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

Proceeding	92046965
Party	Plaintiff Gander Mountain Company
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Date	09/08/2008
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Gander Mountain Company

Petitioner,

v.

ELM Development, LLC

Registrant.

Cancellation No.:

Reg. No.: 3,086,200

Mark: **THE GANDER GUNMEN**

Petitioner's File No.: 7495

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**DECLARATION OF KEVIN S. UELAND**

I, KEVIN S. UELAND, declare and state as follows:

1. I am an attorney licensed to practice in the State of Minnesota. I am an attorney for Petitioner in this case. This Declaration is made in connection with the Memorandum in Support of Petitioner's Motion for Summary Judgment.

2. Attached hereto as Exhibit A is a true and correct copy of Petitioner's Certificate of Registration on the Principal Register for U.S. Registration No. 3,305,894.

3. Attached hereto as Exhibit B are true and correct copy of excerpts from the transcript of the deposition of Eric Lund Marhoun, taken on December 12, 2007.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: September 8, 2008

/Kevin S. Ueland/  
Kevin S. Ueland

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document has been served via first-class mail, postage prepaid, to Christopher J. Schulte and Heather J. Kliebenstein of Merchant & Gould P.C., 3200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402 this 8th day of September, 2008.

/Kevin S. Ueland/  
Kevin S. Ueland

# **EXHIBIT A**

# The United States of America



## CERTIFICATE OF REGISTRATION PRINCIPAL REGISTER

*The Mark shown in this certificate has been registered in the United States Patent and Trademark Office to the named registrant.*

*The records of the United States Patent and Trademark Office show that an application for registration of the Mark shown in this Certificate was filed in the Office; that the application was examined and determined to be in compliance with the requirements of the law and with the regulations prescribed by the Director of the United States Patent and Trademark Office; and that the Applicant is entitled to registration of the Mark under the Trademark Act of 1946, as Amended.*

*A copy of the Mark and pertinent data from the application are part of this certificate.*

*To avoid CANCELLATION of the registration, the owner of the registration must submit a declaration of continued use or excusable non-use between the fifth and sixth years after the registration date. (See next page for more information.) Assuming such a declaration is properly filed, the registration will remain in force for ten (10) years, unless terminated by an order of the Commissioner for Trademarks or a federal court. (See next page for information on maintenance requirements for successive ten-year periods.)*



*Jon W. I. Dudas*

*Director of the United States Patent and Trademark Office*

Int. Cl.: 41

Prior U.S. Cls.: 100, 101 and 107

**United States Patent and Trademark Office**

**Reg. No. 3,305,894**

Registered Oct. 9, 2007

**SERVICE MARK  
PRINCIPAL REGISTER**

**GANDER MTN.**

GANDER MOUNTAIN COMPANY (MINNESOTA  
CORPORATION)  
SUITE 1300  
180 EAST FIFTH STREET  
ST. PAUL, MN 55101

FOR: ENTERTAINMENT IN THE NATURE OF  
ON-GOING TELEVISION PROGRAMS IN THE  
FIELD OF OUTDOOR ACTIVITIES, IN CLASS 41  
(U.S. CLS. 100, 101 AND 107).

FIRST USE 1-3-2004; IN COMMERCE 1-3-2004.

THE MARK CONSISTS OF STANDARD CHAR-  
ACTERS WITHOUT CLAIM TO ANY PARTICULAR  
FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 1,335,489, 2,923,383  
AND OTHERS.

SER. NO. 77-074,177, FILED 1-2-2007.

DAVID ELTON, EXAMINING ATTORNEY

# **EXHIBIT B**

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

3 -----X  
4 GANDER MOUNTAIN COMPANY :  
5 Petitioner, : Reg. No. :  
6 v. : 3,086,200  
7 ELM DEVELOPMENT, LLC :  
8 Registrant : Pages 1 - 389

9 -----X ORIGINAL  
10

11 The deposition of ERIC L. MARHOUN, was  
12 convened on Wednesday, December 12, 2007, at 8:24  
13 a.m., at Funk & Bolton, 36 South Charles Street, 12th  
14 Floor, Baltimore, Maryland, before Charlotte Burke,  
15 Notary Public for the State of Maryland.

16  
17 Job No.: 668364  
18  
19  
20  
21

1 A That's correct.

2 Q Who is Teri Marhoun?

3 A Teri is my spouse.

4 Q And what is her role with the LLC?

5 A Not much, other than she assisted in  
6 filling out this form, and to the extent this entity  
7 has any assets they are part of our joint assets,  
8 this form was after we were married.

9 Q Does she have any title with the LLC?

10 A No.

11 Q Does she have any responsibilities with  
12 the LLC?

13 A No, she does not.

14 Q Does she have any participation in the  
15 affairs of the LLC at all?

16 A No.

17 Q Okay. How many members does the ELM  
18 Development LLC have?

19 A I'm not sure I know for certain what  
20 members are for an LLC. I can say the only people  
21 that have had anything to do with the LLC is me,

1 Eric Marhoun, and Teri, when she signed this  
2 document.

3 Q So does the ELM Development LLC have any  
4 employees?

5 A No.

6 Q What is the fiscal year for ELM  
7 Development LLC?

8 A The calender year.

9 Q Does Pierce Smith have any role with ELM  
10 Development LLC?

11 A No.

12 Q Quinn Merritt, does he have any role with  
13 the LLC?

14 A No.

15 Q Is it fair to say that ELM Development LLC  
16 is your alter ego?

17 A I think so.

18 Q Okay. And by the way --

19 A I'm not sure precisely what that means in  
20 the context of an LLC, but certainly I'm the person  
21 who acts on behalf of ELM Development LLC.

1 person who specifically provided the editing  
2 services was Pierce Smith?

3 A That's correct.

4 Q And I think you testified earlier that  
5 Pierce Smith has no role with ELM Development LLC?

6 A That's correct.

7 Q What was ELM Development LLC's specific  
8 role with respect to the production of the Jeff  
9 Traxler video?

10 A The introduction of Pierce Smith and ELM  
11 Development to Jeff Traxler in the form of a viewing  
12 that was provided in my predecessor capacity in  
13 August of 2002 -- strike that. That would have  
14 actually been just after forming the LLC. But  
15 basically I introduced Jeff Traxler and Pierce Smith  
16 at Traxler Hunting Preserve on August 17th, 2002,  
17 when we were showing a video to patrons there of The  
18 GanderGunmen's Hard Gravity.

19 And the specifics are that Jeff Traxler,  
20 who was the proprietor, liked the product that we  
21 were showing to his patrons and asked us,

1 specifically he asked me, if we would edit for him  
2 some outdoor video that he had and engaged us with  
3 Pierce to do the work to edit that on his behalf in  
4 return for some hunting services at his hunting  
5 preserve.

6 Q So ELM Development LLC's role in the  
7 production of this Traxler video was introducing  
8 Jeff Traxler to Pierce Smith; is that fair?

9 A To Pierce Smith. Introduction to Pierce  
10 Smith, and the work that we had been doing jointly  
11 with respect to the GanderGunmen and Hard Gravity.

12 Q What work are you referring to that was  
13 being done jointly between -- and so that I'm clear,  
14 do you mean jointly between ELM Development LLC and  
15 Pierce Smith?

16 A As to your latter question, between ELM  
17 Development and Pierce Smith. Yes, to the best of  
18 my recollection it was Pierce Smith, not  
19 GanderGunmen Production, LLC. I would have to defer  
20 to others as to whether in fact that was the role in  
21 which Pierce was acting, but it's my understanding

1 anything in the video that said this is an ELM  
2 Development LLC production?

3 A Yes.

4 Q And when did it say that?

5 A At the beginning of the video it said ELM  
6 Development, paren, Elmo, end paren, presents The  
7 GanderGunmen, Hard Gravity. And then it had a lead-  
8 in with background music as just about every  
9 iteration of our videos from 2001 onward had, which  
10 is a definition of gander with background music, the  
11 definition of gunmen with background music, the  
12 definition of hard, again, with background music, a  
13 definition of gravity. And the ELMO, ELMO is just,  
14 it's a DBA name for ELM Development LLC, that stands  
15 for ELM outdoors.

16 Q Okay.

17 A So all of this lead-in was just, in many  
18 respects, sort of standard and sort of the playing  
19 on the definitions and words like ELM Outdoors  
20 becomes Elmo.

21 Q Okay. The footage that Jeff Traxler gave

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 meant someone outside of ELM Development LLC, Elmo,  
2 The GanderGunman Production Company LLC; is that  
3 correct?

4 A That's correct.

5 Q Okay. And so when I'm using the term  
6 others I'm using it in that same way. So my  
7 question to you then is, is outside of Mr. Traxler,  
8 has ELM Development LLC provided production or  
9 editing services to anybody else, any other?

10 A No.

11 Q Okay. Do you know -- strike that.

12 Let's move on to The GanderGunman  
13 Production Company LLC. Since we've been talking  
14 about it let's figure out what we can learn about  
15 that.

16 I'm going to mark as Exhibit 4 a printout  
17 from the Minnesota Secretary of State website for  
18 GanderGunman Production Company LLC.

19 (Deposition Exhibit Number 4 was marked  
20 for identification.)

21 Q Now, this document you didn't produce to

1 not.

2 Q Well, let me ask you, the Hard Gravity,  
3 the footage on these Hard Gravity DVDs, who owns  
4 that footage?

5 A I and Pierce Smith own that footage and  
6 whoever -- I believe, but I don't know this -- might  
7 be his designee.

8 Q Do you consider ELM Development Company  
9 LLC as an owner of that footage?

10 A No.

11 Q Underneath that sentence there is another  
12 sentence that says: In addition our firm offers to  
13 qualified clients contracted pre and post  
14 production, video consulting and editing services,  
15 do you see that?

16 A Yes, I do.

17 Q What firm is being referred to in that  
18 statement?

19 A I don't know.

20 Q Do you know whether it's referring to ELM  
21 Development Company LLC?

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           A       Ducks Unlimited is a waterfowl  
2       conservation organization.

3           Q       Was the purpose of the trade show in  
4       September 2002 to make contacts to sell DVDs?

5           A       Yes.

6           Q       So in September 2002 ELM Development  
7       Company LLC contemplated selling DVDs?

8           A       Yes.

9           Q       Similarly, the meeting in 2003, was that  
10      also sponsored by Ducks Unlimited?

11          A       Yes.

12          Q       Was it the same meeting, just the year  
13      after?

14          A       Basically, yes.

15          Q       Okay. And at that meeting did ELM  
16      Development Company LLC go to that meeting with the  
17      purpose of making contacts for the sale of waterfowl  
18      DVDs?

19          A       Yes.

20          Q       And were contacts made at these meetings?

21          A       Yes.

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 correct?

2 A That is correct.

3 Q Does the customer actually buy services  
4 from ELM Development Company LLC?

5 A Not other than previously identified.

6 Q Okay. And the next channel of trade that  
7 you identified I believe was Internet or website  
8 sales?

9 A Correct.

10 Q Does ELM Development -- has ELM  
11 Development Company LLC sold product through the  
12 website or through the Internet or websites?

13 A No, not to my knowledge.

14 Q Are there -- hang on, I just want to see  
15 that question.

16 Are there plans for ELM Development  
17 Company LLC to sell products through the Internet?

18 A Yes.

19 Q What products does ELM Development Company  
20 LLC intend to sell through the Internet?

21 A Videos and DVDs of the Hard Gravity

1 correct.

2 Q Oh, is that true, that you've never used  
3 or shown video under the GanderGunmen name without  
4 using the word Hard Gravity in connection with it?

5 A Yes, I believe that is correct. We've  
6 always used them together, it's the GanderGunmen  
7 presents Hard Gravity.

8 Q Okay.

9 A That's our schtick.

10 Q And when you distributed these videos did  
11 you receive any payment for them?

12 A No, not in the instances I've described.

13 Q Were you paid at all or compensated for  
14 the actual physical distribution of them?

15 A No.

16 Q Did you -- were you paid at all for the  
17 production or film -- because I think -- you talked  
18 before about -- I asked you what you thought was  
19 encompassed by video production and there was, you  
20 listed filming, editing, recording, duplicating and  
21 distributing under that -- under video production.

1 BY MR. UELAND:

2 Q I have this open to the entry for  
3 8/17/2002. I'm going to hand you your entire  
4 journal.

5 A Thank you.

6 MS. KLIEBENSTEIN: I have another copy if  
7 you need another copy.

8 Q I want you to read the entry for  
9 8/17/2002.

10 A Eric --

11 Q I'm sorry, you don't have to read it out  
12 loud, you can just familiarize yourself with it and  
13 then I want you to find for me and read aloud the  
14 portion that you think corroborates your belief that  
15 ELM Development LLC provided editing services to  
16 Jeff Traxler on August 17th, 2002.

17 A On the second page of the entry, about  
18 halfway down there is an entry that says we watched  
19 Hard Gravity, our best hits reel, in lodge while we  
20 ate cheeseburgers and drank beer. All the patrons  
21 loved it. Jeff Traxler, owner, was so impressed he

1 gave Moneyshot ten videos to mix slash --

2 Q Let me interrupt you for a second. Who is  
3 Moneyshot?

4 A That I believe is a reference Pierce is  
5 making to himself, this is his entry.

6 Q Okay. This is Pierce's entry here and do  
7 you feel comfortable that you understand what Pierce  
8 Smith's intending when he writes in your journal?

9 A I was there when he wrote it and I was  
10 there when he spoke with Jeff Traxler.

11 Q That's fine. Your counsel's objected  
12 previously when I put Pierce Smith's words in front  
13 of you, but I want to make sure you feel comfortable  
14 interpreting his words now.

15 A Yes, because, again, I was there when he  
16 wrote it.

17 Q Fine.

18 A And I was there when he spoke to Jeff  
19 Traxler.

20 Q Fine. I'm sorry, I interrupted because I  
21 wanted to know who Moneyshot was. Please continue.

1           A       Jeff Traxler, owner, was so impressed he  
2       gave Moneyshot ten videos to mix/edit and will  
3       barter for future hunts.

4                    That language reminds me very vividly of  
5       this incident and the following editing work that  
6       Pierce and I did.

7           Q       But the reference is he gave the videos to  
8       Moneyshot, who you've identified as Pierce Smith.  
9       You're not identified as someone who provides  
10      editing services in that journal, are you?

11          A       Correct.

12          Q       Okay. By the way, there's a reference in  
13      the journal to a drake slayer, who is that?

14          A       That is Pierce's reference to Eric  
15      Marhoun.

16          Q       A drake is a male duck; is that right?

17          A       That is correct.

18          Q       So you're -- that reference to you as  
19      drake slayer is meant to imply one who kills male  
20      ducks?

21          A       Correct.

1           A     Yes.

2           Q     And with that belief did you endeavor to  
3 review this letter carefully?

4           A     I can't -- I believe I did. I certainly,  
5 you know, deferred to my attorneys to also review  
6 their letters, but I think I looked at it. I  
7 thought I looked at it carefully, I guess I didn't  
8 catch that statement or typo.

9           Q     Okay.

10           THE WITNESS: Could we take a quick break?

11                     (Recess taken at 2:41 p.m.)

12                     (Resumed at 2:49 p.m.)

13 BY MR. UELAND:

14           Q     Leaving aside the interrogatory responses  
15 and the letter for a second, I just want to ask, ELM  
16 Development LLC in these responses, to the extent  
17 that it talks about production and distribution is  
18 talking about its own product, the Hard Gravity  
19 product?

20           A     Other than that one instance we've spent  
21 so much time on today from August 2002, that is

1 correct.

2 Q ELM Development LLC is not producing or  
3 distributing a hunting show on behalf of or for  
4 anybody else?

5 A No.

6 Q Let's mark as Exhibit 15 GG000034. It's a  
7 copy of a trademark/service mark application for The  
8 GanderGunmen.

9 (Deposition Exhibit Number 15 was marked  
10 for identification.)

11 Q As you're reviewing this document I'm  
12 going to tell you my first question is going to be,  
13 have you seen this document before?

14 A I don't recall if I've seen it before.

15 Q Is this a document then that you reviewed  
16 in preparing for this deposition?

17 A I don't believe so. I don't recall.

18 Q You see that this is titled trademark/  
19 service mark application and there's a serial number  
20 given, and then there is a filing date of  
21 December 9th, 2003, do you see that?