

ESTTA Tracking number: **ESTTA699907**

Filing date: **10/02/2015**

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

Proceeding	91211530
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Date	10/02/2015
Attachments	Deposition_of_William_T_Odonnell_5-26-15_Opposition_No_91211530.pdf(244075 bytes)

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A P P E A R A N C E S

FOR THE PETITIONER:

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1 Eureka, California; Tuesday, May 26, 2015

2 9:07 a.m.

3
4 WILLIAM TUFTS O'DONNELL,

5 being first duly affirmed, was

6 examined and testified as follows:

7 THE WITNESS: That's correct.

8 THE REPORTER: Mr. Medina, you may proceed.

9
10 EXAMINATION

11 BY MR. MEDINA:

12 Q Okay. Good morning, Mr. O'donnell. Thank you
13 for attending and cooperating.

14 Let me start with my first question: What is
15 your full legal name?

16 A William Tufts O'donnell.

17 Q What is your occupation?

18 A I have my own business.

19 Q What is your current living address?

20 MR. SWYERS: We will say we will accept service
21 for Mr. O'donnell for right now. So you can skip that
22 question, if you will.

23 BY MR. MEDINA:

24 Q Do you have a good knowledge of trademarks and
25 registered trademarks?

1 A Who are you talking to?

2 Q Mr. Odonnell, most of the questions will be
3 directed toward you.

4 A Uh-huh.

5 Q So the question, I will repeat that one more
6 time. Do you have a good knowledge of trademarks and
7 registering trademarks?

8 A Not as good as my attorney.

9 MR. SWYERS: And for the record, I will just
10 state an objection that he is not being, you know,
11 proffered here today as an expert in trademarks or
12 anything related to that.

13 MR. MEDINA: Okay. So it's safe to say that
14 Mr. Odonnell is not knowledgeable or an expert on
15 trademarks?

16 MR. SWYERS: I'm saying that what we -- he is
17 here to do today is effectively testify as a fact
18 witness in your case that you have called him as, but he
19 is not being proffered as an expert or nor is he an
20 attorney in the field of trademarks.

21 BY MR. MEDINA:

22 Q Okay. The next question is, do you have
23 registered trademarks in the Class IC 009 related to
24 motion picture films and recorded video and --

25 THE REPORTER: I'm sorry. Could you repeat

1 that? It's a little bit muffled here.

2 MR. MEDINA: Sure.

3 BY MR. MEDINA:

4 Q The question was, you have registered
5 trademarks in the classes of IC 009 related to motion
6 picture films and recorded video and audio media; Class
7 IC 016, fictional books, photo books, and related
8 printed media; Class IC 032, purified drinking water;
9 and Class IC 025 for clothing; for a total of four
10 classes; is that correct?

11 A What was the last --

12 MR. SWYERS: I will object at this juncture.
13 Forgive me.

14 If I may, Mr. Medina, the reason for my
15 objection is three of those are registered ICs -- the
16 form of the question. But I think to help this, three
17 are registered; one is just applied for. That's all I'm
18 going to say.

19 The clothing, if you change the question to be
20 applied for clothing but the other three are registered,
21 that I think would be properly laid.

22 MR. MEDINA: I will repeat that question one
23 more time at Mr. Swyers's request.

24 BY MR. MEDINA:

25 Q Do you have registered class trademarks for

1 IC 009 related to motion picture film, recorded video
2 and audio media; Class IC 016, fictional books, photo
3 books, or related print media; and Class IC 032,
4 purified water; and you also applied for a registration
5 for Class IC 025 for clothing; for a total of three
6 classes registered and one pending application; is that
7 correct?

8 A That's correct.

9 Q When was your first use in commerce for each of
10 the classes that you have registered for and applied
11 to?

12 A I would have to look at some paper. It would
13 be --

14 When did I register them?

15 Q When did you first -- what was your first use
16 in commerce for each of the classes registered for and
17 applied to?

18 A Well, some of them I actually had prior to '07,
19 but I put "2007" because that is the date that the one
20 part with the bottled water officially came on line.
21 And so I just put them all on that particular date for
22 that part.

23 Q So you are saying you only had first use in
24 water and not those other classes?

25 A Some of those other classes were being used

1 prior to all this. But when I registered the trademark,
2 I went with the most recent one for all of them, and
3 that was the bottled water. And so I made the other
4 ones --

5 Q When you did, did you --

6 A What was that?

7 Q Could you explain if you had previous use of
8 your marks for the first time being used in commerce --

9 THE REPORTER: I'm sorry. Maybe you -- I'm
10 sorry. This is the reporter again. Maybe you could not
11 speak so close to the phone. It's seems a little
12 mumbled.

13 MR. MEDINA: Mumbled? Okay. I'll try to --
14 Can you not hear or is it mumbled?

15 THE WITNESS: Mumbled.

16 MR. MEDINA: Okay. It may be my phone or my
17 connection. I apologize. I'm going off the office
18 phone.

19 THE REPORTER: It's just I'm trying to get
20 every word, and I know I missed some in the last
21 question, so.

22 MR. MEDINA: Sure.

23 BY MR. MEDINA:

24 Q Well, the question was -- Mr. Odonnell, I
25 believe, said that he had registered for or had used his

1 first use in commerce prior to that date of 2007. And
2 my question was, why wouldn't he put that on the
3 application before -- his use in commerce was before
4 2007?

5 A Because I had better control because I just
6 saw -- I always -- as you probably notice, I just group
7 all my sales. I don't keep them itemized out. And so I
8 just didn't have any official documentation that shows
9 so. So I just grouped them with my bottled water.

10 Q Okay. The next question is, during the
11 investigation on October 15th, 2012, by IPCybercrime,
12 LLC, the investigator Rob Holmes could not find any
13 prior sale of goods or services using your mark
14 Adventures of Shadow.

15 On the report there Mr. Holmes had spoken that
16 he had inquired to you, talked to you, about buying
17 items with your mark, and you told him, "We don't have
18 DVDs at the moment; the only thing with Shadow in it
19 right now is 'Last One Out, Turn Out the Light,' which
20 has him at the end of" -- what you stated, "which has
21 him at the end near the lighthouse looking at the
22 camera." Is that correct?

23 A I'm not --

24 MR. SWYERS: Objection. I am going to object
25 to the form of the question: Assumes facts not in

1 evidence. Also, it is hearsay in regard to the report
2 that is not at issue in this juncture, has not been
3 admitted in this matter.

4 If you would like, you can touch upon, I think,
5 this issue, but the manner of the questioning again
6 can't assume facts not in evidence and also can't assume
7 hearsay and I ask --

8 MR. MEDINA: Mr. Swyers --

9 I apologize. Go ahead.

10 MR. SWYERS: By all means, go right ahead.

11 MR. MEDINA: Please note I am still in the
12 trial period, so we have not looked at that --

13 THE REPORTER: Okay. This is not --

14 Hello? Hello?

15 I'm sorry. This is really not working. I
16 don't know how to make it any clearer.

17 THE WITNESS: Matthew is nice and clear, but
18 you're not, Tamar.

19 MR. MEDINA: Let me call you back on another
20 line and see if it's clearer.

21 (Off the record 9:16 a.m. to 9:18 a.m.)

22 BY MR. MEDINA:

23 Q The next question, during an investigation on
24 October 5th -- 15th -- let me restate -- October 15th,
25 2012, by IPCybercrime, LLC -- that's spelled

1 I-P-C-y-b-e-r-c-r-i-m-e -- my investigator Rob Holmes,
2 he could not find any prior sales of goods or services
3 using your mark Adventures of Shadow.

4 On the report there Mr. Holmes had spoken to
5 you in part about buying items with your mark. You told
6 him, "We don't have DVDs at the moment. The only one
7 with Shadow in it right now is 'Last One Out, Turn Out
8 the Light,' which has him at the end near the lighthouse
9 looking at the camera." Is that correct?

10 MR. SWYERS: I'm just going to again state for
11 the record it assumes facts that are not in evidence.
12 It's borderline that you are testifying for a witness
13 who is not here today, and then also you get into this
14 whole hearsay issue.

15 If you want to rephrase your question to just
16 be more simply direct as to whether or not, you know,
17 Mr. Odonnell spoke with somebody or, you know,
18 otherwise, I may be willing to allow it. But the
19 question in and of itself is assuming an answer which I
20 can't allow to go forward.

21 So I'm going to instruct the witness not to
22 answer the question as phrased. If you can get there in
23 rephrasing it, I'm fine with that.

24 MR. MEDINA: Okay. Well, I'm just quoting what
25 Mr. Odonnell said, and he is the witness who is here

1 right now.

2 BY MR. MEDINA:

3 Q So did you not -- let me ask that question
4 again.

5 Did you speak to somebody on October 15th,
6 Mr. O'Donnell?

7 A I do not recall when I talked to anybody.

8 Q Okay. All right. Next question. During your
9 conversation with Mr. Holmes, did you mention or offer
10 products like water bottles, clothing, books, and other
11 video or audio recordings for CafePress online store?
12 Is that correct?

13 MR. SWYERS: Objection. During a conversation
14 with Mr. Holmes? We haven't established the witness had
15 a conversation with anyone.

16 BY MR. MEDINA:

17 Q Okay. Let me ask this question, Mr. O'Donnell:
18 Do you speak with --

19 THE REPORTER: I'm sorry? Do you speak --
20 what?

21 MR. SWYERS: What was that?

22 BY MR. MEDINA:

23 Q Mr. O'Donnell, do you speak with customers to
24 sell your products?

25 A Yes.

1 Q Do you speak with them on the phone?

2 A Sometimes.

3 Q So is it the possibility that you could have
4 spoken with Mr. Holmes from IPCybercrime on October 15,
5 2012, but you just don't recall that phone call?

6 A Don't recall. It's -- during that time period
7 my dad just had major heart surgery and everything, and
8 I was taking care of him plus my mom. And who knows
9 what in the world I may have said. So I do not recall
10 too much.

11 And then my dog died in July a few months prior
12 to all that. So it's emotional, not thinking straight
13 at that time period. So who knows what I may have said
14 or not have said.

15 Q Well, that call was October 15, 2012. What
16 were you selling in relation to your mark at that time?

17 A I had bottled water. I've had photos. I've
18 had, of course, the videos on the beginning and ending
19 of my programs that air on television here in
20 Humboldt County. They have been on our local TV station
21 that broadcast up into the Oregon area, all the way down
22 south a ways and east. It has pictures of the banner
23 and everything with Adventures of Shadow on it and
24 et cetera. And I have ink pens and stuff on those lines
25 too.

1 Q So if you did speak with -- say -- even though
2 you can't recall, if you did speak with Mr. Rob Holmes
3 on October 15, 2012, you should have offered him those
4 products; correct?

5 MR. SWYERS: I'm going to object merely to the
6 form of the question because I found it to be very
7 confusing.

8 If Mr. Odonnell can answer it, I'll allow it.

9 THE WITNESS: It's -- when it comes to that
10 time of year, after my major event, which is Bigfoot
11 Days, which is an event that people all over across the
12 country attend to, there's thousands of people there,
13 after that particular event -- but that particular year
14 I did not get a lot of stuff for that because my dad's
15 health was waning and they -- he ended up going in the
16 hospital the same day that I had that, but I usually
17 start bringing my inventory down for the end of the year
18 and then I don't bring it back fully, fully full of
19 items until the first part of the following season,
20 which usually starts bringing stuff back online in
21 February or so.

22 Q So typically if you're out of stock, you
23 typically remind your customers that you normally do
24 have those items and you offer to pre-order, have on
25 hold, or you offer them to call back in a certain time

1 of year when you would have those products available?

2 A That's what I'd normally say. Or if they want
3 to make a special order, they can look at the pictures
4 that are posted on Facebook and they can place the order
5 and I can implement the order for what item they want.

6 But bottled water I have always had in stock
7 throughout, and I have a new version that's completely
8 in stock too.

9 Q So you just stated that you always have your
10 bottled water in stock?

11 A That's correct.

12 Q That's correct?

13 A That's correct.

14 Q Since 2007?

15 A That's correct -- or in 2008 or so, whenever
16 I -- I had an issue, which will come down the line, but
17 there's --

18 Q Answer the question. Is that a "yes" or "no,"
19 sir? I don't need the details.

20 Is that a "yes," you had your bottled water for
21 sale since 2007?

22 A The date that's on the application, that is the
23 date I officially ordered the bottled water. They said
24 the water -- I was already promoting it and the
25 distribution, McClellan Spring Water, never got me the

1 product for many, many months later, and -- but I was
2 still getting the information out there. But it falls
3 under those things that -- distribution issues, which
4 does not affect the trademark.

5 Q But you never actually had items for sale or
6 had full items prior to your registration date of, I
7 believe, August 29, 2007 --

8 A I ordered the bottled water --

9 Q -- or later?

10 A I ordered the bottled water that date, but
11 that's -- and they promised me it would be within that
12 week. They dropped the ball and they never got me the
13 product. But that is not on me; that is on the
14 distribution people I had.

15 And if you seen the bottled water, after I
16 finally got the label is -- the one that was online
17 posted should have been the official label. But when I
18 got the bottled water, that is not the label I
19 officially authorized. On the back it said "Batside."
20 Ours says "Bayside," not "Batside." It was an error --

21 Q Did you actually --

22 MR. SWYERS: If I may interject for a brief
23 moment. I'm sorry.

24 THE WITNESS: Sure.

25 MR. SWYERS: Number one, thank you all. Let's

1 make sure we don't interrupt each other because it's
2 hard for even me to hear what's going on.

3 MR. MEDINA: Sure.

4 MR. SWYERS: And also just as a reminder,
5 Mr. Odonnell, please focus on, you know, Mr. Medina's
6 questions.

7 Thank you. Forgive the interruption.

8 MR. MEDINA: Thank you, Mr. Swyers.

9 THE WITNESS: Now, this is a question, isn't
10 it?

11 BY MR. MEDINA:

12 Q It sounds like from your last answer,
13 Mr. Odonnell, that you hadn't actually sold or made a
14 cash exchange for water bottles well -- a month after
15 your stated first use of commerce of August 29, 2007,
16 that you had applied for at the United States Patent and
17 Trademark Office?

18 A It was being promoted. If I had the water in
19 hand, it would have gone out then. But there was
20 nothing there, so that's correct at that time. There
21 wasn't, but that is not on me; that is on my
22 distribution people at that time.

23 And by the time the trademark officially came,
24 officially registered, the water had been sold and
25 everything at that point, but not the label that I

1 requested.

2 Q Okay. Well, next question is, since even
3 though you did not -- so it's safe to say that you
4 weren't actually selling your product on August 29,
5 2007, which was your claimed first use in commerce. So
6 did you not sell actual products at that time?

7 A I sold -- did not have the bottled water, but
8 the other items were being used.

9 Q But you registered for bottled water as your
10 class of goods when you applied to the USPTO on
11 August 29, 2007; that's correct?

12 A That's correct.

13 Q And you had items for sale?

14 A It was offered for sale.

15 Q Okay. Next question is, you stated that since
16 that date you had been continuously selling your water
17 bottles. So you would have offered on October 15th,
18 2012, when you spoke to -- or if you did speak -- you
19 can't remember if you spoke to Rob Holmes, but if you
20 did speak to Rob Holmes, you should have offered him a
21 water bottle for sale or a pack of water bottles; is
22 that correct?

23 MR. SWYERS: Objection to the form of the
24 question assuming that he should have done anything with
25 a speculative call.

1 MR. MEDINA: Let me rephrase that question.

2 MR. SWYERS: Thank you.

3 BY MR. MEDINA:

4 Q So Mr. Holmes inquired about any goods that you
5 were selling on October 15th, 2012?

6 MR. SWYERS: Objection to the form of the
7 question that Mr. Holmes did do something. The witness
8 is not here.

9 THE WITNESS: If you are going to bring up --

10 BY MR. MEDINA:

11 Q Let me inquire to you --

12 A Can I say something real quick here?

13 Q -- if you had offered --

14 A Can I say something real quick?

15 Q Well, let me finish --

16 A To put a stop to this -- if you are going to
17 constantly refer to Mr. Holmes, we should postpone these
18 hearings, get him on record, let me and my attorney look
19 at what he says, then we will comment on him.

20 BY MR. MEDINA:

21 Q Mr. O'Donnell, you are more than welcome during
22 your trial period to depose Mr. Rob Holmes if you'd
23 like.

24 MR. SWYERS: Well, if I may interject. Thank
25 you. Forgive me for interrupting yet again.

1 But again, Mr. Medina, please continue forward
2 with your questions, and if we can phrase them
3 appropriately, then obviously the witness can answer
4 them.

5 Thank you all.

6 BY MR. MEDINA:

7 Q All right. Mr. Odonnell, let me rephrase the
8 question.

9 If somebody -- if a customer had called you on
10 October 15, 2012, if it was myself, any customer, since
11 you had or you claim to have water bottles for sale at
12 that time, would you offer to sell those goods?

13 A If my mind was thinking properly, I probably
14 possible would have, but my mind was on my dad. I was
15 taking care of him at that time, and my business at that
16 time was not that important as my father's health.

17 Q Okay. Did you have those water bottles on sale
18 online during October 15, 2012?

19 A I did not do a whole lot of online sales. They
20 were -- we had a storefront at the Bayshore Mall here in
21 Eureka, California. We sold them at different events we
22 go through throughout Northern California. And they
23 have also been shipped out of this country too.

24 But then they've also been -- when we left the
25 Bayshore Mall, we went to our storefront in Eureka,

1 California, on E Street. I was sub-renting space and my
2 photos and all that, those pictures online.

3 The reason we left the Bayshore Mall: They
4 were looking at getting Best Buy into that particular
5 mall, and so they kicked our store out of the mall. And
6 right after they fixed up the mall after the earthquake,
7 then they moved us all out.

8 BY MR. MEDINA:

9 Q Mr. Odonnell, you are not answering my
10 question. You're --

11 A I'm just answering your question. I did have
12 bottles of water at all those locations. I did not sell
13 a lot of stuff online at that time.

14 Q Let's -- okay. Let's move on to the next
15 question.

16 Along with J-Lynn Entertainment's investigation
17 from IPCybercrime, our first trademark attorney,
18 Morris E. Turek, also did a trademark search and found
19 no sales or prior sales of goods or services could be
20 found.

21 Is it safe to say that you lied about what
22 products were sold --

23 MR. SWYERS: Objection. Objection. Objection.
24 First of all -- or, once again, we're assuming facts not
25 in evidence, you know, and now we are getting into some

1 sort of inflammatory terms, as the case may be.

2 Again, if we want to, you know, go through
3 hypotheticals or ask correct questions were there sales
4 or were there not sales, that's one thing. But to
5 effectively try to get in testimony from someone who is
6 not here by prefacing these long prefatory statements
7 of, well, our guy did this and our guy did that, that's
8 not what we're here to do today.

9 If we want to ask direct questions, were they
10 for sale, were they not, that's fine, but that's why I
11 objected.

12 So, please, if you'd like to rephrase, go right
13 ahead --

14 MR. MEDINA: Sure.

15 MR. SWYERS: -- but he is not going to answer
16 questions of what your prior attorney found or didn't
17 find.

18 MR. MEDINA: Okay. All right. I will just
19 move on to the next question. Sorry, I apologize for
20 that.

21 BY MR. MEDINA:

22 Q So from your previous answers, Mr. Odonnell, it
23 sounds like you had sold products overseas. I'm
24 assuming those must have been online.

25 A No.

1 Q So you did not keep any records of these
2 transactions of items sold in the United States or
3 outside the United States?

4 A I group all my sales as a group sale, and the
5 one that went -- and the ones that went overseas went to
6 Australia, which was a friend of mine. He sent me the
7 check, I deposited it, but he sent it through his U.S.
8 bank account that he had at the time because I was
9 working for him.

10 He has since passed away, but that's where he
11 was at at the time, in Mt. Gambier in Australia, and he
12 had some of my photos and mousepads and water,
13 et cetera.

14 Q Okay. So you gave no receipts away to anyone;
15 you just gave cash-only sales, no receipts, no tracking
16 of inventory?

17 A I don't keep track of the inventory. I just --
18 I tried that, but my computer crashed at that one period
19 of time, and so I just -- when I do -- it was just too
20 cumbersome. When I do flea markets, I do Bigfoot Days
21 and fire council events, et cetera, et cetera, and I
22 just group them all as -- T-shirts or whatever, I just
23 group them all as one sale, deposit, these are the sales
24 I've sold that day --

25 Q Okay. All right.

1 A -- and that's it.

2 Q Okay. Mr. Odonnell, you answered the question.
3 Let's move on to the next one.

4 Okay. J-Lynn Entertainment had served a
5 written discovery request to you and your attorney,
6 Mr. Swyers. You either failed to or refused to show
7 receipts, sales records of goods and services,
8 especially when using your mark Adventures of Shadow.

9 You also refused to show inventory orders from
10 clients and stores, vendors purchasing any products
11 using your mark. These are requests that should be
12 easily supplied by any person or business --

13 MR. SWYERS: Objection. I'm sorry. Once
14 again, you're using these long statements. These aren't
15 questions. I mean, they are not even prefatory
16 statements at this juncture.

17 Moreover, the rules of procedure of The
18 Trademark Trial and Appeal Board state that if you have
19 a discovery objection, which is what, in essence, you're
20 highlighting, it can be brought forward in a motion to
21 compel. So if this is a discovery dispute, by all means
22 that should be addressed to me. But let's not have a
23 prefatory statement to the client that while you failed
24 to do this, because there's no record that we failed to
25 produce anything that we have and that we basically are

1 required to have produced.

2 So, once again, I would object to the form of
3 the question and the fact that it appears that you are
4 trying a discovery dispute during the trial deposition.

5 Thank you.

6 MR. MEDINA: Thank you, Mr. Swyers.

7 BY MR. MEDINA:

8 Q Okay. Mr. Odonnell, during our investigation
9 we did find one water bottle on -- a picture of a water
10 bottle on Facebook. We couldn't tell if it was sale or
11 not for sale, but it did say it was a limited edition
12 2007.

13 Can you state why it's a limited edition 2007?
14 Does that indicate that it was a one-time sale? Why was
15 it a limited edition?

16 A Rephrase that. I don't understand what in the
17 heck you are talking about.

18 Q Sure. During our investigation we have found a
19 water bottle -- a picture of a water bottle on your
20 Facebook page, and it said "Limited Edition 2007."

21 A Uh-huh -- or "2008" I think it is.

22 Q Or 2008, I'm sorry.

23 Could you explain why it was limited to 2008?
24 Was it a one-time sale just for 2008? Why was it a
25 limited edition versus just a normal edition that would

1 normally be sold like it had appeared a water bottle had
2 been sold over the last eight years?

3 A What happened during that time period, as I
4 mentioned, that water bottle did not officially
5 materialize as it should have been. And I was
6 anticipating having -- being the first batch of water,
7 which was the Limited Edition 2008, which my attorney
8 has the bottle in his possession and -- but I had that
9 water.

10 McClellan Spring Water mentioned that they
11 would replace that bottle, that I can give the other
12 bottles that I had away. And I did quite a few of them,
13 but then I started to -- and a lot of them I gave to the
14 Gideon's International here in Humboldt County, and they
15 gave them out at the Ferndale Fairgrounds. I don't know
16 how many they gave away, but they gave quite a few away
17 and they put their little Gideon's --

18 Q Okay.

19 A -- sticker on top of the label. And then
20 they -- but then the company said they would reproduce
21 the -- recorrect it. And so I changed the label and
22 they never got me the water. But then I just kept
23 holding back. But I always had some water available at
24 each show, but I did not have a whole lot on hand.

25 Q Okay. Mr. O'Donnell, let me stop you. You are

1 kind of rambling on about, I think, the answer. Let me
2 stop you and we will move on to the next question.

3 Thank you.

4 Mr. O'Donnell, were you using your trademark to
5 intimidate or gain access or money from other entities
6 or individuals?

7 MR. SWYERS: I'm going to object on the grounds
8 of relevance, and this time I don't believe that that's
9 relevant to your proceeding in the opposition or the
10 cancellation, which is in large part alleging that we
11 are not operating correctly, in essence, use
12 allegations. And so that would not be relevant.

13 So I am going to instruct the witness not to
14 answer that.

15 THE WITNESS: Okay.

16 BY MR. MEDINA:

17 Q Mr. O'Donnell, prior to the opposition
18 proceeding and the cancellation proceeding for your
19 mark, did you sell T-shirts prior to that date using
20 your mark in commerce?

21 A I had T-shirts made, that is correct. And you
22 see one on the picture of me at the lighthouse.

23 Q Did you have that for sale prior to the
24 opposition and cancellation proceedings? Did you have
25 that for sale for commerce and sold them to customers,

1 interstate commerce?

2 A I had T-shirts that had the similar dog and
3 everything for sale, so your question (sic) is yes on
4 that one.

5 Q Did it have your actual mark Adventures of
6 Shadow on that T-shirt?

7 A No. It was --

8 And the date on the registration of the
9 T-shirt, when I was filing for that, it was the
10 suggestion of the guy, Williams or whatever his name
11 was, to switch the date from the date from August 2007
12 and it should have been changed to the date that it was
13 going to go into Gazette or the date I filed the
14 trademark for the T-shirt, but he failed to change
15 that.

16 Q But your application says that you -- the first
17 use of commerce for a T-shirt was August 29, 2007.

18 A When I applied for that, I just put that. I
19 thought that -- I'm not a trademark lawyer and I never
20 profess to be one. I put that date because I thought
21 that's what they were requesting.

22 I did not know in my -- and the guy looking at
23 it before it went in the Gazette mentioned that that
24 should be switched to -- for less confusion, it should
25 be switched to the date you at least applied for it, and

1 I said that would be fine. And he never changed it.
2 Why they didn't, you'd have to talk to him.

3 Q So it's safe to say that you actually weren't
4 using your mark of commerce for a classification of
5 T-shirts prior to the filing of the cancellation and
6 opposition proceedings; is that your answer, if I'm
7 understanding correctly?

8 A It's the date that was put there, but actually
9 the -- I ordered T-shirts for Adventures of Shadow, the
10 early version, back in 2006. But the company I was
11 using, called Gabriel in New York, they never produced
12 the -- I sent them four slides --

13 Q You never sold any commerce prior to the file
14 of the opposition and cancellation proceedings?

15 A That's correct, but it was also -- that was the
16 very first thing I was considering doing way back then.

17 And your statement that you mentioned in your
18 thing saying that you know for a fact I never planned to
19 or ever would do T-shirts, et cetera, is untrue.

20 Q It was incorrect on your application --

21 THE REPORTER: Okay. I'm sorry. What was your
22 statement? Because the witness was still speaking.

23 MR. MEDINA: Sure.

24 BY MR. MEDINA:

25 Q It's safe to say that your application for the

1 use of commerce for your T-shirt -- for classification
2 of T-shirts for your mark is incorrect?

3 A That's correct. And that should have been
4 taken care of before it was published, but it was not.
5 And that's not on me; that is on the trademark company.
6 Not my attorney company but the main people who were
7 examining it. The examining attorney at the time should
8 have changed it, but he did not.

9 Q Since your application for clothing is
10 incorrect, is it possible that your previous
11 applications for the classification of motion pictures,
12 water bottles, or picture books, is it possible that
13 those could be incorrect as well?

14 A Those I had different -- I have been using
15 Adventures of Shadow on the television and I have had
16 greeting cards and stuff going out back -- all the way
17 back to 2002.

18 Q So is that -- please answer the question "yes"
19 or "no."

20 Is it a possibility that your previous
21 applications, your pre-registered marks for
22 classification of water bottles, clothing, picture
23 books, is it a possibility that those are incorrect?
24 "Yes" or "no."

25 MR. SWYERS: Objection to the form of the

1 question. And, again, it's a legal objection. But the
2 word "possibility" cannot be used in a proceeding like
3 this. So I will object to the form of the question.

4 Instruct the witness not to answer it as
5 phrased.

6 THE WITNESS: Okay.

7 BY MR. MEDINA:

8 Q Mr. Odonnell, do you believe that your previous
9 applications for registering your mark Adventures of
10 Shadow and the goods of water bottles, picture books,
11 and video recording or audio recording, do you believe
12 those should be correct applications?

13 A I believe so because I was promoting them.

14 Q Okay. Thank you. Let me move on to the next
15 question.

16 Okay. Mr. Odonnell, a previous answer you had
17 given on one of the previous questions, you had stated
18 that your attorney, Mr. Swyers, had a sample water
19 bottle on hand that you sent him; correct?

20 A That's correct. And I still have about five to
21 six bottles here too besides the new version.

22 Q Did you receive a second request for discovery
23 requesting a water bottle from J-Lynn Entertainment,
24 Mr. Odonnell?

25 MR. SWYERS: Objection. Once again, it sounds

1 like a discovery dispute. If you want to lay a
2 foundation for the relevance in a trial deposition, I'm
3 willing to listen, but at this juncture it sounds like a
4 discovery dispute.

5 MR. MEDINA: Okay.

6 BY MR. MEDINA:

7 Q Next question, Mr. Odonnell, would you say that
8 the trademark Adventures of Shadow and J-Lynn
9 Entertainment's trademark application The Adventures of
10 Shadow Cat, are those marks the same?

11 A Anyone that is looking online, they would make
12 the assumption that your violent games and stuff might
13 be connected with mine, my trademark, and so you are
14 capitalizing on mine.

15 I had two other trademarks in the past called
16 Tufts Production and William Tufts Production, and they
17 were both cancelled. One was opposed by
18 Tufts University. You tell me how Tufts University --
19 Tufts Production and William Tufts Production can be
20 confused with Tufts University. According to their
21 attorney and the trademark people, they believed so.

22 And so, yes, your trademark is confusing and
23 anyone that sees it will make the assumption that those
24 are mine. And it's not.

25 Q Let me ask you the next question, Mr. Odonnell.

1 Is it just your assumption that they are confusing? Is
2 there any relevant facts or information that shows that
3 customers were actually getting the two marks -- or
4 possibly getting the two marks confused?

5 THE WITNESS: Should I answer this, Matthew?

6 MR. SWYERS: You can. I mean, if you are able
7 to as phrased.

8 THE WITNESS: It's -- who knows what people
9 might think. You don't have any product out there yet
10 with that on there, but you might be capitalizing all
11 the publicity I have been doing in phonebook ads and
12 everything for years and I'm placing there at the top of
13 the search engines. And because your name is connected
14 with mine, you are being moved up into the search engine
15 because of all the money and expenses I'm doing and not
16 what you're doing.

17 So yes, yours can make -- people will make the
18 assumption that it's that, but I have not talked to
19 anyone at this time. But if it comes to that and there
20 is things, then I will cross that bridge when it comes
21 to it.

22 BY MR. MEDINA:

23 Q Okay. So your mark precedes or supercedes
24 other marks that use the "Adventures of" with the terms
25 "Shadow" or "Adventures of" --

1 For instance, say we had a character called the
2 "Adventures of" -- or "Shadow the Hedgehog" that was
3 prior to your mark, would your mark be confused with
4 Shadow the Hedgehog?

5 A There is something coming in here. I don't
6 know what's going on.

7 THE REPORTER: It's just a ringer.

8 THE WITNESS: Can you repeat that? Her phone
9 was beeping in here.

10 BY MR. MEDINA:

11 Q Sure. That's no problem.

12 So prior to your application, prior to you
13 selling your goods in commerce using the mark Adventures
14 of Shadow, there was -- say there was the character
15 Shadow the Hedgehog, would you say that Shadow the
16 Hedgehog confuses customers based on your mark
17 Adventures of Shadow?

18 MR. SWYERS: I would object to the form of the
19 question based upon assuming facts not in evidence. You
20 know, again, if the question is rephrased as to not
21 assume facts not in evidence, perhaps it would be more
22 acceptable. But, again, I will just object because it
23 assumes facts not in evidence.

24 MR. MEDINA: Sure.

25 ///

1 BY MR. MEDINA:

2 Q Mr. Odonnell, do you have exclusive rights to
3 the term "Adventures" and to the term "Shadow"?

4 A No.

5 MR. SWYERS: Objection on the compound nature
6 of the question. Are you asking does he have them
7 independently or together?

8 MR. MEDINA: Well, let's take both. Does he
9 have the rights to those words individually and then
10 both in any configuration.

11 THE WITNESS: No.

12 BY MR. MEDINA:

13 Q So can you explain to me even though the mark
14 the Adventures of Shadow Cat configuration has the
15 sophistication of a cat, a cartoon character, you can
16 tell -- would you say that your personal pet and a
17 cartoon cat, are those two different characters, two
18 different things?

19 MR. SWYERS: Objection because I didn't
20 understand what the question was.

21 But if the witness understands it, he can
22 answer.

23 THE WITNESS: For Matthew to understand it, do
24 you want to rephrase it for both of us to understand it
25 a little bit clearer?

1 BY MR. MEDINA:

2 Q Sure. So if you take your pet dog, Shadow,
3 which is -- answer me "yes" or "no" -- what you are
4 registering your mark for; correct?

5 A Yes and no.

6 MR. SWYERS: Objection: I think it is the
7 nature of how you are asking the question. Forgive me.

8 MR. MEDINA: All right.

9 MR. SWYERS: He didn't register his mark for
10 the dog. I understand what you are trying to say.
11 Forgive me. I think you are trying to say the
12 connotation because it is in connection -- the overall
13 mark has a picture of a dog in it; correct?

14 MR. MEDINA: Correct, yes.

15 MR. SWYERS: Okay. Right. So all right. So
16 that's what you are trying to get at.

17 Okay. Go ahead.

18 BY MR. MEDINA:

19 Q Correct, I don't know how your attorney
20 restated my question, Mr. O'Donnell, but the image of
21 your dog, shepherd dog, and your mark Adventures of
22 Shadow and then you have a cartoon cat called Shadow
23 Cat, do you believe that those are confusing and that
24 those are similar?

25 A When it comes to the logos, no. As per the

1 name, yes. Because I have the Adventures of Shadow and
2 you are capitalizing on mine by just tacking on. It
3 would be like you saying The Microsoft Cat. I guarantee
4 you Microsoft would be putting a stop to you pretty
5 quick.

6 Q So you believe that the word "Shadow" and
7 "Adventures" are distinctive and not vague or
8 descriptive, that they pertain only to your mark?

9 A According to my trademark, the Adventures of
10 Shadow is -- it's an entirety at this time and anyone
11 that tacks anything at the beginning and ending may
12 eventually face a cancellation or whatever in the
13 future.

14 Q Is that your opinion or is that your expertise
15 on what classifies -- classifications of what
16 configuration of words relate to a mark?

17 MR. SWYERS: Again, I'll object as to
18 "expertise." The witness is here as a fact witness
19 testifying as to his own knowledge of his trademark.

20 Subject to that clarification -- excuse me --
21 objection clarifying his role here today, Mr. Odonnell
22 may answer the question if he can.

23 THE WITNESS: Reanswer (sic) the question.
24 Reword it.

25 ///

1 BY MR. MEDINA:

2 Q Based on your previous comments that you
3 believe -- is it your expertise that -- or, actually,
4 let me rephrase that.

5 Is it your opinion that the United States
6 Patent and Trademark Office would not allow a
7 configuration of the words "Adventures of Shadow" with
8 "Cat," "Dog," "Hedgehog," "Person," "Attitude," at the
9 end, beginning or somewhere between?

10 A If you applied for that -- if you applied for
11 the Adventures of Shadow Cat in bottled water or the
12 Adventures of Shadow Cat in books and now T-shirts,
13 et cetera, you would be denied because -- and same with
14 video, if you applied more than just the game section,
15 that would have been -- they would never even have
16 allowed you to go much further because they would
17 never --

18 By my experience in the past trying to register
19 trademarks, like my old trademark that I have had now
20 for ten years of Odonnell Entertainment is --

21 Q Mr. Odonnell, you are not answering the
22 question. Just "yes" or "no."

23 A My -- I'm not going to answer "yes" or "no" on
24 that question. It's going to be --

25 Q Well --

1 A In my opinion, anyone that attaches anything to
2 my name Adventures of Shadow is riding on my shirttails
3 and people can in time get confused. Who cares what the
4 image is.

5 Q Okay. So it would be fair to say that you are
6 not an expert in trademark law and you are not a
7 trademark attorney; correct?

8 A That is correct.

9 Q So your opinions on what's proper in terms of
10 registering a mark, whether it is "Cat" at the end or
11 "Hedgehog" at the end, it's -- could be incorrect?
12 "Yes" or "no."

13 A I'm not going to answer that as a "yes" or
14 "no." It would have to be a little bit more than that.

15 MR. SWYERS: Again, I'm going to object to the
16 question because it sounds like -- could be sort of
17 implies a possibility. "Possibility" is an
18 objectionable term.

19 Again, if you want to rephrase, I think you can
20 come at it from a different direction.

21 MR. MEDINA: Sure.

22 BY MR. MEDINA:

23 Q Well, let me go on to another. Let me make a
24 statement and we will let Mr. Odonnell answer the
25 question.

1 In previous past times there have been the
2 Adventures of Shadow Hedgehog from Sega. There has been
3 a comic character called The Shadow that's been used in
4 comic books over the decades. I believe they also made
5 some films.

6 Mr. O'Donnell, even though there has been other
7 uses of trademarks with the words "Adventures" or
8 "Shadow" in motion pictures, books, and other
9 merchandise that span before 2006, 2007, do you believe
10 that these marks also infringe on your mark Adventures
11 of Shadow?

12 A Those things you mentioned are not trademarks.
13 They are -- people are attaching words to that. They
14 have -- I am the only one until you came into the
15 picture that had an official trademark Adventures of
16 Shadow registered. And if you punched in before you
17 registered yours, you would have seen mine and that I
18 was there.

19 None of the other people have ever -- I did
20 live and dead and there has never been an Adventures of
21 Shadow registered until I registered it.

22 Q Okay. Did you register your mark in the
23 classification of video games or computer software,
24 Mr. O'Donnell?

25 A Not at this moment, no.

1 Q So do you think the United States Patent and
2 Trademark Office would allow the trademark the
3 Adventures of Shadow Cat to be approved and published?

4 MR. SWYERS: I'm going to -- well, I'm going to
5 object on the grounds you are asking for his opinion as
6 to what one of approximately 350 examining attorneys
7 would do at the Patent and Trademark Office.

8 Just to clarify the question, that's what
9 you're asking?

10 MR. MEDINA: No. No. I'm just asking does he
11 think it would be passed.

12 MR. SWYERS: I would object on the grounds that
13 what he thinks, you know, someone at the trademark
14 office would, you know, allow because you are asking the
15 witness' knowledge of a third person's decision. I
16 think we are really starting to strain the boundaries of
17 both relevance --

18 MR. MEDINA: Sure.

19 MR. SWYERS: -- you know, and credibility as to
20 whether or not he can even answer the question.

21 MR. MEDINA: Okay.

22 MR. SWYERS: You know, again, I think rephrased
23 there's a possibility you could get to the same thing
24 you are asking out of him.

25 MR. MEDINA: Sure.

1 MR. SWYERS: But what you're eventually leading
2 to in the question is asking for what is your opinion on
3 what the Patent and Trademark Office would do, and I
4 think that's a very big stretch for him to answer.

5 MR. MEDINA: Sure. Okay. I'll just ask the
6 question again. This is my opinion -- or it seems like
7 Mr. Odonnell is very opinionated on whether my mark or
8 somebody else's mark would be approved or not, so I was
9 just kind of seeing what his opinion would be.

10 MR. SWYERS: I understand.

11 MR. MEDINA: In emails Mr. Odonnell had claimed
12 to be an expert, so I guess I was under the assumption
13 that he was an expert since he claimed to be in previous
14 emails with me.

15 THE WITNESS: That's why I hired Matthew as my
16 attorney.

17 MR. SWYERS: Hold on. We will let Mr. Medina
18 ask the questions, and then respond to him, you know, as
19 you can. I appreciate everyone's, you know, continued
20 working in cooperation to get this done. So thank you.

21 Mr. Medina, back to you. Sorry about the
22 interruptions.

23 MR. MEDINA: That's okay. I apologize for the
24 interruptions that I have given as well.

25 I believe that's it for the questions I have.

1 I have other questions relating to just -- you had
2 objected to some questions that were related to
3 materials that I thought should be supplied in terms
4 of -- on the water bottles and stuff during discovery.
5 You guys are objecting to those questions, so I have no
6 further questions today.

7 MR. SWYERS: Well, I will tell you what, I'm
8 going to --

9 Can we agree, Mr. Medina, to go off the record
10 for a moment?

11 MR. MEDINA: Sure.

12 (Off the record 10:01 a.m. to 10:14 a.m.)

13

14 EXAMINATION

15 BY MR. SWYERS:

16 Q Mr. Odonnell, can you please look at exhibit --
17 what we have designated as Exhibit 1?

18 A Yes, I see it here.

19 Q Mr. Medina, this is the trademark registration,
20 the one that is the subject of the cancellation
21 proceeding?

22 A Right.

23 Q Sorry, but can you identify this for us,
24 please?

25 A This one is the -- it says "United States of

1 America, United States Patent Office." It has a picture
2 the official logo for Adventures of Shadow, and then it
3 has the three different classes on it.

4 Q Thank you.

5 Is this your official trademark registration?

6 A That is correct.

7 Q Is it a true and accurate copy of it?

8 A At this moment, yes, because I did apply for a
9 new business address added to this, Odonnell
10 Entertainment Adventures of Shadow, LLC, but that is
11 currently on hold. But other than that, it's correct.

12 Q Thank you.

13 MR. SWYERS: We will move that into the record
14 as Exhibit 1.

15 (Exhibit 1 marked for identification.)

16 BY MR. SWYERS:

17 Q Referring you to Exhibit 2, which again,
18 Mr. Medina, is his -- the actual trademark application
19 for the Class 25, clothing.

20 Do you have that in front you now?

21 A Yes.

22 Q And, once again, for the record so the witness
23 can identify it, what is this?

24 A This is the Trademark/Service Mark Form,
25 Supplemental Register, Serial No. 85785996, and then the

1 filing date, et cetera. This is for --

2 Q Do you recognize this?

3 A Yes.

4 Q What is it?

5 A It's the --

6 Q Is it your trademark application?

7 A That is correct.

8 Q Is it a true --

9 A Yeah. It's off of their Website thing where
10 you could get that, and then there's also to the
11 Commissioner for Trademarks in another section -- one
12 just gives the informational, and then the other one has
13 on behalf and stuff and I sign it.

14 And then it has a bigger picture of Adventures
15 of Shadow, a picture of one of the T-shirts, and then it
16 also has -- some of the other evidence has my banner,
17 Odonnell Entertainment.

18 MR. MEDINA: I'm going to object to this. This
19 relates nothing to his use of his marks in commerce.

20 This is --

21 MR. SWYERS: I'm laying the foundation. You
22 have actually objected to basically his continued
23 registration of first registration, which makes it of
24 paramount relevance. And, of course, you are opposing
25 the registration of the instant one. However, I'll move

1 along -- move this along.

2 BY MR. SWYERS:

3 Q Mr. Odonnell, just focus on my questions right
4 now, please.

5 A Okay.

6 Q Okay. And so this is a true and accurate copy
7 of the trademark application?

8 A That's correct. It just has pictures, logos.
9 It has the phonebook ads, et cetera.

10 Q Thank you, Mr. Odonnell.

11 MR. SWYERS: So we will move that No. 2 into
12 the record.

13 (Exhibit 2 marked for identification.)

14 BY MR. SWYERS:

15 Moving along. Mr. Odonnell, you have made a
16 number of some motion pictures under the trademark
17 registration at issue?

18 A What was that?

19 Q Have you made any films or motion pictures
20 under the trademark at issue?

21 A Not official, but it does have the -- I had a
22 promo on one of my lighthouse videos, and it also was in
23 one that was about the stamp ceremony that we had back
24 in '07.

25 Q I'd like to direct your attention,

1 Mr. Odonnell --

2 Let me direct your attention to Exhibit No. 3.

3 A Okay. I'm on that.

4 Q Are you looking at Exhibit 3 now for us?

5 A That's correct.

6 Q And, Mr. Odonnell, let me just lead us through
7 this. Okay?

8 A Okay.

9 MR. SWYERS: Mr. Medina, just so you know, this
10 begins with Bates stamp number from our production of
11 documents 113, and then it will be 37, 38, 236, 237,
12 147, 1, 20, 21, 22, 23, 112, 114, 238, and 240.

13 BY MR. SWYERS:

14 Q Mr. Odonnell, specifically on the Bates Stamp
15 No. 113, which is the first page of Exhibit No. 3, can
16 you tell us what is in the screen capture -- or does the
17 trademark appear in the screen capture on this?

18 A Yes, it does. It's a picture --

19 Q Okay.

20 A -- of Shadow and it has the logo of the
21 Adventures of Shadow.

22 Q And is this a film or video that you made with
23 the trademark appearing thereon?

24 A This has aired on television in it's intro and
25 part of the promo I did, yes.

1 MR. MEDINA: Can I pause for one second?

2 MR. SWYERS: Sure.

3 MR. MEDINA: So these are -- from the exhibits
4 these are -- when you called these numbers out,
5 Mr. Swyers, these are from the written discovery that
6 you submitted --

7 MR. SWYERS: That's correct.

8 MR. MEDINA: -- when you were calling these
9 numbers out?

10 Give me one second so I can pull that up
11 because I didn't know you guys were pulling that. Give
12 me a few minutes to pull that up.

13 MR. SWYERS: Can we go off the record for a
14 brief moment?

15 MR. MEDINA: Sure.

16 (Off the record 10:20 a.m. to 10:24 a.m.)

17 BY MR. SWYERS:

18 Q All right. Now, referencing Exhibit 3, is this
19 a true and accurate copy of the screen captures to the
20 videos?

21 A This one here is one of the mousepads that I
22 had, but it's also -- the picture has been on television
23 stuff in this area, plus also on my lighthouse videos
24 and stuff off and on over the years.

25 MR. SWYERS: Thank you very much. All right.

1 We will move Exhibit 3 into the record.

2 (Exhibit 3 marked for identification.)

3 BY MR. SWYERS:

4 Moving on, can you look at Exhibit 4 for me,
5 Mr. Odonnell.

6 A Okay. Exhibit 4, okay.

7 Q What is this?

8 A This is one of my banners I had. These are
9 banners I had made up in February or March of 2012, and
10 it just says "Odonnell Entertainment." It's, like,
11 probably 6-foot, 8-foot long. Whenever I have an event,
12 these are the banners I post. And I hang them and
13 sometimes I've had them -- I think on this particular
14 one didn't air on television for that part, but it did
15 go throughout Old Town and everything at that time, but
16 it has been on television off and on since then.

17 Q Okay. And the trademark at issue is displayed
18 on this banner?

19 A That's correct, the trademark Adventures of
20 Shadow is there, and so is my other trademark,
21 Odonnell Entertainment, listed and the words "Adventures
22 of Shadow," which is another part of that trademark
23 too.

24 Q Is this a true and accurate copy of that
25 banner?

1 A That is correct.

2 MR. SWYERS: Okay. We will move Exhibit 4 into
3 the record.

4 (Exhibit 4 marked for identification.)

5 BY MR. SWYERS:

6 Q Moving onto Exhibit 5. Can you identify what
7 Exhibit 5 is for us?

8 A This is -- we had a ceremony -- the U.S. Post
9 Office had a stamp produced in 1, 2, 3, 4, 5 different
10 states in the Pacific Northwest, and out of the whole
11 state of California, our lighthouse -- St. George Reef
12 Lighthouse was one of the ones featured. And I had some
13 say on the design and wording that's on the stamp and
14 also on the design of the stamp.

15 And then there was also a video clip on there
16 of about the upcoming Adventures of Shadow and et cetera
17 on that. But this was about a 45-minute to an hour-long
18 ceremony that the U.S. Government came in our area up in
19 Crescent City.

20 Q What exactly are we looking at? Is this a
21 brochure or something or --

22 A This is one of the covers to the lighthouse
23 video of the stamp ceremony, first day of sale,
24 June 21st, 2007.

25 Q Does the trademark at issue appear anywhere on

1 this?

2 A Yes, both of my trademarks, Odonnell
3 Entertainment is listed near the bottom and on the
4 bottom it has my -- one that was being proposed at the
5 time. That's why you see the TM symbol thing there,
6 because it wasn't yet registered.

7 Q Is this a true and accurate copy of that cover?

8 A That is correct.

9 MR. SWYERS: Okay. We will move Exhibit 5 into
10 the record as well. Thank you.

11 (Exhibit 5 marked for identification.)

12 BY MR. SWYERS:

13 Q Next up, can you refer to Exhibit 6, please.
14 Let us know what this is.

15 A This is one of the versions of our Website.
16 I'm not sure when this was pulled -- oh, it says 2013,
17 but this is basically what's news and it talks about
18 St. George Reef Lighthouse and it has the little promo
19 on "Last One Out, Turn Out the Light" -- not promo, but
20 a link about the video.

21 And then it also has "The Lantern Room" and
22 then talks about the stamp ceremony of the Pacific
23 lighthouses.

24 And then you also see a picture of me standing
25 on the rocks, the lava rocks that St. George the --

1 which it's built on, and that was taken in November of
2 2002. And you will see a picture that represents my dog
3 there and I have the word "Shadow" below it. And then
4 it also talks about selling of the "Last One Out."

5 And my footage of the lighthouse and other
6 things has aired on History Channel and Real TV and
7 local news channel -- the local stations and it also was
8 being considered for the Discovery Channel. And that
9 one had even more possible -- I submitted all the info
10 and stuff that aired on those things to them with the
11 dog and stuff, and then the Discovery Channel's
12 "Destroyed in Seconds" got cancelled before they ever
13 aired the episode that I had a contract with on that
14 one.

15 MR. MEDINA: Mr. Swyers, I object to this
16 exhibit because it doesn't show any use of commerce, and
17 anything used would be a copyright issue, I believe.
18 There is nothing that shows a link to purchase any
19 products or it's just information on --

20 THE WITNESS: Well, the last one --

21 THE REPORTER: Wait. Wait.

22 "There's nothing that shows a link" --

23 MR. MEDINA: I'm sorry.

24 THE REPORTER: "There's nothing that shows a
25 link to purchase any products or it's just information

1 on"?

2 MR. MEDINA: There's nothing on this exhibit
3 that shows a link to purchase Mr. Odonnell's product
4 with the actual mark or shows that mark was actually
5 used in commerce. It's more -- if you can argue
6 anything, it's a copyright issue to show the image of
7 him and his dog, but there's no -- even with the video,
8 it's not using his mark. "Last One Out, Turn Off the
9 Light," that's not Mr. Odonnell's mark.

10 MR. SWYERS: That's your objection, Mr. Medina?

11 MR. MEDINA: Correct.

12 MR. SWYERS: Madam Court Reporter --

13 MR. MEDINA: I believe it's irrelevant to the
14 case.

15 MR. SWYERS: Very well. Thank you for your
16 objection.

17 Madam Court Reporter, were you able to record
18 his objection?

19 THE REPORTER: Yes.

20 MR. SWYERS: Okay. Thank you. Then I will
21 proceed forward.

22 Your objection is noted. Thank you.

23 BY MR. SWYERS:

24 Q Mr. Odonnell, is this a true and accurate copy
25 of the Website that we talked about?

1 A One of the versions and possible back in that
2 time period, yes. It's been changed since then off and
3 on.

4 MR. SWYERS: Subject, of course, to
5 Mr. Medina's objection, which I will argue at the time
6 of the briefing stage of this matter, I will move
7 Exhibit 6 also into the record.

8 (Exhibit 6 marked for identification.)

9 BY MR. MEDINA:

10 Q Now, Mr. Odonnell, let's just talk very
11 generally for a minute. Have films with this trademark
12 appeared on television?

13 A That is correct.

14 Q Tell me about News Channel 12.

15 A It's actually News Channel 3.

16 Q Sorry. Tell me about News Channel 3.

17 A KIEM TV 3. On -- like, one example of what --
18 there's -- I believe one of the upcoming evidence,
19 there's a banner popping up where -- about the
20 Adventures of Shadow with the logo, and you see both
21 dogs in the wagon. It was the last Saturday in April of
22 2012. And you see the dog in the video and you also see
23 me pulling the wagon with the new dog that's now playing
24 the character of Shadow.

25 Q But the actual films, when we talk about the

1 films and such --

2 A Right, that.

3 Q -- with the actual Adventures of Shadow
4 trademark on it, those appear on television as well;
5 correct?

6 A Yes. The beginning and ending and sometimes in
7 the middle of the programs that we air on Access
8 Humboldt Channel 12, and then prior to that was on Cox
9 Cable, which eventually went to SuddenLink, but they are
10 in Cox Cable's time period. They've aired on TV.

11 And I air programs that are produced by the
12 Institute for Creation Research, Answers for Genesis,
13 and in between all that, I insert the Adventures of
14 Shadow and stuff off and on throughout the run. And we
15 have been airing on Access Humboldt since all the way
16 back to late summer -- late summer, early fall of 1991.

17 Q Okay. All right. What are the broadcast areas
18 for Access Humboldt, if you are aware?

19 A Access Humboldt goes up to the Oregon border
20 and it goes east toward Willow Creek, about an hour to
21 two hours in on Willow Creek's section, and all the way
22 down near Willits.

23 And then PBS aired the parade live, and that
24 one has gone -- it goes into Brookings, along with
25 Channel 3, and it goes all the way down toward Willits

1 and that one actually goes almost all the way to
2 Redding.

3 And then some of my videos in the past, which I
4 believe that -- I'm not sure if they are still around or
5 not, but there is cable station up in The Dalles,
6 Oregon, that I was submitting the -- our creation
7 programs and stuff too up in The Dalles, Oregon, which
8 is near Portland.

9 Q And all of these videos would have the
10 Adventures of Shadow trademark somewhere in them?

11 A Right. Off and on. They weren't in every
12 episode, but they were off and on in variations in the
13 thing. But once I got the official logo and all that
14 stuff, that was pretty much on there, pretty much
15 consistently since I got the trademark.

16 Q Now, you mentioned a couple things I want to
17 follow up quickly. You mentioned Redding. Is that
18 Redding, Washington?

19 A Redding, California. It's 3 hours and about
20 10 minutes drive east on 299.

21 Q Okay. Now, you have mentioned also the
22 History. Is that the History Channel?

23 A Yes. That one -- there was the History Channel
24 at that time, but it's now just called History.

25 Q And videos with the Adventures of Shadow have

1 appeared on the History Channel or History?

2 A I submitted the information for that, but it
3 did not make the final run on any of that. That
4 particular video, I was getting them to do an alternate
5 one, but that particular video came out in 2002.

6 MR. MEDINA: One question to clarify.

7 When you have mentioned "mark" -- Mr. O'Donnell,
8 when mention "mark," you are mentioning your full mark
9 on these videos or just your dog on them?

10 MR. SWYERS: Mr. Medina, I apologize, but the
11 way trial procedure works, we don't ask the witness
12 questions over one another. At the end of this you will
13 have an opportunity to ask followup questions.

14 MR. MEDINA: Okay. No problem.

15 BY MR. SWYERS:

16 Q All right. Mr. O'Donnell, has there come a time
17 that your films have been streamed on the internet?

18 A Yes.

19 Q How about Facebook, have any of these films
20 ever appeared on Facebook?

21 A Yes.

22 Q Okay. And these films, do they also use the
23 Adventures of Shadow trademark that we are sitting here
24 today about?

25 A Yes. It has the words and it also has the

1 official logo.

2 Q Okay. And that's the logo that's registered
3 that we talked about in Exhibit 1?

4 A That is correct.

5 MR. SWYERS: Okay. Now, the next part of this
6 deposition I would like to designate, Madam Court
7 Reporter, as trade secret and commercially sensitive,
8 which means that Mr. Medina when he files this with The
9 Trademark Trial and Appeals Board, he has to effectively
10 redact it out. So this portion -- we can talk about it
11 off the record later -- please designate as trade
12 secret/commercially sensitive.

13 BY MR. SWYERS:

14 Q I'd like to refer you, Mr. Odonnell, to what
15 has been designated as Exhibit 7.

16 A Yes.

17 Q Can you put that in front of you and let us
18 know what it is?

19 A I'm on it right now.

20 Q Okay. Can you identify what Exhibit 7 is for
21 us?

22 A It's a little small, but let me check.

23 This looks like one of my tax returns for some
24 year, but I don't know which year -- 2007.

25 Q And multiple tax returns if I'm not mistaken;

1 right?

2 A Yes. I'm flipping through it right now.

3 Q And so -- just so we are clear, flip through
4 this.

5 MR. SWYERS: I would also like to designate not
6 only the testimony concerning Exhibit 7 as trade
7 secret/commercially sensitive, but, of course, the
8 exhibit itself as well since it deals with
9 Mr. Odonnell's tax returns.

10 BY MR. SWYERS:

11 Q Are these true and accurate copies of your tax
12 returns from 2007 through 2011?

13 A That is correct. They were done by my CPA firm
14 that I use in Eureka, California.

15 MR. SWYERS: Okay. So I would like to go ahead
16 and move these into the record.

17 (Exhibit 7 marked for identification.)

18 BY MR. SWYERS:

19 Q Mr. Odonnell, do these display income from 2007
20 through 2011 for, you know, video and motion picture
21 production?

22 A Yes. And it has different sales of different
23 items I have sold over the years -- or for that
24 particular year and for my gross income. As you see, it
25 was -- looks like in 2007 was 1,786, and then you do

1 all, whatever, the math -- I can't read it all, what
2 goes down. But with all my promotions and everything
3 through my operating expenses it's in the negative.

4 MR. MEDINA: Mr. Swyers, I object to this
5 exhibit. There's nothing in there that shows that -- it
6 shows nothing that proves that Mr. Odonnell was using or
7 tracking the use of his mark in commerce.

8 MR. SWYERS: Thank you for the objection.

9 BY MR. SWYERS:

10 Q Mr. Odonnell, were these services in connection
11 with the trademark at issue here today?

12 A Some of the sales, yes, they are. And also
13 with my Odonnell Entertainment, some of the sales are
14 listed in this. And same with some of my Christian
15 books, yes, and videos.

16 Q Moving forward -- actually, this is going to
17 get a little bit tricky. We are going to -- well, just
18 one second.

19 For now I'm going to skip what I had labeled
20 Exhibits 8, 9, and 10. This is going to be a little bit
21 challenging for us.

22 A Okay. I am moving those aside at the moment.

23 Q Yeah, put them aside.

24 So now we get to renumbering of exhibits, which
25 is always fun. And so I am now looking at Exhibit 11,

1 which I would like to relabel -- if you have a pen
2 there -- as Exhibit 8.

3 THE REPORTER: Just use this.

4 THE WITNESS: Okay. I'm trying --

5 (Off the record.)

6 MR. SWYERS: We're going to relabel 11 as 8.

7 THE WITNESS: Okay. I did No. 11.

8 Okay. I got No. 11 now.

9 THE REPORTER: Okay. I will be remarking these
10 with my official sticker at a later time anyway.

11 MR. SWYERS: I figured, but so we are all on
12 the same page -- are we back on? Are we still on?

13 THE REPORTER: We're back on. Thanks.

14 BY MR. SWYERS:

15 Q So Exhibit 8, which was originally labeled 11
16 but is now for our purposes Exhibit 8.

17 Just so everyone is clear as to what I think
18 I'm referencing, it's an e-mail from Bill Odonnell --
19 William Odonnell, Subject: Water and Hello, August 30,
20 2007.

21 Is everyone on the same -- literally on the
22 same page?

23 A Yes.

24 Q Okay. All right. Great.

25 Mr. Odonnell, would you be so kind as to

1 identify to us what this Exhibit 8 is? I think it
2 should be about four pages.

3 A Right. And this is a communication I had with
4 then owner of McClellan Spring Water -- he was one of
5 the co-owners of McClellan Spring Water -- talking about
6 ordering water and the communication I had. Where are
7 they and stuff, August 30th of 2007, on the first page.
8 And the other one was talking about August 29th of '07.
9 And then August 30th again about the communications
10 dealing with the McClellan Spring Water.

11 And then there -- but also because of the guy's
12 sensitivity of his email and I don't want that posted on
13 the thing, I would like this whole Exhibit 8 to be
14 listed as classified too.

15 MR. SWYERS: Okay. Again, fair enough. If we
16 can kindly designate this portion of the record as trade
17 secret -- excuse me -- again and Exhibit 8 will be so
18 designated.

19 BY MR. SWYERS:

20 Q So we have identified these. Are these true
21 and accurate copies of the emails between you and this
22 gentleman?

23 A That is correct.

24 MR. SWYERS: Thank you. I would move now
25 Exhibit 8 into the record.

1 (Exhibit 8 marked for identification.)

2 BY MR. SWYERS:

3 Q Mr. Odonnell, looking at the Bates page which
4 is I believe 000164 --

5 A What part -- oh, 164, okay. Yes.

6 Q Yeah, the first page.

7 You mention in the email that, I guess, the
8 quantity of bottles that were sold the previous year,
9 was it 350?

10 A "We did about 350 last year, before was about
11 600." Yes, that was --

12 Q Okay. What is Bigfoot Days, by the way?

13 A Bigfoot Days is an event that happens on --
14 years ago it used to be the weekend before Labor Day --
15 or on Labor Day itself, but now it falls on Saturday of
16 Labor Day weekend in Willow Creek.

17 MR. MEDINA: I object to the question. The
18 subject of Bigfoot Days is not related to the mark.

19 MR. SWYERS: Actually, if I may -- thank you
20 for your objection. It is completely relevant. It is
21 going to show -- one of the things that you've
22 challenged in this trademark is it is not used in
23 interstate commerce. The relevance goes to the factor
24 that is actually in use in interstate commerce and
25 affecting interstate commerce because, as you will find

1 out in a few moments, the widespread appeal, shall we
2 say, of Bigfoot transcends Northern California.

3 Thank you. Your objection is noted and is
4 preserved for the record.

5 BY MR. SWYERS:

6 Q Mr. Odonnell, tell me about, you know, who
7 attends Bigfoot Days.

8 A Bigfoot Days covers -- they will have -- like,
9 Smokey the Bear will be there and stuff, but then also
10 Bigfoot will be there, a guy dressed up in Bigfoot
11 outfit, but this particular event --

12 Q Can I ask for clarification?

13 A And this particular event is sort of like what
14 happens up in Astoria, Oregon, you have a day up there
15 called Goonies Days that covers about four days, and
16 this particular event covers three days. It starts on
17 Saturday, then it continues on Sunday and a little bit
18 in Monday. I usually just do Saturday only. There's
19 people that come to this that are from all over the
20 country.

21 Q Okay.

22 A And it's almost every state and then there's
23 some people that even come to this that I've talked to
24 in the past from Hawaii, et cetera, that will come once
25 in a while.

1 Q Do you know how long Bigfoot Days has been
2 going on?

3 A I believe this is the -- coming up, I believe,
4 is the 25th anniversary. I believe. But don't quote me
5 on that. It might be more than that. But it's at least
6 25 years it has been going on in this particular
7 region.

8 Q Fair enough. All right.

9 I'd like to turn your attention briefly to now
10 exhibit -- I labeled it 12. We are going to relabel it
11 No. 9.

12 Can you identify that for the record?

13 A Okay. That is the official label that -- it
14 was supposed to have been on the bottled water at one
15 point when they were supposed to redo the label. This
16 was the label that I officially authorized. Or it could
17 have been -- yeah, I think because they were running
18 late, this is actually the one that they were going to
19 run with before they never printed it.

20 But this is the one -- I signed the contract
21 down below and I signed final proof, et cetera. And
22 this is what was supposed to have been on there, but
23 then they made an error and they put "Batside."

24 But it mentions Creation Research of
25 North America, which is our educational nonprofit which

1 the trademark is connected with, and then also my own
2 production company.

3 Q Is this a true and --

4 A And then it also has the Website.

5 Q I apologize.

6 Is it a true and accurate copy of that proof?

7 A That is correct.

8 MR. SWYERS: I will move what has now been
9 noted as Exhibit 9 into the record.

10 (Exhibit 9 marked for identification.)

11 BY MR. SWYERS:

12 Q Referring you on to exhibit what was previously
13 marked 13, I will now be relabeling Exhibit 10. It
14 should be a two-page exhibit.

15 Can you tell us what this is?

16 A Okay. This is the water bottle which I still
17 have a few copies of, and this is the one that they
18 ended up printing, which is not what I -- they were
19 supposed to do what was on the other label, but then
20 they ended up doing this alternate version and with a
21 lot of errors in it.

22 And then on page -- the next page is a picture
23 of, like, my dog's ASCA name -- her official name is
24 Adventures of Shadow and that is registered with ASCA
25 and that's registered on their official registration of

1 dogs that goes throughout the world.

2 Q All right.

3 A And it also has a picture of bottled water, the
4 calendar, this underneath it was also a picture of my
5 dog that passed away, and these were cremated with
6 her.

7 Q All right. Thank you.

8 And so this is -- now, there's a 2012 in the
9 second picture sitting here. Was this -- do you believe
10 that this picture was taken in 2012 and you are showing
11 a picture of the 2012 calendar?

12 A That is -- this is correct. This is the
13 calendar. Because the dog died July 11th, 2012, and
14 this calendar came out in 2011 for 2012. And this is --
15 the calendar was sitting on top of my dog -- or in back
16 of her when she died, when she was euthanized.

17 Q All right. Thank you.

18 MR. MEDINA: I'm going to object to this.
19 There is nothing to prove when these were taken. It's
20 just photos of -- printed on -- Mr. Odonnell could have
21 printed these the last -- you know, a couple months ago.
22 There's nothing that proves that these are official
23 items that were sold in commerce to anyone.

24 MR. SWYERS: Fair enough. Is that your
25 objection?

1 MR. MEDINA: Correct.

2 MR. SWYERS: All right. Thank you.

3 BY MR. SWYERS:

4 Q Mr. Odonnell, are these true and accurate
5 copies of the label that appeared on the bottles?

6 A That is correct, and still on that particular
7 bottle, which we have -- you have one and I think I have
8 about five or -- I think I have five left because one
9 was cremated with the dog that died July 11th, 2012.

10 And if you printed the bottom part --

11 Q Mr. Odonnell?

12 A Uh-huh.

13 Q Thank you.

14 MR. SWYERS: I will move Exhibit 10 into the
15 record.

16 (Exhibit 10 marked for identification.)

17 BY MR. SWYERS:

18 Q Now, what is the Treasure Trove?

19 A The Treasure Trove was a store that was --
20 initially was located in Old Town, but I did not get
21 involved with her until she opened her store up right
22 next to our Kohl's that had taken over the Mervyn's
23 building. And they -- the store was right next to
24 Kohl's, and right across at the time was Hometown barfet
25 -- or Buffet, sorry.

1 So I had a variety of our items for sale at the
2 Treasure Trove in Eureka at the Bayshore Mall that has
3 people that go through that mall throughout the country
4 as their tours -- because we are a heavily toured town
5 from travels all over the world. And they go into these
6 type of stores because it has unique items that were
7 created from this particular area.

8 And so I sub-rented space at the Treasure Trove
9 at the Bayshore Mall, and then later on we moved to the
10 store on E Street, as I mentioned earlier in this
11 conversation.

12 Q Enlighten us, if you would, as to the dates for
13 this. When did this occur?

14 A The dates at the Bayshore Mall, I believe, was
15 in 2008. I don't have that figure in front of me at the
16 moment, but I believe it was 2008. And I pulled away
17 from her completely in May and June, possible July -- I
18 think it was May and June of 2012 is when I pulled my
19 inventory from the current location she was at because I
20 was just spending more -- losing money at that
21 particular location that she was at. But we would do --

22 Q Did the inventory --

23 A Huh?

24 Q If I may interject. Did the inventory include
25 the Adventures of Shadow branded bottled water that we

1 have seen here today?

2 A That is correct, along with a variety of other
3 items of Adventures of Shadow.

4 Q Okay. What does "CRNC" stand for?

5 A Creation Research of the North Coast. It is an
6 educational nonprofit ministry that my dad and I
7 initially started in '91, but we formed the official
8 nonprofit in '94 and was approved, I believe, in '95.

9 Q Very well. Can you put your -- excuse me.

10 Can you please refer to what I had marked as
11 Exhibit 14, which now we are going to renumber as
12 Exhibit 11, please.

13 Can you please put that in front of you and let
14 me know when it is in front of you?

15 A It's in front of me.

16 Q Okay. What is this?

17 A This is some of the different inventory and
18 stuff that I have had, but it doesn't say quantity and
19 stuff.

20 Q Does it represent sales that you have made?

21 A Yes, sales and also what's left on hand.

22 Q All right. And so if you would be so kind,
23 refer to the Bates-stamp number, please, 000134.

24 Let me know when you get to that page. It
25 should be about -- I think it is actually Page 8 of 18

1 is what it says on the printout.

2 A Okay, 1314 (sic) -- yes, I'm there right now.

3 Q It should be Bates stamp 134, page 8 of 18 from
4 the CRNC, Exhibit No. 11.

5 Can you look about three-quarters of the way
6 down. Do you see where it says "Adventures of Shadow
7 water"?

8 A Yes, I see that with your arrow.

9 Q Okay.

10 A And then "miscellaneous items."

11 Q Did this indicate to you that you had
12 Adventures of Shadow water at CRNC as of February of
13 2009?

14 A That is correct.

15 Q Thank you.

16 And is this a true and accurate copy of this
17 document?

18 A That is correct as of February 24th.

19 MR. SWYERS: Okay. So I will move that into
20 the record.

21 (Exhibit 11 marked for identification.)

22 BY MR. SWYERS:

23 Q You mentioned in passing that the water has
24 also been sold to persons traveling through Australia
25 and New Orleans. Tell me a little about that, please.

1 A Yeah, we had one person, of course, that I
2 worked with in Australia which he wanted some of the --
3 he was the person I worked with and he lives in
4 Mt. Gambier at the time. And he had workers and stuff
5 and he wanted some of my Adventures of Shadow pictures,
6 et cetera, and some of the water. And so I shipped them
7 to him.

8 And then also in New Orleans there was some
9 waters that went to two different individuals, but it
10 all went into one parcel post from the Post Office, the
11 one that you could pack as much weight as you want and
12 you don't pay that much for it. And that was shipped
13 over to New Orleans.

14 Q Okay. All right. Let me check my notes. Let
15 me just direct your attention generally to advertising.

16 A Is that one of the exhibits?

17 Q I'll get to the exhibits in a second.

18 A Okay.

19 Q Generally speaking, do you advertise in
20 connection with Facebook?

21 A That is -- I have it on Facebook, that is
22 correct, and that's one of the sources.

23 Q Okay. Let me ask you now to then refer to
24 exhibit -- what I marked 14, which I believe we'll be
25 relabeling as Exhibit 12. Yes, 12.

1 So if you can kindly relabel 14 to 12, that
2 will be wonderful?

3 THE REPORTER: Just one moment.

4 THE WITNESS: Yeah, I'm getting it now.

5 MR. SWYERS: Sure.

6 THE WITNESS: So it's Batch No. 3 or Batch
7 No. 2?

8 MR. SWYERS: You mean --

9 THE WITNESS: Oh, it's part of Batch 3. It's
10 the one that says Exhibit 14 originally?

11 MR. SWYERS: Correct.

12 Okay. I'm on there now.

13 THE REPORTER: One moment. That will be
14 Exhibit 12.

15 MR. SWYERS: Yeah.

16 BY MR. SWYERS:

17 Q Can you identify it now for us?

18 A Yeah. This is the one that's on the Facebook,
19 and the name is Adventures of Shadow on the call line.

20 And then it has at the time the newest dog in there.

21 And then it also has the official logo and stuff on the
22 front page along with some other info, et cetera.

23 Q Is this a true and accurate copy of that
24 Facebook page?

25 A Yes. When it was published, yes. I may have

1 since made changes, but.

2 Q Very well.

3 MR. SWYERS: I will move Exhibit 12 into the
4 record.

5 (Exhibit 12 marked for identification.)

6 BY MR. SWYERS:

7 Q Is the Facebook page still active?

8 A That is correct.

9 Q Okay. Tell me about odonnellentertainment.com.
10 Has the trademark been advertised on
11 odonnellentertainment.com?

12 A That is correct.

13 Q Okay. Do you know about how long
14 odonnellentertainment.com has been posted for?

15 A Odonnellentertainment.com on this particular
16 Facebook page was posted as soon as I went to Facebook,
17 which wasn't until -- on January/February of 2012 is
18 when I started Facebook.

19 Q All right.

20 A Possible December 2011, but it's somewhere in
21 that timeframe.

22 Q Okay. And how about adventuresofshadow.com, do
23 you own that domain name as well?

24 A I own that domain name along with about another
25 100 variations of that name.

1 Q Do you know about when you registered
2 adventuresofshadow.com?

3 A I don't have the -- odonnellentertainment.com
4 was registered back in -- probably about at least
5 10 years ago when I registered the trademark, and I
6 don't have that figure with me.

7 Q Okay. Turning your attention to Exhibit
8 No. 15, which I would like to relabel to Exhibit No. 13.
9 Can you tell us what this is, please?

10 A This is the official Website of Adventures of
11 Shadow, adventuresofshadow.com. This is the -- a newer
12 version of the Website that I have.

13 Q And is this used in the advertising of the
14 goods and services we have spoken about here today?

15 A That is correct.

16 Q Is this a true and accurate copy of the Website
17 when it was printed out?

18 A That is correct.

19 MR. SWYERS: I will move this into the record
20 as well as Exhibit 13.

21 (Exhibit 13 marked for identification.)

22 BY MR. SWYERS:

23 Q Moving along. Mr. Odonnell, do you also have a
24 Twitter feed for Adventures of Shadow?

25 A That is correct.

1 Q Can you direct your attention to what I
2 designated as Exhibit 16, what we would like to relabel
3 as Exhibit 14.

4 A Okay. I'm there now.

5 Q Identify it for us, please.

6 A This is the Twitter feed Adventures of Shadow
7 and it has -- @travelsofshadow is the name. And then it
8 has the -- at the time it says 2006 to 2013, so it was
9 sometime in 2013 I took to Twitter.

10 Q Okay. And is it a true and accurate copy of
11 the Twitter feed on whatever day this was taken?

12 A Yes, July 23rd, 2013, that is correct.

13 MR. SWYERS: So we will move Exhibit 14 into
14 the record.

15 (Exhibit 14 marked for identification.)

16 BY MR. SWYERS:

17 Q Moving on. You also have a LinkedIn account?

18 A The what?

19 Q A LinkedIn account?

20 A That is correct. That's on Exhibit 17.

21 Q And directing your attention to Exhibit 17,
22 which I would like to renumber Exhibit 15.

23 A Okay.

24 Q What is this?

25 A This is my LinkedIn account. It talks about

1 my -- it was done on July 23rd, 2013, so this is what it
2 looked like at that time. It says I'm the owner at
3 Odonnell Entertainment Adventures of Shadow, LLC, and I
4 officially got that on February 2013 is my -- when I got
5 my LLC name.

6 And then also Odonnell -- Adventures of Shadow,
7 owner of that from 2006 to the present for seven years.

8 Owner of Odonnell Entertainment from 2002.

9 And then it also brings in January of '92 to
10 present under that combined.

11 And then it also talked about -- it was also
12 called Tufts Production at one time, and then January 2,
13 2012, I switched it to Odonnell Entertainment because of
14 Tufts University.

15 Q Very well. Thank you.

16 And is this a true and accurate copy of that
17 LinkedIn page?

18 A That is correct.

19 MR. SWYERS: Okay. And I will move Exhibit 15
20 into the record.

21 (Exhibit 15 marked for identification.)

22 BY MR. SWYERS:

23 Q Directing your attention to Exhibit 18, as I
24 wind down my questions here. What I designated as
25 Exhibit 18 I'm going to ask to be relabeled Exhibit 16.

1 Let me know when you are there.

2 A I'm there.

3 Q Okay. What is this?

4 A This is the banner that I had commissioned
5 February or March of 2012. Before that I would use a
6 cardboard one that I would make each year, but this
7 one -- and then print the little stuff on it.

8 But this one has the Adventures of Shadow
9 official logo on it and, of course, the dog's name. At
10 this time you'll see Shadow in there. She is in the
11 wagon. That's the first dog. And Scamp I don't see in
12 this particular -- at the moment.

13 But I put the label as Shadow colon -- or
14 little star symbol Scamp because both dogs were there
15 and her name officially is named Shadow too.

16 And then it just says "Adventures of Shadow
17 Represents the War Dogs of World War II, Korean War, and
18 other wars past and present," and it says
19 "adventuresofshadow.com." And this particular banner
20 has aired on that PBS that went all way up into Oregon
21 and over near Redding and south plus on their Website
22 off and on for the Rhododendron Parade which has people
23 throughout the country that -- and the world that comes
24 to it.

25 Q Very well.

1 Is this a true and accurate copy of a
2 photograph of the parade or the banner in the parade?

3 A That is correct. And there's also video clips
4 of this that aired on PBS which I have right now.

5 Q Thank you.

6 MR. SWYERS: I will move that into the record
7 as Exhibit 16.

8 (Exhibit 16 marked for identification.)

9 BY MR. SWYERS:

10 Q Have you also advertised in the Yellow Pages?

11 A That is correct.

12 Q And specifically have you advertised the actual
13 trademark at issue in the Yellow Pages in connection
14 with the goods or services at issue?

15 A Yes. It's been in the AT&T phonebook right
16 after I got the trademark. Odonnell Entertainment was
17 in there prior, but then when the new phonebook came
18 out, once I registered the trademark Adventures of
19 Shadow, it moved into the AT&T phonebook.

20 And then -- and then the next year, I believe,
21 it was in the AT&T phonebook, but then I went to the
22 Hagadone Black phonebook, and from that -- I went to it
23 up until this year, and I have full-fledged color ads of
24 Adventures of Shadow in a couple of sections and also
25 with the goods and services and stuff from the different

1 classes in the phonebook. And that particular directory
2 was posted on their Website.

3 Q Okay. Fantastic. Thank you.

4 Last issue for me right now. I'm going to ask
5 you to pull out what should probably be one of the last
6 couple unmarked exhibits. I think there were two to
7 three unmarked exhibits. This one in particular is from
8 Gillware, dated December 13th.

9 Do you have that in front of you?

10 A I'm pulling it out right now.

11 Okay. So it's the one that says "Hi, Jim"?

12 Q Actually, it says "Hello, Bill."

13 A Right.

14 And this one I would like to list as --

15 Q That would be Exhibit 17 if we list it. But do
16 you have that in front of you, the "Hello, Bill. We
17 regret to inform you..."?

18 A Yes. I have that with me.

19 Q I would like to list that as Exhibit 17 I
20 believe we are up to.

21 Can you identify this for the record for us?

22 A Yes. On December 13, 2011, "Hard Drive Status
23 Update - Fail. Hello, Bill."

24 What happened was I had a portable hard drive
25 that I was moving, a brand-new one that I picked up at

1 Costco, and it was all new and I was transferring stuff
2 and deleting stuff and moved everything into this thing
3 along with some of my video clips and everything that
4 was completed.

5 And then in December 13, 2011 -- it happened in
6 the later part of November, I believe, and then I sent
7 it off willing to pay 3' to \$4,000. But it says, "We
8 regret to inform you that Gillware is unable to recover
9 your data from this troubled hard disk drive. If you
10 wish to have your drive sent back to you, we will ship
11 it UPS Ground for \$11.95. If you do not want" it, et
12 cetera, we will destroy it. Please contact us.

13 MR. MEDINA: I object to this exhibit. This
14 exhibit seems too convenient. I mean, it's just like
15 something he can't prove or can't submit certain
16 material because the hard drive was lost. That just
17 seems convenient. I just object to it because it
18 doesn't prove the continuous use of your client's market
19 in commerce in 2007. It's --

20 THE REPORTER: I'm sorry. What was the last
21 bit?

22 MR. SWYERS: In other words, it's your --

23 MR. MEDINA: I object to this exhibit because
24 it relates nothing to the actual trademark. It seems --
25 that the continued use of Mr. Odonnell's mark since

1 2007, it just seems convenient that you are submitting
2 that -- you are basically kind of giving an excuse that
3 you could not submit certain materials based on a hard
4 drive failure.

5 MR. SWYERS: Well, today there has already been
6 allegations that Mr. O'Donnell effectively did produce
7 more documents, and this has been a situation that has
8 been replete throughout this case. Of course, as we
9 have maintained here from day one, we have produced
10 everything that we have and believe that there is
11 sufficient, you know, evidence of use aside from just
12 our client's testimony as well as the documents that
13 have been produced before today.

14 That being said, we've also, you know, been
15 very forthright saying that while to the extent there
16 have been something that has been lost along the way,
17 there was a hard drive issue. This evidence was
18 proffered to corroborate that hard drive issue that we
19 are speaking of and during his testimony today. That's
20 why we are offering it, to consider the legitimacy of
21 that claim.

22 The objection is duly noted and is preserved,
23 and I believe it can be argued on the various reasons,
24 period.

25 ///

1 BY MR. SWYERS:

2 Q Mr. Odonnell, just to wrap up my question on
3 this, is this a true and accurate copy of this email?

4 A That is correct.

5 And then also what -- I also lost -- I was
6 traveling all over the country taking a whole bunch of
7 pictures of the current dog at that time, and I lost all
8 those pictures, et cetera, for the whole year 2011, plus
9 all my current records and stuff and video masters and
10 everything at that time too.

11 MR. SWYERS: Mr. Odonnell, at this time I will
12 move into the record Exhibit No. 17 subject to
13 Mr. Medina's continuing objection, which is noted for
14 the record.

15 (Exhibit 17 marked for identification.)

16 MR. SWYERS: At this point -- I will check my
17 notes, but at this point I have nothing further from the
18 witness subject to my checking my notes at the moment.

19 Mr. Medina, do you have any questions for the
20 witness?

21 MR. MEDINA: I have one question and it's on
22 one exhibit that I'm trying to pull. I'm trying to find
23 that exhibit. I believe it was on the exhibit that had
24 the emails about the water bottles. It was marked
25 Exhibit 11 originally and remarked Exhibit 8.

1 THE WITNESS: This is about the bottled water?

2 MR. MEDINA: Yeah. Let me pull that up so I
3 can ask the question.

4 That was in the second batch originally;
5 correct, Mr. Swyers?

6 MR. SWYERS: Forgive me. I can't remember. I
7 just scanned them in on Sunday and sent them out. I
8 can't remember which batch they are in.

9 THE WITNESS: This one, I believe, was in
10 Batch 2.

11 MR. MEDINA: I found it.

12

13 FURTHER EXAMINATION

14 BY MR. MEDINA:

15 Q The question, Mr. Odonnell, is just in relation
16 to this email, 11. So you are inquiring about water
17 bottles, and the date is August 30th, 2007. And I
18 believe in the application it said -- correct me if I'm
19 wrong -- your first use in commerce was August 29, 2007,
20 on your official --

21 A That's correct.

22 Q -- application for the mark?

23 A That's correct.

24 Q But from this email and the emails included
25 behind it, like, on August 29th, which is the next

1 email -- it looks like it's to you -- there, again, you
2 seem to be inquiring about the cost of having bottles
3 manufactured.

4 A That's correct.

5 Q But in your application, though, you state that
6 you had been using the mark in commerce and had been
7 selling the mark by August 29, 2007; is that correct?

8 A That's correct.

9 Q But you weren't selling them. From the email
10 it looks like you are inquiring about the use of or the
11 manufacturing of water bottles on August 29th; is that
12 correct?

13 MR. SWYERS: I'll object: Characterization.
14 You weren't using them. I believe the emails will speak
15 for themselves first.

16 Second of all, I believe this is effectively a
17 reorder. It very clearly states in the first email, we
18 sold this many last year, you know, anticipate doing
19 even better this year. So mischaracterizing testimony
20 or, rather, the exhibit, and I would object to that.

21 Subject to that, Mr. O'Donnell can answer the
22 question as he sees fit.

23 THE WITNESS: So what's the question?

24 MR. MEDINA: I will rephrase it.

25 ///

1 BY MR. MEDINA:

2 Q The question was about the email on
3 August 29th, 2007. It seems to be inquiring about a run
4 or having more bottles manufactured. So my question is,
5 it appears that you weren't selling bottles on this day,
6 that you were inquiring about having them made.

7 A Yes.

8 Q "Yes" or "no"?

9 A As I mentioned earlier in this, quite a while
10 ago during this whole deposition, I made a reference
11 that the date I used was the date that I wrote the
12 particular check for the Adventures of Shadow water
13 bottle, and that was the date -- but they did not
14 continue producing the thing, and I have been hounding
15 them from that point on. And so that's what -- so I
16 went with the date that was there, but all the
17 promotions and everything was all in place at that
18 point.

19 MR. SWYERS: Well, and for the record the
20 standard is when you file a trademark application you
21 use at least as early as. So he could have had use
22 prior to that.

23 And so, accordingly, this -- you know, in
24 August 30, 2007, it's a reorder of the actual -- you
25 know, the bottles. It also shows that he was already

1 selling them prior to that. And so his date would be
2 correct assuming that is the issue you are trying to get
3 to.

4 BY MR. MEDINA:

5 Q Just a few more final questions, Mr. Odonnell.

6 You have continuously sold without stopping --
7 it seems you sold all your marks -- your marks for all
8 your classifications of goods since you filed for first
9 use of commerce of August 29, 2007?

10 A I have always had stuff on hand. I am no
11 expert, but I know there is a stipulation that you have
12 to stop using it for a full set of three years straight
13 before you have issues.

14 But I did have the items available off and on
15 during this whole time period. And the bottled water I
16 had a little on hand, but I did have it because they
17 ended up not manufacturing the quantities I needed,
18 which eventually I went to a different watering company
19 and then that solved the issue.

20 MR. MEDINA: All right. I have no further
21 questions.

22 Thank you, Mr. Odonnell, for coming in and
23 participating.

24 THE WITNESS: Okay.

25 MR. SWYERS: I have no further questions

1 either. I think we are done.

2 Can we go off the record?

3 MR. MEDINA: Yeah.

4 (Deposition concluded at 11:16 a.m.)

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1 I, the undersigned, declare under penalty of
2 perjury that I have read the foregoing transcript, and I
3 have made any corrections, additions, or deletions that
4 I was desirous of making; that the foregoing is a true
5 and correct transcript of my testimony contained
6 therein.

7 DATED: This _____ day of _____,
8 20____, at _____, _____.
9 (City) (State)

10
11
12
13 _____
14 WILLIAM TUFTS ODONNELL
15
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25

1 I, CHARLOTTE DUNN, a Certified Shorthand Reporter,
2 hereby certify that the witness in the foregoing
3 deposition, WILLIAM TUFTS O'DONNELL, was by me duly sworn
4 to tell the truth, the whole truth, and nothing but the
5 truth in the within-entitled cause;

6 that the deposition was taken in shorthand by me, a
7 disinterested person, at the time and place therein
8 stated, and that the testimony of the said witness was
9 thereafter reduced to typewriting by computer under my
10 direction and supervision;

11 that before completion of the deposition, review of
12 the transcript was not requested. If requested, any
13 changes made by the deponent and provided to the
14 reporter during the period allowed are appended hereto.

15 I further certify that I am not of counsel or
16 attorney for any of the parties to the said deposition,
17 nor am I in any way interested in the event of this
18 cause, and that I am not related to any of the parties
19 thereto.

20 In witness whereof, I have hereunto set my hand
21 this day: June 10, 2015.

22 

23 CHARLOTTE DUNN
24 California Certified Shorthand Reporter 8232
25 California Certificate in Realtime Reporting 109
Certified LiveNote Reporter 060604-03
Registered Professional Reporter