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

Proceeding	92046965
Party	Defendant ELM Development, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Gander Mountain Company,	)	Cancellation No. 92046965
Petitioner,	)	Mark: THE GANDERGUNMEN
v.	)	Reg. No. 3,086,200
ELM Development, LLC,	)	Reg. Date: April 25, 2006
Registrant.	)	

MEMORANDUM OF LAW IN SUPPORT OF REGISTRANT'S OPPOSITION TO PETITIONER'S MOTION TO AMEND THE PETITION FOR CANCELLATION

Petitioner, Gander Mountain Company, has filed a Motion to Amend in connection with the above-referenced cancellation proceeding. Registrant, ELM Development, LLC, submits this opposition to Petitioner's Motion to Amend.

I. INTRODUCTION

Petitioner seeks to add two claims to its Petition for Cancellation: failure to function as a service mark according to 15 U.S.C. §§ 1091 and 1127, and fraud on the United States Patent and Trademark Office ("USPTO"). Petitioner's alleged support for its new claims is the deposition testimony of Registrant, represented by Mr. Eric Marhoun, taken on December 12, 2007. Yet, Mr. Marhoun's testimony does not support either a claim. Petitioner's claims are legally insufficient as a matter of law. Petitioner's proposed amendments are also insufficiently pled and, if added to this proceeding, will prejudice Registrant. The additional claims will complicate the issue of likelihood of confusion and add undue expense to this cancellation proceeding. Registrant therefore requests denial of Petitioner's Motion to Amend its Petition for Cancellation.

II. FACTUAL BACKGROUND

A. Summary of the Prior Proceedings

Registrant, ELM Development, LLC, is the owner of U.S. Registration No. 3,086,200 ("the '200 Registration") for the service mark THE GANDERGUNMEN in connection with "entertainment services, namely production and distribution of a hunting show." Registrant filed the application that became the '200 Registration on December 9, 2003.

The '200 Registration was granted on April 26, 2006. Petitioner, Gander Mountain Company, filed a Petition for Cancellation on January 16, 2007, claiming THE GANDERGUNMEN was confusingly similar to Petitioner's GANDER MTN. and GANDER MOUNTAIN marks. (Dkt. No. 1.) Registrant answered the Petition for Cancellation on January 26, 2007. (Dkt. No. 2.) The parties engaged in settlement negotiations but were unable to reach a compromise. Accordingly, the proceedings resumed on April 23, 2007. (Dkt. No. 6.) Discovery opened thereafter and is scheduled to close on February 11, 2008. (Dkt. No. 14.) The parties have exchanged documents and interrogatories. Mr. Eric Marhoun, the owner of ELM Development, was deposed on December 12, 2007.

B. Petitioner's Motion to Amend

On January 18, 2008, Petitioner filed a Motion to Amend the Pleadings and Memorandum in Support Thereof. Petitioner sought to add a claim for cancellation of U.S. Registration No. 3,086,200 ("the '200 Registration") due to failure to function as a service mark. (Pet. Br. at 2.) Petitioner also sought to add a claim for cancellation due to fraud on the USPTO during the application process. (*Id.*)

Petitioner argues its new claims have merit because Petitioner has in its possession all discovery relating to Registrant's alleged nonuse of the service mark and fraud on the PTO. Specifically, Petitioner stated:

> At this time Petitioner does not believe that it will need to additional discovery to support the bases for cancellation set forth in the Amended Petition. Indeed, based on the clear admissions of Registrant's President, Petitioner anticipates that if the amendment is granted, it will file a motion for summary judgment shortly thereafter.

(*Id.* at 4.)

Petitioner's evidentiary support for its claims of non-use and fraud is predicated on the testimony of Mr. Eric Marhoun, the owner of Registrant. Petitioner took the deposition of Mr. Eric Marhoun on December 12, 2008. Petitioner waited five (5) weeks to file this Motion to Amend, just three weeks before the close of discovery. Petitioner's Motion to Amend is factually baseless, as discussed below. The evidence of record demonstrates Registrant both uses the mark at issue and did not commit fraud during registration of the mark.

C. Registrant has Used THE GANDERGUNMEN Service Mark

Registrant began offering entertainment services, namely distribution and production of a hunting show, under THE GANDERGUMEN mark in commerce in August of 2002. (Exhibit A, Deposition of Eric Marhoun, December 12, 2007 (hereinafter "Marhoun Depo."), at 304:9-305:4.) Mr. Marhoun testified that ELM Development provided "production of waterfowl or outdoor videos on behalf of others, namely specifically produced one video for Jeff Traxler..." in August of 2002. (Marhoun Depo at 23:15-24:10.) ELM Development received payment in kind for this service. (*Id.* at 29:7-30:3.)

In addition to this use in commerce, Mr. Marhoun also testified the services listed in the '200 Registration have been advertised since 2002. The services are currently advertised on the website www.gandergunmen.com. (*Id.* at 79:5-11.) Mr. Marhoun also testified he advertised through letters and word of mouth. (*Id.* at 80:6-20.) Mr. Marhoun also advertised and displayed the mark THE GANDERGUNMEN at trade shows. (*Id.* at 84:16-85:11.)

D. Registrant Did not Commit Fraud during Prosecution of the '200 Registration

The application that became the '200 Registration was filed on December 9, 2003 under Section 1(b) as an intent to use application. Mr. Marhoun testified that he believed that on this date Registrant was using the mark THE GANDERGUNMEN in connection with video production and distribution of a hunting show. (*Id.* at 283:2-7.) Registrant filed a statement of use on June 20, 2005, claiming a first use date of September 2002. Registrant's specimen of use was a video production trailer bearing the mark GANDERGUNMEN. Registrant testified he believed that use of the mark in connection with a production trailer constituted advertisement of entertainment services, namely distribution and production of a hunting show. (*Id.* at 264:10-268:2.)

The USPTO rejected this specimen of use and requested a second specimen. Registrant submitted another specimen on February 10, 2006. This specimen was a screen shot from a DVD that used the mark THE GANDERGUNMEN. Mr. Marhoun signed the statement of use on behalf of Registrant ELM Development. Mr. Marhoun testified he believed, both at the time of submission and during his deposition on December 12, 2007, the DVD screen shot showed use of "entertainment services" in commerce. (*Id.* at 318:1-319:6.)

Petitioner states in its Motion to Amend that Mr. Marhoun testified he never used the GANDERGUNMEN mark in connection with "entertainment services, namely distribution and production of a hunting show." (Pet. Br. at 3.) This statement is false. Mr. Marhoun testified that the service mark, THE GANDERGUNMEN, was intended to be used in connection with producing and distributing hunting DVDs on behalf of other individuals. Mr. Marhoun testified he in fact participated in the providing of entertainment services, namely distribution and production of a hunting show, on August 17, 2002.

III. LEGAL ARGUMENT

A. Legal Standard for Motion to Amend

In general, the Trademark Trial and Appeal Board ("Board") freely grants motions to amend when the amendment is timely and will not prejudice the non-movant. TBMP § 507.02. However, a motion to amend should be denied where the moving party seeks to add a new claim that is improperly pled, legally insufficient or would serve no useful purpose. *Id.* A party will not be allowed to add a pleading that is insufficiently pled. *American Hygienic Labs, Inc. v. Tiffany & Co.*, 228 U.S.P.Q. (BNA) 855, 859 (TTAB 1986). A party will also not be allowed to add a pleading that is insufficient as a matter of law. *Institut National des Appellations d'Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d (BNA) 875, 1896 (TTAB 1998) (opposers could not prevail on res judicata claim as a matter of law). Because both of Petitioner's proposed amendments are improperly pled and legally insufficient, Petitioner's Motion to Amend should be denied.

B. Petitioner's Claim for "Non-Use" Should be Denied as Improperly Pled and Futile

Petitioner's claim for cancellation of the '200 Registration due to non-use is improperly pled and deficient as a matter of law. Petitioner stated in its brief supporting its Motion to Amend that it already had all the evidence it needed to prove non-use of THE GANDERGUNMEN mark. (Pet. Br. at 4.) However, an analysis of the evidence, specifically the testimony of Mr. Marhoun, shows the claim is legally deficient as a matter of law.

1. Petitioner's Claim of "Non-Use" is Insufficiently Pled

Petitioner claims that "Registrant is not entitled to Registration No. 3,086,200 because the term for which registration has been obtained fails to function as a service mark under Trademark Act Sections 23 and 45, 15 U.S.C. §§ 1091 and 1127." (Proposed Am. Pet. for Cancellation ¶ 13.) These claims are insufficiently plead.

The two statutory authorities cited by Petitioner are irrelevant and do not provide a basis for relief. 15 U.S.C. § 1091 addresses marks registered on the Supplemental Register. The '220 Registration is registered on the principal register, and therefore § 1091 is irrelevant and cannot provide a cause of action to cancel a mark registered on the principal register due to non-use. Likewise, 15 U.S.C. § 1127 is also inapplicable. This section discusses definitions as they apply to the Lanham Act. Yet, § 1127 does not provide a cause of action to cancel a mark for failure to use as a service mark. Petitioner's claim for non-use should be dismissed as improperly pled.

2. Petitioner's Claim of "Non-Use" is Legally Futile

To obtain registration, a service mark must be properly used in commerce. Section 1127 of the Lanham Act requires that a service mark be used in commerce "on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce."

Registrant's pleadings are insufficient as a matter of law because Mr. Marhoun's testimony shows that Registrant has used the mark THE GANDERGUNMEN in connection with the advertising of entertainment services, namely distribution and production of a hunting show. Moreover, the services have been rendered in commerce. Registrant claims that:

> Registrant's use of the mark in connection with the sale of DVDs does not identify Registrant as a provider of production or distribution services for the benefit of others, nor does it associate Registrant's mark with those claimed services. Any video production that Registrant did perform was in producing its own DVDs, which Registrant subsequently offered for sale. This activity was primarily for Registrant's own benefit and is unregistrable as a service. A term that is used to only identify a product sold or used in the performance of a service rather than to identify the service itself does not function.

(Proposed Am. Pet. for Cancellation ¶ 15.)

Petitioner's claims are false and ignore the testimony of Mr. Marhoun. The '200 Registration identifies the services as "entertainment services, namely distribution and production of a hunting show." In accord with § 1127, Registrant has continually advertised these entertainment services in connection with THE GANDERGUNMEN mark in commerce.

These services are currently advertised on www.gandergunmen.com. (Marhoun Depo. at 79:5-11.) Registrant advertised through letters and word of mouth since 2002. (*Id.* at 80:6-20.) Mr. Marhoun also advertised the mark THE GANDERGUNMEN at trade shows since 2002. (*Id.* at 84:16-85:11.)

Mr. Marhoun also testified that Registrant did perform the entertainment services for another. Specifically, ELM Development provided "production of waterfowl or outdoor videos on behalf of others, namely specifically produced one video for Jeff Traxler..." (*Id.* at 23:15-24:10.) The provision of this service, to a third party, occurred in August of 2002. ELM Development received payment in kind for this service. (*Id.* at 29:7-30:3.)

Petitioner's claim of non-use is predicated on the falsehood that Registrant has never used its mark in connection with the listed services. This is untrue. As a result, Petitioner's motion to amend to add a claim for failure to function as a service mark should be denied.

C. Petitioner's Claim for Fraud is Insufficiently Pled and Futile

Petitioner's proposed amendment regarding fraud is both insufficiently pled and futile, and therefore should not be added to this proceeding. A person may petition to cancel a registered service mark on the basis that the registrant procured the registration by fraud. *Metro Traffic Control, Inc. v. Shadow Network Inc.*, 104 F.3d 336, 340 (Fed. Cir. 1997). A claim for fraud must be clearly and convincingly proven and proven "to the hilt." *Stocker v. Gen. Conf. Corp. of Seventh-Day Adventists*, 39 U.S.P.Q. 2d (BNA) 1385, 1391 (TTAB 1989). Because the evidence demonstrates, and Petitioner's pleading fails to show, that Registrant knowingly and intentionally made a false, material representation of fact in connection with the '220 Registration, Petitioner's amendment should be denied.

1. Petitioner's Proposed Claim of Fraud is Insufficiently Pled

Fraud must be pled with particularity. The pleader must state the time, place, and content of the false representation, the fact of what was misrepresented and what was obtained as a consequence. *W. R. Grace & Co. v. Arizona Feeds*, 195 U.S.P.Q. (BNA) 670 (CPPA 1977).

Petitioner failed to plead fraud with sufficient particularity. Petitioner's proposed Amended Petition for Cancellation states:

> 17. On information and belief, on December 9, 2003, Registrant filed its service mark application for **THE GANDERGUNMEN** in connection with "[e]ntertainment services, namely production and distribution of a hunting show.
>
> 18. On information and belief, on July 20, 2005, Registrant filed its statement of use. In this statement of use, Registrant claimed a date of first use in commerce in connection with the claimed services of September 2002. Additionally, Registrant stated that Registrant stated that it had "a bona fide intention to use...the mark in commerce...in connection with the identified...services.
>
> 19. On information and belief, on February 10, 2006, Registrant filed a Response to an Office Action dated August 10, 2005, which had rejected Registrant's July 20, 2005 statement of use. In this Response, Registrant claimed that it first used the mark in commerce in September 2002, and stated that it had a "bona fide intention to use...the mark in commerce...in connection with the identified...services."

(Proposed Am. Pet. for Cancellation ¶ 17-19.)

Petitioner's proposed amendment fails to show <u>what</u> material representations of fact were made to the USPTO, what was false, and what Registrant knew was false. Paragraphs 17-19 of Petitioner's proposed amendment state that Registrant filed statements of use and signed declarations in connection with those statements of use. Petitioner makes no mention of what specific information in those statements of use was false or what Registrant knew was false.

Paragraph 20 fails to remedy this insufficient pleading. Paragraph 20 states that Registrant knew or should have known that the misrepresentations of fact referenced in Paragraphs 17-19 were false and/or misleading. (*Id.* at ¶ 20). Again, a detailed description of

what statements were false, why these statements were false, and Registrant's awareness of the falsity is missing.

Petitioner claims it has all the evidence it needs to prosecute a fraud claim. (Pet. Br. at 4.) Yet, Petitioner's proposed amendments are simply bare allegations that contain no description of what facts were false, how Petitioner knows they were false, and that Registrant knew they were false. In fact, the evidence demonstrates Registrant did not knowingly or intentionally make any false, material representations of fact to the USPTO. Petitioner's amendment should be denied.

2. Petitioner's Fraud Claim is Futile as No Set of Facts Exist that Demonstrate Fraud on the USPTO

Petitioner's amendment is futile because no evidence exists on the record that shows Registrant made any statements to the USPTO that were knowingly false and made to intentionally mislead. *Metro*, 104 F.3d at 341. As stated in *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 48 (Fed. Cir. 1986), "[f]raud in procuring a trademark registration...occurs when an applicant knowingly makes false, material representations of fact in connection with his application." (citations omitted)

The Board acknowledges a distinction between a false statement and a fraudulent statement. A party asserting fraud needs to show "the acts alleged to be fraudulent were made in bad faith with a fraudulent purpose and intent to secure a registration by deception." *Stocker*, 39 U.S.P.Q.2d at 1391. Fraud does not exist if a "false misrepresentation" occurred by an honest misunderstanding, inadvertence, negligent omission, or the like rather than with willful intent to deceive. *Smith Int'l, Inc. v. Olin Corp.*, 209 U.S.P.Q. (BNA) 1033, 1340 (TTAB 1981). In *Metro*, the Court agreed that the registrant's statements, though false, were not made with the intent to mislead the PTO. 103 F.3d at 341. The registrant's statements were false, but made

with an unclear understanding of the legal implications of his statements. Therefore, no fraud and no intent to deceive existed. *Id.*

Petitioner stated in its Motion to Amend that it did not need additional discovery. The only evidence that Petitioner relies on, Mr. Marhoun's testimony, shows Petitioner's fraud claim is legally insufficient. Petitioner claims that Registrant made representations of material fact to the USPTO that Registrant knew or should have known were false. (Pet. Br. at 4-5.) Without citation of any legal authority, Petitioner argued that this alone, without any mention of intent, constitutes fraud. (*Id.*) Petitioner argues that "[d]espite knowing that it was not providing video production or distribution services for the benefit of others, Registrant claimed that it was using the mark in connection with the provision of services beginning in September 2002." (*Id.* at 5.)Petitioner argued that Registrant's President "admitted that Registrant has never provided video production or distribution services to others." (*Id.*)

These allegations, besides being patently false, are contradicted by Mr. Marhoun's deposition testimony. Mr. Marhoun's testimony shows he did not provide false information to the USPTO. In accord with the statutory requirements for use of a service mark, Mr. Marhoun testified that he did use the mark in commerce in connection with entertainment services in at least August of 2002. (Marhoun Depo. at 23:15-24:10.) ELM Development received payment in kind for this service. (*Id.* at 29:7-30:3.) Mr. Marhoun testified several times that he believed, both at the time of application for the '220 Registration and during his deposition, that this project for Mr. Traxler, a third party, constituted entertainment services. (*Id.* at 51:12-15; 94:4-10; 304:19-305:4.)

Even assuming these statements regarding use were false, Mr. Marhoun's testimony shows he had no intent to deceive the USPTO. Mr. Marhoun testified that he only had a lay persons understanding of trademark law. (*Id.* at 284:17-21.) Mr. Marhoun honestly believed his

actions constituted use that would support registration of a service mark. Mr. Marhoun testified that as of the filing date of the '200 Registration, he believed Registrant was using the mark THE GANDERGUNMEN in connection with video production and distribution of a hunting show. (*Id.* at 283:2-7.) Mr. Marhoun testified that the first time Registrant provided the service to another was in August of 2002, consistent with the first use date claimed in the '200 Registration. Mr. Marhoun also testified he believed the production trailer and DVD frame submitted to the USPTO as specimens of use properly showed use of "entertainment services" in commerce. (*Id.* at 264:10-268:2 and 318:1-319:6.)

There is no evidence on the record that demonstrates Mr. Marhoun had the requisite intent to deceive. As stated in *Metro*, there is a difference between a false statement and a fraudulent statement. *Metro*, 104 F.3d at 340. Mr. Marhoun's testimony shows he had no intent to mislead. Petitioner's fraud claim lacks legal merit and should be denied as futile.

D. Registrant Will Suffer Prejudice If Petitioner's Motion to Amend is Granted

Registrant will be prejudiced, both evidentiarily and economically, by the addition of these two claims to the Petition for Cancellation. These claims significantly expand the scope of this proceeding, adding fraud and non-use to the claim of likelihood of confusion. Registrant will need to supplement the record with additional testimony regarding the fraud and non-use claims. A claim for fraud in particular is highly fact intensive and detailed. Registrant will need to significantly supplement the record with additional evidence to prove, clearly and convincingly, that the mark has been properly used in commerce and that Registrant did not commit fraud on the PTO.

Registrant will also face economic prejudice. Registrant will face a meritless summary judgment motion, as stated by counsel in its Memorandum in Support of the Motion to Amend. The additional facts and opposing summary judgment motions on these claims will force

Registrant to bear additional expense. Moreover, this expense will be futile as the deposition testimony of Mr. Marhoun demonstrates the lack of basis that Petitioner has for these claims.

IV. CONCLUSION

Registrant requests the Board deny Petitioner's meritless Motion to Amend. Petitioner's claim for non-use is predicated on the wrong statutes. The claim is also meritless as Registrant's representative testified he used the mark in commerce in connection with entertainment services, namely production and distribution of a hunting show. The claim for fraud is clearly improper. The pleading lacks sufficient specificity and lacks any basis in fact. Accordingly, Petitioner's Motion to Amend should be denied.

Respectfully submitted,

ELM Development, LLC

By its attorneys,

Date: 2-6-08

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF REGISTRANT'S OPPOSITION TO PETITIONER'S MOTION TO AMEND THE PETITION FOR CANCELLATION was served upon the following attorney of record for Applicant by First Class Mail, this 6th day of February, 2008:

Kevin Ueland
Dorsey & Whitney LLP
Suite 1500
50 South Sixth Street
Minneapolis, MN 55402

Heather Kliebenstein

CERTIFICATE OF MAILING

I hereby certify that this MEMORANDUM OF LAW IN SUPPORT OF REGISTRANT'S OPPOSITION TO PETITIONER'S MOTION TO AMEND THE PETITION FOR CANCELLATION is being filed electronically with the United States Patent and Trademark Office's Electronic System for Trademark Trials and Appeals (ESTTA) on this 6th day of February, 2008.

Heather Kliebenstein

1 nor Pierce have a copy of the e-mail.
2 Q Okay. That's fine. I think I understand
3 ELM Development LLC sells DVDs showing the hunting
4 of waterfowl; is that right?
5 A Can you repeat that question?
6 Q Sure. ELM Development LLC sells DVDs that
7 show the hunting of waterfowl; is that right?
8 A Yes, it does do that.
9 Q Does it sell any other products?
10 A No.
11 Q And ELM Development produces and
12 distributes the DVD that show the hunting of
13 waterfowl; is that your contention?
14 A Yes.
15 Q Does ELM Development LLC do anything else
16 in the way of services?
17 A Yes.
18 Q What else does ELM Development LLC do?
19 A In the past ELM development LLC has
20 provided jointly with Pierce Smith, GanderGunmen
21 Production Company LLC -- I just want to state for

EXHIBIT
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1 the record I may have the name of that LLC slightly
2 in error, I don't recall if it has company in its
3 name or not. But one of the additional services
4 that we have jointly provided is production of
5 waterfowl or outdoor videos on behalf of others,
6 namely, specifically produced one video for Jeff
7 Traxler, T-r-a-x-l-e-r, of Traxler Hunting Preserve,
8 relative to outdoor footage that Jeff Traxler had
9 and that Pierce Smith specifically edited into a
10 certain format for Jeff Traxler.
11 Q There's certainly a lot in that answer and
12 I want to go back to specific parts of it. You said
13 that ELM Development LLC in conjunction with another
14 LLC, The GanderGunmen Production Company, LLC?
15 A That's correct.
16 Q Has provided, and I don't want to
17 characterize, but what I took it as, production and
18 editing services for others, and the individual you
19 named was Jeff Traxler?
20 A That's correct.
21 Q I believe in your answers you said the

1 to Pierce Smith to edit. Was that footage ever
2 edited into a product that was sold commercially?
3 A It was edited into a short product I
4 believe and understand that was provided to Jeff
5 Traxler in return for consideration that he provided
6 to Pierce and I.
7 Q Okay. Maybe I wasn't clear in my
8 question. But I guess my question is was the
9 footage that was given to Mr. Smith by Mr. Traxler
10 edited into a product that Mr. Traxler then
11 subsequently sold as a commercial product?
12 A Not that I'm aware of.
13 Q Okay. I understand from your answer that
14 in exchange for Mr. Smith's editing services certain
15 hunting services were given in exchange or bartered;
16 is that true?
17 A Yes. I think the most accurate term is
18 bartered, services from Jeff Traxler's hunting
19 preserve were provided to ELM Development and Pierce
20 Smith.
21 Q What sort of services were provided by

1 Mr. Traxler?
2 A Lunch and a hunt with a few birds at his
3 hunting preserve.
4 Q Was there any other services provided?
5 A No, not with respect to that transaction.
6 Q And was there any money exchanged as a
7 part of that transaction?
8 A No. No money was exchanged as a result of
9 that transaction.
10 Q Apart from providing these editing and
11 production services to Mr. Traxler, has ELM
12 Development LLC provided any other production or
13 editing services to anybody else?
14 A Other than with respect to ELM Development
15 endeavors -- I'm not quite sure I understand others.
16 Q Let me clarify my question.
17 You had volunteered Mr. Traxler as
18 someone -- an other --
19 A Yes.
20 Q -- who had been the recipient of video
21 editing and production services. And by other you

1 MS. KLIEBENSTEIN: Objection, asked and
2 answered.
3 A I don't know.
4 Q Would it be a true statement if it was
5 referring to ELM Development Company LLC?
6 MS. KLIEBENSTEIN: Objection, asked and
7 answered.
8 A No.
9 Q Because ELM Development Company LLC does
10 not provide those services?
11 A Not currently.
12 Q Have they ever provided those services?
13 A I believe the services I described that
14 were being offered to Jeff Traxler fall within this
15 category.
16 Q You believe that introducing Mr. Traxler
17 to Mr. Smith falls within that category?
18 A That's correct.
19 Q Okay. That's fair. Let's turn to the
20 next page. And I apologize the way this printed out
21 but I have no control over that, my technical

1 promote its goods or services that it sells under
2 either of the mark The GanderGunmen or the Hard
3 Gravity mark?
4 A No.
5 Q What about websites, can you identify for
6 me websites that ELM Development LLC uses to
7 advertise or promote the goods or services that it
8 offers in connection with the GanderGunmen mark?
9 A Yes.
10 Q And what website or websites are those?
11 A Www.gandergunmen.com.
12 Q Are there others?
13 A There may be a link, but I don't know that
14 that qualifies as a website, if one goes to
15 www.hardgravity.com.
16 Q Do you know whether or not if you type in
17 www.hardgravity.com whether it directs someone to
18 the same content that's at gandergunmen.com?
19 A I don't know that.
20 Q So you've never done that?
21 A I have not done that.

1 Q Okay. Are there any other websites where
2 ELM Development LLC would advertise or promote the
3 goods or services it offers in connection with the
4 GanderGunmen mark?
5 A No.
6 Q Are there any other advertising media you
7 can, sitting here today, identify, by which ELM
8 Development LLC advertises or promotes the goods or
9 services it sells in connection with the
10 GanderGunmen mark?
11 A Yes.
12 Q And what media is that?
13 A Letters that go directly to individuals
14 providing them the Prelude to Hard Gravity DVD or
15 personal distribution by Eric Marhoun of Prelude to
16 Hard Gravity, and the word of mouth advertising that
17 accompanies that. And in addition, similar, similar
18 distribution, i.e., through direct letters and
19 personal distribution of GanderGunmen Hard Gravity
20 videos produced prior to Prelude to Hard Gravity.
21 Q Is that it?

1 A Yes.
2 Q Let's talk about topic five. Let me just
3 ask you, has ELM Development Company LLC attended
4 any trade shows where the mark The GanderGunmen has
5 been displayed?
6 A I believe so, but I'm not certain what
7 trade shows mean.
8 Q In the course of preparing for this
9 deposition did you adopt a working knowledge or an
10 understanding of the word trade shows?
11 A Yes, as it relates to ELM Development.
12 Q And what did you understand trade shows to
13 mean?
14 A An example, a meeting where video or
15 hunting trade is discussed by participants.
16 Q And how many trade shows -- well, let me
17 back up. Applying that definition that you just
18 stated, has ELM Development Company LLC attended
19 trade shows where the GanderGunmen mark has been
20 displayed?
21 A Yes.

1 Q On how many occasions?
2 A Three -- two occasions.
3 Q Okay. And when were those occasions?
4 A September 2002 and September 2003.
5 Q And where were those trade shows? Again,
6 using your definition of that phrase, where were
7 they?
8 A The Edina Country Club in Edina,
9 Minnesota.
10 Q Both trade shows were?
11 A Yes, in both instances.
12 Q Who was in attendance at those trade
13 shows? Let's start with the one in September 2002.
14 A Persons who registered for the Edina
15 sponsor chapter of Ducks Unlimited, and
16 representatives from Jay Anderson's Outdoor
17 Expeditions.
18 Q Do you know, was there an entity that
19 sponsored that trade show?
20 A Ducks Unlimited
21 Q What is Ducks Unlimited?

1 A Prelude to Hard Gravity DVD.
2 Q Are there others?
3 A There are no other goods.
4 Q Can you identify for me the services that
5 ELM Development Company LLC sells to consumers
6 directly under the GanderGunmen mark?
7 A Yes.
8 Q What are they?
9 A The only service sold relates to the
10 August 17th, 2002 transaction with Jeff Traxler.
11 Q And there has been no other services
12 rendered by ELM Development Company LLC in
13 connection with the GanderGunmen mark; is that true?
14 MS. KLIEBENSTEIN: Objection,
15 mischaracterizes his testimony.
16 A I'm not sure I understand what you mean by
17 services. Of course I developed the DVDs. There's
18 all sorts of services we do in order to distribute
19 it directly to people to produce it.
20 Q Those services go into actually producing
21 the goods that the consumer actually buys; is that

1 authored by me, not him, and that's a typo on my
2 part.
3 Q Okay. I guess -- what I want to know is
4 how should that sentence read then, how should it be
5 corrected?
6 A I think it could just read register --
7 registrant, registrant possessed and advertised
8 through the use of a production trailer using its
9 mark beginning in September 2002.
10 Q Okay. Tell me, to the best of your
11 ability, what you believe the production trailer
12 said on it in September of 2002?
13 MS. KLIEBENSTEIN: Objection, asked and
14 answered.
15 A The GanderGunmen Hard Gravity.
16 Q Is that it?
17 A That's it.
18 Q Do you believe that displaying those four
19 words on your trailer advertises video production
20 and distribution services?
21 MS. KLIEBENSTEIN: Objection, asked and

1 answered. We've already covered this in his
2 testimony earlier.
3 A Yes.
4 Q What about those words suggests to someone
5 viewing them that there is video production and
6 distribution services?
7 MS. KLIEBENSTEIN: Same objection.
8 A Because people would ask, you know, they
9 would ask are you a film crew. I base that on the
10 reactions we'd get from people when we'd drag this
11 around, and I think that's derived from just the
12 fact that there's a large industry devoted to
13 producing these waterfowl videos and all of the
14 participants have their, in a colloquial sense,
15 trademark trailers. If you watch Fred Zinc's 24/7,
16 half the film is about his putting flames on his
17 production trailer. That's the basis for that
18 belief. It's part of the industry in which we
19 engage.
20 Q Do the words themselves, those four words,
21 The GanderGunmen Hard Gravity say anything about

1 production and distribution of videos?
2 MS. KLIEBENSTEIN: Objection, asked and
3 answered.
4 A That's what those words represent. I
5 mean, that's what that mark is, it's the production
6 and distribution of videos, waterfowl videos.
7 Q I'm going to move to strike. Listen
8 carefully to the question that I answer -- I ask and
9 answer just those questions, those four words, The
10 GanderGunmen Hard Gravity, none of them mean
11 production and distribution of videos services or,
12 I'm sorry, none of them specifically mean production
13 and distribution of video services; is that right?
14 A No, I think that's correct, gander is a
15 male goose, gunmen is men with guns, hard is
16 something firm, not yielding, together with our mark
17 that's what it represents, the GanderGunmen's Hard
18 Gravity. It's, again, I'm not a trademark attorney,
19 but it's like anything you put in commerce when you
20 tie it in service with a product, that's what it
21 means, but in and of themselves it just means their

1 descriptive terms put together.
2 Q Could someone seeing that trailer, The
3 GanderGunmen Hard Gravity, conclude that it refers
4 to a specific product?
5 A Yes, in the context in which they would
6 have seen the trailer because it has waterfowl
7 equipment on the inside, on the outside, and it's
8 driven be people who are clearly waterfowl hunters
9 because we're always driving around wearing camo. I
10 believe that's the only inference someone would
11 draw. And, factually, that is the only inference
12 anyone has ever drawn because we do get questioned
13 about it a lot when we travel.
14 Q And that inference is that The
15 GanderGunmen Hard Gravity refers to a video product?
16 A A video production company, right, that
17 makes a video.
18 Q Has anyone viewed these words, The
19 GanderGunmen Hard Gravity and asked, hey, will you
20 produce and distribute my video?
21 A To my knowledge, the only person who has

1 asked us to do any production on their behalf is
2 Jeff Traxler.
3 Q All right. By the way, in any of your
4 interrogatory responses, is that work done on Jeff
5 Traxler's video footage mentioned?
6 A No, I don't believe so, because I didn't
7 recall it until I reviewed my personal hunting
8 journals, and as I've previously testified, those
9 were the documents I did not review as part of the
10 process of responding to discovery in this case. I
11 didn't review those until December 10th, 2007.
12 Q Okay. That hunting journal, though, you
13 had in your possession this entire time; is that
14 right?
15 A That is correct.
16 Q So there was nothing to prevent you from
17 reviewing your hunting journal prior to
18 December 10th, 2007?
19 MS. KLIEBENSTEIN: Objection,
20 mischaracterizes the testimony.
21 A That is correct, except any time periods

1 filed, that's why I read it that way.

2 Q It's your testimony under oath today that

3 on December 9th, 2003, ELM Development LLC was using

4 the mark The GanderGunmen in connection with video

5 production and distribution of a hunting show?

6 A Yeah, absolutely, that's been my testimony

7 all day today.

8 Q Okay.

9 A Starting as early as November 2001.

10 Q And when you say that, when you're talking

11 about your testimony all day today, it's the

12 production and distribution of ELM Development LLC's

13 own product, the Hard Gravity DVD?

14 A Or VHS, it's the distribution of The

15 GanderGunmen Hard Gravity, I think initially it was

16 a VHS, but videos.

17 Q Okay. Does it make sense to you that if

18 you were currently using the mark as of

19 December 9th, 2003, you would file for the mark on

20 the basis of an intent to use in the future? Does

21 that make any sense to you?

1 MS. KLIEBENSTEIN: Objection, calls for
2 legal conclusion.
3 A Yes, if you intend to use it in the
4 future, and we did, we're using and intend to use it
5 in the future.
6 Q Did it -- is it your testimony that you
7 don't know the difference between a use-based
8 application and an intent to use application?
9 MS. KLIEBENSTEIN: Objection, calls for a
10 legal conclusion.
11 A Yes. This language that I look at appears
12 to cover both.
13 MS. KLIEBENSTEIN: He's not a trademark
14 lawyer.
15 MR. UELAND: I never implied that he was.
16 BY MR. UELAND:
17 Q And with counsel's representation that
18 you're not a trademark lawyer, is it true then that
19 you have, sitting here today, only a lay
20 understanding of trademark law?
21 A I believe so, yes.

1 were the distribution of The GanderGunmen Hard
2 Gravity VHS as early as November 2001 to individuals
3 outside of ELM Development or the household of the
4 principal for ELM Development, persons such as Quinn
5 Merritt, Kevin Sager and Jeff Howard. In addition,
6 distribution of the GanderGunmen Hard Gravity video
7 on or about December 23rd, 2001 are examples of use
8 in commerce, in my opinion.
9 Q Okay. And are those examples of
10 distribution that you just cited, was that the basis
11 for your understanding that you were using The
12 GanderGunmen as a service mark as of June 20th, 2005
13 when you signed this statement attesting to the
14 first use in commerce as early as September 1, 2002?
15 A No. Well, as early as September 2002.
16 Again, to be precise, really, November 2001. But,
17 yes, distributing something of value is use in
18 commerce.
19 Q And you think that that is a service, used
20 in commerce, to distribute these Hard Gravity DVDs?
21 MR. UELAND: Objection, calls for a legal

1 conclusion.

2 A I think it was a good and the service was,

3 as we discussed, prior to 9/2002. It was initiated

4 in August of 2002.

5 MR. UELAND: I'm going to move to strike.

6 Q I asked you whether you think it's a

7 service to distribute the Hard Gravity DVDs, the act

8 of distribution. Does that qualify as a service?

9 A Yes.

10 Q Okay. Let's turn back to GG000026.

11 A Okay.

12 Q This says the applicant is submitting one

13 specimen for the class showing the mark as used in

14 commerce on or in connection with any item in the

15 class consisting of a, and then it's a scanned

16 photograph of mark affixed to trailer. And the

17 photograph is at GG000022. Can you take a look at

18 that photograph, please?

19 A Yes, I can take a look at that photograph.

20 Q Do you see that this trailer says Team

21 GanderGunmen on it?

1 A It's the services, one, that went into
2 production of it, and the service is the
3 distribution. The video segment is to be
4 distributed. The video is to be distributed.
5 Q In fact, the screen capture says, please
6 do not distribute, broadcast or copy, right?
7 A Right, beyond the person whom it's
8 distributed. So it's distributed like any, any
9 video that is distributed, there's -- it's not
10 distributed beyond what the service provider
11 distributed.
12 Q Is it fair to say you have to look at this
13 screen capture and make an inference that this has
14 been distributed?
15 MS. KLIEBENSTEIN: Objection.
16 Q Produced and distributed.
17 A No, otherwise why do it? I think the
18 inference is in connection with the filing that this
19 is a video segment that is distributed by ELM
20 Development as the registrant for The GanderGunmen
21 Hard Gravity Volume I and that's why we do this.

1 Q Okay.
2 A That's the purpose of the business, that's
3 why it's an LLC, the intent is to distribute and the
4 act is distribution.
5 Q Production and distribution?
6 A Correct, uh-huh.
7 Q Earlier I asked you whether or not you
8 knew there was any requirement that the services had
9 to be rendered on the behalf of or for somebody
10 besides the entity or person applying for the mark,
11 do you remember that?
12 A I can't say I specifically remember it,
13 maybe you can give me more context.
14 Q Well, earlier in connection with another
15 document that we looked at pertaining to the
16 prosecution of the mark, The GanderGunmen, we talked
17 about your understanding of the legal requirements
18 for a service mark, do you remember that?
19 A No, I don't recall a discussion of legal
20 requirements for service marks.
21 Q All right. Well, let's now talk about the