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

Proceeding	92045000
Party	Defendant SPORTSMAN'S WAREHOUSE, INC. SPORTSMAN'S WAREHOUSE, INC. 7035 HIGH TECH DRIVE MIDVALE, UT 84047
Correspondence Address	GARRETT M. WEBER LINDQUIST & VENNUM PLLP 4200 IDS CENTER , 80 SOUTH 8TH STREET MINNEAPOLIS, MN 55402-2205 UNITED STATES
Submission	Brief on Merits for Defendant
Filer's Name	Christopher R. Smith
Filer's e-mail	tmg@lindquist.com
Signature	/christopherrsmith/
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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

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 CASE BRIEF

REDACTED

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

DESCRIPTION OF THE RECORD 2

STATEMENT OF THE ISSUES 5

FACTUAL BACKGROUND 5

ARGUMENT 8

I. Petitioner's Section 2(d) Cancellation Claim Based Upon a Likelihood of Confusion Must Be Denied 8

A. Petitioner's Likelihood of Confusion Claim Must Be Denied Because Petitioner Unreasonably Delayed in Bringing Its Petition, Which Resulted in Material Prejudice to the Respondent. 8

1. Petitioner's Unduly Delayed in Asserting Its Purported Rights. 9

2. Petitioner's Delay Resulted in Material Prejudice to Respondent. 11

3. Laches Defense Not Barred By Inevitable Confusion. 13

B. Respondent's Registration May Not Be Cancelled Based Upon a Likelihood of Confusion with Petitioner's Federal Registration. 14

1. The Parties' Marks Are Substantially Dissimilar in Appearance, Sound, Connotation, and Commercial Impression. 15

i. Dissimilarity in Appearance and Sound. 16

ii. Dissimilarity in Connotation and Commercial Impression. 19

2. The Dissimilarities of the Parties' Described Goods Weigh Against a Likelihood of Confusion 20

3. Conditions of Relevant Sales Do Not Support Likelihood of Confusion. 22

4. Petitioner's Mark is Not Famous and Warrants Narrow Protection. 23

5. Petitioner Has Failed to Establish Any Admissible Evidence of Actual Confusion Based Upon the Registered Marks. 24

6. Marks Have Been Used Concurrently for Over Five Years Without Evidence of Actual Confusion. 27

7. Market Interface Between Petitioner and Respondent is Extremely Limited. 29

8. Petitioner's Survey Regarding the Potential for Confusion is Unreliable, Fatally Flawed, and Provides No Support for a Likelihood of Confusion. 31

C. Respondent's Registration May Not Be Cancelled Upon a Likelihood of Confusion with Petitioner's Purported Common Law Mark. 34

1. Petitioner Cannot Establish Priority in the SPORTSMAN'S WAREHOUSE Mark. 36

2. Petitioner Has Failed to Establish Its Use of the Phrase SPORTSMAN'S WAREHOUSE Attained Secondary Meaning Prior to Respondent. 39

II. Respondent's Registration Cannot Be Cancelled on the Basis of Petitioner's Purported Fraud Claim. 42

CONCLUSION 46

TABLE OF AUTHORITIES

FEDERAL CASES

Bose Corp. v. QSC Audio Products, Inc., 293 F.3d 1367 (Fed. Cir. 2002) 23

Bridgestone/Firestone Research, Inc. v. Automobile Club De L'Ouest De La France, 245 F.3d 1359 (Fed. Cir. 2001) 11, 12, 13

Carefirst of Maryland v. Firsthealth of the Carolina, Inc., 77 U.S.P.Q.2d 1492 (T.T.A.B. 2005) 26

Champagne Louis Roederer, S.A. v. Delicato Vineyards, 148 F.3d 1373 (Fed. Cir. 1998) 16

Coach House Restaurant, Inc. v. Coach and Six Restaurants, Inc., 934 F.2d 1551 (11th Cir. 1991) 14

Corporate Fitness Programs Inc. v. Weidner Health and Fitness Inc., 2 U.S.P.Q.2d 1682 (T.T.A.B. 1986) 24

Cunningham v. Laser Golf Corp., 222 F.3d 943 (Fed. Cir. 2000) 18

Door Systems, Inc. v. Pro-Line Door Systems, Inc., 83 F.3d 169 (7th Cir. 1996) 26

Eastman Kodak Co. v. Bell Howell Document Management Products Co., 994 F.2d 1569 (Fed. Cir. 1993) 35

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713 (Fed. Cir. 1992) 26

Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, (C.C.P.A. 1976) 15

Homeowners Group, Inc. v. Home Marketing Specialists, Inc., 931 F.2d 1100 (6th Cir. 1991) 26

In re Boston Beer Co. Ltd. Partnership, 198 F.3d 1370 (Fed. Cir. 1999) 39

In re Code Consultants Inc., 60 U.S.P.Q.2d 1699 (T.T.A.B. 2001) 20

In re DNI Holdings Ltd., 77 U.S.P.Q.2d 1435 (T.T.A.B. 2005) 18

In re E. I. DuPont de Nemours & Co., 476 F.2d 1357 (C.C.P.A. 1973) 15, 16, 20, 22, 23, 24, 27, 29

In re Interco Inc., 29 U.S.P.Q.2d 2037, 2038 (T.T.A.B. 1993) 18

In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 U.S.P.Q.2d 1201 (Fed. Cir. 2003) 15, 16

J.E.M. International, Inc. v. Happy Rompers Creations Corp., 74 U.S.P.Q.2d 1526 (T.T.A.B. 2005) 43

Johnson Controls, Inc. v. Concorde Battery Corporation, 228 U.S.P.Q. 39 (T.T.A.B. 1985) 18

Kenner Parker Toys Inc. v. Rose Art Industries, Inc., 963 F.2d 350 (Fed. Cir. 1992) 23

King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400 (C.C.P.A. 1974) 27, 28

Larami Corp. v. Talk to Me Programs, Inc., 36 U.S.P.Q.2d 1840 (T.T.A.B. 1995) 35

Lincoln Logs Ltd. v. Lincoln Precut Log Homes, Inc., 971 F.2d 732 (Fed. Cir. 1992) 9

Maids to Order of Ohio, Inc. v. Maid-To-Order, Inc., 78 U.S.P.Q.2d 1899 (T.T.A.B. 2006) 15, 43, 44, 46

Martahus v. Video Duplication Services, Inc., 3 F.3d 417 (Fed. Cir. 1993) 36

National Cable Television Assoc., Inc. v. American Cinema Editors, Inc., 937 F.2d 1572 (Fed. Cir. 1991) 9

Nautilus Group, Inc. v. ICON Health and Fitness, Inc., 372 F.3d 1330 (Fed. Cir. 2004) 41

Otto Roth & Company, Inc. v. Universal Foods Corporation, 640 F.2d 1317 (C.C.P.A. 1981) 35

Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369 (Fed. Cir. 2005) 23, 24

Perma Ceram Enterprises, Inc. v. Preco Industries, Ltd., 23 U.S.P.Q.2d 1134 (T.T.A.B. 1992) 35, 39

Powermatics, Inc. v. Global Roofing Products Co., Inc., 341 F.2d 127 (C.C.P.A. 1965) 38

Quaker State Oil Refining Corp. v. Quaker Oil Corp., 453 F.2d 1296, 172 U.S.P.Q. 361 (C.C.P.A. 1972) 18

Reflange Inc. v. R-Con International, 17 U.S.P.Q.2d 1125 (T.T.A.B. 1990) 13

Sioux Falls v. First Nat. Bank, South Dakota, 153 F.3d 885 (8th Cir. 1998) 26

Smith International, Inc. v. Olin Corp., 209 U.S.P.Q. 1033 (T.T.A.B. 1981) 43

Sports Authority Michigan, Inc. v. The PC Authority, 2002 WL 575718 (T.T.A.B. 2001) 22

Sweats Fashions, Inc. v. Pannill Knitting Company, Inc., 833 F.2d 1560 (Fed. Cir. 1987) 18

T.A.B. Systems v. PacTel Teletrac, 77 F.3d 1372 (Fed. Cir. 1995) 37

Teledyne Technologies, Inc. v. Western Skyways, Inc., 78 U.S.P.Q.2d 1203 (T.T.A.B. 2006) 9, 10, 11, 13, 14

Textron Inc., v. Cardinal Engineering Corp., 164 U.S.P.Q. 397 (T.T.A.B. 1969) 40

Therma-Scan, Inc. v. Thermoscan, Inc., 295 F.3d 623 (6th Cir. 2002) 26

Time Warner Entertainment Co. v. Jones, 65 U.S.P.Q.2d 1650 (T.T.A.B. 2002) 1

Towers v. Advent Software, Inc., 913 F.2d 942 (Fed. Cir. 1990) 35

Turner v. Hops Grill & Bar Inc., 52 U.S.P.Q.2d 1310 (T.T.A.B. 1999) 13

Us, Inc. v. Lamps R Us, 219 U.S.P.Q. 340 (T.T.A.B. 1983) 24

Viacom International, Inc. v. Kermit Komm, et al., 46 U.S.P.Q.2d 1233 (T.T.A.B. 1998) 1

West Florida Seafood, Inc. v. Jet Restaurants, Inc., 31 F.3d 1122 (Fed. Cir. 1994) 14, 38

Willson v. Graphol Products Co., 188 F.2d 498 (C.C.P.A. 1951) 10

FEDERAL STATUTES

15 U.S.C. § 1069 ..... 5, 9

15 U.S.C. § 1072 9

OTHER AUTHORITIES

J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* 25, 35

INTRODUCTION

Respondent Sportsman's Warehouse, Inc. ("Respondent") respectfully submits this Case Brief in response to Petitioner Bass Pro Trademarks, L.L.C.'s ("Petitioner's") attempt to cancel Respondent's Registration No. 2,390,988 for the mark "SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR and design." For the reasons set forth in this brief, Petitioner's Amended Petition must be denied.[1]

First, Petitioner's claims are barred by laches. Petitioner admits it was aware of Respondent's name and trademark at least as early as 1998. Nevertheless, Petitioner watched and waited as Respondent spent millions of dollars building approximately 60 stores and expended enormous amounts of time and energy developing extensive good will and consumer recognition throughout the country under its trademark. By contrast, only one of Petitioner's nearly 40 stores currently operates under Petitioner's asserted mark. In an attempt to obtain an unfair business advantage , Petitioner brought this cancellation proceeding just three days before Respondent's mark would have been eligible for incontestability.

Second, even if the Board can somehow ignore Petitioner's egregious and calculated delay, Petitioner's claim of a likelihood of confusion still must fail. Ignoring that it was specifically required to disclaim the phrase "Sportsman's Warehouse" in order to obtain its asserted mark, Petitioner further ignores the substantial dissimilarities between its mark and Respondent's mark, including that Petitioner's mark is dominated by the Bass Pro Shops

[1] In its Case Brief, Petitioner opted not to argue its claims of mere descriptiveness and misuse asserted in its Amended Petition, and therefore these claims have been waived. *See Time Warner Entertainment Co. v. Jones*, 65 U.S.P.Q.2d 1650, 1655 n.3 (T.T.A.B. 2002); *Viacom International, Inc. v. Kermit Komm, et al.*, 46 U.S.P.Q.2d 1233, 1998 WL 44545 at *7 n.3 (T.T.A.B. 1998). As Petitioner has waived these claims, neither will be addressed in Respondent's Case Brief.

established house mark with its open-mouthed fish and oval design. Petitioner further ignores the many factors that establish consumers will not be confused between the relevant marks. In particular, the only location Petitioner operates under its asserted mark is located in Missouri, where Respondent does not operate any stores. Instead, Petitioner focuses on a few characterizations of hearsay from unidentified sources and a fatally flawed survey to attempt to create a sense of confusion where none exists. In fact, the record shows that customers readily differentiate between the parties' businesses, each of which present very different commercial impressions and are easily distinguishable by the consumer experience offered. Indeed, given the many millions of customers who have patronized the parties' locations, Petitioner's inability to point to any probative evidence of actual confusion on the contrary establishes no likelihood of confusion exists.

Finally, Petitioner falsely accuses Respondent of obtaining its registration by fraud. This accusation is based solely upon Petitioner's blatant mischaracterization of a single interrogatory response, which on its face does not even support the claim Petitioner raises. The record unequivocally establishes that Respondent accurately represented its goods and services in its trademark application, and therefore Petitioner's specious claim must be denied.

DESCRIPTION OF THE RECORD

In addition to the portions of the record referenced in Petitioner's Case Brief, the record consists of the following:

1. Deposition of Stuart Utgaard conducted May 11, 2006, referred to herein as Utgaard Dep.
2. Trial Testimony of Dale R. Smith taken February 20, 2007, referred to herein as Smith Trial Testimony.
3. Respondent's February 1, 1995 Utah Business Name Registration.
4. Petitioner's 1995 Atlanta Store Notice.

25. Deposition of Jamison Bryan Hensley conducted June 1, 2006, referred to herein as Hensley Dep.

26. Examples of Respondent's Consumer Communications.

27. 2006 Commercial Appeal Readers' Choice Awards Publication.

28. Deposition of William Bome conducted May 16, 2006, referred to herein as Bome Dep.

29. Deposition of Joel Michael McRae conducted May 16, 2006, referred to herein as McRae Dep.

30. Deposition of Stanley W. Lippelman conducted August 9, 2006, referred to herein as Lippelman Dep.

31. Copy of Bass Pro Shops Gift Card.

32. Petitioner's Promotional Poster.

33. Petitioner 2005 Hunting Classic Advertisement.

34. Deposition of Michael B. Mazis conducted September 22, 2006 referred to herein as Mazis Dep.

35. Shari Seidman Diamond, "Research Guide on Survey Evidence," *published in* Federal Judicial Center, *Research Manual on Scientific Evidence* 274 (2d ed. 2000).

36. Petitioner's Amended Petition.

37. Trial Testimony of Toni Miller taken January 23, 2007 referred to herein as Miller Trial Testimony.

38. 1994/1995 Business Card of Dale Smith.

39. March 26, 1996 Notice of Abandonment for Petitioner's Application Ser. No. 74,619,167.

40. Respondent's Expert Report of Mark R. Winkelman.

41. Curriculum Vitae of Mark R. Winkelman.

42. Respondent's Answers to Petitioner's First Set of Interrogatories.

43. Respondent's Amended Answer to Interrogatory No. 8.

44. Respondent's Responses to Petitioner's Second Set of Interrogatories.

STATEMENT OF THE ISSUES

1. Does Petitioner's egregious delay in binging its cancellation petition, and the resulting significant prejudice to Respondent, bar Petitioner's likelihood of confusion claims under the equitable doctrine of laches pursuant to 15 U.S.C. § 1069?

2. If Petitioner's cancellation claim based upon a likelihood of confusion is not barred by laches, has Petitioner met its burden of establishing that a likelihood of confusion actually exists in this matter?

3. Has Petitioner met its significant burden of showing that Respondent willfully and fraudulently obtained its registration from the United States Patent and Trademark Office?

FACTUAL BACKGROUND

Since late 1994, Respondent has continuously used the mark "SPORTSMAN'S WAREHOUSE" in connection with its successful business of selling outdoor goods. (Ex. 1, Utgaard Dep. 23:6-22; *see also,* Ex. 2, Smith Trial Testimony 11:7-13:11; Ex. 3, Respondent's February 1, 1995 Utah Business Name Registration.) Since that time, Respondent has operated its stores in close association with a company called Pacific Flyways, an outdoor goods wholesaler, which eventually came under the same ownership as Respondent. (*See* Ex. 1, Utgaard Dep. 26:4-11.) After operating as "Sportsman's Warehouse" for several years, Respondent eventually filed an application on January 22, 1999 with the United States Patent and Trademark Office ("USPTO") for the registration of the mark "SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR and design":

(*See* Ex. 6, Application for Respondent's Fed. Reg. No. 2,390,988.) At the time of the registration, Respondent's best specimen of use for the mark was its Father's Day advertisement published on June 15, 1995 in the publication *Desert News* distributed in the Salt Lake City, Utah area. (*See* Ex. 4, Petitioner's 1995 Atlanta Store Notice.) This specimen and its date were used as the date of first use within Respondent's trademark application.

Prior to Respondent's application, Petitioner registered the mark "BASS PRO SHOPS SPORTSMAN'S WAREHOUSE and Design":

(*See* Ex. 5, Petitioner's Fed. Reg. No. 2,071,417.) As part of Respondent's application process, the trademark examiner specifically considered and rejected the likelihood that consumers would confuse Petitioner's asserted mark with Respondent's mark. (*See* Ex. 6, Application for Respondent's Fed. Reg. No. 2,390,988.) Respondent's mark was published for opposition over Petitioner's mark on June 9, 2000. Although Petitioner admits to being aware of Respondent's business—and necessarily Respondent's trademarks—at least as early as 1998, Petitioner chose not to oppose Respondent's registration. (*See* Ex. 7, Petitioner's Responses to Respondent's First Set of Interrogatories at No. 4.) Petitioner did not object to Respondent's trademark use

until it filed its present cancellation petition on September 30, 2005, just three days before Respondent's mark was eligible for incontestability status on October 3, 2005.

Respondent's registered mark and its common law mark "SPORTSMAN'S WAREHOUSE" have become well known throughout the outdoor goods industry as indicators of Respondent's business, appearing on the primary signage of each of Respondent's approximately 60 stores in 26 states. (Ex. 8, Map and List of Respondent's Store Locations; Ex. 9, Utgaard Trial Testimony 28:3-15.) Since January 1, 1995, Respondent has recorded nearly $2 billion in sales under these marks. (*See* Ex. 10, Spreadsheets of Respondent's Sales and Advertising Figures; Ex. 9, Utgaard Trial Testimony 45:22-47:15.) Respondent's marks represent an enormous amount of goodwill, consumer recognition, and industry respect built up over years of Respondent's hard work, advertising, marketing, and promotion.

On the contrary, Petitioner currently operates one retail location bearing its asserted BASS PRO SHOPS SPORTSMAN'S WAREHOUSE mark, a store in St. Charles, Missouri. In fact, Petitioner has only ever operated three stores in the nation under its asserted mark. (Ex. 7, Petitioner's Responses to Respondent's First Set of Interrogatories at Nos. 6, 7, and 9.) Although Petitioner had operated stores in Lawrenceville, Georgia, and Memphis, Tennessee, bearing its asserted mark, Petitioner's Georgia store closed over five years ago. (*See* Ex. 11, Miller Dep. at 16:14-17:2.) In 2005, Petitioner's Memphis store stopped using the "BASS PRO SHOPS SPORTSMAN'S WAREHOUSE and design" mark in favor of the mark BASS PRO SHOPS SPORTSMAN'S CENTER.[2] (*See* Ex. 12, Holley Dep. 14:11-16:4.) Petitioner's general manager of that store testified that all of the store's advertising and marketing materials also changed over to this new mark. (*Id.* 16:13-17:12.)

[2] Petitioner obtained a registration for the trademark "SPORTSMAN'S CENTER" on March 1, 2005 as Fed. Reg. No. 2,929,833.

An important fact underlying Petitioner's claims in this proceeding is that

(*See* Ex. 13, Hagale Dep. 10:6-12:19; 17:13-20; *see* Ex. 14, January 13, 2006 Letter from John Morris to Stuart Utgaard.) Although Petitioner admits to having knowledge of Respondent's business and marks since at least as early as 1998, Petitioner kept silent when Respondent's mark was published for opposition by the USPTO on June 9, 2000, Indeed, Petitioner remained silent regarding its purported rights for at least seven years as Respondent's investment and goodwill in the mark continued to grow. Then Petitioner filed this cancellation at the last possible moment, , and just days before Respondent's mark was to become eligible for incontestability status. Petitioner's extreme delay in bring its petition could not have been more carefully calculated to use the trademark laws to do maximum damage to Respondent. While Petitioner remained silent, Respondent's sales rocketed from approximately $52 million annually to over a half billion dollars annually. (Ex. 10, Spreadsheets of Respondent's Sales and Advertising Figures; Ex. 9, Utgaard Trial Testimony 45:22-47:15.) While Petitioner remained silent, Respondent invested in an exponentially expanding infrastructure, from just a few stores in 1998 to approximately 60 store locations in 26 states at present. (Ex. 8, Map and List of Respondent's Store Locations.)

ARGUMENT

I. Petitioner's Section 2(d) Cancellation Claim Based Upon a Likelihood of Confusion Must Be Denied.

A. Petitioner's Likelihood of Confusion Claim Must Be Denied Because Petitioner Unreasonably Delayed in Bringing Its Petition, Which Resulted in Material Prejudice to the Respondent.

Petitioner's claim that Respondent's registered mark must be cancelled based upon a likelihood of confusion cannot prevail. In the context of a cancellation proceeding, a petitioner's

likelihood of confusion claim must be denied where the affirmative defense of laches is established. *See Teledyne Technologies, Inc. v. Western Skyways, Inc.*, 78 U.S.P.Q.2d 1203, 1212 (T.T.A.B. 2006); 15 U.S.C. § 1069. Laches bar a cancellation claim based upon a purported likelihood of confusion where (1) a petitioner has unreasonable delayed in asserting its rights and (2) respondent has been materially prejudiced as a result of the delay. *See Lincoln Logs Ltd. v. Lincoln Precut Log Homes, Inc.*, 971 F.2d 732, 734 (Fed. Cir. 1992); *Teledyne,* 78 U.S.P.Q.2d at 1210.

Petitioner's manipulation of the trademark laws, and its resulting substantial prejudice to Respondent, fall squarely within the course of conduct this Board has held to constitute laches. Petitioner admits it has had actual notice of Respondent's business and common law mark for at least seven years. Nevertheless, Petitioner lay in the weeds, delaying as assertion of its purported rights until the eve of the date upon which Respondent's mark would have become eligible for incontestability status. As a result, Petitioner's calculated and inexcusable delay has acutely prejudiced Respondent. Therefore, laches operates to bar Petitioner's claims based upon a purported likelihood of confusion.

1. Petitioner's Unduly Delayed in Asserting Its Purported Rights.

As applied in a trademark cancellation proceeding, if a petitioner had actual prior notice of the registrant's use of the mark, the relevant time period for determining undue delay begins when the mark in question is published for opposition. *See National Cable Television Assoc., Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572, 1581 (Fed. Cir. 1991). Even without actual notice of use, a party seeking to cancel a mark is deemed to have constructive notice of the mark upon the mark's registration. *Teledyne,* 78 U.S.P.Q.2d 1212, at 1209-10; *see also* 15 U.S.C. § 1072. Registrations are "public records and that as such they constitute such constructive notice as will preclude a cancellation petitioner from pleading ignorance of the

existence of a particular mark." *Teledyne,* 78 U.S.P.Q.2d at 1212, at 1210 (quoting *Willson v. Graphol Products Co.*, 188 F.2d 498 (C.C.P.A. 1951)). Recently, the Board determined that a petitioner's failure to oppose a mark during the application period, and then waiting over three and a half years to bring a cancellation claim, was sufficient to bar a petitioner's likelihood of confusion claims. *Teledyne*, 78 U.S.P.Q.2d, at 1210.

In the present case, Petitioner admits that it first became of aware of Respondent's business—which necessarily includes an awareness of Respondent's use of the mark "Sportsman's Warehouse"—in 1998. (Ex. 7, Petitioner's Responses to Respondent's First Set of Interrogatories at No. 4.) Moreover, Respondent's mark was published for opposition by the USPTO on June 9, 2000. Based upon the above standard, at the very least Petitioner either knew or should have known of Respondent's mark as of that date. Nevertheless, Petitioner chose not to file an opposition to Respondent's mark during the notice period, and the USPTO subsequently registered the mark as Reg. No. 2,390,988 on October 3, 2000. Petitioner instead lay in wait until September 30, 2005—nearly five years later and just a mere three days before Respondent's mark was eligible for incontestability status—before deciding to file its petition to cancel Respondent's mark. Such a protracted and premeditated deferral by Petitioner to assert its claims exceeds what the Board has already found to be undue delay. In *Teledyne*, the Board determined that a delay of three and one-half years constituted undue delay and therefore was sufficient to completely bar the petitioner's likelihood of confusion claim for identical marks. *Teledyne,* 78 U.S.P.Q.2d at 1210.

Moreover, Petitioner's delay is entirely unjustified. The reason for Petitioner's last-minute cancellation proceeding is simple.

(Ex. 13, Hagale Dep. 10:6-12:19;

17:13-20; *see* Ex. 14, January 13, 2006 Letter from John Morris to Stuart Utgaard.)

(*See id.*)

Well before those negotiations took place, Petitioner not only had actual knowledge, but had detailed knowledge, of Respondent's business and trademark use. Although Petitioner may attempt to argue it had no obligation to object to Respondent's trademark use until the companies began operating stores in the same metropolitan area, this position is untenable. Petitioner admitted it was aware of Respondent's business at least as early as 1998. In 2000, Respondent was already operating a multi-state retail chain with annual sales of $52,245,000 and annual advertising expenditures of more than a quarter of a million dollars. (Ex. 10, Spreadsheets of Respondent's Sales and Advertising Figures.) Petitioner cannot now argue that it could not have reasonably foreseen the continued expansion of Respondent's business. Therefore, Petitioner's calculated tactics constitute an egregious and impermissible delay that is more than sufficient for laches to bar its claims.

2. Petitioner's Delay Resulted in Material Prejudice to Respondent.

Petitioner's unreasonable delay has resulted in substantial prejudice to Respondent. The primary type of prejudice that generally flows from a Petitioner's unreasonable delay is economic prejudice based upon the loss of time, money, or foregone opportunity. *Bridgestone/Firestone Research, Inc. v. Automobile Club De L'Ouest De La France*, 245 F.3d 1359, 1362 (Fed. Cir. 2001). "[T]he essential inquiry . . . is to determine if there was a change in the economic position of respondent during the period of petitioner's delay." *Teledyne,* 78 U.S.P.Q.2d at 1211. As the Federal Circuit has noted, "economic prejudice to the defendant may ensue whether or not the plaintiff overtly lulled the defendant into believing that the plaintiff

would not act, or whether or not the defendant believed that the plaintiff would have grounds for action." *Bridgestone*, 245 F.3d at 1363.

In the present case, Petitioner's seven-year silence in asserting its purported trademark rights has coincided conveniently with Respondent's meteoric growth as a national force in the outdoor goods industry. In June of 2000, Respondent's business only consisted of three retail stores in two states, with annual sales of $52,245,000 and a yearly advertising expenditure of $264,000. (Ex. 10, Spreadsheets of Respondent's Sales and Advertising Figures.) By September of 2005, Respondent's business had exploded to 36 store locations in 17 states, with annual sales of $415,592,000 and a yearly advertising expenditure of over $3,000,000. (*Id.*; Ex. 42, Respondent's Answers to Petitioner's First Set of Interrogatories at No. 11.) Currently, Respondent's business consists of approximately 60 store locations in 26 states. (Ex. 8, Map and List of Respondent's Store Locations.) In 2006, Respondent's business surpassed the milestone of half-a-billion dollars in annual sales. (Ex. 9, Utgaard Trial Testimony 47:11-12.)

In addition, each one of these stores has a large exterior sign and multiple other types of signage that bear Respondent's registered trademark. (*Id.* at 28:3-15.) From 2000 through 2005, Respondent spent more than $3,062,504 on exterior signage alone. (Ex. 10, Spreadsheets of Respondent's Sales and Advertising Figures.) Respondent spent over $20,000,000 on the production of logoed merchandise from September 1, 2003 to January 20, 2006 alone. (*Id.*) On August 22, 2005, Respondent opened a new 363,654 square foot warehouse and distribution facility equipped to move two million pounds of merchandise a week. (*See* Ex. 16, March 2006 Sportsman's News Article.) Respondent invested substantially in expanding its retail chain nationally under its trademarks while Petitioner did nothing more than watch and wait. Indeed, Respondent has developed extensive goodwill with consumers, the outdoor goods industry, and

the sporting community in general. (*See, e.g.,* Ex. 17, Examples of Respondent's Consumer and Industry Recognition.) As just one example, Respondent has been widely recognized as a philanthropic partner of Ducks Unlimited, world's largest wetlands and waterfowl conservation organization, in its efforts to preserve continental wetlands. (*See* Ex. 18, August 24, 2006 Ducks Unlimited Article.) Any attempt by Respondent at this late date to re-brand its retail operations would cost millions of dollars and would substantially damage Respondent's reputation and goodwill.

Therefore, Respondent has been unquestionably prejudiced by Petitioner's unreasonable delay, and the doctrine of laches bars Petitioner's likelihood of confusion claims. *See Bridgestone*, 245 F.3d at 1362-3 (finding material prejudice and laches where respondent presented evidence of its "longstanding investment in and promotion of" its mark); *Teledyne,* 78 U.S.P.Q.2d at 1211 (finding material prejudice and laches where the respondent's annual advertising budget was $45,000); *Turner v. Hops Grill & Bar Inc.*, 52 U.S.P.Q.2d 1310, 1999 WL 959435, at *3 (T.T.A.B. 1999) (finding material prejudice and laches where respondent had experienced increased sales and an increase in its number of locations during the petitioner's delay).

3. Laches Defense Not Barred By Inevitable Confusion.

Although the application of laches may be limited where confusion is deemed inevitable, this limitation does not apply in the present case. As explained below, confusion is not even likely in this case, let alone inevitable. Confusion has been deemed inevitable only in situations in which parties use identical marks in connection with the same or substantially similar goods. *See Turner*, 52 U.S.P.Q.2d 1310, 1999 WL 959435, at *3, at *3; *Reflange Inc. v. R-Con International*, 17 U.S.P.Q.2d 1125, 1131 (T.T.A.B. 1990). Moreover, "the standard of confusion required for a finding of inevitability of confusion is an increment higher than that required for a

finding of a likelihood of confusion." *Coach House Restaurant, Inc. v. Coach and Six Restaurants, Inc.*, 934 F.2d 1551, 1564, 19 U.S.P.Q.2d 1401, 1414 (11th Cir. 1991). Even when two marks are identical, differences between the goods for which the marks are used bars a finding of inevitable confusion. *See Teledyne,* 78 U.S.P.Q.2d at 1212 (finding no inevitable confusion between GOLD SEAL for ignition harnesses for aircraft engines and respondent's mark GOLD SEAL for aircraft engines).

In the present case, the parties' goods and services have some similarities, but the marks themselves are dissimilar. As set out more fully below, the Respondent's mark SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR with a mountain scene and capital "S" bookends design, and Petitioner's mark BASS PRO SHOPS SPORTSMAN'S WAREHOUSE with an open-mounted fish and oval design, cannot be construed as substantially similar in sound, connotation, appearance, or commercial impression. Therefore, to the extent Petitioner's bases its petition for cancellation upon claims of a likelihood of confusion, such claims are barred by laches.

B. Respondent's Registration May Not Be Cancelled Based Upon a Likelihood of Confusion with Petitioner's Federal Registration.

Petitioner bases its cancellation petition, primarily, upon a claim that a likelihood of confusion exists between Petitioner's Fed. Reg. No. 2,071,417 and Respondent's mark. Service mark registrations are presumed to be valid, and party seeking cancellation must rebut this presumption by preponderance of evidence. *West Florida Seafood, Inc. v. Jet Restaurants, Inc.*, 31 F.3d 1122, 1125 (Fed. Cir. 1994). Determination of the issue of likelihood of confusion in a cancellation proceeding is based upon an analysis of all of the probative facts in evidence relevant to the factors set forth in *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A.

1973).[3] *See In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 U.S.P.Q.2d 1201 (Fed. Cir. 2003). The Board is not obligated to analyze each *DuPont* factor in every case; instead, it need only consider a given factor when relevant evidence exists in the record. *Majestic Distilling*, 315 F.3d 1311, 1315. Based upon the record in this proceeding, the Board needs to look only to the dissimilarity of the marks, the conditions in which relevant sales are made, the lack of fame in Petitioner's registered mark, and the lack of actual confusion, to see that the no likelihood of confusion exists between the registered marks.

1. The Parties' Marks Are Substantially Dissimilar in Appearance, Sound, Connotation, and Commercial Impression.

In any likelihood of confusion analysis, the key consideration is the relative similarity between the marks. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 U.S.P.Q. 24 (C.C.P.A. 1976); *Maids to Order of Ohio, Inc. v. Maid-To-Order, Inc.*, 78 U.S.P.Q.2d 1899, 1909 (T.T.A.B. 2006). Specifically, the "marks in their entireties" are to be

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[3] The *DuPont* factors, in their entirety, are as follows:

1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression;
2) The similarity or dissimilarity and nature of the goods or services described in an application or registration or in connection with which a prior mark is in use;
3) The similarity or dissimilarity of established, likely-to-continue trade channels;
4) The conditions under which and buyers to whom sales are made, i.e. "impulse" v. careful, sophisticated purchasing;
5) The fame of the prior mark;
6) The number and nature of similar marks in use on similar goods;
7) The nature and extent of any actual confusion;
8) The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion;
9) The variety of goods on which a mark is or is not used;
10) The market interface between the applicant and the owner of a prior mark;
11) The extent to which applicant has a right to exclude others from use of its mark on its goods;
12) The extent of potential confusion; and
13) Any other established fact probative of the effect of use.

DuPont, 476 F.2d at 1361, 177 U.S.P.Q. at 567.

analyzed for similarity or dissimilarity with regard to "appearance, sound, connotation, and commercial impression." *DuPont*, 476 F.2d at 1361. In the present case, the appearance, sound, connotation, and commercial impression of the two marks demonstrate they are distinct and dissimilar. The Board may rely solely on the dissimilarity of the marks in finding no likelihood of confusion. *See Majestic*, 315 F.3d at 1315 (noting that "[n]ot all of the *DuPont* factors may be relevant or of equal weight" and "any one of the factors may control a particular case"); *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373 (Fed. Cir. 1998) (upholding Board decision finding no likelihood of confusion and dismissing opposition based solely upon the dissimilarity of the marks "CRISTAL" and "CRYSTAL CREEK" in sound, appearance, significance, and commercial impression). In the present case, this first *DuPont* factor alone is dispositive of Petitioner's likelihood of confusion claim.

i. Dissimilarity in Appearance and Sound.

In terms of the appearance of the marks, even a cursory look reveals that each mark presents a distinct visual impression. The undeniably dominant visual element of Petitioner's mark consists of a image of a large, open-mouthed fish, which tends to signify a retail establishment that focuses primarily on the sale of fishing supplies. In conjunction with this dominant image, the words "Bass Pro Shops" appear in large type within an oval at the top of Petitioner's mark and the words "Sportsman's Warehouse" appearing underneath:

(*See* Ex. 5, Petitioner's Fed. Reg. No. 2,071,417.) Respondent's mark, on the other hand, is dominated by a large capital "S" appearing on the left and right sides of the mark, with the words "Sportsman's" traversing the sky over a centrally located mountain scene and text that reads "Sportsman's Warehouse Hunting Fishing Camping Reloading Outerwear Footwear":

(*See* Ex. 19, Respondent's Fed. Reg. No. 2,390,988.) Neither an image of a large fish, nor an oval, nor the words "Bass Pro Shops" appears anywhere within Respondent's mark. The obvious differences in the dominant visual elements of each mark—a large, open-mouthed fish and "BASS PRO SHOPS" versus a mountain scene design and capital "S" bookends—weigh heavily in favor of finding a substantial dissimilarity between the marks.

When read aloud, the sound of each mark also creates a distinct aural impression. Petitioner's mark, when read aloud, consists of five words "BASS PRO SHOPS SPORTSMAN'S WAREHOUSE." The primary designation of Petitioner's core brand identity, "BASS PRO SHOPS," takes a principal position in the mark and must be spoken first. On the other hand, Respondent's mark, when read aloud, consists of eight words, "SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR," with the primary designation of Respondent's core brand identity, "SPORTSMAN'S WAREHOUSE," taking a principal position.

The only similarity of the marks' appearance or sound are the words "Sportsman's Warehouse." Although Petitioner argues that this single similarly should be given prominence in the Board's analysis, the law is to the contrary. Petitioner was specifically required to disclaim

any exclusive rights in the phrase "Sportsman's Warehouse" as part of its federal registration. (*See* Ex. 5, Petitioner's Fed. Reg. No. 2,071,417.) Respondent was also required to disclaim this phrase to obtain its registration over Petitioner's and other marks. (Ex. 19, Respondent's Fed. Reg. No. 2,390,988.) The Board has long held that "the disclaimer of a term constitutes an admission of the merely descriptive nature of that term." *In re DNI Holdings Ltd.*, 77 U.S.P.Q.2d 1435, 1442 (T.T.A.B. 2005); *see In re Interco Inc.*, 29 U.S.P.Q.2d 2037, 2038 (T.T.A.B. 1993); *Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 1299 (C.C.P.A. 1972). As the Federal Circuit has stated, "the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion." *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 947 (Fed. Cir. 2000). Petitioner agrees. (*See* Petitioner's Case Brief at 10.)

Therefore, the presence of descriptive phrase "Sportsman's Warehouse" appearing in each mark—which has been specifically disclaimed by both Petitioner and Respondent—cannot lead to a finding that the marks are similar in appearance. *See Sweats Fashions, Inc. v. Pannill Knitting Company, Inc.*, 833 F.2d 1560 (Fed. Cir. 1987) (upholding the Board's decision that no likelihood of confusion existed between ULTRA SWEATS and SWEATS and design marks where "the only similar element in the marks of the parties is a generic or highly descriptive term, and . . . the remainder of the respective marks is sufficiently distinguishing"); *Johnson Controls, Inc. v. Concorde Battery Corporation*, 228 U.S.P.Q. 39, 1985 WL 71954, at *45 (T.T.A.B. 1985) (holding there would be no likelihood of confusion between "GEL/CELL" and "GEL POWER" marks—even where opposer had priority and the goods were identical—where the only common feature of the marks was a descriptive term).

ii. Dissimilarity in Connotation and Commercial Impression.

The marks at issue in this proceeding also differ substantially in their respective connotations and commercial impressions. First, the prominently placed image of a large-mouthed fish and with the initial word "BASS" in Petitioner's mark connotes a retail shop which specializes in fishing-related goods and services. In contrast, Respondent's mark, with its prominently placed word "SPORTSMAN'S," central mountain scene, and inclusion of the words "HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR," connotes a retail store offering a much wider range of goods and services for the general sportsman.

Moreover, the dominant portion of Petitioner's mark consists of Petitioner's core word mark, "BASS PRO SHOPS," and its house mark, "BASS PRO SHOPS and design." Based upon its own registrations, Petitioner's "BASS PRO SHOPS" word mark has been in use by the company since 1973. (*See* Ex. 20, Petitioner's Fed. Reg. No. 1,116,517.) Additionally, Petitioner's BASS PRO SHOPS and logo mark has been used by Petitioner at least since 1979. (*See* Ex. 21, Petitioner's Fed. Reg. No. 2,193,039.) These core marks are central to a family of marks Petitioner has either applied for or registered with the USPTO.[4] These core marks appear on exterior and interior signage of Petitioner's approximately 34 stores in approximately 21 states and Canada. Petitioner has generated billions of dollars in sales under these core marks since its use first began. The dominant placement of these established marks within Petitioner's asserted mark undeniably creates a commercial impression that the source of the goods and services offered under the mark is Petitioner Bass Pro Shops, not Respondent. Although Petitioner's mark also contains the phrase "Sportsman's Warehouse," the Board has held that

[4] *See, e.g.,* Ser. Nos. 78,746,097; 78,611,761; 78,895,395; 78,895,393; 78,827,852; 77,015,898; and Reg. Nos. 3,051,275; 2,071,417; 2,081,740; 2,193,041; 2,191,778; 2,487,746; 2,207,865; 2,192,974; 2,093,520; 1,952,297; 1,950,067.

disclaimed matter, while not ignored, is considered much "less significant in creating the mark's commercial impression." *In re Code Consultants Inc.*, 60 U.S.P.Q.2d 1699, 2001 WL 114619, at *4 (T.T.A.B. 2001). Respondent's mark, on the other hand, does not include any portion of Petitioner's core BASS PRO SHOPS or BASS PRO SHOPS and design marks. Instead, Respondent's mark is dominated by the primary designation of Respondent's core brand identity, "SPORTSMAN'S WAREHOUSE."

Given these substantial dissimilarities in the appearance, sound, connotation, and commercial impression of the marks, this factor weighs heavily against a finding of likelihood of confusion.

2. The Dissimilarities of the Parties' Described Goods Weigh Against a Likelihood of Confusion.

Even though the first DuPont factor is dispositive of Petitioner's likelihood of confusion claim, other *DuPont* factors are either neutral or weigh against such a finding. The second *DuPont* factor involves a consideration of the "similarity or dissimilarity" of the goods and services associated with each mark. *DuPont*, 476 F.2d at 1361. This factor must be determined in light of the description set forth in the parties' registrations. Petitioner agrees that "the registrations themselves determine the scope of the goods/services covered by the contested mark." (Petitioner's Case Brief at 11.)

In the present case, the description of goods in Petitioner's asserted registration lists "clothing, fishing supplies, and sporting goods." (Ex. 5, Petitioner's Fed. Reg. No. 2,071,417.) On the other hand, the description in Respondent's registration states a much broader, outdoor-oriented list of goods, covering "hunting supplies, fishing supplies, camping supplies, reloading supplies, outerwear, clothing, and footwear." (Ex. 19, Respondent's Fed. Reg. No. 2,390,988.) Although Petitioner argues these described goods are "practically identical," they most certainly

are not. In the outdoors goods industry, a clear distinction exists between sporting goods stores, which sell goods related to sports like baseball, basketball, and golf, and outdoors stores, which sell goods related to activities like camping, hunting, and fishing. In fact, Respondent changed its name from Sports Warehouse in late 1994 to Sportsman's Warehouse precisely in order to capitalize on this distinction. (*See* Ex. 22, Smith Dep. 20:14-21:16.) Petitioner's argument that it now actually uses its mark in connection with goods befitting an outdoors store is irrelevant to the proper analysis under this factor. Petitioner does not own a trademark that covers outdoor goods relating to hunting supplies, camping supplies, or reloading supplies. Although some overlap exists in the parties described goods, these critical distinctions render the parties' registrations far from "practically identical" and their dissimilarity weighs against a likelihood of confusion.

Even if the Board were to consider evidence of how the marks are actually used in association with goods and services in the parties' stores, a clear distinction between goods and services offered by the parties also exists under this comparison. For instance, a large component of Petitioner's business is the sale of a full line of boats at each location. (Ex. 23, Holley Trial Testimony 33:19-23; Ex. 4, Petitioner's 1995 Atlanta Store Notice.) Absent some special event, Respondent's stores, on the other hand, do not carry large boats. (*Id.* 33:24-34:10.) Moreover, Petitioner's stores focus on "shock and awe" consumer experiences rather than focusing on providing a wide selection of quality outdoor goods at low prices. For instance, Petitioner's notice regarding its Atlanta store boasted that customers could come to view and experience a "40 foot hawg trough aquarium," a "Dart archery range," "unusual wildlife displays," and a "28-foot shark." (Ex. 4, Petitioner's 1995 Atlanta Store Notice.) Respondent does not provide such services nor seek to offer such consumer experiences.

Therefore, the goods covered by the parties' registrations are dissimilar, and this factor weighs against a likelihood of confusion.

3. Conditions of Relevant Sales Do Not Support Likelihood of Confusion.

The fourth *DuPont* factor in part requires a consideration of the "conditions under which . . . sales are made." *DuPont*, 476 F.2d at 1361. Contrary to Petitioner's argument, this factor has no bearing on a finding of a likelihood of confusion int his case. Generally, the thrust of this factor is determined by the expense of the goods or services at issue and the relative sophistication of the relevant consumers. As the *DuPont* court put it, this factor concerns "'impulse' v. careful, sophisticated purchasing." *Id.* In the context of retail stores such as those operated by the parties, this factor favors neither Petitioner nor Respondent.

Although Petitioner attempts to rely upon "average" transaction amounts to assess consumer care in purchasing, this is the incorrect standard. Instead, the relevant inquiry is the *range* of available products and the *range* of their prices. Retail stores that provide goods and services at a wide range of prices necessarily involve customers with a wide range of sophistication in purchasing, therefore neutralizing the impact of this factor in this context. *The Sports Authority Michigan, Inc. v. The PC Authority*, 2002 WL 575718, at *12 (T.T.A.B. 2001) (holding this factor to be neutral where both parties ran retail stores with goods at a wide range of prices and customers with a wide range of sophistication in purchasing). The record shows that the retail stores of both Petitioner and Respondent offer a wide range of products at a broad range of prices. (Ex. 24, Lippelman Trial Testimony 33:19-36:14; Ex. 2 Smith Trial Testimony 7:3-9:4.) For instance, Petitioner's stores products range from $1 fishing lures to $30,000 gun cabinets to a full line of fishing boats. (Ex. 24, Lippelman Trial Testimony 33:19-36:14.) Therefore, this factor does not weigh in favor of either party.

4. Petitioner's Mark is Not Famous and Warrants Narrow Protection.

The fifth *DuPont* factor in part requires the Board to consider the "fame of the prior mark." *DuPont*, 476 F.2d at 1361. A famous mark is one "with extensive public recognition and renown." *Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002). A mark with limited public recognition and renown deserves and receives less legal protection than a famous mark. *See Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992) (stating that "the Lanham Act's tolerance for similarity between competing marks varies inversely with the fame of the prior mark"). As the Federal Circuit has explained, fame may only be found where a "significant portion of the relevant consuming public . . . recognizes the mark as a source indicator." *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1375 (Fed. Cir. 2005); *see also Bose Corp.*, 293 F.3d at 1376.

In the present case, Petitioner admits that no evidence in the record establishes the fame of its asserted mark. (*See* Petitioner's Case Brief at 15.) Indeed, a significant portion of the relevant consuming public could not possibly recognize Petitioner's asserted mark as a source indicator given the mark's relatively narrow impact on the relevant market. Petitioner has operated only three stores in the nation under its asserted mark, only drawing customers from extremely limited geographic areas. (Ex. 7, Petitioner's Responses to Respondent's First Set of Interrogatories at Nos. 6, 7, and 9.) On the contrary, relevant consumers of clothing, fishing supplies, and sporting goods pervade the population at large. It is a logical impossibility that Petitioner's use of the mark in connection with these three stores—one of which it has closed and one of which is no longer connected with the registered mark—could result in a "significant portion of the relevant consuming public" identifying Petitioner's mark as a source identifier.

Palm Bay Imports, 396 F.3d at 1375. Therefore, this factor weighs against a likelihood of confusion and militates toward providing only narrow protection to Petitioner's mark.

5. *Petitioner Has Failed to Establish Any Admissible Evidence of Actual Confusion Based Upon the Registered Marks.*

Additionally, the seventh *DuPont* factor requires a consideration of the "nature and extent of any actual confusion." *DuPont*, 476 F.2d at 1361, 177 U.S.P.Q. at 567. Petitioner has presented no credible or admissible evidence of actual confusion between the parties' federally registered marks. As the Board has stated, actual confusion "is too important to be established by means of an inference, unsupported by corroborating evidence. . . . The fact that questions have been raised as to the possible relationship between firms is not by itself evidence of actual confusion of their marks." *Toys "R" Us, Inc. v. Lamps R Us*, 219 U.S.P.Q. 340, 346 (T.T.A.B. 1983) (sales clerk's testimony given little weight where there was no evidence to indicate whether "the reason for the question as to affiliation was the result of the similarity of the marks."). The case law clearly establishes that uncorroborated testimony regarding third-party statements of purported confusion generally lacks the basic elements of testimonial foundation. *Corporate Fitness Programs Inc. v. Weidner Health & Fitness Inc.*, 2 U.S.P.Q.2d 1682, 1987 WL 123827, at *9 (T.T.A.B. 1986) (finding that testimony regarding a third-party's confusion "is of little probative value in the absence of testimony from the third persons themselves as to whether they were confused and, if so, what caused their confusion.")

Petitioner has only presented unreliable hearsay in which an employee of either Petitioner or Respondent recounts a general conversation regarding "confusion" that the employee has had with some unnamed customer. Petitioner has not and cannot produce first-hand testimony from any individually identifiable person who has actually experienced confusion between the parties' marks in spite of the millions of customers passing through Petitioner's doors since 1995.

Instead, Petitioner attempts to rely upon second-hand accounts from its own employees regarding the vague thoughts and impressions of unidentified customers. For instance, Petitioner's evidence of "confusion" relating to customers seeking to use Respondent's coupons at one of Petitioner's locations collapses under the most basic scrutiny. Petitioner's employees admit that Petitioner readily accepts coupons from other businesses. (*See* Ex. 25, Hensley Dep. 32:2-4; Ex. 23, Holley Trial Testimony 29:24-30:5.) However, of all of the testimony Petitioner cites regarding coupon "confusion," no witness determined whether the customers were actually confused between the two companies or were simply attempting to cash in on Petitioner's known practice of accepting competing coupons. (*See, e.g.,* Ex. 23, Holley Trial Testimony 31:19-32:11.) The absence of any other testimony to substantiate Petitioner's claims renders such evidence devoid of probative value.

Moreover, although Petitioner attempts to argue that its survey provides evidence of actual confusion, it is mistaken. Survey results regarding a potential for confusion between the relevant marks do not constitute evidence of actual confusion. Professor McCarthy explains:

> Surveys do not measure the degree of actual confusion by real consumers making mistaken purchases. . . . Direct evidence of actual confusion can come only from such sources as misdirected phone calls or letters or . . . testimony of someone willing to testify that they were once a confused customer.

J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:184 (4th ed. 2006).

Even if any of Petitioner's purported actual confusion evidence was credible or admissible, the Board is "not concerned with mere theoretical possibilities of confusion, deception, or mistake or with *de minimis* situations but with the practicalities of the commercial world, with which the trademark laws deal." *Carefirst of Maryland v. Firsthealth of the Carolinas, Inc.*, 77 U.S.P.Q.2d 1492, 1514 (T.T.A.B. 2005) (finding no likelihood of confusion

between the marks CAREFIRST and FIRSTCAROLINACARE); *see also Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 717 (Fed. Cir. 1992). Evidence of some actual confusion occurring initially upon the use of marks with some similarities is generally deemed insufficient to establish a likelihood of confusion. *See First Nat'l Bank in Sioux Falls v. First Nat'l Bank, South Dakota,* 153 F.3d 885, 890 (8th Cir. 1998). Indeed, Respondent's stores alone have conducted over 32 million transactions since 2000, with between 150 to 200 million customers passing through its stores. (Ex. 10, Spreadsheets of Respondent's Sales and Advertising Figures.) Even if Petitioner could point to 32 substantiated instances of "confusion"—which it cannot—these would constitute a mere one ten-thousandth of a percent of those transactions. Purported confusion on such a *de minimis* level would have no bearing on Petitioner's likelihood of confusion claim. *See Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, 83 F.3d 169 (7th Cir. 1996) (finding no likelihood of confusion and stating "plaintiff's evidence that two consumers (out of how many thousands?) may have been misled cannot by itself be thought to create a contestable issue of likelihood of confusion even if the evidence, which is hearsay, is admissible and credible"). In fact, "the existence of only a handful of instances of actual confusion after . . . a significant degree of concurrent sales under the respective marks may even lead to an inference that no likelihood of confusion exists." *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 634 (6th Cir. 2002); *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1110 (6th Cir. 1991).

Finally, the record shows that consumers know the difference between the parties' businesses and their marks. Respondent receives frequent communications from customers regarding the differences between Petitioner's and Respondent's businesses that show consumers have no trouble distinguishing between the two. (*See, e.g.,* Ex. 26, Examples of Respondent's

Consumer Communications.) However, the best example demonstrating how consumers readily distinguish between the two companies' marks is a third-party Readers' Choice Awards poll taken in 2006 by *The Commercial Appeal*, the major newspaper in Memphis, Tennessee. (*See* Ex. 27, 2006 Commercial Appeal Readers' Choice Awards Publication.) *The Commercial Appeal* tallied over 132,000 responses from consumers in the Memphis area—the only geographic region in which Petitioner and Respondent have ever concurrently operated stores under the relevant trademarks. (*See id.* at 2.) While Petitioner and Respondent were both honored as consumer favorites in the category of "Outdoor Store," the poll references Petitioner's store merely as "Bass Pro Shops" and Respondent's store as "Sportsman's Warehouse." (*See id.* at 3.) This independent consumer survey clearly demonstrates that consumers in general associate Petitioner with its house mark and associate Respondent with the mark "Sportsman's Warehouse." Consumers are not confused between the two.

As Petitioner has uncovered no credible or admissible evidence of actual confusion, and the record demonstrates that no actual confusion exists, this factor cannot weigh in favor of a likelihood of confusion.

6. Marks Have Been Used Concurrently for Over Five Years Without Evidence of Actual Confusion.

The eighth *DuPont* factor requires a consideration of the "length of time during and the conditions under which there has been concurrent use without evidence of actual confusion." *DuPont*, 476 F.2d at 1361. In fact, a lack of evidence over a period of years must be considered in the determination of a likelihood of confusion. *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402 (C.C.P.A. 1974). In the present case, the parties have been using the relevant registered marks for national retail chains in the United States concurrently for over five years and have been using the common law mark "Sportsman's Warehouse"

concurrently for over 12 years. Petitioner, however, has failed to present any substantiated or credible evidence of actual confusion during this long period of concurrent use. Moreover, Respondent and Petitioner have both been operating stores in the Memphis, Tennessee, area for nearly two years. Nevertheless, Petitioner has been unable to offer testimony from even a single consumer who has actually been confused between the relevant marks used by the two parties. Petitioner's lack of any direct evidence of actual confusion during this period of concurrent use weighs against a finding of a likelihood of confusion.

Although Petitioner attempts to reply upon more recent hearsay regarding a few customers' inquiries about the relationship of the parties' companies, even if such evidence was credible or admissible it stems from Petitioner's own trademark misuse. Much of the purported "confusion" testimony to which Petitioner cites arose in the context Petitioner's gift cards and the explanatory text that appears on each one. (*See, e.g.,* Ex. 1, Utgaard Dep. 18:2-25; Ex. 28, Bome Dep. 52:21-53:21; Ex. 29, McRae Dep. 33:18-34:19.) Within the last two years, Petitioner has sold and distributed thousands upon thousands of such gift cards at approximately 50,000 locations nationally, including Petitioner's retail stores, supermarkets, and convenience stores. (Ex. 30, Lippelman Dep. 27:1-28:20; *see* Ex. 31, Copy of Bass Pro Shops Gift Card.) The explanatory text on each one of these gift cards instructs Petitioner's customers that the cards may be used at "Bass Pro Sportsman's Warehouse®" stores. (*See* Ex. 31, Copy of Bass Pro Shops Gift Card.) On each card, Petitioner carried over this phrase to the next line of text on the gift card so that "Sportsman's Warehouse®" appeared by itself. (*See id.*) This is only one of many examples of Petitioner using the phrase "Sportsman's Warehouse" as a registered mark. (*See, e.g.,* Ex. 32, Petitioner's Promotional Poster; Ex. 33, Petitioner 2005 Hunting Classic Advertisement.) Petitioner, does not own a federal word mark registration for "Bass Pro

Sportsman's Warehouse" nor for "Sportsman's Warehouse." In fact, Petitioner specifically disclaimed any exclusive ownership of the phrase "Sportsman's Warehouse" within its asserted registration, (*See* Ex. 5, Petitioner's Fed. Reg. No. 2,071,417.) Nevertheless, Petitioner used these phrases with the registered symbol hundreds of thousands of times in marketing to consumers. Even if some consumers did question the relationship between Petitioner's and Respondent's stores, such inquiries were a direct result of Petitioner's careless and improper use of the phrase "Sportsman's Warehouse" as a registered trademark on its own marketing materials.

7. Market Interface Between Petitioner and Respondent is Extremely Limited.

The tenth *DuPont* factor requires a consideration of the "market interface between the [respondent] and the owner of the prior mark." *DuPont*, 476 F.2d at 1361. Although Petitioner argues that this factor "is not an issue in this case," on the contrary this factor weighs heavily against a likelihood of confusion.

Although Respondent and Petitioner both operate national retail chains, Petitioner does not actually use its asserted "BASS PRO SHOPS SPORTSMAN'S WAREHOUSE and design" mark throughout its chain of retail stores. On the contrary, Petitioner only operates a single retail store bearing its asserted mark. In fact, Petitioner has only ever used its asserted in connection with three of its retail stores. The first of those stores closed in 2001. (*See.* Ex. 11, Miller Dep. at 16:14-17:2.)[5] The second Petitioner stopped operating under its asserted mark in 2005. (Ex. 25, Hensley Dep. 20:5-19.) Instead, Petitioner now operates that store under a new mark,

[5] Although Holley also testified Petitioner may be planning to change back some of its advertising to reflect its asserted mark, this planned change is an obvious response to the present trademark proceeding. No evidence exists in the record that the store's new exterior "SPORTSMAN'S CENTER" sign, which Holley estimated to be six to seven feet tall and seven car lengths long and which faces a major highway, has been changed back. (*See* Holley Dep. 14:17-25; 15:6-10.)

"BASS PRO SHOPS SPORTSMAN'S CENTER." The only store Petitioner still operates under its asserted "BASS PRO SHOPS SPORTSMAN'S WAREHOUSE and design" mark is located in St. Charles, Missouri. Respondent, however, does not have any retail stores in Missouri. (*See* Ex. 8, Map and List of Respondent's Store Locations.) Therefore, the parties do not concurrently operate retail stores bearing the relevant marks in *any* of the same geographic markets, and Petitioner has presented no evidence that either party has plans to build or operate stores bearing the relevant marks in any of the same geographic markets in the future.

Moreover, Petitioner's own actions demonstrate the negligible impact of any market interface between the parties under the relevant marks. Since 2000, Petitioner has operated a retail store in the Memphis area using the BASS PRO SHOPS SPORTSMAN'S WAREHOUSE and design mark. In 2005, Respondent also opened a retail store in the Memphis area. Soon after Respondent opened its store, Petitioner changed the trademark it used in connection with its store to "BASS PRO SHOPS SPORTSMAN'S *CENTER*." (Ex. 25, Hensley Dep. 20:5-19.) The general manager of Petitioner's Memphis location testified that Petitioner also recently changed is advertising and marketing materials for this store to reflect the name change. (Ex. 12, Holley Dep. 16:13-17:12.) These actions clearly indicate that Petitioner has little interest in using its asserted mark in the only geographic location in which the parties have ever directly competed under the relevant trademarks.

As the parties do not operate store bearing the relevant marks in any geographic market, and no evidence of any plans to do so appear in the record, the market interface between Petitioner's and Respondent's uses of the mark is extremely limited. As a result, this factor also weighs significantly against a finding of likelihood of confusion.

8. Petitioner's Survey Regarding the Potential for Confusion is Unreliable, Fatally Flawed, and Provides No Support for a Likelihood of Confusion.

Although Petitioner has presented a survey report regarding the likelihood of confusion, the survey methods underlying Petitioner's report are fatally flawed, rendering the results wholly unreliable. Given these fundamental flaws, the data presented in Petitioner's survey report cannot validly support a likelihood of confusion between the parties' registered marks. First, the very method by which Petitioner's expert chose to conduct his survey has been deemed unreliable for obtaining accurate data. Second, in addition to choosing an unreliable method, Petitioner's expert failed to take the rudimentary precautions necessary to assure his results were free from the most basic forms of bias.

First, the survey method chosen by Petitioner's expert has long been called into question by the very same authority upon which Petitioner's expert relies in his report. Petitioner's expert conducted a "mall intercept survey" to assess the possibility for confusion between the parties' registered marks. (Ex. 34, Mazis Dep. 30:6-14; Petitioner's Ex. 20, Expert Report of Michael B. Mazis, Ph.D. ("Mazis Report") at 6-7.) In his report, the expert cited as supporting authority an article by Shari Seidman Diamond entitled "Reference Guide on Survey Evidence." (*See* Petitioner's Ex. 20, Mazis Report at 8.) The Diamond article defines a "mall intercept survey" as 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." (Ex. 35, Shari Seidman Diamond, "Research Guide on Survey Evidence," *published in* Federal Judicial Center, *Research Manual on Scientific Evidence* 274 (2d ed. 2000)). As Petitioner's expert admitted, mall intercept surveys are a form of "convenience sampling." (*See* Ex. 34, Mazis Dep. 34:19-24). Diamond defines a "convenience sample" as a "sample of elements selected because they were readily available," rather than because the elements present the most accurate representation of

the survey universe. (Ex. 35, Diamond at 273.) Petitioner's expert testified that he considers the Diamond article to be an authoritative guide on the subject for proper survey methods. (*See* Ex. 34, Mazis Dep. 22:17-23:11.)

However, because mall intercept surveys necessarily involve a less reliable "convenience sample," Diamond warns that basic precautions must be taken to assure fatal biases are not introduced into the survey results. (Ex. 35, Diamond at 244.) First, Diamond recommends that mall locations most be selected randomly to assure that biases are not introduced into the survey data. (*Id.* at 246.) For instance, the outdoor goods retailers relevant to Petitioner's survey are often located near shopping malls. Whether outdoor goods retailers operated stores near the particular shopping malls used for Petitioner's survey would be certain to artificially increase or decrease the number of respondents familiar with the parties' businesses and the differences between the two. Petitioner's expert, however, admitted that he did *not* randomly pick the malls at which the surveys were conducted. (Ex. 34, Mazis Dep. 31:25-32:2.) Incredibly, Petitioner's expert admitted that he had no idea whether either a Bass Pro Shops or a Sportsman's Warehouse retail store was near any of the malls in which his survey was conducted. (*Id.* 28:12-29:11.) When questioned on this fatal oversight in the survey methodology, Petitioner's expert had no response, stating "I don't know. That's something that I can go back and take a look at, it's a good question." (*Id.* at 28:20-21.) Petitioner's survey report completely fails to address this information or the likely impact this oversight had on the reliability of the results. (*See* Petitioner's Ex. 20, Mazis Report at 6-7.)

Second, Diamond also requires that the individuals surveyed in mall intercept surveys be randomly selected to avoid bias introduced by the interviewers themselves who are hired to actually conduct the survey. (Ex. 35, Diamond at 246.) If respondents are not chosen at random,

individual interviewer biases—such as tending to choose only individuals, for instance, of a particular race, body type, or socioeconomic status—are certain to skew the results. Petitioner's expert admitted he did not choose the interviewers himself and did not exercise direct control over the interviewers while the survey was conducted. (Ex. 34, Mazis Dep. 25:20-26:10.) Although the instructions to the survey company included certain "quotas," those instructions only required interviewers to make sure both males and females from two broad age ranges were chosen. (*See* Petitioner's Ex. 20, Mazis Report, Appendix B.) Aside from this, interviewers were free to approach potential respondents using whatever criteria they wished.

In fact, any actual control Petitioner's expert had over the actual execution of the survey was quite attenuated. The expert hired a company, Target Research Group, to oversee the surveys, which in turn hired another company, Quick Test, to conduct the surveys. (Ex. 34, Mazis Dep. 26:22-27:23.) Quick Test in turn then hired the individuals who actually conducted the interviews at each of the shopping malls. Several levels removed from the actual interviews, Petitioner's expert admitted his instructions did not require the interviewers to randomly select the shoppers interviewed, as Diamond suggests. (*Id.* at 32:3-5.)

Ultimately, however, even if randomization precautions are taken—which Petitioner's expert utterly failed to do—Diamond plainly warns that mall intercept surveys as a whole are of extremely limited value:

> 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.

(Ex. 35, Diamond at 247 n.68.) In the present case, the relevant population is not limited to mall shoppers. As Petitioner's survey stated, the relevant population should consist of "individuals 18 years of age or older who had in the last 12 months purchased fishing, hunting, camping, or other outdoor gear." (Petitioner's Ex. 20, Mazis Report at 6.) Although Petitioner's expert intended the interviewers to screen the potential respondents for these parameters, based upon Diamond's conclusions about the accuracy of mall intercept surveys, these instructions were simply not enough to produce accurate survey results. Petitioner's survey data can only be valid if its participants accurately reflect the population relevant to the survey. In other words, even without the impact of various forms of bias, Petitioner's survey could only hope to provide, in his mall intercept survey, data accurate as to "individuals 18 years of age or older who had in the last 12 months purchased fishing, hunting, camping, or other outdoor gear" *who also frequent shopping malls*. When performing a survey involving retail stores—none of which have been shown to be located inside a shopping mall—the methods employed in Petitioner's "mall intercept" survey cannot possibly provide reliable data regarding the likelihood of confusion in the relevant population of consumers.

Since Petitioner's survey is based upon patently unreliable survey methods, and fails to take the crucial, required precautions against the introduction of significant survey bias, Petitioner's purported results are hopelessly flawed and cannot support its claim of a likelihood of confusion.

C. Respondent's Registration May Not Be Cancelled Upon a Likelihood of Confusion with Petitioner's Purported Common Law Mark.

Petitioner also has based its petition upon purported common law rights in the designation "Sportsman's Warehouse." (Ex. 36, Amended Petition ¶¶ 4 and 5.) A party attempting to cancel a registered trademark based upon a likelihood of confusion with an

unregistered mark must first prove it owns proprietary rights in a valid trademark. *See, e.g., Eastman Kodak Co. v. Bell Howell Document Management Products Co.*, 994 F.2d 1569 (Fed. Cir. 1993); *Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 U.S.P.Q.2d (T.T.A.B. 2006). In order to demonstrate proprietary rights in the phrase "Sportsman's Warehouse," Petitioner must establish it was first to use the phrase as a service mark and that mark had become distinctive in the minds of consumers to indicate Petitioner as a source, through either inherent distinctiveness or through the attainment of secondary meaning. *Otto Roth & Company, Inc. v. Universal Foods Corporation*, 640 F.2d 1317 (C.C.P.A. 1981). If a petitioner cannot establish that its unregistered mark is or has become distinctive, it cannot prevail on a cancellation claim based upon likelihood of confusion. *Towers v. Advent Software, Inc.*, 913 F.2d 942, 946 (Fed. Cir. 1990).

As it has not claimed the common law mark upon which it relies is inherently distinctive, Petitioner must establish the mark attained secondary meaning indicating Petitioner as a source prior to Respondent in order to prevail on its likelihood of confusion claim. *See Perma Ceram Enterprises, Inc. v. Preco Industries, Ltd.*, 23 U.S.P.Q.2d 1134, 1992 WL 156544 (T.T.A.B. 1992). As the Board explained in *Perma Ceram*, where the mark relied upon by a party in support of its priority of use and likelihood of confusion claim is descriptive, the party must establish "priority of acquired distinctiveness." *Perma Ceram*, 23 U.S.P.Q.2d 1134, 1992 WL 156544, at *2. In other words, the relevant "test is which party first achieved secondary meaning in its mark." *Id.*; *see also Larami Corp. v. Talk to Me Programs, Inc.*, 36 U.S.P.Q.2d 1840, 1995 WL 743672, at *4 n.9 (T.T.A.B. 1995); *See McCarthy on Trademarks* § 16:34.

Petitioner has fallen far short of meeting its burden of establishing its priority of use. Moreover, it has failed even to attempt to prove that its use of the mark attained secondary

meaning. Therefore, Petitioner has failed to establish that it owns a valid common law trademark in the phrase "Sportsman's Warehouse." On the contrary, Respondent, not Petitioner, first obtained proprietary rights in the phrase "Sportsman's Warehouse" in late 1994 when it first used the mark in connection with its already established business. Therefore, Petitioner cannot properly assert any claims of likelihood of confusion based upon common law rights in the phrase "Sportsman's Warehouse."

1. Petitioner Cannot Establish Priority in the SPORTSMAN'S WAREHOUSE Mark.

In order to establish priority, Petitioner must show that it was first to use the phrase "Sportsman's Warehouse" as a trademark. In the context of a cancellation claim based upon common law rights, the Board must presume the respondent's mark is valid, and the party seeking cancellation has the burden of rebutting this presumption by a preponderance of the evidence. *Martahus v. Video Duplication Services, Inc.*, 3 F.3d 417, 421 (Fed. Cir. 1993). However, Petitioner has failed to meet this burden and cannot establish it was first to use the "Sportsman's' Warehouse" mark in commerce.

Petitioner asserts that "[s]ince at least as early as January 2, 1995, Petitioner has been using the mark SPORTSMAN'S WAREHOUSE in connection with retail store services." (Petitioner's Case Brief at 2.) Petitioner, however, has presented no credible evidence to support this assertion. On the contrary, Petitioner's Chief Financial Officer, Toni Miller, testified that she was unaware of documentation that would establish that Petitioner actually used the mark in January of 1995. (*See* Ex. 11, Miller Dep. 42:16-43:5.) Instead, the record at best only implies that Petitioner began using the phrase "Sportsman Warehouse" in connection with its house mark sometime in March of 1995, when it first apparently opened a store near Atlanta, Georgia. (*See* Ex. 7, Petitioner's Responses to Respondent's First Set of Interrogatories at No. 2.)

Petitioner's single piece of documentary evidence to support a January 2, 1995 first use date is an "advertisement" regarding its unopened Georgia store. (Ex. 4, Petitioner's 1995 Atlanta Store Notice.) However, prior use through pre-sale advertising can only establish priority if Petitioner proves both that 1) the use reached "more than a negligible share" of its potential customers, and 2) the use was sufficient to have a "substantial impact on the purchasing public." *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 1376 (Fed. Cir. 1995). As the Federal Circuit explained, a party must show "advertising of sufficient clarity and repetition to create the required identification [that] must have reached a substantial portion of the public that might be expected to purchase the service." *Id.* at 1377. Although Petitioner has introduced a single advertisement into evidence purported to be published prior to March of 1995, it has presented no evidence that this or any other advertisement was actually published or that the ad reached a substantial portion of the relevant consuming public. In fact, the asserted "advertisement" was actually pulled from the pages of Petitioner's own catalogue and not a third-party publication. (Ex. 37, Miller Trial Testimony 11:23-12:25.) Even though Petitioner's only asserted "advertisement" was purportedly distributed to consumers, Petitioner has provided no evidence of whether or when this "ad" ever reached the consuming public. Therefore, Petitioner has utterly failed to meet the standard required to establish analogous use priority. *See T.A.B. Systems*, 77 F.3d at 1377 (in which the Federal Circuit reversed the Board to find that opposer, who presented no evidence that advertisements were actually published, failed to present sufficient evidence to support its priority claim).

On the contrary, the record shows that Respondent Sportsman's Warehouse has priority of use in the mark "Sportsman's Warehouse," not Petitioner. Respondent first began using the mark "Sportsman's Warehouse" at least as early as late 1994 and has used the phrase as a

trademark continuously thereafter. On February 1, 1995, William Hayes, then-President of Sports Warehouse, Inc., Respondent's predecessor entity, filed a Utah Business Name Registration for "Sportsman's Warehouse." (*See* Ex. 3, Respondent's February 1, 1995 Utah Business Name Registration.) Respondent's CEO Stuart Utgaard, who was initially hired in 1992 to market and sell the company, testified that the company changed its interior signage sometime between 1994 and 1995 and changed its exterior signage in February or March of 1995. (Ex. 1, Utgaard Dep. 23:6-22; *See also,* Ex. 2, Smith Trial Testimony 11:7-13:11.) Respondent's employees began using "Sportsman's Warehouse" business cards in late 1994 and early 1995. (*See* Ex. 38, 1994/1995 Business Card of Dale Smith.) Respondent began formal advertising with the mark for Father's Day in the Desert News newspaper in 1995. Respondent has provided two witnesses supported by two instances of documentary evidence. Testimony of even a single witness with personal knowledge can suffice to prove priority if that testimony is sufficiently probative. *Powermatics, Inc. v. Global Roofing Products Co., Inc.*, 341 F.2d 127 (C.C.P.A. 1965).

Moreover, at the time Respondent changed its name to "Sportsman's Warehouse," it was a thriving business with a continuous, steady stream of customers. Sportsman's Warehouse, Inc. operated without interruption during the time it transitioned to the new "SPORTSMAN'S WARHOUSE" mark in late 1994 and early 1995, registering approximately $8,000,000 million in sales under that mark in 1995 alone. (Ex. 10, Spreadsheets of Respondent's Sales and Advertising Figures.) Respondent's registration of the trade name "Sportsman's Warehouse" in Utah on February 1, 1995 is strong evidence that Respondent was already using the mark in commerce prior to that date. *West Florida Seafood*, 31 F.3d at 1127 (holding state trademark registrations are "quite probative" with regard to actual prior use).

Therefore, the record demonstrates that Respondent used the phrase "Sportsman's Warehouse" in connection with its services prior to Petitioner. At the very least, Petitioner has failed to meet its burden of establish it was first to use the "Sportsman's Warehouse" mark. Therefore, as Petitioner cannot establish priority in a common law mark, it cannot prevail on its likelihood of confusion claim based upon its purported common law rights.

2. Petitioner Has Failed to Establish Its Use of the Phrase SPORTSMAN'S WAREHOUSE Attained Secondary Meaning Prior to Respondent.

Even if Petitioner could establish it used the phrase "Sportsman's Warehouse" prior to Respondent, Petitioner presented no evidence establishing it attained priority of secondary meaning. As the Federal Circuit has noted, "the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning." *In re Boston Beer Co. Ltd. Partnership,* 198 F.3d 1370, 1373 (Fed. Cir. 1999). In the past, trademark examiners have deemed the phrase "Sportsman's Warehouse" to be descriptive. In their relevant federal registrations, both Petitioner and Respondent were required to disclaim the phrase "Sportsman's Warehouse" based upon descriptiveness. (*See* Ex. 5, Petitioner's Fed. Reg. No. 2,071,417; Ex. 19, Respondent's Fed. Reg. No. 2,390,988.) Unable to overcome descriptiveness objections, Petitioner has also abandoned attempts to register the phrase "The Sportsman's Warehouse" as a word mark in 1996. (*See* Ex. 39, March 26, 1996 Notice of Abandonment for Petitioner's Application Ser. No. 74,619,167.) In the complete absence of evidence proving it attained priority of secondary meaning, Petitioner cannot establish it has proprietary rights in the mark "Sportsman's Warehouse," and therefore cannot prevail on its likelihood of confusion claim based upon purported common law rights. *Perma Ceram*, 23 U.S.P.Q.2d 1134, 1992 WL 156544, at *2.

First, Petitioner presented no evidence directly establishing that consumers associate the designation "Sportsman's Warehouse" with Petitioner's business. Although Petitioner may refer advertising expenditures relating to its Georgia store, Petitioner has presented no evidence that such sales and expenditures are directly linked to Petitioner's use of the phrase "Sportsman's Warehouse." For instance, Petitioner's CFO Toni Miller testified that she was aware of no way to determine whether Petitioner's Georgia store's advertising expenditures in fact represent advertising expenses involving only the phrase "Sportsman's Warehouse" as opposed to just the phrase "Bass Pro Shops" or Petitioner's house mark. (*See* Ex. 11, Miller Dep. 23:22-24:24.) Therefore, based upon this evidence the Board cannot assess how much, if any, of these expenditures are relevant to the claimed mark.

Additionally, Petitioner has presented no evidence that it ever used the phrase "Sportsman's Warehouse" in commerce without also preceding it with the phrase "Bass Pro Shops" or Petitioner's composite house mark with the large-mouthed fish and oval. Petitioner's own Vice President of Marketing, Stan Lippelman, who oversees all of Bass Pro Shops' advertising, testified that Bass Pro Shops does not use the phrase "Sportsman's Warehouse" without preceding that phrase with the mark "Bass Pro Shops." (*See* Ex. 30, Lippelman Dep. 26:3-18.) Whether Petitioner's use provides the phrase "Sportsman's Warehouse" with independent trademark significance at all "depends upon the manner in which it is used and the commercial impression engendered as a result of such use." *Textron Inc., v. Cardinal Engineering Corp.*, 164 U.S.P.Q. 397, 399 (T.T.A.B. 1969) In *Textron*, the Board stated the question to consider is whether "the designation, as used, [is] recognized in and of itself as an indication of origin for the particular product [or service]." *Id.* Petitioner has offered no evidence that its use of "Sportsman's Warehouse" independently acts as a source indicator for

Petitioner. Based upon the evidence Petitioner has presented, its use of "Sportsman's Warehouse" appears merely to be a descriptive phrase defining the *type* of services that a particular Bass Pro Shops retail location might offer, not an independent indicator of source.

On the contrary, the mark "Sportsman's Warehouse" has long been known as a source identifier for the products and services of Respondent's Sportsman's Warehouse retail stores. Secondary meaning can be established through "direct consumer testimony, survey evidence, exclusivity, manner, and length of use of a mark, amount and manner of advertising, amount of sales and number of customers, and the owner's established place in the market." *Nautilus Group, Inc. v. ICON Health and Fitness, Inc.*, 372 F.3d 1330, 1340 n.7 (Fed. Cir. 2004). In the present proceeding, Respondent's attainment of secondary meaning is amply supported in the record.

Respondent operates approximately 60 store locations nationwide under the "Sportsman's Warehouse" mark. (*See* Ex. 8, Map and List of Respondent's Store Locations.) Respondent has enjoyed nearly $2 billion in sales under the "SPORTSMAN'S WAREHOUSE" mark since January 1, 1995. (Ex. 10, Spreadsheets of Respondent's Sales and Advertising Figures; Ex. 9, Utgaard Trial Testimony 45:22-47:15.) Since 1997, Respondent's advertising and signage expenditures have exceeded $19 million. (*Id.*) Since 2003, Respondent has sold over $28 million in merchandise bearing the phrase "Sportsman's Warehouse." (*Id.*) Additionally, Respondent enjoys wide recognition of the consuming public through the "SPORTSMAN'S WAREHOUSE" mark. Respondent has received extensive communications from customers and industry recognition demonstrating the wide association of the "SPORTSMAN'S WAREHOUSE" mark with Respondent. (*See, e.g.,* Ex. 17, Examples of Respondent's Consumer and Industry Recognition.)

Finally, Respondent retained an expert witness, Mark R. Winkelman, to conduct a survey and analysis of secondary meaning in the phrase "Sportsman's Warehouse" as an indicator of Respondent's business. (Ex. 40, Expert Report of Mark R. Winkelman.) Mr. Winkelman has over 25 years of experience in designing and conducting surveys, including trademark surveys. (Ex. 41, Curriculum Vitae of Mark R. Winkelman.) Mr. Winkelman concluded that, based upon the data and analysis, that nearly one in every two respondents understood the words "Sportsman's Warehouse" to at least name a specific store or chain of stores that sells mainly hunting, fishing, camping, or outdoor gear. (Ex. 40, Expert Report of Mark R. Winkelman at 1-1.)[6]

Based upon the evidence in the record, Petitioner has not met its burden of establishing either priority or use or priority of secondary meaning of the phrase "Sportsman's Warehouse." On the contrary, the evidence in the record shows that Respondent, not Petitioner, has priority of use and priority of secondary meaning in this common law mark. As Petitioner has failed to meet its burden of proof, Petitioner cannot properly assert any claim of likelihood of confusion based upon purported common law rights. To the extent the present petition relies upon such claims, it must be denied.

II. Respondent's Registration Cannot Be Cancelled on the Basis of Petitioner's Purported Fraud Claim.

Petitioner also cannot prevail on its claim of fraud. For a trademark applicant to commit fraud in procuring a registration, the applicant must make a false representation of material fact within the application, and the applicant must have known or should have known the representation was false or misleading. *J.E.M. International, Inc. v. Happy Rompers Creations*

[6] Respondent anticipates that Petitioner may argue that Petitioner's goodwill is reflected within this survey. This assertion, however, defies common sense. Petitioner operates only one store in the nation bearing Petitioner's asserted mark and Respondent operates approximately 60 store locations bearing its registered mark nationally.

Corp., 74 U.S.P.Q.2d 1526, 1529 (T.T.A.B. 2005). In a recent decision, the Board explained the standard for a finding of fraud in the context of a cancellation proceeding:

> Fraud implies some intentional deceitful practice or act designed to obtain something to which the person practicing such deceit would not otherwise be entitled. Specifically, it involves a willful withholding from the Patent and Trademark Office by an applicant or registrant of material information or fact, which, if disclosed to the Office, would have resulted in the disallowance of the registration sought or to be maintained. . . . It thus appears that the very nature of the charge of fraud requires that it be proven "to the hilt" with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party.

Maids to Order, 78 U.S.P.Q.2d at 1905 (quoting *First International Services Corp. v. Chuckles Inc.*, 5 U.S.P.Q.2d 1628, 1634 (T.T.A.B. 1988)); *see also Smith International, Inc. v. Olin Corp.*, 209 U.S.P.Q. 1033, 1043-44 (T.T.A.B. 1981). If a reasonable basis for the representations existed, then an applicant has not committed fraud. *Maids to Order*, 78 U.S.P.Q.2d at 1906.

In the present case, Petitioner has alleged that Respondent obtained its registration fraudulently when it stated in its application that it used the mark in connection with "Retail and wholesale stores featuring hunting supplies, fishing supplies, camping supplies, reloading supplies, outerwear clothing and footwear." (*See* Ex. 36, Petitioner's Amended Petition at ¶ 6.) Petitioner, however, has presented no evidence to support such an allegation. On the contrary, the record shows that Respondent conducted wholesale transactions as part of its business operations both before and after it filed its trademark application.

Petitioner's claim that Respondent's statement was false is based solely upon Petitioner's blatant mischaracterization of Respondent's answer to a single interrogatory. Petitioner's Interrogatory No. 8 asked Respondent for information relating to selling "goods at wholesale under Respondent's Mark." (Ex. 42, Respondent's Answers to Petitioner's First Set of

Interrogatories at No. 8.) After objecting on the grounds that the interrogatory was vague, Respondent answered that it "does not sell goods at a wholesale level." (*Id.*) Petitioner has taken this single statement and has attempted to twist it into a fraud claim. Petitioner argues that this statement *proves* that Respondent misrepresented the manner in which it sold goods at the time of its application in 1999 because that application describes both retail and wholesale sales. Petitioner only asserted its fraud claim as an afterthought by filing an Amended Petition, and this interrogatory answer in no way supports Petitioner's claim.

Respondent answered Petitioner's vague interrogatory based upon Respondent's understanding that Petitioner's reference to the sale of goods at wholesale "under Respondent's Mark" meant the sale of Respondent's logoed merchandise, products actually bearing the Respondent's mark. These goods have never been sold by Respondent at the wholesale level, and Respondent's answer reflects that fact. Regardless, however, this statement on its face is irrelevant to the only question at issue in a fraud analysis: whether Respondent in fact used the mark in a retail and wholesale context *at the time Respondent made the application to the USPTO.* This interrogatory answer, clearly in the present tense, only references Respondent's current use of the mark and therefore provides no support for Petitioner's manufactured fraud claim.

Upon learning of Petitioner's misreading of this one-sentence answer to Interrogatory No. 8, Respondent immediately clarified its answer by serving an amended response. (Ex. 43, Respondent's Amended Answer to Interrogatory No. 8.) This amended response—which Petitioner fails to mention to the Board in its Case Brief—explains that Respondent routinely conducted wholesale sales in connection with the mark during the time of the application:

> Sportsman's Warehouse responds that it takes the phrase "under Respondent's mark" to refer to sales of goods actually bearing

> Respondent's mark, such as logoed products. Respondent does not sell logoed products as a wholesaler. Respondent has, however, from time to time sold goods at wholesale. Respondent states that its parent company, Sportsman's Warehouse Holdings, Inc., engages in wholesale sales through its subsidiary Pacific Flyway. Pacific Flyway was affiliated with Sportsman's Warehouse prior to December 16, 1998. During that time, it was the business practice of Pacific Flyway to at times send wholesale customers to Sportsman's Warehouse when Pacific Flyway was out of stock in a required item. Sportsman's Warehouse would then sell items to such customers at wholesale. Prior to December 16, 1998, Sportsman's Warehouse would also at times sell items in volume to certain customers at wholesale.

(Ex. 43, Respondent's Amended Answer to Interrogatory No. 8.) Respondent also clarified its answer in response to Petitioner's Interrogatory No. 24. (Ex. 44, Respondent's Responses to Petitioner's Second Set of Interrogatories at No. 24.) Completely ignoring this clarifying testimony, Petitioner forged ahead with its fraud claim and misrepresented Respondent's complete testimony to this Board.

The deposition testimony in this proceeding demonstrates Respondent's practice of conducting wholesale sales. The record shows that at the time its application was filed Respondent sold goods at wholesale in connection with its mark. Although these sales constituted a small portion of Respondent's business, Respondent's mark was being used in connection with these sales at the time of the application. Mr. Utgaard, who actually signed the declaration for the application, provided the following testimony to Petitioner's counsel:

> **Question:** Have you wholesaled non-logo'd product through the Sportsman's Warehouse company?
>
> **Answer:** *Yes, to a small extent.* I mean, when the businesses were side by side, people used to come in sometimes and we discontinued that when we got over there at the other location, which was about 15 miles from here, because—I forget what you would call it, but people would walk up and place an order and the guy would go out in the warehouse and get the product.
>
> Well, when the store was right next to the wholesale company, if they didn't have it at wholesale, in the wholesale

> Pacific Flyway, they might have sent the guy over to the retail store to get the product, and they did some of that. What dollar wise—I would say at the time, the wholesale business—I think its peak was 17 million or something, and when I bought it, it was probably 12, 13 million, and out of that, there was probably—I would be surprised if it was $100,000 a year of sales that were made by the retail store to third parties, which I define as wholesale.

(Ex. 1, Utgaard Dep. 24:24–25:18 (emphasis added).)

Beyond its strained reading of Respondent's initial interrogatory answer, Petitioner has provided no testimony or documentary evidence to support its claim of fraud. On the contrary, the record in this proceeding affirmatively supports the veracity of Respondent's application. As Petitioner has utterly failed to prove the slightest misrepresentation in Respondent's application, fraud cannot provide a valid basis for the cancellation of Respondent's mark, and Petitioner's claim on this basis must be denied. *See Maids to Order*, 78 U.S.P.Q.2d at 1910 (finding petitioner had not met its "heavy burden of proof" that respondent had fraudulent intent on a statement of use in commerce where respondent had some business activities out of state).

CONCLUSION

For the foregoing reasons, Respondent Sportsman's Warehouse, Inc. respectfully requests that the Board deny Bass Pro Trademarks, L.L.C.'s amended petition for cancellation.

DATED: June 20, 2007.

LINDQUIST & VENNUM P.L.L.P.

By: _____
David A. Allgeyer
Christopher R. Smith
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2205
(612) 371-3211

ATTORNEYS FOR RESPONDENT SPORTSMAN'S WAREHOUSE, INC.

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.	Cancellation No. 92045000
SPORTSMAN'S WAREHOUSE, INC.,	
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

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 1

APPEARANCES

For the Petitioner: GREGORY E. UPCHURCH
Husch & Eppenberger, LLC
190 Carondelet Plaza
Suite 600
St. Louis, MO 63105
(314) 480-1500

For the Respondent: DAVID A. ALLGEYER
Lindquist & Vennum
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

INDEX

WITNESS	PAGE
STUART UTGAARD	
Examination by Mr. Upchurch	4
Examination by Mr. Allgeyer	84

EXHIBITS

NUMBER	DESCRIPTION	PAGE
4	November 1994 Advertisement	59
5	November 1995 Advertisement	62
6	Articles of Incorporation Amendment	62
7	Business Name Registration	63
8	Application to Transact Business	64
9	Idaho Registration of Trademark-Service Mark	66
10	Application for Registration of Trademark-Service Mark, Idaho	67
11	Board of Directors Written Action	69
12	US Department of Commerce, Patent and Trademark Office	71
13	Bass Pro Shops Mark Information	73
14	Service Mark Application	74
15	February 7, 2000 Letter	78
16	Application for State Trademark or Service Mark Registration, Utah	79
17	February 7, 2006 e-mail	82

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 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.**

[Page 19]

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?

[Page 20]

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**

[Page 21]

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

[Page 22]

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

[Page 23]

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

[Page 24]

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?

[Page 25]

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

[Page 26]

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

[Page 27]

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.**

[Page 28]

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**

[Page 29]

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.**

[Page 34]

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**

[Page 35]

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**

[Page 36]

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**

[Page 37]

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**

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,

Cancellation No. 92045000

Petitioner,

vs.

SPORTSMAN'S WAREHOUSE, INC.,

Respondent.

~~~~~~

DEPOSITION OF DALE RICHARD SMITH

~~~~~~

TAKEN AT: The Offices of
Sportsman's Warehouse, Inc.,
7035 High Tech Drive
Midvale, Utah 84047

DATE: Tuesday, February 20, 2007

TIME: 11:43 a.m.

REPORTED BY: Scott M. Knight, RPR

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 2

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1 APPEARANCES
2 .
3 FOR PETITIONER:
4 DUTRO E. "BRUCE" CAMPBELL, II, ESQ.,
5 HUSCH & EPPENBERGER
6 190 Carondelet Plaza, Suite 600
7 St. Louis, Missouri 63105-3441
8 .
9 FOR RESPONDENT:
10 DAVID A. ALLGEYER, ESQ.,
11 LINDQUIST & VENNUM
12 4200 IDS Center
13 80 South Eighth Street
14 Minneapolis, Minnesota 55402
15 .
16 INDEX
17 Witness Page
18 DALE RICHARD SMITH
19 EXAMINATION BY MR. ALLGEYER..... 3
20 EXAMINATION BY MR. CAMPBELL..... 17
21 FURTHER EXAMINATION BY MR. ALLGEYER..... 20
22 EXHIBITS
23 Number Description Page
24 1 Sportsman's Warehouse advertisement 9
25 2 Business Name Reg./or DBA Application 11

1 Deposition of Dale Richard Smith
2 February 20, 2007
3 PROCEEDINGS
4 DALE RICHARD SMITH, called as a witness
5 for and on behalf of the Respondent, being first
6 duly sworn, was deposed and testified as follows:
7 EXAMINATION
8 BY-MR.ALLGEYER:
9 Q. Good morning. Please state your full
10 name for the record.
11 A. Dale Richard Smith.
12 Q. Mr. Smith, how are you currently
13 employed?
14 A. Sportsman's Warehouse.
15 Q. And what's your position?
16 A. My title is president.
17 Q. Okay. Tell me where you grew up.
18 A. Right here in Salt Lake City.
19 Q. All right. And where did you go to
20 school?
21 A. Brighton High.
22 Q. Okay. And you graduated from there.
23 And where did you work after that?
24 A. I worked at the Heather Restaurant, and
25 then I went to work for Safeway grocery stores

1 for about fifteen years.
2 Q. What did you do for them? Kind of work
3 your way up?
4 A. From bagger all the way up to assistant
5 manager.
6 Q. Okay. And then how about after that?
7 A. After that the Safeway division was
8 sold out in Salt Lake, and I went to work for
9 Shopko stores.
10 Q. Shopko. And what kind of work did you
11 do for them?
12 A. I was what was called a merchandise
13 manager.
14 Q. Okay. And what was your next position
15 after that?
16 A. One of my store managers that I had--I
17 knew from Safeway opened up his own grocery store,
18 and I went to work for him for a couple of years.
19 Q. Okay. And how about after that?
20 A. And then my father-in-law was--he
21 opened in 1986, but he had started to gain some
22 momentum and asked me to come work for him, so I
23 did some double duty. I went part time in
24 grocery and came full time on at Sportsman's. At
25 that time it was called Sports Warehouse.

1 Q. And about what year was that? Do you
2 remember?
3 A. 1991.
4 Q. Okay. And from 1991 to present, have
5 you worked your way up through the company?
6 A. Yes.
7 Q. I want to talk about--a little bit
8 about the growth of the company. And I want to
9 focus on the growth since the year 2000. Let's
10 go back a little further than that. Now, when
11 you first started working for what was then called
12 Sports Warehouse, which later became Sportsman's
13 Warehouse, there was just a single store in Utah?
14 A. Yes, one store. It was over on Third
15 West.
16 Q. Was that in Midvale?
17 A. Yes, just on the other side--Third
18 West, so it's not even a mile from here.
19 Q. Where we're sitting now is--
20 A. Became our new store at that time.
21 Q. Okay. All right. And what city are we
22 in now?
23 A. Midvale, Utah.
24 Q. And at some point in the history of
25 Sportsman's Warehouse, did it sort of start to

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1 take off and grow, adding stores and so forth?
2 A. Not until Stu purchased it in 1996. I
3 mean, our takeoff was going from that small
4 10,000-square-foot store to 30,000-square-foot
5 store.
6 Q. And when Mr. Utgaard got involved, you
7 eventually went up to 58 stores?
8 A. Yes.
9 Q. Let's focus on the growth of
10 Sportsman's Warehouse business since 2000. Okay?
11 Can you just generally describe from your point of
12 view as someone involved in the business how it
13 grew--how the business grew since 2000?
14 A. It--Stu--when Stu purchased it back in
15 '96, he said, Stick with me and we're going to
16 move fast. And he has been correct to that word.
17 I mean, we've opened--basically grown almost 50
18 percent a year on store students. Last year we
19 did cut back a little bit. And I think our
20 growth percentage-wise is about 20 percent a year
21 now. Fifteen stores last year, and I believe we
22 had eight on the docket for this year.
23 Q. And how about geographically? How did
24 the store expand?
25 A. Well, first it was mainly in the

1 intermountain--Utah, Idaho, Colorado. And now
2 we're all the way from Alaska to South Carolina.
3 Q. Now, I'd like to talk to you a little
4 bit about sort of the products and services that
5 are available at Sportsman's Warehouse. In your
6 duties as president of Sportsman's Warehouse, have
7 you become familiar with the various products and
8 merchandise available in a typical Sportsman's
9 Warehouse retail store?
10 A. Yes.
11 Q. Okay. Now, by the way, are most of the
12 retail stores about as broad-ranged in merchandise
13 as others or are some stores broader range or how
14 does that work?
15 A. Maybe in fishing category, the mix
16 might be slightly different, but for the average
17 consumer, he wouldn't notice a difference. Stu
18 likes a cookie-cutter effect.
19 Q. All right. And so what are some of
20 the--give me some examples of some of the least
21 expensive products that are available in a
22 Sportsman's Warehouse.
23 A. Well, we sell candy bars at 50 cents
24 and flies at 89 cents and several items that are
25 in that dollar-or-under range.

1 Q. Okay. And is there sort of a middle
2 range of products available at this store?
3 A. Yes.
4 Q. Give me some examples of those.
5 A. Propane stove, $39, and--I mean,
6 several. We have several price points with those
7 50,000 SKUs per store.
8 Q. Okay. How about the highest and most
9 expensive products available in a Sportsman's
10 Warehouse store? What would those be?
11 A. That would be probably be a firearm or
12 a safe. And they'd be in the $2,000 range. And
13 we have been known to special-order firearms for
14 even more than that, so--
15 Q. And I think you told me this, but you
16 said something about--you gave me a number of
17 SKUs. First of all, what's a SKU?
18 A. Stock keeping unit, how we track the
19 sales and the history of a particular item.
20 Q. Okay. And how many different SKUs did
21 you say that you have in a typical store?
22 A. In a typical store, 50,000.
23 Q. Okay. And does the organization itself
24 have more SKUs than that?
25 A. Yes, we have--I believe like 160,000

1 active SKUs.
2 Q. And a SKU is just a way of referring to
3 a particular type of product? Is that the idea?
4 A. Yes.
5 Q. In 1994 and 1995, were you involved in
6 overseeing or working with the advertising for the
7 Sportsman's Warehouse--well, Sports Warehouse and
8 Sportsman's Warehouse stores?
9 A. Yes, along with my father-in-law and my
10 wife.
11 Q. Okay. Let's mark this Trial Exhibit
12 Smith 1.
13 Exhibit-1 marked
14 BY-MR.ALLGEYER:
15 Q. Okay. Showing you now--(To Mr.
16 Campbell) did I give you one?
17 MR. CAMPBELL: Yeah.
18 BY-MR.ALLGEYER:
19 Q. Okay. Showing you, showing you what's
20 been marked Trial Exhibit 1, Smith, do you
21 recognize that document as a Sportsman's Warehouse
22 advertisement from the Deseret News?
23 A. Yes.
24 Q. And if you look at the upper left,
25 there's a date. Can you please read that date

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1 for the record?
2 A. Thursday, June 15, 1995.
3 Q. And did you in fact, as Sportsman's
4 Warehouse, run this ad on June the 15th, 1995, in
5 the Deseret News?
6 A. Yes.
7 Q. Okay. What's the Deseret News,
8 incidentally?
9 A. At that time it was affiliated with
10 Salt Lake Tribune. It was just an evening
11 edition.
12 Q. And The Salt Lake Tribune, is that a
13 newspaper of general circulation--
14 A. Yes.
15 Q. --in the Salt Lake area? Is that the
16 largest--
17 A. Yes.
18 Q. --circulation in the Salt Lake area?
19 Why did you choose the Deseret News as
20 one of the publications to advertise in?
21 A. At that time, I mean, that just came
22 part of the package. We actually chose the
23 Tribune, but you get the ad in both papers.
24 Q. Oh, I see. So you necessarily also had
25 this same ad in the Salt Lake City Tribune?

1 A. Yes. It would have been the morning.
2 The Tribune was the morning edition; the Deseret,
3 the evening edition.
4 MR. ALLGEYER: Let's mark this.
5 Exhibit-2 marked
6 BY-MR.ALLGEYER:
7 Q. I'm going to show you what I marked as
8 Smith Trial Exhibit 2. And, first of all, who is
9 William Hayes?
10 A. He's the former owner and my father-in-
11 law.
12 Q. Do you recognize his handwriting?
13 A. Yes.
14 Q. Is this document from the business
15 records of Sportsman's Warehouse?
16 A. It appears to be, yes.
17 Q. And do you recognize this as a document
18 signed by Mr.--
19 A. --William T. Hayes.
20 Q. Is that correct? You do recognize his
21 signature on here?
22 A. Yes.
23 Q. This appears to be a business
24 registration or DBA application for Sportsman's
25 Warehouse. Is that correct?

1 A. Yes.
2 Q. Okay. Now, do you recall that sometime
3 in 1994 and 1995 you made a determination to
4 change the name of Sports Warehouse to Sportsman's
5 Warehouse?
6 A. Yes, I do.
7 Q. Okay. And did you discuss that name
8 change with Mr. Hayes?
9 A. A little bit. Mainly a lot of times
10 before he finally made the decision. I mean, I
11 was on the floor more so than he was, and we had
12 several customers that would come in looking for
13 athletics or golf clubs or baseballs and several
14 customers comment you ought to change the name to
15 "Sportsman's Warehouse." I think that's kind of
16 what started this.
17 Q. And does this reflect that name change
18 or the process of that name change?
19 A. Yes.
20 Q. And was this formal business name
21 registration done at or about the time that you
22 were changing the name of the--of Sports Warehouse
23 to Sportsman's Warehouse?
24 A. Yes.
25 Q. Okay. Now, I note that there's--in the

1 lower left-hand corner, there's a certification
2 that this document was filed and approved on some
3 day or other, it looks like it's 2/1/95. Can you
4 make that out?
5 A. That's what it looks like to me, 2/1/
6 95.
7 Q. Does that look to be the same does that
8 fit in your time scheme of when you--
9 A. Yes, it does.
10 Q. --when the name was changed to
11 Sportsman's Warehouse?
12 (A discussion was held off the record.)
13 BY-MR.ALLGEYER:
14 Q. You might recall during your deposition
15 we had a discussion about people coming to Pacific
16 Flyway and finding themself at Sportsman's
17 Warehouse to get goods at wholesale. Do you
18 recall that testimony at all?
19 A. Yes, that was a common occurrence.
20 Q. Can you just describe for the record
21 your best recollection of that common occurrence,
22 in other words, what--how that would happen?
23 A. Well, a lot of times mainly at this
24 location because we were right next to each other,
25 a customer would go into Pacific Flyway, I would

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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

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.**

Signature of Accepting Agent

801 566-6281
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. Corp 1300299
If Applicant is business entity, Please print name of business.

Individual Person Name

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

X Signature and Title President

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 day of 19 in the office of this Division and hereby issue this Certificate thereof.

Examiner Date 2/1/95

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

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 3

Revised 11/94
corpadba\dbaform.mb/94

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

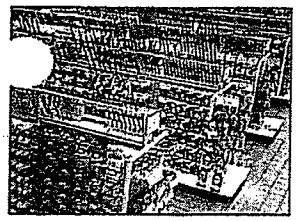
Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 4

PETITIONER EXHIBIT 10

BPS-003336

Attention Fishermen! BASS PRO SHOPS® COMES TO ATLANTA!

THE MOST OUTDOORS THE SOUTH HAS EVER SEEN! BASS PRO SHOPS®.



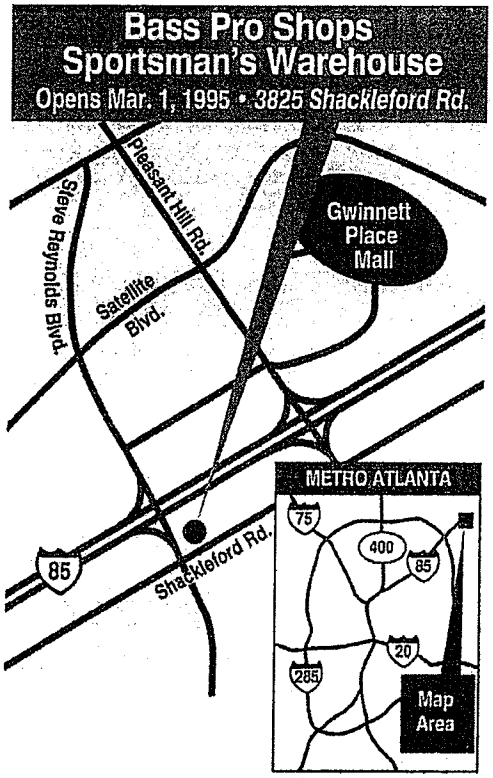
More fishing tackle than you can imagine. Big Saltwater and Fly Shops!

Whether you hunt quail, deer, turkey, dove or duck, we have it all.

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.

Come see our 40 foot hawg trough aquarium, sharpen your skills in our Dart archery range, enjoy unusual wildlife displays or take your picture staring down the jaws of our 28 foot shark. More importantly, be prepared to shop a huge selection at low prices, simplified by our expert service with a smile.

Stock up for the Spring Season in the South's biggest and best new sporting goods store dedicated especially to folks who love to hunt and fish.



TRACKER MARINE AND RV CENTER

Giant selection of SunTracker Pontoons, Bass Tracker and Nitro fishing boats, plus a big selection of Outdoor Inn R.V.'s.

Bass Pro Shops SPRINGFIELD, MO

SPORTSMAN'S WAREHOUSE™

IN ATLANTA

PHONE 404-931-1550

WANTED

Knowledgeable outdoorsmen with retail management experience to join the Outdoor World team for our future expansion. Send personal letter or resume to: 1935 S. Campbell, Springfield MO 65898. Attn: Retail Staffing

Int. Cl.: 42

Prior U.S. Cls.: 100 and 101

Reg. No. 2,071,417

United States Patent and Trademark Office

Registered June 17, 1997

SERVICE MARK
PRINCIPAL REGISTER

Sportsman's Warehouse

BASS PRO TRADEMARKS, L.P. (MISSOURI LIMITED PARTNERSHIP)
1935 SOUTH CAMPBELL
SPRINGFIELD, MO 65898

FOR: RETAIL STORES FEATURING CLOTHING, FISHING SUPPLIES AND SPORTING GOODS, IN CLASS 42 (U.S. CLS. 100 AND 101).
FIRST USE 1-2-1995; IN COMMERCE 1-2-1995.

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

SER. NO. 75-066,261, FILED 3-1-1996.

PAULA MAYS, EXAMINING ATTORNEY

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.

RESPONDENT'S TRIAL BRIEF EX. 5

TRADEMARK

75625090

New Case

Aug 3 1999

Law Office 110

CONTENTS

	Entry	Date	Initials
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
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NOP 01
07/11/00

See inside of file for additional entries.

DEPOSITION EXHIBIT

Little 2

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.

RESPONDENT'S TRIAL BRIEF EX. 6

SP 00362

4/24/80
RNJ

SP 00363

FEB

REG NUM: 2390988
REG DT: 10/03/2000
S/N 75/625090

75-625090

SPORTSMAN'S WAREHOUSE

SPORTSMAN'S WAREHOUSE

LAW OFFICE ~~106~~ 110

PRINCIPAL

BLOHM

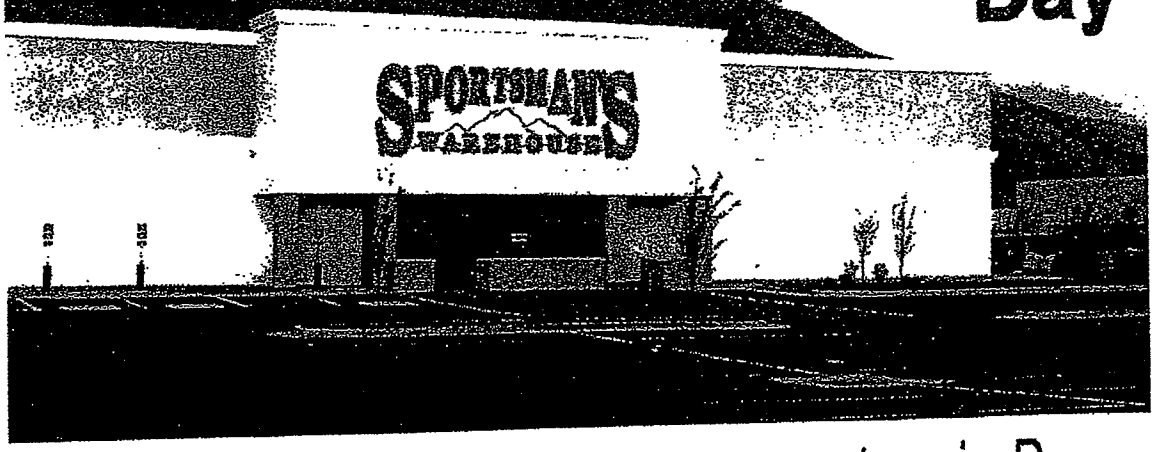
ATTORNEY ADVISOR: _____

PUBLISHED
07/11/00

SP 00364

75625090

Just In Time For Father's Day



Sportsman's Warehouse opens new store in Provo

Now With Two Great Stores To Serve You!

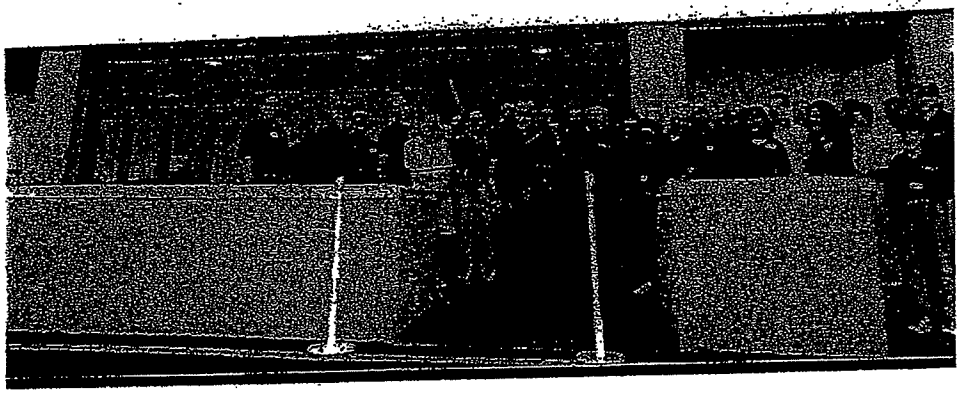
Hodgman • Danner • Hi-Tec • Timberland • Merrell • Lacrosse • Sorel • Columbia • Browning • Wrangler (Rugged Wear) • Carhartt • Nikon • Pentax • Buck • Gurber • Leatherman • Zeiss • Kershaw • Bushnell • Coleman • Slumberjack • Old Town • Lodge • Camp Chef • Wenzel • Remington • Winchester • Ruger • Federal • Smith & Wesson • Bennelli • Casco • Leupold • RCBS • Zebco • Shakesphere • Plano • Lowrance • Minn Kota • Caddis • G. Loomis • Leigh Outdoors • Shimano • Troutsman

SPORTSMAN'S WAREHOUSE

7035 S. 185 West. Midvale • 566-6662
1075 South University Ave. Provo • 818-2000
• Mon-Thurs 9:30-7:00 • Friday 9:30-8:00 •
• Saturday 9:00-6:00 • Closed Sunday •

SP 00365

SPORTSMAN'S WAREHOUSE



75625090

01-22-1999

U.S. Patent & TMOfc/TM Mail Rcpt Dt. #10

DRAWING

35

APPLICANT NAME: Sports Warehouse, Inc.

APPLICANT ADDRESS: 7035 South 185 West
Midvale, Utah 84047

DATE OF FIRST USE: June 16, 1995

DATE OF FIRST USE IN COMMERCE: June 16, 1995

GOODS: Retail and wholesale stores featuring hunting supplies, fishing supplies, camping supplies, reloading supplies, outerwear clothing and footwear.

3/1

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

PUBLISHED
07/11/00

TRADEMARK

75625090

Doc# 1077760\1

SP 00367

*** User: lblohm ***

#	Total Marks	Dead Marks	Live Viewed Documents	Live Viewed Images	Status	Search
01	8	4	3	3		"sports warehouse"[on]
02	13348	N/A	0	0		*sport*[bi,ti]
03	8777	N/A	0	0		(*ware* or *ware*)[bi,ti]
04	10245	N/A	0	0		*hous*[bi,ti]
05	50	29	21	21		2 and (3 or 4)
06	1050	N/A	0	0		3 and 4
07	4747	N/A	0	0		"060104"[dc]
08	667312	N/A	0	0		"035"[cc]
09	1529	N/A	0	0		7 and 8
10	132529	N/A	0	0		("035" or a or b or "200")[ic]
11	259	91	168	168		7 and 10
12	11	7	4	4		6 and (2 or 9)
3	1554	N/A	0	0		7 and (2 or 9)
14	39	18	21	21		7 and (2 or 6)

Session started 8/3/99 10:46:54 AM
Session finished 8/3/99 10:54:04 AM
Duration 8 minutes

Default NEAR limit= 1 ADJ limit= 1

[Typed Drawing]

Mark
TENNIS WAREHOUSE

Goods and Services
IC 035. US 100 101 102. G & S: Retail Mail order Store Featuring Tennis Related Equipment. FIRST USE: 19920801. FIRST USE IN COMMERCE: 19920801

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75411966

Filing Date
December 29, 1997

Supplemental Register Date
July 9, 1999

Owner Name and Address
(APPLICANT) SPORTS WAREHOUSE CORPORATION BY ASSIGNMENT CALIFORNIA 778 HIGUERA SAN LUIS OBIS CALIFORNIA 93401

Assignment Recorded
ASSIGNMENT RECORDED

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "TENNIS" APART FROM THE MARK AS SHOWN

Type of Mark
SERVICE MARK

Register
SUPPLEMENTAL

Live Dead Indicator
LIVE

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT COMMISSIONER FOR TRADEMARKS
2900 Crystal Drive
Arlington, Virginia 22202-3513

Jun 9, 2000

NOTICE OF PUBLICATION UNDER 12(a)

1. Serial No.:
75/625,090

2. Mark:
SPORTSMAN'S WAREHOUSE HUNTING FISHING CA
Etc. and design

3. International Class(es):
35

4. Publication Date:
Jul 11, 2000

5. Applicant:
Sports Warehouse, Inc.

The mark of the application identified appears to be entitled to registration. The mark will, in accordance with Section 12(a) of the Trademark Act of 1946, as amended, be published in the Official Gazette on the date indicated above for the purpose of opposition by any person who believes he will be damaged by the registration of the mark. If no opposition is filed within the time specified by Section 13(a) of the Statute or by rules 2.101 or 2.102 of the Trademark Rules, the Commissioner of Patents and Trademarks may issue a certificate of registration.

Copies of the trademark portion of the Official Gazette containing the publication of the mark may be obtained at $38.00 each for domestic orders, or at $47.50 each for foreign orders from:

The Superintendent of Documents
U.S. Government Printing Office
PO Box 371954
Pittsburgh, PA 15250-7954
Phone: (202)512-1800

By direction of the Commissioner.

TRADEMARK EXAMINATION WORKSHEET

☐ AMENDMENT STAGE ☐ NO CHANGE ☐ PUBLICATION/REGISTRATION STAGE

Name: KEISHA HODGE L.O. L06 Date 5-13-00 Serial No 76/625090

INSTRUCTIONS: Place a check mark in the appropriate column and/or box to indicate which data elements have been amended/coded.

Legal Instrument Examiner (LIE)

	Amended	Data Element	
Class Data		☐ Prime/International Class	☐ Goods and Services
		☐ First Use Date	☐ First Use in Commerce Date
		☐ In Another Form	☐ Certification
		☐ 1b	
Mark Data		☐ Word Mark	☐ Pseudo Mark
		☐ Mark Drawing Code	☐ Design Search Code
		☐ Sizing/Lining Code	
Misc. Mark Data		☐ Mark Description	☐ Disclaimer
		☐ Lining/Stippling	☐ Name/Portrait/Consent
		☐ Translation	
Section 2(f)		☐ Section 2(f) Entire Mark	
		☐ Section 2(f) Limitation Statement	☐ Section 2(f) in Part
		☐ Amended Register	☐ Amended Register Date
Foreign Reg. Data		☐ Foreign Country	☐ 44(d)
		☐ Foreign Application Number	☐ Foreign Application Filing Date
		☐ Foreign Registration Number	☐ Foreign Registration Date
		☐ Foreign Registration Expiration Date	☐ Foreign Renewal Reg. Number
		☐ Foreign Reg. Renewal Expiration Date	☐ Foreign Renewal Reg. Date
Owner Data		☐ Owner Name	☐ DBA/AKA/TA
		☐ Address 1	☐ Address 2
		☐ City	☐ State
		☐ Zip Code	
		☐ Citizenship	☐ Entity
		☐ Entity Statement	☐ Composed of
		☐ Assignment(s)/Name Change	
Amd/Corr Restr.		☐ Concurrent Use	
Prior U.S. Reg.		☐ Prior Registration	
Correspondence		☐ Attorney	☐ Domestic Representative
		☐ Attorney Docket Number	
		☐ Correspondence Firm Name/Address	

I certify that all corrections have been entered in accordance with text editing guidelines.

KH
LIE

5-13-00
DATE

Other:

SP 00371

TRADEMARK EXAMINATION WORKSHEET

☑ AMENDMENT STAGE ☐ NO CHANGE ☐ PUBLICATION/REGISTRATION STAGE

Name: Amphone Mary Sananikone L.O. 110 Date 3/15/00 Serial No. 75/625090

INSTRUCTIONS: Place a check mark in the appropriate column and/or box to indicate which data elements have been amended/coded.

Legal Instrument Examiner (LIE)

	Amended	Data Element	
Class Data	✓	☑ Prime/International Class	☐ Goods and Services
		☐ First Use Date	☐ First Use in Commerce Date
		☐ In Another Form	☐ Certification
		☐ 1b	
Mark Data		☐ Word Mark	☐ Pseudo Mark
		☐ Mark Drawing Code	☐ Design Search Code
		☐ Sizing/Lining Code	
Misc. Mark Data	✓	☐ Mark Description	☑ Disclaimer
	✓	☑ Lining/Stippling	☐ Name/Portrait/Consent
		☐ Translation	
Section 2(f)		☐ Section 2(f) Entire Mark	
		☐ Section 2(f) Limitation Statement	☐ Section 2(f) in Part
		☐ Amended Register	☐ Amended Register Date
Foreign Reg. Data		☐ Foreign Country	☐ 44(d)
		☐ Foreign Application Number	☐ Foreign Application Filing Date
		☐ Foreign Registration Number	☐ Foreign Registration Date
		☐ Foreign Registration Expiration Date	☐ Foreign Renewal Reg. Number
		☐ Foreign Reg. Renewal Expiration Date	☐ Foreign Renewal Reg. Date
Owner Data		☐ Owner Name	☐ DBA/AKA/TA
		☐ Address 1	☐ Address 2
		☐ City	☐ State
		☐ Zip Code	
		☐ Citizenship	☐ Entity
		☐ Entity Statement	☐ Composed of
		☐ Assignment(s)/Name Change	
Amd/Corr Restr.		☐ Concurrent Use	
Prior U.S. Reg.		☐ Prior Registration	
Correspondence		☐ Attorney	☐ Domestic Representative
		☐ Attorney Docket Number	
		☐ Correspondence Firm Name/Address	

I certify that all corrections have been entered in accordance with text editing guidelines.

AMS
LIE

3/15/00
DATE

Other:

SP 00372

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office

SERIAL NO.	APPLICANT	PAPER NO.
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

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.

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

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[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

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

ling 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

ve Dead Indicator
LIVE

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.

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

Doc# 1077760\1

LINDQUIST & VENNUM P.L.L.P.

4200 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402-2205
TELEPHONE: 612-371-3211
FAX: 612-371-3207

IN DENVER
LINDQUIST, VENNUM & CHRISTENSEN P.L.L.P.
600 17TH STREET, SUITE 2125
DENVER, COLORADO 80202-5401
TELEPHONE: 303-573-5900

ATTORNEYS AT LAW

Bruce H. Little
(612) 371-2437
blittle@lindquist.com

January 19, 1999

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

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Mark: **SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR**
Class: 42
Our File No.: 433225.0007

Dear Sir/Madam:

Enclosed for filing pursuant to 15 U.S.C. §1051(a) as amended, please find a service mark registration application for the above-referenced mark along with three specimens of the mark as currently used in commerce, and, a check, made payable to the Commissioner of Patents and Trademarks, in the amount of $245 for payment of the requisite filing fee.

Please contact the undersigned if you have any questions or need further information regarding this mark.

Very truly yours,

LINDQUIST & VENNUM P.L.L.P.

Bruce H. Little

Enclosures
cc: Sports Warehouse, Inc. (without enclosures)

Doc# 1088542\1

75625090

TRADEMARK APPLICATION SERIAL NO.__ ___

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
FEE RECORD SHEET

01/29/1999 CMAY11 00000016 75625090
01 FC:361 245.00 OP

PTO-1555
(5/87)

SP 00381

01-22-1999

U.S. Patent & TMOfc/TM Mail Rcpt Dt. #10

DRAWING

APPLICANT NAME:	Sports Warehouse, Inc.
APPLICANT ADDRESS:	7035 South 185 West Midvale, Utah 84047
DATE OF FIRST USE:	June 16, 1995
DATE OF FIRST USE IN COMMERCE:	June 16, 1995
GOODS:	Retail and wholesale stores featuring hunting supplies, fishing supplies, camping supplies, reloading supplies, outerwear clothing and footwear.

SP 00382

Doc# 1077760\1

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

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
612-371-2437
blittle@lindquist.com

IN ST. PAUL:
LINDQUIST & VENNUM P.L.L.P.
444 CEDAR STREET, SUITE 1700
ST. PAUL, MN 55101
TELEPHONE: 651-312-1300
FAX: 651-223-5332

IN DENVER:
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.

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

Doc# 1194698\1

SP 00384

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

PRINT

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.

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

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, v. Sportsman's Warehouse, Inc., RESPONDENT	CANCELLATION NO. 92045000

PETITIONER'S RESPONSES TO REGISTRANT'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Petitioner Bass Pro Trademarks, L.L.C. ("Petitioner" or "Bass Pro"), by and through counsel of record, hereby objects and further responds to Respondent Sportsman's Warehouse, Inc.'s ("Respondent" or "Registrant") First Set of Interrogatories and Requests for Production of Documents as follows:

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 7

RESPONSES TO INTERROGATORIES

Interrogatory No. 1

Describe the nature of Petitioner's business in the United States, including any business in the United States through licensees.

ANSWER: Bass Pro objects to this Interrogatory on the grounds that it is overbroad and unduly burdensome in that it is not limited in time.

Subject to and without waiving any objections, Bass Pro states that the general nature of its business in the United States from 1995 to the present relates to retail sales of consumer goods primarily, but not exclusively, related to outdoor recreational activities, including, but not limited to, hunting, fishing, camping, hiking, boating, archery, through catalog, internet, and brick and mortar stores. In addition, Bass Pro operates outdoor-themed destination resorts and provides educational services relating to outdoor recreational activities and conservation. Bass Pro also provides ancillary services, including financing and vacation travel planning.

Interrogatory No. 2

With respect to Petitioner's Marks:

(1) State the date and geographic location of the first use of Petitioner's Marks anywhere in the United States in relation to each of the services comprising Petitioner's Services and describe the circumstances of each such first use, including the manner of use and the details of any sale involved, including customer name, number of units sold, and unit price charged;

(2) State whether or not Petitioner's Marks are currently use in commerce on or in connection with all of the services identified in U.S. Trademark No. 2,071,417. If

Petitioner's Marks are not currently in use in commerce on or in connection with all of the services identified in connection with U.S. Trademark No. 2,071,417, identify the particular services on or in connection with which Petitioner's Marks are not in use and (ii) state the date or dates upon which Petitioner's Marks ceased to be used on or in connection with any of Petitioner's Services.

ANSWER: Bass Pro objects to this Interrogatory on the grounds that it is overbroad and unduly burdensome in that it seeks details of specific sales made in each of Bass Pro's Sportsman's Warehouse retail stores. These stores sell thousands of completely different types of merchandise to hundreds of thousands of different retail customers every year. As indicated below, Bass Pro's Lawrenceville, Georgia store had over $29 million in sales in its first year of operation.

Subject to and without waiving any objections, Bass Pro states that its first use of the SPORTSMAN'S WAREHOUSE marks, including use of the registered mark (BASS PRO SHOPS SPORTSMAN'S WAREHOUSE with Design) as well as use of the common law marks BASS PRO SHOPS SPORTSMAN'S WAREHOUSE and SPORTSMAN'S WAREHOUSE, occurred when it opened its Lawrenceville, Georgia retail store in 1995. All store signage and advertising referring to that store location made use of the SPORTSMAN'S WAREHOUSE marks. Documents reflecting such usage will be produced to the extent available. The full range of consumer goods sold by Bass Pro, including, but not limited to, clothing, fishing supplies, and sporting goods, was sold at the Lawrenceville store. Bass Pro made $29,164,000 in retail sales at the Lawrenceville Sportsman's Warehouse store in 1995.

Bass Pro currently uses the SPORTSMAN'S WAREHOUSE marks and has continuously used the marks since 1995. Such use has been in connection with all services identified in U.S.

Trademark No. 2,071,417, including retail stores featuring clothing, fishing supplies, and sporting goods. In 2000, Bass Pro opened a second retail store operating under the SPORTSMAN'S WAREHOUSE marks in Memphis, Tennessee. All store signage and advertising referring to that store location made use of the SPORTSMAN'S WAREHOUSE marks until Registrant entered the Memphis market and began confusing customers. During the week of July 26, 2005, the sign on the building was changed from SPORTSMAN'S WAREHOUSE to SPORTSMAN'S CENTER (U.S. Trademark No. 2,929,833), and the sign on the pylon was also changed on or about August 2, 2005, but Bass Pro continues to use the SPORTSMAN'S WAREHOUSE marks in its advertisements. Documents reflecting such usage will be produced to the extent available. The full range of consumer goods sold by Bass Pro is sold at the Memphis Sportsman's Warehouse store. Bass Pro also operates a Sportsman's Warehouse retail store in St. Charles, Missouri.

Interrogatory No. 3

Describe in detail Petitioner's selection and adoption of Petitioner's Marks, including, without limitation, the origin of Petitioner's Marks for adoption, Petitioner's reasons for selecting Petitioner's Marks for adoption, the date upon which Petitioner adopted the mark and the meaning or impression intended to be conveyed by each of Petitioner's Marks.

ANSWER: Subject to and without waiving any objections, Bass Pro states that the SPORTSMAN'S WAREHOUSE marks were selected for initial use at the Lawrenceville, Georgia retail store because this was the first store Bass Pro opened after the store in Springfield, Missouri which was known as OUTDOOR WORLD (U.S. Trademark No. 2100712) and since the SPORTSMAN'S WAREHOUSE store was significantly scaled-down in size from the

OUTDOOR WORLD store and was using a pre-existing warehouse store space, Bass Pro did not want to call it OUTDOOR WORLD and potentially dilute the brand for OUTDOOR WORLD stores if customers were disappointed with a warehouse store space. Accordingly, the term Warehouse fit the type of store being named and Sportsman fit the type of customer that may be attracted to the store. The terms sounded nice together and fit the business so they became the trademark.

Interrogatory No. 4

State the date upon which Petitioner first became aware of Registrant's Mark and describe the manner in which Petitioner's initial awareness of Registrant's Mark came about.

ANSWER: Subject to and without waiving any objections, Bass Pro states that it first became aware of Registrant's business generally in 1998 and states further that it first became aware of Registrant's use of the SPORTSMAN'S WAREHOUSE mark in 2002 when a search was made of all trademarks belonging to Registrant.

Interrogatory No. 5

Describe the channels of trade and types or classes of purchasers for each of the services comprising Petitioner's Services that have been sold, offered for sale, advertised, or distributed by or for Petitioner in the United States in connection with any of Petitioner's Marks.

ANSWER: Bass Pro objects to this Interrogatory on the grounds that it is overbroad and unduly burdensome in that it is not limited in time.

Subject to and without waiving any objections, Bass Pro states that its Sportsman's Warehouse retail stores are, in effect, their own channel of trade - they are retail stores. The

consumers who patronize Bass Pro's Sportsman's Warehouse retail stores come from every socioeconomic background. However, they do share an interest in recreational activities for which Bass Pro sells products.

Interrogatory No. 6

Identify each state, territory or possession of the United States in which Petitioner has sold, offered for sale, advertised, or distributed each of the services comprising Petitioner's Services in connection Petitioner's Marks.

ANSWER: Bass Pro objects to this Interrogatory on the grounds that it is overbroad and unduly burdensome in that it is not limited in time.

Subject to and without waiving any objections, Bass Pro states that it has operated retail stores under the SPORTSMAN'S WAREHOUSE mark in Georgia, Tennessee, and Missouri.

Interrogatory No. 7

State the dollar amounts, by type of media and by date, that have been expended by Petitioner in advertising and promoting each of the services comprising Petitioner's Services in connection with Petitioner's Marks for each calender year from 1995 through the present date.

ANSWER: Bass Pro objects to this Interrogatory on the grounds that it is unduly burdensome and seeks discovery that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it purports to require Bass Pro to break out its advertising and promotional budgets by type of media.

Subject to and without waiving any objections, Bass Pro states that its advertising and promotional expenses for each of its Sportsman's Warehouse retail stores to date is as follows:

	Sportsman's Warehouse Lawrenceville, Georgia	Sportsman's Warehouse Memphis, Tennessee	Sportsman's Warehouse St. Charles, Missouri
1995	$615,618		
1996	$600,947		
1997	$598,513		
1998	$649,105		
1999	$731,443		
2000	$831,031	$29,424	
2001	$708,308	$33,975	$363,973
2002	$563	$412,653	$678,715
2003		$715,221	$994,237
2004		$798,555	$1,021,862
2005		$918,394	$1,144,846

Interrogatory No. 8

Identify and describe in detail all of the types of media, including publications, radio and television, through which Petitioner has advertised each of the services comprising Petitioner's Services in connection with Petitioner's Marks in the United States, and state the amounts, by type of media and by date, that have been expended by Petitioner in advertising each of Petitioner's Services in connection with Petitioner's Marks for each calender year from 1995 through to the present date.

ANSWER: Bass Pro objects to this Interrogatory on the grounds that it is unduly burdensome to the extent that it seeks information that is duplicative and/or cumulative to Interrogatory No. 7.

Subject to and without waiving any objections, Bass Pro incorporates in full its response to Interrogatory No. 7. Bass Pro further states that it has used newspaper, magazine, radio, internet, and television advertisements to promote each of its Sportsman's Warehouse retail stores.

Interrogatory No. 9

For each of the services comprising Petitioner's Services that Petitioner has sold under Petitioner's Marks in the United States, state, by unit and dollar volume, the amount of sales in the United States for each calender year from 1995 through the present date.

ANSWER: Bass Pro objects to this Interrogatory on the grounds that it is unduly burdensome and irrelevant in that it seeks details of specific sales made in each of Bass Pro's Sportsman's Warehouse retail stores. These stores sell thousands of completely different types of merchandise to hundreds of thousands of different retail customers every year.

Subject to and without waiving any objections, Bass Pro states that its gross sales for each of its Sportsman's Warehouse retail stores to date is as follows:

	Sportsman's Warehouse Lawrenceville, Georgia	Sportsman's Warehouse Memphis, Tennessee	Sportsman's Warehouse St. Charles, Missouri
1995	$29,164,000		
1996	$36,947,000		
1997	$41,664,000		
1998	$46,210,000		
1999	$46,634,000		
2000	$45,933,478	$3,469,000	
2001	$34,436,481	$4,218,329	$17,169,283
2002		$22,372,271	$40,543,110
2003		$26,787,731	$38,962,258
2004		$27,264,579	$39,906,980
2005		$28,566,821	$41,124,373

Interrogatory No. 10

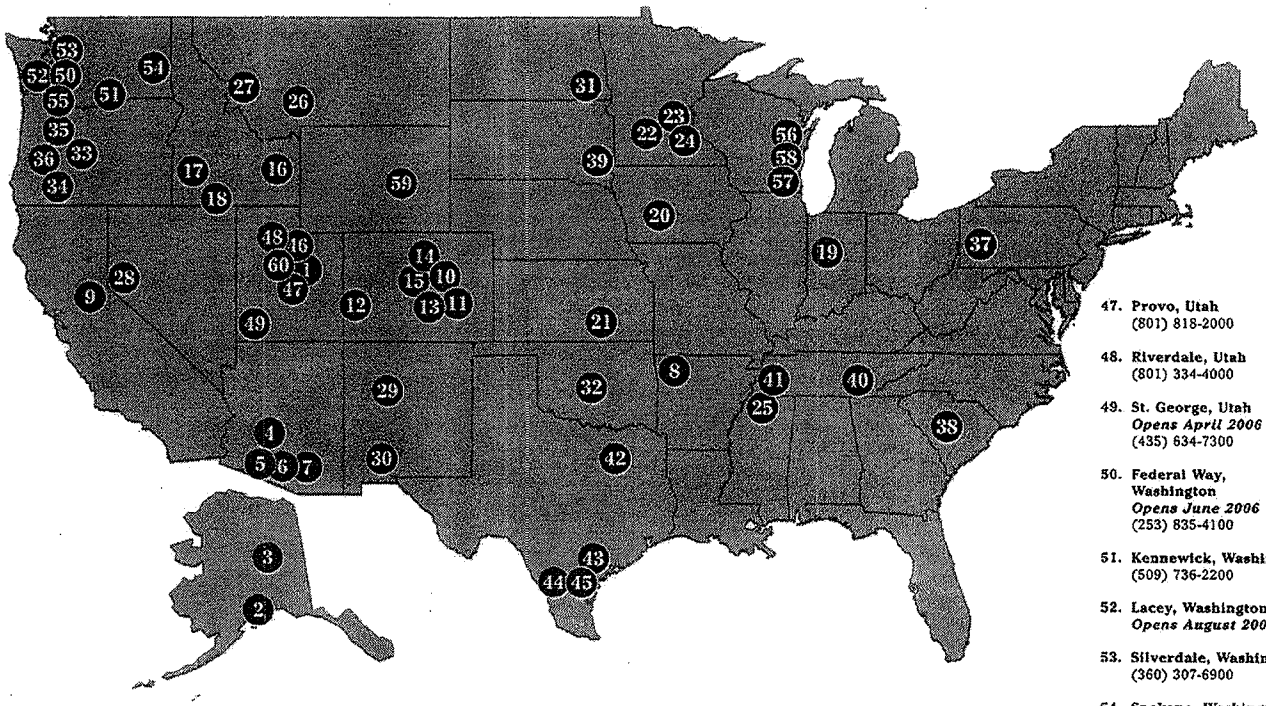
For each of the services comprising Petitioner's Services in connection with which Petitioner's Marks have been used, identify the individuals who are most familiar with Petitioner's marketing, advertising, promotion, and selling of the services.

ANSWER: Subject to and without waiving any objections, Bass Pro states that the individual most familiar with marketing, advertising, and promotion in connection with its

STORE LOCATIONS

www.sportsmanswarehouse.com

1. Corporate Offices
   7035 S High Tech Dr.
   Midvale, UT 84047
   (801) 566-6681
2. Anchorage, Alaska
   (907) 644-1400
3. Fairbanks, Alaska
   (907) 374-8800
4. Phoenix, Arizona
   (623) 516-1400
5. Goodyear, Arizona
   (623) 536-0700
6. Mesa, Arizona
   (480) 558-1111
7. Tucson, Arizona
   (520) 877-4500
8. Rogers, Arkansas
   Opens April 2006
   (479) 986-0300
9. Rocklin, California
   Opens September 2006
10. Aurora, Colorado
    (720) 858-1800
11. Colorado Springs, Colorado
    (719) 597-9200
12. Grand Junction, Colorado
    (970) 243-8100
13. Littleton, Colorado
    (720) 981-2000
14. Loveland, Colorado
    (970) 461-5000
15. Thornton, Colorado
    (303) 428-6500
16. Idaho Falls, Idaho
    (208) 542-1900
17. Meridian, Idaho
    (208) 884-3000
18. Twin Falls, Idaho
    (208) 737-9900
19. Lafayette, Indiana
    Opens September 2006
20. Ankeny, Iowa
    (515) 963-3500



21. Wichita, Kansas
    Opens April 2006
    (316) 612-9900
22. St. Cloud, Minnesota
    (320) 656-0500
23. Coon Rapids, Minnesota
    (763) 560-2000
24. Woodbury, Minnesota
    Opens May 2006
    (651) 731-4400
25. Southaven, Mississippi
    (662) 349-5500
26. Bozeman, Montana
    Opens September 2006
27. Missoula, Montana
    (406)523-9000
28. Reno, Nevada
    (775) 828-1500
29. Albuquerque, New Mexico
    (505) 761-9900
30. Las Cruces, New Mexico
    Opens August 2006
31. Fargo, North Dakota
    (701) 281-7000
32. Oklahoma City, Oklahoma
    (405) 302-4800
33. Bend, Oregon
    (541) 693-5000
34. Medford, Oregon
    Opens September 2006
35. Portland, Oregon
    (503) 777-8700
36. Salem, Oregon
    (503) 589-0800
37. Pittsburgh, Pennsylvania
    (412) 366-6100
38. Columbia, South Carolina
    Opens August 2006
39. Sioux Falls, South Dakota
    (605) 978-9800
40. Chattanooga, Tennessee
    Opens June 2006
41. Memphis, Tennessee
    (901) 753-5000
42. Lewisville, Texas
    (214) 488-2700
43. Round Rock, Texas
    (512) 218-8880
44. San Antonio, Texas
    (210) 494-5505
45. San Antonio, Texas
    (210) 509-4100
46. Midvale, Utah
    (801) 567-1000
47. Provo, Utah
    (801) 818-2000
48. Riverdale, Utah
    (801) 334-4000
49. St. George, Utah
    Opens April 2006
    (435) 634-7300
50. Federal Way, Washington
    Opens June 2006
    (253) 835-4100
51. Kennewick, Washington
    (509) 736-2200
52. Lacey, Washington
    Opens August 2006
53. Silverdale, Washington
    (360) 307-6900
54. Spokane, Washington
    (509) 891-1900
55. Vancouver, Washington
    Opens November 2006
56. De Pere, Wisconsin
    (920) 336-7000
57. New Berlin, Wisconsin
    (262)641-2000
58. West Bend, Wisconsin
    Opens May 2006
    (262) 306-0200
59. Casper, Wyoming
    (307) 233-3700
60. Warehouse & Distribution Center
    9669 S. Prosperity Rd.
    Salt Lake City, Utah

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 8

Exhibit 9 Filed as Confidential
Pursuant to the Protective Order Entered in this Matter

Exhibit 10 Filed as Confidential
Pursuant to the Protective Order Entered in this Matter

[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

[Page 2]

INDEX

PAGE
TITLE PAGE 1
INDEX 2
DEPOSITION INFORMATION 3
APPEARANCES 4
MS. TONI MILLER
Direct Examination by Mr. Allgeyer 5
MILLER EXHIBITS
1 Petitioner's Responses to Registrant's First Set of Interrogatories and Requests for Production of Documents 18
2 Amendment and Response, BPS-000983, 000986-000987 44
3 Bass Pro Retail Locations Formerly Known as Sportsman's Warehouse, Gross Sales 1995-2005, BPS-001305 62
4 Application for Registration of Trademark or Service Mark, BPS-001303-001304 66
5 Application for Service Mark, BPS-000920-000927 68
CERTIFICATE OF REPORTER 71

[Page 3]

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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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.

[Page 4]

APPEARANCES

For Petitioner:

MR. DUTRO E. (BRUCE) CAMPBELL II
HUSCH & EPPENBERGER LLC
190 Carondelet Plaza, Suite 600
St. Louis, Missouri 63105-3441
(314) 480-500
bruce.campbell@husch.com

For Respondent:

MR. DAVID A. ALLGEYER
LINDQUIST & VENNUM PLLP
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 371-3211
dallgeyer@lindquist.com

Court Reporter:

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

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 11

[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 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.

[Page 15]

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

[Page 17]

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.**

[Page 18]

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

[Page 19]

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.

[Page 20]

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 41]

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

[Page 42]

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?

[Page 43]

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,**

[Page 44]

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

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

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Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 12

The deposition of MYERS HADEN HOLLEY, JR., taken on behalf of the Respondent, pursuant to Notice, on August 2, 2006, beginning at approximately 2:25 p.m. in the law offices of Husch & Eppenberger, Suite 1450, 200 Jefferson Avenue, Memphis, Tennessee.

This deposition is taken in accordance with the terms and provisions of the Federal Rules of Civil Procedure.

All forms and formalities are waived, and objections as to relevancy, materiality and competency are reserved, to be presented at or before the hearing. Objections as to the form of the question must be made at the time of the taking of the deposition. The signature of the witness is waived.

- APPEARANCES -

For the Petitioner (Via Telephone):

MR. H. FREDERICK RUSCHE
Attorney at Law
Husch & Eppenberger
190 Carondelet Plaza, Suite 600
St. Louis, MO 63104-3441
314.480.1500
fred.rusche@husch.com

For the Respondent:

MR. CHRISTOPHER RUSSELL SMITH
Attorney at Law
Lindquist & Vennum
80 South 8th Street
4200 IDS Center
Minneapolis, MN 55402-2205
612.371.3533

Reported by:

MS. SHERYL G. WEATHERFORD
Registered Professional Reporter
Alpha Reporting Corporation
236 Adams Avenue
Memphis, TN 38103
(901) 529-1999

- INDEX -

WITNESS:	PAGE NUMBER
MYERS HADEN HOLLEY, JR.	
DIRECT EXAMINATION BY MR. SMITH	5
CROSS-EXAMINATION BY MR. RUSCHE	34

MYERS HADEN HOLLEY, JR.

Having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q. Good afternoon.

A. Good afternoon.

Q. My name is Christopher Smith, and I'm an attorney for Sportsman's Warehouse, Incorporated, it's a Utah corporation. Could you state your full name for the record and spell it, please.

A. Myers, M Y E R S, Haden, H A D E N, Holley, H O L L E Y, Jr.

Q. Have you ever been deposed before?

A. Yes.

Q. And in what kind of case was it that you were deposed?

A. The last one I was -- was a sexual harassment.

Q. Okay. And before that?

A. General liability, slip and fall accidents, those kind.

Q. How many times have you been deposed?

A. Probably a dozen times, probably.

Q. So you're pretty familiar with this

process, are you not?
A. Oh, I don't want to say -- I don't want to become a pro, but I have been through it.
MR. RUSCHE: I made that joke earlier today, Chris, and Haden didn't appreciate it.
A. Yeah, but that was with another company of course.
Q. Right. Well, let me just hit a couple of ground rules which I'm sure you have heard numerous times, but I just want to get it on the record, especially since we are over the telephone on this one. I want to make sure you understand each question and can hear each question before you answer it. So if you have any trouble hearing me or if my question doesn't make sense to you, please ask me to restate it or rephrase it. Okay?
A. Yes, sir. Yes, sir.
Q. This will be a pretty short deposition, but if you do need a break for any reason, just ask for it, I will be happy to oblige you.
A. Yes, sir.
Q. Also be aware that I may pause from time to time, and since you can't see me, trust that I will be reviewing my notes and preparing for the next question. So just sit patiently and I will

ask it pretty quickly.
A. Yes, sir.
Q. Also your attorney may object from time to time which is normal to some of my questions. Just be aware that you should go ahead and still answer the question unless your attorney instructs you specifically not to answer. You understand that?
A. Yes, sir.
Q. Okay. And you were just sworn in, so you understand your testimony is being given today under oath; is that correct?
A. Yes, sir.
Q. Other than discussions with your attorney, how did you prepare for this deposition today?
A. Honestly I didn't.
Q. Okay. You did not review any documents, is that your testimony?
A. Other than today.
Q. Okay. And what documents did you review today?
MR. RUSCHE: Objection, calls for privilege. Instruct the witness not to answer.
Q. Did you have any discussions with anyone else other than your attorney about this

deposition?
A. No, sir.
Q. Did you provide information or documents to anyone to prepare for Bass Pro's answers to discovery requests by my client in this matter?
A. You talking about the interrogatory questions?
Q. Interrogatory answers or documents for document requests, did you provide any information or documents?
A. I was -- I was asked at the beginning of the year to just -- if I had any examples of customer confusion over the name change, that's the only time.
Q. And did you provide information or documents?
A. Later I did.
Q. Okay. What did you -- what information did you provide?
A. Just give some information on an applicant that had been confused about the names.
Q. About a job --
A. That had put in an application.
Q. That's a job application?
A. Yes, sir.

Q. Any other information that you provided?
A. No, sir.
Q. Any documents that you provided?
A. I did turn in to corporate some copies of some Sportsman's Warehouse ads and coupons.
Q. And when you say Sportsman's Warehouse, do you mean Bass Pro Sportsman's Warehouse?
A. No, sir, Sportsman's Warehouse out of Utah. I did turn in a copy of one of their ads and one of their coupons to the corporate level.
Q. And where did you obtain this -- the ads or the coupons?
A. Just out of some publications like just out of some local publications.
Q. Did you provide any other documents?
A. No, sir.
Q. Could you briefly describe your educational background for me?
A. Okay. High school and I have a business degree from the University of Mississippi.
Q. Okay. What year did you graduate from the University of Mississippi?
A. 1983.
Q. And what degree did you obtain?
A. A BBA in marketing.

Page 14

the name of the store changed?
A. Not superiors.
Q. Anybody that you worked with, did you ask them why the name of the store changed?
A. Yes. Yes.
Q. Okay. And how did that conversation -- those conversations go? What did you find out?
A. They just said it was a corporate decision to change the name. Like I said, that was all I was told.
Q. Okay. And what was the new name of the store?
A. Bass Pro Shops Sportsman's Center.
Q. Can you describe the sign on the front of the store that says Sportsman's Center, how big is it?
A. The letters are I think they're -- I think they're six -- six, seven foot letters I believe it is. There's -- I cannot think of the signing ordinance, but I think they're six or seven foot tall. And it's just -- it's across the left front of the building, Sportsman's Center.
Q. About how many car lengths long is that sign?
A. I would guess seven.

Page 15

Q. Okay. And previous deponents have said you can see that sign from the highway; is that right?
A. It's a very well lit sign, yes.
Q. Okay. What is the purpose of that sign?
A. Well, just to call attention to our store and, you know, we are right on access of an interstate, so I would assume they have the largest letters that the signing ordinance will allow to, you know, to draw the customer in.
Q. Okay. And I assume you weren't involved in any decisions to change the name and the sign because you weren't working there; is that correct?
A. Yes, sir.
Q. Do you have any information about how much it cost to change that sign?
A. Hearsay, yes, but I never --
Q. How much was that?
A. I have heard somewhere around 60 to 80 thousand dollars ball park.
Q. Okay. Are you aware if anyone at the company ever discussed changing the sign back to Bass Pro Shop Sportsman's Warehouse?
A. Other than when this -- other than when

Page 16

this started I guess, no.
Q. When you say "this," you mean this litigation?
A. Right, right.
Q. So there was some discussion when this litigation started to change the name back; is that correct?
A. I'm just assuming. No, not any discussion. I'm just assuming. No discussion.
Q. You didn't have any discussion. Did you hear about a discussion?
A. No.
Q. I assume you're familiar with the advertising that is put out in the Memphis area for your store, correct?
A. Yes.
Q. And the marketing materials you guys put out?
A. Yes.
Q. Okay. How is the name of your store reflected in those advertisements and promotional materials?
A. Bass Pro Shops Sportsman's Warehouse on our ads. Bass Pro Shops Sportsman's Center has now been changed on our new ads which was

Page 17

effective last month.
Q. So new advertising, recent advertising has Sportsman's Center along with Bass Pro Shops?
A. Correct.
Q. Okay. Do you know why that change was made?
A. No, sir, I do not.
Q. Does the bulk of your advertising and promotion materials reflect the name Sportsman's Warehouse or Sportsman's Center?
A. Now the bulk of it is Sportsman's Center now.
Q. Okay. Did you notice any customers being confused before your advertising and promotional materials changed to say Sportsman's Center, did you have any customers that were confused to why the front of the store said Sportsman's Center but your advertising said Sportsman's Warehouse?
A. No.
Q. Okay. Have you been involved or been aware of customer concerns or complaints about the similarity between your store's name and my client's Sportsman's Warehouse's store's name?
A. Yes.
Q. Okay. What are some of the types of

Exhibit 13 Filed as Confidential
Pursuant to the Protective Order Entered in this Matter

Exhibit 14 Filed as Confidential
Pursuant to the Protective Order Entered in this Matter

Exhibit 15 Filed as Confidential
Pursuant to the Protective Order Entered in this Matter

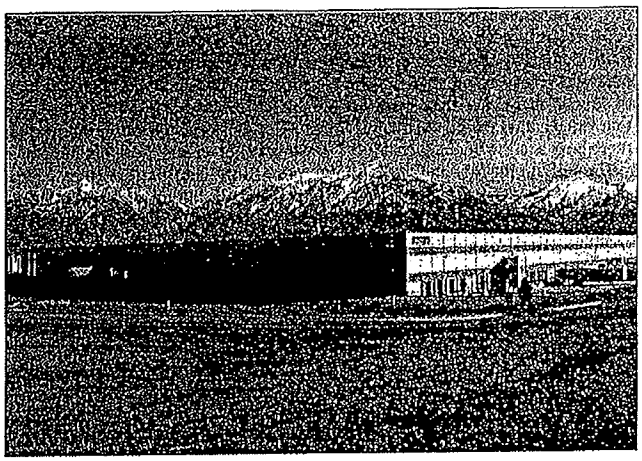
Sportsman's Warehouse

Expanding to Meet Your Needs

Stuart Utgaard, Chairman and Chief Executive Officer of privately-held Sportsman's Warehouse, Inc., announced the completion of a 363,654 sq. ft. warehouse and distribution center located at 9669 S. Prosperity Road in West Jordan last August.

The facility is situated on 26 acres and includes a 351,000 sq. ft. floor, a 27,000 sq. ft. mezzanine, and 38 dock doors. Sportsman's Warehouse already has positioned a full-time staff of 45 at the new facility to provide warehousing and distribution support for the chain's growing number of stores. The outdoor retailer recently opened its 43rd store in Pittsburgh, PA and will open as many as 15 additional stores in 2006.

The facility begin operating Monday, August 22, 2005. At full capacity the facility will house a staff of 100 and move in and out 2 million pounds a week, which is 2,000 semi-truck loads per year.



"This is the largest sporting goods distribution center in Utah and certainly one of the largest in the western United States," Utgaard said. "Our goal was not to build the biggest facility of its kind, but we ended up with something at least seven times the size of our current warehouse in Midvale."

Sportsman's Warehouse has doubled its warehousing every 12 to 18 months. The new distribution center will support all of its 43 stores across the country, but the company is already making plans for additional distribution centers in the near future.

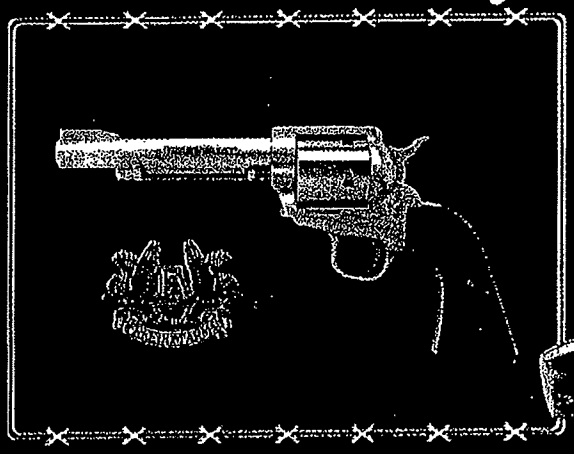
Sportsman's Warehouse (www.sportsmanswarehouse.com) is a rapidly expanding retail chain specializing in hunting, fishing, camping and related lines. Headquartered in Midvale, Utah, the firm currently has 43 stores located in 21 states throughout the Rocky Mountain, Northwest, Southwest and Midwestern states.

For additional information, contact Chris Utgaard, Sportsman's Warehouse Chief Operating Officer, at (801) 304-4309, or Jim Torzak, Distribution Manager, at (801) 641-0981.

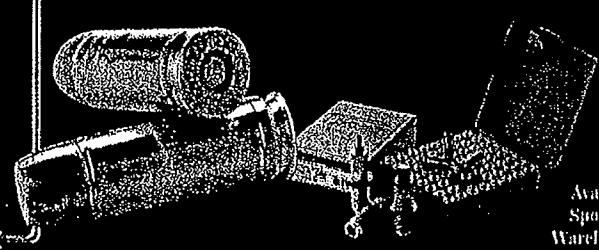
A Caliber as Strong as its Tradition

Introducing

The .500 Wyoming Express



The .500 Wyoming Express (.500WE) is the result of several years of considerable effort, design evolution, testing and finally success. We believe history may show this to be the best 50 caliber revolver cartridge ever developed. We deeply appreciate our customers input on a Freedom Arms 50 caliber and trust it will meet your expectations.



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Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 16

PENGAD 800-631-6989
DEPOSITION EXHIBIT
TR-4
Utgaard

SP 00696

Mountain States Sports Marketing

January 4, 2000

Mr. Stu Utgaard
Sportsmans Warehouse
7035 South 185 West
Midvale UT, 84047

Dear Stu,

To answer your question concerning how well known Sportsmans Warehouse is in the Intermountain area.

My organization travels Utah, Idaho, Montana, Wyoming, Colorado, New Mexico, Arizona, Kansas and Nebraska with offices in Utah and Colorado. As you know we have three sales representatives including myself traveling and making frequent calls on the sporting goods dealer base in the afore mentioned territory. With the exception of Kansas and Nebraska, you would be hard pressed to find a dealer of any magnitude who is not fully aware of your stores and the growth and reputation they have achieved. The name Sportsmans Warehouse is linked to great selection and competitive prices. Current and rumored future growth is more than a small concern of this dealer base.

We look forward to assisting you and your organization with this growth. Please call on us when we can be of service.

Thanks for your support,

Terry Labrum/President
Mountain States Sports Marketing

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 17

PENGAD 800-631-6989
DEPOSITION EXHIBIT
TR-16
Utgaard

SP 00816

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New Electronics & Trolling Motors (Page 28)

December 2002
Four Dollars

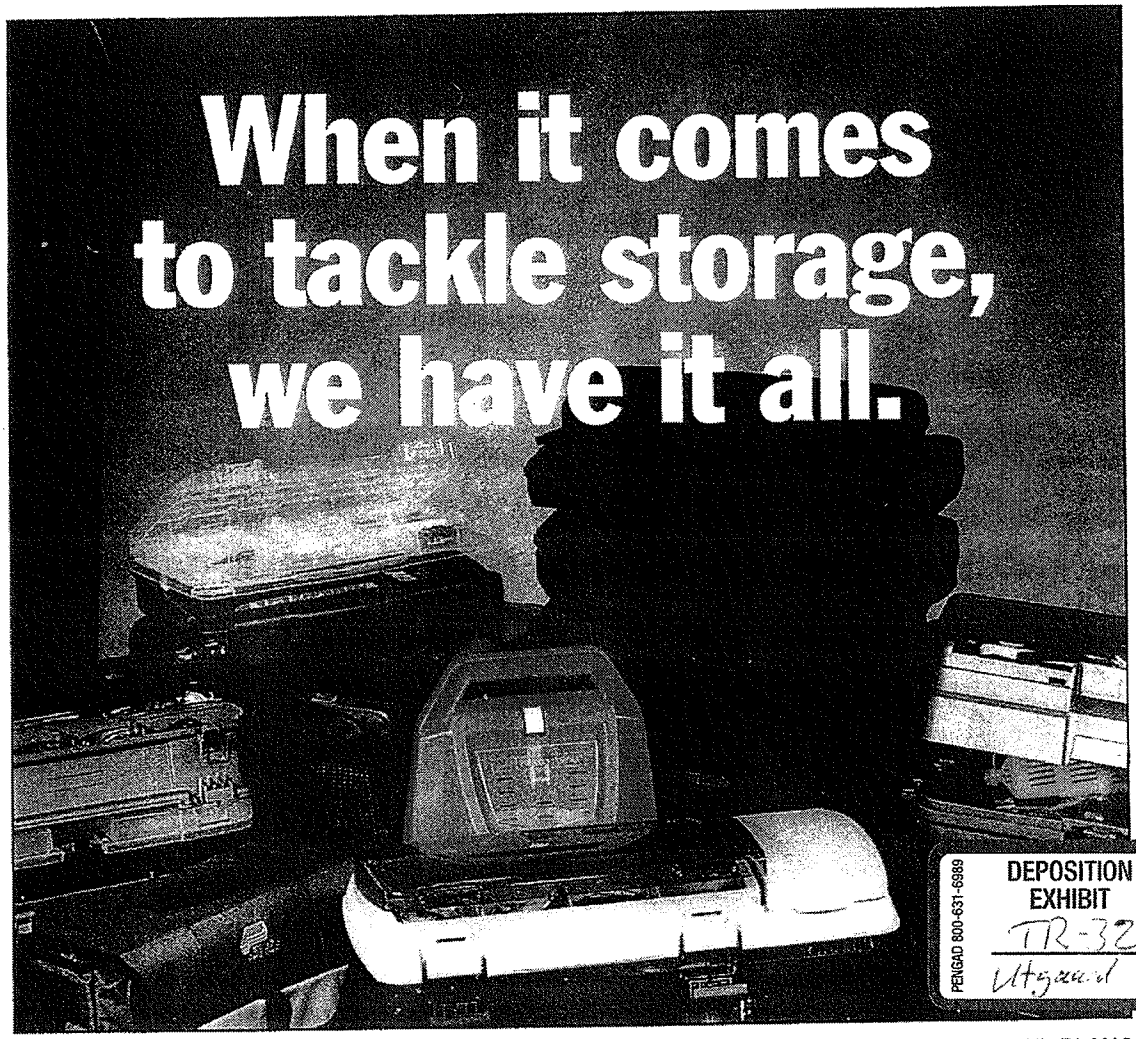
FISHING TACKLE RETAILER®

THE BUSINESS MAGAZINE OF THE SPORTFISHING INDUSTRY • A B.A.S.S. PUBLICATION

2003 Buyer's Guide

***The* reference for retail buyers.**

***Four big directories:* Wholesalers • Manufacturers • Products • Brand Names**



PENGAD 800-631-6989
DEPOSITION EXHIBIT
TR-32
Utgard

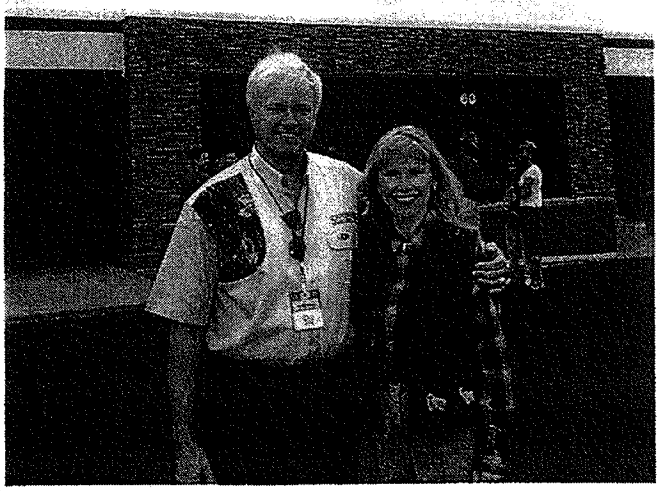
SP 00066

COVER ADVERTISEMENT: PLANO

fast-track retailing

Sportsman's Warehouse is an emerging force in tackle retailing, growing in just a little over six years from its single-store location in Utah into a 13-store chain.

BY ED SPENCER



In St. Cloud, Minn., Stuart and Kimberly Utgaard celebrate the grand opening of their 11th store, which was heavily advertised with billboards as well as with print ads and radio spots. Photos: Ed Spencer

When Stuart Utgaard approached his wife six years ago about going into the sporting goods business, she was unable to hide her skepticism. Today, Kimberly Utgaard describes her husband's decision to acquire Sportsman's Warehouse as a "blessing" to their family.

"It's been quite a ride," she said in September during opening ceremonies of the 11th Sportsman's Warehouse store. "And it's taught me not to step on anybody else's dream. You have to let them bring that dream to fruition." With that statement, she cut the ribbon in front of a gleaming new store in St. Cloud, Minn.

There's no doubt Stuart Utgaard dreams big. What's more, he makes his dreams happen. "It comes down to execution, to running the business like a business," he says.

TACKLE CONNECTIONS

Since he and his wife acquired the original Sportsman's Warehouse store in Midvale, Utah, in November 1996, expansion has been at a lightning-fast pace. By the end of 2002, Sportsman's Warehouse will be 13 stores strong. Sales in 2003 are expected to top $200 million. Included in the business is a wholesale company, Pacific Flyway, which soon will be moving into a 65,000-square-foot facility.

Although before 1996 Utgaard never logged much time behind a cash register, he knows the retailing business. Before acquiring Sportsman's Warehouse, Utgaard

SP 00067

was head of Enterprise Investments, a merger and acquisition company. There, Utgaard says, he engineered the sale of 108 companies, with total transactions amounting to $1.7 billion.

Several of those were in the fishing industry. Utgaard worked the sale of PRADCO to EBSCO, and Bomber to PRADCO. He was instrumental in orchestrating the acquisition by PRADCO of Bagley's Silver Thread brand, and the sale of Storm Manufacturing to Rapala. On the hunting side of the sporting goods industry, he worked the sale of Jason Empire to Bushnell and oversaw Bushnell's move from California to Overland Park, Kan.

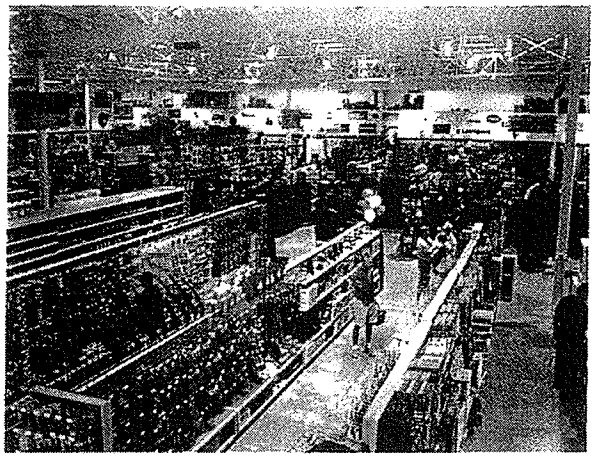
The 57-year-old Utgaard's merger and acquisition skills also have been brought to the table in the sale of six or seven wholesalers. At the retail level, his credits include several sporting goods companies, and he was involved in the sale of the Wolfe's Department Store chain.

Today, Utgaard's offices occupy a 3,600-square-foot building in Star Prairie, Wis., his hometown. It was just 50 miles west, at Minneapolis' Augsburg College, where he earned an undergraduate degree in economics. Utgaard then joined the Army National Guard, serving as a platoon sergeant in advanced infantry training. Following military service, it was back to school, this time the University of Minnesota, where he earned a master's degree in industrial relations.

"That involved human resources issues," Utgaard says, "including training, labor negotiations, salary and wage administration, and things like that." Then he tried law school, "but I decided I didn't want to be a lawyer."

In 1978, after working for a firm involved in merger and acquisition work, he formed Enterprise Investments, which he moved to Star Prairie in 1993.

Other Utgaard credentials include graduation from the American Management Association's Advanced Marketing School. And for about 20 years, he taught an AMA course on mergers and acquisitions. "I've advised 38 Fortune 500 companies on mergers, acquisitions and divestitures," he says. "And so, now, with Sportsman's Warehouse, I'm doing it for myself."



Top: The tackle section of the St. Cloud store occupies about a fourth of the floor space.

Bottom: A staffed island is the centerpiece of the St. Cloud tackle department. Photos: Ed Spencer

SELL OR BUY?

It was one of Utgaard's rare failed attempts to sell a property that led him to buying Sportsman's Warehouse.

"Two guys started the business in 1986," Utgaard says. "It included baseballs, basketballs, golf clubs — whatever they could get." The two were partners in the retail operation, while one of them held full ownership in a related wholesale company, Pacific Flyway.

In 1993, they contracted with Utgaard to sell both businesses. "We tried and just couldn't do it," Utgaard says, so the partners commissioned another company, but with the same negative result.

Utgaard's phone rang again in 1996 with a request from the partners to take another stab at it. Kimberly Utgaard picks up the story: "So we updated the book [on Sportsman's Warehouse and Pacific Flyway] and talked to all the industry players. The market was more stable, but they just weren't ready to buy," she says.

"Stu went to the owners to say, 'Sorry, we were not successful this time, either.' And one of the owners says, 'You know, Stu, you've done a lot in sporting goods. Why don't you buy this company?' "

Utgaard was on the phone to his wife back in Star Prairie. She hesitated only briefly, and then agreed to partner with her husband in pursuit of his dream.

GROWTH SPURTS

A hands-on owner, the athletically built Utgaard is as likely to be found driving a forklift as sitting behind a desk.

Following the 1996 acquisition of the Midvale store, he personally directed the company's expansion. The second Sportsman's Warehouse opened in May 1998 in Provo, Utah. Less than a year later — in April 1999 — the third store opened in Riverdale, Utah. Next, it was off to Idaho for two store openings in 2000: Meridian (near Boise) in April, and Idaho Falls in the autumn. The following spring, Utgaard opened a store in Loveland, Colo. The Spokane, Wash., store was ready in September 2001, then Grand Junction, Colo., in November 2001.

The pace has been even faster in 2002: Salem, Ore., in July; Kennewick, Wash., a month later; St. Cloud, Minn., in September; Aurora, Colo., in October; and a Coon Rapids, Minn., store slated for first business in late November.

By year's end, the Midvale store is expected to be moved into new quarters. The wholesale business, Pacific Flyway, is slated to take over the original Midvale retail site, which is being expanded from 43,000 square feet to 65,000 square feet.

(Continued)

SP 00068

Enterprise Investments is expected to suspend operations by the end of the year.

When all of the 2002 expansion is complete, the Sportsman's Warehouse employee roster will top 1,000. "And our total square footage will probably be around 600,000," Utgaard says.

Sportsman's Warehouse is a schedule C corporation with ownership divided between Stu Utgaard, Kim Utgaard and their children. "I'm 15 years older than my wife, so we set it up so she owns some, I own some and our children own roughly a third." The kids total eight, four by Kim and Stu, and four by his previous marriage.

In addition to various banking relationships, Sportsman's Warehouse has a cadre of subdebt investors (minimum investment of $100,000). "Our most recent offering pays 12 percent monthly, principal and interest," Utgaard says, "and we've been fortunate that our associates have had confidence in us. So far, we have paid all our bills to our vendors on time and to all our subdebt holders on time."

Local Market Response

Although each store is different in some ways, the new St. Cloud facility is representative of all Sportsman's Warehouse stores, and its grand opening followed a formula that's worked well for the chain's other openings.

In the days preceding the September opening, St. Cloud's thoroughfares and major arteries leading into the city were blitzed with billboard advertising. Newspaper advertising was extensive, too. The day before the grand opening and on opening day, several radio stations did live broadcasts from the store. Included were rock music, country and news-talk formats.

"We didn't do television," Utgaard says, but the company has employed it in other markets.

On the morning of the grand opening, a podium was set up in front of the store. The formal ceremony included remarks by the chain's president, Dale Smith, and store manager, Mike Murray. Both Stu and Kim Utgaard spoke, and Kim cut the ribbon. Award plaques and accolades were bestowed on vendors, rep groups, banking associates, investors, and the store's architect and building contractor. Sportsman's Warehouse buyers and department heads — camping, hunting, fishing, clothing, gifts, archery, shoes — were acknowledged.

Once inside after the ribbon cutting, customers were greeted with a gleaming new facility dressed with green, white and gold balloons. Befitting its "warehouse" name, the floors are a smooth-finish concrete and the ceiling is supported by a network of exposed steel beams. In addition to ceiling lighting, a row of massive skylights funnels natural light into the interior.

A partial second floor rings the building and provides a panoramic view of the floor space below. Some of the top-floor space is stocked with inventory and open to customers, while other parts are offices and inventory storage.

Up front, adjacent to the entry, is a fully staffed customer service area with two registers. There are six primary cash-wrap stations for customer checkout. Shopping carts are available at the store entrance.

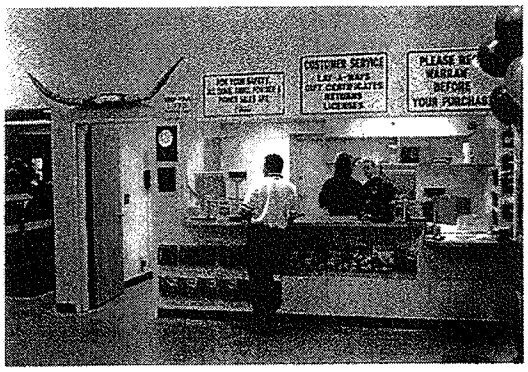
Fishing tackle, which accounts for 25 percent of the corporation's sales, occupies an equivalent quadrant of the new St. Cloud store. "We have about 50,000 SKUs, and the majority of those are in fishing," Utgaard says. "It's a significant part of our business."

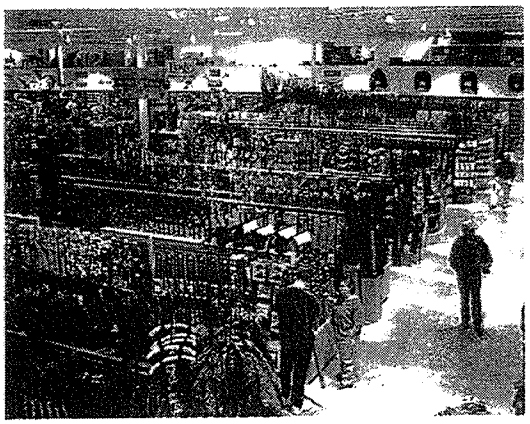
Aisles throughout the store are spacious. The centerpiece of the tackle section is a staffed island. Spinning reels in glass cases line one side of the island, while baitcasting reels are featured on the opposite side.

Although buying is done centrally from Midvale, each store's tackle department is stocked to match local fishing seasons and conditions. The staff of each store advises the buyers, Utgaard says, and recommendations of local reps are sought. "When we go into different markets, we are really quick to adjust," he adds.

The fruits of that process are easy to spot: The new St. Cloud store boasts 36 linear feet of muskie tackle, for example, while equivalent space in the Colorado stores might be devoted to trout gear, and to salmon and steelhead in Pacific Northwest stores.

On opening weekend in St. Cloud, two of the corporation's three Midvale-based tackle buyers were in town. In addition to working the floor, they met with local tackle vendors to further refine the Minnesota inventory mix.





Top: A well-lighted store front and parking lot are inviting to shoppers.

Middle: Service is emphasized at Sportsman's Warehouse.

Bottom: Hunting goods and apparel are big draws. Photos: Ed Spencer

The level of service offered by the staff defies the company's "warehouse" name.

"The 'warehouse' name is deceiving," Utgaard says. "We have good people, and our service levels are extremely high."

The St. Cloud store is in a free-standing, company-owned building. Two other facilities, Loveland and Midvale, also are company-owned. Other stores are leased buildings, some with options to buy, Utgaard says. In addition to free-standing buildings, some Sportsman's Warehouse stores are positioned in-line or in flagship positions of large retail developments.

SP 00069

A Billion-Dollar Target

Utgaard has no plans to slow his company's growth rate. More stores and the hiring of additional top staff are in the plans for 2003.

Regional and district manager positions are in the cards as well as the hiring of a real estate pro. "Site selection has taken a lot of my time," Utgaard says, "so we need a good real estate guy." One essential position was recently filled with the hiring of a distribution manager; he came to Sportsman's Warehouse from Wal-Mart.

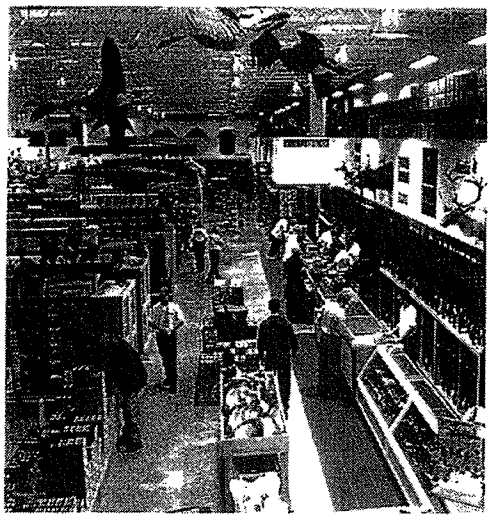
The first 2003 store opening is set for March in Missoula, Mont. "We're going to continue to expand in the Rocky Mountains, Northwest and Midwest," Utgaard says, "and we'll probably go into the Southwest." Utgaard is constantly evaluating store concepts. "We may do smaller stores, or we may do larger ones," he says.

Internet retailing doesn't figure heavily into Sportsman's Warehouse current expansion plans. The store's Web site produces only a small segment of company sales and, says Utgaard, probably always will. However, he says, his staff will continue to refine it. "Some companies have spent beaucoup bucks [on Web-based commerce] and have had disastrous results," he observes, adding that he does not intend to repeat their mistakes.

At some point, Utgaard would like to take his corporation public and offer stock. "But first, we have to grow the business (further) to have a meaningful market value," he says. The issue of size came into sharp focus when Utgaard served on the board of directors of a NASDAQ firm. "Sometimes their stock would sell for $7 a share, 100 shares would trade and the stock would go to six bucks. That's ridiculous.

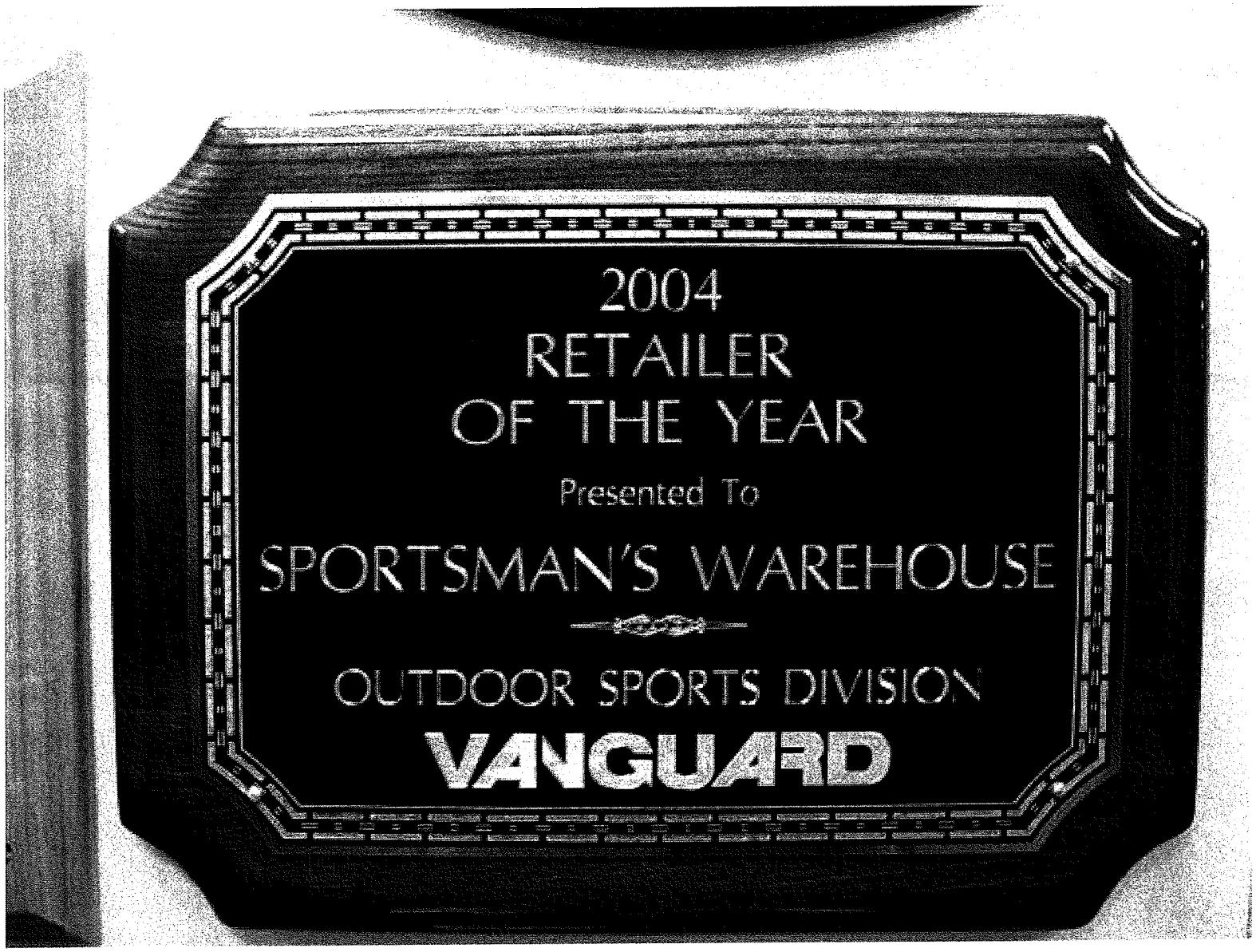
"So when we go public — assuming we get to that point — we want it to be a way of rewarding our associates ... (with) a meaningful market value."

Utgaard doesn't flinch when asked where he'd like his business to be in 2010: "We would like to be a billion dollars in revenue. I think we can get there."



High ceilings and cement flooring fit the "warehouse" image, but well-displayed merchandise and staffed counters give Sportsman's Warehouse stores a full-service cache. Photo: Ed Spencer

For his part, Utgaard intends to keep doing what he does best: "My main role is to see that we have the proper facilities, merchandise, capital and the people to accomplish what we are trying to do." FTR


2004
RETAILER
OF THE YEAR
Presented To
SPORTSMAN'S WAREHOUSE
OUTDOOR SPORTS DIVISION
VANGUARD

hook-n-hunt

Big Game & Fly Fishing Facilitators

October 24, 2006

Mr. Stu Utgaard
Sportsman's Warehouse
7035 S. High Tech Drive
Midvale,UT 84047

Re: Outfitting

Dear Mr. Utgaard,

I recently had the opportunity of visiting your store in Missoula, MT while on my way to Idaho for a two week hunt. Having not heard of Sportsman's Warehouse back here in the east, I wasn't sure what to expect. I must say that I was honestly surprised and very impressed with your Missoula store. I now know there is a store in Columbia, SC (lived there many years ago) which I plan to visit next time I am down that way.

I spoke at length with Mr. Craig Qualman, Manager of the hunting department the other evening as I called about some items I had seen when visitintg the store previously. I happened to inquire if Sportsman's Warehouse had an affiliation or sister company for facilitating hunting and fishing trips, similar to those offered by Cabela's, Bass Pro Shops and Gander Mountain. Craig was kind enough to explain what the situation and past experience had been as he understood it. Craig indicated that he was of the belief that you still had a serious interest in providing this service, which brings me to the point of my letter.

By my day job I am a consulting professional engineer, with 35 years experience, that designs heating, ventilating and air conditioning systems for all types of facilities. On the side, one of my businesses is a fledging Big Game and Fly Fishing Facilitation business. I have chosen to take an approach that allows me to properly manage a small but growing clientele base so as not to be completely overwhelmed and not be able to service my clients as it is a side business at the present. My preference is to build the foundation of my outfitters by hunting with them prior to sending clients out with them on their own. So far this has worked well, although I know it is not feasible to have this be the norm as the business grows.

I would be very interested in speaking with you about any possible opportunity that you may feel exist relative to re-establishing this particular market segment of the hunting and fishing business. Given the right opportunity, I would like fewer things in life more than to be able to take my hunting (and emerging fly fishing) passion and do

1617 ALDERMAN DRIVE, GREENSBORO, NC 27408
336-297-0980
E-Mail Address: bhw@triad.rr.com

that for a living. I believe this business is one that can be successfully run from just about any location as it is for the most part internet based.

I would be glad to provide you with whatever additional information about myself and what I have done with my side business that you feel is needed to further evaluate any potential opportunity there may be.

I have been fishing for most of my life and hunting for nearly 30 years and I will be the first to tell you I don't know everything about hunting and fishing. However, one thing I do know is that I learn a little something everyday and I can organize and manage a small business.

I look forward to hearing from and hope you believe as I do that this subject is worth pursueing.

Sincerely,
hook-n-hunt

Brandt H. Williams
NC Licensed Guide
Principal

SGB
SPORTING GOODS BUSINESS
VOLUME 39 | ISSUE 10 OCTOBER 2006

INSIDE THIS ISSUE:

Back-To-School: Footwear's ups and downs at retail, see page 6

Joy Riding: New gear makes cycling more fun, see page 22

ON THE WEB AT WWW.SGBMAG.COM

What Are They Thinking?

Consumers give out the grades in our exclusive Retail Report Card.

See Page 12

#0XNPQEL FIRM**CAR-RT LOT**C-011
#SGBQ 012806 3/
STUART B UTGAARD
CEO
SPORTSMAN WAREHOUSE S386B
7035 S 185 W 11/7
MIDVALE UT 84047-3706

Academy Sports & Outdoors

DIMENSION	RESULT
PAST 12 MONTH SHOPPING	
YES	[illegible]
REASONS FOR SHOPPING	
CONVENIENT STORE LOCATION	[illegible]
WIDE SELECTION	[illegible]
EVERYDAY LOW PRICES	[illegible]
QUALITY OF THE MERCHANDISE	[illegible]
SPECIAL SALES, PROMOTIONS OR DISCOUNTS	[illegible]
OVERALL REPUTATION OF STORE	[illegible]
ONE-STOP SHOPPING	[illegible]
ATMOSPHERE/OVERALL SHOPPING ENVIRONMENT	[illegible]
CUSTOMER SERVICE	[illegible]

FAVORABLE WORD-OF-MOUTH REFERRALS	[illegible]
IMPULSE PURCHASE—SAW IT AND BOUGHT IT	[illegible]
KNOWLEDGE/EXPERTISE OF THE SALESPEOPLE	[illegible]
OTHER	[illegible]
ASSESSMENT OF SERVICE	
NET: EXCELLENT/GOOD	[illegible]
EXCELLENT	[illegible]
GOOD	[illegible]
AVERAGE	[illegible]
POOR	[illegible]
PERCEPTIONS OF PRICE	
TOO HIGH	[illegible]
FAIR	[illegible]
BARGAIN	[illegible]

BRAND/MODEL PREDISPOSITION	
LOOKING FOR SPECIFIC BRAND/MODEL	[illegible]
PRODUCT PURCHASED	
FOOTWEAR	[illegible]
APPAREL	[illegible]
EQUIPMENT	[illegible]
OTHER	[illegible]
NOTHING	[illegible]
FUTURE SHOPPING INTENT	
NET: VERY/SOMEWHAT LIKELY	[illegible]
VERY LIKELY	[illegible]
SOMEWHAT LIKELY	[illegible]
NOT VERY LIKELY	[illegible]
NOT AT ALL LIKELY	[illegible]

The Athletes Foot

DIMENSION	RESULT
PAST 12 MONTH SHOPPING	
YES	[illegible]
REASONS FOR SHOPPING	
CONVENIENT STORE LOCATION	[illegible]
WIDE SELECTION	[illegible]
QUALITY OF THE MERCHANDISE	[illegible]
OVERALL REPUTATION OF STORE	[illegible]
SPECIAL SALES, PROMOTIONS OR DISCOUNTS	[illegible]
ONE-STOP SHOPPING	[illegible]
CUSTOMER SERVICE	[illegible]
IMPULSE PURCHASE—SAW IT AND BOUGHT IT	[illegible]
EVERYDAY LOW PRICES	[illegible]

FAVORABLE WORD-OF-MOUTH REFERRALS	[illegible]
ATMOSPHERE/OVERALL SHOPPING ENVIRONMENT	[illegible]
KNOWLEDGE/EXPERTISE OF THE SALESPEOPLE	[illegible]
OTHER	[illegible]
ASSESSMENT OF SERVICE	
NET: EXCELLENT/GOOD	[illegible]
EXCELLENT	[illegible]
GOOD	[illegible]
AVERAGE	[illegible]
POOR	[illegible]
PERCEPTIONS OF PRICE	
TOO HIGH	[illegible]
FAIR	[illegible]
BARGAIN	[illegible]

BRAND/MODEL PREDISPOSITION	
LOOKING FOR SPECIFIC BRAND/MODEL	[illegible]
PRODUCT PURCHASED	
FOOTWEAR	[illegible]
APPAREL	[illegible]
EQUIPMENT	[illegible]
OTHER	[illegible]
NOTHING	[illegible]
FUTURE SHOPPING INTENT	
NET: VERY/SOMEWHAT LIKELY	[illegible]
VERY LIKELY	[illegible]
SOMEWHAT LIKELY	[illegible]
NOT VERY LIKELY	[illegible]
NOT AT ALL LIKELY	[illegible]

Bass Pro Shops

DIMENSION	RESULT
PAST 12 MONTH SHOPPING	
YES	[illegible]
REASONS FOR SHOPPING	
WIDE SELECTION	[illegible]
ATMOSPHERE/OVERALL SHOPPING ENVIRONMENT	[illegible]
QUALITY OF THE MERCHANDISE	[illegible]
OVERALL REPUTATION OF STORE	[illegible]
CONVENIENT STORE LOCATION	[illegible]
ONE-STOP SHOPPING	[illegible]
SPECIAL SALES, PROMOTIONS OR DISCOUNTS	[illegible]
FAVORABLE WORD-OF-MOUTH REFERRALS	[illegible]
KNOWLEDGE/EXPERTISE OF THE SALESPEOPLE	[illegible]

IMPULSE PURCHASE—SAW IT AND BOUGHT IT	[illegible]
CUSTOMER SERVICE	[illegible]
EVERYDAY LOW PRICES	[illegible]
OTHER	[illegible]
ASSESSMENT OF SERVICE	
NET: EXCELLENT/GOOD	[illegible]
EXCELLENT	[illegible]
GOOD	[illegible]
AVERAGE	[illegible]
POOR	[illegible]
PERCEPTIONS OF PRICE	
TOO HIGH	[illegible]
FAIR	[illegible]
BARGAIN	[illegible]

BRAND/MODEL PREDISPOSITION	
LOOKING FOR SPECIFIC BRAND/MODEL	[illegible]
PRODUCT PURCHASED	
FOOTWEAR	[illegible]
APPAREL	[illegible]
EQUIPMENT	[illegible]
OTHER	[illegible]
NOTHING	[illegible]
FUTURE SHOPPING INTENT	
NET: VERY/SOMEWHAT LIKELY	[illegible]
VERY LIKELY	[illegible]
SOMEWHAT LIKELY	[illegible]
NOT VERY LIKELY	[illegible]
NOT AT ALL LIKELY	[illegible]

Big 5 Sporting Goods

DIMENSION	RESULT
PAST 12 MONTH SHOPPING	
YES	[illegible]
REASONS FOR SHOPPING	
CONVENIENT STORE LOCATION	[illegible]
SPECIAL SALES, PROMOTIONS OR DISCOUNTS	[illegible]
EVERYDAY LOW PRICES	[illegible]
WIDE SELECTION	[illegible]
ONE-STOP SHOPPING	[illegible]
QUALITY OF THE MERCHANDISE	[illegible]
OVERALL REPUTATION OF STORE	[illegible]
IMPULSE PURCHASE—SAW IT AND BOUGHT IT	[illegible]
CUSTOMER SERVICE	[illegible]

FAVORABLE WORD-OF-MOUTH REFERRALS	[illegible]
ATMOSPHERE/OVERALL SHOPPING ENVIRONMENT	[illegible]
KNOWLEDGE/EXPERTISE OF THE SALESPEOPLE	[illegible]
OTHER	[illegible]
ASSESSMENT OF SERVICE	
NET: EXCELLENT/GOOD	[illegible]
EXCELLENT	[illegible]
GOOD	[illegible]
AVERAGE	[illegible]
POOR	[illegible]
PERCEPTIONS OF PRICE	
TOO HIGH	[illegible]
FAIR	[illegible]
BARGAIN	[illegible]

BRAND/MODEL PREDISPOSITION	
LOOKING FOR SPECIFIC BRAND/MODEL	[illegible]
PRODUCT PURCHASED	
FOOTWEAR	[illegible]
APPAREL	[illegible]
EQUIPMENT	[illegible]
OTHER	[illegible]
NOTHING	[illegible]
FUTURE SHOPPING INTENT	
NET: VERY/SOMEWHAT LIKELY	[illegible]
VERY LIKELY	[illegible]
SOMEWHAT LIKELY	[illegible]
NOT VERY LIKELY	[illegible]
NOT AT ALL LIKELY	[illegible]

Sportsman's Warehouse

DIMENSION	RESULT
PAST 12 MONTH SHOPPING	
YES	[illegible]
REASONS FOR SHOPPING	
CONVENIENT STORE LOCATION	[illegible]
WIDE SELECTION	[illegible]
QUALITY OF THE MERCHANDISE	[illegible]
ATMOSPHERE/OVERALL SHOPPING ENVIRONMENT	[illegible]
CUSTOMER SERVICE	[illegible]
EVERYDAY LOW PRICES	[illegible]
SPECIAL SALES, PROMOTIONS OR DISCOUNTS	[illegible]
ONE-STOP SHOPPING	[illegible]
FAVORABLE WORD-OF-MOUTH REFERRALS	[illegible]

OVERALL REPUTATION OF STORE	[illegible]
KNOWLEDGE/EXPERTISE OF THE SALESPEOPLE	[illegible]
IMPULSE PURCHASE—SAW IT AND BOUGHT IT	[illegible]
OTHER	[illegible]
ASSESSMENT OF SERVICE	
NET: EXCELLENT/GOOD	[illegible]
EXCELLENT	[illegible]
GOOD	[illegible]
AVERAGE	[illegible]
POOR	[illegible]
PERCEPTIONS OF PRICE	
TOO HIGH	[illegible]
FAIR	[illegible]
BARGAIN	[illegible]

BRAND/MODEL PREDISPOSITION	
LOOKING FOR SPECIFIC BRAND/MODEL	[illegible]
PRODUCT PURCHASED	
FOOTWEAR	[illegible]
APPAREL	[illegible]
EQUIPMENT	[illegible]
OTHER	[illegible]
NOTHING	[illegible]
FUTURE SHOPPING INTENT	
NET: VERY/SOMEWHAT LIKELY	[illegible]
VERY LIKELY	[illegible]
SOMEWHAT LIKELY	[illegible]
NOT VERY LIKELY	[illegible]
NOT AT ALL LIKELY	[illegible]

The Sports Authority

DIMENSION	RESULT
PAST 12 MONTH SHOPPING	
YES	[illegible]
REASONS FOR SHOPPING	
CONVENIENT STORE LOCATION	[illegible]
WIDE SELECTION	[illegible]
SPECIAL SALES, PROMOTIONS OR DISCOUNTS	[illegible]
UALITY OF THE MERCHANDISE	[illegible]
EVERYDAY LOW PRICES	[illegible]
ONE-STOP SHOPPING	[illegible]
OVERALL REPUTATION OF STORE	[illegible]
ATMOSPHERE/OVERALL SHOPPING ENVIRONMENT	[illegible]
IMPULSE PURCHASE—SAW IT AND BOUGHT IT	[illegible]

CUSTOMER SERVICE	[illegible]
FAVORABLE WORD-OF-MOUTH REFERRALS	[illegible]
KNOWLEDGE/EXPERTISE OF THE SALESPEOPLE	[illegible]
OTHER	[illegible]
ASSESSMENT OF SERVICE	
NET: EXCELLENT/GOOD	[illegible]
EXCELLENT	[illegible]
GOOD	[illegible]
AVERAGE	[illegible]
POOR	[illegible]
PERCEPTIONS OF PRICE	
TOO HIGH	[illegible]
FAIR	[illegible]
BARGAIN	[illegible]

BRAND/MODEL PREDISPOSITION	
LOOKING FOR SPECIFIC BRAND/MODEL	[illegible]
PRODUCT PURCHASED	
FOOTWEAR	[illegible]
APPAREL	[illegible]
EQUIPMENT	[illegible]
OTHER	[illegible]
NOTHING	[illegible]
FUTURE SHOPPING INTENT	
NET: VERY/SOMEWHAT LIKELY	[illegible]
VERY LIKELY	[illegible]
SOMEWHAT LIKELY	[illegible]
NOT VERY LIKELY	[illegible]
NOT AT ALL LIKELY	[illegible]

Zumiez

DIMENSION	RESULT
PAST 12 MONTH SHOPPING	
YES	[illegible]
REASONS FOR SHOPPING	
CONVENIENT STORE LOCATION	[illegible]
QUALITY OF THE MERCHANDISE	[illegible]
ONE-STOP SHOPPING	[illegible]
WIDE SELECTION	[illegible]
SPECIAL SALES, PROMOTIONS OR DISCOUNTS	[illegible]
ATMOSPHERE/OVERALL SHOPPING ENVIRONMENT	[illegible]
OVERALL REPUTATION OF STORE	[illegible]
FAVORABLE WORD-OF-MOUTH REFERRALS	[illegible]
IMPULSE PURCHASE—SAW IT AND BOUGHT IT	[illegible]

KNOWLEDGE/EXPERTISE OF THE SALESPEOPLE	[illegible]
CUSTOMER SERVICE	[illegible]
EVERYDAY LOW PRICES	[illegible]
OTHER	[illegible]
ASSESSMENT OF SERVICE	
NET: EXCELLENT/GOOD	[illegible]
EXCELLENT	[illegible]
GOOD	[illegible]
AVERAGE	[illegible]
POOR	[illegible]
PERCEPTIONS OF PRICE	
TOO HIGH	[illegible]
FAIR	[illegible]
BARGAIN	[illegible]

BRAND/MODEL PREDISPOSITION	
LOOKING FOR SPECIFIC BRAND/MODEL	[illegible]
PRODUCT PURCHASED	
FOOTWEAR	[illegible]
APPAREL	[illegible]
EQUIPMENT	[illegible]
OTHER	[illegible]
NOTHING	[illegible]
FUTURE SHOPPING INTENT	
NET: VERY/SOMEWHAT LIKELY	[illegible]
VERY LIKELY	[illegible]
SOMEWHAT LIKELY	[illegible]
NOT VERY LIKELY	[illegible]
NOT AT ALL LIKELY	[illegible]

*RESULTS BASED ON SMALL SAMPLE—SHOULD BE CONSIDERED DIRECTIONAL INFORMATION ONLY.

UTAH

100

ONE HUNDRED

MOUNTAINWEST VENTURE GROUP

2002

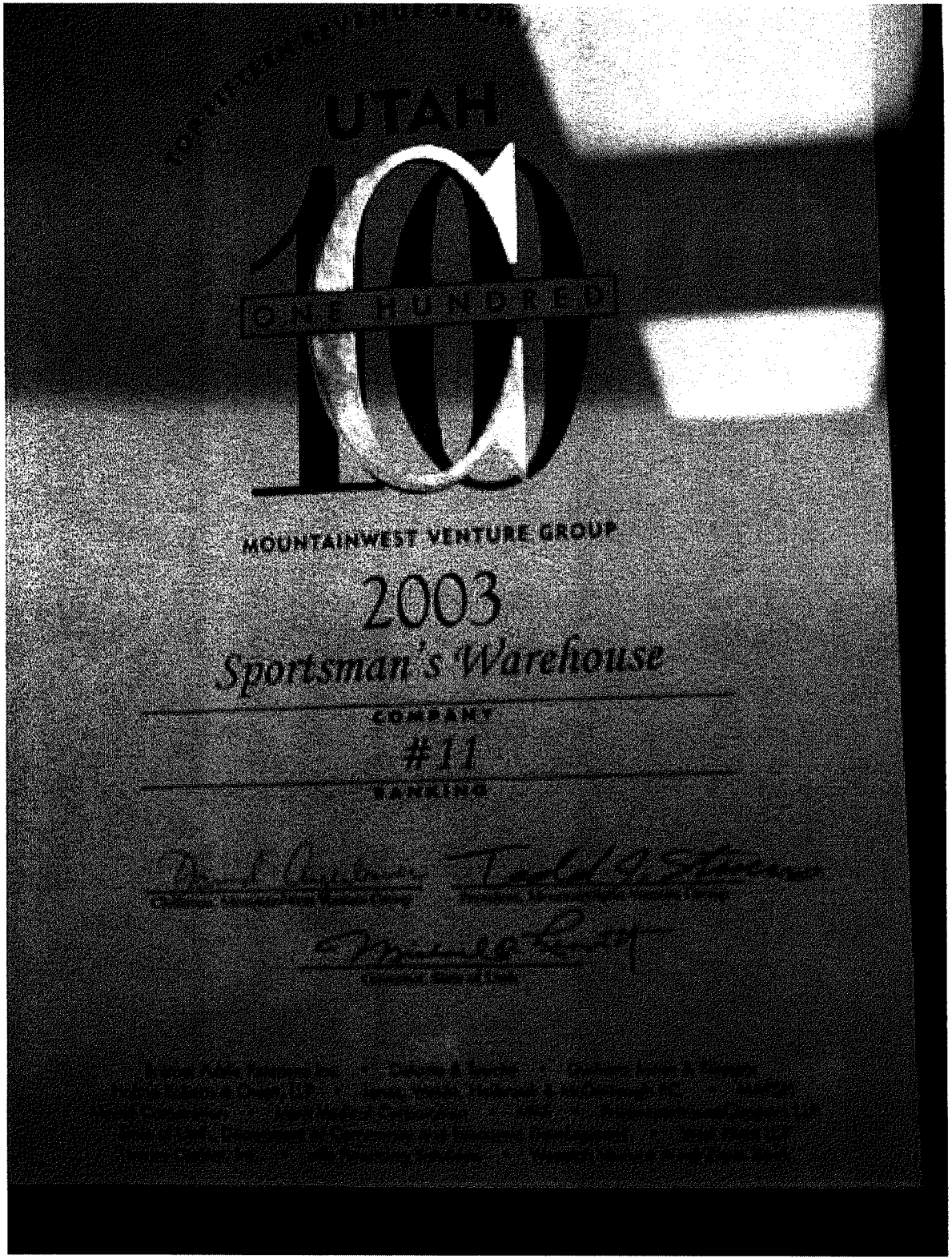
Sportsman's Warehouse

COMPANY

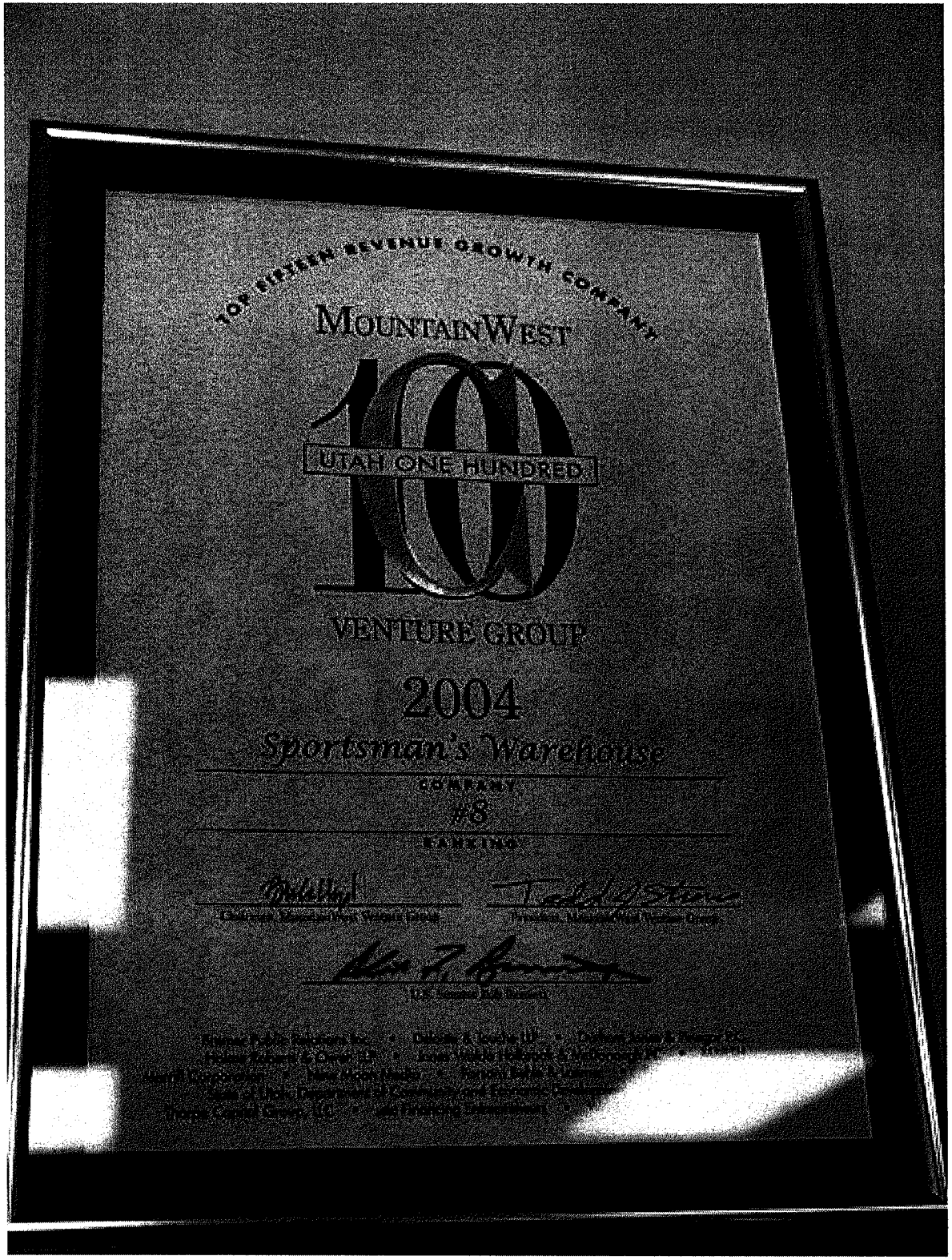
65

RANKING

SP 00193


UTAH
100
ONE HUNDRED
MOUNTAINWEST VENTURE GROUP
2003
Sportsman's Warehouse
COMPANY
#11
RANKING

SP 00191


TOP FIFTEEN REVENUE GROWTH COMPANY
MOUNTAINWEST
100
UTAH ONE HUNDRED
VENTURE GROUP
2004
Sportsman's Warehouse
COMPANY
#8
RANKING

SP 00192

In recognition of their outstanding dedication to conserve the wild turkey and preserve hunting tradition,

The National Wild Turkey Federation

is pleased to honor

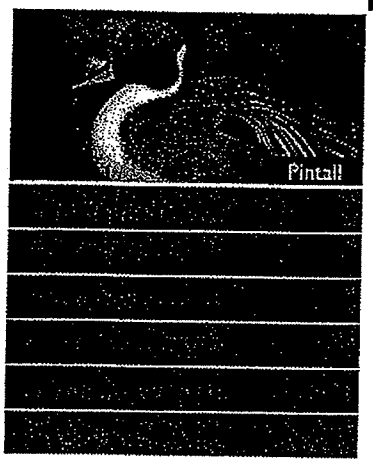
SPORTSMAN'S WAREHOUSE

as an oustanding

"Partner in Conservation"

2003

SP 00214



[go back]

Sportsman's Warehouse Recognized for Contributions to Wetlands Conservation

Ducks Unlimited partner is the only company on record to receive Platinum Teal Award

MEMPHIS, Tenn., August 24, 2006 - In the race against time to preserve continental wetlands, one of Ducks Unlimited's dedicated corporate sponsors has reached an impressive philanthropic milestone. The Sportsman's Warehouse, a DU partner since 1997, recently received a Platinum Teal award for its support and generosity.

To qualify for this honor, a donor must give goods and services valued between $500,000 and $1 million to Ducks Unlimited. Since its first donation to DU, Sportsman's Warehouse has generously given $650,000 to support DU's critical mission to conserve North America's vanishing wetlands.

Wetlands for Tomorrow

"By donating funds to save imperiled wetlands, the Sportsman's Warehouse is helping to ensure the future of the sporting grounds and wildlife habitat that it values so highly," said Ducks Unlimited Executive Vice President Don Young. "Without the support of such dedicated corporate partners, who show true devotion to the spirit of the outdoors, DU's efforts would never have been as successful as they are today."

FREE Cobra 2-Way Radios upon card activation

Beyond simply committing philanthropic support, the Sportsman's Warehouse has provided other invaluable services to DU in its time as a partner. In only a few short years, the company has become a top DU retailer and a frequent host of DU awareness and outreach events, including hunting education classes and cook-offs.

The Sportsman's Warehouse, an indoor oasis for those who love the outdoors, provides a wide selection of high quality fishing, hunting, camping and outdoor products. It is the only company on record to have ever received this award.

Contact: Vicki Tyler
901-758-3859
vtyler@ducks.org

With more than a million supporters, Ducks Unlimited is the world's largest wetlands and waterfowl conservation organization. The United States alone has lost more than half of its original wetlands - nature's most productive ecosystems - and continues to lose more than 80,000 wetland acres each year.

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 18

Related Stories

- Louisiana Wildlife Federation Honors Ducks Unlimited
- North Carolina Wildlife Resources Commission Increases Funding for Waterfowl Conservation
- DU Awarded $400,000 Grant From Attorney General's Office

PENGAD 800-631-6989
DEPOSITION EXHIBIT
TR-38
Hagard

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

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 19

PENGAD 800-631-6989
DEPOSITION EXHIBIT
TR-5
4 pages

Int. Cl.: 42

Prior U.S. Cl.: 101

Reg. No. 1,116,517

United States Patent and Trademark Office

Registered Apr. 10, 1979

SERVICE MARK

Principal Register

BASS PRO SHOPS

Bass Pro Lures, Inc. (Missouri corporation)
503 College
Springfield, Mo.

For: COMBINED DISTRIBUTORSHIP SERVICES IN THE FIELD OF FISHING SUPPLIES, AND RETAIL FISHING SUPPLY STORE SERVICES, in CLASS 101 (INT. CL. 42).

First use on or about Nov. 1, 1971; in commerce on or about Mar. 22, 1972.

Ser. No. 465,291, filed Aug. 10, 1973.

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S
TRIAL BRIEF EX. 20

Int. Cl.: 35

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

Reg. No. 2,193,039

United States Patent and Trademark Office

Registered Oct. 6, 1998

SERVICE MARK
PRINCIPAL REGISTER

BASS PRO TRADEMARKS, L.P. (MISSOURI LIMITED PARTNERSHIP)
1935 SOUTH CAMPBELL
SPRINGFIELD, MO 65898

FOR: RETAIL STORE SERVICES IN THE FIELD OF HUNTING, FISHING AND OUTDOOR GEAR, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).
FIRST USE 1-0-1979; IN COMMERCE 1-0-1979.

OWNER OF U.S. REG. NOS. 1,116,517, 1,950,067, AND 1,952,297.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PRO SHOPS", APART FROM THE MARK AS SHOWN.

SER. NO. 75-173,225, FILED 9-27-1996.

MARY M. MAGNER, EXAMINING ATTORNEY

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S
TRIAL BRIEF EX. 21

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

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 22

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

[Page 2]

1 APPEARANCES
2 For the Plaintiff:
3 Gregory Upchurch
HUSCH & EPPENBERGER
4 190 Carondelet Plaza
Suite 600
5 St. Louis, MO 63105
314.480.1852
6
For the Defendant:
7
David Allgeyer
8 LINDQUIST & VENNUM
4200 IDS Center
9 80 South Eighth Street
Minneapolis, MN 55402
10 612.371.3211
11
12
13
INDEX
14
DALE R. SMITH PAGE
15
Examination by Mr. Upchurch 3
16
Examination by
17
18
19 EXHIBITS
20 NUMBER PAGE
21 No. 1 Sportsman's Warehouse Answers to 7
Petitioner's First Set of
22 Interrogatories
23 No. 2 Registration No. 2,390,099 10
24 No. 3 E-mail String dated 5/9/06 38
25

[Page 3]

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?

[Page 4]

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?

[Page 5]

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

[Page 10]

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.**

[Page 11]

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.**

[Page 12]

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**

[Page 13]

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**

[Page 18]

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**

[Page 19]

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

[Page 20]

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?

[Page 21]

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**

1
2
3
4 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
5
BASS PRO TRADEMARKS LLC,)
6)
Petitioner,)
7) Cancellation No.
v.) 92045000
8)
SPORTSMAN'S WAREHOUSE INC,)
9)
Respondent.)
10
11
12
13
14
15
16
17
18
19 DEPOSITION OF MR. HADEN HOLLEY
20 Taken on behalf of the
21 Petitioner
22 January 23, 2007
23
24
25

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 23

INDEX

PAGE

TITLE PAGE 1

INDEX 2

DEPOSITION INFORMATION 4

APPEARANCES 5

MR. HADEN HOLLEY
DIRECT EXAMINATION BY MR. CAMPBELL 7
CROSS-EXAMINATION BY MR. ALLGEYER 23
REDIRECT EXAMINATION BY MR. CAMPBELL 58

PETITIONER'S EXHIBITS
5 Photographs of Sportsman's Warehouse workshirts and IDs 18

RESPONDENT'S EXHIBITS
1000 Reader's Choice Awards, SP-01067 43
1001 Bass Pro Camping Clearance ad, BPS 002118-002125 47
1002 Bass Pro website, 12/7/06 50

INDEX
(Continued)

PAGE

RESPONDENT'S EXHIBITS (Continued)
1003 Photograph of Sportsman's Center sign, 2/1/06 51
1004 Photograph of Bass Pro Shops Sportsman's Warehouse sign 52
1005 Bass Pro Armed Forces Discount Ad 53
1006 Closeup of Bass Pro Armed Forces discount ad 54
1007 Bass Pro website map of Sportsman's Warehouse, Memphis, Tennesee 56

CERTIFICATE OF REPORTER 62

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

BASS PRO TRADEMARKS LLC,)
)
Petitioner,)
) Cancellation No.
v.) 92045000
)
SPORTSMAN'S WAREHOUSE INC,)
)
Respondent.)

DEPOSITION OF MR. HADEN HOLLEY, produced, sworn, and examined on the part of the Petitioner in an action pending in the United States Patent and Trademark Office, before the Trademark Trial and Appeal Board, in the case of Bass Pro Trademarks LLC, Petitioner, versus Sportsman's Warehouse Inc, Respondent, at 10:00 a.m. on Tuesday, January 23, 2007, at the law offices of Husch & Eppenberger, 1949 East Sunshine, Suite 2-300, Springfield, Missouri, before KAREN S. ROGERS, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public in and for the State of Missouri.

APPEARANCES

For Petitioner:
MR. BRUCE CAMPBELL
HUSCH & EPPENBERGER LLC
190 Carondelet Plaza, Suite 600
St. Louis, Missouri 63105
(314) 480-1642
trademark@husch.com

For Respondent:
MR. DAVID A. ALLGEYER
LINDQUIST & VENNUM PLLP
80 South 8th Street, 4200 IDS Center
Minneapolis, MN 55402
(612) 371-3216
dallgeyer@lindquist.com

Page 6

APPEARANCES
(Continued)

Court Reporter:
MS. KAREN S. ROGERS, RPR, CCR No. 846
MIDWEST LITIGATION SERVICES
1911 South National Avenue, Suite 402
Springfield, Missouri 65804
(417) 877-9700
krogers@midwestlitigation.com

Page 7

PROCEEDINGS

(Proceedings began at 10:00 a.m. on Tuesday, January 23, 2007, with appearances as noted.)
(The witness was placed under oath by the court reporter.)
* * * * *
MR. HADEN HOLLEY,
of lawful age, having been called as a witness and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. CAMPBELL:
Q. Sir, can you please state your full name for the record?
A. It's Myers Haden Holley Junior.
Q. Where do you currently work?
A. Bass Pro Shops Sportsman's Warehouse, Memphis, Tennessee.
Q. What is your current title?
A. General manager.

Page 8

Q. How long have you been the general manager of the Memphis Bass Pro Sportsman's Warehouse?
A. Since mid-August 2005.
Q. What jobs did you hold prior to becoming the general manager of the Bass Pro Sportsman's Warehouse?
A. I was a district manager for Wal-Mart Stores.
Q. And how long did you work for Wal-Mart?
A. All total, about 24 and a half years, 25 years. I forget. Somewhere in that range.
Q. And geographically where did you work when you worked for Wal-Mart?
A. Mainly the southeastern United States.
Q. Where did you live just prior to becoming employed by Bass Pro Sportsman's Warehouse?
A. Olive Branch, Mississippi.
Q. Is that near Memphis, Tennessee?
A. It's about -- I live about a mile and a half from the state line.
Q. Could you please describe your responsibilities as general manager of that Memphis Bass Pro Shops Sportsman's Warehouse store?
A. The operations, the merchandising, the financial, and I guess of course the customer service

Page 9

of the store, the total operations.
Q. Okay. And do you have a staff that works for you?
A. Yes.
Q. And who is on your staff?
A. I have a merchandise manager. I have a operations manager. I have a human resource manager. Then I have assistant managers, GSMs, as far as the merchandising. And a front-end manager also. Support group.
Q. Okay. In the course of performing your duties as general manager, do you interact directly with customers?
A. Yes.
Q. Could you describe the interactions you have with customers, just generally?
A. Greeting, sales of course, customer service, handling complaints.
Q. Okay. Do customers on occasion bring complaints or concerns directly to your attention?
A. Yes.
Q. Is that frequent or is that very rare that customers come directly to you with complaints?
A. Often, I would say.
Q. Can you give me some examples of the

Page 26

1 A. No, not -- no. Just, you know, "Why are
2 your prices -- why are your store's prices different?"
3 Q. And did they all say your stores?
4 A. Yes, sir.
5 Q. And you took that to mean they were
6 talking about you meaning they're the same store?
7 A. Yes, sir. Yes, sir.
8 Q. Did you clarify to say, "What makes you
9 think that we own both those stores?" or anything like
10 that?
11 A. We also make sure that we, you know,
12 told the customer the truth, the difference or what
13 have you.
14 Q. And when you did that, did they seem to
15 understand that?
16 A. Yes, sir.
17 Q. Okay. I believe you mentioned that
18 there was a job applicant that you concluded had
19 thought that he or she had applied for employment in
20 Winchester?
21 A. Yes, sir.
22 Q. How did -- how did that come to you?
23 They didn't talk to you, did they?
24 A. Through my -- through my HR person and
25 all. And I tried to contact the applicant, you know,

Page 27

1 about his job or what have you.
2 Q. And you never were able to contact the
3 applicant?
4 A. No, I never was able to reach the
5 customer, or the applicant.
6 Q. Was this something that the HR person
7 told you about?
8 A. Initially, yes.
9 Q. Okay. But did you -- you've never spoke
10 to that person though?
11 A. No.
12 Q. Did you see a piece of paper or
13 anything?
14 A. Yes, sir, we have the application.
15 Q. Did you provide that to your lawyers so
16 that that could be produced to us?
17 A. To my knowledge it was.
18 MR. ALLGEYER: For the record, I don't --
19 we've looked, and we don't seem to have that.
20 MR. CAMPBELL: Okay. I'll check with my
21 office. I know I personally haven't seen it.
22 MR. ALLGEYER: Okay.
23 Q. Now you mentioned something about -- by
24 the way, how many times would you say you personally
25 spoke to customers where they said to you, "Why are

Page 28

1 your prices different between different stores?"
2 A. I'd say 6 to 10.
3 Q. And that was in what time frame?
4 A. This past 2006.
5 Q. Okay. Is that from the beginning of
6 2006 to the end of 2006?
7 A. No, I would say more so toward the --
8 toward the holiday season, the hunting seasons.
9 Q. Okay. Because through August of 2006,
10 according to your deposition, you hadn't talked to
11 anybody about that, right?
12 A. Right.
13 Q. Okay. So this happened sometime after
14 your deposition?
15 A. Right.
16 Q. And it did not happen at all --
17 A. Right.
18 Q. -- from the time you started the store
19 in 2005 until your deposition was taken in August of
20 2006?
21 A. Right.
22 Q. Do you --
23 A. I had several during the holiday times.
24 Q. Okay. Now did you have any in the
25 holidays of 2005?

Page 29

1 A. Not personally.
2 Q. Okay. So you didn't have any personal
3 interactions of that type since you began your
4 employment in August of 2005, right, until the holiday
5 season of 2006, is that correct?
6 A. Not that I can recall.
7 Q. Okay. And then for some reason, you now
8 recall that there were six during the holiday season
9 of 2006?
10 A. At least, yes.
11 Q. Were there any differences that you were
12 aware of between your advertising or anything else in
13 2005 and 2006?
14 A. Not to my knowledge, no.
15 Q. One of the other things you mentioned
16 were coupons. How many coupons did you personally
17 discuss with customers?
18 A. Several for sure. Because they had --
19 it was like $10 off a $50 purchase was the most common
20 coupon.
21 As far as personally, I would say four or
22 five. I had phone calls about them. But probably
23 four or five, as far as personal.
24 Q. Now when people bring in those coupons,
25 you do accept them, do you not?

Page 30

1 A. Yes, sir, we have. Yes.
2 Q. And that's -- I believe you said in your
3 deposition it's not a policy, but it's sort of a
4 practice?
5 A. Kind of a competitive, yes.
6 Q. Mm-hmm. Now how is it when they -- when
7 they come in and bring a coupon, do you just assume
8 that if we bring a Sportsman's Warehouse coupon to a
9 Bass Pro Sportsman's Warehouse, they're confused
10 between the two? Is that the basis for your thinking
11 there's some confusion?
12 A. Usually the cashier finds out when they
13 explain that it's per se not our coupon and then
14 that's -- that's when the communication starts.
15 Q. Okay. And I don't want to know what the
16 cashiers say because that's hearsay.
17 A. Sure.
18 Q. I'd like to know what people have told
19 you in the four or five instances you've mentioned.
20 A. Just that they thought it was the same
21 company. They thought it was our coupon or what have
22 you.
23 Q. Okay. When was the first time that that
24 happened?
25 A. Probably right after the outdoor show.

Page 31

1 They had a mid-south outdoor show in September of 2006
2 of course.
3 We had a booth at the event. They --
4 Sportsman's Warehouse company had a booth at the
5 event. And they were passing out a lot of coupons and
6 what have you at that -- at that particular function.
7 And I know we had a lot come in after that.
8 Q. So but you personally had four or five?
9 A. Yes, sir, yeah, that asked questions
10 about them, yes.
11 Q. Okay. When was the last time that
12 happened?
13 A. Oh --
14 Q. That you were personally involved with.
15 A. Right before Christmas, I had a
16 gentleman come in right before Christmas using one on
17 a firearm purchase or wanting to, you know, buy a
18 firearm.
19 Q. Now again, how did he present that to
20 you? Did he say -- did he just give you the coupon
21 and say, "Here you go"?
22 A. I was signing off on the 4473 for the
23 paperwork. Took him down to the register. And he
24 said, "Hey, I want to use this coupon."
25 And then I went into the spiel that, you

Page 32

1 know, that's -- that's not our company's coupon and
2 explained the difference or what have you about it.
3 Q. And in the end, he was able to get the
4 discount?
5 A. Yes, sir. I did honor it.
6 Q. Now, did you ever question it and say,
7 "Well, have you heard from others that we accept
8 Sportsman's Warehouse coupons here at Bass Pro
9 Sportsman's Warehouse?" Did you ever question him on
10 that?
11 A. No, sir.
12 Q. How many people -- well, do you have a
13 feel for how many transactions take place in Bass Pro
14 Sportsman's Warehouse, your store, in a year?
15 I recognize you're not going to know down to
16 the penny or the transaction or whatever, but how
17 many?
18 A. I just looked at those numbers. I don't
19 have the actual numbers for the year. But probably
20 about 300 and -- 300 plus, I guess, just a ballpark
21 figure last year.
22 Q. 300 --
23 A. Thousand.
24 Q. 300,000, okay, transactions last year?
25 A. Yeah. And I may be way off. I'm just

Page 33

1 kind of guessing.
2 Q. Do you know what your gross sales were
3 last year?
4 A. Yes, sir.
5 Q. What was that?
6 A. 25.6 million.
7 Q. Okay. 25.6 million. Okay. And how
8 about the year before?
9 A. About 26.3 or 4, somewhere in that
10 range, million.
11 Q. Okay. About the same number of
12 transactions?
13 A. I'm not sure, sir.
14 Q. Okay.
15 A. I would say a little less.
16 Q. About 3 point million less -- or .3
17 million less.
18 A. Yeah.
19 Q. No, I understand. Do you sell boats at
20 your location?
21 A. Yes, sir, we have a separate -- it's in
22 our building, Tracker -- we call it the Tracker store,
23 but yes.
24 Q. There aren't any Sportsman's Warehouse,
25 my client Sportsman's Warehouse, that sell any large

Page 34

1 number of boats, right?
2 A. Not -- I've seen boats at them, but I
3 don't think it's per se them selling them. I think
4 it's another boat dealer maybe.
5 Q. In the Winchester store, do they have
6 boats?
7 A. I have seen them on occasion, but once
8 again it may be an event or something like that.
9 Q. Not like your Tracker operation?
10 A. No, sir.
11 Q. And how about at the South Haven store,
12 have you seen them selling boats anywhere near like
13 the Tracker operation that you have?
14 A. No, sir.
15 Q. You mentioned the sort of average
16 transaction price. I think you said around $55?
17 A. Right.
18 Q. Let me discuss with you just a minute
19 the sort of range of prices that are available in a
20 Bass Pro store.
21 A. Okay.
22 Q. What's the sort of cheapest thing you
23 can buy?
24 A. Off the top of my head, a 49 cent Moon
25 Pie, but that's off the top of my head.

Page 35

1 Q. That sounds about right.
2 A. That's off the top of my head right now.
3 Q. What's the upper end of expense for
4 firearms and that sort of thing?
5 A. I mean not per se -- I mean we carry
6 some guns in the $3,000 range.
7 Q. Mm-hmm.
8 A. I mean we're not a fine gun room store
9 as some of our other stores, but we carry some of them
10 for in the $3,000 range.
11 Q. Is it fair to say that there are quite a
12 number of things in the low price range, a lot of
13 things in the middle price range?
14 A. Yes. Yes, sir.
15 Q. And then there's some high-priced
16 products?
17 A. Mm-hmm.
18 Q. And there's quite a range?
19 A. Yes, sir.
20 Q. And I take it before somebody is going
21 to buy a $3,000 gun, they probably spend a fair amount
22 of time talking to you?
23 A. Well, yes and no.
24 Q. Yes. Some people know what they want, I
25 suppose, huh?

Page 36

1 A. Via the Internet, yeah, you know.
2 Q. You mentioned that among other things
3 you had some responsibility for advertising,
4 marketing, that sort of thing, for your store. Do you
5 remember that testimony?
6 A. The execution, yes, sir.
7 Q. Mm-hmm.
8 A. Yes, sir.
9 Q. In your tenure with Bass Pro, have you
10 ever received any training on the proper use of
11 trademarks in advertising?
12 A. Not with Bass Pro.
13 Q. Okay. Did you with Wal-Mart?
14 A. Yes.
15 Q. Just give me a little feel for what that
16 kind of training was.
17 A. Well, just -- you know, I guess the
18 biggest thing we were -- we don't want to ever distort
19 the logo or what it represents, you know, the ethics
20 part of it, I guess.
21 But more on the ethics side, I would say.
22 Business ethics side.
23 Q. Okay. Before I leave this issue of
24 customers who had complaints or issues about whether
25 your store pricing was the same as the Winchester or

Page 37

1 South Haven, yeah --
2 A. Yes, sir.
3 Q. -- store. Apart from what you've told
4 us now, there were some issues with respect to
5 coupons. I think you said you handled four or five of
6 those, correct?
7 A. Yes, sir. Yes, sir.
8 Q. And there was -- oh, there's an issue
9 with gift cards. Did you personally handle any gift
10 card issues?
11 A. No, sir.
12 Q. So that's something somebody else told
13 you?
14 A. Yes, sir. Yes, sir.
15 Q. And you're aware, by the way, that on
16 the back of the gift card, there's a line of different
17 listings and one of the lines says Sportsman's
18 Warehouse with the circle R after it.
19 Have you seen that on the back of the gift
20 card?
21 A. I believe so, yes, I have.
22 Q. And apart now from the pricing -- oh.
23 You talked a little about the location of stores, I
24 believe.
25 Did you have any personal discussions with

1
2
3 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
4
BASS PRO TRADEMARKS LLC,)
5)
Petitioner,)
6) Cancellation No.
v.) 92045000
7)
SPORTSMAN'S WAREHOUSE INC,)
8)
Respondent.)
9
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12
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16 DEPOSITION OF MR. STAN LIPPELMAN
17 Taken on behalf of the
18 Petitioner
19 January 23, 2007
20
21
22
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24
25

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 24

INDEX

	PAGE
TITLE PAGE	1
INDEX	2
DEPOSITION INFORMATION	4
APPEARANCES	5
MR. STAN LIPPELMAN	
DIRECT EXAMINATION BY MR. CAMPBELL	7
CROSS-EXAMINATION BY MR. ALLGEYER	27
Petitioner's Exhibits	
7 Sales Ad, 11/4 - 11/21, BPS 001620 - 001631	16
8 Sales Ad 8/6/05 - 8/14/05, BPS 002014 - 002065	20
13 Bass Pro Sales Ad, Macon, Georgia, 10/26/06	25
9 Sales Ad, 11/1/04 - 11/11/04, BPS 001548 - 001551	32

INDEX
(Continued)

	PAGE
Respondent's Exhibits	
1005 Bass Pro Armed Forces Discount Ad	36
1006 Closeup of Bass Pro Armed Forces discount ad	38
1008 Bass Pro pamphlet, Duluth, Georgia	42
1009 Bass Pro Clearance Sale Ad, 1/3/05, BPS 001406 - 001411	44
CERTIFICATE OF REPORTER	49

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

BASS PRO TRADEMARKS LLC,)
)
Petitioner,)
) Cancellation No.
v.) 92045000
)
SPORTSMAN'S WAREHOUSE INC,)
)
Respondent.)

DEPOSITION OF MR. STAN LIPPELMAN, produced, sworn, and examined on the part of the Petitioner in an action pending in the United States Patent and Trademark Office, before the Trademark Trial and Appeal Board, in the case of Bass Pro Trademarks LLC, Petitioner, versus Sportsman's Warehouse Inc, Respondent, at 1:00 p.m. on Tuesday, January 23, 2007, at the law offices of Husch & Eppenberger, 1949 East Sunshine, Suite 2-300, Springfield, Missouri, before KAREN S. ROGERS, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public in and for the State of Missouri.

APPEARANCES

For Petitioner:
MR. BRUCE CAMPBELL
HUSCH & EPPENBERGER LLC
190 Carondelet Plaza, Suite 600
St. Louis, Missouri 63105
(314) 480-1642
trademark@husch.com

For Respondent:
MR. DAVID A. ALLGEYER
LINDQUIST & VENNUM PLLP
80 South 8th Street, 4200 IDS Center
Minneapolis, MN 55402
(612) 371-3216
dallgeyer@lindquist.com

APPEARANCES
(Continued)

Court Reporter:
MS. KAREN S. ROGERS, RPR, CCR No. 846
MIDWEST LITIGATION SERVICES
1911 South National Avenue, Suite 402
Springfield, Missouri 65804
(417) 877-9700
krogers@midwestlitigation.com

PROCEEDINGS

(Proceedings began at 1:00 p.m. on Tuesday, January 23, 2007, with appearances as noted.)
(The witness was placed under oath by the court reporter.)
* * * * *
MR. STAN LIPPELMAN,
of lawful age, having been called as a witness and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. CAMPBELL:
Q. Sir, can you please state your full name for the record?
A. Uh-huh. Stan Lippelman.
Q. Okay. Where do you currently work?
A. Bass Pro Shops in Springfield, Missouri.
Q. And what is your position with Bass Pro Shops?
A. I'm the vice president of marketing.

Q. How long have you been the vice president of marketing for Bass Pro Shops?
A. Three years in February.
Q. Okay. Have you ever held any other position with Bass Pro Shops other than vice president of marketing?
A. No.
Q. Could you please give a brief description of your responsibilities as vice president of marketing for Bass Pro Shops?
A. Mm-hmm. I'm responsible for all of the store advertising and brand advertising for Bass Pro Shops, as well as our public relations group, our corporate incentives group, and our production group, our video production group.
Q. Okay. How many employees do you have under your supervision?
A. Roughly between 50 and 60.
Q. Okay. And can you describe what those employees, what they do?
A. Uh-huh. Separated out into a couple different groups. My -- the core marketing group is divided into three groups.
Brand marketing, and I have a director over that area. They do all the advertising for our

proprietorary brands, like Red Head, Johnny Morris, Bass Pro Shops, our products as well as our partnerships, like Toyota, Anheuser-Busch, and those sorts of programs.
Our customer acquisition team which is responsible for broad-reach marketing, and I have a senior manager who runs that group. And that includes all of our broad-reach marketing like television advertising, radio advertising, billboards, anything that's targeted towards new customers.
Our customer retention and development group, which is headed by a director of that group, and that group is responsible for all of our targeted marketing and as well as some of our analytics. So our direct mail, segmented programs, loyalty program, credit card programs, that sort of thing.
Public relations group, which is headed by a director, and they do all of our corporate public relations as well as some of our corporate affairs, for lack of a better way to say it. Partnerships with Ducks Unlimited, National Wild Turkey Federation, and those sorts of groups.
THE REPORTER: With Ducks Unlimited --
THE WITNESS: National Wild Turkey Federation, sorry.

Page 30

1 Warehouse?
2 A. I would say yes. I mean there's always
3 been a clear difference between those stores from a
4 services and a visual aspect. At least from my
5 perspective I would say yes.
6 Q. Okay. Now in terms of Sportsman's
7 Warehouses, the first of those was in Atlanta,
8 Georgia, is that right?
9 A. I believe so, yes.
10 Q. Okay. And do you know when that store
11 was closed?
12 A. I do not. That was before my employment
13 at Bass Pro.
14 Q. Okay. And then was the next one in
15 Memphis or St. Charles, do you remember?
16 A. Again, before my employment at Bass Pro
17 Shops, but I believe the -- I believe the Memphis
18 store was open before the St. Charles store.
19 But I could be wrong on that. That's purely
20 speculation.
21 Q. How many square feet is the Memphis
22 store, do you know, roughly?
23 A. As I recall, it's roughly just under
24 90,000 square feet.
25 Q. Just under 90,000. Okay. And how about

Page 31

1 the St. Charles store?
2 A. I believe about the same.
3 Q. Just under 90,000?
4 A. I believe so. And again, I could be
5 wrong, but --
6 Q. And then I think you -- we just looked
7 at the Macon store. How many square feet is that one?
8 A. I honestly don't know the square footage
9 of Macon.
10 Q. Okay.
11 A. I would just be guessing if I gave you a
12 number.
13 Q. Okay. Did you have any discussions with
14 anyone after the sign was changed in the Memphis store
15 and the advertising was changed as to changing the
16 sign back?
17 A. Yes. I had spoken to I know Bruce Teter
18 who worked with us in our retail group who had told me
19 that the sign was being changed back.
20 And honestly I'm not sure if there's anyone
21 else I spoke to about the sign being changed back. It
22 was my understanding that the sign was being changed
23 back.
24 Q. But to date it has not been?
25 A. To my knowledge -- to my understanding,

Page 32

1 yes.
2 Q. I think one of these ads -- let me see,
3 Exhibit 7. I'm sorry. Exhibit 9. I apologize.
4 A. Oh, that's okay.
5 (Petitioner's Exhibit 9,
6 Sales Ad, 11/1/04 -
7 11/11/04, BPS 001548 -
8 001551, was introduced by
9 Mr. Allgeyer.)
10 MR. ALLGEYER:
11 Q. That was in the Memphis Commercial
12 Appeal?
13 A. (The witness turns to the requested
14 page.) Yes.
15 Q. Now before you decide what -- where
16 you're going to advertise your stores, do you sort of
17 check out the circulation and make sure that the --
18 that the particular newspaper that you're going to use
19 is one that's of wide circulation, generally
20 available, all that sort of thing?
21 A. Not necessarily. It's less about wide
22 circulation than it is targeted circulation.
23 Q. Okay.
24 A. We -- and that strategy has evolved over
25 my tenure at Bass Pro Shops.

Page 33

1 But we typically look at the concentration of
2 potential outdoorsmen, via it hunter, fishermen,
3 campers, that kind of thing, and pick the paper with
4 the best circulation of a particular ZIP Code.
5 We can use several papers actually for the
6 same market but not use a hundred percent of any of
7 them.
8 Q. Okay. So is it fair for me to assume
9 since you advertise in the Memphis Commercial Appeal,
10 that through whatever means you use, you determined
11 that this is one that's reasonably calculated to reach
12 hunters, fishermen, outdoors type people, so forth?
13 A. At that time, yes. But as I said, the
14 strategy has evolved over my tenure at Bass Pro Shops.
15 Q. Okay. Were you at all aware of a poll
16 that was done in the Commercial Appeal, the Best of
17 Memphis?
18 A. No, I'm not.
19 Q. Okay. I take it that you've become
20 pretty well aware of the range of products and
21 services and price points that are offered at the
22 various Bass Pro Shops throughout the country as part
23 of your advertising?
24 A. Relatively speaking. I won't say all of
25 them because it varies greatly by market.

Page 34

Q. Okay.
A. But relatively speaking.
Q. And just to give me a feel, can you tell me sort of what the cheapest kind of price range is for goods that might be sold at Bass Pro Shops?
A. We would have things under a dollar, lures and that sort of thing.
Q. Okay. And what's sort of the upper price range of products?
A. Depends on the store, but in some stores we would have fine guns that would go for $30,000. So it varies by store. Fine gun rooms would be the most expensive things we sell short of boats.
Q. Okay. And the boats, of course those can be extremely expensive?
A. Yes. Depending on --
Q. What's the price? I don't have any boats.
A. You know, I honestly don't know. I know we sell a boat called Myacht, which is a very large and my understanding expensive boat well outside of my means, so I couldn't tell you what the price is.
And I know we sell some saltwater boats and some very expensive bass fishing boats, but I couldn't tell you the price of the boats.

Page 35

Q. Of the 38 Bass Pro Shops throughout the country, how many of them sell large boats? Is it all of them or most of them or --
A. I would say most.
Q. Most, okay. And is it always through Tracker Marine?
A. Yes.
Q. Okay.
A. There are obviously multiple brands underneath Tracker Marine. It's under the Tracker Marine group.
Q. Okay. So does the Sportsman's -- well, we can debate on whether it's a Sportsman's Center, Sportsman's Warehouse.
Whatever it is, the sign outside says Sportsman's Center in Memphis. They have boats there too, don't they?
A. That's my understanding, yes.
Q. Okay.
A. I've seen them there when I'm there.
Q. Okay. And is that also true in St. Charles?
A. Yes. They have a separate boat center off the main building.
Q. And is that true in Macon as well?

Page 36

A. I have not been to Macon, but I would assume so, yes.
Q. Okay. All right.
A. I'm not sure that any of our stores don't sell some sort of boats. Outlet store.
Q. Now by the way, we were talking about pricing. I take it that between the cheapest goods and these sort of very expensive guns or boats there's a fairly broad array of products and services in between?
A. Mm-hmm.
Q. Some in the hundreds of dollars, maybe some in the thousands of dollars, is that fair?
A. Mm-hmm. Yes, I would agree with that.
Q. Okay. I'm going show you what we've already marked as Exhibit 1005, and this is an arm's -- Armed Forces discount promotion. (Mr. Allgeyer hands the witness a document.) Are you familiar with that?
(Respondent's Exhibit 1005, Bass Pro Armed Forces Discount Ad, was introduced by Mr. Allgeyer.)
A. Mm-hmm. Yes, I am.

Page 37

MR. ALLGEYER:
Q. Is that something that's offered through all 38 Bass Pro Shops stores throughout the country?
A. Yes, I believe so. The one exception could be our Toronto store.
Q. Okay.
A. In Canada.
Q. Okay.
A. But I believe we offer something similar, it's just not this exactly.
Q. Okay. And when did that promotion start?
A. It's been going on for a few years. It's changed in terms of the timing and when we offer it and that sort of thing.
But in terms of the Armed Forces discount, we've been doing it for several years.
Q. Okay. Quite some time. How about that particular form of it?
A. I believe this particular execution of it where it runs from the 15th to the 22nd of each month started in July of 2006.
Q. Okay.
A. After July 4th.
Q. And then how do you -- is this in print

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.	

COPY

DEPOSITION

OF

JAMISON BRYAN HENSLEY

THURSDAY, JUNE 1, 2006

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

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 25

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.

APPEARANCES

FOR THE PETITIONER:
MR. BRUCE E. CAMPBELL, II
Attorney at Law
bruce.campbell@husch.com
HUSCH & EPPENBERGER, LLC
190 Carondelet Plaza
Suite 600
St. Louis, Missouri 63105-3441
(314) 480-1500

FOR THE RESPONDENT:
MR. CHRISTOPHER RUSSELL SMITH
Attorney at Law
CSMITH@LINDQUIST.COM
LINDQUIST & VENNUM, PLLP
4200 IDS Center
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

INDEX

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

COURT REPORTER'S CERTIFICATE PAGE 42

1 THE COURT REPORTER: The time is
2 12:45 p.m. This is the beginning of the deposition
3 of Mr. Jamie Hensley.
4 MR. SMITH: Will you state your full
5 name for the record?
6 THE WITNESS: Jamison Bryan Hensley.
7 THE COURT REPORTER: Excuse me. I need
8 to swear the witness.
9 MR. SMITH: Oh, I'm sorry.
10 THE COURT REPORTER: That's okay.
11 Please, raise your right hand, Mr. Hensley. ...
12 JAMISON BRYAN HENSLEY,
13 having been first duly sworn, was examined and
14 testified as follows:
15 DIRECT EXAMINATION
16 BY MR. SMITH:
17 Q. Now, will you please state your full name for
18 the record?
19 **A. Jamison Bryan Hensley.**
20 Q. Have you ever been deposed before?
21 **A. No, I have not.**
22 Q. Let me go over a couple of basic ground rules
23 just so we're on the same page.
24 Make sure, please, to -- I want you to make
25 sure that you understand each question before you

1 **don't remember the exact location.**
2 Q. And what did you do when you read this?
3 **A. I went to Jim Osborne, my boss.**
4 Q. And what did you discuss with him?
5 **A. I explained to him that there was going to be**
6 **mass confusion amongst our customers, because we were**
7 **Sportsman's Warehouse, as clearly stated on our**
8 **building, and this other company was coming into our**
9 **market with the same name.**
10 Q. When did you first become aware of the present
11 dispute, legal dispute, between the two companies?
12 **A. Here recently, two months ago.**
13 Q. And how did you become aware of that?
14 **A. I received an e-mail stating that I would give**
15 **a deposition.**
16 Q. Okay. Have you ever talked to any other Bass
17 Pro employees about the similarity between the two
18 companies' names or this dispute?
19 **A. No, not about the dispute, I have not.**
20 Q. What about the similarities?
21 **A. Oh, of course.**
22 Q. Can you give me an example? Who for instance
23 have you talked to about it?
24 **A. Multiple employees. I can't give you any names**
25 **for instance. Obviously we've got a customer.**

1 **complaint on the fact that it's very confusing.**
2 **Customers have know us as Sportsman's Warehouse for**
3 **the past almost right at four years.**
4 Q. Okay.
5 **A. And they complain to our employees about it,**
6 **and employees obviously come to me about it.**
7 Q. Have you spoken to this -- to the -- have you
8 spoken to any of your superiors at Bass Pro about the
9 similarity in the names of the two companies?
10 **A. I have spoken to my boss.**
11 Q. And that would be Jim?
12 **A. At the time was Jim, yes.**
13 Q. Anyone else of your superiors?
14 **A. I've got my current boss is Hayden Holly.**
15 Q. Anyone from Bass Pro corporate offices that you
16 spoke to?
17 **A. No, sir. I typically do not deal other that**
18 **with buyers, and I don't discuss, typically,**
19 **competitors with my buyers.**
20 Q. Have you been given any instructions by any
21 superiors at Bass Pro regarding this dispute?
22 **A. No, sir.**
23 Q. Have you been given any instructions from any
24 superiors at Bass Pro regarding trademark usage,
25 generally?

1 **A. No, sir.**
2 Q. What's the current name of the store that you
3 work in now?
4 **A. Bass Pro Shops Sportsman's Warehouse.**
5 Q. And what does the sign say on the front of the
6 building right now?
7 **A. The sign on the front of the building? Well,**
8 **there's currently a sign that says Bass Pro Shops.**
9 **And then over to the left there's a sign that says**
10 **Sportman's Center.**
11 Q. Okay. Has that always said Sportman's Center?
12 **A. No, sir.**
13 Q. What did it say before it said Sportman's
14 Center?
15 **A. Sportsman's Warehouse.**
16 Q. And when did that change take place?
17 **A. Back in the end of July last year, I believe.**
18 **That's an estimated date. I don't know the exact**
19 **date.**
20 Q. Was more than one sign on the building changed
21 from Sportsman's Warehouse to Sportman's Center?
22 **A. On the building, no, sir.**
23 Q. Just one sign?
24 **A. There was one sign, yes, sir.**
25 Q. Do you have any understanding of why the sign

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 29

1 obviously, we couldn't do.
2 I've had people to come in to apply for
3 positions at our location asking for a position at
4 our Winchester location, which obviously we do not
5 have, due to the confusion on the ads they'd put out
6 in the newspaper.
7 I've had customers come in and try to return
8 products with a receipt from the Winchester Road
9 location under the impression that they're at the
10 same place.
11 I have had customers call and complain about
12 the service they received at the Winchester Road
13 location, thinking that we are the same company.
14 I have had customers bring their coupons in out
15 of the newspaper.
16 **Q. Any others?**
17 A. That's part much a brief summary.
18 **Q. Could you describe your reward system?**
19 A. The way the reward system works is, the
20 customer makes certain purchases depending on the
21 time of the month and what we're running, whether
22 we're running double awards points or not. And they
23 get point on an account under their name and phone
24 number, and they're eligible to use those towards
25 merchandise in the store, once they've built up $10

Page 30

1 or more in points.
2 **Q. Do they have a -- do the customers receive a**
3 **card?**
4 A. Yes, sir.
5 **Q. How many complaints on a monthly basis --**
6 **before you changed the sign on the front of the**
7 **building, how many complaints on a monthly basis**
8 **would you estimate that you received regarding the**
9 **similarity between the two stores?**
10 A. That I personally received?
11 **Q. That you know about.**
12 A. That I know about? About 30 or 40 complaints,
13 and that's a rough estimate.
14 **Q. And that's per week?**
15 A. Per month.
16 **Q. And how do you know it was 30 or 40 per month?**
17 A. I just told you, it's a rough estimate. I
18 don't.
19 **Q. Are you basing it on anything?**
20 A. I'm basing that on just a generalization.
21 **Q. Now, I assume you didn't handle 30 to 40**
22 **customer complaints personally.**
23 A. Correct.
24 **Q. Did you hear about customer complaints from**
25 **other employees?**

Page 31

1 A. Oh, yes.
2 **Q. Is there a particular management position that**
3 **handles these more than others?**
4 A. We run a manager-on-duty program. Whoever is
5 the manager on duty handles the complaints at the
6 time. So it's pretty well evenly spread.
7 **Q. Are all these complaints shared with your**
8 **general manager?**
9 A. Yes.
10 **Q. Do you have a written company policy about**
11 **addressing these type of concerns with customers?**
12 A. No.
13 **Q. How do you normally handle, for instance, if a**
14 **customer comes in and is concerned about one of the**
15 **instances you mentioned earlier?**
16 **For instance, if he wants to use a Sportsman's**
17 **Warehouse receipt from our client's store.**
18 A. Sure.
19 **Q. How do you handle that?**
20 A. I've got to call and explain to them it's not
21 the same company, to let them know that they did come
22 into the market with the name, Sportsman's Warehouse
23 that we've been using for right now currently almost
24 four years. And explain to them that their receipts
25 and their purchases there are not valid towards our

Page 32

1 rewards point system.
2 **Q. Do you ever honor any of the receipts or**
3 **coupons?**
4 A. I honor every one of their coupons. Not their
5 receipts towards rewards, because I can't.
6 **Q. Does your company keep a record of coupons that**
7 **are used at the register?**
8 A. It's a generic. It's listed as a competitor's
9 coupon, not as any specific company.
10 But as far as a record goes, no, not to my
11 knowledge. Is there a paper trail? Most definitely.
12 **Q. You described at the register there's a**
13 **competitive coupon selection?**
14 A. Correct.
15 **Q. Do you get other coupons? Do you get coupons**
16 **from other competitors other than Sportsman's**
17 **Warehouse, my client.**
18 A. Sportsman's Warehouse is our only major
19 competitor here in the market, so, no, I don't
20 receive any other coupons. The small Mom-and-Pop
21 Shops don't send coupons out.
22 **Q. Do you keep track of how many competitor**
23 **coupons you receive at the store level?**
24 A. No.
25 **Q. Do you have any knowledge of whether your home**

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Stu Utgaard

From: General Delivery [admin@sportsmanswarehouse.com]
Sent: Tuesday, November 14, 2006 4:00 PM
To: Stu Utgaard
Subject: FW: store opening...

From: phillip easterday [mailto:peasterday40@yahoo.com]
Sent: Tuesday, November 14, 2006 2:24 PM
To: info@sportsmanswarehouse.com
Subject: store opening...

Hi do you have plans to open a store here in Knoxville Tenn... we have a bass pro and a gander mountain...visited your store in Memphis several times while I lived there and I prefer it to the others for selection and price.....Im here now and Chattanooga is tooooo far. Hope to see ya'll soon
thanks
phillip easterday

Everyone is raving about the all-new Yahoo! Mail beta.

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 26

Stu Utgaard

From: General Delivery [admin@sportsmanswarehouse.com]
Sent: Friday, November 24, 2006 10:51 AM
To: 'Dustin Grant'
Cc: Stu Utgaard; Dale Smith; 'Chris'; 'Jeremy Sage'; 'Mike Murray'
Subject: FW: Great Store

From: Bien Camungol [mailto:bc9339@yahoo.com]
Sent: Thursday, November 23, 2006 6:40 AM
To: info@sportsmanswarehouse.com
Subject: Great Store

Sportsman's Warehouse:

I just recently visited your store in Lewisville, Texas and very impressed with the caliber of products and prices your store has to offer. Although the Lewisville store is further away, it would benefit me to visit your store first before I visit Bass Pro or Cabelas. SW provides a more comprehensive customer service and a wider variety of product at a very competitive pricing. Keep up the great work. I am glad to have visited Sportsman's Warehouse.

Regards,
Bien Camungol
Hurst, Texas

P.S. How can I subscribe to your store's weekly ads and coupons? I get the Fort Worth paper and do not see ads from SW. I appreciate your assistance.

Stu Utgaard

From: General Delivery [admin@sportsmanswarehouse.com]
Sent: Thursday, October 19, 2006 6:52 PM
To: Dwayne Leamond
Cc: Stu Utgaard; Dale Smith; Chris Utgaard; 'Jeremy Sage'; 'Matt French'; 'Mike Murray'
Subject: FW: Bass Pro Shop Are you kidding me?

From: Jim Ferguson [mailto:jferguson@suncoastrv.com]
Sent: Thursday, October 19, 2006 11:05 AM
To: info@sportsmanswarehouse.com
Subject: Bass Pro Shop Are you kidding me?

To whom it may concern,

I went online to FredBearOutdoors.com to find a place to purchase a bow. Their store locator pulled up Bass Pro. I called them to make sure they had the bow in stock and they said that they did. I called the next day and asked them to hold it but went I arrived 24 hours later it was a bad experience. It took 20 minutes to get someone to the archery counter, and when he arrived, I found that they had been out of stock for a month. They where doing inventory (beginning of deer season and they do inventory) and it would be next week before they could even order it. The clerk walked away as I was looking at other bows. Having no one to answer my questions, I left.

I called your store on Winchester in Memphis and spoke with Andy in the Archery department. He stated that he did have the bow and would hold it. Upon arrival I found Andy with my bow in vise ready for me. He spent 2 hours with me and answered all of my questions. He dresssed the bow out with every imaginable accessory, paper tuned it and sighted it in. I know it may be store policy to provide these services upon purchasing a product, But his attitude, knowledge and helpfulness made my buying experience a pleasure.

I have since then contacted Fred bears customer service line and told them of my experience. They did say that Sportsmans Warehouse would be added to their dealer locator today.

Thankyou and you now have a new customer.

Jim Ferguson
192 McCray
Byhalia Ms 38611

DEPOSITION EXHIBIT
TR-7
PENGAD 800-631-6989

Dear, Mr.Utgaard

My name is Dave Wood and I love the outdoors like any other hunter and fisherman would. I live near Evansville, Indiana. We are in dire need of a great outdoor store like you have brought to other parts of US. Let me give you a little tour of what sporting goods stores that the Evansville area has to offer us. We have a Dick's sporting goods store that only has very limited supplies for hunters and fisherman. We also have the great Super Wal-Mart that every mid size city in the US has. That's all the sporting good store that Evansville has to offer us. If you want to get anything that worth anything you have over 2 hours to get to Bass Pro Shop in Clarksville,Indiana and Wings Supply in Greenville, Kentucky. As you know the Bass Pro's are just another tourist shopping store that doesn't have much for the hunter or fisherman. Now Wing's in Greenville has a lot of hunting supplies but as I stated they are over 2 hours away to the south. A lot of fellow outdoorsman hunters, fisherman, and campers alike are tired of having to travel to get to a store that carries everything or almost everything they need.

To give you a little information's on Evansville area. We have over 150,000 people living in the area. With the great roadways in I-64 and Hwy.41 in the town a lot of travelers travel through our area every day. Just southwest of Evansville is the best waterfowl area in Indiana called Hovey Lake near Mt. Vernon, Indiana. We also have the second biggest refuge in Kentucky just across the Ohio River in Henderson, Kentucky. Also we have a lot of different wild life management areas scattered about in area for deer hunting, fishing, waterfowl, and ect. And for the fisherman we have Patoka Lake the second biggest Lake in Indiana just about 45 min. drive to the northeast. We also have the famous Kentucky and Barkley Lakes in Western Kentucky just 1 ½ hrs. away too. Then the great Ohio River that divides our great state from Kentucky too.

I guess what I'm trying to say to you is. We need a store like you're here in Evansville, Indiana!!!! We can travel to Gander Mountain, Bass Pro, and a Wing's. But we are tired of traveling to these places and want a store that no one has around our area. So, if this letter gives you any clue how much we need one of your stores. Please bring one of your Sportsman's Warehouse's stores to Evansville, Indiana. Thanks for you time and hope you consider this in the near future.

Sincerely,
Dave Wood
Dave Wood
5770 E CR RD 1200 N
LAMAR, IN 47550

PIER ST. LOUIS, 113 Campbell Plaza, Building A, St. Louis, Missouri 63139
Tel. 314 781-5272 Fax. 314 781-5270

An Entertainment Destination

Mr. Stu Utgaard, Chairman & C.E.O
Sportsman's Warehouse
P. O. Box 10
Star Prairie, WI 54026

Tuesday, October 17, 2006

Re: Pier St. Louis Executive Summary

Dear Mr. Utgaard:
Mr. Tony Daniele requested that I forward the enclosed copy of the Executive Summary for the Pier St. Louis Development per your telephone conversation with him on October 16th, 2006. The Development Plan will explain in detail our current plan for mixed-use development on this 70-acre property.

I would like to bring to your attention a few of what I believe are the more important features of this site. The greatest asset of this unique development is the direct access to both the Mississippi River and Interstate 270. The site lines from the interstate are perfect and the most current traffic counts indicate that more than 68,000 people travel through this section of roadway daily. There is no other undeveloped parcel of this size in the Metropolitan St. Louis area with these attributes.

Our development will be a new "front door" into the State of Missouri. Visibility and accessibility will be unmatched. Also, this site is within 2 hours of all of central and southern Illinois with a population in the immediate area of more of 1 million people. Many of the people in this area would certainly be classified as part of a larger target group (including the Missouri side of the Mississippi River) for the products offered by *Sportsman's Warehouse*. The Bass Pro Shop in St. Charles, Missouri, approximately 20 miles away, is reputed to be one of its best selling locations, including the distinction of outselling the home office in Springfield, Missouri. Cabela's is also opening a location in Hazelwood, Missouri, a little more than 10 miles from our site.

Our site offers the very significant advantage of having excellent access from both sides of the river, providing an opportunity to capture the attention of customer bases in both Illinois and Missouri. As you will note upon your perusal of the executive summary, the site also includes a marina and thusly will have the added advantage of river traffic. Our concept for the development is themed to compliment our river access, and to offer a unique mix of goods, services, cuisine, and entertainment, that would be complimented quite nicely by the addition of a *Sportsman's Warehouse*.

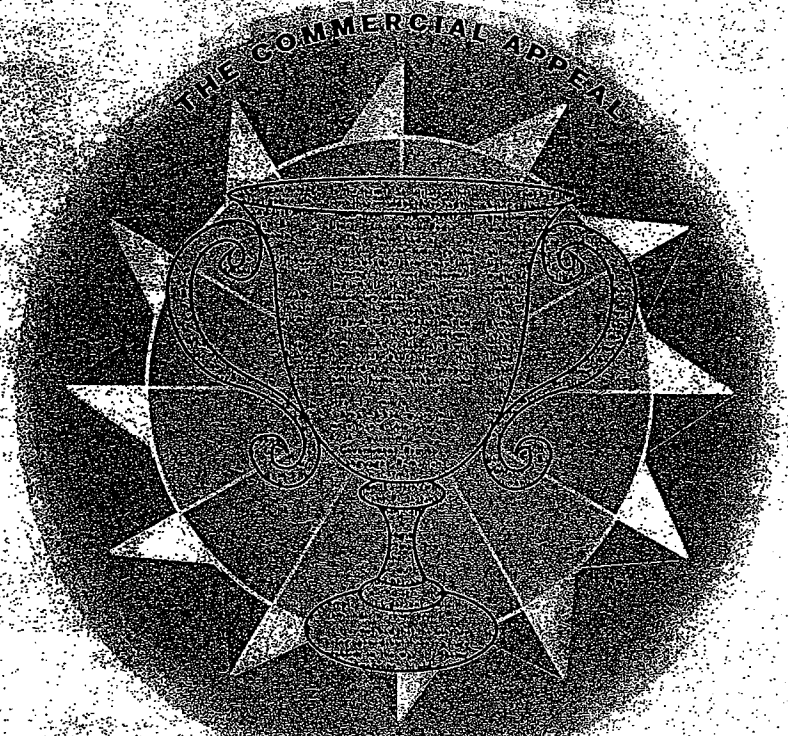
We will be happy to answer any further questions you may have in regard to the development, and meet with you at your convenience if you would like to visit and take a first-hand look at the area. Please do not hesitate to contact me at 618 791-7026, or Tony Daniele at 314 570-3925, or one of us will follow-up with you shortly, after you have had an opportunity to review the attached.

Very truly yours,
PIER ST. LOUIS, INC.

Mark Repking,
Vice President of Finance

cc: T. Daniele

DEPOSITION EXHIBIT
TR-8
Utgaard
PENGAD 800-631-6989



Readers' CHOICE AWARDS

YOUR PICKS FOR THE BEST OF MEMPHIS

SP 01067

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.

RESPONDENT'S TRIAL BRIEF EX. 27

COVER STORY

And your winners are ...

By Chris Peck / peck@commercialappeal.com

THE VOTERS have spoken.

No, not in Tennessee's U.S. Senate race. That comes in November so you still have time.

But this is big in its own way.

Readers of The Commercial Appeal filled out thousands of ballots over the last few weeks touting their favorite places to eat, shop and play. They picked their favorites in 115 categories as part of the newspaper's Readers' Choice Awards.

Now, the results are in.

Here is what we know. We love our barbecue.

More than 2,500 voters cast ballots for the best barbecue sandwich in the region. Barbecue generated more voting interest than any of the 115 topics.

A clue about the barbecue winner: the establishment's name rhymes with the plural of that famous pig, Porky's.

OK, that was easy.

But do you know who the readers voted as the top country western bar? The leading public golf course? The best place to work?

The winning results of these, and all 115 Readers' Choice categories, are inside.

We tallied more than 132,000 responses to our ballot. In many cases, the top three vote-getters were very close. So, we've listed the top three vote-getters in each category.

After all, variety is the spice of life and we want to make sure the best of the best get mentioned in the Readers' Choice Awards.

The top vote-getters in each category also have been invited to answer five questions about their operations.

What makes them the best?

What do the employees strive to do?

What do you want your customers to know about you?

What do you want your customers to tell others?

What little-known fact can you share about your business?

Answers to these questions provide some interesting insights into what makes these successful operations tick.

Enjoy the Readers' Choice Awards.

Keep the winners in mind the next time you are out and about in Greater Memphis.

All the Readers' Choice winners share a special relationship with their customers. When someone votes for you, it's a sign that you have gained their trust, their respect and their business.

We'll do it again next year!

Chris Peck is editor of The Commercial Appeal. Contact him at 529-2390 or at peck@commercialappeal.com.

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READERS ARE WINNERS

Readers who completed a Readers' Choice ballot with at least 40 responses became eligible for a drawing to win one of 12 five-night packages at the Sandestin Golf and Beach Resort in northwestern Florida.

And the winners are:

- Melissa Crown, Memphis
- Mark David, Lakeland
- Shannon Hatcher, Lake Cormorant, Miss.
- Lequita Kilpatrick, Memphis
- Jim Lefler, Germantown
- Nancy Magness, Memphis
- Pam Newman, Memphis
- R.W. Olson, Germantown
- Carolyn Perkins, Collierville
- Wes Pitt, Cordova
- Terri Roberts, Germantown
- Martha Thweatt, Bartlett

FACTS 'N' FIGURES ABOUT READER CHOICES

- 2,893 ballots were returned.
- More than 132,000 responses tallied.
- The reader completed an average of 40-60 of the categories.
- Barbecue sandwich was the category with the most responses (2,529), followed by fast-food franchise (2,526), place for pizza (2,522), grocery store (2,514) and place for hamburgers (2,512).
- Humorous and surprising answers: best hearing aid center — "what?" or "huh?"; best weekend getaway — "anywhere without kids"; best place for an oil change or car wash — "my dad, boyfriend, husband, driveway"; most unlikely — "my wife."

SP 01068

Thanks Memphis for voting Folk's Folly "Best Steak"

Memphis' Original Prime Steak House

551 S. Mendenhall
(901) 762-8200
www.folksfolly.com

Continued from page 15

FINALISTS
- **Liquor store:** Arthur's Wine and Liquor, Joe's Wines & Liquor
- **Place to buy wine:** Arthur's Wine and Liquor, Kirby Wines & Liquor

WOMEN'S SPECIALTY STORE

Talbots

What makes us the best: Talbots provides high-quality, classic clothing for women in a range of misses and petite sizes. We offer an extensive collection of fashionable sportswear, versatile career options, casual wear, dresses and dressy separates in misses and petites sizes, and fashion accessories. Our friendly sales associates are knowledgeable wardrobe consultants and can answer almost any question ranging from wardrobing options to fit. We have a long-standing commitment to providing outstanding customer service and a strong commitment to the community in which our customer resides. This synergy between customer and community service is best summarized by our company credo, "Do What is Right for the Customer."

Our employees strive to: Our associates strive every day to provide the best personalized customer service and to live by our credo "Do What is Right for the Customer."

We want our customers to: be provided with the best shopping experience. With our excellent personalized service can only come an equally outstanding product. Talbots stands behind all its merchandise with an unconditional guarantee and provides appointment shopping and will stay open late or open early to accommodate a customer.

Little known fact about us: Talbots is a baby boomer. We will be celebrating our 60th anniversary next year.

What's next for us: We are excited to be opening a Talbots Woman store in Memphis in October, offering clothing for the fuller-figured woman in sizes 12W-24W and in women's petite sizes 12WP-24WP.

FINALISTS
- Chico's
- Oak Hall

BIKE SHOP

Peddler Bicycle Shop

FINALISTS
- Bikes Plus
- Midtown Bike Co.

COMPUTER STORE

Best Buy

FINALISTS
- Apple Store
- CompUSA

GARDEN/NURSERY STORE

Dan West Garden Center

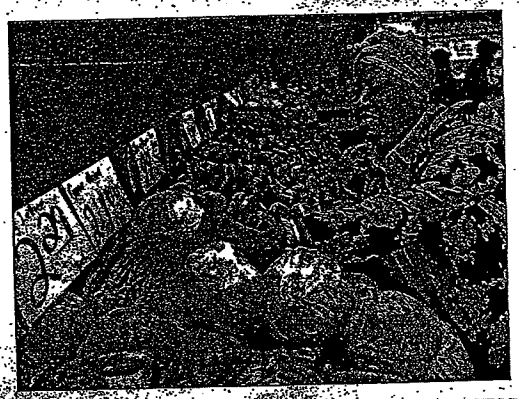
FINALISTS
- Stringer's Garden Centers
- Lowe's Home Improvement Warehouse of Memphis

MEN'S SPECIALTY STORE

Oak Hall

FINALISTS
- James Davis
- Men's Wearhouse

RETAIL



The Readers Choice for Best Place to Buy Produce is Easy Way.

File Photo The Commercial Appeal

OFFICE SUPPLY STORE

Office Depot

FINALISTS
- Office Max
- Corporate Express

OUTDOORS STORE

Bass Pro Shop

FINALISTS
- Outdoors Inc.
- Sportsman's Warehouse

PLACE TO BUY MEAT

The Fresh Market

FINALISTS
- Kroger
- Charlie's Meat Market

PLACE TO BUY PRODUCE

Easy Way

FINALISTS
- The Fresh Market
- Farmers Market

SHOE STORE

DSW (Designer Shoe Warehouse)

FINALISTS
- Rack Room Shoes
- Payless Shoe Source

SPORTING GOODS STORE

The Sports Authority

FINALISTS
- Bass Pro Shop
- Dowdle Sports

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SP 01082

1 32180AKW
2 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
3
4 In the Matter of Trademark Registration No. 2,390,988
5 For the Mark SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR and Design
6
Date Registered: October 3, 2000
7
8 Bass Pro Trademarks, L.L.C.,
9 PETITIONER,
10 vs.
11 Sportsman's Warehouse, Inc.,
12 RESPONDENT.
13
14 DEPOSITION OF WILLIAM BOME
15 May 16, 2006
16 Pursuant to Notice taken on behalf of the Petitioner, at 600 17th Street, Suite 1800, Denver, Colorado 80202, at
17 10:00 a.m., before Kelli J. Wessels, Registered Professional Reporter and Notary Public within Colorado.
18
19
20
21
22
23
24
25

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 28

1 APPEARANCES:
2 DUTRO E. CAMPBELL, II, Attorney at Law, from the Law Firm of Husch & Eppenberger, LLC, 190 Carondelet
3 Plaza, Suite 600, St. Louis, Missouri 63105, appearing on behalf of the Petitioner.
4
CHRISTOPHER RUSSELL SMITH, Attorney at Law,
5 from the Law Firm of Lindquist & Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402,
6 appearing on behalf of the Respondent.
7
8
9 INDEX
10 EXAMINATION: PAGE
11 By Mr. Campbell 3
12
13 (No exhibits marked.)
14
15
16
17
18
19
20
21
22
23
24
25

1 WHEREUPON, the following proceedings were held:
2 WILLIAM BOME
3 having been duly sworn to state the whole truth, testified
4 as follows:
5 EXAMINATION
6 BY MR. CAMPBELL:
7 Q. Good morning, sir. My name is Bruce Campbell.
8 I'm an attorney. I represent Bass Pro in a current matter
9 between Bass Pro and Sportsman's Warehouse. That's why
10 we're here today.
11 Can you please state your name for the record.
12 A. My name is William Bome.
13 Q. Okay. Mr. Bome, have you ever had your
14 deposition taken before?
15 A. Nope.
16 Q. I'm going to go over a few rules particular to
17 this kind of a proceeding and make sure that we make a
18 clear record and there is no misunderstandings as we
19 proceed today.
20 As you can see, we have a court reporter here
21 that is taking down every word that you and I say. So if
22 possible, try and allow me to get my full question out
23 before you answer, and I'll try and let you give your full
24 answer out before I interrupt you.
25 A. Okay.

1 Q. Another thing is sometimes in conversation you
2 may have a tendency to nod or give a nonverbal response,
3 so if you nod your head and I say is that a yes, I'm
4 trying to remind you to give a verbal answer so the
5 transcript can include your testimony, okay?
6 A. Okay.
7 Q. If you don't understand a question, feel free to
8 ask me to clarify or ask it a different way. I don't want
9 you to answer a question that you don't understand. So if
10 you think a question is unclear, just let me know and I'll
11 do my best to try to make it as understandable as
12 possible, okay?
13 A. Okay.
14 Q. If you need a break at any time just let me know.
15 If there is a question pending, I'll ask you to respond to
16 the question first and then if you need to take a break I
17 will be happy to do that. So if you need something to
18 drink or a restroom break, please don't sit there
19 uncomfortable, let us know and we'll take a break.
20 A. Okay.
21 Q. Over the course of the day I will assume that
22 your counsel is probably going to interpose objections
23 from time to time. If he does so, let him state his
24 objection for the record before you answer -- and there
25 are very few circumstances where the attorney will

1 actually instruct you not to respond. If he doesn't give
2 you that instruction, once he's stated his objection you
3 can go ahead and answer, okay?
4 A. Okay.
5 Q. And do you also understand that being sworn in
6 today the testimony that you will be giving will be under
7 oath?
8 A. Yes.
9 Q. Okay. Can you tell me what you did to prepare
10 for this deposition?
11 A. Um, nothing really other than I came here
12 yesterday.
13 Q. You came here to this office yesterday?
14 A. Down the hall.
15 Q. Okay. And who did you meet with?
16 A. I met with Chris.
17 Q. Mr. Smith?
18 A. Mr. Smith.
19 Q. Your counsel here. Okay. How long did you meet
20 with him?
21 A. 45 minutes. Something like that. Hour.
22 Q. Okay. Did you review any documents during that
23 meeting?
24 A. Some papers as far as concerning our logo.
25 Q. But these documents were provided to you by

Page 50

1 policy.
2 Q. Is that a written policy?
3 A. No.
4 Q. Do you know how the policy is communicated to the
5 employees?
6 A. From the store managers.
7 Q. So the store manager prior to your arrival at
8 Aurora communicated this policy to the store employees; is
9 that your understanding?
10 A. Yes.
11 Q. Have you ever heard of any customers trying to
12 redeem coupons or gift cards from other retailers at any
13 other Sportsman's Warehouse location?
14 A. Could you state that again, please.
15 Q. I'm sorry, it is kind of confusing. Let me split
16 it up. I asked you a question about the Aurora store and
17 whether or not any customer ever tried to redeem another
18 retailer's coupon?
19 A. Right.
20 Q. At that particular location you said you weren't
21 aware of any instances, right?
22 A. Right.
23 Q. I'm just asking not specifically with respect to
24 the Aurora location but with respect to any other
25 Sportsman's Warehouse location, do you have any knowledge

Page 51

1 of a customer attempting to redeem a coupon of another
2 store or retail outlet?
3 A. I know of other stores that have had coupons
4 brought to that -- or a card brought to that store trying
5 to be redeemed saying it said Sportsman's Warehouse.
6 Q. Okay. So you are saying at other Sportsman's
7 Warehouse locations other than the Aurora location
8 customers have brought in a third-party gift card and
9 tried to redeem that at a Sportsman's Warehouse location,
10 right?
11 A. Yes.
12 Q. How did you know about that?
13 A. From talking to other store managers.
14 Q. What other store managers told you that they've
15 experienced that?
16 A. Jason from the Thornton store here in Colorado
17 and Joel from the Littleton store. And Darren McDaniel
18 from the Colorado Springs store.
19 Q. Were there any particular circumstances that led
20 to you having those type of discussions with these three
21 other store managers?
22 A. Just talking about the Sportsman's Warehouse --
23 being associated with Bass Pro having, you know, Bass Pro
24 and then having, hey, did you know that Bass Pro was owned
25 by Sportsman's Warehouse, those type of conversations.

Page 52

1 Oh, no, it is on the verbiage of this card that kind of
2 conversation.
3 Q. These conversations that you had were they
4 separate conversations with each of these store managers?
5 A. Two were with -- one was with both Jason and Joel
6 and one was separate with Darren in the Springs.
7 Q. Okay on. When did the conversation with the
8 Thornton manager and the Littleton manager take place?
9 A. Yesterday.
10 Q. Did you have this discussion with them in person?
11 A. Yes.
12 Q. Was your counsel present during that discussion?
13 A. Yes.
14 Q. I won't ask you any more questions about that.
15 The conversation you had with Darren, was that
16 also a conversation you had yesterday?
17 A. Yesterday.
18 Q. Prior to that time, did you ever have any similar
19 conversations with these store managers?
20 A. No.
21 Q. Prior to yesterday, did you have any knowledge of
22 this confusion caused by the Bass Pro gift cards?
23 A. One occurrence while fishing in Oregon. I had
24 started working for Sportsman's Warehouse, proudly wore
25 the Sportsman's Warehouse shirt and somebody comes up to

Page 53

1 me and was, oh, Sportsman's Warehouse, started talking
2 about it. Did you know it is owned by Bass Pro? No, it
3 is not.
4 Argument ensues and the gentleman got out a card
5 that had on the very back of the card, can be redeemed at
6 Outdoor World, Bass Pro Shops and then on a separate line
7 Sportsman's Warehouse.
8 Q. So if my understanding is correct you had a
9 Sportsman's Warehouse shirt on?
10 A. Right.
11 Q. A gentleman thought the Sportsman's Warehouse
12 displayed on your shirt was in fact the Sportsman's
13 Warehouse in fact owned by Bass Pro; is that correct?
14 A. And it brought up a conversation of, did you know
15 Sportsman's Warehouse was owned by Bass Pro.
16 Q. That was the statement that the gentleman made to
17 you?
18 A. Yes.
19 Q. Do you recall roughly when that conversation
20 occurred?
21 A. It was in the winter of 2003.
22 Q. And what was your position with Sportsman's
23 Warehouse at that time?
24 A. I was a fishing associate.
25 Q. Did you ever report the substance of this

1 32180CKW
2 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD
3
4 In the Matter of Trademark Registration No. 2,390,988
5 For the Mark SPORTSMAN'S WAREHOUSE HUNTING FISHING CAMPING
RELOADING OUTERWEAR FOOTWEAR and Design
6
Date Registered: October 3, 2000
7
8 Bass Pro Trademarks, L.L.C.,
9 PETITIONER,
10 vs.
11 Sportsman's Warehouse, Inc.,
12 RESPONDENT.
13
14 DEPOSITION OF JOEL MICHAEL McRAE
15 May 16, 2006
16 Pursuant to Notice taken on behalf of the Petitioner, at
600 17th Street, Suite 1800, Denver, Colorado 80202, at
17 2:11 p.m., before Kelli J. Wessels, Registered
Professional Reporter and Notary Public within Colorado.
18
19
20
21
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24
25

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 29

Page 2

1 APPEARANCES:
2 DUTRO E. CAMPBELL, II, Attorney at Law, from the Law Firm of Husch & Eppenberger, LLC, 190 Carondelet
3 Plaza, Suite 600, St. Louis, Missouri 63105, appearing on behalf of the Petitioner.
4
CHRISTOPHER RUSSELL SMITH, Attorney at Law,
5 from the Law Firm of Lindquist & Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402,
6 appearing on behalf of the Respondent.
7
8
9 INDEX
10 EXAMINATION: PAGE
11 By Mr. Campbell 3
12
13 (No exhibits marked.)
14
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25

Page 3

1 WHEREUPON, the following proceedings were held:
2 JOEL MICHAEL McRAE
3 having been duly sworn to state the whole truth, testified
4 as follows:
5 EXAMINATION
6 BY MR. CAMPBELL:
7 Q. Sir, can you please state your full name for the
8 record.
9 A. Joel Michael McRae.
10 Q. Have you ever had your deposition taken before?
11 A. No.
12 Q. There's a couple of ground rules I'm going to go
13 through just to make this go as smoothly as possible. You
14 can see we have a court reporter here who is taking down
15 everything that you and I say. It is kind of difficult
16 because conversationally a lot of times we talk over one
17 another.
18 I'm going to do the best I can to try to keep my
19 questions fairly short. If you can wait until I get the
20 full question out, even if you know what I'm asking before
21 you give me an answer. I'll be sure to allow you to give
22 your full answer before I ask another question, okay?
23 A. Okay.
24 Q. She can only take down verbal responses so if you
25 give a head nod or mm-hmm, I'll probably say is that a

Page 4

1 yes. And I don't want to be rude, but I'm just saying
2 that to get the full answer on the transcript.
3 A. I understand.
4 Q. So if you can just say yes or no that would be
5 great.
6 If you don't understand a question, definitely
7 ask me to clarify it or ask it in a different way.
8 A. Okay.
9 Q. Over the course of the deposition the counsel
10 here on behalf of Sportsman's Warehouse may make
11 objections to questions that I ask. If he does so, I'll
12 restate the question. He'll state an objection for the
13 record and unless he instructs you specifically not to
14 answer the question, once he's stated his objection, then
15 you can go ahead and answer the question.
16 A. Okay.
17 Q. And if for some reason -- sometimes it is hard to
18 remember what the question was, if that happens and if you
19 need me to repeat the question, I can do it or we can have
20 the court reporter read it back to us.
21 A. Okay.
22 Q. Like I said, I think we're only going to
23 hopefully take about an hour and 15 minutes to an hour and
24 a half, max, but if for some reason you need to take a
25 break, get a drink of water, use the restroom, let me know

Page 5

1 and we'll take a break if you need one.
2 Is it your understanding that you're present here
3 today to provide testimony relating to a trademark dispute
4 pending between Sportsman's Warehouse and Bass Pro Shops?
5 A. Yeah.
6 Q. When did you first learn of this dispute between
7 Sportsman's Warehouse and Bass Pro?
8 A. A week ago.
9 Q. How did you find out about it?
10 A. Via telephone.
11 Q. Who was on the telephone call with you?
12 A. Dale Smith.
13 Q. Do you know what his official title is currently?
14 A. The president of the company.
15 Q. He's the president of Sportsman's Warehouse?
16 A. Yeah.
17 Q. Do you recall exactly what he told you about this
18 dispute?
19 A. He told me that I needed to be here on this date
20 to meet with Christopher. And that it was a trademark
21 dispute with Bass Pro and Sportsman's Warehouse and that's
22 it.
23 Q. Okay. Can you tell me what you did to prepare
24 for your deposition today?
25 A. Christopher and I met yesterday in this office.

Page 30

1 A. No.
2 Q. Would your answer also be no with respect to
3 Sportsman's Warehouse trademarks?
4 A. Yeah, no.
5 Q. Correct, your answer would be no?
6 A. My answer is no.
7 Q. What type of advertising does your store use?
8 A. Newspaper, radio, streaming via the Internet.
9 Occasionally a live remote via radio, internal signage,
10 banners. I would also consider the T-shirts and hats to
11 be advertising to a certain degree.
12 Q. Okay. Whose responsibility is it for putting
13 together the content of the newspaper ad that your store
14 uses?
15 A. Well, there's two different avenues there.
16 Certain events I'm responsible for the content of the
17 newspaper ads.
18 Q. Okay. Can you give me a little more detail in
19 terms of your responsibility in that regard? Do you
20 actually -- let's just start out with the text or the
21 information that is being conveyed in the ad, is that
22 something that you would put together personally?
23 A. Yes.
24 Q. And in terms of the design elements of the ad,
25 are there any Sportsman's Warehouse logos or designs that

Page 31

1 are used in your newspaper ads?
2 A. Yes.
3 Q. And do you have any responsibility or any
4 discretion with regard to the design elements or the logos
5 that are used in your ads?
6 A. No.
7 Q. Is that something that corporate dictates?
8 A. The logos that I use is the logo they sent me.
9 Q. Okay. You said that there are two different --
10 two different levels of responsibility. You said there
11 are certain events in which you are responsible for
12 content and what were the other -- what would be the other
13 situation?
14 A. In the other case I'm talking about
15 advertisements that the company puts out --
16 Q. Okay.
17 A. -- that I have nothing to do with.
18 Q. So these being the company ads that are prepared
19 by corporate?
20 A. Correct.
21 Q. You don't have any input in terms of the input of
22 the content of those ads; is that correct?
23 A. That's correct.
24 Q. You had mentioned banners. When you mentioned
25 banners, would those be banners that are displayed in the

Page 32

1 interior or exterior of your store?
2 A. Both.
3 Q. Can you describe what types of banners your store
4 uses?
5 A. The primary banners that we have are the
6 Sportsman's Warehouse logo with the address and phone
7 number.
8 Q. Are there specific banners that you use all the
9 time or do these banners change over time?
10 A. They are the same ones we use all the time.
11 Q. What Sportsman's logo is displayed on these
12 banners?
13 A. The logo with the mountains in the background.
14 Q. And that logo would be in the form and consistent
15 with what is provided to you from corporate; is that
16 correct?
17 A. That's correct.
18 Q. With no alterations?
19 A. No alterations.
20 Q. What about the T-shirts and hats, what do they
21 have on them?
22 A. Wildlife designs on the back typically. Once
23 again provided by corporate, not something that I had any
24 part in building.
25 Q. As far as logos are concerned with the T-shirts

Page 33

1 and hats that your store uses, would they all only use the
2 logo that you referred to as the one with the mountain in
3 the background?
4 A. I would say that they use both of them.
5 Q. Both of them being the new oval shaped design?
6 A. That's correct.
7 Q. Do you know if any T-shirts or hats at your store
8 use the oval design with the little circled R next to it?
9 A. I don't know that.
10 Q. You've never had someone call you and say, quit
11 handing out the T-shirts and hats with the logo with the
12 circled R on it?
13 A. I have not.
14 Q. Have you ever been instructed to change any of
15 the Sportsman's Warehouse logos that are displayed in any
16 of these advertising mediums that we just discussed?
17 A. No.
18 Q. Were you aware of any instances where your
19 store's customers have been mistaken with respect to
20 Sportsman's Warehouse versus Bass Pro Shops Sportsman's
21 Warehouse?
22 A. Yes.
23 Q. How many such instances are you aware of?
24 A. Just one.
25 Q. How did you find out about that instance?

Page 34

1 A. Woman at the cash register attempting to pay for
2 her merchandise with a Bass Pro gift card.
3 Q. Were you physically present at the time the
4 customer attempted to use the Bass Pro gift card?
5 A. Yes.
6 Q. What exactly did -- did the customer say anything
7 to you at that time?
8 A. She wasn't specific.
9 Q. Actually, can you just explain to me just more
10 specifically what happened in that instance?
11 A. She came to the register with merchandise in a
12 basket. Upon ringing all the merchandise up she pulled a
13 Bass Pro gift card from her wallet to use for purchase. I
14 politely explained to her that we are two different
15 companies and she would have to pay with another means.
16 She said, okay, and pulled a credit card out and paid for
17 it with that.
18 Q. So basically she just said okay and put it away?
19 A. I can't assume what she was thinking but, yeah.
20 Q. I just want to make sure there wasn't anything
21 else that she said?
22 A. I don't remember --
23 Q. Okay.
24 A. -- if there was anything else.
25 Q. She didn't, like, complain about being confused?

Page 35

1 A. She wasn't unhappy, no.
2 Q. Do you recall roughly when this instance
3 occurred?
4 A. 2004.
5 Q. Where did this occur?
6 A. Aurora.
7 Q. What was your position at that time?
8 A. Hunting department manager.
9 Q. Is this a situation where another employee had to
10 seek you out and ask you to resolve the issue or did you
11 just happen to be there when it all happened?
12 A. I was -- I was asked to come and be of assistance
13 at the register.
14 Q. Do you know if the Aurora store manager was in
15 the store at the time?
16 A. He was not.
17 Q. Would that be a reason why you were consulted
18 about this as opposed to the store manager because he
19 wasn't there?
20 A. That is correct.
21 Q. After you handled the situation, did you
22 ultimately report it to anyone?
23 A. I reported it to the store manager the next day.
24 Q. Who was the store manager at that time?
25 A. Gary Watts.

Page 36

1 Q. How did he respond to your report of this
2 instance?
3 A. I don't recall.
4 Q. Do you recall whether or not he seemed surprised?
5 A. He didn't seem surprised.
6 Q. Did he indicate to you whether or not that had
7 ever happened before?
8 A. He did not.
9 Q. Are you aware of any other similar instances of
10 confusion at the Aurora store during your time there?
11 A. None that I'm aware of.
12 Q. Is it possible that there could have been other
13 instances but you are just not aware of them?
14 A. It's possible.
15 Q. Are you aware of any instances at the Littleton
16 store where a customer attempted to present a Bass Pro
17 gift card to one of the employees at your store?
18 A. Not that I'm aware of. It hasn't been brought to
19 my attention.
20 Q. Is it possible that a customer may have tried to
21 present a Bass Pro gift card to a cashier at your store
22 and the cashier just explained to that customer that, you
23 know, we're not Bass Pro and that instance was never
24 reported?
25 A. Pretty unlikely.

Page 37

1 Q. Why would that be unlikely?
2 A. Due to what I've clarified with the cashiers that
3 they need to discuss such matters with the management.
4 Q. So you actually specifically addressed the issue
5 of this confusion between Bass Pro and Sportsman's
6 Warehouse with your cashiers?
7 A. No, but any form of payment confusion has been
8 discussed via discard -- via gift card, credit card, cash,
9 anything. Any form of payment confusion needs to be
10 addressed.
11 Q. Okay. Are you aware of any instances of payment
12 confusion at your store that relate to another retailer
13 other than Bass Pro?
14 A. None that I'm aware of.
15 Q. Okay. Do you have a formal policy or practice
16 for dealing with issues of payment confusion as you just
17 described?
18 A. If a payment confusion situation arises one of
19 the management staff is consulted. Typically it is
20 something that can be worked out immediately.
21 Q. Other than the situation that we just discussed
22 involving the presentation of the third-party gift card,
23 can you give me any other examples of things that would
24 fall under the category of payment confusion?
25 A. Typically it is denied or declined credit cards

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

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 30

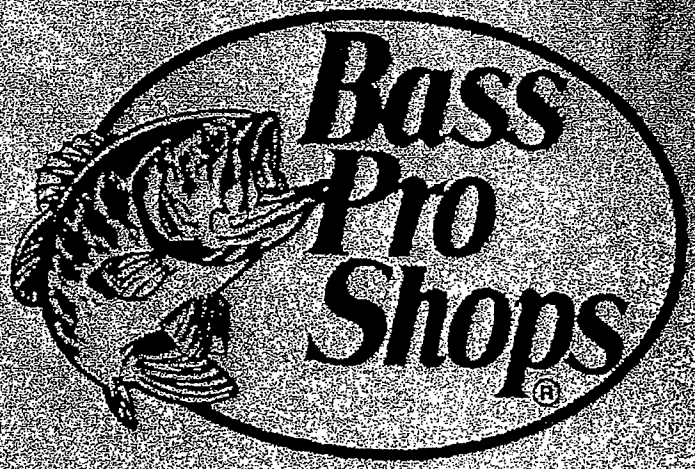
Bass Pro Shops Sportsman's Warehouse stores, correct?
A. Yes.
Q. Okay. In the context of Bass Pro Shops Sportsman's Warehouse stores, is it Bass Pro's practice to use advertising or marketing that indicates -- or that includes the phrase "Sportsman's Warehouse" without the phrase "Bass Pro Shops" or 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

GIFT CARD



Bass Pro Shops®

DEPOSITION EXHIBIT
1
8906 Cm

[redacted]

CARD # 6006491265098849058

PROTECT THIS CARD LIKE CASH
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 BPIP, LLC. All rights reserved.
Use of this card constitutes acceptance of these terms and conditions.

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Issued by Hallmark Insights™
GC Control #: 4989-990063-257636-9 Initial Value (US Dollars): **$50.00**

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 31

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, Bass Pro Shops® Sportsman's Warehouse®, Bass Pro Shops®
ibited, taxed or restricted by law. May not be used toward purcha
rrows, taxidermy, electronics, store restaurant food and drinks, g
og or Internet sales. Applicable taxes must be paid by bearer.
cial orders. No dealers. Customer must present military ID. No

RESPONDENT'S EXHIBIT 1006

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 32

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

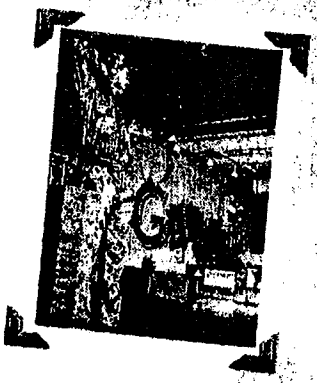
AJ Kiihnl
Aug. 13 & 14
HunTeen

Ben Weddington
Aug. 13 & 14
HunTeen

For seminar schedules and special store hours log onto: basspro.com ALWAYS OPEN 24/7
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@basspro.com.
Visit basspro.com for more details.



Aug. 13–14
Visit with factory experts!
Kids: Don't miss the Archery and Paintball Ranges!

basspro.com ALWAYS OPEN 24/7

Bass Pro Shops® Sportsman'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

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 33

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.

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 34

APPEARANCES:
On behalf of the Petitioner:
(via telephone)
GREGORY E. UPCHURCH, Esq.
Husch & Eppenberger, L.L.C.
190 Carondelet Plaza
Suite 600
St. Louis, Missouri 63105

On behalf of the Respondent:
(via telephone)
DAVID A. ALLGEYER, Esq.
CHRISTOPHER R. SMITH, Esq.
80 South 8th Street
4200 IDS Center
Minneapolis, Minnesota 55402-2205

CONTENTS

Witness	Page
Michael B. Mazis	
Examination by Mr. Allgeyer	4
Examination by Mr. Upchurch	69

EXHIBITS

Mazis Deposition Exhibits	Identification
1 Expert Report of Michael B. Mazis, Ph.D., September 2006	9
2 Reference Guide or Survey Research/Reference Manual on Scientific Research, Shari Seidman Diamond	22
3 Spreadsheet, W-O-L (N=193)	57
4 Spreadsheet, g-b-y (N=203)	59
5 Spreadsheet, S (Gander Mountain) of Open-Ended Responses	64
6 Spreadsheet, L (Sportsman's Warehouse) of Open-Ended Responses	64

PROCEEDINGS

Whereupon,
MICHAEL B. MAZIS
having been called as a witness by Counsel for Respondent, and having been duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR RESPONDENT
BY MR. ALLGEYER:

Q Your name is Michael B. Mazis?
A Mazis.
Q Mazis, pardon me. And do you go by Doctor, Professor, Mister, what are you comfortable with?
A Doctor would be fine.
Q Okay, that's what we'll go with, then. Could you please state your current work address, please?
A College of Business, American University, Washington, D.C.
Q And just for the record, why don't you give us the correct spelling of your first and last name?
A Michael, M-i-c-h-a-e-l, Mazis, M-a-z-i-s.
Q Thank you.
MR. ALLGEYER: Before we get started, I'm going to go over just a few telephone deposition issues. And the main one is if we get disconnected for any reason, I will immediately call back to this

number. I would ask that the court report include the fact of the disconnection on the record. I will also immediately get Mr. Upchurch back on the line.
BY MR. ALLGEYER: (Resuming)
Q Dr. Mazis, have you been deposed before?
A Yes.
Q How many times?
A Over 50 times.
Q I am then going to dispense with the normal directions because I've said them too many times and you've probably heard them too many times. I would ask, however, that if you do have a question about my question, if you don't understand it, please let me know that and I'll try and ask it again in a different way or in a way in which you understand it. Is that fair?
A Yes, sir.
Q All right, and you have certain exhibits in the room with you today?
A Yes.
Q All right, we'll be getting to those in a minute. How did you prepare for today's deposition?
A Primarily, I read through my report.
Q All right, did you discuss your testimony with any attorneys representing Bass Pro Shops?

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?

Page 26

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

Page 27

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

Page 28

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-

Page 29

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

Page 30

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?**

Page 31

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 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.**

Page 33

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.

Reference Guide on Survey Research

SHARI SEIDMAN DIAMOND

Shari Seidman Diamond, J.D., Ph.D., is Professor of Law and Psychology, Northwestern University, Evanston, Illinois, and Senior Research Fellow, American Bar Foundation, Chicago, Illinois.

CONTENTS

I. Introduction, 231
- A. Use of Surveys in Court, 233
- B. A Comparison of Survey Evidence and Individual Testimony, 235

II. Purpose and Design of the Survey, 236
- A. Was the Survey Designed to Address Relevant Questions? 236
- B. Was Participation in the Design, Administration, and Interpretation of the Survey Appropriately Controlled to Ensure the Objectivity of the Survey? 237
- C. Are the Experts Who Designed, Conducted, or Analyzed the Survey Appropriately Skilled and Experienced? 238
- D. Are the Experts Who Will Testify About Surveys Conducted by Others Appropriately Skilled and Experienced? 239

III. Population Definition and Sampling, 239
- A. Was an Appropriate Universe or Population Identified? 239
- B. Did the Sampling Frame Approximate the Population? 240
- C. How Was the Sample Selected to Approximate the Relevant Characteristics of the Population? 242
- 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? 245
- E. What Procedures Were Used to Reduce the Likelihood of a Biased Sample? 246
- F. What Precautions Were Taken to Ensure That Only Qualified Respondents Were Included in the Survey? 247

IV. Survey Questions and Structure, 248
- A. Were Questions on the Survey Framed to Be Clear, Precise, and Unbiased? 248
- B. Were Filter Questions Provided to Reduce Guessing? 249
- C. Did the Survey Use Open-Ended or Closed-Ended Questions? How Was the Choice in Each Instance Justified? 251
- 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? 253

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 35

PENGAD-Bayonne, N. J.
DEPOSITION EXHIBIT
MAZIS-2
9/22/06

E. What Approach Was Used to Avoid or Measure Potential Order or Context Effects? 254
F. If the Survey Was Designed to Test a Causal Proposition, Did the Survey Include an Appropriate Control Group or Question? 256
G. What Limitations Are Associated with the Mode of Data Collection Used in the Survey? 260
1. In-person interviews, 260
2. Telephone surveys, 261
3. Mail surveys, 263
4. Internet surveys, 264
V. Surveys Involving Interviewers, 264
A. Were the Interviewers Appropriately Selected and Trained? 264
B. What Did the Interviewers Know About the Survey and Its Sponsorship? 266
C. What Procedures Were Used to Ensure and Determine That the Survey Was Administered to Minimize Error and Bias? 267
VI. Data Entry and Grouping of Responses, 268
A. What Was Done to Ensure That the Data Were Recorded Accurately? 268
B. What Was Done to Ensure That the Grouped Data Were Classified Consistently and Accurately? 268
VII. Disclosure and Reporting, 269
A. When Was Information About the Survey Methodology and Results Disclosed? 269
B. Does the Survey Report Include Complete and Detailed Information on All Relevant Characteristics? 270
C. In Surveys of Individuals, What Measures Were Taken to Protect the Identities of Individual Respondents? 271
Glossary of Terms, 273
References on Survey Research, 276

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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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	)	
	)	
v.	)	Cancellation No. 92045000
Sportsman's Warehouse, Inc.	)	

AMENDED PETITION TO CANCEL

Petitioner is BASS PRO TRADEMARKS, L.L.C., a Limited Liability Company organized and existing under the laws of Missouri, located and doing business at 2500 E. Kearney, Springfield, Missouri 65898 ("Petitioner").

To the best of Petitioner's knowledge, the name and address of the current owner of the registration are as follows: Sportsman's Warehouse, Inc. (Utah Corporation), 7035 High Tech Drive, Midvale, Utah 84047 ("Respondent").

The above-identified Petitioner believes that it will be damaged by the above-identified registration, and hereby amends its original petitions to cancel the same.

The grounds for cancellation are as follows:

1. Petitioner is the owner of U.S. Trademark Registration No. 2071417 for the mark BASS PRO SHOPS SPORTSMAN'S WAREHOUSE and Design which was registered on the Principal Register on June 17, 1997. Said registration was based on an application filed in the U.S. Patent Office on March 1, 1996, which is a date prior to the date of filing of Respondent's application. Said registered mark of Petitioner is valid and subsisting and is prima facie evidence

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S
TRIAL BRIEF EX. 36

of Petitioner's exclusive right to use said mark in commerce on the services specified in said registration, namely "retail stores featuring clothing, fishing supplies and sporting goods." In view of the similarity of the respective marks and the related nature of the services of the respective parties, it is alleged that Respondent's registered mark so resembles Petitioner's registered mark, as to be likely to cause confusion, or to cause mistake, or to deceive.

2. Respondent's registered mark, when used in connection with the services of respondent, is comprised of a background design and terms that are merely descriptive of the services being provided and that are insufficiently stylized to be inherently distinctive to consumers in the markets served by Respondent.

3. Respondent's registered mark, when used in connection with the services of respondent, is comprised of a common background design and terms that are merely descriptive of the services being provided and that are stylized in a common format (western/frontier) that fails to create a separate and distinct impression necessary for a mark in the markets served by respondent.

4. Since at least as early as January 2, 1995, Petitioner has been using the mark SPORTSMAN'S WAREHOUSE in connection with retail store services. Said use has been valid and continuous since said date of first use and has not been abandoned. Said use was begun on a date prior to the date of filing of Respondent's application. Said mark of Petitioner is symbolic of extensive good will and consumer recognition built up by Petitioner through substantial amounts of time and effort in advertising and promotion. In view of the similarity of the respective marks and the related nature of the services of the respective parties, it is alleged

that Respondent's registered mark so resembles Petitioner's mark previously used in the United States, and not abandoned, as to be likely to cause confusion, or to cause mistake or to deceive.

5. Since at least as early as January 2, 1995, Petitioner has been using the mark SPORTSMAN'S WAREHOUSE in connection with retail store services. Said use has been valid and continuous since said date of first use and has not been abandoned. Said use was begun on a date prior to the actual date of first use of the Respondent's registered mark and prior to the Respondent's claimed date of first use. (Upon information and belief, Petitioner further alleges that Respondent's actual date of first use of the registered mark was after the date set forth in the application.) Said mark of Petitioner is symbolic of extensive good will and consumer recognition built up by Petitioner through substantial amounts of time and effort in advertising and promotion. In view of the similarity of the respective marks and the related nature of the services of the respective parties, it is alleged that Respondent's registered mark so resembles Petitioner's mark previously used in the United States, and not abandoned, as to be likely to cause confusion, or to cause mistake or to deceive.

6. Respondent's registration was obtained fraudulently in that in the formal application papers filed by respondent under notice of 18 U.S.C. § 1001, it was stated that Respondent had used the SPORTSMANS' WAREHOUSE and Design mark since June 16, 1995, in connection with "[r]etail <u>and wholesale stores</u> featuring hunting supplies, fishing supplies, camping supplies, reloading supplies, outerwear clothing and footwear." *See* Exhibit A, Respondent's Application for Registration (emphasis added). Stuart B. Utgaard, president of Respondent signed the declaration for the application on behalf of Respondent. *Id.* Said statement was false in that Respondent has not at any time used the SPORTSMAN'S

WAREHOUSE mark in any form in connection with wholesale stores. Respondent has admitted this fact during discovery associated with the pending proceeding. *See* Exhibit B, Respondent's Answer to Petitioner's Interrogatories.[1]

7. The foregoing false statement was made by Respondent with the knowledge that said statement was false. The statement was also confirmed in a subsequent response to an office action issued in connection with the application by Respondent's authorized agent. *See* Exhibit C, February 7, 2000 Response. Said false statements was made with the intent to induce authorized agents of the U.S. Patent and Trademark Office to grant Respondent's registration and, reasonably relying upon the truth of said false statements, the U.S. Patent and Trademark Office did, in fact, grant said registration to Respondent.

8. Upon information and belief, Respondent has misused the statutory registration notice (Registered Trademark and/or ®) that it obtained for the mark shown in Registration No. 2,390,988 by using such notice in connection with correspondence asserting that Respondent owns a federal registration for the word mark SPORTSMAN'S WAREHOUSE, by itself and without any other terms, visual elements, or stylization, and ordering third parties, in particular, others in the trade of retail sales of sporting goods, hunting supplies, fishing, supplies, and clothing, to cease and desist use of the SPORTSMAN'S WAREHOUSE word mark. Such misuse was intended to deceive others in the trade into believing that Respondent possessed a registration in the word mark SPORTSMAN'S WAREHOUSE.

[1] Exhibit B to Bass Pro's Amended Petition for Cancellation consists of Respondent's responses to Bass Pro's first set of discovery requests relating to the scope of Respondent's use of its registered mark. Because Respondent has elected to designate all of its responses to these discovery requests as "Confidential" pursuant to the Protective Order in place in this opposition, Bass Pro is filing this Exhibit as a confidential document separately from this Amended Petition.

9. Upon information and belief, Respondent has misused the statutory registration notice (Registered Trademark and/or ®) that it obtained for the mark shown in Registration No. 2,390,988 by using such notice in numerous advertisements to the public in a partial version of the logo mark, i.e., without including the terms HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR, terms Respondent had so carefully used to distinguish its mark from that of Petitioner's prior registration (Reg. No. 2071417) when asserting that the logo mark should be registered. Respondent's assertion of a registration to the word mark SPORTSMAN'S WAREHOUSE and partial versions of the logo mark are part of Respondent's reckless disregard for the proper marking of the logo mark actually registered in Registration No. 2,390,988.

WHEREFORE, Petitioner prays that Registration No. 2,390,988 be cancelled and that this Amended Petition for Cancellation be sustained in favor of Petitioner.

Petitioner hereby appoints Dennis J.M. Donahue III, Michael D. Bokermann, Rebecca J. Brandau, Dutro E. Campbell II, David A. Chambers, Robert C. Haldiman, Grant D. Kang, Ryan Mitchem, Harry B. Ray, H. Frederick Rusche, and Gregory E. Upchurch of the firm Husch & Eppenberger, LLC, to act as attorneys for Petitioner herein, with full power to prosecute said Petition and to transact all relevant business with the U.S. Patent and Trademark Office and the United States Courts. **Dennis J.M. Donahue III** is hereby authorized to receive all official communications in connection with this Petition for Cancellation.

Respectfully submitted, this 29th day of March, 2006.

Dennis J.M. Donahue III
Husch & Eppenberger, LLC
190 Carondelet Plaza, Suite 600
St Louis, MO 63105
Phone 314-480-1642
Fax 314-290-5342
E-mail trademark@husch.com

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4 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
5
BASS PRO TRADEMARKS LLC,)
6)
Petitioner,)
7) Cancellation No.
v.) 92045000
8)
SPORTSMAN'S WAREHOUSE INC,)
9)
Respondent.)
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16 DEPOSITION OF MS. TONI MILLER
17 Taken on behalf of the
18 Petitioner
19 January 23, 2007
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Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 37

INDEX

PAGE

TITLE PAGE 1

INDEX 2

DEPOSITION INFORMATION 4

APPEARANCES 5

MS. TONI MILLER
DIRECT EXAMINATION BY MR. CAMPBELL 7
CROSS-EXAMINATION BY MR. ALLGEYER 30
REDIRECT EXAMINATION BY MR. CAMPBELL 43

Petitioner's Exhibits
10 1995 Bass Pro Catalog, BPS 003336 - 003340 12
11 Boat and Camper Ad, Sportsman's Warehouse, 3/27/99, BPS 002288 14
14 Petitioners Responses to Registrant's First Set of Interrogatories, 10/3/00 21
1 Trademark Registration, 11/21/06 26
12 Bass Pro Sportsman's Warehouse Gross Sales 1995-2005, BPS 001305 - 001306 34

INDEX
(Continued)

PAGE

Respondent's Exhibits
1010 Trademark Registration 2,193,039, 12/22/06 41
1011 Trademark Registration 1,116,517, 12/22/06 41

CERTIFICATE OF REPORTER 48

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

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 Petitioner in an action pending in the United States Patent and Trademark Office, before the Trademark Trial and Appeal Board, in the case of Bass Pro Trademarks LLC, Petitioner, versus Sportsman's Warehouse Inc, Respondent, at 2:52 p.m. on Tuesday, January 23, 2007, at the law offices of Husch & Eppenberger, 1949 East Sunshine, Suite 2-300, Springfield, Missouri, before KAREN S. ROGERS, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public in and for the State of Missouri.

APPEARANCES

For Petitioner:
MR. BRUCE CAMPBELL
HUSCH & EPPENBERGER LLC
190 Carondelet Plaza, Suite 600
St. Louis, Missouri 63105
(314) 480-1642
trademark@husch.com

For Respondent:
MR. DAVID A. ALLGEYER
LINDQUIST & VENNUM PLLP
80 South 8th Street, 4200 IDS Center
Minneapolis, MN 55402
(612) 371-3216
dallgeyer@lindquist.com

APPEARANCES
(Continued)

Court Reporter:
MS. KAREN S. ROGERS, RPR, CCR No. 846
MIDWEST LITIGATION SERVICES
1911 South National Avenue, Suite 402
Springfield, Missouri 65804
(417) 877-9700
krogers@midwestlitigation.com

PROCEEDINGS

(Proceedings began at 2:52 p.m. on Tuesday, January 23, 2007, with appearances as noted.)
(The witness was placed under oath by the court reporter.)
* * * * *
MS. TONI MILLER,
of lawful age, having been called as a witness and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. CAMPBELL:
Q. Could you please state your full name for the record?
A. Marie Antoinette Miller.
Q. Okay. And where do you currently work?
A. I work at Bass Pro Shops.
Q. What is your position with Bass Pro Shops?
A. I'm the vice president and chief financial officer.

Q. How long have you been the vice president and chief financial officer for Bass Pro Shops?
A. I believe I've been in that position about six years.
Q. Okay. How long have you worked for Bass Pro Shops?
A. Oh, 25 years and three or four months, something like that.
Q. Okay. And I realized that over the course of the 25 or so years you've had several positions.
Can you just kind of give us a brief rundown of the positions?
A. You want me to start at the beginning or the end?
Q. Starting from the beginning and take us to the end.
A. I was an order clerk. I took phone orders over the phone. Then I was a COD clerk.
And I was accounts receivable clerk and I was accounting clerk and then accounts receivable manager and then accounting manager.
Then financial analyst. Financial analyst manager. Comptroller. Vice president and

comptroller. Vice president, finance. And vice president, chief financial officer.
Q. Okay. Can you give us a general description of your current responsibilities?
A. My current responsibilities include all the finance and accounting functions for Bass Pro Inc and its subsidiaries.
And I have oversight responsibilities for some of the other Bass Pro Group subsidiaries, like Big Cedar and some Tracker Marine responsibilities.
Q. Okay. Is it fair to say that you have at least a general familiarity with all the Bass Pro retail stores around the country?
A. Yes, I do.
Q. Okay. Do you know currently how many retail stores Bass Pro has in operation?
A. Oh, I always mess up on this. I think it's like 37. I don't know.
Q. If I told you it was 38, would that be --
A. Okay. I thought it was 37 or 38. Isn't that horrible? I'm in charge of numbers and don't even know.
Q. Are you familiar with the general nature of the dispute between Bass Pro and Sportsman's

Page 10

1 Warehouse Incorporated?
2 A. Yes, I am.
3 Q. Okay. And what's your general
4 understanding of the dispute?
5 A. The dispute has to do with the trademark
6 issue and that trademark being owned by Bass Pro
7 Shops -- well, Bass Pro Trademarks being Sportsman's
8 Warehouse.
9 And there's confusion with customers out
10 there about, you know, we have a competitor that's
11 using the name that's the name we registered to use
12 and there's a lawsuit over that.
13 Q. Okay. Does Bass Pro currently have any
14 stores that operate under the Bass Pro Shops
15 Sportsman's Warehouse name?
16 A. Yes.
17 Q. Okay. How many such stores does Bass
18 Pro operate --
19 A. Three.
20 Q. -- currently?
21 A. Three.
22 Q. Okay. And where are those three stores
23 located?
24 A. The stores are Memphis, St. Charles,
25 and -- I can't remember. Is it Columbia?

Page 11

1 Q. Are you familiar with a third one that
2 was opened in Macon, Georgia?
3 A. Oh, Macon. I'm sorry. Yeah. That was
4 just opened last year.
5 Q. Okay. That one was opened in late 2006?
6 A. Mm-hmm. Yes.
7 Q. Okay. Other than those three stores
8 that are currently in operation under the name Bass
9 Pro Shops Sportsman's Warehouse, are you aware of any
10 other stores that operate under that name?
11 A. No, I'm not.
12 Q. In the past?
13 A. Oh, in the past. Oh. Yes. I thought
14 we were just talking about the present. It was
15 Sportsman's Warehouse at the Duluth, Georgia --
16 Atlanta, Georgia.
17 Q. Okay. Was that the first Bass Pro Shops
18 Sportsman's Warehouse in operation?
19 A. Yes.
20 Q. Okay. Do you know roughly when the
21 Atlanta Sportsman's Warehouse store opened?
22 A. About March 1st, 1995.
23 Q. Okay. We've got a binder here with some
24 exhibits. I want to direct your attention to Exhibit
25 Number 10. It's a multiple-page exhibit. (Mr.

Page 12

1 Campbell hands a document to the witness).
2 A. Okay.
3 (Petitioner's Exhibit 10,
4 1995 Bass Pro Catalog, BPS
5 003336 - 003340, was
6 introduced by Mr.
7 Campbell.)
8 MR. CAMPBELL:
9 Q. Can you flip through those --
10 A. Mm-hmm.
11 Q. -- pages and let me know after you've
12 had a chance to look at those if you recognize what
13 that exhibit appears to be.
14 A. (The witness reviews the document). It
15 appears to be pages from our 1995 master catalog.
16 Q. Okay. And if you turn to the page
17 that's got the number BPS 003340 at the bottom.
18 A. (The witness turns to the requested
19 page). Okay.
20 Q. Can you describe what that page
21 represents?
22 A. It's an advertisement that was put in
23 our 1995 master catalog for the new store that was
24 opening in Atlanta, Georgia, the Sportsman's
25 Warehouse.

Page 13

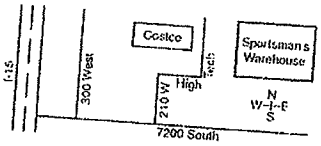
1 Q. Okay. And does that page there
2 represent or reflect the opening date for that Atlanta
3 store?
4 A. It says opens March 1st, 1995, which I
5 believe that to be the date.
6 Q. Okay. You believe that to be the date
7 that that --
8 A. Mm-hmm.
9 Q. -- Atlanta store opened?
10 A. Yes.
11 Q. Is it Bass Pro's practice to circulate
12 announcements for a new retail store in advance of the
13 store's actual opening?
14 A. Yes.
15 Q. Okay. Would that have been the case
16 with the Atlanta store?
17 A. Yes.
18 Q. And why does Bass Pro circulate
19 announcements in advance of a store opening?
20 A. We circulate the announcements because
21 we want our customers to know that we've come into
22 that market, that the store is now open for business,
23 and we need to advertise. Just basic retailing.
24 Q. Okay. Did Bass Pro have any other
25 retail stores around the Atlanta region prior to the

SPORTSMAN'S WAREHOUSE

Hunting • Fishing • Camping • Archery
Reloading • Marine • Outerwear • Footwear

Dale Smith

7035 South 185 West
Midvale, Utah 84047



(801) 566-6662 • Fax (801) 566-0128 • Vendors (801) 566-6681

1994/1995
Calling Card

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

7035 South 185 West, Midvale, Utah 84047
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Vendors (801) 566-6681

1995/1996
Calling Card

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 38

PENGAD 800-631-6989
DEPOSITION EXHIBIT
TR-44
Aguard

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

CONFIDENTIAL
BPS-000951

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 39

Lindquist & Vennum PLLP

Final Report: Sportsman's Warehouse Recognition Assessment

Prepared by

WINKELMAN CONSULTING
PO BOX 11375 • FARGO, ND 58106-1375
701-237-2283 • Office/Voice Mail
701-237-6877 • Fax Machine
701-799-0877 • Cell
MRWinkelman@cableone.net

Final Report Delivered September 2006

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 40

TABLE OF CONTENTS

EXECUTIVE SUMMARY **1-1**

FINDINGS SUMMARY & GENERAL CONCLUSIONS **2-1**

PURPOSE #1: ASSESS THE IMPLIED MEANING OF THE WORDS "SPORTSMAN'S WAREHOUSE". 2-1

FIGURE 1A. WHEN YOU HEAR THE WORDS "SPORTSMAN'S WAREHOUSE", DO YOU THINK THESE WORDS ARE MOST LIKELY..... 2-1

FIGURE 1B. WHEN YOU HEAR THE WORDS "SPORTSMAN'S WAREHOUSE", DO YOU THINK THESE WORDS ARE MOST LIKELY..... 2-2

FIGURE 2. TOP-OF-MIND AND UNAIDED AWARENESS OF SPORTSMAN'S WAREHOUSE. 2-3

FIGURE 3. WORDS USED MOST FREQUENTLY TO DESCRIBE A LARGE STORE THAT SELLS MAINLY HUNTING, FISHING, CAMPING, AND OUTDOOR GEAR? 2-4

PURPOSE #2: ASSESS THE IMPLIED MEANING OF THE "SPORTSMAN'S WAREHOUSE" SAMPLE LOGO..... 2-8

FIGURE 4. AFTER SEEING THIS SAMPLE LOGO, DO YOU THINK IT IS MOST LIKELY... 2-9

METHODOLOGY **3-1**

PURPOSE 3-1

SAMPLING FRAME & SAMPLE SIZE 3-1

COLLECTION TECHNIQUE & TIMING 3-2

MARGIN OF ERROR 3-3

THE QUESTIONNAIRE **4-1**

CONSUMER SURVEY 4-2

CONTINGENCY TABLES **5-1**

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 large store that sells mainly 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 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.

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)

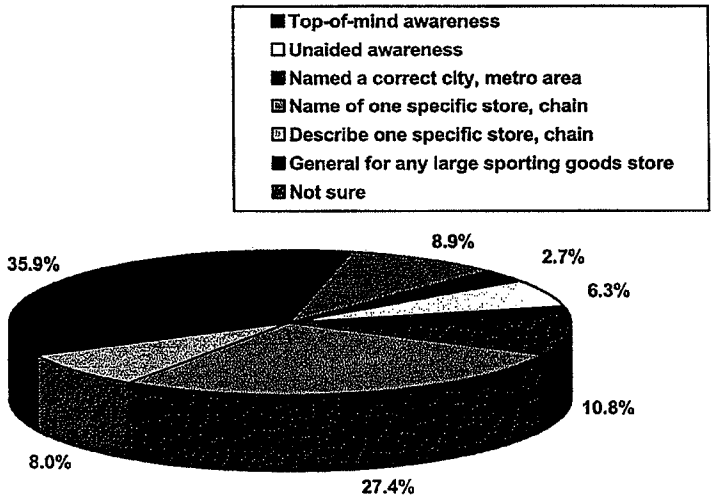
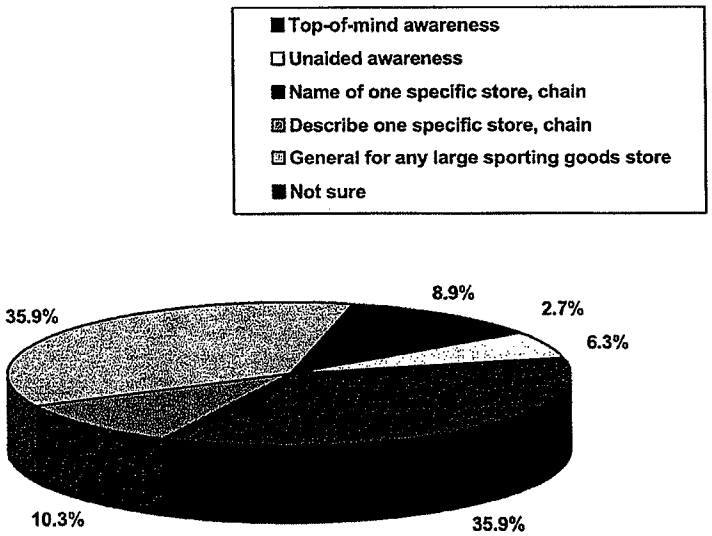


Figure 1b. When you hear the words "Sportsman's Warehouse", do you think these words are most likely...
(Includes all consumers)



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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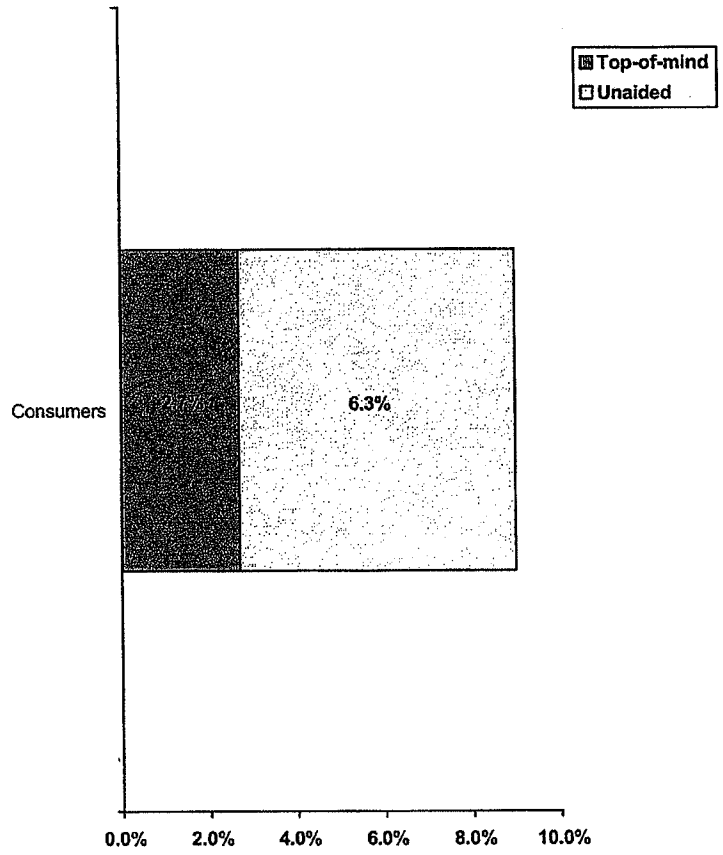
- **Conclusion #2:** Nearly one of every twenty respondents named Sportsman's Warehouse first (top-of-mind awareness), while more than one of every ten named Sportsman's Warehouse (unaided awareness, which includes top-of-mind awareness). These types of awareness are primarily measures of the longevity 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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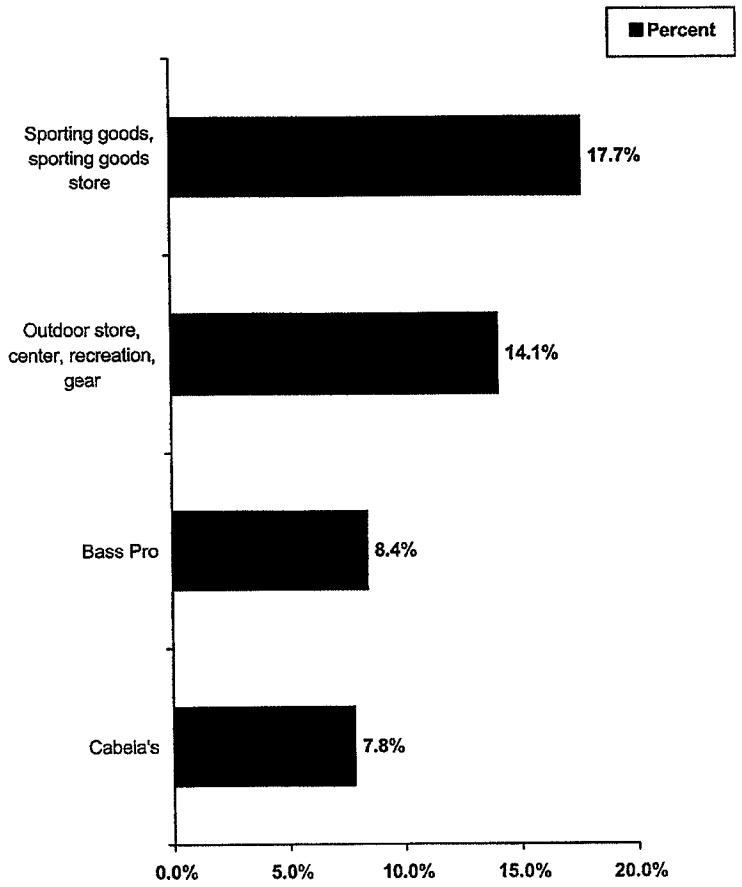
- **Conclusion #3:** The results indicate that a minuscule proportion of respondents used the words "sportsman(s)" or "sportsman(s) warehouse" as a generic term for a large store that sells mainly hunting, fishing, camping, and outdoor gear.

  - 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.

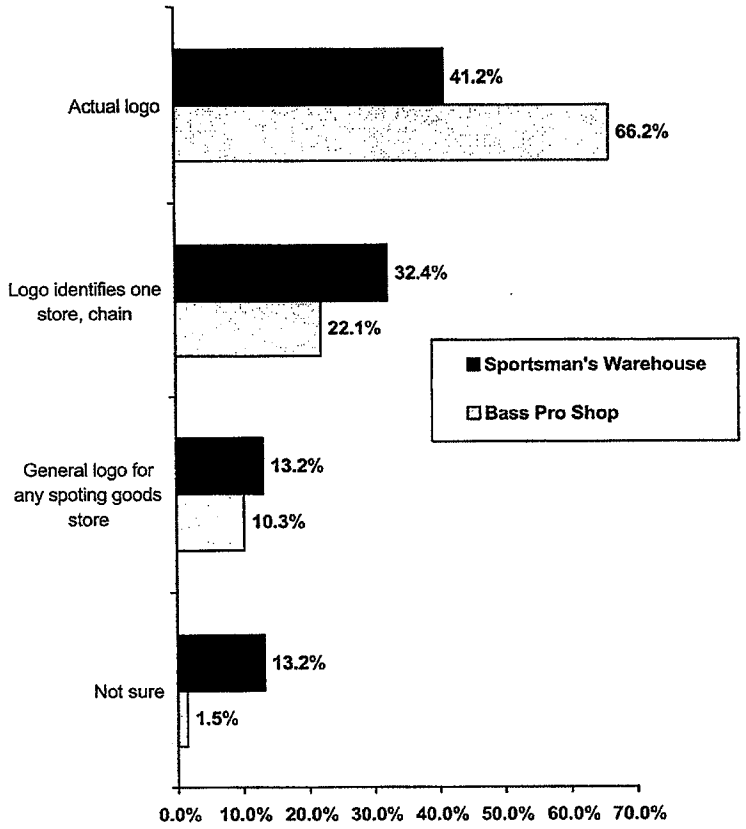
  - Those who were willing and able to access the Internet were asked to view sample logos for Sportsman's Warehouse and Bass Pro Shop. After reviewing each logo they were asked if they think that sample logo is most likely an actual logo that is currently used by one specific store or chain of stores, 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)*

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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).

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%

	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%

	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

		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

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.

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 41

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.*

Exhibit 42 Filed as Confidential
Pursuant to the Protective Order Entered in this Matter

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,

v.

Sportsman's Warehouse, Inc.,

Respondent.

Cancellation No. 92045000

SPORTSMAN'S WAREHOUSE, INC.'S AMENDED ANSWER TO PETITIONER'S INTERROGATORY NO. 8

GENERAL RESPONSES

1. The General Responses and the General and Specific Objections apply to all answers of Respondent Sportsman's Warehouse, Inc. ("Sportsman's Warehouse") to Petitioner's interrogatories. In connection with these answers, Sportsman's Warehouse response is made without waiving or intending to waive, and expressly reserving: (a) the right to object on the grounds of competency, privilege, relevancy, materiality or any other proper ground to the use of the answers for any purpose, in whole or in part, in any subsequent step or proceeding in this action or any other action; (b) the right to object on any and all grounds at any time to other interrogatories or other discovery procedures involving or relating to the subject matter of the

Doc# 2109464\1

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 43

AMENDED ANSWER TO INTERROGATORY NO. 8

INTERROGATORY NO. 8: For each year, beginning with the date Respondent's Mark was first used in the United States, identify any and all businesses, retailers, or distributors to whom Respondent has sold goods at wholesale under Respondent's Mark.

ANSWER: Respondent reaffirms its objection to Interrogatory No. 8 on the grounds that it is vague and overly broad. Subject to and without waiving these objections and the foregoing General Objections, Sportsman's Warehouse responds that it takes the phrase "under Respondent's mark" to refer to sales of goods actually bearing Respondent's mark, such as logoed products. Respondent does not sell logoed products as a wholesaler. Respondent has, however, from time to time sold goods at wholesale. Respondent states that its parent company, Sportsman's Warehouse Holdings, Inc., engages in wholesale sales through its subsidiary Pacific Flyway. Pacific Flyway was affiliated with Sportsman's Warehouse prior to December 16, 1998. During that time, it was the business practice of Pacific Flyway to at times send wholesale customers to Sportsman's Warehouse when Pacific Flyway was out of stock in a required item. Sportsman's Warehouse would then sell items to such customers at wholesale. Prior to December 16, 1998, Sportsman's Warehouse would also at times sell items in volume to certain customers at wholesale. Respondent is presently aware of no "advertising or promotional materials" related to this practice.

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,

v.

Sportsman's Warehouse, Inc.,
RESPONDENT

CANCELLATION NO. 92045000

RESPONDENT'S RESPONSES TO PETITIONER'S FIRST SET OF REQUESTS FOR ADMISSION AND SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Respondent, Sportsman's Warehouse, Inc. ("Respondent"), responds to Petitioner Bass Pro Trademarks, L.L.C.'s ("Petitioner") First Set of Requests For Admission and Second Set of Interrogatories and Requests for Production of Documents as follows:

GENERAL RESPONSES

1. The General Responses and the General and Specific Objections apply to all answers of Respondent Sportsman's Warehouse, Inc. ("Sportsman's Warehouse") to Petitioner's interrogatories. In connection with these answers, Sportsman's Warehouse response is made without waiving or intending to waive, and expressly reserving: (a) the right to object on the grounds of competency, privilege, relevancy, materiality or any other proper ground to the use of the answers for any purpose, in whole or in part, in any subsequent step or proceeding in this

Cancellation No. 92045000
Bass Pro Trademarks, L.L.C
v.
Sportsman Warehouse Inc.
RESPONDENT'S TRIAL BRIEF EX. 44

ambiguous, and overly broad. Subject to and without waiving these objections, Respondent states as follows: Deny.

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 23: With regard to Respondent's assertion that its "use of the ® symbol has been inadvertent and *de minimus* in nature" and that "Sportsman's Warehouse is not aware of any such use" in its Answer to Interrogatory No. 13, identify (i) all of Respondent's advertisements, promotions, flyers, web site pages and any other publications which, prior to December 31, 2005, used the phrase SPORTSMAN'S WAREHOUSE in combination the ® symbol but not in combination with the other words that comprise Respondent's Mark (i.e., HUNTING FISHING CAMPING RELOADING OUTERWEAR FOOTWEAR) or not in combination with the mountain range design element of the Respondent's Mark, (ii) when Respondent first became aware of "such use in its advertisements, promotions, flyers, web site pages and any other publications, (iii) the person or persons who gave the instructions to change Respondent's advertisements, promotions, flyers, web site pages and any other publications to remove "such use" on or after January 1, 2006, and (iv) the person or persons who were instructed to change Respondent's advertisements, promotions, flyers, web site pages and any other publications to remove "such use" on or after January 1, 2006.

ANSWER: Respondent objects to Request No. 23 on the grounds that it is vague, overly broad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections, Respondent states that it already has produced promotional materials responsive to this interrogatory.

INTERROGATORY NO. 24: With regard to Respondent's Answer to Interrogatory No. 9 that the "parent company of Sportsman's Warehouse, Sportsman's Warehouse Holdings, Inc., also owns "Pacific Flyway" and Respondent's statements that "it sells goods only at retail and does not sell at a wholesale level" and "Respondent does not sell at wholesale under Respondent's Mark, and therefore no responsive documents exist" in its Answers to Interrogatory No. 8 and Response to Request No. 15, respectively, (i) identify any advertising or promotional materials in existence on or before December 16, 1998 that Respondent relied upon to declare that its services included "wholesale stores" in filing the trademark application for Respondent's Mark (Ser. No. 75/625,090). (ii) identify the date that Respondent's parent company or predecessor in interest created or otherwise acquired Pacific Flyway, and (iii) describe the facts and circumstances regarding Pacific Flyway's use of Respondent's Mark prior to December 16, 1998 which in any way differed from its servicing of other retailers to whom Pacific Flyway sells goods at wholesale.

ANSWER: Respondent objects to Request No. 24 on the grounds that it is vague, overly broad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections, Respondent notes that an ambiguity in its response to Petitioner's Interrogatory No. 8 should be addressed. Respondent took the phrase "under Respondent's mark" to refer to sales of goods actually bearing Respondent's mark, such as logoed products. Respondent does not sell logoed products as a wholesaler. Respondent has, however, from time to time sold goods at wholesale. Respondent states that its parent company, Sportsman's Warehouse Holdings, Inc., engages in wholesale sales through its subsidiary Pacific Flyway. Pacific Flyway was affiliated with Sportsman's Warehouse prior to December 16, 1998. During that time, it was the business practice of Pacific Flyway to at times send wholesale customers to Sportsman's Warehouse when Pacific Flyway was out of stock in a required item. Sportsman's Warehouse would then sell items to such customers at wholesale. Prior to December 16, 1998, Sportsman's Warehouse would also at times sell items in volume to certain customers at wholesale. Respondent is presently aware of no "advertising or promotional materials" related to this practice.

INTERROGATORY NO. 25: With regard to Respondent's Answer to Interrogatory No. 15, identify "the company that was attempting to file state business and/or corporate names including the words Sportsman's Warehouse" with the following information: (i) the name, address, phone number, web site and any other contact information of "the company" including any subsequent name of "the company" that was at any time known by Respondent; and (ii) the name and address of the person who corresponded with "the company" on behalf of Respondent.

ANSWER: Respondent objects to Request No. 25 on the grounds that it is vague, overly broad, and unduly burdensome. Subject to and without waiving these objections, Respondent will produce documents sufficient to identify this company to the extent they exist.

INTERROGATORY NO. 26: Identify the parties to whom Garrett M. Weber forwarded or copied the e-mail correspondence relating to the eBay VeRO Notice of