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

Proceeding	92062923
Party	Plaintiff Topiclear, Inc.
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Transcript of Johnny Graterol, Corporate Designee

Date: January 11, 2018

Case: Topiclear, Inc. -v- K&N Distributors (TTAB)

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

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TOPICLEAR, INC., :
Petitioner, :
vs. : Cancellation No.
K & N DISTRIBUTORS, : 92062923
Registrant. :
-----X

Deposition of TOPICLEAR, INC.
By and through its Designated Representative,
JOHNNY GRATEROL
Washington, D.C.
Thursday, January 11, 2018
9:04 a.m.

Job No. 170986
Pages 1 - 64
Reported by: Jacquelyn C. Jarboe, RPR

1 Deposition of TOPICLEAR, INC., by and
2 through its Designated Representative, JOHNNY
3 GRATEROL, held at the offices of:

4

5

6

BUTZEL LONG

7

1909 K Street, Northwest

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Suite 500

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Washington, D.C. 20006

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(202) 454-2800

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Pursuant to Notice of Taking Testimony

16

Deposition, before Jacquelyn C. Jarboe, Registered

17

Professional Reporter and Notary Public in and for

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the District of Columbia, who officiated in

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administering the oath to the witness.

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A P P E A R A N C E S

ON BEHALF OF PETITIONER TOPICLEAR, INC.:

DONALD L. DENNISON, ESQUIRE
BUTZEL LONG
1909 K Street, Northwest
Suite 500
Washington, D.C. 20006
(202) 454-2800

ON BEHALF OF REGISTRANT K&N DISTRIBUTORS:

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C O N T E N T S

EXAMINATION OF JOHNNY GRATEROL	PAGE
By Mr. Dennison	7
By Mr. Heyer	47
By Mr. Dennison	62

E X H I B I T S

(Retained by Counsel)

GRATEROL EXHIBIT	PAGE
Exhibit 1 Six Topiclear product packages	14
Exhibit 2 Brochure	16
Exhibit 3 Statement of Income, 12-31-15	17
Exhibit 4 Statement of Income, 12-31-14	19
Exhibit 5 Postcard	20
Exhibit 6 Box for Topiclear Collection	
Exfoliating Soap	21
Exhibit 7 Box for, Topiclear Gold	
Exfoliating Soap	22
Exhibit 8 Advertising agreement for	
Topiclear, OTC Magazine, 2005	26
Exhibit 9 Homepage of Topiclear website	27

E X H I B I T S (Continued)		
GRATEROL EXHIBIT		PAGE
Exhibit 10	Copy of target.com website	28
Exhibit 11	Copy of Twitter profile	30
Exhibit 12	International Beauty Exchange Detail History Report by Job or Inventory Number	30
Exhibit 13	International Beauty Exchange Detail History Report by Job or Inventory Number	32
Exhibit 14	Invoice	33
Exhibit 15	Photograph	37
Exhibit 16	Tropic Clair Plus Lightening Cream	38
Exhibit 17	Exfoliating and Brightening Soap with Argan Oil	38
Exhibit 18	Trademark Registration for Topiclear	42
Exhibit 19	Trademark Registration for Topiclear Paris	43
Exhibit 20	Trademark Registration for Topiclear Collection	44

1
2
3
4
5
6
7
8
9
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11
12
13
14
15
16
17
18
19
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E X H I B I T S (Continued)

GRATEROL EXHIBIT	PAGE
Exhibit 21 Trademark Registration for Topiclear Gold	44

1 PROCEEDINGS

2 MR. DENNISON: Let the record show that
3 this is the trial testimony taken on behalf of the
4 petitioner in regard to the Cancellation Number
5 92062923 before the Trademark Trial and Appeal
6 Board of the United States Patent and Trademark
7 Office. A copy of the notice of deposition has
8 already been given to the Reporter.

9 Petitioner is represented here by Donald
10 Dennison of the Butzel Long law firm and the
11 respondent is represented by Eric Heyer of the
12 Thompson Hine law firm.

13 Whereupon,

14 JOHNNY GRATEROL,
15 being first duly sworn or affirmed to testify to
16 the truth, the whole truth, and nothing but the
17 truth, was examined and testified as follows:

18 DIRECT EXAMINATION BY COUNSEL FOR

19 PETITIONER TOPICLEAR, INC.

20 BY MR. DENNISON:

21 Q Would you please state your name and
22 address.

1 A Johnny Graterol, address is 5810
2 Northwest 163rd Street, Miami Lakes, Florida
3 33014.

4 Q Okay. And what is your present
5 occupation?

6 A I am the part owner of the Topiclear,
7 Inc.

8 Q Okay. And how long have you been
9 associated with Topiclear, Inc.?

10 A About 15 plus years, something.

11 Q 15 plus years?

12 A Yes.

13 Q Okay. What is your educational
14 background?

15 A A major in business and master's degree
16 in information technology.

17 Q Information --

18 A Technology.

19 Q Technology, okay.

20 And where did you go to school?

21 A I went to school in Minnesota in the
22 public university, and master's degree is in

1 Intercontinental American University in Miami,
2 Florida.

3 Q Okay. And what is your background in
4 the cosmetics or beauty products field?

5 A Well, we started the business back in
6 the '90s, and since we have been involved in the
7 beauty industry in general.

8 Q Ever since you've been active in this
9 business?

10 A Yes.

11 Q Okay. And what is your position in
12 Topiclear, Inc., what is your title?

13 A I'm a part owner.

14 Q You're a part owner of the business?

15 A Uh-huh.

16 Q Okay. And are you familiar with the
17 history and background of the company?

18 A Yes.

19 Q Did it exist before you became involved
20 with Topiclear?

21 A Yes.

22 Q And do you have any idea as to how many

1 years it's been in existence?

2 A A while back, probably -- I don't know
3 exactly, but it was way before we got involved.

4 Q Okay. Explain or state for me the
5 business of Topiclear, Inc. What do they do?

6 A Well, we -- as owner of the trademark we
7 order to different labs and factories to produce
8 items for us in different categories, and then we
9 sell it to wholesalers around the country, around
10 the world.

11 Q What type of categories are you talking
12 about?

13 A We have creams, lotions, soaps, serums.

14 Q What are serums?

15 A Those are liquids, concentrated liquids
16 that are used for sensitive area of the skin, like
17 around the eyes, around the mouth.

18 Q And the other products are for topical
19 application or --

20 A It's topical application, yes.

21 Q And how widespread geographically are
22 you marketing products?

1 A Oh, we have presence all around the
2 world, in Europe, Africa, Central America, and
3 Asia, and within the United States.

4 Q And do you have trademarks in some of
5 these countries, also?

6 A Yes.

7 Q Are you exporting the products from the
8 United States to these countries?

9 A Yes.

10 Q What are some of the countries in Africa
11 that you can think of?

12 A South Africa, Zambia, Lambia, Republic
13 of Congo, Ivory Coast, Nigeria, Senegal, Ghana,
14 Mozambique. And then some other small countries,
15 Burkina Faso.

16 Q The market in the South Pacific, for
17 example, Australia?

18 A Australia, yes.

19 Q And Canada?

20 A Canada, yes.

21 Q And how widespread in the United States
22 are your products distributed?

1 A Well, this is the main market. We
2 distribute this all around the country, West
3 Coast, Midwest and the East Coast.

4 Q And how do you distribute these
5 products, how are they sold?

6 A Through the OTC wholesalers.

7 Q OTC?

8 A OTC, over-the-counter wholesalers in the
9 beauty industry.

10 Q These are distributors?

11 A Distributors, yes.

12 Q Do you also sell to individuals?

13 A Through the websites.

14 Q I see, okay.

15 And where are the Topiclear products
16 actually manufactured, if you know?

17 A We manufacture in Europe in different
18 countries, different labs, could be Spain, could
19 be France, could be Belgium, or -- and the USA.

20 Q Do you ever sell directly to beauty
21 supply stores?

22 A Yes.

1 Q And you indicated you also sell on the
2 internet.

3 A Yes.

4 Q Is the Topiclear line an important part
5 of your company's products?

6 A Yes, it's the bestseller.

7 Q And does your company own trademark
8 rights in Topiclear?

9 A Yes.

10 Q And are there variations of that
11 trademark?

12 A Yes, we have variations: Topiclear
13 Paris, Topiclear Collection, Topiclear Gold,
14 Topiclear Classic.

15 Q Does the packaging of your product carry
16 any indication of the country or the area in which
17 the product is made?

18 A Yes.

19 Q And how is that listed, what is on the
20 packaging?

21 A On the packaging is what the -- what's
22 the question, the country of origin?

1 Q Yes, country of origin.

2 A Yes, it says something about made in
3 Europe, made in EU, which is Europe.

4 Q EU?

5 A EU, European Union.

6 MR. DENNISON: I'm going to ask the
7 Reporter to mark this group of packages as
8 Petitioner's Exhibit 1 for identification.

9 (Graterol Exhibit 1 was marked for
10 identification and was retained by counsel.)

11 Q Now, Mr. Graterol, could you identify
12 the materials that are listed as Exhibit 1.

13 A Okay. These are the packages of
14 different type of products for Topiclear. We have
15 here 80-gram soap, soap, two types, 200-gram soap
16 in lemon style.

17 Q Lemon what?

18 A Lemon soap.

19 Q Lemon soap.

20 A And we have the package for
21 skin-lightening gel, cream. This is gel. And we
22 have the skin-lightening cream, regular type, and

1 the skin-lightening lemon cream.

2 Q And are all of those products being
3 marketed today by your company?

4 A Yes.

5 Q Okay. Are you familiar with the sales
6 figures for these products?

7 A Yes.

8 Q Okay. And are you familiar with the
9 advertising that may be carried on with regard to
10 these products?

11 A Yes.

12 Q Okay. Now, taking these particular
13 products that I've shown to you as Exhibit 1, how
14 do you actually distribute them?

15 A Yes.

16 Q How do you do it? Do you --

17 A This one, we -- like we said before, for
18 consumers, they go direct to the website, they can
19 order it. And we distribute to the different
20 distributors that we have around the country and
21 in different countries around the world.

22 Q Okay. Let me have all of those, I'll

1 put them all together.

2 MR. DENNISON: I'm going to ask the
3 Reporter to mark this little pamphlet as
4 Petitioner's Exhibit 2 for identification.

5 (Graterol Exhibit 2 was marked for
6 identification and was retained by counsel.)

7 Q Can you tell me what that is.

8 A Okay. This is an official brochure that
9 we use to give to customers to identify the
10 products line on Topiclear.

11 Q And how do you actually distribute
12 these?

13 A Well, we send the regular mail, we
14 distribute as handouts on the shows, and through
15 the distributors around the country and around the
16 world.

17 Q You talked about shows. What type of
18 shows?

19 A We participate in trade shows
20 domestically and internationally.

21 Q And are all of the Topiclear products
22 that you distribute shown in this brochure?

1 A Yes.

2 Q Now, referring to the first page or the
3 cover, I see a circle on the left of the word
4 "Topiclear." What is that?

5 A This is the seal that identifies all
6 Topiclear products, it is carried on all the
7 packages.

8 Q Does this appear on some of your
9 packaging as well?

10 A Yes.

11 Q I also notice the R with a circle around
12 it after Topiclear, the letter R.

13 A The letter R, yes. This is for the
14 registered trademark.

15 Q Indicates that it's registered?

16 A On all the packages, yes.

17 MR. DENNISON: I'm going to ask the
18 Reporter to mark this sheet as Petitioner's
19 Exhibit 3 for identification.

20 (Graterol Exhibit 3 was marked for
21 identification and was retained by counsel.)

22 Q And can you tell me what that particular

1 document is.

2 A This is a report from International
3 Beauty Exchange, statement of income, December, as
4 of December 31st, 2015.

5 Q So it covers the sales of what
6 particular products?

7 A This covers the sale for Topiclear,
8 but --

9 MR. DENNISON: And you'll notice that
10 portions of it have been deleted, and this is
11 listed as a privileged document. However, for the
12 purpose of this case, since we've already redacted
13 portions of it, we will remove that particular
14 privilege.

15 MR. HEYER: Okay.

16 Q And how much was spent on advertising
17 during that one-year period?

18 A \$117,107.

19 Q And that's just advertising?

20 A That's for advertising and promotion on
21 the product.

22 Q And what do you mean by commissions

1 that's listed?

2 A Commission is what is paid to the sales
3 rep that we use in different areas.

4 Q Okay. And travel expenses were how
5 much?

6 A Travel expenses, 78,198.

7 Q Does that include any foreign travel?

8 A Yes.

9 Q Do you have shows abroad?

10 A Yes.

11 Q Where are they located?

12 A In the Emirates, in Dubai.

13 Q In the United Arab Emirates?

14 A Yes, United Arab Emirates, Dubai.

15 Q Do you also have shows in England?

16 A In London, yes, in the United Kingdom.

17 Q I'm going to show you Exhibit 4. I'll
18 give it to the Reporter for identification
19 purposes.

20 (Graterol Exhibit 4 was marked for
21 identification and was retained by counsel.)

22 Q And can you identify that document for

1 me?

2 A Yes. This is a statement of income as
3 of December 31st, 2014.

4 Q Okay. Is this for the whole year of
5 2014?

6 A Yes.

7 Q And it's similar to the exhibit that we
8 just saw, which was Exhibit 3?

9 A Yes.

10 Q So do you have a sheet like this for
11 every year and these are just as an example?

12 A Yes.

13 MR. DENNISON: I'd ask the Reporter to
14 mark this little card as Petitioner's Exhibit 5
15 for identification.

16 (Graterol Exhibit 5 was marked for
17 identification and was retained by counsel.)

18 Q Now, just looking at the front part of
19 it --

20 A This one?

21 Q Yes. What is that card?

22 A Okay, this is a postcard that we use to

1 advertise Topiclear Paris.

2 Q Okay. And what is the particular brand
3 that is shown on the front?

4 A Topiclear Paris.

5 Q And how does Topiclear Paris differ from
6 the plain Topiclear?

7 A This is a different style and high-
8 quality products.

9 Q Different ingredients?

10 A Different ingredients and better
11 quality, better packages.

12 MR. DENNISON: I'll give the Reporter
13 another document for identification as exhibit,
14 Petitioner's Exhibit 6.

15 (Graterol Exhibit 6 was marked for
16 identification and was retained by counsel.)

17 Q And please identify that, if you can.

18 A This is an image of the Topiclear
19 Collection Exfoliating Soap.

20 Q And what is Topiclear Collection?

21 A Topiclear Collection is another
22 variation of the Topiclear family that we have

1 created to expand the market.

2 Q Does this product differ from the
3 formulation of the previous ones that we've seen?

4 A Yes.

5 Q And is this product marketed today?

6 A It's in the market today, yes.

7 MR. DENNISON: Okay, let's go to
8 Exhibit -- I'd ask the Reporter to please mark
9 this as Petitioner's Exhibit 7 for identification.

10 (Graterol Exhibit 7 as marked for
11 identification and was retained by counsel.)

12 Q And please tell me what that particular
13 document is.

14 A Okay, this is the -- image shows
15 Topiclear Gold --

16 Q Gold?

17 A Yes, exfoliating soap. This is another
18 product that we have on the market on the
19 particular brand, Topiclear Gold, it's a variation
20 of the Topiclear family.

21 Q Now, tell me about the trade shows that
22 you indicated the company participates in. What

1 takes place at these trade shows?

2 A Well, as an exhibitor on those trade
3 shows you contract booth space and you use it
4 three or four days of the shows to meet your
5 distributors, and meet potential new customers,
6 and show the different range of product that you
7 have.

8 Q And do you go personally to these trade
9 shows?

10 A Yes.

11 Q At any time at these trade shows have
12 you ever seen anyone from the respondent's
13 company, K&N Distributors?

14 A Yes.

15 Q They go to the trade shows, or at least
16 some of them?

17 A Some of them.

18 Q Do you know any of the people at that
19 company?

20 A Robert.

21 Q But you don't know -- do you know his
22 last name?

1 A We call him Robert, but --

2 Q Like they call you Johnny.

3 A Yeah. But I don't --

4 Q It goes by first name?

5 A Yeah, first name.

6 Q Okay. And are any of the actual
7 products given away at these trade shows?

8 A Our product, yes, we give handout
9 samples.

10 Q Are any of the various Topiclear brands
11 ever advertised in periodicals or other media?

12 A Yes.

13 Q And can you give me the names of any of
14 the magazines or --

15 A Well, we have Amina Magazine, which is a
16 French magazine.

17 Q What's it called?

18 A Amina, A-M-I-N-A. Amina. It's a French
19 magazine.

20 Q And is it distributed --

21 A It is --

22 Q -- in the United States at all?

1 A No, they distribute it in Europe and in
2 Africa.

3 Q Okay.

4 A It's in French and in English.

5 Q Any other publications?

6 A OTC Magazine, which is --

7 Q OTC?

8 A OTC Magazine in the U.S. And Beauty
9 Store Business Magazine. Beauty & Hair Magazine,
10 this is another different type of magazine,
11 and they just --

12 Q I'm sorry, Beauty and what?

13 A Beauty Hair. Beauty & Hair Magazine.

14 Q Any others that you can think of?

15 A We have some in the Beauty Industry
16 Report, which is a monthly publication from the
17 beauty industry. And we have a website presence,
18 Twitter account, Facebook account, Instagram.

19 MR. DENNISON: I'd like the Reporter to
20 mark this next document as Petitioner's Exhibit
21 Number 8 for identification. It's a two-page
22 document.

1 (Graterol Exhibit 8 was marked for
2 identification and was retained by counsel.)

3 Q Can you identify that document for me,
4 Mr. Graterol?

5 A Okay, this is a copy of the 2005
6 advertising agreement for Topiclear with OTC
7 Magazine.

8 Q And this is an order form?

9 A Yeah, and it's -- also attached is the
10 invoice for a particular month of February.

11 Q Okay. So is this a typical type of
12 agreement when you have advertising placed in a
13 magazine?

14 A Yes.

15 Q And I think you indicated that the
16 company maintains an internet site; is that
17 correct?

18 A Yes.

19 Q And do you know the internet address?

20 A Yes.

21 Q And what is that?

22 A [Www.topicclearinc.com](http://www.topicclearinc.com).

1 MR. DENNISON: I'll ask the Reporter to
2 mark this as Petitioner's Exhibit 9 for
3 identification.

4 (Graterol Exhibit 9 was marked for
5 identification and was retained by counsel.)

6 Q And please identify that for me, if you
7 can.

8 A Okay. This is a copy of a homepage of
9 Topiclear website, and then the second page is a
10 copy of the different products offered on that
11 website with prices. The third page are more
12 products, and the fourth page are some more
13 products.

14 Q And are all of the products shown here
15 under the Topiclear brand?

16 A Yes.

17 Q Is it possible for any individual to
18 access this website and actually order products?

19 A Yes.

20 Q And is that a frequent occurrence?

21 A Yes.

22 Q To your knowledge, do any of the

1 Topiclear products appear on websites of other
2 companies?

3 A Yes.

4 MR. DENNISON: Will the Reporter please
5 mark -- let's take a break for a second until I
6 get this exhibit straightened out here.

7 (Brief pause.)

8 MR. DENNISON: Will the Reporter please
9 mark this multipage document as Petitioner's
10 Exhibit -- what are we up to now?

11 THE WITNESS: 10.

12 MR. DENNISON: This is 10.

13 (Graterol Exhibit 10 was marked for
14 identification and was retained by counsel.)

15 Q Now, you indicated that Topiclear
16 products appear on other websites; is that
17 correct?

18 A Yes.

19 Q And tell me, if you can, what the
20 particular document shows.

21 A Okay.

22 MR. HEYER: Objection, lack of

1 foundation.

2 MR. DENNISON: I'm sorry?

3 MR. HEYER: Objection, lack of
4 foundation.

5 MR. DENNISON: All right, objection's
6 noted.

7 Q Have you seen these particular documents
8 before?

9 A No.

10 Q You haven't seen these before?

11 A No.

12 Q Okay. Are you familiar with your
13 products appearing on the Target website?

14 MR. HEYER: Objection, lack of
15 foundation.

16 A No.

17 MR. DENNISON: Objection noted.

18 A I just see it now. I know it's been
19 sold on different websites, but --

20 Q Okay. Does your company maintain a
21 Twitter account?

22 A Yes.

1 Q And how about Facebook?

2 A Yes.

3 MR. DENNISON: I'd ask the Reporter to
4 mark this next set of documents as Petitioner's
5 Exhibit 11 for identification.

6 (Graterol Exhibit 11 was marked for
7 identification and was retained by counsel.)

8 Q Can you identify that document for me.

9 A This is a copy of Topiclear Twitter
10 account.

11 Q It's from your Twitter account?

12 A Yes.

13 Q And this is a page printed off of a
14 screen?

15 A Yes.

16 MR. DENNISON: I hand the Reporter a
17 multipage document to be listed as Petitioner's
18 Exhibit 12 for identification.

19 (Graterol Exhibit 12 was marked for
20 identification and was retained by counsel.)

21 Q Are you familiar with this particular
22 document?

1 A This is a sale detail history report for
2 a customer, for a particular customer name.

3 Q You say it's for a particular customer?

4 A Yes.

5 Q And did this document come from the
6 official records of your company?

7 A Yes. This is for April 28, 2016.

8 Q And who is the customer?

9 A Adolfo House.

10 Q Adolfo?

11 A House.

12 Q Okay. And are all of the products shown
13 here Topiclear?

14 A Yes.

15 Q And how do you know that?

16 A This is a description that shows the
17 code number for each product.

18 Q The code number for each product?

19 A For each Topiclear product.

20 Q And what is the total amount of sales
21 for this single customer for that period?

22 A \$42,590.08.

1 Q And that's shown on the last page?

2 A On the last page.

3 MR. DENNISON: Here again, we will
4 remove the privilege notation, since we've already
5 redacted the material that's classified.

6 We'll go to Exhibit 13. The Reporter
7 will mark it.

8 (Graterol Exhibit 13 was marked for
9 identification and was retained by counsel.)

10 Q Can you identify that document, please.

11 A Okay, this is a detailed history report,
12 May and April 28, 2016, that compiled years 2014
13 and 2015 on all Topiclear's products, sales.

14 Q So this is a tabulation of all Topiclear
15 products sold between -- for those two years, 2014
16 and 2015?

17 A Yes.

18 Q And what were the total amount of sales?

19 A 2,678,579.

20 Q 2,678,579.71; is that correct?

21 A Yes.

22 Q And does this a document come from the

1 official records of your company?

2 A Yes.

3 Q And who maintains those records?

4 A Well, this is a CPA, every year they
5 count, and then they do all the accounting.

6 Q And you have all of these records in
7 your files?

8 A Yes.

9 MR. DENNISON: This next exhibit for
10 identification is a single sheet to be marked as
11 Petitioner's Exhibit 14 for identification.

12 (Graterol Exhibit 14 was marked for
13 identification and was retained by counsel.)

14 Q If you can, please let me know what this
15 document represents.

16 A Okay, this is a particular quotation
17 order sent to a customer in Canada on August 22nd,
18 2016. And that covered all the products in that
19 order that include Topiclear.

20 Q Okay, there are other products also
21 listed there?

22 A Yes.

1 Q Other than Topiclear.

2 Is this a typical type of order form
3 that you use?

4 A Yes.

5 Q And did this shipment actually ever take
6 place to your knowledge?

7 A Yes.

8 Q Now, going back to Exhibit 1 and
9 looking, for example, at the item known as
10 Topiclear Skin Lightening Gel, what is the general
11 color of that package?

12 A The color of the package is burgundy,
13 with different shades of burgundy.

14 Q All right, so it's several shades of
15 burgundy?

16 A Yes.

17 Q And does the number 1 and a circle
18 appear on that package as well?

19 A Yes.

20 MR. HEYER: Can I have a copy of that?
21 Oh, I'm sorry, that's Exhibit 1.

22 THE WITNESS: That's Exhibit 1.

1 Q Did there ever come a time when you
2 visited personally any of the beauty supply shops
3 in New York?

4 A Yes.

5 Q Did you ever visit Beauty New King in
6 College Point, New York?

7 A Yes.

8 Q And how about Beauty Palace in -- I
9 think in Brooklyn?

10 A Yes.

11 Q Beauty Image?

12 A Yes.

13 Q Did you ever pay a visit to G&P Factory
14 Outlet in Miami?

15 A Yes.

16 Q And how about Vincent International
17 Distributing?

18 A Yes.

19 Q And do you know where they're located?

20 A Miami.

21 Q Also Miami?

22 A North Miami area.

1 Q Okay. How about Zany Enterprises?

2 A Yes, it is also in Miami.

3 Q Are any of these stores customers of
4 your company?

5 A Yes.

6 Q You sell Topiclear products to these
7 companies?

8 A Yes.

9 Q During your visit to any of these
10 stores, did you ever notice on the shelves or in
11 the warehouse any products of K&N that you can
12 identify?

13 A Yes.

14 Q And do you know what name was on those
15 particular products?

16 A A particular different type of product,
17 but the one that called my attention was similar
18 to our Topiclear.

19 Q Was that Tropic Clair?

20 A Yes. The name is similar, Tropic Clair.

21 Q Do you know what clair means?

22 A Clair means clear.

1 Q In another language?

2 A In French.

3 Q In French?

4 A In French.

5 Q While you were in those establishments,
6 did you purchase any of the Tropic Clair products?

7 A Yes.

8 MR. DENNISON: I'll now ask the
9 Reporter, a single sheet photograph to be noted as
10 Petitioner's Exhibit 15 for identification.

11 (Graterol Exhibit 15 was marked for
12 identification and was retained by counsel.)

13 Q Have you seen that photograph before?

14 A Yes.

15 Q And who took the photograph?

16 A I did.

17 Q You did. And do you remember what
18 store?

19 A Beauty New King in New York.

20 Q Beauty New King?

21 A Uh-huh.

22 Q And is your particular product,

1 Topiclear, visible in that picture?

2 A Yes, it's at the top of the -- on the
3 center of the image.

4 Q At the top?

5 A At the top.

6 Q Or near the top?

7 A Yes.

8 Q And how about the K&N product Tropic
9 Clair Plus, is that shown?

10 A Yes, this is all the boxes that you can
11 see.

12 Q I see. So both of these products were
13 on the shelves at this particular store in New
14 York; is that correct?

15 A Yes.

16 MR. DENNISON: I'm going to give the
17 Reporter two boxes, first one is Petitioner's
18 Exhibit 16 for identification, the other will be
19 Exhibit 17 for identification.

20 (Graterol Exhibits 16 and 17 were marked
21 for identification and were retained by counsel.)

22 MR. DENNISON: Rather than provide a

1 copy of the actual boxes to counsel for the
2 respondent, I've photographed the box and the
3 contents. That's 16.

4 MR. HEYER: Could I see the original
5 quickly.

6 Q Can you identify Exhibit 16 for me?

7 A 16. Okay, this is the product name
8 Tropic Clair Lightening Cream.

9 Q And did you purchase this particular
10 box?

11 A Yes.

12 Q At what shop, if you remember?

13 A I purchased it from the store in
14 Brooklyn, Image Beauty, and the other one, beauty
15 supply, in New York.

16 Q And what is the particular product under
17 that trademark Tropic Clair?

18 A Lightening cream.

19 Q And do you manufacture a lightening
20 cream under Topiclear?

21 A Yes.

22 Q If you'll open the container, tell me

1 what's inside the container.

2 A It's a lightening cream on the name of
3 Tropic Clair.

4 Q And is your lightening cream marketed
5 under Tropic Clair also sold in a tube?

6 A Yes.

7 Q Okay. You can put it back in.

8 What is the particular color of that
9 container?

10 A Burgundy.

11 Q It's a burgundy color?

12 A Yes.

13 Q And does it also have a symbol on it,
14 the circle?

15 A Yes.

16 Q And what's inside the circle?

17 A Tropic Clair number 1 original.

18 Q And --

19 MR. HEYER: Objection.

20 MR. DENNISON: What's the basis?

21 MR. HEYER: Misstates the exhibit.

22 MR. DENNISON: The objection is noted.

1 Q Are there any other indications on there
2 of other companies other than K&N?

3 A RB Cosmetics.

4 Q RB Cosmetics?

5 A Yes.

6 Q Inc.?

7 A RB Cosmetics.

8 Q And are familiar with that company?

9 A No.

10 Q Are there any other company names
11 listed?

12 A It shows the website of
13 www.naturecosmeticsllc.com.

14 Q Nature Cosmetics?

15 A LLC.

16 Q And have you ever heard of that company?

17 A No.

18 Q In your personal opinion, is there a
19 similarity between the packaging of your product
20 and that of the other company?

21 MR. HEYER: Objection, relevance.

22 MR. DENNISON: Noted.

1 MR. HEYER: Improper opinion.

2 A Yes.

3 Q Thank you. I'll take those back.

4 If you can inspect the particular
5 packaging, do you see any indication of a country
6 of origin listed?

7 MR. HEYER: Objection, relevance.

8 MR. DENNISON: What's the objection?

9 MR. HEYER: Relevance.

10 MR. DENNISON: It's noted.

11 A It doesn't show any particular country
12 of origin or where it's made.

13 Q Okay. You indicated that your company
14 has a number of trademark registrations; is that
15 correct?

16 A Yes.

17 MR. DENNISON: And I give the Court
18 Reporter this particular document under seal of
19 the U.S. Patent and Trademark Office, and I ask
20 that it be identified as Exhibit 18 for
21 identification.

22 (Graterol Exhibit 18 was marked for

1 identification and was retained by counsel.)

2 Q Do you have a copy of that original
3 document at the company?

4 A Yes.

5 Q And what is the trademark that's shown
6 on that document?

7 A This is a copy of the United States
8 Department of Commerce, Patent and Trademark
9 Office. This is the copy for registration of
10 Topiclear.

11 Q Topiclear.

12 MR. DENNISON: And I'll give the
13 Reporter another document which will be listed as
14 Petitioner's Exhibit 19 for identification.

15 (Graterol Exhibit 19 was marked for
16 identification and was retained by counsel.)

17 Q And can you identify that document for
18 me.

19 A Okay, this is a copy of the United
20 States of America, Department of Commerce.

21 Q Just tell me the mark that's involved
22 here.

1 A Here is a copy for the Topiclear Paris
2 trademark.

3 Q And here's another to be marked as
4 Exhibit 20 for identification.

5 (Graterol Exhibit 20 was marked for
6 identification and was retained by counsel.)

7 Q And what is the trademark shown in that
8 document?

9 A Topiclear Collection.

10 MR. DENNISON: And finally, I give the
11 Reporter another document to be noted as
12 Petitioner's Exhibit 21 for identification.

13 (Graterol Exhibit 21 was marked for
14 identification and was retained by counsel.)

15 Q And what is the trademark in that
16 document?

17 A Topiclear Gold.

18 Q Have you ever heard any comments from
19 any of your distributors indicating that there's
20 confusion between your product and the K&N
21 product?

22 MR. HEYER: Objection, calls for

1 hearsay, move to strike.

2 MR. DENNISON: We're not indicating any
3 particular person or any speech, we're merely
4 indicating whether he had heard.

5 MR. HEYER: I renew my objection.

6 A Yes.

7 Q Okay. In your opinion, is your company
8 being harmed in any way in the marketplace by the
9 existence of Tropic Clair?

10 A Yes.

11 MR. DENNISON: Okay, at this point I
12 move into evidence, although it's not necessary
13 under the rules, Petitioner's Exhibits 1 through
14 21. And I think we'll take a short break here
15 before we get into cross-examination.

16 MR. HEYER: Yes, and I want to put on
17 the -- I think I had already objected, but
18 specifically to Exhibit 10. And then I have
19 some -- I'm going to reserve other objections to
20 the exhibits pending my questioning.

21 MR. DENNISON: Okay. Which exhibit is
22 10?

1 MR. HEYER: 10 was the Target website, I
2 think.

3 MR. DENNISON: The website?

4 MR. HEYER: Yes, the Target website
5 printout.

6 MR. DENNISON: Well, there were a number
7 of websites in that document.

8 MR. HEYER: Yes, it's this one.

9 MR. DENNISON: Okay. Want to take a
10 break, coffee, and whatever else you'd like?

11 (Recess taken from 10:05 a.m. to 10:10
12 a.m.)

13 MR. DENNISON: I would like to propose
14 two stipulations: one, we would waive signature.

15 MR. HEYER: That's fine, yes.

16 MR. DENNISON: And the other is I would
17 retain the original copies of the documents and I
18 will file them with the PTO.

19 MR. HEYER: The exhibits, that's fine.

20 MR. DENNISON: Okay. That's it.

21 (Recess continues from 10:10 a.m. to
22 10:13 a.m.)

1 CROSS-EXAMINATION BY COUNSEL FOR

2 REGISTRANT K&N DISTRIBUTORS

3 BY MR. HEYER:

4 Q Mr. Graterol, good morning. My name is
5 Eric Heyer. I'm counsel for K&N Distributors, the
6 respondent in this proceeding. We met before we
7 went on the record.

8 You said you're the part owner
9 of -- you've been the part owner of Topiclear,
10 Inc., for approximately 15 years?

11 A No, I've been involved with Topiclear,
12 but last year is the part-owner.

13 Q I understand, okay.

14 And the petitioner in this proceeding is
15 Topiclear, Inc., a Florida corporation; is that
16 correct?

17 A Yes.

18 Q Okay. And there's also a Topiclear,
19 Inc., a Delaware corporation, right?

20 A No, no more.

21 Q I'm sorry?

22 A That was in the past.

1 Q That was in the past. In fact, if we
2 look at Exhibits 18 through 21, the registrant
3 that's listed was, in fact, Topiclear, Inc., a
4 Delaware corporation, right?

5 MR. DENNISON: Objection, the document
6 speaks for itself. And it does show what the
7 present title is on the front.

8 Q Did you have any role in the Delaware
9 corporation?

10 A No.

11 Q Okay. And the Florida corporation
12 assumed the rights, really, to these marks
13 pursuant to an assignment in 2013; is that right?

14 A I do not know.

15 Q You have no firsthand knowledge of that?

16 A No.

17 Q Okay. Is International Beauty Exchange,
18 Inc., a separate Florida corporation?

19 A Yes.

20 Q Okay. And what is the role of
21 International Beauty Exchange, Inc., with respect
22 to the Topiclear mark?

1 A International Beauty Exchange has the
2 rights to manage all the distribution of Topiclear
3 products.

4 Q Okay. Does Topiclear, Inc., the Florida
5 corporation, actually make any revenue, receive
6 any revenues from the sale or distribution of
7 products carrying the Topiclear mark?

8 A Yes.

9 Q Okay. And does it receive those
10 directly or through International Beauty Exchange?

11 A Both.

12 Q Okay. How does it receive them
13 directly? How are those revenues generated?

14 A Through sales.

15 Q Okay. And is there a license agreement
16 between International Beauty Exchange and
17 Topiclear, Inc.?

18 A Yes.

19 Q The products that are sold bearing the
20 Topiclear mark such as those that were put into
21 evidence today, who purchases the product from the
22 actual labs that do the manufacturing?

1 A I do not understand the question.

2 Q Okay. Which entity pays for the -- pays
3 the manufacturers for the products?

4 A International Beauty.

5 Q Okay. And I noticed on some of the
6 exhibits it referenced, it said, under license
7 from Topiclear Laboratories in France. Can you
8 explain to me what Topiclear Laboratories in
9 France is?

10 A That was, I guess, the original creator
11 of the formula.

12 Q Okay. So does the word "license" relate
13 to the formula, or the mark, or both?

14 A I do not know about the particulars.

15 Q Okay. And would you agree with me that
16 all of the exhibits that have been offered into
17 evidence today of the products bearing the
18 Topiclear mark, none of them lists a specific
19 country of origin on the packaging?

20 A I do not understand your question.

21 Q Okay. Well, would you agree with me
22 that all the Topiclear packaging and products that

1 have been offered into evidence as exhibits state
2 only made in EU, they don't list a specific
3 country?

4 A It says made in the European Union.

5 Q Right, but they don't say France or
6 Belgium or Spain, do they?

7 MR. DENNISON: Objection. I believe at
8 least some of these do show a specific country.

9 MR. HEYER: Okay. Let's do it this way.
10 And if you could put the exhibits back in front of
11 him.

12 Q Take a look at Exhibit 1, if you would,
13 sir. And Exhibit 1 says only made in EU, it does
14 not identify a specific country, isn't that
15 correct?

16 A Which one? We have a --

17 MR. DENNISON: Again, I would object,
18 because at least one of them that I have in front
19 of me shows made in Jordan. That's the lemon
20 soap.

21 Q Okay, well, let's forget about the lemon
22 soap. Let's look at the skin lightening gel

1 that's part of Exhibit 1. All right. And that
2 only says made in EU, correct?

3 A Yes.

4 Q All right. Okay, and if we look at the
5 lemon cream, that also only says made in EU, it
6 does not say, does not specify a specific country.

7 A Yes.

8 Q Okay. And if we look at the skin
9 lightening cream, same situation, correct?

10 A Yes.

11 Q If we look at the personal hygiene soap,
12 again, it only identifies made in EU, correct?

13 A Yes.

14 Q Okay. And the same with the other
15 package for, again, a different personal hygiene
16 soap, correct?

17 A Yes.

18 Q Okay. Now, you talked about the circle
19 on -- let's look at Exhibit 1. You can take any
20 of the products. Take the skin lightening gel.
21 You talked about the circle and how it says
22 Topiclear number 1 original, do you recall that

1 testimony?

2 A I see it.

3 Q Okay. Why did you feel the need to use
4 the word "original"?

5 A I don't understand the question.

6 Q Why do you use the word "original" in
7 your packaging, along with the name "Topiclear"?

8 A To reflect to the consumer that this is
9 the real product, Topiclear.

10 Q Okay. Are you aware of other products
11 out there that have also used the name Topiclear
12 as part of their product name or marketing?

13 A Okay, what is -- I do not understand the
14 question.

15 Q Are you aware of, have you seen in your
16 experience other products out there on the
17 cosmetics -- other cosmetic products out there
18 that use the word "Topiclear" as part of their
19 name or marketing materials?

20 A The one that we looked at that was
21 similar, the one that said Tropic Clair.

22 Q Any others that you contend, other

1 besides K&N's products?

2 A No.

3 Q Look at Exhibit 3.

4 MR. HEYER: If you could put that
5 back -- probably just give him the pile of the
6 exhibits.

7 Q Do you recall testifying about the
8 advertising and marketing expenses on this
9 exhibit?

10 A Yes.

11 Q Okay. It's fair to say that these are
12 expenses incurred by International Beauty
13 Exchange, Inc., and not the petitioner in this
14 proceeding?

15 A Yes, but because of the agreement
16 between Topiclear and International Beauty,
17 International Beauty pays.

18 Q Okay. And with respect to Exhibit 4,
19 again, are the figures there under the category of
20 selling expenses costs incurred by International
21 Beauty Exchange?

22 A I already gave my answer to that, the

1 same.

2 Q The same, right?

3 A Yes.

4 Q And Exhibit 8, you talked about this
5 being an advertising agreement for advertising
6 associated with the Topiclear mark. I see here
7 that the company name is listed as IBE. Were
8 these advertising costs that are referenced in
9 Exhibit 8 paid by International Beauty Exchange,
10 Inc.?

11 A Yes. This is the same as per agreement
12 between Topiclear and International Beauty.

13 Q With respect to Exhibit 9, which are
14 pages from the Topiclear website, are you
15 personally involved in the maintenance or the
16 creation of content for the Topiclear website?

17 A Yes.

18 Q And did you print off these pages that
19 are Exhibit 9?

20 A No.

21 Q Okay. Do you know who did?

22 A No.

1 Q So do you have any way of knowing
2 whether these are true and correct copies of the
3 content that was on the Topiclear website as of
4 November 18, 2016?

5 A So far as I see it, those are correct.

6 Q And with respect to Exhibit 10, do I
7 understand your testimony to be that you have not
8 seen any of these, the pages in Exhibit 10 before?

9 A No.

10 Q No, you had not seen them before?

11 A I have not seen them before.

12 Q Thank you.

13 With respect to Exhibit 11, are you
14 personally involved in maintaining the Twitter
15 account for Topiclear?

16 A No.

17 Q Okay. Did you personally print out the
18 screen shot that is included in Exhibit 11?

19 A No.

20 Q With respect to Exhibit 12, you
21 testified about these sales figures. Were these
22 all sales made by International Beauty Exchange,

1 Inc.?

2 A Yes.

3 Q Okay. Not sales made by Topiclear,
4 Inc.?

5 A That's correct. But like I said before,
6 this is part of the agreement between Topiclear
7 and International Beauty Exchange.

8 Q And is Exhibit 12, is information found
9 in Exhibit 12 maintained in the ordinary course of
10 business in Topiclear, Inc.'s computer systems?

11 A I do not understand your question.

12 Q Is the information, the sales
13 information found in Exhibit 12 maintained in the
14 ordinary course of business by Topiclear in its
15 computer systems?

16 A No.

17 Q Okay. This is all information that was
18 prepared and collated by a separate CPA firm; is
19 that right?

20 A Yes.

21 Q Okay. With respect to Exhibit 13,
22 again, are these sales by International Beauty

1 Exchange, Inc., and not Topiclear, Inc.?

2 A Yes, as a part of the agreement between
3 Topiclear, Inc., and International Beauty
4 Exchange.

5 Q Okay. And the revenues for these sales
6 come in to International Beauty Exchange at least
7 in the first instance; is that right?

8 A Yes.

9 Q Okay. With respect to Exhibit 14, this
10 is a purchase order. Does International Beauty
11 Exchange distribute a product called Dermaclair
12 Cream?

13 A Yes.

14 Q Okay. And you see that's listed here as
15 the second-to-last item on Exhibit 14?

16 A Second-to-last. Yes.

17 Q And Dermaclair is spelled
18 D-E-R-M-A-C-L-A-I-R; is that right?

19 A Yes.

20 Q Okay. Is there a separate cosmetic
21 product on the market that is Dermaclear, but
22 spelled C-L-E-A-R?

1 A Not that I know.

2 Q I'm sorry?

3 A I do not know.

4 Q You don't know one way or the other?

5 A What do you mean?

6 Q Whether there's a separate product on
7 the market that's called Dermaclear, spelled
8 C-L-E-A-R.

9 A No, I do not know.

10 Q And is Dermaclair a product with which
11 Topiclear, Inc., has any relation?

12 A No.

13 Q Okay. Is there any shared ownership or
14 officers or members between -- shareholders
15 between International Beauty Exchange, Inc., and
16 Topiclear, Inc.?

17 A What is your question again?

18 Q Are there any shared shareholders,
19 directors, or officers between Topiclear, Inc.,
20 and International Beauty Exchange, Inc.?

21 A Yes.

22 Q Okay. Who are the shared shareholders,

1 officers, or directors?

2 A I do not know the particulars, but I
3 know one person that is involved in both.

4 Q Okay. Is that individual a shareholder
5 in both?

6 A Yes.

7 Q Okay. And who is that individual?

8 A Symcha Horowitz.

9 Q And are you either a shareholder,
10 director, or officer of International Beauty
11 Exchange?

12 A No.

13 Q Okay. All the exhibits that we looked
14 at that relate to the sales of International
15 Beauty Exchange, who provided those to you?

16 A What is the question again?

17 Q All the exhibits that we looked at that
18 related to sales by International Beauty Exchange,
19 who provided those documents to you?

20 A We got it from the accounting
21 department.

22 Q The accounting department of which

1 company?

2 A International Beauty.

3 Q Okay. And you yourself are not involved
4 in the creation or maintenance of those sales
5 records; is that right?

6 A No.

7 Q And that would apply, just for the sake
8 of clarity, to Exhibit 14, Exhibit 13, Exhibit 12,
9 Exhibit 8, Exhibit 4; is that correct?

10 A What is the question again?

11 Q With respect to those exhibits, these
12 were all obtained from International Beauty
13 Exchange, and you yourself have no personal
14 involvement in the creation or maintenance of
15 those records?

16 A Correct, nothing to do with this.

17 Q And the same question with respect to
18 Exhibit 3 as well.

19 A Correct.

20 MR. HEYER: Okay. Pass the witness.

21 MR. DENNISON: Okay. Just one question
22 on redirect.

1 REDIRECT EXAMINATION BY COUNSEL FOR

2 PETITIONER TOPICLEAR, INC.

3 BY MR. DENNISON:

4 Q Regarding the use of the indication EU
5 on your products, did you ever obtain an opinion
6 from anybody that it is permissible to use EU
7 rather than an individual country name?

8 MR. HEYER: Objection, relevance.

9 A Those products have been in the imports
10 products, because some of the products are made in
11 the USA, too. So it has been inspected by Customs
12 and they never object. And in those, that
13 situation has brought into the table to be
14 explained that the European Union is a union, like
15 the United States, and they have accepted that,
16 they have been accepted by the authorities.

17 MR. HEYER: Object on the basis of
18 hearsay, move to strike.

19 MR. DENNISON: I have no other questions
20 for you, which will then therefore conclude the
21 deposition.

22 (Off the record at 10:34 a.m.)

1 CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

2 I, Jacquelyn C. Jarboe, Certified
3 Reporter and Notary Public within and for the
4 District of Columbia, do hereby certify:

5 That Johnny Graterol, the witness whose
6 deposition is hereinbefore set forth, was duly
7 sworn by me before the commencement of such
8 deposition and that such deposition was taken
9 before me and is a true record of the testimony
10 given by such witness.

11 I further certify that the adverse
12 party, K & N Distributors, was represented by
13 counsel at the deposition.

14 I further certify that the deposition of
15 Johnny Graterol occurred at the offices of
16 Donald L. Dennison, Esquire, Butzel Long, 1909 K
17 Street, Northwest, Suite 500, Washington, D.C.
18 20006 on Thursday, January 11, 2018, commencing at
19 9:04 a.m. to 10:34 a.m.

20 I further certify the inspection,
21 reading and signing of said deposition was waived
22 on the record by agreement of all parties.

1 I further certify that I am not related
2 to any of the parties to this action by blood or
3 marriage, I am not employed by or an attorney to
4 any of the parties to this action, and that I am
5 in no way interested, financially or otherwise, in
6 the outcome of this matter.

7 IN WITNESS WHEREOF, I have hereunto set
8 my hand this 23rd day of January, 2018.

9
10 My commission expires:

11 April 30, 2019

12

13


Jacquelyn E. Gerboe

14

NOTARY PUBLIC IN AND FOR THE

15

DISTRICT OF COLUMBIA

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Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

A			
a-m-i-n-a	advertised	already	64:2, 64:4
24:18	24:11	7:8, 18:12,	anybody
about	advertising	32:4, 45:17,	62:6
8:10, 10:12,	4:20, 15:9,	54:22	anyone
14:2, 16:17,	18:16, 18:19,	also	23:12
22:21, 30:1,	18:20, 26:6,	11:5, 12:12,	appeal
35:8, 35:16,	26:12, 54:8,	13:1, 17:11,	1:2, 7:5
36:1, 38:8,	55:5, 55:8	19:15, 26:9,	appear
50:14, 51:21,	affirmed	33:20, 35:21,	17:8, 28:1,
52:18, 52:21,	7:15	36:2, 40:5,	28:16, 34:18
54:7, 55:4,	africa	40:13, 47:18,	appearing
56:21	11:2, 11:10,	52:5, 53:11	29:13
abroad	11:12, 25:2	although	application
19:9	after	45:12	10:19, 10:20
accepted	17:12	america	apply
62:15, 62:16	again	11:2, 43:20	61:7
access	32:3, 51:17,	american	approximately
27:18	52:12, 52:15,	9:1	47:10
account	54:19, 57:22,	amina	april
25:18, 29:21,	59:17, 60:16,	24:15, 24:18	31:7, 32:12,
30:10, 30:11,	61:10	amount	64:11
56:15	agree	31:20, 32:18	arab
accounting	50:15, 50:21	another	19:13, 19:14
33:5, 60:20,	agreement	21:13, 21:21,	area
60:22	4:20, 26:6,	22:17, 25:10,	10:16, 13:16,
action	26:12, 49:15,	37:1, 43:13,	35:22
64:2, 64:4	54:15, 55:5,	44:3, 44:11	areas
active	55:11, 57:6,	answer	19:3
9:8	58:2, 63:22	54:22	argan
actual	all	any	5:16
24:6, 39:1,	11:1, 12:2,	9:22, 13:16,	around
49:22	15:2, 15:22,	19:7, 23:11,	10:9, 10:17,
actually	16:1, 16:21,	23:18, 24:6,	11:1, 12:2,
12:16, 15:14,	17:5, 17:6,	24:10, 24:13,	15:20, 15:21,
16:11, 27:18,	17:16, 24:22,	25:5, 25:14,	16:15, 17:11
34:5, 49:5	27:14, 29:5,	27:17, 27:22,	asia
address	31:12, 32:13,	35:2, 36:3,	11:3
7:22, 8:1,	32:14, 33:5,	36:9, 36:11,	ask
26:19	33:6, 33:18,	37:6, 41:1,	14:6, 16:2,
administering	34:14, 38:10,	41:10, 42:5,	17:17, 20:13,
2:19	49:2, 50:16,	42:11, 44:18,	22:8, 27:1,
adolfo	50:22, 52:1,	44:19, 45:2,	30:3, 37:8,
31:9, 31:10	52:4, 56:22,	45:3, 45:8,	42:19
adverse	57:17, 60:13,	48:8, 49:5,	assignment
63:11	60:17, 61:12,	49:6, 52:19,	48:13
advertise	63:22	53:22, 56:1,	associated
21:1	along	56:8, 59:11,	8:9, 55:6
	53:7	59:13, 59:18,	assumed
			48:12

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>attached 26:9 attention 36:17 attorney 64:3 august 33:17 australia 11:17, 11:18 authorities 62:16 aware 53:10, 53:15 away 24:7</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back 9:5, 10:2, 34:8, 40:7, 42:3, 51:10, 54:5 background 8:14, 9:3, 9:17 basis 40:20, 62:17 bearing 49:19, 50:17 beauty 5:5, 5:8, 9:4, 9:7, 12:9, 12:20, 18:3, 25:8, 25:9, 25:12, 25:13, 25:15, 25:17, 35:2, 35:5, 35:8, 35:11, 37:19, 37:20, 39:14, 48:17, 48:21, 49:1, 49:10, 49:16, 50:4, 54:12, 54:16, 54:17, 54:21, 55:9, 55:12, 56:22, 57:7, 57:22, 58:3, 58:6,</p>	<p>58:10, 59:15, 59:20, 60:10, 60:15, 60:18, 61:2, 61:12 became 9:19 because 51:18, 54:15, 62:10 been 7:8, 8:8, 9:6, 9:8, 10:1, 18:10, 29:18, 47:9, 47:11, 50:16, 51:1, 62:9, 62:11, 62:16 before 1:2, 2:16, 7:5, 9:19, 10:3, 15:17, 29:8, 29:10, 37:13, 45:15, 47:6, 56:8, 56:10, 56:11, 57:5, 63:7, 63:9 behalf 3:3, 3:11, 7:3 being 7:15, 15:2, 45:8, 55:5 belgium 12:19, 51:6 believe 51:7 besides 54:1 bestseller 13:6 better 21:10, 21:11 between 32:15, 41:19, 44:20, 49:16, 54:16, 55:12, 57:6, 58:2, 59:14, 59:15, 59:19</p>	<p>blood 64:2 board 1:2, 7:6 booth 23:3 both 38:12, 49:11, 50:13, 60:3, 60:5 box 4:16, 4:18, 39:2, 39:10 boxes 38:10, 38:17, 39:1 brand 21:2, 22:19, 27:15 brands 24:10 break 28:5, 45:14, 46:10 brief 28:7 brightening 5:15 brochure 4:12, 16:8, 16:22 brooklyn 35:9, 39:14 brought 62:13 burgundy 34:12, 34:13, 34:15, 40:10, 40:11 burkina 11:15 business 8:15, 9:5, 9:9, 9:14, 10:5, 25:9, 57:10, 57:14 butzel 2:6, 3:5, 7:10,</p>	<p>63:16</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>c-l-e-a-r 58:22, 59:8 call 24:1, 24:2 called 24:17, 36:17, 58:11, 59:7 calls 44:22 can 11:11, 15:18, 16:7, 17:22, 19:22, 21:17, 24:13, 25:14, 26:3, 27:7, 28:19, 30:8, 32:10, 33:14, 34:20, 36:11, 38:10, 39:6, 40:7, 42:4, 43:17, 50:7, 52:19 canada 11:19, 11:20, 33:17 cancellation 1:6, 7:4 card 20:14, 20:21 carried 15:9, 17:6 carry 13:15 carrying 49:7 case 18:12 categories 10:8, 10:11 category 54:19 center 38:3 central 11:2</p>
---	---	--	--

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>certificate 63:1</p> <p>certified 63:2</p> <p>certify 63:4, 63:11, 63:14, 63:20, 64:1</p> <p>circle 17:3, 17:11, 34:17, 40:14, 40:16, 52:18, 52:21</p> <p>clair 5:13, 36:19, 36:20, 36:21, 36:22, 37:6, 38:9, 39:8, 39:17, 40:3, 40:5, 40:17, 45:9, 53:21</p> <p>clarity 61:8</p> <p>classic 13:14</p> <p>classified 32:5</p> <p>clear 36:22</p> <p>coast 11:13, 12:3</p> <p>code 31:17, 31:18</p> <p>coffee 46:10</p> <p>collated 57:18</p> <p>collection 4:16, 5:22, 13:13, 21:19, 21:20, 21:21, 44:9</p> <p>college 35:6</p> <p>color 34:11, 34:12, 40:8, 40:11</p> <p>columbia 2:18, 63:4,</p>	<p>64:15</p> <p>com 5:3, 26:22</p> <p>come 31:5, 32:22, 35:1, 58:6</p> <p>commencement 63:7</p> <p>commencing 63:18</p> <p>comments 44:18</p> <p>commerce 43:8, 43:20</p> <p>commission 19:2, 64:10</p> <p>commissions 18:22</p> <p>companies 28:2, 36:7, 41:2</p> <p>company 9:17, 13:7, 15:3, 22:22, 23:13, 23:19, 26:16, 29:20, 31:6, 33:1, 36:4, 41:8, 41:10, 41:16, 41:20, 42:13, 43:3, 45:7, 55:7, 61:1</p> <p>company's 13:5</p> <p>compiled 32:12</p> <p>computer 57:10, 57:15</p> <p>concentrated 10:15</p> <p>conclude 62:20</p> <p>confusion 44:20</p> <p>congo 11:13</p> <p>consumer 53:8</p>	<p>consumers 15:18</p> <p>container 39:22, 40:1, 40:9</p> <p>contend 53:22</p> <p>content 55:16, 56:3</p> <p>contents 39:3</p> <p>continued 5:1, 6:1</p> <p>continues 46:21</p> <p>contract 23:3</p> <p>copies 46:17, 56:2</p> <p>copy 5:3, 5:4, 7:7, 26:5, 27:8, 27:10, 30:9, 34:20, 39:1, 43:2, 43:7, 43:9, 43:19, 44:1</p> <p>corporation 47:15, 47:19, 48:4, 48:9, 48:11, 48:18, 49:5</p> <p>correct 26:17, 28:17, 32:20, 38:14, 42:15, 47:16, 51:15, 52:2, 52:9, 52:12, 52:16, 56:2, 56:5, 57:5, 61:9, 61:16, 61:19</p> <p>cosmetic 53:17, 58:20</p> <p>cosmetics 9:4, 41:3, 41:4, 41:7, 41:14, 53:17</p>	<p>costs 54:20, 55:8</p> <p>could 12:18, 12:19, 14:11, 39:4, 51:10, 54:4</p> <p>counsel 4:9, 7:18, 14:10, 16:6, 17:21, 19:21, 20:17, 21:16, 22:11, 26:2, 27:5, 28:14, 30:7, 30:20, 32:9, 33:13, 37:12, 38:21, 39:1, 43:1, 43:16, 44:6, 44:14, 47:1, 47:5, 62:1, 63:13</p> <p>count 33:5</p> <p>countries 11:5, 11:8, 11:10, 11:14, 12:18, 15:21</p> <p>country 10:9, 12:2, 13:16, 13:22, 14:1, 15:20, 16:15, 42:5, 42:11, 50:19, 51:3, 51:8, 51:14, 52:6, 62:7</p> <p>course 57:9, 57:14</p> <p>court 42:17</p> <p>cover 17:3</p> <p>covered 33:18</p> <p>covers 18:5, 18:7</p> <p>cpa 33:4, 57:18</p>
--	---	--	--

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>cream 5:14, 14:21, 14:22, 15:1, 39:8, 39:18, 39:20, 40:2, 40:4, 52:5, 52:9, 58:12 creams 10:13 created 22:1 creation 55:16, 61:4, 61:14 creator 50:10 cross-examination 45:15, 47:1 customer 31:2, 31:3, 31:8, 31:21, 33:17 customers 16:9, 23:5, 36:3 customs 62:11</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d-e-r-m-a-c-l-a-- i-r 58:18 day 64:8 days 23:4 december 18:3, 18:4, 20:3 degree 8:15, 8:22 delaware 47:19, 48:4, 48:8 deleted 18:10 dennison 3:4, 4:3, 4:5,</p>	<p>7:2, 7:10, 7:20, 14:6, 16:2, 17:17, 18:9, 20:13, 21:12, 22:7, 25:19, 27:1, 28:4, 28:8, 28:12, 29:2, 29:5, 29:17, 30:3, 30:16, 32:3, 33:9, 37:8, 38:16, 38:22, 40:20, 40:22, 41:22, 42:8, 42:10, 42:17, 43:12, 44:10, 45:2, 45:11, 45:21, 46:3, 46:6, 46:9, 46:13, 46:16, 46:20, 48:5, 51:7, 51:17, 61:21, 62:3, 62:19, 63:16 department 43:8, 43:20, 60:21, 60:22 deposition 1:11, 2:1, 2:16, 7:7, 62:21, 63:6, 63:8, 63:13, 63:14, 63:21 dermaclair 58:11, 58:17, 59:10 dermaclear 58:21, 59:7 description 31:16 designated 1:12, 2:2 detail 5:6, 5:9, 31:1 detailed 32:11 did 8:20, 9:19,</p>	<p>31:5, 34:5, 35:1, 35:5, 35:13, 36:10, 37:6, 37:16, 37:17, 39:9, 48:8, 53:3, 55:18, 55:21, 56:17, 62:5 differ 21:5, 22:2 different 10:7, 10:8, 12:17, 12:18, 14:14, 15:19, 15:21, 19:3, 21:7, 21:9, 21:10, 23:6, 25:10, 27:10, 29:19, 34:13, 36:16, 52:15 direct 7:18, 15:18 directly 12:20, 49:10, 49:13 director 60:10 directors 59:19, 60:1 distribute 12:2, 12:4, 15:14, 15:19, 16:11, 16:14, 16:22, 25:1, 58:11 distributed 11:22, 24:20 distributing 35:17 distribution 49:2, 49:6 distributors 1:7, 3:11, 12:10, 12:11, 15:20, 16:15, 23:5, 23:13, 44:19, 47:2, 47:5, 63:12</p>	<p>district 2:18, 63:4, 64:15 document 18:1, 18:11, 19:22, 21:13, 22:13, 25:20, 25:22, 26:3, 28:9, 28:20, 30:8, 30:17, 30:22, 31:5, 32:10, 32:22, 33:15, 42:18, 43:3, 43:6, 43:13, 43:17, 44:8, 44:11, 44:16, 46:7, 48:5 documents 29:7, 30:4, 46:17, 60:19 does 13:7, 13:15, 17:8, 19:7, 21:5, 22:2, 29:20, 32:22, 34:17, 40:13, 48:6, 49:4, 49:9, 49:12, 50:12, 51:13, 52:6, 58:10 doesn't 42:11 domestically 16:20 don't 10:2, 23:21, 24:3, 51:2, 51:5, 53:5, 59:4 donald 3:4, 7:9, 63:16 dubai 19:12, 19:14 duly 7:15, 63:6 during 18:17, 36:9</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each 31:17, 31:18,</p>
---	--	--	---

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>31:19 east 12:3 educational 8:13 either 60:9 else 46:10 emirates 19:12, 19:13, 19:14 employed 64:3 england 19:15 english 25:4 enterprises 36:1 entity 50:2 eric 3:12, 7:11, 47:5 esquire 3:4, 3:12, 63:16 establishments 37:5 eu 14:3, 14:4, 14:5, 51:2, 51:13, 52:2, 52:5, 52:12, 62:4, 62:6 europe 11:2, 12:17, 14:3, 25:1 european 14:5, 51:4, 62:14 ever 9:8, 12:20, 23:12, 24:11, 34:5, 35:1, 35:5, 35:13, 36:10, 41:16,</p>	<p>44:18, 62:5 every 20:11, 33:4 evidence 45:12, 49:21, 50:17, 51:1 exactly 10:3 examination 4:2, 7:18, 62:1 examined 7:17 example 11:17, 20:11, 34:9 exchange 5:5, 5:8, 18:3, 48:17, 48:21, 49:1, 49:10, 49:16, 54:13, 54:21, 55:9, 56:22, 57:7, 58:1, 58:4, 58:6, 58:11, 59:15, 59:20, 60:11, 60:15, 60:18, 61:13 exfoliating 4:17, 4:19, 5:15, 21:19, 22:17 exhibitor 23:2 exhibits 38:20, 45:13, 45:20, 46:19, 48:2, 50:6, 50:16, 51:1, 51:10, 54:6, 60:13, 60:17, 61:11 exist 9:19 existence 10:1, 45:9 expand 22:1 expenses 19:4, 19:6,</p>	<p>54:8, 54:12, 54:20 experience 53:16 expires 64:10 explain 10:4, 50:8 explained 62:14 exporting 11:7 eyes 10:17</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facebook 25:18, 30:1 fact 48:1, 48:3 factories 10:7 factory 35:13 fair 54:11 familiar 9:16, 15:5, 15:8, 29:12, 30:21, 41:8 family 21:22, 22:20 far 56:5 faso 11:15 february 26:10 feel 53:3 field 9:4 figures 15:6, 54:19, 56:21 file 46:18 files 33:7</p>	<p>finally 44:10 financially 64:5 fine 46:15, 46:19 firm 7:10, 7:12, 57:18 first 7:15, 17:2, 24:4, 24:5, 38:17, 58:7 firsthand 48:15 florida 8:2, 9:2, 47:15, 48:11, 48:18, 49:4 follows 7:17 foreign 19:7 forget 51:21 form 26:8, 34:2 formula 50:11, 50:13 formulation 22:3 forth 63:6 found 57:8, 57:13 foundation 29:1, 29:4, 29:15 four 23:4 fourth 27:12 france 12:19, 50:7, 50:9, 51:5 french 24:16, 24:18, 25:4, 37:2,</p>
--	---	---	---

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>37:3, 37:4 frequent 27:20 from 11:7, 18:2, 21:5, 22:2, 23:12, 25:16, 30:11, 31:5, 32:22, 39:13, 44:18, 46:11, 46:21, 49:6, 49:21, 50:7, 55:14, 60:20, 61:12, 62:6 front 20:18, 21:3, 48:7, 51:10, 51:18 further 63:11, 63:14, 63:20, 64:1</p> <hr/> <p style="text-align: center;">G</p> <p>g&p 35:13 gave 54:22 gel 14:21, 34:10, 51:22, 52:20 general 9:7, 34:10 generated 49:13 geographically 10:21 get 28:6, 45:15 ghana 11:13 give 16:9, 19:18, 21:12, 24:8, 24:13, 38:16, 42:17, 43:12, 44:10, 54:5 given 7:8, 24:7,</p>	<p>63:10 go 8:20, 15:18, 22:7, 23:8, 23:15, 32:6 goes 24:4 going 14:6, 16:2, 17:17, 19:17, 34:8, 38:16, 45:19 gold 4:18, 6:4, 13:13, 22:15, 22:16, 22:19, 44:17 good 47:4 got 10:3, 60:20 gram 14:15 graterol 1:13, 2:3, 4:2, 4:10, 5:2, 6:2, 7:14, 8:1, 14:9, 14:11, 16:5, 17:20, 19:20, 20:16, 21:15, 22:10, 26:1, 26:4, 27:4, 28:13, 30:6, 30:19, 32:8, 33:12, 37:11, 38:20, 42:22, 43:15, 44:5, 44:13, 47:4, 63:5, 63:15 group 14:7 guess 50:10</p> <hr/> <p style="text-align: center;">H</p> <p>had 45:4, 45:17, 56:10</p>	<p>hair 25:9, 25:13 hand 30:16, 64:8 handout 24:8 handouts 16:14 harmed 45:8 has 7:7, 42:14, 49:1, 59:11, 62:11, 62:13 have 8:8, 9:6, 9:22, 10:13, 11:1, 11:4, 13:12, 14:14, 14:20, 14:22, 15:20, 15:22, 18:10, 19:9, 19:15, 20:10, 21:22, 22:18, 23:7, 23:11, 24:15, 25:15, 25:17, 26:12, 29:7, 33:6, 34:20, 37:13, 40:13, 41:16, 43:2, 44:18, 45:18, 48:8, 48:15, 50:16, 51:1, 51:16, 51:18, 53:11, 53:15, 56:1, 56:7, 56:11, 61:13, 62:9, 62:15, 62:16, 62:19, 64:7 haven't 29:10 heard 41:16, 44:18, 45:4 hearsay 45:1, 62:18 held 2:3</p>	<p>here 7:9, 14:15, 27:14, 28:6, 31:13, 32:3, 43:22, 44:1, 45:14, 55:6, 58:14 here's 44:3 hereby 63:4 hereinbefore 63:6 hereunto 64:7 heyer 3:12, 4:4, 7:11, 18:15, 28:22, 29:3, 29:14, 34:20, 39:4, 40:19, 40:21, 41:21, 42:1, 42:7, 42:9, 44:22, 45:5, 45:16, 46:1, 46:4, 46:8, 46:15, 46:19, 47:3, 47:5, 51:9, 54:4, 61:20, 62:8, 62:17 high 21:7 him 24:1, 51:11, 54:5 hine 3:13, 7:12 his 23:21 history 5:6, 5:9, 9:17, 31:1, 32:11 homepage 4:22, 27:8 horowitz 60:8 house 31:9, 31:11</p>
---	--	---	--

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>how 8:8, 9:22, 10:21, 11:21, 12:4, 12:5, 13:19, 15:13, 15:16, 16:11, 18:16, 19:4, 21:5, 30:1, 31:15, 35:8, 35:16, 36:1, 38:8, 49:12, 49:13, 52:21 however 18:11 hygiene 52:11, 52:15</p>	<p>43:14, 43:16, 44:4, 44:6, 44:12, 44:14 identified 42:20 identifies 17:5, 52:12 identify 14:11, 16:9, 19:22, 21:17, 26:3, 27:6, 30:8, 32:10, 36:12, 39:6, 43:17, 51:14 image 21:18, 22:14, 35:11, 38:3, 39:14</p>	<p>indicated 13:1, 22:22, 26:15, 28:15, 42:13 indicates 17:15 indicating 44:19, 45:2, 45:4 indication 13:16, 42:5, 62:4 indications 41:1 individual 27:17, 60:4, 60:7, 62:7 individuals 12:12 industry 9:7, 12:9, 25:15, 25:17 information 8:16, 8:17, 57:8, 57:12, 57:13, 57:17 ingredients 21:9, 21:10 inside 40:1, 40:16 inspect 42:4 inspected 62:11 inspection 63:20 instagram 25:18 instance 58:7 intercontinental 9:1 interested 64:5 international 5:5, 5:8, 18:2, 35:16, 48:17, 48:21, 49:1,</p>	<p>49:10, 49:16, 50:4, 54:12, 54:16, 54:17, 54:20, 55:9, 55:12, 56:22, 57:7, 57:22, 58:3, 58:6, 58:10, 59:15, 59:20, 60:10, 60:14, 60:18, 61:2, 61:12 internationally 16:20 internet 13:2, 26:16, 26:19 into 45:12, 45:15, 49:20, 50:16, 51:1, 62:13 inventory 5:7, 5:10 invoice 5:11, 26:10 involved 9:6, 9:19, 10:3, 43:21, 47:11, 55:15, 56:14, 60:3, 61:3 involvement 61:14 isn't 51:14 it's 10:1, 10:20, 13:6, 17:15, 20:7, 22:6, 22:19, 24:18, 25:4, 25:21, 26:9, 29:18, 30:11, 31:3, 34:14, 38:2, 40:2, 40:11, 42:10, 42:12, 45:12, 46:8, 54:11 item 34:9, 58:15</p>
<p>I</p>			
<p>i'll 15:22, 19:17, 21:12, 27:1, 37:8, 42:3, 43:12 i've 15:13, 39:2, 47:11 ibe 55:7 idea 9:22 identification 14:8, 14:10, 16:4, 16:6, 17:19, 17:21, 19:18, 19:21, 20:15, 20:17, 21:13, 21:16, 22:9, 22:11, 25:21, 26:2, 27:3, 27:5, 28:14, 30:5, 30:7, 30:18, 30:20, 32:9, 33:10, 33:11, 33:13, 37:10, 37:12, 38:18, 38:19, 38:21, 42:21, 43:1,</p>	<p>important 13:4 imports 62:9 improper 42:1 inc 1:4, 1:11, 2:1, 3:3, 7:19, 8:7, 8:9, 9:12, 10:5, 41:6, 47:10, 47:15, 47:19, 48:3, 48:18, 48:21, 49:4, 49:17, 54:13, 55:10, 57:1, 57:4, 57:10, 58:1, 58:3, 59:11, 59:15, 59:16, 59:19, 59:20, 62:2 include 19:7, 33:19 included 56:18 income 4:13, 4:14, 18:3, 20:2 incurred 54:12, 54:20</p>		

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>items 10:8 its 1:12, 2:2, 57:14 itself 48:6 ivory 11:13</p> <hr/> <p style="text-align: center;">J</p> <p>jacquelyn 1:22, 2:16, 63:2 january 1:15, 63:18, 64:8 jarboe 1:22, 2:16, 63:2 job 1:20, 5:6, 5:9 johnny 1:13, 2:2, 4:2, 7:14, 8:1, 24:2, 63:5, 63:15 jordan 51:19 just 18:19, 20:8, 20:11, 20:18, 25:11, 29:18, 43:21, 54:5, 61:7, 61:21</p> <hr/> <p style="text-align: center;">K</p> <p>k&n 3:11, 23:13, 36:11, 38:8, 41:2, 44:20, 47:2, 47:5 k&n's 54:1 king 35:5, 37:19, 37:20 kingdom 19:16</p>	<p>know 10:2, 12:16, 23:18, 23:21, 26:19, 29:18, 31:15, 33:14, 35:19, 36:14, 36:21, 48:14, 50:14, 55:21, 59:1, 59:3, 59:4, 59:9, 60:2, 60:3 knowing 56:1 knowledge 27:22, 34:6, 48:15 known 34:9</p> <hr/> <p style="text-align: center;">L</p> <p>laboratories 50:7, 50:8 labs 10:7, 12:18, 49:22 lack 28:22, 29:3, 29:14 lakes 8:2 lambia 11:12 language 37:1 last 23:22, 32:1, 32:2, 47:12 law 7:10, 7:12 least 23:15, 51:8, 51:18, 58:6 left 17:3 lemon 14:16, 14:17, 14:18, 14:19, 15:1, 51:19,</p>	<p>51:21, 52:5 let 7:2, 15:22, 33:14 let's 22:7, 28:5, 51:9, 51:21, 51:22, 52:19 letter 17:12, 17:13 license 49:15, 50:6, 50:12 lightening 5:13, 34:10, 39:8, 39:18, 39:19, 40:2, 40:4, 51:22, 52:9, 52:20 like 10:16, 15:17, 20:10, 24:2, 25:19, 46:10, 46:13, 57:5, 62:14 line 13:4, 16:10 liquids 10:15 list 51:2 listed 13:19, 14:12, 18:11, 19:1, 30:17, 33:21, 41:11, 42:6, 43:13, 48:3, 55:7, 58:14 lists 50:18 little 16:3, 20:14 llc 41:15 llp 3:13 located 19:11, 35:19</p>	<p>london 19:16 long 2:6, 3:5, 7:10, 8:8, 63:16 look 48:2, 51:12, 51:22, 52:4, 52:8, 52:11, 52:19, 54:3 looked 53:20, 60:13, 60:17 looking 20:18, 34:9 lotions 10:13</p> <hr/> <p style="text-align: center;">M</p> <p>made 13:17, 14:2, 14:3, 42:12, 51:2, 51:4, 51:13, 51:19, 52:2, 52:5, 52:12, 56:22, 57:3, 62:10 magazine 4:21, 24:15, 24:16, 24:19, 25:6, 25:8, 25:9, 25:10, 25:13, 26:7, 26:13 magazines 24:14 mail 16:13 main 12:1 maintain 29:20 maintained 57:9, 57:13 maintaining 56:14 maintains 26:16, 33:3</p>
---	--	---	--

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>maintenance 55:15, 61:4, 61:14 major 8:15 make 49:5 manage 49:2 manufacture 12:17, 39:19 manufactured 12:16 manufacturers 50:3 manufacturing 49:22 many 9:22 mark 14:7, 16:3, 17:18, 20:14, 22:8, 25:20, 27:2, 28:5, 28:9, 30:4, 32:7, 43:21, 48:22, 49:7, 49:20, 50:13, 50:18, 55:6 marked 14:9, 16:5, 17:20, 19:20, 20:16, 21:15, 22:10, 26:1, 27:4, 28:13, 30:6, 30:19, 32:8, 33:10, 33:12, 37:11, 38:20, 42:22, 43:15, 44:3, 44:5, 44:13 market 11:16, 12:1, 22:1, 22:6, 22:18, 58:21, 59:7 marketed 15:3, 22:5,</p>	<p>40:4 marketing 10:22, 53:12, 53:19, 54:8 marketplace 45:8 marks 48:12 marriage 64:3 master's 8:15, 8:22 material 32:5 materials 14:12, 53:19 matter 64:6 may 15:9, 32:12 mean 18:22, 59:5 means 36:21, 36:22 media 24:11 meet 23:4, 23:5 members 59:14 merely 45:3 met 47:6 miami 8:2, 9:1, 35:14, 35:20, 35:21, 35:22, 36:2 midwest 12:3 minnesota 8:21 misstates 40:21 month 26:10 monthly 25:16</p>	<p>more 27:11, 27:12, 47:20 morning 47:4 mouth 10:17 move 45:1, 45:12, 62:18 mozambique 11:14 much 18:16, 19:5 multipage 28:9, 30:17</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>name 7:21, 23:22, 24:4, 24:5, 31:2, 36:14, 36:20, 39:7, 40:2, 47:4, 53:7, 53:11, 53:12, 53:19, 55:7, 62:7 names 24:13, 41:10 nature 41:14 naturecosmetics1- lc 41:13 nd 33:17 near 38:6 necessary 45:12 need 53:3 never 62:12 new 23:5, 35:3, 35:5, 35:6, 37:19, 37:20,</p>	<p>38:13, 39:15 next 25:20, 30:4, 33:9 nigeria 11:13 none 50:18 north 35:22 northwest 2:7, 3:6, 3:14, 8:2, 63:17 not 45:2, 45:12, 48:14, 50:1, 50:14, 50:20, 51:14, 52:6, 53:13, 54:13, 56:7, 56:10, 56:11, 57:3, 57:11, 58:1, 59:1, 59:3, 59:9, 60:2, 61:3, 64:1, 64:3 notary 2:17, 63:1, 63:3, 64:14 notation 32:4 noted 29:6, 29:17, 37:9, 40:22, 41:22, 42:10, 44:11 nothing 7:16, 61:16 notice 2:15, 7:7, 17:11, 18:9, 36:10 noticed 50:5 november 56:4 now 14:11, 15:12, 17:2, 20:18,</p>
---	---	---	--

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

22:21, 28:10, 28:15, 29:18, 34:8, 37:8, 52:18 number 5:7, 5:10, 7:4, 25:21, 31:17, 31:18, 34:17, 40:17, 42:14, 46:6, 52:22 <hr/> <p style="text-align: center;">O</p> <hr/> oath 2:19 object 51:17, 62:12, 62:17 objected 45:17 objection 28:22, 29:3, 29:14, 29:17, 40:19, 40:22, 41:21, 42:7, 42:8, 44:22, 45:5, 48:5, 51:7, 62:8 objection's 29:5 objections 45:19 obtain 62:5 obtained 61:12 occupation 8:5 occurred 63:15 occurrence 27:20 off 30:13, 55:18, 62:22 offered 27:10, 50:16, 51:1 office 1:1, 7:7,	42:19, 43:9 officer 60:10 officers 59:14, 59:19, 60:1 offices 2:3, 63:15 official 16:8, 31:6, 33:1 officiated 2:18 oh 11:1, 34:21 oil 5:16 okay 8:4, 8:8, 8:13, 8:19, 9:3, 9:11, 9:16, 10:4, 12:14, 14:13, 15:5, 15:8, 15:12, 15:22, 16:8, 18:15, 19:4, 20:4, 20:22, 21:2, 22:7, 22:14, 24:6, 25:3, 26:5, 26:11, 27:8, 28:21, 29:12, 29:20, 31:12, 32:11, 33:16, 33:20, 36:1, 39:7, 40:7, 42:13, 43:19, 45:7, 45:11, 45:21, 46:9, 46:20, 47:13, 47:18, 48:11, 48:17, 48:20, 49:4, 49:9, 49:12, 49:15, 50:2, 50:5, 50:12, 50:15, 50:21, 51:9, 51:21, 52:4, 52:8,	52:14, 52:18, 53:3, 53:10, 53:13, 54:11, 54:18, 55:21, 56:17, 57:3, 57:17, 57:21, 58:5, 58:9, 58:14, 58:20, 59:13, 59:22, 60:4, 60:7, 60:13, 61:3, 61:20, 61:21 one 15:17, 20:20, 36:17, 38:17, 39:14, 46:8, 46:14, 51:16, 51:18, 53:20, 53:21, 59:4, 60:3, 61:21 one-year 18:17 ones 22:3 only 51:2, 51:13, 52:2, 52:5, 52:12 open 39:22 opinion 41:18, 42:1, 45:7, 62:5 order 10:7, 15:19, 26:8, 27:18, 33:17, 33:19, 34:2, 58:10 ordinary 57:9, 57:14 origin 13:22, 14:1, 42:6, 42:12, 50:19 original 39:4, 40:17, 43:2, 46:17, 50:10, 52:22,	53:4, 53:6 otc 4:21, 12:6, 12:7, 12:8, 25:6, 25:7, 25:8, 26:6 other 10:18, 11:14, 24:11, 25:5, 28:1, 28:16, 33:20, 34:1, 38:18, 39:14, 41:1, 41:2, 41:10, 41:20, 45:19, 46:16, 52:14, 53:10, 53:16, 53:17, 53:22, 59:4, 62:19 others 25:14, 53:22 otherwise 64:5 our 24:8, 36:18 out 28:6, 53:11, 53:16, 53:17, 56:17 outcome 64:6 outlet 35:14 over-the-counter 12:8 own 13:7 owner 8:6, 9:13, 9:14, 10:6, 47:8, 47:9 ownership 59:13 <hr/> <p style="text-align: center;">P</p> <hr/> pacific 11:16 package 14:20, 34:11,
---	--	---	--

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>34:12, 34:18, 52:15 packages 4:11, 14:7, 14:13, 17:7, 17:16, 21:11 packaging 13:15, 13:20, 13:21, 17:9, 41:19, 42:5, 50:19, 50:22, 53:7 page 4:2, 4:10, 5:2, 6:2, 17:2, 27:9, 27:11, 27:12, 30:13, 32:1, 32:2 pages 1:21, 55:14, 55:18, 56:8 paid 19:2, 55:9 palace 35:8 pamphlet 16:3 paris 5:20, 13:13, 21:1, 21:4, 21:5, 44:1 part 8:6, 9:13, 9:14, 13:4, 20:18, 47:8, 47:9, 52:1, 53:12, 53:18, 57:6, 58:2 part-owner 47:12 participate 16:19 participates 22:22 particular 15:12, 17:22, 18:6, 18:13, 21:2, 22:12,</p>	<p>22:19, 26:10, 28:20, 29:7, 30:21, 31:2, 31:3, 33:16, 36:15, 36:16, 37:22, 38:13, 39:9, 39:16, 40:8, 42:4, 42:11, 42:18, 45:3 particulars 50:14, 60:2 parties 63:22, 64:2, 64:4 party 63:12 pass 61:20 past 47:22, 48:1 patent 1:1, 7:6, 42:19, 43:8 pause 28:7 pay 35:13 pays 50:2, 54:17 pending 45:20 people 23:18 per 55:11 period 18:17, 31:21 periodicals 24:11 permissible 62:6 person 45:3, 60:3 personal 41:18, 52:11, 52:15, 61:13 personally 23:8, 35:2,</p>	<p>55:15, 56:14, 56:17 petitioner 1:5, 3:3, 7:4, 7:9, 7:19, 47:14, 54:13, 62:2 petitioner's 14:8, 16:4, 17:18, 20:14, 21:14, 22:9, 25:20, 27:2, 28:9, 30:4, 30:17, 33:11, 37:10, 38:17, 43:14, 44:12, 45:13 photograph 5:12, 37:9, 37:13, 37:15 photographed 39:2 picture 38:1 pile 54:5 place 23:1, 34:6 placed 26:12 plain 21:6 please 7:21, 21:17, 22:8, 22:12, 27:6, 28:4, 28:8, 32:10, 33:14 plus 5:13, 8:10, 8:11, 38:9 point 35:6, 45:11 portions 18:10, 18:13 position 9:11 possible 27:17</p>	<p>postcard 4:15, 20:22 potential 23:5 prepared 57:18 presence 11:1, 25:17 present 8:4, 48:7 previous 22:3 prices 27:11 print 55:18, 56:17 printed 30:13 printout 46:5 privilege 18:14, 32:4 privileged 18:11 probably 10:2, 54:5 proceeding 47:6, 47:14, 54:14 produce 10:7 product 4:11, 13:15, 13:17, 18:21, 22:2, 22:5, 22:18, 23:6, 24:8, 31:17, 31:18, 31:19, 36:16, 37:22, 38:8, 39:7, 39:16, 41:19, 44:20, 44:21, 49:21, 53:9, 53:12, 58:11, 58:21, 59:6, 59:10 products 9:4, 10:18,</p>
--	---	---	--

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>10:22, 11:7, 11:22, 12:5, 12:15, 13:5, 14:14, 15:2, 15:6, 15:10, 15:13, 16:10, 16:21, 17:6, 18:6, 21:8, 24:7, 27:10, 27:12, 27:13, 27:14, 27:18, 28:1, 28:16, 29:13, 31:12, 32:13, 32:15, 33:18, 33:20, 36:6, 36:11, 36:15, 37:6, 38:12, 49:3, 49:7, 49:19, 50:3, 50:17, 50:22, 52:20, 53:10, 53:16, 53:17, 54:1, 62:5, 62:9, 62:10 professional 2:17 profile 5:4 promotion 18:20 propose 46:13 provide 38:22 provided 60:15, 60:19 pto 46:18 public 2:17, 8:22, 63:1, 63:3, 64:14 publication 25:16 publications 25:5 purchase 37:6, 39:9,</p>	<p>58:10 purchased 39:13 purchases 49:21 purpose 18:12 purposes 19:19 pursuant 2:15, 48:13 put 16:1, 40:7, 45:16, 49:20, 51:10, 54:4</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quality 21:8, 21:11 question 13:22, 50:1, 50:20, 53:5, 53:14, 57:11, 59:17, 60:16, 61:10, 61:17, 61:21 questioning 45:20 questions 62:19 quickly 39:5 quotation 33:16</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>range 23:6 rather 38:22, 62:7 rb 41:3, 41:4, 41:7 rd 8:2, 64:8 reading 63:21 real 53:9</p>	<p>really 48:12 recall 52:22, 54:7 receive 49:5, 49:9, 49:12 recess 46:11, 46:21 record 7:2, 47:7, 62:22, 63:9, 63:22 records 31:6, 33:1, 33:3, 33:6, 61:5, 61:15 redacted 18:12, 32:5 redirect 61:22, 62:1 referenced 50:6, 55:8 referring 17:2 reflect 53:8 regard 7:4, 15:9 regarding 62:4 registered 2:16, 17:14, 17:15 registrant 1:8, 3:11, 47:2, 48:2 registration 5:17, 5:19, 5:21, 6:3, 43:9 registrations 42:14 regular 14:22, 16:13 relate 50:12, 60:14 related 60:18, 64:1</p>	<p>relation 59:11 relevance 41:21, 42:7, 42:9, 62:8 remember 37:17, 39:12 remove 18:13, 32:4 renew 45:5 rep 19:3 report 5:6, 5:9, 18:2, 25:16, 31:1, 32:11 reported 1:22 reporter 2:17, 7:8, 14:7, 16:3, 17:18, 19:18, 20:13, 21:12, 22:8, 25:19, 27:1, 28:4, 28:8, 30:3, 30:16, 32:6, 37:9, 38:17, 42:18, 43:13, 44:11, 63:1, 63:3 representative 1:12, 2:2 represented 7:9, 7:11, 63:12 represents 33:15 republic 11:12 reserve 45:19 respect 48:21, 54:18, 55:13, 56:6, 56:13, 56:20, 57:21, 58:9,</p>
---	---	---	---

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>61:11, 61:17 respondent 7:11, 39:2, 47:6 respondent's 23:12 retain 46:17 retained 4:9, 14:10, 16:6, 17:21, 19:21, 20:17, 21:16, 22:11, 26:2, 27:5, 28:14, 30:7, 30:20, 32:9, 33:13, 37:12, 38:21, 43:1, 43:16, 44:6, 44:14 revenue 49:5 revenues 49:6, 49:13, 58:5 right 29:5, 34:14, 47:19, 48:4, 48:13, 51:5, 52:1, 52:4, 55:2, 57:19, 58:7, 58:18, 61:5 rights 13:8, 48:12, 49:2 robert 23:20, 24:1 role 48:8, 48:20 rpr 1:22 rules 45:13</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>s 9:6, 57:10</p>	<p>said 15:17, 47:8, 50:6, 53:21, 57:5, 63:21 sake 61:7 sale 18:7, 31:1, 49:6 sales 15:5, 18:5, 19:2, 31:20, 32:13, 32:18, 49:14, 56:21, 56:22, 57:3, 57:12, 57:22, 58:5, 60:14, 60:18, 61:4 same 52:9, 52:14, 55:1, 55:2, 55:11, 61:17 samples 24:9 saw 20:8 say 31:3, 51:5, 52:6, 54:11 says 14:2, 51:4, 51:13, 52:2, 52:5, 52:21 school 8:20, 8:21 screen 30:14, 56:18 seal 17:5, 42:18 second 27:9, 28:5 second-to-last 58:15, 58:16 see 12:14, 17:3, 29:18, 38:11, 38:12, 39:4, 42:5, 53:2,</p>	<p>55:6, 56:5, 58:14 seen 22:3, 23:12, 29:7, 29:10, 37:13, 53:15, 56:8, 56:10, 56:11 sell 10:9, 12:12, 12:20, 13:1, 36:6 selling 54:20 send 16:13 senegal 11:13 sensitive 10:16 sent 33:17 separate 48:18, 57:18, 58:20, 59:6 serums 10:13, 10:14 set 30:4, 63:6, 64:7 several 34:14 shades 34:13, 34:14 shared 59:13, 59:18, 59:22 shareholder 60:4, 60:9 shareholders 59:14, 59:18, 59:22 sheet 17:18, 20:10, 33:10, 37:9 shelves 36:10, 38:13 shipment 34:5</p>	<p>shop 39:12 shops 35:2 short 45:14 shorthand 63:1 shot 56:18 show 7:2, 19:17, 23:6, 42:11, 48:6, 51:8 shown 15:13, 16:22, 21:3, 27:14, 31:12, 32:1, 38:9, 43:5, 44:7 shows 16:14, 16:17, 16:18, 16:19, 19:9, 19:15, 22:14, 22:21, 23:1, 23:3, 23:4, 23:9, 23:11, 23:15, 24:7, 28:20, 31:16, 41:12, 51:19 signature 46:14 signature-oso 64:12 signing 63:21 similar 20:7, 36:17, 36:20, 53:21 similarity 41:19 since 9:6, 9:8, 18:12, 32:4 single 31:21, 33:10, 37:9 sir 51:13</p>
--	--	--	---

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>site 26:16</p> <p>situation 52:9, 62:13</p> <p>six 4:11</p> <p>skin 10:16, 34:10, 51:22, 52:8, 52:20</p> <p>skin-lightening 14:21, 14:22, 15:1</p> <p>small 11:14</p> <p>soap 4:17, 4:19, 5:16, 14:15, 14:18, 14:19, 21:19, 22:17, 51:20, 51:22, 52:11, 52:16</p> <p>soaps 10:13</p> <p>sold 12:5, 29:19, 32:15, 40:5, 49:19</p> <p>some 11:4, 11:10, 11:14, 17:8, 23:16, 23:17, 25:15, 27:12, 45:19, 50:5, 51:8, 62:10</p> <p>something 8:10, 14:2</p> <p>sorry 25:12, 29:2, 34:21, 47:21, 59:2</p> <p>south 11:12, 11:16</p> <p>space 23:3</p> <p>spain 12:18, 51:6</p> <p>speaks 48:6</p>	<p>specific 50:18, 51:2, 51:8, 51:14, 52:6</p> <p>specifically 45:18</p> <p>specify 52:6</p> <p>speech 45:3</p> <p>spelled 58:17, 58:22, 59:7</p> <p>spent 18:16</p> <p>st 18:4, 20:3</p> <p>started 9:5</p> <p>state 7:21, 10:4, 51:1</p> <p>statement 4:13, 4:14, 18:3, 20:2</p> <p>states 1:1, 7:6, 11:3, 11:8, 11:21, 24:22, 43:7, 43:20, 62:15</p> <p>stipulations 46:14</p> <p>store 25:9, 37:18, 38:13, 39:13</p> <p>stores 12:21, 36:3, 36:10</p> <p>straightened 28:6</p> <p>street 2:7, 3:6, 3:14, 8:2, 63:17</p> <p>strike 45:1, 62:18</p> <p>style 14:16, 21:7</p> <p>such 49:20, 63:7,</p>	<p>63:8, 63:10</p> <p>suite 2:8, 3:7, 3:15, 63:17</p> <p>supply 12:21, 35:2, 39:15</p> <p>sworn 7:15, 63:7</p> <p>symbol 40:13</p> <p>symcha 60:8</p> <p>systems 57:10, 57:15</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table 62:13</p> <p>tabulation 32:14</p> <p>take 28:5, 34:5, 42:3, 45:14, 46:9, 51:12, 52:19, 52:20</p> <p>taken 7:3, 46:11, 63:8</p> <p>takes 23:1</p> <p>taking 2:15, 15:12</p> <p>talked 16:17, 52:18, 52:21, 55:4</p> <p>talking 10:11</p> <p>target 5:3, 29:13, 46:1, 46:4</p> <p>technology 8:16, 8:18, 8:19</p> <p>tell 16:7, 17:22, 22:12, 22:21, 28:19, 39:22,</p>	<p>43:21</p> <p>testified 7:17, 56:21</p> <p>testify 7:15</p> <p>testifying 54:7</p> <p>testimony 2:15, 7:3, 53:1, 56:7, 63:9</p> <p>than 34:1, 38:22, 41:2, 62:7</p> <p>thank 42:3, 56:12</p> <p>that's 18:19, 18:20, 19:1, 32:1, 32:5, 34:21, 34:22, 39:3, 43:5, 43:21, 46:15, 46:19, 46:20, 48:3, 51:19, 52:1, 57:5, 58:14, 59:7</p> <p>their 53:12, 53:18</p> <p>them 15:14, 16:1, 23:16, 23:17, 46:18, 49:12, 50:18, 51:18, 56:10, 56:11</p> <p>then 10:8, 11:14, 27:9, 33:5, 45:18, 62:20</p> <p>there 13:10, 33:20, 33:21, 35:1, 41:1, 41:10, 41:18, 46:6, 49:15, 53:11, 53:16, 53:17, 54:19, 58:20, 59:13, 59:18</p> <p>there's 44:19, 47:18,</p>
---	--	--	---

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>59:6 therefore 62:20 these 11:5, 11:8, 12:4, 12:10, 14:13, 15:6, 15:10, 15:12, 16:12, 20:11, 23:1, 23:8, 23:11, 24:7, 29:7, 29:10, 33:6, 36:3, 36:6, 36:9, 38:12, 48:12, 51:8, 54:11, 55:8, 55:18, 56:2, 56:8, 56:21, 57:22, 58:5, 61:11 they 10:5, 12:5, 15:18, 19:11, 23:15, 24:2, 25:1, 25:11, 33:4, 33:5, 51:2, 51:5, 51:6, 62:12, 62:15, 62:16 they're 35:19 think 11:11, 25:14, 26:15, 35:9, 45:14, 45:17, 46:2 third 27:11 this 7:3, 9:8, 12:1, 12:2, 14:7, 14:21, 15:17, 16:3, 16:8, 16:22, 17:5, 17:8, 17:13, 17:18, 18:2, 18:7, 18:10, 18:12, 20:2,</p>	<p>20:4, 20:10, 20:14, 20:20, 20:22, 21:7, 21:18, 22:2, 22:5, 22:9, 22:14, 22:17, 25:10, 25:20, 26:5, 26:8, 26:11, 27:2, 27:8, 27:18, 28:6, 28:9, 28:12, 30:4, 30:9, 30:13, 30:21, 31:1, 31:5, 31:7, 31:16, 31:21, 32:11, 32:14, 32:22, 33:4, 33:9, 33:14, 33:16, 34:2, 34:5, 38:10, 38:13, 39:7, 39:9, 42:18, 43:7, 43:9, 43:19, 45:11, 46:8, 47:6, 47:14, 51:9, 53:8, 54:8, 54:13, 55:4, 55:11, 57:6, 57:17, 58:9, 61:16, 64:2, 64:4, 64:6, 64:8 thompson 3:13, 7:12 those 10:15, 15:2, 15:22, 23:2, 32:15, 33:3, 36:14, 37:5, 42:3, 49:9, 49:13, 49:20, 56:5, 60:15, 60:19, 61:4, 61:11, 61:15, 62:9, 62:12 three 23:4</p>	<p>through 1:12, 2:2, 12:6, 12:13, 16:14, 45:13, 48:2, 49:10, 49:14 thursday 1:15, 63:18 time 23:11, 35:1 title 9:12, 48:7 today 15:3, 22:5, 22:6, 49:21, 50:17 together 16:1 too 62:11 took 37:15 top 38:2, 38:4, 38:5, 38:6 topical 10:18, 10:20 topicclear's 32:13 topicclearinc 26:22 total 31:20, 32:18 trade 16:19, 22:21, 23:1, 23:2, 23:8, 23:11, 23:15, 24:7 trademark 1:1, 1:2, 5:17, 5:19, 5:21, 6:3, 7:5, 7:6, 10:6, 13:7, 13:11, 17:14, 39:17, 42:14, 42:19, 43:5, 43:8, 44:2, 44:7, 44:15</p>	<p>trademarks 11:4 travel 19:4, 19:6, 19:7 trial 1:2, 7:3, 7:5 tropic 5:13, 36:19, 36:20, 37:6, 38:8, 39:8, 39:17, 40:3, 40:5, 40:17, 45:9, 53:21 true 56:2, 63:9 truth 7:16, 7:17 tube 40:5 twitter 5:4, 25:18, 29:21, 30:9, 30:11, 56:14 two 14:15, 32:15, 38:17, 46:14 two-page 25:21 type 10:11, 14:14, 14:22, 16:17, 25:10, 26:11, 34:2, 36:16 types 14:15 typical 26:11, 34:2</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>uh-huh 9:15, 37:21 under 27:15, 39:16, 39:20, 40:5, 42:18, 45:13, 50:6, 54:19 understand 47:13, 50:1,</p>
--	---	---	---

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>50:20, 53:5, 53:13, 56:7, 57:11 union 14:5, 51:4, 62:14 united 1:1, 7:6, 11:3, 11:8, 11:21, 19:13, 19:14, 19:16, 24:22, 43:7, 43:19, 62:15 university 8:22, 9:1 until 28:5 usa 12:19, 62:11 use 16:9, 19:3, 20:22, 23:3, 34:3, 53:3, 53:6, 53:18, 62:4, 62:6 used 10:16, 53:11</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>variation 21:22, 22:19 variations 13:10, 13:12 various 24:10 vincent 35:16 visible 38:1 visit 35:5, 35:13, 36:9 visited 35:2 vs 1:6</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waive 46:14</p>	<p>waived 63:21 want 45:16, 46:9 warehouse 36:11 was 7:17, 10:3, 14:9, 14:10, 16:5, 16:6, 17:20, 17:21, 18:16, 19:20, 19:21, 20:8, 20:16, 20:17, 21:15, 21:16, 22:11, 26:1, 26:2, 27:4, 27:5, 28:13, 28:14, 30:6, 30:7, 30:19, 30:20, 32:8, 32:9, 33:12, 33:13, 36:14, 36:17, 36:19, 37:11, 37:12, 42:22, 43:1, 43:15, 43:16, 44:5, 44:6, 44:13, 44:14, 46:1, 47:22, 48:1, 48:3, 50:10, 53:20, 56:3, 57:17, 63:6, 63:8, 63:12, 63:21 washington 1:14, 2:9, 3:8, 3:16, 63:17 way 10:3, 45:8, 51:9, 56:1, 59:4, 64:5 we'll 32:6, 45:14 we're 45:2, 45:3 we've 18:12, 22:3,</p>	<p>32:4 website 4:22, 5:3, 15:18, 25:17, 27:9, 27:11, 27:18, 29:13, 41:12, 46:1, 46:3, 46:4, 55:14, 55:16, 56:3 websites 12:13, 28:1, 28:16, 29:19, 46:7 well 9:5, 10:6, 12:1, 16:13, 17:9, 23:2, 24:15, 33:4, 34:18, 46:6, 50:21, 51:21, 61:18 went 8:21, 47:7 were 19:4, 32:18, 37:5, 38:12, 38:20, 38:21, 46:6, 49:20, 55:7, 56:21, 61:12 west 12:2 what 8:4, 8:13, 9:3, 9:11, 9:12, 10:5, 10:11, 10:14, 11:10, 13:19, 13:21, 14:17, 16:7, 16:17, 17:4, 17:22, 18:5, 18:22, 19:2, 20:21, 21:2, 21:20, 22:12, 22:22, 25:12, 26:21, 28:10, 28:19, 31:20,</p>	<p>32:18, 33:14, 34:10, 36:14, 36:21, 37:17, 39:12, 39:16, 40:8, 43:5, 44:7, 44:15, 48:6, 48:20, 50:8, 53:13, 59:5, 59:17, 60:16, 61:10 what's 13:21, 24:17, 40:1, 40:16, 40:20, 42:8 whatever 46:10 when 26:12, 35:1 where 8:20, 12:15, 19:11, 35:19, 42:12 whereof 64:7 whereupon 7:13 whether 45:4, 56:2, 59:6 which 13:16, 14:3, 20:8, 24:15, 25:6, 25:16, 43:13, 45:21, 50:2, 51:16, 55:13, 59:10, 60:22, 62:20 while 10:2, 37:5 who 2:18, 31:8, 33:3, 37:15, 49:21, 55:21, 59:22, 60:7, 60:15, 60:19 whole 7:16, 20:4 wholesalers 10:9, 12:6,</p>
--	--	---	---

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>12:8 whose 63:5 why 53:3, 53:6 widespread 10:21, 11:21 will 18:13, 28:4, 28:8, 32:3, 32:7, 38:18, 43:13, 46:18, 62:20 with 5:16, 8:9, 9:16, 9:20, 15:5, 15:8, 15:9, 17:11, 26:6, 27:11, 29:12, 30:21, 34:13, 41:8, 46:18, 47:11, 48:21, 50:15, 50:21, 52:14, 53:7, 54:18, 55:6, 55:13, 56:6, 56:13, 56:20, 57:21, 58:9, 59:10, 61:11, 61:16, 61:17 within 11:3, 63:3 witness 2:19, 28:11, 34:22, 61:20, 63:5, 63:10, 64:7 word 17:3, 50:12, 53:4, 53:6, 53:18 world 10:10, 11:2, 15:21, 16:16 would 7:21, 46:13, 46:14, 46:16,</p>	<p>50:15, 50:21, 51:12, 51:17, 61:7 www 26:22, 41:13 <hr/> Y <hr/> yeah 24:3, 24:5, 26:9 year 20:4, 20:11, 33:4, 47:12 years 8:10, 8:11, 10:1, 32:12, 32:15, 47:10 york 35:3, 35:6, 37:19, 38:14, 39:15 you'd 46:10 you'll 18:9, 39:22 you're 9:14, 47:8 you've 9:8, 47:9 your 7:21, 8:4, 8:13, 9:3, 9:11, 9:12, 11:22, 13:5, 13:7, 13:15, 15:3, 17:8, 23:4, 27:22, 29:12, 29:20, 30:11, 31:6, 33:1, 33:7, 34:6, 36:4, 36:9, 37:22, 40:4, 41:18, 41:19, 42:13, 44:19, 44:20, 45:7, 50:20, 53:7, 53:15, 56:7, 57:11, 59:17,</p>	<p>62:5 yourself 61:3, 61:13 <hr/> Z <hr/> zambia 11:12 zany 36:1 <hr/> \$ <hr/> \$117,107 18:18 \$42,590.08 31:22 <hr/> 0 <hr/> 04 1:16, 63:19 05 46:11 <hr/> 1 <hr/> 10 5:3, 28:11, 28:12, 28:13, 45:18, 45:22, 46:1, 46:11, 46:21, 46:22, 56:6, 56:8, 62:22, 63:19 11 1:15, 5:4, 30:5, 30:6, 56:13, 56:18, 63:18 12 4:13, 4:14, 5:5, 30:18, 30:19, 56:20, 57:8, 57:9, 57:13, 61:8 13 5:8, 32:6, 32:8, 46:22, 57:21, 61:8 14 4:11, 4:14,</p>	<p>5:11, 33:11, 33:12, 58:9, 58:15, 61:8 15 4:13, 5:12, 8:10, 8:11, 37:10, 37:11, 47:10 16 4:12, 5:13, 38:18, 38:20, 39:3, 39:6, 39:7 1600 3:16 163 8:2 17 4:13, 5:15, 38:19, 38:20 170986 1:20 18 5:17, 42:20, 42:22, 48:2, 56:4 19 4:14, 5:19, 43:14, 43:15 1909 2:7, 3:6, 63:16 1919 3:14 <hr/> 2 <hr/> 2,678,579 32:19 2,678,579.71 32:20 20 4:15, 5:21, 44:4, 44:5 200 14:15 20006 2:9, 3:8, 63:18 20036 3:16 2005 4:21, 26:5</p>
--	---	---	---

Transcript of Johnny Graterol, Corporate Designee
 Conducted on January 11, 2018

<p>2013 48:13 2014 20:3, 20:5, 32:12, 32:15 2015 18:4, 32:13, 32:16 2016 31:7, 32:12, 33:18, 56:4 2018 1:15, 63:18, 64:8 2019 64:11 202 2:10, 3:9, 3:17 21 4:17, 6:3, 44:12, 44:13, 45:14, 48:2 22 4:19, 33:17 23 64:8 26 4:21 27 4:22 28 5:3, 31:7, 32:12 2800 2:10, 3:9</p>	<p>331 3:17 34 62:22, 63:19 37 5:12 38 5:14, 5:16</p> <hr/> <p>4</p> <hr/> <p>4 61:9 42 5:18 43 5:20 44 5:22, 6:4 454 2:10, 3:9 47 4:4</p> <hr/> <p>5</p> <hr/> <p>500 2:8, 3:7, 63:17 5810 8:1</p> <hr/> <p>6</p> <hr/> <p>62 4:5 64 1:21</p> <hr/> <p>7</p> <hr/> <p>700 3:15 74 64:12 78,198 19:6</p>	<p>9</p> <hr/> <p>9 1:16, 63:19 90 9:6 92062923 1:7, 7:5</p>	
<p>3</p> <hr/> <p>30 5:4, 5:7, 64:11 31 4:13, 4:14, 18:4, 20:3 32 5:10 33 5:11 33014 8:3</p>	<p>8</p> <hr/> <p>80 14:15 8800 3:17</p>		