BULKY DOCUMENTS

(exceeds 300 pages)

Proceeding/Serial No: 92 045000

Filed: _____

Title: Respondent's Offer of Deposition Designations Into Evidence

Part 1 of 1

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

In the matter of Trademark Registration No. 2,390,988

Mark: SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR and Design

Date Registered: October 3, 2000

Bass Pro Trademarks, L.L.C., PETITIONER, v. Sportsman's Warehouse, Inc., RESPONDENT.	Cancellation No. 92045000

RESPONDENT'S OFFER OF DEPOSITION DESIGNATIONS INTO EVIDENCE

Pursuant to 37 C.F.R. § 2.120(j)(3) and by stipulation of the parties, Respondent, Sportsman's Warehouse, Inc., hereby submits and offers into evidence the following designated portions of discovery depositions as trial testimony in the above-captioned proceeding. Respondent submits herewith copies of the deposition transcript pages listed, including all exhibits referenced in those pages.

1. Deposition of Dale R. Smith, taken May 10, 2006.
2. Deposition of Scott Nielsen, taken May 10, 2006.
3. Deposition of Stuart Utgaard, taken May 11, 2006.
4. Deposition of Jamison Bryan Hensley, taken June 1, 2006:
   a. Page 11, line 20 to page 12, line 25.
   b. Page 21, line 12 to page 21, line 18.

c. Page 23, line 24 to page 24, line 16.

5. Deposition of Jim Hagale, taken June 7, 2006.

6. Deposition of Ms. Toni Miller, taken June 8, 2006.

7. Deposition of John David Hagel, taken August 2, 2006.

8. Deposition of April L. Henderson, taken August 2, 2006.

9. Deposition of Myers Haden Holley, Jr., taken August 2, 2006:

   a. Page 10, line 20 to page 17, line 12.

   b. Page 22, line 9 to page 64, line 16.

10. Deposition of Stanley W. Lippelman, taken August 9, 2006.

11. Deposition of Mark Winkelman, taken August 29, 2006:

    a. Page 4, line 1 to page 16, line 22.

12. Deposition of Gary T. Ford, taken September 15, 2006.

13. Deposition of Michael B. Mazis, taken September 22, 2006.

DATED: Feb 20, 2007.

LINDQUIST & VENNUM P.L.L.P.

By: _____

David A. Allgeyer
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ATTORNEYS FOR RESPONDENT SPORTSMAN'S WAREHOUSE, INC.

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

BASS PRO TRADEMARKS,)
L.L.C.,)
) Cancellation No. 92045000
Petitioner,)
)
vs.) Deposition of:
) DALE R. SMITH
SPORTSMAN'S WAREHOUSE,)
INC.,)
)
Respondent.)

May 10, 2006
10:00 a.m.

Sportsman's Warehouse
7035 High Tech Drive
Midvale, UT 84047

Sharon Morgan, CSR, RPR, CRR
Notary Public in and for the State of Utah

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20 NUMBER PAGE
21 No. 1 Sportsman's Warehouse Answers to 7
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22 Interrogatories
23 No. 2 Registration No. 2,390,099 10
24 No. 3 E-mail String dated 5/9/06 38
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1 PROCEEDINGS
2 DALE R. SMITH,
3 called as a witness on behalf of the petitioners,
4 being duly sworn, was examined and testified as
5 follows:
6 EXAMINATION
7 BY MR. UPCHURCH:
8 Q. Would you state your name for the record,
9 sir.
10 **A. Dale R. Smith.**
11 Q. Mr. Smith, are you currently employed by
12 Sportsman's Warehouse?
13 **A. Yes.**
14 Q. What's your position with Sportsman's
15 Warehouse?
16 **A. President.**
17 Q. How long have you been with Sportsman's
18 Warehouse?
19 **A. Since 1991, March of '91.**
20 Q. What was the name of the company at that
21 time?
22 **A. Sports Warehouse.**
23 Q. Was the business of Sports Warehouse
24 substantially the same as the business of Sportsman's
25 Warehouse?

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1 **A. Pretty much.**
2 Q. Same types of products --
3 **A. Yes.**
4 Q. -- is all I'm getting after.
5 Have you always been president of Sports
6 Warehouse/Sportsman's Warehouse?
7 **A. No. '91 I was just an employee. My**
8 **father-in-law was the president and manager. It was a**
9 **little family business at that time. That's Bill**
10 **Hayes.**
11 Q. Bill Hayes?
12 **A. Yes.**
13 Q. You're a step ahead of me.
14 What positions have you held with Sports
15 Warehouse/Sportsman's Warehouse?
16 **A. When I started I was a salesperson. Then I**
17 **became a camping buyer. Then I took over the footwear**
18 **also, so camping and footwear, and then I took over**
19 **clothing and a store manager, and -- I can't remember**
20 **what year I was made president, but Stu bought it in**
21 **1996 and assigned officers shortly thereafter. I**
22 **would guess it was '98.**
23 Q. And were you the first president?
24 **A. Stu was president when he bought it in '96.**
25 Q. So you became president in '98, you think?

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1 **A. It's roughly '98.**
2 Q. Who is Stu?
3 **A. Stu Utgaard is our CEO.**
4 Q. As president, do you have any duties
5 concerning the trademarks of Sportsman's Warehouse?
6 **A. More so lately, I guess.**
7 Q. Is there a person at Sportsman's Warehouse
8 who is responsible for trademarks other than yourself?
9 **A. It would be Stu.**
10 Q. Have you had your deposition taken before?
11 **A. This is a first.**
12 Q. Oh, really? We have to back up, then.
13 **MR. ALLGEYER: I thought he was doing pretty**
14 **good.**
15 **MR. UPCHURCH: From the way he was answering,**
16 **I figured he had done this many times.**
17 Q. (By Mr. Upchurch) Just so you understand the
18 process, although this is very informal, this
19 testimony can be used in a legal proceeding. In this
20 case, it's a cancellation proceeding in the trademark
21 office. And so it's basically like you were in court
22 and testifying on the stand before Judge Judy.
23 **A. All right.**
24 Q. So any question that I ask that you don't
25 understand, you should let me know that you don't

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1 understand it rather than try to figure out what I
2 meant.
3 **A. All right.**
4 Q. Because being from Missouri, sometimes my
5 syntax gets a little tangled and that sort of thing.
6 So if there's something you don't understand, just ask
7 me to rephrase the question --
8 **A. All right.**
9 Q. -- and we'll go on.
10 If you get tired or you need to take a break,
11 that's fine. I would prefer that, if there's a
12 question pending, that you answer the question before
13 you take a break. But otherwise, if you need to make
14 a phone call or, you know, get water or whatever, you
15 know, we're certainly informal enough to accommodate
16 anything like that.
17 **A. All right.**
18 Q. The reporter takes down everything that we
19 say. It's much more difficult for the reporter to
20 take down head nods, and those can be misinterpreted
21 as well. So please respond verbally. It's also very
22 difficult for the reporter to take down more than one
23 person talking at a time. So wait until I finish
24 asking the question before you answer, and I will try
25 not to ask another question until you finish your

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1 answer.
2 **A. Okay.**
3 Q. And it's just for her. In normal
4 conversation, we don't do that at all. We walk on
5 each other's words all the time and we understand
6 exactly what's going on, but it's very difficult for
7 the reporter if we do that. Okay?
8 **A. Okay.**
9 Q. Thank you.
10 Now, you're aware that there is a proceeding
11 in the trademark office between Bass Pro Shops and
12 Sportsman's Warehouse concerning the Sportsman's
13 Warehouse registration?
14 **A. Yes.**
15 Q. Are you aware that there have been some
16 interrogatory answers that Sportsman's Warehouse has
17 prepared in connection with that proceeding?
18 **A. What do you mean interrogatory?**
19 Q. Well, let me show you.
20 (Exhibit No. 1 marked.)
21 Q. (By Mr. Upchurch) Mr. Smith, I've had the
22 reporter hand you what has been marked as Exhibit 1,
23 which I will represent to you are answers to
24 interrogatories and request for production of
25 documents that we received from Sportsman's Warehouse

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1 in this proceeding.
2 **A. Okay.**
3 Q. Have you seen this document before?
4 **THE WITNESS: Is this part of the same that**
5 **was e-mailed to you?**
6 **MR. ALLGEYER: I can't really help you. You**
7 **can only look at it and tell him what you know.**
8 **You've probably seen a bunch of documents.**
9 **A. I think I've probably seen some of this, but**
10 **I've not read them through. So it's possible.**
11 Q. (By Mr. Upchurch) But it's not part of
12 your --
13 **A. I mean, I've received some documents, but --**
14 Q. You haven't been asked to verify that
15 everything in this is correct?
16 **A. Right.**
17 Q. I'm going to turn to page 3 of this document.
18 Interrogatory No. 1 -- the way this works, they set
19 out the interrogatory, which is just a question,
20 basically --
21 **A. Okay.**
22 Q. -- and then they set out the answer. So the
23 top part will be the question, which is what Bass Pro
24 is asking, and then the answer part is what
25 Sportsman's Warehouse, through either Mr. Utgaard or

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1 the attorneys, whoever, and we'll figure that out,
2 responded.
3 **A. Okay.**
4 Q. So the response part is under Answer, which
5 starts at like the middle of this page.
6 **A. Okay.**
7 Q. And if I'm reading this correctly, you show
8 up under B.
9 **A. Yep. Yes.**
10 Q. So if we go up to the top, it says, "Identify
11 the person or persons who are most knowledgeable about
12 (B) the selection and design of respondent's mark."
13 **A. Okay.**
14 Q. Respondent is Sportsman's Warehouse, and the
15 mark is the Sportsman's Warehouse logo with the
16 mountains and there's a registration. In fact, we'll
17 make that an exhibit later on.
18 **A. Okay.**
19 Q. So what I would like to know is what you know
20 about the selection and design of that mark.
21 **A. At the time after Stu bought us, he asked my**
22 **wife, who happened to do all the advertising at that**
23 **time, to come up with a logo, basically, with our**
24 **printer. His name was Dave Egan. He passed away**
25 **about five years ago, but he was the printer at the**

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1 **time. They designed it, still using the words and**
2 **then the departments underneath, hunting, fishing**
3 **camping, and the mountains in the background. They**
4 **presented it to Stu, he liked it, and it became the**
5 **mark.**
6 **(Exhibit No. 2 marked.)**
7 Q. (By Mr. Upchurch) I've had the reporter mark
8 U.S. Trademark Registration No. 2,390,988.
9 **A. Okay.**
10 Q. Does that show the mark that we've been
11 talking about?
12 **A. Yes.**
13 Q. So that's the logo? What part did your wife
14 and the printer come up with?
15 **A. Well, we already had the words "Sportsman's**
16 **Warehouse." They came up with the rest of it.**
17 Q. The rest of it would be --
18 **A. The style of the font and the mountains**
19 **behind, and then our categories underneath.**
20 Q. You've said several times the categories
21 underneath. Are those the categories of products that
22 were sold in the store?
23 **A. Yes.**
24 Q. And is that still true today --
25 **A. Yes.**

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1 Q. -- that those are the categories?
2 What did you say the name of the printer was,
3 or did you?
4 **A. She would be able to answer that. I remember**
5 **his name. His name was Dave Egan, just because he was**
6 **a customer and personal friend a little bit. But I**
7 **don't remember the name of his company. I think it**
8 **was Print Press. She would be able to tell you that.**
9 Q. But you think Mr. Egan is probably deceased?
10 **A. He's deceased, definitely, yeah.**
11 Q. Do you recall how long it took your wife and
12 Mr. Egan to come up with the design of the mark that's
13 in Exhibit 2?
14 **A. I don't know the answer to that. It didn't**
15 **seem like very much time, but --**
16 Q. But it's been several years ago?
17 **A. It was several years ago, yeah.**
18 Q. Are you familiar with trademark registrations
19 at all?
20 **A. A little more so now, yeah.**
21 Q. Well, that's fair.
22 This particular document, Exhibit 2, shows
23 the mark, and then there are various services that are
24 listed down below.
25 **A. Okay.**

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1 Q. There's a reference to first use and in
2 commerce. Do you see that?
3 **A. Uh-huh (affirmative).**
4 Q. Were you involved in providing any
5 information for the application that became this
6 registration --
7 **A. No.**
8 Q. So other than getting the logo prepared, you
9 didn't have any interaction with a lawyer in preparing
10 the actual application?
11 **A. No.**
12 Q. At the very beginning of the description it
13 says "For: Retail and wholesale stores featuring,"
14 and then there are various goods.
15 **A. Okay.**
16 Q. Does Sportsman's Warehouse -- or did Sports
17 Warehouse before actually have wholesale stores?
18 **A. They weren't wholesale stores, but we were**
19 **attached to Pacific Flyway.**
20 Q. What does Pacific Flyway do?
21 **A. They are a wholesaler. They were a**
22 **wholesaler at that time. There's very little now. It**
23 **was very common for a customer to come into Pacific**
24 **Flyway, and if they were out of an item they would**
25 **walk to the store next door and we would get it out of**

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1 **our inventory. Pacific Flyway and Sportsman's**
2 **Warehouse were partners.**
3 Q. So Pacific Flyway actually had wholesale
4 stores?
5 **A. They were wholesale. Pacific Flyway existed**
6 **before Sportsman's Warehouse. Scott Nielsen owned**
7 **Pacific Flyway.**
8 Q. Do you know how to spell that?
9 **A. N-i-e-l-s -- I think it' e-n. He'll be here**
10 **later today.**
11 Q. I think so.
12 **MR. ALLGEYER: I'm going to ask him that too.**
13 **We've had that issue.**
14 **MR. UPCHURCH: Yeah. It seems to differ.**
15 Q. (By Mr. Upchurch) Other than the
16 relationship with Pacific Flyway, has Sportsman's
17 Warehouse done any wholesale business under the name
18 Sportsman's Warehouse?
19 **A. Just mainly that incident we just spoke**
20 **about.**
21 Q. What kind of products does Pacific Flyway
22 sell?
23 **A. Hunting, reloading.**
24 Q. What is reloading?
25 **A. Reloading ammo, get the exact amount of grain**

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1 **in that bullet so it will shoot just right. It's a**
2 **different breed also of customers.**
3 Q. So you sell the -- I'm sorry. Sportsman's
4 Warehouse sells reloading equipment?
5 **A. Yes.**
6 Q. For both shotgun shells and rifle cartridges?
7 **A. Yes.**
8 Q. Do they sell the powder for reloading?
9 **A. Yes.**
10 Q. Is there a special license that you need to
11 do that, to sell the powder?
12 **A. Just the amount that you carry, yeah.**
13 Q. Are there products other than the loading
14 equipment and the powder that you sell for reloaders?
15 **A. Oh, there's a lot of tools, yeah, tools and**
16 **scales to help you measure the exact amount of grains,**
17 **that sort of thing.**
18 Q. What about the bullets themselves, do you
19 sell those?
20 **A. Yes.**
21 Q. So it's a full line of reloading products?
22 **A. Uh-huh (affirmative), yes.**
23 Q. For hunting products, is that just what you
24 would expect? Do you have a specialty line of hunting
25 products or is it just a broad line of hunting

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1 products?
2 **A. We're pretty complete in that category.**
3 Q. What about fishing?
4 **A. We're pretty complete in that category also.**
5 Q. Camping?
6 **A. Complete. I would say those three**
7 **departments are very mature.**
8 Q. Outerwear?
9 **A. Outerwear and clothing.**
10 Q. Is this mainly the kind of outerwear that
11 hunters would --
12 **A. Hunting and fishing related, mainly, but we**
13 **do some sportswear also.**
14 Q. And footwear would be --
15 **A. Same thing. Hunting, fishing related, but**
16 **there's a little bit of casual.**
17 Q. Hiking?
18 **A. Yes. We carry hiking and we carry Crocs.**
19 Q. Do you know how your wife and the printer
20 came up with that particular mountain scene?
21 **A. I think they were looking for something to**
22 **help describe what's inside. We're an outdoor**
23 **company, and -- I'm not sure how many different types**
24 **they played with before they arrived with that.**
25 **That's the only one I remember.**

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1 Q. Did Sportsman's Warehouse have a logo before
2 your wife and the printer designed one?
3 **A. No. It was just block lettering.**
4 Q. On the stores, that was also the case?
5 **A. We only had one store.**
6 Q. That was in Midvale?
7 **A. It was right here, yeah, and it was just**
8 **block lettering across.**
9 Q. Are you familiar with the Bass Pro stores?
10 **A. Yes.**
11 Q. How long have you known about Bass Pro, you
12 personally?
13 **A. I would guess mid '90s.**
14 Q. When did you first become aware that they
15 used a tag line that included Sportsman's Warehouse in
16 connection with Bass Pro?
17 **A. My first -- I would say it was mid '90s,**
18 **again, probably '96, '98, somewhere in there.**
19 Q. How did you -- I'm sorry, I told you I would
20 get it mangled. Do you recall how you first became
21 aware of Bass Pro?
22 **A. Probably looking at our competitors in the**
23 **marketplace. And, again, we only had one store at**
24 **that time. My background before I came to Sportsman's**
25 **Warehouse was grocery. I didn't know who Cabela's was**

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1 **either when I started in 1991. I certainly do now,**
2 **though.**
3 Q. Cabela's is big in camping equipment?
4 **A. Hunting.**
5 Q. Do you sell tree stands and that sort of
6 thing?
7 **A. We do.**
8 Q. What about boats? Do you sell boats?
9 **A. We sell canoes and we sell some aluminum**
10 **boats in fishing, yes, and some inflatables.**
11 Q. Do your product lines differ -- well, not
12 product lines. Do the kinds of products you carry
13 differ significantly from the kinds of products that
14 Bass Pro carries?
15 **MR. ALLGEYER: I'm going to just, for the**
16 **record, object. Lack of foundation in case the**
17 **witness doesn't know all of that. If you can answer,**
18 **please go ahead. I'm not saying you can't answer.**
19 **A. I have only been into a Bass Pro one time.**
20 **I've seen their ads and stuff like that. We do carry**
21 **a lot of similar products, but we don't carry golf.**
22 Q. (By Mr. Upchurch) Okay. Are you aware of
23 any situations where customers attempted to redeem
24 Bass Pro gift cards in your stores?
25 **A. I've had my store managers call me reporting**

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1 **that, yes.**
2 Q. Several of your store managers called you?
3 **A. Not very many, no. Mainly the Denver area**
4 **and Memphis area.**
5 Q. So how many store managers would that be?
6 **A. One in Memphis and four in Denver.**
7 Q. Okay. So you received these calls from --
8 did you receive five calls, basically?
9 **A. No, actually, I've only received two.**
10 Q. Okay. One from Memphis?
11 **A. Yes, early on, and one from Loveland,**
12 **Colorado right after that Bass Pro shop opened.**
13 Q. Were there any other communications in the
14 Denver area with the other store managers concerning
15 these gift cards?
16 **A. Communications as --**
17 Q. I'm trying to figure out if you're making a
18 distinction between telephone calls and other forms of
19 communication.
20 **A. It was just telephone calls to me.**
21 Q. So basically you received two communications
22 concerning these gift cards from store managers?
23 **A. Uh-huh (affirmative). Yes.**
24 Q. Who were the store managers that called?
25 **A. Bob Goodwin in Memphis, and Brian Mackey in**

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1 **Loveland.**
2 Q. What did they say? What did the fellow in
3 Memphis say?
4 **A. He just said at the time that it was causing**
5 **a little confusion, that they received a gift card. I**
6 **said, "Don't let the customers go away. Give them a**
7 **free hat, but we can't accept the gift card." And I**
8 **had a similar conversation with Brian Mackey in**
9 **Loveland.**
10 Q. Have you had any other conversations with
11 store managers concerning Bass Pro and customers being
12 confused?
13 **A. No.**
14 Q. If you look on page 5, at the top -- and
15 you're welcome to look on the previous page to see
16 what the interrogatory was, if you want to.
17 **A. Okay.**
18 Q. What I'm interested in is the sentence that
19 starts, "Although Sportsman's Warehouse formally
20 changed the name on the store's sign to Sportsman's
21 Warehouse during 1995, respondent believes it had been
22 using the mark Sportsman's Warehouse prior to 1995."
23 Do you see that statement?
24 **A. Uh-huh (affirmative).**
25 Q. Do you know of any documents that show the

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1 use of the mark Sportsman's Warehouse by your company
2 prior to 1995?
3 **A. Documents, no.**
4 Q. Do you know if Sportsman's Warehouse has
5 looked for such documents?
6 **A. Yes, we have looked.**
7 Q. Do you know what formed the basis of the
8 belief referred to in that sentence that Sportsman's
9 Warehouse had been using that mark prior to 1995?
10 **A. Probably just that it was talked about. I**
11 **mean, we know it was spring of '95 sometime, but**
12 **trying to narrow down a date -- but it was talked**
13 **about prior to '95, yes, on the name change.**
14 Q. Okay. And who would have talked about
15 changing the name prior to 1995?
16 **A. Well, I remember talking with customers about**
17 **it on the sales floor.**
18 Q. Okay. What did the customers say?
19 **A. They would come in and say, how come you**
20 **don't carry baseball? That's a sport. How come you**
21 **don't carry golf? That's a sport. You ought to be**
22 **called Sportsman's Warehouse. I was very happy when**
23 **we changed the name.**
24 Q. Because you didn't have to have that
25 conversation again?

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1 **A. It was a conversation that happened over and**
2 **over. It said sports on the building. They thought**
3 **they were going in to get some golf balls or a**
4 **catcher's mitt. That was a complaint once they got in**
5 **there.**
6 Q. Whereas Sportsman's had a different meaning
7 to them?
8 **A. Yes.**
9 Q. So they suggested that, based upon your
10 product line, you ought to be called Sportsman's
11 Warehouse?
12 **A. Yes. And that was with me on the floor from**
13 **'91 to '95.**
14 Q. So sometime in 1995 somebody finally gave up
15 and changed the name, right?
16 **A. Yes.**
17 Q. Who would that have been?
18 **A. Bill and Scott. I think that application for**
19 **the name change was dated 2/1/95.**
20 Q. So Mr. Hayes and Mr. Nielsen would have been
21 the decision makers of --
22 **A. They were partners, but Scott ran Pacific**
23 **Flyway and basically was our accounting, paid all the**
24 **invoices, but he didn't have a lot to do with the**
25 **day-to-day operation, just kind of the back end, but**

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1 **he did help make the decisions.**
2 Q. Is he related -- is he in the family as well?
3 **A. No.**
4 Q. Because you had said --
5 **A. He's an acquaintance of Bill's. Bill used to**
6 **sell to him when he was in the rec industry.**
7 Q. Because you said it was a family business, so
8 I just wondered --
9 **A. It was Bill's idea, the original concept, and**
10 **he needed a partner and he talked Scott into opening**
11 **up part of his wholesale into retail.**
12 Q. Good. And it worked out.
13 **A. And the rest is history.**
14 Q. That's the best kind of plan, the kind that
15 works out.
16 If you'll look at pages 5 through 7, there
17 are advertising expenses and sales figures. All I
18 want to know is if these numbers appear to you to be,
19 you know, fairly accurate.
20 **A. They appear to be accurate, yes.**
21 Q. Did you participate in obtaining these
22 figures --
23 **A. No, but I happen to know the budget on last**
24 **year's advertising number because we're trying to do**
25 **better than that this year.**

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1 Q. So based upon that, these numbers look like
2 they are in the ballpark?
3 **A. Yes.**
4 Q. And the sales numbers as well, which are on
5 page 7, do those appear to be fairly accurate?
6 **A. Yes.**
7 Q. Does Sportsman's Warehouse do any business
8 other than through its stores? I mean, do you have
9 like a "doing business as" business where you sell
10 product but it's not in a Sportsman's Warehouse store?
11 **A. Gift cards over the Internet would be it.**
12 Q. But those would probably say Sportsman's
13 Warehouse on it?
14 **A. They say Sportsman's Warehouse on it, yes.**
15 Q. So other than this relationship with Pacific
16 Flyway, there are no other relationships with
17 entities --
18 **A. No.**
19 Q. -- that don't use the Sportsman's Warehouse
20 name?
21 **A. No.**
22 Q. So these sales would represent, on page 7 of
23 Exhibit 1, would represent sales through the
24 Sportsman's Warehouse stores?
25 **A. Yes.**

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1 Q. Now, do they also include the sales that --
2 well, let me go back. In this relationship with
3 Pacific Flyway, does Sportsman's Warehouse sell the
4 product to Pacific Flyway, which then sells it to
5 their customer?
6 **A. No, we would buy it as Pacific Flyway and**
7 **Pacific Flyway sells it to Sportsman's Warehouse**
8 **and/or the third party.**
9 Q. Okay.
10 **A. But not all of our inventory comes through**
11 **Pacific Flyway, mainly just the hunting department.**
12 Q. You had earlier described a situation where
13 if Pacific Flyway was trying to sell certain product
14 at wholesale and they didn't have it in stock, they
15 would come next door to the Sportsman's Warehouse
16 store?
17 **A. Yes.**
18 Q. That's the situation I'm trying to address,
19 and I'm trying to figure out how -- well, number one,
20 I'm trying to figure out if those particular sales
21 show up in any of these figures on page 7.
22 **A. No. Pacific Flyway sales do not show up in**
23 **that.**
24 Q. If you look at page 8, up at the top,
25 interrogatory No. 8, have you read the interrogatory

[Page 25]

1 and the answer?
2 **A. Okay. Yes.**
3 Q. And I guess this relates to what we were just
4 talking about with the Pacific Flyway?
5 **A. Well, those examples I gave you were quite**
6 **some time ago. I mean, these were connected until --**
7 **well, I guess they were connected until '96.**
8 Q. So all of the Pacific Flyway --
9 **A. Pacific Flyway used to be the other side of**
10 **this building. That was a common occurrence when we**
11 **just had one store, and then it was just less and less**
12 **that happened, and it doesn't happen today.**
13 Q. When did it cease happening? Do you know?
14 **A. I don't know exactly, but it didn't happen**
15 **anymore once we separated the two.**
16 Q. Which would have been in --
17 **A. Right after Stu bought it. We needed a**
18 **little bigger store and we relocated Pacific Flyway.**
19 Q. So after '96?
20 **A. Yes.**
21 Q. For example, the Pacific Flyway situation
22 didn't happen anymore?
23 **A. Right. We broke those bad habits.**
24 **MR. ALLGEYER: For the record, I think we're**
25 **going to be amending this to make this all, you know,**

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1 **clear. I think there's been an error here, slight**
2 **one, but somewhat of an error.**
3 Q. (By Mr. Upchurch) Well, you know, I was
4 trying to figure that out. Certainly the answer says
5 "Sportsman's Warehouse responds that it sells goods
6 only at retail and does not sell goods at a wholesale
7 level," and that's literally true because those are
8 both present tense. And you're telling me that you
9 haven't sold anything, even through Pacific Flyway, at
10 wholesale since 1996?
11 **A. No, I didn't say that. We still have a few**
12 **customers --**
13 Q. Wholesale customers?
14 **A. -- for Pacific Flyway, yes.**
15 Q. I didn't understand that at all. What do you
16 do at wholesale?
17 **A. What do we do?**
18 Q. Yes.
19 **A. We have other competitors that still buy a**
20 **few things from Pacific Flyway, but we have no new**
21 **customers. So if somebody wants to get set up, the**
22 **answer is no, we have service in our stores. But**
23 **there's been a few customers that have done business**
24 **with us over a long period of time that still buy**
25 **something once in a while and we haven't turned them**

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1 **down.**
2 Q. So do they send the invoice to Sportsman's
3 Warehouse?
4 **A. No. It's all done through Pacific.**
5 Q. So they deal directly with Pacific and
6 Pacific Flyway fills the order?
7 **A. Yes. But that number is very small today**
8 **compared to what it used to be.**
9 Q. How does Sportsman's Warehouse get paid for
10 that?
11 **A. They don't. Pacific Flyway does.**
12 Q. So you generate no revenue based upon
13 those -- Sportsman's Warehouse generates no revenue
14 based upon those sales?
15 **A. Correct.**
16 **MR. ALLGEYER: Just so the record is clear,**
17 **when you say Sportsman's Warehouse, you mean the**
18 **entity Sportsman's Warehouse?**
19 **THE WITNESS: That's what I mean, yes.**
20 **MR. ALLGEYER: There's also a dba Sportsman's**
21 **Warehouse. So that may be confusing to the witness.**
22 **MR. UPCHURCH: No, I was talking about --**
23 **MR. ALLGEYER: It was kind of confusing to**
24 **me.**
25 **MR. UPCHURCH: -- the legal entity,**

[Page 28]

1 **Sportsman's Warehouse.**
2 Q. (By Mr. Upchurch) Are you aware of this dba
3 Sportsman's Warehouse that your counsel just
4 mentioned?
5 **A. Sports Warehouse dba Sportsman's Warehouse,**
6 **yes.**
7 Q. And is that the previous company that you
8 talked about, the predecessor company, Sports
9 Warehouse?
10 **A. I'm not sure why Stu set it up that way.**
11 Q. But it's all one company?
12 **A. It's all one company, yes. I think that's**
13 **how it was listed when we were incorporated.**
14 Q. Do you own stock in Sportsman's Warehouse?
15 **A. Yes.**
16 Q. Is it publicly traded?
17 **A. No.**
18 Q. On pages 9 and 10 of Exhibit 1, there are a
19 list of stores. Are these all stores that are doing
20 business under the mark or under the name Sportsman's
21 Warehouse?
22 **A. Yes.**
23 **MR. ALLGEYER: This is missing a store,**
24 **right?**
25 **THE WITNESS: Well, it's been relocated to --**

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1 **MR. ALLGEYER: Okay. I see.**
2 Q. (By Mr. Upchurch) So the date for store
3 No. 12 represents when that particular store moved to
4 its current location?
5 **A. Yes. But it was prior to that that Pacific**
6 **Flyway relocated, because we made this building all**
7 **store.**
8 Q. So the date that the first store in Midvale
9 opened would be much earlier than November of 2002?
10 **A. The first store opened on Memorial weekend in**
11 **1996.**
12 Q. And was the second store the one in Provo in
13 1998?
14 **A. The second store being -- we relocated the**
15 **first store three times. So the first store in 1986**
16 **was the other half of Pacific Flyway wholesale which**
17 **opened up to retail. Then it moved to a building on**
18 **its own just down from Pacific Flyway, and then it**
19 **moved to this building in 1991.**
20 Q. And then in 1998, another --
21 **A. 1998, yes. Stu bought us in 1996 and in 1998**
22 **we added our second store under Stu's tenure.**
23 Q. And that was the one in Provo?
24 **A. Yes.**
25 Q. Do you see the third column on pages 9 and 10

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1 that says "continuously active states"?
2 **A. Yes.**
3 Q. What does that mean?
4 **A. I don't know. I guess we haven't closed a**
5 **store in those states. We've never closed a store. I**
6 **think it's got a number where it looks like at the**
7 **time of this we were in 21 states with 43 stores.**
8 **Today we're now in 23 states with 48 stores open.**
9 Q. Was this information obtained from one of
10 your standard reports?
11 **A. I would bet that Stu provided this**
12 **information.**
13 Q. You did not provide this information?
14 **A. No.**
15 Q. So he would be more likely to know --
16 **A. Yes.**
17 Q. -- the answer to that?
18 Are you familiar with the publication
19 Sportsman's News?
20 **A. Yes.**
21 Q. On page 11, there's a reference to a license
22 agreement, and the actual interrogatory is on the
23 previous page. I was just wondering if you were
24 involved in the granting of that license for
25 Sportsman's News.

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1 **A. I was involved in the meeting with Stu and**
2 **myself and the folks from Sportsman's News.**
3 Q. When did that occur, roughly?
4 **A. At least two years ago. I'm not sure**
5 **exactly.**
6 Q. Okay. On page 11 in response to
7 interrogatory No. 13, the last sentence -- and I want
8 you to read the whole thing. The part I'll be
9 focusing on eventually is the last sentence, which
10 says, "To the extent there has been any use of the
11 R and the circle symbol not in connection with the
12 respondent's design, such use of the R and the circle
13 symbol has been inadvertent and de minimis in nature."
14 So that's where we'll be going with this.
15 **A. Okay.**
16 Q. Are you familiar with any uses of the R and a
17 circle symbol by Sportsman's Warehouse in connection
18 with the Sportsman's Warehouse mark?
19 **A. You mean have we used the -- yes, we have**
20 **used the R.**
21 Q. Do you have a person in the company who's
22 responsible for ensuring that you use your trademarks
23 properly?
24 **A. Advertising.**
25 Q. Okay. Is there a particular person in

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1 advertising that is responsible for that?
2 **A. It is now Rich Coles. He's our director of**
3 **advertising.**
4 Q. How long has he been responsible for that
5 function?
6 **A. Since January of '06.**
7 Q. How do you spell his last name?
8 **A. C-o-l-e-s.**
9 Q. Who was in charge of advertising before that?
10 **A. His name was Ryan Foutz, F-o-u-t-z.**
11 Q. Is Mr. Foutz still with the company?
12 **A. No, he is not.**
13 Q. Would Mr. Foutz also have been responsible
14 for ensuring that your trademarks were used
15 properly --
16 **A. Yes.**
17 Q. -- during the period of time he was in charge
18 of advertising?
19 **A. Yes.**
20 Q. And how long was he in charge of advertising?
21 **A. Probably two years. He was a former store**
22 **manager.**
23 Q. Who was responsible for the correct use of
24 trademarks before Mr. Foutz?
25 **A. That would probably be Betsy Durfee and my**

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1 **wife, Robyn Smith.**
2 Q. Durfee?
3 **A. D-u-r-f-e-e. And that's R-o-b-y-n.**
4 Q. I just put misses.
5 **A. Okay.**
6 Q. Do you know what procedures the person in
7 charge of advertising uses to ensure that your
8 trademarks are used correctly?
9 **A. I don't, no.**
10 Q. So that's something that's delegated to the
11 director of advertising, to whoever is in charge of
12 advertising?
13 **A. Yes.**
14 Q. I think you said earlier that you were not
15 involved in providing the information for the
16 application that became the registration shown in
17 Exhibit 2. Were you involved subsequently in the
18 give-and-take with the trademark office in obtaining
19 the registration?
20 **A. No.**
21 Q. Who would have been involved in that
22 give-and-take with the trademark office?
23 **A. I would -- I don't know. I would guess Bill**
24 **or Stu, depending on the date of that.**
25 Q. I believe it was filed in '99.

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1 **A. Probably Stu.**
2 Q. That would be your guess, but you don't know?
3 **A. Yeah.**
4 Q. On pages 13 and 14, there's a reference to an
5 entity that was doing business as Sportsman's
6 Warehouse on Ebay.
7 **A. Yes.**
8 Q. Are you familiar with that situation?
9 **A. Yes.**
10 Q. Who brought that situation to your attention?
11 **A. A customer that purchased something that was**
12 **looking for a warranty, and our IT department got**
13 **involved and explained that we're not affiliated.**
14 Q. There's also a reference in this answer to an
15 exchange of correspondence with a company that was
16 attempting to file state business and/or corporate
17 names, including the words Sportsman's Warehouse.
18 It's in the paragraph right before interrogatory
19 No. 16.
20 **MR. ALLGEYER: Are you on page 14 now?**
21 **MR. UPCHURCH: Yes.**
22 **A. I'm sorry, what was the question?**
23 Q. (By Mr. Upchurch) What I want to know is if
24 you're familiar with that particular situation where
25 another company was trying to register the business

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1 name Sportsman's Warehouse.
2 **A. I'm not familiar with that, no.**
3 Q. Do you know if Sportsman's Warehouse has
4 retained any experts to use in this particular
5 trademark proceeding, the one -- the cancellation
6 proceeding that we're here about today?
7 **A. Experts being Lindquist & Vennum, I would**
8 **guess, but --**
9 **MR. ALLGEYER: That's so kind of you to say**
10 **that.**
11 Q. (By Mr. Upchurch) There will be a 10-percent
12 reduction on your bill just because of that.
13 But other than expert lawyers, you don't know
14 of any experts that have been retained?
15 **A. No.**
16 Q. On page 15, in response to interrogatory
17 No. 18, it states that "Sportsman's Warehouse does not
18 have a formal written policy concerning the use of its
19 trademarks, but takes all reasonable steps to ensure
20 that its use of the marks is proper." Do you see that
21 answer?
22 **A. Uh-huh (affirmative).**
23 Q. So you agree that there's no formal written
24 policy concerning the use of Sportsman's Warehouse
25 trademarks?

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1 **A. Well, in February an e-mail was sent out to**
2 **all the store managers to make sure they take -- if**
3 **they are going to use our trademark, to make sure it's**
4 **on paper correct.**
5 Q. February of 2006?
6 **A. Yes. That was sent out by Jeremy Sage. He's**
7 **our vice president of operations.**
8 Q. Has that been produced? Do you know?
9 **MR. ALLGEYER: I don't know. I don't think**
10 **it has been. I think it's going to be.**
11 **MR. UPCHURCH: Okay.**
12 **MR. ALLGEYER: I think we learned of it just**
13 **recently. I should be careful because I haven't been**
14 **that involved in the document production. Now that**
15 **he's mentioned it, if it hasn't been produced, we'll**
16 **find it.**
17 **MR. UPCHURCH: Yeah, and I would like to say**
18 **that I've gone through all the documents, but I'm not**
19 **going to say that because I haven't gone through all**
20 **the documents. So I'm not saying that you haven't**
21 **produced it. But if it's available, it would be nice**
22 **to at least see what his knowledge of it is when we**
23 **finish up.**
24 **MR. ALLGEYER: Sure.**
25 **MR. UPCHURCH: So maybe if we could get it**

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1 **over noon or something.**
2 **MR. ALLGEYER: Yeah, if you have that.**
3 **THE WITNESS: Okay.**
4 Q. (By Mr. Upchurch) I would like to ask you
5 about the phrase "all reasonable steps" in that
6 particular answer. Do you have an understanding of
7 what all reasonable steps are that Sportsman's
8 Warehouse has taken to ensure that its use of its
9 marks is proper?
10 **A. No, I don't have knowledge of that.**
11 Q. Do you know who would know what all
12 reasonable steps are that Sportsman's Warehouse has
13 taken?
14 **A. Where most of the errors occurred was at**
15 **store level on stationery. They are on stationery,**
16 **that sort of thing. So if it didn't come from**
17 **advertising, they made all reasonable steps**
18 **instructing the stores if they duplicate the logo,**
19 **make sure it's in a certain way.**
20 Q. And that's set out in the e-mail that you
21 talked about?
22 **A. Yes.**
23 Q. We'll just come back to that after lunch.
24 **A. Okay.**
25 Q. If you look at the bottom of 15,

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1 interrogatory No. 19 and the top of 16, it talks about
2 in-store signage.
3 **A. Okay.**
4 Q. Has Sportsman's Warehouse, to your knowledge,
5 been able to locate documents showing advertising or
6 in-store signage as early as 1994?
7 **A. We have not obtained that, no.**
8 Q. So that's similar to the question I asked you
9 previously about documents that had Sportsman's
10 Warehouse on it?
11 **A. Correct.**
12 Q. Why don't we -- would you mind taking a
13 break, and maybe we could find that and get rid of
14 that one subject?
15 **MR. ALLGEYER: Okay.**
16 **MR. UPCHURCH: Because I'm not sure we're**
17 **going to go very long after lunch. So maybe it makes**
18 **sense to do it now.**
19 **MR. ALLGEYER: Yes, that would be fine.**
20 **(Recess from 11:09 a.m. to 11:16 a.m.)**
21 **(Exhibit No. 3 marked.)**
22 Q. (By Mr. Upchurch) I'm going to hand you what
23 has been marked as Exhibit 3 and ask if you can
24 identify that, please.
25 **A. Yes.**

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1 Q. What is that document?
2 **A. It's an e-mail that we instructed our store**
3 **managers on how to use the Sportsman's Warehouse mark**
4 **on any stationery or -- all the ads come through**
5 **advertising now, so it would mainly just be in-store**
6 **stationery.**
7 Q. Who is responsible for the signage at the
8 stores?
9 **A. At the stores there's now a program that is**
10 **called Sign Maker. It has our logo in the sign**
11 **already.**
12 Q. Okay. And all of the advertising that the
13 stores do comes from Utah, comes from you here?
14 **A. Yes.**
15 Q. Now, there seems to be some attachments to
16 Exhibit 3.
17 **A. Yes. That's these.**
18 Q. Okay. And what do those attachments
19 represent?
20 **A. Our mark used a couple different ways.**
21 Q. Now, the last page of Exhibit 3 doesn't seem
22 to have the oval that the other pages have around the
23 mark; is that correct?
24 **A. Correct. That's our original mark.**
25 Q. I also don't see the R and the circle symbol

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1 on the last page.
2 **A. I don't know why it's not there.**
3 Q. Was the purpose of the e-mail to get people
4 to use the R and the circle symbol when they're using
5 the complete mark?
6 **A. The purpose was just to show them, yes, the**
7 **marks that are authorized. I don't know why the R is**
8 **not in that.**
9 Q. But it's your understanding that there should
10 be an R and a circle on this last page as well?
11 **A. I don't know the answer to that, if we have**
12 **that on stationery.**
13 Q. So who would know the answer to that,
14 Mr. Coles?
15 **A. Yeah. Yes.**
16 Q. Now, I notice on the next to the last page of
17 Exhibit 3, the R and a circle in the lower instance of
18 the mark is much fainter than in the example that's
19 above. Do you know why the R and a circle is not as
20 dark in the one down below?
21 **A. That was a color e-mail. It was just two**
22 **different shades.**
23 Q. Okay. So we're looking at it in black and
24 white?
25 **A. Yes.**

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1 Q. Has the logo changed as time has gone by?
2 **A. Maybe just with the oval.**
3 Q. When I look at the different samples you have
4 as attachments to Exhibit 3, it looks like there are
5 dots on the mountains in some and then there are lines
6 on others. So that's what makes me ask the question
7 if the logo has changed over time.
8 **A. If it has, it's very slight. Just looks like**
9 **the printing on that, maybe.**
10 Q. But to your recollection, there was no
11 redesign of the mark?
12 **A. Only the oval addition.**
13 Q. Do you know when the oval was added?
14 **A. It's during Ryan's tenure, and the biggest**
15 **reason being it looked a little better on print, on**
16 **ads.**
17 Q. On page 16 of the interrogatory answers in
18 response to interrogatory No. 21, it states that you
19 and Stu Utgaard assisted in gathering the information
20 for these responses. Do you see that?
21 **A. Okay.**
22 Q. What did you do in obtaining information for
23 these responses?
24 **A. The biggest thing, I would guess, is getting**
25 **copies of old advertising ads.**

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1 Q. Anything else?
2 **A. Well, it mostly came up empty.**
3 Q. Do you keep that kind of thing? Do you keep
4 old advertising?
5 **A. I know we had a lot, but we have relocated**
6 **several times. So a lot of it got thrown away.**
7 Q. Did you --
8 **A. What we found was on microfiche at the**
9 **library.**
10 Q. Okay. Did you do anything else to gather
11 information to respond to these interrogatories?
12 **A. Well, I did make other contacts, but I wasn't**
13 **able to find an earlier date that I was looking for.**
14 Q. Okay. And so if I'm understanding you
15 correctly, you were looking for material to find an
16 early date --
17 **A. Yes.**
18 Q. -- for the Sportsman's Warehouse mark?
19 **A. Yes.**
20 Q. And in connection with that, did you use
21 anybody here at the company to assist you in finding
22 that kind of material?
23 **A. Mostly advertising. It was the advertising**
24 **department that went to the library and took the time**
25 **to go through the microfiche.**

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1 Q. So that would be Rich Coles or someone under
2 his supervision?
3 **A. Yes. Other than that, it was just phone**
4 **calls.**
5 Q. Phone calls to whom?
6 **A. Vendors or sales reps, our old buying group.**
7 Q. Are you aware of any instances of confusion
8 between Bass Pro and Sportsman's Warehouse by
9 potential job applicants?
10 **A. No.**
11 Q. Do you know if there are any documents
12 reflecting the design of the Sportsman's Warehouse
13 logo? You said your wife and Mr. Egan worked on that.
14 Are you aware of a file or other documents that show
15 their work?
16 **A. No, I'm not.**
17 Q. Who is responsible at Sportsman's Warehouse
18 for changing the corporate name, you know, doing those
19 kinds of legalities?
20 **A. Changing the corporate name?**
21 Q. Yes. If you need to file something to change
22 the name or if you need to file something to do
23 business in a particular state, who is responsible for
24 that kind of thing?
25 **A. Stu might delegate it, but none of that would**

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1 **happen without his knowledge.**
2 Q. Okay. Who would he delegate that kind of
3 thing to?
4 **A. Probably advertising.**
5 Q. I have a document here concerning changing
6 the name of Sports Warehouse, Inc. to Sportsman's
7 Warehouse, Inc. It's signed by Mr. Utgaard dated
8 February 6th, 2004. Is that consistent with your
9 recollection of when the name was officially changed?
10 **A. I don't know what that is. You'll have to**
11 **ask Stu.**
12 Q. That's why I didn't ask the reporter to mark
13 it, because it didn't sound like you were
14 knowledgeable about this kind of thing.
15 Why don't you give me 10 minutes. I think
16 we're about done.
17 **MR. ALLGEYER: Sure.**
18 **(Recess from 11:30 a.m. to 11:41 a.m.)**
19 Q. (By Mr. Upchurch) Do you know Ken Burrows of
20 Tracker Marine?
21 **A. Brief acquaintance. I think I met him one**
22 **time.**
23 Q. Have you discussed this cancellation
24 proceeding with Mr. Burrows?
25 **A. No.**

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1 Q. Does Sportsman's Warehouse have any Bass Pro
2 catalogs?
3 **A. I don't know what you mean by that. I mean,**
4 **we've looked at them, yes, but --**
5 Q. How did you obtain Bass Pro catalogs?
6 **A. Well, somebody is either on a mailing list**
7 **or -- the normal way that you would retain a catalog.**
8 Q. What would the purpose be in retaining those
9 catalogs? Why would you want such things?
10 **A. It's your competitor.**
11 Q. So it's just competitive research?
12 **A. Sure.**
13 Q. And if you had any of those now, who would
14 have them, advertising or would it be somebody else?
15 **A. No, it would be somebody else. I don't have**
16 **one in my possession, no.**
17 Q. But there could be some floating around the
18 company --
19 **A. There could be.**
20 Q. -- used for competitive purposes?
21 **A. Right.**
22 Q. We mentioned the Ebay incident, that there
23 was a company using Sportsman's Warehouse as a
24 business name. There was another reference to someone
25 trying to register the name Sportsman's Warehouse in

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1 various states. Are you aware of any company other
2 than those two and Bass Pro that use Sportsman's
3 Warehouse as part of their company name?
4 **A. The incident in Australia. I think they**
5 **might still be on the Internet. It's**
6 **sportsmanswarehouse.au.**
7 Q. Any U.S. companies that you're aware of
8 that --
9 **A. Not that I'm aware of.**
10 Q. And I asked about using Sportsman's Warehouse
11 as part of a company name. Are you aware of any other
12 companies that use Sportsman's Warehouse as a
13 trademark in the United States?
14 **A. No.**
15 **MR. UPCHURCH: That's all I have.**
16 **MR. ALLGEYER: We'll read and sign.**
17 **(The deposition concluded at 11:44 a.m.)**
18
19 * * *
20
21
22
23
24
25

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Case: Bass Pro vs. Sportsman's Warehouse
Case No.: 92045000
Reporter: Sharon Morgan
Date Taken: 5/10/06

WITNESS CERTIFICATE

STATE OF UTAH :
: ss.
COUNTY OF_____:

I HEREBY CERTIFY that I have read the foregoing testimony consisting of 43 pages, numbered from 3 to 46 inclusive, and the same is a true and correct transcription of said testimony, with the exception of the following corrections listed below, giving my reasons therefor.

Page	Line	Change/Correction	Reason

DALE R. SMITH
Subscribed and sworn to at _____,
Utah, this _____ day of _____, 2006.

My commission expires:
_____ NOTARY PUBLIC

SHARON MORGAN, CSR, RPR, CRR
GARCIA & LOVE

[Page 48]

CERTIFICATE
STATE OF UTAH)
:ss
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the deposition of DALE R. SMITH, the witness in the foregoing deposition named, was taken before me, Sharon Morgan, Certified Shorthand Reporter and Notary Public in and for the State of Utah, residing in Salt Lake City.

That the said witness was by me, before examination duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause.

That the testimony of said witness was by me reported in Stenotype, and thereafter caused to be transcribed into typewriting, and that a full, true, and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages, numbered from 3 to 46, inclusive, and said witness deposed and said as in the foregoing annexed deposition.

I further certify that the reading copy of the same was delivered to Mr. Allgeyer for reading and signature, signing before a Notary Public, and to be returned within 30 days of the date hereon.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this 14th day of May, 2006.

_____
Sharon Morgan, CSR, RPR, CRR

My Commission Expires:
6-16-2007

SHARON MORGAN, CSR, RPR, CRR
GARCIA & LOVE

Int. Cl.: 35

Prior U.S. Cls.: 100, 101 and 102

Reg. No. 2,390,988

United States Patent and Trademark Office

Registered Oct. 3, 2000

SERVICE MARK
PRINCIPAL REGISTER

SPORTS WAREHOUSE, INC. (UTAH CORPORATION)
7035 SOUTH 185 WEST
MIDVALE, UT 84047

FOR: RETAIL AND WHOLESALE STORES FEATURING HUNTING SUPPLIES, FISHING SUPPLIES, CAMPING SUPPLIES, RELOADING SUPPLIES, OUTERWEAR CLOTHING AND FOOTWEAR, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 6-16-1995; IN COMMERCE 6-16-1995.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SPORTSMAN'S WAREHOUSE" APART FROM THE MARK AS SHOWN; AND DISCLAIMS THE FOLLOWING INDIVIDUAL WORDS, "HUNTING," "FISHING," "CAMPING," "RELOADING,", "OUTERWEAR," AND "FOOTWEAR" APART FROM THE MARK AS SHOWN.

THE LINING AND STIPPLING SHOWN IN THE DRAWING ARE NOT INTENDED TO INDICATE COLOR.

SER. NO. 75-625,090, FILED 1-22-1999.

LINDA E. BLOHM, EXAMINING ATTORNEY

PENGAD 800-631-6989
DEPOSITION EXHIBIT
2
Smith

RECEIVED
OCT 13 2000
BY:

SP 00288

ale Smith

·om: "Rich Coles" <rich@sportsmanswarehouse.com>
ɔ: "'Dale Smith'" <dale@sportsmanswarehouse.com>
ent: Tuesday, May 09, 2006 3:34 PM
ubject: FW: Proper display

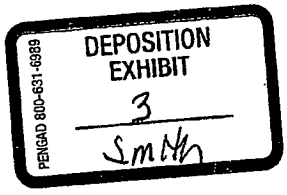
·e is the email Jeremy sent out to all the store managers back in February.

ınk you,

·h Coles
ɔrtsman's Warehouse
rketing/Advertising Manager
ı1)304-4385

ı@sportsmanswarehouse.com

ɔm: Ken Palmer [mailto:kpalmer@sportsmanswarehouse.com]
nt: Tuesday, May 09, 2006 2:32 PM
: Rich Coles
ıbject: Fw: Proper display



ɜn Palmer
ɔortsman's Warehouse
ɔrtland, OR
03)777-8700
ɔalmer@sportsmanswarehouse.com
– Original Message -----
ɔm: Jeremy Sage
ɔ: rich@sportsmanswarehouse.com ; 'Blaine Davey' ; 'Bob Goodwin' ; 'Brett Larson' ; 'BRIAN HOWALD' ; 'Brian Nelson' ; 'Brian ıompson' ; 'Bruce Gibson' ; 'Bryan Mackey' ; 'Chris LePage' ; 'Chris Robertson' ; 'Clayton Upshaw' ; 'Dan Tracey' ; 'Darin cDaniel' ; 'Darrold Berreau' ; 'Daryl Jarnot' ; 'Dave Nitzel' ; 'Don Thomas' ; 'Doug Mason' ; 'Doug Miller' ; 'Erik Glick' ; 'Gary latts' ; 'Howard Spero' ; 'Jackson Felt' ; 'Jason Perez' ; 'Jerry Thompson' ; 'Joel McRae' ; 'John Howard' ; 'John Powell' ; 'Jon ırson' ; 'Ken Palmer' ; 'Kent Stoddard' ; 'Kim Polfus' ; 'Kurt Hintze' ; 'Lee Van Tassell' ; 'Mike Murray' ; 'Pat Nolde' ; 'Paul Neill' ; eagan Cunningham' ; 'Roger Berends' ; 'Sandy Coronado' ; 'Sarge Upchurch' ; 'Steve Collins' ; 'Travis Kingsley' ; 'Travis Mann'
c: Stu Utgaard ; Dale Smith ; Chris Utgaard
ent: Tuesday, February 07, 2006 5:35 PM
ubject: Proper display

ood afternoon,
his e-mail is to clarify how to display our logo properly in regards to Copyright and Trademark. Follow these guidelines with no xceptions at all times.

you are using the Sw logo with the mountain background and the words Hunting.Fishing.Camping eloading.Outerwear.Footwear underneath you must have the Copyright logo displayed. The copyright logo is an R with a circle ound the R.

you are using the SW logo with the phrase "America's Premier Outfitter" you must have the Trademark logo displayed. The rademark logo is a TM with a circle around it.

hese guidelines apply to both the Oval logo and our standard logo.

Please ensure that you follow these. It is a legal issue that we need to keep straight.

ıank you

ıremy

SPORTSMAN'S®
WAREHOUSE
HUNTING • FISHING • CAMPING • RELOADING • OUTERWEAR • FOOTWEAR
America's Premier Outfitter™

SPORTSMAN'S®
WAREHOUSE
HUNTING • FISHING • CAMPING • RELOADING • OUTERWEAR • FOOTWEAR

SPORTSMAN'S®
WAREHOUSE
HUNTING • FISHING • CAMPING • RELOADING • OUTERWEAR • FOOTWEAR

SPORTSMAN'S WAREHOUSE

HUNTING • FISHING • CAMPING • RELOADING • OUTERWEAR • FOOTWEAR

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

BASS PRO TRADEMARKS,)
L.L.C.,)
) Cancellation No. 92045000
Petitioner,)
)
vs.) Deposition of:
) SCOTT NIELSEN
SPORTSMAN'S WAREHOUSE,)
INC.,)
)
Respondent.)

May 10, 2006
1:00 p.m.

Sportsman's Warehouse
7035 High Tech Drive
Midvale, UT 84047

Sharon Morgan, CSR, RPR, CRR
Notary Public in and for the State of Utah

[Page 2]

1 APPEARANCES
2 For the Plaintiff:
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13
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1 PROCEEDINGS
2 SCOTT NIELSEN,
3 called as a witness on behalf of the petitioner, being
4 duly sworn, was examined and testified as follows:
5 EXAMINATION
6 BY MR. UPCHURCH:
7 Q. Would you state your name for the record,
8 please.
9 **A. Scott Nielsen.**
10 Q. Mr. Nielsen, are you a former owner of
11 Pacific Flyways?
12 **A. Yes.**
13 Q. Did you have any ownership interest in Sports
14 Warehouse?
15 **A. Yes.**
16 Q. You have been identified to us by Sportsman's
17 Warehouse as a person who had knowledge of the
18 selection of the Sports Warehouse name. Are you, in
19 fact, a person who helped select the Sports Warehouse
20 name?
21 **A. Yes.**
22 Q. Who was involved in the selection of that
23 name?
24 **MR. ALLGEYER: Just to be clear, you're**
25 **talking about the Sports Warehouse name, first of all?**

[Page 4]

1 **MR. UPCHURCH: Yes.**
2 **A. Bill Hayes.**
3 Q. (By Mr. Upchurch) Anyone else?
4 **A. Myself.**
5 Q. Anyone else?
6 **A. No.**
7 Q. Do you recall when it was that you and
8 Mr. Hayes selected the Sports Warehouse name?
9 **A. 1986.**
10 Q. Were you involved in the business of Sports
11 Warehouse?
12 **A. Yes.**
13 Q. What duties, if any, did you have in
14 connection with the business of Sports Warehouse?
15 **A. The payables.**
16 Q. Any other duties?
17 **A. Supply of inventory.**
18 Q. When you say you supplied the inventory, was
19 that through Pacific Flyways?
20 **A. Yes.**
21 Q. What was the business of Pacific Flyways,
22 just in general?
23 **A. Wholesale sporting goods.**
24 Q. Did Sports Warehouse also have a wholesale
25 sporting goods business?

[Page 5]

1 **A. Some.**
2 Q. How did the wholesale sporting goods business
3 of Sports Warehouse differ from the wholesale sporting
4 goods business of Pacific Flyways?
5 **A. To answer your question -- let me hear that**
6 **again, please.**
7 **MR. UPCHURCH: Could you read that back?**
8 **"QUESTION: How did the wholesale sporting**
9 **goods business of Sports Warehouse differ from the**
10 **wholesale sporting goods business of Pacific Flyways?"**
11 **A. I don't know if I can answer that question.**
12 **I don't know if it did differ.**
13 Q. (By Mr. Upchurch) Okay. So there may not
14 have been any differences?
15 **A. Right.**
16 Q. Have you had your deposition taken before?
17 **A. Yes.**
18 Q. How many times, roughly?
19 **A. Three.**
20 Q. Okay. So you realize that this testimony can
21 be used in legal proceedings and that kind of thing,
22 even though it's very informal here?
23 **A. Yes.**
24 Q. Okay. There was some testimony this morning
25 by Mr. Smith, Dale Smith, who is the president of

[Page 6]

1 Sportsman's Warehouse, that the wholesale business of
2 Sports Warehouse and later Sportsman's Warehouse was
3 done in connection with Pacific Flyways. Is that your
4 recollection?
5 **A. What does he mean by connection? You know, I**
6 **don't know what that means. I don't know how to**
7 **interpret that.**
8 Q. Okay. Do you know if Sports Warehouse sold
9 any product at wholesale other than through Pacific
10 Flyways?
11 **A. When Sports Warehouse sold wholesale, they**
12 **sold through Sports Warehouse. They didn't sell**
13 **through Pacific Flyways. If a wholesale customer**
14 **comes to Sports Warehouse, they paid Sports Warehouse.**
15 Q. Okay. So Sports Warehouse would be doing the
16 invoicing for those wholesale sales?
17 **A. Correct.**
18 Q. Are you still involved with Sports Warehouse
19 or Sportsman's Warehouse?
20 **A. No.**
21 Q. When was the last time that you were working
22 for either of those companies?
23 **A. 1997.**
24 Q. Do you have any knowledge as to whether
25 Sports Warehouse or Sportsman's Warehouse did any

[Page 7]

1 business at wholesale after 1997?
2 **A. No.**
3 Q. Were you involved in renaming Sports
4 Warehouse to Sportsman's Warehouse?
5 **A. Yes.**
6 Q. Who else was involved in that name change?
7 **A. Bill Hayes.**
8 Q. Anyone else?
9 **A. Not that I'm aware of.**
10 Q. Do you recall when that occurred?
11 **A. My best recollection is 1994.**
12 Q. Was there a reason for the name change that
13 you recall?
14 **A. Customers -- I don't recall that. I don't**
15 **recall the reason for the name change.**
16 Q. And you said you thought it was in 1994. Do
17 you have a specific recollection that it was 1994?
18 **A. I do not.**
19 Q. Do you know of any documents that existed at
20 the time reflecting the name change?
21 **A. I do not.**
22 Q. When the name was changed, were the signs on
23 the outside of the store changed?
24 **A. Yes.**
25 Q. How large were those signs, roughly? I mean,

[Page 8]

1 10 feet or larger?
2 **A. I can't remember the size of the signs.**
3 Q. Okay. You're familiar with the Sportsman's
4 Warehouse store across the highway here?
5 **A. Yes.**
6 Q. And that has a fairly large sign on the
7 front; you would agree?
8 **A. I don't pay attention, I'm sorry.**
9 Q. Okay. I went to Taco Bell for lunch, and it
10 was pretty hard to miss because it was pretty big.
11 **MR. ALLGEYER: He probably sees it every day,**
12 **so --**
13 **MR. UPCHURCH: It just kind of fades into the**
14 **background?**
15 **MR. ALLGEYER: Yes.**
16 Q. (By Mr. Upchurch) Do you recall whether the
17 sign on the store or stores was made out of metal?
18 **A. I can't recall the product.**
19 Q. You just don't have any image at all of what
20 your store signage was before the name change?
21 **A. I would say it's the same as it is now, but I**
22 **don't know that. They could have changed it after**
23 **they bought the store. I'm not sure.**
24 Q. Now, you say "they could have changed it."
25 Are you talking about Stu Urgaard?

[Page 9]

1 **A. Uh-huh (affirmative).**
2 **MR. ALLGEYER: Utgaard, U-t-g-a-a-r-d.**
3 **MR. UPCHURCH: I'm sorry. I knew that wasn't**
4 **quite right.**
5 Q. (By Mr. Upchurch) And do you recall when
6 Mr. Utgaard purchased the store?
7 **A. Yes.**
8 Q. When was that?
9 **A. November of -- excuse me, November of 1996.**
10 Q. And at that time there was the one
11 Sportsman's Warehouse store; is that correct?
12 **A. That's correct.**
13 Q. There is a logo that's used in connection
14 with the Sportsman's Warehouse stores which is shown
15 in Exhibit 2. Have you seen that logo before?
16 **A. Yes.**
17 Q. Were you involved in the selection of that
18 logo?
19 **A. No.**
20 Q. Do you know who was?
21 **A. No.**
22 Q. When you and Mr. Hayes decided to do the name
23 change, do you recall if there was any searching done
24 for trademarks to make sure the name was available?
25 **A. No.**

[Page 10]

1 Q. You don't recall?
2 **A. I don't recall.**
3 Q. Are you familiar with Bass Pro Shops?
4 **A. Yes.**
5 Q. How long have you known of Bass Pro Shops?
6 **A. 30 years, approximately.**
7 Q. Are you aware that Bass Pro Shops uses as
8 part of one of its mark the phrase Sportsman's
9 Warehouse?
10 **A. I am now.**
11 Q. When did you first become aware of that?
12 **A. 2004.**
13 Q. Did you have any personal involvement in
14 wholesale sales made by Sports Warehouse or
15 Sportsman's Warehouse?
16 **A. No.**
17 Q. Do you know if there was a person at Sports
18 Warehouse who was responsible for wholesale sales?
19 **A. No.**
20 Q. Are you aware of any confusion between
21 Sportsman's Warehouse and Bass Pro Shops?
22 **A. No.**
23 Q. As part of Pacific Flyways -- is it Flyway or
24 Flyways?
25 **A. Pacific Flyway.**

[Page 11]

1 Q. Pacific Flyway, I'm sorry. I have been
2 pronouncing it incorrectly.
3 As part of Pacific Flyway, have they
4 supplied, while you were associated with them, any
5 sporting goods to Bass Pro Shops?
6 **A. No, not that I'm aware of.**
7 Q. Okay. Are you aware of any other companies
8 other than Bass Pro Shops or Sportsman's Warehouse
9 using the phrase Sportsman's Warehouse?
10 **A. No.**
11 **MR. UPCHURCH: I don't think I have any more**
12 **questions. Let me check.**
13 **MR. ALLGEYER: Okay.**
14 **(Off-the-record discussion.)**
15 Q. (By Mr. Upchurch) I'm sorry, I do have to
16 ask you about the Pacific Flyway wholesale business in
17 connection with Sports Warehouse. If I understood
18 Mr. Smith correctly, he was saying this morning that
19 if a customer came to Pacific Flyway and Pacific
20 Flyway didn't have the product in stock, they would
21 walk down the hall and get that product from Sports
22 Warehouse or Sportsman's Warehouse. Does that ring a
23 bell at all?
24 **A. Yes.**
25 Q. Okay. Is that an accurate description of

[Page 12]

1 what happened?
2 **A. Yes.**
3 Q. Who would invoice for those sales?
4 **A. Sports Warehouse or Sportsman's Warehouse.**
5 Q. So Pacific Flyway at that point would not
6 send out an invoice for that particular product?
7 **A. Correct.**
8 Q. All right. That's more understandable to me.
9 Thank you.
10 I don't have any other questions.
11 **MR. ALLGEYER: Thank you.**
12 **(The deposition concluded at 1:17 p.m.)**
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[Page 13]

1 CERTIFICATE
2 STATE OF UTAH)
:ss
3 COUNTY OF SALT LAKE)
4 THIS IS TO CERTIFY that the deposition of
SCOTT NIELSEN, the witness in the foregoing deposition
5 named, was taken before me, Sharon Morgan, Certified
Shorthand Reporter and Notary Public in and for the
6 State of Utah, residing in Salt Lake City.
7 That the said witness was by me, before
examination duly sworn to testify the truth, the whole
8 truth, and nothing but the truth in said cause.
9 That the testimony of said witness was by me
reported in Stenotype, and thereafter caused to be
10 transcribed into typewriting, and that a full, true,
and correct transcription of said testimony so taken
11 and transcribed is set forth in the foregoing pages,
numbered from 3 to 12, inclusive, and said witness
12 deposed and said as in the foregoing annexed
deposition.
13
I further certify that the original
14 transcript of the same was delivered to Mr. Upchurch,
the witness having waived reading and signing before a
15 Notary Public.
16 I further certify that I am not of kin or
otherwise associated with any of the parties to said
17 cause of action, and that I am not interested in the
event thereof.
18
WITNESS MY HAND and official seal at Salt
19 Lake City, Utah, this 14th day of May, 2006.
20
21 _____
Sharon Morgan, CSR, RPR, CRR
22
23 My Commission Expires:
6-16-2007
24
25

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

-oo0oo-

In the matter of Trademark Registration No. 2,390,988

For the mark SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR and Design
Date registered: October 3, 2000

BASS PRO TRADEMARKS, LLC,	:
Petitioner,	: DEPOSITION OF: STUART UTGAARD
vs.	:
SPORTSMAN'S WAREHOUSE, INC.,	: Cancellation No. 92045000
Respondent.	:

-oo0oo-

May 11, 2006
10:15 a.m.

Location:
Sportsman's Warehouse, Inc.
7035 High Tech Drive
Midvale, Utah

Reporter: Jeanette Lund, CSR, RPR, and
Notary Public in and for the State of Utah

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APPEARANCES

For the Petitioner: GREGORY E. UPCHURCH
Husch & Eppenberger, LLC
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(314) 480-1500

For the Respondent: DAVID A. ALLGEYER
Lindquist & Vennum
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Minneapolis, MN 55402
(612) 371-3211

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PROCEEDINGS

STUART UTGAARD,
called as a witness for and on behalf of the petitioner, being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. UPCHURCH:
Q Would you state your name for the record, please?
A Stuart Brady Utgaard.
Q Mr. Utgaard, are you an officer of Sportsman's Warehouse?
A Yes.
Q What position do you hold at Sportsman's Warehouse?
A Chairman and chief executive.
Q How long have you held that position?
A Well, I bought the company on November 1 of 1996, and at that time I was president and chairman. And for the first three years, I was essentially the only officer, then I made several other people vice presidents, president, and I became chief executive. So I don't know. I guess I've been chief executive basically functionally always, but in terms of title, since probably 1998 or so, '99. I don't know.

Q And you are aware that there's a cancellation proceeding ongoing between Bass Pro and Sportsman's Warehouse?
A Yes.
Q And that's why we're taking your deposition today?
A Yes.
Q Have you had your deposition taken before?
A Yes.
Q So you know that you need to give audible answers so that the reporter can take them down, and wait until I finish so that she doesn't have to take down two people's speech at once?
A Yes.
MR. UPCHURCH: Okay, great. I think we'll just keep going with the deposition exhibit numbers we had yesterday, if that's all right with you.
MR. ALLGEYER: That's fine. That's preferable, in fact.
MR. UPCHURCH: That way we won't unnecessarily duplicate the exhibits.
Q (BY MR. UPCHURCH) We had a deposition yesterday of Dale Smith, who I believe is president of Sportsman's Warehouse; is that correct?
A Yes.

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[Page 6]

1 Q And there were several exhibits entered in his
2 deposition. One is Deposition Exhibit 1, which is
3 answers to interrogatories by Sportsman's Warehouse in
4 this proceeding, and I've handed you that. You're
5 mentioned throughout that, so we're going to have
6 several questions about that particular document.
7 Another was Exhibit 2, which is a copy of the
8 Sportsman's Warehouse registration. And then Exhibit 3
9 was an e-mail that was sent out about proper trademark
10 usage. We'll probably ask you about all three of these,
11 but just so you know the lay of the land.
12 Let's start with Exhibit 1. On Page 3 of
13 Exhibit 1, there's an Interrogatory No. 1 which
14 identifies various categories and asks who the person or
15 person is who's most knowledgeable, and the answer to
16 that, which is the bottom half of the page, lists you
17 several times.
18 I believe the first time you're listed is in
19 answer to Interrogatory 1A which concerns the selection
20 of respondent's, respondent being Sportsman's Warehouse,
21 abandoned mark, which I believe is the Sports Warehouse?
22 **A Yes.**
23 Q I didn't see the definitions --
24 **A I think that's correct, too. I don't know.**
25 **MR. ALLGEYER: Yes, something like that. If**

[Page 7]

1 **you want to define it that way.**
2 **MR. UPCHURCH: That's what the testimony was**
3 **yesterday.**
4 **MR. ALLGEYER: Okay.**
5 **MR. UPCHURCH: So I've been assuming that that**
6 **was correct.**
7 Q (BY MR. UPCHURCH) You are identified as the
8 person with some knowledge concerning the selection of
9 the Sports Warehouse mark, but my understanding was that
10 Sports Warehouse came into existence in like '86 and --
11 were you involved at all in the company in '86?
12 **A No, I was not.**
13 **MR. UPCHURCH: You don't happen to have the**
14 **original interrogatories, do you?**
15 **MR. ALLGEYER: I do, although not -- here, you**
16 **can look at them. I don't see -- we might as well get**
17 **that right. I'm not sure what the interrogatories refer**
18 **to there.**
19 **MR. UPCHURCH: "Respondent's abandoned mark,**
20 **means the word mark as applied for in application**
21 **75208550 now abandoned." That was a different**
22 **application, okay.**
23 **MR. ALLGEYER: Which I think makes that first**
24 **answer more sensible.**
25 **MR. UPCHURCH: Well, it does make the first**

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1 **answer more sensible, and I really think in Mr. Smith's**
2 **depo that there's probably some confusion on that,**
3 **because I think he testified that it concerned the**
4 **Sports Warehouse, so...**
5 **THE WITNESS: I thought that's what you just**
6 **asked me as well.**
7 **MR. UPCHURCH: Well, it was, because that's**
8 **what he had said yesterday, so...**
9 **MR. ALLGEYER: But just in fairness, I don't**
10 **know that he knew what the definition in this**
11 **interrogatory --**
12 **MR. UPCHURCH: Right. I'm just saying -- you**
13 **are going to have him review the depo, so...**
14 **MR. ALLGEYER: I see what you're saying.**
15 **MR. UPCHURCH: I'm just saying we might want**
16 **to clean that up when he reviews the depo. I don't**
17 **think --**
18 **THE WITNESS: Could I inquire as to what the**
19 **question is?**
20 **MR. ALLGEYER: He's going to do it over.**
21 **He'll just ask another question.**
22 **MR. UPCHURCH: We're just trying to straighten**
23 **up the record from yesterday right now because in**
24 **thinking about it last night, what I remember him saying**
25 **didn't make sense.**

[Page 9]

1 Q (BY MR. UPCHURCH) So let me ask another
2 question. Since 1996, have you been involved in the
3 selection of trademarks and service marks for
4 Sportsman's Warehouse?
5 **A Yes.**
6 Q And what has been your involvement?
7 **A Usually anything that's prepared by our legal**
8 **counsel for submission to the US Patent and Trademark**
9 **Office, you know, I see it before we submit it.**
10 Q Do you do any searching for trademarks before
11 you file for a trademark application?
12 **A I personally do not.**
13 Q Do you have someone at Sportsman's Warehouse
14 that does searching before you file for trademarks?
15 **A Our legal counsel would do searches.**
16 Q So you don't have anyone in-house that does
17 that?
18 **A No.**
19 Q Is there a formal process at Sportsman's
20 Warehouse for selecting marks?
21 **A No.**
22 Q Does -- do you have an advertising department?
23 **A Now we do, yes.**
24 Q Are they involved in the selection of new
25 trademarks and service marks?

[Page 10]

1 A No.
2 Q Who by title would be involved in the
3 selection of new trademarks or service marks?
4 A It would depend on what the product was that
5 we're going to do. If it's a corporate matter, I would
6 be, or Dale or both of us. If it's on a product, that
7 would probably -- could originate from a buyer, it could
8 originate from a vice president over that area of
9 operations, anybody.
10 Q But for something like a store name, that
11 would be you and possibly Mr. Smith?
12 A All of our store names have always been
13 Sportsman's Warehouse.
14 Q Right. Except when you -- oh, okay. Let me
15 ask another question. At one point, did you change the
16 corporate name from Sports Warehouse to Sportsman's
17 Warehouse?
18 A When I acquired the business, it was legally
19 incorporated as Sports Warehouse, but they were planning
20 to change the name to Sportsman's Warehouse. And -- or
21 had changed the name to Sportsman's Warehouse, so that
22 was November 1 of '96. I guess they had already changed
23 it the previous year.
24 In 1992, they hired me to sell their company
25 and I was unsuccessful in my attempts to do it, but in

[Page 11]

1 the winter I would come out and go skiing and so on, so
2 I knew that they had been talking about changing the
3 name. They changed it, you know, sometime -- they
4 registered to change it on January 1 of -- I think it
5 was 1995.
6 Q And we have some documents later on that you
7 can look at.
8 A January -- February 1 of 1995, sorry.
9 Q Rather than --
10 A That's when they did it, February 1 of 1995.
11 That's a state filed document, but they had been
12 discussing it, obviously, before that.
13 Q And when you say "they," you are talking
14 about?
15 A Scott Nielson and Bill Hayes, primarily, and
16 also Dale Smith.
17 Q And you said they changed the name in '95. I
18 believe they may have changed the store name but not the
19 corporate name in '95?
20 A Right. It was always -- it was Sports
21 Warehouse dba Sportsman's Warehouse.
22 Q Because Exhibit 2, for example, shows that the
23 owner is Sports Warehouse and that was filed some years
24 later?
25 A Yes. After a while -- I mean, there became --

[Page 12]

1 everybody knew us as Sportsman's Warehouse, so there's
2 no need to have Sports Warehouse as a name. So it was
3 just changed -- the corporate name was changed to
4 Sportsman's Warehouse because that's what we were doing
5 business as.
6 Q And in connection with the corporate name
7 change, which occurred sometime later, who would be
8 involved in that decision?
9 A Myself, Dale, the board.
10 Q Who was on your board at the time?
11 A I don't know -- what date was the name
12 changed?
13 Q Well, we have a document later on, so we'll
14 ask that same question again.
15 A Well, tell me the date and I'll tell you who
16 was on the board.
17 Q Were you involved in the decision to file for
18 the trademark registration that's shown in Exhibit 2?
19 A Yes.
20 Q Was anyone else involved in that decision?
21 A Yes.
22 Q Who else was involved in that decision?
23 A Dale Smith.
24 Q Anyone else?
25 A Our law firm, Lindquist & Vennum.

[Page 13]

1 Q Did you provide the law firm with the
2 information that's shown on the registration, like the
3 logo itself and the description of the goods and the
4 date of first use?
5 A Dale Smith designed the logo, and the
6 information on here on the date of first use is
7 June 16th, 1995. I think at the time that that was the
8 only ad that we could find, so that's why -- that is the
9 date of first use, although it was obviously used before
10 that because right after the first of the year, they
11 changed the sign on the building and changed signs in
12 the store.
13 Q Right after the first of 1995?
14 A Right -- yeah, in January of 1995, and they
15 registered their name with the state on February 1 of
16 '95.
17 Q Do you know of any documents that show that
18 the signs were changed in January of 1995?
19 A Which signs?
20 Q On the stores.
21 A I don't believe it was changed in January. I
22 think it was probably changed in February or March, to
23 my knowledge, and we've been, I guess, trying to find
24 out the date, but...
25 Q Do you know if any searching was done before

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1 the filing of the application that became Exhibit 2, any
2 trademark searching?
3 **A I would assume that Lindquist & Vennum did.**
4 **MR. ALLGEYER: Just tell him what you know.**
5 **THE WITNESS: I don't know.**
6 Q (BY MR. UPCHURCH) So you don't know of any?
7 **A I don't know personally, no.**
8 Q Prior to this proceeding, did you know
9 anything about Bass Pro Shops? Had you heard of Bass
10 Pro Shops?
11 **A Sure, yes.**
12 Q Do you know when you first heard of Bass Pro
13 Shops?
14 **A I would say in about 1980, '79, '80, '81,**
15 **approximately that time.**
16 Q At some point did you become aware that Bass
17 Pro Shops had a trademark registration that included the
18 phrase "Sportsman's Warehouse" in it?
19 **A I became aware that they had a store in**
20 **Georgia that was going by the name of "Bass Pro Shops**
21 **Sportsman's Warehouse" sometime in probably 1998 or so,**
22 **'99 I would guess, somewhere in there.**
23 Q And was that the first time that you became
24 aware of Bass Pro's use of the phrase "Sportsman's
25 Warehouse"?

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1 **A It is, yes.**
2 Q How did you become aware of that store?
3 **A Scott Nielson, who used to own Pacific Flyway**
4 **Wholesale and half of Sports Warehouse, is today a**
5 **professional bass fisherman, and he had been to some**
6 **fishing tournament in Georgia or Florida or someplace**
7 **and he had seen it and called it to my attention after**
8 **he had seen the store, which was -- like I said, I'm not**
9 **sure of the year. It wasn't the first year. It was**
10 **probably in '97, I would guess would probably be the**
11 **year.**
12 Q And once you learned about that store, did you
13 send any letters to Bass Pro asking why they were using
14 Sportsman's Warehouse?
15 **A No, we did not, and the reason we did not**
16 **is --**
17 **MR. ALLGEYER: He didn't ask you that, though.**
18 **He will now, but...**
19 Q (BY MR. UPCHURCH) And why didn't you send
20 them a letter?
21 **A Because when we applied for our service mark,**
22 **the words "Sportsman's Warehouse" were, according to the**
23 **US Patent and Trademark Office, were too generic to be,**
24 **at that time, filed as a -- a name.**
25 **MR. ALLGEYER: You mean generic or**

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1 **descriptive?**
2 **THE WITNESS: Descriptive, yeah. And Bass Pro**
3 **was using theirs with Bass Pro Sportsman's Warehouse and**
4 **we were just using Sportsman's Warehouse, and the patent**
5 **office said we couldn't trademark that name because it**
6 **was too descriptive or generic.**
7 Q (BY MR. UPCHURCH) Okay, so --
8 **A So we couldn't stop them from using the name**
9 **apparently and they couldn't stop us from using the name**
10 **at that point in time.**
11 Q But your application wasn't filed until '99,
12 and I thought you said that you became aware in '97 or
13 '98?
14 **A I think it was '97 or '98.**
15 Q So how could you have known what the patent
16 office position was going to be?
17 **A I'm not sure if we had checked earlier, you**
18 **know, with that, as to whether we could file that or**
19 **not, and subsequent -- you know, we've made numerous**
20 **filings relative to our name over the years.**
21 Q So it could have been an earlier application,
22 for example?
23 **A Could have been.**
24 Q Do you know Mr. Ken Burroughs?
25 **A Yes, I do.**

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1 Q Is he with Marine Tracker?
2 **A He's president of Tracker Marine.**
3 Q Tracker Marine. I knew that didn't sound
4 exactly right.
5 Okay, how do you know Mr. Burroughs?
6 **A Ken Burroughs made the initial inquiry**
7 **approach to us when Bass Pro first expressed interest in**
8 **acquiring Sportsman's Warehouse.**
9 Q When was that?
10 **A I think it was in September, October 1994, I**
11 **believe was the first time they approached us.**
12 Q 1994?
13 **A Or 2004, sorry.**
14 **MR. ALLGEYER: I'm glad to know that I'm not**
15 **the only one that does that.**
16 **THE WITNESS: You'll have to excuse my**
17 **advancing years.**
18 **MR. ALLGEYER: That will be no problem at this**
19 **table.**
20 **MR. UPCHURCH: She has no idea what we're**
21 **talking about.**
22 Q (BY MR. UPCHURCH) Did you ever have a
23 discussion with Mr. Burroughs concerning people trying
24 to redeem Bass Pro gift cards at Sportsman's Warehouse
25 locations?

[Page 18]

1 **A I don't recall that.**
2 Q Independent of Mr. Burroughs, do you recall a
3 situation where people were trying to redeem Bass Pro
4 gift cards at Sportsman's Warehouse locations?
5 **A I think it was 2000 we had opened a store in**
6 **Loveland, Colorado, and somewhere around that time Bass**
7 **Pro Shop opened a store in St. Louis, Missouri, and they**
8 **called it Bass Pro Shops Sportsman's Warehouse. And**
9 **when they first opened that store, there were probably**
10 **two or three instances of people that were confused,**
11 **said they thought we had opened a store in St. Louis,**
12 **and a couple had been, you know, into our Loveland store**
13 **and thought they were affiliated and so on. You know,**
14 **that rapidly became known that that was not the case and**
15 **disappeared, so I don't know. But I recall at that time**
16 **that there was very minor confusion in Loveland thinking**
17 **that we owned the store in St. Louis.**
18 Q Do you know if there was also a confusion like
19 that in Memphis?
20 **A I would anticipate that there was some.**
21 **Unfortunately, as you may have heard, Bob Goodwin, our**
22 **store manager there, was killed in a car accident**
23 **Saturday evening, died early Sunday morning, so I**
24 **don't -- he would be more familiar with it than I was,**
25 **but I'm sure there was some.**

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1 Q And as I expressed to Mr. Smith yesterday, I
2 was very sorry to hear that. It puts a whole new
3 perspective on what we do, so... It's just there's
4 someone there and then they're gone. Terrible thing.
5 Now, when you acquired the business in
6 November of 1996, how many stores did Sports Warehouse
7 have under the Sportsman's Warehouse name?
8 **A One.**
9 Q And where was that located?
10 **A It was located right here. If you sit out in**
11 **front of this -- where we're sitting now, this was**
12 **parking lot and the tall part of this building has been**
13 **added on, and we added on the loading docks there. So**
14 **that building over there was 42 or 43,000 square feet,**
15 **and about 26,000 square feet of that was devoted toward**
16 **retail space and the adjoining space was wholesale**
17 **space. I think it was 42,000 square feet before we**
18 **added to it.**
19 Q And that location is in Midvale, Utah?
20 **A Yes.**
21 Q Just for the record.
22 **A Yes, that's Midvale, Utah.**
23 Q And at that point in time, where did the
24 customers for this particular store come from? Or do
25 you know where the customers came from for this store?

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1 **A I mean, we had customers that came here from**
2 **Texas and Florida and New York and Pennsylvania. The**
3 **majority of the people would come from Utah, but there**
4 **would be customers coming from Wyoming and New Mexico**
5 **and Arizona and California and lots of places. And you**
6 **would know that by the -- all the variety of license**
7 **plates that would be in the parking lot.**
8 Q And do you know why people from those other
9 states would be coming to this particular store?
10 **A Well, I would assume that they were either on**
11 **a hunting or fishing or camping trip and that they**
12 **needed some gear, so they had heard about us, so they**
13 **came here.**
14 Q Does Sportsman's Warehouse sell any product
15 over the Internet?
16 **A Currently, no. Just gift cards.**
17 Q Have you ever sold product over the Internet?
18 **A No.**
19 Q But you do have the gift cards that you
20 mentioned. Do you distribute those over the Internet,
21 the gift cards? I'm trying to figure out why you
22 mentioned the gift cards in connection with the
23 Internet.
24 **A Well, we sell gift cards or distribute them --**
25 **I don't understand the distinction of the wording, but**

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1 **we -- customers order gift cards from us and -- for**
2 **their children or friends, whatever, to redeem at our**
3 **stores through the Internet, and they've ordered them in**
4 **all 50 states, and in some foreign countries.**
5 Q If you look at Pages 5 and 6 of Exhibit 1,
6 there's an Interrogatory No. 6 that asks about
7 advertising expenses. And then on Page 6, there are
8 various figures set out, and I noticed that the
9 advertising expenditure figures appear to start in 1997.
10 Do you have any idea why they don't start in '96 or '95?
11 **A The -- I bought the business on November 1,**
12 **1996, so our first fiscal year would end on October 31,**
13 **1997. So this covers the period of time from**
14 **November 1, 1996 through October 31, '97, which was the**
15 **first year of my ownership.**
16 Q If you look over on Page 7 there are similar
17 figures for sales.
18 **A Yes.**
19 Q And those start in '95. Is there a reason why
20 the sales start in '95, but the advertising expenditures
21 don't start until '97?
22 **A No. I mean, we could go back and get earlier**
23 **advertising numbers if you would desire.**
24 Q I'm just trying to figure out why there was
25 different -- there was no reason for the difference that

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1 you know of?
2 A No. I think this might be -- you know, we had
3 Sportsman's Warehouse sales here versus Sports Warehouse
4 sales, and Sportsman's Warehouse sales started to occur
5 in 1995. So I guess if you wanted to know what the
6 advertising was in '95, we could get an old financial
7 statement and give you that number.
8 MR. UPCHURCH: I would request those for '95
9 and '96 because I think they're relevant to issues in
10 this proceeding.
11 MR. ALLGEYER: We'll see if we can locate
12 those, although having said that, very often in
13 depositions I agree to things like this that I forget.
14 If you wouldn't mind maybe just putting that in a letter
15 when you get back, that would be helpful.
16 THE WITNESS: And I'm hopeful that we can
17 still find those old financial statements. Usually
18 after ten years we throw stuff out, but we'll have to
19 see if it's there.
20 MR. ALLGEYER: That may be the reason.
21 MR. UPCHURCH: That could be the reason.
22 THE WITNESS: I don't know.
23 MR. ALLGEYER: Off the record.
24 (Off-the-record discussion.)
25 Q (BY MR. UPCHURCH) On Page 7, right above that

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1 chart we were looking at that starts in '95, it says,
2 "All sales since late 1994 or early 1995 have been made
3 under the Sportsman's Warehouse name."
4 Do you know of any records that show such
5 sales in '94 under the Sportsman's Warehouse name?
6 A Again, my involvement with the company started
7 in 1992. They hired us again to sell the company in
8 1994, and I think we started marketing the company in
9 like April, May of '95. So somewhere in that period of
10 time -- when I say '94, '95 -- as I recall, inside the
11 store like on the T-shirt tables, I think they had signs
12 that said Sportsman's Warehouse, but I can't reproduce
13 those. I don't have photographs of them or anything
14 else.
15 So somewhere in that period of time. I
16 believe they changed the sign on the exterior of the
17 building in February or March of '95. I think the
18 stores -- above the cash wraps, we have signs between
19 one and two, three and four, five and six, and those
20 signs used to say Sports Warehouse and they were changed
21 to Sportsman's Warehouse right around that period of
22 time. I don't know exactly when.
23 Q If you turn over to the next page, which is
24 Page 8, Interrogatory No. 8 asks about all business
25 retailers or distributors to whom respondent has sold

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1 goods at wholesale under respondent's mark. And the
2 answer ends with "Sportsman's Warehouse responds that it
3 sells goods only at retail and does not sell goods at a
4 wholesale level." Do you see that?
5 A Yes.
6 Q Did you provide the information that formed
7 the basis of this answer?
8 A Yes.
9 Q Is the answer correct?
10 A I think it's a question of, again, definition
11 of words. It says, "For each year, beginning with the
12 date respondent's mark was first used in United States,
13 identify any and all businesses, retailers, or
14 distributors to whom respondent has sold goods at
15 wholesale under respondent's mark."
16 Well, we haven't, to my knowledge, sold
17 Sportsman's Warehouse logo'd merchandise to any other
18 businesses for sale by them. If that answers the
19 question.
20 Q Okay.
21 A So, in other words, we do not wholesale logo'd
22 product. We would only sell it at retail through our
23 own stores.
24 Q Have you wholesaled non-logo'd product through
25 the Sportsman's Warehouse company?

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1 A Yes, to a small extent. I mean, when the
2 businesses were side by side, people used to come in
3 sometimes and we discontinued that when we got over
4 there at the other location, which was about 15 miles
5 from here, because -- I forget what you would call it,
6 but people would walk up and place an order and the guy
7 would go out in the warehouse and get the product.
8 Well, when the store was right next to the
9 wholesale company, if they didn't have it at wholesale,
10 in the wholesale Pacific Flyway, they might have sent
11 the guy over to the retail store to get the product, and
12 they did some of that. What dollar wise -- I would say
13 at the time, the wholesale business -- I think its peak
14 was 17 million or something, and when I bought it, it
15 was probably 12, 13 million, and out of that, there was
16 probably -- I would be surprised if it was $100,000 a
17 year of sales that were made by the retail store to
18 third parties, which I define as wholesale.
19 Q And at some point, did that cease?
20 A Probably -- I would say it was phased out
21 probably in 2001. You know, when we first relocated
22 the -- we built the Provo store, expanded this store,
23 relocated the wholesale company, and then we -- you
24 know, we're 15 miles apart. That was probably -- in
25 like 2000, it probably started to dwindle down and, you

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1 **know, today we don't -- we don't want third-party**
2 **customers, but we still get some.**
3 Q And third-party customers are what?
4 **A We have a warehouse called -- wholesale**
5 **operation called Pacific Flyway Wholesale. It primarily**
6 **sells product to Sportsman's Warehouse, but it also does**
7 **about a million dollars worth of business to third**
8 **parties, which are competitors of Sportsman's Warehouse.**
9 **For example, we would sell to someone like Smith and**
10 **Gallenson's or Intermountain Sports or somebody like**
11 **that.**
12 Q And so --
13 **MR. UPCHURCH: Could I have his previous**
14 **answer?**
15 **(Whereupon, the record was read as follows:**
16 **ANSWER: Probably -- I would say it was phased**
17 **out probably in 2001. You know, when we first relocated**
18 **the -- we built the Provo store, expanded this store,**
19 **relocated the wholesale company, and then we -- you**
20 **know, we're 15 miles apart. That was probably -- in**
21 **like 2000, it probably started to dwindle down and, you**
22 **know, today we don't -- we don't want third-party**
23 **customers, but we still get some.)**
24 Q (BY MR. UPCHURCH) When you say, "but we still
25 get some," is it Pacific Flyway that gets wholesale

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1 customers or is it Sportsman's Warehouse that gets
2 wholesale customers?
3 **A It's Pacific Flyway that has wholesale**
4 **customers today. You know, we might discount a product**
5 **and some people would look at that as wholesale. You**
6 **know, say a guy came in and he wanted to buy 10,000 of**
7 **those red cups, we would give him a better price. Now,**
8 **did he pay the retail price for the cup? No, he paid a**
9 **wholesale price for the cup because it's cheaper, but is**
10 **it still above our costs, et cetera.**
11 Q Right.
12 **A So Sportsman's Warehouse doesn't sell, I would**
13 **say, wholesale to companies. Now, some stores might**
14 **have a guy that comes in that has a competing store**
15 **that's in a remote location and he comes to our store**
16 **and buys product, normally they would buy it at retail.**
17 **But, again, if the guy came in for some reason and**
18 **wanted to buy 10,000 of something, the store manager**
19 **would probably give him a discount.**
20 Q Are you aware of any such instances?
21 **A Yes, we have some customers that they would do**
22 **that to.**
23 Q And are there particular stores that do make
24 sales like that, that you have in mind?
25 **A Not that I'm thinking of specifically, no.**

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1 **You know, it would be like -- let me draw an analogy,**
2 **like a Home Depot or a Lowe's, they basically are**
3 **retailing product to consumers, but they also sell to**
4 **some general contractors.**
5 **Now, a general contractor who came in and**
6 **bought a hammer or something, he would probably pay**
7 **retail for it like everybody else, but if he came in and**
8 **he bought all of his lumber to build a house, he would**
9 **be a wholesale customer.**
10 **Our business at Sportsman's Warehouse is**
11 **primarily retail. We do not sell products at -- logo'd**
12 **products to other third parties. I don't know if I'm**
13 **clarifying or just --**
14 Q I think so. It was confusing yesterday and I
15 think it's less confusing today.
16 If you look down at the next interrogatory and
17 answer, Interrogatory No. 9, it asks about Pacific
18 Flyway. And the last sentence of the answer says,
19 "Pacific Flyway also acts as a distributor for goods
20 sold at the retail stores of Sportsman's Warehouse." Is
21 that the relationship you testified to just a few
22 minutes ago?
23 **A Yes. Again, Sports -- Pacific Flyway today**
24 **sells -- probably 99 percent or so of its sales are**
25 **functioning as a distributor, not a wholesaler. It's**

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1 **like a warehouse. It's a distributor selling -- filling**
2 **our own stores.**
3 Q If you turn over to Page 11 in this document,
4 there's an Interrogatory No. 13. And what I'm going to
5 end up asking you about, once you've had a chance to
6 read Interrogatory No. 13 and the answer, is the
7 sentence in the answer that says, "Sportsman's Warehouse
8 is not aware of any such use," so that's where we're
9 going. But take a minute and read the interrogatory and
10 the answer, if you would.
11 Interrogatory No. 13 is asking about the
12 situation where the logo is used without these words,
13 hunting and fishing, camping, reloading, but with the R
14 in a circle symbol, okay. Do you understand that to be
15 the question?
16 **A Yes.**
17 Q And in response, Sportsman's Warehouse says,
18 in part, "Sportsman's Warehouse is not aware of any such
19 use." Did you ask anyone -- well, did you provide any
20 information that was used in preparing this answer?
21 **A I guess, yes, but I'm just thinking of a case**
22 **right now, if I could. You know, like we put signs on**
23 **the exterior of a building, we put up signs that said**
24 **Sportsman's Warehouse. This logo is our mark. We don't**
25 **have a little R on it, on the side of any store, ever.**

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1 Now -- but that's our logo up there. Sometimes the city
2 will only allow you 90 linear -- 90 square feet, and
3 they measure it by boxing this in. So we normally have
4 sub-copy as part of our mark, hunting, fishing, camping,
5 but in certain locations, like Silverdale, Washington,
6 they won't allow us to put the sub-copy. So we have
7 Sportsman's Warehouse up there with the mountain
8 background like that. Again, it doesn't have the
9 sub-copy, it doesn't have the R.
10 Sometimes a person in a store or a lot of
11 times a person that wants to be affiliated with
12 Sportsman's Warehouse, they might just use our
13 Sportsman's Warehouse logo on something that they do.
14 Q Can you give me an example of that?
15 A Well, take an outfitter. Okay, an outfitter
16 might advertise it -- you know, he sells his trips, that
17 they're available through Sportsman's Warehouse and he
18 may put whatever logo he puts on his brochure, they
19 don't check with us. Just like Bass Pro Shops, somebody
20 may say such and such is available at Bass Pro Shops,
21 and they put out what they perceived to be their logo.
22 It may or may not be 100-percent correct as to form.
23 Q Do you have anyone that polices that?
24 A Periodically, historically, we have sent out
25 either e-mails or faxes or when we've had a store

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1 managers' meeting, try to have people say this is what
2 our deal is and this is how it should be presented, and
3 frequently on internal documents, I'll see it's proper,
4 it might even have an R on it. Like on my jacket, okay,
5 it says Sportsman's Warehouse but there's not a little R
6 after it. There's a mountain scene, but there's not a
7 sub-copy.
8 Q Okay, no sub-copy.
9 A That's what it is.
10 Q Now, I'm asking specifically about the
11 situation where there is the R but there is no sub-copy.
12 Are you aware of any instances like that?
13 A Where there is the R but there's not the
14 sub-copy?
15 Q Yes.
16 A I am not, but that doesn't mean there's not
17 some out there. There probably are, but I personally
18 don't know of any, other than the ones I've just told
19 you about on the signage on the building.
20 MR. ALLGEYER: But there is no R --
21 THE WITNESS: That's right. I'm sorry. He
22 wants to know whether there is an R.
23 Q (BY MR. UPCHURCH) Right. For example, you
24 have a store across the street, which happens to be
25 right next to the Taco Bell, so after I got my lunch

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1 yesterday, I went into your store, because it doesn't
2 take any time to get food at Taco Bell and wandered
3 around. And there were displays by the Remington gun
4 safes that had the logo without the subtext, without
5 hunting, whatever, but did have the R in a circle.
6 A Was this an in-store signage?
7 Q Yes. It was right on top of the safes on the
8 999 one, and on the 699 one. Now, who would prepare
9 that kind of signage?
10 A Historically signage like that was prepared at
11 the store level. So today we have 48 stores open, there
12 would be inconsistencies. We have recently launched a
13 program called "Sign Builder" which we've developed
14 ourselves so we can standardize all of our signs
15 throughout the company. That is being implemented as we
16 speak, but we have -- sometimes the font is not correct
17 and so on, and we have people from each area that manage
18 those signs because there's thousands of signs. In a
19 typical store, you wouldn't realize this, but there
20 might be three, 4,000 signs.
21 Q I wouldn't be surprised.
22 A So is there one or two that aren't 100
23 percent, there could be.
24 MR. ALLGEYER: There won't be next week.
25 THE WITNESS: Well, you know, again, it's just

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1 like on pricing with weights and measures. You've got
2 to have it 100-percent accurate, they don't care whether
3 it's high or low, but whatever something says, that's
4 what it's supposed to scan at. Well, if some buyer
5 lowers the price on something by 20 percent and the guys
6 up -- and a customer comes in and buys it, okay, and it
7 rings up at the old price even though they're making the
8 sign and hasn't got it in, that could happen. It
9 shouldn't happen. Could it, sure.
10 Q (BY MR. UPCHURCH) So for this --
11 A I mean, when there's customers, I can assure
12 you there's mistake.
13 Q So for the store across the street, are you
14 saying it's the store manager who is responsible for the
15 signage in his or her store?
16 A In the -- right today, as we roll this out, he
17 will not be. Historically he hasn't been either. It's
18 been kind of the department within the store, and the
19 store manager oversees to look at it, and throughout all
20 of that 3,000 signs, he tries to spot mistakes. But
21 usually, like the hunting department would do their own
22 signs, the fishing department would do their own signs
23 and so on.
24 Q Do you ever have a situation where the
25 supplier like, in this instance, Remington, would

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1 prepare the signage using your marks?
2 **A Again, I'm sure that that happens, but not**
3 **normally. Sometimes they might do that, but normally,**
4 **you know, we don't want displays and stuff from our**
5 **vendors. So if there's not displays, they usually**
6 **wouldn't be producing our logo, but historically I'm**
7 **sure they have somewhere.**
8 Q Since those were the ones that kind of stood
9 out, I was just wondering if possibly Remington had
10 prepared those. But I think what you're telling me is
11 it's probably the department that prepared those?
12 **A I would have to see the signs to know, but I**
13 **would assume it was not Remington. I would assume it**
14 **was the hunting department that prepared the signage,**
15 **and probably not corporate hunting. It was probably**
16 **guys in that store.**
17 Q Now, yesterday Mr. Smith testified concerning
18 Exhibit 3, which was an e-mail he sent out regarding
19 proper usage -- I think he said of trademarks and
20 copyrights. Are you familiar with this document at all?
21 **A Yes, this looks like one -- just a recent one,**
22 **yeah.**
23 Q So is that part of a program to use trademarks
24 properly in the company?
25 **A Yes. This has been -- what was the day? It's**

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1 **May 9th. It would just be a regular reminder.**
2 Q Now, in the answer to Interrogatory No. 13
3 where it says "Sportsman's Warehouse is not aware of any
4 such use," did you personally check with any store
5 managers to see if they were using the logo with the R
6 in the circle but without the subtext?
7 **A I would say in preparation for this, no, but**
8 **they are -- every year we would have a store managers'**
9 **meeting and -- you know, that's one of the things that**
10 **we always talk about, This is our logo, this is how it's**
11 **supposed to be used. Now, does that mean they're always**
12 **doing that, you know, probably not.**
13 **MR. ALLGEYER: Off the record.**
14 **(Off-the-record discussion.)**
15 Q (BY MR. UPCHURCH) Let's go ahead over to
16 Page 15, because I think it's related. Interrogatory
17 No. 18 talks -- in 18b, talks about policies with
18 respect to the proper use of respondent's mark. And the
19 answer to 18b says that you don't have a formal written
20 policy, but that you take all reasonable steps to ensure
21 that your use of the marks is proper.
22 Are there any additional steps that you take
23 to ensure proper trademark usage other than the ones
24 that we've already discussed?
25 **A No. I think Exhibit 3 would be an example of**

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1 **how we do it.**
2 Q And then you had these annual meetings, I
3 believe, where you said you raised the issue?
4 **A When we have store manager meetings, and**
5 **sometimes there would be -- in the past, there have been**
6 **memos similar to this. Usually I don't send out e-mails**
7 **because I don't type that fast. So, you know, it might**
8 **just be a fax that was shot out.**
9 Q Now, at these manager meetings, who would
10 explain to the managers the proper trademark usage?
11 **A Could be Dale, could be myself, could be**
12 **someone from advertising, could be a district manager.**
13 Q So it varies from meeting to meeting?
14 **A It varies.**
15 Q On Page 16, Interrogatory No. 21 asks for the
16 identity of the persons who assisted in the preparation
17 of the responses, and you and Dale Smith are identified
18 as those persons. Could you tell me what you personally
19 did to gather information to respond to these
20 interrogatories, who you talked to and what kind of
21 information you asked for, that kind of thing?
22 **MR. ALLGEYER: And I'm going to object insofar**
23 **as it may call for attorney-client privileged**
24 **information. So don't tell him what lawyers told you or**
25 **what you told lawyers. But apart from that, tell him**

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1 **what you did. He doesn't need to know that anyway.**
2 Q (BY MR. UPCHURCH) And I don't want to know
3 what your attorneys -- what you told the attorneys.
4 What I want to know is who in the company or outside of
5 the company other than attorneys that you talked to to
6 gather this information and what kind of information you
7 were trying to collect.
8 **MR. ALLGEYER: That question.**
9 **THE WITNESS: I prepared the answers here to**
10 **Interrogatory No. 6, the historical advertising**
11 **expenditures which we took from our financial**
12 **statements, the exterior signage costs, which we**
13 **received from our sign vendor from the time I took over**
14 **going forward once we built the Provo store. The logo'd**
15 **merchandise, Dale ran a computer report on that back as**
16 **far as we could go to July 1. The historical sales**
17 **table for Interrogatory 7 I prepared. The answer to**
18 **Interrogatory No. 11 on Pages 9 and 10 I prepared. I**
19 **guess that was it. I consulted and talked on the other**
20 **ones.**
21 Q (BY MR. UPCHURCH) You said that you got some
22 information from a sign vendor. Who was that?
23 **A Our primary sign vendor today is Young**
24 **Electric Sign Company, so I inquired of them as to how**
25 **much we had spent with them on Sportsman's Warehouse**

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1 **signs for the exterior of our building going back to the**
2 **time that we built the Provo store, which was Store**
3 **No. 2.**
4 Q Do you know if that company had been used by
5 Sports Warehouse before you purchased the company?
6 **A It had not been.**
7 Q Do you know who the sign vendor was before you
8 purchased the company?
9 **A I do not.**
10 Q Who would know that information?
11 **A I don't know. I can speculate.**
12 **MR. ALLGEYER: There's a rule about that.**
13 Q (BY MR. UPCHURCH) With response to -- with
14 regard to Interrogatory No. 2, did you attempt to gather
15 any information concerning that interrogatory?
16 **A I guess, yes.**
17 Q Who did you contact to obtain the information
18 concerning that interrogatory?
19 **A I just gave the same response in the**
20 **interrogatory as I gave you earlier, where I indicated I**
21 **first became aware of Bass Pro Sportsman's Warehouse in**
22 **Atlanta, Georgia in 1997.**
23 Q Did you check with anybody else at Sportsman's
24 Warehouse to see if they were aware of Bass Pro's use of
25 that phrase earlier than 1997?

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1 **A No.**
2 Q With respect to Interrogatory No. 3, which
3 concerns confusion, did you check with anyone at
4 Sportsman's Warehouse in connection with obtaining that
5 information?
6 **A Yes.**
7 Q And who did you contact?
8 **A Bob Goodwin.**
9 Q Who's Bob Goodwin?
10 **A He's our deceased Memphis store manager.**
11 Q I'm sorry. You said that earlier and --
12 Anyone else?
13 **A Yes.**
14 Q Who?
15 **A Jason Perez, he's our Thornton store manager,**
16 **Thornton, Colorado, and also Gary Watts, who is now our**
17 **St. George store manager, who at the time was our**
18 **Aurora, Colorado, store manager.**
19 Q Anyone else?
20 **A I don't believe so.**
21 Q How did you know to contact those particular
22 people?
23 **A In Memphis, Bass Pro had a store called**
24 **Sportsman's Warehouse that they changed the name to**
25 **Sportsman's Center or something like that after we came**

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1 **to town and -- so that is why I contacted Bob Goodwin.**
2 **And the other Bass Pro built a store called Bass Pro**
3 **Shops in Denver right between our Aurora and Thornton**
4 **stores, and they issued some gift cards into the**
5 **marketplace that said they were redeemable at**
6 **Sportsman's Warehouse. But when you went to the store**
7 **to buy a gift card, on the back of it said Bass Pro**
8 **Shop's Sportsman's Warehouse, but the ones that they**
9 **apparently mailed into the market just said Sportsman's**
10 **Warehouse.**
11 Q And you knew about that independently and
12 that's how you knew to contact these people?
13 **A Well, we had several people, when Bass Pro**
14 **Shops first opened, come in to redeem gift cards at our**
15 **store in Colorado, and I don't how many, you could ask**
16 **the store managers, maybe a half a dozen. But when we**
17 **went to buy a gift card at the store to see what it said**
18 **on the back, on the back of the gift card you could buy**
19 **at the store, it said Bass Pro Shops Sportsman's**
20 **Warehouse. But the ones people were trying to redeem**
21 **said redeemable at Sportsman's Warehouse on the back, so**
22 **they were apparently mailed in to the marketplace by**
23 **Bass Pro Shops.**
24 Q And you knew about that and that's why you
25 contacted these particular store managers?

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1 **A They called this to my attention and said, We**
2 **have people coming in -- Bass Pro Shop is issuing cards,**
3 **taking the money from the customer, and telling them**
4 **that they can redeem their gift cards at our stores.**
5 Q Right. And when did you become aware of that
6 situation?
7 **A Right after Bass Pro Shop opened, which I**
8 **think was in November of '95, I believe -- or November**
9 **of 2005.**
10 Q So you learned about that not in preparing
11 this response, but as part of your ordinary course of
12 business?
13 **A Yes.**
14 Q We've been going about an hour. Would you
15 like to take a break? I could use one.
16 (Break taken.)
17 Q (BY MR. UPCHURCH) With respect to
18 Interrogatory No. 5, which is on Page 5, did you obtain
19 information from anyone other than attorneys to obtain
20 the answer to Interrogatory No. 5?
21 **A I would say Dale Smith probably.**
22 Q I don't remember that I asked you before.
23 Over on Page 7, that's the table of sales, and I think
24 you testified that you got that information together.
25 **A Yes.**

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1 Q And the first -- 1995 says estimated. Why is
2 that estimated?
3 **A Because I'm trying to answer how much is**
4 **Sportsman's Warehouse versus Sports Warehouse.**
5 Q So how did you make that estimate?
6 **A As near as I can ascertain, in 1994 our**
7 **Christmas ads showed Sports Warehouse. Our ad -- we**
8 **couldn't -- for Father's Day had Sportsman's Warehouse.**
9 **They changed their name officially on January -- or**
10 **February 1st, 1995 to Sportsman's Warehouse, and prior**
11 **to that, they were probably changing, you know, the**
12 **signs above the cash wraps, the in-store signage, like**
13 **on the T-shirt tables and things like that, all of**
14 **the -- just like the signage you saw that was sitting on**
15 **the safes, some of those signs inside the store were**
16 **probably changed in December, so -- you know, how much**
17 **was under Sportsman's Warehouse, et cetera, in '95 I**
18 **don't know.**
19 Q You use the phrase "cash wraps," I believe.
20 What's a cash wrap?
21 **A A check stand where people pay for their**
22 **merchandise. If you notice in our stores, one and two,**
23 **the registers as you come in the door on the left,**
24 **there's a sign above them that says Sportsman's**
25 **Warehouse that lists our policies. That used to say**

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1 **Sports Warehouse. They changed those signs out in the**
2 **store I would assume in January of 1995.**
3 Q And do you know who would have prepared the
4 new signs?
5 **A In those days, I do not.**
6 Q Where is the in-store signage prepared today?
7 **A Now it's prepared corporately through our sign**
8 **builder program and distributed to the stores, but it's**
9 **in the process of being implemented. So there's a mix**
10 **of signs in the stores today, some of which was prepared**
11 **previously and some of which is on our corporate**
12 **control.**
13 Q So that's the same situation we were talking
14 about earlier, okay.
15 With respect to Interrogatory No. 8, which is
16 on Page 8, did you talk to anyone at Sportsman's
17 Warehouse to obtain the information to answer that
18 particular interrogatory?
19 **A I don't believe so.**
20 Q Same question for Interrogatory No. 9.
21 **A As with No. 8, I just probably spoke with our**
22 **counsel about that and I would have prepared the**
23 **response.**
24 Q I certainly don't want to know what you told
25 them or what they told you.

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1 **MR. ALLGEYER: Well, chances are we would just**
2 **bore you, you're right.**
3 Q (BY MR. UPCHURCH) Did you obtain the
4 information to respond to Interrogatory No. 12, which is
5 at the bottom of Page 10?
6 **A I'm aware of the response that was prepared by**
7 **counsel, that --**
8 Q You didn't obtain that information as far as
9 you know?
10 **A No. I knew that Sportsman's News was a**
11 **licensee of ours, but the serial number and so on, they**
12 **put it in to be correct.**
13 Q So you personally knew of that situation?
14 **A Right. I said that was the -- the only person**
15 **we had licensed to use our deal, and they put in the**
16 **serial number.**
17 Q And did you check with anyone at Sportsman's
18 Warehouse to see if there were any other licenses?
19 **A I know there are not.**
20 Q And how do you know there are no other
21 licenses, because you would have been involved in
22 negotiating them?
23 **A I am pretty involved in the business and every**
24 **aspect of it, and there are no other licenses.**
25 Q With respect to Interrogatory No. 13, which is

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1 on Page 11, did you check with anyone at Sportsman's
2 Warehouse concerning that particular interrogatory?
3 **A Again, I would have talked to Dale and several**
4 **of our vice presidents about that because the -- like**
5 **the America's Premier Outfitter, that was something that**
6 **was developed by a former associate of ours who was head**
7 **of advertising for probably two years, used to be a**
8 **store manager, he did the America's Premier Outfitter**
9 **design.**
10 Q Is that Mr. Coles?
11 **A No, that was Ryan Foust.**
12 Q Foust, okay. Is Coles the present head of
13 advertising?
14 **A He's manager of advertising. Dale and I are**
15 **co-heads of advertising, though.**
16 Q Now, you said you would have communicated with
17 several vice presidents in responding to Interrogatory
18 No. 13. Which vice presidents would you have
19 communicated with to obtain this information?
20 **A Steve Coffee, Matt French, and probably Jeremy**
21 **Sage.**
22 Q What's Mr. Coffee's title?
23 **A Senior vice president.**
24 Q And what's Mr. French's title?
25 **A Vice president.**

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1 Q And Mr. Sage's title?
2 **A Vice president.**
3 Q Do they -- are they responsible for different
4 areas of the company?
5 **A Yes.**
6 Q What area is Mr. French responsible for?
7 **A Hunting.**
8 Q And Mr. Sage?
9 **A Stores.**
10 Q Is Mr. Coffee responsible for any particular
11 area?
12 **A Fishing.**
13 Q Anyone else that you contacted in connection
14 with this particular answer?
15 **A Not that I can recall -- and, of course, Dale**
16 **Smith.**
17 Q Did you obtain any of the information that was
18 used in responding to Interrogatory No. 14?
19 **A I would have worked with counsel to develop**
20 **that response, yes.**
21 Q Did you obtain any of the information from
22 personnel at Sportsman's Warehouse?
23 **A Yes.**
24 Q Who did you communicate with to obtain the
25 information used in responding to Interrogatory No. 14?

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1 **A I believe Bob Goodwin called and told me that**
2 **Bass Pro Shop's Sportsman's Warehouse had changed their**
3 **name to Bass Pro Shops Sportsman's Center in Memphis.**
4 Q Anyone else?
5 **A And, unfortunately, if I could go on, I called**
6 **John Morrison, congratulated him on taking the high road**
7 **and changing his name, because we're well known as**
8 **Sportsman's Warehouse and he is not. And then -- that**
9 **was about three or four days before he would have lost**
10 **all his rights, so he quick hurried up and filed this**
11 **action against us.**
12 Q Anyone else?
13 **A I don't believe so. It's a long answer, so**
14 **maybe I should read through the whole thing.**
15 Q Yeah, why don't you, because that's kind of my
16 reaction, too. It's a pretty long answer and the
17 information had to come from somewhere.
18 **A This sentence says, "Respondent has disclaimed**
19 **exclusive rights to the phrase Sportsman's Warehouse**
20 **apart from the Bass Pro Shops' mark." That would have**
21 **been information that would have been provided by**
22 **counsel.**
23 **I'll continue reading.**
24 **Somehow we learned that Bass Pro opened their**
25 **store on March 1, 1995, not January 2nd, 1995 as they**

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1 **originally claimed.**
2 Q Do you know where that information came from?
3 **A I do not.**
4 **Point (b) where it says, "Sportsman's**
5 **Warehouse is not aware of any instance where petitioner**
6 **has used the phrase Sportsman's Warehouse apart from the**
7 **mark Bass Pro Shops." If you look -- not at a little**
8 **sign on top of a safe, but when you go to the St. Louis**
9 **Bass Pro Shops store, it says Bass Pro Shops Sportsman's**
10 **Warehouse right on the front, it still does to this day,**
11 **so it's always been used in conjunction with Bass Pro**
12 **Shops. And when you walk into a store, all you see is**
13 **logo'd merchandise, Bass Pro Shops logo'd merchandise.**
14 Q What about those cards that were mailed in to
15 Colorado?
16 **A I don't know how many there were. Into our**
17 **store there were probably a half a dozen of them between**
18 **the two stores that showed up that were not issued by**
19 **the local store.**
20 Q And they didn't say Bass Pro Shops Sportsman's
21 Warehouse on them; is that what your testimony was?
22 **A Those ones say just Sportsman's Warehouse, on**
23 **those cards that were mailed out apparently in November**
24 **or December of 2005, I assume by Bass Pro Shops.**
25 Q So that would be an exception to the answer,

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1 to (b)?
2 **A I guess that would be correct.**
3 Q Are you aware of any other instances where
4 Bass Pro Shops has used Sportsman's Warehouse apart from
5 the mark Bass Pro Shops?
6 **A I am not. Am I supposed to be continuing**
7 **or --**
8 Q Well, you were reading through to see if you
9 could determine if there was somebody else that you
10 contacted to obtain information that's contained in
11 these answers.
12 **A I believe just our legal counsel again.**
13 Q If you're done reading that answer, could you
14 turn back to Page 12. In Paragraph (a) toward the end
15 of it, there's a phrase -- well, let me read the
16 sentence. "Respondent has disclaimed exclusive rights
17 to the phrase Sportsman's Warehouse apart from the Bass
18 Pro Shops mark, and has not acquired any secondary
19 meaning in that phrase." Do you see that sentence?
20 **A Yes.**
21 Q Do you have an understanding of what
22 "secondary meaning" means?
23 **A Yes.**
24 Q What does secondary meaning mean to you?
25 **A Where the name would be known in the trade or**

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1 **to the public as what they would associate a company's**
2 **name to be.**
3 Q And did you make any inquiry as to whether or
4 not Bass Pro Shops had developed secondary meaning in
5 the Sportsman's Warehouse mark? Did you ask anybody?
6 **A Well, to me, I had -- they tried to acquire us**
7 **twice, so I went through their warehouse twice. They**
8 **supplied -- 90 plus percent of all the product that's**
9 **sold in their stores comes from a Bass Pro Shops**
10 **warehouse in Springfield, Missouri, okay. So the bills**
11 **that they'll be paying in the trade are on Bass Pro**
12 **Shops -- that's how they buy stuff, Bass Pro Shops.**
13 **Sportsman's Warehouse doesn't buy anything.**
14 **So in the trade, Bass Pro Shops is known as**
15 **Bass Pro Shops. We are known as Sportsman's Warehouse.**
16 Q When you say "in the trade," what do you mean
17 by that?
18 **A If you sold me, say, you know, ten semi loads**
19 **of double A shotgun shells and I were to pay for that, I**
20 **would pay for it under Sportsman's Warehouse. Bass Pro**
21 **would pay for it under Bass Pro Shops. They might**
22 **send -- so in the trade, there's absolutely zero**
23 **confusion about who is Bass Pro Shops and who is**
24 **Sportsman's Warehouse.**
25 Q What about with retail customers?

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1 **A This year we'll have nine million customers.**
2 **You might find ten or 20 that are confused.**
3 Q And do you have -- well, does the phrase
4 "secondary meaning" have any meaning to you in
5 connection with the retail trade?
6 **A Yes.**
7 Q So does it have the same meaning as what you
8 said before, only it's the retail customers that
9 identify the company?
10 **A The retail customers know Sportsman's**
11 **Warehouse and they know Bass Pro Shops. So I would say**
12 **the vast, vast majority of customers out there would**
13 **make a distinction between Bass Pro Shops and**
14 **Sportsman's Warehouse.**
15 Q Based upon -- what would they base that
16 distinction on?
17 **A Their experience, their experience in going to**
18 **our stores and going possibly to their stores. They're**
19 **very discernibly different and people -- you know, they**
20 **look different, they feel different. The merchandise is**
21 **different. And in Bass Pro Shops stores, they have a**
22 **lot of merchandise with the Bass Pro Shops' logo on**
23 **them, even the one in St. Louis.**
24 Q Do they have merchandise that doesn't have the
25 Bass Pro Shops logo on them?

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1 **A Yes.**
2 Q Do you consider Bass Pro Shops to be a
3 competitor?
4 **A Yes.**
5 Q Are there similar products sold in your stores
6 and the Bass Pro Shops stores?
7 **A Yes.**
8 Q Are there product types that Bass Pro sells
9 that you don't sell?
10 **A Yes.**
11 Q What are some of those, the big ones?
12 **A Golf equipment.**
13 Q Anything else?
14 **A Boats. Big boats.**
15 Q I was going to say, I could have sworn I saw
16 some boats over there yesterday.
17 **A We sell some v-hauls and kick boats and things**
18 **like that, but I'm talking about like pontoon boats,**
19 **Tahoe boats, bass tracker boats. We're selling small**
20 **boats. They're selling more major boats.**
21 Q Yeah, okay, I understand the distinction now.
22 Any other products that Bass Pro sells that
23 Sportsman's Warehouse does not, product categories?
24 **A In terms of -- I think they sell fudge, and I**
25 **don't think we sell fudge. We might sell fudge in one**

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1 **or two stores and we get it from a local source. I**
2 **don't know. In terms of big categories, I would say it**
3 **would be boats and golf equipment would be the only two**
4 **things that are different.**
5 Q Are you aware of any other companies using the
6 mark Sportsman's Warehouse other than Bass Pro and
7 Sportsman's Warehouse?
8 **A When you say "using the mark," are you talking**
9 **about the stylized --**
10 Q No. Let me rephrase that. Are you aware of
11 any other company using the phrase "Sportsman's
12 Warehouse" in connection with their business other than
13 your company and Bass Pro?
14 **A I think there's a company in either Africa --**
15 **Africa somewhere, South Africa or else in Australia,**
16 **that there's some small guy over there that does a**
17 **little stuff on the Internet, but...**
18 Q Anyone else?
19 **A That's all I know.**
20 Q If you look at Interrogatory No. 17, it talks
21 about experts. It asks about whether your company has
22 retained an expert to testify in this matter. Do you
23 know if your company has retained an expert other than
24 your attorneys to testify in this proceeding?
25 **A Not at this time.**

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1 Q I think we're done with Exhibit 1 for right
2 now.
3 I'm going to hand you Exhibit 2 -- let's back
4 up a second. Prior to acquiring the company Sports
5 Warehouse, did you have any familiarity with trademarks?
6 **A Yes.**
7 Q And how did you obtain that familiarity?
8 **A Well, I've got Coca-Cola. If you drink that,**
9 **that's a trademark product and so on.**
10 Q Did you ever own any businesses where
11 trademarks were important prior to acquiring this
12 company?
13 **A I owned other businesses and we had names, but**
14 **I don't know to the extent they were trademarked or**
15 **copyrighted.**
16 Q And that's really what I was getting at, was
17 what kind of experience you had in connection with
18 trademarks prior to this company.
19 **A I also previously did merger and acquisition**
20 **work. I sold 108 companies for a billion seven. I**
21 **advised many companies on mergers and acquisitions and,**
22 **of course, service marks, trademarks and so on were many**
23 **times involved in the deal. So I guess I have a lot of**
24 **familiarity with it, but not like you.**
25 Q Well, I'm not asking if you're, you know,

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1 capable of filing and prosecuting your own trademark
2 applications. I was really just trying to see, you
3 know, what experience you had in that area.
4 Well, why don't we look at Exhibit 2, then.
5 Do you recall making the decision to file for this
6 particular trademark?
7 **A Yes.**
8 Q Do you recall when that decision was made?
9 **A Looking at the date on the top of this, I**
10 **would say sometime in 2000.**
11 Q Well, it was registered in 2000. If you look
12 down on the right-hand column, it was filed in January
13 of 1999.
14 **A So we probably made the decision to do this in**
15 **1998, I would say, then, and we were using that mark and**
16 **Dale had designed it with the mountains and stuff, and**
17 **so we thought we'll do it.**
18 Q Since about 1995?
19 **A Yes.**
20 Q Based upon --
21 **A We had had it registered in the state, but we**
22 **decided -- because we started thinking we would do**
23 **business in more places than just Utah, so we should try**
24 **to get it in other places.**
25 Q So that was really what I was getting at, was

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1 what was the impetus, if you waited for three years, why
2 did you wait three years, and so at that point, you were
3 thinking you were going into other states and so you
4 needed better protection?
5 **A Yes.**
6 Q In the left-hand column, there's a description
7 of services. It says, "Retail and wholesale stores
8 featuring hunting supplies, fishing supplies, camping
9 supplies, reloading supplies, outerwear, clothing and
10 footwear." Did you come up with that particular
11 description of the services?
12 **A No.**
13 Q Do you know who did come up with that
14 particular description of the services?
15 **A Whatever legal counsel filed this for us.**
16 Q Does this description accurately describe the
17 services you were providing in 1999?
18 **A I would say so. I'm not sure what Class 35**
19 **is, but...**
20 Q I would have to look it up.
21 **MR. ALLGEYER: Maybe I'll make a belated**
22 **objection, calls for a legal conclusion.**
23 **THE WITNESS: Yeah, as far as I can tell, it**
24 **does.**
25 Q (BY MR. UPCHURCH) At that time, did you have

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1 wholesale stores?
2 **A You know, you seem to be talking about**
3 **wholesale stores, and I've tried to clarify that for**
4 **you. I don't know if I'm able to, okay. We sell at**
5 **retail. Sportsman's Warehouse is a retail company,**
6 **Pacific Flyway Wholesale is a wholesale company. To**
7 **date, it's evolved into a distribution center. It still**
8 **has a wholesale component. Up until 1999 we were**
9 **probably wholesaling some product out of Sportsman's**
10 **Warehouse, okay. So how much that was, it would be a**
11 **small amount, but there would be some of it, where**
12 **somebody would walk next door, fill out an order over**
13 **there and go get it next door.**
14 Q So to the extent you had the situation that
15 you described earlier, the same store was functioning as
16 a retail store and a wholesale store?
17 **A Initially that would be true. We opened our**
18 **second store in May of 1998 and our third store not**
19 **until April of 1999, and it was somewhere in that period**
20 **of time when we relocated the wholesale company to South**
21 **Salt Lake City, so -- and we still had a little of that**
22 **then.**
23 Q Right. Okay. Now, are you saying that it was
24 the first location that was doing some of the wholesale
25 selling?

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1 A Yes.
2 Q But not the second location?
3 A I am trying to respond to your questions the
4 best I can.
5 Q Right. And I'm trying to understand your
6 answer.
7 A I don't know if I can make it clearer.
8 Q Right.
9 A It all hinges on how you're defining
10 wholesale.
11 Q Okay.
12 A If you're talking about giving a retail
13 customer that buys in bulk a discount and calling that
14 wholesale, then that — we would be doing that at other
15 stores as well. If you are talking about a guy coming
16 in and buying something at Pacific Flyway Wholesale and
17 then picking something else up at a retail store that
18 was probably one store, I would say that's
19 essentially -- was there ever a sale made at wholesale
20 price to somebody else, I don't know.
21 Q Well, you know, I'm really asking about -- it
22 says retail and wholesale stores.
23 A I think at the time we were thinking that we
24 would expand Pacific Flyway along with the retail so
25 that when we built -- say we went to Idaho, we would

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1 probably have a small wholesale operation with it, and
2 when we went to Colorado we would have a wholesale
3 operation with it and grow them simultaneously, but as
4 time went along, we decided to focus on just retail, so
5 that's probably what that alludes to. We wouldn't do
6 that in Utah because we had a wholesale company here.
7 But when we went to other states -- we opened Meridian
8 in 2000, that would have been something we were thinking
9 about at the time, in the 1998, '99 time frame.
10 MR. UPCHURCH: Are we getting close to lunch?
11 MR. ALLGEYER: Pretty close.
12 THE WITNESS: They'll bring it in when it gets
13 here, which won't be much longer.
14 MR. UPCHURCH: That's what I was thinking.
15 Why don't we mark that as Exhibit 4, please.
16 (Whereupon, Exhibit No. 4 was marked for
17 identification.)
18 Q (BY MR. UPCHURCH) I've had the reporter hand
19 you what's been marked as Exhibit 4. Can you identify
20 that?
21 A It looks like it's an ad from November 1994 in
22 The Deseret News showing Sports Warehouse as the name on
23 the ad.
24 Q You earlier made reference to a Christmas ad
25 for '94.

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1 A This would be a Christmas ad.
2 Q So is this possibly the Christmas ad you were
3 referring to?
4 A Actually, this is a Thanksgiving Day ad. So
5 what I'm saying, the ads we could find -- they didn't do
6 much advertising in those days -- it appears as if they
7 were using Sports Warehouse in their newsprint
8 advertising through the end of '94. And what we could
9 find in '95, they were using Sportsman's Warehouse.
10 Q Now, are you sure that you found a Christmas
11 ad? And the reason I ask is I didn't see one in looking
12 through the documents. I found this.
13 A Well, change it to Thanksgiving ad if this is
14 the ad that we could find, then. There may be an
15 additional one. I don't know.
16 Q There may be one I missed. Do you have a
17 specific recollection of a Christmas ad for '94?
18 A I don't remember what all we produced. We
19 produced everything that we could find to my knowledge.
20 So this is a -- I would say a Thanksgiving Day ad. It
21 ran prior to Thanksgiving, I would think. I don't know
22 when Thanksgiving was in 1994, but...
23 Q But it looks about right. It looks about
24 right.
25 And the Christmas ad, if there is one, would

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1 be sometime shortly before Christmas; is that correct?
2 A No, it would have been -- you know, we would
3 be running ads every week in December of 2004, 2005 and
4 so on, normally, I would think. We do it today.
5 MR. UPCHURCH: And I would request a copy of
6 those if they exist.
7 MR. ALLGEYER: I think they've been produced.
8 MR. UPCHURCH: And they may have and I just
9 don't have them.
10 THE WITNESS: And I think they have been, too.
11 That's why I said Christmas ad earlier.
12 MR. ALLGEYER: If you'll put that in your
13 letter, we'll check.
14 MR. UPCHURCH: I just want to make sure we
15 have a complete record.
16 THE WITNESS: We searched with the newspapers
17 and this is what we found. So you may have another one,
18 a December one. I don't know if you have it or not.
19 MR. UPCHURCH: And it may have looked so
20 similar that I just overlooked it. That's quite
21 possible.
22 MR. ALLGEYER: And coming off microfiche,
23 sometimes you have a black smudge where the date should
24 be so you never know. We'll certainly -- put that in a
25 letter and we'll find it if it exists.

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1 **MR. UPCHURCH: Would you mark that as 5,**
2 **please.**
3 **(Whereupon, Exhibit No. 5 was marked for**
4 **identification.)**
5 Q (BY MR. UPCHURCH) I've had the reporter hand
6 you what's been marked as Exhibit 5 and ask if you can
7 identify that?
8 **A That's a Sportsman's Warehouse ad, and it's**
9 **from, I think, November 23rd of 1995, I believe.**
10 Q And this is consistent with your earlier
11 testimony that sometime between 1994 and 1995 there was
12 a name change?
13 **A Yes, we produced earlier ads for you, too. I**
14 **think there was one from June.**
15 Q And that was the Father's Day ad that you
16 testified about earlier?
17 **A Yes.**
18 **MR. UPCHURCH: Could you mark that as**
19 **Exhibit 6, please.**
20 **(Whereupon, Exhibit No. 6 was marked for**
21 **identification.)**
22 Q (BY MR. UPCHURCH) Could you identify what the
23 reporter has marked as Exhibit 6, please?
24 **A I believe this was an amendment changing the**
25 **legal name of the corporation from Sports Warehouse,**

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1 **Inc. to Sportsman's Warehouse, Inc.**
2 Q Is that your signature on this document?
3 **A Yes.**
4 Q And that occurred in 2004? Right before your
5 signature --
6 **A Yeah, looking at that date I thought it**
7 **occurred earlier, but apparently not. It must have been**
8 **then.**
9 Q Do you have any reason to believe that it
10 occurred earlier than February 2004?
11 **A No, no. I just thought it occurred earlier.**
12 **MR. UPCHURCH: I'm ready to take a break.**
13 **(Break taken.)**
14 **MR. UPCHURCH: Would you mark that as**
15 **Exhibit 7, please.**
16 **(Whereupon, Exhibit No. 7 was marked for**
17 **identification.)**
18 Q (BY MR. UPCHURCH) You've been handed
19 Exhibit 7. Do you recognize this document?
20 **A Not exactly. It looks like something that**
21 **Bill Hayes in February 1995 applied to have the dba as**
22 **Sportsman's Warehouse, apparently, is what this document**
23 **requests, I guess, with the State of Utah. It wasn't**
24 **prepared by me, but I think that's what it is.**
25 Q And what did you say the date was?

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1 **A February 1, 1995, is when it was filed. Well,**
2 **that's when it was approved by the State of Utah. I'm**
3 **not sure when it was applied for. It's probably, I**
4 **would assume, applied for earlier and it was issued on**
5 **that date.**
6 Q Is that, in fact, Mr. Hayes' signature?
7 **A Yes.**
8 **(Whereupon, Exhibit No. 8 was marked for**
9 **identification.)**
10 Q (BY MR. UPCHURCH) You've been handed what's
11 been marked as Exhibit 8. Do you recognize this
12 document?
13 **A Yes.**
14 Q And is that your signature on the last page of
15 it?
16 **A Yes.**
17 Q Did you prepare this document?
18 **A I don't think so, because the "none" is not my**
19 **writing.**
20 Q Which is not your writing?
21 **A The word that says "none" and the "Sportsman's**
22 **Warehouse," the printing is not my printing. So I don't**
23 **think I prepared the document, I just signed the**
24 **document.**
25 Q Do you know who did prepare the document?

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1 **A I do not.**
2 Q And if you look at Paragraph 10 of the
3 document, right above your signature it says, "The
4 character of business the foreign corporation initially
5 intends to conduct in Arizona is: Sporting goods retail
6 and wholesale service." Do you see that?
7 **A Yes.**
8 Q The -- do you have an understanding of what
9 sporting goods means in that context?
10 **A I think so.**
11 Q And what does that mean to you?
12 **A We're going to sell sporting goods equipment,**
13 **hunting, fishing, camping.**
14 Q Baseball bats?
15 **A We could be selling baseball bats. We could**
16 **be selling tennis rackets, golf clubs. We're selling**
17 **sporting goods stuff.**
18 Q So that was a somewhat broader description
19 than what was in your federal registration that we
20 looked at earlier?
21 **A Again, you want us to say outdoor goods, do**
22 **you want -- and that could include golf and tennis**
23 **because they're outdoor activities -- well, tennis could**
24 **be indoors. Golf is always outdoors. I don't know.**
25 Q Was there an intent that the business be

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1 different in Arizona than what you were doing in Utah?
2 **A No.**
3 **MR. UPCHURCH: Shall we have lunch?**
4 **MR. ALLGEYER: Why not.**
5 **(Break taken.)**
6 **MR. UPCHURCH: Would you mark that as**
7 **Exhibit 9, please.**
8 **(Whereupon, Exhibit No. 9 was marked for**
9 **identification.)**
10 Q (BY MR. UPCHURCH) You've been handed what's
11 been marked as Exhibit 9. Can you identify that
12 document?
13 **A It appears to be a trademark-service mark**
14 **registration with the State of Idaho on 4/15/96 for**
15 **Sports Warehouse dba as Sportsman's Warehouse.**
16 Q Right. And it shows a logo down there as
17 well?
18 **A Yes.**
19 Q Which is similar to what's in Exhibit 2, but
20 doesn't have the hunting, camping, et cetera underneath
21 it; is that correct?
22 **A Yes.**
23 Q And in the middle of this it says, "First use
24 anywhere: 4/15/1996." Do you see that?
25 **A Yes.**

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1 Q Do you know what the basis of selecting that
2 particular date was?
3 **A I don't, because obviously we saw an ad**
4 **earlier that was June 15th, 1995 that was used, so -- it**
5 **was probably -- April 15, 1995 was probably a mistake.**
6 Q Could be a typo?
7 **A Could be a typo because it was obviously used**
8 **before that. It was exhibit -- what do you have here?**
9 **Exhibit 5 is earlier.**
10 Q Right, Exhibit 5 is dated in 1995, right?
11 **A Yes.**
12 **MR. UPCHURCH: Mark that as Exhibit 10,**
13 **please.**
14 **(Whereupon, Exhibit No. 10 was marked for**
15 **identification.)**
16 Q (BY MR. UPCHURCH) You have been handed what's
17 been marked as Exhibit 10. Do you recognize that
18 document?
19 **A Yes.**
20 Q What is that document?
21 **A It's an application for registration of**
22 **trademark-service mark in the State of Idaho for**
23 **Sportsman's Warehouse, I believe -- yes.**
24 Q And is that your signature?
25 **A Yes.**

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1 Q And, again, we have the 4/15/1996 date.
2 **A Yes, and that is my writing as well.**
3 Q Do you have any idea why you wrote 4/15/1996?
4 **A Probably meant 4/15/95, and then it was copied**
5 **from there onto this other document, and I don't even**
6 **know what the significance of 4/15/95 is because it was**
7 **registered earlier.**
8 Q You say it was registered earlier?
9 **A Well, in the State of Utah on February 1 of**
10 **'95, the name was registered.**
11 Q Okay, as a dba?
12 **A At the time there was probably some ad or**
13 **something. I don't know.**
14 Q You don't have any present recollection as to
15 where that date came from?
16 **A No, I do not.**
17 Q Do you have a present recollection as to where
18 the 5/14/1998 date for the first use in Idaho came from?
19 **A I would say that was the date that we -- let's**
20 **see. No. It must have been a date that we could**
21 **identify where we bought something from some vendor in**
22 **Idaho, is probably what it was.**
23 **MR. ALLGEYER: You don't want to guess. Just**
24 **tell him the best you know.**
25 **THE WITNESS: I don't know what the date comes**

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1 **from.**
2 **MR. UPCHURCH: Could you mark that as 11,**
3 **please.**
4 **(Whereupon, Exhibit No. 11 was marked for**
5 **identification.)**
6 Q (BY MR. UPCHURCH) You've been handed what's
7 been marked as Exhibit 11. Do you recognize that
8 document?
9 **A Yes.**
10 Q What is that document?
11 **A It's something where we were registering in**
12 **the State of Washington as Sportsman's Warehouse, to**
13 **conduct business under the name Sportsman's Warehouse.**
14 Q And is that your signature?
15 **A Yes.**
16 Q Is that your wife's signature?
17 **A It kind of looks like -- I think that might be**
18 **my signature. I'm not sure. It looks like it.**
19 Q Look at the second whereas clause on that
20 document, the one that says, "Whereas, the name of this
21 corporation is not available for use in the State of
22 Washington and it is necessary to adopt the use of an
23 assumed name." Do you see that?
24 **A Yes.**
25 Q Was the name Sports Warehouse not available in

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1 Washington at the time?
2 **A I don't know.**
3 Q Do you know what forms the basis of this
4 statement, this whereas clause?
5 **A I do not.**
6 Q Did you prepare this document?
7 **A No.**
8 Q Who did prepare this document?
9 **A Lindquist & Vennum.**
10 Q Your attorneys?
11 **A Yes.**
12 Q Are you aware of any searching done to
13 determine the availability of Sports Warehouse as a
14 corporate name in Washington?
15 **A Yes.**
16 Q What -- who --
17 **A Lindquist & Vennum would have done a search in**
18 **every state that we went into, because we always applied**
19 **for a state registration of our name.**
20 Q And the practice was to do a search before you
21 went in?
22 **A Yes.**
23 Q As part of that searching state by state, did
24 you ever come across -- go ahead.
25 **A There's different requirements to register, as**

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1 **you know, in different states. Every state is**
2 **different. And it could have been here that we had to**
3 **have a physical facility in the state before we could**
4 **have gotten the name, so that may be what this is about.**
5 **I don't know. Because we did have a physical facility,**
6 **but probably not until 2001. That's probably what it**
7 **means.**
8 Q And this was dated in 2000?
9 **A Yes. Because we opened our Loveland store in**
10 **May of 2000, that was store six. Store seven opened**
11 **later in 2000. So we were probably trying to register**
12 **the name Sportsman's Warehouse ahead of time and we had**
13 **to have a physical facility there, and that's probably**
14 **all this means.**
15 **MR. UPCHURCH: Would you mark that, please.**
16 **(Whereupon, Exhibit No. 12 was marked for**
17 **identification.)**
18 Q (BY MR. UPCHURCH) You've been handed what's
19 been marked as Exhibit 12. Have you seen this document
20 before?
21 **A I'm sure I have at one time or another.**
22 Q Do you know what it is?
23 **A This is an application for a Sportsman's**
24 **Warehouse service mark it looks like.**
25 **Do you want to tell me what it is?**

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1 Q I'm just asking if you know what it is.
2 **MR. ALLGEYER: If you don't know, just say you**
3 **don't know.**
4 **THE WITNESS: I don't.**
5 Q (BY MR. UPCHURCH) Well, let me represent to
6 you, then, that this is the trademark office's response
7 to the filing of your application which became Exhibit
8 2, which is that logo mark.
9 Did you have any part in preparing the
10 response to this particular document?
11 **A I don't know.**
12 Q You don't recall having any part in preparing
13 the response?
14 **A No, I do not recall.**
15 Q On Page 2 of this document, there's a
16 reference to the Bass Pro Shops Sportsman's Warehouse
17 mark. Do you see that?
18 **A Which paragraph?**
19 Q The second paragraph.
20 **A Yes.**
21 Q And this particular document, Exhibit 12, is
22 dated August 1999?
23 **A Yes.**
24 Q Do you have a recollection of becoming aware
25 of the Bass Pro mark prior to this date?

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1 **A I believe that I said earlier that in 1997, I**
2 **think it was, Scott Nielson told me he saw the store**
3 **Bass Pro Shops Sportsman's Warehouse in Atlanta.**
4 Q So that was two years prior?
5 **A Yes.**
6 Q Do you have any recollection of being exposed
7 to the Bass Pro Sportsman's Warehouse mark between 1997
8 and 1999?
9 **MR. ALLGEYER: I'm just going to interpose an**
10 **objection for clarity. By mark --**
11 **MR. UPCHURCH: Just the phrase.**
12 **MR. ALLGEYER: Okay, so you're not using the**
13 **legal sense of mark or entitlement --**
14 Q (BY MR. UPCHURCH) The phrase Bass Pro's
15 Sportsman's Warehouse?
16 **A No.**
17 Q So you learned about it in '97, and if I
18 understand you correctly, the next time that it came up
19 was in 1999 in connection with this application?
20 **A As far as I know.**
21 **MR. UPCHURCH: Would you mark that as**
22 **Exhibit 13, please.**
23 **(Whereupon, Exhibit No. 13 was marked for**
24 **identification.)**
25 Q (BY MR. UPCHURCH) You've been handed what's

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1 been marked as Exhibit 13, which I will purport is --
2 shows a copy of the mark that was cited against your
3 application in the previous document, in Exhibit 12. It
4 comes from the same file, and you see the words
5 "Sportsman's Warehouse" and then a Bass Pro Shops' logo
6 above that, you see that?
7 **A Yes.**
8 Q I think you earlier referred to the Bass Pro
9 Shops' logo in some of your answers. Is this the logo
10 that you were talking about?
11 **A Yes, excluding the colors that usually go with**
12 **it.**
13 Q Some kind of green and brown --
14 **A It's usually a yellow.**
15 Q Is it yellow?
16 **A Yes.**
17 **MR. UPCHURCH: Could you mark that as 14,**
18 **please.**
19 **(Whereupon, Exhibit No. 14 was marked for**
20 **identification.)**
21 Q (BY MR. UPCHURCH) You've been handed what's
22 been marked as Exhibit 14. Do you recognize this
23 document?
24 **A I don't recognize it, but it's my signature on**
25 **the back, so... It's another filing with the secretary**

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1 **and commissioner of patents and trademarks for the mark**
2 **Sportsman's Warehouse.**
3 Q I take it you didn't prepare this document?
4 **A No.**
5 Q On the first page of this document, you see a
6 date of first use specified as June 16th, 1995?
7 **A Yes, and that relates again to the first**
8 **newspaper advertising -- advertisement that we could**
9 **find.**
10 Q That would be the Father's Day ad you talked
11 about earlier?
12 **A Yes.**
13 Q At the time that you signed Exhibit 14, were
14 you aware of any earlier use of the mark?
15 **A Of which mark?**
16 Q The one that's shown in Exhibit 2.
17 **A Sure -- I mean, earlier than December 16th,**
18 **1998?**
19 Q Early than June 16th, 1995.
20 **A Not in the -- you know, we didn't have a**
21 **newspaper thing, but we were using it on the side of the**
22 **building for sure by then in terms of our sign on the**
23 **old building that was out here.**
24 Q When was it used on the sign on the building?
25 **A Well, that's -- we're trying to track that**

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1 **down, but we think that it was February or March of**
2 **2000 -- or 1995.**
3 **MR. ALLGEYER: You mean 1995, not 2000.**
4 **THE WITNESS: Yes, February or March of 1995,**
5 **the sign on the exterior of the building was changed.**
6 **And inside the building, I think signage started to be**
7 **changed right after the holiday season that year when**
8 **they hit into January. But, you know, they didn't --**
9 **that's in-store signage, so -- you know, we've**
10 **changed -- just two years ago we changed all of our**
11 **in-store signage again. It used to say Sports**
12 **Warehouse, it still does, but the stuff on the sign**
13 **changed. When I started working on the project, the**
14 **in-store signage above the cash wraps was Sportsman's**
15 **Warehouse. In the report that we prepared showed**
16 **Sportsman's Warehouse as the dba.**
17 Q (BY MR. UPCHURCH) Right. At the bottom of
18 Page 1 of Exhibit 14 there are various disclaimers.
19 There's a section called "Disclaimers."
20 **A Yes.**
21 Q Do you have an understanding as to what
22 disclaimer means in the trademark context?
23 **A I believe so.**
24 Q And what is that understanding?
25 **MR. ALLGEYER: With the understanding that**

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1 **he's stating a layman's understanding.**
2 **MR. UPCHURCH: Yes, I just want to know what**
3 **he thinks it means.**
4 **THE WITNESS: Well, on Exhibit 13, Bass Pro**
5 **said no claim is made to the exclusive right to use**
6 **Sportsman's Warehouse apart from the mark as shown,**
7 **which they show Bass Pro Shops with their logo with**
8 **their name. We made the same disclaimer here saying**
9 **that because at that time they would not give us the**
10 **name Sportsman's Warehouse unless it was with something**
11 **else, so we added the words "hunting, fishing, camping,**
12 **reloading, outerwear and footwear," which was what we**
13 **always had with it. Even back on the sports -- when it**
14 **was Sports Warehouse, they used those names. Here's**
15 **hunting, fishing, camping, archery, reloading,**
16 **outerwear, footwear.**
17 **So we had been using that for ten years prior**
18 **to changing the name. So the only thing that was**
19 **different was we added the word M-A-N apostrophe S to**
20 **the thing that we'd been using since 1986.**
21 Q (BY MR. UPCHURCH) But this also had a logo;
22 is that correct?
23 **A Initially, no. Dale Smith designed the**
24 **logo --**
25 Q Right.

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1 A -- in 1995.
2 Q Right.
3 A Sometime.
4 Q So the registration shows a logo, that logo
5 doesn't go back to '86?
6 A The logo does not go back to '86. It goes --
7 actually, it goes back to '94. Dale Smith designed the
8 logo then when they made the application to the state on
9 February 1 of '95.
10 MR. UPCHURCH: Would you mark that as 15.
11 (Whereupon, Exhibit No. 15 was marked for
12 identification.)
13 Q (BY MR. UPCHURCH) You've been handed what's
14 been marked Exhibit 15. Do you recognize this document?
15 Take your time. It's a multipage document.
16 Feel free to read as much of it as you wish.
17 A This was prepared, again, by our counsel,
18 Lindquist & Vennum, and it's saying that there's no
19 confusion between Bass Pro Shops Sportsman's Warehouse
20 and Sportsman's Warehouse's Sportsman's Warehouse. That
21 was -- and it was filed on February 7th the year 2000,
22 and I was copied on it at Enterprise Investments. So it
23 was submitted by our corporate counsel to the trademark
24 and patent office by our attorney with a carbon copy
25 sent to me.

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1 Q And this Mr. Little, Mr. Bruce Little who
2 signed this was your attorney for this purpose?
3 A Yes.
4 Q Did you approve the filing of this document?
5 A As I indicated, I received a copy of the
6 document.
7 Q You don't --
8 A So whether I approved it prior to submission
9 or not, I do not know.
10 (Whereupon, Exhibit No. 16 was marked for
11 identification.)
12 Q (BY MR. UPCHURCH) You've been handed what's
13 been marked as Exhibit 16. I ask if you can identify
14 that.
15 A Yes. This is an application for a state
16 trademark or a state -- or service mark registration
17 with the State of Utah dated -- I believe October 8th,
18 1999.
19 Q For the words "Sportsman's Warehouse"? It's
20 in the middle.
21 A Yes, for the words "Sportsman's Warehouse."
22 Q If you look in the lower left-hand side, it
23 says, "Date of first use of the trademark or service
24 mark," and it looks like it said in Utah, but it has
25 been cut off. Do you see that?

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1 A Yes.
2 Q And the date's 6/30/94. Do you see that?
3 A Yes.
4 Q Do you know where the date 6/30/94 came from?
5 A I would assume there was something -- they had
6 been discussing using the name Sportsman's Warehouse for
7 a number of years, and I assume they used it on
8 something, and whatever that thing was, whether it was a
9 T-shirt, a baseball cap, you know, something, that
10 that's where that date came from. Now, 12 years later,
11 I do not know what that reference was to seven years
12 ago, but it was a reference to something at that point
13 in time.
14 Q And this is your signature?
15 A Yes.
16 Q And this was filed in October of 1999?
17 A Yes. I can't tell if it's the 8th or 18th.
18 Q I can't tell either.
19 A It was in October of '99.
20 Q And then underneath that there's a line that
21 says, "Outside Utah," and it says, "4/15/96." Do you
22 see that?
23 A Yes.
24 Q Didn't we see the 4/15 date someplace else?
25 A I think on the one for Idaho.

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1 Q Idaho.
2 A And why 4/15/96, I don't know what that was
3 for. I mean, it was used outside of Utah for something.
4 Again, Sportsman's Warehouse would have bought product
5 from vendors outside and we've -- you know, outside
6 vendors would send us bills, so it was obviously before
7 that. I don't know what that date is for because we
8 opened our first store outside of Utah, I believe, in
9 '99.
10 Q I don't know. I'm as puzzled as you are.
11 A Again, this document relates to a long time
12 ago, and I wish I could be more specific, but there's no
13 examples or anything submitted with this, I don't think.
14 Maybe there were. But it says on here -- you know,
15 displays, signs, advertising materials, television
16 advertising, letterhead, business cards, hats, coffee
17 cups.
18 Q Did you prepare this document?
19 A No.
20 Q Did someone at Sports Warehouse prepare this
21 document?
22 A No.
23 Q Was it prepared by your attorney?
24 A Yes.
25

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1 (Whereupon, Exhibit No. 17 was marked for
2 identification.)
3 Q (BY MR. UPCHURCH) You've been handed a
4 document that's been marked as Exhibit 17.
5 **A Yes.**
6 Q Do you recognize this?
7 **A Yes.**
8 Q What is this document?
9 **A This is a -- it looks like a fax, and possibly**
10 **an e-mail, from Gene Nielsen who was -- when we acquired**
11 **the business, he was the accountant for the -- he was**
12 **the CPA for the previous owners, and he did our**
13 **financial statements, I believe, for the first year**
14 **after we acquired the business. His wife -- so the**
15 **reason we contacted him is we were trying to find out**
16 **who prepared the documents to file with the State of**
17 **Utah on February 1, 1995, who did that. We thought that**
18 **maybe Gene Nielsen did that because he was the CPA. He**
19 **did not do that, but his ex-wife Billie Crocker, used to**
20 **be Billie Nielsen, no relation to Scott Nielson,**
21 **prepared the documents, but she didn't have any files on**
22 **it, but she was the one who did it.**
23 **But she -- both -- Gene remembered having**
24 **several meetings earlier to discuss the name change with**
25 **Bill and Scott.**

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1 Q So he had a recollection of it, but he didn't
2 have any documents, and he referred you to Billie
3 Crocker?
4 **A Yes.**
5 Q And you also checked with Ms. Crocker?
6 **A I called her and asked her if she had any**
7 **documents that would show work that she had done prior**
8 **to preparing for the submission, because she didn't just**
9 **wake up on the morning of February 1, 1995, drop**
10 **downtown and make a filing with the secretary of state.**
11 **So she had to do some work prior to that. And Gene**
12 **recalled they had meetings earlier, November and**
13 **December, on it. So Billie was probably involved in**
14 **those, but she couldn't remember.**
15 **MR. UPCHURCH: Why don't you give me ten**
16 **minutes and I'll check my notes and we're just about**
17 **done.**
18 **(Break taken.)**
19 Q (BY MR. UPCHURCH) Are you aware of any
20 confusion by potential job applicants between Bass Pro
21 and Sportsman's Warehouse?
22 **A I am not personally. I see in your responses**
23 **that you guys were alluding there was some, so maybe**
24 **there is some, but I don't know.**
25 Q But other than in the documents that have been

[Page 84]

1 filed on behalf of Bass Pro, you have no information
2 concerning that?
3 **A None.**
4 **MR. UPCHURCH: That's all I have.**
5 **MR. ALLGEYER: I do have one question.**
6 **EXAMINATION**
7 **BY MR. ALLGEYER:**
8 Q Earlier during the testimony, Mr. Upchurch had
9 mentioned he saw a use of the Sportsman's Warehouse
10 without the -- I believe without the hunting, fishing,
11 camping, et cetera, but with a circle R with it. Did
12 you make some inquiry to the store two blocks from here
13 and try to find it?
14 **A Yes, I did. I was going to call over to the**
15 **store manager, but there was something wrong with my**
16 **phone. They're just resetting something. So I asked**
17 **Dale Smith, and Dale called the store manager and he**
18 **couldn't find it. So then Dale went over there and they**
19 **looked all around the safes and they could not find it.**
20 **MR. UPCHURCH: It's a dark green sign right on**
21 **top of the 999 Remington gun safe, and then it had**
22 **exactly the same sign above the 699 Remington gun safe.**
23 **THE WITNESS: We don't sell Remington safes**
24 **either.**
25 **MR. UPCHURCH: It was a gun safe --**

[Page 85]

1 **MR. ALLGEYER: Well, we're not going to argue**
2 **it.**
3 **MR. UPCHURCH: Well, whatever. That's what it**
4 **was, that's what the price was. A gun safe, they have a**
5 **black mat finish.**
6 **THE WITNESS: They looked all over the safes**
7 **and couldn't find it. We don't sell Remington safes**
8 **anyway.**
9 Q (BY MR. ALLGEYER) One final question. Is
10 your intention, now that you've heard about that, to
11 track that down and see what you can --
12 **A Certainly. Whenever we hear of a misuse of**
13 **something, we try to correct it, but we're -- there's**
14 **one that -- a supposed misuse we can't even find it, so**
15 **it's hard to correct it.**
16 **MR. ALLGEYER: That's all the questions I had.**
17 **MR. UPCHURCH: No further questions.**
18 **MR. ALLGEYER: We will read and sign.**
19 **(Deposition concluded at 1:25 p.m.)**
20
21
22
23
24
25

[Page 86]

Case Name: Bass Pro Trademarks vs. Sportsman's Warehouse
Cancellation No.: 92045000
Witness: STUART UTGAARD
Date Taken: May 11, 2006
Reporter: Jeanette Lund

WITNESS CERTIFICATE

I HEREBY CERTIFY that I have read the foregoing testimony consisting of 82 pages, numbered from 4 through 85, inclusive, and the same is a true and correct transcription of said testimony, with the exception of the corrections I have listed below in ink, giving my reasons therefor.

1. Page Line Correction
Reason
2. Page Line Correction
Reason
3. Page Line Correction
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4. Page Line Correction
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5. Page Line Correction
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6. Page Line Correction
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7. Page Line Correction
Reason
8. Page Line Correction
Reason
9. Page Line Correction
Reason
10. Page Line Correction
Reason

NO CORRECTIONS

STUART UTGAARD

SUBSCRIBED AND SWORN to at ,
this day of , 20 .

NOTARY PUBLIC

JEANETTE LUND, RPR, CCR

[Page 87]

CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, Jeanette Lund, a Registered Professional Reporter, Certified Court Reporter and Notary Public in and for the State of Utah, do hereby certify

That the deposition of STUART UTGAARD, the witness in the foregoing deposition named, was taken on May 11, 2006; that said witness was by me, before examination, duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause;

That the testimony of the witness was reported by me in stenotype and thereafter transcribed into typewriting and that a full, true and correct transcription of said testimony so taken and transcribed is set forth in the preceding pages;

That the same constitutes a true and correct transcription of the testimony so taken and transcribed and that the witness deposed and said as in the foregoing annexed deposition set out;

That a reading copy and the original witness certificate were delivered to Mr. Allgeyer, to be submitted to the deponent for review and signature.

I further certify that I am not of kin or otherwise associated with any of the parties of said cause of action and that I am not interested in the events thereof.

WITNESS MY HAND and OFFICIAL SEAL at Salt Lake City, Utah this 17th day of May, 2006.

JEANETTE LUND, RPR, CCR

My Commission Expires:
December 5, 2007

JEANETTE LUND, RPR, CCR

SPORTS WAREHOUSE

Walls SUPER QUILT SUIT — $79

Walls TURTLE HOODS — $15

BROWNING GOOSE DOWN STUFF JACKET — $120

FLEECE JACKET — $35

Alpen Outdoor FLEECE VEST — $50

Sleeping Bags FAHRENHEIT SERIES MUMMY BAG — $88

Camp Trails "WILDERNESS" INTERNAL FRAME BACKPACK — $159

KELTY RED WING BACK PACK — KELTY'S #1 SELLING PACK — $59

OUTDOOR H2O FANNY PACK W/ WATER BOTTLE — $15

Sleeping Bags RECTANGULAR COMPACTIBLE SLEEPING BAG — $77

Sunbeam PATIO MASTER PORTABLE GAS GRILL — $25

CAMP CHEF COMBO — $159

LEATHERMAN POCKET SURVIVAL TOOL — THE TOOL FOR THAT LIES IN THE PALM OF YOUR HAND — $38

LaCrosse BIG CHIEF HIP BOOT — $69

ONEIDA PAC BOOT — $55

BUCK NIGHTHAWK — $44

PENTAX 10 x 24 WR BINOCULARS — $120

Hodgman BRIGHTON NEOPRENE WADERS
- 3.5 mm THICKNESS
- REINFORCED KNEES
- TRIPLE REINFORCED SEAMS
- STOCKING FOOT
- 1 YR WARRANTY
- STOUT SIZES $70

— $65

BANTAM WEIGHT WADING SHOES — $39

MARTIN CLASSIC FLY COMBO — $89

WHITE MUZZLELOADING SYSTEMS "SUPER 94" — $595

Flambeau CANADA GOOSE FLOATER — $40

Remington 870 SYNTHETIC STOCK SHOTGUN
- 12 GAUGE – 3" MAG
- 28" BARRELL
- RIFLE CHOKE MODIFIED
- MATTE FINISH

— $235

Flambeau STANDARD MALLARD DECOY — $30

RCBS MASTER RELOADING KIT — $229

E.L.K. INC. POWER BUGLE — THE MOST REALISTIC ELK BUGLE EVER DEVELOPED — $19

MTM SHOT SHELL RELOADER — AMERICA'S #1 SHOTSHELL LOADER — $90

EAGLE ACCU NAV SPORT HAND HELD GLOBAL POSITION SYSTEM — FOR THE AIRGUN, BOATER, HUNTER AND OFF-ROAD ENTHUSIAST
- SATELLITE RECEIVER
- 100 WAY POINT OR 20 ROUTES
- OPERATES ON AA BATTERIES

— $499

PRO-LINE FLOAT TUBE — $139

Scientific Angler COMPLETE FLY PACKAGE — $159

CANNON SPORT-TROLL DOWN RIGGER — $99

EAGLE CLAW TROLLING COMBO — $59

EBAULL DELUXE ICE EXPLORER 2 PERSON TENT — "EXCLUSIVE FABRIC HOUSING"
- ROW HAND ACTION SNOW AND ICE
- TWO LATCH DOORS AND WINDOWS

— $208

Flambeau SOFT SIDED TACKLE SYSTEM — $50

TROUTSTICK BY FLYWAYS BASIC FLY TYING KIT — $30

GIFT CERTIFICATES AVAILABLE

HUNTING • FISHING • CAMPING • ARCHERY
RELOADING • OUTERWEAR • FOOTWEAR
7035 SOUTH 185 WEST MIDVALE
HOLIDAY HOURS
MON-FRI 9:30-8:00 • SAT 9:30-6:00 • SUNDAY 11-4

EXHIBIT 4
Deponent Hagard
Date 5/11/06 Rptr.

DESERET NEWS, Thursday, November 23, 1995 B5

SPORTSMAN'S WAREHOUSE

LEATHERMAN — POCKET SURVIVAL TOOL
- 6 TOOLS
- W/LEATHER SHEATH
- LIGHT WEIGHT, MEN'S ONLY, 5 OZ.

THE TOOL BOX THAT FITS IN YOUR HAND — $33

KELTY HOT PICK — RED WING INTERNAL FRAME BACK PACK
- REG. 2400 C.I. - LRG. 2600 C.I.
- TWO FRONT AND TWO LARGE SIDE POCKETS
- ANATOMIC WAIST BELT W/LUMBAR PAD
- TEAL GREEN COLOR

KELTY'S #1 SELLING PACK — $49

PENTAX — 10X24 COMPACT BINOCULARS
- CENTER FOCUS
- FLIP DOWN EYECUPS
- ASPHERIC LENSES EDGE TO EDGE SHARPNESS
- COMES WITH CASE AND STRAP

$109

PRO LINE — PRO LINE PAC BOOT
- REMOVABLE LINER
- POWER GRIP SOLE
- OILED BROWN SUEDE LEATHER UPPER

SIZES 7-13 — $44

Gamehide — WADER JACKET
- BROWN CAMO
- WATER PROOF
- INSULATED
- CANVAS FABRIC

$59

RINGER — HIP BOOTS
- ALL RUBBER
- CALF HARNESS
- CLEATED SOLE
- INSULATED

SIZES 7-13 — $29

wenzel — SUNSHINE MOUNTAIN SLEEPING BAG
- OVERSIZE 37"X84"
- 4 LB. HOLLOW
- COTTON COVER
- FLANNEL LINED
- 0-+15 RATING

$39

Johnny Stewart — PORTABLE CASSETTE PREDATOR CALLER
BRING WILDLIFE CLOSER TO YOU
- ALSO PICKS UP REMOTE
- SLIDE ON/OFF SWITCH
- LARGE LONG RANGE SPEAKER 25' CORD
- COMPACT LIGHTWEIGHT
- DURABLE

CALLER BAG $22 • LARGE SELECTION OF TAPES $3 — $170

LEUPOLD — 3X9 RIFLE SCOPE
- LUSTER FINISH
- DUPLEX CROSS HAIR
- FOG PROOF/WATER PROOF
- LIFETIME LIMITED WARRANTY

$199

Hornady — M-3 TUMBLER
- LARGE CAPACITY
- 1000 30 GAL CAPACITY 300-30-06
- CLEANS BRASS CASES

$70

HornCraft — DELUXE RELOADING BENCH
- INDUSTRIAL GRADE STEEL
- "BUTCHER BLOCK" MAPLE WORK SURFACE 1¾" THICK
- LARGE STORAGE AREA WITH TWO SHELVES
- FIVE DRAWERS

$250

RCBS — ROCK CHUCKER MASTER RELOADING KIT
INCLUDES ALL OF THE TOOLS AND ACCESSORIES NEEDED TO START RELOADING

$250

Flambeau — "BEST BUY" MALLARD DECOY
- WATER KEEL
- NATURAL COLOR WATER PROOF, NON GLARE PAINT

$33

FLY TYING STATION
- COMPACT TYING CENTER
- TOOL ORGANIZER
- LEFT OR RIGHT HAND

Made in USA — $35

RUGER — "STAINLESS" 10/22 RIFLE
- 22 LR. CALIBER
- HARDWOOD STOCK
- 10 RD ROTARY MAGAZINE

$185

MITCHELL — 300, 308, 306 EXCELLENCE SPINNING REEL
- TWO PRECISION BALL BEARINGS
- QUICK CHANGE SPOOL
- LIGHTWEIGHT GRAPHITE
- LEFT/RIGHT HAND FAST EASY GEAR RATIO

$30

LEIGH — ALPINE KICK BOAT
- 420 DENIER NYLON
- COMPORTABLE INJECTION MOLDED SEAT
- TRANSPORTING SIZE 19" HIGH, 22" LONG, 36" WIDE
- TWO ACCESSORY POCKETS

IDEAL FOR BACKCOUNTRY AND NON LAUNCHAN LAKES — $200

Rubbermaid — PRO SERIES 14" TOP ACCESS TACKLE BOX
"ULTIMATE ORGANIZATION FOR THE SERIOUS FISHERMAN"
- CLEAR VIEW DUAL ACCESS STORAGE LID
- WORM PROOF PLASTIC
- SOFT-GRIP HANDLES

$13

ZEBCO — 202 COMBO
- AMERICA'S #1 SELLING REEL
- SMOOTH MULTI-RANGE DRAG TACKLE BOX FISH
- TOUGH ALL-METAL GEARS ARE SMOOTHER, LAST LONGER
- 10 LB. LINE

$14

CADDIS PRO FLOAT TUBE WITH FINS
- TRIPLE STITCHED ON CRITICAL SEAMS
- 440 DENIER NYLON
- 28" TUBE

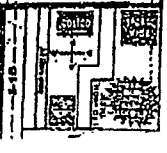
$140

CANNON — SPORT TROLL DOWN RIGGER
- W/WOOD HOLDER SWIVEL HEAD DEPTH COUNTER
- 500 FT. OF 100 LB. TEST STAINLESS STEEL CABLE
- ONE HAND CLUTCH/BRAKE CONTROL
- W/LINE RELEASE

$99

GIFT CERTIFICATES AVAILABLE

HUNTING • FISHING • CAMPING • ARCHERY
RELOADING • OUTERWEAR • FOOTWEAR
7035 SOUTH 185 WEST MIDVALE
HOLIDAY HOURS
MON-FRI 9:30AM-8:00PM • SAT 9:30AM-6:00PM • SUN 11:00PM-4:00PM



Δ π EXHIBIT 5
Deponent Hagcard
Date 5/11/06 Rpt

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EXPEDITE
File 2nd.

RECEIVED
FEB 11 2004
Utah Div. Of Corp. & Comm. Code

ARTICLES OF AMENDMENT TO ARTICLES OF INCORPORATION OF SPORTS WAREHOUSE INC.

I, Stuart B. Utgaard, the Chief Executive Officer of Sports Warehouse Inc., a Utah corporation (the "Corporation"), do hereby certify that the resolution hereinafter set forth was duly adopted effective February 6, 2004, by a unanimous written action of the directors and all of the shareholders, representing all 10,000 shares of common stock outstanding and entitled to vote in accordance with the Utah Revised Business Corporation Act:

RESOLVED, that Article I of the Articles of Incorporation of the Company be deleted in its entirety and replaced with the following:

"The name of this Corporation is Sportsman's Warehouse, Inc."

IN WITNESS WHEREOF, I have hereunto set my hand February 6, 2004.

02-11-04P02:24 RCVD

Stuart B. Utgaard
Stuart B. Utgaard
Chief Executive Officer

State of Utah
Department of Commerce
Division of Corporations and Commercial Code
I hereby certified that the foregoing has been filed
And approved on this 11 day of FEB 2004
In the office of this Division and hereby issued
This Certificate thereof.
Examiner Date 03-04 E.04
Kathy Berg
Division Director

Δ π EXHIBIT 6
Deponent Utgaard
Date 5/11/06 Rptr. 98
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Date: 02/11/2004
Receipt Number: 1061707
Amount Paid: $614.00

Doc# 1851375\1

SP 00280

TOTAL P.03

991589

State of Utah
DEPARTMENT OF COMMERCE

35514

BUSINESS NAME REGISTRATION/or DBA APPLICATION

It is your responsibility to check for conflicts with federally registered trademarks. Registration of this name does not guarantee exclusive right to nor protection against unauthorized use of this name.

•When approved, your business name is registered for 3 years•

Do not use this form if this business will need new state tax registration

DJ

1. Requested Business Name SPORTSMAN'S WAREHOUSE

2. Nature of Business sporting goods

3. Business Address 7035 South 185 West (Street) Midvale (City) Ut (State) 84047 (Zip)

4. **THIS SECTION MUST BE COMPLETED:**

William Hayes
Print Name of Registered Agent (to whom all mailings will be sent.) Must be a UTAH RESIDENT.

William T Hayes
Signature of Accepting Agent

801 566-6681
Daytime Phone Number

7035 S. 185 W. (Street Address ONLY) Midvale (City) UTAH 84047 (Zip)

INFORMATION ABOUT YOU, THE APPLICANT:

A. If you are a corporation, limited partnership or limited liability company, you must be in good standing and incorporated, or be registered or qualified in the state of Utah.
B. If you are a general partnership, your general partnership name must also be registered with this office.
C. If you are not a corporation and not a partnership and not a new business, this application is the only one you must file for a business name. Additional forms may be required for tax purposes for a new business.

5. APPLICANT INFORMATION:

If the name of the agent above is also the applicant, Please write "Same As Above": ~~Same as above~~

X Sports Warehouse, Inc. Co# 130029
If Applicant is business entity, Please print name of business.

Individual Person Name

7035 S. 185 W. (Address) Midvale (City) UT (State) 84047 (Zip)

X William T. Hayes President
Signature and Title

If Applicant is business entity, Please print name of business.

Individual Persons Name

Address City State Zip

Signature and Title

State of Utah
Department of Commerce
Division of Corporations and Commercial Code

I hereby certify that the foregoing has been filed and approved on the 1st day of July, 1995 in the office of this Division and hereby issue the certificate thereof.

Date 5/1/95

Korla T. Woods
KORLA T. WOODS
Division Director

FEE $20.00

STATE OF UTAH
DIVISION OF CORPORATIONS
AND COMMERCIAL CODE
160 East 300 South P.O. Box 45801
Salt Lake City, Utah 84145-0801
Phone Number (801) 530-4849
Fax (801) 530-6438

Δ π EXHIBIT 7
Deponent Utgaard
Date 5/11/06 Rptr. 88
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Revised 11/94
corpsdba\dbaform.mb/94

IF NEEDED, YOU MAY USE AN ATTACHED SHEET FOR ADDITIONAL APPLICANTS!

SP 00281

DO NOT PUBLISH THIS SECTION

1. The corporate name must contain a corporate ending which may be "corporation," "association," "company," "limited," "incorporated" or an abbreviation of any of these words. If you are the holder or assignee of a tradename or trademark, attach Declaration of Tradename Holder form. If your name is not available for use in Arizona, you must adopt a fictitious name and provide a resolution adopting the name, which must be executed by the corporation Secretary.

3. You must provide the total duration in years for which your corporation was formed to endure. If perpetual succession, so indicate in this section. Do not leave blank, or state not applicable.

5. The statutory agent address cannot be a P.O. Box. It must be a physical address in Arizona. Include City, State and Zip code

APPLICATION FOR AUTHORITY TO TRANSACT BUSINESS IN ARIZONA

The name of the corporation is: Sports Warehouse Inc.

A(n) Utah Corporation
(State, Province or Country)

X We are a foreign corporation applying for authority to transact business in the state of Arizona.

___ We are a foreign corporation currently authorized to transact business in Arizona and must now file this Application for New Authority pursuant to A.R.S. § 10-1504 because we have changed the following in our domicile jurisdiction:

- ☐ Our actual corporate name (or the name under which we originally obtained authority in Arizona).
- ☐ The period of our duration.
- ☐ The state, province or country of our incorporation.

1. The exact name of the foreign corporation is:

   Sports Warehouse Inc.

   If the exact name of the foreign corporation is not available for use in this state, then the fictitious name adopted for use by the corporation in Arizona is:

   Sportsman's Warehouse, Inc. (FN).

2. The name of the state, province or country in which the foreign corporation is incorporated is:

   Utah

3. The foreign corporation was incorporated on the 18th day of February, 19 88 and the period of its duration is: perpetual.

4. The street address of the principal office of the foreign corporation in the state, province or country of its incorporation is:

   7035 South 185 West
   Midvale, Utah 84047

5. The name and street address of the statutory agent for the foreign corporation in Arizona is:

   C T Corporation System
   c/o C T Corporation System, 3225 North Central Avenue
   Phoenix, Arizona 85012

Δ π EXHIBIT 8
Deponent Utgaard
Date 5/11/06 Rptr. 86
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DO NOT PUBLISH THIS SECTION

5.a. The street address of the known place of business of the foreign corporation in Arizona IF DIFFERENT from the street address of the statutory agent is:

_____

_____

_____

5.b. Indicate to which address the Annual Report should be mailed.

5.b. The Annual Report and general correspondence should be mailed to the address specified above in section 4 X or 5a_____.

6. If the purpose of your corporation has any limitations with regard to this section, so indicate. If not, state no limitations.

6. The purpose of the corporation is to engage in any and all lawful business in which corporations may engage in the state, province or country under whose law the foreign corporation is incorporated, with the following limitations if any:

NONE

7. The names and usual business addresses of the current directors and officers of the foreign corporation are: (Attach additional sheets if necessary.)

Name: See attached _____, _____[title]

Address: _____

City, State, Zip: _____

Name: _____, _____[title]

Address: _____

City, State, Zip: _____

Name: _____, _____[title]

Address: _____

City, State, Zip: _____

8. The total number of authorized shares cannot be "zero" or "N/A". Include authorized, not issued shares in this section.

8. The foreign corporation is authorized to issue 25,000 shares, itemized as follows: (Attach additional sheets if necessary.)

25,000 shares of Common [class or series] stock at

_____ no par value or par value of $ .01 per share.

_____ shares of _____[class or series] stock at

_____ no par value or par value of $_____ per share.

_____ shares of _____[class or series] stock at

_____ no par value or par value of $_____ per share.

SPORTS WAREHOUSE INC.

Directors:

Stuart B. Utagaard
PO Box 10
Star Prairie, WI 54026-0010

Kimberly Utgaard
PO Box 10
Star Prairie, WI 54026-0010

Officers:

Stuart B. Utgaard	Chariman, CEO and CFO
Dale Smith	President
Kimberly J. Utgaard	Secretary

Officers located at:

P.O. Box 10
Star Prairie, WI 54026-0010

DO NOT PUBLISH THIS SECTION

9. The total number of issued shares cannot be "N/A".

The Application must be accompanied by the following: A Certificate of Disclosure, executed within 30 days of delivery to the Commission. by a duly authorized officer

Attach a certified copy of your articles of incorporation, all amendments and mergers (AZ Const. Art. XIV, §8) and a certificate of existence or document of similar import duly authenticated (within 60 days) by the official having custody of corporate records in the state, province or country under whose laws we are incorporated.

The agent may consent to the appointment by either executing the consent, attaching a cover letter, or if paying by check, executing the check.

CF:0024
Rev. 1/99

9. The foreign corporation has issued 10,000 shares, itemized as follows:

10,000 shares of Common [class or series] stock at _____ no par value or par value of $ .01 per share.

_____ shares of _____ [class or series] stock at _____ no par value or par value of $ _____ per share.

_____ shares of _____ [class or series] stock at _____ no par value or par value of $ _____ per share.

10. The character of business the foreign corporation initially intends to conduct in Arizona is:

Sporting goods retail and wholesale services.

DATED this 16th day of MARCH, 00.

Sports Warehouse INC
[Name of Corporation]

Executed by Stuart B. Utgaard
STUART B. UTGAARD, CEO
[print name] [title]

PHONE 801-567-1000 [optional] FAX 801-567-0000 [optional]

ACCEPTANCE OF APPOINTMENT BY STATUTORY AGENT

The undersigned hereby acknowledges and accepts the appointment as statutory agent of this corporation effective this 27 day of March, 00.

Michele M. Jackson
Signature

Michele R. Jackson Asst Secy.
[Print Name] CT Corporation System

State of Idaho

Department of State

CERTIFICATE
REGISTRATION OF TRADEMARK-SERVICE MARK
STATE OF IDAHO

I, *Pete T. Cenarrusa*, Secretary of State of Idaho and custodian of the records of Trademarks and Service Marks, do hereby certify to the following Trademark/Service Mark Registration filed on 02/08/1999.

Name of Registrant: SPORTS WAREHOUSE, INC.
Business Address: 218 West 1st Street, P.O. Box 10
Star Prairie WI 54026 0010

File No: 16236 Class: 35 State of Incorporation: Utah

First Use in Idaho: 05/14/1998 First Use Anywhere: 04/15/1996 Expiration Date: 02/08/2009

Goods or Services with which mark is used: ADVERTISING AND BUSINESS OF RETAIL SALES OF SPORTING GOODS AND EQUIPMENT

Registered Trademark-Service Mark: ™ "SPORTSMAN'S WAREHOUSE"

SPORTSMAN'S WAREHOUSE

Δ π EXHIBIT 9
Deponent Utgard
Date 5/11/06 Rptr. SK
WWW.DEPOBOOK.COM

GREAT SEAL OF THE STATE OF IDAHO
ESTO PERPETUA

Pete T. Cenarrusa
SECRETARY OF STATE

By [illegible]

APPLICATION FOR
REGISTRATION OF TRADEMARK-SERVICE MARK
STATE OF IDAHO

The applicant swears that he has adopted and is now using in the State of Idaho the trademark-service mark identified below, and believes that no other individual, firm, partnership. corporation, association, union, or other organization has the right to use such trademark-service mark in connection with the same or similar goods or services identified below in this State, either in the identical form thereof or in such near resemblance thereto as might be calculated to deceive or to be mistaken therefor.

Complete all items on the application. The application must be signed by an individual, general partner or officer of a corporation. Enclose one specimen of the mark and a $30. filing fee.

Check box ☐ if this is a Union Label.

1. Name of applicant: Sports Warehouse, Inc.
2. Business address: 218 West 1st Street, P.O. Box 10, Star Prairie, WI 54026-0010
3. If applicant is a partnership, name the general partners: N/A
4. If applicant is a corporation, limited liability company or partnership, give state of domestication: Utah
5. Describe in detail the exact mark to be registered: Sportsman's Warehouse Hunting Fishing Camping Reloading Outerwear Footwear

Number of class in which above particular goods or services fall: 35
($30.00 filing fee per class code) *Classes listed on backside*

7. Describe the kind(s) of goods or services in the above class which the trademark-service mark is used to identify: advertising and business of retail sales of sporting goods and equipment
8. Date of first use of trademark-service mark anywhere: ~~03/15/98~~ 04/15/96
MUST BE IN USE PRIOR TO REGISTRATION
9. Date of first use of trademark-service mark in Idaho: ~~04/15/96~~ 05/14/98
MUST BE IN USE PRIOR TO REGISTRATION
10. State the manner in which the mark will be used (i.e. on the foods, on labels or tags, on displays, on signs, on letterheads, in advertising materials, on business cards, etc.): Displays, signs, advertising materials, television advertising, letterhead, business cards, hats, coffee cups
11. Person and mailing address if different from above: Charles P. Moorse, Esq., Lindquist & Vennum, P.L.L.P. 4200 IDS Center, 80 S. Eighth St., Minneapolis, MN 55402-2205 Phone (612) 371-5771

Stuart B. Utgaard
Applicant

Submit Application, Specimen and $30.00 filing fee to:

SECRETARY OF STATE
Trademark Division
700 West Jefferson, Room 203
P.O. Box 83720
Boise ID 83720-0080

Filing Office Use Only

Δ π EXHIBIT 10
Deponent Utgaard
Date 5/11/06 Rptr. 98
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SP 00357

FILE COPY

KSTMARKSORIGINALPMS

ORIGINAL####

SPORTS WAREHOUSE, INC.

WRITTEN ACTION OF THE BOARD OF DIRECTORS TAKEN IN LIEU OF A MEETING

The undersigned, being the directors of Sports Warehouse, Inc., a Utah corporation (the "Company"), acting pursuant to Utah Revised Business Corporation Act, hereby take the following action and adopt the following resolutions in writing in lieu of a special meeting, effective as of March 16, 2000:

WHEREAS, the Corporation has determined it to be in the best interests of the Corporation to qualify to do business in the State of Washington;

WHEREAS, the name of this Corporation is not available for use in the State of Washington and it is necessary to adopt the use of an assumed name; it is

RESOLVED, that this Corporation shall conduct business in the State of Washington under the name "Sportsman's Warehouse."

BOARD OF DIRECTORS:

Stuart B. Utgaard

Stuart B. Utgaard

Kimberly J. Utgaard

Kimberly J. Utgaard

Δ π EXHIBIT 11
Deponent Utgaard
Date 5/11/01 Rptr. JS
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Doc# 12345764

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office

SERIAL NO.	APPLICANT
75/625090	Sports Warehouse, Inc.

MARK
SPORTSMAN'S WAREHOUSE HUNTING FISHING CAETC

ADDRESS
BRUCE H. LITTLE,
LINDQUIST & VENNUM P.L.L.P.
4200 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402

ACTION NO. 01

MAILING DATE 08/06/99

REF. NO. 1077760 1

FORM PTO-1525 (5-90) U.S. DEPT. OF COMM. PAT. & TM OFFICE

PAPER NO.

ADDRESS:
Assistant Commissioner
for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

If no fees are enclosed, the address should include the words "Box Responses - No Fee."

Please provide in all correspondence:

1. Filing Date, serial number, mark and Applicant's name.
2. Mailing date of this Office action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and ZIP code.

A PROPER RESPONSE TO THIS OFFICE ACTION MUST BE RECEIVED WITHIN 6 MONTHS FROM THE DATE OF THIS ACTION IN ORDER TO AVOID *ABANDONMENT*. *For your convenience and to ensure proper handling of your response, a label has been enclosed. Please attach it to the upper right corner of your response. If the label is not enclosed, print or type the Trademark Law Office No., Serial No., and Mark in the upper right corner of your response.*

RE: Serial Number: 75/625090 **SPORTSMAN'S WAREHOUSE HUNTING · FISHING · CAMPING · RELOADING · OUTERWEAR and design**

The assigned trademark examining attorney has reviewed the referenced application and determined the following.

Section 2(d) Refusal Registration is refused under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because the applicant's mark, when used on or in connection with the identified services, so resembles the mark in U.S. Registration No. 2071417 as to be likely to cause confusion, to cause mistake, or to deceive. TMEP section 1207. See the enclosed registration.

Δ π EXHIBIT 12
Deponent Ulgaard
Date 5/11/06 Rptr. 28
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The examining attorney must analyze each case in two steps to determine whether there is a likelihood of confusion. First, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Second, the examining attorney must compare the goods or services to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Products Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978).

Applicant's proposed mark and the cited registrant's are confusingly similar,
SPORTSMAN'S WAREHOUSE HUNTING · FISHING · CAMPING · RELOADING · OUTERWEAR · FOOTWEAR and design vs. BASS PRO SHOPS SPORTSMAN'S WAREHOUSE and design.

The test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The issue is whether the marks create the same overall impression. *Visual Information Institute, Inc. v. Vicon Industries Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); TMEP section 1207.01(b).

The examining attorney must compare the marks for similarities in sound, appearance, meaning or connotation. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Similarity in any one of these elements is sufficient to find a likelihood of confusion. *In re Mack*, 197 USPQ 755 (TTAB 1977).

When the applicant's mark is compared to a registered mark, "the points of similarity are of greater importance than the points of difference." *Esso Standard Oil Co. v. Sun Oil Co.*, 229 F.2d 37, 108 USPQ 161 (D.C. Cir.), *cert. denied*, 351 U.S. 973, 109 USPQ 517 (1956).
Each mark contains the words SPORTSMAN'S WAREHOUSE

SPORTSMAN'S WAREHOUSE, while descriptive, is the dominant feature of the applicant's in mark for several reasons: 1) it presented in larger font 2) it is embossed over the mountain range design, and 3) the remaining terms are informational as to the type of equipment applicant retail and whole stores feature.

The examining attorney must consider the marks in their entireties in determining whether there is likelihood of confusion. A disclaimer does not remove the disclaimed portion from the mark for the purposes of this analysis. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); *In re MCI Communications Corp.*, 21 USPQ2d 1535 (Comm'r Pats. 1991).

sports·man
1. A man who is active in sports.
2. A person whose conduct and attitude exhibit sportsmanship.

ware·house
1. A place in which goods or merchandise are stored; a storehouse.
2. *Chiefly British.* A large, usually wholesale shop.[1]

The services of the parties are related and overlap as to retail stores, and overlap further in that both feature fishing supplies.

It is well settled that the issue of likelihood of confusion between marks must be determined on the basis of the goods or services as they are identified in the application and the registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973). Since the identification of the applicant's services is more extensive, it is presumed that the application encompasses all services of the type described, including those in the

[1] *The American Heritage® Dictionary of the English Language, Third Edition* copyright © 1992 by Houghton Mifflin Company. Electronic version licensed from INSO Corporation; further reproduction and distribution restricted in accordance with the Copyright Law of the United States. All rights reserved.

registrant's more specific identification, that they move in all normal channels of trade and that they are available for all potential customers.

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration. Additionally, the applicant must also respond to the following.

Lining / Stippling Statement The lining and stippling shown in the drawing appears to be a feature of the mark and not intended to indicate color. The applicant must insert a statement to that effect. 37 C.F.R. Section 2.35; TMEP section 807.06(d).

Disclaimer The applicant must disclaim the descriptive wording SPORTSMAN'S WAREHOUSE HUNTING · FISHING · CAMPING · RELOADING · OUTERWEAR · FOOTWEAR apart from the mark as shown. Trademark Act Section 6, 15 U.S.C. Section 1056; TMEP sections 1213 and 1213.02(a). The wording is merely descriptive because the retail and wholesale stores are presumed to be *warehouse style* featuring goods for the sportsman; while hunting, fishing, camping, reloading, outerwear and footwear are merely informational.

The computerized printing format for the *Trademark Official Gazette* requires a standard form for a disclaimer. TMEP section 1213.09(a)(i). A properly worded disclaimer should read as follows:

> No claim is made to the exclusive right to use **SPORTSMAN'S WAREHOUSE HUNTING · FISHING · CAMPING · RELOADING · OUTERWEAR · FOOTWEAR** apart from the mark as shown.

See In re Owatonna Tool Co., 231 USPQ 493 (Comm'r Pats. 1983).

Classification The applicant has classified the goods incorrectly. The applicant must amend the application to classify the goods in International Class 35. 37 C.F.R. Sections 2.33(a)(1)(vi) and 2.85; TMEP sections 805 and 1401.

Linda E. Blohm
Trademark Examining Attorney
Law Office 110, 703.308.9110 ext.130
fascimile: 703.308.9091

*** User: lblohm *** Serial Number: 75066261 *** 8/3/99 10:50:16 AM ***

Sportsman's Warehouse

Mark
BASS PRO SHOPS SPORTSMAN'S WAREHOUSE

Pseudo Mark
BASS PRO SHOPS SPORTSMANS WAREHOUSE

Goods and Services
IC 042. US 100 101. G & S: retail stores featuring clothing, fishing supplies and sporting goods. FIRST USE: 19950102. FIRST USE IN COMMERCE: 19950102

Mark Drawing Code
(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Code
031924 031925 260302

Serial Number
75066261

Filing Date
March 1, 1996

Publication for Opposition Date
March 25, 1997

Registration Number
2071417

Registration Date
June 17, 1997

Owner Name and Address
(REGISTRANT) BASS PRO TRADEMARKS, L.P. composed of BassGec Management Company, a Missouri corporation LIMITED PARTNERSHIP MISSOURI 1935 South Campbell Springfield MISSOURI 65898

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SPORTSMAN'S WAREHOUSE" APART FROM THE MARK AS SHOWN

Type of Mark
SERVICE MARK

Register
PRINCIPAL

Live Dead Indicator
LIVE

Δ π EXHIBIT 13
Deponent Utgaard
Date 5-11-06 Rptr. DK
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*** Search: 5 *** Document Number: 16 ***

SERVICE MARK APPLICATION, PRINCIPAL REGISTER, WITH DECLARATION	MARK: SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR and Design CLASS NO. 42

TO THE ASSISTANT SECRETARY AND COMMISSIONER OF PATENTS AND TRADEMARKS:

Applicant Name: Sports Warehouse, Inc.

Applicant Business Address: 7035 South 185 West
Midvale, Utah 84047

Applicant Entity:

Applicant is a corporation organized under the laws of the State of Utah

Services:

Applicant requests registration of the above-identified service mark shown in the accompanying drawing in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. 1051 et seq., as amended) for the following services: Retail and wholesale stores featuring hunting supplies, fishing supplies, camping supplies, reloading supplies, outerwear clothing and footwear.

Basis for Application:
Applicant is using the mark in commerce on or in connection with the above-identified services. (15 U.S.C. 1051(a), as amended.) Three specimens showing the mark as used in commerce are submitted with this application.

- Date of first use of the mark anywhere: June 16, 1995
- Date of first use of the mark in commerce which the U.S. Congress may regulate: June 16, 1995
- Specify the type of commerce: Interstate
- Specify the manner or mode of use of mark on or in connection with the services: the mark is used in advertising and promotional materials.

Disclaimers
The applicant makes no claim to the exclusive right to use "Sportsman's Warehouse" apart from the mark as shown.
The applicant disclaims the following individual words; "Hunting." "Fishing," "Camping," "Reloading," "Outerwear" and "Footwear" apart from the mark as shown.

Δ π EXHIBIT 14
Deponent Utgaard
Date 5-11-06 Rptr. JK
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Doc# 1077760\1

POWER OF ATTORNEY

Please recognize Bruce H. Little, member of the Bar of the State of Minnesota, and member of the law firm of Lindquist & Vennum P.L.L.P., 4200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402 to prosecute this application to register, to transact all business in connection therewith, and to receive the certificate.

DECLARATION

The undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he is properly authorized to execute this application on behalf of the applicant; he believes the applicant to be the owner of the service mark sought to be registered, or, if the application is being filed under 15 U.S.C. 1051(b), he believes applicant to be entitled to use such mark in commerce; to the best of his knowledge and belief no other person, firm, corporation, or association has the right to use the above identified mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his own knowledge are true and all statements made on information and belief are believed to be true.

Dated:

12/16/98

Sports Warehouse, Inc.

By Stuart B. Hyman

Its President

110

LINDQUIST & VENNUM P.L.L.P.

4200 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MN 55402
TELEPHONE: 612-371-3211
FAX: 612-371-3207

ATTORNEYS AT LAW

BRUCE H. LITTLE
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TELEPHONE: 651-312-1300
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LINDQUIST, VENNUM & CHRISTENSEN P.L.L.P.
600 17TH STREET, SUITE 1800 SOUTH
DENVER, CO 80202
TELEPHONE: 303-573-5900
FAX: 303-573-1956

www.lindquist.com

02-09-2000
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #57

February 7, 2000

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail, certified mail, return receipt requested in an envelope addressed to:

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

on 2/7/2000
Date

Signature

BRUCE H. LITTLE
Typed or printed name of person signing certificate

Ms. Linda E. Blohm
Trademark Examining Attorney
United States Patent and Trademark Office
Law Office 110
2900 Crystal Drive
Arlington, VA 22202-3513

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re:	**Mark:**	**SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR & Design**
	Serial No.:	**75/625090**
	Our File No.:	433225-0007
	Office Action Date:	August 6, 1999

Dear Ms. Blohm:

We are in receipt of Office Action No. 1 with regard to the above-referenced mark and we respond on behalf of Applicant.

TMEO
LAW OFFICE 110
2000 FEB 11 P 3:45
RECEIVED

Doc# 1194698\1

Δ π EXHIBIT 15
Deponent Utgaard
Date 5-11-06 Rptr.
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THERE IS NO LIKELIHOOD OF CONFUSION

The Examining Attorney initially refused registration of Applicant's mark pursuant to 15 U.S.C. § 1052(d) because the mark is allegedly confusingly similar to the registered mark "BASS PRO SHOPS SPORTSMAN'S WAREHOUSE," U.S. Registration No. 2,071,417. Despite the Examining Attorney's contention that the marks are confusingly similar, the marks are sufficiently distinct and registration should issue. Moreover, because of the Examining Attorney's amendment re-classifying the services in Class 35, the already remote likelihood that Applicant's mark will be confused with the BASS PRO SHOPS mark has been reduced.

The test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison but rather whether the marks are sufficiently similar so that there is a likelihood of confusion as to the source of the good or services. In evaluating the similarities between marks, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. TMEP § 1207.01(b) (citing Sealed Air Corp. v. Scott Paper Co., 190 U.S.P.Q. 106, 109 (TTAB 1975)).

Although both marks contain the phrase "Sportsman's Warehouse," the overall commercial impression created by the marks is distinct. The mark cited by the Examining Attorney features prominently the phrase "BASS PRO SHOPS" in a distinctive design in the form of an open-mouthed fish (a bass). The phrase "BASS PRO SHOPS" does not appear anywhere in the Applicant's mark. Nor does there appear in Applicant's mark the design of a fish.

By contrast, Applicant's mark contains a design featuring mountains and the words "HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR." None of those words appear anywhere in the "BASS PRO SHOPS" mark cited by the Examining Attorney. Applicant's mark prominently features a design of mountains, while the "BASS PRO SHOPS" mark is predominantly an open-mouthed fish. Due to the numerous differences in the visual impressions created by the marks, there is no likelihood of confusion.

The only feature the two marks share is the phrase "Sportsman's Warehouse." The owner of the "BASS PRO SHOPS" mark made the following disclaimer: "No claim is made to the exclusive right to use "SPORTSMAN'S WAREHOUSE" apart from the mark as shown." Similarly, Applicant affirmatively disclaimed the exclusive right to use the term "Sportsman's Warehouse." A disclaimer in a trademark registration amounts to a statement that, in so far as that particular registration is concerned, no rights are being asserted in the disclaimed component

standing alone, but rights are asserted in the composite. TMEP § 1213 (citing Sprague Electric Co. v. Erie Resistor Corp., 101 U.S.P.Q. 486, 486-87 (Comm'r Pats. 1954)). Thus, because the owner of the "BASS PRO SHOPS" mark has disclaimed the exclusive right to use the phrase "SPORTSMAN'S WAREHOUSE," that phrase should not prevent the Applicant from obtaining a registration for its dissimilar mark containing the same descriptive phrase. As noted above, numerous differences exist between the marks, and there is only one similarity. Because the only similarity between the marks is a descriptive phrase that has been disclaimed by the owners of both marks, registration must issue.

In addition, Registration No. 2,071,417 was issued to Bass Pro Trademarks L.P. in International Class 42, "Miscellaneous" for "Retail stores featuring clothing, fishing supplies and sporting goods." Applicant seeks registration in Class 35, "Advertising and business" for a much broader variety of services: "Retail and wholesale stores featuring hunting supplies, fishing supplies, camping supplies, reloading supplies, outerwear clothing and footwear." At a minimum, Applicant should be permitted to amend to delete the phrase "fishing supplies" from its description of services, and registration should issue.

A registration is indicative of "the registrant's exclusive right to use the mark in commerce on or in connection with the goods or services specified in the certificate." 15 U.S.C. § 1057(b). Even if a mark is registered, "the presumption of an exclusive right to use it extends only so far as the goods or services noted in the registration certificate." Mushroom Makers, Inc. v. R.G. Barry Corp., 580 F.2d 44, 48 (2d Cir. 1978). Even an incontestable mark – and the "BASS PRO SHOPS" mark is not incontestable – does not permit a registrant to claim rights over a greater range of products than he would otherwise be entitled to claim. Union Carbide Corp. v. Ever-Ready Inc., 531 F.2d 366, 377 (7th Cir. 1976); Sunmark, Inc. v. Ocean Spray Cranberries, Inc., 64 F.3d 1055, 1058 (7th Cir. 1995).

The "BASS PRO SHOPS" registration and Applicant's mark have in common only the descriptive phrase "SPORTSMAN'S WAREHOUSE." Use of that disclaimed phrase is not a proper basis for extending the scope of the Registrant's mark and denying registration to Applicant.

LINING/STIPPLING STATEMENT

The lining and stippling shown in the drawing are not intended to indicate color. PRINT

Doc# 1194698\1

DISCLAIMER

No claim is made to the exclusive right to use "SPORTSMAN'S WAREHOUSE HUNTING • FISHING • CAMPING • RELOADING • OUTERWEAR • FOOTWEAR" apart from the mark as shown.

PRINT

CLASSIFICATION

The Application is amended to classify the goods in International Class 35.

LINDQUIST & VENNUM P.L.L.P.

Bruce H. Little

cc: Enterprise Investments, Inc.

Doc# 1194698\1

State of Utah

Department of Commerce
Division of Corporations and
Commercial Code
160 East 300 South 2nd Floor
Box 146705
Salt Lake City, Utah 84114-6705

Trademark File#

For office use only

Application for State Trademark or Service Mark Registration

(It is the applicant's responsibility to check for conflicts with federally registered trademarks or service marks)

Please type all entries. Complete all spaces. See instructions on other side.

Applicant's Name: Sports Warehouse, Inc.

Applicant's address: 218 West 1st Street, P.O. Box 10, Star Prairie WI 54026-0010
Street Number City State Zip

Daytime telephone number (include area code): 801/561-6681

State in which applicant was formed as a business: Utah

Is this a new application? [x] Renewal? [ ] (enter TM file number)

Describe the trademark or service mark: The mark consists of the words "SPORTSMAN'S WAREHOUSE"

[illegible]y will the trademark or service mark be used: Displays, signs, advertising materials, [illegible]evision advertising, letterhead, business cards, hats, coffee cups.

Describe the product or service associated with the mark: Retail sales of sporting goods and equipment.

Attach two specimens of the mark on [illegible]arate pages.

Date of first use of the trademark or service [illegible]rk:

[illegible]Utah 6/30/94

[illegible]side Utah 04/15/96

Certificate

[illegible]by certify that I own and have the right to use the trademark or [illegible]e mark applied for, that to the best of my knowledge it is neither [illegible]ical to nor deceptively similar to any other registered trademark or [illegible]e mark, and that the two specimens or facsimiles attached to this [illegible]ation are representative of the trademark or service mark.

Stuart R. Uttgaard
Applicant's signature

Chairman / CEO 10/18/99
Title Date

DO NOT WRITE IN THIS SPACE

Δ π EXHIBIT 16
Deponent Uttgaard
Date 5/11/06 Rptr. 88
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FORM TRADMK

SP 00388

Stu Utgaard

From: Nielsen Gene-AGN020 [Gene.Nielsen@motorola.com]
Sent: Tuesday, February 07, 2006 2:16 PM
To: Stu@Utgaard.net
Subject: Stu Utgaard.doc

Stu Utgaard.doc
(23 KB)

Stu:

It was great to speak with you yesterday. Attached is the letter per our discussion. I would enjoy meeting with you over lunch next time you are in town. Please feel free to give me a call anytime.

Thanks,

Gene
<<Stu Utgaard.doc>>

Δ π EXHIBIT 17
Deponent Utgaard
Date 5/11/06 Rptr.
WWW.DEPOBOOK.COM

February 7, 2006

Stuart Utgaard
Sportsman's Warehouse

Dear Stu:

This letter is a follow-up to our conversation yesterday regarding the name change made on or about February 1, 1995 for Sportsman's Warehouse.

I am not certain on dates but I am confident that the name change made had been talked about for a period of time prior to it actually being changed with the State. Discussions had gone on for a period prior to the change being made most likely in 1994 until the final decision was made to make the change.

I believe that Billie Crocker (Nielsen) had filed the name change with Utah and it seems that discussions had been entertained regarding the name on a broader scale with other States but do not remember much more than this.

If I can be of further help please let me know. Please feel free to call me anytime at 801-231-3840.

Sincerely,

Gene V. Nielsen CPA

[Page 1]

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

BASS PRO TRADEMARKS, L.L.C.,)
)
)
PETITIONER,)
)
VS.)CANCELATION NO. 92045000
)
)
)
SPORTSMAN'S WAREHOUSE, INC.,)
)
)
RESPONDENT.)

DEPOSITION
OF
JAMISON BRYAN HENSLEY
THURSDAY, JUNE 1, 2006

ALPHA REPORTING CORPORATION
236 Adams Avenue
Memphis, TN 38103
901-523-8974
www.alphareporting.com

[Page 2]

The deposition of JAMISON BRYAN HENSLEY, is taken on this, the 1st day of June, 2006, on behalf of the Respondent, pursuant to notice and consent of counsel, beginning at approximately 12:45 p.m.., in the offices of Husch & Eppenberger, LLC, located at 200 Jefferson Avenue, Suite 1450, in Memphis, Tennessee.

This deposition is taken pursuant to the terms and provisions of the Tennessee Rules of Civil Procedure.

All forms and formalities are waived, and objections alone as to matters of competency, irrelevancy and immateriality of the testimony are reserved to be presented and disposed of at or before the hearing.

The signature of the witness is not waived.

[Page 3]

APPEARANCES

FOR THE PETITIONER:
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FOR THE RESPONDENT:
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CSMITH@LINDQUIST.COM
LINDQUIST & VENNUM, PLLP
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80 South Eighth Street
Minneapolis, Minnesota 55402
612-371-3211

COURT REPORTING FIRM:
ALPHA REPORTING CORPORATION
DEBI ROGERS, RPR
236 Adams Avenue
Memphis, Tennessee 38103
(901) 523-8974
Www.alphareporting.com

[Page 4]

INDEX

PLEASE NOTE THAT THERE WERE NO EXHIBITS INTRODUCED OR MARKED DURING THESE PROCEEDINGS.

COURT REPORTER'S CERTIFICATE PAGE 42

[Page 9]

1 school?
2 **A. 1995.**
3 Q. And when did you enter the University of
4 Georgia?
5 **A. 1995.**
6 Q. When did you finish up at University of
7 Georgia?
8 **A. 1998.**
9 Q. What did you study?
10 **A. Business major.**
11 Q. And did you begin working when you finished?
12 **A. I was working throughout school. Actually, I**
13 **worked for Lowes Companies, and continued on with**
14 **them. That's why I didn't finish school.**
15 Q. What did you do for Lowes Companies?
16 **A. I was a manager.**
17 Q. In what location?
18 **A. Multiple locations throughout Atlanta and the**
19 **Boston market.**
20 Q. Atlanta and Boston?
21 **A. Yes, sir.**
22 Q. What was the last position you had with Lowes
23 Companies?
24 **A. I was a co-manager.**
25 Q. Could you describe what a co-manager is?

[Page 10]

1 **A. Assistant to the general manager.**
2 Q. And what was that location?
3 **A. That was -- let's see here. Stockbridge,**
4 **Georgia.**
5 Q. What was your duties in that job?
6 **A. Day-to-day operations, like expense leveraging,**
7 **payroll leveraging, budgeting for the store, managing**
8 **175 associates.**
9 Q. And you left Lowes in what date? What's the
10 date?
11 **A. I don't recall. It was in 2001.**
12 Q. Sometime 2001?
13 **A. I don't recall the exact date.**
14 Q. And when you left Lowes, did you go to take
15 another job?
16 **A. Yes, sir.**
17 Q. Where was that?
18 **A. In Target Corporation.**
19 Q. Was that in 2001?
20 **A. Yes, sir.**
21 Q. How long did you work with Target Corporation?
22 **A. Two-and-a-half years.**
23 Q. And what did you do for Target Corporation?
24 **A. I was a logistics manager.**
25 Q. And what were your duties as a logistics

[Page 11]

1 manager?
2 **A. Initially I was in-store logistics manager over**
3 **the receiving process, the freight door process. I**
4 **had about 80 to 100 associates underneath me and four**
5 **salaried managers.**
6 Q. And where were you located at Target?
7 **A. Initially I was here in Memphis, and I got**
8 **relocated to the Atlanta market.**
9 Q. When did you relocate to Atlanta?
10 **A. Back in 2002.**
11 Q. Were you a logistics manager in Atlanta as
12 well?
13 **A. Yes.**
14 Q. Did you have any further positions with Target?
15 **A. No.**
16 Q. When did you leave Target?
17 **A. I left Target April 28, of 2003.**
18 Q. Did you take another job at that time?
19 **A. With Bass Pro Shops.**
20 Q. And where did you begin working with Bass Pro
21 Shops?
22 **A. Here in the Memphis market.**
23 Q. And what was your title?
24 **A. I was the assistant store manager.**
25 Q. Did you begin working at Bass Pro Memphis, the

[Page 12]

1 Memphis store when it opened, or after?
2 **A. No, sir, after it opened.**
3 Q. How long had it been opened?
4 **A. I believe it had been open about ten months.**
5 Q. What were your duties as assistant store
6 manager?
7 **A. I had four salaried manager -- I'm sorry. At**
8 **the time I started, I had six salaried underneath**
9 **myself, day-to-day operations. I was assistant to**
10 **Jim Osborne.**
11 **I was responsible for budgeting expense**
12 **control, payroll leveraging, payroll management**
13 **throughout the store, all merchandising, and**
14 **operations issues from day to day.**
15 Q. What did you do in terms of merchandising?
16 **A. Day-to-day communication with buyers over each**
17 **area. Adjusting features inside the store. Bringing**
18 **new market-specific product, making sure the store**
19 **was properly merchandised.**
20 Q. Did that include signage?
21 **A. Yes.**
22 Q. How long were you in that position?
23 **A. I'm still in the position right now. They've**
24 **actually changed the name of the position, but I'm**
25 **still in my current position.**

[Page 21]

1 was changed?
2 **A. My understanding is to differentiate my**
3 **building from the competitor down the road, to our**
4 **customers. You know, we got a bad response.**
5 Q. And you were marketing manager, correct?
6 **A. No, sir.**
7 Q. I mean, I'm sorry, merchandising manager?
8 **A. Yes.**
9 Q. And so part of your duties was to deal with
10 signage?
11 **A. Signage inside is the building, yes, sir.**
12 Q. What is your understanding of the purpose of
13 the signage on the outside of your building?
14 **A. The purpose?**
15 Q. Yes.
16 **A. For customers to locate our building from the**
17 **freeway. You know, if we didn't have signs,**
18 **customers couldn't find us.**
19 Q. Does it serve any other purpose?
20 **A. No.**
21 Q. Do you know who makes final decisions at Bass
22 Pro about outdoor signage?
23 **A. That would be Jim Hagale, our president.**
24 Q. Do you know if he made the decision about the
25 sign change from Sportsman's Warehouse to Sportman's

[Page 22]

1 Center?
2 **A. To my knowledge he did not.**
3 Q. Do you who did make that decision?
4 **A. That would have been our previous vice**
5 **president, Kerry (Inaudible), to my knowledge.**
6 **THE COURT REPORTER: Did you say Kerry**
7 **Hart?**
8 **THE WITNESS: Harmon. H-A-R-M-O-N.**
9 **BY MR. SMITH:**
10 Q. Have you ever spoken to any superiors about the
11 sign change?
12 **A. No. Well, I've spoken to my boss. As far as**
13 **the corporate level, no.**
14 Q. And when you say your boss, the present boss,
15 Hayden Holly?
16 **A. Jim Osborne.**
17 Q. Jim Osborne.
18 **A. And he was in the position when the sign was**
19 **changed.**
20 Q. And what did you and Jim Osborne talk about in
21 that regard?
22 **A. I explained to Jim that someone was on the side**
23 **of the building removing the sign.**
24 Q. So you became aware of it when it was actually
25 changing?

[Page 23]

1 **A. Yes, sir.**
2 Q. Could you describe the current signage on the
3 front of the building that says Sportman's Center?
4 **A. It's a white-letter set sign. It's individual**
5 **letters about four or five feet in height.**
6 Q. And about how many car lengths would it be
7 long.
8 **A. Eight, maybe. That's an estimate. Obviously**
9 **I've never measured it.**
10 Q. So the sign is about four feet high and
11 approximately eight car lengths long?
12 **A. Yeah. That's an estimate.**
13 Q. Prior to the sign change, did your store's
14 promotional and marketing material, such as ads,
15 coupons, anything with the store name on it that was
16 put out there for the public, use the phrase
17 Sportman's Center or Sportsman's Warehouse?
18 **A. They both used Sportsman's Warehouse**
19 **typically. On occasion we'll run an ad that says**
20 **Sportman's Center.**
21 Q. This is before the sign change.
22 **A. Before the sign change it was always**
23 **Sportsman's Warehouse, and still is to this date.**
24 Q. So currently all your promotional marketing
25 materials say Sportsman's Warehouse?

[Page 24]

1 **A. Yes. And on occasion we'll have something sent**
2 **out that does say Sportman's Center.**
3 Q. What's an example of something that would be
4 sent out that says Sportman's Center?
5 **A. We send out ads. We send out typically a**
6 **biweekly ad, or tabs as it's referred to, and on the**
7 **back when it gives directions, it will typically say,**
8 **nine times out of ten, it says Sportsman's**
9 **Warehouse.**
10 Q. What are some examples of some marketing
11 material that says Sportman's Center?
12 **A. Sometimes an ad will say Sportman's Center on**
13 **the back. But like I said, nine times out of ten it**
14 **does say Sportsman's Warehouse.**
15 Q. Any other examples besides those ads?
16 **A. Not to my knowledge.**
17 Q. Do you have any idea why the marketing
18 materials were not changed to reflect the change in
19 the sign on the outside of the building?
20 **A. Because we still refer to ourselves as**
21 **Sportsman's Warehouse, and our customers know us as**
22 **Sportsman's Warehouse.**
23 Q. As a merchandising manager, did it strike you
24 that the difference between the store signage on the
25 outside of the building and the marketing materials

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

In the Matter of Trademark Registration No. 2,390,988
For the mark SPORTSMAN'S WAREHOUSE HUNTING FISHING
CAMPING RELOADING OUTERWEAR FOOTWEAR and Design

Date Registered: October 3, 2000

Bass Pro Trademarks LLC,)
PETITIONER,) CANCELLATION NO.
v.) 92045000
Sportsman's Warehouse Inc,)
RESPONDENT.)

DEPOSITION OF MR. JIM HAGALE

Taken on behalf of the Respondent

June 7, 2006

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Bass Pro Trademarks LLC,)
PETITIONER,) CANCELLATION NO.
v.) 92045000
Sportsman's Warehouse Inc,)
RESPONDENT.)

DEPOSITION OF MR. JIM HAGALE, produced, sworn, and examined on the part of the respondent in an action pending in the United State Patent and Trademark Office before the Trademark Trial and Appeal Board in the matter of BASS PRO TRADEMARKS LLC, Petitioner, versus SPORTSMAN'S WAREHOUSE INC, Respondent, at 9:00 a.m. on Wednesday, June 7, 2006, at the law offices of Husch & Eppenberger LLC, Corporate Centre Suite 2-300, 1949 East Sunshine Street, Springfield, Missouri, before KAREN S. ROGERS, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public in and for the State of Missouri.

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13 MS. KAREN S. ROGERS, RPR, CCR No. 846
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[Page 6]

1
2 PROCEEDINGS
3
4 (Proceedings began at 9:17 a.m. on
5 Wednesday, June 7, 2006, with
6 appearances as noted).
7 (The witness was placed under oath
8 by the court reporter).
9 * * * * *
10 MR. JIM HAGALE,
11 of lawful age, having been called as a witness and
12 being first duly sworn, was examined and testified as
13 follows:
14 DIRECT EXAMINATION
15 BY MR. ALLGEYER:
16 Q. Good morning. My name's David
17 Allgeyer. I'm a lawyer representing Sportsman's
18 Warehouse.
19 And what brings us here together, as I'm
20 sure you know, is a dispute with respect to some
21 trademarks in a cancellation proceeding.
22 Could you first state your full name for
23 the record, spelling your last name?
24 **A. James Anthony Hagale, H-A-G-A-L-E.**
25 Q. All right. What is your residence

[Page 7]

1 address?
2 **A. 3959 Glen Abbey, Springfield,**
3 **Missouri, 65809.**
4 Q. And are you employed?
5 **A. Yes.**
6 Q. Where are you employed?
7 **A. Bass Pro shops.**
8 Q. What's your position there?
9 **A. I'm president and chief operating**
10 **officer.**
11 Q. Okay. We'll get a little bit more
12 into that in a minute. Have you had your deposition
13 taken before?
14 **A. Yes.**
15 Q. Okay. Well, you understand then that
16 our court reporter here is going to take down
17 everything that you and I say, so it's important that
18 we not talk over one another. Is that agreeable?
19 **A. Yes.**
20 Q. Okay. It's also important that if you
21 don't understand a question that I ask you, that you
22 ask me to clarify the question. If you don't do
23 that, I'm going to assume that you understood the
24 question and just move on from there. Is that
25 agreeable with you?

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1 **A. Yes.**
2 Q. Okay. We can take as many breaks as
3 you need. The only thing that I would ask is that
4 you not take a break if there is a question pending,
5 if that's okay with you.
6 **A. Yes.**
7 Q. All right. Finally -- and you're
8 doing just fine -- you need to say yes and no instead
9 of uh-huh and huh-uh. But you're doing that already,
10 so we won't belabor that.
11 Okay. With those preliminaries out of the
12 way, why don't you just give me a very brief
13 description of your educational background. Start
14 with high school and move wherever you want after
15 that.
16 **A. I went to high school here in**
17 **Springfield.**
18 Q. Okay.
19 **A. At Saint Agnes. I graduated in 1965.**
20 **And then I attended the University of Notre Dame and**
21 **graduated in 1969 with a bachelor's, a double major**
22 **of accounting and finance.**
23 Q. Okay. Any postgraduate education?
24 **A. No.**
25 Q. Okay. And then can you give me just a

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1 run-through of your professional life after you
2 graduated from college, just sort of until we get to
3 Bass Pro, which we'll explore in more detail the
4 positions you had as you went through your career.
5 And I don't need exact years, but just a feel for it.
6 **A. I started an apparel manufacturing**
7 **company in 1969, Hagale Industries.**
8 Q. Mm-hmm.
9 **A. And operated that business for 32**
10 **years.**
11 Q. Okay. Was that located here in
12 Springfield?
13 **A. We were based in Ozark, and we had**
14 **plants in three states.**
15 Q. Okay. And what did you do after that?
16 **A. After that I did a small consulting**
17 **project for Bass Pro and then joined Bass Pro in June**
18 **of 2002.**
19 Q. What kind of project were you doing
20 for Bass Pro?
21 **A. When I was in the apparel**
22 **manufacturing business, we did business with what I**
23 **would call branded better catalogers and retailers,**
24 **like Land's End, L.L. Bean, J. Crew, Brooks Brothers,**
25 **Joseph Banks. And helped them develop merchandise**

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1 **assortments and product to support their brands and**
2 **their merchandise strategy.**
3 **So originally I was doing a project for**
4 **Bass Pro to help them with their own -- their**
5 **national brand definition and the merchandise**
6 **assortments to support each of those brands.**
7 Q. What were some of the -- at that time
8 some of the national brands that you were helping
9 them to define?
10 **A. Red Head, Worldwide Sportsman, Bass**
11 **Pro.**
12 Q. Is that it?
13 **A. I believe at that time that's --**
14 Q. Okay. Then you joined Bass Pro in
15 June of 2002. What was your position when you
16 joined?
17 **A. Executive vice president.**
18 Q. Who did you report to?
19 **A. John Morris.**
20 Q. What was his position at the time?
21 **A. Founder.**
22 Q. Okay. Head guy. Okay. Did your
23 position change over time?
24 **A. Yes, it did.**
25 Q. Just give me sort of a run-down.

[Page 11]

1 **A. In August of 2002 my role changed --**
2 **my title, which doesn't mean much at our place,**
3 **changed to chief operating officer.**
4 **And my role changed in that at that time I**
5 **became responsible for retail stores and catalog and**
6 **Internet in addition to the other responsibilities I**
7 **had assumed in June.**
8 Q. What were those other
9 responsibilities?
10 **A. Merchandising, distribution, finance,**
11 **human resources, information technology.**
12 Q. Did you ever sleep? That sounds like
13 a lot.
14 **A. We have great people.**
15 Q. Did you report to -- primarily to Mr.
16 Morris during this time?
17 **A. Yes.**
18 Q. Okay. And has that sort of continued?
19 **A. Yes.**
20 Q. Okay. Why don't you give me your next
21 position. At some point you became president, I
22 guess?
23 **A. In December of 2002.**
24 Q. Oh, okay. All right. And then Mr.
25 Morris, is he chairman at the time? Or something?

[Page 12]

1 **A. You know, he doesn't really have a**
2 **title.**
3 Q. Okay.
4 **A. He refers to himself and others refer**
5 **to him as founder.**
6 Q. Okay. Fair enough. And you still
7 report to Mr. Morris?
8 **A. Yes.**
9 Q. Okay. I think I know a fair amount
10 about the nature of your business, but maybe you
11 could describe me sort of just the thumbnail sketch
12 of the different aspects of Bass Pro's business.
13 I know you have the Outdoor World stores.
14 I know you have Internet and catalog. But maybe you
15 could fill me in on all of that.
16 **A. We are a multichanneled retailer. We**
17 **have three different store types and formats. The**
18 **Outdoor World are our large destination stores.**
19 **Our Sportsman's Warehouse stores are**
20 **intended for more supporting and secondary uses to**
21 **our Outdoor World destination stores.**
22 **And then we have Worldwide Sportsman,**
23 **which is yet a smaller footprint really primarily**
24 **used for coastal environments, tourist locations,**
25 **and potentially in the future for some urban**

[Page 13]

1 **locations.**
2 Q. By secondary uses for the Sportsman's
3 Warehouse stores, what do you mean by that?
4 **A. They're not intended -- at least at**
5 **the present time they are not intended to be our**
6 **large format true destination stores.**
7 **They're more to support an existing Outdoor**
8 **World destination store or a future Outdoor World**
9 **destination store, or for use in more secondary**
10 **markets where the population base and the tourism and**
11 **the traffic will not support one of our larger format**
12 **Outdoor World stores.**
13 Q. Okay. How many of the larger format
14 stores are there throughout the -- throughout North
15 America, let's say?
16 **A. (No response).**
17 Q. Best estimate?
18 **A. Okay. We have 27, give or take.**
19 Q. Okay. And how many Sportsman's
20 Warehouse format stores?
21 **A. There are currently open and operating**
22 **two.**
23 Q. Okay. And that's the store in St.
24 Charles, Missouri?
25 **A. And Memphis.**

[Page 14]

1 Q. And Memphis. Okay. And we'll get
2 into those in a little more detail.
3 What is the largest number of Sportsman's
4 Warehouse stores that Bass Pro has in operation at
5 one time? Is it two or was there ever a time when
6 there was more than two?
7 **A. I don't know because, you know, my**
8 **knowledge --**
9 Q. Mm-hmm.
10 **A. -- begins in 2002.**
11 Q. Okay. Let's go then with what you
12 know about it. Beginning in 2002 have there been
13 more than two of those stores open?
14 **A. No.**
15 Q. Okay. As to those two stores, my
16 understanding as the signage for the stores and the
17 ads always or virtually always use Bass Pro -- the
18 Bass Pro logo in connection with the Sportsman's
19 Warehouse. Is that correct?
20 In other words, I've never seen use of
21 Sportsman's Warehouse with those stores without also
22 the Bass Pro Shops logo being involved.
23 Are you aware of any instances where Bass
24 Pro has used Sportsman's Warehouse standalone without
25 any reference to Bass Pro Shops?

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1 **A. I don't know in terms of strictly the**
2 **signage if we've used it as a standalone.**
3 **I know that we do use Sportsman's Warehouse**
4 **standalone in various other ways on certificates, on**
5 **badges, on POS receipts.**
6 **It is used as a standalone, but I don't**
7 **know with regard to just the subject of signage.**
8 Q. In any event, you're not aware of any
9 instances where there's signage that just says
10 Sportsman's Warehouse for a Bass Pro Sportsman's
11 Warehouse that doesn't have the Bass Pro logo
12 adjacent to it?
13 **A. I'm not aware, but I don't know.**
14 Q. Okay. Now you mentioned certificates.
15 What kind of certificates? Gift certificates or --
16 **A. On -- we have training programs for**
17 **associates. Certificates that we issue to those**
18 **associates have Sportsman's Warehouse identified on**
19 **there.**
20 **We also issue badges for certain levels of**
21 **achievement in training. Those have Sportsman's**
22 **Warehouse on them as well.**
23 Q. And I think you said something about
24 POS receipts. What are those?
25 **A. Cash register receipts.**

[Page 16]

1 Q. Now as to the training programs and
2 the certificates there, those would never go to a
3 customer; those are confined to employees, correct?
4 **A. To my knowledge they are displayed in**
5 **stores. The badges certainly are worn by our**
6 **associates. So they are visible and exposed to**
7 **customers.**
8 Q. Okay. And let's see, cash register
9 receipts. Are you telling me that there are cash
10 register receipts that just say Sportsman's Warehouse
11 with them that don't say Bass Pro Shops on them?
12 **A. I know Sportsman's Warehouse is on**
13 **there. I'm not sure whether Bass Pro is identified**
14 **on there or not.**
15 Q. Okay. How about on the badges, do you
16 know if Bass Pro is also on the badges?
17 **A. I believe not.**
18 Q. Okay. And on the certificate?
19 **A. I believe not.**
20 Q. Is there some reason why Bass Pro
21 would ever not want the public to know that its
22 Sportsman's Warehouse stores are associated with the
23 Bass Pro Shops organization?
24 **A. Yes, there could be a reason.**
25 **Sometimes there is an expectation when Bass Pro is**

[Page 17]

1 **attached, there's an expectation that it is one of**
2 **our true Outdoor World destination stores.**
3 **We have had that situation occur with some**
4 **of our Worldwide Sportsman stores where we've got the**
5 **Bass Pro logo adjacent to the Worldwide Sportsman**
6 **signage and logo, and customers come there expecting**
7 **to find an Outdoor World large format store and are**
8 **disappointed.**
9 Q. Mm-hmm. But in terms of the -- well,
10 so does that mean for the -- I'm sorry, the -- you
11 mentioned the store type and I didn't write it down
12 and I lost it. The Sportsman's --
13 **A. Worldwide Sportsman?**
14 Q. Yeah, the Worldwide Sportsman. That's
15 the -- as I recall, you said that's the smallest
16 format store?
17 **A. That's the smallest, yes.**
18 Q. Okay. And are there Worldwide
19 Sportsman stores that also display the Bass Pro logo
20 or have you sort of done away with that?
21 **A. There is one.**
22 Q. Okay. How many Worldwide Sportsman
23 stores are there?
24 **A. Two.**
25 Q. Two, okay. And they're located?

[Page 18]

1 **A. Islamorada, Florida. And Destin,**
2 **Florida.**
3 **THE REPORTER: Excuse me. What was that**
4 **first name?**
5 **A. Islamorada.**
6 **THE REPORTER: Thank you.**
7 **MR. ALLGEYER:**
8 Q. Okay. And which one has Bass Pro
9 associated with it and which one doesn't?
10 **A. Destin has Bass Pro associated with**
11 **it.**
12 Q. And Islamorada doesn't?
13 **A. That's correct.**
14 Q. Okay. And was it once -- was Bass Pro
15 once associated with Islamorada and it was then taken
16 away, or was it from its inception that the decision
17 was made not to associate it?
18 **A. Since I've been with the company, Bass**
19 **Pro has not been associated with it. Prior to that I**
20 **don't know.**
21 Q. Okay. How long has that store been
22 open? I guess since before you were with the
23 company. So at least before 2002, right?
24 **A. Right.**
25 Q. How about Destin?

[Page 19]

1 **A. Destin was open in 2003, I believe.**
2 Q. Okay. Were there any discussions
3 regarding Destin that you were involved in whether or
4 not the Bass Pro logo should or should not be
5 associated with that store?
6 **A. Not that I recall.**
7 Q. But in any event, apparently the
8 decision was made that there would be some
9 association because you told me that the Bass Pro
10 logo was always used in connection with that store,
11 right?
12 **A. It is used in connection with that**
13 **store.**
14 Q. Okay. Now with respect to the Bass
15 Pro Sportsman's Warehouse stores, I take it there's
16 never been a similar situation to that of the
17 Islamorada store where you simply didn't use the Bass
18 Pro logo or name with the Sportsman's Warehouse,
19 right?
20 **A. With regard to the exterior signage?**
21 Q. Well, let's start with that.
22 **A. Not that I'm aware of with regard to**
23 **exterior signage.**
24 Q. Okay. And within the store there are
25 various logos and signage, and some may say Bass Pro

[Page 20]

1 Sportsman's Warehouse and I take it some may say
2 Sportsman's Warehouse, but at least a number of them
3 say Bass Pro Sportsman's Warehouse, true?
4 **A. I don't know.**
5 Q. Okay. Who would know that?
6 **A. Our marketing department. Our signage**
7 **department.**
8 Q. What individuals in either of those
9 departments would you turn to if you needed to know
10 the answer to that question?
11 **A. Stan Lippelman. Bruce Teter.**
12 Q. Oh, I'll be talking to him.
13 Okay. Was there ever a time that you're
14 aware of that for any of the Sportsman's Warehouse
15 Bass Pro stores, an effort was made to disassociate
16 Bass Pro Shops from the Sportsman's Warehouse stores,
17 in other words take away the logo, not let people
18 know that Bass Pro Shops owned the stores, anything
19 like that?
20 **A. I don't know.**
21 Q. Was there any that you're aware of
22 during your tenure at Bass Pro Shops?
23 **A. There have been occasions where we**
24 **have had discussions with regard to both of the other**
25 **store formats, other than the Outdoor World, whether**

[Page 21]

1 **or not Bass Pro should be attached to those.**
2 Q. Okay. But with respect to the
3 Sportsman's Warehouse stores, it's true, isn't it,
4 that you never made the decision to not attach Bass
5 Pro -- the Bass Pro name to the Sportsman's Warehouse
6 stores?
7 **A. We have not made that decision to this**
8 **point.**
9 **(A portion of the deposition**
10 **transcript was identified by the**
11 **attorneys as confidential,**
12 **attorney's eyes only, and was**
13 **therefore removed from this**
14 **transcript by the court reporter,**
15 **placed into a separate sealed**
16 **confidential transcript, and**
17 **designated as Excerpt 1).**
18 **MR. ALLGEYER:**
19 Q. Forgive me if I asked you, how many
20 Sportsman's Center stores are there?
21 **A. There are two.**
22 Q. And where are they?
23 **A. Auburn, New York, and Columbia,**
24 **Missouri.**
25 Q. Okay. Now the store in St. Charles,

[Page 22]

1 Missouri -- well, I said that wrong. The store in
2 Memphis, Tennessee, was once -- well, you folks
3 regard that as a Sportsman's Warehouse Bass Pro,
4 correct?
5 **A. Correct.**
6 Q. But the signage calls it a Sportsman's
7 Center Bass Pro, the exterior signage, true?
8 **A. That signage was Sportsman's Warehouse**
9 **for four years, three or four years.**
10 Q. Right. But it doesn't say Sportsman's
11 Warehouse anymore now; it says Sportsman's Center,
12 correct?
13 **A. That's correct. On the exterior of**
14 **the building it does.**
15 Q. Are there plans to move that back to
16 Sportsman's Warehouse?
17 **A. When we consolidate -- yes. When we**
18 **consolidate this from a branding and marketing**
19 **standpoint, all of the stores of that size and format**
20 **would be consistently signed.**
21 Q. Is there some reason that you picked
22 Sportsman's Warehouse as opposed to say Sportsman's
23 Center to use as -- use for that signage?
24 **A. What signage? I'm sorry.**
25 Q. Well, when you say -- when you're

[Page 23]

1 talking about changing the name and the signage so
2 that it's consistently Sportsman's Warehouse Bass
3 Pros, have you had discussions of using a different
4 name, for example Sportsman's Center?
5 **A. No.**
6 Q. And why not? That was never
7 considered an alternative?
8 **A. No. The Sportsman's Warehouse name**
9 **has been in use in the company for much longer than**
10 **Sportsman's Center and is more recognizable to our**
11 **customer.**
12 Q. When was that first used, do you know?
13 **A. It's prior to my time.**
14 Q. Who would -- would John Morris know
15 that probably?
16 **A. He might.**
17 Q. Who else would be likely to know that?
18 **A. Our marketing department would know**
19 **it. Doug Lyman, who's in our marketing department,**
20 **who's been here for a long time, would know. Toni**
21 **Miller would likely know.**
22 Q. Okay. Have you had any discussions
23 with any of those people as to their understanding of
24 the first use of the Sportsman's Warehouse
25 designation?

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1 **A. I did have some discussions with Toni**
2 **Miller back in 2002 or 2003.**
3 Q. And do you recall what she told you?
4 **A. I believe that the first use was --**
5 **I'm not sure.**
6 Q. You don't know what she said?
7 **A. I don't remember. It was in the mid**
8 **'90s.**
9 Q. Okay. When did you -- and I'm just
10 asking about you now. We'll get more into other
11 people in a minute.
12 When did you first become aware of
13 Sportsman's Warehouse business, my client's
14 Sportsman's Warehouse business?
15 **A. Not until sometime in late 2002 or**
16 **early 2003.**
17 Q. How did you become aware of it?
18 **A. As I stated earlier, my background was**
19 **not in the sporting goods business --**
20 Q. Mm-hmm.
21 **A. -- and I don't hunt or fish. So I**
22 **wasn't that knowledgeable about the people in this**
23 **space with regard to the retailers.**
24 **But as I became more and more involved in**
25 **the store operations piece at Bass Pro, I did become**

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1 **aware of the other people in this segment and became**
2 **aware of Sportsman's Warehouse at that time.**
3 Q. Okay. And at that time did you have
4 an understanding of sort of what markets they were in
5 in 2002, 2003 time frame?
6 **A. Yes.**
7 Q. And what were those?
8 **A. More concentrated in the west.**
9 Q. And was -- where was Bass Pro
10 concentrated at that time, would you say?
11 **A. Well, our catalog and Internet**
12 **business is obviously international and heavy in**
13 **North America. But from a store standpoint, we were**
14 **more concentrated in the Southeast.**
15 Q. Mm-hmm. When did you become aware of
16 Sportsman's Warehouse as a registered mark that is
17 the subject of our proceedings? If you know.
18 **A. I don't know that I was aware that it**
19 **was a registered mark, that they had a registered**
20 **mark.**
21 Q. At any time or --
22 **A. No, I don't know.**
23 **(A portion of the deposition**
24 **transcript was identified by the**
25 **attorneys as confidential,**

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1 **attorney's eyes only, and was**
2 **therefore removed from this**
3 **transcript by the court reporter,**
4 **placed into a separate sealed**
5 **confidential transcript, and**
6 **designated as Excerpt 2).**
7 **MR. ALLGEYER:**
8 Q. Did you at any time, let's say you
9 personally, become aware of any instances of
10 customers being confused as to whether they were at a
11 Bass Pro Sportsman's Warehouse or a Sportsman's
12 Warehouse store?
13 **A. Yes.**
14 Q. And when were you aware of that?
15 **A. Sometime last year in Memphis we had**
16 **customers coming in with confusion with regard to**
17 **ads, coupons, and sale items.**
18 Q. Okay. Memphis last year. Okay. And
19 that's -- the Memphis store, that's the store that
20 had said Bass Pro Sportsman's Warehouse and the
21 outdoor signage now says Bass Pro Sportsman's Center,
22 that's the Memphis store, correct?
23 **A. Correct.**
24 Q. Now I'm gathering that customers
25 didn't come to you as the president of the company,

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1 but you learned about these things through your
2 managers or other store employees, true?
3 **A. From our store manager and our head of**
4 **stores, yes.**
5 Q. Okay. And who reported this to you?
6 **A. At the time I believe it was Pete**
7 **Perkins, who headed up our stores. And our general**
8 **manager in the Memphis store was Jim Osborne.**
9 Q. Okay. Do you have any documentation
10 available to you about these instances where you say
11 customers were confused?
12 **A. I don't have the documentation, no.**
13 Q. Okay. Do you know if anyone at Bass
14 Pro does?
15 **A. I don't know.**
16 Q. Okay. When this situation was
17 reported to you by your store managers and head of
18 stores, I think, did you ever register any
19 complaints with anyone from Sportsman's Warehouse,
20 my client?
21 **A. I did not directly, no.**
22 Q. Do you know if anyone did?
23 **A. I don't know.**
24 Q. Did you direct anyone to bring that to
25 their attention?

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1 **A. I was relying on guidance from our**
2 **counsel. I mean they were intimately involved at**
3 **that point.**
4 Q. Now I can't ask you what you said to
5 your lawyers or what you said to them, so I won't.
6 So don't tell me what you said to lawyers and what
7 lawyers said to you.
8 But did you have any discussions with
9 anyone from Sportsman's Warehouse apart from your
10 lawyers as to whether something should be done
11 regarding the instances you've mentioned where
12 customers were reportedly confused?
13 **A. I did not.**
14 Q. Okay. And do you know whether anybody
15 -- again, not telling me about your counsel, but do
16 you know whether anybody from Bass Pro Shops did
17 that?
18 **A. I am not aware of any of those kinds**
19 **of conversations.**
20 Q. Okay. Were there any other instances
21 where people reported to you instances of customers
22 being confused in some way as to Bass Pro and
23 Sportsman's Warehouse?
24 **A. It wasn't a single occurrence that**
25 **that occurred, so I heard it over a period of time.**

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1 Q. Okay. Other than the series of
2 occurrences in the Memphis store, were there any
3 others that you were aware of that were reported to
4 you?
5 **A. No.**
6 Q. Okay. One of the things I forgot to
7 do, and I want to go back, is I want to just spend
8 one minute on sort of the corporate structure of Bass
9 Pro just so I understand relationship between the
10 various parts of it.
11 For example, I've seen -- well, maybe you
12 can tell me how the -- how the corporate structure
13 works. Is there a parent company? Affiliated
14 companies? If you could just describe that to me, I
15 would appreciate it.
16 **A. The structure changed in the fall of**
17 **last year, I believe December.**
18 Q. Okay.
19 **A. So today there is an umbrella kind of**
20 **a parent so to speak, Bass Pro Group.**
21 Q. Mm-hmm.
22 **A. And under Bass Pro Group are Bass Pro**
23 **Shops Inc, Tracker Marine Group, and Big Cedar Lodge.**
24 **And that's kind of a boiled-down version. I mean**
25 **there are other entities that direct business, but**

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1 **those all come under those umbrellas.**
2 Q. One of those umbrellas, okay. Big
3 Cedar Lodge is kind of a resort thing or -- isn't it
4 where people go on hunting and fishing trips, that
5 kind of thing?
6 **A. Well, it's a resort.**
7 Q. It's a resort, okay.
8 **A. It's a family-oriented resort.**
9 Q. I see. Okay. I thought I got that
10 from the web site. And Tracker Marine, that's sort
11 of the boat division?
12 **A. Yes.**
13 Q. So the sales of the Bass Pro type
14 hunting, fishing, camping equipment, that sort of
15 thing, is handled through Bass Pro Shops Inc or
16 companies affiliated with it?
17 **A. Bass Pro Shops, that entity has the**
18 **retail stores, catalog, and Internet.**
19 Q. Okay.
20 **A. Our wholesale division -- I need to**
21 **back up. When you asked me to tell you about our**
22 **business --**
23 Q. Yeah.
24 **A. -- I forgot about it. American Rod &**
25 **Gun is a small part of our business in total. We**

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1 **sell small independent sporting goods dealers,**
2 **primarily -- well, basic type product in hunting and**
3 **fishing.**
4 Q. So in other words, selling those kind
5 of products to smaller retailers probably in much
6 smaller locations and so forth, true?
7 **A. Right.**
8 Q. Okay. I note something called Bass
9 Pro Trademarks LP. What is that?
10 **A. We have so many entities, I don't**
11 **think I could --**
12 Q. Fair enough.
13 **A. -- clearly explain.**
14 Q. Okay. Who would help --
15 **A. Probably Toni Miller would be helpful**
16 **in that.**
17 Q. Okay. Fair enough.
18 Okay. You're aware that there was a store
19 in Lawrenceville, Georgia, that was called a Bass Pro
20 Sportsman's Warehouse -- or was that during your time
21 or before your time?
22 **A. It was before my time, but I am aware**
23 **of that store.**
24 Q. Okay. And that -- do you remember
25 what year that store closed?

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1 **A. No, I don't. We built a larger**
2 **Outdoor World store and moved the business.**
3 Q. Okay. So that was the reason for its
4 closing?
5 **A. Yes, sir.**
6 Q. Okay. All right. It looks like that
7 would have been sometime in early 2002. Just your
8 answer to interrogatory number 7 --
9 **A. It could have been -- well --**
10 Q. -- it says there's $503 advertising
11 budget in 2002, so I'm guessing that was probably the
12 last year of it.
13 **A. I don't remember, because that's prior**
14 **to my time.**
15 Q. Yeah, okay.
16 **A. But it was either 2001 or 2002.**
17 Q. Okay. Fair enough. Okay. And at
18 that point then a Sportsman's Warehouse -- I'm sorry,
19 a Bass Pro Outdoor World replaced the Bass Pro
20 Sportsman's Warehouse, correct?
21 **A. That's correct.**
22 Q. Okay.
23 **THE WITNESS: Can we take a break?**
24 **MR. ALLGEYER: Absolutely. I was just**
25 **thinking that myself.**

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1 **(A recess was taken from 10:08 a.m.**
2 **to 10:24 a.m.).**
3 **MR. ALLGEYER:**
4 Q. Back on the record. I want to be
5 clear about this.
6 To the best of your knowledge, the only
7 places Bass Pro has used the phrase Sportsman's
8 Warehouse in conjunction with its business is in
9 Lawrenceville, Georgia; Memphis; and St. Charles,
10 Missouri, correct?
11 **A. Well, it is -- it's referenced in our**
12 **catalogs. It's referenced in our retail mailings.**
13 Q. Okay.
14 **A. It's referenced on our web site.**
15 Q. And that was inarticulate of me. In
16 terms of actual signs on stores, those are the three
17 stores that have had that associated with them?
18 **A. To my knowledge. I don't know if**
19 **something else could have been done prior to my**
20 **joining the company.**
21 Q. Okay. That's fair enough. I'm not --
22 you don't have to guess about that, but -- okay. So
23 those are the three for stores.
24 Okay. Now you've said that there are other
25 ways in which Sportsman's Warehouse is used in

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1 conjunction with Bass Pro merchandise, let's say.
2 And one is in the Internet, on the Internet?
3 **A. On our web site.**
4 Q. Okay. And how is that done on the web
5 site?
6 **A. Referencing stores.**
7 Q. Okay. And you mentioned a couple
8 other things?
9 **A. Catalog.**
10 Q. Catalog. How is Sportsman's Warehouse
11 referenced in the catalog? I don't remember seeing
12 that though?
13 **A. We identify -- we have ads in there**
14 **for stores. So it would have been used there. And**
15 **not in every issue.**
16 Q. Mm-hmm.
17 **A. But it is used in the catalog. It's**
18 **used to reference store locations. It's also**
19 **referenced on our retail tabloids that we mail.**
20 Q. What's a retail tabloid?
21 **A. Oh, that's just one of those little**
22 **fliers like you see in your Sunday paper, an insert.**
23 **We mail those as well.**
24 Q. Okay. Now is it always referenced in
25 those or just occasionally?

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1 **A. It's referenced in those stores that**
2 **are Sportsman's Warehouse.**
3 Q. Okay. So I understand it, the retail
4 tabloid, for example, is that pretty much done store
5 by store? In other words --
6 **A. Pretty much. There is some overlap,**
7 **but for the most part it's done store by store,**
8 **region by region.**
9 Q. Okay. So for example, I wouldn't
10 expect the -- reasonably expect the retail tabloid
11 for let's say Springfield, Missouri, to have a
12 reference to a Sportsman's Warehouse, because this is
13 a -- this is an Outdoor World area, right?
14 **A. It would not consistently have it. I**
15 **don't know that it would never have it.**
16 Q. Okay. And that's going to be true in
17 other areas, if you're directing yourself to a market
18 where you have an Outdoor World store, it would not
19 -- it certainly would not consistently have
20 Sportsman's Warehouse in it, right?
21 **A. The issue -- the issue there would be**
22 **in a major metropolitan market where we would have a**
23 **Sportsman's Warehouse and an Outdoor World store,**
24 **there would be overlapping mailings and**
25 **advertisements and marketing that would reference**

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1 **both.**
2 Q. Okay. I understand. And those areas
3 would be either the Memphis or St. Charles area?
4 **A. There would be today.**
5 Q. Today.
6 **A. But in the future, you know, as we**
7 **discussed earlier.**
8 Q. Mm-hmm. All right. I want to mark
9 this.
10 (Hagale Exhibit 3 was marked for
11 identification by the court
12 reporter and was shown to the
13 witness).
14 **THE REPORTER: I've marked Exhibit 3.**
15 **MR. ALLGEYER:**
16 Q. Showing you what's been marked as
17 Hagale Exhibit 3, I will tell you that this is a page
18 from the sports -- I'm sorry, from the Bass Pro
19 sports -- Bass Pro Shops, there we go, web site we
20 printed off the computer on May 22nd.
21 Do you recognize this as a printout from
22 the Bass Pro Shops web site?
23 **A. (The witness reviews the document).**
24 **Well, I do recognize parts of it. Some of this --**
25 **I'm not familiar with this particular page, but I do**

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1 **recognize this, the tabs.**
2 Q. Mm-hmm. Okay. You probably don't
3 cruise your own web site daily or anything like that.
4 **A. No, I don't. And our web site does**
5 **change.**
6 Q. Okay. Well, I want to direct your
7 attention to a couple things. In the lower
8 right-hand corner where it says Outdoor World retail,
9 and it's cut off by the way it printed sto, which I
10 assume is store.
11 If you look down that listing, I note that
12 on the second page of this in the right, you see the
13 St. Charles, Missouri, store listed as a -- under the
14 Outdoor World retail store. You see that?
15 **A. (The witness reviews the document).**
16 **Yes, and I also see some Worldwide Sportsman listed**
17 **under there as well.**
18 Q. Okay. So at least on the web site --
19 on this part of the web site there is no listing of
20 the St. Charles store as a separate Sportsman's
21 Warehouse location, true?
22 **A. I don't see it on these pages.**
23 Q. Okay. I also note that if you look
24 down, the Memphis, Tennessee, store is also listed as
25 an Outdoor World retail store. Do you see that?

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1 **A. Well, I see it. It just says**
2 **Tennessee, Memphis.**
3 Q. Yeah. Now do you know, is that meant
4 to be the existing Memphis, Tennessee, store?
5 Because I note there's one under it that says Memphis
6 future store.
7 **A. So I would assume that's the existing**
8 **store. It doesn't say future, so.**
9 Q. Okay. And so far as you know, is that
10 listed anywhere on your web site separately as a
11 Sportsman's Warehouse store?
12 **A. I don't know.**
13 **MR. ALLGEYER: Thank you.**
14 **(Hagale Exhibit 4 was marked for**
15 **identification by the court**
16 **reporter and was shown to the**
17 **witness).**
18 **THE REPORTER: I've marked Exhibit 4.**
19 **MR. ALLGEYER: Thank you.**
20 Q. Showing you what we've marked as
21 Exhibit 4, this is a memo with some -- some things,
22 some drawings attached to it. And I don't know that
23 -- whether you've seen this document before, but it
24 does mention your name anyway.
25 Have you seen this document before? Take a

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1 minute and look through it if you would like.
2 **A. (The witness reviews the document).**
3 **Yeah, it does mention my name and I do -- I see a lot**
4 **of these. I don't recall the document, but I would**
5 **have likely seen this.**
6 Q. Okay. Let's go to -- if you look at
7 the little right-hand corner markings, you see they
8 say BPS and then there's another number after that.
9 For example, the first page says 750.
10 We call those Bates numbers, and lawyers
11 use these to keep track of documents.
12 **A. Yes, sir.**
13 Q. If you could look down there and turn
14 to the one that's Bates numbered BPS 899, which
15 you'll find about three pages in.
16 **A. (The witness turns to the requested**
17 **page).**
18 Q. This appears to be sort of a sketch of
19 the location of the Bass Pro Shops store in Memphis.
20 It's dated September of '02.
21 Is this a reasonably accurate
22 representation of where that store is with respect to
23 the highways around it and so forth?
24 **A. Yes.**
25 Q. Okay. Then -- and that's where the

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1 store is today, correct?
2 **A. Correct.**
3 Q. Okay. Then turning to the next page,
4 which is labeled Memphis site sign.
5 **A. (The witness turns to the requested**
6 **page).**
7 Q. If you look in the middle, it says
8 something about existing sign raise and then it says
9 Bass Pro Shops and underneath that a Sportsman's
10 Warehouse.
11 Is that -- was a sign of this type ever
12 used at the Memphis location so far as you know?
13 **A. Yes.**
14 Q. Okay. And is this sort of -- although
15 it's somebody's drawing, is this sort of a reasonable
16 depiction of what was planned for that site?
17 **A. (No response).**
18 Q. And one of the reasons I ask you is we
19 don't have the Sportsman's Warehouse sign from
20 Memphis, but was this what the sign was like pretty
21 much?
22 **A. Well, this was right after I joined**
23 **the company.**
24 Q. Mm-hmm.
25 **A. I believe a sign similar to this was**

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1 **in existence.**
2 Q. Okay.
3 **A. And I believe that this was an effort**
4 **to raise it so that it had more visibility from the**
5 **interstate. Okay.**
6 **All right. Then if you look kind of in the**
7 **middle, it has two directional signs. And it shows**
8 **Bass Pro Shops logo on a green background, I guess,**
9 **with a white arrow or something.**
10 **Is this an accurate depiction of the**
11 **directional signs that were used for this location as**
12 **far as you know?**
13 **A. As far as I know, those were not done.**
14 Q. Okay. And who would know -- who would
15 know for sure whether they were done or not?
16 **A. Probably Bruce Teter. I'm not sure.**
17 Q. Okay. Then let's go to the next page
18 if we could, please, bearing Bates number BPS 901.
19 **A. (The witness turns to the requested**
20 **page).**
21 Q. And there's something here that says
22 Shelby Crossing, and I don't know what that is, and
23 then it says Bass Pro Shops on top.
24 First of all, is Shelby Crossing the name
25 of the area where the store is or do you know?

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1 **A. I don't know.**
2 Q. Okay. Do you know whether a sign of
3 this type was added, the one that says Bass Pro Shops
4 on top of the Shelby Crossing sign on that location?
5 **A. I'm not aware of that, no.**
6 Q. Okay. Would Mr. Teter be likely to
7 know?
8 **A. He might.**
9 **MR. ALLGEYER: Okay. Thank you.**
10 **(Hagale Exhibit 5 was marked for**
11 **identification by the court**
12 **reporter and was shown to the**
13 **witness).**
14 **THE REPORTER: I've marked Exhibit 5.**
15 **MR. ALLGEYER:**
16 Q. Showing you what we've marked as
17 Exhibit 5, this is a United States patent and
18 trademark registration for a service mark, Bass Pro
19 Shops Sportsman's Warehouse.
20 Is this a document that you've ever seen
21 before?
22 **A. (The witness reviews the document).**
23 **Not that I recall, no.**
24 Q. Okay. Do you recognize this as the
25 logo that is used at Bass Pro Shops Sportsman's

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1 Warehouse stores?
2 **A. In various forms. This is not exactly**
3 **the way it's always used.**
4 Q. How is it used differently?
5 **A. Well, the Bass Pro logo could move**
6 **around. On some -- like we discussed earlier, on**
7 **some items, like the badges, Sportsman's Warehouse is**
8 **used alone.**
9 Q. Okay. By the way, I note here, if
10 this helps, I know we've been over this, but it says
11 that the owner is Bass Pro Trademarks LP. I think I
12 asked you that question before. Does this help you
13 refresh your recollection?
14 **A. Well, I don't know what else might be**
15 **held in that entity.**
16 Q. Mm-hmm.
17 **A. I think Toni would be more helpful**
18 **there.**
19 Q. Do you know if there's some sort of
20 license agreement or assignment from Bass Pro Shops
21 Trademarks LP to any other Bass Pro Shop entity of
22 the trademark? It's okay if you don't. I'm just
23 asking.
24 **A. I'm not sure about the legalities of**
25 **that. We rely on counsel to help us with that.**

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1 Q. Okay. Now you note if you would in
2 the second column, it says, "No claim is made to the
3 exclusive right to use Sportsman's Warehouse apart
4 from the mark as shown." Do you see that?
5 **A. Yes.**
6 Q. Do you -- is it your understanding
7 that that is true? In other words, that you make no
8 claim under this mark of the right to use Sportsman's
9 Warehouse without Bass Pro Shops being associated
10 with it?
11 **A. It's clearly what is stated here.**
12 Q. Okay. Do you have any reason to
13 believe that that has changed?
14 **A. I don't know.**
15 Q. Okay. Who would know that?
16 **A. I don't know.**
17 Q. Okay. I note at the lower left-hand
18 corner it says, "First use 1/2/1995." And it says,
19 "In commerce 1/2/1995."
20 I realize this is before your time, but
21 apart from any discussions you've had with a lawyer,
22 have you ever discussed with anybody as to whether
23 this mark was actually used in commerce as early as
24 January 2nd of 1995?
25 **A. I have had conversations with Toni**

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1 **Miller. And like I said, I can't remember clearly**
2 **because it was before my time, but it was sometime in**
3 **the mid '90s.**
4 Q. Okay. Was it pretty much Toni Miller
5 who would handle from Bass Pro's point of view,
6 together with counsel of course, the registration of
7 trademarks for the company?
8 **A. She did -- well, prior to my time, I**
9 **don't really know.**
10 Q. Mm-hmm.
11 **A. But since I've been there, Toni, she's**
12 **our CFO.**
13 Q. Mm-hmm.
14 **A. And she handles most of that**
15 **coordination, yes.**
16 **MR. ALLGEYER: Okay. Would you mark that**
17 **one for me, please.**
18 **(Hagale Exhibit 6 was marked for**
19 **identification by the court**
20 **reporter and was shown to the**
21 **witness).**
22 **THE REPORTER: I've marked Exhibit 6.**
23 **MR. ALLGEYER: Thank you.**
24 Q. Showing you, sir, what's been marked
25 as Exhibit 6, this is a document from the trademark

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1 office entitled Notice of Abandonment, together with
2 other accompanying documents. Is this something that
3 you've seen before?
4 **A. (The witness reviews the document).**
5 **No.**
6 Q. I recognize it's before your time.
7 **A. No, sir.**
8 Q. Okay. Were you aware that at some
9 time in the mid '90s that Bass Pro had sought to
10 register Sportsman's Warehouse as a trademark?
11 **A. That was before my time.**
12 Q. Okay. So no one's ever told you that?
13 **A. (No response).**
14 Q. Don't tell me what a lawyer told you,
15 but in terms of someone from the company?
16 **A. I don't recall having any of those**
17 **conversations.**
18 Q. Okay. And did you ever discuss with
19 anyone the fact that the United States patent and
20 trademark office refused to register Sportsman's
21 Warehouse as a mark for Bass Pro?
22 **A. No.**
23 Q. To your knowledge since this was
24 abandoned in 1996, has Bass Pro made any further
25 efforts to register Sportsman's Warehouse by itself

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1 as a trademark or trade name?
2 **A. I don't know.**
3 Q. Or service mark?
4 **A. I don't know.**
5 **MR. ALLGEYER: Okay.**
6 **(Hagale Exhibit 7 was marked for**
7 **identification by the court**
8 **reporter and was shown to the**
9 **witness).**
10 **THE REPORTER: I've marked Exhibit 7.**
11 **MR. ALLGEYER:**
12 Q. I'd like to show you what is marked as
13 Exhibit 7. And I'll represent to you this again was
14 printed off of the web site on May 22nd, 2006.
15 Do you recognize this as something from the
16 Bass Pro Shops web site?
17 **A. (The witness reviews the document).**
18 **Again, they change frequently, but yes, this is the**
19 **format that our web site takes.**
20 Q. Okay. And I note that again this St.
21 Charles, Missouri, store is listed under Outdoor
22 World retail store. Do you see that in the middle of
23 the page, that there is that listing there?
24 **MR. CAMPBELL: Object to the form.**
25 **MR. ALLGEYER:**

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1 Q. Well, there's the title Outdoor World
2 Retail Stores, and then underneath that there's a
3 picture of the St. Charles, Missouri, store?
4 **A. I see that. I am not sure that there**
5 **is not an entity for Outdoor World Retail Stores --**
6 Q. Mm-hmm.
7 **A. -- under which all of the stores**
8 **reside.**
9 Q. And I note that the copy under here
10 says, "For the best in hunting and fishing gear, shop
11 Bass Pro, your St. Louis sporting goods store."
12 Is there some reason that this is not
13 referred to as a Bass Pro Sportsman's Warehouse in
14 the copy here that you're aware of?
15 **MR. CAMPBELL: Objection. Lacks**
16 **foundation.**
17 **A. Well, just to the right there it is**
18 **referred to as Sportsman's Warehouse.**
19 **MR. ALLGEYER:**
20 Q. Right. I see that. But in the copy
21 here, it's just -- you will give me it's just called
22 a Bass Pro?
23 **A. Yes.**
24 Q. Earlier -- I want to come back to
25 something. Someone has thoughtfully written me some

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1 notes that I should ask about here.
2 We had asked -- I had asked you about the
3 use of Sportsman's Warehouse in connection with Bass
4 Pro stores in Atlanta, Memphis, and St. Charles. And
5 I believe you told me that there was some use of
6 Sportsman's Warehouse alone on certificates, and we
7 talked about that?
8 **A. Right, yes.**
9 Q. Badges, and we talked about that?
10 **A. Yes, sir.**
11 Q. Point of sale receipts, and we talked
12 about that?
13 **A. Yes.**
14 Q. And then we talked about some retail
15 fliers that in some markets there would be use of
16 Sportsman's Warehouse in those markets where -- at
17 least where there was overlap between a Outdoor World
18 store and a Bass Pro Sportsman's Warehouse store. Do
19 you recall that testimony?
20 **A. Well, I said that there could be**
21 **overlap in markets where there was an Outdoor World**
22 **destination store and a Sportsman's Warehouse.**
23 Q. Mm-hmm.
24 **A. I think what I stated as well is that**
25 **Sportsman's Warehouse is identified in those tabloids**

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1 **that specifically reference a Sportsman's Warehouse**
2 **and a market in a region.**
3 Q. Okay.
4 **A. And there could be overlap at some**
5 **point when there are both formats in that market.**
6 Q. Okay. Now as to the tabloids -- or
7 let's say other mailers, do any of those ever just
8 say Sportsman's Warehouse without use of the Bass Pro
9 name or mark that you're aware of?
10 **A. I don't know.**
11 Q. Are you aware of any that do? Do any
12 come to mind as you sit here today?
13 **A. Not as I sit here today. I don't know**
14 **that it hasn't happened though.**
15 Q. Okay. Now are there any other -- I
16 just want to make sure I've got my list right.
17 Are there any other uses of Sportsman's
18 Warehouse by Bass Pro on its own without being used
19 in connection with Bass Pro Shops, either name or
20 logo, as you sit here today that you can think of?
21 **A. No.**
22 Q. You're not aware of it?
23 **A. I'm not aware, no.**
24 Q. Okay. Now in terms of those instances
25 where Bass Pro Sportsman's Warehouse is used together

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1 where the Sportsman's Warehouse is used with Bass
2 Pro, I'm trying to make sure I've got every instance
3 of how the company has used those in signage or
4 advertising.
5 We know that there were stores that used it
6 that way, correct?
7 **A. (No response).**
8 Q. That is, Bass Pro Sportsman's
9 Warehouse?
10 **A. Yes.**
11 Q. Okay. And we've already talked about
12 the fliers that used it that way, that is those two
13 together, correct?
14 **A. Yes.**
15 Q. And tabloids is another one?
16 **A. Yes.**
17 Q. And then you talked about the web
18 site?
19 **A. Yes.**
20 Q. Okay. Are there any other uses?
21 **A. Catalogs.**
22 Q. Catalogs, that's right. Okay.
23 Anything else?
24 **A. Interior signage in some of those**
25 **stores.**

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1 Q. Does anything else come to mind?
2 **A. That's all I can think of.**
3 Q. Okay. Are there markets in which Bass
4 Pro has not used Sportsman's Warehouse? In other
5 words, where it just would never -- has never come up
6 that the Sportsman's Warehouse name is used with Bass
7 Pro?
8 **A. Could you say that again, please?**
9 Q. Yeah, that wasn't a very good
10 question.
11 Let's take an example. In the advertising
12 that is done in this region, Springfield, Missouri,
13 is Sportsman's Warehouse ever used in conjunction
14 with Bass Pro in your advertising?
15 **A. To the extent that it's in catalogs,**
16 **it's used everywhere.**
17 Q. Okay.
18 **A. To the extent that the Internet**
19 **represents obviously a wide band, it's used**
20 **everywhere.**
21 Q. Okay. Any others?
22 **A. I don't know.**
23 Q. Okay. Other than what we've
24 discussed, has Bass Pro taken any steps directed to
25 getting customers to associate the name Sportsman's

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1 Warehouse with Bass Pro?
2 **MR. CAMPBELL: Objection. Lacks**
3 **foundation.**
4 **A. I don't know that I understand that**
5 **question.**
6 **MR. ALLGEYER:**
7 Q. Well, let me -- let me give you an
8 example.
9 Have there been any -- apart from using
10 those names together in the ways that we've talked
11 about, have there been any campaigns or explanations
12 to the public or anything of the sort to educate the
13 public that they should associate this Sportsman's
14 Warehouse name with Bass Pro?
15 **MR. CAMPBELL: Same objection.**
16 **A. Well, I think -- I think to the extent**
17 **that we have very, very significant distribution of**
18 **our catalogs, I think our marketing is widespread and**
19 **frequent. On our web site, I think there is a real**
20 **correlation and association.**
21 **MR. ALLGEYER:**
22 Q. Okay. And we've talked about all
23 those things. Have there been any ads in print or
24 otherwise that have said, "When you think of
25 Sportsman's Warehouse, think of Bass Pro," for

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1 example?
2 **A. No, I mean I don't know exactly the**
3 **copy that has been used in our ads.**
4 Q. And I'm not asking you to remember
5 everything. Just what comes to mind. I'm just
6 trying to explore what you have done in that regard.
7 **A. I don't know.**
8 **MR. ALLGEYER: Okay.**
9 **(Hagale Exhibit 8 was marked for**
10 **identification by the court**
11 **reporter and was shown to the**
12 **witness).**
13 **THE REPORTER: I've marked Exhibit 8.**
14 **MR. ALLGEYER:**
15 Q. Showing you what's been marked as
16 Exhibit 8, which is our attempt to copy the front and
17 back and card holder for a Bass Pro Shops gift card,
18 and regrettably it's not color or anything.
19 But with that qualification, do you
20 recognize this as the front and back of a -- going
21 from page to page of a Bass Pro Shops gift card?
22 **A. (The witness reviews the document).**
23 **Yes.**
24 Q. Okay. Do you know the date on which
25 cards of this type were used?

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1 **A. No.**
2 Q. In other words, did the gift cards
3 change over time?
4 **A. Well, the graphics on our gift cards**
5 **change.**
6 Q. Mm-hmm.
7 **A. But other than the graphics, I don't**
8 **know.**
9 Q. Okay. Now my understanding of this,
10 because I got it as a copy, is if you look at the
11 first page of Exhibit 8, there's some sort of big
12 rectangle here.
13 **A. Yes.**
14 Q. That -- is that the gift card holder,
15 kind of folded open?
16 **A. Yes.**
17 Q. Okay. And if you flip Exhibit 8 over,
18 if you would.
19 **A. (The witness complies). This way?**
20 Q. Yeah, this way. See, we're going to
21 read the little redeemable part, okay.
22 **A. Okay.**
23 Q. Which says, "Redeemable through Bass
24 Pro catalogs or any Bass Pro Outdoor World, Worldwide
25 Sportsman's, or Sportsman's Warehouse stores." Do

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1 you see that?
2 **A. Yes.**
3 Q. Now there have only been -- well, that
4 you're aware of, three Bass Pro stores that were
5 called Sportsman's Warehouse stores, correct?
6 **A. Yes.**
7 Q. As we talked about. And yet is it my
8 understanding that all the gift cards issued from all
9 the Bass Pro Shops have this redeemable language on
10 them? Or the card holders?
11 **A. As far as I know.**
12 Q. Okay. And do you know how long it's
13 been like this?
14 **A. No, I don't.**
15 Q. Has anyone ever suggested to you that
16 it might be confusing in those markets where there
17 are both Sportsman's Warehouses and Bass Pro
18 Sportsman's Warehouses to use this kind of language
19 on the gift card holder?
20 **A. Not specifically with regard to the**
21 **gift card, but clearly I stated earlier that there is**
22 **confusion that has been reported to me in the Memphis**
23 **market.**
24 Q. Okay. And the -- do you know whether
25 the confusion in the Memphis market was attributable

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1 to the fact that the gift card holder indicates that
2 it's redeemable through, for example, Sportsman's
3 Warehouse stores?
4 **A. Not specific to the gift card**
5 **language.**
6 Q. Okay. And you don't know one way or
7 another whether that -- what it was that caused that
8 confusion?
9 **A. I know that -- I know that there was**
10 **confusion --**
11 Q. Mm-hmm.
12 **A. -- because customers were coming in**
13 **our store, the coupons, ads, that were confusing**
14 **between the two stores.**
15 Q. Okay. Did any customer ever explain
16 to you what about those things caused the confusion
17 or -- I guess no customers talked to you.
18 Did it ever get related to you from your
19 store managers or other employees as to what exactly
20 about that situation was causing confusion?
21 **A. Not exactly.**
22 Q. If you would now turn to the next
23 page.
24 **A. (The witness turns to the requested**
25 **page).**

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1 Q. This appears to be the back of the
2 card, is that correct?
3 **A. Yes.**
4 Q. All right. Now if you notice, at the
5 end of the first line under the 800 number, it says,
6 "Bass Pro Sportsman's Warehouse," and it's very
7 difficult to see, but there appears to be a little
8 circle R after that. Do you see that?
9 **A. (The witness reviews the document). I**
10 **see a dot.**
11 Q. Okay. And you don't know whether
12 that's a circle R or not?
13 **A. No.**
14 Q. You don't happen to have a Bass Pro
15 gift card on you, do you?
16 **A. No.**
17 **MR. ALLGEYER: Counsel, do we have any**
18 **originals of this, do you know?**
19 **MR. CAMPBELL: I don't know.**
20 **MR. ALLGEYER:**
21 Q. Do you know how long --
22 **MR. CAMPBELL: Do you mean originals of the**
23 **card or originals of this copy?**
24 **MR. ALLGEYER: The card.**
25 **MR. CAMPBELL: I'm not sure.**

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1 **MR. ALLGEYER: I guess I know where to get**
2 **one because --**
3 **MR. CAMPBELL: Yeah, I'm not sure if one**
4 **was produced or not.**
5 **MR. ALLGEYER: Would it be agreeable to**
6 **produce -- I mean you don't have to put any money on**
7 **it --**
8 **MR. CAMPBELL: Sure.**
9 **MR. ALLGEYER: -- but would it be agreeable**
10 **to produce an original to us?**
11 **MR. CAMPBELL: Yeah. If it hasn't been**
12 **done, I don't see that as being a problem.**
13 **MR. ALLGEYER: Okay. Well, you could put**
14 **50 bucks on it. But then you would just get it back,**
15 **so --**
16 **MR. CAMPBELL: Right.**
17 **MR. ALLGEYER:**
18 Q. Do you know how long cards that had
19 this kind of language on the back of them have been
20 used by Bass Pro? Particularly this Bass Pro
21 Sportsman's Warehouse with what looks like a dot, but
22 which appears to be a circle R on it?
23 **A. I don't know.**
24 Q. Who would know that?
25 **A. I don't know.**

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1 **(A portion of the deposition**
2 **transcript was identified by the**
3 **attorneys as confidential,**
4 **attorney's eyes only, and was**
5 **therefore removed from this**
6 **transcript by the court reporter,**
7 **placed into a separate sealed**
8 **confidential transcript, and**
9 **designated as Excerpt 3).**
10 **(Hagale Exhibit 9 was marked for**
11 **identification by the court**
12 **reporter and was shown to the**
13 **witness).**
14 **THE REPORTER: I've marked Exhibit 9.**
15 **MR. ALLGEYER:**
16 Q. Okay. Turning to Exhibit 9, see
17 whether you recognize this.
18 **A. (The witness reviews the document).**
19 Q. This appears to be an ad for a Bass
20 Pro Shops Outdoor Rewards card that we picked up off
21 the Internet.
22 Have you -- first of all, Bass Pro Shops
23 does offer an Outdoor Rewards credit card, true?
24 **A. Yes.**
25 Q. Okay. And do you recognize this as an

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1 ad for that card?
2 **A. Yes.**
3 Q. And you have a program where you can
4 get points for using the card and you can get free
5 gear and discounts and so forth, correct?
6 **A. Yes.**
7 Q. Okay. Now if you turn to the second
8 to the last page of Exhibit 9.
9 **A. (The witness turns to the requested**
10 **page).**
11 Q. And then I'm going to take you into
12 the second paragraph that starts with, "Use a Bass
13 Pro Shops." Do you see that?
14 **A. Yes.**
15 Q. Now go down one, two, three, four,
16 five, six, seven lines after Outdoor World. Do you
17 see there where it says Sportsman's Warehouse with a
18 circle R after it?
19 **A. Yes.**
20 Q. Were you aware that that designation
21 was being used in this particular ad?
22 **A. No.**
23 Q. Okay. Do you folks have a -- at Bass
24 Pro have a policy with respect to proper trademark
25 usage throughout your organization?

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1 **A. Yes.**
2 Q. And what policy is that?
3 **A. Well, I mean we rely on counsel for**
4 **guidance of what the proper use for trademarks.**
5 Q. Okay. Is it a written policy as it
6 would state what the proper use is?
7 **A. I don't know.**
8 Q. Who would know that?
9 **A. Likely Toni Miller.**
10 Q. Okay. Do you know if any training is
11 done to your marketing people or store managers as to
12 what is and isn't prohibited with respect to
13 trademark usage?
14 **A. I don't know.**
15 Q. Okay. Insofar as you know, there in
16 fact -- your company does not own a registered
17 trademark to the service mark Sportsman's Warehouse
18 standing on its own, does it?
19 **MR. CAMPBELL: Objection. Calls for a**
20 **legal conclusion. Lacks foundation.**
21 **MR. ALLGEYER: Yeah, and that's actually a**
22 **pretty good objection.**
23 Q. But to your understanding -- let me
24 rephrase it.
25 Your company doesn't claim to have a

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1 registered United States trademark in the mark
2 Sportsman's Warehouse standing on its own, do you?
3 **A. I don't know.**
4 **(Hagale Exhibit 10 was marked for**
5 **identification by the court**
6 **reporter and was shown to the**
7 **witness).**
8 **THE REPORTER: I've marked Exhibit 10.**
9 **MR. ALLGEYER:**
10 Q. Okay. I'm showing you what's been
11 marked as Exhibit 10. And this appears to be some
12 kind of brochure or something. It says Bass Pro
13 Shops Sportsman's Warehouse and mentions Duluth,
14 Georgia.
15 First of all, do you recognize this as --
16 what would you call this? Let me put it that way.
17 And I'm guessing this is probably folded over or
18 something.
19 **A. (The witness reviews the document). I**
20 **don't know. It appears to be a trifold, but I don't**
21 **know.**
22 Q. Well, in any event, you see where at
23 the very top it says Sportsman's Warehouse and
24 there's a circle R after it. Not the very top.
25 Third R from the top. Do you see that?

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1 **A. Yes.**
2 Q. Okay. Has anyone ever suggested to
3 you that the company should undertake some kind of
4 program to make sure that you weren't using circle R
5 when you shouldn't be?
6 **A. No.**
7 **MR. ALLGEYER: Okay.**
8 **THE WITNESS: Could we take another break?**
9 **MR. ALLGEYER: Absolutely.**
10 **(A recess was taken from 11:06 a.m.**
11 **to 11:22 a.m.).**
12 **(Hagale Exhibit 11 was marked for**
13 **identification by the court**
14 **reporter and was shown to the**
15 **witness).**
16 **THE REPORTER: I've marked Exhibit 11.**
17 **MR. ALLGEYER:**
18 Q. I'm showing you what's been marked as
19 Exhibit 11, which was produced to us by your counsel.
20 And this appears to be some sort of advertisement
21 used in the Memphis area. Is this the kind of thing
22 you've seen before?
23 **A. (No response).**
24 Q. Is this a teaser? I think you talked
25 about -- no, you didn't talk about teasers.

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1 **A. Tabloids?**
2 Q. It says it's a teaser somewhere
3 associated with this.
4 **A. I'm not sure exactly what this is, but**
5 **yes, this is similar to what we would do.**
6 Q. Okay. And does this appear to be a
7 copy of a Bass Pro advertisement for the fall of
8 2005?
9 **A. Yes.**
10 Q. Okay. Now I note at the bottom again
11 it says, at the very bottom, Bass Pro with an R,
12 Sportsman's Warehouse with a circle R. It's hard to
13 make out.
14 Have you seen other instances -- we've gone
15 through a few today -- but other instances where just
16 the phrase Sportsman's Warehouse bears a circle R on
17 it in Bass Pro's advertising or other communications
18 to the public?
19 **MR. CAMPBELL: Before you answer, I'll just**
20 **object to the form of the question to the extent that**
21 **I don't know that it's necessarily clear at the**
22 **bottom there whether you've accurately described**
23 **what's on the bottom of this document, that there's a**
24 **dot by Sportsman's Warehouse, so.**
25 **MR. ALLGEYER: Well, actually that's a fair**

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1 **criticism. I think I've looked at enough of these**
2 **and used, you know, magnifying glasses and stuff, so**
3 **I'm fairly confident. But I don't want you to accept**
4 **that it is if it isn't.**
5 **Do you have a -- counsel, is there an**
6 **original or something of this?**
7 **MR. CAMPBELL: I'll try and find out. And**
8 **part of this too is just I wasn't involved in getting**
9 **the documents together.**
10 **MR. ALLGEYER: Right.**
11 **MR. CAMPBELL: So I can't even sit here**
12 **today and say I know for sure what the original looks**
13 **like. But I'll try and find that.**
14 **MR. ALLGEYER: Okay. I appreciate that, if**
15 **you would.**
16 Q. Well, and then -- that's a fair
17 criticism of the question. I'm pretty confident
18 that's what that is.
19 But without even assuming that, are you
20 aware of instances apart from those we've seen today
21 of use of the Sportsman's Warehouse words with the
22 circle R after them?
23 **A. Honestly, I don't think I'm that**
24 **conscious of it and I just -- I just don't recall**
25 **noticing it.**

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1 **MR. ALLGEYER: Okay.**
2 **(Hagale Exhibit 12 was marked for**
3 **identification by the court**
4 **reporter and was shown to the**
5 **witness).**
6 **THE REPORTER: I've marked Exhibit 12.**
7 **MR. ALLGEYER:**
8 Q. Okay. Now showing you Exhibit 12.
9 First of all, do you recognize this as an
10 advertisement by Bass Pro for its store in Memphis,
11 Tennessee?
12 **A. (The witness reviews the document). I**
13 **don't remember this specific ad, but it's clearly one**
14 **of our ads.**
15 Q. Okay. And by the way, we had talked
16 about fliers and some other things. Is there a -- is
17 there a category for this type of ad?
18 **A. (No response).**
19 Q. Is it a flier or is it a -- if you
20 could tell.
21 **A. It's a copy. I don't know if this is**
22 **reduced. I really don't know what this is.**
23 Q. Okay.
24 **A. But some form of -- some form of our**
25 **ads.**

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1 Q. Okay. And then again you'll notice at
2 the bottom -- and I think on this one you can see it.
3 But Bass Pro has a circle R after it, as does
4 Sportsman's Warehouse have a circle R after it,
5 correct?
6 **A. Yes.**
7 **(Hagale Exhibit 13 was marked for**
8 **identification by the court**
9 **reporter and was shown to the**
10 **witness).**
11 **THE REPORTER: I've marked Exhibit 13.**
12 **MR. ALLGEYER:**
13 Q. Showing you Exhibit 13, this one I'm
14 trying to get a handle on. In the lower left it says
15 Bass Pro Shops Outdoor World and Sportsman's
16 Warehouse. Do you see that?
17 **A. Yes.**
18 Q. Okay. Can you tell what store this is
19 an ad for?
20 **A. (The witness reviews the document).**
21 Q. And I'm not suggesting that you
22 should, but --
23 **A. No, I can't.**
24 Q. Okay. And I'm not sure how we place
25 that. But it does appear to be an ad at least for a

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1 -- well, is there any Bass -- is there any Bass Pro
2 store -- no, there are a number of Outdoor Worlds, I
3 guess.
4 Are there any Outdoor Worlds that are used
5 in conjunction with both Bass Pro and Sportsman's
6 Warehouse other than the Memphis store? Suggesting
7 this might be an ad from the Memphis store.
8 **A. I don't know.**
9 Q. You don't know, okay.
10 **A. I don't know where this ad was**
11 **targeted.**
12 Q. I also notice there's a little leaf to
13 the lower right of the Bass Pro mark, that Bass Pro
14 Shops logo there. The bass is jumping on the left
15 and there's a little leaf on the right?
16 **A. Yes.**
17 Q. Is that something that is part -- has
18 become part of the Bass Pro logo over time?
19 **A. Now that oak leaf -- that oak leaf is**
20 **used in conjunction with Outdoor World.**
21 Q. Oh, okay. All right. And is that how
22 typically the Bass Pro Shops Outdoor World sign
23 looks, it has the -- it has the leaf over there to
24 the right of the Bass Pro?
25 **A. No, actually that's a little unusual.**

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1 Q. Oh, it is? Okay.
2 **A. The placement is.**
3 Q. Okay. Where would it usually be
4 placed?
5 **A. It would be down by the Outdoor World.**
6 Q. I see. Okay. All right. Now again,
7 it may be hard to make out, but there appears to me
8 to be a circle R to the right of the Sportsman's
9 Warehouse. Can you see that? Or is that just a dot
10 to you?
11 **A. I see a dot.**
12 **MR. ALLGEYER: Okay. Counsel, I wonder if**
13 **you could get one of these too.**
14 **MR. CAMPBELL: I'll just ask.**
15 **MR. ALLGEYER: Yeah.**
16 **(Hagale Exhibit 14 was marked for**
17 **identification by the court**
18 **reporter and was shown to the**
19 **witness).**
20 **THE REPORTER: I've marked Exhibit 14.**
21 **MR. ALLGEYER:**
22 Q. Showing you Exhibit 14. Do you
23 recognize this as a Bass Pro ad of some sort?
24 **A. Of some sort, yes.**
25 Q. Okay.

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1 **A. I can't -- I can't really tell you**
2 **where this was targeted either.**
3 Q. Okay. If we look at the last page
4 that bears Bates number BPS 2125 in the lower right,
5 it mentions two stores in Tennessee to serve you. Do
6 you see that?
7 **A. Yes.**
8 Q. Okay. So does this appear to be an ad
9 for the Memphis and Nashville area?
10 **MR. CAMPBELL: When you say this, are you**
11 **referring to just this ad on the last page, or are**
12 **you referring to the exhibit collectively?**
13 **MR. ALLGEYER: Well, it came to us**
14 **collectively, so -- maybe nobody in the room knows,**
15 **but I figure he would be as likely to know as**
16 **anybody.**
17 **A. Well, these could be reduced versions**
18 **of a tabloid, but I don't know.**
19 Q. Okay.
20 **A. Our tabloids are much larger than**
21 **this, and someone may have reduced them to get them**
22 **on the page. I really don't know what these**
23 **represent.**
24 Q. Okay. All right. It almost looks
25 like they have because the Bates numbers are so

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1 little. Okay.
2 Well, anyway, focusing on the last page of
3 this, I note that in this document, as opposed to
4 the rest of it, it does there say Sportsman's
5 Warehouse to the right of Bass Pro Shops. Do you
6 see that?
7 **A. Yes.**
8 Q. Okay. But at least if this were one
9 document, you would agree with me that that's the
10 only reference to Sportsman's Warehouse in the
11 document. The rest of it is Bass Pro everywhere,
12 correct?
13 **A. (The witness reviews the document).**
14 **Some of it is hard for me to read, but I guess some**
15 **of these are blacked out.**
16 Q. I'll just have a look here. These
17 reduction machines are real nice, but they create
18 problems like this sometimes.
19 In perusing the document, did you see any
20 other visible reference to Sportsman's Warehouse
21 other than this one on that part of the last page?
22 **A. I can't detect it in any other part**
23 **of the document.**
24 Q. Okay. As part of your sort of
25 knowledge in the industry and watching your

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1 competitors, have you been aware of the growth of
2 Sportsman's Warehouse in the last, oh, let's say
3 five, six years or so?
4 **A. I've been aware in the last two to**
5 **three years.**
6 Q. Okay. And you've kept track of their
7 expansion a little?
8 I mean I realize it's probably not
9 something you spend all your time on, but you realize
10 they've been expanding, opening a number of new
11 stores every year?
12 **A. In the last two years I'm more aware**
13 **that their store expansion has been ramped up.**
14 Q. Okay. How did you become aware of
15 that?
16 **A. Just that -- you know, we look at all**
17 **of our competition in terms of their store**
18 **development.**
19 Q. Sure. Are there other people in your
20 company that might keep closer track of your
21 competitors' store development than others or maybe
22 than yourself?
23 **A. I don't know.**
24 Q. Okay. Is there someone that's sort of
25 charged with knowing that, you know, competitive

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1 intelligence, that kind of thing?
2 **A. No.**
3 Q. Let's talk a little bit about the
4 Memphis store change names -- Memphis store name
5 change or sign change.
6 There came a time in 2005 or so where you
7 learned that the signage for the Memphis store had
8 been changed, the outdoor signage from Bass Pro
9 Sportsman's Warehouse to Bass Pro Sports Center,
10 correct?
11 **A. Sportsman's Center.**
12 Q. I'm sorry, Sportsman's Center, yes.
13 How did you become aware of that?
14 **A. Ken Burroughs -- I was out for some**
15 **outpatient surgery. And when I came back in the**
16 **following day, Ken Burroughs made me aware that the**
17 **signage on the exterior of the building had been**
18 **changed.**
19 Q. Okay. And did you say anything to Mr.
20 Burroughs about it at that time?
21 **A. I told him that I had specifically**
22 **rejected the CER on two different occasions, and**
23 **that I had told our store people and our signage**
24 **people specifically that there was to be no signage**
25 **change.**

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1 Q. What's a CER?
2 **A. Capital expense request.**
3 Q. Okay. That's somebody that says let's
4 pay for the sign?
5 **A. They have to get approval to pay for**
6 **any capital expenditure.**
7 Q. Okay. And so you had said you
8 shouldn't change the sign, correct?
9 **A. Yes.**
10 Q. Okay. And did you tell anyone why you
11 thought you shouldn't change the sign?
12 **A. Yes. Because we were -- our intent**
13 **was to continue and consolidate our smaller format**
14 **stores under the Sportsman's Warehouse brand.**
15 **MR. ALLGEYER: Okay.**
16 **(Hagale Exhibit 15 was marked for**
17 **identification by the court**
18 **reporter and was shown to the**
19 **witness).**
20 **THE REPORTER: I've marked Exhibit 15.**
21 **MR. ALLGEYER:**
22 Q. You'll be happy to know I'm not going
23 to go over this whole thing, although you're free to
24 read any of it that you would like. I want to direct
25 your attention to just a few of the statements in

[Page 76]

1 here.
2 This is an e-mail from Bruce Teter to
3 somebody else, but it has sort of a chronology. Have
4 you seen this chronology before?
5 **A. (The witness reviews the document). I**
6 **don't recall this, no.**
7 Q. Okay. Well then, you don't need to
8 look at it then for that purpose. But I will use it
9 to help me get some dates straight.
10 It says that the signs were installed on
11 the building between Tuesday, July 26th, and
12 Thursday, July 28th. Do you see that on the third
13 line on --
14 **A. I'm sorry. Would you say that again?**
15 Q. Yeah. On Bates number BPS 003073,
16 second page of the document.
17 **A. (The witness turns to the requested**
18 **page).**
19 Q. If you look down about three lines,
20 Mr. Teter writes, "The signs were installed on the
21 building between Tuesday, July 26th, and Thursday,
22 July 28th, 2005." Do you see that?
23 **A. (The witness reviews the document).**
24 **Yes.**
25 Q. Okay. Is that so far as you know a

[Page 77]

1 true statement, that is about the time that the signs
2 changed?
3 **A. I do not remember the dates.**
4 Q. Okay.
5 **A. I don't know the dates.**
6 Q. All right. That's probably something
7 I should go over with Mr. Teter?
8 **A. Yes.**
9 Q. Okay. Let me then direct you to Bates
10 number 03085. It's a ways in.
11 **A. What is it?**
12 Q. 3085.
13 **A. (The witness turns to the requested**
14 **page).**
15 Q. Does this appear to be an accurate
16 representation of the signage after it was changed at
17 the Bass Pro store in Memphis?
18 **A. Yes.**
19 Q. Okay. And similarly, if you turn to
20 the next page.
21 **A. (The witness turns to the requested**
22 **page).**
23 Q. Is that a -- but for the fact that
24 it's in black and white, is that the way the sign
25 appears today?

[Page 78]

1 **A. Yes.**
2 Q. And if you turn to the next page.
3 **A. (The witness turns to the requested**
4 **page).**
5 Q. This is a different sign. It's kind
6 of rounded at the top. And is that the way -- is
7 that the pylon sign they're talking about?
8 **A. Yes.**
9 Q. Okay. And that's the way that appears
10 today as well?
11 **A. I believe so, yes.**
12 Q. Okay. Did you eventually approve this
13 expenditure, by the way?
14 **A. (No response).**
15 Q. I won't make a guessing game out of
16 that. If you look at 3098.
17 **A. (The witness turns to the requested**
18 **page). I can't read this. A vendor -- a vendor**
19 **cannot be paid if we don't approve an expenditure.**
20 **In our system, they cannot be paid. This was clearly**
21 **not the vendor's fault.**
22 Q. Okay. But you did sign this?
23 **A. I can't read what this says. That's**
24 **my signature.**
25 Q. Okay. Here. Look under product

[Page 79]

1 description, to replace existing Sportsman's
2 Warehouse signage with Sportsman's Center signage.
3 Do you see that?
4 **A. Yes.**
5 Q. So does that help you recognize --
6 this isn't a great copy, but does that help you
7 recognize that eventually there is a sign-off on
8 that?
9 **A. Yes, well after the fact.**
10 Q. Has that sign been changed back?
11 **A. No.**
12 Q. There was some talk about changing it
13 back, was there not?
14 **A. Yes.**
15 Q. And why did you decide not to change
16 it back? Cost too much?
17 **A. I asked -- I asked our people to have**
18 **the sign vendor immediately replace the sign with the**
19 **one that was taken down.**
20 **The vendor for some reason had either**
21 **damaged or destroyed the sign that they took down.**
22 **They came back to me with a very significant CER**
23 **request to replace it, and we just have not replaced**
24 **it.**
25 Q. Okay. 50 or 60 thousand dollars,

[Page 80]

1 something like that?
2 **A. It was -- it was a significant amount.**
3 **I don't recall the number.**
4 Q. Okay. So that was -- that was more
5 than you were willing to spend at that time, true?
6 **A. Yes.**
7 **MR. ALLGEYER: Okay.**
8 **(Hagale Exhibit 16 was marked for**
9 **identification by the court**
10 **reporter and was shown to the**
11 **witness).**
12 **THE REPORTER: I've marked Exhibit 16.**
13 **MR. ALLGEYER:**
14 Q. Exhibit 16 is a document that was
15 produced to us, and I'm really just trying to
16 understand what it is.
17 It references request number 12, which
18 appears to be a document request we made. And at the
19 top it says, "Bass Pro retail locations, formerly
20 known as Sportsman's Warehouse, advertising and
21 promotional expenses."
22 First of all, did you have anything to do
23 with preparing this document?
24 **A. No.**
25 Q. Okay. Do you know who from your

[Page 81]

1 organization would have?
2 **A. No, I don't.**
3 Q. As you look at this, does this appear
4 to be the advertising and promotional expenses for
5 the stores referenced? Is that in the ballpark or is
6 that --
7 **A. I don't know.**
8 **MR. ALLGEYER: Okay. I may be able to save**
9 **us some time if we could go off the record for a**
10 **second.**
11 **(Proceedings go off the record from**
12 **11:44 a.m. to 11:45 a.m.).**
13 **MR. ALLGEYER:**
14 Q. As I think you know, there is a
15 trademark cancellation proceeding which brings us
16 together today.
17 Did you initiate that proceeding or was
18 that something you had to sign off on?
19 **A. Yes.**
20 Q. Okay. And did anyone else in the
21 company sign off on it?
22 **A. No.**
23 Q. And without telling me what your
24 lawyer said, were there any events that gave rise to
25 your decision to start that proceeding?

[Page 82]

1 **A. Only through -- only through**
2 **conversation and guidance from counsel.**
3 Q. Okay. Did you ever have any direction
4 that you made to anyone, either to your store
5 managers or to anyone else at Bass Pro, to keep track
6 of confusion or what they deemed to be confusion
7 between the Bass Pro Sportsman's Warehouse and
8 Sportsman's Warehouse?
9 **A. I don't recall telling them to keep**
10 **any specific document -- documentation with regard to**
11 **the confusion. I was concerned about it when I was**
12 **made aware of it and asked them to give our counsel**
13 **examples.**
14 Q. Okay. Did you ever have anyone give
15 you examples of that?
16 **A. I did see some of it early on.**
17 Q. Okay. And these were written
18 communications?
19 **A. There were some -- there were some ads**
20 **-- well, I don't recall exactly what they were.**
21 **There were some ads. There were some coupons, I**
22 **believe. But not written documentation from other**
23 **people.**
24 Q. Oh, so these might have been things
25 they collected at the stores or something?

[Page 83]

1 **A. They created -- right.**
2 Q. Okay. Does your -- does Bass Pro
3 typically take competitor coupons at its stores?
4 **A. We have a low price guarantee.**
5 Q. Okay. So if for example then I had a
6 Sportsman's Warehouse coupon and I were going to buy
7 some Remington shotgun shells, let's say.
8 And if I were to bring that coupon in to my
9 local Bass Pro store and it had an advertised price
10 that was lower than Bass Pro's price, you would take
11 the coupon and honor the price?
12 **A. Yes.**
13 Q. So how does the presence of a
14 competitor coupon, Sportsman's Warehouse or anybody
15 else's, indicate any confusion to you?
16 **A. We spend considerable amounts of money**
17 **in all of our various forms of marketing for our**
18 **brands. Not -- we're not -- our intent is not to**
19 **market for a competitor.**
20 Q. Okay. But if someone brings in a --
21 say a Sportsman's Warehouse coupon to a Bass Pro
22 Sportsman's Warehouse, how can you tell whether that
23 person was confused or whether they simply said,
24 "Hey, I can get a better deal. You know, because
25 Sportsman's Warehouse has a better price, I'll get

[Page 84]

1 that price at Bass Pro"?
2 **A. It's my understanding that customers**
3 **were coming in specifically saying that they had our**
4 **ad or that they had our coupon, which to me is a**
5 **clear indication of confusion in the mind of the**
6 **customer.**
7 Q. Okay. This would be based on what the
8 people at the stores told you?
9 **A. Yes.**
10 Q. Okay. But you'll agree with me that
11 simply the fact that you had, for example, a
12 Sportsman's Warehouse coupon at your store could
13 indicate that the customer just wanted to take
14 advantage of your low price guarantee?
15 **A. Well, that's an assumption. I mean**
16 **that is not what was being indicated by the people on**
17 **the floor of the store.**
18 Q. Okay. But absent that indication, the
19 mere presence of the coupon could mean the person
20 just wanted a lower price, could mean something else,
21 true?
22 **A. I don't know.**
23 Q. Well, let's say that you've got a
24 Gander Mountain coupon, for example, and the price
25 was lower than Bass Pro, that wouldn't indicate that

[Page 85]

1 people were confusing Bass Pro with Gander Mountain,
2 would it?
3 **A. No.**
4 Q. Are there any policies or procedures
5 in effect at Bass Pro for what to do when a customer
6 comes in and exhibits some unclarity, whether they
7 are at Sportsman's Warehouse or at Bass Pro? Is
8 there some procedure that store managers are trained
9 to follow?
10 **A. I don't know.**
11 Q. Who would know that?
12 **A. Maybe one of our regional store**
13 **managers, if there is a procedure of that kind.**
14 Q. Okay. Did you review any documents in
15 preparation for your deposition today?
16 **A. No.**
17 Q. Did you talk to anybody apart from
18 your counsel in getting ready for your deposition
19 today?
20 **A. No.**
21 **MR. ALLGEYER: Okay. If you'll just give**
22 **me about two minutes, I think I'll just about be**
23 **done.**
24 **(A recess was taken from 11:51 a.m.**
25 **to 11:52 a.m.).**

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1 **MR. ALLGEYER: Okay. Those are all the**
2 **questions I have.**
3 **MR. CAMPBELL: And we'll read and sign,**
4 **please.**
5 **(The deposition was concluded at**
6 **11:52 p.m.).**
7
8 [SIGNATURE RESERVED]
9 * * * * *
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[Page 87]

1
2
3 CERTIFICATE OF REPORTER
4
5 I, Karen S. Rogers, Registered Professional
6 Reporter, Certified Realtime Reporter, and Notary
7 Public within and for the State of Missouri, do
8 hereby certify that the witness whose testimony
9 appears in the foregoing deposition was duly sworn by
10 me, that the testimony of said witness was preserved
11 via machine shorthand by me to the best of my ability
12 and was thereafter reduced to written form under my
13 direction; that I am neither counsel for, related to,
14 nor employed by any of the parties to the action in
which this deposition was taken; and further that I
15 am not a relative or employee of any attorney or
16 counsel employed by the parties thereto, nor
17 financially or otherwise interested in the outcome of
the action.
18
19
20 Karen S. Rogers, RPR, CRR, CCR,
21 and Notary Public within and for
22 the State of Missouri
23
24
25

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENT AND TRADEMARKS
Washington, D.C. 20231

MAR. 25, 1996

NOTICE OF ABANDONMENT

William B. Kircher
KOKJER, KIRCHER, BOWMAN & JOHNSON, P.C.
2414 Commerce Tower, 911 Main
Kansas City, MO 64105-2088

TM101
ATTORNEY
REFERENCE NUMBER:
BASPR380WBK

SERIAL NUMBER: 74/619167
MARK: THE SPORTSMAN'S WAREHOUSE
APPLICANT: BASS PRO TRADEMARKS, L.P.

THE ABOVE IDENTIFIED TRADEMARK APPLICATION WAS ABANDONED ON 01/26/1996 FOR THE FOLLOWING REASON:

AN OFFICE ACTION WAS MAILED ON 07/25/1995. NO RESPONSE WAS RECEIVED BY THE PATENT AND TRADEMARK OFFICE WITHIN THE STATUTORY SIX-MONTH PERIOD. (TRADEMARK RULE 2.65(a)). AN APPLICATION ABANDONED FOR FAILURE TO RESPOND MAY BE REVIVED AS A PENDING APPLICATION IF IT IS SHOWN TO THE SATISFACTION OF THE COMMISSIONER THAT THE DELAY WAS UNAVOIDABLE. A PETITION TO REVIVE MUST BE ACCOMPANIED BY THE REQUIRED FEE, A SHOWING OF THE CAUSE OF THE DELAY ACCOMPANIED BY AN AFFIDAVIT OR RULE 2.20 DECLARATION, AND A PROPOSED RESPONSE, UNLESS THE SAME HAS BEEN FILED PREVIOUSLY. (TRADEMARK RULE 2.66).

EXHIBIT
HAGALE 6
6-7-06 KR

APR 01 1996

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Mark: THE SPORTSMAN'S WAREHOUSE

Class No.:

TO THE COMMISSIONER OF PATENTS AND TRADEMARKS:

BASS PRO TRADEMARKS, L.P., a limited partnership duly organized and existing under the laws of the State of Missouri and having its principal office and place of business at 1935 South Campbell, Springfield, Missouri, requests registration of the above-identified trademark shown in the accompanying drawing in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 for the following goods:

SERVICES, NAMELY, THE RETAIL SALE OF
CLOTHING, FISHING SUPPLIES AND SPORTING GOODS

Applicant has a bona fide intention to use the mark in commerce on or in connection with the above-identified goods by applying it to the goods, labels and in other manners customary to the trade.

Applicant hereby appoints Carter H. Kokjer; William B. Kircher; Joseph B. Bowman; Richard R. Johnson; Taylor J. Ross; Penny R. Slicer; Devon A. Rolf; and Dean D. Small, all members of the Bar of the State of Missouri, the mailing address for each of which is:

KOKJER, KIRCHER, BOWMAN & JOHNSON, P.C.
2414 Commerce Tower, 911 Main
Kansas City, Missouri 64105-2088

telephone number (816) 474-5300 and facsimile number (816) 474-5304, its attorneys with full power of substitution and revocation to prosecute this application, to transact all business in the Patent and Trademark Office in connection therewith and to receive the Certificate of Registration.

A F F I D A V I T

STATE OF MISSOURI :
: ss
COUNTY OF GREENE :

Susie Henry, states that she is Vice President of applicant corporation and is authorized to execute this instrument on behalf of said corporation; she believes said corporation to be the owner of the mark sought to be registered; to the best of her knowledge and belief, no other person, firm, corporation or association has the right to use said mark in commerce, either in the identical form or in such near resemblance thereto as to be likely, when applied to the goods or services of such other person, to cause mistake, to cause confusion or to deceive; and the facts set forth in this application are true.

BASS PRO TRADEMARKS, L.P., a Missouri Limited Partnership

Susie Henry
Susie Henry
Vice President of BassGec Management Company, Its General Partner

Subscribed and sworn to before me this 28th day of December, 1994.

S E A L

Marcene Fredrick
Notary Public

Marcene Fredrick Notary Public
Greene County State of Missouri
My Commission Expires Mar. 25, 1997

My Commission Expires: 3-25-97

CONFIDENTIAL
BPS-000954

Applicant:	Bass Pro Trademarks, L.P.
Address:	1935 South Campbell, Springfield, Missouri, County of Greene
Services:	Services, Namely, the Retail Sale of Clothing, Fishing Supplies and Sporting Goods

THE SPORTSMAN'S WAREHOUSE

William B. Kircher
KOKJER, KIRCHER, BOWMAN & JOHNSON, P.C.
2414 Commerce Tower, 911 Main
Kansas City, MO 64105-2088

01

MAILING DATE

07/25/95

REF. NO.

BASPR3S0WBK

FORM PTO-1525 (5-90)

U.S. DEPT. OF COMM. PAT. & TM OFFICE

TRADEMARK LAW OFFICE 14
Serial Number: 74/619167
Mark: THE SPORTSMAN'S WAREHOUSE
Please Place on Upper Right Corner
**of Response to Office Action ONLY **

CONFIDENTIAL
BPS-000956

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office

SERIAL NO.	APPLICANT	PAPER NO.
74/619167	SASS PRO TRADEMARKS, L.P.	
MARK		ADDRESS: ASSISTANT COMMISSIONER FOR TRADEMARKS 2900 Crystal Drive Arlington, Virginia 22202-3513
THE SPORTSMAN'S WAREHOUSE		
ADDRESS	**ACTION NO.**	
William B. Kircher WALTER, STEPHEN, DUNCAN & TRUMBOW, P.C.	01	If no fees are enclosed, the address should include the words "Box 5."
		Please provide in all correspondence: 1. Filing Date, serial number, mark and Applicant's name. 2. Mailing date of this Office action. 3. Examining Attorney's name and Law Office number. 4. Your telephone number and ZIP code.

A PROPER RESPONSE TO THIS OFFICE ACTION MUST BE RECEIVED WITHIN 6 MONTHS FROM THE DATE OF THIS ACTION IN ORDER TO AVOID *ABANDONMENT.* *For your convenience and to ensure proper handling of your response, a label has been enclosed. Please attach it to the upper right corner of your response. If the label is not enclosed, print or type the Trademark Law Office No., Serial No., and Mark in the upper right corner of your response.*

RE: Serial Number 74/619167 Response due 1/25/96 TB

The assigned examining attorney has reviewed the referenced application and determined the following.

The examining attorney refuses registration on the Principal Register because the proposed mark merely describes the services. Trademark Act Section 2(e)(1), 15 U.S.C. Section 1052(e)(1); TMEP section 1209 *et seq.*

A mark is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. 1052(e)(1), if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *In re MetPath Inc.*, 223 USPQ 88 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); TMEP section 1209.01(b).

It is not necessary that a term describe all of the purposes, functions, characteristics or features of the services to be merely descriptive. It is enough if the term describes one attribute of the services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

The applicant's mark is THE SPORTSMAN'S WAREHOUSE. The applicant's services are "retail sale of clothing, fishing supplies and sporting goods." The mark is descriptive because it states a feature of the services, the fact that it is a warehouse that contains goods for sportsman. Therefore, registration is refused under Section 2(e)(1) of the Trademark Act.

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

If the applicant chooses to respond to the refusal to register, the applicant must also respond to the following informalities.

The applicant must specify the names and the national citizenship or the state or country of their organization or incorporation of the general partners. 37 C.F.R. Section 2.33(a)(1)(ii); TMEP sections 802.03(b) and 802.04.

The recitation of services is unacceptable as indefinite. The applicant may adopt the following recitation, if accurate: Retail outlets featuring clothing, fishing supplies and sporting goods, in class 42. TMEP section 1301.05.

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. Section 2.71(b); TMEP section 804.09. Therefore, the applicant may not amend to include any services that are not within the scope of the services recited in the present identification.

The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). TMEP section 1105.01.

Darlene D. Bullock
Trademark Attorney
Law Office 14
(703) 308-9114 ext. 143

DDB

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JUL 31 1995

KOKJER, KIRCHNER,
BOWMAN & JOHNSON, P.C.
2414 COMMERCE TOWER
911 MAIN STREET
KANSAS CITY, MO 64105-2073

FILING RECEIPT FOR TRADEMARK APPLICATION

Receipt in the DATE OF FILING of the application for registration and filing fees is acknowledged for the mark identified below. The DATE OF FILING is contingent upon the collection of any payment made by check or draft. Your application will be considered in the order in which it was received and you will be notified as to the examination thereof. Correspondence should be expected from the Patent and Trademark Office in approximately [illegible] months. When inquiring about this application, include the SERIAL NUMBER, DATE OF FILING, OWNER NAME and MARK.

IMPRE

William B. Kircher
KOKJER, KIRCHER, BOWMAN & JOHNSON, P.C.
2414 Commerce Tower, 911 Main
Kansas City, MO 64105-2088

ATTORNEY REFERENCE NUMBER
BASPR380WBK

PLEASE REVIEW THE ACCURACY OF THE FILING RECEIPT DATA.
A request for correction of any information on this filing receipt should be submitted within 30 days to the following address: ASSISTANT COMMISSIONER FOR TRADEMARKS, 2900 Crystal Drive, Arlington, Va. 22202-3513. The correspondence should be marked to the attention of the Office of Program Control. The Patent and Trademark Office will review the request and make corrections when appropriate.

SERIAL NUMBER: 74/619167 **DATE OF FILING:** 01/09/1995
MARK: THE SPORTSMAN'S WAREHOUSE
MARK TYPE(S): SERVICE MARK
DRAWING TYPE: WORDS, LETTERS, OR NUMBERS IN TYPED FORM
SECTION 1(A): NO **SECTION 1(B):** YES **SECTION 44:** NO

ATTORNEY: William B. Kircher
OWNER NAME: BASS PRO TRADEMARKS, L.P.
OWNER ADDRESS: 1935 South Campbell
Springfield
MISSOURI 17522
ENTITY: LIMITED PARTNERSHIP
CITIZENSHIP/DOMICILE: MISSOURI

INTERNATIONAL CLASS	DATE OF FIRST USE	DATE OF FIRST USE IN COMMERCE

ONLY THOSE DATES OF USE AND CLASSES FILED UNDER SECTION 1(A) ARE LISTED

GOODS/SERVICES BY INTERNATIONAL CLASS

042-the retail sale of clothing, fishing supplies and sporting goods

ALL OF THE GOODS/SERVICES IN EACH CLASS ARE LISTED

ADDITIONAL INFORMATION MAY BE PRESENT IN THE PTO RECORDS

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APR 26 1995

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DEAN O. SMALL
* ALSO ADMITTED IN KANSAS

CABLE: PATMARK
TELEX: 47-7209
TELECOPIER: 474-5304

January 9, 1995

Asst. Commissioner for Trademarks
Box New App Fee
2900 Crystal Drive
Arlington, VA 22202-3513

Dear Sir:

Enclosed is the complete application for service mark registration of Bass Pro Trademarks, L.P. for the mark THE SPORTSMAN'S WAREHOUSE together with the registration fee of $245.00 per class in the form of a check from the attorney in the case.

The Commissioner is authorized to charge any additional fee which may be required, or credit any overpayment, to Deposit Account No. 12-2245. A duplicate copy of this letter is enclosed.

Please forward the filing receipt to this office at your earliest convenience.

Very truly yours,

KOKJER, KIRCHER, BOWMAN & JOHNSON

By William B. Kircher

William B. Kircher

WBK:klh

Enc.

(Our Docket No. BASPR380WBK)

I hereby certify that this correspondence is being deposited in the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated below and is addressed to the Asst. Comm. of Trademarks, Box New App Fee, 2900 Crystal Dr., Arlington, VA 22202-3513.

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BASS PRO TMS LP
THE SPORTSMAN'S WAREHOUSE
BASPR 380 WBK
1/9/95

Hon. Commissioner of Patents
Sir:

Please acknowledge receipt of this paper by stamping the date received in the space indicated and returning this card to the addressee. Also, if applicable, please enter serial number.

Respectfully,

KOKJER, KIRCHER, BOWMAN & JOHNSON, P.C.

Complete Application	☑
Amendment	☐
Assignment	☐
~~Issue~~ Fee & Drawings	☑
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- Apparel
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- Gift / Home / Golf
- Clearance
- Gift Cards
- Tracker Boats

Customer Service

- Find Answers or Contact Us
- International Orders

Community

- E-mail Newsletter
- Enter Email Addr go
- Your Account
- Talk Forums
- Outdoor Library

From Bass Pro

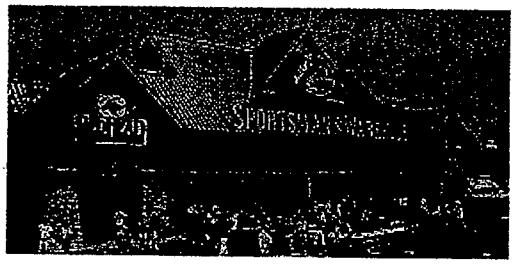
- News Releases
- Rewards Points
- Corporate Incentives
- Career Opportunities
- Outdoor World TV
- Hunting/Fishing Licenses
- Become an Affiliate

Destinations

- Outdoor Wilderness Adventures

Outdoor World Retail Stores

MO - St. Charles (St. Louis)



For the best in hunting and fishing gear, shop Bass Pro, your St. Louis sporting goods store. The Bass Pro Shops retail store is a leader among Missouri fishing and hunting outfitters, offering daily outdoor skill workshops, shooting and archery ranges, weekend activities for children, and aquarium. Whether you need gear for hunting in Missouri, or want to learn how to be a better hunter or angler, shop Bass Pro today.
See Our Photo Gallery

Store Hours

Open 364 Days a Year!

Regular Store Hours
Monday - Saturday 9:00 AM - 10:00 PM

Sunday 10:00 AM - 7:00 PM

View a current circular for this location:
Memorial Day Sales Event - Ends 5/31

St. Charles, Missouri (St. Lc

Sportsmans Warehouse
1365 South 5th Street
St. Charles, MO 63301
Phone: 636-688-2500

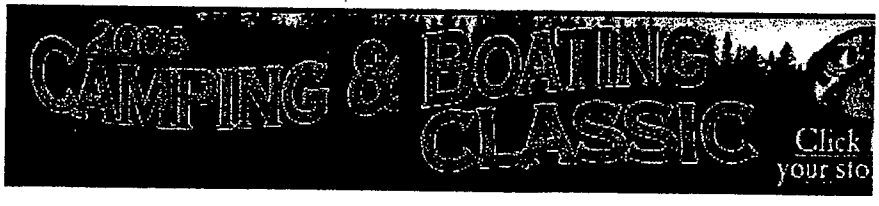
Manager: Robert Brownlee
E-mail: Manager_St.Charles_MO@bas

GPS Coordinates:
38 46.397'2N, 90 29.868'2W (WGS84/N

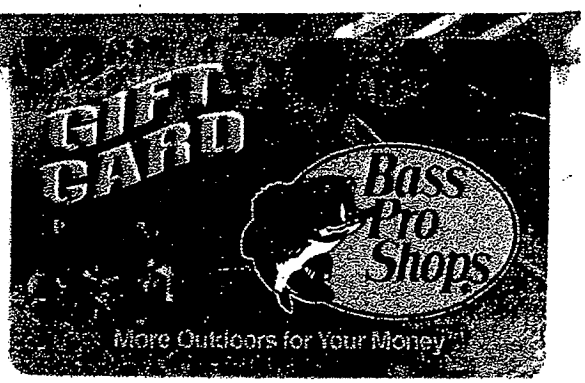
- Directional Map
- Store Events
- Outdoor Skills Workshops
- Store Image Gallery
- Career Opportunities

TRACKER BOAT CENTER
Manager: Darren Egan
Email: Boat Sales
Website: http://stcharles.trackerboat

EXHIBIT
HAGALE 7
6-7-06 KR



First Fish Award Bass Pro Shops Kid Anglers Wall
Click here to read more ...



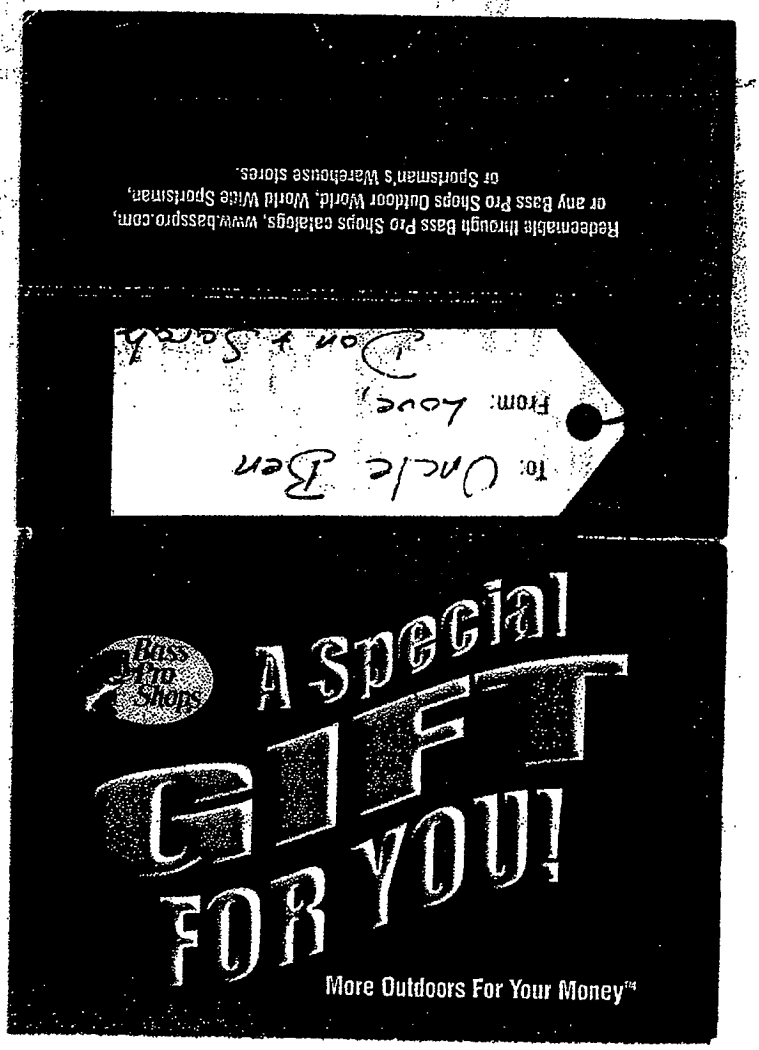


EXHIBIT
HAGALE 8
07-06 KR

PROTECT THIS CARD LIKE CASH

[redacted]

CARD # 6006491265068089347

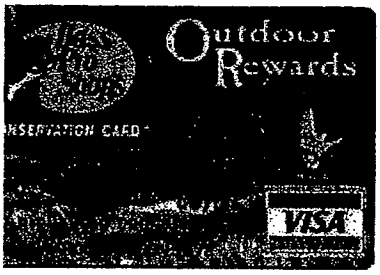
To check your balance, see any cashier or call:
1-800-494-1100

The balance on this card is redeemable for merchandise only at any Bass Pro Shops® Outdoor World®, Bass Pro Sportsman's Warehouse®, or World Wide Sportsman™ stores, through Outdoor World Incentives™, or Bass Pro Shops® catalogs, or via the Internet (basspro.com). The balance may not be redeemed or exchanged for cash, check or credit (unless required by law) or applied as payment against any credit account. AFTER 2 YEARS OF NON-USE THE ENTIRE BALANCE IS VOID (except where prohibited by law). Neither this card nor the balance can be used if this card is lost or stolen. The issuer/merchant is BPS L.L.C. All rights reserved.

PIN # [redacted]

Use of this card constitutes acceptance of these terms and conditions.

BPS 187P



Earn Outdoor Rewards Points

EXHIBIT
9

Earning and redeeming for FREE§§ GEAR has never been easier!

4% on every net retail purchase of Bass Pro Shops branded merchandise.

2% on net retail purchases made in Bass Pro Shops retail stores, catalogs or at basspro.com.

1% on net retail purchases at over 22 million places your card is accepted.

Use your points for Free§§ gear in Bass Pro Shops stores, the Bass Pro Shops catalog center by calling 1-800-BASSPRO, or on the internet at basspro.com

FREE§
$25
Gift Card

after qualifying use(s) o your new account§

Help Conservation Efforts - With each card purchase, Bass Pro Shops and the National Fish and Wildlife Foundation will make a contribution t help conservation efforts, with a guaranteed yearly contribution as high a $1.5 million, at no additional cost to you.

ee below for rate, fee, and other cost information, including fees applied to transactions such as balance transfers, and a description the Introductory APR could end before the expiration date. All terms, including the APRs and fees, are subject to change.

SECURE SSL TRANSACTION

This is a secure online credit card application. We take great care to protect the information you supply on this site b encrypting it. If you'd rather apply by phone, just call 1-800-932-2775. TTY users, call 1-800-833-6262. (Please mention priority code L75N.)

Before completing this application you should be able to answer "Yes" to the following questions:

Do you have a Total Household Income of $15,000 or greater? (not applicable to students)‡ ◯ Yes ◯ No

Is your credit history clear of bankruptcies and seriously delinquent accounts? ◯ Yes ◯ No

ONLINE CREDIT CARD APPLICATION

FEDERAL LAW REQUIRES US TO COLLECT AND VERIFY YOUR NAME, PHYSICAL ADDRESS, SOCIAL SECURITY NUMBER, AND DATE OF BIRTH.

Name
As you would like it to appear on the card. First _____ M.I. ____ Last _____

Date of Birth
You must be at least 18 years of age and either a United States citizen or a permanent resident of the U.S., or at least 21 years of age and a permanent resident of Puerto Rico.

/ / *MM/DD/YYYY*

Social Security Number - -

Street Address
No P.O. Boxes. We are required to obtain your physical street address.

City State select ZIP -

Housing Status select Years There

Housing Payment
Please use numeric characters only. Omit dollar signs, commas, and decimal points.
$ .00 *per month*

Home Phone - -

Mother's Maiden Name
Or other security code word.

Are you a U.S. citizen or Permanent Resident? Yes No

E-mail Address

We'll use your address to communicate with you about your application and/or account. See our privacy policy for additional information.

Yes, keep me informed via e-mail about special marketing offers from MBNA.

EMPLOYMENT INFORMATION

Students, please skip this section. Your employment information will be captured in the Student Information section below.

Occupation select

Employer

Position Years There

Work Phone
or alternate number (e.g., cell phone) - -

Your Income
Please use numeric characters only. Omit dollar signs, commas, and decimal points.
$ .00 *per* Year

Other Income ‡ $ .00 *per* Year

Total Household Income ‡ $ .00 *per* Year

Source of Other Income ‡

‡ Alimony, child support, or separate maintenance income need not be revealed if you do not wish it considered as a basis for repayment.

Previous Employer
If at your current job less than 3 years.

Years There

STUDENT INFORMATION

Please complete this section if you are currently a student and ensure that all fields in the Employment Information section above are left blank.

Student Status ○ Full ○ Part ○ Recent Graduate ○ Not a student

School Name Class select

Major Graduation Year

Campus Telephone - -

Permanent Home Address

City State select ZIP

Source of Personal Income ‡ ☐ Part-time Job ☐ Full-time Job ☐ Other

‡ Alimony, child support, or separate maintenance income need not be revealed if you do not wish it considered as a basis for repayment.

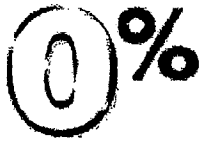
Total Personal Income $ .00 *per* Year
Please use numeric characters only. Omit dollar signs, commas, and decimal points.

Employer
(If applicable)

Position

Employment Status select

OPTIONAL BALANCE TRANSFER REQUEST



INTRO APR†

On Balance Transfers through your first twelve billing cycles.* This Introductory APR applies only to balance transfers and cash advance checks, and may end sooner if your payment is late. (Please note that payments are applied first to balances with the lowest APR and balance transfers and cash advance checks are subject to a 3% transaction fee, no less than $10).

*Please list balance transfer requests in order of priority. Please review important information about transferring balances.**

Please use numeric characters only. Omit dollar signs, commas, and decimal points.

	Amount	Make check payable to:	Account #
1)	$ .00		
2)	$ .00		
3)	$ .00		

ADDITIONAL CARD FOR AUTHORIZED USER

Name **Relationship to Applicant**

DETAILS OF RATE, FEE, AND OTHER COST INFORMATION

As required by law, rates, fees, and other costs of this credit card offer are disclosed here. All account terms are governed by the Credit Card Agreement sent with the card. Account and Agreement terms are not guaranteed for any period of time; all terms, including the APRs and fees, may change in accordance with the Agreement

terms, including the APRs and fees, may change in accordance with the Agreement and applicable law. We may change them based on information in your credit report, market conditions, business strategies, or for any reason.

Annual fee	None.
Annual Percentage Rate (APR) for Purchases	Standard APR: **7.9%** for Platinum Plus accounts, or **13.99%** for Preferred accounts. The account you receive is determined based on your creditworthiness. See explanation below for Default APR[1]
†Other APRs	Cash Advances: **0%** Introductory APR for Balance Transfers and Cash Advance Checks through your first twelve statement Closing Dates; after that the Standard APR is **7.9%** for Platinum Plus accounts, or **13.99%** for Preferred accounts. The Introductory APR may end sooner if your payment is late. See [1] and [2] below for explanation. The Standard APR for Bank and ATM Cash Advances is **19.99%** for both Platinum Plus and Preferred accounts. Default APR: Up to **19.99%** for all Purchase and Cash Advance balances if late or overlimit for both Platinum Plus and Preferred accounts. See [1] below for explanation.
Grace period for repayment of balance for Purchases	At least 20 days from the statement Closing Date (provided you fully paid your New Balance Total from the previous statement by its Payment Due Date). See ■ below for explanation.
Method of computing the balance for Purchases	Average Daily Balance (including new transactions).
	Transaction fee for Balance Transfers and Cash Advance Checks: 3% of each such cash advance (minimum $10).

Transaction fees for cash advances and fees for paying late or exceeding the credit limit	Transaction fee for Bank and ATM Cash Advances: 3% of each such cash advance (minimum $10). See [3] below for explanation. Late-payment fee: Based on your balance on the late fee posting date - $15 if $100 or less; $29 if between $100.01 and $250; $39 if over $250. Over-the-credit-limit fee: Based on your balance as of the day the fee is assessed - $15 if $500 or less; $29 if between $500.01 and $1000; $39 if over $1000.
Transaction fee for Purchases	Transaction fee for the purchase of wire transfers, person-to-person money transfers, bets, lottery tickets, casino gaming chips; money orders, foreign currency and travelers checks from a non-financial institution: 3% of each such purchase (minimum $10).
Foreign Transactions	Transaction fee for any transaction made outside of the United States or in a foreign currency: 3% of the U.S. Dollar amount of each such transaction. This fee will be in addition to any other applicable fee.

[1]Each time your minimum payment is late (i.e., not received by 2 p.m., ET, on its Payment Due Date), or the account balance is over-the-credit-limit, we may increase each of your account's Standard APRs up to the Default APR. The Default APR will be applied to all new and outstanding balances.

If your account has balances with different APRs, payments are applied to the balance with the lowest APR before any payments are applied to balances with higher APRs. This means that balances with higher APRs are not reduced until balances with lower APRs are paid off.

[2] The Introductory APR is effective upon the opening of your account and does not apply to Purchases, or to Bank and ATM Cash Advances. When the introductory APR expires, the Standard (non-introductory) APR for your account is applied to new and outstanding balances (consisting of Balance Transfers and Cash Advance Checks). If your payment is late, either the Standard APR or the Default APR may be applied to those balances as of the first day of the billing cycle in which the payment was late or not received. We reserve the right to change the Standard APRs and the Default APR on your account. REMINDER: To preserve the grace period for new purchases, pay your New Balance Total in full and on time. The 0% APR does not apply to purchases.

■The number of days between your statement Closing Date and your Payment Due Date (the grace period) may vary from one Billing Cycle to another.

[3] We include Transaction Fees when computing finance charges. Incurring Fees results in an APR exceeding 0% for the billing statement on which Fees appear. The Daily Periodic Rate (DPR) will remain 0% as disclosed

Periodic Rate (DPR) will remain 0% as disclosed.

AGREEMENT

I have read the terms and terms and pricing disclosures for this account and by electronically transmitting this application, I indicate my agreement with each of the terms and conditions. I understand that I will be bound by each of the terms of the Credit Card Agreement, including arbitration.

I have read this application, and everything I have stated is true. I am at least 18 years of age and either a United States citizen or a permanent resident of the U.S., or I am at least 21 years of age and a permanent resident of Puerto Rico. I authorize MBNA America Bank, N.A. ("MBNA") to review my credit and employment histories and any other information in order to approve or decline this application, service my account and manage its relationship with me. I consent to MBNA's sharing of information about me and my account with the organization, if any, endorsing this credit card program. I authorize MBNA to share with others, to the extent permitted by law, such information and its credit experience with me. In addition, I may as a Customer later indicate a preference to exempt my account from some of the information-sharing with other companies ("opt-out"). If I accept or use an account, I do so subject to the terms of this application, the "Details of Rate, Fee, and Other Cost Information," and the Credit Card Agreement as it may be amended; I also agree to pay all charges incurred under such terms. **I understand that based on my creditworthiness my application may be approved for a Preferred account. The APRs and benefits for Preferred accounts differ from Platinum accounts.** Counteroffers may be fulfilled by one of our affiliates. I accept that on a periodic basis an account may be considered for automatic upgrade at MBNA's discretion. I consent to and authorize MBNA, any of its affiliates, or marketing associates to monitor and/or record any of my phone conversations with their representatives. MBNA may consider this application a duplicate if another MBNA credit application has been received from me within the past 90 days. The MBNA Privacy Notice is available online and accompanies the credit card.

This is a secure online credit card application. We take great care to protect the information you supply on this site by encrypting it.

Terms of Site | Privacy | Disclosures

SUBMIT MY APPLICATION

The information contained in this advertisement was accurate as of 5/1/2006. The information may have changed after that date. To find out what may have changed you may contact **MBNA America Bank, N.A.,** for specific information by calling 1-800-932-2775 or by writing to P.O. Box 15020, Wilmington, DE 19850. TTY users, please call 1-800-833-6262.

§ To qualify for this offer your new account must be used to make any combination of purchase or cash advance transactions (including balance transfers) totaling at least $25 (exclusive of transaction fees which may apply). Limit one (1) item per new account. Allow 8-12 weeks for delivery after qualifying. Offer sponsored by MBNA; we may substitute an item of equal or greater value and we are not responsible for any lost, stolen, or undeliverable gift card.

§§ Use a Bass Pro Shops® Outdoor Rewards Platinum Plus® or Preferred Visa® credit card to make new retail purchases (purchases less credits, returns, and adjustments) ("Net Purchase(s)") and earn points redeemable for awards. There are three earning rates for points. Earn four percent (4%) for every one (1) dollar (USD1.00) of Net Purchases (exclusive of tax and shipping charges) consisting of Bass Pro Shops branded merchandise (e.g., Bass Pro Shops, RedHead ®, Offshore Angler®, etc.) (collectively referred to as "Bass Pro Shops Merchandise") purchased at any Bass Pro Shops Outdoor World®, Sportsman's Warehouse® or World Wide Sportsman™ retail stores; Bass Pro Shops catalog call center or through basspro.com, the online catalog (collectively referred to as "Bass Pro Shops Retail Locations"). The rate for the preceding category of Net Purchases is the same as the double point earnings described in the Outdoor Rewards rules. Earn two percent (2%) for every one (1) dollar (USD1.00) of Net Purchases (exclusive of tax and shipping charges) consisting of qualified non-Bass Pro Shops Merchandise purchased at any Bass Pro Shops Retail Location(s). Earn one percent (1%) for every one (1) dollar (USD1.00) of Net Purchases (including tax and shipping charges) made anywhere else the credit card is accepted. Cash advances, purchases of money orders or other cash equivalents, and other fraudulent or unauthorized transactions do not earn points. Point earnings are rounded to the nearest whole point. Exceptions to the 4%and 2% earning rates include, but are not limited to, purchases made from any vendor operating within Bass Pro Shops Retail Location(s); taxidermy services; purchases of licenses, food, or beverages; purchases of Tracker® Boats; Mercury Motor RV's and ATV's; and expenses incurred in connection with, or at Big Cedar Lodge. Redemption value of one point is $0.02. Points earned with the credit card will be credited to your Bass Pro Shops Member account. Point earnings are not limited. Minimum redemption level is 500 points (or $10 in rewards). Awards will be issued automatically by catalog operators as well as in-store cashiers. Rewards may be converted to gift cards to use for your stay at Big Cedar Lodge. Points and certificates are NOT redeemable for cash and may not be used to pay any credit card balance. Particpation in the program is subject to the terms published by Bass Pro Shops. Participants release MBNA and all parties affiliated with the program from liability arising from acceptance or use of awards. Other significant terms apply. This program is subject to change and its terms are void where prohibited by law. Complete details accompany new account materials.

***BALANCE TRANSFERS.** Total value of transfer requests cannot exceed your credit line. MBNA sends either full or partial payment to your creditors in the order you list them. Allow at least 2 weeks from account opening for processing. Continue paying each creditor until the transfer appears as a credit. Transfers are processed as cash advances as described in the Credit Card Agreement. Cash advances incur finance charges from the transaction date. Balance Transfers and Cash Advances to which introductory APRs apply are subject to transaction fees in the amount of 3% of the transaction (minimum $10). If your available credit cannot accommodate any transaction, fee and/or finance charge, the account will be subject to over-the-credit-limit costs. Balance transfers and/or cash advances may not be used to pay off or pay down any MBNA account

cash advances may not be used to pay off or pay down any MBNA account.

**Certain restrictions apply to each benefit. Details accompany new account materials. Preferred card benefits differ from Platinum Plus benefits *(i.e.*, coverage amounts vary and some benefits are not available).

MBNA, MBNA America, "The most rewarding card of all," WorldPoints, the WorldPoints design, Bill Pay Choice, Platinum Plus, the MBNA logo, and the tree symbol are service marks of MBNA America Bank, N.A. All other company and product names and logos are the property of others and their use does not imply endorsement of, or an association with the WorldPoints program.

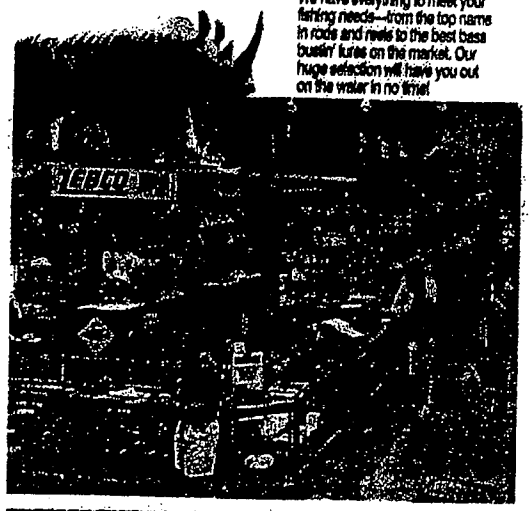
Visa is a registered trademark of Visa International Service Association, and is used by MBNA pursuant to license from Visa U.S.A. Inc.

MBNA America Bank, N.A., is the issuer and administrator of this credit card program.

©2006 MBNA America Bank, N.A.

Welcome to Atlanta's most exciting Sporting goods store.

▼ **Atlanta's largest Fishing Department**
We have everything to meet your fishing needs—from the top name in rods and reels to the best bass busin' lures on the market. Our huge selection will have you out on the water in no time!



Now, under one roof, more fishing tackle, hunting gear, camping equipment, Tracker® and Nitro® boats than ever before! Located in the heart of the South in Atlanta near Lake Lanier on I-85 at Steve Reynolds Blvd.

If you love the outdoors, you'll love our new store! Every department, whether it's men's or ladies' sportswear, footwear or even gifts, has a focus on the outdoors. Exciting displays with incredible wildlife mounts and rustic looking outdoorsmen motifs make Sportsman's Warehouse® a special place you need to experience.

▲ **Bass Tub**
View the freshwater fish that inhabit our 5,500-gal. aquarium, and watch our daily lure demonstrations.

Sportsman's Warehouse®

EXHIBIT
HAGALE 10
6-7-06 KR

Sportsman's Warehouse®

Bass Pro Shops®
Sportsman's Warehouse®
3825 Shackleford Rd. Duluth, GA
(770) 931-1550

We're easy to find!
Store Hours: Mon.–Sat. 9 am–10 pm, Sun. 11 am–7 pm

Let us ship your purchase home for you.
Official Shipper Bass Pro Shops® Sportsman's Warehouse®

Catch it On
Official film of Bass Pro Shops®

We're committed to giving you more: the best selection anywhere; the lowest price every time; and a better outdoor experience overall. We work constantly with conservation agencies and private groups as well, to help ensure the quality of that experience.

recyclable

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BPS-001001

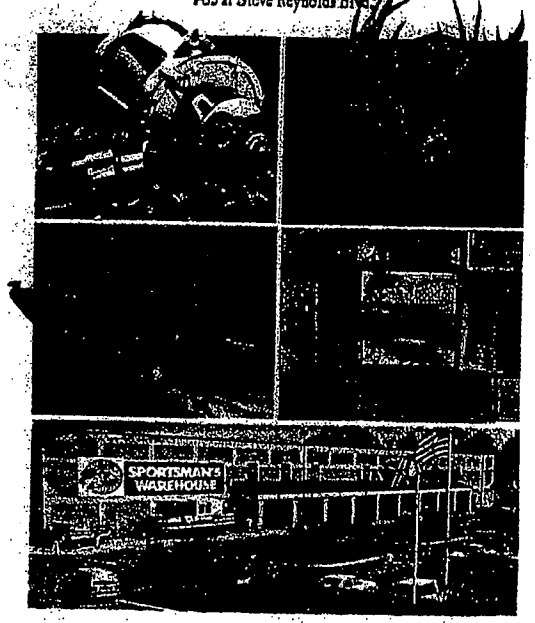
CL9969598

Atlanta's

Sportsman's Warehouse®

The most Outdoors the South has ever seen! Bass Pro Shops®

Duluth, Georgia
I-85 at Steve Reynolds Blvd.



More Outdoors For Your Money!™
3825 Shakleford Rd., Duluth, GA
Mon.–Sat. 9 am–10 pm, Sun. 11 am–7 pm

Bass Pro Shops

2005 FALL

FREE ADMISSION!
FREE PARKING!

HUNTING CLASSIC

DON'T MISS IT!
LOWEST PRICES OF THE YEAR!

Sale Dates: Aug. 6-14 Seminars & Displays: Aug. 12-14 Moonlight Madness: Fri., Aug. 12 5-10pm

THE GREATEST HUNTING SALE & SHOW OF THE YEAR!

VISIT WITH THESE PROS AND OTHERS: AUG. 12-14

Rob Somerville
Aug. 12-14
Bass Pro Shops
Pro Staff

Jack Oliver
Aug. 12-14
Hunter's
Specialties
Pro Staff

AJ Kiihni
Aug. 13 & 14
HunTeen

Ben Weddington
Aug. 13 & 14
HunTeen

For seminar schedules and special store hours log onto: bassprо.com
Pros and pro dates are subject to change.

Big Buck Contest

Showing: Sat. Aug. 6
Awards: Sun. Aug. 7, 3pm
2 categories: Typical and Non-Typical.
1st Place: $500 2nd Place: $250
for each category.
We will provide them with an unofficial score if certification is not available. Pre-register by calling April Henderson at (901) 213-5817 or email alhenderson@bassprо.com.
Visit bassprо.com for more details.

Aug. 13-14

Visit with factory experts!
Kids: Don't miss the Archery and Paintball Ranges!

bassprо.com

Bass Pro Shops® Sportsmen's Warehouse® I-40 at Sycamore View Road, Exit 12
6140 Macon Road, Memphis, TN (901) 213-5800
Hours: Mon-Sat 9am-10pm, Sun 10am-7pm

EXHIBIT
HAGALE 11
6-7-06 KR

Subject: 8/4 Memphis Fall Classic Teasers BP315255
Date: Thursday, July 28, 2005 3:03 PM
From: Cherilyn Knapp <cknapp@basspro.com>
To: <adservices@jacksun.com>

Run date 8/4/05
size: 3.79x7.5

For file info contact Jill Rangel 417-873-5122 or jerangel@basspro.com

Cherilyn Knapp
Production Artist
417-873-5000 ext 6131

BPS-001453

Ad Trans# 1200083

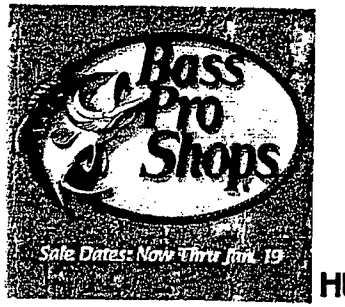
EXHIBIT
HAGALE 12
6-7-06 JCR

BPS-001406

User CKN:Job bp313761:ad-05:Pg 1:75204#/eps at 100%

Wed, Jan 5, 2005 10:08 AM

120474



Hurry In—Limited Quantities!
INCREDIBLE SAVINGS ON OUR STOREWIDE CLEARANCE SALE!

25–50% OFF Reg. Price On Selected

HUNTING | FISHING | MARINE | FOOTWEAR | APPAREL

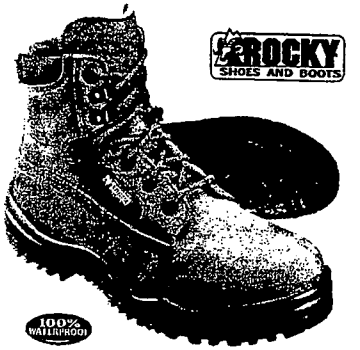
Carhartt

SAVE 41%
$49.88
Orig. 85.00
Carhartt® Sandstone Active Jacket

Wrangler RUGGED WEAR

SAVE 33%
$19.88
Orig. 29.95

Wrangler Hooded Flannel
- 100% cotton yarn-dyed brushed flannel outside
- Quilted nylon lining with polyester insulation inside
- 2 button-flap chest pockets



ROCKY SHOES AND BOOTS

100% WATERPROOF

CLEARANCE!
$79.77
Reg. 109.95

ROCKY® 6" WorkSmart®
- ANSI-approved steel toe for safety
- 100% waterproof construction
- Dual-density polyurethane sole
- Moisture-wicking lining
- Removable foam footbed

STORE PRICING POLICY: Generally, merchandise prices in our stores, catalogs and web sites will be the same. Occasionally, however, due to sales, clearance events or market conditions, prices may vary.

Bass Pro Shops® Sportsman's Warehouse® I-40 at Sycamore View Road, Exit
6140 Macon Road, Memphis, TN (901) 213-5800
Hours: Mon-Sat 9am-10pm, Sun 10am-7

basspro.com
ALWAYS OPEN

BPS-001407

User CKN:Job BP313806:ad-05:Pg 1:75498#/eps at 100%

Mon, Jan 10, 2005 5:04 PM

ADT# 1215688

1/20 Memphis Comm Appeal

MEM - 15

Hurry In—Limited Quantities!
INCREDIBLE SAVINGS ON OUR STOREWIDE CLEARANCE SALE!

25–50% OFF Reg. Price On Selected Items

FISHING · HUNTING · FOOTWEAR · BOATING · CLOTHING

SPECIAL PURCHASE! $99 VALUE!

$39.88

Bass Pro Shops Incredible Value!

Bass Pro Shops® Extreme Pro Series Rods
HM-64 graphite blank

HAWG CALLER

SPECIAL PURCHASE!

99¢
Orig. 1.99
Hawg Caller Soft Plastic Worms

SAVE $70
$99.88
Reg. 169.99
HX260S VHF Handheld Radio
- 6-hour battery
- 120V charger
- Programmable scan
- Dual watch

Limited Quantities! No Rainchecks.

MIDLAND

SAVE $30
$49.88 Reg. 79.99
Midland® GXT 400 Radios
Up to 12-mile range.

SHIMANO

$1.99
Orig. 6.99
Shimano® Utility Boxes

2005 Spring Fishing Classic
February 19–27
Seminars
February 25–27

Technique for Pre-Spawn Bass Fishing
February 2
Fishfinder Selection
February 16

10% DISCOUNT
Some exceptions apply. See store for details.

STORE PRICING POLICY: Generally, merchandise prices in our stores, catalogs and web sites will be the same. Occasionally, however, due to sales, clearance events or market conditions, prices may vary.

Bass Pro Shops® Sportsman's Warehouse® I-40 at Sycamore View Road, Exit 12
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BP313822

BPS-001408

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Sale Dates: Now Thru Feb. 2

Hurry In— Limited Quantities!

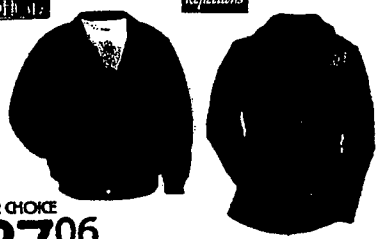
33%–50% OFF

Orig. Price of Selected Men's & Ladies' Fall and Winter Collections

$5 Reg. 7.99

Bass Pro Shops® Steel Quad Chair

33% OFF On Quality Leather Jackets



YOUR CHOICE

$87.06 Reg. 129.95

Natural Reflections® Leather Jacket or RedHead® Leather Bomber Jacket

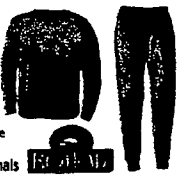
SAVE 50% Natural Reflections

$19.88 Reg. 39.95

Natural Reflections® Women's Shearling Bootie

- Rugged outdoor footwear
- Luxurious genuine shearling lining
- Warm in winter, cool in summer

33% OFF Reg. Price



RedHead® E.C.W.C.S. Extreme Cold Weather Thermals

SAVE $5

$14.88

Reg. 19.95

3XL–5XL & Tall: $17.88

Reg. 22.95

RedHead® Thermal Henley

$29.88 Reg. 42.00

Bob Timberlake Lodge Pants

Tough, wrinkle-resistant, easy wear and care.

FISHING · HUNTING · FOOTWEAR · BOATING · CLOTHING · CAMPING

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FEB. 19–27

Our Biggest Fishing Show and Sale of the Year!

Bass Pro Shops Outdoor Skills Workshops

Techniques for Pre-Spawn Bass Fishing

February 2 7pm

Hunter Safety Class

February 7 5:30pm

Must pre-register for 4 week course. 1-901-213-5800

10% MILITARY DISCOUNT

Some exceptions apply. See store for details.

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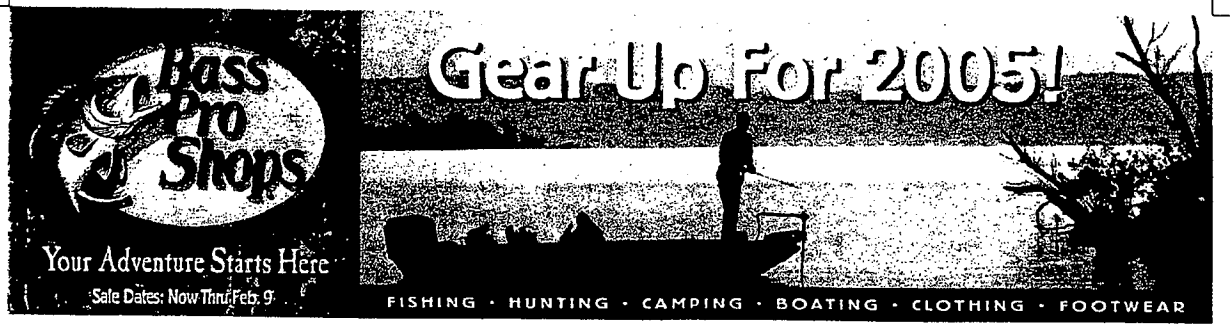
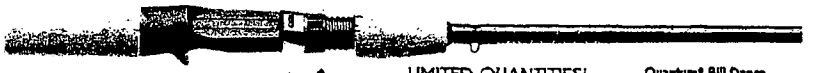




QUANTUM®

SAVE 50%

LIMITED QUANTITIES!

$24.88

Reg. 49.99

Quantum® Bill Dance Signature Series Rods
- HSX44 High-modulus graphite blanks
- Fuji® guides and reel seats
- Hand-laid Guidebrace™ wraps

All Stanley Hardbaits 1/2 Price

$1.24

Reg. 2.49

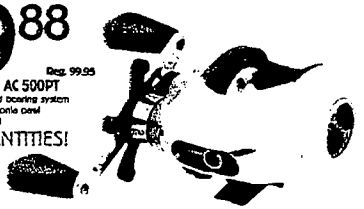
SPECIAL PURCHASE!
SAVE $30

$69.88

Reg. 99.99

Quantum® Accurist™ AC 500PT
- 5 polymer/stainless hybrid bearing system
- Ceramic levelwind with zirconia pawl
- Ultralight MaxCast™ spool

LIMITED QUANTITIES!



$29.95

3XL–5XL & Talls $34.95

RedHead® Angler Jacket

$14.88

Reg. 19.95
3XL–5XL $17.88
Reg. 22.95

RedHead® Thermal Henley
Available in 6 colors.

LIMITED QUANTITIES!

SPRING FISHING CLASSIC
FEB. 19–27
Our Biggest Fishing Show and Sale of the Year!

Outdoor Skills Workshops

Hunter Safety Class
February 7 5:30pm
Must pre-register for 4-week course, 1-901-213-5800

Fishfinder Selection
February 16 7pm

10% MILITARY DISCOUNT
Some exceptions apply. See store for details.

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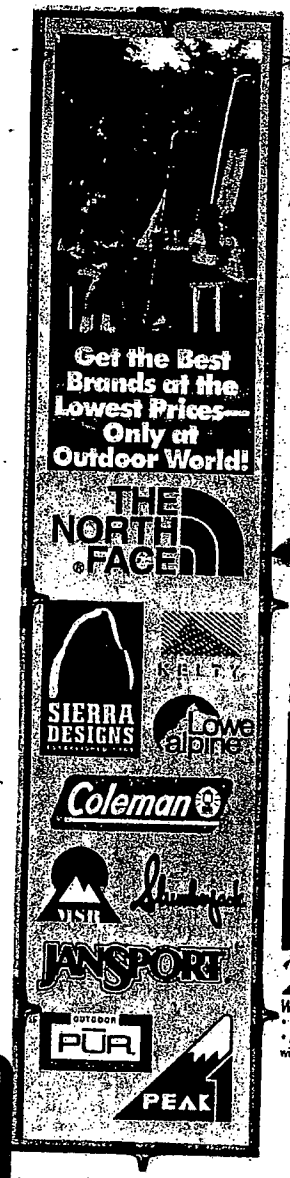


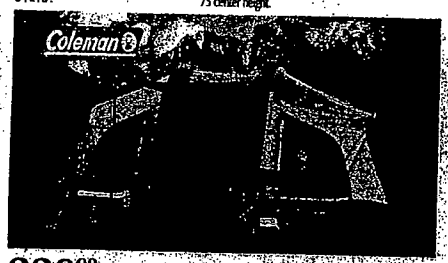
99.99 Reg. 119.99 — SAVE $20
RedHead® Quad Series 10'x8' Peak Dome Tent
• Abrasion-resistant Ripstop polyethylene floor • Quad-peak rainfly forms awnings for extra sun/weather protection • 3 large windows with inside zippered storm flaps • D-style door with separate window and inside zippered storm flap • 72" center height • Sleeps 4

129.99 Reg. 149.99 — SAVE $20
RedHead® Quad Series 12'x10' Peak Dome Tent
• 2 rooms • Removable room divider • 3 large windows with inside zippered storm flap • D-style door with window and inside zippered storm flap • Speed-clips with pin-and-ring attachment systems for fast and easy setup • 72" center height • Sleeps 8

139.99 Reg. 149.99 — NEW — SAVE $10
American Camper™ 14'x12' 3-Room Cabin Tent
• Rugged UV-Tex 5™ coated nylon walls and roof • Two 6'x7' sleeping rooms separated by a divider • Front 12'x7' living/storage/pouch area with no-see-um mesh • Truss-type frame with ridge sleeve and "C" clips for stability • Easy setup • Dutch "D" style doors • 83" center height • Sleeps 5

79.99 Reg. 89.99
Cobra Tent
Lightweight 3-season backpacking tent features 2 doors and dual vestibules for easy access and added gear storage. 84"x45".

99.99 Bass Pro Price
Bass Pro Shops® 8'x8' Canopy
Sets up in less than a minute. Fully assembled. 75" center height.



229.99 Bass Pro Price
Weather Master Tent
• 17'x9' • 3 rooms • Polyurethane coated nylon taffeta tent and rainfly repels water • Attached awning can be rolled back when not in use • Four 27"x41" side windows with no-see-um mesh • 76" center height • Sleeps 8

29.99 Bass Pro Price
PackMate Sleeping Bag
• 30° to 45° F temperature rating • 3 lbs. Ultratherm™ insulation • Polyrayon outer cover • Flannel liner • Roll-up pouch with handle

39.99 Bass Pro Price
Legend Sleeping Bag
• 25° to 40° F temperature rating • 3.5 lbs. Ultratherm™ insulation • Polyrayon outer cover • Flannel liner • Water-resistant roll-up duffel

29.99 Bass Pro Price
Forester™ Folding Cot
Generously sized to accommodate any person up to 6'2" tall. Strong, rust-resistant frame with durable nylon material. Color: Green.

16.99 Bass Pro Price
Swivelrest Stool
Packable seat swivels 360°—great for campers, fishermen, hunters, and gardeners. Adjusts to 5 different heights. Rugged 600 denier polyester with PVC backing, reinforced aluminum frame.

24.99 Reg. 29.99 — SAVE $5
Portable Armrest Chair
Convenient chair goes anywhere, sets up in seconds. Comfortable 600 denier nylon sling seat with adjustable steel armrests and built-in drink holder.

9.99 Bass Pro Price
Mini Mag-Lite® Flashlights
High-strength, corrosion-resistant aircraft aluminum, with sturdy Lexan® lenses and moisture-blocking O-ring seals. Mfrs. lifetime warranty.

19.99 Bass Pro Price
Mini Q-Beam Halogen Spotlight
Rugged water-resistant construction.

More Outdoors For Your Money™

Bass Pro Shops
Outdoor World®
and Sportsman's Warehouse

EXHIBIT
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EXHIBIT
HAGALE 14
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FOOTWEAR CLEARANCE

Save 25–50% OFF Orig. Price On Selected Items

Hikers, casuals, sandals and more!

While Quantities Last!

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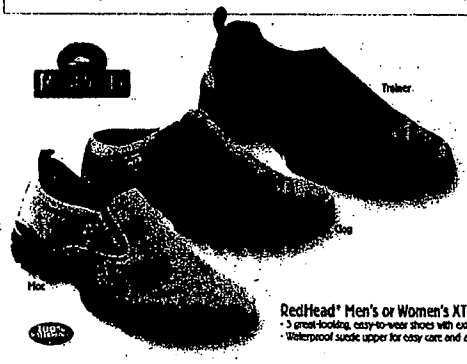
$16.88 YOUR CHOICE

SAVE 15% Reg. 19.88
RedHead® Men's XTR Sandal
• Non-marking outsole • EVA footbed

SAVE 32%
Reg. 24.88
RedHead® Men's Everest Hikers
• Suede leather uppers • Contour molded rubber outsoles • Water resistant

SAVE 33%

$39.88 Reg. 59.95
RedHead® Men's or Women's Bales II Hiker
• Full-grain leather upper • 100% waterproof



SAVE 33%

YOUR CHOICE
$19.88 Reg. 29.88
RedHead® Men's or Women's XTR Moc, Clog or Trainer
• 3 great-looking, easy-to-wear shoes with exercise comfort
• Waterproof suede upper for easy care and all-weather protection

new balance

SAVE 25%

$29.88 Reg. 39.95
New Balance® Men's or Women's CMX335 Sport Trainer
• Supple leather/mesh upper provides breathability
• Cushioned, with a C-CAP® midsole • Available in medium & wide widths

Bass Pro Shops
MEN'S & LADIES' APPAREL
CLEARANCE
Save 20–33% OFF Orig. Price On Selected Items
Tee's, knits, wovens, shorts, pants, swimwear and more!
While Quantities Last!
REDHEAD
$19.88 Reg. 24.95
3XL–5XL & Talls $22.88 Reg. 27.95
RedHead® Outdoor Print Shirts
$14.88 YOUR CHOICE
Reg. 19.95
3XL–5XL & Talls $17.88 Reg. 22.95
RedHead® Color Block Polo Shirt
RedHead® Washed Bass Easy Care Shirts
3XL–5XL & Talls $17.88 Reg. 22.95
RedHead® Bass Tournament Shirt
Henley
Pocket Tee
2 FOR $20! Reg. 12.95 each
3XL–5XL & Talls 2 for $26 Reg. 15.95 each
RedHead® Pigment Series
Pocket Tee or Henley

BPS-002120

Bass Pro Shops

CAMO & RAINWEAR CLEARANCE

HH Helly Hansen

Columbia

Save 25–50% OFF Orig. Price On Selected Items

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LITE

$14.88 Reg. 19.95

RedHead® Stalker Lite Short-Sleeve Shirts or Shorts

2XL & 3XL $19.88 Reg. 24.95

$19.88 Reg. 24.95

RedHead® Men's or Women's Stalker Lite Long-Sleeve Shirt or 6-Pocket Pants

2XL & 3XL $24.88 Reg. 29.95

$39.88 Reg. 49.95

RedHead® 3-D Leafy Bug-Master Suit

2-pc. suit features a VisorPro™ headcover with adjustable face shield. Cool, comfortable no-see-um mesh construction.

$29.88 Reg. 39.95

2XL & 3XL $34.88 Reg. 44.95

Olive $19.88 Reg. 29.95

2XL & 3XL $24.88 Reg. 34.95

RedHead® Bug Suit

Includes jacket, pants, headnet and storage bag, all built of rugged no-see-um mesh.

$14.88 Reg. 19.88

RedHead® Woodland Camo BDU Pants

2 FOR $12 Reg. 8.88 each

RedHead® Woodland Camo Long-Sleeve T-Shirt

2 FOR $10 Reg. 5.88 each

RedHead® Woodland Camo Short-Sleeve T-Shirt

$14.88 Reg. 19.95

RedHead® Scout Day Pack

$17.88 Reg. 24.95

RedHead® Pro Guide 9 Fanny Pack

$29.88 Reg. 39.95

RedHead® H_2O Stalker Daypack

$34.88 Reg. 49.95

RedHead® Extreme Fanny Pack

$34.88 Reg. 49.95

RedHead® Ripcord Hydration Pack

TREESTAND CLEARANCE

Bass Pro Shops

AMERISTEP

BUILT

SUMMIT

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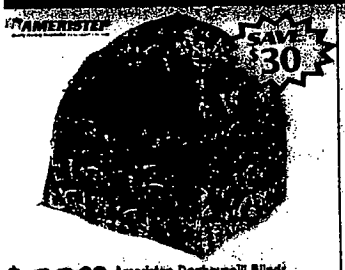


SAVE $30

$69.99 Reg. 99.99

Ameristep Doghouse™ Blinds
The Doghouse continues to set a standard in quality, concealment, and comfort. Features Edge Relief™, ShadowGuard™ and Durashell™ construction. Advantage® MAX-4 HD™ only.

SAVE $50

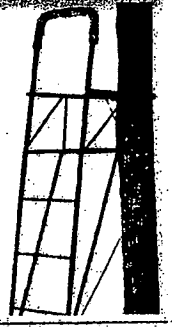
$129.88 Reg. 179.99

Ameristep Brickhouse TSC™ Blinds
A hub-style blind that features a zip open roof panel, Edge Relief™, ShadowGuard™, Durashell™ construction, and 7 zippered windows. Advantage® MAX-4 HD™ only.

STRONG BUILT

$65 Reg. 79.99

StrongBuilt® Basic 15' Ladder
Attaches to any tree with double hook-and-latched strap system. 18"x22" expanded metal mesh foot platform and 14"x22" seat platform. Weight: 60 lbs. Maximum weight cap.: 250 lbs.



COMPARE TO $21.99!

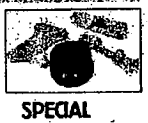
$9.88

Auto-Water™
Fresh water always available. Connects to any garden hose and refills automatically. Will not overflow.

SPECIAL PURCHASE!

COMPARE TO $44.99!

$19.88



Dog Bed Combo with Toys
Includes rope toy, collapsible bowl, plush bone, canvas dummy. 27"x36" Dog Bed. Assorted colors and patterns.

SPECIAL PURCHASE!

COMPARE TO $199.99!

$99.88

SPECIAL PURCHASE!

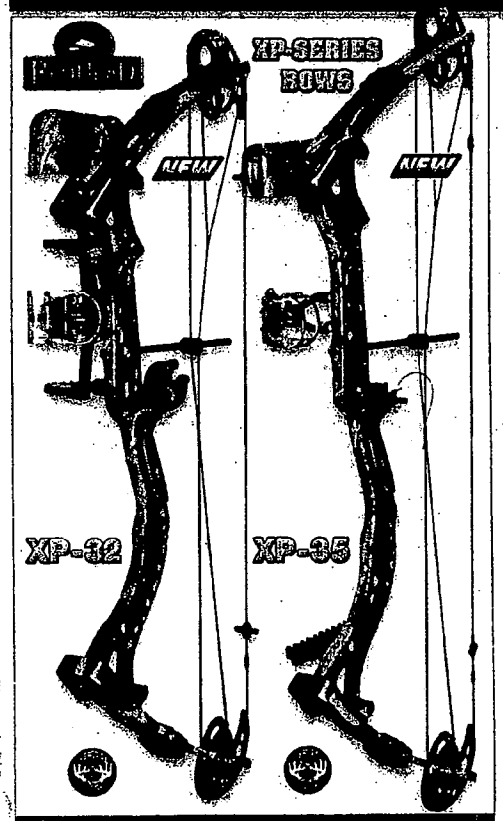
Virtual Fence
Collar emits a harmless burst of compressed air when dog approaches the boundary. Includes transmitter, batteries, 500' of wire, flags to cover 1/3 acre, instructions and training video.

$14.88 STEARNS

Reg. 19.99

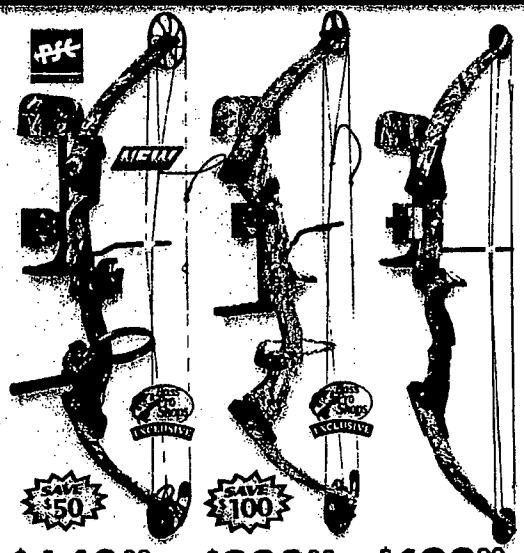
Pet Flotation Vest
Adjustable belt secures fit. Durable 200 denier oxford nylon with handler's loop strap. Available in 4 different sizes.

NEW ARCHERY



$449.99 YOUR CHOICE

RedHead® XP Series Bows
(Shown with optional accessories.)



$449.88
Reg. 499.99
NEW PSE
Xcellerator Package
- 70% let-off Bullwhip Cam
- Axle-to-Axle: 32"
- Includes sight, quiver and arrowrest

$299.88
Reg. 399.99
PSE
Flash Package
- 2004 Model
- Includes sight, quiver and arrowrest

LIMITED QUANTITIES!

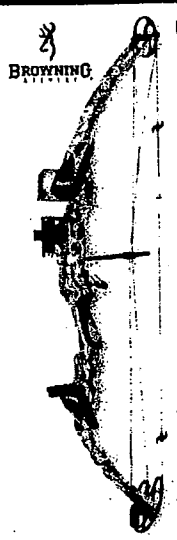
$199.99
PSE
Deer Hunter Package
- 65% let-off Stage 3™ Cam
- Axle-to-axle: 36"
- Includes sight, quiver and arrowrest

HORTON
$319.88 Reg. 349.99
Explorer XL 150 Package

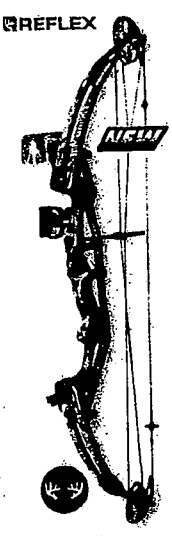
$39.99 Dozen
RedHead® Carbon Fury Arrows

$59.88 Dozen Reg. 69.99
RedHead® Carbon Supreme Custom Arrows

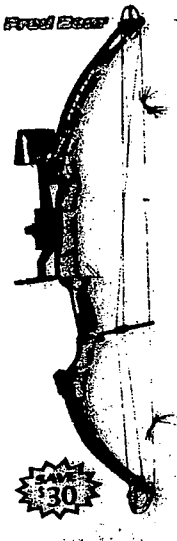
GEAR FOR 2005



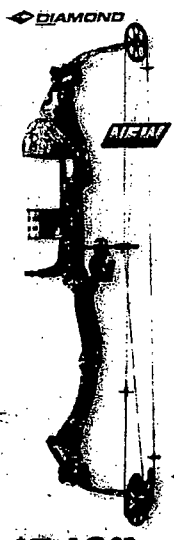
$319.99
Browning™ Rage One™ Combo
·70% let-off Ignitor 6 ED™ Cam
·Axle-to-Axle: 36"
·Includes sight, quiver and arrowrest



$299.99
Reflex Grizzly™
·75% let-off Stern a 1/2 Cam
·Axle-to-Axle: 36"

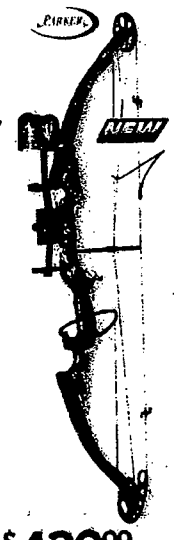


$219.88
Reg. $249.99
Fred Bear Whitetail Quest Package
·75% let-off Super One-Cam
·Axle-to-Axle: 34-1/8"



$549.99
Diamond Victory
·60% let-off Solitaire Cam
·Axle-to-Axle: 34-1/8"

$349.88
Reg. $379.99
Pearson Spoiler Angle
·75% let-off Z-5 Cam
·Axle-to-Axle: 33"



$439.99
Parker Hunter Mag Outfitter
·60% let-off Super One-Cam
·Axle-to-Axle: 37"
·Includes sight, quiver and arrowrest

*Some bows on this page are shown with optional accessories.

$24.88 Reg. 34.99
Stinger Caliper Release

$49.99 Whisker Biscuit Drop-Tine QS

$69.88 Reg. 89.99
McKenzie™ Layered Core Tuff Buck

Open-layered technology
$34.99 RedHead® Layered Foam Target

Bass Pro Shops

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Memphis, TN (901) 213-5800
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Sun 10am-7pm

Nashville
Next to the Opryland' Hotel
323 Opry Mills Drive
Nashville, TN (615) 514-5200
Hours: Mon-Sat 9am-10pm,
Sun 9am-7pm

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Memphis, TN 38134

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Please be aware that descriptive, typographic or photographic errors may sometimes occur, and are subject to correction.

BPS-002125

[Page 1]

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

In the Matter of Trademark Registration No. 2,390,988
For the mark SPORTSMAN'S WAREHOUSE HUNTING FISHING
CAMPING RELOADING OUTERWEAR FOOTWEAR and Design

Date Registered: October 3, 2000

Bass Pro Trademarks LLC,)
PETITIONER,) CANCELLATION NO.
v.) 92045000
Sportsman's Warehouse Inc,)
RESPONDENT.)

DEPOSITION OF MS. TONI MILLER

Taken on behalf of the Respondent

June 8, 2006

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

In the Matter of Trademark Registration No. 2,390,988
For the mark SPORTSMAN'S WAREHOUSE HUNTING FISHING
CAMPING RELOADING OUTERWEAR FOOTWEAR and Design
Date Registered: October 3, 2000

Bass Pro Trademarks LLC,)
PETITIONER,) CANCELLATION NO.
v.) 92045000
Sportsman's Warehouse Inc,)
RESPONDENT.)

DEPOSITION OF MS. TONI MILLER, produced, sworn, and examined on the part of the respondent in an action pending in the United State Patent and Trademark Office before the Trademark Trial and Appeal Board in the matter of BASS PRO TRADEMARKS LLC, Petitioner, versus SPORTSMAN'S WAREHOUSE INC, Respondent, at 9:00 a.m. on Thursday, June 8, 2006, at the law offices of Husch & Eppenberger LLC, Corporate Centre Suite 2-300, 1949 East Sunshine Street, Springfield, Missouri, before KAREN S. ROGERS, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public in and for the State of Missouri.

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APPEARANCES

For Petitioner:

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Minneapolis, Minnesota 55402
(612) 371-3211
dallgeyer@lindquist.com

Court Reporter:

MS. KAREN S. ROGERS, RPR, CCR No. 846

[Page 5]

1
2 PROCEEDINGS
3
4 (Proceedings began at 10:12 a.m. on
5 Thursday, June 8, 2006, with
6 appearances as noted).
7 (The witness was placed under oath
8 by the court reporter).
9 * * * * *
10 MS. TONI MILLER,
11 of lawful age, having been called as a witness and
12 being first duly sworn, was examined and testified as
13 follows:
14 DIRECT EXAMINATION
15 BY MR. ALLGEYER:
16 Q. Good morning, Ms. Miller. My name is
17 David Allgeyer. I'm a lawyer representing
18 Sportsman's Warehouse in a dispute that is occurring
19 between Bass Pro and Sportsman's Warehouse regarding
20 trademark registration.
21 Could you state your full name for the
22 record, please?
23 **A. My full name is Marie Antoinette**
24 **Miller. Toni is a nickname.**
25 Q. Okay. Have you had your deposition

[Page 6]

1 taken before?
2 **A. Yes, I have.**
3 Q. Okay. What kind of case was it?
4 **A. There were a couple that -- wrongful**
5 **termination and landlord dispute.**
6 Q. Okay. Well, then I'll go over the
7 rules just briefly --
8 **A. Mm-hmm.**
9 Q. -- just to refresh you on them.
10 Because our court reporter is taking down everything
11 that you and I say, it's important that we speak one
12 at a time.
13 **A. Mm-hmm.**
14 Q. Is that agreeable?
15 **A. Yes.**
16 Q. Okay. And you'll want to answer
17 questions with yes or no or whatever the answer is
18 and not mm-hmm and huh-uh and all that, like I would
19 tend to do. Okay?
20 **A. Okay.**
21 Q. Fair enough?
22 **A. Yes.**
23 Q. If I ask you a question that you don't
24 understand, I would ask that you ask me to clarify
25 the question, let me know you didn't understand it.

[Page 7]

1 Is that agreeable?
2 **A. Yes.**
3 Q. Okay. I'm going to assume if you
4 don't ask me to clarify the question, you've
5 understood it. Is that sound fair to you?
6 **A. Yes.**
7 Q. Okay. I think that's about it. Now
8 I'd like to just do a little bit about your
9 background.
10 Can you tell me your educational
11 background, beginning with high school graduation and
12 then forward?
13 **A. Well, I graduated from high school and**
14 **went to college and have a bachelor's of science**
15 **degree in psychology from Southern Nazarene**
16 **University.**
17 Q. Where is that located?
18 **A. In Bethany, Oklahoma, outside of**
19 **Oklahoma City.**
20 Q. Okay.
21 **A. Went back to school later on to --**
22 **which now is Missouri State University and completed**
23 **50 hours in finance and accounting, sat for my CPA**
24 **exam and passed it. Went back to school and a couple**
25 **years ago finished my MBA.**

[Page 8]

1 Q. Okay. Let me associate a few dates
2 with that. When you got your BS in psychology, what
3 year was that?
4 **A. 1978.**
5 Q. Okay. And when you completed your
6 coursework in finance and accounting, when was that?
7 **A. I think it was about 1992.**
8 Q. Okay. And you sat for the CPA exam
9 when?
10 **A. Right after I completed that**
11 **coursework.**
12 Q. So about 1992?
13 **A. Mm-hmm.**
14 Q. All right. And you got your MBA in
15 what year?
16 **A. Almost three years ago.**
17 Q. Okay.
18 **A. So 2003.**
19 Q. Okay. Okay. Have you done any public
20 accounting, by the way?
21 **A. No.**
22 Q. Okay. Now a little bit with your
23 professional background. After you graduated from
24 college, I assume you went to work somewhere. Tell
25 me where that was and what you did.

[Page 9]

1 **A. Well, I was going to seminary first.**
2 **I left that because after I graduated from college I**
3 **went to seminary in Kansas City.**
4 Q. Okay.
5 **A. And went there for about two years,**
6 **didn't complete my -- I was working on a master's of**
7 **divinity. And then I met my husband, moved down**
8 **here, needed a job, and took a temporary job at Bass**
9 **Pro Shops 25 years ago.**
10 Q. Okay. And have you been there ever
11 since?
12 **A. I've been there ever since. With that**
13 **temporary employment.**
14 Q. Well, these one of these days you're
15 going to get a real job.
16 **A. Yeah, one of these days they'll get**
17 **tired of me.**
18 Q. Okay. Maybe you can just kind of very
19 roughly bring me up sort of through your rise through
20 the company.
21 **A. Mm-hmm.**
22 Q. I take it you were just an employee at
23 the beginning of --
24 **A. At the time I -- yes. I'm sorry, I**
25 **didn't mean to interrupt you.**

[Page 10]

1 **At the time I got hired, I was a -- what**
2 **they referred to as a telemarketing agent. I took**
3 **phone orders over the phone.**
4 Q. Okay. Okay.
5 **A. And shortly after that I was moved**
6 **into the accounting department to work on COD**
7 **collections for mail order.**
8 **And then I started to do other accounting**
9 **functions, accounting clerk functions. And then was**
10 **promoted to like accounting supervisor.**
11 Q. Mm-hmm.
12 **A. And accounting manager. And I went**
13 **into financial analysis. And was promoted to retail**
14 **controller, corporate controller, vice president,**
15 **vice president finance, and chief financial officer,**
16 **so.**
17 Q. Let me relate just a few dates to
18 those.
19 **A. Mm-hmm.**
20 Q. I'll relate to some of the dates here.
21 Let's say in about 1998, what title did you hold?
22 **A. I'm trying to think. '98. I was**
23 **probably vice president of finance back then.**
24 Q. Okay. When did you become -- is it
25 CFO now?

[Page 11]

1 **A. Mm-hmm. I think that was in 2001.**
2 Q. Okay. And you've been CFO since 2001?
3 Did I get that right?
4 **A. Yes, I'm sorry.**
5 Q. All right. I've been trying to get a
6 little feel for the corporate structure of Bass Pro,
7 and I understand there's a holding company and some
8 companies underneath it.
9 But maybe you can -- some of your bosses
10 describe it more generally. Maybe you can give me
11 some more specifics.
12 **A. Okay. There is a parent company, Bass**
13 **Pro Group. It is an LLC.**
14 Q. Okay.
15 **A. And it has subsidiaries.**
16 Q. Mm-hmm.
17 **A. Mainly Bass Pro Inc, which is a C**
18 **corporation.**
19 Q. Mm-hmm.
20 **A. And there is Tracker Marine Retail**
21 **LLC, which is the retail boat division.**
22 Q. Mm-hmm.
23 **A. Tracker Marine LLC, which is the boat**
24 **manufacturing division.**
25 Q. Okay.

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1 **A. And then there's Big Cedar LLC, which**
2 **is the resort. So there are basically four**
3 **subsidiaries under this Bass Pro Group.**
4 Q. I note that the petitioner in this
5 case is something called Bass Pro Trademarks LLC?
6 **A. Correct. So we have to go a layer**
7 **below --**
8 Q. Okay.
9 **A. -- Bass Pro Inc.**
10 Q. Okay.
11 **A. There are several subsidiaries, one of**
12 **which is the Bass Pro -- BPS Trademarks.**
13 Q. Mm-hmm.
14 **A. And that's the entity that holds all**
15 **the trademarks for all of the subsidiaries under Bass**
16 **Pro Inc.**
17 Q. Okay.
18 **A. Then there's Bass Pro Outdoor World**
19 **LLC. That's another subsidiary. And these are all**
20 **wholly owned subsidiaries.**
21 Q. Okay.
22 **A. And there's BP --**
23 Q. What does Bass Pro -- I'm sorry --
24 what --
25 **A. It's all retail stores.**

[Page 13]

1 Q. Okay. All right.
2 **A. And there's several entities. Do you**
3 **want them all or most of them?**
4 Q. Most of them.
5 **A. Okay. There's BPS Catalog, which is**
6 **the catalog division.**
7 Q. Yeah.
8 **A. There's Bass Pro Outdoor Online, which**
9 **is the Internet division.**
10 Q. Mm-hmm.
11 **A. Then there's Sportsman's Specialty**
12 **Group, which is our wholesale division.**
13 **Then we have Worldwide Sportsman. It's a**
14 **C corp, but it only holds one store in Cincinnati**
15 **because of the state laws as to whether they**
16 **recognize an LLC or C corp for purposes of entities,**
17 **so we had to put a retail store in that entity.**
18 Q. Okay.
19 **A. I'm trying to think what other**
20 **entities there are. That's the bulk of them.**
21 Q. Okay. Thank you. That gives me a
22 little better picture of how that fits together.
23 **A. Mm-hmm.**
24 Q. How many stores does -- stores now
25 overall does Bass Pro have? And I don't mean the

[Page 14]

1 Tracker Marine stores.
2 **A. Okay. Well, last night one opened, so**
3 **33 now. If I miss one, forgive me, but I think it's**
4 **33.**
5 Q. Okay. And I'm going to test your
6 memory a little, but in about 1998 how many Bass Pro
7 stores were open roughly?
8 **A. You are testing my memory. I think it**
9 **was either four or five. I can't remember.**
10 Q. Oh, okay. When did the bulk of the
11 growth in the Bass Pro stores come about? Has it
12 been sort of steady since '98 or so, or has there
13 been a certain period of time where the growth was
14 more?
15 **A. There's been continual growth since --**
16 Q. Mm-hmm.
17 **A. -- since we opened up the first store**
18 **outside of Springfield in 1995 in Atlanta. But it**
19 **took a few years after that and then we started**
20 **opening up more stores. So from '98 on, there's been**
21 **a continual --**
22 Q. Okay.
23 **A. -- some years more, some years not as**
24 **many.**
25 Q. Now you mentioned the Atlanta store.

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1 Was that the first store outside of Springfield,
2 Missouri, that Bass Pro opened?
3 **A. Yes.**
4 Q. And I believe at one time that store
5 was known at least on the signage as Bass Pro
6 Sportsman's Warehouse or Bass Pro Shops Sportsman's
7 Warehouse. Do you recall when that changed?
8 **A. I don't recall it ever -- that it ever**
9 **changed that particular location. We moved to a**
10 **bigger location.**
11 Q. Oh, and at that time then it changed?
12 **A. Yes, mm-hmm.**
13 Q. Yeah. Were you part of the decision
14 to use the phrase Sportsman's Warehouse with Bass Pro
15 Shops for the Atlanta store?
16 **A. I was part of the group of people that**
17 **discussed what the name should be, yes.**
18 Q. Okay. And why did you call it Bass
19 Pro Sportsman's Warehouse? Or I'm sorry, Bass Pro
20 Shops Sportsman's Warehouse?
21 **A. We called it that because we had this**
22 **flagship store in Springfield, Missouri, that was**
23 **very large, had a lot of bells and whistles, a lot of**
24 **amenities.**
25 Q. Mm-hmm.

[Page 16]

1 **A. And we didn't want to go into another**
2 **market and have -- you know, we had a catalog**
3 **business. We've been in the catalog business a long**
4 **time, and people recognize the name Bass Pro Shops.**
5 **And the Outdoor World store was so defined**
6 **because it had so many amenities, we did not want to**
7 **go into Atlanta and disappoint the customers with the**
8 **term Outdoor World and they think, "Well, it's the**
9 **same as the Springfield store. It's supposed to have**
10 **waterfalls and features and all of that."**
11 **So we decided that a better name for it**
12 **would be Sportsman's Warehouse, which would be a**
13 **scaled-down version of the store.**
14 Q. Mm-hmm. So Outdoor World wouldn't
15 really describe that Bass Pro Shops in Atlanta as
16 well as Sportsman's Warehouse?
17 **A. The new store.**
18 Q. Yeah.
19 **A. Up in --**
20 Q. The new one, right.
21 **A. -- at the Discover Mills.**
22 Q. Okay. And then I take it when you
23 opened the new store, which was an Outdoor World,
24 that had the amenities and waterfalls and all you
25 have, then that was called an Outdoor World and the

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1 other one closed, correct?
2 **A. The Sportsman's Warehouse closed.**
3 Q. Yeah, okay.
4 **A. Yes.**
5 Q. Now there's also a Sportsman's
6 Warehouse Bass Pro Shops in St. Charles, Missouri.
7 Do you recall when that one opened?
8 **A. You're testing my memory.**
9 Q. We probably have some documents here.
10 **A. I'm 50 years old. I can't remember as**
11 **well now. It's been a few years now, maybe five or**
12 **six years.**
13 Q. My -- I'll represent to you that
14 here's an interrogatory answer that says that --
15 lists advertising expenses, and they start in 2001
16 for St. Charles. Does that sound about right?
17 **A. I said about five or six years, so**
18 **that sounds about right.**
19 Q. Yeah, yeah. So I'm testing your
20 memory, but you're passing the test.
21 **A. I was always an overachiever, so.**
22 Q. There you go. And the one in Memphis,
23 did that open -- my indication would be that it was
24 about 2000 or so. Does that sound right?
25 **A. That's correct.**

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1 Q. Okay. Now there came a time when the
2 Memphis store signage that said Bass Pro Shops
3 Sportsman's Warehouse was changed to Bass Pro Shops
4 Sportsman's Center I think, is that correct? Yeah,
5 Sportsman's Center.
6 **A. I never have physically seen the sign**
7 **change.**
8 Q. Oh, okay. Have you heard about it?
9 **A. I heard that there was a sign change.**
10 Q. Okay. And so far as you know, has the
11 sign been changed back?
12 **A. I don't know.**
13 **MR. ALLGEYER: Okay. Can you mark this,**
14 **please?**
15 **(Miller Exhibit 1 was marked for**
16 **identification by the court**
17 **reporter and was shown to the**
18 **witness).**
19 **THE REPORTER: I've marked Exhibit 1.**
20 **A. Okay. Thank you.**
21 **MR. ALLGEYER:**
22 Q. I'm going to show you what's been
23 marked as Miller Exhibit 1, and it's a petitioner's
24 response, Petitioner's Bass Pro Trademarks LLC
25 response to the first set of interrogatories and

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1 request for production of documents that was served
2 by Sportsman's Warehouse.
3 Is this a document that you've seen before?
4 And you can take a moment to look through it if you
5 like.
6 **A. (The witness reviews the document).**
7 Q. I'm not going to ask you about the
8 document request.
9 **A. Yes. Yes, I've seen it, yes.**
10 Q. Okay. I note that in answer to one of
11 the interrogatories, I think it's 18, it suggests
12 that you contributed some of the information to the
13 answers to these interrogatories. And you can check
14 18 to verify that. In fact, your name's listed
15 first, lucky you.
16 What I'd like you to do, if you would, is
17 go through the interrogatories and just tick off for
18 me the ones that you provided information for, and
19 then I'll have a couple of questions about them.
20 **A. I didn't on number 1.**
21 Q. Okay.
22 **A. I don't believe I did number 2.**
23 **I think I -- I believe I contributed to**
24 **number 3.**
25 Q. Okay.

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1 **A. I don't think I contributed to number**
2 **4.**
3 **THE REPORTER: I'm sorry, was that I don't**
4 **think?**
5 **A. I don't think, I'm sorry.**
6 **MR. ALLGEYER:**
7 Q. Let me stop you on number 4, if I
8 could --
9 **A. Yes.**
10 Q. -- so we don't have to come back to
11 it.
12 **A. Okay.**
13 Q. The answer indicates that Bass Pro
14 first became aware of registrant's, that would be
15 Sportsman's Warehouse, business generally in 1998.
16 Were -- I realize you say you didn't
17 contribute to this interrogatory, but when did you
18 become aware of Sportsman's Warehouse business?
19 **A. When did I -- could you clarify?**
20 Q. Well, just learned that there was
21 Sportsman's Warehouse, my client, that they were in
22 business and they operated a --
23 **A. I don't recall.**
24 Q. Does 1998 sound about right?
25 **MR. CAMPBELL: Are you asking does it sound**

[Page 21]

1 about right that Bass Pro first learned of them or
2 are you asking does it sound right --
3 MR. ALLGEYER: That's a good clarification.
4 MR. CAMPBELL: Okay.
5 MR. ALLGEYER:
6 Q. Let me first ask about what you knew,
7 whether you would have known about it in 1998, if you
8 remember.
9 A. I don't believe I did.
10 Q. Okay.
11 A. My responsibilities didn't include
12 trademark.
13 Q. All right. Did there come a time when
14 your responsibilities did include trademark?
15 A. Let me clarify that. Include being
16 more involved --
17 Q. Mm-hmm.
18 A. -- in the trademark matters of the
19 company.
20 Q. Okay.
21 A. Probably about two or three years ago
22 I became more involved, only to the extent that I
23 served as, for lack of a better term, a conduit or a
24 coordinator --
25 Q. Mm-hmm.

[Page 22]

1 A. -- between the company and outside
2 counsel. I don't hold myself out to be an attorney.
3 Q. You're not a trademark lawyer?
4 A. No, I'm not. I'm not sure I would
5 want to be.
6 MR. CAMPBELL: No, thanks.
7 MR. ALLGEYER:
8 Q. A couple of us could probably tell you
9 you don't want to be.
10 A. Yeah. There are probably a few more
11 exciting areas of law.
12 Q. Okay. Do you know who contributed --
13 without telling me anything a lawyer told you, but in
14 the course of putting these together, do you know who
15 it was from Bass Pro who was aware of Sportsman's
16 Warehouse business generally in 1998?
17 A. No, I don't.
18 Q. Okay. The other thing it talks about
19 is becoming aware of the Sportsman's Warehouse mark
20 in 2002. Were you aware of that in 2002?
21 A. No.
22 Q. No. Okay. If you could continue then
23 to tell me --
24 A. Probably contributed in some way to
25 number 5.

[Page 23]

1 I don't know that I contributed to number
2 6.
3 Number 7 -- I guess I should clarify that I
4 really didn't do a lot of the work on this. I had
5 someone who worked for me do --
6 Q. Mm-hmm.
7 A. -- pull a lot of the information
8 together.
9 Q. Sure.
10 A. Okay. Number 7.
11 Q. Okay. Let me stop you on 7 for a
12 minute. This apparently summarizes advertising and
13 promotional expenses, and I'm curious what's included
14 in that category?
15 A. Advertising and promotion is generally
16 print media, TV, radio, billboards, other types of
17 advertising media.
18 Q. Okay. Does that include fliers and
19 that kind of stuff?
20 A. It would also include that.
21 Brochures.
22 Q. Okay. Now are we able to tell from
23 these numbers which of these promotional items
24 actually used the term Sportsman's Warehouse in
25 connection with the advertising?

[Page 24]

1 A. I wouldn't be able to tell from this
2 schedule.
3 Q. Is there a schedule from which we
4 could tell that?
5 A. I would think you would have to go
6 back through all the invoices and then pull all the
7 actual documents that support the invoices.
8 Q. Okay.
9 A. Whether it's catalog advertising or --
10 Q. Mm-hmm.
11 A. -- specific to that.
12 Q. So I guess what I'm asking is, I can't
13 conclude from this at least conclusively that, for
14 example, in the year 2000 that the store in
15 Lawrenceville, Georgia, spent $831,000 on ads that
16 actually said Sportsman's Warehouse somewhere in
17 them. This is just ads for that store, whether it
18 was Bass Pro generally or something else?
19 A. Well, you couldn't conclude from this
20 table, but you could if you dug down into the
21 details.
22 Q. Okay. And has anyone done that?
23 A. I am not aware of anybody doing that.
24 It doesn't mean it hasn't been done, but I have not.
25 Q. You have not done it?

[Page 25]

1 **A. No.**
2 Q. Okay. And if somebody wanted to do
3 that, what is it -- what are the steps that one would
4 take? You would have to look at the detailed
5 invoices and stuff like that?
6 **A. You would have to look at the general**
7 **ledger and the accounts payable and then pull the**
8 **invoices. And then go back and find the various**
9 **media, whether it's print media, tabs, newspaper,**
10 **magazines.**
11 Q. And would the actual content of that
12 media be available?
13 **A. Not with the actual invoice.**
14 Q. So you would have to go -- do you
15 have an archive of various ads and so forth over
16 time or --
17 **A. I don't know about the archives.**
18 Q. Okay. So I guess I'm wondering, you
19 know, you could wonder what kind of media it is, but
20 what would you do to check whether the words
21 Sportsman's Warehouse are actually used with -- you
22 know, in a given ad that you paid for?
23 **A. You're asking me how -- what I would**
24 **do to check for that?**
25 Q. Mm-hmm.

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1 **A. I personally wouldn't do that,**
2 **because --**
3 Q. You would tell somebody else to do it?
4 **A. I would tell somebody else to do it.**
5 **I've got plenty to do. I've never been asked to do**
6 **that.**
7 Q. Okay. But I guess I'm just trying to
8 find out if there is a way to do that?
9 **A. I would believe there is a way to do**
10 **that.**
11 Q. And that would include going back to
12 the invoices, but then after that, how would you from
13 the invoice conclude whether or not the words
14 Sportsman's Warehouse were used in a particular piece
15 of advertising?
16 **A. You would have to go back into the**
17 **archives to the extent that archives are available.**
18 Q. Okay.
19 **A. Mm-hmm.**
20 Q. Okay. Thank you. Let's go ahead with
21 the other answers.
22 **A. Yes, I would have had some comments on**
23 **number 8.**
24 Q. Okay.
25 **A. And number 9 would have come from my**

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1 **area probably.**
2 Q. Okay. So you would have supervised
3 whoever did that?
4 **A. Yes, yes.**
5 Q. Okay. Number 10, I probably would
6 have had a comment about who I thought would have had
7 the most input. But again, there's been different
8 people at different times in the company.
9 And number 11, let's see. Number 11, I
10 would have had to say that, because I've let someone
11 put my name in an interrogatory.
12 Q. Without you?
13 **A. Yeah, without my permission.**
14 Q. Now we've already -- let me dwell on
15 11 for a minute then. We've already talked at least
16 a little about the use of -- or the selection of the
17 Sportsman's Warehouse mark starting with Atlanta.
18 Was that mark used in St. Charles and in
19 Memphis for the same reasons that that was used in
20 Atlanta?
21 **A. Yes.**
22 Q. Okay. Incidentally in your experience
23 with the company and with the marks, have you seen
24 Bass Pro use the mark or words or name Sportsman's
25 Warehouse without having the words Bass Pro Sports

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1 somehow associated with it?
2 In other words, used just the words
3 Sportsman's Warehouse without having Bass Pro Shops
4 with that mark?
5 **A. I don't know. I know in verbal**
6 **communication people don't say Bass Pro Shops**
7 **Sportsman's Warehouse. You just say Sportsman's**
8 **Warehouse.**
9 Q. What people?
10 **A. Within the organization.**
11 Q. Okay.
12 **A. If we have meetings and we're talking**
13 **about Sportsman's Warehouse.**
14 Q. Yeah.
15 **A. We never say Bass Pro Shops**
16 **Sportsman's Warehouse.**
17 Q. That would be a lot to say for --
18 **A. Yeah. But I can't answer the**
19 **question. I don't know.**
20 Q. Okay. It hasn't come to your
21 attention, has it, that the stores have selected
22 Sportsman's Warehouse as a mark to use without Bass
23 Pro Shops?
24 **A. I don't know.**
25 Q. Okay. You didn't -- well, you didn't

[Page 29]

1 select any of that?
2 **A. No.**
3 Q. Okay. Okay. Now with respect to the
4 -- and we're going to get to the registration, but
5 how many registrations have there been for marks that
6 included Sportsman's Warehouse, if you know?
7 **A. I don't know.**
8 Q. Okay. We'll get to them. I just
9 wanted to see if I could --
10 **A. Okay.**
11 Q. -- see how many, if there were any
12 others. But we'll get to that. Okay. If you could
13 continue then with the remainder.
14 **A. Okay. (The witness reviews the**
15 **document). I don't -- number 12 I don't believe I**
16 **had any input on.**
17 Q. You didn't?
18 **A. No.**
19 Q. Okay. I wouldn't have on that one.
20 Sorry. On the next one, number 13.
21 Q. Mm-hmm. Let me stop you on 13 for a
22 second.
23 **A. Okay.**
24 Q. Are you aware -- this lists a number
25 of words -- of Sportsman's this, that, or the other

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1 or Sportman, so forth.
2 Has so far as you know your company ever
3 suggested to any of these entities that have used the
4 word Sportman or Sportsman or something like that
5 that they are infringing a Bass Pro trademark?
6 **A. I don't know.**
7 Q. Okay. You haven't done that anyway?
8 **A. I haven't done that.**
9 Q. Okay. And you don't know if anyone
10 from the company has?
11 **A. I don't know that anybody -- but that**
12 **doesn't mean that that hasn't been done. I just**
13 **don't know that anybody in the company has.**
14 Q. Okay. Given your responsibility for
15 trademarks, if that had been done, would you have
16 expected that someone would have mentioned that to
17 you?
18 **A. Yes, I know that Dennis Donahue and**
19 **Fred and Bruce make us aware of trademark**
20 **infringements, make me aware of trademark**
21 **infringements, misuse of the name and that.**
22 Q. Okay. But upon becoming aware of any
23 -- anything like that, have you or anybody from Bass
24 Pro ever directed that a letter be sent --
25 **A. Yes.**

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1 Q. -- or -- okay.
2 **A. Mm-hmm.**
3 Q. Tell me about that.
4 **A. Specific examples?**
5 Q. Yes.
6 **A. Okay. We've had issues with some of**
7 **our dealers that we have independent dealers that**
8 **sell our products that have used our name in their**
9 **advertising and have gone so far as to call it -- and**
10 **you're testing my memory here. But to call it --**
11 **their shop Bass Pro Shops in the city.**
12 **Like outside of Columbia we had an issue**
13 **with a dealer over there that was taking liberties**
14 **with our trademark in the phone book and it was**
15 **confusing customers.**
16 **And so they would call -- go to their store**
17 **and they would go to our store and they would confuse**
18 **the -- let me start over.**
19 **They went to the small store that was the**
20 **dealer who was using our trademark without our**
21 **permission and thinking that was our Bass Pro Shops,**
22 **our Sportsman's Warehouse, and it wasn't.**
23 Q. Mm-hmm.
24 **A. So we had to send letters to the**
25 **dealer saying cease and desist and don't -- I don't**

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1 **know if that's an example.**
2 Q. What was the -- what was the dealer
3 dealing in?
4 **A. Oh, dealer -- I'm sorry, they're small**
5 **independent retailers. They're ma-and-pa shops.**
6 **They sell tackle and they buy from us at wholesale,**
7 **and they're authorized wholesale purchasers from our**
8 **warehouse so they can buy our products, but they**
9 **don't have permission to use our logo.**
10 Q. Okay. And so they bought it from you.
11 Then they used your logo in connection with the
12 products?
13 **A. Mm-hmm.**
14 Q. Okay.
15 **A. And we had an issue in Columbia with**
16 **that and had to write the dealer a cease and desist**
17 **letter. And he actually had our logo in the yellow**
18 **pages with his dealership name.**
19 **And it was confusing customers. They**
20 **thought it was our Bass Pro Shops and Sportsman's**
21 **Warehouse.**
22 Q. Okay. Was it -- did it say Bass Pro
23 Shops Sportsman's Warehouse? Is that what they had
24 or --
25 **A. No, I don't remember, but they -- it**

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1 **had our Bass Pro logo on it and --**
2 Q. Okay.
3 **A. But I didn't handle all that. Our**
4 **counsel handled that.**
5 Q. Okay. Do you remember about when that
6 was?
7 **A. Probably within the last year or two.**
8 Q. Okay. And are there any other
9 examples like that?
10 **A. There probably are, but I don't**
11 **remember them all.**
12 Q. Who else at the company would have
13 been involved with that?
14 **A. Involved when we see issues like that?**
15 Q. Yes.
16 **A. Generally I will take it to Jim**
17 **Hagale.**
18 Q. Okay.
19 **A. And if it's a dealer, I will go to**
20 **Burt Steinberg. He's our president of our wholesale**
21 **division.**
22 **THE REPORTER: Of our what?**
23 **A. Wholesale division.**
24 **THE REPORTER: Thank you.**
25 **A. And whoever else needs to be involved.**

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1 **MR. ALLGEYER:**
2 Q. By the way, does the wholesale
3 division do business under the name Bass Pro Shops?
4 **A. No.**
5 Q. What's the name that --
6 **A. Sportsman's Specialty Group. American**
7 **Rod & Gun.**
8 Q. American Rod & Gun?
9 **A. Yeah.**
10 Q. Okay. Now just so I've got this as
11 clear as I'm going to get it, the cease and desist
12 that was sent against one of the dealers involved for
13 sure use of the Bass Pro Shops logo.
14 Was it a fish and everything and the oval
15 and all that? Is that right?
16 **A. I believe so.**
17 Q. Okay. But you don't know whether or
18 not they used Sportsman's Warehouse with that or not?
19 **A. No, I don't know.**
20 Q. Okay. Do you know of any instance
21 where the company has suggested that use of
22 Sportsman's Warehouse or some variant of Sportsman
23 has received in answer to interrogatory number 13,
24 has the company ever suggested that that was a
25 violation of Bass Pro Shops trademark rights?

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1 **A. No, I'm not aware.**
2 Q. Okay. If you could continue then and
3 go through telling me what interrogatories you
4 contributed to.
5 **A. Are we at 14 now?**
6 Q. Yes.
7 **A. (The witness reviews the document). I**
8 **wouldn't have had anything on 14.**
9 Q. Okay.
10 **A. I wouldn't have had anything on 15.**
11 **I wouldn't have had anything on 16.**
12 Q. Let me stop you for a minute though on
13 16.
14 **A. Okay.**
15 Q. Since unfortunately they tagged you as
16 having some responsibility for trademarks. The
17 trademarks for Bass Pro Shops are I think you told me
18 held in Bass Pro Shops -- or Bass Pro Trademarks LLC.
19 Is there some kind of an agreement or
20 something between Bass Pro Trademarks LLC and Bass
21 Pro, the company that actually owns and runs the
22 store, about use of those trademarks?
23 **A. A formal agreement?**
24 Q. Yes.
25 **A. I'm not aware of any currently, but**

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1 **that doesn't mean that there isn't -- we've had them**
2 **in the past.**
3 Q. Between Bass Pro Trademarks LLC and
4 Bass Pro Shops?
5 **A. Yes.**
6 Q. Okay. And was that some kind of
7 license agreement or --
8 **A. I can't recall the nature of the**
9 **agreement. It was a right to use. No royalties paid**
10 **or anything.**
11 **MR. ALLGEYER: Okay. We'll follow up on**
12 **that one, counsel.**
13 **MR. CAMPBELL: Sure.**
14 **MR. ALLGEYER: I think that this would call**
15 **for that if any exist.**
16 **MR. CAMPBELL: Sitting here today, I'm not**
17 **aware of the existence --**
18 **MR. ALLGEYER: Sure.**
19 **A. No, nothing currently.**
20 **MR. CAMPBELL: I'll double-check to confirm**
21 **whether there in fact ever was any in existence.**
22 **MR. ALLGEYER: Okay. I appreciate that.**
23 **That's the only reason that we take these depositions**
24 **is to get everything clear.**
25 Q. Okay. You must have had some input

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1 into 17 since it lists your name here. I'm sure you
2 volunteered to be a witness.
3 **A. Yes.**
4 Q. Okay. All right. Those are the
5 questions I had on this document. You can set that
6 aside please, if you would. Thank you?
7 **A. (The witness complies).**
8 Q. I'm going to just briefly show you
9 what's been marked as Burroughs 1 already. (Mr.
10 Allgeyer hands a document to the witness).
11 And this appears to be an ad for the
12 upcoming opening of the Bass Pro Shops Sportsman's
13 Warehouse store on March 1st, 1995, outside Atlanta.
14 Is this something you've seen before?
15 **A. (The witness reviews the document). I**
16 **don't recall it. It doesn't mean I haven't seen it**
17 **before.**
18 Q. Okay. Just so I'm -- just so I'm
19 clear, so far as you know, was March 1st, 1995, the
20 actual opening date of the Atlanta store?
21 **A. I believe so.**
22 Q. Okay. It wasn't delayed for any
23 reason or anything like that?
24 **A. I don't recall.**
25 Q. Okay. Let me show you what's been

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1 marked as Hagale Exhibit 3. (Mr. Allgeyer hands a
2 document to the witness).
3 Now this is a -- this is from the Bass Pro
4 web site, I'll tell you. We printed it out from
5 there. Does this -- does this look familiar to you
6 and do you recognize it as something from the Bass
7 Pro web site?
8 **A. (The witness reviews the document).**
9 **It could be. I mean our web site changes from time**
10 **to time.**
11 Q. Okay. What I want to do is draw your
12 attention to the listing of Outdoor World retail
13 stores in the lower right-hand corner of the first
14 page.
15 **A. Mm-hmm.**
16 Q. And then -- unfortunately this isn't
17 in color. And then if you go to the next page and
18 continuing under that listing, you'll note there's
19 the St. Charles, Missouri, store listed.
20 **A. (The witness reviews the document).**
21 **Okay.**
22 Q. Now that's the same St. Charles,
23 Missouri, store that has the sign outside that says
24 Bass Pro Shops Sportsman's Warehouse, correct?
25 **A. Correct.**

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1 Q. Okay. Has -- do you know whether that
2 has consistently been listed on the web site as an
3 Outdoor World retail store over the history of the
4 web site?
5 **A. I don't know.**
6 Q. Who would know that? Who's
7 responsible for the web site?
8 **A. I don't know who would have been**
9 **responsible at various points in time. I know who's**
10 **responsible today, but the same people may not have**
11 **been responsible -- when was this? What date is**
12 **this?**
13 Q. This is May 22nd of this year.
14 **A. Oh, who is responsible today?**
15 Q. We'll start with that, yeah.
16 **A. Okay. David Seifert.**
17 Q. How do you spell Seifert?
18 **A. S-E-I-F-E-R-T.**
19 Q. Okay. Thank you. I also notice that
20 if you look at the Memphis, Tennessee, store -- not
21 the future store, but the current one -- that's also
22 listed under Outdoor World retail stores. Do you see
23 that?
24 **A. Yes.**
25 Q. And again, do you know how long that's

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1 been on the web site?
2 **A. No.**
3 Q. Or would I need to ask Mr. Seifert or
4 his predecessor, I'm guessing?
5 **A. Yes.**
6 **MR. ALLGEYER: Okay. Now -- and counsel, I**
7 **apologize. The ones I used yesterday, I didn't bring**
8 **copies.**
9 **MR. CAMPBELL: No, that's fine.**
10 **MR. ALLGEYER: Okay.**
11 Q. Now I'd like you to, if you would
12 please, take a look at what we've already marked as
13 Exhibit 5. Must have been in the Hagale deposition.
14 So Hagale Exhibit 5. (Mr. Allgeyer hands a document
15 to the witness).
16 Now do you recognize this as the service
17 mark registration for Bass Pro Shops Sportsman's
18 Warehouse?
19 **A. (The witness reviews the document). I**
20 **don't know. I don't know what the legal registration**
21 **looks like. I assume this is --**
22 Q. I'll represent to you that that's --
23 **A. Okay. All right.**
24 Q. -- at least -- if you see the little
25 numbers in the lower right-hand corner --

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1 **A. Yes.**
2 Q. -- at least it means it came from you
3 folks at some point in time.
4 **A. Oh, all right. Yes.**
5 Q. And why it's confidential, I really
6 don't know.
7 **MR. CAMPBELL: Not my doing.**
8 **MR. ALLGEYER: Only Bruce can really**
9 **appreciate that remark. Somebody went wild with the**
10 **confidential stamp, I guess.**
11 Q. Now this indicates, if you look in the
12 right-hand column where it says, "No claim is made to
13 the exclusive right to use Sportsman's Warehouse
14 apart from the mark as shown." Do you see that?
15 **A. Yes.**
16 Q. Okay. Now did you understand that at
17 the time that this registration was made, that in
18 this registration Bass Pro Shops was making no claim
19 to the use of Sportsman's Warehouse apart from the
20 mark?
21 **MR. CAMPBELL: Objection. Lacks**
22 **foundation.**
23 **A. I'm not an attorney.**
24 **MR. ALLGEYER:**
25 Q. Fair enough, and I don't want you to

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1 guess about the law.
2 **A. Okay.**
3 Q. And I don't want to really know what
4 an attorney told you.
5 But I wonder if you understood or
6 understand today that according to this document,
7 Bass Pro Shops is not claiming an exclusive right to
8 the use of Sportsman's Warehouse under this
9 registration?
10 **MR. CAMPBELL: Objection. Compound and**
11 **calls for a legal conclusion. You can answer if you**
12 **can.**
13 **A. I can't answer that. I'm not an**
14 **attorney.**
15 **MR. ALLGEYER:**
16 Q. Okay. If you look at the lower left
17 corner, where it says first use, 1/2/1995 --
18 **A. Okay.**
19 Q. -- did you provide any information
20 that went into the papers that went to the trademark
21 office about the date that the -- let me start over
22 -- the Bass Pro Shops Sportsman's Warehouse service
23 mark was used?
24 **A. No.**
25 Q. Do you know who did?

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1 **A. No.**
2 Q. Are you aware of any documents that
3 would establish that that mark was used in commerce
4 in January of 1995?
5 **A. No.**
6 Q. If I wanted to find out when the first
7 sale was made from the Bass Pro Shops Sportsman's
8 Warehouse store in the Atlanta area, where would I
9 look?
10 **A. Probably in the company's financial**
11 **records.**
12 Q. That would show the sales from that
13 store by date or something?
14 **A. No, it would show it in summarized --**
15 **the general ledger would have a summary balance for**
16 **each month.**
17 Q. Okay.
18 **A. And this would be -- it would be fed**
19 **from a source document, like a daily sales register**
20 **or something like that.**
21 Q. Does the company keep daily sales
22 registers back that far?
23 **A. We have a document retention policy,**
24 **and I can't tell you specifically. But there's a**
25 **certain period of time we keep certain documents,**

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1 **whether it's for IRS or legal purposes and that,**
2 **so --**
3 Q. We would have to check?
4 **A. -- we would have to check.**
5 **MR. ALLGEYER: Okay.**
6 **(Miller Exhibit 2 was marked for**
7 **identification by the court**
8 **reporter and was shown to the**
9 **witness).**
10 **THE REPORTER: I've marked Exhibit 2.**
11 **MR. ALLGEYER:**
12 Q. I'm showing you now what our court
13 reporter has marked as Miller Deposition Exhibit 2,
14 and I would ask you to just take a minute and glance
15 through that document and tell me whether, first of
16 all, it's something you've seen before?
17 **A. (The witness reviews the document).**
18 **No.**
19 Q. Okay. If you look in the second
20 paragraph in this document, which I'll represent to
21 you is a communication from counsel on behalf of Bass
22 Pro Trademarks, it says LP, to the United States
23 Patent and Trademark Office, it says, "Insert the
24 following disclaimer: No claim is made to the
25 exclusive right to use Sportsman's Warehouse apart

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1 from the mark as shown."
2 Whether or not you've seen this document
3 before, did you discuss or have any input into the
4 decision of whether to insert that disclaimer in the
5 application?
6 **A. No.**
7 Q. Who would have, if not you?
8 **A. I don't -- I don't remember. I don't**
9 **know.**
10 Q. You don't know, okay.
11 **A. That wasn't my responsibility.**
12 Q. Who are the candidates for who would
13 have? Is that something Mr. Morris would have had to
14 pass on?
15 **A. I don't know.**
16 Q. And again without telling me what was
17 said, who was communicating with counsel about
18 trademark issues on or about the time of this
19 particular document, which is dated in 1996?
20 **A. I don't know. That was not my**
21 **responsibility.**
22 Q. That was before your time?
23 **A. Well, I've been here 25 years, but it**
24 **was not part of my responsibilities.**
25 Q. I mean before you assumed any

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1 trademark responsibility?
2 **A. Right, yes.**
3 Q. Okay.
4 **MR. CAMPBELL: What was the exhibit number**
5 **on that one?**
6 **MR. ALLGEYER: 2.**
7 **MR. CAMPBELL: Thank you.**
8 Q. Let me show you what we've marked as
9 Hagale Exhibit 6. (Mr. Allgeyer hands a document to
10 the witness).
11 And this is another trademark document
12 dated a little later. Wait a minute. Dated a little
13 earlier, dated March of 1996. Have you seen this
14 document before?
15 **A. (The witness reviews the document).**
16 **No.**
17 Q. Were you aware that at one point in
18 time Bass Pro Trademarks LP had sought to register a
19 word mark for the Sportsman's Warehouse?
20 **A. No.**
21 Q. And I take it you weren't aware that
22 that was abandoned?
23 **A. No.**
24 **MR. ALLGEYER: You know what, we've been**
25 **going for a while. Can we take about a ten-minute**

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1 **break.**
2 **MR. CAMPBELL: Absolutely.**
3 **THE WITNESS: Sure.**
4 **(A recess was taken from 11:00 a.m.**
5 **to 11:11 a.m.).**
6 **MR. ALLGEYER:**
7 Q. I am now going to show you what's
8 already been marked as Hagale Exhibit 8, which I'm
9 just going to use as a jumping-off point to ask you
10 about gift cards. (Mr. Allgeyer hands a document to
11 the witness).
12 I believe, I could be wrong -- well, let's
13 start with Exhibit 8 first. This appears to be --
14 this is a copy of a Bass Pro Shops gift card together
15 with the jacket. And if you notice, it's got some
16 language on the back as well.
17 **A. Yes.**
18 Q. Okay. A few questions. I think
19 somebody yesterday told me you may know about how
20 many of these gift cards get sold every year by Bass
21 Pro. Do you know that?
22 **A. A lot. That's all I know.**
23 Q. That's what they told me too. Is it
24 in the millions or the hundreds of thousands or --
25 **A. I couldn't tell you.**

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1 Q. Who would know that?
2 **A. I would know that if I looked it up.**
3 Q. If you looked it up?
4 **A. Yes.**
5 Q. Okay. Are you familiar with the form
6 these gift cards have taken over the years?
7 **A. Yes.**
8 Q. Okay. Is this substantially the way
9 the gift cards have looked or is there sort of a
10 whole history of different gift cards going back in
11 time?
12 **A. This is substantially the way the gift**
13 **cards have looked. There may be other designs.**
14 Q. Okay. Now let me focus you on the
15 first page in that sort of black square, and you're
16 going to have to turn the exhibit upside down.
17 **A. (The witness complies).**
18 Q. Yeah. Where it says, "Redeemable
19 through Bass Pro Shops catalogs" and goes on for a
20 while and it says "or Sportsman's Warehouse stores."
21 Do you know how long that reference to
22 Sportsman's Warehouse stores has been on the gift
23 card jacket?
24 **A. I don't -- I don't know specifically.**
25 Q. Do you have a -- any general

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1 recollection of when that was added?
2 **A. No.**
3 Q. Okay. Do you know if it was added
4 going back as far as the opening of the Atlanta
5 store, or is that something relative -- last couple
6 years or so?
7 **A. Well, we haven't had gift cards since**
8 **the opening of the Atlanta store. Gift card's a new**
9 **technology that's only come out within the last five**
10 **or six years.**
11 Q. Okay.
12 **A. We would have had gift certificates.**
13 Q. Okay. So it would have been no --
14 okay. So at least this is within the last five
15 years, but we don't know whether it was added in the
16 last year or two or whether it goes back five years?
17 **A. I don't recall.**
18 Q. Okay. Who would know that in your
19 organization?
20 **A. My -- someone -- I should. Someone in**
21 **my area should. But again --**
22 Q. You have to look it up?
23 **A. -- we have to look it up.**
24 Q. Okay. If you would look at the next
25 page.

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1 **A. (The witness turns to the requested**
2 **page).**
3 Q. At the beginning of the first line
4 there's a reference to Bass Pro Sportsman's
5 Warehouse. Do you see that?
6 **A. Yes.**
7 Q. And there's a little circle after it.
8 Do you recall if on those cards that's an R with a
9 circle around it?
10 **A. I don't recall.**
11 Q. Okay. So we would have to look at
12 it?
13 **A. We would have to look at it.**
14 Q. Okay. Is there someone in your
15 organization who is responsible for making sure that
16 trademarks are properly used within the organization?
17 **A. We defer to outside counsel on any**
18 **matters related to trademarks.**
19 Q. Okay. But does -- do you have outside
20 counsel review all your use of trademarks, ads and
21 cards and that sort of thing?
22 **A. To the greatest extent possible.**
23 Q. Do you know whether -- without telling
24 me what they said, whether counsel ever reviewed the
25 back of the gift card?

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1 **A. I know certain counsel reviewed the**
2 **back of the gift card. I'm not sure trademark**
3 **counsel reviewed the back of the gift card.**
4 Q. I think I know what the answer is
5 going to be, but is there -- are there any written
6 directions or training materials that are provided to
7 employees of Bass Pro Shops on how to use trademarks
8 properly?
9 **A. Not that I'm aware of.**
10 Q. Okay. And as part of any training for
11 store managers, assistant managers, employees, and so
12 forth, is there any training on trademark usage?
13 **A. I don't know.**
14 Q. You're not aware of any?
15 **A. I'm not aware of any.**
16 Q. I'm going to show you Hagale Exhibit
17 9. (Mr. Allgeyer hands a document to the witness).
18 This is something else we got on the Internet same
19 day as the last thing.
20 This appears to be an ad for Bass Pro Shops
21 Outdoor Rewards Visa card. Can you look at that and
22 verify whether that's what this is?
23 **A. (The witness reviews the document).**
24 **Looks like that's what it is.**
25 Q. Okay. And in fact, Bass Pro Shops

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1 does have a Visa Outdoor Rewards that gives various
2 discounts and so forth and so on, correct?
3 **A. Well, it's our name on the card. We**
4 **don't actually own the card. It's an MBNA card.**
5 Q. MBNA card?
6 **A. Yes.**
7 Q. Okay. And is this an MBNA web site so
8 far as you know?
9 **A. No, this is our -- no, I can't tell --**
10 **I can't tell whose web site this comes from.**
11 Q. Do you -- does Bass Pro have a web
12 site that allows people to apply for these cards?
13 **A. I believe there's a link on the web**
14 **site, you know. On the web site there's probably an**
15 **icon where you can go into and apply for a credit**
16 **card.**
17 Q. Okay. If you look at the second to
18 the last page.
19 **A. (The witness turns to the requested**
20 **page).**
21 Q. It will take me a while to get you
22 there.
23 **A. Yeah. Okay.**
24 Q. Okay. Yeah. And in the second
25 paragraph -- it has the two paragraphs and we go down

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one, two, three, four, five, six, seven, eight, lines. You'll see that it says Sportsman's Warehouse with a circle R after it?

A. Yes.

Q. Do you know whether or not that is proper trademark usage of Bass Pro Shops marks?

A. No.

Q. Okay. Do you know how long this -- if you link to the web site, one is able to go and find that usage, that is the Sportsman's Warehouse with a circle R?

A. No.

Q. Do you know who would know that?

A. No.

Q. Who would be the candidates from your company who are likely to be involved with the --

A. With the Outdoor Rewards program?

Q. Yes.

A. Stan Lippelman.

Q. Okay. Anybody else?

A. Not that I'm aware of.

Q. Have you seen any other uses in your tenure at Bass Pro of the phrase Sportsman's Warehouse standing by itself with a circle R after it?

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A. I'm -- I don't -- I don't recall -- I don't know of any, but that doesn't mean there haven't been any.

Q. And you mentioned that you have also to the extent possible reviewed usage of marks. Who coordinates that from your organization -- again, not telling me what counsel said, but somebody from the organization has to coordinate that. Do you know who does that?

A. Presently I do.

Q. You do, okay. And do you -- at this point is it your practice to actually send all the various ads and so forth that your company is having throughout the country to get reviewed or how do you do that?

A. I'm not aware that any ads go to counsel for review.

MR. ALLGEYER: Off the record.

(Proceedings go off record at 11:21 a.m.).

MR. ALLGEYER:

Q. Okay. I'm going to move forward.

To your knowledge has anyone from Bass Pro Shops -- employee, officer, or anybody else -- ever made a written complaint to Sportsman's Warehouse

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about Sportsman's Warehouse's use of the mark Sportsman's Warehouse, of the name Sportsman's Warehouse?

A. I'm not aware of anything.

Q. Okay. And to your knowledge has anyone from Bass Pro Shops ever complained orally to anyone at Sportsman's Warehouse about Sportsman's Warehouse use of the name or mark Sportsman's Warehouse?

A. I personally am not aware of it.

Q. Have you had any discussions outside of -- discussions with counsel now, any discussions with people from Bass Pro Shops about whether or not you should formally complain about Sportsman's Warehouse's use of the mark or the name Sportsman's Warehouse?

A. Just Jim Hagale.

Q. Okay. And what -- tell me about that conversation.

A. It was primarily related to my role to facilitate and coordinate with outside counsel relative to the issue with them using the trademark Sportsman's Warehouse.

So again, my role has been always to, you know, control legal costs, you know.

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Q. Mm-hmm.

A. To serve as the coordinator for Jim or others in the company to contact or write counsel.

Q. Okay. Now -- and again, I don't want to know what counsel told you because I don't get to know that.

A. Mm-hmm.

Q. But what did Mr. -- in this conversation, what did Mr. Hagale tell you to do?

A. Basically I would give him information back from counsel and then he would say -- give me directive to go back to counsel and move forward or do this or do that, you know.

But it was based on whatever counsel was telling -- you know, direction from counsel. Based on Mr. Hagale's directives from counsel.

Q. Okay. All right. Again, I don't get to know what counsel said to you --

A. Uh-huh.

Q. -- or really what you said to counsel. But did this have to do with filing the proceeding that brings us here today?

A. Yes.

Q. The cancellation proceeding?

A. Yes.

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1 Q. Okay. Apart from that, have you had
2 any other conversation with Mr. Hagale about taking
3 any formal action to complain, or to bring legal
4 action for that matter, against Sportsman's Warehouse
5 for its use of the mark or name Sportsman's
6 Warehouse?
7 **A. No.**
8 Q. And you've had no conversations with
9 anybody else at Bass Pro in that regard?
10 **A. Not that I'm aware of. To the best of**
11 **my knowledge I'm not aware of anything.**
12 Q. Yeah, okay. Have you in let's say
13 about the last five or six years had any knowledge
14 about the expansion of Sportsman's Warehouse, my
15 client, and their business throughout the country?
16 **A. No.**
17 Q. That's not something you keep track
18 of?
19 **A. I'm aware of them. But I don't keep**
20 **-- I don't watch it daily or weekly. Just in**
21 **general. I believe that they're a privately held**
22 **company.**
23 Q. Mm-hmm. You're aware that generally
24 in the last four or five years they've been growing
25 into a much bigger company with more stores though,

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1 right?
2 **A. Not really.**
3 Q. No? Okay.
4 **A. They're a private company. Other**
5 **companies you can get more information on that are**
6 **public, but I really didn't know very much about**
7 **them.**
8 Q. You've never researched them or looked
9 at their web site?
10 **A. Not until after --**
11 Q. Until this dispute?
12 **A. -- this became an issue, yeah.**
13 Q. When did you first research them or
14 look on their web site?
15 **A. I really don't remember. Probably was**
16 **a year or so ago, maybe a couple years ago. I don't**
17 **know.**
18 Q. Do you remember what it was you were
19 looking for?
20 **A. Yes. I recall wondering why somebody**
21 **was using our mark. And I went on the Internet and**
22 **looked up Sportsman's Warehouse and found out there**
23 **was a company in Utah.**
24 Q. Mm-hmm. And did you learn anything
25 else?

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1 **A. That the owner's name is Stu Utgaard,**
2 **and it sounded very German.**
3 Q. Okay. Anything else?
4 **A. No.**
5 Q. Did you have any discussions about
6 what you learned with anybody -- again, not with
7 counsel --
8 **A. No.**
9 Q. -- but anybody in Bass Pro Sports?
10 **A. No.**
11 Q. Bass Pro Shops, pardon me.
12 Okay. There's been reported to me actually
13 in these interrogatories we're looking at some
14 instances of customers trying to redeem Sportsman's
15 Warehouse coupons in Bass Pro stores and that sort of
16 thing.
17 Did you have any involvement with that
18 issue?
19 **A. No.**
20 Q. Okay. Had anyone told about you that,
21 that customers were seeking to redeem Sportsman's
22 Warehouse coupons in Bass Pro stores?
23 **A. I heard something about it, but I**
24 **couldn't tell you from whom and when. But I remember**
25 **hearing something about that.**

[Page 60]

1 Q. Okay. You don't remember about when
2 that was?
3 **A. No.**
4 Q. Does the company have a policy of
5 accepting competitor coupons as part of the company's
6 low price guarantee, if you know?
7 **A. I don't know.**
8 Q. And I bet I know the answer to this.
9 But just to be sure, you didn't ever raise any
10 instances or claim confusion to anybody at
11 Sportsman's Warehouse?
12 **A. No.**
13 Q. And are you aware of anybody from Bass
14 Pro Shops doing that, complaining or --
15 **A. No.**
16 Q. -- bringing to their attention any
17 instances of customer confusion or claimed confusion?
18 **A. No.**
19 Q. Okay. I want to show you what we've
20 already marked as Hagale Exhibit 16. (Mr. Allgeyer
21 hands a document to the witness).
22 And you'll note that there's a reference
23 there to request number 12. Do you see that?
24 **A. (The witness reviews the document).**
25 **Yes, uh-huh.**

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1 Q. Then I'm going to refer you back to
2 Miller Exhibit 1, request number 12, which asks for
3 certain expenditures. Let me get that out so we're
4 all on the same page. (Mr. Allgeyer hands a document
5 to the witness).
6 Now did you have anything to do with
7 answering or directing an answer to request number 12
8 in Exhibit Miller 1?
9 **A. I didn't have anything to do with**
10 **this, but I did assign responsibilities to assist me**
11 **on these interrogatories.**
12 Q. Okay. And who -- this is actually
13 request for production of documents, but okay.
14 **A. Yeah.**
15 Q. But who -- okay. Who was it that put
16 this together?
17 **A. I believe John Winters. He's our**
18 **director of internal audit. He helped me put some of**
19 **the documents together.**
20 Q. Is that Winners?
21 **A. Winters.**
22 Q. Winters with a T?
23 **A. Mm-hmm.**
24 Q. Okay. And do you know the source of
25 the documents that were used to put this summary that

[Page 62]

1 is Exhibit 16 together?
2 **A. No.**
3 Q. I note that at the top it reads, "Bass
4 Pro retail locations, formerly known as Sportsman's
5 Warehouse." Was that something you directed to be
6 put on there or is that something Mr. Winters put on
7 there?
8 **A. No, I would not have directed that.**
9 **MR. ALLGEYER: Okay. Could you mark that,**
10 **please?**
11 **(Miller Exhibit 3 was marked for**
12 **identification by the court**
13 **reporter and was shown to the**
14 **witness).**
15 **THE REPORTER: I've marked Exhibit 3.**
16 **MR. ALLGEYER: Is this 2?**
17 **THE REPORTER: 3.**
18 **MR. ALLGEYER: 3. Okay.**
19 Q. I'm showing you what's been marked as
20 Miller Exhibit 3. And this appears to be a summary
21 in response to document request 9, but let's turn in
22 Miller Exhibit 1 to request 9 and see if whether this
23 in fact is.
24 **A. Going -- with this? Am I looking at**
25 **this?**

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1 Q. Yeah. We're going to relate 3 to 1.
2 **A. 3 on here to 1?**
3 Q. No, I'm sorry, Exhibit 3.
4 **A. Oh, Exhibit 3 to Exhibit 1.**
5 Q. To Exhibit 1, which is the thick one
6 there.
7 **A. Oh, I'm sorry.**
8 Q. No, I wasn't clear. I apologize.
9 Request 9 asks for documents that refer or relate to
10 annual gross sales in terms of units and dollars from
11 1995 to present.
12 And then there's a listing in Exhibit 3 for
13 the Bass Pro retail locations, formerly known as
14 Sportsman's Warehouse. And again, I just want to
15 know whether so far as you understand it this is a
16 summary of those expenses responsive to request 9?
17 **A. Yes.**
18 Q. Okay. And did you have Mr. Winters
19 prepare this under your direction?
20 **A. I believe he did.**
21 Q. And what was the source of this
22 document?
23 **A. Probably came out of the general**
24 **ledger.**
25 Q. Okay. And this is going to be all

[Page 64]

1 sales from those retail locations of whatever it is
2 they sell from -- does it include boats and that sort
3 of thing?
4 **A. No, it would not include boats.**
5 Q. Okay. But it would include any of the
6 Bass Pro Shops retail sales at these locations?
7 **A. Correct.**
8 Q. I'm going to do something I did
9 yesterday on -- without marking this, I'm going to
10 show you something that's been Bates numbered BPS
11 001355 that's been produced to us. (Mr. Allgeyer
12 hands a document to the witness).
13 I'm just going to ask you if that's a
14 document that you know something about?
15 **A. (The witness reviews the document).**
16 **No.**
17 Q. Does this have -- do you know if this
18 has something to do with advertising expenditures or
19 is that something you've seen before?
20 **A. I've never seen this before. I know**
21 **it says Carol Robinson Communications, Sportsman's**
22 **Warehouse, which I'm familiar with.**
23 Q. You're familiar with Carol Robinson
24 Communications?
25 **A. Yes.**

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1 Q. What -- who are they?
2 **A. It's called CRC Inc.**
3 Q. Mm-hmm.
4 **A. And it's a company that -- this is**
5 **John Morris's sister, Carol Robinson.**
6 Q. Mm-hmm.
7 **A. And she serves as an agent to place**
8 **ads for the company.**
9 Q. Okay. So this has something to do
10 with those ads --
11 **A. Mm-hmm.**
12 Q. -- but you've not seen it before?
13 **A. No, I haven't. (The witness returns**
14 **the document).**
15 Q. Okay. Do you know what tap scan is?
16 **A. No.**
17 Q. I'm going to show you this and see if
18 you can place that for me. That bears Bates number
19 BPS 001344. (Mr. Allgeyer hands a document to the
20 witness).
21 Is that something you're all -- you're
22 familiar with?
23 **A. No. (The witness returns the**
24 **document).**
25 **MR. ALLGEYER: Okay. Would you mark that?**

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1 **(Miller Exhibit 4 was marked for**
2 **identification by the court**
3 **reporter and was shown to the**
4 **witness).**
5 **THE REPORTER: I've marked Exhibit 4.**
6 **MR. ALLGEYER:**
7 Q. Showing you what's -- what we've
8 marked as Miller Exhibit 4, this appears to be an
9 application for registration of a trademark or
10 service mark made on behalf of Bass Pro Trademarks
11 LLC, sworn on July the 25th, 2005.
12 And I think -- yes, is that your signature
13 at the bottom of the document --
14 **A. Yes.**
15 Q. -- Exhibit 4?
16 **A. Yes.**
17 Q. Okay. Now do you recognize this as a
18 state application for registration of a trademark or
19 service mark for the words Sportsman's Warehouse?
20 **A. I would say it's a state of Tennessee**
21 **application for registration, yes.**
22 Q. Okay. And if you look at 9, it says
23 what the mark was in words, correct?
24 **A. Yes.**
25 Q. Okay. Now I note that this lists a --

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1 it says the date when the mark was first used. And
2 then it says in Tennessee May 23rd, 2002. Do you see
3 that?
4 **A. Yes.**
5 Q. What's the source of the May 23rd,
6 2002, date?
7 **A. I don't know.**
8 Q. Is this -- did you prepare this
9 document or was it just done for your signature?
10 **A. It was done for my signature by**
11 **counsel.**
12 Q. Okay. Then I note before that where
13 it says anywhere May 23rd, 2005, again did you have
14 any input into that?
15 **A. No.**
16 Q. If you would turn to the next page.
17 **A. (The witness turns to the requested**
18 **page).**
19 Q. There's a sort of mark there that says
20 Bass Pro Shops Sportsman's Warehouse, and then it has
21 a little leaf on the Bass Pro Shops. Do you see
22 that?
23 **A. Yes.**
24 Q. Is that part of the way that -- as far
25 as you know, that mark is being used within

[Page 68]

1 Tennessee?
2 **A. I don't know.**
3 Q. Have you seen the mark with the leaf
4 before, additional leaf?
5 **A. I've seen the leaf before, but I can't**
6 **tell you how it's been used.**
7 Q. Who would know that? Is there
8 somebody responsible for that kind of thing at Bass
9 Pro?
10 **A. I don't know.**
11 Q. Who had prepared -- this appears to be
12 an ad. Do you know who would have prepared this or
13 what department this comes out of?
14 **A. I don't know. I think it's probably**
15 **the advertising/marketing group.**
16 Q. Okay. Who has that group?
17 **A. Stan Lippelman.**
18 **MR. ALLGEYER: Okay.**
19 **(Miller Exhibit 5 was marked for**
20 **identification by the court**
21 **reporter and was shown to the**
22 **witness).**
23 **THE REPORTER: I've marked Exhibit 5.**
24 **MR. ALLGEYER:**
25 Q. Showing you what's been marked as

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1 Exhibit 5, and this appears to be an application to
2 the State of Missouri for the state registration for
3 the words Sportsman's Warehouse mark. And it is
4 dated July 25th, 2005. Do you see that?
5 **A. (The witness reviews the document).**
6 **Yes, I do.**
7 Q. Okay. And that's your signature on
8 this?
9 **A. Yes.**
10 Q. I note that if you go down about the
11 middle of the document, it reads, "The mark has been
12 used in business by the applicant or predecessor
13 since August 23rd, 2001. It's been used in the state
14 of Missouri since August 23rd, 2001." Do you see
15 that?
16 **A. Yes.**
17 Q. Okay. What was the source of the
18 first August 23rd, 2001, do you know?
19 **A. I don't know.**
20 Q. And you don't know the second one
21 either?
22 **A. No.**
23 Q. This is prepared by counsel?
24 **A. Correct.**
25 Q. And you signed it?

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1 **A. Correct.**
2 Q. Did you -- did you ever question why
3 that date was on there?
4 **A. No.**
5 Q. Without telling me what counsel might
6 have said, what did you have in mind by registering
7 this particular mark at that time? What were you
8 trying to accomplish?
9 **A. I don't recall.**
10 Q. Were you -- strike that.
11 **MR. ALLGEYER: Okay. If you would give me**
12 **about three minutes, I'm probably just about**
13 **finished.**
14 **(A recess was taken from 11:43 a.m.**
15 **to 11:44 a.m.).**
16 **MR. ALLGEYER: Okay. Those are all the**
17 **questions I have. Appreciate you coming in.**
18 **THE WITNESS: All right.**
19 **(The deposition was concluded at**
20 **11:44 a.m.).**
21
22 [SIGNATURE RESERVED]
23 * * * * *
24
25

[Page 71]

1
2
3 CERTIFICATE OF REPORTER
4
5 I, Karen S. Rogers, Registered Professional
6 Reporter, Certified Realtime Reporter, and Notary
7 Public within and for the State of Missouri, do
8 hereby certify that the witness whose testimony
9 appears in the foregoing deposition was duly sworn by
10 me, that the testimony of said witness was preserved
11 via machine shorthand by me to the best of my ability
12 and was thereafter reduced to written form under my
13 direction; that I am neither counsel for, related to,
14 nor employed by any of the parties to the action in
15 which this deposition was taken; and further that I
16 am not a relative or employee of any attorney or
17 counsel employed by the parties thereto, nor
financially or otherwise interested in the outcome of
18 the action.
19
20
21 Karen S. Rogers, RPR, CRR, CCR,
and Notary Public within and for
22 the State of Missouri
23
24
25

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BASS PRO TRADEMARKS, L.P.	)	
	)	
Ser. No. 75/066,261	)	Trademark Attorney:
	)	Paula B. Mays
Filed: March 1, 1996	)	
	)	Law Office: 106
BASS PRO SHOPS SPORTSMAN'S WAREHOUSE and Design	)	

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513, on 11-14-96

AB Hutchie

AMENDMENT

Asst. Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

Dear Sir:

This amendment is responsive to the Office Action dated November 8, 1996 for the above reference application.

Please insert the following disclaimer:

-- No claim is made to the exclusive right to use SPORTSMAN'S WAREHOUSE apart from the mark as shown.--

Please amend the goods identification to read as follows:

--RETAIL STORES FEATURING CLOTHING, FISHING SUPPLIES AND SPORTING GOODS IN INTERNATIONAL CLASS 42.--

RESPONSE

It is respectfully submitted that the present application is in condition for publication and eventual registration. Such action is respectfully requested. However, if issues arise which the examining attorney believes may be best resolved over the

EXHIBIT
MILLER 2
6-8-06 KR

CONFIDENTIAL
BPS-000983

telephone, the examining attorney is invited to contact Applicant's undersigned attorney at the telephone number listed below.

The Commissioner is hereby authorized to charge any additional fee required, or to credit any overpayment, to Account No. 12-2245.

Respectfully submitted,

William B. Kircher
Reg. No. 22,481

Kokjer, Kircher, Bowman & Johnson, P.C.
2414 Commerce Tower, 911 Main Street
Kansas City, MO 64105-2088
Tel: 816/474-5300; Fax: 816/474-5304

(Our Docket No. BASPR430WBK)

CONFIDENTIAL
BPS-000986

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office

SERIAL NO.	APPLICANT	PAPER NO.
75/066261	BASS PRO TRADEMARKS, L.P.	

MARK
BASS PRO SHOPS SPORTSMAN'S WAREHOUSE

ADDRESS
Carter H. Kokjer
KOKJER, KIRCHER, BOWMAN & JOHNSON, P.C.
2414 Commerce Tower, 911 Main
Kansas City, MO 64105-2088

ACTION NO. 01

MAILING DATE 11/08/96

REF. NO. BASPR430WBK

FORM PTO-1525 (5-90) U.S. DEPT. OF COMM. PAT. & TM OFFICE

ADDRESS:
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

If no fees are enclosed, the address should include the words "Box Responses - No Fee."

Please provide in all correspondence:

1. Filing Date, serial number, mark and Applicant's name.
2. Mailing date of this action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and ZIP code.

PRIORITY ACTION Response due 1/8/97

EXAMINING ATTORNEY		PERSON CALLED/INTERVIEWED	TELEPHONE NUMBER	
Paula B. Mays		William B. Kircher, Esquire	(816) 474-5300	
X	TELEPHONE CALL	INTERVIEW DATE	X	ATTORNEY
	PERSONAL INTERVIEW	November 4, 1996		APPLICANT

CALL RECORD/NOTES

OFFICE SEARCH: The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), ~~15~~ U.S.C. Section 1052(d). TMEP section 1105.01.

RE: Serial Number *75/066261 BASS PRO SHOPS SPORTSMAN'S WAREHOUSE (and Design)*

This case will be given priority as an amended case if Applicant or applicant's attorney responds to the requirements stated below within two months of the above mailing date. In any event, a proper response to this Priority Action must be received within SIX MONTHS from the mailing date stated above in order to avoid ABANDONMENT.

The assigned examining attorney has reviewed the referenced application and determined the following:

Disclaimer

The applicant must insert a disclaimer of "*Sportsman's Warehouse*" in the application, because the term is descriptive of a feature of the applicant's store services. Trademark Act Section 6, 15 U.S.C. Section 1056; TMEP sections 1213 and 1213.09(a)(i).

A properly worded disclaimer should read as follows:

No claim is made to the exclusive right to use "*Sportsman's Warehouse*" apart from the mark as shown.

Recitation of Services

The recitation of services is unacceptable as indefinite. The applicant may adopt the following recitation, if accurate: *Retail stores featuring clothing, fishing supplies & sporting goods, (in International Class 42).* TMEP section 804

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BPS-000987

[Page 1]

IN THE U.S. PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BASS PRO TRADEMARKS, L.L.C.,

Petitioner,

Vs. Cancellation No. 92045000

SPORTSMAN'S WAREHOUSE, INC.,

Respondent.

THE DEPOSITION OF JOHN DAVID HAGEL

August 2, 2006

ALPHA REPORTING CORPORATION
SHERYL G. WEATHERFORD, RPR
236 Adams
Memphis, Tennessee 38103
(901) 529-1999

www.alphareporting.com

[Page 2]

1 The deposition of JOHN DAVID HAGEL, taken
2 on behalf of the Respondent, pursuant to Notice,
3 on August 2, 2006, beginning at approximately 1:35
4 p.m. in the law offices of Husch & Eppenberger,
5 Suite 1450, 200 Jefferson Avenue, Memphis,
6 Tennessee.
7 This deposition is taken in accordance
8 with the terms and provisions of the Federal Rules
9 of Civil Procedure.
10 All forms and formalities are waived, and
11 objections as to relevancy, materiality and
12 competency are reserved, to be presented at or
13 before the hearing. Objections as to the form of
14 the question must be made at the time of the
15 taking of the deposition. The signature of the
16 witness is waived.
17
18
19
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22
23
24
25

[Page 3]

1 - APPEARANCES -
2
For the Petitioner (Via Telephone):
3
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7
8 For the Respondent:
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Attorney at Law
10 Lindquist & Vennum
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Minneapolis, MN 55402-2205
12 612.371.3533
13 Reported by:
14 MS. SHERYL G. WEATHERFORD
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23
24
25

[Page 4]

1 - INDEX -
2 **WITNESS:** **PAGE NUMBER**
3 **JOHN DAVID HAGEL**
4
DIRECT EXAMINATION **5**
5 **BY MR. SMITH**
6
7
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Pat Carl & Associates (763) 591-0535 or (800) 591-9PCA (722) patcarl@patcarl.com

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[Page 5]

1 JOHN DAVID HAGEL
2 Having been first duly sworn, was examined and
3 testified as follows:
4 DIRECT EXAMINATION
5 BY MR. SMITH:
6 Q. Good afternoon, Mr. Hagel, my name is
7 Christopher Smith, and I represent Sportsman's
8 Warehouse, Incorporated, a Utah corporation.
9 Could you state your name for the record and spell
10 it, please.
11 **A. John David Hagel. J O H N, D A V I D, H A**
12 **G E L.**
13 Q. Have you ever been deposed before, sir?
14 **A. No, sir.**
15 Q. I'm just going to go over a couple of
16 ground rules, especially since we're on a
17 telephone deposition here to make it clear for the
18 court reporter. First, I want to say if you don't
19 understand a question or can't hear a question I'm
20 asking, please ask me to rephrase it or to restate
21 it, I would be happy to do that. This will be a
22 pretty short deposition, but if you need a break,
23 please ask for one, I would be happy to oblige.
24 And most importantly we shouldn't talk over one
25 another. I will try not to ask you a question

[Page 6]

1 before you finished answering yours if you try not
2 to answer a question before I finish asking my
3 question. Does that sound good?
4 **A. Sure.**
5 Q. Okay. Also be aware that I may pause from
6 time to time to review my notes to prepare for the
7 next question, so just wait patiently and I will
8 be asking the next question pretty shortly.
9 You understand, too, that you have been
10 sworn in today and your testimony is being given
11 under oath; is that correct?
12 **A. Yes, sir.**
13 Q. Okay. Other than discussions with your
14 attorney, how did you prepare for this deposition
15 today?
16 **A. I didn't.**
17 Q. You didn't review any documents for
18 your -- in preparation for your deposition today?
19 **A. No, sir.**
20 Q. Did you discuss the fact that you were
21 going to be deposed with anyone today other than
22 your attorney?
23 **A. No, sir, other than the time with the**
24 **general manager.**
25 Q. Okay. What did you discuss with the

[Page 7]

1 general manager?
2 **A. Just the location of where we were meeting**
3 **today and what time and if we were covered at the**
4 **store for me to make this meeting.**
5 Q. Did you discuss anything about the content
6 of your testimony today with your general manager?
7 **A. No, sir.**
8 Q. Did you provide any information to any of
9 your superiors or any documents in response to my
10 client's requests in this litigation?
11 **A. No, sir, none that I'm aware of.**
12 Q. Can you briefly describe your educational
13 background?
14 **A. High school graduate, associate's degree**
15 **in science.**
16 Q. And where did you get that degree?
17 **A. Northwest Community College.**
18 Q. In what year did you receive that degree?
19 **A. Oh, my goodness. I can -- I can**
20 **guesstimate '91. I apologize, I'm not -- I can't**
21 **remember the exact year.**
22 Q. And did you get any other education
23 besides your associate's after that?
24 **A. I have taken business classes through**
25 **Northwest also after that.**

[Page 8]

1 Q. Okay. And give me a brief description of
2 your employment background.
3 **A. I have been in warehousing since**
4 **graduating whatever year I did. I have pretty**
5 **much been in warehousing distribution atmosphere**
6 **until getting with the present company five years**
7 **ago. I started out of college in lower**
8 **supervisory skills for a few years and have**
9 **probably been in management for the past dozen to**
10 **15 years in distribution, including management at**
11 **our Memphis location now.**
12 Q. Did you start with Bass Pro Shops when the
13 Memphis store opened?
14 **A. I started in -- a few months afterwards, I**
15 **think November. I think they opened in May.**
16 Q. And what was your first position with Bass
17 Pro Shops in Memphis?
18 **A. Receiving manager.**
19 Q. And did your positions change over the
20 years?
21 **A. Yes, sir.**
22 Q. Can you run through the different
23 positions that you have had up to the present day?
24 **A. Sure. I started receiving manager first**
25 **of November 2002. Approximately a year and a half**

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[Page 9]

1 **to two years I was receiving manager, went to**
2 **sales floor, group sales floor manager. Camping**
3 **footwear.**
4 Q. Okay.
5 **A. For less than a year. Approximately a**
6 **little under two years ago I took an operations**
7 **manager position where I am at presently.**
8 Q. And what are your duties as operation
9 manager?
10 **A. A lot of the financial, controlling**
11 **budgets, a lot of the front end day-to-day**
12 **operations, the -- and the back end receiving, the**
13 **maintenance, visual, a lot of the LP areas and**
14 **again being operations pretty much everything on**
15 **the floor, still a day-to-day helper.**
16 Q. Just so we are clear when you say front
17 end day-to-day operations, what does that mean?
18 **A. Customer service and the front end, the**
19 **cash registers, but it includes the front customer**
20 **service, the tills, all the cash registers to the**
21 **cash room.**
22 Q. And when you said that you were
23 responsible for the visual aspects of the store, I
24 believe you said, what does that mean?
25 **A. Mainly with the -- we have a visual team**

[Page 10]

1 **that is accountable for the apparel, the fru-fru**
2 **of the store I guess if you would, the taxidermy,**
3 **the moving of our taxidermy to create scenes, a**
4 **lot of the scenery in our store.**
5 Q. Does that involve signage, too?
6 **A. No, sir, unless it was describing a**
7 **certain taxidermy or a certain picture or**
8 **something of that nature, that would be it.**
9 Q. And how long have you been in your present
10 position as operations manager?
11 **A. I don't know exactly. It was -- it's**
12 **close to two years.**
13 Q. And you worked for Bass Pro consistently
14 over the time. You started in November, was it
15 2001 or 2002?
16 **A. 2002. Yes, sir.**
17 Q. And you worked consistently from that time
18 to the present day; is that correct?
19 **A. Yes, sir.**
20 Q. Did the name of your store change since
21 you began working there to the present day?
22 **A. Yes, sir.**
23 Q. And what did it change from and what did
24 it change to?
25 **A. From Sportsman's Warehouse, the sign has**

[Page 11]

1 **been changed to Sportsman's Center.**
2 Q. And when did the sign change to
3 Sportsman's Center?
4 **A. I can't give you an exact date. I can't**
5 **give you an exact date, I apologize. It was a**
6 **year ago, I think.**
7 Q. Okay. Did the name of your store change
8 or just the sign on the front?
9 **A. As far as I'm aware, just the sign up**
10 **front.**
11 Q. Okay. Could you describe that sign in
12 front?
13 **A. It's a very large sign.**
14 Q. About how tall is it?
15 **A. Just guessing each symbol is probably 12**
16 **to 15 foot -- anywhere from 10 to 15 foot high.**
17 Q. About how long is it?
18 **A. Oh, my goodness -- and I apologize, this**
19 **is all guessing.**
20 Q. How many car lengths?
21 **A. I'm guessing 40 to 50 yards.**
22 Q. Okay.
23 **A. And that's -- I'm sorry, that's a guess.**
24 Q. Is your store near a highway?
25 **A. Yes, sir. It's very close to an**

[Page 12]

1 **interstate.**
2 Q. And can that sign be seen from the
3 interstate?
4 **A. Absolutely.**
5 Q. Okay. What would you say is the purpose
6 of that big sign on the front of the building?
7 **A. The purpose would be to let people know**
8 **who we are.**
9 Q. Do you have any idea why that sign was
10 changed?
11 **A. No, sir. I could only guess.**
12 Q. Have you ever heard whether anyone in the
13 company discussed changing the sign back to
14 Sportsman's Warehouse?
15 **A. No. Hearsay. No, sir, I have not.**
16 Q. When that sign change took place just to
17 reflect the words Sportsman's Center, did you
18 notice whether the marketing materials or
19 advertising materials that your store put out also
20 changed?
21 **A. No, sir, I'm fairly certain that**
22 **immediately they did not. I think it was just a**
23 **sign change.**
24 Q. Okay. So just so I'm clear then, your
25 advertisements in the newspaper, for instance,

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[Page 13]

1 said Bass Pro Shops Sportsman's Warehouse, but
2 this giant sign on the front of the building said
3 Sportsman's Center; is that correct?
4 **A. I apologize, I couldn't tell you when they**
5 **did change, but I don't remember it changing right**
6 **off.**
7 Q. What don't you -- I'm sorry, I didn't
8 quite understand your answer. What don't you
9 remember changing right off?
10 **A. I don't know what else changed when, I**
11 **guess, when you're saying the advertisings**
12 **changed.**
13 **MR. RUSCHE: I don't think he is**
14 **saying that.**
15 **A. I apologize. I don't know when -- I am**
16 **not aware of what else changed.**
17 Q. So you're not aware of whether the
18 marketing materials, advertising materials,
19 changed to say Sportsman's Center?
20 **A. No, sir, I apologize, I don't.**
21 Q. Do you participate in what other deponents
22 have called the manager-on-duty program?
23 **A. Yes, sir.**
24 Q. Okay. Can you describe that program?
25 **A. It's a program designed to -- a customer**

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1 **service type manager allowing all incoming calls,**
2 **any customer service type relations to bring that**
3 **manager in to control any kind of situations,**
4 **good, bad, on the floor with customers, with**
5 **associates, to try to be the first line of any**
6 **kind of management decision.**
7 Q. And so in your participation in the
8 manager-on-duty program you deal with customer
9 complaints; is that correct?
10 **A. Yes, sir.**
11 Q. And you also -- I believe you said you
12 oversee the -- currently and for the last two
13 years oversee the customer service portion of the
14 store; is that correct?
15 **A. Yes, sir.**
16 Q. And in that role you also deal with
17 customer complaints; is that right?
18 **A. Yes, sir.**
19 Q. Are you aware of any customer complaints
20 or concerns relating to the similarity between
21 your store name and my client's Sportsman's
22 Warehouse's store name?
23 **A. Yes, sir.**
24 Q. Okay. Can you describe what kind of
25 complaints or concerns you have heard about or

[Page 15]

1 been involved with?
2 **A. Sure. I guess a lot of complaints that**
3 **were arrived because we wouldn't match or give**
4 **customers what -- we have rewards points for our**
5 **customers. They would bring a receipt in from a**
6 **purchase at the Winchester or Southaven location**
7 **and bring it to our store and want us to add**
8 **points on to their card, and we couldn't do that**
9 **and that caused a lot of -- a lot of interaction**
10 **with MOD and the customers.**
11 **I guess the other main complaints were**
12 **coupons that were brought in -- with the store**
13 **openings, and I'm not aware of their**
14 **advertisements, but they would bring coupons in**
15 **and, you know, they would bring something in for**
16 **$10 off at Sportsman's Warehouse, and it obviously**
17 **wasn't for our Sportsman's Warehouse Bass Pro**
18 **Shops. Those were pretty much the main stays or**
19 **we often get phone calls, complaints, on how our**
20 **Southaven store wasn't doing the things that we**
21 **were doing in Memphis and just wanted to let us**
22 **know. There just seemed to be a lot of confusion**
23 **that we opened up a second store in Memphis.**
24 Q. Okay. Any other areas or types of
25 complaints or concerns that you have been involved

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1 with?
2 **A. I can't think of any more right now.**
3 Q. Now, were you personally involved in these
4 different -- you named three different types.
5 Were you personally involved in dealing with
6 customers on all three types of those complaints?
7 **A. Yes, sir.**
8 Q. Could you estimate on average how many of
9 these types of complaints you witnessed or heard
10 about per month over the last year?
11 **A. I could very -- it would be an estimation.**
12 **Actually I couldn't to give you a definite answer.**
13 **There was numerous to be begin with and it has**
14 **slowed down, but I couldn't give you a number, no,**
15 **sir.**
16 Q. Just so I understand what you just said,
17 so over the -- since the -- my client's store
18 opened in Memphis, the number of complaints have
19 been reduced over time; is that correct?
20 **MR. RUSCHE: Objection,**
21 **mischaracterizes prior testimony.**
22 Q. Well, you can just restate what your
23 answer was before.
24 **A. I couldn't give you an exact number. It**
25 **is less today than it was last year.**

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[Page 17]

1 Q. And about, for instance, in the last month
2 how many of these types of complaints have you
3 witnessed or heard about?
4 **MR. RUSCHE: Chris, just for**
5 **clarification I'm sorry for the nitpick detail,**
6 **but when you say this month, are we -- just**
7 **clarify what we are talking about, July or August.**
8 Q. Well, the last 30 days, let's do it that
9 way.
10 **MR. RUSCHE: Okay. Fair enough.**
11 **A. Again I couldn't give you an exact number.**
12 **I have had -- I have had complaints probably of**
13 **all three that we discussed, but I couldn't give**
14 **you an exact number.**
15 Q. Well, let's talk about you said these
16 types, in terms of their rewards points, could you
17 describe that program a little bit for me?
18 **A. Sure. Rewards points are for -- we offer**
19 **a rewards card, and through purchases made with us**
20 **you gain rewards points. Through those points**
21 **they add up on your card. Every time you make a**
22 **purchase you gain more points. After you have**
23 **reached a thousand points, that equals $10 with us**
24 **and you can redeem those points. So it's pretty**
25 **much us paying back a customer for their valued**

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1 **return services with us.**
2 Q. If I understand how it works correctly, a
3 customer can bring in a receipt from a previous
4 purchase and apply it to this rewards points
5 program; is that correct?
6 **A. Yes, sir.**
7 Q. And so your -- the complaints or concerns
8 about the similarity between the stores that we
9 discussed earlier involve a customer bringing in
10 my client's Sportsman's Warehouse receipt to the
11 Bass Pro store and attempting to have that receipt
12 applied to the rewards points program; is that
13 right?
14 **A. Yes, sir.**
15 Q. Okay. What is your policy about how to
16 deal with situations like that?
17 **A. I am not real sure on what the exact**
18 **policy. I guess it's a case-by-case issue. Our**
19 **policy is to take care of the customer anyway that**
20 **we can.**
21 Q. Well, as a manager, have you been
22 presented with this situation via some employee or
23 I guess -- with yourself at a register?
24 **A. Yes, sir, and again doing whatever it**
25 **takes to make sure that the customer is happy,**

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1 **case by case. We have -- we have granted --**
2 **numerous times we have granted the value of those**
3 **points to the purchase of another item, again to**
4 **take care of the customer, whatever it takes.**
5 Q. So you do provide some sort of
6 satisfaction to the customers who come in with
7 receipts from another store; is that correct?
8 **A. Absolutely.**
9 Q. And you have done that personally?
10 **A. Yes, sir.**
11 Q. Do you remember any particular instance of
12 this happening that you could describe to me?
13 **A. I guess I want to make sure that -- I**
14 **don't know names or --**
15 Q. That's okay.
16 **A. Yeah, I apologize. There was numerous**
17 **occasions where customers would just come in and**
18 **mistakenly think that they were at our Memphis**
19 **Sportsman's Warehouse and not our Southaven**
20 **Sportsman's Warehouse in their thoughts and want**
21 **to apply their purchase from the Southaven to our**
22 **Memphis store.**
23 Q. Just so I understand, how would the
24 customer know they can do that, they could bring
25 in a receipt from a previous purchase and get it

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1 applied at a later date to the points program?
2 **A. I am not real sure unless they have**
3 **visited one of our Bass Pros before.**
4 Q. Okay. Do you have anyway of knowing
5 whether these customers that you have dealt with
6 were actually confused about the difference
7 between the two stores or rather were simply
8 trying to get more points on your rewards points
9 program?
10 **MR. RUSCHE: Objection, calls for**
11 **speculation.**
12 Q. You may still answer.
13 **A. I feel fairly certain that some were, and**
14 **I couldn't tell you if the others were.**
15 Q. Did you keep records of this sort of
16 customer complaint or concern when it happened?
17 **A. On the MOD program, no, sir, because again**
18 **we would just take care of it immediately. There**
19 **are cases where we had other opportunities through**
20 **the questionnaires that I'm not -- I have seen a**
21 **few, but I'm not -- I don't review them or go over**
22 **them so that's not part of me, but...**
23 Q. Now, when you say questionnaires, what do
24 you mean?
25 **A. At different locations in our store we**

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1 **have how we are doing questionnaires for the**
2 **customer.**
3 Q. Like a comment box?
4 **A. Yes, sir.**
5 Q. And have you ever seen customer complaints
6 about the similarity between the stores commented
7 upon in writing by customers through that medium?
8 **A. Yes, sir.**
9 Q. Do you deal with customer complaints like
10 that that are written down and put in a comment
11 box?
12 **A. No, sir.**
13 Q. Do you review those customer complaints?
14 Do you read them?
15 **A. I don't actually, no, sir.**
16 Q. So have you heard about them then?
17 **A. I have heard about customer complaints.**
18 Q. Okay. And do you know what happens to
19 those written complaints or written comment cards?
20 **A. No, sir.**
21 Q. So you're not aware of whether the company
22 keeps those in a file?
23 **A. No, sir, I am not. Our store location**
24 **does not.**
25 Q. Are you aware of any written records that

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1 are kept with regard to customer complaints about
2 the confusion between the names of the two stores?
3 **A. No, sir.**
4 Q. Do you know if there's any policy that
5 your company has about keeping written records of
6 this kind?
7 **A. No, sir, I don't.**
8 Q. Okay. Let's talk about your coupons that
9 you mentioned, the $10 off or that sort of coupon
10 situation. Have you dealt personally with
11 customers who bring in coupons from a competitor
12 and want to use them?
13 **A. I have.**
14 Q. Okay. Have you dealt with customers who
15 brought in coupons for my client, Sportsman's
16 Warehouse, and want to use them?
17 **A. Yes, sir.**
18 Q. And how do you generally handle those
19 situations?
20 **A. Of course it's a case-by-case scenario**
21 **again. With Sportsman's Warehouse being a direct**
22 **competitor to us, we have a policy of honoring or**
23 **matching prices with the like items in our store.**
24 **There's not -- with the competition of Sportsman's**
25 **Warehouse with our warehouse, again it's a case by**

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1 **case, but we wouldn't lose a customer or confuse a**
2 **customer any more to offer them that $10 or take**
3 **that $10 coupon or whatever other coupon they had.**
4 Q. Is it fair to say you generally honor
5 these coupons when they're presented, these
6 competitors' coupons?
7 **A. No, sir, a case by case. Generally it's a**
8 **case-by-case issue.**
9 Q. But you have honored them in the past
10 personally?
11 **A. With Sportsman's Warehouse?**
12 Q. Right.
13 **A. With Sportsman's Warehouse, yes, we have,**
14 **numerous.**
15 Q. Okay. Do your customers generally know
16 that that Bass Pro Shops honors competitors'
17 coupons?
18 **MR. RUSCHE: Objection, speculation.**
19 **You can answer.**
20 **A. I couldn't tell you that, Chris.**
21 Q. Is that published to customers in any way,
22 that policy?
23 **A. Chris, I think -- I'm not for sure, but it**
24 **is our policy that we will match prices.**
25 Q. Are there any signs in the store that say

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1 Bass Pro Shop matches customer prices or something
2 similar?
3 **A. I'm not aware of any, Chris.**
4 Q. When you have dealt with customers that
5 have come in with my client's Sportsman's
6 Warehouse coupons, is there a way for you to
7 determine whether or not that customer is actually
8 confused about the difference between the two
9 stores or simply trying to reduce the amount of
10 their purchase price?
11 **A. I couldn't tell you if they were or not.**
12 **It seems that again most of them seem to be**
13 **confused that we weren't the same business.**
14 Q. And how do you know that?
15 **A. I'm guessing, but most of them said that**
16 **they thought that we would take the coupon in this**
17 **location, just like we would in the Southaven**
18 **location.**
19 Q. Have you ever been a part of a meeting at
20 your store that involved discussions of customer
21 concerns or complaints about the similarity
22 between your store and my client's Sportsman's
23 Warehouse store?
24 **A. No, sir.**
25 Q. Have you ever heard about such a meeting?

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[Page 25]

1 **A. Not that I'm aware of.**
2 Q. As an employee of Bass Pro Shops, do you
3 ever take a look at the advertising that your
4 store puts out, whether it's newspaper,
5 television, et cetera?
6 **A. Yes, sir.**
7 Q. Have you ever seen an advertisement or
8 promotional materials of any kind in which
9 Sportsman's Warehouse is used by your store as a
10 phrase without the phrase Bass Pro Shops next to
11 it?
12 **A. I'm fairly certain on our fliers that**
13 **it -- on either the facing or the back page it**
14 **says Sportsman's Warehouse without saying Bass Pro**
15 **Shops.**
16 Q. What flyer are you talking about?
17 **A. We generally do a monthly tab, a flyer on**
18 **a small or sometimes a rather large paper ad.**
19 Q. And on that you see Sportsman's Warehouse
20 but you don't recall seeing Bass Pro Shops with
21 it?
22 **A. Chris, I couldn't be a hundred percent**
23 **sure without looking at one, but I know that it**
24 **says Bass Pro probably in the paper somewhere, if**
25 **not numerous times, but just answering your**

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1 **question, I think that it says Sportsman's**
2 **Warehouse by itself in that spot.**
3 Q. Other than that one instance, what about
4 all the rest of the advertising, does it use the
5 phrase Sportsman's Warehouse always along with the
6 phrase Bass Pro Shops?
7 **A. I couldn't be a hundred percent sure.**
8 Q. What is your best guess?
9 **A. I don't know. I think that -- I think**
10 **that our billboards sometimes said Sportsman's**
11 **Warehouse, but I couldn't be a hundred percent**
12 **sure, Chris.**
13 Q. What is your store policy about how you
14 answer the phone while you're working?
15 **A. Store policy when I started with**
16 **Sportsman's Warehouse -- Bass Pro Shop Sportsman's**
17 **Warehouse our policy would be exactly that, hello,**
18 **my name is David. Or thank you for calling Bass**
19 **Pro Shop Sportsman's Warehouse Memphis, this is**
20 **David, may I help you. That's how we were trained**
21 **to answer the phone and for the most part that is**
22 **how we were -- up until the last few months**
23 **actually that we have gotten kind of lackadaisical**
24 **that I noticed.**
25 Q. Why in the last few months, has something

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1 changed?
2 **A. Our sign on the front of the building.**
3 Q. So what changed? How do you answer the
4 phone starting a few months ago to now?
5 **A. Well, I don't -- it's not a policy or**
6 **anything. I have just noticed calling the store**
7 **that we are not using Sportsman's Warehouse as**
8 **much as we were trained to do at first.**
9 Q. So what are people saying when they answer
10 the phone more recently?
11 **A. I think it's a combination of both what we**
12 **originally started and Bass Pro Shops.**
13 Q. Just Bass Pro Shops by itself?
14 **A. Yes, sir.**
15 Q. When somebody asks you where you work,
16 what do you tell them?
17 **A. I think it's mixed. Again same with the**
18 **phone I work at the Bass Pro Shops Sportsman's**
19 **Warehouse store on Sycamore View.**
20 Q. Okay.
21 **A. They generally -- with the size of that**
22 **sign on the front of the building, it pretty much**
23 **rings a bell.**
24 Q. Which sign?
25 **A. Well, it's both now, but it was**

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1 **Sportsman's Warehouse.**
2 Q. But do you still say that -- what do you
3 say when someone asks where you work now?
4 **A. I still call it Sportsman's Warehouse.**
5 **MR. SMITH: Okay. I think have**
6 **nothing further. Thank you very much.**
7 **THE WITNESS: Thank you, Chris.**
8 **MR. RUSCHE: No questions.**
9 **(Deposition concluded at 2:10 p.m.)**
10 **AND FURTHER DEPONENT SAITH NOT**
11 **(Signature waived)**
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1 COURT REPORTER'S CERTIFICATE
2 STATE OF TENNESSEE:
3 COUNTY OF SHELBY:
4
I, SHERYL G. WEATHERFORD, Reporter and Notary
5 Public, Shelby County, Tennessee, CERTIFY:
6 1. The foregoing deposition was taken before me at the time and place stated in the foregoing
7 styled cause with the appearances as noted;
8 2. Being a Court Reporter, I then reported the deposition in Stenotype to the best of my
9 skill and ability, and the foregoing pages contain a full, true and correct transcript of my said
10 Stenotype notes then and there taken;
11 3. I am not in the employ of and am not related to any of the parties or their counsel,
12 and I have no interest in the matter involved.
13 WITNESS MY SIGNATURE, this, the 8th day of
14 August, 2006.
15
16
_____
17 SHERYL G. WEATHERFORD
Registered Professional
18 Reporter, Arkansas
Certified Court Reporter
19 #500, Mississippi Certified
Court Reporter #1532,
20 Notary Public for the
State of Tennessee at
21 Large ***
22 My commission expires:
August 30, 2008
23
24
25

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[Page 1]

IN THE U.S. PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BASS PRO TRADEMARKS, L.L.C.,

Petitioner,

Vs. Cancellation No. 92045000

SPORTSMAN'S WAREHOUSE, INC.,

Respondent.

THE DEPOSITION OF APRIL L. HENDERSON

August 2, 2006

ALPHA REPORTING CORPORATION
SHERYL G. WEATHERFORD, RPR
236 Adams
Memphis, Tennessee 38103
(901) 529-1999

www.alphareporting.com

[Page 2]

1 The deposition of APRIL L. HENDERSON,
2 taken on behalf of the Respondent, pursuant to
3 Notice, on August 2, 2006, beginning at
4 approximately 1:00 p.m. in the law offices of
5 Husch & Eppenberger, Suite 1450, 200 Jefferson
6 Avenue, Memphis, Tennessee.
7 This deposition is taken in accordance
8 with the terms and provisions of the Federal Rules
9 of Civil Procedure.
10 All forms and formalities are waived, and
11 objections as to relevancy, materiality and
12 competency are reserved, to be presented at or
13 before the hearing. Objections as to the form of
14 the question must be made at the time of the
15 taking of the deposition. The signature of the
16 witness is waived.
17
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25

[Page 3]

1 - APPEARANCES -
2
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5 **BY MR. SMITH**
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Pat Carl & Associates (763) 591-0535 or (800) 591-9PCA (722) patcarl@patcarl.com
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[Page 5]

1 APRIL L. HENDERSON
2 Having been first duly sworn, was examined and
3 testified as follows:
4 DIRECT EXAMINATION
5 BY MR. SMITH:
6 Q. Good morning, Ms. Henderson.
7 **A. Good morning.**
8 Q. My name is Christopher Smith, and I
9 represent Sportsman's Warehouse, Incorporated,
10 it's a Utah corporation. And could you state your
11 full name for the record and spell it, please.
12 **A. April Leah Henderson. April, A P R I L;**
13 **Leah, L E A H; Henderson, H E N D E R S O N.**
14 Q. Have you ever been deposed before?
15 **A. No, sir.**
16 Q. Was that a no, sir?
17 **A. That's correct.**
18 Q. Okay. Well, we will just go over a couple
19 of ground rules. Especially since we are on the
20 telephone, it's going to be really important that
21 we try to follow these. Please make sure that you
22 understand all my questions and can hear them
23 before you answer that. If you have any trouble
24 understanding or hearing a question, just say so.
25 These are pretty short depositions today, but if

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1 you do need a break, just tell me and we will take
2 a break. I will try my best not to interrupt your
3 answers, and if you wait until I finish asking a
4 question before you begin answering it. Does that
5 sound good?
6 **A. Yes, sir.**
7 Q. Okay. I also may pause from time to time
8 to review notes and what not. I will still be on
9 the line. If you will just wait for me to ask my
10 next question, if you will.
11 **A. Yes, sir.**
12 Q. And you do understand you were sworn in
13 today and your testimony here is being given under
14 oath?
15 **A. Yes, sir.**
16 Q. Okay. Well, other than discussions with
17 your attorney, how did you prepare for this
18 deposition today?
19 **A. Discussion with the attorney.**
20 Q. Okay. Did you review any documents or
21 anything in preparation for this deposition?
22 **A. No, sir.**
23 Q. Have you had any discussions with anyone
24 regarding the fact that you were going to be
25 deposed today?

[Page 7]

1 **A. No, sir.**
2 Q. Did you provide any information to respond
3 to my client's interrogatories in this matter?
4 **A. No, sir.**
5 Q. Did you provide any documents in response
6 to document requests from my client in this
7 matter?
8 **A. No, sir.**
9 Q. Could you briefly describe your
10 educational background.
11 **A. Yes, sir, I graduated from H. M. Simpson**
12 **Academy in Tennessee.**
13 Q. And when was that?
14 **A. 1991.**
15 Q. Okay. And after that?
16 **A. I have a medical assistant degree.**
17 Q. Okay.
18 **A. From Concord which is in Memphis,**
19 **Tennessee.**
20 Q. And could you briefly describe your
21 employment background.
22 **A. Yes, sir, I have been in the retail**
23 **business for 15 years. Grocery retail up until**
24 **about five years ago when I started working for**
25 **Bass Pro Shops. All front-end manager operations**

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1 **background. The last three years have been as the**
2 **promotions manager for Bass Pro Shops, Memphis.**
3 Q. So you started working for Bass Pro
4 somewhere around 2001?
5 **A. Yes, sir.**
6 Q. And what store did you begin working in
7 2001?
8 **A. Bass Pro Shops, Memphis.**
9 Q. And are you still employed at that store?
10 **A. Yes, sir.**
11 Q. Have you been employed consistently since
12 2001?
13 **A. Yes, sir.**
14 Q. At that store?
15 **A. Yes, sir.**
16 Q. Could you please describe your duties and
17 positions since 2001 at the Memphis Bass Pro
18 store?
19 **A. As front-end manager, you oversee the**
20 **operations of the cash office and customer service**
21 **and the cashiers and the telephone operators. So**
22 **you oversee all operational aspects of those**
23 **positions with hiring needs and everything.**
24 Q. And you began as a front-end manager?
25 **A. I did.**

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[Page 9]

1 Q. Okay. And did you change positions at any
2 point?
3 **A. I have. And about two years ago I started**
4 **as the promotions manager. I moved positions to**
5 **the promotions manager.**
6 Q. And what are your duties as the promotions
7 manager?
8 **A. As promotions manager, you promote the**
9 **store here locally through donations,**
10 **contributions and local events, as well as**
11 **off-site events from our store. And you work with**
12 **vendors.**
13 Q. What do you do with vendors?
14 **A. Well, when working with the vendors,**
15 **you're setting them up to come into the store for**
16 **special events to promote their product as well,**
17 **create the event.**
18 Q. Do you deal with advertising at all as the
19 promotions manager?
20 **A. With advertising I gather the information**
21 **locally from different aspects of, you know,**
22 **different groups that want us to advertise with**
23 **them, and I send that through to our corporate**
24 **office.**
25 Q. Okay. And what kind of information do you

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1 gather locally?
2 **A. Radio, newspaper, small town newspapers,**
3 **as well as the Memphis Commercial Appeal.**
4 Q. So these -- so you gather information for
5 who you might put your advertising through locally
6 and you give that to your home office?
7 **A. Let me rephrase gather. They actually**
8 **will come to me, and I will then take the**
9 **information that they have and send that on.**
10 Q. As promotions manager, do you participate
11 in creating ads in any way?
12 **A. No, sir, I do not.**
13 Q. Do you participate in the decision of
14 where to place ads?
15 **A. Not in the decision of where to place ads.**
16 **And I need to back up on the question of creating**
17 **ads. I create the events locally and send that to**
18 **corporate, and they build from there. But it is**
19 **their decision on who to place advertisement with.**
20 Q. For the local events do you create those
21 ads?
22 **A. No, sir, I create the event and then**
23 **corporate creates the ads and all advertisement.**
24 Q. And are you still a promotions manager at
25 the Memphis Bass Pro store?

[Page 11]

1 **A. Yes, sir.**
2 Q. You I assume since you're here are aware
3 that there is a trademark dispute between Bass Pro
4 Shops and my client Sportsman's Warehouse; is that
5 correct?
6 **A. Yes, sir.**
7 Q. When did you first become aware of this
8 dispute?
9 **A. Well, as far as the dispute, a couple of**
10 **months ago.**
11 Q. And how did you become aware of the
12 dispute?
13 **A. Through our store manager.**
14 Q. Was it a conversation or a meeting?
15 **A. A meeting.**
16 Q. And who was at the meeting?
17 **A. All management personnel from our store.**
18 Q. And what did your manager say at that
19 meeting?
20 **A. Just discussed that we need to -- that we**
21 **need to know that this is an ongoing thing. That**
22 **there is an ongoing dispute.**
23 Q. Did he describe the dispute?
24 **A. No, sir.**
25 Q. Did he give you any -- you or any other

[Page 12]

1 employees at the store directions regarding the
2 dispute, certain things to do or not to do?
3 **A. The only thing that I know that we are to**
4 **do is to notify him of any confusion from**
5 **customers coming in or by phone.**
6 Q. Okay. And this meeting was a couple of
7 months ago you said?
8 **A. It's been several months, yes, sir.**
9 Q. Was it April?
10 **A. Could have been between -- between March**
11 **and April, yes, sir.**
12 Q. Okay. Have you had discussions with
13 anyone else about this dispute?
14 **A. No, sir.**
15 Q. Have you had any other meetings other than
16 that meeting about this dispute?
17 **A. No, sir.**
18 Q. At this meeting did your manager describe
19 the type of situation you're supposed to report?
20 You mentioned customer confusion. Did he describe
21 the type of situation that you're supposed to
22 report to him?
23 **A. Well, we know of the type of situations,**
24 **but, yes, sir, we did discuss that.**
25 Q. And what are those types?

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[Page 13]

1 **A. Discussion of directions to our other**
2 **location, discussion of store hours for our other**
3 **location, and discussion of -- they have a certain**
4 **coupon that has actually been brought to our store**
5 **several times and also any type of sales flyer may**
6 **be brought up as well.**
7 Q. Can you describe the coupon that has been
8 brought to your store?
9 **A. It's a $10 off coupon for a certain**
10 **percentage of purchase. I want to say 50 I**
11 **believe.**
12 Q. And do you honor those coupons?
13 **A. Yes, we do.**
14 Q. And then the sales fliers, can you
15 describe the sales fliers or an example of the
16 sales fliers that have been brought in?
17 **A. No, I can't, I'm sorry.**
18 Q. Are there any other types of customer
19 concerns about the similarity to the names of the
20 two stores that were discussed or that you're
21 aware of?
22 **A. The only other situation that I'm aware of**
23 **is someone -- a potential associate or future**
24 **associate actually applied at our store thinking**
25 **he was applying at another location but assuming**

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1 **that we were all the same.**
2 Q. Okay. And we are going to get back to
3 those in a little bit. So I will put that aside
4 for right now. The Memphis store opened when
5 exactly, 2001?
6 **A. Yes, sir, April of 2001.**
7 Q. Okay. And what was the name of the store
8 when it opened?
9 **A. Sportsman's Warehouse, Bass Pro Shop**
10 **Sportsman's Warehouse.**
11 Q. Did the name of the store change between
12 then and now?
13 **A. The name of the store hasn't changed, just**
14 **the title on the front. We still advertise a lot**
15 **with Sportsman's Warehouse.**
16 Q. When did the title on the front of the
17 store change?
18 **A. You know, I'm going to have to say late**
19 **last year. It's been quite a while.**
20 Q. Sometime in 2005?
21 **A. Yes, sir.**
22 Q. And the title on the front of the store
23 was originally what?
24 **A. Sportsman's Warehouse.**
25 Q. Okay. And was there anything else on the

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1 front of the store, any other name?
2 **A. Yes, sir, we have our Bass Pro Shop's logo**
3 **on the front of the store as well.**
4 Q. And when it changed, what did it change
5 to, the name on the front of the store?
6 **A. Sportsman's Center.**
7 Q. Could you describe -- and what does it say
8 now?
9 **A. Sportsman's Center.**
10 Q. Could you describe the sign on the front
11 of the store that says Sportsman's Center?
12 **A. Yes, sir, the letters are of a bubbly type**
13 **text, and the Sportsman's Center goes across the**
14 **left front of the building if you're looking at**
15 **the front, and then directly over the front of the**
16 **store at the entrance we have a huge logo, our**
17 **Bass Pro Shop's logo emblem.**
18 Q. About how big is that -- I assume that the
19 Sportsman's Center sign is pretty big. About how
20 big would you say it is, how tall?
21 **A. As in measurement, I really couldn't say.**
22 Q. Is it a car length tall or four feet tall?
23 **A. Well, yes, the whole Sportsman's Center is**
24 **probably the length of I would say an 18 wheeler.**
25 Q. Okay. So several car lengths long?

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1 **A. Yes.**
2 Q. And maybe -- is it four feet tall, five
3 feet tall?
4 **A. I would say between four and six feet**
5 **tall.**
6 Q. Okay. Is your store near a major roadway
7 or highway?
8 **A. Yes, sir, Interstate 40.**
9 Q. Can that sign be seen from that highway?
10 **A. Yes, sir.**
11 Q. Okay. What would you say is the purpose
12 of that big sign on the front of the building?
13 **A. To notify people of the -- what the store**
14 **is.**
15 Q. Okay. Do you have any idea why the sign
16 was changed in 2005?
17 **A. To try to eliminate any type of confusion**
18 **from our competitor.**
19 Q. Okay.
20 **A. For our customers.**
21 Q. I'm sorry?
22 **A. For our customers' benefit on the**
23 **confusion.**
24 Q. And who was involved in making the
25 decision, if you know, to change the sign?

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1 **A. I'm sorry, that I don't know.**
2 Q. Do you have any idea how much it cost to
3 change the sign?
4 **A. No, sir.**
5 Q. Are you aware if anyone at the company
6 ever discussed changing the sign back to
7 Sportsman's Warehouse?
8 **A. There's been discussion I assume, but I am**
9 **definitely on the lower end of those discussions.**
10 **I'm not really a part of them.**
11 Q. How do you know that there have been
12 discussions?
13 **A. It's through hearsay, so I don't believe**
14 **that I could say. I don't know. Sorry.**
15 Q. Now, when the enormous sign on the front
16 of the building was changed to say Sportsman's
17 Center, were the store's marketing materials and
18 advertising materials changed at the same time?
19 **A. No, sir.**
20 Q. To reflect --
21 **A. No, sir, they still go by Sportsman's**
22 **Warehouse.**
23 Q. Okay. Do you have any idea why these
24 marketing materials were not changed to reflect
25 the change of the sign?

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1 **A. No, sir, I don't know the idea of why.**
2 Q. Have you ever had customers question the
3 difference between your advertising and marketing
4 materials and the sign on the front of your
5 building?
6 **A. No, sir, I have not.**
7 Q. Did it ever strike you that it might
8 confuse customers to have two different names?
9 **A. Yes, sir.**
10 Q. Have you ever brought that to the
11 attention of the manager?
12 **A. Yes, sir, I have.**
13 Q. And what did -- how did that discussion
14 go?
15 **A. Well, in charge of notifying our corporate**
16 **office of different fliers that we would need in**
17 **our store, I have discussed the confusion aspect**
18 **of having the names changed. And I was told that**
19 **at that time that it was in litigation, and that's**
20 **when I was brought to the knowledge of knowing**
21 **that it was in litigation and that I wasn't to**
22 **change anything else until a go ahead. And the**
23 **things that I change are very minimal and it's all**
24 **really just to ask corporate what we need, and it**
25 **is still their approval. I don't have the**

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1 **decision capabilities on that.**
2 Q. A little earlier we discussed some areas
3 of customer complaints or concerns regarding the
4 similarity between Bass Pro Sportsman's Warehouse
5 and my client Sportsman's Warehouse there in
6 Memphis. How many -- do you deal with customer
7 complaints personally?
8 **A. Yes, sir, I do on occasion.**
9 Q. Okay. Do you have a sense of how many
10 such complaints you have dealt with over the last
11 year say per month?
12 **A. No, sir, I couldn't give you a number.**
13 Q. Is it more than one a month?
14 **A. Well, yes, sir, the numbers definitely**
15 **change with each given month.**
16 Q. Have they changed over time? For
17 instance, has it been more early on and less later
18 or vice versa?
19 **A. More early on, less later.**
20 Q. In the last month, how many of these
21 instances have you dealt with or heard about?
22 **A. None come to mind.**
23 Q. What about the month previous to that?
24 **A. There was one incidence where a customer**
25 **called in wanting directions to our other**

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1 **location. That's the most popular one though**
2 **so -- but that is the last one I dealt with in**
3 **passing through customer service just answering**
4 **the phone.**
5 Q. Now, is your position as promotions
6 manager, do you have employees working under you?
7 **A. No, sir, I don't, but I do participate in**
8 **the manager-on-duty program so I do supervise from**
9 **time to time.**
10 Q. So while you're on duty, is it fair to say
11 that any of these situations would come to your
12 attention?
13 **A. No, sir, they wouldn't have been brought**
14 **to my attention. They probably were handled by**
15 **customer service.**
16 Q. Okay. Is it the company's policy to keep
17 written records of customer concerns or complaints
18 about similarity between the two stores' names?
19 **A. Well, there's a customer -- there's a**
20 **policy of keeping customer complaints that are**
21 **written and documented, yes, sir, we do keep those**
22 **regardless of the nature.**
23 Q. So you have a policy of keeping complaints
24 that happen to be written down by customers?
25 **A. Oh, yes, sir.**

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1 Q. Okay. Do have a policy of keeping written
2 records of oral complaints?
3 **A. No, sir.**
4 Q. So just to be clear you don't have a
5 written policy regarding keeping records of
6 customer complaints that are oral?
7 **A. No, sir, not oral complaints, not to my**
8 **knowledge.**
9 Q. You have -- you were obviously working at
10 the Bass Pro Memphis store at the time that my
11 client's store opened up in Memphis; is that
12 correct?
13 **A. Yes, sir.**
14 Q. And you worked there consistently
15 throughout the year that followed that up to the
16 present day; is that correct?
17 **A. Yes, sir.**
18 Q. Do have a sense of whether your customers
19 have come to understand the difference between the
20 two stores?
21 **MR. RUSCHE: Objection, speculation.**
22 Q. You may still answer.
23 **A. I feel that as time has gone by they may**
24 **be able to, but I can't for sure say. I mean, we**
25 **still -- we still get from time to time, but it's**

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1 **not as prevalent as it was.**
2 Q. Now, I want to return now to the coupons
3 that we talked about a little bit earlier.
4 According to your testimony earlier, some
5 customers have brought in coupons that are created
6 or published by my client Sportsman's Warehouse
7 into your store to be redeemed; is that correct?
8 **A. Yes, sir.**
9 Q. And you testified also that you honor
10 those coupons?
11 **A. Yes, sir.**
12 Q. Do you honor all competitors' coupons?
13 **A. I haven't seen any other competitor**
14 **coupons, but we do match prices.**
15 Q. So you have a company policy to match
16 prices and to honor competitors' coupons?
17 **A. We have a company policy to match prices.**
18 Q. And if that involves a coupon, then you
19 will honor it?
20 **A. On a case-by-case basis.**
21 Q. When such coupons are presented at your
22 registers, how are they recorded?
23 **A. They're collected and sent through our**
24 **cash office to our corporate office.**
25 Q. Okay. And is there a record in the

[Page 23]

1 register that a coupon was taken?
2 **A. Yes, sir, there is a procedure to delete**
3 **or to subtract the coupon from the purchase.**
4 Q. And is there a -- in the register system
5 is there a way to record what kind of coupon it
6 is?
7 **A. Not what type. It's a generic amount.**
8 Q. Do you ring on the register a Bass Pro
9 coupon differently than you would a competitor's
10 coupon?
11 **A. No, sir.**
12 Q. Have you had a customer bring a coupon to
13 you at the register before from my client
14 Sportsman's Warehouse?
15 **A. I have not.**
16 Q. When my client's Sportsman's Warehouse's
17 coupons are presented to employees at Bass Pro, do
18 you know of a way in which Bass Pro employees
19 could determine whether the customers presenting
20 the coupon are actually confused about the
21 difference between the two stores or are just
22 trying to save money on their purchase?
23 **A. The procedure that I have been familiar**
24 **with is that the cashier is actually I wouldn't**
25 **say confused but, you know, they don't know where**

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1 **to go from on that procedure so they call the**
2 **manager on duty or their front-end lead, and then**
3 **we usually handle it ourselves for the cashier.**
4 Q. Okay. But from the customer's perspective
5 is there anyway for you to know whether that
6 customer who brings in my client's Sportsman's
7 Warehouse's coupon is thinking it's a Bass Pro
8 coupon or is attempting to save money because you
9 honor competitors' coupons?
10 **MR. RUSCHE: Objection, calls for**
11 **speculation.**
12 **A. We only know by asking.**
13 Q. Do you ask every time?
14 **A. Yes, sir.**
15 Q. Do you keep a record of what the customer
16 tells you?
17 **A. No, sir.**
18 Q. Do you recall a specific instance of when
19 you were involved in one of these coupons being
20 presented at your registers?
21 **A. No, sir.**
22 Q. Okay. Let's turn to the sales fliers you
23 mentioned a little bit earlier. Have you been
24 involved personally with a customer bringing in a
25 sales flyer from my client Sportsman's Warehouse?

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[Page 25]

1 **A. No, sir.**
2 Q. Have you been involved with a customer
3 bringing a sales flyer from my client Sportsman's
4 Warehouse to another employee and later hearing
5 about it?
6 **A. Not that I can recall.**
7 Q. So how is it that you know that this has
8 happened in the past that my client Sportsman's
9 Warehouse's fliers are being brought in by
10 customers to your store?
11 **A. Through hearsay, but I can't tell you a**
12 **specific incident. It's been a while since I have**
13 **heard of that happening with a flyer. The coupons**
14 **seem to be more prevalent.**
15 Q. So just to sum up, are you aware of any
16 written records that Bass Pro keeps either as a
17 corporation or in your store regarding customer
18 concerns about the similarity between the names of
19 the two stores we have been discussing?
20 **A. No, sir, I'm not.**
21 Q. Can you remember a single specific
22 instance of customers being concerned or
23 complaining about the similarity between the names
24 of the two stores?
25 **A. Only via phone through asking for**

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1 **directions to our other locations.**
2 Q. I assume as a promotions manager that
3 you're pretty familiar with the advertising that
4 goes out. Whether or not you make a decision
5 about what it is, you probably view it; is that
6 correct?
7 **A. Yes, sir.**
8 Q. Have you ever seen advertising that your
9 company has put out where the phrase Sportsman's
10 Warehouse is used without the phrase Bass Pro
11 Shops next to it?
12 **A. No, sir, I have not.**
13 Q. Do you review most of the advertising that
14 comes through -- that is put out in the Memphis
15 market from your store?
16 **A. Yes, sir, I do.**
17 Q. Do you keep a record of it at all?
18 **A. Yes, sir, I do.**
19 Q. Do you keep some sort of scrap book?
20 **A. Mostly e-mail.**
21 Q. Okay. Could you describe those e-mails
22 exactly?
23 **A. They'll send PDF files of upcoming sales**
24 **flier or information about what an event that I**
25 **have built, sending it back to me, you know,**

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1 **wanting me to view what I have sent them, you**
2 **know, one of those kinds of things. You know, you**
3 **view this and we will bounce it back and forth and**
4 **make sure we both have it right. But that's**
5 **pretty much it. They do the art work on it. I**
6 **build the event, tell them what I'm going to do,**
7 **and then they go in and build the advertising for**
8 **it. All the --**
9 Q. So all the advertising you have seen
10 Sportsman's Warehouse, the phrase, is always used
11 right next to the phrase Bass Pro Shop; is that
12 correct?
13 **A. With the Bass Pro logo, yes, sir.**
14 Q. Are you familiar with your company -- your
15 store policy for how to answer the phone when
16 you're working at the store?
17 **A. Yes, sir.**
18 Q. And how is it, how do you answer the
19 phone?
20 **A. Thank you for calling Bass Pro Shop**
21 **Sportsman's Warehouse.**
22 Q. Have you ever observed any employees
23 answering the phone differently than that?
24 **A. Well, yes, sir, I have heard them say**
25 **thank you for calling Bass Pro Shops, and then**

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1 **they will add their name. But for the most part**
2 **they add warehouse.**
3 Q. And when somebody asks you where you work,
4 what do you tell them?
5 **A. Bass Pro Shops.**
6 **MR. SMITH: Okay. I think that's all**
7 **the questions I have. Thank you very much,**
8 **Ms. Henderson.**
9 **MR. RUSCHE: I have no questions.**
10 **(Deposition concluded at 1:25 p.m.)**
11 **AND FURTHER DEPONENT SAITH NOT**
12 **(Signature waived.)**
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1 COURT REPORTER'S CERTIFICATE
2 STATE OF TENNESSEE:
3 COUNTY OF SHELBY:
4
I, SHERYL G. WEATHERFORD, Reporter and Notary
5 Public, Shelby County, Tennessee, CERTIFY:
6 1. The foregoing deposition was taken before me at the time and place stated in the foregoing
7 styled cause with the appearances as noted;
8 2. Being a Court Reporter, I then reported the deposition in Stenotype to the best of my
9 skill and ability, and the foregoing pages contain a full, true and correct transcript of my said
10 Stenotype notes then and there taken;
11 3. I am not in the employ of and am not related to any of the parties or their counsel,
12 and I have no interest in the matter involved.
13 WITNESS MY SIGNATURE, this, the 8th day of
14 August, 2006.
15
16
17 SHERYL G. WEATHERFORD
Registered Professional
18 Reporter, Arkansas
Certified Court Reporter
19 #500, Mississippi Certified
Court Reporter #1532,
20 Notary Public for the
State of Tennessee at
21 Large ***
22 My commission expires:
August 30, 2008
23
24
25

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[Page 1]

IN THE U.S. PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BASS PRO TRADEMARKS, L.L.C.,

Petitioner,

Vs. Cancellation No. 92045000

SPORTSMAN'S WAREHOUSE, INC.,

Respondent.

THE DEPOSITION OF MYERS HADEN HOLLEY, JR.

August 2, 2006

ALPHA REPORTING CORPORATION
SHERYL G. WEATHERFORD, RPR
236 Adams
Memphis, Tennessee 38103
(901) 529-1999

www.alphareporting.com

[Page 2]

1 The deposition of MYERS HADEN HOLLEY,
2 JR., taken on behalf of the Respondent, pursuant
3 to Notice, on August 2, 2006, beginning at
4 approximately 2:25 p.m. in the law offices of
5 Husch & Eppenberger, Suite 1450, 200 Jefferson
6 Avenue, Memphis, Tennessee.
7 This deposition is taken in accordance
8 with the terms and provisions of the Federal Rules
9 of Civil Procedure.
10 All forms and formalities are waived, and
11 objections as to relevancy, materiality and
12 competency are reserved, to be presented at or
13 before the hearing. Objections as to the form of
14 the question must be made at the time of the
15 taking of the deposition. The signature of the
16 witness is waived.
17
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25

[Page 3]

1 - APPEARANCES -
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3 **MYERS HADEN HOLLEY, JR.**
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5 **BY MR. SMITH**
6 **CROSS-EXAMINATION 34**
BY MR. RUSCHE
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1 Q. Any other information that you provided?
2 **A. No, sir.**
3 Q. Any documents that you provided?
4 **A. I did turn in to corporate some copies of**
5 **some Sportsman's Warehouse ads and coupons.**
6 Q. And when you say Sportsman's Warehouse, do
7 you mean Bass Pro Sportsman's Warehouse?
8 **A. No, sir, Sportsman's Warehouse out of**
9 **Utah. I did turn in a copy of one of their ads**
10 **and one of their coupons to the corporate level.**
11 Q. And where did you obtain this -- the ads
12 or the coupons?
13 **A. Just out of some publications like just**
14 **out of some local publications.**
15 Q. Did you provide any other documents?
16 **A. No, sir.**
17 Q. Could you briefly describe your
18 educational background for me?
19 **A. Okay. High school and I have a business**
20 **degree from the University of Mississippi.**
21 Q. Okay. What year did you graduate from the
22 University of Mississippi?
23 **A. 1983.**
24 Q. And what degree did you obtain?
25 **A. A BBA in marketing.**

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1 Q. And can you briefly describe your
2 employment background?
3 **A. I worked for Wal-Mart stores for roughly**
4 **24 and a half years. I retired and got a little**
5 **bored and went to work for Bass Pro.**
6 Q. When did you --
7 **A. Sorry.**
8 Q. I'm sorry, we are about to answer and ask
9 the same question. About when did you begin
10 working for Bass Pro?
11 **A. August 15, 2005.**
12 Q. Had you ever worked for Bass Pro in any
13 capacity before that?
14 **A. No, sir.**
15 Q. Were you working anywhere else prior to
16 joining Bass Pro?
17 **A. I have independent -- you know,**
18 **independently I farm. I have a farm on the side**
19 **also, but that's all.**
20 Q. And what position did you take in August
21 of 2005 with Bass Pro Shops?
22 **A. The general manager position.**
23 Q. In the Memphis location?
24 **A. Yes, sir.**
25 Q. And have you had any other positions with

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1 Bass Pro Shops from then until present?
2 **A. No, sir.**
3 Q. And you're currently general manager?
4 **A. Yes, sir.**
5 Q. Can you describe briefly your duties as
6 general manager?
7 **A. Basically the total store operations.**
8 **Anything concerning people, customers, the**
9 **financial performance of the store, basically**
10 **anything that happens in the four walls.**
11 Q. Okay. Do you deal with customer service
12 issues?
13 **A. Yes, sir.**
14 Q. Do you deal with customer complaints?
15 **A. Yes, sir.**
16 Q. Do you deal with store signage?
17 **A. As far as signing sales circulars,**
18 **interior signing, yes.**
19 Q. Okay. Exterior signing is not part of
20 your job description?
21 **A. Other than banners, we receive banners**
22 **from time to time that we are instructed like to**
23 **put on the front of the building, but, right,**
24 **banners I would say.**
25 Q. Did you take over the general manager

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1 position from another person who was previously
2 general manager?
3 **A. Yes, sir.**
4 Q. And who is that?
5 **A. Jim Osborn.**
6 Q. Did you have discussions with Jim Osborn
7 to help you transition into your new job as he was
8 leaving?
9 **A. Yes, on some occasion, yes.**
10 Q. Are you aware of the name of the store in
11 which you're general manager changing from the
12 time it opened to the present day?
13 **A. Yes, you know, after I got there, you**
14 **know, a short time after that.**
15 Q. What was the name change? Can you
16 describe that for me?
17 **A. I guess the first thing I noticed was**
18 **the -- there was a Sportsman's Warehouse, the**
19 **letters were at the back of the building, probably**
20 **the first or second week I was -- I noticed that**
21 **or what have you. And I knew -- they told me they**
22 **had a name change to Sportsman's Center.**
23 Q. I'm sorry. When you say the letters were
24 in at the back of the building, what do you mean?
25 **A. They were just stored in the back of the**

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1 **building.**
2 Q. Oh, so the signage was stored?
3 **A. It was at the back of the building, and I**
4 **was asking why it was there and, you know, we need**
5 **to move it or whatever and --**
6 Q. Meaning it had been removed from the
7 building?
8 **A. Yes, sir. Right.**
9 Q. And was that the Sportsman's Warehouse
10 sign?
11 **A. Yes, sir. I'm -- like I say, I didn't,**
12 **you know, spell out the letters per se, but I just**
13 **wanted to get the sign moved from the back of the**
14 **building.**
15 Q. And what was put up to replace that sign?
16 **A. Well, the sign was already there when I**
17 **reported to work there, Sportsman's Center was**
18 **already there.**
19 Q. Do you know why the store's name changed?
20 **A. No, sir. Not -- no, sir, no, I don't.**
21 Q. Did you have any discussions with the
22 previous general manager about why the store's
23 name had changed?
24 **A. Not that I can recall.**
25 Q. Did you ever ask any of your superiors why

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1 the name of the store changed?
2 **A. Not superiors.**
3 Q. Anybody that you worked with, did you ask
4 them why the name of the store changed?
5 **A. Yes. Yes.**
6 Q. Okay. And how did that conversation --
7 those conversations go? What did you find out?
8 **A. They just said it was a corporate decision**
9 **to change the name. Like I said, that was all I**
10 **was told.**
11 Q. Okay. And what was the new name of the
12 store?
13 **A. Bass Pro Shops Sportsman's Center.**
14 Q. Can you describe the sign on the front of
15 the store that says Sportsman's Center, how big is
16 it?
17 **A. The letters are I think they're -- I think**
18 **they're six -- six, seven foot letters I believe**
19 **it is. There's -- I cannot think of the signing**
20 **ordinance, but I think they're six or seven foot**
21 **tall. And it's just -- it's across the left front**
22 **of the building, Sportsman's Center.**
23 Q. About how many car lengths long is that
24 sign?
25 **A. I would guess seven.**

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1 Q. Okay. And previous deponents have said
2 you can see that sign from the highway; is that
3 right?
4 **A. It's a very well lit sign, yes.**
5 Q. Okay. What is the purpose of that sign?
6 **A. Well, just to call attention to our store**
7 **and, you know, we are right on access of an**
8 **interstate, so I would assume they have the**
9 **largest letters that the signing ordinance will**
10 **allow to, you know, to draw the customer in.**
11 Q. Okay. And I assume you weren't involved
12 in any decisions to change the name and the sign
13 because you weren't working there; is that
14 correct?
15 **A. Yes, sir.**
16 Q. Do you have any information about how much
17 it cost to change that sign?
18 **A. Hearsay, yes, but I never --**
19 Q. How much was that?
20 **A. I have heard somewhere around 60 to 80**
21 **thousand dollars ball park.**
22 Q. Okay. Are you aware if anyone at the
23 company ever discussed changing the sign back to
24 Bass Pro Shop Sportsman's Warehouse?
25 **A. Other than when this -- other than when**

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1 **this started I guess, no.**
2 Q. When you say "this," you mean this
3 litigation?
4 **A. Right, right.**
5 Q. So there was some discussion when this
6 litigation started to change the name back; is
7 that correct?
8 **A. I'm just assuming. No, not any**
9 **discussion. I'm just assuming. No discussion.**
10 Q. You didn't have any discussion. Did you
11 hear about a discussion?
12 **A. No.**
13 Q. I assume you're familiar with the
14 advertising that is put out in the Memphis area
15 for your store, correct?
16 **A. Yes.**
17 Q. And the marketing materials you guys put
18 out?
19 **A. Yes.**
20 Q. Okay. How is the name of your store
21 reflected in those advertisements and promotional
22 materials?
23 **A. Bass Pro Shops Sportsman's Warehouse on**
24 **our ads. Bass Pro Shops Sportsman's Center has**
25 **now been changed on our new ads which was**

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1 **effective last month.**
2 Q. So new advertising, recent advertising has
3 Sportsman's Center along with Bass Pro Shops?
4 **A. Correct.**
5 Q. Okay. Do you know why that change was
6 made?
7 **A. No, sir, I do not.**
8 Q. Does the bulk of your advertising and
9 promotion materials reflect the name Sportsman's
10 Warehouse or Sportsman's Center?
11 **A. Now the bulk of it is Sportsman's Center**
12 **now.**
13 Q. Okay. Did you notice any customers being
14 confused before your advertising and promotional
15 materials changed to say Sportsman's Center, did
16 you have any customers that were confused to why
17 the front of the store said Sportsman's Center but
18 your advertising said Sportsman's Warehouse?
19 **A. No.**
20 Q. Okay. Have you been involved or been
21 aware of customer concerns or complaints about the
22 similarity between your store's name and my
23 client's Sportsman's Warehouse's store's name?
24 **A. Yes.**
25 Q. Okay. What are some of the types of

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1 complaints or concerns that you have heard about
2 or dealt with?
3 **A. Personally dealt with was the job**
4 **applicant back earlier in the spring. The rest is**
5 **just what previously happened, you know, that**
6 **associates have told me happened with Sportsman's**
7 **Warehouse Company, Utah, they run a lot of**
8 **coupons, and I know they had a lot of --**
9 **accordingly they had a lot of problems with that**
10 **initially with the coupons.**
11 Q. So personally you dealt with this job
12 applicant?
13 **A. Correct.**
14 Q. But as far as other instances of customer
15 complaint and concerns, you haven't had any
16 personal interaction with them; is that right?
17 **A. Not personally. Just I have handled a**
18 **couple of situations via the walkies, I mean, you**
19 **know, in satisfying a customer via the walkie**
20 **before. I had a couple of instances with some**
21 **pricing, competitive pricing ads on some items.**
22 **But that's -- you know, we competitively price our**
23 **competitor, of course.**
24 Q. Were those sales fliers related or coupon
25 related or what?

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1 **A. The last one I dealt with was a flyer**
2 **insert I think they may have had in a magazine or**
3 **a local publication, hunting and fishing**
4 **publication.**
5 Q. Any other types of complaints or concerns
6 related to the similarity between the two stores'
7 names?
8 **A. No, sir.**
9 Q. Okay. So in terms of the job applicant,
10 can you describe that situation for me, please?
11 **A. He put in an application at our store and**
12 **he -- actually he put it online or what have you.**
13 **And he thought that the Southaven, Mississippi,**
14 **location, that we were all the same company. And**
15 **that is -- he was actually trying to get a job in**
16 **the Southaven, Mississippi, location. He was**
17 **under the impression that we were the same**
18 **company.**
19 Q. Was he using the Bass Pro Shop's Web site?
20 **A. I believe he was, yes.**
21 Q. Okay. Did you interview this job
22 applicant?
23 **A. No, sir.**
24 Q. Did you receive his application somehow?
25 **A. Yes, through my HR manager.**

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1 Q. Did this person receive a job at Bass Pro
2 Shops?
3 **A. No, sir, I don't -- no, sir.**
4 Q. In terms of the flyer insert, competitive
5 pricing situations you mentioned before, can you
6 remember any specific instance?
7 **A. Just on a fire -- I believe it was on a**
8 **firearm, a long gun.**
9 Q. Okay.
10 **A. You know, that they had advertised or what**
11 **have you.**
12 Q. And what was the -- the advertisement was
13 from what store?
14 **A. Sportsman's Warehouse, Utah.**
15 Q. Okay. And how did you handle that
16 situation?
17 **A. Just we honored that price.**
18 Q. Did your company have a policy for
19 matching competitors' prices?
20 **A. We do match -- yes, we do match**
21 **competitive prices -- competitors for prices.**
22 Q. Does your company -- I'm sorry.
23 **A. I'm sorry.**
24 Q. Does your company have a policy for
25 accepting competitors' coupons?

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

In the matter of Trademark Registration No. 2,390,988

For the mark SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR and Design

Date registered: October 3, 2000

BASS PRO TRADEMARKS, L.L.C.,	)	
	)	
Petitioner,	)	
	)	CANCELLATION
vs.	)	NO. 92045000
	)	
SPORTSMAN'S WAREHOUSE, INC.,	)	
	)	
Respondent.	)	

TELEPHONE DEPOSITION OF STANLEY W. LIPPELMAN

TAKEN ON BEHALF OF RESPONDENT

AUGUST 9, 2006

COPY

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EXHIBIT INDEX

EXHIBIT	DESCRIPTION	PAGE
Depo. 1	Copy of Bass Pro Shops gift card	27

(Original Exhibit 1 was attached to the original deposition transcript.)

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Petitioner,)
) CANCELLATION
vs.) NO. 92045000
)
SPORTSMAN'S WAREHOUSE, INC.,)
)
Respondent.)

THE TELEPHONE DEPOSITION OF STANLEY W. LIPPELMAN,

produced, sworn, and examined on Wednesday, August 9, 2006, at 2:00 p.m. of that day, at the Law Offices of Husch & Eppenberger, 300 Two Corporate Centre, 1949 East Sunshine, in the city of Springfield, county of Greene, state of Missouri, before Connie McKeen, Certified Shorthand Reporter, Certified Court Reporter #0333, Registered Professional Reporter, in a certain cause now pending in the United States Patent and Trademark Office, before the Trademark Trial and Appeal Board, wherein the parties are as above set forth; taken on behalf of the Respondent.

APPEARANCES

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(417) 877-9700

Phonetic spelling: (ph.)
Exactly as stated: (sic)

IT IS HEREBY STIPULATED AND AGREED by and between Counsel for the parties that this deposition may be taken by Connie McKeen, RPR, CSR, CCR, thereafter transcribed into typewriting, with the signature of the witness not being waived.

* * * * *

STANLEY W. LIPPELMAN,
having been duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

BY MR. SMITH:

Q. Good afternoon, Mr. Lippelman.

A. Good afternoon.

Q. Would you state your full name for the record and spell it, please.

A. Stanley Wayne Lippelman, S-t-a-n-l-e-y; Wayne, W-a-y-n-e; Lippelman, L-i-p-p-e-l-m-a-n.

Q. Okay. Because this is a special situation in which you've got a telephone deposition going on, I'm going to go over a few ground rules that you may or may not have been prepared for. Have you been deposed before, Mr. Lippelman?

A. Yes.

Q. Okay. So you've been through this how many times?

A. Once before this.
Q. Okay. Well, I'll just go over a couple things. First of all, since we're on the telephone, if for some reason we get cut off, I will call back immediately, so let's just sit tight and I'll do my best to call back.
I want to make sure also, since we're over the phone, if you don't understand the question or can't hear it, just ask me to repeat it or to rephrase it. I'll be happy to do that. This will probably be a pretty short deposition, but if you do need a break at any point, just say so in between questions, and I'll be happy to oblige.
For the benefit of the court reporter, let's also make sure that we don't -- try not to talk over one another. I'll finish -- or I won't ask you a question until you've finished answering mine, and if you could do me the same service, that will be great. Also I'll warn you, since we can't see one another, I will pause from time to time to review my notes and prepare the next question, so just hang in there with me, and I'll be back again with the next question shortly. Does that all make sense?
A. Yeah.
Q. Okay. Of course, you know that your

attorney will object to questions, no doubt, from time to time, which is normal. But be aware that you'll still have to answer the questions unless your attorney directs your specifically not to answer. Does that make sense?
A. Yes.
Q. And you do understand you've been sworn in today and your testimony is being given under oath?
A. Yes.
Q. Okay. How did you prepare for your deposition today?
A. I met Grant this morning for the first time a couple hours ago.
Q. Okay. Other than discussions with him, did you discuss the fact you were having this deposition today with anyone else?
A. Only my administrative assistant yesterday.
Q. Okay. What did you discuss with your administrative assistant?
A. What time I was supposed to be here and where. That was about it.
Q. Okay. Did you review any documents in preparation for this deposition today?
A. I reviewed prior to the -- this this morning with Grant, the gift card exhibit.

Q. Correct.
A. And the interrogatories on the case.
Q. Okay. And that leads me to my next question. Did you provide any information for Bass Pro's answers to my client's interrogatories in this matter?
A. I guess, yes. I mean, we provided ads and history and that sort of thing sometime ago.
Q. Anything else besides ads or history?
A. Not to my knowledge, no.
Q. When you say "history," what do you mean exactly?
A. When we ran certain ads, when certain things occurred, that kind of thing. Advertising -- advertising history, I guess.
Q. And when you say "ads," how many ads did you provide for the document request, I suppose you mean?
A. You know, to be honest, I'm not sure the term "document request," but I'm assuming that's wha it was.
MR. KANG: Yes.
A. But I couldn't even venture to tell you how many ads we provided. I had several people in my department pull ads to send. I know we sent several print ads or ROP ads and store fliers and some

television ads. I couldn't tell you the number of how many exactly.
Q. (By Mr. Smith) Did you have -- take control of the production of all the advertising?
A. From the standpoint of requesting it from my group and then asking my assistant to pull it all together, yes.
Q. Okay. Did you provide anything else, other than the ads you just mentioned and then information regarding the history of those ads?
A. No, not to my knowledge.
Q. Could you briefly describe your educational background for me?
A. Uh-huh. I have an undergraduate degree in marketing from Missouri State University. I have a master's in business administration from the Darden School of Business at the University of Virginia.
Q. And can you briefly describe your employment background?
A. Uh-huh. Began my career at an advertising agency, Noble & Associates in Springfield, Missouri, after graduate -- or after undergraduate school. I worked after graduate school for General Mills in marketing and general management. Left General Mills and went to Rawlings Sporting Goods in St. Louis,

Missouri, where my last job, I was the vice president of marketing and research and development. And three years ago approximately, a little less than three years ago, came to Bass Pro as vice president of marketing.
Q. Okay. So that would have put your starting date somewhere in 2003?
A. It was February of -- that would have been -- it was either 2003 or 2004. I'm coming up on my -- let's see. That would be 2003 -- 2004. I'm sorry. February of 2007 will be my third year.
Q. And you came in as -- what was your title when you began in February of 2004 at Bass Pro Shops?
A. Vice president of marketing.
Q. Has your title changed since the time you started?
A. No.
Q. And you are still vice president of marketing?
A. Yes.
Q. Could you describe your duties as vice president of marketing?
A. I'm responsible for all of the -- let's just say most of the advertising, promotions, branding, analysis, direct mail. Our public relations group reports to me. Our incentive group reports to me.

We have an in-house production group on the broadcast side that does our television shows, of which we produce three right now for the Outdoor Channel and a syndicated radio show that reports up through me. I have a total of around 50 to 60 people in my department.
Q. So it's safe to say if it has to do with advertising at Bass Pro Shops, you are the top person?
A. Yes. Well, short of Mr. Hagale, who I report to, and obviously John Morris, our founder.
Q. Okay. Does your job entail design or creation of exterior or interior signage of the retail stores?
A. No, it does not.
Q. Okay. Does your job entail the marketing materials that are put out in the stores?
A. Yes, it does.
Q. Okay. Does that involve some signage?
A. Not permanent signage. We do like sale signage and that kind of thing, but not the -- not the permanent signage, the wood fixtures that you see in the store. My group handles everything from basically 8 feet down.
Q. Okay.
A. And our design and development group handles

everything 8 feet up. It's not exactly 8 feet, but that's -- the idea being if it's on the floor, it's my department. If it's on a wall or up at the ceiling, it's the design and development department.
Q. Do your duties involve anything having to do with customer complaints or concerns from a retail store level?
A. Only from communication with the stores in trying to minimize those, particularly as it relates to advertising. But customer service is not my responsibility as a department.
Q. Do you have any other duties other than the ones you described just now?
A. I think I covered everything.
Q. I assume since you're here at a deposition, you're aware that there's a trademark dispute between Bass Pro Shops and my client, Sportsman's Warehouse, Incorporated. Is that correct?
A. Yes.
Q. When did you first become aware of this dispute?
A. I guess I first became aware of it when we got the request for producing ads and materials. That would have been, my recollection, a few months ago when my group got involved in it. I really wasn't familiar

at all with the specifics of the case until this morning.
Q. As part of your job, do you have regular meetings with other corporate employees?
A. Yes.
Q. I assume -- how many vice presidents are there?
A. I wouldn't know off the top of my head. We have a CFO, a CIO, a vice president over merchandising, design and development, construction, and then the general manager for our direct businesses and our head of logistics. I think that covers most of them. HR.
Q. Have you ever been a part of any meetings with folks at your corporate office regarding this dispute?
A. No.
Q. Have you had meetings with your direct reports regarding this dispute?
A. No.
Q. Have you had meetings regarding answering the interrogatories and document requests, in terms of getting ads and that sort of thing?
A. No, we never had a meeting. I received the request for gathering ads, and I just asked various people in my department to pull examples of ads. But

we never had a meeting, per se.
Q. Have you ever been given instructions by anyone at the home office regarding this dispute or how to handle trademarks?
A. No.
Q. In your experience as vice president of marketing, are you aware of whether Bass Pro has any policies regarding the use of trademark symbols or trademark names inside advertising?
A. Well, sure. I mean, we have creative guidelines for how we use our marks, logo types, and that sort of thing, absolutely.
Q. Okay. Is that -- is that a written policy?
A. In some cases, yes. In some cases, no.
Q. Could you elaborate on that, please.
A. I know our creative services group has a very basic kind of -- I wouldn't say policy, but they have a basic review of marks, if you will. And this is the logo type, and this logo is used with this logo type and that sort of thing.
Q. And what do the creative services group do exactly?
A. They produce our in-house ads that we do in-house. They produce our catalogs. They report through our direct marketing group, which is our direct

businesses catalogs and Internet.
Q. Do you oversee this group?
A. No, I do not. No, I do not.
Q. And are there other policies that you had just mentioned, other than the creative services group's policies?
A. No. No written policies, no, not to my knowledge.
Q. Can you describe any of the content of these policies off the top of your head?
A. No, I really can't other than, like I said, it uses this particular font for the logo, you know, the circle R is used in this case, the TM is used in this case, those sorts of things, these are the PMS colors, the very basic guidelines about logo usage.
Q. Do you or any of your direct reports employ those policies?
A. Oh, yeah. I mean, we do in everything we do.
Q. Can you give me an example of how you would use the policy in your position or one of your direct report's position?
A. It's really from just a standpoint of making sure that the ads that go out are correct, that they use the correct fonts, the correct marks, that we're

not misusing the marks, those sort of things.
Q. Do you do a personal review of any advertising that goes out?
A. Some. Not all, but some. I would say the majority, but not all.
Q. It's my understanding that the Bass Pro Shops retail stores can be broken down into different types, such as Outdoor World, etc. Is that correct?
A. Yes.
Q. What are the different types? Can you list them for me?
A. Uh-huh. We have our Outdoor World stores, which are our largest stores. They, on average, tend to be 150,000 square feet or more, up to 300,000 square feet. They will typically have almost all services that we offer, both from a product perspective and, obviously, regionally correct, and from an experience or education/entertainment perspective; laser arcades, rock walls, large aquariums, those sorts of things.
Then we have our Sportsman's Center stores, and they are somewhat between a Sportsman's Warehouse and a Sportsman -- or Outdoor World in that they are smaller. They are typically in the, you know, 80,000, 90,000 square feet up to 130,000 square feet, and they have some of the visual aspects of the Outdoor World, but

they're smaller. They also have some of the entertainment aspects of an Outdoor World, but again they're smaller. So they might have a laser arcade and a more typical aquarium, not a hog trough, and more visual aspects of the store.
We have our Sportsman's Warehouse stores, which are smaller, as well, in the 80,000 to -- I'm not sure if we have one over 100,000 square feet for our Sportsman's Warehouse. Those typically do not have as much imagery and some of the other features and entertainment aspects that our larger stores have.
And then we just recently opened our first Bass Pro Shops Outpost, which is a much smaller, 40,000 to 50,000 square foot store, that is more of a convenience, on-the-lake "pick up a few things while you're out" kind of thing. Still has some visual aspects, still has, obviously, the products we carry, but much less of all those things.
Q. About how many Bass Pro retail outlets are there at this point?
A. Thirty-four. Oh, and I forgot the World Wide Sportsman. I apology. We have a World Wide Sportsman in Florida; that's more of a saltwater store.
Q. Okay. How many Bass Pro Shops Sportsman's Warehouse stores does Bass Pro currently operate?

A. **To the best of my knowledge, two.**
Q. Okay. Could you tell me where those are?
A. **Uh-huh. In Memphis, Tennessee, and St. Louis, Missouri.**
Q. And that is -- the St. Louis store is the St. Charles store?
A. **Yes.**
Q. Do you have any idea what goes into the decision to open, for instance, an Outdoor World versus a Sportsman's Warehouse type retail store?
A. **Honestly, no. Those decisions are made by someone other than me; so, honestly, no.**
Q. Are you aware of any discussions by Bass Pro employees or officers about seeking to use the name Bass Pro Shops Sportsman's Warehouse?
A. **No, not at all.**
Q. Let's talk about this store in Memphis. You said that's a Sportsman's Warehouse store; is that correct?
A. **Yes.**
Q. Have you ever visited that store?
A. **Yes, I have.**
Q. Do you know what the sign on the front of that store says?
A. **Yes. Today it says Sportsman's Center.**

Q. Okay. Do you know why that is?
A. **It's my understanding that it was changed roughly a year or so ago. It was changed by a then head of retail and did not have full approval to be changed, but was changed.**
Q. Do you know, who was that person?
A. **Kerry Harmon.**
Q. Kerry Harmon. And do you know why Kerry Harmon decided to change the signage on the front of the store?
A. **It was due to the Sportsman's Warehouse opening in Memphis, I believe the one in Germantown, and there was a lot of confusion from our customers in terms of bringing in coupons and bringing in ads and thinking that they were in the competitor's store.**
Q. Okay. Do you know if changing the sign alleviated any of those problems?
A. **Honestly, no, I don't know that it did.**
Q. Do you have any personal knowledge about those instances of confusion between the two stores in the Memphis market?
A. **Only from discussions with Kerry and from just comments from the store manager at the time that, you know, customers were coming in with coupons and that sort of thing. And then all the coupons that we**

get come actually to -- examples of them come to corporate, so we would have seen some in the office, as well.
Q. You say examples come to corporate. How does that happen? How does that work?
A. **The stores send them in. They periodically -- not always, but they will send in examples of coupons that they take in, particularly competitive coupons --**
Q. Okay.
A. **-- because we have a price-matching policy.**
Q. So this is unrelated to, for instance, coupons that are taken at the register and kept? Those aren't coupons you're talking about? You're talking about somebody takes the initiative to send an example?
A. **Yes, to my department.**
Q. Okay.
A. **Yes.**
Q. Are you -- are you aware if coupons, competitors' coupons that are taken, if they're taken at the registers in Bass Pro stores, are kept?
A. **I honestly don't know. I'm not sure. I know we take them, but I'm not sure if they're kept.**
Q. Do you have any idea what the costs were -- what costs were involved in changing the Memphis

store's signage to Sportsman's Center?
A. **No, I don't.**
Q. Are you aware if anyone in the company ever discussed changing the sign on the Memphis store back to Bass Pro Shops Sportsman's Warehouse?
A. **Yes, that was discussed.**
Q. Okay. And how do you -- how do you know that that was discussed?
A. **Through conversations again with the retail team, that there was some discussion about changing it back; that it had not been approved to be changed, and it was going to be changed back.**
Q. And what was the content of those discussions?
A. **That we should not be changing any of the other things we were doing because we were going to be change the name back.**
Q. Okay. And was the name -- was the sign changed back?
A. **To my knowledge, no.**
Q. And do you know why?
A. **Honestly, no.**
Q. Now, from your vantage point of overseeing advertising for the company, did the sign change in Memphis affect how you advertise that store and that

market?
A. No, not initially. And from a -- from a strategic perspective, no, it didn't change it at all because, again, it was never fully -- it was never approved to be changed. So from our perspective, it never should have been changed, and we continued to advertise under the Sportsman's Warehouse name.
Q. Okay. You just said not initially. Has something recently changed?
A. There have been some ads that have changed recently because of, again, confusion, both from a customer's perspective and from a perspective of our creative services group updated their creative guidelines and listed the -- listed the Memphis store as the Sportsman's Center. So there are -- there have been a few ads recently that have denoted the Memphis store as a Sportsman's Center and not as a Sportsman's Warehouse.
Q. Do you know if this is indicative of a trend to shift all advertising to reflect the name Sportsman's Center or not?
A. Absolutely not. It was not something that was approved by me to be changed.
Q. So going forward, is it your understanding or your direction that some of the advertising will say

Sportsman's Center and some of it will say Sportsman's Warehouse in the Memphis market?
A. I would say that the advertising would say Sportsman's Warehouse.
Q. So the recent change to Sportsman's Center, if I understand you correctly, is going to be stopped and shifted back to Sportsman's Warehouse?
A. Yes.
Q. Okay.
A. And it hasn't been changed on everything. It was only changed in a few areas. Particularly our fliers is where it got changed, to my knowledge, the circulars.
Q. Do you have any sense of whether recently there has been confusion between my client's store and the Bass Pro Memphis Sportsman's Center store or Sportsman's Warehouse store in Memphis?
A. It would just be my opinion, but my opinion would be yes.
Q. "Yes" meaning there has been recent confusion or --
A. "Yes" meaning there has been recent confusion.
Q. Okay. Do you have any sense of if the amount of customer confusion or customer concerns have

changed about the similarity between the two stores' names since, for instance, 2005 to the present?
A. No. Just, again, because I don't -- I'm not really responsible for the customer service and those comments and that sort of thing.
Q. What causes you to say that you do believe there had been some confusion in the recent past in that market?
A. Just from, again, talking to the folks in the store and the fact that they're still getting customers who come in with a Sportsman's Warehouse a and believe that it's our store.
Q. Okay. Have you had any discussions where particular instances of confusion have been discussed?
A. Nothing I can remember off the top of my head. Just more in general.
Q. Okay. So right now, sitting here today, you can't remember any particular instances of confusion that have been reported to you; is that correct?
A. Not a specific one. Just in general.
Q. Okay. Let's go over one more time the types of advertising that you're responsible for. You mentioned there was a television production --
A. Uh-huh.
Q. -- correct? Some radio advertising?

A. Yes.
Q. And I assume there's various types of print advertising?
A. Uh-huh.
Q. Can you categorizes those for me?
A. Uh-huh. Magazines, newspapers, circulars or fliers, postcards, newsletters, billboards.
Q. Okay. Are there other categories besides television, radio, and print?
A. We do e-marketing, Internet e-mails. And then we obviously have our catalogs, as well.
Q. Now, of these categories, are all these produced in-house?
A. I would -- I would say most. Not all, but most.
Q. Which ones are not produced in-house by Bass Pro Shops?
A. It really just varies by need. All of them are produced in-house. Occasionally we will use outside help because of either resources or creative needs, but every one of those aspects would be created in-house at some point in time.
Q. Okay. And I gather that in the context of all these different types of advertising that you oversee, you also oversee advertising having to do with

Bass Pro Shops Sportsman's Warehouse stores, correct?
A. Yes.
Q. Okay. In the context of Bass Pro Shops Sportsman's Warehouse stores, is it Bass Pro's practice to use advertising or marketing that indicates -- or that includes the phrase "Sportsman's Warehouse" without the phrase "Bass Pro Shops" or the Bass Pro Shops logo preceding it?
A. To my knowledge, no.
Q. So generally every time "Sportsman's Warehouse" is used in any of these areas of advertising, the phrase "Bass Pro Shops" or the Bass Pro Shops logo is put in there along with it; is that correct?
A. Generally, yes.
Q. Can you think of any instances where it's not?
A. Not off the top of my head, no.
Q. Can you give a rough estimate of how many people are involved in creating and displaying the Bass Pro advertising that you oversee?
A. It really varies by the type of ad. I would say it could be, you know, if you looked at a course of a year, as many as a hundred. That's really just a guess.

Q. If I could, I'd like you to take a look at what I'd like to mark as Exhibit 1, which is I think the only exhibit that I sent over. Have you got that in front of you or nearby?
MR. KANG: That is it.
A. Yes, I do, yes.
Q. (By Mr. Smith) Could you describe this document?
A. It looks like a photocopy fax of a Bass Pro Shops incentives gift card.
Q. Okay. Does this show the front and the back of the gift card?
A. Yes. It shows a copy of both.
Q. Okay. And you mentioned that it's called an incentives gift card; is that correct?
A. Yes.
Q. Can you describe what that means?
A. Incentives is our group that does incentive sales, meaning sales of merchandise and/or gift cards to third parties for things like employee incentives, safety incentives for like someone working in a factory, that sort of thing.
Q. Okay. Do you have any idea about how many of these get distributed a year, or is that in your area of expertise?

A. It is in my area, but I couldn't care to guess at a number in terms of the actual number of incentive gift cards that we do.
Q. Is it in the thousands?
A. There's different types of incentive gift cards. Again, I really wouldn't know. In general, I would say incentives, yes, there's thousands.
Q. Okay. Are there different types of gift cards other than incentive gift cards?
A. Yes. There's -- and they're all -- they're all essentially the same. It's creatively what's on the front more than anything that changes. But there are our gift cards that we distribute in the stores. We have a third-party gift card program that is also part of incentives -- that is why it's hard to break those numbers out -- that is distributing our gift cards through places like supermarkets, convenience stores, in about 50,000 locations throughout the U.S. Those would be the primary things. We do holiday seasonal gift cards, that sort of thing.
Q. But is production and marketing of gift cards part of your responsibilities at Bass Pro?
A. The design of them is, yes.
Q. Okay. If I could direct your attention to the paragraph that appears on what's represented as the

back of the gift card.
A. Uh-huh.
Q. Okay. It begins with "The balance" and ends with "terms and conditions."
A. Uh-huh.
Q. Are you familiar with this paragraph?
A. Yes.
Q. Okay. Does it appear on all the gift cards you mentioned just now?
A. Not this particular paragraph, no.
Q. Okay. Are there a series of paragraphs? How do the paragraphs change? Is that easy to describe?
A. Yes. They change over time, as our -- as our brand has grown with various additional brands, like most recently our Islamorada Fish Company Restaurants, which are now accepting our gift cards. The most recent copy on this -- on the back of these cards doesn't refer to each of the store types individually, but more -- it only speaks as Bass Pro Shops retail locations and restaurant locations.
Q. Okay. Why was that change made?
A. Because of the quantities of these cards that we have to produce for costs are very large. And as our business is evolving, like this year we

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introduced the Outpost stores. The Islamorada Fish Companies, like I said, just recently were able to take the gift cards. We have to have large inventories of these cards, and we wanted to do something where we didn't have to worry about changes if new brands were added or deleted or whatever the case may be.

Q. How long ago was that change made?

A. You know, I couldn't tell you off -- I couldn't tell you off the top of my head when that change was made. I would say relatively recently, in the last -- if I were to guess, I would say in the last six months, as our -- as our restaurants were able to accept our cards.

Q. And the paragraph as it appears now on the exhibit in front of you, how long has the store listings in that paragraph -- how long have they been part of the explanatory text in the back of gift cards up till about six months ago?

A. That would be my -- that would be my recollection.

Q. Well, my question is: How long up to the time that you did this shift and took the types of stores out -- about how long did they appear on the back of all your gift cards?

A. I wouldn't know. I would assume since we've

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had gift cards, but I wouldn't know because I haven't seen all the older gift cards.

Q. About when did you begin using gift cards, do you recall?

A. It was prior to my starting with Bass Pro, so -- they've been using them since I came here, so I honestly don't know.

Q. Can you describe your understanding of what the purpose of this paragraph is on the back of the gift card?

A. In general, it's to tell the customer where they can use the card and what the rules are with the use of the card.

Q. So by your answer, I'm understanding that the intended reader of this paragraph is your customers. Correct?

A. That's correct, yes.

Q. Do you see in this paragraph the circle with the R inside of it --

A. Uh-huh.

Q. -- up here?

A. Yes.

Q. If you could, could you -- could I ask you to read the first sentence --

A. Uh-huh.

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Q. -- of that and indicate where you see the circle Rs as you read through?

A. Uh-huh. "The balance on this card is redeemable for merchandise only at any Bass Pro Shops Outdoor World," with a circle R, "Bass Pro Shops Sportsman's Warehouse," with a circle R, "or World Wide Sportsman" with a circle R, "stores, through Outdoor World Incentives," TM, "or Bass Pro Shops," circle R, "catalogs or via the Internet, basspro.com" in parenthesis.

Q. Are you aware of who drafted this particular paragraph?

A. It's my understanding that our accounting department is responsible for this -- for this copy.

Q. Do you review -- do you review this copy as part of your job before it goes out and these gift cards are produced?

A. In general, yes.

Q. Are you personally -- do you personally have knowledge of when a circle R symbol can or cannot be used in conjunction with a trademark or other text?

A. No.

Q. So would it surprise you if I suggested that inside this paragraph, the phrase "Bass Pro Sportsman's Warehouse" followed by a circle R is improper use of

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that statutory symbol?

A. I wouldn't -- I wouldn't know.

Q. If that is improper, would you say that that was an intentional misuse?

A. No, I wouldn't say there would be any intentional misuse.

Q. And why would you say that?

A. Because we would not want to do that.

Q. Why wouldn't you want to do that?

A. Well, for the -- it's just bad practice.

Q. And would it be against your company policy, as well?

A. Yes, it would be.

Q. With the number of individuals that are involved in creating and placing your ads, is it possible -- and gift cards, for that matter, is it possible that some individuals at Bass Pro could make mistakes on how to place a registered trademark symbol inside an ad?

A. I would guess anything's possible, yeah.

Q. Okay. Have you ever been present when your CEO or any other officer, for that matter, had discussed the similarity between my client's Sportsman's Warehouse, Incorporated, stores and your Bass Pro Shops Sportsman's Warehouse stores?

A. Not our CEO, no, not to my knowledge.
Q. Okay. Any other corporate officers discussing that topic?
A. As I mentioned earlier, Kerry Harmon who at the time was an officer.
Q. Any others?
A. None that I can recall.
Q. And just to clarify -- I may have asked this earlier, but I want to make sure I get the right answer here. Have you ever been provided with any instructions regarding the similarity of trademarks between the two companies?
A. No.
Q. Have you ever been provided any instructions regarding the use of the trademark statutory symbol?
A. I don't understand the question. I'm sorry.
Q. Within the last year -- let me rephrase the question. Within the last year, have you been presented any instructions from anyone at the company regarding how trademarks should be used or how the statutory symbols should be used, in your duties as vice president of advertising and marketing?
A. Not to my knowledge, no.
MR. SMITH: All right. Let's go off the record for a moment.

MR. KANG: Okay.
(Pause in proceedings.)
MR. SMITH: I have no further questions. Thank you very much for appearing today.
THE WITNESS: No problem. Thank you for your time.
THE REPORTER: Signature?
MR. KANG: I'd like to -- yeah, I would like to have an opportunity to read and sign.
(Witness excused.)
(The foregoing telephone deposition was concluded at 2:45 p.m. on August 9, 2006.)

CERTIFICATE OF REPORTER

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

I, Connie McKeen, Certified Shorthand Reporter, Registered Professional Reporter, Certified Court Reporter #0333, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither related to, nor attorney for, nor employed by any of the parties thereto, nor financially or otherwise interested in the outcome of said action.

_____
Connie McKeen, CSR, CCR #0333
Registered Professional Reporter

MIDWEST LITIGATION SERVICES
711 North 11th Street
St. Louis, Missouri 63101
Phone (314) 644-2191 * Fax (314) 644-1334

August 24, 2006

Mr. Grant D. Kang
Husch & Eppenberger
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105

RE: BASS PRO TRADEMARKS, L.L.C. vs. SPORTSMAN'S WAREHOUSE, INC.

Dear Mr. Kang:

Please find enclosed your copy of the deposition of Stanley W. Lippelman, taken on August 9, 2006. Also enclosed is the original signature page and errata sheet.
Please have the witness read your copy of the transcript, indicate any changes and/or corrections desired on the errata sheet, and sign the signature page before a notary public. Please forward the errata sheet and notarized signature page to Mr. Christopher R. Smith for filing prior to the date of trial.
Thank you for your attention to this matter.
Sincerely,

Connie J. McKeen, CSR, CCR #0333
Registered Professional Reporter

Encl
cc: Mr. Christopher R. Smith

STATE OF _____)
) ss.
COUNTY OF _____)

I, STANLEY W. LIPPELMAN, do hereby certify:
that I have read the foregoing deposition;
that I have made such changes in form and/or substance to the within deposition as might be necessary to render the same true and correct;
that having made such changes thereon, I hereby subscribe my name to the deposition.
I declare under penalty of perjury that the foregoing is true and correct.

_____
STANLEY W. LIPPELMAN

Executed this _____ day of _____,

2006, at _____.

Notary Public: _____

My commission expires: _____

(CM) Signature page to Mr. Grant D. Kang
STANLEY W. LIPPELMAN, 8/9/06
RE: BASS PRO TRADEMARKS, L.L.C. vs. SPORTSMAN'S WAREHOUSE, INC.

WITNESS ERRATA SHEET

WITNESS: STANLEY W. LIPPELMAN

RE: BASS PRO TRADEMARKS, L.L.C. vs. SPORTSMAN'S WAREHOUSE, INC.
8/9/06

Page # _____ Line # _____
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Reason for change: _____

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Should read: _____

Reason for change: _____

Page # _____ Line # _____
Should read: _____
Reason for change: _____

Witness signature: _____

GIFT CARD

Bass Pro Shops®

DEPOSITION EXHIBIT

8906 cm

[redacted]

CARD # 6006491265098849058

PROTECT THIS CARD LIKE CASH

To check your balance, see any cashier or call:

1-800-454-1199

The balance on this card is redeemable for merchandise only at any Bass Pro Shops Outdoor World®, Bass Pro Sportsman's Warehouse® or World Wide Sportsman® stores, through Outdoor World Incentives™, or Bass Pro Shops® catalogs, or via the internet (basspro.com). The balance may not be redeemed or exchanged for cash, check or credit (unless required by law) or applied as payment against any credit account. AFTER 2 YEARS OF NON-USE THE ENTIRE BALANCE IS VOID (except where prohibited by law). Neither this card nor the balance can be used if this card is lost or stolen. The issuer / merchant is BPIP, LLC. All rights reserved.

Use of this card constitutes acceptance of these terms and conditions.

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GC Control #: 4989-990063-257636-9

Initial Value (US Dollars): **$50.00**

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

2 In the matter of Trademark Registration No. 2,390,988

3 For the mark SPORTSMAN'S WAREHOUSE HUNTING FISHING
4 CAMPING RELOADING OUTERWEAR FOOTWEAR and Design
5 Date Registered: October 3, 2000
6 ----------
Bass Pro Trademark, L.L.C.

7 PETITIONER

8 vs. CANCELLATION NO. 92045000

9 Sportsman's Warehouse, Inc.,

10 RESPONDENT.
11 ----------
12 Deposition of Mark Winkelman taken pursuant
13 to Notice of Taking Deposition and taken before
14 Shannon J. Rothstein, a Notary Public in and for
15 the County of Anoka, State of Minnesota, on the
16 29th day of August, 2006, at 4200 IDS Center, 80
17 South 8th Street, Minneapolis, Minnesota commencing
18 at approximately 1:00 p.m.
19

* * *

20
21
22

Reported by Shannon J. Rothstein
23 8891-162nd Lane NW
Ramsey, MN 55303
24 651-295-0066

ON BEHALF OF THE PETITIONER:

GREGORY E. UPCHURCH, ESQ.
Husch & Eppenberger, LLC
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
(314) 480-1642

ON BEHALF OF THE RESPONDENT:
DAVID A. ALLGEYER, ESQ.
CHRISTOPHER RUSSELL SMITH, ESQ.
Lindquist & Vennum
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3533

* * *

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DEPOSITION OF MARK WINKELMAN

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Mr. Allgeyer	79

EXHIBITS:

No. 1	Resume	5
No. 2	Sportman's Recognition Assessment	16
No. 3	Rebuttal Report of Gary T. Ford	17
No. 4	Log	25
No. 5	Guide on Survey Research	35

REQUESTED MATERIAL:
None

OBJECTIONS:
None

PROCEEDINGS
MARK WINKELMAN
called as a witness, being first duly sworn,
was examined and testified as follows:
* * *
EXAMINATION
* * *

BY MR. UPCHURCH:
Q. Would you state your name for the record, please?
A. Mark Winkelman.
Q. Mr. Winkelman, were you retained in the cancellation proceedings in connection with the Bass Pro trademarks and Sportsman's Warehouse?
A. Yes.
Q. Who were you retained by?
A. Lindquist and Vennum.
Q. Are you personally familiar with the company Sportsman's Warehouse?
A. There's one located in Fargo, so I'm aware of them from that.
Q. In any other way?
A. Through the grapevine I found out my son and the owner's son go to the same college, if you want to call that a connection, but like I said,

other than just them having a store in that area and from that, being exposed to their chain, nothing else.
Q. As far as you know you're not friends with any of the officers of Sportsman's Warehouse?
A. To the best of my knowledge I'm not friends with any of them.
MR. UPCHURCH: Okay. Why don't we mark that as Winkelman 1.
(M. Winkelman Deposition Exhibit Number 1 marked for identification.)

BY MR. UPCHURCH:
Q. Sir, I handed you what's been marked as Exhibit 1, and ask if you can identify that?
A. It appears to be my resume, vitae, whatever you'd like to call it.
Q. On the first page of this document there's a reference to "Winkelman Consulting, a private market research consulting firm that is operated as a home-based business."
A. Uh-huh.
Q. Is that still accurate?
A. That is.
Q. And prior to that you were involved --

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it says you were leader of Precision Marketing, Inc.?
A. Correct.
Q. What did Precision Marketing, Inc., do?
A. Market research and planning.
Q. And for companies of all sizes?
A. Correct.
Q. Did Precision Marketing, Inc., conduct or have conducted trademark surveys?
A. Yes.
Q. Over the years, with only Precision Marketing, can you estimate how many trademark surveys you've either conducted or had conducted?
A. With Precision Marketing only?
Q. Yes. And I'm going to ask the same --
A. Yep.
Q. -- question about Winkelman Consulting.
A. I would say two to three.
Q. Okay. For Precision Marketing?
A. Somewhere in that ballpark, yep.
Q. And how many trademark surveys have you conducted or had conducted at Winkelman Consulting?
A. Probably four to five, and then naturally there's been other litigation cases that

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involve other things.
Q. Okay. On the same first page it says, "Used as an expert witness to substantiate (or refute) claims made by parties involved in litigation in North Dakota, Colorado and Arizona." Is that what you're referring to --
A. Uh-huh.
Q. -- in connection with litigation?
A. Uh-huh.
Q. Were all the --
A. It looks like we can add Minnesota too, huh?
Q. I don't know. This one's actually -- this proceeding is actually pending in the patent trademark office in D.C. so --
A. Okay.
Q. -- are you referring to this proceeding?
A. Yes.
Q. Were these litigations in North Dakota, Colorado and Arizona concerning trademarks?
A. Colorado and Arizona, correct.
Q. But North Dakota didn't have anything to do with trademarks?
A. No.

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Q. In Colorado what was the --
A. Well --
Q. -- trademark involved?
A. -- I guess I would need to go back and look at my records. I can't recall.
Q. Do you recall what it was roughly?
A. For some reason I'm drawing a blank right now. I'd have to go back and check things.
Q. Do you remember the trademark involved in the litigation in Arizona?
A. Yes, that was related to an electrical supply product.
Q. Did you run a survey in connection with that litigation?
A. Yes.
Q. What kind of survey did you run?
A. It was a survey on electricians and electrical suppliers.
Q. In the Colorado case do you remember if you ran a trademark survey?
A. As I said, I'd have to go back and check my information to confirm that.
Q. You have no recollection of it?
A. For some reason it just blocks out, so

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either I'm thinking of the wrong case or -- and so I'd hate to comment on something I'm not 100 percent sure of.
Q. No, I was just trying to investigate if --
A. No, that's fine.
Q. -- you can remember the mark or if it's like many things in my memory, I just don't remember anything at all. Is there another Mark Winkelman who, to your knowledge, testifies in trademark cases?
A. None that I'm aware of at this time.
Q. Were you ever involved in a case in federal court in Minnesota in connection with a trademark matter?
A. Yes.
Q. What case was that?
A. It was a plumbing supply product.
Q. Okay. And that's not on your --
A. And that's not there, so I should have Minnesota.
Q. Did you run a survey for that case?
A. Yes.
Q. What kind of survey was that?

A. It was a survey of plumbers.
Q. And did you run that survey in connection with a preliminary injunction proceeding in that case?
A. I guess I would not recall if it was a preliminary injunction or not, so --
(Attorney Christopher Smith enters the room.)
MR. ALLGEYER: Off the record.
(Off the record.)
BY MR. UPCHURCH:
Q. The Minnesota survey of plumbers --
A. Uh-huh.
Q. -- did that concern a likelihood of confusion issues?
A. Yes.
Q. Did it concern any other trademark issues?
A. Not to my recollection.
Q. Okay. What about the survey in Arizona; did that concern likelihood of confusion?
A. Yes.
Q. Any other issues?
A. That was primarily it, to the best of my

recollection.
Q. The Minnesota survey was run while you were with Winkelman Consulting; is that correct? I think it was 2002.
A. If it was 2002, then it would have been, yes.
Q. And the Arizona survey was probably run while you were with Precision Marketing? It looks like it's May of '99.
A. Then it would have been, yes.
Q. Okay. And did you work with Mr. Allgeyer on that case?
A. Yes, I did.
Q. Have you worked with Mr. Allgeyer on any other cases?
A. Yes.
Q. Any other trademark cases?
A. Yes.
Q. How many?
A. Well, the Arizona one, the project. The Minnesota project, and I'm thinking there's one to two others. I can't recall them off the top of my head.
Q. And I'm not after the names.

A. Yep.
Q. I'm just trying to develop --
A. Yep, so it's --
Q. -- how deep the relationship is.
A. Yep.
MR. UPCHURCH: I don't want to delve into your trade secrets as to who your clients are.
MR. ALLGEYER: They're usually published, so those cases you're reading, so --
MR. UPCHURCH: Oh, no. This is out of the PACER dockets.
MR. ALLGEYER: Yep.
BY MR. UPCHURCH:
Q. So have you run trademark surveys for all of the three to five cases that you've worked with Mr. Allgeyer on?
A. No.
Q. Okay. How many surveys have you run for Mr. Allgeyer?
A. I would say in the neighborhood of four to six, right around there.
Q. Over on page 4 of your resume, up at the

top there's a reference to different industries for which you've provided research and consulting services.
A. Uh-huh.
Q. Toward the end of that list, it lists sporting goods and apparel.
A. Uh-huh.
Q. Do you have a recollection of a particular company or companies that you consulted with in the sporting goods and apparel industry?
A. Yes.
Q. Who was that?
A. One of them would be Scheel's Allsport.
Q. S-H-I-E-L-D-S?
A. S-H -- or S-C-H, sorry, E-E-L-S.
Q. I wasn't even close. Were there others in the sporting goods and apparel industries?
A. Yes, one was Arland (ph) Sagem. Sagem.
Q. I'm not --
A. S-A-G-E-M.
Q. Thank you. Any others?
A. Off the top of my head, those are the two that come to mind.
Q. Did you do trademark research or

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1 consulting for either of those companies?
2 A. No.
3 Q. There's also a reference at the end of
4 that list to wholesalers and distributors.
5 A. Uh-huh.
6 Q. Do you have specific companies that you
7 recall that you performed research and consulting
8 services?
9 A. Red River Commodities, Grand Forks
10 Grocery Company, and off the top of my head, those
11 are the ones that come to mind.
12 Q. And are either of those wholesalers?
13 A. Pardon?
14 Q. Are either of those companies
15 wholesalers?
16 A. Yes.
17 Q. And what is a wholesaler to your way of
18 thinking?
19 A. It would be a person who accumulates a
20 commodity-type product and distributes it to
21 resellers or manufacturers, so it's predominantly
22 business-to-business selling.
23 Q. And did you do any trademark research or
24 consulting for either of those companies, Red River

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1 Commodities or Grand Forks Grocery?
2 A. Nope.
3 Q. On the last page of your resume --
4 A. Uh-huh.
5 Q. -- there are various poles and pole
6 results that you've conducted or had conducted.
7 They all appear to be political or governmental in
8 nature.
9 A. Uh-huh.
10 Q. Is that predominantly what Winkelman
11 Consulting does is --
12 A. No.
13 Q. Okay. Is there a reason that your
14 examples are all political or governmental in
15 nature?
16 A. Yes.
17 Q. What is that?
18 A. Most other type of research you have no
19 way of proving or disproving the accuracy of your
20 research. With a political survey you do have that
21 opportunity because several days after the real
22 results of the survey are released you have an
23 election, and you can compare apples to apples to
24 see whether or not your results were accurate.

Page 16

1 Q. Plus the information at that point is
2 public record, and so you have --
3 A. Correct. Once it's been released in
4 media and then I have the --
5 Q. Ability to freely disseminate?
6 A. Yep, yep.
7 Q. I noticed that the sample size on all of
8 these is at least 179 or greater.
9 A. Uh-huh.
10 Q. Is there a reason for that?
11 A. It would depend upon the level of
12 accuracy desired by the client and/or the budget.
13 Q. Okay. Larger sample sizes cost more?
14 A. Correct.
15 (M. Winkelman Deposition Exhibit Number
16 2 marked for identification.)
17 BY MR. UPCHURCH:
18 Q. You've been handed what's been marked as
19 Winkelman Exhibit 2, and I would ask you if you can
20 identify that document?
21 A. It appears to be the summary report that
22 was provided to Lindquist and Vennum by me.
23 Q. Have you seen Dr. Ford's rebuttal report
24 commenting upon your survey?

Page 17

1 A. Yes, it was emailed to me late Friday,
2 and given the fact that I had commitments over the
3 weekend, I was able to read it for the first time
4 on Monday, so I have read through portions of it
5 but have not thoroughly studied it.
6 MR. UPCHURCH: Why don't we go ahead and
7 mark that.
8 (M. Winkelman Deposition Exhibit Number
9 3 marked for identification.)
10 BY MR. UPCHURCH:
11 Q. You've been handed what's been marked as
12 Winkelman Exhibit 3. Is that the rebuttal report
13 of Dr. Ford that you just referred to that you've
14 had a chance to glance over?
15 A. It appears to be a portion of it.
16 Q. What seems to be missing?
17 A. I just remember it being thicker, so --
18 Q. I believe you described how the survey
19 was conducted --
20 A. Uh-huh.
21 Q. -- starting, I guess. On page 3-1.
22 A. Uh-huh.
23 Q. And it says you obtained telephone
24 numbers from Survey Sampling International?

DEPOSITION EXHIBIT
M. Winkelman #1
8-29-06

Mark R. Winkelman

Experience

December 1999 to Present *Winkelman Consulting* *Fargo, ND*
Owner, Market Research & Planning Consultant

- Philosophy: *"Every client/project deserves my personal attention and full expertise".*
- Mission: *"Contribute to the success of every client by enabling them to make decisions that improve their profitability and/or efficiency"*.
- After seventeen years as the leader of Precision Marketing, Inc. (PMI), was interested in seeking a career change that would allow working more closely with clients, being more involved in each project, and doing what love most – use skills and expertise to enhance the success of those served! In December of 1999, dissolved PMI and opened Winkelman Consulting, a private market research consulting firm that is operated as a home-based business. To enhance abilities, portions of larger projects are occasionally subcontracted to other capable vendors or consultants.
- This move enabled providing the highest quality and customer service in providing a wide variety of marketing research and consulting services, including:
  - Research & Survey Design
  - Statistical Analysis
  - Seminars & Training
  - Focus Group Moderating
  - Marketing Consulting
  - Planning
  - Customer, Market, Product, and Advertising Research
  - Internet-Based Research Methodologies.
- Since 1980:
  - Successfully designed and implemented nearly 1,800 projects for more than 300 clients from a variety of industries in numerous states or provinces *(see Page 4)*.
  - Developed and conducted numerous live and/or satellite training workshops and seminars on research design, political polling, questionnaire development, strategic planning, and focus group moderation.
  - Used frequently by news media as a professional resource in conducting quality market research and interpreting the results *(see page 4)*.
  - Used as an expert witness to substantiate (or refute) claims made by parties involved in litigation in North Dakota, Colorado and Arizona.

March to May 2006 *Minnesota State University Moorhead* *Moorhead, MN*
Adjunct Instructor

- Taught Market Research class (MKTG 422) while the professor was on medical leave.

August 1983 to December 1999 *Precision Marketing, Inc.* *Fargo, ND*
President, Market Research Consultant & Senior Research Analyst

- In 1983, helped found Precision Marketing, Inc., the first full-service market research firm in North Dakota.
- Responsible for all business operations (accounting, planning, sales & marketing, human resources).
- Managed a staff as large as six full-time and nearly 200 part-time associates.
- Initiated the marketing and sales efforts that resulted in substantial revenue growth and placed Precision Marketing, Inc. as the eighth fastest growing business in Fargo in 1989.

PO Box 11375 • Fargo, ND 58106-1375 • (701)237-2283 • MRWinkelman@cableone.net

September 1982 to May 1983 *North Dakota State University* *Fargo, ND*
Graduate Assistant, College of Business

- Assisted professors and instructors in grading quizzes, test and papers, as well as occasionally lecturing for classes.

September 1979 to May 1983 *The Spectrum* *Fargo, ND*
***Business Manager** (1981-83), **Advertising Manager** (1980-81) **& Advertising Sales** (1979-80)*

- As Business Manager and Advertising Manager for *The Spectrum*, NDSU's student newspaper, instilled the philosophy and developed the staff/structure needed to both reduce the paper's dependence on university funds from over $35,000 per year to less than $10,000 per year and still generate excess revenues that enabled the paper to make over $20,000 in unbudgeted equipment purchases.

Education

September 1982 to May 1983 North Dakota State University Fargo, ND
Masters of Business Administration Coursework

- Completed all required coursework with a concentration in marketing & market research. Due to demands of starting a new business, family, etc., did not complete Master's Thesis.

September 1978 to May 1982 North Dakota State University Fargo, ND
Bachelor of Science, Business Administration

- Minors in Statistics and Economics

Academic References

Available upon request.

Past Professional Memberships

American Marketing Association • Market Research Association • Academy for Health Services Marketing • Greater North Dakota Association • Fargo Cass County Economic Development Corporation • Fargo Chamber of Commerce • Grand Forks Chamber of Commerce • Mental Health Association of North Dakota

Past Volunteer Positions & Honors

Fargo-Moorhead Family YMCA Board President, Board of Directors, Executive Committee, Membership and Marketing Committee, Partner of Youth Campaign, and Endowment Board • YMCA Flickertail Cluster 1999 Volunteer of the Year • First United Methodist Church Council, Council on Ministries (Chair), Men's Club (President), and Growing Core Ministry Liaison to Church Council (responsible for communication, small group development, and member involvement/assimilation) • Gus Macker Tournament Committee and "Gus Buster" • Holiday Clearing Bureau Committee • Fargo Chamber Marketing and Program Committees • Grand Forks Chamber Marketing Committee • Calvary United Methodist Church Education (Chair) and Pastor-Parish Relations Committees • United Way Marketing Committee • F-M Athletics football coach • YMCA and traveling basketball coach • Metro Tournament Committee tournament volunteer

Personal Information

Married to my high school sweetheart since 1981• Two children – Tyler & Steve • Enjoy basketball, handball, exercise, hunting, fishing, going to the boys' college events and music concerts and singing in the church choir • Four-year letterman for the NDSU Bison football team (1978-81) • Worked while going to college and personally paid 100% of my college expenses • Graduate school GPA of roughly 3.75 and undergraduate GPA of 3.49 • 1978 Bismarck High School graduate • Worked through high school while participating in football, basketball, track, concert choir and swing choir • Began working in sixth grade as a Minneapolis Tribune carrier and won trips to Washington, D. C., Disney World, Minneapolis, and Medora by selling subscriptions • Born October 23, 1959

Have provided research & consulting services to many different industries

Accounting • Addiction (Chemical Dependency & Gambling) • Advertising • Adult Day Care • Agriculture • Architectural Design • Arts (Museums, Theaters, & Entertainment) • Professional Associations • Automotive Sales, Services & Parts • Banking • Beverage Sales (Soda & Alcohol) • Cable Television Services • Charitable/Non-Profit Organizations • Child Care • Chiropractors • Churches/Religious Services • Clinics • Commercial/Ag Lending • Commercial Services • Community/Regional Planning and Development • Computers/Electronics • Construction/Home Improvement • Consumer Services • Cooperatives • Dentists • Economic Development • Education • Entertainment • Environmental/Wild Life • Equipment Rental • Eye Care & Eye Wear • Farm Machinery • Farming/Ranching • Financial Services/Investment • Food Products • Fraternal Organizations • Funeral Homes • Furniture • Gaming/Bingo/Casinos (Charitable, Native American, and For-Profit) • Grocery Stores • Government (City, County, State, and Federal) • Health & Fitness Facilities • Healthcare • Heating & Air Conditioning • Heavy Equipment Sales, Service and Parts • Home Health Services • Home Security • Hospitals • Hotels • Human Services • Hunting Equipment • Insurance • Law Enforcement • Legal/Litigation Support • Magazines • Manufacturing/Ag Processing • Media • Mental Health Services • Moving & Storage • New Products, Businesses & Ventures • Newspapers/Shoppers • Nursing Homes • Office Equipment • Organic Foods/Processing • Packaging • Parks & Recreation • Pet Care Products • Photography • Political Candidates & Political Issues • Radio • Real Estate • Recycling • Rental Property • Restaurants • Retail Stores/Shopping Centers • Road Emergency Services • Social Issues • Sporting Goods & Apparel • Telecommunications • Telephone Directories • Television • Tourism/Travel • Truck Stops • Utility Companies • Water Craft • Wholesalers & Distributors

Have completed many types of research and planning projects

Attitude Studies • Benchmark Studies • Brainstorming Sessions • Business Plans • Community Leader Surveys • Concept Tests • Consumer/Customer Panels • Consumer Preference, Habit, & Use Evaluations • Corporate Branch/Division Evaluations • Customer Profiles • Customer Satisfaction • Customer Surveys • Database & Literature Searches • Demand Assessments • Demographic Profiles • Employee Attitude Assessments • Employee Evaluations • Employee Satisfaction Surveys • Feasibility Studies • Focus Groups • Image Evaluations • Image/Position Studies • Life-Style Profiles • Logo Tests & Evaluations • Mail Surveys • Mall & Retail Intercept Interviews • Market Assessments • Market Share Estimates • Marketing Plans • Media Habits & Use Studies • Needs Assessments • New Market Entry/Penetration • New Product/Service Research • Patient Satisfaction Surveys • Perception Studies • Personal Interviews • Performance Audits • Planning • Position Appraisals • Pre-Election Polls • Pre-Studies & Post-Studies • Product & Service Evaluations • Product Placements • Public Opinion Polls • Satisfaction Surveys • Secondary Research • Secret Shopper Evaluations • Self-Administered Questionnaires • Situation Analysis • Strategic Plans • Telephone Interviews • Tracking/On-Going Studies

Have conducted a wide variety of local, statewide, regional, national, and international projects, including research or consulting services for clients in the following states or provinces:

Manitoba • Saskatchewan • Washington, D.C. • North Dakota • Minnesota • Alaska • Arizona • Arkansas • California • Colorado • Connecticut • Florida • Illinois • Iowa • Kansas • Louisiana • Maryland • Massachusetts • Michigan • Missouri • Montana • Nebraska • Nevada • New Hampshire • New Jersey • New York • North Carolina • Ohio • Oklahoma • Oregon • Pennsylvania • South Carolina • South Dakota • Texas • Utah • Washington • West Virginia • Wisconsin • Wyoming

Have consistently conducted many highly accurate polls and research studies

Date of Poll - Measure or Race on the Ballot	Sample Size	Poll Results	Actual Election Outcome	Maximum Margin of Error
April 1999 – Cass County Jail Sales Tax *Results show those who would/did vote "Yes"*	458	69.2%	70.8%	±4.3%
November 1996 - ND Governor *Results show those who would/did vote for "Ed Schafer"*	550	70.8%	66.2%	±4.2%
November 1996 - ND House of Representatives *Results show those who would/did vote for "Pomeroy"*	550	60.2%	55.1%	±4.2%
November 1996 - ND Agricultural Commissioner *Results show those who would/did vote for "Johnson"*	550	51.5%	50.1%	±4.2%
November 1996 - ND Auditor *Results show those who would/did vote for "Peterson"*	550	50.9%	54.6%	±4.2%
November 1996 - ND Public Service Commission *Results show those who would/did vote for "Wefald"*	550	60.3%	60.3%	±4.2%
November 1996 - ND Superintendent of Public Instruction *Results show those who would/did vote for "Sanstead"*	550	62.4%	59.2%	±4.2%
April 1996 - Fargo Use of Fargodome Tax for Streets *Results show those who would/did vote "Yes"*	550	72.7%	74.8%	±4.1%
April 1996 - Fargo Super Majority (60%) on Taxes *Results show those who would/did vote "Yes"*	550	62.5%	60.1%	±4.1%
April 1996 - Fargo Publication of Commission Minutes *Results show those who would/did vote "No"*	550	83.6%	84.2%	±4.1%
February 1996 - ND Republican Presidential Primary	179			7.3%
Dole		57.6%	56%	
Forbes		21.2%	20%	
Buchanen		15.1%	18%	
Alexander		6.1%	6%	
November 1995 - Grand Forks Event Center Sales Tax *Results show those who would/did vote "Yes"*	550	58.5%	60.0%	±4.0%
November 1992 - ND Governor *Results show those who would/did vote for "Ed Schafer"*	504	58.9%	58.0%	±4.3%
April 1992 - Fargo Road/Water Plant Sales Tax *Results show those who would/did vote "Yes"*	485	69.1%	66.0%	±4.4%
November 1990 - ND Labor Commissioner *Results show those who would/did vote for "Craig Hagen"*	392	59.7%	60.4%	±4.9%
November 1990 - ND Measure #5 (Metigoshe Gaming) *Results show those who would/did vote "Yes"*	479	33.2%	32.1%	±4.5%
November 1990 - ND Measure #6 (Video Gaming) *Results show those who would/did vote "Yes"*	484	33.5%	33.4%	±4.5%
April 1990 - Fargo, ND Mayor *Results show those who would/did vote for "John Lindgren"*	322	60.2%	62.6%	±5.4%
December 1988 - Fargo, ND Dome Sales Tax *Results show those who would/did vote "Yes"*	415	59.5%	60.5%	±4.9%

**All poll results are released with the full permission of past clients.*

Lindquist & Vennum PLLP

DEPOSITION
EXHIBIT
M. Winkelman #2
8-29-06

Sportsman's Warehouse Recognition Assessment

Prepared by

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June 2006

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Section 1

EXECUTIVE SUMMARY

- **Assess the implied meaning of the words "Sportsman's Warehouse".**
  - Nearly one of every two respondents felt the words "Sportsman's Warehouse" are at least the name of a specific store or chain that sells mainly hunting, fishing, camping, or outdoor gear. In contrast, only about one of every three respondents felt the words "Sportsman's Warehouse" are most likely general words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear.
    - All of the vendors surveyed were at least able to name a city or metro area in which a Sportsman's Warehouse store is located.
  - Nearly one of every twenty respondents named Sportsman's Warehouse first (top-of-mind awareness), while more than one of every ten named Sportsman's Warehouse (unaided awareness, which includes top-of-mind awareness). These types of awareness are primarily measures of the longevity and marketing strength of an organization. In short, the more established an organization is in a market and/or the more an organization advertises, the higher its top-of-mind and/or unaided awareness will be.
    - For vendors, 50.0% named Sportsman's Warehouse first (top-of-mind awareness), while another 40.0% (90.0% overall) named Sportsman's Warehouse (unaided awareness, which includes top-of-mind awareness).
  - The results indicate that a minuscule proportion of respondents used the words "sportsman(s)" or "sportsman(s) warehouse" as a generic term for a <u>large</u> store that sells <u>mainly</u> hunting, fishing, camping, and outdoor gear.
- **Assess the implied meaning of the "Sportsman's Warehouse" sample logo.**
  - Of those who viewed the sample logos, nearly eight of every ten felt the Sportsman's Warehouse sample logo is <u>at least</u> a logo that could be used to identify one specific store or chain of stores. In comparison, more than eight of every ten felt the Bass Pro Shop sample logo is <u>at least</u> a logo that could be used to identify one specific store or chain of stores.
    - For these vendors, 100.0% felt the Sportsman's Warehouse sample logo is an actual logo that is currently used by one store or chain. In contrast, only 42.9% of these vendors felt the Bass Pro Shop sample logo an actual logo that is currently used by one store or chain.

SP 00984

Section 2

FINDINGS SUMMARY & GENERAL CONCLUSIONS

When reviewing this report, the findings and conclusions will be more thoroughly understood if several other sections of the report are also reviewed. First, the questionnaires in Section 4 provide the actual phrasing for each question. A solid understanding of the context in which each question was asked will enable you to more accurately interpret the findings. Second, the contingency tables in Section 5 provide more detailed results.

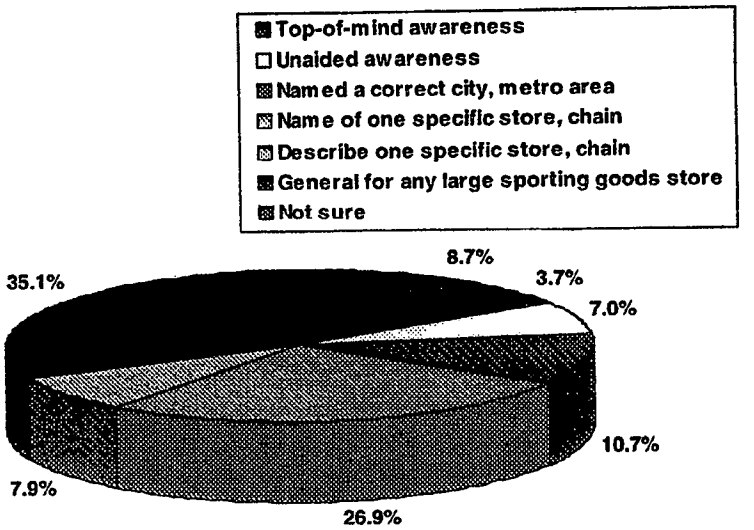
Purpose #1: Assess the implied meaning of the words "Sportsman's Warehouse".

- **Conclusion #1:** Nearly one of every two respondents felt the words "Sportsman's Warehouse" are at least the name of a specific store or chain that sells mainly hunting, fishing, camping, or outdoor gear.

  - Respondents without top-of-mind or unaided awareness of Sportsman's Warehouse were asked if, when they hear the words "Sportsman's Warehouse", they think these words are most likely the name of one specific store or chain of stores, words that describe one specific store or chain of stores, or general words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear. Those who felt these words are the name of or describe one specific store or chain of stores, were also asked to name the location of a Sportsman's Warehouse.

    Figure 1a shows that 48.3% of all respondents felt the words "Sportsman's Warehouse" are at least the name of one specific store or chain of stores. In contrast, only about one of every three respondents felt the words "Sportsman's Warehouse" are most likely general words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear.

Figure 1a. When you hear the words "Sportsman's Warehouse", do you think these words are most likely...
(Includes all respondents)



SP 00985

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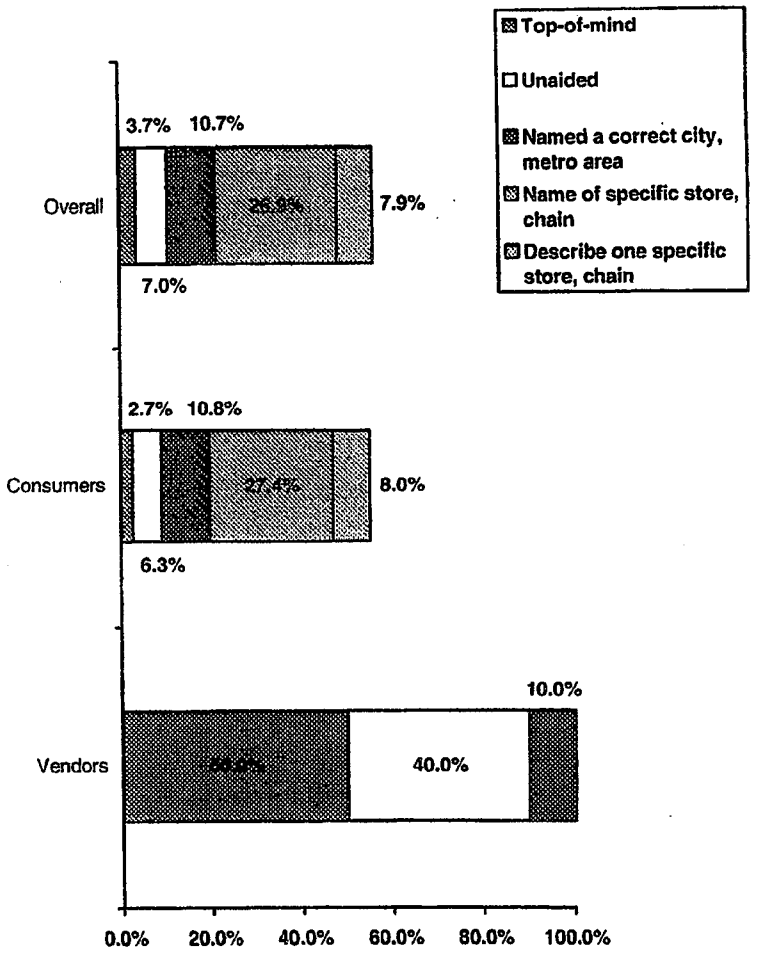
Vendors' awareness of Sportsman's Warehouse appears to be very high. As can be seen in **Figure 1b**, all of the vendors surveyed were at least able to name a city or metro area in which a Sportsman's Warehouse store is located. In comparison, 47.2% of consumers felt the words "Sportsman's Warehouse" are at least the name of one specific store or chain of stores.

Please note that the results in Figure 1a and Figure 1b are based on the combined results for questions A3a to A5. Therefore, they indicate each respondent's highest level of awareness for Sportsman's Warehouse or recognition for the words Sportsman's Warehouse.

Figure 1b. When you hear the words "Sportsman's Warehouse", do you think these words are most likely...
(Includes all respondents)



SP 00986

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- **Conclusion #2:** Nearly one of every twenty respondents named Sportsman's Warehouse first (top-of-mind awareness), while more than one of every ten named Sportsman's Warehouse (unaided awareness, which includes top-of-mind awareness). These types of awareness are primarily measures of the longevity and marketing strength of an organization. In short, the more established an organization is in a market and/or the more an organization advertises, the higher its top-of-mind and/or unaided awareness will be.

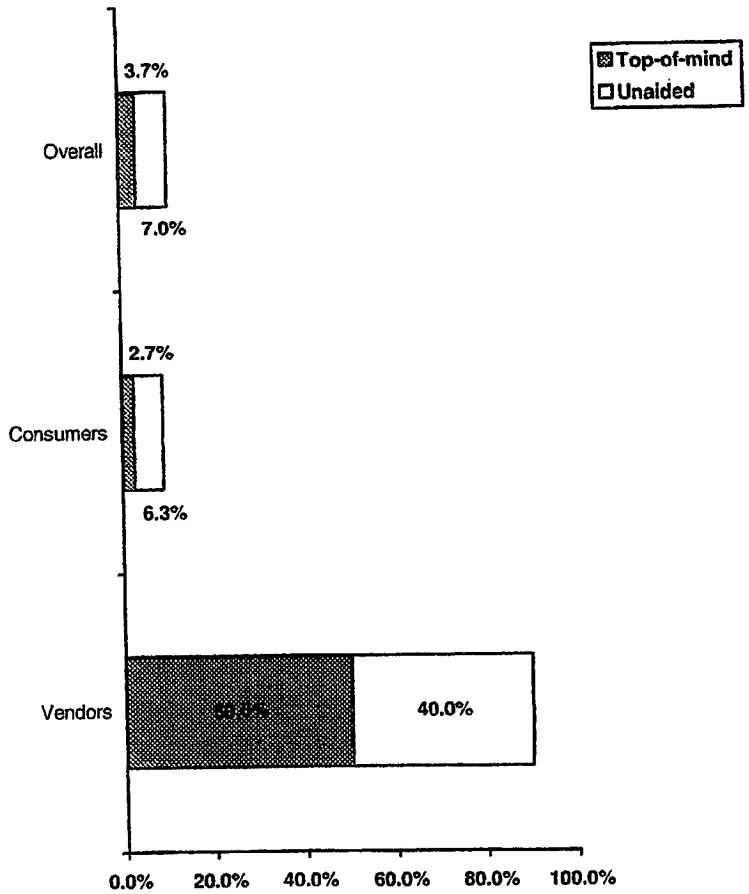
  - All respondents were asked to name the one store that comes to mind first *and* other stores that come to mind when they think about large stores that sell mainly hunting, fishing, camping, or outdoor gear. As can be seen again in **Figure 2**, 3.7% named Sportsman's Warehouse first (top-of-mind awareness), while another 7.0% (10.7% overall) named Sportsman's Warehouse (unaided awareness, which includes top-of-mind awareness).

    For this question, respondents were allowed to give up to seven responses. Therefore, the results will exceed 100% when the percentages are added together.

  - As was noted earlier, vendors' awareness of Sportsman's Warehouse appears to be very high. For vendors, 50.0% named Sportsman's Warehouse first (top-of-mind awareness), while another 40.0% (90.0% overall) named Sportsman's Warehouse (unaided awareness, which includes top-of-mind awareness).

  - Please note that the results in Figure 2 are based on the combined results for questions A3a to A3g. Therefore, they indicate each respondent's highest level of awareness for Sportsman's Warehouse.

Figure 2. Top-of-mind and unaided awareness of Sportsman's Warehouse.
(Includes all respondents)



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- **Conclusion #3:** The results indicate that a minuscule proportion of respondents used the words "sportsman(s)" or "sportsman(s) warehouse" as a generic term for a large store that sells mainly hunting, fishing, camping, and outdoor gear.

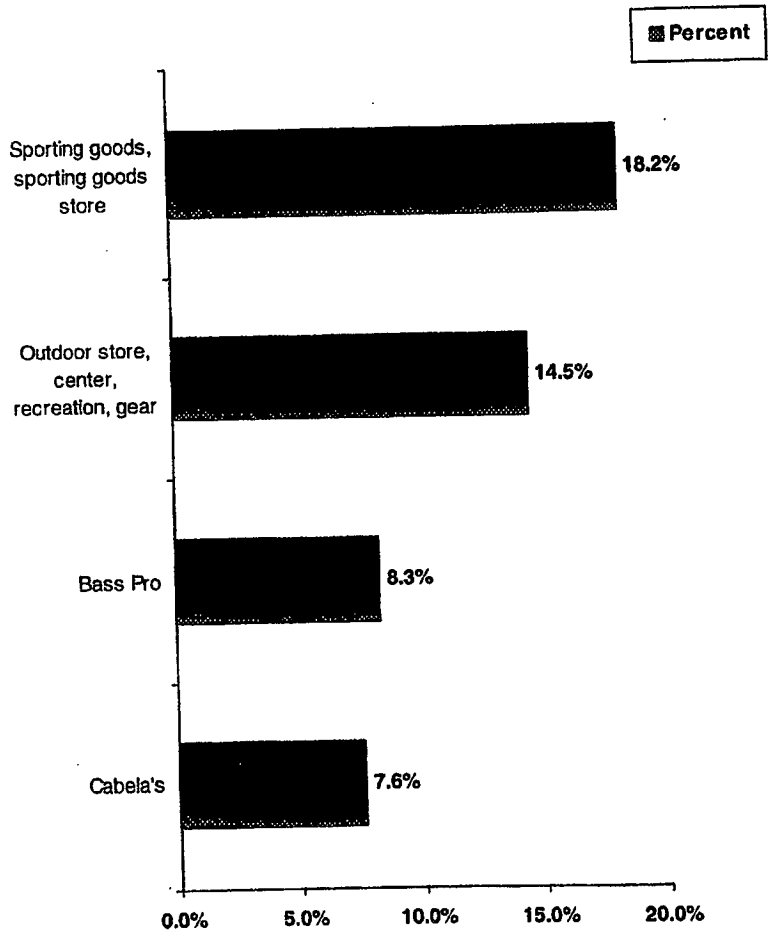
  Before being asked any questions related to the words "Sportsman's Warehouse", all respondents were asked what word or words they would use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear. **Figure 3** shows that the words used most frequently for a large store that sells mainly hunting, fishing, camping, and outdoor gear were the words sporting goods or outdoor, followed by Bass Pro and Cabela's.

  For this open-ended question, respondents were allowed to give up to three responses. Therefore, the results will exceed 100% when the percentages are added together.

  - The contingency tables in Section Five show that less than 1% of the respondents used the words "sportsman(s) warehouse" to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear.

  When looking at vendors' responses to this question, the detail in Section Five shows that the words used most frequently for a large store that sells mainly hunting, fishing, camping, and outdoor gear were the words sporting goods (40.0%) or outdoor (30.0%), followed by big, big box, big book; Outdoorsman; and sports store, center, shop, gear (10% each). None of the vendors used the words "sportsman(s)" or "sportsman(s) warehouse" as a generic term for a large store that sells mainly hunting, fishing, camping, and outdoor gear.

Figure 3. Words used most frequently to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear?
(Includes all respondents)



SP 00988

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Purpose #2: Assess the implied meaning of the "Sportsman's Warehouse" sample logo.

- **Conclusion #4:** Of those who viewed the sample logos, nearly eight of every ten felt the Sportsman's Warehouse sample logo is at least a logo that could be used to identify one specific store or chain of stores. In comparison, more than eight of every ten felt the Bass Pro Shop sample logo is at least a logo that could be used to identify one specific store or chain of stores.
  - Those who were willing and able to access the Internet were asked to view sample logos for Sportsman's Warehouse and Bass Pro Shop. After reviewing each logo they were asked if they think that sample logo is most likely an actual logo that is currently used by one specific store or chain of stores, a logo that could be used to identify one specific store or chain of stores, or a general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, or outdoor gear.

Sportsman's Warehouse Sample Logo

Bass Pro Shop Sample Logo

SP 00989

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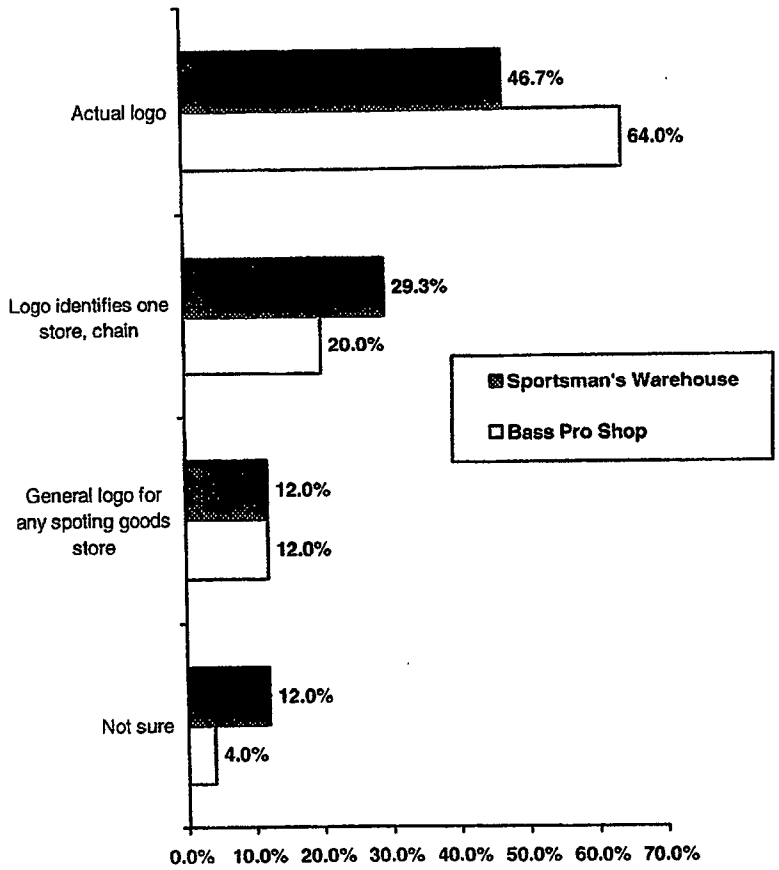
Figure 4 shows that 76.0% of these respondents felt the Sportsman's Warehouse sample logo is at least a logo that could be used to identify one specific store or chain of stores, while 84.0% felt the Bass Pro Shop sample logo is at least a logo that could be used to identify one specific store or chain of stores. Given the margin of error associated with these questions (roughly ±9% to ±10%), one cannot say that the recognition of one sample logo is significantly higher (or lower) than the other.

When looking at vendors' responses to these questions, the detail in Section Five shows that 100.0% of these vendors felt the Sportsman's Warehouse sample logo is an actual logo that is currently used by one store or chain. In contrast, only 42.9% of these vendors felt the Bass Pro Shop sample logo an actual logo that is currently used by one store or chain, while the remaining vendors either felt this sample logo was a general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, or outdoor gear or were not sure.

Figure 4. After seeing this sample logo, do you think it is most likely...
(Includes only phone/web respondents)



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Section

3

METHODOLOGY

Purpose

The purpose of this research study was to obtain information that will be used to determine consumer's recognition of the words/name Sportsman's Warehouse and the Sportsman's Warehouse logo. To do this, the study focused on the following objectives:

Assess the implied meaning of the words "Sportsman's Warehouse".

Assess the implied meaning of the "Sportsman's Warehouse" sample logo.

Sampling Frame & Sample Size

The primary population for this study consisted of telephone households who have expressed an interest in fishing, hunting, and/or camping and live in a state in which, based on their website information, there is both a Bass Pro Shop and a Sportsman's Warehouse. Telephone numbers were obtained from Survey Sampling International, a list company that specializes in generating samples for survey research. A stratified, random-systematic sampling technique was employed in this study to select households. Only persons who had purchased fishing, hunting, camping, and/or other outdoor gear in the past twelve months were allowed to participate in the survey.

The secondary population for this study consisted of vendors who sell fishing, hunting, and/or camping to retailers. Telephone numbers were obtained from Sportsman's Warehouse. No sampling technique was employed for this segment since we attempted to contact all 52 vendors provided by Sportsman's Warehouse.

From these samples, 484 interviews were completed with consumers (474) and vendors (10).

Collection Technique & Timing

All data was collected through the use of telephone interviews and a web site. For consumers, telephone interviews were conducted from May 31 to June 12, 2006, while the telephone interviews for vendors were only completed from June 12-13, 2006. The data collection was completed in compliance with specifications established by Winkelman Consulting. Interviewing was supervised and performed by trained personnel from KLJ Solutions.

Data for the web portion of the survey was collected from May 31 to June 21, 2006.

SP 00991

Margin of Error

The 484 completed questionnaires provide a 95% confidence level with an overall minimum and maximum margin of error of ±2.7% and ±4.4%, respectively, in estimating the proportion of the population who possess a certain characteristic or opinion. In other words, if 100 samples (all having a total of 484 completed questionnaires) were drawn from these populations, approximately 95 of the samples would have proportions within ±2.7% and ±4.4% of the proportions of the entire population for the characteristic or opinion being measured.

The margin of error explained previously only applies to responses of the *entire* sample. As shown in the next chart, the margin of error will be larger when looking at the responses of smaller segments.

		Margin of Error for results at or about...				
Populations	**Completions**	10%/90%	20%/80%	30%/70%	40%/60%	50%/50%
Total Sample	484	2.7%	3.6%	4.1%	4.4%	4.4%
Consumers	474	2.7%	3.6%	4.1%	4.4%	4.5%
Vendors	10	16.7%	22.3%	25.5%	27.3%	27.9%

** The maximum margin of error is shown in the "50%/50%" column and the minimum margin of error is shown in the "10%/90%" column.*

SP 00992

Section

4

THE QUESTIONNAIRE

The questionnaires in this report were used for interviews conducted with each respective segment for this study.

SP 00993

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Consumer Survey

Case #: _____ Employee #: _____ Date: ___/___/___ Start Time: ____ : ____ am/pm Resp. #: _____

Phase One

Intro. **Hi, my name is *(Your First Name)* from Winkelman Consulting in Fargo, North Dakota and I'm not selling anything – I'm simply conducting a short survey about stores that sell hunting, fishing, camping, and outdoor gear in your state. The survey will only take about 1 to 3 minutes, there are no right or wrong answers, and your answers will be kept confidential. This survey is for people who have bought hunting, fishing, camping, or outdoor gear in the past 12 months. Using a scale of within the past 30 days, 1 to 6 months, 7 to 12 months, more than 12 months, or never; how recently have you bought any…**

	30 days	1 to 6 months	7 to 12 months	More than 12 months	Never	Not sure
I1a. **Fishing gear?**	1	2	3	4	5	91
I1b. **Hunting gear?**	1	2	3	4	5	91
I1c. **Camping gear?**	1	2	3	4	5	91
I1d. **Other outdoor gear?**	1	2	3	4	5	91

DC1. *[IF the respondent has bought any of the above in the past 12 months (I1a =< 3 OR I1b =< 3 OR I1c =< 3 OR I1d =< 3), then SKIP to DC3 (DC1-2 = 999).]* **Is there another person in your household who has bought hunting, fishing, camping, or outdoor gear in the past 12 months?**

1.....Yes

Discontinue Close (DC1) ← ← 2.....No, Not Sure, No Response

DC2. **May I please talk to that person?**

Start over at "Intro" ← ← ← ← ← ← ← ← 1 ..... Yes

Record first name & call back date/time ← ← 2 ..... Yes, but currently not available

Discontinue Close (DC2) ← ← ← ← ← ← ← 3 ..... No, Refused *[ONLY use this response choice if they "refuse" to allow you to speak to the other person.] [If they say "no" because the other person is not there right now, then select response choice "2" above.]*

DC3. **Do you or any members of your household work for a store that sells mainly hunting, fishing, camping, or outdoor gear?**

Discontinue Close (DC3) ← ← 1.....Yes

2.....No, Not Sure, No Response

A1. **First, do you have a computer that you can use to access the Internet?** *[The quota will be set after 1-2 days of calling have been completed.]*

1.....Yes

2.....No → → → *If quota is full, then Discontinue Close (DC4)*

91.....Not sure/No response → → → *If quota is full, then Discontinue Close (DC4)*

SP 00994

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A2. **I'd like you tell me what words or words you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear. For example, people may use the words "Mexican restaurant" to describe a business that serves meals that include mainly Mexican foods. Also, people may use the word "Thermos" to describe a travel vacuum bottle or container a person can carry with them and use to keep cold beverages cold or warm beverages warm. So, what word or words would you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear?** *[Correctly type in the exact word or words stated by the respondent! Do not paraphrase, abbreviate, or group comments!]*

a.
b.
c.

A3a. **Now, I'd like you to think about the names of large stores that sell mainly hunting, fishing, camping, or outdoor gear. When you think of names of large stores that sell mainly hunting, fishing, camping, or outdoor gear, what is the one store name that comes to mind first?** *[If the respondent states a name that is not exactly as written in the response choice, then select "other" and type in the name exactly as stated.]*

1 ..... Bass Pro or Bass Pro Shop
2 ..... Bass Pro Outdoor World or Bass Pro Shop Outdoor World
3 ..... Bass Pro Sportsman's Center or Bass Pro Shop Sportsman's Center
4 ..... Bass Pro Sportsman's Warehouse or Bass Pro Shop Sportsman's Warehouse
5 ..... Cabela's
6 ..... Dick's Sporting Goods
7 ..... Gander Mountain
8 ..... Scheel's or Scheel's Allsports
9 ..... Sportsman's Warehouse
10 ..... WalMart
90 ..... Other *[Specify: _____]*
SKIP to A4 ← ← ← 91 ..... Not sure, No response

A3b-g. *[IF A3a = 91, then SKIP to A4 (A3b = 92, A3c = 93, A3d = 94, A3e = 95, A3f = 96, A3g = 97).]* **What other store names come to mind when you think about large stores that sell mainly hunting, fishing, camping, or outdoor gear?** *[Probe for up to 6 responses] [If the respondent states a name that is not exactly as written in the response choice, then select other and type in the name exactly as stated.]*

	B	C	D	E	F	G
1. Bass Pro or Bass Pro Shop	1	1	1	1	1	1
2. Bass Pro Outdoor World or Bass Pro Shop Outdoor World	2	2	2	2	2	2
3. Bass Pro Sportsman's Center or Bass Pro Shop Sportsman's Center	3	3	3	3	3	3
4. Bass Pro Sportsman's Warehouse or Bass Pro Shop Sportsman's Warehouse	4	4	4	4	4	4
5. Cabela's	5	5	5	5	5	5
6. Dick's Sporting Goods	6	6	6	6	6	6
7. Gander Mountain	7	7	7	7	7	7
8. Scheel's or Scheel's Allsports	8	8	8	8	8	8
9. Sportsman's Warehouse	9	9	9	9	9	9
10. WalMart	10	10	10	10	10	10
90. Other *[Specify: _____]*	90	90	90	90	90	90
91. Not sure, No response	92	93	94	95	96	97

IF A3b = 92, then SKIP to A4 (A3c = 93, A3d = 94, A3e = 95, A3f = 96, A3g = 97).
IF A3c = 93, then SKIP to A4 (A3d = 94, A3e = 95, A3f = 96, A3g = 97).
IF A3d = 94, then SKIP to A4 (A3e = 95, A3f = 96, A3g = 97).
IF A3e = 95, then SKIP to A4 (A3f = 96, A3g = 97).
IF A3f = 96, then SKIP to A4 (A3g = 97).

SP 00995

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A4. *[IF "Sportsman's Warehouse" was named in A3b-g (A3b = 9 OR A3c = 8 OR A3d = 9 OR A3e = 9 OR A3f = 9 OR A3g = 9), then SKIP to B1 (A4-A5cstate = 992).] [IF "Sportsman's Warehouse" was named in A3a (A3a = 9), then SKIP to B1 (A4-A5cstate = 991).]* **When you hear the words "Sportsman's Warehouse", do you think these words are most likely...**

3..... **The name of one specific store or chain of stores,**
4..... **Words that describe one specific store or chain of stores, or**
SKIP to B1 ← ← ← 5..... **General words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear?**
SKIP to B1 ← ← ← 91..... *[Do Not Read]* Not sure, No response
991..... *[Do NOT include in response choices seen by interviewers]* Top-of-mind awareness of Sportsman's Warehouse
992..... *[Do NOT include in response choices seen by interviewers]* Unaided awareness of Sportsman's Warehouse

A5. *[IF A4 >= 5, then SKIP to B1 (A5acity-A5cstate = 993).]* **To the best of your knowledge, in what city or town is a "Sportsman's Warehouse" located in your state?**

a. City:	a. State:
b. City:	b. State:
c. City:	c. State:

Phase Two

B1. *[IF they do not have Internet access (A1 >= 2), then SKIP to D1 (B1-C2d = 999).]* **For this interview, I will also want you to look at some sample logos, and then answer a few questions about the sample logos. To do this, I will need you to go to an Internet Web site that has the sample logos. Can you talk to me on this telephone and access the Internet at the same time?**

1.....Yes
Get callback information ← ← 2.....No, but can be online and talk on a different number
Name & alternate number and then call back immediately!

SKIP to C1a ← ← ← ← ← ← 3.....No, have no other phone number
SKIP to C1a ← ← ← ← ← ← 91.....Not sure/No response

Can Access Internet While on the Telephone

B2a. *[IF B1 >= 3, then SKIP to C1a (B2a-B4b = 998).]* **Is your computer currently online?**
SKIP to B2c ← ← ← 1..... Yes
2..... No
91..... Not sure/No response

B2b. **Can you please go to your computer and let me know when you are online.** *[Once they say they are online, continue]*

B2c. **First, you will want to open Internet Explorer or the program you use for going to the Internet. The first screen that pops up should be your web browser. In the address box at the top of your web browser, type 66.223.28.200/20 and then either hit the enter key or click on the "go" button. When you see the web page that says, "Winkelman Consulting - Welcome to our sample logo web site!", let me know.** *[Read as 66 period 223 period 28 period 200 slash 20 – the slash to be used is the slash (/) on the same key as the "question mark".] [Once they say they see the Web page, continue] [If the respondent has "pop up blocking" on their web browser, the logo will not pop up right away. To see the logos, they will need to click on the "pop up bar", then select "Allow pop ups from this site". Then, the logo should appear.]*

[If respondents has problem getting online or to the web site, ask them to see if they can figure out what is wrong and then schedule a call back date/time. Continue on from this point when you call back.]

SP 00996

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B3a. **Next, I'm going to give you the user name and password you need to go to the next page. Before I do that, however, let me tell you what will happen once you enter this information. As soon as you click on the submit button, a sample logo will appear for about 10 seconds, then disappear. Once the sample logo disappears, let me know. First, click on the "user name" box, then type in this 5-digit "user name" number:** *(Username from list)*. **Now, click on the "password box", then type in this 5-digit "password" number:** *(Password from list)*. **Last, get ready to look at the sample logo and then click on the "continue" button.** *[Once they say the picture disappeared, continue]*

[Once the ID & password have been entered and the "continue button" clicked, the respondent will not be able to access the web site again using the same number. If the respondent accidentally closes the website or experiences a technical problem before the interview is done, get their first name, schedule a callback date/time, ask the supervisor for an extra "user name" and "password", and then call them back.] [Programming note: we MUST retain the original "user name" and "password". Copy to original "user name" to "oldid" and copy the original "password" to "oldpassword", then copy the "extra" "user name" and "password" into the fields the needed for the script above.]

B3b. **After seeing this sample logo, do you think it is most likely...**

1..... **An actual logo that is currently used by one specific store or chain of stores,**
2..... **A logo that could be used to identify one specific store or chain of stores, or**
3..... **A general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, or outdoor gear?**
91..... *[Do Not Read]* Not sure, No response

B4a. **Now, I'm going to give you the password you need to see the next page. This time, once you enter the password, another sample logo will appear for about 10 seconds, then disappear. When the sample logo disappears, let me know. Click on the password box. Then type in the number "1". Then click on the "continue" button.** *[Once they say the picture disappeared, continue]*

B4b. **After seeing this sample logo, do you think it is most likely...**

1..... **An actual logo that is currently used by one specific store or chain of stores,**
2..... **A logo that could be used to identify one specific store or chain of stores, or**
3..... **A general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, and outdoor gear?**
91..... *[Do Not Read]* Not sure, No response

Cannot Access Internet While on the Telephone

C1a. *[IF B1 <= 2, then SKIP to D1 (C1a-C2d = 996).]* **Could you please get a pen and paper so you can write down the web site address and the ID and password needed to access the web site.** *[When they have the writing materials, then continue.]* **The web site address is 66.223.28.200/40, your 5-digit ID number is** *(Username from list)* **and your 5-digit password number is** *(Password from list)*. **As soon as we are done with this interview, you can go to the web site, view the sample logos, and answer two quick questions. If your web browser is set to block "pop ups", the logos will not pop up right away. To see the logos, they will need to click on the "pop up bar" near the top of your web browser page, then select "Allow pop ups from this site". Then, the first logo should appear.** *[Read as 66 period 223 period 28 period 200 slash 40 – the slash to be used is the slash on the same key as the "question mark".] [Once they say they have written everything down, then continue]*

C1b. **Do you have an email address that I can send a reminder email to that provides the web site address and the password you will need to access the sample logos?**

1..... Yes
SKIP to D1 ← ← ← 2..... No
SKIP to D1 ← ← ← 91..... Not sure, refused

C2a. *[IF C1b >= 2, then SKIP to D1 (C2a-C2c = 995).]* **What is your email address?**

C2b. **Let me read your email address back to you so I can make sure I typed it correctly?** *[Interviewers: When on the phone, letters like "b", "d", "p", "t", etc. can count alike. When confirming the address, say the letters ("b" as in "boy", "d" as in "dog", "p" as in "pencil", "t" as in truck, etc. (see list)) rather than words.] [Correct email address in C2a as needed, then retype correct email address into C2b.]*

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C2c. *[IF C2b = C2a, then SKIP to C2d (C2c = Missing).]* **I'm sorry, I must have typed your email address incorrectly. Can you give it to me again?** *[Return to C2a.]*

C2d. **In the next day or so, you should receive your reminder email with the web site address and the ID and password needed to access the website. As soon as you get the email, please go to the website, view the sample logos, and answer the questions if you haven't already done so before you get the email.**

Demographics

D1. **For classification and statistical analysis purposes, may I have your age please?** *[Do Not Read categories UNLESS reluctant or refuse, then ask, "Please stop me when I read the age group which includes you..."]*

1 ..... **24 or younger,**
2 ..... **25 to 34,**
3 ..... **35 to 44,**
4 ..... **45 to 54,**
5 ..... **55 to 64, or**
6 ..... **65 or older?**
91 ..... *[Do Not Read]* Choose not to answer

D2. **How long have you lived in your state – would you say...**

1 ..... **5 years or less,**
2 ..... **6 to 10 years,**
3 ..... **11 to 20 years,**
4 ..... **21 to 40 years, or**
5 ..... **More than 40 years?**
6 ..... *[Do Not Read]* Not sure, No response

D3. *[Do Not Read]* Enter respondent's gender.

1 ..... Male
2 ..... Female

VERIFICATION CLOSE: **That's all the questions I have for you. Lastly, let me verify that I dialed ____-_____. Again, my name is (*Your First Name*), and on occasion a small percentage of people are called back just to verify that this interview actually took place. May I please have your first name, and first name only, so my supervisor will know who to ask for in case this interview is verified. Thank you for your time and have a good (evening/day).**

Resp. First Name: _____ Phone: (_____) _____-_____ End Time: _____

D4. *[Do Not Read]* Enter zip code from list. ___ ___ ___ ___ ___

D5. *[Do Not Read]* Enter state code from list. ___ ___

DISCONTINUE CLOSE: **That's all the questions I have for you. Thank you for your time and have a good (evening/day).**

SP 00998

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Vendor Survey

Case #: _____ Employee #: _____ Date: ___/___/___ Start Time: ____ : ____ am/pm Resp. #: _____

Phase One

D3. *[Do Not Read]* Enter respondent's gender.
1..... Male
2..... Female

D5. *[Do Not Read]* Enter state code = ZZ

Intro1. **Hi, my name is *(Your First Name)* from Winkelman Consulting in Fargo, North Dakota and I'm not selling anything – I'm simply conducting a short survey about stores that sell hunting, fishing, camping, and outdoor gear for one of your major customers. The survey will only take about 1 to 3 minutes, there are no right or wrong answers, and your answers will be kept confidential. This survey is for vendors who sell hunting, fishing, camping, or outdoor gear to retailers.**

A1. **First, do you have a computer that you can use to access the Internet?** *[The quota will be set after 1-2 days of calling have been completed.]*
1.....Yes
2.....No → → → *If quota is full, then Discontinue Close (DC4)*
91.....Not sure/No response → → → *If quota is full, then Discontinue Close (DC4)*

A2. **I'd like you tell me what words or words you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear. For example, people may use the words "Mexican restaurant" to describe a business that serves meals that include mainly Mexican foods. Also, people may use the word "Thermos" to describe a travel vacuum bottle or container a person can carry with them and use to keep cold beverages cold or warm beverages warm. So, what word or words would you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear?** *[Correctly type in the exact word or words stated by the respondent! Do not paraphrase, abbreviate, or group comments!]*

a.
b.
c.

A3a. **Now, I'd like you to think about the names of large stores that sell mainly hunting, fishing, camping, or outdoor gear. When you think of names of large stores that sell mainly hunting, fishing, camping, or outdoor gear, what is the one store name that comes to mind first?** *[If the respondent states a name that is not exactly as written in the response choice, then select "other" and type in the name exactly as stated.]*
1..... Bass Pro or Bass Pro Shop
2..... Bass Pro Outdoor World or Bass Pro Shop Outdoor World
3..... Bass Pro Sportsman's Center or Bass Pro Shop Sportsman's Center
4..... Bass Pro Sportsman's Warehouse or Bass Pro Shop Sportsman's Warehouse
5..... Cabela's
6..... Dick's Sporting Goods
7..... Gander Mountain
8..... Scheel's or Scheel's Allsports
9..... Sportsman's Warehouse
10..... WalMart
90..... Other *[Specify:* _____*]*
SKIP to A4 ← ← ← 91..... Not sure, No response

SP 00999

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A3b-g. *[IF A3a = 91, then SKIP to A4 (A3b = 92, A3c = 93, A3d = 94, A3e = 95, A3f = 96, A3g = 97).]* **What other store names come to mind when you think about large stores that sell mainly hunting, fishing, camping, or outdoor gear?** *[Probe for up to 6 responses] [If the respondent states a name that is not exactly as written in the response choice, then select other and type in the name exactly as stated.]*

	B	C	D	E	F	G
1. Bass Pro or Bass Pro Shop	1	1	1	1	1	1
2. Bass Pro Outdoor World or Bass Pro Shop Outdoor World	2	2	2	2	2	2
3. Bass Pro Sportsman's Center or Bass Pro Shop Sportsman's Center	3	3	3	3	3	3
4. Bass Pro Sportsman's Warehouse or Bass Pro Shop Sportsman's Warehouse	4	4	4	4	4	4
5. Cabela's	5	5	5	5	5	5
6. Dick's Sporting Goods	6	6	6	6	6	6
7. Gander Mountain	7	7	7	7	7	7
8. Scheel's or Scheel's Allsports	8	8	8	8	8	8
9. Sportsman's Warehouse	9	9	9	9	9	9
10. WalMart	10	10	10	10	10	10
90. Other *[Specify:_____]*	90	90	90	90	90	90
91. Not sure, No response	92	93	94	95	96	97

IF A3b = 92, then SKIP to A4 (A3c = 93, A3d = 94, A3e = 95, A3f = 96, A3g = 97).
IF A3c = 93, then SKIP to A4 (A3d = 94, A3e = 95, A3f = 96, A3g = 97).
IF A3d = 94, then SKIP to A4 (A3e = 95, A3f = 96, A3g = 97).
IF A3e = 95, then SKIP to A4 (A3f = 96, A3g = 97).
IF A3f = 96, then SKIP to A4 (A3g = 97).

A4. *[IF "Sportsman's Warehouse" was named in A3b-g (A3b = 9 OR A3c = 9 OR A3d = 9 OR A3e = 9 OR A3f = 9 OR A3g = 9), then SKIP to B1 (A4-A5cstate = 992).] [IF "Sportsman's Warehouse" was named in A3a (A3a = 9), then SKIP to B1 (A4-A5cstate = 991).]* **When you hear the words "Sportsman's Warehouse", do you think these words are most likely...**

3..... **The name of one specific store or chain of stores,**
4..... **Words that describe one specific store or chain of stores, or**
SKIP to B1 ← ← ← 5..... **General words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear?**
SKIP to B1 ← ← ← 91..... *[Do Not Read]* Not sure, No response
991..... *[Do NOT include in response choices seen by interviewers]* Top-of-mind awareness of Sportsman's Warehouse
992..... *[Do NOT include in response choices seen by interviewers]* Unaided awareness of Sportsman's Warehouse

A5. *[IF A4 >= 5, then SKIP to B1 (A5acity-A5cstate = 993).]* **To the best of your knowledge, in what city or town is a "Sportsman's Warehouse" located in your state?**

a. City:	a. State:
b. City:	b. State:
c. City:	c. State:

SP 01000

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Phase Two

B1. *[IF they do not have Internet access (A1 >= 2), then SKIP to D1 (B1-C2d = 999).]* **For this interview, I will also want you to look at some sample logos, and then answer a few questions about the sample logos. To do this, I will need you to go to an Internet Web site that has the sample logos. Can you talk to me on this telephone and access the Internet at the same time?**

1.....Yes

Get callback information ← ← 2.....No, but can be online and talk on a different number
Name & alternate number and then call back immediately!

SKIP to C1a ← ← ← ← ← ← 3.....No, have no other phone number
SKIP to C1a ← ← ← ← ← ← 91.....Not sure/No response

Can Access Internet While on the Telephone

B2a. *[IF B1 >= 3, then SKIP to C1a (B2a-B4b = 998).]* **Is your computer currently online?**

SKIP to B2c ← ← ← 1..... Yes
2..... No
91..... Not sure/No response

B2b. **Can you please go to your computer and let me know when you are online.** *[Once they say they are online, continue]*

B2c. **First, you will want to open Internet Explorer or the program you use for going to the Internet. The first screen that pops up should be your web browser. In the address box at the top of your web browser, type 66.223.28.200/20 and then either hit the enter key or click on the "go" button. When you see the web page that says, "Winkelman Consulting - Welcome to our sample logo web site!", let me know.** *[Read as 66 period 223 period 28 period 200 slash 20 – the slash to be used is the slash (/) on the same key as the "question mark".] [Once they say they see the Web page, continue] [If the respondent has "pop up blocking" on their web browser, the logo will not pop up right away. To see the logos, they will need to click on the "pop up bar", then select "Allow pop ups from this site". Then, the logo should appear.]*

[If respondents has problem getting online or to the web site, ask them to see if they can figure out what is wrong and then schedule a call back date/time. Continue on from this point when you call back.]

B3a. **Next, I'm going to give you the user name and password you need to go to the next page. Before I do that, however, let me tell you what will happen once you enter this information. As soon as you click on the submit button, a sample logo will appear for about 10 seconds, then disappear. Once the sample logo disappears, let me know. First, click on the "user name" box, then type in this 5-digit "user name" number:** *(Username from list)*. **Now, click on the "password box", then type in this 5-digit "password" number:** *(Password from list)*. **Last, get ready to look at the sample logo and then click on the "continue" button.** *[Once they say the picture disappeared, continue]*

[Once the ID & password have been entered and the "continue button" clicked, the respondent will not be able to access the web site again using the same number. If the respondent accidentally closes the website or experiences a technical problem before the interview is done, get their first name, schedule a callback date/time, ask the supervisor for an extra "user name" and "password", and then call them back.] [Programming note: we MUST retain the original "user name" and "password". Copy to original "user name" to "oldid" and copy the original "password" to "oldpassword", then copy the "extra" "user name" and "password" into the fields the needed for the script above.]

B3b. **After seeing this sample logo, do you think it is most likely…**

1..... **An actual logo that is currently used by one specific store or chain of stores,**
2..... **A logo that could be used to identify one specific store or chain of stores, or**
3..... **A general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, or outdoor gear?**
91..... *[Do Not Read]* Not sure, No response

SP 01001

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B4a. **Now, I'm going to give you the password you need to see the next page. This time, once you enter the password, another sample logo will appear for about 10 seconds, then disappear. When the sample logo disappears, let me know. Click on the password box. Then type in the number "1". Then click on the "continue" button.** *[Once they say the picture disappeared, continue]*

B4b. **After seeing this sample logo, do you think it is most likely...**

1 ..... **An actual logo that is currently used by one specific store or chain of stores,**
2 ..... **A logo that could be used to identify one specific store or chain of stores, or**
3 ..... **A general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, and outdoor gear?**
91 ..... *[Do Not Read]* Not sure, No response

Cannot Access Internet While on the Telephone

C1a. *[IF B1 <= 2, then SKIP to D1 (C1a-C2d = 996).]* **Could you please get a pen and paper so you can write down the web site address and the ID and password needed to access the web site.** *[When they have the writing materials, then continue.]* **The web site address is 66.223.28.200/40, your 5-digit ID number is** *(Username from list)* **and your 5-digit password number is** *(Password from list)*. **As soon as we are done with this interview, you can go to the web site, view the sample logos, and answer two quick questions. If your web browser is set to block "pop ups", the logos will not pop up right away. To see the logos, they will need to click on the "pop up bar" near the top of your web browser page, then select "Allow pop ups from this site". Then, the first logo should appear.** *[Read as 66 period 223 period 28 period 200 slash 40 – the slash to be used is the slash on the same key as the "question mark".] [Once they say they have written everything down, then continue]*

C1b. **Do you have an email address that I can send a reminder email to that provides the web site address and the password you will need to access the sample logos?**

1 ..... Yes
SKIP to D1 ← ← ← 2 ..... No
SKIP to D1 ← ← ← 91 ..... Not sure, refused

C2a. *[IF C1b >= 2, then SKIP to D1 (C2a-C2c = 995).]* **What is your email address?**

C2b. **Let me read your email address back to you so I can make sure I typed it correctly?** [Interviewers: *When on the phone, letters like "b", "d", "p", "t", etc. can count alike. When confirming the address, say the letters ("b" as in "boy", "d" as in "dog", "p" as in "pencil", "t" as in truck, etc. (see list)) rather than words.] [Correct email address in C2a as needed, then retype correct email address into C2b.]*

C2c. *[IF C2b = C2a, then SKIP to C2d (C2c = Missing).]* **I'm sorry, I must have typed your email address incorrectly. Can you give it to me again?** *[Return to C2a.]*

C2d. **In the next day or so, you should receive your reminder email with the web site address and the ID and password needed to access the website. As soon as you get the email, please go to the website, view the sample logos, and answer the questions if you haven't already done so before you get the email.**

SP 01002

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Demographics

D1. **For classification and statistical analysis purposes, may I have your age please?** *[Do Not Read categories UNLESS reluctant or refuse, then ask, "Please stop me when I read the age group which includes you…"]*

1 ..... **24 or younger,**
2 ..... **25 to 34,**
3 ..... **35 to 44,**
4 ..... **45 to 54,**
5 ..... **55 to 64, or**
6 ..... **65 or older?**
91 ..... *[Do Not Read]* Choose not to answer

D2. **How long have you personally sold hunting, fishing, camping, or outdoor gear to retailers – would you say…**

1 ..... **5 years or less,**
2 ..... **6 to 10 years,**
3 ..... **11 to 20 years,**
4 ..... **21 to 40 years, or**
5 ..... **More than 40 years?**
6 ..... *[Do Not Read]* Not sure, No response

D3. *[Do Not Read]* Enter respondent's gender.

1 ..... Male
2 ..... Female

VERIFICATION CLOSE: **That's all the questions I have for you. Lastly, let me verify that I dialed ____-_____. Again, my name is *(Your First Name)*, and on occasion a small percentage of people are called back just to verify that this interview actually took place. May I please have your first name, and first name only, so my supervisor will know who to ask for in case this interview is verified. Thank you for your time and have a good (evening/day).**

Resp. First Name: _____ Phone: (_____) _____-_____ End Time: _____

D4. *[Do Not Read]* Enter zip code from list. ___ ___ ___ ___ ___

DISCONTINUE CLOSE: **That's all the questions I have for you. Thank you for your time and have a good (evening/day).**

SP 01003

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Section

5

CONTINGENCY TABLES

Contingency tables are commonly referred to as "cross-tabs". They present the findings in an easy-to-understand, table form and provide the categorical data that is used most frequently in marketing. We strongly recommend that you review these tables and use them to facilitate any major decisions you make.

The contingency tables on the following pages show the proportion of all respondents who gave various responses to each question, as well as the proportion of specific sample segments that provided a particular response.

Please note the tables are separated into sections. The tables in each section have the same "banners" or sample segments across the top. Within each section, the tables are in order by question number, which appears on the top, left-hand side of each table.

NOTE: The electronic version of the report does not include tables.

SP 01004

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NOTE: The electronic version of the report does not include tables.

SP 01005

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Section

5

CONTINGENCY TABLES

Contingency tables are commonly referred to as "cross-tabs". They present the findings in an easy-to-understand, table form and provide the categorical data that is used most frequently in marketing. We strongly recommend that you review these tables and use them to facilitate any major decisions you make.

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NOTE: The electronic version of the report does not include tables.

SP 01006

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		Total	Survey Segment	
			Consumers	Vendors
A2a-c. What word or words would you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear?	Academy	2.5%	2.5%	
	Ace Hardware	.4%	.4%	
	All sports, all around, all in one, all purpose, one stop	1.9%	1.9%	
	American store	.2%	.2%	
	Anything store	.2%	.2%	
	Authentic	.2%	.2%	
	Awesome, amazing	.8%	.8%	
	Bait shop	.2%	.2%	
	Bass Outdoors	.2%	.2%	
	Bass Outlets	.4%	.4%	
	Bass Pro, Bass Pro Shop	8.3%	8.4%	
	Big, big box, big book	1.0%	.8%	10.0%
	Buckhorn	.2%	.2%	
	Burger King, have it your way	.2%	.2%	
	Cabela's	7.6%	7.8%	
	Camping, camping store, camping suplies	2.1%	2.1%	
	Camping World	.4%	.4%	
	Catalogue store	.2%	.2%	
	Clothing World	.4%	.4%	
	Complete, comprehensive	.6%	.6%	
	Convenient, handy	.6%	.6%	
	Corporate store, chain	.4%	.4%	
	Department store	.4%	.4%	
	Depot	.2%	.2%	
	Dick's	.6%	.6%	
	Discount store	.4%	.4%	
	Eastern Mountain Sports	.2%	.2%	
	Enjoyment, entertaining, exciting, experience, extravagant	1.0%	1.1%	
	Equipment	.2%	.2%	
	Everything store	1.2%	1.3%	
	Expensive	.6%	.6%	
	Fabulous, fantastic, fun, favorite	1.9%	1.9%	
	Fishing, fishing store, fishing gear	3.1%	3.2%	
	Fishing & hunting, store, gear	.8%	.8%	
	Full gear	.2%	.2%	
	Gaming	.4%	.4%	
	Gander Mountain	1.2%	1.3%	
	Gart/Garth Brothers	.2%	.2%	
	Giant, huge	.8%	.8%	

Includes all respondents

		Total	Survey Segment	
			Consumers	Vendors
A2a-c. What word or words would you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear?	Good, very good, great	1.2%	1.3%	
	Grandpa's	.2%	.2%	
	Gun store, gun shop	.4%	.4%	
	Hardware store	.4%	.4%	
	Heaven, paradise, dream world	1.4%	1.5%	
	Hunter's haven	.2%	.2%	
	Hunting, hunting store, hunting gear	3.5%	3.6%	
	Hunting dog training, gear	.2%	.2%	
	Hunting season	.2%	.2%	
	Ice chest	.2%	.2%	
	Jordan Creek	.2%	.2%	
	Interesting	1.2%	1.3%	
	K-Mart	.4%	.4%	
	Large store, selection	1.0%	1.1%	
	Man store, manly, rugged folks	.6%	.6%	
	Mega store	.2%	.2%	
	Midway	.2%	.2%	
	Mossy Oak	.2%	.2%	
	Mountains	.2%	.2%	
	Multi-purpose	.4%	.4%	
	Name brands	.2%	.2%	
	Non-Wal-Mart	.2%	.2%	
	Out World	.2%	.2%	
	Outdoor store, center, recreation, gear	14.5%	14.1%	30.0%
	Outdoor sports store, center	1.9%	1.9%	
	Outdoor World	1.4%	1.5%	
	Outdoorsman	.2%		10.0%
	Outfitter	1.0%	1.1%	
	Outlet	.2%	.2%	
	Overwhelming	.2%	.2%	
	Pro Bass, Pro Bass Shop	.8%	.8%	
	PX	.2%	.2%	
	Recreation store	.6%	.6%	
	REI	.8%	.8%	
	Retail store	.2%	.2%	
	Right place	.2%	.2%	
	RV, travel store	.4%	.4%	
	Scheel's	.2%	.2%	
	Speciality store, specialized	.4%	.4%	
	Sporting goods, sporting goods store	18.2%	17.7%	40.0%
	Sporting superstore	.2%	.2%	
	Sports store, center, shop, gear	3.3%	3.2%	10.0%
	Sports Academy	.4%	.4%	

Includes all respondents

		Total	Survey Segment	
			Consumers	Vendors
A2a-c. What word or words would you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear?	Sports warehouse	.4%	.4%	
	Sports World	.2%	.2%	
	Sportsman(s) Warehouse	.6%	.6%	
	Sportsman(s)	.8%	.8%	
	Sportsman(s) outfitter	.2%	.2%	
	Sportsman(s) store	.4%	.4%	
	Super center	.2%	.2%	
	Swapmeet	.2%	.2%	
	Tamitta	.2%	.2%	
	Terrific, wonderful	.4%	.4%	
	"The" Store	.2%	.2%	
	Toy store	.4%	.4%	
	Variety, variety store, well-stocked	.8%	.8%	
	Wal-Mart	2.7%	2.7%	
	Warehouse	1.0%	1.1%	
	Misc. others	.8%	.8%	
	Not sure, no response	8.9%	9.1%	
	No second response	84.1%	83.8%	100.0%
	No third response	95.7%	95.6%	100.0%
Total Responses		484	474	10

Includes all respondents

		Total	Survey Segment.	
			Consumers	Vendors
A3a. When you think of names of large stores that sell mainly hunting, fishing, camping, or outdoor gear, what is the one store name that comes to mind first?	Bass Pro or Bass Pro Shop	26.0%	26.6%	
	Bass Pro Outdoor World or Bass Pro Shop Outdoor World	.6%	.6%	
	Bass Pro Sportsman's Warehouse or Bass Pro Shop Sportsman's	.2%	.2%	
	Cabela's	30.0%	30.0%	30.0%
	Dick's Sporting Goods	1.9%	1.9%	
	Gander Mountain	3.1%	3.2%	
	Scheel's or Scheel's Allsports	1.2%	1.3%	
	Sportsman's Warehouse	3.7%	2.7%	50.0%
	WalMart, Sam's	7.9%	8.0%	
	Academy	4.5%	4.6%	
	Ace Hardware	.2%	.2%	
	Backwoods	.4%	.4%	
	Baron's	.2%	.2%	
	Bass	.2%	.2%	
	Big 5, Big Five	.8%	.8%	
	Big Book	.2%	.2%	
	Big Buck(s)	1.4%	1.5%	
	Boot Box	.2%	.2%	
	Camping World	.2%	.2%	
	Coleman	.2%	.2%	
	Dunham's	.2%	.2%	
	Eddie Bauer	.4%	.4%	
	Farm Fleet	.2%	.2%	
	Fin & Feather	.2%	.2%	
	French Creek Outfitters	.4%	.4%	
	Gart/Garth Brothers	.6%	.6%	
	Gene Taylor's	.4%	.4%	
	L L Bean	.8%	.8%	
	Orvis	.2%	.2%	
	Pro Bass, Pro Bass Shop	.2%	.2%	
	REI	1.9%	1.5%	20.0%
	Sears	1.0%	1.1%	
	Sports Academy	.6%	.6%	
	Sports Authority	.6%	.6%	
	Misc. others	3.9%	4.0%	
	Not sure, No response	5.0%	5.1%	
Total Responses		484	474	10

Includes all respondents

		Total	Survey Segment.	
			Consumers	Vendors
A3a-g. Unaided awareness of stores that sell mainly fishing, hunting, camping and outdoor gear.	No third response	56.2%	57.4%	
	No fourth response	82.0%	83.1%	30.0%
	No fifth response	94.2%	95.1%	50.0%
	No sixth response	97.7%	98.3%	70.0%
	No seventh response	99.6%	99.8%	90.0%
Total Responses		484	474	10

Includes all respondents

		Total	Survey Segment.	
			Consumers	Vendors
A3-A4. When you hear the words Sportsman's Warehouse, do you think these words are most likely…	Top-of-mind awareness of Sportsman's Warehouse	3.7%	2.7%	50.0%
	Unaided awareness of Sportsman's Warehouse	7.0%	6.3%	40.0%
	The name of one specific store or chain of stores	35.1%	35.9%	
	Words that describe one specific store or chain of stores	10.3%	10.3%	10.0%
	General words that describe any large sporting goods store	35.1%	35.9%	
	Not sure, No response	8.7%	8.9%	
Total Responses		484	474	10

Includes all respondents

		Total	Survey Segment.	
			Consumers	Vendors
A3-A5. Overall awareness and knowledge of Sportsman's Warehouse.	Top-of-mind awareness	3.7%	2.7%	50.0%
	Unaided awareness	7.0%	6.3%	40.0%
	Named a SW city/area	10.7%	10.8%	10.0%
	SW is name of one specific store or chain	26.9%	27.4%	
	SW are words that describe one specific store or chain	7.9%	8.0%	
	SW are words that describe any large sporting goods store	35.1%	35.9%	
	Not sure, no response	8.7%	8.9%	
Total Responses		484	474	10

Includes all respondents

		Total	Survey Segment.	
			Consumers	Vendors
A1. Do you have a computer that you can use to access the Internet?	Yes	69.8%	69.2%	100.0%
	No	30.0%	30.6%	
	Not sure/No response	.2%	.2%	
Total Responses		484	474	10

Includes all respondents

		Total	Survey Segment.	
			Consumers	Vendors
B1. Can you talk to me on this telephone and access the Internet at the same time?	Yes	13.3%	11.6%	70.0%
	No	86.1%	87.8%	30.0%
	Not sure/No response	.6%	.6%	
Total Responses		338	328	10

Includes all respondents who have Internet access

		Total	Survey Segment.	
			Consumers	Vendors
B3b. (Sportsman's Warehouse sample logo) After seeing this sample logo, do you think it is most likely…	An actual logo that is currently used by one specific store	46.7%	41.2%	100.0%
	A logo that could be used to identify one specific store or	29.3%	32.4%	
	A general logo that could be used by any sporting goods stor	12.0%	13.2%	
	Not sure, No response	12.0%	13.2%	
Total Responses		75	68	7

Includes all respondents who responded to the web portion of the survey

		Total	Survey Segment.	
			Consumers	Vendors
B4b. (Bass Pro Shop sample logo) After seeing this sample logo, do you think it is most likely…	An actual logo that is currently used by one specific store	64.0%	66.2%	42.9%
	A logo that could be used to identify one specific store or	20.0%	22.1%	
	A general logo that could be used by any sporting goods stor	12.0%	10.3%	28.6%
	Not sure, No response	4.0%	1.5%	28.6%
Total Responses		75	68	7

Includes all respondents who responded to the web portion of the survey

		Total	Survey Segment.	
			Consumers	Vendors
D1. Respondent's age.	24 or younger	3.7%	3.8%	
	25 to 34	14.0%	14.1%	10.0%
	35 to 44	19.8%	19.8%	20.0%
	45 to 54	23.3%	22.6%	60.0%
	55 to 64	22.5%	22.8%	10.0%
	65 or older	14.3%	14.6%	
	Choose not to answer	2.3%	2.3%	
Total Responses		484	474	10

Includes all respondents

		Total	Survey Segment.	
			Consumers	Vendors
D2. How long have you (lived in your state/sold gear to retailers)?	5 years or less,	4.5%	4.4%	10.0%
	6 to 10 years,	7.9%	7.4%	30.0%
	11 to 20 years,	11.0%	10.5%	30.0%
	21 to 40 years, or	33.3%	33.3%	30.0%
	More than 40 years?	41.3%	42.2%	
	Not sure, No response	1.9%	1.9%	
	91	.2%	.2%	
Total Responses		484	474	10

Includes all respondents

		Total	Survey Segment.	
			Consumers	Vendors
D3. Respondent's gender.	Male	64.0%	63.5%	90.0%
	Female	36.0%	36.5%	10.0%
Total Responses		484	474	10

Includes all respondents

		Total	Survey Segment.	
			Consumers	Vendors
D5. State of residence.	Colorado	11.4%	11.6%	
	Iowa	12.6%	12.9%	
	Mississippi	13.0%	13.3%	
	Nevada	8.9%	9.1%	
	Oklahoma	13.4%	13.7%	
	Pennsylvania	11.0%	11.2%	
	South Carolina	8.9%	9.1%	
	Tennessee	9.7%	9.9%	
	Texas	9.1%	9.3%	
	Vendors	2.1%		100.0%
Total Responses		484	474	10

Includes all respondents

Lindquist & Vennum PLLP

Final Report: Sportsman's Warehouse Recognition Assessment

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Final Report Delivered September 2006

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Section

1

EXECUTIVE SUMMARY

A "summary" report that included both consumers and vendors was provided previously. This "final" report was prepared to both present consumer results only and enhance the detail of the previous report.

- **Assess the implied meaning of the words "Sportsman's Warehouse".**

  - Nearly one of every two respondents felt the words "Sportsman's Warehouse" are at least the name of a specific store or chain that sells mainly hunting, fishing, camping, or outdoor gear. In contrast, only about one of every three respondents felt the words "Sportsman's Warehouse" are most likely general words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear.

  - Nearly one of every twenty respondents named Sportsman's Warehouse first (top-of-mind awareness), while more than one of every ten named Sportsman's Warehouse (unaided awareness, which includes top-of-mind awareness). These types of awareness are primarily measures of the longevity and marketing strength of an organization. In short, the more established an organization is in a market and/or the more an organization advertises, the higher its top-of-mind and/or unaided awareness will be.

  - The results indicate that a minuscule proportion of respondents used the words "sportsman(s)" or "sportsman(s) warehouse" as a generic term for a <u>large</u> store that sells <u>mainly</u> hunting, fishing, camping, and outdoor gear.

- **Assess the implied meaning of the "Sportsman's Warehouse" sample logo.**

  - Of those who viewed the sample logos, nearly eight of every ten felt the Sportsman's Warehouse sample logo is <u>at least</u> a logo that could be used to identify one specific store or chain of stores. In comparison, more than eight of every ten felt the Bass Pro Shop sample logo is <u>at least</u> a logo that could be used to identify one specific store or chain of stores.

Section 2

FINDINGS SUMMARY & GENERAL CONCLUSIONS

When reviewing this report, the findings and conclusions will be more thoroughly understood if several other sections of the report are also reviewed. First, the questionnaires in Section 4 provide the actual phrasing for each question. A solid understanding of the context in which each question was asked will enable you to more accurately interpret the findings. Second, the contingency tables in Section 5 provide more detailed results.

Purpose #1: Assess the implied meaning of the words "Sportsman's Warehouse".

- **Conclusion #1:** Nearly one of every two respondents felt the words "Sportsman's Warehouse" are at least the name of a specific store or chain that sells mainly hunting, fishing, camping, or outdoor gear.

  - Respondents without top-of-mind or unaided awareness of Sportsman's Warehouse were asked if, when they hear the words "Sportsman's Warehouse", they think these words are most likely the name of one specific store or chain of stores, words that describe one specific store or chain of stores, or general words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear. Those who felt these words are the name of or describe one specific store or chain of stores, were also asked to name the location of a Sportsman's Warehouse.

    Figure 1a shows that 47.2% of all respondents felt the words "Sportsman's Warehouse" are at least the name of one specific store or chain of stores. In contrast, slightly more than one of every three respondents felt the words "Sportsman's Warehouse" are most likely general words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear.

Figure 1a. When you hear the words "Sportsman's Warehouse", do you think these words are most likely...
(Includes all consumers)

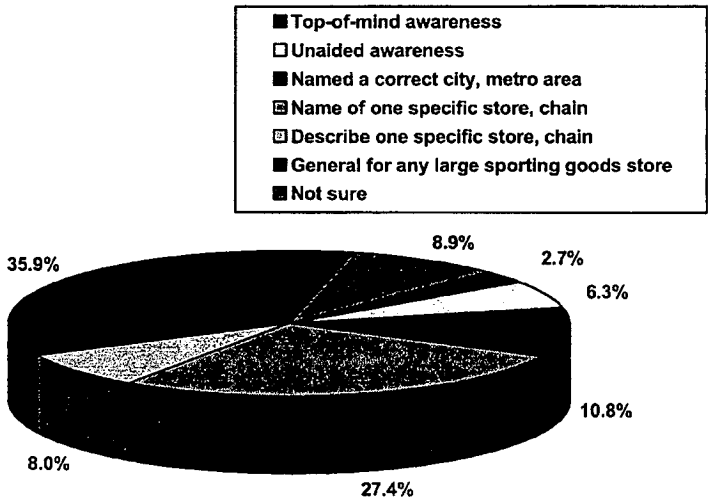
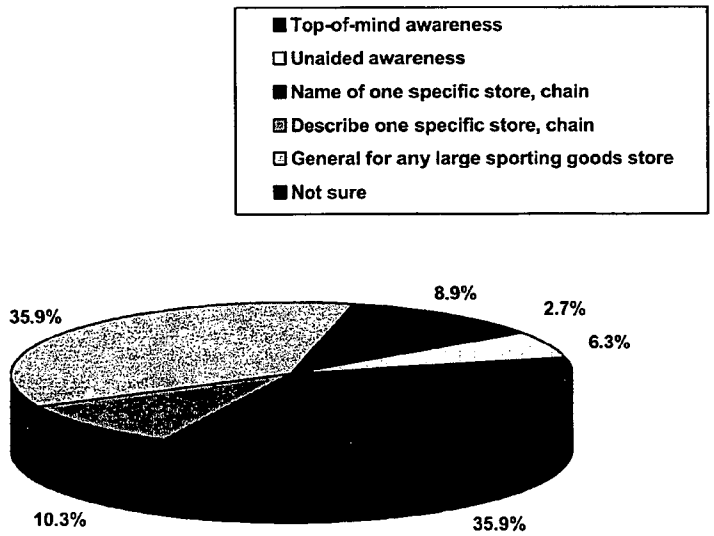


Figure 1b. When you hear the words "Sportsman's Warehouse", do you think these words are most likely...
(Includes all consumers)



C Please note that the results in Figure 1a are based on the combined results for questions A3a to A5. Therefore, the figure indicates each respondent's highest level of awareness for Sportsman's Warehouse or recognition for the words Sportsman's Warehouse for these questions.

Figure 1b is based upon the combined results of questions A3a to A4. Again, the figure indicates each respondent's highest level of awareness for Sportsman's Warehouse or recognition for the words Sportsman's Warehouse for these questions. When looking at these results, roughly 45% of the respondents felt the words "Sportsman's Warehouse" are at least the name of a specific store or chain that sells mainly hunting, fishing, camping, or outdoor gear.

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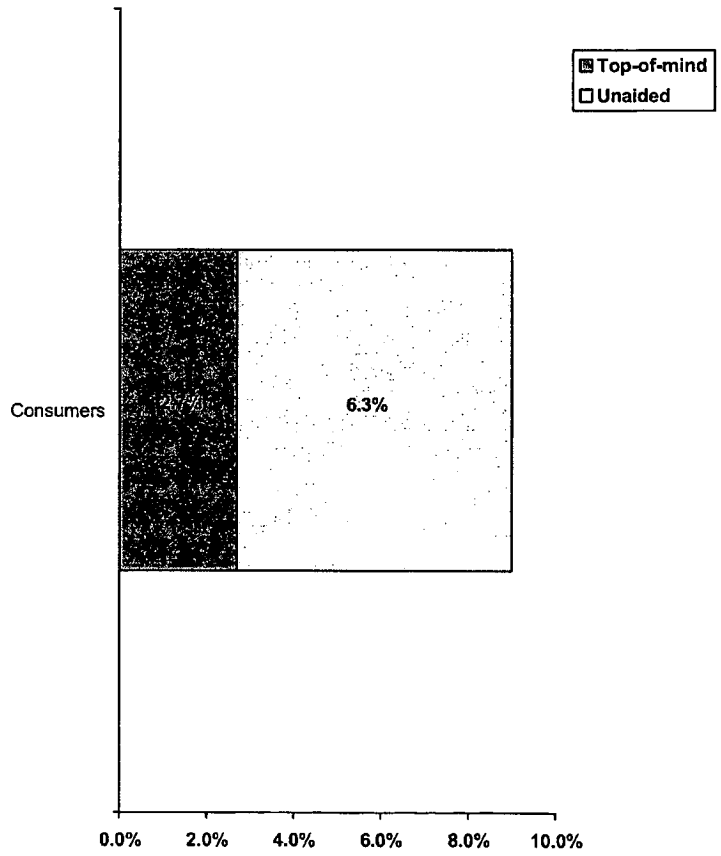
- **Conclusion #2:** Nearly one of every twenty respondents named Sportsman's Warehouse first (top-of-mind awareness), while more than one of every ten named Sportsman's Warehouse (unaided awareness, which includes top-of-mind awareness). These types of awareness are primarily measures of the longevity and marketing strength of an organization. In short, the more established an organization is in a market and/or the more an organization advertises, the higher its top-of-mind and/or unaided awareness will be.

  - All respondents were asked to name the one store that comes to mind first *and* other stores that come to mind when they think about large stores that sell mainly hunting, fishing, camping, or outdoor gear. As can be seen again in **Figure 2**, 3.7% named Sportsman's Warehouse first (top-of-mind awareness), while another 7.0% (10.7% overall) named Sportsman's Warehouse (unaided awareness, which includes top-of-mind awareness).

    For this question, respondents were allowed to give up to seven responses. Therefore, the results will exceed 100% when the percentages are added together.

  - Please note that the results in Figure 2 are based on the combined results for questions A3a to A3g. Therefore, they indicate each respondent's highest level of awareness for Sportsman's Warehouse.

Figure 2. Top-of-mind and unaided awareness of Sportsman's Warehouse.
(Includes all respondents)



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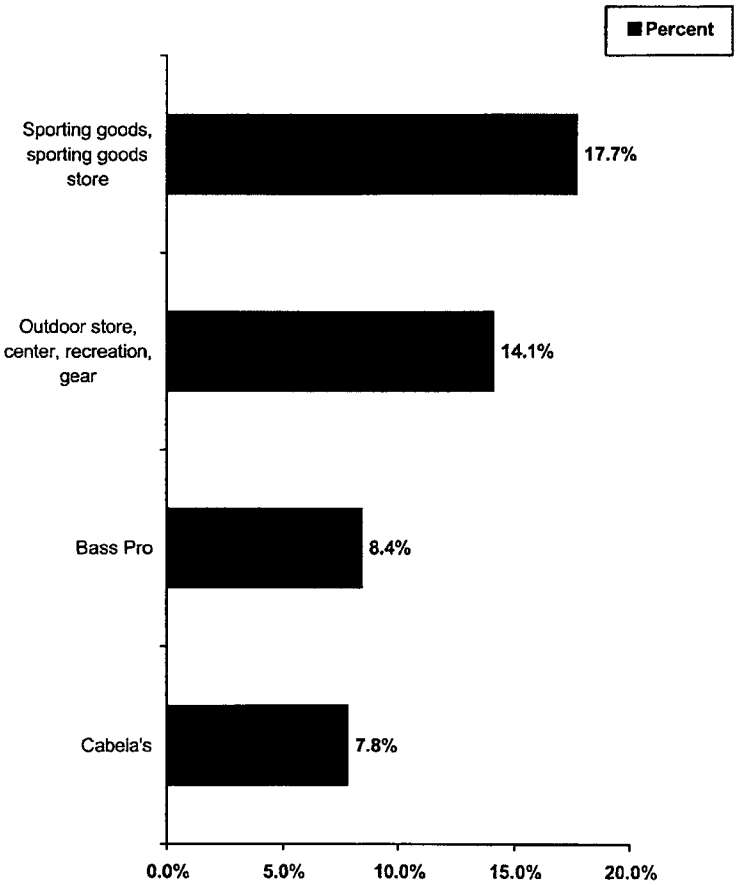
- **Conclusion #3:** The results indicate that a minuscule proportion of respondents used the words "sportsman(s)" or "sportsman(s) warehouse" as a generic term for a large store that sells mainly hunting, fishing, camping, and outdoor gear.

  - Before being asked any questions related to the words "Sportsman's Warehouse", all respondents were asked what word or words they would use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear. **Figure 3** shows that the words used most frequently for a large store that sells mainly hunting, fishing, camping, and outdoor gear were the words sporting goods or outdoor, followed by Bass Pro and Cabela's.

    For this open-ended question, respondents were allowed to give up to three responses. Therefore, the results will exceed 100% when the percentages are added together.

    - The contingency tables in Section Five show that less than 2% of the respondents used the words "sportsman(s) warehouse" to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear.

Figure 3. Words used most frequently to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear?
(Includes all consumers)



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To better understand some of the findings summarized above, some additional explanation may be helpful.

- The purpose of question A2 was to prove or disprove whether the words "sportsman's warehouse" are a generic term that a large number of outdoors people "use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear." Therefore, the lack of "probe phrases" is not "very unusual" and is appropriate in this case since:
  - The question does not ask the respondent for only one word or phrase,
  - A fair number of respondents did provide more than one word or phrase,
  - The question accurately obtained the dominant word or words each respondent uses to describe this type of business, and
  - The purpose of this question was not to measure all of the words or phrases each respondent uses to describe this type of business.

  If the purpose of question A2 had been to collect as many thoughts or opinions as we can, then "probe phrases" would be appropriate. For example, the purpose of questions A3a and A3b-g was to measure top-of-mind and unaided awareness of large stores that sell mainly hunting, fishing, camping, or outdoor gear by soliciting up to seven store names from respondents. Based on this purpose and the fact that question A3a asked respondents "...When you think of names of large stores that sell mainly hunting, fishing, camping, or outdoor gear, what is the **one** store name that comes to mind first?" the probe question (A3b-g) of "What other store names come to mind when you think about large stores that sell mainly hunting, fishing, camping, or outdoor gear?" is appropriate.

- When looking at the coding related to questions A3a and A3b-g, 'Sportsman's Warehouse' responses were assigned to the "Sportsman's Warehouse" brand name. In this situation, coding that "Sportsman's Warehouse" as a brand name is a logical and appropriate grouping since, to the best of my knowledge, Bass Pro Shops has not used the "Bass Pro Shops Sportsman's Warehouse" name or logo in the eight of the nine states in which the consumer surveys were conducted -- Colorado, Iowa, Mississippi, Nevada, Oklahoma, Pennsylvania, South Carolina, Tennessee (signage removed in 2005), and Texas.

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- As can be seen in Section 4, question A4 asks "When you hear the words "Sportsman's Warehouse", do you think these words are most likely (1) The name of one specific store or chain of stores, (2) Words that describe one specific store or chain of stores, or (3) General words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear?" There are many reasons why we used three response choices without reading the "not sure" response for this question.
  - First, the purpose of this question was to obtain information that determines whether or not consumers recognize the words/name Sportsman's Warehouse as a single or sole source for hunting, fishing, camping, or outdoor gear. To assess perceived single or sole source, we used three response choices that are similar to those we have used in several other surveys and cover the entire array of unique, meaningful response choice options: (1) name of a single source, (2) describes a single source, or (3) does not describe a single source.
- Second, it is my experience that, in many cases, a single closed-ended question with an odd number of response choices is more effective in obtaining accurate data than other response options. For example:
  - The five-point scale of very likely, likely, somewhat likely, not very likely, or not at all likely has repeatedly proven to more accurately estimate actual consumer behavior than the "traditional" four-point scale of very likely, somewhat likely, somewhat unlikely, or very unlikely. Therefore, having three favorable and two unfavorable responses enhances the quality of the data. Similarly, increasing to four response choices or decreasing to two response choices for question A4 would have hampered our ability to collect accurate data.
  - In this case, we could have also used an approach that utilizes multiple two response questions such as:
    - (1) Do you think the words Sportsman's Warehouse are the name of one specific store or chain or (2) Don't you think the words Sportsman's Warehouse are the name of one specific store or chain?
    - (1) Do you think the words Sportsman's Warehouse describe one specific store or chain of stores or (2) Don't you think the words Sportsman's Warehouse describe one specific store or chain of stores?

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However, it is my experience that, because this technique tends to inflate the "do" responses, it would not have provided an accurate snapshot of respondents' true options related to perceiving the words Sportsman's Warehouse as a single or sole source.

- In conclusion, despite "theoretical" risks that some associate with a closed-ended question using an odd number of response choices, I deemed the format used for this study to be superior to other options in producing the most accurate data.

- The "not sure" response choice was not read for A4. While some theorists claim that the proportion of "not sure" responses may increase slightly (20% to 25%), it does not significantly affect the relative distribution of respondents selecting a listed choice. Assuming that this is true, since only 8.9% of the respondents gave a "not sure" response to A4, the proportion of "not sure" responses would have likely increased only 20% to 25% –increasing the "not sure" responses to a maximum of 11.1% with minimal impact on the other response choices.

	Actual	20% change in "not sure"	25% change in "not sure"
Name of store	35.9%	35.1%	34.9%
Describes store	10.3%	10.1%	10.0%
General words	35.9%	35.1%	34.9%
Not sure	8.9%	10.7%	11.1%
Total	91.0%	91.0%	91.0%
Increase in "Not sure"	n.a.	1.8%	2.2%

- For question A5 (To the best of your knowledge, in what city or town is a "Sportsman's Warehouse" located in your state), some metro areas named include both a "Sportsman's Warehouse" and "Bass Pro" store. The cities named by respondents were grouped based on typical consumer habits/behavior and/or other facts.

  - First, when people from my community (Fargo, ND-Moorhead, MN) go shopping in the Twin Cities (Minneapolis-St. Paul, MN area), for example, they typically describe the location of where they shopped as "Minneapolis" even though they actually shopped at stores/malls in Edina, Bloomington, or some other city in the metro area. Therefore, responses were grouped into appropriate "metro" areas as described on MapQuest.com.

  - Second, assigning "common" metro areas to "Sportsman's Warehouse" is logical and appropriate since, to the best of my knowledge, Bass Pro Shops has not used the "Bass Pro Shops Sportsman's Warehouse" name or logo in the states in which the consumer surveys were conducted.

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Purpose #2: Assess the implied meaning of the "Sportsman's Warehouse" sample logo.

- **Conclusion #4:** Of those who viewed the sample logos, nearly eight of every ten felt the Sportsman's Warehouse sample logo is at least a logo that could be used to identify one specific store or chain of stores. In comparison, more than eight of every ten felt the Bass Pro Shop sample logo is at least a logo that could be used to identify one specific store or chain of stores.

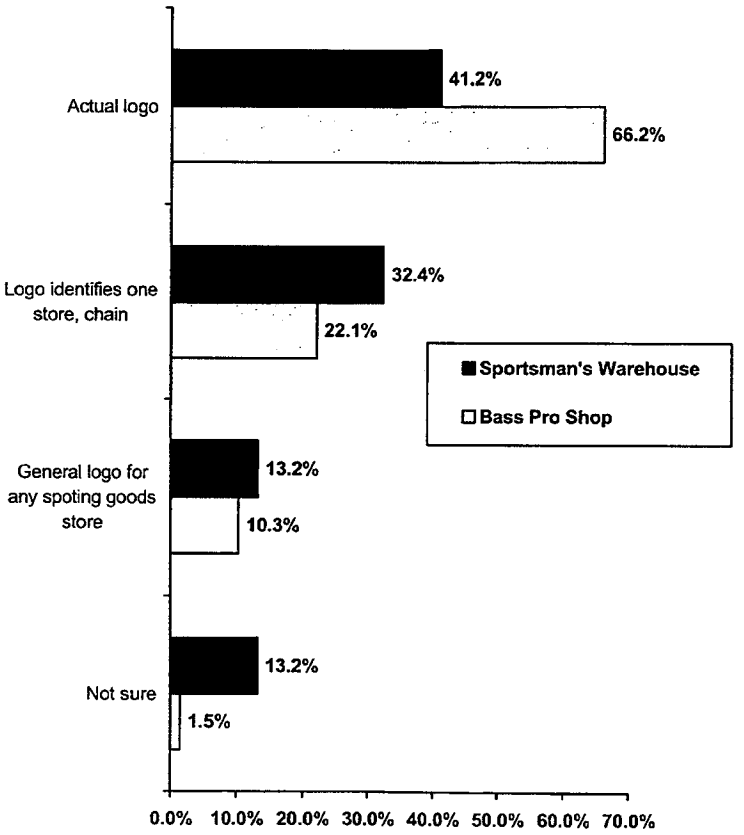
  - Those who were willing and able to access the Internet were asked to view sample logos for Sportsman's Warehouse and Bass Pro Shop. After reviewing each logo they were asked if they think that sample logo is most likely an actual logo that is currently used by one specific store or chain of stores, a logo that could be used to identify one specific store or chain of stores, or a general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, or outdoor gear.

Sportsman's Warehouse Sample Logo

Bass Pro Shop Sample Logo

C **Figure 4** shows that 76.0% of these respondents felt the Sportsman's Warehouse sample logo is at least a logo that could be used to identify one specific store or chain of stores, while 84.0% felt the Bass Pro Shop sample logo is at least a logo that could be used to identify one specific store or chain of stores. Given the margin of error associated with these questions (roughly ±9% to ±10%), one cannot say that the recognition of one sample logo is significantly higher (or lower) than the other.

Figure 4. After seeing this sample logo, do you think it is most likely...
(Includes only phone/web consumers)



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Again, to better understand some of the findings summarized in above, some additional explanation may be helpful.

- For questions B3b (Sportsman's Warehouse) and B3b (Bass Pro Shop Sportsman's Warehouse), respondents were asked if, "After seeing this sample logo, do you think it is most likely (1) An actual logo that is currently used by one specific store or chain of stores, (2) A logo that could be used to identify one specific store or chain of stores, or (3) A general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, or outdoor gear?" As was noted previously for question A4, a three response question was used since:
  - The purpose of these questions was to obtain information that determines whether or not consumers recognize or associate each sample logo with a single or sole source for hunting, fishing, camping, or outdoor gear.
  - The three response choices are similar to those we have used in several other surveys and cover the entire array of unique, meaningful response choice options.
  - This format was deemed to be superior to other two and four response choice options in producing the most accurate data.
- Based on theoretical projections, having a passive "not sure" response choice would not significantly affect the relative distribution of respondents selecting a listed choice.

Sportsman's Warehouse	Actual	20% change in "not sure"	25% change in "not sure"
Logo for one store	41.2%	39.9%	39.6%
Could be logo for one store	32.4%	31.4%	31.2%
General logo	13.2%	12.8%	12.7%
Not sure	13.2%	15.8%	16.5%
Total	100.0%	100.0%	100.0%
Increase in "Not sure"	n.a.	2.6%	3.3%

Bass Pro Shop Sportsman's Warehouse	Actual	20% change in "not sure"	25% change in "not sure"
Logo for one store	66.2%	66.0%	65.9%
Could be logo for one store	22.1%	22.0%	22.0%
General logo	10.3%	10.3%	10.3%
Not sure	1.5%	1.8%	1.9%
Total (rounding error)	100.1%	100.1%	100.1%
Increase in "Not sure"	n.a.	0.3%	0.4%

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- Typically, in some trademark surveys, additional questions are required to adjust for demand effects and/or alternative explanations for the results. In this case, however, the following were not deemed to be appropriate:
  - The purpose of these questions was to obtain information that determines whether or not consumers recognize or associate each sample logo with a single or sole source for hunting, fishing, camping, or outdoor gear. Since the words sportsman's warehouse appeared in both sample logos, any demand effect should have an equal impact on both logos and, therefore, would not justify the added cost needed to conduct a separate logos study.
  - In my opinion, a control group and/or question(s) were not needed for the following reasons:
    - Previous experience on similar studies that use control questions has shown that 1% to 8% of respondents generally "guess" when responding to a two response question. However, the proportion of people who "guess" is typically smaller when more response choices are provided.
- Use of control groups requires one to ask the "test" question(s) of one-half of the respondents and the "control" questions of the other half, thus reducing the sample size, increasing the margin of error or allowable fluctuation, and decreasing the statistical accuracy for the "key" questions. Therefore, using a control group would leave us with the following options:
  - Keep the sample size, budget, and time frame the same and increase the maximum margin of error for "test" question A4 from ±4.5% to ±6.4% and the maximum margin of error for "test" questions B3b and B4b from ±11.9% to ±16.8%, or
  - Double the sample size, budget, and time frame to keep the maximum margin of error for question A4 at ±4.5% and the maximum margin of error for questions B3b and B4b at ±11.9%.

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Section

3

METHODOLOGY

Purpose

The purpose of this research study was to obtain information that will be used to determine consumer's recognition of the words/name Sportsman's Warehouse and the Sportsman's Warehouse logo. To do this, the study focused on the following objectives:

- Assess the implied meaning of the words "Sportsman's Warehouse".
- Assess the implied meaning of the "Sportsman's Warehouse" sample logo.

Sampling Frame & Sample Size

The primary population for this study consisted of telephone households who have expressed an interest in fishing, hunting, and/or camping and live in a state in which, based on their website information, there is both a Bass Pro Shop and a Sportsman's Warehouse. Telephone numbers for households who have expressed an interest in fishing, hunting, and/or camping were obtained from Survey Sampling International (SSI), a list company that specializes in generating samples for survey research. A stratified (by state), random-systematic (the standard "replicate" method utilized by SSI for a vast majority of the samples they generate) sampling technique was employed in this study to select households. Only persons who had purchased fishing, hunting, camping, and/or other outdoor gear in the past twelve months were allowed to participate in the survey. To obtain the highest response rate possible, a relatively small number of telephone numbers/replicates were introduced into the active call list, telephone numbers/replicates were added to the active call list only when they were needed to replace unusable numbers, and, once a telephone number was added to the active call list, it was called each day that calls were dialed from that date until the completion date.

Due to (1) the relatively low proportion of the general population who hunt/fish/camp and (2) the time/budget constraints for this study, we determined that the use of a "pre-qualified" sample would be most appropriate for this study. SSI uses national mail surveys, national email surveys, and other national sources to identify those with interests in a variety of areas.

- This sample cannot be deemed to be a "convenience sample." In short, a convenience sample is a sample that merely includes respondents or participants who happen to be at a certain place at a certain time. The respondents or participants included in a convenience sample are <u>not</u> representative of the larger population and, therefore, the results of a convenience sample <u>cannot</u> be projected to the larger population with any known level of statistical certainty. A good example of a convenience sample would be mall intercept interviews. Mall intercept interviews simply represent the skewed segment of shoppers who happen to frequent that mall and were available be at the times the interviews were being completed and, therefore, <u>cannot</u> be used to estimate the proportion of the larger population who have a certain opinion, knowledge, or anticipated behavior.

From this sample, 474 interviews were completed with consumers. The next chart summarizes the call disposition for the calls made to complete these interviews.

	Consumer	
Total Numbers Available	6,440	
Unusable Numbers	4,902	
Wrong Number		129
Disconnected		733
Language Barrier		51
Not Qualified		1,647
Quota Full		979
Fax/Modem		223
Duplicate Number		4
Do Not Call		137
Privacy Manager		607
Hard Refusal		392
Remaining Useable Numbers	1,538	
Busy		65
No Answer/Machine		999
Completed Interviews		474
Response Rate		31%
Estimated Eligible Numbers from Remaining Useable Numbers		1,055
Estimated Response Rate		45%

The secondary population for this study consisted of Sportsman's Warehouse vendors who sell fishing, hunting, and/or camping to retailers. For each vendor, the contact persons name and telephone number were obtained from Sportsman's Warehouse. No sampling technique was employed for this segment since we attempted to contact all 52 vendors provided by Sportsman's Warehouse.

From this sample, 10 interviews were completed with consumers. Since the sole purpose of surveying this segment was to this provide supplemental marketing information for Sportsman's Warehouse, the results for this segment are not included in this report.

Collection Technique & Timing

All data was collected through the use of telephone interviews and a web site. For consumers, telephone interviews were conducted from May 31 to June 12, 2006, while the telephone interviews for vendors were only completed from June 12-13, 2006. The data collection was completed in compliance with specifications established by Winkelman Consulting. Interviewing was supervised and performed by trained personnel from KLJ Solutions.

Data for the web portion of the survey was collected from May 31 to June 21, 2006.

Margin of Error

The 474 completed consumer questionnaires provide a 95% confidence level with an overall minimum and maximum margin of error of ±2.7% and ±4.5%, respectively, in estimating the proportion of the population who possess a certain characteristic or opinion. In other words, if 100 samples (all having a total of 474 completed consumer questionnaires) were drawn from this population, approximately 95 of the samples would have proportions within ±2.7% and ±4.5% of the proportions of the entire population for the characteristic or opinion being measured.

The margin of error explained previously only applies to responses of the *entire* sample. As shown in the next chart, the margin of error will be larger when looking at the responses of smaller segments.

			Margin of Error for results at or about...				
Populations	**Completions**	**Households**	10%/90%	20%/80%	30%/70%	40%/60%	50%/50%
All Consumers	474	100,000	2.7%	3.6%	4.1%	4.4%	4.5%
Web Survey Consumers	68	14,346	7.1%	9.5%	10.9%	11.6%	11.9%

** The maximum margin of error is shown in the "50%/50%" column and the minimum margin of error is shown in the "10%/90%" column.*

Section

4

THE QUESTIONNAIRE

The questionnaire in this report was used for interviews conducted with consumers for this study.

Consumer Survey

Case #: _____ Employee #: _____ Date: ___/___/___ Start Time: ____ : ____ am/pm Resp. #: _____

Phase One

Intro. **Hi, my name is *(Your First Name)* from Winkelman Consulting in Fargo, North Dakota and I'm not selling anything – I'm simply conducting a short survey about stores that sell hunting, fishing, camping, and outdoor gear in your state. The survey will only take about 1 to 3 minutes, there are no right or wrong answers, and your answers will be kept confidential. This survey is for people who have bought hunting, fishing, camping, or outdoor gear in the past 12 months. Using a scale of within the past 30 days, 1 to 6 months, 7 to 12 months, more than 12 months, or never; how recently have you bought any…**

	30 days	1 to 6 months	7 to 12 months	More than 12 months	Never	Not sure
I1a. **Fishing gear?**	1	2	3	4	5	91
I1b. **Hunting gear?**	1	2	3	4	5	91
I1c. **Camping gear?**	1	2	3	4	5	91
I1d. **Other outdoor gear?**	1	2	3	4	5	91

DC1. *[IF the respondent has bought any of the above in the past 12 months (I1a –< 3 OR I1b –< 3 OR I1c –< 3 OR I1d –< 3), then SKIP to DC3 (DC1-2 – 999).]* **Is there another person in your household who has bought hunting, fishing, camping, or outdoor gear in the past 12 months?**

1..... Yes

Discontinue Close (DC1) ← ← 2..... No, Not Sure, No Response

DC2. **May I please talk to that person?**

Start over at "Intro" ← ← ← ← ← ← ← ← 1..... Yes

Record first name & call back date/time ← ← 2..... Yes, but currently not available

Discontinue Close (DC2) ← ← ← ← ← ← ← 3..... No, Refused *[ONLY use this response choice if they "refuse" to allow you to speak to the other person.] [If they say "no" because the other person is not there right now, then select response choice "2" above.]*

DC3. **Do you or any members of your household work for a store that sells mainly hunting, fishing, camping, or outdoor gear?**

Discontinue Close (DC3) ← ← 1..... Yes

2..... No, Not Sure, No Response

A1. **First, do you have a computer that you can use to access the Internet?** *[The quota will be set after 1-2 days of calling have been completed.]*

1..... Yes

2..... No → → → *If quota is full, then Discontinue Close (DC4)*

91..... Not sure/No response → → → *If quota is full, then Discontinue Close (DC4)*

A2. **I'd like you tell me what words or words you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear. For example, people may use the words "Mexican restaurant" to describe a business that serves meals that include mainly Mexican foods. Also, people may use the word "Thermos" to describe a travel vacuum bottle or container a person can carry with them and use to keep cold beverages cold or warm beverages warm. So, what word or words would you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear?** *[Correctly type in the exact word or words stated by the respondent! Do not paraphrase, abbreviate, or group comments!]*

a.
b.
c.

A3a. **Now, I'd like you to think about the names of large stores that sell mainly hunting, fishing, camping, or outdoor gear. When you think of names of large stores that sell mainly hunting, fishing, camping, or outdoor gear, what is the one store name that comes to mind first?** *[If the respondent states a name that is not exactly as written in the response choice, then select "other" and type in the name exactly as stated.]*

1 ..... Bass Pro or Bass Pro Shop
2 ..... Bass Pro Outdoor World or Bass Pro Shop Outdoor World
3 ..... Bass Pro Sportsman's Center or Bass Pro Shop Sportsman's Center
4 ..... Bass Pro Sportsman's Warehouse or Bass Pro Shop Sportsman's Warehouse
5 ..... Cabela's
6 ..... Dick's Sporting Goods
7 ..... Gander Mountain
8 ..... Scheel's or Scheel's Allsports
9 ..... Sportsman's Warehouse
10..... WalMart
90..... Other *[Specify: _____]*
SKIP to A4 ← ← ← 91..... Not sure, No response

A3b-g. *[IF A3a = 91, then SKIP to A4 (A3b = 92, A3c = 93, A3d = 94, A3e = 95, A3f = 96, A3g = 97).]* **What other store names come to mind when you think about large stores that sell mainly hunting, fishing, camping, or outdoor gear?** *[Probe for up to 6 responses] [If the respondent states a name that is not exactly as written in the response choice, then select other and type in the name exactly as stated.]*

	B	C	D	E	F	G
1. Bass Pro or Bass Pro Shop	1	1	1	1	1	1
2. Bass Pro Outdoor World or Bass Pro Shop Outdoor World	2	2	2	2	2	2
3. Bass Pro Sportsman's Center or Bass Pro Shop Sportsman's Center	3	3	3	3	3	3
4. Bass Pro Sportsman's Warehouse or Bass Pro Shop Sportsman's Warehouse	4	4	4	4	4	4
5. Cabela's	5	5	5	5	5	5
6. Dick's Sporting Goods	6	6	6	6	6	6
7. Gander Mountain	7	7	7	7	7	7
8. Scheel's or Scheel's Allsports	8	8	8	8	8	8
9. Sportsman's Warehouse	9	9	9	9	9	9
10. WalMart	10	10	10	10	10	10
90. Other *[Specify: _____]*	90	90	90	90	90	90
91. Not sure, No response	92	93	94	95	96	97

IF A3b = 92, then SKIP to A4 (A3c = 93, A3d = 94, A3e = 95, A3f = 96, A3g = 97).
IF A3c = 93, then SKIP to A4 (A3d = 94, A3e = 95, A3f = 96, A3g = 97).
IF A3d = 94, then SKIP to A4 (A3e = 95, A3f = 96, A3g = 97).
IF A3e = 95, then SKIP to A4 (A3f = 96, A3g = 97).
IF A3f = 96, then SKIP to A4 (A3g = 97).

A4. *[IF "Sportsman's Warehouse" was named in A3b-g (A3b = 9 OR A3c = 8 OR A3d = 9 OR A3e = 9 OR A3f = 9 OR A3g = 9), then SKIP to B1 (A4-A5cstate = 992).] [IF "Sportsman's Warehouse" was named in A3a (A3a = 9), then SKIP to B1 (A4-A5cstate = 991).]* **When you hear the words "Sportsman's Warehouse", do you think these words are most likely...**

3 ..... **The name of one specific store or chain of stores,**
4 ..... **Words that describe one specific store or chain of stores, or**
SKIP to B1 ← ← ← 5 ..... **General words that can be used to describe any large store that sells mainly hunting, fishing, camping, or outdoor gear?**
SKIP to B1 ← ← ← 91..... *[Do Not Read]* Not sure, No response
991..... *[Do NOT include in response choices seen by interviewers]* Top-of-mind awareness of Sportsman's Warehouse
992..... *[Do NOT include in response choices seen by interviewers]* Unaided awareness of Sportsman's Warehouse

A5. *[IF A4 >= 5, then SKIP to B1 (A5acity-A5cstate = 993).]* **To the best of your knowledge, in what city or town is a "Sportsman's Warehouse" located in your state?**

a. City:	a. State:
b. City:	b. State:
c. City:	c. State:

Phase Two

B1. *[IF they do not have Internet access (A1 >= 2), then SKIP to D1 (B1-C2d = 999).]* **For this interview, I will also want you to look at some sample logos, and then answer a few questions about the sample logos. To do this, I will need you to go to an Internet Web site that has the sample logos. Can you talk to me on this telephone and access the Internet at the same time?**

1..... Yes
Get callback information ← ← 2..... No, but can be online and talk on a different number
Name & alternate number and then call back immediately!

SKIP to C1a ← ← ← ← ← ← 3..... No, have no other phone number
SKIP to C1a ← ← ← ← ← ← 91..... Not sure/No response

Can Access Internet While on the Telephone

B2a. *[IF B1 >= 3, then SKIP to C1a (B2a-B4b = 998).]* **Is your computer currently online?**
SKIP to B2c ← ← ← 1 ..... Yes
2 ..... No
91..... Not sure/No response

B2b. **Can you please go to your computer and let me know when you are online.** *[Once they say they are online, continue]*

B2c. **First, you will want to open Internet Explorer or the program you use for going to the Internet. The first screen that pops up should be your web browser. In the address box at the top of your web browser, type 66.223.28.200/20 and then either hit the enter key or click on the "go" button. When you see the web page that says, "Winkelman Consulting - Welcome to our sample logo web site!", let me know.** *[Read as 66 period 223 period 28 period 200 slash 20 – the slash to be used is the slash (/) on the same key as the "question mark".] [Once they say they see the Web page, continue] [If the respondent has "pop up blocking" on their web browser, the logo will not pop up right away. To see the logos, they will need to click on the "pop up bar", then select "Allow pop ups from this site". Then, the logo should appear.]*

[If respondents has problem getting online or to the web site, ask them to see if they can figure out what is wrong and then schedule a call back date/time. Continue on from this point when you call back.]

B3a. **Next, I'm going to give you the user name and password you need to go to the next page. Before I do that, however, let me tell you what will happen once you enter this information. As soon as you click on the submit button, a sample logo will appear for about 10 seconds, then disappear. Once the sample logo disappears, let me know. First, click on the "user name" box, then type in this 5-digit "user name" number:** *(Username from list)*. **Now, click on the "password box", then type in this 5-digit "password" number:** *(Password from list)*. **Last, get ready to look at the sample logo and then click on the "continue" button.** *[Once they say the picture disappeared, continue]*

[Once the ID & password have been entered and the "continue button" clicked, the respondent will not be able to access the web site again using the same number. If the respondent accidentally closes the website or experiences a technical problem before the interview is done, get their first name, schedule a callback date/time, ask the supervisor for an extra "user name" and "password", and then call them back.] [Programming note: we MUST retain the original "user name" and "password". Copy to original "user name" to "oldid" and copy the original "password" to "oldpassword", then copy the "extra" "user name" and "password" into the fields the needed for the script above.]

B3b. **After seeing this sample logo, do you think it is most likely...**

1 ..... **An actual logo that is currently used by one specific store or chain of stores,**
2 ..... **A logo that could be used to identify one specific store or chain of stores, or**
3 ..... **A general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, or outdoor gear?**
91..... *[Do Not Read]* Not sure, No response

B4a. **Now, I'm going to give you the password you need to see the next page. This time, once you enter the password, another sample logo will appear for about 10 seconds, then disappear. When the sample logo disappears, let me know. Click on the password box. Then type in the number "1". Then click on the "continue" button.** *[Once they say the picture disappeared, continue]*

B4b. **After seeing this sample logo, do you think it is most likely...**

1 ..... **An actual logo that is currently used by one specific store or chain of stores,**
2 ..... **A logo that could be used to identify one specific store or chain of stores, or**
3 ..... **A general logo that could be used by any sporting goods store to let consumers know their stores sell mainly hunting, fishing, camping, and outdoor gear?**
91..... *[Do Not Read]* Not sure, No response

Cannot Access Internet While on the Telephone

C1a. *[IF B1 <= 2, then SKIP to D1 (C1a-C2d = 996).]* **Could you please get a pen and paper so you can write down the web site address and the ID and password needed to access the web site.** *[When they have the writing materials, then continue.]* **The web site address is 66.223.28.200/40, your 5-digit ID number is** *(Username from list)* **and your 5-digit password number is** *(Password from list)*. **As soon as we are done with this interview, you can go to the web site, view the sample logos, and answer two quick questions. If your web browser is set to block "pop ups", the logos will not pop up right away. To see the logos, they will need to click on the "pop up bar" near the top of your web browser page, then select "Allow pop ups from this site". Then, the first logo should appear.** *[Read as 66 period 223 period 28 period 200 slash 40 – the slash to be used is the slash on the same key as the "question mark".] [Once they say they have written everything down, then continue]*

C1b. **Do you have an email address that I can send a reminder email to that provides the web site address and the password you will need to access the sample logos?**

1 ..... Yes
SKIP to D1 ← ← ← 2 ..... No
SKIP to D1 ← ← ← 91..... Not sure, refused

C2a. *[IF C1b >= 2, then SKIP to D1 (C2a-C2c = 995).]* **What is your email address?**

C2b. **Let me read your email address back to you so I can make sure I typed it correctly?** *[*Interviewers*: When on the phone, letters like "b", "d", "p", "t", etc. can count alike. When confirming the address, say the letters ("b" as in "boy", "d" as in "dog", "p" as in "pencil", "t" as in truck, etc. (see list)) rather than words.] [Correct email address in C2a as needed, then retype correct email address into C2b.]*

C2c. *[IF C2b = C2a, then SKIP to C2d (C2c = Missing).]* **I'm sorry, I must have typed your email address incorrectly. Can you give it to me again?** *[Return to C2a.]*

C2d. **In the next day or so, you should receive your reminder email with the web site address and the ID and password needed to access the website. As soon as you get the email, please go to the website, view the sample logos, and answer the questions if you haven't already done so before you get the email.**

Demographics

D1. **For classification and statistical analysis purposes, may I have your age please?** *[Do Not Read categories UNLESS reluctant or refuse, then ask, "**Please stop me when I read the age group which includes you...**"]*

1 ..... **24 or younger,**
2 ..... **25 to 34,**
3 ..... **35 to 44,**
4 ..... **45 to 54,**
5 ..... **55 to 64, or**
6 ..... **65 or older?**
91 ..... *[Do Not Read]* Choose not to answer

D2. **How long have you lived in your state – would you say...**

1 ..... **5 years or less,**
2 ..... **6 to 10 years,**
3 ..... **11 to 20 years,**
4 ..... **21 to 40 years, or**
5 ..... **More than 40 years?**
6 ..... *[Do Not Read]* Not sure, No response

D3. *[Do Not Read]* Enter respondent's gender.

1 ..... Male
2 ..... Female

VERIFICATION CLOSE: **That's all the questions I have for you. Lastly, let me verify that I dialed ____-_____. Again, my name is *(Your First Name)*, and on occasion a small percentage of people are called back just to verify that this interview actually took place. May I please have your first name, and first name only, so my supervisor will know who to ask for in case this interview is verified. Thank you for your time and have a good (evening/day).**

Resp. First Name: _____ Phone: (_____) _____-_____ End Time: _____

D4. *[Do Not Read]* Enter zip code from list. ___ ___ ___ ___ ___

D5. *[Do Not Read]* Enter state code from list. ___ ___

DISCONTINUE CLOSE: **That's all the questions I have for you. Thank you for your time and have a good (evening/day).**

Section

5

CONTINGENCY TABLES

Contingency tables are commonly referred to as "cross-tabs". They present the findings in an easy-to-understand, table form and provide the categorical data that is used most frequently in marketing. We strongly recommend that you review these tables and use them to facilitate any major decisions you make.

The contingency tables on the following pages show the proportion of all respondents who gave various responses to each question, as well as the proportion of specific sample segments that provided a particular response.

Please note the tables are separated into sections. The tables in each section have the same "banners" or sample segments across the top. Within each section, the tables are in order by question number, which appears on the top, left-hand side of each table.

NOTE: The size and page numbering of the tables in the electronic version of the report will not be identical to that in the printed report.

		Total	Survey Segment Consumers
A2a-c. What word or words would you use to describe a large store that sells mainly hunting, fishing, camping, and outdoor gear?	Academy	2.5%	2.5%
	Ace Hardware	.4%	.4%
	All sports, all around, all in one, all purpose, one stop	1.9%	1.9%
	American store	.2%	.2%
	Anything store	.2%	.2%
	Authentic	.2%	.2%
	Awesome, amazing	.8%	.8%
	Bait shop	.2%	.2%
	Bass Outdoors	.2%	.2%
	Bass Outlets	.4%	.4%
	Bass Pro, Bass Pro Shop	8.4%	8.4%
	Big, big box, big book	.8%	.8%
	Buckhorn	.2%	.2%
	Burger King, have it your way	.2%	.2%
	Cabela's	7.8%	7.8%
	Camping, camping store, camping suplies	2.1%	2.1%
	Camping World	.4%	.4%
	Catalogue store	.2%	.2%
	Clothing World	.4%	.4%
	Complete, comprehensive	.6%	.6%
	Convenient, handy	.6%	.6%
	Corporate store, chain	.4%	.4%
	Department store	.4%	.4%
	Depot	.2%	.2%
	Dick's	.6%	.6%
	Discount store	.4%	.4%
	Eastern Mountain Sports	.2%	.2%
	Enjoyment, entertaining, exciting, experience, extravagant	1.1%	1.1%
	Equipment	.2%	.2%
	Everything store	1.3%	1.3%
	Expensive	.6%	.6%
	Fabulous, fantastic, fun, favorite	1.9%	1.9%

	RV, travel store	.4%	.4%
	Scheel's	.2%	.2%
	Specialty store, specialized	.4%	.4%
	Sporting goods, sporting goods store	17.7%	17.7%
	Sporting superstore	.2%	.2%
	Sports store, center, shop, gear	3.2%	3.2%
	Sports Academy	.4%	.4%
	Sports warehouse	.4%	.4%
	Sports World	.2%	.2%
	Sportsman(s) Warehouse	.6%	.6%
	Sportsman(s)	.8%	.8%
	Sportsman(s) outfitter	.2%	.2%
	Sportsman(s) store	.4%	.4%
	Super center	.2%	.2%
	Swapmeet	.2%	.2%
	Tamitta	.2%	.2%
	Terrific, wonderful	.4%	.4%
	"The" Store	.2%	.2%
	Toy store	.4%	.4%
	Variety, variety store, well-stocked	.8%	.8%
	Wal-Mart	2.7%	2.7%
	Warehouse	1.1%	1.1%
	Misc. others	.8%	.8%
	Not sure, no response	9.1%	9.1%
	No second response	83.8%	83.8%
	No third response	95.6%	95.6%
Total Responses		474	474

Includes all respondents

	Fishing, fishing store, fishing gear	3.2%	3.2%
	Fishing & hunting, store, gear	.8%	.8%
	Full gear	.2%	.2%
	Gaming	.4%	.4%
	Gander Mountain	1.3%	1.3%
	Gart/Garth Brothers	.2%	.2%
	Giant, huge	.8%	.8%
	Good, very good, great	1.3%	1.3%
	Grandpa's	.2%	.2%
	Gun store, gun shop	.4%	.4%
	Hardware store	.4%	.4%
	Heaven, paradise, dream world	1.5%	1.5%
	Hunter's haven	.2%	.2%
	Hunting, hunting store, hunting gear	3.6%	3.6%
	Hunting dog training, gear	.2%	.2%
	Hunting season	.2%	.2%
	Ice chest	.2%	.2%
	Jordan Creek	.2%	.2%
	Interesting	1.3%	1.3%
	K-Mart	.4%	.4%
	Large store, selection	1.1%	1.1%
	Man store, manly, rugged folks	.6%	.6%
	Mega store	.2%	.2%
	Midway	.2%	.2%
	Mossy Oak	.2%	.2%
	Mountains	.2%	.2%
	Multi-purpose	.4%	.4%
	Name brands	.2%	.2%
	Non-Wal-Mart	.2%	.2%
	Out World	.2%	.2%
	Outdoor store, center, recreation, gear	14.1%	14.1%
	Outdoor sports store, center	1.9%	1.9%
	Outdoor World	1.5%	1.5%
	Outfitter	1.1%	1.1%
	Outlet	.2%	.2%
	Overwhelming	.2%	.2%
	Pro Bass, Pro Bass Shop	.8%	.8%
	PX	.2%	.2%
	Recreation store	.6%	.6%
	REI	.8%	.8%
	Retail store	.2%	.2%
	Right place	.2%	.2%

		Total	Survey Segment. Consumers
A3a. When you think of names of large stores that sell mainly hunting, fishing, camping, or outdoor gear, what is the one store name that comes to mind first?	Bass Pro or Bass Pro Shop	26.6%	26.6%
	Bass Pro Outdoor World or Bass Pro Shop Outdoor World	.6%	.6%
	Bass Pro Sportsman's Warehouse or Bass Pro Shop Sportsman's	.2%	.2%
	Cabela's	30.0%	30.0%
	Dick's Sporting Goods	1.9%	1.9%
	Gander Mountain	3.2%	3.2%
	Scheel's or Scheel's Allsports	1.3%	1.3%
	Sportsman's Warehouse	2.7%	2.7%
	WalMart, Sam's	8.0%	8.0%
	Academy	4.6%	4.6%
	Ace Hardware	.2%	.2%
	Backwoods	.4%	.4%
	Baron's	.2%	.2%
	Bass	.2%	.2%
	Big 5, Big Five	.8%	.8%
	Big Book	.2%	.2%
	Big Buck(s)	1.5%	1.5%
	Boot Box	.2%	.2%
	Camping World	.2%	.2%
	Coleman	.2%	.2%
	Dunham's	.2%	.2%
	Eddie Bauer	.4%	.4%
	Farm Fleet	.2%	.2%
	Fin & Feather	.2%	.2%
	French Creek Outfitters	.4%	.4%
	Gart/Garth Brothers	.6%	.6%
	Gene Taylor's	.4%	.4%
	L L Bean	.8%	.8%
	Orvis	.2%	.2%
	Pro Bass, Pro Bass Shop	.2%	.2%
	REI	1.5%	1.5%
	Sears	1.1%	1.1%
	Sports Academy	.6%	.6%
	Sports Authority	.6%	.6%
	Misc. others	4.0%	4.0%
	Not sure, No response	5.1%	5.1%
Total Responses		474	474

Includes all respondents

		Total	Survey Segment. Consumers
A3a-g. Unaided awareness of stores that sell mainly fishing, hunting, camping and outdoor gear.	Bass Pro or Bass Pro Shop	49.2%	49.2%
	Bass Pro Outdoor World or Bass Pro Shop Outdoor World	1.1%	1.1%
	Bass Pro Sportsman's Warehouse or Bass Pro Shop Sportsman's	.4%	.4%
	Cabela's	47.5%	47.5%
	Dick's Sporting Goods	8.2%	8.2%
	Gander Mountain	14.6%	14.6%
	Scheel's or Scheel's Allsports	4.4%	4.4%
	Sportsman's Warehouse	9.1%	9.1%
	WalMart, Sam's	28.7%	28.7%
	Academy	11.6%	11.6%
	Ace Hardware	.6%	.6%
	Backwoods	.4%	.4%
	Baron's	.2%	.2%
	Bass	.2%	.2%
	Big 5, Big Five	2.7%	2.7%
	Big Book	.2%	.2%
	Big Buck(s)	1.9%	1.9%
	Boot Box	.2%	.2%
	Camping World	1.7%	1.7%
	Campmor	.4%	.4%
	Coleman	.4%	.4%
	Dunham's	.6%	.6%
	Eddie Bauer	.8%	.8%
	Farm Fleet	.4%	.4%
	Fin & Feather	.8%	.8%
	French Creek Outfitters	.6%	.6%
	Gart/Garth Brothers	3.2%	3.2%
	Gene Taylor's	.4%	.4%
	Great Outdoors	.8%	.8%
	K-Mart	3.4%	3.4%
	L L Bean	2.7%	2.7%
	Lowe's	.6%	.6%
	Orvis	.8%	.8%
	Oshman's	.6%	.6%
	Outdoor America	.6%	.6%
	Pro Bass, Pro Bass Shop	.4%	.4%
	Outdoor World	.2%	.2%
	REI	4.0%	4.0%
	Sears	1.9%	1.9%
	Sports Academy	.8%	.8%
	Sports Authority	2.3%	2.3%
	Surplus City	.6%	.6%
	Target	1.3%	1.3%
	Misc. others	27.8%	27.8%
	Not sure, No response	5.1%	5.1%
	No second response	21.3%	21.3%
	No third response	57.4%	57.4%
	No fourth response	83.1%	83.1%
	No fifth response	95.1%	95.1%
	No sixth response	98.3%	98.3%
	No seventh response	99.8%	99.8%
Total Responses		474	474

Includes all respondents

		Total	Survey Segment. Consumers
A3-A4. When you hear the words Sportsman's Warehouse, do you think these words are most likely…	Top-of-mind awareness of Sportsman's Warehouse	2.7%	2.7%
	Unaided awareness of Sportsman's Warehouse	6.3%	6.3%
	The name of one specific store or chain of stores	35.9%	35.9%
	Words that describe one specific store or chain of stores	10.3%	10.3%
	General words that describe any large sporting goods store	35.9%	35.9%
	Not sure, No response	8.9%	8.9%
Total Responses		474	474

Includes all respondents

		Total	Survey Segment. Consumers
A3-A5. Overall awareness and knowledge of Sportsman's Warehouse.	Top-of-mind awareness	2.7%	2.7%
	Unaided awareness	6.3%	6.3%
	Named a SW city/area	10.8%	10.8%
	SW is name of one specific store or chain	27.4%	27.4%
	SW are words that describe one specific store or chain	8.0%	8.0%
	SW are words that describe any large sporting goods store	35.9%	35.9%
	Not sure, no response	8.9%	8.9%
Total Responses		474	474

Includes all respondents

		Total	Survey Segment. Consumers
A1. Do you have a computer that you can use to access the Internet?	Yes	69.2%	69.2%
	No	30.6%	30.6%
	Not sure, No response	.2%	.2%
Total Responses		474	474

Includes all respondents

		Total	Survey Segment. Consumers
B1. Can you talk to me on this telephone and access the Internet at the same time?	Yes	11.6%	11.6%
	No	87.8%	87.8%
	Not sure, No response	.6%	.6%
Total Responses		328	328

Includes all respondents who have Internet access

		Total	Survey Segment. Consumers
B3b. (Sportsman's Warehouse sample logo) After seeing this sample logo, do you think it is most likely...	An actual logo that is currently used by one specific store	41.2%	41.2%
	A logo that could be used to identify one specific store or	32.4%	32.4%
	A general logo that could be used by any sporting goods stor	13.2%	13.2%
	Not sure, No response	13.2%	13.2%
Total Responses		68	68

Includes all respondents who responded to the web portion of the survey

		Total	Survey Segment. Consumers
B4b. (Bass Pro Shop sample logo) After seeing this sample logo, do you think it is most likely...	An actual logo that is currently used by one specific store	66.2%	66.2%
	A logo that could be used to identify one specific store or	22.1%	22.1%
	A general logo that could be used by any sporting goods stor	10.3%	10.3%
	Not sure, No response	1.5%	1.5%
Total Responses		68	68

Includes all respondents who responded to the web portion of the survey

		Total	Survey Segment. Consumers
D1. Respondent's age.	24 or younger	3.8%	3.8%
	25 to 34	14.1%	14.1%
	35 to 44	19.8%	19.8%
	45 to 54	22.6%	22.6%
	55 to 64	22.8%	22.8%
	65 or older	14.6%	14.6%
	Choose not to answer	2.3%	2.3%
Total Responses		474	474

Includes all respondents

		Total	Survey Segment. Consumers
D2. How long have you (lived in your state/sold gear to retailers)?	5 years or less,	4.4%	4.4%
	6 to 10 years,	7.4%	7.4%
	11 to 20 years,	10.5%	10.5%
	21 to 40 years, or	33.3%	33.3%
	More than 40 years?	42.2%	42.2%
	Not sure, No response	2.1%	2.1%
Total Responses		474	474

Includes all respondents

		Total	Survey Segment. Consumers
D3. Respondent's gender.	Male	63.5%	63.5%
	Female	36.5%	36.5%
Total Responses		474	474

Includes all respondents

		Total	Survey Segment. Consumers
D5. State of residence.	Colorado	11.6%	11.6%
	Iowa	12.9%	12.9%
	Mississippi	13.3%	13.3%
	Nevada	9.1%	9.1%
	Oklahoma	13.7%	13.7%
	Pennsylvania	11.2%	11.2%
	South Carolina	9.1%	9.1%
	Tennessee	9.9%	9.9%
	Texas	9.3%	9.3%
Total Responses		474	474

Includes all respondents

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Before the Trademark Trial and Appeal Board

In the matter of Trademark Registration No. 2,390,988

For the mark SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR and Design

Date Registered: October 3, 2000

COPY

BASS PRO TRADEMARKS, LLC,	*	
Petitioner,	*	CANCELLATION NO.
vs.	*	92045000
SPORTSMAN'S WAREHOUSE, INC.,	*	
Respondent.	*	

* * * * * * * * * * * * * * * * *

Friday, September 15, 2006

Washington, D.C.

The telephone deposition of GARY T. FORD, Ph.D., called for examination by counsel for respondent, commencing 2:15 p.m., at the office of Olender Reporting, Inc., 1522 K Street, Northwest, Suite 720, Washington, D.C. 20005, before E. Faye Grant, Court Reporter and Notary

Public for the District of Columbia, when were present on behalf of the respective parties:

* * *

APPEARANCES (via telephone)

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WITNESS: GARY T. FORD, Ph.D.

Examination by:
Mr. Allgeyer Mr. Upchurch
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No. 4 - Winkelman Report 63

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Whereupon,
GARY T. FORD, Ph.D.,
Was called for examination and, after having been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR RESPONDENT
BY MR. ALLGEYER:

Q. Good afternoon. Do you go by Professor Ford, Dr. Ford, or something else?
A. Either one. It doesn't matter.
Q. Okay. I'll use Dr. Ford because it's shorter.
A. That's fine.
Q. All right. Could you please state your full name for the record.
A. Gary Thomas Ford.
Q. Thank you. And your business address.
A. Kogod, K-o-g-o-d, School of Business, American University, 4400 Massachusetts Avenue, Northwest, Washington, D.C. 20016.
Q. Okay, great. Because this is a telephone deposition, if we get disconnected for

any reason we'll immediately call back to this number. And we will ask the Court Reporter to include the fact of disconnection on the record as we go ahead.
Have you been deposed before, Dr. Ford?
A. I have.
Q. On how many occasions?
A. I'd say 20, 25.
Q. How many of those were in connection with your work as an expert witness?
A. All.
Q. Of those, how many were trademark cases, to the best of your recollection?
A. I'd say maybe a third to a half.
Q. So, something like seven to 10?
A. Yes. That's an estimate.
Q. Are you able to tell me, as best as you can recall, as you sit there, the marks that were involved in the various matters for which you gave depositions?
A. I think that if you refer to my CV --
Q. Okay.

A. -- toward the end, I have the list of cases that I've been in in the last four years. And I think it's probably easiest just to go down through those and see.
Q. All right. That will be great. Do you have with you your rebuttal report?
A. Well, the Court Reporter has it. You want to mark it as an exhibit?
MR. ALLGEYER: That will be great. Madame Court Reporter, if you'd mark that as Exhibit 1. Let's make it Ford Exhibit 1, I think has been the way we've been doing it.
(Ford Deposition Exhibit Number 1 was marked for identification.)
BY MR. ALLGEYER:
Q. And then if you can have a look at that, Dr. Ford, confirm that's your expert report. And then once that's done, I will ask you to turn to Bates Number Ford 30.
A. You want me to -- okay, hang on. I am there.
Q. Okay. Well, first of all, do you

recognize this as the rebuttal report that you provided in the matter of Bass Pro Trademarks v. Sportsman's Warehouse?
A. I do.
Q. All right. I believe that this is the listing that you were referring to?
A. Yes.
Q. "Expert and Expert Witness Assignments Since 2002"?
A. Yes.
Q. Can you just go through there and go ahead and just tick off for me the ones that involve trademarks, and then we'll go back and see which trademarks.
A. Hispanic.
Q. Okay.
A. Diarama.
Q. Okay.
A. I think Pharmavite did, but it might have been deception. It was close.
GEICO, 3M, Polo, Omni, 9 Squared, Medi-Flex, Align, and American Century.

Q. Okay. Now, Hispanic Broadcasting, if you could let me know what the trademark was and perhaps the issue?
A. It was a radio call sign; KLOV, K-L-O-V. And the question was whether there was confusion between those call signs from those two different providers of radio signals.
Q. Did you provide testimony on behalf of the plaintiff or the defendant?
A. Educational Media was my client.
Q. The defendant?
A. Yes. I guess, yeah.
Q. And the question was whether there was confusion; is that correct?
A. Yes.
Q. And what did you determine?
A. That there was not.
Q. Did you do a survey?
A. Yes.
Q. What kind?
A. Telephone.
Q. Did you start with a list or some other

way? How did you get the names for the survey?
A. It was random-digit dialing.
Q. What's random-digit dialing?
A. There's no list. You start with just knowing the area codes and knowing the three-digit prefixes, and then randomly selecting -- then having a random number generator generate the last four numbers, and dialing from there, and then screening.
Q. How did you qualify people?
A. Oh, gee, I don't remember. I mean, that was three or four years ago. But, basically, we had to get people that were familiar with the call letters. As I recall, Educational Media Foundation is owned by a Christian -- or is a Christian company. And KLOV was a Christian broadcasting company. And Hispanic Broadcasting Corporation owned another radio station with the initials KLOV, and that one broadcast in Spanish, and the other one broadcast in English. And one went to Hispanic consumers of popular music, and the other one went to Christian -- people

interested in Christian music stations in English.
Q. Was that case tried to a conclusion?
A. No. It settled.
Q. Okay. Did you have your deposition taken?
A. No.
Q. Just provided a report?
A. Yes.
Q. Okay. And the next one is Diarama Trading Company v. J. Walter Thompson and others.
A. Yes.
Q. What was the issue there?
A. The initials D-T-C.
Q. Okay. What was the claim with that, trademark infringement basically?
A. Yes.
Q. Any confusion?
A. Well, you guys may know it better as lawyers than I do. I can describe the situation.
Q. Okay.
A. J. Walter Thompson represents DeBeers.

Q. Yes.
A. And they had a company that sells diamonds called the Diamond Trading Company and they wanted to use the initials D-T-C. And the client I was working for, Diarama Trading Company, sells diamonds, and it was also using the initials D-T-C.
Q. Okay. So, you were working for Diarama Trading Company?
A. I was.
Q. And you did a report. And I assume your report found there was a likelihood of confusion there?
A. It did.
Q. Did that involve a secondary-meaning inquiry or not? Was it just confusion?
A. Well, you know, you raise a good question. I just don't remember. I remember that there was very little awareness of the initials D-T-C having to do with DeBeers. But I don't remember what else the survey found.
Q. Okay. And you did a report and had your

deposition taken. Was that case tried to a conclusion?
A. I think it's still alive.
Q. Okay. Was your report presented in connection with any court proceedings?
A. I don't know anything more than what I've told you. I said I think it's still alive. I have no idea. I have had no contact with anyone really since the deposition.
Q. Okay. The next one is Pharmavite v. Weider Nutrition Group. Maybe you can describe the issue there?
A. It was a dietary supplement. And I actually think that it was probably a deception issue in the sense that Weider was using or describing a product and advertising it in a way that was similar to the Pharmavite product. And I don't remember whether it was confusion or deception.
Q. Okay. And who was your client?
A. Pharmavite was my client.
Q. Okay. And you gave a report together

with Michael Mazis?
A. Yes, I did.
Q. Who's Michael Mazis?
A. Michael Mazis is a colleague of mine at American University, a marketing professor.
Q. And you were deposed in that case?
A. I was.
Q. Was that case tried to conclusion?
A. I think it settled.
Q. Okay. Was your report ever used in a court proceeding?
A. Not that I -- I think it settled right soon after my deposition, so I doubt it.
Q. Okay. What kind of survey did you do in that case?
A. It was a mall intercept.
Q. I don't know what that means. Explain that to me would you please?
A. Yes. It was screening people in a shopping mall to make sure they met the eligibility criteria, and then if they did, inviting them back to a room to be shown some

materials and interviewed.
Q. Okay. Is there a reason that you would
3 choose that in some circumstances rather than
4 others?
5 A. I think when you need to show people
6 something, you pretty much are going to use --
7 the most common procedure is to use mall
8 intercepts.
9 Q. Okay. Oh, you said mall intercepts?
10 Okay. I thought you said mobile intercept.
11 A. No. Mall. M-a-l-l. Sorry.
12 Q. I do know what that is.
13 A. Yeah.
14 Q. Okay. By the way, have you ever done a
15 survey where you have to show people things where
16 you use the Internet?
17 A. I have.
18 Q. Is that one of these cases? Are we
19 going to get to that or --
20 A. No. It doesn't exist on here.
21 Q. Okay. Maybe you can tell me about that.
22 What was the circumstance and why did you decide

1 to use the Internet?
2 A. The case took place in Sweden, and it
3 involved Swedish consumers. And they needed to
4 -- and the case involved recognition of various
5 logos. And in that situation, because the
6 respondents were dispersed throughout the country
7 of Sweden, it was most effective to do that with
8 an Internet panel.
9 Q. Okay. Was that Internet survey in
10 conjunction with a telephone survey?
11 A. No.
12 Q. Just Internet?
13 A. Yes.
14 Q. What was the response rate on something
15 like that?
16 A. I don't remember. But it was a panel,
17 so it was high.
18 Q. What do you mean by a panel? I'm
19 unfamiliar with that.
20 A. A panel is a group of consumers who have
21 been pre-recruited and who have agreed to respond
to interviews. Panels exist probably in every

1 developed country in the world. For example, in
2 the United States, Market Facts has a panel I
3 think of 750,000 households. And the panels are
4 set up so that they're demographically,
5 socio-economically and geographically balanced to
6 replicate the United States population.
7 Originally these panels started out as mail
8 panels when using the U.S. Postal Service. As
9 telephones became more prevalent, they started
10 developing telephone panels. And over the last
11 ten years, they have been developing Internet
12 panels in the same criteria of being
13 demographically, socio-economically, and
14 geographically representative of Internet
15 households.
16 Q. I see. Thank you. Next is the GEICO
17 case?
18 A. Yes.
19 Q. What was the issue there?
20 A. Initial interest confusion.
21 Q. Okay. That involved Google and Overture
22 Services. Who was your client?

1 A. GEICO.
2 Q. All right. And did you do a survey?
3 A. I did.
4 Q. What kind?
5 A. Mall intercept.
6 Q. What was the issue; what was confusing
7 initially?
8 A. The issue had to do with the sponsored
9 links that appear. This case involved both
10 Yahoo, which is owned by Overture Services, and
11 Google. And the issue was that when people
12 entered the letters g-e-i-c-o into, say, the
13 Google search engine, not only do they get
14 organic search results, which we might all think
15 of as sort of the real search results, but over
16 on the right-hand side and sometimes at the top,
17 there are sponsored links, which are paid
18 advertising that is associated with using
19 different search terms.
20 Q. Okay.
21 A. And GEICO was concerned that those
22 sponsored links mentioned GEICO in them, and they

had no affiliation in any sense at all with GEICO. And they were there to -- and that potential consumers were being misled by those sponsored links.

Q. And that case went to trial it looks like?

A. It did.

Q. What jurisdiction was that?

A. It was in Alexandria, Virginia.

Q. Close to home, huh?

A. Yes.

Q. Okay. What was the result of that trial, if you know?

A. They settled. They started a trial, and then in the middle the two sides got together and worked out a settlement.

Q. Okay. Next is Polo Ralph Lauren versus United States Polo Association. Tell me about that one. It looks like that one went to trial. Who is your client?

A. Polo Ralph Lauren.

Q. And what was the issue?

A. The United States Polo Association wanted to use a logo that Polo Ralph Lauren perceived was too close to their horse and rider logo.

Q. Did you do a survey?

A. I did.

Q. What kind?

A. It was a mall intercept.

Q. Okay. And that was because you had to show people things?

A. Yes. It was a post-confusion study.

Q. What do you mean by post-confusion?

A. Excuse me. I mean post-purchase study. We showed people the shirts on mannequins as if they were seeing someone on the street wearing a Polo shirt.

Q. Oh, I see. Okay. Did the case get tried to a verdict?

A. Yes.

Q. Oh. How did it turn out?

A. Won some, lost some.

Q. Okay. Except on the shirt, right?

A. Yeah, I guess. Parts of it they won and parts of it they lost. Or both sides, I guess.

Q. Okay. Maybe that's why so many of them settle. Omni Pacific, Inc. versus OmniBrands.

A. Yes.

Q. Well, what was the issue there, please?

A. The issue was that Omni Pacific was suing OmniBrands for similarity in the names and confusion about the names.

Q. And who was your client?

A. OmniBrands.

Q. So, you were the defense expert?

A. Yes.

Q. Did you do a survey?

A. No. I did a rebuttal report.

Q. Okay. Suggesting that their methodology was incorrect for the survey showing confusion, I'm guessing?

A. There were a number of problems with it. But I think the sample size was something like 30 people or, as I remember, it was very small and unlikely to be representative of anything.

Q. Okay. 9 Squared, Inc. versus Moviso, LLC and InfoSpace. Maybe you could describe that one to me.

A. 9 Squared was my client. And 9 Squared and the other firms provide ringtones.

Q. Okay. What was the issue?

A. The issue, as I remember it, was whether certain terms, such as ringtones, are generic terms or are they branded words.

Q. And you did a report?

A. It was a rebuttal report.

Q. Okay. And what did you conclude, just in general?

A. There were some flaws in the other guy's study.

Q. Okay. Did that case go to trial or anything?

A. No.

Q. Medi-Flex.

A. Medi-Flex, well --

Q. If I did the wrong one --

A. No. No. Nice-Pak was my client.

Q. Okay.
A. **And it was a preliminary injunction hearing, and I did a rebuttal report.**
Q. What was the issue in the case?
A. **Whether consumers were going to be confused by the name of a new product that Nice-Pak was introducing that allegedly was similar to a product sold by Medi-Flex.**
Q. Okay. I'm sorry. You said your client was who?
A. **Nice-Pak.**
Q. Okay. What was the result of the hearing, do you know?
A. **There was no confusion.**
Q. So, no injunction was --
A. **Yeah, right. Exactly.**
Q. Okay. Next is Align Technology versus Orthoclear. Who was your client in that one?
A. **Align.**
Q. And what was the issue?
A. **The issue is invisible braces.**
Q. Okay. And what about invisible braces?

A. **Orthoclear was using the same advertising slogan in their advertising as had been used many years by Align Technology.**
Q. I see. And, so, that was sort of a confusion based on ad situation?
A. **Yes.**
Q. All right. And did you do a survey or just a rebuttal report?
A. **I did an Internet survey.**
Q. And how did you get your list of surveyants or whatever they're called?
A. **The participants were general practitioner dentists and orthodontists.**
Q. Did you start with a list or how did you --
A. **Yes. Started with an Internet panel.**
Q. They have Internet panels for something that specialized, huh?
A. **Yes. I think in the health professions area it's always difficult to get doctors and nurses and other health professionals and, so, the Internet turns out to be a convenient way to**

reach people. They get paid an incentive, but they can answer the thing on their own time. So, it turns out to be a way to get information from that group, from those groups of health professionals.
Q. What was your conclusion as a result of the survey you did?
A. **Well, because Align had been -- I think because Align had been using the advertising slogan for many years, consumers, the dentists associated that slogan with Align rather than with Orthoclear.**
Q. Okay. Did that case go to trial?
A. **It's still going.**
Q. Still going, okay. And finally, I think, we have American Century Proprietary Holdings versus American Century Casualty Company. Who was your client in that case?
A. **The first one, the plaintiff.**
Q. What's the issue?
A. **Similarity of the names.**
Q. Oh, the American Century part?

A. **Yes.**
Q. Okay. Did you do a survey?
A. **I did.**
Q. What kind?
A. **Mall intercept.**
Q. What did you conclude?
A. **That people perceived that the two companies were associated in some way.**
Q. And you did a report?
A. **Yes, I did.**
Q. It hasn't gone to trial yet?
A. **No. It's just recent.**
Q. Have I pretty well now exhausted your trademark survey and expert work, at least in the last three years with this line of inquiry?
A. **Yes. And there wasn't anything in 2002, so that's it.**
Q. All right. What did you do to prepare for today's deposition?
A. **I was sent the revised Mr. Winkelman report. I looked through that, and I talked to Mr. Upchurch.**

Q. What did you talk to Mr. Upchurch about?
A. About the deposition.
Q. How long did you talk to Mr. Upchurch for?
A. I think about 45 minutes.
Q. Did Mr. Upchurch indicate that there were any areas where you should concern yourself about your testimony or make sure you said one thing or another?
A. No. It was mostly give me time to object if I need to.
Q. Okay.
A. And tell the truth and be clear. That type of stuff.
Q. Have you had a chance to review the Winkelman report fully, the new one?
A. Pretty fully, yes.
Q. Okay. We'll get to that in a minute. If you'd just quickly turn to Appendix B of your report, which is 432 on the Bates numbers in the lower right-hand corner.
A. Yes.

Q. There's a listing of documents that said you consulted or that you referred to.
A. Right.
Q. If we were to add the Winkelman, the newer Winkelman report, the September one I believe it is, would this in fact list all the documents you've looked at in connection with this matter or have you seen some later?
A. No. That's it.
Q. Okay. Apart from your discussions with -- well, let me go back. Have you seen Professor Mazis' report on this matter?
A. I have not.
Q. You weren't asked to review it or criticize it?
A. I was not.
Q. Okay. Have you spoken to Professor Mazis about his report?
A. Only that he did one. But we haven't spoken -- I have no idea what he did.
Q. Okay. Did you have the assistance of anyone else in preparing your rebuttal report,

Exhibit 1?
A. Mr. McCarty -- Dr. McCarty.
Q. Who is Dr. McCarty?
A. John McCarty is a marketing professor at The College of New Jersey, which is near Trenton. And he helped me in terms of looking up the cities. For example, one of my exhibits talks about the cities in which Bass Pro and Sportsman's Warehouse are located. And he, I think, helped me prepare the material in Exhibit -- one of the exhibits here. Appendix C. And --
Q. Well, let me catch up with you. Just a second.
A. Sorry. I'm sorry. It's a little more difficult with you not here or me not there.
Q. That's true. But think of all the airfare we saved. [laughter]
A. Yeah, I know.
Q. Okay. You said appendix --
A. I said Appendix C. And then appendix -- the numbers, the I.D. numbers in Appendix C continued, and then Appendix D.

Q. Okay. So, Bates 33 through 36?
A. Yes.
Q. Okay. What precisely did he do? Let's start with Bates Ford 33, Appendix C.
A. Well, he originally looked up for me the cities in which there were -- for what respondents mentioned. He identified whether there was a Bass Pro in the city or a Sportsman's Warehouse in the city or both or neither.
Q. Okay. Now, do you know what his criteria were? For example, I'll give you an example I know about here. We have Minneapolis, and we also have I don't know how many suburbs; ten or eleven suburbs. In his calculation did he count suburbs --
A. Yes.
Q. -- as close enough, or did he count cities as close enough for suburbs, or do you know?
A. In general he attempted to count suburbs as close enough.
Q. And how do you --

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A. **Well, we had discussions about that.**
Q. Okay. Do you know in which cases that was done, in which cities and which suburbs?
A. **No.**
Q. Okay. How about the suburbs of St. Louis; do you know if he counted St. Charles the same as St. Louis?
A. **I don't know off the top of my head, no.**
Q. Where would you have to go to look to see whether that was done or not?
A. **I would have to go back to -- I would go -- I presume it's in a database someplace.**
Q. Okay. But I'm not going to be able to find it in the report; correct?
A. **No. That's correct. But we do have -- you do have the information in the report by respondent I.D. number, to see how things were categorized.**
Q. Okay. Where is that located?
A. **If you continue with Appendix C, on the second page.**
Q. Right. Okay. And the respondent I.D.,

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that's just a number that's assigned to each row on a data file from the Winkelman survey?
A. **Yes. In the order in which it appeared in the file that Mr. Winkelman supplied.**
Q. I'm guessing then each number corresponds in some way to a person; right?
A. **Yes.**
Q. Is that how you take that?
A. **That's correct.**
Q. Okay. Appendix D, was that also prepared by Professor McCarty?
A. **Yes.**
Q. Did Mr. McCarty do anything besides prepare Appendixes C and D?
A. **Not really.**
Q. Okay. Did anyone, apart from Professor McCarty, contribute to this report in any way?
A. **No.**
Q. Apart from any discussions you may have had with Professor McCarty or Mr. Upchurch, have you discussed this report with anybody else?
A. **Mr. Rusche.**

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Q. Fred Rusche?
A. **Yes.**
Q. He's with Mr. Upchurch's law firm?
A. **Yes.**
Q. Okay. What did you discuss with Mr. Rusche?
A. **Mr. Rusche was just my contact person.**
Q. Okay. Did you discuss anything substantive with him?
A. **No. Not that I recall.**
Q. How did you determine what exactly it was that you were going to comment on in this report? Did the lawyers for Bass Pro kind of say we'd like you to comment on this, or did they just give you the report and say comment any way you'd like, or some combination of the two?
A. **Well, I think that, based on my experience over the years, I know what to look for in terms of the research methodology used in a survey. So, as I recall, the only instructions I got were we'd like you to evaluate the Winkelman survey.**

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Q. Okay. Have you done any surveys for Bass Pro Shops other than -- have you ever done any surveys for Bass Pro Shops?
A. **I have not.**
Q. Have you done any work for Bass Pro Shops apart from this rebuttal report that we see here today?
A. **I have not.**
Q. Do you know anyone from Bass Pro Shops?
A. **Do I know anyone?**
Q. Yes.
A. **No.**
Q. Okay. Thinking back on trademark-related surveys that you have done, have any of those surveys ever been actually entered into evidence in a court proceeding?
A. **Well, I think the Polo.**
Q. Polo. Any others?
A. **And I think -- well, I don't know. Let's go back and look. I'm just thinking about what we went through.**
Q. Okay. So we can go back --

A. **Yeah, to page 30.**
Q. That's page 30 of your report.
A. **Well, GEICO is and Polo. I don't know where these other ones stand that are still going on.**
Q. But you haven't been put on the witness stand and asked to explain your report and give your opinion in the others; right?
A. **That's correct.**
Q. Okay. How many surveys would you say -- and I appreciate you probably won't be able to give me to the penny -- but how many surveys would you say you've done in your professional career?
A. **Including the ones I've taught and courses I've taught and what students have done?**
Q. No. Let's break those down. Let's do the ones that you've been hired to do; hired to do and done surveys or supervised.
A. **Oh, I'd say at least probably 50.**
Q. Fifty, okay. And how about surveys you might have supervised in your teaching role?

A. **Probably over 100.**
Q. And of those hundred, those are typically done by students?
A. **Oh, yeah. That's their assignment.**
Q. Okay. And these are marketing classes or --
A. **Marketing research. I've taught undergraduate, MBA, and Ph.D. courses in research.**
Q. Okay. What would you say the sort of -- if there is a way to characterize -- sort of the focus of your research and work, let's say about right now in your academic career?
A. **I think it's on an area called economics of information.**
Q. Can you just give me the layman's explanation of that?
A. **Oh, sure. It really has to do with how people understand when they should be skeptical or not skeptical of advertising.**
Q. Okay. That's sort of a research and writing focus of yours?

A. **It has been over the years, yes.**
Q. Anything else is a focus of your --
A. **Well, I do consumer behavioral research on a variety of areas. I've done a series of studies on nutrition labels, things like that.**
Q. Okay. You mentioned in your report a term called convenience sample.
A. **Yes.**
Q. And you probably remember this, but I see references to it on page 3, and I'm sure it's in here a couple of other places. Can you define for me what a convenience sample is?
A. **Generally, a convenience sample is a term that is widely used for any non-probability sample.**
Q. Okay.
A. **That could include people because they volunteer to be interviewed, people we interview because they're close to us in terms of -- or because we belong to a church group, and we can interview some of the people in the church, or other kinds of reasons like that.**

Q. Okay. Now, in your report -- and it's on page 11 if you want to look at it, but I bet you remember this -- you indicated that the Survey Sampling International list that Mr. Winkelman used is a "convenience sample."
A. **Yes.**
Q. Tell me all the reasons that you believe that it's a convenience sample.
A. **Well, it's a non-probability sample for sure. Because in order to be a probability sample, one would have to have a list of the people who are eligible or potentially eligible for participating in this survey, and that doesn't exist. And then it's a matter of just how the list was pulled together. My understanding is, a lot of the names on that list come from people who fill out, for example, warranty cards for products that they might buy, such as a DVD player. And then on the warranty card, it also has the list of items and said whether you have an interest in those particular areas.**

Q. What's the basis of your understanding of how SSI does its sampling?
A. **Through information from SSI.**
Q. Who'd you talk to there?
A. **Mr. McCarty talked to SSI. That's another thing he did.**
Q. Well, that wasn't a discussion you had with SSI?
A. **No. It was a discussion that he had. It was a task that I gave him, and then he reported back to me.**
Q. Do you know who he talked to at SSI?
A. **No.**
Q. Okay. Did you ask him that?
A. **No.**
Q. I notice on paragraph 43 of your report you suggest that Mr. Winkelman should have demonstrated how and why he believes the SSI sample replicates the relevant population. Do you see that?
A. **Yes.**
Q. Is it fair to say that if Mr. Winkelman

did demonstrate that or articulated that, that you would withdraw your objection that he used a convenience sample?
A. **Well, I think it's still a convenience sample, but whether it's representative or not is important.**
Q. Okay.
A. **I think if it is representative, then it's better.**
Q. Okay. So, is it fair to say that just because something's a convenience sample doesn't always mean that it's a flawed sample that's not usable?
A. **I agree with that with a caveat. And the caveat is that I think in those situations what you need to do is set up a quota sample. For example -- and this is all hypothetical, but it'll indicate my point. Suppose that with prior research we learn that two-thirds of the people who engage in these activities are males and one-third are females. And let's suppose that they tend to skew younger than older, such that**

40 percent of them are between 18 and 34, 20 percent are between 35 and 54, and 20 percent are 55 and older. I'm trying to get to 100 percent there, so I hope I did that. In terms of quota sample then, we might establish quotas such that the ending sample we have is broken down two-thirds males, one-third females, 60 percent between the ages of 18 to 34 and 20 percent each in those other two age groups.
Q. And then that would allow you to use a convenience sample if you did it in that way; is that what you're saying?
A. **Yes. That's the best you could do.**
Q. I note that in a few cases you talked about doing mall intercept samples. Isn't that by definition a convenience sample?
A. **Yes. But they are with quotas. And that's really the point I was explaining. We're not going to have -- it's very difficult to have a random probability sample of people who use a particular type of product, because most times lists don't exist. So, what you have to do is**

try to develop a representative sample by establishing quotas that allow you to wind up with an ending sample that has the same characteristics of the user population or the relevant population.
Q. I note that in your report you refer to the work by Shari Seidman Diamond.
A. **I do.**
Q. "Reference Guide on Survey Research."
A. **I do.**
Q. All right. Do you have that report there?
A. **It is in the pile that you have. Do you want us to mark it as an exhibit?**
MR. ALLGEYER: Yes. Let's mark that as Ford Exhibit 2.
(Ford Deposition Exhibit Number 2 was marked for identification.)
MR. ALLGEYER: Let me know when you've got that, please.
THE WITNESS: It's ready.
BY MR. ALLGEYER:

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Q. Thank you. Now, my understanding is you recognize this as an authoritative guide on survey research?
A. **I think it's one of the best out there. I don't agree with every word in it, but it's quite good.**
Q. Okay. Just in the end there is something about mall sampling. If you look at page 247.
A. **Yes.**
Q. And you can read as much of this as you need to get the context.
A. **Where am I looking? I'm on 247, but I'm not sure where I'm supposed to be on it.**
Q. I'm about to put you there.
A. **Okay, great. Thank you.**
Q. I'm focusing on the second full sentence where she talks about, "Training that reduces the interviewer's discretion in selecting a potential respondent is likely to reduce bias in selection, as are instructions to approach every nth person entering the facility through a particular door."

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Do you see that?
A. **Yes.**
Q. Okay. Now my understanding is what Professor Diamond is telling us is that one way to try to make a mall intercept survey a little more representative, is to make sure that you don't just take everybody that walks in the door but that you take sort of a random sampling of them; every third person or something like that. First of all, is that your understanding of what she's trying to say?
A. **I think she's -- that is what I believe is a pretty good summary of what she's trying to say, yes.**
Q. Okay. Then I note that in footnote 68 she says that, "In the end, even if malls are randomly sampled and shoppers are randomly selected within malls, results from mall surveys technically can be used to generalize only to the population of mall shoppers." Do you see that?
A. **I do.**
Q. Do you agree with that?

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A. **I agree that technically that is correct. What happens though is that my experience has been -- for example, a typical study I might use, if it's a national product, I might use 12 malls or 16 malls scattered throughout the four census regions of the U.S. And we scatter them around because we want to make sure that we got some people from the South, from the North and the East and the West and so on. And even though technically the results can't be generalized, though they're only empirical results we have and they result in a -- if the quotas are set up so that the sample is representative of the larger population, in practice those results are generalized as if it would be the same had you taken a random sample of consumers from the entire United States.**
Q. But what if the population you were interested in tended not to go to malls, like I would? That would be me, by the way, if I could help it.
A. **Well, it depends. And let's suppose**

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that some shoppers go to malls and some don't. The question is whether the ones who go to the malls or don't go to the malls have different perceptions of materials that they may be shown. And all you know is that you have a sample that "looks like" the population. And "looks like" is in quotes. And it's the best we're going to do given the reality of budget, time, and so on.
Q. I suppose if you had an unlimited budget you could probably do a better survey than if you didn't. That's true, isn't it?
A. **That's probably true. And unlimited time.**
Q. Unlimited. Okay, fair enough. And is it also fair to say that most surveys have to make some compromises on time and budget since we have neither unlimited time nor unlimited funds; true?
A. **I think there's always tradeoffs that one makes between time and budget, yes.**
Q. Okay. I'll tell you, most -- I shouldn't say most. Is it fair to say that many

survey experts, people in that field, may draw the line of what's permissible in terms of how much time and money to spend as opposed to others who might think you might spend more? In other words, do folks all agree with each other on that necessarily?

A. I really can't answer that question, other than to say that I think in situations, for example, where you need to show somebody something, mall intercepts are in general the best way to do that. And sometimes you can't; for example, with a study of dentists or health professionals, you may not be able to do that because of the extraordinary expense that might be. And you're not going to get them to come into a shopping mall. So, I guess, it depends on the situation.

Q. But is it a fair assumption on my part that in this, like most areas, that not all experts agree with each other on all aspects of how surveys should be conducted and how much time and money should be spent on them?

A. I think that that's oftentimes a -- I think that the client budget and the timing are going to be influential. And the expert has to be very forthright in what is being traded off, and decide whether the survey is going to be reliable when it gets done if it uses a certain methodology -- in other words, you shouldn't use a methodology just because it's cheap if it doesn't provide reliable information. And then that's up to the expert to make a decision about.

Q. All right. And it's fair to say that not all experts agree on exactly the way that that ought to be done; is that a fair conclusion on my part?

A. Yes. And I mean if it's going to be used in a litigation context or you want to use it in a peer reviewed context, you have to recognize if you're doing something that the referees or the person who might be evaluating it is going to hold you to pretty high standards.

Q. Okay. There's another document that I've -- on my behalf it was sent to you out

there, entitled, "Reference Manual on Scientific Evidence" on the front. And there's another article, as I understand it, out of the same reference guide the Diamond article is out of. Do you have that there?

A. I believe you're referring to the "Reference Guide on Statistics."

Q. That's correct. By David Kaye and David Freedman?

A. We have it. Should we mark it?

MR. ALLGEYER: Would you, please. That would be 3.

(Ford Deposition Exhibit Number 3 was marked for identification.)

BY MR. ALLGEYER:

Q. Thank you. Could you have a look at Exhibit 3 please, Dr. Ford, and tell me whether that is something you're familiar with?

A. I am not familiar with it.

Q. Do you recognize that as being in the same reference guide as the -- in the Reference Manual on Scientific Evidence?

A. I have seen it in the table of contents.

Q. You have not reviewed it?

A. If I did, I only skimmed it.

Q. Okay. Well, I'll just ask you, because it won't help me to have you read this. In this reference manual, it is my impression that the authors refer to mall intercept or surveys done of mall shoppers as convenience samples. Do you agree that mall surveys rely on convenience samples?

A. It depends on how they're done. They're always convenience samples, so I agree with that. The question is whether the representative samples are not, given that they're convenience samples. It's similar to the discussion we had a bit earlier where I indicated, I hope, that with a mall intercept sample, it's a non-probability sample. And because of that, the only way that you can have some confidence that your results are reliable, is to attempt to develop quota sampling procedures that allow you to develop a sample that, as the words I used, "looks like"

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the larger population. And by "looks like" I mean have the same demographic and socioeconomic characteristics on whatever variables you think are important.

Q. Let me ask you, perhaps, a little better and more pointed question: If you look at page 162 of Exhibit 3 --

A. Yes.

Q. -- the authors define convenience sample. And in the last sentence of that they say mall samples are convenience samples. Do you see that?

A. Yes. And I also see the prior language that says such samples are -- and remember I said this is a non-probability sample. And what they've said in the first sentence is a non-random sample of units. That means non-probability. Those are synonyms. And it says, such samples are easy to take but may suffer from serious bias. The way you try to get around the bias, or to minimize the probability of the bias, is by setting up quotas so that the

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sample looks like, has the same characteristics as the larger population. If you don't do that, you do run the risk of having biases.

Q. Okay. But biased or not, do you agree with the statement that mall samples are convenience samples?

A. Oh, I agree that they are convenience samples. And for that reason, you have to be careful to make sure that they have the same characteristics of the population you're trying to represent.

Q. Okay. Apart from the inquiries that Dr. McCarty made to SSI, have you ever made any inquiries to that organization?

A. I have.

Q. Tell me about that.

A. I have made inquiries to it a few times. I can't give a number. But primarily for samples based on SIC Code of Organizations.

Q. Okay. Have you used SSI samples in your survey work? In other words, you said you asked about SIC samples. I'm just trying to follow

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that up. Does that mean you got those kinds of samples or lists from SSI to use in your work?

A. Well, I know that I was intending to. I can't ever remember whether I did or not.

Q. Okay. Have you, apart from that, had any other contact with SSI or used any of their lists, apart from the SIC Code samples?

A. I don't think so. I think it's only been in situations where I was attempting to do interviews with businesses or with executives or representatives of various kinds of businesses. My understanding is that SSI develops this business list samples by getting every Yellow Pages in the country and calling those companies that they don't already have information about, to identify the SIC Code that they're in. And they assign a business to only one SIC Code, and that's how they developed those lists. And those are the lists that I'm talking about using.

Q. Okay. But not the other way I guess, huh?

A. I can never remember using it for a

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consumer study.

Q. Do any of your colleagues use SSI for consumer studies?

A. Not that I know of.

Q. Okay. I wanted to clarify something in your report. And we can either look at -- you can actually look at your report, or I can just refer to it. You've indicated that in Mr. Winkelman's work the lack of a don't know or no opinion option is a problem. And then you say that studies indicate that presentation of an explicit don't know or no opinion alternative commonly leads to a 20 to 25 percent increase in the proportion of respondents selecting that response.

A. I do.

Q. You recall that?

A. Yes. And I think that's a quote from Diamond.

Q. Okay. Now, have you yourself done any research or analysis of the effect of an explicit don't know or no opinion alternative in survey

research?
A. **I can never remember running any experiment where I looked at that factor.**
Q. Okay. So, in this particular instance, you're relying on Diamond's work in that regard?
A. **Yes. I am relying on Diamond's work, and I'm also -- and without giving any citations -- I'm also familiar that people have been criticized in litigation areas for not having a don't know option.**
Q. Okay. We're talking about the Coors case?
A. **I'm not sure what case I'm referring to. I'm just saying that it's in the back of my mind that it's something that's important to include.**
Q. In your report you refer to a case, which if you're real lucky I'm going to be able to find. Bear with me just a second. I thought I had it marked. On page 18 of your report -- I believe that's right. I could be wrong. Well, skip that. I'm sorry. That's the wrong reference. It's page 16, actually. Coors

Brewing versus Anheuser Busch is a case that Professor Diamond cites?
A. **Yes.**
Q. Okay. So, you just relied on Professor Diamond's citation of that case?
A. **That's correct. In this case I am. But I wasn't necessarily referring just to this case. It's just things that I've read over the years, and I can't necessarily give you a citation for that. That's all.**
Q. Okay. Have you read the Coors case?
A. **I may have. But it doesn't come to mind.**
Q. Apart from there being a -- not having a no response or no option, do you know whether the Court attacked the survey on any other grounds?
A. **I do not know, no.**
Q. In your report you've indicated that a -- well, actually, you've indicated that Professor Diamond indicates that a don't know alternative would commonly lead to a 20 to 25 percent increase in the proportion of respondents

selecting a don't know response?
A. **That's correct.**
Q. So, is my math correct that if, for example, the I don't knows were, let's say, nine percent if you had a -- with a closed-end question, if you had an explicit no opinion alternative, the increase would be 20 percent of nine percent, whatever that is?
A. **Well, I think that's what that reads. But when you have a situation where, for example 50 percent of the people say don't know, then that would lead it up to 60 percent.**
Q. Okay. And if you had ten percent, it would lead to 12 percent; correct?
A. **That's correct.**
Q. Okay. But the one thing we're clear on, you would not add 20 percent, you would take 20 percent of the don't know responses?
A. **That's how I understand what she's saying there.**
Q. Okay. I did, too. But I want to make sure I understood.

A. **But see below in Table 1 on the same page --**
Q. Yes.
A. **-- where we have 116 out of 219?**
Q. Yes.
A. **That could lead from 53 to 63 percent, about.**
Q. Yes. 20 percent of --
A. **Yeah, the 53, right.**
Q. Yes.
A. **Or 25 percent, yes.**
Q. Okay. I want to talk a little bit about control groups.
A. **Yes.**
Q. Do you use a control group of some type in every survey that you do?
A. **I try to.**
Q. Okay.
A. **If it's a survey where I'm investigating a causal proposition. And by causal I mean, A causes B. Or exposure -- I'll take it out of a trademark context and put it in another one.**

Exposure to an ad causes people to think something about a product. In those situations, I attempt to use a control group if I can. Sometimes you can't, and you should use a control question. But I think whenever you're investigating causal issues, it's good to -- it's mandatory, not good -- it's mandatory to have a control of some type.

MR. UPCHURCH: I'm sorry. We've been going about 70 minutes. Could we take a short break?

MR. ALLGEYER: Oh, absolutely. Should we just leave the line open?

MR. UPCHURCH: Yes. I think so.

MR. ALLGEYER: Okay. You want to take -- how long do you want to take?

MR. UPCHURCH: Five minutes is fine.

MR. ALLGEYER: Okay, great.

MR. UPCHURCH: Thank you.

THE WITNESS: Thank you, gentlemen.

MR. UPCHURCH: Thank you.

(Thereupon, a recess was taken.)

BY MR. ALLGEYER:

Q. Okay. I wanted to just clarify one thing. I'm not quite sure I'm so fascinated with these mall intercepts as an alternative method. But since we've been talking about it, you said there's a way you randomize and take other steps -- I don't want to get this wrong -- but to make sure you've got the appropriate cross sample of consumers in such a survey, or words to that effect. Do you recall that?

A. Yes. And I didn't use the word randomize. But I did say that you want to get a representative sample.

Q. Okay. And somehow you used some kind of -- could you just walk me through how you actually do that? Let me put it that way.

A. Well, okay. I think what you're referring to -- and if I'm wrong, let me know -- I think what you're referring to is setting up or developing a quota sample --

Q. That was the word; quota sampling procedures. Yes.

A. -- to get a representative sample.

Q. Yes.

A. Okay. The example I used was, let's suppose we have a situation where two-thirds of the consumers are males and one-third are females, and that 60 percent are between the ages of 18 and 34, 20 percent are between 35 and 54, and 20 percent are 55 and older. What you would do is, as people are entering the mall or walking through the mall, you would approach them and ask them some screening questions. And let's suppose that you already had enough men, well, then, you would only approach women because you filled out your quota of men. But let's suppose that you need some men -- stop and go back again -- that we need some men, but what we need are men who are 55 and older.

Then as men are walking through the mall, we wouldn't intercept kids, we wouldn't intercept my son, but we would look for somebody like me who maybe might be 45 or older as best we can tell. We would ask that person his age and

if he says 46, we'd say, sorry, thank you very much. But if he said 55 or 56, then we're still trying to close that quota, and we would then ask the person other screening questions. So, you really are trying to, at the end, build a sample that replicates the relevant population in terms of the, in this case, the variables of age and gender.

Q. But what is your method you use to determine or set the quotas? How do you do that?

A. That's a good question, a great question. I think what you do there is you go -- I'll tell you what I do most frequently. I'll ask the client what information do you have about the relevant population from your own internal marketing research. And usually the client will have some information saying who their target market is or the relevant market is. If not, then I will go to published sources and do a literature review to identify the characteristics from surveys that have been published or data that has been published about the characteristics

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of that population. And we'll estimate what the population should look like from either of those two sources.

Q. Okay, thank you. I'm going to move on for a moment. I want to go back to something -- in your report on page Ford 11. This is Exhibit 1.

A. Yes.

Q. You have indicated, in paragraph 42, agreement with Mr. Winkelman's survey objectives, where you say they appear appropriate for the issues of this case. Do you see that?

A. Yes, I do.

Q. Okay. What do you understand to be the issues in this case?

A. Well, I understand it to be that people may or may not associate the term Sportsman's Warehouse with both your client and with Bass Pro. And whether they're confused about whether those stores with names that include Sportsman's Warehouse are associated with each other in some particular way.

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Q. Okay. Now, one of the questions Mr. Winkelman asked was designed to determine whether consumers associated Sportsman's Warehouse with a particular source. And you might recall those questions?

A. Yes. And it would be helpful maybe if we could mark the Winkelman report as Exhibit 4, so I could refer to those -- make sure that my understanding of what you're asking about is the same as you're actually asking about.

MR. ALLGEYER: Sure. Let's go ahead and mark that.

THE WITNESS: That's, by the way, all the exhibits that we have here.

MR. ALLGEYER: Okay. We've got the whole thing nailed then. Okay, great.

(Ford Deposition Exhibit Number 4 was marked for identification.)

THE WITNESS: Okay. Let me make sure that what you are asking about is what I think it is.

BY MR. ALLGEYER:

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Q. If you go to page Ford 4-4.

A. Yes. Where it's questions -- oh, wait a second. 4-4?

Q. Well, I've got a particular one. Question A-4.

A. Oh, okay. Sorry. I was down at the bottom. Yeah, good. Sorry.

Q. Okay. Now, without -- first of all, do you understand the meaning of the term secondary meaning in trademark law?

A. I have a vague understanding of it, but I would not characterize it as any more than vague.

Q. Okay.

A. And certainly not a lawyer's understanding of it.

Q. Right. Well, it depends on the lawyer, actually. [laughter]

Is it your understanding that in order to establish secondary meaning, that a customer has to be able to identify the specific source of the product or service?

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MR. UPCHURCH: Objection. Calls for a legal conclusion on the part of the witness.

MR. ALLGEYER: And I don't want a legal conclusion, I want the witness' understanding of a legal concept. So, unless Mr. Upchurch says you can't answer, please go ahead and tell me.

MR. UPCHURCH: Oh, I'm not instructing the witness not to answer. I just want the record to be clear that this would be his understanding, not a statement of the law, which would be binding on Bass Pro.

MR. ALLGEYER: Absolutely. I understand and agree with that.

And, by the way, I'm pleased I was able to get on this far without objection. Thank you.

MR. UPCHURCH: I can do it more often.

MR. ALLGEYER: No. Don't feel like you have to. Just kidding. [laughter]

THE WITNESS: I guess I don't know quite how to answer that question. And I think I've forgotten it. Maybe you could read it back to me again.

BY MR. ALLGEYER:
Q. Let me state it over.
A. **I'm sorry. I just kind of lost it.**
Q. And I'll concede that Counsel will have the same objection to this question as the last one.
Is it your understanding that to establish secondary meaning in trademark, that one must establish that the customer is able to identify the source of the product or service?
A. **It's my understanding that you'd have to come as close as possible to doing that. And I'm only thinking about that from a measurement perspective. I want to be able to say what people are telling me and interpret that as unambiguously as possible.**
Q. Okay. One of the things I note in your report, and you can look at page 20, is that -- and I'm probably going to get the math wrong here. But, basically, you didn't count in Table 2, if I understand this right, as someone recognizing Sportsman's Warehouse or associating

that mark with them if they couldn't properly name the city for a Sportsman's Warehouse. Have I said that about right?
A. **You've said that correctly.**
Q. Okay. So, just so I understand, for you to believe that someone associates Sportsman's Warehouse with a particular source, they have to know what that source is or at least where it is, the way you have delivered your report here; is that true?
A. **In terms of my adjusted analyses, that is correct. Now, the problem I was working with is that there seemed to be so much guessing going on with the responses that were going on with the Winkelman Report, that we needed a way to see whether people actually were expressing knowledge or were just giving a guess. And given the data that existed, this was the way I came up with.**
Q. Okay. Well, assume with me for a second that in fact one is able to establish secondary meaning if consumers associate a particular mark with a single source, although that source may be

anonymous. Under those circumstances, would you agree with me that simply not being able to recognize the city doesn't necessarily disqualify a response from associating a mark with a particular source?
A. **I agree with that point. However, it seems to me that what you want to be able to do in that situation is net out the guessing. Because let's -- they associate it with a source, but they don't have a lot of information about the source, and how do we know they're guessing or not. That's where the subject of controls comes in. Because with controls you are able to assume that the amount of guessing that goes on would go on in both groups at a similar level. And, so, you can wind up subtracting the control results from the results you get to have a little more confidence that the number you get is representative of what the true level of perception is among all consumers.**
Q. Okay. So your concern, as I understand it, was not necessarily to conform to the issue

of their being a single anonymous source, but you rejected those answers because you thought that might represent guessing?
A. **That's correct. There really did seem to be a substantial amount of guessing.**
Q. I take it that you would agree with me that those people who said I don't know or no response weren't guessing, they were just saying they didn't know?
A. **That's right.**
Q. And there was a significant number of people who did indicate don't know responses to this and other questions in the survey, true?
A. **That is true.**
Q. One of the criticisms that I understand you had of the first Winkelman Report, which I probably didn't put before you and you probably don't have with you, but I bet you'll remember from your report, is that it included information for ten vendors. Do you recall that?
A. **I do.**
Q. Okay. And have you looked at the new

Winkelman Report, Exhibit 4?
A. Well, I have looked at the report. I don't know where Exhibit 4 is specifically, but I've looked at the report.
Q. Okay. The new one.
A. Do you mean Figure 4?
Q. No, I mean Exhibit 4. I'm sorry. The final report. That's the new one that you just recently looked at, right?
A. Yeah.
Q. Okay. And you'll note that or did you note that Mr. Winkelman simply eliminated the vendors from the report?
A. Oh, I see. I'm sorry. When you said Exhibit 4 I was not thinking of Ford Exhibit 4 of my deposition. I was looking for Exhibit 4 in his report. Sorry.
Q. Okay, I got you. I could have done that on a Friday afternoon, too, I guess.
A. I understand from his new report that the vendors have been eliminated.
Q. All right. Does that eliminate your

concern based on the vendor data?
A. Well, if they're not in there, yeah.
MR. ALLGEYER: Okay. What I'm going to do, Mr. Upchurch, with your permission, is take about two minutes. I think we're done, but you never know. So, if I may have just a couple of minutes to look things over, we'll be able to wrap it up quickly.
MR. UPCHURCH: That's fine.
MR. ALLGEYER: All right, thank you.
(Thereupon, a recess was taken.)
MR. ALLGEYER: Thank you very much, Dr. Ford, for your time. Those are all the questions I had. And, Mr. Upchurch, will you be reading and signing?
MR. UPCHURCH: Yes. And I have no questions for the witness at this time.
MR. ALLGEYER: Okay, thank you.
THE WITNESS: Thank you, sir.
(Thereupon, reading and signing not being waived, the above proceedings were concluded at 3:45 p.m.)

CERTIFICATE FOR READING AND SIGNING

I hereby certify that I have read and examined the within transcript and the same is a true and accurate record of the testimony given by me.

Any corrections I have listed on the separate errata sheet enclosed, indicating the page and the line number of each correction.

_____
GARY T. FORD, Ph.D.

_____
Date

CERTIFICATE OF NOTARY PUBLIC

I, ELVIA FAYE GRANT, the officer before whom the foregoing deposition was taken do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of the witness was taken by me in stenographic notes and thereafter transcribed under my supervision; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto nor financially or otherwise interested in the outcome of the action.

_____
Elvia Faye Grant, Notary Public
District of Columbia

My Commission Expires: February 28, 2008

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Registration No. 2,390,988

For the mark SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR and Design

Date registered: October 3, 2000

BASS PRO TRADEMARKS, L.L.C., Petitioner,	COPY
-vs-	Cancellation No. 92045000
SPORTSMAN'S WAREHOUSE, INC., Respondent.	

Washington, D.C.

Friday, September 22, 2006

Deposition of MICHAEL B. MAZIS, a witness in the above-entitled action, called for oral examination by counsel for the Respondent, pursuant to notice of taking deposition, and having been duly sworn, at the offices of Olender Reporting, Inc., 1522 K Street, Northwest, Suite 720, Washington, D.C., commencing at 3:34 p.m., and the proceedings being taken down by Stenomask by PAUL R. CUTLER, Certified Verbatim Reporter with Certificate of Merit, and transcribed under his direction.

A **Well, it seemed to make sense that if you wanted to try to assess confusion, that people in those states might have had some experience with one or more of those shops, so they would be the most informed audience.**
Q Do the have the Diamond reference in front of you?
A **Yes.**
MR. ALLGEYER: Mr. Court Reporter, would you please mark that as Exhibit 2?
(Mazis Deposition Exhibit 2 is marked for identification.)
MR. ALLGEYER: Off the record.
(Whereupon, a brief recess is taken.)
MR. ALLGEYER: Let's go ahead.
BY MR. ALLGEYER: (Resuming)
Q I believe we just marked Exhibit 2. Do you have that before you, Dr. Mazis?
A **Yes, hold on just a minute. Okay.**
Q And Exhibit 2 is a Reference Guide on Survey Research authored by Shari Seidman Diamond, correct?
A **Yes.**
Q And you referred to that as an authority in your report on Page 8, is that correct, Footnote 2?
A **I didn't use the word "authority."**

Q Well, do you believe that this is an authoritative guide?
A **Well, in general, yes. I mean like all treatises, you know, there could be areas of weakness and there could be areas that it's really strong in, but in general, I think it's a very good source.**
Q You agree with the Diamond article, for example, explanation of the reason that you use an appropriate control group, correct?
A **Yes, I think it's very strong in that area, gives a nice, clear explanation.**
Q All right. Now if you turn to Page 247 of the Diamond report --
A **Okay.**
Q -- she's talking about -- you can look at 246, if you'd like, for context, but she's talking about recruiters for on-site interviews and suggests that there are potential biases in selection by those recruiters. And then she suggests that those potential biases in selection can be reduced by providing appropriate selection instructions and training recruiters effectively. Do you agree with that statement, first of all?
A **Yes.**
Q All right, now I didn't see anything in your

report on the training that was given to the people doing the mall intercept for this survey. Did you do a training?
A **Yeah, there was a whole training session. Let me find it for you. If you look at Appendix E, Bates Number 207, it describes the supervisor instructions and there are also interviewer instructions.**
And if you look particularly at Page Bates Number 210, it describes the briefing and practice material, so there's practice interviews and there's an audio tape that needs to be sent. And the Target Research conducts a briefing session with each supervisor. So there's a whole procedure here set up for training people and answering any questions they have and it's pretty thorough.
Q How are the interviewers selected?
A **Well, these are all professional firms. I've done a lot of research with Target, they are the best in the business. They select facilities that they have good experience with, that do a good job. That's not true of all facilities, I've had some not so good experiences with some facilities.**
And you'll notice that on Bates 210, it says here, "You will need experienced interviewers who are

good at administering, probing and recording open-ended responses. You may not use an inexperienced or new interviewer," and so on. They know when they get instructions like this that this is likely some litigation survey. Also the tipoff is there's a hundred percent validation attempted, which usually isn't done in commercial surveys.
So there's a general understanding between Target and the facilities that they really need to put experienced interviewers on here, that these interviews are going to be checked, they're going to validated, there's going to be a verification process, so that's really important.
Q But do you know how the particular interviewers for this study were selected, other than that Target said they wanted people that were good at it?
A **I don't know specifically how these particular people were selected.**
Q Did you have any interaction with any of the interviewers?
A **No.**
Q Did you go to any of the sites sort of to oversee how they were doing things or otherwise see how things were going on the ground?

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A No. I've used Target for many studies and have a lot of confidence in their ability to administer these surveys.
Q You mentioned that there were some groups that you've had problems with in the past. Can you tell me just sort of the general nature of the problems that you've had in other surveys?
A Well, for example, the problem of fabricated interviews that --
Q That sounds like a problem.
A Yeah, it certainly is, I mean it's one of the reasons why validation is important. You know, when you see at certain sites validation rates are low and then you go in and you actually look at the verbatim responses, it gives you a pretty good idea.
I mean I've had cases where the same verbatim response seems to be repeated over and over again. It's pretty unlikely that, you know, several interviewees are going to give such similar responses. So I've had that happen, it's troubling, but it isn't that common.
Q Now you mentioned that Target Research, I think is the name, they sort of subcontract with groups in malls to do this interviewing? In other words, is there another company that's set up by the mall that

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does that?
A Well, they're independent facilities. There's several chains of these malls. There are some that are just independent, they're stand-alone facilities in the malls, they just rent space in the mall. And then there's others that belong to these chains where, you know, they have like a hundred or more facilities all over the country.
My experience is that it's better to deal with them because they have higher standards in terms of training and supervising and they have procedures. So most of the time, Target Research uses one or more of those chains.
Q You mean chains of malls or chains of survey outfits?
A Chains of survey outfits.
Q Okay, and do they have names, these chains, are they a branded company?
A Yeah. I'm trying to think of the one that Target uses all the time. It's Quick Test.
Q Do you know what survey outfit was used in this particular study?
A I believe Quick Test.
Q How would you check?
A I could call up Target Research Group. Quick

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Test is the largest one, my experience is they do the best work. You know, there's other chains, but I've had the best success with Quick Test.
Q Now these malls that were used in the cities that were mentioned in your report -- I'm trying to get a picture of what kind of malls they are. Are they strip malls or sort of more those kind of enclosed malls we're used to?
A They're enclosed malls.
Q The ones with many stores and so forth?
A Yes.
Q And do any of those malls have sort of outdoor activity, sporting goods stores in them that you know of?
A I don't know.
Q Do you know if any of those malls have within them any Bass Pro Shops?
A I don't know.
Q How about a Sportsman's Warehouse?
A I don't know. That's something that I can go back and take a look at, it's a good question. I thought most of those were stand-alone stores, I didn't think that they were actually part of an enclosed shopping mall. At least the pictures that I saw on the Web sites seemed to indicate that they were stand-

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alone, but certainly I could go back and check on that.
Q All right, but as you sit there today, you don't know whether any of these malls had any sporting goods stores, outdoor sporting goods stores within them, correct?
A Right, but I don't believe that Bass Pro Shops or Sportsman's Warehouse stores were part of any of these malls.
Q Okay, and how about Scheels or L.L. Bean or any of those, Academy?
A I don't know.
Q Now if you would turn back with me to Diamond for a minute, one of the things that Ms. Diamond suggests is training the interviewers, and this is in the second full sentence on Page 247, as to the, ". . . instructions to approach every nth person entering the facility through a particular door," things like that.
Do you know whether anything like that was done in your mall intercept survey?
A Not to my knowledge.
Q Okay, so so far as you know, it wasn't done that way, correct?
A Correct.
Q Now the other thing I note that Ms. Diamond says in Footnote 68 is, "In the end, even if malls are

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randomly sampled and shoppers are randomly selected within malls, results from mall surveys technically can be used to generalize only to the population of mall shoppers." Do you see that?

A **Yes.**

Q And in this case, your survey sample was done only within malls with mall shoppers, is that right?

A **Right, and that's correct, but she goes on, I think in another part of this, she talks about the fact that just about all Lanham Act surveys use shopping mall intercepts. And the idea here is that it's obviously not a random sample of everybody in the population, it's a random sample of people that are in the malls.**

But they provide a reasonably representative sample and that's just what's commonly done in the field and it's certainly been accepted by courts. I've used these mall intercept samples for lots of studies and I've never had one rejected by a court. They're commonly used in industry and it's just -- people used to criticize that methodology probably 25 years ago, but I haven't heard that lately.

Q But just to be clear, you didn't randomize the malls in any way, did you?

A **What do you mean by randomize the malls?**

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Q Find a way to randomly sample the malls, in other words, pick the malls at random.

A **Well, it's possible to do that, but I don't think that's a very good procedure because you wind up getting firms in these malls that may not do the best work.**

The one thing you have to realize is that this random sampling is really not that important in a case where you have an experiment. It's more important if you're trying to estimate a population parameter, you're trying to estimate some number in a population. But in an experiment, you have two groups, you have this test group and a control group and so really what you're looking for is the difference between the two groups.

So I mean to the extent one wants to argue that the mall, by interviewing people in a mall created some bias, which I don't think it did, but if you want to argue that, then it would affect both groups equally. So it's really -- this whole thing about picking the malls at random or people within the malls at random is really not relevant in a survey in which you have a test group and a control group. Both groups are treated in the same way.

Q All right, so to be clear, you didn't pick

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the malls at random, right? Okay, and you didn't --

A **No, and rarely is that done.**

Q All right, and you didn't pick the shoppers in the malls at random, either, right?

A **Correct, that isn't typically done, either.**

Q Are you familiar with the term quota sampling?

A **Yes.**

Q What is that?

A **That's where the sample is picked so that it approximates a population based on certain criteria.**

Q Okay, did you do any quota sampling in this case?

A **Yes.**

Q And what was the quota sampling?

A **It was on sex and on age.**

Q And what was the criteria?

A **I used the data from the Winkelman survey.**

Q Okay, and what was the criteria there that you used?

A **I forget his exact percentages, but I think it was 65 -- oh, I'll tell you. It was about 65 percent males and 35 percent females and then the age was 18 to 44, about 40 percent, and 45 and over, 60 percent.**

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Q And so how does that work, does the recruiter go out and pick somebody they think is within those groups, is that typically how that works?

A **Well, usually in the beginning, they're just interviewing people as they come up. It becomes more of an issue when you approach the quota.**

Q Okay.

A **And then let's say you have enough men in the quota, but you need more women, so obviously, you're not then approaching men any more, you're just starting to approach women. So you can see it in the screen questionnaire, how that works. There's something in there that says if you've exceeded the sex quota or something, then you need to go on and pick somebody else.**

Q If they exceed it and do an interview, what do they do with that interview, they just throw it out later?

A **No, they don't exceed it because they're monitoring the numbers as they go along.**

Q Okay, so they don't exceed it.

A **Correct.**

Q Have you ever heard of an outfit called Statistical Sampling International, an organization that provides survey data?

A Yes, SSI, yes, I'm familiar with it.
Q Have you used them in the past yourself?
A No.
Q Do you know anyone who has?
A Not that I can remember. I think I might have used them once because they also provide telephone numbers. So I think quite a while ago when I wanted a list of telephone numbers selected randomly, they provided that, but that's the only time I can remember.
I know they have other samples, that if you want a sample of people that, oh, you know, bought an automobile in the last year or something or, you know, whatever, people that bought Tupperware recently or something or people that bought furniture in the last year, that they -- I think they get that information from warranty cards and sort of other sources. They're not random samples, typically, you know, they're convenience samples.
Q By the way, a mall intercept is not a random sample either, right?
A Correct.
Q Would you call it a convenience sample?
A It's a convenience sample and it's a quota sample.
Q I'm going to move on a little bit. What is

distribution data?
A You'll have to give me a context there.
Q Is there something called call distribution data for telephone surveys?
A You mean disposition?
Q Oh, I'm sorry, yeah, disposition. They both start with dis, though.
A That's correct.
Q That's not going to work, is it? I apologize -- disposition data.
A I'm familiar with that, yes.
Q What is it?
A That's where usually in a telephone survey, where you report the number of call attempts and you sort of break it down from the number of call attempts to how many numbers you could reach and after so many attempts and then how many couldn't be reached and then how many refused and it sort of breaks it down by all these different categories, so you know -- essentially, what it's used for is to try to calculate the response rate in the survey.
Q Did you keep disposition data on this mall intercept survey?
A No, I've never seen that done in a mall intercept survey, it's not part of the standard

methodology.
Q What's the purpose of keeping disposition data in a phone survey?
A Well, the phone survey, if it's done properly, has the advantage of being a probability sample, which a mall intercept can never be a probability sample. So part of determining whether you have a probability sample is the proportion of people who respond.
So let's say you had all these numbers and you wound up calling them and you only got a five percent response rate. Then the question is do those five percent represent the population. And I think in most cases, you would conclude it didn't.
So the call disposition data is used to try to makes some assessment as to whether you got a sufficient response rate and whether those respondents are likely to represent the population you're trying to make an inference to.
Q Well, in these mall intercept surveys, do customers from time to time refuse to take the survey?
A Yes.
Q Is it important to know how many refused and that sort of thing?
A No, because there's no claim that these are

probability surveys.
Q Okay, I want to talk a little about the survey design for this particular survey. But in general, as I understand, just like any survey, you're going from sort of a specific sample and then trying to generalize to the relevant population from that. Is that right?
A Yes.
Q Okay, and I take it that -- we may have touched on this before, but in designing the survey, one of the things that you would want to do was, particularly since it related to company logos, is replicate market conditions in which the logos operate as closely as you can. Is that something --
A To the extent you can do that. Any of these types of trademark surveys are only sort of an attempt to replicate reality, but they always fall short because what you're doing is artificial, you know, you're not really showing products in stores or, you know, the way people would encounter them in the real world, but you're trying to create some facsimile.
I think the key thing is to have a test group and a control group and treat those two groups the same, so you're looking for differences between the groups, that's the key issue here.

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Q Well, in this particular survey, I note that
the respondents were told to sort of look at the Bass
Pro-Sportsman's Warehouse mark as long as they would
normally look at such a mark, but to look at it about
as long as they wanted to. Do you recall that?
**A Let me get that in the questionnaire here,
let me turn to that. On Bates Number 169, "I'd like
you to look at this store logo the way you would if you
were considering buying some products from the store.
Take as long as you normally would to examine the
logo."**
Q But there was no constraint on them in how
long they should look at it, except that you said,
"We'd like you to look at it as long as you normally
would," correct?
**A Yeah, that's a standard instruction that is
followed in these types of studies.**
Q And there's no way to know whether they
really looked at it as long as they normally would or
if they looked at it longer or not, correct?
**A Yeah, that's true. I don't know what your
point is, but yeah, that's true.**
Q Okay, you're relying on them to make that
decision, true?
A Yes, as it always is in these types of

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trademark studies.
Q One of the things that I understand folks in
the survey business, let's say, consider and try and
eliminate is sort of a "yes" bias, that is the thought
that people may say yes to please the person taking the
survey.
A Right.
Q And that's something you try and eliminate,
correct?
A Yes, and certainly I did that in this survey.
Q Now in this survey, the first chance to say
yes on a key issue was Question 7a, the "put out by"
question?
A Right.
Q Then if someone didn't say yes to that, they
had another chance to say yes to Question 8c, what I'll
call the permission or approval question, the one that
reads -- well, where you characterize in your study on,
let's see, Bates 113, where they needed permission or
approval. So that was a second chance to say yes,
correct?
A Right.
Q And there is a third chance to say yes in
Question 9c, the question being is one of the logos
before them affiliated with the company that puts the

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logo they've seen earlier, that is the Bass Pro-
Sportsman's Warehouse logo, correct?
A Yes.
Q Okay, so they had three chances to say yes
for one of those three concepts, right?
**A Well, that's right, but you have to realize
that the people in the test group and the control group
both had the same opportunity. So if somebody wanted
to make the argument that there's a yes bias, which I
don't think there is, but if you want to make that
argument, you'd have to make that argument for both the
test and the control group.**
**So to the extent that there was any yea
saying bias here or yes bias, it would occur equally in
both groups. And therefore, essentially, it would
cancel out because -- I mean that's the reason for a
control group. So the point you're trying to make is
really not appropriate here with this type of design.**
Q I'm not really trying to make a point, I'm
just asking questions. And the answer to my question,
though, is in terms of a response that's favorable to
finding some "put out by" affiliation, permission,
approval of the mark, there were three chances to say
yes the way the survey is designed.
A Yes, there were three chances in the test

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**group and three chances in the control group, they both
had an equal number of chances, and those chances
cancel out each other because you compare the results
of the test group with the control group.**
Q So to answer my question, there were three
chances to say yes, right?
**A There were three chances to say yes in both
the control group people and the test group people and
therefore, those three chances cancel themselves out
because it was equal in both groups.**
Q So if I understand what you're saying, so
long as you've got a control group, you don't need to
worry about yes bias, is that true?
**A Well, I can't say that it can't ever be an
issue because you do need to have the questions as
unbiased as you can. But when you have a control
group, the yes bias, in general, is not important.**
Q In Question 7a, you use, as I understand it,
the phrase "put out" or "made by." Have you done any
testing to see how consumers understand that phrase,
particularly the "put out by"?
**A It's the standard phrase that's used in
confusion surveys. I've used it many, many times; I've
never seen any problem with it.**
Q So is there any way that a person would have

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to know that by "put out by," they don't mean maybe from the same newspaper advertiser or the same advertising agency, things like that?

A I've never seen any indication that that's an issue because they are asked to say the company that puts this out. In the follow-up question, 7b, I didn't see any mention of newspaper, so I don't think that that's in anybody's mind here.

Q Okay, in Question 8c, essentially, you talk about whether the subject logo or let's say the second array of logos -- let me start over again -- that the array of logos that's shown after you showed them the Bass Pro-Sportsman's Warehouse logo, whether any of those needed permission or approval from the people who put out the first logo or words to that effect.

A Right.

Q When you were doing that, were you asking the respondents to come to a legal conclusion?

A No.

Q What kind of conclusion were you asking them to come to?

A Based on their perception, did they think that when they saw these logos, did they think these logos looked like there needed to be some permission because of the similarity of the logos. Again, it's a

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standard question, I've used this same question in a number of surveys. No one's ever criticized that, it's just basically a standard question that's used in these trademark surveys.

Q Then in Question 9c, you use the words, among others, "affiliated with."

A Right.

Q What does that mean?

A Well, of course, it means what the consumer thinks it means, but it's the idea that there's some connection. If the consumer perceives that the logos are similar in some way, do they think there is some relationship between the company that put out the first logo they saw and any of the logos that are in the array.

Q Okay, and certainly you don't specify what that relationship might be, right?

A No, that's for the consumer to understand in his or her own way. Again, these are standard questions, I've asked these questions a number of times, other researchers have asked similar questions. This is basically -- this is standard methodology that's used in most of these trademark surveys and I've never seen it challenged.

Q For these questions, did you draft these

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questions or did you copy them from somewhere else?

A I drafted them. Now I've used these before, similar questions, in other surveys.

Q But you've not done a study of what these mean to the consumers?

A No, but I've done a number of these surveys and I haven't observed any problems with this wording, people seem to understand it.

Q By the way, do you have the -- I'm going to have trouble identifying what these are, some tables that we got. I'll identify them by Bates number. There should be four documents that we got recently, they're sort of spreadsheets that have the verbal response to some of these.

A Right.

Q Could you look at the one that's MBM000240?

A 240?

Q Yes, please.

A I don't see that. Is that here?

Q At the bottom, it says L, paren, Sportsman's Warehouse, closed paren.

A I don't have that, it wasn't provided to me. There are only three documents that were provided.

Q Okay, let's go off the record for a second.

(Discussion off the record.)

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MR. ALLGEYER: Back on the record.

BY MR. ALLGEYER: (Resuming)

Q One of the reasons that I picked up that sort of seemed to be prevalent that people gave for these logos being the same is they all dealt with sporting goods --

A Right.

Q -- or they all dealt with outdoor equipment.

A Right, right.

Q And that's one of the reasons that people seemed to think that they were either "put out by" or "affiliated with," right.

A You definitely got those types of answers and you saw them pretty much equally in the test and the control group. You know, there is a certain amount of I guess what I would call guessing; when you give people these questions, they try to guess what they think you're looking for. And that's why there is a control group, to try to control for that guessing.

Q Okay. By the way, you call that guessing noise, as well, right? The noise is a sort of background noise that has to do with guessing or not understanding, is that the idea?

A Well, that's one element of noise. Noise is really any factor that could impact on people's

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responses other than the issue that you're studying.
So it could be -- in this type of study, guessing is
certainly an issue of background noise.
And question wording could be looked at as
background noise, you know, the way you word questions
could bias people in some way. And the reason that you
have this control group is that this background noise
should be equivalent for both the test and the control
groups.
Q But one of the things to understand this
concept of noise, for example, when people see things
like or when you see answers like, "Oh, I think it's
the same because it deals with outdoor living and
supplies," or, "I think it's put out by the same people
for that reason," that's sort of noise or a mistake on
their part, correct?
A I wouldn't call it a mistake, but to me, it's
a result of a certain amount of guessing.
Q Okay.
A I mean basically, what you're looking for in
those reasons is to the extent they mention something
about the name.
Q Yes. Okay, well, while we're on that, one of
the things, correct me if I'm wrong, the main
difference between your preliminary report and your

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final report -- we've been talking about your final
report today.
But in your preliminary report, and correct
me if I'm wrong, you hadn't mentioned that I believe it
is 22 percent of the respondents who indicate the
Sportsman's Warehouse is put out by, needed permission
or approval, is affiliated with the company that puts
the Bass Pro-Sportsman's Warehouse logo mentioned
similarity of the name. I believe that wasn't
mentioned in your first report, but it is in your
second report.
A Right.
Q Do you recall that?
A Yes.
Q Okay, why wasn't it mentioned in the
preliminary report, was there any reason for that?
A Well, at that time, I hadn't had a chance to
analyze those responses and I think it was felt that in
fairness, I should get you what I had at that point, a
preliminary report so you know, this final report
wasn't dropped on you at the last minute.
Q No, I understand. Okay, so basically, it
came in the final report primarily because you hadn't
had a chance to do it yet, time being what it was and
so forth, correct?

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A Yes.
Q Now what is the significance that 22 percent
mentioned the similarity of the name as the reason? Is
that a low number or a high number or how does that
affect your conclusion here?
A Well, I think the case law on confusion,
Lanham Act surveys, you tend to see anything above 20
percent seems to be viewed as an indication that there
is a significant likelihood of confusion. Now I've
seen studies where the numbers are below 20, even, you
know, in the teens, but courts have sort of gone either
way between, say, 15 and 19 percent. And so, you know,
I sort of, based on my experience in this, that
anything that's 20 percent or above would be viewed as
a significant likelihood of confusion.
Q Did you do anything in your study to account
for the fact that when the Bass Pro mark was registered
with the United States Patent and Trademark Office,
they disclaimed the words "sportsman" and "warehouse"?
A I don't know anything about that.
Q So you didn't try and account in any way for
the disclaimers that they made.
A That's a legal issue, I know nothing about
that.
Q Okay. Do you know what the significance is

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of disclaiming the words "sportsman" and "warehouse"
when applying for a United States trademark?
A No, that's a legal issue, it's beyond the
scope of my expertise.
Q Getting back now to the survey itself, I'd
like to turn and have you turn with me in Exhibit 1 to
the percentage data for the answer to Question 7b,
which I believe you'll find in the document that is
Bates numbered MBM000232. And I'll just wait a minute
and let me know when you're there, if you would,
please.
A 232?
Q Yes, sir.
A Is that in my report?
Q Yes, it's toward the end, I think in
Appendix G.
A I'm looking here. Some of these are out of
order. Oh, wait a minute, here we go.
Q It's kind of sideways.
A I've got it, yeah, I've got it.
Q Okay. Now as I understand it, this is sort
of a summary of the total number of people who answered
-- well, of the total and also of the sportsmen's group
and then the control group -- I'm probably saying that
wrong.

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The column that says Sportsman's Warehouse, let me go back there, what do you call that group? Is that the test group?
A **Yes.**
Q So the total is overall for responses, correct, of the people who thought the various marks were put out or made by the same company as the store logo shown earlier, correct?
A **Yes.**
Q And then the Sportsman's Warehouse column, abbreviated, is the test group and the Gander Mountain, "Mtn.," column is the control group, correct?
A **Yes.**
Q Okay. And so then going down -- well, let's go to the control group. 36.1 percent found one or more of the logos were put out by the same company as the logo they were shown earlier, which in that case is the Gander Mountain logo, correct?
A **No.**
Q No?
A **No. Everybody was shown the Bass Pro-Sportsman's Warehouse logo, everybody saw that logo.**
Q Oh, okay.
A **The difference in the two groups was that -- well, Dick's Sporting Goods, Academy Sports, Scheels,**

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L.L. Bean, and Cabela's, those five logos were shown to everybody, but the sixth logo in the test group was Sportsman's Warehouse and in the control group was Gander Mountain.
Q Oh, okay.
A **But everybody had seen the Bass Pro logo --**
Q First.
A **-- first.**
Q Okay, thank you for that correction, I said that wrong, I appreciate that. Okay, so basically, you put in Gander Mountain as sort of a control to see how many people thought -- well, I thought I understood this and maybe I don't.
33 people said, under the control group, said Cabela's, okay? What does that mean?
A **Well, that means 33 out of 194 people in the control group said they thought the Cabela's logo was put out by the same company that put out by the Bass Pro logo.**
Q And similarly, under the Sportsman's Warehouse, that's the test group. 31 of them or 15.3 percent of them thought that the Cabela's logo was put out or made by the Bass Pro people, right?
A **Yes.**
Q Okay, so if I added all the people up in the

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test group that thought that somebody besides Sportsman's Warehouse had its logo put out or made by the same company as the Bass Pro, I'd get 37.1 percent, correct?
A **Where do you get that from?**
Q At the 15.3, the 4.5 for L.L. Bean, the two percent for Scheels, the 7.9 percent for Academy Sports, and the 4.7 percent for Dick's.
A **Well, they're not really additive because people can give you more than one answer.**
Q Okay.
A **People give multiple answers. I think the way to look at this is to say there's 112 or 55.4 percent thought that one or more of the logos was put out by the same company as the store logo they saw earlier.**
A **Right.**
Q And then you could subtract from that the people who said Sportsman's Warehouse. So it would be 55.4, minus 45 percent, so it was 10.4 percent said something other than Sportsman's Warehouse in answer to that question.
A **Okay, so you're not able to add those percentages because people may have said more than one correct?**

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A **Yes.**
Q Now incidentally, there's no question that Gander Mountain's logo is not put out or made by the same company as Sportsman's Warehouse, right -- I'm sorry, as Bass Pro.
A **Right.**
Q And that's why, as I understand it, that's why that's the control group, because for some reason, that's guessing or otherwise misperceived, true?
A **Yes, so you know, the guessing rate, if you would, was around ten percent for that particular question, as assessed by the Gander Mountain percentage.**
Q All right, can you turn two pages down to 234?
A **Okay.**
Q Let's just look for a minute at the test group, the column that says Sportsman's Warehouse. According to this, 7.9 percent of the people in the test group thought that Cabela's needed permission from Bass Pro to use the subject logo, that is Cabela's logo. Is that true?
A **Yes. The kind of asterisk here or the caveat that you need to understand is that the logos that they mentioned on the first pass through, in other words**

after 7b, they got removed from the array.
Q I understand that.
A Okay, so with respect to the people who -- to the products left in the array, 28 of those people said Cabela's. I mean it was only I guess 88 -- oh, wait a minute, we've got to look at the right column here. We need to look at the second, the column --
Q 16.
A 16, yeah. So there's only 47 people, you know, who thought that any of the remaining logos were put out or that needed permission.
Q Okay, but within those 47, more people thought that Cabela's, Academy Sports and Outdoors or Dick's needed permission from Bass Pro than thought needed permission from -- that Sportsman's Warehouse needed permission, right?
A Well --
Q In other words --
A Yeah, I understand your question. Well, you have to look at that in context because the people that thought Sportsman's Warehouse was put out by the same company that put out Bass, there were 91 of those. Sportsman's Warehouse got removed from the array, you know, by something close to half the people. So if people thought that there was some relationship between

Sportsman's Warehouse and Bass, most of those people were already taken care of because that logo was pulled out of the array.
So the comparisons here between Cabela's and Academy, as compared with Sportsman's Warehouse, I don't think they're really relevant because so many people had identified Sportsman's Warehouse on the first pass through. So I don't think that comparing those numbers means much.
Q Well, somebody will decide that. But of those left, it's true, isn't it, that more people picked Cabela's, Bean -- I'm sorry, not Bean -- Cabela's, Academy Sports and Dicks than Sportsman's Warehouse of those left, true?
A Yeah, that's true, but as I said, I think that's a meaningless comparison.
Q And meaningless or not, there's a similar comparison we could make on Bates Number 236, where again, more people, that is 5.9 percent, thought Cabela's, of those left, was affiliated with Bass Pro than thought Sportsman's Warehouse was, true?
A That's true. Again, you know, it's meaningless. I think the better way to look at this is to cumulate them. Each question, you can't look at each question as being independent because those

questions, for example 9d, is really dependent on what they said in the previous questions. So to me, the appropriate way to look at these is to cumulate the answers. The way you're doing it is basically meaningless.
Q I'm not really doing anything, I'm just asking you, you know, what I've got here.
A Yeah, we can all look at the numbers, we don't really need a question to explicate the number, the number is what it is. I'm trying to put the numbers in context so there's some understanding about what these numbers mean.
Q So far as you're concerned, after you look at Question 7b, the others, do they become meaningless?
A No, no, but I think what you have to do is you have to look at 7b in conjunction with 8d, you know, so when you look at 8d, you don't look at it alone, you have to look at it within the context of 7b and 8d, and the same thing with 9d.
The questions aren't mutually exclusive or not independent because each time, there are items removed from the array, so you have to look at how the numbers cumulate as you ask the questions.
Q Okay. I don't have a whole lot left, but I have some more left. Do you need a break or do you

want to keep going?
A We could take a brief break, maybe a couple of minutes.
Q Okay, let's do that, and maybe during that time, I can find out from the court reporter if some documents arrived.
(Whereupon, a brief recess is taken.)
BY MR. ALLGEYER: (Resuming)
Q I'm showing you, Dr. Mazis, what we've marked as Exhibit 3.
(Mazis Deposition Exhibit 3 is marked for identification.)
BY MR. ALLGEYER: (Resuming)
Q Can you tell me what this is?
A It looks to me as a spreadsheet of the open-ended answers for the Gander Mountain control group.
Q And is this something you've seen before?
A Well, I didn't work with this spreadsheet. There's another spreadsheet -- what I had Target Research do was to focus on a subset of this, of the people in the Gander Mountain who gave a Gander Mountain response, because that was the control product.
Q Right.
A And then I had another spreadsheet that was a

subset of the other one, you know, with the 203, that's the Sportsman's Warehouse group. And then I had a subset of this big spreadsheet that focused only on people that said Sportsman's Warehouse.

So what I did was I compared -- I just made the task easier. So I compared all the Sportsman's Warehouse responses to all the Gander Mountain responses and I was able to calculate to what extent they were mentioning name or they're both Sportsman's Warehouse or something to that effect. So I e-mailed over that spreadsheet.

Q Yeah, I'm looking at it, I have it here.

A Okay, I don't have it here.

Q Well, we'll get that to you. Looking, though, at what we've marked as Exhibit 3, this is something you haven't seen before?

A Well, I've had it, but I really didn't use it in my analysis.

Q Well, from the context of it, is this sort of a summary of the responses to the various open-ended questions, is that the idea?

A Yes.

Q And how is it that we figure out, as we look at this column by column, which mark they're talking about? I suppose we can get some context, but is there

any --

A Boy, let's see here, color? I'm trying to figure this out, too, because I hadn't used this before. Maybe we could reason this together. Let's see, there's -- no, color isn't relevant because that had to do with the rotations, that was the color of the questionnaire. I don't think you can use this because it has to indicate what product they chose and that's not on here.

Q Well, on the top, it says 7c-1, 2, 3, 4, 5. Does that go in the order of the product in the rotation, perhaps?

A Oh, yeah, those are -- that seems to refer to the products that they selected from the array. I'm looking at the N=203 group here.

Q Yes.

A And so if you look at the -- well, the first three, it seems like they didn't pick any from the array, at least in the 7 series.

Q Okay, let me stop you there for a second.

MR. ALLGEYER: Can we mark the one with the N=203 as Exhibit 4, please?

THE WITNESS: Okay.

(Mazis Deposition Exhibit 4 is marked for identification.)

BY MR. ALLGEYER: (Resuming)

Q Okay, I'm sorry, as you were saying, turning to Exhibit 4, it looks like the first three didn't pick any, right?

A Correct. And then the fourth person, 00225, it looks like that person picked three and -- well, the first one -- I mean I'm surmising this, but you could pretty much figure out what products they picked here from the array because it says Sportsman's Warehouse and then the second response was Academy and the third was Dick's. Of course, you can't figure that out in all cases.

Q Do you know who put this together?

A Target Research Group, I guess. I said I didn't rely on this, I asked them to put that other one together because I was interested really for the people who said Sportsman's Warehouse, why they said that, and I was interested in the people who said Gander Mountain, why they said that. Because that was the nature of the design, was to compare the test product versus the control product, you know, just those products. So I guess the other one that you have is the one I used, you know, when I calculated that 22 percent?

Q Yes.

A It must be the other one that you have, but I don't have that in front of me right now.

Q All right, he's working on that, hopefully we'll get that to you. I don't have a lot of questions about it, anyway.

Let me go on and ask a little bit about margin of error. Because in a survey, we are typically beginning with a sample population, then generalizing to the whole universe, all surveys have some margin of error, don't they, once you talk to everybody?

A Well, not technically. I mean there's sort of different views on this, but I think in general, statisticians would say if you don't have a probability sample, you know, if your sample isn't -- your respondents aren't chosen randomly from the universe, then you really can't calculate a margin for error because the issue of normal distributions really don't apply. So margin for error, technically, really just applies in random samples.

Now I mean, you know, you could -- some people think you can calculate a margin for error, but on a mall intercept survey, I don't subscribe to that, nor does Shari Diamond. I mean she basically says flat out you shouldn't calculate a margin for error in a survey that's a convenience survey or a quota survey.

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But if you wanted to apply it, which I don't
2 really agree with, I think it's around six percent
3 would be the margin for error if you were really
4 liberal there. I'm not advocating --
5 Q Let me go over about what you just told me.
6 A I'm not advocating that, incidentally, but --
7 Q Okay, what I understand you to be telling me
8 is there really is no good way to compute a margin of
9 error for a mall intercept survey, since it's a
10 convenience sample, right?
11 A Correct.
12 Q And having said that, that doesn't mean
13 there's no margin of error, it just means there's no
14 way to do it?
15 A Well, I guess both, you know, there's no
16 margin for error because you can't do it, I mean it's
17 not appropriate, statistically. See, in these mall
18 intercept surveys, you're not trying to come up with an
19 estimate of a population statistic. What you're trying
20 to do is to look at the difference between two groups,
21 so you know, it's not a random sample of a population
22 that you can compute, you know, could compute margins
23 for error.
24 But I'm saying, you know, some people do
25 compute margins for error, they're people that are, you

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1 know, liberal or more conservative in terms of the way
2 they look the these samples. So if you wanted to
3 compute a margin for error, if you were a believer in
4 that, you'd take whatever it was, 50 some percent that
5 picked Sportsman's Warehouse, and since that sample
6 size was about 200, I think the margin for error is
7 between six and seven percent, around that percentage.
8 So certainly, the Gander Mountain percentage wouldn't
9 fall within that margin for error. So certainly, if
10 one wanted to do that calculation, one could do that
11 calculation.
12 Q And here, you've used two samples, that is
13 you've got your control and you've also got your test
14 group. If there's a margin of error for each, does
15 that mean your maximum margin of error would be more
16 like 12, since you've got two groups?
17 A No, I don't think so. I mean usually, you
18 would compute the margin for error around the
19 percentage of interest and then determine whether the
20 other percentage falls within that margin for error, at
21 least that would be my view of it.
22 But in any event, I don't think it's
23 appropriate to compute a margin for error, so I'm not
24 an advocate of that, nor is Shari Diamond.
25 Q Okay, but if I can understand what you're

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1 telling me, you don't believe you should do a margin of
2 error here, but if you did, it would be about six
3 percent --
4 A Right.
5 Q -- six or seven percent. And then you
6 wouldn't say that the maximum includes the margin of
7 error for both the control and the test, is that
8 correct?
9 A I'm not a statistician, so that would be, you
10 know, something I'd have to go back and think about in
11 a little more detail, I don't want to commit myself to
12 that right here. I just know when you do these mall
13 intercept surveys, you don't compute a margin for
14 error. So I think I'm just going to stop at that
15 point, I don't want to really go beyond that.
16 Q Okay.
17 MR. ALLGEYER: Off the record for a second.
18 (Discussion off the record.)
19 (Mazis Deposition Exhibits 5 and
20 6 are marked for identification.)
21 BY MR. ALLGEYER: (Resuming)
22 Q Dr. Mazis, I'm showing you Exhibit 5. Can
23 you tell me what that is?
24 A That's a list of the people who picked Gander
25 Mountain from the array in the control condition and it

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1 gives their open-ended response to Questions 7c and it
2 looks like 8d and 9d.
3 Q Is this the full extent of their response? I
4 know there may be 40 of them or something like that.
5 A Well, yes, it is, because once they pick
6 product, they drop out of the array, so there's an
7 open-ended answer only for one of the questions.
8 Q And what, if any, conclusions did you draw
9 from Exhibit 5?
10 A Well, not really much. I think Exhibit 6 is
11 really the primary item or the primary interest,
12 because that's where they're mentioning name
13 similarity, for example.
14 Q Okay, let's go to Exhibit 6, then, and can
15 you identify that for me?
16 A That's the exhibit that shows all the people
17 who picked Sportsman's Warehouse from the array and it
18 gives their open-ended responses to Question 7c, 8d and
19 9d.
20 Q And to qualify as having -- in your 22
21 percent that said the name is similar, what did it have
22 to say, can you give me a few examples of what counted
23 and what didn't?
24 A Well, where they mentioned -- you know, I
25 have to go through my notes, exactly which ones counted

Reference Guide on Survey Research

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I. Introduction

Surveys are used to describe or enumerate objects or the beliefs, attitudes, or behavior of persons or other social units.[1] Surveys typically are offered in legal proceedings to establish or refute claims about the characteristics of those objects, individuals, or social units. Although surveys may count or measure every member of the relevant population (e.g., all plaintiffs eligible to join in a suit, all employees currently working for a corporation, all trees in a forest), sample surveys count or measure only a portion of the objects, individuals, or social units that the survey is intended to describe.[2]

Some statistical and sampling experts apply the phrase "sample survey" only to a survey in which probability sampling techniques are used to select the sample.[3] Although probability sampling offers important advantages over nonprobability sampling,[4] experts in some fields (e.g., marketing) regularly rely on various forms of nonprobability sampling when conducting surveys. Consistent with Federal Rule of Evidence 703, courts generally have accepted such evidence.[5] Thus, in this reference guide, both the probability sample and the nonprobability sample are discussed. The strengths of probability sampling and the weaknesses of various types of nonprobability sampling are described so that the trier of fact can consider these features in deciding what weight to give to a particular sample survey.

As a method of data collection, surveys have several crucial potential advantages over less systematic approaches.[6] When properly designed, executed, and

1. Social scientists describe surveys as "conducted for the purpose of collecting data from individuals about themselves, about their households, or about other larger social units." Peter H. Rossi et al., *Sample Surveys: History, Current Practice, and Future Prospects*, *in* Handbook of Survey Research 1, 2 (Peter H. Rossi et al. eds., 1983). Used in its broader sense, however, the term *survey* applies to any description or enumeration, whether or not a person is the source of this information. Thus, a report on the number of trees destroyed in a forest fire might require a survey of the trees and stumps in the damaged area.

2. In *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138 (E.D. Va. 1995), clam processors and fishing vessel owners sued the Secretary of Commerce for failing to use the unexpectedly high results from 1994 survey data on the size of the clam population to determine clam fishing quotas for 1995. The estimate of clam abundance is obtained from surveys of the amount of fishing time the research survey vessels require to collect a specified yield of clams in major fishing areas over a period of several weeks. *Id.* at 1144–45.

3. *E.g.*, Leslie Kish, Survey Sampling 26 (1965).

4. *See infra* § III.C.

5. Fed. R. Evid. 703 recognizes facts or data "of a type reasonably relied upon by experts in the particular field . . . ."

6. This does not mean that surveys can be relied on to address all types of questions. For example, some respondents may not be able to predict accurately whether they would volunteer for military service if Washington, D.C., were to be bombed. Their inaccuracy may arise not because they are unwilling to answer the question or to say they don't know, but because they believe they can predict accurately, and they are simply wrong. Thus, the availability of a "don't know" option cannot cure the inaccuracy. Although such a survey is suitable for assessing their predictions, it may not provide a very accurate estimate of what their actual responses would be.

described, surveys (1) economically present the characteristics of a large group of objects or respondents and (2) permit an assessment of the extent to which the measured objects or respondents are likely to adequately represent a relevant group of objects, individuals, or social units.[7] All questions asked of respondents and all other measuring devices used can be examined by the court and the opposing party for objectivity, clarity, and relevance, and all answers or other measures obtained can be analyzed for completeness and consistency. To make it possible for the court and the opposing party to closely scrutinize the survey so that its relevance, objectivity, and representativeness can be evaluated, the party proposing to offer the survey as evidence should describe in detail the design and execution of the survey.

The questions listed in this reference guide are intended to assist judges in identifying, narrowing, and addressing issues bearing on the adequacy of surveys either offered as evidence or proposed as a method for developing information.[8] These questions can be (1) raised from the bench during a pretrial proceeding to determine the admissibility of the survey evidence; (2) presented to the contending experts before trial for their joint identification of disputed and undisputed issues; (3) presented to counsel with the expectation that the issues will be addressed during the examination of the experts at trial; or (4) raised in bench trials when a motion for a preliminary injunction is made to help the judge evaluate what weight, if any, the survey should be given.[9] These questions are intended to improve the utility of cross-examination by counsel, where appropriate, not to replace it.

All sample surveys, whether they measure objects, individuals, or other social units, should address the issues concerning purpose and design (section II), population definition and sampling (section III), accuracy of data entry (section VI), and disclosure and reporting (section VII). Questionnaire and interview surveys raise methodological issues involving survey questions and structure (section IV) and confidentiality (section VII.C), and interview surveys introduce additional issues (e.g., interviewer training and qualifications) (section V). The sections of this reference guide are labeled to direct the reader to those topics that are relevant to the type of survey being considered. The scope of this reference guide is necessarily limited, and additional issues might arise in particular cases.

7. The ability to quantitatively assess the limits of the likely margin of error is unique to probability sample surveys.

8. *See infra* text accompanying note 27.

9. Lanham Act cases involving trademark infringement or deceptive advertising frequently require expedited hearings that request injunctive relief, so judges may need to be more familiar with survey methodology when considering the weight to accord a survey in these cases than when presiding over cases being submitted to a jury. Even in a case being decided by a jury, however, the court must be prepared to evaluate the methodology of the survey evidence in order to rule on admissibility. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993).

A. Use of Surveys in Court

Forty years ago the question whether surveys constituted acceptable evidence still was unsettled.[10] Early doubts about the admissibility of surveys centered on their use of sampling techniques[11] and their status as hearsay evidence.[12] Federal Rule of Evidence 703 settled both matters for surveys by redirecting attention to the "validity of the techniques employed."[13] The inquiry under Rule 703 focuses on whether facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[14] For a survey, the question becomes, "Was the poll or survey conducted in accordance with generally accepted survey principles, and were the results used in a

10. Hans Zeisel, *The Uniqueness of Survey Evidence*, 45 Cornell L.Q. 322, 345 (1960).

11. In an early use of sampling, Sears, Roebuck & Co. claimed a tax refund based on sales made to individuals living outside city limits. Sears randomly sampled 33 of the 826 working days in the relevant working period, computed the proportion of sales to out-of-city individuals during those days, and projected the sample result to the entire period. The court refused to accept the estimate based on the sample. When a complete audit was made, the result was almost identical to that obtained from the sample. *Sears, Roebuck & Co. v. City of Inglewood*, tried in Los Angeles Superior Court in 1955, is described in R. Clay Sprowls, *The Admissibility of Sample Data into a Court of Law: A Case History*, 4 UCLA L. Rev. 222, 226–29 (1956–1957).

12. Judge Wilfred Feinberg's thoughtful analysis in *Zippo Manufacturing Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 682–83 (S.D.N.Y. 1963), provides two alternative grounds for admitting opinion surveys: (1) surveys are not hearsay because they are not offered in evidence to prove the truth of the matter asserted; and (2) even if they are hearsay, they fall under one of the exceptions as a "present sense impression." In *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999), the Second Circuit distinguished between perception surveys designed to reflect the present sense impressions of respondents and "memory" surveys designed to collect information about a past occurrence based on the recollections of the survey respondents. The court in *Schering* suggested that if a survey is offered to prove the existence of a specific idea in the public mind, then the survey does constitute hearsay evidence. As the court observed, Federal Rule of Evidence 803(3), creating "an exception to the hearsay rule for such statements [i.e., state of mind expressions] rather than excluding the statements from the definition of hearsay, makes sense only in this light." *Id.* at 230 n.3.

Two additional exceptions to the hearsay exclusion can be applied to surveys. First, surveys may constitute a hearsay exception if the survey data were collected in the normal course of a regularly conducted business activity, unless "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6); *see also* Ortho Pharm. Corp. v. Cosprophar, Inc., 828 F. Supp. 1114, 1119–20 (S.D.N.Y. 1993) (marketing surveys prepared in the course of business were properly excluded due to lack of foundation from a person who saw the original data or knew what steps were taken in preparing the report), *aff'd*, 32 F.3d 690 (2d Cir. 1994). In addition, if a survey shows guarantees of trustworthiness equivalent to those in other hearsay exceptions, it can be admitted if the court determines that the statement is offered as evidence of a material fact, it is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and admissibility serves the interests of justice. Fed. R. Evid. 807; *e.g.*, Keith v. Volpe, 618 F. Supp. 1132 (C.D. Cal. 1985); *Schering*, 189 F.3d at 232. Admissibility as an exception to the hearsay exclusion thus depends on the trustworthiness of the survey.

13. Fed. R. Evid. 703 advisory committee's note.

14. Fed. R. Evid. 703.

statistically correct way?"[15] This focus on the adequacy of the methodology used in conducting and analyzing results from a survey is also consistent with the Supreme Court's discussion of admissible scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[16]

Because the survey method provides an economical and systematic way to gather information about a large number of individuals or social units, surveys are used widely in business, government, and, increasingly, administrative settings and judicial proceedings. Both federal and state courts have accepted survey evidence on a variety of issues. In a case involving allegations of discrimination in jury panel composition, the defense team surveyed prospective jurors to obtain age, race, education, ethnicity, and income distribution.[17] Surveys of employees or prospective employees are used to support or refute claims of employment discrimination.[18] In ruling on the admissibility of scientific claims, courts have examined surveys of scientific experts to assess the extent to which the theory or technique has received widespread acceptance.[19] Some courts have admitted surveys in obscenity cases to provide evidence about community standards.[20] Requests for a change of venue on grounds of jury pool bias often are backed by evidence from a survey of jury-eligible respondents in the area of the original venue.[21] The plaintiff in an antitrust suit conducted a survey to assess what characteristics, including price, affected consumers' preferences. The sur-

15. Manual for Complex Litigation § 2.712 (1982). Survey research also is addressed in the Manual for Complex Litigation, Second § 21.484 (1985) [hereinafter MCL 2d] and the Manual for Complex Litigation, Third § 21.493 (1995) [hereinafter MCL 3d]. Note, however, that experts who collect survey data, along with the professions that rely on those surveys, may differ in some of their methodological standards and principles. An assessment of the precision of sample estimates and an evaluation of the sources and magnitude of likely bias are required to distinguish methods that are acceptable from methods that are not.

16. 509 U.S. 579 (1993). *See also* General Elec. Co. v. Joiner, 522 U.S. 136, 147 (1997).

17. People v. Harris, 679 P.2d 433 (Cal.), *cert. denied*, 469 U.S. 965 (1984).

18. EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1308 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 326 (N.D. Cal. 1992); Richardson v. Quik Trip Corp., 591 F. Supp. 1151, 1153 (S.D. Iowa 1984).

19. United States v. Scheffer, 523 U.S. 303, 309 (1998); Meyers v. Arcudi, 947 F. Supp. 581, 588 (D. Conn. 1996); United States v. Varoudakis, No. 97-10158, 1998 WL 151238 (D. Mass. Mar. 27, 1998); United States v. Bishop, 64 F. Supp. 2d 1149 (D. Utah 1999); United States v. Orians, 9 F. Supp. 2d 1168, 1174 (D. Ariz. 1998) (all cases in which courts determined, based on the inconsistent reactions revealed in several surveys, that the polygraph test has failed to achieve general acceptance in the scientific community).

20. *E.g.*, People v. Page Books, Inc., 601 N.E.2d 273, 279–80 (Ill. App. Ct. 1992); People v. Nelson, 410 N.E.2d 476, 477–79 (Ill. App. Ct. 1980); State v. Williams, 598 N.E.2d 1250, 1256–58 (Ohio Ct. App. 1991).

21. *E.g.*, United States v. Eagle, 586 F.2d 1193, 1195 (8th Cir. 1978); United States v. Tokars, 839 F. Supp. 1578, 1583 (D. Ga. 1993), *aff'd*, 95 F.3d 1520 (11th Cir. 1996); Powell v. Superior Court, 283 Cal. Rptr. 777, 783 (Ct. App. 1991).

vey was offered as one way to estimate damages.[22] A routine use of surveys in federal courts occurs in Lanham Act[23] cases, where the plaintiff alleges trademark infringement[24] or claims that false advertising[25] has confused or deceived consumers. The pivotal legal question in such cases virtually demands survey research because it centers on consumer perception and memory (i.e., is the consumer likely to be confused about the source of a product, or does the advertisement imply an inaccurate message?).[26] In addition, survey methodology has been used creatively to assist federal courts in managing mass torts litigation. Faced with the prospect of conducting discovery concerning 10,000 plaintiffs, the plaintiffs and defendants in *Wilhoite v. Olin Corp.*[27] jointly drafted a discovery survey that was administered in person by neutral third parties, thus replacing interrogatories and depositions. It resulted in substantial savings in both time and cost.

B. A Comparison of Survey Evidence and Individual Testimony

To illustrate the value of a survey, it is useful to compare the information that can be obtained from a competently done survey with the information obtained

22. Dolphin Tours, Inc. v. Pacifico Creative Servs., Inc., 773 F.2d 1506, 1508 (9th Cir. 1985). *See also* SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11 (1st Cir. 1999); Benjamin F. King, *Statistics in Antitrust Litigation*, *in* Statistics and the Law 49 (Morris H. DeGroot et al. eds., 1986). Surveys also are used in litigation to help define relevant markets. In *United States v. E.I. DuPont de Nemours & Co.*, 118 F. Supp. 41, 60 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956), a survey was used to develop the "market setting" for the sale of cellophane. In *Mukand, Ltd. v. United States*, 937 F. Supp. 910 (Ct. Int'l Trade 1996), a survey of purchasers of stainless steel wire rods was conducted to support a determination of competition and fungibility between domestic and Indian wire rod.

23. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1946) (amended 1992).

24. *E.g.*, Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976); Qualitex Co. v. Jacobson Prods. Co., No. CIV-90-1183HLH, 1991 U.S. Dist. LEXIS 21172 (C.D. Cal. Sept. 3, 1991), *aff'd in part & rev'd on other grounds*, 13 F.3d 1297 (9th. Cir. 1994), *rev'd on other grounds*, 514 U.S. 159 (1995). According to Neal Miller, *Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation*, 40 Rutgers L. Rev. 101, 137 (1987), trademark law has relied on the institutionalized use of statistical evidence more than any other area of the law.

25. *E.g.*, Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1142–43 (9th Cir. 1997); American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160 (2d Cir. 1978).

26. Courts have observed that "the court's reaction is at best not determinative and at worst irrelevant. The question in such cases is, what does the person to whom the advertisement is addressed find to be the message?" American Brands, Inc. v. R.J. Reynolds Tobacco Co., 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976). The wide use of surveys in recent years was foreshadowed in *Triangle Publications, Inc. v. Rohrlich*, 167 F.2d 969, 974 (2d Cir. 1948) (Frank, J., dissenting). Called on to determine whether a manufacturer of girdles labeled "Miss Seventeen" infringed the trademark of the magazine *Seventeen*, Judge Frank suggested that, in the absence of a test of the reactions of "numerous girls and women," the trial court judge's finding as to what was likely to confuse was "nothing but a surmise, a conjecture, a guess," noting that "neither the trial judge nor any member of this court is (or resembles) a teen-age girl or the mother or sister of such a girl." *Id.* at 976–77.

27. No. CV-83-C-5021-NE (N.D. Ala. filed Jan. 11, 1983). The case ultimately settled before trial. *See* Francis E. McGovern & E. Allan Lind, *The Discovery Survey*, Law & Contemp. Probs., Autumn 1988, at 41.

by other means. A survey is presented by a survey expert who testifies about the responses of a substantial number of individuals who have been selected according to an explicit sampling plan and asked the same set of questions by interviewers who were not told who sponsored the survey or what answers were predicted or preferred. Although parties presumably are not obliged to present a survey conducted in anticipation of litigation by a nontestifying expert if it produced unfavorable results,[28] the court can and should scrutinize the method of respondent selection for any survey that is presented.

A party using a nonsurvey method generally identifies several witnesses who testify about their own characteristics, experiences, or impressions. While the party has no obligation to select these witnesses in any particular way or to report on how they were chosen, the party is not likely to select witnesses whose attributes conflict with the party's interests. The witnesses who testify are aware of the parties involved in the case and have discussed the case before testifying.

Although surveys are not the only means of demonstrating particular facts, presenting the results of a well-done survey through the testimony of an expert is an efficient way to inform the trier of fact about a large and representative group of potential witnesses. In some cases, courts have described surveys as the most direct form of evidence that can be offered.[29] Indeed, several courts have drawn negative inferences from the absence of a survey, taking the position that failure to undertake a survey may strongly suggest that a properly done survey would not support the plaintiff's position.[30]

II. Purpose and Design of the Survey

A. Was the Survey Designed to Address Relevant Questions?

The report describing the results of a survey should include a statement describing the purpose or purposes of the survey. One indication that a survey offers probative evidence is that it was designed to collect information relevant to the legal controversy (e.g., to estimate damages in an antitrust suit or to assess con-

28. Loctite Corp. v. National Starch & Chem. Corp., 516 F. Supp. 190, 205 (S.D.N.Y. 1981) (distinguishing between surveys conducted in anticipation of litigation and surveys conducted for nonlitigation purposes which cannot be reproduced because of the passage of time, concluding that parties should not be compelled to introduce the former at trial, but may be required to provide the latter).

29. *E.g.*, Charles Jacquin et Cie, Inc. v. Destileria Serralles, Inc., 921 F.2d 467, 475 (3d Cir. 1990). *See also* Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513, 522 (10th Cir. 1987).

30. E.S. Originals, Inc. v. Stride Rite Corp., 656 F. Supp. 484, 490 (S.D.N.Y. 1987); *see also* Ortho Pharm. Corp. v. Cosprophar, Inc., 32 F.3d 690, 695 (2d Cir. 1994); Henri's Food Prods. Co. v. Kraft, Inc., 717 F.2d 352, 357 (7th Cir. 1983); Information Clearing House, Inc. v. Find Magazine, 492 F. Supp. 147, 160 (S.D.N.Y. 1980).

sumer confusion in a trademark case). Surveys not conducted specifically in preparation for, or in response to, litigation may provide important information,[31] but they frequently ask irrelevant questions[32] or select inappropriate samples of respondents for study.[33] Nonetheless, surveys do not always achieve their stated goals. Thus, the content and execution of a survey must be scrutinized even if the survey was designed to provide relevant data on the issue before the court. Moreover, if a survey was not designed for purposes of litigation, one source of bias is less likely: The party presenting the survey is less likely to have designed and constructed the survey to prove its side of the issue in controversy.

B. Was Participation in the Design, Administration, and Interpretation of the Survey Appropriately Controlled to Ensure the Objectivity of the Survey?

An early handbook for judges recommended that survey interviews be "conducted independently of the attorneys in the case."[34] Some courts have interpreted this to mean that any evidence of attorney participation is objectionable.[35] A better interpretation is that the attorney should have no part in carrying out the survey.[36] However, some attorney involvement in the survey design is

31. *See, e.g.*, Wright v. Jeep Corp., 547 F. Supp. 871, 874 (E.D. Mich. 1982). Indeed, as courts increasingly have been faced with scientific issues, parties have requested in a number of recent cases that the courts compel production of research data and testimony by unretained experts. The circumstances under which an unretained expert can be compelled to testify or to disclose research data and opinions, as well as the extent of disclosure that can be required when the research conducted by the expert has a bearing on the issues in the case, are the subject of considerable current debate. *See, e.g.*, Richard L. Marcus, *Discovery Along the Litigation/Science Interface*, 57 Brook. L. Rev. 381, 393–428 (1991); Joe S. Cecil, *Judicially Compelled Disclosure of Research Data*, 1 Cts. Health Sci. & L. 434 (1991); *see also* Symposium, *Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law*, Law & Contemp. Probs., Summer 1996, at 1.

32. Loctite Corp. v. National Starch & Chem. Corp., 516 F. Supp. 190, 206 (S.D.N.Y. 1981) (marketing surveys conducted before litigation were designed to test for brand awareness, whereas the "single issue at hand . . . [was] whether consumers understood the term 'Super Glue' to designate glue from a single source").

33. In *Craig v. Boren*, 429 U.S. 190 (1976), the state unsuccessfully attempted to use its annual roadside survey of the blood alcohol level, drinking habits, and preferences of drivers to justify prohibiting the sale of 3.2% beer to males under the age of 21 and to females under the age of 18. The data were biased because it was likely that the male would be driving if both the male and female occupants of the car had been drinking. As pointed out in 2 Joseph L. Gastwirth, Statistical Reasoning in Law and Public Policy: Tort Law, Evidence, and Health 527 (1988), the roadside survey would have provided more relevant data if all occupants of the cars had been included in the survey (and if the type and amount of alcohol most recently consumed had been requested so that the consumption of 3.2% beer could have been isolated).

34. Judicial Conference of the U.S., Handbook of Recommended Procedures for the Trial of Protracted Cases 75 (1960).

35. *E.g.*, Boehringer Ingelheim G.m.b.H. v. Pharmadyne Lab., 532 F. Supp. 1040, 1058 (D.N.J. 1980).

36. Upjohn Co. v. American Home Prods. Corp., No. 1-95-CV-237, 1996 U.S. Dist. LEXIS 8049, at *42 (W.D. Mich. Apr. 5, 1996) (objection that "counsel reviewed the design of the survey

necessary to ensure that relevant questions are directed to a relevant population.[37] The trier of fact evaluates the objectivity and relevance of the questions on the survey and the appropriateness of the definition of the population used to guide sample selection. These aspects of the survey are visible to the trier of fact and can be judged on their quality, irrespective of who suggested them. In contrast, the interviews themselves are not directly visible, and any potential bias is minimized by having interviewers and respondents blind to the purpose and sponsorship of the survey and by excluding attorneys from any part in conducting interviews and tabulating results.

C. Are the Experts Who Designed, Conducted, or Analyzed the Survey Appropriately Skilled and Experienced?

Experts prepared to design, conduct, and analyze a survey generally should have graduate training in psychology (especially social, cognitive, or consumer psychology), sociology, marketing, communication sciences, statistics, or a related discipline; that training should include courses in survey research methods, sampling, measurement, interviewing, and statistics. In some cases, professional experience in conducting and publishing survey research may provide the requisite background. In all cases, the expert must demonstrate an understanding of survey methodology, including sampling,[38] instrument design (questionnaire and interview construction), and statistical analysis.[39] Publication in peer-reviewed journals, authored books, membership in professional organizations, faculty appointments, consulting experience, research grants, and membership on scientific advisory panels for government agencies or private foundations are indications of a professional's area and level of expertise. In addition, if the survey involves highly technical subject matter (e.g., the particular preferences of electrical engineers for various pieces of electrical equipment and the bases for those preferences) or involves a special population (e.g., developmentally disabled adults with limited cognitive skills), the survey expert also should be able to demonstrate sufficient familiarity with the topic or population (or assistance from an individual on the research team with suitable expertise) to design a survey instrument that will communicate clearly with relevant respondents.

carries little force with this Court because [opposing party] has not identified any flaw in the survey that might be attributed to counsel's assistance").

37. 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 32:166 (4th ed. 1996).

38. The one exception is that sampling expertise is unnecessary if the survey is administered to all members of the relevant population. *See, e.g.*, McGovern & Lind, *supra* note 27.

39. If survey expertise is being provided by several experts, a single expert may have general familiarity but not special expertise in all these areas.

D. Are the Experts Who Will Testify About Surveys Conducted by Others Appropriately Skilled and Experienced?

Parties often call on an expert to testify about a survey conducted by someone else. The secondary expert's role is to offer support for a survey commissioned by the party who calls the expert, to critique a survey presented by the opposing party, or to introduce findings or conclusions from a survey not conducted in preparation for litigation or by any of the parties to the litigation. The trial court should take into account the exact issue that the expert seeks to testify about and the nature of the expert's field of expertise.[40] The secondary expert who gives an opinion about the adequacy and interpretation of a survey not only should have general skills and experience with surveys and be familiar with all of the issues addressed in this reference guide, but also should demonstrate familiarity with the following properties of the survey being discussed:

1. the purpose of the survey;
2. the survey methodology, including
   a. the target population,
   b. the sampling design used in conducting the survey,
   c. the survey instrument (questionnaire or interview schedule), and
   d. (for interview surveys) interviewer training and instruction;
3. the results, including rates and patterns of missing data; and
4. the statistical analyses used to interpret the results.

III. Population Definition and Sampling

A. Was an Appropriate Universe or Population Identified?

One of the first steps in designing a survey or in deciding whether an existing survey is relevant is to identify the target population (or universe).[41] The target population consists of all elements (i.e., objects, individuals, or other social units) whose characteristics or perceptions the survey is intended to represent. Thus, in trademark litigation, the relevant population in some disputes may include all prospective and actual purchasers of the plaintiff's goods or services and all prospective and actual purchasers of the defendant's goods or services. Similarly, the population for a discovery survey may include all potential plaintiffs or all em-

40. Margaret A. Berger, The Supreme Court's Triology on the Admissibility of Expert Testimony § IV.C, in this manual.

41. Identification of the proper universe is recognized uniformly as a key element in the development of a survey. *See, e.g.*, Judicial Conference of the U.S., *supra* note 34; MCL 3d, *supra* note 15, § 21.493. *See also* 3 McCarthy, *supra* note 37, § 32:166; Council of Am. Survey Res. Orgs., Code of Standards and Ethics for Survey Research § III.B.4 (1997).

ployees who worked for Company A between two specific dates. In a community survey designed to provide evidence for a motion for a change of venue, the relevant population consists of all jury-eligible citizens in the community in which the trial is to take place.[42] The definition of the relevant population is crucial because there may be systematic differences in the responses of members of the population and nonmembers. (For example, consumers who are prospective purchasers may know more about the product category than consumers who are not considering making a purchase.)

The universe must be defined carefully. For example, a commercial for a toy or breakfast cereal may be aimed at children, who in turn influence their parents' purchases. If a survey assessing the commercial's tendency to mislead were conducted based on the universe of prospective and actual adult purchasers, it would exclude a crucial group of eligible respondents. Thus, the appropriate population in this instance would include children as well as parents.[43]

B. *Did the Sampling Frame Approximate the Population?*

The target population consists of all the individuals or units that the researcher would like to study. The sampling frame is the source (or sources) from which the sample actually is drawn. The surveyor's job generally is easier if a complete list of every eligible member of the population is available (e.g., all plaintiffs in a discovery survey), so that the sampling frame lists the identity of all members of the target population. Frequently, however, the target population includes members who are inaccessible or who cannot be identified in advance. As a result, compromises are sometimes required in developing the sampling frame. The survey report should contain a description of the target population, a description of the survey population actually sampled, a discussion of the difference between the two populations, and an evaluation of the likely consequences of that difference.

42. A second relevant population may consist of jury-eligible citizens in the community where the party would like to see the trial moved. By questioning citizens in both communities, the survey can test whether moving the trial is likely to reduce the level of animosity toward the party requesting the change of venue. *See* United States v. Haldeman, 559 F.2d 31, 140, 151, app. A at 176–79 (D.C. Cir. 1976) (court denied change of venue over the strong objection of Judge MacKinnon, who cited survey evidence that Washington, D.C., residents were substantially more likely to conclude, before trial, that the defendants were guilty), *cert. denied*, 431 U.S. 933 (1977); *see also* People v. Venegas, 31 Cal. Rptr. 2d 114, 117 (Ct. App. 1994) (change of venue denied because defendant failed to show that the defendant would face a less hostile jury in a different court).

43. Children and some other populations create special challenges for researchers. For example, very young children should not be asked about sponsorship or licensing, concepts that are foreign to them. Concepts, as well as wording, should be age-appropriate.

A survey that provides information about a wholly irrelevant universe of respondents is itself irrelevant.[44] Courts are likely to exclude the survey or accord it little weight. Thus, when the plaintiff submitted the results of a survey to prove that the green color of its fishing rod had acquired a secondary meaning, the court gave the survey little weight in part because the survey solicited the views of fishing rod dealers rather than consumers.[45] More commonly, however, the sampling frame is either underinclusive or overinclusive relative to the target population. If it is underinclusive, the survey's value depends on the extent to which the excluded population is likely to react differently from the included population. Thus, a survey of spectators and participants at running events would be sampling a sophisticated subset of those likely to purchase running shoes. Because this subset probably would consist of the consumers most knowledgeable about the trade dress used by companies that sell running shoes, a survey based on this population would be likely to substantially overrepresent the strength of a particular design as a trademark, and the extent of that overrepresentation would be unknown and not susceptible to any reasonable estimation.[46]

Similarly, in a survey designed to project demand for cellular phones, the assumption that businesses would be the primary users of cellular service led surveyors to exclude potential nonbusiness users from the survey. The Federal Communications Commission (FCC) found the assumption unwarranted and concluded that the research was flawed, in part because of this underinclusive universe.[47]

44. A survey aimed at assessing how persons in the trade respond to an advertisement should be conducted on a sample of persons in the trade and not on a sample of consumers. Home Box Office v. Showtime/The Movie Channel, 665 F. Supp. 1079, 1083 (S.D.N.Y.), *aff'd in part & vacated in part*, 832 F.2d 1311 (2d Cir. 1987). *But see* Lon Tai Shing Co. v. Koch + Lowy, No. 90-C4464, 1990 U.S. Dist. LEXIS 19123, at *50 (S.D.N.Y. Dec. 14, 1990), in which the judge was willing to find likelihood of consumer confusion from a survey of lighting store salespersons questioned by a survey researcher posing as a customer. The court was persuaded that the salespersons who were misstating the source of the lamp, whether consciously or not, must have believed reasonably that the consuming public would be misled by the salespersons' inaccurate statements about the name of the company that manufactured the lamp they were selling.

45. R.L. Winston Rod Co. v. Sage Mfg. Co., 838 F. Supp. 1396, 1401-02 (D. Mont. 1993).

46. Brooks Shoe Mfg. Co. v. Suave Shoe Corp., 533 F. Supp. 75, 80 (S.D. Fla. 1981), *aff'd*, 716 F.2d 854 (11th Cir. 1983). *See also* Winning Ways, Inc. v. Holloway Sportswear, Inc., 913 F. Supp. 1454, 1467 (D. Kan. 1996) (survey flawed in failing to include sporting goods customers who constituted a major portion of customers). *But see* Thomas & Betts Corp. v. Panduit Corp., 138 F.3d 277, 294–95 (7th Cir. 1998) (survey of store personnel admissible because relevant market included both distributors and ultimate purchasers).

47. Gencom, Inc., 56 Rad. Reg. 2d (P&F) 1597, 1604 (1984). This position was affirmed on appeal. *See* Gencom, Inc. v. FCC, 832 F.2d 171, 186 (D.C. Cir. 1987).

In some cases, it is difficult to determine whether an underinclusive universe distorts the results of the survey and, if so, the extent and likely direction of the bias. For example, a trademark survey was designed to test the likelihood of confusing an analgesic currently on the market with a new product that was similar in appearance.[48] The plaintiff's survey included only respondents who had used the plaintiff's analgesic, and the court found that the universe should have included users of other analgesics, "so that the full range of potential customers for whom plaintiff and defendants would compete could be studied."[49] In this instance, it is unclear whether users of the plaintiff's product would be more or less likely to be confused than users of the defendant's product or users of a third analgesic.[50]

An overinclusive universe generally presents less of a problem in interpretation than does an underinclusive universe. If the survey expert can demonstrate that a sufficiently large (and representative) subset of respondents in the survey was drawn from the appropriate universe, the responses obtained from that subset can be examined, and inferences about the relevant universe can be drawn based on that subset.[51] If the relevant subset cannot be identified, however, an overbroad universe will reduce the value of the survey.[52] If the sample is drawn from an underinclusive universe, there is generally no way to know how the unrepresented members would have responded.[53]

C. *How Was the Sample Selected to Approximate the Relevant Characteristics of the Population?*

Identification of a survey population must be followed by selection of a sample that accurately represents that population.[54] The use of probability sampling techniques maximizes both the representativeness of the survey results and the ability to assess the accuracy of estimates obtained from the survey.

Probability samples range from simple random samples to complex multistage sampling designs that use stratification, clustering of population elements into various groupings, or both. In simple random sampling, the most basic type

48. American Home Prods. Corp. v. Barr Lab., Inc., 656 F. Supp. 1058 (D.N.J.), *aff'd*, 834 F.2d 368 (3d Cir. 1987).

49. *Id.* at 1070.

50. *See also* Craig v. Boren, 429 U.S. 190 (1976).

51. This occurred in *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651, 657–58 (W.D. Wash. 1982).

52. Schieffelin & Co. v. Jack Co. of Boca, 850 F. Supp. 232, 246 (S.D.N.Y. 1994).

53. *See, e.g.*, Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 263–64 (5th Cir.) (court found both plaintiff's and defendant's surveys substantially defective for a systematic failure to include parts of the relevant population), *cert. denied*, 449 U.S. 899 (1980).

54. MCL 3d, *supra* note 15, § 21.493. *See also* David H. Kaye & David A. Freedman, Reference Guide on Statistics § II.B, in this manual.

of probability sampling, every element in the population has a known, equal probability of being included in the sample, and all possible samples of a given size are equally likely to be selected.[55] In all forms of probability sampling, each element in the relevant population has a known, nonzero probability of being included in the sample.[56]

Probability sampling offers two important advantages over other types of sampling. First, the sample can provide an unbiased estimate of the responses of all persons in the population from which the sample was drawn; that is, the expected value of the sample estimate is the population value being estimated. Second, the researcher can calculate a confidence interval that describes explicitly how reliable the sample estimate of the population is likely to be. Thus, suppose a survey tested a sample of 400 dentists randomly selected from the population of all dentists licensed to practice in the United States and found that 80, or 20%, of them mistakenly believed that a new toothpaste, Goldgate, was manufactured by the makers of Colgate. A survey expert could properly compute a confidence interval around the 20% estimate obtained from this sample. If the survey was repeated a large number of times, and a 95% confidence interval was computed each time, 95% of the confidence intervals would include the actual percentage of dentists in the entire population who would believe that Goldgate was manufactured by the makers of Colgate.[57] In this example, the confidence interval, or margin of error, is the estimate (20%) plus or minus 4%, or the distance between 16% and 24%.

All sample surveys produce estimates of population values, not exact measures of those values. Strictly speaking, the margin of sampling error associated with the sample estimate assumes probability sampling. Assuming a probability sample, a confidence interval describes how stable the mean response in the sample is likely to be. The width of the confidence interval depends on three characteristics:

55. Systematic sampling, in which every *n*th unit in the population is sampled and the starting point is selected randomly, fulfills the first of these conditions. It does not fulfill the second, because no systematic sample can include elements adjacent to one another on the list of population members from which the sample is drawn. Except in very unusual situations when periodicities occur, systematic samples and simple random samples generally produce the same results. Seymour Sudman, *Applied Sampling*, *in* Handbook of Survey Research, *supra* note 1, at 145, 169.

56. Other probability sampling techniques include (1) stratified random sampling, in which the researcher subdivides the population into mutually exclusive and exhaustive subpopulations, or strata, and then randomly selects samples from within these strata; and (2) cluster sampling, in which elements are sampled in groups or clusters, rather than on an individual basis. Martin Frankel, *Sampling Theory*, *in* Handbook of Survey Research, *supra* note 1, at 21, 37, 47.

57. Actually, since survey interviewers would be unable to locate some dentists and some dentists would be unwilling to participate in the survey, technically the population to which this sample would be projectable would be all dentists with current addresses who would be willing to participate in the survey if they were asked.

1. the size of the sample (the larger the sample, the narrower the interval);
2. the variability of the response being measured; and
3. the confidence level the researcher wants to have.

Traditionally, scientists adopt the 95% level of confidence, which means that if 100 samples of the same size were drawn, the confidence interval expected for at least 95 of the samples would be expected to include the true population value.[58]

Although probability sample surveys often are conducted in organizational settings and are the recommended sampling approach in academic and government publications on surveys, probability sample surveys can be expensive when in-person interviews are required, the target population is dispersed widely, or qualified respondents are scarce. A majority of the consumer surveys conducted for Lanham Act litigation present results from nonprobability convenience samples.[59] They are admitted into evidence based on the argument that nonprobability sampling is used widely in marketing research and that "results of these studies are used by major American companies in making decisions of considerable consequence."[60] Nonetheless, when respondents are not selected randomly from the relevant population, the expert should be prepared to justify the method used to select respondents. Special precautions are required to reduce the likelihood of biased samples.[61] In addition, quantitative values computed from such samples (e.g., percentage of respondents indicating confusion) should be viewed as rough indicators rather than as precise quantitative estimates. Confidence intervals should not be computed.

58. To increase the likelihood that the confidence interval contains the actual population value (e.g., from 95% to 99%), the width of the confidence interval can be expanded. An increase in the confidence interval brings an increase in the confidence level. For further discussion of confidence intervals, see David H. Kaye & David A. Freedman, Reference Guide on Statistics § IV.A, in this manual.

59. Jacob Jacoby & Amy H. Handlin, *Non-Probability Sampling Designs for Litigation Surveys*, 81 Trademark Rep. 169, 173 (1991). For probability surveys conducted in trademark cases, see *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651 (W.D. Wash. 1982); James Burrough, Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266 (7th Cir. 1976).

60. National Football League Properties, Inc. v. New Jersey Giants, Inc., 637 F. Supp. 507, 515 (D.N.J. 1986). A survey of members of the Council of American Survey Research Organizations, the national trade association for commercial survey research firms in the United States, revealed that 95% of the in-person independent contacts in studies done in 1985 took place in malls or shopping centers. Jacoby & Handlin, *supra* note 59, at 172–73, 176.

D. Was the Level of Nonresponse Sufficient to Raise Questions About the Representativeness of the Sample? If So, What Is the Evidence That Nonresponse Did Not Bias the Results of the Survey?

Even when a sample is drawn randomly from a complete list of elements in the target population, responses or measures may be obtained on only part of the selected sample. If this lack of response were distributed randomly, valid inferences about the population could be drawn from the characteristics of the available elements in the sample. The difficulty is that nonresponse often is not random, so that, for example, persons who are single typically have three times the "not at home" rate in U.S. Census Bureau surveys as do family members.[62] Efforts to increase response rates include making several attempts to contact potential respondents and providing financial incentives for participating in the survey.

One suggested formula for quantifying a tolerable level of nonresponse in a probability sample is based on the guidelines for statistical surveys issued by the former U.S. Office of Statistical Standards.[63] According to these guidelines, response rates of 90% or more are reliable and generally can be treated as random samples of the overall population. Response rates between 75% and 90% usually yield reliable results, but the researcher should conduct some check on the representativeness of the sample. Potential bias should receive greater scrutiny when the response rate drops below 75%. If the response rate drops below 50%, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn.[64]

Determining whether the level of nonresponse in a survey is critical generally requires an analysis of the determinants of nonresponse. For example, even a survey with a high response rate may seriously underrepresent some portions of the population, such as the unemployed or the poor. If a general population sample was used to chart changes in the proportion of the population that knows someone with HIV, the survey would underestimate the population value if some groups more likely to know someone with HIV (e.g., intravenous drug users) were underrepresented in the sample. The survey expert should be prepared to provide evidence on the potential impact of nonresponse on the survey results.

61. *See infra* § III.E.

62. 2 Gastwirth, *supra* note 33, at 501. This volume contains a useful discussion of sampling, along with a set of examples. *Id.* at 467.

63. This standard is cited with approval by Gastwirth. *Id.* at 502.

64. For thoughtful examples of judges closely scrutinizing potential sample bias when response rates were below 75%, see *Vuyanich v. Republic National Bank*, 505 F. Supp. 224 (N.D. Tex. 1980); Rosado v. Wyman, 322 F. Supp. 1173 (E.D.N.Y.), *aff'd*, 437 F.2d 619 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971).

In surveys that include sensitive or difficult questions, particularly surveys that are self-administered, some respondents may refuse to provide answers or may provide incomplete answers. To assess the impact of nonresponse to a particular question, the survey expert should analyze the differences between those who answered and those who did not answer. Procedures to address the problem of missing data include recontacting respondents to obtain the missing answers and using the respondent's other answers to predict the missing response.[65]

E. What Procedures Were Used to Reduce the Likelihood of a Biased Sample?

If it is impractical for a survey researcher to sample randomly from the entire target population, the researcher still can apply probability sampling to some aspects of respondent selection to reduce the likelihood of biased selection. For example, in many studies the target population consists of all consumers or purchasers of a product. Because it is impractical to randomly sample from that population, research is conducted in shopping malls where some members of the target population may not shop. Mall locations, however, can be sampled randomly from a list of possible mall sites. By administering the survey at several different malls, the expert can test for and report on any differences observed across sites. To the extent that similar results are obtained in different locations using different on-site interview operations, it is less likely that idiosyncrasies of sample selection or administration can account for the results.[66] Similarly, since the characteristics of persons visiting a shopping center vary by day of the week and time of day, bias in sampling can be reduced if the survey design calls for sampling time segments as well as mall locations.[67]

In mall intercept surveys, the organization that manages the on-site interview facility generally employs recruiters who approach potential survey respondents in the mall and ascertain if they are qualified and willing to participate in the survey. If a potential respondent agrees to answer the questions and meets the specified criteria, he or she is escorted to the facility where the survey interview takes place. If recruiters are free to approach potential respondents without controls on how an individual is to be selected for screening, shoppers who spend more time in the mall are more likely to be approached than shoppers who visit the mall only briefly. Moreover, recruiters naturally prefer to approach friendly-

65. Andy B. Anderson et al., *Missing Data: A Review of the Literature*, *in* Handbook of Survey Research, *supra* note 1, at 415.

66. Note, however, that differences in results across sites may be due to genuine differences in respondents across geographic locations or to a failure to administer the survey consistently across sites.

67. Seymour Sudman, *Improving the Quality of Shopping Center Sampling*, 17 J. Marketing Res. 423 (1980).

looking potential respondents, so that it is more likely that certain types of individuals will be selected. These potential biases in selection can be reduced by providing appropriate selection instructions and training recruiters effectively. Training that reduces the interviewer's discretion in selecting a potential respondent is likely to reduce bias in selection, as are instructions to approach every *n*th person entering the facility through a particular door.[68]

F. *What Precautions Were Taken to Ensure That Only Qualified Respondents Were Included in the Survey?*

In a carefully executed survey, each potential respondent is questioned or measured on the attributes that determine his or her eligibility to participate in the survey. Thus, the initial questions screen potential respondents to determine if they are within the target population of the survey (e.g., Is she at least fourteen years old? Does she own a dog? Does she live within ten miles?). The screening questions must be drafted so that they do not convey information that will influence the respondent's answers on the main survey. For example, if respondents must be prospective and recent purchasers of Sunshine orange juice in a trademark survey designed to assess consumer confusion with Sun Time orange juice, potential respondents might be asked to name the brands of orange juice they have purchased recently or expect to purchase in the next six months. They should not be asked specifically if they recently have purchased, or expect to purchase, Sunshine orange juice, because this may affect their responses on the survey either by implying who is conducting the survey or by supplying them with a brand name that otherwise would not occur to them.

The content of a screening questionnaire (or screener) can also set the context for the questions that follow. In *Pfizer, Inc. v. Astra Pharmaceutical Products, Inc.*,[69] physicians were asked a screening question to determine whether they prescribed particular drugs. The court found that the screener conditioned the physicians to respond with the name of a drug rather than a condition.[70]

The criteria for determining whether to include a potential respondent in the survey should be objective and clearly conveyed, preferably using written instructions addressed to those who administer the screening questions. These instructions and the completed screening questionnaire should be made avail-

68. In the end, even if malls are randomly sampled and shoppers are randomly selected within malls, results from mall surveys technically can be used to generalize only to the population of mall shoppers. The ability of the mall sample to describe the likely response pattern of the broader relevant population will depend on the extent to which a substantial segment of the relevant population (1) is not found in malls and (2) would respond differently to the interview.

69. 858 F. Supp. 1305, 1321 & n.13 (S.D.N.Y. 1994).

70. *Id.* at 1321.

able to the court and the opposing party along with the interview form for each respondent.

IV. Survey Questions and Structure

A. Were Questions on the Survey Framed to Be Clear, Precise, and Unbiased?

Although it seems obvious that questions on a survey should be clear and precise, phrasing questions to reach that goal is often difficult. Even questions that appear clear can convey unexpected meanings and ambiguities to potential respondents. For example, the question "What is the average number of days each week you have butter?" appears to be straightforward. Yet some respondents wondered whether margarine counted as butter, and when the question was revised to include the introductory phrase "not including margarine," the reported frequency of butter use dropped dramatically.[71]

When unclear questions are included in a survey, they may threaten the validity of the survey by systematically distorting responses if respondents are misled in a particular direction, or by inflating random error if respondents guess because they do not understand the question.[72] If the crucial question is sufficiently ambiguous or unclear, it may be the basis for rejecting the survey. For example, a survey was designed to assess community sentiment that would warrant a change of venue in trying a case for damages sustained when a hotel skywalk collapsed.[73] The court found that the question "Based on what you have heard, read or seen, do you believe that in the current compensatory damage trials, the defendants, such as the contractors, designers, owners, and operators of the Hyatt Hotel, should be punished?" could neither be correctly understood nor easily answered.[74] The court noted that the phrase "compensatory damages," although well-defined for attorneys, was unlikely to be meaningful for laypersons.[75]

Texts on survey research generally recommend pretests as a way to increase the likelihood that questions are clear and unambiguous,[76] and some courts have

71. Floyd J. Fowler, Jr., *How Unclear Terms Affect Survey Data*, 56 Pub. Opinion Q. 218, 225–26 (1992).

72. *Id.* at 219.

73. Firestone v. Crown Ctr. Redevelopment Corp., 693 S.W.2d 99 (Mo. 1985) (en banc).

74. *Id.* at 102, 103.

75. *Id.* at 103. When there is any question about whether some respondent will understand a particular term or phrase, the term or phrase should be defined explicitly.

76. For a thorough treatment of pretesting methods, see Jean M. Converse & Stanley Presser, Survey Questions: Handcrafting the Standardized Questionnaire 51 (1986). *See also* Fred W. Morgan, *Judicial Standards for Survey Research: An Update and Guidelines*, 54 J. Marketing 59, 64 (1990).

recognized the value of pretests.[77] In a pretest or pilot test,[78] the proposed survey is administered to a small sample (usually between twenty-five and seventy-five)[79] of the same type of respondents who would be eligible to participate in the full-scale survey. The interviewers observe the respondents for any difficulties they may have with the questions and probe for the source of any such difficulties so that the questions can be rephrased if confusion or other difficulties arise. Attorneys who commission surveys for litigation sometimes are reluctant to approve pilot work or to reveal that pilot work has taken place because they are concerned that if a pretest leads to revised wording of the questions, the trier of fact may believe that the survey has been manipulated and is biased or unfair. A more appropriate reaction is to recognize that pilot work can improve the quality of a survey and to anticipate that it often results in word changes that increase clarity and correct misunderstandings. Thus, changes may indicate informed survey construction rather than flawed survey design.[80]

B. Were Filter Questions Provided to Reduce Guessing?

Some survey respondents may have no opinion on an issue under investigation, either because they have never thought about it before or because the question mistakenly assumes a familiarity with the issue. For example, survey respondents may not have noticed that the commercial they are being questioned about guaranteed the quality of the product being advertised and thus they may have no opinion on the kind of guarantee it indicated. Likewise, in an employee survey, respondents may not be familiar with the parental leave policy at their company and thus may have no opinion on whether they would consider taking advantage of the parental leave policy if they became parents. The following three alternative question structures will affect how those respondents answer and how their responses are counted.

First, the survey can ask all respondents to answer the question (e.g., "Did you understand the guarantee offered by Clover to be a one-year guarantee, a sixty-day guarantee, or a thirty-day guarantee?"). Faced with a direct question, particularly one that provides response alternatives, the respondent obligingly may supply an answer even if (in this example) the respondent did not notice the guarantee (or is unfamiliar with the parental leave policy). Such answers will

77. *E.g.*, Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y. 1963).

78. The terms *pretest* and *pilot test* are sometimes used interchangeably to describe pilot work done in the planning stages of research. When they are distinguished, the difference is that a pretest tests the questionnaire, whereas a pilot test generally tests proposed collection procedures as well.

79. Converse & Presser, *supra* note 76, at 69. Converse and Presser suggest that a pretest with twenty-five respondents is appropriate when the survey uses professional interviewers.

80. *See infra* § VII.B for a discussion of obligations to disclose pilot work.

reflect only what the respondent can glean from the question, or they may reflect pure guessing. The imprecision introduced by this approach will increase with the proportion of respondents who are unfamiliar with the topic at issue.

Second, the survey can use a quasi-filter question to reduce guessing by providing "don't know" or "no opinion" options as part of the question (e.g., "Did you understand the guarantee offered by Clover to be for more than a year, a year, or less than a year, or don't you have an opinion?").[81] By signaling to the respondent that it is appropriate not to have an opinion, the question reduces the demand for an answer and, as a result, the inclination to hazard a guess just to comply. Respondents are more likely to choose a "no opinion" option if it is mentioned explicitly by the interviewer than if it is merely accepted when the respondent spontaneously offers it as a response. The consequence of this change in format is substantial. Studies indicate that, although the relative distribution of the respondents selecting the *listed* choices is unlikely to change dramatically, presentation of an explicit "don't know" or "no opinion" alternative commonly leads to a 20%–25% increase in the proportion of respondents selecting that response.[82]

Finally, the survey can include full-filter questions, that is, questions that lay the groundwork for the substantive question by first asking the respondent if he or she has an opinion about the issue or happened to notice the feature that the interviewer is preparing to ask about (e.g., "Based on the commercial you just saw, do you have an opinion about how long Clover stated or implied that its guarantee lasts?"). The interviewer then asks the substantive question only of those respondents who have indicated that they have an opinion on the issue.

Which of these three approaches is used and the way it is used can affect the rate of "no opinion" responses that the substantive question will evoke.[83] Respondents are more likely to say they do not have an opinion on an issue if a full filter is used than if a quasi-filter is used.[84] However, in maximizing respondent expressions of "no opinion," full filters may produce an underreporting of opinions. There is some evidence that full-filter questions discourage respondents who actually have opinions from offering them by conveying the implicit suggestion that respondents can avoid difficult follow-up questions by saying that they have no opinion.[85]

81. Norbert Schwarz & Hans-Jürgen Hippler, *Response Alternatives: The Impact of Their Choice and Presentation Order*, *in* Measurement Errors in Surveys 41, 45–46 (Paul P. Biemer et al. eds., 1991).

82. Howard Schuman & Stanley Presser, Questions and Answers in Attitude Surveys: Experiments on Question Form, Wording and Context 113–46 (1981).

83. Considerable research has been conducted on the effects of filters. For a review, see George F. Bishop et al., *Effects of Filter Questions in Public Opinion Surveys*, 47 Pub. Opinion Q. 528 (1983).

84. Schwarz & Hippler, *supra* note 81, at 45–46.

85. *Id.* at 46.

In general, then, a survey that uses full filters tends to provide a conservative estimate of the number of respondents holding an opinion, whereas a survey that uses neither full filters nor quasi-filters tends to overestimate the number of respondents with opinions, because some respondents offering opinions are guessing. The strategy of including a "no opinion" or "don't know" response as a quasi-filter avoids both of these extremes. Thus, rather than asking, "Based on the commercial, do you believe that the two products are made in the same way, or are they made differently?"[86] or prefacing the question with a preliminary, "Do you have an opinion, based on the commercial, concerning the way that the two products are made?" the question could be phrased, "Based on the commercial, do you believe that the two products are made in the same way, or that they are made differently, or don't you have an opinion about the way they are made?"

C. Did the Survey Use Open-Ended or Closed-Ended Questions? How Was the Choice in Each Instance Justified?

The questions that make up a survey instrument may be open-ended, closed-ended, or a combination of both. Open-ended questions require the respondent to formulate and express an answer in his or her own words (e.g., "What was the main point of the commercial?" "Where did you catch the fish you caught in these waters?"[87]). Closed-ended questions provide the respondent with an explicit set of responses from which to choose; the choices may be as simple as yes or no (e.g., "Is Colby College coeducational?"[88]) or as complex as a range of alternatives (e.g., "The two pain relievers have (1) the same likelihood of causing gastric ulcers; (2) about the same likelihood of causing gastric ulcers; (3) a somewhat different likelihood of causing gastric ulcers; (4) a very different likelihood of causing gastric ulcers; or (5) none of the above."[89]).

Open-ended and closed-ended questions may elicit very different responses.[90]

86. The question in the example without the "no opinion" alternative was based on a question rejected by the court in *Coors Brewing Co. v. Anheuser-Busch Cos.*, 802 F. Supp. 965, 972–73 (S.D.N.Y. 1992).

87. A relevant example from *Wilhoite v. Olin Corp.* is described in McGovern & Lind, *supra* note 27, at 76.

88. Presidents & Trustees of Colby College v. Colby College–N.H., 508 F.2d 804, 809 (1st Cir. 1975).

89. This question is based on one asked in *American Home Products Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 581 (S.D.N.Y. 1987), that was found to be a leading question by the court, primarily because the choices suggested that the respondent had learned about aspirin's and ibuprofen's relative likelihood of causing gastric ulcers. In contrast, in *McNeilab, Inc. v. American Home Products Corp.*, 501 F. Supp. 517, 525 (S.D.N.Y. 1980), the court accepted as nonleading the question, "Based only on what the commercial said, would Maximum Strength Anacin contain more pain reliever, the same amount of pain reliever, or less pain reliever than the brand you, yourself, currently use most often?"

90. Howard Schuman & Stanley Presser, *Question Wording as an Independent Variable in Survey Analysis*,

Most responses are less likely to be volunteered by respondents who are asked an open-ended question than they are to be chosen by respondents who are presented with a closed-ended question. The response alternatives in a closed-ended question may remind respondents of options that they would not otherwise consider or which simply do not come to mind as easily.[91]

The advantage of open-ended questions is that they give the respondent fewer hints about the answer that is expected or preferred. Precoded responses on a closed-ended question, in addition to reminding respondents of options that they might not otherwise consider,[92] may direct the respondent away from or toward a particular response. For example, a commercial reported that in shampoo tests with more than 900 women, the sponsor's product received higher ratings than other brands.[93] According to a competitor, the commercial deceptively implied that each woman in the test rated more than one shampoo, when in fact each woman rated only one. To test consumer impressions, a survey might have shown the commercial and asked an open-ended question: "How many different brands mentioned in the commercial did each of the 900 women try?"[94] Instead, the survey asked a closed-ended question; respondents were given the choice of "one," "two," "three," "four," or "five or more." The fact that four of the five choices in the closed-ended question provided a response that was greater than one implied that the correct answer was probably more than one.[95] Note, however, that the open-ended question also may suggest that the answer is more than one. By asking "how many different brands," the question suggests (1) that the viewer should have received some message from the commercial about the number of brands each woman tried and (2) that different brands were tried. Thus, the wording of a question, open-ended or closed-ended, can be leading, and the degree of suggestiveness of each question must be considered in evaluating the objectivity of a survey.

6 Soc. Methods & Res. 151 (1977); Schuman & Presser, *supra* note 82, at 79–112; Converse & Presser, *supra* note 76, at 33.

91. For example, when respondents in one survey were asked, "What is the most important thing for children to learn to prepare them for life?", 62% picked "to think for themselves" from a list of five options, but only 5% spontaneously offered that answer when the question was open-ended. Schuman & Presser, *supra* note 82, at 104–07. An open-ended question presents the respondent with a free-recall task, whereas a closed-ended question is a recognition task. Recognition tasks in general reveal higher performance levels than recall tasks. Mary M. Smyth et al., Cognition in Action 25 (1987). In addition, there is evidence that respondents answering open-ended questions may be less likely to report some information that they would reveal in response to a closed-ended question when that information seems self-evident or irrelevant.

92. Schwarz & Hippler, *supra* note 81, at 43.

93. *See* Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 273 (2d Cir. 1981).

94. This was the wording of the stem of the closed-ended question in the survey discussed in *Vidal Sassoon*, 661 F.2d at 275–76.

95. Ninety-five percent of the respondents who answered the closed-ended question in the plaintiff's survey said that each woman had tried two or more brands. The open-ended question was never asked.

Closed-ended questions have some additional potential weaknesses that arise if the choices are not constructed properly. If the respondent is asked to choose one response from among several choices, the response chosen will be meaningful only if the list of choices is exhaustive, that is, if the choices cover all possible answers a respondent might give to the question. If the list of possible choices is incomplete, a respondent may be forced to choose one that does not express his or her opinion.[96] Moreover, if respondents are told explicitly that they are not limited to the choices presented, most respondents nevertheless will select an answer from among the listed ones.[97]

Although many courts prefer open-ended questions on the grounds that they tend to be less leading, the value of any open-ended or closed-ended question depends on the information it is intended to elicit. Open-ended questions are more appropriate when the survey is attempting to gauge what comes first to a respondent's mind, but closed-ended questions are more suitable for assessing choices between well-identified options or obtaining ratings on a clear set of alternatives.

D. If Probes Were Used to Clarify Ambiguous or Incomplete Answers, What Steps Were Taken to Ensure That the Probes Were Not Leading and Were Administered in a Consistent Fashion?

When questions allow respondents to express their opinions in their own words, some of the respondents may give ambiguous or incomplete answers. In such instances, interviewers may be instructed to record any answer that the respondent gives and move on to the next question, or they may be instructed to probe to obtain a more complete response or clarify the meaning of the ambiguous response. In either situation, interviewers should record verbatim both what the respondent says and what the interviewer says in the attempt to get clarification. Failure to record every part of the exchange in the order in which it occurs raises questions about the reliability of the survey, because neither the court nor the opposing party can evaluate whether the probe affected the views expressed by the respondent.

Vidal Sassoon, 661 F.2d at 276. Norbert Schwarz, *Assessing Frequency Reports of Mundane Behaviors: Contributions of Cognitive Psychology to Questionnaire Construction*, *in* Research Methods in Personality and Social Psychology 98 (Clyde Hendrick & Margaret S. Clark eds., 1990), suggests that respondents often rely on the range of response alternatives as a frame of reference when they are asked for frequency judgments. *See, e.g.*, Roger Tourangeau & Tom W. Smith, *Asking Sensitive Questions: The Impact of Data Collection Mode, Question Format, and Question Context*, 60 Pub. Opinion Q. 275, 292 (1996).

96. *See, e.g.*, American Home Prods. Corp. v. Johnson & Johnson, 654 F. Supp. 568, 581 (S.D.N.Y. 1987).

97. *See* Howard Schuman, *Ordinary Questions, Survey Questions, and Policy Questions*, 50 Pub. Opinion Q. 432, 435–36 (1986).

If the survey is designed to allow for probes, interviewers must be given explicit instructions on when they should probe and what they should say in probing. Standard probes used to draw out all that the respondent has to say (e.g., "Any further thoughts?" "Anything else?" "Can you explain that a little more?") are relatively innocuous and noncontroversial in content, but persistent continued requests for further responses to the same or nearly identical questions may convey the idea to the respondent that he or she has not yet produced the "right" answer.[98] Interviewers should be trained in delivering probes to maintain a professional and neutral relationship with the respondent (as they should during the rest of the interview), which minimizes any sense of passing judgment on the content of the answers offered. Moreover, interviewers should be given explicit instructions on when to probe, so that probes are administered consistently.

A more difficult type of probe to construct and deliver reliably is one that requires a substantive question tailored to the answer given by the respondent. The survey designer must provide sufficient instruction to interviewers so that they avoid giving directive probes that suggest one answer over another. Those instructions, along with all other aspects of interviewer training, should be made available for evaluation by the court and the opposing party.

E. What Approach Was Used to Avoid or Measure Potential Order or Context Effects?

The order in which questions are asked on a survey and the order in which response alternatives are provided in a closed-ended question can influence the answers.[99] Thus, although asking a general question before a more specific question on the same topic is unlikely to affect the response to the specific question, reversing the order of the questions may influence responses to the general question. As a rule, then, surveys are less likely to be subject to order effects if

98. *See, e.g.*, Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc., 19 F.3d 125, 135 (3d Cir. 1994); American Home Prods. Corp. v. Procter & Gamble Co., 871 F. Supp. 739, 748 (D.N.J. 1994).

99. *See* Schuman & Presser, *supra* note 82, at 23, 56–74; Norman M. Bradburn, *Response Effects*, *in* Handbook of Survey Research, *supra* note 1, at 289, 302. In *R.J. Reynolds Tobacco Co. v. Loew's Theatres, Inc.*, 511 F. Supp. 867, 875 (S.D.N.Y. 1980), the court recognized the biased structure of a survey which disclosed the tar content of the cigarettes being compared before questioning respondents about their cigarette preferences. Not surprisingly, respondents expressed a preference for the lower tar product. *See also* E. & J. Gallo Winery v. Pasatiempos Gallo, S.A., 905 F. Supp. 1403, 1409–10 (E.D. Cal. 1994) (court recognized that earlier questions referring to playing cards, board or table games, or party supplies, such as confetti, increased the likelihood that respondents would include these items in answers to the questions that followed).

the questions go from the general (e.g., "What do you recall being discussed in the advertisement?") to the specific (e.g., "Based on your reading of the advertisement, what companies do you think the ad is referring to when it talks about rental trucks that average five miles per gallon?").[100]

The mode of questioning can influence the form that an order effect takes. In mail surveys, respondents are more likely to select the first choice offered (a primacy effect); in telephone surveys, respondents are more likely to choose the last choice offered (a recency effect). Although these effects are typically small, no general formula is available that can adjust values to correct for order effects, because the size and even the direction of the order effects may depend on the nature of the question being asked and the choices being offered. Moreover, it may be unclear which order is most appropriate. For example, if the respondent is asked to choose between two different products, and there is a tendency for respondents to choose the first product mentioned,[101] which order of presentation will produce the more accurate response?[102]

To control for order effects, the order of the questions and the order of the response choices in a survey should be rotated,[103] so that, for example, one-third of the respondents have Product A listed first, one-third of the respondents have Product B listed first, and one-third of the respondents have Product C listed first. If the three different orders[104] are distributed randomly among respondents, no response alternative will have an inflated chance of being selected because of its position, and the average of the three will provide a reasonable estimate of response level.[105]

100. This question was accepted by the court in *U-Haul International, Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1249 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th Cir. 1982).

101. Similarly, candidates in the first position on the ballot tend to attract extra votes when the candidates are not well known. Henry M. Bain & Donald S. Hecock, Ballot Position and Voter's Choice: The Arrangement of Names on the Ballot and Its Effect on the Voter (1973).

102. *See* Rust Env't & Infrastructure, Inc. v. Teunissen, 131 F.3d 1210, 1218 (7th Cir. 1997) (survey did not pass muster in part because of failure to incorporate random rotation of corporate names that were the subject of a trademark dispute).

103. *See, e.g.*, Stouffer Foods Corp., 118 F.T.C. 746, No. 9250, 1994 FTC LEXIS 196, at *24–25 (Sept. 26, 1994); *cf.* Winning Ways, Inc. v. Holloway Sportswear, Inc., 913 F. Supp. 1454, 1465–67 (D. Kan. 1996) (failure to rotate the order in which the jackets were shown to the consumers led to reduced weight for the survey).

104. Actually, there are six possible orders of the three alternatives: ABC, ACB, BAC, BCA, CAB, and CBA. Thus, the optimal survey design would allocate equal numbers of respondents to each of the six possible orders.

105. Although rotation is desirable, many surveys are conducted with no attention to this potential bias. Since it is impossible to know in the abstract whether a particular question suffers much, little, or not at all from an order bias, lack of rotation should not preclude reliance on the answer to the question, but it should reduce the weight given to that answer.

F. If the Survey Was Designed to Test a Causal Proposition, Did the Survey Include an Appropriate Control Group or Question?

Most surveys that are designed to provide evidence of trademark infringement or deceptive advertising are not conducted to describe consumer beliefs. Instead, they are intended to show how a trademark or the content of a commercial influences respondents' perceptions or understanding of a product or commercial. Thus, the question is whether the commercial misleads the consumer into thinking that Product A is a superior pain reliever, not whether consumers hold inaccurate beliefs about the product. Yet if consumers already believe, before viewing the commercial, that Product A is a superior pain reliever, a survey that records consumers' impressions after they view the commercial may reflect those preexisting beliefs rather than impressions produced by the commercial.

Surveys that record consumer impressions have a limited ability to answer questions about the origins of those impressions. The difficulty is that the consumer's response to any question on the survey may be the result of information or misinformation from sources other than the trademark the respondent is being shown or the commercial he or she has just watched. In a trademark survey attempting to show secondary meaning, for example, respondents were shown a picture of the stripes used on Mennen stick deodorant and asked, "[W]hich [brand] would you say uses these stripes on their package?"[106] The court recognized that the high percentage of respondents selecting "Mennen" from an array of brand names may have represented "merely a playback of brand share"[107]; that is, respondents asked to give a brand name may guess the one that is most familiar, generally the brand with the largest market share.[108]

Some surveys attempt to reduce the impact of preexisting impressions on respondents' answers by instructing respondents to focus solely on the stimulus as a basis for their answers. Thus, the survey includes a preface (e.g., "based on the commercial you just saw") or directs the respondent's attention to the mark at issue (e.g., "these stripes on the package"). Such efforts are likely to be only partially successful. It is often difficult for respondents to identify accurately the source of their impressions.[109] The more routine the idea being examined in the survey (e.g., that the advertised pain reliever is more effective than others on the

106. Mennen Co. v. Gillette Co., 565 F. Supp. 648, 652 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1437 (2d Cir. 1984). To demonstrate secondary meaning, "the [c]ourt must determine whether the mark has been so associated in the mind of consumers with the entity that it identifies that the goods sold by that entity are distinguished by the mark or symbol from goods sold by others." *Id.*

107. *Id.*

108. *See also* Upjohn Co. v. American Home Prods. Corp., No. 1-95-CV-237, 1996 U.S. Dist. LEXIS 8049, at *42-44 (W.D. Mich. Apr. 5, 1996).

109. *See* Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 Psychol. Rev. 231 (1977).

market; that the mark belongs to the brand with the largest market share), the more likely it is that the respondent's answer is influenced by preexisting impressions, by expectations about what commercials generally say (e.g., the product being advertised is better than its competitors), or by guessing, rather than by the actual content of the commercial message or trademark being evaluated.

It is possible to adjust many survey designs so that causal inferences about the effect of a trademark or an allegedly deceptive commercial become clear and unambiguous. By adding an appropriate control group, the survey expert can test directly the influence of the stimulus.[110] In the simplest version of a survey experiment, respondents are assigned randomly to one of two conditions.[111] For example, respondents assigned to the experimental condition view an allegedly deceptive commercial, and respondents assigned to the control condition either view a commercial that does not contain the allegedly deceptive material or do not view any commercial.[112] Respondents in both the experimental and control groups answer the same set of questions. The effect of the allegedly deceptive message is evaluated by comparing the responses made by the experimental group members with those of the control group members. If 40% of the respondents in the experimental group responded with the deceptive message (e.g., the advertised product has fewer calories than its competitor), whereas only 8% of the respondents in the control group gave that response, the difference between 40% and 8% (within the limits of sampling error[113]) can be attributed only to the allegedly deceptive commercial. Without the control group, it is not possible to determine how much of the 40% is due to respondents' preexisting beliefs or other background noise (e.g., respondents who misunderstand the question or misstate their responses). Both preexisting beliefs and other background noise should have produced similar response levels in the experimental

110. *See* Shari S. Diamond, *Using Psychology to Control Law: From Deceptive Advertising to Criminal Sentencing*, 13 Law & Hum. Behav. 239, 244–46 (1989); Shari S. Diamond & Linda Dimitropoulos, Deception and Puffery in Advertising: Behavioral Science Implications for Regulation (American Bar Found. Working Paper Series No. 9105, 1994); Jacob Jacoby & Constance Small, *Applied Marketing: The FDA Approach to Defining Misleading Advertising*, 39 J. Marketing 65, 68 (1975). For a more general discussion of the role of control groups, see David H. Kaye & David A. Freedman, Reference Guide on Statistics, § II.A, in this manual.

111. Random assignment should not be confused with random selection. When respondents are assigned randomly to different treatment groups (e.g., respondents in each group watch a different commercial), the procedure ensures that within the limits of sampling error the two groups of respondents will be equivalent except for the different treatments they receive. Respondents selected for a mall intercept study, and not from a probability sample, may be assigned randomly to different treatment groups. Random selection, in contrast, describes the method of selecting a sample of respondents in a probability sample. *See supra* § III.C.

112. This alternative commercial could be a "tombstone" advertisement that includes only the name of the product or a more elaborate commercial that does not include the claim at issue.

113. For a discussion of sampling error, see David H. Kaye & David A. Freedman, Reference Guide on Statistics, § IV, in this manual.

and control groups. In addition, if respondents who viewed the allegedly deceptive commercial respond differently than respondents who viewed the control commercial, the difference cannot be the result of a leading question, because both groups answered the same question. The ability to evaluate the effect of the wording of a particular question makes the control group design particularly useful in assessing responses to closed-ended questions,[114] which may encourage guessing or particular responses. Thus, the focus on the response level in a control group design is not on the absolute response level, but on the difference between the response level of the experimental group and that of the control group.

In designing a control group study, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed. A survey with an imperfect control group generally provides better information than a survey with no control group at all, but the choice of the specific control group requires some care and should influence the weight that the survey receives. For example, a control stimulus should not be less attractive than the experimental stimulus if the survey is designed to measure how familiar the experimental stimulus is to respondents, since attractiveness may affect perceived familiarity.[115] Nor should the control stimulus share with the experimental stimulus the feature whose impact is being assessed. If, for example, the control stimulus in a case of alleged trademark infringement is itself a likely source of consumer confusion, reactions to the experimental and control stimuli may not differ because both cause respondents to express the same level of confusion.[116]

Explicit attention to the value of control groups in trademark and deceptive-advertising litigation is a recent phenomenon, but it is becoming more common.[117] A LEXIS search using *Lanham Act* and *control group* revealed fourteen

114. The Federal Trade Commission has long recognized the need for some kind of control for closed-ended questions, although it has not specified the type of control that is necessary. Stouffer Foods Corp., 118 F.T.C. 746, No. 9250, 1994 FTC LEXIS 196, at *31 (Sept. 26, 1994).

115. *See, e.g.*, Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership, 34 F.3d 410, 415–16 (7th Cir. 1994) (The court recognized that the name "Baltimore Horses" was less attractive for a sports team than the name "Baltimore Colts."). *See also* Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 912 (7th Cir. 1996) (court noted that one expert's choice of a control brand with a well-known corporate source was less appropriate than the opposing expert's choice of a control brand whose name did not indicate a specific corporate source).

116. *See, e.g.*, Western Publ'g Co. v. Publications Int'l, Ltd., No. 94-C-6803, 1995 U.S. Dist. LEXIS 5917, at *45 (N.D. Ill. May 2, 1995) (court noted that the control product was "arguably more infringing than" the defendant's product) (emphasis omitted).

117. *See, e.g.*, American Home Prods. Corp. v. Procter & Gamble Co., 871 F. Supp. 739, 749 (D.N.J. 1994) (discounting survey results based on failure to control for participants' preconceived notions); ConAgra, Inc. v. Geo. A. Hormel & Co., 784 F. Supp. 700, 728 (D. Neb. 1992) ("Since no control was used, the . . . study, standing alone, must be significantly discounted."), *aff'd*, 990 F.2d 368 (8th Cir. 1993).

district court cases in the six years since the first edition of this manual in 1994,[118] five district court cases in the seven years from 1987 to 1993,[119] and only one case before 1987[120] in which surveys with control groups were discussed. Other cases, however, have described or considered surveys using control group designs without labeling the comparison group a control group.[121] Indeed, one reason why cases involving surveys with control groups may be underrepresented in reported cases is that a survey with a control group produces less ambiguous findings, which may lead to a resolution before a preliminary injunction hearing or trial occurs.[122]

Another more common use of control methodology is a control question. Rather than administering a control stimulus to a separate group of respondents,

118. National Football League Properties, Inc. v. Prostyle, Inc., 57 F. Supp. 2d 665 (E.D. Wis. 1999); Nabisco, Inc. v. PF Brands, Inc., 50 F. Supp. 2d 188 (S.D.N.Y. 1999); Proctor & Gamble Co. v. Colgate-Palmolive Co., No. 96 Civ. 9123, 1998 U.S. Dist. LEXIS 17773 (S.D.N.Y. Nov. 5, 1998); Mattel, Inc. v. MCA Records, Inc., 28 F. Supp. 2d 1120 (C.D. Cal. 1998); Westchester Media Co. v. PRL USA Holdings, No. H-97-3278, 1998 U.S. Dist. LEXIS 11737 (S.D. Tex. July 2, 1998); Time Inc. v. Petersen Publ'g Co., 976 F. Supp. 263 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 113 (2d Cir. 1999); Adjusters Int'l, Inc. v. Public Adjusters Int'l, Inc., No. 92-CV-1426, 1996 U.S. Dist. LEXIS 12604 (N.D.N.Y. Aug. 27, 1996); Upjohn Co. v. American Home Prods. Corp., No. 1-95-CV-237, 1996 U.S. Dist. LEXIS 8049 (W.D. Mich. Apr. 5, 1996); Copy Cop, Inc. v. Task Printing, Inc., 908 F. Supp. 37 (D. Mass. 1995); Volkswagen Aktiengesellschaft v. Uptown Motors, No. 91-CIV-3447, 1995 U.S. Dist. LEXIS 13869 (S.D.N.Y. July 13, 1995); Western Publ'g Co. v. Publications Int'l, Ltd., No. 94-C-6803, 1995 U.S. Dist. LEXIS 5917 (N.D. Ill. May 2, 1995); Dogloo, Inc. v. Doskocil Mfg. Co., 893 F. Supp. 911 (C.D. Cal. 1995); Reed-Union Corp. v. Turtle Wax, Inc., 869 F. Supp. 1304 (N.D. Ill. 1994), *aff'd*, 77 F.3d 909 (7th Cir. 1996); Pfizer, Inc. v. Miles, Inc., 868 F. Supp. 437 (D. Conn. 1994).

119. ConAgra, Inc. v. Geo. A. Hormel & Co., 784 F. Supp. 700 (D. Neb. 1992), *aff'd*, 990 F.2d 368 (8th Cir. 1993); Johnson & Johnson-Merck Consumer Pharms. Co. v. Smithkline Beecham Corp., No. 91 Civ. 0960, 1991 U.S. Dist. LEXIS 13689 (S.D.N.Y. Sept. 30, 1991), *aff'd*, 960 F.2d 294 (2d Cir. 1992); Goya Foods, Inc. v. Condal Distribs., Inc., 732 F. Supp. 453 (S.D.N.Y. 1990); Sturm, Ruger & Co. v. Arcadia Mach. & Tool, Inc., No. 85-8459, 1988 U.S. Dist. LEXIS 16451 (C.D. Cal. Nov. 7, 1988); Frisch's Restaurant, Inc. v. Elby's Big Boy, Inc., 661 F. Supp. 971 (S.D. Ohio 1987), *aff'd*, 849 F.2d 1012 (6th Cir. 1988).

120. American Basketball Ass'n v. AMF Voit, Inc., 358 F. Supp. 981 (S.D.N.Y.), *aff'd*, 487 F.2d 1393 (2d Cir. 1973).

121. Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership, No. 94-727-C, 1994 U.S. Dist. LEXIS 19277, at *10–11 (S.D. Ind. June 27, 1994), *aff'd*, 34 F.3d 410 (7th Cir. 1994). In *Indianapolis Colts*, the district court described a survey conducted by the plaintiff's expert in which half of the interviewees were shown a shirt with the name "Baltimore CFL Colts" on it and half were shown a shirt on which the word "Horses" had been substituted for the word "Colts." *Id.* The court noted that the comparison of reactions to the horse and colt versions of the shirt made it possible "to determine the impact from the use of the word 'Colts.'" *Id.* at *11. *See also* Quality Inns Int'l, Inc. v. McDonald's Corp., 695 F. Supp. 198, 218 (D. Md. 1988) (survey revealed confusion between McDonald's and McSleep, but control survey revealed no confusion between McDonald's and McTavish).

122. The relatively infrequent mention of control groups in surveys discussed in federal cases is not confined to Lanham Act litigation. A LEXIS search using *survey* and *control group* revealed thirty district court cases in the six years from 1994 in which *control group* was used to refer to a methodological feature: the fourteen Lanham Act cases cited *supra* note 118; nine that referred to medical, physiological, or pharmacological experiments; and seven others.

the survey asks all respondents one or more control questions along with the question about the product or service. In a trademark dispute, for example, a survey indicated that 7.2% of respondents believed that "The Mart" and "K-Mart" were owned by the same individuals. The court found no likelihood of confusion based on survey evidence that 5.7% of the respondents also thought that "The Mart" and "King's Department Store" were owned by the same source.[123]

Similarly, a standard technique used to evaluate whether a brand name is generic is to present survey respondents with a series of product or service names and ask them to indicate in each instance whether they believe the name is a brand name or a common name. By showing that 68% of respondents considered Teflon a brand name (a proportion similar to the 75% of respondents who recognized the acknowledged trademark Jell-O as a brand name, and markedly different from the 13% who thought aspirin was a brand name), the makers of Teflon retained their trademark.[124]

Every measure of opinion or belief in a survey reflects some degree of error. Control groups and control questions are the most reliable means for assessing response levels against the baseline level of error associated with a particular question.

G. What Limitations Are Associated with the Mode of Data Collection Used in the Survey?

Three primary methods are used to collect survey data: (1) in-person interviews, (2) telephone surveys, and (3) mail surveys.[125] The choice of a data collection method for a survey should be justified by its strengths and weaknesses.

1. In-person interviews

Although costly, in-person interviews generally are the preferred method of data collection, especially when visual materials must be shown to the respondent under controlled conditions.[126] When the questions are complex and the interviewers are skilled, in-person interviewing provides the maximum oppor-

123. S.S. Kresge Co. v. United Factory Outlet, Inc., 598 F.2d 694, 697 (1st Cir. 1979). Note that the aggregate percentages reported here do not reveal how many of the same respondents were confused by both names, an issue that may be relevant in some situations. *See* Joseph L. Gastwirth, *Reference Guide on Survey Research*, 36 Jurimetrics J. 181, 187–88 (1996) (review essay).

124. E.I. DuPont de Nemours & Co. v. Yoshida Int'l, Inc., 393 F. Supp. 502, 526-27 & n.54 (E.D.N.Y. 1975).

125. Methods also may be combined, as when the telephone is used to "screen" for eligible respondents, who then are invited to participate in an in-person interview.

126. A mail survey also can include limited visual materials but cannot exercise control over when and how the respondent views them.

tunity to clarify or probe. Unlike a mail survey, both in-person and telephone interviews have the capability to implement complex skip sequences (in which the respondent's answer determines which question will be asked next) and the power to control the order in which the respondent answers the questions. As described in section V.A, appropriate interviewer training is necessary if these potential benefits are to be realized. Objections to the use of in-person interviews arise primarily from their high cost or, on occasion, from evidence of inept or biased interviewers.

2. *Telephone surveys*

Telephone surveys offer a comparatively fast and low-cost alternative to in-person surveys and are particularly useful when the population is large and geographically dispersed. Telephone interviews (unless supplemented with mailed materials) can be used only when it is unnecessary to show the respondent any visual materials. Thus, an attorney may present the results of a telephone survey of jury-eligible citizens in a motion for a change of venue in order to provide evidence that community prejudice raises a reasonable suspicion of potential jury bias.[127] Similarly, potential confusion between a restaurant called McBagel's and the McDonald's fast-food chain was established in a telephone survey. Over objections from defendant McBagel's that the survey did not show respondents the defendant's print advertisements, the court found likelihood of confusion based on the survey, noting that "by soliciting audio responses [, the telephone survey] was closely related to the radio advertising involved in the case."[128] In contrast, when words are not sufficient because, for example, the survey is assessing reactions to the trade dress or packaging of a product that is alleged to promote confusion, a telephone survey alone does not offer a suitable vehicle for questioning respondents.[129]

In evaluating the sampling used in a telephone survey, the trier of fact should consider

- (when prospective respondents are not business personnel) whether some form of random-digit dialing[130] was used instead of or to supplement tele-

127. United States v. Partin, 320 F. Supp. 275, 279-80 (E.D. La. 1970). For a discussion of surveys used in motions for change of venue, see Neal Miller, *Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation, Part II*, 40 Rutgers L. Rev. 467, 470–74 (1988); National Jury Project, Jurywork: Systematic Techniques (Elissa Krauss & Beth Bonora eds., 2d ed. 1983).

128. McDonald's Corp. v. McBagel's, Inc., 649 F. Supp. 1268, 1278 (S.D.N.Y. 1986).

129. Thompson Med. Co. v. Pfizer Inc., 753 F.2d 208 (2d Cir. 1985); Incorporated Publ'g Corp. v. Manhattan Magazine, Inc., 616 F. Supp. 370 (S.D.N.Y. 1985), *aff'd without op.*, 788 F.2d 3 (2d Cir. 1986).

130. Random digit dialing provides coverage of households with both listed and unlisted telephone numbers by generating numbers at random from the frame of all possible telephone numbers. James M. Lepkowski, *Telephone Sampling Methods in the United States*, *in* Telephone Survey Methodology 81–91 (Robert M. Groves et al. eds., 1988).

phone numbers obtained from telephone directories, because up to 65% of all residential telephone numbers in some areas may be unlisted;[131]

- whether the sampling procedures required the interviewer to sample within the household or business, instead of allowing the interviewer to administer the survey to any qualified individual who answered the telephone;[132] and
- whether interviewers were required to call back at several different times of the day and on different days to increase the likelihood of contacting individuals or businesses with different schedules.

Telephone surveys that do not include these procedures may, like other nonprobability sampling approaches, be adequate for providing rough approximations. The vulnerability of the survey depends on the information being gathered. More elaborate procedures for achieving a representative sample of respondents are advisable if the survey instrument requests information that is likely to differ for individuals with listed telephone numbers and individuals with unlisted telephone numbers, or individuals rarely at home and those usually at home.

The report submitted by a survey expert who conducts a telephone survey should specify

1. the procedures that were used to identify potential respondents;
2. the number of telephone numbers for which no contact was made; and
3. the number of contacted potential respondents who refused to participate in the survey.

Computer-assisted telephone interviewing, or CATI, is increasingly used in the administration and data entry of large-scale surveys.[133] A computer protocol may be used to generate telephone numbers and dial them as well as to guide the interviewer. The interviewer conducting a computer-assisted interview (CAI), whether by telephone or in a face-to-face setting, follows the script for the interview generated by the computer program and types in the respondent's answers as the interview proceeds. A primary advantage of CATI and other CAI procedures is that skip patterns can be built into the program so that, for example, if the respondent is asked whether she has ever been the victim of a burglary and she says yes, the computer will generate further questions about

131. In 1992, the percentage of households with unlisted numbers reached 65% in Las Vegas and 62% in Los Angeles. Survey Sampling, Inc., The Frame 2 (March 1993). Studies comparing listed and unlisted household characteristics show some important differences. Lepkowski, *supra* note 130, at 76.

132. This is a consideration only if the survey is sampling individuals. If the survey is seeking information on the household, more than one individual may be able to answer questions on behalf of the household.

133. William L. Nicholls II & R.M. Groves, *The Status of Computer-Assisted Telephone Interviewing*, 2 J. Official Stat. 93 (1986); Mary A. Spaeth, *CATI Facilities at Academic Research Organizations*, 21 Surv. Res. 11 (1990); William E. Saris, Computer-Assisted Interviewing (1991).

the burglary, but if she says no, the program will automatically skip the follow-up burglary questions. Interviewer errors in following the skip patterns are therefore avoided, making CAI procedures particularly valuable when the survey involves complex branching and skip patterns.[134] CAI procedures can also be used to control for order effects by having the program rotate the order in which questions or choices are presented.[135] CAI procedures, however, require additional planning to take advantage of the potential for improvements in data quality. When a CAI protocol is used in a survey presented in litigation, the party offering the survey should supply for inspection the computer program that was used to generate the interviews. Moreover, CAI procedures do not eliminate the need for close monitoring of interviews to ensure that interviewers are accurately reading the questions in the interview protocol and accurately entering the answers that the respondent is giving to those questions.

3. Mail surveys

In general, mail surveys tend to be substantially less costly than both in-person and telephone surveys.[136] Although response rates for mail surveys are often low, researchers have obtained 70% response rates in some general public surveys and response rates of over 90% with certain specialized populations.[137] Procedures that encourage high response rates include multiple mailings, highly personalized communications, prepaid return envelopes and incentives or gratuities, assurances of confidentiality, and first-class outgoing postage.[138]

A mail survey will not produce a high rate of return unless it begins with an accurate and up-to-date list of names and addresses for the target population. Even if the sampling frame is adequate, the sample may be unrepresentative if some individuals are more likely to respond than others. For example, if a survey targets a population that includes individuals with literacy problems, these individuals will tend to be underrepresented. Open-ended questions are generally of limited value on a mail survey because they depend entirely on the respondent to answer fully and do not provide the opportunity to probe or clarify

134. Saris, *supra* note 133, at 20, 27.

135. *See, e.g.*, Intel Corp. v. Advanced Micro Devices, Inc., 756 F. Supp. 1292, 1296–97 (N.D. Cal. 1991) (survey designed to test whether the term *386* as applied to a microprocessor was generic used a CATI protocol that tested reactions to five terms presented in rotated order).

136. Don A. Dillman, *Mail and Other Self-Administered Questionnaires*, *in* Handbook of Survey Research, *supra* note 1, at 359, 373.

137. *Id.* at 360.

138. *See, e.g.*, Richard J. Fox et al., *Mail Survey Response Rate: A Meta-Analysis of Selected Techniques for Inducing Response*, 52 Pub. Opinion Q. 467, 482 (1988); Eleanor Singer et al., *Confidentiality Assurances and Response: A Quantitative Review of the Experimental Literature*, 59 Pub. Opinion Q. 66, 71 (1995); Kenneth D. Hopkins & Arlen R. Gullickson, *Response Rates in Survey Research: A Meta-Analysis of the Effects of Monetary Gratuities*, 61 J. Experimental Educ. 52, 54–57, 59 (1992).

unclear answers. Similarly, if eligibility to answer some questions depends on the respondent's answers to previous questions, such skip sequences may be difficult for some respondents to follow. Finally, because respondents complete mail surveys without supervision, survey personnel are unable to prevent respondents from discussing the questions and answers with others before completing the survey and to control the order in which respondents answer the questions. If it is crucial to have respondents answer questions in a particular order, a mail survey cannot be depended on to provide adequate data.[139]

4. Internet surveys

A more recent innovation in survey technology is the Internet survey in which potential respondents are contacted and their responses are collected over the Internet. Internet surveys can substantially reduce the cost of reaching potential respondents and offer some of the advantages of in-person interviews by allowing the computer to show the respondent pictures or lists of response choices in the course of asking the respondent questions. The key limitation is that the respondents accessible over the Internet must fairly represent the relevant population whose responses the survey was designed to measure. Thus, a litigant presenting the results of a web-based survey should be prepared to provide evidence on the potential bias in sampling that the web-based survey is likely to introduce. If the target population consists of computer users, the bias may be minimal. If the target population consists of owners of television sets, significant bias is likely.

V. Surveys Involving Interviewers

A. Were the Interviewers Appropriately Selected and Trained?

A properly defined population or universe, a representative sample, and clear and precise questions can be depended on to produce trustworthy survey results only if "sound interview procedures were followed by competent interviewers."[140] Properly trained interviewers receive detailed written instructions on everything they are to say to respondents, any stimulus materials they are to use in the survey, and how they are to complete the interview form. These instructions should be made available to the opposing party and to the trier of fact. Thus, interviewers should be told, and the interview form on which answers are recorded should indicate, which responses, if any, are to be read to the respondent. Interviewers also should be instructed to record verbatim the respondent's

139. Dillman, *supra* note 136, at 368–70.
140. Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc., 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983).

answers, to indicate explicitly whenever they repeat a question to the respondent, and to record any statements they make to or supplementary questions they ask the respondent.

Interviewers require training to ensure that they are able to follow directions in administering the survey questions. Some training in general interviewing techniques is required for most interviews (e.g., practice in pausing to give the respondent enough time to answer and practice in resisting invitations to express the interviewer's beliefs or opinions). Although procedures vary, one treatise recommends at least five hours of training in general interviewing skills and techniques for new interviewers.[141]

The more complicated the survey instrument is, the more training and experience the interviewers require. Thus, if the interview includes a skip pattern (where, e.g., Questions 4–6 are asked only if the respondent says yes to Question 3, and Questions 8–10 are asked only if the respondent says no to Question 3), interviewers must be trained to follow the pattern. Similarly, if the questions require specific probes to clarify ambiguous responses, interviewers must receive instruction on when to use the probes and what to say. In some surveys, the interviewer is responsible for last-stage sampling (i.e., selecting the particular respondents to be interviewed), and training is especially crucial to avoid interviewer bias in selecting respondents who are easiest to approach or easiest to find.

Training and instruction of interviewers should include directions on the circumstances under which interviews are to take place (e.g., question only one respondent at a time out of the hearing of any other respondent). The trustworthiness of a survey is questionable if there is evidence that some interviews were conducted in a setting in which respondents were likely to have been distracted or in which others were present and could overhear. Such evidence of careless administration of the survey was one ground used by a court to reject as inadmissible a survey that purported to demonstrate consumer confusion.[142]

Some compromises may be accepted when surveys must be conducted swiftly. In trademark and deceptive advertising cases, the plaintiff's usual request is for a preliminary injunction, because a delay means irreparable harm. Nonetheless, careful instruction and training of interviewers who administer the survey and complete disclosure of the methods used for instruction and training are crucial elements that, if compromised, seriously undermine the trustworthiness of any survey.

141. Eve Weinberg, *Data Collection: Planning and Management*, *in* Handbook of Survey Research, *supra* note 1, at 329, 332.

142. *Toys "R" Us*, 559 F. Supp. at 1204 (some interviews apparently were conducted in a bowling alley; some interviewees waiting to be interviewed overheard the substance of the interview while they were waiting).

B. What Did the Interviewers Know About the Survey and Its Sponsorship?

One way to protect the objectivity of survey administration is to avoid telling interviewers who is sponsoring the survey. Interviewers who know the identity of the survey's sponsor may affect results inadvertently by communicating to respondents their expectations or what they believe are the preferred responses of the survey's sponsor. To ensure objectivity in the administration of the survey, it is standard interview practice to conduct double-blind research whenever possible: both the interviewer and the respondent are blind to the sponsor of the survey and its purpose. Thus, the survey instrument should provide no explicit clues (e.g., a sponsor's letterhead appearing on the survey) and no implicit clues (e.g., reversing the usual order of the yes and no response boxes on the interviewer's form next to a crucial question, thereby potentially increasing the likelihood that *no* will be checked[143]) about the sponsorship of the survey or the expected responses.

Nonetheless, in some surveys (e.g., some government surveys), disclosure of the survey's sponsor to respondents (and thus to interviewers) is required. Such surveys call for an evaluation of the likely biases introduced by interviewer or respondent awareness of the survey's sponsorship. In evaluating the consequences of sponsorship awareness, it is important to consider (1) whether the sponsor has views and expectations that are apparent and (2) whether awareness is confined to the interviewers or involves the respondents. For example, if a survey concerning attitudes toward gun control is sponsored by the National Rifle Association, it is clear that responses opposing gun control are likely to be preferred. In contrast, if the survey on gun control attitudes is sponsored by the Department of Justice, the identity of the sponsor may not suggest the kind of responses the sponsor expects or would find acceptable.[144] When interviewers are well trained, their awareness of sponsorship may be a less serious threat than respondents' awareness. The empirical evidence for the effects of interviewers' prior expectations on respondents' answers generally reveals modest effects when the interviewers are well trained.[145]

143. Centaur Communications, Ltd. v. A/S/M Communications, Inc., 652 F. Supp. 1105, 1111 n.3 (S.D.N.Y.) (pointing out that reversing the usual order of response choices, yes or no, to no or yes may confuse interviewers as well as introduce bias), *aff'd*, 830 F.2d 1217 (2d Cir. 1987).

144. *See, e.g.*, Stanley Presser et al., *Survey Sponsorship, Response Rates, and Response Effects*, 73 Soc. Sci. Q. 699, 701 (1992) (different responses to a university-sponsored telephone survey and a newspaper-sponsored survey for questions concerning attitudes toward the mayoral primary, an issue on which the newspaper had taken a position).

145. *See, e.g.*, Seymour Sudman et al., *Modest Expectations: The Effects of Interviewers' Prior Expectations on Responses*, 6 Soc. Methods & Res. 171, 181 (1977).

C. What Procedures Were Used to Ensure and Determine That the Survey Was Administered to Minimize Error and Bias?

Three methods are used to ensure that the survey instrument was implemented in an unbiased fashion and according to instructions. The first, monitoring the interviews as they occur, is done most easily when telephone surveys are used. A supervisor listens to a sample of interviews for each interviewer. Field settings make monitoring more difficult, but evidence that monitoring has occurred provides an additional indication that the survey has been reliably implemented.

Second, validation of interviews occurs when respondents in a sample are recontacted to ask whether the initial interviews took place and to determine whether the respondents were qualified to participate in the survey. The standard procedure for validation of in-person interviews is to telephone a random sample of about 10% to 15% of the respondents.[146] Some attempts to reach the respondent will be unsuccessful, and occasionally a respondent will deny that the interview took place even though it did. Because the information checked is limited to whether the interview took place and whether the respondent was qualified, this validation procedure does not determine whether the initial interview as a whole was conducted properly. Nonetheless, this standard validation technique warns interviewers that their work is being checked and can detect gross failures in the administration of the survey.

A third way to verify that the interviews were conducted properly is to compare the work done by each individual interviewer. By reviewing the interviews and individual responses recorded by each interviewer, researchers can identify any response patterns or inconsistencies for further investigation.

When a survey is conducted at the request of a party for litigation rather than in the normal course of business, a heightened standard for validation checks may be appropriate. Thus, independent validation of at least 50% of interviews by a third party rather than by the field service that conducted the interviews increases the trustworthiness of the survey results.[147]

146. *See, e.g.*, National Football League Properties, Inc. v. New Jersey Giants, Inc., 637 F. Supp. 507, 515 (D.N.J. 1986); Davis v. Southern Bell Tel. & Tel. Co., No. 89-2839, 1994 U.S. Dist. LEXIS 13257, at *16 (S.D. Fla. Feb. 1, 1994).

147. In *Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1218 (7th Cir. 1997), the court criticized a survey in part because it "did not comport with accepted practice for independent validation of the results."

VI. Data Entry and Grouping of Responses

A. What Was Done to Ensure That the Data Were Recorded Accurately?

Analyzing the results of a survey requires that the data obtained on each sampled element be recorded, edited, and often coded before the results can be tabulated and processed. Procedures for data entry should include checks for completeness, checks for reliability and accuracy, and rules for resolving inconsistencies. Accurate data entry is maximized when responses are verified by duplicate entry and comparison, and when data entry personnel are unaware of the purposes of the survey.

B. What Was Done to Ensure That the Grouped Data Were Classified Consistently and Accurately?

Coding of answers to open-ended questions requires a detailed set of instructions so that decision standards are clear and responses can be scored consistently and accurately. Two trained coders should independently score the same responses to check for the level of consistency in classifying responses. When the criteria used to categorize verbatim responses are controversial or allegedly inappropriate, those criteria should be sufficiently clear to reveal the source of disagreements. In all cases, the verbatim responses should be available so that they can be recoded using alternative criteria.[148]

148. *See, e.g.*, Coca-Cola Co. v. Tropicana Prods., Inc., 538 F. Supp. 1091, 1094–96 (S.D.N.Y.) (plaintiff's expert stated that respondents' answers to the several open-ended questions revealed that 43% of respondents thought Tropicana was portrayed as fresh squeezed; the court's own tabulation found no more than 15% believed this was true), *rev'd on other grounds*, 690 F.2d 312 (2d Cir. 1982). *See also* McNeilab, Inc. v. American Home Prods. Corp., 501 F. Supp. 517 (S.D.N.Y. 1980); Rock v. Zimmerman, 959 F.2d 1237, 1253 n.9 (3d Cir. 1992) (court found that responses on a change of venue survey incorrectly categorized respondents who believed the defendant was insane as believing he was guilty); Revlon Consumer Prods. Corp. v. Jennifer Leather Broadway, Inc., 858 F. Supp. 1268, 1276 (S.D.N.Y. 1994) (inconsistent scoring and subjective coding led court to find survey so unreliable that it was entitled to no weight), *aff'd*, 57 F.3d 1062 (2d Cir. 1995).

VII. Disclosure and Reporting

A. When Was Information About the Survey Methodology and Results Disclosed?

Objections to the definition of the relevant population, the method of selecting the sample, and the wording of questions generally are raised for the first time when the results of the survey are presented. By that time it is too late to correct methodological deficiencies that could have been addressed in the planning stages of the survey. The plaintiff in a trademark case[149] submitted a set of proposed survey questions to the trial judge, who ruled that the survey results would be admissible at trial while reserving the question of the weight the evidence would be given.[150] The court of appeals called this approach a commendable procedure and suggested that it would have been even more desirable if the parties had "attempt[ed] in good faith to agree upon the questions to be in such a survey."[151]

The *Manual for Complex Litigation, Second,* recommended that parties be required, "before conducting any poll, to provide other parties with an outline of the proposed form and methodology, including the particular questions that will be asked, the introductory statements or instructions that will be given, and other controls to be used in the interrogation process." [152] The parties then were encouraged to attempt to resolve any methodological disagreements before the survey was conducted.[153] Although this passage in the second edition of the manual has been cited with apparent approval,[154] the prior agreement the manual recommends has occurred rarely and the *Manual for Complex Litigation, Third,* recommends, but does not advocate requiring, prior disclosure and discussion of survey plans.[155]

Rule 26 of the Federal Rules of Civil Procedure requires extensive disclosure of the basis of opinions offered by testifying experts. However, these provisions may not produce disclosure of all survey materials, because parties are not obli-

149. Union Carbide Corp. v. Ever-Ready, Inc., 392 F. Supp. 280 (N.D. Ill. 1975), *rev'd*, 531 F.2d 366 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976).

150. Before trial, the presiding judge was appointed to the court of appeals, so the case was tried by another district court judge.

151. *Union Carbide*, 531 F.2d at 386. More recently, the Seventh Circuit recommended the filing of a motion *in limine*, asking the district court to determine the admissibility of a survey based on an examination of the survey questions and the results of a preliminary survey before the party undertakes the expense of conducting the actual survey. Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 929 (7th Cir. 1984).

152. MCL 2d, *supra* note 15, § 21.484.

153. *Id.*

154. *E.g.*, National Football League Properties, Inc. v. New Jersey Giants, Inc., 637 F. Supp. 507, 514 n.3 (D.N.J. 1986).

155. MCL 3d, *supra* note 15, § 21.493.

gated to disclose information about nontestifying experts. Parties considering whether to commission or use a survey for litigation are not obligated to present a survey that produces unfavorable results. Prior disclosure of a proposed survey instrument places the party that ultimately would prefer not to present the survey in the position of presenting damaging results or leaving the impression that the results are not being presented because they were unfavorable. Anticipating such a situation, parties do not decide whether an expert will testify until after the results of the survey are available.

Nonetheless, courts are in a position to encourage early disclosure and discussion even if they do not lead to agreement between the parties. In *McNeilab, Inc. v. American Home Products Corp.*,[156] Judge William C. Conner encouraged the parties to submit their survey plans for court approval to ensure their evidentiary value; the plaintiff did so and altered its research plan based on Judge Conner's recommendations. Parties can anticipate that changes consistent with a judicial suggestion are likely to increase the weight given to, or at least the prospects of admissibility of, the survey.[157]

B. Does the Survey Report Include Complete and Detailed Information on All Relevant Characteristics?

The completeness of the survey report is one indicator of the trustworthiness of the survey and the professionalism of the expert who is presenting the results of the survey. A survey report generally should provide in detail

1. the purpose of the survey;
2. a definition of the target population and a description of the population that was actually sampled;
3. a description of the sample design, including the method of selecting respondents, the method of interview, the number of callbacks, respondent eligibility or screening criteria, and other pertinent information;
4. a description of the results of sample implementation, including (a) the number of potential respondents contacted, (b) the number not reached, (c) the number of refusals, (d) the number of incomplete interviews or terminations, (e) the number of noneligibles, and (f) the number of completed interviews;
5. the exact wording of the questions used, including a copy of each version of the actual questionnaire, interviewer instructions, and visual exhibits;
6. a description of any special scoring (e.g., grouping of verbatim responses into broader categories);

156. 848 F.2d 34, 36 (2d Cir. 1988) (discussing with approval the actions of the district court).

157. Larry C. Jones, *Developing and Using Survey Evidence in Trademark Litigation*, 19 Memphis St. U. L. Rev. 471, 481 (1989).

7. estimates of the sampling error, where appropriate (i.e., in probability samples);
8. statistical tables clearly labeled and identified as to source of data, including the number of raw cases forming the base for each table, row, or column; and
9. copies of interviewer instructions, validation results, and code books.[158]

A description of the procedures and results of pilot testing is not included on this list. Survey professionals generally do not describe pilot testing in their reports. The Federal Rules of Civil Procedure, however, may require that a testifying expert disclose pilot work that serves as a basis for the expert's opinion. The situation is more complicated when a nontestifying expert conducts the pilot work and the testifying expert learns about the pilot testing only indirectly through the attorney's advice about the relevant issues in the case. Some commentators suggest that attorneys are obligated to disclose such pilot work.[159]

C. In Surveys of Individuals, What Measures Were Taken to Protect the Identities of Individual Respondents?

The respondents questioned in a survey generally do not testify in legal proceedings and are unavailable for cross-examination. Indeed, one of the advantages of a survey is that it avoids a repetitious and unrepresentative parade of witnesses. To verify that interviews occurred with qualified respondents, standard survey practice includes validation procedures,[160] the results of which should be included in the survey report.

Conflicts may arise when an opposing party asks for survey respondents' names and addresses in order to reinterview some respondents. The party introducing the survey or the survey organization that conducted the research generally resists supplying such information.[161] Professional surveyors as a rule guarantee

158. These criteria were adapted from the Council of Am. Survey Res. Orgs., *supra* note 41, § III. B. Failure to supply this information substantially impairs a court's ability to evaluate a survey. *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 532 (D.N.J. 1997) (citing the first edition of this manual). *But see Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 626–28 (1995), in which a majority of the Supreme Court relied on a summary of results prepared by the Florida Bar from a consumer survey purporting to show consumer objections to attorney solicitation by mail. In a strong dissent, Justice Kennedy, joined by three of his colleagues, found the survey inadequate based on the document available to the court, pointing out that the summary included "no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results . . . no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains." *Id.* at 640.

159. Yvonne C. Schroeder, *Pretesting Survey Questions*, 11 Am. J. Trial Advoc. 195, 197–201 (1987).

160. *See supra* § V.C.

161. *See, e.g.*, Alpo Petfoods, Inc. v. Ralston Purina Co., 720 F. Supp. 194 (D.D.C. 1989), *aff'd in part & vacated in part*, 913 F.2d 958 (D.C. Cir. 1990).

confidentiality in an effort to increase participation rates and to encourage candid responses. Because failure to extend confidentiality may bias both the willingness of potential respondents to participate in a survey and their responses, the professional standards for survey researchers generally prohibit disclosure of respondents' identities. "The use of survey results in a legal proceeding does not relieve the Survey Research Organization of its ethical obligation to maintain in confidence all Respondent-identifiable information or lessen the importance of Respondent anonymity."[162] Although no surveyor–respondent privilege currently is recognized, the need for surveys and the availability of other means to examine and ensure their trustworthiness argue for deference to legitimate claims for confidentiality in order to avoid seriously compromising the ability of surveys to produce accurate information.[163]

Copies of all questionnaires should be made available upon request so that the opposing party has an opportunity to evaluate the raw data. All identifying information, such as the respondent's name, address, and telephone number, should be removed to ensure respondent confidentiality.

162. Council of Am. Survey Res. Orgs., *supra* note 41, § I.A.3.f. Similar provisions are contained in the By-Laws of the American Association for Public Opinion Research.

163. Litton Indus., Inc., No. 9123, 1979 FTC LEXIS 311, at *13 & n.12 (June 19, 1979) (Order Concerning the Identification of Individual Survey-Respondents with Their Questionnaires) (citing Frederick H. Boness & John F. Cordes, Note, *The Researcher-Subject Relationship: The Need for Protection and a Model Statute*, 62 Geo. L.J. 243, 253 (1973)). *See also* Lampshire v. Procter & Gamble Co., 94 F.R.D. 58, 60 (N.D. Ga. 1982) (defendant denied access to personal identifying information about women involved in studies by the Centers for Disease Control based on Fed. R. Civ. P. 26(c) giving court the authority to enter "any order which justice requires to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense.") (citation omitted).

Glossary of Terms

The following terms and definitions were adapted from a variety of sources, including Handbook of Survey Research (Peter H. Rossi et al. eds., 1983); 1 Environmental Protection Agency, Survey Management Handbook (1983); Measurement Errors in Surveys (Paul P. Biemer et al. eds., 1991); William E. Saris, Computer-Assisted Interviewing (1991); Seymour Sudman, Applied Sampling (1976).

branching. A questionnaire structure that uses the answers to earlier questions to determine which set of additional questions should be asked (e.g., citizens who report having served as jurors on a criminal case are asked different questions about their experiences than citizens who report having served as jurors on a civil case).

CAI (computer-assisted interviewing). A method of conducting interviews in which an interviewer asks questions and records the respondent's answer by following a computer-generated protocol.

CATI (computer-assisted telephone interviewing). A method of conducting telephone interviews in which an interviewer asks questions and records the respondent's answer by following a computer-generated protocol.

closed-ended question. A question that provides the respondent with a list of choices and asks the respondent to choose from among them.

cluster sampling. A sampling technique allowing for the selection of sample elements in groups or clusters, rather than on an individual basis; it may significantly reduce field costs and may increase sampling error if elements in the same cluster are more similar to one another than are elements in different clusters.

confidence interval. An indication of the probable range of error associated with a sample value obtained from a probability sample. Also, margin of error.

convenience sample. A sample of elements selected because they were readily available.

double-blind research. Research in which the respondent and the interviewer are not given information that will alert them to the anticipated or preferred pattern of response.

error score. The degree of measurement error in an observed score (see true score).

full-filter question. A question asked of respondents to screen out those who do not have an opinion on the issue under investigation before asking them the question proper.

mall intercept survey. A survey conducted in a mall or shopping center in which potential respondents are approached by a recruiter (intercepted) and invited to participate in the survey.

multistage sampling design. A sampling design in which sampling takes place in several stages, beginning with larger units (e.g., cities) and then proceeding with smaller units (e.g., households or individuals within these units).

nonprobability sample. Any sample that does not qualify as a probability sample.

open-ended question. A question that requires the respondent to formulate his or her own response.

order effect. A tendency of respondents to choose an item based in part on the order in which it appears in the question, questionnaire, or interview (see primacy effect and recency effect); also referred to as a context effect because the context of the question influences the way the respondent perceives and answers it.

parameter. A summary measure of a characteristic of a population (e.g., average age, proportion of households in an area owning a computer). Statistics are estimates of parameters.

pilot test. A small field test replicating the field procedures planned for the full-scale survey; although the terms *pilot test* and *pretest* are sometimes used interchangeably, a pretest tests the questionnaire, whereas a pilot test generally tests proposed collection procedures as well.

population. The totality of elements (objects, individuals, or other social units) that have some common property of interest; the target population is the collection of elements that the researcher would like to study; the survey population is the population that is actually sampled and for which data may be obtained. Also, universe.

population value, population parameter. The actual value of some characteristic in the population (e.g., the average age); the population value is estimated by taking a random sample from the population and computing the corresponding sample value.

pretest. A small preliminary test of a survey questionnaire. See pilot test.

primacy effect. A tendency of respondents to choose early items from a list of choices; the opposite of a recency effect.

probability sample. A type of sample selected so that every element in the population has a known nonzero probability of being included in the sample; a simple random sample is a probability sample.

probe. A follow-up question that an interviewer asks to obtain a more complete answer from a respondent (e.g., "Anything else?" "What kind of medical problem do you mean?").

quasi-filter question. A question that offers a "don't know" or "no opinion" option to respondents as part of a set of response alternatives; used to screen out respondents who may not have an opinion on the issue under investigation.

random sample. See simple random sample.

recency effect. A tendency of respondents to choose later items from a list of choices; the opposite of a primacy effect.

sample. A subset of a population or universe selected so as to yield information about the population as a whole.

sampling error. The estimated size of the difference between the result obtained from a sample study and the result that would be obtained by attempting a complete study of all units in the sampling frame from which the sample was selected in the same manner and with the same care.

sampling frame. The source or sources from which the objects, individuals, or other social units in a sample are drawn.

secondary meaning. A descriptive term that becomes protectable as a trademark if it signifies to the purchasing public that the product comes from a single producer or source.

simple random sample. The most basic type of probability sample; each unit in the population has an equal probability of being in the sample, and all possible samples of a given size are equally likely to be selected.

skip pattern, skip sequence. A sequence of questions in which some should not be asked (should be skipped) based on the respondent's answer to a previous question (e.g., if the respondent indicates that he does not own a car, he should not be asked what brand of car he owns).

stratified sampling. A sampling technique that permits the researcher to subdivide the population into mutually exclusive and exhaustive subpopulations, or strata; within these strata, separate samples are selected; results can be combined to form overall population estimates or used to report separate within-stratum estimates.

survey population. See population.

systematic sampling. A sampling technique that consists of a random starting point and the selection of every *n*th member of the population; it generally produces the same results as simple random sampling.

target population. See population.

trade dress. A distinctive and nonfunctional design of a package or product protected under state unfair competition law and the federal Lanham Act §43(a), 15 U.S.C. §1125(a) (1946) (amended 1992).

true score. The underlying true value, which is unobservable because there is always some error in measurement; the observed score = true score + error score.

universe. See population.

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3

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
00207	L	2	4	Cause I recognize the names and I think they're a brother and sister team.				
00215	L	2	4					
00218	L	1	2	Because Dick's sells sports stuff and it saysevery season.	Because it says "we live outdoors" so it leads me to believe they sell all outdoor clothing and supplies.	Because of what it says simply "worlds foremost outfitter" hunting fishing outdoor gear.		
00219	L	1	2					
00220	L	1	1	Because they sell some of their products in their store.	Because they sell fishing products like the Sportsmans Wasehouse.			
00221	L	1	1					
00508	L	2	3					
00510	L	1	1	The Academy picture card "R" shows that they sell sports outdoor equipment. I have been there before.	The Gander Mountain card also says we live outdoors. The outdoors reference makes them similar.			
00511	L	1	1					
00522	L	2	4					
00527	L	1	2					
01312	L	2	3					
01327	L	2	4	Because its an Academy for Sports goods and outdoor goods too just like the bass pro shop.				
01329	L	1	2	Because the two sell the same things and to me they are too similar not to be one in the same.				
01331	L	1	2					
02908	L	1	1	I think they sell their merchandise at Bass Pro Shops				
02917	L	2	3					
02921	L	1	2	Because it's sporting goods like the one I saw with the fish.	Because it has both hunting and fishing on it.	Because when being outdoors, you think of fishing and hunting.		
07705	L	1	1	Because it deals with outdoor living and supplies	It's a sporting good store and outdoor supplies and it's a well known store	Only because it's a sporting good store	Because it's an all sporting good store not familiar	
07720	L	2	3	Because it would seem like the smaller version of the big company.	The same reason the smaller version to a big company.			
07721	L	2	4					
07726	L	1	2	They both carry the type of products, equipments and gears for any sport.	They both carry the same name brands and their both top stores when it comes to sporting goods.			
07727	L	1	2					
10615	L	2	4	Because they carry the same products and they are just like each other				
10616	L	2	3	Not sure since Pro-Bass shop and the Lego Gandes both have to do outdoors. I took a guess.				
10624	L	1	2	Because of the colors and it has to do with the outdoors				
10626	L	1	1	The logos are the same				
70006	L	2	4					

W-O-L (N -193)

DEPOSITION EXHIBIT
MAZIS-3
9/22/06
PENGAD-Bayonne, N. J.

MBM0002

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
70024	L	1	1	Because it sounds like they could be a sister company. Like a smaller company.	Because it sounds like an off brand. And they should carry another brand for discounts.	Because it just looks like something that they will carry.		
70026	L	1	2					
70027	L	1	2					
70030	L	2	4					
70115	L	1	1					
70121	L	1	2	I shop their quite often.				
70125	L	2	4	I shop tin these places and I recognize the logos. I'm also familiar with the Bass Pro Logo.	I shop at Dick's and I may have noticed it there.			
70128	L	1	2					
86401	L	1	1					
86402	L	2	4					
86420	L	1	2					
86427	L	1	2					
86607	L	1	1	Because they are both outdoor fitting companies				
86613	L	2	3					
86621	L	2	4					
86628	L	1	2					
87404	L	1	2					
87408	L	1	2	It seems to be pretty big.				
87416	L	1	1					
87427	L	2	4					
87709	L	1	1	They carry the same products.				
87720	L	1	2					
87721	L	2	4	Because Sport Academy is awell known company that sell sporting goods.	Because it said sporting good letting you know they sell sport items.			
87726	L	1	2	Because they said liive outdoor.				
87802	L	1	2					
87810	L	2	3					
87819	L	1	1					
87823	L	2	4	The green is outdoorsy. I have seen the Bass Pro with a green color.	The green is outdoorsy. I have seen the Bass Por with a green color.			
87827	L	1	2					
88013	L	1	1					
88020	L	2	4					
88026	L	1	2					
93906	L	1	2	The printing looks similar. The style of font and practically the same overall design. That's it.	The printing looks similar. The style of font and practically the same overall design. That's it.			
93911	L	2	3	They are both very plain. Well compared to the logo I was shown before they're plain just like it.	They are both very plain. Well compared to the logo I was shown before they're plain just like it.			
93912	L	1	1					
93924	L	2	4					
00209	O	2	3	Cause both logos look familiar				

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
00216	O	1	1					
00226	O	1	2					
00227	O	1	2					
00509	O	1	1	It looks about like the same logo.				
00518	O	1	2					
00521	O	2	4	The Gander Mountain logo has a Gander fly symbol same Bass Pro has Bass fish symbo on its logo.				
00526	O	1	2					
01314	O	1	2					
01315	O	2	3	The Bass Pro Shop sells all of this that is displayed.				
01316	O	1	2					
01317	O	1	1					
01320	O	2	4					
02905	O	2	3					
02911	O	1	1					
02919	O	1	2					
02924	O	1	2	They just catch my eye in the same amount. They just appeal to me.	They just look the same to me.			
02926	O	2	4	I believe the first logo you showed me mentioned something about season starting like this one.				
07706	O	2	4	Well they specialize in all outdoor gear	They would both have everything you would need for outdoors.	They have the similar kind of wording and deals with sports even though one is a warehoude.		
07707	O	1	1	Because I seen it advertised in magazines. Also said fishing gear.				
07718	O	2	3					
07724	O	1	2					
07725	O	1	2	Because their dealing in bass and warehouses.				
10603	O	2	3					
10617	O	1	2					
10619	O	2	4	Because they both deal with outdoor equipment.				
10620	O	1	2					
10621	O	1	1	Because they have the same colors				
70005	O	2	3					
70014	O	1	1					
70021	O	1	2	Because it has something to use for fishing				
70023	O	1	1					
70025	O	2	4					
70110	O	1	1					
70114	O	1	1					
70116	O	2	3	Because it says fishing				
70126	O	2	4					
70127	O	1	2	L.L. Bean is a familiar logo as is Bass.	It's an oudoor store as well so it's			

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
					probably related to Bass.			
86404	O	1	2					
86407	O	1	1					
86422	O	1	2	They are both fishing oriented.				
86426	O	2	4					
86601	O	2	4					
86614	O	1	1					
86616	O	1	2					
86620	O	1	2					
87407	O	1	1					
87420	O	1	2	The lettering has some similarities.				
87425	O	1	2					
87426	O	2	4	It's sporting goods.				
87716	O	1	1					
87717	O	2	4					
87722	O	1	2					
87801	O	1	2					
87813	O	2	4	Logo looks a little similar				
87817	O	1	1					
87824	O	1	2					
88008	O	2	3					
88014	O	1	1	They sell so much of the same stuff at Scheels.				
88018	O	2	4					
88023	O	1	2	It is the same basic layout.				
93907	O	1	1	I've seen it in academy before. I've seen the ad that was shown in the beginning advertised in the store. That's it.	I've seen it around the same places. Malls, individual shops. That's it.			
93913	O	2	3	The font. It's similar to the font with the logo I was first shown. That's it				
93926	O	2	4					
93927	O	1	2					
00206	W	2	3					
00208	W	1	1					
00212	W	2	4					
00217	W	1	2					
00505	W	1	1	They are offering a different type of sports product that Bass Pro does not offer. It may be an attempt to cover a different corner in the market.	This company specializes in a different product than Bass Pro does. Could be an attempt to extend their market.			
00507	W	2	3					
00519	W	1	2					
00520	W	2	4	Both are sporting goods stores. Both have outdoor sporting goods.				
01304	W	1	1					
01305	W	1	2					
01313	W	1	1					

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
01324	W	2	3					
02904	W	2	3	It seems like they sell L.L. Bean merchandise at Bass Pro Shops				
02912	W	1	1	They have the same type of products. The green and white.				
02914	W	1	2					
02925	W	2	4					
07704	W	2	4					
07708	W	1	1					
07719	W	1	2	The of the merchandises and their both catalog.	Their both like warehouses for every sport.			
07723	W	1	2					
10605	W	1	1	Because I am familiar with Bass Pro Shops and when it comes to the ad for Cabelas Hunting-Fishing-Outdoor Gear.				
10623	W	1	2					
10625	W	1	2	The writing on the logo.				
10628	W	2	4					
70011	W	1	1					
70019	W	1	2					
70022	W	1	1					
70028	W	2	4	It seems like it would be associated with it. Because it's a sports warehouse.	It seems like it would associate with it because it's a sports warehouse too,	It seems like it would be associated with it because it's a warehouse too.		
70109	W	1	1	Similar design				
70113	W	2	3					
70119	W	1	2	I think I saw that logo in the store.				
70123	W	2	4					
70124	W	1	2	It's talking about fishing gear. No well Cabelas is a big fish outlet so is Bass, I know them				
86409	W	1	1					
86414	W	1	2					
86424	W	1	2					
86425	W	2	4					
36605	W	2	4					
36608	W	2	3					
36609	W	1	1					
36617	W	1	2					
36618	W	1	2					
37409	W	2	3	The way the sign looks				
37415	W	1	1	It has to do with hunting and fishing.				
37419	W	1	2	I've seen them together and they make the same equipment.	They're both sporting goods sellers.			
37423	W	1	2	I've seen other places and companies carry carry L.L. Bean stuff.				
37424	W	2	4	I have seen this logo a few times in Bass Pro Shop.				

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
87712	W	2	4					
87718	W	1	1					
87724	W	1	2	Because I know that Academysells a lot of sports equipment and outdoor products.				
87725	W	1	2	Color scheme				
87806	W	2	4					
87814	W	1	2					
87816	W	1	1					
87825	W	1	2					
87828	W	1	1					
88010	W	1	1					
88017	W	2	4					
88022	W	1	2					
93909	W	2	3	It's mostly hunting and fishing. The color. The greens are the same shades used in both. That's all.				
93910	W	1	1	The text and the font and the appearance seem to be the same. The style actually and the presentation. That's all				
93917	W	2	4	Strictly sports.	It's all fishing hunting and fishing gear.			
93918	W	1	2					
93925	W	1	2					

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
00207	L	2	4	Cause Bass is the main company and Dick's is a cheaper company not as well known as Bass					
00215	L	2	4						
00218	L	1	2	Because I shop in LL bean in the mall and online and I know their sports clothing line.					
00219	L	1	2						
00220	L	1	1	Because they sell boxing, fishing, baseball, basketball. All of your sports needs.	They sell outdoor equipment and Pro Bass clothing.				
00221	L	1	1						
00508	L	2	3	Because it would be illegal not to do so					
00510	L	1	1						
00511	L	1	1						
00522	L	2	4						
00527	L	1	2						
01312	L	2	3						
01327	L	2	4	They sell outdoor gaming gear for all outdoor sports.					
01329	L	1	2	The logo tells me that the store promotes outdoor gear.	It's a sports outdoor store like the Bass Pro Shop is a sports warehouse.				
01331	L	1	2	Because it for the sporting goods like the other.					
02908	L	1	1						
02917	L	2	3						
02921	L	1	2	I know L.L. Bean sells clothes and would need permission.	I think it's a clothing brand, too.				
07705	L	1	1						
07720	L	2	3	Because it's a top brand sold in a bunch of different stores.	Because its also sold in a bunch of top stores.	The same, sold in top stores.			
07721	L	2	4						
07726	L	1	2	They both deal in live outdoor sports like fishing.	This store is specific and known for their different types of fishes.				
07727	L	1	2						
10615	L	2	4						
10616	L	2	3						
10624	L	1	2						
10626	L	1	1	They are the sporting goods part of the company					
70006	L	2	4						
70024	L	1	1	Because it's a brand name.	Because they are already a store. So they need permission to use the name.				

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
70026	L	1	2						
70027	L	1	2						
70030	L	2	4						
70115	L	1	1						
70121	L	1	2						
70125	L	2	4	It's obvious that it sells outdoor equipment and the Bass Pro is the outside logo.	If this is a product that Bass Pro puts out and Cabela's sells it. They would need permission.				
70128	L	1	2	They sell a lot of fishing equipment.					
86401	L	1	1						
86402	L	2	4						
86420	L	1	2						
86427	L	1	2						
86607	L	1	1						
86613	L	2	3						
86621	L	2	4						
86628	L	1	2						
87404	L	1	2						
87408	L	1	2	Because it is mainly mail order	They are smaller fish than Bass Pro				
87416	L	1	1						
87427	L	2	4						
87709	L	1	1						
87720	L	1	2						
87721	L	2	4						
87726	L	1	2	Because they sell sporting good products.	Because they are a well known sotre for selling all kinda of sports items.				
87802	L	1	2						
87810	L	2	3						
87819	L	1	1						
87823	L	2	4						
87827	L	1	2						
88013	L	1	1	They carry different brands	They usually sell clothing				
88020	L	2	4	It looks like a sub company to them.					
88026	L	1	2						
93906	L	1	2						
93911	L	2	3						
93912	L	1	1						
93924	L	2	4						
00209	O	2	3	Because Gander probably carries Bass products					
00216	O	1	1						
00226	O	1	2	They sell sporting goods.					
00227	O	1	2	Academy you just can't use a name, you must have approval.					

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
00509	O	1	1						
00518	O	1	2						
00521	O	2	4						
00526	O	1	2						
01314	O	1	2						
01315	O	2	3	Sportsman's Warehouse needs to get permission from Bass Pro Shop but Cabelas is on it.					
01316	O	1	2						
01317	O	1	1						
01320	O	2	4						
02905	O	2	3						
02911	O	1	1						
02919	O	1	2	Because they are sporting goods stores.	Because this is a very important logo and they needed approval to sell this gear.				
02924	O	1	2						
02926	O	2	4						
07706	O	2	4	Because it's a sporting good store, because if they buy or sell their products it's only right to get permission.					
07707	O	1	1	Because they sell all brands of sporting goods.					
07718	O	2	3						
07724	O	1	2						
07725	O	1	2	Because the name Gander sounds more a fishing store.					
10603	O	2	3						
10617	O	1	2						
10619	O	2	4						
10620	O	1	2						
10621	O	1	1						
70005	O	2	3						
70014	O	1	1						
70021	O	1	2						
70023	O	1	1						
70025	O	2	4						
70110	O	1	1						
70114	O	1	1						
70116	O	2	3	Because it's an outdoor store					
70126	O	2	4						
70127	O	1	2	Academy is a sports outlet so it probably needs permission to carry Bass equipment.					
86404	O	1	2						
86407	O	1	1						
86422	O	1	2						
86426	O	2	4						

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
86601	O	2	4						
86614	O	1	1						
86616	O	1	2						
86620	O	1	2						
87407	O	1	1	Picture of storefront	It's a big time company, I can see them being in the competition.	It looks like a logo taken from their store			
87420	O	1	2						
87425	O	1	2						
87426	O	2	4	I think it has the same name as the first one.					
87716	O	1	1						
87717	O	2	4	Because they sell outdoor equipment also.	It's a sporting goods store . Also they sell the same type products.	They sell outdoor equipment like Bass.			
87722	O	1	2						
87801	O	1	2						
87813	O	2	4						
87817	O	1	1	The company just became a company. Nothing	A newer company. Maybe not as known. Nothing				
87824	O	1	2						
88008	O	2	3	To make it look better					
88014	O	1	1						
88018	O	2	4						
88023	O	1	2						
93907	O	1	1						
93913	O	2	3						
93926	O	2	4						
93927	O	1	2						
00206	W	2	3						
00208	W	1	1						
00212	W	2	4						
00217	W	1	2						
00505	W	1	1						
00507	W	2	3						
00519	W	1	2						
00520	W	2	4						
01304	W	1	1						
01305	W	1	2						
01313	W	1	1						
01324	W	2	3						
02904	W	2	3						
02912	W	1	1						
02914	W	1	2	Been around with the company for a long time.					
02925	W	2	4						
07704	W	2	4						
07708	W	1	1	Because it's hunting, fishing,	Because they have everything,	There's not more, just sports	I would say the same thing why		

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
				and outdoors so why would you need two stores	it's where I like to go.		open two shops.		
07719	W	1	2	Because it seems like it would be for bass sporting equipment.	Because their more of a golfing sporting store.	Because their more live or hinting and fishing store.	Because their more softball equipment.		
07723	W	1	2						
10605	W	1	1						
10623	W	1	2						
10625	W	1	2						
10628	W	2	4						
70011	W	1	1						
70019	W	1	2						
70022	W	1	1						
70028	W	2	4						
70109	W	1	1						
70113	W	2	3	You can't just take someone's logo unless you want to get sued.	It's wrong to take people's ideas and logos	Businesses should know that being sued is the way to show businesses they can't steal ideas	The logos all should be very different, they aren't	I don't like too many brands looking the same way. This shows no identity	I don't think these are different enough. It is obvious they relied on the other logos
70119	W	1	2						
70123	W	2	4						
70124	W	1	2						
86409	W	1	1						
86414	W	1	2						
86424	W	1	2						
86425	W	2	4						
86605	W	2	4						
86608	W	2	3						
86609	W	1	1						
86617	W	1	2	Gander Mountain because it is one of the smaller companies and sells the same stuff					
86618	W	1	2						
87409	W	2	3						
87415	W	1	1						
87419	W	1	2						
87423	W	1	2	I think they are the same company.					
87424	W	2	4						
87712	W	2	4						
87718	W	1	1						
87724	W	1	2						
87725	W	1	2	The work on card, the wording of card.					
87806	W	2	4						
87814	W	1	2						
87816	W	1	1						
87825	W	1	2						
87828	W	1	1						
88010	W	1	1						

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
88017	W	2	4						
88022	W	1	2						
93909	W	2	3						
93910	W	1	1						
93917	W	2	4	Not regular sporting store	I don't have any idea	I don't have any idea	I don't have any idea		
93918	W	1	2						
93925	W	1	2						

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
00207	L	2	4					
00215	L	2	4					
00218	L	1	2	The picture tells it all. The family shopping for sports outdoors, boy is holding a basketball.	Neber heard of this place but I'll bet they sell sporting goods clothing.			
00219	L	1	2					
00220	L	1	1					
00221	L	1	1					
00508	L	2	3	The fact that L.L.Bean does outdoor gear	Because they do outdoor gear			
00510	L	1	1					
00511	L	1	1	Bass Pro Shop carries a lot of Cabela's products. They are both outdoor sporting good stores				
00522	L	2	4					
00527	L	1	2					
01312	L	2	3	If a brand name looks like its an outdoorsy type thing				
01327	L	2	4					
01329	L	1	2	They sell the seasonal sportswear year round.				
01331	L	1	2					
02908	L	1	1					
02917	L	2	3					
02921	L	1	2	Because it's a sports equipment-outdoor equipment store.				
07705	L	1	1					
07720	L	2	3	Because they are all outdoors and sports stores so their connected.				
07721	L	2	4	Because of their wellknown company, so they have that.				
07726	L	1	2					
07727	L	1	2					
10615	L	2	4					
10616	L	2	3	Just because of the appearance of it. The colors that they used for it as well.				
10624	L	1	2					
10626	L	1	1					
70006	L	2	4					
70024	L	1	1					
70026	L	1	2					
70027	L	1	2					
70030	L	2	4					
70115	L	1	1	Well they both sell fishing gear				
70121	L	1	2					
70125	L	2	4					

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
70128	L	1	2					
86401	L	1	1					
86402	L	2	4					
86420	L	1	2					
86427	L	1	2					
86607	L	1	1					
86613	L	2	3					
86621	L	2	4					
86628	L	1	2					
87404	L	1	2					
87408	L	1	2	They are big in sports equipment				
87416	L	1	1					
87427	L	2	4					
87709	L	1	1	They both have something to do with outdoors.				
87720	L	1	2					
87721	L	2	4					
87726	L	1	2					
87802	L	1	2					
87810	L	2	3	It looks similar because of the cursive font				
87819	L	1	1					
87823	L	2	4					
87827	L	1	2					
88013	L	1	1					
88020	L	2	4	It has outdoor on it so it's probably affiliated with that company.				
88026	L	1	2					
93906	L	1	2					
93911	L	2	3					
93912	L	1	1					
93924	L	2	4					
00209	O	2	3					
00216	O	1	1					
00226	O	1	2					
00227	O	1	2					
00509	O	1	1					
00518	O	1	2					
00521	O	2	4	Cabela's logo and products are outdoor hunting fishing gaming with outdoor gear. Bass Pro also outdoor hunting fishing outdoor gear.				
00526	O	1	2					
01314	O	1	2					
01315	O	2	3	Because LL Bean is it's own company so to be in a sports store they would need permission from that store or Bass Pro Shops.				

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
01316	O	1	2					
01317	O	1	1					
01320	O	2	4					
02905	O	2	3					
02911	O	1	1					
02919	O	1	2					
02924	O	1	2					
02926	O	2	4					
07706	O	2	4	Because the name gives it away it's more of a fishing gear place as is the Bass Pro.				
07707	O	1	1					
07718	O	2	3					
07724	O	1	2					
07725	O	1	2	Because the name again has that fishing ring to it.	Because it's a well known store and deals with all sports so it carries just about everything.			
10603	O	2	3					
10617	O	1	2					
10619	O	2	4	The colors and it has to do with outdoors.				
10620	O	1	2					
10621	O	1	1					
70005	O	2	3					
70014	O	1	1					
70021	O	1	2					
70023	O	1	1					
70025	O	2	4					
70110	O	1	1	Have an outdoor logo. This is a bird, the other was a bass. Also both mention outdoors	I am familiar with them and they are hunting, fishing, outdoor gear.			
70114	O	1	1					
70116	O	2	3					
70126	O	2	4					
70127	O	1	2	I think that because it's all kinds of sporting gear it's connected to the Bass shop.	It's a sports warehouse so it has to be connected to sell the merchandise.			
86404	O	1	2					
86407	O	1	1					
86422	O	1	2					
86426	O	2	4					
86601	O	2	4					
86614	O	1	1					
86616	O	1	2					
86620	O	1	2					
87407	O	1	1					
87420	O	1	2					
87425	O	1	2.					

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
87426	O	2	4					
87716	O	1	1	Because they sell the same products for outdoor.				
87717	O	2	4					
87722	O	1	2					
87801	O	1	2					
87813	O	2	4	They sell outdoor and fishing gear.				
87817	O	1	1					
87824	O	1	2					
88008	O	2	3					
88014	O	1	1	It looks familiar, like a brand they would sell there.				
88018	O	2	4					
88023	O	1	2					
93907	O	1	1					
93913	O	2	3					
93926	O	2	4					
93927	O	1	2					
00206	W	2	3					
00208	W	1	1	Bass Pro Shop items could be found at Dick's Sporting Goods. Both sell the best brand names.	Gander sells fishing equipment like Bass Pro Shop	Academy sells the same type of fishing equipment	Cabela's is a large outfitter for hunting and fishing gear. They sell similar products.	
00212	W	2	4					
00217	W	1	2					
00505	W	1	1					
00507	W	2	3					
00519	W	1	2					
00520	W	2	4					
01304	W	1	1	It's an outdoor company. They might be connected somehow.				
01305	W	1	2	I'm not familiar with Dick's but I'm sure it's possible that Bass Pro Shop sells some of their merchandise at Dick's location.				
01313	W	1	1					
01324	W	2	3					
02904	W	2	3					
02912	W	1	1	They carry the same type of products. Nine.				
02914	W	1	2					
02925	W	2	4					
07704	W	2	4					
07708	W	1	1					
07719	W	1	2					
07723	W	1	2					
10605	W	1	1					
10623	W	1	2					
10625	W	1	2	Both of them deal with sporting	They are sporting centers too.			

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
				goods.				
10628	W	2	4	Stands out the most. It's the only other one that has an animal on the logo.				
70011	W	1	1					
70019	W	1	2					
70022	W	1	1	Because it's a sports warehouse and they sell a lot of different brands.	Because it's a sports kind of warehouse and they sell a lot of different brands.	Because it's a sports kind of warehouse and they sell a lot of different brands.	Because it's a sports kind of warehouse and they sell a lot of different brands.	Because it's a sports kind of warehouse and they sell a lot of different brands.
70028	W	2	4	Because they are both realted. They are sports and outdoors businesses.				
70109	W	1	1					
70113	W	2	3					
70119	W	1	2					
70123	W	2	4					
70124	W	1	2	Scheels.I don't know anything about them so they throw in a ringer. Random guess.				
86409	W	1	1					
86414	W	1	2					
86424	W	1	2					
86425	W	2	4					
86605	W	2	4					
86608	W	2	3					
86609	W	1	1					
86617	W	1	2					
86618	W	1	2					
87409	W	2	3					
87415	W	1	1	It's a distributer of sporting goods.				
87419	W	1	2					
87423	W	1	2					
87424	W	2	4	Bass Pro is an outdoor shop, and so is this store -- so they would be affiliated.				
87712	W	2	4	They deal with or sell the same products equipment you use outside.				
87718	W	1	1	Because they are both outdoor organizations.				
87724	W	1	2					
87725	W	1	2	The scope on the wording and equipment.				
87806	W	2	4					
87814	W	1	2					
87816	W	1	1					
87825	W	1	2					
87828	W	1	1					
88010	W	1	1					
88017	W	2	4					
88022	W	1	2					
93909	W	2	3					

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
93910	W	1	1					
93917	W	2	4					
93918	W	1	2					
93925	W	1	2					

(4)

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
00203	B	1	1					
00211	B	2	4					
00222	B	1	2					
00225	B	1	2	Because it says Sportsman Warehouse.	Academy all sports indoors and outdoors.	Dick's because I know this is a sporting goods store.		
00502	B	1	1	This logo is on the other logo. Sportsman's Warehouse is on the bottom of Bass Pro Shops				
00504	B	2	3					
00514	B	2	4					
00515	B	1	2	Seen the Sportsmans Warehouse on the Bass Pro logo.	Bass Pro sells the Cabelas brand of products in their store. They have hunting and fishing products.			
00525	B	1	2	They both say sportsmans warehouse. They sell outdoor equipment.				
01319	B	2	3	I think that is put out by the same company because they are both sportamans warehouses. That's it.				
01321	B	2	4	I think that they are put out and made by the same store because they both are a sportmens warehouse.				
01325	B	2	4	It's about sporting goods.				
01330	B	1	2	It kinda fits their store line image.	I've been in there and they sell the same products there.			
02902	B	1	1	They both have Sportsman's Warehouse in the logo				
02907	B	2	3					
02909	B	1	2					
02920	B	2	4	Both sell sport items under the same company.				
02922	B	1	2	Cause they are Sportman's Warehouse				
07702	B	1	1					
07711	B	1	2					
07713	B	1	2	Because they're both warehouses and deal with sporting goods.				
07717	B	1	2					
10601	B	1	2					
10602	B	1	1	I think it's a sporting good store. Just like the other one.	They look similar to other stores I know.			
10609	B	1	2	It looks similar				
10627	B	2	4					
70002	B	2	3					
70007	B	1	2					
70010	B	2	3					
70013	B	2	4					
70105	B	1	1	Becaues the lettering and design look similar. Maybe the color is similar				

DEPOSITION EXHIBIT
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ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
70106	B	1	1					
70108	B	1	2	It is similar. It is, I believe, the same shape and color.				
70117	B	2	4					
70122	B	1	2	It's sports. It's a sports company and so was the other one. It's a place to get sports stuff. It says it.				
86412	B	2	3	They are both circular				
86413	B	1	1	Because the format looks the same				
86416	B	1	1	The shape, maybe the font				
86417	B	2	4					
86423	B	1	2	The lettering shape.				
86606	B	1	1	Because it's Sportsman's Warehouse for both				
86611	B	2	3	The same colors of green in the circle.	The font of the lettering looks similar. The green and yellow colors used are similar to Bass Pro Shop.			
86612	B	1	1	The fonts are similar. Also the same color of greens are the same.				
86619	B	2	4					
86625	B	2	4					
87402	B	1	2					
87406	B	2	3	It looks similar in appearance				
87412	B	1	1	I think I've seen the two logos together in a store. They look similar in style.				
87414	B	2	4					
87701	B	1	1	It's a sporting goods store	It's a sporting goods store also			
87707	B	1	2	They probably would sell same products.	It's a sporting good store.			
87711	B	1	2	Because it sells hunting and fishing gear.				
87713	B	2	3	The other one was a sports store.				
87727	B	2	4					
87808	B	2	3	It is the newest. I think it has something to do with Bass Pro Shop.				
87809	B	1	1	It is circular and uses the same words "Sportsman's Warehouse"				
87815	B	1	2	It's a sportsmans warehouse. The oval design				
87821	B	1	2	Both are "Sportsman's Warehouse". Nothing.				
87822	B	2	4	They have the same name. I've shopped there before.				
88005	B	1	1	It has hunting and fishing equipment.				
88006	B	1	1	Experience. I've been hunting for awhile.	Experience. I've been hunting for awhile.			
88007	B	2	4	Similarity in the logo and the name				
88012	B	2	3	It looks like the same style logo				
88015	B	1	2					

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
88016	B	1	2					
93903	B	1	1	It's all sports and outdoor related things.	It's an outdoor warehouse kind of deal.			
93915	B	1	2	Because it's a Warehouse, the rest look like regular stores.				
93916	B	1	2	The font and the style of the print from the sign has a lot of similarities. That's it.	In this ad as well as the previously has the same style of lettering. That's it.	Again as the other two the style of the block around it and the design is all similar. That's it.		
93920	B	2	4	I just think it is	I see it all over the country.	It's a sporting goods company.	It's outdoor gear	Looks like it comes from the shoe store.
00201	G	1	2	Cause I think they're in competition with their own sales	Cause they're also in competition with their own sales			
00202	G	1	1	I watch the Bass Pro Shop and I see Cabela's on there so I know they're in conjunction with one another.	Cause they run clothing lines out of Bass Pro Shops			
00204	G	2	3					
00214	G	2	4					
00223	G	1	2					
00501	G	1	1	It's Sportsman's just like Bass Pro Shops.	This is a fishing store. This store has the same kind of fishing equipment inside.			
00512	G	2	4	Because it has sports warehouse. Because of the name.	Because it has different variety of outdoor sports equipment			
00513	G	1	2	Looks the same as the Bass Pro logo. Sportsman Warehouse resembles th sportsmans one on Bass Pro logo				
00523	G	1	2					
01307	G	2	3	I think that they are made by the same company, because their logos are the same	I think that they are made by the same place because of the logos.			
01311	G	1	1					
01326	G	2	4					
01328	G	1	2					
02901	G	1	2					
02906	G	1	1	They both have the words "Sportsman's Warehouse" in the logo	I've seen L.L.Bean products at Bass Pro Shops.			
02915	G	2	4	Pro Bass catalog is called Cabelas				
02918	G	1	2					
07703	G	1	1	I've seen their magazines. I have friends that are hunters talk about it.	Because it's a Sportsman's Warehouse	Because I've seen them sell Bass Pro Shop products		
07709	G	1	1	Because it's got the same oval shape logo their both warehouses and they have the same name.	Just the same greenish color and they both involve fishing, both outdoor gear			
07712	G	2	3					
07714	G	2	4					
07716	G	1	2	Because they are both sportman warehouse.				
10604	G	1	2					
10606	G	1	1	Same pattern on logo. I remember				

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
				seeing Sportsman's Warehouse on the Bass Pro Shop's logo.				
10608	G	2	3					
10612	G	1	1	They are both a sporting and hunting warehouse store.				
10613	G	2	4	They are related				
70001	G	1	1					
70004	G	1	2					
70009	G	1	2					
70012	G	2	4					
70101	G	1	1	Most of these companies are under the same umbrella	Most of these companies are under the same umbrella	Most of these companies are under the same umbrella	Most of these companies are under the same umbrella. I will investigate this, like GAP has many companies	
70102	G	1	2	Color. I think I remember the word "Sportsman". Wasn't the shape the same, circular?				
70103	G	1	2	Its got that circular format which is sometimes catchy. Color is similar.				
70104	G	2	4	It has the same design and the same name				
86403	G	2	3					
86406	G	2	4					
86408	G	1	1	It says Sportsman's Warehouse under Bass Pro				
86415	G	1	2	Same backround and same lettering	Same backround and lettering that's it			
86418	G	1	2	Name is similar				
86610	G	2	3					
86615	G	2	4					
86624	G	1	1					
86626	G	1	2					
87401	G	1	1					
87403	G	2	3	It is an old-time outfitter	It has an old-fashioned sign look to it. Very traditional.			
87410	G	1	2	I think I see this label in the other one	It looks a little similar			
87413	G	2	4	Their almost alike to me anyway	It's written the same way as that one was.	The same as L.		
87422	G	1	2					
87702	G	1	2	Because it is saying Sportsman's Warehouse	It's a sporting goods store	Because they have sport outdoors equipment		
87704	G	2	3	Because it has Bass Sportsman's Warehouse and this one has Sportsman's Warehouse in its name also so I think they are similar				
87706	G	2	4	Don't know. Maybe they had some stuff there.				
87710	G	1	2					
87714	G	1	1	It has the same format.	It's the print simple but still says the store logo.			
87803	G	1	1					

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
87807	G	2	3	Kind of the same style				
87812	G	1	2					
87818	G	2	4					
88001	G	2	3					
88002	G	1	1					
88004	G	2	4	The style of the letters				
88011	G	1	2	They put out a lot of sporting stuff				
93902	G	1	1	It is something on sporting area as manufacturer	Same manufacturer. Competitors share same designs as a team.	Same design by shared company willing to make low deals.	Joint designs and decisions	
93908	G	2	4					
93914	G	1	2					
93923	G	1	1	It's just a guess.	It's just a guess.			
93928	G	1	2					
00205	Y	2	4	Because it's a sportsman's warehouse.				
00210	Y	1	1					
00213	Y	1	2					
00224	Y	1	2	Because it says Sportsman Warehouse.				
00503	Y	1	1					
00506	Y	2	3					
00516	Y	1	2	Because it says Sportsmans Warehouse and the other one I saw said Sportsmans Warehouse on it.	Because it's hunting and fishing it is like Pro Bass.	Because it's a sporting goods store and Bass Pro is almost the same.	Because it is also sports and outdoor. The same thing on the other card.	
00517	Y	2	4					
00524	Y	1	2	The Sportman Warehouse logo looks similar to the Bass Pro Sports ware logo.				
01302	Y	1	2	Because it is sporting outdoor store and Cabela's is also a sporting outdoor store	Because it is a sporting outdoor store. And they also have a lot of sports gear like Academy store.			
01303	Y	2	3					
01318	Y	2	4					
02903	Y	1	2					
02910	Y	1	1	Because it says Sportsmans Warehouse				
02913	Y	1	1					
02916	Y	2	3	Bass Pro company is affiliated with Cabelas store. Both of these stores sell hunting, fishing, and outdoor gear.				
02923	Y	2	4	I don't know				
07701	Y	1	1					
07710	Y	2	4					
07715	Y	1	2					
07722	Y	1	2	Their both huge companies they probably use the ssame designers and items.	The oval design.			
10607	Y	1	1	They are both with green and white writing.	This one as well is a sort of sports store.			
10610	Y	1	2	The logo is similar to the other one and the design is very much alike and they				

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
				deal with the same things				
10611	Y	2	3	Because they look alike and they deal with the same thing				
10622	Y	1	2					
10629	Y	2	4	Because they have the same name, probably a part of the same company.				
70003	Y	2	3					
70008	Y	1	2					
70018	Y	1	2					
70020	Y	1	1					
70029	Y	2	4					
70107	Y	1	1					
70111	Y	2	3					
70112	Y	1	2					
70118	Y	1	2	Because it used the word "outfitters". I am aware of the others. Some other stores and this one is similar				
70120	Y	2	4	Because it has sporting goods in front of it. Mountains in backround,	Because it says sports outdoors.	Because it says fishing and outdoor gear.		
86405	Y	1	2	Because it says Sportsman's Warehouse on it.				
86411	Y	1	1					
86419	Y	2	4	Very similar design. The same store brand Sportsmen warehouse. That's all				
86421	Y	2	3	The logo seems similar to it.				
86428	Y	1	2					
86602	Y	1	1	Because they both talk about fishing				
86604	Y	2	4	Because it's circular, not square.				
86622	Y	1	2					
86623	Y	1	2					
87405	Y	1	1	I think it said something about sportsman	I know it's about fishing and hunting and equipment	I know it's about fishing and hunting and equipment. It's about sports.		
87411	Y	1	1	They have similar outlines. The outlook and feel are the same.				
87417	Y	1	2	They both say Sportsmans Warehouse				
87418	Y	1	2	Same design.				
87421	Y	2	4	It's got hunting, fishing and outdoor gear.	I don't think it has as much on there as advertised.			
87705	Y	1	2	Because it is dealing with sports gear just like the company that I saw at first				
87708	Y	1	2					
87719	Y	1	1	Dealing with outdoor equipment.	Dealing with outdoor gear, sports gear.	Outdoor sporting goods.	Sells outdoor equipment for hunting, fishing, etc.	
87723	Y	2	4	Both of them had almost the same logo to me.				
87728	Y	2	3	Because it has the same writing on it as the other logo did.				
87804	Y	2	3	Kinda looks the same				
87805	Y	2	4	I have heard of them and I know that				

ID #	COLOR	GENDER	AGE	Q.7c-1	Q.7c-2	Q.7c-3	Q.7c-4	Q.7c-5
				Bass does the same thing				
87811	Y	1	1					
87826	Y	1	2					
88003	Y	2	3	It has the similar shape and it says Sportsman's Warehouse				
88009	Y	1	1	It said Sportsman's Warehouse in the picture				
88019	Y	1	2					
88021	Y	1	2					
93904	Y	1	1					
93919	Y	2	4	It's for sports and fishing same as the main logo.				
93921	Y	1	2	That's the closest one to the logo.				
93922	Y	1	2	The round thing in the middle.				

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
00203	B	1	1						
00211	B	2	4						
00222	B	1	2						
00225	B	1	2	Because it states it an outfitter for all outside sports.					
00502	B	1	1						
00504	B	2	3						
00514	B	2	4						
00515	B	1	2						
00525	B	1	2						
01319	B	2	3						
01321	B	2	4						
01325	B	2	4						
01330	B	1	2						
02902	B	1	1						
02907	B	2	3						
02909	B	1	2						
02920	B	2	4						
02922	B	1	2	It has Sportsman on it.					
07702	B	1	1						
07711	B	1	2						
07713	B	1	2						
07717	B	1	2	They offer too many products by different brands.					
10601	B	1	2						
10602	B	1	1						
10609	B	1	2						
10627	B	2	4						
70002	B	2	3						
70007	B	1	2						
70010	B	2	3						
70013	B	2	4						
70105	B	1	1						
70106	B	1	1	They need to ask permission from that company because it may be their product	They need to ask permission from that company because it may be their product. Talking about outdoor stuff.				
70108	B	1	2	General copyright. All letters or shapes have to be approved or it is copyright infringement	Legal reasons. Liability. Every letter has got to be different.	Copyright reasons.	There is a law to this. People can't steal items, especially in the same business.	Legal reasons	
70117	B	2	4						
70122	B	1	2	The colors. Everything is the logo.	They sell sporting stuff also. It's not just a catalog or other material.	You can buy sports equipment from them the same way.	They have a few of the same products for the stores.	They sell the same stuff.	
86412	B	2	3						
86413	B	1	1						
86416	B	1	1						

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
86417	B	2	4						
86423	B	1	2	The picture of the building, people.					
86606	B	1	1						
86611	B	2	3						
86612	B	1	1						
86619	B	2	4						
86625	B	2	4						
87402	B	1	2						
87406	B	2	3						
87412	B	1	1						
87414	B	2	4						
87701	B	1	1						
87707	B	1	2	It's hunting and fishing store.					
87711	B	1	2	Because it's a company going to advertise sporting equipment then they have to get permission.					
87713	B	2	3						
87727	B	2	4	I don't know. I don't know anything about the store.					
87808	B	2	3						
87809	B	1	1						
87815	B	1	2						
87821	B	1	2						
87822	B	2	4	Dick's used to be Gaylons. I just feel that they are associated.					
88005	B	1	1						
88006	B	1	1	It's the same type of wear that you could buy in any other store.					
88007	B	2	4						
88012	B	2	3						
88015	B	1	2						
88016	B	1	2						
93903	B	1	1						
93915	B	1	2	Because they don't seem like all sporting stores. That's it.	Because they don't seem like all sporting stores. That's it.				
93916	B	1	2	Same type of advertisement style. They both say Sportsman Warehouse and both have the oval in the ad. That's it.					
93920	B	2	4						
00201	G	1	2	Cause it seems like they're selling the same items					
00202	G	1	1	Cause I've never heard of them before and feel they needed permission to sell the lines.					

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
00204	G	2	3						
00214	G	2	4						
00223	G	1	2						
00501	G	1	1						
00512	G	2	4						
00513	G	1	2						
00523	G	1	2						
01307	G	2	3						
01311	G	1	1	They both said "Sports warehouse" on them					
01326	G	2	4						
01328	G	1	2						
02901	G	1	2						
02906	G	1	1						
02915	G	2	4						
02918	G	1	2						
07703	G	1	1	It's a sporting goods store					
07709	G	1	1						
07712	G	2	3	Because their name is on both cards					
07714	G	2	4	They both are a sports goods and hunting gear. They are very similar products.					
07716	G	1	2						
10604	G	1	2						
10606	G	1	1						
10608	G	2	3						
10612	G	1	1						
10613	G	2	4						
70001	G	1	1						
70004	G	1	2						
70009	G	1	2						
70012	G	2	4						
70101	G	1	1						
70102	G	1	2						
70103	G	1	2						
70104	G	2	4	Same color, same general product. It is associated with the same type of business and same type of sports area					
86403	G	2	3						
86406	G	2	4						
86408	G	1	1						
86415	G	1	2	Look fairly similar to the other ones.					
86418	G	1	2						
86610	G	2	3						
86615	G	2	4						

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
86624	G	1	1						
86626	G	1	2						
87401	G	1	1						
87403	G	2	3						
87410	G	1	2	Because the other company is the original for sports equipment	Because the other company is the original for sports equipment				
87413	G	2	4						
87422	G	1	2						
87702	G	1	2						
87704	G	2	3	Because it is a sport store that sells clothes and shoes and they would need approval					
87706	G	2	4						
87710	G	1	2						
87714	G	1	1	Because they are about as large as Pro Bass.					
87803	G	1	1						
87807	G	2	3	It falls under the copyright rights					
87812	G	1	2						
87818	G	2	4						
88001	G	2	3						
88002	G	1	1	Because this is a well known store					
88004	G	2	4	The style of it.					
88011	G	1	2						
93902	G	1	1						
93908	G	2	4						
93914	G	1	2	Because it's a sports company. That's it.	Because it's a sports company. That's it.	Because it's a sports company. That's it.			
93923	G	1	1						
93928	G	1	2						
00205	Y	2	4	Because they have almost everything H would have					
00210	Y	1	1						
00213	Y	1	2						
00224	Y	1	2	Because this place has it all.					
00503	Y	1	1						
00506	Y	2	3						
00516	Y	1	2	Because Screels could be a copyright and not have permission.					
00517	Y	2	4	It's more for hunting and fishing. Nothing else.	It's the same as the other company. It puts out hunting and fishing gear.				
00524	Y	1	2						
01302	Y	1	2						
01303	Y	2	3						

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
01318	Y	2	4	I think they need approval from Bass Pro Shops.					
02903	Y	1	2						
02910	Y	1	1	It seems like they may be affiliated.					
02913	Y	1	1						
02916	Y	2	3						
02923	Y	2	4	It's almost the same as the company's logo. They're both sports stores.					
07701	Y	1	1						
07710	Y	2	4						
07715	Y	1	2						
07722	Y	1	2	Because it's too plain.	Because there's just something different about their sign and their lettering is too small, the name is kind of stupid.	It looks like a bourbon logo.			
10607	Y	1	1						
10610	Y	1	2						
10611	Y	2	3						
10622	Y	1	2						
10629	Y	2	4						
70003	Y	2	3						
70008	Y	1	2						
70018	Y	1	2						
70020	Y	1	1						
70029	Y	2	4						
70107	Y	1	1	I believe all these companies are selling outdoor products and I believe that all the stuff came from the first store.	I believe all these companies are selling outdoor products and I believe that all the stuff came from the first store.	I believe all these companies are selling outdoor products and I believe that all the stuff came from the first store.	I believe all these companies are selling outdoor products and I believe that all the stuff came from the first store.	I believe all these companies are selling outdoor products and I believe that all the stuff came from the first store.	I believe all these companies are selling outdoor products and I believe that all the stuff came from the first store.
70111	Y	2	3						
70112	Y	1	2						
70118	Y	1	2	The color scheme seems to be the same					
70120	Y	2	4						
86405	Y	1	2						
86411	Y	1	1						
86419	Y	2	4						
86421	Y	2	3						
86428	Y	1	2						
86602	Y	1	1						
86604	Y	2	4						
86622	Y	1	2						
86623	Y	1	2						
87405	Y	1	1						
87411	Y	1	1						
87417	Y	1	2						
87418	Y	1	2						

ID #	COLOR	GENDER	AGE	Q.8e-1	Q.8e-2	Q.8e-3	Q.8e-4	Q.8e-5	Q.8e-6
87421	Y	2	4	It seems like a bigger company.					
87705	Y	1	2						
87708	Y	1	2	Because it's the thing to do.					
87719	Y	1	1						
87723	Y	2	4						
87728	Y	2	3						
87804	Y	2	3						
87805	Y	2	4	It is more a clothing line not the hunting or fishing things					
87811	Y	1	1	Just a guess	Just a guess				
87826	Y	1	2						
88003	Y	2	3						
88009	Y	1	1						
88019	Y	1	2						
88021	Y	1	2						
93904	Y	1	1	Because of the company that already owns it					
93919	Y	2	4	This logo as well as T has similarities between them.	This is or looks like a sister store. This one says sporting goods, its more for sporting.				
93921	Y	1	2	They have the same name.					
93922	Y	1	2	Because of the L.L. Bean.	It has the same colors.				

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
00203	B	1	1					
00211	B	2	4					
00222	B	1	2					
00225	B	1	2					
00502	B	1	1	They sell the stuff in the store. Bass Pro Shops sells L.L. Bean stuff in their stores.	They have the similar font in text. They are the world's foremost outfitter. They have the same kind of equipment as well.			
00504	B	2	3					
00514	B	2	4					
00515	B	1	2					
00525	B	1	2	Academy sports outdoors is similar to Bass Pro outdoor. Both have outdoor logo.				
01319	B	2	3					
01321	B	2	4					
01325	B	2	4					
01330	B	1	2					
02902	B	1	1					
02907	B	2	3					
02909	B	1	2					
02920	B	2	4	Both fit under the same company and sell the same items.				
02922	B	1	2	It has to do with sports too.				
07702	B	1	1					
07711	B	1	2					
07713	B	1	2					
07717	B	1	2					
10601	B	1	2					
10602	B	1	1					
10609	B	1	2					
10627	B	2	4	It has hunting and fishing supplies. They look close				
70002	B	2	3					
70007	B	1	2					
70010	B	2	3					
70013	B	2	4					
70105	B	1	1					
70106	B	1	1					
70108	B	1	2					
70117	B	2	4	Sportsman's Warehouse. That deals and sells the same thing. They all pretty much deal with the same thing	I am familiar with Dick's. They sell the same thing. Most of these places sell the same thing			
70122	B	1	2					
86412	B	2	3					
86413	B	1	1					
86416	B	1	1					

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
86417	B	2	4					
86423	B	1	2	Very similar to the other peopole and the gear they sell.				
86606	B	1	1					
86611	B	2	3					
86612	B	1	1	The green and yellow colors are similar. Also, the similar wording on the logo.				
86619	B	2	4					
86625	B	2	4					
87402	B	1	2					
87406	B	2	3					
87412	B	1	1					
87414	B	2	4					
87701	B	1	1					
87707	B	1	2	It's a sporting good store.				
87711	B	1	2					
87713	B	2	3					
87727	B	2	4	A lot of people I know shop at Academy for shoes and stuff. It's a big store.				
87808	B	2	3					
87809	B	1	1					
87815	B	1	2					
87821	B	1	2					
87822	B	2	4	I think that Sportsmans Warehouse sells Cabelas.				
88005	B	1	1					
88006	B	1	1					
88007	B	2	4					
88012	B	2	3					
88015	B	1	2					
88016	B	1	2					
93903	B	1	1	More clothing and they might be together				
93915	B	1	2	Because it has fishing in the name and Bass Pro Shop is more of a fishing shop. I would go here because it has fishing in there. That's it.				
93916	B	1	2					
93920	B	2	4					
00201	G	1	2					
00202	G	1	1	Because they sell a lot on the line.	Because they sell a lot on the line.			
00204	G	2	3					
00214	G	2	4					
00223	G	1	2					
00501	G	1	1	This is a sporting goods store. I've seen some Bass Pro Shops in the store.	This is a sporting goods store			
00512	G	2	4	Because it says every season				

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
00513	G	1	2					
00523	G	1	2					
01307	G	2	3					
01311	G	1	1					
01326	G	2	4					
01328	G	1	2					
02901	G	1	2					
02906	G	1	1					
02915	G	2	4					
02918	G	1	2					
07703	G	1	1					
07709	G	1	1					
07712	G	2	3					
07714	G	2	4					
07716	G	1	2					
10604	G	1	2					
10606	G	1	1					
10608	G	2	3					
10612	G	1	1	The name. They both carry the same equipment				
10613	G	2	4					
70001	G	1	1					
70004	G	1	2					
70009	G	1	2					
70012	G	2	4					
70101	G	1	1					
70102	G	1	2					
70103	G	1	2	Color scheme, simplicity of it.				
70104	G	2	4	Same general product. Same colors.	Same general product. M is an associated product. In that family. Same colors.			
86403	G	2	3					
86406	G	2	4					
86408	G	1	1	I really don't know.				
86415	G	1	2	The mountain scene and lettering. That's it.				
86418	G	1	2					
86610	G	2	3					
86615	G	2	4	Cabela's carry the same type of line as Bass Pro and the stores are set up the same way.				
86624	G	1	1					
86626	G	1	2					
87401	G	1	1					
87403	G	2	3					
87410	G	1	2	Because of the name				
87413	G	2	4					
87422	G	1	2					

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
87702	G	1	2					
87704	G	2	3					
87706	G	2	4					
87710	G	1	2					
87714	G	1	1	It deals with more outdoor rugged types of equipment.				
87803	G	1	1					
87807	G	2	3					
87812	G	1	2					
87818	G	2	4					
88001	G	2	3	From the way the lettering is and how they advertise and from the merchandise they sell	From the lettering and from the merchandise they sell.			
88002	G	1	1					
88004	G	2	4					
88011	G	1	2					
93902	G	1	1					
93908	G	2	4					
93914	G	1	2					
93923	G	1	1					
93928	G	1	2					
00205	Y	2	4					
00210	Y	1	1					
00213	Y	1	2					
00224	Y	1	2					
00503	Y	1	1					
00506	Y	2	3					
00516	Y	1	2					
00517	Y	2	4					
00524	Y	1	2	Bass Pro sells a lot of the Cabela's products in there store.				
01302	Y	1	2					
01303	Y	2	3					
01318	Y	2	4					
02903	Y	1	2					
02910	Y	1	1					
02913	Y	1	1	The fact that it says Sportsmans Warehouse on both logos. Nothing.	I've seen that store in the same area as the other store. Nothing.			
02916	Y	2	3					
02923	Y	2	4					
07701	Y	1	1					
07710	Y	2	4					
07715	Y	1	2					
07722	Y	1	2					
10607	Y	1	1					
10610	Y	1	2					
10611	Y	2	3					
10622	Y	1	2					

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
10629	Y	2	4	Because they look similar				
70003	Y	2	3					
70008	Y	1	2					
70018	Y	1	2					
70020	Y	1	1					
70029	Y	2	4					
70107	Y	1	1					
70111	Y	2	3	Because I know the store and it's a smaller company. Usually they branch out.				
70112	Y	1	2					
70118	Y	1	2					
70120	Y	2	4	Because I'm familiar with their products.	Because I'm familiar with their products.			
86405	Y	1	2					
86411	Y	1	1	I believe they are affiliated with Bass Pro Shop				
86419	Y	2	4	Cause Dick's is a very large sporting good company. I think Bass Pro Shop does exchange business with each other. That's all.				
86421	Y	2	3	The logo too.	The logo			
86428	Y	1	2					
86602	Y	1	1					
86604	Y	2	4					
86622	Y	1	2					
86623	Y	1	2					
87405	Y	1	1					
87411	Y	1	1					
87417	Y	1	2					
87418	Y	1	2					
87421	Y	2	4	Every season starts a Dick's so it contains every season.				
87705	Y	1	2					
87708	Y	1	2					
87719	Y	1	1					
87723	Y	2	4					
87728	Y	2	3	Because it is selling all the camping, fishing and other outdoor items.				
87804	Y	2	3					
87805	Y	2	4	It has the mountain on it and it says warehouse				
87811	Y	1	1					
87826	Y	1	2					
88003	Y	2	3					
88009	Y	1	1					
88019	Y	1	2					
88021	Y	1	2					

ID #	COLOR	GENDER	AGE	Q.9e-1	Q.9e-2	Q.9e-3	Q.9e-4	Q.9e-5
93904	Y	1	1					
93919	Y	2	4					
93921	Y	1	2					
93922	Y	1	2					

# 06144: OUTDOOR PRODUCT STUDY						
ID #	COLOR	GENDER	AGE			
07705	L	M	1	Q.7c	S	Because it deals with outdoor living and supplies
10615	L	F	4	Q.7c	S	Because they carry the same products and they are just like each other
10616	L	F	3	Q.7c	S	Not sure since Pro-Bass shop and the Lego Gandes both have to do outdoors. I took a guess.
93906	L	M	2	Q.7c	S	The printing looks similar. The style of font and practically the same overall design. That's it.
07720	L	F	3	Q.7c	S	Because it would seem like the smaller version of the big company.
87726	L	M	2	Q.7c	S	Because they said liive outdoor.
00509	O	M	1	Q.7c	S	It looks about like the same logo.
87813	O	F	4	Q.7c	S	Logo looks a little similar
88023	O	M	2	Q.7c	S	It is the same basic layout.
00521	O	F	4	Q.7c	S	The Gander Mountain logo has a Gander fly symbol same Bass Pro has Bass fish symbo on its logo.
00520	W	F	4	Q.7c	S	Both are sporting goods stores. Both have outdoor sporting goods.
70028	W	F	4	Q.7c	S	It seems like it would be associated with it. Because it's a sports warehouse.
87725	W	M	2	Q.7c	S	Color scheme
93913	O	F	3	Q.7c	S	The font. It's similar to the font with the logo I was first shown. That's it
07706	O	F	4	Q.7c	S	They would both have everything you would need for outdoors.
70127	O	M	2	Q.7c	S	It's an oudoor store as well so it's probably related to Bass.
00510	L	M	1	Q.7c	S	The Gander Mountain card also says we live outdoors. The outdoors reference makes them similar.
00218	L	M	2	Q.7c	S	Because it says "we live outdoors" so it leads me to believe they sell all outdoor clothing and supplies.
02921	L	M	2	Q.7c	S	Because when being outdoors, you think of fishing and hunting.

DEPOSITION EXHIBIT
MA215-5
9/22/06

# 06144: OUTDOOR PRODUCT STUDY						
ID #	COLOR	GENDER	AGE			
70024	L	M	1	Q.8d	S	Because it's a brand name.
07726	L	M	2	Q.8d	S	They both deal in live outdoor sports like fishing.
70125	L	F	4	Q.8d	S	It's obvious that it sells outdoor equipment and the Bass Pro is the outside logo.
01329	L	M	2	Q.8d	S	The logo tells me that the store promotes outdoor gear.
70116	O	F	3	Q.8d	S	Because it's an outdoor store
07725	O	M	2	Q.8d	S	Because the name Gander sounds more a fishing store.
00209	O	F	3	Q.8d	S	Because Gander probably carries Bass products
02919	O	M	2	Q.8d	S	Because they are sporting goods stores.
86617	W	M	2	Q.8d	S	Gander Mountain because it is one of the smaller companies and sells the same stuff
87408	L	M	2	Q.8d	S	They are smaller fish than Bass Pro
00220	L	M	1	Q.8d	S	They sell outdoor equipment and Pro Bass clothing.
87817	O	M	1	Q.8d	S	A newer company. Maybe not as known. Nothing
87407	O	M	1	Q.8d	S	It looks like a logo taken from their store
07719	W	M	2	Q.8d	S	Because their more live or hinting and fishing store.
87717	O	F	4	Q.8d	S	They sell outdoor equipment like Bass.
93917	W	F	4	Q.8d	S	I don't have any idea
07708	W	M	1	Q.8d	S	I would say the same thing why open two shops.
70113	W	F	3	Q.8d	S	I don't like too many brands looking the same way. This shows no identity

# 061[illegible]4: OUTDOOR PRODUCT STUDY						
ID #	COLOR	GENDER	AGE			
88020	L	F	4	Q.9d	S	It has outdoor on it so it's probably affiliated with that company.
87424	W	F	4	Q.9d	S	Bass Pro is an outdoor shop, and so is this store -- so they would be affiliated.
87709	L	M	1	Q.9d	S	They both have something to do with outdoors.
10619	O	F	4	Q.9d	S	The colors and it has to do with outdoors.
70110	O	M	1	Q.9d	S	Have an outdoor logo. This is a bird, the other was a bass. Also both mention outdoors
87712	W	F	4	Q.9d	S	They deal with or sell the same products equipment you use outside.
87716	O	M	1	Q.9d	S	Because they sell the same products for outdoor.
10628	W	F	4	Q.9d	S	Stands out the most. It's the only other one that has an animal on the logo.
00208	W	M	1	Q.9d	S	Gander sells fishing equipment like Bass Pro Shop
70022	W	M	1	Q.9d	S	Because it's a sports kind of warehouse and they sell a lot of different brands.

# 06144: OUTDOOR PRODUCT STUDY						
ID #	COLOR	GENDER	AGE			
00502	B	M	1	Q.7c	L	This logo is on the other logo. Sportsman's Warehouse is on the bottom of Bass Pro Shops
00515	B	M	2	Q.7c	L	Seen the Sportsmans Warehouse on the Bass Pro logo.
01319	B	F	3	Q.7c	L	I think that is put out by the same company because they are both sportamans warehouses. That's it.
02902	B	M	1	Q.7c	L	They both have Sportsman's Warehouse in the logo
10609	B	M	2	Q.7c	L	It looks similar
70105	B	M	1	Q.7c	L	Becaues the lettering and design look similar. Maybe the color is similar
70108	B	M	2	Q.7c	L	It is similar. It is, I believe, the same shape and color.
70122	B	M	2	Q.7c	L	It's sports. It's a sports company and so was the other one. It's a place to get sports stuff. It says it.
86412	B	F	3	Q.7c	L	They are both circular
86413	B	M	1	Q.7c	L	Because the format looks the same
86416	B	M	1	Q.7c	L	The shape, maybe the font
86606	B	M	1	Q.7c	L	Because it's Sportsman's Warehouse for both
86611	B	F	3	Q.7c	L	The same colors of green in the circle.
86612	B	M	1	Q.7c	L	The fonts are similar. Also the same color of greens are the same.
87406	B	F	3	Q.7c	L	It looks similar in appearance
87412	B	M	1	Q.7c	L	I think I've seen the two logos together in a store. They look similar in style.
87809	B	M	1	Q.7c	L	It is circular and uses the same words "Sportsman's Warehouse"
87815	B	M	2	Q.7c	L	It's a sportsmans warehouse. The oval design
87821	B	M	2	Q.7c	L	Both are "Sportsman's Warehouse". Nothing.
87822	B	F	4	Q.7c	L	They have the same name. I've shopped there before.
88006	B	M	1	Q.7c	L	Experience. I've been hunting for awhile.
88007	B	F	4	Q.7c	L	Similarity in the logo and the name
93903	B	M	1	Q.7c	L	It's all sports and outdoor related things.
93915	B	M	2	Q.7c	L	Because it's a Warehouse, the rest look like regular stores.
07713	B	M	2	Q.7c	L	Because they're both warehouses and deal with sporting goods.
93920	B	F	4	Q.7c	L	I just think it is
86423	B	M	2	Q.7c	L	The lettering shape.
00225	B	M	2	Q.7c	L	Because it says Sportsman Warehouse.
02922	B	M	2	Q.7c	L	Cause they are Sportman's Warehouse
00525	B	M	2	Q.7c	L	They both say sportsmans warehouse. They sell outdoor equipment.
87707	B	M	2	Q.7c	L	They probably would sell same products.
87713	B	F	3	Q.7c	L	The other one was a sports store.
01321	B	F	4	Q.7c	L	I think that they are put out and made by the same store because they both are a sportmens warehouse.
01325	B	F	4	Q.7c	L	It's about sporting goods.
01330	B	M	2	Q.7c	L	It kinda fits their store line image.
00201	G	M	2	Q.7c	L	Cause I think they're in competition with their own sales
00501	G	M	1	Q.7c	L	It's Sportsman's just like Bass Pro Shops.
00512	G	F	4	Q.7c	L	Because it has sports warehouse. Because of the name.
00513	G	M	2	Q.7c	L	Looks the same as the Bass Pro logo. Sportsman Warehouse resembles th sportsmans one on Bass Pro logo

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MAZIS -6
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PENGAD-Bayonne, N. J.

# 06144: OUTDOOR PRODUCT STUDY						
ID #	COLOR	GENDER	AGE			
02906	G	M	1	Q.7c	L	They both have the words "Sportsman's Warehouse" in the logo
07709	G	M	1	Q.7c	L	Because it's got the same oval shape logo their both warehouses and they have the same name.
10606	G	M	1	Q.7c	L	Same pattern on logo. I remember seeing Sportsman's Warehouse on the Bass Pro Shop's logo.
70102	G	M	2	Q.7c	L	Color. I think I remember the word "Sportsman". Wasn't the shape the same, circular?
70103	G	M	2	Q.7c	L	Its got that circular format which is sometimes catchy. Color is similar.
70104	G	F	4	Q.7c	L	It has the same design and the same name
86408	G	M	1	Q.7c	L	It says Sportsman's Warehouse under Bass Pro
86418	G	M	2	Q.7c	L	Name is similar
87410	G	M	2	Q.7c	L	I think I see this label in the other one
87702	G	M	2	Q.7c	L	Because it is saying Sportsman's Warehouse
87704	G	F	3	Q.7c	L	Because it has Bass Sportsman's Warehouse and this one has Sportsman's Warehouse in its name also so I think they are similar
87807	G	F	3	Q.7c	L	Kind of the same style
88001	G	F	3	Q.7c	L	The green color and the circle.
88004	G	F	4	Q.7c	L	The style of the letters
88011	G	M	2	Q.7c	L	They put out a lot of sporting stuff
07716	G	M	2	Q.7c	L	Because they are both sportman warehouse.
93923	G	M	1	Q.7c	L	It's just a guess.
87714	G	M	1	Q.7c	L	It has the same format.
00205	Y	F	4	Q.7c	L	Because it's a sportsman's warehouse.
00516	Y	M	2	Q.7c	L	Because it says Sportsmans Warehouse and the other one I saw said Sportsmans Warehouse on it.
02910	Y	M	1	Q.7c	L	Because it says Sportsmans Warehouse
10610	Y	M	2	Q.7c	L	The logo is similar to the other one and the design is very much alike and they deal with the same things
10611	Y	F	3	Q.7c	L	Because they look alike and they deal with the same thing
70120	Y	F	4	Q.7c	L	Because it has sporting goods in front of it. Mountains in backround,
86405	Y	M	2	Q.7c	L	Because it says Sportsman's Warehouse on it.
86419	Y	F	4	Q.7c	L	Very similar design. The same store brand Sportsmen warehouse. That's all
86604	Y	F	4	Q.7c	L	Because it's circular, not square.
87405	Y	M	1	Q.7c	L	I think it said something about sportsman
87411	Y	M	1	Q.7c	L	They have similar outlines. The outlook and feel are the same.
87417	Y	M	2	Q.7c	L	They both say Sportsmans Warehouse
87418	Y	M	2	Q.7c	L	Same design.
87705	Y	M	2	Q.7c	L	Because it is dealing with sports gear just like the company that I saw at first
87804	Y	F	3	Q.7c	L	Kinda looks the same
88003	Y	F	3	Q.7c	L	It has the similar shape and it says Sportsman's Warehouse
88009	Y	M	1	Q.7c	L	It said Sportsman's Warehouse in the picture
10629	Y	F	4	Q.7c	L	Because they have the same name, probably a part of the same company.
93919	Y	F	4	Q.7c	L	It's for sports and fishing same as the main logo.
93921	Y	M	2	Q.7c	L	That's the closest one to the logo.
93922	Y	M	2	Q.7c	L	The round thing in the middle.

# 06144: OUTDOOR PRODUCT STUDY						
ID #	COLOR	GENDER	AGE			
00224	Y	M	2	Q.7c	L	Because it says Sportsman Warehouse.
00524	Y	M	2	Q.7c	L	The Sportman Warehouse logo looks similar to the Bass Pro Sports ware logo.
87719	Y	M	1	Q.7c	L	Dealing with outdoor equipment.
87723	Y	F	4	Q.7c	L	Both of them had almost the same logo to me.
87728	Y	F	3	Q.7c	L	Because it has the same writing on it as the other logo did.
01307	G	F	3	Q.7c	L	I think that they are made by the same place because of the logos.
07703	G	M	1	Q.7c	L	Because it's a Sportsman's Warehouse
87403	G	F	3	Q.7c	L	It has an old-fashioned sign look to it. Very traditional.
87421	Y	F	4	Q.7c	L	I don't think it has as much on there as advertised.
07722	Y	M	2	Q.7c	L	The oval design.
87413	G	F	4	Q.7c	L	It's written the same way as that one was.
93902	G	M	1	Q.7c	L	Same design by shared company willing to make low deals.
70101	G	M	1	Q.7c	L	Most of these companies are under the same umbrella. I will investigate this, like GAP has many companies

# 06144: OUTDOOR PRODUCT STUDY						
ID #	COLOR	GENDER	AGE			
93916	B	M	2	Q.8d	L	Same type of advertisement style. They both say Sportsman Warehouse and both have the oval in the ad. That's it.
87711	B	M	2	Q.8d	L	Because it's a company going to advertise sporting equipment then they have to get permission.
70118	Y	M	2	Q.8d	L	The color scheme seems to be the same
02923	Y	F	4	Q.8d	L	It's almost the same as the company's logo. They're both sports stores.
01311	G	M	1	Q.8d	L	They both said "Sports warehouse" on them
07712	G	F	3	Q.8d	L	Because their name is on both cards
00517	Y	F	4	Q.8d	L	It's more for hunting and fishing. Nothing else.
01318	Y	F	4	Q.8d	L	I think they need approval from Bass Pro Shops.
93914	G	M	2	Q.8d	L	Because it's a sports company. That's it.
70107	Y	M	1	Q.8d	L	I believe all these companies are selling outdoor products and I believe that all the stuff came from the first store.

# 06144: OUTDOOR PRODUCT STUDY						
ID #	COLOR	GENDER	AGE			
87805	Y	F	4	Q.9d	L	It has the mountain on it and it says warehouse
86415	G	M	2	Q.9d	L	The mountain scene and lettering. That's it.
10612	G	M	1	Q.9d	L	The name. They both carry the same equipment
86421	Y	F	3	Q.9d	L	The logo too.
02920	B	F	4	Q.9d	L	Both fit under the same company and sell the same items.
70117	B	F	4	Q.9d	L	Sportsman's Warehouse. That deals and sells the same thing. They all pretty much deal with the same thing
86411	Y	M	1	Q.9d	L	I believe they are affiliated with Bass Pro Shop
02913	Y	M	1	Q.9d	L	The fact that it says Sportsmans Warehouse on both logos. Nothing.
00202	G	M	1	Q.9d	L	Because they sell a lot on the line.