

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2008

4 (Argued: June 3, 2009 Decided: April 5, 2012)

5 Docket Nos. 08-2462-cv(L), 08-2677-cv(XAP)

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7 BESSEMER TRUST COMPANY, N.A.,

8 Plaintiff-Counter-Defendant-Appellee-Cross-Appellant,

9 - v -

10 FRANCIS S. BRANIN, JR.,

11 Defendant-Counterclaimant-Appellant-Cross-Appellee.

12 -----

13 Before: McLAUGHLIN, CALABRESI, and SACK, Circuit Judges.

14 Appeal by the defendant and cross-appeal by the
15 plaintiff from a judgment of the United States District Court for
16 the Southern District of New York (John E. Sprizzo, Judge)
17 entered after a bench trial. The district court found the
18 defendant liable to the plaintiff for improper solicitation of a
19 client's account under the so-called "Mohawk doctrine," where
20 that account and its associated "good will" had earlier been
21 transferred to the plaintiff by the defendant and others. On
22 appeal, we certified a question to the New York Court of Appeals
23 as to the scope of the "Mohawk doctrine." Bessemer Trust Co.,
24 N.A. v. Branin, 618 F.3d 76, 93-94 (2d Cir. 2010). In answer to
25 our question, the Court of Appeals concluded, inter alia, that

1 "while a seller [of a business and its 'good will'] may not
2 contact his former clients directly [to seek to attract them to
3 his new firm], he may, in response to inquiries made on a former
4 client's own initiative, answer factual questions." Bessemer
5 Trust Co., N.A. v. Branin, 16 N.Y.3d 549, 559-60, 949 N.E.2d 462,
6 470, 925 N.Y.S.2d 371, 379 (2011) (internal quotation marks
7 omitted). In light of this response, we vacate the judgment of
8 the district court in part and remand for further proceedings.

9 Vacated in part, decision reserved in part, and
10 remanded.

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12 LLP (Gretchen N. Werwaiss, Marjory T.
13 Herold, and Bernadette K. Galiano, on
14 the brief), New York, NY, for Plaintiff-
15 Counter-Defendant-Appellee-Cross-
16 Appellant.

17 LOUIS P. DiLORENZO, Bond, Schoeneck &
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20 York, NY, for Defendant-Counterclaimant-
21 Appellant-Cross-Appellee.

22 SACK, Circuit Judge:

23 We return to consider this appeal further, in light of
24 the answer provided by the New York Court of Appeals in Bessemer
25 Trust Co., N.A. v. Branin (Bessemer V), 16 N.Y.3d 549, 949 N.E.2d
26 462, 925 N.Y.S.2d 371 (2011), in response to a question that we
27 had certified to it in Bessemer Trust Co., N.A. v. Branin
28 (Bessemer IV), 618 F.3d 76, 93-94 (2d Cir. 2010).¹ The issue to

¹ In "Bessemer I," the district court found defendant Francis S. Branin, Jr., an investment portfolio manager, liable to Bessemer, a firm to which he had sold "good will," after one

1 which the Court of Appeals gave its attention and to which we now
2 give ours concerns what actions the defendant, a seller of, inter
3 alia, the "good will"² of a business, may thereafter permissibly
4 take to woo former clients of the business to a competitor under
5 New York law. The facts of this case and its procedural history
6 are set forth at some length in our previous opinion in this
7 appeal, Bessemer IV. We recount them here only insofar as we
8 think it necessary to explain our disposition of this appeal in
9 light of the New York Court of Appeals' answer to our certified
10 question.

11 **BACKGROUND**

12 On August 18, 2000, defendant Francis S. Branin, Jr.,
13 an investment portfolio manager and the largest shareholder of
14 the firm of Brundage, Story and Rose, LLC ("Brundage"), sold the
15 assets of the firm along with its client accounts and related

of Branin's former clients transferred his account from Bessemer to Branin's new firm. See Bessemer Trust Co., N.A. v. Branin (Bessemer I), 427 F. Supp. 2d 386 (S.D.N.Y. 2006). In "Bessemer II," the district court granted Bessemer's motion for summary judgment on Branin's counterclaims. See Bessemer Trust Co., N.A. v. Branin (Bessemer II), 498 F. Supp. 2d 632 (S.D.N.Y. 2007). In "Bessemer III," the district court fixed the amount of money for which Branin was liable to Bessemer. See Bessemer Trust Co., N.A. v. Branin (Bessemer III), 544 F. Supp. 2d 385 (S.D.N.Y. 2008). In "Bessemer IV," inter alia, we certified a question to the New York Court of Appeals. See Bessemer Trust Co., N.A. v. Branin (Bessemer IV), 618 F.3d 76 (2d Cir. 2010). Finally, in "Bessemer V," the New York Court of Appeals answered our certified question. See Bessemer Trust Co., N.A. v. Branin (Bessemer V), 16 N.Y.3d 549, 949 N.E.2d 462, 925 N.Y.S.2d 371 (2011).

² We follow the New York Court of Appeals' style by placing the term "good will" in quotation marks. See, e.g., Bessemer V, 16 N.Y.3d 549, 949 N.E.2d 462, 925 N.Y.S.2d 371 passim.

1 "good will" to Bessemer. Bessemer IV, 618 F.3d at 80-81.
2 Although Branin originally stayed on at Bessemer as a "client
3 account manager," he soon became dissatisfied with his diminished
4 responsibilities. He left Bessemer to join Stein Roe Investment
5 Counsel LLC ("Stein Roe"), an investment management firm in
6 competition with Bessemer. Id. at 81-82.

7 In negotiations with Stein Roe, Branin touted his
8 ability to bring his Bessemer clients, most or all of whom
9 originally moved with him as part of the sale of Brundage to
10 Bessemer, to Stein Roe. He indicated "his hope that within
11 twelve months of joining the firm[,] he would be able to transfer
12 [to Stein Roe] \$1.5 to \$1.8 million of the approximately \$2.3
13 million in [annual] revenue that he was [then] generating for
14 Bessemer." Id. at 82. "He informed Stein Roe that it was
15 possible, however, that few or none of his Bessemer clients would
16 move their business." Id. "Prior to his resignation from
17 Bessemer, Branin refrained from contacting any of his Bessemer
18 clients to inform them of his impending move" or to discuss
19 anything relating to it. Id.

20 Once Branin joined Stein Roe, that company began
21 crafting and implementing a strategy to entice Branin's former
22 Bessemer clients to move their business to Stein Roe. Id. Part
23 of this strategy involved maintaining Branin's current schedule
24 of fees so that clients would not have their fees increased if
25 they followed Branin to Stein Roe. Id. Additionally, Branin's
26 former assistant at Bessemer, who was otherwise of no interest to

1 Stein Roe as a prospective employee, was hired by the firm "to
2 help Branin transition as much of his client base to Stein Roe as
3 possible." Id. at 84 (brackets and internal quotation marks
4 omitted). "By the following summer, around thirty of Branin's
5 former clients, representing \$205 million in assets, had
6 transferred their accounts from Bessemer to Stein Roe, accounting
7 for all but around \$23 million of the assets Branin [had] managed
8 at Stein Roe." Id. at 82.

9 Branin did not initiate contacts with his clients in an
10 effort to assist Stein Roe in its strategy to obtain the Bessemer
11 clients. Id. He did, however, respond to their inquiries if
12 they asked why he left Bessemer. Id. If they requested
13 information about his new firm, he sent them Stein Roe's
14 promotional material. Id. The district court found that
15 "Branin's 'standard' answer to clients who asked why he left
16 Bessemer was that 'a firm like Stein Roe was far more appropriate
17 for me, . . . that the method of dealing with clients, that the
18 approach whereby portfolio managers managed the client portfolios
19 and interacted directly with the clients was more . . .
20 appropriate for my training and experience of 30 years in the
21 business.'" Id. (quoting Bessemer Trust Co., N.A. v. Branin
22 (Bessemer I), 427 F. Supp. 2d 386, 391 (S.D.N.Y. 2006), in turn
23 quoting Joint Statement of Undisputed Facts, Ex. A to Pre-Trial
24 Order dated August 3, 2004) (ellipses in Bessemer I). "Branin
25 did not say or suggest that Stein Roe's approach would be better
26 or more appropriate for any particular client, nor is there

1 [record] evidence that Branin explicitly disparaged Bessemer."

2 Id.

3 "The evidence introduced at trial established that
4 Branin had individual meetings, either alone or with other Stein
5 Roe employees participating," with, among others, representatives
6 of the Palmer family, a former client with a large account at
7 Brundage and then at Bessemer. Id. at 82-83. Branin had managed
8 the Palmer account for fifteen to twenty years at Brundage,
9 developing a close personal friendship with Carleton Palmer, III,
10 who represented the family in its dealings with Bessemer. Id. at
11 83. Branin did not notify Palmer and the Palmer family of his
12 move to Stein Roe. Id. But Palmer did call Branin and ask him
13 questions about the move. Id. Branin's responses were,
14 according to Palmer's testimony, very spare. Id.

15 "Palmer followed up [on his inquiries] with a letter
16 requesting specific information as to how the Palmer account
17 might be handled at Stein Roe." Id. Palmer and other members of
18 the Palmer family then scheduled back-to-back meetings on August
19 29, 2002 with Stein Roe and Bessemer to discuss the Palmer
20 account. Id.

21 Branin helped Stein Roe prepare for these meetings by
22 telling other Stein Roe employees about Carleton Palmer and the
23 Palmers' investment philosophy. Id. According to the trial
24 testimony of Carleton Palmer, during the subsequent meeting
25 between Palmer and Stein Roe, Branin "pretty much sat over in the
26 corner and kept quiet," and "played almost no role," "other than

1 to introduce Carleton Palmer to the firm and occasionally amplify
2 a point if he knew it was something [the Palmers] would be
3 interested in." Id. (internal quotation marks and citations
4 omitted).

5 The Palmers thereafter invited Branin to Ohio to make a
6 specific proposal on behalf of Stein Roe. Id. Branin accepted.
7 Id. During the subsequent visit, "Branin informed the Palmer
8 family that they would pay the same fees at Stein Roe that they
9 were then paying at Bessemer, and that the president of Stein Roe
10 would be the 'number two' on the family account." Id.

11 "The next day, . . . September 17, 2002, the Palmer
12 family moved their account to Stein Roe." Id.

13 District Court Proceedings

14 On November 22, 2002, following the departure of the
15 Palmer family and several of Branin's other former Bessemer
16 clients from the firm, Bessemer filed the complaint in this
17 action in New York Supreme Court, New York County. Id. at 84.
18 "Bessemer asserted claims for breach of contract and breach of
19 Branin's duty of loyalty to Bessemer based on Branin's allegedly
20 improper solicitation of clients and impairment of the [']good
21 will['] which Branin had sold to Bessemer in connection with the
22 sale of Brundage." Id. Branin removed the case to the United
23 States District Court for the Southern District of New York based
24 on diversity of citizenship, and filed various counterclaims.
25 Id.

1 The district court denied the parties' cross-motions
2 for summary judgment on Bessemer's claims, and the case proceeded
3 to a bench trial as to liability. Id. The district court issued
4 a memorandum opinion and order on April 10, 2006, concluding that
5 Branin had violated New York law by impairing Bessemer's "good
6 will" in the Palmer account, but that Bessemer had not proven a
7 violation of law by a preponderance of the evidence with respect
8 to any other transferred account. Bessemer I, 427 F. Supp. 2d at
9 397-98. The district court then conducted a separate bench trial
10 on damages, and concluded that Branin was liable to Bessemer in
11 the amount of \$826,335 plus prejudgment interest of \$402,838, for
12 a total of \$1,229,173. Bessemer III, 544 F. Supp. 2d at 390-93.³

13 Proceedings in this Court

14 Branin appealed the finding of liability and damages.
15 With respect to the district court's finding of liability as to
16 the Palmer account, we determined that New York law regarding the
17 liability of a seller of "good will" for soliciting former
18 clients -- the so-called "Mohawk Doctrine," named after Mohawk
19 Maintenance Co. v. Kessler, 52 N.Y.2d 276, 419 N.E.2d 324, 437
20 N.Y.S.2d 646 (1981) -- was unclear as applied to the facts of
21 this case. Bessemer IV, 618 F.3d at 90. We therefore certified
22 the following question to the New York Court of Appeals:

23 What degree of participation in a new
24 employer's solicitation of a former

³ The district court also granted Bessemer summary judgment on Branin's counterclaims, Bessemer II, 498 F. Supp. 2d at 639, which we affirmed on appeal, Bessemer IV, 618 F.3d at 91-93.

1 employer's client by a voluntary seller of
2 that client's good will constitutes improper
3 solicitation? We are particularly interested
4 in how the following two sets of
5 circumstances influence this analysis: (1)
6 the active development and participation by
7 the seller, in response to inquiries from a
8 former client whose good will the seller has
9 voluntarily sold to a third party, in a plan
10 whereby others at the seller's new company
11 solicit the client, and (2) participation by
12 the seller in solicitation meetings where the
13 seller's role is largely passive.

14 Id. at 94.

15 The New York Court of Appeals's
16 Answer to Our Certified Question

17 The New York Court of Appeals accepted and answered our
18 certified question. It noted that, "[u]nder New York common law,
19 a seller has an 'implied covenant' or 'duty to refrain from
20 soliciting former customers, which arises upon the sale of the
21 'good will' of an established business.'" Bessemer V, 16 N.Y.3d
22 at 556, 949 N.E.2d at 468, 925 N.Y.S.2d at 377 (quoting Mohawk
23 Maintenance Co., 52 N.Y.2d at 283, 419 N.E.2d at 328, 437
24 N.Y.S.2d at 650). This covenant, which is effective in
25 perpetuity, is based on the principle that "the vendor is not at
26 liberty to destroy or depreciate the thing which he has sold;
27 there is an implied covenant, on the sale of [']good will['],
28 that the vendor does not solicit the custom which he has parted
29 with; it would be a fraud on the contract to do so." Id.
30 (quoting Von Bremen v. MacMonnies, 200 N.Y. 41, 50-51, 93 N.E.
31 186, 189 (1910)). Thus, the seller of "good will" may not

1 "actively solicit" the customers associated with it. Id. at 557,
2 949 N.E.2d at 468, 925 N.Y.S.2d at 377.

3 Despite these general principles, a buyer of "good
4 will" assumes "certain risks" relating to the continuation of the
5 purchased business. Id. Unless the buyer has also secured from
6 the seller of "good will" a binding promise not to compete, the
7 buyer risks loss of customers to him or her. Id.

8 Rather than creating a "hard and fast rule [to]
9 determin[e] whether a seller of 'good will' has improperly
10 solicited his former clients" in response to our certified
11 question, the Court of Appeals instructed that "in making this
12 assessment on a case-by-case basis, the trier of fact must
13 consider the principles underlying the rule in Mohawk and the
14 factors involved within the relevant industry that may impair the
15 'good will' conveyed by the original seller." Id. at 557, 949
16 N.E.2d at 469, 925 N.Y.S.2d at 378.

17 Among the factors to be considered in this inquiry are
18 whether the seller initiated contact with his or her former
19 clients associated with the sold "good will." "The 'implied
20 covenant' not to solicit former customers bars a seller from
21 taking affirmative steps to directly communicate with them," such
22 as by "send[ing] targeted mailings or mak[ing] individualized
23 telephone calls to his former customers informing them of his new

1 business ventures."⁴ Id. at 557-58, 949 N.E.2d at 469, 925
2 N.Y.S.2d at 378.

3 The Court of Appeals explained that while a seller "is
4 not free to tout his new business venture simply because a former
5 client has fortuitously communicated with him first," he is
6 allowed to make certain responses to questioning initiated by the
7 former client. Id. The seller "may answer the factual inquiries
8 of a former client, so long as such responses do not go beyond
9 the scope of the specific information sought." Id. at 558-59,
10 949 N.E.2d at 469-70, 925 N.Y.S.2d at 378-79. And "even if
11 prompted," he may not "disparage[] the purchaser of his
12 business." Id. at 559, 949 N.E.2d at 470, 925 N.Y.S.2d at 379.
13 Nor may he "explain . . . why he believes his products or
14 services are superior" in response to a question from a former
15 client. Id.

16 When the seller of "good will" subsequently joins a
17 firm that competes with the buyer, he may "convey certain
18 information about his former client to his new employer,"
19 including "a former client's investment preferences, financial
20 goals, and tolerance of risk." Id. However, the seller may not
21 convey to his new employer "information that is proprietary to a
22 purchaser of 'good will.'" Id. Should the former client request
23 a "sales pitch" meeting, as the Palmer family did, the seller may

⁴ The Court of Appeals made clear that the examples of impermissible conduct just discussed are intended to be "illustrative, not exhaustive." Id.

1 help his new employer prepare for the meeting and "may be present
2 when such meeting takes place, . . . [s]o long as [his] role is
3 limited to responses to factual matters." Id.

4 In sum, the Court of Appeals concluded, "while a
5 seller may not contact his former clients directly, he may, 'in
6 response to inquiries' made on a former client's own initiative,
7 answer factual questions[,] . . . [and] assist his new employer
8 in the 'active development . . . [of] a plan' to respond to that
9 client's inquiries. Should that plan result in a meeting with a
10 client, a seller's 'largely passive' role at such meeting . . .
11 [is permissible]." Id. at 559-60, 949 N.E.2d at 470, 925
12 N.Y.S.2d at 379 (second ellipsis in original; some alterations in
13 original).

14 **DISCUSSION**

15 "In reviewing a district court's decision in a bench
16 trial, we review the district court's findings of fact for clear
17 error and its conclusions of law de novo." White v. White Rose
18 Food, 237 F.3d 174, 178 (2d Cir. 2001). Having reviewed the
19 legal standard applied by the district court and the facts it
20 emphasized in applying it, with the benefit of the Court of
21 Appeals's answer to our certified question, we conclude that the
22 district court's judgment as to Branin's liability must be
23 vacated.

24 First, the district court placed considerable weight on
25 the fact that Branin intended to transfer his former clients to
26 Stein Roe. It also emphasized the fact that Branin's employment

1 with Stein Roe was consummated with the understanding that he
2 would seek to take his Bessemer clients with him to Stein Roe.
3 See Bessemer I, 427 F. Supp. 2d at 393 ("In addition to Branin's
4 stated intent to transfer his clients, the 'lift-out template'
5 which marked his move to Stein Roe was completely dependent upon
6 him successfully transferring clients from Bessemer to Stein
7 Roe."). While these facts may provide useful background for
8 evaluating the propriety of Branin's actions, the New York Court
9 of Appeals has made it clear that an intent to secure the
10 business of former clients associated with sold "good will" is
11 not ipso facto improper. "[P]rovided that he does not actively
12 solicit" his former customers, Bessemer V, 16 N.Y.3d at 557, 949
13 N.E.2d at 468, 925 N.Y.S.2d at 377 (emphasis omitted), a seller
14 of "good will" may "assist his new employer in the active
15 development of a plan to respond to" former clients' inquiries,
16 id. at 560, 949 N.E.2d at 470, 925 N.Y.S.2d at 379 (brackets,
17 internal quotation marks, and ellipsis omitted). Those very
18 actions were an important part of Branin and Stein Roe's plan to
19 persuade Bessemer clients associated with the sold "good will" to
20 bring their business to Stein Roe.

21 The district court, in making its determination, relied
22 significantly on various actions taken by Branin to make Stein
23 Roe attractive to former clients and ease their transition to the
24 firm, but which were not in the nature of active solicitation.
25 These measures included Branin's hiring of his former secretary
26 to assist him in transferring clients, Bessemer I, 427 F. Supp.

1 2d at 394 ("Branin pushed for the hiring of [the former
2 secretary], and willingly absorbed over half of her compensation,
3 as a way to help him transition clients and to frustrate
4 Bessemer's use of someone who was acquainted with approximately
5 70% of his clients."), and Branin's retention of his fee schedule
6 from Bessemer, id. ("[H]aving the same fees as at Bessemer would
7 facilitate the movement of clients to Stein Roe."). While this
8 conduct may evidence an intent to transfer clients, it is clear
9 from the Court of Appeals's opinion that harboring such an
10 intent, and even taking some action in furtherance of that
11 intent, does not necessarily constitute legally impermissible
12 affirmative solicitation.

13 The district court also focused on Branin's stock
14 response to former clients, including Carleton Palmer, who called
15 and asked Branin why he moved from Bessemer to Stein Roe. See
16 id. at 396 n.10. The court found that Branin's response, which
17 was that "Stein Roe 'was far more appropriate for me' and for 'my
18 training and experience of 30 years in the business,'" was
19 "disingenuous and improper." Id. at 394 (citation omitted).
20 Whether Branin's response was factual in nature or instead the
21 equivalent of "tout[ing] his new business venture simply because
22 a former client has fortuitously communicated with him first,"
23 "disparag[ing]" Bessemer, or explaining "why he believe[d] his
24 products or services [were] superior" to Bessemer's, Bessemer V.
25 16 N.Y.3d at 558-59, 949 N.E.2d at 469-70, 925 N.Y.S.2d at 378-

1 79, should be considered by the district court in the first
2 instance in light of the New York Court of Appeals's views.

3 The district court also appeared to place great weight
4 on the fact that Branin helped Stein Roe to organize a "dog and
5 pony" show to entice Palmer to move his business -- "a
6 presentation which" the district court described as "perfectly
7 tailored to [Palmer's] liking by [Branin]." Bessemer I, 427 F.
8 Supp. 2d. at 397. "Armed with information about Palmer that
9 Branin had gathered from years of working with him, Stein Roe's
10 presenters steered clear of topics in which Palmer had little
11 interest and focused only on those things that were of interest
12 to him." Id. at 396 (citations omitted). And as the district
13 court pointed out, this gave Stein Roe a significant advantage
14 over Bessemer when it made a similar presentation to Palmer. Id.

15 But the Court of Appeals has now made clear that at
16 least some tailoring of presentations to former clients of a
17 seller of "good will" such as Branin is permitted. Such a person
18 "is free to convey certain information about his former client to
19 his new employer," including "a former client's investment
20 preferences, financial goals, and tolerance of risk." Bessemer
21 V, 16 N.Y.3d at 559, 949 N.E.2d at 470, 925 N.Y.S.2d at 379. The
22 Court of Appeals also noted that such a seller of "good will"
23 "may also aid his new employer in preparing for a 'sales pitch'
24 meeting requested by a former client." Id. Indeed, he may
25 "assist his new employer in the active development of a plan to
26 respond to that client's inquiries." Id. at 560, 949 N.E.2d at

1 470, 925 N.Y.S.2d at 379 (brackets, internal quotation marks, and
2 ellipsis omitted).

3 Similarly, the district court found it "significant[]"
4 that, although Palmer described Branin's role in the "dog and
5 pony" show as "minor," Palmer testified that "Branin
6 'occasionally amplif[ied] a point if he knew it was something I
7 would be interested in from his relationship with me." Bessemer
8 I, 427 F. Supp. 2d at 396 (citation omitted). The Court of
9 Appeals said explicitly that a seller of "good will" "may be
10 present when such [a] meeting takes place." Bessemer V, 16
11 N.Y.3d at 559, 949 N.E.2d at 470, 925 N.Y.S.2d at 379. On
12 remand, the court should therefore consider whether Branin's
13 "role" at the sale presentation was "limited to responses to
14 factual matters," id., and thus permissible. The court should
15 also make this determination with respect to Branin's subsequent
16 meeting with Carleton Palmer in Ohio, during which Branin
17 "informed Palmer that he would pay the same fees as at Bessemer,"
18 and that William Rankin, "the Chief Executive Officer of Stein
19 Roe and a man with whom Palmer was 'very impressed,' [would be
20 the] 'number two' on the Palmer account" if he moved to Stein
21 Roe. Bessemer I, 427 F. Supp. 2d at 396 (citation omitted).

22 Finally, the district court rejected Branin's argument
23 that "he cannot be found to have acted improperly because he was
24 simply responding to his clients." 427 F. Supp. 2d at 396 n.10.
25 The court thought this argument "unpersuasive and not supported
26 by New York law" because the leading cases "place no significance

1 on who initiates the communications between the seller of [']good
2 will['] and his now-former clients." Id. (emphasis added). But,
3 in answering our certified question, the Court of Appeals
4 explained to the contrary that "[a] trier of fact ought to
5 consider whether, following the sale of a business and its
6 [']good will,['] a seller initiated contact with his former
7 customers or clients. Such initiation is particularly relevant
8 where a seller, like Branin, remains in the industry." Bessemer
9 V, 16 N.Y.3d at 557, 949 N.E.2d at 469, 925 N.Y.S.2d at 378.
10 (emphases added).

11 We conclude, with the benefit of the Court of Appeals's
12 additional guidance (which was, of course, unavailable to the
13 district court at the time it was considering this case), that
14 the court's understanding of New York law was clearly in error.
15 We must therefore vacate the judgment of the district court,
16 insofar as it reflects the court's finding of liability against
17 Branin, and remand the matter to the district court for it to
18 apply New York law in accordance with the legal precepts set
19 forth in the New York Court of Appeals' answer to our certified
20 question and, of course, with the opinions of this Court.

21 "We express no view on how the district court should
22 resolve the matter We merely conclude that, in light of
23 the rulings of the New York Court of Appeals on the certified
24 questions, the district court's [judgment] . . . can no longer
25 stand." Commodity Futures Trading Comm'n v. Walsh, 658 F.3d 194,
26 199-200 (2d Cir. 2011). It will be for the district court in the

1 first instance on remand to decide whether this case in its
2 current posture is best suited for summary judgment practice or
3 for trial. Should this matter come before this Court again, we
4 will review the district court's decision under the ordinarily
5 applicable standards of deference.

6 In our prior opinion, we "reserve[d] decision on the
7 correct method for the calculation of damages" pending the New
8 York Court of Appeals answer to our certified question. Bessemer
9 IV, 618 F.3d at 91. Because we determine that the district
10 court's finding of liability must be vacated and the case
11 remanded for further proceedings, we again reserve decision on
12 the issue of damages. We will consider the issue, if necessary,
13 if the district court finds Branin liable on Bessemer's claim and
14 the case is brought before us on appeal.

15 CONCLUSION

16 For the foregoing reasons, we vacate the district
17 court's judgment insofar as it found Branin liable to Bessemer,
18 and we remand to that court for further proceedings consistent
19 with this opinion and the New York Court of Appeals's opinion
20 answering our certified question. Any further appeal to this
21 Court in this case shall be assigned by the Clerk of Court to a
22 new panel (whether or not including one or more members of the
23 current panel) in the ordinary course.

24 Each party shall bear its or his own costs on appeal.