

In The Matter Of:

*STUART Y. SILVERSTEIN v.
PENGUIN PUTNAM, INC.*

July 25, 2007

*TRIAL
SOUTHERN DISTRICT REPORTERS
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[1] 77PVSILT
 [2] UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK
 [3] -----x
 [4] STUART Y. SILVERSTEIN, BENCH TRIAL
 [5] Plaintiff, 01 CV 309 (JFK)
 [6] v. 01 CV 309 (JFK)
 [7] PENGUIN PUTNAM, INC.,
 [8] Defendant.
 [9] -----x
 [10] July 25, 2007
 11:00 a.m.
 [11] Before:
 [12] HON. JOHN F. KEENAN
 [13] District Judge
 [14] APPEARANCES
 [15] NEAL GERBER & EISENBERG LLP
 Attorneys for Plaintiff
 BY: MARK A. RABINOWITZ
 CHRISTOPHER D. MICKUS
 [16] COWAN LIEBOWITZ & LATMAN PC
 Attorneys for Defendant
 [17] BY: RICHARD DANNAY
 THOMAS KJELLBERG
 [18]
 [19]
 [20]
 [21]
 [22]
 [23]
 [24]
 [25]

[11] THE COURT: I received the two stipulations. And I
 [12] think after we finish the video, I'll make more notations about
 [13] them and we'll find out where we stand. And so Ms. Drevis, I
 [14] suggest you come back at about 3:05. Thanks very much. Good.
 [15] You may continue.
 [16] MR. RABINOWITZ: There is exactly 50 minutes, your
 [17] Honor, left.
 [18] THE COURT: I'm sorry. Thank you for correcting me --
 [19] for bringing it to my attention, you didn't correct me. Let's
 [20] make it that you come back at 3:20. Thank you. Okay.
 [21] (Video recording played)
 [22] THE COURT: All right. Thank you. On the record.
 [23] That completes the deposition of Professor Randall Calhoun.
 [24] I received the two stipulations that were entered into
 [25] by both sides. I read them during the luncheon recess. They
 are received in evidence. They are part of the record in the
 case. I will make them Court's Exhibit 1, which is the
 stipulation where paragraph 1 reads Dorothy Parker Complete
 Poems. So that's Court's Exhibit 1 today.
 MR. RABINOWITZ: Your Honor, it refers to Exhibits 203
 through Exhibit 222 in paragraph 12.
 THE COURT: Yes, it does.
 MR. RABINOWITZ: We would ask those to be admitted, as
 well. Those are plaintiff's exhibits.
 THE COURT: I take it there's no objection to that.

[1] (Trial resumed)
 [2] (In open court)
 [3] THE COURT: All right. We're going to have the
 [4] Randall Calhoun deposition continued. And as I understand it,
 [5] we're going to start with the examination by Mr. Kjellberg,
 [6] which begins at page 134 of the deposition, line 10. Right?
 [7] MR. RABINOWITZ: Correct, your Honor. We have reached
 [8] several stipulations. Would the Court prefer to deal with
 [9] those now or afterwards?
 [10] THE COURT: Whatever you want.
 [11] MR. DANNAY: I would suggest that we do that after
 [12] the --
 [13] THE COURT: I think it makes more sense.
 [14] MR. DANNAY: It would be wrapped up. We have no
 [15] further contentions; we could do it very smoothly.
 [16] THE COURT: Fine.
 [17] MR. DANNAY: Remaining exhibits, stipulations,
 [18] everything is done.
 [19] THE COURT: Fine. Let me just see. I don't want to
 [20] clutter the record with scheduling.
 [21] (Off record)
 [22] (Video recording played)
 [23] (Luncheon recess)
 [24] A F T E R N O O N S E S S I O N
 [25] 2:30 P.M.

[11] MR. DANNAY: No, no objection.
 [12] THE COURT: That's fine. That's Court's Exhibit 1
 [13] today. Today is, of course, July 25.
 [14] And Court's Exhibit 2 of today's date is the second
 [15] stipulation which begins with Exhibit L on the first page.
 [16] All right. Does the plaintiff have anything else in
 [17] this case?
 [18] MR. RABINOWITZ: Yes, your Honor. There are several
 [19] other submissions by the parties in the form of demonstrative
 [20] exhibits. The plaintiff -- the defendant and the plaintiff
 [21] were offering demonstrative exhibits that are in the form of
 [22] charts that show the items that are contained in Not Much Fun
 [23] by page number and where they appear in the biobibliography.
 [24] And both competing views of the case have got slightly
 [25] different formulations of it, so the two of us were going to
 tender these different charts that reflect the page numbers.
 THE COURT: Fine.
 MR. RABINOWITZ: Okay.
 THE COURT: All right.
 MR. RABINOWITZ: And then there's two other items.
 THE COURT: Let's describe them for the record so that
 we know what they are.
 MR. RABINOWITZ: Sure. The plaintiff's is called Item
 by Item Page Numbers Biobibliography and Not Much Fun.
 THE COURT: Okay.

[11] **MR. RABINOWITZ:** And we've labeled it Plaintiff's
[12] Exhibit 290.

[13] **THE COURT:** Fine. Plaintiff's Exhibit 290 is received
[14] as part of the plaintiff's case.

[15] (Plaintiff's Exhibit 290 received in evidence)

[16] **MR. RABINOWITZ:** And then Penguin has offered Exhibit
[17] KKKKK, and it's titled Poems of Dorothy Parker Listed in Stuart
[18] Y. Silverstein Not Much Fun, and it continues from there.
[19] These two kind of compete, different charts from different
[20] views, but they are pretty much the same information.

[21] **THE COURT:** So Exhibit KKKKK is received as a defense
[22] exhibit. Fine.

[23] (Defendant's Exhibit KKKKK received in evidence)

[24] **MR. RABINOWITZ:** And then there's two other types of
[25] items. The plaintiff has submitted as demonstrative exhibits,
[26] your Honor, which detail our damage theory and summarize the
[27] numbers from all those sales sheets as Exhibits 223 through
[28] 226. They are offered solely as demonstrative exhibits
[29] pursuant to Rule of Evidence 1008 -- 1006, excuse me. And they
[30] show our summary of the figures in all those sales sheets in
[31] our theory of damages.

[32] **THE COURT:** Received. There's no objection, right? I
[33] mean I assume that everybody's gone over these. If there's an
[34] objection, I didn't mean in any way to cut you off.

[35] **MR. DANNAY:** No, your Honor. I just want to state for

[11] cigarettes.

[12] **MR. RABINOWITZ:** Plaintiff's Exhibits 230 through 254
[13] were used in the Calhoun deposition. I would move for the
[14] introduction of those.

[15] **THE COURT:** Is there any objection?

[16] **MR. DANNAY:** No, not at all.

[17] **THE COURT:** They are received.

[18] (Plaintiff's Exhibits 230 through 254 received in
[19] evidence)

[20] **MR. RABINOWITZ:** And then the Colleen Breese exhibits,
[21] your Honor, that accompanied the videotape we were going to
[22] submit -- go back in, as you suggested, collate those with our
[23] exhibits, and then submit those later if there's any that
[24] aren't in our exhibits.

[25] **THE COURT:** That's fine. Just show them to Mr. Dannay
[26] and Mr. Kjellberg and make sure that there's no disagreement.
[27] Fine.

[28] **MR. RABINOWITZ:** So we'd like those admitted, as well.

[29] **THE COURT:** So you're resting subject to that. That
[30] will be included in.

[31] **MR. RABINOWITZ:** There's one more point, your Honor.
[32] That is, we have consulted with the defense, and we have agreed
[33] to submit selected designations, very limited, from the
[34] deposition of John Makinson that relate to the interpretation
[35] of some of the sales statements and royalty statements. And we

[11] the record I'm assuming that you would receive it for other
[12] reasons, but defendant does object to those exhibits just
[13] identified for the reason that I don't think they are
[14] demonstrative; I don't think they are clear on their face. I
[15] think they require interpretation from outside of the document,
[16] and they are not helpful. So on that basis, I would object,
[17] but it's a bench trial.

[18] **THE COURT:** I'll receive them.

[19] (Plaintiff's Exhibits 223, 224, 225, 226 received in
[20] evidence)

[21] **THE COURT:** Anything else?

[22] **MR. RABINOWITZ:** Nothing else from the plaintiff.

[23] **THE COURT:** Does the plaintiff rest?

[24] **MR. RABINOWITZ:** One last point, I suppose, is the
[25] Calhoun exhibits, which we just saw are in the plaintiff's
[26] binders.

[27] **THE COURT:** They are.

[28] **MR. RABINOWITZ:** So we wanted to include those, as
[29] well, your Honor.

[30] **THE COURT:** Oh, I see what you mean. In other words,
[31] for instance, the exhibit book is open to what is Exhibit 28 at
[32] the deposition, which is Exhibit 254 in the binder, which is
[33] the so-called moral tales for the young, where the three women
[34] are sitting on the couch, and the one is complaining she gave
[35] up smoking because her mother and grandmother grubbed all her

[11] actually have a very short 10-page excerpt from his
[12] deposition -- sorry, 20 pages that begins on page 67 at line 18
[13] and continues through page 87, line 17. That's from John
[14] Makinson's deposition. We have it in a separate submission.

[15] **THE COURT:** Any objection?

[16] **MR. DANNAY:** No objection. We agree on that.

[17] **THE COURT:** All right. That's received. It's also
[18] part of the plaintiff's case.

[19] **MR. RABINOWITZ:** With that, your Honor, the plaintiff
[20] rests.

[21] **THE COURT:** All right. And the resting is subject to
[22] the introduction of the appropriate exhibits relating to
[23] Colleen Breese, which I understand will be submitted by when?
[24] Tell me when. Give me a date.

[25] **MR. RABINOWITZ:** Is a week --

[26] **THE COURT:** Fine.

[27] **MR. RABINOWITZ:** We have all these boxes.

[28] **THE COURT:** By a week from Friday is fine.

[29] **MR. RABINOWITZ:** All these boxes have to show up. We
[30] have -- 29 boxes were shipped out this morning.

[31] **THE COURT:** Well, do you want more time than a week
[32] from Friday?

[33] **MR. RABINOWITZ:** Maybe we can have two weeks, since
[34] nothing is going to happen in the meantime.

[35] **THE COURT:** Fine. That's no problem. So then we are

[1] talking about August 10th --

[2] **MR. RABINOWITZ:** Okay.

[3] **THE COURT:** -- for the Colleen Breese material. And

[4] you're going to show that to the defense so the defense can

[5] view it and agree or disagree. Okay. Thank you.

[6] **MR. RABINOWITZ:** Yes, your Honor.

[7] **THE COURT:** Plaintiff rests.

[8] Take your time, Mr. Dannay.

[9] **MR. DANNAY:** Your Honor, just in terms of vacations,

[10] could we have the 15th to check the briefs and just be sure

[11] it's accurate?

[12] **THE COURT:** Sure. You just tell me when you want to.

[13] The submissions are going to be contemporaneous.

[14] **MR. DANNAY:** Just so we can check to make sure it's

[15] complete; we don't have to do it twice.

[16] **THE COURT:** Sure. August 15th?

[17] **MR. DANNAY:** Yeah. Would that be okay?

[18] **THE COURT:** That's fine with me. Is that all right

[19] with everybody else?

[20] **MR. RABINOWITZ:** Of course.

[21] **THE COURT:** All right. Fine. August 15th, the

[22] submission. Okay. One thing I need, Mr. Ryan. No, before we

[23] get to that, Mr. Dannay, does the defense rest?

[24] **MR. DANNAY:** No, I have a few things myself.

[25] **THE COURT:** Oh, okay.

[1] **THE COURT:** Yes.

[2] **MR. DANNAY:** Okay. There is a related demonstrative

[3] exhibit which we have labeled as LLLLL, is that right?

[4] **MR. KJELLBERG:** Yes.

[5] **THE COURT:** Okay.

[6] **MR. DANNAY:** Which briefly, without argumentation,

[7] states the purpose for which these 30-plus books and other

[8] publications are submitted for so that if someone walks into a

[9] room and sees all these books and wants to know why they're

[10] there, this will be some sign post. I think it's a

[11] demonstrative exhibit for that purpose alone. We offer that.

[12] **THE COURT:** Any objection?

[13] **MR. RABINOWITZ:** Consistent with the other exhibits,

[14] no, your Honor.

[15] **THE COURT:** All right. So then LLLLL is received for

[16] the defense.

[17] (Defendant's Exhibit LLLLL received in evidence)

[18] **MR. DANNAY:** We also would like to offer the entire

[19] Stuart Silverstein deposition transcript into the record, not

[20] to be read, but as part of the record of this case.

[21] **THE COURT:** My only problem with that is that -- well,

[22] what does the plaintiff have to say about that?

[23] **MR. RABINOWITZ:** Your Honor, they had every

[24] opportunity to cross-examine him on anything that's in the

[25] deposition. This is a trial; this is not summary judgment. I

[1] **MR. DANNAY:** But for the record, I would like to make

[2] my judgment as a matter of law to dismiss the complaint --

[3] **THE COURT:** Fine.

[4] **MR. DANNAY:** -- on all the facts in evidence. I'm not

[5] going to take a lot of time.

[6] **THE COURT:** You want to make your motion at the end of

[7] the plaintiff's case to dismiss.

[8] **MR. DANNAY:** Yeah.

[9] **THE COURT:** Go ahead.

[10] **MR. DANNAY:** And I'll renew it later. I'm making my

[11] motion for judgment as a matter of law on the basis of all of

[12] the facts in evidence and legal propositions that we've made

[13] before in this case and in the papers. I don't want to take a

[14] lot of time, but I simply want to reserve my rights on that.

[15] **THE COURT:** Motion is denied. Your rights are

[16] reserved.

[17] **MR. DANNAY:** Thank you. Now, there are just a few

[18] other things that we need to clear up.

[19] **THE COURT:** Fine.

[20] **MR. DANNAY:** We have put into the stipulation into

[21] evidence of book 1; which is -- I'm sorry, your Honor.

[22] **THE COURT:** That's all right. Talk your time.

[23] **MR. DANNAY:** In connection with the stipulation,

[24] beginning with Exhibit L and about 30 books in publication,

[25] which is now in evidence.

[1] would object because they can't then go cherrypick things out

[2] of the transcript and throw them into the record without

[3] Mr. Silverstein having an opportunity to respond. That's

[4] precisely why we were having a trial.

[5] **MR. DANNAY:** Well, we did initially, your Honor,

[6] designate certain portions. Did we hand those up?

[7] **MR. KJELLBERG:** No.

[8] **MR. DANNAY:** The portions? No.

[9] **MR. RABINOWITZ:** A live witness you don't designate

[10] portions.

[11] **MR. DANNAY:** It's an adverse party.

[12] **THE COURT:** Take it easy, Mr. Rabinowitz. Let me

[13] rule. Go ahead, Mr. Dannay.

[14] **MR. DANNAY:** We had initially, in the pretrial order,

[15] our pretrial order, designated certain portions which certainly

[16] we have a right to put in. It's an adverse party. But in view

[17] of all of the testimony in this case and everything we heard,

[18] we just felt it was actually a fairer exercise to put in the

[19] entire transcript.

[20] **THE COURT:** The trouble with putting something in the

[21] record and then you say it's not to be read is if it's part of

[22] the record, it then should be read, and we come to a matter of

[23] for appeal. When there's a deposition, when there's prior

[24] testimony or a prior statement, the appropriate way to proceed

[25] is to cross-examine the witness from any parts of the

[1] deposition that the adverse side believes to be contradictory
[2] or for some other reason the adverse side seeks to highlight
[3] them.

[4] I'm going to sustain Mr. Rabinowitz's objection. He
[5] was on the stand for several days, there was ample opportunity
[6] to cross-examine him from the deposition or from anything else
[7] that you had that arguably is in any way inconsistent. The
[8] objection is sustained.

[9] MR. DANNAY: Does that apply, your objection apply, as
[10] well, to the portions that we had designated in the pretrial
[11] order?

[12] THE COURT: Yes.

[13] MR. DANNAY: My objection is noted.

[14] THE COURT: All right. Your objection is noted.

[15] MR. DANNAY: There was, your Honor, an Exhibit N, the
[16] song sheet on a single piece of paper. It was published, and
[17] we offer that into evidence. It had been put in evidence, I
[18] think, sliced up into the six separate stances, if you will, of
[19] that.

[20] MR. RABINOWITZ: Objection, your Honor.

[21] THE COURT: Received.

[22] (Defendant's Exhibit N received in evidence)

[23] MR. DANNAY: There was a copy of The Portable Dorothy
[24] Parker, the 2006 edition, Defendant's Exhibit CCC, three C's,
[25] we which we offer into evidence.

[1] THE COURT: It's received.

[2] MR. RABINOWITZ: They are in already.

[3] (Defendant's Exhibit SSSS received in evidence)

[4] MR. DANNAY: Okay. That's our submission, your Honor.

[5] The defendant rests and renews its motion for judgment as a
[6] matter of law.

[7] THE COURT: Well, as of now your motions are denied,
[8] but I'm going to hear oral argument at some point.

[9] MR. DANNAY: Correct.

[10] THE COURT: As I take it, then, the defense rests,
[11] correct?

[12] MR. DANNAY: That is correct, your Honor.

[13] THE COURT: All right. Thank you.

[14] MR. DANNAY: We also have one stipulation, if it's
[15] acceptable to the Court, that Mr. Rabinowitz and I agreed to.
[16] You asked us to consult about a date to submit findings and
[17] conclusions. And we agreed on Friday, September 28th, if
[18] that's okay with the Court.

[19] THE COURT: Friday.

[20] MR. DANNAY: September 28, two-eight.

[21] THE COURT: You want to wait till then, all right.

[22] MR. DANNAY: We won't have the transcript till the
[23] middle of August.

[24] THE COURT: We won't have it till then, all right.

[25] MR. DANNAY: Not the entire transcript.

[1] MR. RABINOWITZ: I'm sorry, that was what?

[2] THE COURT: That's The Portable Dorothy Parker.

[3] MR. RABINOWITZ: No objection, your Honor.

[4] THE COURT: Received.

[5] (Defendant's Exhibit CCC received in evidence)

[6] MR. DANNAY: And finally, there was a composite
[7] exhibit, four S's, SSSS, the Scribner documents showing the
[8] royalties and other information relating to Not Much Fun, which
[9] we offer into evidence.

[10] MR. RABINOWITZ: Are those any different than what we
[11] admitted?

[12] THE COURT: Excuse me?

[13] MR. RABINOWITZ: I think we had those as our exhibits
[14] already.

[15] THE COURT: Hold it a minute. Do you know what your
[16] exhibit designation is?

[17] MR. DANNAY: Yes.

[18] THE COURT: No, I'm talking to Mr. Rabinowitz, I'm
[19] sorry.

[20] MR. RABINOWITZ: The Scribner ones?

[21] THE COURT: The point being whether it's in or not, do
[22] you have any objection to --

[23] MR. RABINOWITZ: No, your Honor, as long as --

[24] THE COURT: It is received.

[25] MR. DANNAY: We had received them from Scribner.

[1] THE COURT: Okay. Could I have my diary, Mr. Ryan.
[2] All right. So September 28th?

[3] MR. DANNAY: Friday, your Honor.

[4] THE COURT: Yes, I see. All right. Again, I don't
[5] want to clutter the record for scheduling, so let's leave this
[6] out for a second.

[7] (Off record)

[8] THE COURT: I should tell you this so that you know
[9] this. We can put it in the record. I have to leave the
[10] district the weekend of October 13th for a meeting of the
[11] multi-district litigation group, and I'll be out of town
[12] basically the whole week of the 15th. If you could do it, I
[13] would prefer oral argument, if you can do it, Tuesday, October
[14] 9th. Is that convenient for you?

[15] MR. RABINOWITZ: October 9?

[16] THE COURT: Yeah.

[17] MR. RABINOWITZ: Does your Honor have any notation in
[18] your book as to when various religious holidays are around that
[19] time?

[20] THE COURT: Yes, I do. October 8th is Columbus Day.
[21] I know Judge Wood will close the court October 8th. That's why
[22] I pick October 9th. The Jewish holidays are --

[23] THE DEPUTY CLERK: September.

[24] THE COURT: September 13th is the first day of Rosh
[25] Hashana. Yom Kippur is September 22nd.

[11] **MR. RABINOWITZ:** Thank you, your Honor.
 [12] **THE COURT:** You're welcome.
 [13] **MR. RABINOWITZ:** October 9th is fine.
 [14] **THE COURT:** This obviously has nothing to do with
 [15] either of you, so October 9th will be after a relatively long
 [16] weekend, if you want October 9th. If you don't want it, I'll
 [17] give you another date.
 [18] **MR. DANNAY:** That's fine with defendant.
 [19] **MR. RABINOWITZ:** That's fine, your Honor.
 [10] **THE COURT:** Fine. October 9th.
 [11] **MR. DANNAY:** It would be in the afternoon because of
 [12] the flying in of --
 [13] **THE COURT:** Is that what you would prefer, the
 [14] afternoon, Mr. Rabinowitz?
 [15] **MR. RABINOWITZ:** I would.
 [16] **THE COURT:** You tell me what time.
 [17] **MR. RABINOWITZ:** Two o'clock.
 [18] **MR. DANNAY:** That's fine.
 [19] **THE COURT:** All right. Let's make it 2:30.
 [20] **MR. DANNAY:** 2:30.
 [21] **THE COURT:** 2:30, Tuesday, October 9th for oral
 [22] argument. Thank you.
 [23] All right. Now, I'd like to compliment both sides on
 [24] the professional way in which the case was tried and the fact
 [25] that counsel got along very well, which makes for a better

[11] Okay. Thank you.
 [12] **MR. RABINOWITZ:** Have a good summer, your Honor.
 [13] **THE COURT:** Thank you.
 [14] * * *

[11] trial.
 [12] Apparently, the problems that existed during the
 [13] period before trial were obviated. And if I said anything that
 [14] was a little too tart the first day of the trial, I advise
 [15] counsel that my wife was a school teacher for many years, and
 [16] she's retired. She tells me that what you have to do with
 [17] students is be very tough at the beginning. And then if you're
 [18] tough at the beginning, everybody behaves themselves for the
 [19] rest of the school year. And I have found so it is with a
 [10] trial.
 [11] So everybody was very professional, very polite. I
 [12] compliment you, and you were very courteous. I look forward to
 [13] the oral argument.
 [14] Thank you very much. Have a very nice summer, the
 [15] rest of the time. Thank you.
 [16] **MR. RABINOWITZ:** The plaintiff greatly appreciates the
 [17] Court's hospitality.
 [18] **THE COURT:** Okay. Thank you.
 [19] **MR. DANNAY:** Same, your Honor. Thank you very much.
 [20] **MR. KJELLBERG:** Thank you.
 [21] **THE COURT:** Okay. Oh, one more thing on the record.
 [22] The various letters that I've received in the past from
 [23] counsel, all that will be docketed as part of the court files,
 [24] so that it's the official file. Some of them have not yet been
 [25] docketed. Anything you send to my chambers will be docketed.

PLAINTIFF EXHIBITS	
Exhibit No.	Received
290	5
223, 224, 225, 226	6
230 through 254	7
DEFENDANT EXHIBITS	
Exhibit No.	Received
KKKKK	5
LLLLL	11
N	13
CCC	14
SSSS	15

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<p>1</p> <p>1 634:17,18,19;635:2; 641:21 1006 636:19 1008 636:19 10-page 639:1 10th 640:1 11 651:9 12 634:21 13 651:10 13th 647:10,24 14 651:11 15 651:12 15th 640:10,16,21;647:12 17 639:3 18 639:2</p>	<p>87 639:3 8th 647:20,21</p> <p>9</p> <p>9 647:15 9th 647:14,22;648:3,5,6, 10,21</p> <p>A</p> <p>acceptable 646:15 accompanied 638:11 accurate 640:11 actually 639:1;643:18 admitted 634:23;638:18; 645:11 adverse 643:11,16;644:1, 2 advise 649:4 afternoon 648:11,14 Again 647:4 agree 639:6;640:5 agreed 638:22;646:15,17 ahead 641:9;643:13 alone 642:11 along 648:25 ample 644:5 Apparently 649:2 appeal 643:23 appear 635:13 apply 644:9,9 appreciates 649:16 appropriate 639:12; 643:24 arguably 644:7 argument 646:8;647:13; 648:22;649:13 argumentation 642:6 around 647:18 assume 636:23 assuming 637:1 attention 634:9 August 640:1,16,21; 646:23</p>	<p>647:18 books 641:24;642:7,9 both 634:15;635:14; 648:23 boxes 639:17,19,20 Breese 638:10;639:13; 640:3 briefly 642:6 briefs 640:10 bringing 634:9</p> <p>C</p> <p>Calhoun 634:13;637:15; 638:3 called 635:23 can 639:23;640:4,14; 647:9,13 case 634:17;635:7,14; 636:4;639:8;641:7,13; 642:20;643:17;648:24 CCC 644:24;645:5;651:11 certain 643:6,15 certainly 643:15 chambers 649:25 charts 635:12,16;636:9 check 640:10,14 cherrypick 643:1 cigarettes 638:1 clear 637:4;641:18 CLERK 647:23 close 647:21 clutter 647:5 collate 638:12 Colleen 638:10;639:13; 640:3 Columbus 647:20 compete 636:9 competing 635:14 complaining 637:24 complaint 641:2 complete 640:15 Complete 634:18 completes 634:13 compliment 648:23; 649:12 composite 645:6 conclusions 646:17 connection 641:23 Consistent 642:13 consult 646:16 consulted 638:22 contained 635:12 contemporaneous 640:13 continue 634:5 continues 636:8;639:3 contradictory 644:1 convenient 647:14 copy 644:23 correcting 634:8 couch 637:24 counsel 648:25;649:5,23</p>	<p>course 635:3;640:20 court 647:21;649:23 Court 646:15,18 COURT 634:1,8,12,22,25; 635:2,17,19,21,25;636:3, 11,22;637:8,11,13,17,20; 638:5,7,15,19;639:5,7,11, 16,18,21,25;640:3,7,12,16, 18,21,25;641:3,6,9,15,19, 22;642:1,5,12,15,21; 643:12,20;644:12,14,21; 645:2,4,12,15,18,21,24; 646:1,7,10,13,19,21,24; 647:1,4,8,16,20,24;648:2, 4,10,13,16,19,21;649:18, 21;650:3 courteous 649:12 Court's 634:17,19;635:2, 4;649:17 cross-examine 642:24; 643:25;644:6 C's 644:24 cut 636:24</p>	<p>designations 638:23 detail 636:16 diary 647:1 different 635:15,16; 636:9,9;645:10 disagree 640:5 disagreement 638:16 dismiss 641:2,7 district 647:10 docketed 649:23,25,25 document 637:5 documents 645:7 Dorothy 634:18;636:7; 644:23;645:2 Drevis 634:3 during 634:15;649:2</p>
<p>2</p> <p>2 635:4 2:30 648:19,20,21 20 639:2 2006 644:24 203 634:20 222 634:21 223 636:17;637:9;651:4 224 637:9;651:4 225 637:9;651:4 226 636:18;637:9;651:4 22nd 647:25 230 638:2,8;651:5 25 635:3 254 637:22;638:2,8;651:5 28 637:21;646:20 28th 646:17;647:2 29 639:20 290 636:2,3,5;651:3</p>	<p>B</p> <p>back 634:4,10;638:12 basically 647:12 basis 637:6;641:11 beginning 641:24;649:7, 8 begins 635:5;639:2 behaves 649:8 believes 644:1 bench 637:7 better 648:25 binder 637:22 binders 637:16 biobibliography 635:13 Biobibliography 635:24 book 637:21;641:21;</p>	<p>D</p> <p>damage 636:16 damages 636:21 Dannay 638:15;640:8,23; 643:13 DANNAY 635:1;636:25; 638:6;639:6;640:9,14,17, 24;641:1,4,8,10,17,20,23; 642:2,6,18;643:5,8,11,14; 644:9,13,15,23;645:6,17, 25;646:4,9,12,14,20,22,25; 647:3;648:8,11,18,20; 649:19 date 635:4;639:14;646:16; 648:7 day 647:24;649:4 Day 647:20 days 644:5 defendant 635:10;637:2; 646:5;648:8 DEFENDANT 651:6 Defendant's 636:13; 642:17;644:22,24;645:5; 646:3 defense 636:11;638:22; 640:4,4,23;642:16;646:10 demonstrative 635:9,11; 636:15,18;637:4;642:2,11 denied 641:15;646:7 deposition 634:13; 637:22;638:3,24;639:2,4; 642:19,25;643:23;644:1,6 DEPUTY 647:23 describe 635:21 designate 643:6,9 designated 643:15; 644:10 designation 645:16</p>	<p>E</p> <p>easy 643:12 edition 644:24 either 648:5 else 635:6;637:11,12; 640:19;644:6 end 641:6 entered 634:14 entire 642:18;643:19; 646:25 everybody 640:19;649:8, 11 everybody's 636:23 evidence 634:16;636:5, 13;637:10;638:9;641:4,12, 21,25;642:17;644:17,17, 22,25;645:5,9;646:3 Evidence 636:19 exactly 634:6 excerpt 639:1 excuse 636:19 Excuse 645:12 exercise 643:18 exhibit 636:12;637:21; 642:3,11;645:7,16 Exhibit 634:17,19,21; 635:2,4,5;636:2,3,5,6,11, 13;637:21,22;641:24; 642:17;644:15,22,24; 645:5;646:3;651:2,7 exhibits 634:24;635:10, 11;636:15,18;637:2,15; 638:10,13,14;639:12; 642:13;645:13 Exhibits 634:20;636:17; 637:9;638:2,8 EXHIBITS 651:1,6 existed 649:2</p>	
<p>3</p> <p>3:05 634:4 3:20 634:10 30 641:24 30-plus 642:7</p>	<p>9</p> <p>9 647:15 9th 647:14,22;648:3,5,6, 10,21</p>	<p>C</p> <p>Calhoun 634:13;637:15; 638:3 called 635:23 can 639:23;640:4,14; 647:9,13 case 634:17;635:7,14; 636:4;639:8;641:7,13; 642:20;643:17;648:24 CCC 644:24;645:5;651:11 certain 643:6,15 certainly 643:15 chambers 649:25 charts 635:12,16;636:9 check 640:10,14 cherrypick 643:1 cigarettes 638:1 clear 637:4;641:18 CLERK 647:23 close 647:21 clutter 647:5 collate 638:12 Colleen 638:10;639:13; 640:3 Columbus 647:20 compete 636:9 competing 635:14 complaining 637:24 complaint 641:2 complete 640:15 Complete 634:18 completes 634:13 compliment 648:23; 649:12 composite 645:6 conclusions 646:17 connection 641:23 Consistent 642:13 consult 646:16 consulted 638:22 contained 635:12 contemporaneous 640:13 continue 634:5 continues 636:8;639:3 contradictory 644:1 convenient 647:14 copy 644:23 correcting 634:8 couch 637:24 counsel 648:25;649:5,23</p>	<p>D</p> <p>damage 636:16 damages 636:21 Dannay 638:15;640:8,23; 643:13 DANNAY 635:1;636:25; 638:6;639:6;640:9,14,17, 24;641:1,4,8,10,17,20,23; 642:2,6,18;643:5,8,11,14; 644:9,13,15,23;645:6,17, 25;646:4,9,12,14,20,22,25; 647:3;648:8,11,18,20; 649:19 date 635:4;639:14;646:16; 648:7 day 647:24;649:4 Day 647:20 days 644:5 defendant 635:10;637:2; 646:5;648:8 DEFENDANT 651:6 Defendant's 636:13; 642:17;644:22,24;645:5; 646:3 defense 636:11;638:22; 640:4,4,23;642:16;646:10 demonstrative 635:9,11; 636:15,18;637:4;642:2,11 denied 641:15;646:7 deposition 634:13; 637:22;638:3,24;639:2,4; 642:19,25;643:23;644:1,6 DEPUTY 647:23 describe 635:21 designate 643:6,9 designated 643:15; 644:10 designation 645:16</p>	<p>E</p> <p>easy 643:12 edition 644:24 either 648:5 else 635:6;637:11,12; 640:19;644:6 end 641:6 entered 634:14 entire 642:18;643:19; 646:25 everybody 640:19;649:8, 11 everybody's 636:23 evidence 634:16;636:5, 13;637:10;638:9;641:4,12, 21,25;642:17;644:17,17, 22,25;645:5,9;646:3 Evidence 636:19 exactly 634:6 excerpt 639:1 excuse 636:19 Excuse 645:12 exercise 643:18 exhibit 636:12;637:21; 642:3,11;645:7,16 Exhibit 634:17,19,21; 635:2,4,5;636:2,3,5,6,11, 13;637:21,22;641:24; 642:17;644:15,22,24; 645:5;646:3;651:2,7 exhibits 634:24;635:10, 11;636:15,18;637:2,15; 638:10,13,14;639:12; 642:13;645:13 Exhibits 634:20;636:17; 637:9;638:2,8 EXHIBITS 651:1,6 existed 649:2</p>
<p>5</p> <p>5 651:3,8 50 634:6</p> <p>6</p> <p>6 651:4 67 639:2</p>	<p>B</p> <p>back 634:4,10;638:12 basically 647:12 basis 637:6;641:11 beginning 641:24;649:7, 8 begins 635:5;639:2 behaves 649:8 believes 644:1 bench 637:7 better 648:25 binder 637:22 binders 637:16 biobibliography 635:13 Biobibliography 635:24 book 637:21;641:21;</p>	<p>C</p> <p>Calhoun 634:13;637:15; 638:3 called 635:23 can 639:23;640:4,14; 647:9,13 case 634:17;635:7,14; 636:4;639:8;641:7,13; 642:20;643:17;648:24 CCC 644:24;645:5;651:11 certain 643:6,15 certainly 643:15 chambers 649:25 charts 635:12,16;636:9 check 640:10,14 cherrypick 643:1 cigarettes 638:1 clear 637:4;641:18 CLERK 647:23 close 647:21 clutter 647:5 collate 638:12 Colleen 638:10;639:13; 640:3 Columbus 647:20 compete 636:9 competing 635:14 complaining 637:24 complaint 641:2 complete 640:15 Complete 634:18 completes 634:13 compliment 648:23; 649:12 composite 645:6 conclusions 646:17 connection 641:23 Consistent 642:13 consult 646:16 consulted 638:22 contained 635:12 contemporaneous 640:13 continue 634:5 continues 636:8;639:3 contradictory 644:1 convenient 647:14 copy 644:23 correcting 634:8 couch 637:24 counsel 648:25;649:5,23</p>	<p>D</p> <p>damage 636:16 damages 636:21 Dannay 638:15;640:8,23; 643:13 DANNAY 635:1;636:25; 638:6;639:6;640:9,14,17, 24;641:1,4,8,10,17,20,23; 642:2,6,18;643:5,8,11,14; 644:9,13,15,23;645:6,17, 25;646:4,9,12,14,20,22,25; 647:3;648:8,11,18,20; 649:19 date 635:4;639:14;646:16; 648:7 day 647:24;649:4 Day 647:20 days 644:5 defendant 635:10;637:2; 646:5;648:8 DEFENDANT 651:6 Defendant's 636:13; 642:17;644:22,24;645:5; 646:3 defense 636:11;638:22; 640:4,4,23;642:16;646:10 demonstrative 635:9,11; 636:15,18;637:4;642:2,11 denied 641:15;646:7 deposition 634:13; 637:22;638:3,24;639:2,4; 642:19,25;643:23;644:1,6 DEPUTY 647:23 describe 635:21 designate 643:6,9 designated 643:15; 644:10 designation 645:16</p>	<p>E</p> <p>easy 643:12 edition 644:24 either 648:5 else 635:6;637:11,12; 640:19;644:6 end 641:6 entered 634:14 entire 642:18;643:19; 646:25 everybody 640:19;649:8, 11 everybody's 636:23 evidence 634:16;636:5, 13;637:10;638:9;641:4,12, 21,25;642:17;644:17,17, 22,25;645:5,9;646:3 Evidence 636:19 exactly 634:6 excerpt 639:1 excuse 636:19 Excuse 645:12 exercise 643:18 exhibit 636:12;637:21; 642:3,11;645:7,16 Exhibit 634:17,19,21; 635:2,4,5;636:2,3,5,6,11, 13;637:21,22;641:24; 642:17;644:15,22,24; 645:5;646:3;651:2,7 exhibits 634:24;635:10, 11;636:15,18;637:2,15; 638:10,13,14;639:12; 642:13;645:13 Exhibits 634:20;636:17; 637:9;638:2,8 EXHIBITS 651:1,6 existed 649:2</p>
<p>7</p> <p>7 651:5</p> <p>8</p>	<p>B</p> <p>back 634:4,10;638:12 basically 647:12 basis 637:6;641:11 beginning 641:24;649:7, 8 begins 635:5;639:2 behaves 649:8 believes 644:1 bench 637:7 better 648:25 binder 637:22 binders 637:16 biobibliography 635:13 Biobibliography 635:24 book 637:21;641:21;</p>	<p>C</p> <p>Calhoun 634:13;637:15; 638:3 called 635:23 can 639:23;640:4,14; 647:9,13 case 634:17;635:7,14; 636:4;639:8;641:7,13; 642:20;643:17;648:24 CCC 644:24;645:5;651:11 certain 643:6,15 certainly 643:15 chambers 649:25 charts 635:12,16;636:9 check 640:10,14 cherrypick 643:1 cigarettes 638:1 clear 637:4;641:18 CLERK 647:23 close 647:21 clutter 647:5 collate 638:12 Colleen 638:10;639:13; 640:3 Columbus 647:20 compete 636:9 competing 635:14 complaining 637:24 complaint 641:2 complete 640:15 Complete 634:18 completes 634:13 compliment 648:23; 649:12 composite 645:6 conclusions 646:17 connection 641:23 Consistent 642:13 consult 646:16 consulted 638:22 contained 635:12 contemporaneous 640:13 continue 634:5 continues 636:8;639:3 contradictory 644:1 convenient 647:14 copy 644:23 correcting 634:8 couch 637:24 counsel 648:25;649:5,23</p>	<p>D</p> <p>damage 636:16 damages 636:21 Dannay 638:15;640:8,23; 643:13 DANNAY 635:1;636:25; 638:6;639:6;640:9,14,17, 24;641:1,4,8,10,17,20,23; 642:2,6,18;643:5,8,11,14; 644:9,13,15,23;645:6,17, 25;646:4,9,12,14,20,22,25; 647:3;648:8,11,18,20; 649:19 date 635:4;639:14;646:16; 648:7 day 647:24;649:4 Day 647:20 days 644:5 defendant 635:10;637:2; 646:5;648:8 DEFENDANT 651:6 Defendant's 636:13; 642:17;644:22,24;645:5; 646:3 defense 636:11;638:22; 640:4,4,23;642:16;646:10 demonstrative 635:9,11; 636:15,18;637:4;642:2,11 denied 641:15;646:7 deposition 634:13; 637:22;638:3,24;639:2,4; 642:19,25;643:23;644:1,6 DEPUTY 647:23 describe 635:21 designate 643:6,9 designated 643:15; 644:10 designation 645:16</p>	<p>F</p> <p>face 637:4 fact 648:24 facts 641:4,12 fairer 643:18</p>

July 25, 2007

<p>felt 643:18 few 640:24;641:17 figures 636:20 file 649:24 files 649:23 finally 645:6 find 634:3 findings 646:16 fine 635:2;638:15;639:18; 640:18;648:3,8,9,18 Fine 635:17;636:3,12; 638:17;639:16,25;640:21; 641:3,19;648:10 finish 634:2 first 635:5;647:24;649:4 flying 648:12 form 635:9,11 formulations 635:15 forward 649:12 found 649:9 four 645:7 Friday 639:18,22;646:17, 19;647:3 Fun 635:12,24;636:8; 645:8</p>	<p>645:8 initially 643:5,14 instance 637:21 interpretation 637:5; 638:24 into 634:14;641:20,20; 642:8,19;643:2;644:17,18, 25;645:9 introduction 638:4; 639:12 Item 635:23,24 items 635:12,20;636:15</p>	<p>646:6 may 634:5 Maybe 639:23 mean 636:23,24;637:20 meantime 639:24 meeting 647:10 middle 646:23 minute 645:15 minutes 634:6 moral 637:23 more 634:2;638:21; 639:21;649:21 morning 639:20 mother 637:25 motion 641:6,11;646:5 Motion 641:15 motions 646:7 move 638:3 much 634:4;636:10; 649:14,19 Much 635:12,24;636:8; 645:8 multi-district 647:11 myself 640:24</p>	<p>643:3;644:5 oral 646:8;647:13;648:21; 649:13 order 643:14,15;644:11 out 634:3;639:20;643:1; 647:6,11 outside 637:5 over 636:23</p>	<p>pursuant 636:19 put 641:20;643:16,18; 644:17;647:9 putting 643:20</p>
<p style="text-align: center;">G</p>	<p style="text-align: center;">J</p>	<p style="text-align: center;">N</p>	<p style="text-align: center;">P</p>	<p style="text-align: center;">R</p>
<p>gave 637:24 good 650:2 Good 634:4 grandmother 637:25 greatly 649:16 group 647:11 grubbed 637:25</p>	<p>Jewish 647:22 John 638:24;639:3 Judge 647:21 judgment 641:2,11; 642:25;646:5 July 635:3</p>	<p>need 640:22;641:18 nice 649:14 notation 647:17 notations 634:2 noted 644:13,14 number 635:13 numbers 635:16;636:17 Numbers 635:24</p>	<p>page 635:5,13,16;639:2,3 Page 635:24 pages 639:2 paper 644:16 papers 641:13 paragraph 634:18,21 Parker 634:18;636:7; 644:24;645:2 part 634:16;636:4;639:8; 642:20;643:21;649:23 parties 635:9 parts 643:25 party 643:11,16 past 649:22 Penguin 636:6 period 649:3 pick 647:22 piece 644:16 plaintiff 635:6,10,10; 636:15;637:12,13;639:9; 642:22;649:16 Plaintiff 640:7 PLAINTIFF 651:1 plaintiff's 634:24;635:23; 636:4;637:15;639:8;641:7 Plaintiff's 636:1,3,5; 637:9;638:2,8 played 634:11 Poems 634:19;636:7 point 637:14;638:21; 645:21;646:8 polite 649:11 Portable 644:23;645:2 portions 643:6,8,10,15; 644:10 post 642:10 precisely 643:4 prefer 647:13;648:13 pretrial 643:14,15;644:10 pretty 636:10 prior 643:23,24 problem 639:25;642:21 problems 649:2 proceed 643:24 professional 648:24; 649:11 Professor 634:13 propositions 641:12 publication 641:24 publications 642:8 published 644:16 purpose 642:7,11</p>	<p>Rabinowitz 643:12; 645:18;646:15;648:14 RABINOWITZ 634:6,20, 23;635:8,18,20,23;636:1,6, 14;637:12,14,18;638:2,10, 18,21;639:9,15,17,19,23; 640:2,6,20;642:13,23; 643:9;644:20;645:1,3,10, 13,20,23;646:2;647:15,17; 648:1,3,9,15,17;649:16; 650:2 Rabinowitz's 644:4 Randall 634:13 read 634:15;642:20; 643:21,22 reads 634:18 reason 637:3;644:2 reasons 637:2 receive 637:1,8 received 634:1,14,16; 636:3,5,11,13;637:9;638:7, 8;639:7;642:15,17;644:22; 645:5,24,25;646:1,3; 649:22 Received 636:22;644:21; 645:4;651:2,7 recess 634:15 record 634:12,16;635:21; 637:1;641:1;642:19,20; 643:2,21,22;647:5,7,9; 649:21 recording 634:11 refers 634:20 reflect 635:16 relate 638:24 related 642:2 relating 639:12;645:8 relatively 648:5 religious 647:18 renew 641:10 renews 646:5 require 637:5 reserve 641:14 reserved 641:16 respond 643:3 rest 637:13;640:23;649:9, 15 resting 638:19;639:11 rests 639:10;640:7;646:5, 10 retired 649:6 right 634:12;635:6,19; 636:22;639:7,11;640:18, 21;641:22;642:3,15; 643:16;644:14;646:13,21, 24;647:2,4;648:19,23</p>
<p style="text-align: center;">H</p>	<p style="text-align: center;">K</p>	<p style="text-align: center;">O</p>	<p style="text-align: center;">P</p>	<p style="text-align: center;">R</p>
<p>hand 643:6 happen 639:24 Hashana 647:25 hear 646:8 heard 643:17 helpful 637:6 highlight 644:2 Hold 645:15 holidays 647:18,22 Honor 634:7,20;635:8; 636:16,25;637:19;638:11, 21;639:9;640:6,9;641:21; 642:14,23;643:5;644:15, 20;645:3,23;646:4,12; 647:3,17;648:1,9;649:19; 650:2 hospitality 649:17</p>	<p>kind 636:9 Kippur 647:25 Kjellberg 638:16 KJELLBERG 642:4; 643:7;649:20 KKKKK 636:7,11,13; 651:8</p>	<p>object 637:2,6;643:1 objection 634:25;635:1; 636:22,24;638:5;639:5,6; 642:12;644:4,8,9,13,14; 645:3,22 Objection 644:20 obviated 649:3 obviously 648:4 o'clock 648:17 October 647:10,13,15,20, 21,22;648:3,5,6,10,21 off 636:24 Off 647:7 offer 642:11,18;644:17, 25;645:9 offered 636:6,18 offering 635:11 official 649:24 one 637:24;638:21; 646:14;649:21 One 637:14;640:22 ones 645:20 only 642:21 open 637:21 opportunity 642:24;</p>	<p style="text-align: center;">P</p>	<p style="text-align: center;">R</p>
<p style="text-align: center;">I</p>	<p style="text-align: center;">L</p>	<p style="text-align: center;">M</p>	<p style="text-align: center;">P</p>	<p style="text-align: center;">R</p>
<p>identified 637:3 include 637:18 included 638:20 inconsistent 644:7 information 636:10;</p>	<p>labeled 636:1;642:3 last 637:14 later 638:13;641:10 law 641:2,11;646:6 leave 647:5,9 left 634:7 legal 641:12 letters 649:22 limited 638:23 line 639:2,3 Listed 636:7 litigation 647:11 little 649:4 live 643:9 LLLLL 642:3,15,17;651:9 long 645:23;648:5 look 649:12 lot 641:5,14 luncheon 634:15</p>	<p>makes 648:25 making 641:10 Makinson 638:24 Makinson's 639:4 many 649:5 material 640:3 matter 641:2,11;643:22;</p>	<p style="text-align: center;">P</p>	<p style="text-align: center;">R</p>

<p>rights 641:14,15 room 642:9 Rosh 647:24 royalties 645:8 royalty 638:25 rule 643:13 Rule 636:19 Ryan 640:22;647:1</p>	<p>Stuart 636:7;642:19 students 649:7 subject 638:19;639:11 submission 639:4; 640:22;646:4 submissions 635:9; 640:13 submit 638:12,13,23; 646:16 submitted 636:15; 639:13;642:8 suggest 634:4 suggested 638:12 summarize 636:16 summary 636:20;642:25 summer 649:14;650:2 suppose 637:14 sure 638:16;640:10,14 Sure 635:23;640:12,16 sustain 644:4 sustained 644:8</p>	<p>V</p> <p>vacations 640:9 various 647:18;649:22 video 634:2 Video 634:11 videotape 638:11 view 640:5;643:16 views 635:14;636:10</p>		
<p>S</p> <p>sales 636:17,20;638:25 same 636:10 Same 649:19 saw 637:15 scheduling 647:5 school 649:5,9 Scribner 645:7,20,25 second 635:4;647:6 seeks 644:2 sees 642:9 selected 638:23 send 649:25 separate 639:4;644:18 September 646:17,20; 647:2,23,24,25 several 635:8;644:5 sheet 644:16 sheets 636:17,20 shipped 639:20 short 639:1 show 635:12;636:20; 638:15;639:19;640:4 showing 645:7 side 644:1,2 sides 634:15;648:23 sign 642:10 Silverstein 636:8;642:19; 643:3 simply 641:14 single 644:16 sitting 637:24 six 644:18 sliced 644:18 slightly 635:14 smoking 637:25 so-called 637:23 solely 636:18 someone 642:8 song 644:16 sorry 634:8;639:2;641:21; 645:1,19 S's 645:7 SSSS 645:7;646:3;651:12 stances 644:18 stand 634:3;644:5 state 636:25 statement 643:24 statements 638:25,25 states 642:7 stipulation 634:18;635:5; 641:20,23;646:14 stipulations 634:1,14</p>	<p>T</p> <p>tales 637:23 Talk 641:22 talking 640:1;645:18 tart 649:4 teacher 649:5 tells 649:6 tender 635:16 terms 640:9 testimony 643:17,24 Thanks 634:4 theory 636:16,21 three 637:23;644:24 throw 643:2 till 646:21,22,24 titled 636:7 today 634:19;635:3 Today 635:3 today's 635:4 tough 649:7,8 town 647:11 transcript 642:19;643:2, 19;646:22,25 trial 637:7;642:25;643:4; 649:1,3,4,10 tried 648:24 trouble 643:20 Tuesday 647:13;648:21 twice 640:15 two 634:1,14;635:15,20; 636:9,14;639:23 Two 648:17 two-eight 646:20 types 636:14</p>	<p>W</p> <p>wait 646:21 walks 642:8 wants 642:9 way 636:24;643:24;644:7; 648:24 week 639:15,18,21; 647:12 weekend 647:10;648:6 weeks 639:23 welcome 648:2 whole 647:12 wife 649:5 without 642:6;643:2 witness 643:9,25 women 637:23 Wood 647:21 words 637:20</p>		
	<p>U</p> <p>up 637:25;639:19;641:18; 643:6;644:18 used 638:3</p>	<p>Y</p> <p>year 649:9 years 649:5 Yom 647:25 young 637:23</p>		