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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91158237
Party	Plaintiff World Confections Inc ,
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Submission	Exhibit "D" to Second Supplemental Declaration of Cohen in Support of Opposer's Motion for Summary Judgment
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X
World Confections, Inc.

Opposer

Mark: ALPINE CONFECTIONS

v.

Opposition No.: 91/158,237

Kencraft Inc.

Application No. 76/362,977

Applicant

-----X

EXHIBIT "D"
TO SECOND SUPPLEMENTARY DECLARATION OF
MATTHEW COHEN IN SUPPORT OF OPPOSER'S
MOTION FOR SUMMARY JUDGMENT

Excerpts From Deposition Cohen
April 2005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

WORLD CONFECTIONS, INC., : MARK: ALPINE
 : CONFECTIONS
 Opposer, :
 vs. : Opposition No.
 : 91/158,237
 KENCRAFT, INC., : Application No.
 : 76/362,977
 Applicant. :
-----x

TESIMONY OF: MATTHEW COHEN

TRANSCRIPT of the stenographic notes of the proceedings in the above-entitled matter as taken by and before TAMMY M. CRANE, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, held at the offices of WORLD CONFECTIONS, INC., 185 30th Street, Brooklyn, New York, 11232, on Thursday, April 14, 2005, commencing at approximately 2:25 p.m.

T.C.

T.C. Reporting Service

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I N D E X

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* * *

1 A Let me look it over for a second. It looks
2 that way.

3 Q And on the third page there is a
4 stamp that shows it was received by the State of
5 New York, filed January 24, 2002. Does that help
6 you remember this happened, you know, about
7 January of 2002?

8 A That's seems to be.

9 Q On the second page, if you go back to
10 it, please, there is a representation made here
11 that Alpine USA, Limited filed a Certificate of
12 Incorporation in March 1997. You see that in the
13 middle of the page in the second paragraph?

14 A March 28? No. March 28, uh-huh.

15 Q So this other entity then, Alpine
16 USA, Limited, began about March 1997?

17 A It seems right that we filed this date,
18 March 28, 1997.

19 Q Okay. From March 1997 forward did
20 Alpine USA, Limited manufacture and distribute
21 products?

22 A I believe it started in May.

23 Q Okay. Well, May.

24 A I am thinking March --

25 Q 1997 then?

1 A Yes.

2 Q And was there a name associated with
3 the products of Alpine USA, Limited?

4 A Yes.

5 Q What was that name?

6 A Alpine Confections.

7 Q And that name Alpine Confections then
8 was used by Alpine USA, Limited up through or for
9 how long?

10 A It's still being used.

11 Q Okay. And how long did Alpine USA,
12 Limited use it?

13 A Alpine USA is still using it.

14 Q Okay.

15 A Alpine -- okay, ask the questions.

16 Q Is Alpine USA still in business?

17 A Alpine USA changed its name to World
18 Confections.

19 Q When?

20 A According to this document, January 22 --
21 24, 2002.

22 Q After January 2002 did Alpine USA,
23 Limited continue to do business in the name of
24 Alpine USA, Limited or was business done
25 thereafter in the name of World Confections, Inc.?

1 A What date did you say?

2 Q January 2002.

3 A Yes, World Confections.

4 Q Okay. So it discontinued using the
5 name Alpine USA, Limited?

6 A Yes.

7 Q While Alpine USA, Limited was doing
8 business between 1997 and January of 2002, one of
9 its business names or what we call a d/b/a, it was
10 doing business as, Alpine Confections, right?

11 A True.

12 Q Was it also known as simply -- was
13 Alpine USA, Limited also known just simply as
14 Alpine?

15 A It was known by Alpine, Alpine Confections.

16 Q Both names?

17 A Yes.

18 Q The company was known by those names?

19 A Yes.

20 Q And it's true, isn't it, that Alpine
21 Confections meant confections from Alpine, right?

22 A No.

23 Q It's not?

24 A Could you repeat the question?

25 Q Sure. The use of the term "Alpine

1 Inc.?

2 A I believe so.

3 Q But even since January 2002, World
4 Confections, Inc. has continued to do business or
5 has it continued to do business in any other
6 names?

7 A What type of business?

8 Q Does it have any d/b/a's?

9 A I don't think so.

10 Q Do people call it World?

11 A Yes, absolutely. Absolutely.

12 Q Do people call it World Candies?

13 A Some people still do.

14 Q Some people call it World
15 Confections?

16 A Absolutely.

17 Q And, in fact, some people still call
18 it Alpine Confections, don't they?

19 A Yes, they do.

20 Q And if someone sends a check, even to
21 this day, made out to Alpine Confections, World
22 Confections, Inc. cashes it, don't they?

23 A Yes. I'm not sure that our federal ID
24 number has changed when we changed the name from
25 Alpine USA to World Confections. I would have to

1 double check.

2 Q Switch gears for a minute. Let's
3 talk about brand names.

4 A Okay.

5 Q When was the first time that a brand
6 name was adopted by World Confections, Inc.? And
7 for the purpose of our record, can I call that
8 WCI? Would that be confusing?

9 A Not really. It would be confusing because
10 World Candies, Inc. is WCI.

11 Q You're absolutely right. When was
12 the first time in which World Confections, Inc. or
13 one of its predecessors -- and when I say "one of
14 its predecessors," either Alpine Confection, Inc.
15 or World Candies, Inc. -- started using a name
16 with Alpine in it?

17 A I believe the first time we used the name
18 Alpine was in May 1997.

19 MR. ZENGER: Would you mark this as
20 Exhibit 2, please.

21 (Fax Message dated 25 junio 1997,
22 eight pages, marked Applicant's Exhibit K-2 for
23 Identification.)

24 Q Okay, Mr. Cohen, document K-2 has
25 been placed before you. Do you recognize that

1 document?

2 A Yes, I do.

3 Q Can you tell me what it is?

4 A This is a document dated June 25, 1997 from
5 our supplier Sanchez Cano, S.A., also known as
6 Fini, indicating to me that they are forwarding
7 six bag designs, where they will put the bar codes
8 that we sent on them and the traditional
9 information. And then it says that it will mean
10 "Imported Exclusively by - your logo - Brooklyn,
11 New York."

12 Q So this is an eight-page document and
13 the last six pages show examples of product
14 packaging, right?

15 A Not really examples. These are black and
16 whites of the almost-finished designs.

17 Q And on those last six pages of those
18 product packaging samples in each place where it
19 says "hot stamp" --

20 A Right.

21 Q -- that's where they can type or they
22 can stamp the name of the company, right?

23 A Correct.

24 Q And from 1997 forward, Alpine USA,
25 Limited used a logo stamp configuration to

1 identify the company, right?

2 A To identify the company on these bags?

3 Q Correct.

4 A Yes.

5 Q It was kind of an oval logo. We will
6 get to them. Some copies are still being made.

7 A Yes.

8 Q Now, on Exhibit 2 on these last six
9 pages that have these product packaging samples --

10 A Are you looking at the Alpine Gummi Apple
11 Rings?

12 Q Yes, look at that one for an example.
13 The comment I want you to make is going to refer
14 to all of them.

15 A Should I read into the record here all the
16 bag designs you are talking about?

17 Q Sure.

18 A "Alpine Confections Gummi Worms."

19 Q Just say the name.

20 A "Alpine Confections Gummi Bears. Alpine
21 Confections Neon Bears. Alpine Confections Gummi
22 Glow Worms. Alpine Confections Gummi Peach
23 Rings."

24 Q None of this product packaging has a
25 trademark notice symbol by Alpine Confections,

1 please.

2 (Photocopies of product packages, 11
3 pages, marked Applicant's Exhibit K-4 for
4 Identification.)

5 Q Mr. Cohen, I placed in front of you
6 what's been marked Exhibit K-4 you received a few
7 minutes ago regarding some product packaging that
8 had been changed in December 2003.

9 Does this Exhibit K-4 represent that
10 product packaging in December 2003?

11 A Did that come from the diskette?

12 Q Yes, sir.

13 A Right. That diskette was a file of pictures
14 of products for Alpine as of December 3rd, 2003.
15 Maybe not inclusive of every item, but there was a
16 representation of what was going on in 2003.

17 Q Would you look with me, please, at
18 the second-to-last and the third-to-last pages for
19 Gummie Dinosaurs, Gummie Rude Dudes.

20 MR. RANNELLS: Sour Dudes, right?

21 Q Excuse me. Sour Rude Dudes.

22 A Yes.

23 Q In the upper left these say for the
24 first time "Alpine Brand," right?

25 A Yes.

1 Q And this was first done sometime in
2 2003?

3 A I would like to get the letter from our
4 supplier that you copied stating when he made the
5 transfer over, then we can get the exact date. I
6 don't think it's in this pile.

7 MR. RANNELLS: Let the record reflect
8 Mr. Zenger handed to Mr. Cohen a file to look
9 through and he is looking through it now.

10 Q That is a set of the copies in that
11 file. It's not in here yet. But in any event,
12 your recollection is that was sometime in 2003,
13 right?

14 A Yes. If we find the letter, we get the
15 exact time.

16 Q Look with me, if you would, at the
17 second-to-last page for Sour Rude Dudes. To the
18 upper right of "Sour" there is a "TM" symbol?

19 A Uh-huh.

20 Q That is for Sour Rude Dudes, right?

21 A Right.

22 Q Again that "TM" represents a
23 trademark or brand name, right?

24 A I'm not -- I don't know the legal definition
25 of what a "TM" means.

1 applications?

2 A I don't understand that question.

3 Q Why has World Candies, Inc. sought
4 and perfected federal trademark registrations?

5 A To trademark products that we bring to
6 market.

7 Q Why?

8 A To protect the company and allow us to
9 market a product.

10 Q There are a number of product names
11 for which either World Candies nor Alpine USA,
12 Limited nor World Confections, Inc. has sought and
13 perfected federal trademark protection, correct?

14 A That's true. If you take an item like gummi
15 bears, there is nothing to trademark there. It's
16 descriptive; gummi bears. No one owns a trademark
17 "gummi bears."

18 If you take peach rings, it is describing
19 the product. There is no trademark. It's an
20 industry term. Like sour balls or bubble gum.
21 It's a description of the product. It's a gummi
22 peach ring. There is no trademark to it. There
23 is no gummi bears. Everybody is selling gummi
24 bears. What gives us the trademark is Alpine.

25 Q None of the registrations sought in

1 company?

2 A On occasion.

3 Q Are there occasions when those
4 companies didn't or don't?

5 A There are occasions where we did not seek
6 trademarks.

7 Q Can you give me an examples of those
8 occasions and why?

9 A Yes. We do license work from other. We
10 sell a lot of candy for Marvels and Warner
11 Brothers. We put out the packages, we license
12 them. We don't seek protection. It's a big part
13 of our business.

14 We currently have 539 inventory items
15 somewhere, whether they are components or finished
16 items. Some of them we have applied for, some of
17 them are generic, like a gummi bear. There is no
18 need to apply for a gummi bear.

19 Some of them are licensed products with
20 Spiderman or Looney Tunes. We don't apply there.
21 It has a place in our business, but it's not
22 completely essential for what we do.

23 Q But your own products or those not
24 licensed for others or made for others, what is
25 the criteria for seeking trademark protection?

1 It's got its place. It's a very attractive,
2 calming --

3 Q Stop. That is not my question. I
4 will get to that next.

5 A Okay, what's the question?

6 Q Is the picture of the Alpine scene an
7 important identifier for your companies?

8 A Not particularly.

9 MR. RANNELLS: I think that is what
10 he was trying to reply.

11 A Not particularly.

12 Q Why is a name including "Alpine"
13 important to your companies?

14 A Because that's the name that we chose to
15 market our products, some of these products under.
16 That's the name we have been continually using
17 since 1997, '98, '99, 2000, one, two, three, four
18 five, today.

19 We have continuity in the market with these
20 products. We have come to be known by these
21 products. Some customers ask for Alpine
22 Strawberry or Alpine -- they don't ask for the
23 Alpine peaks with the nice scene in it. It's not
24 like a Nabisco triangle logo. It doesn't mean as
25 much as the triangle to Nabisco. The name

1 "Alpine" is what our customers know.

2 Q How come you haven't sought trademark
3 protection for the term "Alpine"?

4 MR. RANNELLS: Objection. You mean
5 "Alpine" by itself?

6 MR. ZENGER: That's right.

7 A You would have to talk to my attorney about
8 that.

9 Q I am asking you.

10 A In my understanding, "Alpine" whether it's
11 Alpine Confections or Alpine Brand or -- I am
12 selling candy. It's what they know. They know
13 Alpine. It doesn't mean if it's Confections. We
14 are known Alpine Confections. Does it have the
15 name "Alpine" in it? Yes.

16 Q That is not my question.

17 A What is your question?

18 Q Is the name "Alpine" important to
19 your company?

20 A Absolutely.

21 Q Why haven't you filed trademark
22 applications for it?

23 A I believe we own a trademark.

24 Q Why didn't you file trademark
25 registration for the term "Alpine"?

1 record as saying that. They are every client's
2 dream account. Okay, go ahead. Worked hard
3 getting them, as well.

4 MR. ZENGER: Off the record.

5 (Discussion held off the record.)

6 Q Now, you will acknowledge, won't you,
7 that of your gummi-type product sales or your
8 licorice-type sales that the vast majority of them
9 bearing a name including the word "Alpine" are
10 sold to such dollar-type stores, correct?

11 A I would say that we are a multi million
12 dollar business with Alpine and a large portion of
13 our Alpine sales do go to dollar stores. But we
14 are not limited to other customers.

15 Q But, in fact, it's over 75 percent,
16 isn't it?

17 A It might be. You have been looking at the
18 books.

19 MR. RANNELLS: Just for
20 clarification, are you talking about dollar stores
21 or are you talking about those types of stores?

22 MR. ZENGER: Those types of stores.

23 MR. RANNELLS: Okay.

24 A It's possible.

25 Q Let me lay a foundation. Nobody

1 Q Do your best.

2 A Well, I would say that we have had grocery
3 accounts. We still have grocery accounts. We
4 have had discounters such as K-Mart. We have sold
5 product into dollar stores. We've sold product
6 into 99 cent stores. We sold products to
7 wholesalers who distribute the product up and down
8 the streets. But yes, the vast majority of sales
9 right now because they are the fastest growing
10 customers in the country are dollar stores. We
11 are perfect for them with this product and we are
12 selling a lot to them.

13 Q And that's because the product can be
14 sold to the end consumer consistently at or below,
15 near or below a dollar, right?

16 A Well, if you are selling to a dollar store,
17 it better be at a dollar.

18 Q No, they have to be able to sell it
19 for a dollar.

20 A Absolutely. This product.

21 Q You have to sell it to them less than
22 a dollar?

23 A Absolutely. By the way, we are not the only
24 ones marketing seven-ounce gummi bears or
25 six-ounce gummi bears or eight-ounce gummi bears

1 Q You don't sell in Hallmark stores, do
2 you?

3 A We do not sell Hallmark stores, but I am
4 sure there are card-type stores that carry our
5 product. In fact, some of the biggest retailers
6 of greeting cards now are dollar stores.

7 MR. ZENGER: Would you mark this,
8 please.

9 (Invoices, 11 pages, marked
10 Applicant's Exhibit K-6 for Identification.)

11 MR. ZENGER: Mark this, too, as K-7.

12 (Declaration of Matthew Cohen, seven
13 pages, marked Applicant's Exhibit K-7 for
14 Identification.)

15 Q All right, Mr. Cohen, I placed before
16 you Exhibits 6 and 7. I want to go to K-7 first.
17 Do you recognize K-7?

18 A Yes, I do.

19 Q It's a declaration that you signed
20 and submitted in support of your company's motion
21 for summary judgment, correct?

22 A Yes.

23 Q In it in paragraph nine there is a
24 recitation to an Exhibit 2 bearing representative
25 invoices. Would you confirm for me that --

1 A Right. It goes in a window envelope mailed.

2 Q Separately, right?

3 A Absolutely.

4 Q Would you turn to Exhibit K-7,
5 please, and go to paragraph 10.

6 A Yes.

7 Q In paragraph 10 there is a statement
8 that the gummi candies are sold throughout the 48
9 contiguous states.

10 A Yes.

11 Q What is that statement in fact based
12 upon?

13 A The statement of fact is based upon like we
14 mentioned before. In addition to our normal
15 customers, we have some very, very large customers
16 that we have sold, Dollar Tree, Dollar General,
17 K-Mart, Save a Lot stores, Wakefern Groceries,
18 99-cent stores, who have stores collectively or
19 maybe individually in all 48 states.

20 I discussed with you before, I showed you
21 just one order that we have here, each order for
22 approximately 3,750 cases of 24 bags.

23 MR. RANNELLS: Let the record reflect
24 Mr. Cohen took from behind him, from a box behind
25 him, a list of orders and that is what he is

1 referring to.

2 Q And that's a typical Dollar Tree
3 invoice?

4 A Right, a typical Dollar Tree open order that
5 did not become an invoice on it.

6 Q What is the date?

7 A 3/1/05.

8 Q And you're telling us --

9 A Dollar Tree alone, one of our customers, has
10 a distribution facility that they use to
11 distribute their stores. They have one in Salt
12 Lake City that is used for regions around Salt
13 Lake City. It might not just be Utah, Montana,
14 Wyoming. They have one in Marietta, Oklahoma.
15 And they may use Oklahoma to distribute in
16 Arkansas, Louisiana. They have one in Richfield,
17 Washington state which they will use to distribute
18 in Washington and Oregon. Berwick, Pennsylvania,
19 that services the northeast and part of the
20 mid-Atlantic.

21 Q To their franchise, Dollar Tree?

22 A I think they are corporate owned.

23 Q Excuse me. Corporate-owned stores,
24 right?

25 A Savanna, Georgia. We have another one in

1 Stockton.

2 MR. RANNELLS: When you say "we" --

3 A The Dollar Tree distributions we are
4 shipping to. Each one of these centers is taking
5 90,000 bags of Alpine Brand or Confections gummies
6 to distribute around. It says Juliette, Illinois.
7 Opland, Mississippi. Chesapeake, Virginia.

8 If you went on Dollar Tree's web site we
9 probably find out how many states that their
10 stores are located in. If you added all our other
11 customers to that, I think you will see that we
12 sell this product in all the 48 states.

13 Q And the example you gave us was from
14 March of 2005?

15 A Yes. But you seen the records. You see
16 these invoices go back all the way to 1997. Maybe
17 some new distribution centers, but certainly the
18 same item numbers and distributions and UPSC codes
19 we have been shipping under the Alpine since 1997.

20 Q And you listed a number of customers
21 such as Dollar Tree, Dollar General and Save A
22 Lot. Is that also a discount store?

23 A No, Save A Lot is a grocery store. They
24 have quite a few stores. They are part of the
25 Super Value chains and they have, I believe, I

1 used or is it something that has been used?

2 A It's part of a bag that is currently being
3 used, it looks to me.

4 Q When did that use begin?

5 A This use I want to say began in 1997.

6 Q But you don't know, do you?

7 A I could easily find out. I have the records
8 over there. I could go look. Are you referring
9 to the product code behind that? The UPC code on
10 the back of the bag is a 06? Could you read that
11 out? You have the bag. What is the UPC code?

12 Q 01615.

13 A 01615, which you can see from the back of
14 this bag here, our Exhibit 3 did the same UPC only
15 in reverse because the bag was folded up. I could
16 show you this product with that UPC code and has
17 been used continuously since 1997.

18 Q But this depiction is not of product
19 packaging. In other words, this isn't a sample of
20 the product packaging that has been at your office
21 since 1997, correct?

22 A I'm not sure what that question means. I
23 don't have any packages that have been here since
24 1997.

25 Q So all of the depictions in here are

1 constantly buying films, using film, buying more
2 film. Change his film suppliers, giving them the
3 artwork to redo. It's a living, breathing thing.

4 But the package itself is extremely
5 identifiable, almost exactly as it was on that fax
6 we showed you from April 1997 that shows the
7 original design graphics for Alpine Gummi Peach
8 Rings, yes.

9 Q But from 1997 to the present, for
10 example, with the Gummi Peach Rings, this has been
11 reprinted many, many times because they needed it
12 for suppliers?

13 A Of course.

14 Q There weren't 10 bags in 1997?

15 A No. No, it's a living, breathing and they
16 have a factory in Spain and factory in Brazil and
17 the one in Brazil is printing and the one in Spain
18 is printing.

19 Q How often do they do a package?

20 A That would depend on the movement item.

21 Q How about for the gummi products?

22 A Well, depend what gummi product. There is a
23 minimum order of film required by the supplier.

24 Q What is that minimum order?

25 A The minimum orders vary. The guy in Spain,

1 package of Lizards and I'm sure there is four
2 assortments in here, but in this one only has two.
3 One box has two, another box has another two. But
4 the four, ones are Frogs, Lizards, these Bugs
5 you're looking for and I believe a package of
6 Gators.

7 Q When did they begin?

8 A They began I want to say 1998 or '99.

9 Q They are still being sold?

10 A Not a big seller, but we are still selling
11 them.

12 Q How about the Neon Bears?

13 A Neon Bears, good item. Core item. Still
14 selling.

15 Q When did it begin?

16 A This is in inception. I believe you find
17 that on that 1997 fax with all the graphics of all
18 the core items. Oh, here, on the next page is the
19 Gators. That is the last bag in the Swamp Buddies
20 Assortment. So those items are not sold
21 separately, but sold under the Swamp Buddies
22 umbrella.

23 Q Is Neon Bears an important identifier
24 for your product?

25 A No, Alpine is important identifier for my

1 more and more products are starting to say Alpine
2 Brand rather than Alpine Confections?

3 A Yes.

4 Q And that is the trend you are going
5 in?

6 A That is the temporary trend.

7 Q Through today?

8 A Through today.

9 Q Also in paragraph 13 it says in the
10 second sentence, "The changeover was commenced..."
11 -- "The changeover was commenced as a result of
12 WCI receiving a number of communications from
13 parties wondering if there was a relationship
14 between WCI and Kenkraft's parent company, Alpine
15 Confection, Inc."

16 "Communications from parties," it
17 says. Who were the communications from?

18 A Well, Kenkraft and us, whatever you want,
19 World Confections, are in the same candy business.
20 We sell to a lot of similar customers and we sell
21 through a lot of common salespeople and therefore
22 we have an industry here. And an industry that
23 gathers at a trade show, that goes to conferences,
24 that sees each other in hallways of accounts on
25 presentations and I have been approached at trade

1 shows, I have been telephone called, we showed you
2 a couple of letters by consumers. But inside the
3 trade, when Kenkraft decided to start using Alpine
4 Confections, you know, years after we have been
5 using it, people are coming up to us and say, oh,
6 you're Alpine Confections? Oh, I heard you bought
7 Fannie May.

8 Well, we didn't buy Fannie May. People know
9 us as Alpine Confections. We have -- there is a
10 press release in the industry, "Alpine Confections
11 Buys Fannie May." I get phone calls; hey, you
12 guys bought Fannie May?

13 Q What articles?

14 A Well, there is an article here. This is a
15 perfect case over here. This is a --

16 Q Tell me what you're --

17 A I am on Exhibit 4.

18 Q Of your Declaration?

19 A Of my Declaration. And this is just one
20 instance and it says, "Alpine acquires Fannie May,
21 Fannie Farmer Brands." It says, "Alpine
22 Confection, Inc. acquires the intellectual
23 property to 31 company-owned retail stores of
24 Fannie May and Fannie Farmer bought for \$8.9
25 million from Archibald Candy. Alpine sales were

1 reported at \$80 million prior to the purchase.
2 Alpine will make Fannie May its flagship brand.
3 The company has been producing Fannie May's most
4 popular..." you want me to read the whole thing?

5 Q No. This is the type of article you
6 are referring to?

7 A Right. And the article -- wait, wait. The
8 thing that is so confusing about the article is
9 dead smack in the middle of the press release is
10 my Alpine Confections logo. It's my logo. My
11 front of my bag logo which is on hundreds and
12 hundreds and thousand of bags we have in the
13 market. They used our logo. I don't know who did
14 it, but it was used in the center of the release
15 that says, "Alpine Acquires Fannie May."

16 This articles was in our trade publication.
17 I believe, I want to say, I am not sure, during
18 one of our conventions where people, they were
19 giving away the magazine and people were looking
20 at it. So clearly they see my Alpine Confections
21 logo with Alpine Confections of Utah. Don't you
22 think somebody would confuse that? And we are
23 both in the same industry. Hey, you guys bought
24 Fannie May?

25 Q Who wrote the article?

1 relying on in your Declaration, paragraph 13? So
2 is this a communication from the party?

3 A Yes, I have something else. I have a letter
4 which is --

5 THE WITNESS: Do we have --

6 MR. RANNELLS: He also testified
7 earlier as to having people call him.

8 A We have had phone calls.

9 Q I am asking about articles. Any
10 other articles that are communications from
11 parties that are mentioned in paragraph 13 of your
12 Declaration?

13 A Articles, I don't know about.
14 Communications.

15 Q I am asking about communications. We
16 are breaking it down. Articles?

17 A I talked to people off the top of my head.
18 This seems to be a glaring --

19 Q Communications from? From whom?

20 A Sales guys. Some customers.

21 Q Give me names. When?

22 A You know, the names of the people I didn't
23 feel the need to document at the time or write it
24 down. Never knowing I was going to find myself in
25 this position right now.

1 But when you're at a trade show, people
2 coming up to you, you're at the end of a long day
3 of standing in your booth and trying to write
4 orders and selling customers and a couple of guys
5 come up to you and mention this things with Alpine
6 Confections, I didn't write down their name. But
7 I know it happened and I know I received phone
8 calls about it.

9 Q Was that after the June 2004 candy
10 show?

11 A I don't know exactly when it was, but I will
12 say that your Alpine in Utah has made numerous,
13 numerous press releases and have appeared in -- I
14 am sure if we just did a Lexus search, you know,
15 regarding Alpine's purchase of Fannie May, we
16 would find that there is an article probably in 20
17 or 30 newspapers. I don't know.

18 Q You haven't done that search, have
19 you?

20 A I have not done that search, but what we do
21 get is a thing called -- we get e-mailed the trade
22 called Market Ideas, or something like that.
23 Every day it comes in our e-mail and I have seen
24 numerous times blurbs related to Alpine in Utah.

25 Q You haven't provided any to me today

1 distributed at the show. I know people were
2 coming up to me at the trade show. I don't know
3 the June 2004 or June 2002 trade show. I don't
4 remember exactly which trade show it was, but I am
5 assuming -- and I feel that that publication was
6 at -- the magazine was at a trade show because I
7 recollect people coming up to me and asking me
8 about this, whether it was in a serious manner or
9 some people know us better was in a joking manner.

10 I even had some people come up to me in kind
11 of a derogatory manner; hey, you doing 80 million
12 in sales? Those type of things. Clear confusion
13 by people in our industry.

14 Q But your testimony is that that
15 confusion was caused by this article, Exhibit 4 to
16 your Declaration?

17 MR. RANNELLS: No.

18 A I don't think so.

19 MR. RANNELLS: Paragraph 13 doesn't
20 refer to that article.

21 Q What did the people tell you in their
22 oral communications was the basis for their
23 statements to you?

24 A I just said that there were -- there have
25 been press releases all over the place. It seems

1 to me the guys in Utah give out a lot of press or
2 there is a lot of articles written about them.
3 Especially in Chicago and this whole thing with
4 the purchase of Fannie May. I don't know exactly
5 what it was, but I know I got some calls from
6 Chicago. I think Fannie May is in Chicago. I am
7 not sure. Would you know that?

8 Q No.

9 A Okay. They might be in Chicago. I don't
10 know, the Midwest somewhere, and this was
11 appearing in articles. Alpine Confections is
12 negotiating to buy. Alpine Confections bought
13 them. And there was a whole thing going on and I
14 received phone calls about it.

15 I mean, this was not -- I didn't receive
16 written questionnaires or anything legal. It was
17 an industry feeling I had that Alpine Confections
18 was really making a push in Utah to get their name
19 out there. And their push to get their name out
20 there created confusion in the marketplace.

21 Q That's your feeling, right?

22 A That is my feeling.

23 Q And if all these people who either
24 spoke to you or all these people who spoke to you,
25 none of them told you where they got their

1 might or might not result in confusion or mistake
2 in any industry or among the public particularly
3 in view of Applicant's use of its Alpine
4 Confection's mark."

5 Did I read that right? Close quote.

6 A I don't understand it. And plus, what was
7 the response?

8 Q "Not located any documents responsive
9 to it."

10 A Is that what it says?

11 Q Yes.

12 A Okay. I don't understand the question, if
13 you really want to know the truth. It says
14 "Opposer objects to request number 17 to the
15 extent requests Opposer to take as fact the
16 Applicant has used Applicant's mark."

17 That is a true statement. I understand your
18 client has an intent to use this mark. I have
19 never seen it. My mark, Alpine Confections, or
20 Alpine Brand or Alpine Gummies have been around
21 since 1997 consistently in the market year after
22 year. We have built a multi-million dollar
23 business on it and I never seen your Alpine
24 Confections product.

25 Q You just got done telling me Exhibit

1 haven't developed the web site, but we own Alpine
2 something dot com. Tomorrow I will have my
3 controller pull out the invoice from Network
4 Solutions.

5 Q When did you register it?

6 A I couldn't tell you for sure. I don't even
7 know the full correct name for it, but I know we
8 have a name with the word Alpine dot com
9 something. Something Alpine.

10 Q But it wasn't sought until recently?

11 A No, no, no. In the '90s. Absolutely.

12 Q So you have never used it since the
13 '90s?

14 A We never used www.World Confections.com. We
15 never used www.World Candies. We are always
16 getting to it. We don't sell through the
17 Internet. We know we need a presence on the
18 Internet and I am almost certain we have a domain
19 name with the word "Alpine" in it. Is there a way
20 to search --

21 Q You don't have any Internet sales,
22 correct?

23 A No, we have no Internet sales.

24 Q And you have never had any Internet
25 marketing then of your products either bearing

1 "Alpine"?

2 A No, there are -- that is not true. That is
3 not true. There is Internet commerce with
4 "Alpine" on there.

5 Q Your company --

6 A My company.

7 Q -- does not have web sites?

8 A No, we don't have web sites where we are
9 selling our product on, no.

10 Q Including products bearing the name
11 "Alpine?"

12 A But we do sell to companies that do market
13 that product on the web.

14 Q Let me show you an exhibit marked
15 K-10.

16 A This is us. "Alpine Gummies.com." Does
17 that say "World"?

18 Q Click here.

19 A Let the record show that World Confections
20 owns Alpine Gummies.com.

21 Q When was it created?

22 A December 3rd, 2001.

23 Q That web site has never been used to
24 market Alpine-named products, has it?

25 A No, but "Alpine Gummies.com" is a domain

1 Please remit payment."

2 Q Who did you send this to?

3 A It says, "All customers."

4 Q Now, in line one it talks about two
5 companies; World Candies and it says "our sister
6 company, Alpine Confection, Inc." There is no
7 such company. You never had a company called
8 Alpine Confection, Inc., did you?

9 A Well, Alpine USA.

10 Q But it doesn't say Alpine USA,
11 Limited, does it?

12 A Hold on one second.

13 Q Correct?

14 A Okay, let me --

15 Q None of your related companies have
16 ever had a company incorporated as Alpine
17 Confections, Inc., correct?

18 A Yes, but I will explain this to you: Our
19 invoices, if we get our invoices out, copy of our
20 invoice, Alpine's invoice -- do you have that?

21 Q Sure, we have some here. Let's go
22 back to an earlier exhibit. Let's go to Exhibit
23 6?

24 A Exhibit 6.

25 Q I have it here?

1 A So if you look at all our invoices it says
2 "Alpine Confections." So they were writing checks
3 out to "Alpine Confections." If you're disputing
4 the "Inc.", you know, I mean that could have just
5 been a mistake, typo mistake.

6 Q I am just asking.

7 A I am saying.

8 Q You never had a company named or
9 incorporated as Alpine Confections, Inc., right?

10 A No, our company was Alpine USA, Ltd. doing
11 business as Alpine Confections. So all our
12 invoices said Alpine Confections. So as a letter
13 to our customers, what we are trying to get them
14 to do is to start writing out checks to World
15 Confections.

16 Q I understand.

17 A So that's what that is.

18 Q Thank you. And so when this says it
19 went out to all customers, how many customers do
20 you estimate it went to?

21 A I couldn't say. I mean, I couldn't tell you
22 how many customers it went out to.

23 Q Can you estimate for me; hundreds?
24 Thousands?

25 A No, not thousands. No. Oh, wait, wait.

1 Q So it was talking about the company
2 Alpine Confections?

3 A Right. Would you like me to read that?

4 Q No.

5 A And does this document -- okay.

6 Q Would you please look at Exhibit 13.
7 You recognize that as a true and correct copy as
8 one of your business papers?

9 A I do.

10 Q Can you tell me what it is?

11 A It says "Certificate of Registration" and it
12 says "Title of World Alpine Candy," bag numbers,
13 and it references all the items that we have
14 been -- that have been in our line that you have
15 reviewed consistently, many of them since 1997,
16 being sold continuously throughout Alpine
17 Confections.

18 Q And samples of them are attached,
19 right?

20 A Yes.

21 Q Did you request that this copyright
22 registration be prepared?

23 A Yes.

24 Q Why?

25 A Well, I think we felt that there were

1 K-20. Tell me what K-20 is.

2 A K-20 is a printout we generated earlier
3 today of Alpine Confections sales in 1997, 1998,
4 1999, 2000, 2001 and 2000 --

5 Q They change in 2000?

6 A Right, they change in 2002 in order to
7 incorporate World Confections in 2002. World
8 Confections in 2003 and World Confections in 2004.

9 Q And you're getting the year in the
10 upper left-hand corner, "YR: 97" through "YR:
11 '02." Those represent the annual sales of
12 products bearing a name including the word
13 "Alpine?"

14 A Yes.

15 Q Now, starting in 2002 this includes
16 other products not bearing --

17 A Right. The whole thing. Candies.

18 Q Estimate for me in 2002 the
19 percentage of sales attributed to products having
20 a name including the word "Alpine."

21 A I think that we said it was about 25 percent
22 in the rough glance.

23 Q So of this \$11 million number, about
24 25 percent?

25 A Yeah, I mean, I could go item by item and

1 more accurately represented by the previous years
2 by Alpine products.

3 A You want to know what the Alpine products
4 were in 2002?

5 Q 2002, 2003 and 2004. That's why I
6 thought maybe you knew of a percentage to be
7 confident.

8 MR. ZENGER: Okay, off the record.

9 (Discussion held off the record.)

10 (Whereupon a brief recess was held.)

11

12 BY MR. ZENGER (Continuing):

13 Q So for the year 2002 the Alpine sales
14 were what?

15 A Approximately 2,700,000.

16 Q 2003?

17 A Approximately 2,969,000.

18 Q And that represented about, in 2003,
19 about 26 percent -- 2003 represented 21 percent
20 and 2002 it represented 26 percent.

21 And what do you estimate it is for
22 2004?

23 A I would say about the same.

24 Q Somewhere in the low twenties?

25 A Yeah. Depends on the rest of our sales.

1 one.

2 Q And just applying for it doesn't mean
3 you are going to get it, right?

4 A That's correct.

5 Q And so if you file an application and
6 you don't get it, then you don't get a
7 registration or registration certificate, right?

8 A That would be true.

9 Q Do you know why the application shown
10 in Exhibit K-18 went abandoned?

11 A Sloppy administration.

12 Q Who was administering?

13 A It was either myself, my father, Steven
14 Baker or Jack Rannells.

15 Q When did you learn it had gone
16 abandoned?

17 A We learned it had gone abandoned, I would
18 say, when we forwarded this letter to our
19 attorney.

20 MR. RANNELLS: By "this letter," you
21 are referring to?

22 A I am referring to this letter that came to
23 our attention.

24 Q K-17?

25 A Right, K-17.

1 Q So by early November 2001 you were
2 aware of the abandonment of the application of
3 K-18?

4 A I would say so. I mean, you have to
5 understand, we are running a small family business
6 here. My father was 80, in his 80's at this time.
7 I was on the road trying to build the business.
8 We are short on administrative help here. That is
9 not excuses, but you have to understand the
10 backdrop, which is why certain paperwork could
11 fall through the cracks.

12 But at no time did we ever stop using Alpine
13 Confections in our products, in your sales, in
14 what we are trying to achieve. We have shown a
15 continuity of sales for Alpine gummies since 1997.

16 When I received this letter, my father
17 received this letter in 2001, we looked at it and
18 our mouths went open. We couldn't believe that
19 somebody who lives in an area of Alpine, Utah
20 would ask us to stop. They knew we were selling
21 the products. We asked you to stop. The nerve.

22 They want to file an Intent to Use. We are
23 selling millions of dollars of the items and
24 because they are in Alpine, they want us to stop.

25 If I move to Alpine, New Jersey, is that

1 that you cease immediately the use of the Alpine
2 Confections name on any products."

3 Q Did I read that right?

4 A You did.

5 Q Was that your understanding of his
6 demand at the time?

7 A My understanding of this letter is just an
8 outrageous letter.

9 Q Was it your understanding he was
10 asking you to stop using the Alpine Confections
11 name?

12 A Yeah, he was asking us to stop using the
13 Alpine Confections name.

14 Q That was your understanding, correct?

15 A Yes.

16 Q Would you look at --

17 A It says, "We respectfully ask that you cease
18 immediately the use of the Alpine Confections name
19 on any of your products."

20 They applied for an Intent to Use. I don't
21 understand. They applied for an Intent to Use.
22 What, are you using it? You weren't using it and
23 we didn't stop. There is no credence in this
24 letter.

25 Q Would you look at this? It's is a

1 wanted World Candies to be 100 percent
2 responsible. World Candies.

3 Q Responsible for what?

4 A Responsible for payment. They had, World
5 Candies, had assets, big bank balances and, you
6 know, things that -- that a creditor could attach.
7 You know, get paid for.

8 Alpine had nothing. You know, just a desk
9 and sales and fax machine and they wanted payment
10 to come from Candies. And it was always a source
11 of contention that they give -- they put it on the
12 Alpine name. They said no, they have four
13 partners in that company and they would not agree
14 to give Alpine credit, especially in the
15 beginning.

16 As the years went on, I think we were able
17 to slip a few credits for Alpine, but in any
18 event, World Candies would purchase and pay
19 Sanchez, but Alpine would pay World. Then later
20 on they started to ease that up.

21 But it was a seed business, a new venture
22 and there was a lot of money involved and the
23 factory overseas did not want to extend credit to
24 a company that didn't have enough assets.

25 Q My last question to you is, what in

1 your opinion distinguishes your gummi products
2 from the gummi products of other third parties?

3 A My trademark, Alpine Confections.

4 Q I have no further questions.

5

6 REDIRECT EXAMINATION BY MR. ZENGER:

7 Q You just testified World Confections
8 would pay Sanchez?

9 A No, World Candies.

10 Q World Candies would pay Sanchez or
11 Fini?

12 A Fini.

13 Q For product coming in, right?

14 A Right.

15 Q And that was product bearing the
16 Alpine Confections name, right?

17 A Yes.

18 Q Okay, that's it.

19

20 (Whereupon the witness was excused
21 and the deposition concluded.)

22

23 * * *

24

25