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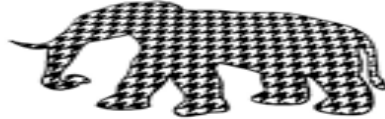
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92057550
Party	Defendant Richard Diaz
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Date	08/05/2014
Attachments	Reply MSJ Brief (Draft, 08.04.14).pdf(342227 bytes) Exhibit 1-Final Consent Judgment Original Houndstooth.pdf(174377 bytes) Exhibit 2-Declaration of Diaz.pdf(138121 bytes) Exhibit 3-Declaration of Douglas.pdf(179813 bytes) Excerpts of Depo of Paul Bryant Jr.pdf(461544 bytes) Excerpts of Depo of Finus Gaston.pdf(460379 bytes) Excerpts of Depo of Richard Diaz.pdf(597425 bytes)

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

BOARD OF TRUSTEES OF THE)	
UNIVERSITY OF ALABAMA and)	Cancellation No.: 92057550
PAUL W. BRYANT, JR.,)	
)	Mark:
Petitioners,)	
)	
v.)	
)	
RICHARD DIAZ,)	
)	
Registrant.)	Registration No.: 3993520



**REGISTRANT’S REPLY TO PETITIONERS’ RESPONSE
TO REGISTRANT’S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Registrant is mindful of the Board’s opinion of reply briefs and will refrain from revisiting arguments set forth in its Motion for Summary Judgment. Registrant stands by his Motion for Summary Judgment and replies to Petitioners’ Response to Registrant’s Motion for Summary Judgment (“the Response”) to clarify testimony and address arguments not considered in Registrant’s Motion for Summary Judgment.

II. ARGUMENTS

A. Per the Supreme Court of the United States, *The Bd. of Trustees of the University of Ala. v. Pitts* Opinion Remains Board Precedent

Petitioners’ Response chastises Registrant for his reference to *The Bd. of Trustees of the University of Ala. v. Pitts*, 107 USPQ2d 2001, 2013 WL 4397047 (TTAB 2013) (hereinafter “*Pitts*”). Petitioners cite the final consent judgment entered in the U.S. District Court for the Northern District of Alabama where the University and Bryant, Jr. appealed the *Pitts* decision.¹ As a result of the judgment purporting to vacate the *Pitts*, Petitioners’ allege that Registrant’s reliance upon *Pitts* is “purely academic.” While Registrant appreciates that vacatur would be beneficial to Petitioners given the

¹ See *Bd. of Trustees of the Univ. of Ala. v. Houndstooth Mafia Enterprises, LLC*, 7:13-cv-01736, Dkt. No. 15 (N.D. Ala., May 27, 2014), attached herewith as Exhibit 1.

language of the *Pitts* opinion, vacatur is unavailable and improper when the parties to an appeal arrive at voluntary, mutual settlement. See *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25, 115 S. Ct. 386 (1994).²

Vacatur is an equitable remedy that should only be entered after a review of the trial court's judgment on the merits of the case. *Id.*, at 28. As the Supreme Court held, "[M]ootness by reason of settlement does not justify vacatur of a judgment under review." *Id.*, at 29. It explained further:

Where mootness results from settlement... the losing party has voluntarily forfeited his legal remedy by the ordinary process... thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice. The denial of vacatur is merely one application of the principle that "[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks."

Id., at 25. Thus, the Supreme Court has disavowed the availability of vacatur after voluntary settlement in all but exceptional circumstance, holding that "[i]t should be clear from our discussion... that those exceptional circumstances do not include *the mere fact that the settlement agreement provides for vacatur*." *Id.*, at 29 (emphasis added). As the Supreme Court noted, there would be less incentive to settle at the trial court level (or even court of appeals) should litigants have the option of washing away an unfavorable outcome by later agreeing to a settlement including vacatur. *Id.*, at 27-28.

It is clear Petitioners appealed the matter to the district court and requested vacatur, having lost their opposition before the Board. See Exhibit 1, Final Consent Judgment, ¶ 4. Likewise, it is without question that the consent judgment allegedly vacating the *Pitts* decision arose out of a settlement agreement between the Houndstooth Mafia purveyors, the University and Bryant, Jr. See Final Consent Judgment ("Plaintiffs... and Defendants... having resolved the matters in issue between them, consent to entry of final judgment in this matter as follows..." ... "the parties agree that the Board's Order should be

² While the *U.S. Bancorp* case involved a motion to vacate the judgment of a court of appeals, the Supreme Court held that its opinion applied to vacatur of trial court opinions by appellate courts as well. "Whether the appellate court's seizure of the case is the consequence of an appellant's right or of a petitioner's good luck has no bearing upon the lack of equity of a litigant who has voluntarily abandoned review." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 28, 115 S. Ct. 386 (1994). If the point of a distinction between trial courts and courts of appeal "is that [the trial court] judgments, being subject to review as of right, are more likely to be overturned and hence presumptively less valid: We again assert the inappropriateness of disposing of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits." *Id.*

vacated”). Per *U.S. Bancorp* and by the express word of the Supreme Court of the United States, vacatur under such circumstances is improper, ineffective, and *Pitts* remains valid precedent of the Board.

Furthermore, Petitioners’ argument that *Pitts* is of little precedential value is misguided. Petitioners acknowledge that there are additional and, in some instances, different circumstances involved in this matter. However, ***Pitts* involved the same Petitioners, many of the same issues and many of the same facts as are involved in this proceeding.** In particular, the facts surrounding the University’s and Bryant, Jr.’s use of and/or claim to the houndstooth pattern are identical, aside from the University’s recent acquisition of the HOUNDSTOOTH MAFIA mark.³ As such, the *Pitts* opinion is highly valuable and influential as precedent to the current matter. The Registrant has cited a bevy of additional authorities in its Motion for Summary Judgment to supplement *Pitts*.

B. Third-Party Use

Petitioners filed a Motion to Strike along with their Response. The bulk of the Motion to Strike centers on Registrant’s evidence of third-party use of the Petitioners’ alleged marks, and likewise evidence of third-party references to those marks. Registrant addressed Petitioners arguments in his own Response to Petitioners’ Motion to Strike. To the extent that Petitioners have additionally attacked Registrant’s evidence of third-party use in their Response, the case law cited in Petitioners’ Response is readily distinguished from the present matter. As in the Motion to Strike, the cases cited by Petitioners involved instances where evidence of only a few third-party uses were offered;⁴ those where only registrations were offered; a combination of evidence of a few instances of use and registrations;⁵ or other instances where the marks were not show to be *in use* in commerce. As set forth in the Motion to Strike, these instances are distinguishable from the present matter based on the volume of third-party use

³ The HOUNDSTOOTH MAFIA mark is not alleged as a basis for this cancellation proceeding in either the Petition to Cancel or Amended Petition to Cancel. Registrant has filed opposition to Petitioners’ Motion for Leave to File a Second Amended Petition.

⁴ See, e.g. *L.D. Kichler Co. v. Davoil, Inc.*, 52 USPQ2d 1307 (Fed. Cir. 1999) (three instances); *Yamaha Int’l Corp. v. Hoshino Gakki Co. Ltd.*, 6 USPQ2d 1001, 1010 (Fed. Cir. 1988) (four instances);

⁵ *Lovely Skin, Inc. v. Ishtar Skin Care Prods. LLC*, 745 F.3d 877, 110 USPQ2d 1071 (8th Cir. 2014) (third party registrations and testimony from three individuals re: the subject mark).

evidence offered and that Registrant has offered evidence of the third-party *use* of the marks in ecommerce and the means through which goods bearing the marks may be purchased.

C. *Smack Apparel* does not apply to the current scenario

Petitioners' citation to *Bd. of Supervisors of La. State Univ. v. Smack Apparel Co.*, 438 F. Supp. 2d 653, 656-62, 82 USPQ2d 1122 (E.D. La 2006), *aff'd*, 550 F.3d 465 (5th Cir. 2008) concerns color schemes used by four universities over a hundred years apiece (LSU since 1893; Oklahoma since 1895; Ohio State since 1878; USC since 1895), and, more generally, their designs and logos. First, Houndstooth is not a color scheme generally employed by the University. Second, the patterns used/licensed by the university are constantly changing size, shape color. Third, Coach Bryant's patterns in his hats were constantly changing size, shape color, and many of patterns were not houndstooth. Moreover, per Petitioners' own authority, greater weight is given to dominant elements of marks in a likelihood of confusion analysis. See *Uncle Ben's Inc. v. Stubenberg Int'l Inc.*, 47 USPQ2d 1310, 1998 WL 416760, *3 (TTAB 1997) (Color was not dominant portion of each mark, but rather the word "BEN'S" in the possessive form).

D. Petitioners' Declarations Should Not Be Considered

The three declarations attached to Petitioners' Response contradict the prior deposition testimony of Bryant, Jr. and Finus Gaston, the representative testifying on behalf of the University's Board of Trustees. Such declarations and affidavits are improper under federal law:

A district court may disregard an affidavit as a sham when a party to the suit files an affidavit that contradicts, without explanation, prior deposition testimony on a material fact. The sham affidavit rule should be applied when "[t]he earlier deposition testimony ... consist[s] of clear answers to unambiguous questions which negate the existence of any genuine issue of material fact."

Kernel Records Oy v. Mosley, 694 F.3d 1294, 1300, 104 USPQ2d 1987 (11th Cir. 2012) *cert. denied*, 133 S. Ct. 1810, 185 L. Ed. 2d 812 (U.S. 2013) (internal citations omitted). Because these contradictions have been offered without explanation in the face of clear answers to unambiguous questions, the Board should disregard the declarations as being shams.

i. Bryant, Jr.'s Testimony

Several crucial statements in Bryant, Jr.'s Declaration attached as an exhibit to Petitioners' Response are directly contradictory to testimony he offered during his deposition and are offered solely for the purpose of creating an issue of fact to survive summary judgment. For example, Bryant, Jr.'s declaration states that "I am the sole heir and the successor-in-interest to the rights Coach Bryant had in his name, likeness, image and trademarks." Bryant, Jr. Declaration, ¶ 2. However, at his deposition, Bryant, Jr. testified that he does not know whether any trademarks, other intellectual property, or rights in Coach Bryant's likeness or name passed to him through Coach Bryant's estate. (Bryant Dep. at 71:15 – 74:2). Moreover, Bryant, Jr. testified he doesn't know whether he owns a trademark for a houndstooth pattern. (Bryant Dep. at 79:18 – 80:1). Thus, Bryant, Jr.'s Declaration cannot serve to create an issue of fact as to whether any of Coach Bryant's intellectual property or rights to his likeness or name have passed to him through inheritance or the administration of Coach Bryant's estate. Further, it cannot be used to create an issue of fact as to whether Bryant, Jr. owns a trademark for a houndstooth pattern.

Bryant, Jr.'s Declaration also states that "[f]or nearly a quarter of a century, Coach Bryant wore his signature Houndstooth Pattern hat at almost every University of Alabama football game," inferring the hat and the pattern were always the same. Bryant, Jr. Declaration, ¶ 3. However, he acknowledged at his deposition that his father wore several different kinds of hats in conjunction with his tenure as football coach at the University, and that some of his famous fedoras featured different patterns. (Bryant Dep. at 59:7 – 60:17). He further acknowledged that these patterns were of different sizes and colors. (Bryant Dep. at 60:21 – 61:17). "Consistent and uniform visual use strengthens both the legal, marketing and economic value of the trademark." 1 McCarthy on Trademarks and Unfair Competition § 7:38.50 (4th ed.). As set forth in Registrant's Motion for Summary Judgment, the opposite is also true: inconsistent visual use does not warrant protection. Bryant, Jr.'s declaration cannot be used to create an issue of fact as to whether Coach Bryant had a singular hat and pattern that he wore during his tenure as the football coach at the University.

ii. Finus Gaston's Testimony

Gaston's Declaration, like Bryant, Jr.'s, repeatedly references Coach Bryant's "iconic", "signature" or "famous" Houndstooth Pattern hat in the singular form in order to give the impressions of a consistency in use. See Gaston Declaration at ¶¶ 4, 8, 9, 10, 11, 23, 24, & 26). However, Gaston acknowledged Coach Bryant wore hats other than Fedoras to football games; that he wore fedoras with patterns other than houndstooth on them; and that some of the fedoras were different colors. (Gaston Dep. at 98:11- 99:4). Gaston admitted there are many different types and designs of the houndstooth pattern (Gaston Dep. at 33:1-5). He further testified the University does not claim any intellectual property rights to a specific type or design of the houndstooth pattern. (Gaston Dep. at 33:6-14). He admitted no one from Coach Bryant's Estate has told him that the University should use a particular houndstooth pattern. (Gaston Dep. at 33:15-20). He also admitted that Coach Bryant did not secure a trademark that included a houndstooth pattern. (Gaston Dep. at 23:3-10). Thus, like Bryant, Jr.'s declaration, Gaston's declaration cannot be used to create an issue of fact as to whether Coach Bryant had a singular hat and pattern he wore during his tenure as the football coach at the University.

Further, Gaston's Declaration states that "The University's football team regularly uses the Houndstooth Pattern to pay tribute to its former coach." Gaston Declaration, ¶ 13. However, Gaston testified at his deposition the University has incorporated houndstooth into its football team's uniforms, albeit subtly, on only three occasions. (Gaston Dep. at 99:22-101:22). Three occasions over the thirty years since Coach Bryant's death is hardly "regular" use, and Gaston's declaration cannot be used to create an issue of fact as to this matter.

Finally, Gaston's Declaration states that "[t]he public, and in particular the University's fans, students, and alumni, immediately associate the Houndstooth Pattern with Coach Bryant and the University." However, Gaston testified at his deposition "[t]he houndstooth pattern itself alone does not draw an association with the University unless [The University's] marks are associated with that." (Gaston Dep. at 30:9-13). Further, Gaston doesn't believe the University has the right to license the houndstooth pattern alone without any other trademarks. (Gaston Dep. at 30:1-8). Thus Gaston's

declaration cannot be used to create an issue of fact as to whether the public associates houndstooth with the University when removed from the University's marks.

iii. Alicia Jones' Declaration

Alicia Jones' Declaration says that a "true and correct copy of Registrant's Facebook page is attached as Exhibit B." Jones Declaration, ¶ 3. However, Registrant does not have a Facebook page. The time stamp on Petitioners' copy of Registrant's alleged Facebook page clearly says "7/10/13" in the upper-right hand corner, and was thus over a year old prior to the submission of Petitioners' Response. Registrant's Facebook page for GameDawg Collegiate was removed as soon as the Registrant was made aware of its contents. See Registrant's Declaration, attached herewith as Exhibit A. The Registrant made it abundantly clear at his deposition the content of the Facebook page had been published without Registrant's authorization or consent and that Registrant would not have agreed to publish the content. (Diaz Dep. at 81:12 – 85:7).

Furthermore, Jones's Declaration states "the Board's decision in *The Bd. of Trustees of the University of Ala. v. Pitts*, 50 USPQ2d 2001 (TTAB 2013) was vacated by the U.S. District Court for the Northern District of Alabama." Jones Declaration, ¶ 6.⁶ For reasons described above, the Supreme Court of the United States has explicitly prohibited vacatur by the appellate court under these circumstances.

E. Misrepresentation of Registrant's Testimony

Petitioners have taken liberties with the Registrant's testimony by ignoring qualifications or contrary testimony when it suits Petitioners' argument. For example, Petitioners claim on p. 8 of their Response that Registrant's Mark is a "self-proclaimed symbol for 'Alabama fans everywhere.'" However, Registrant explicitly testified that he disagreed with the statement that Registrant's mark was for "Alabama fans everywhere." (Diaz Dep. at 84:20 – 23). Moreover, Registrant explicitly testified that he did not agree with the Facebook statements referenced by Petitioner, and that the content on the Facebook page was created without Registrant's authorization or permission by his son. (Diaz Dep. at 81:8 – 85:7);

⁶ Registrant assumes this is a reference to *The Bd. of Trustees of the University of Ala. v. Pitts*, 107 USPQ2d 2001, 2013 WL 4397047 (TTAB 2013).

see also Registrant’s Declaration, attached herewith as Exhibit 2. Registrant acknowledged that the Facebook page had been taken down, and that he *never* had a contract with the University. (Diaz Dep. 82:16 – 84:16).

Further, Registrant testified that only *part* of the reason he chose houndstooth and the elephant was to appeal to University of Alabama fans. (Diaz Dep. at 58:16 – 59:10). Registrant never testified that he primarily sells at University of Alabama football games; rather, he testified to selling at football games, festivals, and other events. (Diaz Dep. at 34:14 – 35:7), as well as at mall kiosks (Diaz Dep. at 41:18 – 42:25). Moreover, Registrant did *not* testify that “Campus Traditions” refers to the University of Alabama. In fact, Registrant explicitly testified that he did *not* choose “Campus Traditions” to refer to the University of Alabama. (Diaz Dep. at 24:20 – 25:3). Finally, Registrant never testified that Alabama fans associate the houndstooth pattern exclusively with Coach Bryant. In fact, Diaz said in his deposition that people also associate Coach Bryant with wearing plaid. (Diaz Dep. at 62:22 – 63:3). Diaz did not testify that the public uses the Houndstooth Pattern as a visual short-hand to refer to Coach Bryant or to the University—especially not uniquely.

F. Houndstooth Mafia Mark

Petitioners HOUNDSTOOTH MAFIA mark (“HM Mark”) is the subject of its Motion for Leave to File Second Amended Petition to Cancel. This motion has not been granted and is actively opposed by the Registrant. The HM Mark has not been identified in the Petition to Cancel or the First Amended Petition to Cancel as a mark upon which Petitioners’ base their rights. As such it should receive no consideration relative to this motion.

Nevertheless, if Petitioners are allowed to rely upon the HM Mark to rebut Registrant’s Motion for Summary Judgment, the HM Mark does little to add to the strength of Petitioners’ cancellation proceedings. First, the background (i.e., houndstooth contained in generic shapes) for a word mark (“Houndstooth Mafia”), cannot function as a mark on its own unless the shape of the background creates

a separate commercial impression on the ordinary buyer.⁷ See *Am. Can Co. v. Marcal Paper Mills, Inc.*, 152 USPQ 772, 1967 WL 7535 (TTAB 1967) (oval background with stripped pattern fill did not create a separate commercial impression on the ordinary buyer when removed from word mark it is used in conjunction with); *Marcalus Mfg. Co. v. Watson*, 156 F. Supp. 161, 162-63, 115 USPQ 232 (D.D.C. 1957); *Dow Corning Corp. v. Applied Power Indus., Inc.*, 322 F. Supp. 943, 945, 167 USPQ 730 (N.D. Ill. 1970).

Second, a design or pattern used as a background has no significance by itself unless it is “distinctive.” Distinctiveness breaks up into three separate issues for background patterns: (1) The design must be incidental to its principal impact of identifying and distinguishing the source of the goods; (2) The design must create a separate commercial impression upon the ordinary buyer, totally separate and apart from that created by other marks created by the background design; and (3) If the design is not inherently distinctive, there must be some proof that buyers have come to use the design to identify once single source of the goods or services (i.e., must establish secondary meaning). McCarthy’s, §7:28.

As set forth in *Pitts*:

There is no evidence showing that the Houndstooth Pattern creates a commercial impression distinct from any accompanying indicia of the University or that the University has promoted it as such. Opposers have punted away their claim of broad rights in any use of a houndstooth pattern by conceding that they only claim rights in the Houndstooth Pattern “when the houndstooth pattern is used on products sold in Alabama or used in connection with trademarks or other indicia of the University or Coach Bryant.

The Bd. of Trustees of the Univ. of Alabama & Paul W. Bryant, Jr., 107 U.S.P.Q.2d 2001, 2013 WL 4397047, *14 (TTAB 2013).

Only the University—not Paul Bryant, Jr.—has allegedly got any ownership interest in the HOUNDSTOOTH MAFIA mark. See District Court Order at ¶ 6, evidencing assignment in all “right, title and interest in and to” the mark from Pitts and Blackburn to the University; Declaration of Finus

⁷ The “Houndstooth Mafia” word mark is the distinctive portion of the HM Mark and is readily distinguished from Registrant’s mark, leaving little possibility for a likelihood of confusion. Thus only the houndstooth patterned background of the HM Mark is relevant to the current matter.

Gaston, ¶ 33. Moreover, the University is not known to use the HM Mark. Thus, the HM Mark does little to further Petitioners' claims.

G. Original Houndstooth Mark

The Petitioners' claim that the ORIGINAL HOUNDSTOOTH mark ("OH Mark") has been used by Original Houndstooth pursuant to a license from the University since December 2010. Response to Motion for Summary Judgment, p. 9. Likewise, Gaston's declaration claims the goods in Exhibit W are examples of the University's licensed products sold by Original Houndstooth. Gaston Declaration, ¶ 43. However, Original Houndstooth is no longer in business and their web page is no longer fully functioning. See Michael Douglas's Declaration, attached herewith as Exhibit 3. As such, the OH Mark is no longer in use and has been abandoned. See *Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 1355, 33 USPQ2d 1961 (E.D.N.Y. 1994) ("Once abandoned, the mark reverts back to the public domain whereupon it may be appropriated by anyone who adopts the mark for his or her own use"). It is thus difficult to see how Registrant can say with any credibility that confusion between Registrant's Mark and the OH Mark is evidence of "*actual and ongoing*" confusion. See Response to Motion for Summary Judgment, p. 21. Further, Petitioners' argument that the public need not know the ultimate source of the Original Houndstooth mark is misguided in this scenario. *McCarthy's* § 3:9 says that the public doesn't have to know the ultimate source so long as it knows that products bearing the mark come from a single source. 1 *McCarthy on Trademarks and Unfair Competition* § 3:9 (4th ed.). Here, the public clearly believed that products bearing the mark came from a single source—Original Houndstooth—as opposed to the University.

Respectfully submitted,

/s/ Michael J. Douglas
Michael J. Douglas
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing pleading upon all counsel of record, via email and U.S. Mail, first class postage prepaid and properly addressed, on this the 5th day of August, 2014.

R. Charles Henn Jr.
Alicia Grahn Jones
Harris W. Henderson
KILPATRICK TOWNSEND & STOCKTON LLP
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s/ Michael J. Douglas
OF COUNSEL

Exhibit 1

**Final Consent Judgment,
Original Houndstooth**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION**

**BOARD OF TRUSTEES OF THE
UNIVERSITY OF ALABAMA and PAUL W.
BRYANT JR.,**

Plaintiffs,

v.

**HOUNDSTOOTH MAFIA ENTERPRISES,
LLC, WILLIAM PITTS JR. and
CHRISTOPHER BLACKBURN,**

Defendants.

Civil Action No. 7:13-cv-01736-RDP

FINAL CONSENT JUDGMENT

Plaintiffs Board of Trustees of the University of Alabama (“University”) and Paul W. Bryant Jr. (collectively, “Plaintiffs”) and Defendants Houndstooth Mafia Enterprises, LLC, William Pitts Jr. and Christopher Blackburn (collectively, “Defendants”), having resolved the matters in issue between them, consent to entry of final judgment in this matter as follows:

1. On December 3, 2007, Mr. Blackburn and Mr. Pitts filed application Serial No. 77/342,852 in the U.S. Patent and Trademark Office to register the HOUNDSTOOTH MAFIA & Design mark, depicted below (the “HOUNDSTOOTH MAFIA & Design Application”);



2. Coach Paul “Bear” Bryant regularly wore a Houndstooth-pattern hat while on the sidelines of the University’s football field for many years before his death in 1983. Because of the positive and widespread association of the Houndstooth pattern with the University, the University has used and licensed the Houndstooth pattern as a trademark in connection with a wide variety of goods, and the Houndstooth pattern has become a well-known source identifier for the University (the “Houndstooth Pattern Mark”).

3. Based on their rights in the Houndstooth Pattern Mark, Plaintiffs opposed registration of the HOUNDSTOOTH MAFIA & Design Application by filing a notice of opposition (Opp. No. 91187103, the “Opposition”) with the Trademark Trial and Appeal Board (the “Board”);

3. The Board issued an opinion in the Opposition on July 23, 2013, in which the Board, inter alia, concluded that the HOUNDSTOOTH MAFIA & Design Application could proceed to registration over Plaintiffs’ opposition (the “Board’s Order”);

4. Plaintiffs believe the Board’s Order is clearly erroneous in a number of material respects and, pursuant to 15 U.S.C. § 1071(b), have appealed the Board’s Order in this civil action and requested that this Court vacate the Board’s Order (the “Appeal”).

5. The parties acknowledge and agree that the Board’s Order should be vacated.

6. Defendants Pitts and Blackburn have executed an Assignment that assigns to the University all right, title, and interest in and to the HOUNDSTOOTH MAFIA mark, including the HOUNDSTOOTH MAFIA & Design Application (the “Assignment”). As such, the HOUNDSTOOTH MAFIA & Design Application should proceed to registration on the Principal Register with the University as its owner.

7. Counsel for all parties consent to the terms of, and agree to the form of and entry of, this Consent Judgment.

THEREFORE, IT IS HEREBY **ORDERED** THAT:

1. The Clerk is directed to enter **FINAL JUDGMENT** in favor of Plaintiffs.
2. The Board's Order is **VACATED**.
3. Once the parties have properly recorded a copy of the Assignment with the U.S.

Patent and Trademark Office, the Register of Trademarks is directed to permit the HOUNDSTOOTH MAFIA & Design Application (Serial No. 77/342,852) to be registered on the Principal Register with the University as its owner.¹

4. Each party will bear its own costs and attorneys' fees.

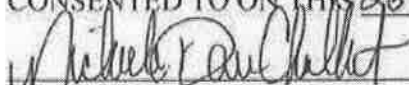
SO ORDERED,


This 27th day of May, 2014.



R. David Proctor
United States District Court Judge

CONSENTED TO ON THIS 23rd DAY OF MAY, 2014 BY:


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Nichole Davis Chollet (*pro hac vice*)
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¹ It is within this Court's authority to approve an application for registration under 15 U.S.C. § 1071(b) that, but for the pending opposition, would otherwise be entitled to registration. *See e.g. Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass'n*, 333 F. Supp. 2d 975, 980 (D. Or. 2004) (ordering issuance of registration on ground that "there do not appear to be any objecting non-parties whose rights would be affected by the registration of [the disputed mark], which the PTO previously published for public opposition"), *aff'd*, 465 F.3d 1102 (9th Cir. 2006); *see also City of Carlsbad v. Shah*, 850 F. Supp. 2d 1087, 1117 n.24 (S.D. Cal. 2012) (referring to prior order requiring the USPTO to approve a series of applications filed by the lead plaintiff).

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Attorneys for Plaintiffs

Exhibit 2

Declaration of Diaz

declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Dated: Aug. 5, 2014



Richard Diaz
Registrant

Exhibit 3

Declaration of Douglas

BOARD OF TRUSTEES OF THE
UNIVERSITY OF ALABAMA and
PAUL W. BRYANT, JR.,

Mark:

v.

Registrant.



DECLARATION OF MICHAEL J. DOUGLAS

3. I have also called the two telephone numbers listed on Original Houndstooth's website under the "Returns" section.² These are the telephone numbers to Black Warrior Outdoor, a separate store in Tuscaloosa, Alabama owned by Original Houndstooth proprietor Mark Gatewood. A Black Warrior Outdoor employee told me over the telephone that Original Houndstooth is being "phased out" and is no longer in business.

² The URL to the returns section is <http://originalhoundstooth.com/returns.php>. The two telephone numbers are 1 (855) 892-7746 and 1 (205) 752-2240.

4. Furthermore, the content of Original Houndstooth's website, including the online store, is no longer accessible from its base URL.³ Instead, a message saying "Under Construction" is displayed. (See Exhibit W of Finus Gaston's Declaration accompanying Petitioner's Response to Registrant's Motion for Summary Judgment). Based upon my conversation with the Black Warrior Outdoor employee, it is my belief that Original Houndstooth does not intend to "construct" the website further, as Original Houndstooth is no longer in business.

5. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Dated: Aug. 5, 2014

A handwritten signature in black ink, appearing to read "MD8" with a long horizontal stroke extending to the right.

Michael J. Douglas
Counsel for Registrant

³ <http://www.originalhoundstooth.com>

EXCERPTS OF THE
DEPOSITION OF
PAUL BRYANT, JR.

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- 1 ceremony was -- the first day of issuance
 2 ceremony was -- that was a new group of
 3 coaches, so that would have been that year,
 4 whatever it was. 1996, '97, somewhere in
 5 there.
 6 **Q.** Okay. Would you agree with me
 7 that the U.S. Postal Service was asking for
 8 your permission to use your dad's likeness?
 9 **A.** Yes.
 10 **Q.** And do you believe there was any
 11 components separated out for a houndstooth
 12 pattern?
 13 **A.** It was the likeness with the
 14 hat.
 15 **Q.** Okay. What I'm asking is --
 16 **A.** And a head shot, a head shot of
 17 him.
 18 **Q.** I remember the stamp. What I'm
 19 asking you is was the U.S. Postal Service
 20 asking you to be able to use a picture of
 21 Coach Bryant, or asking you to use a
 22 picture of a houndstooth pattern?
 23 **A.** They're asking me to use that --

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- 1 that -- that picture of Coach Bryant.
 2 **Q.** Okay. And that was his likeness
 3 that they were asking to use?
 4 **A.** His likeness with the hat.
 5 **Q.** I understand that. And we'll
 6 try to get our hands on the documents. But
 7 as we sit here today do you recall there
 8 being a carve-out provision or anything
 9 specifically that discussed the houndstooth
 10 Fedora?
 11 **A.** No.
 12 **Q.** Okay. But you do remember them
 13 asking to use his likeness?
 14 **A.** That specific likeness --
 15 **Q.** Sure.
 16 **A.** -- they showed me what they
 17 wanted to use.
 18 **Q.** And I think we're saying the
 19 same thing. I just wanted to make sure
 20 that we're clear.
 21 Would you agree with me that
 22 there are many different types, patterns
 23 and designs of what's called a houndstooth?

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- 1 **A.** Correct.
 2 **Q.** Okay. Are you claiming the
 3 rights to a specific pattern of
 4 houndstooth?
 5 **MS. JONES:** Objection to form.
 6 **A.** No.
 7 **Q.** Okay. Would you agree that
 8 Coach Bryant wore several different kinds
 9 of hats during game days or appearances
 10 with or in conjunction with the University
 11 of Alabama?
 12 **A.** During his overall career, yes.
 13 **Q.** Yes, sir. Would you agree that
 14 sometimes he'd wear baseball hats?
 15 **A.** In practice he wore baseball
 16 hats. Most of the pictures of him around
 17 practice and occasionally at a game in the
 18 first few years he was coaching was a white
 19 cap with a red bill. He wore a -- the last
 20 game he coached was -- the weather was so
 21 tough in Memphis he wore a cap that was --
 22 one that was a University of Alabama cap,
 23 but it was -- it wasn't a houndstooth, it

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- 1 was a -- actually a beige cap with an A on
 2 it.
 3 **Q.** Yes, sir, I remember that. I
 4 remember that picture.
 5 **A.** But I would say 99 percent of
 6 the time he wore the houndstooth hat.
 7 **Q.** And I appreciate your answer.
 8 And so we can move this along quickly. In
 9 answer to my question, my question was: Do
 10 you agree that he sometimes wore a baseball
 11 hat; is that right?
 12 **A.** Yes, sir, sometimes.
 13 **Q.** And I'll ask you more questions
 14 about the Fedora. Would you also agree
 15 that he wore Fedoras with different
 16 patterns on them?
 17 **A.** At times, yes, yes.
 18 **Q.** Okay. Would you agree that
 19 sometimes he wore Fedoras that had a
 20 checked pattern on them?
 21 **A.** I'm calling a houndstooth a
 22 check, but he had different sizes.
 23 **Q.** All right.

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1 A. In fact, the ones they produced,
2 they produced some that were different size
3 checks.

4 Q. Sure. And I think that's an
5 important distinction you make. You
6 consider the check pattern and the
7 houndstooth pattern to sometimes be the
8 same?

9 A. Yes.

10 Q. All right. Would you also agree
11 that sometimes Coach Bryant wore Fedoras
12 with either a checked or houndstooth
13 pattern that were different colors?

14 A. Yes.

15 Q. They weren't always black and
16 white?

17 A. Correct.

18 Q. Okay. And you're not claiming
19 rights to any specific type of houndstooth
20 pattern, correct?

21 MS. JONES: Objection to form.

22 A. The houndstooth pattern in
23 conjunction with the University of Alabama

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1 MS. JONES: Objection to form.

2 Q. Is that something that you
3 understand?

4 A. I would assume it has to be
5 specific, yes.

6 Q. Okay. I'm now going to show you
7 -- I'm sorry. Paul, if you wouldn't mind
8 handing that back to me so I can mark it.

9 (WHEREUPON, a document was
10 marked as Registrant's Exhibit Number 3 and
11 is attached to the original transcript.)

12 Q. It's Exhibit 3.

13 A. Okay.

14 Q. Do you recognize this document?

15 A. I don't think I've seen the
16 document. I might have, but I don't think
17 so.

18 Q. Okay. This was something that
19 your lawyers produced to us in document
20 production. Have you ever seen this
21 product?

22 A. I have seen -- I have seen so
23 many of these that are like this or close

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1 and the athletic program is what I'm
2 talking about.

3 Q. Okay. Well, what we're here to
4 talk about today is the trademark. And a
5 trademark has, you know, very specific
6 elements that it must show in order to
7 obtain registration. Do you understand
8 that?

9 MS. JONES: Objection. I think
10 you're getting into legal issues.

11 MR. DOUGLAS: I'm asking if he
12 understands it. He's obviously a very
13 bright person.

14 MS. JONES: Absolutely.

15 MR. DOUGLAS: If he understand,
16 he understands.

17 A. Ask me again.

18 Q. Today what we're here about,
19 we're talking about a trademark. And you
20 understand that a trademark has very
21 specific identifying qualities that it must
22 have, it must be consistent on to obtain
23 registration.

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1 to it that I couldn't tell you if I've seen
2 this very specific one. But I have seen a
3 lot of them that are close --

4 Q. Is this --

5 A. -- or variations of it.

6 Q. Okay. Is this hat that's
7 depicted part of the Houndstooth
8 Collection?

9 MS. JONES: Objection to form.

10 A. Yeah, I don't know.

11 MS. JONES: What do you mean by
12 Houndstooth Collection.

13 MR. DOUGLAS: I mean you
14 produced a bunch of documents that we'll go
15 over that talk about a Houndstooth
16 Collection through the CLC.

17 MS. JONES: The houndstooth
18 licensing program?

19 Q. Using your lawyer's terminology,
20 is this part of the houndstooth licensing
21 program?

22 A. I would think it is, but I don't
23 specifically know that.

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1 if that's what you...

2 Q. Okay. And when you look at the

3 bill of this hat, how would you describe

4 it?

5 A. It's a different houndstooth,

6 but it's a houndstooth.

7 Q. But it's a houndstooth pattern?

8 A. Yes.

9 Q. Okay. You would agree that all

10 three of the hats that we just looked at

11 contain different versions of a houndstooth

12 pattern?

13 A. Yes, sir.

14 Q. Okay. I saw a definition of

15 what a houndstooth pattern is, and I'm

16 going to ask you if you agree with it; is

17 that fair? I'm making sure you understand

18 the question I'm going to ask you.

19 A. You're going to read a

20 definition and see if I agree with it?

21 Q. Yes.

22 A. I understand.

23 Q. "The houndstooth pattern is

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1 defined as a pattern of broken or jagged

2 checks used on a variety of fabrics".

3 Would you agree with that

4 definition?

5 A. Yes.

6 MR. DOUGLAS: You want to take a

7 real quick break?

8 MS. JONES: Paul, do you want to

9 take a break, or would you prefer to

10 proceed?

11 MR. DOUGLAS: I need to take a

12 real quick break.

13 10:18 a.m.

14 (Short break)

15 10:25 a.m.

16 Q. Paul, I wanted to ask you a few

17 questions about Coach Bryant's estate. And

18 I want to be sensitive to the subject

19 matter, obviously, and respectful. And I

20 don't want to ask you any financial

21 components or anything like that.

22 What I'm particularly interested

23 in asking you are matters that solely

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1 relate to the lawsuit that we're here about

2 today. I'm not going on a fishing

3 expedition or trying to take a discovery

4 deposition route. And so I hope you

5 understand that in me asking some of these

6 questions.

7 I believe in another pleading

8 that I read it said that you were acting as

9 the representative of Coach Bryant's

10 estate. Is that a fair representation?

11 A. Yes.

12 Q. Okay. Are there any other

13 representatives of Coach Bryant's estate?

14 A. No.

15 Q. Okay. And again, taking out any

16 financial components, did you receive what

17 you believe to be any intellectual property

18 rights from his estate?

19 MS. JONES: Objection to form.

20 Q. Let me ask it --

21 A. I am --

22 Q. I feel like I've confused you.

23 Did you see any documents in the execution

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1 of Coach Bryant's estate that transferred

2 to you any rights to his likeness or name?

3 MS. JONES: Objection to form.

4 A. I don't know if I did.

5 Q. Okay. Do you understand whether

6 or not those likenesses are transferrable

7 after someone dies in Alabama?

8 MS. JONES: Objection to form.

9 A. I don't know. I have no idea

10 what the law is.

11 Q. Okay. Do you know, and I

12 believe you told me this earlier, but you

13 don't know of any trademarks that Coach

14 Bryant had that he passed to you through

15 his estate; is that correct?

16 MS. JONES: Objection to form.

17 A. I don't know one way or the

18 other.

19 Q. Okay. And one way of handling

20 that, would you agree with me that as we

21 sit here today you don't have any specific

22 knowledge or evidence to show of any

23 trademarks that you received in the

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1 administration of Coach Bryant's estate?
 2 MS. JONES: Objection to form.
 3 A. I don't have -- I don't
 4 remember --
 5 Q. That's fair.
 6 A. -- specifically.
 7 Q. Okay. And to answer my
 8 question, though, you don't have any
 9 evidence to show where you received any
 10 trademarks or other intellectual property
 11 --
 12 MS. JONES: Objection, asked and
 13 answered.
 14 MR. DOUGLAS: He didn't answer
 15 my question. He said he doesn't --
 16 MS. JONES: He said he didn't
 17 know.
 18 MR. DOUGLAS: No, no. He says
 19 he doesn't know whether or not. He didn't
 20 say whether or not he had evidence to
 21 support that.
 22 MS. JONES: Objection to form.
 23 A. Again, I haven't seen any

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1 recently. Whatever I saw back then and got
 2 back then, I don't remember.
 3 Q. Okay. And I've seen certain
 4 e-mails, and we'll look at them, and other
 5 documents that show where I believe the
 6 University of Alabama representatives asked
 7 you for permission to use the houndstooth
 8 pattern on certain products; is that
 9 correct?
 10 A. Yes.
 11 Q. So you believe that you do
 12 have -- you, individually, have the right
 13 to license the houndstooth pattern as it
 14 relates to --
 15 A. The University of Alabama.
 16 MS. JONES: Objection to form.
 17 Q. -- the University of Alabama; is
 18 that correct?
 19 A. The University of Alabama and
 20 the athletic events around the University
 21 of Alabama.
 22 Q. Okay. And again, and I'm not
 23 trying to go around and around, I want to

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1 speed this up like you do. But where do
 2 you derive those rights?
 3 A. I think by being the executor
 4 for my father and having an obligation to
 5 do the right thing for his memory. I don't
 6 know what legal concept it's under, but I
 7 think that's my obligation and I have that
 8 right.
 9 Q. Well, unfortunately, or
 10 fortunately, however you want to look at
 11 it, the only thing that I'm here to talk to
 12 you about is the legal part of it. And so
 13 that's what I'm trying find out from you.
 14 In believing that you have
 15 obtained a right through your father's
 16 estate to individually preclude someone
 17 from using the houndstooth pattern is what
 18 we're here to talk about. And I'm trying
 19 to find out where that right comes from.
 20 And I don't want to put words in your
 21 mouth, and I want to make sure that we're
 22 clear on the record because I think it's
 23 important that I understand.

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1 Are you telling me that you
 2 derived those rights through his estate in
 3 some manner, but you don't have documents
 4 to show it; is that correct?
 5 MS. JONES: Objection to form.
 6 A. Yes.
 7 Q. Okay. Have you personally ever
 8 sold merchandise containing a houndstooth
 9 pattern?
 10 A. No.
 11 Q. Other than my client -- I'm
 12 sorry.
 13 A. Let me correct that because it
 14 may not be merchandise. We have -- our
 15 bank has a debit card with a houndstooth
 16 card on it.
 17 Q. How are you going to get someone
 18 like me to bank there? I went to Auburn.
 19 I was just kidding.
 20 Is that the only houndstooth
 21 pattern associated with Bryant Bank?
 22 A. Bryant Bank has a -- I don't
 23 know if it's a trademark or copyright or

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1 something to use a houndstooth, a
2 houndstooth in conjunction with financial
3 products.

4 Q. And you would agree with me that
5 Bryant Bank is a completely separate
6 institution than the University of Alabama?

7 A. That's correct.

8 Q. Where does Bryant Bank derive
9 its rights to use a houndstooth pattern in
10 association with its services and products?

11 MS. JONES: Objection to form.

12 A. I think I own the bank.

13 Q. Okay. Does the University have
14 any say-so in whether or not Bryant Bank
15 can use the houndstooth pattern in
16 conjunction with its services or products?

17 A. No.

18 Q. Are you aware of any other
19 third-parties, besides my client, that uses
20 the houndstooth pattern affixed to
21 merchandise?

22 A. In conjunction with the
23 University of Alabama?

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1 out and do it. And the University -- that
2 is part of the reason that we have the --
3 assign the rights to the University, to be
4 able to go out and identify that and try to
5 protect it, stop it.

6 So, yeah, I think there's some
7 that do that they haven't gotten to, but I
8 don't know that. But I would just assume
9 there are.

10 Q. Okay. You've acknowledged that
11 you don't own a trademark for a houndstooth
12 pattern?

13 MS. JONES: Objection. I don't
14 think he's made a legal conclusion that he
15 doesn't own a trademark for a houndstooth
16 pattern. That's mistating the witness'
17 testimony.

18 Q. Do you own a trademark for a
19 houndstooth pattern?

20 MS. JONES: And also objection,
21 calling for a legal conclusion.

22 A. I don't know. If that's what I
23 got through the estate or not. I know I

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1 Q. In the State of Alabama.

2 A. I'm not aware of yes or no on
3 that. I know there's a lot of things out
4 there. I don't know what's licensed and
5 what isn't.

6 Q. Would you agree with me that
7 there are unlicensed companies or
8 individuals that sell the houndstooth
9 pattern on products or merchandise in the
10 State of Alabama?

11 A. Likely. I don't know that, but
12 I would say likely.

13 Q. Okay. Why would you say likely?

14 A. I think there are some people
15 that would start doing it without knowing
16 what the ramifications are.

17 Q. Okay. And what are the
18 ramifications?

19 A. That would not recognize that
20 they would need to be licensed. They see
21 all that stuff and don't know it's
22 licensed. They say I've got a picture of
23 Coach Bryant I'd like to sell, and strike

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1 haven't filed one.

2 Q. Okay. But you believe -- is it
3 your opinion that your ability to provide
4 Alabama with a license for a houndstooth
5 pattern to affix to products and
6 merchandise allows you to preclude others
7 from using it?

8 A. It allows the University to
9 preclude others from using it.

10 Q. And they derive their right to
11 preclude others from you?

12 A. They have the right to use it
13 and then they would protect -- protect
14 their right which would be to preclude
15 others from using it in conjunction with
16 athletic events or with the University of
17 Alabama.

18 Q. And what I'm asking is they
19 derive that right from you; is that
20 correct?

21 A. I think so.

22 Q. Was Coach Bryant an employee of
23 the University of Alabama?

EXCERPTS OF THE
DEPOSITION OF
FINUS GASTON

Page 21

1 A. Not facing sideways like that,
 2 no.
 3 Q. Okay. Do you have any
 4 registrations showing a silhouette of an
 5 elephant?
 6 MS. JONES: Objection to form.
 7 A. A silhouette. Could you
 8 rephrase that? What are you asking for as
 9 far as silhouette?
 10 Q. Do you understand what the word
 11 silhouette means?
 12 A. Are you saying do we have an
 13 elephant designed that's registered maybe
 14 facing a different direction, not straight
 15 on, or just sideways?
 16 Q. Well, no. That doesn't show any
 17 features of an elephant, eyes, mouth?
 18 A. We do not have anything
 19 registered that's similar to this design as
 20 far as the -- the elephants we have
 21 registered are much more specific in design
 22 as far as an elephant's image is concerned.
 23 Q. Okay. Now, would you agree that

Page 22

1 the elephant designs that the University
 2 has registered also contain other elements
 3 of Alabama indicia?
 4 A. The registrations do, yes.
 5 Q. Okay. Does Alabama have any
 6 registrations that contain the houndstooth
 7 design or pattern?
 8 A. Are you asking if we have any
 9 registered Federal trademarks with a
 10 houndstooth pattern in it?
 11 Q. Correct.
 12 A. No.
 13 Q. Where does the University derive
 14 its right to use the houndstooth pattern?
 15 A. The houndstooth pattern is
 16 associated with the University through
 17 Coach Bryant as many years as our head
 18 football coach, a nationally and
 19 internationally renowned figure that's
 20 integral to the University of Alabama. The
 21 houndstooth hat he wore on the sidelines
 22 for years and years has become a symbol
 23 that's fully recognized by people around

Page 23

1 the county as being associated with the
 2 University.
 3 Q. Do you know whether or not Coach
 4 Bryant ever secured a trademark that
 5 included a houndstooth pattern?
 6 MS. JONES: Objection to form.
 7 A. Did he personally do that, did
 8 Coach Bryant himself?
 9 Q. Yes. Yes.
 10 A. Not to my knowledge.
 11 Q. Do you know of any document that
 12 would show an assignment or transfer of any
 13 rights from Coach Bryant to the University
 14 of Alabama, any of his rights to the
 15 University of Alabama?
 16 A. The only document that I'm aware
 17 of is the copyright or the image of Coach
 18 Bryant that appears in the Bryant Museum
 19 trademark, State trademark the University
 20 has. And a copy of that was assigned to
 21 the University.
 22 Q. That was not assigned by Coach
 23 Bryant?

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1 A. No, no, he was deceased then.
 2 Q. And that's what I'm asking. Are
 3 you aware of any agreements or writings of
 4 any kind from Coach Bryant to the
 5 University where he transferred any of his
 6 intellectual property rights?
 7 A. I'm not.
 8 MS. JONES: And just to clarify,
 9 are you asking for written documents or any
 10 agreements generally? Because I think
 11 that's ambiguous.
 12 MR. DOUGLAS: I'll ask both
 13 questions.
 14 Q. Any written documents first?
 15 A. I'm not aware of that.
 16 Q. Are you aware of any oral
 17 agreements where Coach Bryant directly
 18 transferred any of his intellectual
 19 property rights to the University of
 20 Alabama?
 21 A. I'm not aware of any oral
 22 agreements from that standpoint.
 23 Q. Okay. And I believe it's clear

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1 A. Yes, they could.
 2 Q. All right. But the houndstooth
 3 patterns that are in 3 and 4 that we've
 4 shown are both houndstooth patterns that
 5 the University of Alabama believes it has
 6 an exclusive right to use?
 7 MS. JONES: Objection to form.
 8 A. These are patterns that New Era
 9 submitted to us and asked to be licensed.
 10 Q. Have they been licensed?
 11 A. It's been approved by the
 12 University. I'm sure the licenses have
 13 been finalized.
 14 Q. So you have approved that
 15 pattern to be used with indicia of the
 16 University of Alabama on products?
 17 A. That's correct.
 18 Q. Okay. So you believe it is the
 19 University's right to allow another company
 20 to use the houndstooth pattern with its
 21 merchandise?
 22 A. In association with our marks,
 23 yes.

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1 Q. In association with your marks.
 2 Do you believe that the University has a
 3 right to license to the CLC or other
 4 vendors the houndstooth pattern alone on
 5 its products --
 6 A. No --
 7 Q. -- without any other trademarks?
 8 A. Excuse me. No.
 9 Q. And why is that?
 10 A. The houndstooth pattern itself
 11 alone does not draw an association with the
 12 University unless our marks are associated
 13 with that.
 14 Q. Okay.
 15 A. We have never attempted, I don't
 16 think, to license that by itself.
 17 Q. All right. I'm going to show
 18 you Exhibit 5. And does the bill of that
 19 hat contain a houndstooth pattern?
 20 A. Yes.
 21 Q. All right. And that is also on
 22 a hat containing other Alabama trademark or
 23 indicia?

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1 A. Yes.
 2 Q. And do you know if that's been
 3 approved and licensed?
 4 A. It's been approved.
 5 Q. Okay.
 6 A. I believe all these designs came
 7 at the same time from New Era.
 8 Q. Now, I'm going to show you
 9 what's been previously marked as Exhibit 6.
 10 And I'll represent to you these are a group
 11 of documents that were produced by your
 12 attorneys that show the trademark
 13 certifications for different depictions of
 14 an elephant; is that correct?
 15 A. That's correct.
 16 Q. Okay. I'm going to ask you a
 17 few questions about these trademarks.
 18 First of all, do you know of any other
 19 drawings of elephants that have been
 20 registered by the University of Alabama?
 21 MS. JONES: Objection to form.
 22 A. With a Federal trademark
 23 registration brand on them?

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1 Q. Yes.
 2 A. No, I don't think so.
 3 Q. Any State trademark
 4 registrations?
 5 A. This question as far as the
 6 elephant design is concerned?
 7 Q. Yes.
 8 A. I don't think so.
 9 Q. Okay. Is it a fair statement
 10 for me to say that none of these elephants
 11 that have Federal registration contain the
 12 houndstooth pattern?
 13 A. That's correct.
 14 Q. And is it a fair statement for
 15 me to say that each one of these elephant
 16 trademarks contain other Alabama indicia
 17 with the elephant?
 18 A. Yes.
 19 Q. Okay. Does Alabama have any
 20 outstanding trademark applications at this
 21 time?
 22 MS. JONES: Objection to form.
 23 A. I don't recall.

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1 Q. Okay. I believe you said this
 2 earlier, but you acknowledge that there are
 3 many different types and designs of the
 4 houndstooth pattern; is that correct?
 5 A. Yes.
 6 Q. And Alabama is not claiming any
 7 type of intellectual property rights to a
 8 certain type of houndstooth pattern?
 9 A. Houndstooth pattern by itself?
 10 Q. Or one of the types that we're
 11 talking about because we said there's many
 12 types. Does Alabama claim a right to any
 13 certain design of a houndstooth pattern?
 14 A. No.
 15 Q. Okay. Has Mr. Bryant, or anyone
 16 from Coach Bryant's estate, ever given you
 17 an example of a houndstooth pattern and
 18 said this is the one that we want you to
 19 use?
 20 A. No.
 21 Q. Do you know when the first time
 22 Alabama used, through its permission from
 23 the Bryant estate, the houndstooth pattern

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1 I'm sure.
 2 Q. Okay. Have you made attempts to
 3 preclude them from doing that?
 4 A. Yes.
 5 Q. Is it because they're using the
 6 pattern, the houndstooth pattern, in
 7 addition to Alabama indicia or trademarks?
 8 MS. JONES: Objection to form.
 9 A. Or with marks that are
 10 associated -- we feel are associated with
 11 the University.
 12 Q. Okay. And I believe you said
 13 this earlier, but you do not believe that
 14 Alabama has the exclusive right to use the
 15 houndstooth pattern in any type or form or
 16 size in the State of Alabama, correct?
 17 MS. JONES: Objection to form.
 18 A. Is your question do we have the
 19 right to use it by itself?
 20 Q. Yes.
 21 A. No.
 22 Q. Okay. You do believe that
 23 Alabama has the exclusive right to use any

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1 on a piece of merchandise or product?
 2 A. The first I recall was in July
 3 of 2010.
 4 Q. Okay. And do you know what that
 5 was?
 6 A. I believe it was a Top of the
 7 World hat.
 8 Q. And do you know where it was
 9 sold?
 10 A. I do not.
 11 Q. Are you aware of other
 12 individuals or companies that are not
 13 licensed that also sell the houndstooth
 14 pattern on merchandise in the State of
 15 Alabama?
 16 A. The houndstooth pattern by
 17 itself?
 18 Q. Or in conjunction with other
 19 Alabama indicia.
 20 A. That are not licensed by the
 21 University?
 22 Q. Yes.
 23 A. Yes, there are some out there,

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1 form of houndstooth pattern with Alabama
 2 indicia on merchandise?
 3 A. Yes.
 4 Q. Including indicia that has not
 5 been trademarked?
 6 MS. JONES: Objection to form.
 7 A. Indicia that represented the
 8 University.
 9 Q. Okay. But what I'm saying is
 10 you believe you have the exclusive right to
 11 prevent people from using the houndstooth
 12 pattern with indicia of the University of
 13 Alabama that has not been trademarked?
 14 MS. JONES: Objection to form.
 15 A. If that indicia draws
 16 association with the University, yes.
 17 Q. Okay. I think I understand what
 18 you're saying. In Plaintiff's (sic)
 19 Exhibit 2, I'm going to give you a
 20 hypothetical.
 21 If that picture of the elephant
 22 did not include the houndstooth pattern,
 23 would you have -- would the University of

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1 type of affiliation that you're alleging my
2 client has tried to mislead the public with
3 other than what you're stating is your
4 claimed rights to the registered trademark
5 in Exhibit 2? Do you understand that's
6 what I'm asking?

7 MS. JONES: Object to form.

8 A. Other than the fact that the
9 product that he sells, the design he uses
10 in my opinion does have some University
11 trademark rights into that as far as
12 indicia that represents the University of
13 Alabama. As far as a registered trademark
14 with that exact same design, the University
15 does not have a registered trademark with
16 that exact same design. Does answer your
17 question?

18 Q. Sort of. And I'm not trying to
19 argue with you or make this drawn out. I'm
20 trying to get any instances that you allege
21 where my client has put forth into the
22 marketplace an improper association with
23 the University of Alabama, other than what

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1 A. On a few occasions.

2 Q. And did he wear different
3 colored Fedoras?

4 A. At times, yes.

5 Q. Do you know where Coach Bryant
6 got his hats, his Fedoras?

7 A. I do not.

8 Q. Do you know if they were custom
9 designed, or one of a kind?

10 A. I don't know that.

11 Q. Do you know if they were
12 specially made for him?

13 A. I don't know that.

14 Q. Okay. We've already established
15 that they had different types of
16 houndstooth designs, sometimes even
17 different designs altogether, but they did
18 have different houndstooth designs as well;
19 is that right?

20 MS. JONES: Object to form.

21 A. Some did, yes.

22 Q. I believe outside of the
23 commemorative stickers that were used on

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1 you've already testified to?

2 A. Nothing other than what I've
3 already testified to, no.

4 Q. Okay. I can't remember if I
5 asked you this earlier. You would agree
6 with me that Coach Bryant wore hats other
7 than Fedoras to football games, correct?

8 A. Occasionally, he did. But he
9 primarily wore the houndstooth hat,
10 houndstooth pattern hat.

11 Q. That's not my question. My
12 question is did Coach Bryant sometimes wear
13 hats other than a Fedora to football games?

14 A. On very few occasions.

15 Q. Is that a "yes"?

16 A. Yes, on very few occasions.

17 Q. Did he wear a baseball hat
18 sometimes?

19 A. I don't recall him ever wearing
20 a baseball cap at the game.

21 Q. Okay. Did he sometimes wear
22 Fedoras with different patterns than the
23 houndstooth on them?

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1 the back of the helmets for one game maybe
2 when Coach Bryant died, are you aware of
3 any use Alabama has ever had of the
4 houndstooth pattern that did not also
5 include one of their indicia or trademarks?

6 A. Yes. In 2006, I believe, our
7 uniforms had a houndstooth trim on them
8 that did get produced for one ballgame. I
9 think it was the Ole Miss game, I think, in
10 2006.

11 Q. Okay. And what was that to
12 commemorate?

13 A. Nike wanted to produce that
14 because of its relationship to the
15 University and Coach Bryant, it was the way
16 they were honoring them.

17 Q. And that was a one-time
18 commemorative use?

19 A. Yes, it was.

20 Q. Okay. Anything else?

21 A. Nike has, through the years, on
22 a couple of occasions tried to incorporate
23 a houndstooth -- subtle houndstooth designs

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1 in our football uniforms.
 2 Q. Uh-huh.
 3 A. The common fan couldn't --
 4 unless you were on television you couldn't
 5 really see it. They've done that on at
 6 least one occasion I know.
 7 Q. Do you remember when that was?
 8 A. It's within the last two or
 9 three years. It's been since Coach Saban
 10 has been here.
 11 Q. Okay. So three commemorative
 12 occasions that we can remember as we sit
 13 here right now?
 14 A. I was trying to think if there
 15 was anything else. That's all I recall
 16 right now.
 17 Q. Okay. Outside of those, you
 18 know of no other use of the University of
 19 Alabama of the houndstooth pattern that did
 20 not also include some kind of indicia or
 21 trademark of Alabama's?
 22 A. I think that's correct. Even
 23 though it's used widely throughout campus

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1 Q. So it's a common design for
 2 clothing for one use?
 3 A. The houndstooth design itself,
 4 yes.
 5 Q. Okay. So you would agree with
 6 me that's the houndstooth pattern is a
 7 common design?
 8 A. In the context of your question
 9 as it's used on clothes and shoes and
 10 apparel.
 11 Q. I'm not really sure how else I
 12 could use it. You would agree with me that
 13 the houndstooth pattern is a design?
 14 A. Yes.
 15 Q. Okay. I believe my research
 16 showed that it started in Scotland in the
 17 early 1800s. Do you have any knowledge of
 18 that?
 19 A. I do not.
 20 Q. Okay. And outside of the
 21 University of Alabama it's a design that
 22 you've seen used in many different
 23 applications; is that a fair assessment?

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1 it's always with our colors and with the
 2 University's name or trademark with it.
 3 Q. I think -- did you just say what
 4 I said, or did you change it somehow? It's
 5 used widely throughout campus with your
 6 colors and trademarks?
 7 A. Yes.
 8 Q. And by "it", you mean the
 9 houndstooth pattern?
 10 A. Yes.
 11 Q. Okay. I just wanted to make
 12 sure we didn't say -- I jumbled that all up
 13 at the end there.
 14 Would you agree that the
 15 houndstooth pattern is a common design in
 16 your opinion?
 17 MS. JONES: Object to form.
 18 A. I don't really understand the
 19 question.
 20 Q. It's used in many other
 21 applications, like men's sports coats,
 22 women's clothing, shoes?
 23 A. Yes.

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1 A. I've seen it in other places,
 2 yes.
 3 Q. Okay. And one of those places
 4 would be on clothes?
 5 A. Yes.
 6 Q. Does the University use the
 7 houndstooth pattern in any of its
 8 advertisements or promotional campaigns?
 9 A. Yes.
 10 Q. Can you tell me about those?
 11 A. Uses it in publications, uses it
 12 in signage through the campus.
 13 Q. And for each one can you be
 14 specific, as specific as you can? I know
 15 it's a tough question for you. But when
 16 you say publications?
 17 A. University publications on
 18 different programs at the University.
 19 Q. Okay.
 20 A. For the academic programs,
 21 student life programs, et cetera.
 22 Q. Okay. And then you said a
 23 second one? Signage.

EXCERPTS OF THE
DEPOSITION OF
RICHARD P. DIAZ

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<p>1 Q. Is he wearing a hat in each of 2 those pictures?</p> <p>3 A. One of them is a baseball hat, 4 one of them is the hat that I described 5 that's plaid. I think there might be two of 6 them that are a plaid hat, and I'm not sure 7 about -- if I even have a fourth one or what 8 the fourth one would be.</p> <p>9 Q. Please tell me about the print you 10 said you recently purchased.</p> <p>11 A. No, I didn't recently purchase 12 it. It was recently produced. It's not an 13 old one like -- like the ones I was just 14 describing from the estate sale. It's a -- 15 you know, last several number of years print 16 is what I mean.</p> <p>17 Q. What's depicted in that print?</p> <p>18 A. I think that's one of those that 19 are a collage of different things like a 20 football helmet, and, you know, it has 21 Alabama's script A in it somewhere, maybe the 22 circle A. It's just, like, a collage of 23 things.</p> <p>24 Q. Do you own any officially licensed 25 prints of the University that incorporate</p>	<p>1 Website again and somebody had already 2 trademarked it. So a separate -- I don't 3 know. I mean, I don't know.</p> <p>4 Q. What did Campus Traditions do?</p> <p>5 A. It was just a name that we were 6 going to use to put on as our -- as our -- 7 what do you call it? So we could have a name 8 to put on shirts with our elephant. That's 9 what I was looking for was a name to go with 10 the -- with our design.</p> <p>11 Q. Why did you like Campus 12 Traditions?</p> <p>13 A. I thought it was a good name for 14 what we were looking for. There -- we 15 could -- when you're looking at a houndstooth 16 elephant, it's hard to come up with something 17 that, you know, that's -- I didn't want to 18 use the words "houndstooth" because there was 19 so many people out doing that.</p> <p>20 Q. Did you select Campus Traditions 21 to refer to the campus of The University of 22 Alabama and its grand traditions?</p> <p>23 A. No. We were not just going to 24 do The University of Alabama. We were going 25 to eventually try to do other campuses,</p>
Page 23	Page 25
<p>1 either an elephant design or the houndstooth 2 pattern?</p> <p>3 A. No.</p> <p>4 Q. When did you form GameDawg?</p> <p>5 A. I don't know the date. Whatever 6 I have in the paperwork that we sent you. I 7 don't remember the date.</p> <p>8 Q. Do you know roughly what year?</p> <p>9 A. I'm thinking 2012. I'm not 10 positive.</p> <p>11 Q. What type of corporate entity is 12 GameDawg?</p> <p>13 A. LLC.</p> <p>14 Q. Is it registered with the 15 Secretary of State?</p> <p>16 A. Yes.</p> <p>17 Q. Is Campus Traditions a separate 18 entity from GameDawg?</p> <p>19 A. I don't know. I'm not sure if 20 it is -- it's a name I came up with, and I 21 was going to trademark it, and when I looked 22 on the trademark office, it was not 23 trademarked. But then by the time I got to 24 trademarking it -- right before I was going 25 to trademark it, I looked on the trademark</p>	<p>1 but -- and the tradition, that's because when 2 I did the elephant, I put "The Tradition" 3 under it.</p> <p>4 Q. So you mention that it wouldn't 5 just be The University of Alabama, but Alabama 6 would be one of the campuses that the phrase 7 "Campus Traditions" may refer to?</p> <p>8 A. Not refer to, but that would 9 be -- you know, I sell at The University of 10 Alabama for their games.</p> <p>11 Q. So why -- why use the phrase 12 Campus Traditions? Why did you select that 13 phrase?</p> <p>14 A. "Traditions" was -- was what I 15 had under the elephant, The Tradition. And I 16 don't know. We just went to try to go 17 through names, and that's the one that we -- 18 it was hard coming up with a name. But 19 because of the -- because that elephant, you 20 know, just -- it was very hard.</p> <p>21 Q. You said that we tried to come up 22 with a name. Who is --</p> <p>23 A. My son and I.</p> <p>24 MR. DOUGLAS: Remember to wait 25 until she's done asking the question.</p>

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<p style="text-align: right;">Page 34</p> <p>1 A. The names of the companies?</p> <p>2 Q. Yes, please.</p> <p>3 A. SDS Designs, Bo Enterprises, B-o</p> <p>4 Enterprises, New World Graphics.</p> <p>5 Q. I'm sorry, was that</p> <p>6 New World Graphics?</p> <p>7 A. New World Graphics out of</p> <p>8 Athens, Alabama.</p> <p>9 I've ordered from The Game. I</p> <p>10 used to order -- there was -- I can't</p> <p>11 remember the name of it, but it was license</p> <p>12 plates. I don't do that anymore. Just a</p> <p>13 bunch of them.</p> <p>14 Q. Where do you and where do -- where</p> <p>15 do you and where does GameDawg sell its</p> <p>16 products?</p> <p>17 A. At the football games. We've</p> <p>18 done the bowl game, SEC Championship game,</p> <p>19 festivals, different type of events. Not</p> <p>20 just festivals, but events that might -- that</p> <p>21 might be something that we could do when</p> <p>22 we're not doing something else.</p> <p>23 Q. The games that you referred to in</p> <p>24 your last response, those are University of</p> <p>25 Alabama football games?</p>	<p style="text-align: right;">Page 36</p> <p>1 does the Girlie Girl shirts. This is another</p> <p>2 line of theirs. I know that one says Girlie</p> <p>3 Girl Originals. When -- they're all from the</p> <p>4 same company, Bo Enterprises, but Girlie Girl</p> <p>5 is generally not collegiate. They have those</p> <p>6 other sayings all over them. But that first</p> <p>7 one wasn't a licensed product, that first one</p> <p>8 with the houndstooth.</p> <p>9 Q. Do you mean that the shirt</p> <p>10 depicted on page 1 of Exhibit 5 is not</p> <p>11 licensed by The University of Alabama?</p> <p>12 A. It's not.</p> <p>13 Q. Turning to page 2 of Exhibit 5, is</p> <p>14 this a shirt licensed by The University of</p> <p>15 Alabama?</p> <p>16 A. It is.</p> <p>17 Q. Turning to page 3 of Exhibit 5, is</p> <p>18 this a shirt licensed by The University of</p> <p>19 Alabama?</p> <p>20 A. Yes.</p> <p>21 Q. Turning to page 4 of Exhibit 5, is</p> <p>22 this a shirt licensed by The University of</p> <p>23 Alabama?</p> <p>24 A. Yes.</p> <p>25 Q. Turning to page 5 of 5, is this a</p>
<p style="text-align: right;">Page 35</p> <p>1 A. Yes.</p> <p>2 Q. And at those football games and</p> <p>3 festivals and events, you sell both officially</p> <p>4 licensed University of Alabama products as</p> <p>5 well as your houndstooth elephant design</p> <p>6 products?</p> <p>7 A. Yes.</p> <p>8 Q. Mr. Diaz, I'm showing you</p> <p>9 Petitioner's Exhibit No. 5.</p> <p>10 (Whereupon Petitioner's Exhibit</p> <p>11 No. 5 was marked for</p> <p>12 identification and is</p> <p>13 attached to the original of the</p> <p>14 transcript.)</p> <p>15 Q. (By Ms. Jones) Mr. Diaz, in</p> <p>16 Exhibit No. 5, are these all shirts that were</p> <p>17 sold by GameDawg?</p> <p>18 A. They are.</p> <p>19 Q. On page 1 of Exhibit 5, is that a</p> <p>20 houndstooth pattern depicted in the peace</p> <p>21 sign?</p> <p>22 A. Yes.</p> <p>23 Q. And is this a part of a line of</p> <p>24 shirts that you refer to as "Girlie Girl"?</p> <p>25 A. Girlie Girl is the company that</p>	<p style="text-align: right;">Page 37</p> <p>1 shirt licensed by The University of Alabama?</p> <p>2 A. Yes.</p> <p>3 Q. I'm looking at the icon adjacent</p> <p>4 to the phrase "GameDawg Collegiate embedded</p> <p>5 behind the phrase "Campus Traditions." What's</p> <p>6 the building depicted in that icon?</p> <p>7 A. I don't know. I just came up --</p> <p>8 well, I didn't came up with it. I asked a</p> <p>9 logo company to come up with a tower because</p> <p>10 my son Googled, "What" -- "what does every</p> <p>11 university have in common," and they said</p> <p>12 either a clock tower or a tower, bell tower,</p> <p>13 clock tower. So we asked the logo company to</p> <p>14 incorporate one into the logo, and that's</p> <p>15 what they came up with.</p> <p>16 Q. Which son are you referring to?</p> <p>17 A. That was my youngest son,</p> <p>18 Dominick.</p> <p>19 Q. Do you know where Dominick got</p> <p>20 that tower in this?</p> <p>21 A. He didn't get the tower. The</p> <p>22 logo company came up with the tower.</p> <p>23 Q. Who was the logo company that you</p> <p>24 used?</p> <p>25 A. I don't know if it was Logo</p>

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<p>1 Express or -- it might have been Logo 2 Express. 3 Q. Did you handle the purchase of the 4 logo from Logo Express? 5 A. I did. Actually they came up 6 with several -- they came up with, I think, 7 four different logos, and this is the one we 8 chose. The other towers were different. I 9 think one might not have even had a tower. 10 But this is the one we chose. 11 Q. Did you communicate with Logo 12 Express by e-mail? 13 A. By e-mail, and sometimes I 14 talked to them. A lot of times I talked to 15 them. 16 Q. Do you have any documents 17 reflecting your instructions to Logo Express 18 for creation of the logo? 19 A. I -- I would have to look. If I 20 have -- if I have e-mails, I would -- I would 21 have them. 22 Q. Were the shirts depicted in 23 Exhibit 5 offered at The University of Alabama 24 games and festivals and events that GameDawg 25 sells at?</p>	<p>1 GameDawg's employees have a license to use any 2 brand's trademarks? 3 A. Just my own. It's not a 4 license. It's just my trademark. 5 (Whereupon Petitioner's Exhibit 6 No. 6 was marked for 7 identification and is 8 attached to the original of the 9 transcript.) 10 Q. (By Ms. Jones) Mr. Diaz, I'm 11 showing you Petitioner's Exhibit 6, which is 12 also from your document production, document 13 0015 and 0016. What do these two pages 14 depict? 15 MR. DOUGLAS: Is this 6? 16 MS. JONES: Yes. 17 THE WITNESS: It depicts a -- a 18 cart or kiosk in the Wiregrass Commons Mall, 19 Dothan, Alabama. 20 Q. (By Ms. Jones) Is this your kiosk? 21 A. It's my brother-in-law's kiosk. 22 We were -- we work together there, but it's 23 his kiosk. It's in his -- it's in his name. 24 Q. What is your brother's name? 25 A. Brother-in-law?</p>
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<p>1 A. Yes. 2 Q. Do you still offer the designs 3 depicted in Exhibit 5? 4 A. Not the first one; the second 5 one, yes; the third one, no. They don't make 6 that one any more. The fourth one, yes; and 7 the fifth one, yes. 8 Q. Have you or GameDawg or any of 9 your employees of GameDawg ever applied to be 10 a licensee of The University of Alabama? 11 A. No. 12 Q. Have you or GameDawg or any of 13 GameDawg's employees ever applied to be a 14 licensee of the Collegiate Licensing Company? 15 A. No. 16 Q. Have you or GameDawg or any of 17 GameDawg's employees ever applied to be a 18 licensee of any university? 19 A. No. 20 Q. Do you or GameDawg or any of 21 GameDawg's employees have a license so use any 22 brand's trademarks? 23 A. I'm sorry, could you repeat 24 that? 25 Q. Do you or GameDawg or any of</p>	<p>1 Q. What is your brother-in-law's 2 name? 3 A. Tommy Bellone, B-e-l-l-o-n-e. 4 Q. When was this picture taken? 5 A. I -- it was either this -- 2013 6 or 2012. I'm trying to -- I can't tell. I'm 7 trying to look. 2013, I believe. Yeah, 8 2013. 9 Q. Does Mr. Bellone own any 10 businesses or entities that operate this 11 kiosk, or does he do it in his own name? 12 A. He does it in his own -- I guess 13 you'd say business name maybe. I know it's 14 not LLC or anything. It's just called 15 Tommy's Sports Apparel. He's the one that's 16 on the paperwork for the contract to do this 17 at the mall. 18 Q. What does Tommy's Sports Apparel 19 offer or sell? 20 A. We were -- well, of course, 21 apparel and pictures, framed pictures. They 22 weren't -- they were -- 2012 they were 23 Alabama merchandise, started out with some 24 Auburn too, but it wasn't selling. Then 25 2013, last year, we sold Alabama, Auburn,</p>

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<p>1 Florida, Florida State, LSU, and all of 2 those. 3 Q. Do you sell both officially 4 licensed and unlicensed products at this 5 kiosk? 6 A. Yes. That picture to the right, 7 far right hanging, that's the snowman I was 8 referring to with the scarf around his neck, 9 the houndstooth scarf. That's not licensed, 10 but it came from the same company, 11 Bo Enterprises, as all those other licensed 12 shirts that -- or those separate licensed 13 shirts that you showed. 14 Q. What are some of the officially 15 licensed products depicted on 0015? 16 A. Well, of course the -- the 17 jersey there. A lot of those T-shirts that 18 are folded there. Some of the pictures are 19 licensed, and some are not licensed. Some 20 didn't have -- some of the pictures didn't 21 have the logos of Alabama. Just -- just the 22 T-shirts and some of the pictures. 23 Q. Do you sell your shirts bearing 24 the houndstooth elephant design at this kiosk? 25 A. Yes.</p>	<p>1 MS. JONES: I could use five 2 minutes. 3 MR. DOUGLAS: No problem. 4 (A short break was taken.) 5 Q. (By Ms. Jones) Mr. Diaz, I'm 6 showing you what has been marked as 7 Petitioner's Exhibit No. 7. 8 A. Okay. 9 Q. I'm sorry, it's two pages. I 10 apologize. 11 A. Okay. 12 Q. And it is Diaz 001 and 00002. 13 (Whereupon Petitioner's Exhibit 14 No. 7 was marked for 15 identification and is 16 attached to the original of the 17 transcript.) 18 Q. (By Ms. Jones) What's depicted in 19 this exhibit? 20 A. Business card. 21 Q. Are these the business cards for 22 GameDawg, LLC on page 1 and GameDawg 23 Collegiate on page 2? 24 A. They are. 25 Q. Do you use both of the names</p>
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<p>1 Q. How long have you been selling 2 those shirts at this kiosk? 3 A. We only -- we were only there 4 seasonal. The first year, 2012, we went 5 there in August and closed it up the end of 6 January because they went to the National 7 Championship. Last year, he opened it up in 8 July, and we closed at the end of December. 9 Q. So the kiosk was only open during 10 those months? 11 A. Uh-huh. 12 Q. And you sold your shirts there 13 during that entire time generally? 14 A. Generally, Yeah. July I didn't 15 have my shirts there. I didn't want to open 16 it up that early, but he did it. And so they 17 weren't there the end of July. But, yeah, 18 generally. 19 MS. JONES: We've been going about 20 an hour. 21 Do we want to take a quick 22 five-minute break? 23 MR. DOUGLAS: That's fine. 24 THE WITNESS: Whatever you want to 25 do. I'm fine.</p>	<p>1 GameDawg, LLC and GameDawg Collegiate to refer 2 to your business, or are they two separate 3 businesses? 4 A. No, I use them the same. 5 Q. When did you make the business 6 card in Exhibit 7, page 1? 7 A. I really don't know when I made 8 it. Not this -- not that one, I really am 9 not sure. 10 Q. Do you think you've had it for, 11 like, two years? 12 A. A couple of years, uh-huh. 13 Q. How about the second one? 14 A. The second one was sooner than 15 that. That one was done -- I believe it was 16 last year, 2013. 17 Q. So Jo Jo Diaz, that's your wife, 18 Betty? 19 A. Yes. 20 Q. Who created the business cards? 21 A. The first one, I think that one 22 was Vistaprint, I think. And the second one 23 was a local company in Enterprise, a printing 24 company. 25 Q. Are those the companies that</p>

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<p style="text-align: right;">Page 58</p> <p>1 Alabama's logos, not those. Just elephant 2 designs, Tuskwear's elephant. Just all these 3 other -- all of a sudden now you see 4 elephants in chevron pattern, the zigzag 5 pattern, you see elephants in just crimson. 6 You see gray. You see elephants all over the 7 place, polka dots. Well, polka dots was a 8 year or two ago, but now it's the zigzag 9 pattern. But you see now they've come out 10 with paisley elephants, just all kinds of 11 paisley. Aztec, that's a new one this year, 12 Aztec. All these elephants weren't out there 13 until I came up with this and started selling 14 it around Alabama at the University football 15 games. 16 Q. So before coming up with this, you 17 were aware that The University of Alabama had 18 an elephant mascot. It's just your opinion 19 that your depiction of an elephant is 20 different from those University of Alabama 21 elephants? 22 A. Exactly. 23 Q. But your elephant and houndstooth 24 design is still intended to appeal to The 25 University of Alabama fans?</p>	<p style="text-align: right;">Page 60</p> <p>1 Campus Traditions, from The Edge Embroidery? 2 A. Yes. 3 Q. On here it refers to two different 4 designs. The first is the "new logo with 5 elephant," and the second one says "elephant, 6 old logo." What's the difference between the 7 new logo and the old logo? 8 A. I know the new logo would be the 9 picture that you saw -- what that -- what 10 they were doing was, they were taking either 11 sweatshirts or T-shirts and putting a white 12 houndstooth pattern, like you saw on those 13 ones that you thought one was a solid white, 14 and they were using the color of the shirt or 15 sweatshirt as the other part of the 16 houndstooth. That was the -- well, they were 17 both the same thing, but what they did was, 18 the old logo was a smaller houndstooth, which 19 I did not like it. You couldn't -- from a 20 distance, not very far of a distance, you 21 couldn't tell that it was houndstooth because 22 it was so small. So what I told them -- I 23 said increase the size of the houndstooth, 24 but they were the same type of thing where 25 the shirt showed through. And so there was</p>
<p style="text-align: right;">Page 59</p> <p>1 A. Well, there's a lot -- in the 2 state of Alabama, there was a lot of 3 houndstooth everywhere. People were wearing 4 houndstooth. So I thought, well, why not put 5 the houndstooth pattern on an elephant? 6 Q. And part of the reason to choose 7 those two elements, houndstooth and elephant, 8 is to appeal to The University of Alabama 9 fans? 10 A. Yes. 11 Q. Did you consider any alternative 12 designs to the houndstooth and elephant design 13 that you applied to register? 14 A. No. 15 Q. Mr. Diaz, I'm showing you what's 16 being marked as Petitioner's Exhibit No. 9. 17 A. Okay. 18 (Whereupon Petitioner's Exhibit 19 No. 9 was marked for 20 identification and is 21 attached to the original of the 22 transcript.) 23 Q. (By Ms. Jones) Is this an invoice 24 for the purchase of shirts from your business, 25 Campus Traditions -- or by your business,</p>	<p style="text-align: right;">Page 61</p> <p>1 only a white -- only a white screen print. 2 So what -- so that's what they're referring 3 to, a bigger houndstooth. 4 Q. Going back to the picture of the 5 elephant design mark, would you consider this 6 elephant a variation of the University of 7 Alabama's elephant mascot? 8 A. No. 9 Q. So why did you choose an elephant? 10 A. I just wanted to market it in 11 Alabama, and that's what, you know -- I don't 12 like Auburn, so I got an elephant. 13 Q. Is one of the reasons you chose an 14 elephant because it's the University of 15 Alabama's mascot? 16 A. Well, I wanted to market it to 17 Alabama fans. Everybody -- like I said, 18 everybody was wearing houndstooth, so I 19 thought, well, let's put a houndstooth 20 pattern in. 21 Q. Why -- you said everyone was 22 wearing houndstooth. Why does everyone wear 23 houndstooth? 24 MR. DOUGLAS: Object to the form. 25 I mean, if you know --</p>

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<p>1 THE WITNESS: I'm sorry?</p> <p>2 MR. DOUGLAS: You can answer. I'm</p> <p>3 just objecting.</p> <p>4 THE WITNESS: Okay. I'm sorry,</p> <p>5 repeat it again.</p> <p>6 Q. (By Ms. Jones) Sure.</p> <p>7 You said that everybody was</p> <p>8 wearing houndstooth. And so I asked, why is</p> <p>9 everyone wearing houndstooth in Alabama?</p> <p>10 A. Well, they have a misconceived</p> <p>11 idea that Bear Bryant wore houndstooth, which</p> <p>12 he did, but he also wore the plaid, and</p> <p>13 mostly he wore plaid. But houndstooth, I</p> <p>14 guess -- I guess -- I don't know why that is</p> <p>15 considered Bear Bryant because, like, most of</p> <p>16 the pictures I have of him in plaid. But if</p> <p>17 that's what everybody liked, I was going to</p> <p>18 put it on an elephant.</p> <p>19 Q. So everybody was wearing</p> <p>20 houndstooth because they --</p> <p>21 A. They weren't wearing plaid.</p> <p>22 Q. But everyone thought that Bear</p> <p>23 Bryant wore houndstooth, so --</p> <p>24 A. He did wear some, but not</p> <p>25 like -- you can go on the Internet and see</p>	<p>1 T-shirts?</p> <p>2 A. Yes.</p> <p>3 Q. On the original version -- you</p> <p>4 can't really see it here. But the two</p> <p>5 redacted lines at the bottom -- actually, you</p> <p>6 can kind of see it -- it appears that it was</p> <p>7 redacted over the phrase "Bear Wear"; is that</p> <p>8 right?</p> <p>9 A. I can't tell. I can't see it.</p> <p>10 Q. Do you refer to any of your</p> <p>11 designs as Bear Wear?</p> <p>12 A. My elephant is -- is not any</p> <p>13 design of Bear Wear.</p> <p>14 Q. What's the Bear Wear design?</p> <p>15 A. It's -- it's a teddy bear.</p> <p>16 Q. What does the teddy bear look</p> <p>17 like?</p> <p>18 A. It just -- it's just -- it's in</p> <p>19 a circle, and it has "Bear Wear Clothing</p> <p>20 Company" going around it and a teddy bear</p> <p>21 inside of it, a brown teddy bear.</p> <p>22 Q. Are the Bear Wear T-shirts sold in</p> <p>23 close proximity to your T-shirts or</p> <p>24 sweatshirts bearing the houndstooth elephant</p> <p>25 design?</p>
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<p>1 that people are writing that Bear Bryant</p> <p>2 originally wore plaid, and he wore mostly</p> <p>3 plaid.</p> <p>4 Q. But the fans at the University all</p> <p>5 thought that Bear Bryant wore houndstooth, so</p> <p>6 the houndstooth pattern became, and is, very</p> <p>7 popular with University of Alabama fans?</p> <p>8 A. Yes.</p> <p>9 Q. And that's the reason why you</p> <p>10 chose houndstooth for your design?</p> <p>11 MR. DOUGLAS: Wait until she's</p> <p>12 done.</p> <p>13 THE WITNESS: Okay. I wanted to</p> <p>14 put it on there, yes.</p> <p>15 (Whereupon Petitioner's Exhibit</p> <p>16 No. 10 was marked for</p> <p>17 identification and is</p> <p>18 attached to the original of the</p> <p>19 transcript.)</p> <p>20 Q. (By Ms. Jones) Mr. Diaz, I'm</p> <p>21 showing you what's been marked as Exhibit</p> <p>22 No. 10.</p> <p>23 A. Okay.</p> <p>24 Q. Is this an invoice from Ink Trax</p> <p>25 to you, for the purchase of various products,</p>	<p>1 A. They're not. I have not sold</p> <p>2 them out like that.</p> <p>3 Q. So you ordered these Bear Wear</p> <p>4 shirts in January of 2013. Did you sell any</p> <p>5 of them or offer them for sale?</p> <p>6 A. No, I did not. I still have</p> <p>7 them.</p> <p>8 Q. Why didn't you sell them?</p> <p>9 A. Because I didn't want that to</p> <p>10 come out yet.</p> <p>11 Q. Why didn't you want it to come out</p> <p>12 yet?</p> <p>13 A. Because I had all this going on</p> <p>14 with litigation. I thought, well, maybe we</p> <p>15 shouldn't bring that out.</p> <p>16 Q. And is that because the shirts</p> <p>17 refer to Bear Bryant?</p> <p>18 A. No, they don't refer to Bear</p> <p>19 Bryant. I mean, not -- not at all.</p> <p>20 Q. Would you be able to provide us</p> <p>21 with pictures of the shirts that are the Bear</p> <p>22 Wear pattern?</p> <p>23 A. Yes.</p> <p>24 Q. And why did you redact the phrase</p> <p>25 "Bear Wear"?</p>

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<p style="text-align: right;">Page 78</p> <p>1 Most of our stuff is -- is geared toward 2 women and older women. Just -- it's not a 3 typical customer. 4 Q. So you sell primarily to 5 individuals, not to corporations? 6 A. No, huh-uh. 7 Q. To your knowledge, do you sell to 8 anyone else that then sells your products to 9 end consumers? 10 A. Huh-uh, no. 11 Q. Would you say most of your 12 customers are fans of The University of 13 Alabama? 14 A. I would say they are. 15 Q. Are some of your customers 16 students at The University of Alabama? 17 A. Yes. 18 Q. Are some of your customers alumni 19 of The University of Alabama? 20 A. I -- I would think so. 21 Q. Do you maintain a customer list? 22 A. No. 23 Q. So you sell both licensed and 24 unlicensed University of Alabama apparel? 25 A. Yes.</p>	<p style="text-align: right;">Page 80</p> <p>1 A. I don't know. Just -- just -- I 2 don't know. Just better looking. Just 3 nicer. 4 Q. Do you have documents that depict 5 what was proposed for gamedawg.net that you 6 decided not to use? 7 A. No, I never did get any 8 documents, pictures, or anything like that. 9 Q. So what did you look at to know 10 that that wasn't what you wanted? 11 A. I went to his office and looked 12 on his computer. 13 MR. DOUGLAS: Wait until she 14 finishes. 15 Q. (By Ms. Jones) Can you describe 16 generally what they came up with for the 17 Website? 18 A. Well, as -- how far they got 19 with it was just, you know, the heading 20 GameDawg. They got that. They -- they made 21 it to where it could scroll if you wanted to 22 write -- type something in there. It 23 could -- it could scroll it. They got to 24 where you could put pictures in it, but there 25 was never any pictures in it. And a lot of</p>
<p style="text-align: right;">Page 79</p> <p>1 Q. I think the answer to this is no, 2 but I'm just going to double check. Has 3 apparel bearing the houndstooth design ever 4 been sold on the Internet? 5 A. No, never. 6 Q. I think I saw that you owned 7 gamedawg.net; is that right? 8 A. Yes. 9 Q. Have you ever used that Website? 10 A. I've never had a Website. Never 11 had it on Facebook either. 12 Q. Did someone else run the Website, 13 gamedawg.net? 14 A. No. 15 Q. No? So it's never been active? 16 A. Huh-uh, never. I had somebody 17 create a Website, but it never went active. 18 Q. Why didn't you take it active? 19 A. I wasn't ready for it to go 20 active. It wasn't exactly -- it wasn't 21 exactly like I wanted it, and I'm not going 22 to put something out there that's not exactly 23 what I want. 24 Q. What did you want the Website to 25 look like?</p>	<p style="text-align: right;">Page 81</p> <p>1 the reason that it didn't -- never did go 2 live is because I really wasn't computer 3 savvy to -- to finish it. You know, he said, 4 well, you could put the pictures in. I 5 never -- I'm very picky. I could not get the 6 pictures the way I wanted to take them and 7 get them on there. Just stuff like that. 8 Q. Mr. Diaz, I'm showing you what's 9 been marked as Exhibit No. 11. Is this a 10 printout from your Facebook page for GameDawg 11 Collegiate? 12 (Whereupon Petitioner's Exhibit 13 No. 11 was marked for 14 identification and is 15 attached to the original of the 16 transcript.) 17 THE WITNESS: I assume it is. 18 Q. (By Ms. Jones) Did you write the 19 description? 20 A. No. 21 Q. Who wrote the description? 22 A. My youngest son. 23 Q. Is that Dominick or Paul? 24 A. Dominick. 25 Q. Dominick?</p>

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<p>1 A. Uh-huh.</p> <p>2 Q. But Dominick wrote this about you,</p> <p>3 since it refers to joining the Army and being</p> <p>4 an ER nurse?</p> <p>5 A. Uh-huh, he did it. Yeah.</p> <p>6 Q. Did he write it with your</p> <p>7 approval?</p> <p>8 A. No. I asked him to create me a</p> <p>9 Website -- I mean, not a Website, but a</p> <p>10 Facebook page. I didn't know he was going to</p> <p>11 go this far and write all this. It never --</p> <p>12 that never went active either. I didn't know</p> <p>13 this was written until this was, I think sent</p> <p>14 to us from, I guess, your firm. That's the</p> <p>15 first time I had seen it.</p> <p>16 Q. Why was it taken down?</p> <p>17 A. It was never put up. It</p> <p>18 shouldn't have been put up. There was never</p> <p>19 even any pictures on it.</p> <p>20 Q. Well, we pulled this off of</p> <p>21 Facebook, so --</p> <p>22 A. Well, if he made it live, it</p> <p>23 shouldn't have been. I mean, it's not even</p> <p>24 finished.</p> <p>25 Q. So did you instruct your son to</p>	<p>1 see.</p> <p>2 MR. DOUGLAS: Take your time and</p> <p>3 review it.</p> <p>4 THE WITNESS: Okay.</p> <p>5 MR. DOUGLAS: Specifically address</p> <p>6 each item you don't agree with.</p> <p>7 THE WITNESS: Well, just about all</p> <p>8 of it. I mean, just, like, saying my true</p> <p>9 passion -- I wouldn't have put -- I wouldn't</p> <p>10 have put the part about daycare center, my</p> <p>11 true passion was football. My passion was</p> <p>12 baseball. My son played baseball, Dominick.</p> <p>13 Saying I have a contract with The</p> <p>14 University of Alabama. I don't have a</p> <p>15 contract with The University of Alabama, never</p> <p>16 have.</p> <p>17 And that I sell all over the</p> <p>18 Southeast. I don't sell all over the</p> <p>19 Southeast. I sell in Alabama.</p> <p>20 The part about creating a</p> <p>21 houndstooth elephant representing Alabama fans</p> <p>22 everywhere. It wasn't like that, representing</p> <p>23 Alabama fans everywhere.</p> <p>24 I have a trademark, yes. Putting</p> <p>25 it on different apparel. Well, that -- I want</p>
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<p>1 take it down?</p> <p>2 A. Yeah, after I saw -- after I saw</p> <p>3 what he wrote.</p> <p>4 Q. Why did you tell him to take it</p> <p>5 down?</p> <p>6 A. Well, it wasn't supposed to have</p> <p>7 even been up. It wasn't ready.</p> <p>8 Q. Why -- why wasn't it supposed to</p> <p>9 be up, or what wasn't ready about it?</p> <p>10 A. Well, the pictures, the -- this</p> <p>11 isn't what I would have written. I mean,</p> <p>12 that's not -- you know, that's -- I just want</p> <p>13 him to make me the Facebook, just to get it</p> <p>14 started with a name, logo because I didn't</p> <p>15 know how to do it. And -- but he went a</p> <p>16 little bit further and -- so I wasn't about</p> <p>17 to put it up.</p> <p>18 Q. So what elements of the Facebook</p> <p>19 description went further than you would have</p> <p>20 liked?</p> <p>21 A. Well, I wouldn't have put all</p> <p>22 that about -- you know, all that about</p> <p>23 graduating from Medical College of Georgia,</p> <p>24 being in the Army, an ER nurse. I</p> <p>25 wouldn't -- I wouldn't have put -- let me</p>	<p>1 to it put it on all different apparel, but I</p> <p>2 haven't done all that.</p> <p>3 And that about having it all in</p> <p>4 stores, I wouldn't have put that. Just about</p> <p>5 almost -- about everything that's on here. I</p> <p>6 wouldn't have wrote it. I wouldn't have</p> <p>7 written it this way, none of this.</p> <p>8 Q. (By Ms. Jones) Going back to</p> <p>9 Exhibit No. 4, I see that you frequently use</p> <p>10 the phrase "The Tradition" on your apparel.</p> <p>11 And it's obviously a term in the name of your</p> <p>12 business, Campus Traditions. Does the phrase</p> <p>13 "The Tradition" refer to the tradition of Bear</p> <p>14 Bryant using a houndstooth pattern hat?</p> <p>15 A. No.</p> <p>16 Q. Does it refer to tradition</p> <p>17 surrounding The University of Alabama?</p> <p>18 A. I'm sorry, what was that again?</p> <p>19 Q. Does it -- does the phrase "The</p> <p>20 Tradition" refer to The University of Alabama</p> <p>21 and its traditions?</p> <p>22 A. It was -- it was just referring</p> <p>23 to the tradition of wearing houndstooth.</p> <p>24 Q. And the tradition of wearing</p> <p>25 houndstooth is that tradition of whom?</p>