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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Designer Skin, LLC, an)
Arizona limited liability)
company; et al.,)

Plaintiffs,)

vs.)

S & L VITAMINS, INC.,)
d/b/a BODY SOURCE d/b/a)
THESUPPLENET.COM, a New)
York corporation; and)
LARRY SAGARIN, an)
unmarried individual,)

Defendants.)

CIV 05-3699-PHX-JAT
Phoenix, Arizona
July 15, 2008
8:33 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Jury Trial - Day 1 - Pages 1 - 237)

BEFORE: THE HONORABLE **JAMES A. TEILBORG**, JUDGE

Official Court Reporter:

David C. German, RMR, CRR
Official U.S. Court Reporter
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC-39
Phoenix, Arizona 85003-2151
(602) 322-7251

PROCEEDINGS TAKEN BY STENOGRAPHIC COURT REPORTER
TRANSCRIPT PREPARED BY COMPUTER-AIDED TRANSCRIPTION

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APPEARANCES :

FOR THE PLAINTIFFS :

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I N D E X

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
MICHAEL SHAWL					
By Mr. Mizrahi	104				
By Mr. Coleman		148			
By Mr. Mizrahi			158		
BETH FELKER ROMERO					
By Mr. Crown	165				
By Mr. Coleman		222			

E X H I B I T S

PLAINTIFFS' EXHIBIT

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
1	Certificates of copyright registrations Re Exhibits 1-1 through 1-54	191	191
2	Designer Skin's Distributor Agreement	203	207

DEFENDANTS' EXHIBIT

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
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Phoenix, Arizona
July 15, 2008

(Proceedings convened at 8:33 a.m.)

THE COURT: Thank you. Please be seated.

I'll ask the clerk to call the next matter, please.

08:33:00

THE DEPUTY CLERK: Civil Case 05-3699, Designer Skin versus S & L vitamins. This is the time set for jury trial. Please announce your presence for the record.

MR. MIZRAHI: Good morning, Your Honor. Elan Mizrahi and Larry Crown here for the plaintiffs, along with Beth Romero from Designer Skin.

08:33:00

THE COURT: All right. Good morning.

MR. COLEMAN: Good morning. Ronald Coleman for the defendants.

THE COURT: Good morning.

08:33:00

MR. COLEMAN: Thank you, Judge.

THE COURT: All right. I scheduled this matter for 8:30 upon receiving the defendants' document titled Notice regarding Proposed issues for a pretrial conference call and suggestion of lack of subject matter jurisdiction, end quote.

08:34:00

And that's Docket Number 91.

I scheduled it at a time where I, of course, did not have the benefit of any response, nor the benefit of any real study of the document or the issues, so -- I'm leading up to saying our time this morning will be brief. Because I have

08:34:00

1 since had the benefit of a response and perhaps more important
2 the opportunity to study and reflect on what's raised or what
3 has been raised.

4 The first issue I will address is the alleged
5 jurisdictional defect, and the notice suggests that the Court 08:35:
6 has no subject matter jurisdiction over the copyright
7 infringement claim because the plaintiff did not register the
8 copyright at issue, whether we're talking about the copyright
9 in the website or the product labels, until after instituting
10 this litigation. 08:35:

11 The plaintiff concedes that it did indeed fail to
12 register the copyrights before filing suit but argues that the
13 jurisdictional defect can be and has been cured by its
14 post-filing registrations.

15 I have read what I think to be the significant cases 08:36:
16 on this subject, and while there is much to be said for what
17 might be described as rather clear language from Congress in
18 Section 411, I think it is, the -- and language which I might
19 tend to agree with but for the absence of authority in the
20 Ninth Circuit and but for cases such as the Fifth Circuit case 08:36:
21 of *Positive Black Talk, Inc. versus Cash Money Records*, 394
22 F.3d 357, which basically holds that this failure can be cured,
23 as argued for by the plaintiffs, and I am persuaded that that
24 is the view that this Circuit would take when confronted with
25 the issue. 08:37:

1 And accordingly, I find that the jurisdictional defect
2 has indeed been cured by the post-filing registration and that
3 therefore the jurisdictional defect has been cured.

4 And certainly the factual posture of this case with
5 this issue having been raised literally on the eve of trial 08:38:
6 would, I think, be even more persuasive to the panel in this
7 Circuit that that is the appropriate rule of law to apply.

8 The -- well, and plaintiff has -- well, let me back
9 up.

10 The Fifth Circuit basically held that a failure to 08:38:
11 amend a complaint in the District Court is no bar to finding a
12 jurisdictional defect cured. Obviously, there has not been a
13 motion to amend filed. Plaintiff has, however, sought
14 amendment to conform to the evidence.

15 It seems to me that that amendment -- that motion to 08:39:
16 amend might be more appropriate after there has indeed been
17 evidence admitted, but, again, the Fifth Circuit and I believe
18 the Ninth Circuit under the facts of this case would find that
19 failure to amend a complaint is no bar to finding a
20 jurisdictional defect cured, and insofar as there has been no 08:39:
21 motion to amend the complaint in this case, I find that that is
22 no bar to a cure of this jurisdictional defect.

23 Next, the issue of the unfair competition claim has
24 again been raised, and I think it's in that context that the
25 Court was invited to do some elucidation, as I recall, but I 08:40:

1 think it is not the function of the Court to do the elucidation
2 but rather the function of the parties to frame the issues both
3 in their summary judgment motions and response and now the
4 framework of the final pretrial order, and in this case the
5 stipulated jury instructions.

08:40:

6 The parties have submitted a stipulated jury
7 instruction on the unfair competition claim, which in pertinent
8 part says, quote, unfair competition can exist where a person
9 falsely advertises a product or creates a false -- and then
10 there's a phrase and/or, and I'm not sure --

08:41:

11 MR. MIZRAHI: Judge, there's a word -- I'm sorry to
12 interrupt. There was a word left out. The word was
13 "impression and/or association".

14 THE COURT: False impression and/or association
15 concerning a product.

08:41:

16 So I'm not sure what I'm supposed to elucidate. The
17 parties have agreed on this instruction. Nothing else was
18 requested.

19 This, as I recall, is a claim in which the Court noted
20 that the defendant had not demonstrated an entitlement to
21 summary judgment. Whether there's an appropriate Rule 50
22 motion to be made and heard at the close of the evidence will
23 be -- we'll wait to see.

08:41:

24 But, in summary, there's nothing further to rule on as
25 far as I'm concerned.

08:42:

1 Finally, some evidentiary issues and/or suggestions
2 for modifying the pretrial order were made, none of which will
3 be granted, except the one that is characterized as a
4 typographical, which is the objections to Plaintiffs' Exhibit
5 Number 6 where I think the objection simply ends with the word 08:42:
6 "unduly" and defendants would ask the Court to add the words
7 "prejudicial rather than probative".

8 So as I recall, that would read unduly prejudicial
9 rather than probative, which I assume is a long-hand version of
10 a 403 objection. 08:43:

11 So that having been said, we're prepared to pick a
12 jury and go forward. I'll make one last point to counsel and
13 the parties. Of course, counsel especially knows that cases
14 can be resolved, of course, in the courtroom, and we're
15 prepared to do that and I'm prepared to do that. We'll have a 08:43:
16 jury shortly that's prepared to do that. But they can be
17 resolved in mediation, which in this case, apparently, it was
18 unsuccessful, but they can be resolved simply by phone calls
19 and negotiations and discussions and sitting down trying to
20 work something out. 08:43:

21 I would urge the parties to do that. And let me
22 preface what I'm about to say by acknowledging that the learned
23 counsel -- and that's more than just a faint compliment because
24 I believe both counsel are expert in this area and certainly
25 far more expert than I. So whatever I may see or say about the 08:44:

1 shape of the case that's about to be tried needs to have a lot
2 of salt and pepper sprinkled on it in view of that.

3 But it seems to me that you're about to present a case
4 for decision that has a number of gaps in it and a number of
5 issues, one of which we've just alluded to. This case is 08:44:
6 certainly one that a losing party may well challenge the very
7 jurisdiction of this Court to conduct this proceeding. There
8 are, obviously, lots of issues concerning disclosures and
9 discovery and evidentiary issues. There seems to me to be some
10 serious damage issues. 08:45:

11 Again, perhaps at the end of the day I will see far
12 more clearly than what I'm able to see now exactly what type of
13 road map the jury is going to be given to follow in dealing
14 with these issues.

15 So all of that is to again suggest that as this trial 08:46:
16 proceeds the parties should see if there's some other
17 resolution.

18 But let me finally say it's not my practice to hammer
19 parties on settlement. Quite the contrary. I view my job to
20 make the courtroom and system available. I've done that. I've 08:46:
21 blocked off this time. Basically, it's yours and we're
22 prepared to go forward with it. We will go forward with it
23 momentarily, but in the intervals I would urge that you at
24 least consider what I've said.

25 All right. We're in recess. 08:46:

1 MR. CROWN: Your Honor?

2 THE COURT: Yes.

3 MR. CROWN: May I address Court while we're together
4 before the jury?

5 THE COURT: You may. 08:46:

6 MR. CROWN: In terms of scheduling, it had been our
7 intent to call one or both of the defendant representatives in
8 our case in chief. There is an individually-named party, Larry
9 Sagarin, whose testimony in the stipulation suggests he is the
10 principal of S & L Vitamins. Secondly, there is Steve 08:47:
11 Mercadante, who in deposition testimony has said he is the sole
12 principal of S & L Vitamins.

13 We communicated that fact to Mr. Coleman last night in
14 a series of e-mails but the message back was that his clients
15 would not be in court, he would not voluntarily produce them as 08:47:
16 witnesses in our case in chief, and that he cited us to
17 subpoena power over these witnesses, yet we don't have their
18 whereabouts now that they're here in Arizona. They're both New
19 York residents.

20 All that being said -- and Mr. Coleman advised us that 08:47:
21 Mr. Sagarin is not in the state of Arizona. We're told
22 Mr. Mercadante is in Arizona; we just don't know where,
23 although we received information that he's very well here in
24 Phoenix and probably within three miles of the courthouse at a
25 hotel. 08:48:

1 All that being said, if they are here in court when
2 this Court says call your first witness, they will be our first
3 witness. If not, we do have deposition transcripts of both of
4 these gentlemen from other related cases, and in the final
5 pretrial order we made that fact known to the Court that in the 08:48:
6 event they're not available we will look to substitute live
7 testimony as adverse witnesses with focused deposition
8 testimony in this case.

9 I want to raise that to the Court now because as you
10 told us on June 30th, before the jury comes we should be 08:48:
11 addressing some issues that might cause delay. So I raise that
12 now.

13 THE COURT: All right. I appreciate that. I'm not
14 sure what kind of delay you think that's going to cause.

15 MR. CROWN: May I address the Court? 08:49:

16 We don't anticipate any delay assuming that we can
17 easily just move right to sworn deposition testimony at the
18 appropriate point in our case.

19 But, as I said, we made that specific reference in the
20 final pretrial order and so -- and that being said, I'm 08:49:
21 addressing it now. I don't know if there's going to be a
22 response. But with the series of e-mails that were exchanged
23 last night, there's at least anticipation that there might be
24 an issue raised by the defense and we don't want to cause delay
25 once the jury is here. 08:49:

1 THE COURT: I just don't -- as you were talking about
2 that, I just don't remember any -- what particular reference in
3 the pretrial order are you making?

4 MR. CROWN: Your Honor, on the deposition section,
5 which I will tell you --

08:49:

6 THE COURT: I've found it.

7 Well, the extent to which that complies with the
8 Court's order with respect to deposition disclosures and the
9 extent to which that may be an issue, I guess we'll have to
10 wait and address at the time we get there.

08:50:

11 MR. CROWN: Sure. Thank you.

12 THE COURT: We're in recess.

13 (Proceedings recessed at 8:50 a.m.)

14

15 (Proceedings reconvened at 9:09 a.m.)

09:09:

16 THE COURT: Thank you. Please be seated.

17 Good morning, ladies and gentlemen, and counsel and
18 the parties.

19 This is the time set for jury trial in cause number
20 05-3699, Designer Skin versus S & L Vitamins.

09:09:

21 I was just advised we have one more juror running late
22 so before we administer the oath I will ask the parties if they
23 are ready to proceed, and in so doing let me start with the
24 plaintiff and ask counsel to identify themselves and introduce
25 themselves on the record and introduce their client or client

09:10:

1 representative.

2 MR. CROWN: Thank you, Your Honor.

3 Good morning. Larry Crown and my partner Elan Mizrahi
4 on behalf of the plaintiff, Designer Skin, and our client Beth
5 Romero, who is here on behalf of Designer Skin. 09:10:00

6 THE COURT: Thank you.

7 For the defendant?

8 MR. COLEMAN: Good morning. I'm Ron Coleman from New
9 York representing my clients, the defendants in this case,
10 S & L Vitamins, Inc., and Larry Sagarin. My paralegal, Heather 09:11:00
11 Halbert, is going to be on the other side of the bench but
12 she's working with me as well.

13 THE COURT: Thank you.

14 I think we will -- so that we don't end up repeating
15 ourselves, because we do have one more prospective juror, I 09:11:00
16 think, we will just wait before we do anything further, and
17 indeed we'll just be in recess until I'm advised that that
18 juror is here.

19 (Proceedings recessed at 9:12 a.m.)

20 09:14:00

21 (Proceedings reconvened at 9:14 a.m.)

22 THE COURT: Thank you. Please be seated.

23 All right. Ladies and gentlemen, you are here for
24 trial in the matter I just previously referenced, and I'll tell
25 you more about the nature of the trial but first I will ask the 09:15:00

1 entire jury panel, each of you that is here for jury duty, to
2 please stand and be sworn for examination on voir dire.

3 THE DEPUTY CLERK: You, and each of you, do solemnly
4 swear that you will -- swear or affirm that the evidence and
5 testimony you are about to give this court -- that's not --
6 will truthfully answer all questions that shall be asked of you
7 touching on your qualifications as jurors in the case now
8 called for trial, so help you God?

9 (The prospective jury panel so swears/affirms.)

10 THE COURT: Thank you. Please be seated. 09:15:

11 You have just been administered the oath for
12 examination on voir dire.

13 And, incidentally, during the course of the trial
14 you'll find that the Court has occasion to administer a variety
15 of types of oaths, and indeed those of you who are selected as 09:16:
16 jurors in this case will then be administered an oath as a
17 juror in this case, so you can understand why Ms. Bengtson, our
18 courtroom deputy clerk, has to keep track of which particular
19 oath is being administered.

20 But notwithstanding that, it is a very solemn oath, 09:16:
21 whether it is an oath taken by a witness or an oath taken by a
22 prospective juror.

23 And I characterized it as examination on voir dire,
24 and voir dire is a word with French origin that basically
25 describes the first phase of a jury trial, and that being the 09:17:

1 phase where the Court will be asking you questions and then
2 counsel will have an opportunity to ask follow-up questions
3 that are designed to help the Court and counsel determine
4 whether or not you can sit as a fair and impartial juror, and
5 in reality, to help you help us decide whether you can sit as a 09:17:
6 fair and impartial juror.

7 Now, there are 13 of you in the jury box, and the rest
8 are in the back of the courtroom. The 13 of you in the box I
9 will refer to and think of as the trial selection group, and,
10 with the exception of a couple of questions, my questions are 09:18:
11 going to be addressed to the trial selection group and only
12 from you do I expect a response.

13 However, for the rest of you in the back of the
14 courtroom, you need to listen to my questions very carefully.
15 Because at some point during the proceedings this morning I may 09:18:
16 have occasion to excuse one of the 13 members of the trial
17 selection group, and if that happens the next one of you in
18 order, which would be 14, will be called to replace Number
19 13 -- replace whoever I excuse, whether it's 13, 10, 1, whoever
20 it is -- and my very first question to Number 14 would be, 09:18:
21 "Have you been listening to the Court's questions?" And I'm
22 sure your answer will be yes. But my next question will be,
23 "Would any of your answers to any of those questions have been
24 yes, and if so, in what respect?"

25 So as I pose these questions to the trial selection 09:19:

1 group, please make a mental or even a written note to yourself
2 if your answer would be yes because I may have occasion to ask
3 you to tell me in what regard it would be yes.

4 Now, most of the questions will probably call for a no
5 answer. If the answer is yes, I expect you to raise your hand. 09:19:
6 And I'll call on you by number. I don't like it any better
7 than you do that we have to refer to you by number but that's
8 the way we do things nowadays. So I'll expect you to stand,
9 tell me your juror number, and then tell me what your answer
10 is. 09:20:

11 As I said, for most of you the answer to my questions
12 will be no, and I don't need you to raise your hand to tell me
13 that the answer is no. We'll be here all day, maybe two days
14 if I do that. So I'm going to assume that if you don't raise
15 your hand the answer to my question is no. 09:20:

16 But as a practical matter, it's a lot easier to not
17 raise your hand, and so sometimes, human nature being what it
18 is, if there's a little doubt, why, it's just easier to not
19 raise your hand, but I want to just emphasize that by not
20 raising your hand, that is -- as I said, that's a no answer, 09:20:
21 but a no answer is every bit as solemn a statement under oath
22 as a yes answer.

23 So if the answer is yes, be sure and raise your hand.

24 Now, this is not a drill or a test or marathon, and
25 again, human nature being what it is, sometimes one can 09:21:

1 initially think the answer is no and then after a few minutes
2 go by you get to thinking about it and realize I overlooked
3 something or I never thought about it this way and so the
4 answer is yes.

5 If that happens, just raise your hand, no matter where 09:21:
6 we are on the examination, and I'll call on you and you can
7 tell me your answer, or if you gave me an earlier answer that
8 you think is incomplete or incorrect just raise your hand and
9 I'll call on you and you can correct the record.

10 Now, once we have reached the point where I've asked 09:22:
11 all my questions and the lawyers have asked their questions,
12 we'll then take a recess, during which time the final selection
13 will take place, but at that point in time it's too late so I
14 need to have all the raised hands before we reach that recess.
15 And that goes with respect to a question which I'll get to in a 09:22:
16 moment concerning any hardship or any reason why you cannot
17 serve on this jury. We need to know that while we still have
18 time to consider it and not after the final selection has taken
19 place.

20 These questions are not intended to embarrass you or 09:23:
21 needlessly pry into your personal affairs, and as a practical
22 matter I don't think they will, but if for some reason there is
23 a question which you feel calls for an answer that would be
24 unduly embarrassing to you let me know and I'll have you come
25 to a position here off to the side of the bench where we have a 09:23:

1 little microphone over there and I'll have the lawyers come up
2 and you can give your answer in what I will call semi-privacy.
3 It's still going to be in the presence of the judge and the
4 lawyers, and the answer is going to be taken down by the court
5 reporter, who is going to be listening through a headset to
6 take that answer down. So that option is available if it comes
7 to that.

09:23:

8 The case that will be tried is entitled Designer Skin,
9 LLC, Splash Tanning Products, LLC, and Boutique Tanning
10 Products, LLC, plaintiffs, versus S & L Vitamins, Inc. and
11 Larry Sagarin, defendants.

09:24:

12 This case should last approximately three days, and I
13 am confident that under the most pessimistic of predictions on
14 my part, and I'm, after all, only predicting based on what I
15 have been told about the case, but even under the most
16 pessimistic predictions I would expect that you'll not be here
17 past Friday of this week. Obviously, once the case is in the
18 jury's hands I have no control and only limited ability to
19 predict how long you might be deliberating as jurors. You have
20 that control. But I think even considering that, your service
21 in this case will not extend beyond Friday.

09:24:

09:25:

22 Today we started at roughly nine o'clock. I think for
23 purposes of the question I'm leading up to let's assume you
24 might start as early as 8:30 and might go as late as five
25 o'clock.

09:25:

1 Now, there are some days when I have other matters on
2 my calendar so I cannot start any earlier than nine, and I
3 sometimes have a matter on my calendar that will necessitate
4 recessing at 4:30. But again, just to take the most extreme
5 trial day, that would be from 8:30 till five, and that would 09:26:
6 include today, tomorrow, Thursday if we need it and Friday if
7 we need it.

8 Now, having that background in mind -- and for this
9 question I'm going to ask all of you. This will probably be
10 the only question I'll do that, but for this question I'll ask 09:26:
11 all of you would service on this jury for this type of trial
12 day for this length constitute an undue -- and the operative
13 word is undue -- hardship on anyone?

14 Jury service is always a hardship but my question is
15 whether this service would constitute an undue hardship on 09:27:
16 anyone.

17 THE DEPUTY CLERK: Testing...

18 THE COURT: See, there is a test after all. It's not
19 on the questions but it's on how to turn the microphone on.

20 PROSPECTIVE JUROR: Okay. Good morning, Your Honor. 09:27:

21 I --

22 THE COURT: You're Juror Number --

23 PROSPECTIVE JUROR: I'm Juror Number 8.

24 I work as a security guard at night and I believe that
25 I would have a difficult time serving as a juror for this time 09:28:

1 period.

2 THE COURT: And that's because you would expect to be
3 working at your security guard position at night and then try
4 to stay awake during the day on jury service. Is that what
5 you're saying? 09:28:00

6 PROSPECTIVE JUROR: Yes. And I also work at a second
7 job. So I think I would have a difficult time. I've already
8 asked my boss to let me off for the night and he refuses to let
9 me off.

10 THE COURT: Now -- and, by the way, I don't think he 09:28:00
11 has that choice, but setting that aside, I gather -- I
12 gather -- and I think he does have the choice whether or not he
13 will compensate you for jury service. And I gather -- I gather
14 that your employment will not compensate you for jury service.
15 Is that right? 09:29:00

16 PROSPECTIVE JUROR: That's correct. They will not.

17 THE COURT: So if you're not working you're not
18 getting paid.

19 PROSPECTIVE JUROR: That's correct.

20 THE COURT: And I gather you're -- are you the sole 09:29:00
21 breadwinner for your family?

22 PROSPECTIVE JUROR: No. I live with my father so I
23 am -- I'm making some of the money for the household but not
24 enough that he can compensate.

25 THE COURT: And you believe that two or three days or 09:29:00

1 even four on this jury would constitute a financial hardship on
2 both you and your father?

3 PROSPECTIVE JUROR: Yes, I do, sir.

4 THE COURT: All right.

5 All right. I will -- let me just preface what I'm
6 about to do by saying this: Until and unless I excuse you,
7 please understand the mere fact you have presented me with what
8 you consider to be a hardship will not result in an excusal
9 until I formally do it.

09:29:

10 In this case and for Juror Number 8, I'm prepared to
11 excuse Number 8 unless there's further need to discuss it with
12 counsel.

09:30:

13 MR. COLEMAN: No objection, Your Honor.

14 MR. CROWN: No objection.

15 THE COURT: All right.

09:30:

16 Then, Number 8, you are excused. Please report back
17 to the Jury Clerk for any further instructions.

18 PROSPECTIVE JUROR: Thank you, Your Honor.

19 THE COURT: I'll ask the next one to be called.

20 THE DEPUTY CLERK: Number 14.

09:30:

21 THE COURT: All right. Number 14, you only had one
22 question to keep track of. Would your answer -- is your answer
23 yes to that question?

24 PROSPECTIVE JUROR: No, Your Honor.

25 THE COURT: All right. Thank you.

09:30:

1 I didn't see -- were there any hands in the back?

2 PROSPECTIVE JUROR: Good morning. Juror Number 27.

3 I'm not sure that this is a hardship. However, my
4 grandfather wasn't into -- excuse me -- went in the hospital
5 yesterday and he's in ICU and I'm just not sure what's going to
6 happen with him. 09:31:

7 THE COURT: All right. Thank you for advising me of
8 that, and we may or may not get to you and I will take what
9 you've just said into consideration and postpone a decision on
10 formally excusing you. 09:31:

11 And I would also just say parenthetically, obviously,
12 for anyone assembled here today there is always the possibility
13 of some type of family emergency or other emergency coming up,
14 which then the Court has to deal with even if one is on a jury,
15 and we certainly understand that. 09:32:

16 But -- let me postpone a decision on that, but thank
17 you for bringing it to my attention.

18 PROSPECTIVE JUROR: Juror Number 1.

19 THE COURT: Yes.

20 PROSPECTIVE JUROR: It's not a hardship but I just
21 want the Court to be aware that I do have a planned vacation
22 that begins this Saturday through next week and reservation and
23 deposits were made prior to my receiving my jury summons. 09:32:

24 THE COURT: All right. And that is to launch on
25 Saturday. 09:32:

1 PROSPECTIVE JUROR: Correct.

2 THE COURT: All right. Thank you.

3 All right. Thank you.

4 Next, I'm going to tell you a little bit about this
5 case. I don't think you can discern too much from just the
6 name of the case.

09:32:00

7 First of all, this is a civil case, to be
8 distinguished from a criminal case, and in federal court the
9 federal court does handle both criminal cases and civil cases,
10 as some of you may know.

09:33:00

11 And what I'm going to tell you about this case is just
12 a bird's eye view of the case and by no means a complete view
13 or description of the case and certainly no substitute for the
14 evidence that you'll hear, and indeed, what I tell you about
15 the case, other than giving you a little background, has
16 absolutely no significance. In other words, you can't consider
17 anything I say about the case right now, you can't consider any
18 of that in your deliberations in the event you are selected as
19 a juror, but rather, I tell you this much about the case so
20 that it will give you a little backdrop for the questions that
21 will be posed in terms of your ability to be a fair and
22 impartial juror.

09:33:00

09:34:00

23 The plaintiffs in this case, Designer Skin, LLC, and
24 two subsidiary companies, Splash Tanning Products, LLC and
25 Boutique Tanning Products, LLC, they make, market and sell skin

09:34:00

1 care products, most of which are indoor tanning lotions.

2 The defendants are S & L Vitamins, Inc. and Larry
3 Sagarin. S & L owns and operates a website that sells
4 nutrition supplements and skin care products, including but not
5 limited to Designer Skin's products. Larry Sagarin owns and 09:35:0
6 operates S & L. S & L markets Designer Skin's products on
7 S & L's website by using images of Designer Skin's products
8 along with an S & L logo.

9 In this lawsuit, Designer Skin contends that S & L has
10 misappropriated those product images from Designer Skin's 09:35:0
11 website and as such has violated Designer Skin's copyrights.

12 Designer Skin also alleges that S & L's application of
13 its logo to Designer Skin's images creates a false association
14 between S & L and Designer Skin and is misleading to the
15 public. 09:36:0

16 Designer Skin contends that it is entitled to damages
17 and injunctive relief as a result of this conduct.

18 S & L denies that it has infringed any copyright of
19 Designer Skin and contends that, if it did, Designer Skin did
20 not suffer damages as a result and is not entitled to statutory 09:36:0
21 damages under the Copyright Act as a matter of law.

22 Now, then, having given you that bird's eye view of
23 the case, have any of you -- and I'm now back focusing on my
24 trial selection group. Have any of you ever seen or heard
25 anything about this case from any source whatsoever? Anything 09:37:0

1 about this lawsuit.

2 All right. You've met both counsel and client
3 representative for the plaintiffs. Do any of you know any of
4 these individuals on either a personal or professional basis?

5 I'm going to read you a list of witnesses, prospective 09:37:..
6 witnesses. The fact that I've read this list doesn't mean all
7 of these folks will be called but I want to find out if any of
8 you know someone that you believe to be this person. If you
9 do, obviously, raise your hand.

10 Mike Shawl, S-H-A-W-L. 09:37:..

11 Beth Felker Romero.

12 Leslie Hartlieb, H-A-R-T-L-I-E-B.

13 Larry Sagarin, S-A-G-A-R-I-N.

14 Steven, S-T-E-V-E-N, Mercadante, M-E-R-C-A-D-A-N-T-E.

15 Did I see a hand go up? 09:38:..

16 All right.

17 Brad Grossman, G-R-O-S-S-M-A-N.

18 Kevin Bodley, B-O-D-L-E-Y.

19 Jackie Chamberlain.

20 I've given you, as I said, a brief description of this 09:38:..
21 case. Have any of you or close friends or members of your
22 immediate family ever been involved in a copyright, trademark,
23 unfair competition type of dispute, to your knowledge?

24 Have any of you ever caused to be applied for and/or
25 obtained a copyright or trademark? 09:39:..

1 All right.

2 PROSPECTIVE JUROR: Your Honor, I'm Juror Number 2,
3 and I have a copyright in writing a book and also in music.

4 THE COURT: Okay. And have -- I gather -- by the
5 absence of your hand on my prior question, I gather that those 09:40:
6 have not been called into question or dispute.

7 PROSPECTIVE JUROR: No, sir.

8 THE COURT: Thank you.

9 Incidentally -- another hand?

10 PROSPECTIVE JUROR: Your Honor, Juror Number 14. 09:40:

11 I have a copyright on a piece of music.

12 THE COURT: Same question. Has that ever been
13 challenged or called into dispute?

14 PROSPECTIVE JUROR: No, sir.

15 THE COURT: Thank you. 09:40:

16 Other than what may have been involved by the two
17 prospective jurors who have indicated they have obtained a
18 copyright, do any of you feel like you have some expertise in
19 that subject?

20 And even those of you who have some experience with 09:41:
21 it, let me just preface my next question by saying this:

22 Those of you that are selected as jurors will be
23 required to make a decision based on the evidence that comes in
24 the courtroom and none other and you'll be required to apply
25 the law that I will instruct you on at the conclusion of the 09:41:

1 case.

2 So in the event that on any relevant subject in this
3 case you realize you do have some expertise or some experience
4 that somehow seems at odds with what you just heard in the
5 courtroom, I would ask you to set aside that experience and
6 expertise and base a decision just on the evidence in this
7 courtroom.

09:42:00

8 Anyone feel they would have a difficult time doing
9 that if confronted with that issue?

10 Have any of you ever been a party to a civil lawsuit,
11 other than domestic relations or a probate proceeding, where
12 you've been the plaintiff or a defendant in a civil lawsuit,
13 such as an automobile accident case, slip and fall,
14 foreclosure, whatever?

09:42:00

15 We'll start at the top.

09:42:00

16 PROSPECTIVE JUROR: Juror Number 6.

17 I was in an auto accident, sued and that case was
18 dismissed.

19 THE COURT: You were the defendant?

20 PROSPECTIVE JUROR: That's correct.

09:43:00

21 THE COURT: All right. Anything about your experience
22 in that case that would have affected you and does affect you
23 in such a way that you think would affect your ability to be a
24 fair and impartial juror in this case?

25 PROSPECTIVE JUROR: No, sir.

09:43:00

1 THE COURT: Thank you.

2 If you'd just then hand that down to the front row,
3 please.

4 PROSPECTIVE JUROR: Juror Number 13.

5 I was involved in an SEC -- as a defendant in an SEC 09:43:..
6 action.

7 THE COURT: Civil action?

8 PROSPECTIVE JUROR: Civil action.

9 THE COURT: How long ago was that?

10 PROSPECTIVE JUROR: I think seven or eight years ago. 09:43:..

11 THE COURT: Anything about that experience that you
12 feel would affect your ability to be fair and impartial in this
13 case?

14 PROSPECTIVE JUROR: I'm unhappy with it. That's all I
15 can say. 09:43:..

16 THE COURT: You were not happy with that particular
17 piece of litigation.

18 PROSPECTIVE JUROR: Correct.

19 THE COURT: All right. But would -- obviously, this
20 is a separate, unrelated piece of litigation by different 09:44:..

21 parties and so forth. You still think you can be fair to both
22 sides if you're seated as a juror in this case?

23 PROSPECTIVE JUROR: Yes, Your Honor.

24 THE COURT: Thank you.

25 Just hand that over to your right. 09:44:..

1 PROSPECTIVE JUROR: Morning, Your Honor. I'm Juror
2 Number 12.

3 I was in a civil lawsuit for -- I'd called CPS and
4 someone -- it was a slander type lawsuit and it went to a jury
5 trial and lasted two days. 09:44:.

6 THE COURT: How long ago was that?

7 PROSPECTIVE JUROR: It was about eight, nine years
8 ago.

9 THE COURT: All right. I'm sorry. I stepped on your
10 last few words. You said it went to a jury and -- 09:44:.

11 PROSPECTIVE JUROR: It was dismissed after around two
12 days.

13 THE COURT: Is there anything about your experience in
14 that case that you think would affect your ability to be fair
15 and impartial in this case? 09:44:.

16 PROSPECTIVE JUROR: No, Your Honor.

17 THE COURT: Thank you.

18 You can just hold onto it until we get to the next
19 question. You'll be the holder.

20 I guess she's going take it. 09:45:.

21 As I said, I'm going -- let me ask this question
22 first.

23 Do any of you have any legal training, whether it's
24 law school or business law or some other type of -- or some
25 type of vocational law, such as paralegal training or police 09:45:.

1 type training?

2 PROSPECTIVE JUROR: Juror Number 6.

3 I have six semester hours of business law, and I also
4 work in tax so I have a lot of tax law knowledge.

5 THE COURT: And I don't know -- in fact, I guess I
6 wouldn't be surprised to learn that a business law curriculum
7 might at least touch on trademark, copyright or patent
8 generally, intellectual type matters. Is that your
9 recollection or --

10 PROSPECTIVE JUROR: It was more UCC.

11 THE COURT: In any event, assuming that when I'm
12 instructing on what the law is suddenly you recall some day in
13 class where you learned something that's at odds with what I'm
14 saying, will you set that aside and follow the law as I
15 instruct you on?

16 PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: Thank you.

18 If you'd hand that down to the front row.

19 PROSPECTIVE JUROR: I'm --

20 THE COURT: You're number --

21 PROSPECTIVE JUROR: 13.

22 THE COURT: -- 13?

23 PROSPECTIVE JUROR: Sorry.

24 I'm trained as a mediator for Arizona Superior Court
25 in probate.

1 THE COURT: Did you -- of course, I guess as a -- I
2 guess in your mediator training you had some exposure to law
3 and legal principles.

4 PROSPECTIVE JUROR: Yes, sir.

5 THE COURT: Did you have some formal training before
6 that in the law?

09:47:00

7 PROSPECTIVE JUROR: No formal training, no.

8 THE COURT: Again, if something comes to your mind as
9 a juror where you realize you have some reason to have a
10 different view of the law than what I'm instructing you on,
11 will you be able to set that aside and follow the law as I
12 instruct you?

09:47:00

13 PROSPECTIVE JUROR: Yes, sir.

14 THE COURT: Thank you.

15 Is there another hand?

09:47:00

16 Okay. Thank you.

17 And as I've just said, I will be instructing you on
18 the law, and it's always possible when we're talking about the
19 law that you and I might have a disagreement about the law. I
20 may say what the law is and you say that doesn't make sense to
21 me, I just disagree with that. My question is, even if that
22 happens, is there anyone who's unwilling to follow the law as I
23 do instruct you on it, even if you disagree with it?

09:48:00

24 As I mentioned, this is a civil case, and as I also
25 mentioned, we handle criminal cases, too, but you're familiar

09:48:00

1 with some of the differences between our criminal law and civil
2 law, one of which is that in a criminal case the government has
3 the burden of proof beyond a reasonable doubt, and in a civil
4 case the burden on the party with the burden of proof -- and
5 typically it's the plaintiff that has the burden of proof on 09:49:
6 most issues but on some issues in some cases the defendant will
7 have the burden of proof. That burden in a civil case is
8 typically by a preponderance of the evidence. It's a lesser
9 burden, a less heavy burden, if you may. Sometimes we
10 visualize it as simply tilting the scales. Sometimes we 09:49:
11 verbalize it in mathematical terms by saying 51 percent.

12 But ultimately you'll get an instruction on what
13 burden of proof means, but -- so I've just given you a couple
14 of metaphors, analogies, but suffice it to say it's a lesser
15 burden than in a criminal case. 09:50:

16 My question is, does anyone have any disagreement or
17 reluctance or unwillingness to apply that burden or hold the
18 parties to that burden of proof when a party has a burden of
19 proof?

20 All right. By your silence I'm assuming the answer is 09:50:
21 no one has a problem with that.

22 If you're picked as a juror, you're going to have to
23 wait until you get to the jury room after having heard the
24 evidence, heard the arguments of counsel and heard the
25 instructions on the law, you're going to have to wait until I 09:50:

1 release you to the jury room to deliberate. You're going to
2 have to wait until then to make up your mind. And between now
3 and then you're going to have to keep an open mind on the
4 issues and on the evidence.

5 Anyone think they'd have a problem doing that? 09:51:

6 Do any of you -- are any of you or members of your
7 family consumers of or users of indoor tanning products?

8 PROSPECTIVE JUROR: Juror Number 2, and yes, sir, I
9 use it.

10 THE COURT: All right. And would -- are you familiar 09:52:
11 with the products that I've described in this case?

12 PROSPECTIVE JUROR: No, sir.

13 THE COURT: All right. And I don't know because I
14 don't know what the evidence -- what form the evidence will
15 take in this case but -- so I don't know whether the particular 09:52:
16 qualities of tanning products will even enter the courtroom in

17 this case, but my question is, as I alluded to earlier, would
18 you set aside whatever familiarity or expertise you have gained
19 in using that type of product and base your decision on
20 whatever the evidence is in this courtroom? 09:52:

21 PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: Thank you.

23 If you'd hand that down to your left.

24 PROSPECTIVE JUROR: Juror Number 3, Your Honor.

25 I've used sunless tanning products and indoor tanning 09:53:

1 products before as well.

2 THE COURT: Okay. And were you familiar with these
3 products in this courtroom?

4 PROSPECTIVE JUROR: No.

5 THE COURT: Again, whatever may come up in the course
6 of the trial that might somehow call on or might trigger your
7 own experience, would you still -- would you be willing and
8 able to set your experience aside and base any decision on what
9 you learn from the evidence in this case?

09:53:

10 PROSPECTIVE JUROR: Yes.

09:53:

11 THE COURT: Thank you.

12 If you'd pass that down to your left.

13 PROSPECTIVE JUROR: Hi. Number 7.

14 I also have used indoor tanning products.

15 THE COURT: The same question.

09:53:

16 Well, are you familiar --

17 PROSPECTIVE JUROR: No.

18 THE COURT: -- with the products we've --

19 PROSPECTIVE JUROR: No.

20 THE COURT: Same question: If it does come up where
21 your experience with those becomes a factor, would you be able
22 to set that aside and base your decision based on what you hear
23 in this courtroom?

09:53:

24 PROSPECTIVE JUROR: Yes.

25 THE COURT: Thank you.

09:54:

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Number 14.

PROSPECTIVE JUROR: I do use --

THE COURT: A little closer.

PROSPECTIVE JUROR: I do use products but I'm not familiar with this one.

09:54:

THE COURT: Okay. Again, if your experience does come up in your mind, would you be able to set it aside and base your decision on what you hear in this courtroom?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: Thank you.

09:54:

Now that I've had each of you up, I've got a follow-up question.

Do any of you who have just indicated you use these products, do any of you use the Internet to purchase these products?

09:54:

Raise your hand.

Okay. Sounds like the answer is no.

Have any of you ever worked in the tanning salon business?

Other than what you may have gained as a consumer of that service and product, do any of you feel like you have any expertise in that specialty of indoor tanning?

09:55:

Do any of you have experience with using the Internet as a medium by which merchandise is sold or distributed?

Okay. If you'd hand that down to your --

09:56:

1 THE DEPUTY CLERK: I think she raised her hand.

2 THE COURT: You raised your hand.

3 PROSPECTIVE JUROR: Juror Number 14.

4 I have purchased items off the Internet.

5 THE COURT: This is like amazon.com?

09:56:

6 PROSPECTIVE JUROR: Yeah. Even like -- I don't know.

7 Just clothing stores. If I can't find something in the store I
8 will purchase it off J. Crew. Just -- just a store you find in
9 the mall.

10 THE COURT: All right. Have you ever -- and my
11 question is intended to be a little more narrow and ask whether
12 or not you have used the Internet as a business vehicle to
13 distribute or market products?

09:56:

14 PROSPECTIVE JUROR: No, sir.

15 THE COURT: Okay.

09:56:

16 If you'd hand that on down to your right.

17 PROSPECTIVE JUROR: I'm an --

18 THE COURT: You're number --

19 PROSPECTIVE JUROR: I'm sorry.

20 THE COURT: -- 2?

09:56:

21 PROSPECTIVE JUROR: Number 2.

22 I'm in a ministry and we have some of the books and
23 teachings and that that are on the Internet.

24 THE COURT: And is this in a ministry that you're
25 involved with?

09:57:

1 PROSPECTIVE JUROR: Yes, sir.

2 THE COURT: And do you -- are you the one that -- now
3 I'm going to reveal my own inability to use the right
4 terminology, but are you the one that would be managing the
5 Internet or working with those who do work on the website, that 09:57:
6 type of thing?

7 PROSPECTIVE JUROR: My administrator -- I oversee it,
8 yes, and my administrator is the one who would actually upload
9 it to the Internet but I would be the one who would okay it or
10 not okay it. 09:57:

11 THE COURT: Do you have some expertise in websites and
12 using the Internet for these purposes?

13 PROSPECTIVE JUROR: I wouldn't call it expertise. We
14 just have some knowledge.

15 THE COURT: Okay. Thank you. 09:58:

16 Have any of you worked in a business which uses the
17 Internet for the wholesale distribution of merchandise or which
18 manufacture -- well, let me just ask that question. Do any of
19 you work in a business where the Internet is used for the
20 wholesale distribution of merchandise? 09:58:

21 Okay.

22 PROSPECTIVE JUROR: Good morning. Juror Number 9.

23 I'm a development manager for an equipment
24 distribution company here in the Valley and we do market our
25 products over the Internet, and I'm responsible for overseeing 09:58:

1 some of the development for the vehicles that we use to
2 distribute those.

3 THE COURT: That would include overseeing the
4 development of the website?

5 PROSPECTIVE JUROR: That's correct. 09:59:00

6 THE COURT: Do you have some expertise in the -- I'll
7 say the nuts and bolts of website development and that type of
8 thing?

9 PROSPECTIVE JUROR: I would say yes. Not hands on but
10 I do manage the developers that actually do the development. 09:59:00

11 THE COURT: Thank you.
12 To your left.

13 PROSPECTIVE JUROR: Hi. Juror Number 10.

14 I worked for a truck manufacturer and we did
15 distribute our after-market parts to our dealerships through 09:59:00
16 websites. They would actually place their orders on line.

17 THE COURT: And what kind of hands-on role did you
18 have in that as it pertained to the Internet?

19 PROSPECTIVE JUROR: I was a regional sales manager so
20 I really didn't have anything to do with the actual operation 09:59:00
21 of the website, but I dealt with the customers on a daily
22 basis.

23 THE COURT: Thank you.

24 PROSPECTIVE JUROR: Juror Number 3.

25 I'm an educator but my master -- I'm getting my 10:00:00

1 master's now in integrating technology. It's not really
2 marketing a product but I do have knowledge of website design,
3 some.

4 THE COURT: What did you call it? Integrating?

5 PROSPECTIVE JUROR: Technology. Education. 10:00:00

6 THE COURT: This would be using the Internet as a
7 vehicle for education?

8 PROSPECTIVE JUROR: It involves that and it involves
9 all sorts of technology-based applications for education,
10 website design for communication with students, parents, 10:00:00
11 administrators, as well as using different types of tools in
12 the classroom.

13 THE COURT: You could design a website?

14 PROSPECTIVE JUROR: Yeah. Theoretically. I have
15 designed one with lots of help. 10:01:00

16 THE COURT: Okay. Thank you.

17 Have any of you -- we've talked about lawsuits. Let
18 me broaden it a bit to ask if any of you or members of your
19 family have been involved in a business dispute with someone
20 else that -- well, question mark. Business dispute. 10:01:00

21 This lawsuit, of course, involves a party filing a
22 lawsuit, bringing a lawsuit. Is there anyone who simply thinks
23 it's wrong or has some philosophical objection to a party
24 bringing a lawsuit?

25 Let me ask the flip side, sort of the flip side to 10:02:00

1 that. Is there anyone who feels that simply because a lawsuit
2 has been brought against another party that party must be in
3 the wrong or that party must owe something?

4 All right. I'm taking from your silence, then, you're
5 willing to be fair and impartial to both sides in this case and 10:02:
6 hold the appropriate party to the appropriate burden of proof
7 and follow the law as I instruct you on.

8 All right. We have next for you an easel, and that
9 easel will have five or six or seven questions, starting out
10 with your juror number and employment and if you're retired 10:03:
11 what type of work you did before you retired, and among other
12 questions your prior jury service. And if you were on a jury,
13 tell us whether it was civil or criminal, and if it was civil
14 and you can recall, what kind of case it was and what kind of
15 outcome the case had, if you can recall. 10:03:

16 And so I'll ask you to stand, starting with Juror
17 Number 1, tell us your juror number. Obviously, you need to
18 read the question to answer the question but we don't need you
19 to read the question out loud to us.

20 We'll start with Number 1. 10:04:

21 PROSPECTIVE JUROR: Juror Number 1. I am single. I
22 have no children. I am not married. Employment, I am a choral
23 director at Apollo Junior High School in Mesa. I'm also a
24 music director and organist for Hosanna Lutheran Church. I
25 have no military service and no prior jury service. 10:04:

1 THE COURT: Thank you, sir.

2 PROSPECTIVE JUROR: I'm Juror Number 2. I'm married.
3 I have two children grown. Seven grandchildren. I am a
4 minister. No military service. I was on a trial -- I believe
5 it was about three or four years ago. It was a criminal case,
6 DUI case, and he was sentenced. 10:04:

7 THE COURT: Thank you.

8 PROSPECTIVE JUROR: I'm Juror Number 3. I'm married.
9 I have one child, a son. He is 11 years old. I work for Mesa
10 Public Schools at Rhodes Junior High. I teach art. And I've 10:05:
11 never been in the military and I've been called for jury duty
12 but never been selected.

13 THE COURT: Thank you, ma'am.

14 PROSPECTIVE JUROR: Juror Number 4. I'm single. I
15 have no children. I retired from the United States military in 10:05:
16 the rank of major. Several locations all over the world where
17 I was assigned. I have no prior jury service.

18 THE COURT: Thank you, sir.

19 PROSPECTIVE JUROR: Juror Number 5. Single. No
20 children. I work for the State of Arizona Office of the 10:05:
21 Auditor General as an accountant, and I deal with school
22 districts.

23 THE COURT: I didn't hear that last --

24 PROSPECTIVE JUROR: I deal with school districts.

25 THE COURT: Okay. Thank you. 10:05:

1 PROSPECTIVE JUROR: No military service. And the
2 last -- I was on a jury about two and a half years ago, was
3 related to forgery, and the person was found not guilty.

4 THE COURT: Thank you, sir.

5 PROSPECTIVE JUROR: Juror Number 6. I'm single. No 10:06:
6 children. I'm a revenue agent for the Internal Revenue
7 Service. No military service. I've been called for jury duty
8 but not impaneled.

9 THE COURT: Thank you, sir.

10 PROSPECTIVE JUROR: I'm Juror Number 7. I am married. 10:06:
11 Two children, 14 and 17. We own our own business, a couple
12 different businesses. Do I name them?

13 THE COURT: You may.

14 PROSPECTIVE JUROR: Arizona Auto Air and O'Brien Auto
15 Group. 10:06:

16 No military service and never served on a jury.

17 THE COURT: Thank you.

18 PROSPECTIVE JUROR: Juror Number 14. I am single. No
19 children. I work for Lincoln Strategies, which is a political
20 consulting firm. I've never served in the military and this is 10:06:
21 my first time in jury.

22 THE COURT: Thank you.

23 If you'd just hand that down to the front row, Number
24 13 there.

25 I guess you can -- there you go. 10:07:

1 PROSPECTIVE JUROR: Juror Number 13. Married. Three
2 children. Five grandchildren. And I'm employed by Arizona
3 Department of Environmental Quality. No military service. One
4 jury -- I was on a jury about 30 years ago, and I don't
5 remember what -- it went to trial and we made a verdict but I 10:07:
6 just can't remember.

7 THE COURT: Thank you, sir.

8 PROSPECTIVE JUROR: I'm Juror Number 12. I'm married.
9 I have two children, one grandchild. I'm a substitute teacher
10 for an elementary school in Glendale. I spent 11 years in the 10:07:
11 military. And I've never been on jury duty.

12 THE COURT: Thank you, sir.

13 PROSPECTIVE JUROR: Juror Number 11. I'm single. No
14 children. I'm employed at GameStop and American Eagle
15 Outfitters. No military service. I have had prior jury 10:08:
16 service in Mesa. It was dealing with a criminal case and it
17 was -- it was dealing with trespassing and the defendant was
18 found guilty.

19 THE COURT: Okay.

20 PROSPECTIVE JUROR: Juror Number 10. I'm married. I 10:08:
21 have three children, two under the age of 18. 12 and 16. I'm
22 employed by Calmar Industries. I'm a regional sales manager
23 for heavy duty equipment. Never been in the military. And I
24 have been on a prior jury in Kansas and it was a criminal case
25 and it involved destruction of a police vehicle, and that case 10:08:

1 actually was mistried.

2 THE COURT: Okay. Thank you, sir.

3 PROSPECTIVE JUROR: Juror Number 9. I'm married. I
4 have two children. I work for Empire Southwest as the
5 technology development manager. No military service. And I 10:09:
6 did serve on a criminal trial in Mesa approximately three years
7 ago, it was a DUI, and the defendant was found guilty.

8 THE COURT: Okay. Thank you, sir.

9 I have one last question and then I'll see if counsel
10 has any follow-up questions, and I'll just ask you to do a bit 10:09:
11 of projecting, I guess, but try to visualize yourself seated at
12 the plaintiffs' table for a moment and then visualize yourself
13 seated at the defendants' table, and my question is whether if
14 you were occupying either of those seats would you -- is there
15 anyone here who would not -- who would not want someone as a 10:09:
16 juror on your case that was of the current mind-set that you
17 are.

18 All right. Any follow-up questions from the
19 plaintiffs?

20 MR. CROWN: Yes, Your Honor. 10:10:

21 THE COURT: You may proceed.

22 MR. CROWN: Good morning again. I'm going to ask some
23 specific questions in light of what we've just heard from some
24 of you and then I'm going to ask some general questions to the
25 group. 10:10:

1 With regard to Juror Number 2, you've indicated that
2 you have copyrighted both a book and a piece or pieces of
3 music? Am I correct on that?

4 PROSPECTIVE JUROR: Yes, sir.

5 Should I stand? 10:10:

6 THE COURT: Yes. Please.

7 PROSPECTIVE JUROR: Yes, sir.

8 MR. CROWN: Is it one book or more than one book?

9 PROSPECTIVE JUROR: It's -- it's three books and about
10 three booklets. 10:11:

11 MR. CROWN: About how long did you copyright those
12 booklets?

13 PROSPECTIVE JUROR: It's been through the years since
14 about 1980 up to about five years ago.

15 MR. CROWN: The subject matter of these books, does it
16 relate to your ministry? 10:11:

17 PROSPECTIVE JUROR: Yes, sir.

18 MR. CROWN: And you said you're a minister?

19 PROSPECTIVE JUROR: Yes.

20 MR. CROWN: What is the name of the church or -- 10:11:

21 PROSPECTIVE JUROR: Ministry. Carpenter Ministries.
22 It's -- I travel throughout the world and speaking at bible
23 colleges and ministries.

24 MR. CROWN: Is there an Arizona location or presence
25 that you're -- 10:11:

1 PROSPECTIVE JUROR: Yes, sir.

2 MR. CROWN: Where is that location?

3 PROSPECTIVE JUROR: It's in -- well, Sun City.

4 MR. CROWN: And is that the only Arizona location?

5 PROSPECTIVE JUROR: Yes, sir.

10:11:

6 MR. CROWN: And you're actually employed by the
7 ministry as well, right?

8 PROSPECTIVE JUROR: Yes, sir.

9 MR. CROWN: Were you the author of the booklets --

10 THE DEPUTY CLERK: Yes, sir.

10:12:

11 MR. CROWN: -- that you copyrighted?

12 And did you yourself actually register your copyrights
13 with the United States Copyright Office?

14 PROSPECTIVE JUROR: Some are poor man's copyright and
15 some are registered.

10:12:

16 MR. CROWN: What is a poor man's copyright?

17 PROSPECTIVE JUROR: Poor man's copyright? That's
18 where you put it in an envelope, take it and get it certified
19 and sealed and so that if the seal was intact you can prove
20 that this was mine at that date.

10:12:

21 MR. CROWN: Can I ask you why you copyrighted the work
22 that you authored?

23 PROSPECTIVE JUROR: Why I copyrighted it?

24 MR. CROWN: Sure.

25 PROSPECTIVE JUROR: To protect it.

10:12:

1 MR. CROWN: So you understand the copyright laws
2 protect original creative work.

3 THE COURT: Counsel --

4 MR. CROWN: I'm sorry.

5 THE COURT: I think you're about to go into a lot of 10:12:
6 area that is the subject of the Court's instructions and
7 evidence, and you remember what I said about the notion of
8 follow-up.

9 MR. CROWN: Thank you, Judge.

10 The music that you wrote, was it lyrics or the actual 10:13:
11 musical score or both?

12 PROSPECTIVE JUROR: Both.

13 MR. CROWN: And did you formally register that work
14 with the United States Copy --

15 PROSPECTIVE JUROR: Yes. 10:13:

16 MR. CROWN: Do you currently use indoor tanning
17 products or --

18 PROSPECTIVE JUROR: I do.

19 MR. CROWN: Do you actually go to a tanning salon as
20 well? 10:13:

21 PROSPECTIVE JUROR: No, I don't.

22 MR. CROWN: Are the products you use -- do you have
23 your own tanning equipment?

24 PROSPECTIVE JUROR: No, sir.

25 MR. CROWN: So -- did you describe it as sunless 10:13:

1 products as well?

2 PROSPECTIVE JUROR: Self-tanning sunless.

3 MR. CROWN: So the application itself --

4 PROSPECTIVE JUROR: Correct.

5 MR. CROWN: -- will give you a tan. 10:13:00

6 PROSPECTIVE JUROR: Hopefully.

7 MR. CROWN: Do you buy your products in retail stores?

8 PROSPECTIVE JUROR: Walgreen's.

9 MR. CROWN: I take it that brands that you prefer are
10 available at Walgreen's. 10:14:00

11 PROSPECTIVE JUROR: Yes.

12 MR. CROWN: Okay.

13 The DUI trial that you sat as a juror on, you
14 indicated it was a guilty finding?

15 PROSPECTIVE JUROR: Yes, sir. 10:14:00

16 MR. CROWN: I think you used the word conviction
17 but --

18 PROSPECTIVE JUROR: I said he was sentenced.

19 MR. CROWN: Was that a trial here in Arizona?

20 PROSPECTIVE JUROR: Yes, it was. 10:14:00

21 MR. CROWN: Maricopa County?

22 THE WITNESS: It was in Tempe, Mesa, that area.

23 MR. CROWN: My last question. You said you were
24 familiar with how to upload information onto your ministry's
25 website? 10:14:00

1 PROSPECTIVE JUROR: Correct.

2 MR. CROWN: Are you also familiar with how to right
3 click a mouse where you can copy something from the Internet
4 and then paste it or insert it into another area, like a
5 website?

10:14:..

6 PROSPECTIVE JUROR: Yes, sir.

7 MR. CROWN: Okay. And you're familiar that a right
8 click -- if you -- like an image, for example, if you just
9 right click the mouse on that image that can copy it into your
10 computer and then you can place that identical image into
11 another document or a website, as the case may be?

10:15:0

12 PROSPECTIVE JUROR: Yes. I'm familiar with
13 downloading images.

14 MR. CROWN: Okay. Thank you so much.

15 May I ask Juror Number 3, you've indicated through
16 your current master's work that you actually can design a
17 website.

10:15:0

18 PROSPECTIVE JUROR: Yes.

19 MR. CROWN: What I just asked Juror Number 2, I take
20 it, then, you're familiar with how to use the right click --

10:15:0

21 PROSPECTIVE JUROR: Oh, yes.

22 MR. CROWN: -- section of the mouse. And would your
23 knowledge be similar or maybe even greater, as the case may be,
24 but the fundamentals that if you put the mouse onto an image on
25 a website, for example, and you right click it that copies it?

10:15:0

1 PROSPECTIVE JUROR: Yes.

2 MR. CROWN: And once copied in your computer you know
3 how to then put it into another document, whether it be a Word
4 document or another website?

5 PROSPECTIVE JUROR: Yes. 10:16:

6 MR. CROWN: You are also someone that has used or
7 currently uses indoor tanning products?

8 PROSPECTIVE JUROR: Yes.

9 MR. CROWN: And I think you actually used the phrase
10 sunless. 10:16:

11 PROSPECTIVE JUROR: Yes. I have used the tanning a
12 long time ago, the beds, but --

13 MR. CROWN: Now, do you -- are you using the word
14 "sunless" synonymously with indoor tanning products?

15 PROSPECTIVE JUROR: No. 10:16:

16 MR. CROWN: So how does sunless products differ from,
17 as you understand it, an indoor tanning product?

18 PROSPECTIVE JUROR: I know when I used the tanning
19 beds you had lotion that you applied to help control the level
20 of tan. I use sunless now that you just spray on so I don't
21 look, you know, completely white. 10:16:

22 MR. CROWN: The sunless product itself, then, give you
23 the tans --

24 PROSPECTIVE JUROR: Yes.

25 MR. CROWN: -- as opposed to needing -- 10:17:

1 PROSPECTIVE JUROR: You don't use any UV rays.

2 MR. CROWN: When you did use indoor tanning products
3 in the past where did you buy those products?

4 PROSPECTIVE JUROR: At the salon I was at or
5 whichever -- 10:17:00

6 MR. CROWN: So when you -- at such a salon, I take it,
7 they had products for sale?

8 PROSPECTIVE JUROR: Yeah.

9 MR. CROWN: Did you consult with the staff of the
10 salon for information as to -- 10:17:00

11 PROSPECTIVE JUROR: Briefly.

12 MR. CROWN: -- what particular product may be suitable
13 for your skin type and what your goal was?

14 PROSPECTIVE JUROR: Yeah, just briefly.

15 MR. CROWN: How about the sunless products you have
16 since used; where do you buy those? 10:17:00

17 PROSPECTIVE JUROR: At retail stores, Wal-Mart,
18 Walgreen's, wherever.

19 MR. CROWN: Thank you so much.

20 While you've got the microphone, let me ask you a
21 question. You said you teach art in the Mesa public school
22 system. 10:18:00

23 PROSPECTIVE JUROR: That's correct.

24 MR. CROWN: What types of art do you teach?

25 PROSPECTIVE JUROR: Introductory. Photography, 10:18:00

1 sculpture and ceramics and painting and drawing.

2 MR. CROWN: What grade level are you teaching?

3 PROSPECTIVE JUROR: Seventh through ninth grade.

4 MR. CROWN: Seven through nine?

5 PROSPECTIVE JUROR: Uh-huh. 10:18:00

6 MR. CROWN: So at that age group, I take it the one --
7 the students with talent can actually show their skills through
8 these different mediums.

9 PROSPECTIVE JUROR: Yes.

10 MR. CROWN: In terms of the art that is created by 10:18:00
11 these students, I take it you assist them in how to develop
12 their creations or their original work?

13 PROSPECTIVE JUROR: I try to.

14 MR. CROWN: In terms of photography, is that digital
15 photography? 10:18:00

16 PROSPECTIVE JUROR: It's both. It's digital and black
17 and white.

18 MR. CROWN: Do you teach them how to edit --

19 PROSPECTIVE JUROR: Yes.

20 MR. CROWN: -- the digital -- 10:18:00

21 PROSPECTIVE JUROR: We use Adobe Photoshop.

22 MR. CROWN: So you understand how basic digital
23 photographs can then be modified or enhanced --

24 PROSPECTIVE JUROR: Uh-huh.

25 MR. CROWN: -- to further the creation, if you will, 10:19:00

1 through the photography medium.

2 PROSPECTIVE JUROR: Yes.

3 MR. CROWN: Thank you.

4 Juror Number 4, you indicated you were a major in the
5 military. Am I correct? 10:19:

6 PROSPECTIVE JUROR: Yes. Retired major.

7 MR. CROWN: Might I ask what branch of the military?

8 PROSPECTIVE JUROR: United States Air Force.

9 MR. CROWN: You said you were assigned in a number of
10 locations throughout the world. 10:19:

11 PROSPECTIVE JUROR: Correct.

12 MR. CROWN: I take it as a major you served a good
13 number of years. How many years approximately?

14 PROSPECTIVE JUROR: 20 years, three months.

15 MR. CROWN: Did you see any active combat during 10:19:
16 that --

17 THE COURT: Let me just pause for a moment, counsel.

18 This particular line of question -- I'm admiring of
19 his service and would be fascinated to hear more about it, but
20 what's the relevance of that to the voir dire that we're 10:19:
21 conducting?

22 MR. CROWN: It was one question for background and I
23 don't need to --

24 THE COURT: All right.

25 MR. CROWN: -- ask any more. 10:19:

1 THE COURT: Let's get down to the business of
2 questions that bear on the issues in this case or we'll be here
3 all day.

4 MR. CROWN: Sure.

5 Did you, in your experience in the military, have 10:20:00
6 reasons to work with computers?

7 PROSPECTIVE JUROR: Very briefly. The airplanes I
8 flew add some computer in them, but, you know, they're
9 basically combat computers.

10 MR. CROWN: Thank you. 10:20:00

11 If -- sir, if I can ask if you can pass the microphone
12 to Juror Number 10.

13 You've indicated that you have worked as the regional
14 sales manager and that you were involved in distribution of
15 both truck manufacturing and then the parts that would be 10:20:00
16 associated for follow-up.

17 PROSPECTIVE JUROR: Correct. I actually was promoted
18 a few years ago to the equipment side of it and I did the
19 after-market side previous to the job I'm in now.

20 MR. CROWN: I take it there are different models of 10:21:00
21 trucks that your company --

22 PROSPECTIVE JUROR: Yes.

23 MR. CROWN: -- produces.

24 You indicated that there's a distribution mechanism
25 for the parts that would go into these trucks. 10:21:00

1 PROSPECTIVE JUROR: Correct.

2 MR. CROWN: Are your distributors under contract with
3 you?

4 PROSPECTIVE JUROR: Yes, they are.

5 MR. CROWN: So they sign the contract and they're 10:21:
6 bound by the terms, obviously.

7 PROSPECTIVE JUROR: Correct.

8 MR. CROWN: Do those distributors then to sell either
9 a dealership or a retail market?

10 PROSPECTIVE JUROR: The distributors are the 10:21:
11 dealerships and they would sell to the general public in
12 retail.

13 MR. CROWN: The website that is used, do they actually
14 purchase these parts on the Internet from you?

15 PROSPECTIVE JUROR: They have the option to, yes. 10:21:

16 MR. CROWN: And if they didn't purchase these parts on
17 the website what would be their other option?

18 PROSPECTIVE JUROR: They could call it in or fax it
19 in. It was more of a convenience than -- you know, an option.

20 MR. CROWN: The trucks themselves, though, are they 10:22:
21 purchased through a direct ordering system as opposed to on the
22 website?

23 PROSPECTIVE JUROR: Correct.

24 MR. CROWN: Okay. And why is that, sir?

25 PROSPECTIVE JUROR: Most people aren't going to spend 10:22:

1 a hundred thousand dollars over an on-line connection.

2 MR. CROWN: Does the website of your company also
3 provide information on the different product lines and --

4 PROSPECTIVE JUROR: Yes.

5 MR. CROWN: -- the parts associated and --

10:22:00

6 PROSPECTIVE JUROR: Yes.

7 MR. CROWN: -- pricing, et cetera?

8 Thank you. If you can hand the microphone to Juror
9 Number 9.

10 Juror Number 9, you've indicated that you are a
11 product manager involved in the Internet, but I've probably
12 misstated the exact --

10:22:00

13 PROSPECTIVE JUROR: My title is technology development
14 manager.

15 MR. CROWN: Can you briefly tell us what that involves
16 on a day-to-day basis?

10:22:00

17 PROSPECTIVE JUROR: Sure.

18 I manage developers of our corporate website, amongst
19 other things, but primarily it's managing the group within our
20 company that delivers technology solutions within our company
21 and to our customers.

10:23:00

22 MR. CROWN: Does your company have a website?

23 PROSPECTIVE JUROR: We do.

24 MR. CROWN: Does your company sell products through
25 the website?

10:23:00

1 PROSPECTIVE JUROR: Yes, we do.

2 MR. CROWN: I take it the website also provides
3 information on the product.

4 PROSPECTIVE JUROR: Yes.

5 MR. CROWN: Do you have a distributor network for your 10:23:00
6 products?

7 PROSPECTIVE JUROR: We actually are the distributor.

8 MR. CROWN: And who would your customers be?

9 PROSPECTIVE JUROR: Contractors, builders, mining
10 companies, that sort of thing. Anyone who is going to use 10:23:00
11 heavy equipment, construction or mining.

12 MR. CROWN: So it's basically the public but this type
13 of segment of the market would be, as you said, heavy
14 industrial users.

15 PROSPECTIVE JUROR: Correct. 10:23:00

16 MR. CROWN: Okay. When I was asking Jurors Number 2
17 and 3 about their proficiency on the computer, do you also know
18 how to right click?

19 PROSPECTIVE JUROR: Yes, I do.

20 MR. CROWN: Okay. Do you use -- does your company use 10:24:00
21 the Internet to market products?

22 PROSPECTIVE JUROR: Yes, we do.

23 MR. CROWN: And if -- if you understood what I meant
24 by that broad question, tell us what -- how your company uses
25 the Internet to market its products. 10:24:00

1 PROSPECTIVE JUROR: Well, basically, our customers
2 would be able to go to our website, find out information about
3 our products, specifications and that sort of thing and -- I
4 guess that -- are you looking for more information than that?

5 MR. CROWN: That's fine. 10:24:

6 If you can now -- and that's all the questions I have
7 for you individually. If you can pass to Juror Number 12 the
8 microphone, I'd appreciate that.

9 Juror Number 12, you indicated that you have previous
10 experience as being a party in a civil lawsuit. Am I correct? 10:24:

11 PROSPECTIVE JUROR: That's correct.

12 MR. CROWN: And you said it was a slander case
13 involving a phone call that you had made?

14 PROSPECTIVE JUROR: That's correct. I called CPS on
15 the welfare of my children at one time and -- 10:25:

16 MR. CROWN: And some -- I'm sorry.

17 PROSPECTIVE JUROR: And the gentleman came back to sue
18 me for that phone call.

19 MR. CROWN: But ultimately in the middle of a jury
20 trial you said it was dismissed? 10:25:

21 PROSPECTIVE JUROR: That's correct.

22 MR. CROWN: Okay. And dismissal meant resolution in
23 your favor, I take it.

24 PROSPECTIVE JUROR: That's correct.

25 MR. CROWN: Okay. 10:25:

1 You said you served 11 years in the military?

2 PROSPECTIVE JUROR: That's correct.

3 MR. CROWN: What branch of service, sir?

4 PROSPECTIVE JUROR: I was in the air force.

5 MR. CROWN: And what was your rank at discharge? 10:25:

6 PROSPECTIVE JUROR: Staff sergeant.

7 MR. CROWN: What grade do you teach as a substitute
8 teacher in Glendale?

9 PROSPECTIVE JUROR: Kindergarten to eight.

10 MR. CROWN: Do you teach all the subjects or do you 10:25:
11 specialize in some areas?

12 PROSPECTIVE JUROR: Everything there is.

13 MR. CROWN: Would that include art class, music class,
14 things of that creative specialty?

15 PROSPECTIVE JUROR: I haven't really got into art or 10:25:
16 music.

17 MR. CROWN: I thank you, if you can pass the
18 microphone to Juror Number 13.

19 Sir, you indicated -- and I -- again, I'm just
20 following up -- that you had been a party to a lawsuit that was 10:26:
21 involving an SEC action?

22 PROSPECTIVE JUROR: SEC. Securities and Exchange
23 Commission.

24 MR. CROWN: And that was a long time ago, but it
25 ultimately resolved in your favor? 10:26:

1 PROSPECTIVE JUROR: It was resolved.

2 MR. CROWN: It was resolved.

3 Did that case go to trial or was it resolved
4 through --

5 PROSPECTIVE JUROR: It did not go to trial.

10:26:

6 MR. CROWN: An SEC action, would that have been
7 brought by the United States Government through either a U.S.
8 Attorney's Office or the Justice Department?

9 PROSPECTIVE JUROR: Securities and Exchange Commission
10 attorneys.

10:26:

11 MR. CROWN: And was that something that happened here
12 in Arizona?

13 PROSPECTIVE JUROR: Yes.

14 MR. CROWN: Okay. Is your mediation training
15 exclusively for probate cases?

10:27:

16 PROSPECTIVE JUROR: I also had -- what's the other --
17 not -- it's -- probate -- probate court was specialized
18 training.

19 MR. CROWN: And do you do that currently?

20 PROSPECTIVE JUROR: I don't do it any longer.

10:27:

21 MR. CROWN: Okay. When you did do it what courthouse
22 did you go to?

23 PROSPECTIVE JUROR: Over on 2nd Street.

24 MR. CROWN: Okay. So the Maricopa County Superior
25 Court --

10:27:

1 THE WITNESS: Yes.

2 MR. CROWN: -- downtown.

3 What is your position with Arizona department of
4 economic quality?

5 PROSPECTIVE JUROR: Environmental Quality. 10:27:

6 MR. CROWN: Environmental Quality. I'm sorry.

7 PROSPECTIVE JUROR: I'm a project manager in the
8 hazardous waste permit division.

9 MR. CROWN: You're based here in Phoenix?

10 PROSPECTIVE JUROR: Yes, I am. 10:27:

11 MR. CROWN: Do you have occasion to travel around the
12 state in your job duties?

13 PROSPECTIVE JUROR: Not very often. Mostly in the
14 office.

15 MR. CROWN: And lastly, if I can have the microphone 10:28:
16 passed up to Juror Number 14.

17 You have copyrighted, you indicated, a piece or more
18 than one piece of music?

19 PROSPECTIVE JUROR: Just one piece of music.

20 MR. CROWN: And how did you go about copyrighting 10:28:
21 that?

22 PROSPECTIVE JUROR: The poor man's way. My dad -- my
23 dad wrote the words and I wrote the music and pretty sure he
24 took care of all the copyright.

25 MR. CROWN: Do you play an instrument? 10:28:

1 PROSPECTIVE JUROR: The piano.

2 MR. CROWN: How long ago was it that you would have
3 copyrighted --

4 PROSPECTIVE JUROR: 2006.

5 MR. CROWN: Okay. And so your dad wrote the words -- 10:28:
6 PROSPECTIVE JUROR: Uh-huh.

7 MR. CROWN: -- and then you wrote the music.

8 THE WITNESS: Uh-huh.

9 MR. CROWN: And both were copyrighted?

10 PROSPECTIVE JUROR: Altogether it was copyrighted. 10:28:
11 MR. CROWN: Okay. You currently use indoor tanning
12 products?

13 PROSPECTIVE JUROR: Yes, sir.

14 MR. CROWN: Do you go to a tanning salon?

15 PROSPECTIVE JUROR: Yes, I do. 10:28:
16 MR. CROWN: Where do you buy your indoor tanning
17 products?

18 PROSPECTIVE JUROR: I bought mine as Wal-Mart but they
19 do sell the one that I use at my tanning salon.

20 MR. CROWN: When you're at these tanning salon or 10:29:
21 salons of your choice do you sometimes consult with the staff
22 there as to --

23 PROSPECTIVE JUROR: Yes.

24 MR. CROWN: -- procedures and tips on tanning and
25 what's best for -- 10:29:

1 PROSPECTIVE JUROR: I have once before.

2 MR. CROWN: You also indicated you have purchased
3 items at times on the Internet. Correct?

4 PROSPECTIVE JUROR: Uh-huh.

5 MR. CROWN: You focused in on clothing stores when 10:29:
6 you've gone to a store of your choice. You mentioned one name
7 in particular.

8 PROSPECTIVE JUROR: Yes. I -- I shop at J. Crew on
9 line. Many other stores, overstock.com.

10 MR. CROWN: When you go to -- I take it you've been to 10:29:
11 a J. Crew store.

12 PROSPECTIVE JUROR: Uh-huh.

13 MR. CROWN: So you're familiar with the retail store
14 physical location of J. Crew.

15 PROSPECTIVE JUROR: Yes. 10:30:

16 MR. CROWN: And if at times when you've gone on the
17 Internet to -- I take it you go -- you've gone to the J. Crew
18 website itself?

19 PROSPECTIVE JUROR: Yes, sir.

20 MR. CROWN: So there's, in your mind, the association 10:30:
21 with the J. Crew website and the J. Crew store.

22 PROSPECTIVE JUROR: Yes.

23 MR. CROWN: What specifically do you do for the
24 political consulting firm that you work for?

25 PROSPECTIVE JUROR: I verify and validate voter 10:30:

1 registrations. I do door-to-door -- you know, just -- I've
2 done some volunteer. I also just -- I just help around the
3 office what needs the help, kind of separate from my own work.

4 MR. CROWN: I take it it's a pretty busy time to be
5 working for --

10:30:

6 PROSPECTIVE JUROR: Very busy.

7 MR. CROWN: -- a political consulting firm right now.

8 PROSPECTIVE JUROR: Yes.

9 MR. CROWN: Thank you so much.

10 As I said, I had a few follow-up questions on an
11 individual basis, and now I'm going to ask just some general
12 questions.

10:30:

13 THE COURT: Is there a general question you're about
14 to ask that was on the written questions that were submitted to
15 the Court and I just failed to ask?

10:31:

16 MR. CROWN: There's -- there was two questions in the
17 area that you asked just those questions and there's some
18 follow-up.

19 THE COURT: The reason we have the written questions
20 is to cover the general questions, and I'm concerned maybe I
21 overlooked something that you gave to me.

10:31:

22 MR. CROWN: No, Your Honor.

23 THE COURT: Well, that's where you ask the general --
24 that's how we ask the general questions.

25 MR. CROWN: Okay. If that's the case, then I would

10:31:

1 have no more questions.

2 THE COURT: All right. You pass the panel?

3 MR. CROWN: Yes.

4 THE COURT: All right. Thank you.

5 MR. CROWN: Thank you. 10:31:.

6 THE COURT: Mr. Coleman?

7 MR. COLEMAN: Good morning.

8 I actually only have a general question. I do think

9 it's a follow-up to a question that the Court asked. The

10 question is -- I believe the response to the Court's question 10:31:.

11 of whether any of you had bought merchandise on the Internet

12 was only a couple of hands, and I wasn't exactly sure that the

13 question registered.

14 Could I ask -- could I ask that question again, Your

15 Honor?

16 How many of you who in the box now have ever purchased

17 anything on the Internet?

18 I don't have any more questions, Your Honor. Thank

19 you.

20 THE COURT: Thank you. 10:32:.

21 You pass the panel, Mr. Coleman?

22 Do you pass the panel?

23 MR. COLEMAN: Yes, Your Honor.

24 THE COURT: All right.

25 Ladies and gentlemen, we're about to take a recess, 10:32:.

1 and before we do I just want to again remind you not to
2 discuss this case with each other, keep an open mind for
3 those of you that are selected to be on the jury. Do not talk
4 to -- and I'm not sure you'll have occasion to but don't talk
5 to anyone involved in the trial, the lawyers or the parties,
6 about anything. Because if you're seen talking to one of the
7 -- or one of the witnesses. If you're seen talking with them
8 about anything, why, then, somebody is going to wonder if
9 you're talking about the case. So don't talk to them about
10 anything, and I'm instructing them not to talk to you about
11 anything, so no one will think that the other is being rude in
12 that regard.

10:33:

10:33:

13 When the -- we're going to be in recess for 20
14 minutes, or ten minutes before 11.

15 And -- do you want them outside the doorway,
16 Ms. Bengtson?

10:33:

17 THE DEPUTY CLERK: Yes.

18 THE COURT: So congregate just outside the door of the
19 courtroom and Ms. Bengtson will usher you in when we're ready
20 to proceed.

10:34:

21 Just want to make sure I didn't omit a question that I
22 had, and I believe I have covered everything.

23 So we'll be in recess for 20 minutes.

24 (Proceedings recessed at 10:34 a.m.)

25

11:00:

1 (Proceedings reconvened at 11:00 a.m.)

2 THE COURT: Thank you. Please be seated.

3 The record will reflect the presence of the parties
4 and counsel and the prospective jurors.

5 At this time I will ask Ms. Bengtson, the courtroom 11:00:
6 deputy, to read the names of those of you who have been
7 selected as jurors to try this case, and as your name is called
8 she will indicate where you should be seated.

9 THE DEPUTY CLERK: Juror Number 1.

10 Sir, if you'll go to the back row, the very first 11:01:
11 seat.

12 Number 3.

13 Number 6.

14 Number 7.

15 Number 9. 11:01:

16 Sir, if you'll go in the first row, the very first
17 seat.

18 Number 10.

19 Number 12.

20 THE COURT: All right. For those of you who were not 11:02:
21 selected, I'm about to excuse you, and when I do I will ask you
22 to return to the Jury Clerk for any possible further
23 assignment, and I don't know if there is any other trial for
24 which you might be called on today.

25 But before I do excuse you I want to thank you on 11:02:

1 behalf of the District of Arizona and the Judges of the
2 District of Arizona. As you may know, our country is the only
3 country that provides for a right to a jury trial in a civil
4 case. At least the last time I checked we were the only
5 country. Some other countries do provide it in terms of 11:03:
6 criminal cases. But that right, that right to a jury trial,
7 would be a hollow right if it were not for the willingness of
8 citizens such as yourselves to serve on a jury.

9 As I mentioned at the outset, jury service always
10 involves some hardship, and yet thanks to folks like yourselves 11:03:
11 who are willing to serve in spite of that hardship those rights
12 we have to a jury trial, civil and criminal cases, are very
13 real rights and not just hollow rights.

14 So again, thank you very much. I hope if you have a
15 future opportunity you will look forward to it. And I will 11:04:
16 just say this last matter in parting. It's been my experience
17 that folks who have served on juries have inevitably, no matter
18 what their thoughts were going into it, have inevitably found
19 it to be very educational, very interesting, very satisfying,
20 because they're getting a chance to participate in one of the 11:04:
21 bedrock features of our democracy, and generally enjoyable.

22 So again, thank you. You are excused to return to the
23 Jury Clerk.

24 (The excused prospective jurors leave the courtroom.)

25 THE COURT: At this time I will ask that those of you 11:05:

1 who have been selected please stand and now you will take the
2 oath as jurors.

3 (The trial jury was duly sworn.)

4 THE COURT: All right.

5 Folks, you are now the jury in this case, and I'm 11:05:
6 going to give you just some preliminary instructions. The
7 instructions which will govern your deliberations will be those
8 that I give at the conclusion of the case.

9 Let me say at the outset that you must not infer from
10 these instructions or from anything I may say or the way I may 11:05:
11 say it or anything I might do during the course of the trial as
12 indicating that I have an opinion regarding the evidence or
13 what your verdict should be. That will be up to you.

14 It is your duty to find the facts from all the
15 evidence in the case, and to those facts you will apply the law 11:06:
16 as I give it to you.

17 You must follow the law as I give it to you whether
18 you agree with it or not and you must not be influenced by any
19 personal likes or dislikes, opinions, prejudices or sympathy.
20 That means you must decide the case based solely on the 11:06:
21 evidence before you, and you've just taken an oath to do
22 exactly that.

23 And in following the instructions that I give at the
24 end of the case, you must follow all of them and not single out
25 some and ignore others. They're all important. 11:07:

1 The plaintiff, Designer Skin, LLC, claims ownership of
2 copyrights and seeks damages against defendants S & L Vitamins,
3 Inc. and Larry Sagarin for copyright infringement, and
4 defendants deny infringing on the copyrights.

5 And to just help you understand the evidence in this 11:07:
6 case I'm going to explain some of the legal terms you'll hear
7 during this trial. And again, keep in mind that formal
8 instructions that will govern your deliberations you'll hear at
9 the end of the case.

10 The owner of a copyright has the right to exclude any 11:07:
11 other person from reproducing, preparing derivative works,
12 distributing, performing, displaying, or using the work covered
13 by the copyright for a specified period of time.

14 Copyrighted work can be a literary work, musical work,
15 dramatic work, pantomime, choreographic work, pictorial work, 11:08:
16 graphic work, sculptural work, motion picture, audiovisual
17 work, sound recording, architectural work, mask works fixed in
18 semiconductor chip products, or a computer programs.

19 Facts, ideas, procedures, processes, systems, methods
20 of operation, concepts, principles or discoveries cannot 11:08:
21 themselves be copyrighted.

22 The copyrighted work must be original. An original
23 work that closely resembles other works can be copyrighted so
24 long as the similarity between the two works is not the result
25 of copying. 11:08:

1 Copyright automatically exists in a work the moment it
2 is fixed in any tangible medium of expression. The owner of
3 the copyright may register the copyright by delivering to the
4 Copyright Office of the Library of Congress a copy of the
5 copyrighted work. After examination and a determination that 11:09:
6 the material deposited constitutes copyrightable subject matter
7 and that legal and formal requirements are satisfied, the
8 Register of Copyrights registers the work and issues a
9 certificate of registration to the copyright owner.

10 In this case, the plaintiff, Designer Skin, LLC, 11:09:
11 contends that the defendants, S & L Vitamins, Inc. and Larry
12 Sagarin, have infringed the plaintiffs' copyright. The
13 plaintiff has the burden of proving by a preponderance of the
14 evidence that the plaintiff is the owner of the copyright and
15 that the defendants copied original elements of the copyrighted 11:09:
16 work.

17 Preponderance of the evidence means that you must be
18 persuaded by the evidence that it is more probably true than
19 not true that the copyrighted work was infringed.

20 To prove that the defendants copied the plaintiffs' 11:10:
21 work, the plaintiff may show that the defendants had access to
22 the plaintiffs' copyrighted work and that there are substantial
23 similarities between the defendants' work and the plaintiffs'
24 copyrighted work.

25 One who reproduces or displays a copyrighted work 11:10:

1 without authority from the copyright owner during the term of
2 the copyright infringes the copyright.

3 The defendants contend there is no copyright
4 infringement. There is no copyright infringement where the
5 defendants independently created the challenged work. 11:11:0

6 Copyright is the exclusive right to copy. This right
7 to copy includes the exclusive rights to:

8 1. Authorize, or make additional copies, or otherwise
9 reproduce the copyrighted work in copies.

10 2. Recast, transform, adapt the work that is prepared 11:11:0
11 derivative works based upon the copyrighted work.

12 Or, 3, display publicly a copyrighted work.

13 It is the owner of a copyright who may exercise these
14 exclusive rights to copy. The term, quote, owner, end quote,
15 includes the author of the work. In general, copyright law 11:11:0
16 protects against adaptation or display of substantially similar
17 copies of the owner's copyrighted work without the owner's
18 permission. An owner may enforce these rights to exclude
19 others in an action for copyright infringement.

20 The works involved in this trial are known as 11:12:0
21 pictorial works, graphics works, works such as two-dimensional
22 and three-dimensional works of fine, graphic and applied art,
23 photographs and computer images.

24 Anyone who copies original elements of a copyrighted
25 work during the term of the copyright without the owner's 11:12:0

1 permission infringes the copyright.

2 On the plaintiffs' copyright infringement claim, the
3 plaintiff has the burden of proving both of the following by a
4 preponderance of the evidence:

5 1. The plaintiff is the owner of a valid copyright, 11:12:
6 and, 2, the defendant copied original elements from the
7 copyrighted work.

8 If you find that the plaintiff has proved both of
9 these elements, your verdict should be for the plaintiff. If,
10 on the other hand, the plaintiff has failed to prove either of 11:13:
11 these elements, your verdict should be for the defendant.

12 The plaintiff is the owner of a valid copyright in
13 each of its product's images and the artwork on its labels if
14 the plaintiff proves by a preponderance of the evidence that,
15 1, the plaintiffs' work is original, and, 2, the plaintiff is 11:13:
16 the author or creator of the work.

17 Another instruction in this case states that the
18 plaintiff has the burden of proving that the defendants copied
19 original elements from the plaintiffs' copyrighted work. The
20 plaintiff may show that defendants copied from the work by 11:13:
21 showing by a preponderance of the evidence that the defendants
22 have access to the plaintiffs' copyrighted work and that there
23 are substantial similarities between the defendants' work and
24 original elements of the plaintiffs' work.

25 Now, the evidence you're to consider in deciding what 11:13:

1 the facts are consists of:

- 2 1. The sworn testimony of any witness.
- 3 2. The exhibits which are received into evidence.
- 4 3. Any facts to which the lawyers stipulate.

5 In reaching your verdict, you may consider only the 11:14:
6 testimony and exhibits received into evidence. Certain things
7 are not evidence and you may not consider them in deciding what
8 the facts are. I'll list them for you.

9 1. Arguments and statements by lawyers are not
10 evidence. The lawyers are not witnesses. What they say in 11:14:
11 their opening statements, closing arguments, and at other times
12 during the trial is intended to help you interpret the
13 evidence, but it is not evidence. If the facts as you remember
14 them differ from the way the lawyers may state them, then your
15 memory of them controls. 11:14:

16 Questions and objections by lawyers are not evidence.
17 Attorneys have a duty to their clients to object when they
18 believe a question is improper under the rules of evidence.
19 You should not be influenced by the objection or by the Court's
20 ruling on it. 11:15:

21 3. Testimony that has been excluded or stricken or
22 that you have been instructed to disregard is not evidence and
23 must not be considered.

24 In addition, sometimes testimony and exhibits are
25 received only for a limited purpose. When I give a limiting 11:15:

1 instruction you must follow it.

2 Anything you may see or hear when the Court is not in
3 session is not evidence. You're to decide the case solely on
4 the evidence received at the trial.

5 Some evidence may be admitted for a limited purpose 11:15:
6 only, so when I do instruct you, if I do, that an item of
7 evidence has been admitted for a limited purpose, you must
8 consider it only for that limited purpose and for no other.

9 Evidence may be direct or circumstantial. Direct
10 evidence is direct proof of a fact, such as testimony by a 11:16:
11 witness about what that witness personally saw or heard or did.
12 Circumstantial evidence is proof of one or more facts from
13 which you could find another fact. You should consider both
14 kinds of evidence. The law makes no distinction between the
15 weight to be given either direct or circumstantial evidence. 11:16:
16 It is for you to decide how much weight to give to any
17 evidence.

18 There are rules of evidence that control what is
19 received in evidence, so when a lawyer asks a question or
20 offers and exhibit in evidence and the lawyer on the other side 11:16:
21 thinks it's not permitted by the rules of evidence that lawyer
22 may object. If I overrule the objection, the question may be
23 answered or the exhibit received. If I sustain the objection,
24 the question cannot be answered and the exhibit cannot be
25 received. 11:17:

1 Whenever I sustain an objection to a question, you
2 must ignore the question and not guess what the answer would
3 have been.

4 Sometimes I may order that evidence be stricken from
5 the record and that you disregard or ignore the evidence, and 11:17:
6 that means when you're deciding the case you must not consider
7 the evidence I told you to disregard.

8 Now, in deciding what the facts are in this case, you
9 may have to decide which testimony to believe and which
10 testimony not to believe. You may believe everything a witness 11:17:
11 says or part of it or none of it. Proof of a fact does not
12 necessarily depend on the number of witnesses who testify about
13 it.

14 In considering the testimony of any witness, you may
15 take into account: 11:17:

16 1. The opportunity and ability of the witness to see
17 or hear or know the things testified to.

18 2. The witness's memory.

19 3. The witness's manner while testifying.

20 4. The witness's interest in the outcome of the case 11:18:
21 and any bias or prejudice.

22 5. Whether the other evidence contradicted the
23 witness's testimony.

24 6. The reasonableness of the witness's testimony in
25 light of all the evidence. 11:18:

1 7. Any other factors that bear on believability.

2 The weight of the evidence as to a fact does not
3 necessarily depend on the number of witnesses who testify about
4 it.

5 Now, a few words about your conduct as jurors. 11:18:

6 You're not to discuss this case with anyone, including
7 members of your family, people involved in the trial, or anyone
8 else, and this includes discussing the case in Internet chat
9 rooms or through Internet blogs, Internet bulletin boards or
10 e-mails, nor are you allowed to permit others to discuss the 11:18:
11 case with you. If anyone approaches you and tries to talk to
12 you about the case, please let me know about it immediately.

13 Second, do not read or listen to any news stories,
14 articles, radio and television or on-line reports about the
15 case or about anyone who has anything to do with it. 11:19:

16 Third, do not do any research, such as consulting
17 dictionaries, searching the Internet or using other reference
18 materials, and do not make any investigation about the case on
19 your own.

20 Fourth, if you need to communicate with me, simply 11:19:
21 give a signed note to the clerk to give to me. However, if you
22 have an immediate need, such as an issue with your exhibit
23 screens or the need for a break, please raise your hand at that
24 time so I can address it.

25 We'll try to take a mid-morning break and a 11:19:

1 mid-afternoon break. Sometimes mother nature does not always
2 conform those needs with my clock, so if that does happen raise
3 your hand and we'll take the break early without any further
4 inquiry on my part.

5 Do not make up your mind about what the verdict should 11:20:
6 be until after you have gone to the jury room to decide the
7 case and you and your fellow jurors have discussed the
8 evidence. Keep an open mind until then.

9 Finally, until this case is given to you for your
10 deliberation and verdict, you are not to discuss the case with 11:20:
11 your fellow jurors.

12 Now, what I just said to you regarding your conduct as
13 jurors I will try to remember to remind you each time we recess
14 mid-morning, mid afternoon, end of the day, but if I do I'm
15 going to simply say, "Remember the admonition." Which is my 11:21:
16 shorthand for what I've just said to you in very longhand. And
17 even if I forget to say, "Remember the admonition," I'm telling
18 you now to remember that admonition each time we take a break.

19 Now, during deliberations you're not going to have a
20 transcript of the evidence to look at, so you're going to have 11:21:
21 to rely on your memories about what the evidence is. So you'll
22 need to pay close attention to the testimony as it is given.

23 And, incidentally, if there's any point where you
24 can't hear the testimony or the questions or, as I said, the
25 screens aren't working, let me know then so we can correct it, 11:21:

1 or if we have a witness -- chances are, if we've got a witness
2 we're having trouble hearing, I'll be the first one or Mr.
3 German, one of us will be the first one to note that, but if
4 we're not and you don't hear it, why, you let us know and we'll
5 do what we need to make sure you do hear it.

11:22:

6 If you wish, you can take notes to help you remember
7 the evidence, but if you do take notes, please keep them to
8 yourself until you and your fellow jurors have gone to the jury
9 room to decide the case.

10 But please remember what you learned in school, and
11 that is, use notes to jog your recollection. Don't you try to
12 make a transcript of what's said or you'll get so far behind
13 and so busy making your own transcript you'll miss part of
14 what's being said.

11:22:

15 So just take such notes as will help you with your
16 memory, but ultimately you're going to have to rely on your own
17 memory of the evidence was when the time comes.

11:22:

18 You won't be permitted to ask questions of witnesses.
19 If during the course of the trial you do have a question
20 relating to some significant matter, write it out and give it
21 to Ms. Bengtson and she'll give it to me and it may or may not
22 be one that I can answer.

11:23:

23 It may happen during the trial that there will be a
24 need for me to consult with the lawyers outside of your
25 hearing. Sometimes there might be a request for a sidebar,

11:23:

1 which means a request to talk to me over here to the side of
2 the bench. Sometimes we're talking about whether or not
3 certain evidence should come in, and obviously, if we talk
4 about it here in open court, why, quite possibly then the very
5 evidence that maybe I decide not to let in has, in essence, 11:23:
6 come in by virtue of that discussion. And, of course, if that
7 type of thing happens, I'll tell you to disregard that evidence
8 and I'll expect you to disregard it.

9 But we try to minimize the need for that kind of
10 remedial instruction by covering those matters at sidebar. 11:24:
11 We'll keep those to a minimum, and sometimes I will deny a
12 request for a sidebar conference, but whether I grant it or
13 deny it it's not to be considered by you as any indication or
14 opinion on my part about the case or what your verdict should
15 be. 11:24:

16 We're about to go into the next phase of the trial,
17 which is the opening statement phase, and opening statements
18 are simply an outline by the attorneys as to what they expect
19 the evidence will show. They're not required to make an
20 opening statement. 11:25:

21 After that the plaintiff will present evidence and
22 counsel for defendant can cross-examine, and after that the
23 defendant may present evidence and counsel for the plaintiff
24 may cross-examine.

25 After that there will be closing arguments by both 11:25:

1 sides and then I will instruct you on the law and you'll retire
2 to deliberate.

3 I've already made reference and you've in essence met
4 Teddy Bengtson, who serves as courtroom deputy clerk. She'll
5 handle the exhibits, administer the oaths and generally take 11:25:
6 multi-tasking to a new level during the course of the trial.

7 Mr. German, David German, serves as the court reporter
8 and he will be taking down everything that's said by both
9 parties, and eventually that will become a transcript but it
10 will not be a transcript available to you during the course of 11:26:
11 the trial.

12 At the table to my right presently seated there is
13 Kerry Hodges. Mr. Hodges is a lawyer and serves as a law clerk
14 in my chambers, and because he has a mountain of work sitting
15 on his desk he will be in and out assisting me in the course of 11:26:
16 this trial.

17 I have two other lawyers on my staff who you may see
18 from time to time.

19 And I also have three externs who are currently seated
20 in the back of the room but they may from time to time be 11:26:
21 seated over here, and I just want you to know they are law
22 students and they are working in my chambers this summer for
23 credit in law school. They're not getting paid so I want you
24 to know that, and if at sometime you see three persons here or
25 over at the table I don't want you to think that here are three 11:27:

1 government employees that are not doing anything, because, as I
2 said, they're working for free. They are hoping and I hope
3 that they're getting some valuable experience and training in
4 the course of this.

5 I believe that covers the preliminary matters so at 11:27:
6 this time the plaintiffs may make an opening statement.

7 And I'll just tell you up front, you know, we'll
8 normally try to break around noon but as we get close to 12 and
9 you feel like just a few more minutes will allow you to finish,
10 that's fine, or if you feel like there's -- I'll let you 11:27:
11 basically decide when we break. If you feel there's a good
12 break point, then we'll recess for an hour for lunch.

13 So the plaintiffs may proceed.

14 MR. MIZRAHI: Thank you, Your Honor.

15 May it please the Court. 11:28:

16 Ladies and gentlemen of the jury.

17 My name is Elan Mizrahi, and I, along with my partner
18 and co-counsel, Larry Crown, are counsel for Designer Skin,
19 Boutique and Splash.

20 Now, throughout the course of this trial you're going 11:28:
21 to hear the term Designer Skin used a lot. That's my client's
22 name. You may not hear the name Splash and Boutique, and I
23 just want to kind of clarify that up front. Splash and
24 Boutique are two subsidiaries of Designer Skin that have
25 particular product lines. Because they're all owned by 11:28:

1 Designer Skin you're just going to basically be hearing the
2 term Designer Skin used throughout the trial without
3 necessarily reference specifically to Splash and Boutique.

4 At the table over here is Beth Romero. She is a
5 representative of Designer Skin. 11:29:

6 This case is a copyright infringement and unfair
7 competition case. You've already heard some of the
8 instructions about that. What that really means -- and we'll
9 start with copyright infringement.

10 Copyright infringement has two basic elements. You 11:29:
11 create a work and somebody copies it. Under the law, that's
12 not allowed. And if you can establish both of those things,
13 that is copyright infringement.

14 Unfair competition is when somebody takes one of your
15 things, one of your images that's protected under the law, 11:29:
16 something that you created, your own creative artistic work,
17 and then they use that in some way to create a false impression
18 about it or false advertising or otherwise create a false
19 association with respect to that work, that can constitute
20 unfair competition and is considered an unfair business 11:30:
21 practice.

22 So that's basically the two claims that are at issue
23 in this case, and that's what this case is about.

24 Now, Designer Skin, like I just told you, owns Splash
25 and Boutique, and all three companies are Arizona companies. 11:30:

1 They essentially have operations in Tempe. They were started
2 here by local Arizona people and they have grown to be a
3 significant player in the skin care product industry, and
4 that's what they do.

5 They essentially make all different kinds of skin care 11:30:
6 products, but most of their products are essentially indoor
7 tanning products.

8 They pride themselves on making a top quality product,
9 and one of their slogans is that what they're actually
10 providing for consumers is nutrition for the skin so that 11:30:
11 people can safely tan and use their products and get the
12 desired results that they seek in the best possible manner.

13 Now, the products themselves are not just what's
14 inside the bottle. I mean, obviously what's inside the bottle
15 is what comes out and that's what people use, but Designer 11:31:
16 Skin's focus is on both inside the bottle and creating a
17 premium product and outside the product creating an image for
18 those products that is unique and creative and artistic.

19 In fact, a lot of people, what you're going to hear is
20 that they don't even necessarily know the Designer Skin name 11:31:
21 but -- the name of Designer Skin itself, but when they're using
22 products and they're loyal to a particular brand, like Tao or
23 one of the other brands that Designer Skin makes, they're going
24 to go in and when they're going to buy that product that's what
25 they're buying. They may not even recognize that it's 11:31:

1 manufactured by Designer Skin because each of the products are
2 so individualized in terms of color and the artwork and the
3 design and the name and everything. They're very, very
4 individualized products.

5 Now, within the scope of those products, just 11:32:
6 generally speaking, just to give you a little primer on the
7 tanning industry and what you're going to hear in the evidence
8 is that there's basically four kinds of products that Designer
9 Skin manufactures.

10 There's accelerators, bronzers, tingles and coolants. 11:32:
11 Okay?

12 And accelerators are just basically tanning lotion
13 products that you put on, and those are essentially the kinds
14 of products that if you use tanning stuff you might be most
15 familiar with. They enhance the natural tanning, and so when 11:32:
16 you put it on and you go into a tanning salon then that will
17 enhance the tan that you are going to get.

18 There's bronzers that do the same kind of thing, but
19 what they also do is they also impart some additional color
20 into the tan, and so that might help out with issues of 11:32:
21 evenness and things of that nature.

22 Then there's tingle products. Tingle products are
23 very unique. And you'll hear evidence some people absolutely
24 love them. Some people don't necessarily prefer them. But
25 what they do is they actually increase circulation and 11:33:

1 oxygenation within the skin and create kind of a warming and
2 reddening sensation and, in fact, a tingle that when you use
3 the product that's one of the features that some people really
4 look after.

5 Then there's coolant products, which, as you might 11:33:
6 infer from the name, are products that get applied to the skin
7 and they essentially have a cooling effect on the skin.

8 So what we're talking about here are four categories
9 of products, generally speaking, and within those four
10 categories of products there's all different kinds of products 11:33:
11 that are within those categories that have different effects
12 and do different things within each category.

13 So, for example, you might have a light bronze or
14 heavy bronze or medium bronze or a bronzer that does this, a
15 bronzer that does that, and you're going to hear more about 11:34:
16 that in the course of the trial.

17 And so -- but that should at least give you a flavor
18 for what we're really talking about over here.

19 Now, since we're still talking about what's inside
20 these bottles of product, Designer Skin prides itself on using 11:34:
21 the highest caliber ingredients, including things like alo
22 vera, nutrients and vitamins and things that will actually help
23 your skin and provide benefits for the skin. They're
24 manufactured in house for Designer Skin.

25 And that's really for two reasons. 11:34:

1 Reason number one is so that they're controlling that
2 internal distribution of the product; they're not outsourcing
3 that, and so that way they're selecting the ingredients,
4 they're making the ingredients, and from a quality control
5 standpoint they're able to stand behind their products because 11:34:
6 they're manufactured by them and then sold out by them.

7 Number two is by maintaining those products in house
8 they're able to, obviously, save the costs of having to hire
9 outside contractors do those sorts of things and those savings
10 then get passed along to the consumer. 11:35:

11 So that's what we're talking about in terms of the
12 products inside the bottle.

13 Now, outside the bottle, as I've alluded to before,
14 each product is an individual. They each have a very unique
15 name. They each are associated with a very, very creative 11:35:
16 image. The labels are colorful and artistic. And sometimes
17 they're accompanied by certain kinds of accoutrements.

18 So, like, for example, the bottle itself might have a
19 band on it with a puffy thing or, for example, one of the
20 brands that you're going to see is called Bronze Bondage, and 11:35:
21 it actually has a little faux leather corset that goes around
22 the bottle with a ribbon that's attached to it.

23 So not all those products -- not all the products have
24 those little accoutrements but a lot of them -- or at least
25 some of them do. 11:36:

1 The one thing that is true with respect to all of the
2 products is they all have a very, very unique name, and you're
3 going to hear some of the names. I've thrown a few out. Like
4 Tao and Bronze Bondage and some of the other ones, and they
5 have all very, very unique labeling that is the subject of
6 creative artwork, and I'm going to talk about that for one
7 second.

11:36:00

8 Now, that artwork that is created and used for the
9 labeling is the subject of months and months of work and
10 effort, and like any other artistic project, that's the focus
11 of doing that and the whole point of that is to create a very
12 particularized product in each and every one of the products
13 that Designer Skin sells.

11:36:00

14 Now, the way that is created is from a process that --
15 that -- ultimately what happens is that it's turned into a
16 computer image, otherwise known as a rendering, and you may
17 hear that term throughout the trial, an image or a rendering,
18 and that image -- from that image that is the base artwork that
19 is then used to then make up the labels.

11:37:00

20 Now, Designer Skin uses its images for all of its
21 products in various kinds of marketing endeavors. It uses it
22 particularly in marketing materials that it generates and then
23 sends out to distributors and salons and places that have --
24 that sell and market Designer Skin products.

11:37:00

25 And more subject to what we're talking about in this

11:37:00

1 lawsuit, it also places those images on its Internet website at
2 designerskin.com, and through the website they basically use
3 the website as a marketing and informational tool where you can
4 learn about the products and so on and so forth. They do not
5 sell any products on the Internet through their website or
6 otherwise.

11:38:0

7 Now, how does Designer Skin sell its products? It's
8 an issue that you're going to be hearing some testimony about
9 in this case.

10 Designer Skin operates through an exclusive
11 distribution system. Through that exclusive distribution
12 system, Designer Skin basically has authorized distributors,
13 and then those authorized distributors then sell to salons
14 around the country.

11:38:0

15 The way that that works is Designer Skin enters into
16 very, very specific contracts with its distributors, and the
17 contracts have all kinds of language in the, but important to
18 this lawsuit is --

11:38:0

19 MR. COLEMAN: Your Honor, objection.

20 THE COURT: The objection is?

11:39:0

21 MR. COLEMAN: The relevance of the distribution issues
22 to the copyright and unfair competition claims. I've been very
23 reluctant to interrupt.

24 THE COURT: Overruled.

25 MR. MIZRAHI: Thank you, Your Honor.

11:39:0

1 What Designer Skin does, again, is they have these
2 very specific contracts that limit the distribution system of
3 their products and within those they have very specific
4 limitations that maintain that their products are to be sold in
5 salons that, number one, offer tanning as an on-site service 11:39:
6 and, number two, furnish proper instruction in the use of their
7 products.

8 Those are restrictions that are contained within the
9 distributor agreements that Designer Skin has its distributors
10 sign. 11:39:

11 And so the point of that, and you'll hear from
12 probably Beth Romero on that, is so that that way they can
13 control their distribution system of their products.

14 One of the preclusions in those contracts is the
15 preclusion that their products are not to be sold through their 11:40:
16 distribution channel on the Internet or in other places that
17 don't meet the qualifications of a salon or a place that offers
18 tanning as an on-site service or otherwise furnishes proper
19 instruction on the use of its various products it makes.

20 There are two basic reasons why they like to control 11:40:
21 their distribution system.

22 The first is based on the slogan that you'll hear
23 about in this lawsuit that they really feel and is very simple:
24 A safe customer is a happy customer. They want to make sure
25 that, to the extent that they can control their distribution 11:40:

1 system, that they're able to control issues such as training,
2 instruction, safety and quality of the products. They want to
3 make sure that the people who are in their chain of commerce
4 that they can control are qualified, that they understand the
5 products, they understand the safe use of the products, and 11:41:
6 also from a quality control standpoint to make sure that the
7 products are current, they're not expired, and things of that
8 nature.

9 The second reason is a concept that is sometimes
10 called brand equity. Brand equity is the actual image of the 11:41:
11 product, and Designer Skin prides itself on providing a premium
12 boutique-quality product that it likes to be sold in salons as
13 a premium brand, salons like to sell it as a premium brand in
14 their salons, and from Designer Skin's standpoint, they have
15 customers that like to buy premium-quality, salon-quality or 11:41:
16 boutique-quality products in the salons.

17 So from the standpoint of the training instruction,
18 and safety and quality and the standpoint of brand equity, they
19 like to control that distribution system, and within that
20 distribution system they obviously spend a lot of money 11:42:
21 creating it and maintaining it.

22 So that's how the products get out into the stream of
23 commerce. They basically start with Designer Skin
24 manufacturing them and then they go through the distribution
25 system from an authorized distributor to a salon that offers 11:42:

1 on-site services and furnishes proper instruction and then
2 generally is sold to the public.

3 Now, S & L Vitamins is a New York company that
4 operates a website called TheSuppleNet.com.

5 Now, that company is -- that company and the website 11:42:
6 are operated by two individuals named Steve Mercadante and
7 Larry Sagarin. Up until 2003-2004, they basically operated the
8 website as a website to sell things like nutritional
9 supplements, proteins, amino acids, things for working out and
10 those sorts of things, and even I think that they were selling 11:43:
11 drill bits at one point. And then in 2003-2004 they started
12 selling tanning products, including Designer Skin's products.

13 Now, they're not, obviously, a tanning salon that is
14 within the meaning of, you know, Designer Skin's contracts and
15 its distribution system. They don't have tanning beds. They 11:43:
16 don't have training or experience with tanning products. And
17 through the course of selling these Designer Skin products from
18 2003-2004 on through today, that addition to their business has
19 increased their sales dramatically, and Designer Skin is a top
20 three -- Designer Skin's products are a top three seller. 11:43:

21 Now, to move a little more specifically to the legal
22 claims that you're going to be hearing evidence on in this
23 case, the first one is let's talk about the copyright
24 infringement claim.

25 Now, Designer Skin maintains original creative images 11:44:

1 on its website.

2 Now, Designer Skin is going to show that S & L has
3 basically copied certain images, presumably from Designer
4 Skin's website, and has pasted those images on to their own
5 website by basically right clicking on a mouse and then just 11:44:
6 dragging it over, and there's no real way to protect from that,
7 and has used those images in connection with the sale of
8 Designer Skin's products.

9 It's a very -- like I said, it's an easy thing to do
10 through right clicking and there's no real way to stop that. 11:44:
11 By right clicking I'm talking about when you right click on a
12 mouse, on a computer mouse and there's an option and it can
13 say -- it will say copy exactly right there, and then you hit
14 copy and then you can put it someplace else and you hit paste,
15 you paste it, and you can Photoshop it and you can do all kinds 11:45:
16 of things.

17 So ultimately, as you've heard in the jury
18 instructions, the evidence that you're going to see in this
19 case is that Designer Skin is the owner of those copyrighted
20 works. And that's not something that is going to be at issue 11:45:
21 in this case. It's essentially agreed that Designer Skin owns
22 copyrights in the images that are going to be the subject of
23 this lawsuit.

24 Part of the case that's going to be at issue is
25 S & L's copying of that work without permission, and again, we 11:45:

1 submit that the evidence is going to show that they've done
2 that. And once those two -- once those two elements are met,
3 that meets the definition of copyright infringement.

4 Now, unfair competition is a different claim. Unfair
5 competition goes to the use of the images on S & L's website. 11:45:

6 Now, the evidence is going to show that when S & L
7 Vitamins displays the images of Designer Skin's products on its
8 website what it does is it actually affixes a logo, S & L's
9 logo and then has a business name right above it. And,
10 actually, that -- if you look at it on the thumbnail images on 11:46:
11 the website, it's actually almost more prominent than the
12 Designer Skin information on the products themselves.

13 And we submit that the evidence is going to show that
14 that creates a false association, false impression, and is
15 misleading with respect to the affiliation or nonaffiliation 11:46:
16 between Designer Skin and S & L Vitamins.

17 Now, to talk specifically about some of the evidence
18 that you're going to be hearing in this case, the first witness
19 you're going to hear from most likely is a gentleman named Mike
20 Shawl. 11:47:

21 Mike Shawl has been with Designer Skin since its
22 inception approximately ten years ago and he's always been the
23 creator of the images that Designer Skin puts out on an annual
24 basis.

25 So when we're talking about inside the bottle versus 11:47:

1 outside the bottle, he's the outside-of-the-bottle guy. He's
2 the guy that's responsible for finding suitable names and
3 images for each of these products, and he does that by working
4 very, very intensely for a period of -- let's say during the
5 course of a year, for a period of months out of the year going 11:47:
6 through, identifying what kinds of products are going to be
7 launched that year, trying to figure out what is the best image
8 to be applied to each particular product, coming up with the
9 unique artwork, working on the computer, doing drawings, doing
10 things like that, until finally through that evolution that 11:47:
11 begins with the creative element that exist in his minds,
12 ultimately through that evolution it turns into the image of
13 the product or that computer -- generally that computer
14 rendering that's the final product from which the labels are
15 then based. 11:48:

16 And again, like I mentioned earlier, you're going to
17 see some of the products and images throughout the course of
18 this lawsuit. You're going to see that they're very colorful,
19 very creative images and color patterns and names and symbols
20 and things like that. 11:48:

21 And again, those images are not just used in terms of
22 the packaging or the labeling of the products. Those images
23 are also used -- the same images that appear on the labels and
24 otherwise are also used in all of Designer Skin's marketing.

25 Now, Mike Shawl, as the creator of this product, is 11:48:

1 going to be testifying in this case that he's looked at S & L's
2 website and that based on his review of S & L's website it's
3 very clear to him that on certain particular products S & L has
4 actually copied and pasted his original work that he can
5 identify as the father of those works and is using those and 11:49:
6 has used those on their website to sell products.

7 You're also going to hear from Beth Romero, who is
8 sitting at the table over here, and she's the director and is
9 in charge of the brands and has been in charge of the brands
10 from the beginning. She's basically the person Mike Shawl 11:49:
11 reports to in terms of the company structure and she's also --
12 she's not just a person who sits in an office and, you know,
13 somebody reports and she gets reports every day. She's
14 actually a person who is very, very intimately involved in the
15 collaborative effort in the creation of these works and then is 11:49:
16 ultimately the one who approves the works.

17 You'll hear testimony from her about -- generally
18 about Designer Skin and its history, about -- well, Mike Shawl
19 is going to talk about the outside of the bottle. Miss Romero
20 is going to talk about both the inside and the outside of the 11:50:
21 bottle and the importance of both.

22 She's going to talk about just generally the creation
23 of the products and the images, the marketing efforts, the
24 distribution system.

25 And when I talk about that I'm talking about the 11:50:

1 training, safety and quality and instruction, all of those
2 things, along with the brand equity in those two factors.

3 And she's also going to talk about the importance --
4 from a company standpoint, for Designer Skin, the importance of
5 not being associated with companies like S & L Vitamins. 11:50:

6 Now, in conclusion, Designer Skin manufactures and
7 places on the market premium products inside and outside the
8 bottle. Each product is a result of months of laborious
9 efforts and in the end the lotion inside each bottle is of high
10 premium quality and is something that Designer Skin can call 11:51:
11 nutrition for the skin.

12 Similarly, the identity of each product is unique,
13 creative and artistic from its name all the way to its image,
14 including its artwork and everything else about it's, so that
15 when you're looking at a given product you're associating a 11:51:
16 name and a face and a personality with that particular
17 product.

18 The evidence is going to show that S & L, without ever
19 requesting let alone receiving any authority from Designer
20 Skin, has copied Designer Skin's images and uses them on its 11:51:
21 own website to market Designer Skin's products, but also
22 affixes its name and logo on the images to falsely associate
23 itself with Designer Skin and then it profits from that
24 wrongful conduct.

25 At the conclusion of this case, we'll be asking you to 11:52:

1 find in favor of Designer Skin. We're going to ask that you
2 find that S & L has wrongfully copied Designer Skin's original
3 and proprietary images and that that's wrong. We're going to
4 ask that you find that S & L has falsely associated itself with
5 Designer Skin and that's wrong and that by doing so it's
6 created misimpressions of legitimacy, authority and
7 affiliation, all misimpressions that Designer Skin has tried
8 hard to cure and separate itself from. And at the conclusion
9 of this case we're going to ask that you award damages for that
10 wrongful conduct.

11:52:00

11:52:00

11 Thank you very much.

12 THE COURT: All right. Thank you, counsel.

13 All right. In view of the hour, we'll take our noon
14 recess now until one o'clock, and between now and then,
15 remember the admonition.

11:52:00

16 We're in recess.

17 (Proceedings recessed at 11:53 a.m.)

18
19 (Proceedings reconvened at 1:02 p.m.)

20 THE COURT: Thank you. Please be seated.

01:03:00

21 The record will reflect the presence of the parties
22 and counsel and the jury.

23 You may make your opening statement, Mr. Coleman.

24 MR. COLEMAN: Thank you.

25 Good afternoon. You might remember from the very

01:04:00

1 beginning I introduced myself. I'm Ron Coleman. I represent
2 the defendants in this case.

3 If someone went on line to buy a product, like tanning
4 lotion, and saw a picture of it so that he would know that it
5 was the product he wanted to buy and he bought some and what he 01:04:
6 got when he bought it was exactly what the picture showed and,
7 in fact, it was exactly what he wanted to buy and it was
8 exactly what the person who owned the picture, the
9 manufacturer, wanted to sell, would you think something wrong
10 had happened? 01:05:

11 That's what this case is about.

12 My adversary on his opening spoke at great length
13 about what Designer Skin wants to do with its business. I
14 wrote a few of those things down.

15 Designer Skin wants to control its distribution 01:05:
16 network. Designer Skin wants to control brand equity.
17 Designer Skin wants to control a number of things.

18 But this is a copyright case and a case for unfair
19 competition, and you're going to have to listen to the evidence
20 that the plaintiff has and decide whether or not there's been a 01:06:
21 copyright infringement and whether there's been some kind of
22 unfair competition.

23 In fact, this case is fundamentally about a small
24 businessman's ability to engage in free enterprise and a
25 consumer's ability to buy merchandise, authentic merchandise, 01:06:

1 wherever it wants to.

2 Copyright is a tool that the plaintiffs are using to
3 try to control a lot of things, but they're not a lot of things
4 the law gives it a right to control.

5 I submit that you will find that the evidence that is 01:06:
6 going to be introduced by the plaintiffs will demonstrate to
7 you that there was no copying or that there's not particularly
8 compelling proof of copying as opposed to any number of other
9 possibilities, one of which includes the possibility that my
10 client took photographs of the bottles himself. 01:07:

11 You might get the impression from the opening
12 statement by the plaintiff that people are not allowed to take
13 pictures of merchandise in order to sell them on the Internet.
14 In fact, that is not the case.

15 So all the talk about the blood, sweat, toil and tears 01:07:
16 that went into designing the very attractive and creative
17 labels has to be weighed against the fact that the plaintiff
18 here has acknowledge and the Court has ruled that photographs
19 of those same labels would not be a copyright infringement. So
20 you'll have to see what it is exactly the plaintiff says was a 01:07:
21 copyright infringement.

22 You've heard a lot about right clicking. Listen very
23 closely to the proof that the plaintiff has that thumbnail
24 sketches from their website were what ended up on my client's
25 website. 01:08:

1 When you consider that evidence and when you weigh it
2 against the range of other possibilities, the possibilities
3 besides the ones that are suggested by the plaintiff, you also
4 want to consider the following:

5 Was there harm here either by virtue of copyright or 01:08:
6 some very murky unfair competition claim?

7 Because you have to keep in mind that every single
8 bottle of Designer Skin tanning lotion sold by my client was
9 manufactured by Designer Skin. Every single bottle sold by my
10 client on the Internet to consumers who knew they were not 01:09:
11 buying it in a tanning salon and who believed correctly that
12 they were buying genuine Designer Skin merchandise was sold by
13 Designer Skin to somebody who in turn sold it to my client.
14 The plaintiff wants you to believe that there's something wrong
15 with that that and there's something against the law about 01:09:
16 that.

17 In other words, anytime someone buys something on
18 Amazon, on eBay, on a Yahoo store, if there's a picture of it
19 perhaps that's a problem, too.

20 Ask yourself what exactly is Designer Skin's argument 01:09:
21 with my client? It wants to control things. It wants to
22 control the distribution network. It wants to control brand
23 equity. This is an odd way to do it, isn't it? Copyrights of
24 the pictures of the bottles.

25 And you're going to hear testimony, in fact, from 01:10:

1 Mr. Shawl about the creative work that went into preparing
2 images of these bottles that you're going to see, and you're
3 going to ask yourself what exactly is the problem for Designer
4 Skin?

5 S & L Vitamins and Larry Sagarin were selling their 01:10:
6 product? What's the problem again? Every bottle they sold is
7 made by the plaintiff. Every bottle they sold was the real
8 thing. Every bottle they sold was sold by Designer Skin, the
9 manufacturer, at whatever price it decided to sell its
10 merchandise. Every bottle that was sold was bought by a 01:10:
11 consumer who knew what he was buying, and one of the reasons
12 that consumer knew what he or she was buying was because he
13 looked at a picture on the website of my client and said that's
14 the product I'm looking for. Designer Skin thinks that's a
15 problem. 01:11:

16 That's all this case is about. I submit that you are
17 not going to find compelling evidence of copying. I'm not even
18 sure any evidence of copying at all. I submit to you that
19 you're going to find no evidence whatsoever that Designer Skin
20 has suffered any damages. 01:11:

21 To the contrary, common sense may well tell you that
22 the brand equity that Designer Skin has said it wants to
23 control is enhanced by my client's activities. Why is it
24 enhanced? Because they're selling more authentic Designer Skin
25 merchandise. That's the business you would think Designer Skin 01:11:

1 would be in.

2 There was also a suggestion in the opening statement
3 that Designer Skin has a problem in terms of its brand equity
4 control, being associated with a small business that sells
5 tanning lotion on the Internet like S & L Vitamins. 01:12:00

6 You'll have to ask yourself whether there's any proof
7 that there's anything bad about being associated with S & L
8 Vitamins or that consumers in any way associate a manufacturer
9 with a place where you buy it. There are a lot of very fine
10 products that we buy when we go into a gasoline snack shop. Do 01:12:00
11 we then think that those products are associated with the snack
12 shop?

13 Is it different on the Internet?

14 They're going to put some arguments in front of you
15 suggesting that somehow it is and that that's unfair 01:13:00
16 competition, and we'll have to ask ourselves whether or not
17 they've met their burden of demonstrating some kind of negative
18 impact, and again you'll ask yourself, as you must in
19 determining your answer to these questions, how exactly has
20 Designer Skin been harmed? Have they been able to prove by a 01:13:00
21 preponderance of the evidence that they've lost something
22 financially?

23 And I submit to you that they will not be able to meet
24 that burden.

25 Thank you. 01:13:00

1 THE COURT: All right. The plaintiffs may call their
2 first witness.

3 MR. MIZRAHI: Thank you, Your Honor. We call Mike
4 Shawl.

5 THE DEPUTY CLERK: Step forward, sir. 01:14:00

6 Your name, sir, is Michael Shawl, S-H-A-W-L?

7 THE WITNESS: That's correct.

8 THE DEPUTY CLERK: Please raise your right hand.

9 Do you solemnly swear or affirm that the testimony
10 you're about to give will be the truth, the whole truth and
11 nothing but the truth, so help you God?

12 THE WITNESS: Yes.

13 THE DEPUTY CLERK: Please be seated on the witness
14 chair.

15 THE COURT: You may proceed. 01:15:00

16 MR. MIZRAHI: Thank you, Your Honor.

17
18 MICHAEL SHAWL,
19 called as a witness herein, having been first duly sworn, was
20 examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. MIZRAHI:

23 Q. Please state your name.

24 A. Michael Shawl.

25 Q. And what do you do for a living, Mr. Shawl? 01:15:00

1 A. I'm the creative director for Designer Skin.

2 Q. How long have you had that position?

3 A. Since Designer Skin's inception back in 1998.

4 Q. Where are you from?

5 A. Originally from Michigan. I moved to Arizona in 1985. 01:15:00

6 Q. What kind of background do you have in the work that you do
7 today?

8 A. I have an associate's degree in graphic design with Collins
9 College and freelance experience for several years. I've been
10 doing graphic design since '87. 01:16:00

11 Q. Have you been with Designer Skin since the beginning of
12 Designer Skin?

13 A. Yes.

14 Q. For how long did you say that was?

15 A. For 11 years now. Just over 11 years. 01:16:00

16 Q. And have you had the same position the entire time?

17 A. Yes.

18 Q. Tell me a little bit about what that position is.

19 A. The position entails designing -- starting with labels,
20 designing the products themselves, choosing bottles, caps, the 01:16:00
21 accoutrements that are associated with the product, as well as
22 all the collateral material that it takes to market a product.
23 Advertising, brochures posters, that sort of thing.

24 Q. Is that a full-time job?

25 A. Yes. 01:16:00

1 Q. Has it always been a full-time job?

2 A. Yes.

3 Q. Has that description that you just gave for the jury, has
4 that always been the same job description that you've had?

5 A. Yes.

01:17:0

6 Q. Designer Skin pays you for that work?

7 A. Yes.

8 Q. Now, tell me a little bit about the development of the
9 image or the outside of the bottle. Is that -- is that your
10 function of what you do?

01:17:0

11 A. Yes.

12 Q. How -- I'm sorry. How do you go about doing your job?

13 A. Well, it's a lengthy process. It starts at the beginning
14 of the year, our fiscal year, in the fall, and just after our
15 national trade show. It starts with trend spotting, looking at
16 what needs there are in the industry for new products.

01:17:0

17 Then we go into picking names, creating master lists
18 of names, the direction we want to go, where we might want to
19 add products in our product line.

20 We'll move on to developing the labels themselves, how
21 we want them to look, colors, what message they're trying to
22 relay to the consumer.

01:18:0

23 Then we'll take them into a 3-D program and actually
24 get a look at what they look like, and then from that
25 computer-generated rendering then we'll be able to make our

01:18:0

1 final decisions on how we want the label to look.

2 MR. COLEMAN: Objection, Your Honor. Relevance.

3 THE COURT: The question has been asked. The answer's
4 given. Overruled.

5 BY MR. MIZRAHI:

6 Q. Now, you referenced -- you referenced a trade show in your
7 testimony. What are you talking about?

8 MR. COLEMAN: Objection, Your Honor. Relevance.

9 THE COURT: The relevance is?

10 MR. MIZRAHI: Well, Judge, they lay their products out 01:19:0
11 on an annual basis and so I just want him to tell how -- when
12 the products get launched and when they wind up on Designer
13 Skin's website as an image.

14 THE COURT: I still don't understand the relevance to
15 an issue in this case. 01:19:0

16 MR. MIZRAHI: Well, the relevance is, obviously, the
17 timing of when an image from a particular product will be on
18 Designer Skin's website and available for other people to then
19 come and take it off of the website.

20 THE COURT: Maybe you want to ask that question. 01:19:0

21 MR. MIZRAHI: Okay.

22 THE COURT: Sustained.

23 BY MR. MIZRAHI:

24 Q. Generally speaking, when do Designer Skin's images of a new
25 product line, for example, become available on Designer Skin's 01:19:0

1 website?

2 A. In the fall of every year just after our trade show.

3 Q. And what's significant about the fall of each year?

4 A. That's when we launch all our new products.

5 Q. And is that something that Designer Skin generally does on 01:20:00
6 an annual basis or semi-annual?

7 A. An annual basis.

8 Q. And up through the year before Designer Skin launches its
9 final product, what are you then doing to get that product in a
10 final form to have it ready to be launched? 01:20:00

11 MR. COLEMAN: Relevance.

12 THE COURT: Relevance?

13 MR. MIZRAHI: This is -- this is the creative input
14 that he creates in his work, and he does it throughout the
15 course of the year. 01:20:00

16 THE COURT: I understand that, but the objection is
17 relevance.

18 MR. MIZRAHI: Again, the issue in the case involves
19 creative work that's developed by Mr. Shawl on behalf of
20 Designer Skin over a lengthy period of time and so the 01:20:00
21 relevance is simply that at the end of the day he puts all that
22 energy and time and everything that goes into the creative work
23 that is then established that gives it the creativity that
24 ultimately gives it its unique features and artistic qualities.

25 MR. COLEMAN: Your Honor, we've -- 01:21:00

1 THE COURT: That's not an issue, is it?

2 MR. COLEMAN: No, sir.

3 THE COURT: Sustained.

4 MR. MIZRAHI: Judge, it's --.

5 BY MR. MIZRAHI:

6 Q. Now, on any given year how many products will Designer Skin
7 generally roll out?

8 A. Generally, 10 to 15.

9 Q. Now, in the development of -- strike that.

10 Can you name some of the products that Designer Skin
11 has developed? 01:21:00

12 A. Several.

13 Q. Give me some names.

14 A. Bombshell. Bronze Bondage. Whisper. It goes on. I could
15 name several. 01:22:00

16 Q. Are you the person that's involved in developing those
17 names as well?

18 A. I'm part of a team that will develop names.

19 Q. Who's on that team?

20 MR. COLEMAN: Your Honor, objection. Relevance.
21 Names. 01:22:00

22 MR. MIZRAHI: The names are part of the labels. We're
23 talking about the actual products that we're about to talk
24 about.

25 THE COURT: Well, I thought the question was who's on 01:22:00

1 the team.

2 MR. MIZRAHI: Who does he work with in terms of
3 developing that product.

4 THE COURT: Is this just background?

5 MR. MIZRAHI: Background. It's part of what he does. 01:22:00

6 THE COURT: On that avowal, I'll overrule the
7 objection.

8 BY MR. MIZRAHI:

9 Q. Who do you --

10 A. Myself, Beth Romero, Jennifer Clayton. 01:22:00

11 Q. Now, what happens when you create an image on behalf of
12 Designer Skin, a Designer Skin product? What does Designer
13 Skin then do with that image?

14 A. We'll use that image on our website. We'll use that in
15 advertising. We'll use it for posters. Any promotional 01:23:00
16 material that we create to market the product.

17 Q. Is that image sometimes called a rendering?

18 A. Yeah. That's the general term for it.

19 Q. What is a rendering?

20 A. A rendering, as the term I use it, is something that I 01:23:00
21 generate in a computer program that allows me to create a 3-D,
22 three-dimensional, shape of the bottle and cap and
23 characteristics of the packaging and actually take the label or
24 designs and then put that on that shape and then be able to set
25 up cameras, lights, and be able to take a virtual snapshot or 01:23:00

1 photo of that shape and image.

2 Q. When you're done creating a rendering is that something
3 that's unique?

4 A. Yes.

5 Q. Are you able to identify images that you create in the form 01:24:0
6 of renderings?

7 A. Yes.

8 Q. Now, once a rendering is created what does Designer Skin
9 then use that rendering for?

10 A. Well, first and foremost, we'll use it to fine-tune our 01:24:0
11 packaging. Because at that point the final packaging decisions
12 haven't been made in how the label will look or appear. So
13 we'll use that as a tool to fine-tune placement of logos,
14 graphics, other elements in the label, and then after that we
15 use it for marketing material, like the website and posters and 01:24:0
16 ads.

17 Q. After you develop the label is that when you finalize the
18 rendering?

19 A. Yes.

20 Q. And what's the significance of having a final rendering and 01:24:0
21 a final label?

22 A. Well, the significance of having the label is something to
23 put on the package. Otherwise, the package has no life or
24 character. And the purpose of the rendering is then to use it
25 in the advertising. It's a very -- because it's unique. The 01:25:0

1 clarity is superior to photographs. It's just a much better
2 image to use in our marketing material.

3 Q. Is the artwork on the label the same as the artwork in the
4 rendering?

5 A. Yes. 01:25:00

6 Q. Now, ultimately does the rendering appear on Designer
7 Skin's website?

8 A. Yes.

9 Q. What is the timing of when -- let's say that there's a
10 product launch in a given year, like -- let's say 2005. When 01:25:00
11 would the images that you create during the course of 2005 for
12 launch in the fall of 2005, when does that appear on Designer
13 Skin's website?

14 A. Our goal is to have it on the website or have our website
15 updated by the trade show, which is typically in the fall. 01:26:00

16 Q. Is it after November?

17 A. Usually before, but I couldn't say that in that particular
18 year it wasn't a week after November 1st or the first week
19 or --

20 Q. Okay. So it's sometime in November usually. 01:26:00

21 A. Yes.

22 Q. Okay.

23 So Designer Skin then takes the image and puts it on
24 its website. How does that correspond with the timing of when
25 the actual products are then released? 01:26:00

1 A. We try to have it correspond at the same time. Because
2 consumers are going to hear of our products or perhaps be told
3 by a salon and they want to learn more about our products. Our
4 website's an informational website.

5 Q. So you're trying to time this release so that everything is 01:26:
6 launched at the same time.

7 A. Yes.

8 Q. The products and then also the marketing that goes along
9 with it.

10 A. Yes. 01:27:

11 Q. Now, what kind of information is available on Designer
12 Skin's website?

13 A. Just product information. We have information about
14 upcoming events perhaps. But it's primarily information about
15 our products. If consumers want to learn about our products, 01:27:
16 they can go to our website, click on a link and it would take
17 them to a page that's specific to that product and give them
18 more detailed information than they could learn on a package.

19 Q. Does Designer Skin sell any products on its website?

20 A. No. 01:27:

21 Q. Has Designer Skin ever sold any products on its website?

22 A. No.

23 MR. MIZRAHI: I'm sorry, Your Honor. I beg your
24 indulgence. Paul is assisting with some of the technical
25 aspects of the presentation and so he's accessing Designer 01:28:

1 Skin's website right now off of the disk, and that's going to
2 be pulled up on the monitors and I'm going to have Mr. Shawl
3 then talk about the website itself that Designer Skin
4 maintains.

5 BY MR. MIZRAHI:

6 Q. Do you have your monitor on in front of you?

7 A. Yes.

8 MR. MIZRAHI: I'm sorry. May I ask the jurors if they
9 all can see -- on their monitors if they're all seeing the same
10 thing?

01:28:

11 MR. COLEMAN: Your Honor, I have to object to that.
12 There's no --

13 THE COURT: Well, we're not ready to put it --

14 MR. MIZRAHI: Okay.

15 THE COURT: -- on their monitors until we deal with --

01:28:

16 MR. MIZRAHI: Okay.

17 THE COURT: I don't know if we have any evidentiary
18 objections or not.

19 MR. COLEMAN: I don't know. Let's see what -- Your
20 Honor, I can't say that. Let's see what the witness -- how the
21 witness identifies this website in terms of date.

01:29:

22 THE COURT: Very well.

23 BY MR. MIZRAHI:

24 Q. Mr. Shawl, is this Designer Skin's website?

25 A. Yes.

01:29:

1 Q. Is this how it appears generally today or within the last
2 couple of days?

3 A. Yes.

4 MR. COLEMAN: I would object, then, to the entry of
5 this website, Your Honor, an objection based on relevance, the 01:29:..
6 complaint having been filed in November 2005 and never
7 supplemental. I don't understand what the relevance would be
8 of today's website.

9 THE COURT: What's the relevance of today's website?

10 MR. MIZRAHI: Judge, this is the way that they do 01:29:..
11 business and the way that they maintain the website, and so the
12 way that they do it today is the same as they did it in 2005.
13 So I'm having him show the website and the way that you can --
14 the way that Designer Skin generally shows imaging of its
15 products, its accessibility by the public. 01:29:..

16 MR. COLEMAN: Your Honor, I would object again based
17 on the best evidence rule in this case, because there is not
18 a -- if they want to show the website from 2005, then I think
19 the proper document, electronic or otherwise, would be the
20 website from 2005. 01:30:..

21 THE COURT: I fail to understand what the relevance of
22 today's website or web pages would be.

23 MR. MIZRAHI: Judge, it's -- it's -- the way that they
24 maintain the website today is the same way that they maintained
25 it in 2005. 01:30:..

1 THE COURT: I don't think I heard him say that.

2 MR. MIZRAHI: Okay. Well, that's what -- that's what
3 I'm going to try to establish.

4 THE COURT: Well, then --

5 MR. MIZRAHI: I'll ask --

01:30:

6 THE COURT: -- establish that before you ask me to
7 show this.

8 MR. MIZRAHI: Okay. And I appreciate that. I was
9 trying to get to that beyond the objection.

10 BY MR. MIZRAHI:

11 Q. The only question asked right now is this Designer Skin's
12 website today and then we -- is this Designer Skin's website as
13 it appears today or over the last couple days?

14 A. Yes.

15 Q. Did Designer Skin maintain its website in the same manner
16 for the last, let's say, five years?

01:31:

17 MR. COLEMAN: Your Honor, object to the question as
18 vague.

19 THE COURT: Overruled.

20 THE WITNESS: Yes. Although the look has changed, how
21 we managed it and maintained it has stayed the same.

01:31:

22 BY MR. MIZRAHI:

23 Q. Designer Skin has always used its website as a marketing
24 tool just as it uses it today?

25 A. Yes.

01:31:

1 Q. Designer Skin always maintains images of its products on
2 its website just as it does today?

3 A. Yes.

4 Q. And Designer Skin always provides access to learn about
5 each of the individual products just as it does today?

01:31:

6 A. Yes.

7 MR. COLEMAN: Your Honor, objection. Leading.

8 THE COURT: Sustained.

9 MR. MIZRAHI: Judge, with that, I ask that we publish
10 this to the jury.

01:31:

11 MR. COLEMAN: I renew my objection. The fact that the
12 witness has testified that the look of the website is not the
13 same look, considering that this case is about looks and not
14 all that much more, I would consider that to be -- I would
15 submit that that is a material distinction and that if
16 plaintiff wants to submit the 2005 website then that's
17 precisely what plaintiff should submit.

01:32:

18 THE COURT: And you're objecting on the basis --

19 MR. COLEMAN: On the basis of the best evidence rule
20 and the relevance of the present website.

01:32:

21 THE COURT: Sustained.

22 MR. MIZRAHI: Judge, may I make a record on that?

23 THE COURT: You may -- you want to make an offer of
24 proof? Is that what you're saying?

25 MR. MIZRAHI: Well, what I'm trying to do is I'm

01:32:

1 trying to establish -- contrary to what Mr. Coleman said, the
2 point is not what the website actually looks like today, it's
3 the point of the function of the website as it exists today and
4 as it existed back then, and the point of it is, number one,
5 it's a marketing tool --

01:32:

6 MR. COLEMAN: Your Honor, I would submit --

7 THE COURT: Don't interrupt him. Let me hear what
8 you're --

9 MR. MIZRAHI: Number one, it's a marketing tool that
10 provides information and views of images containing the
11 rendering as it exists today and as it existed back then. The
12 fact that the products might be a little different is
13 immaterial.

01:32:

14 Number two is that it -- what Mr. Shawl is going to be
15 testifying about with respect to this website is the ability of
16 people, just as they could have done since the beginning, to
17 then access those images and then cut and paste them off the
18 website and put them elsewhere.

01:33:

19 THE COURT: The objection will be sustained. You can
20 proceed to ask him whatever questions you're prepared to ask,
21 but the objection will be sustained.

01:33:

22 BY MR. MIZRAHI:

23 Q. Mr. Shawl, the website itself, is it accessible to the
24 public?

25 A. Yes.

01:33:

1 Q. If it's accessible to the public, are the individual images
2 that you create and then put on the website or Designer Skin
3 creates and then puts on the website, are those accessible to
4 the public?

5 MR. COLEMAN: Objection. He is -- again, the 01:33:
6 questions seem to be relating in the present tense.

7 THE COURT: Sustained. Present tense, sustained.

8 BY MR. MIZRAHI:

9 Q. Since the inception of Designer Skin's website, have the
10 images that appear on Designer Skin's website of Designer 01:34:
11 Skin's products in the electronic format that you create, have
12 they always been accessible to the public?

13 A. Yes.

14 Q. And can members of the general public then take those
15 images and copy them off of Designer Skin's website, can they 01:34:
16 do it now and have they always been able to do it?

17 MR. COLEMAN: Objection. Why are we being asked about
18 whether they can do it now?

19 THE COURT: Present tense, sustained.

20 BY MR. MIZRAHI:

21 Q. Have members of the general public been able to access
22 Designer Skin's website and copy Designer Skin's images off of
23 Designer Skin's website?

24 A. Yes.

25 Q. How is that done? 01:34:

1 A. Simple. The simplest way is just to make a right click
2 with the mouse and save it to your hard drive. It'll save that
3 image. You can click on most images on the Internet and --
4 right click and save it to your desktop to then use any way you
5 want to. You can take it into any image-editing program and
6 change it.

01:35:

7 MR. MIZRAHI: Judge, may I -- may I publish the
8 website at this point for the limited purpose of having
9 Mr. Shawl then explain that from a demonstration standpoint of
10 cutting and pasting an image off of Designer Skin's website and
11 then putting it into another format?

01:35:

12 MR. COLEMAN: I would certainly object, Your Honor.
13 Seems like a way to back in a document that's already been
14 excluded.

15 THE COURT: Sustained.

01:35:

16 BY MR. MIZRAHI:

17 Q. Have you reviewed S & L Vitamins's website located at
18 TheSuppleNet.com?

19 A. Yes.

20 Q. Have you reviewed it recently?

01:36:

21 A. Yes.

22 Q. When was the first time that you remember looking at
23 S & L's website?

24 A. Specifically, the beginning of 2006 is my best recollection
25 of the first time that I'd seen the website.

01:36:

1 Q. Did you look at TheSuppleNet's website on October 18th of
2 2006?

3 MR. COLEMAN: Objection, Your Honor. Again, anything
4 after the date of the filing of the complaint which has not
5 been supplemented would seem to be as equally as irrelevant as 01:36:
6 today's website, the date of the complaint being November 14th,
7 2005. All the allegations, all the evidence that would be
8 relevant as to the proof of those allegations would have to be
9 relevant to alleged infringements on that date or earlier.

10 THE COURT: Your response? 01:36:

11 MR. MIZRAHI: My response, Your Honor, is that this is
12 a continuing violation that started before the filing of this
13 lawsuit. There will be evidence presented from back in '05
14 about S & L's copying of the images during that time. Again,
15 Judge, this has been a continuing violation by the defendants 01:37:
16 and S & L Vitamins. At minimum, it goes to the continuing
17 damages that accrues because of the continued showing of the
18 images and sales of the products associated with the images up
19 through today.

20 MR. COLEMAN: Your Honor, under Rule 15(d) a party has 01:37:
21 an opportunity to supplement the pleadings in order to include
22 any ongoing infringements or any post-filing developments.
23 That has not been done in this case.

24 THE COURT: Well, under contested issues of fact and
25 law, the issue as framed, quote, whether S & L has infringed or 01:37:

1 continues to infringe any of Designer Skin's copyrights and
2 slash or has engaged or continues to engage in unfair
3 competition in its use of Designer Skin's copyrighted images,
4 and we know that the final pretrial order supersedes any
5 previous pleadings.

01:38:

6 What am I missing, Mr. Coleman?

7 MR. COLEMAN: Your Honor, if that's what the pretrial
8 order says, the objection is withdrawn.

9 THE COURT: Very well.

10 You may continue.

01:38:

11 MR. MIZRAHI: Thank you, Your Honor.

12 May I approach the clerk?

13 THE COURT: You may.

14 BY MR. MIZRAHI:

15 Q. Mr. Shawl, do you have Exhibit 7 in front of you?

01:38:

16 A. Yes.

17 Q. Do you see as part of Exhibit 7 some printouts of
18 TheSuppleNet website dated October 18, 2006?

19 A. Yes.

20 Q. Did you review S & L's website at TheSuppleNet.com on
21 October 18th, 2006?

01:39:

22 A. Yes.

23 Q. The printout that you're looking at right now, is that
24 something that you generated?

25 A. Yes.

01:39:

1 Q. Does that printout fairly and accurately represent the
2 portion of the website that's shown in that exhibit as you've
3 looked at it on October 18th, 2006?

4 A. Yes.

5 MR. MIZRAHI: Judge, move for the admission of that 01:39:
6 portion of Exhibit 7.

7 MR. COLEMAN: Can you put it on the screen so I can
8 see what -- so I can see it?

9 THE COURT: You've described it as, quote, that
10 portion of Exhibit 7. Has that been -- is that a 01:41:
11 separately-marked exhibit?

12 MR. MIZRAHI: It's not -- it's not marked separate for
13 right now. What we did was we offered as Exhibit 7 a
14 collective grouping of excerpts from the website from different
15 points in time. So I can hold back on moving for the admission 01:41:
16 until the rest of them are verified and we can move for the
17 admission of the totality of Exhibit 7 at some later point in
18 time.

19 THE COURT: And I didn't give Mr. Coleman a chance.
20 Is there an objection to, quote, that portion of Exhibit 7? 01:41:

21 MR. COLEMAN: I mean, it seems that the way that he
22 wants to put it in is reasonable, that he's going to
23 authenticate the individual portions of it, so I have no
24 objection to it.

25 I have no objection, Your Honor. 01:42:

1 THE COURT: Well, the only -- it doesn't matter to me
2 whether you do it in piecemeal but at some point we're going to
3 have the totality of Exhibit 7 offered and ruled on, or if we
4 end up with something less than the totality of Exhibit 7
5 you're going to have to remark any of the individuals as 7-A,
6 B...some method where our record is clear.

01:42:..

7 MR. MIZRAHI: Yes, Your Honor. And I'm happy to do
8 that at a break just to avoid having to talk about this any
9 further when we get to the other portions of Exhibit 7. I'm
10 happy to get with the clerk and break 7 up into different
11 categories.

01:42:..

12 THE COURT: So do you want me to -- are you going to
13 then move all of them at once or --

14 MR. MIZRAHI: Well, I think -- I think I -- at this
15 point I -- the issue is I don't want to get to a point in the
16 trial where I know that I've authenticated -- I'm going to try
17 to authenticate all of them but if at some point one or two of
18 them are not admitted I want to make sure the record is clear
19 on it. So I think -- at the time I put them in, I was hoping
20 to do them all at the same time, to admit them all at the same
21 time, but I'm thinking to have a better record it might be
22 better to break them up as A, B, C, D or 1, 2, 3, 4.

01:43:..

01:43:..

23 THE COURT: This one is October 18, '06, correct?

24 All right. Then --

25 MR. MIZRAHI: Correct.

01:43:..

1 THE COURT: Then that will be admitted subject to the
2 determination whether that's a separate exhibit or part of a
3 total package.

4 MR. MIZRAHI: Thank you, Your Honor.

5 BY MR. MIZRAHI:

01:43:

6 Q. Mr. Shawl, do you have that exhibit in front of you?

7 A. Yes.

8 Q. Now, looking at the images contained on that exhibit, are
9 those products all products created by Designer Skin?

10 A. Yes.

01:44:

11 Q. Now, if we turn to Smolder, did Designer Skin create an
12 electronic rendering or image for the product Smolder?

13 A. Yes. That's my created image.

14 Q. Did Designer Skin create that image in or before the fall
15 of 2005?

01:45:

16 A. In or before? It's -- I don't have the roll-out dates for
17 our products memorized, but I would say before.

18 Q. Do you see the image that's on the screen in front of you?

19 A. Yes.

20 Q. What is that image?

01:45:

21 A. That's my 3-D rendering of Smolder.

22 Q. Do you see the image in front of you right now?

23 A. Yes.

24 Q. What is that image?

25 A. That, once again, is my 3-D image of Smolder.

01:46:

1 Q. Where does the second image come from?

2 A. From S & L's website.

3 Q. Is that as it appeared on S & L's website on October 18th,
4 2006?

5 A. Yes.

01:46:00

6 MR. MIZRAHI: Judge, I respect to publish -- I
7 respectfully request to publish that image to the jury.

8 MR. COLEMAN: Your Honor, I would object. The witness
9 seems to be unable to testify for a fact that this was on the
10 Designer Skin website prior to the filing of the complaint. He
11 seemed to be rather vague about it. Maybe counsel can ask him
12 to firm up that date, but without affirmative proof...

01:46:00

13 THE COURT: And therefore your objection would be?

14 MR. COLEMAN: Therefore, my objection would be that if
15 it was on the -- if it was not on the Designer Skin website as
16 of the date of the filing of the complaint the complaint would
17 not cover -- that infringement or alleged infringement would
18 not be included in the complaint.

01:47:00

19 MR. MIZRAHI: Judge, he clearly stated that this was a
20 product that was either rolled out in or before 2005, and the
21 complaint was filed in the fall of 2005.

01:47:00

22 MR. COLEMAN: I'm sorry. It wasn't a question about
23 it being rolled out. The issue -- I think the testimony is
24 that it was on the Designer Skin website at an indeterminant
25 time.

01:47:00

1 MR. MIZRAHI: Judge, again, the testimony has been
2 that they roll out the product and they submit the images and
3 they try to do those simultaneously.

4 THE COURT: What's the significance as to whether it
5 was before or after the complaint? 01:47:

6 MR. COLEMAN: Well, unlike the pretrial order, which
7 we've -- which we all agree covers any alleged continuing
8 infringement, the complaint itself still only deals with the
9 Designer Skin website as it existed at the time of the filing
10 of the complaint. If we can't get positive testimony that the 01:48:
11 images in question were on the Designer Skin website, then the
12 infringement -- the complaint would -- then those images would
13 not be a part of the subject matter of the complaint.

14 THE COURT: Your response to that?

15 MR. MIZRAHI: First of all, this -- this product -- 01:48:
16 this subject is in the complaint as part of the subject matter
17 of this case. This product is in the pretrial order. And this
18 is a continuing infringement by the defendants and so the point
19 is that this product has been out since the fall or before the
20 fall of 2005, it's on the website in 2006, and Mr. Shawl's 01:48:
21 testimony is that that's -- that is his image, that they're
22 displaying his image on their website in October of 2006.

23 THE COURT: The objection is overruled with regard --
24 the objection is overruled.

25 MR. MIZRAHI: Thank you, Your Honor. 01:49:

1 So we can publish this image to the jury?

2 THE COURT: That's really a -- I'm not sure what -- is
3 this an exhibit or -- I guess the right-hand image has been
4 taken from the S & L website. Is that the same document I just
5 admitted? 01:49:.

6 MR. MIZRAHI: This -- the right-hand image is from the
7 S & L website. It's from the -- basically, the images that are
8 contained in 10/18/06 document, and this is a demonstrative
9 point that we're just making. And he's authenticated both
10 images. 01:50:0

11 THE COURT: Well, my question is, though, is the
12 right-hand image taken off of Exhibit 7, October 18, 2006, that
13 I've admitted into evidence?

14 MR. MIZRAHI: That's the same -- yes, it's the same
15 image that's blown up that has been existing on their website 01:50:0
16 on October 18th, 2006, before October 18, 2006, after October
17 18, 2006.

18 THE COURT: All right. I see it now. Then the
19 left-hand image --

20 MR. MIZRAHI: The left-hand image is -- by Mr. Shawl's 01:50:0
21 testimony, that's the rendering that he created.

22 THE COURT: All right. You may publish.

23 MR. MIZRAHI: Thank you, Your Honor.

24 BY MR. MIZRAHI:

25 Q. Again, Mr. Shawl, have you formed any conclusions or 01:51:0

1 determinations regarding these two images?

2 A. That they're the same. It's the same -- it's the same
3 image.

4 Q. How do you know that they're the same image?

5 A. Well, because they're created in a 3-D program there's
6 distinct lighting on the products. The placement of the label,
7 the cap. Specifically the cap. When I generated that
8 particular image, we were developing that cap. We were in the
9 middle of developing that cap and we weren't quite sure of the
10 proper proportions to the bottle so I kind of guessed and it
11 actually came out to be -- in the rendering represents a little
12 bit larger cap than what was true to be.

01:51:

01:52:

13 There's other aspects that make it easily identifiable
14 as the same, just how the -- the outer accoutrement, which is
15 like a wine bottle, decorative wine bottle cover. It's exactly
16 the same. The highlight points. When I create it in a 3-D
17 program I create lights that will actually light up the virtual
18 image and set the camera position.

01:52:

19 And all those characteristics are true for both
20 images.

01:52:

21 Q. Mr. Shawl, if somebody was going to take the actual Smolder
22 product and then try to take a photograph of it, would it look
23 like either of these images that we're looking at?

24 MR. COLEMAN: Objection. Speculative.

25 THE COURT: Overruled.

01:53:

1 THE WITNESS: The question is would it look like any
2 of these images?

3 BY MR. MIZRAHI:

4 Q. Would it look like these two images?

5 A. No.

01:53:00

6 Q. Bronze Bondage. Is Bronze Bondage an image -- is Bronze
7 Bondage a Designer Skin image?

8 A. Yes.

9 Q. Is Bronze Bondage a Designer Skin image that you created?

10 A. Yes.

01:53:00

11 Q. Did you create the Bronze Bondage image before the fall of
12 2005?

13 A. Yes.

14 Q. Is Bronze Bondage or an image of Bronze Bondage appear on
15 the 10/18/06 website printout in front of you?

01:53:00

16 A. Yes.

17 Q. Have you compared the images of Bronze Bondage from S & L's
18 website of 10/18/06 and Designer Skin's website and your
19 rendering?

20 A. Yes, I have.

01:54:00

21 Q. Have you formed any conclusions or determinations regarding
22 the two images?

23 A. That they're the same image, my created 3-D image.

24 Q. Now, the Bronze Bondage product, is this it?

25 A. Yes.

01:55:00

1 Q. Now, on your screen in front of you, what is the image that
2 you're looking at on your left?

3 A. That's the 3-D image that I created.

4 Q. And what is the image on the right?

5 A. As it appeared on the S & L website back in 2006. 01:55:

6 Q. Have you formed any conclusions or determinations about
7 those two images?

8 A. Yes; that they're the same image.

9 Q. How do you know that they're the same image?

10 A. Much like the Smolder bottle, because it's generated in a 01:55:
11 3-D program and I'm able to set the light and camera angle.

12 Bronze Bondage had a leather corset accoutrement that at the
13 time that I did the rendering we didn't have out of production
14 so I had no way to take a photo so I did my own representation
15 of it, and my representation ended up being a little bit bigger 01:56:
16 than what we ultimately ended up deciding on, and the rendering
17 that I did as well as the rendering that appeared on S & L's
18 website is of that larger core set that we never produced.

19 Q. Are the caps the same?

20 A. The caps appear to be the same, yes. It's that oversized 01:56:
21 cap that I miscalculated the scale.

22 Q. Are the lighting points the same?

23 A. Yes. One feature of a 3-D program is that I can have
24 separate lights for different elements in the final rendering.

25 In this case, I had specific lights on the cap to give it a 01:56:

1 certain look and show that dimension and the proper shadowing,
2 and I had separate lights on the bottle itself which leave
3 distinct highlight points that I reference.

4 MR. MIZRAHI: Judge, permission to publish this image
5 to the jury? 01:56:.

6 MR. COLEMAN: No objection.

7 THE COURT: You may.

8 BY MR. MIZRAHI:

9 Q. Now, the Bronze Bondage product, is that still in
10 production? 01:57:.

11 A. No. We discontinued that product.

12 Q. Before you discontinued it -- we see a crown-like cap on
13 the product. Did it always have that cap?

14 A. No.

15 Q. It's -- 01:57:.

16 A. Only for about six months. We had some production issues
17 and we chose a different cap.

18 Q. Is this what Bronze Bondage ultimately looked like?

19 A. Yes.

20 Q. Now, we see on the actual product --. 01:57:.

21 MR. MIZRAHI: May I approach the witness, Your Honor?

22 THE COURT: Let me first ask, is this an item in
23 evidence?

24 MR. MIZRAHI: These are purely demonstrative, Your
25 Honor.

1 THE COURT: Have they been -- you have no objection,
2 Mr. Coleman?

3 MR. COLEMAN: I've never seen it before, Your Honor.
4 I would object. It has not been produced. It hasn't been
5 produced in discovery and I've never had the opportunity to 01:58:
6 consider it myself. I would object, yes. It's not on the
7 exhibit list.

8 THE COURT: Sustained.

9 MR. MIZRAHI: Judge, the products themselves are
10 actually listed, because we listed Designer Skin products on 01:58:
11 the final pretrial. So I want to clarify that point. And
12 also, these are the actual -- these are the same products that
13 his client is selling. So from a disclosure standpoint --

14 THE COURT: Wait a minute.

15 MR. MIZRAHI: -- these are the same products. 01:58:

16 THE COURT: Wait a minute. We've established that
17 they are not exhibits marked in evidence, correct?

18 MR. MIZRAHI: That's correct.

19 THE COURT: And under what theory does the fact that
20 you call them -- what did you call them? Documentary or -- 01:59:

21 MR. MIZRAHI: I just said they're demonstrative. I
22 just --

23 THE COURT: How does that theory allow you to wave
24 them around the courtroom?

25 MR. MIZRAHI: I'm sorry, Judge. I don't understand. 01:59:

1 THE COURT: Well --

2 MR. MIZRAHI: These -- these are within the scope
3 of --

4 THE COURT: My point is is the mere fact you label
5 them documentary or illustrative doesn't automatically give you 01:59:
6 license to wave them around the courtroom, does it?

7 MR. MIZRAHI: Okay, Judge. I'll put them back in the
8 box.

9 BY MR. MIZRAHI:

10 Q. Next product. Bipolar. Is Bipolar one of the products 01:59:
11 that you looked at on S & L's website on October 18, 2006?

12 A. Yes.

13 Q. Did you create a rendering for the bipolar product?

14 A. Yes.

15 Q. Was that one of the products that you created on or before 02:00:
16 the fall of 2005?

17 A. Yes.

18 Q. When you looked at the website images of October 18, 2006,
19 did you see the Bipolar image?

20 A. Yes. 02:00:

21 Q. Did you form any conclusions or determinations concerning
22 the image that you were looking at on S & L's website on
23 October 18, 2006?

24 A. It appeared to me to be the rendering that I created.

25 Q. Sheer Wisdom. Is Sheer Wisdom a product that you created 02:01:

1 the outside of the bottle for, the image?

2 A. Yes.

3 Q. Did you create a rendering for that product?

4 A. Yes.

5 Q. And that rendering ultimately -- did that turn into the
6 label and the label turn into the rendering and you finalize
7 both of those things as essentially the same artwork?

02:01:

8 A. Yes.

9 Q. Just as the other products that we're talking about?

10 A. Correct.

02:01:

11 Q. Did you -- did you see Sheer Wisdom on S & L's website on
12 October 18, 2006?

13 A. Yes.

14 Q. Did you form any conclusions or determinations regarding
15 that image?

02:02:

16 A. That it appeared to be the rendering that I created.

17 Q. On the screen in front of you, what is the image on your
18 left?

19 A. That's the 3-D rendering that I created.

20 Q. What is the image on your right?

02:02:

21 A. The 3-D the image I created. That appears on S & L's
22 website.

23 MR. MIZRAHI: Request to publish that one to the jury,
24 Your Honor?

25 THE COURT: You may proceed.

02:02:

1 BY MR. MIZRAHI:

2 Q. Now, how do you know that we're looking at the same images?

3 A. Well, the one distinct feature that gives it away to me is
4 that when I develop that 3-D bottle in the program it had a
5 flat front because it displayed a couple of our products a
6 little bit better than if I had created it more like the
7 bottle, and you can see a distinct edge that encircles the
8 front of the label, and it appears on both images, which
9 wouldn't have shown up on the actual product.

02:03:00

10 Q. Is there anything else distinctive about that image?

02:03:00

11 A. Once again, because of the lighting conditions that I set
12 in the program those lighting -- the shadows in the cap match
13 identically as well as highlights on the bottle.

14 Q. Ray of Light. Is that an image that you created?

15 A. Yes.

02:03:00

16 Q. Did you create that image and that product on or before the
17 fall of 2005?

18 A. Yes.

19 Q. Does that image appear on S & L's website in front of you
20 on 10/18/06?

02:04:00

21 A. Yes.

22 Q. Did you form any conclusions with respect to the image that
23 you created and the image that appears on S & L's website?

24 A. Yes, that they were the same image, the 3-D image that I
25 created.

02:04:00

1 Q. And again, on that product do you -- how do you know
2 they're the same image?

3 A. Much like the last one, Sheer Wisdom, it has that distinct
4 line that wouldn't appear in the final packaging and the same
5 highlights and shadowing effects and the cap and other areas of
6 the bottle.

02:04:

7 Q. If one were to take a photograph of that product, would it
8 look like -- would it look exactly like the image in front of
9 you?

10 A. No.

02:04:

11 Q. Now, on the image in front of you there's also additional
12 features, such as a logo that says Body Source and a notation
13 on the top that says bodysourceonline.com. Do you see that?

14 A. Yes.

15 Q. How would somebody go about adding those features to an
16 image of a Designer Skin product?

02:05:

17 A. Once they download the image to their desk top, they can
18 take it into any program that's available on most computers for
19 digital photo editing and add any graphics, texts, logos of any
20 nature to the image.

02:05:

21 MR. MIZRAHI: Your Honor, request to publish that one
22 to the jury.

23 THE COURT: Granted.

24 BY MR. MIZRAHI:

25 Q. Tao. Is Tao a product that you created on behalf of

02:05:

1 Designer Skin?

2 A. Yes.

3 Q. Is Tao a product that appears on S & L's website?

4 A. Yes.

5 Q. Have you formed any conclusions or determinations regarding 02:06:00

6 the image that you saw on S & L's website on October 18, 2006

7 and the image that you created?

8 A. Yes. The image on S & L's website is my created image.

9 Q. How do you know that?

10 A. Just like the last two products. It has the distinct line 02:06:00

11 on the front of the label and the same shadowing and highlights

12 in the cap and in the bottle.

13 MR. MIZRAHI: Request to publish Tao to the jury.

14 THE COURT: You may.

15 MR. MIZRAHI: Thank you. 02:06:00

16 BY MR. MIZRAHI:

17 Q. Next product. Amazing Face. Is Amazing Face a product you
18 created?

19 A. Yes, it is.

20 Q. You created that on behalf of Designer Skin? 02:07:00

21 A. Yes, I did.

22 Q. And did you create that product in the same manner that's
23 consistent with the other products and the testimony you gave
24 earlier about the way that products are developed on behalf of
25 Designer Skin? 02:07:00

1 A. Yes.

2 Q. You created a computer-generated rendering for that
3 product?

4 A. That's correct.

5 Q. For that product, is that one that Designer Skin launched
6 on or before the fall of 2005?

02:07:

7 A. Yes.

8 Q. Did you have an opportunity to see the Amazing Face or --
9 I'm sorry -- Amazing Face on S & L's website?

10 A. Yes, I did.

02:07:

11 Q. To be specific, we're referring to the 10/18/06 time that
12 you looked at the website?

13 A. Yes.

14 Q. Did you form any conclusions or determinations?

15 A. That it was the same image.

02:08:

16 MR. MIZRAHI: Request to publish that one to the jury.

17 THE COURT: Granted.

18 BY MR. MIZRAHI:

19 Q. Ritual. Is Ritual a product that you created on behalf of
20 Designer Skin?

02:08:

21 A. Yes, sir.

22 Q. Is that a product that Designer Skin launched on or before
23 the fall of 2005?

24 A. Yes, it is.

25 Q. Is that a product that you were able to see on S & L's

02:08:

1 website on October 18, 2006?

2 A. Yes, it was.

3 Q. Did you form any conclusions or determinations about that
4 image?

5 A. In the same manner, yes. It was the same image, the image 02:08:
6 that I created.

7 Q. And how did you know that?

8 A. That particular product has the crown cap, like Smolder,
9 has the same highlight points, the same shadowing effect, and
10 then the oversized cap. 02:09:

11 MR. MIZRAHI: Request to publish Ritual.

12 THE COURT: Granted.

13 MR. MIZRAHI: Thank you.

14 BY MR. MIZRAHI:

15 Q. Shrine. Is Shrine a product you created the image for on 02:09:
16 behalf of Designer Skin?

17 A. Yes.

18 Q. Is that a product that Designer Skin created on or before
19 the fall of 2005?

20 A. Yes, it is. 02:09:

21 Q. Is that an image that you had an opportunity to view on
22 S & L's website?

23 A. I did.

24 Q. Did you form any conclusions or determinations regarding
25 that image? 02:09:

1 A. That it was my created image.

2 Q. And if I ask you how you know that -- well, I'll just ask
3 you. How do you know that?

4 A. In the same manner that I know the other ones are: The
5 highlight in the cap, the shadow effect, the ridge, which is 02:10:0
6 not as prominent on this one but I can see it because it's my
7 work, but in the same manner I determined the other ones were.

8 MR. MIZRAHI: Request to publish Shrine.

9 THE COURT: You may.

10 MR. MIZRAHI: Thank you. 02:10:0

11 BY MR. MIZRAHI:

12 Q. Dolce. Is Dolce a product that you created on behalf of
13 Designer Skin?

14 A. Yes.

15 Q. Did you create that product just like you created these 02:10:0
16 other products?

17 A. Yes.

18 Q. Is that one Designer Skin launched on or before the fall of
19 2005?

20 A. It did. 02:10:0

21 Q. Did you have an opportunity to see Dolce on S & L's
22 website?

23 A. I did.

24 Q. Did you form any conclusions or determinations regarding
25 that image? 02:11:0

1 A. Once again, it was the same image, my created image.

2 Q. Now, Dolce is one of those products that has an
3 accoutrement on it?

4 A. Yes.

5 Q. Can you tell the jury why you think or why you have
6 determined that that is your image that S & L is using or did
7 uses on that day on the website?

02:11:

8 A. Right.

9 Well, like the other products we have discussed, Dolce
10 has the same characteristics, the highlight points from the
11 lights that I've set up in the 3-D program, the same shadowing
12 in the cap, the oversized cap. And then it has the hair
13 scrunchy, it had like a blue feather hair scrunchy that I had
14 to add after I had rendered the image in the 3-D program in a
15 program called Photoshop where I actually took a picture of the
16 hair scrunchy and then had to add it digitally in the program.
17 And when I look at them it's obvious that it's identical. It
18 would be impossible to replicate the feathers coming off it and
19 the direction they are and the highlights in the feather
20 themselves.

02:11:

02:11:

02:12:

21 MR. MIZRAHI: Request to publish Dolce to the jury?

22 THE COURT: Granted.

23 MR. MIZRAHI: Thank you.

24 BY MR. MIZRAHI:

25 Q. Veritas. Did you create Veritas?

02:12:

1 A. Yes.

2 Q. Is that a product that you created and that Designer Skin
3 rolled out on or before the fall of 2005?

4 A. Yes, we did.

5 Q. Is that a product that appears on the printout of S & L's
6 website that you made on October 18, 2006?

02:12:00

7 A. Yes, it does.

8 Q. Did you form any conclusions or determinations regarding
9 those images?

10 A. That they're the same image, the image I created.

02:13:00

11 Q. Why?

12 A. Like the other products we discussed, the cap is very
13 distinctive. It's the oversized cap with the same shadowing as
14 the others, same highlight points. Like Smolder and Dolce, we
15 added an accoutrement we weren't able to display on this
16 particular product because we -- because of production issues
17 we didn't have it in and so I had to generate one in the
18 program I use, the logo Veritas with the V, and that's not
19 representative of our final product so I know on close
20 examination that that's my rendering.

02:13:00

02:14:00

21 MR. MIZRAHI: Request to publish Veritas.

22 THE COURT: You may.

23 MR. MIZRAHI: Thank you.

24 BY MR. MIZRAHI:

25 Q. Angel. That's an old Designer Skin product, isn't it?

02:14:00

1 A. Yes.

2 Q. That one that Designer Skin rolled out prior to the fall of
3 2005?

4 A. Yes.

5 Q. Now, did Designer Skin do anything different in terms of
6 the creation of this image as it appears on its website?

02:14:

7 A. Well, that particular year, due to time line constraints, I
8 wasn't able to fully develop a 3-D rendering for that
9 particular product so I had to take a photo of Angel.

10 Q. Have you had the opportunity to look at the Angel image on
11 S & L's website?

02:15:

12 A. Yes.

13 Q. Did you form any conclusions or determinations regarding
14 that image?

15 A. It appeared to be the same photo that I took.

02:15:

16 Q. Undercover Angel. Undercover Angel is a different product
17 than Angel?

18 A. Yes. Different fragrance.

19 Q. Was that product produced by Designer Skin and rolled out
20 prior to the fall of 2005?

02:15:

21 A. Yes.

22 Q. Like Angel, is that a photo or is that a rendering?

23 A. It's a photo.

24 Q. Did you have an opportunity to look at the image on S & L's
25 website on October 18, 2006?

02:16:

1 A. Yes.

2 Q. Did you form any conclusions about that image?

3 A. Much like I did on my 3-D renderings, just looking at
4 shadows and highlights I was able to determine that it was the
5 same image.

02:16:

6 Q. Now, there's other products that existed on S & L's website
7 on October 18th, 2006 that were manufactured by Designer Skin.

8 A. Yes.

9 Q. Did you have a chance to review those images?

10 A. Yes.

02:16:

11 Q. Did you have the ability to form opinions or determinations
12 and conclusions about those images in the same manner that you
13 formed conclusions and determinations about these other
14 products that we just went over?

15 A. Based on images that I had to work with, I couldn't
16 conclusively say that those were my rendered images, but
17 assuming -- since the rest were and based on the thumbnails I
18 could see, which are very low resolution, they appeared to be
19 my renderings.

02:17:

20 Q. Have you had occasion to -- strike that.

02:17:

21 Can you make that determination to the same level of
22 conclusiveness that you talked about these other images that we
23 just went over?

24 A. I can't. I can't be certain that those are conclusively my
25 renderings.

02:17:

1 Q. Now, have you had a chance to look at S & L's website
2 recently?

3 A. Yes.

4 Q. Were you able to find images on Designer Skin -- I'm
5 sorry -- on S & L's website that were the same images that you
6 were looking at on 10/18/06 and as you just testified were the
7 same images that you've determined that are your original
8 works?

02:17:

9 MR. COLEMAN: Objection, Your Honor. Vague and best
10 evidence rule. Vague as to the number of the specifics and
11 best evidence because he's being asked to testify about a
12 document rather than authenticating the actual document itself.

02:18:

13 THE COURT: I'll sustain it as to the vagueness of the
14 question.

15 You may reframe the question.

02:18:

16 BY MR. MIZRAHI:

17 Q. Do you recall seeing images of Designer Skin's -- I'm
18 sorry. Do you recall seeing on S & L's website images of your
19 renderings or your creations as recently as last week?

20 A. Yes.

02:20:

21 Q. Do you recall how many of the images that you saw on the
22 website from last week that were your images?

23 A. I believe eight.

24 Q. Do you remember which ones they were?

25 A. Not offhand.

02:20:

1 Q. Were they eight of the images that we just went over?

2 A. Yes.

3 Q. Do you recall whether S & L was still selling Bronze
4 Bondage as of last week?

5 A. Yes, I believe they were.

02:20:

6 Q. When was the last time Designer Skin sold Bronze Bondage?

7 A. I believe it was 2000 -- we discontinued it in 2007.

8 Q. If someone were to buy a bottle of Bronze Bondage today, a
9 brand new bottle of Bronze Bondage, would that product still be
10 a viable product?

02:21:

11 MR. COLEMAN: Objection. Vague. And this witness has
12 not been -- established as an expert on product quality, nor is
13 it an issue in this case.

14 THE COURT: Sustained.

15 BY MR. MIZRAHI:

16 Q. Does Designer Skin have expiration dates on its products?

17 MR. COLEMAN: Objection. Relevance.

18 THE COURT: The relevance would be?

19 MR. MIZRAHI: The relevance are -- first of all, it
20 goes to the unfair competition claim. This is exactly the kind
21 of stuff that Designer Skin does not want to do and that's why
22 it controls its --

02:21:

23 THE COURT: I'm not aware that there's issue in the
24 case regarding the quality or -- quality of the product.

25 MR. MIZRAHI: The issue, Your Honor, is that Designer

02:21:

1 Skin --

2 THE COURT: Just tell me what issue it is in the final
3 pretrial order and that will help me.

4 MR. MIZRAHI: The --

5 THE COURT: Tell me what number and paragraph. 02:22:00

6 MR. MIZRAHI: Okay.

7 D-1. False association, unfair competition portion.

8 THE COURT: D as in Delta?

9 MR. MIZRAHI: D as in Delta. 1.

10 THE COURT: It all seems to deal with images and 02:22:00
11 labels and not expiration dates or quality of the product. The
12 objection is sustained.

13 MR. MIZRAHI: Thank you very much, Mr. Shawl. No
14 further questions.

15 THE COURT: All right. Cross-examination. 02:23:00

16 MR. COLEMAN: Yes.

17

18 CROSS-EXAMINATION

19 BY MR. COLEMAN:

20 Q. Good afternoon, Mr. Shawl. 02:24:00

21 You testified about a series of renderings and you
22 stated in the case of each one that you were reasonably sure
23 that they were on the Designer Skin website in the fall of
24 2005.

25 Is that correct? 02:24:00

1 MR. MIZRAHI: Objection. Misstates testimony.

2 THE COURT: Overruled.

3 THE WITNESS: I can say that for certainty they were
4 on our website. What I couldn't say at the time when I
5 misunderstood the question is when we actually -- what year we
6 rolled out that program, but all the specific products we
7 discussed I can say with certainty were on our website.

02:24:

8 BY MR. COLEMAN:

9 Q. During -- and -- on your website at what time?

10 A. On or before the October 18th of 2006.

02:24:

11 Q. Okay. How about -- let me then clarify. Perhaps we're not
12 understanding each other.

13 I thought -- I thought your testimony was that you
14 were able to say that these had been put on the Designer Skin
15 website by the fall of '05. Am I misunderstanding?

02:25:

16 A. When we develop products at the end of the year just prior
17 to launching our products we upload them to our website and
18 display those products specific for that year as well as prior
19 years on our website.

20 Q. So if I were to tell you that the complaint in this action
21 was filed in November 14th, 2005, could you testify right now
22 that each and every one of the images that you have testified
23 about was on the Designer Skin website at the time of the
24 filing of the complaint?

02:25:

25 A. What was the date?

02:26:

1 Q. November 14, 2005.

2 MR. MIZRAHI: Object to relevance.

3 THE COURT: Overruled.

4 THE WITNESS: And which specific -- which products are
5 you asking? 02:26:

6 BY MR. COLEMAN:

7 Q. All of them.

8 A. All of them. All of them that we had just discussed.

9 Q. Yes.

10 A. Yes. 02:26:

11 Q. You can say with certainty now that they were on the
12 Designer Skin website prior to November 14th, 2005?

13 MR. MIZRAHI: Objection. Asked and answered.

14 THE COURT: Overruled.

15 THE WITNESS: My best recollection, yes. 02:26:

16 BY MR. COLEMAN:

17 Q. What is it that would make you remember that specific date?

18 A. We try to target the trade show. We might be a week
19 late --

20 Q. Well -- 02:26:

21 A. -- or a week early to the trade show, so depending on when
22 the trade show corresponded that particular year with November
23 14th would ultimately help me decide that answer.

24 Q. When was the trade show that year? 2005.

25 A. Either the last week of October or the first week in 02:27:

1 November.

2 Q. You testified with respect to each one of these renderings
3 that the photographs would not have come out the same way that
4 if they had been photographed. Did you compare photographs of
5 the products to your renderings in order to come to that
6 conclusion?

02:27:

7 A. Yes.

8 Q. Do you have those photographs with you in court today?

9 A. No.

10 Q. Who took those photographs?

02:27:

11 A. I did.

12 Q. You took them yourself?

13 A. Yes.

14 Q. How many did you take?

15 A. I'm not sure but one year we decided that perhaps instead
16 of using the 3-D renderings that photos might look better on
17 certain products, so I took a series of photos and we
18 determined at point that they weren't better or clearer.

02:28:

19 Q. So, in other words, you're not -- you weren't saying that
20 you compared S & L's renderings, or rather, S & L's images to
21 photographs. That is not the case. Is it?

02:28:

22 I'll withdraw that question. It's not clear.

23 Did you -- you're saying that in the past, as a
24 general rule, you compared your electronic renderings to
25 photographs, correct?

02:28:

1 A. Correct.

2 Q. With respect to the S & L images from its website, did you
3 ever compare those to what photographs would look like?

4 A. I'm saying that those are my images so I'm saying that,
5 yes, I compared them to my images. 02:28:

6 Q. You compared what to your images?

7 A. My 3-D renderings to my photo images.

8 Q. Right. But Mr. Mizrahi asked you whether photographs would
9 have come out the same way, so I'm asking you whether in
10 reaching that conclusion you actually compared photographs of 02:29:
11 the respective products to the S & L images.

12 A. Well, since I compared the S & L images to my 3-D images
13 and came to the conclusion that they were the same, I'm saying
14 that, yes, I compared my 3-D images to the photos that I took
15 and I'm saying that S & L's images are my 3-D images. 02:29:

16 Q. Okay. But when he asked you whether the specific S & L
17 images could not have come out the same way if they had been
18 photographs were you just giving a general answer as opposed to
19 one based on having made the comparison?

20 A. In my opinion, they are -- they -- you cannot replicate a 02:29:
21 photograph to match the 3-D renderings because of the
22 characteristics of the 3-D renderings.

23 Q. Is your opinion based on your academic training in graphic
24 arts, in part?

25 A. Yes. 02:30:

1 Q. Is it based on your experience with this -- in this
2 particular job?

3 A. It's based on the fact that I created all these images and
4 I'm very close to these images and I could recognize them very
5 easily.

02:30:00

6 Q. Would you say that you have a high degree of expertise
7 regarding comparing these images?

8 A. Yes.

9 Q. Do you think consumers looking at TheSuppleNet website
10 would be able to tell the difference?

02:30:00

11 MR. MIZRAHI: Objection. Relevance.

12 MR. COLEMAN: Your Honor, the --

13 THE COURT: Your response?

14 MR. COLEMAN: The plaintiff has stipulated, the Court
15 has ruled that these -- that if photographs of these products
16 had been taken there would be no objection as to copyright. I
17 am seeking to have the witness demonstrate that, although he is
18 an expert and upon inspection based on his experience and
19 expertise he can tell the difference, that since a -- that a
20 consumer would not be able to tell the difference and therefore
21 there are no damages.

02:31:00

02:31:00

22 MR. MIZRAHI: Judge, if that's the objection then it's
23 both relevance and lack of foundation, because the point is the
24 copying. That's the issue. And whether or not a consumer can
25 tell or can't tell, first of all, is not necessarily something

02:31:00

1 that this witness can necessarily talk about, and number two,
2 it doesn't change the fact that they copied the images. That's
3 wrong and that's actionable.

4 THE COURT: The objection is sustained.

5 BY MR. COLEMAN:

6 Q. Are you able to tell whether or not a consumer could tell
7 the difference between the images?

8 MR. MIZRAHI: Same objection.

9 MR. COLEMAN: He said it lacked foundation. I'm
10 trying to see if I can establish foundation.

02:32:0

11 THE COURT: Overruled.

12 THE WITNESS: No.

13 BY MR. COLEMAN:

14 Q. Now, the photographs that Mr. Mizrahi had you compare on
15 the screen, and I don't really have control of the computer so
16 I'm going to have to a little bit wing this, isn't it the case
17 that in each one of these photographs TheSuppleNet picture, the
18 S & L picture, was somewhat fuzzier than the original or your
19 picture?

02:32:0

20 MR. MIZRAHI: Objection, Your Honor. They're not
21 photographs.

02:33:0

22 THE COURT: You may have misspoken but you used the
23 term "photograph".

24 MR. COLEMAN: The images.

25 THE WITNESS: Could you rephrase the question?

02:33:0

1 BY MR. COLEMAN:

2 Q. When we were looking at the screen, the side-by-side
3 comparisons --

4 A. Yes.

5 Q. -- isn't it the case that TheSuppleNet images were fuzzy,
6 less sharp?

7 A. They appeared to be a lower resolution.

8 MR. MIZRAHI: Objection, Your Honor. Vague as to
9 which images.

10 THE COURT: Overruled.

11 BY MR. COLEMAN:

12 Q. They seem to be a lesser -- can you explain for the jury
13 what it means they were a lesser resolution?

14 A. Well, you can change the size of images in the computer.

15 You can have a very detailed image that has a lot of pixel
16 information and how that image is created and when you reduce
17 that in size you lose some of that information and it appears
18 sometimes to be fuzzy.

19 Q. When you made the comparisons were you looking at the
20 versions on Exhibit 7 that's been admitted into evidence or
21 were you looking at the screen with the blowup of the images?

22 A. I'm not sure I understand the question.

23 Q. When you made your comparison that's the basis of your
24 testimony that these were the same images, were you looking at
25 the printout of the website which has been admitted into

1 evidence as Exhibit 7 -- do you have it in front of you,
2 Exhibit 7?

3 A. Uh-huh.

4 Q. Were you looking at that or were you looking at these
5 computer demonstrations? 02:34:00

6 A. Both.

7 Q. Now, you did testify that there were a couple of
8 photographs that were found on the website -- on the S & L
9 website. Is that correct?

10 A. Yes. 02:35:00

11 Q. Do you remember which products those were?

12 A. Angel and Undercover Angel.

13 Q. And the reason -- in other words, those were photographs
14 that had also been used -- published as photographs on the
15 Designer Skin website? 02:35:00

16 A. Yes.

17 Q. And the reason for that, again, was what?

18 A. Because of our production time lines that we work every
19 year. There wasn't enough time to develop a 3-D image, a
20 shape, to wrap those particular images on to create a 3-D
21 image, so under a time line crunch we had to use images. 02:35:00

22 Q. And would the time line crunch have been that rush to get
23 the pictures on line before the trade show?

24 A. Not only on line but also with our distributors. We're a
25 distributor-based business so to meet their catalog deadlines 02:36:00

1 we have to have our product images before even the trade show.

2 Q. Would you ever go and replace a photograph later with an
3 electronic image?

4 A. Yes.

5 Q. So you've testified that to the best of your knowledge the
6 products that appear to have been photographs and not the
7 computer-generated electronic renderings that were -- you've
8 testified, I believe, that they were on the Designer Skin
9 website in November of 2005 and yet by October of 2006 they
10 still have not been replaced with electronic renderings?

02:36:..

02:36:..

11 A. Yes.

12 Q. Is it possible that your testimony regarding when these
13 various images was actually uploaded on the Designer Skin
14 website is not as precise as you first thought?

15 A. No. I know for a fact that all these products were
16 launched before that date and that they would have been on our
17 website. What I'm not clear to is the actual year or date any
18 specific product was launched. We've developed over a hundred
19 products over the last ten years.

02:37:..

20 Q. So you're not sure about the year or date of whether any
21 product was launched, including the ones that were shown on
22 these screens during your testimony?

02:37:..

23 A. I can say with certainty that they were developed and
24 launched prior to October of 2006. Whether it was the fall of
25 2005 or the fall of 2004, I can't be certain on any particular

02:37:..

1 product.

2 MR. COLEMAN: No further questions.

3 THE COURT: Redirect?

4

5 REDIRECT EXAMINATION

02:37:

6 BY MR. MIZRAHI:

7 Q. Would October 18, 2006 have been before the trade show that
8 year?

9 A. October -- what was the date?

10 Q. October 18, 2006. Would that have been before the 2006
11 trade show that you said normally comes during the either last
12 week of October or the first week of November?

02:38:

13 A. I would say that it probably was, yes.

14 Q. And so if -- so then as of October 18, 2006, the fall of
15 2006, materials would not have been published on Designer
16 Skin's website at that point. Is that accurate?

02:38:

17 A. Could you say that again?

18 Q. As of October 18, 2006, would the materials, the materials
19 that were going to be then debuted later in the fall of 2006,
20 have already been on Designer Skin's website as early as
21 October 16, 2006?

02:38:

22 A. It's possible. Yes.

23 Yeah, because it was just maybe two weeks prior to the
24 trade show. Like I said, our deadline is the trade show. So
25 either it will fall a week or two before or a week or two

02:39:

1 after, but --

2 Q. And certainly the stuff from the fall of 2005 is on
3 Designer Skin's website.

4 A. Correct.

5 Q. And the stuff from the fall of 2004 may still be on
6 Designer Skin's website if those products are in production.

02:39:00

7 A. Correct.

8 Q. And is it your testimony about fall of 2005 as being a date
9 that's -- that's the -- is that the last time or the latest
10 time that these images could have been put on Designer Skin's
11 website?

02:39:00

12 A. Yes.

13 Q. Could those products have been on Designer Skin's website
14 in 2004?

15 A. I'm sorry. I'm getting lost in the dates.

02:40:00

16 Q. Okay. Could those images have been on Designer Skin's
17 website in 2004?

18 A. Which images?

19 Q. Some of the images that we --

20 A. Yes. Some of them would have been. Yes.

02:40:00

21 Q. Because is -- is that because some of the products are
22 older than that?

23 A. Yes.

24 Q. When did Designer Skin start rolling out products and
25 putting them on their website?

02:40:00

1 A. 1998.

2 Q. Designer Skin still make some of those products?

3 A. That's correct.

4 Q. Still has the same images on its website?

5 A. Correct.

02:40:

6 MR. MIZRAHI: Nothing further. Thank you.

7 THE COURT: All right. You may step down.

8 We'll take our mid-afternoon recess for 15 minutes.

9 Please remember the admonition.

10 (Proceedings recessed at 2:40 p.m.)

02:40:

11

12 (Proceedings reconvened at 2:58 p.m.)

13 THE COURT: The record will reflect the presence of
14 the defense counsel but I don't seem to see any plaintiffs'
15 counsel.

02:59:

16 Ms. Bengtson, why don't you bring the jury in, then,
17 and we'll proceed.

18 (Plaintiffs' counsel enter the courtroom.)

19 THE COURT: I thought you had something you wanted to
20 take up with the Court.

02:59:

21 MR. CROWN: There is, Your Honor.

22 THE COURT: I was about to bring the jury in.

23 MR. CROWN: My apologies. I was in the bathroom.

24 Your Honor, at approximately 12:30 p.m. our process
25 server was able to serve with a trial subpoena Steven

02:59:

1 Mercadante. We would like Steven Mercadante, who is one of the
2 two principals of defendant S & L Vitamins, to be our next
3 witness. Mr. Mercadante is not in court right now.

4 THE COURT: What date and time did the subpoena
5 command his presence? 03:00:00

6 MR. CROWN: Immediately. I mean, we -- the first time
7 we knew that he was in the state, we said today on July 15th.

8 THE COURT: Let me have a copy of the subpoena that
9 was served on him.

10 MR. MIZRAHI: I don't have a copy of the subpoena. 03:00:00

11 MR. COLEMAN: Your Honor, there's no proof of service
12 at this time.

13 THE COURT: I'm sorry?

14 MR. COLEMAN: There's no proof of service of the
15 subpoena of record. 03:00:00

16 THE COURT: I'm not quite sure what you want me to
17 do.

18 MR. CROWN: I guess -- I guess at this point bring in
19 the jury and we'll go with another witness and we will have --
20 at -- at some point before the end of business today we will 03:00:00
21 present to the Court -- it's being -- our process server is --
22 either our process server or our office staff is in the process
23 of transmitting to us so that we can give to the Court the
24 subpoena and the proof of service. At that point in time I
25 will take up with the Court -- actually, it's in the Court's 03:00:00

1 powers to compel Mr. Mercadante here but I don't have the -- I
2 have been advised verbally that service had been accomplished
3 today at 12:30, specifically in the lobby of the Hilton Suites
4 Hotel, I believe, at the corner of Thomas and Central.

5 THE COURT: Obviously, we can deal with the specifics 03:01:
6 at the time, but if -- if this gentleman was served with a
7 subpoena that said be here at three o'clock this afternoon,
8 three o'clock on the 15th, setting aside the lack of -- I'm not
9 sure how much is reasonable notice. I doubt that three hours
10 is reasonable notice. But setting that aside, if it says -- if 03:01:
11 it doesn't command a specific time, then I wouldn't know quite
12 how I could potentially hold him in contempt for disobedience
13 to something that doesn't have a particular time. But it
14 sounds like until we see the subpoena, I don't know what it
15 said anyway. 03:02:

16 MR. CROWN: And, Your Honor, I appreciate I'm giving a
17 verbal report to the Court. I am advised that the command was
18 for the entire three-day trial. Obviously, we wouldn't want to
19 enter the entire time.

20 But again, it's part of the issue that we raised with 03:02:
21 the Court this morning, and this process of securing his
22 appearance here as a witness was generated in a series of
23 e-mails that went back and forth between us and attorney
24 Coleman yesterday, which is why when we started -- before we
25 started jury selection I raised that issue so that this Court 03:02:

1 could be kept advised of our efforts in trying to secure
2 Mr. Mercadante's appearance as an adverse witness from the
3 defendant.

4 That being said, I don't want to delay the Court or
5 the jury anymore, so our next witness will be Beth Romero, and 03:02:
6 then my hope is by the end of the day after you excuse the jury
7 I'll have written proof so we can take this matter up further
8 and hopefully get Mr. Mercadante tomorrow before we rest.

9 MR. COLEMAN: Your Honor, could I just be heard?
10 Because I feel -- notwithstanding the fact that there is no 03:03:
11 subpoena of record at this time, the groundwork has obviously
12 been laid for a sort of application of some sort.

13 The Court has raised one issue regarding notice,
14 whether it's three hours or whether it's overnight. The
15 pretrial order stated that any witnesses had to be subpoenaed. 03:03:
16 That goes back at least a month, I guess, at this point. The
17 idea that my client should be subpoenaed on the day of trial
18 when it's -- at this juncture it seems rather fair for him to
19 assume that his testimony would not be required because he'd
20 not been subpoenaed earlier, and that as a result of that 03:03:
21 subpoena he should be, on virtually no notice, prepared to
22 testify strikes us as somewhat problematic.

23 And it was avoidable. All they had to do was subpoena
24 him a week ago, two weeks ago, three days ago.

25 Not only that, Your Honor, he is not listed as a 03:04:

1 witness for today. The court deputy clerk has -- the courtroom
2 deputy, rather, has Larry Sagarin as a witness today. He's not
3 here. He has not been subpoenaed either.

4 So -- you know, I understand the Court has bent over
5 backwards to do things such as amending the complaint, 03:04:
6 evidently to some extent permitting supplementation of the
7 complaint. Now we're looking at the pretrial order. Every
8 opportunity was given to the defendants to get their act
9 together and get their witnesses subpoenaed, and now I'm
10 scrambling around with surprises and game-playing. 03:04:

11 So I know it's not in front of the Court right now. I
12 wanted to make my record.

13 Thank you.

14 THE COURT: Let's bring the jury in, please.

15 (Jury in at 3:05 p.m.) 03:05:

16 THE COURT: Please be seated.

17 The record will reflect the presence of the parties,
18 counsel and ladies and gentlemen of the jury.

19 You may call your next witness.

20 MR. CROWN: Thank you, Your Honor. Our next witness 03:05:
21 for the plaintiff is Beth Romero.

22 THE DEPUTY CLERK: Your name, ma'am, is Beth Romero,
23 R-O-M-E-R-O?

24 THE WITNESS: Yes, ma'am.

25 THE DEPUTY CLERK: Please raise your right hand. 03:06:

1 Do you solemnly swear or affirm that the testimony
2 you're about to give will be the truth, the whole truth and
3 nothing but the truth, so help you God?

4 THE WITNESS: I do.

5 THE DEPUTY CLERK: Please be seated on the witness
6 chair.

7 THE COURT: You may proceed.

8 MR. CROWN: Thank you.

9
10 BETH FELKER ROMERO,
11 called as a witness herein, having been first duly sworn, was
12 examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. CROWN:

15 Q. Miss Romero, would you please state your full name to the
16 jury and spell your last name, please?

17 A. Beth Romero, R-O-M-E-R-O.

18 Q. What is your current position with Designer Skin?

19 A. Chief brand management officer.

20 Q. How long have you been employed by Designer Skin?

21 A. Gosh, nine years going back. Yeah. Nine, nine and a half.

22 Q. From 1998 through the present?

23 A. Correct.

24 Q. Where were you born?

25 A. Pennsylvania. East coast.

03:06:

03:06:

03:07:

03:07:

1 Q. What city?

2 A. Bethlehem.

3 Q. Did you go to grade school and high school in Bethlehem,
4 Pennsylvania?

5 A. College, too. 03:07:00

6 Q. Would you tell the jury what college you went to.

7 A. Lanyon College.

8 Q. Did you receive a degree?

9 A. Psychology. BA.

10 Q. That's a bachelor of arts degree? 03:07:00

11 A. Yes, sir.

12 Q. After receiving your bachelor's degree, did you do
13 postgraduate work?

14 A. I did at Villanova, again in psychology.

15 Q. And Villanova is also located in Pennsylvania? 03:07:00

16 A. Yeah. Yes.

17 Q. Specifically, Philadelphia?

18 A. It's the suburbs, mainline.

19 Q. Now, you have not received your master's degree but are you
20 fairly close? 03:08:00

21 A. I completed all the course work, just not the dissertation
22 part.

23 THE COURT: Ma'am, two things. I need you -- pull
24 that microphone closer.

25 THE WITNESS: I'm sorry. 03:08:00

1 THE COURT: Pull it down a little lower --

2 THE WITNESS: Okay.

3 THE COURT: -- so -- so it's right in front of your
4 mouth.

5 And then I need you to just slow down a little bit and 03:08:
6 give him a chance to finish his question before you start your
7 answer.

8 THE WITNESS: Okey-dokey. Sorry.

9 BY MR. CROWN:

10 Q. I want to discuss your employment history. At some point, 03:08:
11 I take it, you moved to the state of Arizona?

12 A. Correct.

13 Q. Would you tell us the type of work and who you worked for,
14 say, starting in approximately 1992.

15 A. I took a position -- a marketing position to the director 03:08:
16 of marketing for the Orange Tree Golf Resort, and I worked
17 there for five years.

18 Q. Now, the Orange Tree Golf Resort is in the northeast part
19 of Phoenix at approximately Shea and 56th Street?

20 A. Correct. 03:09:

21 Q. Would you describe the duties you had while working for the
22 Orange Tree Golf Resort?

23 A. We were involved in all type of the marketing and the
24 marketing materials and the marketing events that were utilized
25 to bring prospective guests to the property. 03:09:

1 Q. When you left employment with Orange Tree Golf Resort who
2 did you go to work for?

3 A. Swedish Beauty, which then became John Abate International,
4 which was an indoor tanning lotion company manufacturer.

5 Q. So I take it that, then, prior to Designer Skin, became
6 your first job as a professional in the field of indoor tanning
7 products and lotions?

03:09:..

8 A. Correct.

9 Q. How long did you work for the Swedish Beauty company?

10 A. I was with them about a year and a half.

03:09:..

11 Q. Tell the jury what you did while employed by Swedish
12 Beauty.

13 A. When I was with Swedish Beauty and John Abate International
14 I started off in the sales and the training, and so I traveled
15 extensively around the country training the salons, training
16 the distributors, and as well as I had distributor accounts
17 that I managed.

03:09:..

18 Q. When you left Swedish Beauty who did you go to work for?

19 A. I went to go work with Designer Skin but I now was in
20 the -- I'm sorry.

03:10:..

21 Q. Finish your answer.

22 A. Okay. I was now in the marketing -- over marketing and
23 sales. So it was the sales end as well as the marketing and
24 the product development. And that was from my inception
25 starting at Designer Skin.

03:10:..

1 Q. How long had Designer Skin been a company and in business
2 at the time you joined them?

3 A. About nine months. In its infancy.

4 Q. Were you and are you involved in brand development?

5 A. Absolutely.

03:10:

6 Q. So from 1998 through the present you have been involved in
7 sales?

8 Correct?

9 A. Uh-huh.

10 Q. Marketing?

03:10:

11 A. Correct.

12 Q. And brand and product development?

13 A. Correct.

14 Q. Are you married?

15 A. Yes, I am.

03:11:

16 Q. And do you have children?

17 A. Two babies.

18 Q. What is the business of Designer Skin?

19 A. We are manufacturer of premium indoor tanning lotions.

20 Q. Where has your manufacturing facility been located during
21 this period of time?

03:11:

22 A. Tempe, Arizona.

23 Q. Approximately how many thousand square feet is the
24 manufacturing facility where Designer Skin makes its indoor
25 tanning lotion and skin-related products?

03:11:

1 A. It's a 45,000-square-foot facility that houses all of our
2 inhouse manufacturing as well as all of our administrative and
3 professional offices.

4 Q. Does Designer Skin's facility include its own laboratory?

5 A. Yes, it does. 03:12:00

6 Q. What does the laboratory do?

7 A. We create our own products internally, and by that, we
8 don't have to contract out or have contract chemists or so
9 forth like that produce the formulas for us. We make them in
10 house. We have an in-house chemist on staff and so forth so we 03:12:00

11 do all of our product development and testing and formulation
12 and pilot batches in the lab, and then once a final product's
13 approved then it moves on to large-scale batch-up production.

14 Q. So I take it there's an element of testing, research and
15 experimentation that goes with that? 03:12:00

16 A. Absolutely.

17 MR. COLEMAN: Objection. Relevance.

18 THE COURT: Overruled.

19 THE WITNESS: Yes. Absolutely.

20 BY MR. CROWN: 03:12:00

21 Q. As part of the manufacturing elements of Designer Skin's
22 product line, I take it there is the ability to take the final
23 approved formulas and the ingredients and the combinations and
24 then mass produce it at that facility?

25 A. Correct. 03:13:00

1 Q. Again, is that something that Designer Skin does
2 internally?

3 A. Yes.

4 Q. Can you tell us in general the types -- not the brand names
5 yet but just the types of indoor tanning lotions that Designer
6 Skin has created, developed and then manufactured.

03:13:00

7 A. Sure.

8 We have different types of products that we
9 manufacture from basic accelerators, which are also called in
10 intensifiers, to bronzer products. We have something called
11 the tingle product, which is really kind of unique to just the
12 indoor tanning industry and actually causes a reddening and
13 warming sensation to the skin which increases the oxygenation
14 so you get really kind of pal immediate color coming out of the
15 tanning bed.

03:13:00

03:14:00

16 We also create coolant products, after-tan body
17 moisturizers, and we have something called a steam extreme,
18 which is kind of like a mild, warming, soothing sensation for
19 while you're in the tanning bed.

20 And then within each of those product types there are
21 different levels for your different stages of tanning, because
22 obviously, someone without any tanning experience or been in
23 the tanning beds for quite a long time isn't going to use an
24 advanced bronze or tingle product.

03:14:00

25 So we have different stages, then, within those

03:14:00

1 different levels of products just so we can run the whole gamut
2 for every type of consumer.

3 Q. Now, each year do you in your position with Designer Skin
4 oversee the development of specific products within each of the
5 categories you've just described to the jury? 03:15:00

6 A. Yes.

7 Q. So you personally will meet with the head chemist in the
8 laboratory?

9 A. Yes.

10 Q. And I take it you will also do research for the different
11 ingredients that will develop the specific products. 03:15:00

12 A. Yes.

13 Q. Can you give the jury an idea of the length of time and
14 what you personally do as part of the process from -- and I'm
15 not talking about the product itself -- how to create that end
16 product that's ready for mass production. 03:15:00

17 A. It's really rather lengthy when you look at a whole
18 12-month fiscal year. The period of time -- I call it womb to
19 tomb -- for a product to go from product conception to story
20 board to mood board into, okay, now we're able to start 03:15:00
21 manufacturing it, it roughly has like a nine-month gestational
22 period. It's really -- that's why we kind of call them our
23 babies, because it's like nine months until like when we'll
24 finally be able to push the button, okay, now we can go to
25 production. 03:16:00

1 Because so much is involved in doing the market
2 research, identifying the hot spots, identifying needs within
3 the product lines, gosh, even just -- I -- I like to think of
4 them as clever names, but even the naming and the trademarking
5 of the names and doing the research on that and then doing the 03:16:
6 whole product development for the label and what goes inside
7 the label and what are the key hot ingredients and we've been
8 meeting with suppliers, and all kind of evolves into this
9 story. And even the fragrance. The fragrance we pick for
10 every product literally takes months and we go through -- am I 03:16:
11 talking too much about this?

12 Q. No, not at all, if you could just slow down slightly.

13 A. Okay.

14 Q. I appreciate when you talk about this product --

15 A. Sorry. 03:16:

16 Q. But no. Continue with your answer.

17 A. I mean, we'll just go through hundreds of submissions just
18 to find the perfect final fragrance.

19 So literally, we start -- Mike made a lot of reference
20 to our trade show, which is always either like the last week in 03:16:
21 October or the first week in November, and boom, after we
22 launch our new babies for that year, I mean, we hit the ground
23 running, starting all the way for next season.

24 Because really, nine months, which may seem long in
25 the big scope -- like sometimes people do years to launch 03:17:

1 products.

2 So that's how intensive we have to be during that
3 nine-month period starting in November and then roughly
4 finishing around July, because it's -- come July, that's --
5 then it goes on to the raw materials production, the shrinks
6 get made, the bottles get ordered, so that, once again, we can
7 have, then, that November 1st ship date.

03:17:00

8 Q. Do some of the ingredients come from locations and sources
9 around the country?

10 MR. COLEMAN: Your Honor, objection. This is so far
11 afield from the issues in this case. Relevance.

03:17:00

12 THE COURT: Your objection is?

13 MR. COLEMAN: Relevance.

14 THE COURT: The relevance is?

15 MR. CROWN: Number one, it's laying the background.

03:17:00

16 Number 2 --

17 MR. COLEMAN: Background for what?

18 THE COURT: Wait a minute. Don't interrupt.

19 MR. CROWN: The background for the company and what
20 the company does to produce the product both inside the bottle
21 and out.

03:18:00

22 This line of questioning will also then lead to how
23 the images are created that have been infringed upon by S & L
24 and how the images are created, how they are then put into
25 different mediums, how they are copyrighted, how ultimately

03:18:00

1 they are put to market, how specific market, and ultimately how
2 there is a diversion detection process that Ms. Romero goes
3 through.

4 It's also going to go to damages in a couple of
5 different ways, because there is an actual damage claim, there 03:18:
6 is also a profit claim, and all of this is tied to our case.

7 THE COURT: Well, let's get to the relevant points,
8 then, in short of order.

9 MR. CROWN: Thank you. Thank you.

10 BY MR. CROWN: 03:18:

11 Q. You've mentioned the inside, and just in one question, I
12 take it that some of the ingredients that go into the various
13 formulas for the various specific products are obtained from
14 sources either in this country and sometimes even around the
15 world? 03:19:

16 A. Correct.

17 Q. And are you personally involved in pursuing and locating
18 and then securing these various ingredients?

19 A. Yes.

20 Q. Now -- 03:19:

21 A. Well, actually --

22 Q. I'm sorry. Go ahead.

23 A. Yes. In conjunction with my chemists. You know what I
24 mean? Obviously. So we always work together to do this.

25 We're a team effort at Designer Skin, a collaborative. 03:19:

1 Q. Now, going alongside the efforts and time and expense for
2 creating the product that goes inside the bottle, what efforts
3 are taken, then, to develop the name of a product, the image or
4 the renderings for those products to represent, the shape of
5 the bottle, and is that done almost parallel with the creation
6 of the product itself? 03:19:.

7 A. It is. It's done in tandem.

8 And for Designer Skin, when it was started, it was
9 kind of a saturated market in terms of tanning lotions. There
10 were a lot of tanning lotions out there. So really, not only
11 having this amazing product on the inside, it was really
12 important for us to have this really strong packaging presence,
13 too, something that wasn't present in the marketplace at the
14 time that could really draw the consumer. We call it the
15 one-two punch. We draw them in with the packaging and our
16 great imaging and our fun names and then they open it up and
17 smell it and feel it and, boom, it's a done deal. 03:20:.

18 I really -- that has been our premise from which we've
19 have followed everything from the beginning and I think one of
20 the reasons for our success. 03:20:.

21 So packaging was as critical as the fragrance and so
22 much so that, especially in our early, early years, I mean, we
23 weren't even necessarily known as Designer Skin because that's
24 how much they would identify with the individual product
25 identities of Worship or Worship Me or Tao or Smolder; yes, I 03:20:.

1 use Siren, you know, because that's -- it all so evolved from
2 the packaging and the name and each product had its own
3 identity.

4 So it's -- it's as intense as what actually goes on
5 inside the bottle.

03:21:

6 Q. Now, is there a particular end-user customer that you're
7 trying to reach with these efforts to put high-quality
8 ingredients that will do the job of a bronzer or accelerator
9 and then to package it in the way you're describing?

10 MR. COLEMAN: Your Honor, leading.

03:21:

11 THE COURT: Sustained.

12 BY MR. CROWN:

13 Q. Can you tell us who your target customer is, ultimate
14 market is, and how you approach that market?

15 A. Sure.

03:21:

16 Clearly, all industry magazines and trade and
17 publications I can think about show us that 70 percent of our
18 consumers are females. So we always keep that in mind as our
19 ultimate target customer when we're designing all of our
20 products. That's why some will be so blatantly feminine, like
21 the Bronze Bondage and the corset and the hot pink, but not --
22 we have products like Tao which address the male market as
23 well but for the most part we keep in mind that 70 percent of
24 our customer base are female women between 18 and 45 years of
25 age.

03:21:

03:22:

1 Q. Is your target customer sophisticated in the use of indoor
2 tanning lotions?

3 MR. COLEMAN: Objects to the form, Your Honor. Vague.
4 Sophisticated. I don't know --

5 THE COURT: The legal objection is what? 03:22:..

6 MR. COLEMAN: The term is vague. I don't -- it's --
7 it basically strikes me --

8 THE COURT: Overruled.

9 THE WITNESS: I would -- in my opinion, I would say
10 so, for two reasons. 03:22:..

11 One, Designer Skin is a premium-style product. So
12 Designer Skin brand itself does not cater at the 18, 19, 20
13 dollar price point, which is more of your either very novice
14 type of consumers or your -- more of your college age type of
15 consumers, whereas our primary price point has been \$55 and 03:23:..
16 plus because of the skin care ingredients in that, and I would
17 think that you would be a more sophisticated consumer to
18 understand the difference in the pricing and the different in
19 the benefits of the skin care ingredients and so forth.

20 BY MR. CROWN: 03:23:..

21 Q. In your position that involves brand development, do you
22 personally evaluate the different products that are suitable
23 for people of different skin types?

24 A. I'm not --

25 Q. Let me -- 03:23:..

1 A. -- sure I understand that.

2 Q. Let me rephrase --

3 A. I mean, because there aren't -- I'm sorry.

4 Q. Are different products suitable for different skin types?

5 A. Yes.

03:23:

6 Q. Explain what goes into that type of analysis and
7 product development.

8 A. And a lot of that ultimately comes down from the
9 recommendation of the salon staff, because they go through
10 certifications about skin typing because you won't put someone
11 who's red hair and fair skin and freckles in with a certain
12 type of product and a certain amount of minutes according to
13 what their skin typing guide is, just like someone who is
14 extremely fair and red headed you probably wouldn't put in an
15 advanced bronzer, high tingle formula because of the different
16 types of skin type. So that's why we do all -- not all those
17 categories but all those different ranges in there to cater to
18 everybody along that spectrum.

03:24:

03:24:

19 Q. What is product efficacy?

20 A. How well the product works. That's my definition of it.

03:24:

21 Q. Does that also include product safety so that people can
22 safely use the right product for indoor tanning?

23 A. That's why we put proper instructions and usages on the
24 back of our bottles. Absolutely.

25 Q. What is trend spotting?

03:25:

1 A. Trend spotting is something that I've done every year,
2 forever, it seems, typically in October right before we go to
3 the trade show so I can start -- I'll go like to the L.A. area
4 or South Beach or I'll go to the New York area and I'll just
5 kind of walk around and I'll check out all the boutiques and
6 see what the hot trends are, what the hot colors are, what the
7 hot names are.

03:25:00

8 You know, you try to find things that really resonate
9 in the society that you are in today. By that I mean like if
10 black and white is really big and vogue and you see it in all
11 the fashion magazines, chances are we'll tend to try to focus
12 on a black-and-white product that year with a pop of red and
13 some sort of name that really goes involved with that.

03:25:00

14 So we do that every single year. That kind of
15 predicates everything.

03:25:00

16 Q. In conjunction with what the jury has already heard from
17 the creative director, Mike Shawl?

18 A. Right.

19 Q. Do you work with Mike Shawl in developing a name and the
20 rendering and the image that will say this is our new product,
21 whether it be an Undercover Angel or a --

03:26:00

22 A. Absolutely.

23 Q. Tell us what you do in conjunction with Mike Shawl to
24 deliver what you're trying to do in your mind.

25 A. Well, because, again, it's a whole collaborative effort and

03:26:00

1 it all kind of starts with identifying the product type and
2 then the name, and then Mike and I will sit down and we'll have
3 like pictures and we'll have mood boards and we'll have things
4 ripped out to help inspire the whole process.

5 And then we decide -- when we look at that in terms of 03:26:
6 our lineup we'll decide what the color combinations are going
7 to be and, okay, say the name is Shrine, like what the feel of
8 the packaging was going to be, what type of deco it was going
9 to be. I mean, we've both searched out decos together
10 independently and we come back together from -- the fonts. 03:26:

11 Even -- I know it sounds so silly, but the font style on every
12 single package really brings the whole product to life in terms
13 of embodying it. So we'll go through hundreds of fonts to find
14 the final front.

15 And he -- he's able to bring it all together amazingly 03:27:
16 on his Photoshop and all those graphic programs together and
17 then we'll critique it and go back and forth and cross check it
18 and so forth.

19 And then once we finally get to a point where we're
20 okay, then that's what we send to production and that then gets 03:27:
21 what is manufactured.

22 Q. I take it there's a lot of building of the product image
23 creation and ideas to go from Mike's head and your head into
24 what ultimately becomes an image on your website and the label
25 that gets copyrighted. 03:27:

1 MR. COLEMAN: Objection, Your Honor. More leading.

2 THE COURT: Sustained.

3 BY MR. CROWN:

4 Q. Let me start back.

5 You mentioned a term a mood board or a design board? 03:27:

6 That sounds at the early stage of the creative process.

7 Correct?

8 A. Correct.

9 Q. Tell the jury, and if you'd pick any product out, just the
10 steps and the time frame that will go from initial idea to 03:28:
11 ultimately producing a final label that will both be on the
12 bottle, put on your website and eventually copyrighted.

13 MR. COLEMAN: Your Honor, a question about relevance.

14 THE COURT: The relevance?

15 MR. CROWN: Well, it's now going to the creative 03:28:
16 process. This case --

17 THE COURT: That's not -- the creative process -- why
18 is that an issue in the case?

19 MR. CROWN: Well, because we have to prove that in
20 copyright. We have to prove it's an original work, a creative 03:28:
21 work, that they had access to it and they copied it without
22 authority. This is the creative process. Their --

23 THE COURT: I'm sorry, but I don't remember that that
24 was presented as an issue in the pretrial order. In other
25 words, I don't see that there's any issue as to whether or not 03:28:

1 that is in the case.

2 MR. CROWN: If I might address, I've -- I would --

3 THE COURT: Just direct my attention to the --

4 MR. CROWN: Sure.

5 And Judge -- Judge Teilborg, I also have in front of 03:29:
6 me the jury instructions that --

7 THE COURT: No, no, no. I'm just -- the issues in the
8 case are framed by the final pretrial order, and I -- I'm just
9 not seeing that that particular item is an issue.

10 MR. CROWN: Well, Issue Number 1. Whether S & L has 03:29:
11 infringed on any of Designer Skin's copyrights.

12 I'm proving the creative process, and I'm not going to
13 do it with each product but I'm trying to build that foundation
14 so that ultimately -- their defense, Your Honor, with all due
15 respect, is we photographed the bottle and we put our 03:29:
16 photograph, S & L's photograph, on our website.

17 Our case is about them going to our website, accessing
18 our creative image and copying it in violation of the law.
19 That's the -- that's the clear, sharp distinction between our
20 position and the defense position. 03:30:

21 MR. COLEMAN: Your Honor, we stipulated to the fact
22 that Designer Skin owns the copyrights, so the question of
23 creativity is not before the Court.

24 THE COURT: Is --

25 MR. COLEMAN: And although they have some inherent 03:30:

1 relevance notwithstanding the stipulation, it seems to be
2 highly cumulative and not relative to anything that we're
3 asking the jury to decide.

4 THE COURT: I'm looking at the stipulations and
5 uncontested facts and law, and then G on page 3 goes on to list 03:30:
6 all the federal copyright registrations your client has, and
7 they wouldn't have those copyright registrations unless these
8 foundational elements were present, would they?

9 Yes. I'm asking you.

10 MR. CROWN: Well, no, and if that -- if that's the 03:31:
11 position, I'll move in Exhibits 1-1 through 1-54 right now,
12 because if there's no issue we might as well get right to the
13 copyrighted labels. But there's also the issue of damages, and
14 if you'll recall Mr. Coleman's opening statement --

15 THE COURT: No, no. Tell me what this line of 03:31:
16 questioning --

17 MR. CROWN: It --

18 THE COURT: How that connects to --

19 MR. CROWN: Well --

20 THE COURT: -- the damage issues. 03:31:

21 MR. CROWN: It shows the multiple issues that are
22 parallel and intertwined to go from creation to bottle to
23 distribution to market.

24 And then they've said how has Designer Skin been hurt.
25 And that was a question. I mean, there was a series of 03:32:

1 rhetorical questions. This also responds because --

2 THE COURT: Finish your thought.

3 MR. CROWN: Okay.

4 THE COURT: I'm trying to --

5 MR. CROWN: This --

03:32:

6 THE COURT: I'm trying to connect the dots between
7 what you're prepared to show and how your client has thereby
8 suffered damages.

9 MR. CROWN: Because through this expense and time and
10 the jury's understanding of the market and the trends and how
11 they meet it every year, then ultimately the next part of
12 Miss Romero's testimony is going to be how they go and spend a
13 lot of money on diversion detection and the complaints that
14 they get from the salons, which are their customers, from
15 people that are buying on the Internet without knowledge,
16 without training, without sophistication.

03:32:

03:32:

17 MR. COLEMAN: Your Honor, that is hearsay.

18 MR. CROWN: Well --

19 MR. COLEMAN: I'm sorry. I have to object to this
20 colloquy.

03:32:

21 MR. CROWN: I'm trying to finish.

22 THE COURT: I'm assuming I'm going to hear --

23 MR. CROWN: Yeah.

24 THE COURT: I'm assuming I'm hearing an avowal from
25 counsel as to how this is going finally be foundational to a

03:32:

1 dollar-and-cents loss by your client.

2 MR. CROWN: It is going to the actual damage
3 component, because it's the value of the image being reduced,
4 and it also goes to the profit. It also goes to the expense
5 that they do in, number one, creating. It takes a lot more 03:33:
6 time and expense to create an image than take a photograph and
7 then to preserve that image and to make sure that you police
8 infringement.

9 THE COURT: On your avowal that this testimony is
10 going to be foundational to damages, I'll let you proceed, but 03:33:
11 obviously, by making that avowal we'll have to see that there
12 is ultimately proof of damages at the end of this
13 presentation.

14 So you may proceed.

15 MR. CROWN: Can I make one more representation to the 03:33:
16 Court?

17 There's also the issue of what goes into a creative
18 image as opposed to a photograph, and it builds upon the
19 testimony of creative director Shawl, because a photograph is
20 something that is a very different type of image than artwork 03:34:
21 that is part of this process. So we're also doing that.

22 Now, I appreciate what they're saying but there's also
23 the issue of their defense. We --

24 THE COURT: You're not ready to deal with their
25 defense. You're in your case in chief. 03:34:00

1 MR. CROWN: True. True. But I'm proving
2 infringement. That being said, I appreciate the opportunity
3 that the Court's given me.

4 THE COURT: You may proceed.

5 BY MR. CROWN:

03:34:

6 Q. From the board to ultimate final approval of an image that
7 eventually is copyrighted, just give the jury an idea of how
8 many different stages and drafts and edits and revisions goes
9 into the final product.

10 A. Countless.

03:34:

11 I mean, when I say nine months, it's nine months, and
12 sometimes we're ready to tear our hair out just because we'll
13 go -- you get this feeling, like you know when something is
14 done, when it's at its final point, when it's the perfect
15 coloring, when it's the perfect font, when it's the perfect
16 image, it just resonates with you. It's like, yes, we got it.

03:35:

17 Unfortunately, that never happens on the first try, so
18 we typically -- we go through numerous, numerous explorations
19 of this product concept, which always starts ultimately, then,
20 with what its name is. You know, if its name is Worship or its
21 name is Believe, obviously, we're going to try to come up with
22 some sort of packaging and imaging and colors that kind of
23 evoke the name of the product, but we'll explore it in a bunch
24 of different directions prior to getting there.

03:35:

25 And graphically, for Mike himself, I mean, that's just

03:35:

1 pretty time and labor intensive.

2 So...

3 Q. Now, Mr. Shawl for Designer Skin has produced a number, a
4 large number, of creative images that are known as electronic
5 renderings, correct?

03:36:0

6 A. Yes.

7 Q. And ultimately they have been copyrighted.

8 A. Yes.

9 Q. Correct?

10 A. Yes.

03:36:0

11 Q. And it's Designer Skin that owns the copyrights.

12 A. Yes.

13 MR. CROWN: Your Honor, I can do one of two things. I
14 can either show Miss Romero each of the copyright registrations
15 and the labels that include these electronic renderings and
16 then offer them into evidence, or since I'm hearing that there
17 may be a stipulation I would like to move right now, but I'm
18 prepared to take the time, Exhibits 11 through and inclusive of
19 154.

03:36:0

20 MR. COLEMAN: Your Honor, there's -- it's clear that
21 they all go in or none of them come in. That's not an issue.
22 I just have objection as to relevance, because as we have
23 pointed out in the pretrial order, the copyright registrations
24 were not filed in a timely fashion and they're not, therefore,
25 relevant to the issues in this case. They're not -- they

03:36:0

03:37:0

1 don't -- they don't provide any legal protections to the
2 plaintiff.

3 And also, it appears to us that the only -- since the
4 plaintiff has stipulated and the Court has ruled that
5 photographs of the labels would not be an infringement, it 03:37:
6 would appear that the only copyright registration that would be
7 relevant would be the one for the website itself on which the
8 renderings are found, not the labels themselves.

9 THE COURT: What is the -- the number -- the numbers
10 that you are offering are numbers what? 03:37:

11 MR. CROWN: 1-1 through 1-54.

12 THE COURT: How do these correspond with the list of
13 exhibits at page 13 -- pages 13 through 16 under the category
14 of exhibits admissible in evidence and may be marked in
15 evidence? 03:38:

16 MR. CROWN: Your Honor, as we read your protocol for
17 marking exhibits, we saw that there was a preference for
18 numbers, and so A through Z on pages 13 and 14 would be 1-1
19 through 1-26, and then what was 1-1 would be 1-27. If you
20 carried the numbers forward, it goes to 1-54. So they are 03:39:
21 identical. We just substituted the letters in accordance with
22 your protocol.

23 THE COURT: So another way of saying that, then, is
24 1-1 through 1-54 are included within those listed exhibits in
25 the final pretrial order where it was agreed that they are 03:39:

1 admissible and may be marked in evidence.

2 MR. CROWN: Yes.

3 THE COURT: All right. 1-1 through 1-54 will be
4 received.

5 MR. CROWN: No. My -- again, I don't want to 03:39:
6 misspeak. I believe there was an objection about the
7 authenticity. So I don't want to just say yes and mislead the
8 Court. I have heard an objection but --

9 THE COURT: I understand that, but I'm looking at a
10 pretrial order that says it's agreed they're admissible. I'm 03:40:
11 not sure what the --

12 MR. COLEMAN: I'm not sure I understand where we agree
13 that they're admissible, Your Honor. We -- we actually object
14 to all -- on page 17, certificates of any copyright
15 registrations not timely filed. 03:40:0

16 THE COURT: Well, look -- I'm sorry, but look at --
17 look at pages 13, 14, 15 and 16 in the pretrial order. That's
18 what I'm looking at.

19 MR. COLEMAN: Well, Your Honor, with all due respect,
20 it does appear that there's an inconsistency here because they 03:40:0
21 are listed as the admissible ones, but there's also a very
22 clear statement of defendant objecting. So obviously the
23 section to which we were referring --

24 THE COURT: I'm sorry. I didn't -- you said there's
25 something about defendants' objections? 03:41:0

1 MR. COLEMAN: Yes. On page 17. A-2. Defendant
2 objects to certificates of --

3 THE COURT: I don't know what that means. What I know
4 and what I'm looking at is the black-and-white language that
5 says, "The following exhibits are admissible in evidence and 03:41:
6 may be marked in evidence by the clerk." That's what's going
7 to happen. 1-1 through 1-54.

8 MR. CROWN: So 1-1 through 1-54 are deemed admitted?

9 THE COURT: 1-1 through 1-54.

10 MR. CROWN: Thank you, Your Honor. 03:41:

11 BY MR. CROWN:

12 Q. Let's move forward. The 54 copyright registrations that
13 have just been admitted, you -- in the interest of time, you
14 know what those 54 registrations are and there are labels that
15 include these image renderings created in conjunction by Mike 03:41:
16 Shawl and ultimately owned by Designer Skin, correct?

17 A. Correct.

18 Q. Okay.

19 Now, in addition, in June 2006 did Designer Skin have
20 a website? 03:42:

21 A. In June -- yes.

22 Q. I take it they've had a website for a period of time longer
23 than June 2006.

24 A. Yeah. Yes.

25 Q. Did Designer Skin register its website that includes these 03:42:

1 54 products?

2 A. Yes, I believe they did.

3 Q. Can you tell us when they had registered the websites that
4 would have included the products and their images?

5 MR. COLEMAN: Objection. Best evidence. If they have 03:42:
6 a registration, they should submit it. They should be
7 available.

8 THE COURT: Your response?

9 MR. CROWN: It's testimony. She has firsthand
10 knowledge. And that also is a record that is equally available 03:42:
11 to the public, which includes the defendant, and --

12 THE COURT: Which rule of evidence are you -- which
13 rule of evidence are you invoking in the Federal Rules of
14 Evidence?

15 MR. COLEMAN: Judge, 1002. 03:43:

16 When the contents of a writing, recording or
17 photograph are directly in issue, the original writing must be
18 produced unless the original is unavailable through no fault of
19 the proponent.

20 So notwithstanding that I may have had access to it, 03:43:
21 the proponent is obligated to proffer it into evidence.

22 THE COURT: Your response to that?

23 MR. CROWN: Yes. We're not offering the document.
24 It's simply her personal knowledge on behalf of the --

25 THE COURT: But you were trying to ask about when the 03:43:

1 registration took place, weren't you?

2 MR. CROWN: The website registration, if I may -- may
3 I make a proffer? -- was June of 2006.

4 THE COURT: Well --

5 MR. CROWN: It's before the same labels and images 03:44:
6 were again copyrighted in '07, which is a stipulated fact. The
7 images, which are the electronic renderings at issue in this
8 case, have actually been registered twice with the U.S.
9 Copyright Office as part of the website, a component part, and
10 as part of the labels. It's simply a question that's an 03:44:
11 affirmative yes and we move on.

12 THE COURT: The registration is best evidenced by the
13 document itself, isn't it?

14 MR. CROWN: I'm sorry?

15 THE COURT: The registration date is best evidenced by 03:44:
16 the document itself, isn't it?

17 MR. CROWN: Well, again, if we go back to the same
18 pretrial, the same section that you just ruled the label
19 registrations as stand-alone labels into evidence, let me
20 continue. 03:44:

21 Designer Skin is the exclusive creator of these
22 products. Designer Skin has also copyrighted its website and
23 product menu.

24 And so it is copyrighted. It's a stipulated fact. It
25 is simply an -- and it's -- in the context of this case, it is 03:45:

1 a duplicated registration of the electronic renderings.

2 THE COURT: My simple question is the registration of
3 the website would be evidenced by the written registration,
4 wouldn't it?

5 MR. CROWN: It would also be evidenced based on her 03:45:
6 personal knowledge. There's not --

7 THE COURT: The objection is sustained.

8 MR. CROWN: Can I ask if the website was registered
9 without referencing --

10 THE COURT: You can ask whatever you want, subject, 03:45:
11 obviously, to objection and ruling by the Court.

12 MR. CROWN: Again, I don't want to run afoul of the
13 Court's ruling.

14 THE COURT: Proceed.

15 BY MR. CROWN: 03:45:

16 Q. Does Designer Skin's website and did it in 2006 contain the
17 same product images that are the subject of these label
18 registrations that have now been admitted as Exhibits 1-1
19 through 1-54?

20 A. You know, the only thing I would have to say on that is I'd 03:46:
21 have to see the total list again to make sure that they were no
22 products post-2006.

23 MR. COLEMAN: Your Honor, I would also -- since the
24 witness has not answered but actually said that she cannot
25 answer, I would like to pose an objection. We objected earlier 03:46:

1 to testimony on the topic of the Designer Skin website as of a
2 given date when once again --

3 THE COURT: You're -- there is no pending question, I
4 think.

5 MR. CROWN: Let me ask the next question. 03:46:

6 BY MR. CROWN:

7 Q. The specific 16 products --

8 A. Right.

9 Q. -- that were discussed during Mr. Shawl's testimony and
10 that were displayed to the jury, were those electronic 03:46:
11 renderings of 14 of the products and the two photographs taken
12 by Mr. Shawl for a total of 16 Designer Skin images, were those
13 16 images included in and on the Designer Skin website as of
14 June of 2006?

15 A. Yes. 03:47:

16 Q. Do you have personal knowledge that those 16 products, and
17 specifically the images of those products created by Designer
18 Skin, were on Designer Skin's website as of June of 2006?

19 A. Well, yes.

20 MR. COLEMAN: Objection. 03:47:

21 Your Honor, we again -- this particular -- this exact
22 point was ruled on regarding Mr. Shawl's testimony where he
23 attempted to testify about the content of a website not before
24 the Court and not in evidence as a document, and again, the
25 best evidence rule applies here. 03:47:

1 THE COURT: Overruled.

2 BY MR. CROWN:

3 Q. What was -- in 2006 or during this whole period of time
4 that you've been employed by Designer Skin, what was and is the
5 purpose of Designer Skin's website? 03:48:

6 A. We use it to market and advertise our products so not only
7 that the salons but the end consumers can come on and read
8 about the different products, read about the different
9 ingredients in there. We'll have ingredient glossaries. We'll
10 typically like a Q and A section for frequently asked 03:48:
11 questions. So it's a big source of information for the
12 products, as well as like fun model images, beautiful product
13 shots, everything like that.

14 Q. Does Designer Skin sell its suntan indoor tanning lotion
15 products through its website? 03:48:

16 A. No, we do not.

17 Q. The electronic renderings that have been testified to by
18 Mr. Shawl this morning, have they also been used by Designer
19 Skin as the owner of those renderings in its brochures?

20 A. Absolutely. Not only are they used in -- they're used in 03:49:
21 our brochures, they're used in our posters, they're used -- we
22 give them to our distributors who then go out in every single
23 distributor catalog. So that image really becomes synonymous
24 with the product.

25 Q. What does the phrase "nutrition for the skin" mean? 03:49:

1 A. That was kind of our motto from the beginning. Because our
2 sister company was a vitamin company. So we had a lot of
3 knowledge from the vitamin/pharmaceutical end, and that's -- we
4 were able to take all that knowledge and put it into -- into --
5 now we're talking on the inside of the bottle -- all of our
6 formulations.

03:49:

7 Q. I want to discuss distribution of the product. Now you've
8 got the jury to the point where they have an understanding of
9 what the -- what the product inside the bottle is and how it's
10 created and the outside of the bottle, including these
11 electronic renderings.

03:50:

12 MR. COLEMAN: Objection.

13 BY MR. CROWN:

14 Q. How does --

15 MR. COLEMAN: I have an objection, Your Honor. I'm
16 not clear whether --

03:50:

17 THE COURT: Let's let him finish his question first
18 and then --

19 BY MR. CROWN:

20 Q. Does -- well, how does Designer Skin get its product from
21 its manufacturing facility to the tanning salons where they
22 will be available for retail purchase?

03:50:

23 MR. COLEMAN: Your Honor, objection.

24 Point one. There was an avowal, as the Court put it,
25 that the previous section or what seems to have been the

03:50:

1 previous section of testimony would result somehow in some
2 meaningful testimony regarding damages. That didn't happen.
3 If, in fact, the Court agrees, then I would ask the Court
4 perhaps order that testimony be stricken.

5 If the -- as to the distributorship testimony, it's 03:51:
6 irrelevant. As the Court knows, there's no distributorship
7 issue in this case anymore.

8 THE COURT: What's the distributorship issue in this
9 case?

10 MR. CROWN: It's -- again, it will take the product to 03:51:
11 the specific point of sale.

12 THE COURT: I assumed that from the nature of the
13 question.

14 MR. CROWN: Sure.

15 THE COURT: My question is what's the relevance of -- 03:51:

16 MR. CROWN: The relevance is, is that the defendant
17 has taken this product and they're selling it on the Internet
18 and they're doing so by using copied images that are protected
19 by the copyright law to sell their product. And it goes to
20 both the infringement claim, what we will then establish with 03:51:
21 the profits damage claim, as well as the unfair competition
22 claim.

23 THE COURT: Your contention is that the testimony on
24 the distributorship issue bears on damages? Is that your
25 avowal? 03:52:

1 MR. CROWN: And liability. Because it's showing that
2 they -- I mean, again, what I heard in opening statement was
3 that no harm --

4 THE COURT: Opening statement doesn't define the
5 issues. The pretrial order does. 03:52:00

6 MR. CROWN: It goes to both liability and damages. It
7 shows the reason for the creative images, the efforts and
8 expense that Designer Skin goes through in creating these
9 original works of art, how they are received in the salon, and
10 then what happens to them when they are copied via infringement 03:52:00
11 and then ultimately sold in the Internet where there is no
12 instruction and no on-site services.

13 MR. COLEMAN: Your Honor, point one: The rationale
14 suggested is that basically any testimony will be admissible
15 because it's goes to damages somehow. We have yet to hear how 03:52:00
16 any of this testimony goes to damages.

17 THE COURT: He's made an avowal and if he doesn't make
18 good that avowal it will all be subject to a motion to strike
19 at an appropriate time.

20 MR. COLEMAN: I understand. 03:53:00

21 Your Honor, I'm now looking at Issue Number 2 in the
22 pretrial order on page 6. There's nothing in the plaintiffs'
23 contention regarding damages that makes any mention of the
24 distributorship, of the distributor network.

25 MR. CROWN: Your Honor, we also -- 03:53:00

1 THE COURT: The objection is overruled. Proceed.

2 MR. CROWN: Thank you.

3 THE COURT: It's subject to what I just said.

4 MR. CROWN: Thank you.

5 So that I'm not -- again, I appreciate what the Court 03:53:
6 has just done, and I don't want to take time now, but at the
7 point that it's raised again, whether we're in or outside the
8 presence of the jury, there's also the unfair competition
9 claim.

10 THE COURT: Those -- 03:53:

11 MR. CROWN: Thank you.

12 THE COURT: Those are your avowals. You may proceed.

13 BY MR. CROWN:

14 Q. Can you briefly describe the chain of distribution that has
15 been developed by Designer Skin to get its products to the 03:54:
16 ultimate retailer that you intend, being tanning salons?

17 A. We've had defined distribution from the beginning, and that
18 was not only to protect the brand integrity but to protect the
19 customer as well for various reasons. So we would sell to a
20 set distribution network, who would sign a contract that they 03:54:
21 could only sell to accounts that were defined as salons that
22 either -- well, actually not either. It's an and. Who, one,
23 offered tanning as an on-premise service, and two, furnished
24 proper instruction in usage for those products.

25 So they would -- we would sell to the distributors and 03:54:

1 the distributors would sign this contract with us agreeing that
2 this is who they would sell to or they would sell to
3 subdistributors who were also having a binding contract who in
4 turn would sell to salons and the salons would then sell to the
5 end consumer.

03:55:0

6 So oftentimes we would go and train, then, both the
7 distributors and the salons so that they could be educated
8 about our products.

9 Q. Do you have a standard distribution agreement?

10 And when I say you, Designer Skin.

03:55:0

11 A. Yes.

12 Q. Is the contract that is executed between Designer Skin and
13 your distributors a contract that has been prepared by Designer
14 Skin?

15 A. Yes.

03:55:0

16 Q. Does that contract become a mandatory requirement for each
17 one of your distributors to execute and abide by?

18 A. Absolutely. We will -- can I --

19 Q. Please do.

20 A. Unless we have a signed contract in hand, we will not ship
21 them product; we will not give them our images, because
22 otherwise -- we don't want people to think of them as an
23 authorized distributor. We will not give them all the benefits
24 of being a distributor until we have it in hand. And they're
25 aware of that process every single year. We won't even take

03:55:0

03:56:0

1 their orders. So they won't get anything.

2 Q. In the chain of distribution, are the distributors the
3 equivalent of wholesalers?

4 A. Yes.

5 Q. So Designer Skin is the creator and the manufacturer. 03:56:

6 A. Right.

7 Q. Correct?

8 Your distributors are the wholesalers. Correct?

9 A. Right.

10 Q. And does this mandatory distributor agreement specify who 03:56:
11 is an eligible retailer that your distributors can sell to?

12 A. That's what --

13 THE COURT: When he stands --

14 THE WITNESS: Oh, I'm sorry.

15 THE COURT: When he stands that means an objection is 03:56:
16 about to be made.

17 THE WITNESS: I'm sorry.

18 MR. COLEMAN: Objection again as to relevance and as
19 to the best evidence rule.

20 THE COURT: Sustained. 03:56:

21 MR. CROWN: Your Honor, Exhibit 2 is an exemplar
22 distributor agreement that Miss Romero will give testimony that
23 every distributor is required to sign that exact language. I
24 would like to have that Exhibit 2 shown to her and that will
25 satisfy this objection. She will authenticate it as the 03:57:

1 contract that is required and in existence with every --

2 THE COURT: Wait a minute. We don't need a speech.

3 Proceed --

4 MR. CROWN: Okay.

5 THE COURT: -- to do whatever you're going to do with 03:57:
6 the exhibit.

7 BY MR. CROWN:

8 Q. Miss Romero, would you please look at Exhibit 2 and tell us
9 what it is.

10 A. It's -- it was our distributor contract for the 2004-2005 03:57:
11 season.

12 Q. Is the terms and conditions of this contract mandatory for
13 each distributor of Designer Skin's to execute and agree to
14 before Designer Skin will allow them to receive its products
15 and ultimately sell to retail salons? 03:57:

16 MR. COLEMAN: Objection. Best evidence rule. There
17 is -- the proffered exhibit is not an actual signed agreement
18 but rather the witness is being asked to describe a generalized
19 type of agreement, not testifying distributors, and that -- and
20 to tell the jury that is an actual -- that they should rely on 03:58:
21 it as if it was actually an executed agreements. The topic is
22 about executed agreements, not about exemplars.

23 THE COURT: That particular objection is overruled.

24 MR. COLEMAN: Object as to relevance also.

25 THE WITNESS: Can you ask me that question again? 03:58:

1 MR. CROWN: Your Honor, with permission, may the court
2 reporter read the question back, as I believe there was the
3 objection.

4 THE COURT: You may.

5 (Question read back.)

03:59:

6 THE WITNESS: Yes.

7 THE COURT: There's a further objection. Relevance.
8 What's the relevance of this?

9 MR. CROWN: Well, again, it is the distinction between
10 the authorized use of their images and ultimately the damage
11 that is caused when companies like an S & L will take these
12 images and put them on the Internet, which is a very opposite
13 form of distribution, and then use them to sell the same
14 product.

03:59:

15 THE COURT: Okay. The objection is sustained.

03:59:

16 BY MR. CROWN:

17 Q. Does Designer Skin require distributors to only sell
18 Designer Skin products to tanning salons?

19 MR. COLEMAN: Objection, Your Honor. It seems that
20 we're just trying to ask about the individual parts of the
21 agreement.

04:00:

22 THE COURT: Sustained.

23 BY MR. CROWN:

24 Q. What is the requirement that a distributor must abide by
25 for who is eligible to receive Designer Skin products?

04:00:

1 MR. COLEMAN: Same objection.

2 THE COURT: Sustained.

3 BY MR. CROWN:

4 Q. Are brochures that contain Designer Skin electronic
5 renderings made available to the salons? 04:00:.

6 A. Yes, they are.

7 Q. Are training videos prepared that are available to eligible
8 salons?

9 A. Yes, they are.

10 Q. Are product brochures that contain the electronic 04:00:.
11 renderings that have been copyrighted by Designer Skin that are
12 at issue in this case made available to the eligible retail
13 salons?

14 A. Yes.

15 Q. Why does Designer Skin go to the time and expense to create 04:01:.
16 these specific electronic renderings in the selling and
17 marketing of its products?

18 A. It's who we are. I mean, we're Designer Skin. It's not
19 Generic Skin. We didn't just do a white bottle with an
20 accelerator name on it. I mean, everything about who Designer 04:01:.
21 Skin is is embodied through its packaging and its formulations,
22 so that's why so much of our efforts go towards that.

23 Q. Why does Designer Skin require that eligible tanning salons
24 have, one, on-site tanning facilities, and two, staff that can
25 provide in-store instruction to its customers? 04:01:.

1 MR. COLEMAN: Your Honor, leading and assuming facts
2 not in evidence, and also circumventing the previous ruling
3 about the content of the agreement.

4 THE COURT: Sustained on all three points.

5 MR. CROWN: May I move into evidence Exhibit 2
6 pursuant to the statements in the pretrial order?

04:02:.

7 THE COURT: You may. Are you?

8 MR. CROWN: I am.

9 THE COURT: And that would be -- what did you say?
10 Exhibit 2?

04:02:.

11 MR. CROWN: Exhibit 2.

12 THE COURT: Exhibit 2 has been offered.

13 MR. COLEMAN: I think Your Honor has ruled that I may
14 not object. So I -- this is pursuant to his earlier -- the
15 colloquy, Your Honor, about the registrations having been on
16 the approved list.

04:03:.

17 THE COURT: Well, I don't automatically know, but
18 maybe I should, that Exhibit 2 is within the universe of
19 documents --

20 MR. COLEMAN: Well, actually --

04:03:.

21 THE COURT: Within the universe of documents --

22 MR. COLEMAN: -- what's Exhibit 2?

23 THE COURT: Give me a chance to at least think out
24 loud.

25 Within the universe of documents included under

04:03:.

1 F(1) (a), and I see that it is. On page 16 is Number 2. Is
2 that correct, counsel?

3 MR. CROWN: It is. And then again on page -- under
4 the exhibits as well. It is -- yes.

5 THE COURT: Exhibit 2 is received. 04:04:.

6 MR. CROWN: Thank you.

7 With the admission into evidence, may I ask the last
8 couple questions that -- and objections sustained and very
9 quickly have Miss Romero just describe the reason for the
10 admissions? 04:05:.

11 THE COURT: Proceed with your next question, whatever
12 that may be.

13 MR. CROWN: Thank you.

14 BY MR. CROWN:

15 Q. Can you explain -- 04:05:.

16 MR. COLEMAN: Your Honor, actually, Your Honor ruled
17 that the testimony proffered was irrelevant. I don't -- does
18 the admission of an exhibit by virtue of an administrative
19 error change -- does that drive what becomes relevant?

20 THE COURT: The exhibit's been admitted. I don't know 04:05:.
21 what the next question is. Let's see what it is and then you
22 can decide whether to tender an objection.

23 BY MR. CROWN:

24 Q. Can you -- let me -- I'm going to ask a fresh question so
25 the record is clear. 04:05:.

1 Can you explain the reason why Designer Skin requires
2 that retail sales only be made through qualified indoor tanning
3 salons?

4 MR. COLEMAN: Objection as to relevance and --

5 THE COURT: Sustained.

04:05:

6 BY MR. CROWN:

7 Q. Without telling us the reason why, is it a fact in the
8 agreement that an eligible tanning salon is one that has
9 on-site tanning facilities and in-store instruction available?

10 MR. COLEMAN: Same objection.

04:06:

11 THE COURT: Sustained.

12 BY MR. CROWN:

13 Q. Does Designer Skin provide training to eligible indoor
14 tanning salons?

15 A. Yes.

04:06:

16 Q. What is the purpose why Designer Skin provides training to
17 eligible tanning salons about its products?

18 A. To ensure that our products are used in the safe and proper
19 manner.

20 Q. When a specific product, like a Shrine, or a Tao, or Bronze
21 Bondage, is ready to be launched can you tell the jury, in
22 summary, what launching involves?

04:06:

23 A. By launching, we always have an annual trade show every
24 year, which I think I mentioned was either at the last week of
25 October or the first week of November, depending where it is,

04:07:

1 typically at Opera Land, so we spend, gosh, I want to say about
2 a quarter million dollars sometimes, or did previously in the
3 past, on a booth where we would launch all of the new products
4 for the next season, and for the tanning salon owners and the
5 people that worked there that was a really big deal because 04:07:
6 they always want to see the latest and greatest and the newest.

7 So they would come to our booths to receive training
8 and education. We would have like nonstop training and
9 educational sessions going on with the products, and they would
10 receive new samples of our products, which kind of was a way to 04:07:
11 give them a little taste of something so then they would start
12 to like call the distributors to be excited as to when the
13 product was going to be ready.

14 So -- it also then gets launched in all of the
15 distributor catalogs and on our website simultaneously all kind 04:08:
16 of hits at once.

17 Q. That's where I want to now focus my next question.

18 When you are launching a product, do you take the
19 electronic renderings that are created through the process
20 you've described and Mike Shawl and place it on your website 04:08:
21 for informational availability to the public?

22 A. Yes.

23 Q. How close in time is it for when a product is going to be
24 launched to the market when the electronic rendering is placed
25 onto Designer Skin's website? 04:08:

1 A. I mean, we -- ideally, we try to have it hit the same day.
2 Maybe some days it's been three or four days late. But
3 literally to get the most bang for your buck you want it to be
4 simultaneous efforts.

5 Q. And this is a website that Designer Skin makes available
6 and accessible to the public.

04:09:00

7 A. Correct.

8 Q. So the electronic renderings, then, are available and
9 accessible to the public.

10 A. Correct.

04:09:00

11 Q. These electronic renderings are also used as component
12 parts in Designer Skin's brochures?

13 A. Correct.

14 Q. Training videos?

15 A. Yes.

04:09:00

16 Q. Marketing videos?

17 A. Yes.

18 Q. Product catalogs?

19 A. Yes.

20 Q. So they are copied by Designer Skin in Designer Skin
21 materials for its marketing and sales efforts.

04:09:00

22 A. As well as our authorized distributor catalogs, too.

23 Q. Do you, as part of your responsibilities with Designer
24 Skin, perform diversion detection activities?

25 A. Yes.

04:10:00

1 Q. Explain to the jury what diversion detection is and what
2 you do and how you oversee it on behalf of Designer Skin.

3 A. I have made mention of that authorized distribution network
4 that we set up as a way to protect the branding as well as
5 protecting the customers in the salons, and there are times 04:10:
6 where products fall outside of that distribution network that
7 we have set up, and that's what we refer to in the trade and
8 also internally as diversion. And that's when our products are
9 found on unauthorized sites, whether it's an Internet site or a
10 flea market or any -- actually, any type of facility that does 04:10:
11 not offer tanning on premises or offer proper usage and
12 instructions. It's considered a diverted place for our
13 products.

14 So one of the -- okay. Every time you rise I'm --
15 okay. One of the -- gosh. I lost my thought. 04:11:

16 Oh.

17 THE COURT: Well, you asked her about four questions
18 in one so let's --

19 MR. CROWN: I'm --

20 THE COURT: Although there was no objection for 04:11:
21 compound question, that's simply an invitation to a narrative,
22 and we're going to proceed a lot more orderly if we have a
23 question-by-question basis --

24 THE WITNESS: Okay.

25 THE COURT: -- to which the witness answers just that 04:11:

1 question and doesn't launch into a narrative.

2 BY MR. CROWN:

3 Q. Designer Skin has in place diversion detection procedures?

4 A. Yes.

5 Q. Explain to the jury if you are a part of that process of
6 diversion detection from Designer Skin.

04:11:

7 A. Yes.

8 Q. Okay. Tell us what you do for diversion detection for
9 Designer Skin.

10 A. I had a person, an employee, report directly to me whose
11 primary responsibility was diversion, and that was to really
12 monitor and check out or send work in conjunction with legal
13 sending out letters and so forth to unauthorized retailers or
14 distributors of Designer Skin. So we would have to do a lot of
15 searching part and parcel to that, including website detection
16 and so forth.

04:12:

04:12:

17 Q. This person that was working specifically to detect if
18 there had been diversion or products diversion of electronics
19 renderings, is that person paid a salary?

20 A. Yes.

04:12:

21 Q. Was it a specific position created by Designer Skin to
22 address this problem?

23 A. Yes.

24 Q. Do you have an idea what that salary was?

25 A. I mean, we had employed someone for several years, but on

04:13:

1 an annual basis it was about 40,000 a year.

2 Q. Can you tell the jury what other expenses Designer Skin
3 incurs to detect and hopefully prevent diversion of your
4 electronic renderings?

5 MR. COLEMAN: Your Honor, objection as to relevance. 04:13:

6 THE COURT: What's the relevance, counsel?

7 MR. MIZRAHI: Well, again, we're going to the efforts
8 that Designer Skin is making to preserve its copyrighted
9 materials, these the electronic renderings, and ultimately why
10 they do it, because this testimony -- and I'll make a proffer. 04:13:

11 There is specific complaints that are made directly to
12 Designer Skin from the unknowing consumer that buys the wrong
13 product and has the wrong result, and they have to field those
14 questions and spend their time and money. There are tanning
15 salons that say, "If you don't stop the diversion on the 04:13:
16 Internet, then we will stop carrying your products."

17 So it represents a clear, defined effort with time and
18 expense to preserve the value of their electronic renderings
19 and how they are used to meet the premium level that has been
20 testified to by Miss Romero. 04:14:

21 THE COURT: Overruled.

22 BY MR. CROWN:

23 Q. Can you describe other expenses that --

24 THE COURT: You -- I thought you left a question --

25 MR. CROWN: If -- 04:14:

1 THE COURT: -- unanswered.

2 MR. CROWN: If I did and if --

3 THE COURT: Just re-ask it now.

4 MR. CROWN: Okay.

5 BY MR. CROWN:

6 Q. Can you -- you've told us about the one salaried position
7 that occurs for years. What other expenses and resources are
8 incurred by Designer Skin as part of this diversion detection
9 process?

10 A. Legal fees, legal fees because our diversion person always
11 worked in conjunction, obviously, with a law firm to make sure
12 that we were doing everything by the book, and then also on top
13 of that our customer service time as well as our sales time and
14 as well as a portion of our sales managers' salaries because
15 they would be having to field and address the complaints from
16 the salons and the distributors about our diverted product and
17 address the customer complaints who would buy something from a
18 diverted source not known to us and put an extreme tingle
19 product their body, be welting up, go outside and pick up their
20 baby and then call us like screaming hysterical. So, I mean,
21 it's -- I don't know how to put an exact dollar on that but it
22 was a portion of everyone's responsibilities.

23 MR. COLEMAN: Your Honor, there's an ongoing problem
24 with this testimony, and it's not being elicited by counsel,
25 but it's constantly making reference to hearsay about

04:15:0

04:15:0

04:15:0

04:15:0

1 complaints from consumers, complaints from distributors that
2 are not in evidence. So I would request that the Court
3 instruct the witness not to make reference to hearsay.

4 THE COURT: Just answer the question and only the
5 question.

04:16:00

6 You may proceed.

7 THE WITNESS: Okay.

8 BY MR. CROWN:

9 Q. Are the diversion detection efforts by Designer Skin also
10 designed to protect its copyrights in its electronic renderings
11 and images that are created by and owned by Designer Skin?

04:16:00

12 A. Yes.

13 Q. Did S & L Vitamins have permission from Designer Skin to
14 copy the electronic renderings discussed and shown to the jury
15 during Mike Shawl's testimony and place it on its own website?

04:17:00

16 A. No.

17 Q. Did S & L Vitamins have the authority to copy those images
18 and use them on its website to sell Designer Skin products?

19 MR. COLEMAN: Objection. Asked and answered.

20 THE COURT: Overruled.

04:17:00

21 THE WITNESS: No.

22 BY MR. CROWN:

23 Q. Is S & L Vitamins, to your knowledge, an authorized indoor
24 tanning salon?

25 A. No.

04:17:00

1 Q. S & L Vitamins would not qualify as an eligible retailer
2 under Exhibit 2 in evidence.

3 A. No.

4 Q. Has Designer Skin ever provided S & L staff with training
5 and instruction about the safe and proper use of its products
6 to end customers? 04:18:00

7 MR. COLEMAN: Objection. Relevance.

8 THE COURT: Overruled.

9 THE WITNESS: No.

10 BY MR. CROWN: 04:18:00

11 Q. In your job did you have the personal occasion as part of
12 diversion detection to go and view the S & L Vitamins's website
13 that existed at the time in 2005?

14 A. Yes.

15 Q. Can you tell the jury whether you saw the electronic
16 renderings that were discussed during Mike Shawl's testimony on
17 the S & L Vitamins' website when you viewed it personally in
18 2005? 04:18:00

19 A. Yes.

20 Q. Did S & L Vitamins have the authority of Designer Skin to
21 have copied those specific electronic renderings owned by
22 Designer Skin and place it on its own website? 04:18:00

23 MR. COLEMAN: Objection. Asked and answered.

24 THE COURT: Haven't you already covered that with her?

25 MR. CROWN: Well, I'm specifically focusing in on that 04:19:00

1 2005 website.

2 THE COURT: Did your previous --

3 MR. CROWN: I --

4 THE COURT: -- question sweep the entire area?

5 MR. CROWN: If so be it, I'll move on. 04:19:00

6 THE COURT: Very well.

7 MR. CROWN: Yes.

8 BY MR. CROWN:

9 Q. I take it your testimony is 2005 and really any time from
10 inception, really, of these products on Designer Skin's
11 website, correct? 04:19:00

12 A. Right.

13 Q. Continuing right through the present day.

14 A. Yes.

15 Q. Have you looked at the S & L Vitamins' website recently? 04:19:00

16 A. Yes.

17 Q. And do some of the products discussed by Mike Shawl this
18 morning still appear on the S & L Vitamins' website?

19 A. Yes.

20 Q. And are they on the website without the authority of
21 Designer Skin? 04:19:00

22 MR. COLEMAN: Your Honor, objection.

23 THE COURT: Let him -- this will be the last time to
24 establish that.

25 MR. CROWN: Thank you. 04:20:00

1 THE COURT: What was your answer?

2 THE WITNESS: Correct.

3 BY MR. CROWN:

4 Q. Have you personally been contacted by eligible indoor
5 tanning salons where you have been told about complaints of
6 Designer Skin products being sold through S & L's website?

04:20:

7 MR. COLEMAN: Objection. Calls for hearsay.

8 THE COURT: Your response?

9 MR. CROWN: My response is it goes to the effect on
10 Designer Skin. If Designer Skin is receiving those complaints
11 and she's the one personally receiving it and they have to
12 respond by the steps they are taking, it does go to the damage
13 issues, and it's not just for the truth of the matter asserted
14 but for the effect on Designer Skin.

04:20:

15 THE COURT: Well, assuming you can ultimately link the
16 effect, I --

04:21:

17 MR. COLEMAN: Judge --

18 THE COURT: -- agree that the objection is --

19 MR. COLEMAN: My objection is not as to relevance,
20 Your Honor. I know it goes to something, but it is,
21 nonetheless, hearsay.

04:21:

22 THE COURT: Overruled.

23 THE WITNESS: Yes.

24 BY MR. CROWN:

25 Q. Can you tell us about different salons that have made

04:21:

1 direct complaints to you?

2 MR. COLEMAN: Same objection.

3 THE COURT: Overruled.

4 I'm sorry. You're making the same objection?

5 MR. COLEMAN: Yes.

04:21:

6 THE COURT: Overruled.

7 THE WITNESS: We've -- we receive the objections a
8 number of ways, either in person when we're at seminars and
9 training and trade shows, they call us directly, or there are
10 tanning website and so forth and chat rooms and blog sites
11 where they call and they address us and they send to our
12 customer service who was in charge of diversion, too, they
13 would send e-mails directly to them as well, which they would
14 notate all of the Internet retailers out there who were doing
15 that.

04:22:

04:22:

16 BY MR. CROWN:

17 Q. When this set of complaints have come to you either in
18 direct contact or at trade shows, has there been any action
19 taken or threatened by these indoor tanning salons if you don't
20 stop the practice of unauthorized Internet sales?

04:22:

21 A. Yes.

22 Q. And what is that?

23 MR. COLEMAN: Objection. Hearsay.

24 THE COURT: Sustained.

25

04:22:

1 BY MR. CROWN:

2 Q. Is there -- is there -- from Designer Skin's standpoint,
3 when you are hearing from and receiving dissatisfaction from
4 the indoor tanning salon retailers, what is Designer Skin's
5 concern behind the market value of its electronic renderings? 04:23:

6 A. That we're going to lose our market value and hence our
7 customer base.

8 Q. The electronic renderings are a component part of
9 establishing the market value of Designer Skin products,
10 correct? 04:23:

11 A. Until you have a tangible product in your hand, it is the
12 face of the image. Absolutely.

13 Q. And what happens from Designer Skin's standpoint to the
14 fair market value of these images that have become component
15 parts of your products if sales are not exclusively at the 04:24:
16 intended indoor tanning salon level?

17 MR. COLEMAN: Objection. The question is vague.
18 There's no foundation for it. It's speculative.

19 THE COURT: Sustained on all three points.

20 BY MR. CROWN: 04:24:

21 Q. Has there -- with sales of Designer Skin products by
22 Internet-only companies like S & L Vitamins, is there an effect
23 on the fair market value of these electronic renderings?

24 A. Yes, I think -- I believe so.

25 Q. Can you tell the jury what that effect is? 04:24:

1 A. Oftentimes they'll contact us and tell us they're going to
2 stop carrying our product line.

3 MR. COLEMAN: Your Honor, this is the same testimony
4 that was objected to as hearsay.

5 THE COURT: And what's your objection now? 04:25:00

6 MR. COLEMAN: Well, that it's still hearsay and that
7 it should be struck. Stricken.

8 THE COURT: Sustained.

9 BY MR. CROWN:

10 Q. From Designer Skin's standpoint, does Internet sales reduce 04:25:00
11 the fair market value of these electronic renderings?

12 A. Yes.

13 Q. Has Designer Skin and you in particular received customer
14 complaints from customers that bought the product through an
15 S & L type operation as opposed from a trained, knowledgeable 04:25:00
16 indoor tanning salon?

17 MR. COLEMAN: Objection as to relevance as regards to
18 S & L type outfits, and hearsay.

19 THE COURT: Sustained. Both counts.

20 BY MR. CROWN: 04:25:00

21 Q. Has Designer Skin received customer complaints about using
22 the products when they've bought them from S & L Vitamins and
23 not from a qualified indoor tanning salon?

24 MR. COLEMAN: Objection as to hearsay.

25 THE COURT: Sustained. 04:26:00

1 BY MR. CROWN:

2 Q. Does Designer Skin believe that customer complaints about
3 its products that have been bought on the Internet reduce the
4 fair market value of its electronic renderings?

5 A. Yes. 04:26:

6 MR. CROWN: Your Honor, that's all the questions we
7 have. Thank you.

8 THE COURT: Cross-examination.

9 MR. COLEMAN: Actually, Your Honor, I would move to
10 have the entire testimony struck. We were -- it was 04:27:
11 represented to us that that testimony would end up with -- in
12 fact, what the Court asked for was a dollar figure as to
13 damages. That never happened.

14 THE COURT: The plaintiff hasn't rested yet so your
15 motion will be denied without prejudice to re-urge it at an 04:27:
16 appropriate time.

17

18 CROSS-EXAMINATION

19 BY MR. COLEMAN:

20 Q. How much does it cost to develop a brand identity for a 04:28:
21 typical brand?

22 A. I had our CFO do the calculations over a five-year period
23 of what it went into developing, what we spent on marketing and
24 creating, and from our financial income statements over a
25 five-year period it came out to \$2.6 million. 04:28:

1 Q. Per brand?

2 A. That was for Designer Skin.

3 Q. For all of Designer Skin?

4 A. Yes.

5 Q. How about for Ultimate Love Junkie? 04:28:

6 A. Well, I mean, I guess for me to -- that would be hard for
7 me to say. I mean, if at any given time we have 40 products,
8 I guess if you want to take 6.2 million and divide it by 40,
9 then -- I don't know. I mean, that's -- I don't know how to --

10 Q. Are all of the products equally profitable? 04:29:

11 A. They have similar profit margins. Some have varying sales
12 levels, with the exception of we have the lowest profit margin
13 on our moisturizer.

14 Q. The margins are similar, but are the gross revenues
15 similar? 04:29:

16 A. Not on every product, no.

17 Q. So wouldn't it be the case that dividing that number by 42
18 might not be a valuable way to answer the question of what it
19 cost to develop Ultimate Love Junkie?

20 A. Well, I'd have to do some research and analysis to give you 04:29:
21 an exact answer.

22 Q. You understand this is the trial, don't you?

23 A. I don't understand what you just said.

24 Q. Withdrawn.

25 Do you have the analysis, the data and the 04:29:

1 calculations and the formulas used by your CFO in order to come
2 to that \$6.2 million number?

3 A. I believe it was submitted as part of my affidavit, that
4 spreadsheet.

5 Q. Your affidavit is not in evidence. Do you have it? Do you 04:30:
6 know it?

7 A. I have it in my books.

8 Q. Do you know it?

9 A. Do I know it inside and out? No. I mean, I know where all
10 the numbers add up and so forth and I know our financial 04:30:
11 statements.

12 Q. Can you explain to the jury the source for the \$6.2 million
13 figure, then?

14 A. He took our income statements for every year for a
15 five-year period and we allocate every single one of our 04:30:
16 expenses to make sure that we were on budget, so we would
17 allocate a certain amount for training, a certain amount for
18 trade shows, a certain amount that went to product development,
19 and you have a budget and then you have actuals where you came
20 out for that year. He took the actuals that we had coded every 04:30:
21 single year and added them up over a five-year period.

22 Q. And that was for the whole company, right?

23 A. Yes.

24 Q. Going back five years, that would be starting what year?

25 A. I have it in that paper. 04:31:

1 Q. Well, it's 2008. Starting 2003, right?

2 A. I -- well, I believe he did it 2002 to 2007 possibly.

3 Q. Was S & L Vitamins having any effect on -- withdrawn.

4 Is -- is Designer Skin alleging that each and every
5 product of Designer Skin has been infringed in some way by
6 S & L?

04:31:00

7 A. Can you clarify that, please? Are you talking about my --
8 the copyright images being --

9 Q. Yes.

10 A. -- infringed?

04:31:00

11 Q. Yes.

12 Let me withdraw the question.

13 If \$6.2 million is the figure, that's per year?

14 A. No. That was for a five-year period that was spent on the
15 development of the products.

04:31:00

16 Q. Okay. So --

17 A. And the marketing of the products.

18 Q. Product development per year, a little over -- about \$1.2
19 million. Is that how that would come out, divided by five?

20 A. I would imagine so, yes.

04:32:00

21 Q. That's for all brands, right?

22 A. That's for Designer Skin. Yes.

23 Q. Does that include products other than those sold by S & L
24 Vitamins?

25 A. I'm sorry. I don't understand the question. You mean --

04:32:00

1 Q. Product development for the whole company, you have
2 testified, was \$1.2 million per year, approximately.

3 A. Right.

4 Q. Does product development include the development of
5 products other than those sold by S & L?

04:32:

6 A. No. I -- I -- I'm -- I want to make sure I'm understanding
7 what you're asking. Those products that I'm talking about are
8 the products that fall under Designer Skin, Splash and
9 Boutique. S & L carries those products.

10 Q. Does S & L carry each and every one of them?

04:33:

11 A. I think they carry the vast majority.

12 Q. Do you think so or you know it?

13 A. I know they carry the vast majority. I do not know the
14 exact number.

15 Q. In 2005 did they carry them all?

04:33:

16 A. They carried the vast majority.

17 Q. Which ones?

18 A. Gosh. I mean, everything that had been launched from
19 pretty much 2004 and 2005 per year, but that would include like
20 the Smolder, the Bronze Bondage, the Dolce, the Ritual. I
21 think that includes the Tao. And so -- and Worship and Bipolar
22 and Neurotic. I mean, I'd have to go back and look at all the
23 dates with all the products.

04:33:

24 Q. So, in other words, you're not sure, are you?

25 A. I know it's the vast majority.

04:33:

1 Q. When you say the vast majority, what percentage do you
2 mean?

3 A. I would say it's at least 70 percent.

4 Q. Not 65?

5 A. You know what, sir? I would say it would be at least 70
6 percent. We're not a huge, enormous product line. We never
7 have been. So if at that point in 2005 if we were lucky if we
8 had 20 products, I would definitely say they had the vast
9 majority on there, and by that that means less than 50 percent
10 and greater than 60.

04:34:0

04:34:0

11 Q. Would you say the same thing for 2006?

12 A. Yes. The more popular Designer Skin became even more
13 products they would carry.

14 Q. What date in 2006 did you take a survey of the S & L
15 website to determine the percentage of the Designer Skin
16 product line that S & L sold?

04:34:0

17 A. I looked at it about the same time that Mike Shawl did
18 because, again, we're a very small office together and it was
19 all a collaborative effort so when everything was going on we
20 would all gather together and look at them and you could see
21 the majority of other products were on there, and I think
22 that -- that's -- that what's submitted as Number 7, correct?
23 Is that --

04:35:0

24 Q. Now, would you say, therefore, that your testimony is --
25 correct me if I'm wrong, please -- that that figure includes

04:35:0

1 some number of products that S & L has never sold, that the 1.2
2 rough figure per year for product development includes
3 development of products never sold by S & L?

4 A. It would be very minor because -- and the reason I say that
5 is they even carried what would be our lowest selling skews. 04:35:
6 So why would they not carry our highest selling skews?

7 Q. Well, you just testified that at least 30 percent of your
8 product line was not carried on S & L, didn't you?

9 A. It would be low. You're the one who is hammering me out to
10 a percentage. I said a vast majority. And so when you're 04:36:
11 trying to have me quantify it, I will for the sake of trying to
12 answer you.

13 Q. Well, this is the time for those answers. You understand
14 that, don't you?

15 A. Yes, I do. 04:36:

16 THE COURT: We're going to take our evening recess at
17 this time until 9 a.m. tomorrow morning.

18 Please remember the admonitions.

19 I'll see counsel briefly.

20 (Jury out at 4:36 p.m.) 04:36:

21 THE COURT: The record will reflect the presence of
22 the parties and counsel outside the presence of the jury.

23 You may be excused.

24 I've been handed a copy of a subpoena and declaration
25 by the server reflecting that Mr. Mercadante was served on July 04:37:

1 15, '08 at 12:25 p.m., that presumably being today. I note
2 that the subpoena commands him to appear at this courtroom on
3 July 15, 16 and 17 and each day at 9 a.m.

4 That's what I've been handed.

5 MR. COLEMAN: I will represent to the Court that on 04:37:
6 inquiry from me my client reports that he was not given a
7 witness fee. So this subpoena may be defective, Your Honor.

8 THE COURT: Well, all I know is what I have in front
9 of me, and I guess Mr. Mercadante will have to decide whether
10 or not to obey it and -- 04:38:

11 MR. COLEMAN: Well, Your Honor, we can move to quash,
12 which is what I would propose to do right now, frankly. I
13 wasn't exactly sure where the Court was going. Obviously,
14 under the circumstances, it is not practicable for us to
15 prepare papers, but certainly notice is deficient here. 04:38:

16 Certainly, the witness fee has not been paid, which is a
17 requirement of the federal rule requiring a subpoena, and
18 certainly this was something that could have been addressed
19 weeks ago without surprise. So we submit that the subpoena
20 should be quashed. 04:39:

21 THE COURT: Your response?

22 MR. CROWN: Your Honor, there's a difference in the
23 timing between a trial witness -- there's a difference in the
24 advance notice for a trial subpoena and a deposition subpoena,
25 and so -- 04:39:

1 THE COURT: He's talking -- let's take things one at a
2 time. He's talking about the failure to tender a fee, witness
3 fee.

4 MR. CROWN: I have not had, in fact, even what the
5 Court has in front of it because we've been in court while this 04:39:
6 has happened. Mr. Mercadante did not appear as the party
7 representative for S & L Vitamins, nor did Larry Sagarin as a
8 named defendant, and these are residents of New York state. So
9 we really didn't have subpoena power that this Court could
10 enforce until they came within the jurisdiction of this Court, 04:40:
11 which is the District of Arizona.

12 This morning I received information that Steven
13 Mercadante was staying at the Hilton Suites Hotel in Phoenix,
14 Arizona located at the intersection of Central and Thomas, the
15 same hotel that Mr. Coleman is staying at for this trial, and 04:40:
16 so under the hope that we would locate him somewhere in a
17 public space when we saw that he didn't show up and Mr. Coleman
18 wouldn't voluntarily produce him we issued a prompt subpoena.

19 Mr. Mercadante's purpose for being in Arizona is one
20 thing and one thing only, for the trial, but it seems that they 04:40:
21 don't want him testifying as a witness in the plaintiffs' case
22 in chief.

23 So we served him with a subpoena, and given that it's
24 a trial and not a deposition -- because if it was a deposition
25 I would go to New York and I would ask this Court to issue the 04:41:

1 proper order that would allow me to apply in a District of New
2 York where I would get him deposed, but that did not happen.
3 So he is here in Arizona, this Court has power over him, and
4 all we're asking for at this point in time is that he be
5 ordered to be here, which is to travel three miles, before we 04:41:
6 rest. I would like to make him our last witness. If
7 Mr. Sagarin was in the state, I would like to make Mr. Sagarin
8 also a witness for us, but that being said, I do have a
9 subpoena on him.

10 Now, as far as the witness fee, we know that it is a 04:41:
11 small nominal fee. I -- I'm -- I will accept what Mr. Coleman
12 has said that it wasn't tendered but I don't know that because
13 my office would have handled the administrative aspects of it.
14 I will personally avow to this Court that if Mr. Mercadante
15 comes to this court the very first order of business will be to 04:42:
16 tender him a proper check for the witness fee as prescribed for
17 in the Federal Rules of Procedure.

18 And let's not have form get over substance here,
19 because in the end what we're asking for this Court to do is to 04:42:
20 just issue a reasonable order requiring him to be here. A
21 proper witness fee, if it has not been tendered, which I don't
22 know that, but again, I'll just assume for the moment that's an
23 accurate representation by Mr. Coleman, we don't have
24 Mr. Mercadante here to tell us that, but that being said, let's
25 not put form over substance, we're in the middle of a jury 04:42:

1 trial, he's here for a very clear reason, to testify, and we're
2 entitled as our rights as the plaintiff to call him now as a
3 witness before we rest.

4 And so we ask this Court compel him to come at a
5 reasonable time, which would be sometime tomorrow, because once 04:42:
6 Beth Romero's testimony is finished he would be our last
7 witness and we would move further exhibits into evidence and
8 the plaintiff will be resting.

9 THE COURT: How much is the witness fee that is
10 supposed to be tendered and was not? 04:43:

11 MR. COLEMAN: I'm not sure, Your Honor.

12 THE COURT: But you -- you know sufficient to
13 represent to the Court that he was not tendered a fee?

14 MR. COLEMAN: Any fee at all.

15 Your Honor, if I may, the suggestion here is let us 04:43:
16 not put form over substance. As the Court is well aware, in
17 the course of this afternoon's testimony we've had a number of
18 opportunities to test that axiom, and I, for example, despite
19 launching what I thought were appropriate objections even in
20 the pretrial order for a number of exhibits, nonetheless found 04:43:
21 that they were in the wrong column in the pretrial order and
22 exhibits that should, in my view, have not been admitted were
23 admitted because of the form of the pretrial order.

24 I will for the record state that under Ames Department
25 Stores, Inc. versus Eden Center, 2004, Bankruptcy, Lexis 1027, 04:44:

1 the 100-mile or within-the-district restriction on trial
2 subpoenas does not apply according to the Southern District of
3 New York, and I'm not aware of any contrary authority having
4 been presented.

5 THE COURT: What's your point? 04:44:

6 MR. COLEMAN: It does not apply to parties or officers
7 of parties.

8 In fact, reading between the lines, Mr. Crown seems to
9 have suggested he's in the process of attempting to serve
10 Mr. Sagarin anyway. Certainly, the attempt could have been
11 made. 04:44:

12 I will be frank, of course. Yes, I don't want my
13 witness to be part of the case in chief if I don't have to have
14 him be, and if there is a form-over-substance issue, which has
15 been consistently cut in both directions up to this point, I
16 would expect it to the remain the same. The rule is very clear
17 about the tender of a witness fee. 04:45:

18 THE COURT: Do you have authority that the failure to
19 tender it excuses compliance with the subpoena as opposed to
20 simply obligating the party to pay that fee? 04:45:

21 MR. COLEMAN: I don't, Your Honor. My -- my
22 understanding has always been that when a statute requires a
23 number of things in order for an instrument to be valid that
24 the absence of one of those things makes the instrument
25 invalid. That would seem to be particularly appropriate when 04:45:

1 the coercive power of the court is being employed over a
2 person.

3 THE COURT: Well, that may be the difference
4 between -- that may be the difference between the severity of
5 the contempt. I don't know. I --

04:46:00

6 MR. COLEMAN: Your Honor, we're not -- there's no
7 contempt in the cards. If the Court rules that the subpoena is
8 not defective, my client will be here.

9 THE COURT: I understand that. But I don't know
10 that -- I don't know that the failure to tender the fee ipso
11 facto renders the subpoena void. And I acknowledge that Rule
12 45(b) regarding service specifies that serving a subpoena
13 requires delivering a copy to the named person and if the
14 subpoena requires the person's attendance, tendering the fees
15 for one day's attendance and the mileage allowed by law.

04:46:00

04:47:00

16 Now, quite possibly what that means is the witness
17 doesn't have to accept the subpoena --

18 MR. COLEMAN: Your Honor, why would --

19 THE COURT: -- if not -- it doesn't have to physically
20 accept it, as opposed to here, I assume, the witness did accept
21 it.

04:47:00

22 MR. COLEMAN: Of course, the witness is a lay person,
23 Your Honor, and even the six or seven lawyers in the room don't
24 know the answer to this question. So to suggest that the
25 drafters of the federal rules contemplated that a person faced

04:47:00

1 with a process server would check -- would first -- how would a
2 person know about ascertaining whether the envelope contained a
3 check without accepting it first? And if Congress had in
4 mind -- I mean the judicial conference had in mind that
5 compensation be given to witnesses, then it would not have been 04:47:
6 a prerequisite to the subpoena; it would simply be a statutory
7 requirement that witnesses be compensated appropriately.

8 THE COURT: Well, I'll deny the motion to quash
9 without prejudice to re-urge it and demonstrate that indeed the
10 subpoena is of no force and effect, but at least on the face of 04:48:
11 it it's been served. I gather that the witness has accepted
12 it. So on the strength of what I've been told I'm going to
13 deny the motion.

14 MR. CROWN: Your Honor, may I also offer one more
15 thing or in a couple ways? 04:48:

16 My understanding, subject to verification, is that a
17 witness fee for a day is \$40 plus mileage. I am prepared to
18 give Mr. Coleman right now \$50 that he will give to his client
19 when he has dinner with him tonight. Because that's really
20 what's happening. He's leaving here and he's going to the 04:48:
21 hotel to meet Mr. Mercadante. I will give Mr. Coleman the
22 money.

23 Or I will give it to the Court's clerk and when
24 Mr. Mercadante walks in the money will be paid. I will do that
25 right now in open court so we don't let form over substance. 04:49:

1 Or thirdly, I'll have a messenger deliver for
2 Mr. Mercadante personally in a sealed envelope \$50, which
3 should account for the \$40 fee and the mileage, but --

4 MR. COLEMAN: Your Honor, I'll raise him \$50 in order
5 to take the distributor agreement out of evidence.

04:49:.

6 THE COURT: All right. We're in recess until nine
7 o'clock tomorrow morning.

8 (Proceedings recessed at 4:49 p.m.)

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C E R T I F I C A T E

I, DAVID C. GERMAN, Official Court Reporter, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the proceedings and testimony reported by me on the date specified herein regarding the afore-captioned matter are contained fully and accurately in the notes taken by me upon said matter; that the same were transcribed by me with the aid of a computer; and that the foregoing is a true and correct transcript of the same, all done to the best of my skill and ability.

DATED at Phoenix, Arizona, this 23rd day of November, 2008.

s/David C. German
DAVID C. GERMAN, RMR, CRR