

ESTTA Tracking number: **ESTTA807457**

Filing date: **03/15/2017**

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

Proceeding	91209226
Party	Defendant DISH Network L.L.C.
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Date	03/15/2017
Attachments	2017-03-15_DISH Reply Brief ISO MSJ as Filed.pdf(2029537 bytes )

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

PREMIER SYSTEMS USA, INC.,	)	Opposition No.: 91209226 (Parent)
a California corporation,	)	Opposition No.: 91211213
Opposer/Counterclaim Registrant,	)	
	)	
v.	)	
	)	
DISH Network L.L.C.	)	
a Colorado limited liability company,	)	
Applicant/Counterclaim Petitioner.	)	
_____	)	

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**APPLICANT AND COUNTERCLAIM PETITIONER DISH NETWORK L.L.C.’S  
REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Applicant and Counterclaim Petitioner DISH Network L.L.C. (“Applicant”) files this Reply to Opposer and Counterclaim Registrant Premier Systems USA, Inc.’s (“Opposer”) Opposition to DISH’s motion for partial summary judgment (the “Response”).

**I. INTRODUCTION**

Opposer’s Response does not raise a genuine dispute of material fact regarding whether the Poret Survey is admissible, reliable, and dispositive on the issue of confusion. Indeed, Opposer does not challenge the admissibility of the Poret Survey at all. Rather, Opposer lodges three minor criticisms regarding the survey’s methodology, but these criticisms are easily rebutted because Opposer cites no expert testimony, no competing survey evidence, and no case law supporting its positions. Instead, Opposer rests solely upon inadmissible evidence and attorney argument, which are insufficient at this stage of the proceedings. The Poret Survey establishes as a matter of law that there exists no confusion between Opposer’s and Applicant’s marks and there is no evidence in the record that permits a contrary conclusion. Accordingly,

Applicant respectfully requests that the Board enter partial summary judgment.

## **II. STATEMENT OF UNDISPUTED FACTS**

### **A. The Board Should Disregard Opposer's Untimely Evidence.**

Opposer filed this opposition over four years ago. Yet, Opposer's Response relies almost entirely on new evidence improperly disclosed for the first time in its opposition brief. *See* Declaration of Steven Lopez, Declaration of Patrick O'Neill, and Declaration of Todd Bates, ¶¶ 2-3, 5 (collectively, the "Improper Evidence"). Fed. R. Civ. P. 37(c)(1) states:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion . . . unless the failure was substantially justified or is harmless.

Not only is the Improper Evidence directly responsive to Applicant's discovery requests, but in the last 15-week period alone, Applicant has contacted Opposer no less than seven times to discuss supplementing discovery responses. *See* Declaration of Kathryn Bohmann, Ex. A, Interrogatories Nos. 5-6, 13-14, 16-17, 19-20, 23-24, 31; Declaration of Ian Saffer ("Saffer Decl."), Ex. A, Request for Production Nos. 2, 8-9, 19, 27-30; Ex. B. Yet, Opposer refused to take a position regarding supplementation and failed to supplement its discovery responses or disclosures. Saffer Decl. ¶ 4. Opposer offers no excuse – much less a substantial justification – for its refusal to supplement. "A party who has refused (even rightfully) to produce information sought in discovery requests may not thereafter rely on the information as evidence on its behalf." *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 U.S.P.Q.2d 1895, 1897 n. 5 (TTAB 1988). The Improper Evidence is inadmissible for this reason alone.

Furthermore, Opposer's failure to timely produce the Improper Evidence was not harmless. Applicant's Motion concerns the Poret Survey, which was timely disclosed to Opposer on October 31, 2014. Now, nearly two and half years later, Opposer seeks to introduce new evidence allegedly relevant to the survey's methodology. If Opposer had believed that the

Improper Evidence was relevant to the survey's methodology, it should have produced that evidence in response to Applicant's discovery requests. Instead, Opposer sat on the evidence for over two years, depriving Applicant and Mr. Poret of an opportunity to consider it. In light of Applicant's timely propounded discovery requests and Applicant's repeated requests for supplementation, there is no excuse for Opposer's failure to produce the documents and facts which it now seeks to introduce, and the Board should disregard the Improper Evidence.<sup>1</sup> Nonetheless, as discussed below, even if the Board considers the Improper Evidence, Opposer's Response fails to raise a genuine dispute of material fact.

**B. Opposer's Response Does Not Raise A Genuine Dispute of Material Fact.**

Opposer largely does not dispute Applicant's Statement of Undisputed Facts ("SOUF"). Where Opposer purports to dispute facts, the record demonstrates that the alleged disputes are neither material nor genuine. For example, Opposer disputes Applicant's SOUF Nos. 3-5 on the basis that Opposer has released new versions of the same goods identified by Applicant, *i.e.*, Opposer now sells lens, cases, and an iTunes App not only compatible with the iPhone 4 and 5, but also with the iPhone 6 and 7. These allegedly disputed facts are immaterial because they would not alter the Board's decision on the legal issue of likelihood of confusion. *See, e.g., Kellogg Co. v. Pack'Em Enterprises, Inc.*, 14 U.S.P.Q.2d 1545 (TTAB 1990).

Similarly, Opposer disputes Applicant's SOUF Nos. 9-11 on the basis that Opposer has released a new grip device for smartphones. As an initial matter, Opposer did not identify the grip device in the goods/services descriptions of its relied-upon registrations, and therefore, it is not a basis for the Opposition. If Opposer wants to rely on purported common law rights in the

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<sup>1</sup> Opposer also states that "supplemental discovery responses from DISH may still impact the material facts." *See, e.g.*, Response at 4. This statement is without merit. Opposer does not identify a single piece of evidence that it needs from Applicant; explain why Opposer needs the evidence; or demonstrate how the evidence might impact the material facts.

OLLOCLIP mark for goods not listed in its registrations, then Opposer must prove priority, which it has not done here. Nonetheless, the addition of the grip device to Opposer's list of goods is immaterial because the grip device is no more related to Applicant's services than the lenses, carrying cases, and software previously identified by Applicant. SOUF Nos. 9-11.

Opposer also disputes SOUF No. 7 stating that Opposer offers television broadcasting services because "Opposer's olloclip products are used to live stream video, which in turn may be broadcast on television." Response at 6. At best, Opposer's assertion is an argument regarding the proximity of the goods, not a dispute of fact. Opposer's lenses, cases, iTunes App, and grip device are not capable of live streaming video, by themselves or in conjunction with one another. Nor would Opposer's goods qualify as television broadcasting services under the Trademark ID Manual. Even assuming *arguendo* that Opposer's goods can be used to facilitate live streaming video, this fact is immaterial because Opposer does not argue – nor could it – that the survey results would have been different had Mr. Poret stated in the survey that Opposer's lenses "are used to live stream video, which in turn may be broadcast on television."

Finally, Opposer disputes SOUF No. 14 which recites the findings of the Poret Survey. Opposer does not dispute the fact of what the Poret Survey discloses; it only criticizes the survey methodology via attorney argument. As discussed below, none of these arguments holds water.

### **III. ARGUMENT**

#### **A. The Poret Survey Methodology is Reliable.**

As an initial matter, Opposer does not challenge the admissibility of the Poret Survey. Opposer does not cite Fed. R. Evid. 702 or the *Daubert* standard, let alone present any evidence that the survey is inadmissible under those standards. Neither does Opposer challenge Mr. Poret's qualifications, but instead states that Mr. Poret has "impressive credentials." Response at 1. Because Opposer has not met its burden to exclude the Poret Survey, Opposer's criticisms,

even if valid, could go only to the weight to be accorded the survey, not to its admissibility. But as discussed below, the three alleged methodology flaws that Opposer asserts are easily rebutted.

**i. The Poret Survey employs a reliable universe.**

Opposer's first criticism of the Poret Survey is that it allegedly employs an unreliable universe because the universe did not contain enough respondents who were aware of OLLOCLIP. Opposer's argument lacks merit. First, contrary to Opposer's implication, *Eveready* surveys are not limited to situations where the mark at issue is well-known. Rather, *Eveready* surveys are routinely used and accepted by courts in situations where, as here, the marks may not be well-known. *See, e.g., Joules Ltd. v. Macy's Merchandising Group, Inc.*, 2016 WL 4094913 (S.D.N.Y. Aug. 2, 2016). In *Joules*, the plaintiff criticized Defendant's use of an *Eveready* survey, arguing that the "format is inappropriate where a mark is not widely known or recognized." *Id.* at 10. The Court rejected Defendant's argument finding that any "errors that might arise as a result of [Plaintiff's] relatively low level of recognition in the marketplace are offset by [the survey's] use of a large sample size" of 800 respondents. *Id.* The Court also noted that this larger sample size created a "survey within a survey" to test whether consumers with awareness of Plaintiff's mark were confused by the competing mark. *Id.* The Court then held that the *Eveready* survey was reliable and supported a finding of no confusion. *Id.*

Here, Mr. Poret also designed his survey with Opposer's concern in mind. In particular, Mr. Poret: (1) conducted the survey within a broad universe of respondents who were prescreened to be the most likely to be familiar with Opposer's products; (2) used an extra-large respondent group of approximately 1,200 individuals; and (3) conducted a "survey within a survey" where he calculated a confusion rate among the 100 individuals who self-identified as familiar with the OLLOCLIP mark prior to the survey. Of the subset of respondents who

indicated that they had previously heard of OLLOCLIP, no more than 6% were confused.

Accordingly, even if Opposer's criticism were valid (which it isn't), and the Board considered only the confusion rate within the sub-group, the level of confusion is *de minimis*.

Furthermore, there is no evidence that the survey's universe was skewed away from Opposer's actual consumer base. To the extent Opposer purports to rely on its newly "gathered" demographic evidence, the evidence is inadmissible because it was not produced in discovery. *See supra* II.A. In particular, Applicant requested information regarding Opposer's target consumers as early as April 18, 2014. Bohmann Decl., Ex. A. Opposer's founder Mr. O'Neill states that he has been studying customer demographics since 2010 and that Opposer's web site collects consumer data. O'Neil Decl. ¶¶ 15, 21. Accordingly, the consumer information requested by Applicant has been available to Opposer since the inception of this opposition and Opposer has no excuse for its failure to produce it earlier. Opposer cannot now, over two years later and after Applicant has conducted its survey, rely on undisclosed evidence.

Even if the Board considers Opposer's demographic data, the data does not establish that the survey universe was unreliable. The survey universe was reasonably based on Mr. Poret's training, experience, and expertise, none of which Opposer challenges. Unlike Mr. Poret, Opposer does not define its preferred universe. Nor does it explain how or why use of its preferred universe would result in *higher* confusion rates. It is equally as possible that use of Opposer's preferred universe would result in *lower* confusion rates. It is undisputed that Mr. Poret's universe consisted of purchasers of the exact products and services identified in Opposer's registrations, especially in light of Opposer's admission that "smartphone and mobile device users [are] Olloclip's actual consumer base." O'Neill Decl. ¶ 20.

Opposer's unsupported criticism of the survey's universe do not raise a genuine dispute

of material fact.

**ii. The Poret Survey accounted for the issue of proximity.**

Opposer's second criticism of the Poret Survey is that the *Eveready* format is improper because it allegedly fails to account for the fact that the parties sell a handful of proximate goods. Opposer's argument misstates Mr. Poret's survey approach, overstates the relevance of the proximity issue, and is heavily flawed.

First, Mr. Poret tailored the *Eveready* format used in the Poret Survey to fit the facts of this particular case, and specifically, to address the concern Opposer raises. Mr. Poret testified that he carefully considered the issue of proximity and designed a survey that used the best, most reliable format under the facts. Saffer Decl., Ex. C, 47:23-56:9; 121:14-123:18. Mr. Poret further testified that he tailored the survey design to account for the fact that some of the parties' goods and services are more proximate and others less so. *Id.* at 68:13-72:4. For instance, Mr. Poret accounted for the proximity issue by (1) using a group of respondents who were the most likely to be familiar with Opposer's products and (2) calculating a confusion rate for a subgroup of respondents who self-identified as familiar with Opposer's mark prior to the survey. *Id.* at 47:23-56:9. Finally, Mr. Poret testified that he considered using a *Squirt* model survey but that based on Mr. Poret's training and experience, such an approach would be "unnecessarily artificial and suggestive" and would "not be typical or realistic or representative." *Id.* at 33:17-36:7; 77:23-83:18; 115:10-116:10. There exists no expert testimony rebutting Mr. Poret's conclusions.

Second, Opposer's argument overstates the relevance of the proximity issue. The issue of proximity is relevant only as to whether a *Squirt* survey *could* have been justified in this case, not to whether the *Eveready* format was improper. At best, Opposer's argument supports the possibility that had Opposer designated an expert, he or she conceivably might have chosen to



use a *Squirt* methodology. The Board then could have weighed both surveys. The argument is irrelevant here, however, because Opposer designated no such expert and there is no competing *Squirt* survey for the Board to weigh. Nor is there any evidence concerning what the confusion rate would have been had either party's expert used a *Squirt* format. It is pure speculation to assume that the confusion rate would have been higher than that reported by Mr. Poret – 0.5% for the entire universe and 6% for the subgroup already familiar with Opposer's mark.

Finally, Opposer's argument regarding proximity is heavily flawed. First, Opposer's argument assumes that OLLOCLIP products will be routinely marketed in close proximity to the OLLO mark for *all* of the goods and services identified in Applicant's applications. This assumption is false. The majority of goods/services listed in Applicant's applications, such as satellite and broadcasting services, are not proximate to Opposer's goods (and Opposer does not argue that they are). Saffer Decl., Ex. C, 68:13-72:4. Second, Opposer mistakenly assumes that the presence of various products in big-box retailers such as Best Buy and Target creates proximity, when in fact such retailers carry various unrelated items in close physical proximity. For example, Opposer's photographs show that boom boxes are also sold in physical proximity to the OLLOCLIP products, but boom boxes are not related to clip-on lens or wireless plans.<sup>2</sup>

**iii. The Poret Survey did not improperly 'prompt' a particular response.**

Opposer's third criticism of the Poret Survey is that the placement of the following question at the end of the survey improperly prompted respondents to identify OLLOCLIP:

Prior to this survey, which of the following product/brands, if any, have you heard of in connection with accessories for mobile phones? (Select all that apply)

- Olloclip
- Otterbox
- Poetic

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<sup>2</sup> In addition, the Declaration of Steven Lopez and its exhibits should be excluded because Mr. Lopez was not disclosed in Opposer's disclosures nor were the exhibits produced in discovery.

- Jabra
- Logitech

Notably, Opposer cites no legal authority, expert testimony, or other evidence to support its allegation that the placement of this question affected the survey results. Rather, the only evidence of record is Mr. Poret's expert testimony that states there was no undue prompting by the placement of this question. Saffer Decl., Ex. C, 105:4-13. In the absence of competing evidence, it would be rank speculation to assume that had the question been placed in a different location, the confusion rate would have been different.

**B. Opposer Offers No Evidence of Reverse Confusion.**

Opposer raises the theory of reverse confusion for the first time in its opposition brief. Opposer did not assert reverse confusion in its pleadings, discovery requests or responses, or any other filing in this case. More importantly, Opposer does not cite a single piece of evidence establishing a risk of reverse confusion. For example, Opposer cites no evidence regarding the parties' respective volume, frequency, reach, and manner of advertising. Instead, Opposer offers only its unsupported opinion that Applicant's advertising would "flood" the market. Response at 17. Opposer states that Applicant is a large company with "massive resources," but cites no such evidence, let alone evidence of how Applicant would market and sell its goods and services. *Id.* at 16. "In countering a motion for summary judgment, more is required than mere assertions of counsel," and "mere conclusory assertions do not raise a *genuine* issue of fact." *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984) (emphasis in the original).

Moreover, in other sections of the Response, Opposer purports to rely on evidence that cuts directly against a theory of reverse confusion. In particular, Opposer states that it sells its products in several national big-box retailers; has millions of dollars in sales, which are steadily increasing each year; and it has contracted with a Fortune 100 company to sell Opposer's

products in its stores nationwide. O'Neill Decl. ¶¶ 14, 18-19. Opposer has not put evidence in the record permitting a fact finder to conclude that reverse confusion is likely.

Furthermore, even assuming *arguendo* that Opposer's concern has any merit, the Poret Survey provides reliable evidence that confusion is not likely even under a reverse confusion theory. In particular, the Poret Survey shows that only 6% of those already familiar with OLLOCLIP drew an association between OLLOCLIP and OLLO. Poret Decl., Ex. B at 20-32. It is only Opposer's speculation that the confusion rate would be materially higher if respondents were asked about association between the same two marks after Applicant enters the market and aggressively promotes its mark. Moreover, Opposer does not state in its Response that it is abandoning a theory of forward confusion or that the Poret Survey not is dispositive on that issue. Because the Poret Survey is reliable evidence concerning reverse confusion, and because it is unrebutted by admissible evidence, Applicant respectfully requests the Board enter partial summary judgment in favor of Applicant.<sup>3</sup>

### **CONCLUSION**

Based on the record of admissible summary judgment evidence, there are no genuine disputes of material fact regarding Opposer's likelihood of confusion claim. Accordingly, Applicant respectfully requests the Board enter partial summary judgment in favor of Applicant.

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<sup>3</sup> The tenuous nature of Opposer's reverse confusion theory is also revealed by Opposer's motion for leave to designate a rebuttal expert. Had Opposer believed that this was a reverse confusion case, and that a survey cannot be reliably run in a reverse confusion case as stated in Opposer's Response, then Opposer would not have stated in that motion that it had engaged an expert to conduct its own confusion survey. 59 TTABVue at 3. Furthermore, if the Board were to conclude that a survey cannot be run reliably in reverse confusion cases prior to the junior user's saturation of the market, then the Board should not recognize reverse confusion theories in opposition proceedings, such as this one, that involve intent-to-use applications. Rather, a registrant in such cases should be required to file a cancellation proceeding after the junior user has entered the market and survey evidence, rather than mere speculation, can be introduced.

Dated: March 15, 2017

Respectfully submitted,

By: s/ils/  
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Telephone: 303-268-0066  
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*Attorneys for Applicant DISH Network L.L.C.*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2017, a true and correct copy of the foregoing **APPLICANT AND COUNTERCLAIM PETITIONER DISH NETWORK L.L.C.'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** was served by E-mail on all counsel or parties of record on the service list below:

s/tnd/  
Tara N. Damhoff

**SERVICE LIST**

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

PREMIER SYSTEMS USA, INC.,	)	Opposition No.: 91209226 (Parent)
a California corporation,	)	Opposition No.: 91211213
Opposer/Counterclaim Registrant,	)	
	)	
v.	)	
	)	
DISH Network L.L.C.	)	
a Colorado limited liability company,	)	
Applicant/Counterclaim Petitioner.	)	
_____	)	

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**DECLARATION OF IAN L. SAFFER IN SUPPORT OF APPLICANT AND  
COUNTERCLAIM PETITIONER DISH NETWORK L.L.C.'S REPLY IN SUPPORT OF  
ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

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I, Ian L. Saffer, declare as follows:

1. I am an attorney with the law firm Swanson & Bratschun L.L.C., counsel for Applicant DISH Network L.L.C. in the above captioned Opposition proceeding. I have personal knowledge of the facts set forth below. If called upon and sworn as a witness, I could and would competently testify as set forth below.

2. Attached hereto as Exhibit A is a true and correct copy of Opposer's Responses to Applicant's First Set of Request for Production of Documents (Nos. 1-32), served by Opposer on May 16, 2014.

3. Attached hereto as Exhibit B is a true and correct copy of an email chain between myself and Opposer's counsel, Mr. Todd Bates, dated between November 7, 2016 – December 12, 2016, demonstrating Applicant's multiple attempts at contacting Opposer regarding the

supplementation of discovery responses. There were no further relevant communications from Mr. Bates after December 12, 2016.

4. To date, Opposer has not served supplemental discovery responses or disclosures.

5. Attached hereto as Exhibit C are true and correct copies of the relevant portions of the deposition transcript of Mr. Hal Poret dated April 28, 2016.

I declare that all statements made herein of my own knowledge are true and all statements made on information and belief are believed to be true. I further declare that these statements are made with the knowledge that willful, false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful, false statements may jeopardize the validity of the application or document or any registration resulting therefrom.

Dated: March 15, 2017

By: s/ils/  
Ian L. Saffer

**CERTIFICATE OF SERVICE**

I hereby certify on March 15, 2017, the foregoing **DECLARATION OF IAN L. SAFFER IN SUPPORT OF APPLICANT AND COUNTERCLAIM PETITIONER DISH NETWORK L.L.C.'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** was served on the following counsel of record served via e-mail to the address listed below:

s/tnl/  
Tara N. Damhoff

**SERVICE LIST**

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# **EXHIBIT A**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PREMIER SYSTEMS USA, INC.	)	
a California corporation,	)	Opposition No.: 91209226 (parent)
Opposer/Counterclaim Registrant,	)	Opposition No.: 91211213
	)	
v.	)	Alleged Mark: OLLO
	)	
DISH NETWORK L.L.C.	)	
a Colorado limited liability company,	)	
Applicant/Counterclaim Petitioner.	)	
	)	

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**OPPOSER'S RESPONSES TO APPLICANT'S  
FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS (NOS. 1-32)**

Pursuant to the Rules of Practice of the United States Patent and Trademark Office and the applicable Federal Rules of Civil Procedure ("FRCP"), Opposer Premier Systems USA, Inc. ("Opposer") hereby responds to Applicant DISH Network L.L.C.'s ("Applicant") First Requests for Production of Documents (Nos. 1-32) ("Requests" or individually, "Request") as set forth below:

**PRELIMINARY STATEMENT**

1. These responses are based upon information presently available to and located by Opposer and its counsel and reflect the current state of Opposer's knowledge, understanding and belief respecting the matters about which inquiry was made. Opposer has not completed its investigation of the facts relating to this proceeding or preparation for trial and anticipates that as discovery proceeds, further facts may be discovered. Without obligating itself to do so, Opposer reserves the right to modify or supplement these responses with any such pertinent information.

2. Opposer's responses are made without in any way waiving or intending to waive, but, on the contrary, intending to preserve and preserving:

- a. The right to raise all questions of authenticity, relevancy, materiality, privilege, and admissibility as evidence for any purpose of the information and the documents identified and/or produced in response to these Requests, which may arise in any subsequent proceeding in, or the trial of, this or any other action;
- b. The right to object to the use of the information and/or documents in any subsequent proceeding in, or the trial of, this or any other action on any grounds;
- c. The right to object on any ground at any time to other interrogatories, requests or other discovery involving the information and/or documents or the subject matter thereof; and
- d. The right to make subsequent answers if Opposer uncovers additional information and/or documents called for by these Requests, as discovery is ongoing and Opposer's investigation of the facts and the evidence pertinent to this action has not been completed.

3. Words and terms used in the following responses shall be construed in accordance with their normal meaning and connotations, and shall in no way be interpreted as terms of art or statutorily defined terms used in the patent and trademark laws, and Opposer specifically disavows any such meaning or connotation that might be accorded to such terms.

4. A statement that Opposer will produce responsive documents and/or things represents only that they will be produced or made available if they exist, are in Opposer's possession, custody, or control, and not that such documents and/or things exist or ever have existed, or are in Opposer's possession, custody, or control.

5. Specific objections to various requests are made in the responses set forth below.

In addition to those specific objections, Opposer generally objects to the Requests as follows:

### **GENERAL OBJECTIONS**

The following general objections are incorporated by reference in response to each and every Request set forth below and are not waived with respect to any response.

1. Opposer objects generally to the instructions and definitions in the Requests to the extent that those instructions and definitions fail to comply with or impose obligations in excess of Rule 34 of the Federal Rules of Civil Procedure.

2. Opposer generally objects to the Requests to the extent they seek “all documents” concerning a particular subject on the ground that Opposer would be required to search for documents from every person in the company. Opposer objects to performing searches of such breadth on the grounds of undue burden and expense. Searching for relevant documents, Opposer has made, and will make, inquiry of all persons who are reasonably likely to have such documents.

3. Opposer generally objects to the Requests to the extent that they call for the production of information, documents or things protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or other limitation on discovery. Opposer has stated its privilege objections expressly in its response to each request that would, in its view, reasonably be interpreted to encompass privileged information, documents, or things. Should any other request encompass privileged information, documents, or things, however, Opposer hereby asserts this general objection. Moreover, should any such response by Opposer occur, it was inadvertent and shall not constitute a waiver of

privilege or of Opposer's right to object during this Opposition or otherwise to the use of any such information, documents, or things.

4. Opposer generally objects to the Requests to the extent that they seek information, documents or things that are not relevant to this Opposition, or are not reasonably calculated to lead to the discovery of admissible evidence. Specifically, Opposer objects to producing documents related to information outside of the United States.

5. Opposer further objects to Applicant's definitions and instructions in the Requests to the extent they make the individual requests vague, ambiguous, or unintelligible, in that Applicant attributes new meanings to ordinary words or defines the same word to have multiple meanings.

6. Opposer generally objects to the Requests to the extent that they seek information, documents or things not in Opposer's possession, custody or control.

7. Opposer generally objects to the Requests to the extent that they are overbroad, unduly burdensome, or fail to describe the information, documents or things sought with a reasonable degree of specificity. Opposer will attempt to construe the terms and phrases used by Applicant in ways to give those terms and phrases meanings that will result in the production of relevant information, documents and things designed to lead to the discovery of admissible evidence.

8. Opposer generally objects to the Requests to the extent that they call for information that is protected from disclosure by agreements Opposer has with another entity, if any, or obligations Opposer has to another entity, if any.

9. Opposer generally objects to each Request to the extent that it calls for the production or identification of attorney-client privilege and/or work product documents

generated by Opposer's counsel or its agents for internal use and/or privileged communications between or among Opposer and its counsel since the commencement of this Opposition. The applicability of the attorney-client privilege and/or work product doctrine to such documents is so clear and the burden of identifying each such document is so great that requiring Opposer to do so would be so burdensome as to result in injustice and would be oppressive in that the burden imposed thereby would be incommensurate with the result sought by Applicant.

10. Opposer has performed a diligent search for information, documents and things responsive to these Requests. Discovery is ongoing, however, and Opposer's investigation is continuing. Therefore, Opposer reserves its right to supplement its responses herein and its production with any responsive, non-privileged information, documents, or things that may be subsequently discovered.

11. The term "non-privileged documents" refers to documents which are not protected by the attorney-client privilege, the work product doctrine or any other privileges or immunity precluding discovery.

### **RESPONSE TO DOCUMENT REQUESTS**

#### **REQUEST FOR PRODUCTION NO. 1:**

All Documents Concerning the transfer, assignment or licensing of Opposer's Marks between Opposer and any other owner or user of Opposer's Marks, or use of the marks as security or collateral, from the date of first adoption and use of each of Opposer's Marks to the present.

#### **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad

and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request to the extent that it seeks documents that are subject to confidentiality obligations to third parties. Opposer further objects to this Request on the grounds that it is vague and ambiguous.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 2:**

All Documents on which Opposer intends to rely in this Opposition proceeding, including all exhibits and documents Opposer may use for impeachment.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects that this Request is premature at this early stage in the proceeding, as discovery is ongoing and Opposer may learn additional information, including information relevant to documents that Opposer intends to rely in this Opposition proceeding, as Opposer's investigation and discovery continues. Opposer further objects to this Request to the extent that it purports to impose on Opposer obligations greater than those imposed by the Federal Rules of Civil Procedure.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request, except for documents and exhibits Opposer may use for impeachment, to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 3:**

All Documents Concerning the acquisition, selection, availability, adoption, creation, design, proposal to use or attempt to register Opposer's Marks, including without limitation Documents Concerning any investigation to determine the availability of each of Opposer's Marks or any similar mark.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrases "acquisition," "availability," "design," and "proposal to use."

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.



**REQUEST FOR PRODUCTION NO. 4:**

All Documents Concerning the acquisition, selection, availability, adoption, creation, design, proposal to use or attempt to register Opposer's OLLO Marks, including without limitation Documents Concerning any investigation to determine the availability of each of Opposer's OLLO Marks or any similar mark.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrases "acquisition," "availability," "design," and "proposal to use."

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 5:**

One copy of each Document on which each of Opposer's Marks have been displayed, including without limitation advertisements, signs, brochures, posters, stationery, business cards, promotional materials, contracts, decals, labels, badges, mail order solicitations, billing and order forms, computer software, web sites, and computer screens or screen printouts.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrases “badges” and “computer screens.” Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks a copy of every advertisement, sign, brochure, poster, stationery, business card, promotional material, contract, decal, label, mail order solicitation, billing and order form, computer software, web site, and computer screen or screen printouts which display Opposer’s Marks.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce a representative sample of non-privileged documents responsive to this Request to the extent that such documents and things exist, are within Opposer’s possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 6:**

One copy of each Document on which each of Opposer’s OLLO Marks have been displayed, including without limitation advertisements, signs, brochures, posters, stationery, business cards, promotional materials, contracts, decals, labels, badges, mail order solicitations, billing and order forms, computer software, web sites, and computer screens or screen printouts.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrases “badges” and “computer screens.” Opposer

further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks a copy of every advertisement, sign, brochure, poster, stationery, business card, promotional material, contract, decal, label, mail order solicitation, billing and order form, computer software, web site, and computer screen or screen printouts which display Opposer's OLLO Marks.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce a representative sample of non-privileged documents responsive to this Request to the extent that such documents and things exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 7:**

All Documents Concerning the formation or organizational structure of Opposer's business and any predecessor-in-interest that owned any of Opposer's Marks, including without limitation articles of incorporation or articles of organization and organizational charts.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request to the extent that it seeks documents equally available to Applicant through public

sources. Opposer further objects to this Request to the extent that it seeks documents outside of its possession, custody or control.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents and things exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 8:**

All Documents that explain or describe the goods or services offered under each of Opposer's Marks, including without limitation advertisements, brochures, flyers, sales tools, catalogs, order forms, price lists, training materials, memoranda and bulletins.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly to the extent it uses the phrases "sales tools," "memoranda," and "bulletins." Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks "all documents."

Subject to and without waiving the foregoing general and specific objections, Opposer will produce a representative sample of non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 9:**

All Documents that explain or describe the goods or services offered, or to be offered, under each of Opposer's OLLO Marks, including without limitation advertisements, brochures, flyers, sales tools, catalogs, order forms, price lists, training materials, memoranda and bulletins.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly to the extent it uses the phrases "sales tools," "memoranda," and "bulletins." Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks "all documents."

Subject to and without waiving the foregoing general and specific objections, Opposer will produce a representative sample of non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 10:**

All Documents Concerning any searches, studies, distinctiveness surveys, likelihood of confusion surveys, market studies, focus group studies or other surveys or studies performed by or for Opposer in connection with the availability, selection, creation, acquisition, evaluation of strength or weakness, valuation, protection or defense of Applicant's Marks, Applicant's OLLO Marks, or Opposer's Marks.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly to the extent it uses the phrases “market studies,” “focus group studies,” “other surveys or studies,” “valuation,” and “protection or defense.” Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects that this Request is premature at this early stage in the case, as discovery is ongoing.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer’s possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 11:**

All Documents Concerning the geographic scope of the use of each of Opposer’s Marks.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence.

Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly to the extent it uses the phrase “geographic scope.”

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer’s possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 12:**

All Documents Concerning the first use of each of Opposer’s Marks (a) in commerce and (b) in interstate commerce, including but not limited to Documents depicting such use of each of Opposer’s Marks, the date and location of such use, and the identities of all persons with knowledge of such use.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks “all documents.” Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly to the extent it uses the phrase “depicting such use.”

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such

documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 13:**

All Documents Concerning any state or federal trademark registration or application to register Opposer's Marks.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request to the extent it seeks documents equally available to Applicant through publicly available sources.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 14:**

All Documents Concerning any state or county corporate, partnership, company name or assumed name filing that includes Opposer's Marks.



**RESPONSE TO REQUEST FOR PRODUCTION NO. 14:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks “all documents.” Opposer further objects to this Request on the grounds that it is vague and ambiguous. Opposer further objects to this Request to the extent it seeks documents equally available to Applicant through publicly available sources.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer’s possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 15:**

All Documents Concerning any policy relating to the use, display, or promotion of Opposer’s Marks, or goods or services offered under Opposer’s Marks.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably

calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly to the extent that it uses the phrase “any policy.”

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer’s possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 16:**

All Documents Concerning any advertising or other outside agency or service used in developing or placing advertisements for goods or services offered under Opposer’s Marks.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request to the extent that it seeks documents that are subject to confidentiality obligations to third parties. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrase “developing or placing advertisements.”

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer’s possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 17:**

All Documents Concerning ownership or use of Opposer's Marks, including without limitation partnership agreements, distributor agreements, marketing agreements, assignments, licenses, security agreements, settlements, consent agreements, co-existence agreements, or any other form of agreement, whether pertaining to Opposer, any predecessor-in-interest, or any other party.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 17:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request to the extent that it seeks documents that are subject to confidentiality obligations to third parties. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is vague and ambiguous. Opposer further objects to this Request to the extent that it seeks documents outside of its possession, custody or control.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 18:**

All Documents Concerning any instance of misdirected (i) mail, (ii) email, (iii) telephone calls or (iv) other communications or inquiries, including via the Internet, or other instances wherein any person may have been confused or mistaken regarding Applicant's Marks or use thereof, Opposer's Marks or use thereof, or any substantially similar mark or use thereof.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 18:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects that this Request is premature at this early stage of the proceeding, as discovery is ongoing. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrase "mistaken."

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 19:**

Documents from which can be derived the revenue, profit, and unit sales recognized by Opposer (a) for all goods or services and (b) for each different type of good or service sold under each of Opposer's Marks on an annual basis, for each year since each of Opposer's Marks was first used, including but not limited to Internet services and long distance carrier services.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 19:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly to the extent that it uses the phrases “Internet services” and “long distance carrier services.”

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer’s possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 20:**

Documents from which can be derived the dollar amount of advertising and promotional expenditures, on an annual basis, for each year since each of Opposer’s Marks was first used, (a) for all goods and services offered under each of Opposer’s Marks and (b) for each particular good or service offered under each of Opposer’s Marks, including but not limited to Internet services and long distance carrier services.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 20:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence.

Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly to the extent that it uses the phrases “Internet services” and “long distance carrier services.”

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer’s possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 21:**

All Documents Concerning the publication of any of Opposer’s Marks in any media, whether such media is electronic (e.g., Internet) or conventional (e.g., paper), including but not limited to publication at tradeshow, magazines, trade journals, and elsewhere.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 21:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks “all documents.” Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrase “the publication of any of Opposer’s Marks.”

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer’s possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 22:**

All Documents Concerning any periods of non-use of any of Opposer's Marks after registration.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 22:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrase "periods of non-use." Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine.

Subject to and without waiving the foregoing general and specific objections, Opposer responds that it is not aware of any non-privileged documents within Opposer's possession, custody or control that are responsive to this Request.

**REQUEST FOR PRODUCTION NO. 23:**

All Documents Concerning any present or prior third-party use, application or registration of a trade name, trademark or service mark comprised in whole or in part of Opposer's Marks, or any name or mark similar thereto.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 23:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request to the extent that it seeks documents protected by the

attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is vague and ambiguous.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 24:**

All Documents Concerning any objection, challenge, proceeding, opposition, cancellation, dispute, or litigation between Opposer or any predecessor-in-interest and any third party Concerning use of any of Opposer's Marks, including correspondence, notes, memos, pleadings, and agreements.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 24:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks "all documents" from other unrelated proceedings. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request to the extent that it seeks documents that are subject to confidentiality obligations to third parties. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrases "any objection, challenge, proceeding" and "dispute."



Opposer further objects to this Request to the extent it seeks documents equally available to Applicant through publicly available sources.

Subject to and without waiving the foregoing general and specific objections, Opposer is not aware of any non-privileged documents within Opposer's possession, custody, or control that are responsive to this Request.

**REQUEST FOR PRODUCTION NO. 25:**

All Documents Concerning any actual confusion Concerning Opposer's Marks and Applicant's Marks.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 25:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is vague and ambiguous. Opposer further objects that this Request is premature at this early stage in the case, as discovery is ongoing.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 26:**

All Documents Concerning the date or circumstances of Opposer's awareness of Applicant or Applicant's Marks.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 26:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request to the extent that it seeks documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request on the grounds that it is vague and ambiguous.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 27:**

All Documents Concerning Opposer's past, present or future marketing plans Concerning goods or services offered or to be offered under each of Opposer's Marks.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 27:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrase "future marketing plans." Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks "future marketing plans."

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 28:**

All Documents Concerning Opposer's past, present or future marketing plans Concerning goods or services offered or to be offered under Opposer's OLLO Marks.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 28:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrase "future marketing plans." Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks "future marketing plans."

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

**REQUEST FOR PRODUCTION NO. 29:**

All Documents Concerning Opposer's planned or projected future sales under each of Opposer's Marks of each good listed in Opposer's registrations and any additional goods or services.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 29:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks “planned or projected future sales.” Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrase “planned or projected future sales.”

**REQUEST FOR PRODUCTION NO. 30:**

All Documents Concerning Opposer’s planned or projected future sales under each of Opposer’s OLLO Marks of each good listed in Opposer’s applications and any additional goods or services.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 30:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence, particularly to the extent that it seeks “planned or projected future sales.” Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly as to its use of the phrase “planned or projected future sales.”

**REQUEST FOR PRODUCTION NO. 31:**

All Documents Concerning any co-branding or co-marketing between Opposer and any manufacturer of electronic devices, software, telecommunications services, or other goods or services.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 31:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request on the grounds that it is overbroad and unduly burdensome in that it seeks documents that are neither relevant to any claim or defense in this case nor reasonably calculated to lead to the discovery of admissible evidence. Opposer further objects to this Request to the extent that it seeks documents that are subject to confidentiality obligations to third parties. Opposer further objects to this Request on the grounds that it is vague and ambiguous, particularly to the extent it uses the phrase “co-branding and co-marketing.”

Subject to and without waiving the foregoing general and specific objections, Opposer is not aware of any non-privileged documents within Opposer’s possession, custody, or control that are responsive to this Request.

**REQUEST FOR PRODUCTION NO. 32:**

All Documents relied upon as a basis for each opinion by all experts whom Opposer intends to call as witnesses in this action, or from whom Opposer has obtained or may obtain any statements, affidavits or declarations relevant to this action.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 32:**

Opposer incorporates by reference its Preliminary Statement and General Objections as if set forth fully herein. Opposer further objects to this Request to the extent that it seeks


documents protected by the attorney-client privilege and/or work product doctrine. Opposer further objects to this Request to the extent that it seeks documents protected by Federal Rule of Civil Procedure 26(b). Opposer further objects that this Request is premature at this early stage in the case, as discovery.

Subject to and without waiving the foregoing general and specific objections, Opposer will produce non-privileged documents responsive to this Request to the extent that such documents exist, are within Opposer's possession, custody or control, and are located after a reasonable search.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: May 16, 2014

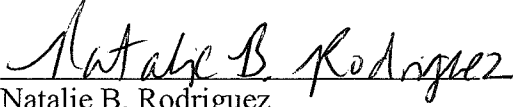
By:   
Steven J. Nataupsky  
Paul N. Conover  
Gregory B. Phillips  
Nicole R. Townes  
2040 Main Street, Fourteenth Floor  
Irvine, CA 92614  
(949) 760-0404  
efiling@knobbe.com  
Attorneys for Opposer/Counterclaim Registrant,  
PREMIER SYSTEMS USA, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing **OPPOSER'S RESPONSES TO APPLICANT'S FIRST SET OF PRODUCTION OF DOCUMENTS (NOS. 1-32)** was served via e-mail to the address listed below and a courtesy copy is being deposited with the United States Postal Service, postage prepaid, on May 16, 2014, addressed as follows:

Ian L. Saffer, Esq.  
Kevin M. Bell  
KILPATRICK TOWNSEND & STOCKTON LLP  
1400 Wewatta Street, Suite 600  
Denver, CO 80202

kbell@kilpatricktownsend.com  
isaffer@kilpatricktownsend.com  
KYates@kilpatricktownsend.com

  
Natalie B. Rodriguez

17829259

# **EXHIBIT B**



## Kate Bohmann

---

**From:** Todd Bates <tbates@hilbornehawkin.com>  
**Sent:** Monday, December 12, 2016 7:18 AM  
**To:** Ian Saffer  
**Cc:** Kate Bohmann  
**Subject:** Re: Premier / Dish - Opposition

Ian,  
I'm still working on this. I will get the information to you as soon as possible.  
Thanks,  
Todd

---

### R. Todd Bates

**Partner**

T. 714.283.1155 x1001  
F. 714.283.1555  
[www.hilbornehawkin.com](http://www.hilbornehawkin.com)

---

### Hilborne|Hawkin

2875 Michelle Drive  
Suite 170  
Irvine, California 92606  
USA

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On Mon, Dec 5, 2016 at 6:48 AM, Todd Bates <[tbates@hilbornehawkin.com](mailto:tbates@hilbornehawkin.com)> wrote:

Hi Ian,

Just a few points of clarification -

With respect to items (b), (c), and (d), I stated that I hoped to be able to get back in touch with my client before Friday, so that I could provide a more firm response to the discovery scheduling questions by Friday the 2nd. As I was unable to confer with my client after our call, I am now attempting to respond early this week and will do so as soon as I have their input.

Thank you,

Todd

---

### R. Todd Bates

**Partner**

T. [714.283.1155](tel:714.283.1155) x1001  
F. [714.283.1555](tel:714.283.1555)  
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On Wed, Nov 30, 2016 at 3:20 PM, Ian Saffer <[ISaffer@sbiplaw.com](mailto:ISaffer@sbiplaw.com)> wrote:

Todd, following up on our call today, we discussed each of the points in my Nov. 18 email:

- a) You stated that Premier does not oppose.
- b) You tentatively agreed that both parties should supplement prior discovery responses on an agreed date, accounting for the holidays, but said you'd provide a firm position in writing by this Friday.
- c) You said you'd provide a firm position in writing by this Friday.
- d) I described the information produced to date and our position that that information is sufficient to show DISH's bona fide intent to use; you agreed to review the issue and let us know by this Friday what additional information you are asking DISH to provide on that topic.
- e) We agreed that each party would want Rule 30(b)(6) depositions of the other in early 2017. I asked and you agreed to let me know if you want any other DISH depositions so I can get started on scheduling, which may be difficult.
- f) I will talk to my client and then provide specific language for a proposed stipulation.

I look forward to hearing from you. Regards, Ian.

**Ian L. Saffer**

Swanson & Bratschun, L.L.C. | 8210 Southpark Terrace | Littleton, CO 80120

T: [303.268.0066](tel:303.268.0066) | F: [303.268.0065](tel:303.268.0065) | [isaffer@sbiplaw.com](mailto:isaffer@sbiplaw.com)

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---

**From:** Ian Saffer

**Sent:** Friday, November 18, 2016 2:01 PM

**To:** Todd Bates <[tbates@hilbornehawkin.com](mailto:tbates@hilbornehawkin.com)>

**Cc:** Kate Bohmann <[KBohmann@sbiplaw.com](mailto:KBohmann@sbiplaw.com)>

**Subject:** RE: Premier / Dish - Opposition

Todd, pursuant to our exchange below, you were going to call me at 3:00 PM ET, 1:00 PM MT, which was an hour ago. As you know, I have been trying to reach you by phone for almost two weeks. I need your position on the following issues:

- a) The most recent schedule issued by the TTAB does not include a testimony period or briefing for the counterclaim (unlike prior schedules). Do you agree not to oppose a motion to correct that omission?
- b) We believe that Premier's discovery responses need to be supplemented due to the passage of time. By way of illustration and not limitation, Premier's responses showing where and how the mark is used, its sales, marketing, and financial data, and the like need to be updated. We need this update well before the close of fact discovery so that we can review it before we take fact depositions. When does Premier propose to provide this supplement?
- c) We believe that Premier's responses to Interrogatory No. 4 and RFP No. 10 may be deficient. These requests seek information about studies, reports, and/or surveys related to Premier's marks. Premier initially responded by stating that it would produce documents following entry of a protective order, but it has not produced any information since the protective order was entered long ago. Please supplement Premier's responses to these requests.
- d) Premier served discovery just prior to the suspension period on the subject of DISH's bona fide intent to use the mark. At the time, Premier said "After the Board issues its decision, the parties will confer in good faith to reset the deadlines to respond to any outstanding discovery requests and reschedule the noticed discovery depositions." We need to talk about timing for responses to that set of written discovery requests. Relatedly, we need to talk about what kinds of documents you think you need in response to those requests. DISH already has produced ample documents on the subject of its efforts to develop its wireless phone business. We are willing to discuss further investigation and production, but I'd like to discuss what you believe in good faith you need to avoid objections on the grounds of burden or relevance, and to avoid unnecessary motion practice.
- e) We should start planning depositions. We will need a 30(b)(6) of Premier sometime in January. I presume Mr. O'Neill will be the designee, but please confirm so that we can start blocking off time on people's schedules. Similarly, please let me know who if anyone Premier would like to depose so I can discuss with my client and start making arrangements. Many of DISH's representatives are extremely busy so I do not want to delay this process.
- f) Would you be interested in discussing stipulations regarding introduction of evidence? For instance, it may make sense to stipulate to authenticity of documents so that witnesses need not be called (or deposed) solely for that purpose. Other objections to admissibility, such as hearsay, would be preserved. What is Premier's position?

Please respond in writing by the end of next week. Thank you. Ian.

**Ian L. Saffer**

Swanson & Bratschun, L.L.C. | 8210 Southpark Terrace | Littleton, CO 80120

T: [303.268.0066](tel:303.268.0066) | F: [303.268.0065](tel:303.268.0065) | [isaffer@sbiplaw.com](mailto:isaffer@sbiplaw.com)

[www.sbiplaw.com](http://www.sbiplaw.com) | [my profile](#)

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---

**From:** Ian Saffer

**Sent:** Thursday, November 17, 2016 4:22 PM

**To:** Todd Bates <[tbates@hilbornehawkin.com](mailto:tbates@hilbornehawkin.com)>

**Cc:** Ian Saffer <[ISaffer@sbiplaw.com](mailto:ISaffer@sbiplaw.com)>; Kate Bohmann <[KBohmann@sbiplaw.com](mailto:KBohmann@sbiplaw.com)>

**Subject:** Re: Premier / Dish - Opposition

Please call me then. Ian.

On Nov 17, 2016, at 3:00 PM, Todd Bates <[tbates@hilbornehawkin.com](mailto:tbates@hilbornehawkin.com)> wrote:

Hi Ian,

Sorry, I am busy at a conference out of town. I have a break in meetings tomorrow at 3 ET if that works for you.

I look forward to speaking with you.

Best,

Todd

On Nov 16, 2016 6:35 PM, "Ian Saffer" <[ISaffer@sbiplaw.com](mailto:ISaffer@sbiplaw.com)> wrote:

Todd, I just tried your office and got your voicemail. What number should I call? Thanks, Ian.

**Ian L. Saffer**

Swanson & Bratschun, L.L.C. | 8210 Southpark Terrace | Littleton, CO 80120

T: [303.268.0066](tel:303.268.0066) | F: [303.268.0065](tel:303.268.0065) | [isaffer@sbiplaw.com](mailto:isaffer@sbiplaw.com)

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---

**From:** Ian Saffer

**Sent:** Tuesday, November 15, 2016 4:48 PM

**To:** Todd Bates <[tbates@hilbornehawkin.com](mailto:tbates@hilbornehawkin.com)>

**Cc:** Kate Bohmann <[KBohmann@sbiplaw.com](mailto:KBohmann@sbiplaw.com)>

**Subject:** Re: Premier / Dish - Opposition

4:30 mountain time, 3:30 pacific?

On Nov 15, 2016, at 2:18 PM, Todd Bates <[tbates@hilbornehawkin.com](mailto:tbates@hilbornehawkin.com)> wrote:

I am out of the office at a conference, but I should be available tomorrow afternoon. Let me know when you are available.

Thanks,

Todd

On Nov 14, 2016 9:34 AM, "Ian Saffer" <[ISaffer@sbiplaw.com](mailto:ISaffer@sbiplaw.com)> wrote:

Todd, when can we talk? In its motion to suspend filed in 2014, Premier said "After the Board issues its decision, the parties will confer in good faith to reset the deadlines to respond to any outstanding discovery requests and reschedule the noticed discovery depositions." We need to talk about those issues and others in the case. Please propose some times you are available this week. Thank you. Ian.

**Ian L. Saffer**

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**From:** Ian Saffer

**Sent:** Wednesday, November 09, 2016 3:06 PM

**To:** 'Todd Bates' <[tbates@hilbornehawkin.com](mailto:tbates@hilbornehawkin.com)>

**Cc:** Tara Damhoff ([TDamhoff@sbiplaw.com](mailto:TDamhoff@sbiplaw.com)) <[TDamhoff@sbiplaw.com](mailto:TDamhoff@sbiplaw.com)>; Kate Bohmann <[KBohmann@sbiplaw.com](mailto:KBohmann@sbiplaw.com)>

**Subject:** RE: Premier / Dish - Opposition

Hi, Todd. I just left you a VM -- as you know, there are a number of things we need to get done in the remaining discovery period so please give me a call to discuss. Thank you. Ian.

**Ian L. Saffer**

Swanson & Bratschun, L.L.C. | 8210 Southpark Terrace | Littleton, CO 80120

T: [303.268.0066](tel:303.268.0066) | F: [303.268.0065](tel:303.268.0065) | [isaffer@sbiplaw.com](mailto:isaffer@sbiplaw.com)

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**From:** Todd Bates [<mailto:tbates@hilbornehawkin.com>]

**Sent:** Tuesday, November 08, 2016 1:55 PM

**To:** Ian Saffer <[ISaffer@sbiplaw.com](mailto:ISaffer@sbiplaw.com)>

**Subject:** Re: Premier / Dish - Opposition

Thanks Ian,

I am trying to speak with my client first. If I can connect with them today, I will be available to speak tomorrow. I will keep you posted.

Best,

Todd

**R. Todd Bates**

**Partner**

T. [714.283.1155](tel:714.283.1155) x1001

F. [714.283.1555](tel:714.283.1555)

[www.hilbornehawkin.com](http://www.hilbornehawkin.com)

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On Mon, Nov 7, 2016 at 8:50 AM, Ian Saffer <[ISaffer@sbiplaw.com](mailto:ISaffer@sbiplaw.com)> wrote:

Todd,

As you know, proceedings in the OLLO opposition have resumed. I'd like to set up a time to meet and confer regarding fact discovery scope and timing. Please let me know your availability for a call on Tuesday or Wednesday of this week. I'd suggest 3pm MT / 2pm PT on either day. Thank you. Regards,

Ian

**Ian L. Saffer**

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T: [303.268.0066](tel:303.268.0066) | F: [303.268.0065](tel:303.268.0065) | [isaffer@sbiplaw.com](mailto:isaffer@sbiplaw.com)

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**From:** Todd Bates [mailto:[tbates@hilbornehawkin.com](mailto:tbates@hilbornehawkin.com)]

**Sent:** Tuesday, September 27, 2016 1:52 PM

**To:** Ian Saffer <[ISaffer@sbiplaw.com](mailto:ISaffer@sbiplaw.com)>

**Subject:** Re: Premier / Dish - Opposition

Hi Ian,

Tomorrow afternoon works best for me. I look forward to speaking with you tomorrow at 3 pm your time.

Best,

Todd

**R. Todd Bates**

**Partner**

T. [714.283.1155](tel:714.283.1155) x1001

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# **EXHIBIT C**



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

Opposition No. 91209226 (Parent)

4 Opposition No. 91211213

- - - - -x

5 PREMIER SYSTEMS USA, INC.,

6 a California corporation,

7 Opposer/Counterclaim Registrant,

8 v.

9 DISH NETWORK LLC,

10 a Colorado limited liability company,

11 Applicant/Counterclaim Petitioner,

12 - - - - -x

13 April 28, 2016

14 9:10 a.m.

15  
16  
17 DEPOSITION of HAL PORET, an  
18 Expert Witness on behalf of DISH  
19 Network LLC, taken by Opposer/  
20 Counterclaim Registrant, held at the  
21 offices of White & Case, 1155 Avenue  
22 of the Americas, New York, New York,  
23 before Kathleen Piazza Luongo, a  
24 Notary Public of the State of  
25 New York.

<p style="text-align: right;">Page 30</p> <p>1 PORET</p> <p>2 would the fact that they would probably 09:35:06</p> <p>3 appear on the same stand in the same type 09:35:11</p> <p>4 of store be something to consider as far 09:35:18</p> <p>5 as proximity is concerned? 09:35:24</p> <p>6 A. It might be something to 09:35:25</p> <p>7 consider, but it's far more complicated 09:35:27</p> <p>8 than that because products that are 09:35:29</p> <p>9 completely different often appear in the 09:35:32</p> <p>10 same stores and often even near each 09:35:35</p> <p>11 other on -- on shelves. 09:35:39</p> <p>12 So it's, um, that might be 09:35:41</p> <p>13 something relevant to consider, but 09:35:46</p> <p>14 that's -- it's complicated -- it's a 09:35:49</p> <p>15 complicated thing. 09:35:56</p> <p>16 I mean, for instance, just to 09:35:57</p> <p>17 give the simplest example, you can be in 09:35:59</p> <p>18 a store that sells garbage bags and 09:36:03</p> <p>19 toothpaste and breakfast cereal that you 09:36:07</p> <p>20 could see within a few seconds of each 09:36:10</p> <p>21 other, but that doesn't make those 09:36:13</p> <p>22 proximate for the purposes of a confusion 09:36:15</p> <p>23 survey, and you can be in the checkout 09:36:17</p> <p>24 aisle of the grocery store and see, you 09:36:22</p> <p>25 know, breath mints and tabloid magazines 09:36:25</p>	<p style="text-align: right;">Page 32</p> <p>1 PORET</p> <p>2 registrations then I would say then that 09:37:56</p> <p>3 yes, literal, fiscal proximity is not -- 09:38:03</p> <p>4 is not really an issue because you can 09:38:13</p> <p>5 see what those relevant products and 09:38:16</p> <p>6 services are in an application and a 09:38:18</p> <p>7 registration and you can consider those 09:38:20</p> <p>8 things and how similar that makes the 09:38:25</p> <p>9 goods and the customers but you can't see 09:38:28</p> <p>10 from an application where something is 09:38:30</p> <p>11 going to be sitting on a shelf and so I 09:38:32</p> <p>12 don't think that's really gonna be a 09:38:35</p> <p>13 consideration in that context. 09:38:37</p> <p>14 Q. Okay. 09:38:40</p> <p>15 But in a -- when you are doing 09:38:40</p> <p>16 a consumer survey, those consumers are 09:38:43</p> <p>17 not aware of the list of goods and 09:38:46</p> <p>18 services that a trademark examiner is 09:38:49</p> <p>19 aware of; is that correct? 09:38:52</p> <p>20 A. Yes. 09:38:54</p> <p>21 Q. So they are dealing with a more 09:38:54</p> <p>22 real-world scenario where they're either 09:38:58</p> <p>23 encountering products on a shelf or 09:39:03</p> <p>24 they're viewing products on a screen or 09:39:06</p> <p>25 marks on a computer screen without the 09:39:12</p>
<p style="text-align: right;">Page 31</p> <p>1 PORET</p> <p>2 virtually next to each other, but that 09:36:28</p> <p>3 doesn't make those proximate in this 09:36:29</p> <p>4 sense. 09:36:32</p> <p>5 So that may be a relevant 09:36:32</p> <p>6 factor, but it's far from dispositive 09:36:35</p> <p>7 because of what I just explained. 09:36:38</p> <p>8 Q. Correct. So certainly -- 09:36:40</p> <p>9 MR. BATES: Well, strike that. 09:36:51</p> <p>10 Q. So would you agree that in the 09:36:58</p> <p>11 context of stores that offer a very broad 09:37:01</p> <p>12 offering of goods and/or services the 09:37:04</p> <p>13 physical proximity of items really 09:37:10</p> <p>14 doesn't have a direct correlation to 09:37:14</p> <p>15 proximity in the trademark sense? 09:37:18</p> <p>16 A. I mean, if we could assume that 09:37:24</p> <p>17 we are limiting our whole discussion here 09:37:28</p> <p>18 to standards for trademark office cases, 09:37:31</p> <p>19 as opposed to Federal Court litigations 09:37:34</p> <p>20 involving infringement allegations, that 09:37:38</p> <p>21 would definitely make it a lot easier 09:37:41</p> <p>22 because there are different standards and 09:37:43</p> <p>23 considerations, and if we can just assume 09:37:45</p> <p>24 we're limiting this whole discussion to 09:37:50</p> <p>25 issues involving applications and 09:37:54</p>	<p style="text-align: right;">Page 33</p> <p>1 PORET</p> <p>2 benefit of knowing that the list of goods 09:39:17</p> <p>3 and services that correspond to the mark; 09:39:19</p> <p>4 correct? 09:39:23</p> <p>5 A. Not really, because what the 09:39:25</p> <p>6 survey is doing is it's asking them to 09:39:27</p> <p>7 consider marks in connection with a 09:39:31</p> <p>8 certain type of product. 09:39:35</p> <p>9 So the survey is doing what it 09:39:40</p> <p>10 can to simulate exposure to the mark in 09:39:42</p> <p>11 the right product or service category, 09:39:44</p> <p>12 it's just not adding extraneous factors 09:39:47</p> <p>13 that are not part of the application, 09:39:51</p> <p>14 such as what does a package look like or 09:39:53</p> <p>15 literally where in a store is this 09:39:58</p> <p>16 sitting on a shelf. 09:40:01</p> <p>17 Q. Okay. 09:40:02</p> <p>18 What did you do, if anything, 09:40:03</p> <p>19 to make a determination that the products 09:40:04</p> <p>20 and services applied for in connection 09:40:10</p> <p>21 with the OLLO mark are not proximate to 09:40:15</p> <p>22 the goods offered in connection with the 09:40:18</p> <p>23 OLLOCLIP mark? 09:40:22</p> <p>24 A. I considered what the products 09:40:25</p> <p>25 and services offered in connection with 09:40:29</p>

<p style="text-align: right;">Page 34</p> <p>1 PORET</p> <p>2 what each mark are, at least based on the 09:40:33</p> <p>3 DISH applications, and formed an opinion 09:40:36</p> <p>4 based on my experience in, you know, the 09:40:42</p> <p>5 consumer products area and having done 09:40:46</p> <p>6 many hundreds of surveys of consumers, 09:40:49</p> <p>7 including among, you know, products like 09:40:53</p> <p>8 wireless plans and mobile phones and 09:40:56</p> <p>9 accessories, and based on all of that I 09:40:59</p> <p>10 looked at the overall situation and I 09:41:03</p> <p>11 said to myself, for the most part, 09:41:05</p> <p>12 someone who is going to sign up for a 09:41:09</p> <p>13 wireless service plan is as part of 09:41:12</p> <p>14 their evaluation and consideration of 09:41:17</p> <p>15 what wireless service plan to sign up 09:41:19</p> <p>16 for, they're unlikely to be reviewing a 09:41:22</p> <p>17 clip-on camera lens as part of that 09:41:27</p> <p>18 process and, likewise, someone who is 09:41:33</p> <p>19 trying to decide on buying a mobile 09:41:36</p> <p>20 phone, which also largely happens in 09:41:39</p> <p>21 connection with signing up for a wireless 09:41:41</p> <p>22 plan, is also unlikely to be considering a 09:41:43</p> <p>23 clip-on camera lens as part of that 09:41:49</p> <p>24 process. 09:41:53</p> <p>25 That doesn't mean they couldn't 09:41:54</p>	<p style="text-align: right;">Page 36</p> <p>1 PORET</p> <p>2 be very artificial and -- and far too 09:43:17</p> <p>3 suggestive, and given the availability of 09:43:27</p> <p>4 another format that could do a much more 09:43:30</p> <p>5 reliable job of accurately testing for 09:43:33</p> <p>6 confusion, I would deem the former method 09:43:37</p> <p>7 to be inappropriate in that context. 09:43:42</p> <p>8 Q. Okay. 09:43:48</p> <p>9 So I believe in your examples 09:43:49</p> <p>10 that you just gave with respect to your 09:43:57</p> <p>11 determination as to proximity you gave an 09:44:00</p> <p>12 example of a consumer signing up for a 09:44:04</p> <p>13 wireless service plan with the -- under 09:44:08</p> <p>14 the mark OLLO or purchasing a cellular 09:44:14</p> <p>15 phone with the -- under the mark OLLO, 09:44:21</p> <p>16 did you limit your assessment as to 09:44:27</p> <p>17 proximity to those two scenarios? 09:44:32</p> <p>18 A. No, the other one I mentioned 09:44:35</p> <p>19 is accessories and that was the other 09:44:37</p> <p>20 category in the survey, and in the world 09:44:39</p> <p>21 of mobile phone if accessories, which 09:44:43</p> <p>22 clues a lot of different things like, you 09:44:48</p> <p>23 know, chargers and cases and head phones 09:44:51</p> <p>24 and all kinds of things like that, for 09:44:54</p> <p>25 the most part my judgment similarly is 09:44:58</p>
<p style="text-align: right;">Page 35</p> <p>1 PORET</p> <p>2 stumble across one in the same store or 09:41:57</p> <p>3 that the same person couldn't buy a 09:42:00</p> <p>4 camera lens and a mobile phone, of course 09:42:02</p> <p>5 they could; but in terms of what you're 09:42:05</p> <p>6 simulating in the survey, which is the 09:42:09</p> <p>7 exposure to OLLO in a realistic context, 09:42:11</p> <p>8 it just strikes me based on my experience 09:42:17</p> <p>9 that the process of encountering the OLLO 09:42:20</p> <p>10 mark in connection with a wireless plan 09:42:24</p> <p>11 or a mobile phone or other accessories is 09:42:27</p> <p>12 not typically going to also involve 09:42:32</p> <p>13 consideration of a clip-on camera lens. 09:42:35</p> <p>14 And, therefore, were you to do 09:42:39</p> <p>15 a survey where you take 100 percent of 09:42:41</p> <p>16 the respondents who are being asked to 09:42:45</p> <p>17 consider a wireless service plan called 09:42:48</p> <p>18 OLLO, for instance, and you also now tell 09:42:53</p> <p>19 them please consider a clip-on camera 09:42:55</p> <p>20 lens called OLLOCLIP, that would not be 09:42:58</p> <p>21 typical or realistic or representative of 09:43:01</p> <p>22 what happens in the marketplace. 09:43:06</p> <p>23 So that's what makes me say 09:43:08</p> <p>24 they're not proximate enough for that 09:43:11</p> <p>25 kind of survey to be realistic. It would 09:43:14</p>	<p style="text-align: right;">Page 37</p> <p>1 PORET</p> <p>2 that there's not -- there's not great 09:45:00</p> <p>3 proximity between those and a -- a 09:45:08</p> <p>4 clip-on camera lens. 09:45:11</p> <p>5 So, again, for the most part I 09:45:13</p> <p>6 think the typical person who is looking 09:45:16</p> <p>7 for some mobile phone accessory is not 09:45:19</p> <p>8 considering a clip-on camera lens in as 09:45:23</p> <p>9 part of their consideration of a mobile 09:45:26</p> <p>10 phone accessory. 09:45:30</p> <p>11 It's not to say it could never 09:45:32</p> <p>12 happen. It's not to say, you know, 09:45:34</p> <p>13 there's no consumer who goes to a store 09:45:38</p> <p>14 and is looking at a couple of different 09:45:40</p> <p>15 types of accessories. Again, though, 09:45:43</p> <p>16 it's not -- it's not typical or 09:45:47</p> <p>17 representative to think that of all 09:45:50</p> <p>18 people who are going to come across OLLO 09:45:56</p> <p>19 phone accessories that it makes sense to 09:45:58</p> <p>20 show every one of those people a clip-on 09:46:03</p> <p>21 camera lens to consider in connection 09:46:07</p> <p>22 with that. 09:46:09</p> <p>23 Q. Do you know if there is any 09:46:19</p> <p>24 actual meaning to the term OLLO? 09:46:20</p> <p>25 A. I don't know. 09:46:22</p>

<p style="text-align: right;">Page 46</p> <p>1 PORET</p> <p>2 -- I don't know DISH's exact intention of 09:56:15</p> <p>3 what they plan to offer and how they plan 09:56:18</p> <p>4 to do that. 09:56:22</p> <p>5 Q. Well, they have filed an intent 09:56:23</p> <p>6 to use mark that lists all of their goods 09:56:24</p> <p>7 and services they intend to use; correct? 09:56:27</p> <p>8 A. Yes. 09:56:29</p> <p>9 Q. Okay. 09:56:30</p> <p>10 So and I believe we had a 09:56:30</p> <p>11 discussion earlier about that's what we 09:56:32</p> <p>12 go by as far as our determination as to 09:56:34</p> <p>13 whether or not these goods or service are 09:56:37</p> <p>14 proximate is what DISH has included in 09:56:40</p> <p>15 their application; correct? 09:56:43</p> <p>16 A. Yes. 09:56:44</p> <p>17 Q. Okay. 09:56:49</p> <p>18 So when I'm asking you what is 09:56:50</p> <p>19 their intended use that's what I'm asking 09:56:52</p> <p>20 you about, what is your understanding of 09:56:55</p> <p>21 what they have applied for? 09:56:56</p> <p>22 A. Well, I don't want to try to 09:56:57</p> <p>23 summarize what is fairly lengthy and in a 09:57:01</p> <p>24 bunch of different applications that I 09:57:04</p> <p>25 don't have sitting in front of me, um, so 09:57:06</p>	<p style="text-align: right;">Page 48</p> <p>1 PORET</p> <p>2 when products are not proximate? 09:58:41</p> <p>3 A. I would say that that is a 09:58:44</p> <p>4 factor in considering when an Eveready 09:58:48</p> <p>5 survey is appropriate to use and I think 09:58:52</p> <p>6 the non-proximity of the products weighs 09:58:55</p> <p>7 in favor of an Eveready, but the analysis 09:59:02</p> <p>8 is not that simple. 09:59:06</p> <p>9 Q. Okay. 09:59:07</p> <p>10 What are some of the other 09:59:07</p> <p>11 factors? 09:59:09</p> <p>12 A. Um, it's really a matter of -- 09:59:09</p> <p>13 well, so one other factor is whether the 09:59:17</p> <p>14 question in an Eveready survey will work 09:59:25</p> <p>15 to get reliable answers that you can 09:59:28</p> <p>16 actually understand what the respondent 09:59:30</p> <p>17 is thinking of, and there being at least 09:59:32</p> <p>18 some notable difference between the 09:59:43</p> <p>19 products helps make that work. 09:59:44</p> <p>20 For instance, if both parties 09:59:46</p> <p>21 make potato chips, in an Eveready survey 09:59:50</p> <p>22 it wouldn't really work to say I'm going 09:59:54</p> <p>23 to show you a mark OLLO for potato chips, 09:59:56</p> <p>24 do you think that company makes any other 10:00:00</p> <p>25 products, because if they say potato 10:00:02</p>
<p style="text-align: right;">Page 47</p> <p>1 PORET</p> <p>2 I can't read it; but what I can tell you 09:57:09</p> <p>3 is my, what I condensed their application 09:57:12</p> <p>4 categories down to, to try to represent 09:57:16</p> <p>5 the major parts of it in a survey was 09:57:20</p> <p>6 wireless service plans, mobile phones and 09:57:25</p> <p>7 mobile phone accessories. 09:57:27</p> <p>8 Q. And so those three categories 09:57:29</p> <p>9 were the categories that you essentially 09:57:32</p> <p>10 distilled from the goods and services 09:57:34</p> <p>11 that were listed in the OLLO 09:57:37</p> <p>12 applications; is that correct? 09:57:40</p> <p>13 A. Yes, not to suggest that those 09:57:41</p> <p>14 are the only things in the applications, 09:57:44</p> <p>15 but that's what I distilled from it to 09:57:47</p> <p>16 address the services or products that 09:57:50</p> <p>17 seemed to have the greatest possible 09:57:53</p> <p>18 connection to -- to OLLOCLIP. 09:57:56</p> <p>19 Q. And this Eveready model that 09:58:01</p> <p>20 you used in your survey, I believe, would 09:58:12</p> <p>21 you -- 09:58:22</p> <p>22 MR. BATES: Strike that. 09:58:22</p> <p>23 Q. Would you agree that the 09:58:24</p> <p>24 Eveready model that you employed in your 09:58:25</p> <p>25 survey is the appropriate model to use 09:58:30</p>	<p style="text-align: right;">Page 49</p> <p>1 PORET</p> <p>2 chips that doesn't really help discern 10:00:05</p> <p>3 who they are thinking of. 10:00:07</p> <p>4 Q. Right. 10:00:10</p> <p>5 A. Whereas here, if you show 10:00:10</p> <p>6 somebody or -- if you say to somebody I'm 10:00:13</p> <p>7 showing you the term OLLO for a mobile 10:00:14</p> <p>8 phone service plan, do you think that 10:00:16</p> <p>9 company makes any other products and they 10:00:18</p> <p>10 say cameras or lenses or something that 10:00:20</p> <p>11 points to a different type of product, 10:00:24</p> <p>12 that's much easier to reveal confusion, 10:00:26</p> <p>13 so that is a factor as well. 10:00:31</p> <p>14 And then, while this is not, 10:00:34</p> <p>15 you know, the dispositive factor, I do 10:00:36</p> <p>16 also consider in the Eveready survey to 10:00:40</p> <p>17 what extent do I want to and can I reach 10:00:45</p> <p>18 at least some meaningful group of people 10:00:48</p> <p>19 who have some awareness of the mark at 10:00:52</p> <p>20 issue, which in this case would be 10:00:56</p> <p>21 OLLOCLIP. 10:00:58</p> <p>22 So it's not that OLLOCLIP needs 10:00:59</p> <p>23 to be a well-known mark, but I was 10:01:03</p> <p>24 considering whether I have the ability to 10:01:07</p> <p>25 at least reach at least a substantial 10:01:11</p>

<p style="text-align: right;">Page 50</p> <p>1 PORET</p> <p>2 group of people who will have previously 10:01:13</p> <p>3 heard of the OLLOCLIP product such that 10:01:16</p> <p>4 when I show them the mark OLLO, as DISH 10:01:20</p> <p>5 intends to use it, they would have the 10:01:24</p> <p>6 potential to make that connection to 10:01:27</p> <p>7 OLLOCLIP if it really was a confusing 10:01:29</p> <p>8 situation, and that's another 10:01:33</p> <p>9 consideration. 10:01:35</p> <p>10 Q. Okay. 10:01:35</p> <p>11 So the considerations that I 10:01:36</p> <p>12 think that you have mentioned are 10:01:38</p> <p>13 considerations of proximity, which we 10:01:41</p> <p>14 were discussing, and then considerations 10:01:45</p> <p>15 of I guess whether or not the -- or 10:01:50</p> <p>16 whether or not the senior mark is well 10:02:05</p> <p>17 known. Did you mention another 10:02:07</p> <p>18 consideration? 10:02:09</p> <p>19 A. Um, well, that what you just 10:02:11</p> <p>20 said is not at all an accurate, you know, 10:02:18</p> <p>21 recitation of what I said about how well 10:02:23</p> <p>22 known the mark is, because I didn't say 10:02:25</p> <p>23 whether the senior mark is well known and 10:02:28</p> <p>24 that's not an accurate way to put it; but 10:02:30</p> <p>25 the other consideration was whether the 10:02:33</p>	<p style="text-align: right;">Page 52</p> <p>1 PORET</p> <p>2 Q. So it seems to me that the 10:03:29</p> <p>3 question of whether or not the types of 10:03:37</p> <p>4 open-ended questions in an Eveready 10:03:41</p> <p>5 survey can elicit a meaningful response 10:03:44</p> <p>6 from a survey respondent have to do with 10:03:47</p> <p>7 those other two considerations that you 10:03:50</p> <p>8 mentioned, which were I believe proximity 10:03:53</p> <p>9 and notoriety of the mark. 10:03:57</p> <p>10 A. Well, I understand what you're 10:04:04</p> <p>11 thinking, but what I said before about -- 10:04:07</p> <p>12 I didn't say a meaningful response, I 10:04:11</p> <p>13 said this third category of consideration 10:04:15</p> <p>14 is whether responses will be ambiguous 10:04:17</p> <p>15 and not susceptible to interpretation; 10:04:22</p> <p>16 and that does, I agree with you, that is 10:04:25</p> <p>17 related to the proximity -- not so much 10:04:27</p> <p>18 the proximity but it is related to what 10:04:31</p> <p>19 the products are and whether they are 10:04:33</p> <p>20 different. 10:04:35</p> <p>21 For instance, the original 10:04:36</p> <p>22 Eveready survey worked so well because 10:04:37</p> <p>23 one company made batteries and the other 10:04:40</p> <p>24 made a lamp; so you could show a lamp and 10:04:43</p> <p>25 say what else does this company make, and 10:04:45</p>
<p style="text-align: right;">Page 51</p> <p>1 PORET</p> <p>2 types of questions that you'd ask in an 10:02:35</p> <p>3 Eveready format, which are largely 10:02:37</p> <p>4 open-ended, are capable of revealing 10:02:40</p> <p>5 confusion or whether open-ended answers 10:02:43</p> <p>6 are doomed to be fairly ambiguous and 10:02:45</p> <p>7 hard to tell which parties they are 10:02:48</p> <p>8 thinking of. 10:02:51</p> <p>9 Q. Well, wouldn't you say to that 10:02:51</p> <p>10 particular aspect, whether or not they 10:02:53</p> <p>11 are capable of eliciting some meaningful 10:02:55</p> <p>12 response, is based on those other two 10:02:59</p> <p>13 factors, proximity and whether or not the 10:03:01</p> <p>14 consumer has access to that information 10:03:04</p> <p>15 in their, you know, cognitive space, 10:03:06</p> <p>16 whether they have access to any knowledge 10:03:09</p> <p>17 of the senior mark. 10:03:11</p> <p>18 MR. SAFFER: Objection to form. 10:03:15</p> <p>19 A. Well, you're asking two things 10:03:16</p> <p>20 at once so. 10:03:18</p> <p>21 Q. So I guess first proximity. 10:03:19</p> <p>22 The only reason why I'm asking 10:03:21</p> <p>23 two things at once is because -- 10:03:24</p> <p>24 MR. BATES: Well, never mind. 10:03:26</p> <p>25 Strike that. 10:03:27</p>	<p style="text-align: right;">Page 53</p> <p>1 PORET</p> <p>2 if they say batteries it's clear that 10:04:47</p> <p>3 people are confused. 10:04:50</p> <p>4 If both parties made lamps that 10:04:52</p> <p>5 wouldn't have worked very well. 10:04:55</p> <p>6 So what I was talking about is 10:04:57</p> <p>7 whether answers in an Eveready survey 10:04:59</p> <p>8 would be clear and unambiguous. 10:05:02</p> <p>9 What you're bringing in is part 10:05:06</p> <p>10 of the issue of, you know, how well known 10:05:08</p> <p>11 the mark is and you're suggesting an 10:05:12</p> <p>12 answer would not be meaningful if 10:05:17</p> <p>13 somebody doesn't know the mark, and that 10:05:19</p> <p>14 isn't true because if in the real world 10:05:22</p> <p>15 somebody sees a service called OLLO and 10:05:24</p> <p>16 they're not confused, even if the reason 10:05:28</p> <p>17 they're not confused is they have never 10:05:31</p> <p>18 heard of OLLOCLIP they're still not 10:05:35</p> <p>19 confused and that's still real and 10:05:37</p> <p>20 meaningful. 10:05:40</p> <p>21 So if you ask somebody a 10:05:40</p> <p>22 question about who do they think makes 10:05:42</p> <p>23 this OLLO product and they say I don't 10:05:44</p> <p>24 know or they have no idea, that's a 10:05:47</p> <p>25 meaningful answer even if it's because 10:05:49</p>

<p style="text-align: right;">Page 54</p> <p>1 PORET</p> <p>2 even if part of the reason for the lack 10:05:52</p> <p>3 of confusion is lack of awareness. 10:05:53</p> <p>4 Q. Yes, okay, I understand that. 10:05:58</p> <p>5 But isn't it true that the lack 10:06:01</p> <p>6 of awareness of a potential survey 10:06:06</p> <p>7 participant largely has to do with how 10:06:11</p> <p>8 you define the universe of survey 10:06:15</p> <p>9 participants; correct? 10:06:18</p> <p>10 A. Um, it is -- it does have a 10:06:20</p> <p>11 relationship to that. 10:06:23</p> <p>12 Q. I mean certainly you could -- 10:06:24</p> <p>13 you could in a different type of survey 10:06:26</p> <p>14 you could define the universe of survey 10:06:30</p> <p>15 participants as anyone who knows what the 10:06:32</p> <p>16 products are that are offered by 10:06:39</p> <p>17 OLLOCLIP; correct? 10:06:43</p> <p>18 A. Well, that wouldn't meet the 10:06:48</p> <p>19 standards for what is accepted as the 10:06:50</p> <p>20 proper universe in a confusion survey. 10:06:52</p> <p>21 Q. Well, in an Eveready survey? 10:06:55</p> <p>22 A. No, in a confusion survey. 10:06:57</p> <p>23 But what you are talking about 10:07:00</p> <p>24 is very similar to something that I did 10:07:01</p> <p>25 do here, which is I focused in on the 10:07:06</p>	<p style="text-align: right;">Page 56</p> <p>1 PORET</p> <p>2 because I didn't simply do a survey that 10:08:23</p> <p>3 shows no confusion because there's a lack 10:08:27</p> <p>4 of awareness of the OLLOCLIP mark. I did 10:08:31</p> <p>5 a survey within a survey that let's you 10:08:34</p> <p>6 know what the level of confusion is among 10:08:36</p> <p>7 the -- this subset that knows the 10:08:39</p> <p>8 OLLOCLIP mark and, um, so it completely 10:08:43</p> <p>9 addresses that issue. 10:08:46</p> <p>10 Q. Okay. 10:08:48</p> <p>11 MR. BATES: So I understand 10:08:50</p> <p>12 that point. I want to just -- and I 10:08:50</p> <p>13 will get to that -- I want to just 10:08:53</p> <p>14 finish up a couple of things that I 10:08:56</p> <p>15 want to understand about proximity. 10:08:59</p> <p>16 I don't want to belabor it too 10:09:03</p> <p>17 much, I just want to make sure that 10:09:05</p> <p>18 I'm clear on it. 10:09:07</p> <p>19 So I'm going to mark as Exhibit 10:09:14</p> <p>20 5 Applicant's Responses to Opposer's 10:09:32</p> <p>21 First Set of Interrogatories Nos. 1 10:09:36</p> <p>22 through 38. 10:09:38</p> <p>23 (Whereupon, the above-mentioned 10:09:32</p> <p>24 Applicant's Responses to Opposer's 10:09:32</p> <p>25 First Set of Interrogatories Nos. 1 10:09:36</p>
<p style="text-align: right;">Page 55</p> <p>1 PORET</p> <p>2 subset of the universe that is most 10:07:09</p> <p>3 likely to be aware of the OLLOCLIP mark 10:07:11</p> <p>4 by targeting people who are iPhone owners 10:07:15</p> <p>5 and have an interest in photography and 10:07:18</p> <p>6 then I also, at the end of the questions, 10:07:20</p> <p>7 survey, asked the question to determine 10:07:23</p> <p>8 who was aware of the OLLOCLIP mark. 10:07:25</p> <p>9 So what I did is regardless of 10:07:29</p> <p>10 how well known OLLOCLIP is generally, I 10:07:32</p> <p>11 achieved a subgroup within the survey 10:07:36</p> <p>12 that are people who are iPhone owners who 10:07:41</p> <p>13 have an interest in photography and who 10:07:44</p> <p>14 know the -- and have heard the OLLOCLIP 10:07:47</p> <p>15 mark; so even if you wanted to just 10:07:49</p> <p>16 define the universe as people who are 10:07:52</p> <p>17 aware of the OLLOCLIP mark, I have 10:07:54</p> <p>18 created a subgroup within the survey that 10:07:56</p> <p>19 is that universe; it's a hundred people 10:07:59</p> <p>20 in the survey who are iPhone owners with 10:08:02</p> <p>21 an interest in photography who know the 10:08:07</p> <p>22 OLLOCLIP product. 10:08:09</p> <p>23 So in other words I've 10:08:14</p> <p>24 completely addressed any issue involving 10:08:16</p> <p>25 how well known the OLLOCLIP mark is 10:08:20</p>	<p style="text-align: right;">Page 57</p> <p>1 PORET</p> <p>2 through 38 was marked Poret Exhibit 5 10:09:38</p> <p>3 for identification.) 10:09:55</p> <p>4 MR. BATES: And I don't want 10:09:55</p> <p>5 you to get too nervous that we are 10:09:56</p> <p>6 going to go through this whole thing, 10:09:59</p> <p>7 but there are a couple of spots that 10:10:01</p> <p>8 I wanted you to look at because I 10:10:02</p> <p>9 believe you were hesitant to start 10:10:05</p> <p>10 reciting the intended goods or 10:10:07</p> <p>11 products or services intended to be 10:10:15</p> <p>12 offered in connection with the OLLO 10:10:18</p> <p>13 marks and there are some lists of 10:10:20</p> <p>14 that stuff here. 10:10:23</p> <p>15 CONTINUED EXAMINATION BY MR. BATES: 10:10:28</p> <p>16 Q. So taking a look at Exhibit 5, 10:10:28</p> <p>17 if you can turn to page 6, it should be 10:10:30</p> <p>18 Interrogatory No. 4 and the interrogatory 10:10:41</p> <p>19 states: "Describe in detail all goods 10:10:49</p> <p>20 and/or services ever promoted, offered 10:10:52</p> <p>21 sold, or rendered, or intended to be 10:10:54</p> <p>22 promoted, offered, sold, or rendered, by 10:10:57</p> <p>23 Applicant or its affiliates, licensees, 10:11:00</p> <p>24 or authorized users, in connection with 10:11:03</p> <p>25 Applicant's Mark in the U.S." 10:11:05</p>

<p style="text-align: right;">Page 66</p> <p>1 PORET</p> <p>2 through to make a determination that the 10:21:53</p> <p>3 OLLOCLIP products are not sufficiently 10:21:57</p> <p>4 proximate to the goods and services that 10:22:02</p> <p>5 are intended to be offered in connection 10:22:06</p> <p>6 with the OLLO mark as to warrant the use 10:22:08</p> <p>7 of an Eveready-type survey as you stated 10:22:13</p> <p>8 in the beginning of your report. 10:22:18</p> <p>9 So my question to you then is, 10:22:19</p> <p>10 if this is out of the scope -- well, my 10:22:21</p> <p>11 question to you is then is this not 10:22:24</p> <p>12 relevant, this information that is in the 10:22:29</p> <p>13 list of goods and services for the OLLO 10:22:34</p> <p>14 mark, is this not relevant to making a 10:22:37</p> <p>15 determination of proximity to the goods 10:22:39</p> <p>16 that are offered in connection with the 10:22:44</p> <p>17 OLLOCLIP mark? 10:22:47</p> <p>18 A. It's not that it's irrelevant 10:22:48</p> <p>19 but it's -- there's never been any 10:22:52</p> <p>20 dispute that, in my mind, that the 10:22:54</p> <p>21 OLLOCLIP product is for a mobile phone 10:23:00</p> <p>22 and that some of these services are 10:23:02</p> <p>23 related to mobile phones, that's an 10:23:03</p> <p>24 explicit part of my survey; so, you know, 10:23:05</p> <p>25 I've already written the whole report 10:23:08</p>	<p style="text-align: right;">Page 68</p> <p>1 PORET</p> <p>2 phones and handheld devices." 10:24:34</p> <p>3 So would this be where you or 10:24:40</p> <p>4 would this be generally where you came up 10:24:45</p> <p>5 with the category of survey participants 10:24:47</p> <p>6 that fell within the accessories group? 10:24:52</p> <p>7 MR. SAFFER: Objection to form. 10:24:56</p> <p>8 A. This would be -- these are some 10:24:57</p> <p>9 of the things that they're applying to 10:24:59</p> <p>10 register that form the basis for having a 10:25:02</p> <p>11 mobile phone accessories category in the 10:25:04</p> <p>12 survey. 10:25:07</p> <p>13 Q. And so do you see where it says 10:25:08</p> <p>14 "carrying cases" there in paragraph 8? 10:25:10</p> <p>15 A. Yes. 10:25:13</p> <p>16 Q. And would you consider it 10:25:14</p> <p>17 proximate to Olloclip's list of goods 10:25:21</p> <p>18 that also contains the words "carrying 10:25:26</p> <p>19 cases"? 10:25:29</p> <p>20 A. Um, yes, I would consider 10:25:31</p> <p>21 carrying cases and carrying cases to be 10:25:34</p> <p>22 proximate. 10:25:38</p> <p>23 Q. Right. 10:25:38</p> <p>24 And I understand that based on 10:25:39</p> <p>25 the tone of your response that that is 10:25:41</p>
<p style="text-align: right;">Page 67</p> <p>1 PORET</p> <p>2 acknowledging that the OLLOCLIP is 10:23:11</p> <p>3 something for a mobile phone and that the 10:23:13</p> <p>4 OLLO services that DISH is applying for 10:23:18</p> <p>5 are related to mobile phones. 10:23:21</p> <p>6 So what you're doing in asking 10:23:23</p> <p>7 me these questions is I don't -- I mean, 10:23:25</p> <p>8 you're just asking me to state some 10:23:30</p> <p>9 completely obvious facts that I've 10:23:32</p> <p>10 already made clear are the basis for my 10:23:34</p> <p>11 report, so that's why I say it's kind of 10:23:38</p> <p>12 going beyond -- 10:23:40</p> <p>13 Q. Okay. 10:23:42</p> <p>14 Well, let's go to paragraph 8, 10:23:42</p> <p>15 numbered paragraph 8 of the response to 10:23:50</p> <p>16 Interrogatory No. 4. So maybe this will 10:23:52</p> <p>17 be something that's within the scope. 10:24:04</p> <p>18 This one says, again, it's 10:24:10</p> <p>19 goods, "Accessories for mobile phones, 10:24:15</p> <p>20 namely, batteries; battery chargers; 10:24:17</p> <p>21 electric cigarette lighter adapters for 10:24:20</p> <p>22 land vehicles; hands-free headsets for 10:24:24</p> <p>23 mobile phones and handheld devices; 10:24:27</p> <p>24 carrying cases and belt clips for 10:24:30</p> <p>25 electronic equipment, namely, mobile 10:24:32</p>	<p style="text-align: right;">Page 69</p> <p>1 PORET</p> <p>2 very obvious. I'm only belaboring the 10:25:43</p> <p>3 point because it seems to me in my mind 10:25:48</p> <p>4 there's a discrepancy between how 10:25:50</p> <p>5 obviously these are closely related 10:25:54</p> <p>6 versus your finding that they are so 10:25:57</p> <p>7 obviously not proximate that you can't 10:26:01</p> <p>8 possibly put the two marks in front of a 10:26:03</p> <p>9 survey participant and, you know, expect 10:26:07</p> <p>10 a, I said meaningful response, I forgot 10:26:14</p> <p>11 what you said that was different from 10:26:19</p> <p>12 that, but so my question is why does that 10:26:22</p> <p>13 not -- the fact that those are identical 10:26:25</p> <p>14 in the list of goods and services for 10:26:28</p> <p>15 both marks, the identical goods are 10:26:30</p> <p>16 listed, and why does that not translate 10:26:36</p> <p>17 into proximity with respect to the 10:26:39</p> <p>18 survey? 10:26:42</p> <p>19 MR. SAFFER: Objection to form. 10:26:43</p> <p>20 A. That's not really an accurate 10:26:45</p> <p>21 way to put it. 10:26:49</p> <p>22 The issue is, you know, if you 10:26:50</p> <p>23 have a huge number of goods and services 10:26:53</p> <p>24 and you can find, you know, one little 10:26:57</p> <p>25 point of proximity, that certainly 10:27:01</p>

<p style="text-align: right;">Page 70</p> <p>1 PORET</p> <p>2 wouldn't justify doing a survey that 10:27:06</p> <p>3 where you show these two things together 10:27:09</p> <p>4 but covers everything. 10:27:12</p> <p>5 So yes, maybe you could do a 10:27:15</p> <p>6 survey that is limited to nothing but 10:27:17</p> <p>7 carrying cases and, say, decide carrying 10:27:19</p> <p>8 cases are obviously proximate to carrying 10:27:23</p> <p>9 cases and on that one thing you could 10:27:27</p> <p>10 then say those are proximate; but that 10:27:29</p> <p>11 wouldn't justify doing a survey that 10:27:31</p> <p>12 covers all of those other things which 10:27:35</p> <p>13 are not proximate. 10:27:37</p> <p>14 What you have here is a 10:27:38</p> <p>15 situation that the large, large majority 10:27:42</p> <p>16 of what is at issue here is not proximate 10:27:44</p> <p>17 and you could basically scrap all of that 10:27:46</p> <p>18 and do a survey that covers only the 10:27:50</p> <p>19 littlest area of overlap or you can do a 10:27:54</p> <p>20 survey that is actually reliable and 10:28:00</p> <p>21 applicable to all of it. 10:28:03</p> <p>22 So that's -- that's the answer 10:28:04</p> <p>23 that I've been able to do a survey that 10:28:07</p> <p>24 gives a meaningful and reliable answer 10:28:11</p> <p>25 with respect to the big picture and all 10:28:13</p>	<p style="text-align: right;">Page 72</p> <p>1 PORET</p> <p>2 And, like I said before, it's not so 10:29:27</p> <p>3 black and white, you know, there are 10:29:30</p> <p>4 shades of proximity. 10:29:32</p> <p>5 Q. So you have done lots of 10:29:34</p> <p>6 surveys and market research in the realm 10:29:39</p> <p>7 of mobile devices and service plans and 10:29:54</p> <p>8 electronics; correct? 10:30:00</p> <p>9 A. Yes. 10:30:01</p> <p>10 Q. Okay. 10:30:03</p> <p>11 So you're fairly knowledgeable 10:30:03</p> <p>12 as to the universe of mobile phone 10:30:06</p> <p>13 accessories that are out there? 10:30:11</p> <p>14 A. Yes. 10:30:13</p> <p>15 Q. Okay. 10:30:14</p> <p>16 So tell me what some of those 10:30:14</p> <p>17 things are. 10:30:17</p> <p>18 A. There's cases, there's these 10:30:17</p> <p>19 battery packs, there are all kinds of 10:30:20</p> <p>20 things for listening to audio, you know, 10:30:24</p> <p>21 headphones, in-ear buds, over-the-ear 10:30:27</p> <p>22 headphones, there are car chargers, there 10:30:32</p> <p>23 are chargers to be plugged in inside and 10:30:36</p> <p>24 there are chargers that are just 10:30:39</p> <p>25 basically connected to USB ports, um, 10:30:42</p>
<p style="text-align: right;">Page 71</p> <p>1 PORET</p> <p>2 of these things, um, and the fact that 10:28:15</p> <p>3 you can go through and find one point of 10:28:20</p> <p>4 commonality or proximity doesn't in any 10:28:23</p> <p>5 way make the whole collection of products 10:28:27</p> <p>6 and services that are at issue proximate 10:28:29</p> <p>7 and it certainly doesn't make any of the 10:28:32</p> <p>8 many specific other things like wireless 10:28:34</p> <p>9 plans or mobile phones proximate. 10:28:38</p> <p>10 Q. Well, I understand that it's 10:28:42</p> <p>11 your position that mobile phones are not 10:28:43</p> <p>12 proximate to -- 10:28:47</p> <p>13 MR. BATES: Strike that. 10:28:50</p> <p>14 Q. I understand that it is your 10:28:51</p> <p>15 position that somehow mobile phone 10:28:52</p> <p>16 accessories are not necessarily proximate 10:28:57</p> <p>17 to each other; is that correct? 10:29:03</p> <p>18 MR. SAFFER: Can you read that 10:29:17</p> <p>19 back, please. 10:29:18</p> <p>20 (The requested portion of the 10:29:20</p> <p>21 record was read.) 10:29:21</p> <p>22 MR. SAFFER: Objection to form. 10:29:21</p> <p>23 A. I think that's correct that 10:29:22</p> <p>24 they are not necessarily proximate to 10:29:23</p> <p>25 each other, some are and some are not. 10:29:25</p>	<p style="text-align: right;">Page 73</p> <p>1 PORET</p> <p>2 there are what's sometimes called glass 10:30:53</p> <p>3 that's put over the front to protect the 10:30:56</p> <p>4 screen. 10:30:59</p> <p>5 There are -- there are cases 10:31:00</p> <p>6 that are stands that help tablets stand 10:31:05</p> <p>7 up. In some cases there are keyboards. 10:31:11</p> <p>8 I don't know, that's mainly what's coming 10:31:18</p> <p>9 to mind at the moment. 10:31:20</p> <p>10 MR. SAFFER: Todd, when you get 10:31:22</p> <p>11 to a good point let's take a five- 10:31:23</p> <p>12 minute break. 10:31:26</p> <p>13 MR. BATES: Sure. We can take 10:31:26</p> <p>14 it now. 10:31:28</p> <p>15 MR. SAFFER: Okay. Thanks. 10:31:29</p> <p>16 (Whereupon, a brief recess was 10:31:29</p> <p>17 taken.) 10:40:03</p> <p>18 MR. BATES: Can you please read 10:40:03</p> <p>19 back the last question and answer. 10:40:05</p> <p>20 (The requested portion of the 10:40:05</p> <p>21 record was read.) 10:41:03</p> <p>22 MR. BATES: Okay. 10:41:03</p> <p>23 CONTINUED EXAMINATION BY MR. BATES: 10:41:03</p> <p>24 Q. Now, I noticed in your response 10:41:09</p> <p>25 you left out clip-on camera lenses. Have 10:41:17</p>



<p style="text-align: right;">Page 74</p> <p>1 PORET</p> <p>2 you been trained to not mention that with 10:41:22</p> <p>3 respect to mobile phone accessories? 10:41:25</p> <p>4 A. No. 10:41:27</p> <p>5 Q. Okay, it just didn't come to 10:41:28</p> <p>6 mind? 10:41:30</p> <p>7 A. Right. 10:41:31</p> <p>8 Q. Or do you not consider that a 10:41:33</p> <p>9 mobile phone accessory? 10:41:35</p> <p>10 A. I think that's a matter of 10:41:37</p> <p>11 semantics. I think that can be forced 10:41:39</p> <p>12 within the definition of accessory as it 10:41:42</p> <p>13 goes along with it, but since it's a 10:41:45</p> <p>14 pretty substantial device on its own it 10:41:48</p> <p>15 doesn't really -- that doesn't seem the 10:41:51</p> <p>16 most natural way for me to talk about it. 10:41:55</p> <p>17 I mean I guess does somebody 10:41:58</p> <p>18 who owns a camera and buys a lens for it 10:42:01</p> <p>19 think of a lens as an accessory? I 10:42:05</p> <p>20 wouldn't personally think of it that way. 10:42:08</p> <p>21 Q. Would they think of it as a 10:42:10</p> <p>22 camera? 10:42:12</p> <p>23 A. No, they would think of it as a 10:42:12</p> <p>24 lens. I think they would just consider a 10:42:14</p> <p>25 lens something that's too substantive to 10:42:16</p>	<p style="text-align: right;">Page 76</p> <p>1 PORET</p> <p>2 not a good question. I don't even 10:44:03</p> <p>3 know if it is a question. 10:44:07</p> <p>4 MR. SAFFER: Then I won't have 10:44:07</p> <p>5 to object to it. Good. 10:44:08</p> <p>6 Q. My question is, what's my 10:44:10</p> <p>7 question? 10:44:13</p> <p>8 What is the difference in your 10:44:24</p> <p>9 mind between the accessories that you 10:44:26</p> <p>10 freely listed previously and the one that 10:44:28</p> <p>11 you noticeably left out, which was 10:44:32</p> <p>12 clip-on lenses? 10:44:40</p> <p>13 A. Well, first of all, there is 10:44:42</p> <p>14 some -- there is some difference in that 10:44:46</p> <p>15 most of these other things are things 10:44:50</p> <p>16 that just make your phone usable as 10:44:52</p> <p>17 opposed to something that is adding on a 10:44:57</p> <p>18 completely new or different element to 10:45:00</p> <p>19 the phone. 10:45:03</p> <p>20 So I do think there is some 10:45:04</p> <p>21 difference but I think that's even 10:45:07</p> <p>22 missing the point because I'm not saying 10:45:09</p> <p>23 all of those accessories belong together 10:45:12</p> <p>24 and a clip-on camera lens is different. 10:45:14</p> <p>25 You know, I mentioned a battery 10:45:17</p>
<p style="text-align: right;">Page 75</p> <p>1 PORET</p> <p>2 be called an accessory. 10:42:22</p> <p>3 I'm not saying that can't fit 10:42:26</p> <p>4 within a definition of accessory as 10:42:28</p> <p>5 something that goes along with something, 10:42:31</p> <p>6 I'm just saying that doesn't -- it's not 10:42:33</p> <p>7 something that for me would spring to 10:42:36</p> <p>8 mind as an accessory. 10:42:37</p> <p>9 Q. I'm just trying to get at, I 10:42:39</p> <p>10 know you raised your view that in the 10:42:41</p> <p>11 long list of goods and services that are 10:42:47</p> <p>12 applied for in connection with the OLLO 10:42:51</p> <p>13 mark that there's a very limited few or 10:42:56</p> <p>14 maybe just carrying cases or cases that 10:43:02</p> <p>15 is proximate and therefore, you know, you 10:43:10</p> <p>16 would have to do a separate survey just 10:43:14</p> <p>17 devoted to that one aspect to, you know, 10:43:17</p> <p>18 to make that relevant. 10:43:20</p> <p>19 My question as to accessories 10:43:22</p> <p>20 and why you couldn't naturally consider a 10:43:34</p> <p>21 lens that actually clips onto a mobile 10:43:38</p> <p>22 device to enhance the native lens that's 10:43:43</p> <p>23 in the mobile device as an accessory has 10:43:49</p> <p>24 to do with why that is not proximate or -- 10:43:53</p> <p>25 MR. BATES: I'm sorry. That's 10:44:03</p>	<p style="text-align: right;">Page 77</p> <p>1 PORET</p> <p>2 charger and I mentioned headphones, those 10:45:21</p> <p>3 aren't proximate either. If the issue 10:45:25</p> <p>4 was comparing a mark that's used on -- on 10:45:27</p> <p>5 a battery charger and a mark that's used 10:45:32</p> <p>6 on headphones I wouldn't call those 10:45:34</p> <p>7 proximate either, even though I've listed 10:45:36</p> <p>8 them both as accessories, because 10:45:39</p> <p>9 somebody who goes into a store and says 10:45:41</p> <p>10 I'm looking to buy a charger for my 10:45:43</p> <p>11 phone, they're not comparing that to 10:45:47</p> <p>12 headphones, that's a different product. 10:45:49</p> <p>13 So the fact that I've listed a 10:45:51</p> <p>14 bunch of them doesn't mean I'm saying 10:45:53</p> <p>15 those are the ones that are proximate and 10:45:55</p> <p>16 somehow the OLLOCLIP is not; I'm saying 10:45:58</p> <p>17 there are various things that could be 10:46:06</p> <p>18 called accessories that I wouldn't 10:46:08</p> <p>19 consider proximate in the sense that it 10:46:10</p> <p>20 would be artificial to show them both to 10:46:14</p> <p>21 people as if they're alternatives to each 10:46:17</p> <p>22 other. 10:46:19</p> <p>23 Q. Well, so with respect to 10:46:19</p> <p>24 consumer confusion as to the origin of a 10:46:22</p> <p>25 product, are you suggesting that the 10:46:26</p>

<p style="text-align: right;">Page 78</p> <p>1 PORET</p> <p>2 products, in order for the consumer to be 10:46:29</p> <p>3 confused as to the origin, would have to 10:46:31</p> <p>4 be the products themselves have to be 10:46:34</p> <p>5 competing with each other? 10:46:37</p> <p>6 A. No, I'm not suggesting that. 10:46:39</p> <p>7 I'm suggesting that the survey that I 10:46:42</p> <p>8 did, which included a group of people who 10:46:45</p> <p>9 were shown the term OLLO and told that 10:46:47</p> <p>10 that was for mobile accessories, that 10:46:51</p> <p>11 tests for whether there is confusion 10:46:54</p> <p>12 with -- with OLLOCLIP and it encompasses 10:46:56</p> <p>13 all these things we're talking about. 10:47:00</p> <p>14 Because if somebody does think of a 10:47:03</p> <p>15 clip-on camera as an accessory and they 10:47:06</p> <p>16 are being asked about the term OLLO in 10:47:09</p> <p>17 connection with accessories then if there 10:47:11</p> <p>18 is confusion with a product that is 10:47:13</p> <p>19 somewhat different but still an accessory 10:47:16</p> <p>20 then they could say yes, I think the 10:47:18</p> <p>21 company that makes OLLOCLIP accessory -- 10:47:20</p> <p>22 sorry, they could say I think the company 10:47:22</p> <p>23 that makes OLLO mobile phone accessories 10:47:24</p> <p>24 makes the OLLOCLIP camera lens. 10:47:27</p> <p>25 Q. And so do you -- sorry. 10:47:30</p>	<p style="text-align: right;">Page 80</p> <p>1 PORET</p> <p>2 the consumer here, take a look at these 10:48:36</p> <p>3 headphones and a look at this battery 10:48:38</p> <p>4 charger because that -- those two 10:48:41</p> <p>5 products to me don't seem proximate 10:48:43</p> <p>6 enough to make that a realistic, reliable 10:48:46</p> <p>7 survey. 10:48:49</p> <p>8 Q. But doesn't proximate also have 10:48:50</p> <p>9 to do with in a real-world experience 10:48:52</p> <p>10 where a consumer enters a mobile phone 10:48:55</p> <p>11 store and sees a mobile phone that says 10:49:00</p> <p>12 iPhone and then they see a keyboard for 10:49:06</p> <p>13 the mobile phone that says iPhone, and 10:49:14</p> <p>14 they will associate those two things 10:49:19</p> <p>15 together because they are -- one is an 10:49:23</p> <p>16 accessory and they also bear the same 10:49:29</p> <p>17 mark? 10:49:33</p> <p>18 MR. SAFFER: Objection to form. 10:49:33</p> <p>19 MR. BATES: If you understand 10:49:36</p> <p>20 the question. 10:49:37</p> <p>21 A. I do understand and, yes, that 10:49:37</p> <p>22 can happen, but the point is how would 10:49:40</p> <p>23 you do a survey to best test whether that 10:49:42</p> <p>24 association occurs, and it's 100 percent 10:49:46</p> <p>25 obvious that the best way to do that 10:49:49</p>
<p style="text-align: right;">Page 79</p> <p>1 PORET</p> <p>2 A. So that survey accounts for 10:47:31</p> <p>3 that. 10:47:33</p> <p>4 What I'm saying is that in not 10:47:35</p> <p>5 that there can't be confusion with 10:47:37</p> <p>6 different products, but that a survey 10:47:39</p> <p>7 that is simulating showing people two 10:47:42</p> <p>8 things that they wouldn't normally 10:47:46</p> <p>9 consider in connection with each other is 10:47:48</p> <p>10 artificial and not reliable. 10:47:51</p> <p>11 Q. Well, so you mentioned that the 10:47:52</p> <p>12 little battery packs and earphones, 10:47:58</p> <p>13 earbuds, that both go with cell phones, 10:48:02</p> <p>14 you would consider those both as 10:48:05</p> <p>15 accessories, that you would say those are 10:48:07</p> <p>16 not proximate because a consumer would 10:48:09</p> <p>17 not -- are you saying those are not 10:48:12</p> <p>18 proximate because a consumer would not 10:48:14</p> <p>19 consider those in the same context? 10:48:16</p> <p>20 A. I'm saying if this case 10:48:19</p> <p>21 involved one company that made headphones 10:48:21</p> <p>22 and another that made a battery charger, 10:48:24</p> <p>23 I would be saying the same thing as I'm 10:48:28</p> <p>24 saying about OLLOCLIP, which is I 10:48:32</p> <p>25 wouldn't want to do a survey that says to 10:48:34</p>	<p style="text-align: right;">Page 81</p> <p>1 PORET</p> <p>2 survey would just be to show the keyboard 10:49:51</p> <p>3 that says iPhone and ask people do you -- 10:49:54</p> <p>4 what company do you think makes this 10:49:58</p> <p>5 product. 10:50:00</p> <p>6 Q. Right. 10:50:00</p> <p>7 A. And see if the fact that it 10:50:00</p> <p>8 says iPhone causes people to say Apple. 10:50:02</p> <p>9 To show them both an iPhone and then the 10:50:07</p> <p>10 keyboard next to each other is a bit, you 10:50:10</p> <p>11 know, that's unnecessarily artificial and 10:50:13</p> <p>12 suggestive, and that's obvious. 10:50:15</p> <p>13 Q. It's suggestive of course, I 10:50:21</p> <p>14 agree with you that it's suggestive. Is 10:50:24</p> <p>15 it artificial? I mean, doesn't that 10:50:27</p> <p>16 happen when a consumer walks into a phone 10:50:29</p> <p>17 store? 10:50:32</p> <p>18 A. No, it doesn't. Somebody walks 10:50:33</p> <p>19 in already having the phone and they're 10:50:35</p> <p>20 not whipping out a phone or looking at a 10:50:38</p> <p>21 rack of phones to compare it to the 10:50:42</p> <p>22 keyboard or the headphones. 10:50:44</p> <p>23 If they come upon the 10:50:46</p> <p>24 headphones or the keyboard and they think 10:50:48</p> <p>25 it's connected to Apple or iPhone it's 10:50:51</p>

<p style="text-align: right;">Page 82</p> <p>1 PORET</p> <p>2 because of something they saw on the 10:50:55</p> <p>3 keyboard or the headphones. It's not 10:50:56</p> <p>4 because they, you know, they made some 10:50:59</p> <p>5 comparison to some other product that's 10:51:02</p> <p>6 sitting in the store. 10:51:04</p> <p>7 Q. So it's not because a consumer 10:51:05</p> <p>8 goes in and sees, let's say a, I don't 10:51:08</p> <p>9 even know what you would call it, the 10:51:18</p> <p>10 parent product, the product that's not 10:51:20</p> <p>11 the accessory, the main product, they go 10:51:22</p> <p>12 in, they are looking at a main product 10:51:25</p> <p>13 and they want to add accessories that go 10:51:28</p> <p>14 along with that main product, that 10:51:30</p> <p>15 doesn't happen? 10:51:32</p> <p>16 MR. SAFFER: Objection to form. 10:51:33</p> <p>17 A. Of course that happens. 10:51:34</p> <p>18 Q. Right. So that's why I'm 10:51:36</p> <p>19 saying, that's why I'm questioning why 10:51:38</p> <p>20 that would be an artificial scenario to 10:51:42</p> <p>21 show the main product and the accessory 10:51:44</p> <p>22 together and say do these come from the 10:51:47</p> <p>23 same source. 10:51:50</p> <p>24 A. Because what most likely 10:51:52</p> <p>25 happens with a real consumer is that 10:51:54</p>	<p style="text-align: right;">Page 84</p> <p>1 PORET</p> <p>2 say what goes with that. When they see 10:53:02</p> <p>3 an Apple accessory they know if they have 10:53:04</p> <p>4 an Apple, an iPhone that will go with it 10:53:06</p> <p>5 or not, but that's because Apple has, you 10:53:09</p> <p>6 know, permeated the consumer 10:53:12</p> <p>7 consciousness already; correct? 10:53:14</p> <p>8 A. In that instance, that's 10:53:16</p> <p>9 correct. 10:53:18</p> <p>10 Q. Okay. 10:53:18</p> <p>11 What if the mark is not known 10:53:19</p> <p>12 by the consumer, how do you -- 10:53:26</p> <p>13 MR. BATES: Well, I'll strike 10:53:34</p> <p>14 that. I'll get to that. 10:53:37</p> <p>15 Q. Now, I believe you mentioned 10:53:57</p> <p>16 earlier that with respect to the universe 10:53:58</p> <p>17 of survey participants that you made 10:54:03</p> <p>18 every effort to ensure that the universe 10:54:10</p> <p>19 contained a significant number of 10:54:16</p> <p>20 respondents that were knowledgeable of 10:54:25</p> <p>21 OLLOCLIP; is that correct? 10:54:27</p> <p>22 A. I said that were aware of 10:54:29</p> <p>23 OLLOCLIP. 10:54:32</p> <p>24 Q. If you look at -- do you have 10:54:43</p> <p>25 your report -- I believe it's Exhibit 4, 10:54:45</p>
<p style="text-align: right;">Page 83</p> <p>1 PORET</p> <p>2 they've -- they're walking into a store 10:51:57</p> <p>3 already knowing I own an iPhone and I am 10:52:00</p> <p>4 looking for some accessory for my 10:52:03</p> <p>5 product, and they are going to walk up 10:52:09</p> <p>6 and they are going to look at the battery 10:52:11</p> <p>7 chargers and they are going to see a 10:52:14</p> <p>8 bunch of brands, and if there happens to 10:52:16</p> <p>9 be one that says, you know, iPhone they 10:52:19</p> <p>10 are going to make that connection to 10:52:21</p> <p>11 Apple on their own. 10:52:23</p> <p>12 It's not going to be because 10:52:25</p> <p>13 they say hmm, gee, let me go compare this 10:52:27</p> <p>14 to a box for an iPhone sitting on the 10:52:33</p> <p>15 other side of the store and see if it 10:52:35</p> <p>16 looks the same. It's going to be a 10:52:37</p> <p>17 connection they made on their own in 10:52:39</p> <p>18 their own mind. 10:52:41</p> <p>19 Q. Right. 10:52:42</p> <p>20 So in that regard certainly 10:52:44</p> <p>21 someone comes into the -- into the 10:52:47</p> <p>22 marketplace into whatever their 10:52:51</p> <p>23 purchasing scenario is already having a 10:52:54</p> <p>24 knowledge of Apple, they don't need -- 10:52:57</p> <p>25 they don't need to see an Apple phone and 10:52:59</p>	<p style="text-align: right;">Page 85</p> <p>1 PORET</p> <p>2 the report? 10:54:51</p> <p>3 A. Exhibit 3. 10:54:52</p> <p>4 Q. Exhibit 3? 10:54:53</p> <p>5 A. Yes. 10:54:55</p> <p>6 Q. If you could go to -- if you 10:54:56</p> <p>7 could please turn to page 4, you will see 10:54:58</p> <p>8 at the end the survey also included 10:55:04</p> <p>9 questions at the end -- I'm sorry, the 10:55:08</p> <p>10 end of the first paragraph on page 4: 10:55:12</p> <p>11 "The survey also included 10:55:15</p> <p>12 questions at the end to determine whether 10:55:18</p> <p>13 the respondent was aware of OLLOCLIP. 10:55:20</p> <p>14 This ensured that the survey did contain 10:55:23</p> <p>15 a subgroup of the relevant universe that 10:55:26</p> <p>16 knows the OLLOCLIP mark." 10:55:28</p> <p>17 A. Yes. 10:55:33</p> <p>18 Q. And just before that at the 10:55:34</p> <p>19 bottom of page 3 and top of page 4, so 10:55:49</p> <p>20 the beginning of the paragraph: "It is 10:55:56</p> <p>21 my understanding that the OLLOCLIP 10:55:58</p> <p>22 product is primarily for the iPhone and 10:55:59</p> <p>23 is a clip-on lens for the phone's 10:56:02</p> <p>24 camera." 10:56:11</p> <p>25 Is that your sole understanding 10:56:11</p>

<p style="text-align: right;">Page 102</p> <p>1 PORET</p> <p>2 here right now. I know that I looked at 11:17:20</p> <p>3 the OLLOCLIP website and that I saw a 11:17:23</p> <p>4 product, but that was in 2014 or whenever 11:17:27</p> <p>5 going forward. I don't have a fresh 11:17:32</p> <p>6 image of it now. 11:17:35</p> <p>7 Q. Well, the mark has two 11:17:38</p> <p>8 different colored fonts, the "OLLO" is in 11:17:45</p> <p>9 one color and then "CLIP" is in a 11:17:49</p> <p>10 different color; and I understand that 11:17:52</p> <p>11 you believe that those marks, OLLOCLIP 11:17:55</p> <p>12 and OLLO, are obviously dissimilar, but 11:18:01</p> <p>13 apart from the word "CLIP" would you 11:18:08</p> <p>14 agree that they are similar? 11:18:14</p> <p>15 MR. SAFFER: Objection to form. 11:18:15</p> <p>16 Q. Would you agree that the word 11:18:18</p> <p>17 OLLOCLIP, absent word "CLIP" is the same 11:18:19</p> <p>18 as the word OLLO? 11:18:23</p> <p>19 A. Yes. 11:18:24</p> <p>20 Q. Okay. 11:18:28</p> <p>21 And would you agree that the 11:18:29</p> <p>22 word "clip" is a fairly generic term? 11:18:30</p> <p>23 MR. SAFFER: Objection to form. 11:18:34</p> <p>24 A. I don't know. 11:18:35</p> <p>25 Q. Is it a fanciful term? 11:18:36</p>	<p style="text-align: right;">Page 104</p> <p>1 PORET</p> <p>2 Q. And you didn't feel like that 11:19:35</p> <p>3 might be suggestive to respondents at 11:19:39</p> <p>4 all? 11:19:41</p> <p>5 A. No. 11:19:42</p> <p>6 Why would asking prior to the 11:19:45</p> <p>7 survey had you heard of OLLOCLIP be 11:19:46</p> <p>8 suggestive? It's literally asking, it's 11:19:49</p> <p>9 making very explicit that we're asking 11:19:53</p> <p>10 about what you had heard of prior to the 11:19:56</p> <p>11 survey. 11:19:58</p> <p>12 Q. Well, if you're asking me the 11:20:02</p> <p>13 question I will say that I know of 11:20:04</p> <p>14 hundreds and hundreds of examples of word 11:20:08</p> <p>15 games that people play where if you 11:20:12</p> <p>16 repeat a certain word and then ask them a 11:20:14</p> <p>17 question they will respond with the same 11:20:17</p> <p>18 word even though it's not the correct 11:20:18</p> <p>19 answer to the question. 11:20:20</p> <p>20 So to me the fact that these 11:20:22</p> <p>21 respondents have just been doing a survey 11:20:26</p> <p>22 about the word OLLO and then they get 11:20:29</p> <p>23 asked a question about did you know 11:20:33</p> <p>24 before this survey which you just took 11:20:35</p> <p>25 about a brand OLLOCLIP, to me it seems 11:20:37</p>
<p style="text-align: right;">Page 103</p> <p>1 PORET</p> <p>2 A. Depends what it's applied to. 11:18:38</p> <p>3 Q. Something that clips onto 11:18:41</p> <p>4 something. 11:18:43</p> <p>5 A. No, that sounds like it clearly 11:18:44</p> <p>6 has some descriptive content if you're 11:18:46</p> <p>7 saying that it's something that clips 11:18:50</p> <p>8 onto something. 11:18:52</p> <p>9 Q. So it wouldn't be considered a 11:18:54</p> <p>10 strong part of that mark, in your 11:18:55</p> <p>11 opinion? 11:18:57</p> <p>12 MR. SAFFER: Objection to form. 11:18:57</p> <p>13 A. I don't know about that. 11:18:58</p> <p>14 Q. Were there any other brands 11:19:00</p> <p>15 listed in the group in the question at 11:19:07</p> <p>16 the end of your survey that was trying to 11:19:12</p> <p>17 get at whether or not respondents were 11:19:14</p> <p>18 aware of OLLOCLIP that contained the word 11:19:16</p> <p>19 OLLO? 11:19:19</p> <p>20 A. No. 11:19:20</p> <p>21 Q. So the survey was about the 11:19:23</p> <p>22 mark OLLO and the question at the end had 11:19:26</p> <p>23 one mark with the term OLLO in it; is 11:19:30</p> <p>24 that correct? 11:19:33</p> <p>25 A. Yes. 11:19:34</p>	<p style="text-align: right;">Page 105</p> <p>1 PORET</p> <p>2 obvious that that will suggest an answer 11:20:40</p> <p>3 to the recipient -- to the respondent. 11:20:43</p> <p>4 But my question to you, just to 11:20:51</p> <p>5 be clear, is you don't see any bias or 11:20:53</p> <p>6 suggestibility of that question having 11:20:56</p> <p>7 just been given after the survey about 11:20:59</p> <p>8 OLLO? 11:21:07</p> <p>9 MR. SAFFER: Objection to form. 11:21:07</p> <p>10 A. No, I don't see any reason why 11:21:07</p> <p>11 anybody would think that either yes or no 11:21:10</p> <p>12 to that is the appropriate response. 11:21:15</p> <p>13 It's very explicit. 11:21:22</p> <p>14 Q. Well, it's not a yes or no 11:21:24</p> <p>15 question; right? 11:21:26</p> <p>16 A. Well, it is for each individual 11:21:26</p> <p>17 choice, they have to decide yes or no, 11:21:28</p> <p>18 have I -- have I heard about that. 11:21:31</p> <p>19 So there is no reason that 11:21:33</p> <p>20 somebody would think that there's a 11:21:34</p> <p>21 reason that they should say yes or -- or 11:21:38</p> <p>22 answer yes. 11:21:41</p> <p>23 Q. But you didn't ask them 11:21:42</p> <p>24 afterwards, of the group that said we 11:21:44</p> <p>25 know OLLOCLIP, you didn't ask them 11:21:48</p>

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1 PORET

2 modality and I believe that you -- and we 11:32:47

3 were discussing whether -- we were 11:32:50

4 discussing the effect on the likelihood 11:32:56

5 of confusion results that surveys 11:32:59

6 conclude where the senior mark is not 11:33:08

7 well known, and my understanding of your 11:33:14

8 explanation of that was that the Eveready 11:33:18

9 survey approach merely reflects what's 11:33:22

10 going on in the consumer experience. Is 11:33:26

11 that correct? 11:33:29

12 A. Sort of. 11:33:30

13 Q. Well, then you gave the 11:33:35

14 scenario -- you can give it again if you 11:33:37

15 would like -- but you gave a scenario 11:33:41

16 which my recollection is -- because I 11:33:43

17 don't have the transcript in front of me 11:33:44

18 -- was a person walks into a store to 11:33:47

19 purchase a wireless plan, it's called 11:33:49

20 OLLO, they are not confused because they 11:33:52

21 are not aware of OLLOCLIP, so the 11:33:54

22 Eveready type survey accurately reflects 11:33:56

23 that a consumer that is not aware of 11:33:59

24 OLLOCLIP is not going to be confused. 11:34:02

25 A. I did -- I did say that that's 11:34:04

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1 PORET

2 one realistic thing that the Eveready 11:34:06

3 survey measures. That's not the only 11:34:09

4 thing that my survey accounted for, 11:34:11

5 however. 11:34:13

6 I'm saying to the extent that 11:34:14

7 that's one of the things that it's showing 11:34:16

8 that is a real, valid thing. 11:34:19

9 Q. Okay. 11:34:21

10 So then the scenario that I 11:34:21

11 demonstrated of a consumer that comes in 11:34:27

12 to purchase an OLLO service plan and is 11:34:29

13 offered other products that could go 11:34:31

14 along with that, including mobile phone 11:34:33

15 accessories, is that scenario accurately 11:34:37

16 reflected in an Eveready survey? 11:34:41

17 A. Yes, in the -- well, let's put 11:34:44

18 it this way. I don't think that what 11:34:49

19 you're describing as in anybody who's 11:34:54

20 signing up for a mobile plan is going to 11:34:59

21 be led around the store and had every 11:35:01

22 accessory pointed out to them is very 11:35:04

23 typical, so if one, you know, wanted to 11:35:06

24 know what would somebody think if they 11:35:11

25 did have exposure to both OLLOCLIP and 11:35:14

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1 PORET

2 OLLO, the way I did it in my Eveready 11:35:18

3 survey would be better. In other words, 11:35:20

4 since I did ensure that I had people who 11:35:24

5 knew OLLOCLIP, that that's the better way 11:35:27

6 to find out whether somebody's going to 11:35:30

7 make a connection between OLLO and 11:35:33

8 OLLOCLIP, rather than what you're 11:35:36

9 suggesting, which I don't think is the 11:35:37

10 typical marketplace scenario. 11:35:41

11 Q. So I'm assuming that you -- I 11:35:43

12 can see that you have a mobile device and 11:35:47

13 did you purchase that for yourself? 11:35:50

14 A. Yes. 11:35:52

15 Q. And do you remember where? 11:35:53

16 A. Yes. 11:35:54

17 Q. Where did you purchase that? 11:35:55

18 A. In a Verizon store. 11:35:57

19 Q. In a Verizon store. I got mine 11:36:00

20 in an AT&T store. 11:36:03

21 Do you remember how long it 11:36:04

22 took you when you went into that store to 11:36:06

23 walk out with the phone? 11:36:10

24 A. I remember it was way too long. 11:36:11

25 Q. And were you offered other 11:36:13

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1 PORET

2 accessories when you were in there 11:36:14

3 purchasing that phone? 11:36:16

4 A. Um, I think I may have -- I 11:36:17

5 think in the sense of, you know, do you 11:36:22

6 need a case or a charger or something 11:36:24

7 like that, I think somebody probably said 11:36:27

8 something like that to me; but certainly 11:36:30

9 nobody took me around the store and 11:36:32

10 showed me things and certainly I didn't 11:36:34

11 see any camera clip-on lenses and I 11:36:36

12 wasn't -- I didn't have my attention 11:36:40

13 called to the variety of accessories that 11:36:43

14 were in the store. 11:36:45

15 Q. So I can definitely relate to 11:36:47

16 the length of time that it takes to go 11:36:50

17 into the store and buy a mobile device. 11:36:53

18 But let me ask you if my last couple of 11:36:58

19 experiences in the AT&T store are 11:37:04

20 reflective of what you think is typical 11:37:09

21 consumer experience, given that you have 11:37:12

22 experienced not only purchasing them 11:37:16

23 yourself but also doing scores of surveys 11:37:18

24 and, you know, market research. 11:37:21

25 I went in to not even to 11:37:28

<p style="text-align: right;">Page 118</p> <p>1 PORET</p> <p>2 purchase a new phone, just to upgrade my 11:37:31</p> <p>3 phone, and I was from my phone offered 11:37:34</p> <p>4 different plans, different wireless 11:37:38</p> <p>5 plans, and based on my new wireless plans 11:37:42</p> <p>6 I was offered a free tablet, I was sold a 11:37:46</p> <p>7 new car charger for my phone and taken 11:37:55</p> <p>8 over to the case for various accessories, 11:38:00</p> <p>9 which included headphones, speakers, 11:38:07</p> <p>10 separate portable Blue Tooth speakers, 11:38:11</p> <p>11 carrying cases, you know, screen 11:38:14</p> <p>12 protectors, and right next to that was 11:38:18</p> <p>13 all the OLLOCLIP stuff and a bunch of 11:38:25</p> <p>14 other iPhone accessories. 11:38:29</p> <p>15 Now, I don't have an iPhone but 11:38:32</p> <p>16 it was right next to where I looked at my 11:38:34</p> <p>17 stuff. 11:38:36</p> <p>18 Now, that scenario, is it your 11:38:37</p> <p>19 opinion that that scenario is atypical of 11:38:44</p> <p>20 the normal consumer experience when they 11:38:48</p> <p>21 go into one of those stores to either 11:38:51</p> <p>22 purchase or upgrade their phone? 11:38:53</p> <p>23 MR. SAFFER: Objection to form. 11:38:54</p> <p>24 A. I mean, that's a lot of 11:38:56</p> <p>25 description. I think some of those 11:38:58</p>	<p style="text-align: right;">Page 120</p> <p>1 PORET</p> <p>2 typical that those people will be paying 11:40:05</p> <p>3 any kind of attention to OLLOCLIP in 11:40:07</p> <p>4 connection with purchasing a wireless 11:40:10</p> <p>5 plan, such that doing a survey where you 11:40:14</p> <p>6 go to the lengths of taking every single 11:40:17</p> <p>7 respondent and saying please look at 11:40:20</p> <p>8 OLLOCLIP while you're looking at OLLO is 11:40:23</p> <p>9 artificial and unnecessarily suggestive. 11:40:27</p> <p>10 Q. Okay. 11:40:42</p> <p>11 So in your example when you say 11:40:42</p> <p>12 you do not believe that a consumer who is 11:40:43</p> <p>13 going in to purchase a wireless plan 11:40:46</p> <p>14 would be looking at OLLOCLIP products, 11:40:48</p> <p>15 what do you mean by "looking at"? 11:40:51</p> <p>16 A. Well, first of all, I'm not 11:40:59</p> <p>17 saying that that could never happen, I'm 11:41:01</p> <p>18 just saying that I don't think that is 11:41:03</p> <p>19 the typical purchase process for a 11:41:05</p> <p>20 wireless plan, to have your attention 11:41:07</p> <p>21 called to and review clip-on camera or 11:41:09</p> <p>22 whatever products. 11:41:14</p> <p>23 Q. So then in your testimony 11:41:15</p> <p>24 "looking at" means having your attention 11:41:18</p> <p>25 called to and review? 11:41:21</p>
<p style="text-align: right;">Page 119</p> <p>1 PORET</p> <p>2 things seem more typical and some less 11:38:59</p> <p>3 typical. 11:39:02</p> <p>4 I don't know how to quantify 11:39:02</p> <p>5 that as a whole package of, you know, how 11:39:04</p> <p>6 common that is. 11:39:07</p> <p>7 Q. I guess, let's just limit it to 11:39:09</p> <p>8 the real relevant part. 11:39:11</p> <p>9 In your view it would not be 11:39:13</p> <p>10 typical for a purchaser of wireless 11:39:15</p> <p>11 service to encounter mobile phone 11:39:21</p> <p>12 accessories such as OLLOCLIP products at 11:39:28</p> <p>13 the same time? 11:39:32</p> <p>14 A. No, that's not my opinion. My 11:39:33</p> <p>15 opinion is that I don't think it would be 11:39:37</p> <p>16 the typical situation that -- let me 11:39:41</p> <p>17 backup. 11:39:45</p> <p>18 If you take 100 people who walk 11:39:46</p> <p>19 into a store to sign up for a wireless 11:39:49</p> <p>20 plan, I do not think it's typical that 11:39:52</p> <p>21 those people are going to be looking at 11:39:55</p> <p>22 OLLOCLIP. 11:39:58</p> <p>23 Q. When you say "looking at," I'm 11:39:59</p> <p>24 sorry, go ahead. 11:40:02</p> <p>25 A. I don't -- I don't think it's 11:40:03</p>	<p style="text-align: right;">Page 121</p> <p>1 PORET</p> <p>2 A. No, that's not -- that's not 11:41:25</p> <p>3 all that it means. 11:41:28</p> <p>4 Q. I'm just trying to get at at 11:41:28</p> <p>5 what point -- I think we've established 11:41:33</p> <p>6 that proximity doesn't have to do with 11:41:36</p> <p>7 you're going to choose either/or product. 11:41:40</p> <p>8 A. No, it does have a lot to do 11:41:43</p> <p>9 with that. 11:41:46</p> <p>10 Q. It could be that; correct? It 11:41:47</p> <p>11 doesn't have to be that. 11:41:51</p> <p>12 A. It has a lot to do with that. 11:41:52</p> <p>13 Q. Okay. 11:41:54</p> <p>14 So are you saying that your 11:41:57</p> <p>15 determination that these goods and 11:42:00</p> <p>16 services are not proximate is based on 11:42:03</p> <p>17 your conclusion that it's unlikely that 11:42:06</p> <p>18 consumers will choose between a wireless 11:42:10</p> <p>19 service or the type of mobile phone 11:42:14</p> <p>20 accessories that are offered by OLLOCLIP? 11:42:17</p> <p>21 A. No, that's a factor, but that's 11:42:20</p> <p>22 not the only factor. 11:42:22</p> <p>23 Q. Okay. 11:42:24</p> <p>24 So what are the other factors? 11:42:24</p> <p>25 MR. SAFFER: Objection to form. 11:42:26</p>

<p style="text-align: right;">Page 122</p> <p>1 PORET</p> <p>2 A. The -- the other factor is that 11:42:28</p> <p>3 I don't think the typical consumer who is 11:42:32</p> <p>4 considering buying a wireless plan will, 11:42:37</p> <p>5 in any context, be looking at a clip-on 11:42:40</p> <p>6 camera lens as part of their experience 11:42:46</p> <p>7 of considering what -- what wireless plan 11:42:48</p> <p>8 to sign up for. 11:42:51</p> <p>9 Q. What about in purchasing a 11:42:52</p> <p>10 mobile cellular device, they wouldn't 11:42:55</p> <p>11 look at that stuff either? 11:42:57</p> <p>12 A. It's not that stuff, it's a 11:42:58</p> <p>13 clip-on camera lens. 11:43:03</p> <p>14 I'm not saying -- there's 11:43:09</p> <p>15 obviously a far stronger, you know, 11:43:11</p> <p>16 argument that somebody who is buying a 11:43:12</p> <p>17 mobile phone might be looking at a case 11:43:14</p> <p>18 or a battery, you know, a charger for it 11:43:16</p> <p>19 than that they're going to be looking at 11:43:21</p> <p>20 what is very much a niche product. So. 11:43:23</p> <p>21 You can try to put it in as 11:43:26</p> <p>22 general terms as you want, but what it's 11:43:28</p> <p>23 always going to come back to is you're 11:43:31</p> <p>24 suggesting a survey should have been done 11:43:34</p> <p>25 where 100 percent of the people had their 11:43:37</p>	<p style="text-align: right;">Page 124</p> <p>1 PORET</p> <p>2 group of respondents to determine whether 11:44:51</p> <p>3 or not they were aware of OLLOCLIP 11:44:56</p> <p>4 without mentioning OLLOCLIP or rubbing 11:45:00</p> <p>5 their noses in it. 11:45:03</p> <p>6 A. You mean, you're asking again 11:45:05</p> <p>7 was there another question? 11:45:07</p> <p>8 Q. Yes. 11:45:09</p> <p>9 A. And, again, no. 11:45:09</p> <p>10 Q. Okay. 11:45:11</p> <p>11 Would you consider rubbing 11:45:18</p> <p>12 their nose in OLLOCLIP to the degree that 11:45:19</p> <p>13 it would create an artificial scenario if 11:45:23</p> <p>14 you asked them do they take pictures with 11:45:26</p> <p>15 their mobile device? 11:45:27</p> <p>16 A. No, that question in itself 11:45:36</p> <p>17 would not be rubbing their nose in 11:45:37</p> <p>18 OLLOCLIP. 11:45:40</p> <p>19 Q. Did you ask any question to 11:45:41</p> <p>20 determine whether or not the respondents 11:45:43</p> <p>21 used their mobile device for photography? 11:45:44</p> <p>22 A. No. 11:45:48</p> <p>23 MR. SAFFER: Objection to form. 11:45:48</p> <p>24 It's been asked and answered more 11:45:49</p> <p>25 than once. 11:45:52</p>
<p style="text-align: right;">Page 123</p> <p>1 PORET</p> <p>2 noses rubbed in a clip-on camera called 11:43:40</p> <p>3 OLLOCLIP as part of their exposure to 11:43:44</p> <p>4 OLLO, and no matter how many times you 11:43:48</p> <p>5 want to go around about it I'm going to 11:43:50</p> <p>6 insist that does not strike me as a 11:43:53</p> <p>7 representative situation. 11:43:57</p> <p>8 Q. Okay. 11:43:58</p> <p>9 A. And therefore it's artificial 11:43:59</p> <p>10 and it's unnecessarily leading and, given 11:44:01</p> <p>11 that there is a way to access people who 11:44:05</p> <p>12 have heard of OLLOCLIP, since the product 11:44:07</p> <p>13 exists and is out there, there's a much 11:44:10</p> <p>14 better way to do it, which is show the 11:44:13</p> <p>15 term OLLO to people who have already been 11:44:15</p> <p>16 exposed to OLLOCLIP and see if they make 11:44:19</p> <p>17 that connection on their own and not in 11:44:22</p> <p>18 some rigged up, artificial, leading way. 11:44:24</p> <p>19 Q. And I'm not suggesting in any 11:44:29</p> <p>20 way as you've termed it that the 11:44:32</p> <p>21 respondents should have their noses 11:44:34</p> <p>22 rubbed in the OLLOCLIP; what I'm 11:44:36</p> <p>23 wondering is other than saying are you 11:44:38</p> <p>24 interested in photography, were there any 11:44:41</p> <p>25 other questions that were asked to the 11:44:47</p>	<p style="text-align: right;">Page 125</p> <p>1 PORET</p> <p>2 Q. Did you ask the respondents 11:45:56</p> <p>3 whether or not they were familiar with 11:45:58</p> <p>4 accessories related to photography with 11:46:01</p> <p>5 cellular phones? 11:46:04</p> <p>6 A. Um, I asked the question which 11:46:06</p> <p>7 I've already told you about which 11:46:09</p> <p>8 referred -- which was asking which 11:46:11</p> <p>9 products or brands they were -- they had 11:46:13</p> <p>10 heard of prior to the survey in 11:46:16</p> <p>11 connection with accessories for mobile 11:46:17</p> <p>12 phones. 11:46:19</p> <p>13 There are no other questions 11:46:25</p> <p>14 that are not stated in the report and the 11:46:27</p> <p>15 questionnaire. 11:46:29</p> <p>16 Q. Is there any scenario where it 11:46:29</p> <p>17 would be appropriate for the pool of 11:46:34</p> <p>18 surveyed respondents to be 100 percent 11:46:39</p> <p>19 exposed to the senior mark beforehand? 11:46:47</p> <p>20 A. Yes, in a scenario where what 11:46:56</p> <p>21 you're simulating is a reasonably typical 11:46:59</p> <p>22 scenario. 11:47:03</p> <p>23 Q. So in a scenario where -- so in 11:47:05</p> <p>24 my scenario, which I believe you said was 11:47:13</p> <p>25 not the typical scenario, the one that I 11:47:15</p>