds.

5 Second, under both the Memoranda of
6 Understanding and the Extension, ALM was only entitled
7 to its fee if Trump entered into an acceptable license.
8 See Plaintiff's Exhibit 1 at paragraph 2. The
9 Memoranda of Understanding provides that an Acceptable
10 License shall mean a license that meets certain
11 criteria, inter alia, a term of seven years and a
12 minimum guarantee license fee to Trump during the term
13 of \$25 million. It is undisputed that the PVH License
14 did not meet the "Acceptable License" criteria.

15 ALM contends that, as part of the
16 Modification, Trump waived the "Acceptable License"
17 requirement. As with the expiration date, this is
18 neither implied nor evidenced in a writing. A
19 modification of an agreement subject to the Statute of
20 Frauds must also meet the Statute of Frauds. Citing
21 again Intercontinental Planning 24 N.Y. 2D at 280.
22 Because the PVH license was not an Acceptable License,
23 and the writings put forth by ALM as evidencing the
24 waiver of this provision, nowhere state that this
25 requirement was waived, the Modification does not meet
26 the Statute of Frauds on this additional basis.

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2 Even if the Court were to consider the
3 Modification to be an agreement completely separate and
4 apart from the Memoranda of Understanding and
5 Extension, and thus not subject to the "Applicable
6 License" or "Tail Period" requirements, the Court finds
7 that the agreement still does not meet the Statute of
8 Frauds. The terms of an agreement between the parties
9 may be established by a combination of signed and
10 unsigned documents, letters or other writings, provided
11 that "at least one writing, the one establishing the
12 contractual relationship between the parties must bear
13 the signature of the party to be charged, while the
14 unsigned documents must on its face refer to the same
15 transaction as set forth in the one that was signed."
16 Again, *Intercontinental Planning*, this time at page 379
17 (quoting *Crabtree*, page 56.) The only document bearing
18 the signature of Trump or an agent of Trump are the 11
19 signed checks. These checks do not establish a
20 contractual licensing agent relationship between the
21 parties, nor do they contain the material terms of the
22 agreement.

23 Then see *Walker*, which I already cited to.
24 Accordingly, the agreement does not meet the Statute of
25 Frauds on this basis.

26 Trump's motion for a directed verdict on
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2 ALM's causes of action for breach and anticipatory
3 breach of the Modification (count one) and for a
4 judgment declaring that ALM is entitled to receive
5 10 percent of all amounts paid by PVH to Trump pursuant
6 to the Modification (count four) is granted and ALM's
7 first and fourth causes of action are dismissed.

8 The Court has considered ALM's argument that
9 Trump is equitably estopped from raising the Statute of
10 Frauds. In order for estoppel to exist, three elements
11 are necessary: (1) Conduct which amounts to a false
12 representation or concealment of material facts, or, at
13 least, which is calculated to convey the impression
14 that the facts are otherwise than and inconsistent
15 with, those which the parties subsequently seeks to
16 assert; (2) intention, or at least expectation, that
17 such conduct will be acted upon by the other party; (3)
18 and in some situations, knowledge, actual or
19 constructive, of the real facts. The party asserting
20 estoppel must show with respect to himself: (1) lack
21 of knowledge of true facts; (2) reliance upon the
22 conduct of the party estopped; and (3) a prejudicial
23 change in his position.

24 That cites the BWA Corp. V Altrans Express
25 USA incorporated at 112 AD 2d 850, 8531st Dep't 1985.

26 The Court reiterates its position that the
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2 only evidence that ALM has provided in support of its
3 estoppel claim is the payment Trump made to ALM and the
4 invoices that accompanied those payments. ALM has not
5 fulfilled the elements of a claim for equitable
6 estoppel.

7 Now we get to the quantum meruit issue.

8 Defendant's motion for a directed verdict on
9 ALM's quantum meruit claim is denied. As this Court
10 determined in this action, in its Decision and Order
11 dated May 19, 2010, if, at trial the Modification is
12 found unenforceable by virtue of the Statute of Frauds
13 ALM "may still recover the reasonable value of services
14 rendered." May 19, 2010 Decision and Order page 15.

15 New York General Obligations Law, Section
16 5-701 applies to contracts "implied in fact or in law
17 to pay reasonable compensation." ALM's quantum meruit
18 claim thus falls under the Statute of Frauds. However
19 in an action for quantum meruit for the reasonable
20 value of services rendered, if it does not appear there
21 has been agreement as to a material term, "a sufficient
22 memorandum need only evidence the fact of plaintiff's
23 employment by defendant to render the alleged services.
24 The obligation of the defendant to pay reasonable
25 compensation for the alleged services is then implied."
26 That goes to Morris Cohon, C-O-H-O-N, 23 N.Y. 2d at

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2 575-576 (analyzing a memorandum which failed to include
3 the parties' agreement as to compensation.)

4 Several of ALM's documents evidence of the
5 fact of ALM's employment by Trump to secure PVH
6 license, Plaintiffs Exhibit 38, (The November 30th,
7 2004 letter from Glosser to Danzer enclosing the PVH
8 license and thanking Danzer for his efforts.) The
9 obligation of Trump to pay reasonable compensation for
10 ALM's services may therefore be implied. Accordingly,
11 ALM's claim for quantum meruit is not barred by the
12 Statute of Frauds.

13 The fifth cause of action is gone so I don't
14 need to get into it.

15 So the order basically is as followed -- then
16 there's one last thing. And that is earlier today you
17 said to me, oh, he did not -- he being Mr. Itkowitz did
18 not in his demand for a trial put quantum meruit as
19 part and parcel of the issues demanded for trial.

20 MR. GOLDMAN: Your Honor, I also had raised
21 in my papers to your Honor that he did not even include
22 a jury charge on that as well, which was also an
23 indication that it wasn't for the jury. That would
24 have been something he did.

25 THE COURT: Right, however, looking over the
26 note of issue is a request for trial. It doesn't say

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2 on all issues, all issues specified below or attached
3 hereto, all that's left blank. It's on contract terms.
4 And obviously, if I find that there wasn't a contract,
5 but then you could recover under quantum meruit, which
6 is a quasi contract, and is not a prohibition to do so.
7 I am going to go to the jury on the quantum meruit
8 issue.

9 MR. GOLDMAN: The other issue I had raised on
10 the directed verdict, when we returned is there is
11 nothing in the evidence upon which the jury can
12 determine compensation.

13 THE COURT: That is for you to argue to the
14 jury. That's an argument.

15 So I have written out -- careful, one of
16 these documents is not stapled throughout.

17 (Pause.)

18 MR. GOLDMAN: Is there a proposed --

19 THE COURT: Quantum meruit --

20 MR. GOLDMAN: -- verdict sheet?

21 THE COURT: Yes. It's right here.

22 MR. GOLDMAN: And will you be --

23 THE COURT: It's not perfect yet. This is
24 just the language, it's not beautiful. We want
25 beautiful things.

26 MR. GOLDMAN: Your Honor, will you be

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2 advising the jury that all the items that we discussed
3 in the opening about those other causes of action have
4 been resolved by the Court? I think they need to know
5 and we need to be able to frame -- certainly I'm going
6 first, what it is that they are being asked and why
7 they are now suddenly not being --

8 THE COURT: What I've decided to say is as
9 follows: First place, do understand that none of the
10 headers are going to be in the language that goes to
11 the jury. All the headers are out. Everything else is
12 in, the actual text.

13 What I'm going to say: The only issue that
14 you will have to decide today is whether or not ALM
15 should recover damages under the theory of quantum
16 meruit. Then I go on. That's what I'm saying. I
17 don't want to say anything else because anything else
18 may be very prejudicial.

19 MR. GOLDMAN: Well, your Honor, just since
20 we've moved this into a charging conference, actually
21 to the contrary, not saying anything else after they
22 have been -- I don't want to use the word bombarded,
23 but bombarded with testimony about payment, with
24 documents about payment, is that evidence that they are
25 to consider now? Because it's critical that those
26 documents were part and parcel of the first and fourth

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2 cause of action.

3 Those payment documents were not part of any
4 quantum meruit and, in fact, they were all -- in fact,
5 all the evidence in other than Mr. Danzer's testimony
6 about what he did and during the period of time in
7 2004 --

8 (Pause.)

9 MR. GOLDMAN: I know your Honor was just --
10 the other question is are reasonable jurors going to
11 say what is it that I am to consider in my
12 deliberations?

13 THE COURT: Question number one of the jury
14 verdict sheet is: Did ALM perform services in 2004
15 with respect to the execution of the PVH license by PVH
16 and Trump? If they answered no they return to the
17 courtroom.

18 MR. GOLDMAN: If the answer is yes, they did
19 perform services?

20 THE COURT: Then the next question: Is did
21 ALM perform the services in good faith?

22 MR. GOLDMAN: Some of these were my charges,
23 in the event that there was going to be a charge or
24 these are condensed versions, but my question to your
25 Honor is a jury is going to say what evidence am I to
26 consider? I've heard testimony from Mr. Danzer about

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2 what he did, but I have a book of documents that are in
3 evidence. What am I doing with all this evidence? Am
4 I to read that evidence? Is that evidence I should
5 consider? I mean there was one juror who asked if a
6 witness nodded what should we be doing or we suspended
7 testimony. I'm sure we're going to say we've heard all
8 this evidence over five days, what am I supposed to do
9 with the payment documents?

10 Your Honor ruled they are coming in subject
11 to relevance. Quite frankly, in light of the dismissal
12 of the first and fourth causes of action they aren't
13 relevant. I could just go through a list. I think
14 your Honor may not want to decide in the next 15
15 minutes, but that is an issue we need to address
16 because what I say to the jury in my opening is going
17 to be somewhat dependent upon what it is they are going
18 to be examining, in order to determine the reasonable
19 value of services. I'd ask your Honor consider that.

20 THE COURT: Yes, Mr. Itkowitz.

21 MR. ITKOWITZ: Two things. Number one,
22 respectfully we take exception to the dismissal of the
23 first and fourth causes of action.

24 THE COURT: Understood.

25 MR. ITKOWITZ: And I want to preserve that
26 for the record.

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2 The other thing is in terms of arguing
3 reasonable value to the jury, if your Honor recalls as
4 part of my declaratory judgment action we contend we're
5 entitled to the renewals.

6 THE COURT: The what?

7 MR. ITKOWITZ: The renewals. So the question
8 logically would be to the jury, does the reasonable
9 value of services include an entitlement to renewals.
10 And so I would ask that that be included on the verdict
11 sheet.

12 THE COURT: That's not what quantum meruit
13 is. Quantum meruit is just basically a finding of
14 elements.

15 Question 1 is: Did ALM perform services in
16 2004 with respect to the execution of the PVH license
17 by PVH and Trump?

18 That's one issue. Either yes or no.

19 Did ALM perform the services in 2004 in good
20 faith? Yes or no. If no, they come back to the
21 courtroom.

22 Did Trump except ALM's services in 2004 with
23 respect to the execution of the PVH license? Yes or
24 no?

25 MR. ITKOWITZ: I understand what you're
26 saying. I accept what you're saying.

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2 THE COURT: I'm not specifying what they have
3 to consider. This is just a general charge. What's
4 the value of the services, if any?

5 MR. ITKOWITZ: Okay, fair enough.

6 THE COURT: What's the value already paid.
7 You have arguments to be made. It's not like you're
8 not going to be capable of standing before the jury and
9 saying something.

10 MR. GOLDMAN: Your Honor, what about our
11 counterclaim.

12 THE COURT: No, no. I dismissed -- you said
13 before we left on the record that indeed not -- you
14 never mentioned quantum meruit. The counterclaim is
15 out. Well, if the jury puts less than the amount of
16 the value than that would be a legal issue that I would
17 deal with.

18 MR. GOLDMAN: Okay.

19 (Pause.)

20 THE COURT: The problem is I really don't
21 want to have to instruct on the counterclaim because if
22 I instruct on the counterclaim I've got to put the
23 contract in. And your counterclaim was specifically to
24 the memorandum of understanding and the extension. You
25 said they were not -- they didn't fulfill the
26 memorandum of understanding and the extension and so

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2 therefore you should be entitled to the complete
3 rescission, all the monies that you sent get back. Now
4 that I've found that the memoranda of understanding was
5 in effect but that nothing else has happened, taking
6 out all the rest of the case, the counterclaim, I
7 think, has to go, too, because it's on a memorandum of
8 understanding.

9 MR. GOLDMAN: Your Honor, just for record
10 purposes for review, since your Honor found that there
11 was a contract -- and we briefed this issue -- under
12 the law of quantum meruit, if there is no contract and
13 only if there is no contract does the theory of quantum
14 meruit apply. However --

15 THE COURT: That's true. I don't disagree.

16 MR. GOLDMAN: Since the Court has found that
17 there was a contract in place with a tail period of
18 September, and that it was not satisfied by virtue of
19 the PVH agreement not satisfying the acceptable license
20 requirement and not being entered into during the tail
21 period, under the cases that we cited for, your Honor,
22 there cannot be a quantum meruit claim as a matter of
23 law, because it only applies when there is no contract
24 and, your Honor rightfully found there is a contract
25 and, therefore, what they did did not satisfy the
26 conditions.

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2 THE COURT: The problem with that,
3 Mr. Goldman, is this, that I have found that the
4 modification didn't meet the Statute of Frauds,
5 therefore, it can't go to the jury on that issue.
6 Nevertheless, it can be reasoned that certain work was
7 done and the whole purpose of quantum meruit is that if
8 certain work was done then a reasonable payment for the
9 certain work. How far it goes I really don't know,
10 we're going to find out what the jury does in the end.

11 (Continued on next page.)
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Donna Evans, Official Court Reporter

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2 MR. GOLDMAN: Okay. We've spoken our objections,
3 and we'll be here tomorrow at 9:15.

4 THE COURT: Wait a second, can't go yet.

5 MR. GOLDMAN: All the evidence, Your Honor, they
6 get to see and we can refer to?

7 THE COURT: No, we can't, because they're different
8 issues.

9 MR. GOLDMAN: Okay.

10 THE COURT: What I suggest you do tonight, both of
11 you, is what evidence you think meets what I've just read
12 and what should go in. All right. So let's discuss that
13 first thing tomorrow. We can be here at 9 o'clock, even if
14 we can't have a record. And so, what can be shown to the
15 jury based on my decision.

16 MR. GOLDMAN: Okay. Thank you.

17 THE COURT: Please look at the charge, okay. The
18 first part of it, introduction and partiality, jury's
19 function, court's function. Falsus in uno, everything is
20 standard. Standard PJI. I don't change it. I reorganize
21 it, mine's much more logical than theirs, but apart from
22 that I have not done anything.

23 I have circumstantial evidence in here. Question
24 is, is there anything that is circumstantial evidence that
25 should be -- we should have a circumstantial evidence
26 charge?

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2 MR. GOLDMAN: The only thing I'm going to -- before
3 we get to circumstantial evidence, the only thing I'm going
4 to say is on the falsus in uno, on the issue that is left
5 for the jury, there is no testimony that that would apply to
6 because -- there is just no testimony that that would apply
7 to.

8 THE COURT: That's not true.

9 MR. GOLDMAN: In 2004. Okay.

10 THE COURT: You got Danzer's testimony. You got
11 Mr. Hager's testimony.

12 MR. GOLDMAN: Mr. Hager knew nothing what was going
13 on in 2004. Those were the last questions I asked him
14 today. Whatever he knew came from Danzer.

15 Okay. We'll keep it in, certainly.

16 THE COURT: You have to have it in. It won't go to
17 the jury without falsus in uno in case they find it.

18 So now the circumstantial evidence, on the other
19 hand, does not have to be in. And I don't know, is anything
20 that comes on circumstantial evidence? I don't think so.

21 MR. ITKOWITZ: I have to think about that, Your
22 Honor, honestly.

23 THE COURT: You have to think about it now.

24 MR. ITKOWITZ: Okay.

25 MR. GOLDMAN: Your Honor, the only --

26 MR. ITKOWITZ: One second.

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2 MR. GOLDMAN: My thought is while Mr. Itkowitz is
3 thinking, the only circumstantial -- I don't even know what
4 probative value is on transcript 653 when Mr. Itkowitz asked
5 Mr. Danzer whether or not it is standard practice to have a
6 renewal portion or an extension portion, and he said it's
7 standard practice to have that.

8 First of all, that has nothing to do with
9 compensation or anything of the sort. So I don't think that
10 should even be something that goes before the jury. There's
11 nothing before the jury. He was just talking his standard
12 practice in a contract to have a renewal provision, which
13 was in the contract that Your Honor has found they didn't
14 satisfy. So that is of no probative value on what we're
15 talking about, which is reasonable compensation for
16 services.

17 You even said to him when we started this trial you
18 didn't put down -- you didn't have any expert witness. And
19 you said it again later on, there's no expert witness.
20 There's nothing for them to latch on to.

21 THE COURT: I frankly don't see circumstantial
22 evidence. I don't know where -- you know, what is
23 circumstantial evidence, something that's proved indirectly.
24 The reason to have direct testimony, Mr. Danzer believes or
25 don't believe, and that kind of direct testimony. What's
26 circumstantial about it?

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2 MR. ITKOWITZ: I'm thinking about it, Your Honor.
3 I'm just going through the verdict sheet.

4 I think the value of the circumstantial evidence
5 charge is it tells the jury that they can infer -- they can
6 infer from the proof whatever they need to infer.

7 So I would ask -- I would prefer that it stay in,
8 and I would ask that it stay in. I think it's a standard
9 charge. It may not -- there may not be circumstantial
10 evidence that we can think of right now, but there may be
11 circumstantial evidence that may occur to the jury when
12 they're considering the evidence.

13 MR. GOLDMAN: Your Honor, for the record, it
14 shouldn't be there, because they shouldn't be trying to use
15 any other means, which was my concern when I first raised
16 this, relying upon all this other evidence that went in over
17 my objection of relevance. We're not even going to explain
18 to them what that is and now we're going to give them a
19 charge that they can use that because it's not direct and
20 they're going to have to -- because you're asking them
21 didn't Plaintiff prove what is reasonable compensation.

22 And they're going to look at the evidence, and any
23 reasonable person here, and I assume the same six in the
24 box, are going to say I don't even see the word compensation
25 anywhere in question, what could I use. Well, then should
26 we use all the writings, the promises, all those things.

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2 That's why it was prejudicial the first time it
3 went in. And now that it's all out or it should be out
4 because of the contract, it's even more prejudicial because
5 that's the only circumstantial evidence, because that's the
6 only evidence. And it was prejudicial before and its
7 prejudice is heightened, which is why I believe, for the
8 record, all those payment documents which were in 2005 the
9 jury should be told they are not to be considered for
10 purposes of determining quantum meruit, because it's the
11 reasonable value of the services rendered in 2004.

12 MR. ITKOWITZ: I'm not going to respond to that
13 unless Your Honor wants me to respond to that.

14 THE COURT: I would get to page 9. Oh, what's
15 George Ross's title? I couldn't figure it out.

16 MR. GOLDMAN: Executive vice president and senior
17 counsel.

18 THE COURT: Executive what?

19 MR. GOLDMAN: Vice president and senior counsel.

20 THE COURT: Senior counsel. Okay. For the Trump
21 Organization, right?

22 MR. GOLDMAN: Yes.

23 THE COURT: Okay. That's why that's there. Burden
24 of proof, standard.

25 MR. ITKOWITZ: Your Honor, with respect to
26 interested witnesses.

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2 THE COURT: Yeah.

3 MR. ITKOWITZ: I would say that Jeffrey Danzer is
4 not an interested witness.5 THE COURT: He is an interested witness because at
6 the time that he was talking about he was an employee,
7 former executive vice president of ALM.8 MR. ITKOWITZ: No. That's true, he was back then.
9 But the purpose of the interested witness information is not
10 to be retrospective. But now, what is he today, he is a
11 former employee not getting compensated with no horse in the
12 race. He should -- I would object to --13 MR. GOLDMAN: He got paid \$200,000 for getting a
14 deal that Your Honor has just thrown out. So I think he's
15 pretty interested.16 MR. ITKOWITZ: He's not interested in a sense that
17 the purpose of an interested witness --18 MR. GOLDMAN: Ms. Glosser is not interested in the
19 outcome of this case. It's not affecting her.20 MR. ITKOWITZ: I would say that she is. She is an
21 agent and she works for Trump Organization and she has a
22 stake.23 THE COURT: I could make the argument that Trump
24 Organization is not in the case; so therefore, the only
25 interested people are Markus Hager and Donald Trump,
26 everybody else is out. What do you want? Want me to do

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1
2 that? Happy.

3 MR. ITKOWITZ: No, no, I prefer it that way.

4 THE COURT: Okay. But it's good argument to be
5 made on that side too.

6 MR. ITKOWITZ: Thank you.

7 MR. GOLDMAN: Whatever happened to circumstantial
8 evidence?

9 THE COURT: What happened?

10 MR. GOLDMAN: With respect to my application on the
11 evidence and the payment document.

12 THE COURT: I don't see anything that's really -- I
13 don't see anything that's circumstantial.

14 MR. ITKOWITZ: Okay.

15 THE COURT: All right.

16 MR. GOLDMAN: For the record, though, the jury
17 heard me stand up several times and say objection either to
18 the testimony or to what we call payment documents, for lack
19 of a better word, time and time again and Your Honor
20 instructed them I'm letting it in. There's an objection as
21 to relevance. I think a determination has to be made if
22 it's relevant, and I submit to the Court I didn't believe
23 they were relevant before and I could tell you I really
24 don't think they're relevant if the only issue is the
25 reasonable compensation for services rendered.

26 THE COURT: Well, I have to think -- that one I

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2 want to think about, because my problem is that a mechanism
3 for the jury to come to what is reasonable, I really don't
4 know.

5 MR. GOLDMAN: When you say -- see, that's the
6 problem -- what the mechanism is. My concern is they have
7 no expert, they have no testimony. So the only thing
8 they're left with is, you know, trying to figure out what
9 could I latch on to to figure what is reasonable for what he
10 did. That's the problem.

11 THE COURT: That's the reason why I'm breaking out
12 the verdict sheet exactly the way I broke it out, because I
13 do think that when you get to question number three --
14 actually, question number four, reasonably compensated for
15 such services, but actually the best thing is has ALM
16 demonstrated a reasonable value of services provided to
17 Trump with respect to the PVH license, and I think -- I
18 think that that's an element of quantum meruit that indeed I
19 don't know can be met.

20 MR. GOLDMAN: Your Honor, maybe I'm missing -- is
21 there any reason why in the jury verdict sheet it does not
22 say did ALM prove by the preponderance of the evidence that
23 they performed services, did ALM prove by the preponderance
24 of the evidence that they performed the services in good
25 faith, et cetera, et cetera? I think if that's the standard
26 in burden of proof, nobody could be prejudiced by putting

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2 the burden of proof, which we all agree it is, into the
3 charge.

4 THE COURT: Well, I don't think you need it, but
5 because I charge on that at length.

6 MR. ITKOWITZ: Your Honor, with respect to the
7 payment documents, since the jury has to consider Mr.
8 Trump's contention that ALM has already been compensated in
9 excess of reasonable value, I think the payment documents
10 obviously need to come in.

11 THE COURT: Why? Why? I mean, there can be a
12 stipulation that ALM did get paid 320,000, \$328,000. That
13 can can come in. You don't need to see payment documents to
14 show that.

15 MR. GOLDMAN: That's something, Your Honor, we were
16 willing to stipulate from the moment we made our first
17 motion in limine. And again, can anybody overstate that
18 they are relevant now?

19 MR. ITKOWITZ: Whatever Your Honor decides. I
20 think counsel need guidance, because when I go back to my
21 office, I'm sure when Mr. Goldman goes back to his office
22 and we start to think about what we're going to argue to the
23 jury, what evidence we're going to use.

24 THE COURT: But that's a real problem. It was a
25 real problem, and I don't know if you get beyond question
26 number one, all right. I really don't. I don't think that

1 Proceedings

2 you do, in my own view.

3 MR. ITKOWITZ: Well, that question --

4 THE COURT: Come up for a second. Come up. Off
5 the record for a second.

6 (Whereupon, an off-the-record discussion was held
7 at the bench among the Court and counsel.)

8 THE COURT: Upon reflection, I thought about going
9 to the jury on the question of quantum meruit, but the truth
10 is I don't know how you establish quantum meruit before the
11 jury, whereas if I kept it to myself obviously I could take
12 writings on the issue of quantum meruit and maybe make a
13 decision after I read the writings, which may be a better
14 thing for everybody.

15 MR. GOLDMAN: Your Honor, I would agree with that
16 and for reasons I had already indicated that I believe
17 Plaintiff knew that it would be your decision again on the
18 note of issue to a lack of any jury charge.

19 And more importantly, I don't think Plaintiff's
20 counsel can articulate two things in the record that the
21 jury from a fact to a document standpoint can reflect upon
22 or use to assist, other than the Ouija board, and what would
23 those two things be.

24 MR. ITKOWITZ: Your Honor, if quantum meruit is
25 going to the jury, I will say this, it would absolutely be
26 no point if you're going to rule that it has to be based

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2 upon acts after September 30th, which I would disagree with.
3 I would say if we're talking about quantum meruit from July
4 1st on, then we have something to put to the jury, and I
5 think there's plenty in the case that the jury could use to
6 decide that. But if it's after September 30th, I mean, the
7 deal was done. And so, you know, the work that was done was
8 prior to September 30th.

9 So I would argue that if we're going to put quantum
10 meruit to the jury, I should be permitted to argue all the
11 work that my client did leading up to the deal. The deal
12 wouldn't have happened without my client and therefore my
13 client, you know, has to be able to argue that.

14 Alternatively, I would ask Your Honor to reconsider
15 your decision in dismissing the first and fourth cause of
16 action. I understand that Your Honor believes the first and
17 fourth cause of action does not satisfy the statute of
18 frauds. However, I think it would be prudent from a
19 judicially economic standpoint to put the case to the jury,
20 let the jury decide that issue, and if you in your wisdom
21 after a jury verdict comes back decide that, you know,
22 adheres to this decision about statute of frauds, you can
23 always give a judgment NOV, but at least it goes up to 25th
24 Street and Madison -- 21st Street and Madison.

25 THE COURT: 25th.

26 MR. ITKOWITZ: With a complete record.

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2 MR. GOLDMAN: Your Honor, how many times -- Your
3 Honor obviously took time to write a decision, heard
4 argument and now read a decision. I'm not going to go and
5 try to respond to Mr. Itkowitz's begging an adverse
6 decision.

7 MR. ITKOWITZ: I take exception to that.

8 THE COURT: Enough. Enough of these
9 characteristics.

10 MR. GOLDMAN: The issue, Your Honor --

11 THE COURT: Both sides.

12 MR. GOLDMAN: And I said it before, what in the
13 record could the jury use to determine what is reasonable.
14 Not what Mr. Danzer did, because clearly he made phone
15 calls, he wrote an agenda, he put people together, I get it,
16 but they have no experience -- they have no idea. A
17 question is what in the evidence can give them any insight
18 to look to as to what is reasonable and fair for what he
19 performed.

20 An expert would have been helpful. Even some
21 opinion testimony, assuming my objection was overruled, some
22 opinion testimony about what is reasonable and fair. It
23 wasn't a surprise to Mr. Itkowitz that there was a quantum
24 meruit cause of action. So he charted a course that he
25 refused to ask any questions about it. He just can't ask a
26 jury to decide something when he has yet to articulate where

1 Proceedings

2 in the record is anything that they can latch on to other
3 than he did work. Yes, he did work. We all agree he did
4 work. What's the reasonable value? It's a Ouija board.

5 MR. ITKOWITZ: Your Honor, I would ask you to
6 reconsider your decision on the first and fourth cause of
7 action. I think you really should.

8 THE COURT: Sir, I'm not going to, because it is, I
9 think, I think it's a waste of the jury's time. If indeed
10 after all is said and done, all right, it has to be
11 dismissed as a matter of law.

12 Now, I'll say it, this is probably the first time
13 that I've ever directed a verdict this way, because it has
14 always been my theory that in case the Appellate Division
15 did not agree with me that we would have the entire case
16 done. But in this particular case, the issue is so black
17 and white in terms of the law that the law indeed has to be
18 followed.

19 MR. ITKOWITZ: What about -- sorry.

20 THE COURT: That I cannot see doing anything else.

21 MR. ITKOWITZ: What about the whole theory, as we
22 set forth in our brief, about acquiescence and about
23 admission; what about that?

24 THE COURT: I don't see it.

25 MR. ITKOWITZ: What about the cases that say --

26 THE COURT: But sir, but sir, but sir, there is no

1 Proceedings

2 writing as to the material terms.

3 MR. ITKOWITZ: Admission doesn't go to writing.

4 THE COURT: The admissions don't go.

5 MR. GOLDMAN: Your Honor, are we arguing or are we
6 talking about quantum meruit?

7 MR. ITKOWITZ: Your Honor, what Your Honor wrote in
8 the summary judgment decision on acquiescence and admitted
9 conduct takes it out of the statute of frauds. Takes it out
10 of the statute of frauds. And you're depriving -- you're
11 depriving the parties.

12 THE COURT: Sir, what I did in the summary judgment
13 motion is I did not grant, in a sense, a directed verdict to
14 the Defendant based on the documents alone. And despite the
15 fact that they tried one or more times in the motion in
16 limine and et cetera for me to say that indeed you can't go
17 because, in a sense, the statute of frauds. Despite that, I
18 allowed it to be heard by a jury.

19 But now, now that all of the evidence is in, now
20 that there is no more anything that can come in as a
21 surprise and no more testimony that could support your
22 claims, there is nothing left but for me to indeed do what
23 the Court must do as a matter of law.

24 MR. ITKOWITZ: Your Honor, but what about -- I
25 don't think -- you didn't even address it in either your
26 opinion. You didn't address it.

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2 MR. GOLDMAN: Your Honor, are you going to permit
3 this?

4 THE COURT: Enough, enough. You can always argue
5 these wonderful points before the great bodies up north.

6 MR. GOLDMAN: Why don't we do quantum meruit, Your
7 Honor.

8 MR. ITKOWITZ: Excuse me.

9 MR. GOLDMAN: Excuse me, the Judge has ruled.

10 MR. ITKOWITZ: Your Honor --

11 MR. GOLDMAN: This is sick.

12 MR. ITKOWITZ: Respectfully, we have done an awful
13 lot of work here and this jury has one more day of work if
14 you give them the opportunity to decide the case. We can
15 have a complete record for the Appellate Division. If
16 agreement is outside of the statute of frauds, the statute
17 of frauds doesn't apply.

18 We have submitted case law and, you know, it's in
19 our memorandum that the Defendant has waived the statute of
20 frauds defense. The ALM modification agreement is outside
21 of the statute of frauds because Defendants have admitted
22 that there was an agreement. The jury should be at least
23 asked if there was, and if the Defendants admitted that
24 there was an agreement, if they admit that there's an
25 agreement, we're outside statute of frauds.

26 That is a jury question. And if you want to

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2 dismiss on the grounds -- if you want to say that there's no
3 statute of frauds issue, and ironically you talk about jury
4 charges being submitted, they submitted jury charges on the
5 statute of frauds. That's their proposal. They wanted to
6 have the verdict sheet and have the jury decide issue of
7 statute of frauds. What I'm --

8 THE COURT: Which is a legal issue that the Court
9 had to decide.

10 MR. GOLDMAN: What are we doing with quantum
11 meruit? Can we get back to the jury charging? Are we just
12 going to let him talk for another hour?

13 THE COURT: We don't have another hour. We have
14 one minute, so make a decision on quantum meruit. Do you
15 want me to do quantum meruit as an issue of law that I would
16 decide or do you -- I just don't think that they have
17 anything, because you have no testimony, Mr. Itkowitz, you
18 have nothing in the record.

19 I can't imagine you could go to this situation and
20 not have anything on the record.

21 MR. ITKOWITZ: Why can't we submit the issue of
22 admission -- admitted conduct to the jury to see whether the
23 statute of frauds applies.

24 THE COURT: No. Thank you. Should I close the
25 record up?

26 MR. GOLDMAN: What do we do about quantum meruit?

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2 THE COURT: Well, I'm going to take it to myself so
3 we're not going to have anything more. Well, they'll come
4 back tomorrow and they'll dismiss them.

5 MR. GOLDMAN: Thank you, Your Honor.

6 MR. ITKOWITZ: So you will give us guidance
7 tomorrow as to what we're supposed to do on statute of
8 frauds on unjust enrichment?

9 THE COURT: What?

10 MR. ITKOWITZ: I mean, on quantum meruit.

11 THE COURT: No. I just said that I'm going to
12 bring it to myself. There's not going to be anything
13 submitted.

14 MR. ITKOWITZ: So you're going to decide it based
15 on?

16 THE COURT: On writings that you'll give me, all
17 right. Decide on when you want to do that.

18 MR. GOLDMAN: Thank you very much.

19 Tomorrow can we, once you excuse the jury, can we
20 speak to the jury if they want? I submit they want. Come
21 on, they spent a week and a half with us.

22 THE COURT: Yes. I don't care one way or the
23 other. Just don't do it in my presence and don't do it in
24 the jury room. You can do it if you can catch them.

25 MR. GOLDMAN: Thank you.

26 THE COURT: But I'm going to make plain that they

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1
2 don't have to.

3 MR. GOLDMAN: Okay.

4 (Whereupon, the matter was adjourned to April 19,
5 2013 at 9:15 a.m.)
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